

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)	

and

MICHAEL ELBERY,)	
Plaintiff)	
)	
v.)	CIVIL ACTION NO.
)	97-11743-MLW
DANIEL SKLUT, JAMES CARLIN,)	
STEPHEN FAUCHER, CARL HANSON,)	
CHESTER JOHNSON, JAMES HURLEY,)	
WAYNE SAMPSON, ROBERT McGINLEY,)	
and THE TOWN OF SHREWSBURY)	
Defendants)	

**MOTION OF THE DEFENDANTS, ROBERT SHEKETOFF,
KIMBERLY HOMAN AND SHEKETOFF & HOMAN, FOR
SUMMARY JUDGMENT AND FOR ENTRY OF SEPARATE
AND FINAL JUDGMENT PURSUANT TO FED. R. CIV. P. 54(b)**

This is a legal malpractice action brought by the Plaintiff, Michael Elbery, against Defendants Robert Sheketoff, Kimberly Homan and Sheketoff & Homan (collectively, the "Sheketoff Defendants") regarding Attorney Sheketoff's representation of him in connection with certain firearms charges filed against him in August 1994. As a result of the firearms charges, a stay of execution on Elbery's prior conviction in 1993 for assault with intent to maim was vacated, and he was remanded to M.C.I. Concord to begin serving his sentence. In March 1995, approximately one month prior to trial, Elbery discharged Attorney Sheketoff from

representing him on the firearms charges (although he requested that Attorney Sheketoff continue to represent him on the appeal of the previous conviction) and retained new counsel. He was eventually acquitted of the firearms charges.

Elbery contends that Attorney Sheketoff secretly conspired with the Worcester County District Attorney's Office and the Shrewsbury Police Department to wrongfully imprison him while the firearms charges were pending and to commit numerous other violations of his constitutional rights in violation of 42 U.S.C., §1983 (Counts I, II, III, IV and VII). In addition, Elbery contends that Attorney Sheketoff committed legal malpractice (Count V) and made various fraudulent misrepresentations (Count VIII) to him while representing him on the firearms charges. He also alleges that Attorney Sheketoff is liable for intentional infliction of emotional distress (Count VI). Lastly, Elbery seeks recovery against the Sheketoff Defendants on the theories of breach of contract, fiduciary breach, and constructive fraud (Count IX).¹

Pursuant to Fed. R. Civ. P. 56(b), the Sheketoff Defendants now move for summary judgment in their favor. 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 Section 1983 claims. 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.

¹ Elbery's complaint contains an additional count entitled "Count X - Damages." This Count does not assert wrongdoing on the part of the Sheketoff Defendants.

Therefore, the Sheketoff Defendants are entitled to summary judgment on his 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 conduct was not extreme or outrageous. They are also 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.

In support of their motion, the Sheketoff Defendants submit the accompanying Statement of Undisputed Material Facts Pursuant to L.R. 56.1, Memorandum of Law, Affidavit of Robert Sheketoff, Affidavit of Anthony M. Doniger, and Affidavit of Karen L. MacNutt.

As there is no just reason for delay, the Sheketoff Defendants also request, pursuant to Fed. R. Civ. P. 54(b), that the Court direct the Clerk to enter separate and final judgment in their favor on all of Elbery's claims.

Re: Michael Elbery v. Sheketoff, et al.
Motion for Summary Judgment

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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
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Dated: October 18, 2000

CERTIFICATE OF SERVICE

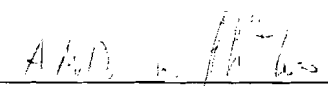
I, Anthony M. Doniger, attorney for the defendants, Robert Sheketoff, Kimberly Homan and Sheketoff & Homan, hereby certify that on this 18 day of October 2000, I served the foregoing Motion for Summary Judgment upon the other parties to this litigation by causing copies thereof to be sent by first-class mail, postage prepaid to:

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

Michael Elbery
168 Fairfield Street
Needham, MA 02192

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

and to all counsel of record in the consolidated cases.


Anthony M. Doniger