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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 10
NASSAU COUNTY

PETER PINTO,

Plaintiff(s),

INDEX No. 30829/99

-against-

MOTION DATE: N/A

CHARLES PINTO also known as V. CHARLES PINTO a/k/a VITOR CHARLES PINTO a/k/a VITO PINTO a/k/a VITO C. PINTO, MARY L. PINTO, JASON A. PINTO, CHRISTINE ALBANO also known as CHRISTINE PINTO, CHASE BANK, GALLET, DRYER & BERKEY, AMRTIN LICHT, and RONA LICHT,

Defendant(s).

After a trial without a jury, the court finds the following facts and reaches the following conclusions of law.

Findings of Fact

In 1991, when Plaintiff Peter Pinto was twenty-one years of age, he was shot in the head by an armed guard working for a security firm whose services had been engaged by a public school district. At the time Plaintiff was still living at home with Defendant Charles Pinto, his father, Mary Pinto, his mother, and Jason Pinto, his brother. A civil suit was commenced against the security firm and school district the course of which is of only tangentially relevant and will not be set forth in detail other than to note that at least two other attorneys were involved in the case prior to its being handled by the firm of Herzfeld & Rubin. Defendant Charles Pinto had experience with commercial real estate and was acquainted with Martin Licht who was an attorney with Herzfeld & Rubin.

According to Defendant Charles Pinto, settlement negotiations reached a point at which four and a half million dollars was offered. Charles Pinto claims that he told Herzfeld and Ruben that such sum was acceptable for Peter, but that he and his wife wanted two million for themselves. Meanwhile Martin Licht left Herzfeld & Rubin and joined Defendant Gallet Dryer & Berkey. As the settlement offers gradually increased, Charles Pinto engaged Gallet Dryer & Berkey in part to pressure Herzfeld & Rubin and in part to negotiate Herzfeld & Rubin's fee. On May 12, 1994, David Berkey authorized Herzfeld & Rubin to settle the case for $6,500,000.00 with $1,650,000 being paid to Herzfeld and Rubin as its fee, $300,000 to be held by Martin Licht to satisfy liens and $4,550,000.00 payable to Peter Pinto and Martin Licht as attorney and Gallet Dreyer & Berkey as attorneys. (Plaintiff's Exhibit 4). Ultimately Gallett Dreyer & Berkey was paid a fee of $12,500 for its services.

With a letter dated May 19, 1994 Defense Counsel forwarded a draft in the amount of $300,000 payable to Martin Licht and drafts of $4,500,000 and $50,000 payable to Peter Pinto, Gallet Dreyer & Berkey as attorneys and Martin Licht as attorney. David Berkey arranged with Chemical Bank to invest the two drafts totaling $4,550,000 in seven day commercial paper and forwarded the drafts along Peter Pinto's signature cards and account application. (Plaintiff's Exhibit 19). Peter Pinto, accompanied by his father and brother, picked up the checks personally from David Berkey and delivered them to Chemical Bank. Peter Pinto testified that David Berkey represented that he would monitor the Chemical Bank accounts and make sure that the investments were sound. In fact Chemical Bank statements were forwarded to Gallet Dreyer & Berkey (Plaintiff's Exhibit 21), but they were merely accumulated and not reviewed. Statements were also sent to Peter Pinto at his parents' home where he resided.

1. The Escrow Account

The escrow account was funded by the settlement check for $300,000 payable to Martin Licht. Plaintiff's Exhibit 11 is Defendant Gallet Dreyer & Berkey's accounting. It is undisputed that after the payment of all liens and payment to itself of $12,500 for Gallet Dreyer & Berkey's fee with regard to the

settlement $134,444 remained.[1] (*See*, Plaintiff's Exhibit 7). On or about September 19, 1994 Gallet Dreyer & Berkey prepared a draft payable to Peter Pinto in the amount of $134,789.26 representing the balance in the escrow account after payment of all liens. The check was voided upon a direction from the client that the law firm should retain the fund for payment of anticipated future legal expenses. From this fund $17,000 was paid to Schiffmacher, Cullen, Farrell & Lummer as Attorneys by check dated Nov. 11, 1994 as an expense incurred in Peter Pinto's purchase of a condominium unit. (Plaintiff's Exhibit 10).

Plaintiff challenges three further expenditures from the escrow account which Gallet Dreyer & Berkey contend exhausted the account. $4,239.11 was charged to the account for the legal services of Gallet Dreyer & Berkey with respect to the condominium purchase. While Peter Pinto claims not to have authorized this charge, he acknowledged that the services were provided and did not challenge the reasonableness of the fee. A check for $100,000 was drawn on Nov. 11, 1994 payable to GIG Wear which Peter Pinto claims not to have authorized. Finally, on Dec. 3, 1995 Gallet Dreyer & Berkey charged the account $3,973.21 for legal fees producing a zero balance and closed the account. (Plaintiff's Exhibit 12).

2. The Alleged Failure to Monitor

Peter Pinto testified that he never discussed with David Berkey in what manner Berkey would monitor Peter Pinto's bank accounts. Neither did he ever discuss a fee for this service and he was never billed for monitoring. He did pay Gallet Dreyer & Berkey for other legal services, but not for "monitoring". Peter Pinto never sought advice from David Berkey or any other member of the firm with respect to any specific investment. When he purchased his condominium, even though he was represented by a member of the firm, he did not seek any advice as to the wisdom of the purchase because he did not consider it an investment. Nevertheless Plaintiff seeks to recover from Gallet Dreyer & Berkey for certain expenditures from the Chemical Bank account.

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[1]There is a $345 discrepancy between this sum and the $134,789.26 check tendered by Gallet Dreyer & Berkey and there is payment of $345 to "Mauro Cateletto (MD)" which may explain it, but for our purposes the discrepancy is *de minimis*.

Between May 31, 1994 and May 5, 1999 Peter Pinto signed checks payable to Charles Pinto in the total amount of $288,480.59. Between Nov. 28, 1994 and Feb. 3, 1995 he issued three checks payable to GIG Wear in the total sum of $500,000. There were also four wire transfers to Martin Licht for GIG Wear between Jan. 6, 1995 and May 4, 1995 which totaled $175,000. On Nov. 11, 1996 Peter Pinto issued a check in the amount of $300,000 payable to Martin Licht. Plaintiff does not challenge his signature on any of the checks, but asserts that Defendant Gallet Dreyer & Berkey, in the exercise of its "monitoring" function should have questioned the expenditures.

No evidence was adduced suggesting that Peter Pinto, a high school graduate, had suffered any diminution in his mental capacity as a result of the shooting. Peter Pinto testified that he trusted his father and Martin Licht. As noted Peter Pinto was living at home with his parents and brother when he was shot. Charles Pinto testified without contradiction that prior to the shooting he and his wife were operating two office cleaning businesses. The demands upon their time while Peter Pinto was hospitalized and during his recovery at home caused the loss of one of these businesses and a significant reduction in scale of the other. Debts including mortgage payments accumulated. Their home went into foreclosure and tax liens were filed. Peter's bother, Jason, was enlisted to drive the Plaintiff to doctor's appointments and for therapy because the Plaintiff's vision had been impaired by the shooting. At least initially the settlement proceeds were treated as a family fund and Plaintiff believed that his father had a rightful claim to some of it. Together with his father and brother Plaintiff explored potential business opportunities as an investment option which might also provide employment for himself and his brother.

In his testimony Peter Pinto did not assert that any of the checks payable to Charles Pinto, which Peter admits signing, were intended as investments. Even after the Plaintiff married his wife Patti-Jo, then a New York City police officer, in May of 1997, he entrusted supervision of Chemical Bank accounts to his father. Sometime later that same year, however, Charles and Mary Pinto began to experience marital difficulties which ultimately led to their separation. According to Plaintiff, his mother then advised him to have an accountant review what had happened with the settlement fund. Soon Peter Pinto and his wife took control of the Chemical accounts.

Checks 105, 117 and 129 drawn on the Chemical Bank account were payable to GIG Wear and totaled $500,000. In addition the electronic transfers to Martin Licht between November 1994 and February 1995 totaling $175,000 were intended for and went to GIG Wear. Finally there was the $100,000 transfer to GIG Wear from the escrow fund for a total of $675,000. According to Charles Pinto, he and his sons viewed GIG Wear as a business opportunity which would not only be an investment, but a potential business in which they might be employed as well. The concept was for stores which would sell merchandise licensed by popular music entertainers much as stores sell merchandise licensed by sports teams and sports personalities. Charles Pinto had experience in the New York garment industry and felt capable of pursuing this opportunity. He also asserted that Peter loved music and found the idea appealing. Although he acknowledge that his brother Jason drove him to the opening of the first GIG Wear store in the SOHO section of lower Manhattan, Peter denied any detailed knowledge of the enterprise.

According to Charles Pinto, the GIG Wear opportunity consisted of an investment by Peter Pinto of $200,000 in return for which he received 750,000 shares. In addition, Peter Pinto loaned GIG Wear $400,000 in exchange for promissory notes, a security interest and additional stock for himself and for Martin Licht. The Pintos also acquired the right to open one or more GIG Wear retail outlets in the Metropolitan region outside New York City. Peter Pinto acknowledges that three promissory notes in a total sum of $400,000 were eventually executed. He testified that he did not seek the advice of anyone at Gallet Dreyer & Berkey with respect to this investment, but relied entirely upon Charles Pinto and Martin Licht whom he trusted. Amazingly, he testified that had David Berkey recommended the investment, he would not complain even though the whole investment was lost.

3. The Licht Loan

On or about Aug. 1, 1996, Gallet Dreyer & Berkey sent a notice to their clients alerting them that Martin Licht was no longer associated with the firm. (Plaintiff's Exhibit 15). Peter Pinto's check #458 in the amount of $300,000 is dated Nov. 11, 1996 and was payable to Martin Licht. (Plaintiff's Exhibit 13). According to Charles Pinto the family at the particular instigation of Jason Pinto determined to loan Martin Licht $300,000 to help him out of financial difficulties.

Conclusions of Law

The complaint in this action originally contained nineteen causes of action. Causes of action 1, 2, 3 and 4 involving other defendants were settled prior to trial. Causes of action 6, 8, 9 and 19 were dismissed on motion prior to trial. Causes of action 11 and 12 were withdrawn. Cause of action 5 against J P Morgan Chase (sued as Chase Bank, formerly Chemical Bank) was dismissed during trial.

The Tenth Cause of Action seeks to recover from Gallet Dreyer & Berkey for their alleged knowing and intentional fraudulent concealment of Peter Pinto's financial records. The cause of action and claim for treble damages is premised upon Judiciary Law §487 which provides in pertinent part that; "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 . . . forfeits to the party injured treble damages, to be recovered in a civil action." To recover under this statute a plaintiff must prove deceit which occurs in a pending judicial proceeding (*Hansen v Caffry*, 280 AD2d 704, 705 [3d dept, 2001]) and no such proof has been offered. Moreover, not only has plaintiff failed to establish a chronic, extreme pattern of deceit necessary to support a recovery under Judiciary Law §487 (*Donaldson v Bottar*, 275 AD2d 897, 898 [4th dept, 2000]), he has failed to prove any deceit at all. Finally, it does not appear that Gallet Dreyer & Berkey even owed a duty to Peter Pinto to monitor his accounts inasmuch as their alleged promise to do so was gratuitous and without consideration on Peter Pinto's part. (*See generally*, *Weiner v McGraw Hill,* 57 NY2d 458, 464-5; 22 NYJur2d §67). The Tenth Cause of Action is dismissed.

The Thirteenth Cause of Action is against Martin Licht only and he has defaulted. Insofar as the Thirteenth Cause of Action states a claim for repayment of the $300,000 advanced by Peter Pinto to Martin Licht in November of 1996, Plaintiff is entitled to a judgment in the amount of $300,000 with interest from the date upon which Martin Licht was served in this action.

The Fourteenth Cause of Action against Gallet Dreyer & Berkey seeks to recover $600,000 which it claims Peter Pinto was deceived into advancing. The $600,000 consists of the $300,000 escrow fund and the $300,000 advanced to Martin Licht in November of 1996. Plaintiff has acknowledged his signature on the

check in question. While the check reflects that it was payable to Martin Licht "Att Special ACC", Mr. Licht was no longer associated with Gallet Dreyer & Berkey when it was made. Finally, Peter Pinto never contended that the $300,000 was anything other than a personal loan to Martin Licht, as testified to by Charles Pinto, made at a time when Plaintiff still reposed faith in Licht. With respect to the escrow fund it is uncontested that after appropriate payment of all liens and Gallet Dreyer & Berkey's fee of $12,500 only $134,444 remained. Plaintiff does not contest the payment of $17,000 to Schiffmacher, Cullen, Farrell & Lummer as part of the condominium purchase nor Gallet Dreyer & Berkey's fee of $4,239.01 for representing him in that transaction. Apparently in connection to the condominium purchase, if one is to judge by its date, Charles Pinto authorized Gallet Dreyer & Berkey "to transfer funds you are holding in your escrow account for the benefit of Peter Pinto to use in payment of your invoices to Peter Pinto." (Defendant's Exhibit T). Defendant firm relies upon that written authorization to justify the deduction of $3,973.21 closing out the account as its fee for the sale of the condominium. Again Plaintiff does not deny that this fee was earned. This leaves only the $100,000 check to GIG Wear drawn on Nov. 9, 1994.

According to David Berkey the $100,000 escrow check to GIG Wear was requested by Marc Rosenberg on Nov. 9, 1994. Marc Rosenberg was the Gallet Dreyer & Berkey attorney who was handling Peter Pinto's condominium purchase which was happening simultaneously. Plaintiff's Exhibit 10 includes a check request form signed by Marc Rosenberg which indicates that the $100,000 was for the purpose of a loan from Peter Pinto. As reflected in Defendant Charles Pinto's Trial Exhibit A, on that same day GIG Wear issued a promissory note in the amount of $100,000 payable to Peter Pinto. Thus, the conclusion is inescapable that the check was drawn as part of the GIG Wear transaction of which Peter Pinto was fully aware. Whether it was drawn at the request of Peter Pinto or Charles Pinto is not of consequence. Peter Pinto had clothed his father with, or allowed his father to assume, sufficient apparent authority that Gallet Dreyer & Berkey were fully justified in relying upon his authority to direct such disbursement. (*Hallock v State,* 64 NY2d 224, 231).

As additional defense, Gallet Dreyer & Berkey asserts that any claim with respect to the escrow fund is barred by the CPLR 214(6) three year Statute of Limitations. It is undisputed that the check was drawn on November 9, 1994 and that this action was not commenced until August of 1999. Were the Court not

dismissing this claim for lack of merit, then it would do so based on the Statute of Limitations. Clearly Peter Pinto is chargeable with knowledge of the check from Nov. 9, 1994 since it was part of the GIG Wear transaction and he or his agent received a promissory note in exchange. Nor can it be said that the Statute of Limitations was tolled by the doctrine of continuing representation since the escrow account was closed August 3, 1995 and Peter Pinto's only contact with the firm was to request that his files be forwarded to Marc Rosenberg when the latter left the firm. (*Shumsky v Eisenstein,* 96 NY2d 67 [2001]). For all of these reasons the Fourteenth Cause of Action must be dismissed.

The Fifteenth Cause of Action seeks to recover $500,000 loaned by Peter Pinto to Charles Pinto and Martin Licht for investment in GIG Wear on the grounds that the loan was procured through fraud. The Sixteenth Cause of Action seeks to recover $650,000 loaned by Peter Pinto to Charles Pinto on the ground that the loans were procured by fraud. The Court credits the testimony of Charles Pinto, which was not inconsistent with that of Peter Pinto, that the $600,000 invested in GIG Wear was intended to be $200,000 investments on the part of each of Peter Pinto, Charles Pinto and Martin Licht. Peter Pinto advanced all of the funds, but $400,000 represented $200,000 loans to each of Charles Pinto and Martin Licht. Absent evidence of a then present intent to deceive, the mere making of a promise to repay a loan does not support a cause of action for fraud. (*Lanzi v Brooks,* 54 AD2d 1057, 1058 *aff'd* 43 NY2d 778). Since no evidence was produced which challenged the sincerity of the promises made by Charles Pinto and Martin Licht to repay the loans, there is no cause of action for fraud. Nevertheless, it has been established that the loans with respect to GIG Wear were made and have not been repaid. Plaintiff is awarded $200,000 on his claim against Martin Licht and $200,000 on his claim against Charles Pinto based on the GIG Wear loans with interest from the date of service of the summons and complaint on each of these defendants.

Other than the GIG Wear loan Peter Pinto did not assert that any of the checks he signed payable to Charles Pinto or funds he made available to his father were intended as loans. As noted, during parts of the period in question Plaintiff was residing with his parents and brother at the family home. Charles Pinto's testimony with respect to the loss of the family businesses during the period the family members were constrained to care for Plaintiff were uncontradicted as was his assertion that the family home fell into foreclosure as a result of the loss of family income. There was simply no claim made by Peter Pinto that any

of these funds were intended as loans. With respect to the claim that the funds were advanced upon Charles Pinto's representation that part of the settlement belonged to the family, Peter Pinto neither claimed to have justifiably relied upon such representation nor would any reliance be justifiable under the circumstances of this case. (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421).

It is, SO ORDERED.

Dated: Nov 20, 2002

HON. GEOFFREY J. O'CONNELL, J.S.C.