

Ehrlich v Robert L. Folks & Assoc., LLP

2011 NY Slip Op 31838(U)

May 17, 2011

Sup Ct, Nassau County

Docket Number: 18616/09

Judge: F. Dana Winslow

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SCAN

**SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK**

**Present:
HON. F. DANA WINSLOW,**

Justice

**ROBERT EHRLICH, 100 ROSLYN AVENUE, LLC,
and SEA CLIFF COFFEE COMPANY, INC.,**

**TRIAL/IAS, PART 4
NASSAU COUNTY**

Plaintiffs,

-against-

**MOTION SEQ. NO.: 001
MOTION DATE: 2/10/11**

**ROBERT L. FOLKS & ASSOCIATES, LLP,
ROBERT L. FOLKS, ESQ. and
CYNTHIA A. KOURIL, ESQ.**

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Defendants.

The following papers having been read on the motion (numbered 1-3):

Notice of Motion.....	1
Affirmation in Opposition.....	2
Reply Affirmation.....	3

Motion by defendants for an order pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) dismissing the First Cause of Action sounding in fraud and misrepresentation and dismissing the Fifth Cause of Action sounding in legal malpractice is determined as follows.

This is an action for legal malpractice. Plaintiff Robert Ehrlich on behalf of himself and the other named plaintiffs, commenced an action against the Incorporated Village of Sea Cliff, as well as various Village Boards and Officials, in the United States District Court, Eastern District of New York (the federal action). Plaintiffs in the federal action alleged that they were denied certain permits required to operate and maintain their business and were given permits only upon their compliance with onerous conditions imposed upon them. Plaintiffs' alleged that the denial of the permits, and the imposition of onerous requirements in the case of other permits stemmed from religious discrimination, and political animus, and was in violation of their equal protection and due process rights. Various state causes of action relating to the substance of the harms done to the plaintiffs were also asserted in the federal action. The defendants represented the plaintiffs in the federal court action beginning at a time in June of 2006, up through

and including the trial of the federal court action. The federal court dismissed many of the plaintiff's claims as a matter of law. The remainder of plaintiffs' claims were dismissed after a jury trial. Various state claims were preserved and remanded to the State Court.

The First Cause of Action in the Complaint alleges Fraud and Mis-representation. The Second, Third, Fourth, and Fifth Causes of Action allege Legal Malpractice.

Such First Cause of action alleges that due to the fraud and misrepresentation of the defendants' "ability, skill and experience in these types of matters" (plaintiffs' federal court claim), the plaintiff suffered damages of \$5,000,000 (Complaint, ¶ 327). Plaintiffs' Second and Third causes of action sound in legal malpractice, based on the defendants' "lack of skill and/or experience to represent plaintiffs in the federal court action" (¶ 327, 332). In the causes of action sounding in legal malpractice, the plaintiff also seeks \$5,000,000 in damages. Mr. Ehrlich's "understanding" that he can make a claim for fraud and misrepresentation in addition to a claim for legal malpractice is misplaced.

In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact that was false and known to be false by the defendants, made for the purpose of inducing the other party to rely on it, justifiable reliance of the other party on the misrepresentation or material omission, and injury or damages. *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413. Mr. Ehrlich's allegations as to the fraud and misrepresentation cause of action is in essence arguing that the defendants breached the retainer agreement by committing legal malpractice. A cause of action to recover damages for fraud cannot be maintained when fraud or misrepresentation alleged relates directly to the legal malpractice cause of action. *Biancone v Bossi*, 24 AD3d 582; *Rosen v Watermill Dev. Corp.*, 1 AD3d 424. Plaintiffs made the same allegations in both the fraud and legal malpractice causes of action and are duplicative. Moreover, the damages sustained by virtue of a fraud must be different or additional to those sustained by virtue of any malpractice. *Harkin v Culleton*, 156 AD2d 19. Where the fraud damages are the same, as in the within action, the plaintiffs' fraud claim cannot be maintained. *LaBrake v Enzien*, 167 AD2d 709.

Mr. Ehrlich makes the following statement under oath "... [defendants] went so far as to tell me that they would practically *guarantee* me a victory in the case!" (emphasis in original) (Robert Ehrlich Affidavit, ¶ 12). A representation of an opinion or prediction of something which is hoped or expected to occur in the future does not sustain

an action to recover damages for fraud or mis- representation. *Coccia v Liotti*, 70 AD3d 747; *Chase Investments, Ltd. v Kent*, 256 AD2d 298.

Defendants argue that the Fifth Cause of Action should be dismissed pursuant to CPLR 3211(a)(1) contending that they have a complete defense based on documentary evidence. The Fifth Cause of Action sounding in legal malpractice alleges that a reasonable attorney in the position of the defendants could have advised plaintiffs of the risks and/or benefits of appealing from the adverse decision in the federal court; and defendants failed to protect the plaintiff's appellate rights. (Complaint, ¶¶ 306-315; 348-352).

“To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim.” *Manfro v McGivney*, 11 AD3d 662; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314; *Jorjill Holding Ltd. v Greico Associates, Inc.*, 6 AD3d 500; *Arnav Industries, Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, LLP*, 96 NY2d 300. “However, factual allegations which are flatly contradicted by the record are not presumed to be true and “[i]f the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action” (*Peter F. Gaito Architecture, LLC v Simone Dev. Corp.*, 46 AD3d 530; see *Deutsche Bank Nat. Trust Co. v Sinclair*, 68 AD3d 914).

The documentary evidence consists of letters dated July 16, 2007 and July 19, 2007 from defendants to the plaintiff regarding a possible appeal of the jury verdict. Defendants assert that in addition to the two letters, several conversations were had with the individual plaintiff regarding the issue of appealing the judgment in the federal action, which took place from the very date of the verdict dismissing the federal claims, and remanding the state law claims to state court, up to and including July 19, 2007. Defendants contend that from June 21, 2007, the day of the jury verdict, discussions began with Robert Ehrlich regarding the prospects for appeal, as well as the work that would be needed, the time frame for filing a Notice of Appeal, the time frame for perfecting the appeal, and the costs involved. About a week later, defendants contend they spoke to Mr. Ehrlich in connection with another matter and again broached the subject of the appeal. According to the defendants, Mr. Ehrlich stated “I can't talk about

that now” and directed them to continue progress on the state court action. Defendants further argue that shortly thereafter, on July 5, 2007, they received a letter from the counsel for the Village of Sea Cliff, addressed to the Court, requesting permission to move for attorney’s fees. Defendants again discussed the appeal; and defendants allege Mr. Ehrlich unequivocally stated that he did not want to pursue the appeal, as he believed that this might dispose the Court to grant the Village permission to seek attorney’s fees. Defendants state that on Friday, July 6, 2007, Mr. Ehrlich’s father, via telephone, instructed defendants to file a Notice of Appeal, but exhibited a misunderstanding of the appeals process in federal court, and advised him that Mr. Ehrlich was the client, rather than the father, and that Mr. Ehrlich must contact the defendants if, in fact, he wished defendants to appeal the federal court judgment. Attorneys for defendants claim leaving several messages for Mr. Ehrlich on Monday, July 2, 2007 asking to discuss this issue. It appears that although Mr. Ehrlich’s father returned defendant’s call on July 10, 2007, defendants did not receive a return call from the individual plaintiff during that week. On Monday, July 16, 2007, defendants faxed the letter to Mr. Ehrlich explaining in detail the federal appeals process, allegedly including the time and expense involved. However, there is no mention of “expenses” in the detailed letter submitted as documentary evidence. Defendants state that on July 19, 2007, Mr. Ehrlich responded by telephone with a clear instruction that he did not want to appeal the judgment. Defendants state that upon receipt of these instructions, they wrote and faxed Mr. Ehrlich a letter confirming his instruction that they were not to file a notice of appeal of the judgment in the federal action, and sent it to him by fax and mail. (See Exhibit “E,” including fax transmittal sheet confirming plaintiff’s receipt of same). Again, defendants contend that Mr. Ehrlich did not contact them to dispute or discuss the contents of the letter.

Also included as part of the documentary evidence in support of the motion is a redacted invoice plaintiff law firm dated August 1, 2007, addressed to the defendants with the following notation:

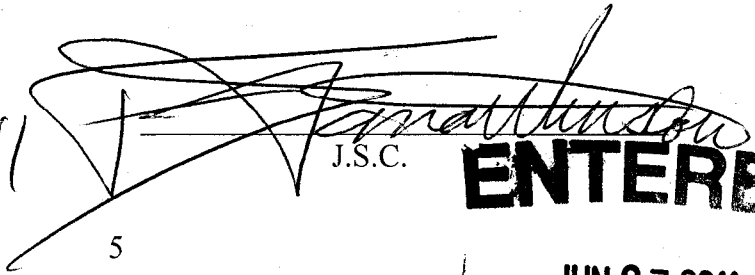
Meeting the RLF. Left telephone messages for Robert Ehrlich. Being preparation of Notice of Appeal and pre-argument started because of waning time. Telephone conference with Robert Ehrlich. Letter to Robert Ehrlich confirming that he has decided not to appeal.

In opposition, Mr. Ehrlich states he wanted to appeal and “as evidence of that, when I got back to my office at the end of the day, although I was feeling beaten from the jury’s verdict against me, I wrote a check to defendants in the amount of \$50,000 as a retainer deposit for the appeal. *A copy of my check dated June 20, 2007, is annexed hereto as Exhibit ‘1.’* It is interesting to note defendants do not talk about this check in their papers, despite the fact that it was clearly received and deposited by defendants.” (emphasis in original) (Robert Ehrlich’s Affidavit in Opposition. ¶ 24). Defendants assert that the position of the plaintiffs that Mr. Ehrlich wrote a check on June 20, 2007, in the amount of \$50,000 to cover an appeal of the jury verdict in the federal court is a fabrication and a distortion of the facts. According to the defendants, the billing records demonstrate that at the end of May, 2007, the plaintiffs owed the firm nearly \$70,000 and within 3 weeks, due to the cost of the trial, the plaintiffs owed defendants approximately \$200,000. Moreover, defendants argue that the plaintiffs produced no writings that accompanied the check, nor is there a notation on the check that it was to be used towards an appeal, rather than to pay for legal fees due and owing.

The billing statements submitted by the defendants are redacted. Defendants do not indicate the reason for redacting portions of the legal bill, or whether they will be requesting an *in camera* review of the unredacted bills in chambers. Consequently, the Court is constrained to deny the defendants’ motion to dismiss the Fifth Cause of Action. The motion for dismissal of the First Cause of Action sounding in fraud and misrepresentation is **granted**. The First Cause of Action is **dismissed**. The application to dismiss the Fifth Cause of Action is **denied** without prejudice to renew at the conclusion of discovery after certification and filing the Note of Issue.

A Preliminary Conference (see 22 NYCRR 202.12) shall be held at the Preliminary Conference Part, located at the Nassau County Supreme Court on the 6th day of July, 2011, at 9:00 AM in the basement. This directive, with respect to the date of the Conference, is subject to the right of the Clerk to fix an alternate date should scheduling require. The attorneys for the plaintiffs shall serve a copy of this order on the Preliminary Conference Clerk and the attorneys for the plaintiffs.

This constitutes the Order of the Court.

Dated: *May 17, 2011*  J.S.C. **ENTERED**

JUN 27 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**