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STATE OF NEW YORK
COURT OF APPEALS

BILL BIRDS, INC. and WILLIAM PELINSKY,

Plaintiffs-Appellants,

- against -

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

Defendants-Respondents.

NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS AND SUPPORTING PAPERS

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Supreme Court, Queens County Clerk's Index No. 31940/10

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COURT OF APPEALS
STATE OF NEW YORK

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BILL BIRDS, INC. and WILLIAM PELINSKY,

Plaintiffs-Appellants,

- against -

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

Defendants-Respondents.

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NOTICE OF MOTION FOR LEAVE TO APPEAL

Queens County Clerk's Index No. 31940/10

PLEASE TAKE NOTICE that upon the annexed affirmation of Thomas Torto, Esq., dated September 20, 2018, and the exhibits annexed thereto, and upon the record and briefs filed in the Appellate Division, Second Department in connection with the Decision and Order of that court entered August 15, 2018, plaintiffs-appellants will move this Court at the Court of Appeals Hall, 20 Eagle Street, Albany, New York 12207 on October 1, 2018 at 9:30 a.m. for an Order:

(1) pursuant to CPLR 5602(a)(1)(i) granting plaintiffs-appellants leave to appeal to the Court of Appeals from the final Decision and Order of the Appellate Division, Second Department, dated August 15, 2018, which reversed the Order of the Supreme Court, Queens County (Dufficy, J.), dated March 21, 2013, and granted defendants' motion for summary judgment dismissing plaintiffs' claim under Judiciary Law §487; and

(2) awarding such other and further relief as this Court deems just and

proper.

Dated: New York, New York
September 20, 2018

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COURT OF APPEALS
STATE OF NEW YORK

----------x

BILL BIRDS, INC. and WILLIAM PELINSKY,

Plaintiffs-Appellants,

- against -

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

Defendants-Respondents.

----------x

AFFIRMATION IN SUPPORT

Queens County Clerk's
Index No. 31940/10

THOMAS TORTO, an attorney licensed to practice before the Courts of the State of New York, affirms under penalty of perjury pursuant to CPLR 2106:

1. I am appellate counsel to Peter Gallanter, Esq., the attorney for plaintiffs-appellants. I am fully familiar with the facts and circumstances set forth below, and submit this affirmation in support of plaintiffs' motion, pursuant to CPLR 5602(a)(1)(i), for leave to appeal to this Court from the final Decision and Order of the Appellate Division, Second Department, dated August 15, 2018 (reported at 164 A.D.3d 635, ___N.Y.S.3d___ [2d Dep't 2018]).

The Question of Law
Presented For Review

2. What is the standard of proof to successfully oppose a motion for summary judgment when relying on an unpleaded cause of action?

Timeliness

3. By notice of appeal dated February 16, 2016 (R. 3-4)[1], defendants timely appealed to the Appellate Division, Second Department from so much of the order of the Supreme Court, Queens County (Dufficy, J.), dated March 21, 2013 (R. 5-9), as denied defendants' motion for summary judgment dismissing plaintiff's claim under Judiciary Law §487. In its March 21, 2013 order, the Supreme Court had dismissed the other causes of action of the complaint.

4. By Decision and Order dated August 15, 2018, the Appellate Division reversed the order of the Supreme Court and dismissed plaintiff's claim under Judiciary Law §487.

5. The Appellate Division's Decision and Order, dated August 15, 2018, was served with notice of entry by regular mail on August 16, 2018 (Exhibit "A").

6. Since this motion has been served on September 20, 2018, it is timely.

Jurisdiction

Finality

7. Under CPLR 5602(a)(1)(i), the Court of Appeals has jurisdiction to entertain this motion and plaintiffs' proposed appeal. This motion (and the proposed appeal) seeks leave to appeal from the Appellate Division's Decision and Order entered August 15, 2018, which finally determines this action.

8. Since the Appellate Division's Decision and Order was unanimous, it is

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[1] References to "R.___" are to the pages of the Record on Appeal in the Appellate Division.

not appealable as of right under CPLR 5601(a).

The Facts

9. The facts are set forth in detail in plaintiffs' respondents' brief in the Appellate Division and are briefly set forth below.

10. Plaintiff Bill Birds, Inc. ("Bill Birds") is a manufacturer of high quality decorative metal automotive parts, including parts for certain General Motors ("GM") automobiles which are no longer manufactured and sold by GM (R. 222). In 1995, Bill Birds entered into a licensing agreement with GM which was "periodically renewed" over the course of approximately eleven years (R. 306-307).

11. The licensing agreements contained a forum selection clause which provided that "any court proceeding relating to any controversy arising under this AGREEMENT shall be in the state or federal courts of Michigan" (R. 104; 194-195).

12. The licensing agreements were costly to Bill Birds since it had to pay royalties, carry certain insurance, account for sales, and affix to its products special labels that included GM's Restoration Part trademark(R. 307).

13. Shortly before the termination of the last licensing agreement on December 31, 2005, plaintiff William Pelinsky, the president of Bill Birds, became concerned that GM "was trying to make [him] license and pay to make and sell the letters "GS" and [he] realized that almost every automobile manufacturer had a "GS" model" (R. 307).

14. In 2006, plaintiffs retained defendants to commence an action for money damages and a determination of certain rights, equities and ownership in certain trademarks and copyrights on behalf of plaintiffs against Equity Management, Inc. ("EMI") and GM (R. 11).

Plaintiffs paid defendants a retainer of $25,000 (R. 308).

15. On August 1, 2006, defendants commenced an action on plaintiffs' behalf against EMI and GM in the United States District Court for the Eastern District of New York ("the Federal Action") (R. 41-61). EMI and GM moved to dismiss the complaint upon the grounds of, inter alia, improper venue in that the forum selection clause in the licensing agreement provided that any dispute would be litigated in state or federal court in Michigan (R. 155-179).

16. In a Memorandum and Order dated March 31, 2008 (R. 280-295), the Eastern District granted EMI and GM's motion dismissing the complaint pursuant to FRCP 12(b)(3) upon the ground that the action was commenced in an improper venue.

The Instant Action

17. On December 29, 2010, plaintiffs commenced the instant action by filing a summons and complaint (R. 10-15) in which causes of action for legal malpractice, breach of contract and fraud were alleged. The complaint alleges, inter alia, that defendants "brought the claims in an improper venue" and that defendants "hid" from plaintiffs the dismissal of the Federal Action (R. 12). The third cause of action for fraud alleges that defendants "knew or should have known that defendants would and our could not successfully prosecute plaintiffs' claims" (R. 13); and that "under Judiciary Law Section 487 defendants have forfeited to plaintiffs 'triple damages'" (R. 14).

18. In their answer (R. 16-23), defendants denied the material allegations of the complaint and raised various affirmative defenses.

Defendants' Motion for Summary Judgment

19. By notice of motion dated August 13, 2012 (R. 24-25), defendants moved for summary judgment dismissing the complaint. In support of their motion, defendants relied on, inter alia, the affirmation of their attorney (R. 26-36), the affidavit of defendant Mitchell A. Stein (R. 37-39) and the licensing agreements between plaintiffs and GM (R. 62-83; 84-89; 90-123; 180–221).

20. Defendants' attorney argued (R. 31-34) that the allegations in the complaint predicated on legal malpractice should be dismissed upon the ground that the underlying Federal Action was "meritless as a matter of law" and that therefore plaintiffs would not have prevailed in the Federal Action regardless of defendants' alleged negligence in commencing that action in an improper venue. Defendants pointed out that paragraph 5.1 of the licensing agreement contained a "no challenge" clause pursuant to which plaintiffs acknowledged GM's ownership of the trademarks at issue and agreed not to challenge GM's ownership during the term of the agreement (R. 33).

21. Defendants also contended that the causes of action for breach of contract and fraud should be dismissed as duplicative of the legal malpractice cause of action (R. 35).

22. Defendants also contended that "to the extent plaintiffs assert any claims under Judiciary Law § 487", such claims should be dismissed upon the grounds that plaintiffs' allegations "fail to establish that [defendant] Stein engaged in a chronic, extreme pattern of legal delinquency" (R. 35) and plaintiffs did not allege that Mitchell Stein made misrepresentations in the context of an ongoing litigation (R. 36).

Plaintiffs' Opposition

23. In opposition, plaintiffs submitted, inter alia, the affidavit of plaintiff William Pelinsky (R. 306-312), the affirmation of plaintiffs' attorney (R. 302-305) and the affirmation of Harold G. Furlow, Esq. (R. 297-301).

24. Plaintiff William Pelinsky asserted that Mr. Stein had intentionally deceived him by informing him that he had researched ownership of the licensed products in the license agreements; that he determined that GM did not have any rights to any of the licensed products; that plaintiffs needed to file a law suit accordingly; that based upon such misrepresentations, Mr. Stein induced plaintiffs to pay defendants a retainer of $25,000 to pursue "a fictitious cause of action" that had no legal merit (R. 311); and that Mr. Stein had to know that the forum selection clauses in the license agreements could not be overcome and deceived him to allow the action to go abandoned after devoting a minimal amount of his personal time (R. 311).

25. Mr. Pelinsky also asserted that the Federal Action had been dismissed in March 2008 but that defendants did not inform him of the dismissal until late December 2008, approximately nine months later, when the statute of limitations was expiring on December 31, 2008 (R. 306).

26. Harold G. Furlow, Esq., an attorney specializing in intellectual property law, opined in his affirmation (R. 297-301) that:

> . . . As an intellectual property attorney, the defendants statements leave me in awe in that the defendants did not explain that in fact plaintiffs had no rights to the decorative parts they were manufacturing and that it did not matter whether they were bona fide registered trademarks or parts in the public domain, they were subject to the terms of the License Agreement. I am further in awe that the defendants encouraged the plaintiffs to

undertake litigation when the specific trademark subject matter of the litigation was precluded from being litigated during and after licensing by the License Agreement (See defendants' Exhibit E, paragraph 5.1) and then pursued the litigation in New York when the defendants knew or should have known that the select clauses (See defendants' Exhibit E, paragraph 16.1) are virtually always binding and honored by the courts (R. 299-300).

27. Mr. Furlow went on to explain that:

It is my opinion based on my reading of Exhibit F and discussions with plaintiffs that the defendants were at least grossly negligent and committed malpractice in the legal advice that was given to the plaintiffs regarding the ownership of the Licensed Parts and the "obligation" to police as a basis for abandonment, especially based upon a search of the "files" of the United States Patent and Trademark Office. That advice, that GM did not own proprietary rights to any of the Licensed Products was beyond reasoned comprehension, it was relied upon by the plaintiffs and encouraged plaintiffs to repudiate the License Agreement which placed plaintiffs at risk for a criminal raid, seizure and arrest. Further, the legal advice provided to the plaintiffs could never have achieved a positive result due to the clauses in the License Agreement that barred litigating the validity of or the Licensor's exclusive rights to the licensed Trademarks (R. 300-301).

28. Mr. Furlow concluded that:

I have to state that in my opinion the totality of the acts of the defendants has every appearance to me of a fraudulent scheme in which the plaintiffs were lured into litigation that could never be won because the trademark subject matter at issue in the License Agreement was barred in the License Agreement itself. In this grand scheme and the attorney is then insulated from malpractice because of the current structure of malpractice law (R. 301).

The Supreme Court's Order

29. In its order dated March 21, 2013 (R. 5-8), the Supreme Court granted defendants' motion to the extent of dismissing plaintiffs' causes of action for legal

malpractice, breach of contract and fraud, and denied so much of the motion as sought to dismiss plaintiffs' claim under Judiciary Law §487.

30. As to the Judiciary Law §487 claim, the Court concluded that the Furlow affirmation (R. 297-301) and the William Pelinsky affidavit (R. 306-312) raised issues of fact which preclude summary judgment. The Court explained in pertinent part as follows:

> . . .Attorney Furlow, who avers that he is a specialist in the field of intellectual property, opines that defendants knew or should have known that the plaintiff had no case against General Motors, that they knew or should have known that the forum selection clause requiring any action to be brought in Michigan would be upheld by the courts, that they sought to induce plaintiff into litigation under false pretenses. . . and that the 'totality of the acts of the defendants has ever appearance to me of a fraudulent scheme'. This evidence 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 . . . In addition, the plaintiff's allegations in his affidavit, inter alia, 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, that counsel made up an excuse that 'the Judge held the decision in chambers and didn't release it'. . .all of which caused him to lose, at minimum, his $25,000.00 payment to the defendants, raise issues of fact that can only be resolved after a trial [citations omitted](R. 7-8).

The Appellate Division's Order

31. In its order dated August 15, 2018 (Exhibit "A"), the Appellate Division reversed the Supreme Court's order and dismissed plaintiffs' Judiciary Law §487 claim, concluding in pertinent part:

> . . .A chronic extreme pattern of legal delinquency is not a basis for liability pursuant to Judiciary Law § 487 (see Dupree v. Voorhees, 102 A.D.3d 912, 913, 959 N.Y.S.2d 235). Further, the plaintiffs failed to allege sufficient facts demonstrating that the defendant attorneys had the "intent to deceive the court or any party" (Judiciary Law § 487; see Schiller v. Bender, Burrows, &

> Rosenthal, LLP, 116 A.D.3d 756, 759, 983 N.Y.S.2d 594; Agostini v. Sobol, 304 A.D.2d 395, 396, 757 N.Y.S.2d 555). Allegations regarding an act of deceit or intent to deceive must be stated with particularity (see CPLR 3016[b]; Facebook, Inc. v. DLA Piper LLP [US], 134 A.D.3d 610, 615, 23 N.Y.S.3d 173; Armstrong v. Blank Rome LLP, 126 A.D.3d 427, 2 N.Y.S.3d 346; Putnam County Temple & Jewish Ctr., Inc. v. Rhinebeck Sav. Bank, 87 A.D.3d 1118, 1120, 930 N.Y.S.2d 42). That the defendants commenced the underlying action on behalf of the plaintiffs and the plaintiffs failed to prevail in that action does not provide a basis for a cause of action alleging a violation of Judiciary Law § 487 to recover the legal fees incurred. 164 A.D.3d at 635.

Plaintiffs' Legal Argument

32. The Appellate Division erred as a matter of law in concluding that plaintiffs failed to allege sufficient facts demonstrating that the defendant attorneys had the "intent to deceive the court or any party" to support a Judiciary Law § 487 claim.

33. While the Judiciary Law §487 claim may not have been artfully pled, the allegations regarding the Judiciary Law §487 claim provided defendants with sufficient notice of the cause of action. See, Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182 (1977) (explaining that whether from the complaint's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law). The complaint specifically alleges that defendants "knew or should have known that defendants would and our could not successfully prosecute plaintiffs' claims" (R. 13), and that "under Judiciary Law Section 487 defendants have forfeited to plaintiffs 'triple damages'" (R. 14).

34. Even if the cause of action under Judiciary Law §487 was not sufficiently pled in the complaint, plaintiffs could still successfully oppose defendants' motion for summary judgment by relying on an unpleaded cause of action under Judiciary Law § 487, since it is

supported by the plaintiff's submissions and defendants were not taken by surprise and did not suffer prejudice thereby. See, Seaboard Sur. Co. v. Nigro Bros., Inc., 222 A.D.2d 574, 574, 635 N.Y.S.2d 296, 296 -297 (2nd Dep't 1995)("Summary judgment may be defeated with an unpleaded defense as long as the opposing party is not taken by surprise and does not suffer prejudice thereby"); Kapchan v. 31 Mt. Hope, LLC, 975 N.Y.S.2d 44, 45 (1st Dep't 2013)("The court 'in examining the pleadings on a motion for summary judgment, may take into account an unpleaded defense'"); Gold Connection Discount Jewelers v. American Dist. Tel. Co., 212 A.D.2d 577, 578, 622 N.Y.S.2d 740, 741 (2d Dep't 1995)("A court may properly look beyond the allegations in the complaint and deny summary judgment where a party's papers in opposition to the motion raise triable issues of fact"); Ayala v. V & O Press Co., 126 A.D.2d 229, 234, 512 N.Y.S.2d 704, 707 (2d Dep't 1987) ("a court should not grant judgment summarily against a plaintiff simply because the theory of liability pleaded in the complaint is shown to be meritless. Instead, the court must scrutinize the plaintiff's submissions in order to determine whether any viable cause of action has been alleged and supported by admissible evidence therein, in which case, leave to amend the complaint should be granted and summary judgment denied"). Indeed, defendants knew of the Judiciary Law § 487 claim since they initially moved to dismiss it (R. 35-36).

35. As the Supreme Court had concluded, the showing in the Furlow affirmation – that defendants knew or should have known that plaintiffs had no case against General Motors; that they knew or should have known that the forum selection clause requiring any action to be brought in Michigan would be upheld by the courts; that defendants sought to induce plaintiff into litigation under false pretenses; and that the "totality of the acts of the

defendants" appeared to be a "fraudulent scheme" – raised issues of fact which preclude summary dismissal of the Judiciary Law §487 claim. See, Laing v. Cantor, 280 A.D.2d 519, 720 N.Y.S.2d 394 (2d Dep't 2001) (denying dismissal of Judiciary Law §487 cause of action) app. dism 'd 4 NY3d 731 (2004); Schindler v. Issler & Schrage, P.C., 262 A.D.2d 226, 692 N.Y.S.2d 361 (1st Dep't 1999) (finding violation of Judiciary Law §487 where the conduct of defendant law firm clearly falls within the proscription of the statute in that it "knowingly withheld crucial information from the declaratory judgment court"); Sarasota, Inc. v. Kurzman & Eisenberg, LLP, 28 A.D.3d 237 (1st Dep't 2006) (issue of fact as to whether the alleged deceit meets the requirements of Judiciary Law §487).

36. The Supreme Court also properly concluded that the allegations in the William Pelinsky affidavit – that defendants did not inform him that the Federal Action had been dismissed on March 31, 2008 until late December 2008 when the statute of limitations had nearly run; that defendant Stein made up an excuse that "the Judge held the decision in chambers and didn't release it"; and that plaintiffs lost, at minimum, their $25,000.00 retainer paid to defendants – also raised issues of fact on the Judiciary Law §487 claim.

37. In view of the above, it follows that the Appellate Division's conclusion that plaintiffs did not alleged with "particularity" the defendants' "intent to deceive" was incorrect as a matter of law.

38. In assuming as true plaintiffs' pleadings and proof submitted in opposition to defendants' motion, and giving plaintiffs the benefit of every favorable inference which can be reasonably drawn from the facts, see, e.g., Doize v. Holiday Inn Ronkonkoma, 6 A.D.3d 573, 574, 774 N.Y.S.2d 792 (2d Dep't 2004)("in determining a motion for summary

judgment, facts alleged by the nonmoving party and inferences which may be drawn from them must be accepted as true"); Byrnes v. Scott, 175 A.D.2d 786, 573 N.Y.S.2d 679, 680 (1st Dep't 1991)(explaining that "on a defendant's motion for summary judgment, opposed by plaintiff, we are required to accept the plaintiff's pleadings, as true, and our decision must be made on the version of the facts most favorable to plaintiff"), the Appellate Division should have affirmed the Supreme Court's determination that there are questions of fact which preclude the drastic relief of summary judgment dismissing the Judiciary Law § 487 claim.

39. The Appellate Division's decision has deprived plaintiffs of their day in court. See, Andre v. Pomeroy, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 133 (1974)(Since summary judgment "deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues"); accord: Ugarriza v. Schmieder, 46 N.Y.2d 471, 474, 414 N.Y.S.2d 304, 305 (1979)("Summary judgment has been termed a drastic measure . . . since it deprives a party of his day in court").

The Question of Law Presented
Merits Review By This Court

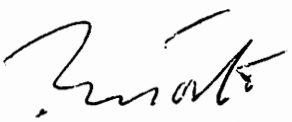
40. As set forth above, plaintiffs relied on cases from the Appellate Division to support their argument that even if plaintiffs' cause of action under Judiciary Law §487 was not sufficiently pled in the complaint, plaintiffs could still successfully oppose defendants' motion for summary judgment by relying on an unpleaded cause of action under Judiciary Law § 487 since it was supported by the plaintiff's submissions and defendants were not taken by surprise and did not suffer prejudice thereby. It appears that the Appellate Division ignored its own precedent in concluding that plaintiffs failed to "allege" sufficient facts demonstrating that

defendants had the intent to deceive.

41. The question of law merits review because it would present this Court with the opportunity to articulate a clear precedent on an important issue which is of statewide importance to the bar and public at large.

WHEREFORE, as well as for the reasons set forth in their respondents' brief in the Appellate Division, plaintiffs-appellants respectfully request that this Court grant leave to appeal.

Dated: New York, New York
September 20, 2018



THOMAS TORTO

EXHIBIT A

----------X

BILL BIRDS, INC. and WILLIAM PELINSKY,

Index No. 31940/10

Plaintiffs,

NOTICE OF ENTRY

-against-

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

Defendants.

----------X

C O U N S E L O R S :

PLEASE TAKE NOTICE, that the within is a true copy of the Decision & Order of the Appellate Division, Second Judicial Department, dated and duly entered on August 15, 2018.

DATED: Garden City, New York
August 16, 2018

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

By: 
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Attorneys for Defendants
STEIN LAW, P.C.
S/H/A STEIN LAW FIRM, P.C. AND
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TO: PETER GALLANTER, ESQ.
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Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D56302
G/htr

_____AD3d_____ Argued - March 13, 2018

ALAN D. SCHEINKMAN, P.J.
RUTH C. BALKIN
LEONARD B. AUSTIN
SYLVIA O. HINDS-RADIX, JJ.

2016-01939 DECISION & ORDER

Bill Birds, Inc., et al., respondents, v Stein Law Firm, P.C., et al., appellants.

(Index No. 31940/10)

L'Abbate, Balkan, Colavita & Contini, LLP, Garden City, NY (Amy M. Monahan and James D. Spithogiannis of counsel), for appellants.

Peter Gallanter, Port Washington, NY (Thomas Torto of counsel), for respondents.

In an action, inter alia, to recover damages for legal malpractice, the defendants appeal from an order of the Supreme Court, Queens County (Timothy J. Duffiey, J.), entered April 3, 2013. The order, insofar as appealed from, denied that branch of the defendants' motion which was for summary judgment dismissing the cause of action alleging a violation of Judiciary Law § 487.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the defendants' motion which was for summary judgment dismissing the cause of action alleging a violation of Judiciary Law § 487 is granted.

The defendants represented the plaintiffs in a trademark dispute against Equity Management, Inc. (hereinafter EMI), and General Motors, Service Parts Operation (hereinafter GM). In 2006, the defendants commenced an action (hereinafter the underlying action) on the plaintiffs' behalf against EMI and GM in the United States District Court for the Eastern District of New York, alleging breach of a trademark licensing agreement and fraud. The complaint alleged that EMI and GM misrepresented to the plaintiffs that they had an ownership interest in the licensed products which in fact they did not have. On March 31, 2008, the court in the underlying action granted the motion of EMI and GM to dismiss the action on the ground that the parties' agreement required that disputes relating to the agreement be commenced in the federal or state courts in Michigan.

Thereafter, the plaintiffs commenced the instant action against the defendants

asserting causes of action to recover damages for legal malpractice, breach of contract, fraud, and a violation of Judiciary Law § 487. In the complaint, the plaintiffs set forth two alternative theories of liability. Under the theory premised upon legal malpractice, the plaintiffs asserted that they had meritorious claims against EMI and GM, and solely due to the defendants' negligence, they were unable to recover monetary damages in the underlying action because the defendants failed to commence an action in the proper forum, and the statute of limitations had run. The plaintiffs further alleged fraud and a violation of Judiciary Law § 487, in that the defendants misrepresented the merits of the underlying action to them and to the court in the underlying action, in order to induce the plaintiffs to retain the defendants' services to prosecute a meritless action and pay legal fees.

The defendants moved for summary judgment dismissing the complaint. The Supreme Court granted those branches of the defendants' motion which were to dismiss the causes of action to recover damages for legal malpractice, breach of contract, and fraud. However, the court denied that branch of the defendants' motion which was for summary judgment dismissing the cause of action alleging that, in violation of Judiciary Law § 487, the defendants, with full knowledge that the plaintiffs' claims in the underlying action were wholly devoid of merit, falsely represented to them that they had superior rights to the trademarks for the sole purpose of inducing the plaintiffs to retain their services, causing specific damages, i.e., payment by the plaintiffs of legal fees to the defendants (*see generally Farkas v Mascolo*, 125 AD3d 925; *Palmieri v Biggiani*, 108 AD3d 604). The court concluded that a triable issue of fact existed as to whether the plaintiffs sustained special damages as a result due to the defendants' alleged deceit or an alleged "chronic, extreme pattern of legal delinquency." The defendants appeal.

Contrary to the defendants' contention, the cause of action alleging a violation of Judiciary Law § 487 was not duplicative of the cause of action alleging legal malpractice. "A violation of Judiciary Law § 487 requires an intent to deceive, whereas a legal malpractice claim is based on negligent conduct" (*Moormann v Perini & Hoerger*, 65 AD3d 1106, 1108; *see Lauder v Goldhamer*, 122 AD3d 908, 911; *Sabalza v Salgado*, 85 AD3d 436, 438).

Nevertheless, the Supreme Court should have granted that branch of the defendants' motion which was for summary judgment dismissing the cause of action alleging a violation of Judiciary Law § 487. A chronic extreme pattern of legal delinquency is not a basis for liability pursuant to Judiciary Law § 487 (*see Dupree v Voorhees*, 102 AD3d 912, 913). Further, the plaintiffs failed to allege sufficient facts demonstrating that the defendant attorneys had the "intent to deceive the court or any party" (Judiciary Law § 487; *see Schiller v Bender, Burrow, & Rosenthal, LLP*, 116 AD3d 756, 759; *Agostini v Sobol*, 304 AD2d 395, 396). Allegations regarding an act of deceit or intent to deceive must be stated with particularity (*see* CPLR 3016[b]; *Facebook, Inc. v DLA Piper LLP [US]*, 134 AD3d 610, 615; *Armstrong v Blank Rome LLP*, 126 AD3d 427; *Putnam County Temple & Jewish Ctr., Inc. v Rhinebeck Sav. Bank*, 87 AD3d 1118, 1120). That the defendants commenced the underlying action on behalf of the plaintiffs and the plaintiffs failed to prevail in that action does not provide a basis for a cause of action alleging a violation of Judiciary Law § 487 to recover the legal fees incurred.

SCHEINKMAN, P.J., BALKIN, AUSTIN and HINDS-RADIX, JJ., concur.

ENTER: Aprilanne Agostino

Aprilanne Agostino
Clerk of the Court

AFFIRMATION OF SERVICE

THOMAS TORTO affirms under penalty of perjury:

1. I am an attorney admitted to practice in the Courts of New York State; am not a party to this action; and reside at 524 East 20th Street, New York, New York 10009.

2. On September 20, 2018, I served two copies of the attached Notice of Motion for Leave to Appeal to the Court of Appeals; Affirmation in Support, upon each party or party listed below, by, prior to the latest time designated by Federal Express for overnight delivery, dispatching a copy of the said document, enclosed in a properly sealed wrapper addressed to the party or parties as given below, into the custody of Federal Express, an overnight delivery service, for overnight delivery.

3. The party or parties served were as follows:

L'ABBATE, BALKAN, COLAVITA & CONTINI, LLP
Attorneys for Defendants-Respondents
1001 Franklin Avenue, 3rd Floor
Garden City, New York 11530
(516) 294-8844

Dated: New York, New York
September 20, 2018

THOMAS TORTO