

Fisher v Legal Aid Socy.
2019 NY Slip Op 34066(U)
April 22, 2019
Supreme Court, Bronx County
Docket Number: 22549/2018E
Judge: Julia I. Rodriguez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

-----X **Index No. 22549/2018E**

Lawrence Fisher,
Plaintiff,

-against-

DECISION & ORDER

The Legal Aid Society and
Natalie Rea, Esq.,

Defendants.

Present:
Hon. Julia I. Rodriguez
Supreme Court Justice

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Recitation, as required by CPLR 2219(a), of the papers considered in review of defendants' motion to dismiss the complaint, pursuant to CPLR 3211(a)(7), for failure to state a cause of action for legal malpractice.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1
Affirmation in Opposition & Exhibit	2
Reply Affirmation	3

In the instant action, plaintiff alleges that defendant The Legal Aid Society ("Legal Aid"), through Legal Aid Attorney Natalie Rea, Esq., was negligent in its representation of him in connection with certain Sex Offender Registry Act ("SORA") proceedings in Supreme Court, Criminal Term, Bronx County.

Defendants now move for the dismissal of plaintiff's complaint, pursuant to CPLR(a)(7), on the ground that the complaint fails to state a cause of action for legal malpractice against them. Specifically, defendants contend that (1) plaintiff failed to show that Rea was negligent in her representation of him; (2) plaintiff failed to demonstrate proximate cause; and (3) plaintiff failed to plead actual and ascertainable damages.

In sum, the verified complaint alleges as follows:

On or about September 9, 2008, Plaintiff Lawrence Fisher was sentenced by Judge Steven Barrett, upon his previous guilty plea to charges under an indictment, to one year in jail. Fisher was represented by a privately retained attorney in connection with those charges, which required Fisher to register in New York with the Sex Offender Registry in accordance with the Sex Offender Registration Act ("SORA"). Fisher was so registered with the Sex Offender Registry. In or around the fall of 2014, the Court that sentenced Fisher attempted to contact him via mail, at an incorrect address, regarding the scheduling of a court date with respect to his SORA registration. Around the same time, the

Court appointed The Legal Aid Society to represent Fisher in connection with his SORA proceeding. Natalie Rea, Esq. was assigned by Legal Aid to represent Fisher. Legal Aid, through Rea, negligently, improperly and unskillfully represented Fisher in the SORA proceeding by: (1) failing to contact Fisher's attorney of record in the underlying criminal matter and (2) failing to advise the Court that her inability to locate Fisher and his resulting failure to appear for a SORA proceeding was not a sufficient legal basis for the Court to issue a warrant for Fisher's arrest. Solely due to the negligence of defendants, Fisher was arrested in New Jersey and extradited to New York. Fisher remained incarcerated for over two weeks, until he was able to contact his attorney in the underlying criminal matter. Had defendants represented Fisher properly, or at least contacted his attorney of record in the underlying criminal matter, he would not have been arrested and incarcerated. By reason of defendants' negligence, Fisher lost his employment as well as future employment opportunities, and suffered mentally, emotionally, psychologically and physically.

In support of dismissal, defendants submitted the affidavit of Natalie Rea, Esq. wherein she states that Fisher was not present on the first date of the proceedings; it was unclear whether he had received notice from the court that the hearing had been scheduled that day; the hearing was adjourned to November 21, 2014; she spoke with Fisher on the telephone on November 20, 2014 "about the proceedings;" in court the next day, at her request, the hearing was adjourned to February 13, 2015 as she needed time to file papers; on February 9, 2015, she was copied on an email sent to the court by the Assistant District Attorney ("ADA") assigned to the case requesting an adjournment to mid-March; since the ADA had notified her and the court that she would not be available on February 13, 2015, and the DA's office had requested an adjournment on consent, she "considered the case adjourned and [she] did not appear in court," and neither did the ADA or Fisher; the court adjourned the proceeding to March 20, 2015; however, without legal authority, and without contacting her or the ADA, Judge Barret issued a bench warrant for Fisher's arrest; because SORA proceedings are civil proceedings, the judge had no authority to issue such a warrant; on March 2, 2015, Fisher called her and informed her that he was being detained in New Jersey pursuant to a warrant; this came as a "total surprise," since the case had been adjourned and the judge had no authority to issue a warrant; she immediately called Judge Barret's chambers and explained that the bench warrant should be vacated and Judge Barret

“promptly corrected his error and vacated the bench warrant;” that day, she also contacted the detention facility in New Jersey and sent the order vacating the warrant; the next day she learned that Fisher had still not been released so she called the ADA to ask for her assistance; the ADA informed her by email that the jail had received the paperwork; and on March 3, 2015, Fisher was released.

In opposition to dismissal, plaintiff submitted his affidavit and the affirmation of his counsel. In his affirmation, counsel states that the Rea affidavit reveals a fact of which plaintiff was unaware, to wit, that Rea never confirmed whether the appearance scheduled for February 13, 2015 had been adjourned. According to counsel, this fact lends additional support for plaintiff’s claim that defendants were negligent. In his affidavit, plaintiff states at all times material to this case, he was a member of the International Brotherhood of Electrical Workers, Local 351 (the “Union”); Union members are offered work opportunities on the basis of seniority; during the time that he was incarcerated as a result of the subject bench warrant, he was called by the Union about a long-term position with Calvi Electric; at that time the value of the salary and benefits being paid for this position was between seventy-five dollars to eighty dollars per hour; since he was incarcerated at the time the Union called him about this position, he was not able to get this job; he was told by a Union employee with knowledge of the matter that the Union member who got the call for the Calvi Electric job after him is still employed in that position by Calvi Electric; since his incarceration, he has had “intermittent, but not steady employment;” and had he not been incarcerated at the time the Union called him, he would have had “steady regular employment since that time instead of the intermittent periods of work and unemployment.”

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On a motion to dismiss pursuant to CPLR §3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994). Affidavits submitted by a defendant to attack the sufficiency of a pleading “will seldom if ever warrant the relief he seeks unless . . .

the affidavits establish conclusively that plaintiff has no cause of action.” See *Rovello v. Orofino Realty Co., Inc.*, 40 N.Y.2d 633, 636, 389 N.Y.S.2d 314 (1976). However, affidavits submitted by a plaintiff in opposition to a motion to dismiss “may be used freely to preserve inartfully pleaded, but potentially meritorious, claims.” See *id.* at 635.

An action for legal malpractice requires proof of three elements: (1) that the attorney was negligent; (2) that such negligence was a proximate cause of plaintiff’s losses; and (3) proof of actual damages. *Global Business Institute v. Rivkin Radler LLP*, 101 A.D.3d 651, 958 N.Y.S.2d 41(1st Dept. 2012). The allegations in the complaint, if true, indicate that Natalie Rea was negligent by failing to advise Fisher of his scheduled court appearance on February 13, 2015, which resulted in his failure to appear in court on that date. Also, Rea’s affidavit indicates that Rea may also have been negligent by failing to confirm with either the ADA or the Court that the application for an adjournment had been granted. Indeed, since the case remained on the court’s calendar for that date, it appears that an adjournment had not been granted. Further, had Rea appeared in court on February 13, 2015, she could have argued to the Court that it lacked the authority to issue a bench warrant for Fisher’s failure to appear at the SORA proceeding. Given that when she did make that argument to the Court, the Court “promptly” vacated the warrant, it is likely that, had she appeared in court on February 13, 2015, a bench warrant would not have been issued. Finally, in his affidavit, Fisher states with sufficient specificity the monetary damages that he suffered as a result of his incarceration. As such, plaintiff has sufficiently alleged that his attorney was negligent, that such negligence was a proximate cause of his losses and that he suffered ascertainable damages.

Based upon the foregoing, defendants’ motion to dismiss the complaint, pursuant to CPLR 3211(a)(7), is **denied**.

Dated: Bronx, New York
April 22, 2019


Hon. Julia I. Rodriguez, J.S.C.