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Appellate Division, Second Department Docket No. 2016-01939
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Court of Appeals

STATE OF NEW YORK

BILL BIRDS, INC. and WILLIAM PELINSKY,

Plaintiffs-Appellants,

—against—

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

Defendants-Respondents.

BRIEF FOR *AMICUS CURIAE* JEFFREY A. JANNUZZO, ESQ. IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Amicus Curiae Pro Se

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STATEMENT OF INTEREST

Amicus curiae has been before the Court on both of its Judiciary Law Sec. 487 cases in the modern era, and before the Appellate Division on a decision that established precedent, either as amicus or as counsel to the successful party. *Amalfitano v. Rosenberg*, 12 N.Y.3d 8 (2009) (statutory term deceit is distinct from fraud and does not require reliance); *Melcher v. Greenberg Traurig LLP*, 23 N.Y.3d 10 (2014) (applying the doctrine of reception of English common law to apply the six-year statute of limitations to Judiciary Law Sec. 487); *Melcher v. Greenberg Traurig LLP*, 135 A.D.3d 547 (1st Dep't 2016) (establishing that a claim under Judiciary Law Sec. 487 can and should be brought in a separate action). During the 12-year duration of *Melcher v. Greenberg Traurig*, amicus closely followed the development of the case law under Section 487, and lectured at CLE seminars on the subject.

However, amicus no longer has any interest as an advocate in the interpretation of the statute. The foregoing action has concluded, amicus has no pending nor any expected cases under the statute, and at the age of 70 is unlikely to ever handle such a case again, the prior one having taken 12 years.

QUESTIONS PRESENTED

1. Does *Amalfitano v. Rosenberg*, 12 N.Y.3d 8 (2009) render no longer good law any case law to the effect that deceitfully inducing a client to commence and to prosecute an unnecessary or meritless lawsuit, so that the deceitful lawyer can obtain a fee, is not covered by Judiciary Law Sec. 487?

> The court below did not address this question. Amicus contends that because of *Amalfitano v. Rosenberg*, any such case law is no longer good law.

2. Does *Amalfitano v. Rosenberg, supra,* compel reversal of the decision below?

> The court below did not address this question. Amicus contends that *Amalfitano v. Rosenberg* compels reversal, because *Amalfitano* relied upon and approved of a decision upholding the validity of a claim under the ancestor statute of Judiciary Law Sec. 487 for deceitfully inducing a client to commence an unnecessary lawsuit in order to obtain a fee.

3. Has the mandate of *Amalfitano v. Rosenberg, supra*, been faithfully applied by the courts below, to interpret Judiciary Law Sec. 487 to enforce the legislative "intent to protect the integrity of the courts and foster their-truth seeking function?"

> The court below rendered a decision that did not apply the mandate of *Amalfitano v. Rosenberg*. Amicus contends that this is not an isolated incident, and that some courts have evidenced dislike of the statute, and while giving lip service to *Amalfitano*, have dismissed claims that should have proceeded.

PRELIMINARY STATEMENT

This appeal represents the first time in the 200-year history of the Court that leave to appeal has been granted in a case under Judiciary Law Sec. 487. Of the Court's two cases in the modern era, *Amalfitano v. Rosenberg*, 12 N.Y.3d 8 (2009) arrived on a certified question from the Second Circuit; and *Melcher v. Greenberg Traurig LLP*, 102 A.D.3d 497 (1st Dep't 2013), *rev'd*, 23 N.Y.3d 10 (2014) arrived by virtue of a two-Justice dissent below. Leave to appeal has been sought in high-profile cases since *Amalfitano v. Rosenberg*, but was never granted.

The appeal now before the Court presents the question of whether the mandate of *Amalfitano v. Rosenberg* has been faithfully applied; and whether *Amalfitano* renders no longer good law any cases to the effect that deceitfully inducing a client to commence and to prosecute a meritless or necessary lawsuit is not covered by the statute. If both the letter and the spirit of *Amalfitano v. Rosenberg* had been followed by the court below, the case now on appeal would not have been dismissed, and would have been unlikely to present a matter worthy of the attention of the Court of Appeals.

The decision rendered on this appeal will have lasting effect on the interpretation and application of the statute. It is the position of amicus that the Court should reinforce the mandate of *Amalfitano* so as to instruct the courts below that the statute should be enforced as written.

STATEMENT OF THE RECORD

The record here presents a case where a tool-and-die worker with a small spare parts business for old cars went to a lawyer to get advice about his 16-page single-spaced intellectual property contract with General Motors. R-324-327. In this $25,000 case now before the Court of Appeals, the tool-and-die worker's pleadings refer to going to the lawyer to get advice about "copy writes" [sic]. R-33. His affidavit in opposition to summary judgment is full of handwritten cross-outs and handwritten notations. R-325-330.

The lawyer advised the tool-and-die worker about those "copy writes," telling him that he had to bring an action in New York to declare his rights under the intellectual property contract with General Motors. R-325. The tool-and-die worker paid the lawyer the requested fees, and the lawyer commenced an action in New York. *Id.*

The lawyer now bases his defense on his sworn assertions that the intellectual property case he commenced and prosecuted for the tool-and-die worker was not only completely meritless the whole time, but was brought in the wrong state. R-57, 58-59. On the basis their acceptance of the lawyer's sworn statement that the case was completely meritless the whole time and was brought in the wrong state, both courts below dismissed all of the tool-and-die worker's claims for malpractice and related causes of action. R-25, R-11.

The motion court recognized that the record, including the affidavit of the tool-and-die worker, stated a prima facie case against the lawyer for deceit under Judiciary Law Sec. 487 for inducing his client to bring and to prosecute a completely meritless lawsuit in the wrong state, and denied the lawyer's motion for summary judgment on that cause of action. R-27-28.

The Appellate Division, however, rendered a short, conclusory decision which stated as follows: "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 Sec. 487." R-12. Everything the tool-and-die worker said his affidavit about having been deceitfully induced to pay a fee to bring and to prosecute a meritless case was disregarded. R-329. That the defendant lawyer was now swearing that the case he had commenced and prosecuted was completely meritless the whole time was disregarded. R-58-59.

That the defendant lawyer never even denied the facts stated in his client's affidavit regarding deceitful inducement and deceitful prosecution was disregarded. R-57-59. The Appellate Division slammed the courthouse door on the fingers of someone who had presented a prima facie case for being cheated by a deceitful lawyer.

ARGUMENT

I. BECAUSE OF *AMALFITANO*, ANY CASE LAW DISALLOWING CLAIMS FOR DECEITFULLY INDUCING A PARTY TO BRING A LAWSUIT ARE NO LONGER GOOD LAW

In *Amalfitano v. Rosenberg*, this Court for the first time in its 200-year history examined the origin and legislative intent of one of New York's longest-standing statutes. The ancestor statute of Judiciary Law Sec. 487 was enacted in 1787, two years before the U.S. Constitution existed. *Amalfitano, supra* at 12. As this Court ruled in *Amalfitano*, the attorney-deceit statute originated in an Act of Parliament in 1275, enacted shortly after Magna Carta. *Id.* The Court examined the history and purpose of the attorney-deceit statute, and found it "remarkably unchanged" throughout its 750-year history. Although not mentioned in *Amalfitano*, the New York statute was subsequently enacted in eight other states and remains on their books to this day.[1]

In *Amalfitano*, the Court was called upon to answer a certified question from the Second Circuit as to whether the statute's term "deceit" meant something distinct from the term "fraud," and that unlike fraud did not require reliance. *Amalfitano* held that the statutory term deceit was in fact distinct from fraud and

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[1] The eight other state statutes which copied New York's statute virtually word-for-word are: *Ind. Code Ann. § 33-43-1-8; Iowa Code Ann. § 602.10113; Minn. Stat. Ann. § 481.071; Mont.C.A. 37-61-406; N.D. St. § 27-13-08; N.M. Stat. Ann. § 36-2-17; 21 Okl.St.Ann. § 575; Wyo. Stat. Ann. § 33-5-114.*

did not require reliance, because the statute was directed at deterring the commission of deceitful acts by a lawyers, regardless of whether that wrongdoing actually succeeded. *Id.* at 14.

To reach that result, *Amalfitano* cited only one case, a 1878 decision by the General Term of Supreme Court, rendered several decades before the Appellate Divisions existed.[2] *Looff v. Lawton*, 14 Hun 588, 589 (1878). *Amalfitano* quoted that decision at some length, and of critical importance, quoted its holding with approval:

> In *Looff*, the plaintiffs accused their attorney of gulling them into bringing an unnecessary lawsuit, motivated solely by his desire to collect a large fee to represent them. In discussing the meaning of the word "deceit" in Sec. 70 (and, by extension, Sec. 148), the General Term of the Supreme Court opined that the Legislature intended an expansive reading rather than "confining the term to common law or statutory cheats" (*Looff v. Lawton*, 14 Hun 588, 589). To support this interpretation, the court reasoned that because there was already a civil action at common law for fraud and damage that an injured party might pursue,
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> > "[t]here was no occasion . . . for another statute to punish, or to give an action for the 'deceit' of lawyers, unless the Legislature intended that that class of persons should be liable for acts which would be insufficient to establish a crime or a cause of action against citizens generally. The statute is limited to a peculiar class of citizens, from whom the law exacts a

[2] The Appellate Divisions were created by the 1894 State Constitution, to take effect January 1, 1896. See *New York Times*, 1/2/1896.

> reasonable degree of skill, and the utmost good faith in the conduct and management of the business intrusted to them. *Amalfitano* at 14. *(Emphasis added.)*

The cause of action that this Court approved in *Amalfitano* is the same presented by the record in the case on appeal. However, neither *Amalfitano* nor *Looff v. Lawton* were mentioned in the briefing by Defendants-Respondents below, where they argued that deceitfully causing a client to bring a meritless lawsuit just did not count under the statute. Rather, Defendants-Respondents merely cited cases for the general proposition that a lawsuit had to be actually pending at the time of the deceit.[3] In fact, not one of those cases concerned the issue presented here, of deceitfully inducing a client either to commence or to prosecute a lawsuit.

The Court's reliance on the General Term decision in *Looff v. Lawton*, standing alone, would resolve any issue of whether deceitfully inducing a client to bring a meritless or unnecessary lawsuit was a violation of the attorney-deceit

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[3] *Tawil v. Wasser*, 21 A.D.3d 948, 949 (2nd Dep't 2005) concerned a lawyer who represented clients in a real estate transaction, where no lawsuit was even in issue. *Henry v. Brenner*, 271 A.D.2d 647, 648 (2nd Dep't 2000) concerned a deceitful bill rendered only after a lawsuit had been concluded. *Mahler v. Campagna*, 60 A.D.3d 1009, 1012-13 (2d Dep't 2009) concerned collection of a fee determined in an arbitration proceeding; the alleged deceit was not described in the decision. However, if the deceit did take place in a prior lawsuit for which the fee was disputed, insofar as the decision disallowed such deceit, it was mistaken, so long as the claim was brought within the statute of limitations. *Gelmin v. Quicke*, 224 A.D.2d 481, 483 (2nd Dep't 1996) concerned a deceitful affidavit on an insurance claim; the affidavit was never used in a subsequent lawsuit but was merely produced discovery in that lawsuit. App. Div. Brief of Defendants-Respondents at 21-22.

statute. The reasoning of *Amalfitano* and its reliance on *Looff* is not challengeble by logic. Deceitfully inducing someone to become a party still involves deceit on a party. And even if deceitfully inducing a client to commence a lawsuit is "antecedent" to the commencement, the prosecution of that lawsuit even one minute after it is filed is deceit on a party.

There was however a subsequent decision in *Looff v. Lawton* that went unmentioned in *Amalfitano*. The decision of General Term found that the clients had stated a valid cause of action for deceitful inducement, and the case proceeded to trial on whether the alleged deceit had, in fact, occurred. The jury returned a verdict that the lawsuit had in fact been deceitfully induced, and treble damages were awarded.

Six years after the General Term decision in *Looff* upheld the cause of action for deceitfully inducing the client to bring a lawsuit, this Court in 1884 modified the judgment after trial to disallow trebling, stating that inducing someone to bring a lawsuit was outside the attorney-deceit statute: "They [the sections of the statute] do not, we think, include a transaction antecedent to the commencement of the action, as the court could have no connection with any such proceeding." *Looff v. Lawton*, 97 N.Y. 478, 479, *modifying* 14 Hun 588 (Gen. Term 1878).

That subsequent decision was illogical for the reason stated above:

there is no logical way to explain why prosecuting a case brought under deceitful premises does not constitute deceit on a party. *Amalfitano* quoted with approval the General Term decision that approved of the same cause of action at issue on this appeal: "In *Looff*, the plaintiffs accused their attorney of gulling them into bringing an unnecessary lawsuit, motivated solely by his desire to collect a large fee to represent them." *Amalfitano, supra* at 14. If *Amalfitano* means what it said, *Amalfitano* raised to Court of Appeals precedent the General Term decision in *Looff v. Lawton* upon which *Amalfitano* relied. Both as a matter of case law, as a matter of statutory interpretation, and as a matter of simple logic, deceitfully causing someone to bring a lawsuit and thereby become a party, or to thereafter prosecute a meritless lawsuit as a party, is subject to the attorney-deceit statute.

And as a matter of public policy, New York should have less attorney deceit, not more; and fewer meritless or unnecessary lawsuits, not more. There should be no get-out-of-jail-free card for lawyers who deceitfully cause their clients to bring meritless lawsuits in order for the lawyer to collect a fee. And if the deceitful lawyer should argue that his client should have been able to understand his rights under the contract all by himself, no one would accept that argument in any other context: "I gave her the X-rays and the CT scan; she should have known she had cancer even if I as her oncologist did not."

And as to the inevitable floodgates argument that is dear to the hearts

of wrongdoers everywhere, just read the affidavit of the tool-and-die worker, with its handwritten cross-outs and write-ins, and pleadings that speak of "copy writes," and think about who it was that this lawyer deceived.

II. CASE LAW HAS BEEN CUTTING BACK *AMALFITANO'S* MANDATE AND THAT IS NOT A GOOD IDEA

During the 20th and early 21st century, the attorney-deceit statute had been interpreted to require proof of reliance, such that the statutory term "deceit" meant the same thing as fraud. *Guardian Life Ins. Co. of Am. v. Handel,* 190 A.D.2d 57 (1st Dep't 1993); *New York City Tr. Auth. v. Morris J. Eisen, P.C.,* 276 A.D.2d 78 (1st Dep't 2000). In 2009, *Amalfitano* looked at the purpose of the statute, and in particular its legislative history, and ruled that the statutory term "deceit" did not involve reliance, and thereby nullified that long-standing case law.

To reach its holding, *Amalfitano* relied upon the derivation note to the 1881 version of the statute, which cited the 1878 decision of General Term in *Looff v. Lawton*: "As to the meaning of the word 'deceit," as used in this Sec., *see Looff v. Lawto*n, 14 Hun 588." *Amalfitano* at 14. This Court noted that *Looff v. Lawton* "opined that the Legislature intended an expansive reading" of the statute.

To give effect to the legislatively-intended expansive reading of the law, the Court ruled that the statute was intended to cover the commission of the

wrongdoing regardless of its success. *Id.* *Amalfitano* gave the statute such construction in order to carry forth "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." *Id.*

Then in *Melcher v. Greenberg Traurig LLP*, 102 A.D.3d 497 (1st Dep't 2013), *rev'd,* 23 N.Y.3d 10 (2014), the Court overruled case law that applied the three-year statute of limitations to Judiciary Law Sec. 487, and held that the six-year statute applied.

It is common knowledge that since the decisions in *Amalfitano* and *Melcher*, claims under Judiciary Law Sec. 487 have substantially increased.[4] It is also true and unfortunate that many of those claims are simply tacked on to plain vanilla malpractice cases, where the lawyer was sloppy but was not a crook. To deal with these types of cases, the Appellate Divisions have applied a standard of pleading similar to that required for claims for fraud, and in principle that is all to the good. It is unfair to accuse a lawyer of being a crook, if you cannot put down in writing your reasons for calling him a crook.

But the case now before the Court is an example of something else: the rendering of conclusory decisions that brush aside well-set forth allegations in

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[4] *See* "Judiciary Law §487 Cases on the Rise After *Amalfitano*," Andrew Lavoot Bluestone, NYLJ 9/25/2014; "Judiciary Law §487 Joins the Mainstream," Andrew Lavoot Bluestone, NYLJ 4/6/2017.

order to get rid of cases under a statute that such courts do not favor. Here, the affidavit of the tool-and-die worker just about screamed facts that said "rip-off." R-327-329. Even in papers that spoke of "copy writes" and were full of handwritten cross-outs, any fair reader can see that this is a case where someone who was not versed in the law of intellectual property went to a lawyer to get legal advice about his rights under a lengthy contract, and was given the advice to bring a lawsuit that such lawyer now swears was both completely meritless and was brought in the wrong state. Cf. R-329 with R-57-59. The Appellate Division chose to disregard the affidavits that screamed rip-off, and instead got rid of a $25,000 case with one conclusory assertion. R-12.

The most notorious use of conclusory assertions to get rid of a Section 487 case is probably *Facebook v. DLA Piper LLP*, 134 A.D.3d 610, 615 (1st Dep't 2015), *leave denied*, 28 N.Y.3d 903 (2016). The decision denounced as "not supported" the allegations that the defendant law firms knew that the document with which they were trying to win a $10,000,000,000 case was an obvious fraud, visible as such just from its face. Complaint, *Facebook v. DLA Piper*, Index No. 653193/2014, NYSCEF Doc. No. 001 ("Complaint") at 3, 13-14, 24-26.

Someone who read only the *Facebook* decision would never know of the copious evidence that the document was such an obvious fraud that the U.S. Attorney, who does not normally bother about crooked civil cases, obtained an

indictment of their client for mail and wire fraud that carried the penalty of 40 years in prison. *U.S. v. Ceglia*, 1:12-cr-00876-ALC (S.D.N.Y. 2012). The evidence upon which that indictment was obtained was the same evidence well-known to the law firms that remained in the case after an ethical one withdrew. *See Ceglia v. Zuckerberg*, 2013 WL 1208558 (W.D.N.Y. 2013) (100-page decision laying out the evidence of a fraud on the court.)

Someone who read only the *Facebook* decision would never know that the defendant law firms knew that the client on whose behalf they tried to win the case with the obviously phony document was a convicted felon, and the subject of an injunction and a civil fraud suit by the N.Y.S. Attorney General. Complaint at 8, 17. Nor would such reader know that the law firms who purveyed that forged document stood to obtain a $4,000,000,000 contingent fee if they prevailed on the claim, or just a paltry $26,000,000 contingent fee if they could coerce a settlement like the one that the movie *Social Network* had publicized just weeks before their client suddenly realized (imagine that) that he had a document that entitled him to half of a $20,000,000,000 company. See Complaint at 3, 15-16.

In *Facebook*, the Appellate Division even went the extra mile and declared that in order to be liable under Section 487, the defendant law firms had to have "actual knowledge" the document was false, which the court indicated they could not possibly have had, because their convicted felon client always stuck

to his story. *Facebook, supra* at 615.[5] That attempt to re-write the statute to create an un-meetable "client confession" standard was then perpetuated by dropping *dicta* into a decision that actually concerned only the measure of damages, if liability had been determined. *Melcher v. Greenberg Traurig LLP,* 164 A.D.3d 1171, 1175 (1st Dep't 2018).[6]

What the Appellate Division failed to grasp in *Facebook* and its progeny is that there is all the difference in the world between defending a client accused of fraud, and affirmatively advancing the client's claim that an obviously forged document is genuine in order to obtain an enormous contingent fee. A lawyer can defend even Harvey Weinstein, and must use all lawful means to discredit the prosecution's evidence, and even God help us must attack the credibility of the accusers. But to take the Weinstein case as an example, a lawyer could never introduce an obviously-forged letter from the victim telling Weinstein how much she loved him and looked forward to going on vacation with him.

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[5] *Facebook* stated: "As noted, Ceglia consistently maintained that the Work For Hire Contract was genuine and even passed a polygraph test covering the contract and his other claims." *Id.* at 615. Not to overstress a point, but a convicted felon who is bold enough to try to defraud a $20,000,000,000 company with an obviously fake contract is likely to be able to get past a polygraph test administered only by his own lawyers.

[6] The 2018 damage-measure decision contained *dicta* that: "To prevail on his claim under § 487, of course, Melcher must prove that Corwin had 'actual knowledge' that the 1998 writing was fabricated at some point before the decision was made not to use it at trial (*see Facebook, Inc. v. DLA Piper LLP [US]*, 134 A.D.3d 610, 615 (1st Dept. 2015), *lv denied* 28 N.Y.3d 903 (2016). *(Emphasis added.)* The undersigned was plaintiff's counsel in that case, which has now concluded.

The undercutting of the attorney-deceit statute can also be seen in the Appellate Division's decision in *Zimmerman v. Kohn*, 125 A.D.3d 413, 414 (1st Dep't), *lv. denied,* 25 N.Y.3d 907 (2015) which essentially repealed the attorney-deceit statute for defendants' counsel (but not plaintiffs' counsel) in all cases for the abuse of school children, medical malpractice, or personal injury. In a case involving alleged sexual abuse by an athletic coach, the Appellate Division held that because the plaintiff's lawyer was on a contingent fee, the client could not possibly have been harmed by attorney-deceit in the underlying sexual abuse case, since all that happened is that the lawyer got a smaller fee. *Id.* at 414; *see Zimmerman v. Poly Prep Country Day Sch.*, 2011 WL 1429221 at *1 (E.D.N.Y. 2011). The Appellate Division rejected all other proposed alternative theories of liability. Because nearly all cases for medical malpractice, personal injury, or sexual abuse of schoolchildren involve contingent fees (without which only the very rich could prosecute such cases) deceitful lawyers for defendants in such cases will henceforth be beyond the reach of the attorney-deceit statute.

These key cases were chosen because of their high-profile, and because the appellate records therein were easily obtainable. How many other times the statute has been undercut with conclusory assertions is impossible to determine. But if the statute has been undercut in cases that many observers and the legal press are watching, it is fair to say that a problem exists, and should be addressed.

CONCLUSION

Amalfitano v. Rosenberg, supra, rendered no longer good law any cases to the effect that deceitfully inducing the client to commence an unnecessary or meritless lawsuit was not covered by Judiciary Law Sec. 487. Under *Amalfitano*, a claim against a lawyer for deceitfully inducing his client to bring an unnecessary or meritless lawsuit in order to obtain a fee states a valid cause of action.

The decision below is an example of the use of a conclusory decision to get rid of a case under a statute that some courts do not like very much. The decision rendered by the Court herein should clarify for the courts below that Judiciary Law Sec. 487 evidences a strong legislative intent to protect the integrity of the courts, and that the statute should be enforced as written.

Dated: New York, NY
May 23, 2019

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