Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE James J. Golia Justice

IAS Part 33

x

PAUL BIBBO AND NADINE LUGO,

Plaintiff(s),

-- against --

KATERINA ARVANITAKIS, ARVANITAKIS & ASSOCIATES, PLLC, BRANDON LISI, ROY LESTER, LESTER & ASSOCIATES, PC, STEVEN COHN, STEVEN COHN, ESQ. PC, SAMUEL I. GLASS, LAW FIRM OF SAMUEL I. GLASS, JEANNE LISIKATOS, TINA NANAS, TYCHE FORTUNE LLC AND CAPTAIN HULBERT HOUSE, LLC,

Defendant(s).

x

Index Number 22872/22873 2012

Motion Date July 22 2013

Motion Cal. Nos. 11 - 16

Motion Seq. Nos. 2,3,4,5,and 6

The following papers numbered 1 to 80 read on **1**) motions by Roy Lester and Lester & Associates, P.C. (herein collectively referred to as "the Lester defendants"), to dismiss the complaint against the Lester defendants pursuant to CPLR §3211 (a)(3), (4) and (7); **2)** motion by defendants Jeanne Lisikatos and Tyche Fortune LLC (the Lisikatos/Tyche defendants), to dismiss the complaint insofar as asserted against them, pursuant to CPLR §§3016(b) and 3211 (a)(7); **3)** motion by defendants Steven Cohn and Steven Cohn, Esq., P.C. (herein collectively referred to as "the Cohn defendants"), to dismiss the complaint insofar as asserted against the Cohn defendants, pursuant to CPLR 3212 or, in the alternative, pursuant CPLR §§3211 (a)(7), 3016 (b) and 3013; **4)** motions by Steven G. Pinks and Pinks Arbeit & Nemeth (collectively "the Pinks defendants"), i/s/h/a Pinks, Arbeit Boyle & Nemeth, for summary judgment in their favor dismissing the complaint insofar as asserted against them pursuant to CPLR§§3211(a)(7), 3016(b) and 3212, and for an award of costs, reasonable attorneys fees and sanctions; **5)** cross motion by plaintiffs to consolidate the

above actions pursuant to CPLR §§602, 305(a), 1002, 1003 and 3025 (b), and for leave to join C.S.H. Ventures, LLC and NKL Enterprises, LLC, as plaintiffs, and Jeffrey H. Weinberger as a party defendant, and to amend the pleadings accordingly; and **6)** cross motion by Samuel I. Glass and the law firm of Samuel I. Glass (collectively referred to herein as the "Glass defendants", for summary judgment in their favor pursuant to CPLR 3212.

	Papers Numbered
Notices of Motions - Affidavits - Exhibits.....	1 - 35
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Upon the foregoing papers it is ordered that the motions and cross motion are determined as follows:

Facts

Plaintiffs allege that they entrusted their attorney to represent them in connection with several real estate investments. Plaintiffs allege that they later learned that their "investments" amounted to nothing more than a "bogus" front through which defendant Arvanitakis and her associate, Brandon Lisi, defrauded plaintiffs out of over one million dollars, with the assistance of the other named defendants. Specifically, in or about July 2008, a foreclosure action was commenced with respect to premises located at 201 Jerusalem Avenue, Massapequa, New York (the "Manor East Premises"), in the Supreme Court, Nassau County, under index number 12738/2008 ("Manor East Premises Foreclosure Action"). In or about December 2008, a foreclosure was commenced with respect to premises located at 53-55 Main Street, Cold Spring Harbor, New York ("Cold Spring Harbor Premises"), in the Supreme Court, Suffolk County, under Index Number 45206/2008 ("Cold Spring Harbor Foreclosure Action"). Plaintiff retained attorneys Arvanitakis and Lisi to represent them in investing in these properties. Instead, plaintiff alleges, these two defendants coordinated a sophisticated fraudulent scheme for the purpose of stealing plaintiffs' savings and borrowings.

On April 8, 20011, allegedly on the advice of Arvanitakis and Lisi, plaintiff Nadine Lugo transferred six hundred fifty thousand dollars ($650,000.00), to the attorney trust account of Arvanitakis, for the purpose of investing in the Cold Spring Harbor Premises. This money was subsequently routed through two limited liability corporations, portions of which were "re-directed" towards other investments, and allegedly plaintiff did not receive anything for the investment.

In or about May of 2011, ninety thousand dollars ($90,000.00), were transferred from Arvantikas' attorney trust account to the Glass defendants, for the purpose of investing in the Cold Spring Harbor Premises. It is alleged that Samuel I. Glass was aware of Arvantikas' fraudulent scheme and aided and abetted the same by taking possession of the "stolen" funds with knowledge of the underlying fraud.

On or about June 20, 2011, four hundred and fifty thousand dollars ($450,000.00) was transferred from the Arvantikas' attorney trust account to the attorney trust account of Steven Haffner and Gordon & Haffner, for the purpose of bidding on the Manor East Premises. Fifty thousand ($50,000.00) was deposited as a down payment with the foreclosing plaintiffs in the Manor East Foreclosure Action. When the Manor East Premises failed to materialize in July of 2011, plaintiffs sought the return of their investment. Instead of returning the monies, Haffner, allegedly without plaintiffs' knowledge or consent, commenced a "pretextual" action (down payment action"), ostensibly to recover the fifty thousand dollar down payment. The down payment action had the practical effect of tying up the four hundred and fifty thousand dollars in the attorney trust account of Steven Haffner and or Gordon & Haffner, LLP.

On or about September 26, 2011, sixty thousand dollars ($60,000.00) was transferred from Arvantikas' attorney trust account to the Pinks defendants, purportedly for the purchase of a bond incidental to plaintiffs' investment in the Cold Spring Harbor Premises. It is alleged that the Pinks defendants were aware of Arvanitakis' and Lisi's fraudulent scheme and aided and abetted the same by taking possession of the "stolen" funds with knowledge of the underlying fraud.

On or about April 26, 2012, twenty thousand dollars ($20,000.00) was transferred from Arvantikas' attorney trust account to the Cohn defendants for legal services purportedly incidental to plaintiffs' investment in the Cold Spring Harbor Premises. It is alleged that the Cohn defendants were aware of Arvanitakis' and Lisi's fraudulent scheme, and aided and abetted the same by taking possession of the "stolen" funds with knowledge of the underlying fraud. It is further alleged that the proposed additional defendant, Jeffrey H. Weinberger, an employee of Steven Cohn, Esq., P.C., falsified an affidavit to which he affixed Nadine Lugo's signature.

On or about May 4, 2012, on the advice of Arvanitakis and Lisi, Lugo tendered one-hundred and seventy eight thousand, four hundred dollars (178,400.00), to Samuel I. Glass and or the law firm of Samuel I. Glass, for the purpose of investing in the premises located at 6 Union Street, Sag Harbor, New York ("Sag Harbor Premises"), 135 Woodhill Lane, Manhasset, New York ("Manhasset Premises), and 1 Shelby Court, East Northport, New York ("East Northport Premises"). It is alleged that the Glass defendants were aware of

Arvanitakis' and Lisi's fraudulent scheme and aided and abetted the same by taking possession of the "stolen" funds with knowledge of the underlying fraud. It is further alleged that Tina Nanas and Jeanne Lisikatos, aided and abetted the underlying fraud by knowingly taking possession of plaintiffs' rightful interest in the Sag Harbor Premises, Manhasset Premises and the East Northport Premises.

On or about May 31, 2012, without Lugo's consent, Arvanitakis and Lisi directed one of their "straw" members of proposed additional plaintiff NKL Enterprises, LLC, to execute a deed in lieu of foreclosure as grantee of the Cold Spring Harbor Premises. On or about July 24, 2012, without the consent of Lugo, Jeffrey H. Weinberger, the proposed additional defendant, filed an Order to Show Cause in the Cold Spring Harbor foreclosure action on behalf of Steven Cohn, Esq., PC, which contained an affidavit that was never read or consented to by plaintiff Lugo, and to which Weinberger, without authorization, affixed Lugo's signature.

On or about July 19, 2012, plaintiff Paul Bibbo authorized Roy Lester and his law firm, Lester & Associates, P.C., to recoup on plaintiffs' behalf the $450,000, held in the attorney trust account of Haffner and or Gordon & Haffner, LLP, and the $50,000, previously transferred to the holder of the mortgage on the Manor East Premises. On or about July 25, 2012, allegedly without plaintiffs' knowledge or consent, defendant Roy Lester directed Haffner to release a total of $350,000.00 from the attorney trust account of Haffner and or Gordon & Haffner, and to use up to $200,000.00, for the unauthorized purpose of bidding on the Cold Spring Harbor premises at its foreclosure auction occurring on the same day.

The complaint set forth causes of action for (1) fraud against defendants Katerina Arvanitakis and Brandon Lisi (2) conversion against defendants Lester, Arvanitakis, Lisi, the Cohn defendants, the Glass defendants, Jeanne Lisikatos and Tina Nanas; (3) breach of the covenant of good faith and fair dealings against Lester, Arvanitakis, Lisi, the Cohn defendants, Lisikatos, Nanas(4) deceptive acts and practices against defendants Lester, Arvanitakis, Lisi, the Cohn defendants, the Glass defendants, Lisikatos, Nanas, Tyche Fortune, LLC ("Tyche"), and Captain Hulbert House, LLC ("Hulbert"); (5) breach of fiduciary duties against the Lester defendants, Arvanitakis, Lisi, the Cohn defendants and the Glass defendants and (6) conduct unbecoming of an attorney against the Lester defendants, Arvanitakis, Lisi, the Cohn defendants and the Glass defendants. As provided above, the respective defendants move and cross move to dismiss the complaint insofar as asserted against them. The plaintiffs oppose the motions and cross move to consolidate the actions; to join a party as plaintiff and to join a defendant in the action.

Generally

The branches of the various motions which are for summary judgment dismissing the causes of action alleging violations of General Business Law § 349, are granted on the ground that the plaintiffs failed to "allege conduct that was consumer-oriented or 'part of a pattern directed at the public generally' " (*Lynch v McQueen,* 309 AD2d 790, 792 [2003], quoting *New York Univ. v Continental Ins. Co.,* 87 NY2d 308, 316 [1995]). New York's General Business Law § 349 declares that deceptive acts or practices in the conduct of any business, trade, or commerce are unlawful. To state a cause of action for a violation of General Business Law § 349, plaintiffs must show that defendants' practices are "consumer oriented", misleading in a material way, and that plaintiffs were injured by these practices (*Med. Soc'y v Oxford Health Plans, Inc.,* 15 AD3d 206 [1st Dept.2005). The practice must be likely to mislead a reasonable consumer (*Stutman v Chemical Bank,* 95 NY2d 24 [2000]). The statute's consumer orientation does not preclude its application to disputes between businesses per se, but it does severely limit it (*Cruz v NYNEX Info. Resources,* 263 AD2d 285 [1st Dept.2000]). Defendants' practices must be "directed towards consumers" or "potentially affect similarly situated consumers" (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.,* 85 NY2d 20 [1995]). Here, plaintiff has not alleged any facts to establish that defendants' conduct would be likely to mislead a reasonable consumer.

The branches of the motions and cross motion which are to dismiss the causes of action for "conduct unbecoming of an attorney", are granted. An attorney's alleged violation of a disciplinary rule does not, by itself, give rise to a private cause of action as there is no private right of action for a violation of the Code of Professional responsibility (*see Steinowitz v Gambescia,* 2009 N.Y. Slip Op. 51370(U), 24 Misc.3d 132(A) [App. Term 2d Dept. 2009]; *Schwartz v Olshan, Grundman etc al,* 302 AD2d 193, 199 [2d Dept.2003].

The branches of the motions which are to dismiss the complaint, pursuant to CPLR 3211 (a)(3), on the ground that plaintiffs lack standing are denied. To have standing in a particular dispute, a plaintiff " 'must demonstrate an injury in fact that falls within the relevant zone of interests sought to be protected by law' " (*Village of Elmsford v Knollwood Country Club, Inc.,* 60 AD3d 934, 934, quoting *Caprer v Nussbaum,* 36 AD3d 176, 183 [2006]). Defendants' argument with regard to standing is without merit, as the injury alleged is personal to the plaintiffs themselves (*see Glenn v Hoteltron Sys.*, 74 NY2d 386, 392 [1989]). Accordingly, the court denies those branches of defendants' motions which are pursuant to CPLR 3211 (a) (3) to dismiss the complaint insofar as asserted against the respective defendants on the ground that plaintiffs lack standing to sue *(see Goldberger v Rudnicki*, 94 AD3d 1047 [2012]; *Craven v Rigas*, 85 AD3d 1524 [2011]). Although defendants contend that the complaint alleges wrongs against the corporation, the pertinent inquiry "is whether the thrust of the plaintiffs' action is to vindicate [their] personal rights as individual[s] and not as stockholder[s] on behalf of the corporation" (*Albany-Plattsburgh*

United Corp. v Bell, 307 AD2d 416, 419 [2003], *lv dismissed and denied* 1 NY3d 620 [2004] [internal quotation marks and citations omitted]; *see Hendrickson v Vandling*, 41 Pa D & C 3d 568, 571 [1983]). Here, plaintiffs allege that the defendants engaged in a scheme to defraud them and did in fact route plaintiffs' investment monies through two shell LLC's and misappropriated and converted plaintiffs' monies. The transactions at issue were between defendants and plaintiffs; the fraud alleged did not harm the corporation, but affected plaintiffs directly (*see Craven v Rigas, supra; cf. Glenn v Hoteltron Sys.*, 74 NY2d 386, 392 [1989]). Thus, this court concludes that plaintiffs have standing to assert the individual claims.

The branches of the motions which are to dismiss the fraud claims in the complaint pursuant to CPLR 3211 (a)(7), are denied except with regard to the Cohn defendants. "The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages" (*Introna v Huntington Learning Ctrs., Inc.*, 78 AD3d 896, 898 [2010]; *see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Where a cause of action is based on a misrepresentation or fraud, "the circumstances constituting the wrong shall be stated in detail" (CPLR 3016 [b]; *see Mandarin Trading Ltd. v Wildenstein*, *supra*). The purpose of this pleading requirement "is to inform a defendant of the complained-of incidents" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *see Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d at 491). However, courts have recognized that, in certain circumstances, it may be "almost impossible to state in detail the circumstances constituting a fraud where those circumstances are peculiarly within the knowledge of [an adverse] party" (*Jered Contr. Corp. v New York City Tr. Auth.*, 22 NY2d 187, 194 [1968]; *see Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d at 491-492). Under such circumstances, the heightened pleading requirements of CPLR 3016 (b) may be met when the material facts alleged in the complaint, in light of the surrounding circumstances, "are sufficient to permit a reasonable inference of the alleged conduct" including the adverse party's knowledge of, or participation in, the fraudulent scheme (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d at 492; *see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d at 559; *Polonetsky v Better Homes Depot*, 97 NY2d at 55; *Houbigant, Inc. v Deloitte & Touche*, 303 AD2d 92, 99 [2003]; *125 Assoc. v Cralin Trading Assoc.*, 196 AD2d 630, 630-631 [1993]; *Elsky v KM Ins. Brokers*, 139 AD2d 691, 691 [1988]; *National Westminster Bank v Weksel*, 124 AD2d 144, 149 [1987]). Here, the material factual allegations in the complaint, in light of the surrounding circumstances described therein, give rise to a reasonable inference that the defendants participated in, or had actual knowledge of the fraud alleged in the complaint. Therefore, the branches of the motions which are to dismiss the fraud claims in the complaint, insofar as asserted against all of the named defendants except the Cohn defendants, are denied.

Motion by the Lester defendants

The Lester defendants move to dismiss the complaint pursuant to CPLR 3211 (a)(3), (4) and (7), on the grounds that the plaintiffs lack standing to sue, that another action is pending between the same parties for the same cause of action in another court; and fail to state a cause of action. The standing issue is addressed above.

The Lester defendant argue that the court should dismiss this action, insofar as asserted against them, pursuant to CPLR 3211(a)(4), which authorizes, but does not mandate, dismissal of an action "when there is another action pending between the same parties for the same cause of action in a court of any state of the United States." The Lester defendants argue that *CSH Ventures, LLC v Steven R. Haffner, Esq., et al.*, (24419/2012), was filed on or about August 24, 2012, and the instant action was filed on or about November 13, 2012. A motion to dismiss pursuant to CPLR 3211(a)(4) should be granted "where an identity of parties and causes of action in two simultaneously pending actions raises the danger of conflicting rulings relating to the same matter" (*see Diaz v Philip Morris Cos., Inc.,* 2006 N.Y. Slip Op 3042[U], [2d Dept 2006], *citing White Light Prods. v On the Scene Prods.,* 231 A.D.2d 90 [1st Dept 1997]). However, the court enjoys "broad discretion in determining whether an action should be dismissed on the ground that there is another action pending between the same parties for the same cause of action" (*see Cherico, Cherico and Assoc. v Midollo,* 67 AD3d 622 [2d Dept.2009]). It is not necessary that the precise legal theories presented in the first action also be presented in the second action (*see Matter of Schaller v Vacco,* 241 AD2d 663 [3d Dept. 1997]); rather, it is sufficient if the two actions are "sufficiently similar" (*Montalvo v Air Dock Sys.,* 37 AD3d 567 [2d Dept. 2007]), and that the relief sought is "the same or substantially the same" (*Liebert v TIAA–CREF,* 34 AD3d 756, 757 [2d Dept. 2006]; *see White Light Prods. v On The Scene Prods.,* 31 AD2d 90 [1st Dept. 1997]). The critical element is that " 'both suits arise out of the same subject matter or series of alleged wrongs' " (*White Light Prods. v On The Scene Prods.,* 231 AD2d at 94, quoting *Kent Dev. Co. v Liccione,* 37 NY2d 899, 901 [1975]; *see JC Mfg. v NPI Elec.,* 178 AD2d 505 [2d Dept. 1991]).

Applying these principles to the matter at bar, the court denies that branch of the Lester defendants' motion which is to dismiss portions of the complaint on the ground that there is another action pending. The "same cause of action" is not asserted in both actions (s*ee also Montgomery Ward and Co., Inc. v Othmer,* 127 AD2d 913, 914 [1987] [("The mere fact that two lawsuits emanate from a common transaction or occurrence is not in and of itself enough to invoke CPLR 3211[a][4] ... If the wrongs alleged are separate and independent they may be prosecuted separately") (citations omitted). On the other hand, there are grounds for consolidating the instant action with the other pending action under CPLR 602(a), because (1) both actions arise out of the same transaction; (2) the actions involve substantially identical parties; (3) the actions are pending before the same court; and

(4) consolidation of the actions may avoid unnecessary cost and delay (*Fay Estates v Toys "R" Us, Inc.,* 22 AD3d 712, 714 [2d Dept 2005) (consolidated two related actions because they involved common questions of law or fact).

On a motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must afford the complaint a liberal construction (*see* CPLR 3026), "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see Nonnon v City of New York*, 9 NY3d 825, 827 [2007]). Such a motion should be granted only where, even viewing the allegations as true, the plaintiff still cannot establish a cause of action (*see Kuzmin v Nevsky*, 74 AD3d 896, 898 [2010]; *Hartman v Morganstern*, 28 AD3d 423, 424 [2006]).

The branch of the motion which is to dismiss plaintiffs' fraud cause of action, insofar as asserted against the Lester defendants is denied. To properly plead a cause of action to recover damages for fraud, the plaintiff must allege that (1) the defendant made a false representation of fact, (2) the defendant had knowledge of the falsity, (3) the misrepresentation was made in order to induce the plaintiff's reliance, (4) there was justifiable reliance on the part of the plaintiff, and (5) the plaintiff was injured by the reliance (*see Eurycleia Partners, LP v Seward & Kissel, LLP,* 12 NY3d 553 [2009]; *New York Univ. v Continental Ins. Co.,* 87 NY2d 308 [1995]; *Selechnik v Law Off. of Howard R. Birnbach*, 82 AD3d 1077 [2011]; *Cerabono v Price,* 7 AD3d 479 [2004]). A cause of action alleging fraud must be pleaded with the requisite particularity pursuant to CPLR 3016(b). However, " '[t]his provision requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of and is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud' " (*Pike v New York Life Ins. Co.*, 72 AD3d 1043, 1050 [2010], quoting *Lanzi v Brooks*, 43 NY2d 778, 780 [1977]). In addition, "at this early stage of the litigation, plaintiffs are entitled to the most favorable inferences, including inferences arising from the positions and responsibilities of defendants," and "plaintiffs need only set forth sufficient information to apprise defendants of the alleged wrongs" (*DDJ Mgt., LLC v Rhone Group L.L.C.*, 78 AD3d 442, 443 [2010]). Here, whether the claim is labeled fraud or aiding and abetting fraud, the court concludes that the allegations in the complaint and the surrounding circumstances give rise to a reasonable inference that the Lester defendants (may have) participated in a scheme to defraud plaintiffs.

The branch of the motion by the Lester defendants which is to dismiss plaintiffs' cause of action against the Lester defendants for breach of covenant of good faith and fair dealing, is granted. Because the existence of a valid and binding contract is not alleged, the

complaint fails to state a cause of action for breach of the implied covenant of good faith and fair dealing (*see American–European Art Assocs. v Trend Galleries,* 227 AD2d 170 [1996]).

The branch of the motion which is to dismiss the cause of action for breach of fiduciary duties, is denied. To state a cause of action to recover damages for breach of fiduciary duty, a plaintiff must allege: "(1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct" (*Parekh v Cain,* 96 AD3d 812 [2012], *citing Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 777 [2010]; *see Kurtzman v Bergstol*, 40 AD3d 588, 590 [2007]). A breach of fiduciary duty cause of action must be pleaded with the requisite particularity under CPLR 3016 (b) (*see Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 808 [2011]; *Chiu v Man Choi Chiu*, 71 AD3d 621, 623 [2010]). Here, plaintiffs properly allege and Roy Lester admits that he was retained to recoup funds for plaintiff and does not deny that on July 25, 2012, Roy Lester directed defendant Haffner, as escrowee, to release escrow funds for the purpose of bidding at the foreclosure auction of the Cold Spring Harbor Premises. In opposing the motion, Roy Lester does not address the $60,000.00, which plaintiff allege was transferred to Lester & Associates by defendants Arvanitakis and Lisi.

Motion by Jeanne Lisikatos and Tyche Fortune, LLC

Insofar as asserted against Lisikatos/Tyche, the complaint alleges causes of action for aiding and abetting fraud, conversion and aiding and abetting conversion; breach of the covenant of good faith and fair dealing and deceptive acts and practices.

A claim for aiding and abetting a fraud allows imposition of liability on those who would not be liable on the fraud claim but who had actual knowledge of the fraud and substantially assisted it (*380544 Canada, Inc. v. Aspen Technology, Inc.,* 544 F. Supp.2d 199 [SDNY 2008]). The general elements of a claim of aiding and abetting a common law fraud are: (1) a fraud; (2) defendant's knowledge of the fraud; and (3) defendant's knowing rendition of substantial assistance to advance the fraud (*Wight v BankAmerica Corp.,* 219 F.3d 79, 91 [2nd Cir.2000]; *VTech Holdings, Ltd. v Pricewaterhouse Coopers, LLP,* 348 F.Supp.2d 255, 269 [SDNY 2004]). The plaintiff must allege facts that show that the aider and abettor had an actual knowledge of the fraud; constructive knowledge is not sufficient (*Filler v Hanvit Bank,* 339 F.Supp.2d 553, 557 [S.D.N.Y. 2004]). Furthermore, a cause of action for aiding and abetting a fraud requires an allegation that in order to enable the fraud to proceed, the defendant gave affirmative assistance, concealed information, or failed to act when required to do so (*Houbigant, Inc. v Deloitte & Touche LLP,* 303 AD2d 92, 100 [1st Dept.2003]). "Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur. Plaintiff asserts that Lisikatos "aided and abetted the underlying fraud by knowingly taking possession

of plaintiffs' rightful interests in the Sag Harbor Premises, the Manhasset Premises and in the East Northport Premises." Giving plaintiffs the benefit of every favorable inference, plaintiffs sufficiently allege that Lisikatos/Tyche provided substantial assistance to the individual defendants in their defrauding of plaintiff (*Eurycleia Partners, LP v Kissel, LLP,* 12 NY3d 553, 560–561 [2009]). For these reasons, the branch of these defendants' motion to dismiss plaintiffs' causes of action which allege aiding and abetting fraud as against Lisikatos/Tyche is denied.

The branches of the motion which are to dismiss the causes of action for conversion and aiding and abetting conversion, are granted. An action sounding in conversion does not lie where the property involved is real property" (*Dickinson v Igoni,* 76 AD3d 943 [2d Dept. 2010], *citing Garelick v Carmel,* 141 AD2d 501, 502 [2d Dept. 1988]; *see Seidman v Industrial Recycling Props., Inc.,* 71 AD3d 1117 [2d Dept. 2010]).

The branch of the motion by the Lisikatos/Tyche defendants which is to dismiss plaintiffs' cause of action against them for breach of covenant of good faith and fair dealing, is granted. Because the existence of a valid and binding contract is not alleged, the complaint fails to state a cause of action for breach of the implied covenant of good faith and fair dealing (*see American–European Art Assocs. v Trend Galleries,* 227 AD2d 170 [1996]).

Motion by the Cohn defendants

Paragraph 73 of the original complaint provides that "in reliance on the advice of Arvanitakis and Lisi, plaintiff Lugo and NKL Enterprises, LLC retained defendants Steven Cohn and Steven Cohn, Esq., PC for the purpose of negotiating the investment in the [Cold Spring Harbor Premises]." Paragraph 74 states that "on or about April 25, 2012, plaintiff Lugo authorized the release of $20,000 from [the escrow account] for the payment of legal fees to the [Cohn defendants]." Paragraph 75 then concludes that the $20,000 "purportedly for the payment of legal fees was misappropriated and or converted by defendants Arvanitakis, Lisi, and the Cohn defendants."

With regard to the Cohn defendants, plaintiffs alleges six causes of action, to wit, fraud, conversion, breach of the covenant of good faith and fair dealing, deceptive acts and practices (General Business Law §349), breach of fiduciary duties and conduct unbecoming of an attorney. The Cohn defendants move for summary judgment in their favor pursuant to CPLR 3212, dismissing the complaint insofar as asserted against the Cohn defendants and, alternatively, for dismissal pursuant to CPLR 3211 (a)(7).

The branches of the motion which are for summary judgment in their favor dismissing the conversion and fraud causes of action, insofar as asserted against the Cohn defendants

are granted. Once again, the elements of a cause of action for fraud are a material misrepresentation of fact, made with knowledge of its falsity, with intent to deceive, justifiable reliance on the misrepresentation by the party claiming that it was deceived, and damages suffered by that party as a result of the reliance (*Desideri v D.M.F.R. Group (USA) Co.,* 230 AD2d 503, 505 [1st Dep't 1997]; *Swersky v Dreyer and Traub,* 219 AD2d 321, 326 [1st Dep't 1996]. Here, plaintiffs failed to plead, with specificity, the material misrepresentation made by the Cohn defendants which would establish a cause of action for fraud. Furthermore, plaintiffs have alleged neither scienter nor reliance, and therefore have not satisfied the pleading requirements of CPLR 3013 and 3016 (*see Barclay Arms v Barclay Arms Assocs.,* 74 NY2d 644 [1989]). Therefore, the branch of the motion which is to dismiss the cause of action for fraud is granted.

"Conversion is the unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's right" (*State of New York v Seventh Regiment Fund,* 98 NY2d 249, 259 [2002] [internal quotation marks omitted]). "[T]o establish a cause of action in conversion, the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question ... to the exclusion of the plaintiff's rights" (*Batsidis v Batsidis,* 9 AD3d 342, 343 [2004] [internal quotation marks omitted]; *see Castaldi v 39 Winfield Assoc.,* 30 AD3d 458, 458 [2006]). Here, the conversion claim is without merit because the Cohn defendants made a prima facie showing that the $20,000 at issue was for legal fees, and plaintiffs admits that the monies were authorized by plaintiffs as legal fees. Specifically, in support of their motion for summary judgment, the Cohn defendants submitted an undisputed affidavit describing their legal work performed on behalf of Nadine Lugo and NKL Enterprises, LLC. The Cohn defendants aver that the firm prepared papers, on an emergency basis, in an attempt to protect a junior mortgage NKL held in the Cold Spring Harbor premises which was then on the verge of a foreclosure sale the next day. As the papers reflect, the Cohn defendants performed work negotiating with (I) Paul Katseros, the principal of Clear Blue Water, LLC, the owner of the Cold Spring Harbor Premises, (ii) Oyster Bay Management Co., LLC, the foreclosing holder of the senior mortgage and its counsel, and (iii) a third party financing source, in an effort to devise a "complicated" three-way transaction whose end-in-view was (a) the purchase of the Oyster Bay Management Co first mortgage by NKL with outside, third-party financing procured by NKL, (b) the contemporaneous conveyance of a deed-in-lieu of foreclosure to the Cold Spring Harbor Premises by Katseros/Clear Blue Water to NKL, and © the termination of the Oyster Bay Management Co. foreclosure action.

Furthermore, a cause of action for conversion "cannot be predicated on a mere breach of contract" (*East End Labs., Inc. v Sawaya,* 79 AD3d 1095, 1096 [2d Dept. 2010]).

The branch of the motion by the Cohn defendants which is to dismiss the cause of action for breach of covenant of good faith and fair dealing, is granted. Implicit in every contract is a covenant of good faith and fair dealing, which encompasses any promise that a reasonable promisee would understand to be included (*see Dalton v Educational Testing Serv.,* 87 NY2d 384, 389 [1995]; *New York Univ. v Continental Ins. Co.,* 87 NY2d 308, 318 [1995]). The covenant embraces a pledge that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*Dalton v Educational Testing Serv.,* 87 NY2d at 389 [internal quotation marks omitted]). "The duty of good faith and fair dealing, however, is not without limits, and no obligation can be implied that 'would be inconsistent with other terms of the contractual relationship' " (*id.* at 389, quoting *Murphy v American Home Prods. Corp.,* 58 NY2d 293, 304 [1983]).

A cause of action for breach of the covenant of good faith and fair dealing may be established where the defendants engage in conduct that injures or frustrates the other party's right to receive the fruits of the contractual bargain (*Frydman v Credit Suisse First Boston Corp.,* 272 AD2d 236 [2000]). Here, the undisputed record indicates that the Cohn defendants did attempt to negotiate and avoid the foreclosure of the Cold Spring Harbor Premises, as they were hired to do. "[B]ad faith requires an extraordinary showing of a disingenuous or dishonest failure to carry out a contract" (*Gordon v Nationwide Mutual Ins. Co,* 30 NY2d 427, 437 [1972]). The Court finds no credible indication that the Cohn defendants' inability to negotiate a stop to the foreclosure of the Cold Spring Harbor Premises, was motivated by a bad faith purpose.

The branch of the motion which is to dismiss the cause of action for breach of fiduciary duties, is granted based upon plaintiffs' failure to state in detail, "the circumstances constituting the wrong" (see CPLR 3016(b); *DeRaffele v 210-220-230 Owners Corp.*, 33 AD3d 752 [2006]).

Motion by the Pinks defendants

Plaintiffs have asserted four causes of action against the Pinks defendants. They are: conversion, breach of covenant of good faith and fair dealing, violation of General Business Law, §349, and conduct unbecoming of an attorney.

The branch of the motion by the Pinks defendants which is to dismiss the cause of action for breach of the implied covenant of good faith and fair dealing is granted, because any such claim must be based on an enforceable contract between the parties (See *Schorr v Guardian Life Ins. Co.,* 44 AD3d 319 [1st Dept.2007] [upholding dismissal of claim for

breach of the implied covenant of good faith and fair dealing since plaintiff "did not demonstrate the existence of a valid contract from which such a duty would arise"].

The branch of the motion by the Pinks defendants which is to dismiss the cause of action for conversion, is also granted. In the amended complaint, at paragraph 96, plaintiffs alleges that the Pinks defendants "wrongfully converted to their own use plaintiffs' money entrusted to them for the purpose of investing in the subject premises". A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession (*State of New York v Seventh Regiment Fund*, 98 NY2d 249 [2002]). Two key elements of conversion are (1) plaintiff's possessory right or interest in the property (*Pierpoint v Hoyt*, 260 NY 26 [1932]; *Seventh Regiment Fund*, 98 NY2d at 259) and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights (*Employers' Fire Ins. Co. v Cotten*, 245 NY 102 [1927]; *see also* Restatement [Second] of Torts §§ 8A, 223, 243; Prosser and Keeton, Torts § 15, at 92, 102 [5th ed]).

In the proposed amended complaint, plaintiffs allege that the Pinks defendants along with Arvanitakis and Lisi converted $650,000.00 of their funds. At paragraph 215, with respect to the Pinks defendants, plaintiff allege that Mr. Pinks had knowledge of Arvanitakis and Lisi's conversion and "rendered intentional and substantial assistance in its achievement by, inter alia, taking possession of [plaintiffs' $60,000.00], on or about September 26, 2011. Plaintiffs further alleged that the Pinks defendants "did and still do exercise unauthorized dominion over the $60,000.00, and are liable for conversion for "directing and advising" the transfer of $60,000.00.

In support of their motion, however, the Pinks defendants submitted documentary evidence indicating that $60,000.00 was never transferred to them. Rather, NKL transferred $100,000.00 to the firm's escrow via a wire transfer, in order to effectuate the purchase of a mortgage on the subject premises. Particularly, Paul Katsaros, who represented to Mr. Pinks that he was a member of NKL, with authority to act on its behalf, instructed him to issue a check to co-defendant Samuel I. Glass, in the amount of $100,000.00. Since Glass had not yet executed an assignment of the mortgage to NKL (the assignment), Pinks advised Katsaros that the $100,000.00 should not be made until the Assignment had been duly executed. The Pinks defendants submitted copies of the correspondence to Katsaros confirming the foregoing conversation, and requesting that he sign same as "Agreed", and send it back, which he did. Thereafter, pursuant to his client's instructions, a check in the amount of $100,000.00 drawn on the Firm's account was issued to Mr. Glass. An option agreement was then signed by Glass, on behalf of himself, and as an agent for the mortgagees of the aforementioned mortgage, whereby it was agreed that in consideration of $100,000.00, Mr. Glass agreed to forebear on foreclosure of certain property , and agreed to assign to NKL

notes and mortgages on those properties, including the subject premises for the sum of $1,250,000.00, payable by September 22, 2011. Mr. Katsaros authorized Mr. Pinks to sign the Agreement on NKL's behalf. In opposition, plaintiffs do not dispute the documentary evidence.

To prevail on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence which forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (*see Goshen v Mutual Life Ins. Co. of N.Y.,* 98 NY2d 314, 326 [2002]; *Jesmer v Retail Magic, Inc.,* 55 AD3d 171, 180 [2008]; *Prudential Wykagyl/Rittenberg Realty v Calabria–Maher,* 1 AD3d 422 [2003]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*Fontanetta v John Doe 1,* 73 AD3d 78, 86 [2010]). Here, the Pinks defendants produced uncontroverted documentary evidence conclusively establishing that the amount transferred to them was $100,000.00, and that Katsaros (on behalf of NKL and not plaintiffs) instructed Mr. Pinks to deliver these monies to the Glass defendants for an assignment, as provided above. Thereafter, pursuant to NKL's instructions, a check in the amount of $100,000.00, drawn on the Firm's account was issued to Mr. Glass. An option agreement (also submitted in support of the motion), was then signed by Glass, on behalf of himself, and as an agent for the mortgagees of the aforementioned mortgage, whereby it was agreed that in considerations of $100,000.00, Glass agreed to forebear on the foreclosure of certain property located in Sag Harbor, New York, and agreed to assign NKL notes and mortgages on certain properties, including the subject premises for the sum of $1,250,000.00, payable by September 22, 2011 (the "Agreement"). Katsaros authorized Pinks to sign the Agreement on NKL's behalf.

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether or not the complaint states a cause of action (*Frank v DaimlerChrysler Corp.,* 292 AD2d 118 [2002]). However where, as here, documentary evidence and undisputed facts negate or dispose of the claims in the complaint or conclusively establish a defense, dismissal may be granted pursuant to CPLR 3211(a)(1). *Biondi v Beekman Hill House Apt. Corp.,* 257 AD2d 76 [1999], *Kliebert v McKoan,* 228 AD2d 232 [1996]; *Gephardt v Morgan Guaranty Trust Co. Of N.Y.,* 191 AD2d 229 [1999]; *Juliano v McEntee,* 150 AD2d 524 [1989]; see also *Leon v Martinez,* 84 NY2d 83 [1994)]; *Frank v DaimlerChrysler Corp.,* supra. Accordingly, the branches of the motion which are to dismiss the conversion and breach of covenant of good faith and fair dealing claims against the Pinks defendants are granted

Furthermore, a cause of action based upon a breach of a covenant of good faith and fair dealing requires a contractual obligation between the parties (*see Phoenix Capital Invs. LLC v Ellington Mgt. Group, L.L.C.*, 51 AD3d 549, 550 [2008]; *Triton Partners v Prudential*

Sec., 301 AD2d 411 [2003]). Here, plaintiffs cannot sustain their claim for breach of the convenant of good faith and fair dealing because the contractual relationships governing the relevant transactions were between plaintiffs and an entity other than the Pinks defendants.

Cross Motion by plaintiffs

The motion to consolidate is granted, to the extent that a joint trial shall be had of the pending actions. "Where common questions of law or fact exist, a motion to consolidate or for a joint trial pursuant to CPLR 602 (a) should be granted absent a showing of prejudice to a substantial right by the party opposing the motion" (*Perini Corp. v WDF, Inc.*, 33 AD3d 605, 606 [2006]). Here, both actions involve common questions of law and fact and a joint trial will avoid unnecessary duplication of proceedings, save unnecessary costs and expenses and prevent the injustice which would result from divergent decisions based on the same facts (*Gutman v Klein*, 26 AD3d 464, 465 [2006]). Moreover, the defendants, in opposing the motion, failed to establish that a joint trial would prejudice a substantial right (*see Mattia v Food Emporium*, 259 AD2d 527 [1999]). [[Although the plaintiffs moved to consolidate the actions, the more appropriate method of achieving that purpose is a joint trial, particularly since the two actions involve different defendants (*Perini Corp. v WDF, Inc.*, 33 AD3d at 606-607).]]

The branch of the cross motion which is for leave to supplement the summons and amend the complaint, is also granted. "Leave to amend should be freely given absent prejudice or surprise" (*Rosicki, Rosicki & Assoc., P.C. v Cochems*, 59 AD3d 512, 514 [2009]). The proposed amendment is neither palpably insufficient nor patently devoid of merit, and there is no evidence that the amendment would prejudice or surprise the defendants (*see Sanatass v Town of N. Hempstead*, 64 AD3d 695 [2009]; *Zorn v Gilbert*, 60 AD3d 850 [2009]). A court deciding a motion for leave to amend a pleading is not required to give any consideration at all to the legal sufficiency of the allegations that the movant sought to add by way of the proposed amendment (*Lucido v Mancuso*, 49 AD3d 220 [2008]). Nor is the mere passage of time sufficient grounds for denied of leave to amend (see *Edenwald Contr. Co. v City of New York*, 60 NY2d 957 [1983]; *Loomis v Civetta Corinno Construction Corp.,* 54 NY2d 18 [1981]; *Sample v Levada*, 8 AD3d 465 [2004]). There can be no plausible claim of surprise or prejudice by virtue of the proposed amendments, which expand upon the original complaints, given that this application is made at the early stage of discovery and the original complaints fully apprises defendants of the nature of the action and the underlying facts and circumstances (*see Lariviere v NYC Transit Authority*, 82 AD3d 1165 [2011]; *Maloney Carpentry, Inc. v Budnik*, 37 AD3d 558 [2007]; *Lambert v Katz*, 121 AD2d 368 [1986]). Further, since no parties have appeared for depositions, discovery is in its early stages and the action has not been certified for trial, defendants have ample opportunity to investigate the claims against them and prepare a defense on the merits.

However, the branch of the cross motion which seeks to add a claim of breach of fiduciary duty against the Pinks defendants in its proposed amended complaint, is denied. The undisputed record indicates that plaintiffs did not have a fiduciary relationship with the Pinks defendants. As previously noted, the Pinks defendants properly represented NKL in a limited capacity on a matter involving $100,000.00, not the $60,000.00 as alleged by plaintiffs.

The branches of the motion which are to join C.S.H. Ventures, LLC and NKL Enterprises, LLC, as nominal plaintiffs, are denied. Section 206 of the Limited Liability Company Law requires each limited liability company to publish its articles of organization or comparable specified information for six successive weeks in two local newspapers designated by the clerk of the county where the limited liability company has its principal office, followed by filing an affidavit with the Department of State, stating that such publication has been made. If the publication requirement of section 206 is not completed within 120 days of the company's formation, the limited liability company will be precluded from "maintaining any action or special proceeding" in any New York court "unless and until" it complies with that requirement. Here, plaintiffs assert in their proposed amended complaint that Arvanitakis and Lisi intentionally caused noncompliance with the above legal requirement. Thus, this "noncompliance" with the Limited Liability Company publication requirement at the time plaintiffs filed their original complaint [CPLR 203 (e)], precludes CSH and NKL from being added as plaintiffs in this action.

CPLR 1002 provides, in pertinent part, that persons "who assert any right to relief jointly ... arising out of the same transaction, occurrence, or series of transactions or occurrences, may join in one action as plaintiffs if any common question of law or fact would arise" (CPLR 1002[a]). The Court of Appeals has held that the joinder statute should be liberally construed (*see Akely v Kinnicutt,* 238 NY 466 [1924] [interpreting a similar predecessor statute, CPA 209]). Plaintiff may join Jeffrey H. Weinberger as a defendant, and amend the complaint to add claims against this new defendant. C.P.L.R. § 3025(b). The claims that plaintiff alleges against Weinberger arise from the same transactions and occurrences as the claims already alleged against the other defendants (C.P.L.R. §§ 1002(b), 3025 [b]).

The branch of the cross motion by plaintiffs which is for punitive damages against the defendants, is denied. Punitive damages are available only in those limited circumstances where it is necessary to deter defendant and others like it from engaging in conduct that may be characterized as "gross" and "morally reprehensible," and of " 'such wanton dishonesty as to imply a criminal indifference to civil obligations' " (*Rocanova,*83 NY2d, at 614,*supra* , quoting, *Walker v Sheldon,* 10 NY2d 401). The pleading elements required to state a claim for punitive damages as an additional and exemplary remedy are: (1) defendant's conduct

must be actionable as an independent tort; (2) the tortious conduct must be of the egregious nature set forth in *Walker v Sheldon*(10 NY2d 401, 404-405, *supra) ;* (3) the egregious conduct must be directed to plaintiff; and (4) it must be part of a pattern directed at the public generally *(Rocanova,*83 NY2d, at 613,*supra)*. Here, plaintiffs do not allege any "egregious" conduct by the defendants which was part of "a pattern of similar conduct directed at the public generally". (*Id*.)

Cross Motion by the Glass defendants

The cross motion by the Glass defendants for summary judgment in their favor dismissing the complaint, insofar as asserted against them, is denied as premature with leave to renew upon the completion of disclosure (*see* CPLR 3212[f]; *Groves v Land's End Hous. Co.,* 80 NY2d 978, 980 [1992]; *Botros v Flamm,* 77 AD3d 602, 603 [2010]; *Afzal v Board of Fire Commrs. of Bellmore Fire Dist.,* 23 AD3d 507 [2005]). CPLR 3212(f) permits a party opposing a summary judgment motion to obtain discovery when it appears that facts supporting the position of the nonmoving party exist but cannot be stated because they are exclusively within the knowledge and control of the moving party (*see Juseinoski v New York Hosp. Med. Ctr. of Queens,* 29 AD3d 636 [date]; *Urcan v Cocarelli,* 234 AD2d 537 [date]). This is particularly relevant when the opposing party has not had a reasonable opportunity to develop the record through discovery (*see Baron v Incorporated Vil. of Freeport,* 143 AD2d 792 [date]). In their opposing papers, plaintiffs established that they have not yet had an opportunity to conduct discovery into the issue of how the Glass and other defendants defrauded them. Since the information that would clarify this issue is solely within the possession of the defendants, plaintiffs are entitled to discovery on this essential issue of fact (*see* CPLR 3212[f]). Accordingly, the court denies, as premature with leave to renew upon the completion of disclosure, that branch of the Glass defendants' motion which is for summary judgment dismissing the complaint insofar as asserted against them.

Conclusion

With regard to all defendants, the branches of the motions which are for summary judgment dismissing the causes of action alleging violations of General Business Law §349, are granted.

With regard to all defendants, the branches of the motions and cross motion which are to dismiss the causes of action for "conduct unbecoming of an attorney", are granted.

The branches of the motions which are to dismiss pursuant to CPLR 3211 (a)(3), are denied.

The branch of the motion by the Lester defendants which is to dismiss portions of the complaint on the ground that there is another action pending, is denied. The court grants consolidation of these actions, however.

The branch of the motion by the Lester defendants which are to dismiss plaintiffs' fraud and breach of fiduciary duties causes of action, insofar as asserted against them, is denied, except with regard to the Cohn defendants. The branch of the motion which is to dismiss plaintiffs' breach of covenant of good faith and fair dealing cause of action, insofar as asserted against the Lester defendants, is granted.

The court denies the branch of the motion by the Lester defendants which are to dismiss plaintiffs' fraud, breach of fiduciary duties and aiding and abetting a breach of fiduciary duty causes of action, insofar as asserted against the Lester defendants.

The branch of the motion by the Lisikatos/Tyche defendants which is to dismiss the claim of aiding and abetting fraud, is denied. The branches of the motion by the Lisikatos/Tyche defendants which are to dismiss the causes of action for conversion and aiding and abetting conversion, are granted.

The motion by the Cohn defendants to dismiss the claims against them is granted.

The motion by the Pinks defendants to dismiss the claims against them is granted.

The branch of the cross motion by plaintiffs which is to consolidate is granted, to the extent that a joint trial shall be had of the pending actions. The branch of the cross motion by plaintiffs which is for leave to supplement and amend the summons and complaint, is granted. The branches of them cross motion which are to join C.S.H. Ventures, LLC, and NKL Enterprises, LLC, as nominal defendants are denied. The branch of the cross motion by plaintiffs which seeks to add Jeffrey H. Weinberger as a defendant, and to amend the caption accordingly, is granted.

The branch of the cross motion by plaintiffs which is for punitive damages against the defendants is denied.

The cross motion by the Glass defendants for summary judgment pursuant to CPLR 3212, dismissing the complaint insofar as asserted against the respective defendants, is denied as premature with leave to renew upon completion of disclosure.

Dated: December 2, 2013

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JAMES J. GOLIA, J.S.C.

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