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

PRESENT: HON. JOAN A. MADDEN J.S.C. PART 11

Justice

Index Number : 105224/2005

CONNOLLY, GERARD A.

VS.

NAPOLI KAISER BERN

SEQUENCE NUMBER : 012

AMEND SUPPLEMENT PLEADINGS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

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

Cross-Motion: ☐ Yes ☒ No

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

FILED

JUL 24 2009

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: July 16, 2009

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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GERARD A. CONNOLLY,

Plaintiff,

-against-

NAPOLI KAISER & BERN, LLP, PAUL J. NAPOLI, MARC J. BERN, GERALD KAISER, and NAPOLI BERN, LLC,

Defendants.

INDEX NO. 105224/05

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JOAN A. MADDEN, J.:

In this action for damages, plaintiff is an attorney who is suing his former employer, a law firm, claiming he was wrongfully discharged in April 2002 for refusing to participate in an alleged "cover-up" regarding the propriety of a settlement of one of the firm's personal injury cases (the "Vasquez matter"). Plaintiff moves for an order pursuant to CPLR 3025(b) granting leave to amend the complaint by adding new factual and legal allegations, asserting several new causes of action, and expanding the previously asserted causes of action. Plaintiff also moves for an order pursuant to CPLR 1001 adding Napoli, Kaiser Bern & Associates, LLP as a "necessary party." Defendants oppose the motion and cross-move for an award of sanctions pursuant to 22 NYCRR § 130-1.1.

Plaintiff commenced this action on May 15, 2005. The original complaint asserts four causes of action: a first cause of action for wrongful discharge and retaliation; a second cause of action for earnings due and owing and an accounting; a third cause of action for harassment and

"extortion" based on defendants' January 22, 2004 letter; and a fourth cause of action for an accounting.

In lieu of answering, defendants made a pre-answer motion to dismiss pursuant to CPLR 3211. In a decision and order dated April 4, 2006, the Honorable Rolando T. Acosta, granted defendants' motion in part only to the extent of dismissing the portion of the second cause of action seeking an accounting, and the fourth causes of action also for an accounting. Rejecting the balance of defendants' motion, Judge Acosta analyzed the Courts of Appeals decision in Wieder v. Skala, 80 NY2d 628 (1992), which created narrow exception to the employee-at-will doctrine. In Wieder, the Court of Appeals reinstated an attorney's breach of contract claim against his former law firm, holding that a law firm has an implied-in-law obligation of good faith and fair dealing when an associate at the firm, hired as an at-will-employee, is terminated for insisting that the firm comply with the governing disciplinary rules requiring the reporting of professional misconduct allegedly committed by another associate.[1]

Judge Acosta determined that under the circumstances of the instant case, plaintiff sufficiently stated a cause of action for breach of an implied-in-law obligation under Wieder, as he was an employee-at-will alleging that he was terminated for refusing to engage in misconduct

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[1]The particular rule of professional conduct implicated in Wieder was DR 1-103(A), 22 NYCRR §1200.4(a), "Disclosure of Information to Authorities," which states that

> (a) A lawyer possessing knowledge, (1) not protected as a confidence or secret, or 2) not gained in the lawyer's capacity as a member of a bona fide lawyer assistance or similar program or committee, of a violation of section 1200.3 [DR 1-102] of this part that raises a substantial questions as to another lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or action upon such violations.

in violation of Disciplinary Rule 1-102.[2] Judge Acosta found that "the firing and subsequent January 22 [2004] letter were inherently coercive and implied an effort to impede post-termination reporting," and that plaintiff alleges "he was terminated specifically for his 'refusal to allow himself to be drawn into the cover-up of defendants' wrongful acts.'" Judge Acosta concluded that "[g]iven that plaintiff has plead[ed] a cause of action cognizable at law the complaint will not be dismissed *even though plaintiff does not have a valid cause of action for wrongful discharge*, Horn v. New York Times, 100 NY2d 85, 96 (2003), *or economic duress*, Bank Leumi Trust Co. v. D'Evori, 163 AD2d 26 (1st Dept 1990) [emphasis added]."[3]

On July 26, 2007, Judge Acosta issued an order permitting substitution of plaintiff's counsel. On December 11, 2008, plaintiff's new counsel made the instant motion seeking to amend the complaint (motion seq. no. 012). The motion papers include an attorney's affirmation in support, and copies of the original complaint, the proposed amended complaint, Judge Acosta's April 4, 2006 and July 16, 2007 orders, discovery orders of this court, and portions of

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[2]Disciplinary Rule 1-102, 22 NYCRR §1200.3, is entitled "Misconduct" and states in relevant part that:

> (a) A lawyer or firm shall not:
> (1) Violate a disciplinary rule.
> (2) Circumvent a disciplinary rule through actions of another.
> (3) Engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer.
> (4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.
> (5) Engage in conduct that is prejudicial to the administration of justice.

[3]While Judge Acosta's decision does not specifically dismiss the third cause of action for retaliation and harassment based on defendants' January 22, 2004 letter, dismissal of that claim is implicit in the determination that plaintiff could not assert a claim for wrongful discharge, apart from the claim for breach of an implied-in-law obligation.

the transcript of defendant Gerald Kaiser's videotaped deposition.

Although motions for leave to amend pleadings are to be liberally granted in the absence of prejudice or surprise, where the proposed amendment is plainly lacking in merit and legally insufficient, leave to amend should be denied. See Thompson v. Cooper, 24 AD3d 203 (1st Dept 2005); Zaid Theatre Corp. v. Sona Realty Co., 18 AD3d 352 (1st Dept 2005); Heller v. Louis Provenzano, Inc., 303 AD2d 20, 25 (1st Dept 2003); Monteiro v. R.D. Werner Co, Inc, 301 AD2d 636 (2nd Dept 2003); Zabas v. Kard, 194 AD2d 784 (2nd Dept 1993). As the party seeking amendment, plaintiff has the burden of making an evidentiary showing establishing the merit of the proposed amendments. See Zaid Theatre Corp. v. Sona Realty Co., supra; Hynes v. Start Elevator, Inc., 2 AD3d 178 (1st Dept 2003); Monteiro v. R.D. Werner Co, Inc, supra.

Here, the proposed amended complaint bears little resemblance to the original complaint, both in terms of the factual allegations and the legal claims asserted. While the original complaint is nine pages and contains four causes of action, the proposed amended complaint is 18 pages and contains six causes of action, none of which is identical to the original causes of action. Moreover, in the proposed amended complaint, the recitation of the "facts common to all counts" provides new and more detailed facts, and includes information obtained through discovery and events that occurred subsequent to the commencement of this action.

The First Count in the proposed amended complaint is a new claim for violation of Judiciary Law §487, which prohibits attorney misconduct; plaintiff seeks compensatory, treble and punitive damages. Under section 487, a party has a private right of action to seek treble damages against an attorney who is found "guilty of any deceit or collusion, or consents to any

deceit or collusion, with intent to deceive the court or any party." Judiciary Law §487(1); see Amalfitano v. Rosenberg, 12 NY3d 8 (2009) (citing Looff v. Lawton, 14 Hun 588 [2nd Dept 1878, aff'd 97 NY 478 [1884]).[4]

Plaintiff bases his proposed Judiciary Law §487 claim on conduct that occurred during two distinct time periods, 2002 and 2008. As to the first time period, the First Count alleges that in March 2002, defendants prepared an affirmation opposing Mrs. Vasquez's order to show cause to vacate the settlement of the Vasquez action; Mrs. Vasquez asserted that her husband settled the action without her knowledge. The First Count alleges that defendants' affirmation "contained false statements" and that defendants engaged in or consented to deceitful acts by not reporting that Mr. Vasquez was directed to sign his wife's signature on the settlement documents, without her consent.

As to the second time period, the First Count asserts that defendants engaged in deceitful conduct during discovery in the instant action. Specifically, the First Count alleges that defendant Kaiser's September 2008 deposition testimony was "intentionally misleading, deceitful and/or perjurious," and that Kaiser "gave several false responses" to questions regarding the

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[4]Judiciary Law §487 is entitled "Attorney Misconduct" and provides in its entirety as follows:

> An attorney or counselor who:
> 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or an party; or,
> 2. Wilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,
>
> Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

settlement of the Vasquez matter. The First Count also alleges that defendants "engaged in additional deceit or collusion" on December 8, 2008 during Mr. Vasquez's deposition, when they advised him, *inter alia*, that his communications with defendants were covered by the attorney-client privilege, and "falsely" stated that plaintiff was "'trying to get him to waive his own privilege' and implying that plaintiff had engaged in unethical behavior."

The portion of the plaintiff's claim based on events from March 2002 is time-barred by the three-year statute of limitations applicable to Judiciary Law §487. See Amalfitano v. Rosenberg, supra; Lefkowitz v. Appelbaum, 258 AD2d 563 (2nd Dept 1999); Kuske v. Gellert & Cutler, P.C., 247 AD2d 448 (2nd Dept), lv app den 91 NY2d 814 (1998); Jorgensen v. Silverman, 224 AD2d 665 (2nd Dept 1996).[5] The relation back doctrine cannot save the March 2002 portion of the Judiciary Law §487 claim, since it would have been time-barred by the three-year limitations period when the instant action was commenced in May 2005.

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[5]To the extent the First Department has held that a Judiciary Law §487 claim is governed by the six-year statute of limitations applicable to a common law fraud claim, as opposed to the three-year period for actions upon a statute imposing a penalty or forfeiture, see New York Transit Authority v. Morris J. Eisen, P.C., 276 AD2d 78 (1st Dept 2000) and Guardian Life Insurance Co. v. Handel, 190 AD2d 57 (1st Dept 1993), those cases have been implicitly overruled by the Court of Appeals recent decision in Amalfitano v. Rosenberg, supra. Amalfitano examines the history of the statute going back to the thirteenth century in England, and concludes that Judiciary Law "section 487 is not a codification of a common-law cause of action for fraud. Rather, section 487 is a unique statute of ancient origin in the criminal law of England." The Court of Appeals explains that "section 487 descends from the first Statute of Westminster, which was adopted by the Parliament summoned by King Edward I of England in 1275."

In view of the holding in Amalfitano that Judiciary Law §487 does not derive from common-law fraud, the underlying basis for the First Department's application of the six-year limitations period for fraud to Judiciary Law §487, is no longer good law. Rather, extending by implication the holding in Amalfitano to the statute of limitations issue, leads to the conclusion that section 487 is governed by the three-year period for actions created by statute imposing a penalty or forfeiture. CPLR 214(2).

More importantly, however, plaintiff's allegations fail to establish a meritorious basis for asserting a Judiciary Law §487 claim, whether such claim is founded on conduct occurring in 2002 or 2008. Since plaintiff was not a party to the Vasquez matter, he cannot maintain a section 487 claim based on any purportedly deceitful or collusive conduct on the part of his former colleagues in connection with the law firm's settlement of that case. See e.g. Amalfitano v. Rosenberg, supra (after prevailing as defendants in prior fraud action, plaintiffs sued opposing party's attorney for violation of Judiciary Law §487); Looff v. Lawton, 97 NY 478 (1884) (the "party" referred to in the statute "is clearly a party to an action pending in a court in reference to which the deceit is practiced"); Sarasota, Inc. v. Kurzman & Eisenberg, LLP, 28 AD3d 237 (1st Dept 2006) (sustaining Judiciary Law §487 claim "based on conduct in a proceeding to which plaintiff was a party"); Bankers Trust Co v. Cerrato, Sweeney, Cohn, Stahl & Vaccaro, 187 AD2d 384, 386 (1st Dept 1992) (section 487 claim properly struck "as the alleged deceit did not occur during a pending judicial proceeding in which plaintiff was a party"); Trepel v. Dippold, 2005 WL 1107010 (US Dist Ct, SDNY 2005) (section 487 "supports a civil action by a party to a litigation against the attorneys representing the parties in the litigation for any deceit or collusion practiced . . . on either the court or 'any' party"). Addressing the purpose of the statute, the Appellate Division First Department explains that a cause of action for treble damages under section 487 "implicate[s] the . . . statute's concern for curbing and providing redress for attorney overreaching vis-a-vis clients." Leskinen v. Fusco, 18 AD3d 387, 389 (1st Dept 2005), lv app dism 6 NY3d 807 (2006) (quoting Liddle & Robinson v. Shoemaker, 276 AD2d 335, 336 [1st Dept 2000]).

As to defendants' conduct during discovery in the instant action, plaintiff's allegations as to the veracity of Kaiser's deposition testimony raise issues as to a party's credibility which must be resolved by the fact finder at trial, and do not provide an independent basis to support a section 487 claim in this action. But cf. NYAT Operating Corp v. Jackson, Lewis, Schnitzler & Krupman, 191 Misc2d 80 (Sup Ct, NY Co 2002) (where plaintiffs' former attorney gave deposition testimony in action against them in federal court, as to the nature of her legal advice, plaintiffs subsequently permitted to assert a Judiciary Law §487(1) claim against their former attorney alleging her testimony was intentionally false and damaged them in the federal action). Defendants' statements to Mr. Vasquez at his deposition, including statements cautioning Mr. Vasquez about the attorney-client privilege and about testifying without the assistance of counsel, are not in the nature of a deceit within the meaning of section 487.

In any event, even assuming without deciding that defendants' acts could provide the foundation for Judiciary Law §487 claim, plaintiff's allegations do not sufficiently establish that the alleged deceit caused him damage, and damages are an essential element of a section 487 claim. See Feldman v. Jasne 294 AD2d 307 (1st Dept 2002); Gelmin v. Quicke, 224 AD2d 481 (2nd Dept 1996); Werner v. Katal Country Club, 234 AD2d 659 (3rd Dept 1996); Cresswell v. Sullivan & Cromwell, 771 FSupp 580 (SDNY 1991), aff'd 962 F2d 2 (2nd Cir), cert den 505 US 1222 (1992). Thus, for the reasons stated above, the motion to amend is denied as to the First Count for violation of Judiciary Law §487.

The motion to amend is granted as to the claim for breach of an implied obligation in law (Second Count), which is essentially a repleading and combination of the original first and third

causes of action for wrongful discharge, retaliation, harassment and extortion, in response to Judge Acosta's April 4, 2007 decision determining that plaintiff had a cognizable claim against defendants for breach of an implied- in-law obligation, under Wieder v. Skala, supra.. As explained in Wieder, plaintiff states "a valid claim for breach of contract based on an implied-in-law obligation in his relationship with defendants," as opposed to a tort claim for wrongful discharge, retaliation or harassment. Id at 639. Judge Acosta acknowledged that distinction when he declined to dismiss the complaint because plaintiff had pleaded "a cause of action cognizable at law," with the qualification that "plaintiff does not have a valid cause of action for wrongful discharge . . .or economic duress."

The motion to amend is denied as to the newly asserted claims for fraud and promissory estoppel (Third and Fourth Counts). Those claims are based on so-called "pre-employment discussions" between plaintiff and defendants. Since plaintiff alleges those discussions occurred sometime between July 2000 and June 2001, the fraud and promissory estoppel claims are barred by the six-year statute of limitations. Specifically, plaintiff alleges that defendants Bern and Napoli made material misrepresentations during a "pre-employment discussion" that "'if things worked out,' plaintiff would have the opportunity to receive a share of [the firm's] earnings," and after "'the dust settle[d]' on the mass tort claims, he [Bern or Napoli] would afford plaintiff a share of the firm's earnings." Contrary to plaintiff's assertion, the CPLR 203(f) relation back doctrine is inapplicable, as the original complaint does not include any references to the alleged pre-employment discussions between plaintiff and defendants. See Alharezir v. Sharma, 304 AD2d 414 (1st Dept 2003); A to Z Assos v. Cooper, 215 AD2d 161 (1st Dept 1995); Monoco v.

New York University Medical Center, 213 AD2d 167 (1st Dept), lv app dism in part, den in part, 86 NY2d 882 (1995).

The motion to amend is also denied as to the retaliation claim (Fifth Count), in light of Judge Acosta's April 4, 2007 decision that plaintiff does not have a cause of action for wrongful discharge, and the holding in Wieder v. Skala, supra. To the extent such claim is cognizable as part of the claim for breach of an implied-in-law obligation, it is subsumed in the Second Count, as discussed above.

The motion to amend is granted as to the breach of contract claim based on the June 22, 2001 employment agreement (Sixth Count), which is basically the same as the original second cause of action for earnings due and owing. While the original complaint does not explicitly mention the June 22, 2001 employment agreement, paragraphs 8 and 9 of the original complaint allege that plaintiff was employed by defendants "at an annual salary of $115,000 plus bonus payments" and that "[p]ursuant to *agreement* and practice, in addition to salary, plaintiff was to receive from defendants 33 1/3% of the fee from all cases originated by him and handled by [defendants], 5% of the fees resulting from the cases he handled and 5% of [defendants'] net earnings over $750,000" (emphasis added). Also, in the second cause of action, plaintiff alleges that defendants have not paid him 5% of the fees to which he is entitled and that he has "been damaged thereby in an amount which cannot be calculated without a full accounting."

Similarly, the proposed amended complaint alleges that on June 22, 2001, plaintiff executed an "employment agreement," which provided for plaintiff to "receive an annual salary of $115,000, 33 1/3% of the net attorneys fee for all cases originated by him, and 5% of the net

attorneys fees on any cases to which he is assigned," and that defendants have failed to pay him "5% of the net attorneys fee on all of the cases to which he was assigned." Thus, in both the original and amended complaints, plaintiff asserts a claim for damages seeking sums he alleges he earned while employed by defendants, which are due and owning to him.

The motion to amend is also granted to the extent of permitting plaintiff to add Napoli, Kaiser, Bern & Associates, LLP as a defendant. Under the circumstances presented, the action against the new defendant is not time-barred, as the CPLR 203(f) relation-back doctrine is sufficiently established. See Buran v. Coupal, 87 NY2d 173 (1995); Euroway Contracting Corp. v. Mastermind Estate Development Corp., 59 AD3d 157 (1st Dept 2009); Brown v. 3392 Bar Corp., 2 AD3d 324 (1st Dept 2003); Hauck v. New York Hilton, 276 AD2d 378 (1st Dept 2000). Under the relation-back doctrine, three conditions must be satisfied for claims against a new defendant to relate back to claims originally asserted: 1) the claims arise out of the same conduct, transaction or occurrence; 2) the new party is "united in interest" with an original defendant; and 3) the new party knew or should have known that, but for a mistake by plaintiff as to the identity of the proper parties, the action would have been brought against the new party as well. See Buran v. Coupal supra.

Plaintiff has demonstrated that the claims asserted against the proposed law firm defendant arise out of the same occurrences as asserted in the original complaint, and that the proposed law firm corporation is united in interest with the originally named law firm corporations, which bear essentially identical names and addresses,[6] and are apparently successor

[6]The June 22, 2001 employment agreement lists two addresses for Napoli, Kaiser Bern & Associates, LLP: 114 Old Country Road, Mineola, NY and 115 Broadway, NY, NY. The letterhead for Napoli Kaiser & Bern, LLP lists one identical address, 115 Broadway, NY, NY.

or alter ego corporations. Notably, plaintiff was first hired in July 2000 pursuant to an oral agreement, and the written employment agreement with the proposed new entity, "Napoli, Kaiser Bern & Associates, LLP," was not executed until nearly a year later on June 22, 2001. Moreover, plaintiff's August 13, 2001 letter is written on the letterhead of one of the originally named law firm corporations, "Napoli, Kaiser & Bern LLP," which is the same entity to which the settlement check was made payable. Further, as the proposed law firm corporation does not dispute that it had notice of plaintiff's claims and has not articulated any prejudice that would result from plaintiff's delay, the fact that plaintiff's failure originally to name that entity as a defendant was an oversight on the part of his former counsel, as opposed to a mistake, is not dispositive, as nothing in the record indicates that plaintiff's omission was intentional in order to gain a tactical advantage. See Buran v. Coupal, supra; Euroway Contracting Corp. v. Mastermind Estate Development Corp., supra; Brown v. 3392 Bar Corp., supra; Hauck v. New York Hilton, supra.

Finally, defendants' cross-motion for an award of sanctions is denied.

Accordingly, it is hereby

ORDERED that plaintiff's motion to amend the complaint is granted to the extent of the Second and Sixth Counts in the proposed amended complaint, and permitting plaintiff to add Napoli, Kaiser, Bern & Associates, LLP as a party defendant; and it is further

ORDERED that the motion to amend is denied as to the First, Third, Fourth and Fifth Counts in the proposed amended complaint; and it is further

ORDERED that within 20 days of the date of this decision and order plaintiff serve and file an amended complaint that complies with the determination herein above; and it is further

ORDERED that within 20 days of such service, defendants shall serve and file answers to the amended complaint; and it is further

ORDERED that defendants' cross-motion for an award of sanctions is denied.

DATED: July 16, 2009

ENTER:

J.S.C.