

DATED: October 16, 2007

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

07-3058-bk (Lead)

07-3213-bk (Con)

D.A. ELIA CONSTRUCTION CORP.,

Plaintiff-Appellant,

L. ANDREW BERNHEIM,

Intervenor-Appellant,

vs.

DAMON & MOREY LLP,

Defendant-Appellee,

CHRISTOPHER K. REED, TRUSTEE

Trustee.

DECLARATION OF DAVID A. ELIA, ESQ.

Pursuant to 28 U.S.C. §1746, David A. Elia, Esq., declares, under penalty of perjury, as follows:

1. I am an attorney duly licensed to practice law in all Courts of the State of New York and United States Federal Courts including the United States Supreme Court. I make this declaration in support of the Application of Debtor-Appellant (hereinafter “Debtor” or “Elia”) to Supplement the Record on Appeal and in reply to the papers of Defendant-Appellee (hereinafter “Appellee” or “Damon & Morey”) in opposition thereto.

2. I am the Chief Executive Officer of the reorganized Debtor. I have actual personal knowledge of all factual representations made herein and affirm that all averments made by me herein are true.

3. Although Daniel Brown represents that he is “fully familiar” with the facts and circumstances set forth in his Declaration, he hedges this assertion by stating that his representations are either based upon his personal knowledge or upon his review of papers and are true to the best of his knowledge, information and belief. Unlike my Declaration which I hereby testify is based upon my own personal knowledge, the Court is left to guess which of Daniel Brown’s representations are based upon his personal knowledge and which are based upon some, perhaps unfounded, “belief”.

4. In addition to not having the requisite personal knowledge of the facts of this case, Daniel Brown has already proven incredible and unreliable and, therefore, this Court should attach no independent weight to representations made in his Declaration, since:

- a. Daniel Brown falsely represented to the District Court that Damon & Morey had never charged Debtor any fees related to the actual conflict of interest it created by representing both the Debtor and the Lead Creditor (hereinafter “CPSI”)

against the Debtor (Exhibit #1) [p7, line 17 and p33, lines 9-11 of June 23, 2005 transcript of Hearing before Judge Arcara]. He was later forced to admit to this Court of Appeals that, contrary to his representation to the District Court, the Debtor had in fact been charged for this. (Exhibit #2) [p12, footnote 2 of its Brief for Appeal to 2nd Circuit]. Further, I hereby declare that there are more of these improper fees that have been charged to the Debtor for which Damon & Morey still has not accounted;

- b. Daniel Brown first falsely represented to the District Court that “an” (one (1)) attorney (Marc Hopkins) from Damon & Morey and one (1) outside attorney (Anthony Ronci) were involved in said actual conflict of interest. (Exhibit #1) [p30, line 11 and p31, lines 1-2 of June 23, 2005 transcript of Hearing before Judge Arcara]. Then, Daniel Brown represented to this Court that a “rogue” attorney (Marc Hopkins) from Damon & Morey and one outside attorney (Anthony Ronci) were involved in said conflict of interest. (Exhibit #2) [p39 of Damon & Morey’s Brief to 2nd Circuit, footnote 2, p12]. Now, in his instant Declaration [on p6, footnote 1] to this Court to which my Declaration hereby responds, Daniel Brown continues to deceive this Court as to the extent of Damon & Morey’s involvement in this actual conflict of interest, clearly implying that only one (1) Damon & Morey attorney (Marc Hopkins) and one (1) outside counsel (Anthony Ronci) knew. Daniel Brown does not attempt to explain how one rogue attorney secretly caused one of the largest and most experienced law firms in Western New York to unilaterally process a Damon & Morey check. Was this rogue attorney an authorized signatory on Damon & Morey’s bank accounts?

Nor does Daniel Brown attempt to explain exactly upon whom Anthony Ronci caused the complaint that Damon & Morey had drafted to be served. He merely states that it was served on the Debtor in March 1996. However, this service upon the Debtor is directly contradicted and denied by another Damon & Morey attorney (William Savino) in representations made to the Bankruptcy Court,

“...In furtherance of its claim, CPSI commenced an action in Supreme Court, Niagara County, in or about of March 1996 under Article 3A of the Lien Law to enforce payment of this amount due to CPSI: an action on which the Debtor was never served with the summons and complaint, leaving the Supreme Court with no jurisdiction whatsoever...”,

at ¶ 46 of Docket # 631. [Debtor’s Objection as to the Timeliness of Unsecured Claims of Naples, NCIDA and CPSI]

- c. By so cryptically characterizing and only partially disclosing material facts related to Damon & Morey’s admitted conflict, Daniel Brown appears to be continuing an attempt to insulate his law firm from liability caused by the actions of its attorneys and the outside counsel it hired and paid. Despite Damon & Morey’s concealment and its continuing retention of Debtor’s files (Debtor has moved for an Order directing Damon & Morey to deliver its files to it), the Debtor has now discovered and has submitted culpatory evidence with its instant Application to Supplement the Record on Appeal that:
 - i. Damon & Morey had also hired and arranged with a second undisclosed outside counsel to secretly share 1/3 of all amounts that they recovered from the Debtor;

- ii. at least three (3) other Damon & Morey attorneys (a minimum of four (4)) were actually working against the Debtor and, therefore, involved in this actual conflict of interest; and
 - iii. Damon & Morey concealed its involvement in the conflict by setting up files in the names of principals of CPSI when, in fact, it was working on CPSI claims against the Debtor.
- d. Daniel Brown misinformed the District Court during the June 23, 2005 hearing by stating that “... *[when] Damon & Morey learned of the existence of this lawsuit [the Supreme Court action in Niagara County involving CPSI against the Debtor]...that’s when the other counsel was retained. Now, it’s my understanding that the counsel obtained an order directing Construction Paysetters [sic, should be “Construction Pacesetters” or “CPSI”] pay back the seventy-thousand dollars...*” [p32, lines 4-11]. But at ¶ 69 of its Responses to Elia’s Objections to Damon & Morey’s Sixth and Final Fee Application, Damon & Morey stated that “... *[the Court] granted Damon & Morey’s motion...and ordered CPSI to repay the \$75,000...*” Exhibit 3 (see Docket #729 for full text). Apparently, Daniel Brown does not have sufficient personal knowledge or information to know that “the other counsel” was actually his own law firm, Damon & Morey.
- e. I have never been the President of the Debtor as Declarant Daniel Brown has incorrectly asserted (twelve (12) times in what I think is a transparent technique designed to prejudice this Court against me) in his papers submitted in Opposition to Appellant’s Application to Supplement the Record on Appeal;

f. Finally, Daniel Brown himself admitted that William Savino was the principal attorney at Damon & Morey representing the Debtor (“...the attorney in charge of this particular client...”) (Exhibit #1) [p30, line 20-21 of June 23, 2005 transcript of Hearing before Judge Arcara]. Therefore, William Savino possesses personal knowledge on behalf of Damon & Morey related to this case that is superior to that of Daniel Brown.

5. William Savino, Esq., the Senior Partner and Chairman of Damon & Morey’s Business Litigation and Insolvency Department, was in fact Debtor’s chief attorney from Damon & Morey, was the attorney who actually handled nearly all of the representation of the Debtor by Damon & Morey as can be readily confirmed by examination of his time charged on billings to Debtor and has, by far, the most extensive personal knowledge of any attorney at Damon & Morey of the facts pertinent to this matter.

6. In his Declaration under penalty of perjury dated May 11, 1994 (Exhibit 4) requesting Bankruptcy Court approval of Damon & Morey’s application to be employed as General Counsel for the Debtor, William Savino said:

- a. at ¶ 2, that “ *The basis for this motion is Damon & Morey’s substantial experience in bankruptcy and construction litigation, combined with its long-standing relationship with the Debtor.* ”
- b. at ¶ 5, that “ *In terms of my relationship with the Debtor, the Court should note that I have known David A. Elia, the Chief Executive Officer of the Debtor for decades, having grown up with him in Niagara Falls, New York. In the mid-1980’s, when Mr. Elia became the Debtor’s Chief Executive Officer, I, on behalf of Damon & Morey, began performing legal services for the Debtor.* ”

- c. at ¶ 8, that “ *Based upon the foregoing, Damon & Morey has a special relationship with the Debtor...continuing over years, arising from a personal relationship and comprising on-going litigation.*”
- d. at ¶ 20 that “ *To support Damon & Morey’s appointment herein, in addition to the special, long-standing relationship between Damon & Morey and the Debtor, as indicated herein, for the purposes of avoiding any interest adverse to the Debtor, Damon & Morey hereby waives approximately \$14,000 in legal fees for legal services performed for the Debtor prior to December 1, 1993.*”
- e. at ¶ 36 that “ *In any situation where there is, was, or potentially could be even an appearance of a conflict of interest, ...such case would be handled herein by the Giardino & Schober firm.*” (Obviously, Damon & Morey did not comply with this representation it made to the Bankruptcy Court.)

7. Despite the fact that William Savino is clearly the attorney from Damon & Morey with the most personal knowledge of its dealing with Debtor, this Court is asked to rely on the beliefs of Daniel Brown. I submit that William Savino is conspicuous by his absence from these proceedings. And it does not appear that William Savino is unavailable since he recently submitted a four (4) page letter to the New York State Supreme Court seeking to expedite receipt of payment on Damon & Morey’s judgment against the Debtor before the end of its fiscal year. (Exhibit 5) [Damon & Morey’s Sept 6 2007 letter to Judge Siwek] For reasons set forth below, I contend that William Savino has purposely avoided testifying in this matter.

8. William Savino has lied to advance Damon & Morey’s and his own personal interests at the expense of the Debtor. Specifically, and as but one example, regarding Debtor’s intention to resume business:

- a. William Savino stated that *“It is and always has been D.A. Elia’s intention to return to operations once its bankruptcy case was closed.”*(emphasis added) (Exhibit 6) [p3 of Debtor’s Objections as to the Timeliness of Naples, NCIDA and CPSI Claims and his August 10, 1999 letter to The Honorable John T. Elfvin]. Obviously, this is truthful. The Debtor’s family has been in the construction business for several generations. No reasonable person could believe that Debtor suddenly decided to get out of the business in 1994. The Debtor was forced to cease its operations only because USF&G breached its agreement to provide the required bonding; BUT,
- b. William Savino later testified that *“...there is no evidence that the Elia ever intended to use the remaining shell of the Debtor to restart in business...”* in his Responses to Elia’s Objections to Damon & Morey’s Sixth and Final Fee Application, at P 36, ¶ 212 (Exhibit 7). It should also be noted when weighing matters of credibility that *“Damon & Morey’s Response is the equivalent to sworn testimony...Mr. Savino’s signature is the equivalent of verification of all the allegations contained in that Response.”* (Exhibit 8 [Damon & Morey’s Brief in the Appeal of the Bankruptcy Court’s October 19, 2004 Final Order at footnote 3, p9])

9. In that same paragraph of its Responses to Elia’s Objections to Damon & Morey’s Sixth and Final Fee Application, William Savino goes on to state, *“Most importantly, this Court knows that its decision regarding discharge turned on the liquidation of the Debtor’s assets, a liquidation Damon & Morey attempted to deny in pleadings submitted on colorable theories”*. The undisputed facts are that Debtor voluntarily filed for bankruptcy protection after its surety,

USF&G, breached its bonding agreement. Debtor continued to operate, but eventually could not sustain its overhead costs without the bonding necessary to conduct its business. It therefore ceased operations and liquidated assets in order to provide sufficient funding to carry out its litigation against USF&G, but was not then judicially restricted from operating. It was only after Debtor received the USF&G settlement monies and Damon & Morey failed to distribute payment checks to creditors, as it had been directed to do by the Debtor, that the Bankruptcy Court (after wrongly assuming that Debtor had already done so and consequently losing trust in the Debtor) enjoined the Debtor from resuming business until after all claims were resolved. The Fourth Amended Disclosure Statement approved by the Bankruptcy Court states, on p13, ¶ E, 1, that *“From and after the Effective Date, the Reorganized Debtor may operate its business, and may use, acquire and dispose of its property free of any restrictions of the Code, except as otherwise provided in the Plan...”* (See Docket #242) The Plan of Reorganization was explicitly and precisely designed to allow liquidation of the Debtor’s assets in order to provide sufficient funding to carry out its litigation against USF&G and, thereby, regain the assets necessary to resume its business. All prior versions of the Plan of Reorganization and all of William Savino’s representations made before the fee dispute with Debtor reflect and confirm Debtor’s intent to resume operations. It was only after it had acquired an interest adverse to the Debtor that Damon & Morey began to represent otherwise. Query: If Damon & Morey is willing to submit “colorable” theories for a client, what is it willing to do to protect its own vital interests?

10. Damon & Morey has submitted material self-serving contradictory papers to the Federal Courts with impunity. As but one additional example to what has previously been set forth herein, in Damon & Morey’s Response to Objections of Debtor to its 6th & Final Fee Application (Docket #729, ¶ 219 et. Seq.) it stated that its representation of Debtor ended *no later than*

August 7, 2002. However, in its Appellee Brief filed on May 2, 2005 with the District Court (p4, 8th line) (and later to this Court in its Brief, p4, line5) (Exhibit 8 and 2, respectively) Damon & Morey stated that its representation ended in September, 2003. The duration of Damon & Morey's representation had been cited by it as a justification of the reasonableness of its fees.

11. Damon & Morey has falsified business records to conceal its wrongful conduct by creating files in the names of the CPSI principals (Pacheco and Cozad) for work it actually performed for CPSI against the Debtor (See the attached excerpts from the sworn testimony of Marc Hopkins, Esq. in Exhibit 9 and affidavit of Matthew Garvey attached hereto as Exhibit 10. Specifically:

- a. Matthew Garvey states in his affidavit at ¶ 18 of Exhibit 10, *"After agreeing to assume the representation of **CPSI** in the appeal, I received a check for \$1,500 from Damon & Morey as an advance for the expenses in the prosecution of the appeal. A copy of the check and deposit slip for the Garvey & Garvey IOLA account dated December 13, 1995, is annexed hereto..."*
- b. Matthew Garvey affidavit attachment of Exhibit B to Exhibit 10 attached hereto shows the Garvey deposit ticket for \$1,500 dated December 13, 1995; BUT
- c. Damon & Morey's business records show this \$1,500 as a disbursement charged to **Cozad Construction** in its February 27, 1996 billing statement. (Exhibit 11)
- d. Damon & Morey copied its \$1,500 check to Garvey in a manner making it *"illegible and reproduced so as to obstruct payor identity"* as I noted in my December 20, 1999 letter to Damon & Morey. (Exhibit 12)
- e. Two (2) days later, on December 22, 1999, William Savino advised the Bankruptcy Court that *"...we truly do not know what Hopkins did. The file was*

not opened as Construction Pacesetters versus Elia. And, in fact, I will tell your Honor that these disbursements were billed to an unrelated file". Although it did not have it then, Debtor now has proof that this \$1,500 was fraudulently billed to Cozad Construction for work (an appeal of a New York Supreme Court Order adverse to CPSI and favorable to Debtor) that Matthew Garvey was to perform services on CPSI's behalf against the Debtor at the direction of Damon & Morey. This is clearly a file related to the exact conflict of interest that Judge Kaplan was inquiring about. Furthermore, how could William Savino be so sure and definitively state that said disbursements were billed to an "unrelated file"? This representation to the Court is particularly doubtful when one considers that William Savino is the Senior Partner and Chairman of Damon & Morey's Business Litigation and Insolvency Department, supervising Damon & Morey attorneys DiGiulio, Piotrowski and Moore, all of whom were charged on the very same billing statement with the Garvey expenditure to what he calls the "unrelated" Cozad Construction file.

12. It is particularly disturbing that Damon & Morey would conceal such critical material information from the Courts and then wantonly state, *"When presented with all of these facts, the Bankruptcy Court exercised its discretion and determined there would be no denial of compensation to attorneys at Damon & Morey who served the estate without actual knowledge of their former partner's wrongdoing. Judge Kaplan further exercised his discretion to determine that disgorgement was not proper under these circumstances."* (Exhibit 2) [p40 of 2nd Circuit Appellee brief].

13. Damon & Morey has actively prevented its Debtor client from discovering and Bankruptcy Court Judge Kaplan, District Court Judge Arcara and the Justices of this Court of Appeals from considering relevant and material evidence that certainly might have affected the exercise of judicial discretion to the detriment of Damon & Morey.

14. Debtor seeks to supplement the record on appeal with information that because of the wrongful conduct of, and concealment by, Damon & Morey was never before the District or Bankruptcy Courts below in connection with the entry on the money judgment against the Debtor. Debtor has: (a) appealed to this Court and (b) moved in the Bankruptcy Court for relief from this judgment procured by fraud. The reason that the information was never before the Courts below is that it is newly discovered information that was purposely concealed from Debtor by its attorney who had professed a “...special relationship with the Debtor...continuing over years, arising from a personal relationship.”

15. The Debtor did not know, did not suspect and had no prior opportunity to submit evidence that, Damon & Morey had

- a. entered into and failed to disclose its contingency agreement with CPSI (Lead Creditor of the Creditors’ Committee) whereby as compensation for its representation of CPSI against its Debtor client, Damon & Morey would receive 1/3 of the amounts collected for CPSI from the Debtor (as confirmed by the sworn testimony of Marc Hopkins, attached hereto as Exhibit 9);
- b. deceived the Bankruptcy, District and Appeal Courts and the Debtor regarding the extent of its participation in the admitted conflict of interest concerning CPSI and Debtor by falsely representing to the Courts and the Debtor that only one (1) attorney and one (1) outside attorney was involved when in fact at least four (4)

Damon & Morey attorneys worked for CPSI against the Debtor, in addition to at least two (2) outside attorneys that Damon & Morey hired and paid but never disclosed (as confirmed by the attached billing statements, attached hereto as Exhibit 13);

- c. concealed its wrongful conduct by opening Damon & Morey files in the names of others for work it performed for CPSI against the Debtor (See the attached excerpts from the sworn testimony of Marc Hopkins, Esq. in Exhibit 9 and affidavit of Matthew Garvey attached hereto as Exhibit 10);
- d. utilized an attorney to advance its own interests to the Debtor's detriment that it had improperly hired (since done without Bankruptcy Court approval) ostensibly for the sole purpose of representing the Debtor against CPSI and thereafter having said attorney acquire a Stipulation of Discontinuance of a malpractice action against Damon & Morey (based upon, inter alia, its conflicted representation of CPSI against Elia) and a General Release for Damon & Morey, (all as set forth in the attached letter from Daniel Elia to the Grievance Committee, with exhibits, dated August 10, 2007, Exhibit 14).

16. It is also inconceivable that Damon & Morey could have the audacity of raising the defense of *res judicata*. Damon & Morey knows full well that Judge Kaplan refused to hear any issues related to Debtor's malpractice claims against it, stating in his October 19, 2004 Order that *"If Elia believes that it can even now bring a malpractice action against Damon & Morey arguing equitable estoppel as to the malpractice Statute of Limitations, it is for the State Courts to hear that argument."* (Exhibit 15). When Debtor did bring its malpractice action in State Court, Damon & Morey removed the action to District Court and began its untenable assertion of

res judicata. The Debtor has moved to remand the case to State Court and the District Court has not yet ruled. Debtor agrees with Damon & Morey that, “Under the doctrine of *res judicata*, “[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.” *Res judicata* is, therefore, totally inapplicable in this case precisely because the issues of Debtor’s malpractice claims were not and could not have been litigated in the prior action. Damon & Morey nonsensically argues that Judge Kaplan’s refusal to hear Debtor’s malpractice claims constitutes litigation on the merits, despite the fact that he explicitly stated that he would not hear the claims and that it is a matter for the State Courts.

17. Obviously, the fact that I am an attorney does not prevent me from being duped by a fellow attorney, especially one with whom I had a “special, long-standing relationship”. Although Damon & Morey continues to emphasize it, the fact that I am an attorney is irrelevant and does not affect the Debtor’s legal rights and privileges. Nor does this fact lessen the duties that Damon & Morey owed Debtor and the reasonableness of its expectation of undivided loyalty, free from conflicts-of-interest; an expectation that is not discretionary but required by Bankruptcy Code 327(a).

18. As this Court must have surmised, I feel very strongly, as a victim, an attorney and an officer of the court, that this egregious misconduct of Damon & Morey must be redressed.

Dated: Clarence, New York
October 16, 2007

David A. Elia
Chief Executive Officer
D.A. Elia Construction Corp.
Debtor-Appellant