SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 17

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VLADIMIRA KOCH, A/K/A VLAD'KA KOCH, MICHAL KOCH, her son, EUROPA DOCU-SEARCH, INC., EUROVID, INC., EUROVID FKK, HELIOS NATURA, EUROPA DOCU-SEARCH, s.r.o, EUROVIDFKK, s.r.o.,

Index No. 112337/07

Plaintiffs,

-against-

DECISION AND ORDER

SHERESKY, ARONSON & MAYEFSKY LLP, DAVID ARONSON, individually, BRAGAR, WEXLER, EAGEL & MORGENSTERN, P.C., RAYMOND A. BRAGAR, individually, RAGUES & MIN, ESQS., RAYMOND RAGUES, individually, D'AGOSTINO & SALVI, LLP, and FRANK J. SALVI, individually,

Defendants.

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HON. SHLOMO HAGLER, J.S.C.:

Motion sequence nos. 51, 53, 54, 55 and 57 are consolidated for disposition. In motion sequence no. 51, plaintiff Vladimira Koch, a/k/a Vlad'ka Koch ("Koch") moves for an order, pursuant to CPLR 3126 (3), striking the answer of defendants Ragues & Min, Esqs. ("the Ragues firm") and Raymond Ragues ("Ragues") (jointly "the Ragues Defendants"), and directing an adverse inference against the Ragues Defendants; and, pursuant to 22 NYCRR § 130-1.1, for an award of sanctions. Defendants Sheresky, Aronson & Mayefsky, LLP and David Aronson ("the Aronson Defendants") (motion sequence No. 53), the Ragues Defendants (motion sequence No. 54), Bragar, Wexler, Eagel & Morgenstern, P.C., and Raymond A. Bragar (Bragar) (jointly "the Bragar Defendants") (motion sequence No. 55), and D'Agostino & Salvi, LLP, and Frank J. Salvi (jointly "the Salvi Defendants") (motion sequence No. 57) move, pursuant to CPLR 3212, for summary judgment dismissing the amended complaint asserted against them. Koch opposes

defendants' motions for summary judgment and cross-moves for partial summary judgment in her favor against each defendant.

Background

In February 2004, Koch initially retained the Bragar Defendants to represent her in connection with litigation against her former husband, Robert Koch ("RK"), in connection with their jointly owned businesses[1] (the Bragar Defendants moving papers, exhibit l, retainer agreement dated February 10, 2004). After learning that RK had commenced a matrimonial action against Koch (*Koch v Koch*, Sup Ct, Westchester County, Index No. 01805/04 ["the Matrimonial Action"]), the Bragar Defendants contacted the Aronson Defendants to assist in the matrimonial aspects of the case (Aronson aff dated 5/2/17). The Aronson Defendants, as co-counsel with the Bragar Defendants, interposed an answer on behalf of Koch (*id.*, exhibit N, answer dated 3/16/04) and filed a motion by order to show cause, requesting (a) restraints as to the disposition of marital assets, and (b) the appointment of a receiver over two companies jointly owned by the parties (the Aronson Defendants' moving papers, exhibit n, motion dated 4/12/04). An order was issued on July 16, 2004, which, inter alia, directed that a new bank account for the parties' companies be opened in the Bank of New York ("BNY"), with Koch having sole check signing authority, and that RK instruct the companies' distributors to pay for their orders by wire transfer to the BNY accounts or to a New York City post office box (*id.*, exhibit p, order dated 7/16/04 ["the July 2004 Order"]). By email communication dated September 30, 2004, Koch terminated the Bragar Defendants and the Aronson Defendants (the Bragar Defendants moving papers, exhibit Q, email from Koch to Bragar dated 9/30/04), and the

[1] Koch and RK were equal co-owners of two naturist video production companies, Eurovid FKK and Europa-Search Inc.

Ragues Defendants were substituted as counsel (the Aronson Defendants' moving papers, exhibit S, consent to change attorney dated 11/12/04).

In June 2005, RK moved to have Koch held in civil contempt for her failure to comply with the terms of the July 2004 Order, claiming that she, inter alia, directed customers to mail their orders and payments to a post office box in the Czech Republic, and failed to provide monthly accounts of sales (the Bragar Defendants moving papers, exhibit R, order dated 7/14/05 ["the July 2005 Order"]). The court found Koch guilty of contempt, imposed a fee of $5,000 and directed that the management and operation of the companies be transferred to RK, pending the conclusion of the litigation (*id.*). After the Ragues Defendants filed a notice of appeal regarding the July 2005 Order (*id.*, exhibit Y, notice of appeal dated 9/2//05), and RK moved a second time for civil contempt against Koch, Koch canceled their authority to represent her in the Matrimonial Action (*id.*, exhibit Z, email dated 9/15/05). She subsequently signed a stipulation agreeing to relieve the Ragues Defendants as counsel, indicating that she would be representing herself (*id.*, exhibit E, stipulation dated 9/20/05). As reflected in the judgment of divorce, the Ragues Defendants were relieved as counsel based upon this stipulation (see *id.*, exhibit BB, judgment of divorce dated 2/28/06).

Thereafter, while Koch was representing herself, a decision was issued without a hearing, in connection with RK's second contempt motion holding that Koch failed to comply with the July 2005 Order; the court, inter alia, struck Koch's answer and scheduled an inquest, that was held on December 22, 2005 (*id.*, exhibits CC and DD, order dated 11/3/05 [the November 2005 Order]), transcript of 12/22/05, respectively). A judgment of divorce on default was entered in March 2006, granting the divorce sought by RK, and awarding him exclusive title to the parties'

businesses, bank accounts, websites and other properties (*id.*, exhibit BB, judgment of divorce dated 2/28/06 ["the Default Judgment"]).

Subsequent to RK's inquest, Koch retained her present counsel to represent her in the Matrimonial Action (the Bragar Defendants moving papers, exhibit U, notice of appearance dated 3/12/07). Koch moved to vacate the Default Judgment and the contempt orders, i.e., the July 2005 and the November 2005 Order, and her application was granted (*id.*, exhibit V, order dated 5/10/17). Koch then interposed an answer with counterclaims (*id.*, exhibit W, answer dated 6/25/07), and moved for summary judgment. Her application was granted without opposition; the court dismissed RK's complaint for divorce, and granted Koch, inter alia, a divorce, spousal and child support, and damages related to RK's alleged dissipation of corporate assets during the time the companies were under his control (*id.*, exhibit X and Y, orders dated 3/19/08 and 10/23/08 [the October 2008 Order], respectively).

Koch, her son, Michal Koch, and the Companies commenced the instant action asserting primarily legal malpractice claims against the Bragar Defendants, the Aronson Defendants, the Ragues Defendants, and the Salvi Defendants, RK's former counsel in the Matrimonial Action. By decision and order dated July 9, 2009, the court dismissed all plaintiffs from the action except Koch, and dismissed all causes of action asserted in the Amended Complaint against the Aronson Defendants, except for the legal malpractice claims (the fourth, fifth, sixth, eighth and sixteenth causes of action), and against the Salvi Defendants, except for the Judiciary Law §487 claim (the seventeenth cause of action). By decision and order dated May, 17, 2010, the court dismissed all causes of actions against the Bragar Defendants, except for those in fraud (first), and legal malpractice (fourth, fifth, sixth, eighth and sixteenth causes of action). As a result of Koch's failure to appear for her court ordered deposition in accordance with this court's orders

dated March 20, 2014 and December 15, 2015, Koch has been precluded from testifying at trial (the Aronson Defendant's moving papers, exhibit G, order dated 12/15/15). A note of issue was filed on June 28, 2016.

In motion sequence no. 51, Koch moves for an order, pursuant to CPLR 3126 (3), striking the answer of the Ragues Defendants based upon their alleged failure to produce Isabel Mendez ("Mendez"), their former employee, for a deposition, or to provide contact information. Koch's counsel maintains that, the Ragues Defendants knew that Mendez was an important witness for Koch, and that they promised to produce Mendez or her contact information several times during discovery, but failed to do so. He states that, Koch's prior application to direct the production of Mendez for a deposition, or alternatively, her contact information, was denied in March 2017, without prejudice, upon the service of a notice of admit on the Ragues Defendants, which he served on March 29, 2017. Counsel contends that the Ragues Defendants failed to admit the requests made therein relating to Mendez, caused Mendez to be unavailable to testify and give evidence, and destroyed Mendez' contact information, thus resulting in spoliation of evidence. He, thus, seeks that the Ragues Defendant's answer be stricken.

The Ragues Defendants oppose Koch's motion, arguing that there was never a formal demand from her for Mendez' contact information. Their counsel maintains, inter alia, that Koch became aware at Ragues' deposition in December 2010 that Mendez had retired from their firm, and, therefore, the firm had no ability to direct her testimony. Counsel alleges that no follow-up request for this information was made by Koch until Ragues' continued deposition on May 18, 2016, more than five years later; that he informed Koch's counsel, after a court appearance in June 2016, that Ragues could not find any contact information for Mendez.

Counsel denies that the Ragues Defendants engaged in spoliation of Mendez' contact information or caused her to be unavailable as a witness.

As for the notice to admit, counsel avers that the court suggested that Koch serve a notice to admit with respect to documents that Mendez could authenticate, but that instead the notice served sought the Ragues Defendants' admission that approximately 12,000 pages of documents produced during discovery were maintained by the firm, without identifying any particular document that was purportedly signed or sent by Mendez. He further alleges that the notice improperly sought the Ragues Defendants' admissions as to Mendez' knowledge of certain purported facts that are in dispute and contrary to the evidence in the existing record. Additionally, he argues that Koch has not offered any proof of material evidence that Mendez, as Ragues' former receptionist/secretary, could present in this case, or any particular document that may be excluded at trial by virtue of the inability to depose her.

Pursuant to CPLR 3126 (3), states, in relevant part, that "if any party . . . refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them . . . an order striking pleadings or parts thereof . . .". "It is well settled that the drastic remedy of striking a party's pleading pursuant to CPLR 3126 for failure to comply with a discovery order . . . is appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith" (*Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011] [internal quotation marks and citation omitted]). Additionally, "to impose a sanction for spoliation of evidence, it must be established that the individual to be sanctioned was responsible for the loss or destruction of evidence crucial to the establishment of a claim or defense at a time that such

evidence might be needed for future litigation" (*Haviv v Bellovin*, 39 AD3d 708, 709 [2d Dept 2007]).

Here, Koch's counsel fails to demonstrate that the Ragues Defendants refused to obey an order for disclosure, willfully failed to disclose Mendez' contact information, or that Mendez' deposition is crucial to the establishment of her claims. It is undisputed that, during Ragues' deposition in 2010, Koch was informed that Mendez had retired from her employment with the Ragues Defendants and was no longer under their control (the Ragues Defendant's opposing papers, exhibit A, tr of 12/15/10 at 771). The record further reflects that, although a request was made at Ragues' deposition for the production of Mendez' last known address (*id.*), a request was not made again until Ragues' continued deposition in May 2016, more than five years later (*id.*, exhibit C, tr of 5/18/16 at 1161), and then, a month later, on June 22, 2016, at the parties' court appearance (Koch's moving papers, exhibit C, tr dated 6/22/16 at 41). While Koch's counsel alleges that the court transcript taken at the June 2016 court appearance reflects that there was a court ordered stipulation requiring the production of Mendez or her contact information (Koch's moving papers, exhibit C, tr dated 6/22/16 at 41), a review of the transcript fails to disclose the existence of such stipulation or any directive by the court relating to Mendez, instead, it reflects the agreement of the Ragues Defendants' counsel, after hearing Koch's counsel request for Mendez' last known address, that he would produce any records his clients had relating thereto (*id.*). Koch's counsel acknowledges the receipt of correspondence from the Ragues Defendants' counsel approximately a month later, wherein he stated that he "was advised that [his] client did not find any information concerning [Mendez] in its files" (the Ragues Defendants' counsel's affirmation in opposition, exhibit E, correspondence dated 7/29/16).

As noted by the Ragues defendants' counsel, Koch's motion to compel Mendez' deposition or production of her contact information, made in September 2016, was based on Koch's claim, inter alia, that Mendez' deposition was required in the instant legal malpractice case, because "there were certain documents which only [she] can identify because she signed them or sent them" (the Ragues Defendant's opposing papers, exhibit C, tr dated 3/8/17 at 43). This Court denied her motion without prejudice to renew after the service of a notice to admit with respect to those documents that she claimed only Mendez could identify (tr 3/8/17 at 50 - 51).

It is well settled that "a notice to admit pursuant to CPLR 3123 (a) is to be used only for disposing of uncontroverted questions of fact or those that are easily provable, not for the purpose of compelling admissions of fundamental and material issues or ultimate facts that can only be resolved after a full trial" (*Meadowbrook-Richman, Inc. v Cicchiello*, 273 AD2d 6, 6 [1st Dept 2000]). As argued by the Ragues Defendants, the notice to admit served did not seek the admission of any particular document that was signed or sent by Mendez, but rather sought that the Ragues Defendants admit that approximately 12,000 pages of documents produced during discovery, identified as Bates numbers Koch 1 through 11971, P1485, P1486, P1495, P1496, were maintained by them as part of Koch's file (the Ragues Defendants' opposing papers, exhibit H, notice to admit dated 3/29/17, §§ 7, 8 ["the Notice"]. In responding to the admission sought by Koch regarding these documents, the Ragues Defendants denied the admission, and stated, inter alia, "the legal file maintained by them was produced in this action as RM 00001 through RM 00097" (*id.*, exhibit I, the Ragues Defendants' responses to Koch's notice to admit dated 4/717, §7), and that the documents referred to in the notice are copies of the documents produced in this action by Koch and the Bragar Defendants (*id.*, § 8). Contrary to Koch's

counsel's argument, their responses were appropriate. The Notice was not intended to require the Ragues Defendant to wade through thousands of documents, but rather to specify those documents that Koch wished to have authenticated.

Further, the Notice also sought admissions regarding Mendez' knowledge of certain purported events, i.e., that the Ragues Defendants never forwarded Koch's legal file and documents in their possession to Koch's home address when she requested (the Notice, § 10), and that the Ragues Defendants did not explain to Koch her rights with respect to termination of attorney representation in New York (*id.*, § 13). Inasmuch as these are contested issues and ultimate facts in the case, Koch was not entitled to have those issues deemed admitted (*Echevarria v 158th St. Riverside Dr. Hous. Co, Inc.*, 113 AD3d 500, 502 [1st Dept 2014]).

Additionally, as the moving party seeking sanctions based on the spoliation of evidence, Koch is required to "demonstrate: (1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a 'culpable state of mind', and finally, (3) that the destroyed evidence was relevant to the party's claim or defense" (*VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 45 [1st Dept 2012]). The burden is on the party requesting sanctions to make the requisite showing (*see Mohammed v Command Sec. Corp.*, 83 AD3d 605, 605 [1st Dept 2011]).

Here, Koch fails to meet the requisite burdens. Contrary to Koch's counsel's contention, there are no factual allegations in the Amended Complaint that would have placed the Ragues Defendants on notice at the inception of this action that such contact information would be required, or that, at the time of the first request for Mendez's contact information the Ragues Defendants had her last known address (Ragues testified that he "may have it somewhere" and was willing to provide it if he had it [tr of 12/15/10 at 771]). Further, Koch does not proffer any

written request for such information. This Court also notes that Koch did not list Mendez as a witness in her response to the defendants' demand for names and addresses (*id.*, exhibit B, response dated 8/13/09). The record is devoid of any supplemental or amended response listing Mendez as a witness. Additionally, in response to Koch's motion to compel in 2016, Ragues alleged that he looked for Mendez' records and did not find any employment or other files for which to obtain her contact information (the Ragues Defendants' opposing papers, exhibit F, affidavit dated 10/28/16). He further indicated that he had moved into new offices, since Mendez' retirement, and did not retain any employment records concerning Mendez (*id.*).

During oral arguments of Koch's instant motion, her counsel maintained that Mendez' testimony was necessary for Koch's claims because Mendez was present during conversations between Koch and Ragues; however, he was unable to provide any factual support for such position (tr held on 9/28/17). While this Court provided counsel with the opportunity to submit a letter identifying an affidavit or sworn pleading by Koch that Mendez was present at any time during conversation between Koch and Ragues with respect to legal representation" (*id.* at 25-26), in his letter, counsel refers to allegations in the amended complaint that only mention the Ragues Defendants with Koch, without any reference to Mendez (correspondence from Koch's counsel dated 10/24/17). Further, he made other arguments which were not responsive to this Court's directive, and, thus, are not considered.

Accordingly, in motion sequence no. 51, those branches of Koch's motion for an order, pursuant to CPLR 3126 (3), striking the answer of the Ragues Defendants and directing an adverse inference against the Ragues Defendants, is denied.

In motion sequence no. 51, Koch also moves, pursuant to 22 NYCRR § 130-1.1 (a), for Koch's costs and counsel fees incurred as a result of the Ragues Defendants purported "willful,

contumacious and wrongful conduct and spoliation of evidence" (Koch's counsel's affirmation dated 4/17/17). "The court, in its discretion, may award to any party or attorney in any civil action or proceeding . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct" (22 NYCRR 130-1.1). Conduct is frivolous if "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false" (22 NYCRR 130-1.1 [c]; *see Premier Capital v Damon Realty Corp.*, 299 AD2d 158, 158 [1st Dept 2002]). Here, Koch fails to demonstrate that the Ragues Defendants or their attorneys engaged in conduct relating to Mendez' contact information that can be characterized as frivolous within the meaning of § 130-1.1 © (*Stone Mtn.Holdings, LLC v Spitzer*, 119 AD3d 548, 550 [2d Dept 2014]).

In motion sequence nos 53, 54, 55 and 57, defendants respectively move for summary judgment dismissing the claims asserted against them. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once a prima facie showing has been made, the burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists, warranting a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986])

The Court shall first address the defendants' respective summary judgment motions in the order in which they represented Koch in the Matrimonial Action. Since the Bragar

Defendants and the Aronson Defendants ("Initial Counsel") jointly represented Koch at the inception of the Matrimonial Action, their motions shall be considered together.

In support of their respective motions, the Initial Counsel argue that summary judgment dismissing the legal malpractice claims asserted against them (fourth, fifth sixth, eighth and sixteenth causes of action) should be granted in their favor. To establish legal malpractice, plaintiff "must establish that [defendants] failed to use the ordinary reasonable skill and knowledge commonly possessed by [members] of the legal profession and that the . . . 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] [internal quotation marks and citation omitted]). In moving for summary judgment dismissing legal malpractice claims, defendant must establish that the plaintiff would be unable to prove at least one of these essential elements of her claim (*see, Aur v Manhattan Greenpoint Ltd.*, 132 AD3d 595, 595 [1st Dept 2015]; *see also Sabalza v Salgado*, 85 AD3d 436, 437 [1st Dept 2011]).

Initial Counsel first argue that, since Koch has been precluded from offering testimony in support of her claims, she may not oppose summary judgment by offering testimony through affidavit or otherwise. They further note that, in her fourth cause of action, she alleges that these defendants negligently misrepresented to Koch that she should submit to jurisdiction in New York (amended complaint, ¶ 225); and that they knew or should have known that she was not properly served in the Matrimonial Action, thus depriving the New York court of personal and subject matter jurisdiction (*id.*, ¶ 227). The Initial Counsel acknowledge that the Answer interposed on her behalf in the Matrimonial Action did not raise any jurisdictional defenses. They argue, however, that they did not breach any duty with respect to either subject matter or personal jurisdiction because Koch actively sought out legal representation in New York to sue

RK for control of the couple's companies, and that proceeding in the Matrimonial Action resulted in obtaining the result she wanted (Aronson aff dated 5/2/17; Bragar aff dated 5/6/17).

Bragar alleges that, in February 2004, Koch, who was conversant in English, contacted Bragar to represent her in New York regarding her commercial claims against Robert Koch, and signed a retainer agreement on February 10, 2004, which reflected that she was retaining the Bragar Defendants with respect to her claims against Robert Koch arising from the parties' companies and business ventures; and that the retainer did not contemplate any representation in connection with a matrimonial action or for legal services in immigration matters (Bragar's affirmation 5/6/17; the Bragar Defendants' moving papers, exhibit L, retainer agreement dated 2/10/04; the Sheresky Defendants' moving papers, exhibit I, Bragar's deposition 11/17/10 at 103, 310). Bragar further maintains that, after the Bragar Defendants were retained, he learned that RK had commenced the Matrimonial Action; and that he told Koch that the Matrimonial Action would provide an opportunity to obtain the relief that she was seeking without the need to effect service on him, which was a concern (Bragar's affirmation 5/6/17; the Sheresky Defendants' moving papers, exhibit I, Bragar's deposition 11/17/10 at 165-166). The Initial Counsel argue that, with a defendant located in the state of New York, and marital and separate property that was governed by a partnership agreement executed in the State of New York with a "choice of law' provision calling for the application of New York law, it was well within their reasonable strategic judgment to pursue Koch's claims in the Matrimonial Action,

Initial Counsel further contend that a subject matter jurisdiction defense could have been raised by the successor counsel at any time during the course of the litigation, inasmuch as a defect in subject matter jurisdiction cannot be waived, and may be raised at any time during an action (CPLR 3211 [e]). They also note that, when Koch was given a second chance to submit an

answer in the Matrimonial Action, her present counsel proceeded to litigate Koch's commercial claims against RK in the same forum. Additionally, she did not seek to dismiss the Matrimonial Action on jurisdictional grounds, but rather submitted an answer and utilized the same strategy Koch now complains that these Defendants inappropriately used. Thus, they argue that they cannot be liable for what was, at its essence, a strategic decision on their part.

The Initial Counsel also note that, apart from her jurisdictional claims, Koch accuses them of failing to (1) advise her of her right to pursue remedies in tort for battery (amended complaint, fifth cause of action, §§ 233-240), (2) pursue child support (*id.*, sixth cause of action, § 244[e]) or spousal maintenance (*id.*, § 244 [f]), (3) advise her of the consequences of their withdrawal (*id.*, eighth cause of action, § 264-271), and of causing her emotional and physical damages as a result of their alleged breaches and "exorbitantly priced legal services" (*id.*, sixteenth cause of action, §§370-378).

With respect to Koch's alleged battery claim, Initial Counsel maintains, while they were not retained to advise her of tort remedies, as a matter of strategy, the answer interposed on her behalf in the Matrimonial Action raised her claims of spousal abuse by RK (verified answer dated 3/16/04 [the Answer], § 5). Aronson alleges that spousal abuse can be alleged within a divorce action to request that the court award a disproportionate share of the marital estate to the victim of the abuse, as opposed to pursuing the abuser separately in a tort action (Aronson affirmation 5/2/17 at 14). Thus, Initial Counsel argue that it cannot be said they did not pursue effective remedies for Koch as a victim of spousal abuse. They further maintain that the statute of limitations for a battery claim did not expire until after they were terminated, and, thus, Koch or her successor counsel could have timely pursued this claim.

The Initial Counsel also note that the answer they interposed on her behalf clearly stated that the relief Koch was seeking included, inter alia, an award of sole custody of Michal Koch, child support and spousal maintenance (the Sheresky Defendants' moving papers, exhibit L, answer dated 3/16/04).

Initial Counsel maintain that, while Koch alleges that they negligently withdrew from representing her, the evidence, consisting of her email dated September 30, 2004 (Aronson's moving papers, exhibit R, email dated 9/30/04), and the consent to change attorney form executed by her (*id.*, exhibit S, consent to change attorney to the Ragues Defendants dated 12/12/04), demonstrates that she, of her own volition, terminated their respective firms. Additionally, they argue that their purported negligent withdrawal could neither be viewed as the cause of any damages, inasmuch they were no longer the attorneys of record in 2005, when Koch was held in contempt twice, nor, in 2006, when the Default Judgment was entered against her. Thus, they request that summary judgment dismissing the legal malpractice claims be granted in their favor.

In opposition to the Sheresky Defendant's summary judgment motion, and in support of her motion for summary judgment on her legal malpractice claims, Koch's counsel submits, inter alia, an affidavit by Koch. He argues that, while the preclusion order bars her from testifying at trial, it does not bar her from submitting an affidavit or evidence through other means in opposition to defendants' summary judgment applications. Counsel also relies on an affidavit by Kathryn S. Lazar, Esq., Koch's expert, who opines that the Initial Counsel failed to use the ordinary reasonable skills and knowledge commonly possessed by member of the legal profession and that, but for these breaches, Koch would have received, inter alia, child support,

arrears, and spousal support, and would not have had to incur additional legal fees, and contempt sanctions.

Additionally, Koch's counsel argues that the comparison of the orders entered against her (the July 2005 Order and the November 2005 Orders) with the October 2008 Order issued in her favor demonstrates that Koch received a more favorable result, and is the basis for her damages against the Initial Counsel, i.e., the awards issued in her favor. He contends that, since the Initial Counsel did not challenge the findings of fact, conclusions of law and awards made in the October 2008 Order, these findings are binding on them, pursuant to the doctrine of collateral estoppel. He also proffers arguments in support of other purported breaches by the Initial Counsel which have not been asserted against the Initial Counsel in the amended complaint, and, thus, need not be addressed by this Court.

Here, the Initial Counsel demonstrate their entitlement to summary judgment with respect to the legal malpractice claims asserted against them. Since an order was issued precluding Koch from testifying at trial, as argued by the Initial Counsel, she is barred from offering her own "affirmative evidence" through an affidavit to oppose the summary judgment applications (*see, Mendoza v Highpoint Assoc. IX, L.L.C.*, 83 AD3d 1, 9 [1st Dept 2011]). Allowing such testimony "would perversely undermine the point of the [preclusion] order by allowing [Koch] to benefit from the short cut of summary judgment by use of the same evidence that otherwise would have been barred at trial" (*id*).

Further their evidence, consisting of, inter alia, their depositions, affidavits and other documentation, including the retainer agreement, clearly negate Koch's claims of purported breaches asserted against the Initial Counsel in the amended complaint against the Initial Counsel. The record establishes that Koch initially retained the Bragar Defendants to pursue

claims against RK for control of the parties' companies; that, after being informed of the Matrimonial Action, the Initial Counsel interposed an answer, that had been sent to Koch (the Bragar's exhibit L, correspondence dated 2/13/04), which sought, inter alia, spousal and child support, and reflected spousal abuse (the Bragar's exhibit M, answer dated 3/16/04). The record also demonstrates that the Initial Counsel filed an application on Koch's behalf for injunctive relief that resulted in relief in her favor, including providing her with, inter alia, sole check-signing authority of the bank accounts of the parties' businesses, Europa Docu-Search, Inc. and Eurovid FKK New York, and access to the post office box of these companies (the Bragar Defendants's exhibit O, the July 2004 Order). The Initial Counsel thus demonstrate that their decision to not challenge personal jurisdiction, and to proceed in the Matrimonial Action was a reasonable strategic decision that obtained the results sought by Koch. It is well settled that "neither an error in judgment nor in choosing a reasonable course of action constitutes malpractice" (*Hand v Silberman*, 15 AD3d 167, 167-168 [1st Dept 2005]).

Further, with respect to subject matter jurisdiction, as argued by the Initial Counsel, "[a] defect in subject matter jurisdiction may be raised at any time by any party or by the court itself" (*Strunk v New York State Bd of Elections*, 126 AD3d 777, 779 [2d Dept 2015] [internal quotation marks and citation omitted]). Here Koch complained that RK's purported inability to satisfy the residency requirements of Domestic Relations Law (DRL) § 230 (1) resulted in the Matrimonial Court's lack of subject matter jurisdiction. This Court notes, however, that the "Supreme Court . . . is vested constitutionally with 'subject matter jurisdiction' in matrimonial actions' (*Lacks v Lacks*, 41 NY2d 71, 76 [1976]), and the requirement of section 230 goes "only to the substance of the divorce cause of action, not to the competence of the court to adjudicate the cause" (*id.* at 73). Thus, contrary to Koch's allegation, any issue relating to RK's residence, pursuant to DRL

230, would not have rendered the court in the Matrimonial Action without subject matter jurisdiction. Thus, the Initial Counsel demonstrate that Koch's complaint that they breached their duty to raise jurisdictional defenses on her behalf, as alleged in the fourth sixth causes of actions, is not supported by the record.

With respect to the fifth cause of action, where Koch's claims that the Initial Counsel breached their respective duties by failing to advise Koch of her right to pursue remedies in tort for battery, the record demonstrates that the subject retainer agreement executed by Koch with the Bragar Defendants provides that they were retained to represent her in connection with "her claims against [RK] arising from Europa Docu-Search Inc. and Eurovid," the companies owned by Koch and RK (the Bragar Defendants' exhibit L, retainer agreement dated 2/10/04), and that the Initial Counsel, with Koch's acknowledgment and agreement, represented her in the Matrimonial Action (*see id*; the Bragar Defendants' exhibit P, email from Koch to Bragar dated 9/30/04, advising that she was terminating their services relating to the Matrimonial Action). There is nothing in the record that demonstrates that their representation was expanded to include a separate tort action.

In any event, as previously noted, the answer interposed by the Initial Counsel includes spousal abuse allegations, in that it refers to RK's "repeated physical assaults upon [Koch's] person" since approximately December 2002 (the Aronson's exhibit L, answer dated 3/16/04). Additionally, the record demonstrates that Koch terminated the Initial Counsel (the Aronson Defendants' exhibit R, email dated 9/30/04), and new counsel were substituted (the Aronson Defendants' exhibit S, consent to change attorney dated 11/12/04; the Bragar Defendants' exhibit Y, the October 2008 Order), who had "sufficient time and opportunity to adequately protect [Koch's] rights" with respect to any jurisdictional defenses or potential tort claims

(*Maksimiak v Schwartzapfel Novic Truhowksy Marcus, P.C.*, 82 AD3d 652, 652 [1st Dept 2011]). Inasmuch as "the substitution of counsel was a superseding and intervening act that severed any potential liability for legal practice on the part of [the Initial Counsel] (*see Liporace v Neimark & Niemark, LLP*, 157 AD3d 473, 474 [1st Dept 2018]), proximate cause cannot be demonstrated (*Maksimiak v Schwartzapfel Novic Truhowksy Marcus, P.C.*, 82 AD3d at 652; *Perks v Lauto & Garabedian* , 306 AD2d 261, 262 [2d Dept 2003]). Thus, the Initial Counsel demonstrate that they are entitled to summary judgment on the fifth cause of action.

The sixth cause of action, aside from purported breaches regarding jurisdiction, alleges, inter alia, that the Initial Counsel did not pursue child support or any other recovery with respect to Michal Koch or spousal support. The Initial Counsel demonstrate that the answer they interposed on Koch's behalf negates such allegations, inasmuch as it expressly sought, inter alia, that Koch be awarded sole custody of Michal Koch, child support and spousal maintenance (the Bragar Defendants' exhibit o, answer dated 3/16/04).

The eighth cause of action complains, inter alia, that the Initial Counsel breached their duties by negligently withdrawing from representing Koch in the Matrimonial Action (the amended complaint, ¶ 264-270). As previously noted, the Initial Counsel submit proof that Koch terminated their services. The record is devoid of any evidence demonstrating that the Initial Counsel withdrew prior to her termination of their services.

As for the sixteenth cause of action, Koch complains that she suffered emotion distress as a result of the breaches by the Initial Counsel (the amended complaint, 369 – 372). As discussed herein, the Initial Counsel sufficiently demonstrate that they have not breached the aforementioned duties alleged by Koch in her amended complaint. In view of the foregoing, the

Initial Counsel make a prima facie showing of entitlement to summary judgment dismissing the legal malpractice claims asserted against them.

It is well settled that "summary judgment motion is the procedural equivalent of a trial, requiring a party to submit in opposition evidentiary facts or materials, by affidavit or otherwise . . . demonstrating the existence of a triable issue of ultimate fact" (*see Adam v Cutner & Rathkopf*, 238 AD2d 234, 240 [1st Dept 1997] [quotation marks and citations omitted]). As previously noted, in light of the order precluding Koch's testimony at trial, her affidavit is also barred (*see, Mendoza v Highpoint Assoc IX, L.L.C.*, 83 AD3d at 9). Further, the proffer of an affidavit by her expert on legal malpractice is also unavailing, since it is the function of the court to determine whether the Initial Counsel's performance or absence thereof constitutes malpractice (*Dimond v Salvan*, 78 AD3d 407, 407 [1st Dept 2010]; *see also Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass*, 301 AD2d 63, 69 [1st Dep 2002]). Attorneys' affidavits are not relied upon by the court to determine what constitutes malpractice (*id*).

Additionally, Koch's argument that the findings in the October 2008 Order are binding on the Initial Counsel, pursuant to the doctrine of collateral estoppel, are without merit. Collateral estoppel applies when "the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and . . . the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination" (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985). In the October 2008 Order, the court found, inter alia, that the contempt orders, i.e., the July 2005 Order and the November 2005 Order, were improvidently entered against her due to the "improper acts and negligence of [Koch's] then counsel with the active participation of [RK's] counsel (the Sheresky Defendants' exhibit Y, October 2008 Order, ¶¶ 60-63], and that the Default Judgment of Divorce was

"procured by reason of the active fraud and perjuries perpetrated by [RK], who was aided and abetted by his counsel, as well as by the negligence of [Koch's former counsel]" (*id.*, ¶ 67). The record reflects that the contempt orders and the Default Judgment of Divorce were entered against Koch at a time when the Initial Counsel's representation had already terminated. Further, this court notes Koch's allegations, in the amended complaint, that the July 2005 order was entered against her at a time when she was represented by the Ragues Defendants (complaint, ¶¶ 123-130, 136, 153), that the November 2005 Order was granted subsequent to the Ragues Defendants' withdrawal (and thus after Koch terminated the services of the Initial Counsel] (*id.*, ¶ 152), and that, as a direct and proximate result of the "deceitful representations" of the Salvi Defendants, RK's counsel, the Default Judgment of Divorce was entered in RK's favor (*id.* ¶153-165). Thus, no assertion of wrongdoing as found in the November 2005 Order could possibly be extended to the Initial Counsel. The Initial Counsel state, and the record reflects, that they had no further involvement in the Matrimonial Action after the Ragues Defendants were substituted as counsel in November 2004, and thus, had no reason or opportunity to contest the findings in the November 2005 Order. This Court has considered Koch's other arguments, and find them to be without merit. Her counsel's averments made in opposition to the Initial Counsel's summary judgment without any personal knowledge of facts or supported by evidence in admissible form are insufficient to defeat the motion (*Johannsen v Rudolph*, 34 AD3d 338, 339 [1st Dept 2006]).

Accordingly, the motions by the Initial Counsel for summary judgment dismissing the legal malpractice claims against them, as asserted in the fourth, fifth, sixth, eighth and sixteenth cause of action (motion sequence nos. 53 and 55), are granted. In view of the foregoing, Koch's

motion for summary judgment in her favor against the Initial Counsel, with respect to the legal malpractice claims, is denied.

The Bragar Defendants also move for summary judgment dismissing the remaining cause of action for fraud asserted against them. In an action to recover damages for fraud, a plaintiff must establish "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]).

The fraud claim asserted again the Bragar Defendants is based on their alleged failure to disclose that they did not practice matrimonial law, the recruitment of the Aronson Defendants allegedly without Koch's knowledge, and Koch's alleged reliance on this alleged fraud to her detriment (the amended complaint, ¶¶ 194-210). The Bragar Defendants sufficiently demonstrate that three days after the retainer agreement was signed with them, Koch was made aware of the involvement of the Aronson Defendants in the Matrimonial Action (the Bragar Defendants' exhibit P, email dated 2/13/14), and that invoices were sent to her, which documented the services of both firms (*id.*, invoices dated 3/31/04 - 2/28/05).

Further, the Bragar Defendants note that the only damages claimed by Koch that potentially relate to these purported misrepresentations would be the increase in legal fees caused by the co-relationship between the Initial Counsel (the amended complaint, ¶ 210). They maintain that the combined bill of the Initial Counsel for their representation of Koch in the Matrimonial Action was $116,476.67, of which the Bragar Defendants billed $99,372.676 (*id.*, the Bragar Defendants' answer, ¶ 41, invoices dated 3/31/04 through 2/28/10, respectively); that Koch admits that she paid $50,000 (the amended complaint, ¶¶ 90, 201); that a credit of $23,804

was issued to Koch in the Matrimonial Action (the Bragar Defendants' answer, ¶¶ 418, 421); and that $42,457.20 of the legal bill went unpaid (*id.*,¶ 419, 422, 429). They further note, however, that their counterclaims for the unpaid amount of $42,457.20 were previously dismissed by this court as a result of the Bragar Defendants' failure to file a retainer agreement in the Matrimonial Action, as required by the rules relating to domestic relations matters, i.e., 22 NYCRR part 1400 (Order dated 5/17/10 at 13-15). Thus, they argue that Koch cannot demonstrate that she has been damaged, since they have been forced to absorb the legal fees charged by the Aronson Defendants, or shown other damages that are unique to her fraud claim, separate and apart from the damages alleged in her malpractice claims. In view of the foregoing, the Bragar Defendants demonstrate a prima facie entitlement of summary judgment dismissing the fraud claim asserted against them.

Since Koch makes no argument in opposition that would raise an issue of fact (*see Klapper v Wang Labs.*, 165 AD2d 693, 694 [1st Dept 1990]), that branch of the Bragar Defendants' motion for summary judgment dismissing the second cause of action in fraud, in motion sequence no. 55, is granted

In motion sequence no. 54, the Ragues Defendants move for summary judgment dismissing the complaint against them, specifically the fifth, and ninth through twelfth causes of actions.

In support of their motion, the Ragues Defendants also argue that Koch is precluded from offering her own affirmative evidence to oppose their motion, due to the order of preclusion entered against her. They also allege that the record establishes that Koch is unable to prove her claims against them.

With respect to the fifth cause of action, which alleges that the Ragues Defendants did not prosecute a separate tort claim on her behalf (amended complaint, ¶ 236), Ragues argues that the Ragues Defendants were solely retained to represent Koch in the Matrimonial Action, and they never agreed to bring any other separate action on her behalf against RK for battery or otherwise. He further maintains that the answer filed on her behalf by the Initial Counsel raised the issue of the alleged physical abuse of Koch by RK. He, thus, argues that adequate relief could have been obtained in the Matrimonial Action had they not been terminated by Koch.

The Ragues Defendants note that, in the ninth cause of action, Koch alleges, inter alia, that she relied on their misrepresentation that they would represent her in the Matrimonial Action for the total sum of $6,000 (also the basis for the tenth cause of action); that after she paid them $6,000, they refused to, inter alia, prosecute the case vigorously, and allowed a contempt citation to go to a hearing without procuring her testimony (the amended complaint, ¶¶ 274 – 286). Ragues claims that, in his initial meeting with Koch, held in or about late October 2004, he told her, and she agreed to pay $250 an hour for court appearances with an initial retainer payment to be made by her of $3,500, and sent an email to her confirming those terms (the Ragues Defendants' exhibit F, email to Koch dated 10/24/04). He alleges that the only payment received from Koch was the initial retainer of $3,500, although their total bill was $9,595.48 (see, the Ragues Defendants' exhibit H, invoice dated 6/15/05).

He also avers that, during the period, in which the Ragues Defendants represented Koch, there were no evidentiary hearings at which she had to appear to testify, and that she was neither prejudiced nor harmed in any way by not appearing personally at any hearing. With respect to RK's first contempt motion, counsel contends that he conferred with Koch at length, personally prepared her opposing affidavit, and filed it in a timely manner, and that the motion was

submitted and fully resolved on the papers without an evidentiary hearing. He maintains that, in support of his motion, RK submitted documentary evidence reflecting that Koch had failed to comply with the directives issued in the July 2004 Order relating to the parties' businesses. He alleges that, after Koch was determined to be in contempt of the July 2004 Order, he advised her that she was obligated to fully comply with this order (the Ragues Defendants' exhibit X, email dated 8/17/05); that, in her written response, she accused him of conspiring with RK's counsel (*id.*); that, on September 2, 2005, he filed a notice of appeal to protect Koch's interest by seeking review of the contempt order (the Ragues Defendants' exhibit Y, appeal dated 8/4/05); that, when RK moved, in September 2005, for a second time against Koch for civil contempt, he sent the moving papers to Koch; that she responded by sending the Ragues Defendants an email, with an attachment entitled "Cancel the Full Power of Attorney," which revoked their authority to represent her in the Matrimonial Action (the Ragues Defendants' exhibit Z, email and attachment dated 9/15/05); and that, on November 16, 2005, she filed with the court her "Appeal," pro se, wherein she stated, inter alia, that "at present I am temporarily forced to act as my own counsel for defense" and proffered her opposing arguments to the RK's second contempt motion (the Ragues Defendants' exhibit AA, Appeal dated 9/17/05). Ragues indicates that he requested, and obtained from Koch, a stipulation relieving the Ragues Defendants from the Matrimonial Action (the Ragues Defendants' exhibit E, Stipulation dated 9/23/05); that he made an application to be relieved as counsel due to her termination of the services of the Ragues Defendants, which was granted on September 20, 2005, and was reflected in the Default Judgment (the Ragues Defendants' exhibit BB, the Default Judgment). He argues that the Ragues Defendants should not be held responsible for any adverse decision issued against Koch after they were relieved of representing her.

With respect to the eleventh cause of action, Ragues notes that Koch alleges that the Ragues Defendants breached their duties by failing to, inter alia: (1) raise any jurisdictional claims; (2) seek child support or other relief for her son, Michael; (3) inform Koch that they were not qualified to address international and immigration issues; and (4) proffer Koch's testimony or her affidavit at a February 2005 hearing (the amended complaint, ¶ 301).

Ragues maintains that jurisdiction was no longer an issue when the Ragues Defendants appeared as her counsel, because that defense was not raised in the answer filed by the Initial Counsel, and affirmative relief was sought therein. He further contends that he engaged in settlement discussions with RK's counsel during a court conference, which included, inter alia, child support; that RK's counsel later provided him with proposed terms for settlement of the action, which included, among other things, child support (the Ragues' exhibit N, settlement letter dated 3/24/05), and that he discussed the proposal with Koch. He submits responses that he received from Koch regarding the settlement proposal (the Ragues' exhibits O & P, fax dated 4/29/05 and email dated 5/17/05, respectively).

As for the purported breach regarding immigration issues, he maintains the Ragues Defendants never agreed to provide immigration services, but rather were retained solely to represent her in the Matrimonial Action. He contends that, during the course of their representation, Koch advised him that she had an immigration attorney representing her in her immigration matters; that, during discovery in this action, he learned that her immigration counsel was Vratislav Pechota, Esq., and that Koch sued him in the United States District Court for the Southern District of New York for legal malpractice (the Ragues Defendants' exhibit I, *Koch, et al. v Pechota, Jr., et. al.*, US Dist Ct, SD NY, 10 Civ 9152). He further maintains that, without seeking any advice from him, in early 2005, Koch left the United States for the Czech

Republic without taking steps to protect her immigration status; that while Koch later claimed in 2005 that she could not return to the United States, RK's counsel represented in court, that on his own, he had conferred with Pechota, who advised him that there were numerous ways for Koch to enter the United States to be present in the litigation, i.e., by obtaining either a Non-Immigrant tourist visa or business visa (the Ragues Defendants exhibit P, correspondence from RK's counsel to Justice Giacomo dated 5/9/05 and cc: to the Ragues Defendants and RK [the Immigration Letter]); and he claims that, as he was directed by the court in the Matrimonial Action, he forwarded this letter to Koch, who was in Czech Republic, and advised her to review the letter with her immigration lawyer.

Ragues disputes that there was a hearing held in February 2005 as alleged by Koch. He maintains that, as reflected in the July 2005 Order, the court issued its decision, regarding RK's first contempt application, based on the submitted papers, wherein it found that there was no need for a hearing (the Ragues Defendants' exhibit V, the July 2005 Order).

As for the twelfth cause of action, it alleges, inter alia, that the Ragues Defendants breached their respective duties by negligently withdrawing from representing Koch, and that, had they continued to represent her, she would not have sustained the damages arising from the dismissal of her appeal of the July 2005 Order and the Default Judgment (the amended complaint, ¶¶ 316 -330). Ragues alleges that Koch summarily terminated the services of the Ragues Defendants after he sent her the motion papers relating to RK's second contempt (the Ragues Defendants' exhibit Z, email dated 9/15/05 from Koch to the Ragues Defendants). He also notes that, in the "Appeal" she filed pro se in the Matrimonial Action, she stated that she had "ended her co-operation" with Ragues on September 15, 2005" and was acting as her own counsel (the Ragues' Defendants' exhibit AA, Appeal dated 9/17/05, ¶¶ 2,3). He, thus, argues

that she acknowledged that she terminated their services in September 2005. He further notes that, in the "Appeal," Koch admitted that she had unilaterally closed the New York Post Office Box and a bank account, even though to do so was in violation of the July 2004 Order without seeking leave of the Court (*id.*, ¶ 30). He further maintains that the Ragues Defendant were properly relieved as attorney of record by the court, after she decided to proceed pro se and executed a stipulation relieving them. He further notes that the Default Judgment was entered after their termination, while Koch was representing herself. Thus, the Ragues Defendants argue that they demonstrate that summary judgment dismissing the claims against them should be granted.

In opposition to the Ragues Defendants' motion and in support of Koch's motion for summary judgment on her legal malpractice claims, Koch's counsel submits the affidavits of Koch and her expert, Lazar. He also maintains that the record demonstrates that a prima facie case of legal malpractice against the Ragues Defendants can be demonstrated by, inter alia, (1) the Ragues Defendants' use of per diem counsel, neither retained by Koch nor experienced in immigration matters, to represent Koch in the Matrimonial Action, namely Lorian Vitas, Esq., and Cecelia S. DeMicco, Esq (Koch's exhibit a-c, appearance report of Loriann Vita, P.C., dated 5/18/05, deposition of Demicco dated 8/14/13 at 13, 35; deposition of Vitas dated 7/2/13 at 18, respectively); (2) the forwarding of the Immigration Letter to Koch containing immigration advice as being approved, appropriate and suitable; and (3) the findings of the court in the October 2008 Order, which he argues are binding on the Ragues Defendants pursuant to the doctrine of collateral estoppel. Thus, he argues that summary judgment on the legal malpractice claims should be granted in Koch's favor.

In reply, the Ragues Defendants maintain that this Court should not consider the affidavits of Koch and her expert, Lazar. They also allege that the practice of hiring per diem lawyers is appropriate, and this practice does not, by itself, constitute legal malpractice.

With respect to the Immigration Letter, Ragues acknowledges that he forwarded it, advising her to review the letter with her immigration lawyer. Further, he notes that, while Koch's counsel contends that it was inappropriately sent, Koch's counsel also made similar representations to those contained therein regarding Koch's immigration options, in writing in the federal court (the Ragues Defendants' exhibit R, letter from Koch's counsel dated 10/23/13). Thus, the Ragues Defendants argue that Koch's counsel cannot in good faith contend that the advice contained therein was inaccurate.

Additionally, they argue that, since they were not parties in the Matrimonial Action, and were relieved as Koch's counsel on September 20, 2005, the court's findings in the October 2008 Order have no preclusive effect on the issues in the instant action.

The Rague Defendants demonstrate a prima facie entitlement to summary judgment dismissing those claims, as alleged in the ninth and tenth causes of action, sounding in negligent and fraudulent misrepresentation regarding those allegations that the Ragues Defendants misrepresented that they would represent Koch in the Matrimonial Action for a total of $6,000. "A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff, (2) that the information was incorrect, and (3) reasonable reliance on the information" (*J. P. Morgan Securities Inc. v Ader*, 127 AD3d 506, 506 [1st Dept 2015] [internal quotation marks and citation omitted]). "A claim of fraudulent misrepresentation requires proof that "the defendant made a material misrepresentation of fact, that the

misrepresentation was made intentionally in order to defraud or mislead the plaintiff, that the plaintiff reasonably relied on the misrepresentation, and that the plaintiff suffered damage as a result of its reliance on the defendant's misrepresentation" (*P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank, N.V.*, 301 AD2d 373, 376 [1st Dept 2003]).

Here, the Ragues Defendants submit documentary proof reflecting that they informed Koch in writing that their initial retainer was $3,5000, and that she would be billed at $150 per hour for office work, $250 for court appearances, and for any expenses, such as copying (the Ragues Defendants' exhibit F, email dated 10/24/04), and that they received the retainer of $3,500, which was credited to her in their invoice dated June 15, 2005 (the Ragues Defendants' exhibit H). Koch fails to provide any evidence refuting or raising any issue of fact regarding the aforementioned terms of the Ragues Defendants' retainer agreement. Thus, Koch does not demonstrate that they negligently or intentionally misinformed her of their fee. Thus, those branches of the ninth and tenth causes of action sounding in negligent or intentional misrepresentation relating to her allegations that the Ragues Defendants represented that the total sum of their fee for their representation in the Matrimonial Action would be $6,000 are dismissed.

Here, the Ragues Defendants also establish their entitlement to summary judgment with respect to the legal malpractice claims asserted against them. As previously noted, "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" (*Brooks v Lewin*, 21 AD3d 731, 734 [1st Dept 2005]). In order to establish proximate cause, a plaintiff must demonstrate that, but for the attorney's negligence, she would have prevailed in the underlying matter or would not have sustained any ascertainable damages (*id.*).

As previously noted with respect to the motion for summary judgment by the Initial Counsel, the affidavits by Koch and her expert, Lazar, are not being considered by this Court for the reasons previously stated.

The fifth cause of action alleges that the Ragues Defendants breached their duties to Koch by failing to pursue remedies in tort (the amended complaint, ¶¶ 235-238). The Ragues Defendants demonstrate that they never agreed to bring any separate action against RK for battery or otherwise (Affd at 21); and that the answer, in any event, already contains an allegation relating to the purported physical abuse sustained by Koch (the Ragues Defendants' exhibit K, Answer dated 3/16/04).

In addition to the claims sounding in negligent and fraudulent misrepresentation in the ninth cause of action, Koch also complains that the Ragues Defendants permitted RK's first contempt application to go forward in Koch's absence without her testimony, and that, after the issuance of the July 2005 Order against her, that they refused to prosecute her case to conclusion (the amended complaint, ¶¶ 283 – 286) The record demonstrates that the Ragues Defendants prepared and submitted her affidavit in opposition to RK's first contempt application (the Ragues Defendants' exhibit U, Koch's affidavit in opposition dated 6/27/05), and that the court determined, after considering the papers submitted on the motion, that a hearing was not required (the Ragues Defendants' exhibit V, the July 2005 Order). Additionally, after the court issued the July 2005 Order, the Ragues Defendants filed a notice of appeal (the Ragues Defendants' exhibit Y, appeal dated 8/4/05). Koch subsequently revoked their authority to represent her in the Matrimonial Action (the Ragues Defendants' exhibit Z, email and attachment dated 9/15/06), signed a stipulation relieving them as attorney of record (the Ragues Defendants' exhibit E, stipulation dated 9/20/05), and proceeded to represent herself as pro se

litigant with respect to RK's second contempt motion (the Ragues Defendants' exhibit AA, appeal dated 9/17/05). Since the Ragues Defendants' application to be relieved as counsel was granted on September 20, 2005 (see the Ragues Defendants' exhibit BB, the default judgment of divorce), contrary to Koch's assertion, they no longer had an obligation to prosecute her case to conclusion.

The Ragues Defendants also demonstrate that they did not breach the duties complained of by Koch in her eleventh cause of action. With respect to Koch's allegation, that the Ragues Defendants failed to raise a defense of subject matter jurisdiction based upon RK's alleged failure to satisfy the durational residency requirement, Domestic Relations Law § 230 (1), as previously noted by this court, the court in the Matrimonial Action was vested with subject matter jurisdiction over matrimonial actions (*Lacks v Lacks*, 41 NY2d 71, 76 [1976]), and the requirements of section 230 "go only to the substance of the divorce cause of action, not to the competence of the court to adjudicate the cause" (*id.* at 73).

Further, while Koch complains that the Ragues Defendants did not pursue child support on behalf of Michal, the record demonstrates that they discussed child support in settlement negotiations with Salvi, RK's counsel (the Ragues Defendants' exhibit N, letter from Salvi to the Ragues Defendants dated 3/24/05), which Koch was aware of, as reflected by her responses in connection therewith (the Ragues Defendants' exhibits N, O & P, settlement letter dated 3/24/05, fax dated 4/29/05, and email dated 5/17/05, respectively).

Additionally, Ragues alleges that the Ragues Defendants were never retained to provide immigration services to Koch. Further, the record demonstrates that Koch had retained an immigration lawyer, Pechota, prior to the commencement of, and continuing through the Matrimonial Action, for representation concerning her immigrations status (see the Ragues

Defendants' exhibit I, *Koch, et al. v Pechota, Jr., et. al.*, US Dist Ct, SD NY, 10 Civ 9152). Further, Koch does not explain how the forwarding of the Immigration Letter to Koch, with a request to review it with her immigration counsel, or the use of per diem counsel, can be viewed as demonstrating examples of the Ragues Defendants' breach of their duty.

With respect to the twelfth cause of action, the Ragues Defendants demonstrate that they did not negligently withdraw from representing Koch in the Matrimonial Action, but rather that she terminated their services (the Ragues Defendants' exhibit Z, email dated 9/15/05; the Ragues Defendants' exhibit AA, appeal dated 9/17/05).

Further, Koch's argument that the findings in the October 2008 Order are binding on the Ragues Defendants, pursuant to the doctrine of collateral estoppel, is without merit. As previously noted, the "doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the [party against whom the issue was decided against] had a full and fair opportunity to litigate the issue in the earlier action" (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999]). While the court therein made findings of the purported acts of negligence by Koch's then counsel, who Koch identified as the Ragues Defendants in her amended complaint (the amended complaint, ¶¶ 123-130, 136, 153), the Ragues Defendants had already been relieved as counsel at the time of the issuance of that order, they were not parties to the Matrimonial Action, and did not have a full and fair opportunity to contest the determinations therein. Thus, the Ragues Defendants are not precluded from litigating the issues raised in the complaint.

Since Koch did not proffer any arguments supported by admissible evidence that would raise an issue of fact as to the claims against the Ragues Defendants, the Ragues Defendants' motion for summary judgment, in motion sequence no. 54, is granted.

In motion sequence no. 057, the Salvi Defendants move for summary judgment dismissing the seventeenth cause of action asserted against them based on Judiciary Law § 487. Judiciary Law § 487 (1) provides, in relevant party, "that an attorney who is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . forfeits to the party injured treble damages, to be recovered in a civil action" (*Melcher v Greenberg Traurig,LLP*, 135 AD3d 547, 552 [1st Dept 2016] [quotation marks and citation omitted]). Additionally, it must be demonstrated that there is a "pattern of delinquent, wrongful or deceitful behavior by the attorney defendants" and "of pecuniary damages resulting from the alleged wrong" (*Jaroslawicz v Cohen*, 12 AD3d 160, 161 [1st Dept 2004]).

The Salvi Defendants contend that the Judiciary Law § 487 claim asserted against them seeks damages for RK's representation to the court, during the inquest held on December 22, 2005, that there were no children of the marriage. Koch alleges that Salvi knew there was a child of the marriage and even offered a compromise offer for child support (the amended complaint, ¶¶ 381-382); and that, since Salvi permitted RK to make the aforementioned representation, the default judgment of divorce did not include child support, and resulted in damages to Koch, Michal and the parties' businesses (*id.*, ¶¶ 384 – 393).

In support of the Salvi Defendants' application, Salvi contends that, on or about February 16, 2005, the parties appeared in court and engaged in settlement negotiations regarding, inter alia, child support for Michal Koch, Koch's son; that a letter setting forth proposed settlement terms was sent to the Ragues Defendants, Koch's then counsel, which included an offer to pay some amount of child support (the Salvi Defendants' exhibit l, letter dated 3/24/05 [the Settlement Letter]); and that this child support offer was solely based on Koch's claim that RK had adopted Michal and was not intended to be an acknowledgment of the adoption. He further

maintains that, at the time of RK's inquest, Salvi understood that RK testified that there were no children of the marriage, because he did not have any biological children with Koch, and he disputed the validity of the adoption agreement executed in the Czech Republic. The record discloses that RK expressed such belief in his affidavit in opposition to Koch's initial motion, wherein he stated that there was no issue of the marriage, except that he was informed by Koch that he had adopted her child, Michal, and that he had never seen such documentation (the Salvi Defendants' exhibit M, RK's affd dated 4/30/04). Salvi alleges that, at that time of RK's inquest, he had not seen any papers confirming the RK's adoption of Michal, or a birth certificate listing RK as his father. Thus, he maintains that there was no attempt to deceive the court. Since the Salvi Defendants sufficiently demonstrate that their actions with respect to RK's testimony do not show "either a deceit that reaches the level of egregious conduct or a chronic extreme pattern of behavior" (*Savitt v Greenberg Traurig, LLP*, 126 AD3d 506, 507 [1st Dept 2015]), they establish a prima facie showing of entitlement to summary judgment dismissing the Judiciary Law § 487 claims asserted against them.

In opposition, Koch's counsel relies on the Settlement Letter to demonstrate that Salvi was aware of a child of the marriage. Here, Salvi does not dispute that there were child support discussions regarding Michal, but, as argued by him, the Settlement Letter, that is marked in bold underlined word stating "For Settlement Purposes Only," is clearly a settlement document, which is not admissible to prove liability or the value of the claims (CPLR 4547; *Collins v 628 W. End* LLC, 127 AD3d 495, 495 [1st Dept 2015]). Thus, any statements therein regarding the Michal is not admissible to prove that he is a child of the marriage. Further, as the record notes, RK challenged the validity of the adoption papers. Additionally, Koch's counsel's allegations of additional purported acts of deceitful conduct by the Salvi Defendants are not alleged in the

amended complaint, are made without any personal knowledge of the facts or supported by any admissible evidence, and, thus, need not be considered by this Court (*Johannsen v Rudolph*, 34 AD3d 338, 339 [1st Dept 2006]).

In view of the foregoing, the motion by the Salvi Defendants, in motion sequence no. 057, for summary judgment dismissing the complaint against them is granted.

Accordingly, it is

ORDERED that, in motion sequence no. 51, Koch's motion for order, pursuant to CPLR 3126 (3), striking the answer of defendants Ragues & Min, Esqs. and Raymond Ragues, directing an adverse inference against them, and for an award of sanctions in her favor, pursuant to 22 NYCRR § 130-1.1, are denied; and it is further

ORDERED, in motion sequence nos. 53, 54, 55 and 57, the respective motions for summary judgment dismissing the complaint by defendants Sheresky, Aronson & Mayefsky, LLP and David Aronson (motion sequence No. 53), the Ragues & Min, Esqs. and Raymond Ragues (motion sequence No. 54), Bragar, Wexler, Eagel & Morgenstern, P.C., and Raymond A. Bragar (motion sequence No. 55), and D'Agostino & Salvi, LLP, and Frank J. Salvi (motion sequence No. 57), respectively, are granted; and it is further

ORDERED that the complaint is dismissed as to all defendants with costs and disbursements to each defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: May 1, 2018

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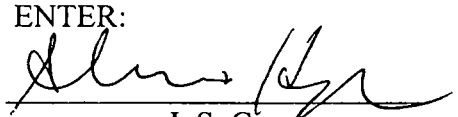

J. S. C.

SHLOMO S. HAGLER, J.S.C.