Order of the Honorable Timothy J. Dufficy, dated March 21, 2013, Appealed From, with Notice of Entry [25-29]

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY PART 35
Justice

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BILL BIRDS, INC. and WILLIAM PELINSKY

Plaintiffs,

-against-

Index No. 31940/10
Motion Date: 11/15/12
Mot. Cal. No. 1
Mot. Seq. 1

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

Defendants.

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The following papers numbered 1 to 15 read on this motion by defendants **STEIN LAW FIRM, P.C., and MITCHELL A. STEIN** (collectively referred to as defendants) for summary judgment dismissing the complaint.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-4
Memorandum of Law	5-6
Answering Affidavits - Exhibits	7-9
Memorandum of Law	10
Reply Affirmation-Exhibits	11-13
Reply Memorandum of Law	14-15

Upon the foregoing papers it is ordered that the motion is determined as follows:

In 2006, plaintiffs Bill Birds, Inc., and William Pelinsky (collectively referred to as plaintiffs) retained defendants to commence an underlying action in federal court for money damages and a determination of certain rights, equities and ownership in certain trade marks and copyrights on behalf of plaintiffs against Equity Management, Inc. (Equity Management), and General Motors, Service Parts Operation (GM) Following the commencement of that action and litigation, in a decision dated March 31, 2008, the court in the underlying action dismissed the matter pursuant to Federal Rule of Civil Procedure 12(b)(3), on the ground that the action was commenced in an improper venue. Thereafter, plaintiff commenced this action alleging legal malpractice.

> "'In order to establish a cause of action to recover damages for legal malpractice, a plaintiff must prove that (1) the attorney failed to exercise the care, skill, and diligence commonly possessed by a member of the legal profession, (2) the attorney's conduct was a proximate cause of the loss sustained, (3) the plaintiff suffered actual damages as a direct result of the attorney's actions or inaction, and (4) but for the attorney's negligence, the plaintiff would have prevailed in the underlying action'"(*Goldberg v Lenihan*, 38 AD3d 598 [2007], quoting *Moran v McCarthy, Safrath & Carbone, P.C.*, 31 AD3d 725 [2006], *lv denied* 8 NY3d 969 [2007], *accord Lichtenstein v Barenbaum*, 23 AD3d 440 [2005]).

On this motion for summary judgment, defendants have the burden of establishing that plaintiffs are unable to prove at least one essential element of a legal malpractice cause of action (*Teodorescu v Resnick & Binder, P.C.*, 55 AD3d 721, 722 [2008]; *Goldberg v Lenihan*, 38 AD3d at 598-599). They must also must demonstrate that there are no material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1987]). In support of their motion, defendants have relied upon, among other things, the affidavit of Mitchell A. Stein and a copy of a licensing agreement that plaintiffs entered into with GM.

Defendants have argued that plaintiffs' underlying action against Equity Management and GM was meritless and that, regardless of their alleged negligence, plaintiffs would not have prevailed in the underlying action. Based upon the evidence in the record, defendants have established, prima facie, that even if they had commenced the underlying action 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 plaintiffs acknowledged GM's ownership of the trademarks at issue and agreed not to challenge GM's ownership during the terms of the agreement (*see Breytman v Schechter*, 101 AD3d 783, 784 [2012]).

In their opposition papers, plaintiffs have conceded that the underlying claims did not have merit and that they would not have prevailed in the underlying action. Plaintiffs' argument that defendants misled them as to the validity of their claims is insufficient to sustain a cause of action for legal malpractice because allegations that an attorney's actions were unreasonable are an inappropriate test to determine the existence of legal malpractice (*see Darby & Darby v VSI Intl.*, 95 NY2d 308, 315 [2000]; *Sklover & Donath, LLC v Eber-Schmid*, 71 AD3d 497, 498 [2010]). Even if defendants were shown to have been negligent in prosecuting plaintiffs' underlying claims, plaintiffs are not relieved of their burden, in opposition, of raising an issue of fact as to whether they would have prevailed in the underlying action, which they have not done herein (*see Aquino v Kuczinski, Vila & Assoc., P.C.*, 39 AD3d 216, 221 [2007]). Additionally, plaintiffs have failed to present

sufficient expert evidence that defendants failed to exercise ordinary reasonable skill and knowledge in pursuing the underlying claims (*see Clanton v Vagianellis*, 192 AD2d 943, 944 [1993]). Plaintiffs' counsel may not serve as their expert on the significant and ultimate factual issue of whether defendants committed legal malpractice and they have presented no other expert evidence (Code of Professional Responsibility DR 5–102 [c] [22 NYCRR 1200.21]).[1] Thus, plaintiffs have failed to raise a triable issue of fact in opposition and defendants are entitled to the relief sought (*see Breytman v Schechter*, 101 AD3d at 784; *Hamoudeh v Mandel*, 62 AD3d 948, 949 [2009]).

Defendants have also moved to dismiss plaintiffs' causes of action for fraud and breach of contract. Inasmuch as plaintiffs' causes of action for fraud and breach of contract have been premised upon the same facts and damages as their action for legal malpractice, those claims are merely duplicative of their claim for legal malpractice (*see Leon Petroleum, LLC v Carl S. Levine & Assoc., P.C.*, 80 AD3d 573, 574 [2011]; *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [2004]). In opposition, plaintiffs have failed to raise a triable issue of fact on this branch of defendants' motion. Therefore, defendants are entitled to the relief sought.

Judiciary Law § 487 provides in pertinent part, that "[a]n attorney or counselor 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]ilfully delays his client's suit with a view to his own gain ... forfeits to the party injured treble damages, to be recovered in a civil action." To recover under this section, a plaintiff must show a "chronic and extreme pattern of legal delinquency" (*Solow Mgt. Corp. v Seltzer*, 18 AD3d 399, 400 [2005], *lv denied* 5 NY3d 712 [2005]; *see Kaminsky v Herrick, Feinstein LLP*, 59 AD3d 1, 13 [2008]), *lv denied* 12 NY3d 715 [2009]). In opposition to the defendant's motion to dismiss, plaintiff's claim under Judiciary Law § 487 , the plaintiff submitted the affirmation of Harold G. Furlow, Esq. 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 (aff. of Furlow at p. 4), and that the "totality of the acts of the defendants has ever appearance to me of a fraudulent

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[1] Although the New Rules of Professional Conduct, including 22 NYCRR § 1200.29 (Rule 3.7) Lawyer as Witness, became effective in New York as of April 1, 2009, and replaced the prior DR § 5–102 set forth at 22 NYCRR § 1200.21, the allegations of malpractice in the instant matter occurred prior to that effective date and this matter is, thus, governed by the Code of Professional Responsibility, which was in effect at the time of the conduct (*see Bank Hapoalim B.M. v West LB AG*, 82 AD3d 433 [2011]).

scheme" (aff. of Furlow at p. 5). 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 (*see Laing v. Cantor*, 280 AD2d 519 [2d Dept. 2001] *app. dism'd* 4 NY3d 731 [2004]; *Schindler v Issler & Schrage, P.C.*, 262 AD2d 226 [1st Dept. 1999]; *Morelli & Gold v Altman*, 24 Misc 3d 1221(A) [Sup Ct. NY Co. 2009]; *Wiggin v Gordon*, 115 Misc 2d 1071 [Civ. Ct. Queens Co. 1982][Friedmann, J.] ; *Sarasota, Inc. v Kurzman & Eisenberg, LLP*, 28 AD3d 237 [1st Dept. 2006]). 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," (*see Morelli & Gold v Altman, supra*), 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.

Accordingly, defendants' motion for summary judgment is granted in part and denied in part in accordance with this decision.

Dated: March 21, 2013

T.D.

TIMOTHY J. DUFFICY J.S.C.

QUEENS COUNTY CLERK
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