

THE DAILY RECORD

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Trials & TRIBULATIONS

Facebook attorneys strike back

Last month, attorneys representing the law firms DLA Piper, Millberg LLP, Paul Argentiera and Associates, Mathias Wexler Friedmann LLP, and individual attorneys (Attorney Defendants) before the Appellate Division, First Department, argued that the Attorney Defendants behaved appropriately during their representation of client Paul Ceglia in his failed breach of contract lawsuit against Facebook, Inc.

The appeal stems from a lawsuit brought by Facebook, and founder Mark Zuckerberg (Facebook plaintiffs), alleging that the Attorney Defendants perpetuated a fraudulent scheme by Ceglia – a Western New York businessman – who claimed that he had a contract with Mark Zuckerberg entitling him to an 84 percent stake in the company.

Background facts

In the lawsuit, Facebook and Zuckerberg alleged malicious prosecution and a violation of New York Judiciary Law § 487, claiming that the Attorney Defendants participated in a fraudulent breach of contract lawsuit filed in June 2010, in Allegany County Supreme Court, captioned *Paul D. Ceglia v. Mark Elliott Zuckerberg, and Facebook, Inc.*, No. 10-cv-00569-RJA (WDNY) (Ceglia action).

United States Magistrate Judge Leslie G. Foschio issued a Report and Recommendation recommending dismissal of the Ceglia action because the contract that formed the basis for the action was a forgery. United States District Court Judge Richard J. Arcara adopted the R&R. After Judge Foschio's R&R, but before Judge Arcara's subsequent adoption, Facebook and Zuckerberg filed the lawsuit, alleging that Ceglia forged the contract at issue and the Attorney Defendants who prosecuted the Ceglia action had knowledge of the forgery.

Now in the role of plaintiffs, Facebook and Zuckerberg alleged that one of Ceglia's previous attorneys, Aaron H. Marks, discovered that certain evidence on Ceglia's computer hard drive established that the contract was forged. The Facebook plaintiffs further alleged that Marks, who was not named in the complaint, repeatedly communicated with his former co-counsel regarding his findings and stated his intention to notify the court of the fraud.

Marks wrote a letter to several of Ceglia's lawyers to memorialize his prior discoveries and communications. Notwithstanding these warnings, Ceglia's new team of lawyers filed an amended complaint

that repeated Ceglia's claims. Like the original breach of contract complaint, the contract was attached as an exhibit to the amended complaint, which again alleged that it was authentic and that Zuckerberg had breached the contract.

The Facebook plaintiffs' lawsuit survived a dismissal motion for failure to state a cause of action, *Facebook, Inc. v. DLA Piper LLP et al.*, __Misc. 3 __, 2015 NY Slip Op. 30764 (NY Co. Sup. Ct., May 11, 2015), and the Attorney Defendants appealed to the First Department.

Trial court decision

Supreme Court Justice Eileen A. Rakower denied the motion to dismiss because the complaint adequately alleged that the Attorney Defendants knew that there was no basis – and therefore no probable cause – for Ceglia's claims. Justice Rakower determined that lack of probable cause and malice are separate elements of a malicious prosecution claim and, "a jury may, but is not required to, infer the existence of actual malice from the fact there was no probable cause to initiate the proceeding," *Id.* at *4, citing, *Martin v. Albany*, 42 NY2d 13, 17 (1977). Thus, the complaint sufficiently pled the existence of actual malice because it adequately alleged that Attorney Defendants lacked probable cause to pursue the underlying action.

The complaint also adequately alleged a special injury, required for a malicious prosecution claim, in the form of a temporary injunction obtained against Facebook in the Ceglia Action. Justice Rakower found that "[s]ince the role that the special injury requirement fulfills is that of a buffer to insure against retaliatory malicious prosecution claims and unending litigation ... a verifiable burden substantially equivalent to the provisional remedy effect can amount to special injury," *Id.* at *5, citing, *Engel v. CBS Inc.*, 93 NY2d 195, 205 (1999).

In other words, "what is special about special injury is that the defendant must abide some concrete harm that is considerably more cumbersome than the physical, psychological or financial demands of defending a lawsuit," *Id.* The imposition of a provisional remedy, such as a temporary injunction, is sufficient to meet this standard, *Id.*



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The Attorney Defendants argued that they were not Ceglia's original counsel, and thus, had no role in obtaining the temporary injunction. Therefore the complaint did not plead a special injury as to them. Indeed, the Attorney Defendants did not enter appearances in the Ceglia action until after the temporary injunction was lifted.

Justice Rakower noted that this defense raised the question of whether a special injury must persist throughout the entirety of the prosecution in order to satisfy the special injury requirement, *Id.* She concluded that there is no such requirement.

The Attorney Defendants also raised separate questions as to whether a plaintiff may state a claim for malicious prosecution against a defendant who had yet to prosecute the underlying action at the time the alleged special injury took place. Justice Rakower found that a defendant, in an action for malicious prosecution, need not institute the requisite special injury so long as the defendant continues the vehicle in which the special injury took place, *Id.*

Where a defendant continues to prosecute an action, the special injury requirements function as a "buffer" against excess litigation and are not diminished provided that the other elements of a malicious prosecution claim are met, *Id.*

According to the court, the Attorney Defendants had knowledge of the Ceglia action's procedural history, knew of the temporary injunction and still prosecuted the action. Therefore, the four corners of the complaint adequately pled a cause of action for malicious prosecution.

Turning to the second cause of action, the alleged violation of New York Judiciary Law § 487, Justice Rakower found that the intent of this section is "to enforce an attorney's special obligation to protect the integrity of the courts and foster their truth-seeking function," *Id.* at *6, citing *Amalfitano v. Rosenberg*, 12 NY3d 8, 14 (2009).

As such, allegations that a defendant deceived, or attempted to deceive, a court with fictitious documents is sufficient to state a cause of action for a violation of Judiciary Law § 487, *Mazel 315 W. 35th LLC v. 315 W. 35th Assoc. LLC*, 120 AD3d 1106, 1107 (1st Dept. 2014). Allegations that the Attorney Defendants maintained a breach of contract action against Facebook and Zuckerberg, even though they allegedly knew that the contract was a forgery, pleaded a sufficient claim to survive a motion to dismiss. *Id.*

First Department proceedings

During oral argument before the First Department, a substantial amount of time was spent discussing Marks' April 2011 letter and

his subsequent withdrawal immediately after a forensic examination of the Contract "poked holes" in Ceglia's claim, see New York Law Journal, Oct. 26, 2015, page 1, col. 4.

Counsel for the Attorney Defendants argued that, at the time of the lawsuit, their clients had a strong reason to stand by Ceglia based upon numerous experts' opinions and findings that the contract between Ceglia and Zuckerberg was real. In fact, four forensic document examiners, a forensic scientist, a polygraph examiner, a fraud examiner, a forensic computer expert and a technician leader of a preeminent paper testing facility, all claimed that the contract was authentic and that Ceglia was truthful.

The Facebook plaintiffs countered that a genuine version of the contract had been provided to the Attorney Defendants and that the "extraordinary story that Ceglia was telling" – that he somehow forgot he had an "84 percent stake in a billion-dollar company – should have sounded the alarm that something was amiss with the case," *Id.* at page 6, col. 4.

Conclusion

This case – and ultimate decision on appeal – could have resonating affects throughout the entire legal community, since attorneys typically rely upon experts when deciding whether or not to pursue lawsuits. The Attorney Defendants claim to have relied upon many experts to establish that the contract was real and authentic.

If, in fact the lawsuit against the Attorney Defendants continues, one must posit whether expert proof will carry the day for the Attorney Defendants. Practical wisdom has been that attorneys who rely upon experts when pursuing a claim will be insulated from exposure to such a lawsuit, but the ultimate result in this case may determine otherwise.

Of course, perhaps most troubling for the Attorney Defendants, is the fact that they are left to face the consequences of their former client's conduct, while Ceglia himself has, at least for the time being, escaped any such responsibility.

Ceglia was indicted by the United States Attorney's Office of the Southern District of New York for his alleged "shakedown" of Facebook but since March 2015, he has been a fugitive after evading his electronically monitored home detention and fleeing with his wife, two children and a dog.

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