SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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THE TRAVELERS INDEMNITY COMPANY, *et al.*,

Plaintiffs,

-against-

PARIS & CHAIKIN, PLLC, *et al.*,

Defendants.

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Index No. 654048/15

Motion seq. nos. 001, 003, 004

DECISION AND ORDER

BARBARA JAFFE, J.

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Plaintiffs, responsible for paying hundreds of structured settlements of claims of New York domiciliaries against plaintiffs' insureds, seek to recover for a fraud committed between 2011 and 2013, by which defendants J.G. Wentworth, LLC, J.G. Wentworth Originations, LLC, Peachtree Settlement Funding, LLC, and Settlement Funding of New York, LLC (Wentworth defendants) and defendants Ash Square Funding, LLC and Woodbridge Structured Funding, LLC (Woodbridge defendants), among others, obtained the rights to receive structured settlement payments via forged court orders.

By notice of motion, Wentworth defendants move pursuant to CPLR 3211(a)(7) for an

order dismissing the complaint against them, or, alternatively, directing plaintiffs to file an amended complaint. Plaintiffs oppose. (Seq. 001).

By notice of motion, Woodbridge defendants move pursuant to CPLR 3211(a)(7) for an order dismissing plaintiffs' claims and the cross claims of co-defendants Paris & Chaikin, PLLC and Ian M. Chaikin, Esq. (Chaikin defendants) against them. Plaintiffs and Chaikin defendants oppose. (Seq. 003).

By notice of motion, Chaikin defendants move pursuant to CPLR 3211(a)(7) for an order dismissing plaintiffs' complaint and all cross claims against them. Plaintiffs and Woodbridge defendants oppose. (Seq. 004).

The motions are consolidated for disposition.

I. PLAINTIFF'S COMPLAINT

Wentworth defendants and Woodbridge defendants (factoring defendants) are in the business of purchasing the rights to receive future periodic payments under structured settlement agreements. (NYSCEF 2). Plaintiffs, obligors under such agreements, follow procedures whereby the periodic payments are funded by an annuity contract purchased from a life insurer and owned by either the settling defendant or its liability insurer, or by an affiliate of the annuity insurer that has accepted a "qualified assignment" of the obligations to make the payments. (NYSCEF 2).

As advance judicial approval is required for any transfer of rights to received future payments (Gen. Obligations Law Ch 24-A, Art 5, T 17), plaintiffs take measures to assure themselves that a transfer is duly approved. Thus, when served with a petition seeking court approval of a transfer, they review their records to determine whether they have a continuing

obligation to pay under the settlement at issue. If they have a continuing obligation, and if any impediments to the transfer have been resolved and the petition appears properly drafted and served, plaintiffs negotiate with the factoring company and annuity issuer, and prepare a proposed form order approving the transfer (SSPA transfer order).

Once a proposed form order is agreed upon, and after they receive a signed copy of the order, they compare it to the proposed order, and if identical, they forward it to the annuity issuer and instruct it to make future payments to the factoring company or its assignee. Plaintiffs usually do not appear in court on the return date of the petition.

Plaintiffs allege that sometime before 2001, factoring defendants entered into transfer agreements with certain payees in exchange for the rights to the settlement payments. Paris & Chaikin represented the factoring defendants in the proceedings at issue. (*Id.*).

On or about November 13, 2013, plaintiffs received from an annuity issuer a copy of a letter from defendant Stone Street, in which it reported that a former Paris & Chaikin paralegal "had apparently engaged in inappropriate conduct by fabricating court orders and court pleadings" relating to transfers of rights to receive such future payments. The annuity insurer listed as "problematic" transfers to Stone Street, one of which involved payment rights under a plaintiffs' settlement. (*Id.*).

Plaintiffs thus contacted Stone Street's in-house counsel, and on or about November 26, 2013, by letter to plaintiffs, Stone Street identified three problematic transfers involving plaintiffs' settlements, and advised that Paris & Chaikin had represented it in structured settlement transfer proceedings in New York and Florida, noting that there were no such problems in Florida. By letters dated December 4, 2013, Stone Street advised the Administrative

Judges of various judicial districts of the problem, and listed cases in which Stone Street had retained Paris & Chaikin to file petitions for transfer approvals. (*Id.*).

Upon review of their records for proceedings in which Paris & Chaikin represented factoring companies, plaintiffs found 26 proceedings relating to payment rights of more than $2.35 million under plaintiffs' settlements. Factoring defendants were petitioners in 25 of them. (*Id.*).

Plaintiffs then identified 11 New York cases involving forged orders where the proceedings concluded with orders that appear in no court record. In some proceedings, the transfer orders were forged and provided to plaintiffs as duly signed by a judge; in others, although the petitions were denied, plaintiffs received orders granting them; in other instances, plaintiffs were served with petitions and orders granting them, even though the petitions were never filed with the court and no orders were signed or entered; and orders which were granted and duly signed by judges but never entered as final orders, were provided to plaintiffs as final orders. (*Id.*).

In September 2015, Paris & Chaikin's former paralegal was indicted in New York County on 234 counts of forgery and criminal possession of a forged instrument in connection with this case. The prosecution provided notice of statements made by the paralegal, as pertinent here:

(1) he made the forged orders when he felt overwhelmed with work;

(2) Jason Paris and Ian Chaikin did not know he was forging the orders; and

(3) he never thought about telling his supervisors about the situation as he feared what they would do to him.

(NYSCEF 88). The paralegal also stated that:

(1) the structured settlement cases were a large part of Paris & Chaikin's income, and he "felt pressured to do what was necessary to get them approved";

(2) he forged the orders when he felt overwhelmed with work, and was "motivated out of fear that the work wouldn't get done";

(5) he received a bonus check every quarter based on the number of structured settlement cases that he processed, and in 2013 he refused to take the bonus;

(6) "The structured settlement business was very important to the firm. I was scared that if I didn't get my work done that other co-workers were going to lose their jobs. I felt like everyone was depending on me, and I wanted to get the job done. I felt a responsibility to my other colleagues. I was told by the bosses that the structured settlement business was crucial to the business, and without this business the firm would constitute only the two attorneys."; and

(7) "The main motivating reason for creating the forged orders was because of the workload. I believed that people's job (sic) depended upon me getting this work done, and even though I asked for help, I always believed the bosses were going to hold me responsible for losing the business.";

(NYSCEF 89).

Plaintiffs assert that they believed that they had received authentic and valid final orders approving the transfers of payment rights, and thus, before discovering the fraud, directed the annuity issuers to send at least $70,948 in future payments to factoring defendants. Since discovering the fraud, plaintiffs claim that they have attempted to mitigate its effects, and that factoring defendants have not followed suit, but have instead asked that the courts ratify the transfers notwithstanding the fraud. Plaintiffs opposed those requests and the courts denied them. (NYSCEF 2).

Plaintiffs complain that they incurred substantial costs in reviewing proceedings for forged orders, in responding to all of the defendants' requests for ratification of the forged orders, and in generally ascertaining the measures needed to resolve the disposition of the payments in

these proceedings. They advance causes of action for fraud and tortious interference with contract against all of the defendants. In claiming fraud, plaintiffs assert that factoring defendants retained Paris & Chaikin as their counsel in the proceedings at issue, that Paris & Chaikin was their agent, that Chaikin defendants submitted forged orders and documents to them, and that to the extent that the documents and orders were created and disseminated by Paris & Chaikin's paralegal, the paralegal's fraud may be imputed to Paris & Chaikin. They allege that defendants:

(1) "made material misrepresentations to [plaintiffs] by providing [plaintiffs] with the Fraudulent SSPA Documents and with Non-Final Transfer Orders"; and

(2) "intended [plaintiffs] to rely on the Fraudulent SSPA Documents and Non-Final Transfer Orders, so that [plaintiffs] would review and respond to the Fictitious SSPA Petitions as if they were authentic and would respond to [a specific falsified petition as if it had been granted, rather than denied], and would respond to forged SSPA Transfer Orders and Non-Final Transfer Orders by redirecting structured settlement payments" to defendants and their assignees.

Plaintiffs also contend that they

(1) "reasonably relied on the misrepresentations of [defendants] in believing the Fraudulent SSPA Documents to be authentic and accurate, in believing the Non-Final Transfer Orders to be final orders satisfying the [statutory] conditions, in responding to the [fraudulent documents] . . . by instructing annuity issuers to redirect to [defendants and their assignees] future payments under [plaintiffs'] structured settlements totaling more than $1 million, including payments totaling more than $850,000 redirected in response to Forged SSPA Transfer Orders and payments totaling more than $150,000 redirected in response to Non-Final Transfer Orders"; and

(2) as a result of defendants' misrepresentations, [they] "incurred substantial costs in distinguishing [forged orders] from effective orders in the relevant proceedings, in responding to defendants' misconceived remedial efforts and advocating and implementing appropriate remedial measures, and otherwise in determining the proper disposition of structured settlement payments affected by the [fraud] . . . In cases in which [plaintiffs] received fictitious SSPA petitions, [they have] incurred and continue[] to incur unnecessary and duplicative costs in responding to

> multiple petitions. [Plaintiffs have] been placed at risk of liability with respect to settlement payments that were directed to [defendants] based on [forged orders] and settlement payments that have been suspended as a consequence of the forgeries."

(*Id.*).

In claiming that defendants tortiously interfered with their contracts, plaintiffs allege that they were parties to valid structured settlement payment agreements, that defendants knew of the agreements and intentionally procured their breach by providing forged orders on which they reasonably relied, causing them to instruct the annuity issuers to redirect payments to defendants. Their alleged damages on this claim are those set forth in their fraud claim. (*Id.*).

Plaintiffs also assert a cause of action for negligent misrepresentation against factoring defendants, based on the facts set forth in the other claims, and contend that factoring defendants had superior knowledge and "were in a position to know that the transfers that were the subjects" of the forged orders had not been legally authorized and were therefore invalid. Thus, they contend, defendants were "negligent in failing to recognize that their representations concerning the [forged orders] were false and misleading." Plaintiffs allege that factoring defendants had superior knowledge in that they should have recognized that the petitions had not been filed in the courts or had been denied, and that they were negligent in failing to recognize that their representations about the petitions were false and misleading. They maintain that factoring defendants were negligent in supervising their personnel and Chaikin defendants, and assert the same damages as in their other claims. (*Id.*).

Against factoring defendants, plaintiffs also seek indemnity pursuant to General Obligations Law § 5-1707, which provides that transferees are liable to structured settlement

obligors for any liabilities or costs, including reasonable costs and attorney fees, if the transferees fail to comply with the Structured Settlement Protection Act (SSPA). They assert the same damages. (*Id.*).

In their claim against Chaikin defendants, plaintiffs allege a violation of Judiciary Law § 487, which requires that an attorney guilty of deceit or collusion with the intent to deceive the court or any party forfeits treble damages to the party injured, recoverable in a civil action. They contend that Ian Chaikin was the attorney supervising the proceedings at issue for Paris & Chaikin, and otherwise repeat the same allegations and damages underlying their fraud claim. (*Id.*).

Plaintiffs also advance a claim for negligent misrepresentation against Chaikin defendants, based on the same facts and damages asserted in their negligent misrepresentation claim against factoring defendants, and assert that they created the fake petitions, forged the orders, and misrepresented the non-final transfer orders as final orders. (*Id.*).

II. APPLICABLE LAW

A. CPLR 3211(a)(7)

Pursuant to CPLR 3211(a)(7), a party may move at any time for an order dismissing a cause of action asserted against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference. (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court need only determine whether the alleged facts fit within any cognizable legal theory. (*Leon*, 84 NY2d at 87-88; *Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept

2013]).

However, a complaint may be dismissed if the defendant submits documentary evidence that "flatly contradicts" the allegations in the complaint. (*NRES Holdings, LLC v Almanac Realty Sec. VI, LP*, 140 AD3d 640 [1st Dept 2016]). The court may consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and the criterion then becomes whether the plaintiff has a cause of action, not whether it has stated one. (*High Definition MRI, P.C. v Travelers Cos.e, Inc.*, 137 AD3d 602 [1st Dept 2016]). If such affidavits are considered, the complaint should not be dismissed unless "'a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it.'" (*Id.* at 602, *quoting Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]).

B. SSPA

Court approval of a transfer must be commenced by special proceeding brought by order to show cause. A copy of the order to show cause and petition must be served on all interested parties at least 20 days before the petition is noticed to be heard. (General Obligations Law § 5-1705[a], [c]). An interested party is the payee, any beneficiary irrevocably designated under the annuity contract to receive payments following the payee's death, the annuity issuer, the structured settlement obligor, and any other party that has continuing rights or obligations under the settlement. (General Obligations Law § 5-1701[f]).

Following a transfer of rights, the structured settlement obligor and the annuity issuer are, as to all parties except the transferee, discharged and released from liability for the transferred payments. (General Obligations Law § 5-1707[a]). The transferee is liable to the obligor and annuity issuer for any other liabilities or costs, including reasonable costs and attorney fees,

arising from the parties' compliance with a court order or arising as a consequence of the transferee's failure to comply with the provisions of the SSPA. (General Obligations Law § 5-1707[b][2]).

The transferee bears the sole responsibility for fulfilling the conditions set forth in section 5-1705, and neither the obligor nor annuity issuer bears responsibility for or liability arising from the transferee's failure to fulfill the conditions (Gen. Oblig. Law § 5-1708[f]). A payee injured by a violation of the SSPA may bring an action for damages, and may recover reasonable attorney fees if it prevails. (General Obligations Law 5-1709[b]).

III. WENTWORTH DEFENDANTS' MOTIONS TO DISMISS

A. Fraud

To establish a claim for fraud, the party asserting the fraud must demonstrate: (1) a misrepresentation or a material omission of fact, (2) which is false or known to be false by the defendant, (3) made for the purpose of inducing the other party to rely on it, (4) justifiable reliance by the other party, and (5) resulting injury. (*Pasternack v Lab. Corp. of Am. Holdings*, 27 NY3d 817 [2016]). Recoverable damages for fraud are "out of pocket" damages, defined as damages that would compensate the successful party for the loss it actually sustained and place it in the same position it would have held had it not been defrauded. (14 NY Prac, New York Law of Torts § 1:74 [2016]; *Connaughton v Chipotle Mexican Grill, Inc.*, 135 AD3d 535 [1st Dept 2016] [damages for fraud meant to compensate plaintiff for what it lost due to fraud]).

1. Contentions

Wentworth defendants argue that plaintiffs' fraud claim is insufficient as a matter of law as a client may not be held liable for its attorney's improper discharge of professional duties,

unless the client knows or consents to the misconduct, and observe that nowhere in the complaint is it alleged that they knew of or consented to the paralegal's misconduct. They deny that plaintiffs sustained any legally recoverable damages, as the damages sought are speculative and are composed entirely of attorney fees. (NYSCEF 16).

Plaintiffs maintain that defendants may be held liable for Paris & Chaikin's misconduct even if they had no knowledge of it, and argue that, in any event, they allege such knowledge and that the issue cannot be resolved without discovery. They also observe that defendants benefitted from the misconduct. Plaintiffs contend that attorney fees are recoverable when a party seeks to mitigate foreseeable damages caused by fraud, as they seek to do, and observe that they would not have had to sustain these costs absent the forged orders, and that the SSPA specifically permits them to recover costs and attorney fees. (NYSCEF 52).

In reply, defendants deny that they, as clients, can be held liable for fraudulent acts committed by their attorney absent their ratification of those acts and retention of benefits from them, or their knowledge of and consent to the fraud. They deny that plaintiffs' damages are recoverable even if they are legal expenses incurred to minimize losses. (NYSCEF 78).

2. Analysis

a. Defendants' liability for their lawyers' fraud

A principal may be held liable for fraud committed by its agent. (*Kirschner v KPMG LLP*, 15 NY3d 446 [2010]). As the Court of Appeals held in *Kirschner*:

> [T]he acts of agents, and the knowledge they acquire while acting within the scope of their authority are presumptively imputed to their principals . . . A corporation must, therefore, be responsible for the acts of its authorized agents even if particular acts were unauthorized . . . After all, the principal is generally better suited than a third party to control the agent's conduct . . .

> Agency law presumes imputation even where the agent acts less then admirably, exhibits poor business judgment, or commits fraud. As we explained long ago, a corporation "is represented by its officer and agents, and their fraud in the course of the corporate dealings [] is in law the fraud of the corporation."

(*Id.* at 465 [*quoting Cragie v Hadley*, 99 NY 131 [1885]). In such instances, it is also presumed that the agent communicates information to the principal even if the agent is defrauding another for the benefit of the principal. (*Id.* at 465).

Even where an agent commits a fraud to his principal's detriment and solely for his own personal benefit, the Court in *Parlato v Equitable Life Assur. Socy. of U.S.*, observed that "it is well established that a principal may be held liable in tort for the misuse by its agent of his apparent authority to defraud a third party who reasonably relies on the appearance of authority . . ." (299 AD2d 108 [1st Dept 2002], *lv denied* 99 NY2d 508 [2003]). And a client was held liable for her attorney's fraud even where the fraud was committed outside the scope of the attorney's authority. (*Chase Manhattan Bank, N.A. v Perla*, 65 AD2d 207 [4th Dept 1978] [same]; *cf. Cash v Titan Servs., Inc.*, 58 AD3d 785 [2d Dept 2009] [plaintiff's claim for fraud against attorneys' client on theory that attorneys' fraud should be imputed to client dismissed based solely on dismissal of fraud claim against attorneys]).

An attorney's conduct may be imputed to the client. (*In re Sullivan*, 367 BR 54 [ND NY 2007]). Thus, in *Sullivan*, the client was held equally liable for the attorney's violation of a bankruptcy stay. However, another bankruptcy court held that an attorney's client, who was a credit consumer and debtor, should not be held liable for her attorney's acts if the attorney, without the client's knowledge or consent, abused process and harmed a third party, finding that by doing so the attorney acted outside the scope of his authority. (*In re Germain*, 249 BR 47

[Bankruptcy Ct, WD NY 2000]). Not only does this decision not bind me, but the court reasonably distinguished non-consumer clients as more sophisticated and aware than credit consumer clients. In the former case, it observed, there is a "higher likelihood of actual client involvement in the attorney's work in more sophisticated transactions." (*Id.* at 52). Defendants undisputably belong to the more sophisticated and aware class of clients.

Absent any apposite authority for defendants' position, they fail to establish that there exists a rule or precedent exempting clients from liability for their attorney's fraud generally, and given the apposite authority, plaintiffs' allegation that defendants knew of the paralegal's fraud sufficiently states a basis for holding them liable for the fraud. Moreover, their allegation that defendants retained the benefits of the fraud by obtaining payments to which they were not otherwise entitled is also sufficiently set forth.

b. Damages

A party injured by another's wrongful act has a duty to expend a reasonable effort to mitigate the damages likely to result from the injury. Thus, a party that successfully or even unsuccessfully mitigates its damages may recover the expenses it incurred in doing so. (*Den Norske Ameriekalinje Actiesselskabet v Sun Print. & Publ. Assn.*, 226 NY 1 [1919]). Reasonable expenses incurred as a natural consequence of a tortious act are likewise recoverable. (36 NY Jur 2d, Damages § 88 [2016]). And where the tortious act resulted in litigation between the plaintiff and a third party or placed the plaintiff in a position requiring it to incur expenses to protect its interests, such cost and expenses, including attorney fees, may be recovered as damages. (36 NY Jur 2d, Damages § 96).

Here, plaintiff alleges that it incurred costs and expenses, including attorney fees, in

attempting to ascertain the fraud and mitigate its impact. It has thus stated a claim for recoverable damages resulting from the fraud. (*See Salles v Chase Manhattan Bank*, 300 AD2d 226 [1st Dept 2002] [attorneys could recover fees for extra work they were required to perform and additional expenses they incurred as result of defendant's fraud]; *Shindler v Lamb*, 25 Misc 2d 810 [Sup Ct, New York County 1959], *affd* 10 AD2d 826 [1st Dept 1960], *affd* 9 NY2d 621 [1961] [plaintiff entitled to damages consisting of reasonable attorney fees, disbursements and expenses incurred in recovery of money loaned and lost due to alleged fraud]; *see also Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954 [1986] [where defendant was fraudulently induced to enter into contract and buy goods which it attempted to sell, it could be awarded damages for costs incurred in locating, repurchasing, storing, and disposing of goods]; *Banco Frances e Brasileiro S.A. v Doe*, 36 NY2d 592 [1975] [plaintiff could recover penalty it had to pay due to defendant's fraud]).

B. Negligent misrepresentation

A cause of action for negligent misrepresentation requires a showing of (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff, (2) that the information was incorrect, and (3) reasonable reliance on the information. (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144 [2007]).

1. Contentions

Defendants argue that plaintiffs cannot establish the existence of a special or privity-like relationship with them as the alleged misrepresentations were a matter of public record and their relationship was arms-length. They again deny that plaintiffs' claim for attorney fees and costs is recoverable. (NYSCEF 16).

Plaintiffs assert that they and defendants had a long-standing working relationship, and that defendants had superior knowledge about the orders based on the relationship and plaintiffs' custom of not appearing at hearings on orders. In any event, they argue, whether they had a special relationship is a factual question that cannot be resolved on a motion to dismiss. They also contend that their fees and costs are recoverable as damages directly resulting from defendants' misrepresentations. (NYSCEF 52).

Defendants in reply argue that plaintiffs' allegation of a long-standing relationship does not give rise to a special or privity-like relationship. (NYSCEF 78).

2. Analysis

Plaintiffs' allegations suffice to withstand the motion to dismiss, and in any event, the issue of the nature of the parties' relationship is generally a question of fact. (*See Kimmell v Schaefer*, 89 NY2d 257 [1996] [special relationship of trust or confidence arose where defendant uniquely situated to evaluate economics of project at issue and experienced with project]; *Fresh Direct, LLC v Blue Martini Software, Inc.*, 7 AD3d 487 [2d Dept 2004] [plaintiff sufficiently pleaded existence of special relationship where defendant involved with assessing plaintiff's software for several months before contract agreed on and plaintiff relied on defendant's expertise]; *Vladeck, Waldman et al. v Paramount Leasehold, L.P.*, 2015 WL 1015984, 2015 NY Slip Op 50298[U] [Sup Ct, New York County] [special relationship may arise from long contractual relationship]).

The damages sought by plaintiffs are recoverable here. (*See* NY PJI 2:230, Comment [damages for negligent misrepresentation include plaintiff's increased costs due to reliance on defendant's statement or out-of-pocket expenses incurred]).

C. Tortious interference with contract

A claim for tortious interference with contract requires (1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant's knowledge thereof, (3) the defendant's intentional procurement of the third-party's breach of the contract without justification, (4) actual breach of the contract, and (5) damages resulting therefrom. (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 [1996]).

1. Contentions

Defendants assert that plaintiffs' claim is insufficiently pleaded absent an identification of the contracts at issue, the parties thereto, or which terms were breached, and they deny that the alleged damages are recoverable even if they proximately resulted from the alleged breaches. Alternatively, defendants contend that plaintiffs should be directed to amend their complaint to specify the costs and fees they seek to recover, and identify the SSPA order or proceeding related to each defendant. (NYSCEF 16).

Plaintiffs oppose, observing that in the complaint, they reference an attached exhibit listing the payees and proceedings at issue. They allege that contracts were breached when defendants induced plaintiffs to redirect payments to defendants, and that such redirection of payments constituted anticipatory breaches. (NYSCEF 52).

Defendants deny that anticipatory breaches may form the basis for a tortious interference claim. (NYSCEF 78).

2. Analysis

Having annexed a list of the contracts with which defendants are alleged to have interfered, plaintiffs have sufficiently identified them. Plaintiffs also state that they had

structured settlement payment agreements with third parties, that defendants knew of the agreements, that defendants induced them to breach the agreements by causing them to divert the payments to them, and that they sustained damages, and thus have sufficiently stated a tortious interference claim. Defendants cite no authority for the proposition that an anticipatory breach may not constitute a tortious interference with contract claim.

D. Indemnity

1. Contentions

Defendants argue that the SSPA does not create a private right of action to enforce compliance for an obligor such as plaintiffs, observing that the statute gives enforcement rights solely to payees and the Attorney General, nor does a right exists under the indemnity provision, and maintain that plaintiffs' claim for attorney fees should have been brought in each SSPA proceeding at issue, relying on the provision within General Obligations Law § 5-1707 permitting an obligor to recover "reasonable" fees and costs. Defendants also contend that payees, not obligors, are within the class for whose particular benefit the SSPA was enacted, and dispute plaintiffs' assertion that defendants are liable for fees and costs incurred in every fraudulent SSPA proceeding. (NYSCEF 16).

Plaintiffs deny reliance on an implied right of action under the SSPA. Rather, they rely on the express provision rendering a transferee liable to an obligor for fees and costs arising from the transferee's failure to comply with the statute. They observe that nothing in the SSPA requires that they seek costs in any particular forum or limits them to doing so in the proceeding at issue. (NYSCEF 52).

Defendants again argue that plaintiffs are restricted to seeking damages in the context of

the transfer proceedings at issue, and observe that plaintiffs may be made whole in this action through its claims against Chaikin defendants. (NYSCEF 78).

2. Analysis

Nothing in the SSPA requires that an obligor seek to recover reasonable costs and attorney fees within the SSPA proceeding at issue or in any particular forum. Whether or not the SSPA permits an obligor to enforce the SSPA and recover costs and fees in doing so is irrelevant, as it explicitly allows the obligor to recover reasonable costs and attorney fees incurred as a result of a transferee's failure to comply with the SSPA. Thus, in *In re J.G. Wentworth Originations, LLC*, the Court awarded the obligor costs and attorney fees upon finding that the transferee had not complied with numerous provisions of the SSPA when it filed its petition. (51 Misc 3d 1216[A], 2016 NY Slip Op 50666[U] [Sup Ct, Broome County 2016]). The court also determined that the statute does not require that a transfer be approved before costs and fees could be awarded.

In *Symetra Life Ins. Co. v Rapid Settlements, Ltd.*, the Court awarded attorney fees to an obligor that had sued the transferee in federal court for tortious interference and a violation of the SSPA, holding that the obligor was entitled to fees incurred in the action, and was not confined to seeking fees in the state court SSPA proceedings, as long as it challenged specific transfers in the federal action. (775 F3d 242 [5th Cir 2014]). The Court also awarded reasonable attorney fees as damages for the obligor's tortious interference claim. And in *Rapid Settlements, Ltd. v Symetra Life Ins. Co.*, the Court upheld an award of costs and attorney fees to an obligor that had successfully opposed a proposed transfer. There, the transfer proceeding had been dismissed, and the obligor commenced a new proceeding by filing a petition seeking its fees. (134 Wash

App 329 [Ct App, Wash, Div 1 2006], *review denied* 160 Wash 2d 1015 [Wash 2007]). In both of the latter cases, the applicable SSPA provision is identical to the New York provision.

Here, where it is alleged that some SSPA transfer petitions were created and not filed in court, restricting plaintiffs to seeking costs and fees in the underlying proceedings as defendants wish leaves plaintiffs with no forum, an unacceptable, if not baseless, outcome.

IV. WOODBRIDGE DEFENDANTS' MOTION TO DISMISS

A. Plaintiffs' claims

As these defendants raise arguments similar to those set forth by Wentworth defendants, namely, that plaintiffs improperly seek attorney fees and costs as damages, that plaintiffs fail to allege that defendants knew of the fraud, that defendants may not be held liable for their attorneys' misconduct, that there existed no special relationship between plaintiffs and defendants necessary to support a claim for negligent misrepresentation, that plaintiffs may not recover fees and expenses under the SSPA in a separate proceeding, and that plaintiffs have not shown that defendants intentionally caused them to breach a contract with a third party, they are denied for the same reasons set forth above. (II.).

Thus, in these circumstances, and under the SSPA provision, plaintiffs may recover fees and costs incurred absent court approval of a particular transfer. (See *In re J.G. Wentworth*, 51 Misc 3d 1216[A] [statutory provision did not require that transfer be approved before costs and fees could be awarded]).

B. Chaikin defendants' cross claims

1. Contribution

Defendants contend that Chaikin defendatns fail to state a claim for contribution against

them as, even assuming that a duty existed and a breach occurred, they neither caused nor exacerbated plaintiffs' alleged injury. (NYSCEF 41).

Chaikin defendants maintain that plaintiffs allege that defendants caused or exacerbated plaintiffs' damages by failing to remediate the harm, which suffices to state a claim for contribution. (NYSCEF 76).

As plaintiffs allege that defendants played a role in causing or exacerbating their damages, defendants have not shown that Chaikin defendants do not have a viable contribution claim against them.

2. Indemnification

Defendants allege that Chaikin defendants' claim for indemnification fails given plaintiffs' allegation that they were also negligent and thus, their liability is direct and not vicarious. (NYSCEF 41). Chaikin defendants assert that defendants may be held liable for indemnification given their actual supervision over the work that caused plaintiffs' damages. (NYSCEF 76).

Indemnification for work actually supervised applies where a claim arises from a violation of the Labor Law. (*McCarthy v Turner Constr., Inc.*, 17 NY3d 39 [2011]; *see also* 21 Carmody-Wait 2d § 123:87, Vicarious Liability - Under the Labor Law [property owner vicariously liable under Labor Law entitled to common law indemnification from party that actually supervised, directed, or controlled work that caused injury]). Research reveals no instance where such indemnification arises outside the Labor Law, nor have defendants offered any authority for that proposition.

As a party is not entitled to indemnification absent vicarious liability and a lack of

negligence on its part (*id.*), plaintiffs' allegations of fraud and negligence against Chaikin defendants provide a basis for dismissing its indemnification claim.

V. CHAIKIN DEFENDANTS' MOTION TO DISMISS

Chaikin defendants assert that plaintiffs' fraud claim against them fails absent an alleged relationship between them which would have justified plaintiffs' reliance on their alleged misrepresentations, and claim that they cannot be held liable for their paralegal's acts as his principal or employer given their adverse interests, denying that they obtained any benefits from the fraudulent acts. They otherwise advance the arguments advanced by the other defendants as to plaintiffs' claims of negligent misrepresentation and tortious interference with contracts. Chaikin defendants also argue that plaintiffs state no claim against them under Judiciary Law § 487 absent any benefit gained from the fraudulent acts and as the acts were neither extreme nor chronic, as plaintiffs' claimed damages are insufficient, and as the claim applies only to wrongful conduct by an attorney in a pending proceeding. (NYSCEF 71).

Plaintiffs maintain that Chaikin defendants are liable for the paralegal's actions as they were committed in furtherance of their business and within the scope of the paralegal's employment. They deny that the adverse interest exception applies here, arguing that the paralegal acted in Chaikin defendants' interest and not entirely for his own purpose, and that their claim that they were harmed rather than helped by the fraud is irrelevant. Plaintiffs also contend that their Judiciary Law claim is sufficiently stated as they allege that Chaikin defendants violated the law by engaging in deceit, which does not require a showing of extreme or chronic behavior but that they in any event allege a chronic and extreme pattern of legal delinquency given the breadth and volume of the paralegal's fraudulent acts, and deny that a claim must be

brought within the proceeding in which the alleged violation occurred. (NYSCEF 87).

In reply, Chaikin defendants deny that they may be held liable for the paralegal's fraud as they neither authorized nor ratified it and had no advance knowledge of it, and that the cause of action for a violation of the Judiciary Law must be dismissed as plaintiffs do not allege that they acted with deceit or engaged in a chronic, extreme pattern of legal delinquency. (NYSCEF 91).

A. Fraud

An attorney may be held liable for fraud that harms a third party. (*See A & M Bldg. & Condo Maintenance, Inc. v Atlas Elec. of Staten Is., Inc.*, 294 AD2d 520 [2d Dept 2002] [non-party adequately pleaded claim against defendants law firm and lawyer where it was alleged that defendants committed fraud by submitting order discharging lien without indicating its conditional nature and without satisfying condition]; *Green v Fischbein Olivieri Rozenholc & Badillo*, 119 AD2d 345 [1st Dept 1986] [attorney may be held liable to third party where attorney committed fraud or collusion or malicious or tortious act, and complaint sufficiently alleges facts entitling plaintiff to prove law firm should be held liable]; *Hahn v Wylie*, 54 AD2d 629 [1st Dept 1976] [attorney may be held personally liable to third parties for injuries caused by wrongful act where attorney is guilty of fraud or collusion]).

And, as an agent's fraud may be imputed to a principal corporation, the principal is responsible for the agent's acts even if unauthorized or fraudulent. (*Kirschner v KPMG LLP*, 15 NY3d 446 [2010]). Moreover, where the agent's conduct occurs within the scope of his authority, the conduct is imputed to the principal, and it is presumed that the agent communicates information to the principal even if the agent is defrauding another for the benefit of the principal. (15 NY3d at 465). Thus, whether or not the Chaikin defendants authorized or knew of

the fraud is irrelevant at this stage of the litigation.

A principal may not be held liable for fraud committed by its agent if their interests are adverse, such as when the agent totally abandons his principal's interests and acts entirely for his or her own purpose. (*Kirschner*, 15 NY3d at 446). The adverse interest exception is "most narrow" and reserved for cases involving outright looting or embezzlement where the agent's conduct benefits only himself or a third party and the fraud is committed against a corporation rather than on its behalf:

> A fraud that by its nature will benefit the corporation is not "adverse" to the corporation's interests, even if it was actually motivated by the agent's desire for personal gain.
>
> . . .
>
> To allow a corporation to avoid the consequences of corporate acts simply because an employee performed them with his personal profit in mind would enable the corporation to disclaim, at its convenience, virtually every act its officers undertake.
>
> . . .
>
> Again, because the exception requires adversity, it cannot apply unless the scheme that benefitted the insider operated at the corporation's expense. The crucial distinction is between conduct that defrauds the corporation and conduct that defraud others for the corporation's benefit . . . when insiders defraud third parties for the corporation, the adverse interest exception is not pertinent . . . So long as the corporate wrongdoer's fraudulent conduct enables the business to survive . . . this test is not met.
>
> . . .
>
> [A]ny harm from the discovery of the fraud - rather than from the fraud itself - does not bear on whether the adverse interest exception applies. The disclosure of corporate fraud nearly always injures the corporation. If that harm could be taken into account, a corporation would be able to invoke the adverse interest exception and disclaim virtually every corporate fraud - even a fraud undertaken for the corporation's benefit - as soon as it was discovered and no longer helping the company.

(*Id.* at 467-8).

Here, the statements made by the paralegal in connection with the criminal proceedings

against him indicate that his motivation in forging the orders was to get his work done more quickly in order to keep up with the workload, and that his ultimate goals were to please the attorneys, satisfy their clients' needs, and sustain the firm's main source of income, the processing of these orders. He was aware that his failure to process a sufficient number of orders could result in the termination of the employment of various employees at the firm. Thus, he sought to benefit, not harm, the firm. As it is alleged that the paralegal's fraud was directed at third parties and not at Chaikin defendants and was for Chaikin defendants' benefit or interest, the adverse interest exception is inapplicable, any harm resulting to Chaikin defendants after discovery of the fraud is immaterial. (*Kirschner*, 15 NY3d at 469 ["a fraud will suit the interests of both a company and its insiders for as long as it remains a secret [ ] and leads to negative consequences for both when disclosed."]).

Chaikin defendants thus fail to show that plaintiffs do not state a viable claim for fraud against them.

B. Judiciary law claim

Pursuant to Judiciary Law § 487, an attorney who is guilty of any deceit or collision, or consents to any deceit or collusion, with intent to deceive the court or any party, is not only guilty of a misdemeanor but also forfeits to the party injured treble damages, recoverable in a civil action. To establish a violation of this section, the allegedly injured party must show either "a deceit that reaches the level of egregious conduct or a chronic and extreme pattern of behavior" by the defendant attorney. (*Savitt v Greenberg Traurig, LLP*, 126 AD3d 506 [1st Dept 2015]).

Plaintiffs allege that Chaikin defendants, through their paralegal's conduct, acted with deceit, which states a claim for a violation of Judiciary Law § 487. (*See Kurman v Schnapp*, 73

AD3d 435 [1st Dept 2010] [plaintiff stated Judiciary Law claim by alleging that defendant deceived or attempted to deceive court with fake letter addressed to defendant]; *Chevron Corp. v Donziger*, 871 F Supp 2d 229 [SD NY 2012] [plaintiff stated claim against attorney and law firm where it alleged that they prepared and filed many court submissions which included false and misleading statements]; *see also Mazel 315 W. 35th LLC v 315 W. 35th Assocs. LLC*, 120 AD3d 1106 [1st Dept 2014] [evidence submitted that attorney presented false documents for recordation and sent letter to justice containing false statement, and attorney's denial of involvement in false recordation and of intent to deceive court raised triable issues and did not warrant dismissal]).

Moreover, damages need not be recovered in the proceeding in which the alleged misconduct occurred (*Melcher v Greenberg Traurig LLP*, 135 AD3d 547 [1st Dept 2016] [plaintiff properly commenced separate action for claimed Judiciary Law violation as he sought to recover value of lost time and excess legal expenses incurred in other action resulting from defendants' alleged deceit]; *Pomerance v McGrath*, 124 AD3d 481 [1st Dept 2015], *lv dismissed* 25 NY3d 1038 [not improper for plaintiff to bring claim in instant action even though based on deceit alleged in prior action]), and plaintiffs have alleged damages that would not have occurred in the absence of defendants' conduct (*Amalfitano v Rosenberg*, 12 NY3d 8 [2009] [party may recover legal expenses in defending lawsuit involving attorneys' deceit]; *Kurman*, 73 AD3d at 435 [plaintiff alleged specific damages that were not possible absent defendant's conduct]).

VI. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion of defendants J.G. Wentworth, LLC, J.G. Wentworth Originations, LLC, Peachtree Settlement Funding, LLC, and Settlement Funding of New York,

LLC (sequence 001) is denied in its entirety; it is further

ORDERED, that the motion of defendants Ash Square Funding, LLC and Woodbridge Structured Funding, LLC (sequence 003) is granted only to the extent of dismissing defendants Paris & Chaikin, PLLC and Ian M. Chaikin, Esq.'s cross claim for indemnification, and is otherwise denied; and it is further

ORDERED, that the motion of defendants Paris & Chaikin, PLLC and Ian M. Chaikin, Esq. (sequence 004) is denied in its entirety.

ENTER:

Barbara Jaffe, JSC

DATED: November 23, 2016
New York, New York