

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

JOSEPH DISALVO

Plaintiff

-against-

ALFONSO CAROTENUTO and
RAPPAPORT, HERTZ

Defendant

Index No: 18793/06

Motion Date: 2/7/07

Motion Cal. No.:14

Motion Seq. No.: 1

The following papers numbered 1 to 7 read on this motion by defendant, Rappaport Hertz Cherson & Rosenthal, P.C. i/s/h as RAPPAPORT, HERTZ (hereinafter Rappaport) to dismiss the complaint insofar as it is asserted against it pursuant to CPLR 3211

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits	1 - 4
Answering Affidavits-Exhibits.....	5 - 7
Replying Affidavits.....	

Upon the foregoing papers it is ordered that this motion is granted and the complaint insofar as it is asserted against RAPPAPORT HERTZ CHERSON & ROSENTHAL, P.C. i/s/h as RAPPAPORT, HERTZ is dismissed. The remainder of the action is severed.

This is an action to recover damages for the alleged fraud and legal malpractice of the defendants. In the complaint plaintiff asserts that he was unable to purchase a co-operative apartment because of a judgment entered against him in a prior action obtained because the defendants conspired against the plaintiff to fraudulently take his money.

The judgment arose out of a failed real estate transaction in 1997 in which the defendant, Carotenuto, represented the plaintiff, the seller of the real property, and in which the defendant, Rappaport, represented the buyer. When the buyer cancelled the contract, the plaintiff's attorney, Carotenuto,

turned over the \$16,000.00 down payment he held in escrow to the plaintiff. Carotenuto allegedly advised the plaintiff that the buyer wrongfully terminated the contract and, therefore, plaintiff was entitled to retain the deposit. The buyer commenced an action in the Civil Court of the City of New York, Queens County to recover the down payment. After a trial, the court found in favor of the buyer and Ordered the entry of a judgment for \$16,000.00 plus interest. A judgment in favor of the buyer and against the plaintiff and his attorney, Carotenuto, was entered on May 21, 2001.

Defendant, Rappaport, moves to dismiss the complaint insofar as it is asserted against it pursuant to CPLR 3211(a) (5) and (7) for failure to state a cause of action on the ground that the plaintiff is collaterally estopped from attacking the validity of the judgment obtained in the Civil Court action.

In deciding the defendant's motion to dismiss pursuant to CPLR 3211 the court must construe the complaint liberally and accept the facts alleged as true, afford the plaintiff the benefit of every favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory (Leon v. Martinez, 84 NY2d 83, 87-88 [2004]; Morone v. Morone, 50 NY2d 481, 484 [1980]; Guggenheimer v. Ginzburg, 43 NY2d 268, 275 [1977]; Rovello v. Orofino Realty Co., 40 NY2d 633, 634 [1976]). Applying these principles to this case, the court finds that the plaintiff's complaint fails to state any cognizable cause of action.

It is well established that, with respect to an attorney absent fraud, collusion, malicious acts, or other special circumstances, an attorney is not liable to third parties not in privity or near-privity for harm caused by professional negligence (see Ryan v. New York Telephone Co., 62 NY2d 494 [1984]; Goldfarb v. Schwartz, 26 AD3d 462 [2006]). In addition, collateral estoppel, or issue preclusion, may be invoked in a subsequent action to prevent a party from relitigating an issue decided against that party in a prior adjudication (Ryan v. New York Tel. Co., supra at 500; Rigopolous v. American Museum of Natural History, 297 AD2d 728 [2002]). The plaintiff does not claim the existence of an attorney-client relationship and the complaint does not contain specific factual allegations to bring this case within one of the exceptions to the privity requirement (see CPLR 3016[b]; Fredriksen v. Fredriksen, 30 AD3d 370 [2006]). The complaint fails to allege any facts from which a conspiracy or a fraudulent scheme may be inferred. The bare conclusory assertion of conspiracy and fraud, without any evidentiary facts to support the elements of a cause of action for fraud (CPLR 3016 [b]) is legally insufficient. Moreover, the plaintiff does not allege any conduct or representations on the part of defendant,

Rappaport, to support his claim of a conspiracy to defraud plaintiff. All of the allegations involve the co-defendant, plaintiff's prior attorney.

In addition, the defendant has established that the identical issue necessary to determine the plaintiff's present claims was necessarily decided in the prior Civil Court action, thus, his present claims of legal malpractice is barred by the doctrine of collateral estoppel (see, Ryan v. New York Tel. Co., supra; Rigopolous v. American Museum of Natural History, 297 AD2d 728 [2002]; Yalkowsky v. Century Apts. Assoc., 215 AD2d 214, 215 [1995]).

The defendant's application for attorney's fees for the defense of this action is denied. Contrary to defendant's claim, the contract does not provide for such recovery by this defendant.

Dated: February 26, 2007
D# 29

.....
J.S.C.