UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL ELBERY, Plaintiff	)	
v.	)	CIVIL ACTION NO. 98-CV-10163-MLW
ROBERT SHEKETOFF, KIMBERLY HOMAN and SHEKETOFF & HOMAN, Defendants	)	

MEMORANDUM IN SUPPORT OF THE SHEKETOFF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

ARGUMENT

A. SUMMARY JUDGMENT STANDARD.

This Court must award summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 324-325 (1986); Villanueva v. Wellesley College, 930 F.2d 124, 127 (1st Cir.), cert. denied, 502 U.S. 861 (1991); Desmond v. Federal Deposit Insurance Corp., 798 F. Supp. 829 (D. Mass. 1992).

Where the moving party does not have the burden of proof at trial, that party may discharge his burden by showing that there is an absence of evidence to support the non-moving party's case. Celotex Corp., 477 U.S. at 322. A complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial and entitles the moving party to summary judgment in his favor. Celotex Corp., 477 U.S. at 323; Conway v. Boston Edison Co., 745 F. Supp. 773 (D. Mass. 1990).

Once a moving party demonstrates such a shortcoming in the evidence, the non-moving party may avoid summary judgment only by establishing specific, definite and competent evidence to rebut the alleged failure of proof. Sheinkopf v. Stone, 927 F.2d 1259, 1261 (1st Cir. 1991); Mesnick v. General Elec. Co., 950 F.2d 816, 822 (1st Cir. 1991), cert. denied, 504 U.S. 985 (1992). The non-moving party may not satisfy his burden simply by showing that there is some metaphysical doubt as to the material facts. Matsushita Electrical Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Mack v. Great Atl. & Pac. Tea Co., 871 F.2d 179, 181 (1st Cir. 1989) (opposing party's evidence "cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a fact finder must resolve at an ensuing trial."). The non-moving party must demonstrate that the record is such that a "rational trier of fact" could return a verdict in his favor. Matsushita Electrical Indus. Co., Ltd., 475 U.S. at 587.

Summary judgment is appropriate in this matter because there are no genuine issues of material fact in dispute. Elbery has no evidence to support his conclusory assertion that Attorney Sheketoff conspired with the Shrewsbury Police Department or the Worcester County District Attorney's Office to imprison him or to otherwise violate his constitutional rights and, therefore, the Sheketoff Defendants are entitled to summary judgment on Elbery's claims under Section 1983. Elbery has no expert to testify that Attorney Sheketoff breached a standard of care while representing Elbery or that any such alleged breach proximately caused damage to Elbery. Therefore, the Sheketoff Defendants are entitled to summary judgment on Elbery's legal malpractice and breach of contract claims.

In addition, the Sheketoff Defendants are entitled to summary judgment on Elbery's claim for intentional infliction of emotional distress because, as a matter of law, Attorney Sheketoff's alleged conduct was not extreme or outrageous. They are entitled to summary judgment on Elbery's fraud and constructive fraud claims because the alleged misrepresentations made by Attorney Sheketoff were in the nature of opinions and, therefore, not actionable as misrepresentations of fact. Lastly, the Sheketoff Defendants are entitled to summary judgment on Elbery's breach of fiduciary duty claim because there is no evidence that Attorney Sheketoff entered into a business transaction with Elbery which unfairly benefitted Attorney Sheketoff at Elbery's expense. Accordingly, the Court should enter summary judgment in favor of the Sheketoff Defendants on all of Elbery's claims.

B. ELBERY CANNOT PROVE THAT ATTORNEY SHEKETOFF WAS PART OF A CONSPIRACY; THEREFORE, THE SHEKETOFF DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON ELBERY'S SECTION 1983 CLAIMS.

The Court should dismiss Elbery's Section 1983 claims (Counts I, II, III, IV, VII), which are based upon his allegation that Attorney Sheketoff conspired with various state actors to deprive him of his constitutional rights, because there is no evidence of a conspiracy. Civil conspiracy is a very limited cause of action in Massachusetts.[1] Jurgens v. Abraham, 616 F. Supp. 1381, 1386 (D. Mass. 1985). A civil rights conspiracy is defined as "a combination of two or more persons acting in concert to commit an unlawful act . . . the principal element of which is

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[1] The First Circuit has cautioned that civil rights conspiracy claims must be reviewed carefully in order to prevent abusive and vexatious claims. See Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 53 (1990) (dismissing complaint for conspiracy to violate plaintiff's civil rights where the complaint contained nothing more than conclusory allegations of conspiracy); Slotnick v. Stavinsky, 560 F.2d 31, 33 (1st Cir. 1977); cf. Sullivan v. Kelleher, 405 F.2d 486, 487 (1st Cir. 1968).

an agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damages.'" Earle v. Benoit, 850 F.2d 836, 844 (1st Cir. 1988) (emphasis added). The "agreement" may be either explicit or implicit, but the plaintiff must produce evidence of a "single plan the essential nature and general scope of which [was] known to each person who is to be held responsible for its consequences". Aubin v. Fadala, 782 F.2d 280, 286 (1st Cir. 1983).

A conspiracy claim must be supported by material facts, not merely conclusory statements. Slotnick v. Garfinkle, 632 F.2d 163, 165 (1st Cir. 1980); Forbes v. Rhode Island Broth. of Correctional Officers, 923 F.Supp. 315, 325 (D.R.I. 1996). Such a claim cannot survive summary judgment where the jury could find the existence of an agreement only with the aid of "speculation and conjecture." See, e.g., Boschette v. Buck, 914 F.Supp. 769, 776 (D. Puerto Rico 1995); Therrien v. Hamilton, 849 F.Supp. 110, 116 (D. Mass. 1994); see also Aubin, 782 F.2d at 286 (verdicts properly directed for defendants on civil rights conspiracy claim where trial court reasonably concluded that a jury could not find for the plaintiffs without "speculation and conjecture").

Here, Elbery has no evidence to support his fanciful allegation that Attorney Sheketoff formed an agreement with the Shrewsbury Police or Worcester District Attorney's Office to put or keep him in prison. He can point to no conversation, meeting, or conduct to show the essential element of "agreement" in order to withstand a motion for summary judgment. At his deposition, Elbery refused or was unable to explain the factual basis for his claim that Attorney Sheketoff was part of a conspiracy. (Undisputed Facts ¶ 76). Attorney Sheketoff has stated affirmatively that he did not communicate with or form an agreement with the Worcester County

District Attorney's Office or the Shrewsbury Police Department's Office to keep Elbery imprisoned or to violate Elbery's civil rights in any other way. (Undisputed Facts ¶ 61-62). Neither Attorney Sheketoff nor any members of the Shrewsbury Police Department knew each other. (Undisputed Facts ¶ 62). There is simply no factual support in the record to show that Attorney Sheketoff formed a plan with anyone to imprison Elbery or to otherwise violate his constitutional rights. See Therrien v. Hamilton, 849 F. Supp. 110, 115-16 (D. Mass. 1994). (granting summary judgment to defendants where deposition testimony established no unlawful agreement between parties to inflict a wrong against plaintiff)

Indeed, the evidence in this case suggests, to the contrary, that Attorney Sheketoff did his best to represent Elbery under unusual and difficult circumstances. Attorney Sheketoff appeared at the hearing on the Commonwealth's motion to revoke the stay of execution on Elbery's sentence for the intent to maim conviction. (Undisputed Facts ¶ 24-25). He argued that the motion to vacate the stay should be denied and that the Court should instead impose high bail, which would have allowed Elbery to maintain his freedom pending the appeal of that conviction. (Undisputed Facts ¶ 26). Attorney Sheketoff also diligently defended Elbery on the firearms charges. He filed and argued a motion to suppress evidence of the firearms[2] on the grounds that they were obtained by virtue of an illegal search in violation of Elbery's rights under the Fourth and Fourteenth Amendments of the United States Constitution and Article Eleven of the Massachusetts Constitution. (Undisputed Facts ¶ 30-32). Attorney Sheketoff requested and received discovery from the Commonwealth, and was prepared to try the case (though Elbery

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[2] This included a post-argument memorandum and an amended motion to suppress. (Undisputed Facts ¶ 32).

discharged him prior to trial). (Undisputed Facts ¶ 29, 65).

Against all of this evidence that Attorney Sheketoff represented him in good faith, Elbery's unsupported assertion of a conspiracy -- which appears to be based solely upon the fact that the District Attorney ultimately offered to dismiss the firearms charges after Elbery discharged Attorney Sheketoff -- is pure conjecture on the part of Elbery. The Assistant District Attorney may have done so for numerous reasons[3]; there is nothing so inherently suspicious about the offer which permits an inference that the Assistant District Attorney conspired with Attorney Sheketoff. In the absence of any evidence to support his claims, Elbery "is not entitled to build a case on the gossamer thread of whimsy, speculation and conjecture." Boschette, 914 F.Supp. at 776 (quoting Manganaro v. Delaval Separator Co., 309 F.2d 389, 393 (1st Cir. 1962)). As this Court aptly noted under similar circumstances: "[a] party may not cry 'conspiracy' and throw himself on the jury's mercy." Duca v. Martins, 941 F.Supp. 1281, 1291 (D.Mass. 1996)(Wolf, J.) (granting summary judgment to defendant police officers on Section 1983 claims and holding that the plaintiff's evidence, consisting mainly of errors in criminal investigation, was insufficient to demonstrate existence of a willful conspiracy). Where, as here, there is no evidence to demonstrate the existence of a conspiracy or that Attorney Sheketoff was part of any such conspiracy, the Court should enter summary judgment in favor of the Sheketoff Defendants

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[3] It is possible that the offer to dismiss was made because witnesses were not available for trial. It is also possible that Assistant District Attorney Ludwig, who was responsible for trying the case, had more important cases to attend to. It may very well be that he interpreted G.L. c. 269, §§10(a) and (h) differently than Assistant District Attorneys Ball and Revelli, who were previously involved in the case. (Undisputed Facts ¶ 24, 28, 31). Of course, without testimony from Assistant District Attorney Ludwig, the above reasons, as well as any reasons proferred by Elbery, are entirely speculative.

on Elbery's Section 1983 claims (Counts I, II, III, IV, and VII).[4]

C. ELBERY CANNOT ESTABLISH LIABILITY OR CAUSATION IN SUPPORT OF HIS LEGAL MALPRACTICE AND BREACH OF CONTRACT CLAIMS.

Elbery cannot prevail on his legal malpractice (Count V) and breach of contract (Count IX) claims against the Sheketoff Defendants because he cannot prove two of the necessary elements of those claims: breach of a duty and causation. As discussed in greater detail below, Elbery must produce expert testimony regarding the applicable standard of care and a breach of that standard by Attorney Sheketoff. He must also produce expert testimony to show that the alleged breach by Attorney Sheketoff caused him to suffer a loss and that, had there been no breach, he would have obtained a better result. Elbery has no expert witness to testify on his behalf. He has no reasonable expectation of proving that Attorney Sheketoff breached a standard of care in defending him in connection with the firearms charges or that, had there been no breach, he would have obtained a better result. Therefore, the Court should dismiss his legal malpractice and breach of contract claims against the Sheketoff Defendants.

1. Elbery Cannot Maintain His Legal Malpractice Claim Without Expert Testimony.

To recover against an attorney for malpractice, a plaintiff must establish that the attorney failed to exercise reasonable care and skill in handling the matter at issue. DiPiero v. Goodman, 14 Mass. App. Ct. 929 (1982). An attorney is not a guarantor and is not liable for a mistake if he

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[4] To the extent that Count VII asserts that the Sheketoff Defendants are liable under 42 U.S.C., §1983 for "conduct which is outrageous and shocks the conscience," rather than conspiracy, it must be dismissed because the Sheketoff Defendants are not state actors. Rockwell v. Cape Cod Hosp., 26 F.3d 254, 256-57 (1st Cir. 1994) (citations omitted) (private doctors who involuntarily admitted plaintiff to psychiatric hospital could not be liable under Section 1983 because they were not state actors); Mendez v. Belton, 739 F.2d 15, 17-18 (1st Cir. 1984).

has exercised reasonable care. Colucci v. Rosen, Goldberg, Slavet, Levinson & Wekstein P.C., 25 Mass. App. Ct. 107, 111 (1987). The plaintiff must therefore prove that the defendant attorney's conduct fell below the standard of care expected of similarly situated professionals. Id.

The plaintiff must also produce competent evidence to prove that the attorney's allegedly negligent conduct proximately caused his loss. Jernigan v. Giard, 398 Mass. 721, 723 (1986); McCann v. Davis, Malm & D'Agostine, 423 Mass. 558, 559-560 (1996); Girardi v. Gabriel, 38 Mass. App. Ct. 553, 560 (mere possibility that the defendant's negligence caused the loss of assets under an estate plan insufficient to take the proximate cause issue to the jury). The plaintiff must show that he would have prevailed in the underlying litigation or obtained a better result, had the attorney not been negligent. Brown v. Gerstein, 17 Mass. App. Ct. 558, 566 (1984) (no liability against attorney for failure to bring action to enjoin foreclosure in absence of evidence tending to show that such action would have prevented foreclosure); Colucci, 25 Mass. App. Ct. at 111 (attorney could not be liable for failure to obtain restraining order in absence of evidence that client satisfied all five statutory criteria necessary to obtain order).[5]

In professional malpractice cases such as this, a jury needs expert testimony in order to determine the appropriate standard of care and whether there was a deviation from that standard of care. See Brown, 17 Mass. App. Ct. at 566. The standard of care owed by an attorney to his client in particular circumstances is generally outside the scope of experience of the average fact finder. See Glidden v. Terranova, 12 Mass. App. Ct. 597, 598 (1981). Expert testimony is

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[5] Where, as here, the client's claim arises out of the defense of criminal charges, the client must prove not only that he would have obtained a better result, but that he is innocent of the crime for which he was convicted. Where the client was guilty of the crime, he suffers no harm from the attorney's alleged malpractice. Glenn v. Aiken, 409 Mass. 699, 707 (1991).

therefore necessary to establish that standard of care and any alleged departure from it. See Focus Investment Assoc., Inc. v. American Title Ins. Co., 992 F.2d 1231, 1239 (1st Cir. 1993); Pongonis v. Saab, 396 Mass. 1005 (1985); Colucci, 25 Mass. App. Ct. at 107; Brown v. Gerstein, 17 Mass. App. Ct. 558, 567 (1984); DePiero, 14 Mass. App. Ct. at 929.

Expert testimony is also necessary in this case to establish legal causation; i.e., the likelihood that, in the absence of the alleged negligence (the failure to file the motion to dismiss), Elbery would have obtained a better result. Atlas Tack Corp. v. Donabed, 47 Mass. App. Ct. 221, 226 (1999) (expert testimony necessary to prove causation in legal malpractice case); Colucci, 25 Mass. App. Ct. at 111 (expert evidence necessary to establish that plaintiffs would probably have been able to prevail in underlying action by satisfying all five statutory criteria needed to obtain a temporary restraining order against picketing). Without the assistance of competent expert testimony, the average juror would have no basis for deciding whether the motion to dismiss the firearms charges would have succeeded (particularly in light of the then-recent amendment to G.L. c. 269, § 10(a)) or if, under the circumstances, Judge Toomey would have reinstated the stay on Elbery's intent to maim conviction.[6] Thus, Elbery must produce competent expert testimony to show that he would have prevailed on the motion to dismiss the firearms charges and that the stay would have been reinstated. Saino v. Martinelli, 12 Mass.

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[6] The decision whether to reinstate the stay is entirely discretionary. Mass. R. Crim. P. 31(a). Factors to be considered in rendering the decision include: the risk that the defendant will flee to avoid punishment, the potential danger of the defendant to the community, the likelihood of further criminal activity by the defendant, and the likelihood that the defendant will prevail on his appeal. Com. v. Hodge, 380 Mass. 851, 855 (1980)(interpreting prior statute governing stay of execution); Com. v. Allen, 378 Mass. 489, 498 (1979).

App. Ct. 946, 947 (1981) (expert testimony that client would have prevailed on appeal necessary in action against former attorney for failure to perfect appeal); see also Hurd v. Dimento & Sullivan, 440 F.2d 1322, 1323 (1st Cir.), cert. denied, 404 U.S. 862 (1971).

On August 3, 1999, the Sheketoff Defendants served a second set of interrogatories upon Elbery. (Undisputed Facts ¶ 80). Interrogatory No. 5 asked Elbery to identify his expert witness and to disclose the substance of the expert testimony he expected to elicit at trial. (Undisputed Facts ¶ 80). On September 29, 1999, this Court (Bowler, U.S.M.J.) entered an Order compelling Elbery to provide answers to defendant Sheketoff's second set of interrogatories by October 13, 1999. (Undisputed Facts ¶ 81). On October 4, 1999, Elbery served handwritten answers to interrogatories identifying Attorney Karen L. MacNutt as his expert and describing, in conclusory terms, the expert testimony which Attorney MacNutt purportedly will offer at trial. (Undisputed Facts ¶ 82).

However, Elbery has never retained Attorney MacNutt to serve as his expert in this matter, and she did not prepare Answer No. 5. (Undisputed Facts ¶ 83). Elbery is not himself a criminal defense attorney (Undisputed Facts ¶ 78); he is not competent to offer expert testimony regarding the conduct of criminal defense attorneys. See Cholfin v. Gordon, 1996 WL 1185106, * 4 (Mass. Super. Jan 2, 1996) (accountant not competent to testify as to negligence of attorney) (a copy of this opinion is attached as Exhibit A to this memorandum); cf. Atlas Tack Corp., 47 Mass. App. Ct. at 227 (attorney expert witness not competent to testify regarding negligence of engineer). Therefore, Elbery has no competent, admissible expert testimony to offer regarding the standard of care applicable to a criminal defense attorney defending a client charged with

violations of G.L. c. 269, §10(a) and G.L. c. 269, §10(h) in the circumstances of his case, or that Attorney Sheketoff deviated from that standard. Pongonis, 396 Mass. at 1005; Brown, 17 Mass. App. Ct. at 558. In addition, Elbery has no competent, admissible expert testimony to prove that the motion to dismiss the firearms charges probably would have succeeded or that Judge Toomey probably would have reinstated the stay on his intent to maim conviction. See Colucci, 25 Mass. App. Ct. at 111; Saino, 12 Mass. App. Ct. at 947.

Elbery's failure to produce expert testimony is fatal to his legal malpractice claim, particularly where, as here, Attorney Sheketoff has submitted expert opinion that he complied with the standard of care applicable to criminal defense attorneys under the circumstances. (Undisputed Facts ¶ 58). Elbery's claim fails for the separate, but equally compelling reason that he cannot rebut Attorney Sheketoff's expert opinion that the motion to dismiss probably would have failed and that, even if the motion had been successful, Judge Toomey probably would have nevertheless declined to reinstate that stay of execution on Elbery's 10-year sentence. (Undisputed Facts ¶ 59, 60). Elbery has no expectation of proving two essential elements of his claim (i.e., breach of duty and causation); therefore, the Sheketoff Defendants are entitled to summary judgment in their favor. Celotex Corp., 477 U.S. at 322-23; Conway v. Boston Edison Co., 745 F. Supp. 773 (D. Mass. 1990).

2. Elbery's Breach Of Contract Claim Is Governed By Tort Standards Which Also Require Expert Testimony.

Expert testimony is also essential for Elbery to recover on his "breach of contract" claim. "A client's claim against an attorney has aspects of both a tort action and a contract action." McStowe v. Bornstein, 377 Mass. 804, 807 (1979). Although "[t]he traditional view of an action

for damages resulting from the negligence of an attorney is that the gist of the action, regardless of its form, is the attorney's breach of contract," (Hendrickson v. Sears, 365 Mass. 83, 86 [1974]), nevertheless, unless a professional warrants a particular result, the cause of action is governed by tort standards. Anthony's Pier Four, Inc. v. Crandall Dry Dock Engineers, Inc., 396 Mass. 818, 822-823 (1986)(claims against design professional); Brownell v. Garber, 503 N.W.2d 81, 83 (Mich. App. 1993) (in the absence of a "special contract" to achieve specific result, action against attorney for breach of contract was governed by ordinary tort standards); see also Resolution Trust Corp. v. Farmer, 823 F. Supp. 302, 308 (E.D. Pa. 1993).

Consistent with these principles, the Massachusetts Appeals Court has held that a "contract" claim for legal malpractice, when nothing more than a restatement of a negligence cause of action, is to be governed by tort standards and requires expert testimony. Harris v. Magri, 39 Mass. App. Ct. 349, 352-353 (1995). The plaintiffs in that case alleged that the defendant attorney breached an "implied contract" to use his legal training, skills and experience in representing them. The Harris court held that the claim, although couched in contract terms, did nothing more than implicate the implied duty of an attorney to exercise a reasonable degree of care and skill in the performance of his legal duties. The court concluded that the plaintiff's contract claim was therefore subject to the same general requirement of expert testimony applicable to a legal malpractice claim in negligence. See id.

In this case, Elbery merely retained Sheketoff to represent him in connection with the firearms charges. (Undisputed Facts ¶ 20). The terms of the agreement were that Elbery paid Sheketoff $5,000 and Sheketoff agreed to represent Elbery in connection with the charges.

(Undisputed Facts ¶ 20). Sheketoff did not warrant a specific result to Elbery in connection with the representation and, therefore, Shektoff's only "contractual" obligation was to exercise the reasonable care and skill of an ordinary attorney in representing Elbery. Anthony's Pier Four, Inc., 296 Mass. at 822-23; Brownell, 503 N.W.2d at 83; Harris, 39 Mass. App. Ct. at 352-53.

Elbery's breach of contract claim is subject to the same requirement of expert testimony as his legal malpractice claim. Harris, 39 Mass. App. Ct. at 352-53. Therefore, he must produce expert testimony to establish the applicable standard of care and that Attorney Sheketoff's conduct deviated from that standard. Harris, 39 Mass. App. Ct. at 352-53. He must also produce expert testimony to prove that any alleged breach by Attorney Sheketoff proximately caused his damages. Colucci, 25 Mass. App. Ct. at 111 (expert evidence necessary to establish that client would have prevailed and obtained injunction in absence of alleged error by attorney); Hurd, 440 F.2d at 1323.

As discussed in the prior section, Elbery has failed to retain an expert and, accordingly, he has no reasonable expectation of introducing expert testimony in support of his claims at trial. (Undisputed Facts ¶ 83). Without an expert to testify regarding the standard of care applicable under the circumstances, Sheketoff's alleged deviation from that standard, and any damages proximately caused by the alleged deviation, Elbery cannot prevail on his breach of contract claim at trial. Harris, 39 Mass. App. Ct. at 352-53; see also Focus Investment Assoc., Inc., 992 F.2d at 1239 (expert testimony needed to determine applicable standard of care and alleged breach thereof); Colucci, 25 Mass. App. Ct. at 111 (expert evidence necessary to establish that plaintiffs would probably have prevailed in underlying action). Therefore, the Court should enter

summary judgment in favor of the Sheketoff Defendants on Elbery's breach of contract claim (Count IX).

D. ATTORNEY SHEKETOFF DID NOT MAKE ANY MISREPRESENTATIONS OF FACT; THEREFORE, ELBERY CANNOT MAINTAIN CLAIMS FOR FRAUD AND CONSTRUCTIVE FRAUD.

The Court should enter summary judgment in favor of the Sheketoff Defendants on Elbery's fraud (Count VIII) and constructive fraud (Count IX) claims because Attorney Sheketoff's alleged misrepresentations were in the nature of opinions, which are not actionable as fraud. In order to prevail on a claim for fraud, a plaintiff must prove that a defendant: (1) made false statements of material fact, (2) for the purpose of inducing the plaintiff to act thereon, and (3) that the plaintiff reasonably relied upon the representation as true and acted upon it to his detriment. Millen v. Flexo-Accessories, Inc., 5 F. Supp.2d 72, 73 (D. Mass. 1998) (emphasis added); Macoviak v. Chase Home Mort. Corp., 40 Mass. App. Ct. 755, 760 (1982) (citing Danca v. Taunton Sav. Bank, 385 Mass. 1, 8 (1982)). In order to establish a claim of constructive fraud, a plaintiff must similarly prove that the defendant: (1) purported to speak of his own knowledge, (2) about a fact which was capable of knowledge, (3) about which the defendant had no knowledge, and (4) the statement of fact was untrue. See Pettricca v. Simpson, 862 F. Supp. 13, 16 (D. Mass. 1994) (emphasis added) (citing Kodras v. Land/Vest Properties, Inc., 382 Mass. 34 (1980)).

False statements of opinion, of conditions to exist in the future, or of matters promissory in nature are not actionable. The Chedd-Angier Production Co., Inc. v. Omni Publications International, Ltd., 756 F.2d 930, 939 (1st Cir. 1995) (quoting Yerid v. Mason, 341 Mass. 527,

530 (1960)); Millen Industries, Inc., 5 F. Supp.2d at 73-74. Moreover, liability for fraud cannot be established where the alleged misrepresentation concerns a matter of opinion, estimate, or judgment which was not susceptible of actual knowledge at the time of its utterance. Millen Industries, Inc., 5 F. Supp.2d at 73-74; (citing Logan Equip. Corp. v. Simon Aerials, Inc., 736 F. Supp. 1188, 1199 (D. Mass. 1990)).

In this case, Attorney Sheketoff's alleged misrepresentations are insufficient, as a matter of law, to support Elbery's fraud and constructive fraud claims. According to Elbery, Attorney Sheketoff misrepresented to him that he was guilty and that he should plead guilty. (Undisputed Facts ¶ 77). Even if Elbery were to prove that Attorney Sheketoff made these statements to him, he still has no actionable claim for fraud or constructive fraud because the two statements were not representations of "fact." The Chedd-Angier Production Co., Inc., 756 F.2d at 939. The alleged misrepresentation that Elbery was "guilty," if proven, amounts to nothing more than Attorney Sheketoff's interpretation of G.L. c. 269, §10(a) and his estimation of Elbery's chances for success on the firearms charges if they were tried to a jury at some point in the future. See Yerid, 341 Mass. at 530-31 (seller's false representation that buyers of house would have no further trouble with water in cellar was a not an actionable representation of fact). The alleged misrepresentation that Elbery "should plead guilty," if proven, similarly consists of nothing more than Attorney Sheketoff's judgment as to how Elbery should proceed in light of his interpretation of the statute and his estimate of Elbery's chances for success at trial.

Neither of these two "representations" were susceptible of knowledge at the time that they were allegedly made: Elbery had not yet been tried on the firearms charges and, because of

the amendments to the statute, it was unclear whether the Commonwealth could successfully prove that Elbery committed a violation under G.L. c. 269, §10(a). Millen Industries, Inc., 5 F. Supp.2d at 74. Attorney Sheketoff, like any other attorney, cannot be held liable for an allegedly inaccurate prediction as to whether a jury would ultimately convict Elbery. See Colucci, 25 Mass. App. Ct. at 111 (an attorney is not a guarantor of his client's case).[7] That the alleged misrepresentations were actually matters of opinion or judgment is demonstrated by the fact that Elbery disagreed with Attorney Sheketoff to whether he was guilty or whether he should plead guilty. (Undisputed Facts ¶ 78).

Elbery's disagreement with Attorney Sheketoff's alleged misrepresentations that he was guilty and that he should plead guilty also demonstrates that he did not rely upon the statements to his detriment. See Rodowicz, 192 F.3d at 175 (reasonable reliance is an element of fraud claim). Elbery testified that despite Attorney Sheketoff's allegedly fraudulent statements, he never thought he was guilty or pleaded guilty to the charges against him. (Undisputed Facts ¶ 78). Therefore, Elbery cannot prove another essential element of his fraud claims, that he took action in reasonable reliance upon the allegedly fraudulent misrepresentations to his detriment. Macoviak, 40 Mass. App. Ct. at 760 (plaintiff bears burden of proving reliance).

Because the alleged misrepresentations were in the nature of opinions and not facts, and

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[7] To the extent that Elbery claims that Attorney Sheketoff's opinions are actionable because they were baseless or advanced in bad faith, he has no expert to testify that Attorney Sheketoff was negligent in interpreting G.L. c. 269, §10(a). (Undisputed Facts ¶ 83); Focus Investment Assoc., Inc., 992 F.2d at 1239 (expert testimony needed to determine whether attorney was negligent in failing to conduct an independent investigation of whether loan was proceeding as planned). A fortiori, Elbery has no evidence that Attorney Sheketoff's opinion was baseless, or that he could not have rendered it in good faith.

Elbery cannot demonstrate that he relied upon the alleged misrepresentations, the Court should enter summary judgment in favor of the Sheketoff Defendants on Elbery's fraud (Count VIII) and constructive fraud (Count IX) claims.

E. AS A MATTER OF LAW, ATTORNEY SHEKETOFF'S CONDUCT DOES NOT RISE TO THE LEVEL OF EXTREME AND OUTRAGEOUS; THEREFORE, ELBERY CANNOT MAINTAIN A CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

In order to prove a claim for intentional infliction of emotional distress, a plaintiff must prove (1) that the defendant intended to cause, or should have known that his conduct would cause emotional distress, (2) that the defendant's conduct was extreme and outrageous, (3) that the defendant's conduct caused the plaintiff's distress, and (4) that the plaintiff suffered extreme emotional distress. Anderson v. Boston School Committee, 105 F3d 762 766-67 (1st Cir. 1997) (citing Agis v. Howard Johnson Co., 371 Mass. 140 (1976)). Recovery under this tort is deliberately limited; a plaintiff must show more than "that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort." Doyle v. Hasbro, Inc., 103 F.3d 186, 195 (1st Cir. 1996) (citing Foley v. Polaroid Corp., 400 Mass. 82 (1986)). The plaintiff must show that the defendant's conduct was so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society. Flibotte v. Pennsylvania Truck Lines, Inc., 131 F.3d 21, 27 (1st Cir. 1997) (citation omitted).

In this case, Elbery cannot prevail on his claim for intentional infliction of emotional

distress (Count VI) because, as a matter of law, Attorney Sheketoff's conduct was not extreme and outrageous. See Doyle, 1903 F.3d at 195 (affirming District Court's dismissal of claim for intentional infliction of emotional distress for failure to state a claim where the alleged conduct of the defendant in demanding kickbacks from the plaintiff in order to order to secure shipping contracts for trucking business was not sufficiently extreme or outrageous to support claim); Brown v. Hearst Corp., 54 F.3d 21, 27 (1st Cir. 1995).

Attorney Sheketoff acted in good faith in representing Elbery on the firearms charges. (Undisputed Facts ¶ 57). The record also shows that Attorney Sheketoff attempted to defend Elbery against the firearms charges and to secure Elbery's release pending the appeal of his intent to maim conviction: at the hearing on the motion to vacate the stay of sentence, Attorney Sheketoff requested high bail so that Elbery would maintain his freedom pending the appeal (Undisputed Facts ¶ 26); Attorney Sheketoff filed and argued a motion to suppress evidence of the firearms (Undisputed Facts ¶ 30-31); he attended an evidentiary hearing on the motion and filed an amended motion to suppress and a post-hearing memorandum (Undisputed Facts ¶ 31-32); he requested and received discovery from the Commonwealth, and was prepared to try the case. (Undisputed Facts ¶ 29). Simply stated, there is nothing extreme or outrageous in this conduct. Anderson, 105 F.3d at 766-67 (principal's actions were not extreme or outrageous). Moreover, Elbery has no expert to testify that Attorney Sheketoff's conduct was negligent or inappropriate. (Undisputed Facts ¶ 83). Because there is no evidence that Attorney Sheketoff's actions were negligent, they can hardly qualify as extreme or outrageous. See Brown, 54 F.3d at 27 (noting with approval District Court's finding that defendant's action were not negligent and,

therefore, could not be extreme and outrageous). Accordingly, the Court should enter summary judgment in favor of the Sheketoff Defendants on Elbery's intentional infliction of emotional distress claim (Count VI).

E. ELBERY'S BREACH OF FIDUCIARY DUTY CLAIM IS INAPPLICABLE TO THIS CASE BECAUSE HE DID NOT ENGAGE IN A BUSINESS TRANSACTION WITH ATTORNEY SHEKETOFF.

Because of the fiduciary duty owed by an attorney to his client, he may not engage in a business transaction with the client which would unfairly benefit the attorney at the expense of his client. Widett & Widett v. Snyder, 392 Mass. 778, 782 (1984) (loan from law firm to sophisticated clients enforceable, no overreaching or breach of fiduciary duty found); Goldman v. Kane, 3 Mass. App. Ct. 336, 340-41 (1975) (affirming judgment for client on breach of fiduciary duty claim where attorney had made a $30,000 loan in exchange for $30,000 note, title to client's $86,000 home, and other personal property). The ordinary fee contract is not a "business transaction" between a lawyer and a client subject to this rule. See Sears Roebuck & Co. v. Goldstone & Sudalter, P.C., 128 F.3d 10, 17 (1st Cir. 1997).

In this case, Elbery does not allege, nor can he prove, that he engaged in a business transaction with Attorney Sheketoff. His claim for breach of fiduciary duty is therefore inapplicable to the facts of this case. See Widett & Widett, 392 Mass. at 782; Goldman, 3 Mass. App. Ct. at 340-41. To the extent that Elbery's claim for breach of fiduciary duty merely restates his legal malpractice claim, it is subject to the requirement of expert testimony and fails because he has no expert. See Harris, 39 Mass. App. Ct. at 352-53; Brown, 17 Mass. App. Ct. at 566. Therefore, the Court should enter summary judgment in favor of the Sheketoff Defendants on

Elbery's claim for breach of fiduciary duty (Count IX).

CONCLUSION

For the reasons discussed above, the Sheketoff Defendants respectfully request that the Court enter summary judgment in their favor on all of Elbery's claims against them in his amended complaint: Section 1983 (Counts I, II, III, IV, and VII), legal malpractice (Count V), intentional infliction of emotional distress (Count VI), fraud (Count VIII), breach of contract/fiduciary breach/constructive fraud (Count IX) and damages (Count X).

Respectfully submitted,
ROBERT SHEKETOFF, KIMBERLY HOMAN, and
SHEKETOFF & HOMAN
By their Attorneys,
SUGARMAN, ROGERS, BARSHAK & COHEN, P.C.

By: _____

Anthony M. Doniger, BBO #129420
John G. O'Neill, BBO #630272
101 Merrimac Street, 9th Floor
Boston, MA 02114
(617) 227-3030

Dated: October 27, 2000

CERTIFICATE OF SERVICE

I, Anthony M. Doniger, attorney for the defendants, Robert Sheketoff, Kimberly Homan and Sheketoff & Homan, hereby certify that on this 27 day of October 2000, I served the within Memorandum in Support of Defendants' Motion for Summary Judgment upon the other parties to this litigation by causing copies thereof to be sent by first-class mail, postage prepaid to:

Michael Elbery
P.O. Box 9106
M.C.I. Concord
Concord, MA 01742

Gerald Fabiano, Esquire
Pierce, Davis & Perritano, LLP
Ten Winthrop Square
Boston, MA 02110

Michael Elbery
168 Fairfield Street
Needham, MA 02192

and all counsel of record in the consolidated cases.

Anthony M. Doniger