

<b>Witty v Barnes &amp; Barnes, PC</b>
2020 NY Slip Op 32035(U)
May 7, 2020
Supreme Court, Suffolk County
Docket Number: 0747/2018
Judge: William G. Ford
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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 38 - SUFFOLK COUNTY

**PRESENT:**

**HON. WILLIAM G. FORD**  
**JUSTICE OF THE SUPREME COURT**

STARR WITTY,

Plaintiff,

-against-

**BARNES & BARNES, PC, LEO BARNES,**  
**ESQ. & MATTHEW BARNES, ESQ.,**

Defendants.

Motion Submit Date: 06/20/19  
Mot Confs Held: 02/28/19 & 05/09/19  
Mot Seq: 002 - Mot D

**PLAINTIFF'S COUNSEL:**

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**DEFENDANT'S COUNSEL:**

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On defendants' motion for dismissal of the amended complaint pursuant to CPLR 3211, the Court considered the following papers: Notice of Motion, Affidavit in Support & supporting papers; Affirmation in Opposition and other opposing papers; Reply Affidavit; and upon due deliberation and full consideration of the same; it is

**ORDERED** that defendant's motion pursuant to CPLR 3211(a)(7) for dismissal of the amended complaint for failure to state a causes of action for violations of Judiciary Law § 487 and breach of fiduciary duty is **granted in part and denied in part** as follows; and it is further

**ORDERED** that plaintiff's counsel is hereby directed to serve a copy of this decision and order with notice of entry via certified first class mail, return receipt requested forthwith; and it is further

**ORDERED** that, if applicable, within 30 days of the entry of this decision and order, that defendant's counsel is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR 8019(c) with a copy of this decision and order and pay any fees should any be required.

**FACTUAL BACKGROUND & PROCEDURAL POSTURE**

As relevant to the presently pending motion, the Court notes that the relevant facts and circumstances underlying the parties' dispute has been stated with specificity and particularity previously by the Supreme Court, Commercial Division (Emerson, J.) in at least two separate actions under entitled *Witty v Wallace* Index Number 25191/2013, affirmed by the Supreme

Court, Appellate Division as *Witty v Wallace*, 176 AD3d 906 [2d Dept 2019] and *Witty v 1725 Fifth Avenue Corp.* Index Number 2509/2017 affirmed in part under *Witty v 1725 Fifth Avenue Corp.*, 170 AD3d 781 [2d Dept 2019]). Therefore the Court assumes the parties' familiarity with all of the same and does not belabor or reiterate the facts as outlined there unless necessary and bearing emphasis.

Plaintiff Starr Witty is the 85 year old widow of attorney Manuel Witty who at one time practiced his profession with Martin R. Wallace at an office located on Fifth Avenue, Bay Shore, Suffolk County, New York. Messrs. Wallace and Witty acquired improved real estate at two locations on Fifth Avenue in Bay Shore, which were held by corporations, 1650 Fifth Avenue Corp. and 1725 Fifth Avenue Corp. The 1650 Fifth Ave. Corp. property was improved by a building which was let via "triple net lease" to a bank. The Wallace Witty law firm was passed onto attorneys Robert Frampton and Susan Veltry upon Messrs. Witty and Wallace's retirement from the practice of law, with the 1725 Fifth Ave. Corp. loaning approximately \$250,000.00 to Frampton and Veltry in the form of a sale agreement, mortgage and promissory note. Plaintiff and Judith Wallace were the sole officers of each respective corporation on their husband's behalf and each held a 50% ownership stake.

Plaintiff retained defendants to represent her interests upon discovering that rental income from the 1650 Corp. property appeared to have declined without explanation. During the scope of that representation, defendants discovered and relayed to plaintiff that the lease held by the corporation to the bank had been renegotiated, seemingly without plaintiff's knowledge or involvement. Distrusting her husband's former partner and suspecting foul play, plaintiff commenced a series of actions and proceedings in the Supreme Court, Commercial Division identified above: a shareholder's derivative action; an action for corporate waste, accounting and production of the corporate books; a judicial dissolution of a corporation action; and a mortgage foreclosure and breach of promissory note action. Succinctly summarized, those litigations did not terminate favorably for the plaintiff. Particularly, the matters in the Commercial Division were dismissed, and subsequently taken up on appeal with mixed success for the plaintiff.

This action followed. As relevant to defendant's pending application for dismissal, plaintiff by her amended complaint seeks recovery of damages against her former attorneys asserting causes of action for breach of fiduciary duty and attorney deceit or misconduct violative of Judiciary Law § 487. In essence plaintiff claims that her former attorneys, who withdrew their representation of her in the prior matters on motion, made errors, omissions, and otherwise knowingly unnecessarily prolonged litigation and "churned legal bills and fees" for their own pecuniary interest and benefit at plaintiff's expense.

In lieu of serving an answer, defendants' moved to dismiss on grounds that plaintiff fails to state a cause of action.

### STANDARD OF REVIEW

#### **Dismissal for Failure to State a Cause of Action**

In considering a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any

cognizable legal theory (*see Nonnon v. City of New York*, 9 NY3d 825, 827; *Leon v. Martinez*, 84 NY2d 83, 87–88; *Paolicelli v. Fieldbridge Assoc., LLC*, 120 AD3d 643, 644; *Wallkill Med. Dev., LLC v Catskill Orange Orthopaedics, P.C.*, 131 AD3d 601, 603 [2d Dept 2015]). Nonetheless, the courts are reminded that on a motion to dismiss the facts pleaded are presumed to be true and are to be accorded every favorable inference, “bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration” (*Intl. Fid. Ins. Co. v Quenzer Elec. Sys., Inc.*, 132 AD3d 811, 812 [2d Dept 2015]).

“Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove [his or her] claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss” (*Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38).

The test of the sufficiency of a pleading is ‘whether it gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments’” (*Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901, 902, 998 NYS2d 107, 108 [2d Dept 2014]).

Furthermore, “[a] court may consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211(a)(7). Thus, “[w]here evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate” (*Lubonty v U.S. Bank N.A.*, 159 AD3d 962, 963, 74 NYS3d 279, 281 [2d Dept 2018], *lv to appeal granted*, 32 NY3d 903 [2018]).

## DISCUSSION

### **Summary of the Parties’ Contentions**

Defendants support their motion seeking dismissal of the pleadings making two separate and distinct arguments. First, they argue that any actions and litigation decisions or strategies they employed on behalf of the plaintiff as her attorneys was with her knowledge and consent. In particular, to the extent that any actions resulting in adverse effects, such as dismissal of an action on motion to dismiss or summary judgment for insufficiency of pleading or insufficient evident to raise triable issues, defendants maintain that those failures rested with plaintiff’s insistence of maintaining frivolous or unnecessary litigation. Underlying this theory is defendant’s assertion that during discovery in the corporate waste action they learned that plaintiff, at her late husband’s insistence, executed the fourth lease renewal which resulted in the lowering of rental income generated by the bank to the 1650 Corp. Thus, defendants’ generally emphasize that they were up front in their dealings with plaintiff and did not seek to deceive her and when the attorneys and client came to an impasse, they withdrew from her representation.

Therefore, defendants urge dismissal of plaintiff’s Judiciary Law § 487 claim. On the law, defendants contend that plaintiff’s failed to plead the claim with requisite specificity.

Moreover, they observe that the underlying matters forming the scope of their representation of the plaintiff have concluded, thus they argue with no pending action, any alleged mistake or deceit is no longer actionable.

Lastly, defendants argue that Supreme Court's prior determinations in the Commercial Division dismissing plaintiff's various other actions and proceedings conclusively decided any and all issues or claims arising therefrom and form the basis of issue or claim preclusion barring this new action. As an aside, defendants additionally seek severance of as of yet unpled counterclaims for alleged unpaid legal fees owned by plaintiff to the defendant, which they simultaneously seek to transfer to the District Court pursuant to CPLR 325(d) arguing the amount for the same falls below the Supreme Court's monetary jurisdiction.

Plaintiff opposes defendants' motion in its entirety. Generally she argues that the amended complaint on its face is entitled to favorable inferences militating against dismissal for lack of requisite specificity. Further she argues that defendants misconstrue the law on the Judiciary Law claim as far as the alleged actionable conduct occurred before the Supreme Court while those matters were active and viable. Lastly, plaintiff argues that there is no identity of the issues litigated previously as compared to the present action, nor a full and fair opportunity to have litigated the same.

The Court notes at the outset that defendants moved for dismissal and/or summary judgment relying both on CPLR 3211(a)(7) asserting failure to state a cause of action and for conversion of the motion to one for judgment as a matter of law relying on the annexed evidence. This Court declines that invitation for lack of sufficient notice to the plaintiff, and more importantly, for the premature nature of the action given it was made preanswer prior to the commencement of discovery.

### I. The Judiciary Law Violation Claim

Turning to the merits of the motion, “[a] violation of Judiciary Law § 487 requires an intent to deceive, whereas a legal malpractice claim is based on negligent conduct” (*Bill Birds, Inc. v Stein Law Firm, P.C.*, 164 AD3d 635, 637, 82 NYS3d 91, 93 [2d Dept 2018], *lv to appeal granted*, 32 NY3d 913 [2019]). Pursuant to Judiciary Law § 487(1), “[a]n attorney or counselor who ... [i]s guilty of any deceit or collusion, or consents to any deceit or collusion, *with intent to deceive* the court or any party ... [i]s guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action (*Dupree v Voorhees*, 102 AD3d 912, 913, 959 NYS2d 235, 236 [2d Dept 2013]). Judiciary Law § 487 focuses on the attorney's intent to deceive, not the deceit's success” (*Sammy v Haupel*, 170 AD3d 1224, 1225, 97 NYS3d 269, 271 [2d Dept 2019]) A cause of action alleging a violation of Judiciary Law § 487 must be pleaded with specificity (*Betz v Blatt*, 160 AD3d 696, 698, 74 NYS3d 75, 79 [2d Dept 2018]; *see also Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 615, 23 NYS3d 173, 178 [1st Dept 2015][allegations regarding an act of deceit or intent to deceive must be stated with particularity, the claim will be dismissed if the allegations as to scienter are conclusory and factually insufficient]).

“Since Judiciary Law § 487 authorizes an award of damages only to ‘the party injured,’ an injury to the plaintiff resulting from the alleged deceitful conduct of the defendant attorney is

an essential element of a cause of action based on a violation of that statute” (*Gumarova v Law Offices of Paul A. Boronow, P.C.*, 129 AD3d 911, 911, 12 NYS3d 187, 188 [2d Dept 2015]). However, defendant establishes entitlement to judgment as a matter of law dismissing such a claim premised upon a showing that “he did not commit deceit or collusion” upon the court or any party” (*Lawrence Ripak Co., Inc. v Gdanski*, 143 AD3d 862, 863, 39 NYS3d 223, 224 [2d Dept 2016]). Moreover, “[a]llegations regarding an act of deceit or intent to deceive must be stated with particularity” (*Gorbatov v Tsirelman*, 155 AD3d 836, 838, 65 NYS3d 71, 74 [2d Dept 2017]).

Here, defendants read the law to require that plaintiff bring an action for recovery for alleged attorney misconduct, mistake or deceit while the underlying action is still pending. However this Court does not read the law in this strict fashion. For sure, precedent does clearly hold that “the statute only applies to wrongful conduct by an attorney in a pending proceeding in which the plaintiff was a party” (*Barouh v Law Offices of Jason L. Abelow*, 131 AD3d 988, 991, 17 NYS3d 144, 147 [2d Dept 2015]). However, the motion record makes clear that plaintiff believes that defendants missteps during the motion practice phase in the actions before the Commercial Division constituted the basis for their assertions of churning and unnecessary and groundless litigation. Whether or not this litigation strategy was of plaintiff’s direction or choosing or initiated with defendant’s as her counsel presents a fact question on which this record is paper thin. No depositions have occurred and by plaintiff’s counsel’s representation, defendants have yet to exchange documents. The amended complaint in this matter does make clear however that defendants were on fair notice of the claims asserted against them and are aware of precisely what to defend against.

Despite the amended complaint putting the defendants on fair notice, the pleading still lacks the requisite specificity of exactly what actions defendants engaged in that constituted willful “deceit.” Plaintiff’s counsel’s affirmation in opposition is rife with conclusions accusing defendants of taking advantage of plaintiff’s elderly status and unspecified mental illness. On the basis that counsel referenced plaintiff’s mental health, and on defendants’ request, this Court held a competency hearing and determined that plaintiff was of sufficient sound mind and comprehension to proceed in the litigation. However, this alone does not support the contention that defendants’ acted against plaintiff’s best interests in the underlying litigation. As argued by defendants in their motion papers, the Commercial Division’s adverse determination were for technical reasons: insufficiency of pleading, absence of corroborative evidence, and other errors. No court that this Court is aware of has ruled that defendants’ acted in bad faith, with malice or improper motive. Counsel’s bald assertions aside, the pleading does not articulate sufficient detail to make out the *prima facie* claim worthy of recovery under Judiciary Law § 487. Plaintiff mere contention that mistakes in representation, strategy and practice alone do not amount to willful, volitional or knowledgeable deceit. Despite the early stage of this litigation, the amended complaint does not come close to meeting with the requisite pleading standard expected under the statute it invokes. Accordingly, that branch of defendants’ motion seeking dismissal of that claim for failure to state a cause is **granted** and that claim is **dismissed**.

## II. Preclusion by Prior Litigation

Defendants further seek dismissal of the rest of plaintiff’s claims for breach of fiduciary duty arguing that the prior determinations in the actions before the Commercial Division entailed

determinations adverse to plaintiff for actions or omissions on her part, which they believe undercut her assertions in this matter. Defendants however are wrong.

To recover for a breach of fiduciary duty, settled law holds that plaintiff must demonstrate with particularity (1) the existence of a fiduciary duty, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct" (*Dineen v Wilkens*, 155 AD3d 607, 609, 64 NYS3d 56, 58 [2d Dept 2017]). On their face, one might conclude that the similarity between the fiduciary elements and the Judiciary Law § 487 claim warrant identical analysis and outcome, however, that assumption is mistaken. Here, it is clear that because the parties were in an attorney-client relationship, the first prong is clearly met. Further, plaintiff articulates clear damages which she traces to the lack of success in the prior litigations. The only dispute lies on the articulation and specificity of defendant's misconduct, which here defendant maintain was "cleared" by the findings of the Supreme Court, Commercial Division.

Pursuant to the doctrine of res judicata, or claim preclusion, "a valid final judgment bars future actions between the same parties on the same cause of action." "One linchpin of res judicata is an identity of parties actually litigating successive actions against each other: the doctrine applies only when a claim between the parties has been previously brought to a final conclusion" (*Highlands Ctr., LLC v Home Depot U.S.A., Inc.*, 149 AD3d 919, 921, 53 NYS3d 321, 324 [2d Dept 2017]). The Appellate Division takes a "pragmatic approach" to determining what constitutes a single transaction or series of transactions for the purposes of res judicata. Thus, events are part of the same transaction or series of transactions where their "foundational facts" are related in "time, space, origin, or motivation," where they "form a convenient trial unit," and where "treatment [of the foundational facts] as a unit conforms to the parties' expectations" (*Manko v Gabay*, 175 AD3d 484, 486, 106 NYS3d 130, 132 [2d Dept 2019]).

On the other hand, "[c]ollateral estoppel, an equitable doctrine, is based upon the general notion that a party, or one in privity with a party, should not be permitted to relitigate an issue decided against it." "[W]hether to apply collateral estoppel in a particular case depends upon 'general notions of fairness involving a practical inquiry into the realities of the litigation.'" The doctrine's fundamental question is "whether relitigation should be permitted in a particular case in light of what are often competing policy considerations, including fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results. No rigid rules are possible, because even these factors may vary in relative importance depending on the nature of the proceedings" (*In re Kaori*, 144 AD3d 911, 913, 42 NYS3d 168, 170-71 [2d Dept 2016][internal citations omitted]). At bottom, it requires a satisfactory showing that (1) the identical issue was decided in the prior action and is decisive in the present action, and (2) the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior issue" (*Curley v Bon Aire Properties, Inc.*, 124 AD3d 820, 822, 2 NYS3d 571, 573 [2d Dept 2015]). Thus, where plaintiff enjoys a full and fair opportunity to litigate the issues previously subsequent relitigation is barred by the doctrine (*Gillen v McCarron*, 126 AD3d 670, 671, 6 NYS3d 253, 254 [2d Dept 2015]).

As referenced in brief passing above, the prior actions involved the parties before the Supreme Court, Commercial Division were limited in scope. In one plaintiff employed defendants to sue to force her widow's partner's spouse to produce corporate books, records and things for an accounting of the corporation's assets, and failing cooperation, then to compel judicial dissolution. Those actions failed due to missteps which plaintiff attributes to mistakes

made by her attorneys. The question of whether those mistakes were reasonable, avoidable, or unreasonably deficient cannot be determined on the present record in its infant state. But what is clear is that those prior determinations in no way passed judgment on defendants' motivations. Thus, the clear record to support the assertion that there was the required identity of the issues and conclusive determination of any and all issues or claims required to successfully invoke the preclusion doctrines is woefully lacking at this point. Accordingly, that branch of defendants' motion seeking dismissal of plaintiff's breach of fiduciary duty claim for failure to state a cause of action is **denied**.

**CONCLUSION**

For the reasons state above, defendants' motion for dismissal is **granted in part and denied in part**. The motion to dismiss the Judiciary Law § 487 claim is **granted, and that claim is dismissed**, however the motion to dismiss the breach of fiduciary duty claim is **denied**.

The foregoing constitutes the decision and order of this Court.

Dated: May 7, 2020  
Riverhead, New York



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**WILLIAM G. FORD, J.S.C.**

\_\_\_\_ **FINAL DISPOSITION**

  X   **NON-FINAL DISPOSITION**