Commonwealth of Massachusetts
County of Suffolk
The Superior Court

CIVIL DOCKET#: **SUCV2009-01961-C**

RE: Minkina MD v Frankl et al

TO: Christopher Maffucci, Esquire
Casner & Edwards
303 Congress Street
2nd floor
Boston, MA 02210

NOTICE OF DOCKET ENTRY

You are hereby notified that on **06/17/2013** the following entry was made on the above referenced docket:

Defts Rule 59 Motion for awards of attorney's fees (w/opposition)

Dated at Boston, Massachusetts this 10th day of September, 2013.

Michael Joseph Donovan,
Clerk of the Courts

BY: Timothy Walsh
Assistant Clerk

Telephone: 617-788-8172

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 09-1961-C

NATALY MINKINA, M.D.

v.

LAURIE A. FRANKL, ESQ., JONATHON J. MARGOLIS, ESQ. and ROGERS, POWERS & SCHWARTZ, LLP

MEMORANDUM OF DECISION AND ORDER ON THE DEFENDANTS' RULE 59 MOTION FOR AWARD OF ATTORNEYS' FEES PURSUANT TO G.L. c. 231, § 6F

(sc)

Dr. Nataly Minkina ("Minkina") brought this action against Laurie A. Frankl, Esq. ("Frankl"), Jonathon J. Margolis, Esq. ("Margolis"), and Rodgers, Powers & Schartz, LLP ("RPS") (collectively, "the defendants"), for professional negligence, negligent misrepresentation, breach of fiduciary duty, and negligent infliction of emotional distress. After a hearing, this court allowed the defendants' motion for summary judgment as to all of Minkina's claims. Memorandum of Decision and Order on Defendants Laurie A. Frankel, Esq., Jonathon J. Margolis, Esq., and Rogers, Powers & Schwartz, LLP's Motion for Summary Judgment (April 4, 2013) ("the April 4, 2013 Order"). The defendants have now filed a Motion for Award of Attorneys' Fees Pursuant to G. L. c. 231, § 6F ("Section 6F"). For the following reasons, the defendants' motion is allowed.

BACKGROUND[1]

From 2005 to 2006, RPS represented Minkina in her employment discrimination and retaliation action against her former employer. Minkina v. Harvard Medical Faculty et al., Suffolk Superior Court, Docket No. 2004-5062-F ("the 2004 Action"). Among other legal services, RPS filed an opposition to the employer's motion to compel arbitration of her claims. On February 28, 2006, the court (Hines, J.) allowed the employer's motion to compel arbitration, and dismissed the 2004 Action. In 2010, *after* Minkina succeeded in her arbitration, see *infra*, she sought to reopen the 2004 Action. On June 24, 2010, the court (Muse, J.) denied Minkina's motion for relief from judgment in the 2004 Action.

In May of 2006, as the parties were preparing for arbitration, Frankl sent Minkina an email informing Minkina that Frankl had mistakenly believed that the employer would be responsible for all arbitration costs. Frankl told Minkina that during a conversation with a representative of the American Arbitration Association ("the AAA"), she was informed that Minkina would be responsible for half of such costs, due to the nature of Minkina's employment contract. The following day, Minkina sent an email to RPS in which she accused Frankl of "gross negligence and unprofessionalism" and complained about delays stemming from, *inter alia*, Frankl's medical leave. She also wrote:

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[1] G.L. c. 231, § 6F mandates that "[t]he court shall include in such finding the specific facts and reasons on which the finding is based."

> I do not plan to choose another firm to represent me, rather I respectfully request a meeting with you to resolve the current situation. However, I also request you to [sic] immediately replace attorney Frankl with another attorney since I can no longer trust her expertise or tolerate her careless attitude.

Margolis, on behalf of RPS, responded as follows:

> From your message, it is clear that you have lost faith in us as your counsel. Accordingly, we shall withdraw from representing you. We shall, however, give you time to find new counsel. Please inform me of how much time you believe you will need. In the meantime, we shall take steps necessary to protect your interests, but we will not do anything beyond that, and will not act without express permission from you.

After this incident, Minkina filed a complaint against RPS with the Office of Bar Counsel ("OBC"), in which she asserted that RPS violated its ethical obligations by withdrawing from her case. The OBC informed her that RPS's actions did not warrant disciplinary action, and that it was not unreasonable for RPS to conclude that her complaints about Frankl's performance presented a conflict of interest that either necessitated or, at minimum, permitted RPS to withdraw from representing her.

Minkina retained new counsel and filed for arbitration in October of 2007. In March of 2009, the arbitrator issued an interim decision in Minkina's favor. In the arbitrator's final decision, rendered in July of 2009, he awarded Minkina approximately $266,000 in damages, fees, and costs, which included $33,940 in

arbitration costs and $95,192.75 in attorneys' fees. The arbitrator did not award attorneys' fees for RPS's unsuccessful opposition to the motion to compel arbitration. Nor did he award any monies for attorneys' fees incurred while Minkina's new counsel became familiar with her case. The attorneys' fees awarded represented a fifty percent reduction of the total amount claimed by the plaintiff, based on Minkina's assertion of other, unsuccessful claims and extraneous background information. Finally, the arbitrator did not award punitive damages. Minkina did not move to vacate or modify the award. Instead, she filed a limited motion to correct and/or reconsider the arbitator's rulings on attorneys' fees, which the arbitator denied.

Minkina filed the present action against the defendants in May of 2009. Throughout the case, which lasted four years, Minkina filed numerous interlocutory appeals. One such appeal stemmed from the Court's denial of her motion for leave to amend her complaint, which she filed immediately after the defendants filed their motion for summary judgment. In this motion, Minkina sought to include a G.L. c.93A claim against Frankl, alleging that Frankl lied about speaking to the AAA and that Frankl let opposing counsel convince her that Minkina would be responsible for half the arbitration costs. These factual assertions were premised solely on Frankl's inability to remember the name of the person she spoke to at the AAA.

Shortly after the court issued its April 4, 2013 summary judgment decision,

the defendants filed the present motion for attorneys' fees. A hearing was held on July 30, 2013. Both parties have submitted briefs and exhibits.

DISCUSSION

"Section 6F authorizes an award of reasonable costs and attorney's fees incurred in litigation when 'all or substantially all' of the opposing party's claims are 'wholly insubstantial, frivolous and not advanced in good faith.'" *Fronk v. Fowler*, 456 Mass. 317, 324-325 (2010), quoting G.L. c. 231, § 6F. "A claim is frivolous if there is an 'absence of legal or factual basis for the claim,' and if the claim is 'without even a colorable basis in law.'" *Fronk*, 456 Mass. at 329 (citations omitted). Whether a claimant lacked good faith may be reasonably inferred from the circumstances, and is neither a wholly subjective nor wholly objective inquiry. *Massachusetts Adventura Travel, Inc. v. Mason,* 27 Mass. App. Ct. 293, 297-299 (1989).

I. Professional Negligence (Count I)

In her complaint, Minkina framed her claim for professional negligence as relating to Frankl's alleged misrepresentation regarding arbitration costs, which is discussed *infra* in Section B(1). In her opposition to the defendants' motion for summary judgment, Minkina focused on the defendants' alleged failure to properly defend against the motion to compel arbitration. Specifically, Minkina asserted that RPS failed to make arguments that would have prevented her from being forced into arbitration. She alleged that if her case had been tried before a jury instead of going

to arbitration, she would have received higher compensatory damages as well as punitive damages.

The argument set forth in Minkina's summary judgment memorandum is "without even a colorable basis in law." *Lewis v. Emerson*, 391 Mass. 517, 526 (1984). Her interpretation of the arbitration agreement is inconsistent with both the agreement's language and the case law in existence at that time. See, e.g., the April 4, 2013 Order; Memorandum of Decision and Order on Defendants' Motion to Compel Arbitration, Suffolk Superior Court, Docket No. 2004-5062-F (Hines, J.)(February 14, 2006); *Fronk*, 456 Mass. at 330 ("Here, the language of the partnership agreement was wholly inconsistent with the plaintiffs' position [about] the agreement . . . .").

Minkina's opposition to the present motion for attorneys' fees cites no case law and makes no reasoned legal argument. Instead, she relies exclusively on her expert witness's conclusory testimony. See *Massachusetts Adventura Travel, Inc.*, 27 Mass. App. Ct. at 299 ("Absence of good faith of a claimant in litigation may be inferred reasonably from . . . the quality and significance of the claimant's grounds advanced for opposing an award under §§ 6F and 6G. . . .").

II. Negligent Misrepresentation (Count II)

This claim was originally based on Frankl's erroneous statement to Minkina that Minkina would be responsible for paying for half of the arbitration costs, but it

later expanded in other directions, as addressed below.

A. Half of the Arbitration Costs

The defendants are correct that Minkina's claim regarding Frankl's alleged misstatement is utterly without merit. On March 4, 2009, the arbitrator ordered that Minkina be reimbursed for her arbitration costs, and on March 20, 2009, the employer and Minkina agreed that Minkina would be reimbursed for $34,000 in such costs. This occurred two months before she filed her complaint in this action. The arbitrator's final award, dated July 17, 2009, confirmed their agreement. Minkina, however, continued to assert that Frankl had harmed Minkina by her alleged misrepresentation throughout the summary judgment stage. See *Fronk*, 456 Mass. at 329 ("The proper vantage point for evaluating whether a claim is frivolous is from the time the claim was brought and over the course of the litigation."). During the entirety of the case, Minkina knew that Frankl's statement had no bearing on her arbitration proceeding, its outcome, or her eventual reimbursement for arbitration costs. Her claim to the contrary was clearly frivolous and not made in good faith. See *id.* at 335 ("Here, the inference of bad faith -- that the plaintiffs had no reason to believe in the merits of their claims -- is fully supported if not inescapable.").

Minkina now contends that Frankl's misrepresentation harmed her by leading to RPS's decision to withdraw from her case. This argument appears purposefully to overlook a critical fact – that Minkina fired Frankl. Minkina's decision to fire Frankl,

and not Frank's error, led to RPS's decision to withdraw.

While perhaps, subjectively, Minkina felt wronged by Frankl's error and RPS's subsequent withdrawal, there is absolutely no reasonable basis in law or fact for her claim that RPS's decision to withdraw was unilateral or, indeed, unfair in any way.[2] *Massachusetts Adventura Travel, Inc.,* 27 Mass. App. Ct. at 299 ("Where as here a claim is advanced which essentially is unsupported by evidence, we hold that a subjective belief of a person in his claim may be ruled, in the trial court and on appellate review, not to preclude an award under these sections."). Indeed, Minkina knew that the OBC, at least, did not consider RPS's actions unethical. See *id.* at 298, n.7 ("He thus had experience and training reasonably enabling him (with the assistance of counsel) to recognize whether he had or did not have [a basis for a claim].").

B. Legal Fees Contesting Arbitration Costs

Minkina alleges that she incurred $7,000 in legal fees when her successor counsel contested, at arbitration, whether Minkina should have to pay half of the cost of arbitration. She further alleges that she was not reimbursed for those fees

[2] At various times, including in her present opposition, Minkina has asserted that Frankl told her in an email to "get another lawyer" when Minkina expressed her unhappiness with Frankl's error. Minkina, however, grossly overstates Frankl's email, in which Frankl wrote: "Finally, your displeasure with me is clear. I am confident that this firm has worked hard to zealously advocate in your best interest, but if you do not agree, you may choose to retain new counsel. You must do what you think is best for you. I will await your direction." Minkina's attempts to misquote Frankl do her no credit and reflect poorly on her assertions of good faith.

despite prevailing on this issue. Of course, she cannot dispute that she was reimbursed for $34,000 in arbitration costs, which certainly created a net gain.

Minkina asserts that RPS forced her to incur the $7,000 in fees by "unilaterally" terminating their attorney-client relationship. The argument regarding RPS's "unilateral" withdrawal has been addressed above. In addition, it is obvious that the $7,000 fee would have been incurred regardless of who represented Minkina in order to prevent Minkina from being required to pay half of the arbitration costs. There is no logical basis for Minkina's attempt to attribute the fee to RPS.

C. Successor Counsel Fees

Minkina alleges that, pursuant to the arbitrator's ruling, she did not receive reimbursement for $12,000 in fees that were incurred by successor counsel while they familiarized themselves with her case. This argument fails because Minkina decided to terminate Frankl, who was the lead attorney on Minkina's case. Any successor attorney, even an attorney from RPS, would have had to familiarize himself or herself with Minkina's case.

III. Breach of Fiduciary Duty (Count III)

Minkina's claim for breach of fiduciary duty is also predicated on RPS's allegedly "unilateral" decision to fire her. Again, *Minkina* chose to fire Frankl when she wrote to RPS requesting that Frankl be removed from her case.

Minkina also blames RPS's withdrawal from the case for the arbitrator's decision that her claims stemming from prior to August 1, 2004 were time-barred, but, again, she chose to terminate her relationship with Frankl. Any delays that arose after her termination of Frank's services cannot be attributed to RPS. In any event, the arbitrator noted that even if her claims had not been time-barred, they would likely not have been successful. In short, this claim is frivolous.

IV. Negligent Infliction of Emotional Distress (Count IV)

Minkina's claim for emotional distress is predicated on RPS's decision to withdraw, which has been addressed in depth, above, and her claim fails for the reasons explained therein. Additionally, there is absolutely no legal basis for this claim. See *Iacono v. Boncore*, 16 Mass. L. Rptr. 681 at *6 (Mass. Super. 2003).

"Ordinarily, prevailing litigants are not entitled to fees because the prospect of paying an opponent's costs 'might unjustly deter those of limited resources from prosecuting or defending suits.'" *Fronk*, 456 Mass. at 335, quoting *Police Comm'r of Boston v. Gows*, 429 Mass. 14, 17 (1999). "Section 6F marks an exception to this rule because there is no public policy against deterring frivolous suits such as these. Where, as here, parties lack the legal or factual basis to commence or sustain an action, yet press ahead for reasons related only to obstinance or avarice, the prospect of reimbursing their harassed opponents should cause them to rethink their litigious venture." *Fronk*, 456 Mass. at 335-336.

Notice sent
9/10/2013

ORDER

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For the foregoing reasons, that the Defendants' Rule 59 Motion for Award of Attorney's Fees Pursuant to G.L. c. 231, § 6F is **ALLOWED**.

Defendants shall serve and file, pursuant to Superior Court Rule 9A, a detailed, itemized statement of fees and costs incurred in connection with their defense of this action, together with any opposition served by the plaintiff with respect to specific fees or costs, and the court shall thereupon determine the amount of fees and costs to be awarded to the defendants pursuant to this Memorandum of Decision and Order.

Peter M. Lauriat
Justice of the Superior Court

Dated: September 9, 2013