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Trials & TRIBULATIONS

Attempted deceit supports treble damages

A recent decision from the New York State Court of Appeals in *Amalfitano v. Rosenberg*, 12 NY3d 8 (2009), held that treble damages will be awarded against an attorney for his attempted deceit in the course of litigation.

The statute at issue is New York Judiciary Law §487, which provides, in part, that an attorney who engages in “any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party” is guilty of a misdemeanor, and “forfeits to the party injured treble damages, to be recovered in a civil action.”

The case was certified to the Court of Appeals by the U.S. Court of Appeals for the Second Circuit. The U.S. District Court for the Southern District of New York had found that Attorney Rosenberg violated Judiciary Law §487 and awarded the Amalfitano plaintiffs three times their costs and legal fees incurred in defending a lawsuit brought by Attorney Rosenberg on behalf of his client, Peter Costalas.

In August 1993, Rosenberg represented Costalas (one of three brothers involved in a partnership) during the negotiations and, ultimately, the dissolution of a family partnership. Rosenberg had several telephone conversations with the attorney who represented the other partners, received drafts of the 1993 agreement and was instrumental in negotiating a settlement of Costalas's claims. Pursuant to the 1993 agreement, Rosenberg retained a third of the settlement proceeds as part of his fees.

About eight years later, Rosenberg, again representing Costalas, initiated a lawsuit against the Amalfitanos, the successors to the partnership, in state court, alleging they defrauded the partnership.

The complaint alleged Costalas still was a member of the partnership. After the Amalfitanos moved to dismiss on the ground that Costalas lacked any interest in the partnership, Rosenberg filed a cross-motion for summary judgment. In support of that motion, Rosenberg presumably prepared an affidavit, signed by his client, which asserted that the 1993 agreement did not have any real effect because Costalas's previous attorney advised him to sign the agreement — as a sham — to avoid potential creditors.

Nevertheless, the motion to dismiss was granted and Rosen-

berg appealed to the Appellate Division, First Department. Included in the record was Costalas's affidavit asserting that the 1993 agreement was a sham as well as several of partnership tax returns, which continued to identify, erroneously, Costalas as a partner, even after the 1993 agreement was executed.

The First Department reversed the dismissal and concluded that “[s]erious open questions” existed regarding “the real need for and purpose of the purported assignment” and whether Costalas was a member of the partnership. *Costalas v. Amalfitano*, 305 AD2d 202, 203 (First Dept. 2003). After the case was remitted, a trial was conducted; the Amalfitanos' trial motion to dismiss for failure of proof was granted and the trial court's dismissal was affirmed.

The Amalfitanos later filed a diversity action in the U.S. District Court for the Southern District of New York, alleging Rosenberg's conduct in the state court litigation violated Judiciary Law §487. A bench trial was conducted and the court concluded that Rosenberg engaged in “a persistent pattern of unethical behavior” during all phases of the state court litigation. *Amalfitano v. Rosenberg*, 428 F.Supp.2d 196, 203 (SDNY 2006).

That behavior included sending the former partnership's accountant a letter — after service of a notice of a deposition by the Amalfitanos — stating, in part, “[y]ou should be advised, that in my opinion, if, in fact, you served in a professional capacity, all communications, contacts and documents were of a privileged nature.” *Id.* at 203. Rosenberg cited no authority for his proposition, and failed to respond to the opposing counsel's letter citing authority that there is no accountant-client privilege in New York. Rosenberg also refused to produce his client's tax returns, insisting they were “totally irrelevant.” Only after being ordered by the trial court to produce the returns was it discovered that Costalas had not asserted an interest in the partnership after the 1993 agreement was executed. *Id.* at 204.

Rosenberg advised the Amalfitanos that he possessed audio recordings that would be very damaging to them, referring to them as “an atomic bomb,” but he refused to produce them. The

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trial court ordered their production, and they were unintelligible. Rosenberg attempted, unsuccessfully, to introduce into evidence during the state court trial an agreement signed only by Costalas, dated after the execution of 1993 agreement, in an attempt to directly contradict that agreement. *Id.* at 205.

Rosenberg also sought to admit a document, purported to be Costalas's 1998 personal tax return, which identified his interest in the partnership. It did not bear a receipt stamp to indicate that it was filed with the IRS, and it directly contradicted the previous returns produced during discovery. Rosenberg sought to admit it simply because "somebody handed it to me." *Id.* at 205-206.

Based on his conduct, the district court found for the Amalfitanos, awarding damages of \$89,415.18, which included their legal fees incurred from the inception of the litigation. The amount was trebled, pursuant to Judiciary Law §487, for a total of \$268,245.54.

In pursuing appeal to the Second Circuit, Rosenberg did not challenge the finding that his deceit was intentional. *Amalfitano v. Rosenberg*, 533 F.3d 117, 124 (Second Cir. 2008). Instead, he argued, unpersuasively, that his deceit never came to fruition because no party actually was deceived. Rosenberg claimed his attempts to deceive the trial court were unsuccessful because the court consistently found in favor of the Amalfitanos.

The Second Circuit found that Judiciary Law §487 is unclear as to whether it applies to attempted deceptions. The Second Circuit indicated that it would affirm the district court's decision in its entirety if the New York State Court of Appeals determined §487 permits an award of treble damages for conduct involving an attempted deceit. *Id.* at 126.

Also certified to the state Court of Appeals was the question of whether "the costs of defending litigation instituted by a complaint containing a material misrepresentation of fact [should] be treated as the proximate result of the misrepresentation if the court upon which the deceit was attempted at no time acted on the behalf that the misrepresentation was true." *Id.* at 126.

In an opinion written by Justice Read, the Court of Appeals found that a recovery, with treble damages under §487 was

appropriate, even for attempted deceit by an attorney.

In a detailed survey of the origins of §487, the court drew an analogy to the criminal law from which the statute emerged. Judiciary Law §487 was traced back to a 1275 enactment in England, which the New York Legislature adopted five centuries later in 1787. A clear distinction was drawn between the Judiciary Law and common law fraud, which under state case law requires proof that the plaintiff was deceived by the defendant's fraud.

Judiciary Law §487 also originated through a series of criminal statutes adopted in New York. In conjunction with the adoption of the revised Penal Law of 1965, Judiciary Law §487 was created. The Court of Appeals concluded, "[a]s this history shows, section 487 is not a codification of a common law cause of action for fraud. Rather, section 487 is a unique statute of ancient origin in the criminal law of England. The operative language at issue — guilty of any deceit — focuses on the attorney's intent to deceive not the deceit's success. ... Further, to limit forfeiture 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."

For an attorney to be found liable for treble damages under §487, it is enough that he or she engaged in fraudulent or deceitful conduct. It is not necessary to prove that the court or anyone else actually was fooled by the deceit. The court made short work of the second question, finding that "[r]ecovery of treble damages under Judiciary Law §487 does not depend on the court's belief in a material misrepresentation of a fact in the complaint."

It remains to be seen whether the decision sets the table for an increase in the number of claims for treble damages under §487. Nevertheless, in light of the court's very clear explanation of the circumstances under which treble damage remedies are available, all litigators should take new note of the potentially serious consequences of engaging in any form of practice that a court later might classify as fraud or deceit.

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