

**Lan[er v Hurwitz**

2004 NY Slip Op 30346(U)

March 5, 2004

Supreme Court, New York County

Docket Number: 110846-03

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN  
*Justice*

PART 17

0110846/2003  
LANGER, LARRY  
vs  
HURWITZ, SEYMOUR  
SEQ 1  
DISMISS ACTION

INDEX NO. 110846-03  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were ~~used~~ 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 *is decided in accordance with the attached decision*

FILED

MAR 3 2 2004

COUNTY CLERK'S OFFICE  
NEW YORK

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Dated: 3/5/04

  
\_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

EMILY JANE GOODMAN

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 17

----- X

LARRY LANCER,

Plaintiff,

INDEX NO.  
110846/03

-against-

SEYMOUR HURWITZ,

Defendant.

**FILED**  
MAR 22 2004

..... X

**EMILY JANE GOODMAN, J.S.C.:**

Defendant moves pursuant to CPLR 3211(a)[1] and [7] to dismiss the complaint in this action based on an attorney's alleged breach of duty owed to a former client.

In 1995, defendant represented plaintiff in an unsuccessful transaction to purchase a Manhattan building in partnership with non-party Seth Miller ("Miller"). Miller ended up purchasing the building through some entities controlled by him (the "related entities") instead of in partnership with plaintiff. After the transaction, title to the building was held by one of the related entities, Broadway Heights Associates, LLC ("Broadway"). In April 1998, plaintiff sued Miller and the related entities in this court for breach of partnership agreement and other claims based on Miller's purchase of the building without plaintiff (Langer v. Miller, index no. 602026/98, the "partnership action"). Defendant did not represent either party in the partnership action. In August 1999, plaintiff served defendant with a subpoena duces tecum (defendant's exhibit E), but defendant never testified.

In 2001, defendant represented Miller in an application to The Roslyn Savings Bank

("Roslyn") for a mortgage on the building. In furtherance of Miller's mortgage application defendant furnished to Roslyn an opinion letter dated December 19, 2001 (the "opinion letter," at defendant's exhibit C). Based in part on that opinion letter, which plaintiff contends withheld vital information about the partnership action and contained material misrepresentations of fact, Miller obtained a \$2,900,000 mortgage on the building from Roslyn. Upon Broadway's receipt of the mortgage proceeds, Miller and his wife allegedly conveyed \$1,752,635.66 from Broadway to another related entity, Aegis Pension Plan ("Aegis"), which then transferred those assets to a Bermuda bank account. Shortly thereafter, in February 2002, plaintiff, after having the answer stricken (see Langer v. Miller, 281 AD2d 338 [1st Dcpt 2001]) and an inquest held, obtained a multi-million-dollar judgment in the partnership action (see Langer v. Miller, 305 AD2d 270 [1st Dcpt 2003], lv den \_\_\_ NY2d \_\_\_ [Dec 18, 2003]).

Plaintiff's complaint, which asserts causes of action for legal malpractice and negligence, pleaded in the alternative, alleges that the conveyances of assets by Broadway and Aegis were fraudulent under New York's Debtor and Creditor Law § 273-a, and that defendant knowingly drafted and delivered to Roslyn a materially false opinion letter in order to "aid and abet" Miller's "fraudulent conveyance of assets" so as to frustrate plaintiff's ability to collect on his imminent judgment in the partnership action.

Defendant argues that the complaint must be dismissed because (i) it cannot state a valid cause of action for legal malpractice since defendant's execution of the opinion letter for Miller is not "substantially related" to defendant's earlier representation of plaintiff; (ii) plaintiff's claims are premature since he has "commenced an action for contempt" in the partnership action and therefore may recover the full amount of the judgment therein; (iii) plaintiff's claim for

negligence is duplicative of the legal malpractice claim and must hence be dismissed; (iv) the fraud claim is not pleaded with the specificity required by the CPLR; and, (v) plaintiff has not sustained any actual ascertainable damages as a result of the alleged malpractice.

“An action for legal malpractice requires three essential elements: (1) the negligence of the attorney; (2) that the negligence was the proximate cause of the loss sustained; and (3) proof of actual damages” (Davis v. Klein, 224 AD2d 196, 198-199 [1st Dept 1996], lv granted, rearg den 226 AD2d 1148 [1st Dept 1996], affd 88 NY2d 1009 [1996], citing Mcendoza v. Schlossman, 57 AD2d 606, 606-607 [2d Dept 1982], app wdn 57 NY2d 778 [1982] and Lauer v. Rapp, 190 AD2d 778 [2d Dept 1993]). As discussed below, the allegations in the complaint do not support these elements.

Plaintiff does not allege that defendant represented Miller in his ouster of plaintiff to purchase the building, in the partnership action, or in any other context in which Miller was in direct opposition to plaintiff. Based on the facts alleged, there is no bar to defendant's representation of Miller in connection with a niche mortgage application. DR 5-108(A) provides, in relevant part, that absent consent of a former client after full disclosure, an attorney may not “[t]hereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client” or “[u]se any confidences or secrets of the former client except as permitted by DR 4-101 [1200.19] (C) or when the confidence or secret has become generally known.” Thus, where there is no substantial relation between the prior representation and the issues in the current adverse representation, and “it is unlikely that [the attorney] gained confidential information which would benefit [his new client], disqualification is not warranted” (Kubcrzig v. Advanced Dermatology, P.C., 260 AD2d

548, 549 [2d Dept 1999]). The question here is whether within an otherwise permissible representation, the *act* of furnishing Roslyn with a false opinion letter violated a duty defendant owed to plaintiff.

Knowingly issuing a false opinion letter which conceals material facts in order to induce a loan has been held to constitute a violation of DR 7-102(A)(7) (National Enterprises, Corp. v. Reback, n.o.r., 1994 WL 44827 [Sup Ct, NY Co, Ramos, J, 1994], rev'd on other grounds, 219 AD2d 484 [1st Dept 1995]). Were Roslyn the plaintiff here, the situation would be clear cut, since the information allegedly withheld would presumably be material to Miller's ability to repay the mortgage. However, the opinion letter was not addressed to plaintiff, who was not even a third party involved in the loan transaction, nor did plaintiff rely on its contents in any way (see Prudential Insurance Company of America v. Dewey, Ballantine, Bushby, Palmer & Wood, 80 NY2d 377, 379 [1992], rearg den 81 NY2d 955 [1993]).

The only privity alleged between the parties is in defendant's prior representation of plaintiff in an attempt to purchase the building; plaintiff had no connection to the subsequent transaction to obtain a mortgage. Hence, plaintiff cannot state a direct claim for fraud or legal malpractice against defendant (see Associated Factors Corporation v. Paul M. O'Neill Detective Agency, Inc., 146 AD2d 728 [2d Dept 1989]; Council Commerce Corporation v. Schwartz, Sachs & Kamhi, P.C., 144 AD2d 422, 424 [2d Dept 1988], lv den 74 NY2d 606 [1989]). While it is true that "[a]n attorney has a continuing fiduciary obligation not to represent interests adverse to those of ... [a] former client, ... [that duty] is based upon an attorney's obligation to preserve the confidences of former clients" (Krouner v. Koplovitz, 175 AD2d 531, 532 [3d Dept 1991], citing Grcene v. Grcene, 56 NY2d 86, 92 [1982] and Cooke v. Laidlaw, Adams & Peck,

126 AD2d 453, 456 [1st Dept 1987]).

Here, plaintiffs malpractice claim against defendant is based not on his disclosure of plaintiff's confidential information but rather on his concealment of information he would not have learned but for his earlier representation of plaintiff. In other words, what flows from defendant's prior representation of plaintiff is not a duty to speak, but rather the actual knowledge of facts which, as alleged in the complaint, rendered defendant's material omissions in the opinion letter intentional rather than negligent. Under the facts herein, the only duty that can be established by plaintiff's allegations is the duty to preserve his confidences, and it is not alleged that such duty was breached, which is fatal to Plaintiff's claim. Plaintiff's alternative claim of negligence similarly cannot stand. "A defendant may be held liable for negligence only when it breaches a duty owed to the plaintiff" (Strauss v. Belle Realty Company, 65 NY2d 399 [1985], citing Pulka v. Edelman, 40 NY2d 751 [1976], rearg den 41 NY2d 901 [1977]).

The complaint also fails to state a cause of action for "aiding and abetting," which is a variety of concerted-action liability (see Pittman v. Pittman, 149 F 3d 111 [2d Cir. 1998]). Under New York law, concerted-action liability is based on the principle that "those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer . . . are equally liable with him" (Bichler v. Eli Lilly & Co., 55 NY2d 571, 580 [1982] [citations omitted]). Thus, it is essential to allege that "each defendant charged with aiding in concert have . . . committed an act in pursuance of the agreement which constitutes a tort" (Rastelli v. Goodyear Tire & Rubber Co., 79 NY2d 289, 295 [1992] [citations omitted]). Plaintiff maintains that the complaint states a claim for aiding and abetting a fraudulent conveyance and for aiding and abetting a fraud.

However, with respect to aiding and abetting a fraudulent conveyance, there is no “creditor’s remedy for money damages against parties who . . . were neither transferees of the assets nor beneficiaries of the conveyance” unless the party “benefitted in any way from the transfer” (Federal Deposit Ins. Corp. v. Porco, 75 NY2d 840, 842 [1990]). Cases have held that an attorney does not receive a benefit merely by being paid for the legal services that facilitated the fraudulent transfer (see Contractors Cas. & Sur. Co. v. I.E.A. Elect. Group, 181 Misc 2d 469 [Sup. Ct., NY County 1999]), and that a plaintiff must prove that the attorney benefitted personally, such as where some of the transferred assets were used to pay the attorney’s family expenses (Stochastic Decisions, Inc. v. DiDomenico, 995 F2d 1158, 1171 [2d Cir], cert. denied 510 US 945 [1993]). Even if the mere payment of legal fees can constitute a benefit, the complaint fails to allege that defendant was paid for his services from the receipt of the proceeds of the fraudulent transfer. Accordingly, plaintiff fails to state a cause of action for aiding and abetting a fraudulent conveyance. Moreover, with respect to plaintiff’s contention that he states a cause of action for aiding and abetting a fraud, plaintiff has not shown that he reasonably relied on any misrepresentation, which an essential element of fraud (see Stuart Silver & Assoc., v. Baco Dev. Corp., 245 AD2d 96, 98 [1st Dept 1997]).

It is hereby

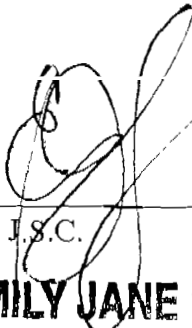
ORDERED that motion to dismiss the complaint is granted and the complaint is dismissed with costs and disbursements as taxed by the Clerk of the Court; and it is further

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

**This constitutes the Decision and Order of the court.**

DATED: March 5, 2004

ENTER

  
\_\_\_\_\_  
J.S.C.  
**EMILY JANE GOODMAN**

**FILED**  
MAR 22 2004  
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