Martin Motors Sales, Inc. v Baratta, Baratta & Aidala LLP
2011 NY Slip Op 33902(U)
April 7, 2011
Supreme Court, New York County
Docket Number: 600514/10
Judge: Shirley Werner Kornreich

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

PRESENT: Kornreich Justice PART 54

MARTIN MOTOR SALES

- v -

BANATIA, BANATIA

INDEX NO. 600514/10

MOTION DATE

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 ...	6,7,8,10,12,14,15,16,17,18,19,20,21,30,31,32,33,22,23,24,25,26,27,28,29
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

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

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

Dated: 4/7/11 JUSTICE SHIRLEY WERNER KORNREICH J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

MARTIN MOTOR SALES, INC., and JANET L. SCHLANGER,

Plaintiffs,

-against- Index No. 600514/10

BARATTA, BARATTA & AIDALA LLP, JOSEPH A. BARATTA, and JOSEPH P. BARATTA,

Defendants.

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KORNREICH, J.:

This is an action for legal malpractice which arises out of the representation of plaintiffs Martin Motor Sales, Inc. (MMS) and Janet Schlanger by defendants Baratta, Baratta & Aidala, LLP (BB&A), Joseph A. Baratta and Joseph P. Baratta during a 2007 transaction involving the sale of real property and a Volvo automobile franchise. Defendants now move, pursuant to CPLR 3211 (a) (1) and (a) (7), for an order dismissing the complaint. For the reasons set forth below, the motion to dismiss is denied.

I. FACTS

The following facts are taken from the complaint or plaintiffs' affidavits, unless otherwise noted.

MMS was formed by Martin Schlanger in 1962, and until July 3, 2007, was engaged in the operation of various franchised automobile dealerships in Manhattan. MMS also acquired a number of parcels of valuable commercial real estate in Manhattan. Prior to his death, Martin Schlanger was the sole shareholder of MMS. Martin Schlanger died on January 12, 1998, survived by his wife Janet Schlanger, their son Mark Schlanger, and their daughter Ellen

Schlanger Bregg..

At the time of Martin Schlanger's death, MMS was engaged in the operation of a Honda dealership. MMS was also engaged in the operation of a Volvo dealership, at property located at 677 11th Avenue, New York, NY. That property was owned by Martin and Mark Realty Group, Inc. (Martin and Mark), a New York limited liability company. Martin and Mark Schlanger were the sole members and each owned 50%. An adjacent vacant lot, located at 681 11th Avenue, was owned by MMS (the properties located at 677 and 681 11th Avenue are collectively referred to herein as the Properties). Janet Schlanger was the primary beneficiary under Martin Schlanger's will and, pursuant thereto, became the sole owner of his shares in MMS and his 50% membership interest in Martin and Mark.

For several years prior to his death, Martin Schlanger and his various enterprises, including MMS and Martin & Mark Realty, were represented by Joseph P. Baratta (Baratta) and Baratta & Goldstein . Following Martin Schlanger's death, Baratta and his firm continued to represent MMS and Martin & Mark, and also provided legal assistance to Janet SCHLANGER. In 2006, Baratta & Goldstein was succeeded by BB&A, which continued to represent MMS, Martin & Mark, and Janet Schlanger and also represented Mark Schlanger.

Mark Schlanger was involved in the business of MMS both before and after Martin Schlanger's death . Janet Schlanger alleges that, following her husband's death, Mark Schlanger sought to gain control of MMS's automotive assets, which attempts continued for several years, through various proposals. She further alleges that Baratta and Baratta & Goldstein provided advice and assistance to Mark Schlanger with respect to these proposed transactions, including preparing agreements and transactional documents. During this time, Baratta & Goldstein and

BB&A continued to serve as MMS's legal counsel, and to provide legal services to Janet Schlanger as well. One or more of the proposed transactions contemplated the transfer of MMS's automotive assets to Martin Auto Group (MAG), a New York corporation that was formed by Baratta and owned by Mark Schlanger. None of the proposed transactions was ever concluded.

After Martin Schlanger's death in 1998, the Honda and Volvo dealerships continued to operate, with Janet Schlanger as the authorized "Dealer Principal". Mark Schlanger was employed by MMS, and held the title of Executive Vice President.

On September 21, 2004, MMS sold its Honda dealership, for $3.5 million. Janet Schlanger alleges that, in June 2005, she learned that her son had caused approximately $3 million, including the proceeds of the sale of the Honda distributorship, to be diverted from MMS, including a substantial amount to a private foundation with which her son and Joseph P. Baratta were involved. Mark Schlanger was then removed from any position he had with MMS, and Janet Schlanger's relationship with him became adversarial and openly hostile.

In 2007, it was decided that the Volvo dealership operated by MMS would be sold. A buyer wished to purchase both of the Properties. Janet Schlanger agreed to sell the Properties if the parties would fully resolve all business and financial disputes existing between them, severing all business and legal ties.

On February 9, 2007, MMS entered into an agreement for the sale of the Volvo dealership to Manhattan Ford-Lincoln Mercury, which sale was concluded at a closing on July 3, 2007. On April 18, 2007, MMS and Martin and Mark Realty entered into agreements for the sale of the Properties to Rockrose Development Corp., which sales were concluded at a closing on

October 10, 2007. Defendants represented both MMS and Janet Schlanger in connection with the sales of the Volvo dealership and the 681 11th Avenue property, and represented both Martin and Mark and Janet Schlanger in connection with the sale of 677 11th Avenue property.

Janet Schlanger alleges that she asked Baratta to prepare any and all agreements and releases necessary so that, after all of the sales were concluded, her son could not pursue any claims against her, MMS, or any person, firm or entity with which they were affiliated. She further alleges that Baratta was well aware of her son's attempts to obtain MMS's automobile dealerships and all of the assets relating to them, including the abortive transactions involving MAG, because Baratta had structured the transactions, had prepared the documents that would be needed to effectuate them, and had advised, assisted and supported Mark Schlanger in these efforts. Over the years, Baratta had also provided legal assistance and/or advice to Mark Schlanger personally and to various entities controlled by him, some of which were incorporated by Baratta or with his assistance.

As a result, on March 2, 2007, in anticipation of the sales of the Volvo dealership and the Properties, MMS, Martin and Mark Realty, Janet Schlanger and Mark Schlanger entered into certain agreements (the Agreements) and related releases (the Releases). Janet Schlanger and Mark Schlanger also entered into a Mutual Release. The purpose of the Releases was to effect a complete disassociation between the plaintiffs MMS/ Janet Schlanger and Mark Schlanger, and any entities with which they were associated. The releases were intended to fully and completely resolve all disputes then existing between Janet Schlanger and Mark Schlanger. Janet Schlanger would not have sold the Properties without the Releases.

Baratta and BB&A negotiated and drafted the Agreements, the Releases, and related

documents on behalf of plaintiffs. Baratta and BB&A also oversaw or arranged for their execution and by agreement of the parties, held all of the Releases and Agreements in escrow, pending conclusion of the sales. On October 10, 2007, the escrowed Agreements and Releases were released from escrow, with copies provided to all of the parties. The originals of the Releases were retained by defendants, who refused to release them even though plaintiffs repeatedly asked for them. After the sales were concluded, defendants continued to maintain various escrow and interest-bearing accounts established in connection with various matters, arising out of or relating to the sale of the Volvo dealership and the Properties, thereby continuing to represent plaintiffs.

The total proceeds of the 2007 Transactions were in excess of $20 million (Aff. of Joseph P. Baratta Aff., ¶ 10). Janet Schlanger alleges that none of the proceeds from the sales of the Volvo dealership and the two properties were disbursed to MMS or Martin and Mark at the closing. Rather, the proceeds were deposited by defendants into various escrow accounts established and administered by them. They subsequently made numerous payments out of the escrows and transferred money from one to the other. No accounting of these transactions were provided plaintiffs. According to Janet Schlanger, six such accounts still remain open, with balances totaling in excess of $715,000.

Moreover, plaintiffs contend that defendants never entered into an engagement letter or retainer agreement with them, or issued any invoices. Instead, defendants paid themselves from the escrow funds. Plaintiffs allege that, for their services in connection with the 2007 Transactions, defendants took legal fees totaling in excess of $1,700,000. Nonetheless, defendants now claim that there remains an unpaid balance of $131,250 in legal fees arising out

of the 2007 Transactions.

On December 2, 2008, Mark Schlanger and certain entities with which he is affiliated, commenced an action in state court in Florida against Janet Schlanger and MMS, alleging various causes of action (the Florida Action). Among the numerous claims asserted, Count VI of the amended complaint asserts that MMS did not have the legal right to sell the Volvo dealership; that the assets of the dealership had previously been sold by MMS to MAG, a company in which Mark Schlanger allegedly holds majority interest; and that the sale of the assets of the dealership by MMS amounted to a conversion of those assets. The documents that MAG relies on in support of its claim for conversion include the documents that Baratta prepared for the proposed sale of the assets to MAG in 2000, the sale which was never consummated.

Plaintiffs asserted the Releases as an absolute defense to the claims in the Florida Action. Mark Schlanger, however, is disputing the authenticity, validity, enforceability, and/or scope of the Releases. Many of the claims in the Florida Action are by parties who are named in the Releases, including Mark Schlanger, Selemar, Inc. and Martin and Mark, and most of the claims arise from alleged transactions which occurred before the Releases were executed. Defendants have refused to turn over the original releases to plaintiffs and their Florida counsel.

In the first cause of action for legal malpractice, plaintiffs sue defendants for malpractice in connection with defendants' representation of plaintiffs in connection with the negotiation, preparation, execution and release from escrow of the Releases and the sales of the Volvo dealership and the Properties. In the second cause of action for replevin, plaintiffs seek the return of the originals of the Releases.[1] In the third cause of action, plaintiffs seek an accounting from

[1] At oral argument, the court directed defendants to turn over the Releases.

defendants with respect to the proceeds of the 2007 Transactions. In the fourth cause of action, plaintiffs seek a declaratory judgment that plaintiffs do not owe an additional $131,250 in legal fees, and are entitled to restitution of sums defendants have taken from the escrow accounts, totaling in excess of $1.7 million, and which were allegedly substantially in excess of the fair and reasonable value of defendants' services. In the fifth cause of action, plaintiffs seek damages for breach of fiduciary duty, including defendants' representation of plaintiffs while under a conflict of interest.

II. DISCUSSION

"The scope of a court's inquiry on a motion to dismiss under CPLR 3211 is narrowly circumscribed." *P.T. Bank Cent. Asia v ABN AMRO Bank N.V.*, 301 AD2d 373, 375 (1st Dept 2003). Thus, on "a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction." *Leon v Martinez*, 84 NY2d 83, 87 (1994). The court "must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory." *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 (2001). A court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint. *Rovello v Orofino Realty Co.*, 40 NY2d 633 (1976). Ultimately, under CPLR 3211 (a) (7), the "'criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one [citation omitted].'" *Leon*, at 88. In addition, in order to prevail on a motion to dismiss based upon documentary evidence pursuant to CPLR 3211 (a) (1), the movant must demonstrate that the documentary evidence conclusively refutes the plaintiff's claims. *AG Capital Funding Partners, L.P. v State St. Bank and Trust Co.*, 5

NY3d 582 (2005).

A. Attorney Malpractice (First Cause of Action)

To state a cause of action for legal malpractice, a plaintiff need only allege facts indicating "'that the defendant-attorney failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community,' and 'that the defendant-attorney's negligence was a proximate cause of damages (citations omitted).'" *Rock City Sound, Inc. v Bashian & Farber, LLP*, 74 AD3d 1168, 1171 (2d Dept 2010); *Barnett v Schwartz*, 47 AD3d 197 (2d Dept 2007); *DaSilva v Suozzi, English, Cianciulli & Peirez, P.C.*, 233 AD2d 172 (1st Dept 1996). Whether malpractice has been committed is ordinarily a factual determination to be made by the jury, and requires expert testimony to establish that the attorney breached a standard of professional care and skill. *Greene v Payne, Wood & Littlejohn*, 197 AD2d 664 (2d Dept 1993).

In their cause of action for legal malpractice, plaintiffs allege that defendants had a duty "to take appropriate measures to ensure" that the Releases "were adequate, in form and content, to accomplish their intended purpose." Complaint, ¶ 57. The purpose of the Releases was the release of all claims Mark Schlanger and his entities had against plaintiffs. "If, in the Florida Action, the Releases are held invalid or unenforceable, or not to be dispositive of all of the claims asserted against MMS and Janet Schlanger in that action, it will only be because defendants failed to act with the care and skill required of them as professionals in their representation of plaintiffs herein, including their failure to adequate and completely discharge" the duty to make sure the Releases achieved their contemplated purpose. *Id.*, ¶ 59. Plaintiffs further allege that "the institution and continued prosecution of the Florida Lawsuit, in and of itself, is evidence that defendants failed to act with the care and skill required of them as

professionals in their representation of the plaintiffs herein: for had defendants acted with the requisite care and skill the Florida Lawsuit would not have been filed, or would have been speedily resolved in plaintiffs' favor." *Id.*, ¶ 60. Finally, plaintiffs allege that they have incurred substantial legal fees to defend themselves against the claims brought by Mark Schlanger in the Florida Action, which have thus far totaled over $500,000. Complaint, ¶ 60; Janet Schlanger Aff., ¶ 40.

In support of their motion to dismiss the legal malpractice cause of action, defendants assert that the allegations set forth in the complaint are insufficient to state a cause of action. Contrary to defendants' contentions, these allegations, which plead that defendants failed to exercise that degree of care, skill and diligence commonly possessed by a member of the legal community, and that their negligence was a proximate cause of the damages, are "sufficient to state a cause of action to recover damages for legal malpractice." *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703, 704-705([2d Dept 2010); *see also Escape Airports (USA), Inc. v Kent, Beatty & Gordon, LLP*, 79 AD3d 437, 438 (1st Dept 2010)(complaint, which "sufficiently pleaded that defendant failed to exercise the ordinary and reasonable skill and knowledge commonly possessed by a member of the legal profession in failing to include [] a termination provision, and that plaintiff sustained actual and ascertainable damages as a result of this breach of duty," stated a cause of action for legal malpractice "sufficient to withstand the motion to dismiss").

Nevertheless, defendants argue that plaintiffs' claim for legal malpractice is "not ripe" for adjudication "in the absence of any 'finding' that the Releases are somehow unenforceable or invalid." Def Mem., at 11. Defendants also argue that "the damages that the [plaintiffs] seek are

completely speculative." *Id.* at 13 The court rejects these arguments.

Premier Pharmacy, Inc. v Bachner, (NYLJ, Dec. 26, 1997 at col 5 (Sup Ct, NY County) is directly in point. In that case, the plaintiff sued the defendant law firm for legal malpractice relating to an earn-out clause contained in an agreement drafted by the defendant. The complaint alleged that the defendant did not exercise the requisite degree of care and skill because it failed to draft the disputed clause in a clear and unambiguous fashion, and failed to properly advise the plaintiff as to what event would trigger the clause. The complaint further alleged that these deficiencies resulted in the other party's misinterpretation of the clause, and the commencement of a lawsuit in Westchester "which [plaintiff] has had to defend, thereby incurring damages in the form of attorney's fees, as well as the potential liability sought." *Id.* Defendant moved for dismissal of the complaint, arguing that Premier's suit was premature, because the Westchester lawsuit against it had not been concluded, and that any alleged damages were therefore speculative. The court rejected the defendant's claim that the action was premature and denied the motion to dismiss, stating that:

> Plaintiff clearly claims actual damages in the form of attorney's fees in the Westchester action, as the result of the alleged negligence in drafting the agreement. The fact that the precise amount has not yet been determined does not preclude the institution of the instant action

Id.

Similarly, in Rodin Properties-Shore Mall, N.V. v Ullmann, 253 AD2d 403 (1st Dept 1998), a creditor sued the attorneys who had represented it in a loan transaction for legal malpractice, claiming that it had been induced to make a loan based upon a fraudulently inflated appraisal and cash flow projection. Defendants moved to dismiss on the ground that the action

was premature, because the loan had not matured, and there was no way to determine whether or how much the creditor would ultimately lose if the debtor were to default. The Court affirmed the lower court's denial of the motion, finding that "the allegations of injury and proximate cause are sufficient," and that "if plaintiff's allegations are borne out, plaintiff has already been damaged" by having been induced to make the loan (*id.* at 404). Likewise here, plaintiffs have adequately alleged defendants' failure to exercise due care and that, as a proximate result, they have been sued and have sustained damages in the form of legal fees and costs, regardless of the outcome of the Florida Action. Defendants' motion to dismiss the first cause of action for legal malpractice is denied.

B. Replevin (Second Cause of Action)

In their second cause of action for replevin, plaintiffs seek property rights to, and the delivery of, the original copies of the Releases. Defendants' motion to dismiss this cause of action is granted, as during oral argument on November 9, 2010, this court ordered the return of the original copies of the Releases to plaintiffs. *See* Transcript of 11/9/2010 Oral Argument, at 38.

C. Accounting (Third Cause of Action)

In their third cause of action, plaintiffs seek an accounting with respect to the millions of dollars in sales proceeds that defendants deposited into one or more escrow accounts in 2007 – more than $700,000 of which they still hold. Plaintiffs allege that "no closing statement was ever provided to MMS in connection with the sale of the Volvo dealership." Complaint, ¶ 72. Plaintiffs further contend that they have not received the information required to ascertain what happened to the proceeds of the subject transactions. Complaint, ¶ 75 ("because of the number

of accounts involved, and a lack of all of the pertinent information and documentation, plaintiffs are unable to verify that all of the proceeds have been accounted for; that any and all payments made were proper; that Plaintiffs have received all of the funds to which they were entitled; and the amounts remaining in each of the accounts").

"Where an attorney collects money and retains it, he is bound to render an account thereof to the client when called upon to do so." *Kleckner v Levine*, 12 AD2d 788, 788 (2d Dept 1961). In other words, "whenever there is a fiduciary relationship between the parties ... there is an absolute right to an accounting." *Koppel v Wien, Lane & Malkin*, 125 AD2d 230, 234 (1st Dept 1986); *accord Disabled Am. Veterans v Phillips*, 13 Misc 3d 1210[A], 2006 NY Slip Op 51772[U] (Sup Ct, Nassau County 2006).

Although defendants do not deny that the complaint states a cause of action for an accounting (*see* Def Mem., at 17), they argue that "plaintiffs received complete information as to the disposition of their funds," and that Exhibits J-V attached to the Baratta affidavit show that plaintiffs received "full disclosure as to the proceeds of the transactions. *Id.* at 18. However, in *Koppel*, like here, the defendant law partners argued, on appeal from the denial of their motion to dismiss plaintiffs' action for an accounting, that their motion should have been granted because the plaintiffs were already in possession of detailed information relating to the sale and the subject litigation. The court rejected this argument, stating:

> regardless of whether or not all of the relevant facts are already known to plaintiffs, it is clear that whenever there is a fiduciary relationship between the parties, as is the situation here, there is an absolute right to an accounting notwithstanding the existence of an adequate remedy at law.

125 AD2d at 234.

Moreover, the documents referred to by defendants do not conclusively refute plaintiffs' claimed entitlement to an accounting, given plaintiffs' allegations that "these documents are neither an accounting nor an acceptable substitute for one." Pl Mem., at 17. The documents do not include closing statements and do not include any report or reconciliation from which it may be determined that all of the sales proceeds have in fact been taken into account. Further, the documents: are voluminous, relate to multiple different accounts and are not accompanied by any reports, summaries or reconciliations to "tie" them together; reflect countless deposits, withdrawals, payments and transfers between accounts unaccompanied by any explanation or backup; do not include information or supporting documents from which it may be determined that all of the money that was expended was properly paid or applied; and do not state what amounts must continue in escrow and why, and are not accompanied by payment to plaintiffs of any sums in excess of those amounts. *See* Complaint, ¶¶ 75-77; Janet Schlanger Aff., ¶¶ 47-50.

In addition, defendants acknowledge that, three years after the sales transactions closed, there still remain six escrow accounts containing in excess of $715,000. Baratta Aff., ¶ 30. Defendants do not explain why these accounts remain open, what obligations they relate to, and how much of the money held in each account is being held for each of these obligations.

In sum, plaintiffs' allegations are sufficient to state a cause of action for an accounting. *See Kaufman v Cohen*, 307 AD2d 113 (1st Dept 2003). Defendants' motion to dismiss this cause of action is denied.

C. Declaratory Judgment (Fourth Cause of Action)

In the fourth cause of action, plaintiffs allege that the "fees which defendants charged and have heretofore taken were exorbitant, grossly in excess of the reasonable value of the services

rendered and, under all of the facts and circumstances, unconscionable." Complaint, ¶ 86. As a result, plaintiffs seek a declaratory judgment "determining and declaring the reasonable value of defendants' services in the matter of legal representation herein described" (*id.*, ¶ 90), with respect to both the legal fees that have already been paid, and the $131,250 of legal fees that remain unpaid. Plaintiffs seek a declaration that (1) they do not owe defendants any additional fees; (2) an order directing the defendants to return to the plaintiffs all sums being held in escrow by the defendant on account of legal fees that defendants claim are due; and (3) a declaration as to the amount of legal fees the defendants have been paid in excess of the fair and reasonable amounts due for their services, and an order directing defendants to return those sums to plaintiffs.

Defendants concede that an action for declaratory relief is a proper remedy to the extent that plaintiffs seek a determination that they are not obligated to pay to defendants any additional fees. Def Mem., at 21. However, they contend that, because declaratory judgments are intended to declare rights prospectively, declaratory relief is not the appropriate remedy with regard to the fees already paid to defendants, and that thus, the court should dismiss this component of the declaratory relief claim.

The court rejects this argument. "It is recognized that the courts possess the traditional authority to 'supervise the charging of fees for legal services under the courts' inherent and statutory power to regulate the practice of law (citation omitted).'" *Collier, Cohen, Crystal & Bock v MacNamara*, 237 AD2d 152, 152 (1st Dept 1997). Thus, when a law firm charges an excessive fee, the court may order restitution. *Matter of Buttarazzi*, 304 AD2d 140 (4th Dept 2003); *Matter of Anschell*, 286 AD2d 173 (1st Dept 2001). Indeed, if as alleged, defendants

violated the disciplinary rules by charging excessive fees, by representing in disregard of a conflict of interest or of improperly invading the escrow accounts to pay their own fees, defendants may well be entitled to no fee. *See Yannitelli v D. Yannitelli & Sons Construc. Corp.*, 247 AD2d 271, 271-2 (1st Dept 1998); *Pessoni v Rabkin*, 220 AD2d 732 (1st Dept 1995); *Matter of Estate of Harry Winston*, 214 AD2d 677 (1st Dept 1995).

Additionally, the court has the discretion to grant declaratory relief. CPLR 3001; *Morgenthau v Erlbaum*, 59 NY2d 143, *cert denied* 464 US 993 (1983); *Solomon Brothers v West Virginia State Board of Investments,* 152 Misc 2d 289 (Sup Ct, NY County), *affd* 168 AD2d 384 (1st Dept 1990), *appeal denied* 77 NY2d 807 (1991). "If the issuance of a declaration of rights in a particular case will serve the interests of convenience of the parties or the public ... or if the court is satisfied that a grant of a declaratory judgment will serve some useful function, then the court should exercise its discretion and render declarations that detail and define interests and rights." *Parry v County of Onondaga,* 25 Misc 3d 1236[A], 2009 NY Slip Op. 52431[U], * 4 (Sup Ct, Onondaga County 2009).

The component of plaintiffs' fourth cause of action which seeks a determination that plaintiffs do not owe defendants any additional amounts as attorney's fees is predicated, in part, upon plaintiffs' belief that "the fees which defendants have already paid to themselves out of the proceeds of the sales were grossly in excess of the reasonable value of their services." Complaint, ¶ 89 (a). It is therefore impossible for the court to determine whether or not plaintiffs are obligated to defendants for the additional $131,250 which they still claim is due, and to afford plaintiffs the declaratory relief they seek in that regard, without also determining whether the entire fee was "grossly in excess of the reasonable value of their services." Thus, it is clear

that the portion of the fourth cause of action dealing with legal fees that have already been paid is properly the subject of the cause of action for a declaratory judgment. Defendants' motion to dismiss the fourth cause of action for declaratory relief is denied.

E. Breach of Fiduciary Duty (Fifth Cause of Action)

In their fifth cause of action for breach of fiduciary duty, plaintiffs allege that defendants "have breached their fiduciary duty, by failing and refusing to deliver to plaintiffs the originals of the Releases, by otherwise failing or refusing to cooperate with or support plaintiffs in their defense of the Florida Lawsuit and, upon information and belief, by preparing documents and undertaking other acts inimical to the plaintiffs' interests." Complaint, ¶ 93. Defendants contend that these allegations are insufficient to state a cause of action for breach of fiduciary duty.

It is axiomatic that the relationship of attorney and client is fiduciary. *Matter of Cooperman*, 83 NY2d 465 (1994). Thus, defendants owed plaintiffs the duty to deal fairly, honestly and with undivided loyalty, including maintaining confidentiality, and avoiding conflicts of interest. *See id.*; *see also Matter of Kelly*, 23 NY2d 368 (1968).

Plaintiffs claim that defendants, while representing plaintiffs, had a conflict of interest due to their relationship with Mark Schlanger, that consequently, defendants did not use their best efforts to protect plaintiffs, and that, as a proximate result, plaintiffs have suffered damages, including the attorney's fees that they are incurring in defending against the Florida Action. Contrary to defendants' assertions, these allegations are sufficient to state a cause of action for breach of fiduciary duty. *See Boone v Bender*, 74 AD3d 1111, 1113 (2d Dept 2010) ("Ordinarily, an action for breach of fiduciary duty requires a plaintiff to merely identify a conflict of interest amounting to a substantial factor in the plaintiff's loss"); *see also Ulico Cas. Co. v Wilson, Elser,*

Moscowitz, Edelman & Dicker, 56 AD3d 1 (1st Dept 2008).

Defendants also claim that the breach of fiduciary cause of action must be dismissed as duplicative of the legal malpractice claim. The court rejects this argument, as the breach of fiduciary cause of action "is based upon different facts than those underlying the cause of action alleging legal malpractice." *Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker,* 56 AD3d at 8 (specifically finding "that the cause of action asserted as breach of fiduciary duty is not redundant"); *see also Nevelson v. Carro, Spanbock, Kaster & Cuiffo*, 290 AD2d 399 (1st Dept 2002).

The court has considered the remaining claims, and finds them to be without merit. Accordingly, it is

ORDERED that defendant's motion to dismiss is granted to the limited extent that the second cause of action of the complaint is dismissed; and it is further

ORDERED that defendants' motion to dismiss the first, third, fourth and fifth causes of action of the complaint is denied; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

Dated: April 7, 2011

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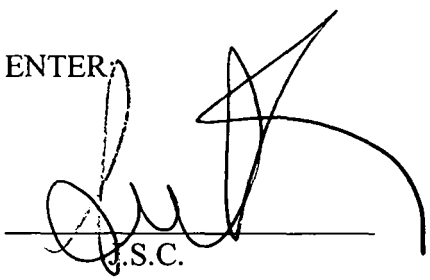

J.S.C.