I.M.P. Plumbing & Heating Corp. v Munzer & Saunders, LLP
2020 NY Slip Op 31478(U)
May 18, 2020
Supreme Court, New York County
Docket Number: 158417/2017
Judge: James E. d'Auguste
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

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I.M.P. PLUMBING & HEATING CORP., 30-32 WEST 31 LLC, 405 8 LLC, and ANDREW IMPAGLIAZZO,

DECISION AND ORDER

Plaintiffs,

Index No. 158417/2017
Mot. Seq. No. 001

-against-

MUNZER & SAUNDERS, LLP, CRAIG SAUNDERS, and MARC A. BERNSTEIN,

Defendants.

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Hon. James E. d'Auguste

In the instant legal malpractice action brought by plaintiffs I.M.P. Plumbing & Heating Corp. ("I.M.P."), 30-32 West 31 LLC ("30-32 West"), 405 8 LLC ("405 8"), and Andrew Impagliazzo ("Impagliazzo") (collectively, "plaintiffs") against defendants Munzer & Saunders, LLP ("M&S"), Craig Saunders ("Saunders"), and Marc A. Bernstein ("Bernstein"), M&S represented plaintiffs in several commercial cases in state court. Plaintiffs allege, *inter alia*, that due to M&S' failure to properly defend and prosecute those actions, a default judgment was entered against plaintiffs in one action, another action was dismissed without opposition, and funds meant to be kept in an escrow account were improperly converted. As a result, plaintiffs seek damages totaling in excess of $30 million.

Defendants Saunders and M&S (collectively, "defendants") now move, pursuant to CPLR 3211, for an order dismissing the complaint as against them. This Court, by interim order dated January 3, 2019, pursuant to CPLR 3211(c), and upon notice to the parties, converted the motion to dismiss to a motion for summary judgment. Plaintiffs oppose and cross-move, pursuant to CPLR 3212, for an order (1) denying defendants' application; (2) granting plaintiffs

summary judgment for the full sums demanded in the verified complaint; and (3) striking defendants' answer and dismissing their affirmative defenses with prejudice. Defendants' motion for summary judgment is granted in part and otherwise denied, and plaintiffs' cross-motion is denied.

FACTUAL BACKGROUND

Impagliazzo is the president of I.M.P., 30-32 West, and 405 8. Impagliazzo and I.M.P. first retained M&S in or about February 2014. NYSCEF Doc. No. 61, ¶ 4. On April 1, 2014, Impagliazzo and I.M.P. entered into a formal retainer agreement with M&S to represent and defend them in two actions pending in Supreme Court, Suffolk County, both captioned *A.M. Concrete, Inc. v. I.M.P. Plumbing & Heating Corp. et ano* under Index Nos. 62017/2014 ("underlying action #1") and 62124/2014 ("underlying action #2"). *Id.*; NYSCEF Doc. No. 63, at 1. In addition, M&S commenced two separate actions in Supreme Court, New York County on behalf of plaintiffs, captioned *Andrew Impagliazzo et ano v. Heena Hotel LLC et al.* under Index No. 155403/2014 ("underlying action #3")[1] and *Andrew Impagliazzo et al. v. Shivbhakti LLC et ano* under Index No. 652437/2014 ("underlying action #4"),[2] on June 2, 2014 and August 8, 2014, respectively, asserting claims for tortious interference with a contract, fraud, and constructive trusts. NYSCEF Doc. No. 61, ¶¶ 33, 41.

I. Underlying Action #1 – *A.M. Concrete, Inc. v. I.M.P. Plumbing & Heating Corp. et ano*, Index No. 62017/2014

On March 25, 2014, A.M. Concrete, Inc. ("A.M. Concrete") commenced an action against I.M.P. for breach of contract and misuse of funds, claiming that it was hired as a

[1] This action was commenced on behalf of plaintiffs Impagliazzo and 30-32 West.

[2] This action was commenced on behalf of plaintiffs Impagliazzo, 405 8, and 30-32 West.

subcontractor on a construction project to perform excavation and concrete work, and owed damages in the amount of $144,000. *Id.*, ¶ 9; NYSCEF Doc. No. 64, ¶¶ 7-9.[3] I.M.P. retained M&S to defend the case. NYSCEF Doc. No. 61, ¶ 10. I.M.P. moved, by order to show cause, to change venue from Supreme Court, Suffolk County to New York County prior to the time that I.M.P. was required to respond to the verified complaint, but the motion was denied on May 15, 2014. *Id.*, ¶ 11(a)-(b).[4] A.M. Concrete then filed a motion for default judgment because I.M.P. failed to seek an extension of time to file an answer to the complaint. *Id.*, ¶¶ 11-12. On July 22, 2014, I.M.P. and Impagliazzo cross-moved, pursuant to CPLR 3211 and 3212, for an order dismissing the complaint, or in the alternative for summary judgment and annexed a proposed answer as an exhibit to their cross-motion, but did not seek an extension of time to file its answer as part of the requested relief. *Id.*, ¶ 12. Thereafter, on December 9, 2015, the Hon. Daniel Martin granted A.M. Concrete's motion for a default judgment and denied I.M.P. and Impagliazzo's cross-motion because I.M.P. and Impagliazzo "failed to show that they had a reasonable excuse for their default." NYSCEF Doc. No. 65, at 2. On December 22, 2015, a judgment was entered in favor of A.M. Concrete in the amount of $177,840.42. NYSCEF Doc. No. 61, ¶ 14.

Thereafter, I.M.P. and Impagliazzo subsequently moved, pursuant to CPLR 5015 and 2221, for an order vacating the default judgment and ordering A.M. Concrete to accept their verified answer. NYSCEF Doc. No. 46. I.M.P. and Impagliazzo explained "that the delay in filing a timely answer was partially caused by settlement negotiations." *Id.*, at 2. On August 4,

[3] This action was also commenced against Impagliazzo. *See* NYSCEF Doc. No. 64, ¶ 6.

[4] NYSCEF Doc. No. 61 has two paragraph 11's which the Court references herein as paragraph 11(a) and 11(b), respectively.

2016, the motion for leave to reargue was granted and, upon granting reargument, the Court (Martin, J.) vacated the order granting the default judgment, and the default judgment itself, and accepted the late filing of I.M.P. and Impagliazzo's verified answer. *Id.* Nonetheless, M&S conveyed to Impagliazzo that it was "interposing a strong defense" in underlying action #1 (NYSCEF Doc. No. 61, ¶ 16; *see* NYSCEF Doc. No. 66), however, Impagliazzo contends that these "statements were false and misleading" (NYSCEF Doc. No. 61, ¶ 17). As a result, I.M.P. and Impagliazzo retained new counsel to continue its representation in underlying action #1 "at a cost of more than $18,514.39 and accruing." NYSCEF Doc. No. 61, ¶ 17.

At some time prior to the above order granting the motion to vacate the default judgment being issued, I.M.P. and Impagliazzo filed an appeal in underlying action #1 to the Appellate Division, Second Department to vacate the default and for leave to serve an amended verified answer. *Id.*; NYSCEF Doc. No. 67. In the instant action, plaintiffs claim damages in the form of costs associated with retaining new counsel and perfecting said appeal totaling an amount no less than $20,000. NYSCEF Doc. No. 61, ¶ 19. Plaintiffs further claim damages in the amount of approximately $250,000 for legal services charged by M&S and Saunders for their alleged litigation costs associated with their "failed litigation strategy, results[, and] malpractice" (*id.*; *see* NYSCEF Doc. No. 68) that caused I.M.P. and Impagliazzo "to contest seven (7) separate motions, a companion action in New York County seeking a transfer of venue, and a fully briefed appeal. All this to accomplish nothing more than to get [I.M.P. and Impagliazzo] back to the very beginning of the action so that it could serve an [a]nswer" (NYSCEF Doc. No. 61, ¶ 20).

II. Underlying Action #2 – *A.M. Concrete, Inc. v. I.M.P. Plumbing & Heating Corp. et ano*, Index No. 62124/2014

On March 28, 2014, simultaneous with underlying action #1, A.M. Concrete filed a verified petition in Supreme Court, Suffolk County, for an order, pursuant to Section 76, Subdivision 5 of the New York Lien Law ("Lien Law"), directing I.M.P. to produce a verified statement of its books and records. NYSCEF Doc. No. 70. I.M.P. retained M&S to defend it in underlying action #2. NYSCEF Doc. No. 61, ¶ 23. The statutory time period to respond lapsed after ten (10) days, and the petition was submitted unopposed. NYSCEF Doc. No. 72. By order dated December 16, 2015, the Court (Martin, J.) granted the petition and directed I.M.P. to provide a verified statement of entries in books and records. *Id.*; NYSCEF Doc. No. 75.

Plaintiffs allege that M&S and Saunders "ignored the [p]etition, failed or refused to fully inform [them] as to the consequences of ignoring this type of action and told [them] that no action was required." NYSCEF Doc. No. 61, ¶ 24; *see* NYSCEF Doc. No. 71. Plaintiffs further allege that I.M.P. "was directed to produce a statement under the [L]ien [L]aw notwithstanding the fact that [it] had a solid defense to the [p]etition." NYSCEF Doc. No. 61, ¶ 25. Plaintiffs allege that they were also advised to ignore the subsequent orders that were issued, which resulted in A.M. Concrete filing a contempt motion against I.M.P. on April 6, 2016. *Id.*, ¶ 26; NYSCEF Doc. No. 73. This pattern of behavior continued even after the contempt motion was filed. NYSCEF Doc. Nos. 61, ¶ 27; 74. I.M.P. was then held in default and failed to comply with the Court's (Martin, J.) order. NYSCEF Doc. Nos. 61, ¶ 28; 75.

Defendants claim that I.M.P. unilaterally ignored their advice to comply with the Court's (Martin, J.) order. NYSCEF Doc. No. 94, at 14. I.M.P. claims that it was again forced to retain new counsel to assume its representation in underlying action #2 with respect to the contempt

motion, which cost $26,397.27 and is accruing interest. NYSCEF Doc No. 61, ¶ 29. Ultimately, I.M.P. was not held in contempt, but was ordered to produce a statement in accordance with Lien Law Section 76. *Id*., ¶ 30; NYSCEF Doc. No. 76. I.M.P. again claims that defendants' legal strategy resulted in unnecessary motion practice, which included its cross-motion to vacate the default that was denied and filing a Notice to Appeal. NYSCEF Doc. Nos. 61, ¶¶ 31-32; 77.

III. Underlying Action #3 – *Andrew Impagliazzo et ano v. Heena Hotel LLC et al.*, Index No. 155403/2014

On June 2, 2014, M&S, on behalf of Impagliazzo and 30-32 West, commenced suit in Supreme Court, New York County, against Heena Hotel LLC, Khandubhai Patel, Nayan Patel, B.L. Patel, Champ Patel, Hament Patel, NCBL NY, LLC, and Utica Avenue Hotel, LLC. NYSCEF Doc. Nos. 61, ¶ 33; 78. The verified complaint in that action asserted claims for tortious interference with a contract, fraud, and constructive trust. NYSCEF Doc. Nos. 61, ¶ 33; 78. A notice of pendency was also filed simultaneously. NYSCEF Doc. No. 61, ¶ 33. Impagliazzo and 30-32 West alleged that the defendants in underlying action #3 had interfered with their purchase of real property located at 405 Eighth Avenue in Manhattan and had undermined the purchase with the intent of preventing the sale to Impagliazzo and 30-32 West, so that the defendants could acquire the property themselves. NYSCEF Doc. No. 78.

The defendants in the underlying action moved, pursuant to CPLR 3211, 6501, and 6514(b), by order to show cause, for an order, *inter alia*, vacating the notice of pendency. NYSCEF Doc. No. 61, ¶ 34; NYSCEF Doc. No. 79. On July 30, 2014, the Court (Bransten, J.) "granted the motion to dismiss the constructive trust cause of action on the basis that [Impagliazzo and 30-32 West] failed to plead a fiduciary relationship" and vacated the notice of pendency because they failed to properly serve the property owner. NYSCEF Doc. No. 80, Tr.

2:12-4:15. Thereafter, defendants in underlying matter #3 moved for summary judgment on the remaining causes of action—fraud and breach of contract—and the motion was granted in its entirety, without opposition. *Id.* at Tr. 4:6-15.

IV. Underlying Action #4 – *Andrew Impagliazzo et al. v. Shivbhakti LLC et ano*, Index No. 652437/2014

On August 8, 2014, M&S, on behalf of Impagliazzo, 405 8, and 30-32 West, commenced an identical lawsuit regarding the same property as in underlying action #3, but against different parties. NYSCEF Doc. Nos. 61, ¶¶ 41-43; 81. Similarly, a notice of pendency was also filed. NYSCEF Doc. No. 61, ¶ 43. This action likewise contained a motion to dismiss the action and vacate the notice of pendency. *Id.*, ¶ 44. While in underlying action #4, M&S opposed the motion, the opposition had little effect as the claim was essentially identical to that in underlying action #3. *Id.*

On October 15, 2014, the Court (Bransten, J.) again vacated and cancelled the notice of pendency because M&S failed to properly serve the property owner in underlying action #4 and improperly filed a successive notice of pendency on the same property and dismissed the action. NYSCEF Doc. No. 82, Tr. at 2:12-5:26. The constructive trust and fraud claims were dismissed because M&S failed to plead reliance and failed to allege a confidential relationship between the parties. *Id.* The tortious interference claim was dismissed because documentary evidence established that the contract was voluntarily cancelled. *Id.* Impagliazzo claims that "[t]he facts in support of these claims, which I gave to the [defendants] for inclusion, were never included. I was in shock and once again, all my claims were dismissed based solely on [their] failure to properly construct and plead the necessary claims with the information . . . provided." NYSCEF Doc. No. 61, ¶ 47. Impagliazzo further asserts that "[a]fter the dismissal, the [defendants] once

again intentionally withheld and failed to disclose the fact that the case was dismissed from me. It was not until I fired [them] and obtained new counsel that I learned the matter had been fully dismissed," which proximately caused damages to him and the other plaintiffs in underlying action #4. *Id.*, ¶¶ 48-49.

V. Check Deposit for the Purchase of Property Known as 40 East 80th Street

On or about August 8, 2014, I.M.P. gave a check to M&S in the amount of $200,000, to be placed in an escrow account, for the down payment of a property located at 40 East 80th Street in Manhattan in contemplation of purchase of the same. NYSCEF Doc. Nos. 83; 61, ¶ 50. Plaintiffs allege that when the property purchase was aborted, defendants refused to return the $200,000 as they were supposed to and, instead, without any authority, applied the money towards legal fees or expenses related to other legal matters. NYSCEF Doc. No. 61, ¶¶ 51-52.

VI. Marc Bernstein

Lastly, plaintiffs allege that Bernstein, a disbarred attorney, provided legal services under the employ or direction of defendants. *Id.*, ¶¶ 54-56. Impagliazzo claims that if he knew "Bernstein was disbarred, [he] would have never allowed him to give me legal advice and [he] would have never allowed the [d]efendants to provide me legal services." *Id.*, ¶ 57.

DISCUSSION

Defendants now move, pursuant to CPLR 3212, for summary judgment to dismiss the verified complaint. They seek to dismiss the following causes of action: (1) legal malpractice; (2) breach of contract; (3) negligent misrepresentation; (4) intentional misrepresentation; (5) refund; (6) fraud; (7) breach of fiduciary duty; (8) conversion; and (9) disgorgement. Plaintiffs oppose and cross-move for an order: (1) denying defendants' prayer for dismissal and/or summary judgment; (2) granting plaintiffs' cross-motion for summary judgment, pursuant to

CPLR 3212, for the full sums demanded in the verified complaint;[5] and (3) striking M&S and Saunders' answer[6] and dismissing their affirmative defenses with prejudice.

It is well-established that in order to obtain summary judgment under CPLR 3212(b), the movant must set forth "proof in admissible form" to "establish [a] cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in [the movant's] favor." *Friends of Animals, Inc. v. Assoc. Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 1067 (1979). "The moving party's '[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers.'" *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 (2012) (alterations in original) (emphasis omitted) (quoting *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986)). Once the movant meets this initial burden, then the burden shifts to the opposing party to rebut that prima facie showing by producing evidence, in admissible form, sufficient to require a trial of any material issue of fact. *Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 (1980).

I. First Cause of Action – Legal Malpractice

Defendants argue that plaintiffs cannot meet the elements required to prove legal malpractice because plaintiffs failed to prove any alleged negligence committed by M&S or Saunders and plaintiffs have failed to allege any actual and ascertainable damages. NYSCEF Doc. No. 94, at 5-11.

[5] The Court notes that the verified complaint does not contain any allegations of fact to support a cause of action for civil conspiracy and no specific allegations or argument beyond the legal standard are set forth in plaintiffs' memorandum of law in opposition to the instant motion and in support of their cross-motion. NYSCEF Doc. No. 60, at 21.

[6] M&S and Saunders have not answered the verified complaint according to the NYSCEF docket.

Plaintiffs contend that defendants breached their duty in both the defense and prosecution of the four underlying actions by, *inter alia*, failing to properly file an answer to a complaint, failing to oppose a motion to dismiss, and failing to respond to both a petition under Lien Law Section 76 and the subsequent Court order. NYSCEF Doc No. 61, ¶¶ 9-49.

Legal malpractice is an attorney's failure to exercise "reasonable skill and knowledge commonly possessed by a member of the legal profession." *Darby & Darby, P. C. v. VSI Int'l, Inc.*, 95 N.Y.2d 308, 313 (2000) (internal quotation marks and citation omitted). An attorney may be held liable for "ignorance of the rules of practice, failure to comply with conditions precedent to suit, or for his neglect to prosecute or defend an action." *Bernstein v. Oppenheim & Co.*, 160 A.D.2d 428, 430 (1st Dep't 1990). To succeed on a claim for legal malpractice, the plaintiff must show: (1) the negligence of the attorney; (2) that the attorney's "negligence was a proximate cause of the loss sustained;" and (3) that the plaintiff was damaged as a result of the attorney's actions. *Tydings v. Greenfield, Stein & Senior, LLP*, 43 A.D.3d 680, 682 (1st Dep't 2007), *aff'd*, 11 N.Y.3d 195 (2008); *Bishop v. Maurer*, 33 A.D.3d 497, 498 (1st Dep't 2006), *aff'd*, 9 N.Y.3d 910 (2007); *Leder v. Spiegel*, 31 A.D.3d 266, 267 (1st Dep't 2006), *aff'd*, 9 N.Y.3d 836 (2007). In addition, plaintiffs must also establish the existence of an attorney-client relationship. *See* PJI 2:125, cmt. I.

In the instant case, M&S and Saunders do not dispute that there was an attorney-client relationship with plaintiffs. NYSCEF Doc. No. 94, at 5.

In order to prove proximate causation, the plaintiff must establish that "but for" the alleged negligence, the plaintiff "would have prevailed in the underlying [action] or would not have sustained any ascertainable damages." *Brooks v. Lewin*, 21 A.D.3d 731, 734 (1st Dep't 2005); *see also Lieblich v. Pruzan*, 104 A.D.3d 462, 462-63 (1st Dep't 2013). "A plaintiff's

burden of proof in a legal malpractice action is a heavy one. The plaintiff must prove first the hypothetical outcome of the underlying litigation and, then, the attorney's liability for malpractice in connection with that litigation." *Lindenman v. Kreitzer*, 7 A.D.3d 30, 34 (1st Dep't 2004). The Appellate Division, First Department has stated that:

> [o]nly after the plaintiff establishes that he would have recovered a favorable judgment in the underlying action can he proceed with proof that the attorney engaged to represent him in the underlying action was negligent in handling that action and that the attorney's negligence was the proximate cause of the plaintiff's loss since it prevented him from being properly compensated for his loss.

Id.

The burden is on the moving defendant, one who seeks summary judgment dismissal of a legal malpractice claim, to present evidence in admissible form establishing that the plaintiff is unable to prove at least one of the three elements of a malpractice cause of action. *Crawford v. McBride*, 303 A.D.2d 442, 442 (2d Dep't 2003); *see also Aur v. Manhattan Greenpoint Ltd.*, 132 A.D.3d 595, 595-96 (1st Dep't 2015). In a plaintiff's motion for summary judgment in a legal malpractice case, the plaintiff "will be entitled to summary judgment . . . where there is no conflict at all in the evidence, the defendant's conduct fell below any permissible standard of due care, and the plaintiff's conduct was not really involved." *Selletti v. Liotti*, 22 A.D.3d 739, 740 (2d Dep't 2005).

A. Underlying Action #1 - *A.M. Concrete, Inc. v. I.M.P. Plumbing & Heating Corp. et ano*, Index No. 62017/2014

At issue in underlying action #1 is defendants' failure to timely answer or to request an extension of time to file a late answer, resulting in the entry of a default judgment. However, I.M.P. and Impagliazzo were able to cure the mistake and the Court (Martin, J.) vacated the

default judgment and permitted them to file a late verified answer. NYSCEF Doc. No. 46. Justice Martin's decision states:

> Defendants in their oral re-argument explain in more detail that the delay of filing a timely answer was partially caused by settlement negotiations. Defendant maintains that it was a brief delay and that it was neither deliberate nor willful.
>
> …
>
> Since on oral argument defendants have brought up settlement negotiations as a reasonable excuse for failure to answer and since the above cases support that argument, this Court is satisfied that the defendants have sustained their burden to provide a reasonable excuse.

Id. at 2.

I.M.P. and Impagliazzo now claim that they were forced to retain new counsel to perfect an appeal of Justice Martin's decision denying their motion to vacate the default judgment, and to serve an amended verified answer with affirmative defenses and counterclaims. Impagliazzo avers that I.M.P. incurred more than $18,514.39 in legal fees. NYSCEF Doc. No. 61, ¶ 17. As evidence, I.M.P. and Impagliazzo attach their appellate brief and amended verified answer with affirmative defenses and counterclaims. NYSCEF Doc. No. 67. Impagliazzo avers that, as a result of M&S' negligence, their new attorneys were required to file seven motions, file a companion action in New York County Supreme Court seeking to change venue, and file and perfect an appeal. NYSCEF Doc. No. 61, ¶ 20.

Defendants argue that the appeal was unnecessary as Justice Martin vacated the default judgment and permitted I.M.P. and Impagliazzo to file a late answer. NYSCEF Doc. No. 94, at 13. Further, defendants contend that I.M.P. and Impagliazzo's costs incurred in filing an amended answer were unnecessary, as defendants themselves reviewed and approved of the initial answer. *But see Shapiro v. Butler*, 273 A.D.2d 657, 658 (3d Dep't 2000) (holding that "an

attorney's failure to timely interpose an answer . . . constitutes prima facie evidence of legal malpractice"); *Ashley v. Maney*, *McConville & Liccardi*, 251 A.D.2d 862, 863 (3d Dep't 1998) (same). However, I.M.P. and Impagliazzo fail to demonstrate the essential element of proximate cause—that but for defendants' malpractice, they caused any actual damage to I.M.P. and Impagliazzo in underlying action #1. *See, e.g.*, *Nel Taxi Corp. v. Eppinger*, 203 A.D.2d 438, 438 (2d Dep't 1994) (holding that the client did not prove that filing a late answer was the cause of malpractice). In underlying action #1, Justice Martin ultimately vacated the default judgment, resulting in no prejudice to I.M.P. and Impagliazzo in the underlying action. As such, the appeal, as related to the default, was completely unnecessary. It was I.M.P. and Impagliazzo's choice to pay to retain new counsel and appeal Justice Martin's decision granting the default judgment.

If I.M.P. and Impagliazzo suffered any damages at all, the most feasible injury would have been the legal fees paid to defendants related to the motion to vacate. However, there is no such allegation in the complaint; they only seek payment for legal fees incurred by their present counsel for perfecting an appeal and submitting an amended answer. For these reasons, this Court finds that I.M.P. and Impagliazzo are not entitled to any recoverable damages relating to defendants' alleged malfeasance from underlying action #1. As such, summary judgment in favor of defendants is granted for the portion of the legal malpractice claim as related to *A.M. Concrete, Inc. v. I.M.P. Plumbing & Heating Corp. et ano*, Index No. 62017/2014, and that corresponding branch of plaintiffs' cross-motion is denied.

B. Underlying Action #2 – *A.M. Concrete, Inc. v. I.M.P. Plumbing & Heating Corp. et ano*, Index No. 62124/2014

At issue in underlying action #2 is I.M.P. contention that defendants advised it to ignore a petition filed under Lien Law Section 76(5) and to further ignore the subsequent Court (Martin,

J.) order that followed, dated December 16, 2015. NYSCEF Doc. No. 61, ¶¶ 24, 26, 30. As a result, I.M.P. claims that it was forced to retain new counsel to produce a responsive statement to the petitioner in underlying action #2, oppose a contempt motion, and appeal the December 16, 2015 order, incurring more than $26,397.27 in costs (*id.*, ¶ 29), even though it had "a solid defense to the petition" (*id.*, ¶ 25). However, Impagliazzo's affidavit is silent as to what specifically that defense would have been. *See id.*

Defendants did not seek to vacate or oppose the petition, but instead defendants claim that they advised I.M.P. to comply with the petition, advice which was allegedly ignored. NYSCEF Doc. No. 94, at 14. Defendants' papers are silent as to their actions or advice with respect to the December 16, 2015 order; however, defendants point to Justice Martin's October 11, 2016 decision on the contempt motion to establish that I.M.P. did not have a meritorious defense in the first instance and cannot prove the essential element of proximate cause:

> As regards a meritorious defense, respondent argues that the two individuals received W-2's and therefore this cannot be a Lien Law case; however petitioner references checks made to "A. M. CONCRETE INC" and his affidavit that they were sub- contractors [sic] not employees. Based on the above, the Court . . . denies respondents'[ ] request to vacate this Court's order of December 16, 2015.

NYSCEF Doc. No. 48, at 3. Accordingly, I.M.P. failed to establish that "but for" defendants' alleged negligence it would have prevailed in underlying action #2 and, therefore, summary judgment in favor of defendants is granted for the portion of the legal malpractice claim as related to *A.M. Concrete, Inc. v. I.M.P. Plumbing & Heating Corp. et ano*, Index No. 62124/2014, and that corresponding branch of plaintiffs' cross-motion is denied.

C. Underlying Action #3 – *Andrew Impagliazzo et ano v. Heena Hotel LLC et al.*, Index No. 155403/2014

At issue in underlying action #3 is defendants' failure to oppose a motion to dismiss. Impagliazzo and 30-32 West allege that defendants "unilaterally chose not to oppose the motion and simply accepted a dismissal of the action with prejudice" (NYSCEF Doc No. 61, ¶ 35) "without [their] knowledge and consent" (*id.*, ¶ 36), thereby abandoning the action. Impagliazzo and 30-32 West also contend that defendants' pleadings were insufficient, thereby preventing them from presenting valid claims against the underlying defendants (*id*., ¶ 37) and causing damages upwards of $4 million (*id*., ¶ 38).

Defendants state that they advised, and Impagliazzo and 30-32 West had agreed, that opposition would be unsuccessful and that filing opposition papers would only incur further legal costs. NYSCEF Doc. No. 94, at 15. Further, defendants contend that underlying action #3 would have been dismissed regardless of opposition papers, since there was documentary evidence conclusively establishing that one of Impagliazzo and 30-32 West's causes of action could not succeed. *Id.*

Both parties point to the January 5, 2015 decision of the Hon. Eileen Bransten, wherein she states her reasoning for granting the underlying defendants' summary judgment motion:

> Well, I'll go through the reasoning I have to grant defendants' motion for summary judgment on the fraud cause of action. . . . Nowhere in the complaint do plaintiffs plead any reliance on any statement, action or omission of either defendant. The failure to plead reliance is fatal to a fraud claim. Ergo, I grant defendants' motion for summary judgment on the fraud action; and I'll go on to grant the tortious interference claim also in that case. . . . Here, the documentary evidence conclusively established that plaintiffs voluntarily cancelled their contract. . . . Plaintiffs' allegations that defendants caused 405's breach of the Utica Purchase contract are contradicted by the letter voluntarily terminating the contract and

> providing for the return of part of 405's deposit. Therefore, plaintiff cannot plead the existence of a valid contract or a resulting breach.

NYSCEF Doc. No. 80, Tr. 4:26-6:15. As to the notice of pendency filed, Justice Bransten stated, "I also cancelled the notice of pendency because plaintiffs never properly served the property owner." *Id.*, Tr. 2:12-4:15.

According to Justice Bransten's decision, although Impagliazzo and 30-32 West may not have succeeded on the underlying tortious interference or breach of contract claims, and the notice of pendency was cancelled, it is possible that had defendants properly pleaded reliance, a fraud cause of action could have been maintained. Nonetheless, Impagliazzo and 30-32 West nowhere in their opposition papers indicate what the actual underlying fraud was that should have been pleaded with particularity. As such, in line with Justice Bransten's decision that granted summary judgment on Impagliazzo and 30-32 West's fraud claim, this Court grants summary judgment in favor of defendants for the portion of the legal malpractice claim as related to *Andrew Impagliazzo et ano v. Heena Hotel LLC et al.*, Index No. 155403/2014 for Impagliazzo and 30-32 West's failure to establish the essential element of proximate cause, and that corresponding branch of plaintiffs' cross-motion is denied.

D. Underlying Action #4 – *Andrew Impagliazzo et al. v. Shivbhakti LLC et ano*, Index No. 652437/2014

The facts giving rise to underlying action #4 are the same as in underlying action #3, but adds 405 8 as a plaintiff and contains different underlying defendants. *See* NYSCEF Doc. No. 61, ¶¶ 42-43. Plaintiffs allege that even though defendants submitted opposition to a motion to dismiss in the underlying matter, defendants again failed to "properly construct and plead the necessary claims." *Id.*, ¶ 47. Plaintiffs claim damages, but only as to the litigation costs billed by defendants, and not any damages regarding the underlying merits of the lost lawsuit.

Defendants again argue that plaintiffs cannot show proximate cause because Justice Bransten dismissed underlying action #4 based upon documentary evidence. NYSCEF Doc. No. 94, at 15. Justice Bransten commented on the similarity of underlying actions #3 and #4, stating that, in both lawsuits:

> three causes of action were on exactly the same properties, exactly the same people, and the fact that you forgot one or are not adding one, guess what? That's a notice to amend. Now, if you had done a notice to amend, you know very well you are not entitled to [an] additional notice of pendency.

NYSCEF Doc. No. 82, Tr. 6:13-8:20. Justice Bransten again cancelled the notice of pendency for failure to properly serve the property owner. *Id.* In addition, Justice Bransten reasoned that:

> Further, neither . . . the Plaintiff 3032 West 31 Street nor Plaintiff 405 8 LLC, allege any relationship with the [Defendants]. Therefore, all constructive trust claims must be dismissed for lack of confidential relationship, except for Impagliazzo's claims against Patel. . . . However, even Impagliazzo's claim against Patel fails. Plaintiff simply fails to allege any promise, either express or implied, that Patel made to Impagliazzo. The Plaintiff also failed to allege Impagliazzo made any transfer to Patel or anyone else in reliance of such a promise. Therefore, the constructive trust claim must be dismissed. . . . As to the claim for tortious interference, that also must be dismissed. . . . Here, documentary evidence conclusively establishes that plaintiff voluntarily cancelled the contract. . . . Therefore, the Plaintiff cannot plead existence of a valid contract or a resulting breach. As for the fraud claim, that also must be dismissed. . . . No where [sic] in the complaint do Plaintiffs plead any reliance on a statement, action or omission of either Defendant. The failure to plead reliance is fatal to a fraud claim.

Id., Tr. 8:23-13:4.

Plaintiffs have failed to articulate, with any specificity, what tasks by defendants were performed incompetently beyond the issues that Justice Bransten discusses in her decision in underlying action #4, set forth *supra*. Further, plaintiffs, in support of their claim for legal malpractice, did not provide an expert affidavit or any other proof to establish that the services

performed by defendants were performed in a negligent manner. *See, e.g.*, *Ho v. Brackley*, 69 A.D.3d 533, 534 (1st Dep't 2010) ("Absent an expert's affidavit, and given claims that, as pleaded, raise issues of professional standards and causation beyond the ordinary experience of persons who are not lawyers, summary judgment was properly granted."). Additionally, there is no proof submitted by plaintiffs to support their allegations that they paid for any legal services performed and billed by defendants—plaintiffs do not annex any billing statements from defendants or copies of checks for services rendered, as evidence of payment, in support of this claim.[7] *See Perkins v. Norwick*, 257 A.D.2d 48, 50 (1st Dep't 1999) ("Accordingly, since the complaint fails to contain the requisite allegation of 'actual ascertainable damages,' it fails to state a cause of action."). "[M]ere speculation of a loss resulting from an attorney's alleged omissions … is insufficient to sustain a claim for legal malpractice." *Gallet, Dreyer & Berkey, LLP v. Basile*, 141 A.D.3d 405, (1st Dep't 2016) (alterations in original) (quoting *Makard v. Bloom*, 4 A.D.3d 128, 129 (1st Dep't 2004)). Accordingly, this Court grants summary judgment in favor of defendants for the portion of the legal malpractice claim as related to *Andrew Impagliazzo et al. v. Shivbhakti LLC et ano*, Index No. 652437/2014, and the corresponding branch of plaintiffs' cross-motion for summary judgment in their favor is denied.

II. Second Cause of Action – Breach of Contract (an Accounting)

The second cause of action sounding in breach of contract, asserts, *inter alia*, that defendants overbilled and performed unnecessary services in order to pad their billable hours. Defendants contend that this cause of action is duplicative of the legal malpractice claim.

[7] The Court notes that plaintiffs do annex an email indicating that defendants held a $200,000 check from plaintiffs in escrow, which plaintiffs allege was converted for the payment of attorneys' fees, discussed *infra* Part VIII.

The elements of a breach of contract claim include: (1) "the existence of a contract;" (2) "the plaintiff's performance thereunder;" (3) "the defendant's breach thereof;" and (4) "resulting damages." *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010). The First Department has held that a "breach of contract claim, which asserts, inter alia, that defendants overbilled [the plaintiffs] and performed unnecessary services, is not duplicative of the legal malpractice claim. The former claim, unlike the latter claim, does not speak to the quality of defendants' work." *Ullman-Schneider v. Lacher & Lovell-Taylor, P.C.*, 121 A.D.3d 415, 416 (1st Dep't 2014). However, where the plaintiff was billed by the defendant for work that was not performed, or the plaintiff was improperly billed, such a claim for breach of contract cannot stand where the bills were paid without objection. *Englese v. Sladkus*, 59 Misc. 3d 1218(A), at *3 (Sup. Ct. N.Y. County 2018) (St. George, J.) (citing *Gamiel v. Curtis & Reiss-Curtis, P.C.*, 60 A.D.3d 473, 474-75 (1st Dep't 2009)).

Here, to the extent plaintiffs assert a breach of contract claim, plaintiffs specifically claim that "[d]efendants over-billed the [p]laintiffs for services rendered and billed for actions either unnecessary or later fully abandoned by the [d]efendants making moot the large amount of work prepared and billed for by said [d]efendants and paid by the [p]laintiffs." NYSCEF Doc. No. 1, ¶ 118. That one paragraph in the complaint thereby renders plaintiffs' breach of contract claims either duplicative of the legal malpractice claims to the extent it alleges legal work that was later abandoned or null and void because plaintiffs already paid defendants' legal fees. To further emphasize the later point with respect to this cause of action, if there is any doubt as to whether plaintiffs in fact paid defendants, "[p]laintiffs demand an accounting of the bill and a refund of a sum not less than $450,000.00." *Id.*, ¶ 121. Accordingly, defendants are granted summary

judgment on plaintiffs' cause of action for breach of contract and the corresponding branch of plaintiffs' cross-motion is denied.

III. Third Cause of Action – Negligent Misrepresentation

Defendants contend that the third cause of action sounding in negligent misrepresentation is also duplicative of the legal malpractice claim and that plaintiffs cannot prove the elements of negligent misrepresentation. NYSCEF Doc. No. 94, at 17-18.

Plaintiffs allege that "[d]efendants did not provide accurate information and made false representations to the [p]laintiffs regarding the facts and status of the litigation." NYSCEF Doc. No. 1, ¶ 128. Plaintiffs further claim that their "detrimental reliance resulted in numerous claims and lawsuits, several of which were dismissed by the Court." *Id.*, ¶ 131.

Since this claim arises from the same facts as the legal malpractice claim and seeks the same damages as the legal malpractice claim, it is duplicative of the legal malpractice claim. *See, e.g.*, *Sun Graphics Corp. v. Levy, Davis & Maher, LLP*, 94 A.D.3d 669, 669 (1st Dep't 2012) ("The causes of action for breach of contract, breach of fiduciary duty, and negligent misrepresentation are redundant of the legal malpractice claim, since they arise from the same allegations and seek identical relief."); *Chowaiki & Co. Fine Art Ltd. v. Lacher*, 115 A.D.3d 600, 600-601 (1st Dep't 2014) ("The motion court properly dismissed plaintiffs' claim for breach of fiduciary duty as duplicative of the breach of contract claim, since the claims are premised upon the same facts and seek identical damages."). Accordingly, defendants are granted summary judgment on plaintiffs' third cause of action for negligent misrepresentation and the corresponding branch of plaintiffs' cross-motion is denied.

IV. Fourth Cause of Action – Intentional Misrepresentation

As a threshold matter, defendants argue that the fourth cause of action for intentional misrepresentation is time-barred. NYSCEF Doc. No. 11, at 12-13. Defendants contend that the one-year statute of limitations applicable to intentional torts applies: Under CPLR 215(3), the statute of limitations for "an action to recover damages for . . . false words causing special damages" is one (1) year. Plaintiffs do not address this issue. However, in this matter, plaintiffs' fourth cause of action explicitly alleges that "[a]s a result of the reliance on the [d]efendants' intentional misrepresentations, the Plaintiff relied, to their [sic] detriment upon the advice and counsel of the [d]efendants" and sustained damages. NYSCEF Doc. No. 1, ¶ 139; *see id.*, ¶ 141.

A cause of action for intentional misrepresentation sounds in fraud and is therefore governed by CPLR 213(8). *See Pyramid Brokerage Co., Inc. v. Zurich Am. Ins. Co.*, 71 A.D.3d 1386, 1387 (4th Dep't 2010). CPLR 213(8) applies to actions "based upon fraud" and must be commenced within "six years from the date the cause of action accrued or within two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it."

Here, all of the underlying actions and allegations of malpractice occurred in 2014 (*see* NYSCEF Doc. No. 1, ¶¶ 25, 44, 62, 76, 90), and the verified complaint in this action was filed in 2017 (*id.*), less than six years from the alleged intentional misrepresentations. Thus, defendants have failed to establish that the fourth cause of action sounding in intentional misrepresentation is time-barred and this cause of action survives defendants' procedural argument. *See* CPLR 213(8); *Sargiss v. Magarelli*, 12 N.Y.3d 527, 532 (2009).

Next, defendants argue that the fourth cause of action sounding in intentional misrepresentation is duplicative of the legal malpractice claim. NYSCEF Doc. No. 94, at 18.

Although plaintiffs do not address this issue in their motion papers, their pleadings indicate that defendants' failure to provide "accurate information and accurate representations was deliberate in nature" (NYSCEF Doc. No. 1, ¶ 138) and as a result "of the reliance on the [d]efendants' intentional misrepresentations" (*id.*, ¶ 139), "[t]he [p]laintiffs were damaged in an amount not less than $5,000,000.00 (*id.*, ¶ 141).

While plaintiffs' claim for intentional misrepresentation survives the procedural statute of limitations argument, this claim arises from the same facts and seeks the same damages as plaintiffs' legal malpractice claim. As such, plaintiffs' claim for intentional misrepresentation is duplicative of their legal malpractice claim. *See, e.g.*, *Sun Graphics Corp.*, 94 A.D.3d at 669; *Sonnenschine v. Giacomo*, 295 A.D.2d 287, (1st Dep't 2002) ("Plaintiffs' remaining causes of action for breach of contract and fiduciary duty and intentional and negligent misrepresentation allege the same operative facts as the cause of action for legal malpractice, and, accordingly, were also properly dismissed."). Accordingly, defendants are granted summary judgment in their favor on plaintiffs' claim for intentional misrepresentation, and the corresponding branch of plaintiffs' cross-motion is denied.

V. Fifth Cause of Action – Refund

Defendants contend that the fifth cause of action for a refund is duplicative of the legal malpractice claim and that a refund is not a proper cause of action. NYSCEF Doc. No. 94, at 18-19. While plaintiffs do not address this issue in their motion papers, their pleadings allege that their legal bills from defendants are inflated and inaccurate, thus entitling them to a refund. NYSCEF Doc. No. 1, ¶¶ 143-45. Even if such a cause of action does exist, because this claim arises from the same facts as the legal malpractice claim and seeks the same damages as the legal malpractice claim, it is duplicative of the legal malpractice claim and defendants are granted

summary judgment in their favor. *See, e.g.*, *Sun Graphics Corp.*, 94 A.D.3d at 669; *cf. Iannucci v. Kucker & Bruh, LLP*, 42 A.D.3d 436, 437 (2d Dep't 2007) (holding that a separate cause of action seeking "a refund of alleged excess fees that were paid to the defendants" constituted a different cause of action because it "invoke[d] facts different from those alleged in the first cause of action" for malpractice). Accordingly, the corresponding branch of plaintiff's cross-motion is denied.

VI. Sixth Cause of Action – Fraud

Defendants contend that the sixth cause of action sounding in fraud is duplicative of plaintiffs' legal malpractice claim. NYSCEF Doc. No. 94, at 16. Defendants also argue that plaintiffs have failed to plead the elements of fraud, including material misrepresentation, false statements made, scienter, and reliance. *Id*. at 19. The crux of plaintiffs' sixth cause of action sounding in fraud, can be broken into three parts: (1) defendants' failure in their representation and defense of underlying actions #1 through #4; (2) defendants' improper use of the $200,000 check made for a down payment on the purchase of real property; and (3) defendants' representation that Bernstein, a disbarred attorney, was properly licensed. NYSCEF Doc. No. 1, ¶¶ 146-64.

A. Defendants' Representation and Defense of Underlying Actions #1 Through #4

The fraud claim alleging inadequate legal practice arises from the same facts as the underlying legal malpractice claim and involve no separate and distinct damages. Accordingly, this portion of the fraud cause of action is duplicative of the legal malpractice claim. *Gourary v. Green*, 143 A.D.3d 580, 581-82 (1st Dep't 2016). As such, defendants are granted summary judgment on this portion of plaintiffs' fraud claim.

B. Defendants' Improper Use of the $200,000 Check for a Down Payment

As to the improper use of the $200,000 check, this Court finds that this issue both arises from the same facts and is properly plead under the eighth cause of action for conversion and will be addressed therein. *See* NYSCEF Doc. No. 1, ¶¶ 147, 172-76. Accordingly, defendants are also granted summary judgment on this portion of plaintiffs' fraud claim.

C. Bernstein

Lastly, this Court addresses: (1) whether this portion of the fraud claim is duplicative of the legal malpractice claim; and (2) whether there are triable issues of fact as to representations made by defendants as to Bernstein's eligibility to practice law. In order to properly allege a cause of action for fraud,

> "the plaintiff must prove: (1) that the defendant made a representation, (2) as to a material fact, (3) which was false, (4) and known to be false by the defendant, (5) that the representation was made for the purpose of inducing the other party to rely upon it, (6) that the other party did so rightfully rely, (7) in ignorance of its falsity, (8) to his injury . . . ;" however, where plaintiff proves "the existence of a fiduciary or confidential relationship warranting the trusting party to repose his confidence in the defendant," the element of defendant's scienter is not required.

Burton v. Kaplan, 1991 WL 11763908 (Sup. Ct. N.Y. County Mar. 13, 1991) (Huff, J.), *aff'd*, 184 A.D.2d 408 (1st Dep't 1992) (quoting *Brown v. Lockwood*, 76 A.D.2d 721, 730-31 (2d Dep't 1980)).

When a cause of action for fraud is asserted alongside a claim for legal malpractice it "is sustainable . . . to the extent that it is premised upon one or more affirmative, intentional misrepresentations—that is, something more egregious than mere 'concealment or failure to disclose [one's] own malpractice.'" *White of Lake George v. Bell*, 251 A.D.2d 777, 778 (3d Dep't 1998) (alteration in original) (quoting *La Brake v. Enzien*, 167 A.D.2d 709, 711 (3d Dep't

1990)); *see Mitschele v. Schultz*, 36 A.D.3d 249, 254-56 (1st Dep't 2006) (holding that "plaintiff's fraud cause of action [was] not merely a malpractice claim with a claim for concealment of malpractice superimposed on it, the parallel nature of the damages [was] not determinative"). Simply alleging that defendants "furnished erroneous legal advice and neglected to take appropriate steps to safeguard [plaintiffs'] interests" are insufficient. *Id*. "As alleged in the complaint, the fraud cause of action was based upon tortious conduct independent of the alleged malpractice, i.e., an alleged misrepresentation as to the eligibility of the defendant . . . to practice law in [this state], and the plaintiffs alleged that damages flowed from this distinct conduct." *Rupolo v. Fish*, 87 A.D.3d 684, 685-86 (2d Dep't 2011). A disbarred attorney may not engage in the practice of law (*see* 22 NYCRR 1240.15(a)), and an attorney may be guilty of professional misconduct where he intentionally aids a disbarred attorney to continue to practice law. *See, e.g.*, *In re Raskin*, 217 A.D.2d 187, 188-90 (2d Dep't 1995); *In re Mainiere*, 274 A.D. 17, 17 (1st Dep't 1948) ("Any member of the bar who lends assistance to a disbarred attorney which enables the latter to keep up the appearance of continuing professional standing subjects himself to discipline.").

In the instant litigation, plaintiffs allege that defendants perpetrated a fraud when they "asserted that [d]efendant Bernstein was an attorney and was able to assist in . . . various actions." NYSCEF Doc. No. 60, at 20. Taking the allegations in the complaint as true, the allegation that defendants represented that Bernstein was licensed to practice law, with the knowledge that he was not, and allowed him to perform legal work on behalf of plaintiffs, could potentially qualify as an affirmative, intentional misrepresentation. However, even if this was an intentional misrepresentation by defendants, plaintiffs fail to allege any actual injury that they suffered, much less any damages separate and apart from the legal malpractice claim sufficient to

sustain a separate cause of action for fraud. *See Rupolo*, 87 A.D.3d at 685-86; *Burton*, 1991 WL 11763908. As such, this Court grants defendants' motion for summary judgment on plaintiffs' sixth cause of action for fraud and denies the corresponding branch of plaintiffs' cross-motion seeking the same relief.

VII. Seventh Cause of Action – Breach of Fiduciary Duty

Defendants contend that the breach of fiduciary duty claim should be dismissed as duplicative of the legal malpractice claim. NYSCEF Doc. No. 94, at 16. Plaintiffs allege that defendants failed to "represent the [p]laintiffs[']' best interest in the various legal matters" and, as a result, breached their "duty of care and goodwill" to plaintiffs. NYSCEF Doc. No. 1, ¶ 168.

With respect to a cause of action for breach of fiduciary duty, as alleged in the context of a legal malpractice action, the First Department has stated the following:

> Because the attorney-client relationship is both contractual and inherently fiduciary, a complaint seeking damages alleged to have been sustained by a plaintiff in the course of such a relationship will often advance one or more causes of action based upon the attorney's breach of some contractual or fiduciary duty owed to the client. The courts normally treat the action as one for legal malpractice only.

Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker, 56 A.D.3d 1, 8-9 (1st Dep't 2008); *see also Nevelson v. Carro, Spanbock, Kaster & Cuiffo*, 290 A.D.2d 399, 400 (1st Dep't 2002) (dismissing claims for breach of fiduciary duty and breach of contract because they were redundant when they were predicated on the same allegations and sought relief identical to that sought in the malpractice claim).

Here, the allegations pleaded in plaintiffs' breach of fiduciary duty claim arise from the same facts as plaintiffs' legal malpractice claim and do not allege distinct damages. *See* NYSCEF Doc. No. 1, ¶¶ 170-71. Accordingly, the two claims are duplicative. *See Ulico Cas.*

Co., 56 A.D.3d at 8-9. Thus, defendants are granted summary judgment in their favor on plaintiffs' seventh cause of action for breach of fiduciary duty, and the corresponding branch of plaintiffs' cross-motion is denied.

VIII. Eighth Cause of Action – Conversion

As a threshold matter, defendants argue that the eighth cause of action for conversion is time-barred. NYSCEF Doc. No. 11, at 20. Plaintiffs do not address this issue.

Plaintiffs allege that defendants converted a $200,000 check that was to be held in escrow for a property purchase. NYSCEF Doc No. 61, ¶ 50. When the property purchase later fell through, plaintiffs allege that defendants used the $200,000 "to cover alleged separate legal fees and/or expenses related to other legal matters." *Id.*, ¶ 52. The check, signed by Impagliazzo on behalf of I.M.P., was dated August 8, 2014 and was payable to M&S. NYSCEF Doc. No. 83. Impagliazzo states that plaintiffs never authorized defendants to use the money for anything other than the down payment for the property (NYSCEF Doc. No. 61., ¶¶ 50, 52), and when Impagliazzo "demanded to know where the money went, the [d]efendants stated that it would be forthcoming, but of course it never was" (*id.*, ¶ 53).

Defendants argue that plaintiffs' claim for conversion is time-barred "as the *res* of this claim occurred on August 8, 2014 and the verified complaint is dated August 31, 2017, more than three (3) years ago." NYSCEF Doc. No. 94, at 24. The statute of limitations for conversion claims is three years. *See* CPLR 214(3). "While accrual [normally] runs from the date the conversion takes place and not from discovery or the exercise of diligence to discover, it is well settled that, where the original possession is lawful, a conversion does not occur until after a demand and refusal to return the property." *D'Amico v. First Union Nat'l Bank*, 285 A.D.2d 166, 172 (1st Dep't 2001) (alteration in original) (internal quotation marks and citations omitted).

Here, defendants failed to establish that plaintiffs' conversion claim is time-barred. The earliest correspondence from plaintiffs requesting an accounting of how the funds were spent is dated June 11, 2015. NYSCEF Doc. No. 51, at 1. On June 15, 2015, defendants responded with a billing record that lacked any dates. *Id*. at 2-3. It is unclear if the payments reflected in the billing record pertain to the contemplated property purchase. Furthermore, there is no evidence of the date that defendants allegedly refused to return the funds or the date that defendants allegedly withdrew plaintiffs' $200,000 from the escrow account and converted said monies for their personal use. NYSCEF Doc. No. 60, at 24. As such, the precise date of the alleged conversion is unclear, and issues of fact exist as to when the conversion claim actually accrued. *See Johnson v. Law Office of Kenneth B. Schwartz*, 145 A.D.3d 608, 612-13 (1st Dep't 2016) (holding that the date of an email indicating funds were released was insufficient to prove the statute of limitations for a cause of action of conversion had expired). Accordingly, plaintiffs' cause of action sounding in conversion survives defendants' procedural argument.

Next, defendants allege that plaintiffs' eighth cause of action sounding in conversion is duplicative of plaintiffs' legal malpractice claim. NYSCEF Doc. No. 94, at 16. Plaintiffs claim that defendants were entrusted with $200,000 "for the sole purpose of being used as a down payment . . . for the purchase of [the] property [located at 40 East 80th Street]" (NYSCEF Doc. No. 1, ¶ 173), but when the purchase fell through, defendants refused to return the money (*id.*, ¶¶ 173-75).

Conversion is the "unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights." *Peters Griffin Woodward, Inc. v. WCSC, Inc.*, 88 A.D.2d 883, 883 (1st Dep't 1982). In order to establish a cause of action for conversion, the plaintiff must show "legal title or an immediate superior right of possession

to the identifiable fund and the exercise by defendants of unauthorized dominion over the money in question to the exclusion of plaintiff's rights." *Bankers Trust Co. v. Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 A.D.2d 384, 385 (1st Dep't 1992). "[W]here the original possession is lawful, a conversion does not occur until after a demand and refusal to return the property." *D'Amico*, 285 A.D.2d at 172.

This Court first addresses whether this cause of action is duplicative of plaintiffs' legal malpractice claim. As discussed *supra*, a claim can be redundant of a legal malpractice claim when the facts underlying that separate cause of action are the same and the two claims allege the same damages. *See, e.g.*, *Ulico Cas. Co.*, 56 A.D.3d at 8-9. Here, plaintiffs allege underlying facts that are not duplicative of the facts alleged under their eight other causes of action and allege distinct damages that do not pertain to any other causes of actions, notably, punitive damages and attorneys' fees. NYSCEF Doc. No. 1, ¶ 176. Therefore, plaintiffs' cause of action sounding in conversion of their $200,000 check is not duplicative of their legal malpractice claim. *See, e.g.*, *Ulico Cas. Co.*, 56 A.D.3d at 8-9.

This Court will now turn to the merits of the conversion claim. An attorney who distributes to himself or herself funds that were entrusted to him or her, respectively, and held in escrow for a specific transaction does so at the risk of not only potentially violating disciplinary rules but having committed conversion. *See, e.g.*, *In re Larsen*, 50 A.D.3d 41, 45 (1st Dep't 2008) (holding that attorney who, after having been sent a check to hold in escrow and depositing the funds in an escrow account, "used the remainder of the funds for her own purposes, believing she had the authority to do so because they were her legal fees" and "respondent should have realized that her conduct was not only improper, but could be deemed a conversion of funds"). The First Department has held that, "absent unusual mitigating

circumstances, . . . conversion of funds belonging to a client [is] grave misconduct warranting disbarment. *In re McLaughlin*, 158 A.D.2d 12, 14 (1st Dep't 1990). As such, it is patently improper for an attorney to simply take a client's funds and later decide to tell the client what said funds were used for—much less, for the attorney to use a client's funds to pay their own outstanding legal fees. *See id.* at 13 (recommending disbarment of attorney who received client funds to be used as a down payment toward a purchase of property by that client and the attorney did not tell his client that the funds were used for his own business purposes).

Here, plaintiffs assert that defendants misappropriated $200,000 in escrow funds "to cover alleged separate legal fees and/or expenses related to other legal matters" (NYSCEF Doc. No. 61, ¶ 52) and when plaintiffs "demanded to know where the money went, the [d]efendants stated that it would be forthcoming, but of course it never was" (*id.*, ¶ 53). The check memo line indicates that it was provided to M&S for a deposit related to purchasing the property located at 40 East 80th Street. NYSCEF Doc. No. 84. Defendants submit emails between Impagliazzo, Bernstein, and Saunders, regarding the use of the $200,000. NYSCEF Doc. No. 51. Contained within the emails is a breakdown of how the money was spent. *Id.* at 3. The proof submitted is that the $200,000 check was not used for the down payment on the property located at 40 East 80th Street as plaintiffs intended. Instead, defendants represent that the money was used, with plaintiffs' permission, to pay other expenditures related to plaintiffs' business activities. In fact, the email containing the breakdown provided to plaintiffs in June 2015 shows that only an extremely small portion of the funds went to attorneys' fees. *Id.* As such, this Court finds that material issues of fact remain because the emails submitted to support defendants' assertion are woefully insufficient to support either the existence of permission from plaintiffs to use the $200,000 check for legal fees and other expenses or that the funds were actually used to pay for

the payments represented in the email breakdown. Accordingly, those branches of defendants' motion and plaintiffs' cross-motion seeking summary judgment on the cause of action for conversion are denied. Likewise, summary judgment on the issue of punitive damages is also denied as the existence of conversion may potentially warrant punitive damages depending on the context of the wrongdoing.

IX. Ninth Cause of Action – Disgorgement

Finally, defendants argue that the ninth cause of action sounding in disgorgement is also duplicative of plaintiffs' legal malpractice claim. NYSCEF Doc. No. 94, at 16. Plaintiffs allege that defendants unfairly retained their legal fee payments as they failed to competently perform the work required to earn said fees. NYSCEF Doc. No. 1, ¶ 177. Under similar circumstances, this Court (Lebovits, J.) has previously held that where the plaintiffs alleged that the defendant law firm "unfairly retained the legal fee payment without competently performing the work required," the "plaintiffs' allegations that [the] defendants failed to act as fit legal advisors in the matters for which they were hired" were subsumed in their cause of action for legal malpractice. *Martin v. Claude Castro & Assocs. PLLC*, 2016 WL 3455936, 2016 N.Y. Slip Op. 31183(U), at *5 (Sup. Ct. N.Y. County June 24, 2016). Likewise, this Court, in this instance, finds that "plaintiffs' demand for the return of attorneys' fees they paid to defendants is, essentially, a claim for monetary damages" and not other equitable relief sought under another term. *Access Point Med., LLC v. Mandell*, 106 A.D.3d 40, 44 (1st Dep't 2013). Plaintiffs do not point to any facts, let alone different facts, to support this cause of action as an independent cause of action separate and distinct from their legal malpractice claim. Accordingly, defendants are granted summary judgment in their favor on plaintiffs' ninth cause of action for disgorgement, and the corresponding branch of plaintiffs' cross-motion is denied.

Based upon the foregoing, it is hereby

ORDERED that defendants Munzer & Saunders, LLP and Craig Saunders' motion for summary judgment is granted in their favor for the following claims: first cause of action (legal malpractice); second cause of action (breach of contract); third cause of action (negligent misrepresentation); fourth cause of action (intentional misrepresentation); fifth cause of action (refund); sixth cause of action (fraud); seventh cause of action (breach of fiduciary duty); and ninth cause of action (disgorgement); and it is further

ORDERED that defendants Munzer & Saunders, LLP and Craig Saunders' motion for summary judgment is denied as to plaintiffs' eighth cause of action (conversion); and it is further

ORDERED that plaintiffs' cross-motion is denied.

This constitutes the decision and order of this Court.

Dated: May 18, 2020

Hon. James E. d'Auguste, J.S.C.