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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Paul Wooten Justice PART 7

Index Number : 106143/2011
WEISS & HILLER, P.C.
vs
FERSHTADT, DOV
Sequence Number : 005
ORDER OF PROTECTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the memorandum decision in motion sequence 007.

RECEIVED
OCT 25 2017
NYS SUPREME COURT - CIVIL
GENERAL CLERK'S OFFICE

FILED
OCT 26 2017
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 10/24/17

J.S.C.
Hon. Paul Wooten

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Printed: 10/26/2017

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10/25/17
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN Justice — PART 7

WEISS & HILLER, P.C.,
Plaintiff,

- against -

DOV FERSHTADT,
Defendant.

INDEX NO. 106143/2011

SEQ. NO. 005 and 007

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits

Answering Affidavits — Exhibits (Memo)

Replying Affidavits (Reply Memo)

FILED
OCT 26 2017
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ■ Yes ☐ No

Motion Sequence numbers 005 and 007 are consolidated for disposition.

In this action, the law firm of Weiss & Hiller,P.C. (W&H or plaintiff law firm), seeks legal fees and reimbursement for expenses advanced from Dov Fershtadt (defendant), W&H's former client. W&H represented defendant for multiple years, pursuant to a retainer agreement, for the prosecution of defendant's claims for long-term disability benefits. This representation included three appeals, an Employee Retirement Income Security Act of 1974 (ERISA) lawsuit, legal work related to a summary judgment motion, negotiations with opposing counsel, mediation, and the successful results obtained for defendant wherein his long-term disability benefits (LTD Benefits) were increased (*see* Verified Complaint ¶ 62). Plaintiff law firm's complaint asserts causes of action for breach of the retainer agreement, an affirmative injunction directing defendant to pay plaintiff future damages based upon its contingency fee for defendant's future receipt of disability payments, and an accounting based upon defendant's

allegec breach of a fiduciary duty. Plaintiff law firm also pleads alternative claims sounding in unjust enrichment and quantum meruit. In his Answer, defendant asserts counterclaims for breach of a fiduciary duty and legal malpractice.

Plaintiff law firm asserts that it successfully prosecuted defendant's claims for LTD Benefits and as a result of W&H's work and efforts, defendant's LTD Benefits, which were initially terminated by his disability insurer after just 12 months in August 2006, have been continued to date, and are scheduled to continue until defendant reaches the age of 65. In addition, W& H asserts that as a result of W&H's work and efforts, defendant's monthly LTD Benefits have been increased to nearly twice the monthly amount he received initially, and the LTD Benefits are now tax free. Thus, instead of receiving just $81,200.00, defendant will ultimately receive in excess of $1.4 Million in LTD Benefits, in monthly installments, until he reaches the age of 65.

In motion sequence 005, defendant moves pursuant to CPLR §§ 3101 and 3103 for a protective order against plaintiff's Subpoenas Ad Testificandum for a deposition of defendant's psychologist, Dr. Lloyd Gilden and psychiatrist, Dr. Edward M. Stephens (*see* Defendant's Notice of Motion, exhibits D and E). Plaintiff law firm opposes defendant's motion for a protective order and cross-moves, *inter alia*, for: (1) a preliminary injunction, pursuant to CPLR 6301, directing defendant to set aside the funds necessary to satisfy the ultimate judgement in this case on an ongoing basis; (2) compelling the deposition of non-party witness Elisa Fershtadt on a date certain; (3) extending the time for plaintiff to complete non-party discovery deposition by sixty (60) days.

In motion sequence 007, plaintiff law firm moves by Order to Show Cause (OSC) seeking an Order: (1) granting plaintiff law firm summary judgement on its first cause of action for breach of the retainer agreement; (2) striking the defendant's affirmative defenses; (3) dismissing the defendant's counterclaims. Such motion is interrelated to the plaintiff's cross-

motion for a preliminary injunction. Defendant is in opposition to the summary judgement motion.

BACKGROUND

In 2001, W & H was established as a professional corporation organized under the laws of the State of New York with offices at 600 Madison Avenue, New York, New York 10022. In 2005, W & H was a general practice law firm, predominantly handling sophisticated matters involving complex legal problems, specializing in Business, Commercial and litigation, Insurance, Business and Corporate matters, Construction, Employment Law and bad faith denial of disability insurance benefits (*see* W & H's motion [MS 7], exhibits 3 and 4).

Defendant was employed as an engineer for the Verizon Communications Corporation (Verizon) and its various predecessors, including Bell Atlantic Communications Corporation (Bell Atlantic), since 1982. On September 11, 2001, defendant was working on the 13th Floor of the World Trade Center (WTC) Tower 2 when it was struck by United Airlines Flight 175 and exploded. He was trapped and narrowly avoided death by running out of the building and into debris, including airplane parts and human bodies. At the time of the September 11, 2001 WTC Attack, defendant was covered by the Bell Atlantic Long Term Disability Plan for Managerial Employees (Bell Atlantic Plan). The Bell Atlantic Plan provided, in part, that defendant had disability benefits in the amount of fifty per cent (50%) of his pre-disability earnings, fully taxable and subject to an annual maximum ceiling of four hundred twenty thousand dollars ($ 420,000.00).[1] Both of defendant's short term disability (STD) and LTD insurance plans were first administered by Unum Provident Corporation and then after July 1, 2006, by Metropolitan Life Insurance Company (Metlife) (collectively, Verizon insurance

[1] Defendant had both short and long term disability insurance coverage plans and each required that any benefit payments would be taxable as income. However, in 2004, he filed for and was granted short term disability payments and received those benefits until they expired in July 29, 2005 and therefore defendant's short term disability insurance coverage is not at issue.

compa ies).

In 2001, Verizon offered its employees an option to transfer from the Bell Atlantic Plan to what was called the Verizon Transfer Plan option plan. Defendant did not receive the Verizon Transfer Plan option notice to transfer LTD plans and hence, his LTD insurance coverage remained unchanged under the Bell Atlantic Plan.

In or about 2002, defendant claimed to have Post-Traumatic Stress Disorder (PTSD), depression and in mid 2004, he was diagnosed with dementia from his experiences at Tower 2 at the WTC on September 11, 2001. On or about August 2, 2004 defendant began receiving STD insurance benefits which expired on July 29, 2005. Also in 2004, Verizon offered its employees a new employee benefit plan under the provisions of ERISA (2004 SPD LTD plan). The 2004 SPD LTD plan provided for benefits that are non-taxable and subject to a $8,333.00 monthly maximum. It also contained a provision which stated that the Verizon employees who were offered the option to be transferred to this new plan, but who did not avail themselves of the 2001 Transfer Option, would continue to have whatever benefit levels to which they were issued set forth in the Bell Atlantic Plan. Defendant did not enroll in the 2004 SPD LTD insurance plan, as the offer to join was never communicated to him.

In October 2004, defendant received an email from Verizon stating that he was still enrolled under the Bell Atlantic Plan, and that he was now *required* to enroll under a new plan, called the 2005 SPD LTD plan. Defendant enrolled under the 2005 SPD LTD plan and chose a benefit option level of 66.6% of his pre-disability earnings, and that his benefits would not be taxable. Under that option in the 2005 LTD plan, the maximum allowable monthly tax-free benefit was $11,111.00 per month until he reached the age of 65 (Full Benefit Plan). In a letter to the defendant, in October 22, 2004, Verizon disability insurance companies confirmed that he was enrolled in the 2005 SPD LTD Full Benefit Plan and began taking premiums from him on this plan.

n January 2005, defendant began a dispute with Verizon over which plan would apply to defendant's transition insurance coverage from STD, expiring on July 29, 2005, to LTD insurance plan payments commencing in August 2005. In a letter dated July 14, 2005, defendant was informed by Unum that while his request for LTD Benefits had been approved, he would not receive his LTD Benefits according to his Benefits Selection Level in the 2005 SPD Plan (66.6% of his pre-disability earnings, with the $11,111.00 monthly cap), but rather he would not receive benefits under a "Legacy Plan." The "Legacy Plan " is the payment of 50% of his pre-disability earnings, fully taxable and subject to a $420,000.00 annual limit as set forth in the Bell Atlantic Plan. Defendant still claimed that after July 29, 2005, he should receive the 2005 SPD LTD Full Benefit Plan.

In August 3, 2005, defendant received a letter from Verizon stating that he was being transferred from their STD plan, expiring on July 29, 2005 to their LTD plan commencing in August 2005. Nevertheless, defendant's employment with Verizon was terminated on August 1, 2005. In August 2005, the Verizon Insurance companies began paying defendant a reduced payment of six thousand five hundred twenty five dollars ($6,529.00) a month, subjecting the payments to income taxation and indicated that the payments were limited to a period to expire in July 2006 (Reduced Benefit Plan). Verizon's rationale for terminating the defendant's LTD benefits on July 2006 was based upon a provision in the 2004 SPD LTD plan, even though defendant was never enrolled in the 2004 SPD LTD plan. As a result of the above, defendant sought to hire an attorney to address his concerns,

On November 11, 2005, the parties met and on or about December 9, 2005, the defendant retained W&H to "prepare an administrative appeal to the Companies to increase the Reduced Benefit to the Full Benefit, including withholding limitation, the full amount of the benefit ($11,111.00), elimination of the tax withholding and increase in the benefit term to at least age 65." W & H would be paid "thirty-three and one-third (33.3%) of all sums recovered in

excess of the Reduced Benefit [Plan], including any past or future benefits in excess of the Reduced Benefit Plan, money saved on taxes previously withheld or any future tax benefits saved, any future benefit payments beyond the future 12 month period, attorney fees and any punitive damages, whether recovered by means of the administrative appeal, suit, settlement or otherwise" (*see* Plaintiff's OSC [MS 7], exhibit 6). The retainer agreement also provided that defendant shall pay for services performed and out-of-pocket expenses when incurred (*see id.*).

Pursuant to the retainer agreement, immediately thereafter W & H began to engage the Verizon insurance companies to pay defendant the Full Benefit Package and extend the package beyond the twelfth (12th) month termination date. Notwithstanding W&H's efforts in or about August 2006, the Verizon insurance companies terminated all LTD benefits to defendant, including the reduced payments package that defendant contested.

On or about September 11, 2006, plaintiff law firm filed the First Administrative Appeal Insurance claim against Verizon and MetLife requesting the Full Benefits Plan package for defendant. Also in September 2006, MetLife became the Administrator of all of Verizon's LTD plans. On September 18, 2006, MetLife denied defendant the Full Benefit Plan package, however, MetLife granted an increase of defendant's LTD to $ 8,333.00 a month. MetLife concluded that the defendant was covered by the 2004 SPD plan and wrote the "LTD Benefit is calculated by taking 50% of you basic monthly salary of [$] 20,058.23, or the maximum LTD benefit payment of $8333.00 (sic) the lesser of the two, resulting in a maximum monthly benefit payment of $8333.00, fully taxable (*see* Plaintiff's OSC [MS 7], exhibit 1 ¶¶ 26-31; exhibit 12).

While plaintiff law firm had secured the increased Benefit Plan package in the defendant's LTD benefit payments through the September 18, 2006 First Administrative Insurance Appeal decision, it was far short of the 2004 SPD LTD Full Benefit's Plan to which defendant felt he was entitled, particularly the portion that terminated all the LTD benefits in August 2006 and that the benefits would be non-taxable. For the following twelve months

defendant received the increased Benefit Plan package and Verizon still planned to terminate all of defendant's LTD benefits in August 2006. On or about November 16, 2006, plaintiff law firm filed its Second Administrative Appeal seeking to gain the Full Benefit Plan package and to prevent the termination of the LTD insurance payments. In January 2007, Verizon denied the Second Administrative Appeal and continued to pay defendant lesser benefits than he believed himself entitled to receive. From approximately January 2007 to April 2007, W & H prepared another appeal. On or about April 27, 2007, W & H filed the Third Administrative Appeal of the January 2007 decision. According to W & H, neither Verizon nor Metlife responded to the Third Administrative Appeal within the time allotted under the ERISA regulations.

As a result of the foregoing, on or about August 1, 2007, W & H filed an action on behalf of defendant against Verizon, Unum and MetLife in the United States District Court, Southern District of New York entitled *Fershtadt v Verizon Communication Inc.*, 07 Civ 6963. The complaint filed four causes of action and sought, *inter alia*, an Order directing Verizon, the Plan, Unum and/or MetLife to provide coverage to defendant under the 2005 SPD; directing the same parties to make payments of all back benefits from July 30, 2005 at the full benefits level, and continue to do so for as long as defendant continues to suffer from his disabling illnesses and conditions; providing *de novo* review of Verizon's decisions in order to restore the LTD Full Benefit Plan package to defendant; and $500,000.00 in damages for bad faith breach of contract (*see* W & H's OSC [MS 7], exhibit 15). Six days after the commencement of the lawsuit, Verizon increased defendant's LTD benefit payments retroactively and prospectively from $8,333.00 a month to $10,029.00 a month, returned the defendant to this premium calculation and granted interest on all the previous monies withheld, but still denied the defendant the Full Benefit Plan package that he sought inasmuch as Verizon and MetLife continued to report defendant's LTD Benefits as fully taxable (*see* W & H Complaint ¶ 41). Since defendant wanted to receive more non-taxable LTD Benefits, W & H continued to

prosecute the above ERISA lawsuit. During the course of said lawsuit, W & H successfully argued to the Court that the determination of defendant's benefits was subject to *de novo* review, as well as defeated a motion for summary judgment brought on behalf of Verizon (*see id.* ¶¶ 43, 44). Shortly after the Court directed that the parties proceed to trial, Verizon initiated settlement discussions with W & H. According to W & H, it advised defendant to file amended tax returns with the IRS to obtain tax refunds on the LTD Benefits received by defendant that were not properly taxable (*see id.* ¶ 47). In or about March 2010, the Court appointed a mediator to facilitate said discussions (*see id.* ¶ 49). During the course of mediation, attorneys for Verizon, MetLife, and Unum indicated that defendant had not reported any LTD Benefits to the IRS as taxable (*see id.* ¶ 51). During settlement conference calls, the mediator requested information regarding defendant's accountant, the dates on which defendant filed amended returns and requested refunds, and whether defendant had received tax refunds (*see id.* ¶ 52). W & H asserts that it requested such information from the defendant but that defendant refused to provide same, even after

W & H learned that defendant had started to receive refunds from the IRS and New York State taxing authorities (*see id.* ¶¶ 54, 56). Defendant's refusal to provide any information concerning the amount of refunds he received, when he received them, or the name of his accountant allegedly led to the deterioration of the attorney-client relationship (*see id.* ¶ 58). Accordingly, on or about August 20, 2010, W & H moved for leave to withdraw as counsel for defendant. In or about March 2011, defendant settled the ERISA lawsuit with Verizon, choosing to stay in the 2004 SPD Plan and receive a lump sum payment, rather than switch into the 2005 SPD Plan offered by Verizon.

On May 25, 2011, after defendant refused to pay W&H its duly demanded legal fees, expenses and refused to disclose various LTD benefits made to him from Verizon, W & H filed the within Complaint. In its Complaint, W & H asserts that it is entitled to 1/3 of all monies

received by defendant for his LTD Benefits from March 2011 to date as a result of W & H's work, as well as reimbursement for all expenses advanced on defendant's behalf. It is W & H's contention that defendant breached the Retainer Agreement (first cause of action). Moreover, W & H asserts causes of action for unjust enrichment (second); a declaration that W & H is entitled to receive, and a mandatory injunction directing defendant to pay 1/3 of all defendant's LTD Benefits and other monies received as a result of his disability claim until they terminate (third); breach of fiduciary duty and an accounting of same (fourth); and payment of legal fees in quantum meruit (fifth) (*see* Plaintiff's OSC [MS 7], exhibit 1]).

On or about November 7, 2012, the defendant filed his Verified Answer with eight affirmatives defenses: culpable conduct by the plaintiffs (first), accord and satisfaction (second), failure to state a cause of action (third), lack of proper retainer agreements under 22 NYCRR § 1215 (fourth), inequitable conduct by plaintiff including claims for monies not earned or due (fifth), inequitable conduct by plaintiff which prevents an award of quantum meruit (sixth), legal malpractice (seventh), and breach of fiduciary duty (eighth) (*see id.*, exhibit 2). Additionally, defendant asserts counterclaims against W & H for breach of fiduciary duty and legal malpractice in contract and tort, claiming that the plaintiff law firm engaged in work that was unnecessary in view of Internal Revenue Service (IRS) regulations and failed to provide defendant proper tax advice. It is defendant's contention that because defendant followed the incorrect disability insurance, benefits advice, ERISA advice, and tax advice of the plaintiff to wit, that defendant wrongfully paid taxes, from which he was exempt, defendant was only able to recoup a portion of wrongfully paid taxes on his benefits (*see id.*). Specifically, defendant asserts that he hired plaintiff law firm to resolve both the medical issue and tax issue which resulted from Verizon placing defendant on the old Bell Atlantic Plan instead of the Verizon Plan and 2005 SPD Plan (*see* Defendant's Verified Answer, Plaintiff's OSC [MS 7], exhibit 2). Defendant acknowledges that plaintiff law firm did file administrative appeals regarding his LTD

Benefits, but alleges that it failed to resolve the tax issue nor advised defendant concerning the correct law. According to defendant, he and his wife Elisa were performing an Internet search concerning disability benefits taxes in March of 2009, and discovered that right after September 11, 2001, approximately four years prior to retaining plaintiff law firm, the IRS created a new rule which stated that Disability Benefits received as a result of the terrorist attack will not be considered income (Publication 3920) (*see id.* ¶ 82). It is defendant's contention that he brought Publication 3920 to W & H's attention and was informed by Michael S. Hiller (Hiller) that he would demand that Verizon issue revised 1099 forms, but was offered no other advice on tax returns or methods of obtaining refunds or statute of limitations (*see id.* ¶ 87). Defendant alleges that due to Hiller's advice defendant missed the deadline of April 15, 2009 for filing a refund request for 2005. In December 2009, defendant filed several amended tax returns for 2002, 2004, 2005, 2006, 2007, and 2008 (*see id.* ¶ 96), and received refunds from the IRS and New York State for the years 2006, 2007, and 2008 (*see id.* ¶ 97). Defendant asserts that the IRS and New York State did not issue refunds for 2002, 2004, and 2005 as the time frame to receive such refunds had passed, since it was more than three years past the date when the original return was filed (*see id.* ¶ 98). The gravamen of defendant's allegations is that had Hiller informed defendant of Publication 3920, there would have been no reason to engage in the lengthy Administrative Appeal process for the purpose of recovering approximately $720 more a month in benefits, but rather the issue was regarding taxable v non-taxable income. Additionally, due to W & H's failure to inform defendant and his wife about the IRS rule, he could have received retroactive refunds for the years 2002, 2004, and 2005. Thus, according to the defendant, plaintiff law firm committed malpractice and breached its duty of care.

DISCUSSION

I. *Motion Sequence 007*

In support of its OSC for summary judgment, plaintiff law firm submits the affirmation of Benjamin B. Neschis, who asserts that if defendant complies with certain procedural requirements he is still within his rights to obtain a refund from the IRS with respect to taxes paid in 2002, 2004, and 2005; a memorandum of law and 23 exhibits in support thereof, including, a copy of the pleadings, the retainer agreement, the deposition transcripts of Elisa Fershtadt, defendant's wife, Karen Mary Wahle, plaintiff law firm's ERISA expert and Peter Mertz, an attorney and Certified Public Accountant (CPA). In opposition, the defendant submits an attorney affirmation, referencing twenty seven exhibits, and affidavits from defendant, Elisa Fershtadt, and Kenneth Votre, defendant's tax expert, who opines that plaintiff law firm's conduct was unreasonable in that it failed to advise either defendant or his wife, who filed taxed jointly, of the right to a refund and the time period during which that refund must be requested.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1984]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial

for resolution" (*Gluffrida v Citibank Corp.*, 100 NY2d 72, 81[2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues of fact exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]). 2009]).

Plaintiff law firm is seeking summary judgement on its first cause of action for breach of contract, to strike defendant's affirmative defenses and dismiss defendant's counterclaims. It is plaintiff law firm's contention that pursuant to the retainer agreement: 1) W & H is entitled to 1/3 of all monies received by defendant to date as a result of W & H's work, 2) W & H is entitled to 1/3 of defendant's LTD Benefits going forward from March 2011, 3) W & H is entitled to 1/3 of all refunds received by or credited to defendant from the IRS and New York State taxing authorities in connection with his disability benefits, 4) W & H is entitled to reimbursement for all expenses advanced on defendant's behalf. Plaintiff asserts that defendant has refused and continues to refuse to remit any legal fees or reimburse expenses due in breach and violation of the Retainer Agreement. In opposition, defendant contends, *inter alia*, that its legal malpractice claim and assertion that plaintiff law firm deviated from good and accepted practice in the handling of defendant's case destroys the vitality of its claim to legal fees from defendant.

"To plead breach of contract, the proponent must allege the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages"

(*Second Source Funding, LLC v Yellowstone Capital, LLC*, 144 AD3d 445, 445-446 [1st Dept 2016]; *see Nevco Contr. Inc. v R.P. Brennan Gen. Contrs. & Bldrs., Inc.*, 139 AD3d 515 [1st Dept 2016]; *Harris v Seward Park Hous. Corp.*, 79 AD3d 425 [1st Dept 2010]; *Rayham v Multiplan, Inc.*, 153 AD3d 865 [2d Dept 2017]). "[A] contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. Consequently, 'a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms'" (*Rayham*, 153 AD3d at *1, quoting *Legum v Russo*, 133 AD3d 638, 639 [2d Dept 2015]).

Here, it is clear from reviewing the record that plaintiff has demonstrated that all these elements have all been met. It is undisputed that W & H entered into a Retainer Agreement and that such Agreement called for W & H to file an administrative appeal on behalf of the defendant. Specifically the Agreement states that defendant requested and W & H agreed to "prepare an administrative appeal to the Companies to increase the Reduced Benefit to the Full Benefit, including withholding limitation, the full amount of the benefit ($11,111.00), elimination of the tax withholding and increase in the benefit term to at least age 65" (*see* Plaintiff's OSC, exhibit 6). Defendant also notes same in his Verified Answer (*see id.*, exhibit 2 ¶¶ 73, 74). Notwithstanding defendant's assertion to the contrary, to be discussed in greater detail below, the Court finds that plaintiff law firm performed its obligations under the Contract as it undertook three successful administrative appeals on behalf of defendant, which ultimately resulted in a settlement with the Verizon insurance companies that extended his benefits past the original 12 month expiration, increased the benefits amount, and an offer to enroll in the 2005 SPD Plan. It is also undisputed that defendant has already begun to receive his LTD Benefits. Nevertheless, defendant has failed and continuously refuses to pay W & H for its services or reimburse W & H for expenses incurred, in contravention of the Retainer Agreement. Accordingly, W & H is

entitled to summary judgment on its cause of action for breach of contract.

In opposition, defendant maintains that W & H's motion should be denied because if his counterclaims of malpractice and breach of fiduciary duty remain vital, plaintiff law firm would be precluded from collecting its legal fees. "An action for legal malpractice requires proof of three elements: (1) that the attorney was negligent; (2) that such negligence was a proximate cause of plaintiff's losses; and (3) proof of actual damages" (*Global Bus. Inst. v Rivkin Radler LLP*, 101 AD3d 651, 651 [1st Dept 2012] [internal quotation marks and citations omitted]). To sustain his cause of action for legal malpractice, defendant must "establish that [W &H] failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages" (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 49 [2015], quoting *Dombrowski v Bulson*, 19 NY3d 347, 350 [2012]; *see Brookwood Cos., Inc. v Alston & Bird LLP*, 146 AD3d 662 [1st Dept 2017]; *Gallet, Dreyer & Berkey, LLP v Basile*, 141 AD3d 405 [1st Dept 2016]). "An attorney's conduct or inaction is the proximate cause of a plaintiff's damages if "but for" the attorney's negligence 'the plaintiff would have succeeded on the merits of the underlying action'" (*Brookwood Cos., Inc.*, 146 AD3d at 666, quoting *AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]). "The failure to show proximate cause 'mandates the dismissal of a legal malpractice action regardless of whether the attorney was negligent'" (*Wo Yee Hing Realty Corp. v Stern*, 99 AD3d 58, 63 [1st Dept 2012], quoting *Leder v Spiegel*, 31 AD3d 266, 268 [1st Dept 2006]).

In order for counsel to prevail on a motion for summary judgment in a legal malpractice case, he or she must present evidence in admissible form establishing that the former client is unable to prove at least one of the above-cited essential elements (*see Pedro v Walker*, 46 AD3d 789, 790 [2d Dept 2007]). Generally, expert testimony is required to establish that an

attorney breached the applicable standard of care (*see Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo*, 259 AD2d 282, 284 [1st Dept 1999]), with the finder of fact deciding whether there was a deviation from such standard.

The crux of defendant's counterclaim is that W & H failed to advise him on a particular tax exemption that would have allowed him to avoid income taxation on his Benefits for the tax years 2002, 2004, and 2005. However it is clear from looking at the Retainer Agreement, as this Court is required to do herein (*see Pllewsky v Solymosy*, 266 AD2d 83, 84-85 [1st Dept 1999] ["The Court of Appeals has observed that the basis of a claim for legal malpractice, whether advanced as a tort or contract cause of action, is the retainer agreement between counsel and client"]), that defendant engaged W & H for the limited purpose of preparing an administrative appeal of the adverse benefit determination by defendant's insurer in order for the defendant to obtain the Full Benefit Package instead of the Reduced Benefit Package. Defendant even admits as much in his counterclaims (*see* Defendant's Verified Answer ¶¶ 73 and 74). The Retainer Agreement makes no mention of W & H dispensing any tax advice, and contrary to defendant's assertion, any reference to "taxes" in the Agreement are solely related to the administrative appeal since defendant was seeking to receive the Full Benefits which would entitle him to receive $11,111.00 monthly, not subject to taxation. Plaintiff law firm was retained to increase defendant's Benefits, and a result of their work, defendant's LTD Benefits were increased and extended from 12 months and approximately $81,200.00 to 11 years and an additional $1.4 million. Looking at the four corners of the Agreement, there is simply no basis for this Court to find that W & H was retained to give tax advice or analysis with regards to his tax returns (*see Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 66 [1st Dept 2008] ["a written agreement that is clear and unambiguous on its face must be enforced according to the plain meaning of its terms"]). Even assuming *arguendo* were the

Court to consider extrinsic evidence to the Agreement, subsequent writings confirm that the scope of W & H's retention was limited to the administrative appeal. Specifically, three days after the parties entered into the Retainer Agreement, defendant and his wife responded with an email that stated in pertinent part as follows:

> Thank you for meeting with us on November 11, 2005, and forwarding your proposed Retainer Agreement on December 9, 2005. We would very much like to retain you to submit the Administrative Appeal on our behalf (*see* Plaintiff's OSC, exhibit 10).

Additionally, emails exchanged between the parties in December 2005 centered around the administrative appeal (*see id.*).

In addition, defendant cannot establish that W & H failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession. In support of its OSC, plaintiff submits the deposition testimony of Karen Mary Whale, who is an expert in ERISA law having practiced for over twenty years and been nationally recognized as superior in her field. Moreover, Ms. Whale was one of the attorneys who provided a defense to the Verizon insurance companies during the course of the federal ERISA lawsuit. Her testimony demonstrates that W & H's performance on defendant's case did not fall below the standard of care (*see* Plaintiff's OSC, Whale Deposition Tr., exhibit 14). Specifically, when asked how she would characterize the nature of W & H's work, she testified that it was "excellent" as W & H avoided summary judgment pushing the case to trial, which forced the defendants into a position of having to settle the matter (*see id.* pgs. 33-34). Moreover, she testified that W & H "vigorously argued the positions that were there," and that Mr. Hiller himself met the standard of good practice during the course of the litigation since he "prosecuted his client's case with more rigor and more expertise and professionalism than often I would have encountered" (*see id.* pg. 34 line 25, pg. 41, pg. 42 lines 4-7). Additionally, in regards to tax

issues, Ms. Whale testified that in all her years of practice, she had never heard of the Victims of Terrorism Tax Relief Act (Tax Publication 3920) prior to the litigation, and that said Act is not a part of ERISA benefits law and litigation (*see id.* pg. 33).

Defendant has also not presented an evidentiary showing that "but for" W & H's negligence, he would have been successful on his underlying claim, to wit, he would have received a tax refund from the IRS pursuant to Publication 3920 for the tax years 2002, 2004, and 2005. The assertion that he has incurred monetary damages as a result of W & H's incorrect advice to wait on filing the tax refunds for those years until after the deadline had passed, is nothing more than speculative and insufficient to demonstrate "actual and ascertainable damages" required to sustain a legal malpractice claim (*Gallet, Dreyer & Berkey, LLP*, 141 AD3d at 406).

In reviewing defendant's malpractice defense in its entirety, it appears to the Court that said defense seems crafted to avoid his obligation to pay his attorney fees for work performed on his behalf, and may even be a violation of Part 130 of the Rules of the Chief Administrator, which allows this Court to impose sanctions upon an attorney or a party for engaging in frivolous conduct (*see* 22 NYCRR § 130-1.1[c][1]-[3]; *Tavella v Tavella*, 25 AD3d 523, 524 [1st Dept 2006]). However, the Court notes that sanctions were not requested by the plaintiff law firm and this Court declines to *sua sponte* impose sanctions whereas here the defendant has not had a "reasonable opportunity to be heard" (*see* 22 NYCRR § 130-1.1[d]; *Hester v Hester*, 121 AD3d 645, 646 [2d Dept 2014]).

Further, the Court finds that defendant's counterclaims for breach of contract and breach of fiduciary duty must be dismissed as well since they arise from the same facts as the legal malpractice cause of action, do not allege distinct damages, and are thus duplicative of the legal malpractice cause of action (*see Palmeri v Willkie Farr & Gallagher LLP*, 152 AD3d

457 [1st Dept 2017]; *Kvetnaya v Tylo*, 49 AD3d 608 [2d Dept 2008]; *Daniels v Lebit*, 299 AD2d 310 [2d Dept 2002]). Lastly, the Court has reviewed the remaining affirmative defenses and finds them to be without merit.

II. *Motion Sequence 005*

A. Defendant's Motion for a Protective Order

In support of his motion for a protective order, pursuant to CPLR §§ 3101 and 3103, against plaintiff's Subpoenas Ad Testificandum for a deposition of defendant's psychologist, Dr. Lloyd Gilden and psychiatrist, Dr. Edward M. Stephens defendant submits, *inter alia*, an affirmation by counsel Andrew Bluestone; a copy of this Court's Order in motion sequence 002, dated October 7, 2013 and entered on October 11, 2013; and affidavits from Dr. Gilden and Dr. Stephens. Plaintiff files in opposition via cross-motion and submits an affirmation by counsel Michael Hiller; a memorandum of law; and 27 exhibits which include, *inter alia*, a copy of the pleadings, the retainer agreement, documentation from the ERISA litigation, discovery conference orders and email correspondence between counsel. Defendant submits a reply.

In an Order dated October 7, 2013 and entered on October 11, 2013, this Court granted defendant's motion for a protective order against the production of defendant's entire psychological and psychiatric records (*see* Defendant's Notice of Motion, exhibit C). In so finding, this Court noted that plaintiff failed to make the requisite showing that defendant's psychological and medical condition was in controversy such that the production of said records was material and necessary (*see id.*). Moreover, this Court found that defendant does not allege any psychological injury as a result of the alleged malpractice thus he has not placed his mental or physical condition at issue in his counterclaims. Plaintiff did not appeal that decision and it is the law of the case. However, plaintiff at that time was not in possession of a letter sent by Dr. Stephens to the IRS dated December 16, 2009 (*see* Plaintiff's Cross-Motion, exhibit

18). The substance of this letter is not limited to information regarding defendant's physical and mental state, but rather discusses the tax issues which are the subject of this lawsuit and especially defendant's counterclaims. Thus, upon learning of this letter's existence, plaintiff issued Subpoenas Ad Testificandum for Drs. Gilden and Stephens to appear at a deposition. According to Hiller, he has suggested to the defendant that if defendant is not going to be using these physicians as witnesses at trial, then he will withdraw these subpoenas. However, defendant has refused, thus necessitating plaintiff to seek to depose these doctors about the non-medical information contained in letters sent to the IRS concerning tax returns that this Court previously ordered to be produced to the plaintiff.

"CPLR 3101(a) entitles parties to 'full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.' What is 'material and necessary' is left to the sound discretion of the lower courts. . .The test is one of usefulness and reason'" (*Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 746 [2000]). "The words "material and necessary," as used in CPLR 3101(a) are 'to be interpreted liberally to require disclosure ... of any facts bearing on the controversy'" (*Matter of Steam Pipe Explosion at 41st St. & Lexington Ave.*, 127 AD3d 554, 555 [1st Dept 2015]), quoting *Allen v Crowell–Collier Pub. Co.*, 21 NY2d 403, 406 [1968]).

Notwithstanding the previous Order of this Court preventing the disclosure of defendant's records (motion sequence 002), the Court finds that defendant's motion for a protective order herein must be denied. Given the nature of the letter to the IRS and the discussion of tax issues, paramount to the complaint as well as defense to the counterclaims, in addition to the public policy which favors a liberal interpretation of CPLR 3101 (*see Matter of Steam Pipe Explosion at 41st St. & Lexington Ave.*, 127 AD3d at 555), the Court believes that a deposition of Drs. Gilden and Stephens is "material and necessary." However, the deposition is

limited to the issues raised by the physicians' letters in their correspondence to the IRS and the defendant's tax returns produced by Court order. The Court has considered defendant's remaining arguments and finds them unavailing.

B. W & H's Cross-Motion

A preliminary injunction is a drastic remedy which should not be granted unless the movant establishes a "clear right" to equitable relief (*see City of New York v 330 Cont. LLC*, 60 AD3d 226, 234 [1st Dept 2009]; *Blueberries Gourmet v Aris Realty Corp.*, 255 AD2d 348, 350 [2d Dept 1998]). The purpose of a preliminary injunction is "not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits" (*Lehey v Goldburt*, 90 AD3d 410, 411 [1st Dept 2011] [internal quotation marks and citation omitted]; *see also Residential Bd. of Mgrs. of Columbia Condominium v Alden*, 178 AD2d 121 [1st Dept 1991]). To establish entitlement to a preliminary injunction, the movant must establish: (1) a likelihood of success on the merits; (2) irreparable harm absent injunctive relief; and (3) that a balancing of the equities favors the movant's position (*see* CPLR 6301; *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *Gliklad v Cherney*, 97 AD3d 401, 402 [1st Dept 2012]). If any of these elements is not met, the motion must be denied (*see Faberge Intl. v Di Pino*, 109 AD2d 235, 240 [1st Dept 1985]). "Proof establishing these elements must be by affidavit and other competent proof, with evidentiary detail" (*Scotto v Mei*, 219 AD2d 181, 182 [1st Dept 1996] [internal quotation marks and citation omitted]). The decision to grant or deny a preliminary injunction rests within the sound discretion of the trial court (*see Gilliland v Acquafredda Enters., LLC*, 92 AD3d 19, 24 [1st Dept 2011]). Further, the movant must show that the claimed injury is more than just a mere possibility and, in fact, is imminent, not remote or speculative, and likely to occur absent a preliminary injunction (*see Golden v Steam Heat, Inc.*, 216 AD2d 440 [2d Dept 1995]).

After a review of the record, as well as oral argument before this Court on November 18, 2015, and taken with the plaintiff's motion for summary judgement, this Court finds that plaintiff law firm does not meet the standard necessary for a preliminary injunction (*see* Court transcript, dated November 18, 2015). Notwithstanding that this Court granted W & H's summary judgment motion on its first cause of action above, the plaintiff law firm still fails to demonstrate irreparable injury absent the granting of an injunction. While W & H claims that defendant is dissipating his LTD Benefits, the Court finds this claim too speculative to sustain the burden required for granting injunctive relief (*see e.g. Golden,* 216 AD2d 442), and anyways involves monetary damages capable of compensation (*see Louis Lasky Mem. & Dental Ctr. LLC v 63 West 38th LLC*, 84 AD3d 528, 528 [1st Dept 2011]; *J.O.M. Corp. v Department of Health*, 173 AD2d 153, 154 [1st Dept 1991]). Granting an injunction to prevent the dissipation of defendant's LTD Benefits, making it judgment proof, is incidental to and in aid of the monetary relief W & H seeks, and flies in the face of the long-settled proscription against preliminary injunctions merely to preserve a fund for eventual execution of judgment in suits for money damages (*see generally Credit Agricole Indosuez v Rossiyskiy Kredit* Bank, 94 NY2d 541 [2000]). The Court has considered W & H's arguments, including its reliance on cases *Ma v Lien*, 198 AD2d 186 [1st Dept 1993] and *Pando v Fernandez*, 124 AD2d 495 [1st Dept 1986], and finds them unavailing.

As to the remaining parts of the cross-motion, the Court finds that it is granted in its entirety. To the extent that plaintiff law firm still seeks to depose defendant's wife, non-party witness Elisa Fershtadt, it is entitled to do so and the Court sees no legal authority which would prevent her from appearing. Moreover, contrary to defendant's assertion, plaintiff law firm is entitled to priority of deposition as a matter of law. As a general rule, in the absence of special circumstances, priority of examination belongs to the defendant (*see Bucci v Lydon*, 116 AD2d

520 [1st Dept 1986] [internal quotation marks omitted]). However, such priority lies if a notice is served within the time to answer; otherwise, priority belongs to the party who first serves a notice of examination (*see id.*; *Church & Dwight Co. v UDDO & Assoc.*, 159 AD2d 275 [1st Dept 1990]). Here, W & H noticed defendant's deposition prior to defendant noticing a deposition for W & H. Accordingly, pursuant to CPLR 3106(a), W & H is entitled to priority of deposition. Lastly, plaintiff law firm's request for an extension of the time to complete non-party depositions by sixty days is granted.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendant's motion for a protective order, pursuant to CPLR §§ 3101 and 3103, against plaintiff's Subpoenas Ad Testificandum for a deposition of defendant's psychologist, Dr. Lloyd Gilden and psychiatrist, Dr. Edward M. Stephens (motion sequence 005) is denied, and plaintiff's subpoenaed deposition is granted but limited to the issues raised by the physicians in their correspondence to the IRS; and it is further,

ORDERED that the portion of plaintiff's cross-motion which seeks a preliminary injunction, pursuant to CPLR 6301, directing defendant to set aside the funds necessary satisfy the ultimate judgement in this case is denied; and it is further,

ORDERED that the portion of plaintiff's cross-motion which sought to compel the deposition of Elisa Fershtadt is granted, and the deposition of Mrs. Fershtadt shall take place no later than 60 days from the date of entry of this Order, if plaintiff law firm still seeks same; and it is further,

ORDERED that the portion of plaintiff's cross-motion which sought to confirm priority of deposition is granted, and plaintiff shall have such priority pursuant to CPLR 3106(a); and it is further,

ORDERED that the portion of plaintiff's cross-motion which sought to extend the time to complete non-party depositions is granted, and such depositions shall be completed within 60 days from the date of entry of this Order; and it is further,

ORDERED that plaintiff's motion (motion sequence 007) seeking: (i) summary judgement on it First Cause of Action for breach of the retainer agreement; (2) to strike the defendant's affirmative defenses; and (3) dismissing the defendant's counterclaims is granted, and the affirmative defenses and counterclaims asserted in defendant's Verified Answer are hereby dismissed in their entirety; and it is further,

ORDERED that counsel for plaintiff law firm is directed to serve a copy of this Order with Notice of Entry upon the defendant and the Clerk of the Court who shall enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 10/24/17

FILED

OCT 26 2017

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NEW YORK

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PAUL WOOTEN J.S.C.

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