[* 1]

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

HON. JOAN A. MADDEN J.S.C.

PART 11

Index Number : 109609/2005

DUANE MORRIS LLP

vs

ASTOR HOLDINGS

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 is consolidated with motion sequence nos. 003+004 and the consolidated motions are determined in accordance with the annexed decision and order.

FILED
OCT 25 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: October 22, 2007

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 11

----------x

DUANE MORRIS LLP,

Plaintiff,

–against- Index No.: 109609/05

ASTOR HOLDINGS INC. and ROBOT WARS LLC,

Defendants.

----------x

ASTOR HOLDINGS INC. and ROBOT WARS LLC,

Third-Party Plaintiffs,

–against- Index No.: 590785/06

KRIEG, KELLER, SLOAN, REILLY & ROMAN, LLP and STEEFEL, LEVITT & WEISS, P.C.,

Third-Party Defendants.

----------x

JOAN A. MADDEN, J.:

Motion sequence numbers 002, 003 and 004 are consolidated for disposition.

In motion sequence 002, plaintiff Duane Morris LLP move, pursuant to CPLR 3212, for summary judgment (a) on its claims for an account stated against defendants Astor Holdings, Inc. and Robot Wars LLC in the amounts of $354,463.82 and $100,000, plus interest, and (b) dismissing the counterclaims of defendants.

In motion sequence 003, third-party defendant Krieg, Keller, Sloan, Reilly & Roman, LLP moves: (a) pursuant to CPLR 3211(a)(8), to dismiss the third-party complaint on the grounds that the court lacks jurisdiction over the Krieg firm or on the basis of forum non conveniens; or, in the alternative, (b) pursuant to the Federal Arbitration Act, to stay the third-

party action on the ground of a valid and binding agreement to arbitrate, or, in the alternative, (c) pursuant to CPLR 3211(a)(5), to dismiss the first and second causes of action of the third-party complaint based on the expiration of the statute of limitations and, pursuant to CPLR 3211(a)(7), to dismiss the first, second, and fifth causes of action of the third-party complaint for failure to state a claim for relief.

In motion sequence 004, third-party defendant Steefel, Levitt & Weiss, P.C. moves for an order, pursuant to CPLR 327(a), 3211(a)(1), (5) and (7), to dismiss the third-party complaint, and for sanctions against the defendants/third-party plaintiffs pursuant to CPLR 8303-a and/or 22 NYCRR Part 130.

This is an action to recover legal fees. The defendants, former clients of the plaintiff and third-party defendant law firms, asserts claims of legal malpractice and other tortious conduct on the part of it former counsel. The long and rather complicated history of this fee/malpractice dispute is set forth herein.

FACTUAL ALLEGATIONS

A. The Players

Steven Plotnicki is the president and sole shareholder of defendant Astor Holdings, Inc. (Astor), a New York corporation, and the managing member of defendant Robot Wars LLC (Robot Wars), a New York limited liability company.

Marc Thorpe (Thorpe) was a former business partner of Plotnicki who, along with Plotnicki, formed a venture known as "Robot Wars," which involved combat events between radio-controlled robots. His bankruptcy filing in May 1998 spawned several lawsuits and is the genesis of this current litigation.

Edward Trey Roski was a business associate of Thorpe and is alleged to have rendered legal and financial assistance to Thorpe in connection with the latter's dispute with Plotnicki and his companies.

Fran Jacobs (Jacobs) is a member of the plaintiff law firm Duane Morris LLP. Jacobs represented Plotnicki and his companies for many years. Duane Morris was counsel of record to Robot Wars in a New York federal litigation against Thorpe, described herein as the "Thorpe action" and counsel of record to Astor in another New York federal litigation, described herein as the "Roski action."

William Pascoe (Pascoe) is an attorney retained in June 1998 to represent Astor in Thorpe's bankruptcy proceedings. He is a member of the law firm Pascoe & Rafton.

Third-party defendant Steefel, Levitt & Weiss, P.C. (the Steefel firm) is a California professional law corporation with its principal place of business in San Francisco, California. Harvey S. Schochet (Schochet) is a practicing attorney at the Steefel firm. The Steefel firm was retained in August 2000 to provide legal advice to Astor and Robot Wars in connection with an appeal of an adversary proceeding filed within Thorpe's bankruptcy case, and later expanded to the Thorpe bankruptcy case.

Third-party defendant Krieg, Keller, Sloan, Reilly & Roman, LLP (the Krieg firm) represented defendants in the "California action," more fully described below, against the Steefel firm, Schochet, Pascoe and his law firm.

B. Plotnicki and Thorpe's Business Relationship

In 1992, Thorpe conceived the idea of competitions involving radio-controlled robots designed to do mayhem to each other. In order to fund the realization of his concept, Thorpe

entered into an agreement with Astor on July 22, 1994, forming the "Robot Wars" joint venture. According to that agreement, Thorpe and Astor each acquired a half interest in the venture; Thorpe contributed his interest in the Robot Wars trademark, and Astor promised to contribute $50,000 and the benefit of its expertise and contacts in the entertainment industry.

On July 25, 1997, Astor filed suit against Thorpe in the Southern District of New York, alleging that Thorpe breached the venture agreement and asserted claims for breach of contract, breach of fiduciary duty, unjust enrichment, trademark infringement, and unfair competition.

C. Thorpe's Bankruptcy Proceedings

On May 27, 1998, Thorpe and his wife, both of whom were California residents, filed for bankruptcy in the United States Bankruptcy Court for the Northern District of California (In re Marc Thorpe and Denise Thorpe, Debtors, Chapter 11 Case No. 98-11963). On February 2, 1999, Astor and Thorpe reached a settlement regarding the Robot Wars venture. A settlement agreement was approved by Bankruptcy Judge Alan Jaroslovsky on March 5, 1999. The settlement agreement conveyed full title to the Robot Wars trademark and entity to Astor, in return for a payment of $250,000 and certain royalties to Thorpe. Thorpe was obligated, while he received royalties and at least through September 1, 1999, to use his reasonable best efforts to promote Robot Wars and help the Robot Wars entity secure likeness and image rights from the community of robot makers.

Shortly thereafter, each side accused the other of breaching the settlement agreement. After a year of informal negotiations, Thorpe commenced an adversary proceeding against Astor (Marc Thorpe and Denise Thorpe, Debtors v Profile Holdings, Inc., et al., Adv. Pro. No. 00-1031) seeking a declaration that Astor must pay him the $250,000 specified in the 1999

settlement agreement. After a trial, Judge Jaroslovsky found Thorpe in breach of the settlement agreement, assessed Astor's damages at $225,000, and offset those damages against the $250,000 due Thorpe, resulting in a net judgment of approximately $25,000 against Astor. Pascoe represented Plotnicki and Astor in the bankruptcy and adversary proceedings.

Astor appealed Judge Jaroslovsky's order, retaining Schochet of the Steefel firm to prosecute the appeal. During the remainder of 2000, Schochet worked closely with Jacobs, Plotnicki and Pascoe in briefing the appeal to the United States District Court for the Northern District of California.

In January 2001, while the appeal was still being briefed, Thorpe filed a Plan of Reorganization (the "Plan") in the main bankruptcy proceeding. One of the Plan's provisions sought to change a provision in the 1999 settlement agreement that allowed an aggrieved party to file suit in his home forum under certain conditions. Thorpe's Plan purported to modify this provision, and confer exclusive jurisdiction for disputes arising under the 1999 settlement agreement on the Bankruptcy Court. However, after Judge Jaroslovsky confirmed the Plan on April 30, 2001, over Astor's objection, Plotnicki asked Schochet to assist Pascoe in appealing the confirmation order. Because of the Steefel firm's expanded role in the Thorpe bankruptcy proceedings, the Steefel firm required Plotnicki to sign written engagement letters on or about August 16, 2001 on behalf of Astor and Robot Wars.

D. The Thorpe Action and the Thorpe Contempt Proceeding

Robot Wars, which was a party to the 1999 settlement agreement, sought advice from Schochet and Jacobs regarding its rights under that agreement. Schochet advised that in order to prevent the Bankruptcy Court from changing the jurisdictional terms of the settlement agreement,

Robot Wars needed to commence a separate action against Thorpe in the Southern District of New York prior to the Plan's confirmation hearing. Plotnicki advised Jacobs to draft such a complaint. He contends that because he and Jacobs were both aware of the "serious repercussions that could result from violating the Bankruptcy Code, they sent Schochet a copy of the complaint and specifically requested his advice on whether anything in the Complaint violated, or could be characterized as violating, any aspect of Thorpe's bankruptcy." Amended Answer and Counterclaims, ¶ 75. Schochet allegedly advised Plotnicki that the complaint did not violate the Bankruptcy Code and authorized its filing.

Thus, on April 16, 2001, prior to the confirmation hearing, Jacobs filed an action on behalf of Robot Wars against Thorpe in the Southern District of New York entitled Robot Wars LLC v Marc Thorpe, Civ. Action No. 01-3195 (the Thorpe action).

However, as stated above, the Plan was confirmed by the Judge Jaroslovsky on April 30, 2001. As a result, Thorpe's attorney informally asked Jacobs to dismiss the Thorpe action by May 2, 2001, contending that it violated the discharge order entered upon confirmation of the Plan. Plotnicki claims that he consulted with both Schochet and Jacobs, and that in a May 3rd telephone conversation, he was talked out of dismissing the Thorpe action by Schochet who insisted that the lawsuit did not violate any aspect of the bankruptcy law, and that whatever relief Thorpe could get from the Bankruptcy Court was temporary and would be quickly overturned on appeal.

When the Thorpe action was not dismissed, Thorpe filed a second adversary proceeding on May 3, 2001, entitled Marc Thorpe v Robot Wars, LLC, Fran Jacobs, Duane, Morris & Heckscher, LLP, Astor Holdings and Steven Plotnicki, Adv. Pro. No. 01-1061 (the Thorpe

contempt proceeding), in which Thorpe sought a declaration that the Thorpe action violated Judge Jaroslovsky's discharge order in connection with the Plan confirmation. Thorpe simultaneously applied for a temporary restraining order staying the Thorpe action (the TRO). Schochet advised Plotnicki that the Bankruptcy Court did not have personal jurisdiction over him personally, Robot Wars, Jacobs or Duane Morris, and advised him not to have an attorney attend the hearing on the TRO, which advice they accepted, and a TRO was entered ex parte enjoining Robot Wars from maintaining the Thorpe action.

Plotnicki alleges that soon after the TRO was entered, he met with Schochet and Jacobs at Duane Morris' New York office, at which time they discussed various strategies about the Thorpe contempt proceeding and the TRO. Plotnicki claims that neither Schochet nor Jacobs advised him that the consequence of a discharge violation would be a civil contempt hearing, and that whatever steps were taken to overturn the TRO and subsequent preliminary injunction, which although opposed by Schochet, was granted by Bankruptcy Judge Jaroslovsky on May 12, 2001, "Robot Wars and Plotnicki would still be subject to an interlocutory proceeding in front of a Federal Bankruptcy Court that had the right to determine in the first instance whether they violated Thorpe's discharge in any way." Amended Answer and Counterclaims, ¶ 89. Defendants contend that as a result of the malpractice of Duane Morris relating to its advice regarding the Thorpe action, they incurred damages, in the form of additional legal fees and settlement funds paid to settle this case. Id. ¶ 90.

Duane Morris filed a notice of dismissal of the Thorpe action pursuant to FRCP 41(a)(i) on or about January 29, 2002.

The bankruptcy case was closed in February 2002.

E. The Roski Action

On March 5, 2001, Jacobs filed an action in the Southern District of New York on behalf of Astor against Edward "Trey" Roski, III and Battlebots, Inc., a business Roski controlled (Civ. Action No. 01-1905) (the Roski action). In that action, Astor alleged that Roski, a robot builder and founder of Battlebots, Inc. (1) tortiously interfered with two contractual agreements that Astor had with Thorpe, and (2) aided and abetted Thorpe in breaching fiduciary duties he owed Astor as a joint venturer.

By decision and order dated August 12, 2003, the District Court (Lynch, D.J.) granted in part, and denied, in part, the defendants' motion for summary judgment. Astor Holdings, Inc. v Roski, 325 F Supp 2d 251 (SD NY Aug. 12, 2003). Roski was granted summary judgment dismissing the claim of aiding and abetting a breach of fiduciary duty by Thorpe. The motion was denied as to the claim of tortious interference.

Part of the claim that Roski induced Thorpe to breach the 1994 venture agreement was that Thorpe filed for bankruptcy in an effort to divest Astor of its interest in the Robot Wars business. Judge Lynch ruled, that under the federal preemption doctrine, no authorized proceeding in bankruptcy can be questioned in a state court or used as the basis for the assertion of a tort claim in state court against any defendant. 325 F Supp2d at 262. Thus, while noting that there was no federal authority directly on point, he concluded that Astor's claims require a finding that Thorpe filed for bankruptcy or filed certain papers in the bankruptcy proceeding in bad faith or for an improper purpose, and thus are preempted. Id. at 263.

On December 31, 2003, Plotnicki, on behalf of Astor and Robot Wars, entered into written letter agreements with Duane Morris regarding their outstanding bills. In these

agreements, defendants acknowledged that they then owed Duane Morris more than $354,000 and agreed (1) to reduce the outstanding balance by $100,000, (2) pay Duane Morris $200,000 in four monthly installments beginning January 30, 2004 to cover trial preparation for the Roski action, and (3) to pay all other amounts billed but unpaid "within 30 days of the conclusion at the trial level of the [Roski action]." Jacobs Aff., Exs. 7 and 8 thereto. Defendants further agreed in the letters that they had no objection to any of the statements submitted to date, that all the services were authorized, and that payment would be due regardless of the outcome of the Roski action. However, Duane Morris contends that defendants paid only $120,000 of the $200,000 they were required to pay on account and did not pay the entire outstanding balance due within 30 days of the end of the trial.

The remaining tortious interference claim went to trial for six days in April 2004. On April 22, 2004, the jury ruled in favor of Roski and Battlebots.

On July 26, 2004, Jacobs sent Plotnicki a letter confirming his decision not to file an appeal in the Roski action, that the court had been informed of this decision, and announcing that the firm had concluded its representation of Astor in the Roski action.

F. The California Action

In early February 2003, the law firm of Berger & Webb commenced an action for legal malpractice against the Steefel firm on behalf of Astor and Robot Wars (Index No. 101817/03) by filing a summons with notice.[1] On March 10, 2003, the Steefel firm removed the case to the

---

[1]On October 7, 2002, the law firm of Berger & Webb filed a summons with notice in this court (Index No. 121999/02) asserting a claim for legal malpractice by Astor and Robot Wars against the Steefel firm. However, the summons was never served and the action was discontinued on December 16, 2002.

Southern District of New York based on diversity of citizenship, and then succeeded in having the action transferred to the Northern District in California on the ground that venue in the Southern District of New York was inappropriate (see Astor Holdings, Inc. v Steefel, Levitt & Weiss, P.C., 2003 WL 21108316 [SD NY 2003]), where it was joined with an existing lawsuit commenced by the Steefel firm against Astor and Robot Wars to recover its unpaid legal fees and costs (Case No. C-03-0440).

The Krieg firm was retained to represent the defendants in the California action, and on June 18, 2003, asserted counterclaims and third-party claims for professional negligence and breach of contract against the Steefel firm, Pascoe and his law firm. Astor alleged that the Steefel firm committed malpractice in two ways. First, Astor claimed that Schochet failed to advise that the filing of the Thorpe action could be considered a violation of the discharge order entered in connection with the confirmation of the Plan and that the penalty for such a violation would be a finding of civil contempt against Plotnicki and his companies. Second, Astor argued that the Steefel firm assumed a duty of care in the Roski action and breached that duty by failing to advise Astor that some of Astor's state law claims were preempted and should have been brought in the bankruptcy proceeding.

Pascoe filed counterclaims against Astor and Plotnicki for his costs and unpaid legal fees. Astor's malpractice claim against Pascoe was based on the same two theories as were asserted against the Steefel firm, as well as an additional theory that Pascoe committed malpractice at the confirmation hearing.

Edward King of the law firm King & Kelleher, LLP was substituted as counsel of record for the defendants on December 17, 2004.

On March 25, 2005, after the close of discovery, the Steefel firm and Pascoe each moved for summary judgment. On May 31, 2005, the district court issued its order granting, in part, and denying, in part, the motions. The Steefel firm and Pascoe were granted summary judgment on their respective claims for unpaid legal fees and costs in connection with their account stated claims totaling approximately $650,000 plus applicable pre-judgment interest.

With respect to the malpractice claims, the court refused to grant summary judgment on Astor's claim that Schochet and Pascoe gave erroneous advice with respect to the consequences of filing the Thorpe action. However, the court dismissed the claim that these attorneys committed malpractice in connection with the Roski action on the basis that neither attorney owed a duty of care to Astor in Roski action. The court based this finding on evidence showing that Schochet was asked by Fran Jacobs to review the draft complaint to "be sure we don't say anything that would hurt us in the bankruptcy case," that Schochet was not provided a copy of the complaint drafted by Jacobs until four days before the action was filed, that his edits were largely grammatical and proofreading corrections, and thus his role was "extremely limited." Plotnicki-002[2] Aff., Ex. G thereto at p. 24. As for Pascoe, the evidence showed that he did not even respond to Jacobs' request, and did not offer any suggestions regarding the draft complaint. Id., at p. 25.

---

[2]Plotnicki has submitted three different affidavits in opposition to these motions, each sworn to on January 17, 2007. For ease of reference, I refer to his affidavit submitted in opposition to Duane Morris' motion for summary judgment as the "Plotnicki-002 Aff.," his affidavit submitted in opposition to the Krieg firm's motion to dismiss as the "Plotnicki-003 Aff.," and his affidavit submitted in opposition to the Steefel firm's motion to dismiss as the "Plotnicki-004 Aff.."

On the eve of trial, Astor and Robot Wars made a motion to join Duane Morris as a party, but the motion was denied.

The California action was tried before a jury in August 2005. The jury ruled on August 11, 2005 that Astor Holdings and Robot Wars breached its contract with the Steefel firm and awarded $493,053.54 in damages; and that Astor and Plotnicki breached their contract with Pascoe and his firm and awarded them $103,121.36 in damages. The jury also found that neither Schochet nor Pascoe committed malpractice in connection with the Thorpe action.

G. The Instant Action

On July 12, 2005, Duane Morris commenced this action against Astor and Robot Wars asserting claims for unpaid legal fees based upon breach of contract and account stated.

On July 7, 2006, defendants filed an answer, asserting various affirmative defenses and two counterclaims against Duane Morris for legal malpractice and breach of fiduciary duty. On August 11, 2006, defendants filed an amended answer and counterclaim. In addition to revising the two counterclaims included in their original answer, defendants added three new counterclaims for tortious interference with prospective economic relations; tortious inducement of a breach of fiduciary duty by the Krieg firm; and a declaratory judgment that the Krieg firm had a conflict of interest in representing defendants in the California action while simultaneously representing Duane Morris in a separate matter, and that the Krieg firm's representation of defendants was compromised as a result.

Defendants also commenced a third-party action against the Krieg and Steefel firms on August 11, 2006. The third-party complaint purports to assert claims against the Krieg firm for legal malpractice and breach of fiduciary duty in connection with its representation of the

defendants in the California action. The Steefel firm is sued for tortious interference with prospective economic relations and unjust enrichment, also in connection with the California action.

H. The Plotnicki Action

Finally, on August 11, 2006, Plotnicki filed an action in this court (Index No. 111326/06), on his own behalf against Duane Morris and the Krieg and Steefel firms, in which the parties have each asserted claims identical in nature to the claims set forth in this action

DISCUSSION

I. Duane Morris' Claim For Account Stated

"'An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or the other.'" Shea & Gould v Burr, 194 AD2d 369, 370 (1st Dept 1993), quoting Chisholm-Ryder Co., Inc. v Sommer & Sommer, 70 AD2d 429, 431 (4th Dept 1979). The essential element of an account stated is that the parties have reached an agreement as to the balance of the indebtedness. Interman Indus. Products, Ltd. v R.S.M. Electron Power, Inc., 37 NY2d 151, 153-54 (1975); Newburger-Morris Co. v Talcott, 219 NY 505, 512 (1916).

Partial payment or the failure of a party receiving an account to examine the statement and make all necessary objections may be deemed acquiescence to the correctness of the balance owed. Morrison Cohen Singer & Weinstein, LLP v Waters, 13 AD2d 51, 52 (1st Dept 2004); Rosenberg Selsman Rosenzweig & Co., LLP v Slutsker, 278 AD2d 145 (1st Dept 2000).

Plaintiff Duane Morris has established a prima facie case against Astor and Robot Wars for an account stated. Astor acknowledged in writing on December 31, 2003 it had received bills from Duane Morris and owed $254,035.76 for services rendered through November 30, 2003. Likewise, Robot Wars acknowledged in writing on December 31, 2003 that it owed Duane Morris $100,000 for services rendered "to date." Between January 8, 2004 and August 9, 2004, defendants received eight additional bills for work relating to the Roski action, which they retained without objection and partially paid.

In this regard, Duane Morris submits evidence that in June 2004, Plotnicki was asked when defendants planned to pay Duane Morris the amounts owed. He responded by email that he was "working on proposing a schedule for [Robot Wars] to pay down its guarantee." Jacobs Aff., Ex. 18 thereto. Plotnicki was again contacted on July 12, 2004 by Jacobs who stated that "we need to come to some understanding about payment." Id., Ex. 19. In response, Plotnicki did not suggest that Duane Morris was not entitled to payment, instead he asked Duane Morris to "be patient" because he claimed "there was no money" that he hoped to make some type of payment in 2-3 weeks. Id. Ex. 20. When three weeks passed, Duane Morris' collection department took over dealing with Plotnicki, who, according to Jacobs, at no point objected to the bills.

In opposition to summary judgment, defendants argue that the December 2003 letters do not contain a waiver of any previous objections by Astor to the services provided by Duane Morris. Plotnicki contends that he orally complained to Jacobs about the consequences suffered as a result of the filing of the Thorpe action in 2001 and after the summary judgment decision was issued in August 2003 against Astor in the Roski action. However, the December 2003 letters he signed clearly and unequivocally state that defendants had "no objection to any of the

statements . . . rendered to date, and that all such services were authorized." Jacobs Aff., Exs. 7 and 8 thereto. Where "documentary evidence conclusively establishes that an issue of fact 'is not genuine, but feigned,' it is appropriate to summarily resolve the matter (citations omitted)." Leo v Mt. St. Michel Academy, 272 AD2d 145, 146 (1st Dept 2000); see also Kornfeld v NRX Techs., Inc., 93 AD2d 772, 773 (1st Dept 1983), affd 62 NY2d 686 (1984) (where facts alleged in opposition to motion were "clearly refuted by documentary proof," summary judgment is proper "since a sham or frivolous issue will not preclude summary relief").

Plotnicki contends that he continued to complain to Jacobs after Judge Lynch threw out a damages claim on the eve of trial, and after they lost the trial in the Roski action. However, these oral protests merely go to the unfavorable outcome in the Roski action. Duane Morris was not representing defendants on a contingency basis, and defendants had agreed to pay Duane Morris "regardless of the outcome of the [Roski action]." Defendants fail to allege that any specific objections were made to any of the time entries, work performed or disbursements detailed in Duane Morris' invoices. While oral objections to an account stated are sufficient to defeat a motion for summary judgment, the defendant must do more than offer self-serving bald allegations of oral protest. Darby & Darby v VSI International, Inc., 95 NY2d 308, 315 (2000); Ferraioli ex rel. Suslak v Ferraioli, 8 AD3d 163, 164 (1st Dept), lv denied 3 NY3d 608 (2004); Manhattan Telecommunications Corp. v Best Payphones, Inc., 299 AD2d 178, 178-79 (1st Dept 2002); Morrison Cohen Singer & Weinstein, LLP v Ackerman, 280 AD2d 355, 356 (1st Dept 2001).

However, defendants correctly argue that the December 31, 2003 letters contain no language by which defendants agreed to waive any malpractice claim against Duane Morris, and

such would be against public policy. As discussed more fully below, Duane Morris has established its entitlement to summary judgment dismissing all of the defendants' counterclaims, except the claim that it provided negligent advice to Robot Wars and/or Plotnicki in connection with the Thorpe action. Therefore, it is appropriate to award partial summary judgment to Duane Morris on its account stated claim against Astor, because all of the alleged conduct on Duane Morris' part which forms the basis of the only remaining malpractice claim occurred prior to the billing period covered by the invoices in question. Morrison Cohen Singer & Weinstein, LLP v Ackerman, 280 AD2d at 356-57.[3]

Accordingly, Duane Morris is granted partial summary judgment against Astor on its third cause of action in the amount of $354,463.82 plus interest at the legal rate from August 6, 2004, the date of the final invoice.

II. Dismissal of the Defendants' Counterclaims

A. Legal Malpractice

To properly plead a cause of action for legal malpractice, a plaintiff must allege facts showing: (1) that the attorney was negligent; (2) that such negligence was a proximate cause of plaintiff's losses; and (3) proof of actual damages. Leder v Spiegel, 31 AD3d 266, 267 (1st Dept 2006), affd 2007 WL 1834826 (2007); Brooks v Lewin, 21 AD3d 731, 734 (1st Dept 2005); Reibman v Senie, 302 AD2d 290 (1st Dept 2003). With regard to the element of causation, the factual allegations in the counterclaim must permit the inference that, but for Duane Morris' alleged negligence, defendants would not have sustained actual, ascertainable damages. Pyne v

---

[3]While Duane Morris contends that this action seeks to recover only unpaid fees and disbursements generated in connection with the Roski action, the firm does not explain why Robot Wars, which was not a party to the Roski action, still owes the firm $100,000.

Block & Assocs., 305 AD2d 213 (1st Dept 2003). "Unsupported factual allegations, conclusory legal argument or allegations contradicted by documentation, do not suffice" to defeat summary dismissal of a claim for legal malpractice. Dweck Law Firm, LLP v Mann, 283 AD2d 292, 293 (1st Dept 2001).

1. Roski Action

The first counterclaim alleges that Duane Morris committed legal malpractice by failing to advise Astor that some of the claims in the Roski action could only be brought in the bankruptcy proceeding, and that had Astor been properly advised of this fact by Duane Morris, it would not have filed the Roski action and Astor would not have incurred significant fees relating to that action. Duane Morris argues that this claim must be dismissed because, at the time the action was filed, the bankruptcy court had not yet ruled on whether Thorpe's bankruptcy was filed in good faith, and that Plotnicki admittedly knew that such a finding could be used against Astor in the Roski action. Duane Morris further contends Plotnicki mapped out a strategy with his bankruptcy counsel, Schochet and Pascoe, to avoid a good faith finding, that the jury in the California action has already determined that the bankruptcy advice that Schochet and Pascoe gave was not negligent, and that Duane Morris did not commit malpractice by relying on the advice of defendants' bankruptcy counsel.

First, Duane Morris' argument that a jury has already ruled there was no malpractice committed in the Roski action is without merit as the claim was summarily dismissed by the court on the ground that these California attorneys had a very limited or non-existent role in the Roski action, and thus did not owe a duty of care to Astor. Duane Morris, on the other hand, is

the firm that drafted, signed and filed the complaint in the Roski action, and clearly owed a duty of care with respect to its legal representation of Astor in the Roski action.

Nevertheless, a malpractice claim cannot be based on losing a case where the legal issues are "'uncertain and debatable. The perfect vision and wisdom of hindsight is an unreliable test for determining the past existence of legal malpractice' (citation omitted)." Darby & Darby v VSI International, Inc., 95 NY2d at 315. An attorney is not held to the rule of infallibility and is not liable for a judgment error where the proper course is open to reasonable doubt. DaSilva v Suozzi, English, Cianciulli & Peirez, P.C., 233 AD2d 172, 176 (1st Dept 1996). However, an attorney can be held liable for negligently failing to advise its client that the legal strategy being proposed is uncertain. Bistricer v Singer, Bienenstock, Zamansky, Ogele & Selengut, LLP, 14 AD3d 468, 469 (1st Dept 2005); Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo, 259 AD2d 282, 284-285 (1st Dept 1999).

The undisputed evidence in this case is that the impact of a good faith finding in the bankruptcy action on the separate litigation against Roski and Battlebots, Inc. was uncertain; that at the time the Roski action was filed in March of 2001, the bankruptcy court had not yet ruled on whether Thorpe's bankruptcy was filed in good faith or in bad faith; that Plotnicki admittedly knew that a good faith finding could be used against Astor in the Roski action at least as early as January 2002 but still chose to proceed with the case; and that Plotnicki again elected to proceed to trial in April 2004 on the remaining claims in the Roski action after the district court dismissed part of the case on summary judgment, at which time the bulk of the legal fees that remain unpaid were incurred.

Plotnicki testified in the California action that, "[f]rom day one of the bankruptcy," Pascoe advised him to settle his differences with Thorpe and sue Roski in federal district court, that Schochet had the same advice, but that he "was always worried, okay, that there was going to be a positive inference, all right, that's going to be taken from the bankruptcy somehow and nobody really could get their arms around that issue, okay? Turns out we lost summary judgment in the Roski case on that exact issue (emphasis added)." Jacobs Aff., Ex. 25 at pp. 469-470, 474-75. Plotnicki's prior sworn statements in the California action constitute informal judicial admissions (Matter of Liquidation of Union Indem. Ins. Co. of New York, 89 NY2d 94, 103 [1996]; Morgenthow & Latham v Bank of New York Co., Inc., 305 AD2d 74, 79 [1st Dept], lv denied 100 NY2d 512 [2003]; Saltzman v Liebman, 63 AD2d 621 [1st Dept 1978]), and if they are not sufficiently and specifically rebutted and explained, summary judgment in favor of Duane Morris is warranted (Koslowski v Koslowski, 245 AD2d 266, 268 [2d Dept 1997], lv dismissed in part, denied in part 92 NY2d 835 [1998]; Walsh v Pyramid Co. of Onondaga, 228 AD2d 259, 260 [1st Dept 1996]).

That Plotnicki was aware that the legal outcome of how confirmation of Thorpe's bankruptcy plan would impact the claim that Roski, by his financial and other assistance to Thorpe, induced Thorpe to declare bankruptcy in bad faith or for an improper purpose, was at best uncertain, is evidenced by two e-mails sent by him to Jacobs. In the first e-mail, Plotnicki indicates that he consulted Andy Kress, a bankruptcy lawyer at Kaye Scholer, who advised him, at least as early as January of 2002, that:

> Roski is indeed entitled to claim that his loan was in good faith since there is no adverse ruling by [Bankruptcy Judge] Jaroslovsky. That would be the inference that he would be entitled to ask the court to draw and I would have the burden of

> showing otherwise. It makes sense, how could the bankruptcy not be in good faith, and the loan not be in good faith yet the court confirm the plan.

Ex. 11 to Jacobs Aff. Thus, Plotnicki chose to continue the lawsuit at this time even though he was admittedly aware of this problem. The second e-mail dated October 1, 2002, indicates that Plotnicki understood that Kress was now telling him that Roski would not benefit from a good faith finding by the bankruptcy court. The e-mail reads, in pertinent part, as follows:

> I'm going out. Here is what Andy Kress told me . . .
>
> 1. The good faith finding is only for Thorpe's benefit. Roski can't rely on the finding for anything.
>
> 2. Not only can't Roski rely on the finding, we can show whatever new evidence we want so as to eliminate any inference he asks the court to give him because the bankruptcy wasn't thrown out and the plan was confirmed.

Ex. 12 to Jacobs Aff. As late as April 30, 2004, even after Judge Lynch ruled, Plotnicki advised Jacobs that Kress had "just stepped through a very detailed analysis of the preemption argument" and concluded that he had no idea whether Plotnicki had standing in the bankruptcy proceeding to challenge Roski's loan to Thorpe. Ex. 48 to Jacobs Reply Aff.

While Plotnicki describes Kress as a "friend" to whom he was not looking for bankruptcy advice in his affidavit submitted in opposition to Duane Morris' motion (see Plotnicki-002 Aff. ¶¶ 45-46), when he was examined in the California action about discussions with Kress, he invoked the attorney-client privilege and declined to answer (see Jacobs Reply Aff., Ex. 41 at p. 323). He also testified that he began consulting Kress about issues arising from Thorpe's bankruptcy in September 2001 and that he paid Kress' firm, Kaye Scholer, for this advice (id., Ex. 41 at p. 388). Plotnicki asked Duane Morris to forward various court papers to Kress (id.,

Ex. 43), and Plotnicki shared with Duane Morris Kress' research relating to Astor's claims against Roski (id., Exs. 44-48).

Finally, in the Roski action itself, Judge Lynch noted in his August 2003 summary judgment decision that "there appears to be no federal authority directly on point." Astor Holdings, Inc. v Roski, 325 F Supp 2d at 262, supra.

This undisputed evidence contradicts Plotnicki's claim that he would not have brought and pursued the Roski action if he had known that some aspects of the case would be dismissed.

Although not pled in defendants' amended answer, Plotnicki contends in his affidavit submitted in opposition to Duane Morris' motion for summary judgment, that he got erroneous advice from Jacobs in August 2003, after the summary judgment decision came down, regarding damages Astor could recover. He contends that soon after this decision, Roski asked Judge Lynch to confirm that Astor had no ability to seek to recover from him the $1.1 million in legal fees incurred in connection with Thorpe's bankruptcy case as part of Astor's effort to establish that Thorpe's filing was in bad faith. Plotnicki-002 Aff. ¶ 18. Plotnicki contends that the damages that Roski was trying to have thrown out were at the heart of Astor' case against him, and the primary reason that Astor brought the case against him in the first place. Before Astor commenced the Roski action, Jacobs allegedly advised Plotnicki that the recovery of these damages would be a "slam dunk." Id. ¶ 19. After the summary judgment decision, Plotnicki contends that Jacobs still advised him that the language of the district court's summary judgment opinion was not specific as to those damages, and that Astor still had a basis for trying to collect those damages at trial. Plotnicki contends that Jacob' included a demand for these damages in

Astor' pre-trial submissions, but Judge Lynch "promptly threw them out as a matter it had already ruled on in the summary judgment decision." Id., ¶ 21. He further contends that he would not have proceeded with the action after the summary judgment motion had he known that Astor could not pursue these damages from Roski.

This new malpractice claim must be dismissed as contrary to the undisputed evidence. In connection with the motions for summary judgment in the Roski action, Roski had argued that because Astor had redacted invoices and billing statements supporting its claim for attorneys' fees in the two underlying court proceedings -- the 1997 lawsuit and the bankruptcy proceedings -- Astor should be denied those fees as part of any award of compensatory damages. In response to this argument, Judge Lynch ruled that "[b]ecause Roski is being granted summary judgment as to any claims arising from the these [sic] proceedings, this issue is moot." 325 F Supp 2d at 270.

By letter dated August 14, 2003, Jacobs asked Judge Lynch to clarify this ruling, arguing that it is inconsistent with his ruling upholding Astor's claims for tortious interference with the 1994 venture agreement and the bankruptcy settlement. Specifically, she argued to Judge Lynch that "[w]hile we recognize that this Court's ruling precludes Astor from pursuing a claim for fees incurred based on Thorpe's bankruptcy filing, we do not believe that the ruling affects Astor's right to recover the fees it incurred due to Thorpe's breach of the bankruptcy settlement -- a breach defendants induced -- even if some of those fees happened to be incurred in proceedings that took place in bankruptcy court." Jacobs Reply Aff., Ex. 34. A copy of this letter as well as the response by Roski's attorneys was sent to Plotnicki. In response to Jacob's letter application, Judge Lynch issued an order dated August 20, 2003, in which he ruled it was "premature at this stage to rule on whether any particular item of damages might be appropriately awarded after

trial, [but] plaintiff has presented a sufficiently plausible argument that certain attorneys' fees might ultimately be recoverable to make it appropriate to supplement the previous Order by ruling on defendants' motion to deny such damages." Id., Ex. 36. Judge Lynch then denied the defendants' motion to preclude legal fees as an item of damages on the grounds of failure to provide discovery. Id. There is no evidence from the court's docket sheet that Judge Lynch ever reversed himself, and "threw out" these damage claims after the pre-trial submissions were filed in or about March of 2004. Id., Ex. 37.

Rather, on or about October 17, 2003, Duane Morris prepared an analysis of the fees that were potentially recoverable -- an amount totaling $720,100.69, and specifically excluding work on the claim that Judge Lynch rejected, and sent it to Plotnicki on October 20, 2003 (Jacobs Reply Aff., Ex. 38), to which he responded that this was "good news. Not really but you know what I mean." Id., Ex. 39. Two months later, Plotnicki acknowledged in writing that Astor had no objection to the legal services rendered by Duane Morris as of November 30, 2003. Jacobs Aff., Ex. 7. It also appears from the transcript of the trial in the Roski action that Plotnicki was entitled to and did testify about legal fees and costs incurred up until Thorpe filed for bankruptcy, and the adversary proceeding Thorpe commenced against Astor regarding breach of their settlement agreement. Jacobs Reply Aff., Ex. 40 at p. 230. Thus, Plotnicki's claim that he was misled by Jacobs about what damages were recoverable trial in the Roski action is belied by the documentary evidence.

Thus, Duane Morris is entitled to summary judgment dismissing so much of the first counterclaim that asserts legal malpractice claims relating to the Roski action.

2. The Thorpe Action

The first counterclaim also alleges that Duane Morris committed legal malpractice by failing to advise defendants that, by filing the Thorpe action, they risked that the Bankruptcy Court might find that the lawsuit violated the discharge order entered upon confirmation of the Plan, and that the penalty for such a violation could be a finding of civil contempt. Duane Morris also allegedly failed to advise that the Bankruptcy Court had personal jurisdiction over Robot Wars, and thus it should have appeared at the May 4, 2001 TRO hearing.

Duane Morris first argues that defendants' malpractice claims with respect to the Thorpe action must be dismissed based on New York's three-year statute of limitations, because its representation of Robot Wars in the Thorpe action ended in February 2002, and the malpractice counterclaims were not interposed until July 7, 2006.

The continuous representation doctrine tolls the running of the Statute of Limitations on the malpractice claim until the ongoing representation of the client is completed. Shumsky v Eisenstein, 96 NY2d 164, 167-68 (2001). The doctrine is not applicable to a client's continuing general relationship with a lawyer, and where the later representation is unrelated to the matter upon which the allegations of malpractice are predicated. Id. at 168; see also CLP Leasing Co., LP v Nessen, 12 AD3d 226, 227 (1st Dept 2004).

Defendants have successfully raised a triable issue of fact as to the application of the continuous representation doctrine. A jury could find that Duane Morris' representation of defendants in the Roski and Thorpe actions was inextricably intertwined, both having spun out of Thorpe's bankruptcy case. Plotnicki avers that the Roski action was filed only one month before the Thorpe action, and that Duane Morris was regularly advising defendants regarding both

claims, often at the same time. In fact, Plotnicki contends that, initially, Duane Morris had combined the claims in one complaint and it was only after Schochet advised to separate out the defendants were separate complaints drafted. And, when the Thorpe action was filed in April 2001, Duane Morris filed it as a related action to the Roski action. Plotnicki-002 Aff. ¶ 40. Moreover, Duane Morris billed Astor for these two matters under a single file number, and did not break down the time entries by the specific matter (id., Ex. C), which arguably shows that Duane Morris viewed this representation as a single engagement by Astor. Thus, it cannot be said that the three-year statute of limitations precludes any malpractice claims relating to the Thorpe action at this juncture.

Duane Morris next argues that this claim must be dismissed as a matter of law, because Plotnicki previously testified under oath that he did not look to Jacobs or Duane Morris' bankruptcy department for advice in connection with the Thorpe action, but relied solely on the advice of Schochet and Pascoe. Plotnicki signed a declaration on September 20, 2001, in which he stated under penalty of perjury that, although he relied on the advice of bankruptcy counsel in California in filing the Thorpe action and declining to dismiss it, the advice was neither given by Jacobs or any other attorney at Duane Morris. Jacobs Reply Aff., Ex. 42. Likewise, Plotnicki testified at his deposition in the California action that he never sought advice from Jacobs about whether to dismiss the Thorpe action (Jacobs Aff., Ex. 25 at pp. 207-208), and that "we all relied on the bankruptcy lawyers" (id., at p. 475). He further testified that Jacobs had "no role about the bankruptcy issues, regarding any of these bankruptcy issues" (id. at p. 505). On August 4, 2005, Plotnicki testified at the trial of the California action that Jacobs had "no experience" in bankruptcy matters, and that she and he both were relying on Schochet's advice with respect to

handling the Thorpe adversary proceeding and Thorpe's motion for a preliminary injunction. Jacobs Reply Aff., Ex. 58 at pp. 532-33.

As discussed infra, Plotnicki's prior sworn statements in the Thorpe contempt proceeding and the California action constitute informal judicial admissions, and must be rebutted and explained in order to defeat summary judgment in favor of Duane Morris. In opposition to Duane Morris' motion for summary judgment, Plotnicki avers that although he looked "primarily" to Schochet and Pascoe for advice on bankruptcy issues, Duane Morris was Astor's long-time counsel, and he trusted that Jacobs concurred with the California attorneys' advice. See Plotnicki-002 Aff. ¶ 48. He further contends that Duane Morris was still representing Astor in the Roski action up until July of 2004, and switching counsel would have significantly harmed Astor's ability to take the case through trial. Id., ¶ 20. He argues that it was the strategy of the three law firms to blame the others for wrongdoing. Indeed, the record reflects that part of Schochet and Pascoe's defense was to blame any malpractice on Jacobs as the attorney "calling the shots" and planning, with Plotnicki, the "master strategy." Plotnicki-003 Aff., Ex. B at p. 8; id., Ex. E at pp. 5-6. Thus, Plotnicki freely admits that he was trying to win the California action without having to pursue Duane Morris for its own wrongdoing. Plotnicki-002 Aff. ¶ 31.

In addition to these explanations by Plotnicki, there is also a question of fact as to whether Duane Morris even followed the advice of defendants' bankruptcy lawyers. Schochet maintained in the California action that he repeatedly advised Plotnicki and Jacobs to dismiss the Thorpe action, not because it was not a legally viable action, but because the Bankruptcy Judge was angry over its filing, and that had Plotnicki accepted his advice, there would not have been a contempt proceeding and no need to settle the matter. There is also evidence that Jacobs

independently researched and advised Plotnicki in May 2001 that the Robot Wars' claims against Thorpe were viable. Plotnicki-002 Aff., Exh. G at p. 13.

Accordingly, keeping in mind that "[s]ummary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue of fact or where the factual issue is arguable or debatable," (International Customs Assoc., Inc. v Bristol-Meyers Squibb Co., 233 AD2d 161, 162 [1st Dept 1996]; see also Andre v Pomeroy, 35 NY2d 361, 364 [1974]), this court finds that defendants have presented enough evidence to rebut and/or explain the prior sworn statements of Plotnicki regarding Duane Morris' role in the Thorpe action sufficient to place the credibility of the parties before a jury.

Duane Morris also argues that this claim must be dismissed, because a jury in the California action found that Schochet and Pascoe did not commit malpractice in connection with the Thorpe action, although they do not specifically rely on the doctrine of collateral estoppel. However, a jury in the California action was never asked if Duane Morris committed malpractice in connection with the Thorpe action, and it may be, as the lawyers in that case argued, that any harm to Plotnicki was caused by Jacobs.

Finally, this court cannot rule as a matter of law that Duane Morris exercised reasonable care in filing and maintaining the Thorpe action on Robot War's behalf on the ground that Jacobs, not a bankruptcy attorney herself, consulted with and relied on experts in bankruptcy law. As an initial matter, there is a question of fact as to whether Duane Morris followed the advice of defendants' bankruptcy lawyers and whether Jacobs independently researched and advised Plotnicki in May 2001 that the Robot Wars' claims against Thorpe were viable. Even if Duane Morris carefully and faithfully followed every piece of advice Schochet and/or Pascoe gave,

Duane Morris cites no law that excuses itself, the law firm who drafted, signed and filed the Thorpe complaint, from exercising its own independent judgment as to the viability of the claims asserted therein under the Bankruptcy Code, particularly where that firm has its own bankruptcy department. While a jury may conclude that although Duane Morris was counsel of record to Robot Wars in the Thorpe action, that the malpractice relates solely to a California bankruptcy proceeding and that Duane Morris, with Robot War's knowledge and consent, did not undertake any duty of care to render advice on issues of bankruptcy law, that is a question of fact as to the scope of Duane Morris' representation that cannot be resolved on summary judgment.

Accordingly, Duane Morris has not established its entitlement to summary judgment dismissing the first counterclaim to the extent that it asserts that the firm committed legal malpractice in connection with the Thorpe action.

B. Breach of Fiduciary Duty

The second counterclaim alleges that Duane Morris breached its fiduciary duty to the defendants by colluding with defendants' adversaries in the California action to prevent defendants from proving their malpractice claims. This alleged collusion is demonstrated, purportedly, by Duane Morris' communications with the Steefel firm and Pascoe regarding its unpaid bills, by Duane Morris' failure to appear in the California action to testify on Astor's behalf, and by the flouting a subpoena served on Joseph Burton, a partner in Duane Morris' San Francisco office.

It is undisputed that Duane Morris ceased its legal representation of the defendants as of July 26, 2004, long before the California action was tried in August 2005, and was an unpaid creditor of both Astor and Robot Wars at this time. Thus, neither Jacobs nor any other Duane

Morris attorney not subject to the subpoena power of the Northern District of New York, was under any legal duty to appear in the California action and testify on defendants' behalf.

Defendants claim that Duane Morris partner Joseph Burton flouted a trial subpoena served by defendants' new counsel, King & Kelleher LLP, in the California action requiring his attendance on the first day of trial. Defendants allege that he "inexplicitly failed to appear and failed to contact Defendants' lawyers for several days." Amended Answer and Counterclaims, ¶ 95. It is further alleged that during an in camera discussion during the trial, the lawyer for the Steefel firm volunteered that the reason Burton did not appear was because defendants owed Duane Morris money Id., ¶ 97.

Defendants, however, fail to offer any documentary or testimonial evidence to support these allegations. It is important to note that defendants are careful to say that Burton "initially flouted" the subpoena. Amended Answer and Counterclaims ¶¶ 95-96. As this subpoena was served by defense counsel in the California action, it seems highly unlikely that Burton's testimony would have been required on the first day of an estimated eleven-day trial, which in fact, took nine days to try. See Jacobs Aff., Exs. 18 and 24. Duane Morris offers an affidavit from Robert Burton in which he avers that, after receiving the subpoena served by defendants' counsel, Edward King, Esq., he met with King at the offices of Duane Morris in San Francisco, and that at the end of the meeting, King explicitly stated that he did not intend to call Burton as a witness and that he was discharged from the subpoena. Michael Silverman, who serves as General Counsel to Duane Morris, sent an e-mail on August 8, 2005 to all counsel in the California action confirming that Burton's testimony was not being sought and that he was released from the subpoena. Defendants fail to offer any evidence that disputes Burton's sworn

testimony and the email attached thereto. Thus, the undisputed evidence is that Burton did not flout the subpoena. In addition, even if Mr. Burton did not show up on the first day of trial, he was released on August 8, 2005, before defendants' counsel attempted to get the Duane Morris invoices admitted into evidence through Plotnicki on August 9, 2005.

Indeed, even if Duane Morris had been in communication with counsel for the Steefel firm about its unpaid bills at the time of the August 2005 trial, at this point in time, Duane Morris was no longer representing the defendants, had been formally accused of malpractice and was owed a significant amount of money to the defendants. Its status as an unhappy creditor of the defendants was not privileged information that Duane Morris was required to keep secret from the world. The courts of New York have uniformly held that fee arrangements between attorneys and clients are not protected by the attorney-client privilege, because it is considered not to be relevant to legal advice which may be given. In re Nassau County Grand Jury Subpoena Duces Tecum, 4 NY3d 665, 678-79 [2005]; Matter of Priest v Hennessy, 51 NY2d 62, 69 (1980); People v Stewart, 230 AD2d 116, 120 (1st Dept 1997); Oppenheimer v Oscar Shoes, Inc., 111 AD2d 28, 29 (1st Dept 1985); People v Belge, 59 AD2d 307, 308 (4th Dept 1977); In re Grand Jury Subpoena of Stewart, 144 Misc 2d 1012, 1017 (Sup Court, NY County), affd 156 AD2d 294 (1st Dept 1989)

Defendants also charge Duane Morris with breaching it fiduciary duty to them by intentionally retaining the Krieg firm in March 2004 on an unrelated matter to exploit a conflict of interest and "hopefully" insulate itself from being brought into the California action by Astor. This claim is completely contradicted by certain undisputed testimonial and documentary evidence.

"[A]n attorney stands in a fiduciary relation to the client." Graubard Mollen Dannett & Horowitz v Moskovitz, 86 NY2d 112, 118 (1995). The representation of conflicting or adverse interests may constitute professional misconduct, and such a conflict of interest may also be actionable as a breach of fiduciary duty. See e.g., Sage Realty Corp. v Proskauer Rose L.L.P., 251 AD2d 35 (1st Dept 1998). However, a violation of the Code of Professional Responsibility is not, by itself, actionable (Shapiro v McNeill, 92 NY2d 91, 97 [1998]; Arkin Kaplan LLP v Jones, 2007 WL 2050946 [1st Dept 2007]; Kantor v Bernstein, 225 AD2d 500, 501-02 [1st Dept 1996]), defendants must demonstrate an actual conflict of interest which proximately caused actual damages (Unger v Paul Weiss Rifkind Wharton & Garrison, 265 AD2d 156, 156-57 [1st Dept 1999]; see also Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267, 271 (1st Dept 2004) ("but for" standard of causation applies to claims for breach of fiduciary duty in the context of attorney liability).

There is simply no admissible evidence establishing that Duane Morris had reason to believe that an actual conflict of interest existed with the defendants as of March 16, 2004, when Duane Morris retained the Krieg firm in connection with a wholly unrelated matter. In December of 2003, the defendants had committed in writing to paying all of Duane Morris' legal fees in the Roski action within 30 days of completion of the trial, and had partially performed under the letter agreements by making $120,000 in partial payments on February 6, March 12 and 22, 2004 (see Jacobs Aff., Exs. 7 and 8; Jacobs Reply Aff., Ex, 29). It was Plotnicki who actually started the California action, suing the Steefel firm in October of 2002 in New York. Duane Morris was not made a defendant in that action, nor sued in the second New York action commenced in February 2003. In an email dated March 8, 2003, Plotnicki advised James Krieg

that Jacobs was a witness to the acts of malpractice by Schochet, as opposed to a participant in those acts. Krieg Aff., Ex. 8.

In addition, as stated above, Plotnicki testified at his deposition on December 9 and 10, 2003 in the California action that he never sought advice from Jacobs about whether to dismiss the Thorpe action (Jacobs Aff., Ex. 25 at pp. 207-208), and that "we all relied on the bankruptcy lawyers" (id., at p. 475). Notably, Plotnicki was deposed for a third time on August 3, 2004, after the Roski action had concluded and Duane Morris was no longer representing him or his companies, and unequivocally testified that Jacobs "had no role about the bankruptcy issues, regarding any of these bankruptcy issues." Id. at p. 505. While Plotnicki contends that Duane Morris knew in December 2003 that the Steefel firm was attempting to shift the blame to Duane Morris in the California suit (see Plotnick-002 Aff. ¶ 17), the first evidence of this defense comes in or about June 2004, after Shochet and Pascoe's deposition was taken in the California action (Plotnicki-003 Aff., Ex. B). And it was not until July 2005, on the eve of trial in the California action, that defendants for the first time, attempted to assert claims against Duane Morris for legal malpractice, which motion was denied. And, even after making this motion, Plotnicki still testified at trial on August 4, 2005 that Jacobs had "no experience" in bankruptcy matters, and that she and he both were relying on Schochet's advice with respect to handling the Thorpe adversary proceeding and Thorpe's motion for a preliminary injunction. Jacobs Reply Aff., Ex. 58 at pp. 532-33.

In support of the Krieg firm's motion to dismiss, James Krieg avers that Plotnicki had no interest in bringing a claim against Duane Morris until he thought a fee claim in New York was imminent in November 2004. James Krieg further contends that he first learned of Plotnicki's

interest in suing Duane Morris on November 2, 2004 and that he promptly disclosed that his firm represented Duane Morris in the unrelated matter. These allegations are supported by a series of emails between James Krieg and Plotnicki dated November 3, 2004. In his original message, James Krieg advised Plotnicki:

> Steve:
> 1. Per our discussion yesterday. First, our law firm represents Duane Morris in a case pending out here. It is entirely unrelated to your issues, but given that representation we cannot participate in any litigation against them on your behalf. I was aware that they represented you in the Roski case and that they claim you owe them money, but was not aware that you and they were getting quite adverse about the fee issue until you told me yesterday. * * *

James Krieg Aff., Ex. 24. Plotnicki's only response to this statement was to inquire if he could add Duane Morris to the California action if they did sue him for unpaid legal fees or whether he should first sue them. Id. In response, James Krieg stated that he did not understand why Plotnicki would want to sue Duane Morris, since

> we have been operating on the strategy that you did not want to sue them because we were blaming Steefel and Pascoe for the errors upon which, as I understood it, both you and Fran [Jacobs] relied, and which causes the loss of the Roski action and the wasted legal expense.

Id. In response, Plotnicki stated:

> No, I wasn't suggesting that I do it. I was suggesting it as a strategy if they sue me or as a way to preempt a suit of me by cross-claiming against them there.

Id. Thus, the evidence demonstrates that Plotnicki never advised the Krieg firm that it viewed Duane Morris as adverse until November 2004, and only because Duane Morris was threatening to sue over its unpaid legal bills.

In addition, contrary to Plotnicki's current claim that the Krieg firm sought to withdraw from the California action in 2004 because of its conflict with Duane Morris, emails between

James Krieg and Plotnicki establish that the Krieg firm sought to withdraw as early as August 6, 2004 only because it was not being paid and it was Plotnicki that suggested that he replace the Krieg firm with a lawyer that would take the case on a contingency basis. James Krieg Aff., Exs. 14-16, 20, 22. Thus, even if the Krieg firm had a conflict of interest once Plotnicki stated his interest in suing Duane Morris, defendants did not suffer any resulting harm since they were intending to replace the Krieg firm with another firm that could and did attempt to bring Duane Morris into the California action.

Thus, that portion of defendants' second counterclaim alleging that Duane Morris breached its fiduciary duty by creating a conflict of interest with the Krieg firm is dismissed on summary judgment.

C. Tortious Interference With Prospective Economic Relations

The third counterclaim alleges that Duane Morris tortiously interfered with "settlement discussions" with Pascoe in the California action that "would have resulted in Pascoe paying Defendants hundreds of thousands of dollars and releasing his claims against Defendants, but for the fact that [Pascoe] was informed [by Duane Morris] that the Krieg firm was planning on withdrawing as counsel for the Defendants in the California action." Amended Answer and Counterclaims, ¶¶ 149, 151.

To state a valid claims for tortious interference with prospective economic relations, defendants allege facts establishing that Pascoe would have entered into a settlement with the defendants but for the intentional and wrongful acts of Duane Morris. WFB Telecommunications, Inc. v NYNEX Corp., 188 AD2d 257 (1st Dept 1992), lv denied 81 NY2d 709 (1993); Ivan Mogull Music Corp. v Madison-59th Street Corp., 162 AD2d 336, 337 (1st

Dept 1990). The wrongful conduct must be "independently unlawful or [stem from an] evil motive" and no tort is committed if "the defendant is motivated by legitimate economic self-interest." Carvel Corp. v Noonan, 3 NY3d 182, 189-91 (2004); see also Barrett v Toroyan, 39 AD3d 366, 367 (1st Dept 2007).

This claims must be dismissed for several reasons. First, there is simply no evidence other than Plotnicki's unsupported allegations made "upon information and belief," that "but for" Pascoe's alleged knowledge that Astor and Robot Wars were changing counsel, he would have settled the California action, paid Astor and Robot Wars "hundreds of thousands of dollars" on their malpractice claims and released his claims for unpaid legal fees. The documentary evidence shows that after the September 28th mediation, the parties were, as James Krieg reported to Plotnicki on September 30th, "far apart" because the Steefel firm and Pascoe wanted Plotnicki to pay all their outstanding fees, and Plotnicki wanted them to walk away from the fees owed, refund all fees paid, and pay substantial damages on top of that. James Krieg Aff., Exh. 20.

Second, the sole evidentiary basis for the allegation that Duane Morris communicated any information to Pascoe that derailed a "possible resolution" are these factual averments by Plotnicki:

> During the California malpractice trial, Joseph Burton, a DM partner, had initially flouted a subpoena calling for him to appear. During an in camera discussion concerning Mr. Burton's failure to appear, Steefel's lawyer, David Evans, Esq., stated that the reason DM had failed to appear was because Astor owed it money. Not only was DM flouting a subpoena, but also, upon information and belief, they discussed the same with Steefel and its trial counsel, to Astor's clear detriment. This is the basis for Astor's belief that DM also communicated to Steefel that the Krieg firm had the foregoing conflict of interest.

Plotnicki-004 Aff., ¶ 7. This is rank speculation based on hearsay, does not even suggest that Duane Morris was in communication with the Steefel firm at the time of the mediation in

September 2004,[4] and insufficient to raise a triable issue of fact to defeat summary judgment. See Leder v Spiegel, 31 AD3d at 27-28 (legal malpractice claim based on unsupported and conclusory assertions that client would have accepted a lucrative settlement offer but for attorneys' negligent advice on his prospect of success at trial properly dismissed).

Third, Duane Morris did not act wrongfully even if it did share any knowledge that the Krieg firm was contemplating withdrawing with the Steefel firm or Pascoe. As of September 2004, Duane Morris was no longer representing the defendants and its status was that of an unpaid creditor of the defendants, akin to the Steefel firm and Pascoe, and was thus only bound to keep confidential attorney-client privileged information about the defendants gleaned from Duane Morris' prior representation of defendants.

Fourth, a claim for tortious interference with prospective business relations against Duane Morris has not been stated because defendants do not allege that Duane Morris was aware of any purported settlement discussions with Pascoe, and thus acted intentionally to thwart such a settlement.

D. Tortious Inducement of Breach of Fiduciary Duty

The fourth counterclaims alleges that Duane Morris tortiously induced a breach of fiduciary duty by the Krieg firm in the following three ways: (1) by Duane Morris' retention of the Krieg firm in March 2004, (2) by communicating with the Krieg firm regarding defendants'

---

[4]Indeed, the documentary evidence establishes that Pascoe was given until Wednesday, October 6, 2004 to accept defendants' settlement offer (James Krieg Aff., Ex. 20), but that the Krieg firm did not communicate to Duane Morris that it might have to withdraw from the California action until November 2, 2004 (id., Ex. 24).

potential malpractice claim against Duane Morris, and (3) by pressuring the Krieg firm not to recommend that defendants sue Duane Morris.

First, as stated above, there was no actual conflict of interest between defendants and Duane Morris in March 2004, therefore Duane Morris did not act wrongfully in retaining the Krieg firm on an unrelated matter. The documentary evidence shows that the Krieg firm promptly disclosed its conflict when Plotnicki first advised, in November 2004, that he wanted to sue Duane Morris.

Second, the undisputed documentary evidence shows that Plotnicki authorized James Krieg to communicate to Duane Morris in November 2004 that Plotnicki would sue the firm if they sued him over their unpaid legal bills, and that the Krieg firm had a conflict of interest if that scenario occurred. In an e-mail to Plotnicki dated November 2, 2004, James Krieg reported that, pursuant to their discussion the day before, he had a discussion with Duane Morris' general counsel, Mike Silverman, on November 2, 2004, and reported back:

> I called . . . Mike Silverman . . . last night. I know him from the case where we are representing his firm. He had heard of your matter, acknowledged that it was now "on his radar", and said there is a substantial sum they believe they are owed. I explained to him that while we would not represent either of you in litigation against the other, I represent you in the litigation out here. I volunteered that if they sued you you would almost certainly sue them back, and that it seems to me the best strategy for them is to assist us out here and postpone addressing your dispute until our case is resolved.

Krieg Aff., Ex. 24. Again, Plotnicki's only response to the email was to ask a procedural question, and he did not express any surprise or objection to James Krieg having contacted Duane Morris or challenge James Krieg's statement that his conversation with Mike Silverman was pursuant to a previously discussed litigation strategy. Id.

Finally, with respect to defendants' claim that Duane Morris exerted pressure on the Krieg firm to recommend that defendants not sue Duane Morris, the emails between James Krieg and Plotnicki establish that James Krieg recommended that Plotnicki not get into an adversarial stance with Duane Morris over its unpaid legal fees and that Plotnicki understood that he needed the cooperation of both Jacobs and Burton as witnesses in the California action. On October 14, 2004, James Krieg advised Plotnicki that Jacobs had called his associate after receiving the a deposition subpoena, and said that Plotnicki was ducking her calls and that Duane Morris may sue Plotnicki before the California case goes to trial. James Krieg Aff., Ex. 21. Plotnicki responded: "As for her cooperation, I know we need it but asking for it now puts me at a negotiating disadvantage with her." Id. Again, on November 3, 2004, in response to James Kreig's advice on why trying to bring Duane Morris into the California action was a bad idea, contrary to Plotnicki's previous "strategy," and likely to be rejected by the court, Plotnicki responded that he was only suggesting suing Duane Morris as a strategy to avoid being sued for unpaid legal fees. Id., Ex. 24. Thus, aside from the fact that there is no admissible evidence that Duane Morris exerted any pressure on the Krieg firm to do anything vis-a-vis its handling of the California action, the documentary evidence shows that Plotnicki was advised that litigating with Duane Morris over the firm's unpaid bills was not in his best interests, advice which he accepted during the period of time that the Krieg firm represented his interests.

E. Declaratory Judgment as to Conflict of Interest

The fifth and final counterclaim seeks a declaratory judgment that the Krieg firm had a conflict of interest in representing the defendants in the California malpractice action while simultaneously representing Duane Morris in another matter, because Duane Morris was a

"potential additional malpractice defendant in the California action," and that the Krieg's firm's representation of the defendants were compromised as a result. Amended Answer and Counterclaims, at ¶ 168. This claim is dismissed because the undisputed documentary evidence establishes that although Duane Morris was potentially adverse to the defendants, there was never any actual conflict of interest prior to the time the Krieg firm was substituted out of the case.

III. The Krieg Firm's Motion to Dismiss

Defendants sue the Krieg firm for legal malpractice in connection with its representation in the California action. Defendants contend that the Krieg firm failed to timely recommend to defendants to bring Duane Morris as an additional defendant on the malpractice claim being pursued in California and failed to take certain necessary actions in discovery. The Krieg firm is also accused of breaching its fiduciary duty to the defendants by agreeing to represent Duane Morris in the Burton matter in March 2004 without disclosing this representation to defendants and obtaining a waiver of a potential conflict of interest and also by divulging privileged information to Duane Morris, namely that the firm was contemplating resigning as defendants' counsel in the California action.

The Krieg firm moves, pursuant to CPLR 3211(a)(8), to dismiss the third-party complaint on the grounds that the court lacks personal jurisdiction over the Krieg firm, a California limited liability partnership, who was retained by Plotnicki and his businesses to conduct litigation solely in the State of California. Defendants properly concede that the court does not have personal jurisdiction over the Krieg firm pursuant to CPLR 301 or long-arm jurisdiction pursuant to CPLR 302(a)(1) based on the fact that James Krieg traveled to New York

to conduct two depositions in the California lawsuit. See Mayes v Leipziger, 674 F2d 178 (2d Cir 1982); Weiss v Greenberg, Traurig, Askew, Hoffman, Lipoff, Quentel & Wolff, P.A., 85 AD2d 861 (3d Dept 1981).

Defendants argue only that the court has long arm jurisdiction pursuant to CPLR 302(a)(2), because the Krieg firm committed a tort against Astor in New York. However, the sole factual predicate for this claim in the third-party complaint is that James Krieg failed to ask Jacobs necessary questions at her two depositions regarding Duane Morris' invoices, and defendants were unable to get these invoices into evidence at the trial of malpractice claim in the California action. Third-Party Complaint at ¶ 74. However, it is undisputed that Jacobs' was deposed twice in the California action, on August 2, 2004 and on April 1, 2005, and that her second and final deposition was conducted by Edward King, defendants' replacement counsel, who would have to be faulted for not getting any required testimony about Duane Morris' invoices. In other words, defendants do not state a claim for legal malpractice against an attorney who fails to ask questions at a deposition that was not completed at the time his firm was relieved as counsel. See Golden v Cascione, Chechanover & Purcigliotti, 286 AD2d 281 (1st Dept 2001); Kozmol v Law Firm of Allen L. Rothenberg, 241 AD2d 484 (2d Dept 1997); Albin v Pearson, 289 AD2d 272 (2d Dept 2001). In addition, since these invoices related only to defendants' damages, an issue the jury did not even reach in the California action, defendants fail to allege that the Krieg firm committed the tort of legal malpractice in New York.

Assuming that the court does have long-arm jurisdiction over the Krieg firm, the third-party claims against this defendant would have to be dismissed on the basis of forum non conveniens or stayed pursuant to the Federal Arbitration Act (FAA) on the ground that the parties

entered into a valid and binding agreement to arbitrate their dispute in the State of California. On March 14, 2003, Astor and Robot Wars executed a written engagement letter with the Krieg firm. This letter governs the services to be rendered by the Krieg firm in the California action. Plotnicki, as the principal of Astor and Robot Wars, retained independent counsel to review the engagement letter. The engagement letter expressly provides for arbitration of all claims related to the engagement of the Krieg firm, stating in prominent capital typeface, as follows:

> ANY DISPUTE BASED UPON OR ARISING OUT OF OUR ENGAGEMENT, OR THIS LETTER AGREEMENT, INCLUDING BUT NOT LIMITED TO CLAIMS OF PROFESSIONAL ERRORS OR OMISSIONS, SHALL BE SUBJECT TO BINDING ARBITRATION, PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 1280, ET SEQ., TO BE HELD IN SAN FRANCISCO COUNTY, CALIFORNIA . . . JUDGMENT ON THE ARBITRATOR'S AWARD SHALL B FINAL AND BINDING AND MAY BE ENTERED IN ANY COMPETENT COURT, BY AGREEING TO ARBITRATE, ALL PARTIES ARE WAIVING JURY TRIAL.

James Krieg 11/20/06 Aff., Ex. 10.

Defendants do not dispute that their engagement agreement contains an arbitration clause, that they were represented by independent counsel during the negotiation of this agreement, or that the FAA applies and empowers this court to stay their third-party claims against the Krieg firm. Rather, they argue only that this agreement to arbitrate is unenforceable due to fact that the Krieg firm made a material misrepresentation -- at the time the engagement letter was signed -- that it was unaware of any potential conflicts of interest, but that in fact, the firm was advising Joseph Burton of Duane Morris on a separate matter.[5] However, it is well settled that fraud in

---

[5]The Krieg firm argues that there is nothing in the record to support the factual claim in the third-party complaint, made on information and belief, that the Krieg firm was advising Duane Morris with respect to the Burton matter prior to it formal retention in March 2004 and offers the affidavit of James Krieg denying such this allegation. However, this is not a summary judgment motion, but a motion to dismiss the complaint pursuant to CPLR 3211, where the

the inducement of the contract in which an arbitration clause is contained does not defeat the right to compel arbitration under the FAA. Southland Corp. v Keating, 465 US 1, 10-11 (1984); see also GAF Corp. v Werner, 66 NY2d 97, 102 (1985).

Accordingly, for these two independent reasons, dismissal of the third-party claims against the Krieg firm is warranted.

IV. The Steefel Firm's Motion to Dismiss and Request for Sanctions

The third-party complaint purports to assert a claim for damages against Steefel for tortious interference with prospective economic relations and unjust enrichment. Defendants also seek a declaratory judgment precluding the Steefel firm from executing on its judgment in the California action as a result of its alleged "unclean hands." The sole basis for these claims is that Krieg firm improperly disclosed to Duane Morris that it had a conflict of interest and intended to withdraw from representing the defendants in the California action, information that was allegedly attorney-client privileged, and that Duane Morris then told Steefel who passed it on to its co-defendant, Pascoe, who then decided not to go through with an alleged settlement of the California action for "hundreds of thousands of dollars." For the following reasons, these allegations fail to state a valid claim for monetary or declaratory relief against the Steefel firm.

First, as the court has held in connection with Duane Morris' motion for summary judgment, the factual predicate for defendants' claims that Pascoe backed out of a lucrative settlement of the California action based on the disclosure of attorney-client privileged information are allegations that consist of rank speculation, hearsay, and which are contradicted

---

factual allegations of the complaint must be accepted as true unless completely contradicted by documentary evidence.

by undisputed documentary evidence. Second, even assuming that the Krieg firm did disclose attorney-client privileged information to Duane Morris who passed it on to the Steefel firm, there is no principle of law that would prevent the Steefel firm, who was no longer acting as counsel to the defendants, but was in an adversarial position with its former clients, from sharing such information with a co-defendant united in interest. Thus, defendants fail to plead any facts showing that the Steefel firm acted with disinterested malevolence.

Third, defendants' claims against the Steefel firm hinge on the contention that its disclosure to Pascoe of the Krieg's firm intended withdrawal from the California action botched a "possible resolution" of the California action that had been "suggested" by Pascoe at the court-ordered mediation. Third-Pary Compl., ¶ 54. However, by the terms of the Confidentiality Agreement signed by all the parties to the mediation, the mediation's settlement talks were made privileged "IN ALL PRESENT AND FUTURE CIVIL . . . PROCEEDINGS." Touitou Aff., Ex. G. Without evidence of a settlement offer by Pascoe, defendants have no basis to pursue their claims against the Steefel firm.

The Steefel firm asks for sanctions and costs against the defendants pursuant to CPLR 8303-a and/or 22 NYCRR Part 130 for their vexatious conduct in bringing a frivolous lawsuit. From the foregoing, it is clear that defendants' claims for monetary damages and for a declaratory judgment precluding the Steefel firm from executing on its judgment in the California action based on "unclean hands, are without cognizable legal theory and devoid of any supportive basis. Thus, all claims defendants have asserted against the Steefel firm are unsupported in law and in fact, and as to defendants' request for declaratory relief, this court concludes that it is a blatant and improper attempt to collaterally attack the judgment entered in

the California action. Under these circumstances, it is appropriate to grant the Steefel firm's request for sanctions pursuant to 22 NYCRR 130-1.1, and defendants are sanctioned in the amount of $2,500.[6]

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff's motion for summary judgment (seq. no. 002) is granted in part and denied in part as follows; and it is further

ORDERED that the plaintiff is granted partial summary judgment on its third cause of action for an account stated against defendant Astor Holdings Inc., that claim in severed and the Clerk is directed to enter immediate judgment in favor of plaintiff Duane Morris LLP against defendant Astor Holdings Inc. on the third cause of action in the amount of $354,035.76 plus interest at the legal rate from August 6, 2004 together with taxable costs and disbursements; and it is further

ORDERED that plaintiff is granted summary judgment dismissing the first counterclaim to the extent it asserts a claim against plaintiff for legal malpractice in connection with the Roski action, the second, third, fourth and fifth counterclaims; and it is further

ORDERED that the motion of third-party defendant Krieg, Keller, Sloan, Reilly & Roman, LLP (seq. no. 003) to dismiss the third-party complaint is granted; and it is further

ORDERED that the portion of the motion of third-party defendant Steefel, Levitt &

---

[6]While the Steefel firm also asks for an award of costs and disbursements, it fails to provide any evidence of what costs and disbursements were incurred in defending this action or the related action filed by Plotnicki. See 22 NYCRR 130-1.1(a) (court may award "costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct").

Weiss, P.C. (seq. no. 004) to dismiss the third-party complaint is granted; and it is further

ORDERED that the third-party complaint is dismissed in its entirety; and it is further

ORDERED that the portion of the motion of third-party defendant Steefel, Levitt & Weiss, P.C. (seq. no. 004) for costs and sanctions against defendants is granted to the extent of awarding sanctions against defendants Astor Holdings, Inc. and Robot Wars LLC, jointly and severally in the amount of $2,500, and said defendants shall deposit the sum of $2,500 (in the form of cash or certified check payable to the "New York County Clerk") with the County Clerk, 60 Centre Street, Room 141B, together with a copy of this order, for transmittal to the New York State Commissioner of Taxation and Finance; and it is further

ORDERED that written proof of such payment be provided to the Clerk of this Part and opposing counsel within 30 days after service of a copy of this order with notice of entry.

Dated: October 22, 2007

ENTER:

J.S.C.