

Strumwasser v Zeiderman

2012 NY Slip Op 30772(U)

March 15, 2012

Supreme Court, New York County

Docket Number: 113524/2010

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon Joan A. Madden
Justice

PART 11

Index Number : 113524/2010
STRUMWASSER, STUART
vs.
ZEIDERMAN, ESQ., LISA
SEQUENCE NUMBER : 003
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the attached Memorandum DECISION + Order.

FILED

MAR 28 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: March 15, 2012

[Signature], J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
STUART STRUMWASSER,

Plaintiff,

-against-

LISA ZEIDERMAN, ESQ., MARTIN BLAUSTEIN,
ABV/CPA, MICHAEL MCLAUGHLIN, CPA,
JOHNSON & COHEN, LLP, EISNERAMPER, LLP
(FORMERLY KNOWN AS AMPER, POLITZINER &
MATTIA ACCOUNTING),

Defendants.
-----X

JOAN A. MADDEN, J.:

Index No.: 113524/10

FILED

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NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff moves for an order granting reargument of the court's decision and order dated October 18, 2011 ("the original decision") to the extent that it dismissed his claims based on a violation of Judiciary Law § 487 against defendants Lisa Zeiderman Esq. (Zeiderman) and Johnson and Cohen, LLP (J&C) (together, the J&C). J&C opposes the motion.

This action arises out of the valuation of a business by the name of Snow Beverages between plaintiff and his former wife. Plaintiff started the business in March 2005, about a year and a half before his wife commenced divorce proceedings in which J&C represented her. Plaintiff maintains that at the time that the divorce proceedings were commenced, Snow Beverages was operating at a loss, and that an appraisal of the company's jointly held stock performed by Richard Friedman (Friedman), an appraiser appointed by the court in the divorce proceeding, indicated that the stock was worthless. Subsequently, according to the complaint, J&C was retained by plaintiff's wife, and when plaintiff refused J&C's offer to settle the divorce

proceeding on terms which sought no compensation for the Snow Beverages stock, the plaintiff filed a motion to be relieved of the cost of the appraisal. In opposition to plaintiff's motion, J&C submitted a copy of the Snow Beverages business plan, which plaintiff alleges purposely misled the court by removing one page from that document. The page that was allegedly missing reads:

••Seed Investment to Date: \$337K

*Total Capital Raise: \$1.85MM

*Funds still needed: \$1MM

*Use of Funds (Summary Totals in Year One for Major Item):

-Salaries (executive, salespeople and consultants): \$528K

-Advertising/Consumer-Marketing in NYC, Dallas and Boston):
\$350K

-Sampling Demonstrations in various markets at major retailers: \$325K

-General Marketing/Promotion/Free Goods/Etc.: \$218K

*Liquidity Events:

It is the company's intention to attempt to create liquidity for investors within five years through one of two possible scenarios: sell the business to a larger food or beverage industry player; do a public offering of stock.

This document is for information only and is not an offering for sale of any securities of the company. Information disclosed herein should be considered proprietary and confidential. The document is the property of Snow Beverages and may not be disclosed, distributed, or reproduced without the express written permission of Snow Beverages."

In this action, plaintiff alleges that it was deceitful for J&C in the divorce action to remove this page and thus imply that the financial projections were anything other than informational, and bases the allegation of violation of the Judiciary Law on this conduct. Plaintiff also alleges that in the divorce action, it was deceitful for J&C to represent that Snow Beverages was profitable since, at the time of the divorce proceedings, it was losing money.

J&C counters that the issue of the value of the jointly-held stock in Snow Beverages was an issue for consideration in the distribution of marital assets. J&C also argues that its

[* 4]

presentation of plaintiff's own business plan was to oppose plaintiff's motion to be relieved of the cost of the court-appointed appraisal, and that the presentation of the business plan was to provide evidence to the court that plaintiff had ascribed a value to Snow Beverages' stock. J&C further maintains that it is irrelevant whether the business plan was designed for informational or investment purposes; its import was to demonstrate plaintiff's own concept of the value of the stock.

Plaintiff subsequently decided to settle the divorce action because of what he characterizes as the "leverage unethically gained" by J&C. *Complaint* ¶¶ 81-83. Plaintiff further alleges that his divorce attorney advised him that the issue of the valuation of a pre-revenue entity would be complicated and costly, and plaintiff alleges that his decision to settle was based on his financial inability to afford the cost of a trial. *Id.* ¶¶ 86-88.

The complaint in this action asserts, inter alia, causes of action against J&C for alleged violations of Judiciary Law § 487. In its original decision, the court granted J&C's motion to dismiss the complaint against it, including the claims for violations of Judiciary Law § 487, the subject of this motion. The court based its dismissal of the Judiciary Law § 487 claims on plaintiff's failure "to articulate or allege a chronic or extreme pattern of behavior on the part of J&C." Cohen v Law Offices of Leonard & Robert Shapiro, 18 AD3d 219, 220 (1st Dept 2005). See also, Markard v Bloom, 4 AD3d 128 (1st Dept 2004); Havell v Islam, 292 AD2d 210 (1st Dept 2002) (original decision, at 14).

Plaintiff now moves for reargument, asserting that a violation of Judiciary Law § 487 does not require a showing of a chronic or extreme pattern of behavior but only an intentional deceit or collusion by an attorney. J&C opposes the motion, citing case law in the Appellate

Division, First Department supporting the court's interpretation of Judiciary Law § 487 and argues that, in any event, no deceit of the kind required by Judiciary Law § 487 has been shown.

A motion for reargument is addressed to the discretion of the court, and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. See, Foley v Roche, 68 AD2d 558, 567 (1st Dept 1979). Plaintiff's motion to reargue is granted to the extent of considering whether the court correctly dismissed the claims under Judiciary Law § 487 and, upon reargument, the court adheres to its original decision.

Judiciary Law § 487 provides that :

An attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,
2. Wilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

Although the statute does not expressly require a pattern of chronic delinquency, in certain instances, the Appellate Division, First Department, has made it a prerequisite to recovery. See Dinhofer v. Medical Liability Mut. Ins. Co., 92 AD3d 480 (1st Dept 2012); Nason v. Fisher, 36 AD3d 486 (1st Dept 2007), but see, Scarborough v Napoli, Kaiser & Bern, LLP, 63 AD3d 1531 (4th Dept 2009); Izko Sportswear Co., Inc. v Flaum, 25 AD3d 534 (2d Dept

2006); Amalfitano v. Rosenberg, 533 F3d 117 (2d Cir 2008).¹

Here, plaintiff makes no claim of chronic delinquency or a pattern of misconduct. Moreover, plaintiff's claims under Judiciary Law § 487 fail to allege the type of intentional, egregious conduct required to permit recovery under the statute. Specifically, plaintiff's assertions that J&C did not include a page of plaintiff's own business plan stating that the plan was informational purposes in connection with a motion by plaintiff to be relieved of an appraiser's fee is insufficient to allege the type of conduct sufficient to provide a basis for a claim under Judiciary Law § 487.. See Ticketmaster v. Lidsky, 245 AD2d 142 (1st Dept 1997)(holding that "[a]ssertion of unfounded allegations in a pleading, even if made for improper purposes, does not provide a basis for liability under Judiciary Law § 487"); O'Callaghan v. Sifre, 537 FSupp2d 594, 596 (S.D. N.Y. 2008)(noting that "by confining the reach of [Judiciary Law § 487] to intentional egregious misconduct, this rigorous standard affords attorneys wide latitude in the course of litigation to engage in written and oral expression consistent with responsible, vigorous advocacy"); compare Scarborough v Napoli, Kaiser & Bern, LLP, 63 AD3d 1531 (denying summary judgment to attorney where record showed that medical malpractice case was dismissed for failure to file a timely note of issue and defendant attorneys asked client to sign a

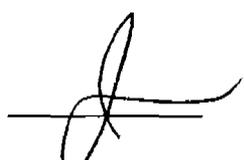
¹Although the Second Circuit noted that the pattern of behavior requirement was not in the text of Judiciary Law § 487, it also acknowledged that New York courts, including the First Department, have required it in certain instances. Furthermore, in the case before it, the District Court found a "persistent pattern of unethical behavior" that "constituted 'a chronic, extreme pattern of legal delinquency.'" Amalfitano v. Rosenberg, 533 F3d at 124, quoting, Amalfitano v. Rosenberg, 428 FSupp2d 196, 203 (SD NY 2006), and the only issue before the Second Circuit was whether an attorney's attempted, but unsuccessful, deceit violated Judiciary Law § 487, which it certified for the New York Court of Appeals. See Amalfitano v. Rosenberg, 12 NY3d 8 (2009)(holding that an attempted, but unsuccessful, deceit may provide a basis for a claim under Judiciary Law § 487).

stipulation of discontinuance informing him he could not prevail on the action but not telling him the reason for the dismissal); Izko Sportswear Co., Inc. v Flaum, 25 AD3d 534 (finding that plaintiff stating a cause of action under Judiciary Law § 487 based on allegations that defendants intentionally deceived plaintiffs and the Bankruptcy court with respect to their previous representation of plaintiffs' creditor in bankruptcy court). Moreover, the submissions do not support plaintiff's argument that the omission constituted deceit that impacted issues with respect to valuation of marital assets, nor does plaintiff explain his apparent failure to address this omission from his own business plan before the divorce court.

In view of the above, it is

ORDERED that the motion for reargument is granted and, upon reargument, the court adheres to its original decision.

DATED: March 15 2012



J.S.C

FILED
 MAR 28 2012
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