

**Kaminsky v Herrick, Feinstein LLP**

2008 NY Slip Op 30127(U)

January 10, 2008

Supreme Court, New York County

Docket Number: 0150010/2006

Judge: Louis B. York

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

PRESENT: YORK  
Justice

PART 2

Raminsky

INDEX NO. ~~150070~~ 150020/06

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

- v -  
Heick Feinstein

MOTION SEQ. NO. 002

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 _____	_____
Repeating Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying ~~affidavit~~ order dismissing this action.

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

**FILED**  
JAN 17 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1/10/08

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

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : LAS 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

**FILED**  
JAN 17 2008  
NEW YORK  
COUNTY CLERKS OFFICE

**LOUIS B. YORK, J.:**

Defendants move pursuant to CPLR 3212 for an order granting summary judgment dismissing the first cause of action of the verified complaint with prejudice.

By decision and order dated February 14, 2007, this court dismissed the second and third causes of action of the verified complaint pursuant to CPLR 3211(a) 1 and 7. The underlying facts are taken from that decision.

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

[\*3] then Agate retained defendant Herrick, Feinstein LLP (Herrick) who sued Segura and Trask for breach of contract and specific performance.

The two lawsuits, which started out as plenary actions before Justice Cahn in the state Supreme Court, were ultimately adjudicated together before a National Association of Securities Dealers (NASD) panel. In their respective Statement 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. 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 before Justice Cahn to vacate the damages portion of the arbitration award. 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 action. The first and only remaining cause of action (legal malpractice) alleges that the defendant attorneys acted negligently and failed to provide adequate legal services to plaintiff and to act with ordinary and reasonable care, skill and diligence by, *inter alia*, failing to properly present evidence as to post-IPO damages suffered by plaintiff, failing to properly cross-examine respondents' expert witness regarding the availability of publicly-traded options by which plaintiff could have hedged his NextLevel investment, failing to present evidence regarding the public market for NextLevel, failing to counter

[\* 4 ]

respondents' "date of breach" valuation of damages, failing to serve and put into evidence plaintiff's letters reflecting that he could have sold his NextLevel shares for \$124 per share if respondents had not breached the oral agreement, failing to name Spencer Trask Investors (Investors) as a party, and failing to adjudicate the parties' dispute in court rather than submit to arbitration (see Jakoby moving affidavit, exhibit A, pp 48-52). Defendants have now moved for an order granting summary judgment dismissing this cause of action.

"An action for legal malpractice requires proof of three elements: (1) that the attorney was negligent; (2) that such negligence was a proximate cause of plaintiff's losses; and (3) proof of actual damages [citation omitted]" (*Brooks v. Lewin*, 21 AD3d 731, 734 [1<sup>st</sup> Dept 2005], lv den 6 NY3d 713 [2006]). "In order to establish proximate cause, a plaintiff must establish that but for the attorney's negligence, she would have prevailed in the underlying matter .... The failure to establish proximate cause mandates the dismissal of a legal malpractice action, regardless of the attorney's negligence" (*id.*).

In support of their motion defendants argue that the 4,839-page transcript of the arbitration proceeding demonstrates that Herrick presented ample evidence of Kaminsky's damages during the arbitration including evidence refuting respondents' pre-IPO date of breach damages calculation and evidence, including expert testimony, regarding Kaminsky's damages after the IPO when the value of NextLevel stock increased significantly. Next, defendants argue that there was no legal or factual basis under which Kaminsky could sue Investors for the breach of an oral agreement made with Segura because Kaminsky was not in privity with Investors and Segura was not Investors' agent. Defendants argue further that arbitration could not have been avoided because Kaminsky signed an agreement to arbitrate. Defendants then contend that

[\*5]

Kaminsky is judicially estopped and collaterally estopped from asserting that there was a failure of proof on his post-IPO damages by virtue of arguments made before Justice Cahn and rejected by him. Defendants conclude that Kaminsky cannot demonstrate that any negligence by Herrick proximately caused any injury to him because the arbitration panel did not set forth any basis for its determinations as to either liability or damages and that Kaminsky's assertion that he would have received \$25,000,000 if not for the malpractice of Herrick is rank speculation.

In opposition, plaintiff argues that defendants' motion papers are fatally defective because the bulk of the evidence relied upon (the arbitration transcript and arbitration exhibits) is inadmissible under CPLR 2106 (affirmation rather than affidavit by attorney allowed provided that attorney is not a party to the action) because it is attached as exhibits to the affirmation of defendant Susan Dwyer, who is an attorney and a party to this action. Plaintiff then argues that Herrick's failure to submit an expert affidavit requires denial of its motion because expert testimony is required to assess the element of attorney negligence. Plaintiff argues that defendants' motion is premature because there has been no discovery. Next, plaintiff argues that this court's decision and order dated August 29, 2006, which granted defendants' motion for summary judgment against *Agate*, should have no bearing on this case for the following reasons: *Agate* has no collateral estoppel effect because plaintiff was not a party thereto and the issues raised herein are different; the *Agate* decision is based entirely on inadmissible evidence because Herrick submitted all of its evidence by way of affirmations by attorneys who were parties to the action in violation of CPLR 2106; the court made substantive errors in the *Agate* decision by improperly relying on the absence of a written decision from the arbitrators and incorrectly invoking collateral estoppel (the court invoked collateral estoppel based on arguments made by

Kaminsky and Agate which were rejected by Justice Cahn) as a basis for its decision; and, unlike *Agate*, plaintiff herein has offered detailed allegations in the complaint, a detailed evidentiary affidavit and a specific expert affidavit. Plaintiff then argues that the doctrine of judicial estoppel does not apply because plaintiff did not prevail on his motion before Justice Cahn to vacate the arbitration award and because the doctrine does not apply to legal arguments. Plaintiff, citing *Iocovello v. Weingrad & Weingrad, P.C.*, 262 AD2d 156 (1<sup>st</sup> Dept 1999), concludes that he has established all of the required elements of a legal malpractice claim, *i.e.*, (1) an attorney-client relationship, (2) negligence by the attorney, (3) that such conduct was the proximate cause of the injury to plaintiff, and (4) that “but for” such malpractice the plaintiff would have been successful in the underlying litigation.

The court disagrees. The instant malpractice action by Kaminsky is based on the same facts as the malpractice action brought by Agate. This is acknowledged by Kaminsky in his opposing affidavit wherein he states that “James Agate, my co-plaintiff in the underlying action entered into the same agreement to purchase 5% of Segura’s NextLevel investment at the same time that I did” (see Kaminsky July 12, 2007 affidavit in opposition, ¶ 4), and in his verified complaint wherein he alleges that “[t]he only difference between plaintiff’s situation and Agate’s was that Segura decided to cut plaintiff out of the deal a few months earlier than Agate” (see Jakoby June 1, 2007 moving affidavit, exhibit A, ¶ 148). Kaminsky and Agate were joint plaintiffs in the action before Justice Cahn and joint petitioners in the arbitration proceeding and the special proceeding before Justice Cahn to vacate the arbitration award.

In March 2005 Agate commenced a legal malpractice action against Herrick and two of its partners alleging, as Kaminsky does herein, that but for defendants’ legal malpractice his

[\* 7 ]

recovery would have been higher than the amount awarded by the arbitrators. Defendants moved for summary judgment. This court granted their motion by decision and order dated August 29, 2006, wherein the court found, *inter alia*, that Agate cannot prove any malpractice by Herrick proximately caused him any injury and that there is no basis to assert that some failing by Herrick caused the arbitrators to rule as they did because the arbitrators did not articulate any reasons for their award (see Jakoby June 1, 2007 moving affidavit, exhibit O, p 8). The court found further that no purpose would be served by discovery and that nothing in the record supported Agate's suggestion that he would have received any amount greater than he did receive had anyone else represented him in the arbitration (*id.*, pp 8, 9). The court makes the same findings herein as it did in *Agate* because both matters are based on the same facts. Independently thereof, the court will follow the findings in *Agate* under the doctrine of *stare decisis* ("to stand by things decided") which requires adherence to precedent (see Black's Law Dictionary [8<sup>th</sup> ed. 2004]; cf. *Maxton Builders v. LoGalbo*, 68 NY2d 373, 381 [1986] ["a court should not depart from its prior holdings unless impelled by the most cogent reasons" (citations omitted)]).

Finally, with respect to plaintiff's invocation of CPLR 2106, this court's findings in *Agate* were based on the arbitration transcript, Justice Cahn's decision in the special proceeding brought by plaintiff and Agate to vacate the arbitration award (*supra*), and the other exhibits before the court. The court concluded that "Agate's malpractice claim fails in light of the undisputed facts and settled law" (see Jakoby moving affidavit, exhibit O, p 5). The affirmation of an attorney who is a party to the action can properly serve as a vehicle for the transmission of documentary evidence (see *Sassower v. Greenspan, Kanarek, Jaffe & Funk*, 121 AD2d 549 [2d Dept 1986]).

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with prejudice; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: 1/10, 2008

*Ley*  
\_\_\_\_\_  
J.S.C.

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

**FILED**  
JAN 17 2008  
NEW YORK  
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