

**Labranche v Edward & Sons, Inc.**

2007 NY Slip Op 33784(U)

November 20, 2007

Supreme Court, Nassau County

Docket Number: 2013-06/

Judge: Daniel R. Palmieri

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*Sum*

**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**Present:**

**HON. DANIEL PALMIERI  
Acting Justice Supreme Court**

-----x  
**MARIE LABRANCHE and KISTODEL, INC.,**

**TRIAL TERM**

**INDEX NO.: 012013/06**

**Plaintiff,**

**-against-**

**MOTION DATE: 10-29-07  
SUBMIT DATE: 10-29-07  
SEQ. NUMBER - 002**

**EDWARD & SONS, INC., WALTER EDWARDS  
and NICHOLAS M. NUDO III, ESQ.,**

**Defendant**

-----x  
**NICHOLAS M. NUDO III, ESQ.,**

**Third-Party Plaintiff,**

**-against-**

**EDWARDS & SONS, INC., WALTER EDWARDS  
and KUSHNICK & ASSOCIATES, P.C.,**

**Third-Party Defendants.**

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**The following papers have been read on this motion:**

- Notice of Motion, dated 10-1-07.....1**
- Memorandum of Law, dated 10-1-07.....2**
- Affirmation in Opposition, dated 10-19-07.....3**

This motion to dismiss the third-party action pursuant to CPLR 3211(a) is granted and the third-party complaint is dismissed. Further, movants' request for costs pursuant to Part 130-1.1 of the Uniform Rules of the Trial Courts is granted in the amount of \$3,410, \$2,500

to be paid to defendant Kushnick & Associates, P.C., and \$910 to be paid to defendant Walter Edwards.

In this legal malpractice action, and by order of this Court dated September 14, 2006, the defendants Edwards & Sons, Inc. and Walter Edwards (“Edwards defendants”) were granted summary judgment dismissing the complaint as to them. In so doing, the undersigned stated

“To establish a claim for legal malpractice it is not necessary to join as a defendant the parties involved in the underlying claim. The research of this Court and the submissions on this motion fail to disclose any authority in support of a contrary proposition.

A person should be joined in an action when complete relief cannot be accorded to the parties or if such person might be inequitably affected by a judgment. CPLR § 1001(a).

Nor should there be permissive joinder of the Edwards defendants since there is no joint or several relief to be obtained and no common questions of law or fact between the co-defendants. CPLR §1002(b).

It is plain that the Edwards defendants are not necessary parties to this legal malpractice action and that they cannot be affected by the outcome.”

Decision and Order, at 2-3.

As there has been no appellate decision reversing or modifying this order, nor was a timely motion for reargument made or granted, the foregoing constitutes the law of the case and is not subject to revision at this late date. *See, AIG Trading Corp. v Valero Gas Marketing, L.P.*, 254 AD2d 117 (1<sup>st</sup> Dept. 1998); *cf.*, *Baldassano v Bank of N.Y.*, 199 AD2d 184 (1<sup>st</sup> Dept. 1993). Accordingly, as the direct action against the Edwards defendants was dismissed on the ground that they were not proper parties to the legal malpractice action, the Court need not further address the claims made against them by Nudo, their former co-

defendant. The third-party action appears to be no more or less than an attempt to circumvent the holding of the September, 2006 decision, as a third party defendant is still a party, and thus cannot be added under the terms of this prior order.

The Court would note only that Nudo asserts that the third-party defendants' alleged failure to properly record a mortgage on real property in favor of his clients under a joint venture agreement, and a resulting monetary loss by his clients upon a sale of the subject property, led to the malpractice claim against him. If this is so, it is possible that he may wish to raise this defensively to demonstrate that the losses allegedly suffered were not proximately caused by professional negligence on his part. *See, e.g., Brooks v Lewin*, 21 AD3d 731 (1<sup>st</sup> Dept. 2005), *lv denied* 6 NY3d 713 (2006). That, however, does not alter the Court's prior finding that the Edwards defendants are not proper parties to the malpractice suit.

With regard to the suit against the law firm defendant, Kushnick & Associates, P.C. ("Kushnick") the Court agrees with such defendant that no basis exists therefor. The only facts alleged in support of the action against Kushnick are the same ones advanced against the Edwards defendants, described above. As a party which allegedly caused the clients' loss, it is no more properly added to the malpractice suit than the Edwards defendants, and the case should be dismissed as against it for the same reasons expressed above, and in the decision and order dated September 14, 2006.

The only additional factor distinguishing its role from that of the Edwards defendants is that Kushnick is a law firm, and thus, reading the third-party complaint generously, it is

also being charged by Nudo with professional negligence. In that regard, and even accepting as true all the allegations made in the third-party complaint (*see, e.g., Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]), it is apparent that no suit against it lies on this basis.

A legal malpractice claim against Kushnick is barred for the simple reason that no lawyer-client relationship and no privity existed between Nudo and Kushnick or between Nudo's clients and Kushnick, and thus no duty existed flowing from one to the other. *Fried v Bower & Gardner*, 46 NY2d 765 (1978); *Aglira v Julien & Schlesinger, P.C.*, 214 AD2d 178 (2d Dept. 1998). The alleged failure by the Kushnick firm to record the mortgage as called for in the joint venture agreement was part and parcel of its representation of its clients, and therefore the suit cannot stand. As was recently stated by the Appellate Division, First Department,

“Strict adherence to the rule prohibiting legal malpractice claims by non-clients serves an important policy consideration... While, concededly, third parties may be interested in the actions by another's attorney and even benefit therefrom, that circumstance does not give rise to a duty on the part of the attorney to the third party. Were it otherwise, the attorney would be faced with the constant burden of weighing all the competing interests attendant upon such diverse obligation to the potential detriment of his or her own client, to whom he owes undivided fealty.”

*Federal Ins. Co. v North American Specialty Ins. Co.*, \_AD3\_, 2007 WL 3306577 (1<sup>st</sup> Dept. November 8, 2007). The only exception, a narrow one, lies in the area of “near privity” based upon an affirmative misrepresentation by the attorney upon which the third party directly relied, which is not alleged here. *Id.*

Finally, given the circumstances present in this case there can be no claim of contribution or indemnification against the Kushnick firm. *See, Jachetta v Vivona Estates*,

*Inc.*, 249 AD2d 512 (2d Dept. 1998); *Aglira v Julien & Schlesinger, P.C.*, *supra*.

The request for sanctions is granted. As indicated above, the third-party plaintiff is attempting to bring in parties to share in any liability that may be found against him as an attorney on the ground that they ultimately were responsible for the clients' losses – in the face of a prior ruling of this Court making it clear that the legal malpractice action should not be burdened with the addition of parties based on their roles in the underlying transaction.

Further, notwithstanding the fact that in the earlier decision the undersigned noted the absence of any authority permitting the addition of such parties, the third-party plaintiff has not cited a single case in support of his legal positions. Indeed, no case of any kind is to be found in his opposing affirmation, nor, with regard to Kushnick, any argument recognizing the existence of the appellate authority cited above and distinguishing the same from present circumstances.

These factors strongly support a finding, now made, that the third-party action is frivolous because it “is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law.” 22 NYCRR § 130-1.1(c).<sup>1</sup>

Accordingly, costs are imposed to the extent indicated above based upon the Court's review of the affirmation of time expended by Kushnick on its own behalf and on behalf of its client, Walter Edwards, as set forth in the moving papers. 22 NYCRR § 130-1.1(a), §130-1.2. If not earlier paid as directed herein, they may be added to the judgment to be entered

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<sup>1</sup> The Court notes the third-party defendants' additional citation to CPLR 8303-a as authority for costs/sanctions, but that section is inapplicable here because it concerns actions for personal injury, property damage or wrongful death only.

dismissing the third-party complaint, with such other statutory costs as may be taxed by the Clerk.

Submit judgment to Clerk.

This shall constitute the Decision and Order of this Court.

DATED: November 20, 2007

ENTER



HON. DANIEL PALMIERI  
Acting Supreme Court Justice

**TO: Rosenthal Curry & Kranz, LLP  
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**Kushnick & Associates, P.C.  
Attorneys for Defendants/Third Party Defendants  
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**Nicholas M. Nudo, III, Esq.  
Defendant/Third Party Plaintiff  
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**ENTERED**  
NOV 21 2007  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE