

**Andrew Garrett Holding Corp. v Singer**

2007 NY Slip Op 30800(U)

April 10, 2007

Supreme Court, New York County

Docket Number: 0100973/2003

Judge: Emily Jane Goodman

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

PRESENT: **EMILY JANE GOODMAN**

PART 17

Index Number : 100973/2003

ANDREW GARRETT HOLDING

vs

SINGER, BILL TODD

Sequence Number : 006

TRIAL DE NOVO

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

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

*is decided for*

*adjudged*

**FILED**

APR 19 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 4/10/07

*[Signature]*  
**EMILY JANE GOODMAN** /s/

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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 17

-----X  
ANDREW GARRETT HOLDING CORP. f/k/a  
ANDREW GARRETT, INC.,

Plaintiff,

-against-

Index No. 100973/2003

BILL TODD SINGER, AEGIS FRUMENTO and  
SHERYL ANNE ZUCKERMAN,

Defendants.

-----X  
BILL TODD SINGER, AEGIS FRUMENTO and  
SHERYL ANNE ZUCKERMAN,

Third- Party Plaintiffs,

-against-

REVAN SCHWARTZ

Third-Party Defendant.

-----X  
EMILY JANE GOODMAN, J.S.C.

**FILED**  
Third-Party  
Index No. 59122R/2003  
APR 19 2007  
NEW YORK  
COUNTY CLERKS OFFICE

Plaintiff brought this legal malpractice action against Defendants for failing to confirm an arbitration award which Defendants secured in Plaintiff's favor against John Buglino for \$554,547.57, with interest. The action resulted in a defense verdict on October 13, 2006.

In Question 1 of the Verdict Sheet, the jury found that the services for which Defendants were retained did not include confirming an arbitration award within one year of obtaining it. In Question 5, the jury found that Defendants had a duty to advise Plaintiff that an award had to be confirmed within one year, but, in Question 6, found that Defendants were not negligent in failing to advise Plaintiff of this fact.

Plaintiff moves, post trial, for an order conforming the pleadings to the proof and for an order directing judgment in its favor, or, setting aside the verdict and ordering a new trial because no valid line of reasoning could have lead a jury to the conclusion reached, and, because the answers to Questions 5 and 6 on the Verdict Sheet were inconsistent. Specifically, Plaintiff maintains that no rational jury could have reached the result here because only Plaintiff's President/CFO, Andrew Sycoff, and Revan Schwartz, Plaintiff's in house counsel, testified and therefore, their evidence was uncontroverted by Defendants who put on no witnesses. Defendants oppose the motion, arguing that the verdict was not irrational as the jury merely found that Plaintiff's witnesses incredible and that Plaintiff failed to sustain its burden. Defendants argue that the jury could have reasonably disbelieved Plaintiff's witnesses, who maintained that they did not know that the arbitration award had to be confirmed within one year, especially because Schwartz, an experienced attorney, admitted on cross examination that he had previously handled an arbitration matter and only came to learn of the requirement from a collection attorney whose name he could not remember.

### Discussion

Preliminarily, the Court grants Plaintiff's motion to the extent that Plaintiff seeks an order conforming the pleadings to the proof to include allegations in the amended complaint regarding Defendant's duty to, and failure to, advise Plaintiff of the legal implications of failing to confirm an arbitration award within one year of obtaining an award. Contrary to Defendants' arguments, the allegations concerning the failure to advise do not constitute a new legal claim, thereby resulting in surprise or prejudice to Defendants, nor do they change the resulting jury verdict. As noted by Plaintiff the issue of the failure to advise was raised in depositions, and more

importantly, was raised in the Court's decision denying summary judgment. In that decision, the Court stated that:

An attorney is not liable for malpractice based on acts performed at the client's direction (*see Warsaw, Burstein, Cohen, Schlesinger & Kuh v Kessner*, 214 AD2d 472, 473 [1st Dept 1995]). However, an attorney may be liable for malpractice based on the failure to advise the client of the legal consequences of the client's actions (*see e.g. Estate of Nevelson v Carro, Spanbock, Kaster & Cuijfo*, 259 AD2d 282 [1st Dept 1999]; *National Enters. Corp. v Dechert Price & Rhoads*, 246 AD2d 481, 481 [1st Dept 1998]; *Campbell v Rogers & Wells*, 218 AD2d 576, 580 [1st Dept 1995]). Here, Singer's testimony raises an issue of fact as to whether defendants had informed plaintiff of the legal consequences of either confirming or not confirming the award.

A few pages later the Court stated: "Whether defendants fulfilled that duty by informing plaintiff of the legal consequences of confirming the award is a question of fact." Moreover, two specific questions (Questions 5 and 6) were included on the verdict sheet regarding the duty to advise and Defendants have not cited any portion of the transcript where an objection to the Verdict Sheet was made concerning this issue. Even if one was made, Defendants cannot claim surprise or prejudice. Accordingly, that aspect of the motion is granted and the amended complaint is deemed amended.

However, the balance of the motion is denied. Cases hold that reconsideration of a jury verdict "must be exercised with caution since, in the absence of an indication that substantial justice has not been done, a litigant is entitled to the benefit of a favorable verdict" (*Brown v Taylor*, 221 AD2d 208, 209 [1st Dept 1995]). To set aside a jury's verdict, there must exist "no valid line of reasoning and permissible inferences" which could lead rational persons to the conclusion reached by the jury on the basis of the evidence at trial (*Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 499 [1978]). Furthermore, the movant must demonstrate that the

preponderance of the evidence so greatly favors its position that the verdict could not have been reached on any fair interpretation of the evidence (*see Chisholm v Madison Square Garden Center, Inc.*, NYLJ, May 8, 2001, at 19, col 1; *Niewieroski v National Cleaning Contractors*, 126 AD2d 424 [1<sup>st</sup> Dept 1987]). Plaintiff has failed to establish that the jury's determination was irrational or against the weight of the evidence.

As noted in this Court's prior decision denying summary judgment, an issue of fact was raised for trial as to whether, under the retainer at issue, the scope of services included confirmation of the award. As noted in that decision, Plaintiff engaged the law firm of Singer Frumento, LLP to represent it "in connection with matters attendant to the assertion of possible claims against John Buglino and Brian Buglino," and it was an issue for trial as to whether services included confirmation of the award, not a matter of law to be decided by the Court. Plaintiff is not entitled to the relief it seeks merely because Defendants did not put on any witnesses. The jury heard the testimony of Andrew Sycoff and Revan Schwartz, who were both interested witnesses, and it was in the realm of the jury to find their testimony not credible after hearing their testimony and assessing their demeanor. As noted by Defendants, Schwartz, an experienced attorney, admitted on cross examination that he had previously handled an arbitration matter. Accordingly, the jury could have found his claim of ignorance unbelievable. Further, the jury was entitled to find the circumstances of Plaintiff's discovery of the legal requirement to confirm an arbitration award within one year unbelievable where Plaintiff claimed that a collection attorney, whose name Plaintiff could not recall, informed Plaintiff of the requirement. If the jury disbelieved Schwartz's claim that he was ignorant of the requirement to confirm the arbitration within one year, the jury could have disbelieved the balance of his

testimony as well (Falsus In Uno) and concluded that Plaintiff failed to meet its burden of proof.

As to Plaintiff's argument that the verdict must be set aside because Questions 5 and 6 were inconsistent, such argument was waived as Plaintiff failed to make that argument prior to release of the jury (*see Echavarria v Cromwell Assoc.*, 232 AD2d 347 [1st Dept 1996]); *Gribbon v Missionary Sisters of the Sacred Heart*, 244 AD2d 185 [1st Dept 1997]). The reason for this rule is that where an objection is timely made, corrective action may be taken by resubmitting the matter to the jury (*see Strauss v Huber*, 161 AD2d 629 [2d Dept 1990]). In answering Question 6 "NO" the jury may have found that Defendants were not negligent in failing to advise Plaintiff that the arbitration needed to be confirmed within one year because the jury believed that Plaintiff already knew of that requirement. If this were the case, the jury might not have known that the correct procedure would have been to answer Question 6 "YES," and then go to Question 7 on proximate cause and answer it "NO." Although no one knows what was in the minds of the jurors, Plaintiff's failure to object to any alleged inconsistency, results in a waiver of that claim because it prevented the Court from clarifying any confusion.

Accordingly, it is

ORDERED that the motion is granted to the extent that the pleadings are conformed to the proof as stated herein but is denied in all other respects.

**This Constitutes the Decision and Order of the Court.**

Dated: April 10, 2007

ENTER: 

J.S.C.

**EMILY JANE GOODMAN**

**FILED**

APR 19 2007

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