

**Steven's Distribs. Inc. v Gold, Rosenblatt &
Goldstein**

2012 NY Slip Op 31990(U)

July 24, 2012

Supreme Court, New York County

Docket Number: 106283/09

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JOAN A. MADDEN

PRESENT: J.S.C.
Justice

PART 11

Index Number : 106283/2009
STEVEN'S DISTRIBUTORS INC
vs
GOLD ROSENBLATT & GOLDSTEIN
Sequence Number : 003
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *is determined in accordance with the annexed decision and order.*

FILED

JUL 27 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 24, 2012

[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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

FILED

JUL 27 2012

-----X
STEVEN'S DISTRIBUTORS INC.,

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff,

-against-

Index No. 106283/09

GOLD, ROSENBLATT & GOLDSTEIN and
STEVEN E. GOLDSTEIN,

Defendants.
-----X

JOAN A. MADDEN, J.S.C.:

Defendant Gold & Rosenblatt, LLC s/h/a Gold, Rosenblatt & Goldstein (G&R) moves for an order dismissing the complaint, pursuant to CPLR 3211 (a) (1), or in the alternative, for summary judgment, pursuant to CPLR 3212 (a). G&R also move for sanctions, pursuant to 22 NYCRR § 130. Plaintiff Steven's Distributors Inc. cross-moves for an order pursuant to CPLR 2001 to correct the name of defendant Gold, Rosenblatt & Goldstein by adding "LLC"; an order pursuant to CPLR 3212 for summary judgment against that defendant; and for sanctions. Alternatively, plaintiff cross-moves for an order pursuant to CPLR 3124 and 3104, compelling defendants to comply with discovery demands, and for the appointment of a referee to oversee discovery. G&R consents to that branch of the cross motion seeking to amend the caption.

This is a legal malpractice case in which plaintiff seeks to recover the legal fees it incurred as a result of the alleged

malpractice. In order to prevail in a legal malpractice case, plaintiff must show: (1) the negligence of the attorney; 2) that the attorney's negligence was the proximate cause of the loss sustained; and (3) proof of actual damages. See *Bishop v Maurer*, 33 AD3d 497 (1st Dept 2006), *affd* 9 NY3d 910 (2007). "In order to establish proximate cause, a plaintiff must demonstrate that 'but for' the attorney's negligence, the plaintiff would either have prevailed in the matter at issue, or would not have suffered any 'ascertainable damages.'" *Id.* at 498 (quoting *Brooks v. Lewin*, 21 AD3d 731 [1st Dept 2005], *lv den* 6 NY3d 713 [2006]).

The following facts are undisputed. In or about May 2004, plaintiff, which had a lease on the building located at 2944 3d Avenue in the Bronx, retained the law firm of Gold, Rosenblatt & Goldstein to commence a commercial summary nonpayment action against the subtenants of the building, Diab and Hasan Saleh, who were doing business as 2944 3d Ave Retail Corp. ("Retail Corp."). Defendant Steven E. Goldstein, a then-partner of the firm undertook the representation of plaintiff, and after commencing the action (*Steven's Distributions, Inc. v 2944 3rd Ave Realty Corp.*, Index No. 90110 (Civ Ct, Bronx Co, 2008), fabricated several court orders purporting to award plaintiff various sums in back rent, so as to persuade plaintiff that Goldstein was actively prosecuting the action.

After numerous adjournments of the summary proceeding, Goldstein procured a default judgment against Retail Corp., when

its attorney failed to appear for an unusual morning court session. Retail Corp. subsequently moved to vacate the default. Judge Rodriguez granted the motion in part based on Goldstein's failure to zealously litigate the case, and, after two years, the matter was finally set down for trial before Judge Alessandro.

In the meantime, Goldstein apparently disclosed his fabrications to plaintiff. Goldstein was terminated by his firm, which then reconstituted itself as Gold & Rosenblatt, LLC., and Peter Lubell, Esq. of the firm Novick Edelstein undertook plaintiff's representation at the trial.

At the conclusion of trial, Judge Alessandro dismissed plaintiff's petition. Plaintiff subsequently retained the law firm of Robinson Borg Leinwand Greene Genovese & Gluck P.C, (Robinson Borg) to commence a second summary nonpayment proceeding (*Steven's Distributors Inc. a/k/a Steven's Distributing, Inc. v 3944 3rd Ave. Retail Corp. d/b/a Calidad Furniture*, Index No. L&T 0900101 [Civ Ct, Bronx Co, June 30, 2008]). Plaintiff prevailed in that proceeding, in a decision by Judge Donald A. Miles, dated June 30, 2008.

While Goldstein's fabrication of purported court orders indisputably constituted legal malpractice, as well as a violation of Disciplinary Rule 1.1 (see *Matter of O'Shea*, 25 AD3d 203 [1st Dept 2005]), plaintiff has not shown that it suffered any damages as a result of the fabrications. Plaintiff contends that Retail Corp's motion to vacate the default was granted

because Judge Rodriguez found that the proceeding had not been zealously litigated, and that it lost the first action for the following reasons: Goldstein negligently misnamed plaintiff in the caption of the proceeding (as Steven's Distributions Inc); Goldstein negligently named Retail Corp, which at that time did not exist as a corporation, as the respondent; Goldstein negligently failed to name the individual subtenants as defendants; and Goldstein negligently failed to prepare plaintiff for the trial. Plaintiff also contends that Goldstein negligently failed to commence a plenary action to recover on the personal guarantee executed by the subtenant, Diab Saleh.

G&R contends, by contrast, that plaintiff lost the first trial, because the court found that Charles Chera, plaintiff's principal, perjured himself when he testified that he had made a pre-trial demand for the rent alleged to be owing, and because plaintiff's bookkeeper was unable to prove how much rent was owed, and that in any event, Novick Edelstein was retained by plaintiff, and accordingly, G&R bears no responsibility for Mr. Lubell's actions at the trial. G&R also contends that the names placed in the caption of the underlying action are as they appear on the sublease that Mr. Chera gave Goldstein.

It is established, however, that an "attorney has the responsibility to investigate and prepare every phase of his [or her] client's case.'" *Rosenstrauss v Jacobs & Jacobs*, 56 AD3d 453, 453 (2d Dept 2008) (quoting *Parksville Mobile Modular v.*

[* 6]

Fabricant, 73 AD3d 595 [2nd Dept 1979]). Goldstein therefore was obligated at least to inquire as to the proper names for the parties in the summary proceeding. The court notes that before Robinson Borg commenced the second proceeding, it filed a Certificate of Assumed Name by Steven's Distributors, Inc. taking the assumed name of Steven's Distributing. See *Holland Reply Aff.*, Exh. B.

Finally, with reference to the incorrect caption, G&R argues that naming Retail Corp. as the respondent in the underlying case could not have played a role in the dismissal of the petition, since the identical name was used to name the respondent in the subsequent proceeding, in which plaintiff prevailed. Plaintiff, however, has shown that by the time of the second proceeding, Retail Corp. had become a corporation.

For reasons that neither party explains, and that are not evident from the record, Judge Alessandro, who presided over the trial in the first summary proceeding, issued two decisions and orders after the trial. In the first decision and order, dated September 26, 2007, Judge Alessandro adopted respondent's proposed decision (see *Berry Affirm.*, Exh. 3, at 1), and dismissed the petition based on petitioner's failure to prove its case. Specifically, Judge Alessandro determined that notwithstanding Chera's testimony, there had been no pre-litigation demand for rent, as is required by RPAPL §711(2); that plaintiff's bookkeeper had been unable to prove the amount of rent due; and that

[i]n keeping with his character, Chera offered no justification for the ongoing violation of a criminal

statute (NYGBL Section 130) in using several aliases in the petition, sublease and main lease Again, no CPLR 3025 motion to amend the caption was ever [made] herein . . . , thereby requiring the dismissal of the petition.

Id., at 3. In the second decision and order dated October 23, 2007, Judge Alessandro further determined that "Petitioner has not proved that the named Respondent owes, as set forth in demands for rent, an amount of \$139,298.60 through 6/30/06 to the named Petitioner based upon the testimony of witnesses and documents set forth at trial." Chera Aff., Exh. 13.

The record is silent as to whether Judge Alessandro intended to withdraw the first decision and order when he issued the subsequent one on October 23, 2007. However, that decision, like the earlier one, is based upon three independent grounds, to wit, plaintiff's failure to prove that: (1) the "named Respondent" owed rent to the "named Petitioner"; (2) a pre-litigation demand for rent had not been made; and (3) the amount of rent sued for would have been owed by a properly named respondent to a properly named petitioner.

Accordingly, while Goldstein's erroneous naming of the parties in the caption was unquestionably malpractice sufficient to have caused the dismissal of plaintiff's petition, and while, perhaps, Goldstein's (or Lubell's) failure to prepare plaintiff's bookkeeper for her testimony would also have been sufficient to cause the dismissal, plaintiff in any event could not have prevailed in the first proceeding, since it had failed to prove a

pre-litigation rent demand. For that reason, Goldstein's (and possibly, Lubell's) negligence "was not a proximate cause of any damages arising from the loss" of the underlying action. *Barnett v Schwartz*, 47 AD3d 197, 204 (2nd Dept 2007).

Nor can plaintiff prove that, but for Goldstein's failure to prosecute the underlying case for almost two years, Retail Corp.'s motion to vacate its default would not have been granted by Judge Rodriguez. While Judge Rodriguez based her decision on "[t]he long standing status of [the] proceeding with no indication that respondent neglected to appear or negotiate, and no indication that petitioner zealously prosecuted its claim" (Chera Aff., Exh. 10, at 2), Diab Saleh's affidavit in support of Retail Corp's order to show cause noted both that there was no such entity as the petitioner named in the caption of the proceeding, and that petitioner lacked standing to prosecute its claim, since its lease with the over-landlord had been terminated for nonpayment. See Chera Aff., Exh. 9.

Finally, plaintiff has failed to establish that it would have prevailed in a plenary action to recover on Diab Saleh's guarantee, since plaintiff has not included any such guarantee in its motion papers, and Saleh's possible defenses to a hypothetical plenary action are unknown.

Based on the foregoing, the moving defendant is entitled to summary judgment dismissing the complaint. For the identical reasons, plaintiff cannot recover against non-moving defendant,

Steven E. Goldstein. Thus, upon a search of the record pursuant to CPLR 3212(b), summary judgment is awarded to the non-moving defendant and the complaint is dismissed as against defendant Steven E. Goldstein. See *Dunham v. Hilco Construction Co, Inc*, 89 NY2d 425 (1996); *Mini Mint, Inc v. Citigroup, Inc*, 83 AD3d 596 (1st Dept 2011); *Atiencia v. MBBCO II, LLC*, 75 AD3d 424 (1st Dept 2010). Notwithstanding these conclusions, since plaintiff's complaint is far from frivolous, defendant's request for sanctions is denied. In view of the court's determination awarding defendants summary judgment, plaintiff's cross-motion for various relief is denied as moot.

Accordingly, it is hereby

ORDERED that the caption is deemed amended by changing the name of defendant Gold, Rosenblatt & Goldstein to Gold, Rosenblatt & Goldstein, LLC; and it is further

ORDERED that the motion by defendant Gold and Rosenblatt, LLC s/h/a Gold, Rosenblatt & Goldstein, LLC for summary judgment dismissing the complaint is granted; and it is further

ORDERED that defendant Steven E. Goldstein is also entitled to summary judgment dismissing the complaint as against him; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly dismissing the complaint in its entirety as against defendants Gold and Rosenblatt, LLC s/h/a Gold, Rosenblatt & Goldstein, LLC and Steven E. Goldstein; and it is further

ORDERED that the branch of defendant's motion for sanctions is denied; and it is further

ORDERED that plaintiff's cross motion is denied in its entirety.

Dated: July 24, 2012

ENTER:



J.S.C.

FILED
JUL 27 2012
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