

Seldon v Sweetbaum & Sweetbaum

2010 NY Slip Op 32727(U)

September 30, 2010

Supreme Court, New York County

Docket Number: 116218/08

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN PART 12

J.S.C.

SELDON, PHILIP,

- v -

SWEETBAUM & SWEETBAUM,
and SWEETBAUM, MARSHALL D.

INDEX NO. 116218/08

MOT. DATE 7/28/10

MOT. SEQ. NO. 002

MOT. CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for D/SJ

PAPERS NUMBERED

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Answering Affidavits — Exhibits
Replying Affidavits

FILED

OCT 04 2010

COUNTY CLERK'S OFFICE
NEW YORK

CROSS-MOTION: Yes No

Upon the foregoing papers, it is

ORDERED that **MOTION IS DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION AND ORDER.**

Dated: September 30, 2010

Paul G. Feinman

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

PC DATE _____ CC Date _____

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

RECORDED IN NEW YORK COUNTY CLERK'S OFFICE
10/1/10

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: IAS PART 12

-----X
PHILLIP SELDON,
Plaintiff,

-against-

SWEETBAUM & SWEETBAUM and MARSHALL D.
SWEETBAUM,
Defendants.
-----X

Index No. 116218/08
Mot. Seq. No. 02

FILED
OCT 04 2010
COUNTY CLERK'S OFFICE
NEW YORK

Appearances: Plaintiff:
Philip Seldon, *Pro Se*
500 East 77th Street
New York NY 10010

Defendant:
Wilson, Elser, Moskowitz, Edelman & Dicker LLP
By: Brett A. Scher, Esq.
150 East 42nd Street
New York NY 10017

Papers considered on review of this motion:

Papers	Numbered
Notice of Motion to Dismiss, Aff. of Brett A. Scher, Exs. A-M	1
Defendant's Memorandum of Law in Support of Motion to Dismiss	2
Plaintiff's Aff. in Opposition	3
Aff. of Brett A. Scher Requesting Dismissal	4
Reply Aff. Of Brett A. Scher	5
Aff. of Marshall Sweetbaum in Support of Defendant's	
Motion for Summary Judgment	6
Defendant's Memorandum of Law in Support of Summary Judgment	7
Plaintiff's Aff. in Opposition to Converted Motion for Summary Judgment	8

PAUL G. FEINMAN, J.:

Defendants Sweetbaum & Sweetbaum and Marshall D. Sweetbaum (the Sweetbaum Defendants) originally moved to dismiss pursuant to CPLR 3211 (a) (1) and (7), seeking to dismiss plaintiff Phillip Seldon's (Seldon) second amended complaint.¹ By an order, dated May 5, 2010, this court converted the motion to one for summary judgment, pursuant to CPLR 3211 (c). The parties were then given a chance to submit supplemental papers. For the reasons set

¹ Seldon filed a third amended complaint following the filing of the Sweetbaum Defendants' motion to dismiss.

forth below, defendants are awarded summary judgment in their favor and this action is dismissed in its entirety.

Background

This legal malpractice action concerns the Sweetbaum Defendants' appellate representation of Seldon, seeking to reverse a judgment entered after a unanimous jury found Seldon liable in a defamation action brought by Andrew Spinnell, Esq., Seldon's former attorney.

In 2003, Andrew Spinnell commenced an action against Phillip Seldon for defamation and libel after Seldon prepared and distributed two memoranda to several attorneys and professionals who knew Spinnell (the Underlying Action). The memoranda stated, in part,

When the New York Bar Association declared Andrew J. Spinnell was unfit to be a judge ... were they also taking into consideration his ethical and moral values in the practice of law exemplified by disciplinary sanctions in both New York and Connecticut along with the imposition of severe sanctions by Justice John Martin, U.S. District Court, Southern District of New York for abusive motion practice in Patsy's Brand v. I.O.B. Realty where falsified documents were used as evidence?

Other allegations abound about Andrew Spinnell ranging from extortion of money to egregious malfeasance to abusing a client with vulgarity and other verbal abuse. ... [h]e has been discharged by at least one client for cause. The New York State Appellate Court also affirmed a finding against Mr. Spinnell for his defrauding the State of New York out of its unemployment insurance tax in a tax scam he ran in his office

See Notice of Motion, Exhibits D & E.

In addition to the memoranda, plaintiff also distributed a Notice to Take Non-Party Deposition by Written Questions (Deposition Notice), which was faxed to several New York attorneys. The Deposition Notice contained 59 questions, which included:

Are you aware:

- of any instance where Andrew Spinnell committed perjury or suborned perjury?
- of any extramarital relationships Andrew Spinnell may have had with his staff?
- of any instance documenting that Andrew Spinnell suffered from emotional

distress by virtue of his wetting his pants in private or public?

See Notice of Motion, Exhibit G, ¶ 7.

In July 2006, the case went to a jury trial, presided over by another justice of this court. At trial, both Seldon and Spinnell testified. At the conclusion of the trial, the jury returned a 6-0 verdict in favor of Spinnell, awarding him \$100,000 in compensatory damages and \$400,000 in punitive damages. The jury found that Seldon made defamatory statements in the two memoranda and the Deposition Notice. Judgment was then entered against Seldon.

In late 2006, Seldon's insurance company, Allstate Insurance Company, hired the Sweetbaum Defendants to represent Seldon in his appeal of the judgment.² Sweetbaum alleges that he spent many hours preparing the appeal, including his preparation for oral argument before the Appellate Division, First Department. On July 12, 2007, the First Department issued a decision and order unanimously affirming the judgment entered by upon the jury's verdict.

Seldon now brings this action for legal malpractice against the Sweetbaum Defendants, claiming that the Sweetbaum Defendants were negligent in their appellate representation of him. Specifically, Seldon alleges that the Sweetbaum Defendants failed to properly prepare for oral argument, failed to argue that Spinnell lied at trial, and failed to argue that the trial court erred in admitting certain evidence.

Analysis

In order to sustain a claim for legal malpractice, a plaintiff must establish that "the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly

² At the defamation trial, Seldon was represented by Conway, Farrell, Curtin, & Kelly, P.C.

possessed by a member of the legal profession which results in actual damages to a plaintiff, and that the plaintiff would have succeeded on the merits of the underlying action ‘but for’ the attorney’s negligence.” *Leder v Spiegel*, 9 NY3d 836, 837 (2007), *cert denied* 552 US 1257 (2008) (internal quotations and citation omitted).

As the Sweetbaum Defendants’ motion to dismiss has been converted to one for summary judgment, the Sweetbaum Defendants have the burden of establishing, through evidentiary proof, that the plaintiff is unable to prove at least one of these elements of a legal malpractice claim. *Ali v Fink*, 67 AD3d 935, 936 (2nd Dept 2009). The Sweetbaum Defendants have met this burden, as they sufficiently established that, at a minimum, plaintiff cannot prove that he would have succeeded on the merits but for the Sweetbaum Defendants’ alleged negligence. The burden now shifts to Seldon to raise a triable issue of fact. *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008).

Seldon has failed to show that he would have succeeded on the merits in the First Department. Seldon alleges in his complaint that he did not defame Spinnell, as everything stated in the memoranda was true. However, this statement is conclusory. The evidence clearly demonstrates that Seldon did defame Spinnell. Reviewing excerpts from the trial transcripts, the evidence presented demonstrated that Spinnell has never been convicted of extortion or fired for cause by a client, as Seldon stated in his memoranda. Seldon failed at trial to present evidence showing the truth in his statements. The First Department even stated that the evidence showing that Seldon defamed Spinnell was clear and convincing.

The Sweetbaum Defendants could not argue on appeal facts not developed at trial. It bears noting that in opposition to this motion, Seldon still offers no proof showing that his

statements about Spinnell were true. If Seldon had such proof, he should have presented it at trial, or, at the latest to the Sweetbaum Defendants to support his appeal.

Even assuming that the Sweetbaum Defendants were negligent in their representation, Seldon's bare conclusions do not raise an issue of fact as to whether he would have succeeded on the merits "but for" the Sweetbaum Defendants' negligence. Seldon's allegations merely show a dissatisfaction with the appellate strategy of the Sweetbaum Defendants, and "a purported malpractice claim that amounts only to a client's criticism of counsel's strategy may be dismissed." *Dweck Law Firm v Mann*, 283 AD2d 292, 293 (1st Dept 2001).

Accordingly, it is

ORDERED that the defendants Sweetbaum & Sweetbaum and Marshall D. Sweetbaum's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of this Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: September 30, 2010
New York, New York

Saul G. Kinner

J.S.C.

FILED
OCT 04 2010
COUNTY CLERK'S OFFICE
NEW YORK