Private Capital Group, LLC v Schlam Stone & Dolan LLP
2012 NY Slip Op 33503(U)
February 17, 2012
Sup Ct, New York County
Docket Number: 650336/11
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Kornreich Justice PART 54

JUSTICE SHIRLEY WERNER KORNREICH

Private Capital Grp

- v -

Schlam, Stone Dolan

INDEX NO. 650336/11

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	10, 12, 13
Answering Affidavits — Exhibits	19, 20, 21, 22, 25
Replying Affidavits	26, 27
	30, 31, 33, 34, 36

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision.

Dated: 2/17/12

J.S.C.
JUSTICE SHIRLEY WERNER KORNREICH

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54
----------X

PRIVATE CAPITAL GROUP, LLC and FICUS INVESTMENTS, INC.,

Plaintiffs,

- against -

SCHLAM STONE & DOLAN LLP,

Defendant.
----------X

Index No. 650336/11
DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

In motion number 001, defendant Schlam Stone & Dolan LLP (SSD) moves, pursuant to CPLR 3211 (a) (1) (defense founded upon documentary evidence), (5) (collateral estoppel), and 3211 (a) (7) (failure to state a cause of action), for dismissal of the complaint.

In motion number 002, SSD moves, pursuant to CPLR 3024 (b), for an order striking allegations of scandalous matter in the complaint.

I. Background

The following facts are taken from the complaint. Defendant, SSD, is a New York limited liability partnership engaged in the practice of law (Complaint, ¶ 5). Plaintiff Private Capital Group, LLC (PCG) is a limited liability Florida company, as is plaintiff Ficus Investments, Inc. (Ficus) (*id.*, ¶¶ 3-4). Plaintiffs commenced this action to recover $2 million of alleged funds of PCG that SSD received, directly or indirectly, from its former clients Thomas B. Donovan (Donovan) and Lawrence A. Cline (Cline), who were engaged in a series of lawsuits against plaintiffs in this court (*id.*, ¶¶ 1, 6). Of these lawsuits, the main one is *Ficus Investments,*

Inc. v Private Capital Management, LLC, Index No 600926/07 (Main Action) (*id.*, ¶ 1) (the Main Action, together with related cases in this court, hereafter referred to as the Litigation). Ficus is the sole managing member and 80% owner of PCG. During the relevant time period, Donovan's and Cline's affiliated entity, Private Capital Management (PCM), owned the other 20% (*id.*, ¶ 4).

In March 2007, Ficus discovered that Donovan and his then partner Cline had fraudulently transferred $9.872 million of PCG funds to their affiliated entity PCM (*id.*, ¶ 6). SSD allegedly knew, or was on notice, that Donovan used stolen funds to pay SSD's legal fees, and SSD allegedly participated in schemes in which the funds were laundered by and through Donovan's surrogates (*id.*, ¶ 2). In letters to the court in May 2007, plaintiffs asserted that Donovan was paying his then lawyers with funds that were stolen or diverted from PCG (*id.*, ¶ 9). In August 2007, plaintiffs' counsel wrote to Donovan's then counsel Curtis, Mallet-Prevost, Colt & Mosle LLP (Curtis Mallet) warning against accepting payment for legal services that could be traced to funds that had been stolen from PCG (*id.*, ¶ 10). Curtis Mallet subsequently withdrew from representing Donovan.

After acting *pro se* for a period of time following Curtis Mallet's withdrawal, on December 18, 2007, Donovan engaged SSD. The engagement letter required the clients not to make any payments to SSD from certain assets pertaining to Donovan and related entities and persons (*id.*, ¶ 11). Nevertheless, SSD accepted and retained allegedly stolen or diverted funds belonging to PCG (*id.*, ¶ 12). Also, SSD allegedly devised a strategy to seek advancement from PCG for Donovan's legal fees, through the filing with PCG and the court of a false undertaking (*id.*, ¶ 13). Donovan violated a December 21, 2007 court order requiring that notice be provided to plaintiffs' counsel in the event there was to be any activity regarding certain so-called "North

Fork Mortgages" (*id.*, ¶ 14). Each scheme resulted in final orders in the Litigation against Donovan, while represented by SSD. The court ruled that the North Fork Mortgages and proceeds therefrom had to be escrowed and that Donovan was in contempt regarding the North Fork Mortgages (*id.*, ¶ 15).

On December 20, 2007, plaintiffs' counsel wrote to SSD warning that the record in the Litigation showed that Donovan had been financing his efforts in the Litigation with monies diverted and stolen from PCG (*id.*, ¶ 16). Allegedly, beginning on December 20, 2007 and continuing through October 25, 2008, a series of straw men and shell entities orchestrated by Donovan remitted approximately $2 million to SSD. Donovan and others acting in concert with him allegedly had stolen or diverted all or nearly all of these funds from PCG (*id.*, ¶ 17).

Another source of funding for the payments made by Donovan to SSD allegedly was a "loan" made by Donovan to then co-defendant Michael Bode (Bode) in June 2007. The "loan" allegedly was sourced from a portion of the $9.872 million of PCG funds that Donovan and Cline diverted in January 2007, which the court enjoined Donovan and Cline from moving. Donovan was later adjudged in contempt of this injunction, because he advanced $1.9 million of the funds in the guise of a loan (*id.*, ¶ 19).

Donovan further directed that payments to SSD come from funds in an account of an entity know as Banque Portfolio Corp. (Banque), a *de facto* subsidiary of PCG, whose sole source of funding were monies rightfully belonging to PCG (*id.*, ¶ 22). SSD knew or should have known that Donovan was financing litigation with purloined funds and assets (*id.*, ¶ 25).

The complaint alleges further that, between December 2007 and October 2008, SSD received payments made directly by Donovan, sourced from: (1) the stolen $9.872 million which

the court had enjoined; (2) the proceeds of the North Fork Mortgages circular sales which have been the subject of both a 48-hour notice order, as well as the subsequent escrow order; or (3) the diverted Banque funds (*id.*, ¶ 24).

The complaint contains five causes of action. The first cause of action, for conversion, alleges that plaintiffs are the owners or have a superior right to immediate possession of the funds that Donovan directed be paid to SSD, and that SSD wrongfully exercised dominion and control over the funds, thereby interfering with plaintiffs' legal title or superior right of possession thereto. As a result, plaintiffs have been damaged in the amount of the converted funds, but not less than $1,934,295, plus interest, and consequential damages (*id.*, ¶ 28).

The second cause of action, for replevin, alleges that plaintiffs have a superior right to immediate possession of the funds that Donovan caused to be remitted to SSD. Plaintiffs assert that SSD has refused to deliver the funds to plaintiffs despite demand.

The third cause of action, for unjust enrichment, alleges that SSD received funds that rightfully belong to plaintiffs, at plaintiffs' expense.

The fourth cause of action, for money had and received, alleges that SSD received monies belonging to plaintiffs, and that SSD received the monies through "oppression, imposition, extortion or deceit, or by the commission of a trespass."

The fifth cause of action, for violation of Judiciary Law § 487, alleges that SSD engaged in a pattern of deceit and collusion with Donovan, intending to deceive the court and the parties to the Litigation.

II. Discussion

A. Motion Number 001

1. Conversion (1st Cause of Action)

SSD argues that the conversion cause of action is not validly stated because plaintiffs cannot plead or establish that it received a "specifically identifiable fund". Additionally, SSD argues that the claim is barred since plaintiffs were compensated in full when they received the North Fork Mortgages in a settlement with Bode (Bode Settlement).

"Conversion is an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights" (*Lopez v Fenn*, 90 AD3d 569, 572 [1st Dept 2011] [internal quotation marks and citation omitted]). "Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights." (*Dobroshi v Bank of Am., N.A.*, 65 AD3d 882, 885 [1st Dept 2009], *lv dismissed* 14 NY3d 785 [2010], quoting *Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 50 [2006] [citations omitted]). Where the property that has been converted is money, it must be specifically identifiable, and be subject to an obligation to be returned or to be otherwise treated in a particular manner (*Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1st Dept 1995]). "Thus, conversion occurs when funds designed for a particular purpose are used for an unauthorized purpose" (*Lemle v Lemle*, 2012 NY Slip Op 01106 (1st Dept 2/14/12).

The allegations in the complaint, supplemented by plaintiffs' additional submissions, satisfy this pleading standard. Plaintiffs are entitled to supplement the pleading with additional evidentiary materials to preserve the conversion claim (*Apple Records v Capitol Records*, 137 AD2d 50, 58 [1st Dept 1988]). They have alleged the existence of identifiable funds that were to be treated in a special manner, i.e., not used for payment of Donovan's legal bills, as set forth

in SSD's own engagement letter. As noted in paragraph 11 of the complaint, the SSD engagement letter required that SSD's clients not make any payment to SSD from:

> "a. '[A]ssets of Thomas B. Donovan, Pamela Donovan, First Secured Capital Corporation, The Thomas B. Donovan Family Trust, First Secured Lien Corporation, Secured Lien Corporation, Secured Partners Corporation, Secured Property Corporation, REO Corporation, or First Paper Corporation (collectively, the 'Restrained Parties');'
>
> b. '[A]ny officers, directors, agents, employees, affiliates or relatives of the Restrained Parties, to the extent that any of them are in possession or control of assets of the Restrained Parties;' or
>
> c. '[F]rom that 'certain sum in the amount of approximately $9,000,000' that is the subject of the order entered in the Litigation that is 'claimed by Private Capital Group, LLC.'"

The pleading, as supplemented, contains sufficient allegations purporting to show that the payments to SSD at issue came from these sources, and it traces the flow from PCG to SSD.

For example, Christopher Chalavoutis, a certified public accountant and a "long-time" business associate of Donovan, submitted an affidavit that purports to trace funds paid to SSD on Donovan's behalf (1) from monies diverted from PCG, (2) used by Kirby Enterprises I Corp. (formed by Chalavoutis) to purchase the North Fork Mortgages, (3) which Donovan directed be transferred to Carter Street Holdings Corp. (Carter Holdings) (also controlled by Chalavoutis), (4) sold to a number of purchasers affiliated with Bode, (5) the proceeds of which were loaned to Gnosis II LLC (an entity affiliated with Bode), and (7) which used those loan proceeds to pay SSD. Additionally, Chalavoutis states that the only proceeds that Carter Holdings had on hand were proceeds from the sale of the North Fork Mortgages. Chalavoutis also details the payments from Banque to SSD (*see* Complaint, ¶ 22; Chalavoutis Affidavit, ¶¶ 10-11).

The allegations are buttressed by the affidavit of Bode tracing the payments to SSD,

including, among others, a $300,000 payment from "Gnosis IV LLC that came from a check that he received from Donovan drawn on an account in his name at First National Bank of Long Island" (Affidavit of Michael Bode, ¶ 3). That plaintiffs trace the flow of funds from the alleged diverted monies from PCG to SSD, militates in favor of sustaining the conversion claim at this pleading stage (*see Republic of Haiti v Duvalier*, 211 AD2d at 384; *Manufacturers Hanover Trust Co. v Weisbrot*, 146 AD2d 500, 501 [1st Dept 1989]). As noted above, an "'action will lie for the conversion of money where there is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question'" (*Amity Loans v Sterling Natl. Bank & Trust Co. of N.Y.*, 177 AD2d 277, 279 [1st Dept 1991] [citation omitted]; *Independence Discount Corp. v Bressner*, 47 AD2d 756, 757 [2d Dept 1975]). SSD's challenges to plaintiffs' allegations as to the flow of the funds and whether they were commingled with other monies, only serves to identify the existence of factual issues (*see e.g.* Affirmation of Richard H. Dolan, Esq. [Dolan Aff.], ¶ 28).

At oral argument, counsel for SSD emphasized that one cannot seek to recover money from a third party which the third party did not have an obligation to treat in a special way. SSD had an obligation, however, not to accept funds emanating from Donovan and certain affiliates. Plaintiffs' pleading, aided by their supplemental submissions, allege that the funds came indirectly from these forbidden sources, as discussed above.

SSD further argues that documentary evidence establishes that General Obligations Law § 15-108 (a) bars the claim. To succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence relied on by the defendant must conclusively establish a defense to the asserted claims as a matter of law (*Ofman v Katz*, 89 AD3d 909, 910 [2d Dept 2011]). That SSD

is relying upon assertions made by its counsel, rather than solely on uncontradicted documentary evidence, demonstrates that the defense is not applicable here (*see e.g.* Dolan Aff., ¶¶ 25-26).

SSD contends that plaintiffs were compensated in full when they received the North Fork Mortgages in the Bode Settlement and should not receive a double recovery. Specifically, SSD argues that, in the 2009 Bode Settlement, plaintiffs obtained possession of the underlying North Fork Mortgages valued at $2,743,563.75, and pursuant to General Obligations Law § 15-108 (a), the amount that an alleged tortfeasor must pay is reduced by any consideration other alleged tortfeasors have given in settlement for the same injury. Allegedly, plaintiffs' settlement with Bode exceeds the amount of recovery that plaintiffs are seeking here (Memorandum in Support, at 14-15). Plaintiffs, on the other hand, claim that the Bode settlement amount stemmed from a separate transaction and does not fall under GOL § 15-108. These contentions, thus, raise issues of fact at this early, pre-discovery juncture in litigation. The assertions do not "utterly refute" the complaint's factual allegations, "conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *DKR Soundshore Oasis Holding Fund Ltd. v Merrill Lynch Intl.*, 80 AD3d 448 [1st Dept 2011]).

SSD next contends that it cannot be liable because it received the funds as a bone fide payee without knowledge that the funds at issue were allegedly tainted. In making this contention, it relies upon the doctrine of collateral estoppel based upon a decision dated October 8, 2009, rendered in the Main Action by the Honorable Bernard Fried. According to SSD, in the Main Action, Judge Fried rejected the claim that SSD knew that the funds were tainted, stating: "I am not satisfied that the Plaintiffs have shown, with reasonable certainty, that the funds received by the law firm were Mortgage proceeds, nor that SSD had knowledge that such funds

were subject to the Escrow Order. I therefore decline to issue an order for civil contempt against SSD." SSD asserts that the factual issue in the contempt proceeding is the same issue here, namely, whether SSD had been paid with "tainted funds" (Memorandum in Support, at 25).

There are two requirements of collateral estoppel: "There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling" (*Lumbermens Mut. Cas. Co. v 606 Rest., Inc.*, 31 AD3d 334, 334 [1st Dept 2006]). The party seeking the benefit of collateral estoppel must demonstrate that the identical issue was necessarily decided in the prior adjudication and is decisive in the newly presented circumstance and forum (*David v Biondo*, 92 NY2d 318 [1998]). SSD has not met its burden of showing an identity of issues. The finding in the Main Action that plaintiffs have not shown, "with reasonable certainty, that the funds received by the law firm were Mortgage proceeds, nor that SSD had knowledge that such funds were subject to the Escrow Order" does not cover the entirety of the allegations here as to the source of payments from Donovan's affiliated entities to SSD. Furthermore, Judge Fried's finding as to SSD's knowledge concerning the contempt charge is inconsequential, because wrongful intent is not a necessary element of a conversion claim (*Brown v Garey*, 267 NY 167, 170, *cert denied* 296 US 615 [1935]; *Ahles v Aztec Enters.*, 120 AD2d 903, 903-04 [3d Dept], *appeal denied* 68 NY2d 611 [1986]). Nor is reasonable certainty the burden here.

Although given the opportunity to do so, SSD has not argued that there are public policy reasons favoring dismissal of the claims on the ground that denial of the motion would impair a

defendant's ability to obtain counsel.[1] Even though plaintiffs made the motion to supplement the record, SSD had an opportunity to argue for dismissal on policy grounds, as was addressed at oral argument. It did not avail itself of this opportunity. Nevertheless, because of the unusual factual scenario presented here (where the law firm itself advised its client as to funds that cannot be used for its payment), the court does not believe that the decision herein will have an adverse precedential effect on a client's ability to retain counsel.

In sum, the conversion claim is not dismissed.

2. Replevin (2nd Cause of Action)

Similarly, the second cause of action for replevin is validly stated. A cause of action for replevin entails a demand by a true owner for return of a stolen chattel and refusal by the person in possession of the chattel to return it (*Solomon R. Guggenheim Found. v Lubell*, 77 NY2d 311, 317–318 [1991]; *Matter of Peters v Sotheby's Inc.*, 34 AD3d 29, 34 [1st Dept 2006], *lv denied* 8 NY3d 809 [2007]). The "'plaintiff need only establish a superior possessory right in the chattel to that of the defendant'" (*Pivar v Graduate School of Figurative Art of the N.Y. Academy of Art*, 290 AD2d 212 [1st Dept 2002], quoting *G & S Quality v Bank of China*, 233 AD2d 215, 216 [1st Dept 1996], *overruled on other grounds*, *Jamie v Jamie*, 19 AD3d 330 [1st Dept 2005]). "A demand consists of an assertion that one is the owner of the property and that the one upon whom the demand is made has no rights in it other than allowed by the demander" (*Feld v Feld*, 279 AD2d 393, 394-95 [1st Dept], *lv denied* 96 NY2d 717 [2001]). The complaint here satisfies

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[1]By decision dated November 3, 2011, this court granted motion number 003, thereby permitting the parties to submit additional memoranda pertaining to motion 001. The additional papers addressed the impact upon a civil litigant's ability to retain defense counsel if an attorney's fees are subject to recovery (*see* Affirmation of John F. Cambria, Esq., ¶ 4).

these pleading requirements.

SSD cites *Matter of Equitable Life Assur. Socy. of U.S. v Branch* (32 AD2d 959 [2d Dept 1969]) for the proposition that "money held in a bank account is not a proper subject of a replevin action" (Memorandum in Support, at 17). *Matter of Equitable Life Assur.*, however, is distinguishable. It involved a joint bank account. Indeed, the Court stated that "[w]here currency can be specifically identified, for example, where particular bills are sought to be recovered, replevin will lie" (*id.*).

3. Unjust Enrichment & Money Had and Received (3rd & 4th Causes of Action)

The unjust enrichment and money had and received causes of action are not validly stated. Unjust enrichment occurs when a defendant enjoys a benefit bestowed by the plaintiff without adequately compensating the plaintiff (*Sergeants Benevolent Assn. Annuity Fund v Renck*, 19 AD3d 107 [1st Dept 2005]). The criteria for recovery under this theory are: "'(1) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services," (*Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 108 [1st Dept 2002] [citation omitted]).

This cause of action fails because the allegations of the complaint do not satisfy any of these requisite elements. Plaintiffs did not bestow anything upon SSD for which there was an expectation of compensation. Although privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated, as is the case here between plaintiffs and SSD (*Mandarin Trading Ltd. v Wildenstein* (16 NY3d 173 [2011]).

Plaintiffs themselves cite *Mandarin Trading Ltd. v Wildenstein* for the proposition that

"'essential inquiry in any action for unjust enrichment . . . is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered'" (16 NY3d at 182, quoting *Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 [1972], *cert denied* 414 US 829 [1973]). Because the payment that SSD received was for the legal services that it performed, the allegations of the complaint do not show that (1) SSD was enriched, (2) at plaintiffs' expense, and (3) that it is "'against equity and good conscience to permit [SSD] to retain what is sought to be recovered'" (*Mandarin Trading Ltd. v Wildenstein,* 16 NY3d at 182).

Not far different from unjust enrichment, "[a] cause of action for money had and received sounds in quasi contract and 'arises when, in the absence of an agreement, one party possesses money that in equity and good conscience it ought not retain," (*Goldman v Simon Prop. Group, Inc.*, 58 AD3d 208, 220 [2d Dept 2008], quoting *Rocks & Jeans v Lakeview Auto Sales & Serv.*, 184 AD2d 502, 502 [2d Dept 1992]). "Although an action for money had and received is recognized as an action in implied contract, the name is something of a misnomer because it is not an action founded on contract at all; it is an obligation which the law creates in the absence of agreement when one party possesses money that in equity and good conscience he [or she] ought not to retain and that belongs to another" (*Goldman v Simon Prop. Group, Inc.*, 58 AD3d at 220 [internal quotation marks and citations omitted]). A ruling here that it would not be "in equity and good conscience" for SSD to retain the funds is not warranted because there is no assertion that it did not perform the legal services for which it had been paid.

4. Judiciary Law §487 (5th Cause of Action)

Judiciary Law § 487 provides:

"An attorney or counselor who:

> 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or
>
> 2. Wilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,
>
> Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action."

Pursuant to Judiciary Law § 487, a party may recover treble damages from a lawyer who is "guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party" (*360 W. 11th LLC v ACG Credit Co. II, LLC*, 90 AD3d 552, 553 [1st Dept 2011] [internal quotation marks and citation omitted]). It provides recourse where there is "a chronic and extreme pattern of legal delinquency" (*Solow Mgt. Corp. v Seltzer*, 18 AD3d 399, 400 [1st Dept], *lv denied* 5 NY3d 712 [2005], citing *Jaroslawicz v Cohen*, 12 AD3d 160 [1st Dept 2004]; *Havell v Islam*, 292 AD2d 210 [1st Dept 2002]).

The cause of action for violation of Judiciary Law § 487 alleges that SSD engaged in a pattern of deceit and collusion with Donovan, intending to deceive the court and the parties to the Litigation. The complaint provides three examples. First, under the pertinent provisions of the PCG "Operating Agreement," dated December 1, 2005, Donovan was required to submit a sworn undertaking to seek indemnification and advancement of legal fees from PCG. Donovan's undertaking submitted to PCG and the court was false (Complaint, ¶ 13). Second, SSD knew that Donovan was in possession of privileged e-mail communications between Cline and his counsel and between that counsel and plaintiffs' counsel, and knew that Donovan actively used these stolen e-mails to further its litigation strategies (*id.*, ¶ 14). Third, Donovan and other SSD clients aligned with him acted in direct violation of a December 21, 2007 court order, which

required that notice be provided to plaintiffs' counsel in the event that there was any activity regarding the North Fork Mortgages (*id.*).

The cause of action is dismissed. Plaintiffs fail to allege that any deception by SSD caused their damages (*see Amalfitano v Rosenberg*, 12 NY3d 8 [2009]; *Boglia v Greenberg*, 63 AD3d 973 [2d Dept 2009]). Plaintiffs argue that, under *Amalfitano v Rosenberg*, *supra*, they need not plead or prove that anyone was actually deceived by the attorney's deception, because the opposing party is obligated to defend or default and necessarily incurs legal expenses, and the lawsuit could not have moved forward in the absence of material misrepresentation. In *Amalfitano v Rosenberg*, the Court of Appeals referred to a party commencing "an action grounded in a material misrepresentation of fact" (12 NY3d at 15). That is not the case here.

Moreover, the allegations are conclusory in that they do not describe (1) in what manner the undertaking was fraudulent; (2) the basis for the assertion that SSD participated in the using of privileged e-mail communications between Cline and his counsel and between that counsel and plaintiffs' counsel, to further Donovan's litigation strategies; and (3) the role that SSD played in Donovan's alleged violation of the December 21, 2007 court order.

B. Motion Number 002

Plaintiffs move to strike paragraph 13 of the complaint in its entirety and paragraph 14 of the complaint as underlined in the Notice of Motion. Paragraph 13 of the Complaint alleges that SSD devised a strategy to seek advancement from PCG for Donovan's legal fees, through the filing of a false undertaking. The underlined portion of paragraph 14 of the Complaint alleges that SSD knew that Donovan was in possession of privileged e-mail communications between Cline and his counsel and between that counsel and plaintiffs' counsel, and knew that Donovan

actively used these stolen e-mails to further his litigation strategies.

CPLR 3024 (b) permits a party to" move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading." In reviewing a motion pursuant to CPLR 3024 (b), "the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action" (*Soumayah v Minnelli*, 41 AD3d 390, 392 [1st Dept], *appeal withdrawn* 9 NY3d 989 [2007]).

The request to strike the allegations in paragraph 13 is granted because they are scandalous in that they impugn the integrity of SSD in their role as attorneys and may cause it prejudice at trial. Moreover, the allegations no longer are relevant to any cause of action, in that the Judiciary Law § 487 cause of action is dismissed. Likewise, the underlined portion of paragraph 14 is stricken because the allegations as to the e-mails are irrelevant to this action, again in light of the dismissal of the Judiciary Law § 487 cause of action. Accordingly, it is

ORDERED that the motion to dismiss is granted to the extent of dismissing the third, fourth, and fifth causes of action; and it is further

ORDERED that Schlam Stone & Dolan LLP is directed to serve its answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the motion to strike scandalous matter is granted; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 228, 60 Centre Street, on March 27, 2012, at 9:30 a.m.

Dated: February 17, 2012

ENTER:

J.S.C.

HON. JUSTICE SHIRLEY WERNER KORNREICH