APL-2019-0006

COURT OF APPEALS
of the
STATE OF NEW YORK

BILL BIRDS, INC. and WILLIAM PELINSKY

Appellants,

-against-

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

BRIEF OF ANDREW LAVOOTT BLUESTONE AS *AMICUS CURIAE*

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Dated: May 22, 2019

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STATEMENT OF INTEREST

I have no financial interest in this case. I have written about Judiciary Law § 487 in the New York Law Journal on multiple occasions, discussed it CLEs and taught the rule in a Legal Malpractice law course at St. John's University College of Law as an adjunct law professor.

Judiciary Law § 487 has enormous implications for the practice of law. Its medieval origin testifies to the profession's ancient origin. Undoubtedly, the central pillar of the profession of law is trust in the integrity of lawyers. Lawyers are among the last groups to self-regulate. That right is jealously held, but must be buttressed with appropriate tools to deal with any lack of transparency or forthrightness.

Judiciary Law § 487 is a strong tool, but it must be wielded consistently and with predictability. This *amicus* brief suggests that there may be protectionism grafted onto the rule that unduly shields attorneys from claims of deceit. It is further suggested that modern embellishments, as described in the brief, are antithetical to the purpose and scope of the rule. It is suggested that the profession of law, the public and the very concept of law will benefit from reliable, predictable comprehensible and transparent application of Judiciary Law § 487 in self-regulation of the practice of law.

PRELIMINARY STATEMENT

This is an *amicus curie* brief offered on the issue of statutory interpretation of a unique statute of the common law. The brief does not support either party in the litigation. The purpose of this brief is to discuss Judiciary Law § 487 from its medieval English origin and to consider modern embellishments not found in the text. The embellishments discussed consist of the requirement of "a chronic and extreme pattern of legal delinquency," and the requirement for "egregious" deceit

History of the Statute

Initially enacted as the First Statute of Westminster in 1275, it was a part of English law in colonial New York. In 1787 the New York legislature adopted a strikingly similar law (L. 1787, ch 35, § 5). In 1836 it was again adopted in the Revised Statutes at 2 Rev Stat of NY, part III, ch III, tit II, art 3, § 69, at 215-216 [2d ed 1836]. It was enacted into Penal Code §148 in 1881, then became Penal Law of 1909 § 273. First in the Civil Practice Act and then in 1965 it was enacted in its present form. Lastly, this Court determined that Judiciary Law § 487 was a part of New York common law (rather than a mere statute) as "part of the Colonial-era incorporation or 'reception' of English law into New York law." *Melcher v. Greenberg Traurig, LLP*, 23 N.Y.3d 10, 14 (2014) The statute reads:

> 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; or,
>
> 2. Wilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,
>
> Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

Chronic and Extreme

In 1982 Queens County made an enduring remark which quickly moved from *dicta* to a permanent element of the statute in *Wiggin v. Gordon*, 115 Misc2d 1071 (Civil Ct., Queens 1982) It was in that case, for the very first time, that the term "chronic, extreme pattern of legal delinquency" was seen. The motion Court was considering only subdivision (2) of Judiciary Law § 487 when it wrote that this sub-section of the judiciary law "should be applied only to the chronic, extreme pattern of legal delinquency as illustrated by this proceeding and contemplated by this statute."

A quote ascribed to Justice Oliver Wendell Holmes, Jr.[1] is that "a good catchword can obscure analysis for fifty years." "Chronic and extreme" is an excellent catchword which has entered the lexicon and obscured the analysis of attorney deceit.

[1] Ascribed by Wendell Willkie in a 1938 radio broadcast.

This *dicta* has become firmly grafted to the body of the entire statute, whether to subdivision (1) or to subdivision (2), and in the First Department has become a necessary and essential element of the statute. *Gonzalez v. Gordon,* 233 A.D.2d 191,191 (1st Dept, 1996) ("the record is devoid of proof that defendant 'engaged in a chronic, extreme pattern of legal delinquency' needed to support the trial court's award of treble damages pursuant to Judiciary Law 487".)

Federal courts picked upon on the *Wiggin* dicta as well, writing that [Judiciary Law] § 487 is "reserved for instances of attorney misconduct amounting to a 'chronic and extreme pattern of legal delinquency.'' *Cresswell v. Sullivan & Cromwell,* 771 F. Supp 580, fn 4 (S.D.N.Y. 1991)

From *Wiggin* forward, the grafting of "chronic, extreme pattern of legal delinquency" has taken and flourished. There are approximately 900 cases in which Judiciary Law §487 is cited from 1982 to present. A pattern has emerged by which cases before the First Department are subject to a requirement that a "chronic, extreme pattern of legal delinquency" be shown, but in the Second Department a single instance of deceit, sometimes "egregious" and sometimes not, is sufficient. The First Department often but not uniformly applies a test of "a chronic and extreme pattern of legal delinquency" without regard to the actual words of the statute. *Kaminsky v. Herrick, Feinstein LLP*, 59 A.D. 3d 1, 13 (1st Dept, 2008). The First Department often adheres to this standard without any mention of mere deceit, or

even intent to deceive. *Havell v. Islam,* 292 A.D.2d 210, 210 (1st Dept, 2002) ("the allegations failed to establish a chronic and extreme pattern of legal delinquency…")

This issue was squarely addressed in *Solow Mgt. Corp. v. Seltzer,* 18 A.D.3d 399,400 (1st Dept, 2005) "Contrary to plaintiff's arguments, the complaint sets forth but one arguable misrepresentation by defendant and accordingly does not allege a cognizable claim under Judiciary Law§ 487, which provides recourse only when there is a chronic and extreme pattern of legal delinquency."

Facebook, Inc. v. DLA Piper, LLP, 134 A.D.3d 610, 615 (1st Dept, 2015) is a recent example of how this grafting has overtaken the common law rule. "Relief under a cause of action based upon Judiciary Law § 487 'is not lightly given' (Chowaiki & Co. Fine Art Ltd. v. Lacher, 115 AD3d 600, 601, 982 NYS2d 474[1st Dept 2004]…" *Facebook* similarly recites the chronic and extreme language requirement.

The Second Department has taken a different approach. It has not required the "chronic extreme pattern of legal delinquency", nor has it taken the explicit position that there is a special higher standard ("not lightly given") to be applied to the rule. The earliest decisions from the Second Department required merely "intent to deceive any party…" *Singer v. Whitman & Ransom,* 80 A.D.2d 862, 863 (2d Dept, 1981)

Decisions from the Second Department allow recovery simply upon intent to deceive. *Aristakesian v. Ballon Stoll Bader & Nadler, P.C.*, 165 A.D.3d 1023, 1025 (2d Dept, 2018). ("violation of Judiciary Law § 487 requires an intent to deceive…") This decision cites backward to *Izko Sportswear Co., Inc. v. Flaum*, 25 A.D.3d 534, 537 (2d Dept, 2006) ("a violation of Judiciary Law § 487 may be established 'either by the defendant's deceit *or* by an alleged chronic, extreme pattern of legal delinquency by the defendant' (emphasis supplied in original)." *Izko* itself looks backward to *O'Connell v. Kerson*, 291 A.D.2d 386, 387 (2d Dept, 2002) and thence further backward to *O'Connor v. Dime Sav. Bank, F.S.B.*, 265 A.D.2d 313, 313 (2d Dept, 1999) ("plaintiff cannot establish that he was deceived by the allegedly false affidavit of service…")

Sammy v. Haupel, 2019 NY Slip Op 02372 at 3 (2d Dept, 2019) remains consistent with the Second Department approach and starkly contrasts with the First Department holdings. It requires only deceit or an intent to deceive.

Despite the grafting of the "chronic language" to the statute, "no such requirement is imposed by the statute itself." *Amalfitano v. Rosenberg*, 428 F. Supp 2d 196 (S.D.N.Y. 2006), question certified by *Amalfitano v. Rosenberg*, 533 F.3d 117 (2d Cir. N.Y. 2008); *aff'd* 572 F. 3d 91 (2d Cit. 2009); *certified question answered, Amalfitano v. Rosenberg*, 12 N.Y.3d 8 (2009).

Egregious Deceit

Judiciary Law § 487 does not contain the work "egregious" nor can it fairly be said that the words of the rule imply that there is a minimum quanta of deceit required.[2] Nevertheless, courts have required that deceit be super-sized in order to violate Judiciary Law § 487. The reach of Judiciary Law § 487 is "confined to 'intentional egregious misconduct." *Alliance Network, LLC v. Sidley Austin LLP,* 43 Misc. 3d 848, 859 (Sup.Ct. NY County, 2014) citing *O'Callaghan v. Sifre,* 537 F. Supp 2d 594, 596 (S.D.N.Y. 2008); *Strumwasser v. Zeiderman,* 2012 NY Slip Op 30772(U) (Sup.Ct. NY County, 2012). A "single act of deceit" may not be sufficiently egregious to support a claim. *Shawe v. Elting,* 161 A.D.3d 585, 588 (1st Dept, 2018).

POINT I

A COURT'S TASK IS TO APPLY THE WORDS OF THE STATUTE TO THE FACTS

Judiciary Law § 487 is a part of the common law. It is not a statute which purports to change the common law. *Melcher* at 14. Statutory interpretation suggests a presumption against presuming a change in the common law. A statute will be

[2] Calibration of the level of deceit may be an ontologically slippery process.

construed to alter the common law only when that disposition is clear. *Scalia & Garner,* Reading Law: The Interpretation of Legal Texts (2012)

Courts have added words and concepts to the text of the statute. This court's task is to "ascertain the legislative intent and construe the pertinent statute to effectuate that intent." *Peo. v. Roberts,* 31 N.Y.3d 406, 418 (2018). The starting point is the statutory text, "the language itself." *Id* at 418. There is "no right to add or take away from that meaning." *Peo. v. Robinson,* 95 N.Y.2d 179, 182 (2000).

Statutory interpretation "always begins with the plain language of the statute which [the court] consider[s] in the specific context in which the language is used. *In re: Amed Dep't Stores, Inc.*, 582 F.3d 422, 427 (2d Cir. 2010). An initial question is whether the text has a plain and unambiguous meaning. *WNET v. Aereo, Inc.*, 871 F. Supp. 2d 281 (S.D.N.Y. 2012) If the plain meaning of the provision can be gleaned from the text, no other sources need be considered. *Louis Vuitton Malletier S.A. v. LY USA, Inc.,* 676 F.3d 83, (2d Cir. 2012).

The language of the statute is clear. It applies to "An attorney or counselor who: is guilty of <u>any</u> deceit or collusion …." (emphasis added) It is suggested that the Court not seek to determine whether deceit was bad, really bad or egregious. The Courts should merely determine whether an attorney attempted to or successfully engaged in <u>any</u> deceit or collusion, or consented to any deceit or collusion, with intent to deceive the court or any party, or from the second

subsection, willfully delayed his client's suit with a view to his own gain; or, willfully received any money or allowance for or on account of any money which he has not laid out, or became answerable for.

Small deceit which leads to small damages and results in small trebling. Small amounts of money willfully received will lead to small amounts to be trebled. The Courts need not gat- keep the intensity of deceit. The statute applies to any deceit. Deceit is always deceit and it is always wrong.

POINT II

THE FIRST AND SECOND DEPARTMENTS ARE IN CONFLICT OVER THE ELEMENTS OF JUDICIARY LAW § 487

The First and Second Departments, which have issued the greater portion of all Judiciary Law § 487 cases are in stark conflict over the elements of Judiciary Law § 487. That conflict is manifest in this case.

The Appellate Division decision below stated in calm fashion that "A chronic extreme pattern of legal delinquency is not a basis for liability pursuant to Judiciary Law § 487." *Bill Birds, Inc. v. Stein Law Firm, P.C.*, 164 A.D.3d 635, 637 (2d Dept, 2018). Contrast that with *Facebook, Inc.* ("Relief under a cause of action based upon Judiciary Law § 487 * * * and requires a showing of egregious conduct or a chronic and extreme pattern of behavior…"

The two Departments cannot agree on the number of elements and have a completely polar view on whether there is a requirement to demonstrate the "chronic" element. There is no rational manner in which to square the two approaches.

The First and Second Department are similarly in conflict over whether a single event of deceit is sufficient for Judiciary Law § 487 purposes or a series of events are necessary. (First Department) *Shawe,* supra; *Sammy*, supra; (Second Department) *Solow Mgt. Corp.*, supra. The First Department requires a "pattern" of such conduct; the Second Department accepts a single egregious event. There is no rational way to square these two approaches.[3]

There is similarly no agreement between the Departments over how bad must be the deceit. Beyond the metaphysical question of how one measures the quality and quantity of deceit, what is the difference between "egregious deceit" and "deceit"? Is it the subject matter of the deceit? Is it the Court in which the deceit is practiced, with appellate lies being worse than trial court lies? Is it the number of people or corporations which benefit from the lie?

The two Departments do not agree on any aspect of Judiciary Law § 487 other that the words of the statute. Practitioners cannot rely upon any set of facts

[3] The standard for an 800 year old part of the common law should not depend upon which side of the East River the case (much less the deceit) takes place.

or cases to suitably predict how a particular department might treat a Judiciary Law § 487 case. There is no case law on how the deceit might be applied and evaluated, other than the venue of the case. Should a lie in a court of the First Department be treated differently if the Judiciary Law § 487 is brought in the Second Department? Is deceit in Suffolk County different from deceit in the Bronx? Should it be treated differently because of geography? Does an attorney get a pass on the first lie in Manhattan, but not in Brooklyn?

CONCLUSION

This Court should, respectfully, harmonize the various readings of Judiciary Law § 487 so that all Departments of this State treat the common law, and this particular portion of the common law consistently. It is suggested that the judicially grafted "chronic" language be eliminated from analysis of the rule. It is suggested that the Court not seek to determine whether deceit was bad, really bad or egregious and that Courts should merely determine whether an attorney attempted to or successfully engaged in any deceit or collusion, or consented to any deceit or collusion, with intent to deceive the court or any party, or from the second subsection, willfully delayed his client's suit with a view to his own gain; or, willfully received any money or allowance for or on account of any money which he has not laid out, or became answerable for.

Small deceit which leads to small damages results in small trebling. Small amounts of money willfully received will lead to small amounts to be trebled. The Courts need not gate-keep the intensity of deceit. Deceit is always deceit and it is always wrong. There is no need for Courts to graft additional roadblocks to recovery for the wrongs that attorneys do to courts and to their fellows. Results and the application of the common law should be consistent across geography and predictable within the entire State.

Dated: New York, New York
May 23, 2019

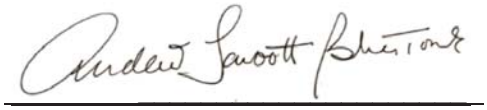
Andrew Lavoott Bluestone

CERTIFICATE OF COMPLIANCE
PRINTING SPECIFICATIONS STATEMENT

1. This brief was prepared on a computer. The processing system was WordPerfect. It was produced in times Times New Roman typeface, in 14 point. Footnotes are no smaller than 12 points. Headings are no larger than 15 point.

2. This brief was prepared using Times New Roman typeface, 14 point, double spaced and consists of 2866 words, and was produced on white, opaque, unglazed recycled paper.

Dated: New York, New York
May 21, 2019



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