

**Kornacki v Virginia & Ambinder, LLP**

2007 NY Slip Op 31430(U)

May 30, 2007

Supreme Court, New York County

Docket Number: 0102856/2006

Judge: Jane S. Solomon

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

JANE S. SOLOMON

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

PART 55

Index Number : 102856/2006

KORNACKI, ZBIGNIEW MARIAN

vs

VIRGINIA & AMBINER, LLP

Sequence Number : 001<sup>^</sup>

DISMISS ACTION

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

MOTION DATE 11/22/06

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

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

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1-4  
5-21  
22-26

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

*Notice of X-motion*

Answering Affidavits - Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the entered memorandum decision and order.*

*N.B. - preliminary conference is scheduled for July 16, 2007 at 10am.*

**FILED**

JUN 01 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 5/30/07

*J.S.*  
\_\_\_\_\_  
J.S.C.

JANE S. SOLOMON

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 55

- - - - - X

ZBIGNIEW MARIAN KORNACKI, ANATOL KOSZELNIK,  
and ROMAN WOJTOWICZ,

Index No. 102856/06

Plaintiffs,

- against -

DECISION AND ORDER

VIRGINIA & AMBINDER, LLP, BARNES, IACCARINO,  
VIRGINIA, AMBINDER & SHEPHERD, PLLC,  
LLOYD AMBINDER, MICHELE BAGINSKI,  
"ABC CORPORATION" (the latter being a  
fictitious corporation not yet known),  
ANDREW KAMINSKI, POLISH & SLAVIC FEDERAL  
CREDIT UNION, BARBARA ZAWLOCKA, CITIBANK,  
N.A., and CAROL BAGLIONI,

Defendants.

- and -

DAVID BEHANNA,

Additional Defendant  
On Cross-Claim,

- - - - - X

JANE S. SOLOMON, J.:

Defendants Virginia & Ambinder, LLP, Barnes Iaccarino,  
Virginia Ambinder & Shepherd, PLLC ("BIVAS firm"), Lloyd Ambinder  
("Ambinder") and Michelle Baginski (together referred to as the  
"BIVAS Defendants") move to dismiss the complaint and all cross-  
claims as against them. Defendant Andrew Kaminski ("Kaminski")  
cross-moves to dismiss the complaint and cross-claims as against  
him, and defendants Citibank, N.A. and Carol Baglioni ("Citibank  
Defendants") also cross-move to dismiss the complaint and all  
cross-claims as against them. Plaintiffs cross-move as well, for

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sanctions against the other moving parties on the grounds that their motions are frivolous.

The cross-motion by the Citibank Defendants is moot because plaintiffs and the other defendants have discontinued all claims against them, as well as against defendants Polish & Slavic Credit Union and Barbara Zawlocha. Accordingly, the BIVAS Defendants and Kaminski were the only remaining defendants when this motion was submitted.

The complaint alleges that defendants are liable for legal malpractice and breach of contract. The claim arises from a class action lawsuit entitled Grib v Tradewinds Environmental Restoration, Inc., Index No. 44652/00 (Sup. Ct. Kings County) ("Grib Action"), in which the plaintiffs here also were plaintiffs.

#### The Parties

In the Grib Action, the plaintiffs claimed that they were construction workers entitled to earn prevailing wages and benefits, under Article 8 of the New York Labor Law, for work they performed for the defendant contractors under contracts to improve public facilities. The BIVAS firm was the attorney for the class plaintiffs, Ambinder was a partner in the BIVAS firm who personally handled the Grib Action, and Michele Baginski was an associate at the firm. Kaminski represented plaintiffs Koszelnik and Wojtowicz as well, albeit in a limited manner. He

is not affiliated with the BIVAS firm.

### The Settlement

The Grib Action was a class action lawsuit brought in Supreme Court, Kings County, to recover unpaid wages from Tradewinds Environmental Restoration, Inc. Tradewinds performed asbestos abatement at certain publicly financed construction projects in Nassau and Suffolk counties. It had been awarded public works contracts to perform the work, which required it to pay its construction workers prevailing wages as defined under Article 8 of the New York Labor Law. The court granted plaintiffs' motion to certify the class, which included all past and present employees of Tradewinds who performed general construction work for Tradewinds on publicly financed asbestos abatement projects.

BIVAS represented the class plaintiffs. It negotiated a settlement with Tradewinds, pursuant to which Tradewinds agreed to compensate class members according to the amount of time they could establish that they worked for Tradewinds on one of the subject public works projects. Stipulation of Settlement, annexed as Exhibit 2 to the Aff. Of Lloyd Ambinder in Support of the Motion to Dismiss ("Stipulation"). The Stipulation was approved by the court, together with the notice of settlement of class action and proof of claim form. Ambinder Aff., Exhibits 3 and 4. The notice of settlement, which was mailed to Tradewind

employees and published in Polish-language newspapers, states that a claimant must file a proof of claim form, and it describes how to opt out of the settlement.

The proof of claim form states that a claimant must sufficiently establish his identity, describes how this is done, and provides that the claim form must be notarized by a public notary at either a bank or credit union, or one of several other specified types of institutions. BIVAS employees were precluded from notarizing proof of claim forms.

At Tradewind's insistence, the Stipulation included a procedure for administering proofs of claim that bypasses any involvement by BIVAS. The notice directed claimants to send their proof of claim forms directly to an administrator named in the Stipulation. If the claims administrator denied a claim, the Stipulation provided that the disputed claim would be referred by the court to a referee, neutral or judicial hearing officer. The court appointed a retired justice of the Kings County Supreme Court, Jules L. Spokek ("JHO Spodek"), to serve as the judicial hearing officer.

#### Plaintiffs' Claims Are Denied

Kornacki, Koszelnik and Wojtowicz learned of the settlement and obtained claim forms. Wojtowicz filled out his claim form and brought it to the Polish & Slavic Federal Credit Union to be notarized. The notary, defendant Barbara Zawlocka, notarized the form but failed to write Wojtowicz's name on it.

JHO Spodek issued written determinations of the challenged denials on or about April 26, 2005. He affirmed the denial of Kornacki's claim on the grounds that the notarization was improper, and further that the notary "attempted to cure this with a statement that was unsworn, even though the Notary Public called her statement an 'AFFIDAVIT'. The statement was also unsworn since the Notary Public could not swear to her own affidavit and make the statement a sworn statement. Accordingly this claim must be denied." Ambinder Aff., Exhibit 6, paragraph 5. He affirmed denial of Koszelnik's claim for the same reason, i.e., it was improperly notarized and the notary public's attempt to cure the default was inadequate. Id., at paragraph 7.

JHO Spodek also affirmed denial of Wojtowicz's claim, stating that "While the expired contains [sic] a photographic identification, and while the license contains what purports to be an extension of the license, there is nothing provided to help determine if the extension is an official act of the State of Louisiana." Ambinder Aff., Exhibit 6, paragraph 14.

On July 8, 2005, the BIVAS firm filed a notice of appeal challenging the final order and judgment in the Grib Action, which incorporated the JHO's determinations. The firm sent notice to those plaintiffs whose claims were denied that it filed the notice of appeal to preserve their rights, but that it would not be prosecuting the appeal on their behalf. The plaintiffs herein did not pursue the appeal.

Plaintiffs filed the summons and complaint in this action on March 1, 2006. In it, plaintiffs allege that they obtained proof of claim forms, signed them before notaries, and submitted them to the BIVAS firm to forward to the claims administrator. Wojtowicz alleges that the BIVAS firm sent only a copy of the front of his license, and not the back with the sticker allegedly extending the expiration date. Plaintiffs allege that the BIVAS Defendants were professionally negligent in the way they handled plaintiffs' proof of claim forms and the challenge to the denial of their claims before the JHO. Wojtowicz and Koszelnik allege that Kaminski and defendant "ABC Corporation" were negligent in failing to appear at the hearing. The complaint alleges that as a result of defendants' negligence, Kornacki lost his settlement in the amount of \$10,865.29; Koszelnik lost \$13,202.94; and Wojtowicz lost \$12,876.86. They seek punitive damages as well.

DISCUSSION:

"A prima facie case of legal malpractice requires proof of the attorney's negligence, that such negligence was the proximate cause of injury to the client, and that absent such negligence, the client would have been successful in the underlying action." Thaler & Thaler v Gupta, 208 AD2d 1130, 1132 (1<sup>st</sup> Dept 1994). On a pre-answer motion to dismiss, the complaint is construed liberally, and the facts alleged are accepted as true, and afforded the benefit of every possible

favorable inference. CPLR § 3211(a); and see EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11, 19 (2005).

With respect to Kaminski, the only alleged act of malpractice was his failure to appear at the hearing before JHO Spodek. While it is fundamental that counsel should appear before a tribunal where necessary to protect a client's interests, Wojtowicz and Koszelnik do not allege any causal connection between Kaminski's non-appearance and denial of their claims. Plaintiffs were represented at the hearing by the BIVAS firm, and it cannot be discerned from the four corners of the complaint how the result would have been different if Kaminski had appeared. The complaint also states that Kaminski failed to advise Wojtowicz and Koszelnik that they could "opt out" of the settlement offer, but does not say how they were harmed by the alleged omission. Indeed, the complaint alleges elsewhere that plaintiffs wanted to be part of the settlement class, and there is no indication that they "opted in" to the class, obtained proof of claim forms and submitted them in reliance upon Kaminski's advice. Complaint, paragraph 62. Accordingly, Kaminski's motion to dismiss is granted because there is no allegation that plaintiffs suffered any harm as a result of his conduct.

With respect to the claims against the BIVAS Defendants, the complaint generally alleges that they failed to properly handle plaintiffs' claims. The BIVAS Defendants argue

that the firm had no duty to prepare or review the proof of claim forms, and that under the terms of the Stipulation, the BIVAS firm was excluded from the claims process, so it had no duty to the individual class members in presenting their claims to the claims administrator. They further contend that as class counsel, the firm owed a duty to represent the interests of the class clients, which may not be the same duties ordinarily due to an individual retained client. Maywalt v Parker & Parsley Petroleum Corp., 155 F.R.D. 494 (S.D.N.Y. 1994).

However, the BIVAS firm did undertake to represent plaintiffs in the claims review process before JHO Spodek. The BIVAS firm prepared and submitted supporting documentation to the JHO on behalf of the plaintiffs herein. Ambinder Aff., paragraph 22. Although the complaint is not specific in how the BIVAS Defendants may have failed in their duty of care, the determination of JHO Spodek indicates that he received inadequate affidavits from the notaries which failed to cure the initial defects. On these papers, it cannot be determined whether the BIVAS firm played a role in that submission, or if it breached a duty of care in connection with it.

The BIVAS Defendants contend that plaintiffs cannot succeed because they did not perfect the appeal challenging the JHO's determinations. Section 670.8(e)(1) of the Rules of the Second Department states that an appeal is deemed abandoned unless perfected within six months after the date of the notice

of appeal. The notice of appeal was filed on July 8, 2005; plaintiffs had until January 8, 2006 to perfect it or to obtain leave to extend their time to do so.

The BIVAS Defendants argue that plaintiffs' claim that they would have succeeded in the underlying action but for legal malpractice is purely speculative because the appeal was abandoned. This argument, first raised in reply to plaintiffs' opposition, goes beyond the facts alleged in the complaint and requires a factual determination as to whether an appeal would more likely than not have been successful, i.e., whether the order and judgment based upon the JHO's determination was in some way deficient as a matter of law. It also raises the possibility that plaintiffs would have incurred unnecessary legal fees to prosecute the appeal, which amount might be ascertainable and may have been recoverable from the BIVAS Defendants.

The possibility that plaintiffs could have succeeded on appeal is not a bar to recovery. "The legal malpractice standard specifically contemplates what *might* have been. That is the very nature of the 'case within the case' assessment, whereby the reasonable factfinder is to determine whether plaintiff's projected result ... would more likely than not have occurred." Diamond v Sokol, 468 F. Supp. 626, 639 (SDNY 2006), citing Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267 (1<sup>st</sup> Dept 2004). Moreover, the notice of appeal is documentary evidence that does not conclusively establish a

ORDERED that the BIVAS Defendants shall serve an answer within twenty days of service of a copy hereof with notice of entry, and counsel for the remaining parties shall appear in Part 55, 60 Centre Street, Room 432, New York, NY, for a preliminary conference on July 16, 2007 at 12 noon.

Dated: May 30, 2007

ENTER:



J.S.C. **JANE S. SOLOMON**

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