

**Hatton v Aliazzo McCloskey & Gonzalez, LLP**

2013 NY Slip Op 32910(U)

October 9, 2013

Supreme Court, Queens County

Docket Number: 14630/12

Judge: Timothy J. Dufficy

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY  
Justice

PART 35

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CONNELL HATTON and RACHEL HATTON

Plaintiffs,

Index No.: 14630/12

Mot. Date: 8/27/13

-against-

Mot. Cal. No. 50

Mot. Seq. 1

ALIAZZO McCLOSKEY & GONZALEZ, LLP.,  
FRANK GONZALEZ, ESQ., THOMAS P.  
McCLOSKEY, ESQ. And RANDALL S.  
FERGUSON, ESQ.

Defendants.

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The following papers numbered 1 to 13 read on this motion by plaintiffs for an order pursuant to CPLR 3215 entering a default judgment against the defendant RANDALL S. FERGUSON, ESQ. and the cross-motion by defendant Randall S. Ferguson, Esq. (Ferguson) for an order, *inter alia*, dismissing the plaintiff's complaint as against him.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affirmation-Exhibits .....	1-4
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Reply Affirmation In Support and In Opposition to Cross-Motion -Exhibits.....	9-11
Reply Affirmation .....	12-13

Upon the foregoing papers, it is ordered that the plaintiffs' motion and the defendant Ferguson's cross-motion are both denied in all respects as follows.

The plaintiffs brings this action seeking damages for legal malpractice against all of the defendants. They allege in their complaint that al of the defendants were retained to represent them in a personal injury action involving an accident that occurred on

March 20, 2007. Plaintiffs Conell Hatton and Rachel Hatton move for a default judgment against defendant Randall S. Ferguson, Esq. for failure to interpose an answer in this matter. Defendant Randall S. Ferguson, Esq. cross-moves for dismissal based on a lack of personal jurisdiction, and, in the alternative, because defendant Randall S. Ferguson, Esq. did not represent the plaintiffs in the underlying personal-injury action.

The Court initially notes that the cross-motion to dismiss this action contains the sworn affidavit of Randall S. Ferguson, Esq. That affidavit, avers, under penalty of perjury, that:

Randall S. Ferguson, being duly sworn, deposes and says:  
I believe it is important to make clear, at the outset, that Conell Hatton did not retain me to bring an action on his behalf against Modells, or anyone else. In fact, *after I advised him that I would not represent him in any such action*, and referred him to the firm of ....he retained the firm of .... to represent him.  
*Accordingly, the assertion by the plaintiff and plaintiffs' attorney that I was retained by Conell Hatton to represent him in an action that was eventually dismissed because the wrong -party was sued is completely incorrect. [Emphasis added].*

(See affidavit of Randall S. Ferguson, Exhibit "C" to defendant's cross-motion, at pages 1 and 2, paragraphs 2 and 3).

In response, in his Reply Affirmation, the attorney for the plaintiff, Steven E. Millon, Esq., provides the following exhibits:

1- Exhibit "A", a "claim letter" to Modell's Sporting Goods on the letterhead of Randall S. Ferguson, dated January 21, 2008, at the same address that Attorney Ferguson claims as his office address. The letter is signed "Randall S. Ferguson". In the caption of the letter it reads : "Our Client: Connell [sic] Hatton". The body of the letter reads:

Please be advised that *this office has been retained in connection with a claim against Modell's Sporting Goods for personal injuries sustained by Connell [sic] Hatton* as a result of an accident occurring on the date indicated above. [Emphasis added.]

(See Reply Affirmation of Steven E. Millon, Esq., Exhibit "A").

2- Exhibit "B", a similar "claim letter", dated October 16, 2008, addressed to the claims department of Modell's Sporting Goods. The letter purports to forward copies of records and reports pertaining to Mr. Hatton's accident, injuries and damages, along with 14 photographs depicting the premises where the accident occurred. It is unsigned, but, below the signature line is printed "Randall S. Ferguson." (See Reply Affirmation of Steven E. Millon, Esq., Exhibit "B").

3- Exhibit "C", a "claim letter" addressed to the Claims Department Modell's Sporting Goods, dated April 1, 2008, which reads as follows:

As I advised previously in my letter dated January 21, 2008, *this office represents Conell Hatton* in connection with his claims for general and special damages for personal injuries sustained on the date shown above. [*Emphasis added.*]

Having had no response to my request that I be contacted, I enclose herewith a courtesy copy of plaintiff's summons and complaint.

(See Reply Affirmation of Steven E. Millon, Esq., Exhibit "C"). This letter is signed "Randall S. Ferguson" and is on the same letterhead of Randall S. Ferguson at the address that Attorney Ferguson claims is his office address in his cross-motion to dismiss. Included in this exhibit is a copy of the certified receipt for the letter indicating that it was received by Modell's Sporting Goods. Also included is a copy of the Summons and Complaint naming Conell Hatton as Plaintiff and Modell's Sporting Goods, Inc. as Defendant. The Summons is subscribed "Randall S. Ferguson, Attorney for Plaintiff."

4- Exhibit "D", a letter on the letterhead of Randall S. Ferguson addressed to Meadows Mid-Queens Radiology requesting medical records pursuant to Public Health Law §18. In the caption of the letter, the patient is listed as "Connell [sic] Hatton.". The letter is signed "Randall S. Ferguson". The letter reads:

*This office represents your patient, above named, who was injured in an accident on the date indicated, and who thereafter came under your care. We write on the patient's behalf. [Emphasis added.]*

(See Reply Affirmation of Steven E. Millon, Esq., Exhibit "D").

With respect to his explicit denial of the fact that he was retained by Conell Hatton, it is obvious that the statements of defendant/attorney Randall S. Ferguson in his affidavit in support of his cross-motion are false, in light of his having sent several letters of representation along with a Summons and Complaint bearing his name on behalf of Mr. Hatton. "The concededly false answers given and [attorney Ferguson's] lack of candor, whether technically perjurious or not, breached the standards of professional ethics" (see In re Friedman, 196 AD2d 280 [1st Dept. 1994]; Matter of Fagan, 58 AD3d 260 [1st Dept. 2008] [*Disbarment is an appropriate sanction for attorneys who...have made deliberate misrepresentations to a court*]; see also Matter of Shearer, 94 AD3d 128 [1st Dept. 2012]).

Sadly, the attorney for defendant/attorney Ferguson in this legal-malpractice action, Kevin A. Wakefield, Esq., of the firm of Catalano Gallardo & Petropoulos, LLP, chose not to address the inconsistencies between his client's proffered affidavit and the tangible evidence to the contrary offered by the plaintiffs in response in his reply papers. If there was a reasonable explanation for the contradictions in the statements of his client, the Court would expect Attorney Wakefield to provide it. In the absence of any explanation, as in the case at bar, the Court would expect no less than that Attorney Wakefield would withdraw his cross-motion containing the false statements, rather than present them to the Court without explanation. As it stands, there is no explanation for obviously false statements presented to this Court.

Plaintiff's attorney, Steven Millon, Esq., of the firm of Jeffrey J. Shapiro & Associates, LLC., while exposing Attorney Ferguson's conduct, also makes the following precarious statements himself:

Whereas Mr. Ferguson never submitted any papers in this action, not even to contest jurisdiction, *your affirmant was not on notice that Mr. Ferguson was challenging service*. If after this passage of time, Mr. Ferguson submits his first document in writing stating that he was improperly served, then plaintiff seeks an enlargement of his time within which to serve Mr. Ferguson in the interest of justice. Defendant ought not be rewarded for laying low and not taking any position in this lawsuit whether it be procedurally or on the merits. [*Emphasis added*]

(Affirmation of Steven E. Millon, Esq. at p. 1-2, paragraph 3).

The aforementioned exhibits attached to Attorney Millon's papers all contain the office address of attorney Ferguson. Attorney Millon cannot, in good faith, claim unawareness of the lack of proper service, under these circumstances. On the contrary, this Court finds attorney Millon's misrepresentations of feigned ignorance as to the fact that the defendant was not served at his proper office address, to be made in bad faith.

As one of my colleagues once observed:

It is the ethical responsibility of every lawyer to maintain the integrity and improve the competence of the Bar to meet the highest standards (Code of Professional Responsibility EC 1-1). A lawyer is an officer of the court and, as such, has a high duty to maintain the dignity of the legal system (see, *Bennett v Martoche*, 123 Misc 2d 874). Canon 1 of the Code prohibits an attorney from engaging in misrepresentation (Code of Professional Responsibility DR 1-102 [A] [4] [22 NYCRR 1200.3 (a) (4)]). "*An attorney is to be held strictly accountable for his statements or conduct which reasonably could have the effect of deceiving or misleading the court in the action to be taken in a matter pending before it. The court is entitled to rely upon the accuracy of any statement of a relevant fact unequivocally made by an attorney in the course of judicial proceedings.*" (See, *Matter of Schildhaus*, 23 AD2d 152, 155-156; also see, *Matter of Friedman*, 196 AD2d 280, 296; *Matter of Rotwein*, 20 AD2d 428, 430.) . . . It is our collective duty to always remember that "A lawyer should maintain high standards of proper conduct and should encourage other lawyers to do likewise" (Code of Professional Responsibility EC 1-5). . . Specifically applicable herein is Standard IX, "*Lawyers should not mislead other persons involved in the litigation process.*" (22 NYCRR part 1200, Appendix A.) [*emphasis supplied.*]

*Klein by Klein v. Seenauth*, 180 Misc2d 213, 222 [Civil Court Queens County, 1999 [Ritholtz, J.]; see also *Meachum v. Outdoor World Corp.*, 171 Misc. 2d 354 [Sup. Ct. Queens Co. 1996] ). As officers of the Court, counsel have a high duty to maintain the dignity of the legal system (see *Smith v Smith*, 2006 NY Misc. LEXIS 2851 [Sup. Ct. West. Co.. 2006])

The Court opines that both parties who have made the instant submissions to the Court have failed to rise to the standards of officers of the Court. The line of zealous advocacy ends where truth becomes fiction. Since it is not the Court's function to punish this type of behavior, the Court will strike both sets of motion papers, and award no relief in the instant matter to either side.

Needless to say, both sides (attorney Kevin A. Wakefield, of the firm Catalano Gallardo & Petropoulos, LLP, attorney Randall S. Ferguson and attorney Steven E.

Millon, of the firm Jeffrey J. Shapiro & Associates, LLC.) are strongly admonished not to repeat this conduct.

Any and all other applications not specifically addressed herein are denied.

Accordingly, based upon the foregoing, the plaintiffs' motion is denied in all respects and the defendants' cross-motion is denied in all respects.

This constitutes the opinion, decision and order of the Court.

**Dated: October 9, 2013**

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**TIMOTHY J. DUFFICY, J.S.C.**