

**Redmond v Bailey**

2012 NY Slip Op 31081(U)

April 11, 2012

Supreme Court, Queens County

Docket Number: 4004/2011

Judge: Howard G. Lane

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Short Form Order

## NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE** Howard G. Lane  
**Justice****IA Part** 6

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PETER M. REDMOND and PETER M.  
REDMOND, P.C.,

Plaintiffs,

-against-

EDWARD BAILEY, BAILEY AND SHERMAN,  
P.C.,

Defendants.

Index  
Number 4004 2011Motion  
Date October 25, 2011Motion  
Cal. No. 24Motion Seq. No. 2

The following papers numbered 1 to 6 read on this motion by defendant Edward Bailey and defendant Bailey and Sherman, PC for an order: pursuant to CPLR 3211(a)(5) dismissing the complaint against them on the grounds of collateral estoppel, res judicata, law of the case and statute of limitations and, irrespective of the statute of limitations, said cause of action is otherwise untimely; pursuant to CPLR 3211(a)(7) dismissing the pleadings on the ground that the pleadings fail to state a cause of action; pursuant to CPLR 3211(a)(3) dismissing the pleadings on the ground that the party asserting the cause of action has not the legal capacity to sue; pursuant to CPLR 3211(a)(1) dismissing the pleadings on the grounds of a defense that is founded upon documentary evidence; pursuant to CPLR 3211(a)(2) dismissing the pleadings on the ground that the party asserting the cause of action has not standing to sue and thus the court has not jurisdiction of the subject matter of the cause of action; and, upon dismissing the pleadings as aforesaid, issuing a further order as follows, pursuant to Rule 130-1.1, including sections (a), (b) and (c)(1) thereof, awarding costs/and or fees in favor of the above- captioned defendants and/or imposing sanctions against the pro se plaintiffs, in an amount to be determined by the Court, as resulting from the frivolous conduct of said plaintiffs in commencing and continuing a frivolous complaint that is, among other things, completely without merit in law; and/or, pursuant to Rule 130-1.1, including sections (a), (b) and (c)2 thereof, awarding costs and/or fees and/or imposing sanctions against plaintiffs, as resulting from the frivolous conduct of plaintiffs as aforesaid, which conduct was undertaken primarily to delay and/or prolong the resolution of the litigation, and/or to harass and/or maliciously injure the defendants; and/or, pursuant to CPLR 8303-a et seq., and upon a finding of frivolousness based on the conduct as aforesaid, and more partially as pursuant to CPLR 8303-a(c)(i) (harassing, delaying, injurious, etc. litigation), imposing costs and/or attorney fees against plaintiffs in the amount of \$10,000; and/or, pursuant to CPLR 8303-a et seq., and upon a finding of frivolousness based on the conduct as aforesaid; and more partially as pursuant to CPLR 8303-a(c)(ii) (meritless claim), imposing costs and/or attorney fees against plaintiffs in the amount of \$10,000.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits .....	1
Answering Affidavits - Exhibits .....	2
Reply Affidavits .....	3-4
Memorandum of Law .....	5-6

Upon the foregoing papers it is ordered that: the branch of the motion which seeks an order dismissing the complaint pursuant to CPLR 3211(a)(7) is granted. The remaining branches of the motion brought pursuant to CPLR 3211(a) are denied as moot. Those branches of the motion which seek an order imposing sanctions, etc. on the plaintiffs are denied.

### I. Overview

The facts underlying this dispute are more fully given in decisions dated December 22, 2011 rendered by the Honorable Robert J. McDonald on motions for summary judgment in a companion case brought in the New York State Supreme Court, County of Queens (*Smallwood v. Lupoli*, Index No. 6066/10).

Judge McDonald gave a short summary of the facts in a decision and order (one paper) dated June 30, 2011 rendered in the companion action:

“ Briefly, in or about November, 2000, an IAS judge appointed Editha Hills as the guardian of the person of Keishma Smallwood, a blind and developmentally disabled woman, and defendant Matthew M. Lupoli, an attorney, as the guardian of her property in a guardianship proceeding pending in the New York State Supreme Court, County of Queens ( Index No. 14698/00). In 2001, an IAS judge appointed Lupoli as the guardian of the property of Alice Dailyda, an 89 year old woman suffering from Alzheimer’s disease, in a guardianship proceeding pending in the New York State Supreme Court, County of Queens ( Index No. 5920/01). Lupoli allegedly manipulated the sale of houses owned by Smallwood and Dailyda in such a manner that defendant Albert Basal, defendant Fred Basal, and defendant Tony Zadeh, or corporations they controlled, purchased the houses below fair market value. The purchasers then resold the houses a relatively short time later, making large profits.

Editha Hills and Alice Collins, the executrix of the estate of Alice Dailyda, retained attorney Edward Bailey to inquire into the matter, and, after doing so, his clients brought an action against Lupoli, among others, based on, inter alia, the Racketeer Influenced and Corrupt Organizations Act (RICO) in the United States District Court for the Eastern District of New York. On September 14, 2007, the federal district judge rendered a decision granting the defendants’ motions for summary judgment on the

RICO claims and declining to retain jurisdiction over the state law claims (*Smallwood ex rel. Hills v. Lupoli*, 2007 WL 2713841 [nor].) On March 4, 2009, the Court of Appeals for the Second Circuit affirmed the order of the federal district judge, finding that the plaintiffs had “failed to adduce sufficient evidence of a RICO enterprise” (*Smallwood v. Lupoli*, 2009 WL 579419 [nor].) Bailey’s clients subsequently brought the instant action for, inter alia, breach of fiduciary duty on the part of Lupoli and aiding and abetting the breach of fiduciary duty on the part of the other defendants. Lupoli and other defendants served a third-party complaint against Bailey, his law firm, Hills, and Collins for abuse of process, defamation, and prima facie tort.”

Attorney Peter M. Redmond, a principal of Peter M. Redmond PC, the plaintiffs in this action and two of the defendants in the companion action, represented Lupoli in the guardianship proceedings, prepared contracts for the sale of the Dailyda and Smallwood properties, and represented Lupoli at the closings of the Smallwood and Dailyda properties.

By memorandum and order dated May 11, 2011, Justice McDonald, inter alia, pursuant to CPLR 3211(a)(7) dismissed counterclaims by the Redmond defendants in the companion action for malicious prosecution and tortious interference with contract and dismissed claims by the other defendants/third-party plaintiffs in the companion action for abuse of process, defamation, and prima facie tort. The third-party plaintiffs had named Bailey as one of the third-party defendants.

Pursuant to a decision and order (one paper) dated May 11, 2011, Justice McDonald denied a motion made in the companion action by defendants/third-party plaintiffs Matthew Lupoli, Albert Basal, Fred Basal, Tony Zadeh, Plaza Homes, LLC, and George J. Brucker for an order permitting them to amend their third-party complaint to add a cause of action based on the violation of Judiciary Law § 487 against third-party defendant Edward G. Bailey, Esq. Justice McDonald found the proposed cause of action to be “patently lacking in merit.”

By memorandum dated December 22, 2011 and order dated December 21, 2011, Justice McDonald granted a motion brought by all of the defendants in the companion action except the Redmond defendants for summary judgment dismissing the complaint against them. By another memorandum dated December 22, 2011 and order dated December 21, 2011, Justice McDonald granted a motion by the Redmond defendants for summary judgment dismissing the complaint against them in the companion action.

## II. The Verified Amended Complaint in the Instant Action

The amended verified complaint alleges facts pertaining to the course of the guardianship proceedings and Bailey’s involvement as the attorney for Editha Hills and Alice Collins.

The complaint also alleges the following: In December, 2003, Bailey filed a frivolous application on behalf of Collins and Hills which sought the removal of Lupoli as the guardian. In February 2004, Bailey began the federal RICO action against Redmond and other defendants out

of “disinterested malevolence” and for the purpose of tortiously interfering with the business relationship between Lupoli and the Redmond plaintiffs. The complaint filed in the federal proceeding falsely accused Redmond of “having engaged in a scheme to manipulate and corrupt guardianship proceedings in the Supreme Court, County of Queens, for their own pecuniary gain”. After the federal court declined to retain jurisdiction over state claims, Bailey began *Smallwood v. Lupoli* ( Index No. 6066/10) in the New York State Supreme Court, County of Queens asserting frivolous claims against Redmond for aiding and abetting a breach of fiduciary duty, common law fraud, conversion, violation of Judiciary Law § 487, conspiracy, abuse of process, intentional infliction of emotional distress, prima facie tort, and negligence.

A reading of the complaint in this action could easily lead to the conclusion that the pleading filed by the Redmond plaintiffs ignores the requirement of CPLR 3014 that “[s]eparate causes of action or defenses shall be separately stated and numbered” (*see, Cole v. O'Tooles of Utica, Inc.*, 222 AD2d 88). The complaint contains language used in causes of action for malicious prosecution, defamation, tortious interference with a business relationship, and violation of Judiciary Law § 487.

However, Redmond has made it plain that the instant complaint alleges only one cause of action against the defendants, a cause of action based on Judiciary Law § 487. He states in his opposing affirmation (p2): “The following is a concise statement of the litigation history and relevant facts which form the basis for the cause of action which plaintiffs are asserting against defendants for deceit and collusion under New York Judiciary Law § 487 \*\*\*\*”. “Said conduct on the part of Bailey as detailed above has resulted in filing this above captioned action by the Redmond plaintiffs alleging that the Bailey defendants violated Judiciary Law § 487 \*\*\*\*” ( p27): “A single cause of action for violations of the Judiciary Law has been stated in the amended complaint” (p28): Redmond states in his memorandum of law: “A single cause of action for violations of the Judiciary Law has been stated in the amended complaint” (p 10): “ Defendants falsely and intentionally claim that the amended complaint contains two causes of action \*\*\*\*” ( p10, fn5).

### III. The Legal Standards Relevant to CPLR 3211(a)(7) (failure to state a cause of action)

In determining a motion brought pursuant to CPLR 3211(a)(7), the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory \*\*\*\*" (*1455 Washington Ave. Assocs. v. Rose & Kiernan*, 260 AD2d 770, 770-771; *Esposito-Hilder v. SFX Broadcasting Inc.*, 236 AD2d 186). "The sole criterion is whether ‘from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law' \*\*\*\*" ( *Mayer v. Sanders*, 264 AD2d 827, 828 quoting *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275; *see, Aranki v. Goldman & Associates, LLP*, 34 AD3d 510; *Operative Cake Corp. v. Nassour*, 21 AD3d 1020). "The court must accept the facts alleged in the pleading and the submissions in opposition to the motion as true, and accord the plaintiff the benefit of every possible favorable inference \*\*\*\*" ( *Operative Cake Corp. v. Nassour, supra*, 1021; *see, Aranki v. Goldman & Associates*,

LLP, *supra*).

Nevertheless, "[w]hile typically the pleaded facts will be presumed to be true and accorded a favorable inference, 'allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence [will] not [be] entitled to such consideration' \*\*\*\*" (*Marraccini v. Bertelsmann Music Group Inc.*, 221 AD2d 95, 98, quoting *Roberts v. Pollack*, 92 AD2d 440, 44; *see, Ullmann v. Norma Kamali, Inc.*, 207 AD2d 691; *Fisher v. Maxwell Communications Corp.*, 205 AD2d 356). "A complaint is insufficient if based solely on conclusory statements, unsupported by factual allegations . . . ." (*Melito v. Interboro Mut. Indem. Ins. Co.*, 73 AD2d 819, 820).

#### IV. The Cause of Action for Violation of Judiciary Law § 487

Judiciary Law § 487, "Misconduct by Attorneys", provides that an attorney who "[i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party \*\*\*\*" incurs civil liability to the injured party and is subject to treble damages" (*see, Maksimiak v. Schwartzapfel Novick Truhowsky Marcus, P.C.*, 82 AD3d 652; *Rock City Sound, Inc. v. Bashian & Farber, LLP*, 74 AD3d 1168). The deceit need not occur in open court, and "the statute applies to any oral or written statement related to a proceeding and communicated to a court or party with the intent to deceive" (*Amalfitano v. Rosenberg* 533 F.3d 117, 123). "A violation of Judiciary Law § 487(1) may be established either by the defendant's alleged deceit *or* by an alleged chronic, extreme pattern of legal delinquency by the defendant" (*Boglia v. Greenberg*, 63 AD3d 973, 975 [italics added]; *Rock City Sound, Inc. v. Bashian & Farber, LLP, supra*; *Izko Sportswear Co., v. Flaum, supra*). An attorney may be found liable under Judiciary Law § 487 for a single deceitful or collusive act, and a pattern of legal delinquency need not be shown (*see, Izko Sportswear Co., v. Flaum*, 25 AD3d 534; *Amalfitano v. Rosenberg, supra*).

In the case at bar, the complaint brought by the Redmond plaintiffs alleges that "the Defendants engaged in a course of conduct to deceive and defraud state and federal courts, being untruthful and nefarious in accomplishing their own ends to the prejudice of the Plaintiffs" (¶27). The Redmond complaint further alleges that the "defendants herein have engaged in conduct which represents a violation of Judiciary Law Section 487" and that they have "over a period of years, conducted a chronic and extreme pattern of legal delinquency to deprive the Plaintiffs herein of their rights". The Redmond complaint alleges that Bailey deceived the federal court by filing a complaint which falsely accused the defendants of violating the RICO statute and committing state common law torts and which falsely accused them of "having engaged in a scheme to manipulate and corrupt guardianship proceedings in the Supreme Court, County of Queens, for their own pecuniary gain" (¶29). According to the Redmond plaintiffs, the federal complaint filed by Bailey falsely accused them of "having facilitated a corrupt sales process by drafting contracts of sale, attending the auction and the closing, making numerous motions in furtherance of the sale, and attending court conferences and appearances and seeking payment for such services with regard to the sale by public auction of the Smallwood property" (¶30) and by performing similar services in regard to the Dailyda property (¶32). Although the defendants in the federal action obtained summary judgment dismissing the RICO claim, Bailey allegedly

successfully deceived the federal court by getting it to deny a prior motion to dismiss the complaint for insufficiency. The Redmond complaint further accuses Bailey of violating Judiciary Law § 487 by bringing *Smallwood v. Lupoli* in state court alleging various common law torts after the federal court declined to retain jurisdiction over them.

“A violation of Judiciary Law § 487 requires an intent to deceive \*\*\*” (*Moormann v. Perini & Hoerger*, 65 AD3d 1106, 1108; *Sabalza v. Salgado*, 85 AD3d 436). Although Bailey may have made allegations in state and federal actions that the courts determined were unfounded, intent to deceive is not thereby established.

The “[a]ssertion of unfounded allegations in a pleading, even if made for improper purposes, does not provide a basis for liability under [Judiciary Law § 487]” (*Thomas v. Chamberlain, D’Amanda, Oppenheimer & Greenfield*, 115 AD 2d 999, 1000; *Ticketmaster Corp. v. Lidsky*, 245 AD2d 142; *O’Callaghan v. Sifre*, 537 F.Supp.2d 594). The Redmond plaintiffs concede that “[c]ourts have consistently endorsed the concept that an [sic: a] § 487 action grounded solely on claims that an attorney made meritless or unfounded actions in state court proceedings are not sufficient” (Memorandum of Law, pp6-7).

The Redmond complaint is based on little more than the accusation that Bailey made false allegations in the course of the federal action, the state guardianship proceedings, and in *Smallwood v. Lupoli*. However, the Redmond complaint does not adequately substantiate the allegation that Bailey knowingly made false statements with the intent to deceive the court. “A complaint is insufficient if based solely on conclusory statements, unsupported by factual allegations . . . .” (*Melito v. Interboro Mut. Indem. Ins. Co.*, 73 AD2d 819, 820). Bailey’s making of allegations in state and federal actions that were subsequently determined to be unfounded must be distinguished from the making of allegations that he knew were false. The Redmond complaint does not allege sufficient facts permitting the inference that Bailey knowingly and with an intent to deceive made false statements in judicial proceedings. As Justice McDonald held in *Smallwood v. Lupoli*, in denying a motion by the other defendants therein for an order permitting the amendment of the pleadings for the purpose of asserting a cause of action based on Bailey’s alleged violation of Judiciary Law § 487, the making of unfounded allegations without more does not amount to a violation of the statute.

The Redmond plaintiffs attempted to salvage their case by arguing that Bailey did more than make unfounded allegations. The attempt is futile. First, the Redmond plaintiffs cite several cases where violations of Judiciary Law § 487 were found, but these cases are not on point. For example, *Rock City Sound, Inc. v. Bashian & Farber, LLP* (74 AD3d 1168) does not concern the filing of an unfounded complaint, and Bailey committed none of the acts attributed to the attorney therein (counseling a shareholder to ignore an injunction and to ignore Business Corporation Law § 909, failing to advise another shareholder of the sale of corporate assets, and failing to move for an order relieving him as the attorney for the corporation).

Second, while some violations of 22 NYCRR 130-1.1, which pertains to “frivolous conduct” and 22 NYCRR Part 1200, which sets out the Rules of Professional Conduct, may permit the inference of an intent to deceive, the allegations made by the Redmond plaintiffs do

not permit such an inference to be drawn in this case.

The Redmond plaintiffs did not allege that Bailey engaged in conduct that was “sufficiently egregious” to support the statutory claim (*see, Englert v. Schaffer*, 61 AD3d 1362, 1363).

In view of the extensive analysis undertaken by the federal and state courts in dismissing the two actions brought by Bailey, the Redmond plaintiffs cannot successfully argue that the filing of those two actions was frivolous, and the Redmond plaintiffs otherwise failed to adequately allege that Bailey’s conduct in state and federal court amounted to a “chronic, extreme pattern of legal delinquency by the defendant” (*Boglia v. Greenberg, supra*, 975).

Third, the argument made by the Redmond plaintiffs that the commencement of *Smallwood v. Lupoli* after the dismissal of the RICO claim by the federal court “amounts to a massive attempt to deceive and provides an abundance of ‘more’ which distinguishes this action from Thomas \*\*\*” (Memorandum, pp10-11) cannot withstand scrutiny. The commencement of the state action after the federal court dismissed the RICO claim and declined to retain jurisdiction over state claims did not amount to a violation of Judiciary Law § 487. The RICO claim was dismissed on grounds specific to that statute’s complex requirements, and Justice McDonald, after pages of analysis, denied those branches of the motions by the defendants in *Smallwood v. Lupoli* for summary judgment on the grounds of collateral estoppel.

The complaint fails to state a cause of action.

Dated: April 11, 2012

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**Howard G. Lane, J.S.C.**