Gersten v Lemke

2010 NY Slip Op 33317(U)

November 10, 2010

Supreme Court, New York County

Docket Number: 110651/07

Judge: Marylin G. Diamond

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[* 1]
SCANNED ON 11/24/2010

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

PRESENT: MARYLIN G. DIAMOND PART 48

Index Number : 110651/2007

GERSTEN, BEN

VS

LEMKE, DENNIS M.

Sequence Number : 007

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided pursuant to the Court's decision and order in motion sequence number 006.

ENTER ORDER

FILED

NOV 24 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/10/10

MCD

MARYLIN G. DIAMOND, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SCANNED ON 11/23/2010

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. MARYLIN G. DIAMOND PART 48
Justice

BEN GERSTEN,

Plaintiff,

-against-

DENNIS M. LEMKE, PEACE AGRESTA & LEMKE, LOUIS N. AGRESTA and ERNEST J. PEACE,

Defendants.

INDEX NO. 110651/07

MOTION SEQ. NO. 006

FILED
NOV 22 2010
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: [X] Yes [] No

Upon the foregoing papers, it is ordered that: Motion sequence numbers 006, 007 and 008 are consolidated herein for decision. This is a legal malpractice action. The plaintiff Ben Gersten was indicted by a Nassau County grand jury in July, 1999 for sodomy in the first degree and various other crimes arising from his alleged forcible sexual conduct with his daughter. The criminal acts were alleged to have been committed between March, 1995 and December, 1998 when the plaintiff's daughter was nine to thirteen years old. The defendant Dennis Lemke was retained to represent Gersten on these charges.

The plaintiff waived his right to a jury trial. At the bench trial, the main witnesses for the prosecution were the alleged victim, who gave detailed testimony concerning various acts of sexual abuse allegedly committed by her father, and a physician who testified about her examination of the daughter's genital area. The physician testified that the examination revealed findings consistent with the daughter's having suffered forcible trauma to her vagina and anus. In order to bolster the credibility of the daughter by explaining why she had failed to report the alleged abuse for a number of years, the prosecutor also called a psychologist who, citing the theory of child sexual abuse accommodation syndrome, testified that children who are sexually abused by their father frequently do not disclose the abuse until adolescence. In defending the plaintiff, Lemke asserted that the daughter had engaged in sexual activity with a boyfriend and that the medical evidence found by the physician was consistent with this type of sexual activity. However, Lemke did not call his own medical expert to testify or offer evidence as to whether the objective findings were consistent with forcible penetration. Nor did Lemke call an expert to testify about the theory of child sexual abuse accommodation syndrome, a theory which, according to the plaintiff, has been discredited by experts in the field.

The plaintiff was convicted on December 1, 1999 of all charges and sentenced to serve multiple terms of imprisonment, including several consecutive indeterminate terms of 12½ to 25 years. He began his incarceration on December 1, 1999. After exhausting his state remedies, the petitioner sought a writ of habeas corpus in federal court on the ground that he had received ineffective assistance of counsel. By decision and order dated January 15, 2004, the district court (Jack B. Weinstein, J.) agreed and granted the petition, directing that the plaintiff be released unless state criminal proceedings were commenced within sixty days. *See Gersten v. Sendowski*, 299 F Supp2d 84 (EDNY 2004). Judge Weinstein found that Lemke's performance was constitutionally deficient based upon his failure to call or consult with

medical experts in order to effectively rebut the medical evidence of forcible penetration and the prosecution's reliance on the child sexual abuse accommodation syndrome theory. Specifically, Judge Weinstein found that Lemke's errors had prejudiced the plaintiff because there was a "reasonable probability that petitioner would not have been convicted had defense counsel conducted an adequate investigation and called an expert to testify." *Id.* at 104. The order was affirmed on appeal. *See* 426 F3d 588 (2nd Cir. 2005). Thereafter, concluding that the plaintiff's daughter was unlikely to be physically or emotionally able to testify at a second trial, the State elected not to pursue the charges and the plaintiff was released from prison in November, 2005. By order dated September 12, 2006, the County Court of Nassau County (Donnino, J.) dismissed all criminal charges which had been brought against the plaintiff. This legal malpractice action was then commenced on August 3, 2007.

In addition to Lemke, this action was brought against two law firms in which he was allegedly a partner (Peace Agresta & Lemke and Peace Agresta Carr Blum & Lemke) and the four attorneys who were allegedly partners with Lemke in one or both of these firms (Louis N. Agresta, Victor Carr, Andrew Blum and Ernest J. Peace.) The plaintiff claimed that since these other attorneys were partners with Lemke in the respective firms, they are vicariously liable for his malpractice during the criminal trial. By decision and order dated February 14, 2008, this court dismissed the complaint as against Carr, Blum and Peace Agresta Carr Blum & Lemke, finding that there was no evidence that Peace Agresta Carr Blum & Lemke ever represented the plaintiff or was retained by the plaintiff to represent him in the criminal proceeding. The court also denied the plaintiff's motion for partial summary judgment on the issue of Lemke's liability for malpractice. On that motion, the plaintiff had argued that the federal courts, in concluding that Lemke had failed to provide him with effective assistance of counsel at his criminal trial and that such ineffective representation was sufficiently material so as to warrant overturning his conviction, had essentially found that Lemke had committed legal malpractice. The court rejected this argument, finding that Lemke was not collaterally estopped herein from challenging this determination since he had not had a reasonable opportunity in federal court to litigate the issue of the quality of his legal services and that, in any event, the issues of attorney malpractice and ineffective assistance of counsel are not identical. Following the completion of discovery, the plaintiff filed a note of issue in October, 2009.

In motion sequence number 006, defendant Agresta now moves for summary judgment dismissing the complaint as against him. In motion sequence number 007, defendant Peace moves for the same relief regarding the claims against him. In motion sequence number 008, Peace, Agresta & Lemke also move for summary judgment dismissing the complaint as against it. Finally, the plaintiff again cross-moves for partial summary judgment on the issue of liability.

Discussion

A. The Partnership Liability of Lemke's Co-Defendants - - The plaintiff has not suggested that defendants Peace or Agresta committed legal malpractice. Rather, he alleges that, as partners in the law firm of defendant Peace Agresta & Lemke, they are vicariously liable for any tort committed by their partner Mr. Lemke. Under Partnership Law §§ 24, 26(a)(1), a partner is ordinarily liable for the tortious conduct of another member or employee of the firm. *See Wright v. Shapiro*, 37 AD3d 1181, 1183 (4th Dept 2007). *See also Buechel v. Bain*, 97 NY2d 295 (2001). In moving for summary judgment, Peace and Agresta claim that there was never any written partnership agreement or agreement of any kind to share profits or losses. Rather, they assert that Lemke and Agresta were merely associates and/or employees of Peace, who allowed them to place their names on his letterhead in order to add to their stature as criminal defense attorneys. Thus, according to these defendants, there was never an actual partnership called Peace Agresta & Lemke and they never assumed any of the rights or responsibilities

of a partnership. They also claim that their association with Peace terminated upon his retirement in 1996, some three years prior to Lemke's representation of the plaintiff at his criminal trial.

In the face of these assertions, the plaintiff has failed to raise a triable issue of fact. Although the plaintiff points out that the Agresta and Lemke continued to share office space after Peace's retirement, such an arrangement does not make them partners. It is true that where, as here, there is no written partnership agreement between the parties, a de facto partnership may nevertheless be found by looking to the conduct, intention and relationship between the parties, the most important of which is a mutual promise or undertaking to share in the profits and losses of the business. *See Community Capital Bank v. Fischer & Yanowitz*, 47 AD3d 667, 668 (2nd Dept. 2008). In this respect, as already discussed, there is no evidence that any of these defendants agreed to share profits and losses. Similarly, although the transcripts from various court proceedings held after 1996, including the transcript of the Nassau County criminal proceeding, listed Lemke as appearing for the law firm of Peace, Agresta and Lemke, Lemke has indicated, without any evidence from the plaintiff to the contrary, that this listing was simply an error by a court reporter who had known him for years and assumed he was still practicing with the defendants.

Finally, under the doctrine of partnership by estoppel, a person is estopped from denying the existence of a partnership where, by words or by conduct, he represents himself as a partner in an existing partnership and the plaintiff relied on this representation. *Id.* at 668-669. Here, the retainer letter signed by the plaintiff referred only Lemke and plaintiff's fee was paid only to Lemke. Indeed, plaintiff never even met Peace or Agresta. Moreover, none of the correspondence received by the plaintiff from Lemke ever mentioned other attorneys or a law firm. In fact, the plaintiff testified at his deposition that he only first became aware of an entity named Peace, Agresta and Lemke when he saw their name on the court transcript of the trial. Since plaintiff did not rely on any partnership between Lemke and the other two individual defendants, there can be no partnership by estoppel. The plaintiff's claims against Peace, Agresta and the firm Peace, Agresta and Lemke must therefore be dismissed.

B. Plaintiff's Cross-Motion for Summary Judgment - - As the court discussed in its earlier decision denying plaintiff's motion for summary judgment, to establish a cause of action for legal malpractice in this action, the plaintiff must show (1) that Lemke was negligent in failing to exercise that degree of care, skill and diligence commonly exercised by an ordinary member of the legal community, (2) that but for the attorney's negligence, the plaintiff would have prevailed in the underlying action; and (3) that actual damages were sustained as a direct result of the attorney's actions. *See, e.g., Davis & Davis, P.C. V. Morson*, 286 AD2d 584, 585 (1st Dept. 2001). In denying plaintiff's motion, the court held that the findings of the district court did not have collateral estoppel effect on Lemke since he did not have a full and fair opportunity to contest the plaintiff's claim of ineffective assistance of counsel and that in any event, the criteria for a claim of ineffective counsel at a criminal trial and for a claim of legal malpractice are not identical.

In now moving a second time for summary judgment, the plaintiff purports to abandon his collateral estoppel argument, but nevertheless argues that Judge Weinstein's findings of ineffective counsel are supported by unrebutted evidence, obtained herein through discovery, compelling this court to find, as a matter of law, that Lemke's ineffective assistance of counsel constituted legal malpractice. However, the fact that evidence has been obtained through discovery which is consistent with Judge Weinstein's conclusions hardly warrants a finding that, as a matter of law, Lemke committed legal malpractice. Indeed, the plaintiff has failed to adequately explain how the "but for" element of a legal malpractice claim may be resolved in this action on a summary judgment motion given the presence of

factual issues involving the underlying crimes for which he was indicted. Notwithstanding the plaintiff's assertion that this motion is not based on the doctrine of collateral estoppel, it is clear that his arguments are ultimately tied to and dependent upon Judge Weinstein's decision.

In fact, the only real difference between this motion for summary judgment and plaintiff's earlier motion is his reliance on the affirmation of a self-designated expert, Michael S. Pollok, Esq., who expresses his legal opinion that plaintiff's guilt or innocence is irrelevant herein and that plaintiff need only establish that but for Lemke's negligence representation at the criminal trial, he would have been acquitted and would not have spent almost six years in prison. Pollok goes on to assert that, having reviewed the evidence, he has concluded that plaintiff has met this burden and therefore proved his legal malpractice claim as a matter of law. The submission of this expert affidavit is inappropriate since it is well established that "a trial court should not rely on the testimony of a legal expert on a question of domestic law....." *Kaplan v. Winslett*, 218 AD2d 148, 155 (1st Dept 1996). Indeed, the determination of whether a lawyer's performance constitutes legal malpractice is the function of the court and any opinion proffered by an "expert" as to a legal conclusion is impermissible. *See Russo v. Feder , Kasszovitz, Isaacson, Weber, Skala & Bass, LLP*, 301 AD2d 63, 68-69 (1st Dept. 2002). Thus, the court should not even consider Pollok's affirmation since it usurps the court's function of determining whether the plaintiff has met the legal standards for establishing a malpractice claim.

In any event, Pollok's assertion that the plaintiff need not establish his innocence in order to prevail does not accurately reflect the legal standards applicable to plaintiff's claim. As discussed at length in the court's previous decision, it is well settled that to prevail on a legal malpractice claim arising from a criminal conviction which was overturned, a criminal defendant must allege and prove "his innocence or a colorable claim of innocence of the underlying offense." *Carmel v. Lunney*, 70 NY2d 169, 173 (1987). *See also Britt v. Legal Aid Society, Inc.*, 95 NY2d 443, 447-448 (2000); *Winkler v. Messinger, Alperin & Hufjay*, 147 AD2d 693 (2nd Dept. 1989); *B.K. Industries, Inc. v. Pinks*, 143 AD2d 963 (2nd Dept. 1988). Under this standard, such a plaintiff bears the "unique burden" of pleading and proving that his conviction was due to the attorney's negligent actions alone and not to the consequences of his guilt. *See Britt v. Legal Aid Society, Inc.*, 95 NY2d at 447. Thus, although the plaintiff herein need only prove, by a preponderance of the evidence, that he would not have been convicted absent Lemke's negligence, Lemke may offer evidence of the plaintiff's guilt in this legal malpractice action in order to rebut the plaintiff's claim that he would have prevailed but for Lemke's inadequate representation. *See Lemke v. Zurich North America*, 26 Misc.3d 1084, 1092 (Sup Ct Nassau Co 2009). Since these are issues which can only be determined at trial, the plaintiff's motion for partial summary judgment, which is essentially a motion to reargue, must be denied.

006

Accordingly, in motion sequence numbers 007, 008 ~~and 009~~, the respective motions for summary judgment by defendants Agresta, Peace, and Peace, Agresta & Lemke are granted and the complaint is hereby dismissed as against these defendants. Lemke's cross-motion for summary judgment is denied.

ENTER ORDER

FILED
NOV 22 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11-10-10

MGD

MARYLIN G. DIAMOND, *J.S.C.*

Check one: [] FINAL DISPOSITION [X] NON-FINAL DISPOSITION