Hirsch v Fink
2010 NY Slip Op 31663(U)
June 21, 2010
Supreme Court, New York County
Docket Number: 112198/06
Judge: Eileen A. Rakower
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SCANNED ON 6/28/2010

[* 1]

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

PRESENT: RAKOWER
Justice

PART 15

Index Number : 112198/2006

HIRSCH, SAMUEL

VS.

FINK, STEPHEN

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. ____

MOTION DATE ____

MOTION SEQ. NO. ____

MOTION CAL. NO. ____

motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - Ex A-X
Answering Affidavits — Exhibits	2 - Ex A-F
Replying Affidavits	3 - Ex A

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
JUN 28 2010
NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

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

Dated: 6/21/10

HON. EILEEN A. RAKOWER J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

---X

SAMUEL HIRSCH,

Plaintiffs,

Index No. 112198/06

- against -

DECISION and ORDER

STEPHEN FINK,

Mot. Seq. 003

Defendants.

FILED
JUN 28 2010
NEW YORK
COUNTY CLERK'S OFFICE

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HON. EILEEN A. RAKOWER

Plaintiff Samuel Hirsch ("Hirsch"), an attorney, brings this action against Stephen Fink ("Fink") for alleged legal malpractice in the matter titled *Frankel v. Hirsch*, Index No. 27608/1998 ("the underlying action"). Fink now moves for summary judgment pursuant to CPLR §3212.

The underlying action was commenced by the plaintiff therein, Michael Stewart Frankel ("Frankel"), on or around December 16, 2008, and sought an accounting from Hirsch based upon the latter's alleged violation of a partnership agreement between the parties. According to Frankel's complaint, Frankel was a legal practitioner with specific expertise in the litigation of claims involving and arising from childhood lead poisoning. In or around late December 1992, Frankel and Hirsch entered into a partnership agreement whereby they would jointly advertise, retain clients, manage, and potentially litigate personal injury cases involving lead poisoning that came to them as a result of the advertising. Under the terms of the agreement, Hirsch was to provide $100,000 at the outset for advertising costs. Frankel was to contribute a third of the first $30,000 of advertising costs. Frankel and Hirsch were to share the profits in the form of net attorneys fees on the basis of 60% to Frankel and 40% to Hirsch, with respect to cases (lead poisoning and non-lead poisoning cases alike) that were retained as a result of the first $30,000 of advertising costs. Attorneys fees from cases obtained through advertising costs associated with the remainder of the $100,000 contributed by Hirsch were to be split 50-50. The

agreement provided that, in the event that Hirsch failed to make the agreed capital contribution, he would obtain a third of the profits in attorneys fees in cases retained as a result of the advertising.

According to Frankel's complaint, Hirsch breached his fiduciary obligations under the partnership agreement by (a) causing himself to be retained in his own name by clients who came to the partnership as a result of the advertising campaign; (b) deliberately secreting from Frankel the names of clients who had contacted the partnership; (c) deliberately secreting from Frankel cases retained by the partnership and cases retained by Hirsch's individual practice which rightfully belonged to the partnership; and failing and/or refusing to reveal to Frankel information as to the status and/or disposition of those cases.

On or around December 26, 1998, Hirsch, acting *pro se* at the time, appeared by verified answer with counterclaims in the underlying action, wherein he denied all allegations in Frankel's complaint and asserted two counterclaims: (1) claiming as an offset "any monies to be paid, the total cost of advertising, the total cost of hiring extra staff, disbursements expended in the prosecution of any retained lead cases, telephone bills as well as any other expenses associated with and undertaking the advertising campaign"; and (2) alleging that Frankel converted monies due and owing to Hirsch.

A preliminary conference in the underlying action was held on October 15, 1999. Hirsch, appearing through *per diem* attorney Larry Love, Esq., entered into a stipulation which provided, *inter alia*, as follows:

> [Hirsch] agrees to comply with [Frankel]'s notice for discovery and inspection served 2/5/99 & dated 2/4/99 by November 23, 1999.

Hirsch first retained Fink on or around May 22, 2000. However, Hirsch subsequently retained the law firm of Manton, Sweeney & Reich, which he believed would serve as a "counterweight" to Frankel's counsel.

A compliance conference in the underlying action was held on September 25, 2001. Hirsch testified at his deposition in the instant action that Mr. Reich was supposed to appear at the conference, but failed to do so. Although Hirsch sought an

[* 4]

adjournment of the conference, Hirsch testified that Justice Ritholtz directed him, to proceed with the conference, and to enter into a stipulation, over his objection, which provided, *inter alia*, the following:

> [Hirsch] is directed to comply and produce each item demanded in [Frankel's] notice for discovery and inspection dated 2/4/99including each document noticed... within 30 days of the date hereof or [Hirsch] shall be precluded at trial on all issues.

Some time after the September 25, 2001 conference, Hirsch ended his relationship with Manton, Sweeney & Reich and hired Sanford Young, Esq. as his attorney. Mr. Young assisted Hirsch in his efforts to comply with the September 25, 2001 stipulation. In his deposition testimony in the instant action, Hirsch described his efforts to comply with the stipulation as follows:

> Well, irrespective of the fact that it was overly broad and totally a fishing hunt, but we couldn't comply with the request because many of those records were no longer available.... And some had been misplaced. And so we had to write to the OCA and request copies of all retainer agreements and old files that had been put in closed and so forth, which was a massive job. We had to get copies of videotapes that were in the basement that we even had. So it was a massive undertaking. We – but we did comply subsequently. And Sanford Young in fact served all of the documents, a ton of documents gathered with copies of the videotapes and so forth. Numerous records.

Hirsch further testified that he believes that Mr. Young served the above discovery within thirty days of the stipulation. Mr. Young also represented Hirsch at a November 19, 2001 compliance conference and during the first two days of his deposition testimony.

The record indicates that some time in late 2001 or early 2002, Hirsch re-hired Fink to represent him. After Frankel filed his note of issue in the underlying action, Fink, once again acting as attorney for Hirsch, made a motion to strike the action

[* 5]

from the trial calendar. Frankel cross-moved for an order of preclusion against Hirsch based upon his alleged failure to comply with the September 25, 2001 stipulation. Fink submitted an affirmation in further support of Hirsch's motion to strike the note of issue and in opposition to the cross-motion for preclusion. By order dated June 20, 2002, Justice Allan B. Weiss granted Hirsch's motion to strike the underlying action from the trial calendar and denied Frankel's motion to preclude.

Frankel appealed the order, however, and on December 1, 2003, the Second Department reversed Justice Weiss' order, reasoning that

> As a result of [Hirsch's] failure to fully comply with a conditional order of preclusion dated September 25, 2001, that conditional order became absolute [citing cases]. To avoid the adverse impact of the conditional order of preclusion, the defendant was required to either comply with the order or to demonstrate an excusable default and a meritorious defense [citation omitted]. Since [Hirsch] neither complied with the order nor demonstrated the necessary criteria to excuse his failure to do so, the proper remedy was for the court to grant that branch of [Frankel's] cross motion which was to strike his answer and for an inquest on the issue of damages [citation omitted].

(*Frankel v. Hirsch*, 2 A.D.3d 399, 400 [2nd Dept. 2003]).

In accordance with the Second Department's decision, Justice Weiss issued an order on December 19, 2003 stating that

> As a result [of the striking of Hirsch's answer], [Hirsch] is deemed to have admitted all traversable allegations in the complaint, including the basic allegation of liability, but does not admit [Frankel's] conclusion of damages.
>
> Therefore, at inquest to determine [Frankel's] damages, [Hirsch] is entitled to a full opportunity to cross-examine witnesses, give testimony and offer evidence in mitigation of damages if such evidence involves circumstances

[* 6]

> intrinsic to the transaction at issue that, if proven, will be determinative of [Hirsch's] real damages, which cannot be established by the fact of the defendant's default. [citing cases]

On January 28, 2004, Frankel and Hirsch (through Fink as counsel) stipulated that the inquest would be referred to a judicial hearing officer ("JHO") for hearing and determination. After said stipulation, however, Hirsch retained the law firm of Snitow, Kanfer, Holtzer & Millus, LLP, and was represented at the inquest by Paul F. Millus and Linda Simmons, Esqs.[1] The inquest was held before JHO Allen Beldock on April 28-30, 2004, May 19, 2004, July 7-8, 2004, November 10-12, 2004, December 1, 2004, and March 23 and 30, 2005. The voluminous transcript of proceedings indicates, and JHO Beldock noted in his August 30, 2005 Memorandum Decision, that "the issues in the case were fervently contested and the defendant was given... extreme latitude in cross-examining witnesses and offering evidence as referred to... in Justice Weiss' order of December 19, 2003."

JHO Beldock further noted that, although the allegation in Frankel's complaint that a partnership commenced between Frankel and Hirsch in 1992[2], the date of the partnership's termination had to be determined at the inquest, as no termination date was alleged in the complaint. Based upon his review of the evidence adduced at the inquest, and through analysis of the applicable provisions of the Partnership Law, JHO Beldock found that "the relationship between [Frankel and Hirsch] was a partnership at will under the partnership law and that the partnership was dissolved on or about September 6, 1995 when there was a disagreement stemming from the case of Leandro Fermin v. Palmbeach...." JHO Beldock then made findings of fact as to which individual lawsuits fell under the Frankel and Hirsch partnership. Significantly, JHO Beldock noted that, in arriving upon his findings, he found the testimony of Hirsch to be "suspect," while Frankel's testimony was found to be credible.

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[1]The competence of Millus and Simmons' representation of Hirsch at the inquest is not called into question by Hirsch.

[2]The court notes that, although this portion was deemed admitted due to Hirsch's default, JHO Beldock also found that this fact was "confirmed by the evidence at the inquest and in an order of Judge Weiss of December 23, 2002."

[* 7]

Based on the foregoing, JHO Beldock concluded that "[Frankel] is entitled to the sum of $1,393239.00 as and for his partnership share of fees and disbursements," and "[Hirsch] is entitled to the sum of $620,101.00 as and for his partnership share of fees and disbursements."

Hirsch appealed JHO Beldock's decision to the Appellate Division, Second Department. By decision dated March 20, 2007, the Second Department affirmed JHO Beldock, reasoning that

> The trial court's determinations as to the date of dissolution of the parties' partnership, the lawsuits which belonged to the partnership, and the amount of the parties' share of partnership fees are supported by the record, and by its evaluation of the credibility of the parties at the inquest following the striking of [Hirsch's] answer by this court [citing cases]. Accordingly, we find no basis to disturb them.

Hirsch subsequently commenced this action against Fink, claiming that Fink's representation of Hirsch in the underlying action was negligent in several respects and, but for Fink's alleged negligence, Hirsch would have prevailed in the underlying action. Specifically, Hirsch's four causes of action allege that Fink was negligent in (1) failing to competently represent Hirsch with respect to, and during the course of Hirsch's deposition by failing to make a record and obtain rulings on repetitious and abusive questioning by Frankel, and by failing to have the deposition limited in time and scope; (2) agreeing to a "hearing and determination" before JHO Beldock rather than a "hearing and report," which would have required approval by Justice Weiss; (3) failing to either get Frankel to stipulate to appear for a deposition, or get an order directing that he appear for a deposition at a court conference; and (4) failing to clarify and/or modify the September 25, 2001 stipulation, resulting in the striking of Hirsch's answer.

Fink submits an affirmation in support of his motion for summary judgment. Fink argues that any alleged claims of legal malpractice are precluded by the doctrine of collateral estoppel, based upon JHO Beldock's decision at the inquest. Fink claims that, in addition to the action being precluded by collateral estoppel, Hirsch's second and fourth causes of action fail for additional reasons. As for the second cause of

action, Fink argues that the choice to have JHO Beldock hear and determine the matter was a reasonable decision on which reasonable minds may differ. With respect to the fourth cause of action, Fink asserts that his representation cannot be found to have caused the striking of Hirsch's answer since he did not represent Hirsch at the September 25, 2001 conference or during the thirty day period thereafter.

Hirsch submits an affirmation in opposition. Fink submits a reply affirmation in response.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

In order to prevail against an attorney on a legal malpractice claim, a plaintiff must first prove that the attorney was negligent, that such negligence was the proximate cause of the loss sustained, and that actual damages resulted therefrom (*see Tydings v. Greenfield, Stein & Senior*, 2007 NY Slip Op 6734, *2 [1st Dept. 2007]). In order to establish proximate cause, the plaintiff must demonstrate that he or she would have prevailed in the underlying matter "but for" the attorney's negligence (*id.*). If the plaintiff cannot demonstrate proximate cause, the malpractice action must be dismissed (*id.*).

Here, the court finds that based on JHO Beldock's decision after the inquest, Hirsch is collaterally estopped from asserting that, but for Fink's allegedly negligent representation, he would have prevailed in the underlying accounting action.

> Collateral estoppel, or issue preclusion, 'precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and

[* 9]

> decided against that party ..., whether or not the tribunals or causes of action are the same' (*Ryan v New York Tel. Co., 62 NY2d 494, 500*; *see also, Burgos v Hopkins, supra, 14 F3d, at 792*). The doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action (*Ryan v New York Tel. Co., supra, at 500-501*). '[T]he burden rests upon the proponent of collateral estoppel to demonstrate the identicality and decisiveness of the issue, while the burden rests upon the opponent to establish the absence of a full and fair opportunity to litigate the issue in [the] prior action or proceeding' (*id., at 501*). (*Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 349 [1999]).

The extensive record before the court indicates that Hirsch had a full and fair opportunity to contest each matter that Frankel alleged to be a partnership case by offering testimony and documentary evidence, and by cross-examining Frankel and his other witnesses. The termination date of the partnership was not alleged in Frankel's complaint, nor did the complaint name specific cases that allegedly belonged to the partnership. Thus, no cases were deemed admitted as partnership cases by virtue of the striking of Hirsch's answer. Moreover, JHO Beldock clearly states in his Memorandum Decision that his findings of fact as to when the partnership ended, and which cases belonged to the partnership, were predicated upon his weighing of the evidence presented and his assessment of the testimony elicited *at the inquest*.

Accordingly, Hirsch had a full and fair opportunity at the inquest to demonstrate that the cases underlying JHO Beldock's award of fees and disbursements to Frankel did not in fact arise out of the partnership. As JHO Beldock decided those issues against Hirsch, Hirsch is collaterally estopped from asserting that he would have prevailed against Frankel in the underlying accounting action, but for Fink's alleged negligence (*see Clark v. Golenbeck, Eiseman, Assor, Bell & Perlmutter*, 269 A.D.2d 180 [1st Dept. 2000]) (plaintiff collaterally estopped from asserting that defendant's malpractice is the proximate cause of loss where subsequent decision "which is not tainted by any claim of malpractice" demonstrates

that plaintiff would have incurred the same loss.).

Finally, the court notes that Hirsch cannot maintain an action for malpractice based upon Fink's entering into a stipulation to refer the underlying action to a JHO to "hear and determine," rather than to "hear and report." It is well settled that professional liability cannot attach where the challenged action is a reasonable strategic action or a mere error in judgment, rather than negligence (*Mars v. Dobrish*, 2009NY Slip Op 6768, *1 [1st Dept. 2009]).

Wherefore it is hereby

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed; and it is further.

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: June 21, 2010

EILEEN A. RAKOWER, J.S.C.

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