TO BE ARGUED BY:
THOMAS TORTO, ESQ.
COURT OF APPEALS NO. APL-2019-00006 TIME REQUESTED: 10 MINUTES

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.

BRIEF FOR PLAINTIFFS-APPELLANTS

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Appellate Division, Second Department, Docket No. 2016-01939
Supreme Court, Queens County, Index No. 31940/2010

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DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of Practice for the Court of Appeals, plaintiff-appellant Bill Birds, Inc., respectfully states that it does not have any parents, subsidiaries or affiliates.

STATUS OF RELATED LITIGATION

There is no related litigation pending between the parties as of the date of this brief.

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BRIEF OF PLAINTIFFS-APPELLANTS

PRELIMINARY STATEMENT

Plaintiffs-appellants Bill Birds, Inc. and William Pelinsky respectfully submit this brief in support of their appeal from the final order (R. 11-12)[1] of the Appellate Division, Second Department, entered on August 15, 2018 (reported at 164 A.D.3d 635, 82 N.Y.S.3d 91 (2d Dep't 2018)). The Appellate Division's order reversed so much of the order of the Supreme Court, Queens County (Dufficy, J.), dated March 21, 2013 (R. 25-29), as denied defendants' motion for summary judgment dismissing plaintiffs' claim under Judiciary Law §487 and granted defendants' motion.

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

JURISDICTIONAL STATEMENT

Pursuant to CPLR 5602(a)(1)(i) this Court has jurisdiction to entertain plaintiffs' appeal under this Court's order dated January 15, 2019 (R. 8-9) which granted plaintiffs' motion for leave to appeal from the Appellate Division's order dated August 15, 2018 (R. 11-12).

The issue presented is reviewable by this Court because it raises a question of law.

The question of law presented by this appeal was raised in the Supreme Court (R. 315-319; 320-323; 324-330) as well as in the Appellate Division.

ISSUE PRESENTED FOR REVIEW

Whether factual allegations that the defendant attorney falsely represented to plaintiffs that they had a meritorious action in order to fraudulently induce plaintiffs to retain their services and pay legal fees, when in fact the attorney knew that the case was without merit, states a cause of action under Judiciary Law § 487?

The Supreme Court concluded (R. 27-28) that plaintiffs' evidence raised a triable issue of fact as to whether plaintiff sustained damage proximately caused either by the defendants' alleged deceit or by an alleged chronic, extreme pattern of legal delinquency by the defendant.

The Appellate Division determined (R. 12) that allegations regarding "an act of deceit or intent to deceive must be stated with particularity" and that plaintiffs "failed to allege sufficient facts demonstrating that the defendant attorneys had the 'intent to deceive the court or any party' [citations omitted]".

STATEMENT OF FACTS

Background

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. 242). In 1995, Bill Birds entered into a licensing agreement with GM which was "periodically renewed" over the course of approximately eleven years (R. 324-325).

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. 124; 214-215).

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. 325).

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. 325).

In 2006, plaintiffs consulted with defendants with respect to retaining them 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. 31). Defendants represented to plaintiffs that they had thoroughly researched plaintiffs' claims which were valid and that plaintiffs had superior rights to the trademarks and copyright in question and valid causes of action on which they should prevail (R. 33). In reliance on defendants' representations, plaintiffs paid defendants a retainer of $25,000 (R. 326).

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. 61-81). 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. 175-199).

In a Memorandum and Order dated March 31, 2008 (R. 298-313), 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

On December 29, 2010, plaintiffs commenced the instant action by filing a summons and complaint (R. 30-35) in which causes of action for legal malpractice, breach of contract, fraud and violation of Judiciary Law §487 were alleged.

The third cause of action for fraud and violation of Judiciary Law §487 alleges that defendants "falsely represented to plaintiffs that they had thoroughly research[] plaintiffs' claims which were valid claims and that plaintiffs had superior rights to the trademarks and copy writes [sic] in question and valid cases of action on which they should prevail (R. 33); that defendants "knew or should have known that defendants would and or could not successfully prosecute plaintiffs' claims" (R. 33); that defendants fraudulently contracted with plaintiffs solely for the purpose of generating the $25,000 fee" (R. 33); that had plaintiffs known that their claims would not be successful they "would not have given $25,000 to defendants to handle plaintiffs' claims (R. 33); and that "under Judiciary Law Section 487 defendants have forfeited to plaintiffs 'triple damages'" (R. 34).

In their answer (R. 36-43), defendants denied the material allegations

of the complaint and raised various affirmative defenses.

Defendants' Motion for Summary Judgment

By notice of motion dated August 13, 2012 (R. 44-45), defendants moved pursuant to CPLR 3212 for summary judgment dismissing the complaint. In support of their motion, defendants relied on, inter alia, the affirmation of their attorney (R. 46-56), the affidavit of defendant Mitchell A. Stein (R. 57-59) and the licensing agreements between plaintiffs and GM (R. 82-103; 104-109; 110-143; 200-241).

Defendants argued (R. 51-54) 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" (R. 53) 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. 53).

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. 55).

As to the Judiciary Law §487 claim, defendants contended that such claim 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. 55) and that defendant Mitchell Stein made the misrepresentations in the context of an ongoing litigation (R. 56).

Plaintiffs' Opposition

In opposition, plaintiffs submitted, inter alia, the affidavit of plaintiff William Pelinsky (R. 324-330), the affirmation of plaintiffs' attorney (R. 320-323) and the affirmation of Harold G. Furlow, Esq. (R. 315-319).

Plaintiff William Pelinsky asserted that Mr. Stein 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. 329); and that Mr. Stein had to know that the forum selection clauses in the license agreements could not be overcome and that he deceived plaintiffs to allow the action to go abandoned after devoting a minimal

amount of his personal time (R. 329).

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. 326).

Harold G. Furlow, Esq., an attorney specializing in intellectual property law, opined in his affirmation (R. 315-319) 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.l) are virtually always binding and honored by the courts (R. 317-318).

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. 318-319).
>
> 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. 319).

The Supreme Court's Order

In its order dated March 21, 2013 (R. 25-29), 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 that part of the motion as sought to dismiss plaintiffs' Judiciary Law §487 claim.

As to the Judiciary Law §487 claim, the Supreme Court concluded that the Furlow affirmation and the William Pelinsky affidavit raised issues of fact which precluded summary judgment. The Supreme 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. 27-28).

The Appellate Division's Order

In its order dated August 15, 2018 (R. 11-12), the Appellate Division reversed the Supreme Court's order to the extent of dismissing plaintiffs' Judiciary Law §487 claim. The Appellate Division concluded that "[a] chronic extreme pattern of legal delinquency is not a basis for liability pursuant to Judiciary Law § 487".

However, the Appellate Division determined that plaintiffs "failed to allege sufficient facts demonstrating that the defendant attorneys had the intent to deceive the court or any party", citing Judiciary Law § 487, Schiller v. Bender, Burrows, & Rosenthal, LLP, 116 A.D.3d 756, 759, 983 N.Y.S.2d 594 (2d Dep't 2014) and Agostini v. Sobol, 304 A.D.2d 395, 396, 757 N.Y.S.2d 555 (1st Dep't 2003), and that "[a]llegations regarding an act of deceit or intent to deceive must be stated with particularity", citing CPLR 3016(b); Facebook, Inc. v. DLA Piper LLP [US], 134 A.D.3d 610, 615, 23 N.Y.S.3d 173 (1st Dep't 2015), Armstrong v. Blank Rome LLP, 126 A.D.3d 427, 2 N.Y.S.3d 346 (1st Dep't 2015), and Putnam County Temple & Jewish Ctr., Inc. v. Rhinebeck Sav. Bank, 87 A.D.3d 1118, 1120, 930 N.Y.S.2d 42 (2d Dep't 2011).

The Appellate Division concluded "[t]hat 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, 82 N.Y.S.3d at 91.

The Order Granting Leave to Appeal

In its order dated January 15, 2019 (R. 8-9), reported at 32 N.Y.3d 913, 93 N.Y.S.3d 259 (2019), this Court granted plaintiffs' motion for leave to appeal from the Appellate Division's order dated August 15, 2018.

ARGUMENT

THE FACTUAL ALLEGATIONS THAT DEFENDANTS FALSELY REPRESENTED TO PLAINTIFFS THAT THEY HAD A MERITORIOUS ACTION WHEN THEY KNEW THAT THE CASE WAS WITHOUT MERIT, IN ORDER TO FRAUDULENTLY INDUCE PLAINTIFFS TO RETAIN THEIR SERVICES AND PAY LEGAL FEES, STATES A CAUSE OF ACTION UNDER JUDICIARY LAW § 487

Judiciary Law § 487 imposes civil and criminal liability on any attorney who "(1) [i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or, (2) [w]illfully delays his client's suit with a view to his own gain" and provides that the injured party may recover "treble damages" in a "civil action".

The essential element of a cause of action under Judiciary Law § 487 is an injury caused by the deceitful conduct of the defendant attorney. See, Amalfitano v. Rosenberg, 533 F.3d 117, 123–124 (2d Cir. 2008), certified question accepted, 11 N.Y.3d 728, 864 N.Y.S.2d 380 (2008), and certified question answered, 12 N.Y.3d 8, 874 N.Y.S.2d 868 (2009) (explaining that section 487 "permits a civil action to be maintained by any party who is injured by an attorney's intentional deceit . . . on any party to litigation, and it provides for treble damages"); Gumarova v. Law Offices of Paul A. Boronow, P.C., 129 A.D.3d 911,

12 N.Y.S.3d 187, 188 (2d Dep't 2015)("an injury to the plaintiff resulting from the alleged deceitful conduct of the defendant attorney is an essential element of a cause of action based on a violation of that statute"); Rock City Sound, Inc. v. Bashian & Farber, LLP, 74 A.D.3d 1168, 1172, 903 N.Y.S.2d 517, 521 (2d Dep't 2010)("A violation of Judiciary Law § 487(1) may be established . . . by the defendant's alleged deceit . . .").

Judiciary Law § 487 "focuses on the attorney's intent to deceive, not the deceit's success". Amalfitano v. Rosenberg, supra, 12 N.Y.3d at 14, 874 N.Y.S.2d at 871. Accordingly, although injury to the plaintiff is an essential element of a Judiciary Law § 487 cause of action seeking civil damages, see, Gumarova v. Law Offs. of Paul A. Boronow, P.C., supra, "recovery of treble damages under Judiciary Law § 487 does not depend upon the court's belief in a material misrepresentation of fact in a complaint". Amalfitano v. Rosenberg, supra, 12 N.Y.3d at 15, 874 N.Y.S.2d at 872. A party's legal expenses in defending the lawsuit may be treated as the proximate result of the misrepresentation. Ibid.

A complaint seeking damages under Judiciary Law § 487 must state with particularity an "an act of deceit or intent to deceive". See, Gorbatov v. Tsirelman, 155 A.D.3d 836, 838–839, 65 N.Y.S.3d 71, 74–75 (2d Dep't 2017)

("[a]llegations regarding an act of deceit or intent to deceive must be stated with particularity"); accord: Armstrong v. Blank Rome LLP, 126 A.D.3d 427, 2 N.Y.S.3d 346 (1st Dep't 2015); CPLR 3016(b) ("where a cause of action. . .is based upon misrepresentation, fraud. . . the circumstances constituting the wrong must be stated it detail").

In Sargiss v. Magarelli, 12 N.Y.3d 527, 530–531, 881 N.Y.S.2d 651 (2009), this Court, citing its prior decision in Pludeman v. N. Leasing Sys., Inc., 10 N.Y.3d 486, 491, 860 N.Y.S.2d 422 (2008), explained the pleading requirements of a fraud claim under CPLR 3016(b) as follows:

> . . .[w]hen a plaintiff brings a cause of action based upon fraud, "the circumstances constituting the wrong shall be stated in detail" (CPLR 3016 [b]). "The purpose of section 3016(b)'s pleading requirement is to inform a defendant with respect to the incidents complained of," thus, "[w]e have cautioned that section 3016(b) should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud" . . . What is "[c]ritical to a fraud claim is that a complaint allege the basic facts to establish the elements of the cause of action," and although under CPLR 3016(b) "the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud" . . . "Necessarily, then, section 3016(b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct [citations omitted].

Applying the foregoing authorities to the case at bar, and 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, Leon v. Martinez, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 974 (1994)("We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory"), plaintiffs urge that the Appellate Division erred as a matter of law in concluding (R. 12) 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.

Since defendants' motion sought summary judgment pursuant to CPLR 3212 filed after pre-trial discovery was completed, and was not a pre-answer CPLR 3211(a) motion to dismiss the complaint for pleading insufficiency, the Appellate Division's scope of review included an examination of the sufficiency of the evidence which underlies plaintiffs' complaint and was presented in opposition to defendants' motion. See, Friedman v. Connecticut Gen. Life Ins. Co., 30 A.D.3d 349, 350, 818 N.Y.S.2d 201, 202 (1st Dep't 2006), aff'd as modified, 9 N.Y.3d 105, 846 N.Y.S.2d 64 (2007) (explaining that "the

motion to dismiss examines the sufficiency of the pleadings, whereas summary judgment examines the sufficiency of the evidence underlying the pleadings"); Tenzer, Greenblatt, Fallon & Kaplan v. Capri Jewelry, 128 A.D.2d 467, 469, 513 N.Y.S.2d 157 (1st Dep't 1987)("a motion to dismiss under CPLR 3211(a)(7) for failure to state a cause of action, which addresses merely the sufficiency of the pleadings, is distinct from a motion for summary judgment pursuant to CPLR 3212, which searches the record and looks to the sufficiency of the underlying evidence").

The Appellate Division's error is underscored by its reliance on Schiller v. Bender, Burrows & Rosenthal, LLP, supra, 116 A.D.3d 756, 983 N.Y.S.2d 594 and Agostini v. Sobol, 304 A.D.2d 395 757 N.Y.S.2d 555 to support its conclusion that the plaintiffs failed to allege sufficient facts which demonstrate that defendants had the intent to deceive them. In Schiller and Agostini, the defendants moved pre-answer pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to state a cause of action under Judiciary Law §487. The Appellate Division, in concluding that the motions were properly granted, explained that the plaintiffs had not pleaded sufficient facts which demonstrated that the defendant attorneys had the "intent to deceive the court or any party". Schiller and Agostini did not involve CPLR 3212 summary judgment motions in

which evidence underlying the complaint was submitted.

Even if the Appellate Division properly limited its examination to the sufficiency of the complaint's allegations regarding the Judiciary Law §487 claim, plaintiffs submit that the allegations of defendants' acts of deceit or intent to deceive were pleaded with sufficient particularity to support their Judiciary Law §487 claim. See, Betz v. Blatt, 160 A.D.3d 689, 695, 75 N.Y.S.3d 217, 223 (2d Dep't 2018)(concluding that the proposed second amended complaint "adequately pleaded facts . . . which, if proved, would demonstrate that Blatt both acted with intent to deceive the court or other parties and wilfully delayed the proceedings with a view toward his own gain"); Armstrong v. Blank Rome LLP, supra; see also, Sargiss v. Magarelli, supra; Pludeman v. N. Leasing Sys., Inc., supra; see generally, Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182 (1977) (explaining that the standard is whether any cause of action cognizable at law is manifest from the factual allegations within the complaint's four corners).

The factual allegations in the complaint – that defendants "falsely represented to plaintiffs that they had thoroughly research[] plaintiffs' claims which were valid claims and that plaintiffs had superior rights to the trademarks and copy writes [sic] in question and valid cases of action on which they should prevail (R. 33)"; that defendants "knew or should have known that defendants

would and or could not successfully prosecute plaintiffs' claims" (R. 33); that defendants fraudulently contracted with plaintiffs "solely for the purpose of generating the $25,000 fee" (R. 33); that had plaintiffs known that their claims would not be successful they "would not have given $25,000 to defendants to handle plaintiffs' claims (R. 33); and that "under Judiciary Law Section 487 defendants have forfeited to plaintiffs 'triple damages'" (R. 34) – set forth the essential facts from which defendants' deceitful conduct can be reasonably drawn and establish the material elements of plaintiffs' Judiciary Law §487 cause of action. See, Betz v. Blatt, supra; Armstrong v. Blank Rome, LLP, supra; Sargiss v. Magarelli, supra; Pludeman v. N. Leasing Sys., Inc., supra.

Thus, the Appellate Division's conclusion that plaintiffs did not allege with "particularity" the defendants' "intent to deceive" was incorrect as a matter of law.

Additionally, the Appellate Division should have considered, as the Supreme Court did, the evidence submitted by plaintiffs in opposition to defendants' motion in order to determine whether plaintiffs' proof raised an issue of fact which would preclude the drastic relief of summary judgment which 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)(explaining that 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").

As the Supreme Court concluded, the showing in the Furlow affirmation (R. 315-319) – 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 precluded summary dismissal of the Judiciary Law §487 claim. See, Betz v. Blatt, supra (summary judgment properly denied since there were "triable issues of fact as to whether [defendant] acted with an intent to deceive the court or the plaintiff"); Moormann v. Perini & Hoerger, 65 A.D.3d 1106, 1108, 886 N.Y.S.2d 49, 51 (2d Dep't 2009) (denying defendant's motion for summary judgment dismissing Judiciary Law §487 cause of action since "plaintiff raised a triable issue of fact as to whether the defendant intentionally deceived him"); Scarborough v. Napoli, Kaiser & Bern, LLP, 63 A.D.3d 1531, 880 N.Y.S.2d 800 (4th Dep't 2009)(summary judgement was properly denied in view of evidence

showing that defendant attorneys represented to client/plaintiff that he could not prevail in his action, and asked him to sign a stipulation of discontinuance, when in fact the action already had been dismissed for failure to timely file note of issue); Sarasota, Inc. v. Kurzman & Eisenberg, LLP, 28 A.D.3d 237, 814 N.Y.S.2d 94 (1st Dep't 2006) (issue of fact as to whether the alleged deceit meets the requirements of Judiciary Law §487).

In particular, the Supreme Court properly concluded (R. 28) that the averments in the William Pelinsky affidavit (R. 324-330) – 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 as to liability and damages.

The Appellate Division's conclusion (R. 12) "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 (R. 12), was misplaced. The facts detailed in the Furlow affirmation (R. 315-319) and

the William Pelinsky affidavit (R. 324-330) establish that defendants deceitfully brought an action which they knew had no merit in a forum that they knew was improper which they falsely represented to plaintiffs was meritorious and that therefore this case goes far beyond a mere disgruntled litigant who has lost a case.

The Appellate Division should have concluded, as the Supreme Court did, that the showing in the Furlow Affirmation (R. 315-319) and the William Pelinsky affidavit (R. 324-330) raised factual questions for a jury to determine. Notably, the Appellate Division did not cite authority to support its conclusion.

Defendants' anticipated argument that their misconduct did not proximately cause plaintiffs any damages is without merit. Defendants induced plaintiffs to pay substantial legal fees in the sum of $25,000 to file a lawsuit that defendants knew had no merit. Under Amalfitano, plaintiffs' legal fees of at least $25,000 represented by the retainer constitutes recoverable damages in a § 487 Judiciary Law action.

Defendants' anticipated argument that plaintiffs' Judiciary Law § 487 claim does not lie because plaintiffs do not claim that defendants' committed an act of deception during the pendency of the underlying Federal Action, should be rejected. The deception committed before the commencement of the Federal litigation was ongoing and continued during the Federal litigation. As shown by

defendants' letter dated December 15, 2009 (R. 383-387), plaintiffs paid an initial retainer of $7,500 and thereafter $10,000 and another $7,500, for a total of $25,000. As demonstrated in the William Pelinsky affidavit (R. 324-330), defendants' initial deception induced plaintiffs to pay the retainer of $25,000 to file and maintain the Federal lawsuit that defendants knew had no procedural or substantive merit. During his deposition, defendant Stein testified that he recommended that an action be filed against EMI and GM (R. 422-423; 424-425; 426). Defendants now assert under oath the case they had told plaintiffs to bring was meritless all along. Under the legal principles articulated in Amalfitano v. Rosenberg, supra, the factual averments set forth in William Pelinksy's affidavit and the Furlow affidavit – that defendants told plaintiffs to file a meritless suit solely in order to bilk them out of a legal fee – make out a prima facie case under Judiciary Law § 487 and raise factual questions for the jury.

Thus, the rule adopted by this Court in Looff v. Lawton, 97 N.Y. 478, 52 Sickels 478, 1884 WL 12457 (1884) should not bar plaintiffs' Judiciary Law § 487 claim. The states a cause of action under the statute but it also states facts which constitute a breach of duty by defendants for which plaintiffs are entitled to recover damages. 1884 WL 12457, at 3.

Accordingly, the Appellate Division's order appealed from should be

reversed; the branch of defendants' motion for summary judgment dismissing plaintiffs' claim under Judiciary Law §487 denied; and plaintiffs' Judiciary Law §487 claim re-instated.

CONCLUSION

FOR THE FOREGOING REASONS:

(1) THE APPELLATE DIVISION'S ORDER APPEALED FROM SHOULD BE REVERSED;

(2) THE BRANCH OF DEFENDANTS' MOTION AS SOUGHT SUMMARY JUDGMENT DISMISSING PLAINTIFF'S CAUSE OF ACTION UNDER JUDICIARY LAW §487 SHOULD BE DENIED; and

(3) PLAINTIFF'S JUDICIARY LAW §487 CLAIM RE-INSTATED

Dated: New York, New York
April 16, 2019

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

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