

Edelman v O'Toole-Ewald Art Associates, Inc.

2005 NY Slip Op 30008(U)

May 12, 2005

Supreme Court, New York County

Docket Number: 0603104/2004

Judge: Carol R. Edmead

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: HON. CAROL EDMEAD
Justice

PART 35

0603104/2004

EDELMAN, ASHER B.
VS
O'TOOLE-EWALD ART ASSOCIATES

SEQ 01

TR Disc

DEX NO. 603104/04

OTION DATE 5/10/05

OTION SEQ. NO. 001

OTION CAL. NO. _____

tion 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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that defendants' motion for dismissal of the amended complaint is granted pursuant to CPLR 3212 and the amended complaint is dismissed; and it is further

ORDERED that plaintiff's cross-motion for partial summary judgment against defendants on the issue of liability is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon plaintiff within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 5/12/05

[Signature]

J.S.C.

HON. CAROL EDMEAD

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
MAY 16 2005
NEW YORK COUNTY CLERK'S OFFICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
ASHER B. EDELMAN,

Plaintiff,

Index No. 603104-2004

DECISION/ORDER

-against-

O'TOOLE-EWALD ART ASSOCIATES, INC.,
ELIN LAKE EWALD, and JOHN DOES "1" through "10,"

Defendants.

----- X
HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action, Asher B. Edelman ("plaintiff") seeks damages for breach of fiduciary duty, appraiser malpractice, violations of New York's General Business Law ("GOL") § 349, and common law fraud. Particularly, plaintiff alleges that, *inter alia*, defendant O'Toole-Ewald Art Associates, Inc. ("O'Toole-Ewald") and its President, Elin Lake Ewald ("Mr. Ewald") (collectively "defendants") owed him a fiduciary duty and that they breached this alleged duty and committed "appraiser malpractice" by preparing erroneous appraiser reports regarding a painting formerly owned by plaintiff entitled "Greece on Eighth Avenue" by Willem de Kooning (the "Painting"). Plaintiff also alleges that defendants violated GOL § 349 by engaging in deceptive business practices designed to mislead the public by reading an "understanding with insurance industry representatives to favor the interests of insurance companies over the interests of policyholders when appraising valuable art work insurance claims."

Defendants now move pursuant to CPLR 3212 for summary judgment dismissing the amended complaint, and for dismissal of the amended complaint for failure to state a cause of action. In response, plaintiff cross moves for partial summary judgment against defendants on

the issue of liability.

Amended Complaint

According to plaintiff, in September 2002, plaintiff consigned the Painting to an auction house then known as Phillips de Pury & Luxembourg (“Phillips”) pursuant to a consignment agreement. On September 23, 2003, Phillips picked up the Painting from his office,¹ and placed the Painting at an auction on November 11, 2002. However, the Painting was not sold, and on November 21, 2002, was delivered to the James Goodman Gallery in New York, New York. On November 21, 2002, the James Goodman Gallery then advised plaintiff that the Painting had been damaged. Plaintiff notified Chubb Indemnity Insurance Company (“Chubb Insurance”), which initiated a claims investigation.

Plaintiff sets forth the “Total loss” and “Partial loss” coverage provisions in his policy with Chubb Insurance (the “Policy”), and indicates that the itemized value of the Painting at the time of loss was \$2 million. Plaintiff alleges that in order to determine the amount of his compensation under the Policy, it was necessary for the parties to ascertain the percentage change to the market value of the Painting which occurred as a result of the damage, also known as “loss in value.”

In December 2002, Chubb Insurance hired defendants to act as independent art appraisers regarding plaintiff’s insurance claim.² Chubb allegedly advised plaintiff that defendants were well regarded independent appraisers who would determine the loss in value of the Painting, and

¹ In his affidavit in support of his cross-motion, plaintiff claims that at the time, there was no noticeable damage to the Painting.

² According to Mr. Ewald’s affidavit, defendant O’Toole-Ewald is in the business of fine art and personal property appraisals. (¶2).

the costs necessary to restore and stabilize the Painting. Chubb also advised that it would issue a report on the restoration costs and loss in value, and that this report would be provided to plaintiff.

Defendant O'Toole-Ewald inspected the Painting in December 2002, and on January 23, 2003, issued a preliminary report to Chubb. Defendant O'Toole-Ewald recommended that the Painting be restored, estimated that the Painting would have a loss in value of 10% after restoration, and concluded that plaintiff be paid \$65,000.00 for the damage (\$7,000.00 for restoration costs, and \$55,000.00 for loss in value based on a calculation of 10% of the \$555,000 market value of the Painting at the time of loss). Chubb disagreed with O'Toole-Ewald's calculation, which under the Policy, should have been 10% of the \$2 million "scheduled amount" in accordance with the "Partial loss" provision. After Chubb informed O'Toole-Ewald of the correct methodology, on February 5, 2003, O'Toole-Ewald issued a second report estimating that the Painting would have a loss in value of 5%. This report was provided to plaintiff with defendants' knowledge.

Plaintiff further alleges that in an unrelated criminal action against a certain defendant "Nuzzo," concerning a stolen painting (the "Criminal Matter"), defendant Nuzzo's counsel cross-examined Mr. Ewald, who was called as an expert regarding the market value of the stolen painting. During cross-examination, Mr. Ewald was shown documents Chubb had produced in plaintiff's insurance coverage action against Chubb previously commenced in Supreme Court, New York County for payment under the Policy for loss of the Painting at issue herein. At his cross-examination, Mr. Ewald testified essentially that the initial appraisal was "recalculate[d]" because if the loss in value had been 10% on \$2 million, it would have been \$200,000, which

was too much money for “a painting that was . . .in that condition. . . .the compensation should not be an extraordinary amount of money for someone who had insured a painting for two million, but whose painting was worth five hundred fifty thousand dollars.”³

Plaintiff also alleges that defendants’ appraisal of the Painting at a market value of \$555,000 was deliberately low; the market value of the Painting in 2002 was between \$750,000 and \$2 million. In May 2003, plaintiff sold the Painting for \$350,000. Assuming the pre-accident market value of the Painting was \$750,000, the Painting suffered a 53% loss in value, which would result in a payment to plaintiff of over \$1 million.

It is alleged that defendants’ website indicates that they “adhere to the regulations required by the Appraisal Foundation’s Uniform Standards of Professional Appraisal Practice” (rule 3.6) and the ethical standards set by the American Society of Appraisers (“ASA”) (Ethics Rules 39(a)-(d)). In promoting the interest of insurance companies, defendants failed to comply with such standards in connection with their appraisal of the Painting. Defendants knew that their appraisal was being given by Chubb to plaintiff and used to determine the amount of damages the plaintiff would be offered by Chubb under the Policy.

As independent appraisers selected by Chubb, defendants owed plaintiff a fiduciary duty to abide by ethical standards and rules of independent appraisers. By manipulating their findings on unfounded suspicions about plaintiff’s motivations, defendants breached their fiduciary duty, impugned his reputation in the business and art communities, poisoned his relationship with his

³ Mr. Ewald also testified that he is “able to look at both [the owner’s intent and motives and the damage or loss in value of the painting] because we talked to the conservator who is independent also. She had told [plaintiff] not to travel that painting . . .” “This man had done it twice. . . .He seemed to be wanting to collect on insurance.” (Pages 9-10 of amended complaint).

insurance company, and caused him to incur legal fees. Defendants improperly acted as Chubb's advocates, instead of acting as "independent" art appraisers.

In support of the malpractice claim, plaintiff alleges that defendant knew or should have known that Chubb and plaintiff were each relying on them, and did rely on them, to exercise the care and skill expected of independent appraisers. Defendants committed malpractice by providing an appraisal of loss in value that was influenced by their unfounded suspicions, and by failing to disclose in their report that their appraisal was based on their subjective beliefs, resulting in damages.

Furthermore, defendants reached an understanding with insurance industry representatives to favor the interest of insurance companies over the interests of policyholders. Therefore, when Chubb advised plaintiff that defendants would be acting as independent appraisers, he reasonably believed that they would act as independent appraisers. Instead consistent with the agreement to favor the interest of insurance companies, defendants conspired with John Does "1" to "10" to manipulate their conclusions to limit plaintiff's insurance claim. These deceptive acts caused damage to numerous consumers, including plaintiff.

Finally, it is alleged that all of the above constitutes actual and/or constructive fraud under New York's common law.

Dismissal Motion

In support of summary relief, defendants point out that there was no contract between plaintiff and defendants regarding the Painting, and defendants never had any contact with plaintiff; their reports were addressed and sent directly to Chubb. Moreover, prior to sending the reports to Chubb, Mr. Ewald and the appraiser (Janice Vrana) were never made aware that Chubb

intended to provide copies of the reports to plaintiff; it was Mr. Ewald and Mrs. Vrana's belief that the reports would only be used by Chubb for internal purposes. Therefore, defendants argue that since there is no privity between plaintiff and defendants, defendants owed plaintiff no duty; since plaintiff's claims are analogous to nothing more than an alleged private contract dispute unique to the parties rather than the public at large, GOL § 349 is inapplicable; since plaintiff hired his own expert to perform an appraisal on the Painting in connection with his insurance claim, it is undisputable that plaintiff never relied on O'Toole-Ewald's appraisals of the Painting; and plaintiff has not suffered any damages because his insurance claim involving the Painting is still pending.

As to the fraud claim, the record demonstrates that plaintiff did not rely on the reports because he conceded at his deposition that he hired his own appraiser because he did not agree with the appraisals; the record fails to demonstrate that defendants intended to induce plaintiff to rely on the reports; and plaintiff cannot demonstrate that he sustained any damages.

Further, it is argued that plaintiff's GBL § 349 claim must be dismissed as it is analogous to nothing more than an alleged private contract dispute regarding insurance coverage that is unique to plaintiff rather than the public at large. The amended complaint is bereft of any facts tending to establish an extensive scheme that had a broad impact on consumers at large. And, because the allegation that plaintiff was damaged as a result of the "settlement of art claims" is false given that this insurance claim is still pending in the related lawsuit, plaintiff has suffered no injury.

In opposition, plaintiff claims that the relationship between himself and defendants is sufficiently close to sustain his causes of action. Plaintiff also argues that he is entitled to

summary judgment on all three causes of action.

According to plaintiff, the evidence demonstrates that defendants owed a duty to plaintiff, in that (1) the appraisal reports indicate that defendants knew that their opinion was being used for the particular purpose of establishing the loss in value for the Painting; (2) defendants knew that plaintiff was relying on their appraisal in that plaintiff spoke directly with Mr. Ewald about the report he later received; Chubb representatives told Mr. Ewald that plaintiff had noted factual inaccuracies in the report which could affect the amount Chubb would pay, and therefore, Mr. Ewald knew that plaintiff had reviewed the appraisal report and was relying on it; also, when plaintiff wanted to hire a second appraiser, Chubb refused to pay for it on the ground the Policy required Chubb to pay for one appraiser; since the “end and aim” of defendants’ retention was to determine the loss in value of the Painting, the defendants knew that plaintiff would rely upon their opinion; and (3) there is ample evidence linking defendants’ conduct to plaintiff which evince defendants’ understanding that plaintiff was relying on the reports; plaintiff spoke with Mr. Ewald concerning the appraisal; the report was for the benefit of plaintiff who would receive an insurance payment; the sole purpose of the defendants’ engagement was to fix the amount due plaintiff under Chubb’s Policy.

Plaintiff also argues that the cases cited by defendants involve insurance investigation, and do not apply to the instant matter in which defendants were hired to conduct an independent appraisal to determine the replacement value and subsequent loss in value.

As to his fraud claim, plaintiff contends that Mr. Ewald’s admissions in the Criminal Matter demonstrate defendants’ violation of the ASA Rules, which indicate that a fiduciary relationship exists between the appraiser and “those who rely upon his findings.” Plaintiff argues

that defendants fraudulently represented that they were independent and unbiased, as evidenced by Mr. Ewald's expert testimony in the Criminal Matter.

Further, it is argued that issues of fact exist as to plaintiff's GBL § 349 claim. Defendants boast that their clients include numerous members of the insurance industry, and plaintiff has alleged that defendants have reached an understanding with the insurance industry to favor the interest of insurance companies which caused injury to numerous consumers. Therefore, plaintiff contends, his amended complaint sufficiently states a cause of action under GBL § 349.

In reply, defendants point out that the closest connection asserted by plaintiff is that he called Mr. Ewald to request a copy of the report O'Toole-Ewald was preparing for Chubb, but according to plaintiff, she refused to provide it to him and referred him to Chubb. Also, all three causes of action must fail because since plaintiff "did not agree" with defendants' reports, plaintiff cannot establish the "reliance" element common to all these causes of action. Further, plaintiff has not suffered any damages because the Policy provides that Chubb and plaintiff are entitled to select their own appraiser in the event they cannot agree on the amount of loss covered, and that each appraiser shall be paid for by the party selecting the appraiser. Chubb and plaintiff hired their own appraiser, and there is no basis for plaintiff to recover plaintiff's cost of litigating the related action against Chubb. Further, as to the GOL 349 claim, other than plaintiff's counsel's conclusory statements, there is no evidence tending to establish any scheme or conspiracy, let alone any scheme that had a broad impact on consumers at large.

Analysis

Breach of Fiduciary Duty

To state a claim for breach of fiduciary duty, plaintiff must first establish that a fiduciary relationship existed between the parties. A fiduciary relationship only arises when one has reposed trust and confidence in the integrity and fidelity of another who thereby gains influence or assumes control and responsibility (*see, Board of Managers of Fairways at North Hills Condominium v. Fairway at North Hills*, 193 A.D.2d 322). As to insurance companies, such companies do not generally owe a fiduciary duty to insureds (*Murphy v. Kuhn*, 90 N.Y.2d 266 [1997]). However, a fiduciary duty may arise if the facts of the particular relationship between the parties create an exceptional situation in which an insurance agent, through his or her conduct or by express or implied contract, assumes or acquires duties in addition to those fixed at common law (*Murphy v. Kuhn*, *id.* at 272; *Fortino v. Hersh*, 307 A.D.2d 899 [1st Dept 2003]). Consequently, a fiduciary duty by defendants, which were hired by Chubb, may arise if the facts of their purported relationship with plaintiff creates an exceptional situation in which defendants acquire duties in addition to those fixed at common law.

Here, defendants were hired directly by Chubb to examine the Painting; the appraisal reports were sent directly to Chubb; the defendants did not provide the appraisal reports to plaintiff. Further, defendants expressly deny any communication with plaintiff concerning the Painting. Plaintiff never hired O'Toole-Ewald to examine the Painting and no such agreement or contract exists. In fact, the only contact plaintiff had with defendants was in regard to arranging for defendants to inspect the Painting, and receiving the appraisal reports, which defendants declined to provide to plaintiff. Therefore, there are insufficient facts establishing the existence

of a relationship between plaintiff and defendants as would give rise to a fiduciary duty by defendants to him.

Appraiser Malpractice

The threshold question in any negligence action is whether the alleged tortfeasor owes a duty of care to the injured party (*Sheila C. v. Povich*, 11 AD3d 120 [1st Dept 2004] citing *Espinal v. Melville Snow Contrs., Inc.*, 98 N.Y.2d 136, 138, 746 N.Y.S.2d 120; *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 232, 727 N.Y.S.2d 7), and the existence and scope of that duty is a legal question for the courts to determine (citations omitted). Indeed, "[i]n the absence of duty, there is no breach and without a breach there is no liability" (*Pulka v. Edelman*, 40 N.Y.2d 781, 782, 390 N.Y.S.2d 393; *Dugue v. 1818 Newkirk Mgmt. Corp.*, 301 A.D.2d 561, 562, 756 N.Y.S.2d 51; *Petito v. Verrazano Contr. Co., Inc.*, 283 A.D.2d 472, 473, 724 N.Y.S.2d 463). As the Court of Appeals has noted, duty in a negligence case is not defined by privity of contract, although privity may be relevant in determining whether a duty exists (*see, Strauss v. Belle Realty Co.*, 65 N.Y.2d 399, 402-403, 492 N.Y.S.2d 555). Thus, the fact that plaintiff was not in privity of contract with defendants does not, as a matter of law, operate to preclude plaintiff's appraisal malpractice negligence claim.

In *Credit Alliance Corp. v. Andersen & Co.* (65 NY2d 536, 551 [1985]) the Court determined the issue of "whether an accountant may be held liable, absent privity of contract, to a party who relies to his detriment upon a negligently prepared financial report." A third party brought suit for negligent misrepresentation and malpractice against an accounting firm based upon an erroneous financial report issued by the firm to its client L.B. Smith, Inc. of Virginia, a capital intensive enterprise. As a condition for continued financing, the enterprise submitted its

financial statement, which contained an auditor's report prepared by defendant, Arthur Andersen & Co. In reliance upon the defendant's accounting reports, the plaintiff provided continued financing to the enterprise. Subsequently, the enterprise defaulted on several millions of dollars of obligations to plaintiffs, and filed for bankruptcy.

The Court stated the following three-prong test for determining when accountants may be held liable in negligence to non-contractual parties who rely to their detriment on inaccurate financial reports: (1) the accountant must have been aware that the reports were to be used for a particular purpose; (2) intended reliance upon the reports for the furtherance of the purpose; and (3) there must have been some conduct on the part of the accountant linking him to that party which evinces the accountant's understanding of that party's reliance (65 N.Y.2d at 551, 493 N.Y.S.2d 435; *Ossining Union Free School District v. Anderson LaRocca Anderson*, 73 N.Y.2d 417, 541 N.Y.S.2d 335 [1989]; *see also Alpert v. Shea Gould Climenko & Casey*, 160 A.D.2d 67 [1st Dept 1990]). This test has been applied to other professionals as well (*see Ossining Union Free School District, supra* [1989] [engineers]; *Eiseman v. State*, 70 N.Y.2d 175, 518 N.Y.S.2d 608 [1987] [physicians]; *Viscardi v. Lerner*, 125 A.D.2d 662, 510 N.Y.S.2d 183 [2d Dept 1986] [attorneys]; *Calamari v. Grace*, 98 A.D.2d 74, 469 N.Y.S.2d 942 [2d Dept 1983] title insurers]).

In *Ossining Union Free School District v. Anderson LaRocca Anderson* (73 N.Y.2d 417), the plaintiff alleged that it relied upon certain reports made by defendant in order to determine the structural soundness of the high school annex. As a result of plaintiff's request to defendant Anderson for an evaluation and feasibility study of plaintiff's buildings, two consulting firms hired by Anderson tested the concrete at certain locations of the building. Both firms reported serious weaknesses in the building, and Anderson reported these findings to plaintiff. Relying on

these findings, the plaintiff school district closed the annex at purportedly substantial expense. After retaining an independent expert to check the results, plaintiff learned that defendant's findings were based on mistaken assumptions, and therefore, its actions were unnecessary. Plaintiff sued, *inter alia*, the consulting firms for negligence and malpractice. Citing to *Credit Alliance (supra)*, the Court stated as the second factor "reliance by a known party or parties in furtherance of [the particular] purpose [for which the reports were to be used]." Applying the three factors, the court found that dismissal of the claims was not warranted.

Therefore, plaintiff must show that defendants were aware that the substance of their reports would be distributed to and relied upon by plaintiff, that such reliance did occur, and that the conduct of such defendants sufficiently linked them to plaintiff and evinced their understanding of plaintiff's reliance.

As to the first element, it cannot be disputed that defendants were aware that the reports were to be used for a particular purpose of providing the loss in value for the Painting.

As to the second element, to wit: whether plaintiff was intended to rely on the reports for the furtherance of the purpose, it cannot be said that defendants did not know that plaintiff was relying on their appraisal. Defendant O'Toole-Ewald was hired directly by Chubb to examine the Painting and provide an appraisal report to Chubb. An appraisal report, dated January 24, 2003 (the "First Report") by Janice Vrana was prepared. An appraisal report, dated February 5, 2003 (the "Second Report") by Mrs. Vrana was also prepared. These reports were sent by O'Toole-Ewald directly to Marcelle Dial at Chubb. Mrs. Vrana states that she was never advised or made aware that Chubb intended to provide copies of the reports to plaintiff, denies having had any contact with plaintiff, and is unaware of any employee of O'Toole-Ewald having any

such contact. However, based on plaintiff's affidavit, wherein he states that defendants advised him to obtain the reports from Chubb, it may reasonably be inferred by a fact finder that defendants were aware that plaintiff was intending to rely on their reports. Further, the record indicates that Chubb representatives told defendant Mr. Ewald that plaintiff had noted factual inaccuracies in the report which could affect the amount Chubb would pay.

However, notwithstanding the above, plaintiff failed to raise an issue of fact as to his reliance of such reports. Although plaintiff cites to several instances in which Chubb advised them of the quality and production of the appraiser reports, the record demonstrates that plaintiff did not rely on defendants' reports to his detriment; plaintiff hired his own appraiser and indicated that he would rely on his own appraiser, with consideration of defendants' reports. Unlike the plaintiff in *Credit Alliance Corp.*, where plaintiff provided financing to an enterprise based upon their reliance on financial reports prepared by defendant therein, or the plaintiff school district in *Ossining* which closed the annex at purportedly substantial expense based on the defendant's reports, plaintiff here failed to allege, and the record is devoid any evidence indicating, that plaintiff changed his position as result of the appraiser reports (*see also, Ossining Union Free School District, supra* [stating that defendants allegedly rendered their reports with the objective of thereby shaping this plaintiff's conduct, and thus, they owed a duty of diligence . . . to the school district *who relied*"] (*emphasis added*)). In fact, instead of relying on the defendants' reports, plaintiff hired his own independent appraiser.

Furthermore, that plaintiff hired his own independent appraiser at his expense is inconsequential, given that the Policy expressly contemplates this event. The Policy provides:

Appraisals

If you [plaintiff] and we [Chubb] fail to agree on the amount of loss, either one can demand that the amount of loss be set by appraisal. If either makes a written demand for appraisal, each shall select a competent, independent appraiser and notify the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers shall then select a competent, impartial umpire. If the two appraisers are unable to agree upon an umpire within 15 days, you or we can ask a judge of a court of record . . . to select an umpire. . . .

A plain reading of this provision indicates that plaintiff's selection of an independent appraiser was contemplated and required by the Policy in the event plaintiff and Chubb did not *first* agree on the amount of loss. Upon plaintiff's refusal to agree with Chubb's offer, whether based on the defendants' appraisal or not, plaintiff was required to select its own independent appraiser, which plaintiff herein so selected. Therefore, it cannot be said that plaintiff "relied" on defendants' reports to his detriment, especially when plaintiff rejected Chubb's offer and hired his own independent appraiser.

Fraud

"An action for fraud requires that the plaintiff demonstrate the making of a material misrepresentation, known to be false, made with the intention of inducing reliance on the part of the victim, on which the victim does in fact rely and, as a result of which, he sustains damages" (*National Union Fire Ins. Co. v Robert Christopher Assocs.*, 257 AD2d 1 [1st Dept 1999] citing *Ippolito v Lennon*, 150 AD2d 300, 303 [1st Dept 1989]). Based on this Court's conclusion that plaintiff failed to demonstrate any reliance in fact upon defendants' reports, plaintiff's fraud claim must fail.

General Business Law § 349

In order to make out a valid GBL § 349 claim, plaintiff must allege both a deceptive act

or practice directed toward consumers and that such act or practice resulted in actual injury to a plaintiff (*Blue Cross and Blue Shield of N.J., Inc. v Philip Morris USA Inc.*, 3 N.Y.3d 200, 785 N.Y.S.2d 399 [2004]). Plaintiff's amended complaint is devoid of any facts sufficient to support a claim under GBL § 349. Particularly, there are no allegations, or indicia in the record, to support the claim that defendants' acts constitute a practice directed toward consumers.

Based on the foregoing, it is hereby

ORDERED that defendants' motion for dismissal of the amended complaint is granted pursuant to CPLR 3212 and the amended complaint is dismissed in its entirety; and it is further

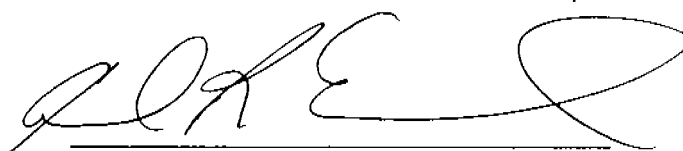
ORDERED that plaintiff's cross-motion for partial summary judgment against defendants on the issue of liability is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon plaintiff within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: May 12, 2005



Hon. Carol R. Edmead, J.S.C.

FILED
MAY 16 2005
NEW YORK
COUNTY CLERKS OFFICE