

**Sessa v Himmelstein, McConnell, Gribben,  
Donoghue & Joseph**

2011 NY Slip Op 33729(U)

August 17, 2011

Supreme Court, New York County

Docket Number: 113860/2010

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: [Signature]  
Justice

PART 1

Index Number : 113860/2010  
SESSA, MARIA  
vs.  
HIMMELSTEIN, MCCONNELL  
SEQUENCE NUMBER : 001  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

n this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1, 2  
3, 4  
5, 6

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

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

FILED

AUG 22 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 8/17/11 [Signature]

HON. EILEEN A. BACOWER <sup>J.S.C.</sup>

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: PART 15

-----X  
MARIA SESSA,

Plaintiff,

Index No.  
113860/10

- against -

**DECISION  
and ORDER**

HIMMELSTEIN, MCCONNELL, GRIBBEN,  
DONOGHUE & JOSEPH,

**FILED** Mot. Seq.  
001

Defendant.

AUG 22 2011

-----X  
LION. EILEEN A. RAKOWER, J.S.C.

NEW YORK  
COUNTY CLERK'S OFFICE

Maria Sessa ("Plaintiff") brings this action against the law firm of Himmelstein, McConnell, Gribben, Donoghue & Joseph ("the Firm") alleging legal malpractice in connection with a landlord-tenant matter in which the firm provided legal representation.

According to her complaint, Plaintiff first occupied Apartment 2E in the building located at 25 Fifth Avenue in New York County ("the Apartment") in 2002 as a subtenant. She became the tenant of record in 2004 pursuant to a two-year lease running from May 1, 2004 through April 30, 2006. The lease stated that the Apartment was not subject to the Rent Stabilization Law, and provided for a monthly rent of \$2,500. Plaintiff claims that the landlord advised her that, prior to taking occupancy of the Apartment as tenant of record, the Apartment would be renovated. However, when she occupied the Apartment as tenant of record, it was clear that no major renovations justifying an increase in rent had been undertaken.

Plaintiff states that on March 3, 2006, she retained William Gribben, Esq., a partner at the Firm, to ascertain whether the landlord was overcharging rent. On March 9, 2006, Gribben wrote to the landlord asserting that the Apartment was rent stabilized and that Plaintiff was being overcharged. On or around March 29, 2006, Plaintiff, Gribben, and the landlord conducted an inspection of the Apartment. Plaintiff states that upon inspection, it was apparent that the landlord had not

undertaken improvements that would qualify the Apartment for removal from rent stabilization. Plaintiff states that, as per the advice of counsel, she retained possession of the Apartment at the conclusion of her lease and withheld rent beginning in May 2006.

Plaintiff states that on or around February 19, 2008, Gribben filed a rent overcharge complaint with the New York State Division of Housing and Community Renewal ("DHCR"). On or around February 2, 2009, DHCR ruled in Plaintiff's favor, holding that (1) the landlord overcharged Plaintiff by \$1,151.63 per month; and (2) the landlord was liable for treble damages, having failed to prove that the overcharge was not willful. Plaintiff was awarded a total of \$58,233.15 for the overcharge, for charging an illegal brokerage commission and for holding an illegal deposit.

Plaintiff alleges that "[b]ecause the Rent Stabilization Law and the Rent Stabilization Code limit an award of treble damages to the two (2) year period prior to the filing of the DHCR Complaint and because Gribben had advised Sessa to withhold rent from May 2006, DHCR could only award treble damages for March and April 2006." Plaintiff contends that the Firm owed her "a duty to timely file the DHCR Complaint." Had the Firm filed prior to May 2006, she argues, DHCR would have awarded treble damages for 24 months, and Plaintiff would have received a total award of \$108,875.15 - \$50,642 more than she received.

Plaintiff further alleges that despite being entitled to recover her attorney's fees from the DHCR Complaint, the Firm failed to seek attorney's fees. Thus, she was further damaged in the amount of \$16,475. 86.

Presently before the court is a motion by the Firm for dismissal of the action pursuant to CPLR §3211(a)(1) & (7). The Firm argues that Plaintiff's complaint fails to make out any of the elements required for a legal malpractice claim, much less all of them. The Firm states that, even assuming that its February 2008 commencement of the rent overcharge proceeding with DHCR was negligent, Plaintiff cannot establish that such negligence was the proximate cause of Plaintiff's claimed damages. Further, the Firm claims that Plaintiff cannot demonstrate that she sustained actual damages, because the "lost" treble damages are punitive damages not recoverable in a legal malpractice action. The Firm further states that Plaintiff's claim with respect to attorney's fees must fail because Plaintiff has failed to pay the Firm for its representation of her.

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]). On a motion to dismiss pursuant to CPLR §3211(a)(1) “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted) “When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

To establish a cause of action for legal malpractice, the plaintiff must show (1) that the attorney was negligent in failing to exercise that degree of care, skill and diligence commonly exercised by an ordinary member of the legal community; (2) that but for the attorney's negligence, plaintiff would have prevailed in the underlying action; and (3) that actual damages were sustained as a direct result of the attorney's actions.

(*Wilson v. City of New York*, 294 A.D.2d 290, 293 [1st Dept. 2000]) (citation omitted).

Here, Plaintiff's claim is based on the theory that, had the Firm acted with the care and skill of an ordinary attorney, it would have quickly filed an overcharge complaint with DHCR. This would have allowed Plaintiff to fully capitalize on the provisions of the Rent Stabilization Law and Rent Stabilization Code which award treble damages for a period of two years prior to the filing of the complaint for willful overcharges (*see* NYC Admin. Code §26-516; 9 NYCRR §2526.1). Because the “lost” damages Plaintiff claims are punitive in nature, (*see H.O. Realty Corp. v. DHCR*, 2007 NY Slip Op 7768, \*5 [1st Dept. 2007]) (“By any reasonable measure, treble damages amount to a substantial penalty. It is punitive in nature and obviously designed to severely punish owners who deliberately and systematically charge

tenants unlawful rents, while deterring other owners of stabilized premises who might be similarly inclined”), she cannot recover them from the Firm, even assuming *arguendo* that the Firm was negligent. The First Department has held that “[i]t would be ‘illogical’ to hold [a] law firm liable for causing the loss of a claim for punitive damages which are meant to punish the wrongdoer and deter future similar conduct.... Recognition of plaintiff’s claim would not further the purpose of punitive damages to punish and deter” (*Summerville v. Lipsig*, 270 A.D.2d 213 [1st Dept. 2000]) (citations omitted).

Moreover, to the extent that Plaintiff claims malpractice by virtue of the Firm’s failure to pursue attorney’s fees, Plaintiff does not dispute the Firm’s contention that she has failed to pay the Firm for the legal services it performed. Plaintiff cannot claim that she was damaged by the Firm’s failure to seek attorney’s fees when she failed to pay the costs that attorney’s fees would compensate her for in the first instance.

Wherefore it is hereby

ORDERED that the Firm’s motion to dismiss the complaint herein is granted and the complaint is dismissed in its entirety, with costs and disbursements to Defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly.

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

DATED: August 17, 2011

  
EILEEN A. RAKOWER, J.S.C.

**FILED**

HON. EILEEN A. RAKOWER

AUG 22 2011

NEW YORK  
COUNTY CLERK'S OFFICE