

**Noel v Feinberg**

2014 NY Slip Op 32230(U)

August 15, 2014

Supreme Court, Kings County

Docket Number: 502465/12

Judge: David I. Schmidt

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

At an IAS Part 47 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 31<sup>st</sup> day of March, 2014

P R E S E N T:

HON. DAVID I. SCHMIDT,  
Justice.

-----X

DENZIL NOEL, BY HIS MOTHER AND NATURAL  
GUARDIAN, CARLOTTA DEEGAS,

Plaintiff,

- against -

Index No. 502465/12

*Signol*

LAW OFFICE OF MARK E. FEINBERG, et al.,

Defendant(s).

-----X

The following papers numbered 1 to 10 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>1 - 4</u>
Opposing Affidavits (Affirmations) _____	<u>5 - 6</u>
Reply Affidavits (Affirmations) _____	<u>7</u>
Further Affirmation in Opposition _____	<u>8</u>
Supplemental Reply Affirmation _____	<u>9</u>
Other Papers <u>Transcript dated January 13, 2014</u>	<u>10</u>

Upon the foregoing papers, in this legal malpractice action, defendants Law Office of Mark E. Feinberg, Mark E. Feinberg, Esq., and Mark E. Feinberg move for an order pursuant to CPLR 3211(a)(7), dismissing the complaint of Denzil Noel, by his mother and natural guardian Carlotta Deegas. By order dated October 3, 2013, this court converted defendants' motion to dismiss pursuant to CPLR 3211 to a motion for summary judgment

FILED  
KINGS COUNTY CLERK

PA.

pursuant to CPLR 3213 and granted the parties additional time in which to submit papers addressing the issues of: (1) whether the court would have granted a pre-trial order of attachment in the underlying personal injury case, *Denzil Noel, an Infant under 14 years of age, by his Mother and Natural Guardian, Carlotta Deegas, and Carlotta Deegas, Individually* (Index No. 39599/98) (the Personal Injury Action); and (2) whether plaintiff's potential claim for fraudulent transfer against the grantee of property formerly owned by defendant-landlord in the Personal Injury Action, John George, to Mordechia Meisels, is time barred.

### ***Facts and Procedural Background***

Plaintiff commenced this action seeking to recover damages for the alleged malpractice committed by defendants in the Personal Injury Action. Therein, plaintiffs sought to recover damages for injuries sustained by the infant plaintiff on July 12, 1997 when he fell out of a window that did not have proper and/or adequate window guards. Plaintiff alleges that in that action, defendants committed malpractice when they failed to obtain a pre-trial order of attachment for properties owned by Mr. George or to file a lis pendens against the properties. They allege that as the result of this malpractice and negligence on defendants' part, the judgment they obtained is can not be collected, since the properties owned by Mr. George were sold before the judgment was filed and immediately after the trial, Mr. George physically disappeared and cannot be located.

Plaintiff first retained the law firm of Jacoby & Meyers to bring the Personal Injury

Action, but apparently due to the lack of liability insurance and general perception that Mr. George was insolvent, that firm did not actively prosecute the case. Accordingly, plaintiff retained defendants. On October 9, 1998, defendants filed a complaint on plaintiff's behalf in the Personal Injury Action. Defendants retained the firm of Weicholz, Monteleone, Peters & Studley (the Weicholz Firm) to act as trial counsel. Following a four day jury trial before the Honorable Gerald S. Held, the court rendered a directed verdict on the issue of liability and the jury rendered a verdict on the issue of damages in the amount of \$500,000 for conscious pain and suffering and \$1,500,000 for future conscious pain and suffering. The court accordingly entered a judgment in the amount of \$2,010,545 on plaintiff's behalf.

Defendants then retained Michael T. Sucher, Esq., an experienced collections attorney, to enforce the judgment. Despite his efforts, he was unable to locate Mr. George or any assets belonging to him. Accordingly, plaintiff's judgment remains unsatisfied.

### ***Defendants' Contentions***

In support of the motion, defendants argue that their representation of plaintiffs in the Personal Injury Action did not fall below the applicable standard of care and that their alleged actions and/or inactions are not the proximate cause of plaintiff's alleged damages. More specifically, defendants argue that a pre-judgment attachment and lis pendens were not available in the Personal Injury Action. Defendants also contend that plaintiff fails to plead that but for defendants' conduct in not seeking these provisional remedies, they would have been able to enforce the judgment obtained, so that they fail to establish that the alleged

malpractice was the proximate cause of their alleged damages.

Further, defendants contend that plaintiff's action is premature in that he has yet to sustain any actual or ascertainable damages, since he is free to pursue the true tortfeasor, Mr. George. In this regard, defendants allege that pursuant to CPLR 211(b), there is a 20-year statute of limitations to enforce the judgment. Accordingly, this statute of limitations will not expire until at least March 7, 2020. In addition, plaintiff can still pursue a claim for fraudulent conveyance against Mr. Meisels, since pursuant to CPLR 208, the statute of limitations on that claim is three years after the infant plaintiff's birthday, or July 5, 2014. Finally, defendants argue that they exercised ordinary and reasonable care in representing plaintiff in the Personal Injury Action.

Defendants also explain that during the pre-trial phase of that action, they and the Weicholz Firm expressed concern to the court regarding the lack of liability insurance and insolvency of Mr. George at a pre-trial conference held on November 1, 1999, when they made an oral application to the court for an order of attachment. That application was denied, but Mr. George was ordered to provide an affidavit listing his assets. In his affidavit, dated December 13, 1999, Mr. George stated that he owned three properties valued at \$476,000, although he held a combined equity of only \$176,830.

Defendants go on to argue that they could not establish grounds for a pre-judgment attachment, since they could not demonstrate that Mr. George was disposing of or concealing any assets. In this regard, the law is clear that even if defendants had known that Mr. George

had sold his properties, this fact alone is not enough to warrant the issuance of a pre-judgment attachment, since a sale does not evidence a specific intent to defraud plaintiff and frustrate his ability to enforce the judgment. In fact, it appeared that Mr. George was being cooperative, since he filed the affidavit listing his assets. Similarly, defendants contend that they had no way of knowing that Mr. George would vanish, so that he could not be found by a professional collection attorney.

Defendants also contend that they could not have filed a lis pendens against Mr. George's properties, since plaintiff had no right, title or interest in the properties owned by Mr. George, and a claim for money damages only is insufficient to support the filing of a lis pendens. Defendants also point out that Mr. Sucher commenced a collection action against Mr. George in which he filed notices of pendency against the properties owned by him. Mr. Sucher also served subpoenas for depositions upon Mr. George, his wife, Mr. Meisels, and subpoenas seeking records from the bank where the checks for the purchase of the properties had been deposited. The information supplied by the banks revealed that the proceeds from the sales were deposited into Mr. George's account, but were immediately withdrawn and cannot be located now. In addition, the deposition of Mr. Meisels confirmed that he purchased the properties on December 31, 1999 and that consideration was given, so that an action for a fraudulent conveyance would not be successful.

### ***Plaintiff's Contentions***

In opposition to defendants' motion, plaintiff notes that when Ms. Noel spoke with

Mr. Feinberg, she told him that Mr. George had no liability insurance and was in the process of selling the buildings in which they resided to a third-party and that he owned other properties in Brooklyn. Ms. Noel believes that the properties were sold at below market value. She further alleges that she was unaware that defendants made an oral application seeking an order of attachment or that Mr. George had provided an affidavit listing his assets. She contends that defendants' application for an order of attachment should have been made on papers so that the denial could be appealed. Ms. Noel thus concludes that because of defendants' failure to secure the assets of Mr. George before the judgment was filed, the judgment can not be collected.

Plaintiff further argues that Mr. Sucher never served any papers in the collection action on Mr. George or his wife. Defendants also note that the checks for the purchase of Mr. George's properties were in the amount of \$40,000 and \$25,000 and were made out to someone named Manganello, so that they do not appear to be related to the sale of Mr. George's properties. Plaintiff goes on to argue that Mr. Sucher determined that Mr. Meisels was "clean" without conducting an adequate investigation, since the contracts of sale were not produced and plaintiff was not supplied with a copy of the transcript of Mr. Meisels' deposition.

### *Discussion*

It is well settled that:

“In order to prevail on a claim to recover damages for legal malpractice, a plaintiff must show (1) that the attorney

failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community, (2) that the attorney's negligence was a proximate cause of the loss sustained, (3) that the plaintiff incurred damages as a direct result of the attorney's actions, and (4) that the plaintiff would have been successful if the attorney had exercised due care (*see Turner v Robins*, 267 AD2d 376 [1999]; *McCoy v Tepper*, 261 AD2d 592 [1999]; *Iannarone v Gramer*, 256 AD2d 443 [1998]).”

(*Kossifos v Harry I. Katz, P.C.*, 33 AD3d 591, 592 [2006]). Further, “[a]n attorney may be liable for his ignorance of the rules of practice, for his failure to comply with conditions precedent to suit, for his neglect to prosecute or defend an action, or for his failure to conduct adequate legal research” (*Shopsin v Siben & Siben*, 268 AD2d 578 [2000], quoting *McCoy*, 261 AD2d at 593]). “To survive dismissal, the complaint must show that, but for counsel’s alleged malpractice, the plaintiff would not have sustained some actual ascertainable damages” (*Simmons v Edelstein*, 32 AD3d 464, 466 [2006], citing *Pellegrino v File*, 291 AD2d 60, 63 [2002], *lv denied* 98 NY2d 606 [2002]; accord *Siwiec v Rawlins*, 103 AD3d 703 [2013]). “Stated another way, plaintiff is required to prove a ““case within a case”” (*Reibman v Senie*, 302 AD2d 290, 290-291 [2003], quoting *McKenna v Forsyth & Forsyth*, 280 AD2d 79 [2001], 82, *lv denied* 96 NY2d 720 [2001], quoting *Kituskie v Corbman*, 552 Pa 275, 281 [1998]).

“On a motion for summary judgment dismissing an action to recover damages for legal malpractice, the defendant attorney must submit evidence in admissible form establishing that the plaintiff is unable to prove at least one of these elements” (*Briggs v*

*Berkman*, 284 AD2d 423, 424 [2001], citing *Shopsin*, 268 AD2d 578; *Ippolito v McCormack, Damiani, Lowe & Mellon*, 265 AD2d 303 [1999]). Further, “[t]he failure to establish proximate cause mandates the dismissal of a legal malpractice action, regardless of the negligence of the attorney” (*Reibman*, 302 AD2d at 291, citing *Tanel v Kreitzer & Vogelman*, 293 AD2d 420, 421 [2002]; *Pellegrino*, 291 AD2d at 63).

### ***Pre-Judgment Order of Attachment***

Pursuant to CPLR 6201(3), the only provision that could be applicable to the facts now before the court:

“An order of attachment may be granted in any action . . . where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:

“[T]he defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff’s favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts.”

(see generally *Crescentini v Slate Hill Biomass Energy, LLC*, 113 AD3d 806 [2014]; *Corsi v Vroman*, 37 AD3d 397 [2007]). “Furthermore, the mere removal, assignment or other disposition of property is not grounds for attachment” (*Corsi*, 37 AD3d at 397, quoting *Computer Strategies v Commodore Bus. Machs.*, 105 AD2d 167, 173 [1984]; accord *Mitchell v Fidelity Borrowing LLC*, 34 AD3d 366, 366-367 [2006]).

As is also of particular relevance in the instant case, “[t]he moving papers must contain evidentiary facts, as opposed to conclusions, proving the fraud” (*Benedict v Browne*,

289 AD2d 433, 433 [2001], citing *Arzu v Arzu*, 190 AD2d 87, 91 [1993], *Societe Generale Alsacienne De Banque, Zurich v Flemington Dev.*, 118 AD2d 769, 772 [1986]; accord *Laco X-Ray Sys. v Fingerhut*, 88 AD2d 425, 429 [1982], *lv denied* 88 AD2d 425 [1983] [fraud cannot be inferred; it must be proved]). It has also been held that “[t]he fact that the affidavits in support of an attachment contain allegations raising a suspicion of an intent to defraud is not enough” (*Mitchell*, 34 AD3d at 366-367, quoting *Rosenthal v Rochester Button Co.*, 148 AD2d 375, 376 [1989]).

Applying these general principles of law to the facts of this case, defendants have made a prima facie showing that plaintiff could not have obtained a pre-judgment order of attachment in the Personal Injury Action. Plaintiff does not refute this showing. Most significantly, in support of his position, plaintiff relies solely upon the fact that Mr. George transferred his properties prior to entry of the judgment. As discussed above, the fact that a defendant transfers property, standing alone, is insufficient to establish fraud (*see Mitchell*, 34 AD3d at 366-367; *Corsi*, 37 AD3d at 397; *Computer Strategies*, 105 AD2d at 173). Plaintiff offers no other evidentiary basis upon which this court can find an intent to defraud on the part of Mr. George (*see Benedict*, 289 AD2d at 433, *Societe Generale Alsacienne De Banque, Zurich*, 118 AD2d at 772; *Laco X-Ray Sys.*, 88 AD2d at 429). Thus, in the absence of raising a question of fact with regard to whether the court would have granted a pre-judgment attachment in the Personal Injury Action, it is irrelevant whether defendants made an oral application or submitted a motion on papers.

### *Lis Pendens*

CPLR 6501 provides, in relevant part, that “[a] notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property.”

“[B]ecause of ‘the powerful impact that this device has on the alienability of property,’ together with ‘the facility with which it may be obtained,’ the courts have applied a narrow interpretation in reviewing whether an action is one affecting the title to, or the possession, use or enjoyment of, real property.”

(*Shkolnik v Krutoy*, 32 AD3d 536, 537 [2006], quoting *5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 315-316, 321 [1984]). Thus, it is well settled that “[a] notice of pendency is not available where a plaintiff claims no right, title or interest in the property itself” (*Long Island City Sav. & Loan Assn. v Gottlieb*, 90 AD2d 766 [1982], *mod on other grounds* 58 NY2d 931 [1983]; *see also Khanal v Sheldon*, 55 AD3d 684, 686 [2008], *lv denied* 12 NY3d 714 [2009] [notice of pendency should be cancelled where plaintiff asserted only a claim for money, not a right, title, or interest in the property itself]).

Applying these general principles of law to the facts of this case, defendants have also made a prima facie showing that plaintiff could not have obtained a pre-judgment order of attachment in the Personal Injury Action. Again, plaintiff does not refute this showing, since it is clear that plaintiff was seeking money damages in the Personal Injury Action, so that his action clearly did not “affect the title to, or the possession, use or enjoyment of, real property.” Accordingly, plaintiff fails to establish that defendants were negligent in not filing

a lis pendens in the Personal Injury Action.

### *Ascertainable Damages*

In order to succeed on a claim of legal malpractice, the law clearly provides that:

“‘Mere speculation about a loss resulting from an attorney’s alleged omission is insufficient to sustain a prima facie case of legal malpractice’ (*Giambrone v Bank of NY*, 253 AD2d 786, 787 [1998]). Rather, ‘plaintiff must prove that it was the attorney’s negligence which proximately caused the actual and ascertainable damages that resulted’ (*Ressis v Wojick*, 105 AD2d 565, 567 [1984]).”

(*Plymouth Org. v Silverman, Collura & Chernis, P.C.*, 21 AD3d 464, 465 [2005]; accord *Antokol & Coffin v Myers*, 30 AD3d 843, 845 [2006]). “‘The threat of future harm, not yet realized, is not enough’” (*IGEN v White*, 250 AD2d 463, 465 [1998], quoting Prosser and Keeton, Torts § 30, at 165 [5th ed 1984]).

As is also relevant to the issues now before the court, CPLR 211(b) provides that “[a] money judgment is presumed to be paid and satisfied after the expiration of twenty years from the time when the party recovering it was first entitled to enforce it.” CPLR 208 provides, in relevant part, that:

“If a person entitled to commence an action is under a disability because of infancy . . . at the time the cause of action accrues, and the time otherwise limited for commencing the action is three years or more and expires no later than three years after the disability ceases . . . the time within which the action must be commenced shall be extended to three years after the disability ceases . . . whichever event first occurs; if the time otherwise limited is less than three years, the time shall be extended by the period of disability.”

Accordingly, since plaintiff's time to enforce the Judgment has not yet expired, because he can still pursue a cause of action premised upon an alleged fraudulent transfer to Mr. Meisels until July 5, 2014, and because he has 20 years in which to collect on the Judgment, plaintiff has not yet sustained any ascertainable damages.<sup>1</sup>

**Conclusion**

Defendants' motion for summary judgment dismissing the complaint is granted, since they have made a prima facie showing that they were not negligent in not seeking a pre-judgment attachment and/or filing a lis pendens in the Personal Injury Action, since that relief was not available. Accordingly, defendants cannot be held liable to plaintiff for malpractice, since plaintiff cannot establish that but for defendants' alleged failure to move for provisional relief, he would have been able to collect on the Judgment, since it is Mr. Georges's failure to purchase insurance, his insolvency and his conduct in leaving the jurisdiction that renders plaintiff unable to satisfy his Judgment.

The foregoing constitutes the decision, order and judgment of this court.

ENTER,



J. S. C.

**HON. DAVID I. SCHMIDT**

---

<sup>1</sup> The court also notes that plaintiff argues the Mr. Sucher did not properly pursue the collection proceeding against Mr. George. Inasmuch as plaintiff did not name Mr. Sucher as a defendant herein and offers no basis upon which to conclude that defendants should be held liable for any damages resulting from the alleged malpractice on the part of Mr. Sucher, the court will not address that issue.

2014 AUG 15 AM 9:08  
KINGS COUNTY CLERK  
FILED

