

# 07-3058-bk (L)

## 07-3213-bk-(CON)

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IN THE  
**United States Court Of Appeals**  
FOR THE SECOND CIRCUIT

In Re: D.A. Elia Construction Corp., Debtor.

D.A. ELIA CONSTRUCTION CORP.,

*Debtor-Appellant,*

vs.

DAMON & MOREY, LLP,

*Defendant-Appellee,*

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ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF NEW YORK  
JUDGE RICHARD J. ARCARA, AT DOCKET NUMBERS:  
06-MC-71, BK NUMBER: 94-10866-K

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**REPLY BRIEF ON BEHALF OF DEBTOR-APPELLANT**

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DATED: December 3, 2007

**TABLE OF CONTENTS**

Table of Authorities..... ii

Statement in Reply to Appellee’s Brief..... 1-3

Argument ..... 3-10

**THE DISTRICT COURT DECISION MUST BE REVERSED AS IT IS  
INCONSISTENT WITH THE MANDATE ISSUED BY THE SECOND  
CIRCUIT AFFIRMING THE BANKRUPTCY COURT’S GRANTING IN  
FULL OF DAMON & MOREY’S FEE APPLICATION**

Conclusion ..... 10

**TABLE OF AUTHORITIES**

	<u>Page</u>
<b>CASES:</b>	
<i>Choi v. State,</i> 74 N.Y.2d 933, 550 N.Y.S.2d 267, 549 N.E.2d 469 (1989).....	8
<i>Greater Boston Television Corp. v. FCC,</i> 149 U.S. App. D.C. 322, 463 F.2d 268 (App. D.C. 1971).....	10
<i>In re: Layo,</i> 460 F.2d 289 (2d Cir. 2006).....	8
<i>In re: Long Island Lighting Co.,</i> 197 F.2d 709 (2d Cir. 1952).....	9
<i>Saud v. Bank of New York,</i> 929 F.2d 916 (2d Cir. 1991).....	8
<i>W.L. Development Corp. v. Thalgott,</i> 54 A.D.2d 901, 387 N.Y.S.2d 902 (2d Dept. 1976).....	8
<b>RULES AND STATUTES:</b>	
28 U.S.C. §2106 .....	9

## **STATEMENT IN REPLY TO APPELLEE'S BRIEF**

Appellant D.A. Elia Construction Corp. (hereinafter referred to as "Debtor") appeals from the District Court's decision entering judgment against the Debtor in an amount different from the amount requested by the Appellee, Damon & Morey, LLP in its Sixth and Final Fee Application that was approved in full by the Bankruptcy Court, affirmed by the District Court and subsequently affirmed and mandated by this United States Court of Appeals for the Second Circuit.

The difference between the amount affirmed and mandated by this Court and the amount subsequently entered by the District Court can only mean that one of the Courts has made an error. Damon & Morey attributes this discrepancy to its failure to account for credits due Debtor and for a "voluntary" credit given to Debtor for charges that Damon & Morey attributes to its conflict-of-interest resulting from its dual and simultaneous representation of the Debtor and a creditor of the Debtor. The difference, however, is symptomatic of the real problem here: Damon & Morey has procured its judgment by fraud and no court has ever been allowed to exercise its discretion with full knowledge of the actual facts.

Damon & Morey's "voluntary credits" occurred after the Bankruptcy Court granted Damon & Morey's fee applications in full. Thus, the Bankruptcy Court Judge was unaware of and, therefore unable to consider, the scope of the conflict-of-interest or correctness of these credits magnanimously volunteered by Damon &

Morey, as would be necessary to determine the reasonableness of Damon & Morey's fee applications. Had the Bankruptcy Court known that fees that it was approving were effectively "a double dip" since Damon & Morey had already been compensated by third parties and again by the Debtor or had the Court known that it was approving fees that were incurred as a result of Damon & Morey's actions in violation of the disinterested rule while it acted as counsel for the Lead Creditor against its own client the Debtor herein, it is inconceivable that the fee applications would have been granted "in full".

Damon & Morey made a self-serving gesture by paying legal fees associated with a pretended effort to recover the seventy-five thousand dollars (\$75,000.00) lost by Debtor because of Damon & Morey's traitorous actions. The money was never recovered and Debtor has now discovered evidence that Damon & Morey shared in these ill-gotten gains pursuant to its contingency agreement with outside counsel that it had hired and paid to act in its stead. The Debtor was ultimately charged for and the Bankruptcy Court unknowingly approved fees for these tainted services and later Damon & Morey falsely advised the District Court that it did not charge for services related to the conflict.

In summary, the Record in this case clearly indicates:

1. The Courts below could not consider evidence concealed by Damon & Morey in order to fraudulently gain judicial approval of all of its fee applications in full;
2. This Court affirmed and mandated the lower Courts' Final Decisions and Orders that Damon & Morey's fee applications "are all approved in full" ( $\$358,756.62 = \$87,671.20 + \$271,085.42$ );
3. Subsequently, the District Court entered a judgment in a different amount ( $\$342,518.49$ );
4. Logic dictates that both of these results can not be correct;
5. The reason for the discrepancy is that in the intervening time Damon & Morey has been forced to admit that its fee applications previously affirmed by the Courts were incorrect.

**THE DISTRICT COURT DECISION MUST BE REVERSED AS IT IS INCONSISTENT WITH THE MANDATE ISSUED BY THE SECOND CIRCUIT AFFIRMING THE BANKRUPTCY COURT'S GRANTING IN FULL OF DAMON & MOREY'S FEE APPLICATION**

The District Court abused its discretion by entering judgment in an amount different than that affirmed and mandated by this Court. Damon & Morey's Brief discounts this discrepancy and attributes it to its failure to properly credit the account of the Debtor and for charges that were "voluntarily" credited to the Debtor. These

“voluntary credits” are actually for charges it has admitted that were associated with representing an adverse party against its own client and therefore completely inappropriate due to its violation of the Bankruptcy Code, Rules and the New York State Bar Association Code of Professional Responsibility.

Damon & Morey purposefully deferred submitting its Motion for Judgment as a strategy to prevent the Courts from scrutinizing the false billings that it had previously submitted. The discrepancy between the amount it submitted in its Final Fee Application (and subsequently affirmed by the District Court and this Court) and the amount that the District Court later awarded (that is the subject of this Appeal) is explained for the very first time in its Appellee Brief to this Court. This was never before the Courts below and is deliberately designed to prevent Debtor from proving that its fee applications are incorrect.

Damon & Morey’s explanation in its Brief that it “voluntarily reduced the fees for which Damon & Morey was seeking payment” fails to explain the true reasons for this “voluntary reduction” which goes directly to the gravamen of the Debtor’s objection that Damon & Morey’s Fee Applications are fraudulent and unreasonable.

Further scrutiny of the Damon & Morey Fee Applications shows that this credit is wholly inadequate to account for numerous similar time entries which are also attributed to the same conflicted representation and are rife in its fee applications approved in full. Contrary to Damon & Morey’s assertion, the Debtor has identified

other payments or credits to which it knows it is entitled. For the convenience of the Court, the Debtor has compiled a listing of other amounts charged to the Debtor as a result of the conflicting representation of Damon & Morey. For a more complete explanation and to see the context of this compilation please reference Damon & Morey's Fifth and Sixth Fee Applications located in Documents 677 and 713 of Docket 94-10866.

Damon & Morey Billing Entries for Conflict re CPSI					
5th Fee Application " Possible Chapter 11"					
Date	Description	Attorney	Hours Charged	Amount Charged	
12/28/1999	EBT Hopkins	BDG	1.5	\$	142.50
1/14/2000	EBT Hopkins	BDG	0.2	\$	19.00
1/18/2000	EBT Hopkins	BDG	0.2	\$	19.00
1/20/2000	EBT Hopkins	BDG	0.1	\$	9.50
1/29/2000	Feldman	WFS	0.3	\$	-
1/31/2000	Feldman	WFS	0.3	\$	-
1/31/2000	Drew	WFS	0.1	\$	22.00
2/2/2000	Feldman/Hopkins	BDG	0.3	\$	31.50
2/3/2000	Feldman	WFS	0.1	\$	-
2/7/2000	Feldman/Hopkins	BDG	0.1	\$	10.50
2/9/2000	Feldman/Retainer	WFS	0.2	\$	-
2/14/2000	Feldman	BDG	0.5	\$	52.50
2/15/2000	Feldman re Kaplan Dec	WFS	0.3	\$	66.00
2/22/2000	Feldman	WFS	0.1	\$	-
2/24/2000	Feldman	WFS	0.1	\$	-
3/24/2000	Feldman/Hopkins EBT	WFS	0.1	\$	22.00
3/28/2000	Feldman re informal claims	WFS	0.1	\$	22.00
4/6/2000	Feldman re CPSI	BDG	0.2	\$	21.00
4/7/2000	Feldman/Hopkins EBT	WFS	0.1	\$	22.00
4/11/2000	Feldman/Hopkins EBT	WFS	0.1	\$	22.00
4/25/2000	Feldman/Hopkins EBT	WFS	0.1	\$	22.00
5/9/2000	Feldman/Hopkins EBT	WFS	0.2	\$	44.00
5/22/2000	Drew/Pacheco	WFS	0.1	\$	22.00
5/23/2000	Feldman/Elia	WFS	0.5	\$	110.00
6/1/2000	Feldman	WFS	0.3	\$	66.00
6/13/2000	Feldman/Hopkins	WFS	0.1	\$	22.00
TOTAL 5th Fee App			6.3	\$	767.50
6th & Final Fee Application "NCIDA"					
Date	Description	Attorney	Hours Charged	Amount Charged	
8/8/2000	Gross Shuman bill	WFS	0.1	\$	-
8/9/2000	Feldman/NCIDA Arb	WFS	0.1	\$	22.00
9/13/2000	Feldman re calculations	WFS	0.3	\$	66.00
9/20/2000	Feldman	WFS	0.1	\$	22.00
9/21/2000	Feldman	WFS	0.1	\$	22.00
9/26/2000	Garvey	WFS	0.1	\$	22.00
10/6/2000	Feldman	WFS	0.1	\$	22.00
10/16/2000	Feldman	WFS	0.1	\$	22.00
10/30/2000	Gross Shuman bill	WFS	0.1	\$	-
11/28/2000	Feldman re settlement	WFS	0.1	\$	22.00
12/20/2000	Feldman/Garvey/Drew	WFS	0.1	\$	22.00
1/2/2001	Feldman	WFS	0.1	\$	22.50
1/3/2001	Feldman/Elia	WFS	0.2	\$	45.00
2/5/2001	Feldman/Elia	WFS	0.3	\$	67.50
2/6/2001	Feldman/Elia	WFS	0.2	\$	45.00
2/7/2001	Feldman/Bankruptcy Ct re Settlement	WFS	0.8	\$	180.00
2/14/2001	Feldman re settlement	WFS	0.2	\$	45.00
3/26/2001	Garvey/Drew/settlement	WFS	0.1	\$	22.50

3/27/2001	Garvey/Drew/releases	WFS	0.1	\$	22.50
4/7/2001	Settlement/Releases	WFS	0.5	\$	112.50
5/7/2001	Feldman/Drew/stip	WFS	0.2	\$	45.00
5/10/2001	Powers/stip	WFS	0.1	\$	22.50
6/4/2001	Powers/Drew/rev settl	WFS	0.1	\$	22.50
6/12/2001	Powers	WFS	0.1	\$	22.50
6/21/2001	Powers	WFS	0.1	\$	22.50
6/26/2001	Powers/exec instruments	WFS	0.1	\$	22.50
7/11/2001	Feldman re closing	WFS	0.1	\$	22.50
7/12/2001	Feldman	WFS	0.1	\$	22.50
8/13/2001	Feldman/Gardner	WFS	0.1	\$	22.50
8/31/2001	Feldman re releases	WFS	0.3	\$	67.50
9/25/2001	Drew/Powers/docs	WFS	0.1	\$	22.50
10/8/2001	Feldman re releases	WFS	0.2	\$	45.00
10/9/2001	Feldman re Bankruptcy Ct	WFS	0.1	\$	22.50
10/10/2001	Feldman/Powers/settlement	WFS	0.4	\$	90.00
10/11/2001	Feldman	WFS	0.3	\$	67.50
10/12/2001	Feldman re escrow	WFS	0.2	\$	45.00
10/22/2001	Feldman re procedures	WFS	0.3	\$	67.50
10/23/2001	Feldman re stip	WFS	0.1	\$	22.50
10/31/2001	Feldman correspondence	WFS	0.1	\$	22.50
1/19/2002	Feldman	WFS	0.1	\$	22.50
4/16/2002	Feldman/ re CPSI resolved	WFS	0.1	\$	22.50
TOTAL 6th Fee Appl			7.1	\$	1,547.00
TOTAL 5th + 6th				\$	2,314.50
1429% of amount Damon & Morey admitted					

Damon & Morey attempts to explain the discrepancy away as though its actions leading to these “voluntary credits” were innocent mistakes. These discrepancies are in fact the damning evidence that lingers from Damon & Morey’s malfeasance.

The Debtor respectfully submits that the District Court’s reliance and acceptance of Damon & Morey’s one-sided explanation as to the discrepancy is an abuse of discretion and requires reversal. The Debtor believes that it is wholly improper for the District Court to adjust this Court’s Order or stray from its Mandate.

The Debtor respectfully urges this Court to vacate its Mandate because the discrepancy between the Mandate and the Judgment (even accepting the self-serving, but unavailing, explanations in Damon & Morey’s Brief) call for judicial scrutiny of Damon & Morey’s credits and “voluntary” reductions to assure that they are reasonable under the unique circumstances of this case.

The admission by Damon & Morey that it improperly charged the Debtor is conclusive proof that approval of all Damon & Morey Fee Applications in full was clearly erroneous and an abuse of discretion. To enter judgment in a different amount, and thereby accept Damon & Morey's self-policing, is violative of the Bankruptcy Court's duty to determine the reasonableness of fee applications and principles of due process. It is incomprehensible that the Legislature could have intended or that the Courts would ever allow counsel to determine on its own, without any judicial scrutiny, the credit for billed but unnecessary legal services, especially when coupled with pecuniary loss incurred as a result of its admitted malfeasance.

It is respectfully submitted that the Bankruptcy Court might not have called Debtor's allegations of misconduct and malpractice "a gambit" or "a crock of baloney" had it known about the contingency fee arrangement that Damon & Morey made for a percentage of amounts collected against its own client, the Debtor, or that four (4) attorneys of Damon & Morey and two (2) outside attorneys (and not just one (1) "rogue" attorney as Damon & Morey represented) had worked on matters directly adverse to the Debtor for its own financial gain pursuant to its contingency interest agreement, or that Damon & Morey had falsified its business records by setting up files in the name of others in order to avoid detection.

This Court should not allow the integrity of the entire judicial system to be impugned by this reprehensible behavior of Damon & Morey. This Court should take

notice that Damon & Morey, although its footnoted explanations have now grown to pages, has never addressed, let alone rebutted, the serious allegations concerning its contingency agreement against its Debtor client, or that it developed false business records to conceal its egregious misconduct or that more attorneys were involved in the conflict-of-interest than it has disclosed to the Courts. The Courts below did not know about any of these facts and Damon & Morey can cite no record wherein it disclosed these facts to anyone because it has purposely concealed the truth.

Damon & Morey should also be chastised for its disingenuous assertion to this Court in its Brief that the claims of the Debtor are “barred by res judicata, despite newly discovered evidence”. This citation is misleading and the quotation is plainly taken out of context. A full reading of In re: Layo, 460 F. 2d. 289 (2<sup>nd</sup> Cir. 2006) shows that this case explicitly states that Damon & Morey’s assertion is not true in cases where the evidence was either fraudulently concealed or when it could not have been discovered with due diligence. See Saud v. Bank of New York, 929 F. 2d. 916, 920 (2<sup>nd</sup> Cir. 1991) and Choi v. State, 74 N.Y.2d 933, 550 N.Y.S.2d 267, 549 N.E.2d 469 (1989); W. L. Development Corp. v. Thalgott, 54 A.D.2d 901, 387 N.Y.S.2d 902 (2d Dep’t 1976) (holding that if the plaintiff is not given a full and fair opportunity to litigate the issues in a prior action because the court would not permit the introduction of certain evidence, the rule of collateral estoppel would not be applicable to a subsequent action). Additionally, Damon & Morey knows that in its October 24, 2006 Order, the

Bankruptcy Court ruled that it would not hear any evidence of Debtor's malpractice allegations and that malpractice claims should be heard in State Court. Neither res judicata nor collateral estoppel are applicable to the facts of this case.

The Debtor has always maintained that the reasonableness of Damon & Morey fees can only be determined after full disclosure of its conflicted representation and a full and fair opportunity to determine what portion of its billing relate to and the pecuniary losses incurred as a result of same. The Debtor seeks nothing more than due process after its attorney has admitted its violation of the disinterestedness requirement.

Under 28 USC § 2106, the Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

The Court of Appeals has jurisdiction to set aside its judgment if judgment was induced by fraud upon the court practiced by party to litigation. In re Long Island Lighting Co. (1952, CA2 NY) 197 F2d 709. Mandate, once issued, will not be recalled except by order of court for good cause shown, good cause being need to avoid injustice; while authority of appellate court to recall mandate to prevent injustice is not expressly set forth in statute, it has foundation in provisions of 28 USC § 2106, as well as inherent power of court; clearest reason for recall or revision of appellate mandate is

to exercise Court of Appeals' power to, at any time, correct clerical mistakes or to make judgment consistent with opinion, and Court of Appeals has power to set aside, at any time, any mandate that was procured by effecting fraud upon court. Greater Boston Television Corp. v FCC (1971, App DC) 149 US App DC 322, 463 F2d 268, 31 ALR Fed 765, cert den (1972) 406 US 950, 32 L Ed 2d 338, 92 S Ct 2042.

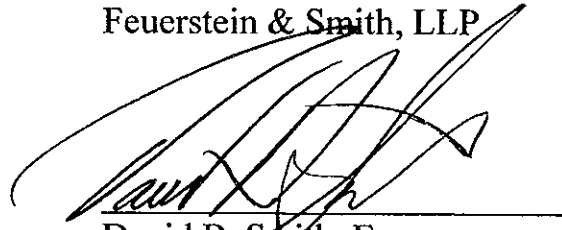
It is respectfully submitted that the extremely disturbing but uncontested facts in this case require just such corrective action by this Court.

**CONCLUSION**

For the foregoing reasons, and those set forth in the Debtor's previously filed Brief, the Debtor prays that in the interests of justice the judgment against the Debtor be vacated and the matter remanded for further proceedings to address Damon & Morey's malfeasance, billing errors and for such further relief as this Court may deem just and proper.

Dated: Buffalo, New York  
December 3, 2007

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