

<b>Hampton Valley Farm, Inc. v Flower &amp; Medalie, Esqs.</b>
2008 NY Slip Op 30187(U)
January 7, 2008
Supreme Court, Suffolk County
Docket Number: 0022426/1992
Judge: Robert W. Doyle
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SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**PRESENT:**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 7-27-07 (053)  
4-1-07 (054)  
ADJ. DATE 10-11-07  
Mot. Seq. # 053 - MotD; CASEDISP  
054 - MD

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HAMPTON VALLEY FARM, INC., THE SUN	:	ROSE ANN SHEARIN, ProSe Plaintiff
QUEST CORPORATION and ROSE ANN	:	Federal Building - Suite 245
SHEARIN, individually,	:	300 N. Grace Street
	:	Rocky Mount, North Carolina 27804
	:	
- against -	:	EDWARD FLOWER, ESQ., ProSe Defendant
	:	24 E. Main Street, Suite 201
	:	Bay Shore, New York 11706
FLOWER & MEDALIE, ESQS., FLOWER &	:	
PLOTKA, ESQS., FLOWER, PLOTKA &	:	LONG, TUMINELLO, BESSO, SELIGMAN,
MEDALIE, ESQS., EDWARD FLOWER, ESQ.,	:	& WERNER, LLP
individually and RANDOLPH M. MEDALIE,	:	Attorneys for Defendants Flower, Plotka &
individually,	:	Medalie
	:	120 Fourth Avenue, P.O. Box 591-P
	:	Bay Shore, New York 11706
	:	
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Upon the following papers numbered 1 to 18 read on this motion for summary judgment and motion to extend time to move for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 13 - 16; Replying Affidavits and supporting papers 17 - 18; Other    ; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion (#53) by defendant, Edward Flower, dismissing the action on the ground that the complaint fails to state a cause of action, or, in the alternative, for summary judgment, or, in the alternative, an order converting the fourth cause of action to an action in equity, is determined as hereinafter set forth; and it is further

**ORDERED** that the motion (#54) by defendant, Edward Flower for an extension of time to move for summary judgment and other relief is denied as academic inasmuch as the identical relief was determined by order dated May 10, 2007 (Tanenbaum, J.).

In 1992, plaintiffs, Hampton Valley Farm, Inc., The Sun Quest Corporation and Rose Ann Shearin (hereinafter referred to as "plaintiffs"), commenced this action against defendants Flower & Medalie, Esqs., Flower & Plotka, Esqs., Flower, Plotka & Medalie, Esqs., Edward Flower and Randolph Medalie (hereinafter "F & M") to recover damages for, among other things, breach of contract and excessive legal

fees, legal malpractice, wrongful retainer of an escrow payment, conversion of plaintiff's shares of stock and real property, barratry and libel. Prior to the commencement of a separate action as against plaintiffs by defendant, Flower & Medalie, as Successor in Interest to both Flower, Plotka & Medalie, a partnership and Flower & Plotka, a partnership, the parties agreed that the proposed complaint by defendant as against the plaintiffs to recover unpaid legal fees on account stated in the approximate amount of \$115,000.00 (one hundred fifteen thousand dollars) would be deemed a counterclaim in the plaintiffs' action.

In the counterclaim, F & M alleges that it rendered extensive legal services to plaintiffs from November, 1985 through 1992. Plaintiff first retained F & M to render legal services in connection with a lawsuit entitled, Pellicane v Shearin (Index No. 84/23040) and Shearin v Pellicane (Index No. 86/4791). F & M alleges that the firm rendered substantial legal services totaling more than 205 hours on work and litigation. After partial payment was made, a balance of \$16,664.65 remains, no part of which has been paid. F & M also alleges that it was retained by plaintiffs on or about March 21, 1989 to render legal services in connection with a lawsuit entitled, Andreoli v Shearin (Index No. 89/14426). F & M rendered substantial services totaling over 225 hours of work. Although the agreed upon fee was \$48,332.94, only \$2,274.85 has been paid, leaving an unpaid balance of \$46,058.09, no part of which has been paid. On or about July 9, 1990, Shearin on behalf of herself and the Sun Quest Corp. retained F & M to render legal services in connection with three related lawsuits commenced by Citytrust regarding the foreclosure of three mortgages entitled, Citytrust v The Sun Quest Corp. (Index Nos. 90/18028, 90/18029, and 90/18030), which were removed to Federal District Court, Index No. 91-CV-3325. The total agreed fee amounted to \$81,541.64 for services totaling over 325 hours on work and matters related to the Citytrust litigation. After partial payment, a balance remained in the amount of \$52,647.79, no part of which was paid. The total balance owed was \$115,370.53 (one hundred fifteen thousand three hundred seventy dollars and fifty three cents).

F & M further alleges in the counterclaim that on or about July 6, 1992, in a conference between Justice Alan Oshrin and the attorneys for the parties in the Pellicane action, a settlement was reached in the amount of \$25,000. The plaintiffs' new attorney, William Miller, executed a stipulation wherein the sum of \$14,500 would be paid directly to F & M in satisfaction of the \$16,664.65 legal fee, however, no part of this amount has been paid. It is undisputed that the plaintiff never answered the counterclaim.

Procedurally, F & M's motion for a default judgment on the counterclaims was granted<sup>1</sup>, the determination was vacated<sup>2</sup> and subsequently was reinstated by the appellate division.<sup>3</sup> The court later denied plaintiffs' motion to compel defendants to account for any money it has received in satisfaction of

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<sup>1</sup> By order dated January 31, 1995 (Lama, J.), the court granted defendants' motion to reargue and granted the motion for a default judgment.

<sup>2</sup> By order dated January 10, 2005 (Tanenbaum, J.) the court granted plaintiffs' motion to vacate the default judgment on the counterclaim based upon constitutional considerations.

<sup>3</sup> By order dated May 8, 2007, the default judgment was reinstated by the Appellate Division, Second Department on the ground that the trial court was bound by the previous rulings of Justice Lama, a judge of equal jurisdiction, and that the law of the case is binding upon the parties and the court.

the judgment and to compel an accounting.<sup>4</sup> F & M's motion for summary judgment was granted as against the corporate plaintiffs on the counterclaims.<sup>5</sup> In addition, the court granted F & M's motion for an order declaring that the fourth cause of action had been converted to an equitable accounting claim.<sup>6</sup> Now pending before the court is a motion for summary judgment by defendant, Edward Flower, dismissing the action. A subsequent motion by Flower to extend the time to move for summary judgment and other relief is denied as academic inasmuch as the same relief was granted by the court by order dated May 10, 2007 (Tanenbaum, J.). In addition, since the corporate plaintiffs' causes of action have been dismissed, the court will now determine the motion for summary judgment as against the pro se plaintiff, Rose Ann Shearin.

In support of summary judgment dismissing the first and second causes of action for breach of contract and legal malpractice, defendant Flower contends that plaintiff's failure to answer the counterclaims causes her to have admitted all allegations therein. Defendant also contends that the judgment on the counterclaim in favor of defendants arises from the very same transactions and representations upon which plaintiff bases her alleged causes of action. Defendant submits, inter alia, the pleadings; bill of particulars; his personal affidavit and several orders by the court. Defendant Flower avers in his affidavit that plaintiff Shearin retained his law firm in or about November, 1985 for assistance in litigating two actions and to perform real estate work. The firm ultimately opened approximately 15 files on her behalf. In order to pay mounting legal fees, plaintiff assigned all her stock in Hampton Valley Farms, Inc. to the firm as partial security of payment. Plaintiff produced a single stock certificate bearing one hundred shares.

Defendant avers that a problem arose with plaintiff Shearin in a transaction with a party named Demetriades wherein defendant refused to draw up a separate agreement for the payment of \$100,000.00 which would not be revealed to the mortgagee, Citytrust, in a pending foreclosure action. Thereafter, plaintiff began to complain that the firm's services were unsatisfactory. By June 22, 1992, plaintiff Shearin had retained new counsel, Mr. William C. Miller, Esq., to represent her. However, at the time, defendant's firm was settling the aforementioned three matters and subsequently placed retaining liens on all three for the payment of legal fees.

In opposition, plaintiff submits her personal affidavit wherein she avers that all legal bills have been paid to defendants and relates the events leading to the commencement of the instant action. Plaintiff further submits portions of previously submitted motions and unidentified documents. In addition, plaintiff reiterates the content of her affidavit in her response to defendants' demand for a bill of particulars. Plaintiff further avers her dissatisfaction with defendant's legal strategies and her sentiments

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<sup>4</sup> By order dated December 13, 2000 (Henry, J.), reasoned that defendant had provided a satisfactory accounting in its opposition papers.

<sup>5</sup> By order dated May 10, 2007 (Tanenbaum, J.), the court noted that the corporate plaintiffs had failed to comply with the prior short form order dated October 21, 2006 (Tanenbaum, J.), which directed the corporate plaintiffs to appear by counsel.

<sup>6</sup> The court relied upon the prior order dated September 20, 1993 (Lama, J.), which provided the same relief.

regarding defendant's billing practices.

An action to recover damages for legal malpractice requires proof that: (a) the attorney is negligent; (b) the negligence is the proximate cause of the loss sustained; and (c) actual damages. In other words, a plaintiff in a legal malpractice action must demonstrate that the attorney fails to exercise that degree of skill commonly exercised by an ordinary member of the legal community, and that but for the failure to exercise that requisite degree of skill the result sought by the plaintiff would or could have been achieved (*Zeitlin v Greenberg, Margolis, Ziegler, Schwartz, Dratch, Fishman, Franzblau & Falkin, P.A.*, 209 AD2d 510, 619 NYS2d 289 [1994]). Attorneys may select among reasonable courses of action in prosecuting their clients' cases without thereby committing malpractice (*Rosner v Paley*, 65 NY2d 736, 738, 492 NYS2d 13 [1985]), so that a purported malpractice claim that amounts only to a client's criticism of counsel's strategy may be dismissed.

Here, defendant has demonstrated by his affidavit that he was not negligent in providing legal representation to plaintiff. In opposition, plaintiff's malpractice claims are vague and conclusory, warranting dismissal on that basis (*Pacesetter Communs Corp. v Solin & Breindel, P.C.*, 150 AD2d 232, 541 NYS2d 404 [1989], *lv dismissed* 74 NY2d 892). Moreover, plaintiff has failed to submit any proof that defendant Flower acted negligently or that there were actual damages and thus, has failed to raise an issue of fact requiring trial. The court also notes that plaintiff has failed to submit copies of cancelled checks or paid receipts. In addition, the breach of contract cause of action is dismissed as duplicative of the legal malpractice cause of action (*TVGA Engineering, Surveying, P.C. v Gallick*, 2007 N.Y. App. Div. LEXIS 11466, 2007 NY Slip Op 8491 [Nov. 9, 2007]). Thus, summary judgment is granted dismissing the first and second causes of action.

Turning to the third cause of action, alleging defendants' failure to return an escrow payment, in support of the motion for summary judgment, defendant submits a letter dated August 3, 1992, wherein the parties agreed that the transaction between the plaintiff and potential buyer, Alex Demetriades, was terminated and that the escrow payment in the amount of \$50,000.00 (fifty thousand dollars) would be returned to Demetriades. The court finds that defendant has demonstrated his entitlement to judgment as a matter of law (*Zuckerman v New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). In opposition, plaintiff fails to raise an issue of fact. Thus, summary judgment is granted dismissing the third cause of action.

With regard to the fourth and fifth causes of action, defendant has established his prima facie entitlement to judgment as a matter of law. In support of the motion, defendant submits the plaintiff's examination before trial testimony wherein she testified to the effect that she paid off the \$20,000.00 value of the stock certificate and demanded the return of the certificate, but, she could not produce the cancelled check. In addition, defendant submits a copy of the stock certificate which reveals that the certificate represented all the stock in Hampton Valley Farms and correspondence from plaintiff which states that she asked her brother, an IRS attorney, review the document which conveyed the certificate to defendants. In addition, defendant submits a copy of a Stock Power which was executed by plaintiff on September 24, 1990. Defendant also refers to the order dated September 20, 1993 (Lama, J.), wherein the court granted defendant's request to sell the real estate at Hampton Valley Farms. It is undisputed that the premises at Hampton Valley Farms, Inc. was sold pursuant to a judgment of foreclosure on or about December 28, 1994. Defendant also refers to the orders dated December 13, 2000 (Henry, J.) and July 5,

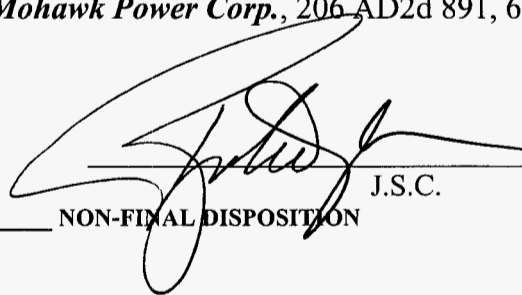
2005 (Henry, J.), wherein the court was satisfied with the accounting for the monies obtained from the foreclosure sale of Hampton Valley Farms. In opposition, plaintiff contends that defendants wrongfully converted a stock certificate which represented all of plaintiff's interest in Valley Farms, Inc. to pay for legal expenses and wrongfully sold the real estate at Hampton Valley Farms. Plaintiff has failed to provide admissible evidence which would raise an issue of fact.

In any event, the original orders dated September 20, 1993 (Lama, J.), December 13, 2000 (Henry, J.) and July 5, 2005 (Henry, J.) constituted the law of the case and was thus conclusive on all Justices of coordinate jurisdiction (see, *Forbush v Forbush*, 115 AD2d 335, 336-337, 496 NYS2d 311 [1985], appeal dismissed 67 NY2d 756; *George W. Collins, Inc. v Olsker-McLain Industries Inc.*, 22 AD2d 485, 488-489, 257 NYS2d 201 [1965]). The doctrine of law of the case " 'is essential to an orderly and seemly administration of justice in a court composed of several judges \* \* \* [Violation of the doctrine] is a breach of comity which, if sanctioned, could only lead to unseemly conflicts of decision and to protracting the litigation' " (*George W. Collins, Inc. v Olsker-McLain Industries, Inc.*, supra, at 489, citing *In re Hines*, 88 F2d 423, 425, 1937 U.S. App. LEXIS 3146 [2d Cir. N.Y. 1937]). Thus, summary judgment is granted dismissing the fourth and fifth causes of action. In light of this determination, defendant's request to convert the fourth cause of action to an equitable action is denied as academic.

In support of summary judgment on the sixth cause of action alleging barratry, a form of fraud, defendant avers in his affidavit that no such fraudulent action was taken as against the plaintiff, but instead the firm commenced an action to obtain its legal fees. In opposition, plaintiff fails to oppose the motion on this cause of action and therefore fails to raise an issue of fact. In any event, the statutory offense of barratry was repealed in 1965 (L 1965, ch 1030) (see, *Drago v Buonagurio*, 61 AD2d 282, 402 NYS2d 250 [1978]). In support of summary judgment on the seventh cause of action, defendant avers in his affidavit that he may have communicated in writing to Benjamin Krupinski during the pending sale of the premises owned by Shearin, however, it was without malice. In addition, defendant notes that plaintiff cannot demonstrate that she sustained damages from any communications with Krupinski since plaintiff was paid a consultant fee of \$450,000.00 (four hundred fifty thousand dollars) in addition to the funds paid to purchase the premises. Moreover, defendant states that plaintiff has failed to state the particular words complained of in her bill of particulars. The court finds that defendant has demonstrated his prima facie entitlement to judgment as a matter of law. In opposition, plaintiff fails to submit the alleged writing or any admissible evidence which would raise an issue of fact. Accordingly, summary judgment is granted dismissing the sixth and seventh causes of action.

Accordingly, defendant Flower's motion for summary judgment dismissing the action is granted. Moreover, the court searches the record and grants summary judgment to the remaining non-moving defendants (CPLR 3212[b]; see, *Smerka v Niagara Mohawk Power Corp.*, 206 AD2d 891, 616 NYS2d 114 [1994]).

Dated: JAN 17 2008

  
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J.S.C.

FINAL DISPOSITION       NON-FINAL DISPOSITION