

**Hassan v Wallach**

2010 NY Slip Op 30295(U)

February 8, 2010

Supreme Court, New York County

Docket Number: 112534-2009

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PART 10

PRESENT: \_\_\_\_\_

Index Number : 112534/2009

HASSAN, TARIQ A.

vs

WALLACH, ERIC, ESQ.

Sequence Number : 001

DISMISS ACTION

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

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

MOTION SEQ. NO. 001

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

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

832-11(a) 104  
57

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED

FEB 11 2010

NEW YORK COUNTY CLERK'S OFFICE

FEB 08 2010

Dated: \_\_\_\_\_

HON. JUDITH J. GISCHE 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: IAS PART 10**

-----X  
Tariq A. Hassan,  
Plaintiff (s),

**DECISION/ ORDER**  
Index No.: 112534-2009  
Seq. No.: 001, 002, 003

**-against-**

**PRESENT:**  
Hon. Judith J. Gische  
J.S.C.

Eric Wallach, Esq., Kasowitz,  
Benson, Torres & Friedman, LLP,  
John Singer, Esq., Singer  
Deutch, LLP, Mark Susswein, Esq., and  
Liddle & Robinson, LLP

Defendant (s).

**FILED**  
FEB 11 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X

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

<b>Papers</b>	<b>Numbered</b>
Defs MS and L&R n/m (3211) w/ MS affid, exhs .....	1
Defs EW and KBT&F n/m (3211) w/NR affirm, exhs .....	2
Defs JS and SD n/m (3211) w/JDS affid, exhs .....	3

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

**GISCHE J.:**

This is an action by plaintiff Tariq A. Hassan based on claims that the three named law firms and individually named lawyers were negligent and committed legal malpractice. Each law firm has separately moved for pre-answer dismissal of the complaint against it and the individually named attorney associated with its firm. Thus, there is a motion by Eric Wallach, Esq. and Kasowitz Benson, Torres & Friedman, LLP (collectively hereinafter "Kasowitz Benson") for dismissal for failure to state a cause of action and based upon documentary evidence (CPLR 3211 [a][1] and [7]) and motions

for the same relief by John Singer, Esq. and Singer Deutsch, LLP i/s/h/a "Singer Deutch, LLP" (collectively hereinafter "Singer Deutsch") and Mark Susswein, Esq. and Liddle & Robinson, LLP (collectively hereinafter "Liddle Robinson"). Since all three motions involve the same claims and set forth related arguments and defenses, they consolidated herein for decision in this decision and order.

Although due proof of service of each motion has been filed with the court, Hassan has not opposed any of the motions. They will be decided on default.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction, the facts as alleged in the complaint as true, and plaintiff is accorded the benefit of every possible favorable inference (Leon v. Martinez, 84 NY2d 83, 87-88 [1994] [citation omitted]). However, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence are insufficient to defeat a motion to dismiss (Sud v. Sud, 211 AD2d 423, 424 [1<sup>st</sup> Dept 1995]).

### **Facts Considered and Arguments Presented**

Hassan was hired in September 2007 by J.P. Morgan Chase ("JPMC") as its Chief Procurement Officer. While employed by JPMC, Hassan claims he discovered and investigated certain irregularities in pricing, illegal billing and other corrupt practices that he reported to his senior managers and the head of corporate security. According to plaintiff, he was instructed by those individuals to drop his investigation and not press these matters any further. In July 2008, Hassan was terminated from employment.

Upon being notified of his termination, Hassan suspected it was because he was a "whistle blower," within the meaning of section 806 of the Sarbanes-Oxley Act

("SOX"), and he proceeded to retain the Kasowitz Benson law firm on July 28, 2008.

Hassan claims that the firm did not protect his position by failing to commence an action under SOX, not disclosing a conflict of interest, improperly billing him for services, abandoning him in favor of other clients, and not advising him that a delay in bringing a lawsuit would prejudice him (1<sup>st</sup> cause of action).

The Kasowitz Benson firm referred Hassan to the Singer Deutsch law firm in September 2008 and, according to the complaint, plaintiff retained the Singer Deutsch law firm sometime around September 19, 2008. Hassan contends Singer Deutsch also failed to start an action under SOX or advise him of the consequence of failing to do so and also charged him unnecessary legal fees (2<sup>nd</sup> cause of action).

According to plaintiff, he then retained a third law firm (Liddle Robinson), also at or about September 19, 2008 and that firm, like the other two firms, failed to commence an action under SOX, or advise him of the consequence of failing to do so, and also charged him unnecessary legal fees (3<sup>rd</sup> cause of action).

Hassan's 4<sup>th</sup> cause of action, against all the defendants, is for breach of contract.

Hassan claims that "but for" each firm's failure to file a law suit on his behalf, he would have prevailed on his pretextual termination claims against JPMC because he was fired immediately after he obtained evidence of corruption that he disclosed to senior personnel. Hassan contends that the lawsuit should have been commenced within 90 days of his termination, or no later than October 21, 2008. Hassan states that Kasowitz Benson (Wallach) met with him and outlined a plan to enter into settlement negotiations with JPMC , but after getting in touch with JPMC's in house counsel, Tara A. Griffin, Esq. ("Griffin"), Wallach became "evasive," and then told Hassan to hire new

counsel.

The defendants, who present arguments supportive of one another, present documents that portray a strikingly different picture of the events that led to Hassan's termination and what happened when he came to each of them for legal counsel.

All defendants agree that the complaint omits certain critical facts which seriously undercut the viability of his SOX claim against JPMC.

Wallach of Kasowitz Benson states that Hassan did not tell him he was fired for making discriminatory statements which were tape recorded. According to Wallach, and the documents provided to the court, Hassan summoned a JPMC employee to his office to fire him. William Powers ("Powers") a white male, asked Hassan why he was being fired and Hassan told him that although he was competent, Hassan had already hired Traci Jackson ("Jackson"). Hassan told Powers that Jackson was an African American female he had hand picked and that he had deliberately made this selection because putting a "white guy" into that job would be a turn off to the community. Unbeknownst to Hassan, Powers taped the entire conversation. Powers brought the tape to senior management and then took steps towards starting a lawsuit against JPMC. JPMC settled the discrimination claims with Powers and paid him an undisclosed, but substantial, sum to avoid publicity. Hassan was sent a letter terminating him based upon his discriminatory actions. The incident with Powers took place only a few weeks before Hassan was fired.

Griffin told Wallach about the incident and encouraged him to listen to the tape, which he did. It was at that time that he urged Hassan to let him try to negotiate a severance package for him. These letters are referred to in the complaint (paragraphs

41, 42, 43), but Hassan does not discuss or reveal their contents. On September 2, 2008 Wallach told Hassan to get a new attorney, and he suggested Singer of Singer & Deutsche.

Singer of Singer & Deutsche met with Hassan on September 25, 2008, but according to Singer, the firm was never retained by Hassan. The firm never incurred any legal fees representing him nor did it ever send Hassan a bill for legal services.

At about the same time, Hassan contacted Little Robinson. He began a dialog with Susswein via emails which continued throughout October and November 2008. The emails are provided and show that Hassan was trying to develop a discrimination claim against JPMC. Hassan provided a number of documents for the firm's review and in one email, he asks Susswein whether "the Bank [is] discriminating against me by firing me for making a mistake and not just reprimanding me like they normally do with senior level managers?"

Little Robinson provided Hassan with a retainer agreement dated December 3, 2008. He did not accept and return the retainer agreement until December 31, 2008.

The retainer refers to Hassan's relationship with Singer Deutsch as follows:

"You further understand and agree Singer Deutsch, LLP will assist L&R in your representation in this matter. Singer Deutsch, LLP shall receive one-quarter (i.e. 25%) of the twenty-five percent contingent attorneys' fee and one third (i.e. 33%) of the thirty-three percent contingent attorneys' fee due under this agreement."

In an email dated February 8, 2009 to Susswein, Hassan for the first time admits to Susswein that he made certain comments that were tape recorded by Powers and JPMC fired him after that. In the email Hassan paraphrases what he said as follows:

"there is no way in hell I am going to put in a white guy with a terrible incompetent reputation in this job and send a negative message to the Diverse Community at large. . . " The next day Susswein contact Griffin and listened to the tape at JPMC's offices. Susswein also discussed the case with her and she confirmed that JPMC had paid Powers a financial settlement and that it had sent Hassan a letter firing him for those reasons.

At that point Susswein told Hassan it made no sense to go forward with the matter and on March 6, 2009, Liddle Robinson refunded the full amount of Hassan's retainer. Hassan brought this lawsuit on September 2, 2009, alleging that the law firms and attorneys had failed to commence an action against JPMC under SOX and that had they done so, he would have prevailed.

Kasowitz Benson argues that Hassan's SOX based lawsuit was baseless which is why it was never commenced and the firm told him to get another lawyer. The claim about Kasowitz Benson having a conflict of interest is, according to Kasowitz Benson, a complete fabrication and the person referred to in the complaint - "Quallen" - is unknown to anyone at the firm. Kasowitz Benson argues Hassan has not offered any facts to show what the purported conflict is, and even if a lawsuit was brought against this unidentified person, the suit -according to the complaint- took place in January 2009, months after the firm and Hassan ended their relationship.

Singer Deutsche argues that it was never retained by Hassan, and therefore, he cannot establish an essential element of his legal malpractice claim, which is an attorney client relationship. Singer Deutsche argues further that Hassan has not set forth facts tending to show that "but for" the firm's negligence, Hassan would have

prevailed on a SOX lawsuit, had it been commenced.

Liddle Robinson argues that Hassan did not retain the firm until after the time to commence an action under SOX had passed. Liddle Robinson contends the deadline was October 21, 2008. In any event, like Singer Deutsche, Liddle Robinson argues that Hassan has not provided any facts to showing he would have prevailed on the underlying SOX action, had it been commenced.

### **Discussion**

To establish a *prima facie* case of legal malpractice or negligence, the client must plead and prove facts tending to show that the law firm: 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, 3) that "but for" the defendant's negligence, the plaintiff would have been successful in the underlying matter (Laventure v. Galeno, 307 AD2d 255 [1<sup>st</sup> Dept. 2003]; Wexler v. Shea & Gould, 211 AD2d 450, 621 NYS2d 858 [1<sup>st</sup> Dept. 1995]).

Although the court must accept the allegations in the complaint as true, the court can consider information extrinsic to the complaint – like documents – if the information definitely disposes of the plaintiff's claims (Greenwood Packing Corp. v. Associated Telephone Design, Inc., 140 A.D.2d 303, 305 [2<sup>nd</sup> Dept 1988]). Furthermore, bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence are insufficient to defeat a motion to dismiss (Sud v. Sud, 211 AD2d 423, 424 [1<sup>st</sup> Dept 1995]).

The complaint alleges that Hassan had a viable claim under SOX against JPMC

because JPMC fired him almost immediately after he reported corrupt practices to senior personnel. Hassan, however, omitted all mention of the tape recorded conversation he had with Powers which took place shortly before he was fired. Hassan also failed to mention in the complaint that JPMC had to pay a substantial sum in settlement of that claim and that he was fired because of his discriminatory comments.

Hassan's email to Susswein at Liddle Robinson indicates that Hassan had reason to believe the Powers incident and his termination from employment were related: "why not just [reprimand] me like they normally do with senior level managers?"

Factoring in these events, which are supported by documentary evidence – some of which is in Hassan's own emails– the complaint is not supported by facts that support plaintiff's legal malpractice claim against any of the defendants. Furthermore, the documentary evidence flatly contradicts Hassan's claim, that he was fired because he "blew the whistle" on corrupt activity. Even if the SOX lawsuit had been timely commenced, there are no facts tending to show that it was a viable claim and that he would have prevailed "but for" the attorneys' conduct in not starting the action (Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., 10 AD3d 267 [1<sup>st</sup> Dept. 2004]; Pellegrino v. File, 291 AD2d 60, 63 [1<sup>st</sup> Dept. 2002]; Stroock, Stroock & Lavan v. Beltramini, 157 AD2d 590, 591 [1<sup>st</sup> Dept. 1990]).

Kasowitz Benson has established that it no longer represented Hassan by mid to late September 2008 and that by then it had learned about the taped conversation between Hassan and Powers. The firm urged Hassan to settle and tried to negotiate a severance package. The negotiations were unsuccessful and Kasowitz Benson urged Hassan to get a different attorney. Thus, Kasowitz Benson has proved through

documentary evidence, which includes Hassan's own emails, that the time to bring a SOX action against JPMC had not expired when that firm's relationship with Hassan ended.

Although the complaint indicates that Hassan entered into a retainer with Singer Deutsch, there is documentary evidence that Singer Deutsch was not retained but was "of counsel" to Liddle Robinson. Hassan did not accept Liddle Robinson's retainer agreement until December 31, 2008, although it was prepared December 3, 2008.

Typically a claim under section 806 of SOX involves an employee who is terminated for reporting some wrongful act, corruption, etc., to an agency or the employee's higher ups. The aggrieved employee must file a claim with the Department of Labor within ninety (90) days of the adverse employment action (18 U.S.C.A. § 1514A [b][2][D]). Hassan was terminated July 23, 2008. For his claim to have been timely filed with the Department of Labor it would have had to have been filed no later than October 21, 2008, which is what Hassan alleges in the complaint. Liddle Robinson was not retained until December 2008, after the time to file the claim with the Department of Labor had expired. Therefore, Hassan has not set forth facts to support a malpractice action against that firm.

Hassan also does not provide any facts to support his claim that he was billed for work that any of the firms did not perform or that he was overcharged. Aside from mentioning the name "Quallen," the complaint does not state who he is, or why representing him presented a conflict of interest for Kasowitz Benson.

The breach of contract claim asserted against all the named defendants is based on the same facts that are offered to support the legal malpractice claim making the

contract claim redundant of Hassan's negligence claims. In any event, there is documentary proof that Singer Deutsch did not have a retainer agreement with Hassan.

The documentary evidence presented by the defendants severely undercuts Hassan's claims. Although he could have opposed these motions and presented his affidavit to clarify any defects in the complaint, Hassan has remained silent and this motion is before the court on default. Allowing the complaint its broadest construction, it still fails in the presence of documents which flatly contradict his claims. Each motion for dismissal of the complaint must, therefore, be granted. All claims are hereby dismissed.

#### **Conclusion**

*It is hereby*

**Ordered** that the motion by Eric Wallach, Esq. and Kasowitz, Benson, Torres & Friedman, LLP for the pre-answer dismissal of this action is hereby granted in all respects; and it is further

**Ordered** that the motion by John Singer, Esq. and Singer Deutsche LLP i/s/h/a "Singer Deutch, LLP" for the pre-answer dismissal of this action is hereby granted in all respects; and it is further

**Ordered** that the motion by LLP, Mark Susswein, Esq. and Liddle & Robinson, LLP for the pre-answer dismissal of this action is hereby granted in all respects; and it is further

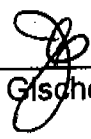
**Ordered** that the clerk shall enter judgment against Plaintiff Tariq A. Hassan, in favor of defendants Eric Wallach, Esq., Kasowitz, Benson, Torres & Friedman, LLP,

John Singer, Esq., Singer Deutsche, LLP i/s/h/a "Singer Deutch, LLP," Mark Susswein, Esq., and Liddle & Robinson, LLP, dismissing the complaint in its entirety; and it is further

**Ordered** that any relief not expressly addressed is hereby denied; and it is further

**Ordered** that this constitutes the decision and order of the court.

Dated: New York, New York  
February 8, 2010

So Ordered;  
  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC

**FILED**  
FEB 11 2010  
NEW YORK  
COUNTY CLERK'S OFFICE