

SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU

SCAN

PRESENT:

HON. JEROME C. MURPHY,  
Justice.

JONATHAN WINSTON,

Plaintiff,

- against -

IRA LEE SORKIN,

Defendant.

TRIAL/IAS PART 24  
Index No.: 8227-13  
Motion Date: 11/1/13  
Sequence No.: 001

DECISION AND ORDER

MG  
XXX

The following papers were read on this motion:

Notice of Motion, Affirmation, Memorandum of Law and Exhibits.....	1
Memorandum of Law in Opposition.....	2
Reply Affirmation and Exhibit.....	3

PRELIMINARY STATEMENT

Defendant brings this application for an order pursuant to CPLR §3211(a)(1) and (7), dismissing plaintiff's complaint. Plaintiff opposes this application.

BACKGROUND

Defendant previously represented plaintiff's mother-in-law against plaintiff in connection with a claim of fraud. The action, brought in the U.S. District Court for the Eastern District of New York (Spatt, J.), was ultimately dismissed on the grounds of the statute of limitations. (*Lorber v. Winston*, 2013 WL 3424173 (E.D.N.Y.). (Exh. 3). On August 10, 2012, Winston moved to disqualify Sorkin from representing his mother-in-law, Annette Lorber on the grounds that Sorkin previously represented Winston in two proceedings before the National Association of Securities Dealers ("NASD") and that defendant Winston had consulted with Sorkin about representing him when he was being investigated for matters connected to his criminal indictment for securities fraud. Thereafter, on October 17, 2012, Winston filed a second motion to dismiss, or alternatively, to disqualify Sorkin based upon his alleged

use of privileged material related to Winston's criminal case in drafting the Complaint by Lorber against Winston. By Order dated November 24, 2012 the Court (Spatt, J.) granted Winston's motion to disqualify Sorkin, holding that there was a possibility of trial taint due to Sorkin's previous representation of Winston at the NASD proceedings and in prior consultations with Winston concerning Winston's criminal investigation. The Court also found that Sorkin's use of a "Memorandum of Law in Support of Defendant's Motion for Termination of Probation Pursuant to 18 U.S.C. §3564(c) and Fed. R. Crim.P. Rule 32.1 and Discharge from Supervision" was an additional reason for disqualification.

The provenance of this "Probation Memorandum" is a matter of substantial debate. It was apparently prepared on behalf of Winston by a former counsel, Gerald Lefcourt, Esq. It was never fully completed, signed, or filed with the U.S. District Court (Garaufis, J.), who had sentenced Winston, illegally it appears, to ten years probation. There seems to be no question that the Memorandum was emailed to Sorkin by Raoul Felder, Esq., who represented Eve Winston in her divorce proceeding from Jonathan Winston. There is an implication that Winston gave a copy of the Memorandum to his wife while they were still married, and he claims that if it was given to her, it was under the marital privilege.

Plaintiff Winston brings this action under Judiciary Law § 487, alleging entitlement to treble damages, the damages being the legal fees incurred by plaintiff in seeking the disqualification of Sorkin on the basis of the alleged misuse of the Probation Memorandum. The Verified Complaint (Exh. 2) asserts that when Winston discovered Sorkin's improper use of the Memorandum, Sorkin embarked upon a "... course of deceitful conduct that involved offering numerous, conflicting explanations of how he came into possession of the Probation Memo, culminating in outright lies made to Judge Arthur D. Spatt of the United States District Court for the Eastern District of New York."

The Complaint in ¶¶ 35 — 45 sets forth claims by Sorkin that he believed that the Probation Memo had been filed with the Court on May 26, 2010, but the docket from the case for which it was drafted does not reflect any such filing; Sorkin claimed that any privilege attaching to the Memo had been waived by Winston's voluntarily giving the Memo to a specific third party, which later was shown to be untrue; that Sorkin represented to the Court that they were prepared to submit affidavits from his client and others as to how they obtained access to the document, none of which proof he actually had at the time. As later acknowledged by Sorkin, the Memo came from Mr. Felder, and he had never been present for a discussion with the party who gave the document to Felder, and, in fact, Felder did

not recall who specifically gave him the document. At ¶ 42 Winston alleges that had Sorkin not engaged in misleading representations as to his receipt of the Memo, he would have been spared the expenditure of extensive legal fees for his counsel to prepare and file a motion to disqualify Sorkin. At a minimum, the motion fees would have been substantially reduced because counsel would not have been required to face the false factual claims made by Sorkin to Judge Spatt. Winston therefore claims that he was damaged by Sorkin's deceit, and is entitled to treble damages.

Defendant moves to dismiss the Complaint on the ground that it fails to state a cause of action under Judiciary Law § 487. He claims that the characterization of Sorkin's statements on October 5, 2012, before J. Spatt, as outright lies is disproved by the taking of judicial notice of judicial proceedings in the Federal Court. For example, the source of the Probation Memorandum, and its potential privilege waiver, are contained in the motion papers in the federal action. Winston stated under oath that he gave the Memorandum to Eve Winston, which supports the fact that Sorkin received or discussed it at meetings in which Eve Winston, the provider of the document to Felder, was present. Also present were Felder's associate, Eve Winston's mother, and her matrimonial attorney, Steven Gassman, Sorkin and Sorkin's associate.

Plaintiff reiterates that Sorkin was disqualified from representing Annette Lorber in her action against her estranged son-in-law, Jonathan Winston, in which she claimed that he deceived her in relation to his prior criminal history, and ingratiated himself to her, even going so far as to marry her daughter, in order to steal millions of dollars from her. He points out that the disqualification was based not only upon Sorkin's earlier representation of Winston in proceedings by the SEC and conversations about representing him in the criminal charges about which he allegedly lied to Ms. Lorber, but also included the fact that he had come into possession of the Probation Memorandum, which represented attorney's work product and which included confidential communications with Winston's former counsel, but which Memorandum was never filed with the Federal Court.

The deceit which plaintiff alleges does not involve the receipt, or even the use of the memorandum in connection with drafting of the complaint against Winston. In fact, counsel for Sorkin represents that the memorandum was useful only in the preparation of one of the 312 paragraphs of the complaint, and contained no attorney-client privileged matter. Rather, plaintiff claims that when confronted with the use of the Probation Memorandum, Sorkin gave multiple false accounts as to why the Memorandum was not privileged, how it came to be in his possession, and misrepresented that he

had material which would vindicate his claims about the document. As a consequence, attorneys for Winston were compelled to expend significant time and effort to debunk the claims made by Sorkin in the defense of the claim that he should be disqualified from representing Ms. Lorber.

Plaintiff challenges defendant's contentions that he was not deceitful as a matter of law, in that Judge Spatt found that he had changed his statements about the Memorandum, and that seeking to minimize the use to which the Memorandum was put in drafting the complaint was of no moment. He also challenges the more rigorous standard of the First Department, which he claims defendant seeks to employ; that is, that plaintiff must show a "pattern of chronic delinquency" in order to state a cause of action. Rather, the standard is that expressed by the Second Department in *Dupree v. Voorhees*, 102 A.D.3d 912, 913 (2d Dept. 2013). The Court there stated is that "the only liability standard recognized in Judiciary Law § 487 is that of an intent to deceive."

He further claims that the representation made to the Court by Sorkin at the October 5, 2012 Conference, to the effect that the chain of events leading to Sorkin's acquisition of the Memorandum was unclear, and was intentionally misleading. Lastly, plaintiff disputes the claim by Sorkin that he had a right to defend against a claimed disqualification, and the motion would have been necessary in any event. He claims that had there been no misrepresentations as to the source of the Memorandum been made, the motion would have been circumscribed, without the need to counter Sorkin's deceptions.

#### DISCUSSION

CPLR § 3211 (a)(1) provides as follows:

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

1. a defense is founded upon documentary evidence;

In order to succeed in a claim based upon documentary evidence, "... the defendant must establish that the documentary evidence which form the basis of the defense be such that it resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim". (*Symbol Technologies, Inc. v. Deloitte & Touche, LLP*, 69 A.D.3d 191, 194 [2d Dept. 2009]); (*DiGiacomo v. Levine*, 2010 WL 3583424 (N.Y.A.D. 2d Dept.)).

When determining a motion to dismiss for failure to state cause of action, the pleadings must be afforded a liberal construction, facts as alleged in the complaint are accepted as true, and the plaintiff is accorded the benefit of every favorable inference, and the court must determine only whether the facts

as alleged fit within any cognizable legal theory. (*Uzzle v. Nunzie Court Homeowners Ass', Inc.* 55 A.D.3d 723 [2d Dept. 2008]). A pleading will not be dismissed for insufficiency merely because it is inartistically drawn; rather, such pleading is deemed to allege whatever can be implied from its statements by fair and reasonable intendment; the question is whether the requisite allegations of any valid cause of action cognizable by the state courts can be fairly gathered from all the averments. (*Brinkley v. Casablanacas*, 80 A.D.2d 815 [1<sup>st</sup> Dept. 1981]).

Defendant urges that the Court take judicial notice of the proceedings in the underlying matter of *Lorber v. Winston*, 12 CV 03571, and attaches copies of Decisions of Hon. Arthur Spatt dated November 26, 2012, November 29, 2012, July 3, 2013, and a Transcript of Proceedings of October 5, 2012. This Court agrees that it is entitled to take judicial notice of published decisions and undisputed court files. (*RGH Liquidating Trust v. Deloitte & Touche LLP*, 71 A.D.3d 198, 207—208 [1<sup>st</sup> Dept. 2009]).

By Decision and Order dated November 26, 2012, Judge Spatt granted two motions made by defendant Winston. The first motion was to disqualify Sorkin as counsel for Annette Lorber on the grounds that he had previously represented defendant Winston in proceedings before NASD in 1999, and that Winston consulted with him about representation in connection with the investigation of securities fraud, which predated the alleged fraud upon Ms. Lorber. The second motion by Winston was for dismissal of the action, or, alternatively, to disqualify Sorkin for the alleged use of privileged material referable to Winston's criminal case. The Court granted the first motion and granted in part and denied in part the second motion. (Exh. "2" at p. 2).

Judge Spatt noted that "Attorney Sorkin has provided the Court with varying accounts of how he obtained the Probation Memo referenced in his Original Complaint. At the October 5, 2012 conference he advised the Court that the Memorandum was given to a third party, who then passed it on to another party and that party gave the document to him in the presence of the first third party. There were then conversations with the third party present, the first recipient of the memo. Additionally, he claimed that the Memo was known by his client (Ms. Lorber) as well.

In opposition to the motion by Winston, Sorkin says that he received the document by email. He stated that he was introduced to plaintiff by Raoul Felder, Esq., who had previously represented her daughter, Eve, in divorce proceedings against Winston. On or about November 1, 2011 plaintiff met with Sorkin and his associate, and decided to retain them to process the action against Winston. On or

about November 1, 2011, Sorkin received the Memorandum by email from Felder.

Sorkin thereafter made inquiry as to the status of the Memorandum, learning that it had not been filed by Mr. Lefcourt, the prior criminal attorney. He came to believe that the Memo was provided by Winston to his wife, Eve, and that by doing so, Winston waived his attorney-client privilege. On September 14, 2012, plaintiff filed an Amended Complaint which made no reference to the Probation Memorandum. Mr. Lefcourt's associate, Faith Friedman, with whom Sorkin had spoken about the Memorandum, contacted Judd Burstein, Esq., counsel for Winston in the civil action, and advised him of having been contacted by Sorkin about the Memorandum.

The Federal Court determined that defendant Winston established that there was a real risk of trial taint if plaintiff is permitted to proceed forward with Sorkin as her attorney. The facts at issue in the NASD proceedings and the criminal case, involved acts of securities fraud and money laundering, all of which occurred prior to the time when Winston allegedly began defrauding Lorber. But during the course of his representation of Winston, Sorkin would have been privy to privileged information, which could serve as the basis for cross-examination of Winston. The motion to disqualify Sorkin as counsel for Lorber was therefore granted. The Court also determined that the prior communications between Winston and Sorkin regarding the criminal prosecution was sufficiently related to the present case because the material provided by Winston to Sorkin would be useful in the pending action.

As to the claimed privilege attaching to the Probation Memorandum, Winston claims attorney-client privilege, the work product privilege, and the marital communication privilege. Significantly, the Court determined that Winston met his burden of establishing that the Memorandum was a privileged document. This was so because it was in the form of a draft, with blanks unfilled, unsigned, and was never filed in any Court. In addition, the document was prepared by Winston's attorneys with a view toward filing it with the court in the criminal case. The Court therefore determined, on the foregoing bases, that the Memo was protected by the work product privilege, and that the transfer of the document to his wife did not constitute a waiver, since the voluntary disclosure must result in a substantial risk that it will be obtained by an adversary. At the time that the Memo was given to Eve, their marriage was not in jeopardy.

The foregoing analysis is all that Winston would need to establish entitlement to the grant of his motion to disqualify Sorkin. Whether Sorkin thought the attorney work product, or any other privilege, had been waived, is irrelevant. It was not incumbent upon defendant Winston to establish that

the privilege was not waived; all he needed to show was that it was subject to an attorney work product privilege. Moreover, the motion for disqualification of Sorkin on the basis of improper use of attorney work product material was generated by Winston, and was, in any event, superfluous, since the first motion, based upon prior representation and attorney-client privilege involving material communicated by Winston to Sorkin was adequate.

The costs incurred by counsel in prosecuting the second motion to disqualify Sorkin were self-created. The motion was not essential and, in fact, appears to have been made for the primary purpose of invoking the punitive treble damage claim of Judiciary Law § 487. The statute, a model of brevity, provides in relevant part as follows: “An attorney or counselor who: 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or, . . . Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.” Was Sorkin’s defense of a claim that he had utilized a document shielded by the attorney work product deceit or collusion within the intent of § 487? The Court believes not.

Confronted with an allegation that he used a privileged attorney work product document in connection with the draft of a complaint, Sorkin was well within his rights to litigate the issue. (*God’s Battalion of Prayer Pentecostal Church, Inc. v. Hollander*, 24 Misc.3d 1250(A) [Sup.Ct. Nass. Co. 20099, *aff’d*, 82 A.D.3d 1156 [2d Dept.2011]). The claim that his recollection of precisely how he received the document, or whether the privilege in the then concluded criminal matter had been waived by providing a copy to Eve Winston, are well within the boundaries of adversarial conduct. While Winston attests to a clear recollection of giving the document to his wife, with a specific charge that it not be shared with anyone, Eve Winston has denied any recollection of seeing the Memorandum. Winston’s speculation that Annette Lorber, who had a key to his and Eve’s home in Sands Point, may have entered the home and stolen the document, is little different from Sorkin’s musing that the privilege may have been waived by the dissemination of the Memorandum to Winston’s wife and mother-in-law.

The term “deceit” is a strong one, constituting a misdemeanor. While this Court does not take a position, consistent with the Appellate Division First Department, that “a chronic and extreme pattern of legal delinquency” is necessary to establish a claim under § 487, it certainly is obligated to acknowledge the Second Department’s language in *Dupree v. Voorhees*, 102 A.D.3d 912, 913 (2d Dept.2013), that the “. . . only liability standard recognized in Judiciary Law § 487 is that of an intent to

deceive.”

While Sorkin’s exploration of the issue as to whether or not the work product privilege or the marital privilege had been waived was unsuccessful, there is no evidence that he intentionally sought to deceive the Court or his adversary. The Memorandum passed through a number of hands before it reached him, and he was warranted, and seemingly duty-bound to his client, to avoid the impact of her being precluded from representation of her choice in the action. In fact, the underlying thrust of his claim that the Memorandum was given to a third party (Eve Winston), who then conveyed it to a third party (Raoul Felder, Esq.), who then forwarded it to him, appears to be true. There is no clear evidence that Winston voluntarily gave the document to a third party, thereby vitiating all privileges, but is was certainly an issue ripe for inquiry.


Defendant’s conduct did not reach the level of deceit, and the Complaint therefore fails to state a valid claim under Judiciary Law § 487.

Defendant’s motion to dismiss the complaint in accordance with CPLR §§ 3211(a)(1) and 3211 (a)(7) is granted.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York  
January 9, 2014

ENTER :

  
JEROME C. MURPHY  
J.S.C.

**ENTERED**

JAN 13 2014

NASSAU COUNTY  
COUNTY CLERK'S OFFICE