

Successor Legal Counsel Not a “Joint Tortfeasor” Under New Jersey’s Joint Tortfeasors Contribution Law

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D’Elia v. Law, 2019 N.J.Super.Unpub.LEXIS 1235 (N.J. App. Div. May 30, 2019)

Brief Summary

An attorney who failed to file a demand for arbitration on behalf of a client within the applicable statute of limitations period sought contribution from the client’s subsequent legal counsel pursuant to New Jersey’s Joint Tortfeasors Contribution Law. The appellate court affirmed the statute did not apply because the attorneys were not joint tortfeasors. The attorneys were not liable for the same injury, and there was no common liability between the attorneys: the acts alleged to have been committed by successor counsel were separate from and occurred after those undertaken by prior counsel, and after plaintiff’s cause of action for malpractice against his prior counsel accrued.

Complete Summary

Underlying Action

In 2009, plaintiff hired attorney D’Elia to represent him against his former employer for breach of his employment agreement. The employment agreement provided that disputes were to be resolved by arbitration, and the agreement was governed by Delaware law.

In August 2012, plaintiff discharged D’Elia and retained attorney Kelly to represent him. In September 2012, Kelly filed a demand for arbitration on plaintiff’s behalf with the American Arbitration Association (“AAA”). Plaintiff’s former employer asserted that plaintiff’s claims were time-barred, and the parties agreed to have the arbitrator decide the question of whether the claims were time-barred by the applicable statute of limitation. The AAA arbitrator concluded that under Delaware law, a three year statute of limitations applied to plaintiff’s claims. The

arbitrator then dismissed plaintiff's claims on the ground that he failed to demand arbitration before the statute of limitations expired.

Malpractice Action

In June 2013, plaintiff filed a malpractice action against D'Elia alleging that he committed malpractice by failing to demand arbitration within the three year statute of limitations. In the meantime, plaintiff consented to D'Elia filing a petition in the U.S. District Court for the District of New Jersey seeking vacatur of the arbitrator's decision dismissing plaintiff's claims. D'Elia argued, among other things, that in the absence of an express provision in an agreement to the contrary, Pennsylvania law on choice of law and the statute of limitations governed the employment agreement. Because Pennsylvania allowed four years to demand arbitration after termination of employment, plaintiff's demand for arbitration was timely.

In November 2016, the district court disagreed, finding that the agreement clearly indicated that Delaware law applied, and that was the law that the arbitrator applied. Accordingly, the motion to vacate the award was denied and the petition was dismissed.

In December 2016, D'Elia commenced an action against Kelly pursuant to New Jersey's Joint Tortfeasors Contribution Law [N.J.S.A. 2A:53A-3]. D'Elia sought 100% contribution from Kelly in the event D'Elia was found liable and had to pay damages to plaintiff. D'Elia claimed that Kelly committed malpractice by failing to "properly brief" the arbitrator on the statute of limitations issue, and thereby, failing to obtain a proper ruling on the statute of limitations.

Kelly filed a motion to dismiss D'Elia's complaint for failure to state a cause of action. The trial court dismissed the complaint, finding that D'Elia did not have a claim for contribution because the acts of legal malpractice were committed before any acts by Kelly. D'Elia appealed.

The trial court's decision was affirmed. The appellate court determined that the Joint Tortfeasors Contribution Law did not apply here because Kelly and D'Elia were not joint tortfeasors. "[J]oint tortfeasors means two or more persons jointly or severally liable in tort for the same injury. . . . Joint tortfeasors must share 'joint liability and not joint common or concurrent negligence.' . . . The liability must be common and arise at the same time plaintiff's cause of action accrued." [Internal citations omitted]. "It is common liability at the time of the accrual of plaintiff's cause of action that is the sine qua non of defendant's contribution right."

Consequently, joint liability could only stem from a single injury—separate acts of malpractice cannot constitute "joint liability" for the imposition of contribution under the statute. The acts of malpractice D'Elia claimed Kelly committed were separate from and occurred after the ones D'Elia committed. "Kelly's alleged act of malpractice was a 'separate tort, severable as to time and breaching [a] different duty.'" D'Elia's and Kelly's liability were not common and did not arise at the same time plaintiff's action against D'Elia accrued. Accordingly, the contribution claim was properly dismissed because D'Elia and Kelly were not liable for the same injury and thus were not joint tortfeasors.

Significance of Decision

Successor counsel is liable as a joint tortfeasor in a malpractice action only where there is common liability at the time of the accrual of a client's cause of action. Actions taken by successor counsel after plaintiff's injury by prior counsel's conduct constitute separate acts for purposes of malpractice and do not constitute common liability. Consequently, they are not "joint tortfeasors." Other courts have reached the same conclusion. *See, e.g., Roberts v. Heilgeist*, 124 Ill.App.3d 1082 (1984) (no contribution from successor counsel allowed because plaintiff did not suffer a common injury which each attorney's acts combined to bring about, and for which each is subject to liability in tort).

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