

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA JAFFE
J.S.C.
Justice

PART 5

Feinberg, Herbert

INDEX NO. 108473/03

- v -

Bonas, Jenene S.

MOTION DATE _____

MOTION SEQ. NO. 016

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

FILED

JUN 07 2011

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

See decision under sequence # 015

Dated: 6-3-11

JUN 03 2011

30
BARBARA JAFFE

J.S.C.

Check one: FINAL-DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JAFFE Barbara Jaffe

PART 5

Index Number : 108498/2003
FEINBERG, HERBERT
vs.
BOROS, JEROME S.
SEQUENCE NUMBER : 015
OTHER RELIEFS
CAL # 40

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for interest

PAPERS NUMBERED

1, 2
3
4

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

JUN 07 2011

NEW YORK
COUNTY CLERK'S OFFICE

RECORDED IN ACCORDANCE WITH
ANY APPLICABLE LOCAL ORDER

Dated: 6/3/11 Barbara Jaffe J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----x
HERBERT FEINBERG, Individually and As
Assignee of I.A. ALLIANCE CORP.,

Index No. 108498/03

Plaintiff,

DECISION & ORDER

-against-

JEROME C. BOROS, ROBINSON, SILVERMAN,
PEARCE, ARENSON & BERMAN, LLP, and
BRYAN CAVE, LLP,

Defendants.

FILED

JUN 07 2011

NEW YORK
COUNTY CLERK'S OFFICE

-----x
BARBARA JAFFE, JSC:

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By notice of motion dated December 1, 2010, defendants move pursuant to CPLR 4404(a) for an order entering judgment notwithstanding the verdict and dismissing plaintiff's case in its entirety or, in the alternative, granting a new trial. Plaintiff opposes the motion. Oral argument on the motion was held on March 29, 2011.

By notice of motion dated December 1, 2010, plaintiff moves pursuant to CPLR 5001 and 5002 for an order granting pre-verdict and prejudgment interest. Defendants oppose the motion.

I. PERTINENT BACKGROUND

In or about 2000, plaintiff commenced an accounting malpractice action against Mahoney

Cohen & Company, CPA, P.C. (Mahoney Cohen), seeking damages related to work performed by it for I. Appel Corporation. (IA), which work ultimately led to the end of plaintiff's business relationship with Norman Katz, a former partner in IA, and an arbitration between them. (Affirmation of Steven E. Frankel, Esq., dated Dec. 1, 2010 [Frankel Aff.], Exh. DX95).

By decision and order dated March 20, 2001, and affirmed on appeal, some of plaintiff's claims against Mahoney Cohen were dismissed as collaterally estopped as the issues raised therein had been decided against plaintiff during the arbitration between him and Katz. (*I. Appel Corp. v Mahoney Cohen & Co., CPA, P.C.*, 294 AD2d 196 [1st Dept 2002]).

In 2003, plaintiff commenced the instant action against defendants for legal malpractice. By decision and order dated April 8, 2004, another justice of this court granted defendants' motion to dismiss the complaint, finding that plaintiff had failed to plead facts showing that Katz was or would have been amenable to an agreement restricting the post-award collateral estoppel effect of the arbitration award (limiting agreement).

However, by decision and order dated September 3, 2004, the court vacated its decision and granted plaintiff's motion to amend the complaint to add more facts showing that Katz would have been amenable to a limiting agreement. In opposing the motion, defendants argued that plaintiff's claim failed as a matter of law, as an agreement limiting the collateral estoppel effect of an arbitration award would not prevent a third party from asserting a defense of collateral estoppel in subsequent litigation against one of the parties to the agreement. The court rejected defendants' argument based on *State Farm Ins. Co. v Smith*, 277 AD2d 390 (2d Dept 2000) and *Kerins v Prudential Prop. & Cas.*, 185 AD2d 403 (3d Dept 1992), and concluded that if plaintiff and Katz had entered into a limiting agreement, Mahoney Cohen would likely have

not prevailed in asserting collateral estoppel as a defense in plaintiff's action against it.

By decision and order dated April 26, 2005, the Appellate Division, First Department, affirmed the September 2004 decision, finding that defendants had not "established as a matter of law, that even if plaintiff and Katz had entered into an agreement limiting the collateral estoppel effect of the arbitration award, the Mahoney Cohen lawsuit would nonetheless have been dismissed on collateral estoppel grounds." (17 AD3d 275, 276). The court, citing *Smith*, also observed that "in circumstances involving arbitration, the parties themselves can formulate their own contractual restrictions on the carry-over estoppel effect." (*Id.*).

By decision and order dated January 18, 2006, another justice of this court denied defendants' motion for summary judgment, rejecting the argument that plaintiff had not pursued a limiting agreement with Katz due to their adversarial relationship, and holding that the issue could not be summarily resolved. The court also rejected defendants' contention that due to the state of the law at the time, it was not negligent for them to fail to advise plaintiff to seek a limiting agreement, observing that the same argument had been raised and rejected, on appeal as well. Defendants' second and third summary judgment motions were likewise denied.

On October 18, 2010, the trial commenced, and continued on October 18, October 20, October 21, October 22, October 25, October 27, October 28, ending on October 29, 2010.

II. JURY VERDICT

On October 29, 2010, the jury rendered a verdict and, as to the issue of defendants' malpractice, found as follows:

- (1) there was an attorney-client relationship between plaintiff and defendants in January 2000 and February 2000;

- (2) defendants failed to exercise the degree of care, skill and diligence commonly used by an ordinary member of the legal profession in defendants' situation by failing to advise plaintiff that an agreement between plaintiff and Katz would likely be effective in barring Mahoney Cohen's assertion of collateral estoppel; and
- (3) if defendants had provided plaintiff with advice concerning the effectiveness of an agreement to bar Mahoney Cohen's assertion of collateral estoppel, plaintiff and Katz would have entered into such an agreement.

The jury then considered whether Mahoney Cohen had committed accounting malpractice and found that Mahoney Cohen had failed to exercise due care and deviated from recognized and accepted professional standards for accountants in providing services to plaintiff and/or IA, and that plaintiff and/or IA suffered a loss as a result of Mahoney Cohen's malpractice.

The jury also determined that plaintiff had been negligent and that his negligence was a substantial factor in causing his losses, thus apportioning liability by finding that defendants were 60 percent liable and plaintiff was 40 percent liable.

As to damages, the jury indicated that the following claimed losses were caused by Mahoney Cohen's malpractice:

- (1) Plaintiff's investment in IA in January 1996 (\$2 million);
- (2) Plaintiff's payment to Katz prior to closing in June 1996 (\$143,146);
- (3) Plaintiff's purchase of Katz's loan in July 1996 (\$2,953,226);
- (4) Plaintiff's payment to Katz at closing (\$1,537,343);
- (5) Plaintiff's investment in IA in July 1996 (\$1 million);
- (6) Plaintiff's investment in IA in August 1996 (\$495,000); and
- (7) Plaintiff's payment to settle the Val Mode (SS&J) lawsuit (\$459,965).

The jury also determined that Mahoney Cohen's malpractice did not cause: (1) plaintiff's investment in IA on September 13, 1996; (2) plaintiff's investment in IA on September 19, 1996; (3) plaintiff's payment to Katz after the arbitration award; (4) plaintiff's payment of Holland & Knight's legal fees; (5) plaintiff's payment of Robinson Silverman's legal fees; (6) plaintiff's

payment of Storeh Amini & Munves's legal fees; (7) plaintiff's payment of mediator John Byrne's fees; (8) plaintiff's payment of AAA arbitration fees; and (9) plaintiff's payment of Jaspan Schlesinger's legal fees.

III. DEFENDANTS' MOTION

A. Applicable law

Pursuant to CPLR 4404(a), the court may set aside a verdict or judgment entered after trial, and direct judgment in favor of the moving party or grant a new trial, where the verdict is contrary to the weight of the evidence or in the interest of justice. In order to find that a verdict is against the weight of the evidence, the court must determine that "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial." (*Cohen v Hallmark Cards, Inc.*, 45 NY2d 493 [1978]). Thus, if "it can be said that the evidence is such that it would not be utterly irrational for a jury to reach the result it has determined upon, and thus a valid question of fact does exist, the court may not conclude that the verdict is as a matter of law not supported by the evidence." (*Id.* at 499).

A jury verdict should not be set aside as against the weight of the evidence "unless the jury could not have reached its verdict on any fair interpretation of the evidence," and "[g]reat deference is accorded to the fact-finding function of the jury, and determinations regarding the credibility of witnesses are for the factfinders, who had the opportunity to see and hear the witnesses." (*Desposito v City of New York*, 55 AD3d 659 [2d Dept 2008]). The jury's resolution of disputed factual issues and inconsistencies in witnesses' testimonies is also entitled to deference. (*Bykowsky v Eskenazi*, 72 AD3d 590 [1st Dept 2010], *lv denied* 16 NY3d 701 [2011]).

And it is the jury's function to determine whether a witness is credible and what weight ought to be given to the testimony of experts. (*Devito v Feliciano*, 2011 WL 2039582, 2011 NY Slip Op 04366 [1st Dept], citing *Harding v Noble Taxi Corp.*, 182 AD2d 365 [1st Dept 1992]).

B. Contentions

Defendants argue that even if plaintiff and Katz had signed a limiting agreement, Mahoney Cohen's motion to dismiss would nonetheless have been granted on the ground of collateral estoppel, an issue they claim is purely legal. And, if such an agreement would not have changed the outcome of the Mahoney Cohen case, then their failure to advise plaintiff about the agreement would not have constituted a breach of their duty of care, nor would it have caused plaintiff's losses. Moreover, they maintain that the issue has not yet been decided as the court's September 2004 decision and the decision on appeal both addressed defendants' motion to dismiss plaintiff's complaint for failure to state a cause of action, whereas the court in its decision on defendants' summary judgment motion merely found a triable issue as to whether plaintiff and Katz would have entered into a limiting agreement. (Transcript of oral argument, dated Mar. 29, 2011 [Tr.]). They also deny that there was sufficient evidence before the jury to support its finding that if defendants had advised plaintiff about a limiting agreement, he and Katz would have entered into it, as Katz's testimony does not provide a rational basis for concluding that he would have signed a limiting agreement, the evidence on this issue is vague and speculative, and some of the evidence introduced also permits a finding that Katz would not have entered into a limiting agreement (Tr.), and claim that, as a matter of law, plaintiff's claimed losses are not recoverable as damages in this case as he failed to prove that Mahoney Cohen's actions were the proximate cause of certain of his losses, and that the jury was not

properly instructed on causation or the measure of damages (Mem. of Law, dated Dec. 1, 2010).

Plaintiff contends that the issue of whether a limiting agreement would have prevented Mahoney Cohen from asserting collateral estoppel as a defense in plaintiff's claim against it was previously litigated and decided along with whether plaintiff and Katz would have so agreed, and that the prior decisions constitute the law of the case on these issues. Plaintiff also asserts that there was evidence presented at trial from which the jury could have determined that plaintiff and Katz would have entered into a limiting agreement. (Tr.).

C. Analysis

1. Effectiveness of limiting agreement

Although defendants argued about the effectiveness of a limiting agreement in their motion to dismiss, that argument was not addressed to the pleadings. Rather, defendants argued that as a matter of law, plaintiff's claim had no merit as any limiting agreement entered into between plaintiff and Katz would not have barred Mahoney Cohen from asserting collateral estoppel as a defense. And in both the decision denying the motion to dismiss and the decision on appeal affirming it, the courts specifically stated and determined that defendants had not established, as a matter of law, that such an agreement would not have been effective. Neither defendants' argument nor the decisions thereon depended on the whether plaintiff's complaint stated a claim against defendants or on the facts underlying the claim but focused only on the legal issue of whether such a limiting agreement would have prevented the dismissal of plaintiff's lawsuit against Mahoney Cohen.

Thus, the prior decisions on this legal and not factual issue stand as the law of the case, as was recognized by the court in denying defendants' summary judgment motion in which they

raised this identical issue. (*See eg Powell v Kasper*, ___ AD3d ___, 921 NYS2d 890 [2d Dept 2011] [as decision on prior summary judgment motion addressed parties' arguments about whether motion was timely, court barred from making new determination as to timeliness]; *Wasson v Bond*, 80 AD3d 1114 [3d Dept 2011] [court correctly relied on law of case to conclude that legal issue of effect of deeds had been resolved against defendant in earlier motion for summary judgment which had been denied on ground that triable issues remained]; *Brownrigg v New York City Hous. Auth.*, 29 AD3d 721 [2d Dept 2006] [law of case prevents re-litigation of legal issues that have already been determined in action]; *Baldasano v Bank of New York*, 199 AD2d 184 [1st Dept 1993] ["law of the case applies only to legal determinations that were necessarily resolved on the merits in the prior decision"]). I thus find that defendants are barred from advancing this argument.

Moreover, even were I to consider defendants' argument, they have not established that the caselaw warrants a finding in their favor. In *Matter of Am. Ins. Co. (Messinger-Aetna Cas. & Sur. Co.)*, the Court of Appeals held, as pertinent here, that:

appropriate clauses [providing that "that awards made thereunder shall be for the purposes of the dispute submitted only and shall have no carry-over effect"] may be included in all future submissions under the present arbitration agreement, and postaward limiting agreements may be executed with respect to outstanding awards. The classic method for limiting the scope and effect of agreements to arbitrate, as we so frequently both caution and hold, is for the parties themselves to include the desired limitations in their own arbitration agreements or submissions.

(43 NY2d 184 [1977]).

In *Kerins*, an arbitration was held between the defendant and a third party, and a provision in the master arbitration agreement governing the arbitration provided that "awards thereunder were for the purpose of the dispute submitted only and had no collateral estoppel

effect.” (185 AD2d at 403). The plaintiff subsequently sued the defendant and asserted that the arbitration award collaterally estopped the defendant from contesting his claim. The court found that the limiting provision was valid as against a non-party to the arbitration, and thus dismissed the part of the complaint alleging collateral estoppel. The court in *Smith* came to the same conclusion on this issue. (277 AD2d at 390-391).

While none of these decisions is directly on point, defendants, who bear the burden of proof on this motion, submit no authority holding that parties to an arbitration may not enter into a post-award agreement limiting the collateral estoppel effect of the award, and have thus not established, as a matter of law, that even if plaintiff and Katz had agreed to a limiting agreement, it would not have prevented Mahoney Cohen from asserting collateral estoppel as a defense to plaintiff’s action against it.

2. Possibility of limiting agreement

In light of the evidence introduced at trial, including the testimony of plaintiff and Katz, and specifically the facts that Katz’s lawyer convened a meeting with Katz and plaintiff to discuss a possible lawsuit against Mahoney Cohen, that Katz also had a financial incentive to sue Mahoney Cohen, and that Katz and plaintiff had held settlement discussions, and the inferences reasonably drawn therefrom, defendant has failed to demonstrate that there is no valid line of reasoning and permissible inferences that could have led the jury to conclude that Katz would have entered into a limiting agreement with plaintiff.

3. Damages

As the measure of damages in a legal malpractice claim involving the loss of a cause of action is the value of the claim lost and as the damages are designed to make the injured client

whole (*Campagnola v Mulholland, Minion & Roe*, 76 NY2d 38 [1990]), defendants have failed to establish that the jury improperly awarded certain damages to plaintiff. Rather, the parties both argued to the jury and presented evidence as to whether certain claimed losses were or were not caused by Mahoney Cohen's negligence, and the jury was entitled to determine the issue of causation. (See *Williams v Fisher*, 277 AD2d 893 [4th Dept 2000] [whether client was entitled to recover for certain claimed losses as result of accountant's malpractice was for jury to determine]; see generally *Lewis v Progressive Agency*, 6 AD3d 293 [1st Dept 2004] ["(a)ny conflict as to causation, which plaintiff had the burden of proving, was for the jury to resolve in assessing all of the evidence as well as the credibility of the witnesses."]).

Although the verdict sheet did not contain instructions as to causation or the measure of damages, I read the jury specific and explicit instructions as to how to determine these issues.

IV. PLAINTIFF'S MOTION

Plaintiff seeks pre-verdict and prejudgment interest on the verdict, asserting that he is entitled to recover such interest as of the date that his claim accrued, which he alleges was May 15, 2000, when defendants terminated their representation of plaintiff and the earliest date on which he could have sued defendants for malpractice, and also contends that defendants substantially delayed the trial of this action by filing numerous motions. (Memo. of Law, dated Dec. 2, 2010).

In opposition, defendants argue that it is unclear whether pre-verdict and prejudgment interest may be awarded in a legal malpractice claim, and that in any event, the date on which the claim accrued was January 23, 2003, when plaintiff's claims against Mahoney Cohen were dismissed. (Memo. of Law, dated Dec. 29, 2010).

In reply, plaintiff observes that defendants did not oppose his claim as to interest between the date of the verdict and the judgment. (Reply Memo. of Law, dated Jan. 20, 2011).

Pursuant to CPLR 5001, pre-verdict interest may be awarded where an act or omission deprived or interfered with a person's possession or enjoyment of property, and shall be computed as of the earliest date that the cause of action existed. Pre-verdict interest on a malpractice claim may be awarded. (*Barnett v Schwartz*, 47 AD3d 197 [2d Dept 2007]; *Butler v Brown*, 180 AD2d 406 [1st Dept 1992], *lv denied* 80 NY2d 751).

Here, as the jury found that defendants committed malpractice by failing to advise plaintiff about the possibility of a limiting agreement, and as defendants terminated their representation of plaintiff on May 15, 2000, plaintiff's claim against them accrued on that date, the earliest date on which the cause of action existed. (See *Duane Morris LLP v Astor Holdings Inc.*, 61 AD3d 418 [1st Dept 2009] [malpractice claim accrued when firm's representation of client ended]; *Shivers v Siegel*, 11 AD3d 447 [2d Dept 2004], *lv denied* 5 NY3d 717 [2005] [claim accrued when plaintiff discharged attorney]; *Daniels v Lebit*, 299 AD2d 310 [2d Dept 2002] [claim accrued when attorney ceased to represent plaintiff]).

V. CONCLUSION

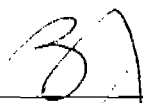
Accordingly, it is hereby

ORDERED, that defendants' motion for a judgment notwithstanding the verdict is denied; and it is further

ORDERED, that plaintiff's motion for pre-verdict interest is granted, and the clerk is directed to add to the judgment, being filed separately, interest thereon from May 15, 2000 to

October 29, 2010 at the statutory rate for an amount to be calculated by the clerk.

ENTER:



Barbara Jaffe, JSC
BARBARA JAFFE
W.S.C.

DATED: June 3, 2011
New York, New York

FILED

JUN 07 2011

NEW YORK
COUNTY CLERK'S OFFICE