

**Peck v Milbank LLP**

2024 NY Slip Op 32596(U)

July 29, 2024

Supreme Court, New York County

Docket Number: Index No. 152290/2022

Judge: Andrew Borrok

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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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IAN PECK, STUBBS HOLDINGS, LLC,

Plaintiff,

- v -

MILBANK LLP, MILBANK, TWEED, HADLEY & MCCLOY,  
 LLP, GEORGIANA J. SLADE

Defendant.

INDEX NO. 152290/2022

MOTION DATE 12/08/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
 MOTION**

-----X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 98, 99, 100

were read on this motion to/for DISMISS.

Upon the foregoing documents, the defendants’ motion to dismiss (Mtn. Seq. No. 002) is granted to the extent that the fraud (third cause of action) and breach of fiduciary duty (first cause of action) claims are dismissed. No statement or omission is alleged to have been made to or relied upon by *Ian Peck or the Trustee* that satisfies CPLR § 3016(b) to Ian Peck’s detriment after Norman Peck passed away such that the grantor trust vested and Ian Peck had a vested interest as a beneficiary (*In re Malasky*, 290 AD2d 631, 631-32 [3d Dept 2002]). As such, and taking the allegations as true as the Court must at this stage of the litigation (*Leon v Martinez*, 84 NY2d 83, 88 [1994]), the FAC (hereinafter defined) fails to state a claim sounding in fraud. The FAC also fails to allege a cause of action sounding in breach of fiduciary duty because no independent conduct is alleged to have occurred at the time when Ian Peck was in fact owed fiduciary duties separate and apart from the conduct that forms the basis for the Judiciary Law § 487 cause of action. Ian Peck indicates that depositions of the trustee are forthcoming and may form the basis for asserting these claims. As such, these causes of action are dismissed without prejudice.

The defendants are not however entitled to dismissal of the claim sounding in violation of Judiciary Law § 487. Judiciary Law § 487 provides that

An attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,
2. Wilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,

Is 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.

(Judiciary Law § 487). As discussed more fully below, the judicial proceedings privilege does not serve to shield the testimony of Georgiana Slade in the Surrogate Court's proceeding where she was representing the Estate because, as alleged, this testimony was not given to assist the truth seeking process and she was not merely a fact witness. In fact, as alleged, she was not merely a fact witness and her testimony was given to undermine the truth seeking process (*Oakes v Muka*, 56 AD3d 1057, 1058 [3d Dept 2008]). To wit, the First Amended Complaint (the **FAC**; NYSCEF Doc. No. 59) alleges that defendant Ms. Slade deliberately and vindictively (i) abused her position to have plaintiff Ian Peck cut out of a certain portion of his inheritance and (ii) lied to a tribunal all to get even for her father (Jarvis Slade)'s loss of a \$100,000 investment some years ago after entrusting the funds to Ian Peck. Stated differently, at bottom, the FAC alleges that Ms. Slade deceived (and intended to deceive) a court in the State of New York *when she was acting as an attorney for the Estate*. This is sufficient to make out a Judiciary Law § 487 claim and to articulate why the judicial proceedings privilege does not apply at this stage of the litigation.

### The Relevant Facts and Circumstances

Ms. Slade's father, Jarvis Slade, and Ian Peck's father, Norman Peck, were business partners (NYSCEF Doc. No. 59, ¶¶ 23-27). One of their co-investments involved an investment in an Ian Peck venture. In that venture, Jarvis Slade lost \$100,000. When Mr. Slade requested "special treatment" as to the return of his money, Ian Peck refused. (*Id.*, ¶¶ 30-31.) Mr. Slade apparently became angry and never wanted his family to do business with Ian Peck again (*id.*, ¶ 32).

Ms. Slade was a trust and estates attorney who represented Norman Peck. In 2006, as alleged, Ms. Slade recommended changes to one of Norman Peck's trusts that held certain co-investment interests with Mr. Slade (*i.e.*, the **Horseneck Trust**). As a result of these recommended changes to the revocable Horseneck Trust, Ian Peck was removed as a beneficiary. (*Id.*, ¶¶ 42-43, 49-50.) According to the FAC, Ms. Slade did not disclose to Norman Peck her father's alleged animus or her potential personal contingent interest in the same assets (*id.*, ¶¶ 45-47).

Separate from the co-investments, and as relevant to the instant dispute, Norman Peck also lent Ian Peck various sums of money over the years. In connection with those loans, Ian Peck executed a number of notes (the **Notes**) evidencing his obligation for repayment. The plaintiffs allege that Norman Peck's intent (as embodied in certain estate planning) was that the Notes would be forgiven at his death, rather than repaid out of Ian Peck's inheritance (*id.*, ¶¶ 59-71).

Norman Peck passed away on April 16, 2016. He left a Will, the Horseneck Trust, and The Norman L. Peck Revocable Trust (the **Peck Trust**). After Norman Peck's death, the Peck Trust also became irrevocable and Ian Peck's interest in it vested (*id.*, ¶ 71).

Within two weeks of Norman Peck's death, the defendants filed a probate petition in the Surrogate's Court of New York County (*id.*, ¶¶ 75-76). Ms. Slade and Milbank (hereinafter defined) represented the Estate in the proceeding before that court. Ms. Slade did not disclose (i) the alleged animus her father (and she) held against Ian Peck, (ii) that she had allegedly abused her position as Norman Peck's attorney to have Ian Peck cut out of the revocable Horseneck Trust, or (iii) that a 2016 amendment executed by Norman Peck impacted (*i.e.*, impaired) the estate's ability to collect on the Notes (*id.*, ¶¶ 71-79, 126-131). Ms. Slade submitted an affidavit in the Surrogate's Court action on April 27, 2016 (*id.*, ¶ 74-75, 90; NYSCEF Doc. No. 88). Ian Peck maintained that the Notes were intended to be forgiven under his late father's testamentary plan.

The Estate however brought two separate actions to collect on the Notes on the Estate's behalf pursuant to CPLR § 3213 which the Surrogate's Court granted (NYSCEF Doc. No. 59, ¶¶ 80-117.) On appeal, the Appellate Division reversed holding that (i) the Notes were not the type of instrument that was subject to CPLR § 3213 and (ii) there are issues of fact as to whether the Notes are inconsistent with the estate plan (*In the Matter of the Estate of Norman L. Peck v Ian S. Peck*, Case No. 2019-04713 [1st Dept, February 16, 2021]; NYSCEF Doc. No. 93). On February 15, 2022, the defendants filed a notice in the Surrogate's Court formally withdrawing as counsel of record (NYSCEF Doc. No. 59, ¶ 123).

The Surrogate's Court case is ongoing. Now, in this Court, Ian Peck has brought suit against Milbank LLP, Milbank, Tweed, Hadley & McCloy, LLP (collectively, **Milbank**), and Ms. Slade alleging cause of action sounding in breach of fiduciary duty (first cause of action), Judiciary Law § 487 (second cause of action), and fraud (third cause of action).

### **Discussion**

On a motion to dismiss pursuant to CPLR § 3211(a), the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). To dismiss a cause of action pursuant to CPLR § 3211(a)(5) on the ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, *prima facie*, that the time within which to commence the action has expired, at which point the burden shifts to the plaintiff to raise a question of fact as to the timeliness of suit (*Ocean Gate Homeowners Assn., Inc. v T.W. Finnerty Prop. Mgt., Inc.*, 163 AD3d 971, 973 [2d Dept 2018]).

#### **I. Ian Peck has Standing to assert his Fraud and Breach of Fiduciary Duty Claims as of the date that the Grantor Trust became Irrevocable such that his Interest vested**

As an initial matter, although the defendants are correct that before Ian Peck's interests vested in the Peck Trust or the Horseneck Trust, his interests were contingent and unvested and as such he did not have standing to assert claims for breach of fiduciary duty or fraud, once his father passed away, these trusts became irrevocable and his rights (if any) were fully vested. As of that

moment (*i.e.*, April 16, 2016), to the extent that Ian Peck was then a beneficiary, Ian Peck had standing to assert these claims (*In re Malasky*, 290 AD2d 631, 632 [3d Dept 2002]).

## **II. The Defendants are not entitled to Dismissal on Statute of Limitations Grounds**

The FAC alleges deliberate, vindictive, and fraudulent misconduct. As such, the six-year statute of limitations period applies (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003]; *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009]). Despite the defendants' attempts to portray it as such in their moving papers, this is not simply a malpractice case where a three-year statute of limitations would apply (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009]; *cf. New Canaan Capital Mgt., LLC v Chadbourne & Parke LLP*, 194 AD3d 424, 425 [1st Dept 2021]). To wit, the allegations are not merely that the defendants failed to meet the requisite standard of care in, by way of example, drafting papers. As discussed above, the allegations in the FAC sound in intentional misconduct and are very different than that.

## **III. The Judiciary Law § 487 Claim is not ripe for dismissal**

Under Judiciary Law § 487, any attorney who is guilty of any deceit or collusion or consents to any deceit or collusion with intent to deceive the court or any party must pay treble damages (*see Melcher v Greenberg Traurig, LLP*, 23 NY3d 10, 12-13 [2014], *revd*, 23 NY3d 10 [2014] [reversed on statute of limitations grounds]). This provision applies to an attorney acting in his or her capacity as an attorney, not to a party who is represented by counsel and who, incidentally, is an attorney (*Oakes v Muka*, 56 AD3d 1057, 1058 [3d Dept 2008]). Deceit through non-disclosure is actionable – an attorney's concealment from a court of a fact he or she is required by

law to disclose is tantamount to the assertion of a false material fact (*Melcher v Greenberg Traurig, LLP*, 102 AD3d 497, 500 [1st Dept 2013], *revd*, 23 NY3d 10 [2014] [reversed on statute of limitations grounds]).

The defendants are not correct that they are entitled to dismissal of the Judiciary Law § 487 cause of action based on the judicial proceedings privilege. To further the public policy goal of permitting persons involved in a judicial proceeding to write and speak about it freely among themselves, pertinent statements made in the course of such proceedings are protected by the judicial proceedings privilege (*Front, Inc. v Khalil*, 24 NY3d 713 [2015]). Whether a statement is at all pertinent to the litigation is determined by an extremely liberal test, and any doubts are to be resolved in favor of pertinence (*Casa de Meadows Inc. [Cayman Is.] v Zaman*, 76 AD3d 917, 920 [1st Dept 2010]). The privilege is chiefly directed at protecting allegedly defamatory statements. Allowing such statements to be a basis for a defamation action “would be an impediment to justice, because it would hamper the search for truth and prevent making inquiries with that freedom and boldness which the welfare of society requires.” (*Front, Inc. v Khalil*, 24 NY3d 713, 718 [2015], citing *Youmans v Smith*, 153 NY 214, 220 [1897].)

The privilege does apply to causes of action other than defamation, but it does not apply to malpractice or malicious prosecution (*Hadar v Pierce*, 111 AD3d 439, 440 [1<sup>st</sup> Dept 2013]). The privilege may apply to a cause of action for breach of fiduciary duty that is based on allegations of defamation, but it does not apply when such cause of action does not exclusively rely on allegedly defamatory statements made in the course of litigation (*Fletcher v Dakota, Inc.*, 99 AD3d 43, 54-55 [1st Dept 2012]) or when the actions giving rise to the claim take place before

the statement in question (*Toaspern v LaDuca Law Firm LLP*, 154 AD3d 1149, 1152 [3d Dept 2017]).

At the time she submitted an affidavit to the Surrogate's Court, Ms. Slade was Norman Peck (*i.e.*, the estate)'s lawyer. The rationale as to why the privilege does not apply to malpractice applies even more soundly to allegations of intentional misconduct. Lawyers may be held responsible for their conduct during a judicial or quasi-judicial proceeding under Judiciary Law § 487 and pursuant to their ethical obligations under the canons of professional responsibility. As discussed above, at bottom, the allegation is that Ms. Slade frustrated the search for the truth by intentionally deceiving the Surrogate's Court and concealing her purported bias while she was an attorney of record in the Surrogate's Court action (NYSCEF Doc. No. 59, ¶¶ 72, 75-76, 94-98, 131, 141, 146). This is sufficient to state a cause of action under Judiciary Law § 487, and the judicial proceeding privilege simply does not apply because she was not merely a party represented by counsel who also happened to be an attorney herself at that time (*see Oakes v Muka*, 56 AD3d 1057, 1058 [3d Dept 2008]). For the avoidance of doubt, the other allegations concerning activities of Ms. Slade raise issues of fact as to what her role was at such other times which are not properly decided on a motion to dismiss – particularly because when asked at her deposition about why she was billing time during those other periods she indicated that the information was protected by the attorney-client privilege without further explanation (NYSCEF Doc. No. 85, pages 189-191, lines 25-19).

#### **IV. The Breach of Fiduciary Duty Cause of Action Fails to State a Claim**

The breach of fiduciary duty cause of action is dismissed because the FAC does not adequately allege an act or omission that is separate and apart from the statements and omissions to the tribunal that underpin the Judiciary Law claim; the FAC does not adequately identify statements or omissions to the Trustee when a duty was owed. The parties have indicated (*tr.* 7.25.24), however, that the trustee has yet to be deposed but that such deposition will take place in the Surrogate's Court action in short order. As such, this claim is dismissed without prejudice.

**V. The Fraud Cause of Action Fails to allege action or omission when Ian Peck's Interest had Vested Separate from the Judiciary Law based claim or reliance on any such action or omission**

The elements of a cause of action for fraud are (i) a material misrepresentation of a fact, (ii) knowledge of its falsity, (iii) an intent to induce reliance, (iv) justifiable reliance by the plaintiff and (v) damages (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Instead of an affirmative misrepresentation, acts of concealment where the defendant had a duty to disclose material information can support a finding of fraud. Where a fiduciary relationship exists, the mere failure to disclose facts which one is required to disclose may constitute actual fraud, provided the fiduciary possesses the requisite intent to deceive. (*Kaufman v Cohen*, 307 AD2d 113, 119-20 [1st Dept 2003].)

When Ian Peck was "cut out" of the revocable Horseneck Trust, he was merely a contingent beneficiary with a speculative interest. As such, at this time, Ms. Slade did not owe him fiduciary duties (*In re Malasky*, 290 AD2d 631, 632 [3d Dept 2002]). As for the alleged fraud that took place *after* Ian Peck obtained a vested interest (*i.e.*, the misstatements to the Surrogate's Court), the plaintiffs have not alleged that there was any sort of reliance on any of Ms. Slade's

misstatements or omissions. Stated differently, even if disclosure were required on her part, the plaintiffs are not alleged to have done anything to their detriment based on Ms. Slade's silence. There is no allegation that the plaintiffs, for example, took action in reliance on legal advice that was compromised by Ms. Slade's alleged self-interest and the family vendetta against Ian Peck (*cf. Mitschele v Schultz*, 36 AD3d 249, 255 [1st Dept 2006]). The loans were already made and all relevant testamentary documents had been signed before Norman Peck died, so the actions caused by the alleged fraud (i) were taken by someone else (*i.e.*, Norman Peck) and (ii) were taken before Ian Peck had standing. The cases cited by the plaintiffs regarding fraudulent concealment do not change this result. Those cases feature an element of justifiable reliance which is simply not alleged here (*Mitschele v Schultz*, 36 AD3d 249, 254-55 [1st Dept 2006]; *Kaufman v Cohen*, 307 AD2d 113, 120 [1st Dept 2003]). The defendants are thus entitled to dismissal of the cause of action sounding in fraud without prejudice as well.

The Court has considered the parties' remaining arguments and finds them unavailing.

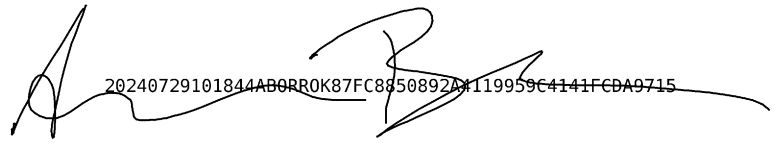
Accordingly, it is hereby

ORDERED that the fraud cause of action is dismissed without prejudice; and it is further

ORDERED that the breach of fiduciary duty cause of action is dismissed without prejudice; and it is further

ORDERED that the defendants shall serve an answer within 20 days of this decision and order;  
and it is further

ORDERED that the parties shall appear for a preliminary conference via the Microsoft Teams  
platform on August 30, 2024, at 12:30 pm.



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7/29/2024

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE