

Zaky v Stern

2014 NY Slip Op 32879(U)

May 7, 2014

Sup Ct, Westchester County

Docket Number: 53444/2011

Judge: Charles D. Wood

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
**DR. YOSEPH M. ZAKY and DENTAL IMPLANT &
COSMETIC, P.C.,**

Plaintiffs,

-against-

**DECISION & ORDER
Index No. 53444/11
Sequence No. 1**

**ILENE STERN, ESQ. and KURZMAN, EISENBERG,
CORBIN & LEVER, LLP,**

Defendants.

-----X

WOOD, J.

The following papers numbered 1- 21 were read and considered in connection with the defendants' motion for summary judgment:

Defendants' Notice of Motion, Counsel's Affirmation, Exhibits.	1-12
Defendants' Memorandum of Law.	13
Plaintiff's Affirmation in Opposition, Exhibits.	14-16
Defendant's Reply Affirmation, Exhibits.	17-21

Plaintiffs commenced this action by service of a summons with notice on July 27, 2011, to recover damages for legal malpractice. On or about May 24, 2012, plaintiffs served a complaint. Defendants served responsive pleadings on or about June 25, 2012. After issue was joined, defendants moved for summary judgment on the issue of liability, and seek to narrow the scope of damages that can be sought at trial. Plaintiffs oppose the motion.

Upon the foregoing papers, the motion is decided as follows:

It is well settled that a 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” (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Moreover, failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the motion papers (Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1986]; see Jakobovics v Rosenberg, 49 AD3d 695 [2d Dept 2008]; see also Menzel v Plotkin, 202 AD2d 558, 558-559 [2d Dept 1994]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). In deciding a motion for summary judgment, the court is “required to view the evidence presented in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion” (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v. Prospect Hospital, 68 NY2d 320,324 [1986]).

An action to recover damages for legal malpractice must be commenced within three (3) years from accrual which is measured from when the malpractice is committed (Glam v Allen, 57 NY2d 87 [1982]); (Zorn v Gilbert, 8 NY3d 933 [2007]). Tolling of the statute of limitations for legal malpractice may apply under the continuous representation doctrine if it can be shown that the attorney's involvement in the case after the alleged malpractice is for

performance of the same or related services and not merely the continuation of the general professional relationship (Pellati v Lite & Lite, 290 AD2d 544 [2d Dept 2002]; Piliero v Adler & Stavros, 282 AD2d 511 [2d Dept 2001]).

Regarding the merits of a claim for legal malpractice, “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 the duty proximately caused the plaintiff actual and ascertainable damages. 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” (Bells v Foster, 83 AD3d 876, 877 [2d Dept 2011]). Moreover, conclusory allegations of damages or injuries based upon speculation will not suffice (Holschauer v Fisher, 5 AD3d 553 [2004]).

Courts have recognized that a client cannot premise a claim of malpractice on a claim that he was misadvised about the content of an agreement, or that his attorney missed something in that agreement to the client’s detriment, where the agreement itself recites that the client had been apprised of his rights and had been given the opportunity to weigh all the facts likely to influence his decision (Faden v. Satterlee Stephens Burke & Burke, LLP, 24 Misc 3d 1205(A) (Supreme Court Nassau County 2007) *aff’d*, 52 AD3d 652 [2nd Dept 2008]).

In the case at bar, in or about August of 2008, plaintiffs, a dentist and the entity formed to conduct his practice, retained defendants to prepare an employment contract for plaintiffs’ employee, Joy Pellegrino (“Pellegrino”).

Defendants allege that defendant Stern, an attorney at defendant Kurzman Eisenberg Corbin & Lever, LLP, advised plaintiff Zaky, that based upon the description of the

employee's job duties as provided by plaintiff Zaky, the employee was "non-exempt" from the requirements of the Federal Fair Labor Standards Act. Defendant Stern advised plaintiff Zaky that pursuant to the Federal Fair Labor Standards Act, plaintiffs were required to pay the employee overtime for hours worked in excess of 40 hours per week. Defendant Stern testified that plaintiff Zaky was upset by defendant Stern's legal advice that he could not include a contract provision eliminating payment of overtime benefits, and directed her to include a provision in the contract that the employee would not be paid for overtime hours worked. No further legal services were provided to plaintiff Zaky after August of 2008. Without any further legal consultation with defendants, plaintiffs drafted three employment contracts in 2009, 2010 and 2011 for execution by Pellegrino. Defendants contend that the 2009, 2010 and 2011 contracts were not just re-dated versions of the 2008 contract, but instead the subsequent contracts were agreements with material changes as compared to the 2008 contract. In the subsequent contracts, plaintiffs changes the employee's salary, the definition of the employee's position, and made the employee responsible for the payment of 50% of the health care premium from 2009 forward. Defendants also point out that Pellegrino struck out the provision in the 2010 contract which provided she would not be paid for Saturdays or for overtime (Exh H).

In 2011, Pellegrino commenced suit against plaintiffs seeking to recover overtime pay due since 2008 pursuant to the Fair Labor Standards act, and since 2005 pursuant to the New York State Labor Law §190 and the Wage Orders and the Commissioner of Labor¹. That

¹ See, Defendant's Exh D, *Joy Pellegrino v. Dental Implant & Cosmetic P.C., and Dr. Yoseph M. Zaky*, 11 Civ 4122.

underlying action was settled prior to proceeding to trial. Plaintiffs seek to recover the amount of the settlement in the instant action.

In support of their motion, defendants contend that plaintiffs cannot prove one or more of the essential elements of a legal malpractice cause of action on each of their claims of alleged errors committed by defendants in their preparation of the 2008 employment contract, and plaintiff's complaint should be dismissed in its entirety as a matter of law. Defendants cite that in an action to recover damages for legal malpractice involving the negligent giving of advice, a client is required to prove that the attorney's advice was provided: (1) within the context of an attorney-client relationship; (2) the attorney negligently (3) gave improper advice (4) which was a proximate cause of the client's doing of things he would not have otherwise done (5) resulting in harm and damage of the client Marks Polarized Corporation v. Solinger & Gordon, 124 Misc. 2d 266 (Sup Ct. Queens Cty 1984); Farrauto, Berman, Fontana & Selznick v. Keowongwan, 166 Misc. 2d 804 [Sup Ct. Westchester Cty 1995]). Defendants further argue that there was no attorney client relationship with plaintiffs, since defendants did not prepare the 2009, 2010 and 2011 contracts, thus, summary judgment should be awarded in defendants' favor. Defendants also argue that plaintiffs cannot prove that defendants' preparation of the 2008 contract was the proximate cause of any damages they sustained stemming from the 2010 and 2011 contracts. The 2010 contract did not even contain a provision that plaintiff would not pay Pellegrino overtime, and the 2011 contract was never signed. Defendants also argue that the term in the 2008 contract and in the subsequent contracts, which provided that Pellegrino was not entitled to overtime was inserted into the 2008 contract at the insistence of plaintiffs against the advice of defendants.

To make a prima facie showing on a motion for summary judgment, the attorney must present admissible evidence that the plaintiff cannot prove at least one of the essential elements of a legal malpractice claim (Carrasco v Pena & Kahn, 48 AD3d 395, 396 [2d Dept 2008]). Based upon the foregoing, defendants demonstrated their entitlement to judgment as a matter of law, establishing prima facie, that their conduct was not a proximate cause of any loss to plaintiffs.

A sufficient prima facie showing having been made, the burden shifts to the non-moving party. To defeat a motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. Plaintiffs argue that they were entitled to rely on the legality of the provisions of an employment contract drafted by counsel, which relationship doesn't end if the client essentially uses the same contract form with the same employee with only minor, unrelated modifications. Plaintiffs further argue that plaintiff Zaky in his deposition testified that defendant Stern never told him that he needed to pay his employee overtime, and in fact defendant Stern specifically advised him that he didn't need to pay the employee overtime if she agreed to such a term in the written contract defendant was drafting for plaintiffs. Plaintiff Zaky also testified that he never discussed what an exempt employee was or that he needed to pay overtime to any employee who was not exempt. Plaintiffs raise the point that despite defendant Stern allegedly knowing the inclusion of such a provision was illegal, unenforceable and likely to expose plaintiff Zaky to claims for damages by Pellegrino, nevertheless agreed to and did include such a provision but failed to send anything in writing to plaintiff Zaky advising or warning him regarding his alleged insistence that these provisions be included in the contract. However, plaintiff Zaky in his affidavit states that defendants knew he was going to use the employment

contract again and never told plaintiff Zaky that he needed to go back to them to change the rate of pay or the description of her duties.

An attorney-client relationship is established where there is an explicit undertaking to perform a specific task Wei Cheng Chang v. Pi, 288 AD2d 378 [2002]). Notably, if a special relationship exists, such as an attorney client relationship, the attorneys have a duty to impart correct information; if that information, however, is incorrect and the client reasonably relies on it, a claim of negligent representation will lie (Solondz v Barash, 225 AD2d 996, 998; [1966]). Whether the nature of the relationship between parties is such that a plaintiff's reliance on a negligent misrepresentation is justified, generally raises an issue of fact (Caprer v. Nussbaum, 36 AD3d 176, [2006]).

Based upon the arguments raised here, the court finds that plaintiffs have raised a triable issue of fact in relation to the 2008 and 2009 contracts, but failed to do so with respect to the 2010 and 2011 contracts.

Accordingly, from the totality of the circumstances presented, the court finds that defendants' motion pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint is **GRANTED** as to those causes of action premised upon legal malpractice in connection with the 2010, and 2011 contracts, and is **DENIED**, as to the cause of action premised upon legal malpractice in connection with the 2008 and 2009 contracts.

In making its decision, the court considered that in the 2010 contract, the clause providing that the employee would not be paid overtime, was struck out and initialed by Pellegrino. Likewise, Pellegrino refused to sign the 2011 contract, instead tendering her resignation. Plaintiffs have failed to state a cause of action against defendants for the 2010 and 2011 contracts, and thus, there is no triable issue of fact. Interestingly, and perhaps telling, is

even though the provision was struck out in the 2010 contract, plaintiffs made an independent decision not to pay Pellegrino for overtime.

Further, the court finds that with regard to the 2008 contract, there are several disputed issues of fact surrounding this legal malpractice claim, such that a trial is necessary. There are triable issue of facts existing regarding whether the inclusion in the 2008 contract of the provision requiring Pellegrino to work overtime for no pay was explained to plaintiffs; and whether the legal issues raised by such a provision were discussed; and whether defendants advised plaintiffs that the provision was legal, provided it was in writing and agreed to by Pellegrino. Specifically, with regard to the 2009 contract, there are triable issues of fact, as to the longevity of defendants' representation of plaintiffs; the understanding between the parties; whether defendants were informed in 2008 that plaintiffs would be utilizing and relying upon the same terms of the contract for 2009; and the advice of defendants.

Furthermore, at this stage, the court denies the defendants' application to have the court limit plaintiffs' recoverable damages in the instant legal malpractice action to half-time or 50% of her regular salary for the overtime hours worked by Pellegrino until the execution of the 2009 contract prepared by plaintiffs on September 21, 2009.


NOW THEREFORE, it is hereby

ORDERED, that the parties are directed to appear at a settlement conference scheduled for June 3, 2014 at 9:30 a.m. in courtroom 1600, the Settlement Conference Part of the Westchester County Courthouse.

All matters not herein decided are denied. Defendants are directed to serve a copy of this Decision and Order, with notice of entry, upon plaintiffs, within 10 days of such entry. This constitutes the Decision and Order of the court.

The Clerk shall enter judgment in accordance herewith.

Dated: May 7, 2014
White Plains, New York



HON. CHARLES D. WOOD
Justice of the Supreme Court

To: Steven D. Feinstein, Esq.
Feinstein & Naishtut, LLP
Attorneys for Plaintiffs
211 South Ridge Street
Rye Brook, New York 10573

Wendy B. Shepps, Esq.
Podvey, Meanor, Catenacci, Hildner
Cocoziello & Chattman, P.C.
Attorneys for Defendants
One Riverfront Plaza, 8th Floor
Newark, New Jersey 07102