Santos v Garzon
2011 NY Slip Op 33848(U)
September 26, 2011
Sup Ct, Bronx County
Docket Number: 16876-2004
Judge: Mary Ann Brigantti-Hughes
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SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

PRESENT: Honorable Mary Ann Brigantti-Hughes

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THANIA SANTOS,
AS ADMINISTRATRIX OF THE ESTATE
OF DIOMEDES POLONIA,

Plaintiff,

-against-

DECISION / ORDER
Index No. 16876-2004

JOHN GARZON,

Defendant.

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The following papers numbered 1 to read on the below motions noticed on **May 25, 2011** and duly submitted on the Part IA15 Motion calendar of :

Papers Submitted	Numbered
Def.'s Affirmation in Support, Exhibits	1,2
Pl.'s Affirmation in Opposition	3
Def.'s Affirmation in Reply.	4

In an action seeking damages for alleged legal malpractice, plaintiff Thania Santos, as administratrix of the Estate of Diomedes Polonia (hereinafter "Plaintiff") moves for partial summary judgment on the issue of liability against defendant John J. Garzon, Esq. (hereinafter "Defendant") pursuant to *CPLR* 3212.

I. Factual History

In 1998, Defendant represented Diomedes Polonia (hereinafter "Mr. Polonia") in a criminal trial in Bronx County Supreme Court. The facts of that case were, briefly, that a man accused Mr. Polonia of shooting him in the arm during an altercation at an apartment building. In fact, as uncovered through post-trial investigation, it was Mr. Polonia's brother, Pedro, who committed the crime. As a result of the trial, Mr. Polonia was convicted and sentenced to 14-18 years in prison.

In post-conviction proceedings, Mr. Polonia was represented by pro bono counsel, who moved to vacate the conviction partially due to ineffective assistance of counsel pursuant to *CPL* 440.10. During the subsequent investigation and full hearing on the motion's merits, the court found that Defendant had failed to investigate Mr. Polonia's alibi or even speak to his alibi witness, his girlfriend Karla Uriarte. In fact, during the defenses' case in chief, Mr. Polonia testified that he was "at home sleeping" while the alleged crime was taking place. When asked on cross-examination if he was with anyone else, he allegedly pointed to Ms. Uriarte, who appeared in the courtroom that day. Despite failing to give "alibi notice", the court allowed Defendant to make the decision on whether to put Ms. Uriarte on the witness stand. He elected not to do so. As a result, the jury heard Mr. Polonia testify that he had been with Ms. Uriarte at the time of the incident, saw him point her out in the courtroom, but did not hear her corroborate Mr. Polonia's alibi.

Justice Peter J. Benitez granted the post-judgment motion and found Defendant had provided ineffective assistance of counsel. The indictment against Mr. Polonia was later dismissed. This legal malpractice action was commenced on or about May 14, 2004. During the pendency of this lawsuit, Mr. Polonia died of natural causes.

Plaintiff, through his child Thania Santos as Administratrix of his Estate, now moves for partial summary judgment against Defendant on the issue of liability.

II. Standard of Review

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). There is no requirement that the proof for said motion be submitted in affidavit form, rather, the requirement is that the evidence proffered be in admissible form. *Muniz v. Bacchus*, 282 A.D.2d 387 (1st Dept. 2001). Accordingly, affirmations from attorneys having no personal knowledge of the facts are not evidence and offer nothing more than hearsay.

Reuben Israelson v. Sidney Rubin, 20 A.D.2d 668 (2nd Dept. 1964); *Erin Federico v. City of Mechanicville*, 141 A.D.2d 1002 (3rd Dept. 1988).

Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. *Knepka v. Tallman*, 278 A.D.2d 811 (4th Dept. 2000).

Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 (1978). When the existence of an issue of fact is even debatable, summary judgment should be denied. *Stone v. Goodson*, 8 N.Y.2d 8 (1960).

III. Analysis

A legal malpractice claim in the State of New York requires a plaintiff to demonstrate three elements: the negligence of the attorney, that the negligence was the proximate cause of the damages sustained, and proof of actual damages. *See Mendoza v. Schlossman*, 87 A.D.2d 606 (2d Dept. 1982) (setting forth the standard). "A plaintiff must not only prove lack of reasonable care; plaintiff must also establish that he would have been successful in the underlying action, if his attorney had exercised due care." *Parksville Mobile Modular, Inc. v. Fabricant*, 73 A.D.2d 595, 599 (2d Dept. 1979). In other words, Plaintiff must establish that "but for" the defendant's negligence, the plaintiff would not have suffered the injury. *See also Strook & Strook & Lavan v. Beltramini*, 157 A.D.2d 590, 591, 550 N.Y.S.2d 337, 338 (1st Dept. 1990) (holding that legal malpractice claim must allege that plaintiff "would have prevailed in the underlying action but for her attorneys' malpractice"); *Parker, Chapin Flattau & Kimpl v. Daelen Corp.*, 59 A.D.2d 375, 378-79, 399 N.Y.S.2d 222, 224 (1st Dept. 1977) ("The party must show that but for the negligence, the particular result sought by the client would or could have been achieved.") (emphasis added).

In order to prove a legal malpractice claim arising from negligence of a criminal defense attorney, a plaintiff must establish that "but for" the attorney's alleged failures, the plaintiff would not have been convicted. *Ospina v. Booth*, 1995 WL 386485 (SDNY 1995). "New York has traditionally applied a 'but for' approach to causation on evaluating legal malpractice claims...the test is whether a proper defense would have altered the result of the prior action." *Carmel v. Looney*, 70 N.Y. 2d 169, 173 (1987) (citation omitted). The criminal client bears the "unique burden" to plead and prove that his conviction was due to the attorney's actions alone and not due to some consequences of his guilt. *Britt v. Legal Aid Society*, 95 N.Y.2d 443, 447, (2000).

In this matter, Plaintiff moves for partial summary judgment on the issue of Defendant's legal malpractice liability, based in part on the finding that he provided ineffective assistance of counsel at Mr. Polonia's criminal trial. Where no conflict of interest is involved, the New York standard for assessing the effectiveness of trial counsel is whether the attorney provided "meaningful representation" *People v. Ennis*, 11 N.Y.3d 403 409-410 (2008). Thus, New York adopts a "flexible approach that takes into account the fairness of the trial process as a whole and the totality of the representation" *Id.* at 412. While a showing of prejudice is "significant," it is not an "indispensable element" of a state ineffective assistance claim. *Id.* Since New York does not require "but for" causality for ineffective assistance, an attorney whose assistance has been found ineffective by the state standard has not *necessarily* committed malpractice. *Lemke v. Zurich North America*, 26 Misc.3d 1084 (N.Y. Sup. Ct., Nassau Cty., 2009)(emphasis added). Plaintiff herein does not cite any cases where the reversal of a criminal conviction based on the grounds of ineffective assistance of counsel was given collateral estoppel effect in a later civil action for legal malpractice. *Compare, Siddiqi v. Ober, Kaler, Grimes & Shriver*, 224 A.D.2d 220, 637 N.Y.S.2d 399 (1st Dep't 1996).

Accordingly, this court must determine whether there is an issue of fact as to whether Mr. Polonia would have been found innocent "but for" his counsel's failure to call this alleged alibi witness. In this matter, Plaintiff moved post-conviction to vacate the judgment based, in part, on ineffective assistance of counsel pursuant to *CPL* 440.10 (1)(h). A hearing on the merits of the motion was held on October 29, 2002 before Justice Benitez. In rendering his decision, the Judge

focused on Defendant's handling of the purported alibi defense of Mr. Polonia. During trial, Mr. Polonia testified to an alibi on direct examination, without naming the purported alibi witness, Carla Uriarte. Judge Benitez determined that Defendant knew prior to trial that Ms. Uriarte would support the alibi. Ms. Uriarte would have testified that she was at home with Mr. Polonia at the time the crime was allegedly committed. She would have disclosed that others saw Pedro after the crime with a bloody shirt and gun, claiming he had shot someone, and would have testified to her disposal of the gun and assistance to Pedro in fleeing to Puerto Rico.

Nevertheless, the court found that Defendant left production of the alibi witness to a "friend" of Mr. Polonia, despite counsel's obligation to seek out and interview Ms. Uriarte once he was advised she would support his alibi. Moreover, "even in the fact of these professional shortcomings", Judge Benitez found that Defendant could have salvaged the alibi defense at trial, when Ms. Uriarte appeared in the courtroom at trial while Mr. Polonia was on the stand. Defendant could have asked for an adjournment to interview the witness to determine whether or not to call her. He did not, and elected not to call the alibi witness to the stand. Defendant took these actions despite having his client "point out" Ms. Uriarte and identify her for the jury. Judge Benitez found this had a "devestating effect" on Mr. Polonia's case, as the jury was left to wonder why an alibi witness was identified but never called to testify. If counsel had decided not to call Ms. Uriarte after interviewing her, Judge Benitez stated that he could have kept her out of the courtroom and had an opportunity to place on the record the reasons for that decision.

At the motion hearing, Judge Benitez rejected Defendant's claim that the alibi witness's "information" was unreliable. He concluded that counsel erred in allowing Ms. Uriarte to be present in the courtroom where she was identified to the jury, yet not called to testify. This heavily damages Mr. Polonia's case, since he had testified to an alibi, but had no support from a witness. According to Judge Benitez, this mishandling "struck at the core of the defense", that the victim had mistaken Mr. Polonia for his brother. These actions and inactions "deprived defendant of meaningful representation and thereby violated his right to effective assistance of counsel."

In further support of its motion, Plaintiff includes an Affidavit of Merit from attorney Jesse Siegel, Esq. Mr Siegel stated in his Affidavt of Merit that Defendant committed malpractice when, despite knowing Mr. Polonia would testify he was at home sleeping during the incident, he did not question on direct examination whether Mr. Polonia was with anyone else. Further, by failing to call Ms. Uriarte when she appeared in the courtroom, he "virtually guarantee[d]" that his client's testimony would be viewed by the jury as false. It was further malpractice when Defendant failed to obtain the entire file from his client's previous attorney, which had Ms. Uriarte's name as a possible alibi witness.

At deposition, Defendant stated that he met with Ms. Uriarte for the first time after the prosecution rested, but before Mr. Polonia took the stand. Defendant testified that she approached him on the day the defense's case in chief was set to start, and notified him she was an alibi witness. He did not ask the judge for a continuance in light of the newly-discovered witness. The Court, instead, allowed him to "make the decision" on whether to call the witness. He discussed the matter with Mr. Polonia, and told him it would not be advisable to call the witness. Nevertheless, Defendant permitted Ms. Uriarte to be present in the courtroom. He admitted at deposition that he did not retrieve Mr. Polonia's file from his previous attorney, who listed Ms. Uriarte as a witness in the case.

In opposition to the instant motion, Defendant's submitted affirmation seeks to create an issue of fact as to whether his failure to call Ms. Uriarte as an alibi witness constituted professional negligence In his affirmation, Defendant states "at no time did [Mr. Polonia] indicate to me that he had an alibi defense." He conceded at deposition, however, that his opening statement indicated the existence of an alibi defense, by stating that Mr. Polonia was not present at the time the incident occurred. Regardless of whether Defendant made an effort to speak with or prepare Ms. Uriarte as an alibi witness, it is uncontroverted that he decided not to call her to testify at trial. Moreover, Defendant allowed her to sit in the courtroom during the proceedings. It is further uncontroverted that Defendant's client, Mr. Polonia, identified her in open court as an alibi witness in front of the jury. He didn't call her as a witness because he "didn't believe her". "The failure to fill the alibi notice was not a mistake nor malpractice as

claimed by the Plaintiff but rather, a decision that was made by the Plaintiff and his trial counsel." Defendant "respectfully disagrees" with the findings of Judge Benitez that he made no effort to talk to Karla Uriarte and prepare her as an alibi witness.

While the issue of whether certain conduct constitutes legal malpractice normally requires a factual determination to be made by a jury (*see, Saveca v. Reilly*, 111 A.D.2d 493 [3rd Dept. 1985]), a plaintiff will be entitled to summary judgment in a case where there is no conflict at all in the evidence, the defendant's conduct fell below any permissible standard of due care, and the plaintiff's conduct was not really involved. *Logalbo v. Plishkin, Rubano & Baum*, 163 A.D.2d 511 (2nd Dept. 1990), citing *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974); and 4 Weinstein-Korn-Miller, NY Civ Prac. ¶ 3212.03. In this matter, Plaintiff has established its entitlement to judgment as a matter of law on the issue of Defendant's legal malpractice. Judge Benitez' decision, coupled with the deposition testimony and Affidavit of Merit, indicate that there would have been a favorable result in Mr. Polonia's case but for Defendant's actions and inactions at trial. Judge Benitez found Defendant's mishandling of the alibi witness had disturbed the core element of Mr. Polonia's defense and effectively devastated his case. Plaintiff's expert opined that under the circumstances, the jury had no choice but to conclude that Mr. Polonia lied on the stand when he claimed he was elsewhere when the crime occurred. As a result of this alleged malpractice, Mr. Polonia spent over five (5) years in jail.

The opposition presented is insufficient to raise an issue of fact as to whether the errors made at trial would or would not have led to a favorable result for his client. The record reflects that Defendant stated in his opening to the jury that his client had an alibi. As part of his case-in-chief, he put his client on the stand to testify that he was elsewhere when the crime occurred. On cross-examination, his client pointed out in the courtroom the person he was with at that time. Nevertheless, Defendant failed to ask for an adjournment to further investigate the substance of that witnesses' knowledge or testimony. He did not call on her to testify. Moreover, it appears from the record that Defendant did not plan on having *any* corroborating alibi witness testify at trial. The jury therefore saw Mr. Polonia point out his alibi witness, but never heard her testimony. These events fundamentally ruptured Mr. Polonia's defense and there is no issue of

fact as to whether his outcome would have been favorable, but for Defendant's actions or inactions. Accordingly, Plaintiff's motion for partial summary judgment will be granted.

IV. Conclusion

Accordingly, it is hereby

ORDERED, that Plaintiff's motion for summary judgment on liability, pursuant to *CPLR* 3212, is hereby GRANTED.

The above constitutes the Decision and Order of this Court.

Dated: September 26, 2011

Hon. Mary Ann Brigantti-Hughes, J.S.C.