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

PRESENT: Hon. Joan A. Madden PART 11

Index Number : 104223/2009
HARBOR CONSULTANTS LTD.
VS.
ROTH, RICHARD A.
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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 is decided in accordance with the annexed Memorandum Decision and Order.

FILED
JAN 26 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: January 19, 2010

J.S.C.

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

Check one: FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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HARBOR CONSULTANTS LTD. f/k/a
SANDS BROTHERS & CO., LTD.,

Plaintiff,

-against-

Index No. 104223/2009

RICHARD A. ROTH,
THE ROTH LAW FIRM, PLLC,
MICHAEL LICHTENSTEIN, and
ALAN GODDARD,

Defendants.

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JOAN A. MADDEN, J.:

Defendants Richard A. Roth, The Roth Law Firm, PLLC (the Roth Firm) (together, the Roth defendants), Michael Lichtenstein, and Alan Goddard move for an order: (1) pursuant to CPLR 3211 (a) (1) and (7), dismissing the complaint based upon documentary evidence and for failure to state a cause of action; and (2) pursuant to 22 NYCRR 130-1.1, sanctioning plaintiff Harbor Consultants Ltd. f/k/a Sands Brothers & Co., Ltd. (Sands Brothers) and its counsel, Howard B. Sirota, Esq., for filing a frivolous lawsuit.

According to the complaint, plaintiff, a Delaware corporation, was formerly known as Sands Brothers, which, until late 2004, was a broker-dealer registered with the U.S. Securities and Exchange Commission (Complaint, ¶ 8). The Roth defendants represented Lichtenstein, Goddard, and Sands Brothers in an arbitration proceeding before the National Association of Securities Dealers (NASD) (NASD Dispute Resolution Case No. 02-07354) (Klibanoff I), which was brought by investor Daniel Klibanoff and other individuals (*id.*, ¶¶ 14, 15). Lichtenstein and Goddard were securities brokers employed by Sands Brothers (*id.*, ¶ 15). Klibanoff was a former customer of Sands Brothers whose account was serviced by Lichtenstein and Goddard (*id.*, ¶ 14).

Klibanoff also commenced a second NASD arbitration proceeding against Steven and Martin Sands, the principals of Sands Brothers, and a successor-in-interest named Laidlaw & Co. (UK) Ltd. (NASD Dispute Resolution Case No. 05-02223) (Klibanoff II), after the first arbitration panel denied Klibanoff's request to amend his Statement of Claim (*id.*, ¶ 16). In that proceeding, the Sands were represented by David A. Gehn, Esq. of Gusrae, Kaplan, Bruno & Nusbaum PLLC (*id.*). Walter F. Becker, Jr., Esq. of Chaffe McCall LLP represented the claimant investors in both Klibanoff I and Klibanoff II (*id.*, ¶ 17).

On December 12, 2005, the Klibanoff I arbitration panel dismissed the claimants' claims in their entirety, and expressly denied the parties' respective requests for attorneys' fees (*id.*, ¶ 18, Exh. A). The complaint alleges that, on the same date, Roth and Becker reached a tentative agreement, pursuant to which Klibanoff was to pay Roth $100,000 in exchange for mutual releases (*id.*, ¶ 19). Plaintiff alleges that Roth had coerced that agreement out of Klibanoff by threatening to file a fraud action against him, based on Klibanoff's testimony in the NASD proceedings (*id.*, ¶¶ 19, 20, Exh. C [Klibanoff Aff. in Support of Motion to Compel Arbitration, ¶ 5]). A draft settlement agreement was prepared and exchanged between Roth and Becker (*id.*, ¶ 21). The draft stated that it was intended to settle and discharge all claims arising out of the Klibanoff I and II arbitrations (*id.*, Exh. D, at 1). However, the draft agreement provided that Klibanoff would pay Lichtenstein and Goddard, but not plaintiff, $100,000 in installments, by checks payable to the Roth Firm (*id.*, Exh. D, at 4). The draft settlement agreement also stated that Klibanoff would execute an affidavit of confession of judgment in the amount of $100,000 in favor of Lichtenstein and Goddard (*id.*, ¶ 22, Exh. D, at 4). The confession of judgment was to be held in escrow by Roth and was only to be filed with the court upon Klibanoff's failure to

make timely settlement payments (*id.*, Exh. D, at 4). Roth allegedly signed the draft agreement on behalf of plaintiff, but without its knowledge or authority (*id.*, ¶ 4, Exh. D, at 7).

The complaint further alleges that Roth concealed the proposed settlement from Sands Brothers and Gehn as counsel for the respondents in Klibanoff II (*id.*, ¶ 24). Plaintiff alleges that Roth intended to prevent Sands Brothers from learning that its own lawyer was conspiring against it (*id.*). Nevertheless, plaintiff learned of the settlement negotiations when Becker insisted that the Klibanoff II respondents sign the settlement agreement, and release any claims they had against Klibanoff (*id.*, ¶ 25). After learning about the settlement negotiations between Becker and Roth, Gehn orally consented to the settlement (*id.*, ¶ 26). However, neither Gehn nor the Sands had received a copy of the draft settlement agreement or were informed that it provided that the entire settlement proceeds would be paid to Roth for Lichtenstein and Goddard only (*id.*). According to plaintiff, at a hearing before Justice Karla Moskowitz on December 12, 2006, Roth admitted that he never sent a copy of the draft settlement agreement to Gehn (*id.*, ¶ 28, Exh. H [Hearing Tr., at 101-102]).

Subsequently, Becker sent Gehn a revised settlement agreement which was signed by Becker and Roth, and included the Sands as parties to the agreement (*id.*, ¶ 29). Plaintiff alleges that Gehn was taken aback by the previously concealed agreement, and wrote to Roth on January 25, 2006, stating that the Sands were previously unaware of the settlement negotiations and demanded that Roth identify the basis for excluding the Sands from entitlement to a portion of the $100,000 settlement proceeds (*id.*, ¶ 30, Exh. I). The complaint alleges that the Sands refused to agree to the settlement, and that Becker subsequently informed Roth that the agreement was null and void (*id.*, ¶ 33).

Thereafter, Roth filed the confession of judgment executed by Klibanoff, which he was holding in escrow, and commenced enforcement proceedings against Klibanoff in a proceeding captioned *Lichtenstein v Klibanoff* (Sup Ct, NY County, Index No. 106839/06) (*id.*, ¶ 34). Klibanoff, appearing pro se, moved to compel arbitration and stay the action under the same index number (*id.*, ¶ 36). After a hearing, Justice Moskowitz denied Klibanoff's application because there was no pending action to stay (*id.*, Exh. N). In the interim, Roth had domesticated the judgment in Alabama, but an Alabama judge, the Honorable James P. Smith of Circuit Court, Madison County, granted Klibanoff's motion to stay enforcement of the judgment, pending final disposition of proceedings in New York (*id.*, ¶ 37). After retaining counsel in New York, Klibanoff moved to vacate the judgment, which Justice Moskowitz denied on the record (*id.*, ¶ 38, Exhs. P, Q). Goddard subsequently made an application to vacate the stay of the New York judgment in Alabama (*id.*, ¶ 40). However, Judge Smith denied that motion to lift the stay (*id.*, Exh. R). Coerced by Roth's improper conduct, Klibanoff allegedly paid Roth a settlement amount to partially satisfy the judgment (*id.*, ¶ 41).

I. **Timeliness of Plaintiff's Opposition**

Defendants contend that plaintiff's opposition papers are untimely. CPLR 2214 (b) states that "[a]nswering affidavits shall be served at least two days before the [return date]. Answering affidavits and any notice of cross-motion, with supporting papers, if any, shall be served at least seven days before such time if a notice of motion served at least sixteen days before such time so demands. . . ." Defendants' notice of motion, served over a month before the return date of July 14, 2009, states that "responsive papers, if any, are to be served so as to be received by the undersigned at least seven (7) days prior to the return date of this motion" (Defendants' Notice of

Motion, at 2). An affirmation of service states that plaintiff served its opposition papers on defendants by Federal Express on July 9, 2009 (Affirm. of Service of Howard B. Sirota, Esq.). Although plaintiff's opposition is thus untimely, the court exercises its discretion to consider the opposition papers, in light of the minimal delay and the fact that defendants have not established any resulting prejudice (*Dinnocenzo v Jordache Enters.*, 213 AD2d 219 [1st Dept 1995]).

II. **Defendants' Motion to Dismiss the Complaint**

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord [plaintiff] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, "'bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not presumed to be true and accorded every favorable inference'" (*M & B Joint Venture, Inc. v Laurus Master Fund, Ltd.*, 49 AD3d 258, 260 [1st Dept 2008], *affd as mod* 12 NY3d 798 [2009] [citation omitted]). Dismissal of a complaint pursuant to CPLR 3211 (a) (1) is proper where the documentary evidence "'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim'" (*Reid v Gateway Sherman, Inc.*, 60 AD3d 836, 837 [2d Dept 2009], quoting *McCue v County of Westchester*, 18 AD3d 830, 831 [2d Dept 2005]).

Initially, the court denies defendants' request to treat this motion as one for summary judgment (*see* CPLR 3211 [c]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]).

The first cause of action, which is asserted against all of the defendants, is labeled fraud. This cause of action alleges that Roth made the following material omissions of fact: (1) he

concealed that the Klibanoff settlement agreement excluded any funds or benefit to plaintiff; and (2) he failed to inform plaintiff that he accepted funds from Klibanoff as settlement proceeds (Complaint, ¶ 46). The complaint also alleges that Roth's signing of the settlement documents on behalf of plaintiff, without its knowledge or permission, was done intentionally in order to defraud or mislead plaintiff (*id.*, ¶ 48). Further, plaintiff asserts that Lichtenstein and Goddard were aware that the settlement funds were being credited to them and not to plaintiff (*id.*, ¶ 50).

Defendants argue that the complaint is devoid of any specific misstatements upon which plaintiff relied. Defendants further contend that this cause of action is inherently incredible and flatly contradicted by documentary evidence. For instance, although the complaint alleges a fraudulent scheme by the Roth defendants to take $100,000 in fees, there is a well-documented exchange of correspondence wherein Roth informed Gehn that his firm would receive the $100,000 payment directly from Klibanoff, and apply it to legal fees owed in the Klibanoff arbitration. Additionally, defendants maintain that this cause of action is "absurd," given that the Sands Brothers paid no legal fees to the Roth Firm in defending the Klibanoff I arbitration, and did not assert a counterclaim in the Klibanoff I arbitration and therefore cannot show that they suffered any damages as a result of the settlement.

A cause of action for fraud requires "'a misrepresentation or a material omission of fact which was . . . known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party . . . and injury'" (*Mandarin Trading Ltd. v Wildenstein*, 65 AD3d 448, 459 [1st Dept 2009], quoting *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). Fraudulent concealment requires a duty to disclose material information, which arises where a fiduciary or confidential relationship exists between the parties

(*Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 [1st Dept 2006]; *Kaufman v Cohen*, 307 AD2d 113, 119-120 [1st Dept 2003]). Pursuant to CPLR 3016 (b), where a cause of action is based upon fraud, "the circumstances constituting the wrong shall be stated in detail." However, CPLR 3016 (b) should not be so strictly interpreted "as to prevent an otherwise valid cause of action in situations where it may be 'impossible to state in detail the circumstances constituting a fraud'" (*Lanzi v Brooks*, 43 NY2d 778, 780 [1977], quoting *Jered Contr. Corp. v New York City Tr. Auth.*, 22 NY2d 187, 194 [1968]). This requirement may be met where the facts are sufficient to permit a reasonable inference of the alleged fraudulent conduct (*Sargiss v Magarelli*, 12 NY3d 527, 531 [2009]).

Here, the complaint alleges that defendants, plaintiff's attorneys and former employees, knowingly concealed that they had agreed to settle with Klibanoff for $100,000, and that plaintiff would not receive any portion of the settlement proceeds (Complaint, ¶ 46). The complaint alleges that defendants acted with intent to defraud plaintiff, and that plaintiff suffered damages (*id.*, ¶¶ 47-51). Thus, although plaintiff does not allege fraudulent misrepresentation, plaintiff adequately pleads fraudulent concealment. Defendants have not shown that the alleged fraudulent scheme is inherently incredible as a matter of law.

In addition, while plaintiff was not owed any moneys in connection with Klibanoff I since no counterclaims were asserted by plaintiff in that arbitration and, in fact, plaintiff owed (and still owes) the Roth defendants money for attorneys fees and expenses in connection with their work in that arbitration, the complaint nonetheless adequately alleges the plaintiff suffered damages as a result of the Roth defendants' alleged fraudulent concealment. Specifically, based on the allegations in the complaint, as well as other evidence in the record, the draft settlement

agreement was intended not only to resolve the Klibanoff I arbitration but also the Klibanoff II arbitration and all claims that might arise out of the arbitrations. In addition, the complaint alleges that Klibanoff agreed to pay the $100,000, to avoid being sued for fraud by the respondents, which included plaintiff's predecessor, in the Klibanoff II arbitration. Accordingly, the complaint adequately alleges that plaintiff had an interest in the settlement proceeds such that it was damaged as a result of the Roth defendants' alleged fraudulent concealment.

Moreover, it cannot be said that the fraud claim is flatly contradicted by documentary evidence. The documentary evidence submitted in this case includes a letter dated January 26, 2006, from Roth to Gehn, in which Roth states that, a few weeks before, he informed plaintiff's principal, Steven Sands, that he would receive $100,000 in legal fees from the claimants, and that Steven Sands "was fine with the legal fees payment and approved it" (Complaint, Exh. J). Defendants also submit e-mails dated April 11 and 12, 2006, from Roth to Gehn, in which Roth stated that his firm was going to receive the $100,000 directly from Klibanoff, and apply it to unpaid legal fees (Roth Affirm., Exhs. 6, 7).[1] Nonetheless, in a letter dated January 25, 2006 from Gehn to Roth (which prompted Roth's reply letter of January 26, 2006), the Sands, the principals of plaintiff, denied being aware of the proposed settlement with Klibanoff. In that letter, Gehn stated that "Walter Becker, Esq. has recently provided me with a proposed DRAFT

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[1]Although defendants also reference Exhibit 8 to their motion, Exhibit 8 consists of Justice Moskowitz's short form order denying the stay in *Lichtenstein v Klibanoff*. The court also notes that defendants' other documents are not conclusive. First, the funds transfer notification does not show that plaintiff agreed that the settlement proceeds would be paid to the Roth Firm to satisfy attorneys' fees (Roth Affirm., Exh 10). This document only states that $70,000 was transferred to the Roth Firm in reference to Daniel Klibanoff (*id.*). Second, Justice Moskowitz's comments on the record are not conclusive; she did not make any finding that the $100,000 was to be paid to the Roth Firm to satisfy legal fees (Roth Affirm., Exh. 9 [Hearing Tr., at 25]).

settlement agreement in connection with the *Klibanoff, et. al. v. Sands Brothers, et. al.* NASD arbitrations. Our clients have previously been unaware of such settlement negotiations" (Complaint, Exh. I). The draft settlement agreement, which allegedly was not provided to plaintiff by Roth, states that the $100,000 would be paid only to Lichtenstein and Goddard (*id.*, Exh. D, at 4).

Additionally, the draft settlement agreement does not state that the $100,000 would be paid to the Roth Firm to satisfy outstanding legal bills (*id.*). An affidavit from Becker, filed in support of Klibanoff's motion to vacate the judgment of confession, also states that the threat of a fraud suit was the *only* consideration for proceeding with the settlement once it was known that plaintiff's request for legal fees was denied (*id.*, Exh. E [Becker Aff., ¶¶ 3, 4]). In sum, it cannot be concluded, as a matter of law, that plaintiff knew of and approved the proposed settlement, and agreed that defendants would keep the settlement proceeds to pay legal fees. Therefore, plaintiff has properly stated a cause of action for fraud.

The second cause of action, labeled breach of fiduciary duty, is asserted against the Roth defendants. In this cause of action, plaintiff alleges that Roth and the Roth Firm owed it their undivided loyalty, and that they breached these fiduciary duties by structuring the Klibanoff settlement agreement to exclude any benefit to plaintiff, and by accepting funds from Klibanoff in settlement to the exclusion of plaintiff (Complaint, ¶¶ 53-56).

In the third cause of action, plaintiff asserts a theory of aiding and abetting a breach of fiduciary duty, only against Lichtenstein and Goddard. This cause of action alleges that Lichtenstein and Goddard knowingly acted in concert with Roth and the Roth Firm, and that these defendants were aware of the breach of trust to plaintiff (*id.*, ¶ 59).

The eighth cause of action alleges that, in the Roth Firm's case against Martin and Steven Sands, the Roth defendants revealed plaintiff's privileged attorney-client communications for their own benefit (*id.*, ¶ 80).

Defendants again argue that the second and third causes of action are absurd, since plaintiff paid no legal fees to the Roth Firm in defending Klibanoff I. They contend that the eighth cause of action is conclusory and fails to plead the transactions or occurrences on which it is based.

The court finds that the second and eighth causes of action are sufficient to allege breaches of fiduciary duty. "In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct" (*Kurtzman v Bergstol*, 40 AD3d 588, 590 [2d Dept 2007]). As a fiduciary, an attorney "is charged with a high degree of undivided loyalty to his [or her] client" (*Matter of Kelly*, 23 NY2d 368, 375 [1968]). As noted by the Court of Appeals in *Matter of Cooperman* (83 NY2d 465, 472 [1994]), the relationship of attorney and client is one of unique fiduciary reliance and 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 client's interests over the lawyer's." Thus, any act of disloyalty by an attorney will be deemed a breach of fiduciary duty owed to the client (*Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 9 [1st Dept 2008]). In this connection, it is well settled that an attorney cannot settle claims without authorization from his or her client, either express or implied (*Hallock v State of New York*, 64 NY2d 224, 230 [1984]; *Nash v Y & T Distribs.*, 207 AD2d 779, 780 [2d Dept

1994] [an attorney has no implied power to settle or compromise a client's claim by virtue of his or her general retainer]).

In this case, plaintiff has adequately alleged an attorney-client relationship between plaintiff and the Roth defendants. The complaint also sufficiently alleges that Roth failed to disclose the proposed settlement agreement with Klibanoff, and signed the agreement without plaintiff's knowledge or authority. Pursuant to that agreement, plaintiff was not to receive any portion of the settlement proceeds, even though the agreement purported to resolve plaintiff's fraud claims against Klibanoff. Plaintiff further claims that Roth accepted payment of the settlement proceeds from Klibanoff. As noted above, it cannot be said that this cause of action is inherently incredible or flatly contradicted by documentary evidence. Thus, the second cause of action sufficiently alleges acts of disloyalty by Roth (*see Beltrone v General Schuyler & Co.*, 252 AD2d 640, 641 [3d Dept 1998] [client stated cause of action for breach of fiduciary duty against his attorney concerning partnership entered into with attorney's partnership, where attorney allegedly failed to advise of consequence of various transactions that partnership undertook]; *Kantor v Bernstein*, 225 AD2d 500, 501 [1st Dept 1996] [law partnership stated cause of action for breach of fiduciary duty against former partner; former partner allegedly went to second law firm and offered virtually all of arbitration practice in exchange for making him a partner at the second firm]).

As for the eighth cause of action, for breach of attorney-client privilege, CPLR 3013 states that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action." Notice pleading is satisfied so long as

the pleading gives notice to an adversary of the transactions or occurrences giving rise to a claim (*Colleran v Rockman*, 232 AD2d 322, 323 [1st Dept 1996]; *Foley v D'Agostino*, 21 AD2d 60, 63 [1st Dept 1964]). Applying this standard, the court finds that defendants have been sufficiently apprised of the conduct upon which this claim is predicated This cause of action attributes specific wrongs to the Roth defendants, i.e., they revealed privileged attorney-client communications. Moreover, courts have recognized a cause of action for breach of the attorney-client privilege (*Goldberg v. American Home Assurance Co.*, 80 AD2d 409 [1st Dept 1981]).

Aiding and abetting a breach of fiduciary duty requires: "(1) a breach by a fiduciary of obligations to another, (2) that the defendant[s] knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach" (*Kaufman*, 307 AD2d at 125; *see also Ulico*, 56 AD3d at 11 ["(v)iability of the cause of action for aiding and abetting (depends on a) fiduciary duty, . . . a breach of that duty, and defendant's substantial assistance () in effecting the breach, together with resulting damages"]). As noted above, it cannot be concluded, at this juncture on a motion to dismiss, that the third cause of action is absurd, incredible as a matter of law, or flatly contradicted by documentary evidence. Given the benefit of all reasonable inferences, the complaint sufficiently alleges that Lichtenstein and Goddard were aware of the attorney-client relationship between plaintiff and the Roth defendants, and that they agreed to conceal the proposed settlement from plaintiff (Complaint, ¶¶ 21, 22, 34, 40, 58-59). Accordingly, the third cause of action is sufficient.

The fourth cause of action asserts a cause of action pursuant to Judiciary Law § 487 against the Roth defendants. Plaintiff alleges that the Roth defendants engaged in deceit, collusion, and consented to deceit and collusion, with intent to deceive the court and plaintiff

(*id.*, ¶ 62). Specifically, plaintiff claims that the Roth defendants' deceit included their attempts to settle the matter around plaintiff, in collusion with Lichtenstein and Goddard, and filing the enforcement action against Klibanoff without informing plaintiff or providing for its participation in the fruits of the settlement (*id.*, ¶ 63).

Defendants again argue that this cause of action should be dismissed because plaintiff did not pay attorneys' fees incurred in defending the Klibanoff I arbitration.

Judiciary Law § 487 (1) permits injured third parties to recover treble damages when an attorney engages in "any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party." The plaintiff must show a "chronic and extreme pattern of legal delinquency" (*Kaminsky v Herrick, Feinstein LLP*, 59 AD3d 1, 13 [1st Dept 2008], *lv denied* 12 NY3d 715 [2009] [internal quotation marks and citation omitted]), and that the actions of the attorney proximately caused its damages (*Nason v Fisher*, 36 AD3d 486, 487 [1st Dept 2007]; *Jaroslawicz v Cohen*, 12 AD3d 160, 161 [1st Dept 2004]). Defendants have provided no support for the proposition that this cause of action is legally insufficient where a client fails to pay its attorney legal fees. However, the court notes that the alleged deceit, when not directed at a court, must occur during a pending judicial proceeding (*Jacobs v Kay*, 50 AD3d 526, 527 [1st Dept 2008]; *Costalas v Amalfitano*, 305 AD2d 202, 203-204 [1st Dept 2003]). Here, the Roth defendants' attempts to settle the potential fraud claims around plaintiff did not occur during a pending judicial proceeding. In addition, plaintiff was not a party in the proceeding to enforce Klibanoff's judgment of confession (*see Bankers Trust Co. v Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 AD2d 384, 386 [1st Dept 1992] [court properly struck claim pursuant to Judiciary Law § 487 where alleged deceit did not occur during a pending judicial proceeding in which

plaintiff was a party]). Plaintiff has also not alleged deceitful conduct to the court, which caused its damages. As a result, the fourth cause of action is dismissed.

The fifth and seventh causes of action are denominated constructive trust and unjust enrichment, respectively. The fifth cause of action is asserted against the Roth defendants, and the seventh cause of action is asserted against all of the defendants. In the fifth cause of action, plaintiff asserts that it has an equitable interest in any settlement funds paid by or on behalf of Klibanoff to the Roth defendants and/or to their benefit, and that it would be contrary to equity for the Roth defendants to retain those funds (Complaint, ¶¶ 66-67). In the seventh cause of action, plaintiff alleges that defendants acted in concert with one another in order to deprive plaintiff of any share of the funds paid to the Roth defendants (*id.*, ¶ 75). By taking such funds, defendants were allegedly enriched at the expense of plaintiff (*id.*, ¶ 76).

As for the unjust enrichment claim, defendants contend that this claim fails, because Sands Brothers paid no attorneys' fees to the Roth Firm in defending the Klibanoff arbitration. With respect to the constructive trust claim, defendants similarly contend that the allegation that "[i]t would be contrary to equity for the Roth Defendants to retain the amounts paid to them or the benefits received by them, in which Plaintiff has an interest" (*id.*, ¶ 67), is nonsensical.

A constructive trust may be imposed "[w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest" (*Sharp v Kosmalski*, 40 NY2d 119, 121 [1976] [internal quotation marks and citation omitted]). The elements of a cause of action for a constructive trust are "a confidential or fiduciary relationship, a promise, a transfer in reliance upon the promise, and unjust enrichment" (*Matter of Gupta*, 38 AD3d 445, 446 [1st Dept 2007] [internal quotation marks and citation

omitted]; *see also Panetta v Kelly*, 17 AD3d 163, 165 [1st Dept], *lv dismissed* 5 NY3d 783 [2005]). However, these requirements are not to be rigidly applied (*Simonds v Simonds*, 45 NY2d 233, 241 [1978]). A constructive trust may be imposed even in the absence of an express promise; "a promise may be implied or inferred from the very transaction itself" (*Sharp*, 40 NY2d at 122).

To prevail on a claim of unjust enrichment, the plaintiff must establish that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against good conscience and equity to permit the other party to keep what is sought to be recovered (*Cruz v McAneney*, 31 AD3d 54, 59 [2d Dept 2006]). "'[T]he essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered'" (*Mandarin*, 65 AD3d at 453, quoting *Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421, *rearg denied* 31 NY2d 709 [1972], *cert denied* 414 US 829 [1973]).

Here, plaintiff alleges a fiduciary relationship between its predecessor and the Roth defendants, its attorneys. Implicit within that relationship was a promise to deal honestly with its assets (*Majer v Schmidt*, 169 AD2d 501, 503 [1st Dept 1991]). Plaintiff also alleges that the money received by Roth was the property of plaintiff arising from the settlement of plaintiff's potential fraud claims against Klibanoff. While the transfer involved does not appear to have been made in reliance upon this implied promise, under circumstances where an attorney is alleged to have committed fraud on his client by misappropriating the client's settlement proceeds, a constructive trust "'will be erected whenever necessary to satisfy the demands of justice'" (*id.*, quoting *Latham v Father Divine*, 299 NY 22, 27 [1949]). As previously noted,

these causes of action are not inherently incredible or flatly contradicted by documentary evidence. Therefore, plaintiff has adequately stated the fifth and seventh causes of action (*see id.* [former client stated cause of action for imposition of constructive trust, where attorney allegedly wrongfully converted former client's assets to satisfy liability of attorney and law firm in connection with settlement]).

The sixth cause of action alleges that any settlement payments received by the Roth defendants were impliedly held in escrow for plaintiff (Complaint, ¶¶ 71-73).

To prove the existence of an escrow agreement, the plaintiff must show: (1) an agreement regarding the subject matter and delivery of the funds; (2) a third-party depositary; (3) delivery of the funds to a third party conditioned upon the performance of some act or the occurrence of some event; and (4) relinquishment by the grantor or depositor (*Mortgage Elec. Registration Sys., Inc. v Maniscalco*, 46 AD3d 1279, 1281 [3d Dept 2007]). Its purpose is "to assure the carrying out of an obligation already contracted for" and it need not be in writing (*Russell v Demandville Mtge. Corp.*, 11 Misc 3d 1056 [A], *5, 2006 NY Slip Op 50231 [U] [Sup Ct, Kings County 2006] [internal quotation marks omitted]). However, merely "[c]alling an act an escrow does not necessarily make it such" (*Lennar Northeast Partners Ltd. Partnership v Gifaldi*, 258 AD2d 240, 243 [4th Dept], *lv denied* 94 NY2d 754 [1999] [internal quotation marks and citation omitted]). The plaintiff must show that the alleged escrow agent agreed to accept that responsibility (*Grossman v Fieland*, 107 AD2d 659, 660 [2d Dept 1985]; *Tinker Natl. Bank v Grassi*, 57 Misc 2d 886, 888 [Sup Ct, Suffolk County 1968]). Although the complaint alleges that Roth violated his obligations as an escrow agent (Complaint, ¶¶ 41, 42), the complaint is devoid of any allegation that he ever agreed to serve as an escrow agent. Plaintiff could not force

Roth "against his will . . . to act as an escrow agent" (*Tinker*, 57 Misc 2d at 888). Therefore, the sixth cause of action is dismissed.

The ninth cause of action, asserted only against Roth, states that the court should refer Roth's misconduct to the disciplinary authorities for investigation and prosecution pursuant to Judiciary Law § 90 (2) and the inherent powers of the court (Complaint, ¶ 83). Defendants contend that "referral" is not a "cause of action" and is also premature.

Judiciary Law § 90 (2) states that:

> "The supreme court shall have power and control over attorneys and counselors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counselor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice . . . ."

In the present case, plaintiff has not shown any entitlement to the type of relief requested. Of course, the court may, on its own initiative, refer attorneys for discipline under appropriate circumstances (*see* 22 NYCRR 100.3 [D] [2]). Accordingly, the ninth cause of action is dismissed.

III. Defendants' Request for Sanctions Against Plaintiff and its Counsel Pursuant to 22 NYCRR 130-1.1

Defendants contend that this court should sanction plaintiff and its counsel for filing a frivolous lawsuit. However, sanctions are only appropriate when a party or an attorney has abused the judicial process, or wasted judicial resources by engaging in wholly frivolous litigation (*Drummond v Drummond*, 305 AD2d 450, 451 [2d Dept], *lv denied* 1 NY3d 504 [2003]; *Levy v Carol Mgt. Corp.*, 260 AD2d 27, 34 [1st Dept 1999]). The litigation for which sanctions are sought must "(1) [be] completely without merit in law and cannot be supported by a

reasonable argument for an extension, modification or reversal of existing law; (2) [be] undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) [] assert[] material factual statements that are false" (22 NYCRR 130-1.1 [c]). Here, defendants have not shown an abuse of the judicial process. Nor have defendants shown, on this motion to dismiss, that the complaint contains material false statements of fact, or that this action was brought to delay the related action or maliciously injure plaintiff. Accordingly, the court denies defendants' request for sanctions.

In view of the above, it is hereby

ORDERED that the motion (sequence number 002) of defendants Richard A. Roth, The Roth Law Firm, PLLC, Michael Lichtenstein, and Alan Goddard to dismiss the complaint is granted to the extent of severing and dismissing the causes of action for violation of Judiciary Law § 487 (fourth cause of action), breach of implied escrow (sixth cause of action), and referral by the court pursuant to Judiciary Law § 90 (2) (ninth cause of action), and is otherwise denied; and it is further

ORDERED that defendants' request for sanctions against plaintiff Harbor Consultants Ltd. f/k/a Sands Brothers & Co., Ltd. and its counsel is denied; and it is further

ORDERED that defendants shall answer the complaint within 30 days of the date of this decision, a copy of which is being sent by my chambers to counsel for the parties; and it is further

ORDERED that a preliminary conference shall be held on March 11, 2010 at 9:30 am, in Part 11, room 351, 60 Centre Street, New York, NY.

Dated: January 14, 2010

J.S.C.