

Colucci v Arisohn

2009 NY Slip Op 32053(U)

September 8, 2009

Supreme Court, New York County

Docket Number: 111955/07

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE, J.S.C.
Justice

PART 10

Index Number : 111955/2007

COLUCCI, THOMAS E.

VS.

ARISOHN, MARK

SEQUENCE NUMBER : 007

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

In this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Motion seq #s 007, 008 + 009 are consolidated for consideration + decision - J

Status conf. to be held on

12/10/09 @ 9:30am.

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED

SEP 10 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/8/09

J
JUDITH J. GISCHE, J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**Supreme Court of the State of New York
County of New York: Part 10**

-----x

CLEUZA COLUCCI, as Administratrix of the
Estate of Thomas E. Colucci,

Plaintiff,

-against-

MARK ARISOHN, LABATON, SUCHAROW
& RUDOFF, LLP, PHILIP MICHAEL and
TROUTMAN SANDERS, LLP, AND
NAJMUDDIN PERVEZ,

Defendants.
-----x

Decision/Order

Index No.: 111955/07

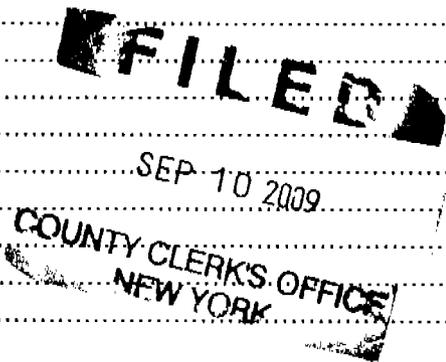
Seq. Nos. : 007, 008 and 009

Present:

Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers - Motion Seq 007	Numbered
Labaton Defs n/m (3211).....	1
ML affirm in support, exhs.....	2
WNF affirm in opp, exhs.....	3
DM affid in opp, exhs.....	4
WNF exhs 1.....	5 ¹
WNF exhs 2.....	6
DM exhs.....	7
DM exhs 2.....	8
ML reply affirm, exhs.....	9
6/18/09 Transcript.....	10



Papers - Motion Seq 008	Numbered
Pervez n/m (3211), exhs.....	1
NP affid, exhs.....	2

¹Papers numbered 5 through 8 on motions seq. # 007 are copies of exhibits that plaintiff first refers to as being submitted to the court under seal as part of papers numbered 3 and 4. Ultimately no papers were filed with the court under seal and no papers were considered by the court that were otherwise under seal in connection with these motions.

Papers	Numbered
Troutman n/m (3211), exhs.....	1

This action largely arises from a medicaid fraud scheme which was prosecuted and settled in a federal *qui tam* filed action under the Federal False Claims Act, 31 USC §§ 3729-3733. Defendants Najmuddin Pervez (“Pervez”) (seq. no. 007), Labaton Sucharow LLP, Mark Arisohn and Philip Michael (collectively referred to herein as the “Labaton Defendants”) (seq. no. 008) and Troutman Sanders LLP (“Troutman”) (seq. no. 009) have each moved, pre-answer, to dismiss claims asserted against them in this action. Plaintiff opposes each motion. After oral argument held on June 18, 2009, the court consolidated these motions for consideration and disposition in a single decision and order.

The following facts are based upon the allegations contained in the complaint. Prior to September 2002, plaintiff², through a number of corporations of which he was the sole shareholder, contracted with Beth Israel Medical Center (“BIMC”) to provide, *inter alia*, business consulting with respect to BIMC’s billings and collections for professional services, hospital services, physician credentialing, Medicare and Medicaid reimbursements, self-pay patients and customer services for a medical supplies program (“BIMC Consulting Services”). On or about June 4, 2002, BIMC commenced an action in New York Supreme Court, New York County, bearing Index No. 602059 against plaintiff, plaintiff’s corporations and Donald Modzelewski. Modzelewski was

² References to plaintiff herein are made with respect to the now deceased Thomas E. Colluci, whose claims are prosecuted by Cleuza Colucci, as Administratrix of Thomas E. Colluci’s Estate.

Vice President for Reimbursement and Budget at BIMC. In the complaint, BIMC alleged that plaintiff had engaged in wrongful and fraudulent billing practices arising from the BIMC Consulting Services (the "Civil Action"). Plaintiff retained the Labaton law firm to represent him in the Civil Action. Mark Arisohn was the lead attorney at Labaton representing plaintiff in that Civil Action.

On or about August 2003, plaintiff and Modzelewski were indicted by the New York State Attorney General's Office in an action entitled People of the State of New York v. Colucci and Modzelewski, Indictment No. 2573/03 (the "Criminal Action"), in connection with the alleged wrongful and fraudulent billing practices asserted by BMIC in the Civil Action. In particular, the indictment alleged that plaintiff and his companies "submitted fraudulent invoices ... claiming payment for work never performed and claiming, in other instances, payment for other invoices already paid or for an amount in excess of the amount due." It was also alleged that Modzelewski approved those invoices for payment and directed third-party vendors to pay plaintiff's companies directly. Plaintiff was represented by the Labaton law firm in the Criminal Action as well.

Plaintiff alleges that during the course of the Labaton Defendants' representation of him, he conveyed specific written and verbal information about the BIMC Consulting Services, which was to be held confidential by the Labaton defendants and revealed only as appropriate to benefit plaintiff and his corporations in their defense of the Civil and Criminal Actions. During a meeting, Arisohn allegedly advised plaintiff that any "dirt" he had "on BIMC" pertaining to possible illegal activities would be useful to "push back" against BIMC in the Civil and Criminal Actions. Plaintiff then told Arisohn

information about "certain frauds" that BIMC perpetrated and continued to perpetrate on the Federal government in connection with the Medicare and Medicaid programs.

Plaintiff refers to this information throughout the complaint as "BIMC Fraud Information." Arisohn advised plaintiff that such information "might form the basis for a *qui tam* action against BIMC and, in or about February 2003, introduced plaintiff to defendant Philip Michael, another Labaton attorney. Plaintiff claims that Michael was represented to be Labaton's expert in *qui tam* actions.

According to plaintiff, Michael was present at future meetings between Arisohn and plaintiff, and he allegedly "discuss[ed] information about BIMC's frauds previously provided by plaintiff, prob[ed] plaintiff for revelation of additional information about BIMC's frauds, review[ed] such of plaintiff's BIMC consulting information that supported or confirmed BIMC's frauds, and [sought] plaintiff's advice and guidance in obtaining additional information about or supporting BIMC's frauds." Michael and Arisohn advised plaintiff that plaintiff's knowledge of BIMC Medicaid/Medicare fraud would be held in confidence and only utilized solely for purposes of assisting in plaintiff's defense in the Civil and Criminal Actions and additionally for assessing the viability of a *qui tam* lawsuit against BIMC. Michael also advised plaintiff that although he had sufficient information to commence a *qui tam* action, plaintiff could not be a relator "because of" the pending Civil and Criminal Actions.

While the aforementioned meetings were occurring, Labaton, Arisohn and Michael were actually representing defendant Pervez in a *qui tam* action against BIMC which had been filed on or about April 2, 2001. The case was pending under seal in

the United States District Court for the Southern District of New York under Docket Number 01 CV 02745 (the "*Qui Tam* Action"). Plaintiff claims that neither the *Qui Tam* Action nor the Labaton Defendants' participation therewith was ever disclosed to him by the defendants during the course of their representation of him in the Civil and Criminal Actions.

Plaintiff then alleges that Arisohn met with him "outside of Labaton's offices" and assured him that even though plaintiff could not be a relator in a *qui tam* action against BIMC, "there would be some money in it for him in the event a successful *qui tam* action were brought against BIMC" based upon plaintiff's information.

Plaintiff claims that in or about June 2004, plaintiff met with Michael and Arisohn at Labaton's offices for their "final meeting." At this meeting, plaintiff met Pervez. Plaintiff claims that he was asked by Michael to reveal his "BIMC Fraud Information" in the presence of Pervez. Michael and Arisohn purportedly assured plaintiff that he would be rewarded in the event of a recovery against BIMC in a *qui tam* action based upon plaintiff's information, and that revealing such information would not compromise plaintiff's attorney-client relationship with the Labaton Defendants. Plaintiff alleges that at some time after this meeting, but before September 20, 2004, Michael amended the complaint in the *Qui Tam* Action to add allegations and claims based upon plaintiff's "BIMC Fraud Information." Plaintiff claims that at this time he still did not know that there was a pending, ongoing *Qui Tam* Action.

Still according to plaintiff, in or about October 2004, Arisohn "presented" to plaintiff terms to settle the Civil Action. Plaintiff alleges that he was "induced, compelled

and coerced" to enter into a stipulation of settlement. Plaintiff specifically alleges that because he had already expended in excess of \$350,000 for attorneys' fees in defense of the Civil and Criminal Actions, he was unable to afford continued representation "that would have established his and [his] Corporations' lack of liability in the Civil Action or would have improved the terms and conditions of settlement with BIMC." As a consequence, plaintiff maintains that he had "no practical choice" but to follow the directions of Arisohn and Labaton and settle the Civil Action, "despite his grave reservations concerning its onerous terms and conditions."

In the Settlement Agreement, plaintiff, his corporations and his co-defendant, confessed judgment to BIMC in the total amount of \$5.6 million, of which \$1 million was to be paid in cash and the balance was to be paid in the event that plaintiff breached specified conditions of the settlement agreement or received any portion of any proceeds from a *qui tam* action against BIMC which involved factual allegations "that in any way implicate, relate to or arise from" BIMC's employment of or contractual relationships with plaintiff and plaintiff's corporations. Plaintiff alleges that if Arisohn and Labaton had properly utilized plaintiff's "BIMC Fraud Information" in "concluding the terms and conditions of the Settlement Agreement", the terms thereof would have been "far more favorable and beneficial" to plaintiff and his corporations.

Thereafter, plaintiff pled guilty to a class "C" felony in the Criminal Action. Plaintiff maintains, however, that he did not "participate in the negotiation nor was he consulted by Labaton or Arisohn in connection with the settlement of the Criminal Action. He alleges that while he was "[w]ithout financial resources and otherwise in a state of emotional distress", he was coerced into entering the guilty plea.

On or about November 30, 2005, the *Qui Tam* Action was settled upon terms and conditions which remain under seal except that BIMC paid approximately \$73 million dollars in settlement . Pervez' share of the settlement was approximately \$15 million. Plaintiff maintains that allegations and claims in the amended complaint in the *Qui Tam* Action are based upon his BIMC Fraud Information. Plaintiff further claims that it was his information that resulted in most or substantially all of the approximately \$73 million agreed to by BIMC to be paid in settlement. Based thereupon, plaintiff asserts that had he been made a party-relator to the *Qui Tam* Action, or had a new *qui tam* action been commenced with him as relator, plaintiff would have received a substantial award as relator, and further, that the terms of settlement of the Civil and Criminal Actions would have been far more favorable to him.

Plaintiff also claims that the Labaton Defendants' representation of him in the Civil and Criminal actions constituted an impermissible conflict of interest because the Labaton Defendants were, simultaneously and without his knowledge, also representing Pervez in the *Qui Tam* Action. Plaintiff alleges that the Labaton Defendants divulged and disclosed plaintiff's confidential and privileged communications in furtherance of Pervez's *Qui Tam* Action.

Plaintiff's nineteen causes of action fall into one of two general categories: to wit: [1] claims relating his defense in the Civil and Criminal Actions and (causes of action I through X) [2] claims related to the unauthorized disclosure and use of confidential information (causes of action XI to XIX).

Plaintiff's claims arising from the defendants' actions related to the defense of

the Civil and Criminal Actions are for: [I] legal malpractice; [II] conspiracy to commit malpractice; [III] aiding and abetting malpractice [IV] violations of the Judiciary Law § 487; [V] conspiracy to violate Judiciary Law § 487, [VI] aiding and abetting the violation of Judiciary Law § 487 [VII] violation of General Business Law (“GBL”) § 349; [VIII] conspiracy to violate GBL § 349; [IX] aiding and abetting the violation of GBL § 349 and [X] for indemnity from the Labaton Defendants.

In connection with the disclosure of plaintiff’s confidential communications, plaintiff seeks redress for: [XI] breach of their fiduciary duty; [XII] conspiracy to breach fiduciary duty; [XIII] aiding and abetting breach of fiduciary duty; [XIV] fraudulent misrepresentation; [XV] conspiracy to commit fraud; [XVI] aiding and abetting fraud; [XVII] usurpation of economic benefits; and [XVIII] unjust enrichment.; Lastly, plaintiff seeks as a special remedy the imposition of a constructive trust [cause of action XIX].

Plaintiff’s claims against Troutman arise from the fact that Michael left Labaton at or about 2005 to join Troutman, which subsequently earned legal fees in the *Qui Tam* Action

DISCUSSION

Pervez’ motion to dismiss

The court will first address Pervez’ motion to dismiss based upon jurisdictional grounds. Pervez argues that the court does not have personal jurisdiction over him because service was not properly effectuated. Pervez has submitted his affidavit, as well as the affidavit of Gazmir Lika, the doorman at his building. Lika claims that a process server left an envelope with him, although Lika offered to call Pervez so that

Pervez could get the envelope immediately. Lika then claims that the process server "told [him] that the envelope was being delivered on behalf of his boss and that he was told not to disturb Mr. Perez." Lika then placed the envelope in Perez' mailbox.

Although plaintiff's affidavit of service on its face meets plaintiff's burden, Pervez has raised an issue of fact sufficient to controvert the affidavits and require a traverse hearing. Chaudry Const. Corp. v. James G. Kalpakis & Associates, 60 AD3d 544 (1st dept., 2009). The issue of whether the court has obtained personal jurisdiction over Pervez must be resolved before the remainder of Pervez' motion can be addressed. Therefore, the court hereby refers the issue of whether the defendant was properly served with the summons and complaint to a Special Referee to hear and report back to the Court. The remaining aspects of Pervez' motion will be held in abeyance until the referenced issue as identified herein, is fully resolved.

The Labaton Defendants' motion to dismiss.

In connection with the Labaton defendant's motion to dismiss, the court accepts the facts as alleged by plaintiff as true, affording them the benefit of every possible favorable inference (EBC I, Inc v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]; Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 [2001]; P.T. Bank Central Asia v ABN AMRO Bank NV, 301 AD2d 373, 375-6 [1st Dept 2003]), unless clearly contradicted by documentary evidence submitted in connection with the motion (see Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1st Dept 2006]).

The first, second and third causes of action

In all of his claims predicated on legal malpractice, plaintiff "must demonstrate that [the defendants] failed to exercise the ordinary reasonable skill and knowledge

commonly possessed by a member of the legal profession and that [the defendants'] breach of this duty proximately caused [plaintiff] to sustain actual and ascertainable damages." Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d 438 (2007) [internal citations and quotations omitted]. To establish causation, plaintiff must show that he would have prevailed in the underlying action or would not have incurred any damages, "but for" the lawyer's negligence. Id.; see also Barnett v. Schwartz, 47 AD3d 197 (2d Dept 2007).

Where a defendant is convicted of a crime, he is precluded from maintaining a tort claim against the attorney who represented him in the criminal action in which he was convicted because the defendant cannot prove that he would have prevailed in the criminal action. Britt v. Legal Aid Society, Inc., 95 NY2d 443 (2000). Similarly, a defendant whose underlying criminal conviction remains undisturbed has no cause of action for legal malpractice on the ground of negligent representation in a criminal action. Carmo v. Lazzaro, 4 AD3d 216 (1st Dept 2004).

The Labaton Defendants seek dismissal of plaintiff's malpractice claims. They first argue that any alleged malpractice arising from their representation of plaintiff in the Criminal Action is barred because plaintiff's undisturbed conviction serves as a categorical bar. Relatedly, the Labaton Defendants also argue that plaintiff is collaterally estopped from claiming innocence and freedom from liability.

In the first cause of action for legal malpractice, plaintiff claims that the Labaton Defendants committed malpractice by failing to use plaintiff's "BIMC Consulting Information" and "BIMC Fraud Information" for plaintiff's benefit in defense of the Civil and Criminal Action. Plaintiff contends that as a separate ground for legal malpractice,

the Labaton Defendants should not have continued to represent plaintiff in the Civil and Criminal Actions while simultaneously representing Pervez in the *Qui Tam* Action and by using plaintiff's BIMC Fraud Information to amend the Complaint in the *Qui Tam* Action. Plaintiff also cites numerous disciplinary rule violations, which, in and of themselves, cannot form the basis for a legal malpractice action (see William Kaufman Org., Ltd. v. Graham & James LLP, 269 AD2d 171 [1st Dept 2000]).

In the second and third causes of action, plaintiff alleges that Michael, Labaton and Pervez conspired and/or aided and abetted the aforementioned attorney malpractice.

The Criminal Action was settled pursuant to a Cooperation and Plea Agreement between the New York State Office of the Attorney General and plaintiff dated November 5, 2004, pursuant to which, plaintiff pled guilty to one count of Grand Larceny in the Second Degree, in satisfaction of all crimes charged under New York County Indictment 2573/2003. Plaintiff allocuted before Justice Yates on November 5, 2004. Plaintiff's Allocutation reads in pertinent part:

THE COURT: ... Okay. Mr. Colucci, your attorney says you want to plead guilty to grand larceny in the second degree, a class (c) felony under the Second Count of the indictment in full satisfaction of the indictment; is that what you want to do?

[Plaintiff]: Yes, your Honor.

THE COURT: Are you satisfied with the work Mr. Arisohn, as an attorney, has done for you?

[Plaintiff]: I am.

...

THE COURT: Now, by pleading guilty under the Second Count you are

admitting that you stole, wrongfully stole, during a period of time from August, 1998 to January, 2002 more than \$50,000 from Beth Israel Hospital.

...

Go ahead. Explain to me the underlying basis for the convictions here under your plea.

[Plaintiff]: From approximately August, 1998 to January, 2002 I was a hospital reimbursement consultant who, through various entities I owned or controlled, contracted with Continuum Health Partners, a member corporation comprised of several hospitals, including [BIMC]..., to perform services related to hospital reimbursement issues. During this period, three of those entities that I owned or controlled..., received payment for invoices all dated February 5, 2001 submitted to Continuum, exceeding fifty thousand dollars, which I knew to be false.

Plaintiff's attorney malpractice claims based upon the Criminal Action fail in light of the plea agreement he entered into with the government. Plaintiff pled guilty, and that determination has remained undisturbed. Therefore, malpractice arising from his attorneys' representation in the Criminal Action does not lie (see Carmel v. Lunney, 70 NY2d 169 [1987]; Malpeso v. Burstein & Fass, 257 AD2d 476 [1st Dept 1999]).

Next, the Labaton Defendants argue that plaintiff's criminal conviction collaterally estops his requisite allegations of innocence and freedom from liability with regards his attorney malpractice claims stemming from the Civil Action. "All that is required to give collateral estoppel effect to a criminal conviction is that there be [1] an identity of the issues in the criminal and subsequent civil actions[,] and [2] that the defendant ... had a full and fair opportunity to contest the issues raised in the criminal proceedings." Launders v. Steinberg, 39 AD39 57, 64 [1st Dept 2007].

The Amended Complaint in the Civil Action (the "Civil Complaint") alleged the following causes of action against plaintiff: [1] aiding and abetting a breach of fiduciary

duty; [2] conversion; [3] commercial bribery; [4] fraud; and [5] tortious interference with contract. The Civil Complaint specifically alleges that plaintiff caused the corporate defendants that he owned and controlled ... "to submit invoices that were grossly in excess of the reasonable and customary market value of such services, or which covered work that was never performed. Plaintiff does not dispute that there exists an identity of issues in the Civil and Criminal Actions. Rather, plaintiff argues that "[t]here was no crime in the Indictment that [plaintiff] was obliged to pay BIMC anything." This argument is untenable because the identity of issues inquiry does not focus upon the variation between the relief available in a civil action as compared to the consequences of a criminal conviction. Instead, the court must look at the facts and claims asserted in each action, and here, the issues upon which both the Indictment and the Civil Complaint are premised are identical (*cf. Hughes v. Farrey*, 30 AD3d 244 [2006]).

Plaintiff's next contention, that he was coerced into settling both the civil and criminal actions because he did not have sufficient funds to continue paying his counsel, is also unavailing. Plaintiff was not entitled to free representation from the Labaton Defendants. Nor has plaintiff even alleged that the Labaton Defendants billed for more than the agreed-upon value of the services that they provided. Plaintiff has, therefore, failed to prove that the settlement achieved in the underlying actions was coerced by any of the defendants (*cf. U.S. Ice Cream Corp. v. Bizar*, 240 AD2d 654 [2d Dept 1997]). Consequently, plaintiff had a full and fair opportunity to defend himself in the Criminal Action (see *S. T. Grand, Inc. v. City of New York*, 32 NY2d 300 [1973]), and accordingly, the guilty plea entered in the Criminal Action collaterally estops him from alleging his innocence and freedom from liability in the Civil Action.

Accordingly, the first cause of action is hereby severed and dismissed. Since plaintiff's malpractice claim is untenable, claims that Michael and Labaton conspired and/or aided and abetted attorney malpractice also fail (second and third causes of action).

The fourth cause of action

The fourth cause of action is for the Labaton Defendants' violation of Judiciary Law § 487. Judiciary Law § 487 allows treble damages in a civil action against an attorney who is guilty of deceit or collusion. Section 487 thus permits a civil action to be maintained by any party who is injured by an attorney's intentional deceit or collusion. (Izko Sportswear Co., Inc. v. Flaum, 25 AD3d 534 [2d Dept 2006]). For § 487 to apply, the deceit must be made to a party in the course of a pending judicial proceeding. (Gelman v. Quicke, 22 AD2d 481 [2nd dept. 1996]; Trautenberg v. Paul, Weiss, Rifkind, Wharton and Garrison, LLP, 2007 WL 2219485 [SDNY 8/2/07]).

The Labaton Defendants argue that this is merely a duplicate claim of the malpractice that should be dismissed. They further argue that because plaintiff was not a party to the *Qui Tam* Action, any alleged deceptions made are not actionable under Judiciary Law § 487. Alternatively they argue that if the pending action relied upon by plaintiff is the Civil and Criminal action, any alleged deceit is contradicted by documentary evidence.

In his Memorandum of Law, plaintiff concedes that it "does not argue that Defendants' deceit and collusion in connection with Pervez's [Qui Tam] Action-Colucci was not a party to it." Instead, in the same Memorandum of Law (p.38), plaintiff clarifies his Judiciary Law § 487 claim as follows: "The deceit and collusion occurred

when Arisohn and Michael did not use the BIMC Fraud Information for the benefit of Colucci in either the Criminal or Civil Action because they stole it to enhance the claims of their client Pervez in his BIMC [Qui Tam] Action and therefore increase (sic) the financial award realized by all of them.”

To the extent the Judicial Law § 487 claim is referable to the Civil and Criminal actions, to which plaintiff was certainly a party, they must be dismissed because the claims duplicate the malpractice claims. Since the malpractice claims cannot stand, this claim, based upon the same alleged facts and circumstances and arising in connection with the Labaton Defendants representation of plaintiff in the Civil and Criminal Actions must be dismissed as well. Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., 10 AD3d 267 (1st Dept 2004).

The seventh cause of action

In the seventh cause of action, plaintiff claims that the Labaton Defendants violated General Business Law § 349. GBL § 349 provides a remedy to consumers who have been subject to deceptive or misleading acts or business practices. Oswego Laborers Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 NY2d 20 (1985). Plaintiff's GBL § 349 claim against the Labaton Defendants fails because the challenged act or practice was not consumer-oriented, but rather, arose out of the attorney-client relationship. See Stutman v. Chemical Bank, 95 NY2d 24 (2000).

Plaintiff, in opposition, has voluntarily withdrawn the seventh cause of action. Plaintiff also withdraws the eighth and ninth causes of action, which were against Pervez only, and were for conspiracy and aiding and abetting violations of GBL § 349. Therefore, the seventh, eighth and ninth causes of action are hereby severed and

dismissed.

The tenth cause of action

In the tenth cause of action, plaintiff seeks indemnification from the Labaton Defendants in the event that he should recover any sums in a subsequently commenced and ultimately successful *qui tam* action against BIMC, which would make him liable to pay a substantial portion and /or all of that money to BIMC pursuant to the Settlement Agreement. Common law indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party (Baron v. Grant, 48 AD3d 608 [2d Dept 2008]). At the very least, because plaintiff is unable to demonstrate that the Settlement Agreement is a byproduct of legal malpractice, a claim for indemnity does not lie. Accordingly, the tenth cause of action is hereby severed and dismissed.

The eleventh, twelfth and thirteenth causes of action

Plaintiff alleges that the Labaton Defendants breached their fiduciary duty to him by utilizing the information stemming from plaintiff's confidential communications with them to further the *Qui Tam* Action, by failing to name plaintiff as co-relator in the *Qui Tam* Action, and/or failing to recommend and commence a new *qui tam* action naming plaintiff as relator against BIMC. The twelfth and thirteenth causes of action are for the Labaton Defendants' conspiracy and aiding and abetting the breach of the fiduciary duty, respectively.

The attorney-client relationship imposes on the attorney "[t]he duty to deal fairly, honestly and with undivided loyalty ... including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring

the clients' interests over the lawyer's" (Matter of Cooperman, 83 NY2d 465, 472 [NY 1994]). Thus, any act of disloyalty by counsel will also comprise a breach of the fiduciary duty owed to the client.

The Labaton Defendants argue that plaintiff's breach of fiduciary duty-based claims (as well as fraud, usurpation of economic opportunity and unjust enrichment claims) should be dismissed because they are duplicative of plaintiff's malpractice claims. This argument is rejected. Plaintiff's second amended complaint adequately sets forth that the breach of fiduciary duty claim relates to the Labaton Defendants' purported unauthorized use of plaintiff's confidential communications to bolster the amended complaint in the *Qui Tam* Action, whereas the malpractice claim is predicated upon the Labaton Defendants' actions as plaintiff's counsel in the Civil and Criminal Actions. Because the claims for malpractice and breach of fiduciary duty are based upon separate facts, the claims for breach of fiduciary duty and legal malpractice stand or fall separately. Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker, 56 AD3d 1 (1st Dept 2008); Smartix International Corp., v. Garrubbo, Romankow & Capese, P.C., 2009 WL 857467 (SDNY 2009). The fact that the malpractice causes of action have been dismissed, does not result in an automatic dismissal of the causes of action for breach of fiduciary duty.

The Labaton Defendants argue that this cause of action is dismissible based upon documentary evidence.³ The Labaton defendants have the burden of showing

³The Labaton Defendants made this same argument in connection with the dismissal of the malpractice causes of action. Because the court found that the malpractice causes of action were dismissible for other reasons, it never reached the Labaton Defendants' arguments concerning documentary evidence.

that the documentary evidence conclusively resolves all factual issues and that plaintiff's claims fail as a matter of law. While a complaint is to be liberally construed in favor of the plaintiff on a motion to dismiss, the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupported based upon the undisputed fact. Robinson v. Robinson, 303 AD2d 234 (1st Dept 2003).

To the extent that the Labaton Defendants rely on representations made by plaintiff in the plea agreement that disclosed all information in his possession relevant to the inquiries made by the Attorney General, the argument must be rejected. These representations do not bear upon the breach of fiduciary duty claim which is premised on the alleged misuse of confidential information in the Qui Tam Action.

The Labaton Defendants also claim that in the Civil Action settlement stipulation, plaintiff (as a defendant therein) made the following representation, which precludes the instant breach of fiduciary duty claim:

(b) Defendants are not plaintiffs in, or witnesses to, any *qui tam* or other 'whistleblower' litigation.....(c) Defendants are not advising, or otherwise providing information to, any plaintiffs in, or witnesses to any [*qui tam*] Proceedings; [and] (d) Defendants have not entered into any agreements relating to the [*qui tam*] Proceedings, direct or indirect, with plaintiffs in, or witnesses to, any [*qui tam*] Proceedings."

Plaintiff claims at the time he made the statement he believed it to be true. He was not a plaintiff in any *qui tam* and allegedly based upon information given to him by the Labaton Defendants, he believed he could not be a plaintiff in any such action. Plaintiff also claims that he did not know about Pervez's *Qui Tam* Action and/or that information he was giving in confidence to the Labaton Defendants was being used in

the Pervez *Qui Tam* Action.

Under these circumstances, it cannot be said, as a matter of law, that the Civil Action Stipulation of Settlement conclusively requires dismissal of the breach of fiduciary duty claim.

The Labaton Defendants next claim that the cause of action must fail because plaintiff cannot show that he was damaged. To recover against an attorney, a client is required to prove both the breach of a duty owed to it and the damages sustained as a result thereof. Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker, *supra*. In the complaint, plaintiff claims that as a result of the Labaton Defendants breach of their fiduciary duty, “[p]laintiff has been injured and suffered damages representing all or substantially all of Pervez’s reward as relator in the *Qui Tam* Action.”

The Labaton Defendants argue that the fiduciary duty claim is deficient because plaintiff has failed to allege even a single allegation in the *Qui Tam* Action for which plaintiff was a source or how the settlement funds in the *Qui Tam* Action were attributable to plaintiff’s otherwise unidentified information. In opposition, plaintiff has submitted the affidavit of Modzelewski. Modzelewski states the following:

In June 2007, Diance McFaddin, an attorney representing both Colucci and me, filed a motion to unseal the complaint in the Pervez *Qui Tam* Action. We discovered that there had been an Original QT Complaint and also an Amended QT Complaint. On reviewing the Amended QT Complaint, Colucci and I understood immediately that the claims Pervez had added to his original QT Complaint could only have been based upon information provided by [plaintiff] to his attorneys during their handling of the Civil and Criminal Actions. Further, and more importantly, Pervez’s added claims were worth far more than the claims reported in the U.S. Attorney’s Notice of 30 November 2005.

Modzelewski outlines the information he believes was added to the Original

Complaint in the *Qui Tam* Action based upon plaintiff's confidential communications with the Labaton Defendants.

... the amendments to the initial complaint which I am certain originated with [plaintiff] appear in Para 189 (a) through (f). Para 189 is headed: "Defendants have violated the False Claims Act With Respect to: RCCAC, Outliers, Double-Billing, GME, IME and Disproportionate Share."

...

None of these several terms - RCCAC, Outliers, Double-Billing, GME, IME or Disproportionate Share - is fully explained or relied upon in Pervez's original QT Complaint to explain his claims in that document.

While plaintiff's burden on a motion for summary judgment is far more exacting, at this stage of the litigation, plaintiff must merely allege sufficient facts to support a cause of action. Based upon the allegations contained in the complaint, as well as Modzelewski's affidavit, plaintiff has identified specific information which he disclosed to the Labaton Defendants during the course of their representation of him which the Labaton Defendants then improperly utilized to bolster the amended complaint in the *Qui Tam* Action. The result of these amendments to the complaint greatly increased the value of Pervez's claims and consequent award therein. Accordingly, plaintiff's breach of fiduciary duty claim survives dismissal, as do the collateral conspiracy and aiding and abetting claims based upon the alleged breach of fiduciary duty (the twelfth and thirteenth causes of action).

The remaining causes of action

The fourteenth cause of action is for fraudulent misrepresentation against the Labaton Defendants. The fifteenth and sixteenth are for conspiracy and aiding and abetting the fraudulent misrepresentation. Plaintiff claims that the Labaton Defendants

made several specific misrepresentations to induce him to “share his knowledge about the BIMC Frauds”, to wit: [1] that plaintiff was not a suitable relator; [2] that plaintiff would be awarded a share of any relator’s award in a successful *qui tam* action brought against BIMC based upon the BIMC Fraud Information; [3] that plaintiff must settle the Civil Action in order to settle the Criminal Action; [4] the concealment of the *Qui Tam* Action against BIMC’ [5] that Pervez was the Labaton Defendants’ client in that *Qui Tam* Action; and [6] concealing that Pervez utilized the BIMC Fraud Information to amend the complaint.

The seventeenth cause of action is for usurpation of economic benefit and the eighteenth cause of action is for unjust enrichment. The nineteenth cause of action is for the imposition of a constructive trust upon the funds received by each of the defendants in connection with the *Qui Tam* Action. The Labaton Defendants’ sole argument in support of dismissal of these claims is that they are redundant of the malpractice based claims. As with the breach of fiduciary duty claim, the court finds that these claims are not in fact identical to plaintiff’s legal malpractice claim. Rather, these claims center particularly on the unauthorized use of plaintiff’s confidential communications. Therefore, dismissal of these claims is not warranted at this early stage of the litigation.

Accordingly, the Labaton Defendants’ motion to dismiss is granted only to the extent that the first, second, third, fourth, seventh, and tenth causes of action against Arisohn, Michael and/or Labaton are severed and dismissed. The eighth and ninth causes of action, which are against Pervez, are also severed and dismissed.

Troutman's motion to dismiss

It is undisputed that Attorney Michael joined the law firm of Troutman Sanders, LLP in or about March 2005. Troutman now moves to dismiss the complaint against it on the ground that all of the alleged tortious activity occurred before Michael became associated with it. Plaintiff has alleged that he last met with Michael in June of 2004 and that the complaint in the Qui Tam Action was then amended sometime before September 20, 2004. It is also undisputed that Troutman's liability is derived from Michael's actions. Since it is undisputed that all of Michael's alleged tortious activities occurred at the latest in September 2004, when the complaint in the Qui Tam Action was amended to allegedly include the confidential information obtained from plaintiff, Michaels subsequent association with Troutman in 2005 cannot form a basis for any liability against Troutman

Accordingly the motion by Troutman Sanders, LLP to dismiss is granted and the claims against it are hereby severed and dismissed.

Conclusion

In accordance herewith, it is hereby:

ORDERED that defendant Pervez' motion to dismiss is held in abeyance until the issue of whether the court has obtained jurisdiction over Pervez has been resolved. The court hereby refers this issue to a Special Referee to hear and report. Plaintiff is directed to serve a copy of this decision and order upon the Office for the Special Referee within twenty days from the date hereof so that this reference may be assigned; and it is further

ORDERED that the Labaton Defendants' motion is granted only to the extent that the first, second, third, fourth, seventh, and tenth causes of action against Arisohn, Michael and/or Labaton are severed and dismissed; and it is further

ORDERED that the eighth and ninth causes of action, which are against Pervez, are also severed and dismissed; and it is further

ORDERED that the Labaton Defendants' motion is otherwise denied; and it is further

ORDERED that the motion by Troutman Sanders LLP to dismiss the complaint against it is granted in its entirety and the complaint as to it is severed and dismissed; and it is further

ORDERED that the Labaton Defendants are directed to answer the complaint within 20 days from the date hereof. Plaintiff's reply, if any, shall be made within the time provided under the CPLR.

All parties are directed to appear at Part 10 on December 10, 2009 at 9:30 a.m. for a status conference.

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
September 8, 2009

FILED
SEP 10 2009
COUNTY CLERK'S OFFICE
NEW YORK
So Ordered
[Signature]
HON. JUDITH J. GISCHE, J.S.C.