

Vasquez v Guerrero

2013 NY Slip Op 34248(U)

June 17, 2013

Supreme Court, Bronx County

Docket Number: 22880/2012E

Judge: Lizbeth Gonzalez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 10(e)

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Jeannette Vasquez,

Plaintiff,

DECISION and ORDER
Index No. 22880/2012E

-against-

Enrique O. Guerrero, Howard M. Rosengarten and
The Law Offices of Guerrero and Rosengarten,

Defendants.

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Recitation of the papers considered in reviewing the underlying motion for summary judgment as required by CPLR § 2219(a):

Notice of Motion and annexed Exhibits and Affidavits.....	1
Affirmation in Opposition and annexed Exhibits.....	2
Reply Affirmation.....	3

Plaintiff Vasquez seeks compensatory and punitive damages for legal malpractice and breach of fiduciary duty. Defendants Guerrero, Rosengarten and The Law Offices of Guerrero and Rosengarten (“Guerrero, Rosengarten and The Law Offices”) move to dismiss the plaintiff’s claims pursuant to CPLR 3211(a)(7) for failure to state a cause of action. The plaintiff opposes the defendant’s motion.

Procedural History

Plaintiff Vasquez was struck by a falling tree branch in a Bronx city park on 10/7/09. The plaintiff retained the defendants to represent her in this matter. The defendants filed the plaintiff’s Notice of Claim against the City of New York, New York City Department of Parks and Recreation and New York City Transit Authority on 11/3/09. The plaintiff therefore had to commence an action against the defendants on or no later than 1/5/11, one year and ninety days after the plaintiff’s injury.

(General Municipal Law §§50-e[5], 50-i[1][c].) The defendants purchased Index No. 310699/10 and filed a summons with notice against the City of New York on 12/30/10. On or about 3/23/11, three months later, an amended *pro se* summons with notice, bearing the plaintiff's signature, was filed. By letter dated 5/2/12, fourteen months after the filing of the amended notice, the defendants informed the plaintiff that they could no longer represent her. The letter states in pertinent part that Ms. Vasquez had three years from the date of her 10/7/09 accident to "file a lawsuit for standard negligence and preserve (her) claims...And lawsuits against the City of New York and its municipal agencies must be commenced within one (1) year and ninety (90) days without forgetting about the required "Notice of Claim" that must also be filed within the first ninety (90) days from the date of accrual." Four months after they withdrew as plaintiff's counsel, the defendants mailed a second letter to the plaintiff dated 9/5/12 delineating their disbursements on her behalf.

DISCUSSION

Defendants Guerrero, Rosengarten and The Law Offices move for dismissal for failure to state a cause of action pursuant to CPLR 3211(a)(7). CPLR § 3013 provides that "statements in a pleading shall be sufficiently particular to (1) give the court and parties notice of the transactions, occurrences or series of transactions or occurrences, intended to be proved and (2) the material elements of each cause of action or defense." (CPLR § 3013.) A motion to dismiss for failure to state a cause of action is defeated if the complaint satisfies these two requirements. (Siegel, NY Prac § 208 [4th ed].)

To establish the requisite elements of legal malpractice, the plaintiff must "meet the 'case within a case' requirement, demonstrating that "but for" the attorney's conduct the client would have prevailed in the underlying matter or would not have sustained any ascertainable damages. (*Warshaw*

Burstein Cohen Schlesinger & Kuh, LLP v Longmire, 2013 WL 2096485 [1st Dept 2013] citing *Weil, Gotshal & Manges, LLP v Fashion boutique of Short Hills, Inc.*, 10 AD3d 267 [1st Dept 2004].) In order to recover punitive damages, the plaintiff must show by clear, unequivocal and convincing evidence that defendants' egregious and willful conduct was morally culpable or actuated by evil and reprehensible motives. (*Munoz v Puretz*, 301 AD2d 382 [1st Dept 2003]; *Sladick v Hudson Gen. Corp.*, 226 AD2d 263 [1st Dept 1996].)

In opposition to the defendants' motion, plaintiff Reyes proffers the summons with notice; the notice of claim; the 5/2/12 and 9/5/12 letters; and the plaintiff's e-Courts search results. The affirmation of Arnold Bernstein, plaintiff's counsel, states that the 12/30/10 summons with notice filed against the City of New York was dismissed because it was "fatally defective as it did not comply with Municipal Law 50-I." Mr. Bernstein does not attach the order of dismissal; the alleged defects and missing criteria are not specified. He states that there is no motion to be relieved as counsel in the court file.

Plaintiff's counsel states that Ms. Vasquez learned that the defendants were no longer representing her when she received their 5/2/12 letter withdrawing as counsel. The 3/23/11 amended *pro se* summons with notice, however, is signed by plaintiff Vasquez. Mr. Bernstein states that the defendants, and not the plaintiff, filed the amended summons. The plaintiff proffers neither corroboration evidence nor her affidavit to establish the contrary.

Mr. Bernstein alleges that the defendants failed to move for a default judgment after the City filed an answer. The plaintiff maintains that her claim against the City of New York is no longer viable. The summons filed on 12/30/10 and the amended summons filed on 3/30/11, however, respectively fall within the statute of limitations.

After careful review and consideration of the evidence proffered, the Court finds that the defendants met their initial burden of going forward and the plaintiff failed to meet her shifting burden of proof. The defendants' motion is accordingly granted. The defendants shall serve the plaintiff with a copy of this Decision and Order with notice of entry within 20 days.

This is the Decision and Order of the Court.

Dated: June 17, 2013

So ordered,



Hon. Lizbeth González, JSC