26 A.D.3d 410
Supreme Court, Appellate Division,
Second Department, New York.

Leon GREEN, appellant,
v.
Robert J. CONCIATORI, et al., defendants,
Jesus J. Pena, et al., respondents.

Feb. 21, 2006.

Synopsis

Background: Former client brought legal malpractice action against attorneys who had represented him in personal injury action. The Supreme Court, Kings County, Jacobson, J., granted attorneys' motions to dismiss. Former client appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] three-year statute of limitations barred action as to attorney who had acted only as trial counsel in personal injury action and ceased his representation of former client more than three years before malpractice action was filed;

[2] attorneys' failure to discover facts about underlying accident that differed from facts which former client had given them regarding accident did not support legal malpractice claim; and

[3] attorneys were not liable for alleged malpractice of former law firm partner and related counsel.

Affirmed.

West Headnotes (4)

[1] Limitation of Actions Negligence in performance of professional services

Three-year statute of limitations for legal malpractice actions barred former client's action against attorney who had acted only as trial counsel for former client in underlying personal injury action and ceased his representation of former client more than three years before malpractice action was filed. McKinney's CPLR 214(6).

1 Cases that cite this headnote

[2] Attorneys and Legal Services Pretrial proceedings

Failure of attorneys who represented former client in personal injury action to discover facts about underlying accident that differed from facts which former client had given them regarding accident did not support legal malpractice claim, given that such facts were known to former client but not disclosed to attorneys or others at their firm before complaint was filed, and former client did not show that attorneys failed to exercise ordinary reasonable skill and knowledge possessed by member of legal profession.

[3] Attorneys and Legal Services Litigation

Although attorney has responsibility to investigate and prepare every phase of client's case, attorney should not be held liable for ignorance of facts which client neglected to tell him or her.

1 Cases that cite this headnote

[4] Attorneys and Legal Services Partners and associates; law firms

Pursuant to partnership statutes governing partner and partnership liability for acts of other partners, attorneys could not be held liable to former client for acts of malpractice that allegedly were committed by attorneys' former partner in law firm and by trial counsel retained by former partner when alleged acts of malpractice took place after law firm disbanded. McKinney's Partnership Law §§ 24, 26.

1 Cases that cite this headnote

Attorneys and Law Firms

****560** Carlin & Rothstein, New York, N.Y. (Eric E. Rothstein of counsel), for appellant.

Robert A. Siegel, New York, N.Y., for respondents Jesus J. Pena and Christopher E. Wittstruck.

Eric F. Popkin, New York, N.Y., respondent pro se.

A. GAIL PRUDENTI, P.J., THOMAS A. ADAMS, ROBERT A. SPOLZINO, and JOSEPH COVELLO, JJ.

Opinion

***410** In an action to recover damages for legal malpractice, the plaintiff appeals from an order of the Supreme Court, Kings County (Jacobson, J.), dated September 28, 2004, which granted the motion of the defendants Jesus J. Pena and Christopher E. Wittstruck, and the separate motion of the defendant Eric F. Popkin pursuant to CPLR 3211(a)(5) and (7) to dismiss the complaint insofar as asserted against them.

ORDERED that the order is affirmed, with one bill of costs to the respondents appearing separately and filing separate briefs.

The plaintiff commenced this action to recover damages for legal malpractice against the defendants, who were his attorneys in an underlying personal injury suit. The defendants Jesus J. Pena and Christopher E. Wittstruck, and the defendant Eric F. Popkin, separately moved to dismiss the complaint insofar as asserted against them on the grounds that the action was time-barred and that the complaint failed to state a cause of action. The Supreme Court granted the motions, concluding that the action was time-barred as against the respondents. We affirm, but in part on a different ground.

[1] The Supreme Court properly concluded that the plaintiff's cause of action against Popkin was time-barred. Popkin acted only as trial counsel, and did not continue to represent the plaintiff after September 15, 1999. Therefore, the three-year statute of limitations for a legal malpractice action as against Popkin had expired when the plaintiff commenced this action in February 2004 (*see* CPLR 214[6]).

[2] **[3]** ***411** While Pena and Wittstruck failed to demonstrate that the action against them was time-barred, the complaint nevertheless failed to state a cause of action to recover damages for legal malpractice against them. The plaintiff asserted three causes of action against them. In his first cause of action, he alleged that they were negligent in failing to discover certain facts about the plaintiff's underlying accident that differed from the facts the plaintiff had given them regarding the accident. These facts were known to the plaintiff, but never disclosed to Pena or Wittstruck, nor any attorney at their firm before the complaint was filed. While an attorney has a responsibility to investigate and prepare every phase of a client's case, an attorney should not be held liable for ignorance of facts which the client neglected to tell him or her (*see Parksville Mobile Modular v. Fabricant,* 73 A.D.2d 595, 422 N.Y.S.2d 710). The plaintiff did not show that Pena and Wittstruck failed to exercise the ordinary reasonable skill and knowledge possessed by a member of the legal profession (*see McCoy v. Feinman,* 99 N.Y.2d 295, 301–302, 755 N.Y.S.2d 693, 785 N.E.2d 714).

[4] In the second and third causes of action, the plaintiff alleged that acts of malpractice were committed by a former ****561** partner of Pena and Wittstruck in a law firm which disbanded in 1994, and by trial counsel retained by this former partner. These alleged acts of malpractice took place after the firm had disbanded, and therefore Pena and Wittstruck cannot be held liable for them (*see* Partnership Law §§ 24, 26). The plaintiff thus failed to state a cause of action against Pena and Wittstruck to recover damages for legal malpractice.

All Citations

26 A.D.3d 410, 809 N.Y.S.2d 559, 2006 N.Y. Slip Op. 01278

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