SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **47**

Justice

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DENISE A. RUBIN,

Plaintiff,

- v -

NAPOLI BERN RIPKA SHKOLNIK, LLP, WORBY GRONER EDELMAN & NAPOLI BERN, LLP, NAPOLI BERN & ASSOCIATES, LLP and PAUL J. NAPOLI,

Defendants.

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INDEX NO. 154060/2015 (Action #1)

MOTION DATE 10/25/2021, 10/25/2021, 10/25/2021, 10/25/2021

MOTION SEQ. NO. 019 020 021 022

DECISION + ORDER ON MOTION

PAUL J. NAPOLI,

Third-Party Plaintiff,

-against-

MARC J. BERN and ALAN RIPKA,

Third-Party Defendants.

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Third-Party
Index No. 595154/2017

PAUL J. NAPOLI,

Plaintiff,

-against-

DENISE A. RUBIN,

Defendant.

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DECISION/ORDER
Index No. 450243/2018
(Action #2)

The following e-filed documents, listed by NYSCEF document number (Motion 019) 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 667, 671, 675, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 757

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 020) 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589,

590, 591, 592, 593, 594, 595, 668, 672, 676, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 751, 753, 758, 759

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 021) 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 656, 669, 673, 677, 718, 719, 720, 721, 722, 723, 724, 750, 761, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 022) 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 663, 665, 670, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 752, 760, 768, 769

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 274, 276, 277, 283, 284, 285, 286

were read on this motion for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 007) 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 270, 273, 275

were read on this motion for SUMMARY JUDGMENT

Plaintiff Denise A. Rubin (Rubin), an attorney formerly employed as general counsel and appellate counsel by defendants Napoli Bern Ripka Shkolnik, LLP and Worby Groner Edelman & Napoli Bern, LLP, alleges employment discrimination and breach of contract against her former employers and one of the firms' partners, defendant Paul J. Napoli (Napoli). Napoli, in turn, asserts claims for legal malpractice, breach of fiduciary duty, and violation of Judiciary Law § 487 against Rubin for events that occurred while Rubin represented Napoli personally.

In Action No. 1, Napoli Bern Ripka Shkolnik, LLP, Worby Groner Edelman & Napoli Bern, LLP, and Napoli Bern & Associates, LLP (collectively, the Law Firm defendants) move, pursuant to CPLR § 3212, for summary judgment dismissing the amended complaint in its entirety (motion sequence number 019).

Defendant/counterclaim plaintiff Napoli moves, pursuant to CPLR § 3212, for summary judgment dismissing the discrimination and retaliation claims as against him (motion sequence number 020). Napoli also moves for summary judgment on his claims alleging legal malpractice, breach of fiduciary duty, and violation of Judiciary Law § 487 (motion sequence number 021).

Rubin moves, under CPLR § 3212, for summary judgment dismissing the Law Firm defendants' counterclaim for breach of her employment agreement. Rubin also moves for summary judgment dismissing Napoli's counterclaim for tortious interference with contract (motion sequence number 022).

In Action No. 2, defendant/counterclaim plaintiff Rubin moves for summary judgment dismissing the complaint (motion sequence number 006).

Napoli moves for summary judgment dismissing Rubin's counterclaims for violations of Judiciary Law § 487, abuse of process, and malicious prosecution (motion sequence number 007).

Motion sequence numbers 019, 020, 021, and 022 in Action No. 1, and motion sequence numbers 006 and 007 in Action No. 2, are consolidated for disposition.

BACKGROUND

The following facts are undisputed unless otherwise indicated. Rubin is an attorney admitted to practice in the State of New York since 1991 (NY St Cts Elec Filing [NYSCEF] Doc No. 563 ¶ 1).[1] Rubin was hired as an associate attorney by the Law Firm defendants in January 2003 (*id.*, ¶ 2). Rubin entered into an employment agreement with the Law Firm defendants in 2004, which was deemed retroactively effective to May 1, 2003 (*id.*, ¶ 3). On March 19, 2007,

[1] The court cites to the NYSCEF documents filed in Action No. 1 unless otherwise indicated.

the parties subsequently entered into a new employment agreement, which replaced the previous agreement (*id.*, ¶ 4).

Napoli and Marc Bern were equal partners of the firm (*id.*, ¶ 9; NYSCEF Doc No. 543, Bern tr at 43). Rubin alleges that Napoli was "primarily responsible for making employment, promotion and compensation decisions at the Napoli Firm" (NYSCEF Doc No. 532, verified amended complaint ¶ 4).

Rubin is Hired As Appellate Counsel and General Counsel

Rubin testified at her deposition that she was hired as an associate attorney, and handled appeals, research and substantive writing (NYSCEF Doc No. 536, Rubin tr at 13). Within the first couple of years, Rubin began reviewing other attorneys' research and writing (*id.*). In the summer of 2008, Rubin was promoted to general counsel (*id.* at 19). As general counsel, Rubin was responsible for responding to disciplinary grievance complaints against the firm and the individual attorneys working for the firm (*id.* at 20). Rubin testified that she was also responsible for assisting Napoli and Bern with professional liability insurance (*id.*). Rubin also oversaw the work of outside counsel (*id.*).

When asked about her trial experience, Rubin testified that her experience was "minimal," and "second-seated" a medical malpractice trial (*id.* at 69). Rubin testified that she was "[n]ot formally" a manager of employees, and that employees did not report to her on a day-to-day basis (*id.* at 83). Rubin testified that her starting salary was $110,000 (*id.* at 97). When she signed her employment agreement in 2008, her salary increased to $150,000 (*id.*). From 2007 through September 2013, Rubin received three salary increases, which resulted in annual salaries of $165,000, $185,000, and $200,000 (*id.* at 98-99). In September 2013, Rubin was given an additional 25% salary increase, which resulted in an annual salary of $250,000 (*id.*).

Law Firm Defendants Fail to Promote Rubin and Fail to Pay a 5% Bonus

Rubin testified that she did not complain that she was being discriminated against based on her gender; "I don't believe that I phrased it in terms of, you are not making me a partner because I am a woman, but I did phrase it in terms of, he keeps hiring one man after another over my head, who are less experienced, who have less responsibility and calling them partner" (*id.* at 109-110).

Napoli testified that there were a "variety of reasons" why Rubin was not made a partner (NYSCEF Doc No. 540, Napoli tr at 116). He testified that Rubin was the only person that held the title of general counsel; "[s]he wasn't bringing in business like the other partners were bringing in business"; "[s]he didn't have the ability to try cases"; "we needed a unanimous vote of the different partners in order to have someone become a partner," and "[w]e didn't have a unanimous vote" (*id.* at 116-117). Bern testified that he never recommended that Rubin become a partner because of her "inability to come to work on time" (NYSCEF Doc No. 543, Bern tr at 108, 135-136). Even though she was not given the title of partner, she was "very well paid" (*id.* at 136).

On April 16, 2013, Rubin sent a memorandum to Napoli and Bern regarding her past and future compensation. In that memorandum, she stated:

> "Concurrent [with a 2010 pay increase] I had also been promised . . . five percent of the net attorneys' fee to the firm of any matter in which I was 'materially involved' . . . [and] [f]ive percent of the net attorneys' fee upon settlement or verdict being paid for any matter assigned to me for appeal. This was later amended to include any case assigned to me, whether or not it was for appeal"

(NYSCEF Doc No. 737 at 2). Rubin alleges that the Law Firm defendants failed to make the promised payments, other than several payments on relatively small cases (NYSCEF Doc No. 532, verified amended complaint ¶ 22).

The Events Leading Up to Rubin's Termination

According to Rubin, on September 4, 2014, Napoli sent her an email asking her about an email that Bern had sent about a certain section of the firm's handbook (NYSCEF Doc No. 536, Rubin tr at 136). She replied to Napoli that she did not know why or which section of the handbook (*id.* at 136-137). Rubin admitted that she was not being truthful (*id.* at 139). Rubin testified that Napoli terminated her within "several hours" by email (*id.* at 141). She spoke with Bern, who told her, "Go back to your desk, you're not fired" (*id.* at 142). Rubin never returned to the firm's offices, but continued to do work for the firm's clients "through at least November or early December" (*id.* at 146). Bern told her to work from home "until [he] can work some of this out and things quiet down," and Bern paid her out of his own pocket for two pay periods, once in September and again in mid-October (*id.* at 145, 163).

Napoli testified that, in May 2014, he was diagnosed with AML leukemia and began receiving cancer treatment at Memorial Sloan Kettering Cancer Center where he remained until October 2014 (NYSCEF Doc No. 540, Napoli tr at 138-139). In September 2014, while he was still in the hospital, Napoli learned that Rubin had emailed Bern about a certain section of the firm's employee handbook (*id.* at 240-241). When Napoli asked Rubin what specific section Bern was looking for, Rubin told Napoli in an email on September 4, 2014, that "[h]e was asking for the handbook, I do not know why or what section" (NYSCEF Doc No. 554 at 2). Napoli Skyped Rubin, and "she picks up and literally hangs up right away" (NYSCEF Doc No. 540, Napoli tr at 243). Napoli Skyped her back and she said "f--- you" and hung up (*id.*). He thought that maybe she was joking, so he Skyped her back (*id.*). Rubin again said, "f--- you" and hung up (*id.*). Napoli testified that he emailed her back and fired her (*id.*).

Rubin's Allegations of Retaliation

Rubin alleges that, after the denial of Napoli's motion to dismiss, Napoli filed a frivolous counterclaim as retaliation against her alleging, without any factual support that Rubin had conspired with Bern to steal the Napoli Bern entities from Napoli (NYSCEF Doc No. 74, first amended counterclaims ¶¶ 159-168, 175-186, 201-210). In addition, Rubin alleges that Napoli's counterclaims included allegations that she was tardy, belligerent, insubordinate, and incompetent in the performance of her duties as an attorney (*id.*).

Rubin asserts that, on February 27, 2017, Napoli's wife, Marie Napoli, filed an allegedly frivolous action against Rubin in Supreme Court, Nassau County, asserting, among other things, that Rubin was Marie Napoli's attorney and "personal counsel" to the Napoli family, "switched sides" and revealed client confidences after her representation, and that, in this action, Rubin "stipulated to having violated firm and client confidences in at least five incidences before the Court and Justice Kern" (NYSCEF Doc No. 2 in *Napoli v Rubin*, Index No. 601679/17 [Sup Ct, Nassau County, complaint ¶¶ 16, 55]).

On March 6, 2017, Napoli filed Action No. 2, also allegedly as retaliation for Rubin bringing her discrimination claims (NYSCEF Doc No. 699 at 13-14).

Rubin also avers that Napoli retaliated against her by, among other ways, pressuring attorneys who previously referred cases to her to stop doing so (NYSCEF Doc No. 532, verified amended complaint ¶ 41).

Rubin also claims that Napoli interfered with her relationship with an insurance carrier (*id.*, ¶ 42). On March 1, 2017, Napoli emailed the insurance carrier's coverage counsel and stated that "You should look to Denise to pay that deductible. From what I know about her

financial situation, you should demand the full amount in escrow at the outset or have a high risk nonpayment" (*id.*).

Napoli's Allegations of Malpractice, Breach of Fiduciary Duty, and Violation of Judiciary Law § 487

Napoli alleges that, in 2014, he was named as a defendant in an action brought by a former employee of Napoli Bern Ripka Shkolnik, LLP, Vanessa Dennis (Dennis), captioned *Dennis v Napoli*, Index No. 153857/14 (Sup Ct, NY County) (NYSCEF Doc No. 254 in Action No. 2, verified complaint ¶ 13). On June 2, 2014, Rubin sent an evidence preservation letter to Dennis's counsel, stating that she was "the General Counsel for NBRS and pending retention of counsel for the firm and the individually-named defendants, I ask that you kindly accept the within notice from the undersigned" (NYSCEF Doc No. 794 at 2).

Napoli claims that Rubin attempted to deceive and/or influence Justice Eileen Bransten, who was overseeing the dissolution action of Napoli Bern Ripka Shkolnik, LLP, and sent an email dated July 18, 2014 to Bern, stating "Marc – just FYI – I also plan to attend. I have a longstanding and strong relationship with Eileen Bransten dating back to my days as Moskowitz's Court Attorney" (NYSCEF Doc No. 795 in Action No. 2 at 2).

According to Napoli, after her termination, Rubin violated her fiduciary duties to Napoli by representing former NBRS employees, Michael Rongomas, Mahesh Raghunandan, Satish Raghunandan, and Chris Martuscello on a CPLR article 75 petition to stay arbitration (NYSCEF Doc No. 797, petition in *Martuscello v Napoli*, Index No. 653738/14 [Sup Ct, NY County]).

Napoli further alleges that Rubin filed an affidavit in Action No. 1 on April 25, 2016, which he claims contained Napoli's confidences revealed during Rubin's representation of Napoli (NYSCEF Doc No. 801 ¶ 21; NYSCEF Doc No. 793, Rubin aff, ¶ 21).

Napoli also alleges that Rubin "switched sides" and appeared on behalf of Dennis in an action brought by his wife, Marie Napoli, against Bern, *Napoli v Bern*, Index No. 161423/15 (Sup Ct, NY County) (NYSCEF Doc No. 798, hearing tr at 4).

Napoli avers that he never consented to Rubin representing his litigation opponents at any time (NYSCEF Doc No. 799, Napoli aff, ¶ 11). Napoli states that he has never been asked to consent, and if he had been, he would have refused based on Rubin's varying representations of Napoli or his law firms from the period 2003 through 2014 (*id.*).

PROCEDURAL HISTORY

Action No. 1

Rubin originally filed Action No. 1 on April 24, 2015, asserting claims for sex discrimination in violation of the New York City Human Rights Law (NYCHRL), breach of contract, and quantum meruit (NYSCEF Doc No. 1).

The Law Firm defendants asserted a counterclaim for breach of her employment agreement's confidentiality provision (NYSCEF Doc No. 233 ¶¶ 51-67).

The Law Firm defendants previously moved for summary judgment dismissing Rubin's breach of contract claim seeking a 5% bonus. On October 29, 2018, the court dismissed Rubin's second cause of action (*Rubin v Napoli Bern Ripka Shkolnik, LLP*, 2018 NY Slip Op 32766[U] [Sup Ct, NY County 2018], *affd as mod* 179 AD3d 495 [1st Dept 2020]). The First Department modified this court's decision and reinstated Rubin's breach of contract claim, finding that there were issues of fact as to whether the employment agreement was orally modified (*Rubin*, 179 AD3d at 497). The Court also held that the Law Firm defendants established their prima facie entitlement to summary judgment on their counterclaim that Rubin breached the confidentiality provision in her employment agreement when she filed four confidential documents discussing

client and firm business and that her actions were knowing, intentional or willful, and triggered the liquidated damages provision of her employment agreement (*id.* at 496). However, the Court further held that the Law Firm defendants failed to make a prima facie showing of entitlement to damages (*id.*).

After the First Department issued its decision, Rubin amended her complaint, asserting the following six claims: (1) discrimination in violation of the NYCHRL; (2) retaliation in violation of the NYCHRL; (3) breach of contract for failure to pay Rubin 5% of all net attorneys' fees recovered in matters assigned to her or in which she was "materially involved"; (4) breach of contract for failure to pay Rubin her base salary or benefits from October 14, 2014 until December 2014; (5) breach of contract for failure to purchase professional liability tail coverage; and (6) quantum meruit (NYSCEF Doc No. 532, verified amended complaint ¶¶ 44-45, 46-47, 48-52, 53-57, 58-71, 72-75). Rubin requests compensatory damages, punitive damages, and reasonable attorneys' fees, costs and expenses (*id.*, wherefore clause).

Napoli asserts a counterclaim for tortious interference with contract against Rubin (NYSCEF Doc No. 629 at 5).

Action No. 2

Napoli commenced Action No. 2 in Supreme Court, Suffolk County on March 6, 2017 (NYSCEF Doc No. 2 in Action No. 2, verified complaint). The complaint in Action No. 2 asserts the following three claims: (1) legal malpractice; (2) breach of fiduciary duty; and (3) violation of Judiciary Law § 487 (NYSCEF Doc No. 254, verified complaint ¶¶ 66-78, 79-87, 88-102). Napoli seeks, among other things, compensatory damages, punitive damages, attorneys' fees, costs, and expenses, sanctions, and Rubin's disbarment and suspension from practice (*id.*, wherefore clause).

Rubin asserted the following counterclaims against Napoli: (1) violation of Judiciary Law § 487; (2) abuse of process; and (3) malicious prosecution (NYSCEF Doc No. 4 in Action No. 2, answer with counterclaims ¶¶ 127-202, 203-231, 232-243).

Napoli moved to dismiss Rubin's counterclaims (NYSCEF Doc No. 603). Rubin cross-moved for summary judgment dismissing Napoli's legal malpractice claim, or alternatively, for an order transferring Action No. 2 to Supreme Court, New York County (NYSCEF Doc No. 604).

By decision and order dated February 6, 2018, Justice Arthur G. Pitts transferred Action No. 2 to Supreme Court, New York County, and consolidated Action No. 2 with Action No. 1 for trial purposes only (NYSCEF Doc No. 605).

On October 5, 2021, the Second Department affirmed, in effect, the denial of Rubin's motion for summary judgment, since Rubin "failed to establish her prima facie entitlement to judgment as a matter of law" (*Napoli v Rubin*, 199 AD3d 819, 820 [2d Dept 2021]).

DISCUSSION

"On a motion for summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc.*, 36 NY3d 69, 73-74 [2020] [internal quotation marks and citation omitted]; *see also* CPLR 3212 [b]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*,

100 NY2d 72, 81 [2003]; *see also Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). "The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility" (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be examined "in the light most favorable to the non-moving party" (*Schmidt v One New York Plaza Co. LLC*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*id.*).[2]

I. The Law Firm Defendants' Motion for Summary Judgment (Motion Sequence Number 019 in Action No. 1)

A. Rubin's Claim for Breach of Contract for Failure to Purchase Tail Coverage

As a preliminary matter, Rubin concedes that she has no damages on her claim for breach of contract based on the Law Firm defendants' failure to purchase "tail coverage" for her benefit and consents to its dismissal (NYSCEF Doc No. 725 at n 67). Accordingly, Rubin's fifth cause of action (breach of contract) will be dismissed.

B. Rubin's Gender Discrimination Claim

As relevant here, the NYCHRL (Administrative Code of the City of NY § 8-107 [1]) provides that "[i]t shall be an unlawful discriminatory practice: (a) For an employer or an employee or agent thereof because of the actual or perceived . . . gender . . . to discharge from

[2] Rubin argues that Napoli's motions must be denied because he failed to file statements of material facts. Napoli, in fact, filed the required statements of material facts (NYSCEF Doc Nos. 751, 801). Rubin also filed responses to the statements of material facts (NYSCEF Doc Nos. 750, 753). In any event, "blind adherence to the procedure set forth in 22 NYCRR 202.8-g" is not required (*Leberman v Instantwhip Foods, Inc.*, 207 AD3d 850, 850-851 [3d Dept 2022]).

employment such person [and] [t]o discriminate against such person in compensation or terms, condition or privileges of employment" (Administrative Code of City of NY [Administrative Code] § 8-107 [1] [a] [2], [3]).

A motion for summary judgment dismissing a NYCHRL claim can be granted "only if the defendant demonstrates that it is entitled to summary judgment under both the *McDonnell Douglas* burden-shifting framework (*McDonnell Douglas Corp. v Green*, 411 US 792 [1973]) and the 'mixed-motive' framework" (*Hudson v Merrill Lynch & Co.*, 138 AD3d 511, 514 [1st Dept 2016], *lv denied* 28 NY3d 902 [2016] [internal quotation marks, brackets and citation omitted]).

Under the *McDonnell Douglas* framework, a plaintiff asserting an employment discrimination claim bears the initial burden of establishing a prima facie case, by showing that: (1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she suffered an adverse employment action; and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113 [1st Dept 2012]).

"If the plaintiff makes such a showing, the burden shifts to the employer to show a legitimate, nondiscriminatory reason for the employment decision" (*Hudson*, 138 AD3d at 514). "If the employer succeeds in doing so, the burden then shifts back to the plaintiff to prove that the reason proffered was merely a pretext for discrimination" (*id.*), by showing "'*both* that the reason was false, *and* that discrimination was the real reason'" (*Dickerson v Health Mgt. Corp. of Am.*, 21 AD3d 326, 328 [1st Dept 2005], quoting *St. Mary's Honor Ctr. v Hicks*, 509 US 502, 513 [1993] [emphasis in original]).

Under the "mixed-motive" framework, "the question on summary judgment is whether there exist triable issues of fact that discrimination was one of the motivating factors for the defendant's conduct" (*Hudson*, 138 AD3d at 514 [internal quotation marks and citation omitted]). Under this analysis, "the employer's production of evidence of a legitimate reason for the challenged action shifts to the plaintiff the lesser burden of raising an issue as to whether the action was motivated at least in part by . . . discrimination" (*Melman*, 98 AD3d at 127 [internal quotation marks and citation omitted]).

Where a claim is based on disparate pay, "a plaintiff must first set forth a prima facie case of discrimination, i.e., that he [or she] is a member of a protected class and that he [or she] was paid less than similarly situated nonmembers of the class" (*Shah v Wilco Sys., Inc.*, 27 AD3d 169, 176 [1st Dept 2005], *lv dismissed* 7 NY3d 859 [2006]). To be "similarly situated," "[t]he individuals being compared 'must be similarly situated in all material respects" (*id.*, quoting *Shumway v United Parcel Serv., Inc.*, 118 F3d 60, 64 [2d Cir 1997]). "When plaintiffs seek to draw inferences of discrimination by showing that they were similarly situated in all material respects to the individuals to whom they compare themselves, their circumstances need not be identical, but there should be a reasonably close resemblance of facts and circumstances" (*Lizardo v Denny's, Inc.*, 270 F3d 94, 101 [2d Cir 2001] [internal quotation marks and citation omitted]). "What is key is that they be similar in significant respects" (*id.*).

1. Disparate Pay

Rubin's disparate pay claim fails because she cannot demonstrate that she was paid less than similarly-situated male attorneys (*see Shah*, 27 AD3d at 176). In moving for summary judgment, the Law Firm defendants argue that the male comparators that Rubin identified at her deposition are not similarly situated to her (NYSCEF Doc No. 563 ¶¶ 24-54). Rather, the Law

Firm defendants assert that these comparators had extensive trial experience with highly specialized knowledge in narrow, specific areas of practice.

Specifically, the Law Firm defendants assert that:

- Larry Burnett worked as an associate attorney and was hired to do trial work (NYSCEF Doc No. 536, Rubin tr at 46);
- Chris LoPalo "oversaw a lot of the hands-on, like, when clients came in, or moving papers through the system, for example, with discovery, he was the senior attorney, I think who was responsible for overseeing paralegals and clerks who did data entry and that sort of thing" (*id.* at 47);
- Adam Gana was an associate who worked on securities fraud cases (*id.* at 51-52; NYSCEF Doc No. 540, Napoli tr at 86);
- Ethan Horne worked as an asbestos trial attorney, who managed the West Coast asbestos department and traveled the country trying asbestos cases (NYSCEF Doc No. 536, Rubin tr at 67-68; NYSCEF Doc No. 540, Napoli tr at 88-89);
- Steven Aroesty was a partner who handled asbestos litigation in Illinois (NYSCEF Doc No. 536, Rubin tr at 70-71; NYSCEF Doc No. 540, Napoli tr at 92-93);
- Patrick Haines was a trial lawyer who had a vast array of knowledge about asbestos products and asbestos companies (NYSCEF Doc No. 540, Napoli tr at 94-95);
- Bradley Smith was a Texas attorney brought in to handle asbestos litigation concerning bankrupt asbestos manufacturers (*id.* at 79, 98-99);
- Mark Willick was a lawyer that specialized in asbestos cases and managed the firm's asbestos practice (*id.* at 101-102);
- Mark Strauss was an asbestos partner that tried asbestos cases (NYSCEF Doc No. 536, Rubin tr at 86; NYSCEF Doc No. 540, Napoli tr at 104); and
- Elliot Shackman was an attorney who handled personal injury matters and made court appearances, drafted and argued motions, and met with clients. Nicholas Farnolo was an attorney who primarily handled mass torts and pharmaceuticals. Neither were given salary increases associated with their promotions (NYSCEF Doc No. 536, Rubin tr at 93, 100, 101-102).

Rubin's roles and responsibilities greatly differed from these male attorneys. When she was hired as an associate, Rubin handled appeals, research, and writing. In her role as general counsel, Rubin was responsible for responding to disciplinary complaints and for overseeing the work of outside counsel.

Rubin has failed to raise an issue of fact as to whether the male comparators were similarly-situated to her in all material respects. Although Rubin argues that there is an absence

of evidence supporting the Law Firm defendants' position, Rubin admitted the facts concerning the qualifications and experience of the male comparators (NYSCEF Doc No. 741 ¶¶ 25, 28-54). Rubin's argument that an adverse inference should be drawn against the Law Firm defendants because they failed to produce relevant pay records is without merit. The cases cited by Rubin are distinguishable, since Rubin failed to establish that the Law Firm defendants lost or destroyed the records (*see Ortega v City of New York*, 9 NY3d 69, 76 [2007] [courts have a number of remedial options "(w)hen parties involved in litigation engage in the destruction of evidence"]; *Gogos v Modell's Sporting Goods, Inc.*, 87 AD3d 248, 254-255 [1st Dept 2011] [trial court properly directed adverse inference charge at trial for destruction of surveillance tape]; *Mylonas v Town of Brookhaven*, 305 AD2d 561, 563 [2d Dept 2003] [trial court properly precluded evidence of condition based upon destruction of vehicle and maintenance records]). Rubin could have subpoenaed the payroll records on her own. Rubin did not make a motion in connection with the Law Firm defendants' failure to produce discovery. Indeed, there has not been a determination that the Law Firm defendants' failure to produce payroll records was willful and contumacious. In sum, there is no evidence to "support a minimal inference that the difference of treatment may be attributable to discrimination" (*McGuinness v Lincoln Hall*, 263 F3d 49, 54 [2d Cir 2001]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise an issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

2. Failure to Promote Rubin to Partner

In addition, viewing the evidence in the light most favorable to Rubin, no reasonable jury could find that the Law Firm defendants' decision not to make her a partner was pretextual, or that gender discrimination played any role in that decision. Napoli testified that Rubin was not

given the partner title because she held the title of general counsel, which no one else had at the firm; she did not generate business like partners did; she did not have the ability to try cases; and she did not have a unanimous vote in the partnership, which was required to make someone a partner (NYSCEF Doc No. 563 ¶ 75; NYSCEF Doc No. 540, Napoli tr at 116-117). Bern testified that he did not want to make Rubin a partner because of her "inability to come to work on time," and that she did not have a substantial book of business (NYSCEF Doc No. 563 ¶ 76; NYSCEF Doc No. 543, Bern tr at 108, 135-136). Rubin merely concludes that "Napoli Bern routinely awarded senior male attorneys the partner title but failed to do so for [her]" (NYSCEF Doc No. 725 at 16) without citation to any evidence and has therefore failed to raise an issue of fact.

3. Termination

Moreover, the Law Firm defendants have established that Rubin was terminated for lying to her direct supervisor and insubordination (*see Stephens v Isabella Geriatric, Ctr., Inc.*, 178 AD3d 478, 478 [1st Dept 2019], *lv denied* 35 NY3d 914 [2020], *rearg denied* 36 NY3d 957 [2020]; *Bantamoi v St. Barnabas Hosp.*, 146 AD3d 420, 421 [1st Dept 2017]). Rubin argues that "there was evidence that Napoli singled [her] out [ ] for harassment and termination for cooperating with Bern but did not do so with the male attorneys" (NYSCEF Doc No. 725 at 16). To the contrary, there is no reasonable view of the evidence that plaintiff's termination was pretextual, or that gender discrimination played any role in her termination. In September 2014, Napoli learned that Rubin had emailed Bern about a certain section of the firm's employee handbook (NYSCEF Doc No. 540, Napoli tr at 241). According to Napoli, Rubin "told him that there was no such email. She didn't know what I was talking about. That – I said, you know what? I know – because I saw the email between the two of them back and forth. I said, I know

there was. You're a liar. And she said to me – and we're on Skype. She said, F--- you and hung up the phone on me" (*id.* at 160). Napoli Skyped her back and Rubin "look[ed] him right in the eye and she says, F--- you and hangs up again" (*id.* at 160-161). Rubin admitted that she was not being truthful to Napoli when she responded to Napoli's inquiry regarding the handbook (NYSCEF Doc No. 536, Rubin tr at 137). Rubin testified that her employment was terminated within several hours by email (*id.* at 140-141; *see also* NYSCEF Doc No. 554).

Therefore, based on the foregoing under both the *McDonnell Douglas* burden shifting framework and the mixed motive framework the Law Firm defendants have established entitlement to summary judgment on Rubin's gender discrimination claim.

Accordingly, Rubin's first cause of action (gender discrimination) will be dismissed as against the Law Firm defendants.

C. Rubin's Claim for Breach of Contract for Failure to Pay 5% Bonus

The Law Firm defendants move for summary judgment on Rubin's 5% bonus claim, arguing that there is no evidence of any promise to pay Rubin on MTBE and Ground Zero litigation. They further argue that the partial performance exception to the statute of frauds does not apply because Rubin cannot point to any conduct that is unequivocally referable to the alleged oral modification. Although Rubin claims that she was paid a 5% bonus on five occasions, there are other reasonable explanations for the payment of the bonuses. According to the Law Firm defendants, none of these five cases involved MTBE, Ground Zero or any other mass tort case, and were all individual personal injury cases with relatively small exposure. The Law Firm defendants also assert that Rubin cannot demonstrate the equitable estoppel exception, given that Rubin simply did her job, and did no more than she was required to do under her employment agreement.

In response, Rubin argues that the Law Firm defendants' motion for summary judgment is an impermissible successive motion for summary judgment, and is barred by the law of the case doctrine. Even considered on the merits, she argues, the Law Firm defendants are free to present explanations as to why the payments are not "unequivocally referable" to the 5% bonus to the jury. Rubin asserts, with respect to equitable estoppel, that she worked long hours on the Ground Zero litigation in reliance on the promise of a bonus, and any conflict that her work was consistent with her normal duties presents an issue of fact.

Rubin entered into an employment agreement that does not contain any reference to a 5% bonus, and includes the following merger clause:

> 4.7 **Entire Agreement**. This Agreement sets forth the entire understanding between the parties with respect to this subject matter hereof and no amendment nor variation of the terms of this Agreement shall be valid unless made in writing and signed by Attorney and a duly authorized representative of the Law Firm.

(NYSCEF Doc No. 552 at 8).

The Law Firm defendants previously moved for summary judgment on Rubin's breach of contract claim with respect to her 5% bonus. The First Department held that:

> The law firm defendants met their burden on summary judgment by providing plaintiff's employment agreement which did not include any reference to a 5% nondiscretionary bonus, and which included a general merger clause requiring any modification to be in writing. However, plaintiff raised a triable issue of fact as to this claim. Specifically, in *Rose v Spa Realty Assoc.* (42 NY2d 338, 343-344 [1977]), the Court of Appeals held that while generally an oral modification may not be enforced in light of a merger clause, an oral modification may be enforced if there is partial performance that is 'unequivocally referable to the oral modification' or if one party 'induced another's significant and substantial reliance upon an oral modification.' Here, plaintiff averred that she was promised the 5% bonus and the law firm defendants partially performed by paying her this bonus on at least five separate occasions. As the law firm defendants sought summary judgment, this Court is obligated to view the evidence in the light most favorable to plaintiff and to accept plaintiff's evidence 'as true' (*Aguilar v City of New York*, 162 AD3d 601, 601 [1st Dept 2018]; *Hernandez v Kaisman*, 103 AD3d 106, 112 [1st Dept 2012]). Plaintiff also averred that she relied on this oral agreement and took on certain complex cases with the expectation that she would receive

> additional compensation for those actions. Accordingly, summary judgment in favor of defendants was not warranted.

(*Rubin*, 179 AD3d at 497).

"Successive motions for summary judgment should not be entertained without a showing of newly discovered evidence or other sufficient justification" (*Maggio v 24 W. 57 APF, LLC*, 134 AD3d 621, 615 [1st Dept 2015] [internal quotation marks and citation omitted]). The Law Firm defendants' previous motion for summary judgment was made prior to discovery and the Law Firm defendants' instant summary judgment motion was made after the completion of substantial discovery and is therefore appropriate (*see Kobre v United Jewish Appeal-Fedn. of Jewish Philanthropies of N.Y., Inc.*, 32 AD3d 218, 222 [1st Dept 2006], *lv denied* 7 NY3d 715 [2006] [trial court properly entertained renewed summary judgment motion where "significant discovery took place here, including more than 16 depositions and numerous document exchanges"]; *Fielding v Environmental Resources Mgt. Group*, 253 AD2d 713, 713 [1st Dept 1998] [summary judgment motion was "entirely appropriate" where it was based on "(n)ew materials, including deposition transcripts, obtained through discovery since the prior round of motion practice"]; *Beagan v Manhattanville Nursing Care Ctr., Inc.*, 176 AD2d 633, 635 [1st Dept 1991], *appeal denied* 79 NY2d 753 [1992] ["defendant was not barred from again moving for summary judgment, since the second motion was based upon new information obtained through depositions and, as such, was not repetitive of the first"]). Similarly, the doctrine of law of the case, which "generally operates to preclude successive motions by the same party *upon the same proof*" is inapplicable (*Ruiz v Anderson*, 96 AD3d 691, 692 [1st Dept 2012] [internal quotation marks and citation omitted and emphasis supplied]).

However, as argued by Rubin, the Law Firm defendants have not resolved the issues of fact as to whether her employment agreement was orally modified. Rubin testified that she

received a 5% bonus on the following cases: (1) a medical malpractice case in which Rubin wrote an appeal (NYSCEF Doc No. 538, Rubin tr at 84-86); (2) a motor vehicle case in which Rubin handled an appeal (*id.* at 86); (3) a medical malpractice case in which Rubin worked on an appeal to reinstate the claim (*id.* at 87-88); (4) a nursing home personal home injury case in which Rubin handled an appeal (*id.* at 138); and (5) another case, the details of which she did not recall at her deposition (*id.* at 180, 181-182). In addition, Rubin avers that, in or about early 2010, Napoli promised her a 5% bonus, the Law Firm defendants partially performed by paying her the bonus on at least five occasions, and that she continued to work on complex cases with the expectation that she would continue to receive a bonus and was not paid it (NYSCEF Doc No. 740, Rubin aff, ¶¶ 8-13).

Accordingly, therefore a question of fact remains whether Rubin's employment agreement was orally modified and breached and consequently the Law Firm defendants are not entitled to summary judgment on Rubin's third cause of action (breach of contract).

D. Breach of Contract/Quantum Meruit

Rubin asserts a breach of contract claim for the Law Firm defendants' failure to pay her for work she performed from October 14, 2014 until early December 2014, after she was terminated on September 4, 2014 (NYSCEF Doc No. 532, verified amended complaint ¶¶ 53-57). Alternatively, Rubin asserts a claim for quantum meruit (*id.*, ¶¶ 72-75).

The Law Firm defendants move for summary judgment, arguing that: (1) Rubin's claims are barred because she had had an employment agreement; (2) Bern's representations to her and his payments to her out of his own pocket were insufficient to bind the firm as a whole; and (3) Rubin could not have reasonably relied on Bern's representation that she was not fired.

Rubin contends that there are questions of fact as to her quantum meruit claim but does not address her implied contract claim.

To establish a claim in quantum meruit, the plaintiff must establish: "(1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services" (*Moses v Savedoff*, 96 AD3d 466, 471 [1st Dept 2012], quoting *Soumayah v Minnelli*, 41 AD3d 390, 391 [1st Dept 2007], *appeal withdrawn* 9 NY3d 989 [2007]).

There are questions of fact that preclude summary judgment on Rubin's claim for quantum meruit (*see Moses*, 96 AD3d at 471 [newly-admitted attorney was entitled to recovery in quantum meruit "(i)n the absence of a valid contract"]). Rubin asserts that after she was terminated she "continued to do work for Napoli Bern clients through at least November or early December," and Bern told her that she was "not fired" and that "it would be better if you worked from home until I can work some of some of this out and things quiet down, but I want you to continue to do your work and make whatever appearances that have to be made and you will not miss a paycheck, even if I have to pay you out of my pocket" (NYSCEF Doc No. 536, Rubin tr at 145-146). Bern paid Rubin out of his own pocket for two pay periods, once in September and again in mid-October (*id.* at 163, 165).

Contrary to the Law Firm defendants' contention, there was no express written contract in effect at the time, given that Rubin's employment had already ended on September 4, 2014. Because Bern was a fifty percent shareholder, and directed her to continue working, Rubin was entitled to rely on that representation (*cf. Smalley v Dreyfus Corp.*, 40 AD3d 99, 103 [1st Dept 2007], *revd* 10 NY3d 55 [2008], *rearg denied* 10 NY3d 852 [2008]). Accordingly, the Law Firm defendants are not entitled to dismissal of Rubin's sixth cause of action (quantum meruit claim)

but since Rubin did not oppose dismissal of her fourth cause of action (breach of contract) they are entitled to dismissal of Ruben's fourth cause of action and it will be dismissed (*see Martin Assoc., Inc. v Illinois Natl. Ins. Co.*, 188 AD3d 572, 573 [1st Dept 2020] [dismissing breach of fiduciary duty claim where plaintiff did not oppose dismissal in opposition to motion to dismiss]).

II. Napoli's Motion for Summary Judgment Dismissing the Discrimination and Retaliation Claims (Motion Sequence Number 020 in Action No. 1)

A. Napoli's Personal Liability for Discrimination

Napoli contends that he cannot be personally liable for Rubin's gender discrimination claim pursuant to Partnership Law § 26. As noted above, Rubin's gender discrimination claim will be dismissed as against the Law Firm defendants. Accordingly, Rubin's first cause of action (gender discrimination) will also be dismissed as against Napoli since he cannot be held personally liable with respect to this claim.

B. Retaliation Under the NYCHRL

"To establish a retaliation, claim under the [NYCHRL], a plaintiff must make out a prima facie case that: (1) he [or she] participated in a protected activity known to the defendant; (2) the defendant took an employment action that disadvantaged plaintiff; (3) a causal connection exists between the protected activity and the adverse employment action" (*Melman*, 98 AD3d at 140-141). The plaintiff can meet the second prong by showing that the employer did something that would be "reasonably likely to deter a person from engaging in lawful activity" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 71 [1st Dept 2009], *lv denied* 13 NY3d 702 [2009], quoting Administrative Code § 8-107 [7]). "In the post-employment context, impermissible adverse action may be found where, for example, an employer provides an untruthful letter of reference for a former employee who complained of discriminatory conduct, [or] 'blacklists' or otherwise

speaks ill of a former employee with retaliatory motive . . . ." (*Thompson v Morris Heights Health Ctr.*, 2012 WL 1145964, *6, 2012 US Dist Lexis 49165, *15 [SD NY, Apr. 6, 2012, 09 Civ. 7239, Engelmayer, J.]; *accord Wanamaker v Columbian Rope Co.*, 108 F3d 462, 466 [2d Cir 1997] ["Blacklisting and refusing to recommend an individual tend to besmirch his reputation. But barring a terminated employee from using an office and phone to conduct a job hunt presents only a minor, ministerial stumbling block toward securing future employment"]).

Once the plaintiff has met this initial burden, the burden then shifts to the defendant to present legitimate, independent, and nonretaliatory reasons to support its actions (*see Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]). "Then, if [the employer] meet[s] this burden, [the] plaintiff has the obligation to show that the reasons put forth by [the employer] were merely a pretext" (*Pace v Ogden Servs. Corp.*, 257 AD2d 101, 104 [3d Dept 1999]).

When a defendant moves for summary judgment in a retaliation case, "'a defendant must demonstrate that the plaintiff cannot make out a prima facie claim of retaliation or, having offered, legitimate, nonretaliatory reasons for the challenged actions, that there exists no triable issue of fact as to whether the defendant's explanations were pretextual'" (*Brightman v Prison Health Serv., Inc.*, 108 AD3d 739, 740-741 [2d Dept 2013], quoting *Delrio v City of New York*, 91 AD3d 900, 901 [2d Dept 2012]).

Napoli asserts that Rubin's retaliation claim should be dismissed because: (1) there is insufficient temporal proximity between her protected activity and Napoli's retaliatory conduct; and (2) there is no admissible evidence of Napoli's conduct directed at third parties.

Whether there is sufficient evidence of a causal connection between Rubin's protected activity and Napoli's adverse employment actions will be addressed first.

> While temporal proximity between a protected activity and an adverse employment action may, under some circumstances, be sufficient in itself to permit

> the inference of a causal connection necessary for a retaliation claim, the fact that actions are not temporarily proximate is not necessarily fatal to a retaliation claim. The absence of temporal proximity will not defeat the claim, where, as here, there are other facts supporting causation.

(*Harrington v City of New York*, 157 AD3d 582, 586 [1st Dept 2018]; *see also Noho Star Inc. v New York State Div. of Human Rights*, 72 AD3d 448, 449 [1st Dept 2010]).

Viewing the evidence in the light most favorable to Rubin, there are questions of fact as to the causal connection between Rubin's protected activity and Napoli's alleged retaliation. As previously indicated, Napoli asserted counterclaims on April 5, 2016, shortly after his motion to dismiss was denied on February 26, 2016. Once his motion to dismiss was denied, Napoli accused Rubin for the first time of conspiring with Bern to steal the firm from him (NYSCEF Doc No. 575, first amended counterclaims, ¶¶ 145-149). Moreover, a reasonable jury could conclude, given the substance of similar lawsuits filed by Napoli and his wife, and the allegations impugning Rubin's professional competence and ethics as a lawyer, that these actions were retaliatory. Rubin also submits an affirmation from Brian J. Isaac, Esq., an attorney who rents space to Rubin, indicating that Napoli was angry at him for associating with Rubin, and told Mr. Isaac, "a friend of my enemy is my enemy" (NYSCEF Doc No. 716, Isaac affirmation ¶¶ 4, 6).

Rubin testified that Napoli contacted "many, many" firms to which she applied for employment, including Pollack, and Silberstein and Associates (NYSCEF Doc No. 592, Rubin tr at 42). At her deposition, Rubin stated that:

> He threatened them. Then he refused to pay their bills. He said, 'As long as you're harboring that traitor and that terrorist.' Then he called Mr. Isaac and used the term effing traitor, at him, for even allowing [her] to do of counsel work shortly after [she] was fired, because – I could not say why.
>
> I don't know why. I don't know why. I – I can't say. Then he threatened to yank his work from them. They said be our guest. He then stopped work. He owes them

> hundreds of thousands of dollars of unpaid fees, because 'You're harboring that terrorist.' He also used that term to Adam Handler, a partner. He might have voiced that same thing to their bookkeeper, and others there.

(*id.* at 43). Rubin further testified that she heard this from Jim Cumin, the appellate printer, Brian Isaac, Adam Handler, and Keith Silverstein (*id.* at 44, 45). Rubin stated that Napoli issued "multiple" negative writings about her, including information to the New York Law Journal and Law360 (*id.* at 46). Napoli called her "mentally unbalanced, unskilled, and unethical" (*id.* at 46-47). According to Rubin, Napoli cut off her COBRA benefits prematurely (*id.* at 48). Rubin further stated that he compelled Hunter Shkolnik and a female partner to file disciplinary complaints against her (*id.* at 52). She also stated that Napoli and/or his wife threatened him "in some way" (*id.* at 53). Although Rubin relies on hearsay, such evidence may be used to defeat summary judgment since it is not the only evidence on the issue of causation (*see Ying Choy Chong v 457 W. 22nd St. Tenants Corp.*, 144 AD3d 591, 592 [1st Dept 2016]).

Next, Napoli contends that Rubin's claim for retaliation based upon the initiation of legal proceedings is barred by the *Noerr-Pennington* doctrine. Rubin asserts, in response, that Napoli has waived any *Noerr-Pennington* defense by failing to raise it in his answer.

CPLR 3018 (b) provides, with respect to affirmative defense, that "[a] party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of the pleading." Courts have held that "[t]he *Noerr-Pennington* doctrine is generally raised as an affirmative defense" (*360 Mtge. Group, LLC v Fortress Inv. Group LLC*, 2020 WL 5259283, *4, 2020 US Dist LEXIS 161531, *4 [SD NY 2020]; *accord Calabrese v CSC Holdings, Inc.*, 2006 WL 544394, *6, 2006 US Dist LEXIS 99681, *11 [SD NY 2006]).

When a defendant fails to plead an affirmative defense, but asserts that defense in a summary judgment motion, "'[s]uch . . . waiver . . . may be retracted by [the] assertion of an unpleaded affirmative defense in connection with a summary judgment motion'" (*Lerwick v Kelsey*, 24 AD3d 918, 919 [3d Dept 2005], *lv denied* 6 NY3d 710 [2005], quoting *Sheils v County of Fulton*, 14 AD3d 919, 921 [3d Dept 2005], *lv denied* 4 NY3d 711 [2005]). An unpleaded defense may be invoked to serve as the basis for an affirmative grant of relief in the absence of surprise and prejudice, provided that the opposing party has had a full opportunity to respond (*see Rogoff v San Juan Racing Assn.*, 54 NY2d 883, 885 [1981]; *Ingordo v Square Plus Operating Corp.*, 276 AD2d 528, 528 [2d Dept 2000]). Therefore, whether Rubin's retaliation claim is barred by the *Noerr-Pennington* doctrine needs to be considered since Rubin has had a full and fair opportunity to respond to Napoli's assertion of this defense, and she does not claim any prejudice.

"[T]he *Noerr-Pennington* doctrine . . . holds, essentially, that parties may not be subjected to liability for petitioning the government" (*Sutton 58 Assoc. LLC v Pilevsky*, 189 AD3d 726, 728 [1st Dept 2020], *cert dismissed* 142 S Ct [2021] [internal quotation marks and citation omitted]). "The filing of litigation falls within the protection of the *Noerr-Pennington* doctrine . . . ." (*I.G. Second Generation Partners, L.P. v Duane Reade*, 17 AD3d 206, 208 [1st Dept 2005]). The immunity provided by the *Noerr-Pennington* doctrine applies "so long as the litigation is not a sham" (*Matsushita Elec. Corp. v Loral Corp.*, 974 F Supp 345, 355 [SD NY 1997] [internal quotation marks and citation omitted]).

> There is a 'sham' exception to the *Noerr-Pennington* doctrine which applies in "situations in which persons use the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon'. The 'sham' exception to the *Noerr-Pennington* doctrine has an objective and subjective element. The objective element requires that the defendant's conduct must be objectively baseless with no reasonable expectation of success. The subjective element requires that the

> defendant act, not with the intent of influencing governmental action, but rather with the intent to 'interfere directly with the business relationships of a competitor'. If the objective element is not satisfied, the court is precluded from examining the subjective motivation for the conduct, and the 'sham' exception is not applicable.

(*Singh v Sukhram*, 56 AD3d 187, 192 [2d Dept 2008] [internal quotation marks and citations omitted]).

In this case, Rubin is not suing Napoli only for filing litigation against her. Since there is other evidence that is sufficient to support a prima facie case of retaliation, it is unnecessary to "rely on the lawsuit[s] [and counterclaims] to find retaliatory conduct" (*Durham Life Ins. Co. v Evans*, 166 F3d 139, 157 [3d Cir 1999]; *see also Delville v Firmenich Inc.*, 920 F Supp 2d 446, 465 [SD NY 2013]). In making this determination, it is noteworthy that the NYCHRL "shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed" (*Makinen v City of New York*, 30 NY3d 81, 87 [2017], quoting Local Law No. 85 [2005] of City of N.Y. § 7). Accordingly, Napoli's request to dismiss Rubin's second cause of action (retaliation) will be denied.

III. Rubin's Motion for Summary Judgment Dismissing the Law Firm Defendants' Counterclaim and Napoli's Counterclaim (Motion Sequence Number 022 in Action No. 1)

A. Law Firm Defendants' Counterclaim for Breach of Rubin's Employment Agreement

Rubin moves for summary judgment dismissing the Law Firm defendants' counterclaim for breach of her employment agreement, arguing that the Law Firm defendants did not sustain any damages on this claim.

The First Department previously held that:

> The law firm defendants established as a matter of law that plaintiff violated the confidentiality provision of her employment agreement when she filed four confidential documents—three email chains discussing client and law firm business issues and a written audit report of the firms' policies and procedures prepared by another law firm—on NYSCEF (New York State Courts Electronic Filing), making them publicly available. At the time of the filing, plaintiff was an attorney licensed in New York and was represented by counsel. Accordingly, under the circumstances, her actions qualified as "knowing [ ], intentional[ ] or willful[ ]" and triggered the liquidated damages provision of her employment agreement. However, on this record, defendants did not make a prima facie showing of entitlement to those damage."

(*Rubin*, 179 AD3d at 496).

Section 4.15 of the employment agreement provides:

> 4.15 **Liquidated Damages**. If a court, arbitrator, mediator or other tribunal determines that the Attorney has knowingly, intentionally or willfully breached this Employment Agreement and/or confidentiality either directly or indirectly though his/her agents, representatives, employees or family members, then the Attorney agrees that he/she will compensate the Law Firm for any injury, loss or detriment, including attorneys' fees and expenses, that the Law Firm suffers as a result of such breach. The parties agree that the amount of the damages sustained by such breach would be impractical or extremely difficult to determine and stipulate and agree that such damages shall be set in the amount of Fifty Thousand ($25,000) [sic] Dollars for each such occurrence of confidentiality. All other damages will be determined under the arbitration provision.

(NYSCEF Doc No. 552 at 9).

Rubin has failed to establish prima facie entitlement to summary judgment dismissing the Law Firm defendants' counterclaim for breach of her employment agreement. It is the law of the case that Rubin violated her employment agreement. Furthermore, the employment agreement specifically requires Rubin to compensate the Law Firm defendants for attorneys' fees and expenses as a result of any breach (*id.*). As such, *Klein v Sharp* (41 AD2d 926 [1st Dept 1973]), relied upon by Rubin, is distinguishable. There, the Court restated the general rule that "[a]ttorneys' fees are merely incidents of litigation and are normally not recoverable *absent contractual obligation* or specific statutory authority" (*id.* [emphasis added]).

Accordingly, that branch of Rubin's motion seeking dismissal of the Law Firm defendants' breach of contract counterclaim will be denied, "regardless of the sufficiency of the opposing papers" (*Winegrad,* 64 NY2d at 853).

B. Napoli's Counterclaim for Tortious Interference with Contract

Rubin moves for summary judgment dismissing Napoli's counterclaim for tortious interference with contract. Rubin asserts that: (1) there is no evidence that she did anything to procure a breach by Bern of the partnership agreement; (2) she cannot be held liable for tortious interference because the partnership agreement was terminable-at-will; and (3) Napoli's conduct was not the "but for" cause of any breach by Bern.

"Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of that contract without justification, actual breach of the contract, and damages resulting therefrom" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]). Additionally, the party asserting a claim for tortious interference with contract must show that the breach would not have occurred absent the other party's conduct (*see Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 55 [1st Dept 2015]).

"Agreements that are terminable at will are classified as only prospective contractual relations, and thus cannot support a claim for tortious interference with existing contracts" (*Am. Preferred Prescription, Inc. v Health Mgmt., Inc.*, 252 AD2d 414, 417 [1st Dept 1998]). Where a contract terminable at will is involved, the means employed to interfere with the contract must include fraudulent representations, threats, or a violation of a duty of fidelity owed to the other party (*see Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 194 [1980]).

In this case, there is no evidence that Rubin intentionally procured a breach of the partnership agreement, or that Bern, in fact, breached the partnership agreement (*see Snyder v Sony Music Entertainment*, 252 AD2d 294, 299 [1st Dept 1999] ["there is no evidence that Carter Ledyard breached the at-will agreement with Snyder"]). The partnership agreement states that "a Partner may withdraw from the Partnership at any time upon notice in writing or via email addressed to the Management Committee" (NYSCEF Doc No. 652 at 22). Napoli blamed the dissolution of the firm on Bern's relationship with a "Russian prostitute," on the fact that "Ms. Rubin and Mr. Ripka and Mr. Bern had decided since I was dying that the three of them would take over the firm," and because "Mr. Bern was reluctant to continue difficult [asbestos] cases without [Napoli] in the office to handle them" (NYSCEF Doc No. 642, Napoli tr at 136-137).

Napoli contends that the court may not determine credibility of the witnesses. However, Napoli has failed to identify an issue of credibility. Although Napoli relies on instances in which Rubin represented adverse parties to Napoli after her termination, these events have no bearing on whether Bern breached the partnership agreement. Accordingly, Napoli's counterclaim for tortious interference with contract will be dismissed.

IV. Napoli's Motion for Summary Judgment on his Legal Malpractice, Breach of Fiduciary Duty, and Violation of Judiciary Law § 487 Claims (Motion Sequence Number 021 in Action No. 1)/Rubin's Motion for Summary Judgment Dismissing the Complaint (Motion Sequence Number 006 in Action No. 2)

A. Legal Malpractice

Napoli contends that he is entitled to summary judgment on his legal malpractice claim. He argues that Rubin admitted that she represented Napoli and also represented members of his family and used that knowledge against him in filing a petition to dismiss an arbitration demand

filed by Napoli. Napoli maintains that that petition asserted numerous false allegations. Further, Napoli argues that he sustained damages as a result of Rubin's actions.

Rubin counters that Napoli has not identified any actual confidences that he imparted to Rubin in the course of an attorney-client relationship or any that she subsequently revealed. She contends that even if she had a conflict of interest, Napoli is unable to identify any legally cognizable damages or that her negligence proximately caused those damages.

On a legal malpractice cause of action, the plaintiff must show that an attorney "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal community" (*Darby & Darby v VSI Intl.*, 95 NY2d 308, 313 [2000]). "A conflict of interest, even if a violation of the Code of Professional Responsibility, does not by itself support a legal malpractice cause of action" (*Schafrann v N.V. Famka, Inc.*, 14 AD3d 363, 364 [1st Dept 2005]).[3] Thus, to succeed on a legal malpractice claim that is based on a conflict of interest, the plaintiff must show "actual damages" flowing from the conflict (*see Fletcher v Boies, Schiller & Flexner, LLP*, 140 AD3d 587, 588 [1st Dept 2016], *lv denied* 28 NY3d 914 [2017]; *Amodeo v Gellert & Quartararo, P.C.*, 26 AD3d 705, 705 [3d Dept 2006]).

Here, Napoli has failed to demonstrate prima facie entitlement to summary judgment on his legal malpractice claim against Rubin. Napoli only points to one instance in which Rubin represented him personally, an appeal that ended in the Appellate Division in 2010 (NYSCEF Doc No. 785, Rubin tr at 244-245). Napoli has not identified any negligence by Rubin in the course of her representation. In his moving papers, Napoli has also not identified any client confidences that Rubin revealed. To the extent that Napoli premises his claim on Rubin's alleged representation of Napoli's family members, Napoli has failed to demonstrate that the

[3] In his moving papers, Napoli appears to base his legal malpractice claim on a conflict of interest (NYSCEF Doc No. 800 at 16).

alleged representation of Napoli's family members constituted representation of Napoli. Moreover, Napoli has failed to demonstrate any damages flowing from any alleged conflict of interest.

On the other hand, Rubin has demonstrated that, even assuming that she had a conflict of interest, Napoli's damages were not proximately caused by her actions.[4] Napoli testified, in conclusory fashion that "I've spent hours defending myself because of her actions," "I've lost relationships with people because of her actions," and that "I've lost cases because of her actions" (NYSCEF Doc No. 783, Napoli tr at 254-255). Napoli testified that he:

> lost cases for opioids upstate in two different counties because they cited the problems with Ms. Rubin's case to me in conversations. They saw the articles. They were two women county executives. And it was specifically because they said that I had committed sexual discrimination with Ms. Rubin by not paying her enough when she knew full well that she was the highest paid person because she worked on the Worby stuff.

(*id.* at 263-264). Napoli testified that he lost a case in Rockland County and Massachusetts based upon her allegations of discrimination (*id.* at 264-265). He stated that "[e]very once in while when a client is looking and trying to decide between different lawyers and would say, you know, I Googled you and what Ms. Rubin said and did came up as an issue. And they said we've decided to go with someone else" (*id.* at 266). He believed that he lost case referral sources from three attorneys, but never asked them why they stopped sending him cases (*id.* at 266-267). Moreover, "the established rule limit[s] recovery in legal malpractice actions to pecuniary damages" (*Kaufman v Medical Liab. Mut. Ins. Co.*, 121 AD3d 1459, 1460 [3d Dept 2014], *lv denied* 25 NY3d 906 [2015] [holding that non-pecuniary damages such as taint on reputation are not recoverable on a legal malpractice cause of action] [internal quotation marks

[4] Napoli argues that Rubin rehashes the same issues as on her prior motion for summary judgment, however, the Second Department's decision is not the law of the case since Rubin's prior motion was made before discovery in this action (*see Ruiz*, 96 AD3d at 692).

and citation omitted]; *see also Zarin v Reid & Priest*, 184 AD2d 385, 388 [1st Dept 1992] [taxpayers bringing legal malpractice action could not recover for loss of plaintiffs' "good reputation" and "credit-worthiness"]). Napoli has failed to raise an issue of fact. Accordingly, Napoli's legal malpractice claim will be dismissed.

B. Breach of Fiduciary Duty

Napoli also moves for summary judgment on his breach of fiduciary duty claim against Rubin because she represented litigation opponents after representing him in a contract dispute.

Rubin asserts that Napoli's breach of fiduciary duty claim is duplicative of his legal malpractice claim. In addition, Rubin contends that Napoli's breach of fiduciary duty claim must be dismissed because Napoli has failed to identify any confidences imparted to or revealed by Rubin or any damages proximately caused by her conduct.

It is well settled that the relationship of client and counsel is one of "unique fiduciary reliance" which imposes on the attorney "[t]he duty to deal fairly, honestly and with undivided loyalty . . . including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property, and honoring the clients' interests over the lawyer's" (*Matter of Cooperman*, 83 NY2d 465, 472 [1994]). "Thus, any act of disloyalty by counsel will also comprise a breach of the fiduciary duty owed to the client" (*Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 9 [1st Dept 2008]).

"It is this duty that provides the foundation for the well-established rule that a lawyer may not represent a client in a matter and thereafter represent another client with interests materially adverse to interests of the former client in the same or a substantially related matter" (*Kassis v Teacher's Ins. & Annuity Assn.*, 93 NY2d 611, 615-616 [1999]).

> This is consistent with the long-established ethical standards in the practice of law which impose a continuing obligation upon a lawyer to preserve the confidences

> and secrets of this client even after the termination of his employment and which forbid the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

(*Cooke v Laidlaw Adams & Peck*, 126 AD2d 453, 456 [1st Dept 1987]). To recover damages against an attorney arising out of the breach of an attorney's fiduciary duty, the plaintiff must establish the "but for" element of malpractice (*Knox v Aronson, Meyefsky & Sloan, LLP*, 168 AD3d 70, 76 [1st Dept 2018; *Ulico Cas. Co.*, 56 AD3d at 11])

Applying these principles, Napoli has failed to demonstrate prima facie entitlement to summary judgment. Napoli only makes a conclusory assertion in his moving papers, without any supporting evidence, that Rubin revealed client confidences. Moreover, Napoli has failed to establish that Rubin represented interests materially adverse to Napoli in a substantially related matter. Furthermore, Napoli has failed to demonstrate that he would not have sustained damages *but for* Rubin's actions.

By contrast, Rubin has shown that, even if she revealed client confidences and represented interests materially adverse to Napoli, such actions were not the "but for" cause of his damages (NYSCEF Doc No. 783, Napoli tr at 254-255, 264, 265, 266-267). It is clear that Napoli blamed the discrimination case, and not any act or omission on Rubin's part, for the loss of cases and case referrals. Napoli has failed to raise an issue of fact. Accordingly, in light of the foregoing, Napoli's breach of fiduciary duty claim will be dismissed.

C. Violation of Judiciary Law § 487

Napoli moves for summary judgment on section 487 claim, arguing that Rubin clearly acted with intent to deceive the court and Napoli.

Rubin contends that: (1) Napoli's Judiciary Law § 487 claim is duplicative of his legal malpractice claim; (2) there is no evidence that she did anything deceptive or had any intent to

deceive; (3) to the extent the claim is premised on Rubin's appearance for Dennis's attorney in the *Napoli v Bern* action, Napoli cannot recover for alleged misconduct in a case in which he was not a party; and (4) Napoli did not sustain any damages.

Under Judiciary Law § 487, an attorney 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" is liable to the injured party for treble damages. Relief under Judiciary Law § 487 is "not lightly given" (*Chowaiki & Co. Fine Art Ltd. v Lacher*, 115 AD3d 600, 601 [1st Dept 2014]). To recover under Judiciary Law § 487, the plaintiff must show "'egregious conduct or a chronic and extreme pattern of behavior on the part of the defendant attorneys that caused damages'" (*Pruss v AmTrust N. Am., Inc.*, 204 AD3d 620, 621 [1st Dept 2022], *lv denied* 39 NY3d 907 [2023], quoting *Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 615 [1st Dept 2015], *lv denied* 28 NY3d 903 [2016]), and that the actions of the attorney proximately caused his or her damages (*Nason v Fisher*, 36 AD3d 486, 487 [1st Dept 2007]; *Jaroslawicz v Cohen*, 12 AD3d 160, 161 [1st Dept 2004]).

Here, Napoli has failed to demonstrate prima facie entitlement to summary judgment on his Judiciary Law § 487 claim. Rubin, though, has shown that she did not engage in any deceitful conduct that rises to the level of egregious conduct or a chronic and extreme pattern of behavior (*see Facebook, Inc.*, 134 AD3d at 615). Rubin openly represented the petitioners in the arbitration proceeding and openly requested an adjournment for Dennis's counsel in Napoli's presence (NYSCEF Doc Nos. 265 in Action No. 2, Rubin tr at 325-326; NYSCEF Doc No. 798, hearing tr at 4). Although Napoli relies on an email from Rubin to Bern indicating that she intended to attend a hearing before Justice Bransten (NYSCEF Doc No. 795 at 2), Napoli has failed to show any deceitful conduct by Rubin. Rubin testified that "I sat in the back of the

courtroom and watched. That's it" (NYSCEF Doc No. 265 in Action No. 2, Rubin tr at 340). Accordingly, based on the foregoing Napoli's claim asserting a violation of Judiciary Law § 487 will be dismissed.

V. Napoli's Motion for Summary Judgment Dismissing Rubin's Counterclaims (Motion Sequence Number 007 in Action No. 2)

Finally, Napoli moves for summary judgment dismissing Rubin's counterclaims asserting violations of Judiciary Law § 487, abuse of process, and malicious prosecution. Rubin did not oppose the motion. By letter dated September 17, 2021, Rubin consented to the dismissal of her counterclaims (NYSCEF Doc No. 278 in Action No. 2). Accordingly, Rubin's counterclaims will be dismissed.

CONCLUSION

Accordingly, as to Action No. 1, it is hereby

ORDERED that the motion (sequence number 019) of defendants Napoli Bern Ripka Shkolnik, LLP, Worby Groner Edelman & Napoli Bern, LLP, and Napoli Bern & Associates, LLP for summary judgment is granted to the extent of dismissing the first cause of action (discrimination in violation of the New York City Human Rights Law), the fourth cause of action (breach of contract), and the fifth cause of action (breach of contract), and is otherwise denied; and it is further

ORDERED that the motion (sequence number 020) of defendant/counterclaim plaintiff Paul J. Napoli is granted to the extent of dismissing the first cause of action (discrimination in violation of the New York City Human Rights Law) as against him, and is otherwise denied; and it is further

ORDERED that the motion (sequence number 021) of defendant/counterclaim plaintiff Paul J. Napoli for summary judgment is denied; and it is further

ORDERED that the motion (sequence number 022) of plaintiff/counterclaim defendant Denise A. Rubin for summary judgment is granted to the extent of dismissing the counterclaim of Paul J. Napoli for tortious interference with contract, and is otherwise denied.

As to Action No. 2, it is hereby

ORDERED that the motion (sequence number 006) of defendant/counterclaim plaintiff Denise A. Rubin for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the motion (sequence number 007) of plaintiff/counterclaim defendant Paul J. Napoli for summary judgment is granted and the counterclaims asserted by defendant/counterclaim plaintiff Denise A. Rubin are dismissed with costs and disbursements to plaintiff as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED the remainder of the action is severed and continued.

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4/10/2023
DATE

PAUL A. GOETZ, J.S.C.

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