

**Savitt Law Firm PLLC v Minichiello**

2010 NY Slip Op 31432(U)

June 8, 2010

Supreme Court, New York County

Docket Number: 115782/08

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

SAVITT LAW FIRM PLLC,  
Plaintiff,

Index No.: 115782/08

Motion Date: 06/08/10

- v -

Motion Seq. No.: 004

STEVEN MINICHIELLO, ATTORNEY LEONARD M. ROSS, THE LAW FIRM of ROSS & MATZA, ATTORNEY GREGORY D. WINTER, ATTORNEY IDA GENOVA and THE LAW FIRM of WINTER & WINKLER,  
Defendants.

Motion Cal. No.: \_\_\_\_\_

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

Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits - Exhibits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers,

Defendants Leonard M. Ross and Ross & Matza (hereinafter "Ross Defendants") move pursuant to CPLR 3212 for an order granting summary judgment dismissing the first through eighth causes of action in the complaint in this action, on the ground that no issues of fact exist to be tried with respect to such causes of action.

Plaintiff Savit Law Firm was retained by defendant

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):

FILED  
JUN 09 2010  
NEW YORK COUNTY CLERK'S OFFICE

MINICHIELLO to represent him in an action entitled Minichiello v Black-NYC, LLC, New York County Supreme Court Index No. 603837-05 (hereinafter "Black-NYC action") pursuant to a written Fee Agreement under which Minichiello agreed to pay plaintiff for legal services on an hourly time charged basis.

In April 2005 plaintiff and defendant Minichiello modified their Fee Agreement under which Minichiello agreed to pay plaintiff based on a contingency of 25% of the gross sum recovered on his behalf by plaintiff.

In March 2007, plaintiff applied to the court to be relieved as counsel for defendant Minichiello, which motion was granted by the court (Gammerman, J.)

Defendant Minichiello then retained defendants Gregory Winter, Ida Genova and Winter & Winkler (hereinafter "Winter Defendants") to represent him in the Black-NYC action. In April 2007, the Ross Defendants agreed to appear of record as defendant Minichiello's attorneys in the Black-NYC action because though licensed in New York, the Winter Defendants did not have a New York office. The Winter Defendants provided all the legal services to defendant Minichiello.

In May 2008, plaintiff notified that Ross Defendants that it asserted a lien against any all proceeds of the Black-NYC action and that "no monies shall be disbursed to any party for any

reason whatsoever, without the prior written approval of plaintiff's... or a court order."

In June 2008, the Winter Defendants negotiated a \$45,000 settlement of the Black-NYC action with three defendants. Only one of the three defendants paid his portion of the settlement, which payment in the amount of \$5,000 was received by the Ross Defendants. The Ross Defendants deposited the \$5,000 in to the Ross Defendant's attorneys escrow account and then transferred those funds into an interest bearing account (hereinafter "the Settlement Fund"). On December 5, 2008, the Ross Defendants notified plaintiff that such funds were on deposit. The Ross Defendants have not disbursed any money from such account.

Plaintiff assert eight causes of action against the Ross Defendants which are conversion, breach of contract, quantum meruit, injunction, account stated, fraudulent representations, tortious interference with contract and accounting.

With respect to plaintiff's application to disqualify the firm of Ross & Matza from representing itself, plaintiff's papers are procedurally defective as they contain no notice of cross motion, the proper mechanism for seeking affirmative relief. In any event, plaintiff misapprehends 22 NYCRR § 1200.21, the Lawyer as Witness Disciplinary Rule, as such rule is inapplicable to attorneys who are pro se litigants. Walker & Bailey v. We Try Harder, Inc., 123 AD2d 256 (1<sup>st</sup> Dept 1986).

As to the motion of the Ross Defendants to dismiss the first through eighth causes of action of the complaint, the court shall GRANT such motion.

The Ross Defendants are correct that the gravamen of plaintiff's complaint is for payment of legal fees incurred by Minichiello in the Black-NYC action.

As to plaintiff law firm's first cause of action for conversion, the Ross Defendants have prima facie established, in part based upon plaintiff's own admission, that plaintiff never had ownership, possession of control of the Settlement Fund. As plaintiff has failed to raise an issue of fact with respect the absence of any of the essential elements of its claim for conversion, the first cause of action must be dismissed.

Dobroski v Bank of America, 65 AD3d 882, 886 (1<sup>st</sup> Dept 2009).

Likewise, the second cause of action for breach of contract must be dismissed as plaintiff does not deny that its contingency fee agreement was with Minichiello, and that the Ross Defendants were not parties to that agreement. Similarly, plaintiff's third cause of action alleging quantum meruit lies against defendant Minichiello since plaintiff does not claim that it rendered any services to the Ross Defendants.

The fourth cause of action for an injunction does not state a cognizable claim as injunctive relief is a remedy. In any event, the court concurs with the Ross Defendants that plaintiff

has an adequate remedy at law since its claim seeks monetary damage.

The invoices proffered by plaintiff are rendered to defendant Minichiello. As there is no evidence that plaintiff addressed any bills or other accounts to the Ross Defendants, plaintiff has not raised any issue of fact with respect to its fifth cause of action for an account stated against such defendants. Nor does the eighth cause of action for an accounting lie against the Ross Defendants, since the evidence shows that the Ross Defendants have provided plaintiff with a copy of each and every record associated with the Settlement Funds.

With respect to the sixth cause of action for fraudulent misrepresentation, plaintiff fails to rebut the evidence proffered by the Ross Defendants that proves the truth of their statement that none of the Settlement Funds have been distributed, but that all such monies remain in their attorney escrow account. Nor has plaintiff offered one scintilla of evidence that any of proceeds of the settlement in the Black-NYC lawsuit beyond the single \$5,000 payment were made to the Ross Defendants.

Since plaintiff has failed to raise any issue of fact with respect to the disbursement of the Settlement Funds, its cause of action for tortious interference with contract fails since no

damages arising out of any alleged tortious interference with plaintiff's contract with defendant Minichiello can be established.

Accordingly, it is hereby

ORDERED that plaintiff's application to disqualify Ross & Matza as attorneys pro se is DENIED; and it is further

ORDERED that defendant Leonard M. Ross and Ross & Matza's motion for summary judgment is GRANTED and plaintiff's first through eighth causes of action are hereby DISMISSED as to such defendants.

This is the decision and order of the court.

Dated: June 8, 2010

ENTER:

~~Debra A. James~~ J.S.C.

DEBRA A. JAMES  
J.S.C.

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