At an IAS Civil Term Part 31, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on March 30, 2009.

PRESENT: **HONORABLE MICHAEL A. AMBROSIO**
JUSTICE

ULLA LEE, ULLA LEE AS ADMINISTRATRIX OF THE ESTATE OF MIKE LEE, DEGREE SECURITY SYSTEMS, INC. AND 58TH NORTH 6TH STREET DEVELOPMENT CORP.,
PLAINTIFFS,
- AGAINST -

GARY C. GRANOFF, ELLEN M. WALKER, LEE A. FORLENZA, AND GRANOFF, WALKER & FORLENZA, P.C.,
DEFENDANTS.

INDEX NO.: 3929-2006

MOTION SEQ.#:
3, 4, 5, 6, 7, 8 & 9

DECISION AND ORDER

MARCH 30, 2009

The Following papers numbered 1 to 25 used on this motion:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	PAPERS NUMBERED 1 - 16
Opposing Affidavits (Affirmations)	17 - 20
Reply Affidavits (Affirmations)	21 - 25
Other Papers	

Upon the foregoing papers in this legal malpractice action, the following motions are before the court (1) defendants Gary C. Granoff (Mr. Granoff) and Ellen M. Walker (Ms. Walker) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs Ulla Lee, Ulla Lee as Administratrix of the Estate of Mike Lee, Degree Security Systems, Inc. and 58 North 6th Street Development Corp.'s (collectively, plaintiffs) complaint against them; (2) defendants Mr. Granoff, Ms. Walker, Lee A. Forlenza (Mr. Forlenza), and Granoff, Walker & Forlenza, P.C. (GWF) (collectively defendants) move to strike the note of issue filed by plaintiff and further move to compel plaintiffs to provide responses to all discovery demands; (3) plaintiffs cross-move to disqualify the law firm of Martin Clearwater & Bell LLP from representing defendants in this matter due to a conflict of interest; (4) plaintiffs move for summary judgment on the question of liability against all defendants; (5) defendants move for partial summary judgment dismissing plaintiffs' claim for lost profits; (6) plaintiffs cross-move to quash subpoenas served upon their counsel and

Ulla Lee and for an order imposing financial sanctions against Martin Clearwater & Bell LLP; and (7) plaintiffs cross-move for partial summary judgment on the issue of damages so as to find that plaintiffs suffered no less than $1,625,000 in damages on their lost profits claim.

Background Facts and Procedural History

In 1999, plaintiff 58th North 6th Street Development Corp. (Development Corp.) entered into a contract (the 1999 contract) with F.A.B. Land Corp. (FAB) whereby FAB agreed to sell a certain parcel of land to Development Corp. The contract contained a rider whereby FAB granted plaintiff Degree Security Systems, Inc. (Degree), an affiliate of Development Corp., the right of first refusal to purchase a separate parcel located at 65, 67, 76, and 78-80 North 6th Street in Brooklyn (collectively, the premises). Mike Lee was the principal and owner of Degree.[1] After the 1999 contract closed, FAB notified 58 Development and Degree that it had received an offer for the sale of the premises and, in accordance with the right of first refusal clause, offered to sell the premises to Development Corp. and Degree for the sum of $1,150,000.000. Thereafter, GWF, the law firm that represented Degree in this real estate transaction, sent a letter which advised FAB that Degree accepted the offer to purchase the premises. However, FAB subsequently attempted to raise the purchase price of the premises based upon a higher offer submitted by another potential buyer. Acting as Degree's attorney, GWF rejected this attempt and notified FAB that Degree was ready willing and able to purchase the premises for the sum of $1,150,000.00. When FAB refused to honor the right of first refusal clause in the contract, Degree sued FAB seeking specific performance of the contract.

[1] Mr. Lee died in June 2006, shortly after the present action was commenced. He was never deposed in this action

By order dated June 10, 2002, Hon. Nicolas A. Clemente of this court denied FAB's motion for summary judgment dismissing the complaint and sua sponte awarded Degree summary judgment on its specific performance cause of action. In a decision dated February 24, 2003, the Appellate Division, Second Department affirmed Justice Clemente's order, albeit on different grounds than those set forth in the lower court's order (*see Degree Security Sys., Inc., v F.A.B. Land Corp.*, 302 AD2d 555 [2003]). Specifically, the Appellate Division ruled that Degree's right of first refusal survived the closing of the 1999 contract and was in effect at the time FAB offered to sell the premises to Degree (*id.* at 557).

On May 20, 2003, Degree and FAB entered into a contract of sale for the premises for the purchase price of $1,125,000.00 with a closing scheduled for June 23, 2003. The contract had a mortgage contingency clause which provided:

> "This contract is subject to and conditioned upon [Degree] obtaining a firm mortgage commitment for a conventional mortgage of $1,010,000.00 for a term [of] not less than ten (10) years, and bearing interest at the rate prevailing at the time of CLOSING, such firm mortgage commitment to be obtained . . . [by June 23, 2003]. [Degree] agrees to make proper, diligent and truthful application for such loan, and to execute all necessary papers and instruments in connection herewith. In the event such mortgage cannot be obtained in that time, then either party may cancel this contract and the down payment shall be returned. Upon the mailing of such payment, this contract, for all purposes, shall be considered cancelled and of no further force and effect, and the parties shall have no further or other claim against the other . . ."

The contract also had a provision requiring that all changes to the contract be made in writing and that all prior understandings and agreements between the parties were merged in the contract.

Finally, in accordance with the terms of the contract, Degree tendered a down payment of $115,000.00, which was held in FAB's attorney's escrow account.

After signing the contract, Mr. Lee decided that instead of obtaining a mortgage to pay for the premises, he would re-finance another property (located at 167-170 Wythe Avenue in Brooklyn) owned by one of his holding companies in order to raise funds to pay for the premises on an all-cash basis. In this regard, Mr. Lee was apparently unhappy with the terms of the mortgage he was negotiating inasmuch as it required him to pay too many points. Accordingly, Mr. Lee made an application to re-finance the Wythe Avenue property with Astoria Federal Savings Bank (Astoria Federal) so as to obtain a $1,200,000.00 mortgage loan. According to Mr. Forlenza, approximately two weeks prior to the scheduled June 23, 2003 closing date, Mr. Lee contacted him and told him that he had worked out a deal with FAB's principals to carry out the sale on an all-cash basis, which was to close in August. Mr. Forlenza also testified that shortly thereafter, he spoke with FAB's attorney, Avrom R. Vann, regarding the scheduling of an August 2003 scheduling date, but no firm date was agreed upon. In any event, as of June 23, 2003, Degree failed to notify FAB that it had obtained a mortgage commitment as required under the contract.

In a letter to Degree dated June 23, 2003, FAB noted that plaintiff had not advised FAB as to whether Degree had obtained the mortgage commitment required by the contract, returned Degree's down payment, and exercised its right to cancel the contract. By letter dated June 24, 2003, Mr. Forlenza sent a letter to FAB on behalf of Degree which rejected FAB's termination letter and tender of the down payment. Mr. Forlenza stated that FAB's reliance on the mortgage contingency provision of the contract was misplaced, as Degree had already informed FAB in a telephone conversation between Mr. Vann, and Mr. Forlenza that the sale would proceed on an all-cash basis.

Lastly, Mr. Forlenza rescheduled the closing of title to August 15, 2003, informed FAB that it had filed a subsequent notice of pendency on the premises, and returned Degree's prior down payment check to FAB. Thereafter, a series of letters were exchanged between Mr. Forlenza and Mr. Vann wherein Vann indicated that FAB was exercising its right to cancel the contract and Mr. Forlenza indicated that Degree had waived the mortgage contingency clause and reiterated that the closing was set for August 15, 2003. On July 22, 2003, a closing was held for the refinancing of the Wythe Avenue property. On July 30, 2003, Ms. Walker sent Mr. Vann a check in the amount of $1,010,000.00, which represented the balance due under the contract of sale. However, this tender was rejected by Mr. Vann.

On June 30, 2003, Degree commenced an action against FAB seeking specific performance of the contract of sale. Thereafter, FAB moved for an order declaring that the May 20, 2003 contract between Degree and FAB for the purchase of the premises was properly cancelled and directing Degree to discharge all notices of pendency.[2] In a decision and order dated December 5, 2003, Justice Clemente granted FAB's motion. Specifically, Justice Clemente ruled that FAB had a clear right to cancel the contract under the terms of the mortgage contingency clause when Degree failed to obtain the mortgage commitment on or before June 23, 2003. The court also ruled that, although Degree's decision to forego a mortgage and complete the transaction an all-cash deal would not necessarily vitiate the contract, Degree failed to offer proof that it possessed the funds needed to close title on June 23, 2003. By order dated April 11, 2005, the Appellate Division affirmed Justice Clemente's order (*see Degree Security Sys., Inc. v F.A.B. Land Corp.*, 17 AD3d 402 [2005]). In this

[2] FAB's motion was made as part of the original specific performance action which Degree commenced in 2001.

regard, the Appellate Division ruled that the mortgage contingency clause was a condition precedent inuring to the benefit of both parties and could not be unilaterally waived by Degree (*id.* at 403). The Appellate Division further ruled that FAB timely exercised its right to cancel the contract upon Degree's failure to obtain the mortgage commitment by the time of closing (*id.*).

In or about February of 2006, plaintiffs commenced the instant action sounding in breach of contract and legal malpractice against Mr. Granoff, Ms. Walker, and Mr. Forlenza individually, as well as law firm GWF in connection with legal representation they provided during Degree's failed attempt to purchase the premises. The gravamen of plaintiff's complaint is that defendants were negligent inasmuch as they erroneously advised plaintiffs that the mortgage contingency clause of the contract could be waived unilaterally by Degree, that they were negligent in failing to advise Mr. Lee that any changes in the contract regarding proceeding on an all-cash basis had to be set-down in writing, and that they were further negligent in failing to advise Mr. Lee that he needed to have the necessary funds available to close on an all-cash basis on the June 23, 2003 closing date. The complaint also alleges that this malpractice caused plaintiffs to sustain damages in excess of $20,000,000.00, a sum which includes lost profits that plaintiffs would have made had they been able to purchase the premises and develop this property in accordance with their plans. However, in a subsequent bill of particulars, plaintiffs alleged that they suffered lost profits of $7,490,000.00. Finally, the complaint alleges that defendants' negligence resulted in Degree losing the down payment money it tendered prior to the closing. The instant motions are now before the court.

Plaintiffs' Motion to Disqualify

Plaintiffs' move pursuant to Code of Professional Responsibility DR 5-108 (22 NYCRR 1200.24 [c]) for an order disqualifying the law firm of Martin Clearwater & Bell LLP from

representing defendants in this matter. In support of this motion, plaintiffs argue that defendants' counsel has a clear conflict of interest in simultaneously representing Ms. Walker and Mr. Forlenza. Specifically, plaintiffs point to the fact that Martin Clearwater & Bell has filed a motion to dismiss the claims against Mr. Granoff and Ms. Walker but not Mr. Forlenza. Plaintiffs further note that if the claims against Granoff and Walker are dismissed, the extent of liability and damages assigned to Forlenza will be dramatically increased to his prejudice.

In opposition to plaintiffs' motion, defendants maintain that plaintiffs lack standing to raise this issue inasmuch as plaintiffs are not currently, nor have they ever been represented by Martin Clearwater & Bell. In further opposition, defendants submit an affidavit by Mr. Forlenza in which he states that Martin Clearwater & Bell fully disclosed the impact that the granting of Granoff and Walker's pending summary judgment motion would have on his own potential liability and that he specifically authorized Martin Clearwater & Bell to file said motion. Mr. Forlenza further avers that he is not aware of any facts or information that would support the claims asserted by plaintiffs against Mr. Granoff or Ms. Walker and he does not consider Martin Clearwater & Bell's filing of this summary judgment motion to create a conflict of interest. Finally, Mr. Forlenza maintains that Martin Clearwater & Bell has provided him with appropriate legal advice throughout its representation of him and that his is entitled to be represented by counsel of his own choosing.

It is well-settled that a plaintiff who is neither a former nor present client of the law firm representing two or more defendants in an action lacks standing to seek disqualification of that law firm based upon its dual representation of the defendants (*Hall Dickler Kent Goldstein & Wood, LLP v McCormick*, 36 AD3d 758, 759 [2007]; *Singh v Friedson*, 10 AD3d 721, 722 [2004]; *Ogilvie v McDonald's Corp.*, 294 AD2d 550, 552 [2002]). Here, it is undisputed that plaintiffs are neither a

present nor former client of Martin Clearwater & Bell. Consequently, plaintiffs lack standing to seek the disqualification of Martin Clearwater & Bell based upon its simultaneous representation of Mr. Granoff, Ms. Walker, and Mr. Forlenza.

In any event, Forlenza's affidavit indicates that he was fully informed regarding the potential conflict of interest presented by Martin Clearwater & Bell representation of all three partners and that he consented to such representation (*Hall Dickler Kent Goldstein & Wood, LLP*, 36 AD3d at 759-760).

Accordingly, plaintiffs' motion for an order disqualifying Martin Clearwater & Bell from representing defendants is denied.

Claims Against Ms. Walker and Mr. Granoff

Defendants move for partial summary judgment dismissing plaintiffs' complaint against Ms. Walker and Mr. Granoff. In so moving, defendants argue that neither of these attorneys provided any legal advice to plaintiffs in their individual capacity regarding the mortgage contingency clause which caused plaintiffs to lose out on the sale of the premises. In support of this argument, defendants point to the allegations in plaintiffs' second amended complaint. In particular, defendants maintain that the complaint fails to allege that Mr. Granoff or Ms. Walker provided legal services to defendants in connection with the sale of the subject premises. Defendants also submit a sworn affidavit by Mr. Granoff in which he avers that prior to May 20, 2003, and between May 20, 2003 and June 23, 2003, he did "not provide nor was I asked to provide any legal services to the plaintiffs, nor did I consult with anyone in [GWF] about any of the matters that are the subject of the pending action." Mr. Granoff further avers that his only contact with Mr. Lee involved representing him at a closing in late July 2003 for the refinancing of property located at 170 Wythe Avenue in Brooklyn

(the Wythe Avenue property). According to Mr. Granoff, this property was owned by Degree Holdings Inc., which is not a party to this action. Finally, Mr. Granoff states that at this closing, Mr. Lee did not "discuss anything having to do with any of the matters that are the subject of the present action."

In further support of their summary judgment motion, defendants point to the sworn deposition testimony of Ms. Walker. In this regard, defendants maintain that Ms. Walker's testimony indicates that, in her individual capacity, she did not provide any legal advice to plaintiffs between February 24, 2003 and May 20, 2003. Defendants also argue that this testimony establishes that Ms. Walker did not provide any legal advice to plaintiffs between May 20, 2003 and June 23, 2003 regarding the mortgage contingency clause in the contract. Finally, defendants claim that Ms. Walker's testimony establishes that with respect to the contract for the sale of the premises, Mr. Lee was dealing solely with her partner Mr. Forlenza, who was not supervised by her.

In opposition to defendants' motion, plaintiffs initially concede that "it does not appear that Mr. Granoff was involved in the malpractice that took place," and that they have agreed to discontinue their action against him without prejudice. However, according to plaintiffs, defendants have insisted that the action against Mr. Granoff be discontinued with prejudice. Plaintiffs maintain that there is nothing in the record which requires that the action be dismissed against Mr. Granoff with prejudice and that it is their right to assert new claims against him should any facts arise giving rise to a cause of action against Mr. Granoff.

With respect to Ms. Walker, plaintiffs argue that she was clearly involved in the transactions that gave rise to the malpractice and was negligent in failing to provide needed legal advise to plaintiffs and in failing to use proper care in her supervision of Mr. Forlenza. In this regard, plaintiffs

note that Ms. Walker admitted that she discussed with Mr. Lee in July 2001 a nearly identical mortgage contingency clause that was contained in the contract involved in the first litigation. According to plaintiffs, "[t]he issue of Ms. Walker's discussions with Mr. Lee about the import of the mortgage contingency clause, what could and could not be done without a subsequent writing being executed, especially in light of Mr. Forlenza's continued testimony that he never discussed these issues with Mr. Lee nor performed these services as Mr. Lee's counsel, are integral to plaintiffs' claims herein and require Ms. Walker to remain a defendant herein."

Plaintiffs also note that Ms. Walker's claim that she did not supervise Mr. Forlenza are inconsistent with the actions taken by GWF. In particular, Mr. Forlenza testified at his deposition that he advised Mr. Lee on June 24, 2003 (after the contact had been cancelled by FAB) that Mr. Lee had until the August closing date to have the balance of the purchase price available. However, it is undisputed that Ms. Walker forwarded the balance of the purchase price to FAB's attorney on July 30, 2003. According to plaintiffs, this demonstrates that Ms. Walker was involved in the underlying transaction and that she supervised Forlenza's work inasmuch as she decided on her own that the funds needed to be forwarded on July 30, 2003 rather than the later August date advocated by Mr. Forlenza.

As further evidence of Ms. Walker's involvement with the underlying transaction, plaintiffs note that the counsel hired to appeal Justice Clemente's December 5, 2003 order billed for numerous conversations he had with Ms. Walker. Plaintiffs also submit a copy of a July 31, 2003 e-mail sent by a GWF associate, Martin Valk, to Mr. Forlenza. This e-mail states:

> "Ellen [Ms. Walker] has reviewed the draft. She has serious concerns about you stating that we inadvertently overlooked the mortgage contingency

> clause. She suggested an alternative of claiming that it is customary when a purchaser decides to go forward on an all-cash basis, that a letter is sent to the seller's counsel."

According to plaintiffs, this e-mail demonstrates that Ms. Walker was directly involved in the underlying transaction and that she was supervising Mr. Forlenza's work given the fact that she was editing his drafts.[3] Plaintiffs also maintain that the phrase "*we* inadvertently overlooked the mortgage contingency clause" indicates that Mr. Forlenza was not alone in making this mistake, but that Ms. Walker was involved as well.

In reply to plaintiffs' opposition papers, defendants maintain that Mr. Granoff's motion for summary judgment should be granted inasmuch as it has been established that he did not have an individual attorney-client relationship with plaintiffs during the relevant time period and plaintiffs have failed to submit any evidence which raises an issue of fact in this regard.

With respect to Ms. Walker, defendants maintain that none of the alleged conduct that plaintiffs point to in support of their claims against Ms. Walker took place during the critical May 20, 2003 to June 23, 2003 time period during which, according to plaintiffs' own pleadings, the underlying malpractice took place. Defendants argue that, inasmuch as plaintiffs' pleadings fail to allege that Ms. Walker committed malpractice when she advised (or failed to advise) Mr. Lee regarding the meaning and importance of the mortgage contingency back in 2001, they cannot raise this issue for the first time in opposition to a summary judgment motion. In any event, defendants maintain that there is no evidence that Ms. Walker provided erroneous advice regarding the mortgage

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[3] The specific nature of this draft document (which pre-dated Justice Clemente's December 5, 2003 order) is unclear. However, plaintiffs aver that it was likely a draft of the complaint in the action Degree commenced against FAB after FAB cancelled the contract.

contingency clause at that point in time and she had no duty to re-review the clause with him between February 24, 2003 and June 23, 2003 inasmuch as Mr. Lee was dealing exclusively with Mr. Forlenza during this time period. Additionally, defendants aver that the actions taken by Ms. Walker after FAB cancelled the contract on June 23, 2003 do not demonstrate that she supervised Mr. Forlenza during the relevant time period between May 20, 2003 and June 23, 2003. Moreover, defendants argue that whatever actions Ms. Walker did or did not take after June 23, 2003 were not proximately related to the damages suffered by plaintiffs inasmuch as FAB obtained and exercised the absolute right to cancel the contract on that date.

Finally, defendants submit an expert affirmation by Bruce J. Bergman, Esq., in which he opines, with a reasonable degree of legal certainty, that plaintiffs cannot establish that Ms. Walker had an individual attorney-client relationship with plaintiffs during the relevant time period, that Ms. Walker was negligent, that Ms. Walker's actions were the proximate cause of loss sustained by plaintiffs, or that but for Ms. Walker's negligence, plaintiffs would have been successful in completing the real estate transaction.

Initially, it is clear that there is no basis for plaintiffs' claims against Mr. Granoff individually. Defendants have made a prima facie showing that Mr. Granoff did not have an attorney-client relationship with plaintiffs in connection with the attempted purchase of the premise. Indeed, plaintiffs fully concede that there is no evidence that Mr. Granoff was involved in the transaction. However, plaintiffs argue that they have the right to assert a claim against Mr. Granoff should new evidence materialize that implicates him. This argument ignores the fact that plaintiffs have filed a note of issue certifying that discovery is complete. Moreover, once a defendant meets its initial burden of establishing its right to summary judgment, the burden shifts to the plaintiff to

"lay bare" his or her proof and establish a triable issue of fact (*Geffner v North Shore Univ. Hosp.*, 57 AD3d 839 [2008]; *DiGiaro v Agrawal*, 41 AD3d 764, 767 [2007]). Here, plaintiffs concede that they lack such proof. Accordingly, plaintiffs' claims against Mr. Granoff individually are dismissed.

Turning to plaintiffs' claims against Ms. Walker, in order to "prevail in an action to recover damages 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, and that the attorney's breach of that duty proximately caused the plaintiff to sustain actual and ascertainable damages" (*Teodorescu v Resnick & Binder, P.C.*, 55 AD3d 721 [2008]). With respect to the causation element, "a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence" (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]). "A defendant moving for summary judgment in a legal malpractice action must present admissible evidence that the plaintiff cannot prove at least one of the essential elements of a legal malpractice cause of action" (*Teodorescu*, 55 AD3d at 722).

As evidenced by Justice Clemente's December 5, 2003 order, as well as the Appellate Division decision affirming that order, FAB was successfully able to cancel the contract of sale based upon Degree's failure to obtain a firm mortgage commitment by the time of the June 23, 2003 closing date combined with its failure to have the necessary funds available to complete the sale of the premises on an all-cash basis on the June 23, 2003 closing date. Moreover, to the extent that Mr. Lee reached an agreement with FAB's principals prior to June 23, 2003 to change the terms of the contract so as to complete the transaction on an all cash-basis in an August 2003 closing, the failure to put this agreement in writing may also have caused plaintiffs to lose the deal. Defendants have

made a prima facie showing that none of these failures were caused by anything Ms. Walker did or failed to do in her individual capacity.

Specifically, although Ms. Walker played an active part in representing Degree during its initial attempt to purchase the premises, once the Appellate Division affirmed Justice Clemente's decision awarding Degree specific performance of the contract in February 2003, the evidence before the court indicates that Mr. Lee dealt exclusively with Mr. Forlenza in attempting to complete the transaction. In particular, according to Ms. Walker's uncontroverted deposition testimony, following the Appellate Division decision, "Lee Forlenza undertook to have the contract executed and delivered. And in connection therewith moved toward closing, as one would do as an attorney in connection with any standard commercial real estate transaction." Ms. Walker further testified that she was not a witness to any discussions in regard to the mortgage continency clause that took place after February 2003. In addition, Ms. Walker specifically testified that she did not supervise Mr. Forlenza. All of Ms. Walker's testimony in this regard is supported by Mr. Forlenza'a own deposition testimony.

Most importantly, Mr. Forlenza's deposition testimony indicates that approximately two weeks prior to June 23, 2003, when Mr. Lee informed GWF that he had worked out a deal with FAB to complete the transaction on an all-cash basis with an August closing date, Mr. Lee dealt exclusively with Mr. Forlenza. Furthermore, Ms. Walker's deposition testimony indicates that she was not advising Mr. Lee at this critical time inasmuch as Mr. Lee "was dealing with my partner Lee Forlenza . . . That was the division of labor in my firm. Mike Lee and Lee Forlenza were handling this particular matter." Thus, to the extent that there was a negligent failure to advise Mr. Lee at this time that his plan jeopardized the entire transaction given the terms of the mortgage contingency

clause, and/or a negligent failure to advise Mr. Lee that he would need the funds to complete the transaction on the June 23, 2003 closing date, and/or a negligent failure to advise Mr. Lee that his agreement with FAB had to be put into writing, defendants have made a prima facie showing that Ms. Walker was not individually responsible for this negligence. Under the circumstances, the burden shifts to plaintiffs to summit evidence which establishes a triable issue of fact regarding Ms. Walker's individual negligence.

Plaintiffs have failed to meet this burden. In this regard, plaintiffs rely heavily upon the fact that in July 2001, Ms. Walker discussed with Mr. Lee the terms of a nearly identical mortgage contingency clause contained in the contract involved in the first litigation. However, as defendants correctly note, defendants' pleadings are devoid of any allegation that Ms. Walker committed legal malpractice at this point in time. Furthermore, there is no evidence that Ms. Walker committed malpractice when she discussed the mortgage contingency clause with Mr. Lee in July 2001. Stated otherwise, there is no evidence that the advice (or lack thereof) that Ms. Walker provided to Mr. Lee in July 2001 led him, nearly two years later, to erroneously believe that Degree could unilaterally waive the mortgage commitment requirement. In fact, any finding of such a causal connection would necessarily be based upon speculation and conjecture.[4] Furthermore, although plaintiffs have submitted evidence that Ms. Walker became involved in the case again inasmuch as she reviewed/edited a document generated by Mr. Forlenza and forwarded the balance of the purchase

[4] Plaintiffs allege that no one from GWF ever advised them of the importance of the mortgage contingency clause. However, Mr. Forlenza testified that approximately two weeks prior to the June 23, 2003 closing he specifically spoke to Mr. Lee regarding the fact that he needed to obtain a mortgage commitment before the June, 23rd deadline, at which point Mr. Lee told him about his plans for an all-cash transaction (see Forlenza deposition transcript at pp 246-247).

price to FAB's attorney on July 30, 2003, all of this involvement took place after FAB canceled the contract on June 23, 2003.[5] Since Justice Clemente and the Appellate Division determined that FAB had an absolute right to cancel the contract on June 23, 2003 when Degree failed to obtain the mortgage commitment, whatever Ms. Walker did or did not do after that date was not a proximate cause of plaintiffs' loss. At the same time, the actions taken by Ms. Walker after the cancellation of the contract are insufficient to demonstrate that she supervised Mr. Forlenza's work on the transaction during the critical period preceding the cancellation. Finally, the July 31, 2003 e-mail sent by a GWF associate, Martin Valk, to Mr. Forlenza constitutes inadmissible hearsay evidence. In any event, it is entirely unclear to whom the word "we" is referring in this communication. Accordingly, plaintiffs' individual claims against Ms. Walker are dismissed.

Subpoenas and Discovery Matters

Defendants move for an order striking the note of issue filed by plaintiffs on the grounds that pre-trial discovery is incomplete. Defendants further seek an order compelling plaintiffs to provide responses to all outstanding discovery demands. In particular, defendants seek authorizations to obtain from plaintiffs' attorney and accountant all business, bank, and financial records related to Mike Lee and Ulla Lee and the multiple real estate investment companies they owned and operated between April 1, 2003 and July 31, 2003. Similarly, defendants seek an order directing plaintiffs to

[5] As discussed further below, after the submission of all papers related to this summary judgment motion, plaintiffs obtained from Astoria Federal Savings the complete file for the re-financing of the Wythe Avenue property. One document in this file, which was signed by Mr. Lee and dated May 14, 2003, lists Ms. Walker as the attorney who would order the title report for the Wythe Avenue property. However, this document is not signed by Ms. Walker. Moreover, the other documents in this voluminous file list Mr. Forlenza as Mr. Lee's attorney. In addition, the title report itself indicates that it was ordered by Mr. Forlenza and lists Mr. Lee's attorney as GWF "Attention: Lee Forlenza, Esq." Thus, May 14, 2003 title report document is insufficient to raise an issue of fact regarding whether Ms. Walker was directly involved in the refinancing of the Wythe Avenue property prior to June 23, 2003.

provide this financial information pursuant to a subpoena duces tecum served upon plaintiffs' counsel on March 27, 2008 and a separate subpoena duces tecum and testimonial subpoena served upon Ulla Lee on May 2, 2008.

In support of this motion, defendants argue that a key issue in this case is whether or not Mr. Lee had the ability to obtain the funds necessary to purchase the premises on an all-cash basis by the scheduled June 23, 2003 closing date. Specifically, defendants maintain that if Mr. Lee lacked the necessary funds as of this critical date, the transaction was destined to fail as FAB would have successfully cancelled the contract regardless of any alleged negligence on defendants' part. Defendants further argue that there is reason to believe that Mr. Lee lacked the necessary funds in light of information that he provided on the loan refinancing application with Astoria Federal Savings which indicated that he and Ulla Lee's liquid assets totaled $145,000.00. Under the circumstances, defendants maintain that it is critical that they obtain the financial information that they seek. Defendants further argue that they are entitled to a further deposition of Ulla Lee so that she can be questioned regarding the Lee's finances during the period of time between April 1, 2003 and July 31, 2003.

In opposition to defendants' motion, and in support of their own motion to quash the subpoenas, plaintiffs point out that defendants served two demands for authorizations shortly before plaintiffs filed their note of issue. The first demand, dated March 27, 2008, sought copies of all records maintained by Frank Platt, Esq. pertaining to documents he generated on behalf of Mr. Lee and Ulla Lee between April 1, 2003 and July 31, 2003. However, plaintiffs responded to this demand by stating that these records were protected under the attorney-client privilege. In addition, the second demand, dated April 16, 2008, sought all records maintained by the Lee's accountant between

April 1, 2003 and July 31, 2003 pursuant to CPLR 3121. According to plaintiffs, this demand was improper inasmuch as CPLR 3121 only pertains to actions in which the "mental or physical condition or the blood relationship of a party" is in issue. Accordingly, plaintiffs maintain that both of these demands were improper.

With respect to the subpoenas, plaintiffs' attorneys were served with subpoena duces tecum dated March 26, 2008 seeking copies of financial records related to Mike Lee and Ulla Lee and the multiple real estate investment companies they owned and operated between April 1, 2003 and July 31, 2003. However, plaintiffs' attorneys responded to this subpoena by notifying defendants that they were not in possession of any such records. Accordingly, plaintiffs reason that, at the time they filed their note of issue on April 22, 2008, there was no outstanding discovery. Plaintiffs note that, although defendants served an identical subpoena, along with a testimonial subpoena upon Ulla Lee on May 2, 2008, at that point, the note of issue had been filed and served and therefore, these subpoenas improperly sought post-note of issue discovery.

In further opposition to defendants' motion to strike the note of issue and compel discovery, plaintiffs argue that the subpoenas were not properly served. In particular, plaintiffs argue that, under CPLR 2303 (a), a subpoena duces tecum must be served in the same manner as a summons. Here, the subject subpoenas were served by regular mail. In addition, plaintiffs argue that, as a general rule, it is improper to use subpoenas as a discovery device against a party to the lawsuit.

Finally, plaintiffs argue that the issue raised by defendants regarding Mr. Lee's financial records is moot. Specifically, plaintiffs maintain that there is no question that Mr. Lee had the ability to obtain the necessary funds during the relevant time period inasmuch as Astoria Federal Savings issued a commitment letter dated June 23, 2003 evidencing that it had approved the refinancing loan

on the Wythe Avenue property in the amount of $1,190,000. Plaintiffs further note that Degree obtained this money shortly thereafter, when the closing for the Wythe Avenue refinance mortgage was held in July 2003. Thus, plaintiffs argue that the issue is not whether Mr. Lee could obtain the necessary liquid funds. Rather, the issue is whether defendants were negligent in advising Mr. Lee that he could wait until August to close on the refinance mortgage and/or in failing to advise him that he had to close before the June 23, 2003 deadline set forth in the contract for the sale of the premises.

In response to plaintiffs' opposition papers and cross motion to quash the subpoenas, defendants served an additional subpoena duces tecum and subpoena ad testificandum (seeking the same information) upon Ulla Lee on or about June 3, 2008. However, these subpoenas were served via personal service.

Initially, given the language in Justice Clemente's December 5, 2003 order that although "[Degree's] decision to forego a mortgage and make the transaction an all-cash deal would not necessarily vitiate the Contract, [Degree] has offered no proof that it possessed the funds required to close title on June 23, 2003" it was clear from the inception of the instant malpractice litigation that Mr. Lee's financial ability to close on an all-cash basis on June 23, 2003 was of some relevance. Indeed, in defendants' combined discovery demands dated April 27, 2006, their former counsel sought, among other things, "all documentation of liquid assets available to plaintiffs for the purpose of closing on the property in question on the original proposed closing date." However, in their January 5, 2007 response to defendants' demands, plaintiffs refused to provide this information stating, "plaintiff's object to this demand on the basis that it is irrelevant and immaterial to the above referenced action, it is overly broad, unduly burdensome, vague, ambiguous, and are [sic] not reasonably calculated to lead to admissible evidence, or is privileged or otherwise protected from

discovery."

Thereafter, defendants failed to make a motion to compel discovery under CPLR 3126. Instead, after some 15 months had elapsed and all tecum had been completed, defendants served the aforementioned discovery demands seeking plaintiffs' financial records for the period of April 1, 2003 through July 31, 2003. In addition, defendants served subpoenas upon plaintiffs' attorneys and Ulla Lee seeking these financial records as well as an additional opportunity to depose Ulla Lee. However, these subpoenas were not served in accordance with CPLR 2303 (a) inasmuch as they were sent via regular mail. Moreover, as contemplated under CPLR 3120, subpoenas duces tecum are intended for use against non-parties, not as a remedy against parties who refuse to comply with ordinary discovery demands. Instead, a party seeking to compel discovery against another party must make a motion under CPLR 3126.

Although CPLR 3122 does not impose a time limit upon a party seeking discovery to bring a motion to compel production, "[i]f a party fails to make a motion to compel within a reasonable time, she may forfeit the right to obtain the items sought" (Connors, Practice Commentaries, McKinney's Cons Law of NY, Book 7B, CPLR C3122:1). Thus, a defendant who allowed 18 months elapse before making a motion to compel service of a bill of particulars was not entitled to relief under CPLR 3126 inasmuch as the delay was "inexcusable" (*Charter One Bank, FSB v Houston.* 300 AD2d 429, 430 [2002]). Similarly, a defendant which sought an order vacating the note of issue and compelling the plaintiff to answer certain interrogatories was not entitled to this relief inasmuch as it was "guilty of inexcusable delay by waiting approximately 18 months before moving to vacate the note of issue, and some 20 months before seeking to compel answers to the interrogatories" (*Remark Electric Corp., v Manshul Constr. Corp.*, 242 AD2d 694 695 [1997]).

In the instant case, defendants originally sought documentation related to assets "available to plaintiffs for the purpose of closing on the property in question on the original proposed closing date" in their April 27, 2006 discovery demand. When plaintiffs refused to comply with this demand in a January 5, 2007 response, defendants waited nearly 15 months to elapse before taking any action regarding this discovery material. And even then, defendants did not seek judicial intervention. Rather, beginning in late March 2008, defendants served new discovery demands upon plaintiffs' counsel, as well as a series of subpoenas duces tecum upon counsel and Ulla Lee seeking the aforementioned financial information. Ultimately, it was not until May 16, 2008, over two years after their initial demand, and over 16 months after plaintiffs refused to comply with this demand, that defendants sought an order, in effect, directing that plaintiffs provide the subject financial information by making the instant motion. In the court's view, defendants' lack of diligence and delay in seeking to force compliance with its demand for the subject financial documents until the late date constitutes inexcusable neglect. This is especially true inasmuch as any re-opening of discovery at this phase would lead to lengthy delays in this already three-year old action.

In any event, it appears that the controversy surrounding the production of plaintiffs' financial records for the period between April 1, 2003 and July 31, 2003 has largely been rendered academic at this point in proceedings. In this regard, defendants are already in possession of the Degree's application (and attendant documents) with Astoria Federal for a mortgage to refinance the Wythe Avenue property. This application, which was filled out by Mr. Lee in May of 2003, contains a list of Mr. Lee and Ulla Lee's liquid assets, including the cash value of their checking and IRA accounts. In addition, the application contains a detailed statement of Mike and Ulla Lee's net worth, which includes a list of properties owned by the Lees, as well as any liabilities associated with these

properties.

Moreover, the real issue here is not whether, as a general proposition, Mr. Lee had the financial wherewithal to obtain the funds necessary to complete the sale of the premises on an all-cash basis. The fact that he obtained the necessary funds approximately one month after June 23, 2003 when the closing was held for the refinancing of the Wythe Avenue property demonstrates the necessary funds could be accessed given sufficient time. Thus, the real issue is whether or not the refinancing of the Wythe Avenue property could have been expedited to provide the necessary funds on or prior to June 23, 2003 had Mr. Forlenza advised Mr. Lee of the need to have these funds available at the scheduled closing when he first learned of Mr. Lee's plan to complete the sale on an all-cash basis.[6]

Accordingly, defendants' motion for an order striking the note of issue and compelling plaintiffs to provide responses to all outstanding discovery demands is denied. Plaintiffs' cross motion to quash the subpoenas duces tecum and ad testificandum is granted.

Plaintiffs' Cross Motion for Sanctions

Plaintiffs also cross-move for an order, pursuant to 22 NYCRR 130-1.1, imposing financial sanctions upon defendants' attorneys Martin Clearwater & Bell LLP. In so moving, plaintiffs point out that defendants served a subpoena duces tecum upon Astoria Federal on or about March 14, 2008 seeking all records relating to the refinancing of the mortgage on the Wythe Avenue property. However, as noted in plaintiffs' opposition to defendants' motion to strike the note of issue,

[6] If the refinancing deal could not be completed in time, this leads to the additional questions of whether the firm mortgage commitment called for in the contract of sale for the premises could have been obtained in a timely manner, and if so, whether Mr. Lee should have been advised in obtain the mortgage commitment instead of proceeding on an all-cash basis.

defendants' counsel failed to serve plaintiffs with a copy of the subpoena, and further failed to give plaintiffs notice that the documents produced as a result of the subpoena were available for inspection and copying as required under CPLR 3120(3). After receipt of plaintiffs' opposition, defendants counsel forwarded a copy of the subpoena, along with approximately 30 pages of documents identified as "records supplied to us by Astoria Federal in compliance with said subpoena." However, believing that the loan application would ordinarily contain more than 30 pages, plaintiffs' counsel contacted Astoria Federal and obtained the entire refinancing file, which contained hundreds of additional pages. Moreover, according to plaintiffs, some of these documents in the file (which defendants' counsel failed to provide) contained damaging evidence inasmuch as they indicated that Lee Forlenza and GWF were involved in and aware of the refinancing plan as early as mid-May of 2003, which is earlier than Mr. Forlenza claimed at his deposition. In addition, plaintiffs note that one of the documents is a commitment letter dated June 23, 2003, evidencing that Astoria Federal had approved the mortgage refinancing loan in the amount of $1,190,000.00. According to plaintiffs, this document is damaging to defendants inasmuch as this approval letter may have satisfied the mortgage contingency requirement under the contract. Under the circumstances, plaintiffs argue that Martin Clearwater & Bell LLP should be sanctioned inasmuch as they withheld damaging evidence which they were required to turn over to plaintiffs under the CPLR.

In opposition to plaintiffs' cross motion, defendants' counsel maintains that when they provided plaintiffs with the 30 pages of documents from the Astoria Federal file on June 4, 2008, those documents represented the entirety of the documents from Astoria in their possession at that time. Defendants' counsel further maintain that on that same day, one of their associates, Michael

Lynch Esq., went to Astoria Federal's offices and photocopied the remainder of the file pertaining to the refinancing application. According to defendants' counsel, they forwarded the remainder of the file to plaintiffs on August 15, 2008. Under the circumstances, defendants' attorneys maintain that sanctions are not warranted in that any delay in providing the documents in accordance within the time frame established by the CPLR was due to inadvertence rather than bad faith. In addition, defendants' attorneys aver that plaintiffs have failed to demonstrate that they were prejudiced as a result of these delays.

CPLR 3120 (3) requires that "[t]he party issuing a subpoena duces tecum . . . shall at the same time serve a copy of the subpoena upon all other parties and, within five days of compliance therewith, in whole or in part, give to each party notice that the items produced in response thereto are available for inspection and copying, specifying the time and place thereof." Here, it is undisputed that defendants' counsel failed to serve a copy of the Astoria Federal subpoena upon plaintiffs at the same time they served the subpoena upon the bank. It is equally undisputed that defendants's counsel failed to give plaintiffs the required notice and opportunity to inspect and copy within five days of Astoria Federal's compliance with the subpoena. Indeed, it was not until defendants' failure to comply with CPLR 3120 (3) was pointed out in plaintiffs' May 30, 2008 opposition to the motion to strike the note of issue that defendants' attorneys first served plaintiffs with a copy of the Astoria Federal subpoena. Furthermore, although defendants' attorneys provided plaintiffs with 30 pages of documents from the refinancing file on June 4, 2008, and defendants admit that they obtained the remainder of the file on this same June 4, 2008 date, counsel failed the provide or otherwise notify plaintiffs regarding the existence of the remainder of the file until August 15, 2008, after plaintiffs made the instant cross motion for sanctions and had obtained the remainder

of the documents through their own efforts.

Given this history, the court is not persuaded by defendants' attorneys' claim that their failure to comply CPLR 3120 (3) was due to mere "inadvertence" inasmuch as some of this noncompliance took place after plaintiffs specifically complained about defendants' attorneys' failure to comply with the statutory requirements. Furthermore, as plaintiffs' correctly note, there is First Department precedent whereby the deliberate flaunting of non-party discovery rules has resulted in heavy sanctions, including a severe reprimand and disqualification of counsel as well as the suppression of evidence obtained through the non-party discovery (*see Matter of Beiny*, 129 AD2d 126 [1987]).[7]

However, the Second Department has adopted a more lenient approach regarding the failure to comply with nonparty discovery rules. Specifically, so long as the evidence obtained from the nonparty is not privileged, the opposing party would be entitled to the production of the documents in the normal course of discovery, and if the opposing party is not otherwise prejudiced, neither suppression, disqualification of counsel, nor monetary sanctions are warranted (*Levy v Grandone*, 8 AD3d 630 [2004]; *Gutierrez v Dudock*, 276 AD2d 746 [2000]).

Here, there is no claim that the subject Astoria Federal refinancing documents were privileged. Moreover, plaintiffs have already obtained the complete file through discovery.[8] In addition, plaintiffs have not been prejudiced by defendants' failure to comply with CPLR 3120 as respects their ability to oppose Mr. Granoff and Ms. Walker's summary judgment motion since the

[7] At the time of the *Beiny* decision, nonparty discovery under CPLR 3120 required a court order. Thus, although still relevant, *Beiny* is distinguishable from the instant case.

[8] Indeed, given the fact that Mr. Lee made the loan application, it is possible that the subject documents were already in plaintiffs' possession.

relevant refinancing documents were brought to the court's attention and duly considered prior to the court's issuance of a decision on the matter.

Accordingly, plaintiffs' cross motion for sanctions against Martin Clearwater & Bell LLP is denied.

Remaining Summary Judgment Motion

On August 1, 2008, plaintiffs made their instant motion for summary judgment against defendants on the issue of liability. On this same date, defendants made their motion for partial summary judgment dismissing plaintiffs' claim for lost profits. On August 19, 2008, plaintiffs made their cross motion for partial summary judgment on the issue of damages for a finding that they suffered no less than $1,625,000 in damages given the fact that the buyer who actually purchased the premises re-sold it in April 2004 for $1,625,000 more than the $1,125,000 purchase price in the contract between FAB and Degree.

As previously noted, plaintiffs filed a note of issue on April 22, 2008, some 101 days before plaintiffs and defendants' August 1, 2008 summary judgment motions and 119 days before plaintiffs' August 19, 2008 cross motion. Pursuant to Rule 13 of the Uniform Civil Term Rules of the Supreme Court, Kings County, summary judgment motions may not be made more than 60 days after the filing of a note of issue except obtaining leave of the court, on good cause shown (*Kennedy v Bae*, 51 AD3d 980, 981 [2008]; *Dallal v Kantrowitz, Goldhamer & Graifman*, 48 AD3d 389, 392 [2008]; *McNally v Beva Cab Corp.*, 45 AD3d 820, 821 [2007]). Good cause under CPLR 3212 (a) "requires a showing of good cause for the delay in making the motion - a satisfactory explanation for the untimeliness - rather than simply permitting meritorious, nonprejudicial findings, however tardy" (*Brill v City of New York*, 2 NY3d 648, 652 [2004]).

Here, neither plaintiffs nor defendants have even attempted to offer a satisfactory explanation for their untimely summary judgment motions. Moreover, upon searching the record, there does not appear to be any valid excuses. Specifically, although defendants (unsuccessfully) argued above that they are entitled to additional discovery in the form of plaintiffs' financial records for the period between April 1, 2003 through July 31, 2003, as well as an additional deposition of Ulla Lee, none of this evidence would be relevant with regard to their untimely motion to dismiss plaintiffs' lost profits claim. Similarly, although it does not appear that plaintiffs obtained the complete Astoria Federal refinancing file until after the note of issue was filed, plaintiffs do not rely upon these documents in support of their summary judgment motions. Additionally, although plaintiffs do rely upon their June 23, 2008 "Statement of Undisputed Material Facts" and defendants July 22, 2008 response thereto, these facts came directly from discovery in the instant case, all of which was conducted long before the note of issue was filed.[9] Finally, the fact that defendants original motion for summary judgment dismissing the complaint against Ms. Walker and Mr. Granoff was timely filed does not constitute good cause for considering the untimely motions inasmuch as the grounds for the respective motions are not "nearly identical" (*compare Ellman v Village of Rhinebeck*, 41 AD3d 635, 636 [2007]).

Accordingly, plaintiffs' motion for summary judgment on the issue of liability, defendants cross motion for summary judgment dismissing the lost profits claim, and plaintiffs' cross motion for summary judgment setting a minium damages award to their lost profits claim are denied as

[9] Plaintiffs' Statement of Material Facts and defendants response were exchanged as part of a declaratory judgment action in the United States District Court for the Southern District of New York between GWF and their malpractice insurance carrier.

untimely.

Summary

In summary, the court rules as follows: (1) plaintiffs' cross motion to disqualify the law firm of Martin Clearwater & Bell LLP from representing defendants in this matter is denied; (2) defendants' motion for summary judgment dismissing the complaint against Mr. Granoff and Ms. Walker is granted; (3) defendants' motion to strike the note of issue and compel discovery is denied; (4) plaintiffs' cross motion for sanctions against the law firm of Martin Clearwater & Bell LLP is denied; and (5) plaintiffs' motion for summary judgment on the issue of liability, defendants cross motion for summary judgment dismissing plaintiffs' lost profits claim, and plaintiffs' cross motion for summary judgment setting a minium damages award to their lost profits claim are denied as untimely.

This constitutes the decision and order of the court.

ENTER

Michael A. Ambrosio