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.

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

AMY M. MONAHAN, ESQ.
JAMES D. SPITHOGIANNIS, ESQ.
L'ABBATE, BALKAN, COLAVITA
& CONTINI, LLP
Attorneys for Defendants-Appellants
1001 Franklin Avenue, 3rd Floor
Garden City, New York 11530
(516) 294-8844

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PRELIMINARY STATEMENT

Defendants-Appellants Stein Law Firm, P.C., and Mitchell A. Stein (collectively "defendants") submit this Reply Brief in further 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' motion, under C.P.L.R. R. 3212, for an order granting defendants summary judgment and dismissing Plaintiffs-Respondents' ("plaintiffs") complaint in its entirety. This Court should reverse the March 21, 2013 Order to the extent that it denied defendants' summary judgment motion and dismiss the complaint in its entirety because no triable issues of fact exist with respect to plaintiffs' sole remaining claim under Judiciary Law § 487.

The Lower Court erred in denying defendants' summary judgment motion to the extent that it did not also dismiss plaintiffs' claim for damages under Judiciary Law § 487. Contrary to the assertions in the Brief of Plaintiffs-Respondents dated November 16, 2016 ("Respondents' Brief"), plaintiffs failed to plead a claim under Judiciary Law § 487. Moreover, had plaintiffs even pled such a claim, it should have been dismissed anyway, because it is solely based on plaintiffs' fraud allegations, which the Lower Court correctly dismissed as

being duplicative of the cause of action for legal malpractice. Furthermore, the purported Judiciary Law § 487 claim should have been dismissed because there is no evidence whatsoever that any alleged misconduct occurred during the pendency of an ongoing litigation, that defendants deceived plaintiffs, and that defendants proximately caused plaintiffs to sustain damages. Indeed, there is no evidence that plaintiffs suffered any injury at all, having been relieved from any license agreement or the payment of royalties thereunder.

It is accordingly respectfully submitted that, upon the record evidence or, more exacting, the dire lack thereof, this Court should reverse the portion of the Lower Court's Order that denied defendants' summary judgment motion and dismiss the complaint in its entirety.

ARGUMENT

THE LOWER COURT SHOULD HAVE DISMISSED THE COMPLAINT IN ITS ENTIRETY

A. The Lower Court Should Have Dismissed Any Purported Claim For Damages Under Judiciary Law § 487 Because It Dismissed Plaintiffs' Fraud Cause of Action

As an initial matter, the Court should find unavailing plaintiffs' new assertion that "[p]laintiffs' counsel did not state anywhere in his affirmation in opposition . . . that plaintiffs do not have a Judiciary Law § 487 cause of action"

(See Respondents' Brief at p. 16). The double negatives alone show the contortions necessary to even make an argument. Plaintiffs' counsel, in fact, admitted in opposition to the summary judgment motion that plaintiffs did not plead a Judiciary Law § 487 claim. Plaintiffs' counsel stated: "When this action was commenced it necessarily contained 3 causes of action. One for malpractice, one for fraud and one for breach of contract" (R. 304). Since the complaint pled "3 causes of action," plaintiffs did not amend the complaint, and the Lower Court dismissed all three causes of action, the Lower Court should have, at that point, dismissed the complaint in its entirety.

Even assuming that plaintiffs pled a claim under Judiciary Law § 487 – which they admittedly did not – this Court should reject the notion that plaintiffs' fraud cause of action and their Judiciary Law § 487 claim "are separate and distinct and do not rise and fall together" (See Respondents' Brief at p. 17). Indeed, plaintiffs' fraud claim and their purported Judiciary Law § 487 claim of necessity are based on the same alleged misconduct. In the third cause of action, plaintiffs allege that defendants knew or should have known that plaintiffs could not have prevailed in their action against Equity Management, Inc. ("EMI"), and General Motors, Service Part Operation

("GM") ("Underlying Action"), and committed fraud by agreeing to represent plaintiffs solely to generate a legal fee (R. 13-14). (The case was intended to avoid any license fee or royalty and succeeded in doing so.) Yet, based on that contention alone, plaintiffs conclude that, "[u]nder the provisions of the law pertaining to fraud including the New York Judiciary Law Section 487[,]" they are entitled to "triple damages" (R. 14). Moreover, in Respondents' Brief, plaintiffs do not identify a distinction between the allegations supporting their fraud claim and the allegations supporting a claim to damages under Judiciary Law § 487. Since the Lower Court dismissed plaintiffs' fraud cause of action as being duplicative of the legal malpractice cause of action (R. 7), plaintiffs' request for damages under Judiciary Law § 487, premised on the identical fraud allegations in the third cause of action, simply could not independently have survived summary judgment.

B. Plaintiffs' "Attorney's Affirmation" Should Not Have Prevented Dismissal Of Their Purported Judiciary Law § 487 Claim Because It Is Not Evidence; Harold G. Furlow, Esq., Has No Personal Knowledge Of The Facts, And He Did Not Allege That Defendants Engaged In Misconduct In The Context Of An Ongoing Litigation

In deciding defendants' summary judgment motion, the Lower Court erred by considering the "Attorney's Affirmation" signed by Harold G. Furlow,

Esq. ("Furlow"), as "Attorney for Plaintiffs" (R. 297-301). It is well-settled that "an 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)). Plaintiffs could not have made a "showing in the Furlow affirmation" (see Respondents' Brief at p. 14) because Furlow is an attorney with no personal knowledge of the facts, and he admitted that his analysis and opinions were based on reviewing documents and discussing the case with plaintiffs (R. 297-301). In fact, the Lower Court recognized that Furlow's statements could not have made an evidentiary showing because it properly disregarded them when deciding to dismiss the legal malpractice claim (R. 6-7). The Lower Court should have also disregarded Furlow's statements when assessing plaintiffs' purported Judiciary Law § 487 claim.

Assuming *arguendo* that the Lower Court was permitted to consider Furlow's statements, it should have nevertheless determined that they did not raise a triable issue of fact warranting trial. 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)). Furlow, however, claimed that defendants, *before* the commencement of the Underlying Action, "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). Furlow did not allege that defendants engaged in misconduct during the pendency of the Underlying Action (R. 297-301). Thus, the Lower Court should not have concluded that Furlow's statements raised an issue of fact warranting trial.

C. Plaintiff William Pelinsky Did Not Raise An Issue Of Fact Regarding Whether Defendants Engaged In Deceit In The Context Of An Ongoing Litigation

Plaintiff William Pelinsky's ("Pelinsky") affidavit did not support a claim under Judiciary Law § 487 because he referred to concealment that allegedly took place *after* the termination of the Underlying Action. At page 15 of the Respondents' Brief, plaintiffs state, in conclusory fashion, that the Lower Court, in denying summary judgment, correctly relied on the assertions 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, however, do not raise a triable issue of fact because a failure to disclose 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 cause 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"). Furthermore, Pelinsky's allegations only refer to conduct that allegedly occurred *after* the Underlying Action was terminated and not during the pendency of a litigation. Thus, Pelinsky's allegations should not have saved plaintiffs' purported Judiciary Law § 487 claim from being dismissed.

The cases that plaintiffs cite in the Respondents' Brief are distinguishable because they involved misconduct during a legal proceeding, or a fraud on a court. For example, in Rock City Sound, Inc. v. Bashian & Farber, LLP, 74 A.D.3d 1168, 903 N.Y.S.2d 517 (2d Dep't 2010), unlike here, the complaint sufficiently alleged that the attorney defendant engaged in deceit in a pending

litigation in Supreme Court, Dutchess County. Id. at 1172, 903 N.Y.S.2d at 521.

The Appellate Division, First Department, in Mazel 315 W. 35th LLC v. 315 W. 35th Assocs. LLC, 120 A.D.3d 1106, 992 N.Y.S.2d 402 (1st Dep't 2014), denied the attorney defendant's pre-discovery summary judgment motion because the plaintiff showed that "defendant presented false assignment documents for recordation in the City Register and sent a letter to the justice stating falsely that his client was the true owner of the notes and mortgages . . . ." Id. at 1107, 120 A.D.3d at 403.

In Kurman v. Schnapp, 73 A.D.3d 435, 901 N.Y.S.2d 17 (1st Dep't 2010), the Appellate Division, First Department, denied the defendant's motion to dismiss the Judiciary Law § 487 claim because the plaintiff alleged that "defendant deceived or attempted to deceive the court with a fictitious letter addressed to him . . . ." Id. at 435, 901 N.Y.S.2d at 18.

In Schindler v. Issler & Schrage, P.C., 262 A.D.2d 226, 692 N.Y.S.2d 361 (1st Dep't 1999), the Appellate Division, First Department, granted the plaintiff partial summary judgment on his Judiciary Law § 487 claim because

the "defendant law firm . . . knowingly withheld crucial information from the declaratory judgment court." Id. at 229, 692 N.Y.S.2d at 363.

The Appellate Division, First Department, in Sarasota, Inc. v. Kurzman & Eisenberg, LLP, 28 A.D.3d 237, 814 N.Y.S.2d 94 (1st Dep't 2006), affirmed the Supreme Court's Order denying the defendants' motion to dismiss the Judiciary Law § 487 claim that "was based on conduct in a proceeding to which plaintiff was a party, rather than conduct taking place before or after the proceeding." Id. at 237, 814 N.Y.S.2d at 95.

Here, the Lower Court should have dismissed the complaint in its entirety because plaintiffs did not show that defendants committed misconduct during the pendency of the Underlying Action and have not cited a single case supporting their theory that pre-litigation or post-litigation conduct is actionable under Judiciary Law § 487.

In an attempt to evade the Judiciary Law § 487 case law, plaintiffs now claim in the Respondents' Brief that their purported Judiciary Law § 487 claim is viable because plaintiffs may have paid defendants legal fees after making an initial retainer payment (See Respondents' Brief at p. 18). The inquiry

regarding conduct in an ongoing litigation, however, focuses on the attorney's conduct; the client's conduct is irrelevant. Nevertheless, as shown in the Appellants' Brief dated August 15, 2016 ("Appellants' Brief"), at pages 24 through 25, and in Section D. below, plaintiffs were not deceived into paying legal fees. Accordingly, this Court should reverse the Lower Court's Order to the extent that it denied defendants' motion for summary judgment.

D. Defendants' Purported Misconduct Did Not Proximately Cause Plaintiffs To Sustain Any Damages

Even if the alleged misconduct had occurred during the pendency of the Underlying Action, the Lower Court should have nevertheless dismissed plaintiffs' complaint in its entirety. As fully set forth in Sections E. and F. of the Appellants' Brief at pages 24 through 31, nothing in the record supports the assertion that defendants deceived plaintiffs, or that defendants' alleged misconduct proximately caused plaintiffs to sustain damages.

Furlow's statements, aside from not being evidence, did not create a triable issue of fact with respect to proximate cause because he did not allege that plaintiffs suffered any damages as a result of defendants' purported scheme to lure plaintiffs into a meritless lawsuit (R. 297-301). Although Furlow

discussed purported "risks" associated with defendants' conduct, he was unable to explain how plaintiffs were actually damaged by that advice (R. 299-301). (Nor could he as a matter of logical sense. Plaintiffs were relieved from paying license or royalty fees for rights that the purported licensor did not own, and thus saved money rather than incurring any damages whatsoever.)

Thus, Pelinsky, in his affidavit, did not explain and could not truthfully explain how defendants' purported delay in disclosing the existence of the Memorandum and Order dismissing the Underlying Action could have caused plaintiffs damages in any manner (R. 306-312).

Critically, plaintiffs, in the Respondents' Brief, do not contest the reality that defendants did not deceive plaintiffs. As fully set forth in Section E. of the Appellants' Brief at pages 24 through 25, Pelinsky admitted at his deposition that the primary purpose of commencing the Underlying Action was to put pressure on EMI and GM to substantiate their claims to ownership of the intellectual properties at issue (which EMI and GM failed to do because they could not), that he understood that the outcome of the Underlying Action was uncertain, and that he viewed the Underlying Action as "a win/win situation" (R. 517-521). Pelinsky's admissions flatly discredit Furlow's opinion that

plaintiffs were "lured" into commencing the Underlying Action, and dispel the theory that defendants' purported pre-litigation conduct impacted plaintiffs' decisions (R. 300-301).

Moreover, the record contradicts the conclusion that "plaintiffs sustained damages in the sum of at least $25,000 for the retainer that they paid defendants" (See Respondents' Brief at p. 17). As a result of paying defendants' legal fees, plaintiffs "won." 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), and plaintiffs do not contest that point on appeal. Plaintiffs have now saved nearly a decade of unnecessary royalty fees. Thus, the Lower Court should not have found that issues of fact exist with respect to plaintiffs' claim for damages under Judiciary Law § 487 because it is clear that there are no damages emanating from defendants' conduct, just cost savings, the very "win/win" outcome to which Pelinsky refers in his deposition testimony.

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-Appellants' summary judgment motion, under C.P.L.R. R. 3212, for an order dismissing Plaintiffs-Respondents' complaint in its entirety, on the basis that Plaintiffs-Respondents asserted a claim under Judiciary Law § 487, and that there exist triable issues of fact with respect to that purported claim, and, upon such reversal, dismiss the complaint in its entirety; and (b) grant Defendants-Appellants such other, further and different relief as this Court may deem just and proper.

DATED: Garden City, New York
December 28, 2016

Respectfully submitted,

L'ABBATE, BALKAN, COLAVITA & CONTINI, L.L.P.

By: _____
James D. Spithogiannis
Attorneys for Defendants
Stein Law Firm, P.C., and
Mitchell A. Stein
1001 Franklin Avenue
Garden City, New York 11530
(516) 294-8844

Of Counsel:
Amy M. Monahan, Esq.
James D. Spithogiannis, Esq.

APPELLATE DIVISION – SECOND DEPARTMENT
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 670.10.3(f) that the foregoing Defendants-Appellants' Reply Brief was prepared on a computer using Microsoft Word.

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DATED: Garden City, New York
December 28, 2016

Respectfully submitted,

L'ABBATE, BALKAN, COLAVITA & CONTINI, L.L.P.
James D. Spithogiannis
Attorneys for Defendants-Appellants Stein Law Firm, P.C., and Mitchell A. Stein
1001 Franklin Avenue
Garden City, New York 11530
(516) 294-8844

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