Feinberg v Boros
2007 NY Slip Op 32936(U)
September 4, 2007
Supreme Court, New York County
Docket Number: 0108498/2003
Judge: Emily Jane Goodman
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SCANNED ON 9/19/2007
[* 1]

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

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 108498/2003
FEINBERG, HERBERT
VS
BOROS, JEROME S., ESQ.
Sequence Number : 009
SUMMARY JUDGMENT

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 per attached memorandum decision

FILED
SEP 19 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 9/4/07

EJG
EMILY JANE GOODMAN, J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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HERBERT FEINBERG, Individually and
As Assignee of I.A. ALLIANCE CORP.,

Plaintiff,

-against-

Index No.: 108498/03

JEROME S. BOROS, ESQ., ROBINSON, SILVERMAN, PEARCE, ARONSOHN & BERMAN, LLP, and BRYAN CAVE, LLP,

Defendants.

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EMILY JANE GOODMAN, J.S.C.:

The instant action involves a legal malpractice claim by Herbert Feinberg (Feinberg), individually and as assignee of I.A. Alliance Corp. (Plaintiff), against Jerome Boros, Esq. (Boros), Robinson, Silverman, Pearce, Aronsohn & Berman, LLP, and Bryan Cave, LLP (collectively, Defendants).[1] The malpractice claim has its genesis in an arbitration proceeding between Feinberg and his former business partner Norman Katz (Katz), and Defendants' subsequent failure to advise Feinberg on pursuing a post-award "limiting agreement" with Katz to limit the collateral estoppel effect of the Arbitration Award as to claims against the accounting firm of Mahoney Cohen Rashba & Pokart (Mahoney Cohen).

In a decision dated September 3, 2004, Judge Rosalyn Richter vacated her prior judgment in favor of Defendants dismissing the

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[1] Boros was counsel to the law firm of Robinson Silverman, which subsequently merged into Bryan Cave. Unless otherwise specified herein, "Robinson Silverman" refers to both firms.

complaint, and granted Plaintiff's leave to amend the complaint. That decision was upheld by the Appellate Division of the First Department. In a subsequent decision dated January 18, 2006, Judge Richter denied Defendants' motion for summary judgment seeking dismissal of Plaintiff's amended complaint. Thereafter, Defendants took the depositions of Katz, Feinberg and their attorneys. Based on these depositions, Defendants filed a supplemental and renewed motion for summary judgment dismissing the amended complaint, and both sides agreed that Judge Richter permitted Defendants to make this motion. For the reasons stated herein, the supplemental and renewed motion for summary judgment is denied.

Background

In 1996, Feinberg and Katz entered into a Purchase Agreement in which Feinberg agreed to buy out Katz's fifty percent interest in an apparel company named I. Appel Corp. (Appel), as well as certain loans made by Katz and his son Stephen Katz to Appel. The parties retained the accounting firm of Mahoney Cohen to determine, among other things, the final share price or value of Katz's interest in Appel. After closing of the transaction under the Purchase Agreement and in the ensuing arbitration proceeding, Feinberg claimed that Katz fraudulently inflated Appel's net worth and the value of the loans made to Appel. Feinberg sought rescission of the Purchase Agreement and damages against Katz.

Katz counterclaimed that Feinberg breached the Purchase Agreement by failing to pay him the balance of the purchase price for his 50% share in Appel. Mahoney Cohen was not a party to the arbitration proceeding.

In the arbitration, Feinberg nominated Boros of Robinson Silverman as party arbitrator, and Katz nominated Alvin Davis (Davis) of Steel Hector & Davis as party arbitrator.[2] The two party arbitrators then selected a neutral third-party arbitrator, Dana Freyer of Skadden Arps, to serve as chair of the arbitration panel. In the Arbitration Award dated November 22, 1999, the arbitrators denied Feinberg's claims for damages, and directed him to pay Katz $2.5 million. However, Katz claimed that the amount should have been $6.1 million, the estimated price under the Purchase Agreement. Feinberg challenged the Arbitration Award in court, which was reduced to $1.8 million.

After issuance of the Arbitration Award, Davis became Katz's counsel, and Boros became Feinberg's counsel, in connection with their potential claims against Mahoney Cohen for alleged accounting malpractice.[3] On January 5, 2000, on behalf of his client Katz, Davis met with Feinberg and his attorney Boros in

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[2] In the arbitration, Feinberg was represented by Holland & Knight LLP, and Katz was represented by Zuckerman Spaeder LLP.

[3] In a decision and order dated April 8, 2004, Judge Richter noted that, in *Feinberg v Katz* (2003 U.S. Dist. LEXIS 1677 [SD NY Feb. 3, 2003]), an arbitrator is not barred from representing a party to the arbitration in a subsequent related matter.

Davis' Florida office to discuss the possibility of filing a joint complaint against Mahoney Cohen. During the meeting, the possible collateral estoppel effect of the Award on the Mahoney Cohen claims was discussed,[4] as it contained findings regarding Mahoney Cohen's determination of values of Appel and Katz's share in Appel.

From January 2000 to early May 2000, Defendants continued to advise Feinberg on the Mahoney Cohen claims. However, in mid-May 2000, Defendants told Feinberg that they would not represent him in a suit against Mahoney Cohen, because Boros, as a party arbitrator, had signed off on the Arbitration Award. Thus, on or about May 19, 2000, Feinberg retained new counsel, Steven Storch (Storch) of Storch Amini Munves PC, to represent him in his action against Mahoney Cohen, which was filed on July 24, 2000. In separate decisions, Judge Marilyn Shafer dismissed Feinberg's claims against Mahoney Cohen, on the basis that the Arbitration Award collaterally estopped him from maintaining such claims.

Consequently, Feinberg commenced the instant action against

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[4] Deposition Transcript of Mark Bunim, at page 46, a copy of which is annexed as Exhibit 3 to Plaintiff's Opposition to Defendants' Motion to Dismiss. Bunim, a law partner of Boros at Robinson Silverman, also worked on the Feinberg-Mahoney Cohen matter. Bunim testified that "[t]here was an issue about collateral estoppel, and Davis had a proposal to get around collateral estoppel ...." *Id.* Bunim's testimony appears contrary to that of Davis, who testified that collateral estoppel and limiting agreement issues either were not discussed at the meeting or that he could not recall discussing same.

Defendants, alleging that they committed legal malpractice by failing to advise him in pursuing a post-award "limiting agreement" with Katz, to limit the collateral estoppel effect of the Arbitration Award as to his Mahoney Cohen claims. In their renewed motion for summary judgment, Defendants argue that (1) even if Feinberg were advised of a limiting agreement and had pursued it with Katz, there was no evidence that Katz would have entered into an agreement on terms acceptable to Feinberg; and (2) even if Katz were willing to enter into such an agreement, Feinberg's failure to pursue the agreement when he was represented by Storch, his new counsel, broke the chain of causation that could otherwise result in Defendants' liability on the legal malpractice claim.

Based on the record, there exists material issues of fact as to (a) whether Feinberg and Katz would have agreed to a limiting agreement during the period of time Defendants represented Feinberg; and (b) whether Storch's alleged failure in pursuing such an agreement on behalf of Feinberg could be deemed an intervening or superseding cause relieving Defendants from liability on the malpractice claim. These and other issues, as discussed below, cannot be fully resolved on Defendants' renewed summary judgment motion, and must await a trial on the merits.

Applicable Legal Standards

In setting forth the standards for granting or denying a

motion for summary judgment, the Court of Appeals, in *Alvarez v Prospect Hospital* (68 NY2d 320, 324 [1986]), noted:

> As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action [internal citations omitted].

Adhering to the Court of Appeals' guidance, the lower courts uniformly scrutinize motions for summary judgment, as well as the facts and circumstances of each case, to determine whether relief may be granted. *See Giandana v Providence Rest Nursing Home*, 32 AD3d 126, 148 (1st Dept 2006)(because entry of summary judgment "deprives the litigant of his day in court, it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues")(citations omitted); *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997)(in considering a summary judgment motion, "evidence should be analyzed in the light most favorable to the party opposing the motion") (citations omitted). However, it is generally held that allegations of a conclusory nature that are unsupported by competent evidence are insufficient to defeat a motion for

summary judgment. *Alvarez,* 68 NY2d at 324-325.

Discussions

To properly plead a legal malpractice claim, a plaintiff must allege: (1) the attorney's negligence; (2) the negligence was the proximate cause of plaintiff's loss; and (3) actual damages sustained by plaintiff. *Leder v Spiegel*, 31 AD3d 266 (1st Dept 2006); *Pellegrino v File*, 291 AD2d 60 (1st Dept 2002). In order to establish "proximate cause," a plaintiff must show that "but for" the attorney's negligence, plaintiff would have prevailed in the underlying matter or would not have sustained damages. *Brooks v Lewin*, 21 AD3d 731, 734 (1st Dept 2006).

In the instant case, it is undisputed that Defendants failed to advise Feinberg of the significance or the pros and cons of a limiting agreement to limit the potential collateral estoppel effect of the Arbitration Award.[5] This failure is the basis of Plaintiff's assertion that Defendants were negligent. Defendants argue that, even assuming they were negligent, the malpractice claim fails because such negligence was not the proximate cause

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[5]In their original motion to dismiss, Defendants argued that an agreement by the parties to an arbitration to limit the collateral estoppel effect of the arbitration would not preclude a third-party entity to assert a collateral estoppel defense in a later action between such entity and the arbitration parties. This argument was rejected by Judge Richter, whose decision was upheld by the First Department. Indeed, Judge Richter noted in her decision that had Feinberg and Katz entered into a limiting agreement, Mahoney Cohen would likely not have prevailed on its collateral estoppel defense to Feinberg's claims.

of Feinberg's loss, as there was no evidence that Katz would have agreed to a limiting agreement on terms acceptable to Feinberg, even if it was pursued.

In support of the argument, Defendants allege: (1) Feinberg and Katz hated each other and would unlikely agree to a limiting agreement; (2) Katz might consider such an agreement, only if Feinberg would agree to make substantial payments to him and release all claims against him and his son Stephen Katz, conditions which Feinberg would find unacceptable; (3) any possibility for an agreement was lost when Katz's attorney Davis abruptly ended the January 5, 2000 meeting, after Katz told Davis that Feinberg started a new lawsuit against his son Stephen Katz; and (4) Katz had always thought that the arbitration should have collateral estoppel effect because Katz's son wanted to stay the Feinberg lawsuit, on the ground that determination of certain issues in the arbitration would preclude Feinberg from relitigating those issues against him under the doctrine of collateral estoppel. Based on the foregoing and *the case of Brooks v Lewin, supra,*[6] Defendants contend that Feinberg's claim that Katz would be willing to enter into a limiting agreement was mere speculation, which was insufficient to establish a legal

[6] In that case, the First Department held that "speculation on future events is insufficient to establish that the defendant lawyer's malpractice, if any, was a proximate cause of any ... loss." 21 AD3d at 734-735.

malpractice claim.

In response, Plaintiff counters that: (a) despite the mutual animosity between Feinberg and Katz, in January 2000 Katz and Davis decided to take a "business approach" and invited Feinberg and his attorney Boros to meet and discuss the filing of a lawsuit against Mahoney Cohen, because Katz was informed by Davis that he could recover substantial sums against Mahoney Cohen; (b) Katz's "well rehearsed" testimony, which was taken six years after the January 2000 meeting, displayed significantly more bias toward Feinberg, as circumstances have changed; (c) although Katz testified that he would consider a limiting agreement only if certain conditions were met, his testimony indicated that he did not understand the legal impact of collateral estoppel and a limiting agreement; (d) Katz's credibility is suspect because he had been convicted of tax fraud, and had falsified his credentials for consideration as an arbitrator before the American Arbitration Association; and (e) despite Katz's concern about the arbitration's collateral estoppel effect on Feinberg's suit against Stephen Katz, a limiting agreement could be crafted to state that it would have no effect upon the defenses available to Stephen Katz.

The foregoing shows that material issues of fact are in dispute as to whether Feinberg and Katz would have been willing to enter into a limiting agreement during the period of time

Defendants represented Feinberg. Plaintiff states that "Katz's testimony in its entirety does not support the argument that he would never have entered into a limiting agreement on terms acceptable to Feinberg." Plaintiff's Brief, at page 2; and (ii) Defendants state that "[i]n sum, there is no evidence that shows what Katz would have done if Feinberg had requested a limiting agreement of him." Defendants' Brief, at page 10. However, there is no evidence in the record to support a finding, as a matter of law, that Katz and Feinberg would never have agreed to a limiting agreement, if they were then advised by their counsel, including Defendants, if such an agreement would limit the collateral estoppel effect of the Arbitration Award with respect to their claims against Mahoney Cohen.

The case (among others) relied on by Defendants, *Brooks v Lewin, supra*, for the proposition that "speculation on future events" is insufficient to establish a malpractice claim, is inapposite. In that case, there was nothing in the record to support a determination that but for defendants' failure to take certain legal action, plaintiff would not have suffered its losses. In *Brooks*, the plaintiff actually admitted it had already lost a major client before the defendant-lawyers were retained by plaintiff and further admitted that other losses where caused by production problems. Unlike *Brooks*, however, there is no evidence here which establishes, as a matter of law,

that the Plaintiff's loss on his Mahoney Cohen claims was caused by reasons unrelated to Defendants' failure to advise.

Here, the jury will determine, based on the evidence presented, whether, during the relevant period, Feinberg and Katz were more interested in money than in their personal animosity. For instance, although Katz testified that Feinberg was "not going to be happy until Katz is dead" and that their relationship was "no doubt" one of hatred, Katz also noted that he "wouldn't have done anything that would have benefitted Mr. Feinberg, unless it benefitted me."[7] Thus, despite their hatred and prior litigation history they appear to have taken the step of scheduling the January 2000 meeting to discuss the pursuit of Mahoney Cohen. The jury will also determine whether (and if so, when) Feinberg's and Katz's personal disputes rose to such a level that it outweighed their common interest in pursuing Mahoney Cohen (i.e., when Feinberg fueled the fire by suing Katz and his son, which allegedly resulted in cancellation of the January 2000 meeting). This in turn requires a determination of credibility of the witnesses, which is within the province of the jury, and does not involve "rank speculation."

<u>The Alleged Intervening Cause</u>

Defendants also contend that Storch's representation of Feinberg, starting in May 19, 2000, and his failure to advise

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[7]Katz Deposition Transcript, at pages 79-80.

Feinberg of a limiting agreement, was an intervening cause that cut off their liability on the malpractice claim. Defendants also refute Feinberg's argument that he only had a small window of opportunity to pursue a limiting agreement because Feinberg believed that Katz's statute of limitations tolling agreement with Mahoney Cohen was about to expire in February 2000.[8] In particular, Defendants allege that (1) Feinberg purportedly admitted in his February 8, 2006 deposition that he knew, as late as 2002, that the Katz-Mahoney Cohen tolling agreement was still in effect; and (2) Katz's willingness to enter into a limiting agreement with Feinberg had no bearing on whether his tolling agreement with Mahoney Cohen expired because Katz testified that he would have only entered into the limiting agreement if Feinberg paid him the money owed and released him and his son from litigation. Further, Defendants argue that because Feinberg's action against Mahoney Cohen was not filed until July 2000, Storch had ample opportunity to pursue a limiting agreement, as he was retained by Feinberg in May 2000. Relying on the case (among others) of *Richardson v Lindenbaum & Young* (11 Misc 3d 1070 (A) [Sup Ct, Kings County 2006]), for the proposition that a plaintiff's former counsel could not be held

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[8] Feinberg maintains that if Katz's statute of limitations tolling agreement with Mahoney Cohen expired in February 2000, Katz would have no incentive to enter into a limiting agreement with Feinberg to sue Mahoney Cohen because Katz's claims against Mahoney Cohen would already be time barred.

liable for legal malpractice if a successor counsel had sufficient time to protect the plaintiff's right, Defendants contend that they should not be held liable, as Feinberg's former counsel, for his loss.

The law is well settled that where "successor counsel had sufficient time to adequately protect plaintiff's rights" a legal malpractice claim against a predecessor firm, hired for the same services, fails as a result of lack of proximate cause. *Golden v Cascione, Chechanover & Purcigliotti*, 286 AD2d 281 [1st Dept 2001]; *see also Pyne v Block & Assoc.*, 305 AD2d 213 [1st Dept 2003]; *Albin v Pearson*, 289 AD2d 272 [2d Dept 2001]; *Kozmol v Law Firm of Allen L Rothenberg*, 241 AD2d 484 [2d Dept 1997]). However, Defendants have not met their burden to demonstrate that successor counsel had sufficient time to protect Feinberg's rights. First, based on Boros' testimony in connection with a memorandum he wrote immediately after his January 5, 2000 meeting with Feinberg and Davis, Boros testified that his writing "Tolling agreement HF/Mahoney Cohen (on S/L) NK/Mahoney Cohen" meant that because of statute of limitations issues, the parties had to "get off the dime" if they were going to sue Mahoney Cohen. Boros Deposition Transcript, at pages 66 and 80, a copy of which is annexed as Exhibit 1 to Plaintiff's Opposition to Defendants' Motion. Boros' memorandum also indicated (in item 7 thereof), in connection with AD's reference to MC's valuation

gap, the following: "NK tolling agreement to February 2000." Boros testified that "NK" stood for Norman Katz. *Id.* at page 80; apparently, "HF" means Herbert Feinberg, "AD" means Alvin Davis, and "MC" means Mahoney Cohen. Hence, Feinberg contends that, based upon the circumstances that were communicated to him in January 2000, he was under the impression that the Katz tolling agreement was to expire in February 2000, and there was an urgent need (a small window to "get off the dime") to pursue a limiting agreement with Katz, as there were statute of limitations and tolling agreement issues, as reflected in Boros' memorandum of the January 2000 meeting.

Secondly, Feinberg contends that he was not aware, and there was no indication in January 2000, of whether the Katz tolling agreement would be renewed or extended, but in March 2002 he was informed by Marvin Weissman, a partner of Mahoney Cohen, that the Katz tolling agreement was still in place at that time.[9] Whether Feinberg "knew" all along that the Katz tolling agreement was renewed or extended, and was still in effect until 2002, is an issue of fact. Moreover, since Defendants were Feinberg's counsel from January 2000 to May 2000, an issue exits as to whether they were obligated to find out the status of the Katz

[9] Feinberg also contends that the tolling agreements, including renewals or extensions, have yet to be produced in this litigation, and the party most likely would have same, Mahoney Cohen, has yet to be deposed.

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tolling agreement, in order to fully apprise Feinberg of the alternatives available to him with respect to his claims against Mahoney Cohen, and the advisability of pursuing a limiting agreement with Katz.

Thirdly, even though Katz testified that his willingness to enter into a limiting agreement with Feinberg had nothing to do with his Mahoney Cohen tolling agreement, an issue may be raised as to the credibility of his testimony. In particular, just prior to giving such testimony, he answered "That's correct", in response to Defendants' counsel question: "You told Mr. Storch that you don't know when the tolling agreement began and when the tolling agreement expired?" Katz Deposition Transcript, at page 111, a copy of which is annexed as Exhibit E to Defendants' Motion. Immediately thereafter, when Katz was again asked by Storch about his knowledge of the tolling agreement:

Q: So you could not then have joined in a lawsuit to seek damages from Mahoney Cohen if the tolling agreement had expired, correct?"
A: If it had expired, yes, but I don't think it had expired.
Q: You think it was still in effect in May of 2000?
A: Pardon?
Q: You think it had not expired?
A: To the best of my knowledge, it hadn't.

Id. at pages 112-113. Based upon the foregoing exchanges, Katz's testimony as to his knowledge of the tolling agreement changed from no knowledge of when it began and expired (when asked by Defendants' counsel), to "the best of my knowledge" that the

agreement had not expired in May 2000 (when asked by Plaintiff's counsel). These seemingly conflicting testimonies, given only within minutes of each other, raise an issue regarding Katz's selective recollection of events when asked by different counsel, as well as the credibility of his testimonies.

Also, the record shows that when Storch began representing Feinberg in May 2000, the statute of limitations for Feinberg to commence a suit against Mahoney Cohen (July 2000) was imminent. Further, Storch's testimony indicates that Mark Bunim, Boros' partner at Robinson Silverman, had advised him (Storch) that negotiations with Katz were dead, and there was no reason to believe any agreement could be reached with Katz at that time. Storch Deposition Transcript, at pages 128-130, a copy of which is attached as Exhibit G to Defendants' Motion. While the record shows that Storch did consider the collateral estoppel effect of the Arbitration Award upon the Mahoney Cohen claims, an issue is raised as to whether the pursuit of a limiting agreement with Katz at that time to avoid collateral estoppel would be feasible, due to changed circumstances that occurred from January 2000 to May 2000. These circumstances, as alleged by Plaintiff, include, among other things: Feinberg and Katz were engaged in full blown litigation in May 2000; Feinberg was pursing an appeal of the Arbitration Award; Feinberg's belief that the Katz tolling agreement had expired in February 2000; and Bunim's indication

that no agreement could be reached with Katz in May 2000 as negotiations had fallen apart.

Based on the foregoing, there exists issues of fact as to whether under the circumstances when Storch was retained by Feinberg in May 2000, Storch's alleged failure in pursuing a limiting agreement with Katz could be considered as an "intervening cause" relieving Defendants from liability on the legal malpractice claim. Plaintiff has established the existence of material issues of fact, which precludes the entry of a summary judgment in favor of Defendants.

Accordingly, it is

ORDERED that Defendants' supplemental and renewed motion for summary judgment dismissing Plaintiff's amended complaint is denied.

This Constitutes the Decision and Order of the court

FILED
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Dated: September 4, 2007

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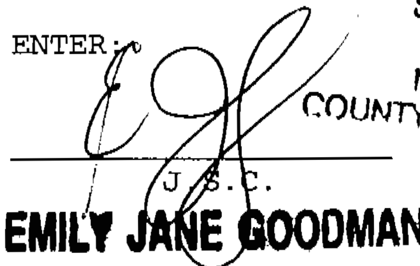

J.S.C.

EMILY JANE GOODMAN