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

PRESENT: Hon. MICHAEL D. STALLMAN PART 7
Justice

Index Number : 109116/2008
WEISER & ASSOCIATES, P.C.
VS.
ANTHONY E. DONOFRIO & ASSOC.,
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. 109116/08
MOTION DATE 4/23/09
MOTION SEQ. NO. 002
MOTION CAL. NO. 11

The following papers, numbered 1 to 6 were read on this motion to dismiss

	PAPERS NUMBERED
Notice of Motion— Affirmation — Exhibits A-G; Affidavit	1-5
Answering Affirmation — Exhibits 1-4	6
Replying Affirmation — Exhibits	

Cross-Motion: ☐ Yes X No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

Dated: 6/19/09
New York, New York

J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

HON. MICHAEL D. STALLMAN

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 7

WEISER & ASSOCIATES, P.C.,

Plaintiff,

INDEX NO. 109116/08

-against-

MOTION SEQ. NO. 002

ANTHONY C. DONOFRIO & ASSOCIATES, P.C., CINCOTTA & DONOFRIO, LLP, ANTHONY C. DONOFRIO, PLLC, and ANTHONY C. DONOFRIO, Individually,

Defendants.

HON. MICHAEL D. STALLMAN, J.:

In this case, a law firm, plaintiff Weiser & Associates, P.C. (Weiser & Associates), seeks to recover a portion of its legal fees from several other law firms, defendants Anthony C. Donofrio & Associates, P.C. (Donofrio & Associates), Cincotta & Donofrio, LLP (Cincotta & Donofrio), Anthony C. Donofrio, PLLC (Donofrio PLLC), and an attorney, defendant Anthony C. Donofrio (Donofrio), (collectively, Donofrio defendants).

Donofrio moves, pursuant to CPLR 3211, to dismiss the complaint.[1]

BACKGROUND

In 1990, a non-party law firm, Raiskin, Weiser & Raiskin, P.C. (Raiskin), hired Donofrio as an associate. Soon thereafter, Donofrio brought in Arthur Sickler as a client, whom Raiskin

[1]The notice of motion says that Donofrio is the only movant. The supporting papers, however, make arguments that dismissal is warranted as against all defendants. Additionally, the notice of motion is signed by Anthony C. Donofrio of Law Offices of Anthony C. Donofrio, PLLC, "[a]ttorneys for Plaintiffs." Although it is obvious that this firm does not represent the plaintiff in this action, it is unclear which defendants Law Offices of Anthony C. Donofrio, PLLC, represents.

represented in an action on a contingency fee basis, captioned *Sickler v City of New York*, which was filed in Supreme Court, Kings County, index No. 12503/91, and subsequently transferred to the Civil Court (the Sickler action). According to the retainer statement filed with the Office of Court Administration, Raiskin would receive one third of any sum recovered (Donofrio Affirm., exhibit B).

Due to Sickler's incarceration in November 1993, the Sickler action was marked off the calendar until October 1996. From August 1997 until October 1998, Donofrio was suspended from the practice of law. Prior to his suspension, in July 1997, Donofrio, who by then had formed Donofrio & Associates, entered into a contract (July 1997 Agreement) with Raiskin, which at the time was called Raiskin, Weiser & Donofrio, P.C.[2] (Raiskin, Weiser & Donofrio) (01/05/09 Weiser Affirm., exhibit 1). The July 1997 Agreement provided, inter alia, that Donofrio would be paid one-third of the legal fees earned by Raiskin on specific cases which Donofrio had generated (*id.*). Martin Weiser, one of Raiskin's partners, claims that Weiser & Associates did pay Donofrio in accordance with the July 1997 Agreement (01/05/09 Weiser Affirm., ¶ 21).

Upon readmittance to practice, Donofrio did not rejoin Raiskin. Instead, he opened Cincotta & Donofrio. Sickler, who was released from prison in June 1998, was apparently dissatisfied with the way Raiskin was handling his case. Sickler approached Donofrio, and, in October 1998, agreed to substitute Cincotta & Donofrio for Raiskin as his attorneys in the Sickler action.

In January 1999, Raiskin, Weiser & Donofrio, and Weiser & Associates entered into an agreement with Donofrio & Associates and Cincotta & Donofrio (January 1999 Agreement), pursuant to which (1) the July 1997 Agreement was nullified, (2) Donofrio & Associates and Cincotta & Donofrio (incoming counsel) would be substituted for Weiser & Associates, and Raiskin, Weiser &

[2] Weiser & Associates is the successor to Raiskin, Weiser & Donofrio, P.C.

Donofrio (outgoing counsel), on a number of cases listed in the agreement, and (3) outgoing counsel was entitled to between one-third and 45% of the total legal fees on particular cases (*see* 12/02/08 Donofrio Affirm., exhibit A). The Agreement referenced the Sickler action and provided that outgoing counsel was entitled to 45% of the legal fees. In the event that incoming counsel were to try the case as to liability and damages and obtain a jury verdict, outgoing counsel was due only 40% of the legal fees (*see id.*, ¶ 6).

The parties dispute the extent of work that Raiskin did in the Sickler action. Martin Weiser, a former partner at Raiskin, contends that the firm completed discovery and filed a note of issue in October 1997 (*see* Weiser Affirm., ¶ 12), whereas Donofrio contends that Raiskin did little work on the case (*see* 03/20/09 Donofrio Aff., ¶ 14).

After incoming counsel took over the Sickler action, they proceeded with litigation, obtained a significant jury verdict following a trial, defended three separate appeals, and settled the case for $735,000 (03/20/09 Donofrio Aff., ¶ 13).

In its five-count complaint (Complaint), Weiser & Associates alleges (1) the existence of a contract between incoming and outgoing counsel, pursuant to which outgoing counsel is owed either 45% or 40% of the legal fees on the Sickler action, and that outgoing counsel assigned the contract to Donofrio PLLC, which breached the contract by failing to inform outgoing counsel of a settlement and refusing to pay Weiser & Associates a portion of its legal fees, (2) that Donofrio PLLC wrongfully converted the property of Weiser & Associates by disbursing all of the legal fees to itself in violation of the contract and the Canons of Ethics, (3) that Donofrio PLLC failed to account for the monies involved in the settlement of the Sickler action and Weiser & Associates seeks an accounting of all transactions involved in the Sickler action, (4) that Donofrio created Donofrio

PLLC, to which he assigned the assets of Cincotta & Donofrio and Donofrio & Associates in order to defraud "creditors of the predecessor entities" and that Donofrio & Associates and Donofrio PLLC "are in effect one and the same having an identity of interest in their management, operation, accounting, obligation and responsibilities," and (5) that, pursuant to the New York Judiciary Code, Weiser & Associates should be granted a charging lien for the work that it did on the Sickler action, and that Weiser & Associates may enforce such a "lien against the legal fee earned in a percentage that will fairly and adequately compensate in proportion to the total legal services rendered" (Complaint, ¶ 30) in the Sickler action, and seeking fifty percent of the legal fee earned in the Sickler action.

Donofrio defendants move to dismiss the Complaint.

DISCUSSION

As a threshold matter, Weiser & Associates argues that the motion of Donofrio defendants should be denied as defective, because the relief sought in the notice of motion, a default judgment, contradicts the relief sought in the accompanying affirmation, which is to dismiss the Complaint on the merits. CPLR 2214 (a) requires that a notice of motion specify, inter alia, "the relief demanded and the grounds therefor" (CPLR 2214 [a]; *see e.g. McGuire v McGuire*, 29 AD3d 963, 965 [2d Dept 2006]). In this case, however, because the notice of motion contains the catch-all language, "such other and further relief that this Court deems just and proper," the affirmation in support makes it clear that Donofrio defendants seek dismissal of the Complaint, and plaintiff has not been prejudiced, the court will disregard this defect and treat this motion as one to dismiss the Complaint (*see Frankel v Stavsky*, 40 AD3d 918, 918-919 [2d Dept 2007]).

A motion to dismiss pursuant to CPLR 3211 (a) (1) "may be appropriately granted only where

the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). "In assessing a motion under CPLR 3211 (a) (7), ... the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Leon v Martinez*, 84 NY2d 83, 88 [1994] [citations and internal quotation marks omitted]).

Donofrio defendants argue that the Complaint should be dismissed, pursuant to CPLR 3211 (a) (7), because the January 1999 Agreement purportedly violates the Code of Professional Responsibility DR 2-107 (a) (1) and (2). In addition, they contend that documentary evidence establishes that Weiser & Associates was discharged for cause, and therefore not entitled to any fees. Donofrio defendants consequently insist that the January 1999 Agreement was not supported with consideration, insofar as incoming counsel was entitled to all of the legal fees in the Sickler action as a result of Raiskin's purported dismissal for cause. Finally, Donofrio defendants argue that the January 1999 Agreement was a product of economic duress and Martin Weiser allegedly used "unclean hands." According to Donofrio, he was experiencing economic hardship in January 1999, and Martin Weiser allegedly threatened to litigate the issue of legal fees for all 39 cases referenced in the January 1999 Agreement if Donofrio did not agree to the fee sharing terms.

As Donofrio defendants indicate, an attorney discharged for cause may not recover any compensation (*see e.g. Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 12 [1st Dept 2008]). Dismissal for cause exists where, for example, an attorney's conduct falls "'below the ordinary and reasonable skill and knowledge commonly possessed by a member of the profession '" (*Morrison Cohen Singer & Weinstein*, 203 AD2d at 119 [quoting *Bernstein v Oppenheim & Co.*, 160 AD2d 428, 430 (1st Dept 1990)];*Matter of Spatola*, 196 Misc 2d 666, 668

[Sur Ct, Richmond County 2003] [attorneys who failed to disclose to their client that a statute of limitations had run were discharged for cause]). "The attorney's malpractice constitutes a failure to honor faithfully the fidelity owed to the client and to discharge competently the responsibilities flowing from the engagement" (*Campagnola v Mulholland, Minion & Roe*, 76 NY2d 38, 44 [1990]). However, an attorney's error of judgment (*Rosner v Paley*, 65 NY2d 736, 738 [1985]), or a client's "dissatisfaction with [an attorney's] reasonable strategic choices regarding litigation" (*Callaghan v Callaghan*, 48 AD3d 500, 501 [2d Dept 2008]) alone do not constitute grounds for discharge for cause (*see e.g. De Luccia v Village of Monroe*, 180 AD2d 897, 899 [3d Dept 1992]).

Cause may also exist where an attorney committed professional misconduct (*see e.g. Griffin v Sciame Constr. Co.*, 267 AD2d 100 [1st Dept 1999] [attorneys for the estate took positions adverse to the interests of the estate's distributees]; *Dagny Mgt. Corp. v Oppenheim & Meltzer*, 199 AD2d 711 [3d Dept 1993][attorney interfered with the client's right to settle]).

Here, Sickler claims that he discharged Raiskin primarily because Martin Weiser allegedly informed him that his case "was basically worthless" and that the maximum expected recovery was $10,000, even though his injuries were allegedly "severe" (Sickler Aff., ¶¶ 7-9). Sickler claims that he asked for a $2,000 advance when he was released from prison, which Weiser & Associates allegedly refused to advance to Sickler because it allegedly believed that Sickler's case was worthless.

However, Sickler's affidavit is not the kind of documentary evidence that may be properly considered on a motion to dismiss pursuant to CPLR 3211 (a) (1). "While such affidavits might suffice to establish the elements of their defense in a motion for summary judgment, they do not afford a proper basis for a motion to dismiss based on documentary evidence" (*Crepin v Fogarty*, 59 AD3d 837 [3d Dept 2009]; *Fletcher v Fletcher*, 56 AD2d 589, 590 [2d Dept 1977]["Affidavits may

not themselves stand as proof of the facts in dispute"]). On this motion, Donofrio defendants have not conclusively established that Sickler terminated Weiser & Associates for cause. Thus, for purposes of addressing the remainder of this motion to dismiss, Sickler's discharge of Weiser & Associates is not for cause.

> "When a client discharges an attorney without cause, the attorney is entitled to recover compensation from the client measured by the fair and reasonable value of the services rendered whether that be more or less than the amount provided in the contract or retainer agreement. As between them [the attorney and client], either can require that the compensation be a fixed dollar amount determined at the time of discharge on the basis of quantum meruit or, in the alternative, they may agree that the attorney, in lieu of a presently fixed dollar amount, will receive a contingent percentage fee determined either at the time of substitution or at the conclusion of the case.
>
> Where the dispute is only between attorneys, however, the rules are somewhat different. The outgoing attorney may elect to take compensation on the basis of a presently fixed dollar amount based upon quantum meruit for the reasonable value of services or, in lieu thereof, the outgoing attorney has the right to elect a contingent percentage fee based on the proportionate share of the work performed on the whole case. The percentage may be fixed at the time of substitution but, as several courts have recognized, is better determined at the conclusion of the case when such factors as the amount of time spent by each lawyer on the case, the work performed and the amount of recovery can be ascertained."

(*Lai Ling Cheng v Modansky Leasing Co.*, 73 NY2d 454, 457-458 [1989][internal citations and quotation marks omitted]). Here, the January 1999 Agreement reflects outgoing counsel's election of a contingent percentage fee fixed several months after substitution of counsel.

However, as Donofrio defendants indicate, former DR 2-107(a) proscribed a division of the legal fees between lawyers from different firms, unless

> "(1) [t]he client consents to employment of the other lawyer after a full disclosure that a division of fees will be made[, and] (2) [t]he division is in proportion to the services performed by each lawyer or, by a writing given the client, each lawyer assumes joint responsibility for the representation"

(*see* Code of Professional Responsibility DR 2-107 [22 NYCRR 1200.12] [repealed]).[3] The main controversy under former DR 2-107 was "centered on whether a lawyer should be permitted to share a fee with a lawyer whose only service is to refer the client" (Simon's New York Code of Professional Responsibility Annotated, at 435 [2008]). The provision also prohibit the total fee of the lawyers from exceeding reasonable compensation for all legal services that they rendered (DR 2-107 [a] [3]). In the history of referral fees, one commentator notes,

> There never been a controversy as to whether a lawyer may share fees with a lawyer who actually works on a case. If two lawyers in different firms both work on the same matter, and if either lawyer working alone would have been entitled to receive a fee, and if the client has given consent for both lawyers to work on the matter, then both lawyers are entitled to be paid for the work they have actually done.
>
> The difficult question is whether a lawyer may share fees with a lawyer who does nothing but refer a case. . . in a ratio far out of proportion to the amount of work that the other lawyer does on the case. The ABA has flip-flopped on this issue, first saying yes, then no, then yes again. New York has followed the ABA's lead each time.

(Simon's New York Code of Professional Responsibility, at 435).

Where, as here, a client has discharged its counsel, engaged new counsel, and executed a substitution of counsel, the situation is different from a referral situation. In this situation, the client is fully aware that another attorney is independently representing the client's interests, and the client is fully aware of the fees of incoming counsel.[4] Moreover, in the situation of substitution of counsel,

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[3] DR 2-107 of Disciplinary Rules of the Code of Professional Responsibility, 22 NYCRR 1200.12, was repealed and replaced effective April 1, 2009 by the Rules of Professional Conduct. The current analogous rule is in Judiciary Law, Appendix, Rules of Professional Conduct, R 1.5 (g), and in 22 NYCRR 1200.5 (g). However, the Court will apply the former Disciplinary Rules, because they were in effect at the time that the parties in this action entered into, and performed under, the January 1999 Agreement.

[4] To meet the obligation of disclosure under former DR 2-107 (a) (1), "[a] client is simply to be made aware that another attorney is jointly or independently representing his or her interests at no additional expense to her therefor. Any further elaboration or specificity regarding the exact

compliance with DR 2-107 (a) (1) presents a practical challenge to outgoing counsel. The fee sharing agreement may be reached after counsel has been substituted. The client may have terminated prior counsel before engaging new representation, and outgoing counsel will no longer be communicating with the client after being terminated. Practically speaking, the obligation of disclosing the fee sharing arrangement to the client would fall on incoming counsel, who would have an incentive not to disclose the fee sharing arrangement and to disclose that the agreement would not result in any additional expense to the client. Incoming counsel has an incentive not to share the legal fee, and in the absence of disclosure to the client of the fee sharing agreement, it could be argued, as here, that the fee sharing agreement is void for failure to comply with former DR 2-107 (a), or its successor, Rule 1.5 (g).

Nevertheless, on its face, DR 2-107 (a) prohibited a lawyer from splitting a fee with another lawyer, unless the requirements of DR 2-107 (a) were met. Such broad language encompasses the situation of a substitution of counsel, even though DR 2-107 (a) was generally intended to address a different concern. Thus, in *Ford v Albany Medical Center* (283 AD2d 843 [3d Dept 2001]), the Appellate Division, Third Department ruled that an alleged agreement between outgoing counsel and incoming counsel to split fees in a medical malpractice action was unenforceable because it violated DR 2-107, insofar as the attorneys allegedly agreed that outgoing counsel would receive 33.33% of any counsel fee, without regard to the proportion of services performed by each lawyers. The Appellate Division affirmed the lower court's finding after a hearing that, based on the amount of services rendered, outgoing counsel was only entitled to 3% of the total fee. Therefore, Weiser &

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arrangement between the collaborating attorneys is not ethically mandated by this code provision" (*Carter v Katz, Shandell, Katz & Erasmous,* 120 Misc 2d 1009 [Sup Ct, Queens County 1983]).

Associates's argument that DR 2-107 (a) does not apply is unavailing.

On this motion, Donofrio defendants have not conclusively demonstrated that Weiser & Associates violated DR 2-107 (a) (1), i.e., that Sickler was allegedly unaware of the fee sharing arrangement. That factual argument is based on Sickler's affidavit, which cannot be considered on this motion to dismiss. More importantly, Donofrio defendants cannot raise Sickler's lack of knowledge of the fee sharing arrangement to void the agreement, because, as discussed above, the obligation to disclose the fee sharing arrangement to the client would fall on incoming counsel also. "Defendants are also bound by the Code of Professional Responsibility, and cannot avoid a fee-sharing agreement on ethical grounds if they freely agreed to be bound by and received the benefit of same." (*Law Offices of K.C. Okoli, P.C. v Maduegbuna*, ___ AD3d ___, 2009 WL 1288702, *1, 2009 NY App Div LEXIS 3663, * *2 (1st Dept 2009).

Donofrio defendants also contend that the fee sharing agreement violates DR 2-107 (a) (2), because the amount of the fee split was purportedly disproportionate to the work that Weiser & Associates rendered. The January 1999 Agreement divides different cases into five categories, based on the amount of work performed by outgoing counsel (Donofrio Aff., exhibit A). The Sickler action is listed among the cases that were already "calendared in Courts of the State of New York," therefore entitling outgoing counsel to either 45% or 40% of the legal fees (*id.*, ¶ 6). The January 1999 Agreement specifically provides that outgoing counsel was entitled to at least 40% of the legal fees in the cases that include the Sickler action, even if incoming counsel would have to engage in "appellate practice" (*id.*, ¶ 6).

The Court of Appeals held that in fee disputes between attorneys, "the courts will not inquire into the precise worth of the services performed by the parties as long as each party actually

contributed to the legal work ... " (*Benjamin v Koeppel*, 85 NY2d 549, 556 [1995]; *see also Matter of Fuller*, 122 AD2d 792 [2d Dept 1986]). "If lawyers in different firms have *not* taken joint responsibility, then they may still divide fees in any way they wish as long as the client has consent to each attorney's involvement in the matter and each attorney has performed at least "some" legal work on the matter" (Simon's New York Code of Professional Responsibility Annotated, at 439). Donofrio concedes that Raiskin performed at least some work on the Sickler matter (*see* Donofrio Aff., ¶¶ 13-14) and does not dispute that Raiskin had completed discovery and filed a note of issue prior to its termination. "To the extent *Ford* and *Benjamin* can be read to conflict, [this Court must] follow the decision of the Court of Appeals in *Benjamin*" (*Ballow Brasted O'Brien & Rusin P.C. v Logan*, 435 F3d 235, 242-243 n 7 [2d Cir 2006] [applying New York law]; *see also Nicholson v Nason and Cohen, P.C.*, 192 AD2d 473, 474 (1st Dept 1993)(there is no requirement that compensation be in proportion to the amount of work actually performed where the attorney seeking a share "performed some work, labor or services which contributed toward the earning of the fee"). Thus, the Court rejects Donforio defendants' argument that Donofrio & Associates is entitled to keep the entire legal fee from the settlement of Sickler matter on the ground that the January 1999 agreement violated DR 2-107 (a).

Turning to defendants' arguments of economic duress and unclean hands, defendants have not submitted documentary evidence conclusively establishing these defenses as a matter of law. As discussed above, the affidavits submitted do not constitute documentary evidence that can be considered on a motion to dismiss. In any event, to the extent that Donofrio defendants argue duress based on Weiser & Associates's alleged threat of a fight for legal fees on each of the 39 matters governed by the January 1999 Agreement, i.e., the threat of litigation (*see* 3/20/09 Donofrio Aff. ¶

11), "a threat to do what one has a legal right to do is not actionable" (*Wehringer v Standard Sec. Life Ins. Co. of New York*, 57 NY2d 757, 759 [1982]).[5]

Corporate Veil

Donofrio argues that the Complaint as against him should be dismissed, because he is shielded from personal liability by the corporate veil. In its fourth cause of action, Weiser & Associates alleges that Donofrio created Donofrio PLLC, to which he assigned the assets of Cincotta & Donofrio and Donofrio & Associates, in order to defraud "creditors of the predecessor entities" and that Donofrio & Associates and Donofrio PLLC "are in effect one and the same having an identity of interest in their management, operation, accounting, obligation and responsibilities" (Complaint, ¶¶ 24-26).

Piercing a corporate veil requires a showing that "the individual owned a majority interest in the corporation," "completely dominated the corporation," "and that such domination was used to commit a fraud or a wrong against the party seeking to pierce the veil" (*Matter of Sharon Towers v Bank Leumi Trust Co. of N.Y.*, 250 AD2d 509, 512 [1st Dept 1998]).

Donofrio does not argue that the allegations in the Complaint are insufficient to support a finding that piercing the corporate veil is warranted here. Rather, he attempts to demonstrate facts that allegedly show that the multiple entities that he created withstand the test for piercing the corporate veil (12/02/08 Donofrio Affirm., at 26-28). Donofrio's only documentary evidence, however, is his own affirmation (*see id.*), which cannot be considered on a motion to dismiss pursuant

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[5] Donofrio also claims that Martin Weiser stated that if Donofrio, "failed to pay any of the legal fees owed to him under the contract that he would not hesitate to file grievances against me seeking to have my license revoked" (3/20/09 Donofrio Aff. ¶ 16). The Court's decision should not be construed as ruling that Weiser had a legal right to file a disciplinary complaint regarding Donofrio's alleged breach of their fee-sharing agreement.

to CPLR 3211 (a) (1).[6] Furthermore, as Weiser & Associates argues, even if defendants' motion papers were adequate, the dismissal would be premature at this juncture, because the claim seeking the piercing of the corporate veil is fact-ridden, and the parties here have not completed discovery. Accordingly, Donofrio's request to dismiss the Complaint as against him individually is denied.

Donofrio & Associates

Finally, Donofrio defendants contend that the action against Donofrio & Associates should be dismissed, because it ceased to exist shortly after the January 1999 Agreement was executed and this entity properly disposed of its liabilities and satisfied its creditors. Defendants, however, submit no proof to substantiate this argument, and this request is denied.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that defendants' motion, pursuant to CPLR 3211, to dismiss the complaint is denied.

Dated: June 19, 2009
New York, New York

ENTER:

J.S.C.

[6]Additionally, by the order dated March 5, 2009 and entered March 10, 2009, this court stated that, pursuant to CPLR 2106, "an attorney who is a party to the action may not submit an affirmation." The facts that Donofrio relies on are not found in his affidavit, dated March 10, 2009, but only in his affirmation, dated December 2, 2008, and, therefore, cannot be considered (CPLR 2106).