At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 31st day of January, 2013.

PRESENT:

HON. KAREN B. ROTHENBERG,

Justice.

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ABRAHAM KLEIN,

Plaintiff,

- against -

SAMUEL E. RIEFF,
EUGENE F. LEVY,
MATTHEW W. NAPARTY,
MAURO LILLING NAPARTY LLP,
MARK L. HANKIN,
HANKIN & MAZEL, PLLC,
STEPHEN PREZIOSI,
JOHN and JANE DOES 1-10, and
JOHN DOE CORPORATIONS 1-10,

Defendants.

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**DECISION, ORDER, AND JUDGMENT**

Index No. 500820/12

Mot. Seq. 1-5

The following papers numbered 1 to 34 read herein: Papers Numbered

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| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed | 1-2; 5-7; 12-13; 19-20; 27-28 |
| Supporting Affidavits (Affirmations) | 30,31 |
| Opposing Affidavits (Affirmations) | 3; 8; 15; 22; 32 |
| Reply Affidavits (Affirmations) | 10; 17; 24,25 |
| Other Papers Memoranda of Law | 4; 9,11; 14,16,18; 21,23,26; 29,33 |
| Samuel Rieff's Feb. 24, 2012 Letter and Feb. 21, 2012 Affirmation | 34 |

This action involves claims of legal malpractice and fraud against numerous attorneys arising out of an arbitration hearing and a subsequent proceeding to confirm an arbitration

decision, which awarded plaintiff Abraham Klein approximately $2 million in damages and ownership of two home-care services agencies against nonparty Christine Persaud. All of the named defendants represented Persaud either in the negotiation of the underlying agreements (defendant Rieff), the arbitration hearing (defendant Levy), the proceeding to confirm the arbitration award and the appeals in that proceeding (defendant Levy, and defendants Naparty, Hankin, and Preziosi). The named defendants (with the exception of Rieff) have moved, pre-answer, to dismiss the complaint insofar as asserted against them for, inter alia, failure to state a cause of action under CPLR 3211 (a) (7). Additionally, defendant Levy has moved to disqualify plaintiff's counsel and his firm under the attorney-witness rule. For the reasons set forth below, the complaint is dismissed against all of the moving defendants for failure to state a cause of action under CPLR 3211 (a) (7). The motion to disqualify plaintiff's counsel and his firm is denied.

*Facts and Allegations*[1]

Plaintiff Abraham Klein (plaintiff) and nonparty Christine Persaud (Persaud) had been partners in two home-care services agencies (known as "Caring" and "Liberty") pursuant to an agreement, dated as of May 11, 2007 (the operating agreement), that was allegedly executed by plaintiff and Persaud, and was witnessed by nonparty Melquisedec ("Mel")

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[1] *See* plaintiff's verified complaint, dated Apr. 20, 2012 (CEF No. 2); exhibits to the motions sub judice filed electronically and in hard copy, the County Clerk's docket in *Matter of Arbitration of Klein v Persaud, et al.*, index No. 8007/2009 (Sup Ct, Kings County); Second Department's decisions on motions on appeals from the underlying action; PACER docket in the *Matter of Persaud*, No. 10-44815-ESS (Bankr ED NY).

Escobar (Complaint, ¶¶ 70, 77-79). The parties' business relationship broke apart about two years later. Plaintiff proceeded to arbitration in accordance with the arbitration provision set forth in the operating agreement. Persaud and her then litigation counsel, defendant Eugene F. Levy, Esq. (Levy), were on notice of, but did not appear at, the arbitration hearing (Complaint, ¶¶ 140-141). On March 31, 2009, plaintiff obtained, on default, an approximately $2 million award against Persaud and their two home-care services agencies (the arbitration award).[2] In addition to the monetary award, the arbitrator ordered that plaintiff shall have "a 50% ownership interest in both Caring and Liberty in accordance with the terms of the [Operating] Agreement, subject to the approvals of the agencies with jurisdiction, which interest in Liberty shall cease [and shall vest solely in Persaud] as soon as he, or his designee, is approved by the agencies with jurisdiction to be the sole operator of Caring" (Complaint, ¶¶ 178 and 180 [quoting Decision and Award at 7]).

Plaintiff then commenced an article 75 proceeding, by order to show cause on notice to Levy, to confirm the arbitration award (*see Matter of Arbitration of Klein v Persaud*, index No. 8007/2009 [Sup Ct, Kings County] [the underlying action]). The matter came before Justice Arthur M. Schack of this court. Plaintiff's counsel appeared at the confirmation hearing, but Levy, although on notice, failed to show up (Complaint, ¶ 207). Justice Schack confirmed the arbitration award, on default, by order, dated Apr. 17, 2009 (the confirmation

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[2] *See* Decision and Award, dated Mar. 31, 2009, by Marvin Neiman, Esq.

order).[3] Levy then sought, by order to show cause, to vacate the confirmation order claiming that he was unavailable to appear at the hearing and that "the Arbitrat[ion] Award was based on the *fraudulent actions* of the Plaintiff. According to Persaud and Levy, one of plaintiff's "fraudulent actions" was that Persaud never executed the operating agreement and that her purported signature thereon was not genuine (Complaint, ¶¶ 215-216). Levy submitted to Justice Schack Persaud's affidavit averring that she never signed the operating agreement, an affirmation from Persaud's transactions counsel, defendant Samuel E. Rieff, Esq. (Rieff), opining that Persaud did not sign the version of the operating agreement that was proffered by plaintiff to the arbitrator, and an affidavit from Persaud's hand-writing expert opining that there were "indications to suggest" that her signature on the version of the operating agreement as proffered by plaintiff was not genuine. Justice Schack declined to sign Persaud's order to show cause, citing her failure to demonstrate a reasonable excuse for her counsel's failure to appear at the confirmation hearing.

Persaud thereafter replaced Levy with Matthew W. Naparty, Esq. (Naparty), and his law firm defendant Mauro Lilling Naparty LLP, formerly known as Mauro Goldberg & Lilling LLP (collectively, Naparty). Her newly retained counsel brought a second order to show cause, reiterating the "excusable neglect" argument, plus advancing a host of allegedly meritorious defenses, one of which included her original position that she had never signed

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[3] *See* Short-Form Order, dated Apr. 17, 2009, which reads in its entirety as follows: "The petition to confirm the arbitrat[ion] award and for a preliminary injunction is hereby granted on default." Persaud's appeal from the confirmation order was dismissed as non-appealable (*see Matter of Klein v Persaud*, 2010 NY Slip Op 66123[U] [2d Dept, Mar. 19, 2010]).

the operating agreement and her purported signature on it was a forgery. Plaintiff opposed by serving his own affirmation averring that he and Persaud did, in fact, sign the operating agreement, Mr. Escobar's affidavit averring that he was present when Persaud (and plaintiff) signed the operating agreement and that he actually witnessed their signatures, and an affidavit from plaintiff's hand-writing expert who, by explaining the technically complex language in the affidavit of Persaud's hand-writing expert, undermined its conclusion that Persaud's signature on the operating agreement was not genuine. Justice Schack, once more, was not persuaded and refused to vacate her default, as more fully set forth in his order, dated May 4, 2009 (the default-denial order). Justice Schack again did not reach the Persaud's argument that she did not execute the operating agreement.

Persaud (by Naparty) appealed the default-denial order, to the Second Department and sought a stay pending appeal. The Second Department denied her a stay, (*see Matter of Klein v Persaud*, 2009 NY Slip Op 72138[U] [2d Dept, May 11, 2009]) and also denied her subsequent request for a stay of enforcement of the arbitration award pending her appeal(*see Matter of Klein v Persaud*, 2011 NY Slip Op 67999[U] [2d Dept, Mar. 24, 2009]).

On May 19, 2009, Justice Schack appointed a receiver for Caring (Complaint, ¶ 289) following Persaud's repeated refusal to comply with the confirmed arbitration award and with Justice Schack's prior orders restraining Persaud from taking money out of "Caring," one of the home-care services agencies that are the subject of the arbitration award (Complaint, ¶¶ 267, 270, 273, 275, 278, 286). Justice Schack also ordered Persaud to return

to Caring all monies and assets that were improperly taken from Caring from and after Mar. 19, 2009 (Complaint, ¶ 290).

In response Persaud replaced Naparty with Mark L. Hankin, Esq., and his law firm Hankin & Mazel, PLLC (collectively, Hankin). On Hankin's advice, Persaud, acting in the capacity as a co-owner (with plaintiff) of one of their joint businesses (known as "Liberty"), commenced an action in the Supreme Court, Queens County, challenging the confirmation order on the grounds that the operating agreement did not include Liberty and, hence, the arbitration award, as confirmed by Justice Schack, did not extend to Liberty (*see Liberty Home Care Nurses Employment Agency, Inc. v Klein*, index No. 13892/09 [Sup Ct, Queens County]). Concurrently, Liberty moved in the underlying action to vacate the confirmation order, insofar as it related to it (Complaint, ¶ 359). Plaintiff responded by cross-moving in the underlying action for, inter alia, consolidation of the Queens action with the underlying action in Kings County and, upon consolidation, the dismissal of the Queens action. Justice Schack left the confirmation order undisturbed, consolidated the underlying action with the Queens action, added Liberty as a named defendant in the underlying action, and dismissed the Queens action in its entirety.

Persaud, having lost once again, discharged Hankin, and hired new counsel, defendant Stephen H. Preziosi, Esq. (Preziosi), to brief her appeal of the default-denial order to the Second Department. In May 2011, the Second Department reversed Justice Schack's default-denial order, vacated his confirmation order, and remitted the matter to him for a new

determination on the issue of whether the arbitration award should be confirmed (the appellate decision). The first ground for reversal was the finding that Persaud did, in fact, demonstrate excusable neglect. The second (and independent) ground for reversal was the Second Department's finding, that Persaud had a meritorious defense:

> "Although the Supreme Court did not address the issue of whether the appellants raised a potentially meritorious defense, we nevertheless may reach that issue. On their motion to vacate the order, the appellants established the existence of a potentially meritorious defense, inter alia, by submitting affidavits from the appellant Christine Persaud and her former attorney [*i.e.*, Rieff] that she never entered into an [operating] agreement to arbitrate disputes."

(*Matter of Klein v Persaud*, 84 AD3d 959, 960 [2d Dept 2011] [internal citations omitted]).

Plaintiff thereupon filed a motion for leave to reargue or, in the alternative, for leave to appeal to the Court of Appeals (Docket No. 2009-4150), contending that Persaud's theory that she had not signed the operating agreement was false and refutable by documentary evidence,and Plaintiff also had additional evidence at his disposal in the form of defendant Rieff's admission at his prior deposition in the underlying action that his "[a]ffirmation was not entirely accurate." On reargument, the Second Department denied plaintiff's motion in its entirety without explanation (*see Matter of Klein v Persaud*, 2011 NY Slip Op 75627[U] [June 14, 2011]).

Yet, when the Second Department handed down its decision, Persaud was unable to benefit from it because she had filed a voluntary petition for bankruptcy relief to stave off plaintiff's ongoing enforcement efforts against her assets. Although her bankruptcy petition

had invoked an automatic stay (*see In re Persaud*, 467 BR 26, 31 [Bankr ED NY 2012]), neither plaintiff, Persaud, nor her subsequently appointed chapter 7 trustee, had advised the Second Department of her intervening bankruptcy before it reversed Justice Schack's default-denial order and vacated his confirmation order. On Aug. 4, 2011, plaintiff moved in the bankruptcy court for an order voiding the Second Department's decision as violating the automatic stay (part of CEF No. 111). Persaud's bankruptcy trustee objected, contending that the parties had implicitly consented to the relief from the automatic stay in proceeding with the appeal, and that at most,the decision was voidable, rather than void, and that the bankruptcy court had the power to grant a retroactive relief from the automatic stay to ensure the appellate decision's continued validity (part of CEF No. 111). The bankruptcy court is next scheduled to hear plaintiff's motion on Feb. 5, 2013 (*see* Notice of Hearing, dated Dec. 6, 2012, filed in Persaud's bankruptcy case under No. 442).[4]

Persaud next sought leave from the bankruptcy court to permit her to proceed in the underlying action to challenge the arbitration award. Persaud's chapter 7 trustee opposed her motion for the reason that he, rather than Persaud, had standing to seek that relief. The

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[4] Plaintiff and Persaud's chapter 7 trustee have been proverbially at each other's throats. On Sept. 9, 2011, plaintiff brought an adversary proceeding against Persaud's bankruptcy trustee (Adv. Pro. No. 11-01456), seeking, inter alia, pursuant to Bankruptcy Rule 7001 (9), a declaratory judgment that Caring is not property of Persaud's bankruptcy estate by virtue of the pre-petition arbitration award, that the pre-petition arbitration award deprived the debtor Persaud of her ownership interest in Caring, that said award, albeit unconfirmed, remains in full force and effect, and that, therefore, Persaud's bankruptcy estate has no property interest in Caring. On Oct. 14, 2011, Persaud's bankruptcy trustee filed his answer and counterclaims against plaintiff under Bankruptcy Code §§ 541 (property of the estate), 542 (turnover of property to the estate) and 543 turnover of property by a custodian). On May 25, 2012, Persaud's bankruptcy trustee brought an adversary proceeding against plaintiff and Caring, seeking to assert his chapter 7 trustee's avoiding powers regarding certain assets in plaintiff's possession (Adv. Pro. No. 12-01176). Neither of these adversary proceedings have been resolved to date.

bankruptcy court, by order, entered Dec. 20, 2011, denied Persaud's motion "without prejudice to other applications to permit the determination of these issues in the State Court" (*see In re Persaud*, No. 10-44815-ESS [Bankr ED NY], Order Denying Stay Relief, filed in Persaud's bankruptcy case under No. 359).[5]

If this were not enough to complicate matters, on Feb. 24, 2012, defendant Rieff (who, as noted, represented Persaud in negotiating the operating agreement) sent a letter to Justice Schack, with a copy to the Appellate Justices The purpose of his letter, Rieff explained, was to "correct certain misstatements contained in an affirmation which [he] signed on April 20, 2009, and which, [he] believe[d], was filed as an exhibit to motion papers prepared by the Law Office of Eugene Levy." Rieff enclosed his affirmation, dated Feb. 21, 2012, which he suggested be filed "in the appropriate manner." In his affirmation, Rieff reverses his original position that Persaud did not sign the operating agreement.

About two months later, on Apr. 17, 2012, plaintiff commenced the instant action against all of Persaud's attorneys sounding in fraudulent misrepresentation, negligent misrepresentation, legal malpractice, abuse of process, malicious prosecution, and violations of Judiciary Law § 487. Each category of the aforementioned claims is broken down into sub-claims, with each sub-claim constituting a separate cause of action. A total of

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[5] Because the parties have referred to Persaud's bankruptcy case and provided this Court with some documents filed in that case, this Court has taken judicial notice of the electronically filed documents in the bankruptcy case. These documents are available on PACER and can be accessed on Westlaw.

132 causes of action are alleged. At 433 pages and containing 3,610 paragraphs, plaintiff's complaint is neither "plain" nor "concise," as required by CPLR 3014.

Causes of action numbered 25 through 48 are against Levy.[6] As noted, it was Levy who missed the confirmation hearing, resulting in the entry of the confirmation order, the subsequent litigation over its vacatur, Persaud's intervening bankruptcy, and the resulting (and still ongoing) litigation between Persaud's bankruptcy trustee and plaintiff. And it was Levy, plaintiff posits, who propounded Persaud and Rieff's spurious theory that Persaud never signed the operating agreement. In this regard, plaintiff alleges that Levy drafted the original affirmation which Rieff revised and then signed, obtained Persaud's affidavit attesting to the purported forgery, and further obtained a corroborating affidavit of a hand-writing expert. Plaintiff maintains that Levy's efforts in propagating this spurious theory were ultimately successful when the Second Department reversed the default-denial order and vacated the confirmation order.

The first and second groups of claims against Levy (causes of action 25 through 32) sound in fraudulent and negligent misrepresentations made by him to the court in the underlying action, by submission of his affirmation, Rieff's affirmation, Persaud's affidavit, and the affidavit of her hand-writing expert. The third, fourth, fifth, and sixth groups of claims against him (causes of action 33 through 48) sound in legal malpractice, abuse of

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[6] Causes of action numbered 1 through 24 are against Rieff, who is not a movant and, accordingly, are not discussed herein. Plaintiff's allegations of fraud and deceit against Rieff will be separately addressed when they are brought before the Court (*see Melcher v Apollo Med. Fund Mgt. L.L.C.*, 2013 NY Slip Op 00443 [1st Dept 2013]).

process, malicious prosecution, and violation of Judiciary Law § 487, in that Levy submitted to the court the aforementioned documents which he knew (or should have known) were false or inaccurate.

The other named defendants are (1) Naparty and his firm who, based on Persaud's affidavit, Rieff's original affirmation, and that of Persaud's hand-writing expert, re-argued (unsuccessfully) that she did not sign the operating agreement, and sought (likewise, unsuccessfully) a stay pending appeal of the default-denial order, (2) Hankin and his firm, who sought (unsuccessfully) to collaterally attack the confirmation order through the commencement of the Queens action on behalf of Liberty, and (3) Preziosi, her appellate counsel who won the reversal of the default-denial order and the vacatur of the confirmation order, and who won the denial of plaintiff's motion for leave to reargue or, in the alternative, for leave to appeal to the Court of Appeals. The liability of Persaud's subsequent attorneys (Naparty, Hankin, and Preziosi) stems from their incorporation – as part of, and as exhibits to, their individual submissions to Justice Schack, the Queens County Supreme Court, and the Second Department. An additional basis for plaintiff's liability against Preziosi stems from his inclusion in the appellate brief and appendix several items that had not been considered by Justice Schack in the underlying action and thus were matters outside the record. At plaintiff's request, however, both items were stricken from the record by the Second Department, and thus were not considered by it in rendering its decision (*see Matter*

*of Klein v Persaud*, 2010 NY Slip Op 74804[U] [2d Dept, June 18, 2010], *reargument denied* 2010 NY Slip Op 78798[U] [2d Dept, Aug. 4, 2010]).

As is the instance with his claims against Levy, plaintiff's claims against the remaining named defendants (Naparty, Hankin, and Preziosi) all sound in fraudulent and negligent misrepresentation, legal malpractice, abuse of process, malicious prosecution, and violation of Judiciary Law §487.

All of Persaud's attorneys, with the exception of Rieff, have moved pre-answer to dismiss all of plaintiff's claims insofar as asserted against them.[7] Their common theme is that, as attorneys for Persaud – plaintiff's adversary throughout the litigation in the underlying action and in the Queens action – they owed no duty to him, and thus he fails to state to state a claim against them as a matter of law under CPLR 3211 (a) (7).

Separately, Levy moves to disqualify plaintiff's counsel and his firm as a material and necessary witness to this litigation, pursuant to the attorney-witness Rule 3.7 of the New York State Rules of Professional Conduct. The theory here is that plaintiff's counsel has acquired sufficient first-hand knowledge to be in a position to challenge Persaud's defenses. Plaintiff does not dispute the defense contention that no attorneys were present on May 11, 2007 in Persaud's office when Persaud (and plaintiff) allegedly executed the operating agreement and Mr. Escobar witnessed her (and plaintiff's) signatures.

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[7] Rieff has answered the complaint and asserted cross claims against co-defendants (*see* Rieff's Verified Amended Answer filed July 5, 2012 [CEF 65]). The moving defendants are not seeking dismissal of Rieff's cross claims against them.

*Failure to State a Cause of Action (CPLR 3211 [a] [7])*

The purpose of a motion under CPLR 3211 (a) (7) is to test "whether the pleader has a cause of action rather than on whether he has properly stated one" (*Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 636 [1976] [internal quotation marks omitted]). The court's task on a motion to dismiss for failure to state a cause of action is to "determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). Thus, a motion to dismiss pursuant to CPLR 3211 (a) (7) must be denied "unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Even affording plaintiff all favorable inferences, his complaint fails to sufficiently plead its claims against the moving defendants (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]).

***Fraudulent Misrepresentation***

To recover damages for fraudulent misrepresentation, a plaintiff must prove, among other things, a "misrepresentation [that] was made for the purpose of inducing the *plaintiff* to rely upon it" and "justifiable reliance of the *plaintiff* on the misrepresentation or material omission" (*Bernardi v Spyratos*, 79 AD3d 684, 687 [2d Dept 2010] [emphasis added]). Plaintiff does not allege that the misrepresentation regarding Persaud's denial that she executed the operating agreement was made to induce him to rely upon it, nor that he, in fact, relied upon it. Obviously, plaintiff did not rely on Persaud's denial but retained counsel to

contest same throughout the course of the underlying action (*see O'Connor v Dime Sav. Bank of N.Y.*, 265 AD2d 313 [2d Dept 1999]).

*Negligent Misrepresentation*

Proof of a claim for negligent misrepresentation requires the plaintiff to demonstrate, among other things, "the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff" (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]). Plaintiff fails to allege facts demonstrating the existence of the requisite relationship between him and the moving defendants (*see High Tides, LLC v DeMichele*, 88 AD3d 954, 960 [2d Dept 2011]).

*Legal Malpractice*

"Absent fraud, collusion, malicious acts, or other special circumstances, an attorney is not liable to third parties not in privity or near-privity for harm caused by professional negligence" (*Breen v Law Office of Bruce A. Barket, P.C.*, 52 AD3d 635, 636 [2d Dept 2008] [internal quotation marks omitted]). Plaintiff's complaint fails to plead specific facts from which the existence of an attorney-client relationship, privity, or a relationship that otherwise closely resembles privity between plaintiff and the moving defendants may be inferred (*see Fredriksen v Fredriksen*, 30 AD3d 370, 372 [2d Dept 2006]). It is undisputed that each of the moving defendants was retained by Persaud and represented Persaud and not plaintiff.

Moreover, plaintiff's complaint fails to plead evidentiary facts showing that any of the moving defendants was a participant with Persaud in a common scheme or plan to

defraud plaintiff, or otherwise aided and abetted her in the commission of fraud (*see Fredriksen*, 30 AD3d at 372). Plaintiff was never defrauded by Persaud's persistent denial that she executed the operating agreement.

*Abuse of Process*

To prevail on his abuse of process claim, plaintiff must establish, among other things, that the moving defendants "used the process in a perverted manner to obtain a collateral objective" (*Wilner v Village of Roslyn*, 99 AD3d 702, 704 [2d Dept 2012] [internal quotation marks omitted]). Plaintiff does not allege in his complaint that the moving defendants used process to obtain a collateral objective. Even accepting plaintiff's allegations as true, the moving defendants' improper motive in seeking to vacate the confirmation order does not, standing alone, give rise to a cause of action to recover damages for abuse of process (*see Muro-Light v Farley*, 95 AD3d 846, 847 [2d Dept 2012]).

***Malicious Prosecution***

The tort of malicious prosecution requires, among other things, that a judicial proceeding be "terminated in favor of the plaintiff" (*347 Cent. Park Assoc., LLC v Pine Top Assoc., LLC*, 83 AD3d 689, 690 [2d Dept 2011] [internal quotation marks omitted]). Plaintiff does not allege that he prevailed in the underlying action. To the contrary, the appellate decision vacated the confirmation order, and plaintiff's motion to have the bankruptcy court vacate the appellate decision has not been determined. Moreover, plaintiff's cause for malicious prosecution is not viable because he cannot show that probable

cause was entirely lacking for the moving defendants' defense of Persaud in the underlying action against. Not only Persaud asserted in her own affidavit that she did not sign the operating agreement, but her sworn denial was only one of her proffered reasons for the reversal of the default-denial order and the vacatur of the confirmation order (*see I.G. Second Generation Partners, L.P. v Duane Reade*, 17 AD3d 206, 207 [1st Dept 2005]).

***Violation of Judiciary Law § 487***

Under Judiciary Law § 487 (1), "[a]n attorney or counselor who . . . [i]s guilty of any deceit or collusion, or consents to any deceit or collusion, *with intent to deceive* the court or any party . . . [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). The operative language of the statute is the "intent to deceive" (*Dupree v Voorhees*, 2013 NY Slip Op 00452 [2d Dept 2013]). Here, plaintiff alleges that Levy intended to deceive Justice Schack by the submission of Persaud's affidavit and Rieff's affirmation (Complaint, *e.g.*, ¶¶ 1427, 1513, and 1532) and that the other defendants intended to deceive Justice Schack and the appellate division by the submission of their individual affirmations, petitions, appeals, motions, or cross motions either in the subsequent proceedings in the underlying action or in the subsequent appeals (Complaint, *e.g.*, ¶¶ 1992, 2012, 2031, 2503, 2522, 2541, 2761, 2778, 3495, 3515).

Nevertheless, plaintiff cannot establish a nexus between the alleged fraud on the part of Levy, Naparty, and Hankin on the one hand and Justice Schack's orders confirming the

arbitration award and refusing to vacate Persaud's default on the other hand. Justice Schack merely addressed the "excusable neglect" prong on the issue of whether the confirmation order should be vacated and never reached Persaud's defense that the operating agreement was not authentic. Moreover, plaintiff cannot establish a nexus between Preziosi's alleged fraud and the appellate reversal of the default-denial order and vacatur of the confirmation order. Although plaintiff, on his motion for leave to reargue or, in the alternative, for leave to appeal to the Court of Appeals, made the Second Department aware of his position that Persaud's signature on the operating agreement was genuine, the Second Department left its original decision undisturbed. The Second Department, therefore, Preziosi's position was not the basis for its reversal of the default-denial order and the vacatur of the confirmation order (*see Weisman, Celler, Spett & Modlin v Chadbourne & Parke*, 271 AD2d 329, 330-331 [1st Dept 2000], *lv denied* 95 NY2d 760 [2000]). In fact, the Second Department did not rely solely on Rieff's affirmation in finding that Persaud may have had a meritorious defense as they also relied on Persaud's affidavit in this regard and, indeed, cited it as the first of the two grounds for finding a meritorious defense. But even assuming for the purposes of these motions that Persaud's affidavit was false, her attorneys, as the moving defendants, cannot be held liable for the acts of their client under the circumstances of this case (*see Pu v Mitsopoulos*, 67 AD3d 561, 562 [1st Dept 2009]).[8] Like other lawyers, Persaud's lawyers

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[8] Although a successful lawsuit under Judiciary Law § 487 may be based on an attempted but unsuccessful deceit (*see Amalfitano v Rosenberg*, 12 NY3d 8, 11 [2009]), the element of causation is still required. If the court never considered (or exclusively relied upon) a false document that was submitted to it, there can be no attempted deceit.

were not miracle workers. Their argument that Persaud did not execute the operating agreement followed ineluctably from her own affidavit in that regard.

Beyond the debate over the authenticity of Persaud's purported signature on the operating agreement, however, looms the larger issue of the nature of this action. Fundamentally, this action is an improper attempt to collaterally attack the appellate decision in the underlying action. Assuming as true plaintiff's allegations that each of the moving defendants falsely represented to Justice Schack and the appellate division that Persaud did not execute the operating agreement, resulting in the appellate reversal of the default-denial order and the vacatur of the confirmation award, plaintiff's remedy lies exclusively in the underlying action (subject to prior relief from the automatic stay in Persaud's bankruptcy case), not in a second plenary action collaterally attacking the appellate decision in the underlying action (*see Yalkowsky v Century Apts. Assoc.*, 215 AD2d 214, 215 [1st Dept 1995]). In fact, plaintiff has already pursued this remedy, by moving (unsuccessfully) for leave to reargue the appellate decision and, additionally, by seeking a declaration from the bankruptcy court that the appellate decision is void as violating the automatic stay.

***Disqualification of Plaintiff's Counsel as a Potential Witness***

Rule 3.7 (1) of the Rules of Professional Conduct (22 NYCRR part 1200.0) prohibits a lawyer from acting "as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact," with certain exceptions not relevant here. The advocate-witness rule provides guidance, but is not binding authority, for the courts in

determining whether a party's attorney should be disqualified during litigation (*see Falk v Gallo*, 73 AD3d 685, 686 [2d Dept 2010]).

It is not apparent from the record as to why it is necessary to call plaintiff's attorney as a witness. Plaintiff's attorney can provide no testimony concerning Persaud's alleged execution of the operating agreement. Moreover, whatever plaintiff's counsel may testify to has already been reflected in the recorded testimony before the arbitrator and in the numerous court filings made in the underlying action. Thus, the movant has failed to demonstrate that the testimony of plaintiff's attorney is necessary. The Court finds, in its discretion, that disqualification of plaintiff's counsel and his firm is not warranted (*see Bentvena v Edelman*, 47 AD3d 651, 652 [2d Dept 2008]).

***Conclusion***

Based upon the foregoing, it is

ORDERED that Preziosi's motion to dismiss (motion sequence No. 1) Hankin's motion to dismiss (motion sequence No. 2), Naparty's motion to dismiss (motion sequence No. 3), and Levy's motion to dismiss (motion sequence No. 4), are each granted to the extent that plaintiff's complaint insofar as asserted against them is dismissed for failure to state a cause of action under CPLR 3211 (a) (7),and it is further

ORDERED that the action is severed and continued against the remaining defendants, Samuel E. Rieff, John and Jane Does 1-10, and John Doe Corporations 1-10; and it is further

ORDERED that defendant Rieff's cross claims against Preziosi, Hankin, Naparty, and Levy are severed and continued; and it is further

ORDERED that Preziosi's alternative request for a stay pending resolution of Persaud's bankruptcy case or for a change of venue to New York County is denied as moot; and it is further

ORDERED that Naparty's request for the imposition of attorneys' fees and costs is denied in the court's discretion; and it is further

ORDERED that Levy's motion (motion sequence No. 5) to disqualify plaintiff's counsel and his firm is denied; and it is further

ORDERED that the parties are reminded to appear in the Intake Part on Feb. 21, 2013; and it is further

ORDERED that plaintiff's counsel shall be served with a copy of this decision, order, and judgment with notice of entry pursuant to CPLR 2103 (b) and 5513 (a), and an affidavit (or affirmation) of said service shall be filed with the County Clerk.

This constitutes the decision, order, and judgment of the court.

ENTER,

FILED
FEB 06 2013
KINGS COUNTY CLERK'S O.

Karen B. Rothenberg
J.S. Justice, Supreme Court