Carl v Cohen
2007 NY Slip Op 31665(U)
June 13, 2007
Supreme Court, New York County
Docket Number: 0117043/2006
Judge: Carol R. Edmead
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SCANNED ON 6/18/2007

[* 1]

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

PRESENT: HON. CAROL EDMEAD, Justice — PART 35

CARL, JOHN R.

-v-

COHEN, JOEL ESQ.

INDEX NO. 117043/06
MOTION DATE 6/13/07
MOTION SEQ. NO. 003
MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on 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

FILED
JUN 18 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

It is hereby

ORDERED that Defendant's motion for an order pursuant to CPLR 3211(a)(7) dismissing Plaintiff's claims for legal malpractice, tortious interference with prospective business advantage and fraud is denied as to the legal malpractice claim and granted as to the claims for tortious interference with prospective business advantage and fraud; and it is further

ORDERED that Defendant's motion for an order pursuant to CPLR 2201, staying this entire action pending the resolution of the NASD Arbitration is denied; and it is further

ORDERED that Defendant shall serve a copy of this order upon Plaintiff within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 6/13/07

HON. CAROL EDMEAD, J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

---x

JOHN R. CARL,

Plaintiff,

-against-

JOEL COHEN, ESQ.,

Defendant.

---x

Index No.: 117043-2006

Sequence 003
DECISION/ORDER

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

John R. Carl (the "Plaintiff") commenced this action against Joel Cohen, Esq. (the "Defendant") for legal malpractice, tortious interference with prospective business advantage, and fraud in connection with Defendant's representation of him during an investigation of Alliance Capital/Alliance Bernstein, now known as Alliance Bernstein, L.P. ("Alliance") for illegal market-timing activities.[1]

Before the Court is Defendant's motion for an order (1) pursuant to CPLR 3211(a)(7) dismissing Plaintiff's claims for legal malpractice, tortious interference with prospective business advantage and fraud; or (2) in the alternative, pursuant to CPLR 2201, staying this entire action pending the resolution of a related arbitration before the NASD (the "NASD Arbitration").

FACTUAL BACKGROUND

On September 3, 2003, the New York Attorney General ("NYAG") filed a civil complaint against Alliance for illegal market-timing activities. As a result, Alliance hired Clifford Chance LLP to represent it in connection with the complaint and began an internal investigation.

Plaintiff, the then District Director of the Northeast Region, participated in an interview with Alliance's in-house counsel about his knowledge of the market-timing activities. Thereafter, Alliance's in-house counsel advised Plaintiff to obtain outside counsel. Alliance

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[1] Market-timing is the short-term trading of mutual funds, a practice which generated sales commissions for Alliance, but placed long-term investors in mutual funds at some risk.

appointed Defendant to represent the plaintiff, during which time, Defendant was Alliance's counsel in an unrelated action in Florida involving the Enron collapse. At the time of said representation, Defendant advised Plaintiff that he represented Alliance in this unrelated matter, and that the dual representation was "a good thing and will serve to [plaintiff's] advantage."

Alliance terminated Plaintiff on November 14, 2003. Upon his termination, Plaintiff discharged Defendant and retained substitute counsel. During the next several weeks, Alliance issued, and then amended, Plaintiff's "U-5 Form," in which Alliance answered "yes" to the following internal review disclosure question: "Currently is, or at termination, was, the individual under internal review for fraud or wrongful taking of property?" Alliance also indicated in the U-5 that Plaintiff was "permitted to resign in connection with market-timing matters."

In December 2003, a settlement among Alliance, the SEC and the NYAG was reached in which Alliance agreed to pay $600 million in fines and penalties.

Three years later, on November 13, 2006, Plaintiff filed an arbitration claim with the NASD Dispute Resolution Center against Alliance Capital Management, L.P., and a number of Alliance affiliates and subsidiaries (the "Alliance Respondents") and Defendant. As against Alliance, Plaintiff alleged claims for: (1) tortious interference with prospective business advantage, (2) violations of New York's labor law, (3) *quantum meruit*, (4) conversion, (5) defamation, (6) fraud, and (7) equitable/injunctive relief. As against Defendant, plaintiff alleged (1) tortious interference with prospective business advantage, (2) fraud, and (3) legal malpractice. However, Defendant, who is not a member of the NASD, did not submit to arbitration.

After commencing the arbitration, Plaintiff commenced this action against Defendant, again alleging tortious interference with prospective business advantage, fraud, and legal malpractice.

THE COMPLAINT

Plaintiff's first cause of action for legal malpractice alleges that Defendant owed Plaintiff

a fiduciary duty to act in Plaintiff's best interests, Defendant failed to exercise the degree of care, skill, and diligence commonly possessed by a member of the legal community, and that such failures caused Plaintiff harm. Plaintiff claims that Defendant failed to advise Plaintiff that the information he possessed, which allegedly contradicted Alliance's public positions regarding the market-timing investigation, triggered certain whistleblower protections and Defendant took no action to preserve Plaintiff's rights in this regard. Had Defendant done so, Plaintiff would have invoked said whistleblower protections protecting him from his employer and would have preserved a direct cause of action against his employer. Plaintiff claims that had Defendant protected Plaintiff's interests, Plaintiff would not have been terminated and his securities license would not have been tarnished.

In his second cause of action for fraud, Plaintiff alleges that Defendant aided and abetted Alliance's efforts to target its employees in order for Alliance to protect its high ranking executives. Plaintiff contends that Defendant was paid by Alliance and represented Alliance in an unrelated matter contemporaneous to his representation of Plaintiff. It is further alleged that Defendant did not properly inform his firm, Greenberg Traurig, LLP, that his representation of Plaintiff would be potentially adverse to Alliance. Plaintiff also contends that Defendant was personal friends with the Clifford Chance lawyers who conducted Alliance's internal investigation and that during the course of this investigation, Defendant withheld documents from Plaintiff demonstrating that Plaintiff was not responsible for Alliance's problems. Following Plaintiff's termination by Alliance, Defendant was hired by Clifford Chance as a partner where he continued to represent Alliance. Plaintiff further alleges that Defendant made materially false statements and/or omitted key facts and/or aided and abetted Alliance, including, but not limited to: (1) failing to inform Plaintiff that he should obtain his own, independent counsel; (2) that Alliance's interests were contrary to those of Plaintiff; (3) that Defendant was compromised and beholden to Alliance; (4) that it was a conflict of interest for Defendant to represent both Alliance and Plaintiff; (5) that Defendant was working to advance his and

Alliance's interests above Plaintiff's; (6) that Alliance secretly intended to blame Plaintiff, among others, and to mislead the public about its own wrongdoing; (7) failing to advise Plaintiff that he qualified as a whistleblower; and (8) that Defendant and Alliance concealed documents that tended to exculpate Plaintiff. It is further contended that Defendant knew these statements and omissions to be false at the time, that he intended Plaintiff to rely on same, Plaintiff did in fact rely, and Plaintiff has been harmed.

Plaintiff's third cause of action for tortious interference with prospective business advantage alleges that Defendant engaged in fraudulent conduct designed to prevent Plaintiff from becoming employed by a competitor and building a mutual fund sales organization that could successfully compete for Alliance's customers, that Defendant participated in conduct that framed Plaintiff for Alliance's wrongful acts, and that Defendant knew such falsities would damage Plaintiff's ability to find future employment in the securities business. It is further alleged that as a direct and proximate result of Defendant's conduct, Plaintiff has been unable to find commensurate employment and has suffered economic harm.

CONTENTIONS

Defendant's Contentions

Defendant contends that Plaintiff's claims for legal malpractice, tortious interference with prospective business advantage, and fraud should be dismissed for failure to state a cause of action.

Plaintiff's malpractice claim is unavailing because Plaintiff has not alleged that Defendant's conduct fell below that of the ordinary and reasonable skill and knowledge commonly possessed by a member of the legal profession. Plaintiff's allegation that Defendant should have taken steps to invoke whistleblower protections under the Sarbanes-Oxley statute, 18 USC § 1514A ("SOX") in order to prevent Plaintiff's termination is misplaced. Under SOX, an employee may have a cause of action against his or her employer where the company discharges the employee because the employee, *inter alia*, "participate[d] in ... a proceeding filed

on or about to be filed ... relating to an alleged violation of ... any regulation of the [Securities and Exchange Commission], or any provision of Federal law relating to fraud against shareholders."[2] Such a complaint must be filed "not later than 90 days after the date on which the violation occurs."[3] However, this is a post-termination remedy and there is no provision for invoking the provisions prior to Plaintiff's termination. Further, Plaintiff makes no allegation that he had contractual or other protections against New York's traditional "at will" employment rule.

Even if Defendant had a duty to inform Defendant about a claim under SOX, Plaintiff has failed to sufficiently allege that he would have won such a case absent Defendant's purported negligence. In order to prevail on a SOX claim, a plaintiff must prove that the alleged protected activity was a contributing factor in the unfavorable personnel action.[4] An employer may avoid liability by demonstrating that it would have taken the same unfavorable action in the absence of the protected behavior.[5] Plaintiff has not alleged that his participation in the investigation was a contributing factor to his discharge or that Alliance terminated him for a reason other than participating in the market-timing activity.

Although Plaintiff alleges that Defendant could have been more aggressive during the internal investigation, such an allegation challenges the strategy employed by Defendant and not the substance of the representation.

Nor does Plaintiff properly allege that Defendant's conduct was the proximate cause of his damages as there is no allegation that Defendant could have taken steps pre-termination to prevent Plaintiff from losing his job. Furthermore, there is no allegation that Defendant continued to represent Plaintiff after Plaintiff's termination, much less that any alleged act or

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[2] 18 USC § 1514A(a)(2).

[3] 18 USC § 1514A(b)(1)(A) & (2)(D).

[4] 49 USC § 42121(b)(2)(B)(iii).

[5] 49 USC § 42121(b)(2)(B)(iv)

omission by Defendant made Plaintiff unable to sue Alliance for damages for wrongful termination. Also, there is no allegation that Defendant was involved in the preparation of Plaintiff's U-5 Form or that he represented him at that time.

As to Plaintiff's claim for tortious interference with prospective business advantage, Plaintiff does not identify any specific offer of employment with which Defendant allegedly interfered. Nor does Plaintiff allege that Defendant intentionally interfered with such an arrangement, that Defendant knew about any offer of employment, or that Defendant continued to represent Plaintiff when Plaintiff's U-5, which purportedly contains misstatements that have thwarted his efforts to secure a new job, was drafted.

Plaintiff's fraud claim is similarly deficient because it is based solely on the alleged conflict of interest created by Defendant's simultaneous representation of Plaintiff and Alliance in an unrelated matter. This claim is nothing more than a legal malpractice claim in disguise and is insufficient to form the basis for a separate fraud cause of action.

Further, the fraud claim should also be dismissed because it fails to sufficiently allege that Plaintiff was injured by Defendant. Defendant disclosed to Plaintiff that he represented Alliance, but even if he had not done so, or if his disclosure was inadequate, a lawyer's failure to disclose a conflict of interest is not actionable absent an allegation that such failure proximately caused actual damages. Plaintiff has not shown any link between the alleged conflict and any damages since Plaintiff has not alleged that: (1) Defendant knew that Alliance was going to terminate Plaintiff, (2) that Defendant was in a position to prevent Alliance from firing an at-will employee, and (3) Defendant had a reason to participate in a conspiracy to terminate his client's employment.

Lastly, Plaintiff has not adequately alleged any compensable losses or punitive damages. Plaintiff's alleged losses, including his securities licenses, his employment with Alliance, his future employment opportunities, and his supposed retaliation and whistleblower claims are out-of-pocket losses and not recoverable in fraud. Further, Plaintiff's claims for punitive damages

should be dismissed because Defendant's alleged conduct did not involve the requisite high moral culpability or malice required under New York law and was not aimed at the general public.

Alternatively, Defendant contends that this action should be stayed pending the outcome of the NASD Arbitration that Plaintiff has brought against the Alliance Respondents since both actions arise from the same facts and seek damages for the same injuries. The fact section in the Statement of Claim in the NASD Arbitration is virtually identical to the complaint filed in the instant matter. The three claims against Defendant are largely duplicative of the seven claims against the Alliance Respondents in the NASD Arbitration. Although the legal malpractice claim will not be adjudicated in the NASD Arbitration, its factual underpinnings are inextricably interwoven with the claims asserted in the NASD Arbitration. Further, the interest of justice and economy require a stay of the instant matter. A favorable result in the NASD Arbitration will make Plaintiff whole since Plaintiff seeks the same damages from both Alliance and Defendant. The instant matter should also be stayed because the NASD Arbitration is likely to end sooner than the instant matter and could have collateral estoppel effects.

Plaintiff's Contentions

With respect to Plaintiff's cause of action for legal malpractice, Plaintiff contends that he has properly pled two theories: (1) Defendant negligently advised Plaintiff and (2) Defendant failed to give advice to Plaintiff. Concerning the first theory, Plaintiff contends that he has alleged that Defendant negligently advised him during the course of Alliance's internal investigation by leading Plaintiff to believe that his interests were aligned with Alliance's and by falsely representing to Plaintiff that Defendant's relationship with Alliance was a "good thing." As to the second theory, Plaintiff has alleged that Defendant failed to advise him (1) to seek documents from Alliance, (2) of the dangers of participating in the internal investigation, (3) that he could go to the Securities and Exchange Commission ("SEC") or other government agency to report Alliance's wrongdoing and thereby receive statutory protection, (4) that he request that the

interviews during the internal investigation be taped and/or transcribed, (5) of his whistleblower claims and to take actions to preserve same.

Plaintiff further contends that Defendant has blatantly misrepresented SOX whistleblower protections by stating that a "discharge" is the only action that forms the basis for retaliation under the Act. SOX states that no company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 may "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee...."[6] Plaintiff also contends that under SOX, a person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c).[7]

Additionally, Plaintiff contends that Defendant's conflict of interest also forms the basis for a legal malpractice claim because Defendant advanced his own interests and those of Alliance at the expense of Plaintiff without disclosing said conflict. Plaintiff contends that Defendant did nothing to disclose, resolve, or gain client consent for the conflict. Moreover, Plaintiff has pled that Defendant lied to Plaintiff about the benefit of representing both him and Alliance. Defendant also aided Alliance in an effort to protect the true wrongdoers and intentionally concealed documents from Plaintiff that implicated the highest ranking officers at Alliance.

Accordingly, Plaintiff has alleged that acts by Defendant proximately caused him actual damages related to his termination, damage to his reputation in the securities industry, and the loss of his whistleblower claims.

Plaintiff also contends that Defendant has admitted in his motion that the conflict of interest limited his aggressiveness in representing Plaintiff. Defendant's argument that his conduct was a "mistake in judgment," in reference to his choosing between different courses of

[6] 18 USC § 1514A(a).

[7] 18 USC § 1514A(b)(1).

conduct while advising Plaintiff, is actionable because those judgment calls were affected by Defendant's simultaneous representation. Further, Defendant's argument that there was nothing he could have done to prevent Plaintiff from losing his job is more evidence that he could not fully represent both Plaintiff and Alliance.

With regard to Plaintiff's fraud claim, Plaintiff also contends that his complaint contains facts regarding Defendant's egregious conduct sufficient to support a claim for fraud, and warranting the imposition of punitive damages. Further, Plaintiff contends that the instant matter is nearly identical to *Mitschele v Schultz* (826 NY2d 14, 19-20 [1st Dept 2006]) in which the Appellate Division held that a fraud claim predicated on proof of the commission of an intentional tort, and not simply based upon errors in professional judgment, should be allowed to continue.

Lastly, Plaintiff contends that punitive damages are appropriate because Defendant subverted Plaintiff's interests for both his and Alliance's benefit. Plaintiff alleges that Defendant collaborated with Alliance, and its attorneys, to deprive Plaintiff of his whistleblower and witness tampering protections and to scapegoat Plaintiff for Alliance's wrongful acts. Further, Defendant intentionally failed to abide by his duties to protect Plaintiff from Defendant's conflict. Plaintiff contends that case law supports the conclusion that abuse of a professional relationship to the detriment of a client or for personal gain permits the assessment of punitive damages.

Also, Plaintiff contends that he has properly alleged a claim for tortious interference with prospective economic advantage because he has alleged that Defendant's interference was accomplished by "wrongful means" or for the sole purpose of harming Plaintiff. Plaintiff has alleged that Defendant wrongfully interfered with Plaintiff's employment status at Alliance, ability to find employment in the securities industry, specifically with Goldman Sachs, and his securities licenses by his actions, failures to act, and his complicity with Alliance. Plaintiff further alleges that Defendant was complicit in creating the falsehood that Plaintiff was the

wrongdoer at Alliance and spreading such incorrect information to third parties.

With respect to the branch of Defendant's motion seeking a stay, such an action is inappropriate in that there is not a complete identity of the parties between this case and the NASD Arbitration because Defendant is not a party to the NASD Arbitration and the Alliance Respondents are not a parties to the instant matter. Further, the claims in the instant matter are separate and distinct from the NASD Arbitration in that there is no legal malpractice claim in that action. Also, there is no identity of relief in that the relief in the instant matter can only be obtained from Defendant, not the parties involved in the NASD Arbitration, and the punitive damages sought are for Defendant's wrongful acts. Defendant's contention that a verdict against the Alliance Respondents will render Plaintiff "whole" is utter speculation. Accordingly, Defendant should not be allowed to opt out of the NASD Arbitration and then seek a stay of the instant matter because of the NASD Arbitration.

Lastly, Plaintiff contends that Defendant's citation to *Nat'l Mgmt. Corp. v Adolfi* (277 AD2d 553, 679 NYS2d 616 [3d Dept 2000]) is misleading, as this case only applies where there are simultaneous criminal and civil matters proceeding against a defendant.

Defendant's Reply

In reply, Defendant contends that Plaintiff has failed to alleged that Defendant's pre-termination actions either constituted malpractice or proximately caused his alleged losses. First, Defendant's alleged failure to disclose his conflict of interest is insufficient to satisfy the "negligence" element of his legal malpractice claim because an undisclosed conflict, without more, is not enough to constitute malpractice; there must be some action or inaction by the lawyer that results in some loss to the client. Further, Plaintiff admits in the Complaint that he was aware that Defendant represented Alliance and this constituted a conflict of interest. The Complaint thus contradicts the statement in Plaintiff's Memorandum that Defendant did not disclose the conflict.

Second, Plaintiff has failed to alleged that there was anything Defendant could have done

to preserve Plaintiff's job. The suggestions that defendant should have demanded that government lawyers attend Alliance's internal debriefing sessions, insisted on tape recording or transcribing the internal debriefing sessions, or threatened Alliance with a SOX lawsuit underscore the fact that Defendant's decisions were strategic, and may not form the basis for a malpractice claim. Nor does Plaintiff allege that "but for" Defendant's failure to take certain steps a different result would have been achieved, especially in light of the fact that Alliance was paying $600 million to stave off an indictment.

Defendant also states that Plaintiff's claim for malpractice on the basis of Defendant's alleged failure to pursue a whistleblower lawsuit post termination is also insufficient because Plaintiff does not allege that Defendant represented Plaintiff post-termination. Defendant's time records indicate that he was discharged by Plaintiff within ten days of Plaintiff's termination by Alliance and therefore did not have an opportunity to represent Plaintiff in post-termination whistleblower suit. Additionally, for the same reason, Defendant may not be held liable for the fact that Plaintiff's securities licenses are now tarnished because Plaintiff has not alleged that Defendant was involved in preparing the U-5 Form or that he represented Plaintiff during the time frame that the U-5 Form was drafted. The changes that allegedly served as "the death knell" to Plaintiff's career were made in December 2003 after Plaintiff and Defendant's attorney/client relationship ended.

Further, Plaintiff failed to dispute that the fraud claim is really one for legal malpractice and that Plaintiff did not allege out-of-pocket damages. And, Plaintiff's conclusory statement regarding causation is insufficient. As to the misrepresentation element, the case law on which Plaintiff relies is inapposite.

As to Plaintiff's tortious interference with prospective business advantage claim, Plaintiff's affidavit only alleges that he was in negotiations with another brokerage house, not that an offer was about to be or had been made, or that Defendant had tortiously interfered with it. Further, Plaintiff has not pled facts alleging that Defendant, rather than Alliance, engaged in

the alleged misconduct (*e.g.*, filing a "false press release" and "false U-5") that purportedly harmed his business opportunities.

Moreover, Plaintiff has not sufficiently alleged that Defendant's conduct (1) constituted a crime or an independent tort or (2) that the sole purpose of that conduct was to inflict harm on Plaintiff. Most importantly, Plaintiff has not alleged that Defendant engaged in misconduct directed at the third-party with whom Plaintiff "has or seeks to have a relationship." Instead, Plaintiff has introduced an entirely new claim, namely that Defendant interfered with Plaintiff's employment relationship with Alliance. Accordingly, this claim for intentional interference with an existing contract should not be considered on the instant motion.

Lastly, Defendant contends that Plaintiff's arguments against a stay are misplaced. First, Plaintiff provides no legal support for his argument that because Defendant opted out of the NASD Arbitration he waived his right to seek a stay of the instant matter. Since Defendant cannot be compelled to arbitrate, his determination not to do so cannot result in a waiver of any his legal rights.

Second, Plaintiff's argument that there is a lack of identical parties, claims, and reliefs between the two actions is supported by a line of older cases that are not uniform and are inconsistent with recent precedent. A finding in the NASD Arbitration that there was no conspiracy to scapegoat Plaintiff for the failings of Alliance's senior manager and that Defendant's termination was proper, would, under the principles of collateral estoppel, spell the end of the instant matter as the allegations against Defendant rest on the central notion that he participated in scheme to blame Plaintiff for the wrongful conduct of others. Further, if Plaintiff prevails in arbitration he will receive complete relief from Alliance as the damages claims in the two suits are the same. Moreover, without a stay there is a serious risk of inconsistent results if the two actions proceed in parallel.

Lastly, Plaintiff's claim that Defendant misled the Court lacks merit. Plaintiff cites to a case different from the one on which Defendant relies, and caselaw indicates that a stay may

issue even where the parties and claims were not identical in the two actions.

DISCUSSION

I. Motion to Dismiss

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint, liberally construed, states a cause of action (*see*, CPLR §3026; *Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether accepting factual allegations as true, and deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]; *Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997]). However, in those circumstances where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence," they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996]), and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1st Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804 [1993] [CPLR 3211 motion granted where defendant submitted letter from plaintiff's counsel which flatly contradicted plaintiff's current allegations of prima facie tort]).

Where the parties have submitted evidentiary material, including affidavits, the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint

(*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS.2d 532 [1st Dept 1989]). Affidavits submitted by a plaintiff may be considered for the limited purpose of remedying defects in the complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-36 [1976]; *Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]).

Legal Malpractice

To establish a cause of action for legal malpractice, a plaintiff must prove (1) that the defendant attorney failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community, (2) proximate cause, (3) damages, and (4) that the plaintiff would have been successful in the underlying action had the attorney exercised due care (*Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 170 AD2d 108 [1st Dept 1991], *affd* 80 NY2d 377 [1992], *rearg denied* 81 NY2d 955 [1993]). To sustain a cause of action for legal malpractice, a party must show that an attorney failed to exercise "the ordinary reasonable skill and knowledge" commonly possessed by a member of the legal profession (*Darby & Darby, P.C. v VSI International, Inc.*, 95 NY2d 308 [2000]). For example, an attorney may be liable for his or her ignorance of the rules of practice; failure to comply with conditions precedent to suit; neglect to prosecute or defend an action; and the failure to conduct adequate legal research (*Shopsin v Siben & Siben*, 268 AD2d 578 [2d Dept 2000]). To establish the elements of proximate cause and actual damages it must be shown that the plaintiff would have had a favorable outcome but for the attorney's negligence (*Davis v Klein*, 88 NY2d 1008 [1996]; *Carmel v Lunney*, 70 NY2d 169 [1987]).

Here, Plaintiff has pled three theories for his legal malpractice cause of action which constitute how Defendant failed to exercise the degree of care, skill, and diligence commonly possessed by a member of the legal community, *inter alia*: (1) Defendant negligently advised Plaintiff during the course of Alliance's internal investigation, (2) Defendant failed to give advice to Plaintiff during the course of Alliance's internal investigation, and (3) Defendant

advanced his own interests and those of Alliance at the expense of Plaintiff without disclosing said conflicts of interest (*see Salvatore v Kumar,* 12 Misc 3d 1157 [Supreme Court, Nassau County 2006] [holding that a complaint alleging that defendants attorneys were compensated by plaintiff's employer, failed to disclose the conflict of interest, and failed to advise plaintiff as to the possible consequences of her cooperation with the internal investigation, sufficiently alleged legal malpractice claim]; *Gotay v Breitbart*, 14 AD3d 452, 454 [1st Dept 2005] [holding that a complaint alleging that defendants attorneys failed to prosecute plaintiff's medical malpractice action so as to preserve her claims against the defendants therein and as a result plaintiff incurred damages by reasons of the loss of her opportunity to bring suite against the parties responsible for her injuries, were sufficient to allege a legal malpractice claim]; CW2D § 3:395 [an attorney may be liable to the client for failure to commence an action or proceeding on a matter entrusted to the attorney before the claim was barred by the running of the statute of limitations provided the claim was otherwise valid and collectible]). Plaintiff has further alleged that such actions and inactions proximately caused him actual damages related to his termination, damage to his reputation in the securities industry, and the loss of his whistleblower claims. Additionally, Plaintiff has alleged that he would not have been damaged had Defendant exercised due care.

Accordingly, the branch of Defendant's motion to dismiss Plaintiff's claim for legal malpractice is denied.

Fraud

In order to assert a claim of fraud, Plaintiff must allege that: (1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiffs thereby, (3) the plaintiff reasonably relied upon the representation, and (4) the plaintiff suffered damage as a result of his or her reliance (*Swersky v Dreyer and Traub,* 219 AD2d 321, 326, 643 NYS2d 33 [1st Dept 1996]). Misrepresentation must be pleaded with sufficient particularity, as required by CPLR 3016(b). The language of 3016(b) merely requires that a claim of misrepresentation be pleaded in sufficient detail to give adequate notice (*see Foley v D'Agostino*, 21 AD2d 60, 64, 248

NYS2d 121 [1st Dept 1964]). Indeed, the Court of Appeals has specifically noted that this rule "is not to be interpreted so strictly 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, 402 NYS2d 384 [1977] [citation omitted]).

On a motion to dismiss for failure to state a cause of action, "a plaintiff ··· need only plead that he relied on misrepresentations made by the defendant ··· since the reasonableness of his reliance [generally] implicates factual issues whose resolution would be inappropriate at this early stage" (*Guggenheimer v Bernstein Litowitz Berger & Grossmann LLP*, 11 Misc 3d 926, 810 NYS2d 880 [N.Y.Sup. 2006]).

A fraud claim asserted in connection with charges of a legal malpractice claim "is sustainable only to the extent that it is premised upon one or more affirmative, intentional misrepresentations - that is, something more egregious than mere 'concealment or failure to disclose [one's] own malpractice'" (*White of Lake George v Bell,* 251 AD2d 777, 778, 674 NYS2d 162 [1998], *appeal dismissed* 92 NY2d 947, 681 NYS2d 477 [1998], *quoting La Brake v Enzien,* 167 AD2d 709, 711, 562 NYS2d 1009 [1990]). In addition to establishing each element of fraud, plaintiff has the burden of proving that the alleged fraud "caused additional damages, separate and distinct from those generated by the alleged malpractice" (*White of Lake George v Bell, supra* at 778, 674 NYS2d 162; *see La Brake v Enzien, supra* at 711, 562 NYS2d 1009).

In the instant matter, Plaintiff has set forth a litany of allegations purporting to show materially false statements or omissions by Defendant. These allegations comprising Plaintiff's fraud claim consist, essentially, of a restatement of his accusations of legal malpractice. While these assertions, if proven, could warrant a finding of malpractice, they are insufficient, without more, to make out a separate cause of action for fraud.

Contrary to Plaintiff's citation, *Mitschele v Schultz* (36 AD3d 249, 826 NYS2d 14 [1st Dept 2006]) does not warrant a different result. In both cases, the essence of the fraud claim is that the defendants allegedly perpetrated a fraud on the plaintiffs from the time of retention due

to the defendants' relationship with the plaintiffs' employer. The Court in *Mitschele* determined that the defendants "failed to inform [the] plaintiff of their conflicted interests, despite their professional obligation to make such disclosure" (*Mitschele*, 36 AD3d at 255). Here, however, Plaintiff admits in the Complaint that "[u]pon their first meeting, [Defendant] acknowledged to [Plaintiff] that he formally and currently represented Alliance and that he 'had a duty' to inform [Plaintiff]" of this fact. Thus, this matter is distinguishable from from *Mitschele*.

Accordingly, as the cause of action for fraud, which is duplicative of plaintiff's legal malpractice cause of action, is therefore dismissed (*see Sabo v Alan B. Brill, P.C.*, 25 AD3d 420, 808 NYS2d 194 [1st Dept 2006]; *Tortura v Sullivan Papain Block McGrath & Cannavo, P.C.*, 21 AD3d 1082 [2d Dept 2005]; *Shivers v Siegel*, 11 AD3d 447 [2d Dept 2004]; *Daniels v Lebit*, 299 AD2d 310 [2d Dept 2002]).

Tortious Interference With Prospective Business Advantage

The allegations set forth are insufficient to state a cause of action for tortious interference with prospective business advantage.

Tortious interference with prospective business advantage requires a showing that but for the intentional and wrongful acts of a defendant, a known third party was prevented from entering into a business relationship with a plaintiff (*see Levy v P & R Dental Strategies, Inc.*, 302 AD2d 255, 756 NYS2d 3, 4 [1st Dept 2003]. Thus, the required elements are: (1) that the defendant must have known of the proposed business relations between the plaintiff and a third party, (2) that the defendant must have intentionally interfered with the proposed business relations, (3) that the proposed business relations would have been entered into but for the defendant's interference, (4) that the defendant acted with wrongful means, and (5) injury to the business relationship (*see Carvel v Noonan*, 3 NY3d 182, 785 NYS2d 359 [2004]; *NBT Bancorp Inc. v Fleet/Norstar Fin. Group, Inc.*, 87 NY2d 614, 641 NYS2d 581 [1996]; *Guard-Life Corp. V S. Pakrer Hardware Mfg. Corp.*, 50 NY2d 183, 428 NYS2d 628 [1980]).

The level of culpable conduct necessary to state a cause of action is comparably high

when viewed against other business torts (*see Carvel Corporation v Noonan*, 3 NYS3d 182, 190, 785 NYS2d 359, 362 [2004]; *NBT Bancorp Inc. v Fleet/Norstar Fin. Group, Inc.*, 87 NY2d 614, 621, 641 NYS2d 581 [1996]; *Guard-Life Corp. v S. Pakrer Hardware Mfg. Corp.*, 50 NY2d 183, 191, 428 NYS2d 628, 632 [1980] [Greater protection is accorded an interest in an existing contract than to the less substantive, more speculative interest in a prospective relationship where liability will be imposed only on proof of more culpable conduct on the part of the interferor.]).

Since an interference claim require's Defendant's knowledge of the proposed relationship, Plaintiff is required to specify said knowledge. Here, Plaintiff, by way of affidavit in support of his opposition to Defendant's motion, has alleged that during the course of his representation by Defendant he was engaged in interviews with Goldman Sachs for the position of Director of National Sales and that Defendant was informed of Plaintiff's search and was aware of Plaintiffs contacts with Goldman Sachs. Plaintiff does not identify any other third party with whom he was negotiating a business relationship.

As to the intentional interference element, Plaintiff has alleged that Defendant was complicit with Alliance in creating the falsehood that Plaintiff was the wrongdoer at Alliance. Similarly, Plaintiff's affidavit contends that Defendant's actions and inactions were intentional. However, these general assertions do not allege intentional acts of interference by Defendant.

Plaintiff must also show that, but for the interference he would have entered into a relationship with Goldman Sachs, not just that it was reasonably certain that it would have been entered into (*see Fine v Dudley D. Doernberg & Co.*, 203 AD2d 419, 419 610 NYS2d 566, 567 [2d Dept 1994]). Here, Plaintiff has alleged that the Defendant's purported wrongdoing caused him to lose the job opportunity. However, Plaintiff's vague references to difficulty in securing employment do not satisfy the pleading requirements. Plaintiff has not made any allegation that a job offer from Goldman Sachs was forthcoming or that one was retracted. Accordingly, it cannot be said that Defendant has pled this element.

It must also be alleged that Defendant acted with wrongful means. Accordingly, Plaintiff

must show that Defendant's culpable conduct amounted to a crime or an independent tort or that Defendant engaged in conduct for the sole purpose of inflicting intentional harm on Plaintiff (*see Carvel Corp. v Noonan*, 3 NY3d 182, 192, 785 NYS2d 359, 363 [2004]). Wrongful conduct can include, but is not limited to, physical violence, fraud, misrepresentation, civil suits and criminal prosecutions, violation of a duty of fidelity owed to a plaintiff, and severe forms of financial persuasion or duress (*see Carvel v Noonan*, 3 NY3d 182, 191, 785 NYS2d 359, 363 [2004]; *NBT Bancorp Inc. v Fleet/Norstar Fin. Group, Inc.*, 87 NY2d 614, 624, 641 NYS2d 581, 587 [1996]; *Guard-Life Corp. V.S. Pakrer Hardware Mfg. Corp.*, 50 NY2d 183, 191, 428 NYS2d 628, 632 [1980]). Most importantly, it must also have been directed at a third party and not Plaintiff (*see Carvel Corp. v Noonan*, 3 NY3d 182, 192, 785 NYS2d 359, 363 [2004].

As expressed in the second element, it has been alleged that Defendant intentionally acted and failed to act, although such actions and failures have not been defined. Additionally, Plaintiff has alleged that Defendant engaged in "multiple [instances] of tortious, criminal, and intentional conduct." Though not expressly identified in the third cause of action, said allegations were identified at length in the earlier cause of action alleging fraud and it has been held that this is sufficient to plead this element (*see Zulawski v Taylor*, 11 Misc3d 1058 [A], 2005 WL 3823584 *7 [N.Y. Sup. 2005]). However, in carefully reviewing the allegations set forth in support of the fraud cause of action it is apparent that the wrongful conduct Plaintiff alleges was not directed at a third party; rather, it was allegedly directed at Plaintiff. Thus, it cannot be held that the allegations set forth in the earlier cause of action alleging fraud is sufficient to plead this element.

Based on the foregoing, Plaintiff's claim for tortious interference with a prospective business advantage is dismissed for failure to state a cognizable claim.

II. Motion to Stay

CPLR § 2201 states that "[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be

[* 21]

just." The broad language of CPLR § 2201, however, has been limited by case law (*Hope's Windows v Albro Metal Products Corp.*, 93 AD2d 711, 712, 460 NYS2d 580 [1st Dept 1983]; *660 Riverside Drive Also Assocs., L.L.C. v Marte*, 178 Misc2d 784, 786, 681 NYS2d 436 [Civil Ct., New York County 1998). Thus, "to impose a stay in one action pending the resolution of a related action, there must be a complete identity of parties, claims and reliefs sought in the two action" (*Green Tree Fin. Servicing Corp. v Lewis*, 280 AD2d 642, 643 [2d Dept 2001]; *see also Rael Automatic Sprinkler Co. v Solow Dev Corp.*, 58 AD2d 600, 395 NYS2d 485, 486 [2d Dept 1977]).

Based on the contentions and in light of the Court's determination to deny Defendant's motion to dismiss the legal malpractice claim, the Court determines that Defendant has not made a sufficient showing to stay the instant matter. There is not a complete identity of parties, claims and reliefs sought in the two actions. For the same reasons, the interests of justice and economy do not warrant a stay.

FILED JUN 18 2007 COUNTY CLERK'S OFFICE NEW YORK

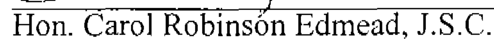
Based on the foregoing, it is hereby

ORDERED that Defendant's motion for an order pursuant to CPLR 3211(a)(7) dismissing Plaintiff's claims for legal malpractice, tortious interference with prospective business advantage and fraud is denied as to the legal malpractice claim and granted as to the claims for tortious interference with prospective business advantage and fraud; and it is further

ORDERED that Defendant's motion for an order pursuant to CPLR 2201, staying this entire action pending the resolution of the NASD Arbitration is denied; and it is further

ORDERED that Defendant shall serve a copy of this order upon Plaintiff within 20 days of entry.

This constitutes the decision and order of the Court.



Dated: June 13, 2007

Hon. Carol Robinson Edmead, J.S.C.