For Opinion See 831 N.Y.S.2d 507

Supreme Court, Appellate Division, Second Department, New York.
ENERGY BRANDS, INC., Plaintiff-Appellant,
v.
UTICA MUTUAL INSURANCE COMPANY, Hermitage Insurance Company, Defendants, andJaspan Schlesinger Hoffman, LLP, Defendant-Respondent.
No. 2006-06812.
September 5, 2006.

Reply Brief for Plaintiff-Appellant

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***i** *TABLE OF CONTENTS*

***ii** *TABLE OF AUTHORITIES*

STATE CASES

OTHER AUTHORITY CITED

***1** *THE WASSERMAN AFFIDAVIT SHOULD NOT BE DISREGARDED*

Defendant-Respondent Jaspan Schlesinger Hoffman LLP ("Respondent") argues in its brief that the affidavit of Bennett J. Wasserman (the "Wasserman affidavit") submitted by plaintiff-appellant Energy Brands, Inc. ("Energy Brands" or "Appellant") should be disregarded. (Res. Br. at 12)

Appellant respectfully submits that it is not necessary for the Court to address whether the Wasserman Affidavit should be admitted into evidence because it is immaterial to this appeal.[FN1] The Wasserman affidavit provides support to the Appellant's argument that it has a meritorious cause of action against the Respondent for legal malpractice and that there are valid grounds to vacate the default, not to the question not currently before the Court of whether Mr. Wasserman should be permitted to testify at trial. *See, Storchevoy v. Blinderman,* 303 A.D.2d 672, 673, 757 N.Y.S.2d 82, 83 (2d Dep't 2003) (plaintiff's expert affidavit was sufficient to demonstrate a meritorious cause of action). While the Wasserman Affidavit supports Appellant's position, ***2** Appellant's malpractice claim does not in any way hinge on the Wasserman Affidavit, but rather on the factual record that it merely collated. More importantly, the lower court did not accept the argument of Respondent below to exclude the Wasserman Affidavit; the issue was not addressed by the court in its December 21, 2005 Order. (R.3)

FN1. Appellant is also compelled to address Respondent's summary of the case's appellate procedural history in its brief. Respondent suggests that although the notice of appeal was dated January 23, 2006, it was not filed with the Queens County Clerk until July 10, 2006. (Res. Br. 7) The notice of appeal was in fact delivered to the Queens County Clerk and served on Respondent on January 23, 2006. The Queens County Clerk misplaced the notice of appeal and it was never filed internally. Upon discovery of the Clerk's error in July, Appellant informed the Clerk of this Court and, on the Clerk's instructions, immediately re-filed the Notice of Appeal (which was still timely), also advising Respondent of the Queens County Clerk's error.

If, however, the Court elects to consider Respondent's argument, the Wasserman Affidavit should not be disregarded because, as mentioned, the lower court accepted it - nay, invited it; it is part of the Record in this case; and, critically, it is based entirely on facts that were placed before the court below, in admissible form, from the Record. In this sense it is, as an evidentiary matter, no different from the affidavit of Respondent's counsel submitted by Respondent in opposition to the motion. The only distinction is Mr. Wasserman's legal argumentation as to the standard of care, which is not evidence, and Mr. Wasserman's qualifications as an expert, which Respondent has never questioned. (Indeed, despite the opportunity to do so on the motion below, Respondent did not even attempt to rebut Mr. Wasserman's affidavit by submitting an opposing expert's opinion).

Furthermore, Respondent's argument that the Wasserman Affidavit was filed after the Respondent moved for summary judgment and the note of issue was filed, and should therefore be precluded, is not dispositive where, as here, ***3** there is no surprise as to the theory of liability regarding which the expert is to testify. N.Y. C.P.L.R. §3101(d)(1)(i). Thus, in *Legari v. Lawson Co. Ltd.*, 189 A.D.2d 1089, 1091, 593 N.Y.S.2d 336, 338 (3d Dep't 1993), the plaintiff's expert affidavit, which elaborated on and was consistent with plaintiff's claims, was admitted, even though it was submitted after the note of issue was filed and defendants moved for summary judgment. *See also*, *Grogan v. Mercury Paint Corp.*, 10 Misc.3d 1074(A), 2005 WL 3691525 at * (Sup. Ct. 2005) (expert witness affidavit admissible even after note of issue filed).

In addition, the Wasserman Affidavit is not, as the Respondent asserts (Res. Br. at 18), "new evidence"; rather, it is a compilation of facts already of record plus legal arguments and analysis, and is thus consistent with the rule of *Broida v. Bancroft*, 103 A.D.2d 88, 93 (2d Dep't 1984) requiring that appellate review be limited to the record and that new facts not be injected at the appellate level.

No less significantly, Appellant secured and submitted the Wasserman Affidavit in response to the lower court's May 26, 2005 Order (R. 10), which based its ruling, in part, on the fact that Energy Brands did not submit an affidavit from a party with knowledge of the facts showing that Appellant has a meritorious malpractice claim. The Supreme Court then, in its May 26, 2005 Order, granted Appellant leave to resubmit the motion, i.e., to file just such an ***4** affidavit. Respondent seems to suggest that if the same exact affidavit, based entirely on citations to depositions and authenticated documents which constitute first-hand admissible evidence, had been prepared and sworn to by counsel for Appellant, it would have been unobjectionable - but that the introduction of a presumptive increment of objectivity and expertise[FN2] made the record facts in the Wasserman affidavit suddenly objectionable. Ultimately it is those facts, put before the court below in admissible form (sworn deposition testimony and documents authenticated at deposition), that form the basis of Appellant's case, and its opposition to summary judgment. Accordingly, Respondent will not suffer any prejudice if the Court considers the Wasserman Affidavit, and in-

deed having failed to appeal from or otherwise object to the Court's May 26, 2005 Order which granted Energy Brands leave to make the submission now complained of, is foreclosed from arguing this point on appeal.

> FN2. Respondent seems to want this both ways. On the one hand it objects to the introduction of a "new witness" while it relies solely on a largely hearsay affidavit of counsel. Respondent then insinuates that Mr. Wasserman's affidavit is not to be trusted, observing no fewer than three times that Mr. Wasserman is or was an employee of Appellant's law firm (Res. Br. at 6, 12, 18). But Mr. Wasserman is *not*, and never has been, Appellant's lawyer. He is of counsel to Stryker Tams & Dill LLP, which does not represent any party in this case. As his affidavit explicitly states, he was retained by Appellant's counsel as an expert in this case based on his expertise in legal malpractice claims, not as an attorney for Appellant. (R.43)

***5** *THE RECORD DEMONSTRATES THAT* MS. TUFARIELLO ADVISED ENERGY BRANDS REGARDING INSURANCE MATTERS

Respondent asserts that Ms. Tufariello advised Energy Brands and Mr. Bikoff that she could not advise him as to insurance coverage issues. (Res. Br. at 9) This would be a critical fact if there were proof of it in the Record, but Respondent does not cite to the Record to support its assertion, and for good reason: Not only is there no basis in the Record for such an assertion, but, to the contrary, Ms. Tufariello plainly admitted under oath that she did in fact routinely advise Energy Brands about insurance issues, meeting with Mr. Bikoff to discuss his intellectual property portfolio as well as the insurance policies in place to protect that portfolio. (R.482-485) Ms. Tufariello also testified that is was her practice to immediately forward any claims to her client's insurance company because she wanted to avoid issues of notice. (R.460) It is noteworthy that, on the motion to vacate below, Ms. Tufariello did not submit an affidavit that in any way limited or qualified, much less retracted, this damning testimony.

Respondent also argues that "there is no evidence that plaintiff specifically asked Jaspan to contact the insurance carrier for them, or agreed to retain them for such services, or even forwarded them a copy of the full policy for this express purpose." (Res. Br. at 14) This assertion is plainly erroneous. ***6** As set forth in the Record, Ms. Tufariello had indeed reviewed Energy Brands' insurance policies (R.394-397) and led Mr. Bikoff to believe that she was going to contact the Appellant's insurance carriers regarding the Global Brands claim (R.400). Further, Ms. Tufariello testified that she reviewed the Appellant's intellectual property and insurance policies on at least a quarterly basis and advised Energy Brands' concerning these matters. (R.482-485)

The record here is clear that, far from being entitled to summary judgment, Respondent has by its own words made out a powerful case for the imposition of liability for professional malpractice. In light of the applicable law and the public interest, adoption of the suggestion by Respondent that its duties to its client were understood by all to be narrowly limited - in direct contradiction to the sworn testimony of the attorney herself, much less her client - and that the question, on this record, is not even worthy of submission to a fact-finder, would be a severe miscarriage of justice. It would also render a disservice to clients, who depend on the expertise and diligence of their attorneys in those matters where, as here, their attorneys suggest or even explicitly represent that such reliance is justified.

***7** *CONCLUSION*

For the foregoing reasons, the Wasserman Affidavit should not be disregarded, the Supreme Court's December 21, 2005, Order should be reversed, the motion by Appellant to vacate the default judgment granted, and the cause herein placed on the trial cal-

endar in the Supreme Court.

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