Streit v Brooke
2007 NY Slip Op 32463(U)
August 3, 2007
Supreme Court, New York County
Docket Number: 0117154/2006
Judge: Karla Moskowitz
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SCANNED ON 8/8/2007

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

PRESENT: Hon. KARLA MOSKOWITZ, Justice PART 03

MICHAEL STREIT,
Plaintiff,

-against-

PETER BROOKE and MITCHELL MASS,
Defendants.

INDEX NO. 117154/2006

MOTION DATE ______

MOTION SEQ. NO. 001

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	

FILED
AUG 08 2007
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying Decision and Order.

Dated: August 03, 2007

KARLA MOSKOWITZ J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 3

--x

MICHAEL STREIT

Plaintiff,

Index No. 117154/2006

-against-

PETER BROOKE and MITCHELL MASS,

DECISION and ORDER

Defendants.

--x

FILED
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NEW YORK

KARLA MOSKOWITZ, J.:

The court consolidates motion sequence numbers 001 and 003 for disposition.

In this action seeking rescission of an agreement ("the written agreement") for development of a property located in Bridgehampton, New York, defendants Peter Brooke ("Brooke") and Mitchell Mass ("Mass") move by separate motions to dismiss the complaint, as against each of them, pursuant to CPLR 3211(a)(1) and (a)(7).

THE COMPLAINT

The complaint alleges that, in 2003, based on a long standing business relationship, plaintiff Michael Streit ("Streit") and Brooke entered into an oral agreement to develop a property in Bridgehampton, New York in which Brooke agreed to provide the financing for the project and Streit agreed to oversee the development. Brooke purchased the property for three million five hundred thousand dollars ($3,5000,000), and, according to the complaint, Streit and Brooke agreed that Brooke would receive the first one million dollars in profit and thereafter they would each receive fifty percent (50%) of the remaining profit.

Construction on the project began in late August 2004 and proceeded slowly because of unanticipated problems. Sometime in early 2005, Brooke demanded that the parties put their

agreement in writing. Plaintiff alleges that Brooke stated that 1) "reducing their oral agreement to writing was a mere formality intended to protect both their interests . . . ." (Complaint ¶ 35) and 2) that Mass would be acting as their attorney (Complaint ¶ 36). The complaint goes on to allege:

> When plaintiff Streit arrived at the office of defendant Mass in Manhattan, he . . .was shown a lengthy document that he had never seen before. Defendant Mass did not advise Plaintiff Streit that he . . . was not acting as plaintiff Streit's attorney and that Plaintiff Streit should retain his own counsel; Defendant Mass did not advise plaintiff Streit that he . . . was representing both Plaintiff Streit and Defendant Brooke; and Defendant Mass did not review the written agreement.

Streit claims that, based on Brooke's assurances that the written agreement simply memorialized their oral agreement, he signed the written agreement without reading it. Streit admits, however, that the written agreement included a paragraph stating that he "has freely chosen, without any compulsion or duress, not to consult an attorney pertaining to the terms and conditions of the Agreement" and that the written agreement further states that Streit acknowledges full understanding of the terms and conditions of the written agreement. Streit claims that he did not receive a copy of the written agreement until sometime in October 2005.

Brooke and Streit amended the written agreement, first on May 16, 2005 ("the first amendment") and for a second time on September 12, 2005 ("the second amendment").

In January 2006, Brooke entered into a contract to sell the Bridgehampton property for twelve million, five hundred thousand dollars ($12,500,000). Streit alleges that, as a result of the pending sale, he read the written agreement and was "shocked" to discover that the written agreement that he had signed varied from the oral agreement in that:

1) it understates the development costs for the property;

2) it states that Streit is the construction manager and states that Streit has no interest in the premises;

3) it makes Streit solely responsible for completing construction in accordance with the budget and plans and requires that Streit complete the work to Brooke's satisfaction;

4) it leaves the sale of the Bridgehampton property solely to Brooke's discretion; and

5) it contains a paragraph that varies the terms of a certain personal loan between Brooke and Streit;

(Complaint, ¶¶ 43 and 44)

In addition, the complaint alleges that the first and second amendments place additional financial and other burdens on Streit without consideration. Moreover, Streit claims that, based on Brooke's "incomplete and creative accounting," he received only $188,913 for his work on the property – an amount far less than what he would have earned under the oral agreement.

The complaint states seven causes of action. In the first cause of action, Streit asks the court to rescind the agreement based on lack of consideration, and, in the second cause of action, Streit seeks rescission based on fraudulent inducement. The third cause of action seeks recission on the grounds of unconscionability. In the fourth cause of action, Streit asks the court to enforce the partially performed oral agreement, and, in the fifth cause of action, Streit seeks an equitable distribution of the profits based on quasi-contract. The sixth and seventh causes of action state claims against Mass for breach of fiduciary duty and malpractice.

DOCUMENTARY EVIDENCE

In support of his motion to dismiss the complaint, defendant Brooke produces copies of the notarized written agreement and first amendment, that demonstrate that Streit not only signed

the written agreement and first amendment, but that he also initialed every page of those documents. As to the second amendment, Streit signed that document, but he did not sign the attached promissory note.

The written agreement states not only that Streit has chosen not to consult his own attorney, but also that:

1) the agreement supersedes all prior oral and written agreements of the parties (Isser Aff. Ex. 2, ¶2);

2) that Streit's fee shall be equal to 25% of the "net profit" (Isser Aff. Ex. 2, ¶ 9[c]);

3) that the written agreement constitutes that entire agreement between the parties and all modifications must be in writing (Isser Aff, Ex. 2, ¶ 20); and

4) that not only does Streit acknowledge a full understanding of the written agreement, but also that he "waives any objection at a later time of any of the terms of the Agreements based upon the fact that he was not advised by an attorney of his own selection of the legal effect of the Agreements or of his rights and obligations under the Agreements."[1] (Isser Aff., Ex. 2, ¶ 23).

In addition, Brooke submits a copy of a March 28, 2005 fax he received from Streit that Brooke alleges is a draft agreement that Streit prepared and signed for the Bridgehampton property. In that draft agreement, Streit acknowledges that Brooke would receive seventy-five per cent (75%) of the profits and he would receive twenty-five per cent (25%). (Isser Reply Aff, Ex. 1).

In support of the motion to dismiss the breach of fiduciary duty and malpractice claims against him, Mass submits: (1) a copy of a March 30, 2005 retainer agreement that evidences that Brooke retained Mass to represent him in his current business dealings with Streit (Mass Aff, Ex.

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[1] "Agreements" refers to the written agreement, the note and the power of attorney. (Complaint, ¶ 23).

1); (2) copies of his invoices for services that he addressed solely to Brooke (Nagler Aff. Ex. H); and (3) a copy of an April 11, 2005 letter with the subject line Brooke-Streit Agreement that he alleges he faxed to Streit. That letter states:

> Due to additional information furnished to me by Bob Fass as well as clarification of various terms used in the Agreement, I strongly urge each of you to review this "final" draft. I will be available today and tomorrow to receive any changes.
>
> Michael, please note Paragraph 23 in the Agreement in which you have acknowledged that you have not had an attorney review the Agreement.

ARGUMENTS

In addition to the documentary evidence that Brooke submits in support of the motion, he argues that, pursuant to General Obligations Law ("GOL") Section 5-1105, adequate past consideration supports the written agreement. Alternatively, he argues that contemporaneous consideration supports the written agreement because Streit admits, in the complaint, that, at the time he executed the written agreement, he had not performed all his obligations under that agreement. Brooke also argues that, pursuant to Section 5-1103 of the GOL, consideration does not need to support written and signed amendments to a contract.

As to the fraudulent inducement claim, Brooke argues that the documentary evidence establishes that Streit cannot demonstrate reasonable reliance, an essential element of a fraudulent inducement claim. Moreover, Brooke argues that the cause of action alleging that the agreement was unconscionable is subject to dismissal because, based on the documentary evidence, Streit cannot demonstrate that he had no choice but to enter into the written agreement or that the written agreement was disproportionally one-sided.

Finally Brooke claims that the court should dismiss the cause of action that seeks to enforce the oral agreement and the quasi contract cause of action because the written agreement is valid and binding.

In support of his motion for dismissal, Mass argues that malpractice and breach of fiduciary duty do not lie because he did not enter into an attorney-client relationship, or any other relationship, with Streit.

In opposition to dismissal, Streit argues that the court should rescind the written agreement because it runs afoul of the pre-existing duty rule and that Brooke cannot rely on GOL 5-1105 because the written agreement does not obligate Booke to pay Streit a sum certain on a date certain.

Streit claims that the fraudulent inducement cause of action states all of the elements of the claim because, under the circumstances of this case, Brooke led Streit to believe that Mass was representing both of them and Streit paid Mass's legal fees for drafting the written agreement.

Streit argues that the written agreement was unconscionable because he had no choice but to sign it and because it gave Brooke absolute authority over the sale of the Bridgehampton home and placed all of the risks and responsibilities of the construction costs on Streit.

As to Mass's dismissal motion, Streit claims that he did have an attorney-client relationship with Mass because Streit paid Mass's legal bill and Streit believed that Mass was representing him. Moreover, he argues that the breach of fiduciary claim is valid, even if he did not have a formal attorney-client relationship with Mass, because an attorney owes a fiduciary duty to persons with whom he deals.

DISCUSSION

On a motion that addresses the sufficiency of the pleadings, the court must accept every factual allegation as true and liberally construe the allegations in a light most favorable to the pleading party. (*Guggenheimer v Ginzburg,* 43 N.Y.2d 268 [1977]; *see also* CPLR 3211[a][7]). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez,* 84 N.Y.2d 83, 87-88 [1994]). "The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 N.Y.2d 144, 151-152 [2002][internal citations omitted]).

However, allegations consisting of bare legal conclusions or factual claims, that are either inherently incredible or that documentary evidence clearly contradicts, are not entitled to survive. (*Franklin v Winard,* 199 A.D.2d 220[1st Dept 1993], *see also Bishop v Maurer,* 33 A.D.3d 497 [1st Dept. 2006]; *Robinson v Robinson,* 303 A.D.2d 234 [2d Dept. 2003]; *Ozdemir v Caithness Corp.*, 285 A.D.2d 961[3d Dept. 2001]).

For the reasons stated below, the court grants Brooke's and Mass's motions to dismiss the complaint in their entirety.

1. Consideration

The complaint, itself, establishes that Streit had not completed construction on the Bridgehampton house on April 12, 2005, the date that Streit executed the contract. In fact, Streit states in the complaint that one of the reasons he signed the contract was that Brooke advised

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him "that if the . . .Home was not finished by September 1, 2005,[2] Plaintiff Streit 'would not see a dime.'"(Complaint ¶ 5). In addition, the written agreement requires Streit to perform several contractual obligations that he had not finished prior to his execution of the document, *e.g.*, complete construction of the home by September 1, 2005 and obtain a valid certificate of occupancy by the completion date. (Agreement, ¶¶ 5 [a] [ii] and [iv]).

That the agreement required Streit to perform several obligations after execution in exchange for payment is sufficient consideration to support the contract because the law only requires that there be some consideration for the contract and, under the traditional principles of contract law, the parties to a contract are free to make their bargain, even if the consideration they exchange is grossly unequal or of dubious value. (*See Apfel v Prudential-Bache Securities,* 81 N.Y.2d 470, 475 [1993]; *Laham v Chambi,* 299 A.D.2d 151, 152 [1st Dept 2002]).

Alternatively, even if Streit had completed construction when he executed the written agreement, Section 5-1105 of the GOL provides:

> A promise in writing and signed by the promisor or its agent shall not be denied effect as a valid contractual obligation on the ground that consideration for the promise is past or executed, if the consideration is expressed in writing and is proved to have been given or performed and would be valid consideration but for the time when it was given or performed.

Streit alleges in the complaint that he "worked tirelessly on the . . .Home development

[2] Indeed, Streit completed construction on the Bridgehampton property on September 10, 2005, approximately five months after he executed the written agreement. (Complaint ¶ 22).

project and oversaw each and every detail thereof." (Complaint ¶ 25). Thus, Streit claims that he performed many of his obligations as construction manager prior to executing the contract. This "proof," coupled with the consideration the written agreement details and the specific date when Streit would complete the project, is sufficient to satisfy GOL Section 5-1105 and any additional requirement that the agreement provide for payment of a sum certain on a date certain. (*See Braka v Travel Assistance International,* 25 A.D.3d 456 [1st Dept 2006] [citing GOL Section 5-1105 and holding that "while past consideration is normally unenforceable . . . here the promissory agreement signed by plaintiff and his father . . . constituted valid consideration]; *Movado Group, Inc. v Presberg,* 259 A.D.2d 371 [1st Dept 1999] [written expression of past consideration satisfied GOL Section 5-1105]).

The cases that Streit relies on for his argument that the "pre-existing duty" rule applies are inapposite because, in both of those cases, *Tierney v Capricorn Investors, L.P.* (189 A.D.2d 629 [1st Dept 1993]) and *Two Wall Street Associates Ltd. Partnership v. Anderson Raymond & Lowenthal* (183 A.D.2d 498 [1st Dept 1992]), the parties first executed written agreements that stated any amendments to the agreements must be in writing and the parties to be charged must sign the amendments. The plaintiffs in those cases alleged that they later entered into oral modifications that amended the written agreements and sued for breach of the alleged oral modifications. Because the alleged oral agreements were inconsistent with the terms of the written agreements, the courts in *Tierney* and *Two Wall Street* dismissed the plaintiffs' claims for breach of contract. In those cases, unlike the matter before the court, the alleged superseding agreements were oral, and thus Section 5-1105 of the GOL did not apply.

As to the first and second amendments to the written agreements, Streit concedes in his

memorandum of law that, pursuant to GOL Section 5-1103, "an agreement . . . to change or modify . . . in whole or in part, any contract . . . shall not be invalid because of the absence of consideration, provided that the agreement . . . changing or modifying such contract . . . shall be in writing and signed by the party against whom enforcement is sought to enforce the change [or] modification." Streit also states, on page 4 of his memorandum of law in opposition to Brooke's motion to dismiss, that "[t]he . . .Written Agreement was legally, therefore, a change or modification of the original Oral agreement." Thus, under Streit's theory, GOL Section 5-1103 would govern the written agreement, and it "shall not be invalid because of the absence of consideration." Here, the amendments are in a writing that both Streit and Brooke signed, and consideration does not to support the amendments.

2. <u>Fraudulent Inducement</u>

A cause of action for fraudulent inducement requires the plaintiff to plead and prove that the defendant made a misrepresentation of a material fact, that was false and that the defendant knew to be false at the time he made the statement, justifiable reliance and damages. (*Lama Holding Co. v Smith Barney, Inc.,* 88 N.Y.2d 413 [1996]; *New York University v Continental Ins. Co.,* 87 N.Y.2d 308 [1992]). In this case, both the documentary evidence and the complaint establish that Streit cannot prove justifiable reliance because: (1) he admits, in the complaint, that "[p]laintiff Streit signed the written agreement without reading it," (Complaint, ¶ 36) and (2) the written agreement demonstrates that Streit not only signed the agreement but that he also initialed each page of the document. "Where, as here, a written instrument contains terms different from those orally or otherwise represented, a person is presumed to have read the writing and may not claim that she or he relied on the representations." (*Lewin Chevrolet-GEO-*

Oldsmobile, Inc. v Bender, 225 A.D.2d 916 [3d Dept 1996]; *see also Abrahami v UPC Construction Co., Inc.,* 224 A.D.2d 231 [1st Dept 1996]; *Shea v Hambros*, 244 A.D.2d 39 [1st Dept 1998]; *Mariani v Dyer,* 193 A.D.2d 456 [1st Dept 1993] [rejecting fraud in the inducement claim because "defendant is presumed to have read [the agreement] and he may not claim reliance on oral representations which contradict its terms."]).

Moreover, if the facts of a transaction are not peculiarly within one party's knowledge, and the other party, by the exercise of ordinary intelligence, has the means to ascertain the truth, "he must make use of those means or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations." (*Dunkin' Donuts of America, Inc. v Liberatore,* 138 A.D.2d 559 [3d Dept 1988]; *see also Abrahami v .P.C. Construction Co., Inc.,* 224 A.D.2d 231 [1st Dept 1996] [no reasonable reliance where sophisticated businessmen did not exercise ordinary diligence and conduct an independent appraisal of the risk they assumed]).

Streit had the means to ascertain the truth about the agreement by simply reading it before he signed it. Streit's conclusory allegation that he had no choice but to sign the agreement, or he would not receive his payment, is insufficient, as a matter of law, to state a claim for fraudulent inducement. (*See Collins v E-Magazine, LLC,* 291 A.D.2d 350 [1st Dept 2002]).

3. Unconscionability

In order to rescind a contract based on unconscionability, a plaintiff must plead and prove that the contract was both procedurally and substantively unconscionable when the parties made it. (*Gilman v Chase Manhattan Bank*, 73 N.Y.2d 1 [1988]; *Rosiny v. Schmidt*, 185 A.D.2d 727 [1st Dept 1992]; *see also State v. Avco. Fin. Serv. Of New York, Inc.*, 50 N.Y.2d 383 [1980]).

That is, plaintiff must plead an absence of meaningful choice (procedural unconscionability) and terms that are unreasonably favorable to the other party (substantive unconscionability).

In this case, Streit's conclusory allegations that (1) he had no choice but to enter into the agreement as written because his name was not on the property; (2) Brooke told him he had to sign; and (3) he was afraid that he would not receive payment are without merit because the documentary evidence demonstrates that Streit received at least one draft of the written agreement before April 12 and that he had an opportunity to review and comment on the adequacy of the draft and request changes. In addition, the draft agreement that he prepared, signed and sent to Brooke contained the 25%-75% split in profits that Streit was "shocked" to find in the written agreement. Moreover, the written agreement is between two sophisticated businessmen with equal bargaining power, each with the means to protect his rights, and it does not contain any fine print or hidden terms. This type of agreement is not procedurally or substantively unconscionable. (*Bianco v Shareholders Communication Corp*, 223 A.D.2d 617 [2d Dept 1996]; *Edwards v North American Van Lines,* 129 A.D.2d 869 [3d Dept 1987]).

4. Enforcement of the Oral Agreement and Quasi Contract

The fourth and fifth causes of action for enforcement of the oral agreement and quasi contract are subject to dismissal because the written agreement, by its terms, supersedes all prior oral agreements, understandings, negotiations and discussions between the parties. (Isser Aff, Ex. 2, para.2).

5. Malpractice

To recover damages for legal malpractice, a plaintiff at this stage must plead, *inter alia,*

the existence of an attorney-client relationship. (*Moran v Hurst,* 32 A.D.3d 909 [2d Dept 2006]; *Jun Xiao v Jianming Shen,* 2006 WL 2000151 [N.Y. Sup. App. Term 2006]) "It is well established that, with respect to attorney malpractice, absent fraud, collusion, malicious acts or other special circumstances, an attorney is not liable to third parties, not in privity, for harm caused by professional negligence." (*Rovello v Klein,* 304 A.D.2d 638 [2d Dept 2003], citing *Conti v Polizotto,* 243 A.D.2d 672 [2d Dept 1997]). Because an attorney-client relationship does not depend on the existence of a formal retainer agreement or upon payment of a fee (*see Hanson v Caffry, 280 A.D.2d 704* [3d Dept 2001]; *Jane St. Co. v Rosenberg & Estis,* 192 A.D.2d 451 [1st Dept 1993]), a court must look to the totality of the circumstances to ascertain the existence of this relationship, including: (1) whether the parties entered into a fee arrangement or whether the individual paid a fee; (2) whether the parties entered into a written retainer agreement; (3) whether the attorney performed services gratuitously based on an informal relationship; (4) whether the attorney actually represented the individual in one aspect of the matter; and (5) whether the individual reasonably believed the attorney was representing him or her (*see First Hawaiian Bank v Russell & Volkening,* 861 F. Supp. 233, 238 [S.D.N.Y. 1994]; *Reyes v Leuzzi,* 2005 WL 3501578 [Sup. Ct. N.Y. County 2005]). The unilateral belief of a plaintiff alone does not confer upon him or her the status of a client. (*See Wei Cheng Chang v Pi,* 288 A.D.2d 378 [2d Dept 2001]).

Here, both the allegations in the complaint, or lack of allegations, and the documentary evidence refute Striet's allegation that he had an attorney-client relationship with Mass. In the complaint, Streit alleges that Brooke advised Streit that Mass would be acting as their attorney; that Mass did not advise Streit that he was not acting as his attorney; and that Streit believed that

Mass was his attorney. (Complaint, ¶¶ 36-37). The complaint does not allege that Mass, himself, did anything affirmative to encourage Streit's belief that Mass was Streit's attorney. In fact, Mass produces an April 11, 2005 letter that he faxed to Streit that states, "Michael, please note Paragraph 23 in the Agreement in which you have acknowledged that you have not had an attorney review the Agreement." This is certainly sufficient to put Streit on notice that Mass was not acting as his attorney. Moreover, Streit does not allege that he entered into a retainer agreement with Mass; that he entered into a fee arrangement with Mass; or that he had any contact with Mass either before or after he executed the contract. In fact, Mass's retainer agreement was exclusively with Brooke, and he addressed his bills for services to Brooke.

That Streit issued a check to Brooke for $11,700, the amount of Mass's fee for drafting the written agreement, does not establish an attorney-client relationship. (*Priest v Hennessy,* 51 N.Y.2d 62 [1980] [payment of legal fees by a third person does not in itself create an attorney-client relationship between the attorney and his client's benefactor sufficient to sustain a claim of privilege]; *People v O'Connor,* 85 A.D.2d 92 [4th Dept 1982] [an attorney-client relationship is not established because one pays a legal fee]).

Moreover, the documentary evidence, consisting of (1) Mass's retainer agreement with Brooke, (2) paragraph 23 of the written agreement in which Streit acknowledges that he had no legal representation, (3) the April 11, 2005 letter cited above, and (4) Mass's bills for services that Mass addressed to Brooke, negates completely Streit's allegations that he had an attorney-client relationship with Mass.

6. Breach of Fiduciary Duty

The cause of action for breach of fiduciary duty is also dismissable as it arises from the same facts as Streit's legal malpractice claim and does not allege distinct damages. (*Mecca v Shang,* 258 A.D.2d 569 [2d Dept 1999]; *Reyes v Leuzzi,* 10 Misc. 3d 814 [Sup. Ct., N.Y. County 2005]).

Streit's reliance on *Cohen v Good Friend* (665 F. Supp. 152 [E.D.N.Y. 1987]) and *George Heine v Colton, Hartnick, Yamin and Sheresky* (768 F.Supp. 360 [S.D.N.Y. 1992]) for the proposition that an attorney may owe a fiduciary duty to persons with whom he deals, even if a formal attorney-client relationship does not exist, is misplaced as the facts in those cases are distinguishable from the circumstances here. In *Cohen,* the court found that the allegations in the complaint were sufficient to allege both an attorney-client relationship and a breach of fiduciary duty, and the *Heine* court sustained a cause of action for breach of fiduciary duty against a law firm where the tortfeasor was a former partner of the defendant law firm, the tortfeasor was using the law firm's facilities, letterhead, secretaries and telecopier to perpetrate a fraudulent scheme and the law firm knew or should have known about his conduct.

Here, the documentary evidence belies Streit's allegation that he had a relationship with Mass, let alone an attorney client relationship, that would give rise to a claim for breach of fiduciary duty.

Accordingly, it is ORDERED that defendant Peter Brooke's motion to dismiss the first, second third fourth and fifth causes of action is granted; and it is further

ORDERED that defendant Mitchell Mass's motion to dismiss the sixth and seventh

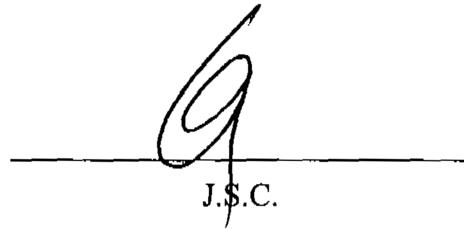
causes of action is granted; and it is further

ORDERED that the complaint is dismissed.

This decision constitutes the order of the court.

The clerk is directed to enter judgment dismissing the complaint accordingly.

Date: August 3, 2007



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