

Betz v Blatt

2016 NY Slip Op 33206(U)

July 27, 2016

Supreme Court, Westchester County

Docket Number: Index No. 58938/11

Judge: Mary H. Smith

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DECISION AND ORDER

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: 7/15/16
INDEX NO.: 58938/11**

-against-

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

Defendants.
-----X

The following papers numbered 1 to 29 were read on this motion by defendant Blatt for summary judgment dismissing the second amended complaint, etc., and on this motion by defendant Pieragostini for summary judgment dismissing the second amended complaint, and on this motion by defendants Sirignano and Enea, Scanlan and Sirignano, LLP collectively for summary judgment dismissing the second amended complaint, and on this cross-motion by plaintiff for a renewed Order pursuant to CPLR 2221 granting renewal and restoration of previously dismissed causes of action against defendants Sirignano and Enea, Scanlan and Sirignano, LLP, etc.

Papers Numbered

Notice of Motion - Affirmation (Isaacson) - Affidavit (Blatt) - Exhs. (A-G) 1 - 4
Notice of Motion - Affirmation (Tonorezos) - Exhs. (A-T) - Affidavit (Miller) -
Memorandum of Law 5 - 9
Notice of Motion - Affidavit (Covello) - Affirmation (Proscia) - Exhs. (A-AA) -

Memorandum of Law	10 - 14
Notice of Cross-Motion - Affirmation (Frisenda) ¹ - Exhs. (1-29) - Affidavit (McCarty)	15 - 18
Answering/Replying Memorandum	19
Answering/Replying Affirmation (Tonorezos) - Affidavit (Miller)	20 - 21
Answering/Replying Affirmation (Proscia) - Memorandum of Law - Answering/ Replying Affirmation (Proscia) - Exhs. (A-F) - Memorandum of Law ²	22-26
Answering/ Replying Affirmation (Myers) - Exhs. (U-X) - Memorandum of Law	27-29

Upon the foregoing papers, it is Ordered that these motions and the cross-motion are disposed of as follows:

The underlying facts shall not be fully restated herein, this Court having great familiarity with same as a result of past extensive litigation in this action which has been pending since 2011, and the instant motions and cross-motion constituting sequence numbers 17 through 20, as well as this Court’s having decided a number of motions in several related actions and proceedings which are predicated upon the same underlying facts. By way of brief summary, however, this Court had summarized the underlying facts precipitating this action in its Decisions and Order, dated August 1, 2012, thus:

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,

¹Plaintiff’s counsel’s affirmation is 77 pages in length notwithstanding a prior admonition by this Court as to said counsel’s previously filed 55-page affirmation which this Court had found to be unnecessarily lengthy and burdensome. This Court hereby implements a 30-page limit for counsel’s future affirmation submissions.

²Defendants Sirignano’s use of two separate set of answering papers to address different issues raised by plaintiff had been completely unnecessary and further burdensome to this Court.

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 children. By the time the Westchester County Surrogate, in a contested proceeding challenged by Betz, had suspended Carbone's letters, on April 13, 2011, the value of the Estate had been reduced to approximately \$110,000.00.³

Suffice it to state that defendants Blatt, Pieragostini and Sirignano all are attorneys who sequentially had represented Executor Carbone or Carbone individually in Surrogate's Court proceedings and whom, plaintiff alleges, inter alia, all had been professionally negligent in the handling of their Estate duties and had committed legal malpractice and had aided Carbone in his wrongful depletion of the Estate assets and fraudulent actions. The general theories of plaintiff's claims in this action are that each defendant had actual knowledge that Executor Carbone had stolen Estate assets, that Carbone had continued to loot the Estate during the course of each defendant's representation of him, and that each defendant had failed to stop his wrongdoing and indeed had facilitated his on ongoing fraud and theft through their negligent acts and omissions.

By Decision and Order, dated August 1, 2012, this Court, inter alia, had dismissed plaintiff's causes of action sounding in fraud and violations of Judiciary Law section 487 as against all defendants,⁴ which Decision and Order inter alia had been affirmed by the Appellate Division, in its Decision, dated April 14, 2014. The Appellate Division however also had modified this Court's Decision to the extent that it had dismissed the pleaded

³Plaintiff asserts that Carbone's and defendants' actions have harmed plaintiff in an amount in excess of \$2.38 million.

⁴Essentially, this Court had found the fraud causes of action duplicative of the negligence and legal malpractice claims, and the section 487 claims to have been insufficiently particularized.

cause of action for negligence and legal malpractice stated as against defendants Sirignano on the basis of lack of privity and additionally had reinstated the cause of action sounding in disgorgement against the Sirignano defendants.

By Decision and Order, dated December 4, 2014, this Court, for the reasons set forth in said Decision, had granted plaintiff's then motion pursuant to CPLR 2221 seeking renewal in part of the Court's August 1, 2012, Decision and Order to the extent the Court previously had dismissed the fraud and Judiciary Law section 487 causes of action and, upon renewal, had reinstated said causes of action. Specifically, this Court had determined in its December 4, 2014, Decision⁵ that:

the [then] recently conducted depositions of defendants Blatt and Pieragostini have disclosed new and specific facts that not only support the meritorious nature of plaintiff's previously stated extant claims against each defendant but further support plaintiff's claim that defendants each had undertaken specific actions tending to establish a pattern of their intentionally concealing a fraudulent accounting and further colluding and assisting Mike Carbone's looting, depletion and waste of plaintiff Estate, as well as their intentionally having deceived the Court with respect to Carbone's actions and filed accounting as Estate Administrator, and thus claims pursuant to Judiciary Law section 487 properly have been asserted in plaintiff's proposed second amended complaint.

Presently, defendant Blatt is moving for summary judgment dismissing the complaint and specifically he is seeking dismissal of the pleaded claims for negligence, malpractice and a violation of Judiciary Law section 487. Similarly, defendant Pieragostini is moving for summary judgment dismissing the complaint and specifically he is seeking dismissal of the pleaded claims for negligence, malpractice and alleging a violation of Judiciary Law

⁵This Court has been herein advised that appeals of that Decision and Order have been perfected but not yet orally argued.

section 487. Defendants Sirignano and Enea, Scanlan and Sirignano, LLP (collectively defendants "Sirignano"), are moving for summary judgment dismissing the complaint and specifically they are seeking dismissal of the claims alleging that they had aided and abetted a fraud, seeking disgorgement and restitution of legal fees paid, and alleging a violation of Judiciary Law section 487.

Plaintiff opposes each defendants' respective motion and is cross-moving in this Court pursuant to CPLR 2221 for renewal of "The Appellate Division, Second Department's Decision & Order of April 16, 2014 wherein the Causes of Action sounding in Negligence and Legal Malpractice against the Sirignano defendants were dismissed as the controlling law regarding Privity and duty upon which the Appellate Division relied has since changed." Upon the granting of said renewal, plaintiff further seeks an Order restoring the causes of action against defendants Sirignano for negligence and legal malpractice. Additionally, plaintiff seeks an Order disqualifying defendant Pieragostini's expert witness and striking his filed expert affidavit.

Initially, the Court notes that it shall read and consider defendants' opposition/replying papers over plaintiff's objections as to their timeliness. Defendants' untimeliness argument is unfounded; it is not supported by any cited case law, it ignores the parties' Stipulation, April 6, 2016, and the apparent intention of the parties expressed therein to have afforded defendants until June 14, 2016, to serve opposition papers to any cross-motion that plaintiff might serve⁶ based upon that date being the date that had been

⁶The Stipulation actually does not address the date by which plaintiff was to cross-move for any relief; instead, it states only the date by which plaintiff was to serve her opposition papers, and the date by which defendants thereafter were to serve their replying papers.

expressly agreed for defendants to serve their replying papers, and defendants all having served their answering/replying papers on or before said June 14th date, and given the lack of prejudice to plaintiff who would have had sufficient time to serve her replying papers but for reasons not offered has not filed any.

Firstly addressing defendant Blatt's motion for an Order pursuant to CPLR 8501, subdivision (a), and CPLR 8503 directing plaintiff, presently an out-of-state resident, to execute an undertaking, said relief is granted. An undertaking in the sum of \$1,000.00 shall be posted within twenty (20) days after service of this Order with notice of entry upon said plaintiff. Plaintiff's legally unsupported arguments that defendant Blatt is guilty of laches and that he had participated in the alleged underlying fraud do not alter this Court's finding, particularly given that Blatt's relief request statutorily is "as of right." See CPLR 8501, subd. (a).

Addressing next plaintiff's cross-motion seeking to renew the Second Department's Decision dismissing plaintiff's claims against defendants Sirignano for negligence and legal malpractice, said relief is denied. CPLR 2221, subdivision (a), expressly states that a motion for leave to renew a prior motion "shall be made, on notice, to the judge who signed the order ..." This Court finds no authority for plaintiff's requesting that this Court grant renewal of an Appellate Court Decision. While of course, as plaintiff argues, "a court of original jurisdiction may entertain a motion for leave to renew based on new facts even after an appellate court has affirmed the original order," and indeed that essentially is what occurred when this Court, by Decision and Order, dated December 4, 2014, had granted plaintiff's then motion to renew and reinstate certain causes of action following the Appellate Division's affirmance of this Court's earlier Decision dismissing said causes of

action, that is not what plaintiff herein is asking of this Court. Plaintiff overlooks the fact that this Court, in its August 1, 2012, Decision and Order, had upheld plaintiff's cause of action against defendants Sirignano alleging legal malpractice, and that it had been the Appellate Division that had modified this Court's Decision in said regard and thereupon had dismissed said cause of action. That plaintiff now maintains that the law on this issue, specifically as to privity and the scope of the duty of care, since has been modified by the Court of Appeals' recent Decision in a medical malpractice action entitled Davis v. South Nassau Communities Hosp., 26 N.Y.3d 563 (2015), and that reinstatement of plaintiff's legal malpractice action as against defendants Sirignano is required thereunder, a legal result with which this Court in any event does not agree notwithstanding plaintiff's counsel's cogent and thoughtful analysis, simply does not change this Court's required finding that plaintiff improperly is seeking CPLR 2221 relief from this Court in the circumstances presenting. Accordingly, plaintiff's cross-motion brought pursuant to CPLR 2221 is hereby denied.

Next, the Court addresses plaintiff's cross-motion seeking an Order disqualifying defendant Pieragostini's expert, Hon. Howard Miller, and, upon his disqualification, for an Order striking and disregarding Judge Miller's expert affidavit offered in support of defendant Pieragostini's dispositive motion. Plaintiff submits that disqualification is mandated pursuant to the Rules of Professional Conduct 1.12 because Judge Miller had presided as the Appellate Division CAMP Judge regarding this action, at a conference held, on April 2, 2014, which conference however had not resulted in any compromise or settlement of the action. No further details are offered by plaintiff. Moreover, plaintiff cites no case law supporting her disqualification argument.

Judge Miller has offered his affidavit opposing plaintiff's request for his disqualification, he stating that he had been assigned by the Second Department as Special Referee to conduct two CAMP conferences in this action, one having occurred in 2014, addressed to plaintiff's then appeal of a discovery Decision and Order that had been entered by Hon. Joan Lefkowitz, and the other having occurred, also in 2014, regarding defendant Blatt's then appeal of this Court's entered Order denying his motion to file an amended answer. According to Judge Miller, each of these conferences had lasted five minutes, it immediately having been determined thereat that the parties' issues could not be resolved, and there not having been any substantive discussion concerning the case, the conversation at the conferences having been limited to the noticed appellate issues. Judge Miller notes that both appeals ultimately had been withdrawn and that he never had discussed this action and/or its merits with any Appellate Division justices. Judge Miller states that he never has represented any litigant herein and that his role herein solely is limited to that as an expert witness. Accordingly, defendant Pieragostini argues that disqualification is not required and is unnecessary. This Court agrees.

Rules of Professional Conduct 1.12 states:

Specific conflicts of interest for former judges, arbitrators, mediators or other third-party neutrals.

(a) A lawyer shall not accept private employment in a matter upon the merits of which the lawyer has acted in a judicial capacity.

(B) ... unless all parties to the proceeding give informed consent, confirmed in writing, a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as:

- (1) an arbitrator, mediator or other third-party neutral; or
- (2) a law clerk to a judge or other adjudicative officer or an arbitrator, mediator or other third-party neutral .

Although defendant Pieragostini apparently had failed to comply with informed consent requirements of the foregoing Rule, and notwithstanding that, under the above-described presenting circumstances, it would have been more prudent for Judge Miller to not have been retained herein, in the discretion of this Court, plaintiff's motion for an Order disqualifying Judge Miller as defendant Pieragostini's expert is denied upon the unrefuted circumstances presenting that Judge Miller's limited prior involvement did not concern any of the factual and/or legal issues herein raised, that his proffered opinion at bar is based solely upon his recent review of the pleadings, discovery that has been exchanged, the deposition testimony and the other material constituting the record herein, and that he is not representing any party as counsel herein.

The Court next shall address defendants Blatt's and Pieragostini's respective motions for summary judgment both seeking dismissal of the cause of action for negligence and legal malpractice.

Anent defendant Blatt solely, the Court observes that his motion is a second summary judgment motion, this Court previously having denied, in its Decision and Order, dated August 1, 2012, defendant Blatt's original motion seeking summary judgment dismissing the asserted negligence and legal malpractice claim, which denial the Appellate Division had affirmed.⁷ Properly, a second summary judgment motion may be entertained where it is based upon new evidence and facts that have been obtained during the course

⁷The Appellate Division Decision incorrectly states that this Court had treated defendant Blatt's cross-motion as one solely for dismissal pursuant to CPLR 3211. In fact, this Court, as noted in footnote 5 of its August 1, 2012, Decision and Order, specifically had noted that it had addressed Blatt's cross-motion both pursuant to CPLR 3212 and CPLR 3211.

of now completed discovery that had not been available at the time the initial summary judgment motion had been made. See Vinar v. Litman, 110 A.D.3d 867 (2nd Dept. 2013); Sutter v. Wakefern Food Corp., 69 A.D.3d 844 (2nd Dept. 2010); 85th Street Corp. v. WHCS Real Estate Limited Partnership, 292 A.D.2d 520 (2nd Dept. 2002).

Upon application of this law to defendant Blatt's motion at bar, the Court finds that defendant Blatt is not entitled to again move for summary judgment dismissing the complaint. While discovery in this action indeed has transpired since the making of Blatt's original motion, the inescapable fact is that Blatt has not herein relied upon any of the subsequently discovered evidence in support of his duplicate summary judgment motion, nor does he offer herein any expert affidavit on the issues raised. Rather, defendant Blatt exclusively relies once again upon the record that had been developed in the earlier Surrogates' Court proceeding and upon which he unsuccessfully had relied in bringing his original summary judgment motion. Defendant Blatt thus has failed to establish entitlement to have this Court address the merits a second judgment motion.

In any event, were this Court to address the merits of defendant Blatt's dispositive motion, it would deny same upon the finding that defendant Blatt prima facie has failed to demonstrate entitlement to dismissal judgment.

In order to establish a cause of action to recover damages for legal malpractice, a plaintiff must allege that the defendant-attorney had failed to exercise that degree of ordinary reasonable care, skill, and diligence commonly possessed by a member of the legal community, and that the defendant-attorney's breach of this duty proximately had caused actual damages. See Betz v. Blatt, 116 A.D.3d 813, 815 (2nd Dept. 2014); Rock City Sound, Inc. v. Bashian & Farber, LLP, 74 A.D.3d 1168, 1171 (2nd Dept. 2010); Boglia

v. Greenberg, 63 A.D.3d 973, 974 (2nd Dept. 2009). The element of causation is demonstrated by a plaintiff's showing that s/he would not have incurred any damages but for the attorney's negligence. See Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer, 8 N.Y.3d 438, 442 (2007); Marino v. Lipsitz, Green, Fahringer, Roll, Salibury & Cambria, LLP, 87 A.D.3d 566 (2nd Dept. 2010). A plaintiff's damages on a legal malpractice claim are designed to make the plaintiff whole and may include "litigation expenses incurred in an attempt to avoid, minimize, or reduce the damage caused by the attorney's wrongful conduct." DePinto v. Rosenthal & Curry, 237 A.D.2d 482 (2nd Dept. 1997). A defendant will prevail in dismissal of a legal malpractice claim where he demonstrates that a plaintiff cannot prove at least one of these essential elements. See Boglia v. Greenberg, 63 A.D.3d 973, 974 (2nd Dept. 2009).

Applying the foregoing principles of law relating to legal malpractice, defendant Blatt woefully has failed to identify what the required standard of legal care was that he had owed to plaintiff/Estate, he has not demonstrated that there had been no breach of that duty, nor has he demonstrated that any breach of the required standard of legal care by him had not proximately caused plaintiff/Estate to have sustained actual damages. Defendant Blatt's simple claim that "there was no way anyone involved in this could influence Mike Carbone," and his thus reasoning that it therefore does not matter what he had done or did not do given Carbone's clear mind set, and his noting that "[w]hen Blatt attempted to influence Carbone to stop his self-dealing, Blatt was fired and replaced by another attorney [i.e., defendant Pieragostini]," simply does not and cannot support the legal finding that Blatt had not been negligent in his duties and had not committed legal malpractice resulting in damages to plaintiff/Estate. Fatally, Blatt does not submit his own

affidavit, and nowhere does he specifically address plaintiffs' numerous stated examples of Blatt's negligence and malpractice, including his failure to have protected Estate assets despite his knowledge of Carbone's fraudulent activity and his improper taking of Estate assets from "late 2006, early 2007," his ignoring Carbone's improper payments to himself, his son, his daughter and his mother, Blatt's having circulated a non-sensical Informal Accounting, Blatt's failure to have tracked Estate monies, disbursements and payees, his having turned a blind-eye to misuse of Estate funds, his having failed to remedy the theft of assets by demanding their return or the Court-reporting thereof, his failure to have corrected, amended and/or supplemented what he admittedly knew to have been, or subsequently had learned were, false records before the Surrogate's Court, Blatt's payment to himself of fees in excess of that which had been reported to Surrogate's Court, his wrongful paying over of Estate monies to Carbone and family members from his IOLA account without prior Court approval, his allowance of the misappropriation of Estate assets through Carbone's use of other corporate entities, and his facilitating the preparation and filing of Mechanic's Liens on real estate that Carbone fraudulently had transferred to his wife and which this Court has adjudicated in a companion action brought under Westchester County Index No. 58557/11 to have been violative of the Debtor and Creditor Law.⁸ Accordingly, defendant Blatt has not established his entitlement to summary judgment dismissing the negligence and malpractice claim against him.

Addressing next defendant Pieragostini's motion seeking summary judgment

⁸Plaintiff has submitted an affidavit from her expert, Hon. Edward W. McCarty, III, wherein he identifies 51 separately stated examples of defendant Blatt's having failed to exercise that degree of care, skill and diligence commonly possessed by members of the legal profession and follow standards of acceptable practice.

dismissing the cause of action pleading negligence and legal malpractice, the Court first notes a seeming critical discrepancy between Pieragostini's presentation of the evidence at the time of his dismissal motion and that which has been presented in this summary judgment motion. Previously, it is the Court's recollection that defendant Pieragostini had not furnished any Engagement Letter executed by Carbone regarding his representation of Carbone and/or the Estate, and said defendant had not previously argued, nor had he denied, that he had represented the Estate. Indeed, this Court, in its August 1, 2012, Decision and Order, had stated at page 3 thereof that Pieragostini had been retained to represent the Estate. Defendant Pieragostini had not appealed that Decision. Now, almost four years later, defendant Pieragostini, arguing that he had represented Carbone individually, has produced an Engagement Letter, dated January 27, 2009, that is "Agreed to" by "Carbone," with his having affixed his Estate representative status following his name, and which expressly states their "Agreement" for Pieragostini "to furnish legal service to you (the "Client") with regard to above referenced matter." The above referenced matter is stated to be: "Estate of Carmelo Carbone," and the text of the Letter states by way of handwritten insertion that Pieragostini agrees to represent Carbone with respect to "The estate, including, filing settlement of accounting & closing out & settling Estate."

The Court observes that counsel for defendant Pieragostini argues in paragraph 34 of his supporting affirmation at bar that defendant Pieragostini had been "retained by Mike Carbone as the Executor of the Estate to advise and represent Mike Carbone in his capacity as the Executor." Counsel cites the afore Engagement Letter as poof of same. Counsel's statement is in accord with defendant Pieragostini's previous position before this

Court and this Court's understanding of the facts.

However, counsel then states in confusing fashion in the very next paragraph that defendant Pieragostini had been "retained by Mike Carbone, individually, to assist in purging the contempt and assist in filing an accounting on behalf of Mike Carbone as Executor." Counsel again cites the same Engagement Letter as proof of same, notwithstanding that said Letter does not specifically mention legal representation for Carbone to include any pending "contempt."

This Court will not accept as evidence in determining this motion the subject Engagement Letter that has been produced by defendant Pieragostini purporting to establish his retention only as counsel for Carbone individually, and not in his capacity as Executor of the Estate, given the apparent delayed production of this Engagement Letter four years after a different factual circumstance had been presented to this Court, and especially in light of the absence of an affidavit from defendant Pieragostini explaining the circumstances surrounding this "newly" found document. Moreover, it appears that defendant Pieragostini himself at different times had contradicted what appears to be his current position in that he previously had represented that he had been representing the Estate; on March 9, 2009, in correspondence to the IRS, Pieragostini stated that he represented "the Estate of Carmelo Carbone," and in his April 29, 2009, affidavit in support of legal fees accompanying the submitted Surrogate's Court Accounting he had averred that he was submitting his bill for services rendered "in representing the Estate."

Accordingly, defendant Pieragostini's argument that the scope of Pieragostini's representation of Carbone had been identical to the scope of defendants Sirignano's representation, which the Appellate Division has adjudicated had been limited to

representing Carbone individually, and that the legal malpractice claim against Pieragostini must therefore be dismissed because plaintiff had not been in privity with him, is erroneous and rejected by this Court; Pieragostini's motion for summary judgment based upon lack of privity is denied.

The Court next moves on to defendant Pieragostini's additional arguments in support of dismissal of the alleged malpractice claim, all of which previously had been raised in support of defendant Pieragostini's earlier CPLR 3211 dismissal motion, and rejected by this Court. Defendant Pieragostini, herein supported by the affidavit of Judge Miller,⁹ contends that plaintiff cannot establish a deviation in the standard of care possessed by a member of the legal community, that the evidence does not support a finding of "but-for" proximate causation, and that plaintiff has not demonstrated any actual and ascertainable damages caused by defendant Pieragostini and, in any event, that plaintiff's damages properly are limited to the amount of the collectable judgments, which plaintiff herein has not established. Defendant Pieragostini maintains that Pieragostini is not accountable to the Estate because the submitted Accounting presented to Surrogate's Court had been based upon the "information available at the time," and Judge Miller states in support of Pieragostini's position that defendant Pieragostini had no reason to believe that the information furnished to him by Carmela Smart, "who served as the accountant of Mike Carbone the Executor, and John Slattery, CPA, who worked in conjunction with Ms. Smart, in his preparation of the accounting," was inaccurate, and Judge Miller further contends that Pieragostini's reliance thereon had not constituted a deviation in the required

⁹Judge Miller's submitted affidavit relies in part upon the Letter of Engagement, which this Court has determined cannot be considered on this motion.

standard of care.

Plaintiff vigorously opposes defendant Pieragostini's motion, supported by the affidavit of Judge McCarty, arguing that the record demonstrates that Pieragostini had failed to exercise that degree of care, skill and due diligence commonly possessed by the legal community in submitting an Accounting that was false and did not balance and where the majority of expenses listed had been improper, unnecessary, inaccurate and unsupported. Plaintiff argues that the Accounting had disclosed blatant acts of Carbone's self-dealing and improper and unauthorized payments of Estate to himself and his other family members, that the Accounting had included improper charges to and payments from the Estate, that the Accounting had failed to set forth an accurate and itemized statement of all the valuations of property owned by the Estate and its assets, thereby misrepresenting the financial status of the Estate to the Court, all of which Pieragostini knew or in the exercise of reasonable care should have known, and that Pieragostini had submitted an "Addendum" to the Accounting that did not make the corrections Ordered by Surrogate's Court for the itemization of each and every expense. The record reveals that the submitted Accounting relies upon Carbone's daughter's "advice," for which she had been paid \$90,000 of Estate assets, even though she is not a CPA. Moreover, plaintiff argues that Pieragostini had continued to fail to properly correct the Accounting after the deficiencies had been brought to his attention, had ignored the opinion of Betz's attorney in the Surrogate's Court proceeding that the accounting was wrong, had ignored Carbone's own hired certified public accountant's opinion that the Accounting was wrong, he had failed to comply with Surrogate's Court Attorney Referee's directive that wrongfully taken Estate assets be returned, he did not seek to withdraw from his representation, and he had

violated numerous specified Rules of Professional Conduct and had turned a blind eye to the rampant wrongdoing by Carbone, and then affirmatively had created and put in place an Estate plan for Carbone, including his having prepared and filed four deeds wherein Carbone wrongfully had transferred title to four pieces of real estate in his name to his wife, on or about December 18, 2009, rendering Carbone judgment-proof.

Moreover, plaintiff argues that Judge Miller's proffered opinion is of no value because he mistakenly has confused an important fact applicable to defendants Sirignano only as also being applicable to defendant Pieragostini. Specifically, plaintiff cites Judge Miller's claim that defendant Pieragostini had been retained by Carbone "for the limited purpose to purge the contempt order [in Surrogate's Court] and prepare a filing of an accounting" when in fact Pieragostini himself had testified that he only had been retained to do the accounting. Indeed, the newly submitted Letter of Engagement does not even support Judge Miller's supposition that Pieragostini had been hired by Carbone to represent him in the contempt proceeding.

The Court denies defendant Pieragostini's motion for summary judgment dismissing the negligence and legal malpractice cause of action, finding that there exist triable issues of fact including, but not necessarily limited to, whether defendant Pieragostini had failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession in his advice and representation of Carbone as Executor of the Estate and specifically including his submission of a fraudulent Accounting and Addendum to the Accounting, which Accounting and Addendum he knew or should have known to be fraudulent and rife with improper and fraudulent charges, payments and self-dealing by Carbone, and whether actual and ascertainable damages sustained by the

Estate had been proximately caused by said legal malpractice, if any.

The Court next addresses defendant Sirignano's motion seeking summary judgment dismissing plaintiff's asserted cause of action that they had aided and abetted a fraud, as supported by the expert affidavit of Hon. Joseph Covello. A claim for aiding and abetting fraud lies against a defendant where there exists an underlying fraud that defendant had knowledge of and the defendant substantially assists in the achievement of the fraud. See Ginsburg Development Companies, LLC v. Carbone, 134 A.D.3d 890, 894 (2nd Dept. 2015); Stanfield Offshore Leveraged Assets, Ltd. v. Metropolitan Life Ins. Co., 64 A.D.3d 472, 476 (1st Dept. 2009), quoting Gabriel Capital, L.P. v. NatWest Fin., Inc., 94 F. Supp.2d 491, 511 (S.D.N.Y. 2000). Substantial assistance exists "where (1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated." Stanfield Offshore Leveraged Assets, Ltd. v. Metropolitan Life Ins. Co., *supra*, citing UniCredito Italiano Spa v. JPMorgan Chase Bank, 288 F. Supp.2d 485, 502 (S.D.N.Y. 2003).

Said defendants do not deny that a fraud had been committed by Carbone; instead, in this Court's view, defendants Sirignano misguidedly argue, based upon Judge Covello's otherwise legally unsupported opinion, that plaintiff cannot demonstrate that she, while represented by counsel, reasonably had relied upon anything done or said by defendants Sirignano. Given however that a fraud has been factually and legally established, plaintiff does not have to establish herein her reasonable reliance upon Sirignano's representations, contrary to defendants' argument. To sustain a claim for aiding and abetting a fraud, plaintiff need herein establish only defendants Sirignano's knowledge of

the fraud and their substantial assistance with respect to same. This Court finds that defendants prima facie have failed to demonstrate entitlement to judgment dismissing said cause of action.

In any event, this Court finds that there exists triable issues of fact regarding defendants Sirignano's knowledge of Carbone's fraudulent actions as Executor of the Estate at the time of and during the time of their retainer, whether said defendants knowingly had made false misrepresentations in Surrogate's Court proceedings and/or had undertaken any actions that affirmatively had assisted Carbone in his fraudulent activity, including their knowing advocacy of the false and fraudulent Accounting and/or its Addendum, and/or whether said defendants had failed to timely and promptly act regarding Carbone's fraudulent actions, and/or had failed to undertake proper and due diligence and investigation to determine the legitimacy of the Accounting and its Addendum, as well as the legitimacy of Carbone's actions, including Carbone's liquidation of approximately \$25,000 from an Estate bank account after Carbone had been removed as Executor and Carbone's real estate transfers made during the period of Sirignanos' representation of Carbone, undertaken by Carbone in an effort to make him judgment-proof, and thereby consequently had assisted Carbone in his ongoing fraudulent activity, and whether damages to the Estate proximately had resulted from defendants Sirignano's actions and/or inactions.

Addressing next defendant Sirignano's motion for summary judgment dismissing plaintiff's cause of action for restitution and disgorgement of their paid legal fee by the Estate, said relief also is denied.

The "essential inquiry" to be examined on a cause of action for restitution is

whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered.' (Citations omitted). In determining whether this equitable remedy is warranted, a court should "look to see if a benefit has been conferred on the defendant under mistake of fact or law, if the benefit still remains with the defendant, if there has been otherwise a change of position by the defendant, and whether the defendant's conduct was tortious or fraudulent. (Citations omitted)."

Betz v. Blatt, supra, 116 A.D.3d 813, 816-817).

Upon the record at bar, this Court denies defendants Sirignano's motion for summary judgment dismissing the cause of action seeking restitution and disgorgement of the legal fees that had been paid to defendants Sirignano from Estate assets finding that said defendants prima facie have failed to establish that their actions during the course of their representation of Carbone had not been harmful to the Estate and/or that the Estate had obtained any benefit from their representation, and that there exist triable issues of fact regarding defendants Sirignano's knowing participation in Carbone's fraudulent Surrogate's Court Accounting filing and whether they substantially had assisted in any of Carbone's fraudulent actions as Executor during the period of their representation of him, whether defendants Sirignano's representation of Carbone had conferred any benefit on the Estate, and whether it is equitable for defendants Sirignano to retain their legal fees based upon their alleged actions and/or their alleged failures to have acted. The Court finds wholly insufficient as warranting dismissal of the restitution cause of action Judge Covello's unsupported opinion that Surrogate Court has the discretion to fix an attorney's compensation and that plaintiff is required to apply to Surrogate's Court for restitution. Nor does this Court find relevant Judge Covello's opinion that the fact that Betz had prevailed in the underlying accounting proceeding does not mean that defendants Sirignano had not furnished beneficial legal services to the Estate. Given that defendants Sirignano are the

movants for dispositive judgment, the burden had been upon said defendants to demonstrate that their rendered legal services had been beneficial to the Estate and that they equitably are entitled to retain their Estate-paid fee for said services; defendants, however, have failed to do so.

Finally, the Court addresses all defendants' motions seeking dismissal of the pleaded section 487 Judiciary Law claims. Section 487 states:

An attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party ...Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

However, it further appears that, whereas a claim for treble damages pursuant to section 487 earlier in case law only could be found where the defendant had "engaged in a chronic, extreme pattern of legal delinquency," Gonzalez v. Gordon, 233 A.D.2d 191 (1st Dept. 1996), now no violation of Judiciary Law §487 properly may be found where the defendant did not engage in the "extreme pattern of legal delinquency." See Lifeline Funding, LLC v. Ripka, 114 A.D.3d 507, 508 (1st Dept. 2014); Donaldson v. Bottar, 275 A.D.2d 897 (4th Dept. 2000); cf. Dupree v. Voorhees, 102 A.D.3d 912 (2nd Dept. 2013). The alleged deceit must have been directed at the Court or occurred during the course of a pending judicial proceeding, see Costalas v. Amalfitano, 305 A.D.2d 202 (1st Dept. 2003), and the alleged deceit must have caused actual damages, which is an essential element of said cause of action. See Rozen v. Russ & Russ, P.C., 76 A.D.3d 965 (2nd Dept. 2010); NYCTA v. Morris J. Eisen, P.C., 276 A.D.2d 78, 86 (1st Dept. 2000). A violation of Judiciary Law § 487, subdivision 1, may be established either by the defendant's alleged deceit or by his alleged chronic, extreme pattern of delinquency. See

Wiggins v. Gordon, 115 Misc.2d 1071, 1077 (N.Y. City Civ. Ct. 1982); Rock City Sound, Inc. v. Bashian & Farber, LLP, 74 A.D.3d 1168 (2nd Dept. 2010).

All defendants' motions seeking summary judgment dismissing the Judiciary Law section 487 claims are hereby denied. Defendant Blatt's motion is denied based upon his failure prima facie to have demonstrated entitlement to dismissal of the section 487 cause of action. Defendant Blatt's arguments insufficiently are put before this Court without Blatt's own submitted supporting affidavit and they are predicated upon his attorney's arguments that Blatt allegedly had not submitted any papers to, nor had certified anything filed in, Surrogate's Court, his not having testified in the Surrogate's Court proceeding, and his not having had any communications with plaintiff Betz. However, Blatt does not and cannot deny that he had communicated with Betz's Surrogate's Court counsel, Lawrence A. Codispoti, that Blatt had made appearances on Carbone's behalf in Surrogate's Court and that he had circulated an Informal Accounting that had been rife with numbers that "didn't add up." The record at bar contains excerpts from attorney Codispoti's deposition testimony wherein Codispoti had testified that, while, at that time that he and Blatt had communications he did not believe that Blatt had misled him with respect to "information provided" but that if the information which thereafter had been provided to him from plaintiff's current counsel is correct, Codispoti "believe[s] Blatt misled" him.

Blatt's only submitted further "support" entitling him to dismissal, according to said defendant, is his counsel's conclusory claim that "Blatt did not intentionally deceive anyone, and, as no party or Court was deceived, Blatt is not guilty of a Judiciary Law Section 487 violation." Said contention simply is not sustainable and belied by defendant Blatt's own deposition testimony that he had been aware of Carbone's looting of the Estate's assets

from "late 2006, early 2007" but nevertheless had continued to represent the Estate in the Surrogate's Court matter until Carbone ultimately had discharged him. During that period of representation, Blatt necessarily had numerous conversations with attorney Codispoti regarding the Estate and its assets, had forwarded to Codispoti the preliminary "intermediate accounting," which Blatt himself had concluded was "a fraud," as well as his having made Surrogate's Court appearances. He never claims to have disclosed to Codispoti or Surrogate's Court the true state of the Estate's then affairs, Carbone's wrongful looting of Estate assets or his own conclusion that the numbers in the Accounting to Surrogate's Court "didn't make sense." Upon these facts, Blatt cannot successfully maintain as a matter of law that he is not guilty of deceit during the course of a pending judicial proceeding and that he is entitled to dismissal of the Judiciary Law section 487 cause of action.

Defendant Pieragostini's motion seeking dismissal of the Judiciary Law section 487 claim too is denied, as this Court finds that his motion insufficiently is put before this Court without Pieragostini's own submitted supporting affidavit and is predicated upon his attorney's conclusory arguments that plaintiff cannot prove that Pieragostini had submitted any documents or had conveyed any information that had been intended to deceive a party or the Court, that Pieragostini's "conduct can only be considered to unconditionally illustrate the Executor's position that the submissions did not provide a reasonable basis to support that the Executor did not engage in self-dealing," that plaintiff has failed to submit proof of any conduct that could be considered fraudulent, malicious, or tortious, and that plaintiff did not sustain any damages proximately caused by Mr. Pieragostini's alleged conduct and that there is "no nexus" between the Accounting and any alleged damages.

The Court first rejects defendant Pieragostini's argument that Mr. Codispoti's testimony that he, Codispoti, at the time, had not believed that the submissions to Surrogate's Court on behalf of the Executor had been fraudulent or deceitful absolutely requires the finding that there is no proof of defendant Pieragostini's having intended to deceive the Court and/or Betz. Not only does said argument ignores Mr. Codispoti's further testimony, previously noted, that he now believes, if plaintiff's proof is true, that he had been misled, but that Mr. Codispoti further had testified that he had disagreed with the Accounting and that same had not been properly supported at the time of its submission with proof of the expenses and disbursements that Carbone, as Executor, had claimed. In any event, what Mr. Codispoti had believed is not the proper inquiry, which instead is whether Pieragostini is guilty of any deceit or collusion, or had consented to any deceit or collusion, during his representation of the Estate.

This Court finds that the record at bar supports the finding that triable issues of fact exist with respect to plaintiff's supported allegations that defendant Pieragostini had deceived and/or had consented to Carbone's deception of plaintiff and/or Surrogate's Court regarding the Estate Accounting, which Pieragostini falsely had represented to be accurate and truthful and necessarily had certified to be true and correct upon his filing of same, notwithstanding Pieragostini's having had actual knowledge to the contrary and that the Accounting did not balance and add up, and that it had contained numerous false statements, including that the vintage Corvette was not an Estate asset and that various identified payments to Carbone's son, daughter and two entities owned and controlled by Carbone's family were legitimate and proper payments, and whether Pieragostini had engaged herein in an extreme pattern of legal delinquency supported by his delaying

Surrogate's Court proceedings and eventually filing a false Addendum to the Accounting which nevertheless had failed to correct the material misrepresentations founded by Surrogate's Court staff and which had been directed to be corrected, as well as whether Pieragostini's further assistance to Carbone in establishing an Estate Plan, the effect of which rendered Carbone judgment-proof, had been intended to deceive the Estate during the course of the Surrogate's Court proceeding into believing that Carbone could make the Estate whole in the event restitution were Ordered.

The Court rejects Pieragostini's argument that plaintiff cannot demonstrate that any alleged fraud and deceit actually had caused the Estate, which has sustained adjudicated damages in the sum of \$2,386,129.46, plus accruing interest to date, has not suffered any damages.

Lastly, the Court denies defendants Sirignano's motion seeking dismissal of the Judiciary Law section 487 claim. This Court does not find on this record as a matter of law that plaintiff's complaints of defendants Sirignano's actions and conduct during the course of their representation of Carbone in Surrogate's Court with respect to the then pending accounting and contempt proceedings were, as argued, non-actionable as being within the bounds of the adversarial proceedings and not outrageous or egregious in any way. Cf. Lazich v. Vittoria & Parker, 189 A.D.2d 418 (2nd Dept. 1993), app. dsmd. 81 N.Y.2d 1006 (1993). Nor does this Court find defendants Sirignano's argument that the section 487 must be dismissed because vicarious liability for said violation is not recognized. Plaintiff is not seeking to impose vicarious liability upon defendants Sirignano; rather, plaintiff seeks to hold said defendants liable for their own wrongdoing in the course of their representation of Carbone.

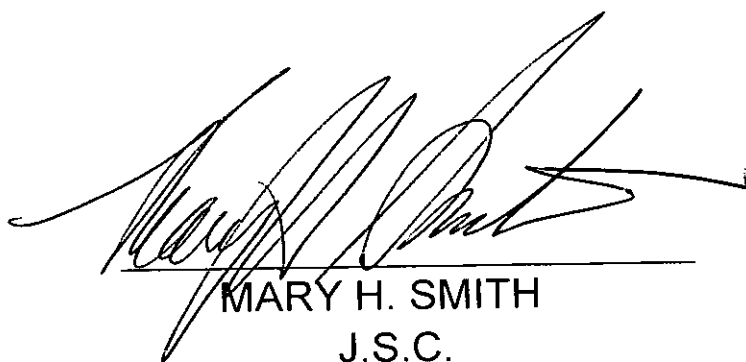
Although the Estate's damages proximately had been caused by the acts of Carbone and his family, as asserted by defendants Sirignano, this does not demonstrate that defendants Sirignano's actions and/or failures to act had not been intended to deceive the Court or the Estate and that same too had been a substantial factor in causing the Estate actual and definable damages presently in a sum exceeding \$2,386,129.46.

Judge Covello's conclusory opinion that plaintiff cannot demonstrate that defendants Sirignano had engaged in any conduct with the intent to deceive or the defraud the Court or the parties in the accounting proceeding, which is offered without specific reference to any supporting facts in the record, is without probative value and insufficient to sustain defendants Sirignano's burden on this motion.

Any and all arguments presented by the parties and not otherwise specifically addressed herein above have been considered by the Court and rejected.

The parties shall appear, as previously has been scheduled, in the Compliance Conference Part, room 800, at 9:15 a.m., on September 6, 2016.

Dated: July 27, 2016
White Plains, New York



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