Barnave v Davis
2012 NY Slip Op 33956(U)
March 29, 2012
Supreme Court, Queens County
Docket Number: 17053/2010
Judge: Allan B. Weiss

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS Justice

IA Part 2

LESLIE BARNAVE, x

Plaintiff,

-against-

TRAIK DAVIS, ESQ.,

Defendant. x

Index Number 17053 2010

Motion Date January 17 2012

Motion Cal. Number 1

Motion Seq. No. 2

The following papers numbered 1 to 8 read on this motion by Tarik Davis, Esq., for summary judgment pursuant to CPLR 3212.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1 - 5
Answering Affidavits - Exhibits	6 - 7
Reply Affidavits	8

Upon the foregoing papers it is ordered that the motion for summary judgment is granted, and the complaint is dismissed.

Plaintiff in this legal malpractice action seeks damages based upon allegations that defendant mishandled plaintiff's automobile accident case causing the same to be dismissed. Defendant moves to dismiss the complaint on the ground that plaintiff cannot establish an essential element of the legal malpractice action. Plaintiff opposes the motion.

Facts

On or about October 29, 1999, plaintiff was involved in an automobile accident in which he suffered personal injuries. The vehicle was driven by Zacharias Rodriguez and owned by United Ambulette, Inc. (United). Plaintiff initially retained Howard A. Ralpheson, Esq. to recover monetary damages on his behalf. After becoming dissatisfied with Mr. Ralpheson, plaintiff retained the law firm of Jacoby and Meyers, which filed suit against Rodriguez and United.

In February, 2002, plaintiff substituted defendant as counsel for Jacoby and Meyers. Shortly thereafter, United's insurance carrier went into rehabilitation and the case was marked off the court calendar. Upon completion of the rehabilitation, the parties began discovery. All discovery was completed except the deposition of the parties, which was adjourned on approximately two occasions.

In 2003, defendant made an application to be relieved as plaintiff's counsel on the grounds that plaintiff had repeatedly refused defendant's advice and often sought to control the direction of the litigation. The application was granted but at some point thereafter, defendant returned as plaintiff's counsel after plaintiff requested the same upon being unable to find other counsel.

Defendant alleges that between February, 2004 and August, 2007, he had no contact with plaintiff despite numerous telephone calls and written correspondence. In or about October, 2004, plaintiff sent written correspondence to attorneys for United and Rodriguez informing them that he would retain new counsel. Defendant alleges that he did not hear from plaintiff until September, 2007, when plaintiff was served with a motion to dismiss the pending action. Defendant submits that he had not been served. Nevertheless, defendant filed opposition to the motion upon receiving a copy of the motion from plaintiff. Plaintiff and defendant appeared on the first return date of the motion and informed the court that plaintiff did not wish defendant to continue representing him. The motion was thereupon adjourned to December 14, 2007.

On December 14, 2007, plaintiff failed to appear but defendant did appear. The court directed plaintiff to retain new counsel within 60 days and to appear at a compliance conference on March 20, 2008. Defendant alleges that he called plaintiff within days after December 14, 2007, to inform him of the contents of the order and that he mailed plaintiff a copy of the order. Defendant submits that he then considered himself relieved of plaintiff's case.

Neither plaintiff nor defendant appeared at the compliance conference on March 20, 2008, and the case was marked off calendar. At some point after March 20, 2008, unable to retain other counsel, plaintiff contacted defendant. Defendant agreed to assist plaintiff by making a motion to restore the case using law office failure as the reason defendant did not appear. Defendant failed to include an affidavit of merit along with the

motion to restore.. Nevertheless, on December 22, 2008, the return date for the motion, the court was prepared to restore the case to the calendar on the default of United and Rodriguez but plaintiff refused to allow this to happen. Instead of allowing the case to be restored on default as advised by defendant (which would have prevented counsel for United and Rodriguez from objecting or appealing the restoration), plaintiff insisted that the motion not be granted on default but that he see the judge regarding what he considered to be outstanding discovery. Upon his examination before trial, plaintiff acknowledges that he was otherwise advised by defendant. In any event, at plaintiff's insistence, the court did not restore the case on default but adjourned the case to January 9, 2009. Upon his own volition, plaintiff notified counsel for United and Rodriguez and requested that they appear in court on January 9, 2009. On that date, counsel for United and Rodriguez appeared and filed opposition to the motion to restore. The motion to restore the case to the calendar was nevertheless granted by the court (Ruchelsman, J.).

An appeal ensued and the Appellate Division, Second Department reversed the order granting the motion to restore, and the case was thereupon dismissed. The Appellate Division noted that the case was dismissed when plaintiff failed to appear at a duly scheduled compliance conference. "To be relieved of the default in appearing at the conference, the plaintiff was required to show both a reasonable excuse for the default and a meritorious cause of action (citations omitted). The plaintiff failed to demonstrate a reasonable excuse for his failure to appear at the compliance conference and failed to submit any evidence of a meritorious cause of action (citations omitted)". Notably, at the time of the dismissal, plaintiff was acting pro se.

Discussion

"In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney 'failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession' and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages" (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer,* 8 NY3d 438, 442 [2007], quoting *McCoy v Feinman,* 99 NY2d 295, 301–302 [2001] [internal quotation marks omitted]; *see Bells v Foster,* 83 AD3d 876 [2011]). To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer,* 8 NY3d at 442; *see Bells v Foster,* supra). To succeed on a motion for summary judgment, the defendant in a legal malpractice action must present evidence in admissible form establishing that the plaintiff is unable to prove at least one of the essential elements (*Alizio v Feldman,* 82 AD3d 804, 804 [2011]). If the defendant makes such a prima facie showing, the burden then shifts to the plaintiff to raise an issue of fact necessitating a trial (*see Marino v Lipsitz, Green, Fahringer, Roll,*

Salibury & Cambria, LLP, 87 AD3d 566 [2011] ; *Siciliano v Forchelli & Forchelli,* 17 AD3d 343, 345 [2005]).

Here, defendant established his prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff is unable to prove that he would have prevailed in the underlying action but for the defendant's alleged negligence (*see generally Zelenaya v Rosengarten,* 301 AD2d 519 [2003]). Specifically, the case was dismissed after plaintiff, acting pro se, failed to appear at a duly scheduled compliance conference.

In opposition, plaintiff failed to raise a triable issue of fact (*see Levinstim v Parker,* 27 AD3d 698 [2006]; *see also Molina v State of New York,* 46 AD3d 642 [2007]; *Williams v Wal–Mart Stores, Inc.,* 10 AD3d 653 [2004]). Plaintiff's conclusory allegations as to defendant's lack of aggression in pursuing the personal injury action on plaintiff's behalf is insufficient to establish a claim for legal malpractice (*Wald v Berwitz,* 62 AD3d 786, 787 [2009]; *Olschauer v Fisher,* 5 AD3d 553, 554 [2004]; see *Dempster v Liotti,* 86 AD3d 169 [2011]). The record reveals that at various times throughout the course of the litigation, plaintiff acted pro se, refused to take the advice of counsel and in fact, relieved defendant of his duties as plaintiff's attorney.

Furthermore, "[m]ere speculation about a loss resulting from an attorney's alleged omission is insufficient to sustain a prima facie case of legal malpractice" (*Siciliano v Forchelli & Forchelli,* 17 AD3d 343, 345 [2005]; *see Dupree v Voorhees,* 68 AD3d 810, 812–813 [2009]; *Plymouth Org., Inc. v Silverman, Collura & Chernis, P.C.,* 21 AD3d 464 [2005]; *Giambrone v Bank of N.Y.,* 253 AD2d 786 [1998]).

Accordingly, the motion to dismiss is granted.

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J.S.C.