

Kelleher v Adams

2014 NY Slip Op 33865(U)

January 17, 2014

Supreme Court, Rockland County

Docket Number: 034753/12

Judge: Gerald E. Loehr

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 of 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 ROCKLAND

-----X
JOHN C. KELLEHER, JR. and PAMELA M. KELLEHER,

Plaintiffs,

DECISION AND ORDER
Index No.: 034753/12

-against-

JEFFREY M. ADAMS, ESQ.,
THE ADAMS LAW FIRM, P.C., and
MITCHELL S. CLAIR, ESQ.,

Defendants.

-----X

LOEHR, J.

The following papers numbered 1- 5 were read on the motion of Defendants Jeffrey M. Adams, Esq. and The Adams Law Firm, P.C. (the "Defendants") to dismiss the Complaint as failing to state a claim.

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Exhibits	1
Memorandum of Law in Support	2
Affirmation in Opposition - Exhibits	3
Memorandum of Law in Opposition	4
Reply Affirmation	5

Upon the foregoing papers, as alleged in the pleadings, Plaintiff John Kelleher, a resident of this county, suffered serious personal injuries in a motor vehicle accident in Pennsylvania on

September 11, 2009 as the result of a rear-end collision. Plaintiffs retained Defendants to represent them and prosecute this claim for damages for personal injuries and property damage arising therefrom pursuant to a written retainer dated September 24, 2009. Thereafter, in 2011, Defendants retained or arranged for Mitchell S. Clair, an attorney in Pennsylvania, to commence an action in that state with respect to Plaintiff's accident.¹ The Plaintiffs did not retain Clair and had no dealings with him. For reasons not set forth, Clair failed to commence the action within the statute of limitations, whereupon Plaintiffs commenced this action for malpractice on August 20, 2012. The Complaint asserts two causes of action: malpractice against Clair and malpractice against the other Defendants. Clair apparently settled, and the Defendants now move, in lieu of answering, to dismiss the Complaint as failing to state a cause of action.

To state a cause of action to recover damages for legal malpractice, a plaintiff must allege: (1) that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession, and (2) that the attorney's breach of the duty proximately caused the plaintiff actual and ascertainable damages (*Keness v Feldman, Kramer & Monaco, P.C.*, 105 AD3d 812 [2d Dept 2013]). To ultimately establish causation, a plaintiff must show that he or she would have prevailed in the underlying action but for the attorney's negligence (*id.* at 813). Here, in the Complaint, based on the facts alleged above, it is further alleged that Defendants had a duty to timely commence the lawsuit and to insure that Clair filed the lawsuit before the statute of limitations expired, and, based on Defendants' failure to do so, Plaintiffs lost a judgment. Defendants now move to dismiss the Complaint upon the argument that, inasmuch as Clair was an attorney/independent contractor,² Defendants were not responsible for his negligence.

Even as the law stood prior to 1993, the Complaint alleged a valid cause of action for malpractice if only based on the Defendants' alleged negligent failure to supervise Clair – as

¹ It is unclear whether Clair was hired just to commence the action in Pennsylvania or to prosecute it as well.

² As this is a CPLR 3211 motion, the facts alleged in the Complaint are deemed as true. As it is not alleged that Clair was an independent contractor – as opposed to an agent of Defendants – it is inappropriate for Defendants to assert that Clair was an independent contractor. Be that as it may, the Court is assuming he was an independent contractor for the purpose of this motion.

employers often have a duty to supervise even independent contractors (*see Kleeman v Rheingold*, 81 NY2d 270, 274 [1993]). Since 1993, however, the law has become clear that, as an attorney has a nondelegable duty to his or her clients to exercise due care in the commencement of the action – it being an integral part of the task that the attorney has undertaken (*id.* at 275) – the attorney is responsible to his or her clients for the negligent failure of even independent contractors to timely commence an action (*id.* at 277-78; *Whalen, DeGraff, Foy, Conway, Holt-Harris & Mealy*, 53 AD3d 912, 913-914 [3d 2008]).

Thus, this motion must be denied. However, inasmuch as it appears, based on the facts and authorities cited above, that Plaintiffs are entitled to summary judgment on the issue of liability and proximate cause, the only real issues being whether, and to what extent, Plaintiffs would have been successful in the Pennsylvania action if it had been timely commenced, the Court hereby converts this motion to one for summary judgment pursuant to CPLR 3211[e]. The parties shall have until March 21, 2014 to submit any further papers they feel appropriate with respect to the above issues.

This constitutes the decision and order of the Court.

Dated: New City, New York
January 17, 2014



HON. GERALD E. LOEHR
J.S.C.

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