

Hassan v Wallach

2010 NY Slip Op 33490(U)

December 20, 2010

Supreme Court, New York County

Docket Number: 112534/09

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT

PART 10

Index Number : 112534/2009

HASSAN, TARIQ A.

vs

WALLACH, ERIC, ESQ.

Sequence Number : 004

VACATE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 004

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

FILED

Upon the foregoing papers, it is ordered that this motion

DEC 22 2010

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

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

Dated: DEC 20 2010


HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X

Tariq A. Hassan,
Plaintiff (s),

-against-

Eric Wallach, Esq., Kasowitz,
Benson, Torres & Friedman, LLP,
John Singer, Esq., Singer
Deutch, LLP, Mark Susswein, Esq., and
Liddle & Robinson, LLP

Defendant (s).

-----X

DECISION/ ORDER
Index No.: 112534/09
Seq. No.: 004

PRESENT:
Hon. Judith J. Gische
J.S.C.

FILED

SEP 22 2010

NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pltf n/m (vacate) w/ALB affirm, TAH affid, exhs	1
KBT&F opp w/NR affirm, exhs	2
L&R opp w/JBB affid, exhs	3
JS, SD opp w/AMF affirm, exhs	4
Pltf reply w/ALB affirm, TAH affid, exhs	5
Transcript 6/17/10 OA	6

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is an action by plaintiff Tariq A. Hassan ("Hassan") based on claims that the three named law firms and individually named lawyers were negligent and committed legal malpractice. The court granted prior motions by each law firm and the three individually named defendants for pre-answer dismissal of the claims against them

(Order, Gische J., 2/8/2010) ("prior order").

Hassan now moves to have the court set aside its prior order because it was entered on default. He contends the parties agreed that defendants' motions would be adjourned and that the written stipulation signed by all the parties was inadvertently not filed. Although defendants acknowledge they agreed to put the motion over so plaintiff could oppose it, they argue that it was the plaintiff's responsibility to make the stipulation was filed since the adjournment was for his benefit. They point out he offers no excuse for why plaintiff's attorney did not file the stipulation or follow up on it. Thus, defendants argue plaintiff has not shown any excuse for his default. Alternatively, even if he has offered a reasonable excuse, they contend his claims have no merit.

To obtain relief from an order or judgment on the basis of excusable default, a party must provide a "reasonable excuse" and demonstrate the merit of the cause of action or defense (CPLR § 5015 [a] [1]). Law office failure can provide a reasonable excuse for why the stipulation was not filed (see Goldman v. Cotter, 10 AD3d 289 [1st Dept 1004]). While it is unclear why the stipulation to adjourn the motion was not filed or what happened to it, the court accepts the excuse provided by Hassan so that it can move on to consider whether he has meritorious claims against the defendants.

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction, the facts as alleged in the complaint as true, and plaintiff is accorded the benefit of every possible favorable inference (Leon v. Martinez, 84 NY2d 83, 87-88 [1994] [citation omitted]). However, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence are insufficient to defeat a motion to dismiss (Sud v. Sud,

[* 4]
211 AD2d 423, 424 [1st Dept 1995]).

In deciding the underlying motions, the court applied this legal standard. The court did not, however, have the benefit of plaintiff's sworn affidavit which is now before the court. Where a motion is directed at the sufficiency of the pleadings, such an affidavit may be considered for the sole purpose of sustaining the pleading and remedying any deficiencies in it (Ackerman v. Vertical Club Corp., 94 A.D.2d 665 [1st Dept 1983] *app dism* 60 NY2d 644 [1983]). Therefore, the court will consider plaintiff's submissions in deciding whether the court's prior order should be vacated. The prior order is incorporated herein by reference.

Facts and Arguments Already Considered and Presented

In deciding the prior motion, the court already accepted the following facts as true:

Hassan was hired in September 2007 by J.P. Morgan Chase ("JPMC") as its Chief Procurement Officer. Hassan, while employed by JPMC, discovered and investigated certain irregularities in pricing, illegal billing and other corrupt practices that he reported to his senior managers and the head of corporate security. Hassan alleges that he was instructed by those individuals to drop his investigation and not press these matters any further. In July 2008, Hassan was terminated from employment.

Upon being notified of his termination, Hassan suspected it was because he was a "whistle blower," within the meaning of section 806 of the Sarbanes-Oxley Act ("SOX"), and he proceeded to retain the Kasowitz Benson law firm on July 28, 2008. Hassan claims that the firm did not protect his position by failing to commence an action under SOX, not disclosing a conflict of interest, improperly billing him for services,

abandoning him in favor of other clients, and not advising him that a delay in bringing a lawsuit would prejudice him (1st cause of action).

The Kasowitz Benson firm referred Hassan to the Singer Deutsch law firm in September 2008 and, according to the complaint, plaintiff retained the Singer Deutsch law firm sometime around September 19, 2008. Hassan contends Singer Deutsch also failed to start an action under SOX or advise him of the consequence of failing to do so and also charged him unnecessary legal fees (2nd cause of action).

According to plaintiff, he then retained a third law firm (Liddle Robinson), also at or about September 19, 2008 and that firm, like the other two firms, failed to commence an action under SOX, or advise him of the consequence of failing to do so, and also charged him unnecessary legal fees (3rd cause of action).

Hassan's 4th cause of action, against all the defendants, is for breach of contract.

What Hassan did not disclose in his complaint, however, and the bedrock of the defendants' underlying motion to dismiss, is that JPMC fired Hassan for making discriminatory statements which were tape recorded by William Powers ("Powers") a JPMC employee who Hassan fired. Hassan told Powers, a white male, that he was being fired although he was competent, because Hassan had already hired Traci Jackson ("Jackson"), an African American female. Hassan told Powers he had hand picked Jackson because putting a "white guy" into that particular job would be a turn off to the community. Unbeknownst to Hassan, Powers taped the entire conversation Hassan had with him. Powers then brought the tape to senior management and took steps to bring a discrimination lawsuit against JPMC. JPMC decided to settle Powers' discrimination claim by paying him an undisclosed, but substantial sum, to avoid

publicity. Shortly thereafter, JPMC sent Hassan the termination letter dated July 23, 2008. The letter notified him he was being terminated based upon his discriminatory actions.

After Hassan was fired and he hired Kasowitz Benson, the firm contacted JPMC, warning them of forthcoming legal action by Hassan. That was when JPMC played a copy of the tape for Eric Wallach, Esq. ("Wallach"), an attorney with the firm. That was when Kasowitz Benson (Wallach) told him he should get a new lawyer. Hassan acknowledges that happened September 2, 2008 and that he contacted the firm of Singer & Deutsch on September 25, 2008. In fact, Hassan contends he retained Singer & Deutsch that day, although he also acknowledges they never had a retainer agreement. On the advice of Singer, Hassan also retained the law firm of Liddle Robinson a few months later in December 2008. There is documentary proof that Hassan entered into a written retainer agreement with Liddle Robinson on December 31, 2008. The date of the retainer agreement is after the time Hassan could have timely filed a SOX lawsuit expired, assuming the latest date would have been December 8, 2008, that being 90 days after his termination became effective.

Hassan argues that although he did not have a written retainer with Singer & Deutsch, he did have one with Liddle Robinson and Liddle Robinson had a fee arrangement with Singer Deutsch. Thus, by paying fees to Liddle Robinson, he established an attorney-client relationship with Singer & Deutsch as well. Since both represented him on December 8, 2008, when the statute of limitation on his SOX claim expired, both firms were (according to plaintiff) negligent.

Hassan states in his sworn affidavit that the Power's incident was a pretext for

his firing, but the real reason he was fired was that he was a whistle blower. Thus, he claims Kasowitz Benson's decision to not file a lawsuit on his behalf and "discharge" him as a client jeopardized his valid claims against JPMC because they represented him while the statute of limitations for the SOX action had not yet expired.

Discussion

To establish a *prima facie* case of legal malpractice or negligence, the client must plead and prove facts tending to show that the law firm: 1) failed to exercise that degree of care, skill, and diligence commonly possessed and exercised by an ordinary member of the legal community, 2) that such negligence was the proximate cause of the actual damages sustained by the plaintiff and, 3) that "but for" the defendant's negligence, the plaintiff would have been successful in the underlying matter (Laventure v. Galeno, 307 AD2d 255 [1st Dept. 2003]; Wexler v. Shea & Gould, 211 AD2d 450, 621 NYS2d 858 [1st Dept. 1995]).

Although the court must accept the allegations in the complaint as true, the court can consider information extrinsic to the complaint -- like documents -- if the information definitely disposes of the plaintiff's claims (Greenwood Packing Corp. v. Associated Telephone Design, Inc., 140 A.D.2d 303, 305 [2nd Dept 1988]).

Furthermore, bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence are insufficient to defeat a motion to dismiss (Sud v. Sud, 211 AD2d 423, 424 [1st Dept 1995]).

Nothing in Hassan's affidavit sheds any additional light on or demonstrates why he has a meritorious claim against Kasowitz Benson or Wallach for legal malpractice. His facts show that Kasowitz Benson/Wallach notified him that he should get a new

lawyer. This happened after they listened to the tapes and urged Hassan to back off his lawsuit against JPMC. This advice and instructions were made before the statute of limitations on the SOX claim had expired. Hassan heeded their advice and contacted another law firm. Hassan has not stated and does not have a legal malpractice claim against Kasowitz Benson or Wallach. There is no basis for the court to vacate its prior order as it pertains to Hassan's claims against either of these defendants and, therefore, his motion for that relief is denied.

Hassan did not retain the law firm of Singer & Deutsch. Although Attorney Singer met with Hassan on September 19, 2008 to discuss his case, Hassan did not enter into a retainer agreement with Singer & Deutsch, then or ever. Singer & Deutsch referred him to Liddle Robinson, another law firm with which Singer & Deutsch apparently had a fee arrangement. That fee arrangement is set forth in the retainer agreement that Hassan signed with Liddle Robinson. However, that retainer was not signed by Hassan until December 31, 2008, several weeks after the deadline to commence a SOX action against JPMC had expired. Liddle Robinson's cover letter shows the retainer agreement was sent to Hassan on December 3, 2008, a point which he does not dispute. Thus, not only was Singer & Deutsch apparently only "of counsel" to Liddle Robinson, Hassan did not even retain Liddle Robinson until after the SOX deadline had expired. Hassan's legal argument, that payment of fees established a legal relationship with Liddle Robinson, despite the absence of a retainer, requires that the court examine whether the statute of limitation had expired when he first sought legal advice from Liddle Robinson.

Typically a claim under section 806 of SOX involves an employee who is

terminated for reporting some wrongful act, corruption, etc., to an agency or the employee's higher ups. The aggrieved employee must file a claim with the Department of Labor within ninety (90) days of the adverse employment action (18 U.S.C.A. § 1514A [b][2][D]). Hassan was notified by letter dated July 23, 2008 that he was being terminated. That was an adverse employment action. Thus, for his claim to have been timely filed with the Department of Labor it would have had to have been filed no later than October 21, 2008 – which is what Hassan alleged in the complaint. Liddle Robinson was not retained until December 2008, after the time to file the claim with the Department of Labor had expired. Therefore, Hassan has not set forth facts to support a malpractice action against Liddle Robinson or Mark Susswein, Esq., an attorney with the firm.

Even if the statute of limitations on his SOX claim did not expire until December 8, 2008, as Hassan now claims, he offers no new facts in his sworn affidavit, that it was a viable claim and that he would have prevailed on his SOX claim "but for" the attorneys' conduct in not starting that action timely (Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., 10 AD3d 267 [1st Dept. 2004]; Pellegrino v. File, 291 AD2d 60, 63 [1st Dept. 2002]; Stroock, Stroock & Lavan v. Beltramini, 157 AD2d 590, 591 [1st Dept. 1990]).

There is documentary proof that JPMC notified Hassan in writing that he was being terminated and the reason he was being fired. JPMC paid Powers a substantial sum of money to settle his discrimination claim against the company. That payment was necessitated by Hassan's blunt language in firing Powers; the conversation was tape recorded. Hassan's whistle blower activities at JPMC took place months before he

met with and fired Powers. In fact Hassan was allowed to continue playing an influential role at JPMC by, among other things, leading an important restructuring plan. Although the court accepts Hassan's facts as true, he only offers his personal opinion, that he was fired as part of a ruse or conspiracy against him because he was delving into unusual, if not questionable activities at JPMC. Hassan's claim that he was fired for pretextual reasons are flatly contradicted by the record. He has not provided any facts tending to show that he engaged in protected behavior or conduct and that it was a contributing factor in the unfavorable personnel action JPMC took against him. Having failed to do so, Hassan's motion to have the court vacate its prior order dismissing this action is denied. The court's prior order remains unmodified.


Conclusion

The motion by plaintiff to vacate the default judgment previously entered against him dismissing the complaint is granted only to the extent that although plaintiff has an excuse for his default, he has failed to show that his claims against the defendants have merit. In making that decision, the court has considered plaintiff's opposition to those underlying motions, including his sworn affidavit. The court's prior order dismissing the complaint remains unmodified.

Any relief sought but not addressed is hereby denied. This constitutes the decision and order of the court.

Dated: New York, New York
December 20, 2010

So Ordered:



Hon. Judith J. Gische, JSC
FILED

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