

**M.T. Packaging, Inc. v Maidenbaum & Assoc.,  
P.L.L.C.**

2018 NY Slip Op 30601(U)

April 4, 2018

Supreme Court, New York County

Docket Number: 153441/2017

Judge: James E. d'Auguste

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 55

X-----X

M.T. PACKAGING, INC.,

Plaintiff,

-against-

**DECISION AND ORDER**

Index No. 153441/2017

Mot. Seq. No. 001

MAIDENBAUM & ASSOCIATES, P.L.L.C.,  
JEFFREY MAIDENBAUM, and CAROL MOROKOFF,

Defendants.

X-----X

**Hon. James E. d'Auguste**

Defendants' motion seeking to: (1) strike prejudicial and unnecessary language from the complaint, and (2) disqualify plaintiff's counsel is granted to the extent of striking the requested paragraphs of the complaint, and is otherwise denied without prejudice.

This action is based upon alleged violations of Judiciary Law Section 487 that were originally asserted as part of an amended pleading in a related action, entitled *M.T. Packaging, Inc. v. Fung Kai Hoo, et al.*, Index No. 652579/2014, but were then directed to be severed by an order of this Court (Kern, J.) dated October 21, 2016. NYSCEF Doc. No. 25. The alleged violations of Judiciary Law Section 487 are based upon defendants' representation of their clients in two lawsuits in which plaintiff was involved: *K's International Polybags Mfg. Ltd. v. M.T. Packaging, Inc.*, Index No. 154420/2012 ("Contract Action"), in which defendants represented the plaintiff in that action, and *M.T. Packaging, Inc. v. Fung Kai Hoo, et al., supra*, ("Fraud Action"), in which defendants represented certain defendants in that action.

In its prior decision, this Court granted the motion to sever the Judiciary Law Section 487 claim in the Fraud Action on the grounds that the Judiciary Law claim and the fraud claims in that action did "not involve common factual and legal issues." NYSCEF Doc. No. 25, at 2.

Specifically, the Court made the following findings with respect to commonality:

The facts underlying plaintiff's fraud claim against [certain defendants] relate to the sale of packaging and bags in 2008 and 2009, while the facts underlying plaintiff's Judiciary Law § 487(1) claim against Maidenbaum relate to its representation of its codefendants in the related action [Contract Action], which was commenced in 2012, and the instant action [Fraud Action], which was commenced in 2014.

*Id.* The Court further held that:

Plaintiff's allegation that Maidenbaum's misconduct in the related and instant actions furthered the fraud of [certain defendants] fails to establish that the claims involve any common issues of fact. All of the facts underlying plaintiff's fraud claims against [said defendants] as alleged in the amended complaint occurred before the related and instant actions [the Contract Action and the Fraud Action] were commenced and thus before Maidenbaum allegedly committed any misconduct.

*Id.* at 4.

The allegations set forth in paragraphs 16 through 30 of the complaint in the within action are duplicative of the very factual allegations of fraud that formed the basis of this Court's earlier severance decision. In defendants' moving papers, they indicate that the allegedly fraudulent certificate at issue in that action was provided to plaintiff more than four years prior to the retention of defendants as counsel and commencement of the Contract Action. The undersigned agrees with this Court's prior determination that the allegations contained in paragraphs 16 through 30 of the complaint have no bearing on the Judiciary Law claim and are prejudicial to defendants as the only purpose such allegations serve are to disparage defendants in this action. Defendants themselves, as attorneys, had nothing to do with the breach of contract or certificate fraud because they were not involved in the conduct that is the subject of the Contract Action and the Fraud Action. Defendants merely represented their clients in both actions. Moreover, any pre-litigation conduct is not relevant to claims brought under the Judiciary Law as this is not the type of fraud contemplated by the statute. *See, e.g., Mahler v.*

*Campagna*, 60 A.D.3d 1009, 1012 (2d Dep't 2009). It is both unnecessary in this action and inappropriate for plaintiff to prove the truth of the allegations contained in the Fraud Action because it would be tantamount to having a litigation within this litigation. Further, it would be prejudicial to defendants to make them defend against such allegations as parties. However, if the purpose of including such allegations in the complaint is to give context to the instant Judiciary Law claim, as plaintiff asserts, the most appropriate way would be to state, using neutral language, that defendants were lawyers in the Fraud Action and the Contract Action. Accordingly, the Court permits plaintiff leave to amend the complaint as directed above.

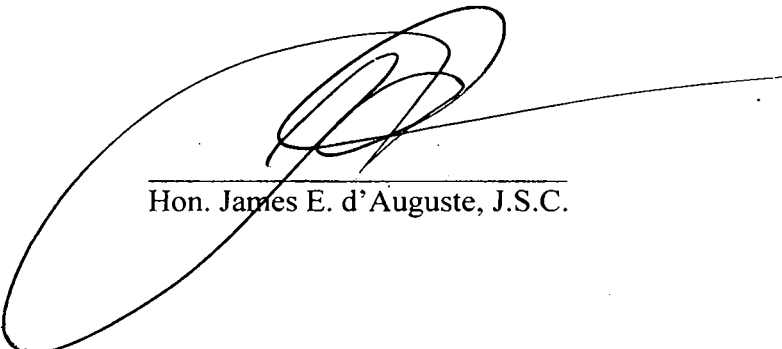
Moreover, the allegations contained in paragraphs 55 through 62 of the complaint relate to privileged attorney-client communications—a privilege owned by defendants' non-party clients. The only way for defendants to defend against such allegations would be for defendants to reveal what they communicated to their clients, which is privileged. The Judiciary Law was never designed to require such disclosure to defend against an allegation where the privilege has not been waived. Because waiver of the attorney-client privilege belongs to the client, the attorney, and thus defendants herein, cannot waive the privilege. While there are some situations where an attorney's conduct can constitute a waiver by the client, this is because the attorney is acting as the client's agent. *In re von Bulow*, 828 F.2d 94, 101 (2d Cir. 1987). However, in this instance, the allegations are not that defendants are acting as the client's agents, but that defendants, as attorneys, are themselves committing a fraud. In such situations, an attorney is not acting as an agent, but as a principal. This Court then must return to the strictures of the attorney-client privilege—that the privilege belongs to the client and only the client can waive the privilege, either expressly or impliedly. Defending against allegations made pursuant to the Judiciary Law does not equate to a knowing or implied waiver of the attorney-client privilege by

the client. As such, this Court does not read the Judiciary Law as a hammer to chip away at the attorney-client privilege. Section 487 of the Judiciary Law is not meant to require disclosure by attorneys or waiver by their clients. *See Wailes v. Tel Networks USA, LLC*, 116 A.D.3d 625, 626 (1st Dep't 2014) (“[T]he only allegations of wrongdoing refer to a settlement discussion had after Tel Networks commenced a legal proceeding, and that communication is absolutely privileged.”). Thus, the Court does not read the Judiciary Law as permitting a claim where the only means of defending against the cause of action is to disclose privileged communications.

Finally, while the Court appreciates defendants' concern that the allegations upon which this action is based essentially makes plaintiff's counsel a fact witness, the Court declines at this stage of the proceedings to mandate disqualification.

This constitutes the decision and order of this Court.

Dated: April 4, 2018



Hon. James E. d'Auguste, J.S.C.