

**Murray Hill Investments, Inc. v Parker Chapin Flattau
& Klimpl, LLP**

2002 NY Slip Op 30004(U)

January 3, 2002

Supreme Court, New York County

Docket Number: 1_30011/4124

Judge: Louis B. York

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

STATE OF NEW YORK

PRESENT: _____
Justice

PART 2

Murray Hill Investments
Inc
Parker Chipin et al

INDEX NO. 114/24-00
MOTION DATE _____
MOTION SEQ. NO. 04
MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Motion is decided in accordance
with accompanying memorandum decision.

MOTION/CASE IS REFERRED TO JUSTICE

Dated: 1/3/02

Luy STATE OF NEW YORK
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2**

..... X
MURRAY HILL INVESTMENTS, INC.,

Plaintiff,

Index No. 114124/00

-against-

PARKER CHAPIN FLATTAU & KLIMPL, LLP a/k/a
JENKINS, GILCHRIST, PARKER CHAPIN;
DANIEL S. GREENFIELD; MARK ABRAMOWITZ;
and CHARLES P. GREENMAN,

Defendants.

-----X

LOUIS B. YORK

In this action, plaintiffs principal, who pleaded guilty to felonies and tax fraud and served a prison sentence, seeks in plaintiffs behalf compensatory damages of \$5,000,000, plus punitive damages, arising out of defendant law firm’s negligent representation in a lawsuit against Citibank and others. Defendant had replaced defendant’s first attorney, also accused of malpractice, in the underlying action for the proceeds of alleged unpaid loans.

The heart of the claims against the defendant is that it failed to timely inform plaintiff of certain conflicts it had because of its prior representation of certain parties to the lawsuit, and also its refusal to cite the case of Smith v. Merrill Lynch, 113 A.D.2d 387 (3rd Dept. 1985). Defendant states that it immediately informed plaintiff of its prior representation of Citibank and that Citibank had given its permission for defendant to represent plaintiff in this action. Plaintiff expressed no objection. When the plaintiff discovered that there were conflicts with other defendants, it immediately moved to be

relieved as plaintiffs attorney. The motion was granted in open court on May 1, 1997, and the order was filed with the court on June 20, 2001.

Defendant moves to dismiss the complaint's six causes of action upon the grounds that its defense is based upon documentary evidence, the statute of limitations, the complaint's failure to state a cause of action, and failure to plead certain of the causes of action with sufficient particularity.

The court grants the motion to dismiss on statute of limitations grounds and failure to state a cause of action. The first cause of action is professional malpractice. Plaintiff blames defendant's malpractice for the dismissal of the underlying action. It is common knowledge that to sustain such a claim, the plaintiff must prove that it would have succeeded in the underlying action. This, it cannot do. The firm that replaced the defendant on appeal cited Smith v. Merrill Lynch, supra. Nevertheless, the trial court's decision was affirmed. Therefore, the defendant's citation of that case would not have affected the final outcome. Moreover, this court fails to see how the belated assertion of the conflicts of interest were a factor in plaintiffs loss of the underlying action.

The court notes that the court's granting of the motion to be relieved in open court with plaintiff present, on May 1, 1997, should have put plaintiff on notice that it could no longer rely on defendants' continuing representation. This was more than three years before the filing of the summons on June 26, 2000 in this action. The court's directive at that time to submit an order, which was recited in an order dated June 20, 1997 was also more than three years before the filing of the summons and complaint in this action on June 26, 2000 . Plaintiff claims that it did not become effective because the proposed

order was not served on it prior to or at the time of its submission to the court. However, service on the other side of a court's order is only required by the court rules if the court's decision states "settle order" or "submit order on notice." There is no such requirement where the direction is to merely "submit order." See Uniform Court Rule 202.48(a). Moreover, well before the signing, plaintiff had no basis for believing that the defendants' representation of it continued when it knew for a fact that the court had relieved the defendant law firm. Plaintiffs second and third causes of action sound in breach of fiduciary duty and fraud. The court determines that these are in actuality the same as the cause of action for malpractice, dressed up to look like different causes of action. Therefore, for statute of limitations purposes, the three-year statute of limitations applies, and they are both dismissed. Golia v. Health Insurance Plan of Greater New York, 6 A.D.2d 844 (2nd Sept. 1958) affd. 7 N.Y.2d 931 (1960). Moreover, both of these causes of action are dismissed on the merits because, like the cause of action for malpractice, they do not show how the plaintiff can prove damages, i.e., that it would have won the underlying lawsuit but for defendant's negligence.

The fourth and fifth causes of action are for replevin and for money damages resulting from conversion. Defendants' defense is that they have already turned over everything they have, including the copy of the mortgage. Once again, the order relieving counsel also required it to turn over everything of plaintiff's that it had on 6/20/97, which is more than three years before the filing of the summons and complaint. Several days later, the plaintiff mailed the copy of the mortgage papers in its possession. However, the causes of action regarding the mortgage papers were first raised in the amended

complaint on May 2, 2001, which was well beyond the three years of the demand and refusal. The statute of limitations begins to run upon a demand and refusal. Solomon R. Guggenheim Foundation v. Lubell, 77 N.Y. 311 (1991).

Finally, the fraud claim regarding the original mortgage papers was added only to avoid the statute of limitations for conversion, an approach that has been repudiated by our courts. Brick v. Cohn Hall Marx Co., 276 N.Y. 259 (1937). See also Gold Sun Shipping Limited v. Ionian Transport. Inc., 245 A.D.2d 420 (2nd Dept. 1997).

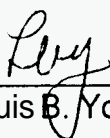
I have examined the plaintiffs other arguments and find them to be without merit. Accordingly, it is

ORDERED that this action is dismissed with motion costs of \$100 together with statutory costs; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

Enter:

Dated: ~~December~~ ^{January} 3, 2001²



Louis B. York, J.S.C.