

Agate v Herrick, Feinstein LLP
2005 NY Slip Op 30100(U)
October 14, 2005
Supreme Court, New York County
Docket Number: 0104289/2005
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

LOUIS B. YORK

PRESENT: _____

PART 2

Index Number : 104289/2005 *luctica*

AGATE, JAMES

vs

HERRICK FEINSTEIN LLP

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ in 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.**

FILED
OCT 24 2005
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/19/05

[Signature]
LOUIS B. YORK

J.S.C.

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):

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

-----X
JAMES AGATE,

Plaintiff,

Index No.
104289/05

-against-

HERRICK, FEINSTEIN LLP and ARTHUR
JAKOBY, ESQ.

Defendants.

-----X
LOUIS YORK, J.:

FILED
OCT 24 2005
NEW YORK
COUNTY CLERK'S OFFICE

Motion Sequence Nos. 001 and 002 are consolidated for disposition. In Sequence No. 001, defendants move, pursuant to CPLR 3211 (a) (1) and (a) (7), for an order dismissing the complaint.

In Sequence No. 002, plaintiff moves for an order granting leave to serve a supplemental summons and amended complaint to add Harvey Feuerstein as a defendant. That motion is granted on consent. Thus, this court will decide Motion Sequence No. 001 with reference to the amended complaint.

Defendant Herrick Feinstein LLP (HFLLP) is a New York law firm and defendants Arthur Jakoby and Harvey Feuerstein are members of the firm. The instant legal malpractice claim arises out of defendants' representation of plaintiff James Agate in an arbitration proceeding.

An individual named Spencer Segura, acting on behalf of Spencer Trask Securities (Trask), made separate oral agreements with Agate and with another individual, Edward Kaminsky, under which Agate and Kaminsky were each to purchase a \$100,000 investment in the general partner of an entity known as NextLevel Communication I (NextLevel). NextLevel later went public. Segura ultimately repudiated both oral agreements. Kaminsky then retained HFLLP to represent him in an action against Trask. Agate later decided to retain HFLLP to prosecute his claims against Trask.

The claims of Agate and Kaminsky were tried together before a National Association of Securities Dealers (NASD) arbitrator. Ultimately, without any oral or written explanation, the arbitrator awarded Agate and Kaminsky each the sum of \$294,000 in compensatory damages plus \$50,000 in punitive damages. Agate and Kaminsky were dissatisfied with the dollar amounts awarded, and brought a petition to vacate the award. Since the award was far less than the damages sought, Segura cross-moved for a judgment confirming the arbitration award. Justice Cahn denied the petition and granted the cross-motion. Agate and Kaminsky are currently appealing the judgment of Justice Cahn.

Plaintiff, who had sought \$18 million against Segura in the arbitration proceeding, then brought this legal malpractice action, contending that, but for the legal malpractice of HFLLP, his recovery would have been far higher than the amount awarded by the arbitrator.

The complaint alleges legal malpractice and seeks treble damages pursuant to Judiciary Law § 487.

In the first cause of action, plaintiff alleges that, by reason of factual and legal differences in their respective claims against Segura, a conflict of interest existed between himself and

Kaminsky, and that HFLLP should not have represented both of them. It is alleged that by reason of HFLLP's conflict of interest, HFLLP was in violation of the Code of Professional Responsibility.

The second cause of action alleges that HFLLP did not present proper proof to the arbitrators regarding Agate's damages. The damages recoverable depended upon the date of Seguura's breach of the oral agreement. Since, according to plaintiff, the stock price of NextLevel rose substantially after the Initial Public Offering (IPO), it was important to be able to prove that the breach occurred sometime after the IPO rather than before the IPO. In his affidavit submitted in opposition to the motion, Agate claims that the facts of his case were different from the facts of Kaminsky's case, and that HFLLP failed to represent Agate's interests in a proper manner.

The third cause of action alleges that HFLLP made false representations to Agate regarding legal fees. Agate contends that although HFLLP told him that he and Kaminsky would be sharing legal fees equally, Kaminsky received favorable treatment at Agate's expense.

The fourth cause of action alleges that, by reason of the allegations described above, HFLLP was guilty of deceit and is liable for treble damages under Judiciary Law § 487.

The fifth cause of action alleges that HFLLP breached a fiduciary duty owed to him as a client.

In deciding a motion to dismiss a legal malpractice claim for failure to state a cause of action, the facts alleged by plaintiff are assumed to be true, and plaintiff is afforded the benefit of every possible favorable inference (Gamiel v. Riess-Curtis, 16 AD3d 140 [1st Dept 2005]).

In order to recover for legal malpractice, plaintiff must show that but for the alleged

negligence of the defendants, he would have prevailed in the litigation or arbitration (Hand v Silverman, 15 AD3d 167, [1st Dept 2005], lv denied 5 NY3d 707 [2005]). Neither an error in judgment nor choosing a reasonable course of action would constitute malpractice (id). Plaintiff must prove that the attorney was negligent in handling the matter, that such negligence caused a loss and that he suffered actual and ascertainable damages (Brodeur v. Hayes, 18 AD3d 979 [3d Dept 2005]). It must be shown that defendants departed from the standard of care commonly possessed by member of the legal community (Edwards v Haas, Greenstein, Samson, Cohen & Gerstein, 17 AD3d 517 [2d Dept. 2005]). Mere speculation about a loss resulting from the attorney's omission is insufficient to make out a prima facie prima facie case of legal malpractice (Plymouth Organization, Inc. v Silverman, Collura & Chernis, 21 AD3d 464 [2d Dept 2005]).

There is no private right of action for violation of the Code of Professional Responsibility (Kantor v Bernstein, 225 AD2d 500 [1st Dept 1996]). Therefore, the first cause of action must be dismissed. However, the alleged conflict of interest conceivably can be part of plaintiff's second cause of action, discussed below.

Defendants maintain that they used their best efforts to prove Agate's damages theory to the arbitrator, but were unsuccessful. Defendants also maintain that Agate's legal malpractice claim is speculative because the arbitrator did not give any reason for the award. In other words, according to defendants, plaintiff cannot properly accuse them of malpractice in the handling of the damages aspect of the arbitration, because it is impossible to know how the arbitrator arrived at the award of damages. However, this court cannot determine, at the pleadings stage, whether or not HFLLP failed to present proper proof ^{of} ~~as~~ Agate's damages. None of the documentary evidence submitted by plaintiff is conclusive, and defendants have not proffered any affidavits

from Jakoby, Feuerstein or any other member of HFLLP relating to the firm's work on the arbitration proceeding. A mere error in judgment would not suffice as a case of legal malpractice, but a malpractice claim can properly be based on conduct which was so negligent that it violated the standard of care required of attorneys. The parties should take discovery and then, if so advised, move for summary judgment. Thus, the second cause of action is sustained, insofar as it alleges legal malpractice.

In order to make out a cause of action in fraud, plaintiff must plead a knowing misrepresentation or a failure to disclose a material fact, justifiable reliance by plaintiff and a resultant injury (Bernstein v. Kelso & Co., Inc., 231 AD2d 314 [1st Dept 1997]). Defendants maintain that no misrepresentations were made and Agate's fees were actually less than the amount charged to Kaminsky. Even assuming without deciding that plaintiff was overcharged, his remedy, if any, is to assert a cause of action to recover excess legal fees paid. Thus, the third cause of action must be dismissed, without prejudice to assertion of a cause of action for refund of legal fees.

In order to maintain a cause of action under Judiciary Law § 487, plaintiff must show that the attorney intended to deceive him, or that the attorney was guilty of a chronic, extreme pattern of legal delinquency that caused the plaintiff's alleged damages (Knecht v. Tusa, 15 AD3d 626 [2d Dept 2005]). The allegations of the complaint and Agate affidavit, even if accepted as true, allege no more than negligent handling of the arbitration proceeding. Thus, the fourth cause of action, and the allegations of the other causes of action relating to Judiciary Law § 487, must be dismissed.

A claim of breach of fiduciary duty which is duplicative of a legal malpractice claim must

be dismissed (Sonnenschine v. Giacomo, 295 AD2d 287 [1st Dept. 2003]). The fifth cause of action does not add anything to the claim of legal malpractice and must be dismissed.

Accordingly, it is

ORDERED that the motion to dismiss is granted to the extent that the first, third, fourth and fifth cause of action are dismissed, and that the portion of the second cause of action which seeks recovery under Judiciary Law § 487 is dismissed, and is further

ORDERED that plaintiff shall have leave to serve a second amended complaint to add a cause of action for recovery of excess fees paid, if any.

Dated: 10/14/05

ENTER:



J.S.C.

LOUIS E. YORK
FILED
OCT 24 2005
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