

**David J. Gold, P.C. v H&K Investigations, Inc.**

2010 NY Slip Op 30538(U)

March 8, 2010

Supreme Court, New York County

Docket Number: 604026/2006

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

- Index Number : 604026/2006

DAVID J. GOLD P.C.

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

vs

H&K INVESTIGATIONS INC

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

Sequence Number : 001

MOTION SEQ. NO. 001

SUMMARY JUDGEMENT

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

MAR 11 2010

NEW YORK  
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.

*PC scheduled  
for April 22 2010 @ 9:30  
Part 10*

MAR 08 2010

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

HON. JUDITH J. GISCHE 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 10**

-----X

David J. Gold, P.C. and It is Time Inc. d/b/a  
Howard, Adams & Rose,  
Plaintiff (s),

**DECISION/ ORDER**  
Index No.: 604026-2006  
Seq. No.: 001

**-against-**

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

H&K Investigations, Inc. a/k/a  
HK Investigations, Inc.,  
Ronald Hughes and Stephanie Bowman,  
Individually and as co-partners d/b/a  
Supreme Judgment Recovery, Thomas  
Wesley Archer a/k/a Thomas Archer,  
Ronald Hughes and Stephanie Bowman,  
Defendant (s).

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

-----X

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

<b>Papers</b>	<b>Numbered</b>
Plt's n/m (3212) w/ DJG affid, exhs . . . . .	1
Def H&K, RH x/m <sup>1</sup> (3212) w/GCV affirm, RH affid, exhs . . . . .	2
Def Archer opp w/TWA affirm, DJG affid, exhs . . . . .	3
Def SB/Supreme opp w/ARP affirm . . . . .	4
Def H&K, RH reply w/GCV affirm . . . . .	5
Plt's reply w/DJG affid, exhs . . . . .	6
Various stips of adj . . . . .	7

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

**GISCHE J.:**

This is an action by plaintiff alleging breach of contract, fraud and other causes

<sup>1</sup> Rule 12 of the Rules of Court states that exhibits to motions should be tabbed. While the court accepts the cross motion papers submitted, none of the exhibits are separately tabbed as they should have been.

of action against the defendants. All the defendants have answered the complaint; some defendants have asserted counterclaims against plaintiff and cross claims against one another. Presently before the court is plaintiff's pre-note of issue motion for summary judgment on its complaint against each one of the defendants. Defendant H&K Investigations, Inc. d/b/a HK Investigations, Inc. ("H&K") and Ronald Hughes (collectively "H&K/Hughes") have cross moved to dismiss the complaint for failure to state a cause of action (CPLR 3211 [a][7]). Each defendant opposes plaintiff's motion for summary judgment. None of H&K/Hughes's co-defendants take a position on H&K/Hughes's cross motion for summary judgment.

Since issued is joined and the motion and cross motion are each timely (CPLR 3212 [a]) they will be considered and decided on the merits. The court's decision and order is as follows:

### **Arguments**

The underlying factual circumstances of this case are quite extensive. Many facts, however, are either established in the record before the court, or are uncontroverted.

David J. Gold, Esq. ("Gold") is an attorney at law. He is the principal of plaintiff David J. Gold, P.C., a law firm ("Gold law firm"). Gold is also the principal of It is Time, Inc. doing business as "Howard, Adams & Rose." H&K is a debt collector, as is Stephanie Bowman d/b/a Supreme Judgment Recovery ("Bowman/Supreme"). Defendant Thomas W. Archer, Esq., is an attorney at law and the lawyer for Bowman/Supreme ("Archer").

The Gold law firm has an extensive debt collection practice and Howard, Adams & Rose ("HAR") is the assignee of a debt owed by Leonard T. Zaichik and Grigori Zaichik (collectively "Zaichik"). HAR obtained a money judgment against Zaichik on default in the Civil Court of the City of New York. The judgment, in the total amount of \$20,561.11, was entered February 5, 2004. The plaintiff in that action is HAR and Gold was HAR's attorney.

The Gold law firm and H&K entered into a client/ agency agreement dated September 28, 2005 ("agreement") which in relevant part provides as follows:

"The Agency [H&K] will hold the Client [Gold law firm] harmless for all claims arising as a result of any action taken by the Agency with regard to the enforcement or attempted enforcement of any judgment referred to the Agency by the Client...

Client agrees to immediately notify Agency of an Orders to Show Cause, Bankruptcy notices or other notifications which may limit or restrict the enforcement efforts on any referred case. . .

The Agency is authorized to endorse all instruments payable to and requiring the endorsement of the Client. However, such authorization is limited to depositing said instruments to the Client disbursement account.

The Client shall not incur any costs related to the enforcement procedure. The Agency shall pay all Sheriff/ Marshal costs and be reimbursed from first monies received..."

It is unrefuted that HAR forwarded the Zaichik judgment to H&K/Hughes for collection on April 17, 2006. It is also unrefuted that the judgment identifies the claimant as "Howard Adams & Rose, as assignee of Bank One" and the attorney of record for the judgment creditor is David J. Gold, Esq. However, the August 8, 2006

Information Subpoena and Restraining Notice served on Zaichik's bank ("restraining notice"), identifies the claimant as "Supreme Judgment Recovery as assignee of H&K Investigations, Inc." and states that "a judgment was entered in this court on 2/5/2004 in favor of claimant [Supreme Judgment Recovery as assignee of H&K Investigations, Inc.] . . . in the amount of \$25,307.35 . . ." The attorney for the judgment creditor is listed as defendant "Thomas W. Archer, Esq."

After Zaichik's Chase Manhattan bank account was frozen, he brought an Order to Show Cause to vacate the default judgment and the restraint on that account ("1<sup>st</sup> OSC"). That 1<sup>st</sup> OSC, signed by Judge Kenney is dated August 31, 2006. Judge Kenney ordered service on the Gold law firm and upon being served, the Gold law firm sent H&K/Hughes the following instructions by fax in a letter dated September 5, 2006: "enclosed herewith is a copy of an Order to Show Cause recently received in our office . . . please discontinue all enforcement proceedings until further notice . . . please confirm receipt of this facsimile in writing . . ." On October 19, 2006 the Gold law firm and Zaichik, who was represented by counsel, entered into a so-ordered stipulation vacating plaintiff's money judgment against Zaichik.

Afterwards, on October 25, 2006, Zaichik was notified by Apple Bank that it had been served with a Marshal's Notice of Levy and Final Demand ("notice of levy"). The notice of levy identified the claimant/plaintiff as "Supreme Judgment Recovery [as assignee of] H&K Investigations." The notice listed the judgment amount as being \$8,565.31 and referred to the "original" judgment amount of \$25,307.34.

On November 1, 2006, Zaichik brought a second Order to Show Cause ("2<sup>nd</sup>

OSC") in Civil Court. Despite the stipulation with plaintiff to vacate the money judgment and restraining notices, the money judgment was satisfied from Zaichik's Chase account on October 24, 2006.

According to Zaichik's lawyer, Zaichik had brought the stipulation to the bank who did not accept it because the claimant/plaintiff's name on the stipulation differed from that on the judgment and restraining notice.

Upon being served with Zaichik's 2<sup>nd</sup> OSC, the Gold law firm sent a copy of it to H&K/Hughes and instructed H&K/Hughes to "cease and desist from proceeding further on this file and if any monies have been collected by your office, or anyone on your behalf, please return them to defendant immediately . . ."

Judge Kern ordered restitution of the funds to Zaichik's Chase account on November 14, 2006 and the Gold law firm sent a copy of that order to H&K/Hughes on November 14, 2006. The Gold firm sent a second request to H&K/Hughes on November 22, 2006. The Gold firm also instructed H&K/Hughes to immediately return the "monies wrongfully taken" or Judge Kern would take further action against H&K/Hughes, Supreme Judgment and Archer. The Gold law firm instructed H&K/Hughes to close the Zaichik file immediately and in a separate letter, also dated November 14, 2006, Gold instructed H&K/Hughes to "close all files which have been placed with your office . . . You are no longer authorized to handle any of my files . . . I am also directing you to provide my office with a written status of each and every file and what steps have been taken by your office since placement of these files. . ."

Plaintiffs commenced this action in November 2006. In April 2007, Zaichik

commenced a putative class action against HK, Gold, Gold's law firm, Archer, and Bowman d/b/a Supreme Judgment Recovery in Supreme Court, N.Y. Co. (Index no. 402415-07) ("Zaichik action"). The Zaichik action was transferred to Civil Court by Judge Marilyn Diamond in her decision of October 12, 2007 for reasons set forth therein. Zaichik's motion to reargue that decision was denied by Judge Diamond on June 4, 2008.

In Civil Court, plaintiffs herein brought a motion to dismiss the claims against them in the Zaichik action. That motion was granted by Judge Kenney in her order of August 25, 2008. H&K/Hughes motion to dismiss, however, was denied and H&K/Hughes's motion to reargue was also denied by her in her decision of November 14, 2008.

In this action, plaintiff assert the following causes of action against H&K and Hughes ("COA"):

1<sup>st</sup> and 2<sup>nd</sup> COAs - breach of contract - based the defendants' alterations to legal documents without plaintiff's knowledge or consent and defendants' failure to deposit monies recovered into an attorney trust account.

3<sup>rd</sup> COA - fraudulent inducement into entering into the collection agreement - based upon defendants representation that collections would be reported and remitted to plaintiff in a timely fashion.

The following COAs are asserted by plaintiffs against Hughes and Bowman individually and Bowman d/b/a Supreme Judgment Recovery:

4<sup>th</sup> COA - tortious interference with contract- based upon claims that the these

defendants altered legal documents and were issuing legal documents (i.e. practicing law) without a license.

The following COA is asserted against Thomas W. Archer, Esq. only:

5<sup>th</sup> COA - alteration of documents, failure to place money in to attorney escrow account- based upon Archer's name being on the restraining notice and other legal documents served on Zaichek's bank and sent to the Marshal.

Plaintiffs contend that H&K/Hughes had no right to "assign" the Zaichek collection matter to any another debt collection firm, but even if it did have that right, H&K/Hughes (with the help of their co-defendants) issued false or altered legal documents that misidentified the judgment creditor, inflated the judgment amount and improperly identified Archer as the judgment creditor's attorney. Plaintiffs contends H&K/Hughes exceeded its authority under the debt collection agreement by continuing to enforce the judgment which the judgment creditor and the debtor agreed would be vacated. Plaintiff argues that it did not know any of this was taking place because it did anticipate H&K/Hughes would be having any one else working on plaintiff's files.

Plaintiff relies on the defendants' answer and admissions they made in affidavit submitted in the Zaichik Civil Court action. Bowman, in her sworn affidavit dated October 30, 2008 which she submitted in support of her motion for summary judgment in that case, stated that she drafted the restraining notice and served the respective banking institutions as H&K's assignee. She also stated that H&K was "well informed of my business practices and in particular, of how we sent out our subpoenas, which did not include the original creditors' name."

In opposition to plaintiff's present motion for summary judgment, H&K/Hughes argues it never received the first letter that the Gold law firm sent instructing them to stop their collection efforts, nor any other correspondence from plaintiff about the court proceedings, the stipulation vacating the judgment, etc., or the 2<sup>nd</sup> OSC in time to stop the Marshal from executing on Zaichik's bank account. Hughes states in his sworn affidavit that he followed his usual procedures and it was not until November 7, 2006 that he was notified for the first time that there was a stay of enforcement of the judgment. Thus, he contends that the issue of whether any of the faxes were received by him has to be decided at trial. In support of its cross motion for summary judgment dismissing the complaint for failure to state a cause of action, H&K/Hughes argues it was not prohibited from hiring someone else to aid it in the debt collection process and that it did not retain nor exercise any control over the manner in which Bowman/Supreme did its work because it is an independent contractor.

Bowman/Supreme does not provide an affidavit in opposition, but only an attorney's affirmation. The attorney (who does not have personal knowledge of the facts) states that "Bowman did not enter into any type of contract, written or verbal, with the mentioned plaintiffs. Hence, in the instant matter there exists an issue of fact."

Archer, on his own behalf, denies he was involved in any alterations of the legal documents involved.

### **Discussion**

On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts to prove its prima facie case that would entitle it to judgment in its

favor, without the need for a trial (Zuckerman v. City of New York, 49 N.Y.2d 557, 562 [1980]). The party opposing the motion must demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her/its failure so to do (Alvarez v. Prospect Hosp., 68 N.Y.2d 320 [1986]).

Although plaintiffs contend they immediately notified H&K/Hughes to stop all collection efforts against Zaichek, and they have proof of sending these instructions by facsimile, H&K/Hughes denies receiving any instructions to stop their collection efforts until November 7, 2006, after the money had been removed from Zaichek's bank account. Proof of transmission by fax does not conclusively establish plaintiff's claim against H&K/Hughes, that the defendant breached its contract.

It is hornbook law that the function of summary judgment is issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]). Summary judgment is a drastic remedy and should not be invoked where there is any doubt as to the existence of a triable issue (City University of New York v. Finalco, Inc., 93 A.D.2d 792, 793 [1<sup>st</sup> Dept 1983]). The court cannot resolve issues of credibility on a flat record; it is for the jury to weigh the evidence and draw legitimate inferences therefrom. S.J. Capelin Assocs. v Globe Mfg. Corp., 34 NY2d 338 (1974). Whether H&K/Hughes were timely notified to stop their collection efforts is a disputed, material issue of fact that must be decided at trial. Plaintiff's motion for summary judgment on its 1<sup>st</sup> cause of action is denied.

Plaintiffs have also failed to prove on this motion that H&K/Hughes was the party that actually altered legal documents. Bowman/Supreme Judgment indicates that it

was Bowman who prepared the restraining and execution notices with the different caption, not H&K/Hughes. Although plaintiffs' agreement with H&K/Hughes requires that all fund collected be deposited into the "Client's disbursement account," H&K/Hughes denies it received the money collected, and has asserted a cross claim against Bowman/Supreme for keeping the money, and thereby depriving H&K/Hughes of its contingency fee. Therefore, plaintiffs' motion for summary judgment on their 2<sup>nd</sup> cause of action is denied.

Plaintiffs' 3<sup>rd</sup> cause of action, for fraudulent inducement, is not supported by facts. A fraudulent inducement claim must allege misrepresentation of facts that are collateral to the contract and which induced the allegedly defrauded party into signing the contract (Hawthorne Group, LLC v RRE Ventures, 7 AD3d 320, 323 [1<sup>st</sup> Dept 2004]; *See also: Orix Credit Alliance, Inc. v R.E. Hable Co.*, 256 AD2d 114 [1<sup>st</sup> Dept 1998]). Plaintiffs simply argue that had they known H&K/Hughes ran such a slipshod business, they would not have done business with them and further that the defendants made representations to them they could do the work that was the subject of their agreement. These facts are virtually indistinguishable from the facts supporting plaintiffs' breach of contract action. The representations made to plaintiffs are not collateral to the contract, but integral to it. Therefore, not only has plaintiff failed to prove it is entitled to summary judgment on this claim against H&K/Hughes, H&K/Hughes has proved it is entitled to summary judgment dismissing this cause of action; H&K/Hughes' cross motion is granted dismissing the 3<sup>rd</sup> cause of action against them for failure to state a cause of action.

To the extent that the 4<sup>th</sup> cause of action is asserted against Hughes as a co-partner of Bowman d/b/a Supreme, plaintiffs have failed to present any facts on this motion showing Hughes and Bowman are, in fact, co-partners of Supreme. Hughes and Bowman have separately answered the complaint and alleged cross claims against one another. Therefore, the "co-partnership" aspect of plaintiffs' motion for summary judgment is denied for that reason.

Plaintiffs claim that Bowman/Supreme tortiously interfered with the contract between themselves and defendants H&K/Hughes and that Bowman, who is not a lawyer, prepared legal documents which is the same as practicing law without a license. Furthermore, plaintiffs contend Bowman/Supreme altered legal documents.

There are four elements to a tortious interference with contract claim, they are: 1) the existence of a contract between the plaintiff party and a third party; 2) defendant's knowledge of the contract; 3) defendant's intentional procurement of a breach of contract without economic justification; and 4) resulting damages (Bernberg v. Health Management Systems, Inc., 303 AD2d 348 [2<sup>nd</sup> Dept 2003]). There are material disputed issues of fact regarding whether Bowman/Supreme knew about H&K/Hughes' agreement with the plaintiffs. Bowman contends she simply followed her usual procedures in preparing the restraining notices and other legal documents sent to the banks and the Marshal. As far as Bowman knew, the claimant/client was H&K/Hughes and no one else.

Judiciary Law 478 pertains to the unauthorized practice of law and provides that the attorney general may maintain an action for enforcement of the statute against any

person who commits any act or engages in the unlawful practice of law. There is no private right of action to enforce the statute (Lawrence v. Houston, 172 AD2d 923 [3<sup>rd</sup> Dept 1991]). In any event, filling out forms is different than holding oneself out as a lawyer, practicing law or giving legal advice (see New York County Lawyers' Assn. v. Dacey, 21 N.Y.2d 694 1967]). Since plaintiffs have the burden of proving they are entitled to summary judgment on their claims against Bowman/Supreme but have, at this point in the litigation, failed to prove they are entitled to summary judgment as a matter of law, plaintiffs' motion is denied as to the 4<sup>th</sup> cause of action.

The 5<sup>th</sup> cause of action is asserted only against Archer who is an attorney admitted to practice in New York state. The claim made by plaintiffs is that he altered legal documents and should have placed money into his attorney escrow account. Archer denies he prepared the documents in dispute and that he served his clients' interest. The obligation to place money into the "client's" disbursement account is found in the contract between plaintiffs and H&K/Hughes. Plaintiffs are not Archer's clients. Therefore, plaintiff has not proved, as a matter of law, that it is entitled to summary judgment on its 5<sup>th</sup> cause of action against Archer.

#### **Preliminary Conference**

Since this case has not yet had a preliminary conference, it is hereby scheduled for **APRIL 22, 2010** at 9:30 a.m. in Part 10, 60 Centre Street, Room 232. No further notices will be sent.

#### **Conclusion**

Plaintiff's motion for summary judgment is denied in all respects. Defendant

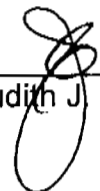
H&K/Hughes' cross motion is granted insofar as the "co-partnership" aspect of that claim against H&K/Hughes is dismissed. The preliminary conference is hereby scheduled **APRIL 22, 2010** at 9:30 a.m. in Part 10.

Any relief not expressly addressed is hereby denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
March 8, 2010

So Ordered:

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

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