

Sheraton v. LeBoeuf – A Test Of Trial Malpractice

BY STEVEN WECHSLER

In August 1997, the firm of LeBoeuf, Lamb, Greene & MacRae undertook the representation of defendant Sheraton Corporation in a law suit filed in the U.S. District Court for the District of Delaware. The suit alleged that Sheraton had improperly profited from a volume purchasing plan it operated for a network of managed hotels. Sheraton expected to emerge from the lawsuit a multi-million dollar winner. Instead, the litigation ended in December 1999 with a jury verdict against Sheraton of \$50.1 million, including \$37.5 million in punitive damages.

Grievously disappointed with this result, Sheraton has now filed a malpractice and breach of contract lawsuit in Manhattan Supreme Court against LeBoeuf. While the facts remain to be developed at trial, it appears that the thrust of Sheraton's claim is that the firm mishandled the case by allowing an inexperienced and poorly supervised attorney, Scot C. Gleason, to handle the litigation as lead trial counsel and that Gleason made serious errors in his conduct of the case. The case should be especially interesting to New York trial lawyers as a review of the standard of care needed in the handling of major litigation, and, especially, to large law firms, which may wish to assign major responsibilities to junior lawyers.

The Plaintiff's Burden of Proof

Although it is far too early to predict the outcome of Sheraton's claim, a review of the plaintiff's burden of proof in a legal malpractice case suggests that Sheraton has a difficult road ahead of it. "To establish a cause of action to recover damages for legal malpractice, a plaintiff must prove: (1) that the defendant attorney failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community, (2) proximate cause, (3) damages, and (4) that the plaintiff would have been successful in the underlying action had the attorney exercised due care," *Briggs v. Berkman*, 726 N.Y.S.2d 690, 691, (2nd Dept. 2001), quoting *Iannarone v. Gramer*, 682 N.Y.S.2d 84 (2nd Dept. 1998).

The causation requirement is a double-barreled one. As in any negligence case, the "but for" test requires the plaintiff to demonstrate that there is no other possible cause of its damages (see, e.g., *Cannistra v. O'Connor, McGuinness, Conte, Doyle, Oleson & Collins*, 728 N.Y.S. 2d 770 (2nd Dept. 1998)). But, in addition, a legal malpractice case "arising from an attorney's alleged negligence in preparing or conducting litigation" has the "distinctive feature" that the plaintiff must also prove the "case within a case," *McKenna v. Forsyth & Forsyth*, 720 N.Y.S.2d 654 (4th Dept. 2001). That is, the plaintiff must show that it would have achieved a more successful result in the underlying matter if the representation had not been negligent.

The Lawyer's Standard of Care

The standard of care required of New York attorneys is the exercise of "the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession," *Darby & Darby v. VSI International*,

Inc., 95 N.Y.2d 308, 313 (2000). “What constitutes ordinary skill and knowledge cannot be fixed with precision, but should be measured at the time of representation,” (*Id.*). “An attorney may be liable for his ignorance of the rules of practice, for his failure to comply with conditions precedent to suit, for his neglect to prosecute or defend an action, or for his failure to conduct adequate legal research,” *Shopsin v. Siben & Siben*, 702 N.Y.S.2d 610, 612 (2nd Dept. 2000), quoting *McCoy v. Tepper*, 690 N.Y.S.2d 678 (2nd Dept. 1999).

The issue, therefore, is not whether the attorney could have done a better job, but whether the attorney in fact departed from the requisite standard of care, see, *Estate of Nevelson v. Carro, Spanbock, Kater & Cuiffo*, 686 N.Y.S.2d 404 (1st Dept. 1999).

In some cases the lawyer’s negligence is transparent. When the attorney misses the statute of limitations, *McKenna v. Forsyth & Forsyth, supra*, or when his failure to appear results in a default judgment, *Grago v. Robertson*, 370 N.Y.S.2d 255 (3rd Dept. 1975), the negligence is apparent on its face, and the plaintiff will probably prevail if it can prove its case with-in the case.

Errors In Judgment

Here, Sheraton’s claims are based on mishandling of the trial itself and on poor trial tactics. These are likely to be much more difficult claims to sustain. In attempting to prove that trial counsel mishandled the actual nuts and bolts of the trial, Sheraton will be confronted with the rule that a mere error in judgment does not constitute malpractice, *Rosner v. Paley*, 65 N.Y.2d 736 (1985). Under this rule, the attorney is protected from the client’s “dissatisfaction with strategic choices,”

Bernstein v. Oppenheim & Co., 554 N.Y.S.2d 487, 490 (1st Dept. 1990) and “is not held to the rule of infallibility and is not liable for an honest mistake of judgment, where the proper course is open to reasonable doubt,” *id.* at 489. Indeed, an attorney may “take chances,” *Camarda v. Danziger, Bangser & Weiss*, 561 N.Y.S. 2d 233 (1st Dept. 1990), and “a purported malpractice claim that amounts only to a client’s criticism of counsel’s strategy may be dismissed,” *Dweck Law Firm v. Mann*, 727 N.Y.S.2d 58 (1st Dept. 2001).

In its complaint, Sheraton alleges numerous specific errors by trial counsel. These include: failure to introduce rebuttal expert testimony; withdrawal of an advice of counsel defense, following and caused by a failure to introduce available supporting evidence; failure to raise objections during the trial and to jury instructions; failure to prepare Sheraton witnesses adequately for depositions and trial; submission of inadequate post-trial briefs; and other critical errors.

In several New York cases, the courts have defined specific attorney errors at trial as mere errors in judgment and not as instances of malpractice. This category of cases includes: failure to reargue a motion for an award of expert fees, *Allen v. Potruch*, 723 N.Y.S.2d 101 (2nd Dept. 2001); failure to cite certain potential parties as defendants, *Iannacone v. Weidman*, 708 N.Y.S.2d 723 (2nd Dept. 2000); use of a non-board-certified physician as an expert witness, *Geller v. Harris*, 685 N.Y.S.2d 734 (1st Dept. 1999); failure to submit certain affidavits, *Rubinberg v. Walker*, 676 N.Y.S.2d 149 (1st. Dept. 1998); failure to call a particular witness, *L.I.C. Commercial Corp. v. Rosenthal*, 609 N.Y.S.2d 301 (2nd Dept. 1994); *Kenney v. Zimmerman*, 586 N.Y.S.2d 80 (4th Dept. 1992); and failure to object to a jury charge, *Sellers v. Jaekel, Manly Fleischmann, and Mugel*, 578 N.Y.S.2d 49 (4th Dept. 1991).

Some cases, however, have treated trial failures as rising to the level of malpractice. Thus, failure to comply with well-established disclosure rules was held to violate the requisite standard of care, *Kenney v. Zimmerman*, *supra*, as did the failure to introduce available documentary evidence in *Iocovello v. Weingrad & Weingrad*, 691 N.Y.S.2d 520 (1st Dept.1999).

Exactly where Sheraton's claims will fall in this spectrum of lawyer conduct is hard to say. But LeBoeuf was certainly not helped by the trial judge in the initial trial when he characterized the firm's performance as "kind of like not knowing where you parked your car ten minutes ago" (as alleged by Sheraton in their Complaint).

Malpractice In Decisions Over Staffing

An interesting, and apparently novel, alternative negligence theory urged by Sheraton is that LeBoeuf imprudently switched attorneys on the eve of trial. According to Sheraton, LeBoeuf partner John Kinzey (admitted to the bar in 1975) had been in charge of the case until just a few weeks before trial. At that point the firm allowed Gleason—who was not a partner at LeBoeuf and who allegedly had never previously tried a case to a jury on his own before—to handle the entire trial, with Kinzey sitting by as a passive observer. (The plaintiffs in the underlying case against Sheraton were represented in court by a partner, a counsel and a senior associate of Morgan Lewis & Bockius.)

Sheraton's claim would seem to require the introduction of evidence of the practices of large law firms in the staffing of major trials. Arguably, a court might find negligence whenever a client retains a large law firm in a multi-million dollar case and the firm assigns a relatively new, inexperienced associate to handle the trial. But here, the facts are less clear cut. LeBoeuf will undoubtedly rely on the fact that Gleason was a graduate of New York University School of Law and had been admitted to the bar for 14 years at the time of the trial.

Interestingly, in the malpractice case, LeBoeuf is represented by Stephen Fishbein of Shearman & Sterling. Fishbein has practiced at Shearman & Sterling since 1993 and became a partner in 1997, having previously served as Assistant U.S. Attorney for the Southern District of New York from 1988 to 1993. These facts may raise a tactical dilemma for LeBoeuf in the malpractice trial. As a client, LeBoeuf has selected a senior, highly experienced attorney to handle this major case. Sheraton is sure to point to LeBoeuf's more prudent choice of counsel when the law firm's own liability is on the line.

If accepted, Sheraton's argument that the wrong lawyer was assigned to the trial may actually prove to be more persuasive than picking at any individual errors made by Gleason. Each single error may be construed as a reasonable judgment at the time it was made and may not be sufficient to show the necessary causation of Sheraton's loss. But if the firm was negligent in assigning Gleason in the first place and in not properly supervising him, then everything that followed is arguably a result of that single act of negligence. Of course, whether Sheraton's theory of the case is bottomed on Gleason's errors or on LeBoeuf's choice of Gleason instead of Kinzey to try the case, Sheraton must nevertheless show that it would have fared better in the underlying case except for the actions of the LeBoeuf lawyers.

Sheraton's Breach of Contract Claim

Sheraton has also included a breach of contract claim against LeBoeuf, alleging the failure to provide competent legal services. A logical subsidiary element of this theory is that LeBoeuf breached its contract by assigning Gleason to handle virtually the entire trial. It does not appear from the complaint that there

was an express agreement between LeBoeuf and Sheraton regarding staffing of the case. However, one can imagine an implied agreement growing out of the relationship between lawyer and client during the earlier stages of the case. Indeed, Sheraton does allege that Kinzey was in charge of the litigation and had been designated as lead trial counsel from the beginning and that Sheraton's expectation was that Gleason would handle only the opening statement and a few witnesses. Sheraton claims that at the very least, Kinzey and LeBoeuf should have consulted it about this change in plans. Under this contract theory, Sheraton would still have to show the causal connection between the contractual breach and the damages it suffered. Sheraton will undoubtedly argue that LeBoeuf had the duty to assign the conduct of the trial to the more senior and experienced of the two available lawyers.

Implications for Lawyers and Law Firms

However it comes out, Sheraton's case against LeBoeuf offers several important lessons for New York lawyers and firms. First, it teaches the critical importance of communicating with clients at all stages of a representation and of reaching a clear agreement about who in the firm will be doing what for the client. (If the courts' current proposal for mandatory engagement letters is adopted, the engagement letter may well offer the best opportunity to cover these issues.) [See, NYPRR, August 2001, page 1 et. seq.] Second, when law firms assign associates and other junior lawyers to handle client matters, there should be a reasonable standard and judgment of competence (see DR 6-101) and the lawyers must be properly supervised (see DR 1-104). Finally, if Sheraton prevails in its claims against LeBoeuf, the case may have a serious impact on the manner in which large firms assign work to junior lawyers and on the training of those lawyers to gain the experience they need to become senior lawyers, especially in the conduct of litigation.

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