

Nason v Fisher

2006 NY Slip Op 30306(U)

April 21, 2006

Supreme Court, New York County

Docket Number:

Judge: Barbara Kapnick

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

BARBARA R. KAPNICK

Index Number : 108120/2002

PART 12

NASON, HERBERT

vs
FISHER, IVAN STEPHEN

Sequence Number : 004

DEFAULT JUDGMENT

INDEX NO. 108120/02

MOTION DATE _____

MOTION SEQ. NO. 004

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 _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

and cross-motion are

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

PAPERS NUMBERED

FILED

APR 25 2006

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 4/21/06



BARBARA R. KAPNICK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

-----X
HERBERT NASON and SUZANNE NASON,

Plaintiffs,

-against-

IVAN STEPHEN FISHER, LUCAS ANDINO
and LUIS BRITO,

Defendants.

-----X
BARBARA R. KAPNICK, J.:

DECISION/ORDER

Index No. 108120/02

Motion Seq. No. 004

FILED

APR 25 2006

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiffs' Amended Complaint alleges that:

(1) defendants Ivan Stephen Fisher, Esq. and his associate, Lucas Andino, Esq., who represented plaintiff Herbert Nason, Esq. in connection with litigation with plaintiff's former partners, Harvey Krieger and Wayne Wilansky, conspired and breached the terms of plaintiff's retainer agreement with Fisher (first cause of action);

(2) Fisher and Andino committed fraud because Fisher falsely represented that he was qualified to represent Mr. Nason in matters involving commercial partnership law even though Fisher's actual area of expertise is criminal law (second cause of action);

(3) Fisher and Andino violated Judiciary Law § 487 (Deceit and Collusion) (third cause of action);

(4) Fisher and Andino violated the Disciplinary Rules "by excessive billing and overcharging the plaintiff Nason for the alleged services performed by Defendants without cause, reason or purpose" (fourth cause of action);

(5) Fisher and Luis Brito, who is described in the complaint as his "bodyguard, chauffeur and Man Friday",¹ falsely imprisoned plaintiffs Herbert Nason and his wife, Suzanne Nason,² by refusing to let plaintiffs leave defendants' law office unless they returned a Reply Affidavit prepared by Fisher on plaintiff's behalf or issued a check for legal fees in the sum of \$2,830 (fifth cause of action);

(6) Fisher failed to comply with the law and committed legal malpractice (sixth cause of action); and

(7) Fisher breached the agreement with plaintiff (seventh cause of action).

Plaintiff Herbert Nason, who is representing himself pro se, and his wife, now move for an order:

(1) granting a default judgment against the defendants on the ground that they failed to serve an Answer to plaintiffs' Amended Verified Complaint and to fully comply with the Preliminary Conference Order dated January 22, 2003;

(2) granting summary judgment in the amount of \$152,830 plus interest, costs, disbursements, punitive and treble damages from August 16, 2001 to date;

(3) precluding defendants from continuing their purported

¹ Defendants indicate that Mr. Brito was and is employed as Fisher's office assistant.

² Mrs. Nason is named as a plaintiff solely with respect to the fifth cause of action. The remaining causes of action are brought on behalf of Mr. Nason only.

defenses and counterclaims, if any, and/or dismissing defendants' purported defenses and counterclaims, if any;

(4) finding in favor of plaintiff on all other specific causes of action in the Amended Complaint, and dismissing defendants' 'case';

(5) levying sanctions 'in the Court's wisdom and judgment';
and

(6) forwarding for investigation defendants' record of misconduct to the Grievance Committee.

Defendants oppose the motion and cross-move for summary judgment dismissing the Amended Complaint.³

Plaintiffs argue, inter alia, that the cross-motion should be denied and that judgment should be granted in their favor because defendant failed to serve an Answer to the Amended Complaint.

However, by Decision/Order dated May 2, 2003, this Court denied plaintiffs' prior motion for summary judgment (motion sequence number 002) and granted defendants' motion to compel plaintiffs to accept late service of their Verified Answer to the Amended Complaint (motion sequence number 003). Specifically, this

³ Oral argument on the motion and cross-motion was scheduled for November 9, 2005. Due to a calendaring error, counsel for the defendants failed to appear. Thus, oral argument was never held and the motion and cross-motion were marked submitted for a determination on the merits based on the extensive papers submitted by both sides.

[*5]

Court directed that "Defendants' Verified Answer to the Amended Complaint in the form annexed to defendants' moving papers is deemed served nunc pro tunc as of the date of service of their Notice of Motion."

Thus, defendants have, in fact, served an Answer to the Amended Complaint. Plaintiffs' motion seeking a default judgment and various other relief on that ground must, therefore, be denied.

That portion of the cross-motion seeking to dismiss the first cause of action asserted against defendants Fisher and Andino for conspiracy and breach of the retainer agreement is granted since the allegations set forth in connection with the first cause of action are encompassed in the other causes of action.

That portion of the cross-motion seeking to dismiss the second cause of action asserted against defendants Fisher and Andino for alleged fraud is dismissed against Andino since plaintiffs have not alleged that Andino made any false statements to Nason. The claim is, however, severed and continued as against Fisher.

Defendants argue that the third cause of action asserted against defendants Fisher and Andino for an alleged violation of Judiciary Law § 487 must be dismissed because plaintiffs cannot demonstrate any deceit or collusion on the part of either Fisher or Andino.

Plaintiff Herbert Nason, however, contends that Fisher deceived him as to his qualifications, expertise, reputation and fees. Yet, plaintiff has not alleged, let alone set forth evidence to establish that defendants had either an intent "to deceive, or a chronic, extreme pattern of legal delinquency that proximately caused" damages to plaintiff. O'Connell v. Kerson, 291 A.D.2d 386, 387 (2nd Dep't 2002). See also, Cohen v. Law Offices of Leonard & Robert Shapiro, 18 A.D.3d 219 (1st Dep't 2005); Cohen v. Law Offices of Leonard & Robert Shapiro, 18 A.D.3d 219 (1st Dep't 2005) Knecht v. Tusa, 15 A.D.3d 626 (2nd Dep't 2005); Jaroslawicz v. Cohen, 12 A.D.3d 160 (1st Dep't 2004).

Accordingly, that portion of the cross-motion seeking to dismiss the third cause of action is granted.

That portion of the cross-motion seeking to dismiss the fourth cause of action asserted against defendants Fisher and Andino for alleged violations of the Disciplinary Rules based on excessive billing and overcharging for services performed is granted since the Disciplinary Rules do not confer a private right of action. See, William Kaufman Organization, Ltd., v. Graham & James, LLP, 269 A.D.2d 171 (1st Dep't 2000).

Defendants argue that the fifth cause of action asserted by plaintiffs Herbert Nason and Suzanne Nason against defendants

Fisher and Brito for false imprisonment must be dismissed because the Nasons were not detained without just cause.

Plaintiffs argue that, at best, Fisher had an action for breach of contract, and their "[f]alse imprisonment by the Defendants in this case is an offshoot of the medieval debtors' prison."

Defendants, however, contend that plaintiffs were essentially attempting to steal property by attempting to leave with the affirmation without paying Fisher approximately \$2,800.00 in unpaid legal fees, as the parties previously agreed.

There is no dispute that Mr. Fisher and Mr. Brito permitted Mr. Nason to call the police during the incident, which he apparently did. There is also no dispute that after some discussion, Mr. Nason paid the fees and left the office with the Reply Affidavit.

Accordingly, this Court finds that plaintiffs have failed to allege sufficient facts to sustain a claim for unlawful imprisonment. That portion of the cross-motion seeking to dismiss the fifth cause of action, is, therefore, granted.

That portion of the cross-motion seeking to dismiss the sixth cause of action alleging that Fisher failed to comply with the law and committed legal malpractice is granted since there is no

dispute that the underlying lawsuit was ultimately settled for terms favorable to Nason.

Defendants argue that the seventh cause of action for breach of contract must also be dismissed because plaintiff has failed to establish how any of the defendants breached any contract.

Plaintiffs, on the other hand, contend that Fisher breached the retainer agreement by failing to send bi-weekly billing statements, and by sending excessive bills.

Although defendants argue that plaintiff has not produced any evidence of excessive billing or overcharging, plaintiffs note that they were charged \$1,500 for the preparation of an adjournment and \$1,500 for a two-hour meeting.

This Court thus finds that there is at least an issue of fact as to whether any of the legal bills were excessive. Accordingly, that portion of the cross-motion seeking to dismiss the seventh cause of action is denied.⁴

The case is thus dismissed for all purposes against defendants Lucas Andino and Luis Brito with prejudice and without costs or disbursements. The Clerk may enter judgment accordingly.

⁴ Although the papers suggest that the seventh cause of action asserts a claim against Andino as well as Fisher, a reading of the Seventh Cause of Action in the Amended Complaint makes it clear that it seeks relief only against defendant Fisher.


All the causes of action except the second and seventh are dismissed as against defendant Ivan Stephen Fisher with prejudice and without costs or disbursements. The second and seventh causes of action against defendant Ivan Stephen Fisher only are severed and continued.

Since the fifth cause of action, which has now been dismissed, was the only cause of action asserted on behalf of the plaintiff Suzanne Nason, the action on behalf of Suzanne Nason is now dismissed with prejudice and without costs or disbursements.

A pre-trial conference on the two remaining causes of action shall be held in IA Part 12, 60 Centre Street, Room 341 on May 24, 2006 at 9:30 a.m.

This constitutes the decision and order of this Court.

Date: April 21, 2006



 Barbara R. Kapnick
 J.S.C.
BARBARA R. KAPNICK
J.S.C.
FILED
 APR 25 2006
 NEW YORK
 COUNTY CLERK'S OFFICE