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Court of Appeals Rules That “Attempted Deceit” is Sufficient to Sustain a Cause of Action Under Judiciary Law Section 487

The Court of Appeals recently considered the scope of section 487 of the New York Judiciary Law. *Amalfitano v. Rosenberg*, 2009 NY Slip Op 01069, 2009 N.Y. LEXIS 14 (February 12, 2009).

Courts in New York had historically applied this section carefully, in light of the potential for the harsh penalty of treble damages. The statute has been held to apply only to the most extreme chronic pattern of legal delinquency. See *Markard v. Bloom*, 4 A.D.3d 128 (1st Dep't 2004); see also *Cohen v. Law Offices of Leonard & Robert Shapiro*, 18 A.D.3d 219 (1st Dep't 2005).

In the early 1990s, the defendant Rosenberg began representing Peter Costalas, one of three brothers who were at one time engaged in a family real estate and restaurant business. Unbeknownst to his brothers, Peter had improperly diverted approximately ten million dollars from the family business. While Peter avoided criminal charges, his brothers commenced a civil action against him. In settlement of the action, Peter signed an agreement in August 1993 in which he assigned and transferred his right, title, and interest in all the family businesses to one of his brothers. Rosenberg was involved in the negotiations which led to the drafting of the 1993 agreement and learned many of the details of Peter's misdeeds.

Later in 1993, the plaintiff (the daughter of Peter's brother) began to assume responsibility of the Costalas family businesses, of which only one restaurant and a building remained. The building was subject to a two million dollar mortgage (\$800,000 of which had been undertaken by Peter without his brothers' knowledge). The plaintiff purchased the building in 2000 and personally guaranteed the necessary mortgage loan, and Peter's brothers were released from their obligations on the mortgage. The next year Rosenberg, as Peter's attorney, initiated a lawsuit in state court against the plaintiff and her husband, alleging that they defrauded James and John into conveying the building, that Peter was still a partner in the business, and seeking \$4,185,000 in damages.

In response to the plaintiffs' motion to dismiss on the basis of the 1993 Agreement, the defendant made a cross-motion for summary judgment. In support of his cross-motion, the defendant prepared and notarized a sworn affidavit by Peter which claimed, among other things, that the 1993 Agreement was signed only as a sham to avoid potential creditors. After granting the plaintiffs' motion on default, the trial judge failed to vacate the default because he found that the litigation was without merit in that Peter was estopped by the parol evidence rule from arguing that the 1993 Agreement was a sham and therefore not effective. The Appellate Division, First Department reversed, holding that discovery was needed before a determination could be made on the validity and scope of the 1993 Agreement.

During the pre-trial discovery that pursued, Rosenberg engaged in a persistent pattern of unethical behavior. In 2004, the plaintiffs commenced an action in federal court, alleging that the defendant's conduct in the state court action violated New York Judiciary Law section 487 and caused them damages in the form of attorney's fees and expenses.

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After a four day bench trial, the district court concluded that Rosenberg engaged in “a persistent pattern of unethical behavior” during the state court litigation, finding that he acted with intent to deceive both the trial court and the Appellate Division and assessed damages in the amount of \$89,415.18, comprising the plaintiffs' legal fees from the inception of the state court litigation to the judgment, and trebled the award to \$ 268,245.54 as allowed by section 487.

On appeal to the Second Circuit, the defendant argued that the district court's conclusion was erroneous because his deceit was not material to the Appellate Division's decision to reverse the entry of default judgment. The Second Circuit rejected the first part of defendant's argument, concluding that there was no error in the district court's conclusion that the defendant was liable under section 487 for intentionally and successfully deceiving the Appellate Division. With respect to defendant's argument that district court improperly held him liable for his unsuccessful attempt to deceive the state trial court, the Second Circuit held that it could affirm the judgment of the district court in its entirety only if Rosenberg's attempted deceit ~ the false allegations in the complaint in the Costalas litigation ~ supported a cause of action under section 487 and was the proximate cause of the plaintiffs damages in defending the litigation from its inception. The Second Circuit certified the following two questions to the Court of Appeals: (1) can a successful lawsuit for treble damages brought under N.Y. Jud. Law § 487 be based on an attempted but unsuccessful deceit; and (2) in the course of such a lawsuit, may the costs of defending litigation instituted by a complaint containing a material misrepresentation of fact be treated as the proximate result of the misrepresentation if the court upon which the deceit was attempted was not in fact deceived.

Addressing the first certified question, the Court of Appeals noted that section 487 does not derive from common law fraud (which requires that the plaintiff actually have been deceived), but rather is a unique statute descending from the first Statute of Westminster, a criminal statute which was adopted by the Parliament summoned by King Edward I of England in 1275. The Court of Appeals found it significant that for many years section 487 was placed in the state's penal law, supporting the argument that the more appropriate context for its analysis is not the law applicable to comparable civil torts but rather criminal law, where an attempt to commit an underlying offense is punishable as well as the underlying offense itself.

The Court of Appeals further noted that the operative language at issue ~ “guilty of any deceit” ~ focuses on the attorney's intent to deceive, not the deceit's success. The Court reasoned that limiting liability under section 487 to successful deceptions would run counter to the statute's evident intent to enforce an attorney's special obligation to protect the integrity of the courts and foster their truth-seeking function.

Addressing the second certified question, the Court of Appeals ruled that recovery of treble damages under section 487 does not depend upon the court's belief in a material misrepresentation of fact in the complaint. The Court reasoned that when a party commences an action grounded in a material misrepresentation of fact, the opposing party is obligated to defend or default and necessarily incurs legal expenses. Because, in such a case, the lawsuit could not have gone forward in the absence of the material misrepresentation, the Court ruled that the party's legal expenses in defending the lawsuit may be treated as the proximate result of the misrepresentation.

While it appears unlikely that the Court's decision will open the doors to a flood of successful claims under the statute, it does greatly expand the potential exposure for unscrupulous attorneys. ■

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