

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARYLIN G. DIAMOND

PART 48

Justice

DAVID J. HILL,

Plaintiff,

- v -

SCOTT GUTTERSON,

Defendant.

INDEX NO. 603899/07

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

FILED
MAY 21 2008
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: [] Yes [X] No

Upon the foregoing papers, it is ordered that: This is a legal malpractice action. In 2003, the plaintiff was unable to pay his federal and state income taxes. He retained the defendant in order to represent him in connection with the tax collection efforts of the IRS and the New York State Department of Taxation and Finance. He claims that the defendant thereafter ignored phone calls made to the defendant by the tax authorities and that, as a result, his wages were garnished and his property levied against in order to satisfy his tax liabilities. The plaintiff also alleges that the defendant advised him that he should retain bankruptcy counsel to file a chapter 7 bankruptcy petition discharging his debts to the taxing authorities for the years 2003 and 2004 without advising him that if the petition were not filed at the proper time, his liabilities would not be discharged. According to the complaint, the bankruptcy attorney whom plaintiff then retained filed his bankruptcy petition, but did so a few days too early to entitle the plaintiff to discharge his tax liabilities. As a result, plaintiff's tax liabilities were not discharged. The complaint alleges that (1) the defendant committed legal malpractice by failing to respond to the telephone calls of the taxing authorities and that but for this malpractice, plaintiff's wages would not have been garnished and his property levied against, and (2) the defendant committed legal malpractice by failing to advise him that his tax liabilities would not be discharged in bankruptcy court unless his petition was filed at the proper time and that but for this malpractice, plaintiff's liabilities would have been discharged. In addition, the complaint suggests that the defendant is responsible for the fact that plaintiff has been unable to obtain the sort of lucrative employment to which he was accustomed because of the stigma which has attached to his having filed a bankruptcy petition.

The defendant has now moved to dismiss the petition, pursuant to CPLR 3211(a), on the ground, *inter alia*, that the complaint fails to state a cause of action. The motion should be granted.

First, although the plaintiff alleges that his wages would not have been garnished and his property levied against if the defendant had responded to the taxing authorities' phone calls, he admits that he owed both federal and state taxes. Indeed, he has not suggested that the monies which the authorities obtained through such garnishment and levy were not used to satisfy his actual tax obligations. As such, the plaintiff has failed to allege any facts showing that he suffered any damages by reason of the defendant's alleged malpractice. Notably, nowhere in the complaint does not the plaintiff seek the return of the legal fees which he paid to the defendant. Rather, the complaint only seeks damages allegedly arising from the garnishment of his wages and the levies against his property for the collection of taxes which he admittedly owed. Under the circumstances, this claim fails to state a cause of action.

Second, the fact that the plaintiff's bankruptcy petition was allegedly filed earlier than it should have been filed in order for his tax liabilities to be discharged was entirely the responsibility of the plaintiff's bankruptcy attorney. Clearly, the petition could have been filed at the correct time since doing so would have entailed waiting only a few days. The defendant hardly committed malpractice by failing to advise the plaintiff that his tax liabilities would not be discharged if his bankruptcy attorney thereafter filed the petition at the wrong time.

Finally, although the complaint, as noted previously, alleges that the plaintiff has lost lucrative offers of employment because of the stigma that has attached to his having filed a bankruptcy petition, it fails to allege any facts indicating that the defendant somehow committed legal malpractice by advising the plaintiff to chart such a course. The court is therefore persuaded that the complaint fails to state a cause of action and must be dismissed.

Accordingly, the defendant's motion to dismiss is granted and the complaint is hereby dismissed in its entirety.

The Clerk Shall Enter Judgment Herein

Dated: 5/14/08



MARYLIN G. DIAMOND, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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