| **Pu v Mitsopoulos** |
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| 2008 NY Slip Op 33158(U) |
| June 30, 2008 |
| Supreme Court, New York County |
| Docket Number: 602986/06 |
| Judge: Barbara R. Kapnick |
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SCANNED ON 7/8/2008

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

PRESENT: **BARBARA R. KAPNICK** PART 12

Index Number : 602986/2006

PU, RICHARD

vs

MITSOPOULOS, GEORGE

Sequence Number : 001

DISMISS ACTION

INDEX NO. 602986/06

MOTION DATE ______

MOTION SEQ. NO. 001

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 and cross-motions are decided in accordance with the accompanying memorandum decision.

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

FILED JUL 08 2008 COUNTY CLERK'S OFFICE NEW YORK

Dated: 6/30/08

BARBARA R. KAPNICK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2 ]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

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RICHARD PU,

Plaintiff,

-against-

GEORGE MITSOPOULOS, THEONI MITSOPOULOS, APOSTOLOS MITSOPOULOS, EFROSINI MITSOPOULOS, TITAN PHARMACEUTICALS AND NUTRITION, INC., THEONI'S PHARMACY, INC., THEODORE ALATSAS, ASHER TAUB, and ALATSAS & TAUB, P.C.,

Defendants.

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**DECISION/ORDER**
Index No. 602986/06
Motions Seq. Nos. 001, 002 and 003

FILED
JUL 08 2008
COUNTY CLERK'S OFFICE
NEW YORK

**BARBARA R. KAPNICK, J.:**

Motion Sequence No. 001, 002 and 003 are consolidated for disposition.

In this action, plaintiff Richard Pu ("Pu") seeks to recover $178,315.44 for legal services rendered in connection with a franchise agreement dispute.[1]

Background

Defendant Titan Pharmaceuticals and Nutrition, Inc. ("Titan") is a retail pharmacy which is owned in whole or in part by defendant George Mitsopoulos, a pharmacist.

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[1] Plaintiff is appearing herein pro se, but is represented by counsel with respect to the counterclaims asserted against him.

Defendant Theoni's Pharmacy, Inc. ("Theoni's Pharmacy") is another retail pharmacy which is owned in whole or in part by George Mitsopoulos' wife, defendant Theoni Mitsopoulos, a nurse, and which operates under the name "First Health Pharmacy".

Defendants Theodore Alatsas, Esq. and Asher Taub, Esq. are partners in the law firm of Alatsas & Taub (collectively, the "attorney defendants"). In or about the fall of 1996, Mr. Alatsas, a friend of George Mitsopoulos, allegedly reviewed a prospectus, i.e., the Uniform Franchise Offering Circular ["UFOC"] from Medicine Shoppe International, Inc. ("MSI"), a franchiser of retail pharmacies, on behalf of George Mitsopoulos. Titan thereafter entered into a franchise agreement with MSI (the "franchise agreement"), although plaintiff claims that it was readily apparent that MSI's representations regarding expected revenues were misleading and should have been discovered by George Mitsopoulos and/or Alatsas.

In or about October 1997, Titan borrowed $100,000.00 from MSI. George Mitsopoulos' father and mother, defendants Apostolos Mitsopoulos and Efrosini Mitsopoulos, respectively, guaranteed

repayment of the loan, as well as Titan's obligations to pay royalties, and gave MSI a $100,000.00 mortgage on their home.[2]

There is no dispute that by June 30, 2004, Titan fell behind on its payment of the royalties by about $230,000.00, as well as repayment of the loan. On or about December 1, 2004, MSI commenced an action against Apostolos and Efrosini Mitsopoulos in the Federal District Court, Eastern District of New York based on their guarantee. On or about December 15, 2004, Titan, George, Apostolos and Efrosini Mitsopoulos retained plaintiff to represent them.

On or about March 11, 2005, MSI commenced an arbitration proceeding against Titan and George Mitsopoulos in St. Louis pursuant to the broad arbitration clause contained in the franchise agreement. Plaintiff claims that he and George Mitsopoulos agreed on a strategy to seek to bring counterclaims asserted in the Eastern District action by Apostolos Mitsopoulos and Efrosini Mitsopoulos against MSI for stress-related injuries to trial before MSI could obtain and confirm an arbitration award.

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[2] Defendants George Mitsopoulos, Theoni Mitsopoulos, Apostolos Mitsopoulos, Efrosini Mitsopoulos, Titan and Theoni's Pharmacy shall collectively be referred to hereinafter as the "Mitsopoulos defendants".

Plaintiff, thereafter, engaged in extensive motion practice to stay the arbitration in several forums, including the Supreme Court, New York County and the Federal District Court for the Southern District of New York where plaintiff apparently commenced duplicative law suits. Plaintiff also pursued an appeal in the Second Circuit Court of Appeals.

All these efforts were unsuccessful and the arbitration was thereafter held for four days, from May 15 through 18, 2006. George Mitsopoulos allegedly realized that "things had gone very badly".

George Mitsopoulos sent an e-mail to Pu on June 5, 2006 stating,

> richard, it appears that your attitude has radically changed. i haven't cast blame on you or anyone and yes i could have caved in at anytime, but do not forget that a lot of promises have been made. you promised the class action would scare the pants off of them. you promised you could get the statute of limitations to stick, thus causing the amount of debt to remain about $200,000.00. you assured me many times that the ny case would reach before arbitration and then told me it typically takes 3 years for a court case to reach trial and that was just 2 weeks prior to arbitration. so though i did not stop your actions at any time, i believed in you and still do. I told you many times we should stop and you said, no it doesn't make sense to stop now. the May check has been sent and you will get June sometime this month. But you are probably aware that after the decision of the arbitrator I may not have any means to continue paying you at that rate.

Plaintiff sent an e-mail in response on the same day stating,

> I didn't make any of those promises. All of those scenarios were objectives, not promises. But given your feeling, I'm going to withdraw.

On or about June 6, 2006, Taub began settlement negotiations with MSI on behalf of Titan and George Mitsopoulos.

After numerous requests for a stay of Arbitration were denied, the arbitrator, Jay L. Kanzler, Jr., issued an Arbitration Award entered on July 5, 2006 in favor of MSI and against Titan and George Mitsopoulos, jointly and severally, in the amount $919,434.64, together with 50% of the costs of the arbitration.

George Mitsopoulos claims to have directed plaintiff on or about July 13, 2006 to stop doing any work on the case. Titan and George Mitsopoulos reached a settlement with MSI on or about July 24, 2006, which allowed George Mitsopoulos to retain ownership of his pharmacy.

The Settlement Agreement also provided that if the Mitsopoulos defendants "receive any recovery from Richard Pu relating to his representation of [them], they shall immediately remit 50% of such recovery to MSI, and ... execute all documents necessary to secure MSI's rights to such recovery."

[* 7]

Plaintiff contends that the agreement reflected a wholesale capitulation by Taub without obtaining any benefit from George Mitsopoulos' primary source of leverage, i.e., his parents' counterclaims. He further contends that defendants could have opposed the confirmation of the arbitration award by arguing that the arbitrator was biased because he was dependent on MSI for future work.

George Mitsopoulos, Apostolos Mitsopoulos and Efrosini Mitsopoulos each submitted an affidavit sworn to on July 27, 2006 in the Eastern District lawsuit indicating that through George they had instructed Pu to sign a stipulation of dismissal, but that he had refused to do so, and that they, therefore, had "no choice" but to dismiss him as their attorney and to substitute Taub as their "new counsel for the purposes of dismissing [that] lawsuit and settling [that] action."

To effectuate the settlement, defendants Apostolos and Efrosini Mitsopoulos took out a mortgage on their home for $600,000.00 in or about March 2007. Plaintiff contends that the settlement thus resulted in Apostolos and Efrosini Mitsopoulos "sacrificing" their retirement home to pay George's debts. Plaintiff, however, also alleges that "[b]ecause the Parents were retired on miniscule pensions, the Son must have shouldered the burden of paying the mortgages."

George Mitsopoulos acknowledges that he obligated himself to make the monthly mortgage payment and claims to have continuously met this obligation. The Mitsopoulos defendants contend that Apostolos and Efrosini Mitsopoulos agreed to this arrangement out of love for their son and to enable him to keep his pharmacy and maintain a standard of living that they had worked for and imagined for him since he was born.

Although there is no dispute in this action that plaintiff received payments from the Mitsopoulos defendants for legal fees in the total sum of $82,000.00, plaintiff claims that he is still owed substantial fees.[3]

Plaintiff also claims that on or about March 1, 2005, defendants George and Theoni Mitsopoulos engaged in a fraudulent conveyance in an attempt to defraud their creditors and, specifically, plaintiff, by transferring the deed to their home solely into Theoni Mitsopoulos' name.

Plaintiff further claims that defendant Alatsas prepared the deed even though both Alatsas and George Mitsopoulos knew that the Mitsopoulos defendants and Titan, by reason of their franchise agreement and guaranties, were about to incur debts that they could not pay.

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[3] It appears that the amount of fees charged by plaintiff exceeds the amount initially sought by MSI.

Plaintiff claims that George Mitsopoulos committed another fraudulent conveyance by transferring cash beginning in mid-2006, from Titan to Theoni's Pharmacy.

Defendants deny that any of the alleged transfers constituted a fraudulent conveyance.

In addition, the Mitsopoulos defendants contend that plaintiff failed to notify them that he was suspended from the practice of law in the Southern District of New York for a period of six months pursuant to Stipulation and Order, so-ordered by the Hon. Jed S. Rakoff, United States District Court Judge and Chair of the Grievance Committee on May 31, 2006, while the appeal to the Second Circuit was pending.[4]

Defendants claim that plaintiff wrongfully billed them for work he did on the appeal in June 2006 while he was already suspended from the practice of law.

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[4] In the Stipulation and Order, plaintiff acknowledged that he advanced a factual theory which he had reason to know was not true, and that he made a false representation to a Magistrate Judge in an unrelated matter. A copy of the Stipulation and Order was allegedly forwarded by MSI to the arbitrator prior to the issuance of his determination.

Based on his suspension in the Southern District, Pu was suspended from the practice of law in the State of New York for a period of one year, effective January 12, 2007 and until further order of the Appellate Division, First Department (37 A.D.3d 56 [1st Dep't 2006], *app dism'd* 8 NY3d 877 [2007]).

Plaintiff initially commenced this action solely against the Mitsopoulos defendants. The Complaint set forth causes of action for: (i) breach of the retainer agreement based on the Mitsopoulos defendants' alleged failure to pay Pu for the services he performed (first cause of action); (ii) an account stated in the amount of $178,315.44 (second cause of action); (iii) the reasonable value of Pu's services (third cause of action); (iv) fraudulent conveyances in violation of the Debtor and Creditor Law (fourth cause of action); and (v) an injunction reversing the alleged fraudulent conveyances (fifth cause of action).

Plaintiff thereafter sent an e-mail dated September 15, 2006 to Mr. Taub, stating as follows:

> I enclose a copy of my complaint, which is being served now. Please note that I have not named you, Alatsis or your firm as defendants. If the answer contains counterclaims, I will amend my complaint to add you and your affiliates as defendants.
>
> The Mitsopouloses benefit from not asserting counterclaims. 1) Asserting counterclaims will increase their cost of defense, at a time when they are strapped for cash. 2) Asserting counterclaims will increase my attorneys fees, which I am entitled to recover under the retainer agreement. The parents' home is worth about $400,000. A sale of the parents' home will pay for MSI's $100,000 mortgage, my fees (and attorneys fees) of roughly $200,000, and leave the parents' with $100,000 to start them towards a new home. If I expend $100,000 of time defending against the counterclaims - - and, I probably will - - a sale will leave the parents with nothing. 3) A counterclaim will not survive a motion to dismiss or a motion for summary judgment. I have e-mails showing that George Mitsopoulos approved of everything I did. 4) If you are added as a defendant, you will have a conflict of interest that will disqualify you as the

> attorney for the Mitsopouloses. I intend, at an early juncture, to move to disqualify your firm.

Alatsas & Taub reported what they perceived as improper threats by Pu to the Disciplinary Committee.

The firm thereafter filed on behalf of the Mitsopoulos defendants a Verified Answer with Counterclaim[s] in the instant action alleging that: (i) plaintiff engaged in frivolous and/or self-serving motion practice, delay tactics, telephone calls, appearances and showmanship in order to increase his fee and said additional fees amount to the sum of $120,000.00 (first counterclaim); (ii) plaintiff fraudulently billed defendants in the amount of $100,000.00 (second counterclaim); (iii) plaintiff engaged in legal representation after he had been discharged by the defendants, said fees amounting to $10,000.00 (third counterclaim); (iv) plaintiff coerced the defendants to continue with the litigation despite their express wishes to end the litigation, said bills amounting to $200,000.00 (fourth counterclaim); (v) plaintiff negligently and/or recklessly represented the defendants in the underlying proceeding causing monetary harm to the defendant George Mitsopoulos in the amount of $5,000,000.00 (fifth counterclaim).

Plaintiff thereafter filed his First Amended Complaint in which he named Theodore Alatsas, Asher Taub and Alatsas & Taub, P.C. as additional party defendants, and set forth the following causes of action: (i) breach of the retainer agreement (first cause

of action); (ii) an account stated (second cause of action); (iii) the reasonable value of Pu's services (third cause of action); (iv) breach of the covenant of good faith, an implied term of the retainer agreement (fourth cause of action); (v) fraudulent conveyances in violation of the Debtor Creditor Law (fifth cause of action); (vi) tortious interference by defendants (other than defendants Apostolos and Efrosini Mitsopoulos) with the retainer agreement, including breach of the covenant of good faith, and interference with Pu's prospective economic advantage (sixth cause of action); (vii) fraud arising out of (a) the preparation by the attorney defendants of a deed on March 1, 2005 whereby George and Theoni Mitsopoulos transferred their residence to Theoni Mitsopoulos only, (b) the creation of Theoni's Pharmacy on April 19, 2005, (c) the alleged transfer of cash from Titan to Theoni's Pharmacy, (d) the alleged diversion of business from Titan to Theoni's Pharmacy, (e) the recording of the March 1, 2005 deed on or about September 2, 2005, and (f) the filing by the attorney defendants of a document stating that Theoni Mitsopoulos had paid $262,500.00 to herself and to George Mitsopoulos (seventh cause of action); and (viii) an injunction reversing the alleged fraudulent conveyances (eighth cause of action).

Alatsas & Taub, on behalf of the Mitsopoulos defendants, filed a Verified Answer to Amended Complaint with Counterclaim dated November 3, 2006 in which they reasserted their five counterclaims as well as a sixth counterclaim alleging that plaintiff breached

the attorney-client privilege and thereby is subject to punitive damages in the amount of $1,000,000.

Motions and Cross-Motions

Plaintiff now moves (under motion sequence number 001) for an order:

(1) dismissing defendants' counterclaims pursuant to CPLR § 3211(a)(7) for failure to state a claim, pursuant to CPLR § 3211(a)(1) based on documentary evidence, and pursuant to CPLR § 3016(b) for failure to plead details of the alleged fraud; and

(2) disqualifying Alatsas & Taub from representing the Mitsopoulos defendants pursuant to the Court's inherent powers and section 5-101 of the Code of Professional Responsibility on the ground that their own interests conflict with those of the Mitsopoulos defendants.

The attorney defendants, who are represented by separate counsel but are continuing to appear on behalf of the Mitsopoulos defendants, oppose the motion and cross-move for an order:

(1) pursuant to CPLR § 3211(a)(7) and (a)(1) dismissing each of the causes of action in the First Amended Complaint asserted against them for failure to state a cause of action and based upon documentary evidence; and

(2) pursuant to 22 N.Y.C.R.R. § 130-1.1, *et seq.*, imposing sanctions upon plaintiff for submitting material factual statements

and evidence that are false to the Court on this motion consisting of a purported August 3, 2006 communication to Asher Taub attached to the Appendix to Pu's motion at page 188, which is referred to and repeated on page 12 of Pu's brief, in violation of 22 N.Y.C.R.R. § 130-1.1(c)(3).[5]

The Mitsopoulos defendants cross-move for an order:

(1) dismissing the Complaint against Apostolos Mitsopoulos, Efrosini Mitsopoulos, Theoni Mitsopoulos and Theoni's Pharmacy; and

(2) dismissing the cause of action for punitive damages against all the defendants.

Plaintiff also moves (under motion sequence number 002) for an order pursuant to CPLR § 3025 granting him leave to file a Second Amended Complaint in order to: (i) add claims to void two mortgage loans made by JPMorgan Chase on or about March 23, 2007 to Apostolos and Efrosini Mitsopoulos on the ground that they constitute fraudulent conveyances in violation of Debtor and Creditor Law §§ 272, 273 and 276; (ii) name JPMorgan Chase as an additional party defendant; and (iii) revise the seventh cause of action to explicitly allege that certain defendants aided and abetted the fraud of others.

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[5] The purported communication to Mr. Taub states, "Please tell the Mitsopouloses that I propose to settle my claims against them by Asher & Taub and its principals paying my indebtedness." The attorneys contend that this document is forged in a desperate attempt to contrive a fraudulent basis to claim that a conflict exists between the Mitsopoulos Defendants and the Alatsas and Taub Defendants, and deny that it was ever conveyed to Taub.

The Mitsopoulos defendants oppose the motion and cross-move a second time for an order dismissing this action and imposing sanctions and costs.

Finally, plaintiff moves by Order to Show Cause (under motion sequence number 003) for an order:

(1) granting an order of attachment pursuant to CPLR § 6201 against the property of the Mitsopoulos defendants and any interest of said defendants in personal property situated in the State of New York; and

(2) appointing a receiver pursuant to CPLR § 6401 for Titan and Theoni's Pharmacy.

Discussion

*Motion Sequence Number 001*
*Defendants' Counterclaims*

Plaintiff moves to dismiss the Mitsopoulos defendants' counterclaims on the grounds, inter alia, that: (i) the counterclaims asserted on behalf of Theoni Mitsopoulos and Theoni's Pharmacy must be dismissed since said defendants were never his clients; (ii) defendants' counterclaims fail to state a claim against him for legal malpractice because defendants have not pleaded specific factual allegations establishing that 'but for' plaintiff's alleged negligence, there would have been a more

favorable outcome in the underlying matter;[6] (iii) the second counterclaim must be dismissed because it fails to specifically identify the items which were allegedly fraudulently billed and/or to set forth any evidence of scienter; (iv) the first four counterclaims must be dismissed because defendants have not alleged actual loss; (vi) the fifth counterclaim must be dismissed because defendants have not alleged with specificity the purported 'monetary harm'; and (vii) the sixth counterclaim must be dismissed because it seeks punitive damages only and does not allege any loss sustained by defendants.

The Mitsopoulos defendants argue that that portion of plaintiff's motion seeking to dismiss their counterclaims is moot, since defendants served a First Amended Verified Answer with counterclaims upon the plaintiff on December 14, 2006, which contains only two counterclaims. In the first counterclaim, defendants George Mitsopoulos and Titan only allege that plaintiff "negligently and/or recklessly represented the defendants in the underlying action upon which this suit is based" and "represented the defendants in the underlying action upon which this suit is based for the sole purpose of enriching himself." Said defendants further allege that "[p]laintiff's conduct fell below the ordinary and reasonable skill and knowledge commonly possessed by a member of the profession" and "departed from the standards commonly

[6] In addition, plaintiff contends that the circumstances of the settlement of the Eastern District action demonstrate that the outcome was determined by Taub, and not by plaintiff.

exercised by legal practitioners in the community"; that "[p]laintiff had no reasonable belief that the defendants would prevail in the underlying action" and "knew that he would not prevail in the underlying action" but, nonetheless, chose to litigate the matter to generate fees, thus resulting in the adverse award.

In the second counterclaim (which is labeled the "seventh" counterclaim) asserted on behalf of all the Mitsopoulos defendants, they allege that "[p]laintiff breached the attorney client privilege and thereby is subject to punitive damages in the amount of ONE MILLION DOLLARS."

Plaintiff argues that the First Amended Verified Answer should be considered a nullity because defendants' time to amend their Answer as of right pursuant to CPLR § 3025(a) had already expired, and defendants were never granted leave of Court to amend their Answer pursuant to CPLR § 3025(b).

However, leave to amend is "freely given upon such terms as may be just". CPLR § 3025(b). Accordingly, defendants are granted leave _nunc pro tunc_ to amend their Answer to discontinue certain of the counterclaims and to reallege the two counterclaims.

[* 18 ]

Alternatively, plaintiff argues that defendants' first counterclaim must be dismissed for failure to state the necessary elements of a claim for legal malpractice.

> "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" (citation omitted). To establish proximate cause, "a plaintiff must demonstrate that but for the attorney's negligence, she would have prevailed in the underlying matter or would not have sustained any ascertainable damages" (citation omitted).

*LaRusso v Katz*, 30 AD3d 240, 243 (1st Dep't 2006).

Plaintiff contends that the first counterclaim fails to allege facts showing that the course of action he undertook in defense of the underlying litigation was hopeless. *See Iocovello v Weingrad & Weingrad*, 4 AD3d 208 (1st Dep't 2004), which held that "[a]ttorneys are free to select among reasonable courses of action in prosecuting clients' cases without thereby exposing themselves to liability for malpractice (citation omitted)."

In addition, plaintiff argues that the first counterclaim fails to allege specific facts showing that 'but for' Pu's alleged deficient representation, there would have been a more favorable outcome in the underlying litigation and fails to allege that

defendants sustained damages. *See Dweck Law Firm v Mann*, 283 AD2d 292 (1st Dep't 2001).

However, defendants have not merely alleged that plaintiff selected a course of action which proved to be unsuccessful, but claim that plaintiff selected a course of action which he knew to be unreasonable (i.e., one which plaintiff knew would not prevail) and that he continued to pursue that course of action for the sole purpose of generating fees.

Therefore, this Court finds that defendants have met their requirement at this early stage of the litigation of stating a claim for legal malpractice against the plaintiff. Accordingly, that portion of the motion seeking to dismiss the first counterclaim is denied.

Plaintiff next argues that the seventh counterclaim must be dismissed because it seeks punitive damages only. It is well settled that "no separate cause of action exists for punitive damages which are but an incident of damages (citation omitted)." *Edison v Viva Intern., Ltd.*, 70 AD2d 379, 386 (1st Dep't 1979). Moreover, "punitive damages are not properly requested to redress a private wrong." *Id.* Therefore, that branch of plaintiff's motion seeking to dismiss the seventh counterclaim is granted.

*Motion to Disqualify*

Plaintiff next argues that Alatsas & Taub must be disqualified due to a conflict of interest.

Section 5-101 of the Code of Professional Responsibility (22 NYCRR § 1200.20) provides as follows:

> A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest.

Plaintiff contends that Alatsas & Taub's professional judgment on behalf of its clients may be adversely affected because Titan, George Mitsopoulos, Apostolos Mitsopoulos and Efrosini Mitsopoulos have a potential malpractice claim against Alatsas & Taub based on Alatsas' review of the UFOC and his failure to discover the fraud allegedly committed by MSI.

In addition, plaintiff contends that the Mitsopoulos defendants have an interest in assigning responsibility for the alleged fraudulent conveyances to the attorney defendants who are currently representing them, as well as an interest to accept Pu's

purported offer to settle this action by having the attorney defendants pay his claim.

Plaintiff further speculates that Apostolos and Efrosini Mitsopoulos did not know what they were agreeing to when they financed the settlement with MSI, and suggests that they may have not appreciated the risks of the dual representation, i.e., being represented by an attorney who was also representing their son, rather than by independent counsel. *See LaRusso v Katz, supra;* DR 5-105.

Alatsas & Taub, on the other hand, contend that they assisted the Mitsopoulos defendants in effecting a reasonable settlement and in extricating themselves from an "unseemly" litigation with MSI.[7]

Plaintiff alternatively argues that Alatsas & Taub must be disqualified because Taub is a fact witness. According to plaintiff, Taub's legal advice, decisions and litigation tactics are central issues to this case.

However,

> [t]he advocate-witness rule requires an attorney to withdraw from a case "if the lawyer knows or it is

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[7] In addition, Alatsas & Taub note that any claims sounding in legal malpractice would, in any event, be barred by the applicable three-year statute of limitations. See, CPLR § 214.

> obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client" (Code of Professional Responsibility DR 5-102[a] [22 NYCRR 1200.21(a)]). "But such disqualification is required only where the testimony by the attorney is considered necessary." (citations omitted). "Testimony may be relevant and even highly useful but still not necessary. A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence" (*S&S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d [437] at 446 [1987]).

*Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 74-75 (1st Dep't 2002).

Based on the papers submitted and the oral argument held on the record, this Court finds that plaintiff has failed to establish that there were or are conflicting interests between the parents and their son and/or between the Mitsopoulos defendants and their counsel. This Court further finds that plaintiff has not established that the testimony of either Alatsas or Taub is necessary in this case. Therefore, that portion of plaintiff's motion seeking an order of disqualification is denied.

*Plaintiff's Claims Against the Attorney Defendants*

The First Amended Complaint alleges five claims against the attorney defendants; namely, the fourth, fifth, sixth, seventh and eighth causes of action.

Plaintiff's fourth cause of action, which alleges that the Mitsopoulos defendants breached the covenant of good faith implied

in the retainer agreement, is dismissed against the attorney defendants for failure to state a cause of action since said defendants were never parties to the retainer agreement.

The attorney defendants next argue that: (i) the fifth cause of action based on an alleged fraudulent conveyance arising out of George Mitsopoulos' transfer of his share in his home to his wife, Theoni Mitsopoulos, on or about March 1, 2005 and the incorporation of Theoni's Pharmacy must also be dismissed against them since they are neither transferees nor beneficiaries of the conveyance; and (ii) the seventh cause of action to the extent that it seeks to assert a fraudulent conveyance claim against them must be dismissed because they are alleged to have acted solely as counsel in connection with the transfer of property.

Plaintiff argues that the attorney defendants may be held liable on the ground that they participated in the alleged fraudulent transfers (*see Stochastic Decisions Inc. v DiDomenico*, 995 F2d 1158 [2nd Cir. 1993]) and/or aided and abetted the fraud (*see Pension Committee of the University of Montreal Pension Plan v Banc of America Securities, LLC*, 446 FSupp2d 163 [SDNY 2006]).

Plaintiff contends that the attorney defendants prepared and filed documents on behalf of the other defendants in connection

with the transfer of George Mitsopoulos' residence and the incorporation of Theoni's Pharmacy.

However, the attorney defendants argue that even assuming the law firm provided the legal services to incorporate Theoni's Pharmacy, that claim is not actionable since Theoni Mitsopoulos had the right to incorporate and conduct a pharmacy business.

Moreover, the Court of Appeals has held that the relevant sections of the Debtor and Creditor Law do not, "either explicitly or implicitly, create a creditor's remedy for money damages against parties who, like [the attorney] defendants here, were neither transferees of the assets nor beneficiaries of the conveyance." *Federal Deposit Ins. Corp. v Porco*, 75 NY2d 840, 842 (1990). *See also Cahen-Vorburger v Vorburger*, 41 AD3d 281 (1st Dep't 2007); *Blakeslee v Rabinor*, 182 AD2d 390 (1st Dep't 1992).

Thus, this Court finds that said claims must be dismissed against the attorney defendants. *See Gallant v Kanterman*, 198 AD2d 76 (1st Dep't 1993).

To the extent that the seventh cause of action seeks to assert a separate claim under the common law for fraud, this Court finds said claim must also be dismissed against the attorney defendants

on the grounds that plaintiff has failed to allege any material misrepresentations which were made to Pu upon which he relied to his detriment, and said claim is "merely duplicative of the insufficient fraudulent conveyance causes of action" asserted against them. *Cahen-Vorburger v Vorburger*, *supra* at 282.

The attorney defendants next argue that the sixth cause of action, which alleges tortious interference with the retainer agreement and interference with Pu's prospective economic advantage must likewise be dismissed since the Mitsopoulos defendants had an absolute right to terminate the agreement at any time and to discharge Pu as their counsel with or without cause. *See Demov, Morris, Levin & Shein v Glantz*, 53 NY2d 553 (1981). They further contend that there is no basis to give a right of action to plaintiff, a third party, based on any legal advice that they may or may not have rendered to their client. *See Beatie v DeLong*, 164 AD2d 104 (1st Dep't 1990).

In addition, the attorney defendants contend that there was no basis for Pu to perpetuate the litigation and that it was entirely proper for the Mitsopoulos defendants to terminate Pu's representation in order to permit them to effect a settlement.

Although plaintiff argues in opposition that the attorney defendants tortiously interfered with his contract with the Mitsopoulos defendants by 'inducing' them to withhold payment from Pu, plaintiff has not alleged any facts beyond speculation in support of this claim.

Accordingly, that portion of the attorney defendants' cross-motion seeking to dismiss the sixth cause of action against them is granted.[8]

The attorney defendants next argue that the eighth cause of action for injunctive relief reversing the conveyances made by the Mitsopoulos defendants must be dismissed against them since none of the property is alleged to have been transferred to Alatsas & Taub.

In the absence of any allegation that the attorney defendants were or are in possession of any such property, the eighth cause of action against them is also dismissed.[9]

That portion of the attorney defendants' cross-motion seeking to impose sanctions against plaintiff for submitting material factual statements and evidence that they claim are false is denied

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[8] The sixth cause of action is also dismissed to the extent that it is asserted against some of the Mitsopoulos defendants since, as stated above, said defendants had a right to terminate Pu's representation at any time and for any reason.

[9] Moreover, as discussed *infra*, this Court rejects plaintiff's position that the alleged transfers constitute fraudulent conveyances in violation of the Debtor and Creditor Law.

at this time, pending discovery on the authenticity of the allegedly fraudulent document.

*Plaintiff's Claims Against the Mitsopoulos Defendants*

The Mitsopoulos defendants argue that plaintiff's claims against Theoni Mitsopoulos and Theoni's Pharmacy, Inc., - i.e., the causes of action alleging fraudulent conveyances - must be dismissed.

Pursuant to Debtor and Creditor Law § 273. Conveyances by insolvent:

> [e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

Pursuant to Debtor and Creditor Law § 276. Conveyance made with intent to defraud:

> [e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

There is no dispute that George and Theoni Mitsopoulos owned the house in question as tenants by the entirety. Defendants argue that there was, therefore, nothing illegal about George Mitsopoulos transferring his share to his wife, and that plaintiff has made no

showing that said transfer was done with intent to defraud either present or future creditors.[10]

Defendants further argue that there is no support for plaintiff's theory that the opening of Theoni's Pharmacy constituted fraud or any other illegal conduct.

Plaintiff contends that the transfer of the house was done for inadequate consideration and with the intent to defraud him. He further contends that Theoni's Pharmacy was created to conceal George Mitsopoulos' assets to avoid paying his legal fees.

However, the Mitsopoulos defendants contend that at the time the residence was conveyed from George Mitsopoulos to Theoni Mitsopoulos on March 1, 2005, Pu was not a creditor at risk since plaintiff's statement to George Mitsopoulos dated April 2, 2005 was for a balance of only $4,571.25. Likewise, the Mitsopoulos defendants contend that plaintiff was seeking a relatively small balance at the time of the incorporation and opening of the new pharmacy.

Moreover, plaintiff has not alleged any facts showing that George Mitsopoulos was rendered insolvent as a result of these

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[10] Defendants further claim that before George Mitsopoulos transferred his share in the house to his wife, he discussed it with Mr. Pu, although Pu now denies that he knew about the transfer of the house.

conveyances as required pursuant to Debtor & Creditor Law § 273 and/or with the intent to defraud him, as required pursuant to Debtor and Creditor Law § 276.

Accordingly, that portion of the cross-motion seeking to dismiss plaintiff's Complaint against defendants Theoni Mitsopoulos and Theoni's Pharmacy is granted.

The Mitsopoulos defendants next argue that the Complaint should be dismissed against defendants Apostolos Mitsopoulos and Efrosini Mitsopoulos on the ground that the over $80,000.00 in fees which he received was more than enough to cover the simple motion which they claim should have been made by Pu in the context of the federal litigation. They contend that all Pu needed to do was to move to dismiss MSI's action for lack of standing pursuant to CPLR § 1312 on the ground that MSI was a foreign corporation doing business in New York without authority.

Plaintiff, on the other hand, contends that such a motion would have lacked merit, because MSI was not a foreign corporation 'doing business' in New York. In addition, plaintiff argues that even if said section applied to MSI, MSI could have readily cured the delinquency and resumed the litigation.

This branch of the motion to dismiss is denied as premature.

That portion of the motion seeking to dismiss plaintiff's claim for punitive damages is granted since plaintiff has failed to "demonstrate egregious tortious conduct by which he ... was aggrieved, [and] also that such conduct was part of a pattern of similar conduct directed at the public generally." *See Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603, 613 (1994).

*Motion Sequence Number 002*

Plaintiff seeks to amend the Complaint to allege a fraudulent conveyance based on a mortgage note in the amount of $420,000.00 signed by Apostolos and Efrosini Mitsopoulos on March 8, 2007 and a home equity line of credit which were collateralized by Apostolos and Efrosini Mitsopoulos' retirement home, on the ground that these mortgages removed the only asset available to satisfy a judgment in his favor and, thus, constitute fraudulent conveyances within the meaning of the Debtor and Creditor Law.

Plaintiff also seeks leave to name the lender, JPMorgan Chase, as an additional party defendant.

Defendants deny that any fraud was committed by George Mitsopoulos' parents mortgaging of their home for the sole purpose of paying off the debt to MSI. They further argue that sanctions are warranted on the ground that this motion was premature because plaintiff is moving herein to assert additional claims based on the actions of the defendants who are already the subject of the earlier cross-motion to dismiss.

The motion for leave to amend is denied, as this Court finds that plaintiff has failed to allege sufficient facts showing that the taking of the mortgages constitutes a fraudulent conveyance.[11]

The cross-motion to dismiss plaintiff's Complaint is granted to the extent set forth above. Defendants' request for sanctions is denied, in the discretion of the Court, with leave to renew at the conclusion of this action.

*Motion Sequence No. 003*

Finally, plaintiff moves by Order to Show Cause for an order: (i) granting an order of attachment pursuant to CPLR § 6201 against the property of the Mitsopoulos defendants and any interest of said defendants in personal property situated in the State of New York; and (ii) pursuant to CPLR § 6401 appointing a receiver for the two pharmacy defendants on the grounds that plaintiff is entitled to recover a sum over and above all counterclaims and that it is probable that plaintiff will succeed on the merits.

Pursuant to CPLR § 6201,

> [a]n order of attachment may be granted in any action,... where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:
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> ***

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[11] That portion of the motion seeking leave to further allege that the attorney defendants 'aided and abetted' the purported fraud of the Mitsopoulos defendants is denied for all the reasons discussed above.

> 3. the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the State or is about to do any of these acts; . . .

Plaintiff has failed to establish the existence of such circumstances in this case. Nor has plaintiff, an unsecured creditor, established a basis for the appointment of a receiver pursuant to CPLR § 6401(a), i.e., that there is danger that property in which plaintiff has an apparent interest "will be removed from the state, or lost, materially injured or destroyed."

Accordingly, the motion for an order of attachment and the appointment of a receiver is denied.

The Clerk may enter judgment (i) dismissing plaintiff's First Amended Complaint against defendants Theoni Mitsopoulos, Theoni's Pharmacy, Inc., Theodore Alatsas, Asher Taub and Alatsas & Taub, P.C.; (ii) dismissing plaintiff's claim for punitive damages as well as the fifth, sixth, seventh and eighth causes of action; and (iii) dismissing the "seventh" counterclaim against plaintiff, with prejudice.

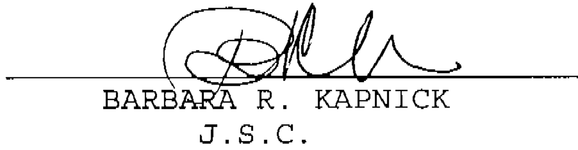
Plaintiff's other claims against defendants George Mitsopoulos, Apostolos Mitsopoulos, Efrosini Mitsopoulos and Titan and the first counterclaim are severed and continued.

A preliminary conference shall be held in IA Part 12, 60 Centre Street, Room 341 on August 6, 2008 at 9:30 a.m.

This constitutes the decision and order of this Court.

Dated: June 30, 2008

BARBARA R. KAPNICK
J.S.C.

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JUL 08 2008
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