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

PRESENT: HON. EILEEN BRANSTEN, Justice   PART 3

Index Number : 102262/2006

VICI VIDI VINI

vs

BUCHANAN INGERSOLL, PC

Sequence Number : 002

DISMISS ACTION

INDEX NO. 102262/06

MOTION DATE 5/1/08

MOTION SEQ. NO. 02

MOTION CAL. NO.

The following papers, numbered ... this motion to/for CPLR 324 dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED
AUG 08 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 7-29-08

HON. EILEEN BRANSTEN, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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VICI VIDI VINI, INC. and
MICHAEL STARK,

Plaintiffs,

-against-

BUCHANAN INGERSOLL, PC,
TROUTMAN SANDERS LLP,
ROBERT L. BOURGUIGNON, ESQ.
and MARTIN SHAW, ESQ.,

Defendants.

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Index No. 102262/06
Motion Date: 5-01-08
Motion Seq. Nos.:
002, 004 & 005

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BUCHANAN INGERSOLL, PC, and
ROBERT L. BOURGUIGNON, ESQ.,

Third-Party Plaintiffs,

-against-

GOLDEN APPLE ASSOCIATES LLC,
CHUT, INC., ELIZABETH HARRIS and
CHARLES HARRIS,

Third-Party Defendants.

Third-Party Index No.
590828/07

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PRESENT: EILEEN BRANSTEN, J.:

Motion sequence numbers 002, 004, and 005 are hereby consolidated for disposition.

In this action, the former corporate owner of a bar in lower Manhattan, and one of its principals, allege that their former attorney and his law firm committed legal malpractice and breached fiduciary duties in connection with their representation of the plaintiffs in negotiations with the owner of the building for a commercial lease of the bar premises with an option to purchase the entire building. In essence, plaintiffs allege that defendants improperly failed to secure the execution of a final agreement containing the purchase option and right of first refusal, preventing them from purchasing the building and leaving them with only a lease requiring the payment of above-market rent. Plaintiffs' former attorneys, in turn, have commenced a third-party action seeking contribution from the former owner of the building, two of its principals and the former lessee of the bar premises.

In motion sequence number 002, third-party defendants Golden Apple Associates LLC, Chut Inc., Elizabeth Harris and Charles Harris ("third-party defendants") move, to dismiss the Third-Party Complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, and pursuant to CPLR 3211(a)(1) based on documentary evidence. Alternatively, third-party defendants move, pursuant to CPLR 3211(f), for leave to interpose an answer.

In motion sequence number 004, defendants Buchanan Ingersoll & Rooney PC, as successor in interest to Buchanan Ingersoll, PC and Robert L. Bourguignon, Esq.

(collectively referred to as "Bourguignon"), move to dismiss plaintiffs' first and second causes of action of the Amended Complaint pursuant to CPLR 3211(a)(1) and (7).[1]

In motion sequence number 005, plaintiffs Vici Vidi Vini, Inc. ("VVV") and Michael Stark ("Stark") move, pursuant to CPLR 3025(b), for leave to serve a Second Amended Complaint to allege two new claims against Bourguignon.

Background

The Amended Complaint alleges that defendant Bourguignon was hired by plaintiff VVV to finalize negotiations for the lease of a bar (the "bar premises") located at 232-234 West Broadway, New York, New York (the "building") with an option to purchase the building from the then owner, third-party defendant Golden Apple Associates LLC ("Golden Apple"). Amended Complaint ("Complaint"), ¶ 6. The deal involved VVV leasing the bar premises for several years; at any time during the first two years of that period, plaintiffs

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[1] Plaintiffs originally sued the law firm of Troutman Sanders LLP, where defendant Bourguignon is currently employed, but dropped the firm as a defendant in the Amended Complaint filed on or about October 16, 2007. The caption will be amended to reflect this voluntary dismissal, as well as to reflect the current name of Bourguignon's prior firm -- Buchanan Ingersoll & Rooney PC. The current motions do not involve the other named defendant -- Martin Shaw, Esq. ("Shaw"). According to the Amended Complaint, he is a newly-added defendant in this action, but for some unexplained reason, Shaw is not named in the captions placed on the motion papers submitted by the plaintiffs. All counsel are directed to file papers with the correct caption in the future.

could opt to purchase the building, at a mutually-agreed price; after two years, plaintiffs would retain a right of first refusal should Golden Apple decide to sell the building; and, as consideration for the purchase option and right of first refusal, plaintiffs would pay rent in excess of the rental market value of the bar premises. Complaint, ¶ 16.

Although the original drafts combined the lease, purchase option and right of first refusal all in one document, by the February 19, 2003 closing date, plaintiffs allege that the defendants had inexplicably split the agreement into two parts, one containing the lease of the bar premises, and the other, the purchase option and right of first refusal on the sale of the building. Complaint, ¶¶ 20-22. When the parties met on February 19, 2003 to sign all the documents, plaintiff Stark on behalf of VVV signed only the lease and was advised by Bourguignon not to sign the option agreement, stating that it contained problems that Bourguignon would fix. *Id.*, ¶¶ 24-25. The lease provides for the payment of rent at $246,000 per year (or $20,500 per month) through April 30, 2005, with rent escalating over time through the end of the leasehold on April 30, 2013. Complaint, ¶ 20(a); Affidavit of Michael Stark In Opposition to Motion to Dismiss sworn to on January 25, 2008 ("Stark Aff."), Exh. 4. On Bourguignon's advice, Stark signed a personal guaranty of VVV's performance under the lease. Complaint, ¶ 27.

The next day, defendant Shaw, the attorney for Golden Apple, faxed Bourguignon a revised copy of the option agreement. The cover sheet to the fax reads: "Sorry for the delay, please call me after your review, so we can finalize." Complaint, ¶ 30. On March 4, 2003, Shaw provided Bourguignon with "two (2) originals" of the option agreement with a fully-executed six-page addendum. Stark Aff., Exh. 7. The accompanying letter stated that he was enclosing four copies of the signature page of the option agreement for Stark's signature, and requested that Bourguignon "forward two original executed copies executed by Michael Stark to his office and I will forward two (2) copies of the Agreement executed by Charles Harris." *Id.* Bourguignon had Stark sign two signature pages for the option agreement and Bourguignon, on information and belief, returned the original executed pages to Shaw. *Id.*, ¶ 33. Plaintiffs allege, however, that Golden Apple never executed or returned executed copies of the option agreement and that Bourguignon never informed plaintiffs of this oversight. *Id.*, ¶¶ 33-34. The final version of the agreement signed by Stark on behalf of VVV, which contains a footer entitled "Option Agreement and Right of First Refusal Final Draft," contained a purchase option, consisting of two one-year option periods during which VVV could purchase the building for $4.35 million, less a credit of $10,000 for each month that VVV paid rent, and a right of first refusal. Stark Aff., Exh. 8; *see also* Memorandum

of Law In Support of Defendants' Amended Motion to Dismiss the Amended Complaint dated January 11, 2008 ("Defs. Memo."), Exh. 3.

The Amended Complaint alleges that "[p]laintiffs learned of this failure only upon inquiring of Bourguignon regarding the status of the agreement. Stark first made such an inquiry of Bourguignon, and learned of the situation, several months after the February 19, 2003 partial signing of the agreement." Complaint, ¶ 35. Plaintiffs allege that "[d]ue to various factors, including but not limited to the ruinous rent term in the lease without benefit of the purchase option or right of first refusal, Plaintiffs were unable to successfully operate the Premises as a bar." *Id.*, ¶ 42. On July 14, 2004, VVV filed a petition for reorganization in the United States Bankruptcy Court for the Southern District of New York. *Id.*, ¶ 43. Plaintiffs allege that the Bankruptcy Court rejected the lease, requiring VVV to vacate the bar premises. *Id.*, ¶ 44. Plaintiffs allege that had they obtained the purchase option and right of first refusal as originally negotiated, they would have either exercised such option and purchased the building or they would have had a right of first refusal upon Golden Apple's sale of the building in June of 2005 for $5.75 million. *Id.*, ¶¶ 48-51; Stark Aff., ¶ 31.

In the Amended Complaint, plaintiffs sue Bourguignon for legal malpractice (first cause of action) and breach of fiduciary duty (second cause of action). Plaintiffs also assert claims against Shaw, alleging that, at the February 19, 2003 closing, Bourguignon and Shaw

created an oral escrow agreement, with Shaw acting as escrow agent, placing the executed documents in escrow pending the execution of the missing option agreement. Complaint, ¶¶ 7, 52. Even though the option agreement was never allegedly executed by Golden Apple, Shaw released the lease, the check for the deposit, and Stark's personal guaranty of the lease from escrow. Shaw is sued for breach of fiduciary duty (third cause of action) and breach of contract (fourth cause of action).

Bourguignon commenced a third-party action in September 2007, seeking common-law contribution against the third-party defendants alleging that they committed tortious conduct that caused or contributed to the same injuries for which plaintiffs are attempting to collect from Bourguignon.

Analysis

Amendment of the Complaint

Plaintiffs move for leave to serve and file a Second Amended Complaint to assert a new cause of action against Bourguignon for fraudulent concealment of the fact that he had failed to obtain a fully executed copy of the option agreement (proposed fifth cause of action). Plaintiffs also seek to assert a new sixth cause of action against Bourguignon for

violating Judiciary Law § 487 by allegedly deceiving and defrauding plaintiffs and this Court by wrongfully claiming that the lease and option agreement were independent agreements between VVV and Golden Apple in their pleadings, responses to plaintiffs' notice to admit and during Bourguignon's April 9, 2007 deposition, when the agreements were in fact integrated or interdependent, a fact that Bourguignon allegedly finally admitted at his August 6, 2007 deposition.

Motions to amend pleadings under CPLR 3025(b) are freely granted, absent prejudice or unfair surprise to the other side resulting from the delay or unless the new claims are "palpably insufficient as a matter of law." *Ancrum v. St. Barnabas Hosp.*, 301 A.D.2d 474, 475 (1st Dept. 2003); *see also Thompson v. Cooper*, 24 A.D.3d 203, 205 (1st Dept. 2005); *Manhattan Real Estate Equities Group LLC v. Pine Equity NY, Inc.*, 27 A.D.3d 323 (1st Dept. 2006).

An attorney's failure to disclose his or her malpractice does not give rise to an independent tort claim separate from the customary malpractice action. However, where the alleged fraud is not simply a failure to disclose the malpractice, but amounts to a subsequent and intentional material misrepresentation to the client about the legal services that were rendered, upon which the client relies to his detriment, a separate and distinct claim for fraud is stated. For example, in *Simcuski v. Saeli* (44 N.Y.2d at 451-53), a claim for intentional

fraud was stated based on allegations that a surgeon's post-operative assurances to his patient that the facial and neck numbness she was experiencing following neck surgery was transient and would disappear upon a regimen of physiotherapy, alleged to be intentionally false when made and which prevented the patient from seeking corrective surgery in a timely fashion. *See also Mitschele v. Schultz*, 36 A.D.3d 249, 254-55 (1st Dept. 2006) (fraud claim stated against accounting firm that allegedly lied to the client about accounting errors to protect the interests of another entity).

Bourguignon argues that plaintiffs fail to properly plead fraudulent concealment of the malpractice, because they fail to plead scienter by Bourguignon with the particularity required by CPLR 3016(b) and have alleged only bald, conclusory allegations of an intent to deceive that are unsupported by any of the evidence. The proposed fifth cause of action specifically alleges that Bourguignon was aware that Harris and Golden Apple had not executed the option agreement and intentionally concealed that fact from Stark for months after March 4, 2003. Plaintiffs need not prove this allegation on a CPLR 3025 motion to amend. In any event, the evidence does not refute this allegation. To the contrary, it appears that by letter dated February 24, 2003, Shaw was advised by Bourguignon to "break escrow" subject to the future receipt of a fully executed copy of the lease and option agreement. Bowles Affirm., Exh. 5. Bourguignon testified that it was his belief that, during the period

between March and September 2006, the lease was not effective because an executed copy of the option agreement had not been delivered (*id.*, Exh. 1 at p. 372), and yet Bourguignon admittedly rendered legal advice to the plaintiffs in early September 2003 regarding the lease without mentioning the lack of an executed copy of the option agreement (*id.*, Exh. 8 at BI 002284).

Finally, defendants argue that plaintiffs failed to plead and prove damages that are separate from those resulting from the alleged malpractice. Again, no proof is required on a motion to amend, however, plaintiffs must plead some damages separate and apart from the malpractice damages. *Simcuski v. Saeli*, 44 N.Y.2d at 451-53; *Harkin v. Culleton*, 156 A.D.2d 19, 25 (1st Dept. 1990); *LaBrake v. Enzien*, 167 A.D.2d 709, 711-12 (3d Dept. 1990). By reason of plaintiffs' demand for punitive damages, the fraud claim does not seek the same damages as the malpractice cause of action. *Savattere v. Subin Associates, P.C.*, 261 A.D.2d 236, 237 (1st Dept. 1999).

The motion to amend is, however, denied with respect to the proposed sixth cause of action for violation of Judiciary Law § 487 on the ground that the claim is palpably insufficient.

> "Case law makes it clear that Section 487 can only be invoked in cases of deceit or collusion by an attorney while acting in his/her capacity as an attorney." See *Northern Trust Bank of Florida/Sarasota v. Coleman*, 632 F. Supp. 648, 650 (S.D. N.Y.1986) ("Section 487 is aimed at actions by an

> attorney in his or her role as an attorney. The mere fact that a wrongdoer is an attorney is insufficient to impose liability for treble damages under section 487"); *Haber v. Kisner*, 255 A.D.2d 223, 223, 680 N.Y.S.2d 233, 234 (1998) ("The second cause of action based on Judiciary Law § 487 was properly dismissed since defendant was sued in the foreclosure action as trustee [not as an attorney], and responded in that capacity"); *216 Garage, Inc. v. Roth*, 12 Misc.2d 1081, 1082, 174 N.Y.S.2d 478, 479 (Sup.Ct., N.Y.Co., Special Term, Part III, 1958) ("Penal Law, section 273 [prior statute to Judiciary Law § 487], refers to transactions had by attorneys as attorneys. It does not purport to put an extra liability on a person sued merely because he happens to be admitted to the bar"); *Hyams v. Mehlman*, 148 A.D.2d 586, 540 N.Y.S.2d 191 (1989) ("At bar, the plaintiff was acting as the attorney for the Federal Deposit Insurance Corporation when he negotiated the escrow arrangement at issue in this case. Consequently, a violation of Judiciary Law § 487 may be asserted as a legitimate counterclaim"); *People of the State of New York v. Canale*, 240 A.D.2d 839, 841, 658 N.Y.S.2d 715, 717 (1997) (dicta) ("In these civil actions, courts have generally held that this section is limited to actions by an attorney acting in his or her capacity as an attorney and the mere fact that a wrongdoer is an attorney is insufficient to impose liability")."

In re Kovler, 253 B.R. 592, 604 (Bkrtcy. S.D.N.Y. 2000).

Here, Bourguignon answered the complaint, responded to plaintiffs' discovery demands, and Bourguignon testified at his deposition as a party, not as an attorney, rendering Judiciary Law § 487 inapplicable. The remedy for false testimony is perjury, and any inconsistent statements by Bourguignon made at his deposition can be used to discredit him at trial before a jury of his peers.

The request for sanctions, made by defendants in their papers filed in opposition to plaintiffs' motion to amend, is denied.

Punitive Damages Claim

To obtain punitive damages in a malpractice case, a claim must allege facts demonstrating that the lawyers' conduct "'was so outrageous as to evince a high degree of moral turpitude and showing such wanton dishonesty as to imply criminal indifference to civil obligations.'" *Rosenkrantz v. Steinberg*, 13 A.D.3d 88 (1st Dept. 2004), quoting *Zarin v. Reid & Priest*, 184 A.D.2d at 388; *see also Bothmer v. Schooler, Weinstein, Minsky & Lester*, 266 A.D.2d 154 (1st Dept. 1999).

Plaintiffs' motion to amend their complaint to assert a claim that Bourguignon not only committed negligence in the handling of the negotiation and execution of the lease and option agreement, but that he intentionally and knowingly concealed that failure from Stark has been granted. Thus, it would be premature to dismiss the claim for punitive damages at this time.

Legal Malpractice Against Bourguignon

Bourguignon moves for dismissal of the first cause of action pursuant to CPLR 3211(a)(1) based on documentary evidence and, pursuant to CPLR 3211(a)(7), for failure to state a claim for legal malpractice, arguing that plaintiffs were not harmed by Bourguignon's

negligence in failing to ensure that Golden Apple signed and returned both the option agreement and the addendum.

As an initial matter, plaintiffs contend that the moving defendants waived their right to make a motion under CPLR 3211(a)(1), because they answered the Complaint on March 23, 2006 and CPLR 3211(e) provides that such a motion be made at any time prior to service of the responsive pleading. However, plaintiffs filed an Amended Complaint on or about October 16, 2007, and the parties stipulated before Justice Karla Moskowitz to a briefing schedule for these motions to dismiss.

A CPLR 3211(a)(1) motion to dismiss may be granted only when the documentary evidence "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Life Ins. of New York*, 98 N.Y.2d 314, 326 (2002) (*citing Leon v. Martinez*, 84 N.Y.2d 83, 88 [1994]); *see also Arnav Indus., Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 96 N.Y.2d 300, 303 (2001). The movant may not rely on affidavits or depositions to support a motion to dismiss pursuant to CPLR 3211(a)(1). *See* Siegel, Practice Commentaries, McKinney's Cons. Law of NY, Book 7B, CPLR C3211:10; *see also Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267, 270-71 (1st Dept. 2004). Bourguignon's motion to dismiss

the legal malpractice claim is denied because the documentary evidence does not conclusively dispose of this claim.

"An action for legal malpractice requires proof of three elements: (1) that the attorney was negligent; (2) that such negligence was a proximate cause of plaintiff's losses; and (3) proof of actual damages." *Brooks v. Lewin*, 21 A.D.3d 731, 734 (1st Dept. 2005) (*citing Reibman v. Senie*, 302 A.D.2d 290 [1st Dept. 2003]). The failure to allege facts establishing proximate cause mandates the dismissal of a legal malpractice action, regardless of the attorney's negligence. *Reibman v. Rennie*, 302 A.D.2d, at 291; *see also IGEN, Inc. v. White*, 250 A.D.2d 463 (1st Dept. 1998) (dismissing legal malpractice claim because client suffered no injury as a result of defendant's failure to file for patent protection in Europe); *Senise v. Mackasek*, 227 A.D.2d 184, 185 (1st Dept. 1996) (damages sustained by plaintiff were caused by its own conduct in violating Insurance Law, and not by any legal malpractice).

Bourguignon argues that the fact that the option agreement was never fully executed ultimately had no effect on plaintiffs' rights thereunder, because the statute of frauds will not bar enforcement of an unsigned agreement where, as here, there is an executed writing relating to the same subject matter or series of transactions and the writings together contain all material terms of the transaction. Bourguignon maintains that the fully-executed addendum to the option agreement satisfies the statute of frauds due to its repeated references

to the option agreement, relying on *Crabtree v. Elizabeth Arden Sales Corp.* (305 N.Y. 48, 55 [1953]), wherein the Court of Appeals noted that this standard prevents the risks of fraud or violation of the parol evidence rule so long as the signed and unsigned writings together set forth all material terms of the transaction. *See also Suchin v. Frederick*, 30 A.D.3d 503 (2d Dept. 2006) (awarding buyer specific performance of unsigned contract of sale that was fully referable to the same transaction as a fully executed construction rider).

In this context, the Court will not hold, as a matter of law, that the "Final Draft" of the option agreement was enforceable.[2] *Kaplan v. Vincent*, 937 F. Supp. 307, 312 (S.D.N.Y. 1996) ("Under New York law, a contract is unenforceable if the parties did not intend to be bound except by a formal written agreement. This rule holds true even if the parties have orally agreed upon all terms of the proposed contract") ; *see also Schenk v. Francis*, 26 N.Y.2d 466, 469-70 (1970).

Plaintiffs clearly believed they had an enforceable option agreement. They alleged in an adversary proceeding in Bankruptcy Court that it was Bourguignon who objected to the parties signing the option agreement, as then drafted, at the February 19, 2003 closing, not Golden Apple or its counsel, defendant Shaw, and that the parties mutually agreed that Shaw

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[2]Page 2 of this document, which contains terms and conditions of both the option to purchase and right of first refusal, is missing from both copies attached to the parties' submissions, and the Bates numbers do not show a page break that would indicate merely an oversight occurred with the filed copies. *See* Stark Aff., Exh. 8; Defs. Memo., Exh. 3.

would quickly amend the option agreement and return the agreement to all parties for signature. Third-Party Plaintiffs' Response to Third-Party Defendants' Pre-Answer Motion to Dismiss Third-Party Complaint dated January 11, 2008 ("Response"), Exh. E, at ¶¶ 43-44. However, in support of his motion to dismiss the third-party complaint, defendant Charles Harris avers that: "ultimately the parties could not reach a final agreement with respect to the terms [of the option agreement], and accordingly, no agreement with respect to such rights was executed by the parties." Affidavit of Charles Harris sworn to on December 20, 2007, ¶ 12.

In *Suchin v. Frederick*, 30 A.D.3d 503, upon which the moving defendants rely, parties fully-executed a basement construction rider that specifically stated: "WHEREAS, the [seller] has entered into a Contract of Sale with the [buyers] to sell to the [buyers] a one-family residence . . ." *Id.*, at 503. The seller admitted in that case that he had intended to sign the contract of sale at the same time that he signed the basement construction rider. *Id.*, at 503-504. Here, in contrast, there is no such admission by Golden Apple, it is not clear when Charles Harris signed the addendum, and, most importantly, the signed addendum does not contain the purchase price for the option or any language acknowledging that Golden Apple has entered into the option agreement similar to the language of the construction rider in *Suchin*. In addition, Shaw's March 4, 2003 cover letter to Bourguignon also does not

establish a contractual relationship between VVV and Golden Apple. *Schenk v. Francis*, 26 N.Y.2d 466.

Finally, the issue here is not whether the option agreement was enforceable, but whether Bourguignon's undisputed failure to obtain a fully executed copy of that document caused his client any damages. Had Bourguignon obtained a signature on the final version of the option agreement, Golden Apple would never have been in a position to make the argument that no enforceable agreement existed, and Stark avers that he intended to use the purchase option as negotiating leverage to reach a resolution of the conflict with Golden Apple, or failing, resolution, to exercise the option and purchase the building.

Next, both Bourguignon and third-party defendants argue that, even if the statute of frauds was not satisfied, undisputed documentary evidences establishes that the failure of Bourguignon to obtain a fully executed copy of the option agreement did not cause his clients any damages. Because, within five months of the lease becoming effective and prior to any attempt to exercise the purchase option or right of first refusal, VVV defaulted under the lease by failing to pay the monthly rent. They argue that, pursuant to section 10(a)(iii) of the final draft of the option agreement, the option "shall terminate and be of no further force or effect upon the happening of . . . any default by Tenant under the Lease which remains

uncured for any applicable notice and/or cure period," and thus, based on VVV's own conduct there would not have been a valid option. Stark Aff., Exh. 8 at p. V01276.

The moving defendants rely on a notice of default letter sent by Golden Apple on or about October 17, 2003 in which VVV was advised that it was in default under the lease by its failure to pay $41,000 in rent plus accrued interest, and that VVV had 15 days from the date of the notice to cure its default. VVV failed to cure within the 15-day period (or at any point thereafter), and Golden Apple filed a petition in Housing Court (L&T Index No. 106118/03) seeking VVV's eviction on or about December 3, 2003. Defs. Memo., Exh. 6. The Housing Court petition alleged that VVV still owed $8,750 in rent for the month of October 2003, and had failed to pay any rent in November and December 2003. *Id.* Defendants contend that, on July 14, 2004, the Housing Court ordered VVV to post a $100,000 bond in order to stay the issuance of a warrant of eviction from the bar premises, but offer no documentary support for this factual claim. *See* Defs. Memo., at p. 7. However, it is undisputed that VVV filed for bankruptcy protection that day. Complaint, ¶ 44. After motion practice in Bankruptcy Court with Golden Apple regarding the lease, VVV elected to withdraw its motion to assume the lease, and to reject the lease effective March 14, 2005 and was ordered to vacated the bar premises on or before that date. Affirmation of Mark A. Chapman dated December 21, 2007 ("Chapman Affirm."), Exh. F.

In or about July 2005, Golden Apple's non-payment action went to trial in Housing Court. After a non-jury trial, the Court issued a written decision dated August 8, 2005, finding that, even if plaintiffs' assertions that Golden Apple had defaulted on certain obligations under the lease were true, those defaults did not excuse VVV's obligation to pay rent. Defs. Memo., Exh. 7. On August 12, 2005, judgment was entered on behalf of Golden Apple in the principal amount of $150,596.77, equaling the rent due and owing from October 2003 through July 14, 2004, less a set-off for six weeks rent due to constructive eviction. *Id.*; Chapman Affirm., Exh. C.

The documentary evidence establishes that VVV was in default of its obligations to pay rent under the lease from at least October 17, 2003, and failed to cure that default within the 15-day period specified in section 17 of the lease. Thus, pursuant to section 10(a)(iii) of the final version of the option agreement, the option and right of first refusal would have terminated and been of no further force or effect at the time Golden Apple commenced the non-payment proceeding against VVV on or about December 3, 2003, and there is no dispute that VVV made no attempt to exercise the option until February 28, 2005, when its bankruptcy counsel sent a letter to Golden Apple's counsel purporting to elect to exercise the option at that time. *See* Stark Aff., Exh. 11. It is equally clear that any right of first refusal would have terminated at least by March 14, 2005, when VVV elected in Bankruptcy Court

to reject the lease and vacate the bar premises, months before the building was sold in June of 2005.

In opposition to this argument about VVV's uncured default under the lease, Stark avers that Golden Apple never provided him with notice of termination of the purchase option, and thus the option agreement had not been terminated when VVV attempted to exercise it in February of 2005. Plaintiffs rely on section 11 of the final version of the option agreement, entitled "Default," and in particular, subsection (c), which provides, in pertinent part:

> "(c) Notwithstanding the provisions of Section 12(a) above [sic] (and Section 8(d) of the Addendum), it is understood and agreed that no action may be taken by Seller or Purchaser to terminate the Option or Right of First Refusal or exercise any of its rights and remedies hereunder which are operative upon a breach of any representation or warranty, or a failure or default in performance by the other party, unless such breach, failure or default remains uncured for thirty (30) days after written notice of such breach, failure or default from the non-defaulting party; . . ."

Stark Aff., Exh. 8 at p. V01277 (emphasis added).

The moving defendants argue that section 11 of the option agreement only applies to defaults under that document, and that it is entirely irrelevant to section 10, which sets forth the circumstances under which the option agreement terminates. That argument ignores that section 10(a), also provides that termination "shall" occur upon a default by the "Purchaser

or Tenant" "hereunder" (referring to the option agreement itself), a default under the addendum, or a default under the lease. It should also be noted that the provisions of section 11(c) purport to modify "Section 12(a) above," but there is no such preceding paragraph, and thus it is entirely unclear whether such notice was required to be given. Bourguignon argues that even if notice of a default by VVV under the lease was required pursuant to section 11(c), notice was given in October 2003 and the default remained uncured for at least 30 days thereafter. Section 10(c) of the final version of the option agreement, however, contemplates "action being taken by Seller or Purchaser to terminate the Option or Right of First Refusal" which suggests that Golden Apple may have been required to give written notice of the termination of the option agreement itself, not just written notice of the tenant's default under the terms of the lease. The October 17, 2003 default letter speaks only to a 15-day period to cure the tenant's default under the lease, and makes no mention of the termination of any other contractual agreement. *See* Defs. Memo., Exh. 4. Since the language of the final version of the option agreement is ambiguous based on the documentary evidence presented, this Court cannot conclude as a matter of law that the option agreement had been terminated as of February 28, 2005.

Additionally, in opposition to the motions to dismiss, plaintiffs submit an affidavit from Stark in which he claims that, in September or October 2003, he called Bourguignon

to discuss problems he was having with Golden Apple's management of the building and, specifically, to discuss the purchase option. Stark avers:

> "We had difficulties with Golden Apple, their management of the property, and their cooperation with VVV. By September and October of 2003, these problems were critical. Around this time I called Mr. Bourguignon to discuss the purchase option. I was considering the possibility of exercising the option to obtain control of the building, or at least using it in my negotiations with the landlord. I had assets that I could use, if necessary, to raise the money necessary to exercise the purchase option, and to the extent those moneys fell short, I had several family members willing to loan me the necessary money.
>
> "It was at this time, when I asked Mr. Bourguignon for a copy of the executed purchase option, that he first told me that we did not have a final, executed copy of the purchase option. I do not remember the date of the conversation, but it was sometime in late 2003."

Stark Aff., ¶¶ 19, 20.

Stark further avers that, in September 2003, he asked Bourguignon to help him with the situation with the landlord, and that Bourguignon wrote a letter on his behalf about the dispute. Stark Aff., ¶ 21. Stark complains that, despite his conversations with Bourguignon about the problems with Golden Apple, Bourguignon never advised him that he should keep paying rent in order to preserve the possibility of exercising the purchase option. *Id.*, ¶ 21. Stark further contends that VVV was forced into litigation in Supreme Court with Golden Apple in February of 2004 over its refusal to recognize that any purchase option existed and

its insistence that VVV was liable for the double rent under the lease, even in the absence of a purchase option. *Id.*, ¶ 23.

Stark claims that he did not, as the moving defendants maintain, lose the purchase option because he defaulted on the lease. Stark Aff., ¶ 34. Since the option was exercisable at $4.35 million and Stark claims that the building was worth $5.5 to 6.5 million, he claims: "I would never have allowed a default on the lease to destroy my extremely valuable purchase option. The most important dispute that I had with Golden Apple is that the landlord refused to admit that any purchase option actually existed, since they had never signed one." *Id.*, ¶¶ 30-31, 34.

The moving defendants argue that the court cannot consider Stark's affidavit to the extent it contradicts prior deposition testimony in assessing these motions to dismiss, citing, for example, *Weiss v. Gerard Owners Corp.* (22 A.D.3d 406 [1st Dept. 2005]). However, *Weiss* and its progeny were decided on summary judgment, in which context the court searches the record for genuine, not feigned, issues of fact. *See also Fernandez v. V.A. Realty, LLC*, 45 A.D.3d 391 (1st Dept. 2007); *Phillips v. Bronx Lebanon Hosp.*, 268 A.D.2d 318, 320 (1st Dept. 2000). Reviewing evidence, particularly deposition and trial testimony, and making factual findings and credibility determinations, is the not the proper function of

this court in determining these CPLR 3211 motions. *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d at 270-71.

The allegations of the Amended Complaint, supplemented by Stark's affidavit, both of which are accorded every favorable inference, sufficiently allege facts that show that plaintiffs may have been harmed by the failure of Bourguignon to obtain an executed copy of the option agreement from Golden Apple. When Stark first learned that the option agreement had not been executed by Golden Apple; whether that fact was concealed from Stark by Bourguignon; whether Bourguignon, whose own billing records show he had a teleconference and meeting with Stark about the "lease" as early as September 2 and 4, 2003 (*see* Affirmation of David K. Bowles In Opposition to Motion to Dismiss dated January 28, 2008 ["Bowles Affirm."], Exh. 8 at BI002284), committed malpractice by failing to advise Stark that VVV should keep paying rent in order to preserve the possibility of exercising the allegedly valuable purchase option; whether a notice of termination of the option agreement was required under the language of sections 10 and 11 of said document; and whether Stark could have raised the money to exercise the purchase option or used the threat of exercising it as a means of pressuring Golden Apple; are all questions of fact that are not conclusively resolved by the documentary evidence submitted on these motions. Therefore, the motion

by Bourguignon to dismiss the first cause of action must be denied. For the same reasons, plaintiffs' request for summary judgment in their favor on liability is denied.

Breach of Fiduciary Against Bourguignon

It is well settled that a breach of fiduciary duty cause of action that is "premised on the same facts and seeking the identical relief sought in the legal malpractice cause of action, is redundant and should be dismissed." *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d at 271; *see also Inking Pharm. Co., Inc. v. Coleman*, 305 A.D.2d 151, 152 (1st Dept. 2003); *Sonnenschine v. Giacomo*, 295 A.D.2d 287, 288 (1st Dept. 2002); *DiPlacidi v. Walsh*, 243 A.D.2d 335, 335 (1st Dept. 1997). Here, the specific factual allegations supporting the second cause of action for breach of fiduciary duty are word-for-word identical to the allegations supporting the legal malpractice claim.

Plaintiffs counter that this claim is based on Bourguignon's concealment from his clients that there was no executed version of the option agreement. An attorney's failure to disclose his or her own malpractice, however, does not give rise to an independent tort claim separate from the customary malpractice action. *Weiss v. Manfredi*, 83 N.Y.2d 974, 977 (1994); *Zarin v. Reid & Priest*, 184 A.D.2d 385, 387 (1st Dept. 1992); *see also Simcuski v. Saeli*, 44 N.Y.2d 442, 452 (1978).

Plaintiffs also contend that Bourguignon's alleged misrepresentation of the facts during this litigation gives rise to a claim of breach of fiduciary duty. However, plaintiffs fail to cite to any case holding that attorneys have continuing fiduciary duties to their former clients in the context of a malpractice action. *Cf. Eastbrook Caribe, A.V.V. v. Fresh Del Monte Produce, Inc.*, 11 A.D.3d 296, 297 (1st Dept. 2004) (fiduciary relationship ceased by the parties becoming adversaries in litigation).

For the foregoing reasons, Bourguignon's motion to dismiss the second cause of action for breach of fiduciary duty is granted. Leave to replead is denied.

Dismissal of the Third-Party Complaint

Third-party defendants seek dismissal of the third-party complaint on the ground that it lacks allegations that any of the third-party defendants owed any duty to either the plaintiffs or Bourguignon, and therefore fails to state a cause of action for common-law contribution.

In New York, a third-party claim for contribution must be predicated upon a third-party's breach of a duty owed to either the plaintiff or the defendant that had a part in causing or augmenting the injury for which contribution is sought. *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 557-58 (1992). There is a distinction between the absence of liability to an injured party, and the absence of a duty, and a defendant sued in tort may seek

contribution from a joint wrongdoer, despite the wrongdoer's own defense to the plaintiff's claim. *See, e.g., Garrett v Holiday Inns, Inc.*, 58 N.Y.2d 253, 259 (1983). In addition, the third-party defendant may be subject to liability for damages for the same injury under any theory of liability for damages that the plaintiff could have asserted against that person, but had not done so. *Raquet v. Braun*, 90 N.Y.2d 177, 183 (1997); *Comi v. Breslin & Breslin*, 257 A.D.2d 754, 756 (3d Dept 1999).

Bourguignon argues that third-party defendants' breach of duty to plaintiffs is established by VVV's February 2004 lawsuit against Golden Apple and Charles Harris (Index No. 103109/04), alleging among other things "fraudulent inducement" and "misrepresentation." Response, Exh. 1. Defendants further rely on the fact that, in the bankruptcy, VVV filed an adversary proceeding against the third-party defendants on or about September 2, 2004 in which it contended that it was fraudulently induced into signing the lease by the third-party defendants and their counsel's representations that they would enter into the option agreement after certain deficiencies in the language were corrected. Response, Exh. 2, at ¶¶ 43-49, 116-121.

Here, plaintiffs claims that Bourguignon was negligent in failing to ensure that the negotiations with Golden Apple resulted in a legally-binding lease for the bar premises and option to purchase the building, by which VVV could then recoup a portion of the allegedly

above-market rent as a credit against the purchase price of the building. Bourguignon claims that any injury that may have been caused to plaintiffs was due, at least in part, by the actions of the third-party defendants, who are alleged to have fraudulently induced VVV to enter into an above-market rent lease, and induced Stark to sign a personal guaranty of the lease, by misrepresenting that they would fully execute the option agreement, when they had no intention of doing so. Thus, although different theories are offered as to the cause of injury to the plaintiffs, it is plausible that the actions and/or omissions of Bourguignon and Golden Apple and/or its principals, together, may have contributed to the plaintiffs' alleged injuries.

The case of *Comi v. Breslin & Breslin*, 257 A.D.2d 754, is directly on point. In that case, a law firm sued for legal malpractice in connection with its representation of the buyer in the sale of a business was entitled to bring a claim for contribution against the seller of that business. There, like here, former client had alleged in prior unresolved litigation with the seller that he had been defrauded into buying the business by the seller's concealment of undisclosed liabilities.

The motion is granted, however, as to Chut, Inc. who was merely the prior owner of the business establishment that existed at the bar premises prior to execution of the lease. The claim for contribution is validly stated against Charles and Elizabeth Harris, since plaintiffs alleged in Bankruptcy Court that they both participated in the fraud (*see* Response,

Exh. 2 at ¶¶ 25, 41-44), and corporate officers may be held individually liable for fraud if they participated in or had knowledge of the fraud, even if they did not stand to gain personally. *Polonetsky v. Better Homes Depot, Inc.*, 97 N.Y.2d 46, 55 (2001).

Conclusion and Order

Accordingly, it is

ORDERED that the motion (seq. no. 002) by third-party defendants Golden Apple Associates LLC, Chut, Inc., Elizabeth Harris and Charles Harris to dismiss the third-party complaint is granted as to Chut, Inc., and is denied in all other respects; and it is further

ORDERED that third-party defendants Golden Apple Associates LLC, Elizabeth Harris and Charles Harris shall serve and file an answer to the third-party complaint within thirty (30) days of service of a copy of this order with notice of entry; and it is further

ORDERED that the motion (seq. no. 004) of defendants Robert L. Bourguignon, Esq. and Buchanan Ingersoll & Rooney, PC to dismiss the first and second causes of action of the Amended Complaint is granted as to the second cause of action, without leave to replead, and is denied in all other respects; and it is further

ORDERED that plaintiffs' motion (seq. no. 005) for leave to serve and file a Second Amended Complaint is granted with respect to the proposed fifth cause of action, and is denied in all other respects; and it is further

ORDERED that plaintiffs' request for summary judgment in their favor on liability and defendants' request for sanctions are both denied; and it is further

ORDERED that plaintiffs shall serve and file the Second Amended Complaint, in a form consistent with this decision and order, within ten (10) days of service of a copy of this order with notice of entry and defendants shall serve and file a responsive pleading within twenty (20) days from the date of said service; and it is further

ORDERED that the caption shall be amended to read as follows:

----------X
VICI VIDI VINI, INC. and
MICHAEL STARK,

Plaintiffs,

-against- Index No. 102262/06

BUCHANAN INGERSOLL & ROONEY PC,
ROBERT L. BOURGUIGNON, ESQ.
and MARTIN SHAW, ESQ.,

Defendants.
----------X
----------X
BUCHANAN INGERSOLL & ROONEY, PC, and
ROBERT L. BOURGUIGNON, ESQ.,

Third-Party Plaintiffs,

-against- Third-Party
Index No. 590828/07

GOLDEN APPLE ASSOCIATES LLC,
ELIZABETH HARRIS and CHARLES HARRIS,

Third-Party Defendants.

----------X

and it is further

ORDERED that plaintiffs shall serve and file a copy of this order on the Trial Support Office (Rm. 158M), which is directed to mark the court's records to reflect the changes in the caption and on the County Clerk.

Dated: July 29, 2008
New York, NY

ENTER:

Hon. Eileen Bransten

HON. EILEEN BRANSTEN

FILED
AUG 08 2008
COUNTY CLERK'S OFFICE
NEW YORK