

**Empire Purveyors, Inc. v Brief Justice Carmen &
Kleiman, LLP**

2011 NY Slip Op 31420(U)

May 31, 2011

Sup Ct, NY County

Docket Number: 110909/08

Judge: Jane S. Solomon

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

PRESENT:

PART _____

Index Number : 110909/2008

EMPIRE PURVEYORS, INC.

vs

BRIEF JUSTICE CARMEN &

Sequence Number : 011

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE

2/17/11

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits *+ Motion of V. Mahan*

Replying Affidavits _____

PAPERS NUMBERED

1-4

5-9

10-11

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is denied together with motion on in accordance with the enclosed memorandum decision and order.

N.B. -- pre-trial conference scheduled for 8/4/11 @ 2 PM

FILED

JUN 01 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: _____

5/31/11

JANE S. SOLOMON
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X
EMPIRE PURVEYORS, INC., THE ESTATE OF
ANTONIO PINTO, TONI PINTO, and
RICHARD PINTO

Index No. 110909/08

Plaintiffs,

DECISION and ORDER

-against-

BRIEF JUSTICE CARMEN & KLEIMAN, LLP,
ROY JUSTICE, ESQ., WAYNE S. COOK, JR., ESQ,
and WINDELS MARX LANE & MITTENDORF, LLP,

Defendants.

-----X
JANE S. SOLOMON, J.S.C.:

Motion sequence Nos. 011 and 012 are consolidated for disposition. In motion sequence No. 011, defendant Wayne Cook, Jr., Esq. moves, pursuant to CPLR 3212 (a), for summary judgment dismissing the complaint and the cross claims asserted by Roy Justice and Brief Justice Carmen & Kleiman (the Firm). In motion sequence No. 012, the Firm and Justice move, pursuant to CPLR 3212 (a), for summary judgment dismissing the complaint. Plaintiffs cross-move for leave to file an amended complaint adding a cause of action alleging violation of Judiciary Law § 487. They have discontinued their claims against defendant Windels Marx Lane & Mittendorf (Windels Marx). Plaintiff Empire Purveyors, Inc. (Empire) is a meat store that was owned by the late Antonio Pinto. Plaintiffs Toni Pinto and her brother Richard are the current co-owners of Empire.

This is a legal malpractice case that, at present, alleges malpractice and breach of fiduciary duty. The Firm's retainer agreement was solely with Empire. The Pintos contend that the

Firm's failure to enter into a retainer agreement with them, and with plaintiff estate, was the result of a mistake on the part of the Firm. Be that as it may, the Pintos were free to demand a retainer agreement naming all of the plaintiffs herein. They do not contend that they did so. Accordingly, Cook's motion regarding plaintiffs other than Empire must be granted.

Cook admitted the following at his deposition. On or about October 3, 2003, Empire retained the Firm to assist it in recovering the balance allegedly due on two promissory notes signed by Eileen Weinberg, the defendant in the underlying case. The notes guaranteed repayment of two loans, one in the amount of \$40,000, and the other in the amount of \$80,000, that the late Mr. Pinto had extended to Ms. Weinberg. The matter was assigned to Cook, who at that time was an associate at the Firm. In approximately November 2005, Cook left the Firm and joined Windels Marx. From some time in October 2003 through October 2005, Cook falsely, and repeatedly, represented to plaintiffs that he had commenced an action and had obtained a judgment against Ms. Weinberg, and that he was engaged in discovery and enforcement proceedings to collect on that judgment. So as to provide "corroborative detail intended to give artistic verisimilitude" to his fabrication (Gilbert and Sullivan, *The Mikado*, Act 2), Cook presented the Pintos with a purported subpoena duces tecum to take the deposition of Ms. Weinberg, as a judgment debtor, as well as a notice of motion seeking sanctions for contempt, and other fake documents. In fact, Cook had lost

the promissory notes signed by Ms. Weinberg, which plaintiffs had given to the Firm, and he had not commenced any action on behalf of Empire. Indeed, he did not even purchase an index number. He now seeks to escape liability for his negligence, and for his lies, by arguing that: (i) the plaintiffs other than Empire have no claim; (ii) plaintiffs suffered no damages; (iii) plaintiffs' successor counsel had sufficient opportunity to protect their rights; and (iv) plaintiffs' claims are barred by collateral estoppel and by judicial estoppel.

After Cook left the Firm, the Firm realized that the Empire file was not in its offices, and that no one at the Firm knew what was in it. After multiple requests of Cook, in mid-December 2005, he provided a file that he had deliberately removed and kept in his garage. See Gleason Aff., Exh. O, at 32. The Firm partners noticed that the file appeared to be incomplete, and the Pintos, who were given a copy of the file, contend that none of the original documents that they had provided to Cook was in it. Specifically, Toni Pinto testified at her deposition that the missing documents included the original promissory notes and attached confessions of judgment, as well as three notes handwritten by her father, each of which was signed or initialed by Ms. Weinberg. In one of these notes, Ms. Weinberg acknowledged that she was commencing weekly payments of \$200. In another, she acknowledged that her payments were being reduced to \$100 per week. Ms. Pinto testified that her recollection was that the first of these notes expressly referred to the

promissory notes, but that it was possible that they had expressly referred to the underlying loans, and that the second note obviously referred to the first one. The third note stated that, in exchange for an additional loan of \$3,000, Ms. Weinberg was depositing certain rings with Mr. Pinto, which she would recover when she paid that loan.

In late December 2005, the Pintos retained Alfred Marks and Day Berry & Howard LLP, subsequently replaced by plaintiff's counsel herein, to prosecute their case against Ms. Weinberg. Because the six-year limitations period applicable to their action (CPLR 213 [2]) had long run with respect to the promissory notes, plaintiffs could prevail only if they showed that the statute of limitations had been tolled, either by a signed acknowledgment of an existing debt which contains nothing inconsistent with an intention on the part of the debtor to pay it (General Obligations Law § 17-101; *Banco Do Brasil S.A. v State of Antigua and Barbuda*, 268 AD2d 75 [1st Dept 2000]), or by evidence of partial payments evincing an unequivocal intention to satisfy an acknowledged debt. *Chiu v 1-9 Bond St. Realty, Inc.*, 79 AD3d 416 (1st Dept 2010).

By decision and order, dated May 12, 2008, the court (Freedman, J.) denied Ms. Weinberg's motion for summary judgment, on the grounds that, while there was no evidence that Ms. Weinberg had reaffirmed her debt, plaintiffs had presented evidence that Ms. Weinberg had made partial payment on a debt, in the form of paying bills that Empire invoiced for purchases of

meat by Ms. Weinberg's then-restaurant, which included a sum over and above the charge for the meat. At the conclusion of the bench trial, however, the court ruled that Ms. Weinberg's payment of those inflated bills was not clearly referable to the promissory notes, and accordingly, that plaintiffs had failed to show that the statute of limitations had been tolled. On appeal, the Appellate Division, First Department, affirmed the trial court's judgment. *Empire Purveyors, Inc. v Weinberg*, 66 AD3d 508 (1st Dept 2009).

Plaintiffs contend that had the first two of the three handwritten notes been available, they would have constituted proof of Ms. Weinberg's acknowledgment of her debt. Cook takes the position that the purportedly missing documents described by Ms. Pinto are "a fabrication by Plaintiffs upon the commencement of the legal malpractice case." Cook's Reply Mem., at 2. Although Cook testified at his deposition that he did not specifically recall what was contained in the file that he took home (see Fischman Aff., Exh.O, at 31), he now states in his affidavit that the only documents that he lost were the original promissory notes; he was never in possession of the written notes; and neither Mr. Marx, nor Mr. Fischman, contacted him during the underlying trial to ask for them. Even were the first two of these statements credited, despite Cook's earlier deposition testimony, plaintiffs have shown that there is a disputed issue of fact as to the existence of the handwritten notes, and their delivery to Cook. Accordingly, they have made a

showing, sufficient to withstand Cook's motion for summary judgment, that, but for Cook's failure to return the notes to them, they would have prevailed in the underlying action.

Cook also argues, incorrectly, that the undisputed fact that plaintiffs did not refer to the handwritten notes in the underlying action, or seek to depose him as to their whereabouts, or question Ms. Weinberg about them, shows that they never existed. These facts might be evidence that plaintiffs are not credible, but that is not grounds for summary judgment.

Citing *Golden v Cascione, Chechanover & Purcigliotti* (286 AD2d 281 [1st Dept 2001]), Cook argues that any negligence on his part could not have been the proximate cause of plaintiffs' damages, because plaintiffs' lawyers in the underlying action had an opportunity to protect plaintiffs' rights. Any such opportunity was hollow, if, as plaintiffs contend, Cook lost or destroyed evidence that was crucial to their case.

Cook's collateral estoppel argument is that the trial court "determined that Plaintiffs did not have sufficient proof that Ms. Weinberg's payments were clearly referable to the promissory notes, and therefore, Attorney Cook was not the proximate cause of any loss sustained by Plaintiffs." Mem. of Law, at 16. Plaintiffs' claim, however, is that Cook failed to return to them documents that would have established their claim. Cook's conduct was not at issue in that action, and their loss there does not estop them from claiming that they would have prevailed but for Cook's loss of additional proof.

Cook's argument that plaintiffs are judicially estopped from arguing that the written notes existed, rests upon Ms. Pinto's answers to two questions asked at her deposition in the underlying action. The first of those asked whether she could think of any documents "relating to payments made on [one of the two promissory notes]," that were no longer in her possession. Ms. Pinto replied, "I don't think so." Bruno Aff., Exh. O, at 27. The second question asked about communications between Ms. Pinto and Ms. Weinberg. Cook's argument fails even if plaintiffs' position here is inconsistent with Ms. Pinto's earlier testimony, because the doctrine of judicial estoppel bars a party from taking a position that is inconsistent with a position, on the basis of which the party prevailed in a prior proceeding. "The doctrine of judicial estoppel holds that a party successfully taking a position in one proceeding may not thereafter assume an inconsistent position in a subsequent proceeding. . . . However, judicial estoppel may not be asserted as a defense unless it can be shown that the party against whom the estoppel is sought procured a judgment in its favor as a result of the inconsistent position taken in the prior proceeding." *Kalikow 78/79 Co. v State of New York*, 174 AD2d 7, 11 (1st Dept 1992) (citations omitted); accord *Bluebird Partners, L.P. v First Fid. Bank, N.A.*, 261 AD2d 200 (1st Dept 1999). Plaintiffs did not prevail in the underlying action.

Cook argues that, even had plaintiffs prevailed in the underlying case, they would have been unable to collect on a

judgment, because of Ms. Weinberg's current financial difficulties. A judgment remains enforceable for 20 years. Cook, who acknowledges that he has the burden of proving uncollectability, has not shown that Ms. Weinberg, or her eventual estate, would have remained unable to pay a judgment.

Plaintiffs' claim alleging breach of fiduciary duty alleges that Cook provided Ms. Weinberg with confidential documents and information pertaining to plaintiffs' case against her. Any such acts by Cook would constitute malpractice. In addition, the damages that plaintiffs seek in the second cause of action are identical to the damages that they seek in the first cause of action. Accordingly, the second cause of action should be dismissed as redundant to the first.

As in the related case (*Empire Purveyors, Inc. v Brief Justice Carmen & Kleiman, LLP*, NY County index No. 114499/07), the Firm's arguments for dismissal of the complaint are identical to Cook's. Accordingly, they require no independent discussion.

Justice and the Firm do not oppose that part of Cook's motion that seeks summary judgment dismissing their cross claims for common-law indemnity and contribution. Accordingly those claims are dismissed.

Finally, plaintiffs' motion to amend the complaint is denied because Judiciary Law § 487 is solely applicable to deceit that a lawyer practices in the course of a pending judicial proceeding. *Jacobs v Kay*, 50 AD3d 526 (1st Dept 2008). All of the deceit that is alleged here occurred prior to the commencement of the

underlying action.

Accordingly, it hereby is

ORDERED that, in motion sequence No. 011, Cook's motion for summary judgment is granted to the extent of dismissing the complaint of The Estate of Antonio Pinto, Toni Pinto, and Richard Pinto, as plaintiffs, and to the extent of dismissing the second cause of action and the cross claims against Cook are dismissed, and the motion otherwise is denied; and it further is

ORDERED that the cross-motion to amend the complaint is denied; and it further is

ORDERED that, in motion 012, the Firm's and Justice's motion for summary judgment is granted to the extent of dismissing the complaint of The Estate of Antonio Pinto, Toni Pinto, and Richard Pinto, as plaintiffs, and to the extent of dismissing the second cause of action, and the motion otherwise is denied; and it further is

ORDERED that counsel shall appear in Part 55 for a pre-trial conference on August 1, 2011, at 2 PM.

Dated: May 31, 2011

ENTER:



J.S.C.

FILED
JUN 01 2011
NEW YORK
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