

**Atlas v Joseph**

2007 NY Slip Op 31256(U)

May 9, 2007

Supreme Court, New York County

Docket Number: 0103098/2005

Judge: Rolando T. Acosta

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SCANNED ON 5/22/2007  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. ROLANDO T. ACOSTA**  
*Justice*

PART 101

Atlas

INDEX NO. 103098/05

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

MOTION SEQ. NO. 02

MOTION CAL. NO. \_\_\_\_\_

Charles Joseph

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

See attached

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

MAY 22 2007

NEW YORK  
COUNTY CLERK'S OFFICE

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

SO ORDERED

Dated: 5/18/07

*[Signature]*

**ROLANDO T. ACOSTA** 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: PART 61

Helaine Atlas and Brent Cutler,

Plaintiff,

-- against --

Charles Joseph, Esq. and Law Office of  
Charles Joseph,

**FILED**  
MAY 22 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**DECISION/ORDER**

Index No. 103098/05

Seq. No. 2

Present:  
**Rolando T. Acosta**  
Supreme Court Justice

The following documents were considered in reviewing defendants' motion for an order pursuant to CPLR 3211 dismissing the complaint:

Papers

**FILED**

Numbered

Order to Show Cause & Affidavit MAY 22 2007

1 (Exhibit A)

Affirmation in Opposition NEW YORK  
COUNTY CLERK'S OFFICE

2 (Exhibits E-G)

Reply Affidavit

3

Plaintiffs commenced this action against defendants for their failure to secure a default judgment against Jonathan Fuchs in an action entitled Helaine Atlas and Brent Cutler v. George Shebitz, Esq. And Jonathan Fuchs, Esq., Supreme Court, New York County Index No. 603791/00. The underlying action was terminated against Shebitz by stipulation dated March 21, 2002, but continued with respect to Fuchs. According to plaintiffs, defendants failed to secure a default judgment against Fuchs even though they told plaintiffs that they would file a default motion. Based on this omission, plaintiffs asserted three causes of action against defendants: malpractice, breach of contract (retainer agreement), and a violation of Judiciary Law § 487. Defendants now moves to dismiss the complaint pursuant to CPLR

3211. Base on their arguments, it appears that defendants are relying on CPLR 3211(a)(7), failure to state a cause of action. Plaintiffs' assertions to the contrary, a CPLR 3211(a)(7) motion may be raised at any time. CPLR 3211(e); D. Siegel, Practice Commentaries, McKinneys Consolidated Laws of New York, Book 7B, CPLR 3211:28.

In evaluating a motion to dismiss for failure to state a claim under CPLR § 3211(a)(7), the Court must accept the allegations of the complaint as true, and accord plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within a cognizable legal theory. CBS Corp. v. Dumsday, 268 A.D.2d 350 (1<sup>st</sup> Dept. 2000); see also Polonetsky v. Better Homes Depot, Inc., 97 N.Y.2d 46 (2001)(motion must be denied if “from [the]four corners [of the pleading] factual allegations are discerned which taken together manifest any cause of action cognizable at law”); Weiner v. Lazard Freres & Co., 241 A.D.2d 114 (1<sup>st</sup> Dept 1998(“so liberal is th[is] . . . standard that the test is simply ‘whether the pleading has a cause of action,’ not even ‘whether he has stated one’”).

Defendant's motion is granted solely to the extent of dismissing the breach of contract claim. Plaintiff cannot allege malpractice and breach of a retainer agreement for the same acts. Mitschele v Schultz, 36 A.D.3d 249 (1<sup>st</sup> Dept. 2006). Otherwise, viewing the facts alleged in the complaint in the light most favorable to plaintiffs, they have stated sufficient facts to plead a legal malpractice claim. To establish a legal malpractice claim, plaintiff must plead: the negligence of the attorney; that the negligence was a proximate cause of the loss sustained; and actual damages. Prudential Insurance Co. v. Dewey Ballantine, Bushby, Palmer & Wood, 170 A.D.2d 108 (1<sup>st</sup> Dept. 1991), aff'd 80 N.Y.2d 377 (1992). Here, plaintiff assert that but for defendant's failure to move for a default judgment against Fuchs,

they would have obtained a judgment against Fuchs. Whether defendants had a valid reason for not pursuing a default against Fuchs will be explored during discovery.

Plaintiffs also properly pleaded a violation of Judiciary Law § 487. To demonstrate a cause of action under Judiciary Law § 487,<sup>1</sup> a plaintiff must plead facts showing either deceitful conduct by the defendant which caused damage to the plaintiff or a chronic extreme pattern of legal delinquency Izko Sportswear Co. v. Flaum, 25 AD3d 534, 537 (2<sup>nd</sup> Dept. 2006). Here, plaintiffs alleged that defendants deceived them by failing to disclose that they had not filed for default judgment against Fuchs, even though they had agreed to do so, and this failure costs them a judgment against Fuchs. These allegations are sufficient to preclude dismissal under CPLR 3211(a)(7). Accordingly, based on the foregoing, it is

ORDERED that defendants's motion to dismiss is granted solely to the extent of dismissing the second cause of action for breach of contract; and it is further

ORDERED that that portion of plaintiff's motion which sought costs, attorneys fees,

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1. Judiciary Law § 487 provides:

An attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,
2. Wilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

and sanctions is denied; and it is further

ORDERED that on the Court's own motion, plaintiff is given leave to amend its complaint to have it properly verified within 15 days of this order; and it is further

ORDERED that on the Court's own motion, defendants are given 20 days to properly answer the complaint; and it is further

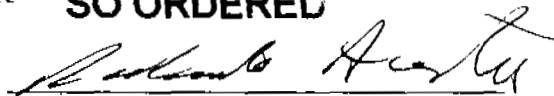
ORDERED that a Preliminary Conference is scheduled for June 28, 2007 at 9:30 a.m. in Part 61.

This constitutes the Decision and Order of the Court.

Dated: May 9, 2007

ENTER

**SO ORDERED**



Rolando T. Acosta, J.S.C.  
**ROLANDO T. ACOSTA**  
**J.S.C.**

**FILED**

MAY 22 2007

NEW YORK  
COUNTY CLERK'S OFFICE