

**Seligson, Rothman & Rothman v Gallin & Newman**

2003 NY Slip Op 30198(U)

September 19, 2003

Supreme Court, New York County

Docket Number: 126570/02

Judge: Louis B. York

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: LOUIS B. YORK  
*Justice*

PART 2

Deligson, Rothman + Rothman

INDEX NO. 156570-02

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 01

Gallin + Newman Esqs.

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

*motion is decided in accordance  
with accompanying memorandum decision.*

SCANNED

OCT 02 2003

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 9/19/03

Ley LOUIS B. 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  
SELIGSON, ROTHMAN, & ROTHMAN,  
ESQS.,

Plaintiffs,

Index No. 126570/02

-against-

GALLIN & NEWMAN, ESQS. and MARTIN  
GALLIN, and PHILIP NEWMAN,

Defendants.

-----X

**SCANNED**  
OCT 02 2003

YORK, J.:

Plaintiffs Seligson, Rothman & Rothman, Esqs. move for summary judgment, pursuant to CPLR 3212, on their first cause of action for breach of contract. Defendants Gallin & Newman, Esqs., and Martin Gallin and Philip Newman cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Collectively, the above motions are designated motion sequence 001.

**BACKGROUND**

Defendants served as the original counsel for a plaintiff in an underlying personal injury lawsuit, Gotoy v City of New York, New York City Police Department & Louis Leggett, (J. Barasch, Index-No. 39686/91). In the underlying case, the individual plaintiff (Gotoy) sued for injuries suffered, due to a motor vehicle accident, which occurred after his car became disabled on a three-lane expressway. Gotoy sued New York City, the New York City Police Department and another individual driver (Leggett) involved in the accident.

The underlying case commenced in the Supreme Court, Kings County, where Judge Barasch declined to instruct the jury on the issue of comparative negligence. The jury found in

favor of Gotoy, apportioned the percentage of liability among the defendants, and awarded damages for past and future pain and suffering and for past and future lost earnings. The judgement was entered on February 1, 1996. See Martin S. Rothman Affidavit in Support (Rothman Affidavit), Ex.C.

The case was appealed to the Appellate Division, Second Department. See Gotoy v City of New York, 249 AD2d 268 (2d Dept 1998). Plaintiffs, here, joined defendants in serving as the appellate counsel to Gotoy in the underlying case. On April 6, 1998, the Appellate Division affirmed the liability verdict, but found the damages to be excessive. Two justices dissented, on the basis that the trial court erred by not instructing comparative fault, since “a valid line of reasoning that could rationally support” such a finding existed, and recommended reversal and the granting of a new trial on the apportionment of liability among the defendants. Id. at 272.

The instant action arose from a letter agreement, executed on October 26, 1998, which set forth a fee arrangement for appellate services to be paid by the defendants to the plaintiffs. The letter was drafted and signed by Martin S. Rothman, Esq. (from the plaintiffs’ partnership) and also signed by Philip Newman, Esq. (from the defendants’ firm). The letter stated that,

This letter will serve to confirm our mutual agreement that our fee for appellate services rendered and which may be rendered in the above captioned matter [Gotov v. Citv of New York] is \$100,000, if the judgment or any part thereof is affirmed. Naturally, our obligation under this contingency arrangement extends to any appeal to the Court of Appeals.

Rothman Affidavit, Ex. F.

Subsequently, the underlying case was appealed, as of right, to the Court of Appeals, pursuant to CPLR 5601(a). On November 23, 1999, the Court of Appeals reversed the order and granted a new trial, “for reasons stated by the dissenters, to the extent that they concluded that the trial court erred in refusing to instruct the jury as to any alleged comparative negligence on

plaintiff's part.” Gotov v City of New York, 94 NY2d 812, 813 (1999).

On December 22, 1999, plaintiffs, on behalf of Gotoy, made a motion to amend the remittitur to clarify that the Court of Appeals had granted a new trial solely on the issue of comparative negligence “and, if any is found, that the apportionment of liability already adjudicated as between defendants *inter se* be reduced accordingly.” Lawrence T. D’Aloise, Jr. Affidavit in Opposition (D’Aloise Affidavit), **Ex. D**. The Court of Appeals denied the motion. See id., **Ex. E**. On or about July 6, 2001, the Supreme Court, Kings County granted a new trial on all the issues. See id., **Ex. K**.

#### Present Action

On or about December 9, 2002, the plaintiffs commenced this action for (1) breach of contract, and (2) quantum meruit. On or about January 3, 2003, the defendants filed an answer with an affirmative defense, asserting that the plaintiffs were not entitled to any contractual recovery against the defendants.

#### Present Motions

Plaintiffs move for an order granting summary judgment on their first cause of action for breach of contract, in the sum of \$100,000, plus 9% interest from April 6, 1998. Defendants cross-move for summary judgment dismissing the first and second causes of action.

#### ANALYSIS

The proponent of a summary judgment motion must tender sufficient evidence to establish entitlement to such relief as a matter of law and to eliminate any material issues of fact from the case. See CPLR 3212; Winegard v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are

insufficient.” Zuckerman v City of New York, 49 NY2d 557, 562 (1980) (citations omitted).

#### Alleged Breach of Contract

For the first cause of action, the court finds that the plaintiffs fail to provide sufficient evidence for summary judgment, and grants dismissal in favor of defendants. The letter agreement clearly states that the plaintiffs would only receive their fee, “if the judgment or any part thereof is affirmed.” Rothman Affidavit, Ex. F. This is an express condition which must be “literally performed.” Oppenheimer & Co., Inc. v Oppenheim, Appel, Dixon & Co., 86 NY2d 685,690 (1995). There is no doubt of the parties’ intentions, nor is there an occasion to interpret the terms of the letter agreement other than as written. See id. at 691.

The defendants argue that the express condition was not met, since the Court of Appeals reversed and granted a new trial on all issues. Therefore, the defendants were under no obligation to pay. Plaintiffs, however, argue that the Court of Appeals had no power to review the adequacy of damages and that its order directing a new trial had to be limited to the issue of liability.

The court finds that the express condition was not met because the Court of Appeals properly reversed and granted a new trial on all issues. First, the Court of Appeals may properly examine the issue of comparative fault and liability. See e.g. Mullen v Zobebe, Inc., 86 NY2d 135, 140 (1995); Lemlek v Israel, 78 NY2d 891 (1991). Second, it is not unusual for the Court of Appeals to reverse and grant a new trial on all issues, when a trial court errs in giving or failing to give a jury charge affecting liability or excludes evidence regarding plaintiff’s own negligence. See e.g. Caristo v Sanzone, 96 NY2d 172,175-76 (2001) (regarding jury charge on the emergency doctrine); Ellison v New York City Tr. Auth., 63 NY2d 1029,1030 (1984)

(regarding exclusion of evidence of contributory negligence, which was relevant to determine the extent of defendant's liability). Third, if a new trial is granted as to comparative negligence, a retrial of damages may also be appropriate (see e.g. Chan v Board of Educ., 162 AD2d 576, 577 [2d Dept 1990]), because if comparative fault is found, "the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages" (CPLR 1411).

Here, the Court of Appeals had the authority to reverse and grant a new trial without exceptions. The trial court's failure to instruct on comparative fault not only affected liability, but also affected the apportionment of liability, and the exact calculation of damages as well. Due to the above, the condition for payment, as set forth in the letter agreement, failed to occur. Therefore, the defendants' refusal to pay plaintiffs \$100,000 did not constitute a breach of the parties' agreement. No questions of fact remain.

#### Quantum Meruit Analysis

Furthermore, the court also finds plaintiffs' quantum meruit cause of action should be dismissed. The existence of an express agreement governing a particular subject matter precludes quasi-contract recovery for events arising out of the same subject matter. See Morales v Grand Cru Assocs., 759 NYS2d 890, 891 (2d Dept 2003). Plaintiffs do not argue that the express contract is unenforceable and, thus, cannot ignore it and proceed on the inconsistent theory of quantum meruit. Cf. Unisys Corp. v Hercules Incr., 224 AD2d 365, 367 (1<sup>st</sup> Dept 1996).

Accordingly, it is

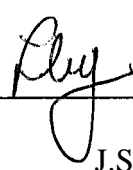
ORDERED that the motion submitted by the plaintiffs Seligson, Rothman & Rothman,

Esqs. for summary judgment is denied; and it is further

ORDERED that the cross motion submitted by the defendants Gallin & Newman, Esqs., and Martin Gallin and Philip Newman for summary judgment is granted, and the complaint is hereby dismissed, with costs and disbursements to the defendants as taxed by the Clerk of the Court; and it is

ORDERED that the Clerk is directed to enter judgment in favor of said defendants.

Dated: September 19, 2003

  
\_\_\_\_\_

J.S.C.

LOUIS B. YORK