

**Savitt v Greenberg Traurig, LLP**

2013 NY Slip Op 31402(U)

June 27, 2013

Sup Ct, NY County

Docket Number: 101200/2012

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

CHARLES E. RAMOS

PRESENT: \_\_\_\_\_  
Justice

PART 53

SAVITT

INDEX NO. 101200/12

-v-

MOTION DATE \_\_\_\_\_

GREENBERG TRAUGER

MOTION SEQ. NO. 002

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

Motion is decided in accordance with  
accompanying Memorandum Decision.

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

Dated: 6/27/13

  
\_\_\_\_\_  
J.S.C.  
**CHARLES E. RAMOS**

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DECISION

-----x  
 Michelle Savitt and M+J Savitt, Inc.,

Plaintiffs,

Index no. 101200/2012

- against -

Greenberg Traurig, LLP, Paul D. Schindler,  
 G. Roxanne Elings, Janis Savitt and Designs  
 by Janis Savitt, Inc.,

Defendants.

-----x

**CHARLES E. RAMOS, J.S.C.**

Motion sequence 002 and 003 are consolidated for  
 disposition.

In motion sequence 002, defendant Greenberg Traurig ("GT")  
 moves to dismiss the first, second, sixth, seventh, fifteenth,  
 and sixteenth causes of action. In motion sequence 003, defendant  
 Janis Savitt ("Janis") and Designs by Janis Savitt ("Designs")  
 seeks to dismiss the fourth, fifth, and ninth through fourteenth  
 causes of action pursuant to 3211(a)(7). For the reasons stated  
 herein, both motions are granted and both causes of action are  
 dismissed.

**Background<sup>1</sup>**

Plaintiff Michelle Savitt ("Michelle"), defendant Janis, and  
 Wynne Savitt ("Wynn") are sisters, and were at one time part  
 owners of the family-run jewelry business, M+J Savitt ("M+J").

<sup>1</sup> The facts are taken from the pleadings, and affidavit of  
 Michelle Savitt in opposition dated 8/31/12, and presumed to be  
 true for purposes of disposition.

The business was owned twenty-seven percent by each sister, with their mother Mildred Savitt owning the remaining nineteen percent. In 2006, Janis began to take steps toward establishing her own business, eventually formed in December 2007 as Designs by Janis Savitt ("Designs").

In October 2008, Wynne, a director and shareholder of M+J, instituted an action in federal court against Janis, both individually and derivatively on behalf of M+J (the "prior action"). At that point, GT, who was already counsel for Janis, advised Michelle that Wynne's claims were without merit and frivolous. At GT's advice, Michelle joined Janis in an M+J shareholders meeting where Wynne was voted out as a director of the corporation.

Following the meeting, Wynne requested Michelle join her in the action against Janis. When Michelle refused, Wynne joined her as a defendant. GT offered to represent Michelle in the suit, advising her that there was no need for independent legal counsel, and that it would be in everyone's best interest to have all defendants under the same representation. GT did not advise Michelle or M+J that potential conflicts of interest existed, or that Michelle's interests may be adverse to that of its client Janis. At that time, Janis was already heavily indebted to GT for legal fees.

Judge Cote of the Southern District of New York dismissed the derivative claims for failure to make a demand on M+J's board, and demand futility could not be shown. Judge Cote further dismissed all but one of the individual claims, and sanctioned Wynne and her attorneys for bringing on abusive litigation. The final claim was settled in an agreement under which all parties waived their rights to bring further claims against any other party.

Following settlement, Janis has retained control over M+J, liquidating the corporation's assets, selling a large portion of the inventory and raw materials, and has continued to utilize whatever opportunities have come to M+J in her own name and through Designs. In response, Michelle has retained and sold certain assets of the corporation. Neither Michelle nor Janis has operated with formal approval of the board of directors of M+J. Furthermore, the sisters are currently engaged in litigation over the estate of their parents.

Michelle, individually, and derivatively on behalf of M+J, commenced this action in January 2012, followed by an amended complaint in July 2012. Michelle and M+J allege claims against GT for breach of fiduciary duty, fraud, malpractice, and a violation of Judiciary Law § 487. Michelle alleges that GT misrepresented to her that Janis' claims lacked merit, misrepresented to her that there were no meritorious claims she could have asserted

against Janis, and never informed her that a conflict of interest existed in one firm representing parties with adverse interests. Michelle further alleges that GT used this misrepresentation to defraud Michelle and M+J in order to advance the interests of its client, Janis. Michelle also asserts a claim, individually and derivatively, for violation of Judiciary Law § 487 against GT.

In addition, Michelle asserts claims against Janis for breach of fiduciary duty and ouster, and tortious misappropriation of design credit. M+J asserts claims against Janis for breach of fiduciary duty, conversion, embezzlement, unjust enrichment, unfair competition, and seeks an injunction enjoining Janis and Designs from competing and carrying on tortious activity against M+J.

Michelle alleges that following the settlement of the prior action, Janis has usurped control of M+J and denied Michelle access to corporate books and materials, while taking advantage of M+J's corporate opportunities and converting its inventories, goodwill and other assets.

#### **Standard of Review**

"On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction" (*ABN AMRO Bank, N.V. v MBIA, Inc.*, 17 NY3d 208 [2011], quoting *Leon v Martinez*, 84 NY2d 83 [1994]). The court "must accept as true the facts as alleged in the complaint and submissions in opposition

to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superiro Well Services, Inc.*, 20 NY3d 59 [2012], citing *Sokoloff v. Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]).

#### **GT's Motion to Dismiss**

GT moves to dismiss the first, second, sixth, and seventh causes of action on the basis that they are duplicative of Michelle's malpractice claims (the third and eighth causes of action). The first and second causes of action allege breach of fiduciary duty and fraud, respectively, on behalf of Michelle individually. The sixth and seventh causes of action are premised upon the same allegations on behalf of M+J. GT also argues that Michelle's Judiciary Act § 487 claim fails to allege the requisite conduct.

In opposition, Michelle argues that the amended complaint clearly states distinct tortious conduct sufficient to support a claim of breach of fiduciary duty and fraud, both independently and derivatively.

#### A. First, Second, Sixth and Seventh Causes of Action

This Court has consistently held that in a case alleging claims for legal malpractice, claims of breach of fiduciary duty and fraud will be regarded as duplicative of the malpractice

claim unless based on independent tortious acts. Thus, where the facts pled on each claim are the same, the claims will be dismissed as duplicative (*Cosmetics Plus Group, Ltd. v Traub*, 105 AD3d 134 [1st Dept 2013] ["the cause of action for breach of fiduciary duty was properly dismissed as duplicative of the legal malpractice claim. It arose out of the same facts as the legal malpractice claim and did not involve any damages that were separate and distinct from those generated by the alleged malpractice"], citing *Bernard v Proskauer Rose, LLP*, 87 AD3d 412 [1st Dept 2011]; *Dinhofer v Medical Liability Mut. Ins. Co.*, 92 AD3d 480 [1st Dept 2012] ["fraud claim is duplicative of his legal malpractice claim since it arose from the same underlying facts and alleged similar damages"]).

The facts upon which Michelle attempts to establish claims for breach of fiduciary duty and fraud are based upon the same facts as the claim of malpractice. All of the facts alleged under the breach of fiduciary duty claim and the fraud claim are realleged and incorporated for the malpractice claim (*compare* Savitt Complaint ¶163 and 194 *with* Savitt Complaint ¶207, and *compare* Savitt Complaint ¶240 and 257 *with* Savitt Complaint ¶266). Furthermore, Michelle does not allege that GT committed tortious acts independent of the alleged malpractice.

As to the claim for breach of fiduciary duty, prior to GT's representation of Michelle, GT owed her no fiduciary duties upon

which a claim of breach separate from the malpractice claim could be premised. After GT began legal representation of Michelle, any further tortious conduct became actionable as malpractice (See *Cosmetics Plus Group*, 105 AD3d at 143).

Michelle's fraud claim is similarly premised on allegations that (1) GT misrepresented to her that Wynne's claims in the prior action were devoid of merit, (2) GT misrepresented that there was no need for Michelle to obtain independent counsel, and (3) GT misled her into signing the settlement agreement (Savitt complaint at ¶196-201). The giving of this advice by GT to Michelle occurred in the context of an attorney-client relationship, and thus is actionable as malpractice. By making the alleged misrepresentations to Michelle, GT was "stepping into the shoes of being an attorney" (2/21/13 Tr 17:16-17). The very conduct which Michelle alleges is independent of the acts upon which the malpractice claim is based "implicates [GT's] status as an attorney" (*Id.* at 17:25-26).

This line of reasoning applies equally to Michelle's individual and derivative claims. Accordingly, Michelle has failed to state claims for breach of fiduciary duty or fraud.

#### B. Fifteenth and Sixteenth Cause of Action

In order to succeed on a Judiciary Law § 487 claim, a plaintiff must show a "chronic and extreme pattern of legal delinquency" (*Solow v Seltzer*, 18 AD3d 399 [1st Dept 2005]). A

"[c]omplaint that set[s] forth but one arguable misrepresentation by defendant [does] not [a] allege cognizable claim under Judiciary Law § 487" (*Id.*). Courts have sustained a section 487 claim where the conduct against a party or the court has been deemed egregious, and has caused damage to a party, such as where an attorney forged a letter from the Taxi and Limousine Commissioner and submitted it to the court as evidence, "causing specific damages that could not have occurred in the absence of defendant's conduct" (*Kurman v Schnapp*, 73 AD3d 435 [1st Dept 2010]).

Michelle's amended complaint fails to show either a deceit that reaches the level of egregious conduct, or a chronic and extreme pattern of behavior on the part of GT. According to Michelle's amended complaint, the behavior giving rise to the section 487 claim was (1) the misrepresentation to Michelle that she had no meritorious claim against Janis, (2) the misrepresentation that she did not need independent legal counsel, (3) the failure to inform Michelle that there was a conflict of interest, (4) the advice to Michelle to sign the settlement agreement, and (5) that GT's behavior was allegedly an intentional deception designed to benefit Janis (Savitt complaint at ¶307-312).

While Michelle's complaint spends a great number of words in an attempt to establish a section 487 claim, these allegations

give rise to only one act on the part of GT, as all of the allegations arise, and are indistinguishable from GT's representation that Michelle had no meritorious claims to assert against Janis.

While on a CPLR § 3211(a)(7) motion to dismiss a plaintiff's allegations must be taken as true, statements alleging only a bare legal conclusion that defendant intended to deceive the plaintiff are not entitled to the presumption of truth (*Simkin v Blank*, 19 NY3d 46 [2012], citing *Maas v Cornell University*, 94 NY2d 87 [1999])). In her amended complaint, Michelle alleges no more than bare legal conclusions that GT's advice to her constituted an intentional deception (Savitt complaint at ¶311-312). Rather, the facts support the presumption that GT's representations to Michelle were the advice of counsel.

Additionally, as Michelle fails to show any way in which GT's representation damaged her, "the inability to demonstrate consequential damages renders the claim deficient as a matter of law" (*Kaminsky v Herrick, Feinstein LLP*, 59 AD3d 1 [1st Dept 2008]). At oral argument, Michelle claimed GT's misrepresentations damaged her in causing her not to assert meritorious claims against Janis. However, Michelle alleges no facts supporting such a claim. In fact, when queried, counsel for Michelle was unable to articulate any claims she could have brought individually against Janis (2/21/13 Tr 26-34).

Additionally, Judge Cote dismissed all but one claim against Janis in the prior lawsuit, which was settled without monetary compensation, belying the assertion that GT intended to deceive in advising Michelle that she had no meritorious claims to assert against Janis.

### **Janis' Motion to Dismiss**

Janis moves to dismiss the fourth cause of action for breach of fiduciary duty and ouster on the basis that the complaint fails to state a claim on which relief may be granted. Janis moves to dismiss the fifth cause of action for tortious misrepresentation of design credit on the basis that the claim is merely a way of disguising a time barred defamation claim. For the reasons set forth below, the Court does not reach the issue of defamation, as Michelle lacks standing to bring the claim individually. Janis further seeks to dismiss the ninth through fourteenth causes of action on the basis of Michelle's unclean hands.

#### **A. Fourth Cause of Action**

The fourth cause of action alleges that Janis as a controlling shareholder owed fiduciary duties to Michelle who is also a shareholder of the corporation. The complaint also alleges that as an officer and director of the corporation Michelle is entitled to access all of the corporate books and records of M+J and to participate in the management of the business.

First, a question exists as to whether Michelle was a director of M+J at the time she filed this action. Janis has provided emails in which Michelle formally resigned from M+J as a director and officer. At oral argument, counsel for Michelle claimed that the email was rescinded, though no evidence supporting that assertion has been presented (2/21/13 Tr 42:3-4). Nevertheless, whether Michelle is a director of M+J has no bearing on the resolution of this motion.

With regard to the claim that Janis has denied her access to the books and records of the corporation, if Michelle is only a shareholder of M+J she has not made a proper demand in compliance with § 624 of the Business Corporation Law ("BCL"). Michelle's complaint alleges that she made several attempts to inspect the books and records of M+J (Savitt complaint at ¶96). However BCL § 624(d) requires that,

Upon refusal by the corporation or by an officer or agent of the corporation to permit an inspection of the minutes of the proceedings of its shareholders or of the record of shareholders as herein provided, the person making the demand for inspection may apply to the supreme court in the judicial district where the office of the corporation is located, upon such notice as the court may direct, for an order directing the corporation, its officer or agent to show cause why an order should not be granted.

At no point prior to or during this action has Michelle made any application to this Court or any other requesting such an order.

Furthermore, as to Michelle's claim that Janis has prevented her from participating in the management of the business, BCL §

701 states that the "business of a corporation shall be managed under the direction of its board of directors." Michelle alleges no facts supporting her assertion that she is entitled to participate in the management or direction of the business as a shareholder.

Even if Michelle retained her status as a director of the corporation, her amended complaint alleges no facts stating in what way she was kept from participating in the management of the business, except that she has been denied access to the corporate books and records.

In her affidavit of August 31, 2012, Michelle claimed Janis had refused meetings, and provides as evidence one email from June 2011, in which she makes a large request for information from Janis (Savitt aff, exhibit J).

If Michelle and Janis are the last remaining directors of M+J, the situation at hand appears to be one of director deadlock as parties are unable to agree on management of the business. Under New York law, Michelle may take judicial action to resolve the dispute, including filing a petition for dissolution under § 1104 of the BCL. However, Michelle has not petitioned any court for aid in resolving the management issues relating to M+J. In fact, Michelle has taken no steps to resolve the disagreement in management prior to requesting monetary damages in this action.

Whether as a shareholder or a director, Michelle's fourth cause of action states no claim upon which relief may be granted.

B. Fifth Cause of Action

Michelle's fifth cause of action fails to state a claim on which individual relief may be based. Michelle's amended complaint states that Janis has "converted to herself credit for Michelle's designs" and has misrepresented Michelle's designs as her own. At oral argument, counsel for Michelle conceded that "while depriving Michelle access and while she [Janis] is running the show, she is transferring these inventories to her own companies, Designs By Janis Savitt, she is selling M+J goods online as her own..." (2/21/13 Tr 42:26, 43:1-5).

Based on these allegations, Michelle's claim is derivative in nature, as she alleges no facts showing individual harm. The harm suffered appears to be borne by the corporation, as those designs which Janis has allegedly converted, even if created by Michelle, were created for, and are owned by, M+J. "Allegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually" (*Abrams v Donati*, 66 NY2d 951 [1985]).

C. Ninth through Fourteenth Causes of Action

The ninth through fourteenth causes of actions are asserted by Michelle derivatively on behalf of M+J. In opposition, Janis

raises the equitable defense of unclean hands (see *Horizon Asset Management, LLC v Duffy*, 106 AD3d 594 [1st Dept 2013] [stating that derivative actions are equitable in nature], citing *Sakow v 633 Seafood Restaurant, Inc.*, 25 AD3d 418 [1st Dept 2006]).

Where a plaintiff has committed the same acts as a defendant, "the doctrine of unclean hands applies to bar such plaintiff from seeking relief on his or her equitable claims" (*Ross v Moyer*, 286 AD2d 610 [1st Dept 2001]). Here, there is no dispute as to Michelle's purported unclean hands. Michelle alleges that Janis has converted to herself assets of the corporation including raw materials, merchandise, and corporate funds. However, by Michelle's own admission in her affidavit of August 31, 2012, Michelle is committing the same acts of which she accuses Janis.

Michelle admits to selling \$6,316.25 of M+J goods through her California store, and through the online auction site eBay (7/31/12 Affidavit of Michelle Savitt in opposition [herein "Savitt aff"] at ¶34). Michelle further admits to possessing \$11,436-\$17,751 (depending on method of valuation) of M+J goods (Savitt aff at ¶34).

Michelle offers no reason why she is entitled to possession of M+J's corporate assets, stating

The reason why I did not turn over the sales proceeds and the remaining items to Janis is because she ousted me from the corporation and I firmly believed, as I continue to

believe today, that Janis was dissipating corporate assets and converting them for her own personal benefit (Savitt aff at ¶35).

Essentially Michelle argues she is entitled to convert corporate assets because her sister did the same, though she now sues her sister for the very conduct she has committed. This is a classic case of unclean hands, in which two sisters are committing the same conduct against a corporation, and one will not be heard to complain of the other's equally guilty behavior. Accordingly, it is

ORDERED that defendants' motion to dismiss is granted in its entirety and that the plaintiff's first, second, fourth through seventh, and ninth through sixteenth causes of action are severed and dismissed;

ORDERED that Defendants shall serve an answer to the complaint within twenty days of service of a copy of notice of entry.

Dated: June 27, 2013

ENTER:



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J.S.C.

CHARLES E. RAMOS