

**Holloway v Rubman**

2010 NY Slip Op 30471(U)

February 17, 2010

Supreme Court, New York County

Docket Number: 112228/08

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 112228/2008  
HOLLOWAY, WILLIAM  
VS.  
RUBMAN, SCOTT A.  
SEQUENCE NUMBER : 002  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

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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 *is denied*  
*per attached*

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

**FILED**  
MAR 09 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 2/12/10

*[Signature]*  
EMILY JANE GOODMAN <sup>J.S.C.</sup>

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 PART17

-----X  
WILLIAM HOLLOWAY and JANE ALEXANDER,

Plaintiffs,

-against-

Index No.: 112228/08

SCOTT A. RUBMAN and ROBERTA ASHKIN,

Defendants.

-----X  
EMILY JANE GOODMAN, J.S.C.:

**FILED**  
MAR 09 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

In this case, plaintiffs seek damages and disgorgement of legal fees from their former attorneys, defendants Scott A. Rubman and Roberta Ashkin, incurred during litigation concerning the management control and ownership of 1stdibs.com., Inc. (1stdibs). Defendant Roberta Ashkin moves, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing the action as against her, and for costs and sanctions.

Plaintiffs contend that they consulted with Rubman and retained him to become general counsel to 1stdibs, and to represent plaintiffs in their transactions with the company, and its president and shareholder, Michael J. Bruno, II. Plaintiffs allege that they sought from Rubman corporate legal advice about how to enact management changes at 1stdibs. Rubman allegedly advised plaintiffs that they together held a combined 53% ownership interest in 1stdibs, and thus could declare Holloway to be chairman of the board, and call a special shareholder's meeting.

A meeting was held, in December 2004, at which plaintiffs attempted to install themselves as president and secretary of 1stdibs (the Meeting). Plaintiffs allege that, believing

that they were authorized to bring litigation on behalf of Istdibs, they did so, against Larry Forcione, retaining Rubman to represent them in the action under index number 1000935/05 (the Initial Action).<sup>1</sup> By summons and verified complaint, filed January 21, 2005, Istdibs, a website-based company, alleged that it was denied access to its website, and thus to operational control of the company. Subsequently, Bruno intervened and became a defendant in the Initial Action. In addition, on March 24, 2005, Bruno commenced a third-party action against plaintiffs and Istdibs, seeking, among other things, a declaration that the actions taken at the Meeting were invalid (the Third-Party Action). Plaintiffs concede that they retained Rubman to represent them in the Third-Party Action, but allege that, at some point, Rubman recommended that Plaintiffs retain the “additional services of defendant Ashkin as their personal attorney.” Both the Initial Action and the Third-Party Action are collectively referred to herein as the Underlying Litigation.

Plaintiffs claim that Rubman showed up with Ashkin at a court appearance and told them that they needed individual representation. Plaintiffs contend that they agreed, but never formally retained Ashkin. It is undisputed that no retainer letter with Ashkin was ever executed, and billing for Ashkin’s services was done through Rubman. Plaintiffs allege that Rubman and Ashkin billed the sum of \$405,924.31 for their services, the greater part of which was paid, and that Ashkin and Rubman split the billing, to make the bill to Istdibs palatable to others, including Bruno. Plaintiffs allege that later on, at a deposition, Rubman and Ashkin told Alexander that Ashkin could no longer represent her, and provided another attorney for Alexander.

By order dated June 26, 2008, this court deemed the purported actions taken at the

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<sup>1</sup>The Initial Action was discontinued against Larry Forcione by Stipulation dated April 28, 2005.

Meeting invalid (*Istdibs.com v Forcione and Bruno, II*, Index No. 100935/05). Thereafter, but before this motion was filed, the parties to the Underlying Litigation settled the matter.

Plaintiffs allege that Ashkin had the opportunity to review the relevant corporate law and documents, and the events precipitating the Underlying Litigation, and to advise plaintiffs on the viability of the law suit and defenses available to them in the Third-Party Action, but did not advise them to discontinue, resolve, withdraw or otherwise deal with the Underlying Litigation in any fashion, other than to litigate as if they had a good and meritorious claim and defense to the Third-Party Action. Plaintiffs further allege that part of defendants' billing was for the work of the Zurich Insurance Company in representing Rubman.

The first cause of action of the complaint is against Rubman and will not be addressed. In the second cause of action, plaintiffs claim that Ashkin and Rubman were negligent in failing to advise them that the Underlying Litigation lacked merit, and that there was no merit to plaintiffs' defense to the Third-Party Action. Plaintiffs contend that had they been so-advised, they would not have continued in the litigation, thereby avoiding the attendant legal fees. In the third cause of action, plaintiffs allege that defendants' conduct was a breach of contract. In the fourth cause of action, plaintiffs seek disgorgement of legal fees paid, alleging that defendants advised plaintiffs to start and continue litigation for the purpose of generating legal fees.

To meet her burden on the motion, Ashkin submits an affirmation in which she states that she and Rubman entered into an informal arrangement wherein she collaborated with Rubman on certain cases on an as-needed basis. Under the terms of this arrangement, Ashkin avers, she was paid by Rubman for legal services she rendered to his clients, but did not become directly engaged or retained by Rubman's clients. Ashkin further avers that she was never retained to

represent plaintiffs concerning any transactional work involving 1stdibs, and that plaintiffs do not allege that she advised or counseled them with regard to the calling of the Meeting, but that they retained Rubman as general counsel to 1stdibs. Ashkin also contends that plaintiffs did not hire her to commence or prosecute a law suit, but concede that they hired Rubman to represent them in the Initial Action.

Ashkin concedes that although she was not formally retained by plaintiffs, and did not discuss entering into an retainer agreement or reach an hourly rate with them, she became counsel for them when Bruno filed the Third-Party Action. Ashkin further concedes that she represented plaintiffs as defendants in the Third-Party Action, from March 2005 to November 2005, due to a potential conflict of interest which arose as a result of Rubman's representation of 1stdibs. Ashkin avers that during this period, she was paid by Rubman, not plaintiffs.

In March 2006, Ashkin's motion for leave to withdraw as counsel for Alexander and Holloway in the Third-Party Action was granted by this court. Ashkin avers that she was thereafter replaced by successor counsel, and that at the termination of her attorney-client relationship with plaintiffs, plaintiffs owed her no money, and she held none for them. Ashkin maintains that she did not commit negligence during her limited involvement with plaintiffs, when she represented them as third-party defendants.

On a CPLR 3211 (a) (7) motion, a court must accept the allegations of the complaint as true and view them in a light most favorable to plaintiff (*see Madison Apparel Group Ltd. v Hachette Filipacchi Presse, S.A.*, 52 AD3d 385 [1st Dept 2008]). The elements of a cause of action for Legal Malpractice are "that the attorneys were negligent, that their negligence was the proximate cause of the plaintiff's damages, and that the plaintiff suffered actual damages as a

direct result of the attorneys' actions" (*Franklin v Winard*, 199 AD2d 220, 221 [1st Dept 1993]).

Ashkin argues that dismissal of the complaint is warranted because plaintiffs made false allegations that she advised them to enter into litigation, when she represented them only as third-party defendants, and did not pursue, or enter into a retainer agreement to pursue, an action on their behalf, or to advise them on corporate transactions relating to 1stdibs and the Meeting. In opposition, plaintiffs submit bills and e-mails that they claim demonstrate that Ashkin's involvement in the 1stdibs dispute did not begin with the Third-Party Action. Plaintiffs also contend that Ashkin putatively represented plaintiffs as shareholders of 1stdibs, with Rubman, and appeared at a court conference representing plaintiffs in the Initial Action. Plaintiffs maintain that Ashkin was already working for them, as 1stdibs shareholders, at the time of the Meeting. Finally, plaintiffs allege that Rubman, in billing plaintiffs for Ashkin's work, distributed that billing, arbitrarily, throughout different bills.

While plaintiffs attach four exhibits of bills and e-mail messages between Holloway and Rubman, they do not point to what in the documents, which appear to include bills for other matters, demonstrates that Ashkin represented plaintiffs in the Initial Action. However, regardless of Ashkin's earlier role, if any, in the battle for control of 1stdibs,<sup>2</sup> plaintiffs also claim that Ashkin failed to advise them that their defenses in the Third-Party Action lacked merit, and that they lacked an adequate defense (Complaint, ¶¶ 98-99, 110, 115, 125). Plaintiffs specifically argue that Ashkin never reviewed the 1stdibs bylaws in its minute book, or Delaware law, to

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<sup>2</sup>In her affirmation on her motion for leave to withdraw as counsel, Ashkin avers that she began to assist Rubman in litigation strategy in February 2005, prior to Bruno's commencement of the Third-Party Action in March 2005.

assess and advise on the merit of any potential defense. Plaintiffs further allege that but for Ashkin's failure to properly advise them concerning the merit, or lack thereof, of their position, they would not have continued on with the Third-Party Action, thereby avoiding additional defense costs. Ashkin has not demonstrated or argued that this claim is not a viable legal malpractice claim, and to the extent that she asserts that plaintiffs' allegations falsely overstate the scope of her responsibilities as counsel to them, this does not, without more, warrant dismissal of the complaint.

Ashkin argues that plaintiffs' malpractice claim fails because they are unable to establish that Ashkin's alleged unreasonable conduct proximately caused their injury. Ashkin admits that she represented Holloway and Alexander as third-party defendants, but maintains that when she did so, the Third-Party Action was being actively pursued by Bruno, leaving no option other than to defend. Because the Underlying Litigation was heavily contested and hostile, Ashkin characterizes as baseless plaintiffs' contention that they would not have continued the litigation or defended against the Third-Party Action but for her failure to inform them that they had no defenses. Ashkin also argues that it is nonsensical for plaintiffs to claim that she had control over Bruno's decision to commence and pursue the Third-Party Action, and that if Alexander and Holloway had wanted to settle the Third-Party Action, which she denies, their ability to do so was limited because Bruno's willingness to settle was also required.

On this motion, plaintiffs' allegation that they would have sought to resolve the Third-Party Action must be taken as true (*see Madison Apparel Group Ltd.*, 52 AD3d 385, *supra*), and whether the poor relationship between the parties would have precluded resolution of the case is a fact issue. While this issue may lend itself to resolution on a future motion, it does not do so

here. In addition, as Bruno's claims in the Third-Party Action concerned the validity of actions taken by plaintiffs at the Meeting, Ashkin does not explain why Alexander and Holloway could not have resolved, ended, or hastened the end of, the controversy entirely by, for example, submitting an affidavit on motion conceding the disputed contentions about the Meeting. Ashkin's argument that plaintiffs do not allege that they instructed her to settle the Third-Party Action ignores that plaintiffs' primary contention is that *Ashkin* did not advise *them* to settle, and did not afford plaintiffs the opportunity to make informed choices about how to proceed by counseling them as to the merits of their position.

Ashkin argues that the legal malpractice claim must be dismissed because plaintiffs cannot establish proximate cause, as a lawyer's choice between two reasonable courses of action is not legal malpractice. To the extent that this concept applies here, Ashkin's argument again ignores that the gravamen of plaintiffs' complaint is that their counsel was negligent in failing to advise them. Indeed, while Ashkin correctly argues that an attorney is not liable for an honest mistake of judgment where the proper course is open to reasonable doubt, she does not demonstrate that, under the circumstances here, as a matter of law, the proper course was open to reasonable doubt.

Ashkin further argues that the Legal Malpractice claim should be dismissed because her representation of plaintiffs in the Third-Party Action was only from March 2005 to November 2005, after which plaintiffs were represented by successor counsel for years before the court's June 28, 2008 decision determining that the actions taken at the Meeting were invalid.<sup>3</sup> In

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<sup>3</sup>Ashkin asserts that the purported basis for malpractice is the this court's June 2008 decision. The court, however, interprets the complaint as pointing to the June 2008 decision as demonstrating that Rubman and Ashkin should have been aware all along that plaintiffs had no

support, Ashkin discusses cases in which prior counsel is not liable for legal malpractice because successor counsel retained the opportunity to protect the client's rights, such as where a client hires successor counsel prior to the expiration of a statute of limitations and time remains to timely file the action. Ashkin does not explain how such cases are analogous to the present case, where plaintiffs maintain that Ashkin represented plaintiffs for six months, during which time, she failed to advise them that they lacked a meritorious defense in the Third-Party Action, so that they could have settled or otherwise resolved the matter without incurring continuing defense fees. Specifically, plaintiffs argue that Ashkin failed to review the appropriate corporate documents, such as the bylaws in 1stdibs's minute book, and failed to research and appreciate the appropriate corporate law regarding the Meeting, or analyze, discuss or advise on the litigation's merits. Ashkin does not address these contentions. While plaintiffs' theory of the case indicates that the successor firm also had the opportunity to inform plaintiffs of the merits of their position, and plaintiffs thus state no basis to recoup through this action damages that include successor attorney's fees, this does not dispose of the issue of legal fees incurred by plaintiffs prior to retention of successor counsel.

Ashkin argues that the case is premature because the measure of damages in a legal malpractice claim, where the injury suffered is loss of a cause of action, is the value of the lost cause of action, and the Underlying Litigation is still pending. The Underlying Litigation is no longer pending. In addition, this is not a case in which plaintiffs allege that they suffered the loss of a cause of action, but that their position in the litigation entirely lacked merit, and that they

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meritorious defense in the Third-Party Action.

were depending on their counsel to honestly tell them so, in order to cut their losses.

Despite plaintiffs' contention otherwise, Ashkin has made arguments for dismissal of the contract and the disgorgement claims. In fact, plaintiffs' contract cause of action is duplicative of the malpractice claim and is dismissed (*Natural Organics Inc. v Anderson Kill & Olick, P.C.*, 67 AD3d 541, 542 [1st Dept 2009]; *Rivas v Raymond Schwartzberg & Assoc., PLLC*, 52 AD3d 401, 401 [1st Dept 2008] [breach of contract claim, arising from the same facts and alleging similar damages as legal malpractice claim, should have been dismissed as duplicative]). In addition, plaintiffs' cause of action for disgorgement, other than containing a factually unsupported statement that defendants advised plaintiffs to start and continue litigation for the purpose of generating legal fees, "is predicated upon the same factual allegations as the malpractice claim, and seeks damages which may be recovered on that cause of action," and thus is dismissed (*Mecca v Shang*, 258 AD2d 569, 570 [2d Dept 1999]).

To the extent that Ashkin argues that there is no private right of action under 22 NYCRR 1215.1, the court notes only that there is no cause of action in the complaint based on that provision. Finally, Ashkin's request for sanctions is denied. Accordingly, it is


ORDERED that the defendant Roberta Ashkin's motion to dismiss the complaint is granted to the extent that the third and fourth causes of action are dismissed as to defendant Roberta Ashkin and is otherwise denied.

**This Constitutes the Decision and Order of the Court.**

Dated: February 17, 2010

**FILED**  
MAR 09 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

ENTER:

  
\_\_\_\_\_  
**EMILY JANE GOODMAN**