

First Mercury Ins. Co. v Damato & Lynch LLP

2026 NY Slip Op 30348(U)

February 2, 2026

Supreme Court, New York County

Docket Number: Index No. 159185/2019

Judge: Kathleen Waterman-Marshall

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

PRESENT: HON. KATHLEEN WATERMAN-MARSHALL PART 31

Justice

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FIRST MERCURY INSURANCE COMPANY ACTING
THROUGH ITS AGENT RIVERSTONE CLAIMS
MANAGEMENT, LLC,

Plaintiff,

- v -

DAMATO & LYNCH LLP, LUKE LYNCH, ARTURO BOUTIN,
MICHAEL HAIG, ROBERT LANG, JOHN DOES 1-20, JANE
DOES 1-10

Defendant.

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INDEX NO. 159185/2019
MOTION DATE 01/23/2024
MOTION SEQ. NO. 010

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 010) 241, 242, 243, 247, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 271

were read on this motion to/for DISMISSAL.

This matter was administratively transferred to Part 31 after the motion was fully submitted. Following the administrative transfer, this Court held oral argument on the motion.

Upon the foregoing documents and oral argument, the motion by defendant Robert Lang, Esq. (“Mr. Lang”) to dismiss the action under CPLR 3211(a)(1) and (7) and CPLR 3103 is granted.

Background

Plaintiff First Mercury Insurance Company (“First Mercury”) engaged Riverstone Claims Management, LLC (“Riverstone”) to be its claims administrator. Riverstone engaged defendant law firm D’Amato & Lynch (“D’Amato & Lynch”) to represent First Mercury’s policyholders in various lawsuits throughout the country, pursuant to an Engagement Agreement dated August 14, 2017. First Mercury contends that, during all relevant times discussed in the amended complaint, defendant Arturo Boutin, Esq. (“Mr. Boutin, Esq.”) was an attorney and limited partner working at D’Amato & Lynch under the supervision of Mr. Lang, and that defendant Luke Lynch, Esq. (“Mr. Lynch”) was the sole general and equity partner, and the only individual with authority to access D’Amato & Lynch’s financial records and trust account.

This action alleges, in the main, legal malpractice arising out of the alleged mishandling of settlement proceeds in litigation handled by D’Amato & Lynch in the personal injury action *Cox v Linco Restoration Corp., et. al* (NY County Index No. 9423/2012, hereinafter “Cox matter”). As a general matter, First Mercury contends that when a matter settled, Riverstone would disburse settlement funds directly to the settling party, except for those situations in which

settlement funds could not be directly disbursed. In such cases, Riverstone would send the funds to D'Amato & Lynch to hold pending disbursement.

First Mercury alleges that in October 2018, Mr. Boutin advised Riverstone that the *Cox* matter had settled for \$1 million and, pursuant to his instructions, Riverstone issued the settlement check to D'Amato & Lynch's trust account to be held pending receipt of the executed settlement documents. Instead of depositing the settlement funds into D'Amato & Lynch's client trust account, the funds were deposited into D'Amato & Lynch's operating account (*see In re Matter of Lynch*, 206 AD3d 70 [1st Dept 2022] [*Cox* settlement comingled in D'Amato & Lynch operating account]). According to First Mercury, throughout January and March 2019, Mr. Boutin provided updates to Riverstone stating that the firm was working towards resolving the *Cox* matter and disbursing the settlement funds.

Mr. Lang retired from D'Amato & Lynch on April 1, 2019. In June 2019, approximately six-months after receiving the *Cox* settlement funds, D'Amato & Lynch – without specifying who – allegedly advised it could no longer provide legal services pursuant to the Engagement Agreement and terminated the agreement. Riverstone sought to locate the *Cox* settlement funds, and contends that D'Amato & Lynch's non-attorney comptroller, defendant Michael Haig (“Mr. Haig”), falsely advised in June 2019 that all settlement funds had been deposited into D'Amato & Lynch's client trust account and had already been released to the settling party – despite the *Cox* matter's settlement funds having been deposited into D'Amato & Lynch's operating account and not released to the settling party. First Mercury alleges that on August 1, 2019, it learned, for the first time, from Mr. Lynch's brother (who had apparently been retained to assist with the firm's finances) that the *Cox* settlement funds had been improperly deposited into the firm's operating account instead of its trust account. That same day, First Mercury demanded return of the \$1 million settlement. First Mercury contends that the following day Mr. Lynch's brother advised that D'Amato & Lynch was regularly comingling settlement funds with the firm's operating account. D'Amato & Lynch has not returned the \$1 million *Cox* settlement.

On May 31, 2022, Mr. Lynch was indefinitely suspended from the practice of law pending resolution of disciplinary matters before the Attorney Grievance Committee due to comingling of the *Cox* matter's settlement check with D'Amato & Lynch's operating account, along with the comingling of three other separate settlements (*In re Matter of Lynch*, 206 AD3d 70 [1st Dept 2022]).

Discussion

On a motion to dismiss, the complaint should be liberally construed, the facts presumed to be true, and the pleading accorded the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83 [1994]). “Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*id.* at 88 citing *Heaney v Purdy*, 29 NY2d 157 [1971]). “When evidentiary material is considered, the criterion is whether the [plaintiff] has a cause of action, not whether [they] have stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]).

On a motion to dismiss under CPLR 3211(a)(7) for failure to state a claim, the complaint is likewise afforded the benefits of liberal construction, a presumption of truth, and any favorable

inference (*see e.g. M & E 73-75, LLC v 57 Fusion LLC*, 189 AD3d 1 [1st Dept 2020]; *Askin v Department of Educ. of City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]). The motion must be denied if, from the four corners of the pleadings, “factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001] [internal quotation omitted]). A complaint should not be dismissed so long as, “when the plaintiff’s allegations are given the benefit of every possible inference, a cause of action exists,” and a plaintiff may cure potential deficiencies in its pleading through affidavits and other evidence (*R.H. Sanbar Projects v Gruzen Partnership*, 148 AD2d 316, 318 [1st Dept 1989]). However, bare legal conclusions and factual allegations which are inherently incredible or contradicted by documentary evidence are not presumed to be true (*Mark Hampton, Inc. v Bergreen*, 173 AD2d 220 [1st Dept 1991]).

I. Professional Negligence

Plaintiff’s claim for legal malpractice / professional negligence against Mr. Lang is dismissed as both refuted by the documentary evidence and for failure to state a claim. Section III (C) of the Engagement Agreement between D’Amato & Lynch and Riverstone states “[D’Amato & Lynch] does not represent Carrier or Riverstone.” Additionally, Section VII (I) of the Engagement Agreement is entitled “No Attorney Client Relationship” and provides, in relevant part:

This Engagement Agreement is not intended to create an attorney-client relationship between NCC [D’Amato & Lynch] and Riverstone, or any other party other than the tripartite relationship recognized by the courts in certain states, including California. The only attorney-client relationship intended to be created is between NCC [D’Amato & Lynch] and Insureds whom NCC will defend pursuant to this Engagement Agreement.

(NYSCEF Doc. No. 242).

Consequently, the documentary evidence establishes that there is no attorney-client relationship between First Mercury and the attorneys at D’Amato & Lynch. “New York courts impose a strict privity requirement to claims of legal malpractice; an attorney is not liable to a third party for negligence in performing services on behalf of his client” (*Lavanant v General Acc. Ind. Co.*, 164 AD2d 73, *aff’d*, 79 NY2d 623 [1st Dept 1990]; *Zhang v Lau*, 210 AD3d 829 [2d Dept 2022] [“The existence of an attorney-client relationship is an essential element of a cause of action to recover damages for legal malpractice”]). In the absence of such privity, the “plaintiff must set forth a claim of fraud, collusion, malicious acts, or other special circumstances in order to maintain a cause of action [for legal malpractice]” (*AG Capital Funding Partner, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582 [2005] [internal quotation omitted]). The amended complaint does not assert a claim of fraud, collusion, malicious act, or any special circumstances as against Mr. Lang.¹ As more fully discussed herein, the amended complaint does not allege that Mr. Lang was involved in any aspect of the mishandling or comingling of settlement checks beyond being copied on emails sent by Mr. Boutin and an email Mr. Lang sent to Riverstone complaining about the financial circumstances of the Engagement Agreement. Accordingly, the

¹ In failing to assert any factual claims of fraud, the complaint necessarily fails to plead with the requisite detail and particularity required under CPLR § 3016(b).

claim for malpractice / professional negligence as against Mr. Lang is dismissed for want of an attorney-client relationship or a claim of fraud, collusion, malicious acts, or other special circumstances.

Assuming that an attorney-client relationship or privity existed between First Mercury and D'Amato & Lynch sufficient to support a legal malpractice / professional negligence claim, Mr. Lang, as a limited partner, is only liable “for any negligent or wrongful act or misconduct committed by him ... or by any person under his supervision and control” or to the extent that “a majority of the partners shall have agreed” (Partnership Law § 26[c] and [d]). The complaint does not allege any direct personal involvement by Mr. Lang in the mishandling of the *Cox* settlement funds (*Ederer v Gursky*, 9 NY3d 514, 523-24; *LaRock & Perez, LLP v Song Joon Sim*, 118 AD3d 473 [1st Dept 2014]). The only reference to Mr. Lang’s involvement with the settlement funds is Mr. Boutin copying Mr. Lang on email correspondence with Riverstone in which Mr. Boutin advised of the *Cox* settlement, confirmed receipt of the *Cox* settlement check, informed Riverstone that Mr. Boutin hand-delivered the check to Mr. Haig, and provided updates on the settlement between January 2019 and March 2019. Nothing in any of these emails could suggest to Mr. Lang that D'Amato & Lynch had comingled or mishandled the *Cox* settlement funds. First Mercury’s reliance on an email from Mr. Lang in November 2018, which allegedly requested financial relief because D'Amato & Lynch was facing financial hardship under the Engagement Agreement, does not indicate a comingling of funds or support an inference that Mr. Lang knew or should have known the *Cox* settlement would be comingled. Thus, to survive dismissal, the amended complaint must assert a sufficient claim that Mr. Lang supervised Mr. Boutin.

First Mercury’s conclusory allegation that Mr. Lang supervised Mr. Boutin’s work because Mr. Lang signed the Engagement Agreement on behalf of D'Amato & Lynch is not entitled to a presumption of truth and is insufficient to hold Mr. Lang vicariously liable for Mr. Boutin’s or Mr. Haig’s alleged actions.² It is not a reasonable inference, as First Mercury contends, that the attorney who signed the Engagement Agreement on behalf of the firm necessarily becomes the supervising attorney for all matters under the Engagement Agreement. Furthermore, under the terms of the Engagement Agreement, both Mr. Lang and Mr. Boutin comprise “the team of supervising lawyers (“NCC Team”) listed on Exhibit A attached”; the agreement does not provide that Mr. Lang would supervise Mr. Boutin (Engagement Agreement Section “II. Team”). Thus, the documentary evidence demonstrates that both Mr. Lang and Mr. Boutin were “supervising lawyers,” refuting First Mercury’s conclusory claim that Mr. Lang supervised Mr. Boutin. The amended complaint’s allegation that Mr. Lang negotiated the *Cox* settlement amount is separate and apart from the allegation that Mr. Lang mishandled or comingled the *Cox* settlement funds. Stated differently, it is not reasonable to infer that an attorney, who did not receive or process a settlement check, is responsible for the mishandling or comingling of the settlement check simply because that attorney negotiated the settlement amount.

Additionally, the amended complaint alleges that Mr. Lynch was the only partner at D'Amato & Lynch with authority to review the firm’s financial accounts and the sole signatory on the firm’s trust account (¶¶ 30-34 and 83) and Mr. Lang confirmed that he did not have access

² A default judgment was granted as against Mr. Haig (NYSCEF Doc. No. 274).

to the firm's accounts. Put simply, the complaint does not allege any facts that Mr. Lang was involved in the mishandling or comingling of the *Cox* settlement funds and the documentary evidence demonstrates that Mr. Lang and Mr. Boutin were both supervising attorneys (not one supervising the other). Thus, the claim for professional negligence / legal malpractice is dismissed as against Mr. Lang.

II. Breach of Fiduciary Duty

The breach of fiduciary duty claim is duplicative of the legal malpractice / professional negligence claim, as both claims arise out of the same facts and allege the same damages, and dismissal is warranted on that basis (*Cobble Creek Consulting, Inc v Sichenzia Ross Friedman FERENCE LLP*, 110 AD3d 550, 551 [1st Dept 2013]; *Waggoner v Caruso*, 14 NY3d 874 [2010]).

Additionally, the breach of fiduciary claim against fails to set forth any facts, actions, or omissions by Mr. Lang related to the *Cox* settlement funds. Stated differently, the amended complaint sets forth specific factual allegations regarding Mr. Lynch, Mr. Haig, and Mr. Boutin but it, conspicuously, does not set forth any specific factual allegations regarding Mr. Lang. Accordingly, the second cause of action for breach of fiduciary duty is dismissed as against Mr. Lang.

III. Conversion

First Mercury's claim for conversion against Mr. Lang is also dismissed. "[C]onversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). "An action for conversion of money may be made out 'where there is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question'" (*Thys v Fortis Sec. LLC*, 74 AD3d 546 [1st Dept 2010] quoting *Manufacturers Hanover Trust Co. v Chemical Bank*, 160 AD2d 113, 124 [1990]).

Taking as true the allegation that Mr. Lang was copied on emails between Riverstone and Mr. Boutin, the amended complaint does not allege that Mr. Lang ever exercised dominion or control over the *Cox* settlement check. Instead, the amended complaint alleges that Mr. Boutin received the *Cox* settlement check and hand-delivered it to Mr. Haig. Therefore, a conversion claim against Mr. Lang does not lie (*see e.g. Scott v Fields*, 85 AD3d 756 [2d Dept 2011] [claim for conversion dismissed against attorneys who were never in possession of and never exercised dominion over property]).

IV. Judiciary Law § 487

Under Judiciary Law § 487, an attorney who "is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or ... willfully delays his client's suit with a view to his own gain; or, willfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for" is guilty of a misdemeanor (*see e.g. Gorbatov v Tsirelman*, 155 AD3d 836, 838 [2d Dept 2017]). A claim under Judiciary Law § 487 must "show either a deceit that reaches the level of egregious conduct or a chronic and extreme pattern of behavior on the part of the defendant attorneys" (*Savitt v Greenberg Traurig, LLP*, 126 AD3d 506, 507 [1st Dept 2015]; *Facebook, Inc. v DLA*

Piper LLP (US), 134 AD3d 610, 615 [1st Dept 2015]; *see also* Decision and Order NYSCEF Doc. No. 169 at 12 [Billings, J.].

First Mercury’s amended complaint does not allege any facts that show Mr. Lang engaged in egregious deceit or collusion, or consented to same, or that he willfully received the *Cox* settlement funds. At most, the complaint alleges that Mr. Lang was copied on email correspondence by Mr. Boutin and sent an email to Riverstone complaining about the finances of the Engagement Agreement. The amended complaint alleges that it was Mr. Boutin who confirmed receipt of the *Cox* settlement and advised he had delivered the settlement check to Mr. Haig. This is insufficient to state a claim under Judiciary Law § 487 against Mr. Lang. The amended complaint does not allege that Mr. Lang willfully received the *Cox* settlement check or that he colluded or consented to collusion regarding the check’s mishandling/comingling. An allegation that Mr. Lang knew the firm was in a dire financial position does not amount to collusion (or consent to collusion) to comingle future settlement checks with the firm’s operating account. Accordingly, the Judiciary Law § 487 claim against Mr. Lang is dismissed.

Given the dismissal of the direct claims against Mr. Lang, the crossclaims of D’Amato & Lynch and Mr. Lynch are deemed converted to third-party claims (*see e.g. Jones v New York City Housing Authority*, 293 AD2d 371, 372 [1st Dept 2002]).

Accordingly, it is hereby

ORDERED that Mr. Lang’s motion is granted, and the amended complaint is dismissed as against him, without prejudice the replead upon the completion of further discovery; and it is further

ORDERED that the crossclaims against Mr. Lang are deemed converted to a third-party action; and it is further

ORDERED that counsel are reminded a **Preliminary Conference is scheduled for June 3, 2026 at 10:00am** in Courtroom 335 at 60 Centre Street New York, NY 10007 and are reminded of the Part Rules, including those regarding the submission of a joint proposed conference order in lieu of an in-person appearance.

2/2/2026
DATE

KATHLEEN WATERMAN-MARSHALL,
J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
			DENIED		OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	
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