

<b>Berkowitz v Fischbein</b>
2006 NY Slip Op 30344(U)
January 13, 2006
Supreme Court, New York County
Docket Number:
Judge: Marilyn Shafer
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: \_\_\_\_\_

PART 36

Justice

ABRAHAM BERKOWITZ

INDEX NO.

104159/02

MOTION DATE

FISCHBERG BERKOWITZ

MOTION SEQ. NO.

008

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on 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 consolidated

w/ seq 7 + decided pursuant to attached Rem on Sequence # 7

**FILED**  
JAN 30 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1/13/06

[Signature]  
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 36

-----X  
ABRAHAM BERKOWITZ,

Plaintiff,

Index No.: 104359/02  
DECISION/ORDER

-against-

FISCHBEIN, BADILLO, WAGNER & HARDING,  
RICK, STEINER, SEGAL & FELL, P.C. f/k/a RICK,  
STEINER, P.C., and JACK SEGAL,

Defendants.  
-----X

**FILED**  
JAN 30 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

HON. MARILYN SHAFER, J.S.C.:

The motions with the sequence numbers 007 and 008 are hereby consolidated for disposition. Both motions request leave to renew or reargue with respect to portions of one of the court's earlier decisions. For the following reasons, both motions are denied.

BACKGROUND

The court recited the facts of this case at length in its July 6, 2005 decision (the July 6, 2005 decision) that disposed of the summary judgment motion (motion sequence number 006) that was previously submitted by defendants Rick, Steiner, Segal & Fell, P.C. f/k/a Rick, Steiner, P.C. (RSS&F) and Jack Segal (Segal). It need not recite them again here except insofar as they are pertinent to the instant motions.

Plaintiff Abraham Berkowitz (Berkowitz) commenced this action on March 1, 2002 as a result of his participation in the settlement of two earlier (consolidated) actions in which he was named as a defendant.<sup>1</sup> On February 5, 2003, this court entered a decision (the February 5, 2003

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<sup>1</sup> The first of the two earlier actions was a private, commercial claim for fraud, negligence and breach of contract that was encaptioned The Board of Managers of the 27 North Moore Street Condominium v 27 North Moore Associates, LLC (Index Number 100460/00); the

decision) that disposed of the motions to dismiss, pursuant to CPLR 3211, that defendants Fischbein, Badillo, Wagner & Harding (FBW&H) and RSS&F had previously submitted (motion sequence numbers 001 and 002, respectively). See Notice of Motion (motion sequence number 008), Exhibit B. The February 5, 2003 decision dismissed Berkowitz's causes of action against RSS&F and Segal for breach of fiduciary duty, but did not disturb his claims against them for legal malpractice and breach of contract. Id. The February 5, 2003 decision also dismissed the entire original complaint against FBW&H, but granted Berkowitz leave to serve and file an amended complaint. Id. On May 18, 2004, the Appellate Division, First Department, entered a decision that upheld this court's February 5, 2003 decision. See Berkowitz v Fischbein, Badillo, Wagner & Harding, 7 AD3d 385 (1<sup>st</sup> Dept 2004); Defendants' Reply Affidavit (motion sequence number 008), Exhibit A. In the interim, Berkowitz served his amended complaint on February 19, 2003. See Notice of Motion (motion sequence number 008), Exhibit C. The amended complaint merely restated Berkowitz's earlier claims for legal malpractice/negligence, breach of fiduciary duty and breach of contract, and did not specify which defendants those claims were directed against. Id.

The July 6, 2005 decision granted RSS&F and Segal partial summary judgment dismissing Berkowitz's cause of action against them for legal malpractice, but not his claim against them for breach of contract. Id., Exhibit A. Berkowitz now moves, pursuant to CPLR

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second was a Martin Act claim by the New York State Attorney General (the AG) that was captioned State of New York v 27 North Moore Associates, LLC (Index Number 400215/01). On January 23, 2002, this court (Kapnick, J.) ordered that the two actions be consolidated. On February 6, 2002, the court also so ordered a stipulation that settled the consolidated actions. Pursuant to the terms of that stipulation, Berkowitz paid \$304,000.00 to settle the various claims against him.

2221, for leave to renew or reargue with respect to four portions of that decision (motion sequence number 007). In particular, Berkowitz claims that the court made errors of fact when it found that:

It is, therefore, clear that Berkowitz's alleged "inconsistency" is a purely semantic construct, and completely devoid of any legally significant substance. It is also clear that Berkowitz himself created the "inconsistency" by first requesting that Rosengart<sup>2</sup> change the wording of the second draft letter, and then having his counsel exploit that change in wording at Rosengart's deposition.

(see Notice of Motion [motion sequence number 007], ¶ 4); and

Berkowitz specifically argues that, in the letter, Rosengart stated that Berkowitz would not have been prosecuted: 1) if an amendment to the offering plan had been filed, and 2) if "many units had not yet closed" at the time of his divestiture (emphasis added)

(Id., ¶ 11); and

It is also clear that Berkowitz himself created the "inconsistency" by first requesting that Rosengart change the wording of the second draft letter, and then having his counsel exploit that change in wording at Rosengart's deposition. This behavior can only be regarded as duplicitous.

(Id., ¶ 16) and

Pursuant to the terms of the Buyout Agreement, Berkowitz sold his 40% interest in North Moore LLC to Lefkowitz for \$4.8 million, and terminated his association with North Moore LLC, effective as of April 26, 1999.

Id., ¶ 24. Berkowitz also argues that there are "many other triable issues, not even addressed by defendants." Id., ¶ 25. These involve Berkowitz's dismissed claim for legal malpractice against RSS&F and Segal, and include allegations that Berkowitz suffered financial losses as a direct result of: 1) defendants' drafting an "ambiguous" indemnification clause in the contract in which

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<sup>2</sup> Oliver Rosengart was the Assistant State Attorney General who prosecuted the AG's Martin Act claim against 27 North Moore Associates and Berkowitz.

Berkowitz divested himself of his interest in 27 North Moore Associates, LLC; 2) defendants' actions at closing which caused a "dilution" of the sale price of Berkowitz's interest in 27 North Moore Associates, LLC; and 3) defendants ignoring of the tax consequences of Berkowitz's sale of his interest in 27 North Moore Associates, LLC. *Id.*

RSS&F and Segal contest all of the foregoing. They also move, via order to show cause, for: 1) a stay of pre-trial mediation of Berkowitz's claims against them until the court resolves Berkowitz's motion; and 2) leave, pursuant to CPLR 2221, to renew or reargue the portion of the July 6, 2005 decision that declined to dismiss Berkowitz's cause of action against them for breach of contract (motion sequence number 008). The court granted RSS&F's and Segal's application for a stay when defendants submitted their motion on September 13, 2005.

#### DISCUSSION

CPLR 2221 requires different showings to be made in support of motions to renew and motions to reargue. A motion to renew must be based on "material facts which, although extant at the time of the original motion, were not then known to the party seeking renewal and, consequently, were not placed before the court." Matter of Beiny, 132 AD2d 190, 209-210 (1<sup>st</sup> Dept 1987), citing Foley v Roche, 68 AD2d 558, 568 (1<sup>st</sup> Dept 1979). "Renewal is not available as a 'second chance' for parties who have not exercised due diligence in making their first factual presentation." Chelsea Piers Management v Forest Elec. Corp., 281 AD2d 252 (1<sup>st</sup> Dept 2001), citing Rubinstein v Goldman, 225 AD2d 328 (1<sup>st</sup> Dept 1996). By contrast a motion for leave to reargue may be granted only upon a showing "that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." William P. Pahl Equipment Corp. v Kassis, 182 AD2d 22, 27 (1<sup>st</sup> Dept 1992), citing Schneider v Solowey, 141

AD2d 813 (2<sup>d</sup> Dept 1988). “Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided.” Id. at 27, citing Pro Brokerage, Inc. v Home Insurance Co., 99 AD2d 971 (1<sup>st</sup> Dept 1984). Nor is a reargument motion intended to provide a party “an opportunity to advance arguments different from those tendered on the original application.” Rubinstein v Goldman, 225 AD2d at 328, quoting Foley v Roche, 68 AD2d at 568.

#### Plaintiff’s Motion

Although Berkowitz’s counsel takes no notice of the distinction between the remedies of renewal and reargument, it is clear that this motion seeks the latter, because it alleges that “the court may have inadvertently overlooked the affidavit submitted by Mr. Berkowitz,” and “the court mistakenly overlooked Mr. Berkowitz’s detailed submission which responded to the factual issues raised by the defendants.” See Notice of Motion (motion sequence number 007), ¶ 2. However, for the following reasons, the court finds that all Berkowitz’s allegations in connection with his request for reargument are meritless.

Berkowitz first asserts that the court made a “factual error” in finding that Berkowitz attempted to first create and then exploit a “semantic inconsistency” in Rosengart’s statements with respect to whether or not Rosengart would have named Berkowitz in the AG’s Martin Act prosecution. See Notice of Motion (motion sequence number 007), ¶ 4. Berkowitz argues that the court either misread or ignored the import of the correspondence between Berkowitz and Rosengart on this issue. Id., ¶¶ 5-10; Exhibits A, C, G. However, neither the documentary evidence that Berkowitz submits, nor the conclusions that he draws therefore, are new. In rendering the July 6, 2005 decision, the court carefully read and considered those documents, but

drew different conclusions from them than the ones that Berkowitz continues to espouse. A motion for “[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided.” William P. Pahl Equipment Corp. v Kassis, 182 AD2d at 27, citing Pro Brokerage, Inc. v Home Insurance Co., 99 AD2d 971. Because that is precisely all that Berkowitz’s proffered evidence and arguments do, they cannot form a basis for relief under CPLR 2221. Accordingly, the court rejects Berkowitz’s allegations with respect to his first alleged “factual error” as meritless.

Berkowitz next argues that the court made a “factual error” in finding that Rosengart’s testimony was that he would not have named Berkowitz in the Martin Act prosecution: 1) if Berkowitz had caused an amendment to the offering plan for 27 North Moore Street to be filed, and 2) if “many units had not yet closed” at the time that Berkowitz divested himself of his interest in 27 North Moore Associates. See Notice of Motion (motion sequence number 007), ¶ 11. Berkowitz argues that the correspondence between himself and Rosengart shows that the court was incorrect to conclude there was a second condition. Id., ¶¶ 12-15; Exhibit A. Again, however, neither Berkowitz’s evidence nor his arguments on this point are new. Therefore, they cannot form the basis for relief pursuant to CPLR 2221, and the court rejects them for the same reasons as stated in the preceding paragraph. Accordingly, the court also finds that Berkowitz’s claims with respect to his second alleged “factual error” lack merit.

Berkowitz next argues that the court made a “factual error” in labeling his behavior in contacting Rosengart for multiple drafts of the letter regarding his decision to prosecute under the Martin Act as “duplicitous.” See Notice of Motion (motion sequence number 007), ¶ 16. Berkowitz objects that while he was attempting to deal honorably with the fraud claim and the

Martin Act prosecution against him, he himself was the victim of duplicitous behavior on the part of opposing counsel and by Rosengart. *Id.*, ¶¶ 17-23; Exhibits A, B, C, D, G, M, O.

Berkowitz's argument on this point is irrelevant. The court's earlier statement that his behavior was "duplicitous" was a characterization, not a finding of fact that bore on the court's decision to grant summary judgment dismissing his legal malpractice claims against RSS&F and Segal. The court does note, however, that the documentary evidence that Berkowitz presents in support of his current argument (all of which the court previously reviewed when rendering the July 6, 2005 decision) amply justifies the court's characterization. The court finds that Berkowitz's allegations with respect to his third alleged "factual error" are both irrelevant and lack merit and, accordingly, rejects them.

Berkowitz next argues that the court made a "factual error" in finding that "Berkowitz sold his 40% interest in North Moore LLC to Lefkowitz for \$4.8 million," while the sale price was actually \$3.2 million. *See* Notice of Motion (motion sequence number 007), ¶ 24.

Berkowitz argues that, although this disparity "may not relevant at first glance, ... we will establish its relevance." *Id.* However Berkowitz fails to do so. As was the case with the matter discussed in the preceding paragraph, this "factual error" was not at all relevant to the court's decision to grant summary judgment dismissing Berkowitz's legal malpractice claims against RSS&F and Segal. Accordingly, the court finds that Berkowitz's allegations with respect to this fourth alleged "factual error" do not afford any basis for relief pursuant to CPLR 2221, and rejects those allegations as both irrelevant and meritless.

Finally, as previously mentioned, Berkowitz asserts that there were "many other triable issues, not even addressed by defendants," including claims that: 1) defendants' drafted an

“ambiguous” indemnification clause in the contract in which Berkowitz divested himself of his interest in 27 North Moore Associates, LLC; 2) defendants’ actions at the closing of that contract caused a “dilution” of the sale price of Berkowitz’s interest in 27 North Moore Associates, LLC; and 3) defendants ignored the tax consequences of Berkowitz’s sale of his interest in 27 North Moore Associates, LLC. See Notice of Motion (motion sequence number 007), ¶ 25. However, a reargument motion is not intended to provide a party “an opportunity to advance arguments different from those tendered on the original application.” Rubinstein v Goldman, 225 AD2d at 328, quoting Foley v Roche, 68 AD2d at 568. Because Berkowitz did not present any of the foregoing - his “many other triable issues” - in his opposition to defendants’ earlier summary judgment motion, the court may not consider them now in the context of this motion to reargue. Accordingly, because all of the arguments that Berkowitz asserts in support of his application for relief pursuant to CPLR 2221 lack merit, Berkowitz’s motion should be denied in all respects.

#### Defendants’ Motion<sup>3</sup>

The second portion of defendants’ motion seeks leave, pursuant to CPLR 2221, to renew or reargue the portion of the July 6, 2005 decision that declined to dismiss Berkowitz’s cause of action against them for breach of contract.<sup>4</sup> The first of defendants’ three supporting arguments asserts that the court committed a factual error in retaining that claim because the court had already dismissed it in the February 5, 2003 decision that was later upheld by the Appellate

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<sup>3</sup> Defendants RSS&F and Segal have submitted their motion jointly.

<sup>4</sup> As previously mentioned, on September 13, 2005 the court granted the first portion of defendants’ motion, which sought stay of pre-trial mediation of Berkowitz’s claims pending the resolution of Berkowitz’s motion. The court will revisit that matter at the end of this decision.

Division, First Department. See Memorandum of Law in Support of Motion (motion sequence number 008), at 5-6. After reviewing both the February 5, 2003 decision and the Appellate Division's affirmance thereof, the court finds that defendants are mistaken. In the February 5, 2003 decision, the court clearly stated that Berkowitz had stated a breach of contract claim against RSS&F and Segal, but that there was no evidence that there had been any contract executed between Berkowitz and FBW&H. See Notice of Motion (motion sequence number 008), Exhibit B (February 5, 2003 decision), at 6, 7. Thus, the February 5, 2003 decision allowed Berkowitz's breach of contract claim as against RSS&F and Segal, but dismissed it as against FBW&H. The Appellate Division's affirmance did not disturb this portion of the court's ruling. See Berkowitz v Fischbein, Badillo, Wagner & Harding, 7 AD3d 385 (1<sup>st</sup> Dept 2004). Therefore, the court finds that defendants' first argument, which alleges the court's misapprehension of fact, is unavailing. Defendants' confusion on this point is understandable, given that (as the court previously observed) Berkowitz's amended complaint merely restates his claims for legal malpractice/negligence, breach of fiduciary duty and breach of contract, without specifying which defendants those claims are directed against. See Notice of Motion (motion sequence number 008), Exhibit B. Nonetheless, defendants' first argument does not state any grounds for relief pursuant to CPLR 2221, and the court rejects it.

Defendants next argue that the court's prior adjudication - that the facts showed that the AG would have named Berkowitz in the Martin Act regardless of whether or not they had filed an amendment to the offering plan for 27 North Moore Street - is now the law of the case, and that it precludes Berkowitz from demonstrating that he suffered any money damages (i.e., settlement costs) resulting from defendants' alleged breach of contract in failing to file such an

amendment. See Memorandum of Law in Support of Motion (motion sequence number 008), at 6-7. Defendants also raise the alternative argument that Berkowitz's money damages claim would be impermissibly speculative. Id. Berkowitz responds, in effect, that defendants' failure to file an amendment to the offering plan is not the only breach, and that the amounts he paid to settle the AG's Martin Act claim are not the only measure of money damages, that he is asserting against defendants in his breach of contract claim. See Berkowitz Affidavit in Opposition, ¶¶ 12-15; Exhibit A. The court believes that it would be both highly improper and improvident to grant defendants what amounts to summary judgment dismissing Berkowitz's breach of contract claim in the context of this motion to renew or reargue - especially since the court has not even reviewed the subject contract. Until the court has made some review, there is no rationale by which to conclude that the court has misapplied the controlling law. Accordingly, the court rejects defendants' second argument for relief pursuant to CPLR 2221.

Finally, defendants argue that Berkowitz's breach of contract claim should be dismissed as duplicative of his legal malpractice claim. See Memorandum of Law in Support of Motion (motion sequence number 008), at 8-9. It is occasionally correct to do so as a matter of law. See e.g. Senise v Mackasek, 227 AD2d 184 (1<sup>st</sup> Dept 1996). However, the law also permits plaintiffs to plead alternative theories of relief, and only mandates dismissal where a claim is specifically found to be duplicative. See e.g. Scalisi v New York University Medical Center, 805 NYS2d 62 (1<sup>st</sup> Dept 2005). In any event, Berkowitz asserts that the two claims are materially different. See Berkowitz Affidavit in Opposition, ¶¶ 12-14; Exhibit A. Further, as was stated in the preceding paragraph, there is no justification for drawing any legal conclusions until the court has had the opportunity to review the substance of Berkowitz's breach of contract claim. The court has not

yct done so. Accordingly, the court rejects defendants' third argument for relief pursuant to CPLR 2221, and finds that the portion of defendants' motion that seeks relief pursuant to that statute should be denied.

As previously mentioned, on September 13, 2005 the court granted defendants' application for a stay of pre-trial mediation of Berkowitz's claims pending the resolution of Berkowitz's motion. Berkowitz has raised no objection to that stay. However, because this decision fully disposes of both Berkowitz's and defendants' motions for leave to renew and/or reargue, there is no more need for said stay. Accordingly, the court lifts the stay of pre-trial mediation of Berkowitz's claims that it previously imposed.

#### DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 2221, of plaintiff Abraham Berkowitz, is, in all respects, denied; and it is further

ORDERED that the motion, pursuant to CPLR 2221 (which was submitted via order to show cause), of defendants Rick, Steiner, Segal & Fell, P.C. f/k/a Rick, Steiner, P.C., and Jack Segal is, in all respects, denied; and it is further

ORDERED that the balance of this action shall continue.

Dated: New York, New York  
January 13, 2006

ENTER

Hon. Marilyn Shafer, J.S.C.

HON. MARILYN SHAFER, JSC

**FILED**  
JAN 30 2006  
NEW YORK  
COUNTY CLERK'S OFFICE