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Legal Malpractice Lawsuit Against Hayes Is Dismissed

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A Manhattan federal judge has thrown out a legal malpractice suit that had accused well-known litigator Edward W. Hayes of sleeping through the deposition of his own client.

Robert Flutie retained Mr. Hayes in 2003 to defend companies controlled by him against a suit brought by the trustee overseeing the bankruptcy of companies mostly affiliated with his brother Michael, a model manager whose clients have included James King and Alexis Bledel.

Southern District Bankruptcy Judge Burton Lifland ruled in 2004 that Robert Flutie's companies, Flutie Bros. LLC and Flutie Entertainment USA, Inc., were successors to the bankrupt Flutie Entertainment Corp. and liable for \$191,089 in loans. Mr. Flutie blamed Mr. Hayes for the outcome, claiming the lawyer reassured him the trustee had no case, then did almost nothing to prepare for trial.

In his complaint, Mr. Flutie alleges that, during his deposition by the trustee's lawyer, Mr. Hayes "positioned himself on a couch . . . put his hat over his face and slept through much, if not most, of Flutie's deposition."

But Southern District Judge Deborah A. Batts said Mr. Flutie failed to show, as required in legal malpractice cases, that "but for" the lawyer's alleged mistakes, the outcome would have been different. Rather, based on the bankruptcy judge's reasoning, she said, it seemed clear the outcome would have been the same.

"The type of evidence Plaintiff contends that Hayes should have obtained, and the information he could have gleaned from the depositions he should have taken, would not have changed the Bankruptcy Court's determinations on whether Flutie Bros. was a successor in interest to Flutie Entertainment," Judge Batts wrote in [Flutie Bros. v. Hayes](#), 04 Civ. 4187.

The decision will be published Friday.

The bankruptcy court had agreed with the trustee that Michael Flutie had illegally transferred model representation contracts from the insolvent entities. To counter that claim, Robert Flutie had argued, Mr. Hayes should have taken depositions or procured the trial testimony of models and others familiar with the industry. Such witnesses, he claimed, would have testified that it was industry practice, not fraudulent conveyance, for models to transfer their contracts among different management firms.

But the judge said such testimony would have been irrelevant in the case of Flutie Bros., which was found liable for outstanding loans not for their receipt of illegally transferred model contracts. She also said it was unclear how such experts might have challenged the testimony of the trustee's forensic accounting expert.

The judge also noted that much of the bankruptcy's court's decision seemed based on its evaluations of the Flutie brothers' credibility as witnesses. Judge Lifland had found both brothers evasive and "lacking in credibility."

Judge Batts also said there were no grounds for a breach of contract claim against Mr. Hayes, finding that his alleged reassurances about the ease of the case did not constitute an enforceable promise.

One of the city's most well-known lawyers and the model for the defense lawyer in Tom Wolfe's "Bonfire of the Vanities," Mr. Hayes said yesterday that his assessment of the case was actually the complete opposite of that alleged in the malpractice suit.

"I told them it was complete lunacy to take this to trial and they should settle," he said. "The Flutie brothers' perception of acceptable risk is much higher than normal."

He said he never intended to take the depositions because of his strong feelings about not taking the case to trial. He noted that he only cashed one of the two \$7,500 checks he received as a retainer.

Asked whether he slept through his client's depositions, Mr. Hayes laughed.

"Only through the boring parts," he said.

In addition to finding Robert Flutie's companies owed \$191,089, the bankruptcy court also found that Michael Flutie had looted his companies for personal expenses, declaring only around \$14,000 in salary in 2001, despite a lavish lifestyle, occasionally chronicled in gossip columns, in Manhattan and the Hamptons. Judge Lifland ruled he owed the estate \$1.7 million and was personally liable for its debts.

Mr. Hayes, who represented one of the former police officers recently convicted in Brooklyn federal court of murdering for the mob, was represented by A. Michael Furman of Kaufman Borgeest & Ryan.

Robert Flutie was represented by Manhattan's Jeffrey L. Rosenberg and Alex Spizz of Todtman, Nachamie, Spizz & Johns.

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