

**Harvey v Greenberg**

2009 NY Slip Op 32625(U)

November 6, 2009

Supreme Court, New York County

Docket Number: 105665/09

Judge: Carol R. Edmead

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

PRESENT: Edmead  
Justice

PART 35

Harvey  
- v -  
Greenberg

INDEX NO. 105665/09  
MOTION DATE 9/18/09  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion of defendant Laurence P. Greenberg for an order, pursuant to CPLR §§3211 (a)(1), (a)(5) and (a)(7), dismissing the Complaint of Sharde Harvey, is granted, and the Complaint is dismissed; and it is further

ORDERED that plaintiff's cross-motion for an order, pursuant to CPLR §3025(b), granting her leave to amend her Complaint, nunc pro tunc to the date of filing is denied; and it is further

ORDERED that defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk of the Court enter judgment accordingly.

This constitutes the decision and order of the Court.

**FILED**  
NOV 10 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 11/5/09

*[Signature]*  
J.S.O.

**HON. CAROL EDMEAD**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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 35

-----x  
SHARDE HARVEY,

Index No. 105665/09

Plaintiff,

-against-

LAURENCE P. GREENBERG,

Defendant.

-----x  
HON. CAROL ROBINSON EDMEAD, J.S.C.

DECISION/ORDER

**FILED**

NOV 10 2009

NEW YORK  
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

In this action, plaintiff Sharde Harvey (“plaintiff”) seeks to recover against defendant Laurence P. Greenberg (“defendant”) for legal malpractice and breach of fiduciary duty.

Defendant now moves for an order, pursuant to CPLR §§3211 (a)(1), (a)(5) and (a)(7), dismissing plaintiff’s Complaint with prejudice, on the grounds that the action is time-barred, the Complaint fails to state a cause of action, and documentary evidence provides a complete defense. In response, plaintiff cross moves, pursuant to CPLR §3025(b), for leave to amend her Complaint, *nunc pro tunc* to the date of filing.

*Plaintiff’s Contentions*

In her Complaint, plaintiff alleges defendant represented plaintiff from 2004 through at least May 2007 in connection with her divorce from her husband, Christopher Harvey (“Mr. Harvey”). Plaintiff alleges that in the course of handling the divorce, defendant, *inter alia*, (a) failed to conduct adequate discovery of Mr. Harvey as to his assets and liabilities, and adequately analyze the marital estate, causing an undervaluation of the size of the marital estate, to plaintiff’s detriment; (b) induced plaintiff to settle the divorce on unfavorable terms, resulting in,

*inter alia* a reduction in the amount of the marital estate allocable to plaintiff, to plaintiff's detriment; (c) failed to adequately analyze child support payments payable by Mr. Harvey, the child's father; (d) took large sums of money as legal fees for representing plaintiff without accounting therefor; (e) failed to complete agreed-upon legal work in connection with a "Qualified Domestic Relations Order" ("QDRO") for plaintiff; and (f) exposed plaintiff to unjustified legal claims by experts in plaintiff's divorce proceeding by failing to resolve such claims as agreed between plaintiff and defendant. As a proximate result of defendant's malpractice, plaintiff allegedly sustained \$300,000 in actual damages.

*Defendant's Motion*

First, defendant argues that plaintiff's claim for legal malpractice arising from the underlying divorce proceedings is time-barred pursuant to the three-year statute of limitations under CPLR §214(6). Defendant contends that the attorney-client relationship concluded when the underlying divorce proceeding was settled in open court on the record on October 26, 2005 ("the Divorce Settlement"). The Divorce Settlement was later embodied in a Judgment of Divorce and filed with the Court on December 21, 2005 (see "the Transcript" and "the Divorce Judgment"). "Since the task for which defendant was retained to perform had been completed, the attorney-client relationship concluded at that point."<sup>1</sup>

Defendant argues that a legal malpractice claim must be filed within three years of the accrual of damages, and a legal malpractice claim, along with any damages alleged, accrues at the time the malpractice occurs, not from when the malpractice is discovered. Since this action

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<sup>1</sup>In defendant's affidavit ("the Greenberg Aff."), defendant attests that the attorney-client ended on December 21, 2005, when Justice Jeffrey S. Sunshine signed off on the Divorce Judgment, (Greenberg Aff., ¶¶ 6-7).

was commenced on April 22, 2009, “more than three (3) years later,”<sup>2</sup> plaintiff’s legal malpractice claim arising out of the divorce proceeding must be dismissed as time-barred.

Defendant further argues that plaintiff may not invoke the “continuous representation doctrine” to toll the statute of limitations with respect to her claims arising from the handling of the divorce. The continuous representation doctrine tolls the statute of limitations only where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim. Here, the post-divorce legal work performed by defendant was separate and distinct from the work performed by him in connection with the divorce proceeding.

Initially, defendant was retained on July 29, 2004 to represent plaintiff “in a divorce proceeding,” defendant contends, citing “the 2004 Retainer Agreement.” After the divorce proceeding was settled, plaintiff subsequently retained defendant on January 13, 2006, pursuant to a separate retainer agreement, to (1) draft and file the QDRO, (2) attempt to negotiate a settlement with certain creditors, and (3) obtain information from Mr. Harvey’s employer (see “the 2006 Retainer Agreement”). This post-divorce work was “separate and distinct” from the handling of the underlying divorce, defendant argues. Therefore, plaintiff may not invoke the continuous representation doctrine by alleging deficiencies in defendant’s handling of the QDRO and post-judgment creditor claims to stave off dismissal of her legal malpractice claim arising from defendant’s handling of the Divorce Settlement.

Defendant also argues that plaintiff “cannot plead and prove” that defendant’s conduct

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<sup>2</sup> Defendant does not specify whether the instant action accrued more than three years after the alleged malpractice occurred or after the client-attorney relationship ended with plaintiff.

was the “but for” proximate cause of any alleged loss she may have sustained with respect to the Divorce Settlement. Plaintiff’s allocution in connection with the Divorce Settlement makes clear that plaintiff understood the terms of the Divorce Settlement, was aware that the Divorce Settlement was “full and final,” was entering into the Divorce Settlement on her own free will, and was satisfied with defendant’s counseling. Additionally, the allocution makes clear that plaintiff was aware that she was entitled to a trial, yet elected to settle the action, defendant contends. Thus, plaintiff, an educated individual and practicing dentist, understood and consented to the terms of the Divorce Settlement, and was satisfied with defendant’s conduct. Therefore, plaintiff cannot now allege that defendant’s conduct somehow compelled her to accept a Divorce Settlement that she now, in hindsight, alleges is insufficient.

Further, plaintiff cannot demonstrate that “but for” defendant’s alleged malpractice, the outcome of the Divorce Settlement would have been any different. After playing an active role in lengthy negotiations, plaintiff agreed to settle the divorce proceeding on “quite favorable” terms “under the circumstances.”

Defendant further argues that plaintiff cannot prove that she has suffered any loss as a result of defendant’s post-divorce services. Defendant contends that plaintiff alleges two claims arising out of the post-divorce services rendered by defendant: (1) that defendant failed to complete legal work in connection with the QDRO, and (2) that defendant exposed plaintiff to “unjustified legal claims by experts.” The documentary evidence makes clear that the QDRO was signed by Justice Jeffrey S. Sunshine (“Judge Sunshine”) “on January 30, 2007,” and filed with the Clerk’s office on February 6, 2007 (see “the QDRO” and the “May 17, 2007 Letter”

from defendant to plaintiff).<sup>3</sup> Moreover, the QDRO accurately reflects the agreed-upon terms of the Divorce Settlement stipulation and provides that plaintiff was awarded 50% of the appreciation on Mr. Harvey's retirement account, from the date of marriage through the commencement of the divorce proceedings, as set forth in the Divorce Settlement stipulation. +

Additionally, plaintiff cannot demonstrate that defendant's conduct caused her to suffer any loss with respect to any amounts she owed to experts retained in connection with the underlying divorce proceeding. Plaintiff retained the creditors (CPAs who served as experts in the underlying divorce proceeding), yet failed to pay them. Upon information and belief, plaintiff still has not paid these creditors the fees they claim they are owed. Even if plaintiff had paid the experts, the pleadings fail to articulate how or why this debt would somehow be attributable to any misconduct on the part of defendant. Plaintiff is responsible for paying her own experts, defendant contends.

Since plaintiff cannot point to any actual and ascertainable damages she has suffered as a result of defendant's post-divorce conduct, paragraphs 6(g) and 6(h) of the Complaint "must be dismissed as a matter of law," defendant contends. +

Finally, defendant argues that plaintiff's claim for breach of fiduciary duty must be dismissed, as it is duplicative of her legal malpractice claim. The allegations giving rise to plaintiff's claim for breach of fiduciary duty arise solely from defendant's conduct as plaintiff's attorney. The Complaint is devoid of any independent allegations that would give rise to a separate, sustainable claim for breach of fiduciary duty, defendant contends.

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<sup>3</sup> The actual document shows that it was signed by Judge Sunshine and date-stamped on January 31, 2007. +

*Plaintiff's Opposition and Cross-Motion*

In opposition to defendant's motion, plaintiff first argues that her action is not time-barred, since there was a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim. Therefore, the three-year time-period was tolled under the continuous representation doctrine. Defendant continued to represent plaintiff in matters directly relating to the divorce proceeding after the acts constituting legal malpractice took place, and until at least a time that renders the acts of legal malpractice within the time period specified for the commencement of a legal malpractice action. As set forth in the Transcript and the Divorce Judgment, certain items were not concluded at the time that the Divorce Settlement was agreed on October 26, 2005, namely the preparation of the QDRO and the resolution of the claims of experts for additional compensation in connection with proposed testimony in the divorce case.

Plaintiff and defendant, upon entering into the 2006 Retainer Agreement, reasonably intended that their professional relationship of trust and confidence – focused entirely upon the very matter in which the alleged malpractice was committed – would continue. In fact, the QDRO was apparently not finalized by defendant until January 31, 2007, and it was submitted by Mr. Harvey's attorney, despite plaintiff's agreement with defendant that he himself would draft and work on finalizing the QDRO after the Divorce Settlement was reached, plaintiff argues, citing the 2006 Retainer Agreement. Contrary to defendant's allegations, the QDRO was an essential element of the Divorce Settlement, and defendant was fully aware of the requirement that the QDRO would have to be prepared in accordance with the requirements of Mr. Harvey's retirement plan(s) and provided to the administrator thereof before all of the elements of the

Divorce Settlement could be implemented.

The 2006 Retainer Agreement specifically states that defendant would “*continue*” his work on the QDRO post-divorce. Plaintiff and defendant were in communication about the subject-matter of defendant’s professional retention through at least May 2007, plaintiff contends. Additionally, defendant “admitted in his letter to Plaintiff dated May 27, 2007” that “he had not closed his file at that date.”<sup>4</sup> Plaintiff further contends that in a letter dated December 18, 2008 from defendant to plaintiff’s attorney in which defendant discussed the post-divorce work, defendant stated that he “completed that work on or about May 2007” and that he sent plaintiff a letter and final bill in May of 2007 (*id.*), both within the three-year period prior to the commencement of this action, plaintiff contends.

Second, plaintiff argues that the Complaint states valid and provable causes of action against defendant. Each of the claims in the Complaint are susceptible to proof on discovery, and the Transcript containing plaintiff’s allocution does not end any inquiry into the sufficiency of defendant’s advice to plaintiff. Plaintiff contends that a claim for legal malpractice is viable, despite the settlement of the underlying action, if it is alleged that settlement of the action was compelled by the mistakes of counsel. Issues such as whether plaintiff’s reliance on defendant’s advice was unreasonable, or whether plaintiff did not rely on defendant’s advice can only be properly addressed in discovery.

Third, plaintiff argues that the “documentary evidence” submitted by defendant does not provide a complete defense to her Complaint, because it cannot be said in advance of discovery.

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<sup>4</sup>A copy of a “May 27, 2007” letter is not included in the parties’ moving papers; however, plaintiff refers to “Exh. F” of defendant’s moving papers, which is the May 17, 2007 Letter from defendant to plaintiff. Upon review of the May 17, 2007 Letter, the Court is unclear what plaintiff is referring to when she states that defendant “admitted” that he had not closed his file “at that date.”

that plaintiff will not be able to raise an issue of fact. Defendant cannot prove by way of affidavits and the Transcript that plaintiff cannot establish that she was damaged and that such damage would not have occurred but for defendant's malpractice. Defendant would have to, and is unable to, adduce facts sufficient to show that plaintiff will not be able to raise an issue of fact in respect of the adequacy of his advice, plaintiff argues. Defendant's affidavits and documentary evidence are insufficient to enable the Court to assess the validity of the malpractice claims prior to discovery.

Finally, plaintiff cross-moves for leave to amend the Complaint to add causes of action for breach of contract and breach of professional responsibility. Plaintiff contends that leave to amend a pleading is freely given, pursuant to CPLR §3025(b), absent prejudice or surprise resulting from the delay. She further argues that defendant can demonstrate no harm if such cause of action is added. In addition, a plaintiff is not required to establish the merit of the proposed amendment in the first instance, plaintiff contends. Finally, plaintiff argues the additional causes of action are timely, because a six-year statute of limitations under CPLR §213 applies.

In support of her cross-motion, plaintiff alleges, *inter alia*, that in order to induce plaintiff into the Divorce Settlement, "knowing that [Mr. Harvey] had substantial resources and income and that Plaintiff did not, and seeing an opportunity to profit from the situation," defendant sought and obtained "an unethical and illegal payment of \$50,000 from [Mr. Harvey], who wished to settle the case as soon as possible on the most favorable terms to him." Defendant sought and obtained additional amounts during the divorce case initially from plaintiff and then from Mr. Harvey *pendent lite*, under Domestic Relations Law ("DRL") §237(a) and finally under

the Divorce Settlement, without accounting therefor. Defendant claims to have spent “hundreds of hours” on discovery, without providing any documentary proof thereof, as required by ethics rules and the DRL. Defendant also collected additional unearned fees of \$50,000 from Mr. Harvey in “an unethical and illegal attempt to profit from the situation,” plaintiff alleges. No support has ever been provided for such fees, and defendant has abused his fiduciary position toward plaintiff by profiting in clear contravention of the intent of the *pendent lite* provision of DRL §327(d).

Plaintiff contends that where an attorney is in a position, as in this case, to take advantage of his knowledge that (1) the monied spouse [Mr. Harvey] has substantial resources unavailable to the non-monied spouse (plaintiff), (2) there is a provision of the DRL providing that legal fees may be awarded *pendente lite*, (3) the attorney has already received legal fees in the case *pendente lite* and (4) it is unlikely that the judge, the divorcing spouse, the attorneys for the monied spouse and the monied spouse, or even the attorney’s client (the non-monied spouse) will object to a divorce settlement, then “such attorney is not relieved of his ethical and legal duty not to take fees he has not earned or will not earn, in order to profit from the divorce.” Further, the attorney should be required to disgorge the unearned amount.

#### *Defendant’s Reply*

In response, defendant adds that while a complaint is to be liberally construed in favor of plaintiff on a CPLR §3211 motion to dismiss, the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts. The sufficiency of a pleading that alleges a cause of action for legal malpractice presents a question of law that can be determined by a trial

court on a motion to dismiss.

Further, leave to amend should be denied because the proposed amendment is devoid of merit or fails to state a cause of action. Since Mr. Harvey paid defendant the \$50,000 in legal fees, plaintiff is not entitled to seek disgorgement of those fees as a matter of law. Moreover, Mr. Harvey, who was neither defendant's client nor a party to this action, is not entitled to a refund of the fees, and cannot confer standing to plaintiff. Additionally, the courts have routinely denied leave to amend for the movant's failure to annex the proposed amended pleadings. Therefore, since plaintiff's cross-motion is deficient, futile, subject to dismissal on its face, and otherwise procedurally defective, it must be dismissed as a matter of law.

*Plaintiff's Reply*

In response to defendant's argument that plaintiff lacks standing to sue for the disgorgement of \$50,000 in legal fees Mr. Harvey paid to defendant, plaintiff argues that Mr. Harvey assigned to plaintiff the rights to the fee payment.<sup>5</sup> Plaintiff further argues that if defendant were correct in his assertion that Mr. Harvey would not have standing to sue for return of the unearned fees either, because he was not defendant's client, then divorce attorneys such as defendant could routinely obtain interim fee payment orders from adverse monied spouses or, as in the case at bar, in settlements of divorce matters, and disavow any responsibility to (a) earn any of it, or (b) observe the ethical duties of attorneys in respect of fee payments in divorce proceedings, because they could claim they owe "no one" any responsibility. They would have no client or any court to account to, no responsibility, and would be entitled just to receive "free

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<sup>5</sup>Plaintiff refers to the Affidavit of Christopher Harvey (the "Christopher Harvey Aff.") dated April 3, 2009 at paragraph 6 and attached to the Harvey Aff.

money” at the expense of the divorcing couple. That would be “a totally illogical and absurd result” and clearly not what was intended by the court handling the divorce proceeding or the drafters of the attorney canons of ethics, plaintiff argues.

The source of payment of the legal fees is irrelevant to the question of whether defendant earned the fees he was paid, and the assignment of rights to any reimbursement by Mr. Harvey to plaintiff obviates any issue with regard to her standing to sue. Finally, allowing defendant to escape his ethical and legal responsibilities to plaintiff in this manner, without even addressing the merits of her claim would be a gross injustice, plaintiff argues.

Finally, plaintiff submits the proposed Amended Verified Complaint as an exhibit to her reply (“see the Amended Complaint”), noting that the proposed amendments were described in detail and verbatim in her cross-motion.

#### *Discussion*

##### *Continuous Representation Doctrine*

CPLR §214(6) provides that the statute of limitations [SOL] for legal malpractice is three years from accrual. “A legal malpractice claim accrues ‘when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court’” (*McCoy v Feinman*, 99 NY2d 295, 301 [2002], quoting *Ackerman v Price Waterhouse*, 84 NY2d 535, 541 [1994]). Further, the SOL runs from the time the alleged malpractice is committed, and not from the time when the client discovers it (*Shumsky v Eisenstein*, 96 NY2d 164, 166 [2001]).

However, the continuous representation doctrine tolls the SOL “where the continuing representation pertains specifically to the matter in which the attorney committed the alleged malpractice” (*Shumsky* at 168, citing *Glamm v Allen*, 57 NY2d 87, 93 [1982]; *Zorn v Gilbert*, 8

NY3d 933, 933 [2007] [“The ‘continuous representation doctrine tolls the statute of limitations . . . where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim’”]).

In order for the continuous representation doctrine to apply, “there must be clear *indicia* of an ongoing continuous, developing, and dependent relationship between the client and the attorney” (*Gotay v Breitbart*, 58 AD3d 25, 27-28 [1st Dept 2008], citing *Aaron v Roemer*, *Wallens & Mineaux*, 272 AD2d 752, 754 [3d Dept 2000], *lv dismissed* 96 NY2d 730 [2001], and quoting *Luk Lamellen U. Kupplungbau GmbH v Lerner*, 166 AD2d 505, 506 [2d Dept 1990]; *cf. Henry v Leeds & Morelli*, 4 AD3d 229, 230 [1<sup>st</sup> Dept 2004] [holding that the continuous representation doctrine did not apply because there was no evidence of the “relationship and bond of continuous trust necessary for the continuing representation doctrine to apply”; after the underlying action was settled, plaintiff, “*represented by different counsel, moved to rescind the settlement agreement*” (emphasis added)]). Further, the continuous representation toll ends once the client is informed or otherwise put on notice of the attorney’s withdrawal from representation (*Shumsky at 170*).

In *Shumsky*, the Court denied the defendant attorney’s motion for summary judgment to dismiss the legal malpractice cause of action, noting that continuous representation “does not automatically come to an end *where, as here, pursuant to a retainer agreement, an attorney and client both explicitly anticipate continued representation*” (*id.*) (emphasis added). The plaintiffs in *Shumsky* retained the defendant, an attorney, in 1993 for the purpose of suing a home inspector for breach of contract. Defendant subsequently avoided plaintiffs and failed to keep them informed about the case’s status. On December 5, 1997, the plaintiffs commenced a legal

malpractice action against defendant. Defendant moved for summary judgment dismissing the complaint arguing that since the malpractice occurred in March 1994, when defendant failed to commence the action against the home inspector, the plaintiffs' action was barred by the SOL (*id.* at 165 -166). The "Supreme Court denied defendant's motion, concluding that the continuous representation doctrine tolled the limitations period at least until defendant finally revealed, in 1997, that he had failed to timely commence plaintiffs' action against the home inspector" (*id.* at 166). The Second Department reversed the Supreme Court, and the Court of Appeals reversed the Second Department, explaining:

The continuous representation doctrine, like the continuous treatment rule, its counterpart with respect to medical malpractice claims, "recognizes that a person seeking professional assistance has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered" . . . . The doctrine also appreciates the client's dilemma if required to sue the attorney *while the latter's representation on the matter at issue is ongoing.* (*Id.* at 167, quoting *Greene v Greene*, 56 NY2d 86, 94 [1982] (emphasis added))

The Court of Appeals further explained that the plaintiffs retained defendant "for the sole purpose of pursuing their specific contract claim. Thus, upon signing the retainer agreement, plaintiffs and the defendant reasonably intended that their professional relationship of trust and confidence – focused entirely upon the very matter in which the alleged malpractice was committed – would continue" (*id.* at 170).

Plaintiff commenced the instant action on April 22, 2009. If December 21, 2005 were the date of accrual, the latest plaintiff could have commenced the instant action is December 21, 2008, and, accordingly, plaintiff's action would be time-barred. However, accepting plaintiff's allegations as true, the record indicates that plaintiff and defendant "explicitly anticipated continued representation" until May 2007; therefore, the continuous representation doctrine

applies to toll the three-year SOL, and plaintiff's legal malpractice cause of action is timely.

First, the evidence in the record supports plaintiff's allegation that defendant's representation was "continuous, developing, and dependent" through May 2007 (*Gotay v Breitbart*). In her Complaint, plaintiff alleges that defendant committed various acts of legal malpractice from July 29, 2004, when plaintiff first retained defendant, through "until at least May 2007" (Complaint, ¶¶ 3, 6[a]-[i]). Also, the 2004 Retainer Agreement provides in relevant part:

I, SHARDA HARVEY [*sic*], hereby retain LAURENCE P. GREENBERG, ESQ. (hereinafter "the law firm") to represent me in a divorce proceeding in the Supreme Court of the State of New York.

\* \* \*

This Retainer Agreement and any sums paid to the law firm pursuant hereto, do not cover any services which might be required following the entry of a final judgment or order, including but are [*sic*] not limited to such matters as enforcement or modification. The law firm's representation shall terminate with the entry of final judgment in your matter, unless extended by mutual agreement in writing.<sup>6</sup> (Emphasis added)

Arguably, by specifically referring to "services which might be required following the entry of final judgment" and providing that the attorney-client relationship "shall terminate with the entry of final judgment in your matter, unless extended by mutual agreement in writing," the 2004 Retainer Agreement indicates that the parties anticipated continued representation (*Shumsky at 170*). Although the Divorce Judgment was filed on December 21, 2005, defendant

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<sup>6</sup> The 2004 Retainer Agreement does not indicate whether the agreement extending defendant's representation had to be executed before or after the final judgment. However, for the continuous representation doctrine to apply, the Court requires only "a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim" (*Zorn v Gilbert at 933*) and "clear indicia of an ongoing continuous, developing, and dependent relationship between the client and the attorney" (*Gotay v Breitbart at 27-28*). Here, the evidence demonstrates such a mutual understanding as well as indicia of a continuous relationship.

failed to demonstrate that the post-divorce legal work was “separate and distinct” from the work performed by him in connection with the divorce proceeding. First, defendant’s own statements in his affidavit contradicts his argument, and supports the proposition that the QDRO was indeed related to the Divorce Settlement. Defendant attests:

Subsequently, on January 13, 2006, plaintiff retained me to perform separate *post-divorce legal services*, including drafting and filing a Qualified Domestic Relations Orders (“QUADRO”), attempting to negotiate a settlement with certain creditors (two CPA’s who plaintiff retained – and failed to pay – *in connection with the matrimonial action*), and to obtain COBRA information from [Mr. Harvey’s] employer, Munich Re. (The QUADRO is an order which permits a party to enforce her rights to a former spouses [*sic*] retirement accounts.) The plaintiff and I entered into a new retainer agreement for the performance of those services.  
(GreenbergAff., ¶ 8) (emphasis added)

Defendant further attests that the QDRO “was filed with the Court on January 31, 2007 and plaintiff was awarded 50% of the appreciation on her former husband’s retirement account from the date of marriage through the commencement of the divorce proceedings – *this was previously agreed upon by the parties pursuant to the underlying settlement of October 26, 2005 [i.e., the Divorce Settlement]*” (*id.*, ¶ 9) (emphasis added).

Second, the language of the Divorce Settlement and Divorce Judgment demonstrates that the QDRO was part of the underlying subject matter giving rise to the plaintiff’s legal malpractice claim. Defendant made the following statements at the Divorce Settlement hearing on October 26, 2005:

The parties acknowledge and represent that the Plaintiff husband possesses certain 401K plan through . . . his current employer as well as certain IRAs. A certain portion of those were earned and/or accumulated during the marriage. Those aforementioned may have been earned during the marriage and *to the extent that those pension IRAs or any other pension or retirement plan was earned during the marriage they will be distributed . . . in accordance with a Qualified Domestic Relations Order.*  
(Transcript, p. 13, lines 24-25, p. 14, lines 1-10) (emphasis added)

The Divorce Judgment also makes specific reference to the QDRO:

[It is] ORDERED AND ADJUDGED, that pursuant to the Stipulation [*i.e.* the Divorce Settlement], the parties will equally divide the marital portion of all retirement assets of Plaintiff . . . *in accordance with a Qualified Domestic Relations Order* on or before October 21, 2005.

(Divorce Judgment, p. 9) (emphasis added)<sup>7</sup>

Therefore, the documentary evidence demonstrates that the Divorce Settlement and QDRO were not separate and distinct, but instead part of the same underlying subject matter that gave rise to plaintiff's legal malpractice claim.

The 2006 Retainer Agreement also demonstrates the continuous nature of defendant's representation of plaintiff. The 2006 Retainer Agreement provides:

This will memorialize that Dr. Harvey wishes Mr. Greenberg *to continue* to do certain *post-judgment of divorce work*, namely:

1. Draft and prepare certain Qualified Domestic Relations Orders . . . [;]
2. Attempt to negotiate a settlement of claim David Marcus CPA lawsuit . . . ;
3. Attempt to negotiate a settlement of claim of Joan Lipton, CPA . . . ;

\* \* \* \* \*

*Mr. Greenberg will perform the aforementioned work as part of Dr. Harvey's previously paid legal fees* so long as the total hours do not exceed 20.00 hours and the total disbursements do not exceed \$1000.00 (QUADRO).

(Emphasis added)

Further, in the May 17, 2007 Letter, defendant informs plaintiff that, pursuant to the 2006 Retainer Agreement, defendant "has completed all of the work required . . . . Thus, there is no further work to be performed under our agreement." The letter includes a final "Statement of Professional Services." Further, in the December 18, 2008 Letter to plaintiff, defendant states: "I

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<sup>7</sup> This Court notes that the QDRO was not completed until January 31, 2007.

completed [the work pursuant to the 2006 Retainer Agreement] on or about May of 2007 and memorialized that fact by sending [plaintiff] a letter and final bill in May of 2007 (almost a year and a half ago).”

Therefore, the evidence in the record supports plaintiff’s allegation that she and defendant had a “mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim” at least through May 17, 2007 (*Zorn v Gilbert* at 933).

The caselaw defendant cites does not support his arguments. For example, *Goldman v Akin, Gump, Strauss, Hauer & Feld, LLP* (11 Misc3d 1077, 816 NYS2d 695 [NY Sup 2006]) is factually distinguishable from the instant case. In *Goldman*, the plaintiffs were general partners of seven limited partnerships who negotiated the sale of facilities without a release from the limited partners. The plaintiffs retained the defendants (attorneys) to assist them in consummating the sale, and the sale closed on September 25, 1998. Subsequently, plaintiffs were sued by the dissenting partnerships, resulting in a series of arbitration awards against plaintiffs, including one as late as August 2002. On December 2, 2004, the plaintiffs sued their attorneys for legal malpractice, contending that the attorneys negligently told them that they could successfully sell the limited partnerships without incurring any liability. The defendants maintained that their representation of plaintiffs in the sale ended in 1999, and that the three-year statute of limitations had expired in 2004 when the action was filed. However, the plaintiffs argued that the doctrine of continuous representation applied, as defendants represented plaintiff in the arbitrations that ended less than three years before they commenced their legal malpractice action. The Court held that the statute of limitations *prohibited* plaintiff’s bringing the legal malpractice action.

The record reflects that the defendants were retained to consummate the sale. Although they told the plaintiffs they were available if any further litigation occurred, *they were not retained until much later when the arbitrations commenced. There was a clear break in the two representations. Moreover, they were distinct – one retention was for papering the deal while the other was for representation in litigation. . . .* If I were to decide the merits of this claim, I would still dismiss. Plaintiffs were obviously sophisticated businessmen who knew the risks they were taking because they were revealed by Hochman’s strenuous objections to the deal. [Defendants were] *not retained to advise whether the plaintiffs should have entered into the deal.* (*Id.*) (emphasis added)

Here, defendant failed to demonstrate that there was a “clear break” in defendant’s representations of plaintiff under the 2004 and the 2006 Retainer Agreements. The Divorce Judgment was issued on December 21, 2005. On January 13, 2006, a mere few weeks later, the parties executed the 2006 Retainer Agreement, wherein defendant agreed to “continue” post-divorce work for plaintiff. In *Goldman*, by contrast, years lapsed between the time the defendant attorneys consummated the business deal on behalf of the plaintiffs (1999) and the time they represented plaintiffs in arbitration. Further, the two tasks the *Goldman* defendants were asked to perform for plaintiffs were clearly distinct, whereas here defendant played a principal role in negotiating the Divorce Settlement for plaintiff, and arguably was aware of the need to prepare the QDRO as part of the Divorce Settlement (see the Divorce Judgment).

Defendant also cites *McCoy v Feinman* (99 NY2d 295 [2002]), a case in which the plaintiff client brought a legal malpractice action against her former attorney, based on his failure to prepare and file a QDRO in her divorce case. The defendant attorney conceded, and the court held, that the defendant was negligent in failing to assert plaintiff’s claim to preretirement death benefits in the settlement stipulation and the judgment of divorce. Thus, the Court concluded, the plaintiff suffered an actionable injury on the day of the stipulation (June 23, 1987), or the day the judgment incorporating the stipulation was filed in the county clerk’s office (June 14, 1988).

However, because the plaintiff did not commence her legal malpractice action until June 12, 1996, *nine years* after the settlement stipulation, *eight years* after the divorce judgment and *five years* after the Family Court proceeding, the Court held that the continuous representation doctrine did *not* toll the SOL in the case.

[T]he malpractice that caused plaintiff's injury was defendants' failures in connection with the stipulation and judgment, *and no further representation thereon was then contemplated*. Even were we to grant plaintiff's argument that it was [the defendant's] failure to obtain a QDRO that constituted actionable negligence, [the defendant] told the court that he would file the QDRO with the court "simultaneously with or shortly after the judgment of divorce." *Thus, plaintiff might have been justified in believing that [defendant] continued to represent her on this specific matter until "shortly after" the 1988 entry of the divorce judgment, but not eight years later when plaintiff brought this action.*"

(*McCoy* at 306) (emphasis added)

Here, the evidence in the record supports plaintiff's belief that defendant was to represent her in preparing the QDRO as part of representing her in the Divorce Settlement, and that the QDRO would be prepared "shortly" after the Divorce Judgment. Plaintiff attests:

Defendant's claim that the "post-divorce work" was separate and distinct from the work he performed during my divorce proceeding, and created a break in his continuous representation of me . . . contradicts advice he gave me as to the elements of the settlement I accepted, and which he advised me to accept – he had in fact advised me that a QDRO would have to be obtained and never informed me that the QDRO was not part of his work on the divorce. Neither did I have any expectation that he would demand additional fees for drawing up such QDRO and filing it to complete that element of the divorce settlement until he informed me of such demand.

(*Harvey Aff.*, ¶ 8)

The May 17, 2007 Letter itemizing the work defendant performed for plaintiff pursuant to the 2006 Retainer Agreement indicates that on February 3, 2006, defendant conducted a conference with plaintiff – further supporting that defendant began working on the QDRO "shortly after" the Divorce Settlement.

Therefore, as the evidence supports plaintiff's argument that the continuous representa-

tion doctrine applies to toll the three-year SOL until May 17, 2007, plaintiff's legal malpractice complaint is not time-barred.

*Dismissal Pursuant to CPLR §3211(a)(1)*

Under CPLR §3211(a)(1), dismissal of a complaint is warranted where “the documentary evidence submitted *conclusively establishes a defense* to the asserted claims as a matter of law” based on documentary evidence (*150 Broadway NY Associates, L.P. v Bodner*, 14 AD3d 1 [1st Dept 2004]). “To succeed on a CPLR 3211(a)(1) motion to dismiss, the documents upon which the movant relies must definitively dispose of the cause(s) of action of the opposing party” (*DL Rothberg & Associates, et al. v 309 West Owners*, 2007 WL 2175594 [Sup Ct, NY County, 2007], citing *Fischbach & Moore, Inc. v E.W. Howell Co., Inc.*, 240 AD2d 157, 157 [1st Dept 1997]).

According to the First Department, a “claim for legal malpractice is viable, despite settlement of the underlying action, if it is alleged that settlement of the action was *effectively compelled* by the mistakes of counsel” (*Bernstein v Oppenheim & Co., P.C.*, 160 AD2d 428, 429-430 [1st Dept 1990]) (emphasis added). However, the First Department also makes clear that an allocution at settlement wherein the client states that she is satisfied with the attorney's performance constitutes documentary evidence that contradicts an allegation of legal malpractice (*Katebi v Fink*, 51 AD3d 424, 425 [1st Dept 2008], citing *Bernstein* [holding that while a “‘claim for legal malpractice is viable, despite settlement of the underlying action if it is alleged that settlement of the action was effectively compelled by the mistakes of counsel,’ here, the complaint is contradicted by the evidentiary material submitted on the motion to dismiss”]). In *Katebi*, the plaintiff/client settled the matrimonial action during trial, and the plaintiff's

allocation took place on the record. The Court granted defendants' motion to dismiss the complaint for failure to state a cause of action for legal malpractice, on the following grounds:

Plaintiff testified that she did not wish to proceed with the trial of the matrimonial action, that she decided instead to enter into the stipulation of settlement because she wanted no further connection with her husband, that she understood that by settling the action before the completion of the trial she was foregoing the right to pursue the funds allegedly dissipated by him, and that *she was satisfied with the services provided by her attorney.* (*Id.* at 425)

Similarly, in dismissing another plaintiff's legal malpractice case, the Court in *Weissman v Kessler*, 2008 WL 6920033 [Sup Ct, NY County 2008]) noted that the plaintiff "allocuted that she was satisfied with her counsel and that no one forced her to settle . . . . Defendants have demonstrated that the documentary evidence conclusively establishes that [plaintiff's legal malpractice claims] should be dismissed.").

On October 26, 2005, plaintiff testified in open Court that she was satisfied with the Divorce Settlement and defendant's services. The section of the Transcript containing plaintiff's allocution reads as follows:

THE COURT: You heard the stipulation of settlement which was placed on the record?

MRS. HARVEY: Yes

THE COURT: Did you understand it?

MRS. HARVEY: Yes.

THE COURT: Did your lawyer answer any questions you may have had to your satisfaction?

MRS. HARVEY: Yes.

\* \* \*

THE COURT: Is anybody forcing you or coercing you to enter into this agreement?

MRS. HARVEY: No.

THE COURT: You do it on your own free will?

MRS. HARVEY: Yes.

\* \* \*

THE COURT: Are you satisfied with the services provided to you by your lawyer?

MRS. HARVEY: Yes.

\* \* \*

THE COURT: Do you understand by resolving the matter today you have opted not to

continue with the trial and resolve the matter?

MRS. HARVEY: Yes, I do.

(Transcript, p. 19, lines 23-25 through p. 21, line 14)

Therefore, the documentary evidence flatly contradicts plaintiff's allegations she was "effectively compelled" to settle the divorce by the mistakes of defendant. Plaintiff's allegations that she would have achieved a better divorce settlement but for defendant's alleged malpractice, and that it was not until she consulted with another attorney after the Divorce Settlement that she was made aware of problems with defendant's representation are insufficient to overcome her previous allocation that she willingly settled the divorce proceeding and was satisfied with defendant's services. Such allegations also are insufficient to indicate that defendant's alleged malpractice compelled her to settle. Accordingly, plaintiff's allocation defeats her claim for legal malpractice based on services defendant rendered under the 2004 Retainer Agreement through the Divorce Judgment on December 21, 2005.

Plaintiff further alleges that defendant committed legal malpractice *after* the Divorce Judgment, pursuant to the 2006 Retainer Agreement. Plaintiff accuses defendant of failing to complete agreed legal work in connection with a QDRO for plaintiff, and exposing plaintiff to unjustified legal claims by experts in plaintiff's divorce proceeding by failing to resolve such claims as agreed between plaintiff and defendant (Complaint, ¶¶ 6 [g], and [h]). However, the documentary evidence demonstrates that defendant fulfilled all of his obligations regarding the QDRO and the expert claims, pursuant to the 2006 Retainer Agreement.

The 2006 Retainer Agreement provides in relevant part that defendant will "*draft and prepare* certain Qualified Domestic Relations Orders," "[a]ttempt to negotiate a settlement of claim David Marcus CPA lawsuit (not appear in litigation)," "[a]ttempt to negotiate a settlement

of claim of Joan Lipton, CPA (not to appear in any lawsuit),” and “[a]ttempt to obtain necessary COBRA information” from Mr. Harvey’s employer. Regarding the QDRO, defendant attests that the QDRO “was filed with the Court on January 31, 2007 and plaintiff was awarded 50% of the appreciation on her former husband’s retirement account from the date of marriage through the commencement of the divorce proceedings – this was previously agreed upon by the parties pursuant to the underlying settlement of October 26, 2005” (Greenberg, Aff., ¶ 9).

Plaintiff does not contest that she was awarded the amount *previously agreed upon* in the Divorce Settlement. Further, that the QDRO was “*apparently not finalized* by the Defendant and was submitted by [Mr. Harvey’s] attorney in January 2007,” as plaintiff attests (Harvey Aff., ¶ 5), is of no moment.<sup>8</sup> Plaintiff does not allege that defendant failed to “draft and prepare” the QDRO, defendant’s only obligations under the 2006 Retainer Agreement.

Finally, plaintiff’s allegation that defendant failed to “resolve” the creditors’ claims also lacks merit. Pursuant to the 2006 Retainer Agreement, defendant was obligated only to “attempt to negotiate” a settlement of the claims. Plaintiff does not allege that defendant made no *attempt* to resolve the claims.

Therefore, as the documentary evidence also flatly contradicts plaintiff’s allegations that defendant’s conduct in preparing the QDRO and negotiating the settlement of the claims was a proximate cause of her damages, plaintiff’s cause of action for legal malpractice fails.

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<sup>8</sup>Citing an e-mail from defendant on March 2, 2007 (the “March 2, 2007 E-mail”), plaintiff attests that defendant “demonstrated he was unaware of what was happening with the QDRO (it was apparently signed by Judge Sunshine 2 months earlier after having been prepared and submitted by my ex-husband’s attorneys). Additionally, Defendant never checked to ensure that I received the appropriate amount in accordance with my rights under the settlement” (Harvey Aff., ¶ 5, p. 4) In the March 2, 2007 E-mail, plaintiff writes: “Larry, please follow up and get back to me about the IRAs. It’s been over a year and you said you would take care of it. Thanks Sharda [*sic*].” Defendant replies: “I have followed up, but will followup [*sic*] again.” Therefore, the March 2, 2007 E-mail does not demonstrate that defendant acted negligently.

*Dismissal Pursuant to CPLR §3211(a)(7)*

The standard on a motion to dismiss a pleading for failure to state a cause of action, pursuant to CPLR §3211(a)(7), is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1<sup>st</sup> Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205 [1st Dept 1997]). On a motion to dismiss made pursuant to CPLR §3211, the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory” (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, where the bare legal conclusions and factual allegations are “flatly contradicted by documentary evidence,” they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]; *Kliebert v McKoan*, 228 AD2d 232 [1st Dept], *lv denied* 89 NY2d 802 [1996]), and the criterion becomes “whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Leon v Martinez* at 88 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001]).

It is well settled that “an essential element” in any legal malpractice action is “actual damages, *i.e.*, the injuries he suffered and their value” (*Lindenman v Kreitzer*, 7 AD3d 30, 34 [1st Dept 2004], *citing Mendoza v Schlossman*, 87 AD2d 606, 607 [2d Dept 1982]), which must be established with “reasonable certainty” (*Creative Inception, Inc. v Andrews*, 50 AD2d 553, 554

[1st Dept 1975]). However, plaintiff “is not obliged to show, at this stage of the pleadings, that [it] actually sustained damages . . . [it need only plead] allegations from which damages attributable to [defendant’s conduct] might be reasonably inferred” (*InKine Pharmaceutical Co., Inc. v Coleman*, 305 AD2d 151, 152 [1<sup>st</sup> Dept 2003], citing *Tenzer, Greenblatt, Fallon & Kaplan v Ellenberg*, 199 AD2d 45; *see also Great Atlantic Ins. Co. v Weinstein*, 125 AD2d 214, 215 [1<sup>st</sup> Dept 1986]).

In her Complaint, plaintiff alleges that “[a]s a direct and proximate result of defendant’s negligence and/or malpractice *Plaintiff sustained actual damages in the amount of \$300,000*” (Complaint, ¶ 7) (emphasis added). Plaintiff further alleges that plaintiff *miscalculated* the size of the marital estate, the value of plaintiff’s enhanced earning capacity, and the child support payments and spousal support payments due from Mr. Harvey (Complaint, ¶ 6[a]-[d]). Plaintiff also alleges that defendant failed to account for “large sums of money as legal fees” (Complaint, ¶ 6[f]). Therefore, contrary to defendant’s arguments, plaintiff’s alleged damages are not speculative; they capable of being proved with reasonable certainty (*Zarin v Reid & Priest*, 184 AD2d 385, 388 [1st Dept 1992]).

However, the documentary evidence noted previously (*i.e.*, plaintiff’s allocution) flatly contradicts plaintiff’s contentions that her alleged damages were the proximate result of any claimed negligence by defendants. Therefore, plaintiff’s legal malpractice cause of action fails.

#### *Breach of Fiduciary Duty*

To state a claim for breach of fiduciary duty, a movant must allege (1) the existence of a fiduciary duty between the parties, (2) the breach of that duty, and (3) damages suffered by the movant as a result of the breach (*see* 4A NY Prac, Com Litig in New York State Courts §70:17

[2d ed]; *Blue Chip Emerald LLC v Allied Partners Inc.*, 299 AD2d 278 [1<sup>st</sup> Dept 2002]; *Gibbs v Breed, Abbott & Morgan*, 271 AD2d 180, 184-185 [1<sup>st</sup> Dept 2000]). In the context of an action asserting attorney liability, the claims of malpractice and breach of fiduciary duty are governed by the same standard of recovery (*Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1 [1<sup>st</sup> Dept 2008]). Therefore, where a breach of fiduciary duty claim “merely tracks” the allegations of defendant’s legal malpractice claim “and does not allege any independent intentional tort,” it is duplicative and warrants dismissal (*CVC Capital Corp. v Weil, Gotshal, Manges*, 192 AD2d 324, 325 [1<sup>st</sup> Dept 1993], citing *Zarin v Reid & Priest*, 184 AD2d 385, 387 [1<sup>st</sup> Dept 1992] [holding that a second cause of action for breach of fiduciary duty was “fatally deficient” in that it “merely rehashes the allegations of the malpractice claim and does not allege any independent intentional tort”]; see also *Tal v Leber*, 2008 WL 4274490, 8, *rearg denied* 2008 WL 6152847 [NY Sup Ct 2008] [“Because the allegations supporting plaintiff’s claims for breach of fiduciary duty mirror those for his claim for malpractice, he has not alleged an independent tort, and this claim must be dismissed as duplicative”]).

Plaintiff’s breach of fiduciary duty claim “merely tracks” the allegations of defendant’s legal malpractice claim “and does not allege any independent intentional tort.” Plaintiff’s Complaint combines her legal malpractice and breach of fiduciary claims into one sentence: “Plaintiff avers that Defendant was negligent and/or committed malpractice and breached fiduciary duties to [plaintiff] in the following regards” (Complaint, ¶ 6). Then, in paragraphs 6(a)-(6(i), plaintiff alleges facts in support of the *combined* claims. Therefore, plaintiff’s breach

of fiduciary duty claim is dismissed as duplicative.<sup>9</sup>

*Leave to Amend Complaint*

Leave to amend a pleading, pursuant to CPLR §3025(b), should be freely granted provided there is no prejudice or surprise to the nonmoving party (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009]; *Crimmins Contr. Co. v City of New York*, 74 NY2d 166 [1989]; *McCaskey, Davies & Assocs. v New York City Health & Hosps. Corp.*, 59 NY2d 755 [1983]; *Lambert v Williams*, 218 AD2d 618 [1st Dept 1995]).

Although leave to amend should be freely granted, the movant must make some evidentiary showing that the proposed amendment has merit, and a proposed pleading that fails to state a cause of action or is plainly lacking in merit will not be permitted (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp.* at 405; *Hynes v Start Elevator, Inc.*, 2 AD3d 178 [1st Dept 2003]; *Tishman Constr. Corp. v City of New York*, 280 AD2d 374 [1st Dept 2001]). Further, leave to amend “may not be granted upon mere request, without appropriate substantiation. There must be compliance with the required procedure to permit the court to pass upon the merits of the leave for amendment” (*Brennan v City of New York*, 99 AD2d 445, 446 [1st Dept 1984], citing *East Asiatic Co. v Corash*, 34 AD2d 432 [1st Dept 1970]).

The party “opposing a motion to amend a pleading must overcome a presumption of validity in the moving party’s favor, and demonstrate that the facts alleged and relied upon in the moving papers are obviously unreliable or insufficient to support the amendment” (*Peach Parking Corp. v 346 West 40th Street, LLC*, 42 AD3d 82, 86 [1st Dept 2007], citing *Daniels v*

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<sup>9</sup> The Court also notes that in her opposition papers, plaintiff offers no argument in opposition to defendant’s motion to dismiss the breach of fiduciary duty claim.

*Empire-Orr, Inc.*, 151 AD2d 370, 371 [1st Dept 1989]). However, those facts do not need to be proved at this juncture (*Daniels v Empire-Orr* at 371).

As a threshold issue, defendant's argument that plaintiff's cross-motion to amend should be denied on procedural grounds lacks merit. Defendant contends that plaintiff's failure to attach a proposed Amended Complaint to her cross-motion renders her cross-motion "procedurally defective." The First Department has denied motions to amend on the grounds that the amended pleadings are non-existent or conclusory (*see e.g. Sirohi v Lee*, 222 AD2d 222, 223 [1st Dept 1995] [stating that the plaintiff's cross motion to amend the thirteenth cause of action was properly denied because the proposed amendment was devoid of merit and because plaintiff failed to furnish the proposed amended pleading]; *Abbott v Herzfeld & Rubin, P.C.*, 202 AD2d 351, 352 [1st Dept 1994] ["Leave to replead was properly denied, plaintiffs not having provided proposed new pleadings supported by evidence as on a motion for summary judgment"]; *Hickey v National League of Professional Baseball Clubs*, 565 NYS2d 65, 66 [1st Dept 1991]), *citing Walter & Rosen, Inc. v Pollack*, 101 AD2d 734, 735 [1st Dept 1984]). However, here, plaintiff's cross-motion not only contains the actual text of the proposed amendments, it also provides factual allegations supporting the proposed amendments. Therefore, the Court proceeds to determine whether plaintiff's proposed amendments have merit.

Plaintiff seeks to amend her Complaint to add causes of action for breach of contract and breach of professional responsibility *nunc pro tunc* to the date of filing, and to amend the *ad damnum* clause of the Complaint. Specifically, plaintiff seeks the disgorgement of \$50,000 in

legal fees paid to defendant on the ground that defendant did not earn the fees.<sup>10</sup>

*Breach of Contract*

Plaintiff's breach of contract claim lacks merit because it is duplicative of her insufficient legal malpractice claim (*Tsao v Scudieri*, 23 Misc 3d 128, 885 NYS2d 714 [1st Dept 2009]; *Turk v Angel*, 293 AD2d 284 [1st Dept 2002], *lv dismissed* 99 NY2d 651 [2003]; *Nevelson v Carro, Spanbock, Kaster & Cuiffo*, 290 AD2d 399, 400 [1st Dept 2002] ["We modify solely to dismiss the redundant claims for breach of contract and breach of fiduciary duty, which are predicated on the same allegations and seek relief identical to that sought in the malpractice cause of action. Contrary to plaintiffs' assumption, it is not the theory behind a claim that determines whether it is duplicative" (citations omitted)]). It is clear from plaintiff's Proposed Amended Complaint that her breach of contract claim is predicated on the same allegations as her claim for legal malpractice under the 2004 Retainer Agreement. The Proposed Amendment reads as follows:

8. Plaintiff avers that Defendant *breached his agreement with Plaintiff for representation of her in her divorce* and breached his professional responsibility as an attorney by retaining legal fees that he did not earn in excess of \$50,000, which unearned legal fees Defendant has a legal and contractual obligation to return to Plaintiff.  
(Emphasis added)

Further, the facts plaintiff cites as relevant to her cross-motion mirror the facts she cites in support of her legal malpractice action. For example, plaintiff alleges in her cross-motion that "[d]uring the course of the divorce case . . . and in order to induce Plaintiff into the settlement . . . Defendant sought and obtained an unethical and illegal payment of \$50,000 from [Mr. Harvey]

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<sup>10</sup> Plaintiff points out that on March 11, 2009, she originally filed for arbitration seeking the return of the \$50,000 in "unearned" legal fees. Defendant filed a petition seeking a restraining order to stay the arbitration. According to plaintiff, Justice Alice Schlesinger ruled that since this malpractice action had been filed subsequent to the filing of arbitration, such arbitration proceeding should be stayed on the grounds that the filing of this legal malpractice action constituted an election of remedies.

who wished to settle the case as soon as possible on the most favorable terms to him” (cross-motion, pp. 11-12; see also Harvey Aff., ¶ 6).

Finally, it is clear from plaintiff’s Proposed Amended Complaint and cross-motion that the \$50,000 was paid to defendant under the 2004 Retainer Agreement, *during* the Divorce Settlement.<sup>11</sup> As discussed above, plaintiff’s allocution that she willingly settled the divorce and was satisfied with defendant’s services precludes plaintiff from now challenging defendant’s performance under the 2004 Retainer Agreement. Accordingly, plaintiff’s cause of action for breach of contract lacks merit, and is dismissed.<sup>12</sup>

#### *Breach of Professional Responsibility*

Plaintiff’s claim for breach of professional responsibility also fails. Plaintiff contends that defendant violated “the canons of ethics binding New York attorneys” and DRL §237 by failing to provide documentation that he actually earned the \$50,000 in fees he received from Mr. Harvey (cross-motion, p. 12). Plaintiffs seeking to recover attorneys fees under a theory of breach of professional responsibility have made such claims under Judiciary Law §487.

Judiciary Law §487 provides in relevant part that an attorney or counselor who “[w]ilfully delays his client’s suit with a view to his own gain; or, *wilfully receives any money or*

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<sup>11</sup>In her affidavit, plaintiff attests: “*In order to induce me into the settlement . . . Defendant sought and obtained an unethical and illegal payment of \$50,000 from [Mr. Harvey]*” (Harvey Aff., ¶ 6) (emphasis added). Mr. Harvey attests: “Our divorce proceeding *was settled* partly on the basis *that I would pay [plaintiff’s] remaining legal fees* arising out of the divorce. As such I was informed that [defendant] was owed by [plaintiff], and I in fact paid to [defendant] on her behalf, the amount of \$50,000 in respect of such legal fees towards [*sic*] a total of \$104,000 in legal fees he claimed he had earned” (Christopher Harvey Aff., ¶ 5) (emphasis added). Finally, on plaintiff’s “Client Request for Fee Arbitration” form, dated March 11, 2009, plaintiff provided the following explanation for why she believed defendant was not entitled to the \$50,000 in fees: “[Defendant] received a total of over \$102,000 in fees, including a \$50,000 payment from my ex-husband *that was paid during the settlement of the divorce action.*”

<sup>12</sup>The Court notes that defendant’s argument that plaintiff lacks standing to recover the fee lacks merit, and the caselaw he cites is distinguishable. However, as the breach of contract cause of action has been dismissed on other grounds, the issue is moot.

allowance for or on account of any money which he has not laid out, or becomes answerable for, [i]s 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” (emphasis added). According to the First Department, the alleged misconduct must have been directed at the Court or must have occurred during the course of a pending judicial proceeding (*Costalas v Amalfitano*, 305 AD2d 202, 204 [1<sup>st</sup> Dept 2003]), and caused actual damages, *i.e.* “pecuniary harm” (*New York City Transit Auth. v Morris J. Eisen, P.C.*, 276 AD2d 78, 86 [1<sup>st</sup> Dept 2000]). Finally, “civil relief and the imposition of treble damages is warranted only where the defendant attorney has ‘engaged in a chronic, extreme pattern of legal delinquency’” (*Schindler v Issler & Schrage, P.C.*, 262 AD2d 226, 228 [1<sup>st</sup> Dept 1999], citing *Wiggin v Gordon*, 115 Misc2d 1071, 1077, 455 NYS2d 205, 209 [NY City Civ Ct 1982]). The Court in *Wiggin v Gordon* held that an attorney’s “action in taking \$1,200.00 from plaintiff in July, 1976 and his willful refusal to pay the estate taxes for five years, and his willful refusal for the past six years to return the funds to plaintiff,” as well as his “his protracted indifference to this proceeding, now pending for the past 10 months” constituted a chronic, extreme pattern of legal delinquency (*id.* at 1077).

In her cross-motion, plaintiff sufficiently alleges that defendant’s misconduct took place during the course of a pending judicial proceeding (*Costalas v Amalfitano* at 204) and caused her pecuniary harm (*New York City Transit Auth. v Morris J. Eisen, P.C.* at 86). Further, plaintiff alleges that defendant “abused his fiduciary position towards [*sic*] his client by profiting in clear contravention of the intent of” DRL §237, which provides in relevant part:

(a) In any action or proceeding brought . . . for a divorce . . . the court may direct either spouse . . . to pay such sum or sums of money directly to the attorney of the other spouse to enable that spouse to carry on or defend the action or proceeding as, in the court’s discretion, justice requires, having regard to the circumstances of the case and of the

respective parties.

\* \* \* \* \*

(d) The term “expenses” as used in subdivisions (a) and (b) of this section shall include, but shall not be limited to, accountant fees, appraisal fees, actuarial fees, investigative fees and other fees and expenses that the court may determine to be necessary to enable a spouse to carry on or defend an action or proceeding under this section. In determining the appropriateness and necessity of fees, the court shall consider:

1. The nature of the marital property involved;
2. The difficulties involved, if any, in identifying and evaluating the marital property;
3. *The services rendered and an estimate of the time involved; and*
4. The applicant's financial status.

(Emphasis added)

However, because of her allocation in the Divorce Settlement, plaintiff's claim for breach of professional responsibility lacks merit. Although defendant, in his reply, does not respond to plaintiff's specific allegations regarding the \$50,000 in fees,<sup>13</sup> the record indicates that plaintiff knew about the \$50,000 Mr. Harvey paid defendant before she allocuted that she was satisfied with defendant's services at the Divorce Settlement. Further, plaintiff neither alleges nor provides any evidence that she objected to the \$50,000 payment at the time Mr. Harvey paid defendant. Therefore, as “the facts alleged and relied upon in the moving papers are obviously unreliable or insufficient to support the amendment” (*Peach Parking Corp.* at 86), plaintiff's breach of professional responsibility claim is dismissed.

#### *Conclusion*

Based on the foregoing, it is hereby

ORDERED that the motion of defendant Laurence P. Greenberg for an order, pursuant to CPLR §§3211 (a)(1), (a)(5) and (a)(7), dismissing the Complaint of Sharde Harvey, is granted, and the Complaint is dismissed; and it is further

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<sup>13</sup> Instead, as discussed above, plaintiff only challenges the procedural sufficiency of the cross-motion, and the rights of plaintiff and Mr. Harvey to recover said fees.


ORDERED that plaintiff's cross-motion for an order, pursuant to CPLR §3025(b), granting her leave to amend her Complaint is denied; and it is further

ORDERED that defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk of the Court enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: November 6, 2009



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Hon. Carol R. Edmead, J.S.C.

**HON. CAROL EDMEAD**

**FILED**  
NOV 10 2009  
NEW YORK  
COUNTY CLERK'S OFFICE