

Koch v Sheresky, Aronson & Mayefsky LLP
2009 NY Slip Op 31520(U)
July 7, 2009
Supreme Court, New York County
Docket Number: 112337/07
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

EMILY JANE GOODMAN

PRESENT: _____
Justice

PART 17

Index Number : 112337/2007

KOCH, VLADIMIRA

vs

SHERESKY, ARONSON & MAYEFISKY

Sequence Number : 002

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is 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 *to dismiss is*

denied without prejudice

FILED

JUL 13 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/7/09

EMILY JANE GOODMAN
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----X
VLADIMIRA KOCH, a/k/a VLAD'KA KOCH,
MICHAL KOCH, her son, EUROPA DOCU-SEARCH,
INC., EUROVID FKK, HELIOS NATURA, EUROPA
DOCU-SEARCH, s.r.o., EUROVIDFKK, s.r.o.,

Plaintiffs,

-against-

Index No.: 112337/07

SHERESKY, ARONSON & MAYEFESKY LLP, DAVID
ARONSON individually, BRAGER, WEXLER,
EAGEL & MORGENSTERN, P.C., RAYMOND A.
BRAGAR individually, RAGUES & MIN, ESQS.,
RAYMOND RAGUES individually, D'AGOSTINO &
SALVI, LLP and FRANK J. SALVI individually,

Defendants.

FILED
JUL 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

EMILY JANE GOODMAN, J.S.C.:

The instant case involves, primarily, legal malpractice claims by Vladimira Koch a/k/a Vlad'ka Koch (hereinafter Vladka Koch), her son Michal Koch, and several video companies in which Vladka Koch allegedly holds ownership interests (collectively, the Plaintiffs), against Vladka Koch's former counsels who represented her in a divorce action commenced by her former husband Robert Koch. Specifically, the defendant-counsels are David Aronson (Aronson) and his law firm Sheresky, Aronson & Mayefesky LLP (Sheresky Aronson and Aronson, the Aronson Defendants); Raymond A. Bragar (Bragar) and his law firm Bragar, Wexler, Eagel & Morgenstern, P.C. (Bragar Wexler and Bragar, the Bragar Defendants); and Raymond Ragues (Ragues) and his law firm

Ragues & Min (Ragues Min and Ragues, the Ragues Defendants). In addition, Plaintiffs assert, among others, a legal malpractice claim against Frank J. Salvi (Salvi) and his law firm D'Agostino & Salvi, LLP (D'Agostino and Salvi, the Salvi Defendants), former counsel for Robert Koch in the divorce action.

The Salvi Defendants, the Bragar Defendants and the Aronson Defendants (collectively, the Moving Defendants) have each filed a motion seeking dismissal of the complaint on various grounds (motion sequence numbers 002, 003 and 004, respectively).¹ In response and in opposition to the motions to dismiss by the Bragar and Aronson Defendants, Plaintiffs filed a cross motion for an order extending their time to complete service of process (motion sequence number 005). The cross motion and the various motions to dismiss are consolidated herein for disposition.

Background

According to the complaint,² Robert Koch (a U.S. citizen and non-party to this action) and Vladka Koch (a Czech national) met when he was on a business trip in 1991, in the country then known as Czechoslovakia. Robert was in the business of producing and

¹ The Ragues Defendants did not move for dismissal of the complaint. Instead, they filed an answer in which they generally denied the allegations of the complaint and asserted cross claims against the co-defendants. This decision does not address the issues raised by the Ragues Defendants in their answer.

² The original complaint filed in December 2007 was later amended in February 2008. As amended, the complaint is referred to hereinafter as "the Complaint," unless otherwise specified.

distributing naturist (i.e. nudist) videos, and Vladka began working with him after they met. In 1997, they entered into a partnership agreement and formed several video companies, including Europa Docu-Search, Inc., Eurovid, Inc., Eurovid FKK, Helios Natura, Europa Docu-Search, s.r.o. and Eurovidfkk, s.r.o., which are the named corporate plaintiffs in this action. They lived together in the country now known as the Czech Republic, from 1997 to 2003, married in a civil ceremony in New York in 2000, but never took up residence in the United States. In 2003, Robert adopted Michal, Vladka's son from a prior marriage; the adoption was finalized in the Czech Republic. Allegedly, Robert later abandoned Vladka and Michal, and left the Czech Republic for the United States in December 2003.

In February 2004, Robert commenced a divorce action against Vladka in the Supreme Court of New York, Westchester County (the Divorce Court). In the divorce action, Robert retained the Salvi Defendants as counsel to represent him, and Vladka retained the Bragar Defendants to represent her. The Complaint alleges that, unbeknownst to Vladka at the time, the Bragar Defendants engaged the Aronson Defendants as co-counsel. The Complaint also alleges, and it is undenied, that the Aronson Defendants appeared in court, conducted negotiations and participated in the divorce action on Vladka's behalf. The Complaint further alleges that, in the answer filed on Vladka's behalf in the divorce action, the

Bragar and Aronson Defendants failed to, inter alia, challenge service of process, venue, subject matter as well as personal jurisdictions. In September 2004, the Bragar Defendants and the Aronson Defendants withdrew from representation of Vladka without resolving the divorce action, including issues relating to her business interests under the partnership agreement with Robert. Thereafter, Vladka retained the Ragues Defendants to represent her in the divorce action.

In February 2005, Vladka's conditional immigrant status expired.³ The Complaint alleges that the loss of her immigrant status was due to the absent and/or neglectful advice of all counsels in the divorce action, including the Salvi Defendants who allegedly volunteered erroneous immigration advice. The Complaint also alleges that Vladka was thus prevented from appearing in person in the divorce action, as she was unable to obtain a visa despite her applications for re-entry into the United States. This scenario allegedly impeded her prosecution of the counterclaims and defenses in the divorce action. The Complaint further asserts that her inability to appear and participate contributed to the entry of civil contempt orders issued by the Divorce Court against her in July and November

³ Vladka obtained her conditional immigrant status as the wife of Robert, a U.S. citizen. Such status was to be adjusted to permanent status via Robert's sponsored petition filed prior to the end of the conditional period. The petition was not filed, apparently, due to the commencement of the divorce action.

2005, which adversely affected her various interests in the divorce action. In or about October 2005, the Ragues Defendants moved to withdraw from representation of Vladka. The motion was granted by the Divorce Court in November 2005.

In December 2005, an inquest was held in the Divorce Court in the absence of Vladka, where Robert Koch allegedly testified falsely, among other things, that no children were involved in the marriage, and the video companies were marital property that could be awarded him in an equitable distribution. The Complaint asserts that the Salvi Defendants knew or should have known that Robert's testimony was false, but nonetheless prepared a proposed divorce judgment based on fraudulent testimony. A Judgment of Divorce by default was entered in March 2006, and it provided, among other things, that Robert obtained exclusive rights to and control of the video companies, together with the copy-righted films/videos and related web-sites.

In or about August 2006, Vladka retained current counsel, KTHL Law Offices, P.C., to represent her in the divorce action. In February 2007, a motion was filed on her behalf to vacate the divorce judgment and civil contempt orders. As Robert failed to oppose, the motion was granted on the basis of justifiable excuse and his misrepresentations made at the December 2005 inquest. After the divorce action was restored to the court calendar, Vladka filed an amended answer and counterclaims based on, among

other things, Robert's alleged fault in the marriage and the parties' interests under the partnership agreement. Subsequent to Vladka's filing of the answer and counterclaims, Plaintiffs commenced the instant action against the defendants herein.

The Complaint in this action contains eighteen causes of action that sound in legal malpractice, fraud/misrepresentation and violation of Judiciary Law § 487. The Moving Defendants move to dismiss (motion sequence numbers 002, 003 and 004), arguing, inter alia: (1) lack of privity (as to the Salvi Defendants); (2) failure to show reliance on the alleged fraud/misrepresentation; (3) inability to show ascertainable damages as the underlying divorce action was pending; (4) failure to show a chronic or extreme pattern of legal delinquency under Judiciary Law § 487; and (5) lack of personal jurisdiction due to improper service of process (as to the Bragar and Aronson Defendants). In response to the last argument, Plaintiffs cross move (motion sequence number 005) for an extension of time to complete service.

While the instant motions to dismiss and cross motion are pending, the Divorce Court issued a Decision and Order on October 23, 2008, that contained findings of fact, conclusions of law, and judgment of divorce in favor of Vladka. In light of the Decision and Order, Plaintiffs filed in February 2009, with leave of court, a supplemental affirmation based on "new evidence" that came into existence after the parties' submission of motions,

opposing the relief sought by the Moving Defendants.

Discussions

I. Extension Of Time To Effect Service Of Process

The Bragar Defendants and the Aronson Defendants move to dismiss the Complaint for, among other things, lack of personal jurisdiction based on Plaintiffs' alleged failure to effectuate proper service of process. As to the Bragar Defendants, they contend that service was attempted by the delivery of the summons with notice to a Stephanie Aldrich, a legal secretary of Bragar Wexler who was not authorized to accept service, and no followup mailing was sent to Bragar, as required by CPLR 308 (2) for an individual defendant. As to the Aronson Defendants, they contend that service was improper because the summons and notice was delivered to a B.J. Morris, the person in charge of the messenger desk at the office building of the Aronson Defendants, but Morris was neither a Sheresky Aronson employee nor was he authorized to accept service on its behalf,⁴ and there is no evidence that followup mail was sent to Aronson, as required by CPLR 308 (2).

⁴ The affidavit of Plaintiffs' process server, Douglas Hilfman, stated that the building security denied him access to the Aronson Defendants' offices, and he was told to go to the security desk where B.J. Morris was in charge. The affidavit also stated that Morris called the law firm, and was apparently authorized to receive service on behalf of the firm and Aronson. As such, Plaintiffs argue that service was proper. *Al Fayed v Barak*, 39 AD3d 371 (1st Dept 2007) (service was properly left with doorman of defendant's building, because access to the building was prohibited to the process server).

The Defendants also contend that, because both the time to effect service and the statute of limitations on the claims have since expired, dismissal of this action is warranted. In response and in opposition, Plaintiffs cross move pursuant to CPLR 306-b for and order, inter alia, extending the time to complete service.

CPLR 306-b provides, in relevant part, that service of the summons with notice shall be made within 120 days of the filing of the summons with notice, and if service is not made upon a defendant within such time, the court shall "dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service." A leading case on CPLR 306-b is *Leader v Maroney, Pozinni & Spencer* (97 NY2d 95 [2001]). In *Leader*, the Court of Appeals noted that, unlike an extension request based on "good cause," there is no requirement, under the "interest of justice" standard, that a plaintiff show diligent efforts at service as a threshold matter. Instead, in its discretion the court may consider diligence (or the lack thereof) along with other factors to determine whether under the "interest of justice" standard, an extension of the time for service should be granted. The factors may include "[the] expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant." *Id.* at 105-106.

In the instant case, it is undisputed that service of the summons with notice on the Bragar and Aronson Defendants was first made on September 14 and 17, 2007, albeit not in full compliance with the CPLR, promptly after court filing of same on September 12, 2007, which was done prior to the expiration of the limitations period. It is also undisputed that soon after service of process, respective counsels for the Bragar and Aronson Defendants entered into discussions and stipulations with Plaintiffs' counsel regarding, inter alia, extensions of the time for Plaintiffs to file the Complaint and for Defendants to answer or move with respect to the Complaint. Copies of the Complaint were later served upon Defendants' counsels in accordance with their Demand for Complaint. The record reflects that promptly after Defendants filed the instant motions to dismiss, counsel for Plaintiffs remedied prior service deficiencies by re-serving the papers according to the CPLR, and by cross moving for an order either deeming the service timely and properly made *nunc pro tunc* or granting an extension of time to complete service.

As noted, whether an asserted claim is meritorious is one of the factors under the "interest of justice" test. Construing the allegations of the Complaint in favor of Plaintiffs, which is required when considering a motion to dismiss, certain claims in the Complaint appear meritorious, as discussed below. *Mead v Singleman*, 24 AD3d 1142, 1144 (3d Dept 2005) (extended plaintiff's

time to complete service based on, inter alia, public policy favoring resolution of cases on the merits); *AIG Managed Market Neutral Fund v Askin Capital Mgmt., L.P.*, 197 FRD 104, 110 (SD NY 2000) (expiration of statute of limitation militated in favor of plaintiff's motion to extend time for service of process, because dismissal would extinguish potentially meritorious claims). Importantly, the record shows that the Aronson and Bragar Defendants were served with notice of the claims prior to the expiration of limitations period, and had notice of same well within 120 days after the commencement of this action. Thus, the contention that granting an extension of time is prejudicial to Defendants is unpersuasive. *Spath v Zack*, 36 AD3d 410, 413-414 (1st Dept 2007) (court granted cross motion to extend time to serve under CPLR 306-b; although initial service was defective, it was timely made and there was no legal prejudice to defendant who had notice of the action); *Rosenzweig v 600 North Street, LLC*, 35 AD3d 705, 706 (2nd Dept 2006) (court found defendants' claim of prejudice without merit, because they were served with process within the 120-day period and had actual notice of the claims, although such service was later found to be defective and the statute of limitations had since expired).⁵

⁵ Conversely, the cases cited in support of Defendants' motions to dismiss are inapposite. See e.g., *Estate of Jervis v Teachers Ins. & Annuity Assn.*, 279 AD2d 367 (1st Dept 2001); *Hafkin v North Shore University Hospital*, 279 AD2d 86 (2nd Dept 2000), *affd* 97 NY2d 95 (2001). In those cases, plaintiffs never

In light of the foregoing and in the interest of justice, Plaintiffs' cross motion pursuant to CPLR 306-b deeming the service proper and complete nunc pro tunc is granted, as there does not appear to be a dispute regarding the remedial service of process made shortly after the instant motions to dismiss were filed by the Bragar and Aronson Defendants. In this regard, the motions to dismiss for lack of personal jurisdiction (due to improper service of process) should be denied.

II. The Legal Malpractice Claims

To properly plead a legal malpractice claim, a plaintiff must allege: (1) the attorney's negligence; (2) the negligence was the proximate cause of plaintiff's loss; and (3) actual damages sustained by plaintiff. *Leder v Spiegel*, 31 AD3d 266 (1st Dept 2006), *affd* 9 NY3d 836 (2007); *Pellegrino v File*, 291 AD2d 60 (1st Dept 2002). In order to establish "proximate cause," a plaintiff must show that "but for" the attorney's negligence, plaintiff would have prevailed in the underlying matter or would not have sustained damages. *Brooks v Lewin*, 21 AD3d 731, 734 (1st Dept 2005). In addition, the courts impose a strict requirement for malpractice claims in that a plaintiff-client must establish contractual privity with the defendant-

served defendants within the 120-day period. Here, it is undisputed that service was made or attempted promptly after filing of the summons and notice and well within the 120-day period. Thus, Plaintiffs showed at least some degree of diligence in making or attempting service.

attorney. *Federal Ins. Co. v North American Specialty Ins. Co.*, 47 AD3d 52, 59 (1st Dept 2007); *Goldfarb v Schwartz*, 26 AD3d 462, 463 (2nd Dept 2006). Hence, a plaintiff's subjective belief or conclusory allegation as to a privity relationship is insufficient. *Weadick v Herlihy*, 16 AD3d 223, 224 (1st Dept 2005); *Conti v Polizzotto*, 243 AD2d 672, 673 (2nd Dept 1997).

As to the Salvi Defendants, it is undisputed that they were counsel for Robert Koch, not Vladka Koch, in the divorce action. Thus, there is no contractual privity between Vladka Koch and the Salvi Defendants. *Aglira v Julien & Schlesinger, P.C.*, 214 AD2d 178, 183 (1st Dept 1995) ("[a]n attorney does not owe a duty of care to his adversary or one with whom he is not in privity"). Yet, Vladka argues that there is "implied privity" because Salvi volunteered immigration advice by way of an "opinion letter" and that such letter is "an exception to strict privity." Plaintiffs' Opposition Brief, p. 13, citing *Prudential Ins. Co. of America v Dewey, Ballantine, Bushby, Palmer & Wood*, 80 NY2d 377 (1992). Vladka contends that the so-called "opinion letter" written by Salvi in May 2005 to the Divorce Court (with a copy to Vladka's then counsel Ragues Min), in response to that court's request for information regarding immigration procedures to obtain a visa for Vladka to enable her to appear in court to complete the divorce, contained erroneous information that was

relied upon by Vladka to her detriment.⁶ In Vladka's view, this was legal malpractice.

The argument is unpersuasive, and Vladka's reliance on the *Prudential* case, *supra*, is misplaced. In *Prudential*, the issue was whether an attorney could be held liable to a third party for misrepresentations made in an opinion letter that was sent to that party pursuant to the instructions of the attorney's client. The *Prudential* court held that the attorney could be liable if "there was either actual privity of contract between the parties or a relationship so close as to approach that of privity." *Id.* at 382. Finding that the opinion letter was sent directly to the plaintiff at the behest of the attorney's client, and the attorney was aware that such letter would be relied upon by plaintiff in deciding whether to enter into a debt restructuring transaction with the attorney's client, the *Prudential* court concluded that the relationship between the attorney and the plaintiff was sufficiently close to establish a duty of care running from the former to the latter. *Id.* at 385-387.⁷

In the instant case, there is no claim or allegation that Salvi is an expert or attorney on immigration laws. Indeed, the

⁶ The "opinion letter" expressly stated that the immigration information contained therein was provided by Vratslave Pechota, Jr., Esq., the attorney previously retained by Robert Koch to file the initial petition for an immigrant visa for Vladka.

⁷ However, the facts did not establish there was a breach of that duty, because there was no procedural or substantive misrepresentations made by the attorney in the opinion letter. *Id.*

opinion letter explicitly stated that the information therein came from Mr. Pechota, a lawyer from the Czech Republic whose primary practice is immigration laws. Also, unlike *Prudential*, the letter was directed to the Divorce Court at its request, with a copy to Vladka's counsel as a matter of course and courtesy, and it was not written at the behest of Salvi's client, Robert Koch. Although Vladka purportedly relied on the information in the letter, she was represented by counsel who could seek other legal advice, if needed, on immigration matters. As such, it is rather disingenuous for Plaintiffs to argue that "it is not as if Vladka had any other option or source for advice on immigration matters." Plaintiffs' Opposition Brief, p. 13. Therefore, the "implied privity" argument fails, and the legal malpractice claim against the Salvi Defendants should be dismissed.

With respect to the Bragar and Aronson Defendants, privity with Vladka is not in dispute, as it appears to be conceded.⁸ However, with respect to all the named Plaintiffs other than Vladka (i.e. Michal Koch and the corporate plaintiffs), it is apparent that they have no contractual or implied privity with any of the Moving Defendants. Yet, they argue that they have "unity of interest" with Vladka such that their interest could be adjudicated along with hers. Such argument is without merit, and

⁸ The Bragar Defendants have not addressed the legal malpractice and other claims. Instead, they currently seek dismissal based on improper service only, as discussed above.

Plaintiffs have not cited any law in support of same. Therefore, the legal malpractice claim of all the named Plaintiffs other than Vladka Koch, which requires the existence of an attorney-client relationship, should be dismissed.⁹

With respect to the Aronson Defendants, they argue that the legal malpractice claim against them should be dismissed because of, inter alia: (1) pendency of the divorce action and inability to ascertain damages, *Zletz v Outten & Golden, LLP* (18 AD3d 322 [1st Dept 2005]) (absent ascertainable damages due to pendency of the underlying action, a legal malpractice claim cannot stand); (2) subsequent counsel had adequate time to protect Vladka's rights in the underlying divorce action, *Golden v Cascione, Chechanover & Pucigliotti* (286 AD2d 281 [1st Dept 2001]) (where successor counsel had sufficient time to protect plaintiff's rights, alleged negligence by prior counsel could not be the proximate cause of plaintiff's injury); and (3) failure to establish the "but for" requirement of a malpractice claim, *Schwartz v Olshan Grundman Frome & Rosenzweig* (302 AD2d 193 [1st Dept 2003]) (legal malpractice claim must allege that "but for" attorney's negligence, plaintiff would have received a better result or prevailed in the underlying action).

Notably, the "pendency" argument is now academic because the

⁹ In any event, the damages these other Plaintiffs might have suffered appear to have been taken into consideration by the Divorce Court in its October 2008 Decision and Order when awarding damages to Vladka in her favor, as discussed below.

Divorce Court issued its Decision and Order on October 23, 2008, which brought the matrimonial action to a final conclusion, as no appeal has been taken therefrom. Moreover, any contention about unascertainable damages is moot, because the Decision and Order dealt with various damages issues, such as the award of spousal and child support, the distribution of pre-marital and marital assets (including various business interests in the corporate plaintiffs), in favor of Vladka.

With respect to the "subsequent counsel" argument, the record reflects that the Aronson (and Bragar) Defendants withdrew from representation of Vladka on September 30, 2004, and the Ragues Defendants succeeded as Vladka's new counsel thereafter. The Complaint alleges that the Aronson and Bragar Defendants failed, in the answer filed on behalf of Vladka in the divorce action, to challenge service, venue, subject matter and personal jurisdiction issues. The Complaint also alleges that the answer failed to discuss Vladka's various business interests under the Partnership Agreement. These failures, among others, allegedly resulted in the entry of various court orders that significantly impaired Vladka's strategies in the prosecution and defense of the divorce action. The Aronson Defendants have not demonstrated that subsequent counsel could have cured all such prior alleged failures and issues, especially the personal jurisdiction

issue.¹⁰ See generally *Marshel v Hochberg*, 37 AD3d 559 (2nd Dept 2007) (court affirmed the denial of defendant-attorney's summary judgment motion based on subsequent counsel argument, as there were factual issues as to whether the scope of subsequent counsel's duties broadly encompassed the services for which plaintiff-client had retained defendant-attorney, or whether subsequent counsel represented plaintiff-client only on discrete issues).

The Aronson Defendants also assert that the Complaint fails to allege proximate cause (i.e. the "but for" argument). They contend that, as a result of the Divorce Court's decision of March 19, 2008 (which among other things granted Vladka a divorce and awarded child support and maintenance), Vladka "has effectively been relieved of all damages that she claims in this action."

The Complaint alleges, inter alia, that (1) although the Aronson Defendants knew there was a child of the marriage (i.e. Michal Koch), they failed to pursue child support, which caused Vladka using her limited funds to support Michal; (2) although Defendants knew that Robert had substantial assets when the divorce action was commenced, as his Statement of Net Worth

¹⁰Furthermore, although the Aronson Defendants claim that Plaintiffs failed to allege that Vladka would have achieved a better result had she contested jurisdiction in New York, the Complaint reasonably implies that Vladka would have achieved a better legal result had the action been litigated in the Czech Republic.

listed assets at \$7.8 million (and Vladka's income depended on the performance of the corporate entities), Defendants failed to seek spousal support for Vladka; (3) because of Defendants' alleged negligence, Robert was permitted to waste or convert corporate assets, and because of Robert's asserted indigence and his "disappearance," it is unlikely that Vladka would be able to collect funds from him, thus causing her substantial damages; and (4) Defendants intentionally or negligently misrepresented that Vladka would suffer no harm from their withdrawal as her counsel.

Although the Aronson Defendants maintain that Plaintiff cannot demonstrate damages in light of the favorable Divorce Court's decision, they have not demonstrated that the amounts awarded by the Divorce Court are the same amounts as would have been awarded had favorable results been obtained earlier, nor have they demonstrated that legal fees were not needlessly incurred in this pursuit. Moreover, Plaintiffs maintain that the award will not be collectible because Robert has disappeared. The Aronson Defendants have not demonstrated that collectibility is not an issue, or that the amounts awarded would not have been collectible even if the favorable results were obtained, in the absence of any malpractice.

In light of the foregoing, the Aronson Defendants have failed to support their "but for" argument, as the Complaint sufficiently alleges a legal malpractice cause of action, as it asserts that but for the negligence of the Aronson Defendants,

Vladka would have prevailed in the matrimonial action or attained a better result, or would not have sustained significant damages. Accordingly, the Aronson Defendants' motion to dismiss the claims asserted in the Complaint sounding in legal malpractice (i.e. the fourth, fifth, sixth, eighth and sixteenth causes of action) is denied.¹¹

III. The Fraud Or Misrepresentation Claims

The Complaint alleges that the Moving Defendants committed fraud and/or misrepresentation in connection with the divorce action. The Aronson Defendants move to dismiss such claims (the third and seventh causes of action) on the ground that they are based on the same facts and allegations as the legal malpractice claims. *Ambase Corp. v Davis Polk & Wardell*, 30 AD3d 171, 172 (1st Dept 2006), *aff'd* 8 NY3d 428 (2007) (breach of fiduciary duty claim dismissed as redundant as it was based on same facts as legal malpractice claim); *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 (1st Dept 2004).

Plaintiffs argue that the fraud/misrepresentation and legal malpractice claims are distinguishable in that attorney Bragar fraudulently misrepresented or warranted to Vladka that he could resolve the matrimonial action favorably for \$50,000 in fees, and thus the fraud or breach of contract-warranty claim "is obviously separate and apart from the attorney's negligence." Plaintiffs'

¹¹ The Aronson Defendants' characterization of such causes of action as sounding in legal malpractice is unchallenged.

Opposition Brief, p. 13. This argument is without merit because Plaintiffs do not allege that the Aronson Defendants made such misrepresentation or warranty, and the same cannot be imputed to them. Except for the "contract-warranty" argument, Plaintiffs do not dispute that the alleged facts for the malpractice and fraud-misrepresentation claims are basically the same. Thus the third and seventh causes of action against the Aronson Defendants should be dismissed.

With respect to the Salvi Defendants, the Complaint (the fifteenth and sixteenth causes of action) alleges that they repeatedly and fraudulently misrepresented certain alleged facts to the Divorce Court to induce that court into issuing orders and judgments adverse to Vladka. The Complaint also asserts that Salvi, as an officer of the court, had a duty not to engage in deceit or collusion to deceive that court. These claims and assertions are substantially similar to those for the alleged violation of § 487 of the Judiciary Law (the seventeenth cause of action), as discussed below. Because these claims are redundant of the § 487 violation claim, the fifteenth and sixteenth causes of action should be dismissed.

IV. Violation Of Judiciary Law § 487 Claims

Section 487 of Judiciary Law provides, in relevant part, that an attorney who is (1) "guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party"; or (2) "wilfully delays his client's

suit with a view to his own gain;" is "guilty of a misdemeanor" and "he forfeits to the party injured treble damages, to be recovered in a civil action." Judiciary Law § 487.

Caselaw interpreting § 487 generally states that, in addition to pleading the required elements of the statute, the complaint must plead that the defendant attorney engaged in "a pattern of delinquent, wrongful or deceitful behavior" and the plaintiff suffered "pecuniary damages resulting from the alleged wrong." *Jaroslawicz v Cohen*, 12 AD3d 160, 161 (1st Dept 2004), citing, *inter alia*, *Havell v Islam*, 292 AD2d 210 (1st Dept 2002). See also *Solow Mgmt. Corp. v Seltzer*, 18 AD3d 399, 400 (1st Dept) (single misrepresentation by defendant attorney did not allege a cognizable claim under § 487, "which provides recourse only where there is a chronic and extreme pattern of legal delinquency").

With respect to the Aronson Defendants, the Complaint merely alleges that they "did wilfully delay their client, Ms. Koch's suit, with a view to their own gain," and that "this delay violated New York Judicial Rule, Section 487." Complaint, ¶ 395-396. Such allegation, even if true, does not rise to the level of "chronic and extreme pattern of delinquency." Apparently cognizant of the legal deficiency, Plaintiffs argue in their opposition papers that Defendants failed to "pursue basic jurisdictional problems" and "accommodate [Vladka for] her lack of proficiency in English or American legal concepts," and that it was "irresponsible and unethical for Defendants to ignore

these factors in undertaking her representation." Plaintiffs' Opposition Brief, p. 14. Assuming these allegations are true, they are duplicative of the legal malpractice claims, which are dealt with above, and they do not constitute or arise to violations of § 487. Accordingly, the motion to dismiss the eighteenth cause of action (violation of § 487) against the Aronson Defendants is granted.

With respect to the Salvi Defendants, the Complaint alleges, among other things, that Salvi and Robert Koch knew that a child was involved in the marriage (i.e. Michal), and that Robert even offered to pay for child support when confronted with the issue. However, when Vladka was unrepresented by counsel at the December 2005 inquest, and she was unable to attend due to her inability to obtain a visa, Salvi allowed Robert to falsely testify that there was no child involved in the marriage, and proposed a judgment based on fraudulent testimony. In reply, Salvi contends that the Divorce Court could not have been deceived because it was aware of the prior settlement negotiations that included an offer of child support. Salvi Defendants' Reply Brief, p. 14.

Such contention is belied by the Divorce Court's Decision and Order dated October 23, 2008, which, among other things, contained the following "findings of fact":

Plaintiff [Robert Koch] and the former counsel of record exploited Defendant's [Vladka's] exclusion from the United States. They affirmatively, and by omission, misrepresented various facts before this Court, thereby causing the issue of not less than

three court orders, which have since been vacated upon this Court learning the true facts and circumstances of this case.

Decision and Order, page 15, ¶ 102.

While this court is cognizant that the Salvi Defendants are not parties to the underlying divorce action, the Decision and Order is nonetheless a basis to deny the Salvi Defendants motion regarding this issue. Significantly, in a recent decision by the Court of Appeals issued on February 12, 2009, it was noted that Judiciary Law § 487 is "not a codification of common-law cause of action for fraud," and "the statute's evident intent [is] to enforce an attorney's special obligation to protect the integrity of the courts and foster their truth-seeking function." *Amalfitano v Rosenberg*, 12 NY3d 8, 14 (2009). See also *Dupree v Voorhees*, __ misc 3d __, 876 NYS2d 840, 842 (Sup Ct, Suffolk County 2009) ("the revival of this cause of action under the *Amalfitano* decision emphasizes the need for all attorneys to be completely forthright in their dealings with the court, and with one another"). Hence, the Salvi Defendants' motion to dismiss the seventeenth cause of action (violation of Judiciary Law § 487) is denied.

Accordingly, it is

ORDERED that the motions to dismiss (motion sequence numbers 003 and 004) for lack of personal jurisdiction based on improper service of process brought by defendants Bragar, Wexler, Eagel & Morgenstern, P.C. and Raymond A. Bragar, as well as by Aronson &

Mayefsky LLP and David Aronson, are hereby denied; and it is further

ORDERED that the cross motion by plaintiffs (motion sequence number 005) pursuant to CPLR 306-b for an order deeming service of process proper and complete nunc pro tunc is hereby granted; and it is further

ORDERED that the motion to dismiss (motion sequence number 002) the legal malpractice claims and fraud/misrepresentation claims (the 14th and 15th causes of action of the Complaint) against D'Agostino & Salvi, LLP and Frank J. Salvi is granted, but the motion is denied as to the Judiciary Law §487 claim (the 17th cause of action); and it is further

ORDERED that the motion to dismiss (motion sequence number 004) the fraud/misrepresentation claims (the 3rd and 7th causes of action of the Complaint) and the Judiciary Law § 487 claim (the 18th cause of action) of the Aronson Defendants is granted, but the motion is denied as to the legal malpractice claims (the 4th, 5th, 6th, 8th and 16th causes of action).

This constitutes the Decision and Order of the court.

Dated: July 7, 2009

ENTER:



J.S.C.

EMILY JANE GOODMAN

FILED
JUL 13 2009
COUNTY CLERK'S OFFICE
NEW YORK