

**Fiber-Shield Industries, Inc. v Furgang & Adwad,  
LLP**

2001 NY Slip Op 30033(U)

April 9, 2001

Supreme Court, New York County

Docket Number:

Judge: Marilyn Shafer

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

PRESENT: MARILYN SHAFER  
J.S.C. Justice

PART 36

Fiber Shield

Furgang + Adva

INDEX NO. 114877/00  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
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 \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion to dismiss  
complaint granted. Motion to  
amend complaint denied, pursuant  
to attached Denial order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

MARILYN SHAFER  
J.S.C.

Dated: 4/19/01

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
J.S.C.

Supreme Court of the State of New York  
County of New York

-----X  
Fiber-Shield Industries, Inc.,

Plaintiff,

-against-

Index No.: 114877/00

Furgang & Adwad, LLP and  
Philip Furgang,

Defendants.

-----X

Marilyn Shafer, J.:

In this legal malpractice/breach of contract action arising out of, and in connection with certain legal representation provided to Plaintiff Fiber- Shield Industries, Inc. (hereinafter, the complaining “Client”) by Co-defendants Furgang & Adwad, LLP and Philip Furgang (hereinafter, collectively referred to as the “Law Firm”), the Law Firm seeks pre-answer dismissal of the complaint (CPLR 3211 [a][1], [5] and [7]; CPLR 3016 [b]); and the Client seeks leave to amend its Fifth Cause of Action so as to characterize and clarify it as a claim for breach of contract, rather than ‘over-billing’(CPLR 3025[b]).

For nearly two decades the Law Firm has, at times, represented the Client in various legal matters. One such matter presently at issue entails the Law Firm’s representation of the Client with respect to a certain unrelated, complained of trademark infringing business entity (hereinafter, the “Trademark Litigant”) In 1987, the Client and Trademark Litigant entered into a trademark infringement settlement agreement (hereinafter, the “1987 Settlement”) drafted by Client’s legal counsel, the Law Firm. In 1988, the Client and the Trademark Litigant entered into another trademark infringement settlement agreement (hereinafter, the “1988 Statement”) once again drafted by the Law Firm. This latest agreement, inter alia, provides for both a notice of

default and an opportunity to cure. Some ten years later [1998], on behalf of the Client the Law Firm served an Order to Show Cause upon the Trademark Litigant's attorney of record, who actively last represented the Trademark Litigant a decade earlier. However, the Law Firm's service upon that attorney was in direct contravention of the 1987 Agreement which required service directly and personally of the Trademark Litigant. Even though the Trademark Litigant's attorney promptly advised the Law Firm that he was no longer representing the Trademark Litigant, the Trademark Litigant was not served in the manner set forth in the 1987 Agreement. The Client's Order to show Cause Contempt Order was then granted on default due to the Trademark Litigant's failure to appear. However, the Law Firm failed to to tender the requisite statutory notice of the default judgment (F.R.C.P. Rule 55[b]).

Thereafter, the Contempt Order by default was vacated. While the court found service upon the Trademark Litigant's latest attorney of record to be proper, the Client arguably incurred unnecessary (order to show cause/default) legal fees in connection with, and/or arising out of, the Law Firm's failure to comply with the 1987 Agreement.

Another matter presently at issue entails the Law Firm's failure to communicate to the Client an allegedly acceptable offer of settlement (hereinafter, the "Undisclosed Equipment Settlement Offer") extended within the context of breach of contract litigation involving certain complained of equipment purchased by the Client. The Undisclosed Equipment Settlement Offer purportedly contained an offer from the defending vender to buy back the complained of equipment "for a dollar amount equal to the value of the equipment . . . [not the purchase price]". Thereafter, the parties to that dispute entered into a subsequent settlement agreement which was allegedly less favorable to the Client than the complained of Undisclosed Equipment Settlement Offer. Arguably, the Client did not become aware of the Undisclosed Equipment Settlement

Offer until sometime after the Law Firm no longer represented [September of 1999] the Client, and a federal court order favorable to the Law Firm had been issued with respect to a contested fee hearing [November of 1999].

Over the years the parties have been somewhat at odds with one another with respect to, inter alia, the Law Firm's legal fees. Some twelve years after the Law Firm drafted the 1988 Agreement and some two years after the Law Firm represented the Client with respect to the 1998 Undisclosed Equipment Settlement Offer, the Client commenced this action asserting claims for legal malpractice, breach of contract, "over-billing" and fraudulent concealment. In essence, the Client is seeking to recover certain legal fees remitted to the Law Firm for allegedly unnecessary, extra services arising out of, and in connection with, the Law Firm's purported failure to properly represent the Client.

The Law Firm presently seeks pre-answer dismissal on the grounds that the Client has either failed to state a claim upon which relief may be granted, failed to state a claim with the requisite particularity, and/or is precluded from asserting a claim due to the applicable statute of limitations, collateral estoppel, and documentary evidence. In addition to opposing such dispositive relief, the Client presently seeks leave to amend its complaint to the limited extent of characterizing and clarifying its 'over-billing' claim [Fifth Cause of Action] as one for breach of contract.

While hindsight is twenty-twenty, such an assessment of the Law Firm's conduct would be neither appropriate nor beneficial. Rather, this court is compelled to assess the complained of actions and/or omissions in terms of whether or not such were objectively reasonable (*Rosner v Paley*, 65 NY2d 736 [1985]; *Bernstein v Oppenheim & Co., P.C.*, 160 AD2d 428 [1<sup>st</sup> Dept. 1990]). In order to successfully plead a legal malpractice and breach of contract claim, a party's

pleadings must sufficiently set forth that (i) an attorney-client relationship existed, thereby creating a duty of care; (ii) each of the complained of errors or omissions constituted a breach of the requisite standard of care; (iii) counsel's alleged negligence was the proximate cause of the complained of loss[es]; and (iv) the claimant sustained actual damages as a consequence of the complained of acts or omissions (*Novak v Fishbein, Olivieri Rozenholc & Badillo*, 151 AD2d 296 {1<sup>st</sup> Dept. 1989}).

As to the Client's legal malpractice and breach of contract claims for negligent drafting of the 1988 Agreement (First and Second Causes of Action), the barring applicable three (3) year statute of limitations (CPLR 214[6]) accrues when the alleged error or omission occurs (*Gilbert Properties, Inc. v Millstein*, 33 NY2d 857 [1973]; CPLR 3211[a][5] & [6]). In order to successfully toll the statute, a claimant invoking the continuous representation doctrine must affirmatively demonstrate that such representation has been rendered in connection with the underlying particular matter for which the malpractice arose and not merely the continuation of a general relationship (*Glamm v Allen*, 57 NY2d 87 [1982]; *Zaref v Berk & Michaels, P.C.*, 192 AD2d 346 [1<sup>st</sup> Dept. 1993]). In as much as the Law Firm's legal representation of the Client over the years has been as to various other matters rather than more particularly the recent 1998/99 infringement prosecution of the Trademark Litigant, suspension of the applicable statute of limitations is unwarranted.

As to the Client's legal malpractice and breach of contract claims for the Law Firm's allegedly improper prosecution of the 1998 contempt proceeding against the Trademark Litigant (Third and Fourth Causes of Action), the pleadings set forth alleged omissions and/or actions - - - failure to personally serve the Trademark Litigant; failure to tender notice of default and opportunity to cure; failure to tender notice of default judgment - - - which neither depart from

the established standard of care, nor fail to be insulated under the attorney judgment rule. It has already been judicially determined within the context of the underlying contempt proceeding, that the (i) notice and cure provision of the 1988 Agreement was inapplicable, in that it did not modify the 1987 Agreement ; (ii) service as completed was proper regardless of the personal service provision in the 1987 Agreement; and (iii) default judgment ultimately vacated after balancing a number of discretionary factors, of which the lack of statutory notice (FRCP 55[b]; 60[b]) was relatively insignificant.

As to the Client's "over billing" claim (Fifth Cause of Action), there exists no such cognizable independent tort for which relief may be granted.

As to the Client's claim for fraudulent concealment of the complained of "suspicious over billing" (Sixth Cause of Action), the absence of such requisite elements as claimant's justifiable reliance [Client previously challenged charges and requested explanation/back-up] and the Law Firm's scienter [Law Firm openly acknowledged fee/cost increases] render this claim fatally flawed (In Re Jack Kent Cooke, 222 AD2d 334 [1<sup>st</sup> Dept. 1995]).

As to the Client's legal malpractice and breach of contract claims for the Law Firm's failure to convey the Undisclosed Equipment Settlement Offer to the Client (Seventh and Eighth Causes of Action), such a claim is presently barred in that within the context of the underlying matter therein there has been rendered a judicial determination as to the Law Firm's fees/disbursements ( Koppelman v Liddle, O'Connor, Finkelstein & Robinson, 246 AD2d 356 [1<sup>st</sup> Dept. 1998]). That determination of fees was, inter alia, implicitly predicated upon an un rebutted presumption of propriety with respect to the issue of legal representation.

As to the Client's claim for emotional distress is devoid of merit in law and/or fact in that as a mere legal fiction the corporate Client is incapable of sustaining such personal harms

[mental suffering and anguish] as 'emotional distress'.

Lastly, the Client's cross motion to amend its complaint is both procedurally and substantively flawed in that the Client has failed to include the requisite affidavit of merits, the proposed amended pleading, and/or any evidentiary proof indicating in what way they propose to cure the fatally significant insufficiency(ies)/deficiency(ies) of the original pleading.

In view of the foregoing, this court is compelled to deny the Client's cross motion for leave to serve an amended complaint; grant the Law Firm's pre-answer dismissal motion in all respects; and dismiss the complaint in its entirety.

This shall constitute the decision and order of the court.

Dated:

4/9/01

MAHILYN J. GIBSON  
J.S.C.  
\_\_\_\_\_  
J.S.C.