

McGlynn v Burns & Harris, Esq.
2021 NY Slip Op 34330(U)
June 30, 2021
Supreme Court, Nassau County
Docket Number: Index No. 600930/2016
Judge: Christopher G. Quinn
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU CIVIL TERM PART 23

Present: HON. CHRISTOPHER G. QUINN
Justice of the Supreme Court

WILLIAM MCGLYNN,

Plaintiff,

INDEX NO: 600930/2016

-against-

MOTION SEQ. No. 4 - MG

BURNS & HARRIS, ESQ.; ALLISON R. KEENAN;
MARKEL INTERNATIONAL INSURANCE
COMPANY, a subsidiary of MARKEL CORPORATION
AND MARKEL CORPORATION,

MOTION SEQ. No. 5 - MD

Defendants.

The following papers were read on this motion:

- (1) Notice of Motion/Affidavit/Exhibits A-M
- (2) Memorandum of Law
- (3) Notice of Cross Motion/Affidavit/Exhibits 1-14
- (4) Reply

In this matter plaintiff seeks damages from the defendant, his former law firm. Defendants BURNS & HARRIS, ESQ. and ALLISON R. KEENAN, an Associate in the firm, seek an Order dismissing the claims against them. Plaintiff opposes and seeks an Order sanctioning these defendants for spoliation of evidence.

Plaintiff alleges that the defendants committed legal malpractice in connection with their prior legal representation of plaintiff. MCGLYNN claims he hired the defendants BURNS & HARRIS, ESQ. and ALLISON R. KEENAN ("LAWFIRM") to represent him in a negligence suit arising out of a March 15, 2005 accident. He sued Express Haulage Corp. and related

defendants for negligence resulting in his suffering injuries. Those defendants were found in default and plaintiff was awarded over \$250,000.00 in damages after an Inquest.

Thereafter defendant MARKEL, an insurer of one of the defendants disclaimed coverage alleging improper notice. Plaintiff sought damages from the defendant LAWFIRM alleging they committed malpractice in not providing that notice. He also sought a Declaration that MARKEL's disclaimers were improper and in violation of Insurance Law § 3420(d)(2).

Upon motion by MARKEL, all claims and cross claims against it were Dismissed.

Defendant LAWFIRM alleges that they were hired to bring two negligence actions for the plaintiff in 2007 in Kings County Supreme Court. Both resulted in judgements in the plaintiff's favor. Defendants claim that they had no knowledge of a separate Workers Compensation action by the plaintiff regarding the same injuries as alleged in these negligence actions. Defendants also allege that any medical records it had relating to its representation of the plaintiff were destroyed at the end of its representation of the plaintiff.

Defendant BURNS & HARRIS and KEENAN, seek summary judgment arguing the undisputed facts demonstrate the claims of legal malpractice should be dismissed. The LAWFIRM claims that the plaintiff filed for Workers Compensation benefits before he retained them. In his Workers Compensation action plaintiff claimed he was injured in the March 2005 when packages fell on his head while he was standing in his delivery truck and loading from the dock. Plaintiff, in the underlying matter with EXPRESS defendants, claimed he was injured when he tripped and fell due to the height differential between the truck and dock surfaces.

Counsel for the defendants argue that the doctrine of *res judicata* bars any recovery here, and the plaintiff is estopped from pursuing these claims.

Plaintiff settled his Workers Compensation claim before the Workers Compensation Board. Counsel for plaintiff argues that this settlement does not constitute a "judicial

endorsement” of an inconsistent theory of the injury as a matter of law. He argues that this was an administrative proceeding, not a judgment.

Where, as here, a judicial or administrative body approves the settlement of a proceeding, such approval triggers application of the estoppel doctrine [*Karakash v. Trakas*, 163 AD3d 788 (2nd Dept 2018); *Simon v. Safelight Glass Corp.*, 128 F.3d 68 (2nd Cir. 1997)]. Judicial estoppel against inconsistent positions precludes a party who assumed a certain position in a prior legal proceeding from assuming a contrary position in another action simply because his or her interests have changed [*Ford Motor Credit Co. v. Colonial Funding Corp.*, 215 AD2d 435 (1995)].

In this action plaintiff alleges legal malpractice. He must prove the defendant’s failure to exercise the ordinary skill and knowledge commonly possessed by a member of the legal community caused him to suffer damages [*Rudolf v. Shayne, Dachs, Stanisci Corker & Sauer*, 8 NY3d 438 (2007)]. A plaintiff must show that he would have prevailed in the underlying action but for the attorney’s negligence [*Barnett v. Schwartz*, 47 AD3d 197 (2nd Dept 2007)].

The Court finds that the LAWFIRM has established its entitlement to summary judgment as a matter of a law by demonstrating that the plaintiff is unable to prove the element of causation due to his contrary position in the Workers Compensation action [*Nill v. Schneider*, 173 AD3d.753 (2nd Dept 2019)]. Plaintiff’s hope is purely speculative [*Kaloakas Management Corp. v. Lawrence & Walsh, P.C.*, 157 AD3d 778 (2nd Dept 2018)].

Based on the proof and arguments presented, their motion seeking summary judgment is Granted.

A plaintiff seeking sanctions for spoliation must show that the party with control over the evidence possessed an obligation to preserve it and at the time of its destruction the defendant had a culpable state of mind and destroyed it knowing it was relevant to the party’s claim or

defense. There must be an intentional willful destruction of relevant evidence. In the absence of pending litigation or notice of specific claims, a defendant has no obligation to maintain evidence and should not be sanctioned for discarding items in good faith pursuant to its normal business practice [*Sanders v. 210 N.12th Street, LLC* 171 AD3d 966 (2019); *Tanner v. Bethpage Union Free School District*, 161 AD3d 1210 (2nd Dept 2018)].

In this instance the defendant KEENAN appeared for a deposition on this issue. KEENAN testified at her deposition that she discovered that defendant BURNS & HARRIS destroyed the underlying file after commencement of plaintiff's suit. Defendant argues that this is insufficient to support a claim of spoliation as Ms. KEENAN testified not that the file was destroyed at that time, but that she searched for it and found it had already been destroyed. KEENAN testified that she did not know when it was destroyed. In her affidavit, she states that she believed it was destroyed pursuant to office policy at the conclusion of the underlying case. (Motion, Exh. 13) There is no evidence offered to rebut those sworn statements.

Based on the proof presented, that motion of the plaintiff for sanctions based on spoliation is Denied.

It is **SO ORDERED**.



HON. CHRISTOPHER G. QUINN, J.S.C.

Dated: JUN 30 2021

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE