

Carboni v Ginsberg

2010 NY Slip Op 30256(U)

February 2, 2010

Supreme Court, Richmond County

Docket Number: 101381/09

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**
DOMINICK J. CARBONI,

**Calendar No. : 3208 - 001
Index No. 101381/09**

Plaintiff,

-against-

LOUIS GINSBERG, THOMAS RICOTTA and
THE LAW FIRM OF LOUIS GINSBERG, P.C.,

**DECISION AND ORDER
HON. JOSEPH J. MALTESE**

Defendants.

The following papers numbered 1 to 4 were marked fully submitted on the 20th day of November, 2009:

	Papers Numbered
Defendants’ Pre-Answer Notice of Motion to Dismiss Complaint, with Supporting Papers and Memorandum of Law.....	1
Plaintiff’s Affirmation in Opposition.....	2
Defendants’ Reply Affidavit and Memorandum of Law.....	3

Upon the foregoing papers, defendants’ pre-answer motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and CPLR 214(6) is denied.

This legal malpractice and negligence action arises out of defendants’ representation of plaintiff in litigation that was to be brought against his former employer, the New York City Transit Authority (hereinafter, the “Transit Authority”), relating to his discharge. As set forth in the complaint, plaintiff claims that defendants were “ negligent in failing to prosecute [his employment] claim, and thereafter abandoned [said claim] without notice” causing him to forfeit employment reinstatement and sustain a loss of earnings and other forms of compensation, e.g., disability benefits.

In moving to dismiss the complaint pursuant to CPLR 3211(a)(1), defendants maintain that their defense to this action is founded upon documentary evidence, to wit: (1) a purported “Stipulation and Agreement” dated October 16, 2003 between the Transit Authority and the Amalgamated Transit Union, on behalf of plaintiff, wherein the plaintiff/grievant agreed to “release the Transit Authority from any and all claims, whether at law, in equity or arising by virtue of contract which they may have or which they may have had...in connection with the underlying disputes”, i.e., plaintiff’s disciplinary grievances, and (2) a purported IRS Form W-4 dated and signed by defendant Thomas Ricotta, Esq. on September 26, 2005. Defendants also submit a copy of the parties’ “Retainer” agreement, dated July 29, 2004, which appears to have been signed by plaintiff, but is otherwise incomplete.

According to defendants, the Stipulation and Agreement with the Transit Authority conclusively establishes that plaintiff waived all of his rights to seek legal redress from his employer one year prior to retaining defendants. Stated otherwise, it is argued that plaintiff’s inability to prosecute his employment claims cannot be attributed to any acts or omissions on the part of defendants.

As for the annexed “employer tax form” (IRS Form W-4), defendants contend that this so-called document conclusively establishes that as of September 26, 2005, defendant Thomas Ricotta was no longer employed/associated with either the defendant law firm or codefendant Louis Ginsberg. As a result, defendants contend, with no citation of supporting authority, that since plaintiff’s challenge to his discharge from employment is governed by a three-year Statute of Limitations (*but see Hoerger v. Bd. of Education*, 127 AD2d 88, 97-98, relating to actions arising out of public sector employment), an attorney-client relationship did not exist between the parties on October 16, 2006, i.e., three years after plaintiff’s alleged dismissal, and purportedly the last day to timely commence an action against his former employer.

Turning to the second branch of the motion to dismiss, defendants maintain that the three-year Statute of Limitations on plaintiff's legal malpractice claim (*see* CPLR 214[6]) accrued on September 26, 2005, the date defendant Ricotta allegedly left the firm, and that this action is therefore untimely, having been commenced after the running of the Statute of Limitations on September 26, 2008.

The Court disagrees.

It is well settled that in order to prevail on a motion to dismiss pursuant to CPLR 3211(a)(1), the movant is required to demonstrate that "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326; *see* R.I Island House, LLC v North Town Phase II Houses, Inc., 51 AD3d 890, 893). Here, however, the documentary evidence submitted by defendants fails to resolve all of the factual issues upon which plaintiff's claims are based. Thus, while it is claimed that plaintiff waived his right to contest his discharge from employment by entering into the Stipulation and Agreement dated October 16, 2003 (*see* Uzzle v Nunzie Court Homeowners Assn., Inc., 55 AD3d 723, 724; R.I Island House, LLC v North Town Phase II Houses, 51 AD3d at 895), said agreement further provided that plaintiff was "eligible for restoration to the next available non-safety budgeted position in Staten Island" upon his successful completion of the Transit Authority's drug and alcohol rehabilitation program (hereinafter, "EAP"), and that his dismissal did not become final until May of 2004, when plaintiff was apparently discharged from EAP as non-compliant. Thus, the propriety of plaintiff's discharge from EAP remained a triable issue that was not forfeited in the Stipulation and Agreement dated October 16, 2003.

Neither does the purported IRS Form W- 4 conclusively establish that defendant Ricotta ceased his employment/association with his codefendants at any time. The document in question merely indicates that he claimed no dependents for the 2005 tax

year. Moreover, no authority has been cited (nor has any been found), which supports movants' contention that plaintiff's attorney-client relationship with the Ginsberg firm terminated when, if he did, defendant Ricotta severed all relationship with the defendant law firm on September 26, 2005 or any other date.¹ In fact, this contention is belied by a letter to plaintiff dated February 20, 2008 from the Grievance Committee for the Tenth Judicial District indicating that upon its investigation, it had issued a "Letter of Caution [to counsel] to timely determine whether he [sic] will represent his client in the matter for which he is retained or withdraw from that matter; and if withdrawing from a matter, to ensure that he provide[s] his client with written notice of his withdrawal which includes information sufficient to protect his client's rights." The other "documents" tendered by defendants are unauthenticated and of no probative value.

Finally, defendants have failed to demonstrate that they did not represent plaintiff when the Statute of Limitations against the Transit Authority expired, whether that be on October 16, 2006 or subsequently. At a minimum, the time within which plaintiff had to commence his legal malpractice action could not have expired before October 16, 2009. Here, plaintiff commenced his action on June 8, 2009.

In view of the foregoing, defendants are not entitled to dismissal of the complaint on the ground that it is barred by the Statute of Limitations.

Accordingly, it is hereby:

ORDERED, that defendants' motion to dismiss the complaint is denied in its entirety.

¹ In this regard, the Court must note that plaintiff's retainer agreement is with "The Law Firm of Louis Ginsberg, P.C.", not defendant Ricotta, whose personal affidavit is not to be found among defendants' moving papers.

All parties shall appear in DCM Part 3 for a preliminary conference on **February 23, 2010** at 9:30 a.m.

E N T E R,

Dated: February 2, 2010

Joseph J. Maltese
Supreme Court Justice