Lewit v Fleishman
2020 NY Slip Op 31366(U)
May 15, 2020
Supreme Court, New York County
Docket Number: 152455/2016
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

----------X

GUY LEWIT,

Plaintiff,

- v -

SHELDON FLEISHMAN,

Defendant.

----------X

INDEX NO. 152455/2016

MOTION DATE

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 52-152 were read on this motion for summary judgment.

In this action for legal malpractice, plaintiff moves pursuant to CPLR 3212 for an order granting him summary judgment and dismissing defendant's counterclaim for attorney fees, and pursuant to CPLR 3212(g) for an order specifying the undisputed or incontrovertible facts and deeming them established for all purposes in the action. Defendant opposes.

I. UNDISPUTED BACKGROUND

The background of this action, set forth in my decision and order dated November 28, 2016 (NYSCEF 18, 92), is repeated here with corrections.

This action arises from a Surrogate's Court proceeding involving the estates of plaintiff's mother and father, two trusts funded by his father, and an unfunded qualified terminable interest property (QTIP) trust. Plaintiff's father had hired an attorney, defendant's predecessor, to handle his estate and tax issues, and upon his father's death in 2007, plaintiff was appointed executor of his estate. Plaintiff commenced a proceeding in Queens County Surrogate's Court, seeking to

transfer the estate's non-exempt assets to plaintiff's mother. Soon after the transfer was authorized, plaintiff's mother died intestate. Defendant's predecessor was retained to handle her estate as well. (*Id.*).

In November 2009, plaintiff and one of his sisters were appointed co-administrators of their mother's estate. In December 2009, plaintiff untimely filed federal estate tax returns prepared by defendant's predecessor, which plaintiff alleges resulted in penalties and interest amounting to approximately $170,000. Plaintiff also alleges that defendant's predecessor failed to disclose to him that in 2008, his request for an extension of time to file the estate taxes had been denied by the Internal Revenue Service.

In the fall of 2010, defendant's predecessor commenced work on the estate accountings, which he completed in early 2011, along with a stipulation settling the estates and trusts and distributing the assets. Plaintiff's sisters, however, refused to settle, stopped communicating with plaintiff, retained counsel, and demanded copies of all relevant financial information. By then defendant's predecessor stop responding to plaintiff. (NYSCEF 53).

Soon thereafter, plaintiff told defendant that in his capacity as administrator of his father's estate, he had distributed more than $540,000 in income but was unsuccessful in trying to distribute to his sisters an investment brokerage account containing approximately $900,000 in securities. Plaintiff's sisters, however, did not "complete[]the process required to receive their share." (*Id.*).

After firing defendant's predecessor, plaintiff retained defendant by letter dated November 21, 2011, as pertinent here, to perform legal services on his behalf as executor of his parents' estates and as trustee of certain trusts, to prepare all appropriate court papers and filings, to appear at all court appearances on plaintiff's behalf, and to attend all settlement conferences.

(NYSCEF 55).

By email to defendant, dated December 2, 2011, the attorney for plaintiff's sisters complained that as plaintiff had refused to provide them with information about their father's brokerage account and was withholding rent from them, they decided to seek a judicial accounting. The attorney also advised of the sisters' intention to seek an order removing plaintiff as executor of their father's estate. (NYSCEF 56). In reply to defendant, plaintiff denied the allegations and explained his conduct to date as executor. (*Id.*).

Plaintiff instructed defendant to commence a malpractice action against his former attorney. Defendant advised him that it could not be done as plaintiff's sister, the co-administrator of their mother's estate, opposed such an action. When plaintiff asked defendant to prepare a petition to either have his sister removed as co-administrator or obtain permission from the surrogate to proceed against the former attorney without the co-administrator's participation, defendant agreed by email dated January 12, 2012, to prepare a removal petition (NYSCEF 83), but never did so.

Plaintiff fired defendant soon after April 1, 2013.

In the November 28, 2016 decision, *supra*, at 1, defendant's motion to dismiss this action was granted to the extent of dismissing any claim for malpractice arising from his failure to seek the removal of plaintiff's sister as co-administrator as defendant had sufficiently demonstrated that his alleged negligence in that regard was not the proximate cause of any damages in that regard. The decision left intact plaintiff's causes of action for breach of contract, a violation of Judiciary Law § 487, and legal malpractice relating to conduct other than the failure to seek the removal of his sister as co-administrator. (NYSCEF 18, 92).

II. UNDISPUTED FACTS

A. The accountings

By email dated April 2, 2012, plaintiff sent defendant accountings that his former attorney had prepared and circulated to plaintiff's sisters in 2011. According to plaintiff, those accountings satisfied his responsibility to account, although he acknowledged that some of the figures had changed and that it did not include a distribution to himself alone of $215,000 from his father's brokerage account. He also advised defendant therein that no accounting had been prepared for the QTIP trust as it was not part of either estate. (NYSCEF 57).

On July 9, 2012, plaintiff received and forwarded to defendant three orders dated June 11, 2012, by which the presiding surrogate had directed him to file his final accountings by August 23, 2012. (NYSCEF 59). Each order reflects that the petition for the accounting had been submitted without an appearance in opposition and contains a direction that plaintiff attend court "from time to time for the purpose of the settlement of said account." (NYSCEF 58). Plaintiff thus expressed to defendant his concern that in failing to appear or oppose the petitions, defendant had not only left a poor impression, but left unchallenged the false claim advanced in the petition that no accounting had been previously provided. Defendant immediately emailed plaintiff in response, stating that he had appeared several times, and asking to speak with plaintiff about it the following day. (NYSCEF 59). In response to his requests for updates on the accountings (NYSCEF 59), defendant assured him by email dated August 7, 2012, that they were almost complete (NYSCEF 60).

In late August and early September 2012, defendant sought and received from plaintiff additional documents and information for the accountings; plaintiff again expressed his concern that the time to file the accountings had expired. (NYSCEF 60). Defendant did not reply.

Having heard nothing from defendant by mid-September 2012, plaintiff falsely told him, intending to spur him into action, that he was in contempt of the orders. (NYSCEF 61). Defendant then sought and received from plaintiff updated account totals. (NYSCEF 62).

On September 21, 2012, as the accountings remained outstanding, plaintiff again expressed concern to which defendant responded by assuring him that he was in contact with his sisters' attorney and that the accountings would be provided by the end of the month with drafts to plaintiff in a few days. (NYSCEF 63, 64). In emails dated October 8 and 15, 2012, the parties continued to seek and provide additional information for the accountings. (NYSCEF 65, 66). By email dated October 23, 2012, defendant provided plaintiff with drafts of the accountings, observing that "again, [the numbers] do not seem to add up." (NYSCEF 67). Exchanges of information continued between the parties on October 24, 2012. (NYSCEF 68).

On November 9, 2012, plaintiff relayed to defendant that he had been told that orders were being sought requiring that he show cause as to why he should not be held in contempt for failing to file the accountings. (NYSCEF 69).

By email dated January 23, 2013, defendant advised plaintiff that the show cause orders were scheduled to be heard the following day and that he would be seeking an adjournment to respond to supplemental affirmations he had received that day from plaintiff's sisters' attorney. He also informed plaintiff therein that he had paid for the filing fees for the accountings and would pay for the one for the next day, all totaling $3,795, and that he needed $350 for service of process on his sisters, their attorney, and the state Department of Taxation and Finance. (NYSCEF 71). By email of the same day, plaintiff complained to defendant about the draft accountings, including that no mention had been made therein of plaintiff's earlier accounting to his sisters. (*Id.*, NYSCEF 78). The next day, defendant filed the accountings and the contempt

motions were withdrawn without being heard by the surrogate. (NYSCEF 53).

B. The distributions

On or about May 24, 2012, plaintiff mailed defendant four $50,000 checks drawn from the estate accounts for distribution to plaintiff's two sisters. (NYSCEF 72). On June 26, 2012, plaintiff learned that his sister's checks had not been negotiated. (NYSCEF 73). Although defendant advised him that he had mailed the checks to the sisters' attorney, defendant's cover letter to the attorney contains no indication that the mailing had been sent certified or in a manner that would permit tracking. (NYSCEF 74). When, by email dated October 8, 2012, plaintiff told defendant that the checks remained unnegotiated, defendant responded that he had sent them. (NYSCEF 75). Plaintiff again advised defendant on November 6 and 28, 2012, that the checks remained unnegotiated. (NYSCEF 76, 77).

By email dated March 5, 2013, at 5:13 pm, defendant asked plaintiff to speak with him following day.

On March 7, 2013, during an appearance in surrogate's court in connection with the accountings, defendant executed three stipulations by which plaintiff agreed to pay each sister, by 5 pm on March 21, 2013, $215,000, the amount that plaintiff had paid to himself in July 2011, plus $100,000 to each sister matching the funds that plaintiff had recently paid to himself. (NYSCEF 83).

Then, on March 8, 2013, at 1:51 pm, plaintiff emailed defendant that as his sisters wanted their distribution in cash from the brokerage account, "considerable amounts for commission on sales" would be incurred. Thus, plaintiff stated, he intended "to transfer the account [to] the TD Ameritrade [account] where the sales will be FREE," which would take approximately one week, and that once the account is transferred, he would sell "sufficient securities to generate"

$215,000 each for his sisters in connection with the trust. Then, he wrote, after establishing a checking account and stopping the checks that he had issued in May 2012, he would issue his sisters new checks from the estates and the trust. (NYSCEF 81).

Plaintiff also informed defendant that he would take $9,700 expenses from another account to cover the expenses he incurred "over the years," per "the accounting that was filed," and that he was "reserv[ing] the right to issue a check to [himself and one sister] to match the funds [defendant] allowed [the other sister] to take from the sale of the Queens property which expenses were bogus." (*Id.*). Moreover, he was reserving the right to take a fee from the estate "because of the crap [a sister] pulled AFTER the estate should have been wrapped up," and that he expected defendant to move for an order removing the sister as co-administrator should she persist in refusing to join in the suit against the former attorney and hold her responsible in the event that the suit is time-barred. At 3:33 pm, defendant responded, asking plaintiff to send him the replacement checks for the distributions "as soon as possible." (*Id.*).

Shortly thereafter, at 4:23 pm, defendant emailed plaintiff stating that he was under the impression that plaintiff previously transferred the funds to the new TD Ameritrade account and advised that he need not open a new checking account to do so. Defendant also stated therein that as it was necessary to amend the accounting to include "these additional accounts," it would waste money to do so. Plaintiff responded at 6:34 pm, mentioning that he wanted the malpractice action against his former attorney commenced immediately to avoid it becoming time-barred, and that if his sister poses an obstacle, "something" should be filed in surrogate's court

> to force her to do what she is supposed to be doing as CO-ADMINISTRATOR or get her kicked out ... here's why: For 6 years she's done NOTHING EXCEPT: I. She's sitting on estate assets and billing the estate but does not report what she has ... 2. She lied about me not distributing the estate funds .. .I did and you know what happened. 3. Additionally, I need to see the accounting report you indicated she filed .. you never shared her

> accounting with me. I want to see where she signed off on NO ASSETS ... she is the co-account holder of the BOA estate account. That account had over $100 grand in it last I looked. She was the seller of the [Queens] Property for over $850,000. SO, she lied on her papers .. .I want that fact broadcast to the world ... or at least to the judge. 4. I do NOT want the estate paying any of her legal expenses especially when they are fraudulent. . . . I stopped the Citibank checks at $30/per. That's coming out of their $50,000 checks. I have to get to BOA to do the same with those funds. I started the application process to transfer the brokerage account. They should have it set up by next week. (I am away from the 13th to the 20th-perfect timing). . . .I will close out [his mother's] Estate account after they cash their [apparent end of email]

(NYSCEF 81).

By email dated March 11, 2013, plaintiff complained that defendant had not yet filed a petition to remove his sister as co-administrator. In reply, defendant said that he would and instructed plaintiff "to move forward" with the new checks and account liquidation. (*Id.*).

On March 18, at 2:35 pm, defendant emailed plaintiff asking for an "update as to when [he] will receive the money to forward to your sister's attorney," and expressing reluctance at filing the petition to remove his sister as co-administrator before plaintiff eliminated any reason for his sister to cross move against him. (*Id.*).

At 3:39 pm that day, plaintiff responded as follows by email:

> File the motion. If they file a cross motion we'll deal with it. I have the proof I tried to distribute the funds once before and that both sisters REFUSED to accept the funds and REFUSED to explain why .. let the Judge see and hear that. I will also bring up the fact that [his sisters' attorney] advised is [sic] that [plaintiff's sister] would sign the retainer agreement and only told us otherwise when you prompted him. She reversed herself. I want the Court to see and hear that she sat on the signing of her application for co-administrator for 10 months and refused to explain why (further delaying the filing of Estate taxes and causing us THOUSANDS in interest charges, that she delayed action . . .

To which defendant responded at 3:40 pm, "Are you saying that you are refusing to make these payments at this time?" (*Id.*).

In reply, plaintiff told defendant, by email at 3:49 pm

> that the payments were to be made in the context of a settlement agreement that gets me

> out of all the actions that are pending, that gets me a complete list of estate property my sister is refusing the provide (and has refused to provide for SIX PLUS years) and that provides for the equitable distribution of the estate property SHE is holding .. just as I am being asked to distribute the estate property that I am holding. NO ONE SEEMS TO CARE ABOUT WHAT SHE IS REFUSING TO DO .. only what I am reluctant to do because I tried doing it once before. . . . SO I am not refusing I am simpy [sic] waiting for the appropriate time.

(*Id.*).

> At 4:23 pm, also on March 18, defendant emailed plaintiff:
>
> I left you a voicemail on your cell phone. The payments will not be made in the context of a settlement agreement. You and I both offered to make the payments when we were in court. These are your immediate obligation and they are not the equivilent [sic] of personal property that by your estimate I believe are worth less than $50K and probably not half that in one of the estates. What is lost on you is that although you did not cause the delays in this estate, ultimately you do get blamed for many of them because you are a fiduciary in all 4 matters. Your sister is a fiduciary in your mothers [sic] estate only. Your obligations in all of the other accountings while related should be considered as separate. That being said do not withhold in any of these matters I am urging you in the strongest terms to make these payments immediately. If you do not make these payments despite the proof that you tried to make the payment you will be removed as fidcuiary [sic] in all of the matters in my opinion. When we spoke on the phone 10 days ago you indicated that you were going to take care of this. What has changed? Unfortunately, despite the fact that I believe that [plaintiff's sisters' attorney] knows that this is going nowhere he will be deposing you. He will not be able to convince his clients otherwise. Why escal[at]e this any further? We need to speak today to resolve how to move forward from this point. It is difficult to calculate your commissions without full documentation for all trust activity. I do not understand why you do not recognize that the [malpractice] matter is separate from your obligation to account in these matters.

(*Id.*). And then at 5:32 pm, plaintiff emailed defendant:

> File the motion to have [sister] removed as the co-administrator of the estate. We will see what happens at that time and I will send them the funds after you file. The points that have to be demanded from [the sister] and the explanation are set forth in the emails I just sent you. We have to sue [the former attorney] and everyone seems to be telling me NOT to do so ... l want it done IMMEDIATELY. I have asked to sue [the former attorney] for over a year and I do NOT want to wait any longer. File the papers so that I can get [sister] out of the estate so I can sue. That's what I want you to do ... Stop rolling that into everything else.

(*Id.*). At 5:42, plaintiff emailed defendant:

> I want to know how much I can get from the trust and from the estate ... these two questions I have repeatedly put to you have gone unanswered and have a direct bearing on what I can release to my sisters. I want to know the fees I can take on the 2006 irrevocable trust. It was created on March 22 or 23, 2006 and my father died June 20. There was over $2 Million in that trust when it was created. If l choose to I can take the fee on the date when the trust was at its highest value and calculate the length of time the trust remaining in existance [sic] (3 months or so) OR I can take the funds each year for 6 years and let them argue otherwise in court. I can also take the executor's fee in full OR I can do something else that takes into account the $40 thousand they "gave" me. Represent me in this matter. If l pay out the funds and I have nothing left in the bank and they continue their search for whatever it is they are looking for (as you seem to believe) then how are you going to get paid? This isn't going to be over until the action against [the former attorney] is finalized. Get the $200 thousand or so and then let's talk about closing the matter down.

(*Id.*). Defendant acknowledged his understanding of plaintiff's position and asked to speak to him. (*Id.*).

The following day, March 19, plaintiff insisted to defendant by email that the malpractice action is related to the estate and not to the accounting because the attorney who had been hired to file the complaint "isn't filing [it] because [plaintiff's sister] isn't signing the retainer agreement. So, we have to file our motion to have her removed so that I can proceed as the only signer of the retainer. So file the motion." (*Id.*).

The same day, defendant emailed plaintiff values associated with the father's estate, with a total value of $221,860.52 in cash and securities. (*Id.*).

By email to plaintiff dated March 21, defendant attached a letter from the sisters' attorney setting forth two issues relating to the father's estate. He first reported that plaintiff's sister, the co-administrator, had told him that the managing agent of an apartment owned by the father was instructed by plaintiff not to provide his sister with information or access to the apartment, and that it was not clear from the accounting the income derived from the apartment. The attorney thus asked that defendant instruct plaintiff to permit his sister access to information about and

access to the apartment, and that the apartment should be distributed, regardless of its form of ownership, expressing hope that a subpoena to the managing agent would not be necessary. He also demanded a complete accounting for the trust and again expressed hope that plaintiff would provide it and "spare all parties the needless expense and time of another court accounting proceeding." (*Id.*).

The same day, which was the due date for the stipulated payments, defendant emailed plaintiff a letter from his sisters' attorney which contains no mention of the stipulations or that the payments were due that day. (*Id.*).

On March 22, at 2:57 pm, plaintiff emailed defendant, denying that he had instructed the managing agent to prohibit his sister access to the apartment. Rather, he instructed the agent that as he was the executor, any issues or decisions were to be raised with him. (*Id.*).

On March 27, defendant emailed plaintiff that his sisters' attorney had informed him that plaintiff had communicated directly with him, and that plaintiff must have known that the attorney cannot do so. He added that he would look into the issues raised in the attorney's letter if plaintiff pays the $630,000 to his sisters "as soon as possible," warning him that absent the payment, his sisters will seek his removal. He reminded plaintiff that the sole issue about plaintiff's performance as executor was his having taken for himself the $215,000. (*Id.*).

On April 1, at 12:19 pm, defendant received a letter from the sisters' attorney whereby he alleged that plaintiff had issued a K-1 to one of his sisters reporting income to her of $53,205 even though no distribution had yet been made, adding that if plaintiff intends to "starve" his sisters "into submission by passing along phantom income, he is mistaken." He thus advised defendant that plaintiff's sisters are petitioning to remove plaintiff as fiduciary and to surcharge him for all penalties and interest the sisters will incur for being taxed on income withheld from

them by plaintiff. (*Id.*).

Defendant immediately forwarded the letter to plaintiff by email and stated therein that he saw "no gain for you in the course of action that you insist on continuing. Please end this before you do damage to yourself going forward." In reply, by email at 2:07 pm, plaintiff wrote that according to his accountant "it makes no difference whether the funds were distributed," and that he could advise the sisters' attorney accordingly, to which defendant replied at 2:24 pm that he would. He also asked when plaintiff would send him the distributions. (*Id.*).

At 3:40 pm, plaintiff asked defendant by email if he was able to mail out the checks even though "the liquidation of the brokerage account cannot happen until TD verifies they got the account. So you will get 4 checks for $50 grand each." He also sought the status of the malpractice action and whether he had "any recourse" against his sister absent the action. (*Id.*).

Later that day, at 6:03 pm, plaintiff asked defendant, "Where is the petition? I would expect I have to file an affidavit about the reasons why?" Defendant responded that he was petitioning the court for an order permitting plaintiff to bring the petition himself. He again asked for the checks.

By email dated April 6, 2013, plaintiff informed defendant that he had been served with two emergency motions seeking his removal as executor and trustee given his failure to pay the distributions pursuant to the three stipulations. He blamed defendant for the motions. (NYSCEF 82). On April 22, 2013, the return date of the motions, plaintiff sent his sisters' attorney the $630,000 distributions and retained alternate counsel. The motions were withdrawn. (NYSCEF 53).

C. Decisions of the surrogate (NYSCEF 84)

In two of three decisions and orders dated August 25, 2015, the surrogate denied

plaintiff's motions for summary judgment dismissing objections that had been filed by his sisters in connection with the parents' estates, finding that plaintiff had breached his fiduciary duty to them. The surrogate thus surcharged plaintiff with interest at the rate of nine percent on the principal sum of $50,000 each for May 21, 2012 through April 22, 2013, the time during which plaintiff had use of each of the sister's $50,000 of the estate funds.

In the decision and order addressing the father's trust, the surrogate addressed the motion for partial summary judgment filed by plaintiff's sisters seeking an order surcharging plaintiff for breaching his fiduciary duty by delaying the payment of their distributions. The surrogate observed that plaintiff's account reflected that he had distributed to himself $215,000 without providing his sisters with equal distributions. He considered plaintiff's allegations and arguments in opposition whereby he had set forth his attempts to pay the distributions and his consequent belief that his sisters were responsible for the delay, that his sisters neither demanded the distributions nor set up their own brokerage accounts to facilitate the payments, that his attorney never informed him of the stipulations and that they had been entered into without authorization, and that plaintiff's new attorney delivered the checks to plaintiff's sisters on April 22, 2013.

The surrogate held that the evidence demonstrated that plaintiff had breached his fiduciary duty by delaying the payment of the distributions and surcharged him with interest at the rate of nine percent on the principal sum of $215,000 each for July 19, 2011 through April 22, 2013. Plaintiff's cross-motion for summary judgment was denied with the observation that plaintiff had given himself the cash two years before distributing anything to his sisters and had left most of the trust assets in the form of illiquid securities.

III. PLAINTIFF'S CONTENTIONS (NYSCEF 52-95)

A. The accountings

Plaintiff argues that defendant's possession since July 9, 2012 of the accounting that had been prepared by the former attorney demonstrates that the delay in complying with the surrogate's June 11 order evidences malpractice and that in any event, the delay in filing the accountings for his mother's estate and the trust was unduly lengthy and unreasonable as the trust had no assets and his mother's estate contained a single asset, her residence. He, moreover, alleges that defendant offers no evidence suggesting that his lack of cooperation caused the delay and that even if it had, he offers no evidence that he had sought additional time to respond to the surrogate's order, that he had notified him of his lack of cooperation, or that he had sought to withdraw from representing him. He also complains that as a result of defendant's malpractice and breach of his fiduciary duty, the surrogate ruled against him without knowing that an accounting for his mother's estate had been circulated in 2011. The surrogate's reference to the contempt motions and defendant's failure to reference in the accounts the unequal distributions, plaintiff contends, are attributable to defendant.

Plaintiff denies having refused to pay the filing fees as alleged by defendant in his counterclaim and that his failure to pay them resulted in the filing delay, as he was not invoiced for the fees until long after the accountings had been filed. Rather, plaintiff contends, defendant delayed in invoicing him for the fees. Plaintiff argues that defendant violated not only his fiduciary duties, but several disciplinary rules as well, and that his failure to inform plaintiff of the motions and to attempt to correct the record with respect to his claim that he had appeared on the motion, also constitute violations of Disciplinary Rule 22 NYCRR § 1200.1(2) (c).

According to plaintiff, defendant violated his duty to act with diligence as required by 22

NYCRR § 1200.3, given his receipt of several orders directing him to file the accountings by a date certain and his failure to comply, which resulted in the contempt motions.

B. The distributions

Plaintiff alleges that as a result of having failed to notify him of the stipulations relating to the required distributions and ensure that the checks had been received, his sisters filed "punitive motions" against him. He observes that although defendant had been provided with $200,000 in checks to be delivered to his sisters' attorney in partial distribution of the assets, he failed to ensure their delivery or inquire into their receipt. As a result of defendant's conduct, by which he violated 22 NYCRR § 1200.4 (1)(i), plaintiff contends, he was required to pay surcharges.

Plaintiff also argues that defendant had failed to advise him that his good faith albeit unsuccessful attempt to pay the distributions does not relieve him of his duty to distribute assets properly, and that had defendant so advised him, plaintiff would have immediately paid his sisters the equivalent funds to avoid, or at least limit, the surcharges. Instead, plaintiff labored under the erroneous belief that his good faith attempts to distribute the funds relieved him of the risk of violating his fiduciary duty to his sisters, as did his belief that it was his sisters who had thwarted the distributions, absent any reason to suspect that defendant had not delivered the checks to his sisters' attorney. Defendant also, plaintiff asserts, failed to advise him against depositing the $100,000 until his sisters negotiated their checks and of the risk that a surcharge could be imposed. Moreover, defendant deceived him, plaintiff claims, about preparing a petition seeking the removal of his sister as co-administrator.

For all of these reasons, plaintiff maintains that but for defendant's breach of the retainer agreement and the fiduciary duty owed him, and his legal malpractice, the surrogate would not

have issued adverse decisions against him whereby he was directed to pay $86,503.08 in surcharges.

C. Plaintiff's motion to dismiss defendant's counterclaim for fees

In moving to dismiss defendant's counterclaim for attorney fees, plaintiff denies owing the alleged $31,850 as defendant provided him with no invoices or statements evidencing the unpaid fees nor did he demand payment or provide documentation indicating how he had calculated the hours allegedly worked.

According to plaintiff, had defendant responded timely to the surrogate's June 2012 order, the motions for contempt would have been avoided in addition to the stipulations for additional time to complete the accountings. Defendant could also have avoided the later motions by stipulating for additional time to deliver funds and by advising plaintiff of the stipulations he had executed. Thus, plaintiff argues that defendant is responsible for much of the time spent. And, had defendant properly delivered the distribution checks and followed up on them, plaintiff contends, he would not have incurred the surcharges of $16,471.22 for the late accountings.

Given the foregoing failures of defendant in litigating on his behalf, plaintiff maintains that he thereby forfeits his right to the fees and should be required to disgorge any legal fees already paid.

IV. DEFENDANT'S CONTENTIONS (NYSCEF 97-103)

A. The accountings

According to defendant, plaintiff's failure to set up a separate estate account for collecting rents and distributing income from rental properties owned by his father's estate, using instead his attorney trust account to do so, was "potentially problematic," and that the completion of the accountings was difficult because plaintiff's records were incomplete and the numbers did

not initially correspond. He partly ascribes the contempt motions to the hostility among the siblings, observing that plaintiff was "angry and upset" that his sisters required him to account, believing instead that the "informal" accounting previously provided to them by the former attorney was sufficient.

Although plaintiff had wanted him to oppose the petitions for the accountings, defendant convinced him not only that it would constitute a waste of time and money, but that it was not advisable strategically. Contrary to plaintiff's assertion, defendant alleges that he appeared on the return date (NYSCEF102) and was told that plaintiff would have 45 days to account. Defendant thus argues that his decision not to oppose the petitions was strategic.

In any event, plaintiff maintains that his alleged malpractice relating to the accountings caused no damages as plaintiff had failed to account for five years, well before he retained defendant.

B. The distributions

Defendant acknowledges that plaintiff had informed him of his unsuccessful prior attempt to distribute to his sisters' funds equal to those he had distributed to himself. The sisters, however, manifested by their conduct that they would not accept any distributions absent a full accounting. Consequently, defendant and plaintiff decided to re-issue checks which defendant would send to the sisters' attorney.

According to defendant, at the next court conference in connection with the accounting proceedings on March 7, 2013, he stipulated that plaintiff would pay his sisters to balance the July 2011 distribution to himself, and alleges that plaintiff "was informed" of the due date. He states that as the checks had not been cashed by plaintiff's sisters, he contacted their attorney, and that in response to his query about the checks he had sent, the attorney told him that they

wanted a full accounting of all funds that plaintiff controlled on behalf of all entities.

Defendant also argues that he cannot be faulted in connection with the delayed distributions as plaintiff's distribution to himself of the brokerage account funds preceded his retention and that one of plaintiffs' parents had died more than five years prior thereto. Moreover, his alleged failure to advise plaintiff that he should not have made the distribution to himself without making distributions to all beneficiaries also occurred prior to his representation of plaintiff.

Soon after March 21, 2013, defendant claims that he was notified that he was being replaced as plaintiff's attorney.

C. Other arguments

Defendant observes that while plaintiff offers numerous emails, he and plaintiff often spoke to discuss the matters raised in the emails. He argues that plaintiff's claims of legal malpractice are overbroad and insufficiently clear and that given the questions of fact that exist regarding all of the remaining claims, the motion should be denied in its entirety. In light of the dismissal of his cause of action for legal malpractice to the extent it relies on his failure to move for his sister's removal as co-administrator of the mother's estate, defendant asks that plaintiff's allegations reiterating that claim be disregarded, and he maintains that plaintiff's failure to address his cause of action for breach of contract precludes summary judgment on it.

Plaintiff also fails, defendant asserts, to demonstrate entitlement to punitive damages or offer evidence that he violated Judiciary Law § 487. Rather, the penalties or surcharges imposed were due to plaintiff's failures before retaining him. He complains of having been paid only $3,500 for performing more than 100 hours of work and that plaintiff waited some 60 days before reimbursing him for the filing fees for the accounting proceeding.

V. PLAINTIFF'S REPLY (NYSCEF 104-152 plaintiff's original exhibit numbers)

Plaintiff argues that defendant's affidavit contains bald, conclusory, irrelevant and immaterial allegations, hearsay, and false statements, and he denies that defendant raises an issue of fact that would require a trial.

In challenging defendant's claim to have appeared in opposition to the petitions for the accountings, plaintiff relies on the certified copy of the orders to show cause signed by the surrogate which reflect that defendant had not appeared in opposition, and observes that the copy of an order to show cause relied on by plaintiff is neither signed nor certified. In any event, plaintiff maintains that defendant was retained to attend all court appearances, and that an inference arises from defendant's failure to correct the record in that regard that he did not appear in opposition.

Defendant's contention that opposition to the petitions would "be fruitless," plaintiff argues, is irrelevant given the false allegations contained in them that no prior accountings had been provided, and the undisputed fact that defendant submitted no opposition papers challenging those allegations even though he had directed him to do so. Plaintiff also surmises that had defendant circulated the prior accounting and attendant stipulations if executed, both estates would have been finalized in 2011.

Plaintiff admits having been told several times by defendant to pay his sisters to equalize the uneven distribution he had made to himself, but again argues that having failed to follow his instruction that he condition further distributions on a finalization of the estates due to his fear that his sisters would continue to delay, defendant breached the retainer agreement. He cites in support his emails to defendant dated March 6, 2012 (NYSCEF 81) and March 18, 2013 (NYSCEF 107).

Plaintiff again complains that defendant's failure to advise him of the three stipulations constitutes malpractice and now newly alleges that defendant knew that he was not going to distribute funds per the March 18 email, because he had advised him that it would require the liquidation of certain accounts. He, moreover, denies having complained about sending the distributions, referencing his instruction to defendant, which defendant omits, that he condition the distributions to his sisters on their "creation of the new brokerage account and the establishment of a new checking account." He also maintains that defendant's assertion, by email dated April 8, 2013, that the payments were due six weeks earlier, well before the March 8 execution of the stipulations, warrants a strong inference that defendant did not disclose the existence of the stipulations.

Defendant's failure to seek the removal of his sister as co-administrator, plaintiff contends, prevented him from suing the former attorney, and he newly alleges that, "successor attorneys" advised him that a motion to remove his sister would have resulted in a cross motion to remove him, which, given defendant's failings before the surrogate, the equities would not have weighed in plaintiff's favor on the motion to remove her.

Plaintiff also posits the existence of a "hidden motive" for defendant's "passive attempt to protect" the former attorney who had been recommended by another attorney with whom plaintiff had once been associated. Within a week after plaintiff retained new counsel, plaintiff recounts, his former associate called him and asked him to verify that he was "really going after" the former attorney, from which plaintiff infers that there was "some relationship between" the former attorney and the recommending associate, and claims that the two "most likely" derived "some financial benefit owing to the considerable fees paid to" the former attorney. If, plaintiff muses, "there was litigation involving [the former attorney] embarrassing financial links might

be uncovered."

Plaintiff specifies that defendant violated Judiciary Law § 487 by willfully delaying the proceedings before the surrogate "with a view to his own gain," and he observes that although defendant admits having never invoiced him for the time spent, his current estimate that he spent 100 hours is far in excess of the number of hours he would have spent given the simplicity of the matters and absent the errors he had made.

VI. ANALYSIS

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." Moreover, "a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense." (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

To establish a claim for legal malpractice, a party must show that the attorney 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 the party to

sustain actual and ascertainable damages. (*Rudolph v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438 [2007]). In other words, a plaintiff must show that the attorney was negligent and that the negligence was a proximate cause of the plaintiff's losses, and proof of actual damages. (*Excelsior Cap. LLC v K&L Gates LLP*, 138 AD3d 492 [1st Dept 2016], *lv denied* 28 NY3d 906). To establish proximate cause, a plaintiff must demonstrate that but for the attorney's negligence, the plaintiff would have prevailed in the underlying matter or would not have sustained ascertainable damages. (*Nomura Asset Cap. Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40 [2015]).

Dissatisfaction with an attorney's reasonable strategic choices and tactics does not constitute a basis for stating a cause of action for attorney negligence (*Kassel v Donohue*, 127 AD3d 674 [1st Dept 2015], *lv dismissed* 26 NY3d 940 [2015]), nor does speculation as to what might have occurred had the attorney acted differently under the circumstances establish "but for" causation. (*Wexler v Shea & Gould*, 211 AD2d 450, 451 [1st Dept 1995]).

In order to determine whether plaintiff sustains his burden of establishing, *prima facie*, any of his causes of action, plaintiff obliges me to read through the multitude of emails he provides which are disorganized and repetitive. Once read, the emails demonstrate that there exist factual issues as to each and every one of plaintiff's causes of action. In addition, in his affidavit in support of his motion, plaintiff omits certain portions of the emails that contradict certain of his assertions. As he bears the burden of proof on this motion, his similar accusation against defendant needs not be addressed.

A. The accountings

In alleging that defendant failed to oppose the sisters' petition for the accountings, plaintiff fails to acknowledge the strategic reason for doing so, which precludes a finding of

malpractice on this ground, absent authority for the proposition that the accounting prepared by the former attorney was sufficient and given the many changes, additions, and deletions affected over time with respect to the accounting for the father's estate. (*See e.g, O'Neal v Muchnick Golieb & Golieb, P.C.,* 149 AD3d 636 [1st Dept 2017] [counsel's strategic decision to not oppose summary judgment motion did not constitute malpractice, given absence of meritorious defense to motion]; *see also Brookwood Cos., Inc, v Alston & Bird LLP*, 146 AD3d 662 [1st Dept 2017] ["a client's disagreement with its attorney's strategy does not support a malpractice claim, even if the strategy had its flaws"; attorney's choice among several reasonable courses of action not malpractice, and plaintiff failed to establish attorney's decision unreasonable course of action]). Plaintiff's emails reflect that as late as October 24, 2012, long after the expiration of the August 23 deadline for filing the accountings, there were ongoing requests for and exchanges of documentation, demonstrating an issue as to whether defendant was thereby unable to file the accountings timely. Moreover, the contention that had defendant circulated the former attorney's accountings and stipulation, "if executed," the estates would have been finalized earlier, is beyond speculation, as are plaintiff's aimless thoughts about "hidden motives." And, having offered no nonspeculative allegations concerning such motives, plaintiff fails to allege, *prima facie*, that defendant violated Judiciary Law § 487 by willfully delaying the proceedings for his own gain, nor does he specify what defendant stood to gain.

Plaintiff's allegation that defendant failed to inform the surrogate of his sisters' false allegations that he had never provided them with accountings is unsupported by evidence that such information would have changed the outcome. Nor does he show that but for defendant's failure to attempt to correct the record in that regard or with respect to his failure to appear and oppose, he would have prevailed. (*See e.g., Caso v Miranda Sambursky et al*., 180 AD3d 611

[1st Dept 2020] [speculation about loss resulting from attorney's alleged omissions insufficient to support legal malpractice claim]; *see also Salans LLP v VBH Properties S.R.L.*, 171 AD3d 460 [1st Dept 2019], *lv dismissed* 34 NY3d 1013 [2019] [contention that but for attorney's failure to appear for hearing on temporary restraining order, TRO would not have been granted or return date would have been shorter fatally speculative]).

It is undisputed that the contempt motions brought by plaintiff's sisters for the failure to comply with the June 2012 orders were never heard and plaintiff offers no evidence as to damages flowing therefrom. In any event, defendant raises an issue as to whether the contempt motions were partly the product of the hostility between plaintiff and his sisters. That the surrogate referenced the contempt motions in his surcharge decisions proves nothing absent an alleged basis for attributing any portion of the surcharges to such references.

Plaintiff also offers no authority for his assertion that defendant's failure to give him notice of his lack of cooperation or seek to withdraw from the case due to his lack of cooperation, estops defendant from attributing the delay to his lack of cooperation.

B. The distributions

Plaintiff's emails reflect that from the end of June 2012 to the end of November 2012, he blamed defendant for not ensuring that the distribution checks he had sent to him for forwarding to his sister's attorney at the end of May 2012 were received by the attorney. Nonetheless, three months after November 2012, plaintiff repeatedly told defendant, in response to his urging that he pay the distributions, that he did not intend to pay the distributions absent a settlement or the satisfaction of other conditions, which defendant advised him against. And to the extent that proof that the checks had not been cashed proves that they were not received, a proposition plaintiff fails to support, defendant raises an issue by offering some evidence that the checks had

been received, namely, the email to plaintiff wherein he recounts the attorney's response to his inquiry about the checks, from which it may be inferred, from the attorney's silence on the issue, that he had received the checks and that they would not be negotiated absent the accountings. Additionally, plaintiff's ensuing email to defendant in March 2013 that he would stop the checks and replace them reflects his acceptance of defendant's allegation that the checks had been sent and received.

Even if defendant did not tell plaintiff about the stipulations, plaintiff offers no basis for finding that the surcharges were proximately caused by it, and while the surrogate referenced the failure to comply with the stipulations, plaintiff offers no evidence that the surcharges were based on anything other than his failure to pay the distributions well before he retained defendant and he offers no explanation for not having paid them between March 27 and April 22, 2013, or well before then. That plaintiff was unaware of the stipulations entered into by defendant is of no moment as his obligation to pay the distributions did not arise from the stipulations but independently existed long before, as defendant repeatedly reminded him. In any event, defendant alleges that he had orally informed plaintiff of the due dates set forth in the stipulations, and there is no issue as to defendant's apparent authority to enter in them.

Plaintiff, in relying on defendant's March 2013 invoices as proof that his failure to pay fees did not arise until then and thus had no impact on defendant's conduct, fails to account for defendant's January 23, 2013 email in which he details more than $4,000 in fees he had paid and was to pay.

Consequently, to the extent that plaintiff demonstrates, *prima facie*, that defendant may be held liable, as a matter of law, for the delay in paying the distributions, defendant raises factual issues as to whether plaintiff is solely responsible for the delay in paying them and

whether but for the delay, no surcharge would have been imposed. (*See e.g., Kodsi v Gee*, 100 AD3d 437 [1st Dept 2012], *lv denied* 23 NY3d 904 [2014] [alleged harmful delays in prosecution of divorce not attorney's fault, but caused by divorcing couples' inconsistence and indecision and plaintiff's own conduct]).

C. Breach of contract

Plaintiff offers no evidence that defendant promised in the parties' retainer agreement to prepare a petition for the removal of plaintiff's sister as co-administrator. In any event, any damages flowing therefrom are speculative absent evidence that he would have prevailed on the motion, filed a timely action against the former attorney, and obtained a judgment against him. Moreover, the hearsay evidence that defendant's successor attorneys advised him that due to defendant's failings, a motion to remove his sister would not have succeeded is speculative and constitutes inadmissible hearsay, and is inappropriately alleged for the first time on reply.

Sufficient issues of fact are raised as to the other alleged breaches of the retainer agreement which are all addressed above.

D. Breach of fiduciary duties

In alleging that defendant had failed to advise him that that he could not pay himself his own distribution without paying the distributions to his sisters, plaintiff fails to acknowledge that defendant so advised him in his March 18 email and it is reasonably inferred from plaintiff's emails alone that he was not inclined to take defendant's advice. That the former attorney also failed to so advise plaintiff is of no significance here.

E. Violations of the Disciplinary Rules

To the extent that plaintiff's allegations prove that defendant violated certain Disciplinary Rules, he does not show that the violations proximately caused his damages, and absent proof of

damages stemming therefrom, they need not be addressed. (*See e.g., Fletcher v Boies, Schiller & Flexner LLP*, 140 AD3d 587 [1st Dept 2016], *lv denied* 28 NY3d 914 [2017] [malpractice claim based on alleged violation of disciplinary rule dismissed absent proof of damages related thereto]; *Cohen v Kachroo*, 115 AD3d 512 [1st Dept 2014] [violation of rules of professional conduct or ethical rules, in and of itself, does not constitute malpractice]).

F. Plaintiff's motion to dismiss defendant's counterclaim for fees

That defendant provided plaintiff with no invoices or statements evidencing the unpaid fees and demanded no payment or provided no documentation indicating how he had calculated the hours allegedly worked does not prove that his counterclaim should be dismissed. And, given the findings above, plaintiff offers insufficient proof in support of his allegation that defendant forfeits his fees by his conduct.

VII. CONCLUSION

In light of the specificity of the findings as set forth above, there is no need to issue an order pursuant to CPLR 3212(g).

Accordingly, it is hereby

ORDERED, that plaintiff's motion for an order granting him summary judgment is denied in its entirety; and it is further

ORDERED, that the clerk of the trial support office is directed to schedule this matter for pre-trial mediation.

5/15/2020
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
APPLICATION:		GRANTED	X	DENIED	GRANTED IN PART		OTHER
		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE