

<b>Salem v Legal Aid Socy.</b>
2020 NY Slip Op 32032(U)
May 1, 2020
Supreme Court, Bronx County
Docket Number: 31267/2017E
Judge: Robert T. Johnson
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 12**

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**AITABDELLAH SALEM,**

**Plaintiff,**

**Decision and Order**

**- against-**

**Index No. 31267/2017E**

**THE LEGAL AID SOCIETY, CITY OF NEW YORK,  
Defendants.**

**The following papers, numbered 1, 2, were considered on the motion:**

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion, Exhibits, Affidavits Annexed.....	1
Opposition, Exhibits, Affidavits Annexed.....	2

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

Defendant The Legal Aid Society, City of New York (“Legal Aid”) moves herein to dismiss plaintiff Aitabdellah Salem’s complaint pursuant to CPLR 3211 (a) (1) and (7), for failure to state a claim and defense founded in documentary evidence.<sup>1</sup> If the complaint is not dismissed, defendant alternatively asks that the matter be transferred to New York County for the convenience of material witnesses. Plaintiff submits opposition.

Plaintiff’s complaint alleges that his Legal Aid attorneys’ failure to promptly inform him that his bail had been reduced to \$1 constituted legal malpractice, for which Legal Aid is liable under *respondeat superior*. He further avers that Legal Aid was negligent in hiring and supervising the attorneys in question. Finally, plaintiff Salem invokes the Rules of Professional Conduct (22 NYCRR 1200), citing the preamble and Rule 1.4, alleging violations thereof.

<sup>1</sup> The Court notes that defendant’s submissions occasionally refer to the instant motion as a “motion for summary judgment to dismiss the complaint.” Because defendant invokes CPLR 3211, governing a motion to dismiss, and cites caselaw on motions to dismiss, and as the Court did not convert the motion to one for summary judgment the Court considers the instant motion a motion to dismiss.

Plaintiff Salem was arrested in November of 2014 on a series of charges. Three different dockets were before the court within a week. Bail on one docket was initially set at \$25,000. A short time later he had bail set of \$25,000 on another, for a total of \$50,000. Salem was unable to post bail and was thus remanded to Rikers Island. At different appearance dates and in relation to the different cases, Salem was represented by three Legal Aid attorneys. Salem himself was not produced. Stephen Pokart, Esq. ("Pokart") was the attorney assigned to represent Salem on a case of assault in the second degree under NYPL § 120.05 (3), but Eric Williams, Esq. appeared on Pokart's behalf at Salem's November 26, 2014 appearance on this case. At the November 26 appearance, Salem's bail for the assault charge was reduced to \$1. This left Salem with an additional, outstanding bail sum of \$25,000 on the second docket. Jerome Greco, Esq. appeared for Salem on this case on November 28, 2014, at which date the Judge ordered that Salem no longer be held on bail with respect to that case. On November 28, 2014, therefore, the only remaining bail Salem owed was the \$1 on the first charge. However, it is alleged that at that time, Legal Aid (by the assigned attorneys) did not inform Salem of the bail reduction and release order. Salem continued to be held at Rikers Island until April 15, 2015, a total of 138 days, when he was released upon posting his \$1 bail. After trial, Salem received a prison sentence of two years for the assault charge and an additional one year for the petit larceny charge. (Defendant's Exhibit B, Sentencing Minutes). As prescribed by CPL § 70.03 (3), these 138 days were credited towards plaintiff's sentence as time served. (Defendant's Exhibit C, Certification of Jail Term).

Defendant Legal Aid avers that plaintiff cannot sustain a legal malpractice claim, which requires a plaintiff to show actual or pecuniary damages, because he received credit for the 138 days served towards his eventual sentence, and his convictions have not alternatively been vacated. (*Wolkstein v. Morgenstern*, 275 AD2d 635 [1st Dept 2000] [legal malpractice claim dismissed where plaintiff could only show emotional damages, not pecuniary damages])

In opposition, plaintiff emphasizes that the defendant attorneys did not produce Salem at the respective bail hearings, despite his presence in a holding cell outside the courtroom(s) in question and emphasize the conditions at Rikers Island, where Salem, they claim, was unnecessarily incarcerated for the 138 days and, for the remainder of his sentence. However, plaintiff does not rebut defendant's allegation that plaintiff served no additional jail time

above his imposed sentence and, does not show any additional pecuniary loss resulting from defendant's failure to inform him of the bail reduction. Plaintiff thus does not satisfy the prima facie damages requirement for a legal malpractice claim. Furthermore, because plaintiff was convicted of the crimes at issue and has not shown his innocence, he cannot sustain a legal malpractice claim against defendant. (*Carmel v. Lunney*, 70 NY2d 169, 173 [1987]).

To sustain a claim for negligent supervision and/or hiring regarding the Legal Aid attorneys assigned to represent plaintiff Salem requires a showing that at least one of the attorneys employed by Legal Aid was individually liable. Without underlying employee liability, there can be no recovery from the employer under a theory of *respondeat superior*. (*Karoon v. New York City Transit Authority*, 241 AD2d 323 [1<sup>st</sup> Dept 1997]). *Karoon* cites only one exception to this principle, where a plaintiff is seeking punitive damages. Here, individual claims of legal malpractice against the employee attorneys cannot be sustained for lack of actual or pecuniary damages. As such, he cannot sustain a cause of action against the employer, Legal Aid, and the exception does not apply.


In separately alleging a violation of the Rules of Professional Conduct (22 NYCRR 1200), plaintiff materially reiterates his legal malpractice claim, as such violations cannot be brought as civil causes of action by the allegedly injured party. (*Compare, e.g., Decolator, Cohen & DiPrisco, LLP v. Lysaght, Lysaght & Kramer, PC*, 304 AD2d 86, 91 [1st Dept 2003] ["although petitioner has framed the issue in terms of ethical considerations, what is before us is nothing more than a fee dispute."]). Accordingly, it is hereby

ORDERED, that defendant's motion to dismiss pursuant to CPLR 3211 (a) (1) and (7) is granted, and it is further

ORDERED, that plaintiff's complaint is dismissed in its entirety.

Defendant shall serve plaintiff with a copy of the Decision and Order with notice of entry within 30 days the of Unified Court System's reopening.  
This constitutes the decision and order of this Court

**Dated: May 1, 2020**

  
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**Hon. Robert T. Johnson, J.S.C.**