

Lapham v Corbally Gartland & Rappleyea, LLP

2016 NY Slip Op 32883(U)

September 12, 2016

Supreme Court, Dutchess County

Docket Number: 51595/2015

Judge: James W. Hubert

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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WILLIAM LAPHAM and MARJORIE LAPHAM,

Plaintiffs,

-against-

DECISION & ORDER

Index No. 51595/2015

CORBALLY GARTLAND & RAPPLEYEA, LLP,
WILLIAM FRAME, ESQ. and VINCENT
DEBIASE, ESQ.,

Defendants.

-----X
Hubert, J.S.C.

Before the Court is a motion by the Defendants pursuant to CPLR § 3211(a)(1) and (7) seeking an order of the Court dismissing the complaint. The Plaintiffs oppose the motion by Memorandum of Law in Opposition. The Defendants reply by Affirmation and Reply Memorandum of Law.¹ The Court has reviewed the submissions of the parties. After due consideration, the Motion is granted in part and denied in part.

Between 2006 and 2015, the Defendant law firm, Corbally Gartland & Rappleyea, LLP, and two of its attorneys, Defendants William Frame and Vincent Debiase (collectively the Defendants), represented Plaintiffs in eight legal matters. The eight are identified in the complaint as follows:

- 1) *Lapham v. Porach*, U.S.D.C.S.D. No. 06-CV-0681 [trade mark rights matter];
- 2) *Lapham v. Porach*, Index No. 4695/2010 [same as above];
- 3) *Lapham v. Porach*, Index No. 5531/2012 [same as above];
- 4) *Lapham v. Kensico Cemetery*, Index No. 5433/2011 [sale of cemetery plots];

¹ The Motion, responsive papers and all attachments were E-Filed with the Court.

- 5) *Lapham v. Wing*, Index No. 2401/2008 [medical malpractice matter];
- 6) *Citibank v. William Lapham*, (Index Number not listed) [debt collection matter];
- 7) *Barclays Bank v. Marjorie Lapham*, Index Number not listed [debt collection matter];
- 8) *Temple of I Cheng* [Not for Profit status application matter].

Three causes of action are alleged as to each matter, respectively as: 1) legal malpractice; 2) violation of N.Y. Judiciary Law; and 3) actual and constructive fraud. Plaintiffs commenced the action on September 10, 2015.

The Porach Matters (items 1, 2, and 3 above)

In 2006, William Lapham hired Defendants to represent him in connection with a dispute over copyright and trademark infringements regarding a martial arts temple and school he owned and operated. The federal action was dismissed, whereupon the Defendants commenced two successive law suits in state court seeking the same relief (Index Nos. 4659/2010 and 5531/2012). The state cases were subsequently dismissed by Dutchess County Supreme Court (Brands, J.).

Temple I - Cheng (item 8 above)

The Defendants, on or about March 11, 2010, incorporated William Lapham's martial arts temple (*see* moving papers, Ex. B), however Plaintiff William Lapham claims they failed to register the Temple as a federal not-for-profit organization causing loss of tax benefits. Plaintiffs claim that Defendants did not perform any work on this matter after the date of incorporation, but continue to seek payment.

Citibank v. William Lapham (item 6 above)

Plaintiff William Lapham claims that Defendants accepted service of a complaint on

behalf of Plaintiff William Lapham in a lawsuit brought by Citibank for a past due credit card bill. Defendants answered the complaint but took no further action. A default judgment was entered against the Plaintiff. Plaintiff thereafter alleges he settled the claim as a result of Defendants' alleged malpractice, "[paying] additional money to resolve the Citibank claim and incurr[ing] unnecessary legal fees."

Barclays Bank v. Marjorie Lapham (item 7 above)

Plaintiff Marjorie Lapham alleges that upon receiving a demand letter from Barclays Bank of Delaware, she informed the Defendants, who said the firm "would handle it." Plaintiff alleges she heard nothing further until she was served with a copy of a motion by the Defendants in 2015 requesting leave to withdraw from the case. She subsequently retained separate counsel to negotiate a settlement. Plaintiff claims unspecified damages based on Defendants' alleged malpractice.

Marjorie Lapham v. Kensico Cemetery (item 4 above)

Plaintiff Marjorie Lapham claims that Defendants gave her negligent advice to commence a lawsuit against Kensico Cemetery in connection with her rights to certain burial plots which she had inherited with her niece. Plaintiff also claims that Defendants then commenced the lawsuit without authorization (*compare* ¶¶ 22 and 29 of the complaint annexed as Ex. A to moving papers). Plaintiff further contends that the lawsuit dragged on for 3 ½ years and that although Defendants belatedly advised her of the lawsuit, they continued to misrepresent the status of the case. In addition, Defendants took an unspecified "number of steps during the litigation without Ms. Lapham's knowledge or consent" while billing her for the matter. Plaintiff hired new counsel who negotiated a settlement whereby Plaintiff and her niece would donate the

plots to a charitable organization.

William and Marjorie Lapham v. Wing, et al. (item 5 above)

In 2009, Defendants represented plaintiffs William and Marjorie Lapham in a medical malpractice action. Plaintiffs allege that due to Defendants' malpractice, the case was dismissed on summary judgment grounds in July 2010,² and "the entire value of the case was lost" (Ex. A ¶ 32). Plaintiffs claim they did not learn about Defendants' actions or that the case had been dismissed until about July 2014.

Attorney Client Relationship

The Defendants correctly contend Plaintiffs fail to allege an attorney-client relationship between Plaintiff William Lapham and the Defendants in the *Barclays Bank v. Marjorie Lapham* and *Marjorie Lapham v. Kensico Cemetery* matters. Plaintiffs further fail to allege an attorney-client relationship between Plaintiff Marjorie Lapham and Defendants in the *William Lapham v. Porach, Temple I-Cheng*, and *Citibank v. William Lapham* matters. Therefore, the claims asserted on behalf of William Lapham in the *Barclays Bank v. Marjorie Lapham* and *Marjorie Lapham v. Kensico Cemetery* matters and those claims asserted by Marjorie in the *William Lapham v. Porach, Temple I-Cheng*, and *Citibank v. William Lapham* matters must be dismissed (see *Weiss v. Manfredi*, 83 NY2d 974 [1994]).

Statute of Limitations

An action to recover damages for an attorney's malpractice must be commenced within

²A review of the court file (*Lapham v. Wing, et al.*, Sup Ct, Dutchess County [Index No. 2401/2008]) indicates that the court dismissed the action by decision and order dated December 29, 2010. "In some circumstances, and under certain circumstances, undisputed portions of court files or official records, such as prior orders or kindred documents, may be judicially noticed" (*Ptasznik v. Schultz*, 247 AD2d 197, 199 [2d Dep't 1998]).

three years of accrual of the cause of action (*see* CPLR § 214[6]). A legal malpractice claim accrues “when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court” (*Ackerman v. Price Waterhouse*, 84 NY2d 535, 541 [1994]). Thus, the time is measured from the day an actionable injury occurs, “even if the aggrieved party is then ignorant of the wrong or injury” (*id.*). “What is important is when the malpractice was committed, not when the client discovered it” (*Glamm v. Allen*, 57 NY2d 87, 95 [1982]).

Plaintiffs contend that the statute of limitations is tolled as a result of the continuing representation doctrine. “[T]he rule of continuous representation tolls the running of the Statute of Limitations on the malpractice claim until the ongoing representation is completed” (*Glamm, supra* at 94). However, the statute is tolled “only where the continuing representation pertains specifically to the matter in which the attorney committed the malpractice” (*Shumsky v. Eisenstein*, 96 NY2d 164, 168 [2001]). Plaintiffs hired the Defendants to work on eight matters. Continuous representation on one does not impart continuous representation to the others.

Of the eight matters, two are barred by the statute of limitations, i.e., *Temple I - Chang* and *Lapham v. Wing*. The complaint as to those two matters is therefore dismissed. The *Porach* matters, however, are subject to the continuous representation doctrine and are, therefore, not time-barred. The remaining matters are not time-barred.

Temple I - Chang

Defendants had the temple incorporated on March 11, 2010. Plaintiff William Lapham alleges that Defendants misrepresented the status of the martial arts temple for five years from the time of incorporation (Ex. A ¶ 40). This pre-supposes that the work Defendants should have done was more than three years before commencement of this action. Accordingly, Plaintiff

William Lapham's claim must be dismissed with respect to the legal malpractice cause of action and Judiciary Law cause of action because the injury occurred no less than five years prior to the instant complaint (*see* CPLR 214[6]; *see Jorgensen v. Silverman*, 224 AD2d 665 [2d Dep't 1996] [Judiciary Law § 487 is also governed by a three year statute of limitations]).

Lapham v. Wing

This medical malpractice action was dismissed on December 29, 2010, more than three years before the commencement of the instant legal malpractice action. Accordingly, Plaintiffs' claim must be dismissed with respect to the legal malpractice and Judiciary Law causes of action because the injury occurred no less than five years prior to the instant complaint (*see* CPLR 214[6]; *see Jorgensen v. Silverman, supra* [Judiciary Law § 487 is also governed by a three year statute of limitations]). For the reasons previously set forth, it is of no moment that Plaintiffs claim they learned about the dismissal in July 2014 (*see Carnevali v. Herman*, 293 AD2d 698 [2d Dep't 2002]).

Lapham v. Porach

Plaintiff William Lapham claims that Defendants, between 2008 and 2014, misrepresented that the *Porach* matter was still pending. Plaintiff alleges that Defendants failed to act to restore the federal action to the calendar within 30 days as required by the court's January 16, 2008 order in the event no settlement was reached. Settlement was not reached, and the Defendants did not apply to the federal court to restore the action to the calendar. Plaintiff alleges that, thereafter, the Defendants, without authorization, commenced an action in state court (*Lapham v. Porach*, Index No. 4695/2010) to remedy their error in failing to restore the federal action and pursue Plaintiff's claim. Although they purchased an index number and filed

the summons and complaint, the Defendants allegedly never served the summons and complaint and took no further action. More than two years later, the Defendants commenced another state court action (*Lapham v. Porach*, Index No. 5531/12), again without authorization. In this action, the court, by order dated February 19, 2014, dismissed the complaint based on *res judicata* grounds. The Court further ordered that Lapham pay Porach's attorneys fees in the sum of \$5,400.00, even though the Plaintiff contends he did not know that a state court action had been commenced. Plaintiff also claims that the Defendants, without authorization, filed a notice of appeal of the Supreme Court's order, but then failed to perfect the appeal.

The two Supreme Court actions were clearly a continuation of the representation of Plaintiff on the same claim brought in the federal court action (*see Kuritzky v. Sirlin & Sirlin*, 231 AD2d 607 [2d Dep't 1996]). Therefore, the statute of limitations did not accrue until the Supreme Court rendered its decision in February, 2014. Thus, Plaintiff William Lapham's claim with respect to the *Porach* matter was timely commenced.

Duplicative Causes of Action

Defendants contend that the second and third causes of action for violations of Judiciary Law § 487 and for fraud are duplicative of the legal malpractice causes of action.

A violation of Judiciary Law § 487 requires an intent to deceive whereas a legal malpractice cause of action is based on negligent conduct. Therefore, the two causes of action are not duplicative (*see Moormann v. Perini & Hoerger*, 65 AD3d 1106 [2d Dep't 2009]) and the motion cannot be sustained on that ground.

A review of the complaint indicates that the fraud cause of action is based on the same underlying allegations as set forth in the legal malpractice cause of action and does not allege

distinct damages. Accordingly, the fraud claims must be dismissed as duplicative of the legal malpractice claims (*see Palmieri v. Biggiani*, 108 AD3d 604 [2d Dep't 2013]; *Daniels v. Lebit*, 299 AD2d 310 [2d Dep't 2002]). Mere failure to disclose malpractice does not give rise to a cause of action alleging fraud or deceit separate from the underlying malpractice cause of action (*see Ferdinand v. Crecca & Blair*, 5 AD3d 538, 539 [2d Dep't], *lv denied* 3 NY3d 609 [2004]; *see also Carnevali, supra* [plaintiff failed to state a cause of action for fraud separate and distinct from his causes of action for legal malpractice]).

Malpractice (1st cause of action) - Sufficiency of the Complaint

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction. The court accepts the facts as alleged in the complaint as true, accords plaintiffs the benefit of every possible favorable inference and determines only whether the facts as alleged fit into any cognizable legal theory (*see Rovello v. Orofino Realty Co.*, 40 NY2d 633, 634 [1976]). “Under 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Leon v. Martinez*, 84 NY2d 83, 88 [1994]). In assessing a motion under 3211(a)(7), “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]).

“In order to establish a cause of action to recover damages for legal malpractice, a plaintiff must prove that (1) the attorney failed to exercise the care, skill, and diligence commonly possessed by a member of the legal profession, (2) the attorney’s conduct was a proximate cause of the loss sustained, (3) the plaintiff suffered actual damages as a direct result of the attorney’s actions or inaction, and (4) but for the attorney’s negligence, the plaintiff would

have prevailed in the underlying action” (*Porello v. Longworth*, 21 AD3d 541, 541 [2d Dep’t 2005]). A review of the subject complaint reveals that it fails, in large part, to allege sufficient facts to establish each of the requisite elements of a cause of action to recover damages for legal malpractice (*see* CPLR § 3013). Specifically, the complaint fails to adequately allege facts showing that but for attorneys’ alleged breach of the duty to exercise the care and skill one could reasonably expect of the legal community, there would have been a more favorable result in the underlying matters and specific damages (*see Ferdinand v. Crecca & Blair, supra*, 5 AD3d at 540).

Citibank v. William Lapham

Plaintiff claims that defendants neglected a lawsuit brought by Citibank for a past due credit card bill. Defendants answered the complaint but took no further action. As a result, a default judgment was entered against Plaintiff. Plaintiff does not set forth the amount of the judgment in the complaint. However, the court order indicates that plaintiff owed Citibank the net amount of \$7,785.64 (Ex. E).

Defendants entered into a stipulation of settlement on Plaintiff’s behalf. A copy of the stipulation of settlement indicates that the gross amount due is \$8,960.47 and the matter was compromised for \$4,500.00 (Ex. F).³ Although Plaintiff vaguely states that he had to pay additional money at a closing to clear the lien and pay otherwise unnecessary legal fees, he does not deny that he owed Citibank money or that the amount of the judgment was correct.

Assuming Defendants breached the standard of care and skill reasonably expected of the

³Although the stipulation of settlement in the record is only signed by Defendants, Plaintiff does not dispute that the matter was settled for \$4,500.00.

legal community, Plaintiff cannot allege, and indeed did not allege, that there would have been a more favorable result in the underlying matter but for the breach. The compromise sum, given no assertion by the Plaintiff that he did not owe money to Citibank, must be regarded as a favorable outcome.

Barclays Bank v. Marjorie Lapham

The complaint alleges that Marjorie Lapham received a demand letter from Barclays Bank of Delaware. She informed Defendants of the letter, and they said the firm “would handle it.” She heard nothing more of the matter until she was served with a copy of a motion by Defendants requesting leave to withdraw from the case. She retained separate counsel to negotiate a settlement.⁴ The complaint further alleges that the majority of the unpaid credit card bill was for invoices sent by Defendants for services rendered. Plaintiff does not set forth the amount of credit card debt; the amount purportedly billed by the Defendants, if any, and whether that amount is disputed; the amount of the other charges on the card and whether they are disputed; or the amount of the settlement. Plaintiff does not deny owing the money.

Again, assuming Defendants breached the standard of care and skill reasonably expected of the legal community, Plaintiff cannot allege, and indeed did not allege, that there would have been a more favorable result in the underlying matter but for the breach.

Marjorie Lapham v. Kensico Cemetery

Marjorie Lapham claims that because Defendants negligently advised her that she should

⁴The court file indicates that Barclays sued plaintiff for a net amount of \$7,649.32. The court file further indicates that the matter was settled for \$5,000. These are the types of documents in a court file of which a court may take judicial notice (*see e.g. Ptasznik v. Schultz*, 247 AD2d 197 [2d Dep’t 1998]).

commence an action against the cemetery, she “incurred unnecessary legal fees and was forced to dispose of the cemetery plot at a reduced value” (Ex. A ¶29). However, assuming a breach of duty by Defendants, Plaintiff must demonstrate “that the attorney’s breach ...proximately caused the plaintiff to sustain actual and ascertainable damages” (*Bua v. Purcell & Ingrao*, PC, 99 AD3d 843, 845 [2d Dep’t 2012], *lv denied* 20 NY3d 857 [2013]). Plaintiff does not allege the value of the cemetery plots or what she would have been able to sell them for on the open market.

William Lapham v. Porach

Defendants, on behalf of Plaintiff, sued Vincent A. Porach for, *inter alia*, federal copyright and trademark infringement. Plaintiff sought a preliminary injunction restraining Porach from reproducing and distributing Plaintiff’s copyrighted material and videos and from using several trademark phrases. Although the federal court did not find merit to the copyright infringement claim, the court did not similarly discount the trademark claims (Ex. C). Rather, the court found that defendant misused Plaintiff’s registered mark. Misuse of the mark alone, however, was not enough to obtain injunctive relief. Plaintiff also had to demonstrate a likelihood of confusion about the source or sponsorship in the marketplace that establishes the likelihood of success on the merits, as well as imminent, irreparable harm. The court then considered eight factors in determining whether there was confusion as to the source or sponsorship of the registered mark and the unregistered marks. In the end, the court found that Plaintiff had “slept on his rights” and therefore could not demonstrate imminent harm. Accordingly, the court denied the preliminary injunction.

The court held a settlement conference regarding the remainder of the action on September 15, 2008. The next day the court issued an order stating that the action would be

“discontinued with prejudice but without costs; provided, however, that if settlement is not consummated within 30 days of the date of this order, either party may apply by letter for restoration of the action to the calendar of the undersigned. Any such application must be made before the 30 days have expired or it will be denied. Any such application timely made will be granted” (Ex. D, p. 2).

Plaintiff William Lapham retained a viable cause of action in the federal action. He lost the ability to prosecute his claims, incurred unnecessary legal fees and related costs and was subject to a court-imposed sanction in an action he claims not to have known was even commenced (Ex. A ¶ 21).

Accordingly, so much of the motion to dismiss the first cause of action (malpractice) regarding the *Porach* matters as asserted by William Lapham is denied.

Judiciary Law § 487 (2d cause of action)

Lapham v. Porach

Judiciary Law § 487 addresses attorney misconduct. The proof required is either a single egregious act as a lawyer (*see Kirk v. Heppt*, 532 FSupp2d 586 [SDNY 2005] [applying New York law] or an alleged chronic, extreme pattern of legal delinquency by the defendant that proximately caused the plaintiff damages (*see Rosen v. Nite Rider Group, Inc.*, 19 Misc3d 1139 [A] (Sup Ct Nassau County 2008), *aff'd* 76 AD3d 964 [2d Dep’t 2010]).⁵

⁵Judiciary Law § 487 provides that:

An attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,

Plaintiffs argue that Defendants have violated Judiciary Law § 487 with respect to the *Porach* matter. Indeed, Plaintiffs have sufficiently alleged that the Defendants engaged in a chronic, extreme pattern of legal delinquency by failing to restore the federal court action and then by trying to cover up their error by bringing successive state court actions, which were clearly without merit. In the first state court action, Defendants did nothing more than purchase an index number and file the summons and complaint. After failing to prosecute the first action (which would have been barred by *res judicata*), the Defendants commenced a second state court action which was dismissed on *res judicata* grounds and which also assessed a sanction against Plaintiff. In addition, Plaintiff also claims the Defendants charged him for legal services which were unnecessary and brought about by the Defendants' own alleged misconduct. Plaintiff claims that the Defendants kept him in the dark for years about the true status of the case while billing him for a matter which was going nowhere.

Accordingly, so much of the motion to dismiss the second cause of action (Judiciary Law) regarding the *Porach* matter as asserted by William Lapham is denied.

William Lapham and Marjorie Lapham v. Wing, et al.

Plaintiffs make only a passing reference to the *Wing* matter. The whole of the allegation under this cause of action is "In a sixth case (*Wing*), the Defendants appeared without authority in an ongoing proceeding and purported to file papers on Marjorie Lapham's behalf" (Ex. A ¶ 47).

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

However, as previously stated, *Wing* must be dismissed on statute of limitations grounds.

In any event, assuming the *Wing* matter is timely, Plaintiffs do not identify the underlying claim in the *Wing* matter, do not identify the nature of the court appearance, and do not identify the papers purportedly filed on Marjorie's behalf. Furthermore, Plaintiffs do not claim that they suffered any damages as a result of these acts. There is only the conclusory allegation that "the entire value of the case was lost" (Ex. A ¶ 32). Plaintiffs do not put a value on the case and do not allege that but for the Defendants' negligence they would have prevailed in the underlying case (the nature and value of which is unspecified). (*cf. Richard J. Werner v. Katal Country Club*, 234 AD2d 659 [3d Dep't 1996] [on summary judgment motion, plaintiff failed to establish a nexus between defendant's acts and plaintiff's damages]). Even considering the liberal standard applicable on a motion to dismiss, this single conclusory sentence (Ex. A ¶ 47), without more, is insufficient to allege a cause of action under Judiciary Law § 487 (*see Mecca v. Shang*, 258 AD2d 569 [2d Dep't 1999], *lv dismissed* 95 NY2d 791 [2000] [Judiciary Law § 487 cause of action not supported by allegations of deceit sufficient to state a cause of action]).

Plaintiffs do not make any allegations under the Judiciary Law regarding *Citibank v. William Lapham*; *Barclays Bank v. Marjorie Lapham*; *Marjorie Lapham v. Kensico Cemetery*; or *Temple of I Cheng* (which is dismissed, in any event, on statute of limitations grounds).

Fraud (Third Cause of Action)

The third cause of action for fraud is dismissed as duplicative of Legal Malpractice Claim (*see supra*).

Punitive Damages

Plaintiffs also seek punitive damages as part of the second and third causes of action. In particular, Plaintiffs claim that “[d]efendants’ actions were willful and wanton and constituted a public wrong sufficient to warrant punitive damages” (Ex. A at ¶¶ 51 and 57). Plaintiffs request for punitive damages as part of the fraud cause of action must be dismissed as the fraud cause of action is dismissed as duplicative of the legal malpractice claim, and there is no independent cause of action for punitive damages (*see Bader’s Residence for Adults v. Telecom Equip. Corp.*, 90 AD2d 764 [2d Dep’t 1982]; *Laks v. Springer*, 101 AD2d 1001 [4th Dep’t 1984]).

As for the Judiciary Law claim, “[p]unitive damages are warranted where the conduct of the party being held liable evidences a high degree of moral culpability or where the conduct is so flagrant as to transcend mere carelessness or where the conduct constitutes willful or wanton negligence or recklessness [citations omitted]” (*Rey v. Park View Nursing Home, Inc.*, 262 AD2d 624, 627 [2d Dep’t 1999]; *accord Buckholz v. Maple Garden Apartments, LLC*, 38 AD3d 584 [2d Dep’t 2007]). Here, Plaintiff William Lapham alleges that after the Defendants failed to restore the federal court action, they undertook to commence, without authority, a Supreme Court action in which they only filed the summons and complaint and a second Supreme Court action which resulted in a *res judicata* dismissal and sanctions against Plaintiff, all in an effort to conceal the fact for years that the federal action had been discontinued with prejudice and all the while deceiving Plaintiff and charging him for the unnecessary state court actions. Taking the allegations in the complaint as true (as the court must on a motion to dismiss), so much of Defendants’ motion to dismiss the punitive damages claim in connection with the malpractice and Judiciary Law claims relating to the *Porach* matter is denied.

Request to Amend Complaint

Finally, Plaintiffs request that if the complaint is considered to be insufficient, the court should dismiss it without prejudice and grant leave to serve a motion to re-plead. Plaintiffs have failed to request any affirmative relief by way of cross-motion (*see Knopp vSlater*, 258 AD2d 624 [2d Dep't 1999]; *Thomas v. The Drifters, Inc.*, 219 AD2d 639 [2d Dep't 1995]). In any event, Plaintiffs did not submit a copy of a proposed amended pleading and did not demonstrate that a proposed amended pleading had any merit (*cf. Ferdinand, supra* 5 AD3d at 540).

Conclusion

Defendants' motion to dismiss the first cause of action, as asserted by William Lapham in the *Temple I Cheng, Wing and Citibank* matters, and as asserted by Marjorie Lapham in the *Wing, Barclays Bank and Kensico Cemetery* matters, is granted.

With respect to the second cause of action (Judiciary Law § 487), the Defendants' motion to dismiss is granted except that William Lapham may pursue his claim against the Defendants in the *Porach* matter.

Defendants' motion to dismiss the third cause of action (fraud) is granted. Plaintiffs' request to serve an amended complaint is denied.

It is hereby

ORDERED that so much of Defendants' motion to dismiss the first cause of action is granted except that Plaintiff William Lapham may pursue his claim thereunder on the *Porach* matter; and it is further

ORDERED that so much of Defendants' motion to dismiss the second cause of action is

granted except that Plaintiff William Lapham may pursue his claim thereunder on the *Porach* matter including punitive damages; and it is further

ORDERED that so much of Defendants' motion to dismiss the third cause of action is granted; and it is further

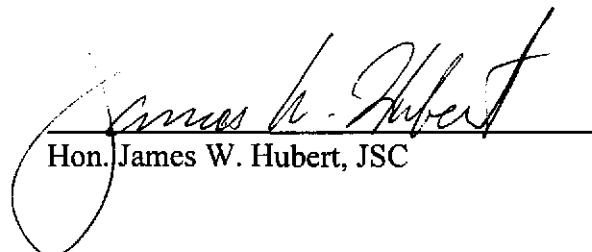
ORDERED that Plaintiffs' request to serve an amended complaint is denied, and it is further

ORDERED that Defendants serve an answer to the two remaining causes of action (*Porach* [malpractice] and *Porach* [Judiciary Law]) within 20 days of the date of service of a copy of this Order with notice of entry; and it is further

ORDERED that the parties and their counsel appear for a preliminary conference on October 14, 2016 at 10:00 a. m.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
September 12, 2016



Hon. James W. Hubert, JSC

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