UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL ELBERY,
Plaintiff

V.

ROBERT SHEKETOFF, ET AL
Defendants

CIVIL ACTION

NO. 98-10163-MLW

JUDGMENT

WOLF, D. J.

In accordance with the Court's Memorandum and Order dated September 26, 2001 granting Defendants' motion for summary judgment (Docket No. 63) and denying Plaintiff's motion for summary judgment (Docket No. 73), in the above-entitled action, it is hereby ORDERED:

Judgment for the Defendants.

By the Court,

September 26, 2001
Date

Deputy Clerk

(JUDGE-SJ.wpd - 12/98)

[jgm.]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL ELBERY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 98-10163-MLW
	)	
ROBERT SHEKETOFF, ET AL.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

WOLF, D.J. September 26, 2001

I. SUMMARY

Plaintiff Michael Elbery, pro se, has sued his former attorney Robert Sheketoff, Sheketoff's partner, Kimberly Homan, and their law partnership, Sheketoff and Homan, for purported misconduct by Sheketoff in his representation of Elbery. After the period for discovery expired, the defendants moved for summary judgment.

Elbery, who was then incarcerated, moved for: a stay of this case; a continuance of summary judgment proceedings; extra time to oppose the motion for summary judgment and file his own motion for summary judgment; an opportunity to provide the court with a typed version of his opposition to the motion for summary judgment; and for notice of Orders entered in this case.

The essence of Elbery's motion for a stay and other relief is his claim that he cannot adequately present his case while

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incarcerated. The court has previously found this contention to be unproven, but offered Elbery an opportunity to seek extra time to submit his pleadings. See September 28, 2000 Order, ¶ 2. Elbery has presented no new facts to support his renewed request for a stay. Defendants are entitled to a resolution of this case, charging them with malpractice, which was filed in 1998. Moreover, Elbery has demonstrated his ability to address this case while incarcerated by opposing the defendants' motion for summary judgment and timely filing his own motion for summary judgment. Therefore, the foregoing motions are being denied.[1]

II. THE STANDARD OF REVIEW

Elbery is a lay person representing himself. Therefore, his pleadings must be liberally construed. See Haines v. Kerner, 404 U.S. 519, 520 (1972). Nevertheless, established legal standards apply to claims made by pro se litigants as well as to claims made by parties represented by counsel. See Francis v. Angelo, No. 00-80-BK, 2001 WL 194926, at *4 n.8 (D. Me. Feb. 23, 2001) ("[D]eference to the plight of the pro se pleader must be counterbalanced against the policy concerns that animate the

[1]While Homan and the firm of Sheketoff and Homan are named as defendants, Elbery's allegations and evidence relate exclusively to Sheketoff's conduct. Thus, this Memorandum discusses only the evidence relating to Sheketoff.

rigorous pleading requirements of Federal Rule of Civil Procedure 56 and our complimentary local rules."). Summary judgment may be granted against pro se litigants if they fail to satisfy those standards. See id.

The court's discretion to grant summary judgment is governed by Federal Rule of Civil Procedure 56. Rule 56 provides, in pertinent part, that the court may grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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). In making this assessment, "the court must look at the record in the light most favorable to the party opposing the motion and must indulge all inferences favorable to that party." Stepanischen v. Merchants Despatch Transp. Corp., 722 F.2d 922, 928 (1st Cir.1983); Attallah v. United States, 955 F.2d 776, 779 (1st Cir.1992); Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir.1990).

In determining the merits of a motion for summary judgment, the court is compelled to undertake two inquiries: (1) whether the factual disputes are genuine, and (2) whether any fact genuinely in dispute is material. Anderson v. Liberty Lobby, 477 U.S. 242, 247-48 (1986). "As to materiality, the substantive law will

identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law properly preclude the entry of summary judgment." Id. To determine if the dispute about a material fact is "genuine," the court must decide whether "the evidence is such that a reasonable [factfinder] could return a verdict for the non-moving party." Id.; see also Medina-Munoz, 896 F.2d at 8; Oliver v. Digital Equipment Corp., 846 F.2d 103, 105 (1st Cir. 1988).

The standard of review of cross-motions for summary judgment is:

> identical to that for an individual motion, the Court must handle each of the cross motions as if they were two distinct, independent motions. Thus, in evaluating each motion, the Court must consider the facts and inferences in the light most favorable to the nonmoving party.

United States v. Murray, 73 F. Supp. 2d 29, 33 (D. Mass. 1999).

III. FACTS

The following facts are undisputed unless otherwise indicated. Sometime in 1982 or 1983, Elbery applied for and received a firearms identification card ("FID card") from the Shrewsbury Police Department. Defendants' Statement ¶ 1; Elbery Affidavit ¶ 8. In 1984, Elbery applied to the town of Shrewsbury for a license to carry firearms. Defendants' Statement ¶ 2. His request was denied. Id. Around the same time, Elbery applied to the City of

Worcester for a license to carry firearms. Id. His request was granted and he was issued a license to carry. Id.

Between 1985 and 1992, Elbery was arrested on over a dozen criminal charges by the Shrewsbury and Worcester police. Id. ¶ 3. On February 28, 1990, Elbery was arrested by the Shrewsbury Police Department on an outstanding warrant for assault and battery with a dangerous weapon. The Shrewsbury Police Department sent a letter to the Worcester Police Department advising that Elbery had been arrested and that he had been carrying a loaded 9mm pistol at the time of his arrest. Id. ¶ 4.

On March 20, 1990, the Worcester Police Department sent Elbery a letter notifying him that his license to carry was being revoked. Id. ¶ 5. The Worcester Police Department also sent Elbery a letter in 1990 that ordered him to surrender his firearms. Id. ¶ 5. Elbery did not turn in his firearms, apparently because he still had a valid FID card issued by the Shrewsbury Police Department. Id. ¶ 6. Elbery possessed several handguns, including a Glock pistol and a Smith & Wesson .38 Special, as well as several rifles, including an AK-47, an Uzi, a Remington AR-15, and a shotgun. Id. ¶ 7.

In 1992, Elbery was involved in a bar fight in Worcester. Id. ¶ 8. He was prosecuted for attempting to gouge out the eye of an off-duty Westboro police officer, and in 1993, a jury found Elbery

guilty of assault, disorderly conduct, and assault with intent to maim. Id. ¶¶ 8-9. He was sentenced to probation for the disorderly person and assault convictions and was sentenced to 10 years in MCI Concord for the assault with intent to maim. Id. ¶ 9. In July 1993, Elbery's defense attorney filed a motion to stay the prison sentence pending appeal. Id. ¶ 10. The motion was granted and Elbery was released on $7,500 bail. Id. ¶ 10.

Elbery hired Robert Sheketoff ("Sheketoff") to pursue this appeal. Id. ¶ 11. Sheketoff was admitted to the Massachusetts bar in 1976 and has represented criminal defendants for over 24 years. Defendants' Statement ¶ 12. He has represented hundreds of defendants in connection with criminal charges in state and federal court. Id. ¶ 12. He has represented numerous defendants who were charged with firearms violations pursuant to Massachusetts General Laws chapter 269 ("Chapter 269"), the statute that governs possession and carrying of firearms. Id. ¶ 13. He is familiar with the standards of care generally applicable to criminal defense attorneys in Massachusetts, and in particular, with criminal defense attorneys representing defendants in connection with firearms charges under Chapter 269. Id. ¶ 13.

Elbery paid Sheketoff $15,000 in March 1994 to pursue all post-conviction relief "to exhaustion" in the Massachusetts courts relating to the attempted mayhem conviction. Elbery Affidavit ¶ 5.

Elbery asserts that Sheketoff "produced a motion for new trial regarding [that] conviction on or about February '96[, which] was, at a minimum, ineffective and Sheketoff's $15,000 fraud against me was complete." Id.

At some point before 1994, Elbery lease a storage unit at E-Z Mini Storage ("the E-Z"), which is located in Shrewsbury. Id. ¶ 14. Elbery stored a 1990 Corvette Stingray in his storage unit, as well as various firearms and ammunition including a Remington 870 12-gauge shotgun, an AK-47, an Uzi 9-mm pistol, and a .22 caliber Beretta semi-automatic pistol. Id. ¶ 15. Some of the guns were in the Corvette. Id. ¶ 15; Elbery Affidavit ¶ 6.

On August 4, 1994, there was a fire at the E-Z. Defendants' Statement ¶ 16. In the early morning of August 5, 1994, Elbery received a telephone call from the Shrewsbury Police Department to go to the E-Z and claim his belongings. Id. ¶ 17; Elbery Affidavit ¶ 10. He arrived at the E-Z office, where he spoke with police officer James Hurley ("Hurley"). Defendants' Statement ¶ 18. Defendants assert that Elbery and Hurley discussed the fact that there were guns in the storage bin and that Elbery had a prior criminal conviction. Id. ¶ 18.

Elbery asserts that Hurley stated that he knew that Elbery had a valid FID card, "but he claimed it was revoked because of the mayhem conviction." Elbery Affidavit ¶ 10. Elbery asserts that he

told Hurley that the FID was valid and had not been revoked. Id. Elbery also asserts that Hurley told him that there were guns in his storage unit, that it was illegal for Elbery to have guns, and "implied that he was going to arrest me." Id. ¶¶ 10-11.

Elbery states that he called Sheketoff that morning from the E-Z "as a result of the Hurley conversation and asked for legal advice because Hurley was going to arrest me." Elbery Affidavit ¶ 12. Elbery relayed the content of the conversation with Hurley to Sheketoff, and Sheketoff asked if Elbery had a valid FID card. Id. ¶ 13. Elbery responded that he had a valid FID card that was issued by the Shrewsbury Police Department in the early 1980's and that it had not been revoked. Id. ¶ 13. Elbery also told Sheketoff that the police were in his storage unit. Id. Sheketoff responded "What's their problem," and "Tell them to stay out of your E-Z unit." Id. ¶ 14. "Sheketoff assured me that there was nothing that the police could do to me regarding the guns at E-Z, that I had not violated any law." Id. ¶ 14.

That morning at the E-Z, Elbery also spoke with police officer Chester Johnson ("Johnson") who was conducting the arson investigation. Defendants' Statement ¶ 18. Johnson allowed Elbery to check on his belongings in the storage unit. Id. ¶ 18.

Later in the day, the police showed Elbery a search warrant. Defendants' Statement ¶ 19. At some point thereafter, Elbery was

arrested on firearms charges. Id. ¶ 19.

After he was arrested, Elbery called Sheketoff and retained him as his attorney. Id. ¶ 20. During the telephone call, Sheketoff "was flabbergasted that the S.P.D. arrested me and searched by E-Z unit." Elbery Affidavit ¶ 18. The terms of the engagement were that Elbery would pay Sheketoff $5,000 and in return Sheketoff would represent Elbery against he firearms charges. Defendants' Memorandum ¶ 20.

On August 8, 1994, a formal complaint was filed against Elbery in Westboro District Court charging him with one count of illegally carrying a firearm without a license and five counts of illegally possessing firearms without a FID card. Defendants' Statement ¶ 21. Elbery was arraigned that day on the firearms charges and bail was set at $5,000. Id. ¶ 22. He did not make bail and remained in custody. Id. ¶ 22.

Elbery asserts that he told Sheketoff at the arraignment that he could make bail, but that Sheketoff told him "not to make bail because it would show 'good faith' to Judge Toomey [but that] if I posted bail Toomey would think I was running on the 'stay' of the attempted mayhem conviction." Elbery Affidavit ¶ 20. "As I result I did not make bail but stayed in jail not able to retrieve my F.I.D. card, totally relying on my attorney." Id.

Elbery also asserts that he "ordered Sheketoff to tell the

arraignment judge that I had an F.I.D. Card. Sheketoff refused saying 'it was not the right time to present the F.I.D. or alert the Court that I had a valid F.I.D. card.'" Elbery Affidavit ¶ 21. Elbery asserts that at the arraignment, Sheketoff spoke with the Assistant District Attorney who was prosecuting the case. Id. ¶ 22.

On August 10, 1994, Massachusetts Superior Court Judge Toomey held a hearing in the Worcester Superior Court on the Commonwealth's motion to vacate the stay of the 10-year prison sentence on the intent to maim conviction. Defendants' Statement ¶ 24. Before the hearing, Sheketoff met with Elbery's wife outside of the courthouse and she showed Elbery's FID card to Sheketoff. Id. ¶ 25. She refused to give the FID card to Sheketoff. Id.

During the hearing, Sheketoff represented to Judge Toomey that Elbery had a valid FID card and requested that the court deny the motion to vacate and instead reinstate bail at a higher amount. Id. ¶ 26. After Sheketoff argued that Elbery had a valid FID card, Judge Toomey stated that:

> [I]f it turns out in the next couple of months or weeks or whatever that there is an indication that he indeed was not in violation of law in terms of possessing those particular firearms, you may address the court again on reinstituting the stay.

Elbery Attachments, Ex. R at 11 (transcript of hearing). However, "based upon representation by the district attorney that the local

police have revoked his license and his F.I.D. card, whatever it is he has to have," Judge Toomey granted the Commonwealth's motion to vacate and Elbery was remanded to MCI Concord. Defendants' Statement ¶ 27; Elbery Attachments, Ex. R at 11.

After the hearing, Elbery states that Sheketoff told him that "'Toomey is saying that he will let you back on the stay if you have the proper licenses for the guns.'" Elbery Affidavit ¶ 25a. Elbery "ordered Sheketoff to produce to Judge Dan Toomey my valid F.I.D. card . . . immediately after the stay hearing." Id. ¶ 26. However, "Sheketoff refused these orders, saying 'Toomey did not know the gun laws because he is a Superior Ct. judge.'" Id.

Also after the hearing on the motion to vacate the stay, "Sheketoff abruptly changed his claim that I was not guilty of the gun charges." Id. ¶ 29. "Sheketoff told me that due to a '91 amendment to Mass. c. 269-10a that the handgun that was in my E-Z unit which was in the car caused me to violate Mass. c. 269-10a-'carrying.'" Id.

On September 9, 1994, Sheketoff represented Elbery at a pre-trial conference on the firearms charges at the Westboro District Court. Assistant District Attorney John Revelli represented the Commonwealth at the conference. Defendants' Statement ¶ 28. During the conference, Sheketoff advised that Elbery intended to defend the charges in part based on his FID card. Id. ¶ 29.

Sheketoff also requested that the Commonwealth provide its file on Elbery's firearms licenses and their alleged revocation, and the Commonwealth agreed to do so. Id. ¶ 29.

On September 29, 1994, Sheketoff filed a motion to suppress evidence of the firearms on the grounds that the searches of Elbery's storage area were without a warrant, probable cause, or other justification in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Article Fourteen of the Massachusetts Constitution. Id. ¶ 30. Before the hearing, Elbery "ordered Sheketoff to tell the judge [ ] at the 10-21-94 Evidence Suppression Hearing of the gun charges, that I had an F.I.D. card and present the F.I.D. card as proof of it to the judge." Elbery Affidavit ¶ 34. Also before the hearing, Sheketoff asked Elbery if he had consented to the search of the storage space. Id. ¶ 44. Elbery told him that he did not consent. Id.

Sheketoff attended the October 21, 1994 evidentiary hearing on the motion to suppress, after which the court requested that the parties file post-hearing briefs. Defendants' Statement ¶ 31. After the hearing, "Sheketoff would not take [Elbery's] calls." Elbery Affidavit ¶ 35.

On October 26, 1994, Sheketoff filed a post-hearing brief and an amended motion to suppress. Defendants' Statement ¶ 32. Along with the amended motion, Sheketoff submitted an affidavit in which

he attested that he had seen Elbery's FID card and that the Commonwealth had failed to produce any evidence that it had been revoked. Id. ¶ 32. However, on November 21, 1994, District Court Judge McCann denied Elbery's motion to suppress and issued his findings. Id. ¶ 33.

The parties agree that: (1) Elbery wanted to file a motion to dismiss; and (2) Sheketoff told Elbery that he believed that filing the motion would be unwise. Elbery asserts that from the time of the arraignment until after the hearing on the motion to suppress, Elbery "ordered Sheketoff . . . to present my F.I.D. card of proof of it and Motion to Dismiss the 6 gun charges." Elbery Affidavit ¶ 27. Furthermore, Elbery "told Sheketoff that we must get rid of the 5 [Section] 10(h) charges before trial through dismissal, and that there was nothing to lose by a Motion to Dismiss based on F.I.D. Sheketoff agreed that the 5 [Section] 10(h) charges would be dismissed." Id. However, "Sheketoff refused to do as I ordered." Id. ¶ 27a. "Sheketoff said that presenting the F.I.D. card to the presiding judges was not appropriate and a waste of time under the circumstances." Id. Elbery asserts that "Sheketoff claimed there was no point to presenting the F.I.D. because I was guilty of the 10a-carrying charge." Id.

Elbery asserts that he told Sheketoff to obtain a copy of his F.I.D. card from the Massachusetts Department of Safety, to get a

court order for the Shrewsbury Police Department to produce his F.I.D., and to call Elbery's wife to "complete the arrangements I made to have my wife give Sheketoff the F.I.D. card." Elbery Affidavit ¶ 28. Elbery "gave these orders because the S.P.D. defendants and D.A.'s Office were claiming my F.I.D. was revoked. My objective in making these orders was to get the charges dismissed." Id. However, "Sheketoff refused these orders saying he could get this evidence/information through discovery without going to the judge for a Court order." Id. Elbery asserts that "Sheketoff then shut me off from 10-21-94 until the first week in March '95 when I fired him. During that period of time Sheketoff would not take my calls, except once on Christmas '94." Id.

Defendants assert that at various times during Sheketoff's representation of Elbery, Elbery requested that Sheketoff pursue a motion to dismiss the firearms charges on the grounds that Elbery had a valid FID card at the time of his arrest. Defendants' Statement ¶ 34. Sheketoff considered Elbery's request and whether it would obtain a dismissal of the firearms charges. Id. ¶ 35. Based on his interpretation of the applicable statutes, Sheketoff advised Elbery that a valid FID card was a defense to the charges for possession without a FID card, but not to the charge for carrying without a license. Id. ¶ 40.

Defendants assert that Elbery insisted that he could not be

guilty of carrying a weapon without a license because he interpreted the statute to prohibit only carrying a handgun on his person or in his car. Id. ¶ 41. Sheketoff told Elbery that under the prior iteration of the statute, "carrying" was equated with movement, but that the 1990 amendments to the statute had removed all reference to the term "carrying" in defining prohibited conduct. Id. ¶ 42. Sheketoff also advised Elbery that the plain language of the statute as amended did not require a defendant to be "carrying" or that the defendant have the firearm on his person, but rather the Commonwealth only had to prove that Elbery had a firearm in his possession away from his residence or business, or a firearm under his control in an automobile away from his residence or business. Id. ¶ 43. Possession in Massachusetts includes constructive possession. Id. ¶ 43. Sheketoff also advised Elbery that the Commonwealth could argue that he had violated the statute by having a firearm in or under his control in a car at the storage facility, which was neither his residence or place of business. Id. ¶ 44.

Sheketoff was aware that even if the firearm charges were dismissed, Judge Toomey could reinstate the 10-year sentence for the intent to maim conviction. Defendants' Statement ¶ 45. Because Elbery had been arrested with numerous firearms, it was Sheketoff's opinion that it was unlikely that Judge Toomey would

have reinstated the stay, which was entirely discretionary. Id. ¶¶ 45, 60.

Furthermore, Sheketoff was concerned that if he filed the motion to dismiss, it might prompt the Worcester County District Attorney's office to refer Elbery for federal prosecution. Id. ¶ 46. Pursuant to 18 U.S.C. § 922, it would be a violation of federal law for a convicted felon such as Elbery to possess a firearm or to receive a firearm that was in or affected interstate commerce. Id. ¶ 46. Sheketoff had an experience with the District Attorney's office in which the Commonwealth offered a defendant a plea bargain on a firearms charge that the defendant accepted only to have the case referred to the federal Bureau of Alcohol, Tobacco, and Firearms ("ATF") and the defendant prosecuted for federal charges based in part on his plea in the state case. Id. ¶ 48.

Sheketoff was concerned that if he filed a motion to dismiss, it would highlight the legal issues for the prosecutor, who might then seek advice from other prosecutors in his office. Id. ¶ 50. Sheketoff was also concerned that one of the prosecutors would recommend that the case be referred for federal prosecution. Id. ¶ 50. Elbery asserts that Sheketoff never told him that he was concerned about the possibility of federal prosecution. Elbery Affidavit ¶ 47.

Finally, Sheketoff believed that the motion to dismiss was unlikely to succeed because a FID card was not a defense to the carrying charge. Defendants' Statement ¶ 59. In the end, Sheketoff determined that it would not be in Elbery's best interest to pursue the motion to dismiss. Id. ¶ 51. Rather, Sheketoff determined that it would be better for Elbery to proceed to trial and defend against the possession charges on the grounds that Elbery had a valid FID card at the time of his arrest. Id. ¶ 51. Sheketoff decided that the best defense to the carrying charge was the theory that the storage unit was the functional equivalent of a residence and that the statute was therefore inapplicable. Id. ¶ 53. Sheketoff hoped that he could raise these issues in a motion for a required finding of not guilty once the Commonwealth had presented its case, or that he would be able to convince the prosecutor or a busy trial judge that the Commonwealth could not prove its case. Id. ¶ 52.

Sheketoff told Elbery that he would not file a motion to dismiss, and that if Elbery did not agree, he could seek new counsel. Id. ¶ 53. Elbery fought with Sheketoff over the motion to dismiss, but did not seek new counsel. Id. ¶ 54. Elbery knew that he could fire Sheketoff at any time and he had the funds to hire a new attorney. Id. ¶ 54.

During Sheketoff's representation of Elbery, the prosecutor

offered a plea agreement of one year for each of the firearms charges with sentences to run concurrently. Id. ¶ 55. Sheketoff communicated this offer to Elbery, who immediately refused it. Id. ¶ 55. At no time during Sheketoff's representation of Elbery did the prosecutor offer to dismiss the charges against Elbery. Id. ¶ 56.

On December 14, 1994, Judge McCann scheduled a trial on the firearms charges for January 18, 1995 in Worcester District Court. Id. ¶ 63. At the request of the prosecutor, the trial was continued until April 3, 1995. Id. ¶ 64. On February 7, 1995, Elbery wrote a seven-page, single-spaced, typewritten letter to Sheketoff. Elbery Attachments, Ex. G. In that letter, Elbery expressed in detail his dissatisfaction with Sheketoff's representation and set out Elbery's perspective on the substantive and procedural legal issues relating to his cases. At the end of the letter, he asked Sheketoff whether he wanted to resign from the case.

Sometime before the April 3, 1995 trial date, Sheketoff wrote an undated letter to Elbery, which may have been a response to Elbery's February 7 letter. Elbery Attachments, Ex. H. In that letter, Sheketoff reiterated his interpretation of the amended statute, indicated that he did not believe that a motion to dismiss was appropriate, stated "I want the FID card as soon as

possible[,]" and told Elbery that he could "feel free to fire me . . . . You should have counsel that you trust."

At a pretrial hearing in February 1995, "Sheketoff told me to plead guilty to the charges (all) and take 1 year in jail. He told me it was a good deal the government was offering. I was furious with Sheketoff that he even talked to the government about a plea." Elbery Affidavit ¶ 38. Elbery and Sheketoff had further discussions about the case, and "Sheketoff finished that last meeting between us on the case by laughing at me. At the time I was behind bars in the Worcester County holding tank." Id. ¶ 39.

In March 1995, Elbery fired Sheketoff on the firearms carrying and possession charges, but defendants assert that Elbery allowed Sheketoff to continue to represent Elbery on the appeal of the assault, disorderly conduct, and intent to maim convictions. Defendants' Statement ¶¶ 65-66. Defendants assert that Sheketoff continued to represent Elbery on the appeal until 1996. Id. ¶ 66. Elbery disputes that he allowed Sheketoff to continue to represent him on the attempted mayhem charges after having fired him on the gun charges. Elbery Affidavit ¶¶ 2-4.

Elbery retained attorney Kenneth Brekka to represent him on the firearms charges. Defendants' Statement ¶ 67. Thereafter, "the gun case against [Elbery] came to a screeching halt." Elbery's Second Affidavit ¶ 6. "Within a week of retention Brekka

had the Worcester D.A.'s Office begging for a dismissal of all charges." Id. In other words, one of the prosecutors offered to dismiss the charges against Elbery. Defendants' Statement ¶ 68. Elbery refused to agree to a dismissal of the charges because he believed that if he agreed, he would not be able to sue the Shrewsbury police. Id. ¶ 68. Therefore, he chose to remain incarcerated so that he could proceed to trial. Id. ¶ 68.

Elbery testified about this decision:

> [Attorney Brekka] called me up, and he said, Listen, it's all over. He said, They want you to dismiss the case.
>
> I said, I"m not going to dismiss it. I said, I'll go to trial. I said, I'm not guilty. I said, I'm not going to dismiss it, because then I can't sue the cops.
>
> The jailhouse lawyers told me that. They said, If you dismiss that case, you're not - you've got an unbelievable case against these people. Puelo told me, he said, If you allow them to dismiss it, that's - I said, You've got to be kidding.
>
> He said, No. He said, That's the law. If you allow a dismissal, you get no lawsuit.
>
> So I said, No. I'm gonna try him.

Doniger Affidavit, Ex. A: Elbery Dep. at 157-58.

On April 3, 1995, a trial was held in Worcester District Court on the possession and carrying charges. Id. ¶ 69. No one appeared on behalf of the Commonwealth and Elbery was found not guilty on the weapons charges. Id. ¶ 69.

Sheketoff asserts that at all times during the representation,

he represented Elbery in good faith and in compliance with the standards of care applicable to criminal defense attorneys defendant a client against firearms charges. Id. ¶¶ 57-58. Elbery disputes this assertion.

Sheketoff also asserts that at no time did he communicate with or form an agreement with any member of the Worcester County District Attorney's Office to keep Elbery in jail, to deprive him of his constitutional rights, to cover up an allegedly illegal search and seizure, or to deprive him of access to the courts in connection with the firearms charges. Id. ¶ 61. Elbery disputes this assertion. Sheketoff also asserts that he did not communicate with or form an agreement with any member of the Shrewsbury Police Department to put or keep Elbery in jail, to deprive him of his constitutional rights, to cover up an allegedly illegal search and seizure, or to deprive him of access to the courts. Elbery disputes this assertion. Sheketoff does not know any members of the Shrewsbury Police Department, nor do they know him. Id. ¶ 62.

Elbery asserts that throughout the representation:

> Sheketoff would not let me give up hope. He led me to believe via his "little assurances" there was, as he said, "something he could probably do for me" regarding the 6 gun charges. He told me "not to worry that he would handle the case" that I was "getting the best legal defense."

Elbery Affidavit ¶ 30. Furthermore, Elbery asserts that he did not

understand the law and believed that "lawyers had some kind of magic that they knew about to win cases." Id. ¶ 31. He "never thought it made any sense that I was guilty of 'carrying.'" Id. Sheketoff would "convince [Elbery] he knew that law and that I did not understand it." Id.

Elbery asserts that he did not fire Sheketoff sooner because he "put his faith in Sheketoff's claim that I would receive the best possible representation." Id. ¶ 35. Elbery "relied on Sheketoff's knowledge and reputation to defend me as the law of the case allowed. I presumed Sheketoff was pursuing all my rights regarding the charges against me. I acted by not hiring another lawyer for 7 months as I relied on his fraudulent and deliberately misleading legal advise and 'little assurances' of false hope until he gave me no hope." Id. ¶ 36.[2]

IV. DISCUSSION

For the reasons discussed in detail below, defendant's motion for summary judgment on all counts is being allowed. In summary, Elbery has produced no evidence to support his conclusory

[2]Elbery also asserts that he has been the victim of a racial and ethnic conspiracy against him by a number of attorneys, judges, and town officials, none of whom are named defendants in this case. Those allegations are not relevant to the claims against the defendants in this case and, therefore, are not recited in this Memorandum.

allegation that Sheketoff conspired with the Shrewsbury Police Department or the Worcester County District Attorney's Office to imprison him or to violate his constitutional rights. Moreover, none of the defendants are state actors and there is not sufficient evidence to prove that they conspired with state actors. Therefore, they are entitled to summary judgment on Elbery's Section 1983 claims (Counts I, II, III, IV, and VII).

In addition, Elbery has offered no expert testimony to support his legal malpractice and breach of contract claims (Counts V and IX). In particular, Elbery has failed to present competent evidence to demonstrate that Sheketoff breached the relevant standard of care or that Sheketoff was the proximate cause of the purported harm to Elbery.

Defendants are also entitled to summary judgment on Elbery's claim of intentional infliction of emotional distress (Count VI) because Sheketoff's actions were not extreme or outrageous. In addition, defendants are entitled to summary judgment on Elbery's claims for constructive fraud and fraud (Counts VIII and IX) because the alleged misrepresentations that Sheketoff made were in the nature of opinions or reassurances, not statements of fact or guarantees, and are, therefore, not actionable. Finally, defendants are entitled to summary judgment on Elbery's breach of fiduciary duty claim (Count IX) because there is no evidence that

Sheketoff failed to act in a competent, diligent, and zealous manner.

A. Elbery has offered no evidence to support his theory that defendants conspired to deprive him of his constitutional rights.

Defendants have moved for summary judgment on Counts I, II, III, IV, and VII in which Elbery asserts that defendants conspired with various state actors to deprive him of his constitutional rights. If proven, 42 U.S.C. § 1983 would provide a remedy for defendants' misconduct. Dennis v. Sparks, 449 U.S. 24, 28 (1980); Adickes v. S. H. Kress & Co., 398 U.S. 144, 152 (1970).

"To survive [defendants'] motion for summary judgment, [Elbery] must establish that there is a genuine issue of material fact as to whether [Sheketoff] entered into an illegal conspiracy that caused [him] to suffer a cognizable injury." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986). However, even liberally construing his claim and looking at the record in the light most favorable to Elbery, there is no evidence from which a reasonable factfinder could return a verdict for him. Therefore, defendants' motion for summary judgment on Counts I, II, III, IV, and VII is being allowed.[3]

[3]To the extent that Count VII asserts that defendants are directly liable under Section 1983 rather than for conspiracy, this claim fails because none of the defendants are state actors.

Civil conspiracy is a very limited cause of action. See 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 an agreement between the parties to inflict a wrong against or injury upon another, and an overt act the results in damages." Earle v. Benoit, 850 F.2d 836, 844 (1st Cir. 1988) (internal quotation marks and citation omitted). 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. Fudala, 782 F.2d 280, 286 (1st Cir. 1983) (internal citation and quotation marks omitted). Indeed, "[a]t the least [the issue is whether] the parties decide to act interdependently, each actor deciding to act only because he was aware that the others would act similarly[.]" Id.

Moreover, a conspiracy claim must be supported by material facts, not merely conclusory statements. See Slotnick v. Stavisky, 560 F.2d 31, 33 (1st Cir. 1977) ("It has long been the law in this

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See Rockwell v. Cape Cod Hosp., 26 F.3d 254, 256-57 (1st Cir. 1994) (internal citations omitted) (finding that physicians who involuntarily committed person pursuant to state law were not liable as state actors).

and other circuits that complaints cannot survive a motion to dismiss if they contain conclusory allegations of conspiracy but do not support their claims with reference to material facts."); see also Forbes v. Rhode Island Brotherhood of Correctional Officers, 923 F. Supp. 315, 325 (D.R.I. 1996) (same in summary judgment context). In other words, a conspiracy claim cannot survive summary judgment if the jury could find the existence of an agreement only with the aid of "speculation and conjecture." See Boschette v. Buck, 914 F. Supp. 769, 776 (D.P.R. 1995) (noting that allegations of conspiracy "based on mere speculation . . . cannot countervail the affidavits of the parties involved affirming that their acts were taken independently and without any concerted purpose of harassing [plaintiff]"); Therrien v. Hamilton, 849 F. Supp. 110, 116 (D. Mass. 1994) ("Since a jury could not find for plaintiff without speculation and conjecture, summary judgment must be granted [on conspiracy claim].").

Elbery asserts that Sheketoff's involvement in the purported conspiracy began "after Sheketoff spoke to Lt. Wayne Sampson of the S.P.D., the Worcester D.A.'s representative at the arraignment, and at the 8-10-94 bail revocation hearing where Sheketoff was exposed to Elbery's enemies in the Worcester Court (the "home rule gangsters") . . . [and] all of a sudden out of the clear blue Sheketoff decided Elbery was guilty of C. 269-10a 'carrying.'"

Elbery Opposition at 33. Indeed, Elbery claims that "[i]t was only due to Sheketoff's handling of Elbery's gun case, via fraud, conspiracy, malpractice . . . that the S.P.D. was able to continue their conspiracy . . . . Sheketoff, at a minimum, aided and abetted the S.P.D. conspiracy." Elbery Opposition at 31. In fact, Elbery contends, "Sheketoff was the 'Kingpin' of the conspiracy, without Sheketoff as a co-conspirator, . . . the S.P.D.'s conspiracy to falsely arrest, imprison, & maliciously prosecute Elbery would have ended immediately." Id. at 31.

Elbery also asserts that Sheketoff should have "seen the false arrest and malicious prosecution of Elbery as complained in the Sklut case, [and] then Sheketoff should have recognized that Elbery's arrest, prosecution & imprisonment were clearly illegal." Elbery Opposition at 5. According to Elbery, the fact that Sheketoff did not notice the false arrest and malicious prosecution is further evidence of the conspiracy. Id.

In particular, Elbery asserts that "Sheketoff [was] privy to all the same facts and evidence and information [about the search at the E-Z] and did nothing but allow the S.P.D. defendants to cover-up via conspiracy at the 10-21-94 suppression hearing." Elbery Opposition at 15. It was clear, Elbery asserts, that the fire had been out "long before Johnson claimed he arrived at E-Z." Id. at 15. Sheketoff should have noticed that "if there was a

consensual search or if the guns were discovered by the S.P.D. due to Elbery consenting to the S.P.D. entering his unit that it would have been on the search documentation the S.P.D. used to gain the search warrant. Sheketoff did not." Id. at 15. Moreover, Sheketoff "knowingly allowed the S.P.D. to change their story of cause to search the E-Z unit with impunity." Id. at 16.

Ultimately, Elbery appears to have concluded that Sheketoff participated in a conspiracy based on the fact that after he fired Sheketoff and retained a new attorney, the prosecutor offered to dismiss the firearms charges. These allegations are sufficient, according to Elbery, "to bring before a jury Elbery's claim . . . that Sheketoff conspired with the S.P.D. codefendants to cover-up their illegal search and seizure of Elbery's E-Z unit." Id. at 15-16.

However, even drawing all reasonable inferences in favor of Elbery, there is insufficient evidence to prove that a conspiracy existed to violate Elbery's constitutional rights,[4] much less that

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[4]Elbery also he asserts that Judge Toomey and a number of Worcester attorneys, to whom he refers as the "Worcester' Authorities" or the "Worcester Home Rule Gangsters", conspired to convict him on charges of attempted mayhem. See Elbery Affidavit ¶¶ 56-79. Elbery also contends that the "Worcester Authorities" later conspired with the Jewish Legal Community and the Jewish Anti-Defamation League against him. Elbery's Opposition at 45-46. These allegations are not dealt with in detail in this Memorandum because the alleged conspirators to whom they relate primarily are not defendants.

Sheketoff was part of any such conspiracy. In his affidavit, Sheketoff asserts that:

> 39. [He] did not communicate with or form an agreement with any member of the Worcester Count District Attorney's Office to put or keep Elbery in jail, to deprive Elbery of his constitutional rights, to cover up an allegedly illegal search and seizure, or to deprive Elbery of access to the courts in connection with the firearms charges.
>
> 40. [He] did not communicate with or form an agreement with any member of the Shrewsbury Police Department to put or keep Elbery in jail, to deprive Elbery of his constitutional rights, to cover up an allegedly illegal search and seizure, or to deprive Elbery of access to the courts. [He does] not know any members of the Shrewsbury Police Department.

Sheketoff Affidavit ¶¶ 39-40. Elbery has not offered any evidence, beyond his own speculation and conjecture, to refute these factual assertions and support his claim that Sheketoff had an agreement with either the prosecutor or any of the police officers to act against him. Thus, Elbery's "allegations of conspiracy are based on mere speculation and cannot countervail the affidavits of the parties involved affirming that their actions were taken independently and without any concerted purpose." Boschette, 914 F. Supp. at 776.

In essence, Elbery has attempted to "to build a case on the gossamer thread of whimsy, speculation and conjecture." Id. Elbery has done little more than "cry 'conspiracy' and [attempt to] throw himself on the jury's mercy.'" Gramenos v. Jewel Companies,

Inc., 797 F.2d 432, 436 (7th Cir. 1986); see also Duca v. Martins, 941 F. Supp. 1281, 1291 (D. Mass. 1996). The mere fact that Sheketoff's successor obtained a more favorable result for Elbery than Sheketoff is not sufficient to create a triable issue of conspiracy. Therefore, defendants' motion for summary judgment on Counts I, II, III, IV, and VII is being allowed.

B. Elbery has not offered evidence adequate to prove his legal malpractice and breach of contract claims.

Count V of Elbery's amended complaint asserts a claim for legal malpractice and Count IX asserts a claim for breach of contract. Defendants and Elbery have each moved for summary judgment on these two counts. As set forth below, the court is allowing defendants' motion on these two counts because Elbery has not provided any expert evidence on breach of duty or causation, as is required by the nature of each claim.

1. Legal malpractice claim.

To recover against an attorney for legal malpractice, a plaintiff must establish that the attorney failed to exercise reasonable care and skill in handling the matter at issue, that the plaintiff has incurred a loss, and that the defendant's alleged malpractice was the proximate cause of the loss. See DiPiero v.

Goodman, 436 N.E.2d 998, 999 (Mass. App. Ct. 1982). An attorney is not liable for making a mistake so long as he or she has exercised reasonable care. See Colucci v. Rosen, Goldberg, Slavet, Levenson & Wekstein, P.C., 515 N.E.2d 891, 894 (Mass. App. Ct. 1987) ("If the attorney acts with a proper degree of attention, with reasonable care, and to the best of his skill and knowledge, he will not be responsible."). Indeed, "[s]ome allowance must always be made for the imperfection of human judgment." Id.

a. Standard of care.

The standard of care that an attorney owes to his client is ordinarily outside of the knowledge of the average juror. See Glidden v. Terranova, 427 N.E.2d 1169, 1170 (Mass. App. Ct. 1981). Therefore, "expert testimony is generally necessary to establish the standard of care owed by an attorney in the particular circumstances, and the defendant's alleged departure from it." Id.; see also Colucci, 515 N.E.2d at 894 ("Expert testimony is generally necessary to establish that an attorney failed to meet the standard of care owed in the particular circumstances."); Brown v. Gerstein, 400 N.E.2d 1043, 1049 (Mass. App. Ct. 1984) ("That statute is beyond the understanding of lay people and expert testimony was necessary to establish that a lawyer in [defendant's] position should have discovered the statute and, if he had, that it

could have been used to obtain an injunction.").

Elbery has not submitted any expert evidence to demonstrate the appropriate standard of care or that Sheketoff deviated from that standard. In particular, Elbery asserts that Sheketoff misinterpreted Massachusetts weapons laws and failed to file a motion to dismiss the weapons charges against him. According to Elbery, these failures resulted in the revocation of the stay of this prison sentence.

Elbery indicated in his answers to interrogatories that he intended to call attorney Karen L. MacNutt ("MacNutt") as his expert witness on these issues. Defendants' Memorandum at 10. However, defendants have submitted an affidavit from MacNutt in which she attests that although she consulted with Elbery about his case, he has not engaged her as an expert. MacNutt Affidavit, ¶¶ 3-4.

Elbery is not a criminal defense attorney and is, therefore, not competent to testify as an expert witness regarding the conduct of a defense attorney. See Cholfin v. Gordon, No. 943623C, 1996 WL 1185106, at *4 (Mass. Super. Ct. Jan. 2, 1996) (finding that a certified public accountant was not qualified to opine on standard of care for an attorney); cf. Atlas Tack Corp. v. Donabed, 712 N.E.2d 617, 621 n.4 (Mass. Ct. App. 1999) (emphasizing that an engineer's expert opinion was required in an engineering

malpractice case)).

Elbery asserts that he does not need to present expert testimony on the standard of care issue because Sheketoff's actions fall within the "exception in Wagenmann v. Adams, 829 F.2d 196, 219 (1st Cir. 1987) of gross & obvious malpractice which requires no expert to testify to Sheketoff's malpractice." Elbery Opposition at 6; see also Elbery Memorandum at 14. For example, Elbery asserts that, "[n]o expert is needed to present evidence as to what Sheketoff should have done at the stay [revocation hearing]." Elbery Opposition at 7. "All Sheketoff had to do was follow Elbery's order to present the F.I.D. or proof of it before the 8-10-94 [hearing] and there would have been no violation of the stay." Elbery Opposition at 6-7.

Moreover, Elbery asserts that if the gun charges had been dismissed prior to the stay revocation hearing, "there would have been no violation of probation due to the gun charges and hence no violation of the stay, as a matter of law. Toomey would have had to maintain Elbery's stay." Id. at 7. Elbery notes that Judge Toomey based the revocation of the stay on the prosecutor's representation that Elbery did not have a valid license to carry or a FID card. Id. (citing Exhibit R: Transcript from stay revocation hearing at 11). Therefore, Elbery concludes that no expert is necessary to "tell a jury presenting proof of the F.I.D. would

continue the stay." Id. at 8.

Another example of Sheketoff's alleged failure to act as evidence of his "gross and obvious conduct" is that "Sheketoff did nothing in terms of defense of the gun charges." Id. Rather, "Sheketoff conspired to defeat Elbery and made some appearances for the defense. All that can be said of Sheketoff's defense of Elbery regarding the gun charges is that he was of record and took a fee." Id. As such, Elbery asserts that expert testimony is not required to demonstrate that Sheketoff's purported failure to act falls outside of the proper standard of care.

However, the facts in Wagenmann, supra, on which Elbery relies, are distinguishable from the undisputed facts here. In Wagenmann, the court upheld a legal malpractice verdict that the plaintiff obtained without presenting expert testimony. 829 F.2d at 218-21. There, the attorney had been advised by a psychiatrist that his client was sane, but he failed to prevent his client's admission to a psychiatric facility by "seem[ingly doing] almost nothing to protect his client - either before or after the commitment." Id. at 219. The attorney failed to familiarize himself with the facts of the case, did not interview his own client, did not interview any of the prosecution witnesses, did not file any documents with the court on his client's behalf, and did not attempt to obtain a reduction in bail. Id. at 219-20. Based

on the attorney's conduct, the court concluded that an ordinary juror could determine that the attorney's negligence was sufficiently "gross or obvious" without expert testimony. Id. at 220.

Similarly, in Glidden v. Terranova, 427 N.E.2d 1169 (Mass. App. Ct. 1981), another case on which Elbery relies, the defendant-attorney agreed to represent the plaintiffs in pending litigation and promised to remove the case to a different court. Id. at 1171. The defendant-attorney did not, however, file an answer or remove the action, which became obvious to the plaintiffs only when the court entered default judgments against them. Id. The court decided that "the evidence was such that expert testimony was not required to determine whether . . . the defendant's conduct violated the standard of reasonable care and diligence." Id.

In contrast, in the instant case, the undisputed facts include the following. Sheketoff appeared at Elbery's arraignment. Sheketoff Affidavit ¶ 6. Sheketoff also appeared at the hearing on the Commonwealth's motion to revoke the stay of execution of Elbery's sentence of the intent to maim conviction. Id. ¶ 7. He argued that the motion to vacate the stay should be denied and that the court should instead impose a higher bail, "which would have allowed Elbery to maintain his freedom." Defendants' Memorandum at 5. Sheketoff also defended Elbery on the firearms charges by

filing a motion to suppress, attending an evidentiary hearing on that motion, filing a post-argument brief and amended motion to suppress, requesting discovery from the Commonwealth, and formulating a trial strategy. Sheketoff Affidavit ¶ 10-13, 29-30; see also Elbery Attachments, Ex. E (pretrial conference report dated September 8, 1994 indicating that Sheketoff requested "file on license and its alleged revocation" and that he would rely on "defense in part based upon a license"). Based on this uncontested evidence, the Wagenmann exception does not apply to this case.

Elbery also argues that an expert is not necessary because Sheketoff's failure to "follow orders" constitutes a violation of the standard of care. In support of this proposition, Elbery asserts that it is undisputed that Sheketoff knew that he had a valid FID card at the time of his arrest. Elbery Opposition at 3. Elbery believes that "the gun in [his] car . . . could never be a violation of Mass. c. 269-10 at 8-5-94[,]" and, therefore, if Sheketoff had followed Elbery's "orders" and presented the FID card at the arraignment or had filed a motion to dismiss based on the FID card, "Elbery would have been free of the charges as a matter of law." Id. at 2-3. Elbery states that "[t]he gun charges were disposed of as a matter of law by exactly the same procedure or amount of activity Elbery ordered Sheketoff to take from 8-8-94 though February '95." Id.

As defendants assert, however, the cases that Elbery has cited stand for the proposition that liability attaches when an attorney agrees to comply with his client's wishes, but then does not act as promised. See Whitney v. Abbott, 77 N.E. 524 (Mass. 1906) (upholding finding of malpractice when client "instructed the defendant to do nothing to lose the plaintiff's title to the engine[,]" but attorney did just that); Gilbert v. Williams, 8 Mass. 51 (1811) (noting that the attorney had agreed to obtain an attachment on property, but failed to do so); McInnis v. Hyatt Legal Clinics, 461 N.E.2d 1295, 1296 (Ohio 1984) (upholding finding of liability after attorney promised not to publish information about plaintiff's divorce, but subsequently published the information); Olfe v. Gordon, 286 N.W.2d 573 (Wisc. 1980) (concluding that attorney who assured client he was obtaining first mortgage, but did not was properly liable).

Furthermore, as defendants argue, an attorney is not obligated to "blindly accept every instruction given by the client." Defendants' Opposition at 9. As defendants assert, such a rule would "preclude the attorney from exercising his independent judgment and render him liable for an honest disagreement with his client." Id. Where, as here, an attorney, for professional reasons, declines to follow a client's orders, the client knows of this declination, and has the opportunity to replace his counsel

with a more agreeable counsel, malpractice cannot be established by the mere disagreement between the attorney and his client. If it could, the proper standard of professional conduct would be dictated by uneducated lay persons rather than by the conduct of the reasonable, trained, and experienced attorneys. In this case, there is not evidence beyond mere disagreements between Elbery and Sheketoff to prove malpractice.

More specifically, the undisputed facts include the following. Elbery wanted Sheketoff to file a motion to dismiss based on his FID card and instructed him to do so. Sheketoff told Elbery on more than on occasion that he believed that it would not be prudent to file a motion to dismiss the firearms charges based on the FID card. Sheketoff refused to file the motion. Sheketoff told Elbery that if he did not agree with this strategy, he should seek a new attorney. Therefore, this case involves a disagreement between a client and his counsel based on the attorney's professional judgment rather than a failure of an attorney to effectuate his agreement to follow his client's instructions. It is, therefore, distinguishable from the cases on which Elbery relies to excuse his failure to proffer expert evidence. See Whitney, supra; Gilbert, supra; McInnis, supra; Olfe, supra.

Defendants are also correct in their contention that expert testimony is necessary to interpret the relevant statutes and case

law at the time of Elbery's arrest, especially in light of the fact that the amendments to M.G.L. c. 269 were relatively new and had not been interpreted by the Massachusetts courts at the time of Elbery's arrest. In response to this argument, Elbery asserts that "[t]he existing gun laws at 8-5-94 in Mass. made it incontrovertible that the guns in Elbery's E-Z unit were not a violation of C.269-10a or any other law." Elbery Opposition at 4.

Citing a number of cases interpreting the prior version of the relevant statute, Elbery contends that he was not in violation of the statute because the storage area was not a "public" place. Elbery Memorandum at 11. Elbery argues that "if the guns in controversy are in an area within the exclusive control of Elbery there can be no 10a violations/charges." Id. at 12 (citing Commonwealth v. Dunphy, 386 N.E.2d 1036 (1979) ("[T]he unlicenced carrying of a firearm within one's residence or place of business by one having a valid firearm identification card is not a criminal offense." (internal quotation marks and citation omitted))).

Moreover, Elbery asserts that because the storage facility was the equivalent of a residence, the gun charge was incorrect as a matter of law because the statute contained an exemption for "carrying" in one's home or place of business. Elbery Opposition at 12 (attempting to analogize to Commonwealth v. Hamilton, 508 N.E.2d 871 (Mass. App. Ct. 1987) (noting that hotel guest receives

heightened Fourth Amendment protection)).

However, Elbery's arguments, based on decisions rendered before M.G.L. c. 269, § 10(a) was amended in 1991, actually demonstrate the need for expert testimony in this case. Not only has Elbery failed to present such testimony, it is unlikely that any competent attorney would opine that Sheketoff was negligent. Rather, it appears that his views concerning the proper interpretation of M.G.L. c. 269, § 10 were not only reasonable, they were right.

As defendants point out, prior to 1991, the statute prohibited "carrying" a firearm without a license. See Mass. Gen. Laws Ann. ch. 269, § 10, Historical and Statutory Notes, at 552. In 1991, the statute was amended to prohibit possession of a firearm, outside of an individual's residence or place of business, without a license. Id. Previously, an individual without a firearm identification card could possess a firearm, but not carry it - meaning move it. See Commonwealth v. Morse, 425 N.E.2d 769, 771 (Mass. App. Ct. 1981); Commonwealth v. Osborne, 368 N.E.2d 828 (Mass. App. Ct. 1977). The obvious import of the 1991 amendment was to require that a person have a license to possess a firearm anywhere outside his residence or place of business and, therefore, to eliminate the previous qualification that a license was required only if the weapon was in the process of being moved.

Similarly, it is not surprising that no attorney has opined that Sheketoff was negligent in not defending Elbery on the basis that the EZ was part of Elbery's residence. First, the record indicates that Sheketoff originated this theory. Second, while there was no case on point, it is highly unlikely that a judge could have been persuaded to dismiss the case because the EZ constituted Elbery's residence. Generally, "residence" is defined as "[a] personal presence at some place of abode with no present intention of definite and early removal . . ." Black's Law Dictionary at 1176 (5th ed.). An "abode" is "[o]ne's home." Id. at 7. The EZ plainly was not part of Elbery's abode.

In these circumstances, it appears that Sheketoff properly informed Elbery that cases concerning "carrying" that were decided before the 1991 amendment to M.G.L. c. 269, § 10(a) were not applicable to his case. In any event, there were no reported cases on point. In the circumstances, the evidence is insufficient to prove that Sheketoff was negligent in his defense of Elbery.

b. Causation.

In addition to evidence of the appropriate standard of care, there must be evidence of causation to demonstrate legal malpractice, meaning there must be evidence that, in the absence of the alleged negligence, the controversy would have ended with a different result. See Glidden v. Terranova, 427 N.E.2d 1169, 1171

(Mass. App. Ct. 1981). Expert testimony is ordinarily necessary to establish causation. Atlas Tack Corp., 712 N.E.2d at 622 (absent expert testimony as to engineering standards of care, plaintiff could not show that defendant caused any actual loss); Colucci, 515 N.E.2d at 897 (legal arguments that restraining order was warranted did not constitute proof that a court would have granted the order, and, therefore, expert testimony was required to demonstrate causation). Plaintiff has the burden of proving his malpractice claim, including causation. See Atlas Tack Corp., 712 N.E.2d at 622; Colucci, 515 N.E.2d at 897.

In Glidden, a narrow exception to this rule was recognized when an attorney who represented to his clients that he would take action failed to do so, and the court entered default judgments against his clients. 427 N.E.2d at 1171. In Glidden, the court held that in cases in which the attorney failed to defend against an underlying civil action, "the attorney should indeed bear the burden of proof in such a case, for since the client had no obligation to prove his case in the underlying action (he could have simply required the plaintiff to prove his case), he should not shoulder the burden of proving a defense in the malpractice action." Id. (internal quotation marks and citations omitted).

However, the Glidden exception is inapplicable here. This is not a case in which Sheketoff ignored his duties. Rather it is a

case in which he exercised his professional judgment and declined to file a motion to dismiss, expressing a strategic preference for addressing certain issues at trial. The fact that the case against Elbery was dismissed when called for trial tends to validate the wisdom of that view. In any event, there is no evidence that Sheketoff's decision caused Elbery any harm.

Here, without expert testimony, there is no basis for a juror to determine whether the motion to dismiss would have succeeded in its entirety, whether the success on the motion to dismiss would, contrary to Sheketoff's prediction, have preempted the Commonwealth's motion to vacate the stay of Elbery's sentence, or whether Judge Toomey would have denied the Commonwealth's motion to vacate or would have subsequently reinstated the stay. Thus, there is no competent evidence of causation and, therefore, no triable issue of fact on this issue.

As there is no expert evidence on the standard of care and causation issues, both of which are essential elements of Elbery's legal malpractice claim, defendants' motion for summary judgment on Count V is being allowed.

2. Elbery's breach of contract claim fails for the same reasons as his legal malpractice claim.

"A client's claim against an attorney has aspects of both a

tort action and a contract action." McStowe v. Bornstein, 388 N.E.2d 674, 676 (Mass. 1979). When a "contract claim is nothing more than a restatement of the negligence cause of action, [it is] therefore[] subject to the same general requirement of expert evidence to establish [a failure] to meet the standard of care owed in the particular circumstances." Harris v. Magri, 656 N.E.2d 585, 587 (Mass. App. Ct. 1995). This is such a case.

Elbery engaged Sheketoff to represent him in connection with the firearms charges. The terms of their agreement were that Elbery paid Sheketoff $5,000 and Sheketoff agreed to represent him. Id. Sheketoff did not promise that he would achieve a specific result. Therefore, Sheketoff's only contractual obligation was to exercise the reasonable care and skill of an ordinary attorney in representing Elbery.

More specifically, under Massachusetts law, unless a professional warrants a particular result, he is generally only required to exercise the skill and care of a similarly situated professional:

> Architects, doctors, engineers, attorneys, and others deal in somewhat inexact sciences and are continually called upon to exercise their skilled judgment in order to anticipate and provide for random factors which are incapable of precise measurement. The indeterminable nature of these factors makes it impossible for professional service people to gauge them with complete accuracy in every instance. . . . Because of the inescapable possibility of error which inheres in these

> services, the law has traditionally required, not perfect results, but rather the exercise of that skill and judgment which can be reasonably expected from similarly situated professionals.

Klein v. Catalano, 437 N.E.2d 514, 525 (Mass. 1982).

In this case, Elbery's contract claim does not go beyond his legal malpractice claim. Rather, it is merely a "restatement of the negligence cause of action." Harris, 656 N.E.2d at 587. Therefore, Elbery's failure to provide expert evidence on the standard of care and causation issues is fatal to his contract claim as well as to his malpractice claim. Thus, defendants' motion for summary judgment on the breach of contract claim (Count IX) is being allowed.

C. Elbery cannot maintain his claims for fraud or constructive fraud.

In Counts VIII and IX, Elbery asserts claims for fraud and constructive fraud. To prevail on a claim for fraud, a plaintiff must prove that a defendant made false statements of material fact for the purpose of inducing the plaintiff to act and that the plaintiff reasonably relied on the representation as true and acted upon it to his detriment. See Millen v. Flexo-Accessories, Inc., 5 F. Supp. 2d 72, 73 (D. Mass. 1998); Macoviak v. Chase Home Mortgage Corp., 667 N.E.2d 900 (Mass. App. Ct. 1996). To prevail

on a claim of constructive fraud, a plaintiff must show that defendant "purported to speak of his own knowledge about a fact which was capable of ascertainment, and about which the [defendant] had no such knowledge and his statement was not true." Pettricca v. Simpson, 862 F. Supp. 13, 16 (D. Mass. 1994) (internal quotation marks and citation omitted).

Furthermore, "false statements of opinion, of conditions to exist in the future, or of matters promissory in nature are not actionable." Millen Industries, 5 F. Supp. 2d at 73-74 (internal quotation marks and citations omitted). Liability for fraud cannot be established when the alleged misrepresentation concerns an estimate or judgment that was not susceptible of actual knowledge at the time of its utterance. Id.

Elbery asserts that throughout the representation:

> Sheketoff would not let me give up hope. He led me to believe via his "little assurances" there was, as he said, "something he could probably do for me" regarding the 6 gun charges. He told me "not to worry that he would handle the case" that I was "getting the best legal defense."

Elbery Affidavit ¶ 30. Elbery also complains of Sheketoff's advice to enter into a plea agreement that would require that he serve a year in prison. Elbery Opposition at 11; Elbery Affidavit ¶ 54.

These statements are insufficient as a matter of law to support Elbery's fraud claims. These alleged statements are not

representations of fact capable of ascertainment. Rather, they constitute advice based on Sheketoff's interpretation of M.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 in the future.

Taking the facts in the light most favorable to Elbery, Sheketoff's specific statements were that there was "something he could probably do" for Elbery, "not to worry that he would handle the case," and that Elbery was "getting the best legal defense." At very most, these statements could constitute "puffery" by Sheketoff about legal skills or "false statements of opinion, of conditions to exist in the future, or of matters promissory in nature[,]" none of which are actionable. Millen Indus., 5 F. Supp. 2d at 74.

Therefore, defendants' motion for summary judgment on Counts VIII and IX is being allowed.

D. Elbery cannot maintain his claim for intentional infliction of emotional distress.

The evidence to support Elbery's claim of intentional infliction of emotional distress is also insufficient to defeat defendants' motion for summary judgment on Count VI. To prove a claim for intentional infliction of emotional distress, a plaintiff must prove that the defendant intended to cause, or should have

known that his conduct would cause, emotional distress; the defendant's conduct was extreme and outrageous; the defendant's conduct caused the plaintiff's distress; and that the plaintiff suffered extreme emotional distress. Agis v. Howard Johnson Co., 371 Mass. 140 (1976). 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). Rather, the plaintiff must demonstrate 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." Id.; see also Flibotte v. Pennsylvania Truck Lines, Inc., 131 F.3d 21, 27 (1st Cir. 1997) (internal citation omitted) (same).

The evidence concerning Sheketoff's conduct is insufficient to satisfy these standards. Even viewing the evidence in the light most favorable to Elbery, there is no basis upon which a reasonable factfinder could conclude that Sheketoff acted in an "atrocious and utterly intolerable" manner. Doyle, 103 F.3d at 195. Therefore, defendants' motion for summary judgment on Count VI is being

allowed.

D. Elbery cannot maintain his claim for breach of fiduciary duty.

Defendants' motion for summary judgment on Elbery's claim of breach of fiduciary duty in Count IX is also meritorious. The attorney-client relationship is deemed to be "highly fiduciary" in Massachusetts. See Sears, Roebuck & Co. v. Goldstone & Sudalter, P.C., 128 F.3d 10, 15 (1st Cir. 1997). "An attorney owes a client the obligations of full and fair disclosure, as well as competent, diligent, and zealous representation." Walsh v. Menton, No. 932738H, 1994 WL 879470, at *2 (Mass. Super. Sept. 23, 1994). In Massachusetts, "an attorney is held to the standard owed by a fiduciary, that of utmost good faith and loyalty." Id.

In this case, there is not direct or circumstantial evidence sufficient to prove that Sheketoff was not candid, competent, and industrious in representing Elbery. Elbery's claim of breach of fiduciary duty is essentially a reiteration of his malpractice claim and is, for the reasons described previously, inadequately supported.

Therefore, defendants' motion for summary judgment on Count IX is being allowed.

V. ORDER

For the foregoing reasons, it is hereby ORDERED that:

1. Defendants' motion for summary judgment (Docket No. 63) is ALLOWED and judgment shall enter forthwith for all defendants.

2. Defendant Homan's motion for a separate and final judgment (Docket No. 63) is MOOT.

3. Plaintiff's motion for summary judgment (Docket No. 73) is DENIED.

4. Plaintiff's motion for stay of case (Docket No. 70) is DENIED.

5. Plaintiff's motion for continuance of summary judgment proceedings (Docket No. 69) is DENIED.

6. Plaintiff's motion for extension of time to oppose motion for summary judgment (Docket No. 69) is MOOT because plaintiff timely filed his opposition.

7. Plaintiff's motion -to substitute a typed version of his opposition (Docket No. 79) was, in effect, previously ALLOWED.

8. Plaintiff's motion for "Equal Rights" (Docket No. 72) is DENIED.

9. Plaintiff's motion to stay trial (Docket No. 88) is MOOT.

UNITED STATES DISTRICT JUDGE