New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 254—NO. 62
TUESDAY, SEPTEMBER 29, 2015

Outside Counsel

Expert Analysis

Judiciary Law §487: Potency Of Claims Has Grown Since 'Amalfitano'

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Although cases and success rates for claims invoking the attorney misconduct statute, N.Y. Judiciary Law §487, have risen—even doubled—over the past five years, there appears to be no change in the severity of misconduct required for an actionable claim. Given the clarification in 2009's seminal *Amalfitano v. Rosenberg*, 903 N.E.2d 265, 266 (N.Y. 2009) that even attempted deceit was actionable, the post-Amalfitano consistency in the severity standard is arguably surprising and provides some comfort. It appears, keeping with the history of §487, that New York jurists will properly allow these claims to survive motions to dismiss and proceed to discovery only in true outlier cases. What could otherwise be inconsistent with the advocate's duty to zealously advocate for her client is properly reserved for these circumstances.

In New York, an attorney who intentionally deceives a court or party during a judicial proceeding, and causes injury by that action, may be guilty of a misdemeanor, subject to penal law punishments, and liable for treble damages. N.Y. Jud. Law §487 (McKinney 2005).

Section 487 has been on the books for almost two centuries. See *Amalfitano v. Rosenberg*, 428 F.Supp.2d 196, 210 (S.D.N.Y. 2006), aff'd 572 F.3d 91 (2d Cir. 2009) (tracing the statute's origin to the 1836 Revised Statutes of New York Sections 69 and 70, but noting the statute in its current form was enacted in 1965). The past five years have seen an increase both in the number of filings and the likelihood of Section 487 claims to survive motions to dismiss.

'Amalfitano v. Rosenberg'

The sharp increase in Section 487 claims occurred in 2009 after the New York Court of Appeals clarified, and arguably broadened, the scope of the statute in *Amalfitano*. In that case, Vivia and Gerard Amalfitano brought a claim in federal court alleging a lawyer, Armand Rosenberg, had filed a complaint in state court that contained false allegations against the Amalfitanos. *Amalfitano v. Rosenberg*, 903 N.E.2d 265, 266 (N.Y. 2009). In addition, they alleged that Rosenberg knowingly made false representations in a motion for summary judgment and submitted an affidavit containing false statements to the state court. *Amalfitano v. Rosenberg*, 533 F.3d 117, 124 (2d Cir. 2008). To be clear, Rosenberg did not represent the Amalfitanos; rather, the couple brought the Section 487 action against opposing counsel. Section 487 provides an avenue of relief beyond and separate from the attorney conduct sanctioning system of the court that presided over the original lawsuit. What was the subject of debate prior to *Amalfitano* was whether a failed attempt to deceive a court could provide the basis for relief.

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The Amalfitanos were awarded treble damages for their litigation costs under Section 487. Rosenberg appealed. 533 F.3d at 125. The court certified two questions to the New York Court of Appeals, one of which was whether a successful lawsuit brought under Section 487 could be based on an attempted but unsuccessful deceit. Id. at 122.

In the Court of Appeals' answer, it clarified that Section 487 does not track the common law tort of fraud or misrepresentation, and thus, does not require that the complaining party or court actually rely on the attorney's misrepresentation. 428 F.Supp.2d at 209 (noting that there was never a requirement for the deceit to be successful and that the statute is similar to criminal law under which attempts to act may be prosecuted regardless of success). Deciding that such an approach would neglect "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," the Court of Appeals held that a claim is actionable under the statute even where the court or party did not actually rely on the attorney's deceit. *Amalfitano*, 903 N.E.2d at 269. Therefore, the court held, even unsuccessful deceits are actionable.

As a general matter, attorneys are of the belief that the potential for opposing party liability is defined by the rules of their bars and courts, as effectuated through a presiding court's sanctioning system. This is not so in New York, where the amorphous charge of deceptive conduct can cause an attorney to be haled into court, whether or not the attorney's client prevailed in the underlying action.

Commentators predicted that, as a result of the Amalfitano decision, plaintiffs would likely prevail with their Section 487 claims where they had not before.[1] An (admittedly limited) empirical analysis shows these prognostications to have been correct. We examined 25 cases in both the pre- and post Amalfitano era. Both the rate of Section 487 filings and the ability of Section 487 plaintiffs to get past the pleadings stage appear to have increased markedly post-*Amalfitano*. Attorneys litigating in New York state and federal courts

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would be well-advised to keep Section 487 risk in mind both in litigating and settling cases where a vengeful opponent has a powerful tool to switch targets from their opponent to its counsel.

Pre-'Amalfitano'

Prior to *Amalfitano*, out of a sample of 25 cases filed since 2005, only four stated claims that alleged deceptive conduct in a manner and of a nature sufficient to survive a motion to dismiss, while the balance of 21 were dismissed.

All of the allegations in the cases surviving dismissal were quite egregious, with facts including: an attorney who sent letters to a judge prior to a hearing that indicated the client's assets had been seized when they had not[2]; an attorney who knowingly introduced fraudulent documents, used fabricated evidence, and suborned perjury with the intent to inflate damages[3]; bankruptcy attorneys who failed to advise clients of conflicting representation of a creditor, and revealed confidential information to that creditor[4]; and finally, an attorney who essentially settled a case without informing his client, deceived the court by representing that he had the requisite authorization, and then misappropriated funds.[5]

These cases demonstrate the high bar of egregious misconduct courts typically required to state a §487 claim prior to *Amalfitano*.[6] Since *Amalfitano*, if the bar had dropped, then less severe claims would also survive dismissal.

Post-'Amalfitano'

Out of a sample of 25 cases filed after the 2009 Amalfitano decision, nine of the cases alleged facts sufficient to state a claim under the statute—nearly double the success rate as the case sample pre-Amalfitano. While fewer courts appear to require a pattern of conduct to state a claim, however, successful Section 487 claims still allege severe misconduct.[7]

Of the cases that survived dismissal, the alleged facts in-clude: an attorney who was alleged to have knowingly submitted a forged letter stating the opposing party was subject to a lifetime ban on owning a taxi, in an attempt to void a contract[8]; an attorney who falsely claimed his client refused to pay litigation expenses in order to be relieved as counsel[9]; and an attorney who falsely and deliberately represented to a party in a personal injury action that the case had been settled within the party's policy limits and her assets would not be vulnerable to collection.[10]

The remaining cases that survived dismissal allege equally, if not more, egregious patterns of conduct, including a number of attorneys who asked their client to sign a stipulation of discontinuance with respect to an underlying action that, they concealed from the client, had already been dismissed,[11] and a debt-buying law firm that was found to devise a scheme to obtain and enforce fraudulent consumer debt judgments.[12]

Examining the claims that were dismissed after *Amalfitano* similarly illustrates that courts remain reluctant to permit Section 487 claims to proceed when the conduct alleged may not be viewed as particularly egregious. For example, post-Amalfitano claims that were dismissed include claims involving allegations of an attorney who intentionally switched a page in a document to conceal the unreliability of certain projections relating to a start-up company,[13] and an attorney who deleted accounting reports in an attempt to cover up unapproved advanced payments.[14] In addition, even where the alleged misconduct is found to be sufficiently egregious, New York courts have still found that the act may lack materiality and proximate cause of injury to satisfy a claim under the statute.[15]

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Conclusion

Plaintiffs no doubt will continue to invoke Section 487 in increasing numbers in light of recent successes. Perhaps most notably, Facebook invoked Section 487 in a lawsuit against opposing counsel who represented individuals in an apparent scheme to extort a settlement payment from Facebook "by filing a false lawsuit against Facebook based on forged documents [a contract] claiming [Paul] Ceglia [plaintiff in the underlying breach of contract suit] owned an 84 percent interest in Facebook." *Facebook v. DLA Piper*, 2015 WL 2179836, *2 (Sup. Ct. 2015).

The defendant-attorneys argued that the Section 487 claim was "available only if the defendant attorney engaged in a "chronic, extreme pattern of legal delinquency."[16] Facebook relied on significant precedent, including *Amalfitano*, to argue that plaintiffs are not required to demonstrate a pattern of deceptive conduct and that a single egregious act accompanied by an intent to deceive is sufficient to support liability.[17]

The court agreed, finding "allegations that defendant deceived or attempted to deceive the court with fictitious documents may be sufficient to state a cause of action for violation of Judiciary Law §487." 2015 WL 2179836 at *6. Thus, Facebook's Section 487 claim survived dismissal even though opposing counsel had no part in the alleged forgery and no settlement payment was made in the underlying lawsuit. The court allowed the claim to proceed in light of allegations that the defendant-attorneys allegedly maintained the breach of contract action even after they "knew that the contract in issue in that action was a forgery" and "filed discovery motions and made arguments in court in reliance on the authenticity of a purported contract document" the defendants allegedly knew to be forged. Id. at *6-7.

Cases like this will continue to shape how courts view Section 487 and what level of misconduct is required for an actionable claim. Because of the tension at the borders between what an opponent may view as deceit and what counsel may view as required zealous advocacy, every New York attorney is well advised to monitor developments in this area closely.

1. See, e.g., Andrew Lavoott Bluestone, "Judiciary Law Cases on the Rise After 'Amalfitano'" (Sept. 25, 2014); Daniel Markewich, "Effect of 'Amalfitano v. Rosenberg' on Judiciary Law §487 Claims" (Oct. 5, 2010).
2. *Trepel v. Dippold*, 2006 WL 3054336, at *4-5 (S.D.N.Y. Oct. 27, 2006).
3. *Specialized Indus. Servs. Corp. v. Carter*, 2008 WL 2937174 (Sup. Ct. July 23, 2008), aff'd 890 N.Y.S.2d 90, 92 (2009).
4. *Izko Sportswear v. Flaum*, 25 A.D.3d 534 (2006).
5. *Empire Purveyors v. Brief Justice Carmen & Kleiman,* 875 N.Y.S.2d 820 (Sup. Ct. 2008).
6. While a number of pre-Amalfitano courts recognized that a Section 487 violation could be established either by a single alleged deceit or an alleged "chronic, extreme pattern of legal delinquency," some had required the plaintiff to establish such an extreme pattern of conduct. See *Amalfitano*, 533 F.3d at 123-24.
7. See *Dupree v. Voorhees*, 102 A.D.3d 912, 913 (2d Dept. 2013) ("To the limited extent that decisions of this Court have recognized an alternative predicate for liability under Judiciary Law §487 based upon an attorney's 'chronic, extreme pattern of legal delinquency', they should not be followed as the only liability standard recognized in Judiciary Law §487 is that of an intent to deceive.") (citations omitted); but see *Pannone v. Silberstein*, 118 A.D.3d 413, 415 (1st Dept. 2014) ("The cause of action based on Judiciary Law §487 was properly dismissed inasmuch as the record does not establish a 'chronic and extreme pattern of legal delinquency.'") (citation omitted).
8. *Kurman v. Schnapp*, 73 A.D.3d 435 (2d Dept. 2010).
9. *Palmieri v. Biggiani*, 108 A.D.3d 604 (2d Dept. 2013).
10. *Duszynski v. Allstate Ins.*, 107 A.D.3d 1448 (2d Dept. 2013).
11. *Scarborough v. Napoli, Kaiser & Bern*, 63 A.D.3d 1531, 1531-32 (2d Dept. 2009).
12. *Mayfield v. Asta Funding*, 2015 WL 1501100 (S.D.N.Y. March 31, 2015).
13. *Strumwasser v. Zeiderman*, 102 A.D.3d 630 (2d Dept. 2013).
14. *In re Borges*, 35 Misc. 3d 1229(A), 953 N.Y.S.2d 548 (Sur. 2012).
15. See, e.g., *Corcoran v. Giampetruzzi*, 29 Misc. 3d 1217(A), 918 N.Y.S.2d 397 (Sup. Ct. 2010).
16. Consolidated Memorandum in Opposition to Defendants' Motions to Dismiss, *Facebook v. DLA Piper (US)*, 2015 WL 2449146 (Sup. Ct. Jan. 30, 2015).
17. Id. (citing *Amalfitano, Mazel 315 West 35th v. 315 W. 35th Assoc.*, 120 A.D.3d 1106 (1st Dept. 2014), and *Trepel v. Dippold*, 2006 WL 3054336 (S.D.N.Y. Oct. 27, 2006).