

Court of Appeals
of the
State of New York

BILL BIRDS, INC. and WILLIAM PELINSKY,

Plaintiffs-Appellants,

– against –

STEIN LAW FIRM, P.C. and MITCHELL A. STEIN,

Defendants-Respondents.

OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	1
STATEMENT OF FACTS	2
THE DECISION BELOW	2
ARGUMENT	4
POINT I	4
THE COURT OF APPEALS SHOULD DENY PLAINTIFFS’ MOTION FOR LEAVE TO APPEAL BECAUSE PLAINTIFFS DO NOT IDENTIFY A REVIEWABLE QUESTION OF LAW.....	4
POINT II	7
PLAINTIFFS FAIL TO RAISE ISSUES THAT ARE NOVEL OR OF PUBLIC IMPORTANCE, THAT PRESENT A CONFLICT WITH PRIOR DECISIONS OF THIS COURT, OR THAT INVOLVE A CONFLICT AMONG THE DEPARTMENTS OF THE APPELLATE DIVISION.....	7
CONCLUSION.....	9

PRELIMINARY STATEMENT

Defendants-Respondents Stein Law Firm, P.C., and Mitchell A. Stein (collectively “Defendants”) submit this brief in opposition to Plaintiffs-Appellants’ (“Plaintiffs”) motion for leave to appeal to the Court of Appeals of the State of New York.

The instant motion, which duplicates Plaintiffs’ brief before the Appellate Division, Second Judicial Department, is nothing more than Plaintiffs’ last-ditch attempt to persuade this Court that they raised a triable issue of fact in opposition to Defendants’ summary judgment motion. The Court of Appeals’ scope of review, however, is limited to issues of law, and Plaintiffs do not raise a reviewable issue of law in their motion.

Even assuming that Plaintiffs raise a true question of law, this matter does not present unique or novel issues or issues of public importance, a conflict with prior decisions of this Court, or a conflict among the departments of the Appellate Division that could potentially justify further review by the Court of Appeals. In light of the foregoing, Plaintiffs should not be granted permission to appeal to the Court of Appeals, and their motion should be denied.

STATEMENT OF FACTS

In the interest of brevity, Defendants respectfully refer this Court to Defendants' Statement of Facts contained in the Brief For Defendants-Appellants dated August 15, 2016, in the Second Department ("Defendants' Appellate Brief"), at pages 10-13.

THE DECISIONS BELOW

By Notice of Motion dated August 13, 2012 (R. 24-25),¹ Defendants moved for an Order, under C.P.L.R. R. 3212, granting Defendants summary judgment and dismissing Plaintiffs' complaint in its entirety.

By Order dated March 21, 2013, the Honorable Timothy J. Dufficy granted Defendants' motion to the extent that it dismissed Plaintiffs' causes of action for legal malpractice, breach of contract, and fraud ("March 2013 Order") (R. 5-8). The Supreme Court dismissed the legal malpractice cause of action because Plaintiffs could not prove the essential element of proximate cause (R. 6-7). Justice Dufficy dismissed the causes of action for breach of contract and fraud because those causes of action were based upon the same facts, and

¹ References to "R. ___" refer to the relevant pages of the Record on Appeal, which was submitted to this Court with Plaintiffs' motion.

alleged the same damages, as Plaintiffs' cause of action for legal malpractice (R. 7).

The Supreme Court denied Defendants' summary judgment motion to the extent that it found that Plaintiffs asserted a claim for damages under Judiciary Law § 487, and that Plaintiffs' opposition to the motion created triable issues of fact regarding that claim (R. 7-8).

On appeal, the Second Department held that the Supreme Court should have granted the branch of Defendants' motion which was for summary judgment dismissing the Judiciary Law § 487 cause of action (See a copy of the Second Department's August 15, 2018 Decision & Order ("August 2018 Decision & Order"), which is annexed as Exhibit "A"² to the Torto Aff., at p. 2).

² References herein to Exhibit "A" refer to the August 2018 Decision & Order.

In reaching this holding, the Second Department determined that Plaintiffs “failed to allege sufficient facts demonstrating that the defendant attorneys had the ‘intent to deceive the court of any party’” (See Exhibit “A” at p. 2) (citations omitted). The Court further stated, “That the defendants commenced the underlying action on behalf of the plaintiffs and the plaintiffs failed to prevail in that action does not provide a basis for a cause of action alleging a violation of Judiciary Law § 487 to recover the legal fees incurred” (See Exhibit “A” at p. 2).

ARGUMENT

POINT I

THE COURT OF APPEALS SHOULD DENY PLAINTIFFS’ MOTION FOR LEAVE TO APPEAL BECAUSE PLAINTIFFS DO NOT IDENTIFY A REVIEWABLE QUESTION OF LAW

Generally, under Section 5501(b) of the Civil Practice Law and Rules (“C.P.L.R.”), “[t]he court of appeals shall review questions of law only” Id. Even mixed questions of law and fact are beyond review by the Court of Appeals. See People v. Alzate, 84 N.Y.2d 983, 984, 646 N.E.2d 801, 802, 622 N.Y.S.2d 499, 500 (1994); People v. Thatch, 71 N.Y.2d 906, 907, 523 N.E.2d 814, 815, 528 N.Y.S.2d 527, 528 (1988). The Court of Appeals reviews questions of fact under limited circumstances, including “where the appellate

division, on reversing or modifying a final or interlocutory judgment, has expressly or impliedly found new facts and a final judgment pursuant thereto is entered.” C.P.L.R. § 5501(b).

As an initial matter, any purported factual questions contained in Plaintiffs’ motion cannot be reviewed. Plaintiffs do not identify any new facts that the Second Department found in affirming the Judgment. See C.P.L.R. § 5501(b). No other exception to the rule that the Court of Appeals only reviews questions of law is applicable.

Plaintiffs’ counsel opens his Affirmation in Support of the instant motion by raising a single, purported legal issue: “What is the standard of proof to successfully oppose a motion for summary judgment when relying on an unpleaded cause of action?” (See Affirmation of Thomas Torto, Esq., dated September 20, 2018 (“Torto Aff.”), at ¶ 2).

The burden of a party opposing a summary judgment motion is well-settled. In the March 2013 Order, Justice Dufficy correctly identified Plaintiffs’ burden in opposition to the summary judgment motion, which was to “rais[e] an issue of fact” (R. 6).

Plaintiffs and Defendants never disputed Plaintiffs' burden in opposition to Defendants' summary judgment motion. In the Supreme Court and on appeal, the parties litigated whether Plaintiffs satisfied their burden. The Second Department determined that Plaintiffs did not raise an issue of fact: "[T]he plaintiffs failed to allege sufficient facts demonstrating that the defendant attorneys had the 'intent to deceive the court or any party'" (See Exhibit "A" at p. 2) (citations omitted).

The Second Department did not dismiss the Complaint because it determined that Plaintiffs' Judiciary Law § 487 claim was "an unpleaded cause of action," and did not impose a new or different burden on Plaintiffs as opponents of a summary judgment motion seeking to dismiss "an unpleaded cause of action" (See Exhibit "A"). Rather, the Second Department assumed that Plaintiffs pleaded a cause of action under Judiciary Law § 487 and dismissed it because Plaintiffs failed to satisfy their burden to raise a genuine issue of material fact in opposition to Defendants' summary judgment motion (See Exhibit "A" at p. 2).

Moreover, Plaintiffs suggest that a different burden should apply to an opponent of a summary judgment motion seeking to dismiss an unpleaded cause

of action, but they do not articulate what that burden should be.

After asserting the purported question of law for review, Plaintiffs' counsel reveals the crux of Plaintiffs' argument before this Court: that Plaintiffs met their burden in opposition to the summary judgment motion (See Torto Aff. ¶¶ 32, 35-40). That argument fundamentally raises factual issues and provides no basis for leave to appeal to the Court of Appeals.

POINT II

PLAINTIFFS FAIL TO RAISE ISSUES THAT ARE NOVEL OR OF PUBLIC IMPORTANCE, THAT PRESENT A CONFLICT WITH PRIOR DECISIONS OF THIS COURT, OR THAT INVOLVE A CONFLICT AMONG THE DEPARTMENTS OF THE APPELLATE DIVISION

In a motion for leave to appeal to the Court of Appeals, the movant must set forth “[a] concise statement of the questions presented for review and why the questions presented merit review by this Court, such as that [1] the issues are novel or of public importance, [2] present a conflict with prior decisions of this Court, or [3] involve a conflict among the departments of the Appellate Division.” 22 N.Y.C.R.R. 500.22(b)(4).

Plaintiffs offer no explanation as to why this Court should grant them leave to appeal. Plaintiffs state, in conclusory fashion, that “[t]he question of

law merits review because it would present this Court with the opportunity to articulate a clear precedent on an important issue which is of statewide importance to the bar and public at large” (See Torto Aff. ¶ 41). The alleged legal issue, however, is not an issue at all (See Point I, supra). Furthermore, Plaintiffs do not explain whether that purported issue is “novel or of public importance,” or that it “present[s] a conflict with prior decisions of this Court,” or that it “involve[s] a conflict among the departments of the Appellate Division.” See 22 N.Y.C.R.R. 500.22(b)(4).

This is a garden-variety, private, attorney-client dispute in which the Second Department determined that no triable issues of fact exist, and, accordingly, granted the branch of Defendants’ summary judgment motion which was to dismiss the Judiciary Law § 487 claim. This Court should deny Plaintiffs leave to appeal.

CONCLUSION

For all of the foregoing reasons, Defendants-Respondents Stein Law Firm, P.C., and Mitchell A. Stein respectfully request that this Court enter an Order denying Plaintiffs' motion in its entirety, and granting Defendants-Respondents such other, further and different relief as this Court may deem just and proper.

DATED: Garden City, New York
September 27, 2018

Respectfully submitted,

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