

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2007

4 (Argued: September 6, 2007 Decided: July 14, 2009)

5 Docket No. 06-2364-cv

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7 VIVIA AMALFITANO AND GERARD AMALFITANO,

8 Plaintiffs-Appellees,

9 - v. -

10 ARMAND ROSENBERG,

11 Defendant-Appellant.

12 -----  
13 Before: WALKER, CALABRESI, and SACK, Circuit Judges.

14 Appeal from a judgment of the United States District  
15 Court for the Southern District of New York (Naomi Reice  
16 Buchwald, Judge). We certified two questions to the New York  
17 Court of Appeals, see Amalfitano v. Rosenberg, 533 F.3d 117, 126  
18 (2d Cir. 2008), which it has now answered, see Amalfitano v.  
19 Rosenberg, 12 N.Y.3d 8, 903 N.E.2d 265, 874 N.Y.S.2d 868 (2009).

20 In light of those answers, the judgment is:

21 Affirmed.

22 WILLIAM J. DAVIS, Scheichet & Davis,  
23 P.C., New York, NY, for Defendant-  
24 Appellant.

25 RICHARD E. HAHN, Llorca & Hahn LLP, New  
26 York, NY, for Plaintiffs-Appellees.

1 PER CURIAM:

2 We return to this appeal from a judgment of the United  
3 States District Court for the Southern District of New York  
4 (Naomi Reice Buchwald, Judge). We assume the parties' continued  
5 familiarity with the facts and procedural history of this case,  
6 and the issues presented on appeal.

7 On July 15, 2008, we certified two questions to the New  
8 York State Court of Appeals:

9 (1) Can a successful lawsuit for treble  
10 damages brought under N.Y. Jud. Law § 487 be  
11 based on an attempted but unsuccessful deceit  
12 upon a court by the defendant?

13 (2) In the course of such a lawsuit, may the  
14 costs of defending litigation instituted by a  
15 complaint containing a material  
16 misrepresentation of fact be treated as the  
17 proximate result of the misrepresentation if  
18 the court upon which the deceit was attempted  
19 at no time acted on the belief that the  
20 misrepresentation was true?

21 Amalfitano v. Rosenberg, 533 F.3d 117, 126 (2d Cir. 2008). We  
22 noted that we "would almost surely affirm the district court's  
23 judgment in its entirety if the New York Court of Appeals  
24 determines that section 487 permits the award of treble damages  
25 for an attempted deceit of the New York courts." Id. The Court  
26 of Appeals has now answered both certified questions in the  
27 affirmative, see Amalfitano v. Rosenberg, 12 N.Y.3d 8, 903 N.E.2d  
28 265, 874 N.Y.S.2d 868 (2009), and, in light of that decision, we  
29 do indeed affirm.

30 "The district court . . . assessed [a base calculation  
31 of] damages in the amount of \$89,415.18, comprising the

1 Amalfitanos' legal fees from the inception of the Costalas  
2 litigation to the judgment." Amalfitano, 533 F.3d at 122. As we  
3 noted in our previous opinion, such an award assumes that the  
4 defendant committed actionable fraud for section 487 purposes  
5 from the commencement of the litigation -- i.e., from his filing  
6 of the complaint -- at which time the defendant "was [merely]  
7 attempting (but failing) to deceive Justice Gammerman, [and] had  
8 not yet successfully deceived the Appellate Division into  
9 reversing the default judgment." See id. at 125. It also  
10 assumes that the fraud was a proximate cause of the defendants'  
11 incurring legal fees to defend against the entire litigation,  
12 even the period of the litigation before the fraud was  
13 successful. See id.

14 In light of the Court of Appeals' answer, we conclude  
15 that both assumptions were correct. That the defendant's  
16 misrepresentation in the complaint did not actually deceive the  
17 state courts until later in the litigation does not matter, for  
18 "[t]he operative language" of section 487 "focuses on the  
19 attorney's intent to deceive, not the deceit's success."  
20 Amalfitano, 12 N.Y.3d at 14, 903 N.E.2d at 268, 874 N.Y.S.2d at  
21 871. The defendant does not challenge the district court's  
22 finding that his deceit was intentional. See Amalfitano, 533  
23 F.3d at 124. Moreover, because the central claim of the  
24 complaint was predicated upon a misrepresentation of fact, see  
25 id., and because the plaintiffs were "obligated to defend or  
26 default" in response to that complaint "and necessarily incur[]

1 legal expenses" as a consequence, those expenses "may be treated  
2 as the proximate result of the misrepresentation," Amalfitano, 12  
3 N.Y.3d at 15, 903 N.E.2d at 269, 874 N.Y.S.2d at 872. We  
4 conclude that the district court did not err in treating them as  
5 such.

6 For the foregoing reasons, the judgment of the district  
7 court is AFFIRMED.