

**Coccia v Liotti**

2008 NY Slip Op 31335(U)

April 30, 2008

Supreme Court, Nassau County

Docket Number: 5195-06/

Judge: Ute W. Lally

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SCAN

SHORT FORM ORDER

md,mod,mod

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 6  
NASSAU COUNTY

JOAN COCCIA,

Plaintiff(s),

MOTION DATE: 2-8/08

INDEX No.: 5195/06

-against-

MOTION SEQUENCE NO: 5,6,7

CAL. NO.: 2007H4000

THOMAS F. LIOTTI,

Defendant(s).

The following papers read on this motion:

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Upon the foregoing papers, it is ordered that this motion by plaintiff for an order pursuant to CPLR 3103, 3111, 3124 and 3126 compelling various forms of discovery is denied. Motion by plaintiff for a protective order is withdrawn. Motion by defendant for summary judgment in his favor dismissing the complaint and for an order pursuant to CPLR 3211(a)(7) for failure to state a cause of action is granted in part and denied in part. Cross-motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment in her favor dismissing defendant's counterclaims is granted in part and denied in part.

This is an action to recover money damages as the result of defendant's alleged legal malpractice. Defendant attorney represented plaintiff in a matrimonial action which had been commenced by her husband William Coccia. The matrimonial action was commenced on July 16, 2002.

Joan and William Coccia were married on September 28, 1991. The couple had two daughters, Danielle, who was nine, and Nicole, who was three, at the time of the divorce proceeding. Joan and William appear to have enjoyed a comfortable standard of living during their 13-year marriage. They lived in a home in Brookville

which was worth over \$3,000,000.00, and Danielle attended private school. In granting a divorce decree Justice O'Connell found that Joan constructively abandoned William around June 15, 2001.

William's income appears to have been derived primarily from a family-owned trucking and warehouse business which he operated with his father. Subsequent to the marriage on February 18, 1995, Joan entered into a written agreement with William in which she waived any right to equitable distribution with respect to the business. The waiver was in consideration of her being made the beneficiary of certain life insurance policies and of a testamentary disposition which William was to have made. Around the time that Joan relinquished her marital rights in the business, William's brother, Richard Coccia, Jr., became a stockholder.

Joan and William built the house in Brookville on land which had been conveyed to them by Richard Coccia, Sr., William's father. Around 1996 or 1997, Richard had transferred the property to Joan and William for a stated consideration of \$175,000. At the time of the conveyance, the parties entered into an agreement that in the event Joan and William were separated or divorced, Richard would be paid an additional \$600,000 for the property. To effectuate the agreement, Joan and William executed a deed which was apparently intended as security. The agreement and the deed were drafted by an attorney, Jerry Rosenthal, who appears to have represented all three of the parties.

When the defendant began his representation of plaintiff he substituted for her prior counsel on June 19, 2003 and entered into a written retainer agreement with her. The retainer agreement provides that plaintiff would be charged \$325 per hour for partner's time, \$200 per hour for associates' time, \$125 per hour for law clerk's time, and \$75 per hour for time expended by paralegals in the office. Defendant's retainer agreement set forth the factors to be considered in determining the reasonableness of a legal fee, including the time and labor required, the novelty and difficulty of the questions involved, the likelihood of preclusion of other employment, the fee customarily charged in the locality, the results obtained, and the experience, reputation, and ability of the attorney (Code of Prof. Resp. DR 2-106). At the time of the agreement the plaintiff paid defendant a retainer fee of \$10,000. The agreement expressly provided that the retainer fee did not include an appeal in the matrimonial action or representation in any other proceeding.

Although defendant has submitted an itemized invoice and client ledger, all of the various proceedings in the matrimonial action have not been fully explained. Nevertheless, defendant's billing records indicate that Michael Cancellare, defendant's

immediate predecessor counsel, made a motion to vacate the earlier post-nuptial agreement. Justice Falanga's decision, denying the motion to vacate the post-nuptial agreement, has not been submitted on the present motions.

Aside from the matrimonial action the defendant also represented plaintiff in an action which Richard brought to enforce his rights in the Brookville property. Since Richard's action was related to the matrimonial, both cases were eventually assigned to Justice O'Connell. Before Justice O'Connell the defendant argued that because the matrimonial had not yet resulted in a judgment, Richard's action was "untimely." Defendant did not appear to have argued that the deed and post-nuptial agreement may have been voidable based upon Rosenthal's conflict of interest. Parenthetically, the court notes that defendant stated that he has known Rosenthal for "many, many years" and regards him as a "very competent attorney." In any event, Justice O'Connell dismissed Richard's action without prejudice on the ground that his claim was "only due when there's a divorce." Nonetheless, Justice O'Connell regarded it as "everyone's understanding" that Richard would receive \$600,00 from the proceeds of the sale of the property.

On January 13, 2005, the matrimonial action was resolved pursuant to a written stipulation of settlement that was amplified on the record before Justice O'Connell. The stipulation provided that Joan was to receive combined maintenance and child support of \$55,000 per year. According to defendant, William had arranged for a significant amount of personal expenses to be paid by the business, and child support was based upon an attributed income of approximately \$125,000 per year. In addition to the child support, William agreed to pay Danielle's private school tuition, albeit at a less expensive school.

The stipulation further provided that Joan was to receive \$1.5 million, representing her interest in the marital residence, and a \$100,000 lump sum payment in lieu of equitable distribution of the remainder of the marital property. These payments were contingent upon plaintiff having vacated the marital residence by June 15, 2005. In order to finance the payments before the residence was actually sold, the stipulation provided that plaintiff would deed her interest to William and he would obtain a mortgage loan on the property. The stipulation also provided that William would advance plaintiff some funds in order to purchase a home, and if she vacated the marital residence before June 15, the balance of her equitable distribution payments would be received before that date.

The stipulation also provided that Richard was to receive

\$600,000 from the proceeds of the sale of the marital residence. William agreed to hold plaintiff harmless from any further claim that his father might make based upon his deed to the property. Finally, the stipulation provided that the parties were to pay their own attorney fees. According to defendant, Justice O'Connell had indicated on the record that he would not award counsel fees to either side. Nonetheless, defendant asserts that the \$100,000 lump sum equitable distribution payment was intended to take the place of a counsel fee award.

In April 2005, shortly after receiving her equitable distribution payments, plaintiff refused to pay the balance of her attorney's fees and discharged defendant. This action for legal malpractice was commenced on March 27, 2006. It should be noted that the defendant moved in the Matrimonial Part to impress a lien upon plaintiff's equitable distribution award. On July 11, 2006, Justice Balkin denied the application on the ground that defendant's application for fees should be decided in the context of the malpractice action.

Plaintiff claims that defendant was negligent in failing to obtain more generous support, maintenance, and equitable distribution awards. Specifically, plaintiff alleges that had defendant properly utilized a report which had been prepared by a forensic accountant, he could have attributed significantly more income to William and obtained greater economic awards. Plaintiff further alleges that defendant was negligent in failing to appeal Justice Falanga's order which denied plaintiff's motion to vacate the earlier post-nuptial agreement. Plaintiff further alleges that defendant was negligent in settling the matrimonial action without a counsel fee award.

Plaintiff also asserts a claim for attorney misconduct pursuant to Judiciary Law § 487(2). Plaintiff alleges that defendant wilfully delayed his client's suit for his own gain by protracting the trial of the matrimonial action and other proceedings. Plaintiff seeks recovery of the legal fees which she has already paid, on the grounds of attorney misconduct, failure to render regular itemized bills, and on the ground that the fees were excessive under the Code of Professional Responsibility.

Finally, plaintiff asserts two claims for fraud. Plaintiff alleges that defendant falsely represented that he would pursue an appeal from Justice Falanga's order. Plaintiff alleges that defendant falsely represented that Alan Ansell, an associate who worked on the matter, was a licensed attorney when Ansell had actually been disbarred. Plaintiff alleges that she was induced to enter into the retainer agreement based on defendant's misrepresentations as to his intention to appeal Justice Falanga's

order and Ansell's status. Plaintiff argues that defendant should be estopped from recovering any fees based upon his false representations.

In his answer, defendant denies any malpractice or attorney misconduct and counterclaims for unpaid legal fees and disbursements in the amount of \$90,067.92. Defendant asserts claims for his fees based upon the retainer agreement, an account stated, and unjust enrichment.

Additionally, defendant asserts a counterclaim against plaintiff for defamation. Defendant does not set forth the substance of the allegedly defamatory statements in his answer because he claims that the information relates to a disciplinary matter and is confidential pursuant to Judiciary Law § 90(10). Nevertheless, at his deposition, defendant testified that plaintiff had accused him of fraud in a grievance which she filed with the grievance committee. Defendant claims that the statements are defamatory per se because they "impugned the integrity of the defendant in his trade and profession." Defendant also suggests that the statements are false because no disciplinary action has been taken. Defendant claims that plaintiff made the defamatory statements not only to the grievance committee, but also to Betsy Gahagan, another client whom defendant represented in a matrimonial action.

By order dated September 10, 2007, the court granted plaintiff's motion pursuant to CPLR 3126 to strike defendant's answer unless defendant served answers to plaintiff's interrogatories within 20 days after service of a copy of the order with notice of entry. The court denied defendant's cross-motion for summary judgment dismissing the complaint on the ground that the motion was not supported by a sworn affidavit. The court further determined that defendant had failed to carry his burden of making a prima facie showing of entitlement to judgment as a matter of law on plaintiff's malpractice claim. Defendant filed a notice of appeal from the court's order on or about September 28, 2007.

The Appellate Division denied a stay of this court's order, and defendant submitted his answers to interrogatories on October 17, 2007. Defendant refused to answer questions 5 and 8 concerning compensation paid to Ansell. Defendant refused to answer question 14, concerning other clients with whom he had discussed Ansell's status as a suspended attorney, or question 15, concerning grievances concerning Ansell which had been filed by other clients. Questions 22 and 23 inquired as to whether defendant had served interrogatories on William, or examined him before trial, in the matrimonial action. Defendant's response to these questions suggests that he relied upon the discovery obtained by Michael

Cancellare, Esq., defendant's immediate predecessor counsel. Question 24 inquired as to whether defendant had received a report from a forensic accountant comparing William's stated income to his standard of living. Defendant's response suggests that such a report was also obtained by Cancellare. Questions 26-30 inquired as to the substance of the statements which defendant claimed to be defamatory and the persons to whom the statements were made. Although defendant still did not provide the substance of the statements, his response explains the theory on which defendant claims the statements were defamatory. Defendant asserted that the statements had been made not only to the grievance committee, but also to the court and other persons "associated" with the matrimonial litigation. Question 31 inquired as to other charges of malpractice or grievances filed against defendant. In response, defendant referred to Selletti v Liotti, a malpractice action which had been brought by plaintiff's counsel, and a grievance which had been filed by Betsy Gahagan.

Defendant's examination before trial was conducted at his office on November 6, 2007. Although some of defendant's files were produced at the deposition, defendant did not make available all of the documents which he possessed concerning the representation. In particular, defendant's correspondence file and billing records were not available at the examination. However, the court notes that plaintiff has submitted the billing records as an exhibit on her cross-motion. Defendant asserted that plaintiff had received "copies of everything" during the course of his representation. Nonetheless, defendant offered to reproduce documents at the rate of \$.25 per page if, after reviewing the court file, plaintiff determined that she was missing specific documents.

Plaintiff moves pursuant to CPLR 3124 to compel defendant to appear for a continued examination before trial and to produce his entire file relating to the representation. Plaintiff also seeks discovery of defendant's agreements with Alan Ansell, as well as all W-2's or form 1099's issued in connection with his employment. Plaintiff moves pursuant to CPLR § 3126 to strike defendant's answer for wilful failure to answer the above interrogatories and to comply with the court's order. Finally, plaintiff requests the court to continue overseeing discovery despite the filing of a note of issue on December 19, 2007.

Plaintiff also moved pursuant to CPLR 3103 for a protective order prohibiting defendant from using plaintiff's examination before trial on the ground that defendant failed to submit the deposition to plaintiff for examination. Since defendant asserts that the transcript has been forwarded to plaintiff's attorney, the court deems plaintiff's motion for a protective order as withdrawn.

Defendant moves for an order pursuant to CPLR 3211(a)(7) dismissing the complaint on the ground of failure to state a cause of action, and for an order pursuant to CPLR 3212 granting summary judgment in his favor dismissing the complaint. Although defendant has not specifically identified his motion as one for leave to reargue, because defendant asserts that the court "misapprehended the law and facts," the court will deem the motion as one affecting its prior order (CPLR 2221). Where a party seeking reargument has also taken an appeal, the court may, as a matter of discretion, grant reargument if the appeal has not yet been perfected (*Leist v. Goldstein*, 305 AD2d 468). The court notes that defendant has not perfected his appeal from the order denying summary judgment. In view of the acrimony which has developed between defendant and plaintiff's counsel and the need to narrow the issues in this litigation, the court will grant reargument and proceed to the merits of defendant's motion.

In support of his motion for summary judgment, defendant asserts that his fees were fair and reasonable. Defendant asserts that an appeal from Justice Falanga's order would have been futile because the statute of limitations had expired on plaintiff's claim to vacate the post-nuptial agreement. Defendant asserts that plaintiff failed to object to any of his billing statements. Additionally, defendant asserts that plaintiff is in default with respect to certain of his discovery requests and moves to compel disclosure pursuant to CPLR 3124.

Plaintiff cross-moves for summary judgment dismissing defendant's counterclaims for his unpaid legal fees as well as his defamation claim. The court will consider the motions for summary judgment before ruling upon the outstanding requests for discovery.

In order to sustain a claim for legal malpractice, a plaintiff must establish that the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession, resulting in actual damages, and that the plaintiff would have succeeded on the merits of the underlying action "but for" the attorney's negligence (*Ambase Corp. v. Davis, Polk & Wardwell*, 8 NY3d 428, 434). A settlement of the case is not an intervening cause which will bar a malpractice action, if settlement was effectively compelled by the attorney's unprofessional conduct (*Tortura v. Sullivan Papain Block McGrath & Cannavo*, 21 AD3d 1082, 1083). However, where there has been a recovery by verdict or settlement, to make the requisite showing of "success on the merits" plaintiff must establish that there would have been a more favorable outcome but for the attorney's negligence (*Ellsworth v. Foley*, 24 AD3d 1239).

The selection of one among several reasonable courses of

action does not constitute malpractice, even if the attorney committed an error of judgment (*Rosner v. Paley*, 65 NY2d 736). Whether the attorney's course of action was reasonable must be established by expert testimony, unless the jurors may determine from their ordinary, daily experience whether the standard of care has been violated (*Merlin Biomed Asset Management v. Wolf Block Schorr & Solis-Cohen*, 23 AD3d 243). However, a party who is qualified by reason of education or training in a specific field may serve as his own expert (*Rodriguez v. Pacificare, Inc.*, 980 F.2d 1014, 1019 [5<sup>th</sup> Cir. 1993]). Thus, an attorney who is a defendant in a malpractice case may offer his own affidavit on a summary judgment motion (Id). While the defendant's interest in the case will of course affect his credibility, it does not prevent him from making a *prima facie* showing that he is entitled to judgment on the malpractice claim.

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373, 384). Failure to make such a *prima facie* showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Id). However, if this showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324).

The report of the forensic accountant has not been submitted on the present motions. Nonetheless, it appears from defendant's examination before trial that the accountant found that the sources and application of funds of William's business could not be reconciled. The accountant's report, coupled with evidence as to the couple's standard of living, suggests that William may have had income even greater than what was attributed to him for purposes of the matrimonial action. Nonetheless, as defendant frankly testified at his deposition, there were risks involved with "pushing the envelope," that is claiming that William had income significantly greater than what he was reporting on his tax return. For William, and perhaps even Joan, to be accused of tax fraud was clearly not in the best interest of either party. The court concludes, as a matter of law, that defendant's course of conduct with respect to the accountant's report was reasonable. Defendant's motion for summary judgment dismissing the complaint is granted as to plaintiff's claim that defendant was negligent in failing to utilize the accountant's report in order to obtain greater support, maintenance or equitable distribution awards.

While an attorney may commit malpractice by failing to pursue an appeal, plaintiff must establish that she would have prevailed on the appeal, and, but for the failure to appeal, she would have obtained a more favorable result in the underlying action (*Hutt v. Kanterman & Taub*, 280 AD2d 379). However, on this motion for summary judgment, it is defendant's burden to make a *prima facie* showing that an appeal from Justice Falanaga's order had no merit or that a successful appeal would not have affected the outcome of the matrimonial action (*JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373, 384).

Domestic Relations Law § 236(B)(3) provides that an agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded. Such an agreement may include, among other terms, a contract to make a testamentary provision of any kind and provision for the ownership, division, or distribution of separate and marital property (*Id*). These agreements are referred to as "opting out," or property settlement, agreements, and the parties are to be encouraged to utilize them (*Christian v. Christian*, 42 NY2d 63, 71). Judicial review of such agreements is to be exercised sparingly and circumspectly (*Id*). Where there has been full disclosure and no inequitable conduct, courts are not to "redesign the bargain" on the ground that, in retrospect, the agreement seems one-sided or improvident (*Id* at 72).

However, agreements between spouses, unlike ordinary business contracts, involve a fiduciary relationship requiring the utmost of good faith (*Id*). There is strict surveillance of all transactions between married persons (*Id*). Indeed, equity may set aside an agreement between spouses on grounds that would be insufficient to vitiate an ordinary contract (*Id*). If voidable, a property settlement agreement may be set aside under principles of equity in an action brought for that purpose or by way of affirmative defense in a matrimonial action (*Id*).

Absent fraud or undue influence, an action to rescind an agreement between spouses accrues and the six-year statute of limitations begins to run on the date the agreement is executed (CPLR § 213[1]; *DeMille v. DeMille*, 5 AD3d 428). On the other hand, if plaintiff seeks to rescind such an agreement based upon fraud, plaintiff may bring the rescission action within two years from the time she discovered the fraud or could with reasonable diligence have discovered it (CPLR 213[8]).

A counterclaim seeking rescission of a post-nuptial agreement is interposed when defendant's answer is served (CPLR § 203[d]). However, defendant's counterclaim for rescission was not barred if it was still timely at the time that the matrimonial was commenced, July 16, 2002 (CPLR § 203[d]). Moreover, CPLR § 203(d) further provides that "if the defense or counterclaim arose from the transactions, occurrences or series of transactions or occurrences, upon which a claim asserted in the complaint depends," it is not barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the action was commenced. Since William was the plaintiff in the matrimonial action and presumably asserted a claim for equitable distribution based upon the post-nuptial agreement, plaintiff's claim for rescission of the agreement was arguably timely, at least to the extent of William's demand for equitable distribution.

Since Justice Falanga's decision denying the motion to vacate the post-nuptial agreement has not been submitted to the court, it cannot be determined whether the decision was based on the statute of limitations or on the merits. Nevertheless, an appellate court need not rely on the rationale articulated in the court of original jurisdiction to affirm a decision (*American Dental Cooperative v. Attorney General*, 127 AD2d 274, 279 n.3). Thus, to carry his burden of showing *prima facie* that Justice Falanga's order would be affirmed, defendant may make a showing that plaintiff's claim for rescission was time-barred or a showing that the agreement was valid and enforceable (*Katz v. Katz*, 37 AD3d 544). The court concludes that defendant has not made either showing.

Since the agreement was executed on February 18, 1995, the six-year statute of limitations had expired when the matrimonial was commenced on July 16, 2002. However, since defendant has offered no evidence that plaintiff was actually made the beneficiary of the life insurance policies or that the testamentary disposition was actually made, defendant has not established *prima facie* that the 2-year extension of the statute of limitations for fraud did not apply. Moreover, as noted above, it appears that plaintiff's counterclaim for rescission of the post-nuptial agreement was timely at least to the extent of offsetting William's equitable distribution claim. Furthermore, since defendant has not established that there was full disclosure as to the value of the business, the face amount of the life insurance policies, or the terms of the testamentary disposition, or that there was no inequitable conduct, defendant has not made a showing that the post-nuptial agreement was valid and enforceable. The court also notes that because the pre-nuptial agreement was not submitted on the present motion, defendant has not established that it was in proper form to be recorded. Accordingly, defendant's motion for summary judgment is denied as to plaintiff's claim for malpractice

based upon defendant's failure to appeal Justice Falanga's order.

Domestic Relations Law § 237 provides that in any action brought for a divorce, the court may direct either spouse to pay such sum or sums of money directly to the attorney for the other spouse to enable that spouse to carry on or defend the action as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties. The statute provides that, "Such direction must be made in the final judgment in such action or proceeding" (Id). DRL § 237 is "designed to redress the economic disparity between the monied spouse and the non-monied spouse" (*O'Shea v. O'Shea*, 93 NY2d 187, 190). The court is to exercise both "flexibility and judicial discretion" in awarding counsel fees (Id at 192). Despite the provision in the statute that "such direction" must be made in the final judgment, it is not an abuse of discretion to deny the wife a counsel fee award (*Keane v. Keane*, 8 NY3d 115, 122). If equitable distribution leaves the financial circumstances of the parties "quite similar," the court has discretion to refuse to make a counsel fee award (*Chase v. Chase*, 208 AD2d 883).

In view of plaintiff's substantial equitable distribution award and defendant's un rebutted claim that Justice O'Connell announced that he would not award counsel fees, the court concludes, as a matter of law, that defendant's settlement of the matrimonial action without an attorney fee award was reasonable. Accordingly, defendant's motion for summary judgment dismissing the complaint is granted as to plaintiff's claim of malpractice based on defendant's failure to obtain a counsel fee award.

Judiciary Law § 487(2) provides that an attorney or counselor who "wilfully delays his client's suit to his own gain" is guilty of attorney misconduct. An attorney who commits such misconduct forfeits to the party injured treble damages to be recovered in a civil action (Id). To establish a cause of action pursuant to Judiciary Law § 487(2), plaintiff must show a "chronic extreme pattern of legal delinquency" that proximately caused damages to the client (*Tawil v. Wasser*, 21 AD3d 948).

The matrimonial action was commenced on July 16, 2002. Defendant, who was the third attorney to represent plaintiff, was retained on June 19, 2003. The matrimonial was settled on January 13, 2005. Although defendant's itemized billing records do not explain the reason for every legal maneuver, they describe the general course of the representation. The court concludes that defendant has carried his burden of establishing prima facie that there was no chronic extreme pattern of delinquency during his 19 month representation of plaintiff. Thus, the burden shifts to

plaintiff to offer proof showing a material issue of fact as to whether defendant delayed the suit for his own gain. The only evidence of delay which plaintiff submits is that the trial extended for four days and included the issue of grounds for divorce. As a matter of law, four days is not an inordinate amount of trial time for a matrimonial of this complexity. While William, as the plaintiff in the matrimonial action, had the burden of proof as to marital fault, Joan's ultimate concession as to constructive abandonment was no doubt a "bargaining chip" in the economic negotiations. The court concludes that plaintiff has not carried her burden of showing a triable issue as to delay. Accordingly, defendant's motion for summary judgment dismissing the complaint is granted as to plaintiff's claim pursuant to Judiciary Law § 487.

The court now turns to the branch of defendant's motion seeking summary judgment as to plaintiff's claim for return of fees already paid. A lawyer shall not enter into an agreement for, charge, or collect an illegal or excessive fee(DR 2-106[A]). Upon being discharged without cause, an attorney must refund that portion of the retainer fee which exceeds the fair and reasonable value of completed services(*In re Cooperman*, 83 NY2d 465, 473). However, where the discharge is for cause, the attorney has no right to compensation(*Campagnola v. Mulholland*, 76 NY2d 38, 44).

A client in a domestic relations matter is entitled to receive a written, itemized bill on a regular basis, at least every 60 days(22 NYCRR § 1400.2). The right to receive regular itemized bills is one of the Appellate Division rules which were "promulgated to address abuses in the practice of matrimonial law and to protect the public"(*Gross v. Gross*, 36 AD3d 318, 322). Noncompliance with the itemized billing rule will result in the attorney's being precluded from recovering unpaid legal fees(*Id*). However, noncompliance with the rule does not require an attorney to return a properly earned fee which has already been paid(*Behrins & Behrins v. Sammarco*, 305 AD2d 346).

Accordingly, defendant's motion for summary judgment dismissing plaintiff's claim for a refund of fees is granted to the extent that plaintiff's claim is based upon a failure to render itemized bills and attorney misconduct in violation of Judiciary Law § 487. However, it cannot be determined whether defendant's discharge was for cause since summary judgment has been denied as to the malpractice claim based on failure to appeal Justice Falanga's order. Furthermore, the court cannot determine from defendant's billing records whether the charges for services performed were fair and reasonable. Thus, defendant's motion for summary judgment dismissing plaintiff's claim for a refund of fees paid is denied to the extent that the claim is based upon a discharge for cause or the fees being excessive.

To establish a *prima facie* case of fraud, plaintiff must establish 1) defendant made a representation as to a material fact, 2) such representation was false, 3) defendant intended to deceive plaintiff, 4) plaintiff believed and justifiably relied upon the statement and was induced by it to engage in a certain course of conduct, and 5) as a result of such reliance plaintiff sustained pecuniary loss (*Ross v. Louise Wise Services*, 8 NY3d 478, 488). A contract which has been induced by fraud is voidable. However, to rescind the contract plaintiff must establish by clear and convincing evidence all the necessary elements of a fraud cause of action (*Almap Holdings, Inc. Bank Leumi Trust Co.*, 196 AD2d 518). Plaintiff alleges that she was induced to enter into the retainer agreement based upon defendant's fraud concerning his promise to take an appeal and his misrepresentation concerning Ansell's status. "Absent a present intention to deceive, a statement of future intentions, promises, or expectations is not actionable on the grounds of fraud. A complaint based upon a statement of future intention must allege facts to show that the defendant, at the time that the promissory representation was made, never intended to honor or act on his statement" (*Non-Linear Trading Co. v. Braddis Associates*, 243 AD2d 107, 118). Thus, plaintiff must establish not only that defendant told her that he would appeal from Justice Falanga's order but also that defendant never intended to pursue that course of action. Statements by an attorney concerning the advisability of an interlocutory appeal made at the inception of the attorney-client relationship are provisional and tentative in nature. While defendant's ultimate decision not to appeal may have been malpractice, defendant has established *prima facie* that he did not mislead plaintiff as to whether an appeal would be taken. Thus, the burden shifts to plaintiff to show a triable issue as to whether defendant committed fraud concerning his intention to pursue an appeal. Since plaintiff has not carried that burden, summary judgment is granted to defendant dismissing plaintiff's claim of fraudulent inducement based upon defendant's failure to appeal from Justice Falanga's order.

To establish a claim of fraudulent inducement, plaintiff must establish by clear and convincing evidence that she relied upon Ansell's status as an attorney in good standing when she retained the defendant. While Ansell's experience as a matrimonial lawyer may have been a "drawing card" for defendant's firm, a reasonable client retains a law firm based upon the reputation of the name partner rather than the experience of a senior associate. Moreover, the retainer agreement provided a reduced hourly rate for "law clerk" time. Thus, defendant had a clear incentive to disclose Ansell's hourly rate to plaintiff, and a reasonable client might have inquired why Ansell's services were being offered at a discount.

Since Ansell presented himself as a "suspended attorney," defendant would have been well advised to request permission from the Appellate Division before employing Ansell in any capacity (See 22 NYCRR § 691.10; § 691.11). The fact that Ansell was not in good standing may be prima facie evidence of negligence as to any non-ministerial action which he took with regard to plaintiff's representation (Cf. CPLR 4504(d) [unlicensed physician]). Moreover, defendant had a non-delegable duty to ensure that Ansell's services were performed with the ordinary reasonable skill of a licensed attorney (*Kleeman v. Rheingold*, 81 NY2d 270). Nevertheless, the court concludes, as a matter of law, that plaintiff cannot establish by clear and convincing evidence that she relied upon Ansell's status as an attorney in good standing when she retained the defendant. Accordingly, defendant's motion for summary judgment dismissing plaintiff's claim for fraudulent inducement based upon defendant's misrepresentation as to Ansell's status is granted.

The court now proceeds to plaintiff's motion for summary judgment dismissing defendant's counterclaims. In moving for summary judgment as to defendant's counterclaims for his fees, plaintiff argues that defendant committed malpractice as a matter of law, and defendant is not entitled to compensation because his discharge was justified. Plaintiff's argument is moot as to those claims of malpractice for which summary judgment has been granted to defendant. Furthermore, plaintiff's allegations as to excessive fees do not state a claim for malpractice (*Luddy v. Osborn*, 186 AD2d 1069). Thus, the court will consider only the claim of malpractice as to which defendant's motion for summary judgment has been denied, namely the failure to appeal Justice Falanga's order.

Since a judgment may be affirmed on grounds different from those relied upon by the trial court, plaintiff must make a *prima facie* showing that her claim for rescission was timely and the post-nuptial agreement was not valid and enforceable. Since plaintiff has not made this showing, she has not established that she is prima facie entitled to judgment on her malpractice claim. Thus, plaintiff's motion for summary judgment must be denied without regard to the sufficiency of defendant's opposing papers. Contrary to plaintiff's argument, despite the applicability of the domestic relations rule requiring regular itemized bills, an account may be stated as between an attorney and his client (*Liddle, O'Connor, Finkelstein & Robinson v. Koppelman*, 215 AD2d 204). Accordingly, plaintiff's motion for summary judgment dismissing defendant's counterclaims for attorney fees is denied.

Pursuant to CPLR 3016(a), in an action for libel or slander, the particular words complained of shall be set forth in the complaint. On a motion to dismiss for failure to state a cause of

action, a pleading's failure to set forth the particular words complained of may be remedied by granting leave to serve an amended pleading (*Avant Graphics, Ltd. v. United Reprographics, Inc.*, 252 AD2d 462). However, statements made during the course of a judicial or quasi-judicial proceeding are protected by an absolute privilege, as long as the statements are material and pertinent to the questions involved (*Rosenberg v. MetLife, Inc.*, 8 NY3d 359, 365). A complaint to a grievance committee, accusing an attorney of misconduct, is an absolutely privileged communication (*Wiener v. Weintraub*, 22 NY2d 330). The grievance committee functions as a quasi-judicial body, and the public interest in reporting unethical conduct on the part of attorneys warrants the extension of absolute privilege to such complaints (*Id* at 332). Thus, plaintiff's allegedly defamatory statements which were made in the course of judicial and grievance proceedings are absolutely privileged. Plaintiff's statements to Betsy Gahagan, the other client who filed a grievance, are protected by the common interest privilege (*Lieberman v. Gelstein*, 80 NY2d 429, 437). Since defendant has not established that plaintiff spoke with malice, i.e. spite or ill will, the statements to Gahagan are not actionable. Accordingly, plaintiff's motion for summary judgment dismissing defendant's counterclaim for defamation is granted.

In view of the court's rulings on summary judgment, discovery is no longer needed as to most of the areas requested by the parties, including the terms of Ansell's employment, the substance of the defamatory statements, and other grievances or charges of malpractice against defendant. From a review of the outstanding discovery requests, it appears that the only issue upon which additional discovery would be relevant is whether Ansell performed any legal research on the question of the validity of the post-nuptial agreement or the timeliness of a claim for rescission. However, because this issue is neither unusual nor unanticipated, post note of issue discovery cannot be granted (22 NYCRR § 202.21[d]). Accordingly, plaintiff and defendant's motions to compel discovery and plaintiff's motion to strike the answer are denied. Plaintiff's motion for permission to conduct additional pretrial proceedings subsequent to the filing of the note of issue is also denied. The clerk of the court is directed to forward a copy of this decision to the clerk of the Appellate Division, Second Department.

APR 30 2008

Dated: \_\_\_\_\_

**ENTERED**  
J.S.C.

MAY 05 2008

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COUNTY CLERK'S OFFICE**