

**O'Brien v Sullivan, Papain, Block, McGrath &
Cannavo, P.C.**

2007 NY Slip Op 30572(U)

March 30, 2007

Supreme Court, New York County

Docket Number: 0111220/2006

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE
Justice

PART 10

Maion D'Brien et
Thomas D. Brien
Sullivan, Paparone
et al

INDEX NO. 111220106
MOTION DATE _____
MOTION SEQ. NO. 001
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 _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

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

FILED
APR 06 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: MAR 30 2007

HON. JUDITH J. GISCHE J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE [* 1]

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

**Supreme Court of the State of New York
County of New York: Part 10**

-----X
MARION O'BRIEN and
THOMAS O'BRIEN,

Plaintiffs,

-against-

SULLIVAN, PAPAIN, BLOCK,
MCGRATH & CANNAVO, P.C.
Defendant.

-----X

Decision/Order

Index No.: 111220/06
Mot. Seq.: 001

Present:
Hon. Judith J. Gische
J.S.C.

Pursuant to CPLR 2219(a) the court considered the following numbered papers on this motion:

PAPERS	NUMBERED
Notice of Motion, JRW affd., exhibits.....	1
KP affirm, MO affd., exhibits.....	2
JRW reply affd.....	3

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APR 06 2007
NEW YORK
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Hon. Gische, J.:

Upon the foregoing papers the decision and order of the court is as follows:

Defendant brings this pre-answer motion to dismiss the third and fourth causes of action in the complaint. Plaintiff opposes.

The court accepts plaintiff's factual allegations as true for the purpose of this motion. Morone v. Morone, 50 NY2d 481 (1980); Beattie v. Brown & Wood, 243 AD2d 395 (1st dept. 1997). There are facts alleged common to all causes of action. They are as follows:

Defendant law firm represented plaintiffs in connection with a personal injury and products liability action commenced in Nassau County Supreme court. A federal class action had also been commenced which stayed the Nassau County action. Plaintiffs claim that they were advised by defendants to participate in the settlement reached in the class

action and Marion O'Brien claims that defendants "guaranteed" that she would be awarded \$960,000 as part of that settlement. She alleges that as a result of defendants negligence, her claims were never timely submitted and were rejected. She claims that defendants negligence also extended to a number of potential persons otherwise entitled to receive benefits as part of the class action settlement.

As a result of these events plaintiffs have alleged causes of action for negligence and legal malpractice (first and second causes of action). Plaintiffs have also alleged causes of action for breach of contract (third cause of action) and punitive damages (fourth cause of action).

Defendant argues that the breach of contract cause of action is based upon the same facts as the malpractice action. It argues that it should, therefore, be dismissed. Under the law of this department, however, where an attorney "guarantees" a certain outcome of a case, this is a basis for a separate breach of contract action. Sarasota, Inc. V. Kurzman & Eisenberg, 28 AD3d 237 (1st dept. 2006); Pelegrino v. File, 291 AD2d 60 (1st dept. 2002).¹ In this case, the complaint alleges such a guaranteed outcome. Thus this cause of action cannot be dismissed at the pleading stage.

Defendants separately claim that there is no basis for punitive damages in this case which seek to redress a private wrong. They further claim that it should not be stated as a separate cause of action.

¹A "guaranty" in the context of the first department cases does not require defendant to pay in the place or stead of the adversarial party, but it apparently is in the nature of a projection of the result of the case. Thus there is a split in the departments about whether this cause of action for breach of contract should survive. See: Tortua v. Sullivan, Papain, 21 Ad3d 1082 (2nd dept. 2005).

It is black letter law that punitive damages is not sustainable as a separate cause of action. Collision Plan Unlimited, Inc. V. Bankers Trust Company, 63 NY2d 827 (1984). To the extent the claim of punitive damages is based on the allegations that are not otherwise part of the three other asserted causes of action, it must fail. The court also considers whether the allegations in any of the three other asserted causes of action would support a determination of punitive damages. The court finds that the allegations do not rise to that level.

Punitive damages may only be awarded where there is a reckless or conscious disregard of the rights of others. Hartford Accident & Indemnity Co. v. Hempstead, 48 NY2d 218 (1979). An act is wanton and reckless when it is done in such a way and under such a circumstance as to show conscious indifference and utter disregard of its effect upon the safety and rights of others. Gostkowski v. Ramon Catholic Church of Sacred Hearts of Jesus and Mary, 262 NY 320 (1933). An act is malicious when it is done deliberately with knowledge of plaintiff's rights and with the intent to interfere with those rights. Lamb v. S. Cheney & Son, 227 NY 418 (1920); see generally: PJI 2:278. They are awarded to punish the defendant and to protect society against similar acts. Rocanova v. Equitable Life Assur Soc of US, 83 NY2d 603 (1994).

Even giving plaintiffs every favorable inference, the facts alleged in this complaint do not rise to the level warranting punitive damages. They allege in an ipse dixit fashion the elements of punitive damages, but the facts alleged, even if all true, do not bear it out. There are no facts indicating that defendants failed to file timely claims in the class action suit as a means of deliberately depriving these plaintiffs or any one else of a recovery. Indeed to the extent their legal fees were contingent upon recovery, the opposite is true.

While they claim they were misled into believing that the claims were timely filed, this is not claimed as a basis for any separate cause of action and/or compensatory damages and cannot on its own support a claim for punitive damages. Nor does the fact that more than one person have such a claim convert this into a case in which punitive damages may attach. While their claims raise serious allegations of attorney malpractice, such claims are private wrongs which are fully addressable by compensatory damages.

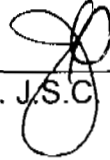
Accordingly the motion is granted only to the extent that the fourth cause of action for punitive damages is severed and dismissed. The motion to dismiss is otherwise denied. **The parties are directed to appear for a preliminary conference on April 26, 2007 at 9:30 a.m. In Part 10, 80 Centre Street, Room 122.**

Any requested relief not otherwise expressly granted herein is denied. This constitutes the decision and order of the court.

Dated: New York, New York
March 30, 2007

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NEW YORK
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SO ORDERED:



J.G. J.S.C.