To be Argued by:
JAMES D. SPITHOGIANNIS
(Time Requested: 10 Minutes)

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Court of Appeals

of the

State of New York

BILL BIRDS, INC. and WILLIAM PELINSKY,

Plaintiffs-Appellants,

– against –

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

Defendants-Respondents.

BRIEF FOR DEFENDANTS-RESPONDENTS

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STATEMENT OF QUESTION PRESENTED

Whether Plaintiffs-Appellants' purported cause of action under Section 487 of the Judiciary Law should have been dismissed, where Plaintiffs-Appellants did not allege sufficient facts demonstrating that Defendants-Respondents had the intent to deceive the court or any party, Plaintiffs-Appellants did not state a Judiciary Law § 487 claim with particularity, Plaintiffs-Appellants did not allege that Defendants-Respondents engaged in misconduct in the context of an ongoing litigation, Plaintiffs-Appellants viewed that lawsuit as a "win/win situation," and Plaintiffs-Appellants suffered no injury resulting from Defendants-Respondents' purported misconduct?

The Appellate Division, Second Judicial Department, answered this question in the affirmative.

PRELIMINARY STATEMENT

Defendants-Respondents Stein Law Firm, P.C., and Mitchell A. Stein (collectively "Defendants") submit this brief in opposition to Plaintiffs-Appellants' ("Plaintiffs") appeal from the August 15, 2018 Decision & Order of the Appellate Division, Second Judicial Department ("Second Department Order"), which reversed, insofar as appealed from, the March 21, 2013 Order of the Honorable Timothy J. Dufficy ("Supreme Court Order"), and granted the branch of Defendants' motion for summary judgment dismissing Plaintiffs' purported cause of action alleging a violation of Section 487 of the Judiciary Law.

In 2010, Plaintiffs commenced this action as a generic legal malpractice case with duplicative causes of action alleging breach of contract and fraud. Unable to demonstrate that they would have prevailed in the underlying lawsuit that Defendants commenced on their behalf, and therefore unable to meet their burden to prove proximate cause, Plaintiffs attempted to transform this action into a Judiciary Law § 487 claim. Plaintiffs contended that, since their underlying lawsuit was dismissed, they must have been deceived into bringing it, and they are entitled to three times the amount they paid in legal fees. The Second Department properly thwarted this baseless effort, determining that Plaintiffs failed to allege, with particularity, facts sufficient to demonstrate Defendants' intent to deceive Plaintiffs (R. 12). The Second

Department opined, "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 legal fees incurred" (R. 12). Bill Birds, Inc. v. Stein Law Firm, P.C., 164 A.D.3d 635, 637, 82 N.Y.S.3d 91, 94 (2d Dep't 2018).

As part of their legal representation of Plaintiffs, Defendants commenced, on Plaintiffs' behalf, a lawsuit against Equity Management, Inc. ("EMI"), and General Motors, Service Parts Operation ("GMSPO"), arising out of certain licensing agreements. Plaintiffs had been required to pay license fees and other expenses for their manufacture and sale of automobile emblems and trim dedicated to discontinued automobile lines and abandoned brands (e.g., "Pontiac"). In that lawsuit, Plaintiffs contested General Motors' ownership of rights to the underlying intellectual property and EMI's and GMPSO's ability to license such rights. Plaintiffs also contended that they had superior rights emanating from their ongoing manufacture and sale of such emblems and trims bearing General Motors' discontinued and abandoned brands. The court dismissed the underlying case for improper venue. There was no evidence or determination that General Motors had retained ownership of the discontinued and abandoned intellectual property, let alone that EMI or GMPSO, the defendants in that case, had authority to license that intellectual property. Tellingly, nothing in this

record suggests that, subsequent to the dismissal of the underlying litigation, EMI or GMSPO ever provided evidence of their rights to license, or compelled Plaintiffs to again license any of those rights or bear any such costs, as they had done for years prior to the suit. As demonstrated below, Plaintiffs clearly achieved the "win/win situation" they were looking for, and have thus not alleged – as they cannot show – any damages from the successful strategy that unfolded.

In the Supreme Court Order, Justice Dufficy granted Defendants summary judgment and dismissed each of Plaintiffs' three causes of action. The Supreme Court dismissed Plaintiffs' first cause of action for legal malpractice on the ground that, regardless of Defendants' alleged negligence, Plaintiffs could not demonstrate proximate cause. The Supreme Court dismissed Plaintiffs' second and third causes of action for breach of contract and fraud, respectively, because those claims were duplicative of the legal malpractice cause of action.

The Supreme Court however, denied in part Defendants' summary judgment motion, finding that Plaintiffs asserted a Judiciary Law § 487 claim. Defendants appealed.

A cause of action under Judiciary Law § 487 must be pleaded with particularity. To state a Judiciary Law § 487 claim, a complaint must assert sufficient facts demonstrating that the defendant attorney had the intent to deceive the plaintiff.

Allegations with respect to scienter cannot be conclusory. Furthermore, a Judiciary Law § 487 cause of action must allege that the defendant attorney committed misconduct in a pending lawsuit. The complaint must also allege that the defendant attorney's deceitful conduct proximately caused the plaintiff to suffer damages.

The Second Department correctly held that Plaintiffs failed to state a Judiciary Law § 487 claim because the third cause of action contained in Plaintiffs' Verified Complaint ("Complaint") failed to allege specific facts demonstrating Defendants' purported intent to deceive them. Plaintiffs, in conclusory fashion, alleged Defendants knew that Plaintiffs would not prevail in the underlying lawsuit and commenced that lawsuit solely to obtain a fee. In the Complaint, however, Plaintiffs did not set forth the basis for its bald assertion that Defendants knew the underlying lawsuit would be dismissed, or the basis for their speculation regarding Defendants' intent. Accordingly, the purported Judiciary Law § 487 claim was properly dismissed.

Even assuming that Plaintiffs sufficiently alleged Defendants' intent to deceive them, Plaintiffs failed to allege that Defendants' misconduct occurred in the context of an ongoing litigation. In the Complaint, Plaintiffs alleged that Defendants induced them to commence the underlying lawsuit, not that Defendants committed an act of deceit while the underlying lawsuit was pending. In support of their contention that the Complaint states a cause of action, Plaintiffs cite the affirmation of Plaintiffs'

attorney Harold G. Furlow, Esq. That affirmation, however, is not evidence because Mr. Furlow does not allege to have personal knowledge of the facts. In any event, Mr. Furlow's allegations cannot sustain a Judiciary Law § 487 claim because he echoed the Complaint's conclusory allegation that Defendants committed wrongdoing *prior* to the underlying lawsuit.

Plaintiff William Pelinsky's ("Pelinsky") affidavit cannot establish a Judiciary Law § 487 claim because Pelinsky alleged that Defendants concealed their purported malpractice *following* the dismissal of the underlying lawsuit. In addition, it is well-settled that an attorney's mere failure to disclose his or her malpractice does not give rise to an independent cause of action.

Defendants also failed to demonstrate that Plaintiffs sustained an injury proximately caused by the alleged misconduct. The probability of prevailing in the underlying litigation did not influence Plaintiffs' decision to hire Defendants and pay them legal fees. In fact, Pelinsky testified that he viewed the underlying litigation as "a win/win situation," in that, if Plaintiffs won the case, they would recovery monetarily, and if they lost the case, Plaintiffs would benefit because General Motors would be permitted (really required) to police its marks and eliminate Plaintiffs' competition in the industry.

Indeed, Pelinsky got his "win/win situation." Nothing in the record raises an issue of fact as to whether Plaintiffs suffered damages. In his affirmation in opposition to the motion, Mr. Furlow described certain risks associated with Defendants' advice but asserted no monetary loss to Plaintiffs resulting from Defendants' alleged wrongdoing. In his affidavit, Pelinsky alleged that Defendants concealed the Court's decision dismissing the underlying litigation, but did not demonstrate how this alleged concealment caused Plaintiffs any harm. Plaintiffs cannot recover the $25,000 fee they paid to Defendants because they were paying for "a win/win situation" and lost nothing as a result of the underlying litigation.

In light of the foregoing, this Court should affirm the Second Department Order.

PROCEDURAL HISTORY

In the Complaint, Plaintiffs asserted causes of action against Defendants for (1) legal malpractice (R. 31-32), (2) breach of contract (R. 32-33), and (3) fraud (R. 33-34). In their fraud cause of action, Plaintiffs also alleged, in conclusory fashion, that they are entitled to "triple" damages under Judiciary Law § 487 as a result of Defendants' alleged fraud (R. 34).

Defendants served their Verified Answer on April 26, 2011 (R. 36-43). In their Verified Answer, Defendants denied the substantive allegations in the Complaint and asserted affirmative defenses (R. 36-39).

Following discovery, Defendants moved, under C.P.L.R. R. 3212, for an Order granting Defendants summary judgment and dismissing the Complaint in its entirety (R. 44-55).

The Supreme Court granted Defendants' motion in part and denied the motion in part (R. 25-28). With regard to Plaintiffs' causes of action for legal malpractice and breach of contract, the Supreme Court granted summary judgment in favor of Defendants and dismissed those causes of action (R. 26-27). With respect to the fraud cause of action, the Supreme Court also granted Defendants summary judgment (R. 27-28), yet determined that Plaintiffs asserted a claim under Judiciary Law § 487, and that there exist triable issues of fact with respect to that claim (R. 27-28).

Defendants filed a Notice of Appeal from the portion of the Supreme Court Order that denied Defendants' motion for summary judgment (R. 23-24).

The Second Department reversed the Supreme Court Order insofar as appealed from and granted the branch of Defendants' motion seeking summary judgment dismissing the purported cause of action under Judiciary Law § 487 (R. 11).

By Order decided and entered on January 15, 2019, this Court granted Plaintiffs' motion for leave to appeal to the Court of Appeals (R. 8-9).

COUNTER-STATEMENT OF FACTS

Pelinsky claimed that, in January, 1995, he "received a threatening phone communication" from Mitch Renix of EMI (R. 324). According to Pelinsky, Mr. Renix said that EMI represented General Motors and claimed that the items Pelinsky was making required licensing because "they were trademarked and copyrighted by General Motors" (R. 324). Mr. Renix stated that, "if [Pelinsky] continued making the replacement parts without licensing with General [M]otors[,] [he] would be prosecuted and if convicted [he] would be liable for hundreds of thousands of dollars in fines and serious jail time" (R. 324). As a result of this phone communication, Pelinsky entered into a licensing agreement that was "periodically renewed" over the course of 11 years (R. 324-325).

Although Plaintiffs have never set forth the specific amounts of money that the licensing agreements purportedly required them to expend, Pelinsky contended that "[t]hese agreements were costly to [his] operation" (R. 325). According to Pelisnky, the agreements required him "to pay royalties, carry certain insurance, account for

[his] sales, and affix special labels (that included) the General Motors Restoration Part trademark to [his] products" (R. 325).

Pelinsky claimed that, "[s]hortly before the end of the last [licensing] agreement which was terminating December 31, 2005[,]" he "became suspicious because General Motors was trying to make [him] license and pay to make and sell the letters 'GS[,]'" even though "almost every automobile manufacturer had a 'GS' model" (R. 325). Thus, Pelinsky "question[ed] if anything that General Motors claimed was actually true" (R. 325).

Shortly after Pelinsky became suspicious, Plaintiffs retained Defendants, and Defendants subsequently commenced, on Plaintiffs' behalf, an action "to recover damages and determine certain rights, equities, and ownership in certain trade marks [sic] and copy rights [sic] on behalf of the plaintiff against Equity Management, Inc. and General Motors, Service Part Operation" ("Underlying Action") (R. 31). The Underlying Action was commenced on or about August 1, 2006, in the United States District Court, Eastern District of New York, against EMI and GMSPO (R. 61-174).

At his deposition in this action, Pelinsky testified that Plaintiffs' goal in the Underlying Action was to obtain "clarity" as to whether EMI or GMSPO had a viable legal interest in the intellectual property at issue (R. 535-539). Pelinsky explained that he viewed the Underlying Action as "a win/win situation" (R. 536-537). He stated, "If

I lose, then they have a right to chase my infringers out of the industry and I win. If I recover, then I win as well . . .” (R. 538). Furthermore, Pelinsky explained that he simply wanted clarity with respect to ownership issues relating to the intellectual property at issue (R. 536, 539). According to Pelinsky, “If I won or lost, I would win either way” (R. 539).

Following the commencement of the Underlying Action, EMI and GMSPO moved to dismiss the complaint based upon, *inter alia*, improper venue (R. 175-199). EMI and GMSPO specifically argued that a forum selection clause in the parties’ licensing agreement provided that any dispute arising out of that agreement would be litigated within the State of Michigan (R. 189-191, 214-215). Defendants, on Plaintiffs’ behalf, opposed that motion (R. 242-296).

By Memorandum and Order dated March 31, 2008 (“Memorandum and Order”) (R. 298-313), the Court in the Underlying Action granted the motion by defendants EMI and GMSPO to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(3), on the ground that the action was commenced in an improper venue (R. 301-313). In the Memorandum and Order, the Court observed that the 2001 licensing agreement (which the Court described as “the only relevant contract”), contained a forum selection clause providing that any disputes arising out of the agreement would be litigated within the state or federal courts in Michigan (R. 303). The Court noted that

the forum selection clause was presumably enforceable, so that the burden shifted to Plaintiffs to show that the enforcement of the forum selection clause would be "unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching" (R. 304-308). In the Court's view, Plaintiffs had failed to meet that venue burden.

In early 2009, Plaintiffs communicated to Defendants that they no longer wished to use their legal services (R. 314).

THE DECISIONS BELOW

By Notice of Motion dated August 13, 2012, Defendants moved for an Order, under C.P.L.R. R. 3212, granting Defendants summary judgment and dismissing the Complaint in its entirety (R. 44-45).

In the Supreme Court Order, Justice Dufficy granted Defendants' summary judgment motion and dismissed Plaintiffs' only three causes of action. The Supreme Court dismissed Plaintiffs' first cause of action for legal malpractice because it determined that Plaintiffs could not prove the essential element of proximate cause (R. 26-27). Defendants established that, "even if they had commenced the [U]nderlying [A]ction in a proper venue, plaintiffs would not have been successful on the merits of those claims because the language of the license agreement provided for 'no challenge' clause, pursuant to which plaintiff acknowledged GM's ownership of the

trademarks at issue and agreed not to challenge GM's ownership during the terms of the agreement" (R. 26). In opposition, Plaintiffs did not raise an issue of fact regarding whether they would have prevailed in the Underlying Action (R. 26-27). In fact, Plaintiffs "conceded that the underlying claims did not have merit" (R. 26). Accordingly, the Court dismissed Plaintiffs' legal malpractice cause of action (R. 27).

Justice Dufficy also granted Defendants summary judgment with respect to Plaintiffs' second and third causes of action for breach of contract and fraud, respectively, because those causes of action were based upon the same facts and alleged the same damages as their cause of action for legal malpractice (R. 27). Thus, the Supreme Court dismissed those causes of action as being "merely duplicative of the claim for legal malpractice" (R. 27).

The Supreme Court denied Defendants' summary judgment motion to the extent Justice Dufficy found that Plaintiffs asserted a claim for damages under Judiciary Law § 487, and that Plaintiffs' opposition to the motion created triable issues of fact regarding that claim (R. 27-28). In reaching this decision, Justice Dufficy relied on the affirmation of Plaintiffs' own attorney ("Furlow Aff."), in which Mr. Furlow opined: (1) that Defendants knew or should have known that Plaintiffs could not have prevailed in the litigation; (2) that Defendants "sought to induce plaintiff into litigation under false pretenses"; and (3) that the "totality of the acts of

the defendants has every appearance to [Mr. Furlow] of a fraudulent scheme" (R. 27-28, 317-319). Furthermore, the Supreme Court concluded that Pelinsky's affidavit in opposition to the summary judgment motion ("Pelinsky Aff."), including the allegations (1) that Pelinsky was not told that the Underlying Action had been dismissed until the statute had nearly run in December, 2008, and (2) that Defendants "made up" the excuse that the Judge in the Underlying Action held in Chambers the decision dismissing the Underlying Action and did not release it, raised issues of fact warranting trial (R. 28).

Thereafter, Defendants filed and served a Notice of Appeal from that portion of the Supreme Court Order that denied Defendants' summary judgment motion (R. 23-24).

On appeal, the Second Department held that the Supreme Court should have granted the branch of Defendants' motion which was for summary judgment dismissing the purported Judiciary Law § 487 cause of action (R. 11-12). In reaching this holding, the Second Department determined that Plaintiffs "failed to allege sufficient facts demonstrating that the defendant attorneys had the intent to deceive the court or any party" (R. 12) (internal quotations and citations omitted).

The Court opined, "That 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).

ARGUMENT

THE SECOND DEPARTMENT CORRECTLY REVERSED THE SUPREME COURT'S ORDER INSOFAR AS APPEALED FROM AND DISMISSED PLAINTIFFS' PURPORTED JUDICIARY LAW § 487 CLAIM

The Second Department correctly held that Plaintiffs' purported Judiciary Law § 487 claim failed to state a cause of action. Plaintiffs did not state its Judiciary Law § 487 claim with particularity. Aside from conclusory, unsupported allegations, the Complaint did not demonstrate that Defendants had the intent to deceive Plaintiffs. Even assuming that Plaintiffs sufficiently alleged an intent to deceive, Defendants' alleged misconduct cannot form the basis of a Judiciary Law § 487 claim because it did not take place in the context of a pending lawsuit. Moreover, Plaintiffs have not shown that any alleged deceit proximately caused them to suffer injury. Indeed, Pelinsky viewed the Underlying Action as "a win/win situation," and Plaintiffs did not articulate that they suffered any damages as a result of the dismissal of the Underlying Action. Accordingly, the Second Department correctly reversed the Supreme Court Order insofar as appealed from, and granted the branch of Defendants' summary judgment motion seeking dismissal of Plaintiffs' Judiciary Law § 487 claim.

POINT I

PLAINTIFFS HAVE NOT PRESENTED A QUESTION OF LAW TO BE REVIEWED

With certain exceptions not applicable here, this Court "shall review questions of law only[.]" C.P.L.R. § 5501(b). Plaintiffs, however, have not presented a legal question for review (See Brief for Plaintiffs-Appellants dated April 16, 2019 ("Plaintiffs' Brief"), p. 3). Plaintiffs merely disagree with the Second Department's conclusion, and contend that they made sufficient factual allegations to avoid dismissal (See Plaintiffs' Brief, p. 3).

In an apparent effort to manufacture a question of law, Plaintiffs contend that, because the Second Department determined that the Complaint, on its face, failed to state a Judiciary Law § 487 cause of action, the Second Department must not have considered Plaintiffs' opposition to Defendants' summary judgment motion (See Plaintiffs' Brief, pp. 17-20). At the outset, this argument is peculiar because it advocates for the standard of review applicable to a summary judgment motion, even though it is fundamentally stricter than the standard applicable to a pleading purportedly asserting a cause of action under Judiciary Law § 487.

Furthermore, it was proper for the Second Department to evaluate whether the Complaint stated a cause for Judiciary Law § 487 because Justice Dufficy found that Plaintiffs stated a Judiciary Law § 487 claim, even though Plaintiffs never asserted

one. The Complaint only asserted causes of action for legal malpractice (R. 31-32), breach of contract (R. 32-33), and fraud (R. 33-34). Plaintiffs did not set forth the elements of a Judiciary Law § 487 claim or state how Defendants' conduct satisfied those elements (R. 31-34). Plaintiffs' only reference to Judiciary Law § 487 appeared in one conclusory allegation in the fraud cause of action, where Plaintiffs contended, in essence, that Defendants' purported fraud is also a violation of Judiciary Law § 487 (R. 34). In opposition to Defendants' summary judgment motion, Plaintiffs' counsel admitted that Plaintiffs only alleged causes of action for fraud, malpractice, and breach of contract, and stated that the issues to be resolved in this matter relate to those causes of action (R. 322). Indeed, nowhere in Plaintiffs' opposition did they reference Judiciary Law § 487 (R. 315-518). Thus, the Second Department properly considered whether Plaintiffs stated a cause of action under Judiciary Law § 487.

Moreover, there is no basis for Plaintiffs' contention that the Second Department did not examine Plaintiffs' "evidence" submitted in opposition to the motion (See Plaintiffs' Brief at p. 17, 20). Plaintiffs may dispute the Second Department's conclusions, but it cannot credibly argue that the Second Department failed to consider the parties' submissions.

POINT II

THE SECOND DEPARTMENT CORRECTLY HELD THAT PLAINTIFFS FAILED TO STATE A CAUSE OF ACTION FOR A VIOLATION OF JUDICIARY LAW § 487

Section 487 of the Judiciary Law "'must be strictly construed.'" Ray v. Watnick, 182 F. Supp.3d 23, 30 (S.D.N.Y. 2016) (quoting Kaye Scholer LLP v. CNA Holdings, Inc., No. 08 Civ. 5547(NRB), 2010 WL 1779917, at *2 (S.D.N.Y. Apr. 28, 2010)). "Relief under a cause of action based upon Judiciary Law § 487 is 'not lightly given.'" Facebook, Inc. v. DLA Piper LLP (US), 134 A.D.3d 610, 615, 23 N.Y.S.3d 173, 178 (1st Dep't 2015) (quoting Chowaiki & Co. Fine Art Ltd. v. Lacher, 115 A.D.3d 600, 601, 982 N.Y.S.2d 474, 476 (1st Dep't 2014)), lv. denied, 28 N.Y.3d 903, 63 N.E.3d 71, 40 N.Y.S.3d 351 (Table) (2016).

"The operative language [in Judiciary Law § 487(1)] – 'guilty of any deceit' – focuses on the attorney's intent to deceive . . . ." Amalfitano v. Rosenberg, 12 N.Y.3d 8, 14, 903 N.E.2d 265, 268, 874 N.Y.S.2d 868, 871 (2009).

A claim for a violation of Judiciary Law § 487 must be pleaded with particularity. See C.P.L.R. R. 3016(b); Putnam County Temple & Jewish Ctr., Inc. v. Rhinebeck Sav. Bank, 87 A.D.3d 1118, 1120, 930 N.Y.S.2d 42, 46 (2d Dep't 2011) (holding that Judiciary Law § 487 claim "lack[ed] the required specificity").

A. Plaintiffs Did Not Sufficiently Allege That Defendants Had The Requisite Intent To Deceive Them

To state a Judiciary Law § 487 claim, the plaintiff must allege "'the type of intentional, egregious conduct required to permit recovery under the statute.'" Alliance Network, LLC v. Sidley Austin LLP, 43 Misc.3d 848, 859, 987 N.Y.S.2d 794, 803 (Sup. Ct. N.Y. County 2014) (quoting Strumwasser v. Zeiderman, No. 113524/2010, 2012 WL 1080105 (Sup. Ct. N.Y. County Mar. 15, 2012), aff'd, 102 A.D.3d 630, 958 N.Y.S.2d 395 (1st Dep't 2013)); see also, Ray, 182 F. Supp.3d at 32 (dismissing complaint where "the allegedly deceitful statements d[id] not rise to the level of 'egregious' or 'extreme'").

A complaint fails to state a cause of action under Judiciary Law § 487 "if the allegations as to scienter are conclusory and factually insufficient." Facebook, Inc., 134 A.D.3d at 615, 23 N.Y.S.3d at 178 (citing Briarpatch Ltd., L.P. v. Frankfurt Garbus Klein & Selz, P.C., 13 A.D.3d 296, 297-98, 787 N.Y.S.2d 267, 268 (1st Dep't 2004), lv. denied, 4 N.Y.3d 707, 829 N.E.2d 674, 796 N.Y.S.2d 581 (Table) (2005); Agostini v. Sobol, 304 A.D.2d 395, 396, 757 N.Y.S.2d 555, 557 (1st Dep't 2003)); see also, Doscher v. Mannatt, Phelps & Phillips, LLP, 148 A.D.3d 523, 524, 48 N.Y.S.3d 593, 594 (1st Dep't 2017) (dismissing Judiciary Law § 487 claim where "the allegations regarding scienter lack[ed] the requisite particularity [under C.P.L.R. 3016(b)]"); Rice v. City of New York, 275 F. Supp.3d 395, 410 (E.D.N.Y. 2017)

(finding complaint's allegations "insufficient to show, or support an inference of, intentional deceit").

Here, the allegations in the Complaint purporting to reflect Defendants' intent to deceive Plaintiffs are, at best, conclusory and factually insufficient (R. 33-34). In Plaintiffs' Brief, Plaintiffs merely regurgitate the Complaint's conclusory allegations and declare that the allegations "set forth the essential facts from which defendants' deceitful conduct can be reasonably drawn . . ." (See Plaintiffs' Brief, p. 20). The Complaint, however, merely alleged generally that Defendants knew the Underlying Action would not be successful and that they brought the Underlying Action on Plaintiffs' behalf solely to generate a fee. Plaintiffs provided no specific support for either allegation.

Furthermore, the Furlow Aff. and the Pelinsky Aff. did not, as Plaintiffs contend, "establish that defendants deceitfully brought an action" (See Plaintiffs' Brief, pp. 22-23). As demonstrated in Point II B., infra, Mr. Furlow was Plaintiffs' attorney and has no personal knowledge of the facts. Consequently, nothing in the Furlow Aff. could have been deemed evidence rebutting Defendants' summary judgment motion. The Pelinsky Aff. is Pelinsky's self-serving statement expressing his dissatisfaction with Defendants' representation of Plaintiffs, reiterating the Complaint's conclusory allegations, and surmising that Defendants "purposefully

deceived [him]" (R. 329) despite his having received the "win-win" outcome that he sought at the outset (R. 537-538). Pelinsky cited to no specific evidence of Defendants' alleged intent to deceive Plaintiffs (R. 324-330).

The Second Department therefore aptly concluded that Plaintiffs, through Judiciary Law § 487, are improperly seeking a refund of their legal fees simply because the Underlying Action was dismissed, and properly dismissed the purported Judiciary Law § 487 claim (R. 12). See Facebook, Inc., 134 A.D.3d at 615, 23 N.Y.S.3d at 178 (dismissing Judiciary Law § 487 claim where complaint's allegations were "conclusory and not supported by the record"); Schiller v. Bender, Burrows and Rosenthal, LLP, 116 A.D.3d 756, 759, 983 N.Y.S.2d 594, 597 (2d Dep't 2014) (dismissing Judiciary Law § 487 claim where complaint "did not allege sufficient facts to demonstrate an intent to deceive the court or any party"); Agostini, 304 A.D.2d at 396, 757 N.Y.S.2d at 557 (dismissing Judiciary Law § 487 claim where "plaintiff did not sufficiently plead facts demonstrating that defendant attorneys had the intent to deceive the court or any party") (internal quotations omitted);

"That the defendants commenced an 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). Bill Birds, Inc., 164 A.D.3d at 637, 82 N.Y.S.3d at 94.

B. Plaintiffs' Attorney's Statements Are Not Evidence

"[A]n affidavit or affirmation of an attorney without personal knowledge of the facts cannot 'supply the evidentiary showing necessary to successfully resist [a summary judgment] motion.'" GTF Mktg., Inc. v. Colonial Aluminum Sales, Inc., 66 N.Y.2d 965, 968, 489 N.E.2d 755, 757, 498 N.Y.S.2d 786, 788 (1985) (quoting Roche v. Hearst Corp., 53 N.Y.2d 767, 769, 421 N.E.2d 844, 845, 439 N.Y.S.2d 352, 353 (1981)). "'Such an affirmation by counsel is without evidentiary value and thus unavailing.'" GTF Mktg., Inc., 66 N.Y.2d at 968, 489 N.E.2d at 757, 498 N.Y.S.2d at 788 (quoting Zuckerman v. City of New York, 49 N.Y.2d 557, 563, 404 N.E.2d 718, 720, 427 N.Y.S.2d 595, 598 (1980)). In Bates v. Yasin, 13 A.D.3d 474, 788 N.Y.S.2d 397 (2d Dep't 2004), for example, the Second Department reversed the Supreme Court's Order denying the defendants summary judgment in part because the plaintiff's attorney's "affirmation . . . has no probative weight and cannot raise a triable issue of fact." Bates, 13 A.D.3d at 474, 788 N.Y.S.2d at 398 (citing Zuckerman, *supra*).[1]

[1] Notably, in granting the branch of Defendants' summary judgment motion seeking dismissal of Plaintiffs' legal malpractice cause of action, the Supreme Court stated, regarding the Furlow Aff., "Plaintiffs' counsel may not serve as their expert on the significant and ultimate factual issue of whether defendants committed legal malpractice and they presented no other expert evidence" (R. 27).

Plaintiffs' counsel did not claim to have personal knowledge of the facts and admitted that his analysis and opinions were based on reviewing documents and discussing the case with Plaintiffs (R. 315-319). Plaintiffs' counsel's opinions are not evidence and therefore should not be considered.

C. Plaintiffs Did Not Allege That Defendants Committed Misconduct In The Context Of An Ongoing Litigation

Judiciary Law § 487 "'only applies to wrongful conduct by an attorney *in a suit actually pending*.'" Tawil v. Wasser, 21 A.D.3d 948, 949, 801 N.Y.S.2d 619, 620 (2d Dep't 2005) (emphasis added) (quoting Henry v. Brenner, 271 A.D.2d 647, 648, 706 N.Y.S.2d 465, 466 (2d Dep't 2000)); Mahler v. Campagna, 60 A.D.3d 1009, 1012-13, 876 N.Y.S.2d 143, 147 (2d Dep't 2009) ("[T]he cause of action alleging violation of Judiciary Law § 487 fails to state a cause of action because . . . the statute applies only to wrongful conduct in an action that is actually pending."); Gelmin v. Quicke, 224 A.D.2d 481, 483, 638 N.Y.S.2d 132, 134 (2d Dep't 1996) (holding that a complaint failed to state a cause of action under Judiciary Law § 487 where the allegedly false affidavit at issue was not created in connection with a legal proceeding).

The Second Department correctly dismissed Plaintiffs' Judiciary Law § 487 claim because Defendants' purported misconduct did not occur during the Underlying Action. To sustain a claim of deceit under Judiciary Law § 487, the attorney's wrongdoing must have taken place during the pendency of a lawsuit. Plaintiffs claim

that Defendants engaged in deception before the Underlying Action was commenced by inducing Plaintiffs to agree to pay them $25,000 to prosecute the Underlying Action, and that Defendants deceived Plaintiffs after the Underlying Action was dismissed by concealing the Court's decision from them. Since Plaintiffs do not claim that Defendants committed an act of deception during the pendency of the Underlying Action, Plaintiffs cannot establish a claim under Judiciary Law § 487.

The Second Department correctly dismissed Plaintiffs' purported Judiciary Law § 487 claim because in the Complaint and in Plaintiffs' opposition to Defendants' summary judgment motion, there was no allegation – nor could there be – that Defendants intentionally deceived Plaintiffs in a pending lawsuit. As demonstrated in Point II B., supra, Mr. Furlow's statements opining on the facts underlying this matter had no evidentiary value in opposition to the motion. Even assuming that Mr. Furlow has personal knowledge of the facts underlying this matter, he did not create a triable issue of fact because he opined on Defendants' purported actions taken *before* the Underlying Action was commenced. Mr. Furlow concluded (without support) that Defendants "sought to induce the Plaintiffs into litigation under . . . false pretenses" (R. 318) and may have engaged in a "fraudulent scheme in which the plaintiffs were lured into litigation" (R. 319). Nowhere did Mr. Furlow allege that Defendants made a misrepresentation to Plaintiffs after Defendants commenced that litigation (the

Underlying Action) on Plaintiffs' behalf (R. 315-319). Accordingly, none of Mr. Furlow's opinions could have established a Judiciary Law § 487 claim.

The Pelinsky Aff. also cannot support a Judiciary Law § 487 claim. At the outset, Defendants cannot be liable for allegedly "concealing" wrongdoing because an attorney's purported failure to disclose his or her malpractice does not give rise to an independent claim. See Ferdinand v. Crecca & Blair, 5 A.D.3d 538, 539, 774 N.Y.S.2d 714, 715 (2d Dep't 2004) (holding that the court properly dismissed plaintiff's fraud causes of action "as the mere failure to disclose malpractice does not give rise to a cause of action alleging fraud or deceit separate from the underlying malpractice cause of action"); see also, Weiss v. Manfredi, 83 N.Y.2d 974, 977, 639 N.E.2d 1122, 1124, 616 N.Y.S.2d 325, 327 (1994); Baystone Equities, Inc. v. Handel-Harbour, 27 A.D.3d 231, 231, 809 N.Y.S.2d 904, 904 (1st Dep't 2006); see also Zarin v. Reid & Priest, Esqs., 184 A.D.2d 385, 387, 585 N.Y.S.2d 379, 382 (1st Dep't 1992) ("[T]here is no independent cause of action for 'concealing' malpractice.").

Moreover, Pelinsky's concealment allegations refer to concealment that allegedly took place after the Underlying Action ended. In opposition to Defendants' motion, Pelinsky argued that Defendants hid from Plaintiffs the existence of the Memorandum and Order dismissing the Underlying Action. The Supreme Court specifically relied on Plaintiffs' allegations that "[Pelinsky] wasn't told that the case

was dismissed on March 31, 2008, until the statute had nearly run in December of that year, [and] that counsel made up an excuse that [‘]the Judge held the decision in chambers and didn’t release it[’]” (R. 28). These allegations do not relate to conduct in the context of an ongoing litigation because the Underlying Action was no longer pending when the alleged concealment occurred. Since Pelinsky did not allege that Defendants deceived Plaintiffs during the pendency of the Underlying Action, the Second Department correctly dismissed any purported Judiciary Law § 487 claim.

In Plaintiffs’ Brief, Plaintiffs’ counsel contends that, because Plaintiffs did not pay Defendants $25,000 in one lump sum, Defendants’ alleged deception was “ongoing and continued during the [Underlying Action]” (See Plaintiffs’ Brief, pp. 23-24). As an initial matter, Plaintiffs submitted no evidence of the dates on which they paid Defendants. Nevertheless, Judiciary Law § 487 has nothing to do with *the clients’* conduct. To state a Judiciary Law § 487 claim, the plaintiff must allege misconduct that *the attorney* committed in a suit that is actually pending. See, e.g., Tawil, 21 A.D.3d at 949, 801 N.Y.S.2d at 620. Indeed, Plaintiffs’ counsel states that “defendants’ [alleged] initial deception induced plaintiffs to pay the retainer of $25,000 to file and maintain the [Underlying Action]” (See Plaintiffs’ Brief, p. 24). Plaintiffs did not allege, let alone set forth sufficient facts establishing, that Defendants deceived Plaintiffs while the Underlying Action was pending.

Plaintiffs' counsel further claims, "Defendants now assert under oath the case they had told plaintiffs to bring was meritless all along" (See Plaintiffs' Brief, p. 24). This statement is simply false, and notably, Plaintiffs do not cite to a place in the record where Defendants allegedly made that assertion under oath. Although Defendants never claimed that the Underlying Action was "meritless all along," Defendants successfully demonstrated that Plaintiffs could not satisfy its burden, in a legal malpractice case, to prove that Defendants' alleged negligence proximately caused Plaintiffs to suffer actual and ascertainable damages.

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

A Judiciary Law § 487 claim must plead "an injury to the plaintiff resulting from the alleged deceitful conduct of the defendant attorney . . . ." Gumarova v. Law Offices of Paul A. Boronow, P.C., 129 A.D.3d 911, 911, 12 N.Y.S.3d 187, 188 (2d Dep't 2015) (citing Rozen v. Russ & Russ, P.C., 76 A.D.3d 965, 968, 908 N.Y.S.2d 217, 220 (2d Dep't 2010) (dismissing Judiciary Law § 487 claim where complaint "failed to set forth allegation from which damages proximately caused by the attorney defendants' alleged deceitful conduct might be reasonably inferred")); see also, Jean v. Chinitz, 163 A.D.3d 497, 499, 83 N.Y.S.3d 55, 59 (1st Dep't 2018) (holding that "plaintiff's claim of injury lacks sufficient support to sustain his claim that defendant's false email communications with the proximate cause of any injury");

Strumwasser, 102 A.D.3d at 631, 958 N.Y.S.2d at 396 (granting motion to dismiss where "plaintiff [did] not allege that the settlement he entered into with his former wife was the proximate result of defendants' alleged deceit") (citing Amalfitano, 12 N.Y.3d at 15, 903 N.E.2d at 269, 874 N.Y.S.2d at 872).

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

In Barouh v. Law Offices of Jason L. Abelove, 131 A.D.3d 988, 17 N.Y.S.3d 144 (2d Dep't 2015), the Second Department affirmed the Supreme Court's grant of summary judgment and dismissal of the plaintiff's Judiciary Law § 487 cause of action because the defendant did not proximately cause the plaintiff any damages, "which consisted of her legal fees in defending against the BEA defendants' motion to dismiss." Id. at 990, 17 N.Y.S.3d at 147. The plaintiff's claim was that, had the defendant disclosed to the plaintiff that he had previously represented BEA, the BEA

defendants would not have decided to make its dismissal motion. Id. "The alleged damages, however, stem[med] from the BEA defendants' independent decision to move for dismissal[,]" and the Second Department reasoned that "speculation is required to conclude that the BEA defendants would not have moved for dismissal if Abelove disclosed his representation of BEA to the plaintiff." Id. The Second Department, therefore, found the plaintiff's proximate-cause assertion to be speculative. Id. (citing Mizuno v. Barak, 113 A.D.3d 825, 827, 980 N.Y.S.2d 473, 474-75 (2d Dep't 2014) (other citations omitted)).

Here, Defendants did not violate Judiciary Law § 487 because even if Defendants' had properly alleged deceit, there is no conduct alleged or present that proximately caused Plaintiffs to suffer damages. At his deposition, Pelinsky admitted that Plaintiffs paid Defendants legal fees not because they were deceived into bringing the Underlying Action, but because they wanted to obtain "clarity" over whether EMI/GM had a viable legal interest in the intellectual property at issue (R. 535-539). Pelinsky explained at his deposition that he viewed the Underlying Action as "a win/win situation," stating, "If I lose, then they have a right to chase my infringers out of the industry and I win. If I recover, then I win as well so I said, okay, who do I make the check out to?" (R. 537-538).[2] Pelinsky further explained that he simply

[2] The transcript of Pelinsky's deposition was sent to plaintiffs' counsel on July 30, 2012 (R. 541). Since more than sixty days had passed without Plaintiffs returning the executed transcript, Defendants properly submitted the unsigned transcript in support of their motion. C.P.L.R. 3116(a).

wanted clarity with respect to ownership issues relating to the intellectual property at issue (R. 539).

Hence, Plaintiffs' complaint regarding Defendants commencing the Underlying Action without merit is disingenuous in light of their acknowledgement that they brought the lawsuit with the mentality that "whether I won or I lost, I would still win" (R. 536). Plaintiffs admit that their primary purpose in commencing the Underlying Action was to put pressure on EMI and GMSPO to substantiate the claims of ownership of the intellectual properties at issue, and it was not motivated by any representation Defendants made as to the merits of the case. Critically, there is no allegation or evidence that such substantiation was ever provided or the underlying license agreements ever renewed. Accordingly, Plaintiffs achieved their goal.

In the Supreme Court Order, Justice Dufficy stated that the Furlow Aff. "raises a triable issue of fact as to whether plaintiff sustained any damage proximately caused either by the defendants' alleged deceit or by an alleged chronic, extreme pattern of legal delinquency by the defendant" (R. 28). To the contrary, Mr. Furlow did not allege, let alone demonstrate, that Plaintiffs suffered any damages as a result of

Defendants' purported "scheme" to lure Plaintiffs into a meritless lawsuit (R. 315-319).

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

- "the impact of the defendants' legal advice *could have* resulted in a criminal raid, confiscation of molds and other manufacturing tools and the criminal prosecution of the Plaintiffs" (R. 317) (emphasis added);
- "The advice of the defendants also *risked* the aggravation of GM and termination of any future licenses . . ." (R. 318) (emphasis added);
- "That advice . . . placed plaintiffs *at risk* for a criminal raid, seizure and arrest" (R. 318-319) (emphasis added).

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

Justice Dufficy also stated that Pelinsky raised an issue of fact in his affidavit by making allegations that "caused him to lose, at minimum, his $25,000.00 payment to the defendants" (R. 28). The allegations that the Supreme Court cited relate to Defendants' purported misconduct following the Underlying Action that could not have caused Plaintiffs to lose the legal fees they had paid to Defendants. Specifically, the Supreme Court cited Pelinsky's allegations: (1) that "he wasn't told that the case

was dismissed on March 31, 2008, until the statute had nearly run in December of that year," and (2) "that counsel made up an excuse that 'the Judge held the decision in chambers and didn't release it[']" (R. 28). Pelinsky did not demonstrate how Defendants' purported delay in disclosing the existence of the Memorandum and Order dismissing the Underlying Action could have possibly saved Plaintiffs the $25,000 they paid to Defendants (R. 324-330). Accordingly, the Pelinsky Aff. did not raise an issue of fact with respect to proximate cause.

Plaintiffs considered the Underlying Action "a win/win situation" (R. 536-537), and the record shows that Plaintiffs, indeed, "won." Plaintiffs suffered no monetary loss as a result of the dismissal of the Underlying Action. In his affidavit, Pelinsky stated that, before the Underlying Action, Plaintiffs' licensing agreements with EMI/GMSPO caused him to "pay royalties, carry certain insurance, account for [his] sales, and affix specific labels . . . to [his] products" (R. 325). Pelinsky did not allege that, following the dismissal of the Underlying Action, Plaintiffs were compelled to bear any of the costs that they were earlier required to pay under the licensing agreements (R. 324-330). Moreover, nothing in the record supports the assertion that Defendants' purported misconduct proximately caused Plaintiffs any damages. Thus, the purported Judiciary Law § 487 claim was properly dismissed.

Furthermore, the mere fact that the Underlying Action was dismissed is not a

valid basis for Plaintiffs to recoup (in whole or in part) their legal fees. The judicial system would be chaotic if parties that lose lawsuits are entitled to simply refuse to pay their legal fees. See D'Jamoos v. Griffith, No. 00-CV-1361 (ILG), 2006 WL 2086033, at *6 (E.D.N.Y. July 25, 2006) ("[A] client cannot second guess an attorney's decisions with the benefit of hindsight, looking for arguments or strategies that would have been more favorable, and then using them to justify withholding payment."), aff'd, 340 Fed. Appx. 737 (2d Cir. 2009). Although courts have recognized that attorneys may be required to disgorge attorney's fees that they received upon a determination that they violated a Disciplinary Rule (see Shelton v. Shelton, 151 A.D.2d 659, 660, 542 N.Y.S.2d 719, 720 (2d Dep't 1989)), in this case, Plaintiffs have not identified any Disciplinary Rule that Defendants purportedly breached.

Finally, Plaintiffs misconstrue this Court's decision in Amalfitano. According to Plaintiffs, Amalfitano provides that a plaintiff may recover, under Judiciary Law § 487, its fees paid to an attorney who induced them into commencing a meritless lawsuit (See Plaintiffs' Brief, p. 23). This is not true. In Amalfitano, this Court made two holdings regarding two certified questions. First, this Court held that a Judiciary Law § 487 claim may be successful, even if it is based on an attempted but unsuccessful deceit. Amalfitano, 12 N.Y.3d at 11-14, 903 N.E.2d at 267-69, 874

N.Y.S.2d at 870-72. Second, this Court held that *the opposing party's* legal expenses in an action based on a material misrepresentation of fact "may be treated as the proximate result of the misrepresentation." Id. at 15, 903 N.E.2d at 269, 874 N.Y.S.2d at 872. The Court did not find that a client allegedly lured into a lawsuit may recover legal fees paid to his attorney.

In light of the foregoing, the Second Department correctly dismissed Plaintiffs' purported claim under Judiciary Law § 487.

CONCLUSION

For all of the foregoing reasons, Defendants-Respondents Stein Law Firm, P.C., and Mitchell A. Stein respectfully request that this Court: (a) affirm, in its entirety, the August 15, 2018 Order of the Appellate Division, Second Judicial Department; and (b) grant Defendants such other, further and different relief as this Court may deem just and proper.

DATED: Garden City, New York
May 31, 2019

Respectfully submitted,

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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DATED: Garden City, New York
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