

<b>Proskauer Rose LLP v Kalish</b>
2007 NY Slip Op 32353(U)
July 26, 2007
Supreme Court, New York County
Docket Number: 0101775/2007
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE

PART 10

Index Number : 101775/2007

PROSKAUER ROSE LLP

vs

KALISH, LEONARD M.

Sequence Number : 001

DISMISS

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

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

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

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

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for 3211 dismiss & stay

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

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

Cross-Motion:  Yes  No (for stay)

Upon the foregoing papers, it is ordered that this motion

**FILED**  
JUL 31 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

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

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

Dated: JUL 26 2007

**HON. JUDITH J. GISCHE**

J.S.C.

Check if appropriate:  DO NOT POST

REFERENCE

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10**

-----X

Proskauer Rose LLP,  
Plaintiff

-against-

Leonard M. Kalish,  
Defendant.

**DECISION/ORDER**

Index No.: 101775/07  
Seq. No.: 001

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

-----X

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

**Papers**

	Numbered
Pltff n/m [§3211] w/BS affirm, exh . . . . .	1
Def x/m [stay action] w/RAK affirm . . . . .	2
Pltff reply w/BS affirm, exh . . . . .	3

**FILED**

JUL 31 2007

NEW YORK  
COUNTY CLERK'S OFFICE

*Upon the foregoing papers the court's decision is as follows:*

**GISCHE, J.**

This is an action to recover unpaid legal fees from the defendant, plaintiff's former client. Defendant has answered the complaint and asserted counterclaims. Before the court is plaintiff's (preanswer) motion to dismiss the counterclaims on the basis that they fail to state a cause of action. CPLR § 3211 (a) (7). There are three counterclaims and defendant seeks punitive damages. Defendant has cross moved for a stay of this action pending a determination in a criminal action against defendant now pending in Federal court. He has withdrawn his third counterclaim for breach of fiduciary duty and punitive damages, but without prejudice. Moreover, since he made

that motion, the Federal case was completed and the jury returned a guilty verdict against him. Therefore, to the extent that defendant seeks a stay of this case, that branch of his cross motion is now moot. Although defendant consents to dismissal of that third counterclaim, plaintiff contends he should be permitted to do so, but with prejudice because his conviction bars him from bringing a lawsuit in tort against the attorneys who represented him the action in which he was convicted. Therefore, the issues that remain for the court to decide is whether the 1<sup>st</sup> and 2<sup>nd</sup> counterclaim should be dismissed, and whether the voluntary dismissal of the 3<sup>rd</sup> cause of action should be with prejudice.

On a motion to dismiss, the facts as alleged by the plaintiff are accepted as true, and afforded the benefit of every possible favorable inference (EBC I, Inc v. Goldman, Sachs & Co., 5 N.Y. 3d 11, 19 [2005]; Sokoloff v. Harriman Estates Development Corp., 96 N.Y. 2d 409, 414 [2001]; P.T. Bank Central Asia v. ABN AMRO Bank NV, 301 A.D. 2d 373, 375-6 [1<sup>st</sup> Dept 2003]), unless clearly contradicted by evidence submitted by moving parties in connection with the motion (see Zanett Lombardier, Ltd v Maslow, 29 A.D. 3d 495 [1<sup>st</sup> Dept 2006]).

Where a defendant is convicted of a crime, he is precluded from maintaining a tort claim against the attorney who represented him in the criminal action in which he was convicted. Britt v. Legal Aid Society, Inc., 95 N.Y. 2d 443 (2000). Similarly, a defendant whose underlying criminal conviction remains undisturbed has no cause of action for legal malpractice on the ground of negligent representation in a criminal action. Carmo v. Lazzaro, 4 A.D.3d 216 (1<sup>st</sup> Dep't 2004).

[\* 4 ]

## Background

Plaintiff - law firm was retained by defendant to prepare a defense in his criminal case, which is now concluded, and in which he was convicted (United States v. Kalish, Dkt No. S3 05 Cr 656 [RPP] SDNY) (the "criminal case"). According to plaintiff, defendant incurred legal fees of \$75,752.10 during the period June through October 2006 which remain unpaid. Plaintiff and defendant entered into a retainer agreement dated June 22, 2006 which sets forth the terms of plaintiff's representation, including the hourly rate, the retainer and billing procedures.

Defendant's first counterclaim is for failure to perform necessary legal services in the criminal case. His 2<sup>nd</sup> counterclaim is for recoupment of all amounts paid to the plaintiff.

Originally, in opposition to plaintiff's motion to dismiss, and in support of his cross motion for a stay, defendant had argued that there were other facts to support his counterclaims that he could not reveal because they were so closely intertwined with his defense in criminal case. He argued that to reveal these facts, he would be compromising his 5<sup>th</sup> amendment privilege against self-incrimination. He has not provided his sworn affidavit in support of this motion, but relies on the facts already in his answer, in which he alleges that he had a financial arrangement with plaintiff to limit the firm's legal fees to \$70,000. Defendant contends that the firm charged him more than amount and the fees were above their reasonable value - more than customarily would have been charged for such services.

In his first counterclaim, defendant contends that plaintiff failed to perform and undertake necessary actions in its representation of him, they did not provide him with the services alleged in the complaint, and that he had to obtain a different lawyer, incurring damages of \$100,000. His second counterclaim is for him to recoup the fees he already paid.

Although the court must accept defendant's factual allegations as true on a motion to dismiss, the retainer agreement does not contain the limitation on fees that defendant claims a partner at the firm agreed to. A claim cannot be supported by bald conclusions, but must be supported by facts. CPLR § 3016; Ben-Zvi v. Kronish Lieb Weiner & Hellman LLP, 278 A.D.2d 167 (1<sup>st</sup> Dept. 2000). Plaintiff's further argument, that to reveal any information about that agreement would be self-incriminating is unavailing for two reasons. First, if this is a pure fee dispute, then there is nothing incriminating to reveal. If it is not simply a fee dispute, then the claim is really a malpractice or tort claim against the firm based upon allegations that the firm failed to perform its contract to represent him with due care. Carmo v. Lazzaro, *supra.*; Ben-Zvi v. Kronish Lieb Weiner & Hellman LLP, *supra.* Therefore, plaintiff's motion, to dismiss the first and second counterclaim is granted. They are severed and dismissed.

Although defendant has decided to withdraw his 3<sup>rd</sup> counterclaim (breach of fiduciary duty) without prejudice, plaintiff objects and asks that it be with prejudice. The court agrees. Even if plaintiff had not voluntarily withdrawn the 3<sup>rd</sup> counterclaim, it would have been dismissed on the merits because the underpinnings of this claim are the firm's agreement with him and its representation of him in the criminal action. A

defendant who is convicted of a crime is precluded from maintaining a tort claim against the attorney who represented him in the criminal action in which he was convicted. Britt v. Legal Aid Society, Inc., supra. Therefore, this counterclaim is dismissed on the merits.

**Conclusion**

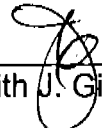
Plaintiff's motion is granted. All three counterclaims asserted by defendant are hereby severed and dismissed on the merits.

**The preliminary conference in this case is hereby scheduled for October 11, 2007 at 9:30 a.m. in Part 10, 80 Centre Street.**

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York  
July 26, 2007

So Ordered:  
  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC

**FILED**  
JUL 31 2007  
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