

**Garnett v Fox, Horan & Camerini, LLP**

2009 NY Slip Op 32823(U)

November 30, 2009

Supreme Court, New York County

Docket Number: 114079/2008

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 114079/2008

GARNETT, ALMA

vs

FOX HORAN & CAMERINI LLP

Sequence Number : 001

DISMISS ACTION

INDEX NO. \_\_\_\_\_

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

MOTION SEQ. NO. \_\_\_\_\_

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

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

1-3

45

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is decided in accompanying decision + order dated 11/30/09*

**FILED**

DEC 03 2009

NEW YORK COUNTY CLERK'S OFFICE

Dated: 12/1/09



**JANE S. SOLOMON** J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55

-----X

ALMA GARNETT, as Liquidating  
Trustee Of Boylan International,  
Inc.,

Index No. 114079/2008

Plaintiff,

-against-

FOX, HORAN & CAMERINI, LLP,

Defendant.

-----X

JANE S. SOLOMON, J.S.C.

DECISION AND ORDER

**FILED**  
DEC 03 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff Alma Garnett is the "liquidating trustee" of Boylan International, Inc. ("Boylan"), presumably under Chapter 7 of the United States Bankruptcy Code, although it is not so stated. In this lawsuit for legal malpractice, she sues Boylan's former attorneys, defendant Fox, Horan & Camerini, LLP (Fox Horan). On this motion, Fox Horan seeks dismissal of the complaint on the ground that, assuming negligence, plaintiff has not pleaded any damages that resulted to Boylan as a result of its work.

From the complaint, it appears that: Boylan engaged Fox Horan to represent it in a dispute with the landlord of the building where Boylan's offices were located; the 10 year lease, made in May 1997, had a real estate tax escalation clause under which Boylan was to pay .94% of the building's taxes; as a result of improvements to the building the taxes were increased--in

1998, Boylan's share was \$2,136 and by 2006, it was \$73,317; Boylan fell behind in its rent well before 2006 and, in August 2003, the landlord sued Boylan for \$276,000; the proceeding languished for three years during which Boylan seems not to have paid anything to reduce the claim; during the trial in January 2007, and at a time when Boylan's principal was sick, she consented to settle the dispute on allegedly onerous terms; subsequently, with the assistance of new counsel, the settlement was vacated; in May 2007, Boylan filed a Chapter 11 petition.

The complaint then asserts in paragraph 70:

Ultimately, because of the errors by counsel and the failure to properly present the defense available under the controlling precedent of *Blackstar*, Boylan was forced to seek bankruptcy protection . . . on or about May 2007.

In support of this conclusion, plaintiff provides a litany of grievances about the conduct of Fox Horan's lawyer on the case, and details about Ms. Boylan's health at the time of trial. The referenced case, *Blackstar Publishing Co. v 460 Park Assoc*, 137 Misc2d 414 (Sup Ct, NY County 1987), involved a tax escalation clause in a lease. In the decision, competing motions for summary judgment were found to have been denied properly. Notably, the tenant defended on the ground that it should not be held liable for the increase in taxes attributable to the addition of six stories to the building. Here, where there was a negotiated lease and building wide improvements over time, it is

not at all clear that the described defense would have succeeded for Boylan.

In any event, Fox Horan's argument on this motion is that the vacatur of the stipulation of settlement with the assistance of successor counsel, even if Boylan agreed to new terms, establishes that the complaint fails to plead damage to Boylan proximately caused by Fox Horan's conduct.

The first cause of action, captioned "legal malpractice in failing to properly prepare for trial," asserts that "had Fox Horan prepared for trial using the ordinary reasonable skills commonly possessed in the profession, Boylan would have owed at most only \$36,000 in back tax assessments" and would still be in business, causing damages of \$2,256,000, plus the costs and expenses, including reasonable legal fees. The second cause of action is captioned "legal malpractice in conducting the trial"; the third is called "legal malpractice in negotiating and 'coercing' the settlement"; the fourth is captioned "legal malpractice in failing to recognize or acting in contravention of the clear conflict of interest resulting from defendant's malpractice", which is explained as Fox Horan setting about protecting itself from its recognized professional failures when it recommended the settlement to which Boylan agreed. The last claim simply is called "fraud," and an additional \$5 million is sought as punitive damages.

In opposing the motion, plaintiff provides an amended complaint, and asks, without a formal cross-motion, that it be given leave to serve it if the motion otherwise would be granted.

#### DISCUSSION

##### **A. Legal Malpractice (Counts 1, 2 & 3)**

In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages (*Pellegrino v. File*, 291 AD2d 60, 63 [1<sup>st</sup> Dept 2002]). Fox Horan argues that plaintiff has not alleged proximate cause or damages. Certainly if the work of Fox Horan was undone, there might be a claim for a return of the legal fees paid, but that claim is not clearly set forth. Equally surely, it appears that time was on Boylan's side as it was evicted contemporaneously with the expiration of the term of the lease.

To establish causation, a plaintiff must show that it would have prevailed in the underlying action, or would not have incurred damages, but for the lawyer's negligence (*Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]). To survive a preanswer motion to dismiss a legal malpractice claim, "a pleading need only state allegations from which damages attributable to the defendant's conduct may reasonably be

inferred" (*Lappin v. Greenberg*, 34 AD3d 277, 279 [1<sup>st</sup> Dept 2006]). Plaintiff concedes Boylan owed \$36,000, though for what period is not known; nor is it clear that Boylan paid anything on account of presumably escalating tax bills which arose after the 2003 commencement of the proceeding for the then due amount of \$276,000. Furthermore, there is no statement of what amount, if any, Boylan ever paid. Filing for bankruptcy with over \$2 million of debt seems unlikely to have been caused by the described conduct of defendant. Absent clarity of pleading, the motion is meritorious. Reference to the proposed amended complaint does not help to fill in what is missing from the complaint to which the motion is addressed.

Specifically, the amended complaint is nearly identical to the original complaint, in that it is similarly replete with ad hominem attacks on the lawyer and conclusory statements which are not factual. There is however a different description of the circumstances by which the stipulation was set aside. Garnett now alleges that on June 12, 2007, in the course of the bankruptcy proceeding, Boylan's new counsel moved to vacate the stipulation, and then states, in paragraph 72:

Unfortunately, the damage had already been done as Boylan had already filed for bankruptcy protection and the business shut down in anticipation of liquidation. Specifically, Boylan filed for Bankruptcy in May, 2007, days after it was served with a notice of eviction and had its bank accounts frozen as per the terms of the coerced Stipulation foisted upon Plaintiff by Defendant.

This alteration of the facts does not remedy the insufficiencies within the complaint.

Accordingly, the portion of Fox Horan's motion to dismiss the first three causes of action is granted, with leave for Garnett to replead, if she can, with factual allegations, within the four corners of the complaint, of proximate cause and damages to Boylan.

#### **B. Conflict of Interest (Count 4)**

Garnett contends that Fox Horan's associate forced the settlement agreement on Boylan for the purpose of covering up his own malpractice and to protect Fox Horan from any liability stemming from that malpractice, putting him and the firm in a conflict with Boylan, the client. Fox Horan argues that New York does not recognize malpractice based upon a conflict of interest because conflict of interest is merely a violation of ethical responsibilities and cannot be used in a malpractice claim.

Garnett counters that a disciplinary rule violation can result in liability when a client can show that actual damages resulted from the conflict. Furthermore, she argues that the claim could also be phrased as one for breach of fiduciary duty or breach of loyalty, which has a lower standard of proof than malpractice. Fox Horan replies that the conflict of interest in

question in the present matter is not a conflict between the interests of multiple clients, but rather between a client and the lawyer, and Garnett has not supplied the court with any case law on point regarding this type of conflict.

When a conflict of interest amounts to a violation of the code of professional conduct, liability can follow where the client can show that it suffered actual damage as a result of the conflict (*Kaminsky v. Herrick, Feinstein LLP*, 59 AD3d 1 [1st Dept 2008]). Thus, the question in this matter is whether the complaint alleges a conflict of interest that amounts to a violation of the rules of professional conduct. Garnett does not allege a conflict of interest between current clients, and she provides no authority for her assertion that there was a conflict between counsel and its client that rose to the level of legal malpractice.

Garnett's request to convert this claim to one for breach of fiduciary duty would be unsuccessful. "In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct" (*Kurtzman v. Bergstol* 40 AD3d 588 [2<sup>nd</sup> Dept 2007]). The court has already noted that the complaint does not sufficiently allege what damages were actually suffered by Boylan as a result of Fox Horan's actions. There are no further

allegations of specific damages within this count. Garnett has not sufficiently alleged what damages, if any, were directly caused by Fox Horan's misconduct. Accordingly, this branch of Fox Horan's motion is granted.

### **C. Fraud**

A fraud claim is duplicative of a legal malpractice action unless it is based on an allegation of independent, intentionally tortious conduct with separate and distinct damages (*Carl v. Cohen*, 55 AD3d 478 [1<sup>st</sup> Dept 2008]). Furthermore, allegations of fraud must be something more egregious than mere concealment or failure to disclose one's own malpractice (*Mitschele v. Schultz*, 36 AD3d 249 [1<sup>st</sup> Dept 2006]).

The allegations in Garnett's fraud claim are direct restatements of those found in her legal malpractice claims and are insufficient to support a separate cause of action. Accordingly, the branch of Fox Horan's motion to dismiss the cause of action for fraud also is granted.


In accordance with the foregoing, it hereby is

ORDERED that the motion to dismiss is granted and the complaint is dismissed, provided, however, that plaintiff is granted leave to serve an amended complaint with respect to the first, second and third causes of action within 20 days after service of a copy of this order with notice of entry; and it further is

ORDERED that in the event that plaintiff fails to serve and file an amended complaint within the time stated in the above decretal paragraph, the Clerk shall enter judgment dismissing the action, with costs and disbursement to defendant as taxed.

Dated: November 30, 2009

ENTER:

  
\_\_\_\_\_  
J.S.C

JANE S. SOLOMON

**FILED**  
DEC 03 2009  
NEW YORK  
COUNTY CLERK'S OFFICE