

<b>Bellinson Law, LLC v Iannucci</b>
2009 NY Slip Op 31694(U)
July 28, 2009
Supreme Court, New York County
Docket Number: 600593/09
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE

PART 10

*Justice*

Bellinson Law LLC

Plaintiff (s),

INDEX NO. 600593/09

- v -

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

Iannucci

MOTION SEQ. NO. 001

Defendant(s)

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

motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.

**FILED**  
JUL 30 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 7/28/09

J. Gische  
Hon. Judith J. Gische, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

-----X

BELLINSON LAW, LLC,  
  
Plaintiff,

-against-

ROBERT IANNUCCI, ESQ.,  
  
Defendants.

**Decision/Order**

Index No.: 600593/09  
Seq. No. : 001

Present:  
Hon. Judith J. Gische  
J.S.C.

-----X

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

**Papers**

Pltf n/m [sj] w/ RJB affirm, exhs .....	1
RI affid, exhs .....	2
RJB rply affirm, exhs .....	3

**FILED**  
 JUL 30 2009  
 COUNTY CLERK'S OFFICE  
 NEW YORK

Numbered

*Upon the foregoing papers, the decision and order of the court is as follows:*

This is an action by plaintiff Bellinson Law, LLC ("Bellinson") to recover legal fees from the defendant. The defendant, Robert Iannucci, Esq., has asserted a counterclaim for, *inter alia*, legal malpractice. Bellinson, *pro se*, moves: [1] for summary judgment on its complaint against defendant; [2] dismissing defendant's affirmative defenses and counterclaims; and [3] directing defendant to place the sum of \$376,250 into escrow. CPLR § 3212. Defendant opposes the motion.<sup>1</sup>

Issue has been joined as to the causes of action contained in the complaint, and

<sup>1</sup> Since the submission of this motion, the court has received correspondence from both parties wherein each attempts to supplement the record on this motion and even request additional relief. Such correspondence has not been properly interposed by either party and, therefore, has not been considered by the court.

the note of issue has not yet been filed. Summary judgment relief is, therefore, available with respect to the complaint. CPLR § 3212. Brill v. City of New York, 2 N.Y.3d 648 (2004). However, plaintiff has not yet responded to the defendant's counterclaims. Therefore, plaintiff's motion with respect thereto is properly made and considered only as a pre-answer motion to dismiss pursuant to CPLR § 3211.

In 2002, the defendant commenced an action in the United States District Court for the Eastern District of New York, against the City of New York, claiming violations of his procedural and substantive due process property rights under the Fourteenth Amendment of the United States Constitution (the "federal action"). Defendant alleged in the federal action that over a twenty-five year period, official New York City vehicles using New York City Parking placards, illegally parked on the sidewalks and curbs of his various commercial and residential properties located in Downtown Brooklyn, thereby interfering with his rights as a landowner.

In or about June 2008, the defendant met with Robert J. Bellinson, Esq., a member of the plaintiff in this action, for purposes of obtaining trial counsel in the federal action. Defendant claims that based upon Attorney Bellinson's "affirmative representations about his experience and qualifications to handle a complex commercial litigation in federal court", defendant hired plaintiff. The parties executed a retainer agreement dated June 27, 2008 wherein the defendant agreed to pay plaintiff 22.5% of any amount received or recovered in connection with the federal action. Defendant also paid plaintiff a retainer of \$22,500. By addendum dated July 4, 2008, the parties agreed that "if the case settles prior to the completion of Jury Selection, the amount of the contingency percentage payable to [plaintiff] shall be reduced to 19%."

Defendant claims that he thereafter learned that Attorney Bellinson was not an experienced federal court commercial litigator. Defendant claims that instead of preparing for trial, Attorney Bellinson spent most of his time trying to persuade the defendant to settle the federal action. Defendant provides extensive details regarding Attorney Bellinson's purported substandard legal work. Defendant now maintains but for Attorney Bellinson's lies and misrepresentations about his qualifications, expertise and ability to try a federal commercial case to a jury, he would not have retained plaintiff to represent him in the federal action. Attorney Bellinson, in his own affidavit, vigorously denies the defendant's factual claims.

Meanwhile, the trial date in the federal action was scheduled for November 17, 2008. A settlement conference was held on November 10, 2008. Defendant outlines the multitude of mistakes and missteps made by Attorney Bellinson during that conference. The defendant himself attended that conference and claims that he settled the case, ultimately because "it was painfully obvious that [Attorney] Bellinson was simply unqualified to take [his] case to a jury" and that there was simply not enough time to hire another trial attorney. The defendant maintains that the amount for which the case settled, \$2,125,000, is approximately 40% of the defendant's actual damages. Defendant also claims that he withdrew his claim for a permanent injunction in the federal action, which he otherwise would have continued to prosecute but for the plaintiff's substandard representation.

On or about February 20, 2009, after the defendant received the settlement proceeds himself, he expressed his dissatisfaction with plaintiff's services in the federal action and indicated his intention not to pay plaintiff any portion of the legal fees

earned. Shortly thereafter, plaintiff commenced this action.

### Summary of the Arguments

Plaintiff seeks summary judgment on the two claims asserted in the complaint, to wit: breach of the retainer agreement, and conversion. Plaintiff argues that there are no material issues of fact which would otherwise preclude judgment in its favor regarding plaintiff's successful completion of the services for which he was retained. He claims that the defendant has breached the retainer agreement by converting the settlement proceeds. Plaintiff argues that retainer agreement should be enforced according to its terms because plaintiff did the work, was never discharged, and there is no evidence of fraud or misconduct on the part of the plaintiff.

Plaintiff also seeks dismissal of the defendant's counterclaims: fraud in the inducement, breach of contract, and legal malpractice. Plaintiff specifically argues that the malpractice claim is deficient because the defendant prevailed in the underlying suit and, therefore, cannot prove damages. Plaintiff further argues that the fraud in the inducement counterclaim is "belied by the clear and unambiguous language of the parties original retainer agreement."

Defendant contends that the instant motion should be denied because: [1] plaintiff has not demonstrated a *prima facie* cause of action for either breach of the retainer agreement or conversion of the settlement proceeds; and [2] summary judgment relief is premature and/or precluded by material issues of fact.

### **Discussion**

#### Summary judgment on plaintiff's claims

On a motion for summary judgment, the proponent bears the initial burden of

setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Only if it meets this burden, will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film, 3 N.Y.2d 395 (1957). When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 A.D.2d 459 (2<sup>nd</sup> dept. 2003).

The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendants' failure to perform; and (4) resulting damage. Furia v. Furia, 166 A.D.2d 694 (2<sup>nd</sup> Dept. 1990). "To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all

material terms." Express Industries and Terminal Corp. V. New York State Dept. Of Transportation, 93 N.Y.2d 584 (1999).

Subject to certain ethical requirements, contracts between attorneys and clients relative to professional services rendered are interpreted and enforced in the same manner as all other contracts. Gair v. Peck, 6 N.Y.2d 97, 160 N.E.2d 43 (1959). An attorney, however, may not recover fees for legal services performed in a negligent manner, even where that negligence is not a proximate cause of the client's injury (see Summit Rovins & Feldesman v. Fonar Corp., 213 AD2d 201 [1st Dept 1995]; Kluczka v. Lecci, 63 AD3d 796 [2d Dept 2009]; Campagnola v. Mulholland, Minion & Roe, 148 AD2d 155 [2d Dept 1989], *affd.* 76 NY2d 38 [1990]).

Although plaintiff has established the existence of a contract, his performance, and the defendant's failure to perform, disputed issues of fact exist which preclude summary judgment. Through defendant's own affidavit detailing the plaintiff's purported incompetent acts and ineptitude, there is a disputed issue of fact as to whether the plaintiff's performance of legal services, as measured against that of an attorney of reasonable skill and knowledge, was negligent. There is sufficient evidence from which a reasonable trier of fact could conclude that the plaintiff's representation of the defendant in the federal action was negligent. Moreover, defendant's claim that the retainer agreement was the result of plaintiff's fraudulent inducement is also a disputed issue (see GTE Automatic Electric Inc. v. Martin's Inc., 127 AD2d 545 [1st Dept 1987]).

As for plaintiff's conversion claim, summary adjudication is also not warranted. Conversion is the wrongful interference with the property of another. Republic of Haiti v. Duvalier, 211 AD2d 379 (1<sup>st</sup> dept. 1995). In order to assert a cause of action for

conversion, a plaintiff must demonstrate an ownership interest in the property alleged to have been converted State v. Seventh Regiment Fund, Inc., 98 NY2d 249 (2002).

Here, for the reasons already stated herein, there is an issue of fact as to whether plaintiff possesses a superior right to the settlement proceeds. Accordingly, plaintiff's motion for summary judgment on the complaint is denied.

#### Dismissal of defendant's counterclaims

In determining whether the counterclaims are sufficient so as to withstand a motion to dismiss pursuant to CPLR § 3211 "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977). The facts as alleged must be accepted by the court as true, for purposes of such a motion, and are to be accorded every favorable inference. Morone v. Morone, 50 N.Y.2d 481 (1980); Beattie v. Brown & Wood, 243 A.D.2d 395 (1<sup>st</sup> dept. 1997).

Where the basis for the motion to dismiss is the purported failure to state a cause of action [CPLR § 3211 (a) (7)] the court's attention "should be focused on whether the plaintiff has a cause of action rather than on whether he has properly stated one." Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 634 (1976).

To establish a *prima facie* case of legal malpractice, plaintiff must plead facts that show defendants: (1) failed to exercise that degree of care, skill, and diligence commonly possessed and exercised by an ordinary member of the legal community; (2) that such negligence was the proximate cause of the actual damages sustained by the plaintiff; and that (3) "but for" the defendants' negligence, plaintiff would have been

successful in the underlying action. Laventure v Galeno, 307 A.D.2d 255 (1<sup>st</sup> dept. 2003). Thus, plaintiff must set forth facts demonstrating that "but for" the attorney's conduct, he would have prevailed in the underlying matter, or would not have sustained any ascertainable damages. Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., 10 A.D.3d 267 (1<sup>st</sup> Dept. 2004). At least one court has likened this burden or requirement to the plaintiff having to prove a "case within a case." Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., *supra* at 272.

Here, the defendant has met his burden. Plaintiff's sole argument in favor of dismissal, that plaintiff cannot prove damages since he settled the underlying claim, is rejected (see Cohen v. Lipsig, 92 AD2d 536 [2d Dept 1983]). Rather, defendant's claims that his case was worth far in excess of the settlement ultimately realized, coupled with the claim that the defendant abandoned his cause of action for equitable relief, is sufficient at this stage to allege the element of damages on the malpractice claim (*id.*, see also Fusco v. Fauci, 299 AD2d 263, 749 N.Y.S.2d 715 N.Y.A.D. 1 Dept. 2002).

The elements of a cause of action for fraudulent inducement are: defendant's representation of a material existing fact, falsity, scienter, justifiable reliance, and damages (CPLR 3016[b]; see Raytheon Co. v. AES Red Oak, LLC, 37 AD3d 364 [1st Dept 1997]; Brown v. Wolf Group Integrated Communications, Ltd., 23 AD3d 239 [1st Dept 2005]). These elements must be plead with specificity (*id.*). Defendant's claims that the plaintiff misrepresented his experience, ability and knowledge of federal law and practice in order to induce the defendant into retaining plaintiff for its legal services in the federal action is sufficient to withstand the motion to dismiss.

Defendant's counterclaim for breach of contract must, however, be dismissed, since it is duplicative of his legal malpractice claim (*cf.* Sarasota, Inc. v. Kurzman & Eisenberg, LLP, 28 AD3d 237 [1st Dept 2006]; see Maiolini v. McAdams & Fallon, P.C., 61 AD3d 644 [2d Dept 2009]). Accordingly, plaintiff's motion to dismiss defendant's counterclaims is granted only to the extent that the second counterclaim for breach of contract is hereby severed and dismissed.

Motion for an order directing defendant to place money into escrow

Plaintiff has also moved for an order directing the defendant to place the sum of \$376,350 into escrow pending the outcome of this action, pursuant to Judiciary Law § 475. From the commencement of an action or special proceeding, an attorney who appears has a lien upon his client's claim that attaches to a determination in the client's favor and to the resulting proceeds wherever they are. Judiciary Law § 475. A charging lien does not depend upon who possesses the proceeds of an action (see Kaplan v. Reuss, 113 AD2d 184 [2d Dept 1985]).

Here, the issue of whether the defendant has "appeared" within the meaning of the Judiciary Law is conceded by the defendant. Plaintiff appeared at the settlement conference held on November 10, 2008 (see *i.e.* Ebert v. New York City Health & Hospitals Corp., 210 AD2d 292 [2d Dept 1994]). Therefore, the court must conclude that plaintiff has a valid charging lien in the settlement funds, and in order to enforce that lien, the court hereby directs defendant to deposit with the court the disputed sum allegedly due to plaintiff, \$376,350, pending further order of the court. (see CPLR § 6201 (3); Klein v. Eubank, 232 AD2d 183 [1st Dept 1996]; see also Matter of Gutches's Estate, 90 AD2d 663 [1st Dept 1982]).

**Conclusion**

In accordance herewith, it is hereby

ORDERED that the motion by plaintiff is granted only to the following extent: [1] that the defendant's second counterclaim for breach of contract is hereby severed and dismissed; and [2] that within 20 days from the date of this decision, the defendant is directed to deposit with the court the total sum of \$376,350, pending further order of the court; and it is further

ORDERED that plaintiff's motion is otherwise denied; and it is further

ORDERED that plaintiff is directed to respond to defendant's counterclaims within 20 days from the date of this decision; and it is further

ORDERED that the court hereby schedules a preliminary conference in this action to be held on September 24, 2009 at 9:30 a.m. in Part 10, 60 Centre Street.

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the court.

Dated: New York, New York  
July 28, 2009

So Ordered:

  
\_\_\_\_\_  
HON. JUDITH J. GISCHE, J.S.C.

**FILED**  
JUL 30 2009  
COUNTY CLERK'S OFFICE  
NEW YORK