

New Jersey Law Journal

VOL. CLXV – NO. 5 – INDEX 405

JULY 30, 2001

ESTABLISHED 1878

His Turn as the Litigant

In a 29-year-old commercial case in which many defendants have been lawyers, Andrew Napolitano is the latest target

By Henry Gottlieb

Andrew Napolitano, the former New Jersey judge who spent time in Hollywood presiding over daytime television's "Power of Attorney," is up for a role he doesn't want: malpractice defendant.

Licette Music Corp. of New York said in papers filed in Essex County Superior Court this month that Napolitano erred by advising the corporation in 1998 to drop a collection case because the statute of limitations had expired.

In fact, the litigation wasn't time-barred and Napolitano was negligent for not pursuing the claim, Licette says.

Licette wants to add Napolitano to a 2 1/2-year-old related case against Newark's Sills Cummis Radin Tischman Epstein & Gross. Superior Court Judge Francine Schott reserved decision on the request Friday. She also reserved on Sills Cummis' motion for summary judgment, saying she needs more documents.

While she's thinking about it, Napolitano isn't commenting. His lawyer, Laurence Orloff, says the attempt to throw Napolitano into the existing case against Sills Cummis is "a total ploy by the plaintiff to resuscitate a sinking ship."

If it's any consolation to Napolitano, he's got plenty of company on the list of former lawyers Licette has sued in the past decade. New York's Davis, Weber & Edwards already has paid to settle a claim that it botched a collection effort for Licette in Florida.

The size of the settlement is confidential. The company also has filed a suit against an adversary's firm for allegedly withholding evidence.

END GAME: A former client is trying to sue former judge Andrew Napolitano for allegedly blowing the statute of limitations on a real estate deal. His lawyer calls the move 'a total ploy ... to resuscitate a sinking ship.'



PHOTOS BY CARMEN NATALE

Yet a case against Napolitano would be particularly ugly, for beyond the allegations of giving bad advice, the pleadings raise questions about Napolitano's fees and whether he was on solid ethical ground in his relationships with the client and Sills Cummis.

Top Gun

Licette turned to Napolitano in early 1997 when he was a partner in the New Jersey office of Pittsburgh's Reed Smith Shaw & McClay. He'd resigned two years earlier as a Bergen County Superior Court judge with 150 jury tri-

als behind him.

That experience at a young age — at 43 he was the youngest judge to win tenure on the New Jersey state court — made him a much-sought advocate, as he was later at Sills Cummis and is now in the firm he joined earlier this year, Epstein Becker & Green in Newark.

He also burnished his reputation as someone who can interpret cases for mass audiences, first as a commentator for Court TV and then as the judge on

"Power of Attorney." Skill at stifling loud-mouth litigants and feisty lawyers to create good theater is not something corporate clients usually seek in a lawyer, and he quit the program earlier this year.

In 1996, Licette hired him as a top gun to work as co-counsel with West Orange's lesser-known Lentz & Gengaro. Their mission: resuscitate Lisette's long-running attempt to collect on a judgment the company had obtained against an adversary in litigation almost 25 years old.

Licette owned the rights to hundreds of popular songs it licensed to

record producers, and in 1972 it sued one of them for not paying millions of dollars in royalties. It took 20 years and a few law firms, but Licette eventually won an \$8.1 million judgment against the licensee and its owner, Abraham Massler, a Florida resident.

Enter Sills Cummis. Massler claimed he couldn't pay, but an investigation by the firm disclosed the possibility that he had fraudulently conveyed valuable commercial properties in Mountainside and Fairfield to escape

one in Fairfield and one in Mountainside, were time-barred.

Rather than continue the litigation, Napolitano and Gengaro settled with the owners of the property. One property was turned over to Licette, and it abandoned claims that Murphy had ruled out.

Armed with Murphy's report that the statute had been blown on two of the property claims, Licette turned to yet another lawyer, Princeton solo practitioner Glenn Bergenfield. He sued Sills

mistake, which Long says he discovered. The statute of limitations on claims against the Mountainside property worth millions of dollars had not expired. Murphy applied the wrong law, both sides say in their pleadings. That's only their joint conclusion, of course, because no court has ever reviewed her report.

Napolitano erred by not catching Murphy's error, the proposed complaint against him says. "It appears that the decision of the Special Master con-



The present attorney for Licette Music Corp., Glenn Bergenfield, sued Sills Cummis for malpractice and is now attempting to add Andrew Napolitano as a defendant.

the judgment.

A suit by Sills Cummis, advancing Licette's interests in the properties, was filed in Union County Superior Court. But unfortunately for Licette, it looked to the judge in the case that Sills Cummis was a little late. The statute of limitations on the fraudulent conveyance claims had apparently expired.

To make sure, the judge called in a special master, Marianne Espinosa Murphy, a partner in Newark's Tompkins, McGuire, Wachenfeld & Barry. She held a hearing under *Lopez v. Swyer*, 62 N.J. 267 (1973), to determine whether the claims were time-barred.

By then, Licette had replaced Sills Cummis with Christopher Gengaro and Napolitano. Murphy, another former Superior Court judge, finished her work in October 1997. She reported that Licette could pursue claims on two properties but that claims on two others,

Cummis, partners Joseph Buckley and associate Paul Doda for filing the fraud claim too late to get the two properties.

Since then, their defense has a simple bottom line: Even if they had filed in time, they would never have been able to prove that the two properties had been fraudulently conveyed. There was no available evidence that could have been used against Massler, according to the pleadings by Sills Cummis' lawyer Stephen Long, a partner in Florham Park's Drinker Biddle & Shanley.

Trusting the Master

So where did Napolitano go wrong? According to Licette, he erred by making a settlement based on Murphy's report.

For as it turns out, both Bergenfield and Long now agree, Murphy made a

tained an error in computing the statute of limitations concerning 1011 Route 22 Mountainside, New Jersey property," Bergenfield says in his proposed amended complaint. "The error was not discovered by Defendant, Napolitano."

"Based upon the advice of Napolitano, plaintiffs settled the Union County action for far less than they should have received, had they gotten proper legal advice," the proposed amended complaint says.

One of the strange twists in the case is that Napolitano left Reed Smith for Sills Cummis during the litigation in Union County.

Licette's president, Charles Benanty, said in a July 5 certification that at no time when Napolitano was at Reed Smith or at Sills Cummis did he suggest that Sills Cummis might have committed malpractice. "I now see that Mr. Napolitano could not ethically have

represented us after he became a partner at Sills Cummis," Benanty said in his certification. "The firm, it seemed, blew the statute of limitations."

He also said that Napolitano, while he was still at Reed Smith, advised Benanty to pay a \$70,000 disputed fee to Sills Cummis. "He never advised me that Sills Cummis may have committed malpractice in its representation of Licette."

In the certification, Benanty said he wants discovery on whether, in fact, Napolitano actually was a partner at Sills Cummis, for purposes of the litigation in Union County.

The question is raised, Benanty suggests, by the fact that fee checks Benanty paid to Napolitano were made directly to Napolitano and not to Sills Cummis and that some of them were cashed under Napolitano's endorsement rather than deposited in Sills Cummis' business account.

Photocopies of checks Benanty

says were fee payments to Napolitano and cashed by him while he was a partner at Sills Cummis were attached to Benanty's certification.

Orloff, Napolitano's counsel, declines to comment on the checks.

But he does suggest that a case filed so long after the facts were known has dubious merit. "All the matters alleged in the motion papers have been known by the plaintiff since 1997 and were certainly known by its current lawyer from the time he first took on the matter at least two and one-half years ago if not longer.

The idea that Bergenfield didn't realize that the statute hadn't run and that the special master was wrong until Long pointed it out in his recent summary judgment motion "is hard to swallow," says Orloff, of Roseland's Orloff, Lowenbach, Stifelman & Siegel.

"Even harder to swallow is the proposed allegation that another lawyer committed malpractice in not discover-

ing something that Mr. Bergenfield didn't discover in the two to three years that he has handled this case," Orloff adds.

Long makes the same point in his pleadings. The claims that Sills Cummis messed up by blowing a statute of limitations shouldn't be muddled by a claim that Napolitano committed negligence by settling.

But Bergenfield says it doesn't matter because Sills Cummis was implicated both times, before Napolitano came to the firm and afterward.

"Sills Cummis was the lawyer at both times. Whether the statute was blown in 1995 or 1997-1998, Sills Cummis blew it," he says in his pleadings.

If Licette loses both motions, it presumably still has the option to file a new suit against Napolitano and the litigation will continue. In this case, Judge Schott said, "there are no periods; only semi-colons." ■