

Lion v Yalkut

2011 NY Slip Op 33993(U)

October 12, 2011

Supreme Court, Bronx County

Docket Number: 307672/10

Judge: Howard H. Sherman

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NEW YORK STATE SUPREME COURT - COUNTY OF BRONX
PART 4

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

| | |
|---------------------|--------------------------|
| Case Disposed | <input type="checkbox"/> |
| Settle Order | <input type="checkbox"/> |
| Schedule Appearance | <input type="checkbox"/> |

-----X
DAVID C. LION,

Plaintiff,

Index No.: 307672/10

-against-

ARLEN YALKUT ESQ. ,

Defendants.
-----X

DECISION/ORDER

Present:

Hon. Howard H. Sherman
J.S.C.

The following papers numbered 1 to 4 read on this motion for dismissal noticed on April 14, 2011 and duly submitted on the Motion Calendar of May 26, 2011.

| | <u>PAPERS NUMBERED</u> | |
|----------------------------------------------------|------------------------|--|
| Notice of Motion - Exhibits and Affidavits Annexed | 1 | |
| Answering Affidavit | 2 | |
| Replying Affidavit | 3 | |
| Memorandum of Law | 4 | |

Upon the foregoing papers this motion to dismiss the complaint for failure to state a cause of action is granted for the reasons set forth below.

Defendants in this legal malpractice action seek an order dismissing the complaint pursuant to CPLR 3211(a)(1), (5) and (7). In reply, defendants withdraw that branch of the motion seeking relief pursuant to CPLR 3211(a)(1) and (5), contending that the motion should be granted pursuant to CPLR 3211(a)(7) on the grounds that plaintiff has failed to state a cause of action.

Facts and Procedural Background

In 2005 plaintiff was injured in a motorcycle accident in Virginia. After receiving medical treatment there, plaintiff retained the defendant Bronx law firm to represent him in the prosecution of a medical malpractice action as against the Virginia physicians and treating facility.

An action was commenced in the New York Federal District Court, Southern District on behalf of plaintiff and as defendants were not admitted to practice in Virginia, to which district the action was transferred, plaintiff was instructed to retain local counsel, Joseph A. Blaszkow, Esq., on an hourly basis which plaintiff did.

Verified Complaint

In this action plaintiff seeks recovery for damages, alleged to have resulted from defendants' conduct as set forth below.

- That Defendants provided little or no assistance to Mr. Blaszkow.
- That Defendants failed to cooperate with Mr. Blaszkow.
- That Defendants conduct was such that no reasonable attorney would have acted in this manner.
- That defendants' failure to comply with requests to provide the requisite discovery prejudiced Plaintiff's action.
- That defendants failed to take steps that were necessary for the successful prosecution of the case.
- That as a result of the foregoing, the outcome of the medical malpractice case was unfavorable to Plaintiff.
- That it was improper for Defendants to have Plaintiff pay an hourly fee to local counsel while defendants represented Plaintiff on a contingency basis.

- That as a result of the foregoing, the fees Plaintiff paid to attorney Blaszkow were for naught.

Motion

Defendants maintain that the complaint fails to allege specific facts that constitute the material elements for legal malpractice, including of how the alleged failure to cooperate proximately caused plaintiff a loss.

In opposition, plaintiff contends that defendants fail to make their requisite showing for dismissal of the complaint as plaintiff has sufficiently set forth the elements of his claim, i.e., a breach of the duty of care and that the breach was a proximate cause of damages to him.

Discussion and Conclusions

It is well established that upon consideration of a motion made pursuant to CPLR § 3211(a)(7), the court must presume the facts pleaded to be true and must accord them every favorable inference. However, it is also settled that factual allegations that fail to state a viable cause of action "that consist of bare legal conclusions, or that are inherently incredible or unequivocally contradicted by documentary evidence, are not entitled to such consideration" [internal citations omitted]. Leder v Marshall Spiegel, 31 A.D. 3d 266 [1st Dept. 2006].

To state a cause of action for legal malpractice, a complaint must set forth three elements: 1) the negligence of the attorney; 2) that such negligence was the proximate cause of the loss sustained, and 3) actual damage (see, Reibman v Senie, 302 A.D. 2d 290 [1st Dept. 2003]). With respect to the second element, it is settled that as part of a prima facie case, a plaintiff must demonstrate that "but for" the attorney's negligence, plaintiff would either have prevailed in the matter at issue or would not have sustained any

ascertainable damages (see, Leder, op. cit. at 268) with respect consideration of the third element in the context of a 3211(a)(7) pre-answer dismissal motion, "a pleading need only state allegations from which damages attributable to the defendant's conduct may reasonably be inferred (internal citations omitted)." Lappin v Greenberg, 34 A.D. 3d 277, 279 [1st Dept. 2006]; see also, Garnett v Fox, Horan & Camerini, LLP, 82 A.D. 3d 435 [1st Dept. 2011]).

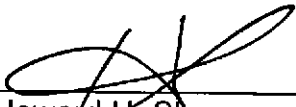
Upon review of the complaint and upon consideration of the applicable law, it is the finding of this court that plaintiff has failed to state a cause of action legal malpractice.

Plaintiff's claim rests on the conclusory assertion that defendants' lack of cooperation with local counsel and failure to provide certain discovery resulted in the "an unfavorable" outcome on the medical malpractice action. However, plaintiff fails to plead any details as to how defendants' conduct caused the unfavorable outcome, or even what that outcome was. There is no allegation that plaintiff could have prevailed on the Federal Court claim but it was dismissed due to the failure to prosecute the claim or pursuant to the imposition of discovery sanctions. Plaintiff provides no specifics as to whether or how local counsel pursued the litigation or whether and how his ability to do so was thwarted by defendants' failure to exercise reasonable professional diligence. Nor does plaintiff allege that there was a settlement under less than favorable terms that was compelled by the defendants' mistakes (compare, Lappin v Greenberg, op. cit. - allegation in complaint of inordinate delay in effecting stipulated transfer of retirement funds in divorce action-; see also, Garnett v Fox, Horan & Camerini, op. cit. - allegation in complaint that defendants failed to mount defense to tax assessment arrears and negotiated settlement less favorable than payment of amount sought - court held claim of malpractice was viable despite settlement as it is alleged settlement was compelled by mistakes of counsel).

For the reasons above stated, defendants' motion is granted and the complaint dismissed.

This constitutes the decision/order of this court.

Dated: October 12, 2011
Bronx, New York



Hon. Howard H. Sherman
J.S.C.