To be Argued by:
JAMES D. SPITHOGIANNIS
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Second Department

Docket No.: 2016-01939

BILL BIRDS, INC. and WILLIAM PELINSKY,

Plaintiffs-Respondents,

– against –

STEIN LAW FIRM, P.C. and MITCHELL A. STEIN,

Defendants-Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS

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Queens County Clerk's Index No. 31940/10

STATEMENT PURSUANT TO CPLR § 5531

New York Supreme Court

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1. The index number of the case in the court below is 31940/10.

2. The full names of the original parties are as set forth above. There have been no changes.

3. The action was commenced in Supreme Court, Queens County.

4. The action was commenced on or about December 21, 2010 by filing of a Summons and Verified Complaint. Issue was joined on or about April 26, 2011 by service of a Verified Answer.

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the Lower Court should have found that Plaintiffs-Respondents asserted a Judiciary Law § 487 claim, where Plaintiffs-Respondents did not plead a Judiciary Law § 487 claim in their complaint, Plaintiffs-Respondents admitted in opposition to Defendants-Appellants' summary judgment motion that they did not have a Judiciary Law § 487 claim, and Plaintiffs-Respondents' conclusory allegation in their complaint referring to Judiciary Law § 487 was based solely upon the allegations in their fraud cause of action, which the Lower Court dismissed as duplicative because it was premised upon the same facts and damages as Plaintiffs-Respondents' legal malpractice claim?

The Lower Court answered in the affirmative.

2. Whether the Lower Court, in finding that Plaintiffs-Respondents asserted a Judiciary Law § 487 claim and that there are triable issues of fact with respect to that purported claim, should have considered as evidence the affirmation of Plaintiffs-Respondents' attorney, where the attorney has no personal knowledge of the facts, and the Lower Court rejected the attorney's affirmation as evidence concerning Plaintiffs-Respondents' alleged malpractice claim?

The Lower Court answered in the affirmative.

3. Whether summary judgment dismissing Plaintiffs-Respondents' unpled damages claim under Judiciary Law § 487 should have been granted, where none of the alleged misconduct in which Defendants-Appellants purportedly engaged occurred in the context of an ongoing litigation?

The Lower Court answered in the negative.

4. Whether summary judgment dismissing Plaintiffs-Respondents' unpled damages claim under Judiciary Law § 487 should have been granted, where Plaintiffs-Respondents decided to commence the underlying litigation against General Motors and pay Defendants-Appellants $25,000.00 because they viewed the underlying litigation as "a win/win situation" (to relieve themselves from paying any further royalties under a license agreement to rights that General Motors did not own), and not because Defendants-Appellants deceived them into believing that they would ultimately prevail against General Motors in that litigation.

The Lower Court answered in the negative.

5. Whether summary judgment dismissing Plaintiffs-Respondents' unpled damages claim under Judiciary Law § 487 should have been granted, where Plaintiffs-

Respondents suffered no damages as a result of Defendants-Appellants' purported misconduct?

The Lower Court answered in the negative.

PRELIMINARY STATEMENT

Defendants-Appellants Stein Law Firm, P.C., and Mitchell A. Stein (collectively "defendants") submit this brief in support of their appeal from the portion of the Order of the Honorable Timothy J. Dufficy of the Supreme Court of the State of New York, County of Queens, dated March 21, 2013, that denied defendants' summary judgment motion, under C.P.L.R. R. 3212, for an order dismissing Plaintiffs-Respondents' ("plaintiffs") complaint in its entirety, on the basis that plaintiffs asserted a claim under Judiciary Law § 487, and that there exist triable issues of fact with respect to that purported claim.

In its March 21, 2013 Order, the Lower Court granted defendants summary judgment and dismissed all of plaintiffs' three causes of action. The Lower Court dismissed plaintiffs' first cause of action for legal malpractice on the ground that, regardless of defendants' alleged negligence, plaintiffs could not demonstrate proximate cause. The Lower Court also dismissed plaintiffs' second and third causes of action for breach of contract and fraud, respectively, because the Lower Court deemed those claims duplicative of the legal malpractice claim.

The Lower Court erred in denying, in part, defendants' summary judgment motion and finding that plaintiffs asserted a Judiciary Law § 487 claim. In their

complaint in this action, plaintiffs asserted three causes of action for legal malpractice, breach of contract, and fraud, respectively. Plaintiffs did not set forth a distinct cause of action under Judiciary Law § 487, did not state the elements of a Judiciary Law § 487 claim, and did not describe how defendants' conduct satisfied those elements. Plaintiffs referenced Judiciary Law § 487 once in their complaint, as part of an allegation in their fraud cause of action, in which plaintiffs merely concluded, without support, that defendants' purported fraud entitled plaintiffs to "triple" damages under Judiciary Law § 487. Furthermore, in opposition to defendants' motion, plaintiffs' brother and counsel, Michael Pelinsky, Esq., confirmed that plaintiffs did not have a Judiciary Law § 487 claim, and plaintiffs' opposition did not refer to Judiciary Law § 487. The Lower Court should have, therefore, dismissed the complaint in its entirety.

Furthermore, the Lower Court should have dismissed any purported claim for damages under Judiciary Law § 487 because the Lower Court granted defendants summary judgment and dismissed the fraud cause of action. The complaint's allegation regarding Judiciary Law § 487 is a statement in plaintiff's fraud cause of action, which the Lower Court properly dismissed as duplicative of the legal malpractice cause of action. Accordingly, the Lower Court inherently also dismissed

any purported damages claim under Judiciary Law § 487, a claim not otherwise pleaded.

Assuming *arguendo* that the Lower Court was correct in finding that plaintiffs asserted a Judiciary Law § 487 claim separate and apart from the duplicative fraud cause of action (although contained merely as a damages allegation therein), the Lower Court should have nevertheless dismissed the Judiciary Law § 487 damages claim because plaintiffs did not allege that defendants made misrepresentations to plaintiffs in the context of an ongoing litigation, as required by the statute and case law. As an initial matter, the Lower Court erred in considering the affirmation of plaintiffs' attorney Harold G. Furlow, Esq., as evidence with respect to Judiciary Law § 487 because plaintiffs' counsel lacks personal knowledge of the facts, and the Lower Court disregarded Mr. Furlow's statements as to defendants' alleged malpractice. In any event, Mr. Furlow's allegations cannot sustain a Judiciary Law § 487 claim because he alleged that defendants committed wrongdoing *prior* to the underlying lawsuit. Plaintiff William Pelinsky's ("Pelinsky") affidavit, upon which the Lower Court relied, cannot sustain a Judiciary Law § 487 claim because Pelinsky alleged that defendants concealed their purported malpractice *following* the dismissal of the underlying lawsuit. In addition, it is well-settled that an attorney's mere failure to disclose his or her malpractice does not give rise to an independent cause of action. Thus, the Lower

Court should have dismissed plaintiffs' purported claim for damages under Judiciary Law § 487.

Additionally, even if plaintiffs had demonstrated that defendants engaged in misconduct in the context of an ongoing litigation, defendants did not deceive plaintiffs, and there is no evidence to support such a position. Mr. Furlow claimed that defendants knew or should have known that plaintiffs had no case against General Motors, and that defendants fraudulently induced plaintiffs into commencing the underlying litigation against General Motors solely to collect a $25,000.00 fee. Critically, however, the probability of prevailing in the underlying litigation did not influence plaintiffs' decision to hire defendants and pay them $25,000.00. In fact, plaintiffs viewed the underlying litigation as a "a win/win situation," in that, if they won the case, plaintiffs would recovery monetarily, and if they lost the case, plaintiffs would benefit because General Motors would be permitted (really required) to police the marks and eliminate their competition in the industry. Since plaintiffs were not deceived, the Lower Court should have dismissed any purported damages claim under Judiciary Law § 487.

The Lower Court also erred in finding that there was an issue of fact as to whether plaintiffs sustained damages proximately caused by defendants' conduct.

Nothing in the record raises an issue of fact as to whether plaintiffs suffered damages. In his affirmation in opposition to the motion, plaintiffs' counsel described certain risks associated with defendants' advice but asserted no monetary loss to plaintiffs resulting from defendants' alleged wrongdoing. In his affidavit, Pelinsky alleged that defendants concealed the Court's decision dismissing the underlying litigation, but did not demonstrate how this alleged concealment caused plaintiffs any harm. Plaintiffs cannot recover the $25,000.00 legal fee they paid to defendants because they were not deceived into paying that fee, admitted that they were paying for "a win/win situation," and lost nothing as a result of the underlying litigation. Accordingly, the Lower Court should have dismissed any claim for damages under Judiciary Law § 487 and dismissed the complaint in its entirety.

PROCEDURAL HISTORY

Plaintiffs commenced this action against defendants by filing a summons and complaint dated December 21, 2010 (the "Complaint") (R. 10-15). In the Complaint, plaintiffs asserted causes of action against defendants for legal malpractice (R. 11-12), breach of contract (R. 12-13), and fraud (R. 13-14). In their fraud cause of action, plaintiffs also alleged, in conclusory fashion, that they are entitled to "triple" damages under Judiciary Law § 487 as a result of defendants' alleged fraud (R. 14).

Defendants served their verified answer on April 26, 2011 (R. 16-23). In their answer, defendants denied the substantive allegations in the Complaint and asserted affirmative defenses (R. 16-19).

Following discovery, defendants moved, under C.P.L.R. R. 3212, for an Order granting defendants summary judgment and dismissing the Complaint in its entirety (R. 24-25).

The Lower Court granted defendants' motion in part and denied the motion in part (R. 5-8). With regard to plaintiffs' causes of action for legal malpractice and breach of contract, the Lower Court granted summary judgment in favor of defendants and dismissed those causes of action (R. 6-7). With respect to the fraud cause of action, the Lower Court also granted defendants summary judgment (R. 7), yet determined that plaintiffs asserted a claim under Judiciary Law § 487, and that there exist triable issues of fact with respect to that claim (R. 7-8).

STATEMENT OF FACTS

Pelinsky claimed that, in January, 1995, he "received a threatening phone communication" from Mitch Renix of Equity Management, Inc. ("EMI"), which ostensibly represented General Motors ("GM") (R. 306). According to Pelinsky, Mr. Renix claimed that the items he was making required licensing because "they were trademarked and copyrighted by General Motors" (R. 306). Mr. Renix stated that, "if [Pelinsky] continued making the replacement parts without licensing with General [M]otors[,] [he] would be prosecuted and if convicted [he] would be liable for hundreds of thousands of dollars in fines and serious jail time" (R. 306). As a result of this phone communication, Pelinsky entered into a licensing agreement with GM that was "periodically renewed" over the course of 11 years (R. 306-307).

Although plaintiffs have never set forth the specific amounts of money that the GM licensing agreements purportedly required them to expend, Pelinsky contended that "[t]hese agreements were costly to [his] operation" (R. 307). The agreements required him "to pay royalties, carry certain insurance, account for [his] sales, and affix special labels (that included) the General Motors Restoration Part trademark to [his] products" (R. 307).

Pelinsky claimed that, "[s]hortly before the end of the last [licensing] agreement which was terminating December 31, 2005[,]" he "became suspicious because General Motors was trying to make [him] license and pay to make and sell the letters 'GS[,]'" even though "almost every automobile manufacturer had a 'GS' model" (R. 307). Thus, Pelinsky "question[ed] if anything that General Motors claimed was actually true" (R. 307).

Shortly after Pelinsky became suspicious of GM, plaintiffs retained defendants to commence an action "to recover damages and determine certain rights, equities, and ownership in certain trade marks [sic] and copy rights [sic] on behalf of the plaintiff against Equity Management, Inc. and General Motors, Service Part Operation" (the "Underlying Action") (R. 11). The Underlying Action was commenced on or about August 1, 2006, in the United States District Court, Eastern District of New York (R. 41-154).

At his deposition in this action, Pelinsky testified that plaintiffs' goal in the Underlying Action was to obtain "clarity" as to whether GM had a viable legal interest in the intellectual property at issue (R. 517-521). Pelinsky explained that he viewed the Underlying Action as "a win/win situation" (R. 518-519). He stated, "If I lose, then they have a right to chase my infringers out of the industry and I win. If I recover,

then I win as well . . ." (R. 520). Furthermore, Pelinsky explained that he simply wanted clarity with respect to ownership issues relating to the intellectual property at issue (R. 518, 521).

Following the commencement of the Underlying Action, EMI and GM moved to dismiss the complaint based upon, *inter alia*, improper venue (R. 155-179). EMI and GM specifically argued that a forum selection clause in the parties' licensing agreement provided that any dispute arising out of that agreement would be litigated within the State of Michigan (R. 169-171, 194-195). Defendants, on behalf of plaintiffs, opposed that motion (R. 222-276).

By Memorandum and Order dated March 31, 2008 (the "Memorandum and Order") (R. 280-295), the Court in the Underlying Action granted the defendants' motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(3) on the ground that the action was commenced in an improper venue (R. 283-295). In the Memorandum and Order, the Court observed that the 2001 licensing agreement (which the Court described as "the only relevant contract"), contained a forum selection clause providing that any disputes arising out of the agreement would be litigated within the state or federal courts in Michigan (R. 285). The Court noted that the forum selection clause was presumably enforceable, so that the burden shifted to plaintiffs to show that the

enforcement of the forum selection clause would be "unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching" (R. 286-290).

Plaintiffs alleged that, following the dismissal of the Underlying Action, defendants "hid" the dismissal from them (R. 12). Plaintiffs further alleged that, although the statute of limitations had not yet run on plaintiffs' claims when the Underlying Action was dismissed, by the time plaintiffs learned of the dismissal, it was "too late" to commence a new action (R. 12).

In early 2009, plaintiffs communicated to defendants that they no longer wished to use their legal services (R. 296).

DECISION BELOW

By Notice of Motion dated August 13, 2012, defendants moved for an Order, under C.P.L.R. R. 3212, granting defendants summary judgment and dismissing the Complaint in its entirety (R. 24-25).

By Order dated March 21, 2013, Justice Dufficy granted defendants' summary judgment motion to the extent that it dismissed plaintiffs' only three causes of action: their first cause of action for legal malpractice, their second cause of action for breach of contract, and their third cause of action for fraud (R. 5-8).

The Lower Court granted defendants summary judgment with respect to plaintiffs' first cause of action for legal malpractice because it determined that plaintiffs could not prove the essential element of proximate cause (R. 6-7). Defendants established that, "even if they had commenced the [U]nderlying [A]ction in a proper venue, plaintiffs would not have been successful on the merits of those claims because the language of the license agreement provided for 'no challenge' clause, pursuant to which plaintiff acknowledged GM's ownership of the trademarks at issue and agreed not to challenge GM's ownership during the terms of the agreement" (R. 6). In opposition, plaintiffs did not raise an issue of fact regarding whether they would have prevailed in the Underlying Action (R. 6-7). In fact, plaintiffs "conceded that the underlying claims did not have merit" (R. 6). Accordingly, the Court dismissed plaintiffs' legal malpractice cause of action (R. 7).

The Lower Court also granted defendants summary judgment with respect to plaintiffs' second and third causes of action for breach of contract and fraud, respectively, because those causes of action were based upon the same facts and damages as their cause of action for legal malpractice (R. 7). Thus, the Lower Court dismissed those causes of action as being "merely duplicative of the claim for legal malpractice" (R. 7).

This appeal relates to the Lower Court's partial denial of defendants' summary judgment motion, notwithstanding its grant of summary judgment dismissing all causes of action. The Lower Court denied defendants' summary judgment motion to the extent that the Lower Court found that plaintiffs asserted a claim for damages under Judiciary Law § 487, and that plaintiffs' opposition to the motion created triable issues of fact regarding that claim (R. 7-8). In reaching this decision, the Lower Court relied on the affirmation of plaintiffs' own attorney Harold G. Furlow, Esq. (the "Furlow Aff."), in which he opined: (1) that defendants knew or should have known that plaintiffs could not have prevailed in litigation against GM; (2) that defendants "sought to induce plaintiff into litigation under false pretenses"; and (3) that the "totality of the acts of the defendants has every appearance to [plaintiffs' counsel] of a fraudulent scheme" (R. 7-8, 300-301). Furthermore, the Lower Court concluded that Pelinsky's affidavit in opposition, including the allegations (1) that Pelinsky was not told that the Underlying Action had been dismissed until the statute had nearly run in December, 2008, and (2) that defendants "made up" the excuse that the Judge in the Underlying Action held in Chambers the decision dismissing the Underlying Action and did not release it, raised issues of fact warranting trial (R. 8).

Thereafter, defendants filed and served a Notice of Appeal from that portion of the Lower Court's Order that denied defendants' summary judgment motion (R. 3-4).

ARGUMENT

THE LOWER COURT SHOULD HAVE DISMISSED THE COMPLAINT IN ITS ENTIRETY

The Lower Court erred in finding that plaintiffs asserted a claim for damages under Judiciary Law § 487 and that triable issues of fact exist as to that purported claim. As an initial matter, plaintiffs did not plead a claim under Judiciary Law § 487, and, in opposition to defendants' summary judgment motion, plaintiffs conceded that they did not assert a Judiciary Law § 487 claim. Regardless, the Lower Court should have granted defendants' motion in its entirety because plaintiffs' purported damages claim under Judiciary Law § 487 is solely based upon the allegations in plaintiffs' fraud cause of action, which the Lower Court dismissed on the ground that it was duplicative of the legal malpractice claim. The Lower Court should have dismissed any purported Judiciary Law § 487 damages claim on the alternative ground that defendants' alleged deception occurred before and after, but not during, the Underlying Action. Moreover, by Pelinsky's own admissions, defendants' alleged misconduct did not deceive plaintiffs into bringing a lawsuit against GM. Finally, the Judiciary Law § 487 damages claim should have been dismissed because plaintiffs could not

demonstrate that defendants' alleged misconduct caused them any damages. This Court should, therefore, reverse the portion of the Lower Court's March 21, 2013 Order denying defendants' summary judgment motion and dismiss the Complaint in its entirety.

A. Plaintiffs Have Not Asserted A Judiciary Law § 487 Claim

The Lower Court erred in finding that plaintiffs have a Judiciary Law § 487 claim because plaintiffs never asserted one. The Complaint only asserted causes of action for legal malpractice (R. 11-12), breach of contract (R. 12-13), and fraud (R. 13-14). Plaintiffs did not set forth the elements of a Judiciary Law § 487 claim or state how defendants' conduct satisfied those elements (R. 11-14). Plaintiffs' only reference to Judiciary Law § 487 appears in one conclusory allegation in plaintiffs' fraud cause of action, in which plaintiffs contend, in essence, that defendants' purported fraud is also a violation of Judiciary Law § 487 (R. 14). Critically, in opposition to the motion, plaintiffs' counsel admitted that plaintiffs only had causes of action for fraud, malpractice, and breach of contract, and stated that the issues to be resolved in this matter relate to those causes of action (R. 304). Indeed, nowhere in plaintiffs' opposition do they reference Judiciary Law § 487 (R. 297-500). Thus, the Lower Court erred in finding triable issues of fact with respect to a purported Judiciary Law §

487 claim.

B. Since The Lower Court Dismissed Plaintiffs' Fraud Cause Of Action As Being Duplicative Of Their Legal Malpractice Claim, It Should Have Also Dismissed Any Purported Claim To Damages Under Judiciary Law § 487

The Lower Court properly granted defendants summary judgment with respect to plaintiffs' third causes of action for fraud (R. 7). In the fraud cause of action, plaintiffs alleged that defendants knew or should have known that plaintiffs could not have prevailed in the Underlying Action and committed fraud by agreeing to represent plaintiffs solely to generate a $25,000.00 legal fee (R. 13-14). Justice Dufficy concluded that plaintiffs' fraud (and breach of contract) causes of action were "premised upon the same facts and damages as their action for legal malpractice" and, therefore, "those claims are merely duplicative of their claim for legal malpractice" (R. 7) (citing Leon Petroleum, LLC v. Carl S. Levine & Assocs., P.C., 80 A.D.3d 573, 574, 914 N.Y.S.2d 661, 662 (2d Dep't 2011); Weil, Gotshal & Manges, LLP v. Fashin Boutique of Short Hills, Inc., 10 A.D.3d 267, 271, 780 N.Y.S.2d 593, 596 (1st Dep't 2004)). See, e.g., Moormann v. Perini & Hoerger, No. 758406, 2008 WL 10665154 (Trial Order), at *3 (Sup. Ct. Queens County June 11, 2008) (granting defendant's motion for summary judgment and dismissing plaintiff's complaint, including "the causes of action for fraud and breach of Judiciary Law § 487 as duplicative of the legal malpractice cause of action"). Furthermore, the Lower Court determined that

plaintiffs, in opposition, "failed to raise a triable issue of fact on this branch of defendants' motion" (R. 7). Accordingly, the Lower Court properly dismissed plaintiffs' third cause of action (R. 7).

The Lower Court should have also dismissed any purported Judiciary Law § 487 claim. In the Complaint (R. 11-14), plaintiffs alleged no specific violation of Judiciary Law § 487(1) or (2), and its conclusory allegation with respect to damages under Judiciary Law § 487 (R. 14) is based solely upon the fraud allegations in plaintiffs' third cause of action (R. 13-14). Since the Lower Court determined that plaintiffs' fraud cause of action could not survive summary judgment (R. 7), it should have also dismissed plaintiffs' request for damages under Judiciary Law § 487, which was contained in that very cause of action.

C. The Lower Court Should Not Have Considered Plaintiffs' Attorney's Statements In Denying The Portion Of Defendants' Motion Seeking Dismissal Of Plaintiffs' Purported Judiciary Law § 487 Claim

"[A]n affidavit or affirmation of an attorney without personal knowledge of the facts cannot 'supply the evidentiary showing necessary to successfully resist [a summary judgment] motion.'" GTF Mktg., Inc. v. Colonial Aluminum Sales, Inc., 66 N.Y.2d 965, 968, 489 N.E.2d 755, 757, 498 N.Y.S.2d 786, 788 (1985) (quoting Roche v. Hearst Corp., 53 N.Y.2d 767, 769, 421 N.E.2d 844, 845, 439 N.Y.S.2d 352, 353

(1981)). "'Such an affirmation by counsel is without evidentiary value and thus unavailing.'" GTF Mktg., Inc., 66 N.Y.2d at 968, 489 N.E.2d at 757, 498 N.Y.S.2d at 788 (quoting Zuckerman v. City of New York, 49 N.Y.2d 557, 563, 404 N.E.2d 718, 720, 427 N.Y.S.2d 595, 598 (1980)). In Bates v. Yasin, 13 A.D.3d 474, 788 N.Y.S.2d 397 (2d Dep't 2004), for example, this Court, reversed the Supreme Court's Order denying the defendants summary judgment in part because the plaintiff's attorney's "affirmation . . . has no probative weight and cannot raise a triable issue of fact." Bates, 13 A.D.3d at 474, 788 N.Y.S.2d at 398 (citing Zuckerman, *supra*).

In granting defendants' motion for summary judgment to the extent of dismissing plaintiffs' legal malpractice cause of action, the Court stated, "Plaintiffs' counsel may not serve as their expert on the significant and ultimate factual issue of whether defendants committed legal malpractice and they presented no other expert evidence" (R. 7).

Although the Lower Court properly disregarded plaintiffs' counsel's statements with respect to defendants' purported malpractice, the Lower Court improperly relied on the Furlow Aff. in maintaining plaintiffs' purported Judiciary Law § 487 claim (R. 7-8). Plaintiffs' counsel did not claim to have personal knowledge of the facts and admitted that his analysis and opinions were based on reviewing documents and

discussing the case with plaintiffs (R. 297-301). Plaintiffs' counsel's opinions at pages 4 and 5 of the Furlow Aff. (R. 300-301) are not evidence, and, therefore, the Lower Court should not have considered them in concluding that plaintiffs' opposition raises a triable issue of fact.

D. None Of Defendants' Purported Misrepresentations Were Made In The Context Of An Ongoing Litigation

The Lower Court should have dismissed plaintiffs' Judiciary Law § 487 claim because defendants' purported misconduct did not occur during the Underlying Action. To sustain a claim of deceit under Judiciary Law § 487, the attorney's wrongdoing must have taken place during the pendency of a lawsuit. Plaintiffs claim that defendants engaged in deception *before* the Underlying Action was commenced by inducing plaintiffs to agree to pay them $25,000.00 to prosecute the Underlying Action, and that defendants deceived plaintiffs *after* the Underlying Action was dismissed by concealing the Court's decision from them. Since plaintiffs do not claim that defendants committed an act of deception during the pendency of the Underlying Action, there is no issue of fact warranting trial, and, consequently, the Lower Court should have dismissed plaintiffs' Judiciary Law § 487 claim.

Judiciary Law § 487 "'only applies to wrongful conduct by an attorney *in a suit actually pending*.'" Tawil v. Wasser, 21 A.D.3d 948, 949, 801 N.Y.S.2d 619, 620 (2d

Dep't 2005) (emphasis added) (quoting Henry v. Brenner, 271 A.D.2d 647, 648, 706 N.Y.S.2d 465, 466 (2d Dep't 2000)); Mahler v. Campagna, 60 A.D.3d 1009, 1012-13, 876 N.Y.S.2d 143, 147 (2d Dep't 2009) ("[T]he cause of action alleging violation of Judiciary Law § 487 fails to state a cause of action because . . . the statute applies only to wrongful conduct in an action that is actually pending."); Gelmin v. Quicke, 224 A.D.2d 481, 483, 638 N.Y.S.2d 132, 134 (2d Dep't 1996) (holding that a complaint failed to state a cause of action under Judiciary Law § 487 when the allegedly false affidavit at issue was not created in connection with a legal proceeding).

Here, the Lower Court should have dismissed plaintiffs' purported Judiciary Law § 487 claim because, in opposition to defendants' summary judgment motion, there was no allegation – nor could there be – that defendants intentionally deceived plaintiffs in a pending lawsuit. As demonstrated in Section C. above, the Lower Court, as a threshold matter, should not have considered plaintiffs' counsel's statements opining on the facts underlying this matter. Even assuming, for the sake of argument, that plaintiffs' counsel has personal knowledge of the facts underlying this matter, he did not create a triable issue of fact because he referred to defendants' purported actions taken *before* the Underlying Action was commenced. In the Furlow Aff., plaintiffs' counsel concluded (without support) that defendants "sought to induce the Plaintiffs into litigation under . . . false pretenses" (R. 300) and may have engaged in a

"fraudulent scheme in which the plaintiffs were lured into litigation" (R. 301). Nowhere in the Furlow Aff. did plaintiffs' counsel allege that defendants made a misrepresentation to plaintiffs after defendants commenced that litigation (the Underlying Action) on plaintiffs' behalf (R. 297-301). Accordingly, none of plaintiffs' counsel's opinions established an issue of fact warranting trial.

The portions of Pelinsky's affidavit upon which the Lower Court relied also did not demonstrate a triable issue of fact. As an initial matter, defendants cannot be liable for allegedly "concealing" wrongdoing because an attorney's purported failure to disclose his or her malpractice does not give rise to an independent claim. See Ferdinand v. Crecca & Blair, 5 A.D.3d 538, 539, 774 N.Y.S.2d 714, 715 (2d Dep't 2004) (holding that the court properly dismissed plaintiff's fraud causes of action "as the mere failure to disclose malpractice does not give rise to a cause of action alleging fraud or deceit separate from the underlying malpractice cause of action"); see also Weiss v. Manfredi, 83 N.Y.2d 974, 977, 639 N.E.2d 1122, 1124, 616 N.Y.S.2d 325, 327 (1994); Baystone Equities, Inc. v. Handel-Harbour, 27 A.D.3d 231, 231, 809 N.Y.S.2d 904, 904 (1st Dep't 2006); see also Zarin v. Reid & Priest, Esqs., 184 A.D.2d 385, 387, 585 N.Y.S.2d 379, 382 (1st Dep't 1992) ("[T]here is no independent cause of action for 'concealing' malpractice."). Thus, a claim of concealment cannot

support a claim against defendants.

Moreover, Pelinsky's concealment allegations do not support a Judiciary Law § 487 claim because they refer to concealment that allegedly took place after the Underlying Action ended. In opposition, Pelinsky argued that defendants hid from plaintiffs the existence of the Memorandum & Order dismissing the Underlying Action. The Lower Court specifically relied on plaintiffs' allegations that "[Pelinsky] wasn't told that the case was dismissed on March 31, 2008, until the statute had nearly run in December of that year, [and] that counsel made up an excuse that ['] the Judge held the decision in chambers and didn't release it[']" (R. 8). These allegations do not relate to conduct in the context of an ongoing litigation because the Underlying Action was no longer pending when the alleged concealment occurred. Since Pelinsky's affidavit did not allege that defendants deceived plaintiffs during the pendency of the Underlying Action, the Lower Court should have dismissed any purported claim for damages under Judiciary Law § 487.

E. Defendants' Purported Misconduct Did Not Deceive Plaintiffs Into Agreeing To Commence The Underlying Action And Paying Defendants $25,000.00

Plaintiffs did not violate Judiciary Law § 487 because they did not deceive plaintiffs. At his deposition, Pelinsky admitted that plaintiffs paid defendants' legal

fees not because they were deceived into bringing the Underlying Action, but because they wanted to obtain "clarity" over whether EMI/GM had a viable legal interest in the intellectual property at issue (R. 517-521). Pelinsky explained at his deposition that he viewed the Underlying Act as "a win/win situation," stating, "If I lose, then they have a right to chase my infringers out of the industry and I win. If I recover, then I win as well so I said, okay, who do I make the check out to?" (R. 519-520).[1] Pelinsky further explained that he simply wanted clarity with respect to ownership issues relating to the intellectual property at issue (R. 521). Hence, plaintiffs' complaint in their opposition regarding defendants commencing the Underlying Action, despite the lack of merit to plaintiffs' claims in that action, is disingenuous in light of their acknowledgement that they went into that lawsuit with the mentality that "whether I won or I lost, I would still win" (R. 518). Plaintiffs admit that the primary purpose of commencing the Underlying Action was to put pressure on EMI/GM to substantiate their claims of ownership of the intellectual properties at issue, and it was not motivated by any representation defendants made as to the merits of the case. Thus, the Lower Court should not have found that issues of fact exist with respect to plaintiffs' claim for damages under Judiciary Law § 487.

[1] The transcript of Pelinsky's deposition was sent to plaintiffs' counsel on July 30, 2012 (R. 523). Since more than sixty days had passed without plaintiffs returning the executed transcript, defendants properly submitted the unsigned transcript in support of their motion. C.P.L.R. R. 3116(a).

F. Defendants' Purported Misconduct Did Not Proximately Cause Plaintiffs Any Damages

Even if defendants had made misrepresentations to plaintiffs during the pendency of the Underlying Action that deceived plaintiffs, the Lower Court should have nevertheless dismissed plaintiffs' third cause of action to the extent that it asserts a claim for damages under Judiciary Law § 487 because plaintiffs could not establish that they were damaged as a result of defendants' purported wrongdoing.

In DiPrima v. DiPrima, 111 A.D.2d 901, 490 N.Y.S.2d 607 (2d Dep't 1985), this Court modified a judgment to delete provisions awarding treble damages to the plaintiff under Judiciary Law § 487(1) because "plaintiff failed to prove she was injured as a result of the deceit or collusion." DiPrima, 111 A.D.2d at 902, 490 N.Y.S.2d at 608. According to this Court, the damages "were patently the result of plaintiff's husband's failure to fulfill his obligations under the divorce decree and cannot be charged to [the defendant], the attorney for plaintiff's husband . . . ." Id.

In Boglia v. Greenberg, 63 A.D.3d 973, 882 N.Y.S.2d 215 (2d Dep't 2009), this Court affirmed the Supreme Court's Order granting the defendants' cross-motion for summary judgment dismissing the plaintiff's Judiciary Law § 487(1) claim. Id. at 975, 882 N.Y.S.2d at 218. This Court determined that the defendants "demonstrate[ed] that the plaintiff did not sustain any damages which were proximately caused by the

defendants' alleged deception or by an allege chronic, extreme pattern of legal delinquency." Id. (citations omitted). "In opposition, the plaintiff failed to raise a triable issue of fact." Id. (citations omitted).

In Barouh v. Law Offices of Jason L. Abelove, 131 A.D.3d 988, 17 N.Y.S.3d 144 (2d Dep't 2015), this Court affirmed the Supreme Court's grant of summary judgment and dismissal of the plaintiff's Judiciary Law § 487 cause of action because the defendant did not proximately cause the plaintiff any damages, "which consisted of her legal fees in defending against the BEA defendants' motion to dismiss." Id. at 990, 17 N.Y.S.3d at 147. The plaintiff's claim was that, had the defendant disclosed to the plaintiff that he had previously represented BEA, the BEA defendants would not have decided to make its dismissal motion. Id. "The alleged damages, however, stem[med] from the BEA defendants' decision to move for dismissal[,]" and this Court reasoned that "speculation is required to conclude that the BEA defendants would not have moved for dismissal if [the defendant] disclosed his representation of BEA to the plaintiff." Id. This Court, therefore, found the plaintiff's proximate-cause assertion to be speculative. Id. (citing Mizuno v. Barak, 113 A.D.3d 825, 827, 980 N.Y.S.2d 473, 474 (2d Dep't 2014) (other citations omitted)).

In its March 21, 2013 Order, the Lower Court stated that the Furlow Aff. "raises a triable issue of fact as to whether plaintiff sustained any damage proximately caused either by the defendants' alleged deceit or by an alleged chronic, extreme pattern of legal delinquency by the defendant" (R. 8). To the contrary, plaintiffs' counsel did not allege, let alone demonstrate, that plaintiffs suffered any damages as a result of defendants' purported scheme to lure plaintiffs into a meritless lawsuit (R. 297-301).

Although plaintiffs' counsel is generally critical of certain advice that defendants purportedly gave plaintiffs, he was unable to offer any explanation as to how plaintiffs were actually damaged by that advice. Rather, plaintiffs' counsel merely stated that such advice *could have* damaged plaintiffs:

- "the impact of the defendants' legal advice *could have* resulted in a criminal raid, confiscation of molds and other manufacturing tools and the criminal prosecution of the Plaintiffs" (R. 299) (emphasis added);
- "The advice of the defendants also *risked* the aggravation of GM and termination of any future licenses . . ." (R. 300) (emphasis added);
- "That advice . . . placed plaintiffs *at risk* for a criminal raid, seizure and arrest" (R. 300-301) (emphasis added).

Neither plaintiffs' counsel nor Pelinsky claimed that any of these purported "risks" ever came to fruition.

In the March 21, 2013 Order, the Lower Court also stated that Pelinsky raised an issue of fact in his affidavit by making allegations that "caused him to lose, at minimum, his $25,000.00 payment to the defendants" (R. 8). The allegations that the Lower Court cited relate to defendants' purported misconduct following the Underlying Action that could not have caused plaintiffs to lose the money they had paid to defendants as a legal fee. Specifically, the Lower Court cites Pelinsky's allegations: (1) that "he wasn't told that the case was dismissed on March 31, 2008, until the statute had nearly run in December of that year," and (2) "that counsel made up an excuse that 'the Judge held the decision in chambers and didn't release it[']" (R. 8). Pelinsky did not explain how defendants' purported delay in disclosing the existence of the Memorandum and Order dismissing the Underlying Action could have possibly saved plaintiffs the $25,000.00 fee they paid to defendants to prosecute the Underlying Action (R. 306-312). Accordingly, Pelinsky's affidavit did not raise an issue of fact with respect to proximate cause.

As set forth in Section E. above, plaintiffs considered the Underlying Action "a win/win situation" (R. 518-519), and the record shows that plaintiffs, indeed, "won." Plaintiffs suffered no monetary loss as a result of the dismissal of the Underlying Action. In his affidavit, Pelinsky stated that, before the Underlying Action, plaintiffs' licensing agreements with GM caused him to "pay royalties, carry certain insurance,

account for [his] sales, and affix specific labels . . . to [his] products" (R. 307). Pelinsky did not allege that, following the dismissal of the Underlying Action, plaintiffs were compelled to bear any of the costs that they were required to incur under the licensing agreements (R. 306-312). Moreover, nothing in this record supports the assertion that defendants' purported misconduct proximately caused plaintiffs any damages. Thus, the Judiciary Law § 487 claim should have been dismissed.

Furthermore, the mere fact that the Underlying Action was dismissed without prejudice is not a valid basis for plaintiffs to recoup (in whole or in part) the $25,000 in legal fees that they paid in connection with the underlying litigation. The judicial system would be chaotic if parties that lose lawsuits are entitled to simply refuse to pay their legal fees. See D'Jamoos v. Griffith, No. 00-CV-1361 (ILG), 2006 WL 2086033, at *6 (E.D.N.Y. July 25, 2006), aff'd, 340 F. App'x 737 (2d Cir. 2009) ("[A] client cannot second guess an attorney's decisions with the benefit of hindsight, looking for arguments or strategies that would have been more favorable, and then using them to justify withholding payment."). Although courts have recognized that attorneys may be required to disgorge attorney's fees that they received upon a determination that they violated a Disciplinary Rule (see Shelton v. Shelton, 151 A.D.2d 659, 660, 542 N.Y.S.2d 719, 720 (2d Dep't 1989)), in this case, plaintiffs have not identified any

Disciplinary Rule that defendants purportedly breached. In light of the foregoing, plaintiffs cannot establish any damages, and the Lower Court should have dismissed plaintiffs' claim for damages under Judiciary Law § 487.

CONCLUSION

For all of the foregoing reasons, Defendants-Appellants Stein Law Firm, P.C., and Mitchell A. Stein respectfully request that this Court: (a) reverse the Lower Court's March 21, 2013 Order that denied defendants' summary judgment motion, under C.P.L.R. R. 3212, for an order dismissing Plaintiffs-Respondents' ("plaintiffs") complaint in its entirety, on the basis that plaintiffs asserted a claim under Judiciary Law § 487, and that there exist triable issues of fact with respect to that purported claim; and (b) grant defendants such other, further and different relief as this Court may deem just and proper.

DATED: Garden City, New York
August 15, 2016

Respectfully submitted,

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APPELLATE DIVISION – SECOND DEPARTMENT
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 670.10.3(f) that the foregoing appellant's brief was prepared on a computer using Microsoft Word.

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DATED: Garden City, New York
August 15, 2016

Respectfully submitted,

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