

Kelleher v Adams

2015 NY Slip Op 32690(U)

December 30, 2015

Supreme Court, Rockland County

Docket Number: 034753/12

Judge: Gerald E. Loehr

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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 Defendant Clair to vacate this Court's Decision and Order dated February 13, 2015 and dismiss the cross claims of Defendant Adams.

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

Upon the foregoing papers, it appears that Plaintiff John Kelleher, a resident of this county, suffered personal injuries in a motor vehicle accident in Pennsylvania on September 11,

2009 as the result of a rear-end collision. Plaintiffs retained Adams 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, Adams retained or arranged for Mitchell S. Clair, an attorney in Pennsylvania, to commence an action in that state with respect to Plaintiff's accident. The Plaintiffs did not retain Clair and had no dealings with him. Due to his admitted error and oversight, 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 Adams. Adams moved, in lieu of answering, to dismiss the Complaint as failing to state a cause of action.¹

In a decision and Order dated January 17, 2014, this Court noted that 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, it was further alleged that Adams 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 the Defendants' failure to do so, Plaintiffs lost a judgment. Adams moved to dismiss the Complaint upon the argument that, inasmuch as Clair was an attorney/independent contractor, Adams was not responsible for his negligence.

This Court then noted that even as the law stood prior to 1993, the Complaint alleged a valid cause of action for malpractice if only based on the Adam's alleged negligent failure to supervise Clair – as 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

¹ Although Plaintiffs did not file an Affidavit of Service with respect to either Defendant, both were aware of the action. As stated above, Adams moved to dismiss the Complaint as failing to state a cause of action and Clair settled on April 11, 2013, referencing this action in the settlement agreement.

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]).

Based on the foregoing, this Court, in its Decision and Order dated January 17, 2014, converted the motion to one for summary judgment pursuant to CPLR 3211(c) and granted the parties additional time to submit further papers. Neither party did so and, in a Decision and Order dated April 30, 2014, denied the motion to dismiss and granted the Plaintiffs summary judgment (CPLR 3212[b]) on the issue of liability against Adams, to wit, that Adams was negligent in failing to timely commence the Pennsylvania action and so cost the Plaintiffs the ability to obtain a judgment therefor. The remaining issues – whether and to what extent Plaintiffs would have been successful in the Pennsylvania action had it been timely commenced by Adams, including the damages that would have been recovered, were reserved for trial.

Thereafter (February 19, 2014), Adams answered and cross-claimed for indemnification or contribution from Clair. There is no evidence that the Answer was served on Clair other than by e-filing (*cf.* 22 NYCRR 202.5-b[f]). In July 2014, Adams moved to reargue the January 17, 2014 Decision and Order. As indicated above (*see* note 1, *supra*), in the interim, Clair had settled. Presumably based on his belief that General Obligations Law 15-108 insulated him from liability to Adams, on April 23, 2014, Clair executed an Affidavit *in this case* in which he admitted that the responsibility to file the lawsuit on behalf of Plaintiffs was his alone and that he failed to do so through his “oversight and error.” Adams efiled it in support of his motion to reargue. That notwithstanding, the motion was denied: while the negligence was Clair’s, Adams was responsible because the responsibility to timely commence the action was nondelegable.

Thereafter, in December 2014, apparently under the theory that no good deed should go unpunished, Adams moved for summary judgment against Clair on his cross claim for indemnification.² The motion was both efiled and mailed to Clair who did not respond. In a Decision and Order dated February 13, 2015, the motion was granted as Adams liability to Plaintiffs was derivative and based solely on Clair’s negligence (*see Kleeman v Rheingold*, 81

² Clair argues that summary judgment was inappropriate procedurally because he had never answered the cross claim. As cross claims are deemed denied (CPLR 3011), summary judgment was the appropriate procedural mechanism.

NY2d 270, 274 [1993]; *Rogers v Dorchester Associates*, 32 NY2d 553 [1973]).³

Clair now moves to vacate the February 13, 2015 Decision and Order and dismiss the cross claims both for a lack of jurisdiction and excusable default with a meritorious defense. As to jurisdiction, while it does not appear that Adams ever served his Answer (with the cross claims) on Clair in accordance with CPLR 308, Clair was admittedly aware of this action and participated in it, on the merits, after Adams had efiled his Answer (with the cross claim) by submitting his Affidavit without any reservation as to jurisdiction. He, therefore, submitted himself to the jurisdiction of this Court (*Henderson v Henderson*, 247 NY 428, 432-33 [1928]; *Taveras v City of New York*, 108 AD3d 614, 617 [2d Dept 2013]). As to his alternative theory, assuming the Court accepts that Clair did not receive the motion for summary judgment although mailed to him,⁴ he has no defense to Adams' claim for indemnification. Although Adams had a nondelagable duty to the Plaintiffs, his liability to the Plaintiffs was due solely to Clair's admitted negligence. Clair must therefore indemnify him (*Lui v Town of East Hampton*, 117 AD3d 689 [2d Dept 2014]). Accordingly, the motion is denied.⁵

This constitutes the decision and order of the Court.

Dated: New City, New York
December 30, 2015



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

³ Adams also successfully moved to disqualify Plaintiffs' attorneys for improperly obtaining confidential information concerning this case from a former employee of Adam's law firm.

⁴ The motion for summary judgment was also efiled and Clair, an attorney, was aware he had been named as a Defendant in this action and that there were cross claims pending against him.

⁵ To the extent it is properly before the Court, Adams cross claim for contribution would be barred by General Obligations Law 15-108[b].

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