

**Kaminsky v Herrick, Feinstein LLP**

2007 NY Slip Op 34433(U)

February 14, 2007

Supreme Court, New York County

Docket Number: 150010/06

Judge: Louis B. York

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: LOUIS B. YORK  
*Justice*

PART 2

Kominsky

INDEX NO. 130102

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

MOTION SEQ. NO. 001

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

- v -

Hershel Feinstein

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

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

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

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

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

**FILED**  
FEB 27 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 2/11/07

Leif  
**LOUIS B. YORK** *S.C.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 2

----- X

EDWARD A. KAMINSKY,

Plaintiff,

INDEX NO.  
150010/06

-against-

HERRICK, FEINSTEIN LLP, ARTHUR G.  
JAKOBY, HARVEY S. FEUERSTEIN, SUSAN T.  
DWYER, and JOHN and JANE DOES 1-10  
(Members of Herrick Feinstein LLP Managing  
Committee),

Defendants.

----- X

LOUIS B. YORK, J.:

**FILED**  
FEB 27 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Defendants move pursuant to CPLR 3211(a)1 and 7 for an order dismissing the second and third causes of action in the verified complaint.

Plaintiff's cross-motion pursuant to CPLR 2201 for an order enjoining defendants from arbitrating any fee dispute arising from or relating to the instant legal malpractice action and staying all arbitration proceedings pending the resolution of the instant action is granted on consent.

This is an action for legal malpractice arising out of defendants' representation of plaintiff in an arbitration proceeding.

In March 1998, one Spencer Segura (Segura) acting on behalf of Spencer Trask Securities (Trask) orally agreed to sell to James Agate (Agate) and plaintiff a \$100,000 interest each in an entity known as NextLevel Communication I (NextLevel), which was a privately held company. Shortly before NextLevel went public, Segura repudiated both oral agreements. Plaintiff and

then Agate retained defendant Herrick, Feinstein (Herrick) who sued Segura and Trask for breach of contract and specific performance.

The two lawsuits, which started out as plenary actions in the state Supreme Court, were ultimately adjudicated together before a National Association of Securities Dealers (NASD) panel. In their respective Statements of Claim plaintiff and Agate each sought \$17 million in compensatory damages and \$5 million in punitive damages. The arbitration proceeding was commenced in March 2002 and concluded in August 2003 after 24 days of hearings. During the course of the arbitration Herrick threatened to withdraw as counsel because of nonpayment of legal fees. Plaintiff hired independent counsel, Anthony E. Davis, Esq., who negotiated a Fee Arbitration Agreement (the Fee Agreement) with Herrick dated May 27, 2003 whereby *inter alia* plaintiff agreed to make payment of his accrued legal fees by certain dates and Herrick agreed to continue to represent him in the arbitration. Thereafter, by decision dated August 28, 2003, the arbitrators, without any oral or written explanation, awarded plaintiff and Agate each \$294,000 in compensatory damages plus \$50,000 in punitive damages. Plaintiff and Agate terminated Herrick as their attorney, retained new counsel, and moved to vacate the damages portion of the arbitration award before Justice Cahn of this court. Their application was denied and Segura's cross-motion to confirm the award was granted (*see Kaminsky v. Segura*, 4 Misc 3d 1019A [Sup Ct, NY Co, 2004]). Justice Cahn's decision was unanimously affirmed by the Appellate Division (*see Kaminsky v. Segura*, 26 AD3d 188 [1<sup>st</sup> Dept 2006]).

In July 2006 plaintiff commenced this legal malpractice action. The complaint asserts three causes of action: (i) legal malpractice; (ii) violation of Judiciary Law § 487; and, (iii) breach of contract. Defendants have now moved to dismiss the second and third causes of action pursuant to CPLR 3211(a)1 and 7.

For a defense based on CPLR 3211(a)1 (documentary evidence) to succeed, the proffered documentation must definitively dispose of the claim (*see Demas v. 325 West End Avenue Corp.*, 127 AD2d 476, 477 [1<sup>st</sup> Dept 1987]). The standards applicable to a motion to dismiss pursuant

to CPLR 3211(a)7 are set forth by the First Department as follows:

A motion to dismiss for failure to state a cause of action assumes the truth of the material allegations and everything reasonably to be implied therefrom. (see, *Foley v D'Agostino*, 21 AD2d 60, 65.) In determining such a motion, it is not the function of the court to evaluate the merits of the case (*Carbillano v Ross*, 108 AD2d 776, 777) or express an opinion as to plaintiff's ability to ultimately establish the truth of the averments. (*219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509.) Rather, the plaintiff must be "given the benefit of every possible favorable inference" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 634) and the motion to dismiss will fail if, "from [the pleading's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275)

(*Khan v. Newsweek, Inc.*, 160 AD2d 425, 426 [1<sup>st</sup> Dept 1990]). However, factual allegations that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence, are not entitled to such consideration (see *Caniglia v. Chicago Tribune-New York News Syndicate, Inc.*, 204 AD2d 233, 233-234 [1<sup>st</sup> Dept 1994]).

The second cause of action alleges, in essence, that defendants violated § 487 of the Judiciary Law by engaging in a course and pattern of deceitful or collusive conduct and wrongdoing during their representation of plaintiff in the Supreme Court action and the NASD arbitration by concealing from plaintiff the substance of a taped conversation between Agate and Segura, concealing from plaintiff that Agate had engaged in discussions with Segura and had participated in the preparation and revision of a proposed affidavit that was harmful to plaintiff's claims, concealing from plaintiff that Agate had engaged in communications with Segura and Trask that harmed plaintiff's position, and not disclosing other information to plaintiff that should have been disclosed by reason of the attorney-client relationship (see complaint, defendants' exhibit A, ¶ 188).

Defendants contend that the second cause of action should be dismissed because the complaint fails to allege the requisite chronic, extreme pattern of legal delinquency and fails to specify how defendants' allegedly deceitful conduct, which plaintiff was aware of well before

commencement of arbitration, caused plaintiff any damages.

Judiciary Law § 487 provides in pertinent part that an attorney who is "guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party ... forfeits to the party injured treble damages, to be recovered in a civil action." To maintain a cause of action under Judiciary Law § 487, plaintiff must show that the defendant attorney intended to deceive him or that the defendant attorney engaged in a chronic, extreme pattern of legal delinquency that proximately caused plaintiff's damages (see *Knecht v. Tusa*, 15 AD3d 626 [2d Dept 2005]; *Havell v. Islam*, 292 AD2d 210 [1<sup>st</sup> Dept 2002]; *Schindler v. Issler & Schrage, P.C.*, 262 AD2d 226, 228 [1<sup>st</sup> Dept 1999], lv. *dism* 94 NY2d 791 [1999], *rearg* den 94 NY2d 859 [1999]). No such showing can be made herein because plaintiff admits he that he was made aware of Agate's conduct in November 2000 (see Kaminsky affidavit ¶¶ 8-12), some 15 months prior to the commencement of the arbitration proceeding, which subsumed the prior action. Judiciary Law § 487 has no application because the wrongful conduct complained of occurred before the arbitration proceeding was commenced (see *Stanski v. Ezersky*, 228 AD2d 311, 313 [1<sup>st</sup> Dept 1996], lv. *den* 89 NY2d 805 [1996]). As noted by this court in the parallel action of *Agate v. Herrick Feinstein*, index no. 104289/05 (the Agate action), with respect to the arbitration itself the allegations of the complaint and plaintiff's affidavit, even if accepted as true, allege no more than negligent handling of the arbitration proceeding which is insufficient to sustain a claim under § 487 (*cf. Chiarello v. Harold Sylvan, PC*, 161 AD2d 948 [3d Dept 1990]).

The third cause of action seeks rescission of the Fee Agreement on the ground of duress and violation of applicable Attorney Disciplinary Rules, a declaration that the Agreement is unenforceable and that plaintiff is entitled to a 30% discount from Herrick's ordinary billing rates with a resulting refund of excess fees paid, plus compensatory and punitive damages (see defendants' exhibit A, ¶¶ 193-199).

Defendants contend that plaintiff cannot claim duress for the following reasons: Herrick had every right to insist that it be paid for legal services that it had already rendered and billed

for; plaintiff was represented by independent counsel who negotiated and drafted the Fee Agreement; plaintiff received the benefit of his bargain because defendants complied with the terms of the Fee Agreement by continuing to represent plaintiff through the conclusion of the arbitration; plaintiff ratified the Fee Agreement by making payments due thereunder to Herrick on May 28, 2003 and July 6, 2003, seeking relief pursuant to its terms, commencing a fee arbitration pursuant to its terms and waiting for over three years to repudiate it (see defendants' exhibits O-W).

The court agrees with all of defendants' contentions. The gravamen of plaintiff's third cause of action is that the Fee Agreement was obtained by duress. There is no basis for plaintiff's claim. "A contract may be voided on the grounds of economic duress where the complaining party was compelled to agree to its terms by means of a wrongful threat which precluded the exercise of [his] free will [citation omitted]" (*767 Third Avenue, LLC v. ORIX Capital Markets, LLC*, 26 AD3d 216, 218 [1<sup>st</sup> Dept 2006]). Plaintiff's claim of duress is completely vitiated by the fact that the Fee Agreement was negotiated and drafted by independent counsel retained by plaintiff, who himself is an attorney (*cf. Goldberg v. Moskowitz*, 262 AD2d 56, 57 [1<sup>st</sup> Dept 1999]). Furthermore, "[t]he law is well settled that a party seeking to repudiate a contract procured by duress must act promptly lest he be deemed to have elected to affirm it [citation omitted]" (*Shemdlin v. Sheindlin*, 88 AD2d 930, 931 [2d Dept 1982]). As noted by defendants, plaintiff waited for over three years to repudiate the Fee Agreement. Finally, as this court noted in the Agate action, there is no private right of action for violation of the Code of Professional Responsibility (see *Kantor v. Bernstein*, 225 AD2d 500, 501 [1<sup>st</sup> Dept 1996]).

Accordingly, the court finds that under the standards set forth above plaintiff's second and third causes of action cannot be sustained, and it is

ORDERED that defendants' motion to dismiss the second and third causes of action is granted, and it is further

ORDERED that plaintiff's cross-motion to enjoin defendants from arbitrating any fee

dispute relating to the instant action and to stay all arbitration proceedings pending resolution of the instant action is granted on consent.

Defendants are directed to serve their answer to plaintiff's remaining cause of action within 20 days of service of a copy of this order with notice of entry.

This constitutes the decision and order of the court.

DATED: Feb. 14, 2007

*Entered*

*[Signature]*  
\_\_\_\_\_  
J.S.C.

**LOUIS B. YORK**  
J.S.C.

**FILED**  
FEB 27 2007  
NEW YORK  
COUNTY CLERK'S OFFICE