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COURT OF APPEALS

STATE OF NEW YORK

BILL BIRDS, INC. AND WILLIAM PELINSKY,

Appellants,

-against-

NO. 19

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

Respondents.

20 Eagle Street
Albany, New York
February 13, 2020

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Penina Wolicki
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The first appeal on this
2 afternoon's calendar is appeal number 19, Bill Birds v.
3 Stein Law Firm.

4 Counsel?

5 MR. TORTO: Thank you, Your Honor. May I reserve
6 two minutes for rebuttal?

7 CHIEF JUDGE DIFIORE: Of course, you may.

8 MR. TORTO: Thank you. My name is Thomas Torto,
9 and I represent the plaintiffs-appellants.

10 May it please the court, I'd like to address
11 three points. The first point is on the - - - the pleading
12 aspect of - - - of this case. Contrary to the Appellate
13 Division's decision, it's our position that the complaint,
14 as amplified by the plaintiffs' opposition papers to the
15 motion for summary judgment, set forth sufficient facts
16 that state a cause of action under Section 487 of the
17 Judiciary Law.

18 JUDGE STEIN: Well, should we be reviewing this
19 under a motion to dismiss standard or a - - - or a summary
20 judgment standard, in your view?

21 MR. TORTO: Summary judgment - - - summary
22 judgment.

23 JUDGE STEIN: Summary judgment. Okay.

24 MR. TORTO: So any deficiency in the complaint
25 was cured by the plaintiffs' opposition papers,



1 particularly the affirmation of Howard - - - or Harold
2 Furlow, the plaintiffs' expert.

3 JUDGE RIVERA: Was Mr. Furlow counsel?

4 MR. TORTO: No, he's solely an expert. He's - -
5 -

6 JUDGE RIVERA: So who was - - - who was counsel?

7 MR. TORTO: William - - - Michael Pelinsky - - -

8 JUDGE RIVERA: Thank you.

9 MR. TORTO: - - - was the attorney of record - -
10 - or is counsel on the motion.

11 JUDGE RIVERA: Thank you.

12 MR. TORTO: And the - - - and the core position
13 is that the defendant-attorney deceived the plaintiffs into
14 filing a meritless lawsuit in an improper forum, motivated
15 solely to collect the large legal fee.

16 JUDGE STEIN: So - - - so your allegation under
17 the statute is based on what happened - - -
18 misrepresentations - - - you allege there are
19 misrepresentations or deceitful conduct before the action
20 was commenced, right? You're not relying, as part of your
21 cause of action, on what happened after the action was
22 dismissed. Is that - - - am I correct about that?

23 MR. TORTO: We're relying on the
24 misrepresentations committed before the action was
25 commenced. And it's our position that under Amalfitano



1 once the lawsuit was commenced and prosecuted, and the
2 client continued to be billed, that the fr - - - the deceit
3 continued.

4 JUDGE STEIN: If we - - -

5 JUDGE FEINMAN: Let me - - - I'm sorry.

6 JUDGE STEIN: - - - I'm sorry. One - - - one
7 quick thing. If we conclude that Looff is still good law -
8 - -

9 MR. TORTO: Yes.

10 JUDGE STEIN: - - - do you lose?

11 MR. TORTO: Well, it depends which Looff we're
12 talking about.

13 JUDGE STEIN: I'm talking about Court of Appeals
14 Looff.

15 MR. TORTO: Yeah, the - - - yes, if you conclude
16 that the Court of Appeals decision in Looff in 1884 is
17 still good law - - -

18 JUDGE STEIN: Right.

19 MR. TORTO: - - - I think we lose.

20 JUDGE STEIN: Okay.

21 JUDGE FEINMAN: So why is that - - -

22 JUDGE RIVERA: But why is that - - -

23 JUDGE FEINMAN: That was actually my question.

24 MR. TORTO: Well, because in Amalfitano, a 2009
25 decision, this court cited the - - - a decision of the



1 General Term of the Second Department rendered in 1874 for
2 the proposition that a lawyer who goads a client into
3 bringing a meritless or unnecessary lawsuit, violates
4 Section 487.

5 As far - - -

6 JUDGE RIVERA: But there's a difference between
7 what happened here, right? I mean, in that case, the suit
8 itself is not deceitful, you just didn't need to bring it,
9 which is different, I thought, from your argument.

10 I thought the argument here was that the suit was
11 absolutely, obviously, on its face, frivolous to begin
12 with.

13 MR. TORTO: Yes, and - - - and I think that's the
14 same as the Looff in 1874.

15 JUDGE FAHEY: Is it possible - - - is it possible
16 to reconcile Looff with the actions in this lawsuit, and
17 specifically I look to the fact that wasn't this case
18 dismissed on federal court, but the client wasn't notified
19 for a number of months, and almost to the point where the
20 time ran out and - - - and dealing with it? And wouldn't
21 that be an action against the party, which is what Looff
22 requires?

23 MR. TORTO: An action - - -

24 JUDGE FAHEY: Do you see what I'm saying?

25 MR. TORTO: - - - against the lawyer?



1 JUDGE FAHEY: Yes.

2 MR. TORTO: Yes, I - - - I think that - - -

3 JUDGE FAHEY: So it would be possible to both
4 characterize Looff as good law and at the same time say
5 that there was an action by the attorney here that was an
6 action against the party in the context of a lawsuit, that
7 would reconcile a potential deceit here with Looff and - -
8 - and save this?

9 MR. TORTO: Right. It - - - it seems, though,
10 that just as a matter of logic and common sense, that a
11 lawyer who deceives a client into filing a meritless
12 lawsuit and continues with this meritless lawsuit solely to
13 generate a fee, that that's covered by the statute - - -

14 JUDGE FAHEY: You - - -

15 MR. TORTO: - - - because once he starts a
16 lawsuit, the - - - the deceit continues. It's ongoing.
17 You know, the - - - it's not like these other cases where
18 the - - - the deceit had nothing to do with a lawsuit. I
19 mean, the object of the statute is to make sure that
20 lawyers are honest before the court and enhance the truth-
21 seeking function.

22 And - - - and in a case like this, where a lawyer
23 brings a - - - a lawsuit that's - - - that the claim is - -
24 - that it's totally improp - - - totally without merit, in
25 an improper forum - - - you know, to add insult to injury -



1 - - and - - - and the lawsuit is presented in a court. It
2 seems like the statute would cover that.

3 JUDGE RIVERA: But - - - but I thought - - - I
4 thought the claim went one step further - - - and you can
5 correct me if I've misunderstood the cause of action here -
6 - - I thought the claim was not just that the attorney
7 brought a frivolous lawsuit, which could be incompetence,
8 right, but not deceit in - - -

9 MR. TORTO: Could be - - -

10 JUDGE RIVERA: - - - the - - - in the sense of I
11 knew I was doing that - - - I thought the argument being
12 made was that - - - and I thought that's what you were
13 repeating now, that it - - - that the lawyer knew it was
14 frivolous, brought it anyway, persuaded the client to
15 proceed with this lawsuit to get the money from the client
16 - - - and then as Judge Fahey has already pointed out, done
17 other things post-filing that appeared to be deceit, if not
18 on the court, on the party.

19 MR. TORTO: Yes, I agree. I think that's - - -
20 that's - - - that's part of the whole - - - the entire
21 claim. It's all - - - all just part of a package.

22 And I would note, though, you know, the - - - in
23 the plaintiff - - - in the defendants' papers, the
24 defendant-attorney signed an affidavit - - - it's at pages
25 58 and 59 at the record on appeal - - - where he says that



1 the plaintiff had no case to begin with. So why was this -
2 - - this begs the question, why was this case even brought
3 in the first place?

4 You know, the - - - the agreement provided that
5 you couldn't sue General Motors, you couldn't challenge the
6 license, and if you did bring it, you had to bring it in
7 the State of Michigan.

8 JUDGE FAHEY: So your argument is a Catch-22
9 argument, which is that I go to a lawyer, he says, yes,
10 you've got this lawsuit; you bring the case; you pay the
11 money to bring the suit; there's no guarantees, according
12 to anything; and then when he's sued for legal malpractice,
13 he says, well, he never had a case to begin with, so
14 there's no chance of you winning, therefore there's no loss
15 - - - there's no legal malpractice?

16 MR. TORTO: Correct.

17 JUDGE FAHEY: Yes.

18 MR. TORTO: That - - - that's our argument. And
19 we think that under Amalfitano, again I'm relying on the
20 Second Department or General - - - whatever it is - - - the
21 General Terms - - -

22 JUDGE FAHEY: Yeah, but you've got to listen to
23 Judge Stein's question.

24 MR. TORTO: Yeah.

25 JUDGE FAHEY: Judge Stein's question was how do



1 you win under Looff, not under Amalfitano?

2 MR. TORTO: Well, I agree that - - - but I don't
3 think Looff is good law, because it wasn't cited in
4 Amalfitano. That - - - that's what - - -

5 JUDGE RIVERA: But sir, isn't there a difference
6 - - -

7 JUDGE FEINMAN: I thought if we don't cite a case
8 - - -

9 JUDGE RIVERA: - - - in Looff, because in Looff,
10 the - - - the case itself is not frivolous? Where's the
11 deceit on the court? There's nothing frivolous about the
12 action.

13 MR. TORTO: I thought it was.

14 JUDGE RIVERA: The deceit is in advance, telling
15 someone you need to do this to achieve these goals.

16 MR. TORTO: Right, and that - - - that was false.
17 It was unnecessary. The lawsuit was unnecessary. In other
18 words - - -

19 JUDGE RIVERA: Unnecessary but not - - - not
20 frivolous.

21 MR. TORTO: I think it was frivolous, too, Your
22 Honor.

23 JUDGE RIVERA: Well, there's nothing frivolous in
24 the partition. You could proceed with the partition.

25 MR. TORTO: You could, but it was unnecessary,



1 that was the - - - the point.

2 JUDGE RIVERA: All right.

3 MR. TORTO: And on damages, we rely on Amalfitano
4 that the lawsuit - - - that the attorneys' fees are a
5 recoverable item of damages. And also - - - and again, in
6 Amalfitano, this language, "the lawsuit could not have gone
7 forward in the absence of a material misrepresentation."

8 That's this case. This lawsuit - - - the
9 underlying lawsuit never would have gone forward.

10 JUDGE STEIN: Well -- -- well, here -- -- here it
11 was based -- -- I'm sorry -- -- in Amalfitano, it was based
12 on misrepresentations in the complaint itself. And but for
13 those misrepresentations in the complaint itself, you would
14 have no lawsuit. That's a little bit different than
15 misrepresentations -- -- it seems to me -- -- to the
16 clients saying yeah, I think -- -- I think you've got a
17 lawsuit, and you know -- -- and here we'll -- -- you know,
18 we'll bring a lawsuit.

19 MR. TORTO: But it's even -- -- even more than
20 that. Just I think -- --

21 JUDGE STEIN: So what were the misrepresentations
22 in the context of the lawsuit itself to the court, to the
23 parties?

24 MR. TORTO: Just bringing the lawsuit. And -- --

25 JUDGE STEIN: But -- --



1 MR. TORTO: - - - the lawsuit had no merit as a
2 matter of law.

3 JUDGE STEIN: So any time a lawyer brings a
4 lawsuit that they think may have no merit but they bring it
5 anyway, then that states a claim under this statute, in
6 your view?

7 MR. TORTO: No, no. That the - - - the - - - any
8 time a lawyer brings a claim that he knows has no merit and
9 he's doing it just to generate a large legal fee, and
10 taking advantage of a client who doesn't know the law, and
11 - - - and relies on a lawyer's advice, that would be
12 subject to the statute. That's what we - - -

13 JUDGE FEINMAN: But what - - - what if - - -

14 MR. TORTO: - - - that's what we're saying
15 happened here.

16 JUDGE FEINMAN: - - - what if the client says I -
17 - - I just want to sue this person, even if it's just to
18 put them through the aggravation of having to go get a
19 lawyer to get my case dismissed?

20 MR. TORTO: Well, I don't think there would be -
21 - -

22 JUDGE FEINMAN: I mean, there may be other
23 ethical problems for the lawyer who does that, but is that
24 covered by this?

25 MR. TORTO: I don't think so. I mean, if the - -



1 - provided - - - assuming the lawyer tells the client you
2 have no case and don't bring it, the client says I want to
3 bring it anyway, I don't think that's - - - that's - - -
4 the client's not deceived.

5 But where the lawyer tells the client - - -
6 remember this is a - - - this is a blue-collar guy, goes to
7 a lawyer, asks for advice on a complicated - - - you know -
8 - - trademark question - - -

9 JUDGE FEINMAN: Well, you say it's a blue-collar
10 guy, but who's also dealing with his brother who's an
11 attorney.

12 MR. TORTO: Well, you saw the effort - - -

13 JUDGE FEINMAN: And is who sophisticated enough
14 to understand the - - - this business of having to deal
15 with the licenses with GM.

16 MR. TORTO: Right, but that - - - you know, this
17 is the guy who spelled copyright, you know, "W-R-I-T-E". I
18 mean, I don't think they're all that sophisticated, Your
19 Honor.

20 JUDGE FEINMAN: Well, that brings me to a totally
21 minor detail. So is it Bill's Birds or is it Bill Birds?

22 MR. TORTO: It's the way it is - - -

23 JUDGE FEINMAN: It seems to be changing
24 throughout the record.

25 MR. TORTO: Bill Birds, Inc.



1 JUDGE FEINMAN: Okay.

2 MR. TORTO: There should be no apostrophe. And
3 I'll reserve.

4 CHIEF JUDGE DIFIORE: Thank you, Counsel.

5 MR. TORTO: Thank you.

6 CHIEF JUDGE DIFIORE: Counsel?

7 MR. SPITHOGIANNIS: May it please the court,
8 James Spithogiannis, for the defendants.

9 Amalfitano is a different case than the case
10 here. The certified questions before this court were
11 whether unsuccessful deceptions are actionable and whether a
12 proximate cause of an unsuccessful deception can be the legal
13 fees that a defendant pays in connection with a lawsuit
14 that was premised on misrepresentations.

15 JUDGE RIVERA: Well, you are correct, because he
16 is claiming the deception was successful. So you're - - -
17 you're correct about that, in terms of the attempt.

18 But could you perhaps address what I was asking
19 Counsel about with respect to, perhaps, a distinction
20 between Looff and what he's arguing?

21 MR. SPITHOGIANNIS: I don't think there's a
22 distinction between Court of Appeals - - - I think there is
23 a - - - I don't think there's a distinction between Looff
24 on the issue of deception and the Court of Appeals opinion
25 that the - - - the deception has to be in connection with a



1 pending litigation against a party and cause injury to a
2 party.

3 I think Looff was absolutely correct. Amalfitano
4 did not disturb Court of Appeals Looff. It cited the
5 Appellate Term Looff, for basically the point that
6 Judiciary Law 487, or what - - - what was the statute at
7 that time, is not - - -

8 JUDGE RIVERA: Right.

9 MR. SPITHOGIANNIS: - - - just the codification
10 of fraud. And deceits don't necessarily have to be
11 successful - - -

12 JUDGE WILSON: So let - - - let me ask you about
13 Melcher, then. Because as I read Melcher, it says that the
14 cause of action is a common-law cause of action. The
15 statute doesn't have in it a cause of action; it simply has
16 a penalty enhancement. Is that a way to distinguish Looff?

17 MR. SPITHOGIANNIS: I - - - I don't think so. I
18 - - - I think that - - - that it is statutory. It derives
19 from - - - from criminal statute - - -

20 JUDGE WILSON: Well, how do you read Melcher? Do
21 you read Melcher differently than I do?

22 MR. SPITHOGIANNIS: I think so. I - - - I - - -

23 JUDGE WILSON: So tell me how you explain that
24 language in Melcher.

25 MR. SPITHOGIANNIS: Can you please provide that,



1 again, Your Honor.

2 JUDGE WILSON: Sure. It says, "A cause of action
3 for attorney deceit therefore existed as part of New York's
4 common law before the first New York statute governing
5 attorney deceit was enacted in 1787. The 1787 statute
6 enhanced the penalties for attorney deceit by adding an
7 award for treble damages, but did not create the cause of
8 action.

9 MR. SPITHOGIANNIS: Okay. Well, I think that
10 just because in - - - in Melcher the court stated that - -
11 - that Judiciary Law 487 derived from common law, doesn't
12 mean that the law following it is not good law. I believe
13 that in this case that - - - you know, you always have to
14 prove an intent to deceive the court or a party to a
15 litigation in a pending litigation. And treble damages
16 will result if there's proximate cause.

17 So I - - - I'm not - - - I'm not sure that - - -
18 that the distinction that's made in - - - in Melcher
19 carries the day in this case, for the appellant.

20 JUDGE RIVERA: Well, he says - - - or they - - -
21 they argue that there was deceit post the filing.

22 MR. SPITHOGIANNIS: Yeah.

23 JUDGE RIVERA: Why wasn't the conduct that
24 they're referring to the kind of deceit that's covered by
25 the statute?



1 MR. SPITHOGIANNIS: So I - - - I'd like to
2 comment on that and - - - and to Judge Fahey's point in the
3 - - - in the earlier argument.

4 The allegation is that Mr. Stein hid the
5 memorandum of order - - - memorandum and order dismissing
6 the - - - the underlying case for - - - for lack of
7 jurisdiction. So you know, obviously we - - - we deny
8 that. However, the case was already over at that time. It
9 wasn't a pending lawsuit, it was a dismissed lawsuit.

10 JUDGE FAHEY: Well, but it's - - - that's - - -
11 it's an action towards a party. The dismissal, as I under
12 - - - and you - - - you know the record probably better.
13 But the way I understand it is the dismissal occurred in
14 March 31st, of 2008, and it's a question of fact as to
15 whether by late 2008, the plaintiff was informed.

16 So it certainly involves an action of the court
17 and an action of the party and a possible deceit as to
18 informing them.

19 MR. SPITHOGIANNIS: I - - - I think there is an
20 argument that it may be considered an action toward a
21 party.

22 JUDGE FAHEY: Um-hum.

23 MR. SPITHOGIANNIS: In plaintiffs' reply brief,
24 they state that the actions post-dismissal of the complaint
25 are not the basis for plaintiffs' lawsuit.



1 JUDGE FAHEY: Um-hum.

2 MR. SPITHOGIANNIS: That's on page 16 of their
3 reply brief. Also there's a proximate cause problem. What
4 - - - what would happen next? If - - - you know, as we - -
5 - as we point out, there's still - - -

6 JUDGE FAHEY: Well, tell me what the proximate
7 cause problem is?

8 MR. SPITHOGIANNIS: The proximate cause problem
9 is that suing General Motors in Michigan, it seems like in
10 the memorandum of order there was an instruction or at
11 least advice from the court in some way, you know, if you
12 want to pursue this litigation, it has to be in Michigan.

13 JUDGE FAHEY: Right, you can't do it in New York,
14 but you might be able to do it in Michigan. Right.

15 MR. SPITHOGIANNIS: Right.

16 JUDGE FAHEY: Right.

17 MR. SPITHOGIANNIS: So if the action is brought
18 in Michigan plai - - - the plaintiff, as a legal
19 malpractice plaintiff, has to prove in this case, that he
20 would have prevailed in that litigation.

21 JUDGE FAHEY: Well, that goes - - - that goes
22 back to the legal malpractice problem. But it doesn't go
23 to the deceit problem. I think you've got to distinguish -
24 - - distinguish between the two here.

25 Legal malpractice, I - - - I see what you're



1 saying there, that they couldn't be successful no matter
2 what, so they don't have a cause for negligence. That's
3 not the same as deceit, though. And the argument is that
4 you would hide the deceit because you - - - this is the
5 argument; I'm not judging the argument - - - but the
6 argument would be you were hiding the deceit because that
7 way it would be easier for you to keep the money that you
8 were given to bring the action.

9 I understand the argument. The real question is
10 whether or not that's an action in the context of
11 litigation towards a party.

12 MR. SPITHOGIANNIS: Yeah. I - - - I think
13 arguably it can be, but in this case - - -

14 JUDGE FAHEY: Um-hum.

15 MR. SPITHOGIANNIS: - - - there's no proximate
16 cause. There was no additional legal fee - - -

17 JUDGE FAHEY: Well, the proximate cause is a pure
18 negligence question. I'm having a difficult time to see
19 how it applies, but I understand your argument.

20 MR. SPITHOGIANNIS: But - - - but there must be
21 co - - - proximately caused injury to a party to prevail
22 under a Judiciary Law 487 claim.

23 JUDGE FAHEY: Right. Thank you.

24 CHIEF JUDGE DIFIORE: Counsel, does the 487 claim
25 need to be pleaded with particularity?



1 MR. SPITHOGIANNIS: It does. And - - -

2 CHIEF JUDGE DIFIORE: And what - - - what - - -

3 MR. SPITHOGIANNIS: - - - the lower courts have -
4 - - have applied it - - - applied 3016(b) that way. In the
5 Second Department - - - I think what the Second Department
6 was grappling with was that there were only three causes of
7 action in this original complaint. There was a pretty
8 standard legal malpractice case with a duplicative causes
9 of - - - cause of action for breach of contract, and
10 another duplicative cause of action for fraud.

11 The only time Judiciary Law 487 appears is in the
12 last paragraph of that complaint. I guess the plaintiff
13 figured he'd throw in Judiciary Law to - - - to potentially
14 get treble damages. But it's the exact same claim as the
15 fraud claim.

16 And I think the Second Department was correct.
17 Even though it was up on a - - - on an order gran - - -
18 granting in part a summary judgment motion, I think they
19 were correct in stating that the complaint does not allege
20 an intent to deceive in a litigation and that the intent to
21 deceive was directed at the court or - - - or a party.

22 There are allegations in the - - - in the fraud
23 cause of action that state that up - - - upon information
24 and belief, Mr. Stein knew or should have known that this
25 case wasn't going to work out, but - - - but that is far



1 from pleading a Judiciary Law 487 claim.

2 JUDGE RIVERA: So - - - so you're saying, if - -
3 - if the complaint had asserted some action post the filing
4 that suggested fraud or met some minimal threshold of the
5 detail of suggesting fraud, that that would have been good
6 enough?

7 MR. SPITHOGIANNIS: I think it would have been
8 good enough if that allegation was made and there were
9 specific allegations as to Mr. Stein's alleged intent to
10 deceive - - -

11 JUDGE FAHEY: Let me ask you this.

12 MR. SPITHOGIANNIS: - - - a party to - - - or the
13 court.

14 JUDGE FAHEY: I know the Appellate Division said
15 that 3016(b) didn't apply, but let me ask you, did you ever
16 make any motion to dismiss on this, that the plain - - -
17 that these pleadings were dismissible?

18 MR. SPITHOGIANNIS: We did not make a motion to
19 dismiss.

20 JUDGE FAHEY: Okay. So and you never made any
21 3211(a)(7) motion either, did you?

22 MR. SPITHOGIANNIS: I don't believe so, Judge.

23 JUDGE FAHEY: So we're really not in the "motion
24 to dismiss, failures to plead with particularity"
25 bailiwick; we're really in a 3212 summary judgment posture,



1 correct?

2 MR. SPITHOGIANNIS: Correct.

3 JUDGE FAHEY: Right. So how does particularity
4 even apply, then?

5 MR. SPITHOGIANNIS: Well, I - - - I think it
6 applies - - -

7 JUDGE FAHEY: Because we're not talking about how
8 you pled the pleadings. We're - - - that's - - - you
9 didn't - - - you didn't argue that. You never raised that.
10 You didn't preserve that.

11 MR. SPITHOGIANNIS: What - - - what the Supreme
12 Court did in deciding our motion for summary judgment - - -

13 JUDGE FAHEY: Um-hum.

14 MR. SPITHOGIANNIS: - - - was it granted our
15 motion on proximate cause grounds with respect to the legal
16 malpractice cause of action and held that the breach of
17 contract and fraud causes of action were duplicative.

18 There were only three. Then - - -

19 JUDGE FAHEY: No, I - - - I understand that. But
20 in order for you to argue before us today that - - - that
21 this action was not pled with sufficient particularity, and
22 that 3016(b) would apply, which the Appellate Division did
23 - - - and whether or not that's error is something we have
24 to decide - - - but you had to raise that issue as a - - -
25 in a motion to dismiss, because it goes to the face of the



1 pleadings themselves.

2 And I don't believe that - - - I could be wrong
3 about the record; I'll go back and look - - - but I - - - I
4 didn't think that's what was done here. I thought that was
5 never done, that this was a pure summary judgment motion,
6 therefore it's, you know, balancing the facts, the normal
7 kind of thing.

8 MR. SPITHOGIANNIS: Right. I don't - - - I don't
9 believe that that was done. But what the Second Department
10 did, in our view, was correct.

11 JUDGE FAHEY: I agree with you, they did raise
12 it. Your - - - I agree with you. I - - - I understand
13 what you're saying. I'm saying they might be wrong, but -
14 - - but I understand what you're saying. All right.

15 MR. SPITHOGIANNIS: And in - - - in this case - -
16 - may I have one moment?

17 CHIEF JUDGE DIFIORE: Of course.

18 MR. SPITHOGIANNIS: There has to be an intent to
19 deceive, and I think Mr. Pelinsky's actions - - - the
20 plaintiff - - - show that he was not deceived. He wanted -
21 - - he was boiling mad; he was angry at GM that they were
22 taking advantage of him by having him sign these licensing
23 agreements. They were infringers in the business who were
24 making fake items as opposed to Mr. Pelinsky's genuine
25 items, and they were getting away with it.



1 He was angry. He wanted to bring a lawsuit. He
2 wanted to bring his allegations before the judge. I think
3 his deposition testimony sums it up when he said, "I see
4 this as win-win situation. If I lose then they have a
5 right to chase my infringers out of the injury (sic) - - -
6 out of the industry and I win. If I recover, then I win as
7 well. So I said okay, who do I make the check out to."

8 He wanted to bring this lawsuit. The lawsuit was
9 unsuccessful, but lawsuits are sometimes unsuccessful.
10 Thank you.

11 CHIEF JUDGE DIFIORE: Thank you, sir.

12 Counsel?

13 MR. TORTO: Just briefly, Your Honor. With - - -
14 with regard to the defendants' position that Mr. Pelinsky
15 wanted to bring this lawsuit and it was a win-win
16 situation. It's our position that that raises a question
17 of fact, and that given the advice that he was given, that
18 yeah, he might say that I'm going to win either way - - -
19 even if I lose I'm going to win. We don't think that
20 defeats this cause of action as a matter of law.

21 Secondly, with regard to the - - - the
22 particulars of the - - - of the fraud, the complaint is
23 inartfully drafted. However, that deficiency was cured
24 with the opposition papers. And like Judge Fahey said,
25 this was a summary judgment motion. The court considers



1 all the papers.

2 It appears that the Appellate Division only
3 considered the complaint, and - - - and that's apparent
4 from them citing - - - that court citing C.P.L.R. 3016(b).
5 But this is not a pleading motion.

6 JUDGE RIVERA: So to be clear, what are the post-
7 filing deceitful actions by the lawyer?

8 MR. TORTO: Concealing - - -

9 JUDGE RIVERA: That - - - that are in this
10 record?

11 MR. TORTO: Concealing the adverse decision and
12 not telling the client about it. That in and of itself
13 could sustain a cause of action.

14 JUDGE STEIN: And then how did that po - - - how
15 did that particular conduct proximately cause any damage to
16 the client?

17 MR. TORTO: According to Mr. Pelinsky's
18 affidavit, he was - - - by the time he found out about it,
19 the statute of limitations had expired.

20 JUDGE STEIN: Right. But we know that he
21 wouldn't have had a cause of action anyway, right?

22 MR. TORTO: Right.

23 JUDGE STEIN: So - - - so how did that - - - I
24 mean, I thought that the - - - the damages that he was
25 really alleging by this whole thing had to do with the - -



1 - the legal fees that he'd paid.

2 MR. TORTO: Correct.

3 JUDGE STEIN: But he'd already paid those.

4 MR. TORTO: Yes.

5 JUDGE STEIN: So - - - so just - - -

6 MR. TORTO: I think if he'd get the fees back.

7 There - - - there's law to the effect that a lawyer who - -

8 - you know, acts inappropriately toward a client, forfeits

9 his fee. And that - - - that principle would apply here.

10 Well, it just seems to me, though, that getting
11 back to that Amalfitano argument, you know, where the court
12 quotes the Second Department decision, "In Looff the
13 plaintiffs accuse their attorney of gulling them into
14 bringing an unnecessary lawsuit motivated solely by his
15 desire to collect a large fee to represent them," that - -
16 - that's this case. And - - - and you can't get around
17 that. The court gave its imprimatur or its endorsement to
18 a cause of action under those facts under Section 487 of
19 the Judiciary Law.

20 I mean, just substitute the - - - the parties in
21 this case with the language in Amalfitano. You know, the -
22 - - the plaintiffs accused the defendant of gulling him
23 into bringing an unnecessary lawsuit, whether it's
24 meritless or unnecessary, it - - - it's the same. He
25 shouldn't have brought the lawsuit. It never should have



1 been brought.

2 You know, and the lawyer should have told the
3 client you've got not case, and you know - - - and not
4 collect a large fee.

5 So thank you. I'll rest on my brief.

6 CHIEF JUDGE DIFIORE: Thank you, Counsel.

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8 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Bill Birds, Inc. and William Pelinsky v. Stein Law Firm, P.C. and Mitchell A. Stein, No. 19 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

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