Ambra v Awad
2010 NY Slip Op 31118(U)
April 13, 2010
Sup Ct, Nassau County
Docket Number: 487/05
Judge: F. Dana Winslow
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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 5
NASSAU COUNTY

JOHN AMBRA,

Plaintiff,

-against-

JOSEPH P. AWAD, individually and as corporate officer of SILBERSTEIN, AWAD & MIKLOS, a professional corporation, and GREGORY D. BELLATONE,

Defendant(s).

INDEX NO.: 487/05

MOTION DATE: 1/11/10
MOTION SEQ.: 008

The following papers read on this motion (numbered 1-4):

Notice of Motion..1
Plaintiff's Attorney's Affirmation in Opposition To
Defendants' Summary Judgment Motion...2
Plaintiff's Legal Expert's Affirmation In Opposition
To Defendants' Summary Judgment Motion...3
Reply Affirmation in Support of Motion for Summary Judgment...................4

Memorandum of Law in Opposition to Defendants'
Motion for Summary Judgment......................................A

In this legal malpractice action, defendant moves for summary judgment pursuant to **CPLR §3212.**

Facts and Procedural History.

Plaintiff JOHN AMBRA ("AMBRA") brings this action against his former attorneys, defendants JOSEPH P. AWAD ("AWAD"), SILBERSTEIN, AWAD & MIKLOS, P.C. and GREGORY D. BELLANTONE ("BELLANTONE") (collectively, the "SILBERSTEIN, AWAD defendants" or "SILBERSTEIN, AWAD"), for losses incurred as a result of their alleged legal malpractice in a personal injury action entitled *John Ambra v. Makko of Brooklyn, Ltd.,* Index No. 27901/98, Supreme Court, Kings County (the "Personal Injury Action"). The Court refers to the prior order of this Court entered September 20, 2007 [16 Misc.3d 1128(A)] (the "Prior Order"), and the decision of the Second Department affirming the Prior Order as modified [62 AD3d 732], for a complete recitation of the facts and procedural history of this action.

The Personal Injury Action arose out of an accident which occurred on May 30, 1998, in which AMBRA's stationary vehicle was struck by a vehicle owned and operated by Makko of Brooklyn, Ltd. ("Makko"). The action was commenced on August 11, 1998 with the filing of a Verified Complaint containing an *ad damnum* clause in the amount of $1,000,000. In the course of discovery, Makko disclosed that it had a primary insurance policy with liability coverage in the amount of $1,000,000, but did not provide any excess insurance information.

On April 4, 2002, the jury returned a verdict against Makko with respect to liability. On April 9, 2002, at the conclusion of the trial on damages, BELLANTONE made an oral application to conform the pleadings to the proof and to increase the amount of the *ad damnum* clause from $1,000,000 to $5,000,000. The trial court granted the application to conform the pleadings to the proof, but denied the application to increase the *ad damnum.* On April 10, 2002, the jury awarded damages to plaintiff in the sum of $2,020,000.

On April 15, 2002, Makko's excess insurer, with whom Makko had a $5,000,000 policy, disclaimed coverage on the basis of late notice. The disclaimer letter was forwarded to SILBERSTEIN, AWAD. On or about May 17, 2002, SILBERSTEIN, AWAD filed a written motion to increase the *ad damnum.* Before that motion was decided, AMBRA agreed to a settlement of the Personal Injury Action for $1,000,000, the amount of the primary insurance policy. A General Release was forwarded to AMBRA on or about May 29, 2002, and signed by AMBRA on June 17, 2002. The settlement resulted in a net recovery to AMBRA, after costs, expenses and attorneys fees, of $658,917.37. On or about July 8, 2002, SILBERSTEIN, AWAD sent a check to AMBRA (after deducting the amount of the workers' compensation lien) in the amount of $626,172.41.

AMBRA brought the instant action against the SILBERSTEIN, AWAD defendants, alleging, in sum and substance, that as a result of their negligence or malpractice, AMBRA was deprived of full recovery of the damages awarded to him by the jury. The Amended Complaint originally included four causes of action. The SECOND and THIRD causes of action were dismissed by this Court in the Prior Order, and the dismissal was affirmed by the Appellate Division.

The Instant Motion.

The SILBERSTEIN, AWAD defendants seek summary judgment dismissing the remaining causes of action: [FIRST] that the SILBERSTEIN, AWAD defendants negligently and incorrectly advised AMBRA that Makko's resources were insufficient to

cover the jury verdict (to the extent that it exceeded the primary insurance coverage); and [FOURTH] that the SILBERSTEIN, AWAD defendants coerced or pressured AMBRA to accept an inadequate settlement, diminishing his recovery by at least $1,000,000.

In support of their motion, the SILBERSTEIN AWAD defendants argue: (1) that AMBRA is barred from maintaining this malpractice action because he implicitly ratified the underlying settlement by waiting over two years to challenge it; (2) that AMBRA was not coerced or pressured to accept the settlement; (3) that SILBERSTEIN, AWAD provided AMBRA with correct information regarding Makko's resources; and (4) that the recommendation to settle the Personal Injury Action was not malpractice, insofar as it represented one of several reasonable courses of action.

AMBRA argues that the motion must be denied because: (1) the evidence submitted by the SILBERSTEIN, AWAD defendants is not in admissible form; (2) the motion is not supported by expert opinion; and (3) the SILBERSTEIN, AWAD defendants fail to establish, *prima facie*, their entitlement to summary judgment as a matter of law.

Discussion.

To prevail on a motion for summary judgment, the movant must first establish its claim or defense as a matter of law, by tender of evidentiary proof in admissible form. **CPLR §3212(b)**; **Winegrad v. New York University Medical Center,** 64 N.Y.2d 851; **Zuckerman v. City of New York,** 49 N.Y.2d 557. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers. **Alvarez v. Prospect Hosp.**, 68 N.Y.2d 320, 324; **Winegrad** 64 NY2d at 853. Once the movant establishes a *prima facie* case, the burden then shifts to the opponent to produce evidence in admissible form sufficient to establish a genuine issue of material fact. **Alvarez v. Prospect Hosp.**, 68 N.Y.2d at 324; **Zuckerman**, 49 NY2d at 562. To warrant a trial, the fact issue must be genuine, bona fide and substantial. **Leumi Financial Corp. v. Richter**, 24 A.D.2d 855, citing **Richard v. Credit Suisse**, 242 NY 346. Summary judgment cannot be defeated by "mere conclusions, expressions of hope or unsubstantiated allegations or assertions." **Zuckerman**, 49 NY2d at 562.

AMBRA's procedural arguments are superficial, meriting only brief discussion. AMBRA argues that the deposition transcripts offered in support of the motion are inadmissible because they are unsigned. **CPLR §3116(a)** provides that an unsigned deposition transcript "may be used as fully as though signed" if the witness fails to sign and return it within sixty days after it was submitted to him or her for review. The SILBERSTEIN, AWAD defendants have submitted the affirmation of counsel and

transmittal letters demonstrating that the deposition transcripts were sent to the respective witnesses and not returned. Accordingly, the unsigned transcripts are admissible. **Thomas v. Hampton Express, Inc.,** 208 AD2d 824.

AMBRA also argues that the Court may not consider the transcript of an unauthorized tape recording of a telephone conversation between AMBRA and AWAD [Motion Exh. N] because the transcript is not appropriately certified; that is, there is no information as to who taped or transcribed the conversation, or whether or not the transcript reflected the entire conversation between the parties. A transcript of a tape-recorded conversation may be admitted if the accuracy of the transcript has been sufficiently established. **People v. Tapia,** 114 AD2d 983. The admissibility of such a transcript is generally within the discretion of the Court. **Id.** In this case, AMBRA admitted under oath that the transcript of the recorded telephone conversation was true and accurate, and that it included the entire conversation with AWAD. [Continued Examination Before Trial of John Ambra, dated February 16, 2006, attached as Motion Exh. H ("AMBRA Continued EBT"), pp. 5-16.] Accordingly, the Court finds that the transcript's accuracy is sufficiently established for purposes of consideration on this motion.

Finally, AMBRA's assertion that expert testimony is required to establish *prima facie* entitlement to summary judgment is inaccurate, and mis-characterizes the cases cited for that proposition. In **Estate of Nevelson v. Carro** [259 AD2d 282], the First Department denied summary judgment on a legal malpractice claim where the movants offered only conclusory, self-serving statements in support of their motion. There, the issue was whether or not the plaintiff was required to submit expert testimony in opposition to the motion. The Appellate Division found that, even if, *arguendo*, expert opinion was required to establish a departure from the requisite standard of care, the plaintiff's obligation to offer such evidence was never triggered because the defendants had failed to establish a *prima facie* right to judgment. The panel noted that the defendants had offered "no expert <u>or</u> <u>other</u> evidence which would tend to establish, prima facie, that they did not depart from the requisite standard of care." **Id.** at 284 (emphasis supplied).

Similarly, in **Drazek v. Napoli,** [23 Misc. 3d 11], the Court denied the defendant's motion for summary judgment because the motion was supported solely by the testimony of the defendant's attorney and a former employee, and offered "no evidentiary materials whatsoever in support of its claim of adequate legal representation." **Id.** at 13-14. The Court, quoting the decision in **Nevelson**, noted the absence of "expert <u>or</u> <u>other</u> evidence." **Id.** at 13, *quoting* **Estate of Nevelson**, 259 AD2d at 284 (emphasis supplied).

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Neither of the cases cited by AMBRA stands for the proposition that expert opinion is an indispensable proof in support of a malpractice defendant's motion for summary judgment. AMBRA has not cited, and the Court has not found, a single decision holding that the absence of expert opinion precludes summary judgment for the defendant. Accordingly, for purposes of the instant motion, the Court is free to determine the sufficiency of the defendants' *prima facie* showing on the evidence submitted.

Turning to the merits of the motion, the Court rejects the argument of the SILBERSTEIN, AWAD defendants that AMBRA is barred from recovery in this action by virtue of his implied ratification of the settlement in the underlying action. This action does not seek to rescind the settlement or to reopen the underlying action against Makko. Rather it seeks to recover from the SILBERSTEIN, AWAD defendants the loss incurred as a result of their alleged malpractice in recommending the settlement. To the extent that AMBRA's implicit ratification of the settlement, if any, is inconsistent with his present position that the settlement was detrimental to him, that inconsistency is not a bar to the present action, but rather a factor to be considered in connection with the other evidence. Insofar as this action was timely commenced in accordance with the applicable statute of limitations [**CPLR §214**], any purported delay in seeking relief on the part of AMBRA is not a basis for dismissal.

The Court also rejects the fourth basis for summary judgment offered by the SILBERSTEIN, AWAD defendants; namely, that the advice to settle was not malpractice because it was one of several reasonable courses of action under the circumstances. In the Court's view, this is an ultimate conclusion that cannot be reached without reference to the question of whether or not AMBRA was coerced into settlement or inadequately informed. It is undisputed that the SILBERSTEIN, AWAD defendants advised AMBRA to settle for an amount at least $1,000,000 less than the jury awarded. Such advice would be reasonable only if it were based on sufficient and accurate information, and if AMBRA were afforded the opportunity to choose among fairly presented alternatives.

Accordingly, the Court moves to the central issue of this case: did the SILBERSTEIN, AWAD defendants commit malpractice by (i) improperly pressuring or coercing AMBRA into accepting an inadequate settlement or (ii) recommending settlement on the basis of insufficient or inaccurate information.

The Court finds that the SILBERSTEIN, AWAD defendants have established, *prima facie,* that they did not coerce or pressure AMBRA into accepting the settlement. In his sworn affidavit, BELLANTONE states that he was present at all meetings with AMBRA, and that at no time was plaintiff coerced, pressured or cajoled into accepting the settlement. Affidavit of Gregory D. Bellantone, Esq., sworn to on September 29,

2009, attached as Motion Exh. J (the "BELLANTONE Affidavit"), ¶ 4. BELLANTONE states that he apprised AMBRA of all the options, including post-trial motions, excess coverage litigation and collection of the judgment, and that AMBRA directed him to accept the settlement after full disclosure and due consideration. BELLANTONE Affidavit, ¶¶ 4, 9.

This account is corroborated by evidence other than the defendants' own testimony. First, AMBRA was under no time pressure to accept the settlement. The offer of settlement was conveyed to AMBRA a few days after the verdict in April 2002. [Examination Before Trial of John Ambra, dated February 15, 2006, attached as Motion Exh. H ("AMBRA EBT"), pp. 114-117.] AMBRA verbally accepted the offer at a second meeting with counsel. [AMBRA EBT, pp. 119-120.] A General Release was purportedly forwarded to AMBRA on May 29, 2002 [Motion Exh. L], although AMBRA denies receiving it. [AMBRA EBT p.123.] The General Release was signed on June 17, 2002. [Motion Exh. M.] Based upon the above time-line, AMBRA had at least two months to think about the settlement, seek advice, and consider his options. According to AWAD, the settlement offer was in no danger of being withdrawn by the insurance company, and AWAD had relayed this opinion to AMBRA. [Examination Before Trial of JOSEPH P. AWAD, dated February 16, 2006, attached as Motion Exh. O, pp 105-106.] In addition, AMBRA was told on June 18, 2002, after the General Release was signed, that it was still not too late to cancel the settlement, particularly if he felt that he did not have complete information. [Transcript of Recorded Telephone Conversation of June 18, 2002 between AMBRA and AWAD, attached as Motion Exh. N ("Telephone Conversation"), pp. 2, 5-6].

Second, AMBRA admitted that he did not consider anything said in the Telephone Conversation to be pressuring or cajoling him to accept the settlement. [AMBRA Continued EBT, p.16.] Finally, AMBRA's prior conduct in the litigation, particularly his rejection of a high/low arbitration recommended by his attorneys and a prior $750,000 settlement offer, suggests generally that he was not unduly influenced by counsel. [AMBRA EBT pp. 75-80; 95-96]

The Court finds the above evidence sufficient to shift the burden to AMBRA to show that he was pressured or coerced to settle. AMBRA does not meet this burden. AMBRA states that AWAD pressured him to settle the case by repeatedly insisting that "they're going broke." AMBRA admitted that this was the only thing that the SILBERSTEIN, AWAD defendants ever said or did to pressure him to settle the case. [AMBRA EBT, p.160].

According to AMBRA, "before, middle and after" the Telephone Conversation, AWAD told him "a million times," that "[t]hey're going to go broke. They're going broke, while we're talking." [AMBRA EBT pp. 153] This account is contradicted by transcript of the Telephone Conversation. AWAD never said that Makko was "going broke." Rather, AWAD said "[T]hey're viable corporation. There is a likelihood of collecting a couple of bucks there. I don't know how much, John. I don't know what you can do. I don't know if they would file bankruptcy. They've got assets. They've got trucks, you know. But that's called collection in judgment an that's at least two years away from now, maybe a little bit longer." [Telephone Conversation, p.3]

AMBRA testified further that, apart from the Telephone Conversation, he was told "20 or 30 times," on 20 or 30 different occasions, that "[t]hey're going broke. They're going broke now. They could go out of business now." [AMBRA EBT, pp. 159-160] It is not clear, however, whether AMBRA was referring to Makko or Makko's insurance carrier. In another section of the deposition, AMBRA testified that AWAD did not tell him that Makko was "going broke," but only that the insurance company was in danger of doing so. [AMBRA EBT, pp. 109-111]

In any event, AMBRA's testimony is vague, inconsistent and unsupported by objective evidence. Accordingly, the Court finds it insufficient to raise an issue of fact on the issue of coercion. If anything, to the extent that AMBRA's testimony reflects his understanding at the time of settlement that Makko could not satisfy the verdict, it more aptly relates to the question of whether or not the decision to settle was sufficiently and accurately informed.

On the evidence presented, the Court cannot find, as a matter of law, that the SILBERSTEIN, AWAD defendants were not negligent in their advice to AMBRA regarding the resources of Makko available to satisfy the verdict. The investigation regarding the potential assets of Makko is described in the BELLANTONE Affidavit. BELLANTONE states that he went to Makko's premises to view the property and operations. In addition, "[s]omeone from the firm conducted an internet investigation, went to the county clerk's office or consulted with a realtor to determine that Makko did not own its buildings. . . During the deposition of the witness from Makko in the underlying case, I inquired about Makko's operations, contracts and assets. . . . Prior to the trial of the underlying matter, I determined that Makko had a few trucks and a contract with Yankee Stadium to deliver pretzels and was an ongoing business. This was discussed with plaintiff." [BELLANTONE Affidavit, ¶¶ 5-8.]

The description of BELLANTONE's investigation is imprecise at best. To the extent that BELLANTONE relied on public records or reports regarding the financial

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condition of Makko at the time of settlement, he did not attach or incorporate specific reference to them in his Affidavit. To the extent that BELLANTONE relied on the deposition of a principal of Makko in the underlying trial, he also did not attach or incorporate specific testimony from the transcript of that deposition.

With respect to the content and quantum of information communicated to AMBRA, the testimony is contradictory. The only undisputed, contemporaneous evidence is the portion of the Telephone Conversation quoted above. In the Telephone Conversation, AWAD informed AMBRA that Makko was a viable corporation with assets, that they were likely to collect "a couple of bucks," but that AWAD didn't know how much, or whether or not Makko might file for bankruptcy. This information is also imprecise. Further, it may have been misleading, insofar as there was no evidence that Makko intended or was in a position to file for bankruptcy.

Otherwise, to the extent provided, SILBERSTEIN, AWAD's information regarding Makko's financial condition was substantially corroborated by the testimony of Jacek Dybas, the self-described Controller Network Adminstrator of Makko, which was elicited during discovery in this malpractice action. [Examination Before Trial of Jacek Dybas, sworn to on January 10, 2005, attached as Motion Exh. K ("Dybas EBT"), p.6.] Dybas testified that, in 2002, Makko was a medium-sized family-owned corporation, with one shareholder and 50 employees. [Dybas Affidavit p.5, p.75, p.81] Dybas confirmed that Makkos did not own the buildings it occupied, that it did own about four 1995 trucks and machinery purchased primarily with loans, and that most of its equipment was leased. [Dybas Affidavit pp. 12-21, 52, 55, 63-73, 87-89.]

Nonetheless, it is not clear that the information known or communicated to AMBRA was sufficient to warrant settlement on the basis that Makko was a collection risk. As set forth in the BELLANTONE Affidavit and the Telephone Conversation, the information provided to AMBRA was vague and unspecific. It was also incomplete. Dybas testified that in 2002, Makko earned $6 million in sales and $750,000 net profit. In 2003, Makko had $6.5 million in sales. To the extent that such information could have been obtained by the SILBERSTEIN, AWAD defendants, there is no evidence that they attempted to do so, or to communicate such information to AMBRA. There is no evidence as to how this information, if known, might have affected the calculation of risk and the decision to recommend or accept the settlement.

Similarly, in the context of discussing the potential delay in collection, there is no evidence that SILBERSTEIN, AWAD took into account, or informed AMBRA, that he would be entitled to interest on the verdict at the rate of 9%. The Court cannot determine how this information, if known, might have affected AMBRA's consideration.

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The Court finds that, on the record presented, it cannot determine, as a matter of law, that SILBERSTEIN, AWAD did not violate any standard of reasonable care with respect to its evaluation of Makko's resources and its recommendation to settle the case for $1,000,000. The Court also cannot determine, as a matter of law, that AMBRA did not sustain a loss as a result of the settlement and that the failure to adequately inform AMBRA, if any, was not a substantial factor in bringing about the settlement and corresponding loss. These questions must be determined by a finder of fact upon a full and fair evidentiary hearing.

The Court has considered the remaining contentions of the parties and finds them to be without merit. Based upon the foregoing, it is

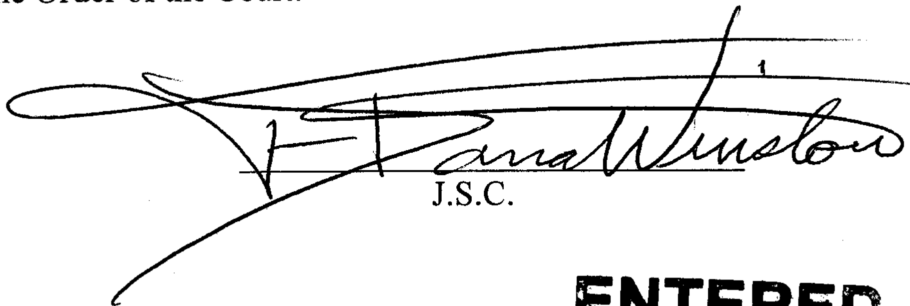
ORDERED, that a framed issue hearing in accordance with the above discussion shall be held before the undersigned in Part 5 of the Supreme Court, Nassau County, 100 Supreme Court Drive, Mineola NY 11501 on **Wednesday, June 16** at **11:00 a.m.** Counsel shall call the Court on the afternoon before, and the day of, the scheduled hearing, or any duly authorized adjournment thereof, to confirm the availability of all participants and the Court; and it is further

ORDERED, that the instant motion, to extent that it seeks summary judgment for defendants on the FIRST cause of action, is **adjourned** to the date of the hearing set forth above, or any duly authorized adjournment thereof; and it is further

ORDERED, that the instant motion, to the extent that it seeks summary judgment for defendants on the FOURTH cause of action, is **granted.**

This constitutes the Order of the Court.

Dated: 4/13/10



J.S.C.

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