

**Chibcha Rest., Inc. v David A. Kaminsky & Assoc.,
P.C.**

2011 NY Slip Op 32111(U)

August 1, 2011

Sup Ct, NY County

Docket Number: 112242/10

Judge: Judith J. Gische

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

HON. JUDITH J. GISCHE

PRESENT: _____

PART 10

Justice

Index Number : 112224/2010
CHIBCHA RESTAURANT, INC.
 vs.
DAVID A. KAMINSKY & ASSOCIATES, P.C.
 SEQUENCE NUMBER : 001
 DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

Cross-Motion: Yes No

AUG 02 2011


Upon the foregoing papers, it is ordered that this motion

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION

AUG 01 2011

Dated: August 1, 2011


HON. JUDITH J. GISCHA *s.c.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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
Chibcha Restaurant, Inc. d/b/a
Oxes Nightclub and Miguel Rojas,

Plaintiff (s),

-against-

David A. Kaminsky & Associates, P.C.,
David A. Kaminsky, Esq. and James A.
English, Esq.,

Defendant (s).
-----X

DECISION/ ORDER
Index No.: 112224/10
Seq. No.: 001

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

FILED

AUG 02 2011

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of
this (these) motion(s):
NEW YORK
COUNTY CLERK'S OFFICE

Papers	Numbered
Defs' n/m (3211) w/PJB, exhs	1
Pltfs' opp w/RB affid, MR affid, exh	2
Defs' reply w/exhs	3

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

GISCHE J.:

This is an action for legal malpractice and related claims. Defendants have brought this motion for the preanswer dismissal of this action (CPLR 3211 [a] [1], [4] and [7]). The motion is opposed by the plaintiffs who are defendants' former clients. The complaint and sworn affidavit of Miguel Rojas set forth the following facts, events and claims:

Facts

Miguel Rojas was at one time the principal of Chibcha Restaurant, Inc. the owner/operator of the "Oxes Nightclub" ("nightclub") in Queens, New York (collectively

"Rojas"). Rojas hired the law firm of David A. Kaminsky & Associates, P.C. to represent the plaintiff in connection with various disputes Rojas and his landlord were having regarding a liquor license, public assembly permit, cabaret license and certificate of occupancy. David A. Kaminsky, Esq. is a member of the law firm and Jonathan English, Esq. is associated with the firm as well. Hereinafter, these defendants are collectively referred to as the "Kaminsky defendants."

According to the complaint, Rojas paid the Kaminsky defendants to commence a lawsuit against the landlord and to bring an Order to Show Cause ("OSC") with a temporary restraining order ("TRO") (Index No. 12235/09). The TRO was for various relief, including a stay on the landlord taking steps to recover the premises where the nightclub was, disturbing or interfering with the nightclub's equipment, interfering with the nightclub obtaining a liquor license, preventing the landlord from cancelling the bond for the liquor license at the premises, and enjoining the landlord from making any alterations to the premises. The landlord was notified of the impending OSC with the TRO on May 9, 2009. Although the summons and complaint were filed with the court, the OSC was never presented to any judge for signature. The reasons for why the OSC was not presented forms the basis for Rojas' claims that defendants committed legal malpractice.

On May 28, 2009, the landlord commenced an action against the Rojas herein (J&J Alarcon Realty Corp and Jorge Alarcon v. Miguel Rojas and Chibcha Restaurant, Inc. d/b/a Oxe's, Index No. 13972/09) by bringing an OSC with a TRO. The TRO was to enjoin Rojas from operating any establishment at the premises until it obtained a liability insurance policy with a \$3 million limit for personal injury and \$500,000 limit for

property damage. Other branches of the TRO were to enjoin Rojas herein from operating a strip club, using the liquor license for the premises to sell alcohol at the club, prohibiting dancing at the club and the distribution of any advertising or marketing materials for the club. Among the allegations made by the landlord was that Chibcha had at one time been a reputable establishment, but that after the landlord's principal decided to retire and sold his shares in the business to Rojas, Rojas decided to establish Oxes. According to the landlord, Oxes – or “Sexo” spelled backwards – was a strip joint, complete with pole dancing. The landlord claimed that Rojas was using its liquor license at the premises and that it did not approve of such use of the premises. Furthermore, the activities at the club were strictly forbidden under the lease which prohibited “topless dancing or any other type of distasteful entertainment at the demised premises.”

On May 28, 2009, after Attorney English appeared to argue in opposition to the landlord's application, Hon. Orin Kitzes granted the landlord's TRO, effectively shutting down the club until Rojas showed proof the club was insured, preventing him from using the landlord's liquor license and other relief set forth in the half-page long TRO.

Shortly thereafter, on June 8, 2009, Rojas terminated the Kaminsky defendants as counsel. They hired a new attorney (Ravi Batra, Esq.) who now represents plaintiffs in this action. Attorney Batra contends that he succeeded in having the TRO vacated because he “marshaled significant documentary evidence and presented it to [the judge] as a 40 exhibit opposition to the landlord's OSC.” In Judge Kitzes' decision on the landlord's OSC, he set forth the material elements of Rojas' dispute with the landlord, principally that Rojas was operating a strip club at the premises without a

cabaret license, that he had failed to obtain his own liquor license and that he was using the landlord's liquor license. In deciding to vacate the TRO and deny the landlord's motion for a preliminary injunction, Judge Kitzes wrote that although the landlord's submissions and the affidavit of its principal supported the claims in the complaint and the need to enjoin Rojas' activities, Rojas had successfully opposed the motion by persuading the court that "the balance of equities does not favor either side" and the court "was not satisfied that money damages are not capable of providing plaintiffs [the landlord] with a sufficient remedy."

In the action at bar, Rojas contends that the Kaminsky defendants offered substandard legal representation (1st cause of action) because they "tipped off" the landlord that the OSC was about to be filed but then did not file it, caused the landlord to gain a significant tactical advantage over Rojas. Rojas contends his business suffered because he was shut down for over 21 days resulting in lost net revenue of \$32,500. Rojas contends this eventually forced him to sell the business in February 2010 at a loss.

The complaint further alleges that although Rojas paid the Kaminsky defendants a fee to file the Summons and Complaint and bring an OSC, the Kaminsky defendants only filed the complaint but did not proceed with presenting the motion to any judge for signature. Rojas alleges that the defendants simply placed the check for the motion fee in its file and then had the temerity to bring an action for legal fees in Civil Court (David A. Kaminsky, P.C. v. Chibcha Restaurant, Inc. et al, Civil Court, N.Y. Co., Index no. 043060 CV 2009) ("legal fees action"). Rojas claims that by preparing the OSC but not filing it and then seeking to be paid for the work they did, defendants not only churned

the file and delayed Rojas' Queens action for their personal gain, they commenced the Civil Court action in violation of Judiciary Law § 487. According to Rojas, the Kaminsky firm had a duty to disclose in the Civil Court action that they were terminated for cause and that by failing to disclose that fact, the default judgment they obtained against him for almost \$10,000 in legal fees action, he is entitled to statutory (treble) damages.

In support of his cross motion in Civil Court to vacate the enforcement of the money judgment for the legal fees, "compensatory damages of \$850,000" and "treble damages pursuant to Judiciary Law § 487." Rojas also asks that Judge Payne stay the Civil Court action "for issue to be joined in the related New York County Supreme Court matter [so that] Miguel Rojas [can] move in Supreme Court for removal and consolidation pursuant to CPLR § 602."

Rojas' 3rd cause of action is for negligent hiring. He claims David A. Kaminsky, Esq., the principal of the David A. Kaminsky, P.C., was negligent in hiring and retaining James A. English, Esq. According to the complaint, the fact that the landlord was able to obtain a TRO against the nightclub – even though Attorney English appeared in court to oppose it – is testament that he lacks the skill and experience necessary to properly serve his clients.

In support of their motion to dismiss, defendants first argue that the second cause of action based upon alleged violations of Judicial Law § 487 is a collateral attack on the judgment the Kaminsky firm obtained in the Civil Court action that Rojas is in the process of trying to have vacated. Defendants argue that, in any event, that because Rojas defaulted in that action the issue of whether the firm was terminate for cause was never raised because it was Rojas' obligation to raise that defense.

The Kaminsky defendants deny they were negligent in how they handled Rojas' case against the landlord. They claim that once the landlord's attorney received notice of the impending OSC with TRO, the landlord's attorney notified them that Rojas was operating the nightclub without any liability insurance in place to protect the landlord. The Kaminsky defendants deny they missed any kind of a deadline or failed to act in a manner required by law resulting in Rojas losing any kind of legal right. According to the Kaminsky defendants, this case is simply about strategic choices by a lawyer which displeased the client. The Kaminsky defendants contend that whatever merit or demerit their legal tactics had, the real reason the TRO was granted was that there was no insurance in place until *after* the landlord brought its motion.

The Kaminsky defendants also argue that plaintiffs have failed to state a claim for negligent hiring and retention because there is no claim that the Kaminsky firm was aware of any inability by Attorney Kaminsky or Attorney English to perform competently and a poor result at the argument of the TRO is insufficient to support such a claim.

Rojas denies he is collaterally estopped from asserting his Judiciary Law § 487 claim because of the Civil Court action or that this case is simply about disagreeing with the Kaminsky defendants' legal tactics. Rojas contend the Kaminsky defendants unnecessarily tipped off the landlord about the OSC that was to be filed which prompted the landlord to then raise the issue of insurance which had never come up before that. Rojas contends this irreparably damaged him and his business.

Rojas argues that there is also a procedural basis for denying defendants' motion because they only attached the complaint but not the 40 exhibits which annexed to it. According to Rojas, the failure to include the exhibits is fatal to the motion

because it presents a false record and is incomplete.

Discussion

Regardless of which subsection of CPLR 3211[a] a motion to dismiss is brought under, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 [2002]; Leon v. Martinez, 84 N.Y.2d 83, 87 [1994]).

Defendants' motion is based upon documentary evidence, another action pending between the parties involving the same claims and failure to state a cause of action (CPLR §§ 3211 [a] 1, 4, and 7).

Prior Action Pending

The Civil Court legal fees action is based on an account stated. In his cross motion to have the default against him vacated and enforcement stayed, Rojas argues that the Kaminsky firm perpetrated a fraud against the court by not disclosing that defendants were discharged for cause. If, as claimed by Rojas, the Kaminsky defendants were terminated for cause and should have disclosed that information to the judge in the Civil Court then Rojas' remedy lies "exclusively in that lawsuit itself, i.e., by moving pursuant to CPLR 5015 vacate the civil judgment due to its fraudulent procurement, not a second plenary action collaterally attacking the judgment in the original action" (Yalkowsky v. Century Apartments Associates, 215 A.D.2d 214 [1st Dept 1995]). Whether Judiciary Law § 487 is asserted by Rojas as a defense in the Civil Court or a direct claim in the action at bar, the claims are indistinguishable from one another. The Kaminsky defendants' motion for the dismissal of the action at bar is

granted (CPLR 3211 [a][4]). The dismissal is, however, without prejudice to Rojas raising the dismissed claims in the Civil Court action.

Legal Malpractice

Legal malpractice consists of the failure of an attorney to exercise that degree of skill commonly exercised by an ordinary member of the legal community, resulting in damages to the client (Lewis v. Desmond, 187 A.D.2d 797 [3rd Dept 1992]). To properly support a claim for legal malpractice action, the client must meet the “case within a case” requirement, demonstrating that “but for” the attorney's conduct, the client would have prevailed in the underlying matter or would not have sustained any ascertainable damages (Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., 10 A.D.3d 267 [1st Dept 2004]).

Rule 202.f of the Uniform Rules – Trial Courts mandates that a party seeking a stay notify the party against whom the stay is sought of the time, date and place that the application will be made. Such notification must be made in advance. The Kaminsky defendants' notification to the landlord of the impending OSC was in compliance with this requirement. Although it was not actually presented to any judge for signature, the claim by Rojas that the landlord was “tipped” off, does not support a claim for legal malpractice. One the landlord learned of the proposed TRO, the landlord notified the Kaminsky defendants that the nightclub was not properly insured- something Rojas himself did not apparently tell his attorneys. The decision thereafter not to present the OSC after learning this information is, at worst, an error in judgment by the Kaminsky defendants. Neither an error in judgment, nor in choosing a reasonable course of action constitutes malpractice (Hand v. Silberman, 15 A.D.3d 167

[1st Dept. 2005]). “An attorney is not held to the rule of infallibility and is not liable for an honest mistake of judgment where the proper course is open to reasonable doubt” (Bernstein v. Oppenheim & Co., 160 A.D.2d 428, 430 [1st Dept 1990]). Rojas does not deny that he was improperly insured at the applicable time.

Although Rojas claims his rights were prejudiced because the landlord was tipped off of the OSC that was never presented, it is clear from Judge Kitze’s decision that the absence of proper insurance for the nightclub was an important reason for why the landlord’s TRO was granted. The landlord also presented Judge Kitze with persuasive evidence that Rojas was, in fact, operating some kind of unlicensed cabaret. Accepting allegations set forth in the complaint as true, and giving them the benefit of every favorable inference, Rojas has failed to provide any facts tending to show that Kaminsky’s failure to present the OSC proximately caused the injuries alleged. The damages (if any) sustained by Rojas are directly attributable to the landlord’s success with its own motion, shutting down the club until the proper insurance, etc., was in place (SantaMarina v. Citrynell, 203 A.D.2d 57 [1st Dept 1994]).

There are no facts tending to show that even if the Kaminsky firm prepared OSC had been presented to the court it would have been successful in obtaining the relief requested. There are no facts tending to show that the Kaminsky defendants either missed any deadlines or failed to protect or preserve Rojas’ rights. Therefore, Rojas has failed to state a cause of action for legal malpractice and, therefore, the 1st cause of action is hereby dismissed (CPLR 3211 [a][7]).

Negligent hiring and retention

This claim holds an employer accountable for a tort committed by an employee

against a third person “when the employer has either hired or retained the employee with knowledge of the employee's propensity for the sort of behavior which caused the injured party's harm” (Sandra M. v. St. Luke's Roosevelt Hosp. Center, 33 A.D.3d 875, 879 [2nd Dept 2006]). A necessary element of a cause of action for negligent hiring is that the employer knew or should have known of an employee's propensity for the conduct that caused the injury (Doe v. Whitney, 8 A.D.3d 610 [2nd Dept. 2004]; Gomez v City of New York, 304 A.D.2d 374 [1st Dept 2003]). The complaint contains no facts supporting this cause of action based upon acts or inaction by either Attorney Kaminsky or Attorney English. Rojas insists that Attorney English's presence in court when the landlord prevailed in obtaining its TRO is evidence that Attorney English is unskilled. That argument is unavailing. Losing an argument happens to the best of attorneys and this fact does not support a negligent hiring and retention cause of action. Moreover, as previously stated, Attorney English had nothing to do with Rojas failure to obtain insurance. Therefore, defendants' motion for the dismissal of this cause of action is also granted.

Conclusion

In accordance with the forgoing,

It is hereby

ORDERED that defendants' motion for the preanswer dismissal of the legal malpractice (1st cause of action) and negligent hiring claims (2nd cause of action) asserted by plaintiffs is granted; those claims are hereby severed and dismissed; and t is further

ORDERED that defendants' motion for the preanswer dismissal of the Judiciary Law § 487 based claim is also dismissed but without prejudice to plaintiffs' seeking relief in the Civil Court action; and it is further

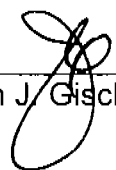
ORDERED that the Clerk shall enter judgment against plaintiffs Chibcha Restaurant, Inc. d/b/a Oxes Nightclub and Miguel Rojas, in favor of defendants David A. Kaminsky & Associates, P.C., David A. Kaminsky, Esq., and James A. English, Esq., dismissing this action in its entirety with costs and disbursements to the defendants as taxed by the Clerk of the Court; and it is further

ORDERED that any relief not specifically addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
August 1, 2011

So Ordered:



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

FILED

AUG 02 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

Index Number : 101116/2009
REITKNECHT, SEYMOUR
vs.
REITKNECHT, SEYMOUR
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

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 transferred*

per de novo appeal to motion 89001

FILED

AUG 02 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/12/11

[Signature]
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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