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.

REPLY BRIEF OF 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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REPLY BRIEF OF PLAINTIFFS-APPELLANTS

PRELIMINARY STATEMENT

Plaintiffs-appellants Bill Birds, Inc. and William Pelinsky respectfully submit this reply brief in further support of their appeal and in opposition to the brief dated May 31, 2019 of defendants-respondents.

POINT I

PLAINTIFFS' APPEAL PRESENTS A QUESTION OF LAW REVIEWABLE BY THIS COURT

Defendants' contention (Respondents' Br., at 16) that plaintiffs "have not presented a legal question for review" is refuted by the language of the Appellate Division's order. The Appellate Division's order, in reversing and granting that branch of defendants' motion as sought summary judgment dismissing plaintiffs' Judiciary Law § 487 claim, expressly states that the Supreme Court's order, to the extent appealed from, was reversed "on the law" and does not state that it was the result of the exercise of discretion or a factual finding with which this Court may not interfere. See, Braunworth v. Braunworth, 285 N.Y. 151, 33 N.E.2d 68, 70 (1941); Mencher v. Chesley, 297 N.Y. 94, 75 N.E.2d 257, 261 (1947).

Thus, the question of law articulated in plaintiffs' main brief (Appellants' Br., at 3) – "[w]hether 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" – does not implicate the Appellate Division's

discretion or fact-finding power but rather "as a matter of law whether the order should have been granted or denied". Cf., Meenan v. Meenan, 1 N.Y.2d 269, 270, 152 N.Y.S.2d 268, 268 (1956)(pointing out that since "[n]either the order appealed from nor the order granting permission to appeal to this court contains any specification by the Appellate Division that its decision was based solely on the questions of law and was not also the result of an exercise of discretion . . . , no decisive question of law presented for our review . . ."); accord: Hilton Watch Co. v Benrus Watch Co., 1 N.Y.2d 271, 271, 152 N.Y.S.2d 269, 270 (1956).

Indeed, defendants' position (Respondents' Br., at 16) that "it was proper for the Second Department to evaluate whether the Complaint stated a cause for Judiciary Law §487" and that the Appellate Division "properly considered whether Plaintiffs stated a cause of action under Judiciary Law § 487", presents a question of law and not discretion.

Additionally, in granting plaintiffs' motion for leave to appeal, this Court has ostensibly determined that plaintiffs' appeal presents a question of law which is reviewable by this Court.

POINT II

THE COMPLAINT AS AMPLIFIED BY PLAINTIFFS' OPPOSITION PAPERS SUFFICIENTLY ALLEGES DEFENDANTS' INTENT TO DECEIVE PLAINTIFFS

As to the complaint itself, defendants incorrectly assert (Respondents' Br., at 17, 20) that there is only one "conclusory allegation" in the complaint regarding a Judiciary Law §487 claim. To the contrary, there are 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). These factual allegations plead with sufficient particularity defendants' acts of deceit or intent to deceive to support their Judiciary Law §487 claim, state

a cognizable cause of action under Judiciary Law § 487 and raise questions of fact as the Supreme Court concluded (R. 28).

Defendants incorrectly contend (Respondents' Br., at 19) that a Judiciary Law §487 claim requires allegations of "egregious" conduct. As the Appellate Division concluded, "[a] chronic extreme pattern of legal delinquency is not a basis for liability pursuant to Judiciary Law § 487" (R. 12). Moreover, defendants' argument is disingenuous since, in opposition to the amicus motion of Andrew Lavoott Bluestone, Esq., defendants took the position (Spithogiannis Aff., ¶ 3) that the question of whether Judiciary Law §487 requires a chronic extreme pattern of legal delinquency is not at issue on this appeal.

The factual allegations in the complaint set forth the essential facts from which defendants' deceitful conduct is reasonably shown and establish the material elements of plaintiffs' Judiciary Law §487 cause of action. See, Pludeman v. N. Leasing Sys., Inc., 10 N.Y.3d 486, 860 N.Y.S.2d 422 (2008); Betz v. Blatt, 160 A.D.3d 689, 75 N.Y.S.3d 217 (2d Dep't 2018); Armstrong v. Blank Rome, LLP, 126 A.D.3d 427, 2 N.Y.S.3d 346 (1st Dep't 2015); Sargiss v. Magarelli, 12 N.Y.3d 527, 881 N.Y.S.2d 651 (2009). Thus, the Appellate Division's conclusion that plaintiffs did not allege with "particularity" defendants' "intent to deceive" was incorrect as a matter of law (R. 12).

Additionally, defendants fail to meaningfully refute plaintiffs' showing that their proof in opposition to defendants' motion – the affidavit of William Pelinsky (R. 324-330), the Furlow affirmation (R. 315-319) and the affirmation of Michael Pelinsky (R. 320-323) – were sufficient to raise an issue of fact as to defendants' intent to deceive them. See, Chanko v. American Broadcasting Cos. Inc., 27 N.Y.3d 46, 52, 29 N.Y.S.3d 879 (2016) (pointing out that in determining a motion to dismiss a complaint, "we may also consider affidavits submitted by plaintiffs to remedy any defects in the complaint, because the question is whether plaintiffs have a cause of action, not whether they have properly labeled or artfully stated one", citing Leon v. Martinez, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972 (1994)); Gorbatov v. Tsirelman, 65 N.Y.S.3d 71, 74 (2d Dep't 2017)("the complaint, as amplified by the plaintiffs' submissions in opposition to the defendants' motions").

Contrary to defendants' contention (Respondents' Br., at 17), the Appellate Division's order does not state that the court considered the Furlow affirmation and the affidavit of William Pelinsky to determine whether plaintiffs have a viable Judiciary Law § 487 claim. The Appellate Division's express conclusion that plaintiffs "failed to allege sufficient facts demonstrating that the defendant attorneys had the intent to deceive the court or any party" indicates that

the Appellate Division limited its determination of whether a Judiciary Law § 487 claim was sufficiently pleaded to review of the complaint only. The Appellate Division ostensibly disregarded the factual averments in the William Pelinsky affidavit that he was deceitfully induced to pay a fee to bring and prosecute a meritless case (R. 329). Defendant Stein never denied the facts stated in the William Pelinsky affidavit regarding deceitful inducement and deceitful prosecution (R. 57-59). Yet, defendant Stein now swears that the case he had commenced and prosecuted was completely meritless the whole time (R. 58-59).

Defendants' assertion (Respondents' Br., at 17) that plaintiffs' opposition papers did not make an argument under Judiciary Law §487 is incorrect. The Michael Pelinsky affirmation specifically asserted that "[t]here was never a valid cause of action against General Motors of Equity Management, and Stein's statement that he found no evidence that General Motors had any rights to anything was false and misleading to plaintiff intending to entice him into a lawsuit, and pay him a large fee" (R. 322).

Additionally Mr. Furlow's opinion – 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" – was based upon his review of the record evidence and was sufficient to raise an issue of fact under Judiciary Law § 487 and preclude dismissal of the Judiciary Law §487 claim, as the Supreme Court concluded (R. 28). See, Betz v. Blatt, supra; Moormann v. Perini & Hoerger, 65 A.D.3d 1106, 1108, 886 N.Y.S.2d 49, 51 (2d Dep't 2009); Scarborough v. Napoli, Kaiser & Bern, LLP, 63 A.D.3d 1531, 880 N.Y.S.2d 800 (4th Dep't 2009); Sarasota, Inc. v. Kurzman & Eisenberg, LLP, 28 A.D.3d 237, 814 N.Y.S.2d 94 (1st Dep't 2006).

The factual averments in the William Pelinsky affidavit (R. 324-330) that plaintiffs paid defendants a $25,000.00 retainer and that defendants "[got] the client to pay for an action [defendants] knows he can't possibly win" (R. 330), also raised issues of fact on the Judiciary Law §487 claim as to liability and damages, as the Supreme Court concluded (R. 28).

The facts detailed in the Furlow affirmation (R. 315-319) and the William Pelinsky affidavit (R. 324-330) – that defendants deceitfully brought an action which they falsely represented to plaintiffs was meritorious and which they knew had no merit in a forum they knew was improper – establish that this case goes far beyond a mere disgruntled litigant who lost a case. The William Pelinsky

affidavit, apparently disregarded by the Appellate Division, establishes that he did not know intellectual property law and went to defendants to get legal advice about his rights under a lengthy contract, and was given the advice to bring a lawsuit that his then lawyer now swears was both completely meritless and was brought in the wrong state (Cf. R. 329 with R. 57-59). The Appellate Division's decision took no account of the facts admitted in defendant Stein's affidavit that the suit was completely meritless and brought in the wrong state the whole time (R. 58-59).

Relying on the line of cases which hold that an attorney's affirmation which is not based on personal knowledge is of no probative value to defeat summary judgment, see, Zuckerman v. City of New York, 49 N.Y.2d 557, 563, 427 N.Y.S.2d 595, 598 (1980), defendants contend (Respondents' Br., at 20, 22-23) that Mr. Furlow's affirmation was without probative value because he is "Plaintiffs' attorney" and lacked personal knowledge of the facts. Defendants' position is incorrect.

Mr. Furlow is an attorney who specializes in intellectual property law (R. 315). Plaintiffs retained him to give an expert opinion which he based on his review of the evidence in the record (R. 315-316). Mr. Furlow is not plaintiffs' attorney. His affidavit was not a "lawyer's affidavit" but an expert opinion.

Defendants' reliance (Respondents' Br., at 22, ftn "1") on the Supreme Court's conclusion (R. 27) that "[p]laintiffs' 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. 27) is misplaced as it relates to plaintiffs' cause of action for legal malpractice as defendants admit in their brief (Respondents' Br., at at 22, ftn "1").

Defendants' conveniently ignore the Supreme Court's determination (R. 28) that the Furlow affirmation was sufficient to raise a question of fact as to whether plaintiff sustained any damage under Judiciary Law § 487 claim proximately caused by defendants' alleged deceit:

> . . .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'. . . . 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).

It is established in New York that the opinion of an expert on the ultimate issue of fact is admissible when it concerns a matter requiring professional or skilled knowledge. See, Fisch, NY Evidence, §§ 413, 422 [2d ed]); see generally, Lopez v. Senatore, 65 N.Y.2d 1017, 1020, 494 N.Y.S.2d 101 (1985) (permitting a treating physician to express an opinion in an affidavit on a summary judgment motion as to serious injury based on an adequate factual basis, which raises credibility issues for a jury. Thus, there was no error in Supreme Court's decision to allow expert testimony in the form of the Furlow affirmation on an ultimate issue of fact involving intellectual property law since his opinion was on a subject matter that exceeds the scope of common knowledge of a typical juror. See, De Long v. Erie County, 60 N.Y.2d 296, 307, 469 N.Y.S.2d 611, 617 (1983)(upholding testimony by an expert economist as to the financial value of a deceased housewife in a wrongfoul death action, since "[t]he guiding principle is that expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror").

Notwithstanding the above, the Furlow affirmation may not even have been necessary to establish defendants' deceitful inducement in view of their

position that plaintiffs "could not have successfully obtained any monetary award in the underlying litigation as a matter of law pursuant to the doctrine of licensee estoppel" (R. 521; 58). Even without the Furlow affirmation, plaintiffs' prima facie case for deceitful inducement is proven from the affidavit of defendant Stein, and from the factual and legal positions taken in the brief filed on behalf of Stein which defendants are judicially estopped to deny.

POINT III

PLAINTIFFS' JUDICIARY LAW § 487 CLAIM IS VIABLE UNDER AMALFITANO

In Looff v. Lawton, 97 N.Y. 478, 482 (1884), this Court, in construing the predecessor statute to what is now Judiciary Law § 487, explained as follows:

> "The question then arises whether the section under consideration [refers to the giving of incorrect advice which results in injury and expense to the client]. . . or does it mean deceit and collusion practiced by [an] attorney in a suit actually pending in court, with the intent to deceive the court or the party? The latter interpretation would seem to be more consistent with the language employed, and the general object of the section in question, and other sections contained in the same article of the statutes. The words used relate to a case where [an] attorney intends to deceive the court or his client by collusion with his opponent, or by some improper practice. They do not, we think, include a transaction antecedent to the commencement of the action, as the court could have no connection [to] any such proceeding. The 'party' referred to is clearly a party to an action pending in a court in reference to which the deceit is practiced, and not a person outside, not connected with the same at the time or with the court. . . In the case at bar, the advice given by the defendant, which is complained of, preceded the action subsequently brought, and at [the same] time there was no court or party to be deceived within the meaning of the statute. It is obvious that a plain and intelligent distinction exists between an action of an attorney in

> reference to a suit pending in court, and a proceeding out of court".

However, in Amalfitano v. Rosenberg, 12 N.Y.3d 8, 874 N.Y.S.2d 868, 872 (2009), this Court concluded that "[w]hen a party commences an action grounded in a material misrepresentation of fact, the opposing party is obligated to defend or default and necessarily incurs legal expenses. Because, in such a case, the lawsuit could not have gone forward in the absence of the material misrepresentation, that party's legal expenses in defending the lawsuit may be treated as the proximate result of the misrepresentation". This Court noted in Amalfitano that "the Legislature intended an expansive reading" of the statute and to give effect to the legislatively-intended expansive reading of the law, the Court ruled that the statute was intended to cover the commission of the wrongdoing regardless of its success in order to implement "the statute's evident intent to enforce an attorney's special obligation to protect the integrity of the courts and foster their truth seeking function". Ibid.

Thus, this Court's prior decision in Looff is inconsistent with Amalfitano since prosecuting a case brought under deceitful premises plainly constitutes deceit on a party. Moreover, Amalfitano quoted with approval the General Term decision in Looff that approved the same cause of action at issue on

this appeal: "In Looff, the plaintiffs accused their attorney of gulling them into bringing an unnecessary lawsuit, motivated solely by his desire to collect a large fee to represent them." Amalfitano, supra, at 14. Given Amalfitano's reliance on the General Term decision in Looff, plaintiffs contend that as a matter of case law, statutory interpretation, logic and public policy, an attorney who deceitfully causes a client to bring a meritless lawsuit in order to collect a fee and thereby become a party, or to thereafter prosecute a meritless lawsuit as a party, is subject to Judiciary Law § 487. Amalfitano rendered no longer good law cases to the effect that deceitfully inducing the client to commence an unnecessary or meritless lawsuit is not covered by Judiciary Law § 487. Under Amalfitano, a claim against a lawyer for deceitfully inducing a client to bring an unnecessary or meritless lawsuit in order to obtain a fee states a valid cause of action.

Here, similarly, defendants' deception, though initially committed before commencement of the Federal litigation, was grounded in material misrepresentations of fact made to plaintiffs who were as a result deceitfully induced to pay legal fees. This Court's reliance on the General Term decision in Looff v. Lawton, 14 Hun 588, 589 (2d Dep't 1878), resolves in plaintiffs' favor any issue of whether deceitfully inducing a client to bring a meritless or unnecessary lawsuit constitutes a violation of Judiciary Law § 487.

Notably, the Appellate Division did not base its decision on whether defendants' committed an act of deception before commencement or after termination of the Federal Action, undoubtedly recognizing that the underlying litigation would not have gone forward in the absence of defendants' material misrepresentations which were necessarily ongoing and continued during the Federal litigation. Moreover, as the Supreme Court pointed out, the allegations in the affidavit of William Pelinsky that, inter alia, he was not 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 (R. 28), are not the basis for plaintiffs' lawsuit but corroborate other evidence that shows that defendant Stein was a deceitful lawyer and underscore the propriety of that Court's conclusion that there are issues of fact regarding defendants' deceit.

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, and the factual averments in William Pelinksy's affidavit – that defendants told plaintiffs to file a meritless suit 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. The reasoning of Amalfitano and its reliance on Looff is applicable to an attorney who deceitfully induces a client to become a party. Even if deceitfully inducing a client to commence a lawsuit is "antecedent" to the commencement of an action, the prosecution of that lawsuit after it is filed is deceit on a party.

Therefore, defendants' argument (Respondents' Br., at 23) that "[p]laintiffs did not allege, let alone set forth sufficient facts establishing that Defendants deceived Plaintiffs while the Underlying Action was pending", should be rejected. The Appellate Division cases relied on by defendants are distinguishable on their singular facts. See, Tawil v. Wasser, 21 A.D.3d 948, 949, 801 N.Y.S.2d 619, 620 (2d Dep't 2005) (lawyer represented clients in a real estate transaction where no lawsuit was in issue); Henry v. Brenner, 271 A.D.2d

647, 648, 706 N.Y.S.2d 465, 466 (2d Dep't 2000)(deceitful bill rendered only after a lawsuit had been concluded); Mahler v. Campagna, 60 A.D.3d 1009, 1012-1013, 876 N.Y.S.2d 143, 147 (2d Dep't 2009)(concerned collection of a fee determined in an arbitration proceeding); Gelmin v. Quicke, 224 A.D.2d 481, 483, 638 N.Y.S.2d 132, 134 (2d Dep't 1996) (false affidavit at issue was not created in connection with a legal proceeding).

POINT IV

UNDER AMALFITANO, PLAINTIFFS' LEGAL FEES CONSTITUTE DAMAGES WHICH ARE RECOVERABLE UNDER JUDICIARY LAW § 487

Defendants assert (Respondents' Br., at 30, 33) that plaintiffs "achieved their goal" of having "won" merely by bringing the Federal action and that therefore they did not suffer any monetary loss as a result of the dismissal of the Federal action. Defendants' rely on William Pelinsky's deposition testimony – that he wanted to legally clarify whether GM had a viable legal interest in the intellectual property at issue which required a determination on the merits in the Federal action and that he therefore viewed the underlying Federal action as a "win/win situation" – to support their argument (Respondents' Br., at 29) that they did not engage in misconduct which proximately caused plaintiffs any damages.

However, defendants' argument ignores their own position that plaintiffs' underlying claim was without merit as a matter of law because any action against GM was precluded by a "no challenge" clause (paragraph 5.1 of the licensing agreement) 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). Indeed, defendant Stein admitted in his supporting

affidavit (R. 58) that plaintiffs were precluded under the license agreement from challenging GM's ownership of the trademarks and therefore "could not" have recovered money damages in the underlying action. Moreover, defendants' argument ignores that a determination on the merits was never reached because defendants commenced the Federal action in an improper venue in violation of the licensing agreements (R. 124; 214-215).

Defendants' "win-win" argument actually arises from the dishonest advice given by defendant Stein and conveniently disregards defendant Stein's present sworn position that the case against General Motors was entirely foreclosed by the contract. Given the advice that Mr. Pelinsky was given, he could easily say something like "win-win," but that begs the question of whether he believed that because he was duped into filing a completely meritless lawsuit in the wrong State. When Mr. Pelinsky said that he could "win even if he lost" (R. 536) that both logically and factually is based on the very concept that he had a claim which could be heard on the merits, when in fact there was a no-challenge clause in the contract that prevented anyone from getting to the merits.

Thus, even if defendants had brought the Federal action in a proper forum, a determination on the merits could not have been reached. This begs the question as to why in the first instance defendants induced plaintiffs to sue. By

defendant Stein's own admission, regardless of whether the Federal action was brought in the correct forum, the case could not be won. Yet, he accepted a $25,000 retainer from plaintiffs to bring a meritless action.

Contrary to defendants' contention, plaintiffs' payment of legal fees of $25,000 represented by the retainer constitutes recoverable damages in a Judiciary Law § 487 action under Amalfitano v. Rosenberg, supra; see, Betz v. Blatt, supra ("A party's legal expenses in defending the lawsuit may be treated as the proximate result of the misrepresentation" and are recoverable in a Judiciary Law § 487 action).

CONCLUSION

FOR THE FOREGOING REASONS, AS WELL AS THOSE IN PLAINTIFFS' MAIN BRIEF:

(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
July 1, 2019

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing reply brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

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