

<b>Betz v Blatt</b>
2012 NY Slip Op 3351 (U)
August 1, 2012
Supreme Court, Westchester County
Docket Number: 58938/11
Judge: Mary H. Smith
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DECISION AND ORDER

FILED & ENTERED

8/1/12

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH  
Supreme Court Justice

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DEBRA BETZ, as Administratrix of the Estate of  
Carmelo Carbone aka Mel Carbone,

Plaintiff,

MOTION DATE: 6/29/12  
INDEX NO.: 58938/11

-against-

ARNOLD W. BLATT, ANTHONY J. PIERAGOSTINI,  
GEORGE A. SIRIGNANO, JR. and ENEA, SCANLAN  
& SIRIGNANO, LLP,

Defendants.  
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The following papers numbered 1 to 24 were read on this motion by defendants Sirignano and Enea, Scanlan & Sirignano, LLP (collectively defendants "Sirignano") for an Order pursuant to CPLR 3211 dismissing this action, etc., and on this separate motion by defendant Pieragostini for an Order pursuant to CPLR 3211 dismissing this action, etc., and on this separate cross-motion (sic)<sup>1</sup> by defendant Blatt for summary judgment dismissing the complaint.

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<sup>1</sup>The improperly designated cross-motion is deemed a notice of motion. See CPLR 2215; Volpe v. Canfield, 237 A.D.2d 282, 283 (2<sup>nd</sup> Dept. 1997), lv. to app. den. 90 N.Y.2d 802 (1997); Mango v. Long Island Jewish Hillside Medical Center, 123 A.D.2d 843, 844 (2<sup>nd</sup> Dept. 1986).

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Upon the foregoing papers, it is Ordered and adjudged that these motions by defendants are disposed of as follows:

This unfortunate action arises from a Will of decedent Carmelo Carbone who had died, on May 13, 2004. Mr. Carbone's will had named his brother, Mike Carbone ("Carbone"), as Executor of his Estate, and decedent's two daughters, Debra Betz and Kristin Carbone-Lopez, were the primary beneficiaries thereunder, with the Estate's estimated gross value at the time of Mr. Carbone's death to have been approximately \$2 million, comprised of real estate holdings, liquid assets and a 1962 Vintage Corvette. From the inception of his qualifying and serving as Executor, Carbone had begun looting the assets of the Estate, and the only individuals who apparently had benefitted by the Will were Carbone, and his two

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<sup>2</sup>This Part's published Rules require separately tabbed exhibits.

children. By the time the Westchester County Surrogate, in a contested proceeding challenged by Betz, had suspended Carbone's letters, on April 13, 2011,<sup>3</sup> the value of the Estate had been reduced to approximately \$110,000.00.<sup>4</sup>

Defendants named herein are all attorneys who had represented the Estate and/or Carbone sequentially throughout the probate; defendant Blatt, who had represented the decedent for several decades, had filed the petition for probate on behalf of Carbone, on August 15, 2004, and he had continued to represent Carbone and the Estate until the summer of 2006, at which time he essentially had been fired. Thereafter, defendant Pieragostini had been retained to represent the Estate, from about February 18, 2009 to July 24, 2009, and it had been he who ultimately had filed both the original Estate Accounting, which subsequently had been found inadequate and insufficient by the Surrogate, as well as the Amended Estate Accounting that had been Ordered by the Surrogate to be filed. Defendants Sirignano and his law firm defendant Enea,

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<sup>3</sup>As reflected in the caption of this action, Debra Betz has since been substituted as Executrix.

<sup>4</sup>In his June 2, 2011, Order, Surrogate Scarpino had Ordered that Carbone pay the Estate "the total of the principal and interest surcharges imposed together with interest, the total present sum as of May 15, 2011 of \$731,697.95 and the added sums of interest accruing daily detailed above until payment is received by Debra Betz as the duly appointed representative ...". A future trial date was to be scheduled at the conference Ordered to be held.

Scanlan & Sirignano, LLP (collectively defendants "Sirignano") thereafter had been retained by Carbone, "individually and as Executor of the Estate of Carbone," in November, 2009.

Plaintiff Estate alleges in its amended complaint that these defendant attorneys all had been professionally negligent in the handling of their Estate duties, that they had committed malpractice, that they had aided and abetted Carbone in his wrongful depletion of the Estate assets, that they had engaged in fraud, that they had breached their fiduciary duties and duties of trust, that they had conflicts of interest in their representation of Carbone as against the Estate, and that they had violated Judiciary Law section 487.

By Decision and Order, dated March 6, 2012, this Court had granted the separate motions of defendants Sirignano and Pieragostini for an Order pursuant to CPLR 3024(a), 3013, 3014 and 3016(b), to the extent of its requiring plaintiff to re-plead its 43-page complaint, this Court having directed plaintiff to serve an amended complaint setting forth allegations:

against defendants in clear, plain and concise statements which sufficiently give defendants notice of the transactions and occurrences and elements of each asserted cause of action asserted against each defendant, in accordance with CPLR 3013, and which shall include single allegations in the numbered paragraphs, in accordance with CPLR 3014, with particularization of the allegations and claims as against each defendant, in accordance with CPLR

3016, subdivision (b), and which otherwise omit what this Court agrees with defendants are vague allegations which presently preclude a properly framed response and further improperly contain scandalous and prejudicial matter which is extraneous to the alleged theories of liability, contrary to CPLR 3024. Plaintiff throughout her complaint improperly has lumped all of the defendants together under the variously identified overlapping theories of liability, notwithstanding that plaintiff herself sets forth a chronology of events which establishes that the various named defendants had represented the Estate at different times, none of which had overlapped. The Court finds that, while certain allegations may be directed against an individually named defendant, that it presently is impossible for defendants to frame an answer to the complaint in its present form.

Plaintiff thereafter had served its amended complaint.

Presently, defendants Sirignano are moving pre-answer to dismiss same, arguing that plaintiff has failed to state a cause of action, that the documentary evidence warrants dismissal, that the complaint fails to allege fraud with the particularity required by CPLR 3016, subdivision (b), and that the amended complaint, "in complete defiance" of this Court's prior Order, continues to include a "rambling recitation" and "continues to assert, indiscriminately and without any specificity, various allegations as against all of the defendants, with regard to various transactions and events that have occurred over a span of more than seven years." He also seeks an award of costs pursuant to 22 N.Y.C.R.R. 130-1.1.

Defendant Pieragostini similarly is moving pre-answer for

dismissal based upon an alleged failure to state a cause of action, and similarly arguing that the amended complaint fails to comply with this Court's Order directing re-pleading, and that the fraud claim is not pleaded with the required particularity.

Defendant Blatt is moving for summary judgment dismissing the complaint, arguing that the five asserted claims against him all sound in malpractice but that no such claim exists because plaintiff cannot establish that it has sustained actual damages and, in any event, no claim of damage is directly attributable to Blatt, who had been fired, and that the record establishes that Blatt had refused to file the accounting performed by Carmela Carbone, Carbone's daughter, and that plaintiff merely has made serious allegations without having supported same with necessary facts.

Initially, the Court finds that, although the amended complaint now is 78 pages in length, compared to the original 43-pages, and that it clearly contains some allegations which improperly "lump" together allegations against all defendants (for example, paragraphs 28, 32, 40 and 44), and that it also continues to contain unnecessary allegations, including verbatim recitation of four letters and approximately five pages from the Order of Surrogate Scarpino, nevertheless, it sufficiently complies with this Court's prior Order and CPLR requirements to the extent that

plaintiff now sufficiently has separately segregated out the various claims and allegations as against defendants, defendant Pieragostini's claim to the contrary notwithstanding, and the Court finds no basis for finding that defendants cannot interpose their responses and/or answers to the amended complaint, particularly since the causes of action asserted as against each defendant has been herein limited to a single cause of action for legal malpractice. See infra.

Defendants Sirignano's and Pieragostini's answers shall be filed and served within thirty (30) days after the date of entry of this Order.

Upon consideration of defendants' respective dispositive motions, the Court hereby grants same on behalf of all defendants to the extent that the Court hereby dismisses plaintiff's claims alleging violations of the Code of Professional Responsibility; same simply fails to state a viable private cause of action. See DeStaso v. Condon Resnick, 90 A.D.3d 809, 814 (2<sup>nd</sup> Dept. 2011); Kantor v. Bernstein, 225 A.D.2d 500, 502 (1<sup>st</sup> Dept. 1996).

Addressing first defendant Blatt's summary judgment motion, same is hereby denied in its entirety.<sup>5</sup> Defendant Blatt woefully

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<sup>5</sup>To the extent that defendant Blatt's counsel conclusorily states that the amended complaint does not comply with the specific pleading requirements of CPLR 3016(b), and that the allegations are insufficient to support the alleged causes of actions, his motion more properly should have been brought as a

has failed to demonstrate as a matter of law, through the submission of admissible evidence, his entitlement to dismissal of the remaining causes of action alleging legal malpractice, fraud and breach of trust, entitlement to disgorgement of legal fees and restitution, and/or a violation of Judiciary Law section 487. Indeed, other than defendant Blatt's conclusory assertion that "all five claims against Blatt ... sound in Malpractice," neither Blatt's attorney's 3-page supporting affirmation, nor defendant Blatt's 2-page supporting affidavit, demonstrates legal support for said contention, nor are either adequate or sufficient support for summary judgment dismissing any of the claims herein.

Indeed, defendant Blatt fails to separately detail and analyze each of the non-malpractice causes of action, and fails to identify evidence in the record supporting dismissal of same. Instead, Blatt's attorney offers only a cursory conclusory analysis of the legal malpractice action wherein he states that the Estate has a judgment against Michael Carbone for damages and that no attempt to enforce this judgment has been taken as of yet, so that the Estate's damages are merely speculative, and further that "the beneficiaries are actually ahead" when the cost of excavation work

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dismissal motion pursuant to CPLR 3211, subdivision (a), paragraph 7. The Court after first addressing Blatt's motion as a summary judgment motion, thereafter shall also consider same more properly as a CPLR 3211 dismissal motion.

yet to be performed with respect to the farm is calculated.<sup>6</sup>

Similarly, Blatt himself only offers his self-serving statements that he had refused to file the accounting that had been prepared by Carmela Carbone Smart, Mike Carbone's daughter, and that he had "told Mike Carbone [ that he] saw no way to defend his action in this case. That is why Mike fired [him] and hired Anthony Pieragostini." Additionally, defendant Blatt states that Debra Betz "knew her father's assets and knew the condition of the farm," and that he had spoken with her attorney "frequently" and that "there was no fraud. She relied on her attorney, not on me." Again, the foregoing is wholly insufficient to establish entitlement to judgment dismissing as a matter of law claims alleging legal malpractice, fraud, entitlement to restitution and/or disgorgement of legal fees and a violation of Judiciary Law section 487.

Accordingly, defendant Blatt's summary judgment motion is denied in all respects. The Court shall next address all defense motions, including Blatt's, to the extent they seek dismissal pursuant to CPLR 3211, subdivision (a), paragraphs 1 and/or 7.

It is well-settled that on a motion to dismiss for failure to state a cause of action, the Court initially must accept the facts alleged in the complaint as true and then determine whether those

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<sup>6</sup>No such judgment is before this Court.

facts fit within any cognizable legal theory. See Campaign for Fiscal Equity, Inc. v. State, 86 N.Y.2d 307, 318 (1995); Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994); People v. New York City Transit Authority, 59 N.Y.2d 343, 348 (1983); Morone v. Morone, 50 N.Y.2d 481 (1980); Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 274-275 (1977); Cavanaugh v. Doherty, 243 A.D.2d 92, 98 (3<sup>rd</sup> Dept. 1989); Klondike Gold, Inc. v. Richmond Associates, 103 A.D.2d 821 (2<sup>nd</sup> Dept. 1984). "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claim, is irrelevant to the determination of a pre-disclosure motion to dismiss." Porcelli v. Key Food Stores Co-op., Inc., 44 A.D.3d 1020 (2<sup>nd</sup> Dept. 2007).

Where extrinsic evidentiary material is considered, the Court need not assume the truthfulness of the pleaded allegations. The criterion to be applied in such a case is whether the plaintiff actually has a cause of action, not whether he has properly stated one. Guggenheimer v. Ginzburg, supra at 275; Kaufman v. International Business Machines Corp., 97 A.D.2d 925 (3<sup>rd</sup> Dept. 1983), affd. 61 N.Y.2d 930 (1984); Rappaport v. International Playtex Corporation, 43 A.D.2d 393, 395 (3<sup>rd</sup> Dept. 1974). Thus where it has been shown that a material fact or facts as claimed by the plaintiff "have been negated beyond substantial question" by the documentary evidence or affidavits and other evidentiary

submissions, and/or where the very allegations set forth in the complaint fail to support any cause of action, the complaint should be dismissed. See CPLR 3211, subd. (a), par. 1; DePaulis Holding Corp. v. Vitale, 66 A.D.3d 816, 818 (2<sup>nd</sup> Dept. 2009); Biondi v. Beekman Hill House Apartment Corp., 257 A.D.2d 76 (1<sup>st</sup> Dept. 1999), affd. 94 N.Y.2d 659 (2000); Robinson v. Robinson, 303 A.D.2d 234 (1<sup>st</sup> Dept. 2003).

Further, in order to prevail upon a defense founded upon documentary evidence, the documents relied upon must resolve all of the factual issues as a matter of law. See Arnav Industries, Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, 96 N.Y.2d 300, 303 (2000); Ofman v. Katz, 89 A.D.3d 909 (2<sup>nd</sup> Dept. 2011); Scott v. Bell Atlantic Corp., 282 A.D.2d 180 (1<sup>st</sup> Dept. 2001), affd. as modf. 98 N.Y.2d 314 (2002); Weiss v. Cuddy & Feder, 200 A.D.2d 665 (2<sup>nd</sup> Dept. 1994).

In order to state a viable legal malpractice cause of action, a plaintiff must plead that the attorney had failed to exercise the ordinary reasonable skill and knowledge commonly possessed by the legal community and that this breach of duty proximately had caused plaintiff to sustain actual and ascertainable damages. See Board of Managers of Bay Club v. Borah, Goldstein, Schwartz, Altschuler & Nahins, P.C., \_\_ A.D.3d \_\_, 2012 WL 2819360 (2<sup>nd</sup> Dept. 2012); Lovino, Inc. V. Lavalley Law Offices, 96 A.D.3d 910 (2<sup>nd</sup> Dept.

2012).

Applying the foregoing principles of law to the pleading and allegations and facts at bar, each defendants' motion seeking dismissal of the asserted legal malpractice claim is denied. The Court finds that plaintiff sufficiently alleges that each defendant, during their respective representation of Carbone, as Executor, negligently had performed their duties and breach their duty to the Estate and the beneficiaries, resulting in financial damages of the depletion of the Estate's assets and an increase in attorney's fees charged to the Estate.

Firstly, the Court observes that only defendants Sirignano apparently had a written retainer agreement with Carbone, as Executor of the Estate. Yet, defendants Sirignano claim that plaintiff is not in privity with said defendants and that they only had represented Carbone "as Petitioner in the above mentioned Accounting Proceeding," and thus that they had owed no duty to plaintiff and/or the Estate, and therefore that the claims asserted herein against them necessarily must fail. This Court does not agree.

Firstly, the Court clarifies that Betz is not asserting that defendants had an attorney-client relationship with her, nor that they had owed any duty to her personally; rather, she has brought this action solely in her representative capacity for the Estate,

to whom said defendants clearly did owe a fiduciary duty. See Gibbs v. Breed, Abbott & Morgan, 170 Misc.3d 493, 497 (Sup. Ct. NY Co. 1996).

Secondly, the proffered subject retainer agreement between Carbone and defendants Sirignano identifies the retained representation as relating to an "Accounting by Michael Carbone, as *Executor of the Estate of Carmello Carbone*," it expressly states that said defendants are being "retained to represent Michael Carbone (the "Client"), *Executor of the Estate of Carmello Carbone (the "Estate")*, and that said retainer is executed by Carbone, "Michael Carbone, Individually and as *Executor of the Estate of Carmello Carbone*."

Notably, defendants do not assert that Carbone personally, rather than the Estate, had paid said defendants' legal fees; indeed, plaintiff has submitted copies of checks payable to defendants Sirignano as and for legal fees totaling the sum of \$34,620.00, which checks all were drawn on the account of Estate of Carmelo Carbone.

Also lacking in merit is defendants Sirignano's additional claim that they had not been hired to perform any duties related to the administration of the Estate, and thus that they consequently have no liability herein. Firstly, "the administration of the estate" which the Retainer Agreement expressly references as being

the subject of said Agreement, necessarily requires the filing and approval of a formal Estate accounting, which Surrogate Court approval had yet to occur at the time that defendants Sirignano had been hired. Defendants Sirignano's contention that they had been hired only to represent the Estate's then executor with respect to his defending against the legal attack that had been filed by Debra Betz, as beneficiary, against the formal accounting that Carbone had filed relating to the Estate, simply is not supported by the Retainer Agreement proffered by them, which again is noted to reference only the Estate "accounting," nor by the record at bar.

Further, while the Surrogate previously has determined that Carbone improperly had engaged in self dealing prior to March 31, 2009, and the Court agrees that defendants Sirignano, who had not been retained until November, 2009, is not liable for Carbone's failures in properly discharging his fiduciary duties as Executor of the Estate prior thereto, it nevertheless finds that plaintiff has alleged more than mere conclusory claims supporting liability against defendants Sirignano with respect to their own actions herein.

Plaintiff specifically claims that, at the time of Surrogate Scarpino's Order in the Accounting proceeding, which had encompassed the period of May, 2004 to March 2009, \$334,638.08 had remained "on hand." According to plaintiff, "from 2009-2011,

Carbone had continued his looting of the Estate unrestrained, depleting it of another \$224,324.98 during the time he was represented by Sirignano and ESS," including \$20,000 in assets which had been removed from an Estate bank account after defendants Sirignano had been advised that Carbone had been removed as Estate executor and had been notified to hold three M&T bank accounts of the Estate. This looting of the Estate's assets had continued, according to plaintiff, because defendants Sirignano, as the Estate's then attorney, had failed to exercise the degree of professional care required to oversee Carbone's actions and prevent his self-dealing, wasting and looting of the Estate's assets. Plaintiff specifically alleges that defendants Sirignano never independently had analyzed the deficient Estate accounting and Carbone's actions as executor, and specifically his systematic depletion of Estate assets, that they never undertook examination of whether Carbone was continuing to deplete Estate assets and they had failed to undertake measures to correct the depletion of the Estate's assets, including his liquidation of an Estate bank account, in the sum of \$23,403.00, on May 2, 2011, notwithstanding Surrogate Scarpino's Order of September 15, 2012, enjoining "further money [from being] expended from the Estate," and the Surrogate's having placed a hold on three Estate M&T bank accounts, on April 29, 2011.

Moreover, plaintiff argues that, without the Estate's approval and "in a flagrant conflict of interest," defendants Sirignano not only had represented Carbone in a combined proceeding to remove him as executor and for a successor letter testamentary to Betz, but had moved to Renew and Reargue Surrogate Scarpino's April 13, 2011, Order, which motion had been denied by his Decision and Order, dated November 28, 2011, had perfected an appeal of Surrogate Scarpino's Order, and had represented Carbone in defense of contempt motions that Betz had been filed for Carbone's violation of two Orders.<sup>7</sup> During the ensuing contempt hearing, plaintiff charges that defendant Sirignano wrongfully had argued to the Court that the fraudulent transfers of Estate assets that had been effected by Carbone had been intended as valid transfers made "after a near death experience in 2009" and "in the ordinary course of love and affection" for his family.

Upon this record, the Court rejects defendants Sirignano's arguments that they had no duty to the Estate. What manifestly is clear to this Court is that, upon the circumstances presenting at the time of their retention, defendants Sirignano should not have agreed to represent Carbone individually and in his capacity as

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<sup>7</sup>Carbone had been found guilty of contempt by Surrogate Scarpino. It is stated that he subsequently never had purged this contempt and that issued Warrants of Commitment have not resulted in Carbone's arrest since neither the Westchester, Putnam nor Dutchess County Sheriff Departments have been able to locate him.

executor. See Matter of Estate of Drier, 245 A.D.2d 787 (3<sup>rd</sup> Dept. 1997), lv. to app. den. 91 N.Y.2d 812 (1998); Matter of Hof, 102 A.D.2d 591 (2<sup>nd</sup> Dept. 1984); see, also Matter of Clark, 12 N.Y.2d 183, 187 (1962); cf. Matter of Birnbaum, 118 Misc.2d 267 (Surr. Ct. Monroe Co. 1983). By said defendants' having agreed to represent Carbone as Executor, it necessarily had undertaken a duty of undivided loyalty to the Estate and its beneficiaries, which seemingly had been compromised when said defendants thereafter had represented Carbone in his defense in the proceedings challenging his actions as executor and the proffered accounting, in thereafter filing on Carbone's behalf a motion to reargue the unfavorable determination, and again thereafter seeking on Carbone's behalf an appeal thereof, all the time accepting the Estate's assets to pay their legal fees.

The Court thus finds, viewing as it must the complaint's allegations most favorably to plaintiff, that plaintiff sufficiently has pleaded the existence of an attorney-client relationship with an attendant fiduciary duty between defendants Sirignano and the Estate and its beneficiaries, misconduct by defendants Sirignano in their duo representation of Carbone and the Estate, negligence by defendants Sirignano for their lack of oversight, at the least, with respect to Carbone's continued looting of the Estate assets during the period of their afore

representation, and consequential direct financial damages to the Estate and its beneficiaries as a result thereof, both in terms of incurred legal fees paid by the Estate to defendants Sirignano and the loss of Estate assets by Carbone's actions during the relevant time period, which is sufficient to state a cause of action for legal malpractice.

Notwithstanding the apparent lack of a written retainer agreement between defendant Blatt and Carbone, as executor and/or the Estate, and between defendants Pieragostini and Carbone, as executor and/or the Estate, the Court finds that plaintiff too has stated sufficient causes of action against each for legal malpractice. The same above analysis with respect to these defendants too owing a duty to the Estate and beneficiaries is incorporated herein.

As against defendants Blatt, plaintiff sufficiently alleges in support of her legal malpractice claim, that he negligently had failed to address letters sent to him from attorney Lawrence A. Codispoti, who at the time had represented the beneficiaries, regarding Carbone's early failures as an Executor with respect to his duties, and specifically with respect to Blatt's failure to have effected the timely dissolution of the corporation and instead allowing it to incur operating costs, without proper oversight, for Carbone's sole benefit, that Blatt negligently had failed to

segregate the proceeds from the sale of the farm into his attorney escrow account, as requested by the beneficiaries, thereby enabling Carbone's looting of the monies, that Blatt knew that Carbone had not properly been marshaling the Estate assets, nor preserving them for distribution to the beneficiaries, and that Carbone instead had been wasting same and using them for his own benefit but that Blatt had continued not to check and investigate Carbone's actions, that Blatt knew that Carbone improperly had been continuing the farm for his own purpose and that he and his children were providing fictitious services for which the Estate was paying and that Blatt never took any actions to stop this waste, that Blatt falsely had represented to attorney Codispoti that the 1962 Corvette, an Estate asset valued at \$33,600.00, was to be sold and the proceeds placed into an account for the beneficiaries and later Blatt had affirmed to the Court that the Corvette had been a gift to the Executor, that Blatt had failed to exercise that degree of skill required when Carbone's daughter had been hired to perform the accounting and he had misrepresented to the Court that she was an accountant when in fact she was not and at the time had been found disabled with respect to a filed Social Security disability claim wherein she had averred in 2007 that she was unable to work even at a secondary level as a bookkeeper, and that Blatt knew in fact that there were no farm business records kept for Carbone's

daughter to allegedly have reconstructed a financial history and that her recovery of her accounting fee from the Estate in the sum of \$92,127.50, which accounting Blatt had failed to oversee and question, had been fraudulent. Plaintiff alleges that it had been Blatt's failures to properly assist in the administration of the Estate and failures oversee the Executor's actions that had facilitated Carbone's self-dealing, waste and substantial depletion of the Estate assets in a quantifiable sum. The Court finds that plaintiff sufficiently has stated a legal malpractice claim against defendant Blatt.

Addressing next defendant Pieragostini's dismissal motion with respect to the legal malpractice cause of action, plaintiff alleges that Pieragostini had been retained by Carbone, in February, 2009, to file and prepare an accounting to purge the Surrogate's extant judgment of contempt against Carbone. Defendant Pieragostini had prepared an accounting of the Estate's assets and liabilities for the period of May 14, 2004 through May 9, 2007, which accounting ultimately had been rejected by Surrogate Scarpino. Defendant Pieragostini thereafter had prepared an amended accounting, which allegedly had been accepted and resulted in Carbone's purging of his then contempt. Carbone thereafter had terminated defendant Pieragostini and hired defendants Sirignano.

It is defendant Pieragostini's stated position that plaintiff

Betz cannot succeed in her legal malpractice argument because no privity existed between her and defendant Pieragostini and she is unable to identify any damages sustained by virtue of Pieragostini's actions herein, and that the remaining causes of action "are duplicative of the malpractice claim and substantially devoid of merit."

Regarding defendant Pieragostini's argument that no privity exists sufficient to support the legal malpractice claim and that no fiduciary duty had been owed by him to the Estate, the Court firstly relies upon its above analysis to the contrary, and finds that privity supporting a claim of legal malpractice existed, and further that a fiduciary duty had been owed by defendant Pieragostini to the Estate, the real party in interest. This finding is further supported by defendant Pieragostini's own submitted bill of legal services rendered and paid by the Estate wherein he identifies a number of legal services provided to the Estate and his representation in IRS correspondence, dated March 9, 2009, that he "represent[s] the Estate of Carmelo Carbone."

This Court notes that not one of said defendant's string-cited cases actually supports the finding herein that no privity exists and that no duty exists in the circumstances here presenting involving a legal malpractice claim and claims of breach of trust by an estate against the attorney representing the former executor

of the estate. Nor is this Court persuaded that Pieragostini's "limited retention, for a limited period of time," absolves him as a matter of law of liability herein.

The inescapable fact is the defendant Pieragostini had filed both the original Estate Accounting, which subsequently had been found fraudulent and inaccurate by the Surrogate, as well as the Ordered Amended Estate Accounting. Plaintiff sufficiently has pleaded that in doing so, Pieragostini had failed to exercise the degree of care and skill required and the due diligence incumbent upon him; that he had ignored the clear and obvious fact that the filed Accounting did not balance, that he had failed to investigate the true facts, that he had failed to notify the Court of evidence of Carbone's continued malfeasance, that he had failed to undertake careful examination of the records so as to prevent further looting and additional transfers of Estate assets by Carbone, and that he failed to correct the record with respect to errors and/or misstatements of prior counsel. As a fiduciary filing an accounting on behalf of the Estate, defendant Pieragostini had been in possession of certain facts and evidence regarding Carbone's spending and depletion of estate assets, and necessarily had a duty of inquiry in the face of indicia that improper Estate looting had and was continuing to occur. Cf. Baron v. Galasso, 83 A.D.3d 626, 628 (2<sup>nd</sup> Dept. 2011).

Accordingly, the Court denies all defendants' motions seeking dismissal of the legal malpractice claim asserted against them.

As to the remainder of defendants' respective dismissal motions, the second, seventh and twelfth causes of action respectively pleading breach of fiduciary duty, and the third, eighth and thirteenth causes of action to the extent they respectively plead causes of action for breach of trust and fraud are all hereby dismissed. These separately pleaded causes of action are all based upon essentially the same facts as, and do not allege distinct damages from, the legal malpractice claims asserted against each defendant; therefore, the breach of fiduciary duty claims, breach of trust claims and fraud claims necessarily are all dismissed as duplicative of the malpractice claims. See DeStaso v. Condon Resnick, 90 A.D.3d 809, 814 (2<sup>nd</sup> Dept. 2011); Daniel v. Turco, 84 A.D.3d 858 (2<sup>nd</sup> Dept. 2011); Kvetnaya v. Tylo, 49 A.D.3d 608 (2<sup>nd</sup> Dept. 2008); Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., 10 A.D.3d 267, 271 (1<sup>st</sup> Dept. 2004); Daniels v. Lebit, 299 A.D.2d 310 (2<sup>nd</sup> Dept. 2002); Estate of Nevelson v. Carro, Spanbeck, Castor and Cuiffo, 290 A.D.2d 399 (1<sup>st</sup> Dept. 2002); Mecca v. Shang, 258 A.D.2d 569 (2<sup>nd</sup> Dept. 1999), lv. to app. dsmd. 95 N.Y.2d 791 (2000); Zambito v. Ryan, 125 A.D.2d 462 (2<sup>nd</sup> Dept. 1986), app. dsmd. 70 N.Y.2d 693 (1987).

Further, the Court also hereby dismisses as against defendants

Blatt, Pieragostini and Sirignano, respectively, the fourth, ninth and fourteenth causes of action seeking restitution and disgorgement of legal fees since these claims are predicated upon the same factual allegations as the legal malpractice claims and are recoverable within those claims. See Mecca v. Shang, supra; cf. Feiger v. Iral Jewelry. Ltd., 41 N.Y.2d 928 (1977).

The Court also hereby grants defendants Blatt, Pieragostini and Sirignano's motions to the extent of dismissing the fifth, tenth and fifteenth causes of action asserting violations of Judiciary Law section 487 since the complaint fails to allege as against each of these defendants fraud or deceit allegations sufficient to state a cause of action under section 487. See DeStaso v. Condon Resnick, supra. Treble damages accordingly are not available to plaintiff.

However, to the extent that moving defendants properly seek dismissal of plaintiff's request for punitive damages, and in light of plaintiff's lack of opposition thereto, plaintiff's request for punitive damages is hereby stricken. See New York University v. Continental Insurance Co., 87 N.Y.2d 308, 315-316 (1995); Rocanova v. Equitable Life Assurance Society of United States, 83 N.Y.2d 603, 613 (1994); Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354, 358 (1976); Tartaro v. Allstate Indemn. Co., 56 A.D.3d 758 (2<sup>nd</sup> Dept. 2009); Rodriguez v. Allstate Ins. Co., 33 Misc.3d. 827 (Sup. Ct.

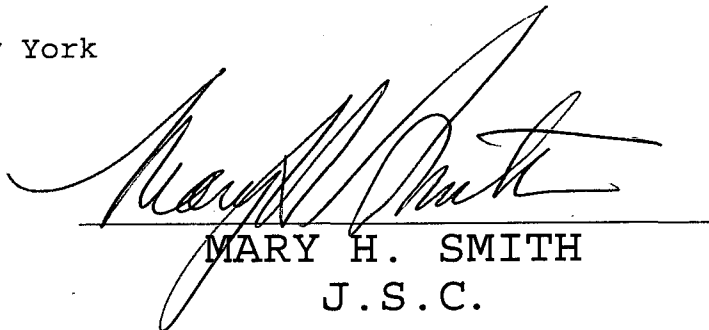
Kings Co. 2007).

Lastly, defendants Sirignano's additional request for an award pursuant to 22 N.Y.C.R.R. 130-1.1 imposing costs and/or sanctions upon plaintiff is denied.

Any arguments not specifically addressed above have been considered and either rejected or found not to be warranting of separate and further comment by the Court.

The parties shall appear in the Compliance Conference Part, at 9:30 a.m., on August 1, 2012, as previously scheduled.

Dated: August 1, 2012  
White Plains, New York



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