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

PRESENT: _____ PART 10

Justice

Index Number : 600593/2009

BELLINSON LAW, LLC

VS.

IANNUCCI, ROBERT ESQ.

SEQUENCE NUMBER : 008

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 008

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

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION

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

Dated: Feb 14, 2012

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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Bellinson Law, LLC,

Plaintiff (s),

-against-

Robert Iannucci,

Defendant (s).

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DECISION/ ORDER
Index No.: 600593-09
Seq. No.: 008

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

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Bellinson n/m 3212 w/AMF affirm, RJB affid, exhs (3 vols)	1-4
Iannucci x/m 3212 w/RHD, RB affirms, RTI, SL,LF affids (sep backs)	5-11
Bellinson reply w/AMF affid	12
Iannucci reply w/DEG affirm, exh	13

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

GISCHE J.:

Plaintiff Bellinson Law, PLLC ("Bellinson firm") is the law firm that previously represented defendant Robert T. Iannucci s/h/a/ Robert Iannuci ("Iannucci") in a Federal action brought against the City of New York. The Bellinson firm seeks to recover its contingency fees in connection with the settlement achieved in that action. Iannucci has asserted counterclaims of legal malpractice and fraud/ fraud in the inducement, rescission and breach of contract. The breach of contract counterclaim was previous dismissed by the court in deciding a prior motion to dismiss.

The Bellinson firm now moves and Iannucci cross moves for summary judgment

on Iannucci's counterclaims. Since these motions were made timely after plaintiff filed its note of issue, they are properly before the court and will be decided on their merits (CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004]).

Background

Unless otherwise stated, the following facts have been established:

Iannucci owned a number of buildings in the Downtown Brooklyn area near a police station. NYPD and others with NYPD placards parked their vehicles in areas and in such a way that access to Iannucci's buildings was hampered and the sidewalks were damaged, requiring significant repairs. This situation persisted and evolved over the course of 25 years and eventually Iannucci sued the City in Federal court (Iannucci v. City of New York, U.S. District Ct., E.D.N.Y. 02-CV-6135) ("Federal action), alleging violations of his substantive property rights under the 14th amendment to the United States Constitution (42 USC §1983). During the course of the Federal action (six years), Iannucci had different attorneys representing him. Although he was pleased with the work by one attorney, Kevin Farrelly, Esq. ("Farrelly"), and Farrelly continued to be the attorney of record in that action, Iannucci decided he needed a larger firm with greater resources and more Federal jury trial experience to represent him. Iannucci is an attorney at law and admitted to practice in New York state. His present pursuits are, however, in real estate and the antique motorcycle business.

A former attorney representing him in the Federal action recommended the Bellinson law firm. Iannucci and Robert Bellinson, Esq. ("Attorney Bellinson") first met to discuss the Federal action on June 3, 2008. After their meeting, the Bellinson firm sent Iannucci a proposed retainer agreement. In relevant part, the retainer states that

Iannucci will "pay [Bellinson] 22.5% of any amount(s) received or recovered in connection with the above-referenced cases, whether received by verdict, settlement or otherwise..." After making certain corrections to the agreement, Iannucci signed and dated it July 4, 2008. The parties also executed an addendum to the retainer. The addendum bears the same date as the retainer (July 4, 2008).

In relevant part, the addendum provides that "we will seek an award of fees if we obtain a winning verdict" and to that end, the Bellinson firm will "keep an accurate log of [its] hours and expenses to assist in seeking this award." The parties also agreed that the Bellinson firm would handle such matters as post trial motions and appeals (but not post trial briefs) and that "[if] the case settles prior to the completion of Jury Selection, the amount of the contingency payable to Counsel shall be reduced to 19%." Later (July 29, 2008), following discussions between Iannucci and Bellinson, the retainer agreement was further amended to add the following paragraph to the July 4, 2008 addendum[1]:

> 5. Cost of Kevin Farrelly, Esq. as "law man": as of today, R. Bellinson will bear first $5K or 22.5% of his total cost, whichever is higher, to be deducted from R.B.'s contingency fee, share of proceeds. R.B. & R.I. will jointly decide when/where to use K.F.

Although the trial in Federal action was originally scheduled for July 7, 2008, Iannucci obtained an adjournment to October 6, 2008. The trial was then adjourned again to November 17, 2008. On November 6, 2008 the presiding judge ("Judge

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[1]Hereinafter, references to "retainer" shall means the retainer, as amended through July 29, 2008, unless otherwise provided.

Sifton"), held a pre-trial conference. That conference was attended by Iannucci, Farrelly and Attorney Bellinson. No settlement was achieved. According to Farrelly, who was deposed, he felt Attorney Bellinson was unprepared for the conference and surprised Attorney Bellinson had not contacted him in the preceding months to review his (Farrelly's) extensive file on the matter. Farrelly also stated at his EBT that he expressed these concerns to Iannucci.

Following the pre-trial conference with Judge Sifton, he directed that the parties have a settlement conference with a magistrate judge ("Judge Mann"). The settlement conference took place November 10, 2008 in the presence of Iannucci, his wife, Sonia Ewers, Lauren Forman, Esq., Iannucci's in house counsel, Attorney Bellinson and attorneys for the City. Despite the concerns Farrelly had expressed to Iannucci, Iannucci told Farrelly not to come to the settlement conference. At the settlement conference Judge Mann recommended a settlement that Iannucci rejected. Throughout the day the City slowly raised its offer but Iannuci walked away from their "final" offer of $2,000,000, insisting he would not settle for less than $2,125,000.

The next day (November 11th), Farrelly sent Judge Mann a letter stating as follows:

> "I represent Plaintiff Robert Iannucci in this action. I write to advise the Court that the parties have reached a settlement of this action and expect to file a stipulation of dismissal within a week. On behalf of my client, I thank the Court for its assistance in settling this matter."

The settlement was for $2,125,000, the same amount Iannucci had demanded to settle the case the day before.

In the ensuing weeks, Farrelly and Iannucci exchanged email correspondence about the settlement and the terms the City wanted in the final settlement documents. Farrelly also wrote a letter to the City's attorney. In that letter, dated November 19, 2008, Farrelly wrote the following:

> "This letter sets forth our mutual understanding regarding the processing of the settlement of the above-referenced action. The Plaintiff will deliver to the Defendant the following closing documents, to wit: a release signed by me [Farrelly] in the form attached hereto (the "stipulation") and a Release and Discharge of Attorney's liens in the form previously sent to you for the prior attorneys of record in the action (collectively "the Closing Papers")... The action is settled for the amount of $2,125,000 (the "Settlement amount"). The City will pay the Settlement Amount, provided that no liens are found as a result of a routine lien search... The City will pay the Settlement Amount in a two-party check made payable to "Robert T. Iannucci and Kevin J. Farrelly as his attorney"...If the City pays the settlement within 30 Days...Iannucci will simultaneously deliver to you a release signed by his wife Sonia Ewers..."

In subsequent emails, Farrelly wrote to Iannucci that the City is looking for releases by other attorneys who represented Iannucci in the action out of "concern" that the City will be liable "for a lien placed on the [settlement] proceeds by these attorneys" and Farrelly also references case law provided by the City attorney on this issue. These emails do not appear to be copied to the Bellinson firm.

As of January 14, 2009, the stipulation of discontinuance had not been filed and the City attorney reached out to Judge Mann for assistance stating that the City was still waiting for the necessary documents, which included release by Iannucci's prior counsel because the City was "bound as a matter of law, to retain funds sufficient to

pay the lien or subject to liability for the amount of the lien." In response, Judge Mann ordered that "the parties shall, by 1/23/09, file a stipulation of discontinuance that reserves the right to reopen the case within 60 days if the settlement is not consummated."

Iannucci contends that he had no choice but – and was "forced" – to settle the Federal action because Attorney Bellinson (on behalf of the Bellinson firm) was not equipped or ready to try the case and that by the time he ("Iannicci") figured this out, it was too late for him to get a new attorney. Iannucci alleges that he made it clear to Attorney Bellinson that he wanted to try the case, not settle. Iannucci alleges that Attorney Bellinson misrepresented his trial experience and familiarity with Federal court procedures when in fact (according to Iannucci) he only handled "slip and falls" and equally uncomplicated civil state matters. Iannucci states he relied on these misrepresentations and was persuaded by Attorney Bellinson's personal demeanor that he was the right attorney for the case.

Iannucci alleges that the Federal action was a very complicated commercial case, presenting sophisticated issues of valuation. When asked whether he was referring to his claim for loss of rent due to the City's violation of his civil rights, Iannucci responded "basically." According to Iannucci the Federal action was also complicated because it presented issues of first impression. Iannucci claims that he expected Attorney Bellinson to keep track of his time because under the applicable Federal statute, he would have recovered his legal fees, had he prevailed.

Iannucci also claims that Attorney Bellinson committed legal malpractice by among other things:

- Not subpoenaing certain witnesses in advance of trial
- Preparing inadequate proposed jury instructions
- Going to the settlement conference with Judge Mann unprepared
- Not bringing a copy of Iannucci's expert's report to the settlement conference
- Insisting that he represented Iannucci's wife when, in fact, she was not a named plaintiff in the Federal action
- Not familiarizing himself with Iannucci's expert's report
- Not telling the court that he had been the subject of a death threat

In support of its motion for summary judgment, the Bellinson firm argues that Iannucci is an attorney and savvy business person who was intimately involved in every step of the case, including the settlement conference that Judge Mann held. The Bellinson firm contends that Iannucci is so experienced with legal and business matters, that he expertly negotiated the firm's retainer and fully anticipated that the case might settle because of the language in the addendum to the retainer: "[if] the case settles *prior to the completion of Jury Selection, the amount of the contingency* payable to Counsel shall be reduced to 19%."

The Bellinson firm also contends that Iannucci has a pattern of hiring lawyers, not paying them and then threatening legal action against them for malpractice to bully them into settling their fees. In particular, the Bellinson firm highlights the fee dispute another attorney ("Harfenist") had with Iannucci. Harfenist was another one of Iannucci's attorneys in the Federal action.

The Bellinson firm argues that Iannucci's case had a serious flaw because he was seeking monetary damages for more than three years prior to the commencement of the Federal action. The City had brought a motion *in limine* which, if granted, would have, in Iannucci's own words have "gutted" his case. Thus, Bellinson contends did not have a realistic claim for more than $5,000,000 in damages because $2,600,000 in

damages would have been precluded.

Iannucci provides various affidavits in support of his cross motion. One affidavit is by Richard Dolan, Esq., who Iannucci contends is qualified to render an opinion on the issue of whether the Bellinson law firm failed to exercise the ordinary skill and knowledge commonly possessed by a member of the legal profession. Dolan contends that Attorney Bellinson firm failed to live up to that standard by: 1) failing to maintain contemporaneous records of his time, as required under 42 USC § 1983 which allows a prevailing plaintiff to seek an award of legal fees and; 2) failing to prepare for trial in an adequate and timely manner.

Sharon Locatell ("Locatell"), a real estate appraiser, also provides her sworn affidavit in support of Iannucci's cross motion. Locatall was his expert in the Federal action. She states that Iannucci suffered loses for his various properties in excess of $5 million and that, in her opinion, the City's expert's report was flawed because it failed to consider a similar property at 170 Tillary Street in its analysis.

Discussion

Since each side seeks summary judgment, each side bears the burden of making a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp ., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]; Santiago v. Filstein, 35 AD3d 184 [1st Dept 2006]).

In a legal malpractice action, the former client must show that an attorney "failed

to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession" (McCoy v. Feynman, 99 NY2d 295, 301 [2002]). In addition, the former client must show that the attorney's breach of this professional duty caused the former client's actual damages (McCoy v. Feynman, 99 NY2d at 301). Thus, the former client's burden of proof in a legal malpractice action is a heavy one because the former client must first prove the hypothetical outcome of the underlying litigation and, then, the attorney's liability for malpractice in connection with that litigation (Sabalza v. Salado, 85 AD3d 436 [1st Dept 2011]).

When it is the law firm seeking summary judgment in its favor, the law firm must establish that its former client is unable to prove at least one of the essential elements of his cause of action (Suydam v O'Neill, 276 A.D.2d 549 [2nd Dept 2000]). Thus, to defeat the Bellinson law firm's motion for summary judgment, Iannucci need only establish the existence of a material issue of fact as to whether he or she would have prevailed in the underlying action absent the attorney's negligence (Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, 8 N.Y.3d 438 [2007]). The failure to demonstrate proximate cause requires dismissal of a legal malpractice action regardless of whether the attorney was negligent.

The Bellinson firm has established that it was reasonably prepared to handle the case and that when it went to the settlement conference with Judge Mann it acted in accordance with is client's (Iannucci's) instructions. Iannucci did not want to settle for anything less than $2,125,000 and that was how much the case settled for. Other claims by Iannucci, that he was "forced" to settle because he was concerned the Bellinson firm was not ready to try the case, are not persuasive and inadequate.

Iannucci was present at the settlement conference and not once did he notify Judge Mann that he did not want to discuss settlement but only wanted to try the case. Nor did Iannucci make an application for an adjournment so he could hire more competent counsel. Statements by Iannucci, that he believed the trial was nonadjournaable, are are offered without any supporting proof that he made such an application and it was denied or that the trial was marked "final."

Although settlement of an action will not preclude an award of damages for legal malpractice where the former client is able to demonstrate that the settlement was caused by the malpractice, namely, that the value of the underlying claim was in excess of the settlement (Fusco v. Fauci, 299 A.D.2d 263 [1st Dept 2002]), here Iannucci has failed to show that his case settled for measurably less than it was worth. The Federal action was commenced in November 2002 and his claims were subject to a three (3) year statute of limitations. Shortly before trial, the City brought a motion to limit the issue of damages. Locatell, Iannucci's real estate appraiser, had calculated the lost rental income at more than $5 million, based upon rental loss from 1983, when several of the buildings were acquired by Iannucci. Two other buildings were acquired by Iannucci in 2002 and 2003. The estimated lost income for the older buildings alone was $2,630,000 alone. Had the motion been granted, this would have – as Iannucci himself stated in correspondence – "gutted" his case. Therefore, Iannucci cannot prove that the settlement he made was for an amount measurably less than his case was worth. The City's real estate expert had a far lower valuation than did Iannucci's expert. Furthermore, as Iannucci contends, the Federal action was a case of first impression which means there was no precedent mandating a specific outcome.

An attorney is liable in a malpractice action if it can be proved that his conduct fell below the ordinary and reasonable skill and knowledge commonly possessed by a member of the profession. The Bellinson firm has established that Attorney Bellinson came to each of the November 2008 conferences prepared to discuss the case. The transcript of the recorded portions of the conference with Judge Mann show that Attorney Bellinson was familiar with the issues. He was never scolded by Judge Mann for not knowing a particular issue and his description of the case is consistent with the summons and complaint in that action. Although Iannucci argues that the City attorneys were better prepared for the conference because, for example, Attorney Bellinson did not have a copy of the Locatell's appraisal with him, this oversight does not establish professional malpractice by the Bellinson firm, as a matter of law (Morrison Cohen Singer & Weinstein v. Zuker, 203 A.D.2d 119 [1st Dept 1994]). An attorney is not held to the rule of infallibility (Bernstein v. Oppenheim & Co., P.C., 160 A.D.2d 428 [1st Dept 1990]).

Dolan, Iannucci's law expert, opines that it was malpractice for Attorney Bellinson to have not have kept contemporaneous records of his time since Iannucci could have recovered his legal fees had the case gone to trial and he had been the prevailing party. In New York State Association for Retarded Children, Inc v. Carey (711 F2d 1136 [1983]) ("Carey"), the Second Circuit held that an attorney seeking fees under 42 USC § 1988 must keep contemporaneous time records, specifying, for each attorney, the date, the hours expended, and the nature of the work done. Attorney Bellinson admitted he was not keeping contemporaneous records, but stated it was because he was working on a contingency fee basis. All this means, however, is that

the Bellinson firm could not have made an application under 42 USC § 1988 to recover its own legal fees from the defendant, had Iannucci prevailed at trial. Therefore, Attorney Bellinson's failure to keep contemporaneous records of his time is not malpractice under the facts presented, nor does it preclude the Bellinson law firm from obtaining summary judgment on its claim for legal fees based upon a contingency agreement.

Dolan also opines that Attorney Bellinson's proposed jury charges and verdict sheet were inadequate and that an attorney should prepare an outline of his or her case, set up witness files, serve trial subpoenas and understand the facts and the applicable law thoroughly so as to be a vigorous advocate. He cites from a treatise and opines, in effect, that "preparation preparation preparation" is key to a successful trial. The matter that Dolan opines on does not involve professional or scientific knowledge or skill not within range of ordinary training or intelligence of a jury (Dufel v. Green, 84 N.Y.2d 795 [1995]). An attorney owes each client a duty to exercise that degree of care, skill and diligence commonly possessed and exercised by an ordinary member of the legal community. Thus, while Dolan would have prepared for trial differently (and possibly better) than Attorney Bellinson, this does not mean the Bellinson firm committed legal malpractice.

Legal malpractice claims consist of the following elements (1) attorney negligence (2) proximately causing the loss, and (3) proof of damages (Tinter v Rapaport, 253 A.D.2d 588 [1st Dept 1998]). The damages are based on the value of the claim lost. Iannucci has failed to establish any of these elements. Arguments that he could have done better by going to trial are entirely speculative (AmBase Corp. v.

Davis Polk & Wardwell, 30 A.D.3d 171 [1st Dept 2006]). Iannucci instructed his "law man" (Farrelly) to accept the City's offer. Not once after Farrelly notified Judge Mann that the case had settled did Iannucci (or Farrelly) contact Judge Mann to say that Iannucci had reconsidered the settlement, did not want to execute the necessary documents and wanted a trial instead. Iannucci did not discharge the Bellinson firm or bring any kind of motion. Statements by Iannucci that these were not choices available to him are offered without a scintilla of proof. The Bellinson law firm achieved success for Iannucci who should "not be heard to complain that th[e] result was not achieved in the precise manner [plaintiff] would have preferred (AmBase Corp. v. Davis Polk & Wardwell, 30 A.D.3d at 172). Since the Bellinson firm has proved that it did not commit legal malpractice and Iannucci has failed to raise issues of fact requiring a trial, the motion by Bellinson for summary judgment dismissing the malpractice claim is denied and Iannucci's cross motion for summary judgment in his favor on that claim is denied.

Fraud based claim

According to Iannucci, Attorney Bellinson lied about how many trials he had taken to completion in the Federal courts and he (Iannucci) agreed to retain the firm based upon these and other fraudulent misrepresentations about Attorney Bellinson's skills.

A claim for fraud/fraudulent misrepresentation requires that the plaintiff establish a misrepresentation of a material fact, which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party, and injury (Lama Holding Co. v. Smith Barney, 88 N.Y.2d 413, 421 [1996]). A contract induced by fraud is subject to rescission, rendering it

unenforceable by the culpable party (Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Wise Metals Group, LLC, 19 A.D.3d 273 [1st Dept 2005]). The true measure of damage is indemnity for the actual pecuniary loss sustained as the direct result of the wrong" or what is known as the "out-of-pocket" rule (Lama Holding Co. v. Smith Barney, 88 N.Y.2d at 421).

Even assuming Attorney Bellinson stated he had "extensive" trial experience in Federal court, mere puffery by an attorney of his skills is not actionable as fraud (see Schonfeld v. Thompson, 243 A.D.2d 343 [1st Dept 1997]). Furthermore, it is Iannucci who states that he did not believe Attorney Bellinson was skilled enough to try the case and, therefore, felt he had to settle the case. These factual allegations are indistinguishable from those made in support of Iannucci's claim malpractice. Therefore, the Bellinson firm is entitled for summary judgment in its favor on this claim for that reasons alone (Waggoner v. Caruso, 14 N.Y.3d 874 [2010]).

Iannucci has not proved that Attorney Bellinson made statements about his skills that were untrue at the time they were made and with the intent to deceive. Though Iannucci claims Attorney Bellinson never tried a federal case, it is unrefuted that Attorney Bellinson is a litigator and familiar with litigation. Statements by Iannucci that the Bellinson firm misrepresented its qualifications just to achieve " a healthy paycheck" is not evidence in admissible form, but an opinion.

The Bellinson law firm has met its burden of proving it is entitled to summary judgment on Iannucci's fraud based counterclaim for rescission. Iannucci has failed to come forward with issues of fact requiring a trial. Therefore, the Bellinson's motion for summary judgment on the fraud based claim is granted and Iannucci's cross motion for

summary judgment is denied. The fraud based counterclaim for rescission of the retainer agreement is dismissed.

Conclusion

The Bellinson law firm's motion for summary judgment dismissing Iannucci's remaining counterclaims which are for legal malpractice and fraudulent inducement/rescission is granted. Iannucci's cross motion for summary judgment is denied.

In accordance with the foregoing,

It is hereby

ORDERED that the Clerk shall enter judgment in favor of plaintiff Bellinson Law, LLC dismissing the counterclaims by defendant Robert Iannucci; and it is hereby

ORDERED that once the parties complete mediation, presently scheduled for March 29, 2012, this case is ready for trial; and it is further

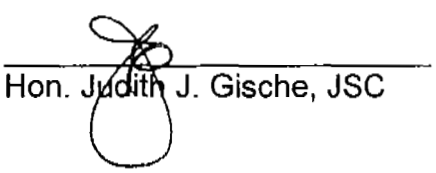
ORDERED that plaintiff Bellinson Law, LLC shall serve a copy of this decision and order on Mediator Vigilante; and it is further

ORDERED that any relief requested but not expressly addressed is hereby denied; and it is further

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

Dated: New York, New York
February 14, 2012

So Ordered:



Hon. Judith J. Gische, JSC