

Abramowitz v Lefkowicz & Gottfried, LLP
2012 NY Slip Op 31011(U)
April 11, 2012
Sup Ct, Nassau County
Docket Number: 015385-11
Judge: Arthur M. Diamond
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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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**DARRYL ABRAMOWITZ, 23KT GOLD
COLLECTIBLES, LTD., and MERRICK MINT LTD.,**

Plaintiffs,

-against-

**LEFKOWICZ & GOTTFRIED, LLP, MARK
I. LEFKOWICZ, INDIVIDUALLY, and ERIC
J. GOTTFRIED, INDIVIDUALLY,**

Defendants.

-----x

TRIAL PART: 10
NASSAU COUNTY
INDEX NO: 015385-11
MOTION SEQ. NO:1,2
SUBMIT DATE:02/24/12

The following papers having been read on this motion:

- Notice of Motion.....1**
- Notice of Cross Motion.....2**
- Memorandum of Law.....3**

This motion by the defendants Lefkowitz & Gottfried, LLP, Mark J. Lefkowitz, Individually and Eric J. Gottfried, Individually, for an order pursuant to CPLR §3211(a)(7) dismissing the plaintiff Daryl Abramowitz' causes of action sounding in legal malpractice, false arrest and malicious prosecution and the plaintiffs' causes of action sounding in breach of contract and punitive damages and an order pursuant to CPLR§3211(a)(1), (7) dismissing the plaintiffs 23 KT Gold Collectibles, Ltd. and Merrick Mint Ltd.'s cause of action sounding in legal malpractice is determined as provided herein.

This cross-motion by the plaintiffs for an order pursuant to CPLR §3025(b) allowing them to amend their complaint is determined as provided herein.

In this action, all of the plaintiffs seek to recover of the defendant attorneys for legal malpractice and breach of contract based upon the defendant attorneys' alleged negligent representation of them in connection with their claims against the Daily News as well as their defense of counterclaims that were advanced against them by the Daily News. In addition, the

plaintiff Darryl Abramowitz seeks to recover of defendant Lefkowitz for common law battery, false arrest and malicious prosecution based upon an alleged altercation and the ensuing criminal charges Lefkowitz lodged against him sounding in menacing in the first degree and harassment in the second degree. The plaintiffs also seek punitive damages.

With the exception of Abramowitz' common law battery claim against Lefkowitz, the defendants seek dismissal of the complaint pursuant to CPLR § 3211(a)(1) and/or (7). The plaintiffs have cross-moved for leave to amend their complaint. More specifically, the plaintiffs seek to supplement in detail the allegations supportive of their legal malpractice claim.

The facts relevant to the determination of this motion are as follows:

23KT Gold Collectibles and Merrick Mint Ltd. are corporations in the business of designing and manufacturing memorabilia and collective coins. In 2006 and 2007, they entered into two separate agreements with the Daily News to market, promote and advertise collectible coins and to share profits. Mutual accusations of breach of those agreements arose; litigation ensued; and, a settlement was ultimately reached. 23KT Gold Collectibles and the Daily News subsequently entered into a new agreement on September 3, 2008 to develop and promote a coin club. 23KT Gold Collectibles was obligated to conceive, design and develop "coins," "coin sets" and products which were to be sold through a Coin Club. The agreement incorporated illustrative designs of the products. The agreement contained an exclusivity provision as follows:

The Products shall not be advertised, marketed, sold, or offered for sale in any forum or media by or on behalf of 23KT, any affiliate or [sic] 23KT or any entity under common control with 23KT including without limitation, The Merrick Mint, LTD. (a "23KT Affiliate"), other than through the Advertisements and the Website. . . . Any products [sic] that is substantially similar to a Product (a "Similar Product") will not be advertised, marketed, sold, or offered for sale by 23KT but may be advertised, marketed, sold, or offered for sale by a 23KT Affiliate,

provided: (i) in the case of a U.S. Mint issued coin set bearing no additional design (a "Mint Coin"), the marketing and configuration of the Similar Product is not identical to the Product; and (b) in the case of a product other than a Mint Coin, the design and concept of the Similar Product is not identical to the Product.

The Agreement permitted both parties to terminate the agreement via written notice, inter alia, "if the other party materially breache[d] the Agreement and the breach [was] not remedied within thirty (30) days of the breaching party's receipt of written notice of the breach." If the Agreement was terminated by 23KT Gold Collectibles pursuant to that provision, it was entitled to recover from the Daily News "reasonable actual out-of-pocket attorney's fees due to breach; and liquidated damages"

By correspondence dated January 29, 2009, the Daily News notified 23KT Gold Collectibles that it was in material breach of their agreement; more specifically, that it had come to its attention that "products and/or Similar Products were advertised, marketed, sold and/or offered for sale in violation of their Agreement." The Daily News further advised 23KT Gold Collectibles that its breach was not capable of being remedied and their Agreement would accordingly terminate on March 1, 2009. By correspondence dated February 24, 2009, 23KT Gold Collectibles' attorney Frank V. DeRosa advised the Daily News that 23KT Gold Collectibles "sincerely" believed that it had not violated the Agreement and that in any event, any breach was "curable" since any improper marketing and sales could be discontinued and the Daily News could be paid monetary compensation or otherwise credited for damages suffered as the result of marketing and sales which were violative of the parties' agreement, if any. In addition, counsel for 23KT Gold Collectibles accused the Daily News of having materially breached their Agreement by unilaterally terminating their agreement and refusing to afford it an opportunity to cure. Via counsel, 23KT Gold Collectibles accordingly put the Daily News on notice that it was in breach of their agreement and it afforded the Daily News an

opportunity to cure that alleged breach. By correspondence dated April 6, 2009, the Daily News notified 23KT Gold Collectibles that it had breached their agreement again by failing to make a quarterly payment and report. On April 22, 2009, the Daily News notified 23KT Gold Collectibles' attorney that over two months had passed since it notified 23KT Gold Collectibles of its initial product related breach and that although 23KT Gold Collectibles had sought and been afforded an opportunity to cure that breach and had assured the Daily News that it intended to send an accounting and proposal to establish that its breaches were curable, it had instead remained silent leading the Daily News to conclude that 23KT Gold Collectibles did not wish to attempt or intend to cure its breaches. Given the expiration of 23KT Gold Collectibles' time to cure, the Daily News terminated their agreement.

As Chief Financial Officer of 23KT Gold Collectibles, Abramowitz retained the law firm to represent it in connection with its dispute with the Daily News on March 31, 2009. More specifically, the law firm was retained to institute a lawsuit on behalf of 23KT Gold Collectibles against the Daily News and to defend against anticipated counterclaims or retaliatory claims advanced by the Daily News. The Retainer Agreement provided that Lefkowitz & Gottfried "cannot, and therefore does not, in any manner by entering [that] Agreement or otherwise, make any promises or guarantees with regard to the outcome of the Client's claims" and that it was not retained to represent 23KT Gold Collectibles with regard to "an appeal of any sort or kind."

Lefkowitz & Gottfried commenced a lawsuit on behalf of 23KT Gold Collectibles against the Daily News on April 23, 2009 in New York County Supreme Court. The Daily News served a Verified Answer with counterclaims in June, 2009. An Answer was interposed by Lefkowitz & Gottfried. An Amended Verified Answer and counterclaim was served by the Daily News in December, 2009. The Daily News obtained summary judgment dismissing 23KT Gold Collectibles' and Merrick Mint Ltd.'s complaint against it and it procured a conditional order of dismissal against 23KT Gold Collectibles requiring 23KT Gold Collectibles to produce documentary evidence or face having its Reply to Counterclaims stricken. Based upon 23KT Gold Collectibles' inadequate

response to its discovery demand, the Daily News ultimately procured enforcement of that conditional order and 23KT Gold Collectibles' Reply to Counterclaims was stricken and a declaration of liability in favor of the Daily News was entered. An inquest on damages owed to the Daily News was scheduled. Although Michael Goldberg, Esq., was retained by the plaintiffs and timely filed an appeal of the dismissal of 23KT Gold Collectibles' complaint, the plaintiffs untimely settled their dispute with the Daily News resulting in a payment by them and relinquishment of any claims 23KT Gold Collectibles had against the Daily News.

A second action was commenced by Lefkowitz & Gottfried against the Daily News on behalf of 23KT Gold Collectibles and Merrick Mint Ltd., in 2010. The Daily News' motion to dismiss that complaint based upon the doctrine of res judicata was granted.

In this action seeking to recover for, inter alia, legal malpractice, the plaintiffs maintain that Lefkowitz & Gottfried should have notified the Daily News that it was in breach before commencing 23KT Gold Collectibles' first action against it; that they negligently drafted the first complaint and failed to cure the vital errors contained therein; that they negligently defended against the Daily News's summary judgment motion and never sought leave to amend to correct vital errors in the complaint; and, that they negligently responded to the Daily News' discovery request. They also allege that the law firm failed to respond to their requests regarding the status of the lawsuit and to keep them apprised of critical developments and furthermore, concealed negative facts from them. The plaintiffs also maintain that Lefkowitz & Gottfried never told them that the Daily News had procured summary judgment dismissing their complaint against it; that they refused to appeal from that order; and that they never sought additional discovery documents from them even though they were faced with a conditional order of dismissal.

More specifically, the plaintiffs allege in their complaint that in the first action against the Daily News, the defendant attorneys not only erred in naming Merrick Mint Ltd. as a plaintiff thereby subjecting it to liability on the Daily News' cross-claims, they commingled the facts regarding 23KT Gold Collectibles' agreements with the Daily News from 2006 and 2007 which had

been formally settled with the facts concerning the 2008 agreement, which resulted in the dismissal of that complaint on motion by the Daily News based on the settlement of the 2006 and 2007 claims. The plaintiffs further allege that the second complaint against the Daily News was dismissed based upon res judicata since the pertinent facts regarding the 2008 agreement had been advanced in the first complaint and a distinction had not been made. The plaintiffs also allege that defendants' dilatory conduct with respect to discovery led to their liability on the Daily News' counterclaims.

The plaintiffs additionally allege that a dispute arose at a meeting on September 13, 2011 between Lefkowitz, Abramowitz, Abramowitz's brother Matt and Goldberg, 23KT Gold Collectibles and Merrick Mint Ltd.'s successor attorney. More specifically, they allege that Lefkowitz attempted to leave the meeting but Abramowitz would not allow him to do so whereupon Lefkowitz allegedly pushed him and left. Abramowitz alleges that Lefkowitz then went to the police and filed a complaint swearing that he had threatened him with a gun causing him to fear for his life, which Abramowitz adamantly denies. Abramowitz alleges that he ultimately surrendered to the police where he remained in custody while the charges, Menacing in the First Degree and Harassment in the Second Degree were prepared.

"CPLR§3025(a) allows a party to amend a pleading as of right within 20 days after a responsive pleading is served." *STS Management Development Inc. v New York State Dept. of Taxation and Finance*, 254 AD2d 409 (2nd Dept 1998). A defendant's motion to dismiss a complaint pursuant to CPLR§ 3211 extends the defendant's time to answer and thus extends the time in which the plaintiff can amend his/her complaint as of right. *STS Management Development Inc. v New York State Dept. of Taxation and Finance*, supra, citing CPLR§ 3211(f); CPLR§ 3025 (a); *Sholom & Zuckerbrot Realty Corp. v Coldwell Banker Commercial Group*, 138 Misc 2d 799 (Supreme Court Queens County 1988). The plaintiff's motion for leave to amend their complaint is denied as unnecessary. *Terranova v Fine*, 17 AD3d 449 (2nd Dept 2005). A defendant's motion to dismiss pursuant to CPLR§ 3211 may nevertheless be addressed on the merits vis-a-vis the Amended Complaint. *Terrano v Fine*, supra, citing *Livadiotakis v Tzitzikalakis*, 302 AD2d 369, 370 (2nd Dept

2003); *see also*, *Sage Realty Corp. v Proskauer Rose, LLP*, 251 AD2d 35 (1st Dept 1998).

As is their right, the defendants have elected to pursue their motion to dismiss against the proposed Amended Verified Complaint.

“ ‘On a motion to dismiss pursuant to CPLR§3211(a)(7), the pleading is to be afforded a liberal construction.’ ” *Nelson v Roth*, 69 AD3d 912, 913 (2nd Dept 2010), quoting *Kempf v Magida*, 37 AD3d 763, 764 (2nd Dept 2007). “The court must accept the facts as alleged in the complaint as true, accord the plaintiffs the benefit of every possible favorable inference, and determine whether the facts as alleged fit within any cognizable legal theory.” *Nelson v Roth, supra*, at p. 913, citing *Arday Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 303 (2001) and *Leon v Martinez*, 84 NY2d 83, 87-88 (1994).

“[I]n order to prevail on a CPLR §3211(a)(1) motion, the moving party must show that the documentary evidence conclusively refutes . . . plaintiff’s allegations.” *AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY 3d 582, 590-591 (2005), citing *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 (2002).

“ ‘In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney “failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession” and that the attorney’s breach of his duty proximately caused plaintiff to sustain actual and ascertainable damages.’ ” *Verdi v Jacoby & Meyers, LLP*, 92 AD3d 771 (2nd Dept 2012), quoting *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 (2007), quoting *McCoy v Feinman*, 99 NY2d 295, 301-302 (2002) and citing *Bells v Foster*, 83 AD3d 876 (2nd Dept 2011). “To establish a cause of action alleging legal malpractice, a plaintiff must prove, *inter alia*, the existence of an attorney-client relationship.” *Nelson v Roth, supra*, at p. 813, citing *Terio v Spodek*, 63 AD3d 719, 721 (2nd Dept 2009) and *Velasquez v Katz*, 42 AD3d 566, 567 (2nd Dept 2007). “To prove an attorney-client relationship, there must be an explicit undertaking ‘to perform a specific task.’ ” *Nelson v Roth, supra*, quoting *Terio v Spodek, supra* at p. 721. “ ‘It is well established that, with respect to attorney malpractice, absent fraud, collusion, malicious acts,

or other special circumstances, an attorney is not liable to third parties, not in privity, for harm caused by professional negligence.’ ” *Moran v Hurst*, 32 AD3d 909, 911 (2nd Dept 2006), quoting *Rovello v Klein*, 304 AD2d 638 (2nd Dept 2003), *lv den.*, 100 NY2d 509 (2003) and citing *Conti v Polizotto*, 243 AD2d 672 (2nd Dept 1997) and *Good Old Days Tavern, Inc. v Zwirn*, 259 AD2d 300 (1st Dept 1999), *rearg den.*, 261 AD2d 288 (1st Dept 1999). “Since an attorney-client relationship does not depend on the existence of a formal retainer agreement or upon payment of a fee, a court must look to the words and actions of the parties to ascertain the existence of such a relationship.” *Nelson v Kalathara*, 48 AD3d 528, 529 (2nd Dept 2008), citing *Hansen v Caffry*, 280 AD2d 704 (3rd Dept 2001); *lv den.*, 97 NY2d 603 (2001) and *Tropp v Lumer*, 23 AD3d 550 (2nd Dept 2005). “ ‘To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer’s negligence.’ ” *Verdi v Jacoby & Meyers, LLP, supra*, quoting *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, supra*, at p. 442 and citing *Bells v Foster, supra*.

“To succeed on a motion for summary judgment, the defendant in a legal malpractice action must present evidence in admissible form establishing that the plaintiff is unable to prove at least one of these essential elements” *Verdi v Jacoby & Meyers, LLP, supra*, quoting *Alizio v Feldman*, 82 AD3d 804 (2nd Dept 2011).

The complaint fails to plead facts which would establish an attorney-client relationship between Abramowitz and the defendants. While the plaintiffs have alleged that the defendant represented 23KT Gold Collectibles, Ltd. and Merrick Mint Ltd., they have not alleged facts indicative of a relationship with Abramowitz, individually. *See, Topor v Enbar*, 15 Misc 3d 1139(A) (Supreme Court New York County 2007); *Holloway v Ernst & Young, LLP*, 28 Misc 3d 1214(A) (Supreme Court New York County 2009), *affd*, 82 AD2d 611 (1st Dept 2011). Abramowitz’ claim for legal malpractice is dismissed pursuant to CPLR§3211(a)(7).

Merrick Mint Ltd. was not a party to the agreement with the Daily News. The defendants’ misnomer of it as a plaintiff in 23KT Gold Collectibles’ suit against the Daily News did not cause

it any damages. While theoretically it could have been held responsible on the Daily News' counterclaims, the Daily News could not have established its liability. More importantly, judgment was in fact only procured against 23KT Gold Collectibles. And, the plaintiffs have not established that the settlement included Merrick Mint Ltd. Accordingly, Merrick Mint Ltd. suffered no damage as a result of the defendants' alleged negligence. Merrick Mint Ltd.'s legal malpractice claim is dismissed pursuant to CPLR 3211(a)(1), (7).

The plaintiffs' have amply alleged facts establishing the defendants' negligent handling of their case against the Daily News as well as ensuing damages. Furthermore, the documentary evidence relied on by the defendants does not conclusively establish that the plaintiffs could not have prevailed on their claims against the Daily News: Issues of fact exists as to whether the plaintiffs would have prevailed against the Daily News on their claims and in defense of the Daily News' counterclaims. Dismissal of the 23KT Gold Collectibles' legal malpractice claim pursuant to CPLR §3211(a)(1), (7) is denied. *See, Siciliano v Forchelli & Forchelli*, 17 AD3d 343 (2nd Dept 2005), citing *Shopsin v Siben & Siben*, 268 AD2d 578 (2nd Dept 2000); *see also, Pechko v Gendelman*, 20 AD3d 404 (2nd Dept 2005).

Contrary to the defendants' assertions, 23KT Gold Collectibles has alleged that "but for" the defendants' negligence, it would have faired better in its dispute with the Daily News: That is all that is required at this juncture. Nor does the documentary evidence relied on by the defendants establish as a matter of law that 23KT Gold Collectibles could not have prevailed as against the Daily News and/or that it could not successfully defended against the Daily News's counterclaims. The defendants have not established that 23KT Gold Collectibles violated the exclusivity provision nor is it clear that the Daily News' initial notice of breach did not breach the agreement as well insofar as it failed to afford 23KT Gold Collectibles an opportunity to cure. Furthermore, that 23KT Gold Collectibles' agreement with the Daily News only entitled it to damages if it terminated the agreement does not require dismissal of 23KT Gold Collectibles' legal malpractice claim: It may have been the defendants' failure to pursue that path that barred 23KT Gold Collectibles from

recovering of the Daily News. The defendant attorneys cannot hide behind a contractual provision which they failed to execute on to escape liability for their malpractice.

Finally, the court rejects the defendants' repeated allegations that 23KT Gold Collectibles simply cannot establish that "but for" their alleged negligence, it would have prevailed in its action against the Daily News. That position puts the cart before the horse. The defendants are seeking dismissal of the complaint: They accordingly bear the burden of establishing as a matter of law that assuming, arguendo, they were negligent in their representation of 23KT Gold Collectibles in its dispute with the Daily News, that 23KT Gold Collectibles could not have prevailed in any event. This, the defendants have clearly failed to do.

Where a "claim of breach of contract arises out of the same facts as an asserted legal malpractice cause of action and does not allege distinct damages, the breach of contract claim is duplicative of the malpractice claim (citations omitted)." *DiTondo v Meaghen*, 85 AD3d 1385, 1385-1356 (3rd Dept 2011); *see also*, *Turner v Irving Finkelstein & Meirowitz, LLP*, 61 AD3d 849, 850 (2nd Dept 2009). The plaintiffs' breach of contract claim is based upon the defendants' alleged mishandling of their legal matters and does not seek damages distinct from their legal malpractice claim. It is dismissed. *Afman v Katz*, 89 AD3d 909 (2nd Dept. 2011); *see also*, *Alizio v Feldman*, *supra*; *Conklin v Owen*, 72 AD3d 1006 (2nd Dept 2010); *Town of Walkill v Rosenstein*, 40 AD3d 972 (2nd Dept 2007). In any event, the plaintiffs failure to "identify any particular provision of a written retainer agreement whereby defendants contracted to provide a particular result above and beyond what they might be expected to accomplish using due care" requires dismissal of that cause of action as well. *Boslow Family Ltd. Partnership v Kaplan & Kaplan, PLLC*, 52 AD3d 417 (1st Dept 2008), *lv den.*, 11 NY3d 707 (2008), citing *Matter of R.M. Kliment Frances Halsband, Architects (McKinsey & Co., Inc.)*, 3 NY3d 538 (2004), and *Sarasota, Inc. v Kurzman & Eisenberg, LLP*, 28 AD3d 237 (1st Dept 2006). In fact, the Retainer specifically precludes any additional promises or guarantees by the defendant lawyers.

To establish a cause of action for false arrest, a plaintiff must show that the defendant

intended to confine him, that the plaintiff was conscious of the confinement, that the plaintiff did not consent to the confinement and that the confinement was not privileged. *Guntlow v Barbera*, 76 AD3d 760 (3rd Dept), *app. dismissed*, 15 NY3d 906 (2010), citing *Martinez v City of Schenectady*, 97 NY2d 78, 85 (2011) and *Broughton v State*, 37 NY2d 451 (1975), *cert. den. sub nom. Schanbarger v Kellogg*, 423 U.S. 929 (1975). “In the context of a claim for false arrest . . . there is no liability for merely giving information to legal authorities who are left entirely free to use their own judgment in effecting an arrest or in swearing out a criminal complaint.” *DiMarinis v Sterling Mets, L.P.*, 13 Misc 3d 1243(A) (Supreme Court Nassau County 2006), citing *Chapo v Premier Liquor Corp.*, 259 AD2d 1050 (4th Dept 1999); *see also Mesiti v Wegman*, 307 AD2d 339 (2nd Dept 2003); *Du Chateau v Metro-North Commuter R. Co.*, 253 AD2d 128 (2nd Dept 1999). In fact, identifying the plaintiff as a perpetrator of a crime, signing a complaint or testifying at trial does not give rise to tort liability. *Du Chateau v Metro-North Commuter R.R. Co.*, *supra*, at pg. 131, citing *Collins v Brown*, 129 AD2d 902 (3rd Dept 1988) and *Pugach v Borja*, 175 Misc 2d 683 (Supreme Court Queens County 1998). “A plaintiff must demonstrate that the defendant ‘played an active role in the prosecution, such as giving advice and encouragement or importuning the authority to act.’ ” *Mesiti v Wegman*, *supra*, at p. 340, quoting *Du Chateau v Metro-North Commuter R.R. Co.*, *supra*, at pg. 131. “ ‘The defendant must have affirmatively induced the officer to act, such as taking an active part in the arrest and procuring it to be made or showing active, officious and undue zeal, to the point where the officer is not acting of his own volition.’ ” *Mesiti v Wegman*, *supra*, quoting 59 NY Jur.2d, False Imprisonment and Malicious Prosecution § 37, citing *Eisenkraft v Armstrong*, 172 AD2d 484, 486 (2nd Dept 1991). Abramowitz only alleges that Lefkowitz swore out a complaint against him. It was the Freeport Police Department that elected to press charges against Abramowitz. Abramowitz’s claim against Lefkowitz for false arrest fails and is dismissed.

“The tort of malicious prosecution has four elements: ‘that a criminal proceeding was commenced; that it was terminated in favor of the accused; that it lacked probable cause; and that the proceeding was brought out of actual

malice.’ ” *Guntlow v Barbera*, *supra*, at pg. 765, citing *Cantalino v Danner*, 96 NY2d 391, 394 (2001), and citing *Broughton v State of New York*, *supra*, at p. 457. “A criminal proceeding terminates favorably to an accused, for purposes of a malicious prosecution claim, when the final disposition of the proceeding involves the merits and indicates the accused’s innocence.” *MacFawn v Kresler*, 88 NY2d 859, 860 (1996), citing *Hollender v Trump Village Co-op.*, 58 NY2d 420 (1983); *Halberstadt v New York Life Ins. Co.*, 194 N.Y. 1 (1909); *see also*, *Rahman v Incagliato*, 84 AD3d 917 (2nd Dept 2011). And, “ ‘[a] civilian defendant who merely furnishes information to law enforcement authorities who are then free to exercise their own independent judgment as to whether an arrest will be made and criminal charges filed will not be held liable for malicious prosecution. . . .’ ” *Hendrickson-Brown v City of White Plains*, 92 AD3d 638, 639-640 (2nd Dept 2010), quoting *Lupski v County of Nassau*, 32 AD3d 997, 998 (2nd Dept 2006).

Lefkowicz’ limited role in the criminal case against Abramowitz is an insufficient ground for the imposition of liability for malicious prosecution. *Hendrickson-Brown v City of White Plains*, *supra*. Furthermore, Abramowitz has failed to plead that the underlying criminal proceeding terminated in his favor. In fact, it is still pending. Abramowitz’ claim for malicious prosecution is dismissed. *Rahman v Incagliato*, *supra*, citing *Kochis v Revco Pharmacy*, 9 AD3d 449 (2nd Dept 2004) and *Levy v Coates*, 286 AD2d 424 (2nd Dept 2001); *see also*, *Martinez v City of Schenectady*, *supra*.

“Punitive damages are available only in those limited circumstances where it is necessary to deter defendant and others like it from engaging in conduct that may be characterized as ‘gross’ and ‘morally reprehensible’ and of “such wanton dishonesty as to imply a criminal indifference to civil obligations.” ’ ” *New York University v Continental Ins. Co.*, 87 NY2d 308, 315 (1995), quoting *Rocanova v Equitable Life Assur. Socy.*, 83 NY2d 603 (1994), quoting *Walker v Sheldon*, 10 NY2d 401, 404-405 (1961). The conduct alleged here does not rise to that level. The plaintiffs’ claim for punitive damages is dismissed.

In conclusion, the cause of action sounding in legal malpractice as advanced by plaintiff

Abramowitz and Merrick Mint Ltd., the cause of action sounding in breach of contract, the cause of action sounding in false arrest and the cause of action sounding in malicious prosecution as well as the claim for punitive damages are dismissed pursuant to CPLR § 3211(a)(1), (7).

This constitutes the decision and order of this Court.

ENTER

DATED: April 9, 2012

ENTERED
APR 11 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE


HON. ARTHUR M. DIAMOND
J. S.C.

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