Matter of Schleifer
2017 NY Slip Op 31501(U)
July 14, 2017
Surrogate's Court, New York County
Docket Number: 2010-3599/A
Judge: Rita M. Mella
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of Natalie Schleifer, Individually, and as Co-Executor of the Estate of Jack P. Schleifer, and as Co-Trustee of the Jack P. Schleifer Revocable Trust, and of Martin Rosen, as Co-Executor of the Estate of Jack P. Schleifer and as Co-Trustee of the Jack P. Schleifer Revocable Trust,

New York County Surrogate's Court
JULY 14, 2017

DECISION and ORDER

JACK P. SCHLEIFER,

File No.: 2010-3599/A

Settlor, Deceased,

To Rescind a Settlement Agreement Entered in Connection With the Estate of Jack P. Schleifer, Award Compensatory And Punitive Damages; Disgorge and/or Surcharge Fees, Payments, and Other Amounts Wrongfully Retained; Impose a Constructive Trust and Equitable Liens; and Compel Accountings.

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M E L L A, S.:

The following papers were considered in determining these two motion to dismiss:

Papers Considered	Numbered
Notice of Motion, dated March 27, 2015, to Dismiss by Respondents Richard L. Yellen and Richard L. Yellen & Associates, with Affidavit, dated March 26, 2015, of Richard L. Yellen, Esq. attaching Exhibits A through K	1, 2
Notice of Motion, dated March 27, 2015, to Dismiss by Respondent Marx Group, with Affirmation, dated March 26, 2015, of Howard S. Wolfson, Esq., attaching Exhibits A through G	3, 4
Yellen Respondents' Memorandum of Law, dated March 27, 2015, in Support of Motion to Dismiss	5
Marx Respondents' Memorandum of Law in Support, dated March 27, 2015	6
Affidavit, dated April 29, 2015, of Natalie Schleifer, in Opposition to Motions, attaching Exhibits A through G	7
Affirmation, dated April 29, 2014, of Paula K. Colbath, Esq., in Opposition, attaching Exhibits 1 through 20	8
Affidavit, dated April 28, 2015, of John L. Sang, Forensic Document Examiner, Retained by Petitioners, attaching Exhibits A through E	9
Affirmation, dated April 28, 2015, of Martin Rosen, Esq., in Opposition attaching Exhibits 1 through 22	10

Papers Considered (cont.)	Numbered
Affidavit, dated June 9, 2015, of Martin Rosen, Esq., Confirming Contents of April 28, 2015 Affirmation, improperly made by party Rosen, and attaching as Exhibit A, his April 28, 2015 Affirmation and Exhibits 1 through 22	11, 12
Petitioners' Memorandum of Law, dated April 29, 2015, in Opposition	13
Affirmation, dated May 13, 2015, of Brendan C. Kombol, Esq., together with Affidavit, dated May 18, 2015, of Richard L. Yellen, Esq., attaching Exhibits L and M	14, 15
Reply Affidavit, dated May 15, 2015, of David Marx, in Further Support, attaching Exhibits A through H	16
Yellen Respondents' Reply Memorandum of Law, dated May 18, 2015, in Further Support of Motion to Dismiss	17
Marx Respondents' Reply Memorandum of Law, dated May 18, 2015, in Further Support of Motion to Dismiss	18
Letter, dated May 26, 2015, of Wook Hwang, Esq., for Petitioners, Requesting Permission to File Sur-Reply Papers	19
Sur-Reply Affirmation of Paula K. Colbath, Esq., in Opposition, attaching as (1) Exhibit A, the Sur-Reply Affidavit, dated May 26, 2015, of Natalie Schleifer, that further attaches Exhibit 1; and (2) Exhibit B, the Sur-Reply Affidavit, dated May 23, 2015, of John L. Sang, Forensic Document Examiner that further attaches Exhibit 1 (allowed p. 36 of colloquy)	20, 21, 22
Letter, dated May 27, 2015, of Sarah C. Lichtenstein, Esq., for Yellen Respondents, regarding Petitioners' Sur-Reply	23
Transcript of May 29, 2015 Oral Argument, filed July 29, 2015	24

Decedent Jack Schleifer was a real estate investor, and his will left his estate to his lifetime trust that benefits his only child, Natalie Schleifer ("Schleifer") and charity. Schleifer, along with decedent's estate planning counsel, Martin Rosen, serve as two of the co-executors under decedent's will and co-trustees of his trust, and they have commenced the instant proceeding against Richard Yellen, the third co-executor and co-trustee, as well as against certain real estate companies and the developer managing or controlling those companies, David Marx ("Marx"), and his father, Robert Marx. Petitioners seek to rescind, on the basis of fraud and other grounds, a September 30, 2011 settlement agreement entered into among all the parties to this proceeding. By its terms, the agreement resolves claims that decedent and decedent's estate

had against Marx and his companies in connection with loans or investments decedent made during his life.

The respondents have moved to dismiss the petition on several grounds, namely, that documentary evidence bars petitioners' claims, that their claims have been released, and that the petition fails to state a claim for which relief may be granted (CPLR 3211[a][1], [5] & [7]). Additionally, respondents argue petitioners have not pled fraud and mistake with the requisite particularity (CPLR 3016[b]).

Schleifer executed the 2011 settlement agreement individually and as executor of decedent's estate and petitions here in both capacities. Together with Rosen, she claims that the estate was misled into entering into this agreement by Yellen and his law firm, Richard L. Yellen and Associates (together "Yellen") as well as by Marx. Yellen was decedent's real estate attorney and one of his most trusted advisors, on whom, petitioners allege, decedent came to rely more and more in the time leading up to his death on September 25, 2010 at the age of 96.

Allegations of Divided Loyalties

According to petitioners, although Yellen served as fiduciary and as their attorney,[1] his loyalties were with David Marx and Marx's real estate companies (together "Marx Group"),[2] one of which, 34-10 Development, LLC, a respondent here, Yellen represented as attorney in a court

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[1]Petitioners allege that, after decedent's death, they retained Yellen to represent them "in connection with various matters, including their dispute with Marx over his outstanding obligations to the Estate."

[2]According to the petition, Robert Marx was included as a respondent because he personally was a party to the 2011 settlement agreement. He is not alleged to have managed or controlled any of the various entities that are parties to the agreement or that are respondents in this proceeding.

action related to a real estate venture in which decedent had invested millions of dollars. The estate's claim against Marx in connection with this specific venture is recited as one of the claims covered in the settlement agreement. Petitioners claim that Yellen sought to benefit the Marx Group rather than decedent's estate by taking advantage of petitioners' lack of knowledge as to details of decedent's financial dealings with the Marx Group. They further allege that they were fraudulently induced by Marx and Yellen to enter into the settlement, which required Marx to repay only $9.7 million in purported outstanding financial obligations to decedent's estate, when "[u]nbeknownst to the estate, these obligations amounted to over $26 million" by the time of the settlement.

Although he admits in his reply affidavit that he acted as a consultant and provided support to Rosen's and Schleifer's counsel during the settlement discussions—and received compensation for those services— Yellen claims he did not serve as counsel to Schleifer or Rosen for the purposes of their considering whether to enter into the settlement with the Marx Group. He relies on a June 21, 2011 email to Rosen, stating that, "[A]s you know, I have represented Atria Builders (a Marx entity) in connection with lien and construction claims relating to various failed projects, and I am counsel in the 34th Street foreclosure action" and adding that, "[a]ll of this makes it imperative that I stay out of direct negotiations, and that you and [Schleifer] alone determine how the Estate should proceed against Marx."

It is unclear when exactly petitioners became aware of Yellen's legal representation of Marx or his entities, but, within a month of decedent's death, Rosen asked Yellen for information concerning decedent's assets and, in particular, about Marx's obligations to the estate. Petitioners state that they had no choice but to rely on Yellen, the only executor with personal

knowledge of decedent's real estate dealings, and that he was the person hired by the estate to conduct a diligent examination of the Marx Group's obligations to decedent's estate because he was in a direct position to know. It is undisputed that Yellen billed and was paid by the estate for this investigation and other legal work during the time the 2011 settlement agreement was being negotiated.

In another act of alleged disloyalty, according to petitioners, Yellen has refused to provide to counsel for petitioners in their capacity as co-executors documents in his possession concerning his representation of decedent, including documents memorializing the transactions between decedent and Marx, and documents and communications relating to the settlement agreement at issue here, until he is assured of being compensated for assembling and delivering these documents.

The 2011 Settlement Agreement

As relevant here, the 2011 "Settlement Agreement and Release" contains a recital of the "loans" or "investments" by decedent, Schleifer and/or entities affiliated with them ("Schleifer Group") to or in companies or entities affiliated with Marx, "including, but not limited to" five specified deals with a total loaned or invested of $13,823,375. It also recites that the Schleifer Group has asserted claims "in connection with" these loans and investments and that the parties agree to settle those claims. As mentioned above, the instrument requires a repayment of $9.7 million from the Marx Group to the Schleifer Group, and sets forth a schedule for various monetary payments or alternatively the transfer of assets at certain deadlines.

Section 3 of the settlement provides that, "[w]ithin 10 days of this Agreement, the Marx Group agrees to provide the Schleifer Group with a detailed statement of financial condition for

David Marx listing his assets and his liabilities"[3] and that Marx "represents and warrants that he does not possess sufficient assets (net of liabilities) to pay the Estate and the Schleifer Investors the outstanding principal amounts specified in the recitals in this Agreement, as established by the statement of financial condition to be provided in accordance with the provisions of this Section 3." Section 4, in turn, defines the "Events of Default," which include failure to make any payment required by the Settlement when due, and makes "any inaccuracy in or breach of any representation or warranty . . . contained in this Agreement" a default only if it has a "material adverse impact on the Schleifer Group," but further defines Marx's "representation and warranty" in Section 3 as being "deemed to have a material adverse impact on the Schleifer Group." Upon Notice to Cure a default under Section 4, the Schleifer Group may immediately declare all monetary obligations under the agreement as due and owing, which amounts will thereafter accrue interest annually at a rate of 8%.

Additionally, Section 6 of the settlement agreement includes release language: each member of the Schleifer Group, "forever releases and discharges David Marx, Robert Marx and the Marx Entities"[4] from:

> "all actions, causes of actions, suits, debts . . . claims, liabilities and demands

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[3]This financial statement was to be delivered to Yellen as an attorney and held in escrow by him "and not released to the Schleifer Group until there is an Event of Default by the Marx Group under this Agreement."

[4]The "Marx entities" executing the settlement agreement were 338-342 East 110, LLC, 333-339 East 109, LLC, and Douglaston Realty Associates, LLC. The group of companies that are respondents in this proceeding is broader than that which signed the settlement agreement. The entities in the Marx Group that are respondents here are: 34-10 Development LLC, 37-11 Development LLC, 338-342 East 110 LLC, 333-339 East 109 LLC, Louisiana Nursing Realty, LLC, 91- DMR of Queens, LLC, Douglaston Realty Associates, LLC, Atria Builders, LLC, and DSM Design Group, LLC.

> whatsoever, at law, in equity or otherwise, which against them or any of them any such party ever had, now has or hereafter can, shall or may have, whether known or unknown, by reason of any matter, claim, cause or thing from the beginning of the world to the date of this Agreement . . ."

It explicitly excepts from this release all claims for breach and enforcement of the settlement agreement itself. That section also contains a release on identical terms by the Marx Group members in favor of the Schleifer Group.

The settlement agreement also includes a disclaimer in Section 8(b) and states that the parties agree that the Settlement "is entered into after such investigation has been made by each party hereto (or by its, his or her representatives) as is satisfactory to it, him or her, and no party hereto is relying upon any statement or representation made by any other party hereto that is not set forth in this Agreement."

To date, the estate has been paid approximately $5,115,000 under the settlement agreement, and petitioners claim that Marx has failed to pay the balance of his obligations under it, an allegation that Marx disputes.[5]

The Alleged Misrepresentations

Petitioners plead that the settlement agreement was a "sham concocted by Marx and Yellen, with the sole purpose of allowing Marx to walk away scot free with [decedent's] money and allow Yellen to satisfy his most important client [Marx]." According to petitioners, Marx and "his agent" Yellen:

- misrepresented the extent of Marx's indebtedness to the estate, the true

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[5]The Marx Group asserts in its motion papers that it has tendered payments and also scheduled a closing for the final amounts due under the settlement agreement, and that petitioners did not attend the closing. It also asserts that petitioners expressed their intention to keep some of the funds paid under the agreement in escrow—a condition to which Marx did not agree.

amount of which still remains within the exclusive knowledge of Marx and his lawyer Yellen;

- misrepresented that Marx was on the verge of bankruptcy;
- misrepresented that Marx was unable to pay the amounts set forth in the recitals of the settlement agreement ($13,823,375) at the time the agreement was executed in November 2011 and that his net assets were worth less than this amount at that time;
- misrepresented Marx's intention to comply with his obligations in the settlement agreement, including providing Marx's financial statement within ten days of the agreement's execution, when in fact Marx had no intention of complying with those obligations at the time he entered into the settlement agreement; and
- misrepresented Marx's financial status including the value of his assets, liabilities and net worth on the financial statement that was belatedly furnished.[6]

(Amended Petition ¶ 97.)

The specific misrepresentations alleged to have been made by Yellen are those as to the "amount of Marx's monetary obligations" to decedent's estate, to Marx's "near insolvency" at the time of the settlement and, that absent an agreement with the estate, "Marx would be forced into bankruptcy." These appeared in Yellen's January 7, 2011 memorandum to petitioners,[7] written on the letterhead of his law firm, signed by Yellen as "co-executor," and provided to

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[6]Petitioners, of course, do not argue that misrepresentations allegedly made by Marx in the financial statement provided to petitioners almost a year after the agreement was executed induced them to enter into it. They argue instead that Marx's failure to provide, as required in the agreement, an accurate and detailed financial statement within ten days of the agreement's execution constituted a breach and is evidence of Marx's false representation that he intended to comply with the terms of the agreement.

[7]According to petitioners, the misrepresentations concerning the amount of the obligations of Marx and his entities to the estate were repeated by Yellen when he prepared the recitals of the 2011 settlement agreement.

petitioners three months after decedent's death in response to a request from Rosen's law firm for a "summary of all of the Marx deals and amounts owed."

Yellen's memorandum states: "Marx has proposed the following [$9.75 million] in satisfaction of the overall principal debt of $11,847,000 " which included "$1,000,000 of equity invested in the Pascal [respondent 333-339 East 109 LLC] and Conrad [respondent 338-342 East 110 LLC] condominiums." Yellen concludes his analysis of the obligations of Marx and related entities to decedent's estate by "urg[ing] that some deal be worked out, and properly papered and secured, which would avoid forcing Marx into bankruptcy."

Marx's alleged misrepresentations—the amount of his indebtedness, that he did not possess sufficient assets to satisfy his obligations to the estate and his intent to perform the obligations under the settlement agreement—were made in the agreement itself.

According to petitioners, they "finally discovered" the extent to which they had been misled by Marx and Yellen in connection with an effort by Marx "to further compromise his monetary obligations" under the agreement. No additional allegations are offered as to the timing or nature of this discovery, however.

The statement of financial condition that Marx agreed to provide under Section 3 of the agreement was disclosed to petitioners on September 24, 2012. Petitioners allege that this statement was outdated and that Marx deliberately misrepresented in it his true financial condition by, among other things, listing the negative book values of Marx's companies as his personal "negative equity." As pled by petitioners, "Adding up the actual positive equity in Marx's companies and his other liquid assets, those assets were more than sufficient to pay the 'outstanding principal amounts specified in the recitals'" of the settlement agreement (Amended

Petition ¶ 89).

The Claims for Relief

Schleifer and Rosen's amended petition asserts 14 claims for relief against Yellen or the Marx Group. Petitioners seek rescission of the September 30, 2011 settlement agreement (1st claim) on the grounds of unilateral mistake, and of fraud, breach of fiduciary duty and breach of contract by Marx and/or Yellen. Petitioners also seek damages—including punitive— against Yellen and the Marx Group for fraud and misrepresentation (2nd claim) and civil conspiracy (13th claim).

Against Marx or entities in the Marx Group, petitioners also seek: compensatory damages for breach of certain promissory notes in favor of decedent (3rd claim); compensatory damages for breach of certain membership agreements or assignments (6th claim); relief for unjust enrichment (disgorgement of all amounts by which Marx and the Marx entities have been unjustly enriched, at least $31 million) (4th claim); and the imposition of a constructive trust on all real property owned by entities in the Marx Group purchased with moneys wrongfully retained from the estate or obtained through unjust enrichment (5th claim). The petition also seeks accountings from Marx and his entities and access to their books and records (7th claim), and damages—including punitive—for breach of fiduciary duty by Marx as the managing member of entities in the Marx Group in which decedent had an interest (8th claim) and for aiding and abetting Yellen's breach of fiduciary duties (11th claim). Alternative to rescission, petitioners seek compensatory damages from the Marx Group for breach of the settlement agreement (14th claim).

Against Yellen, petitioners seek damages—including punitive damages—for breach of

fiduciary duty as co-executor, co-trustee and attorney (9th claim) and attorney malpractice (10th claim), and for aiding and abetting Marx's breach of fiduciary duty (12th claim).

Motion to Dismiss Standards

Yellen and the Marx Group have separately moved to dismiss each of the claims made against them. In analyzing a motion to dismiss under CPLR 3211(a)(5) the court must assume the allegations in the amended petition to be true and give them the benefit of every favorable inference (*Faison v Lewis*, 25 NY3d 220, 226 [2015], citing *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The same standard is to be applied to the motions for dismissal for failure to state a claim under CPLR 3211(a)(7), unless such claim is definitively contradicted by documentary evidence (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134-135 [1st Dept 2014]). To justify dismissal, pursuant to CPLR 3211 (a)(1), because a defense is grounded on documentary evidence, the proof must resolve "all factual issues as a matter of law," and dispose conclusively of the proposed claim (*United States Fire Ins. Co. v North Shore Risk Mgt.*, 114 AD3d 408, 410 [1st Dept 2014]).

Petitioners have submitted affidavits which, as respondents concede, may be accepted by the court in motions to dismiss for failure to state a claim for the limited purpose of remedying defects in the pleading sought to be dismissed (*Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 636 [1976]). Respondents have also submitted affidavits in support of that portion of their motions seeking to dismiss for failure to state a claim. As it is well settled, in such motions, the analysis by the court is whether petitioners have a cognizable claim, rather than whether they have stated one within the four-corners of their pleading (*Basis Yield Alpha Fund*, 115 AD3d at 133-134). In this regard, "an affidavit used by a [respondent] to attack the sufficiency of a

pleading 'will seldom if ever warrant the relief [respondents] seeks unless [such evidence] establishes conclusively that plaintiff has no cause of action'" (*id.* at 134, quoting *Rovello v Orofino Realty Co.*, 40 NY2d at 636 [emphasis omitted]).

The court first turns to the claim of rescission.

Rescission of the 2011 Settlement Agreement

As pled by petitioners, the court must rescind the 2011 agreement because it was induced by the above-described fraudulent misrepresentations by Marx and Yellen. According to petitioners, the agreement should also be rescinded because it is the product of petitioners' unilateral mistake as to the material facts underlying the agreement, *i.e.* Marx's financial obligations to the estate and his financial ability to meet those obligations at the time, and because Marx's breach of the critical terms of the agreement—the requirements that he make an immediate payment and that he provide an accurate and detailed financial statement—substantially defeats the purpose of the agreement.[8]

Of the several grounds pressed by the Marx Group for dismissal of the rescission claim, the court will address the one that it finds determinative: that petitioners ratified the settlement agreement by demanding and accepting payments.

Ratification as a Bar to Rescission

It is well settled that equity aids the vigilant (*Studley v National Fuel Gas Supply Corp.*,

[8]Petitioners also pled, as ground for rescission, breach of fiduciary duty by Yellen, as Marx's agent, in concealing from petitioners material facts concerning the extent of Marx's actual obligations to the estate and his inability to pay the amounts owed, and by Marx as managing member of some of his companies, but do not pursue these grounds in opposition to the motion to dismiss. A fifth ground for rescission, that the settlement agreement is null and void because the exhibits to which it refers were never included, is stated for the first time in their Memorandum of Law in opposition to the motions to dismiss.

125 Misc 2d 956 [Sup Ct, Cattaraugus County 1984]), and where a petitioner has accepted the benefits or demands performance of an agreement, knows of the grounds for relief, but delays seeking it, there may be a ratification of the agreement sufficient to bar an equitable remedy such as rescission (*see Beutel v Beutel*, 55 NY2d 957 [1982]).

As the authority cited by the Marx Group makes clear, relevant to a claim of ratification are the time from which the circumstances constituting the wrong are known and the time at which relief is sought, as well as whether all the benefits of the agreement have been accepted (*see R & A Food Services, Inc. v Hallmark Equities, Inc.*, 278 AD2d 398 [2d Dept 2000] [action commenced more than one year after knowledge of fraud]; *Fisk Bldg Assocs., LLC v Integrity Title Agency, Inc.*, 6 Misc 3d 1017[A] [Sup Ct, NY County 2005] [delay of more than one year in commencing action]; *Napolitano v City of New York*, 12 AD3d 194 [1st Dept 2004] [plaintiff accepted all benefits for two years after alleged duress in executing release]; *Capstone Enterprises of Port Chester, Inc. v County of Westchester*, 262 AD2d 343 [2d Dept 1999] [plaintiff accepted all benefits for one year and nine months after claimed economic duress and coercion]). In *Beutel* (55 NY2d at 958), ratification blocked plaintiff's rescission claim grounded on lack of capacity because the claim did not include allegations that his incapacity continued for the two years before suit was brought, during which time he had accepted the benefits of the contract.

Undisputed here is that petitioners accepted, on behalf of decedent's estate, payment of more than $5 million under the settlement agreement, including a payment of more than $1 million in December 2012. On this record, the Marx Group has established that petitioners ratified the settlement agreement by demanding performance and by accepting these payments

after knowing of its breach and after they knew—or should have known—of the alleged fraud. Consequently, the equitable remedy of rescission is not available to them.

The facts underlying the breach of contract ground in support of rescission—that Marx failed to provide Yellen with a detailed statement of his assets and liabilities within 10 days of the agreement's execution and that he failed to make a specified payment due at the time of execution—were known to petitioners at least by the end of 2011.[9] This matter was not commenced until September of 2014.

As to fraud and mistake as grounds for rescission, the Marx Group has established that petitioners were aware of the facts that provide a basis for those claims since September 24, 2012. Rosen acknowledges having received from Yellen on that date Marx's financial statement, which the amended petition characterizes as outdated, incomplete and inaccurate. It is based, at least in part, on the information provided in this statement, that petitioners allege that Marx misrepresented his ability to meet his financial obligations to the estate at the time of the settlement. Again, petitioners waited two years after receiving the alleged inaccurate and incomplete statement to commence this proceeding and did so after having accepted a payment under the agreement in December 2012.

Petitioners' argument that their demand for payments under the contract was expressly made without prejudice to their rescission claim ignores the fact that this reservation of rights, asserted for the first time in July 2014, occurred after petitioners had accepted payments of substantial amounts under the agreement at least a year and seven months earlier. As the

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[9]By Rosen's own account, on December 27, 2011, his law firm sent his first email communication to Yellen requesting that he ask Marx for the financial statement required under the agreement.

authority on which petitioners rely clearly indicates, "'A right to rescind, abrogate, or cancel a contract must be exercised promptly on discovery of the facts from which it arises; it may be waived by continuing to treat the contract as a subsisting obligation'" (*Schwartz v National Computer Corp.*, 42 AD2d 123, 125 [1st Dept 1973], quoting 10 N.Y. Jur., Contracts § 411; *see Charlop v A.O. Smith Water Products*, 64 AD3d 486, 486 [1st Dept 2009]).

The motion to dismiss, on ratification grounds, the claim for rescission (1st claim) is granted.

The Fraud Claim: Representations of Indebtedness and Insolvency as Fraudulent

Grounds for Dismissal

That petitioners do not have a claim for rescission based on fraud, in light of the court's ratification determination, does not bar petitioners from seeking damages as a remedy for being defrauded, as they do in their second claim (*see Sager v Friedman*, 270 NY 472, 479-480 [1936]; *J.P. Morgan Securities, Inc. v Ader*, 127 AD3d 506 [1st Dept 2015]; *see also On the Level Enterprises, Inc. v 49 E. Houston LLC*, 104 AD3d 500, 501 [1st Dept 2013]). The court now turns to the analysis of the sufficiency of that claim, which requires allegations of "a misrepresentation . . . which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]).

In seeking to dismiss petitioners' fraud claims, the Marx Group argues that: (1) the amended petition does not allege that Marx made any misrepresentations, alleging instead that Yellen did, but without asserting facts from which it can be inferred that Yellen was acting as

Marx's agent; (2) the release contained in the agreement bars any fraud claim; (3) the allegation that Marx misrepresented his finances in the agreement is not the basis of a fraud claim because it is duplicative of the breach of contract claim; (4) the disclaimer (in Section 8[B] of the agreement) of reliance on extra-agreement representations bars the fraud claim based on representations made by Yellen in the January 2011 memo; (5) in any event, the alleged misrepresentations by Yellen are not fraudulent as they are simply predictions of future events; and (6) the petition does not allege that petitioners justifiably relied on any misrepresentation, nor can petitioners allege they were justified in such reliance because they did not exercise due care to review decedent's books and documents or required certified financial statements from Marx or examine his books. For his part, Yellen relies on the last two arguments as basis for his motion to dismiss the fraud claim asserted against him. All movants also seek dismissal of the fraud claim on the ground that it was not pled with sufficient particularity (CPLR 3016 [b]).

Pleading Fraud with Particularity

The statements alleged to be fraudulent have been specified by the petitioners and are those made by Yellen in his January 7, 2011 Memorandum and by Marx in the 2011 Settlement agreement itself. They center on the extent of the Marx Group's indebtedness to the estate and its ability to meet these financial obligations. In specifying the statements—in Yellen's memorandum and in the settlement agreement – petitioners have satisfied the particularity requirement for pleading fraud (CPLR 3016 [b]; *Pludeman v N. Leasing Sys., Inc.*, 10 NY3d 486 [2008]). Movants' argument that the allegations did not inform them of the conduct about which petitioners complain fails as a matter of law (*Sargiss v Magarelli*, 12 NY3d 527, 530-531 [2009]).

Yellen as Marx's Agent

The Marx Group questions whether the allegations in the petition establish that Yellen's statements can be imputed to Marx as his principal under the law of agency. Petitioners do not, as the Marx Group argues, rely solely on conclusory statements that Yellen was acting as Marx's agent, which could not survive a motion to dismiss (*see Sutherland v Remax 2000*, 20 Misc 3d 1131[A] [Sup Ct, Nassau County 2008]).

As supplemented by the affidavits submitted in opposition to the motions, petitioners rely on several concrete factual allegations to support their theory of Yellen's agency. For instance, petitioners rely on the fact that Yellen's January 7, 2011 Memorandum to them is stated to be "FROM: David E. Marx and Related Entities." They rely also on the fact that Yellen represented one of the Marx entities in other litigation matters and even filed court papers on behalf of that entity within days of providing the memorandum to petitioners, and continued to represent that entity during the months in which settlement was being discussed among petitioners and Marx—allegations that Yellen does not dispute—while at the same time having many discussions and meetings with Marx relating to the 2011 settlement. The fact that Yellen's representation of this particular Marx entity related to a development project as to which Marx was indebted to the estate in the amount of $8.6 million, and that Yellen urged petitioners in his memorandum to settle their claims in connection with this debt are additional facts indicative of Yellen's agency, according to petitioners. They further allege that Marx's own counsel referred petitioners to Yellen to determine the scope of the Marx Group's prior indebtedness to decedent. Finally, petitioners point to Yellen's refusal to turn over to their counsel documents related to their settlement with Marx on the ground that, as Yellen stated in his affidavit in support of his

motion to dismiss, turning over these documents "implicated Marx's and the entities' attorney-client privilege" (Yellen Aff in Support, March 26, 2015, at ¶ 19). The court concludes that these allegations are sufficient to support a claim that Yellen could have been acting as Marx's agent (*see Cerchia v V.A. Mesa Inc.*, 191 AD2d 377 [1st Dept 1993]).[10]

Justifiable Reliance and the Fraudulent Inducement Claim

One of the main questions presented by the instant motions concerns the adequacy of the allegations of petitioners' justifiable reliance on the respondents' alleged misrepresentations. Questions of justifiable reliance are not always appropriate for resolution on a motion to dismiss (*see Knight Secs. L.P. v Fiduciary Trust Co.*, 5 AD3d 172, 173 [1st Dept 2004]), but New York law is clear that sophisticated parties have "an affirmative duty . . . to protect themselves from misrepresentation . . . by investigating the details of the transactions and the business" into which they enter (*Global Minerals & Metals Corp. v Holme*, 35 AD3d 93, 100 [1st Dept 2006]), and that they must plead that they took reasonable steps to discharge that duty in order to defeat a motion to dismiss their claims of fraudulent inducement (*DDJ Mgt, LLC v Rhone Group LLC*, 15 NY3d 147 [2010]). Thus, when sophisticated parties neglect to allege that they protected themselves from misrepresentation, courts have held that, as a matter of law, their pleadings failed to allege justifiable reliance (*see Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.*, 17 NY3d 269, 279 [2011]).

As set forth in the analysis below, the court concludes that, assuming them to be true, the allegations in the amended petition sufficiently plead that the petitioners justifiably relied on the

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[10]The fact that the Marx Group states that it had its own separate counsel for these transactions does not change this analysis.

respondents' misrepresentations (*see DDJ Mgt*, 15 NY3d at 152).

As to the first category of alleged misrepresentations—concerning the amounts owed by the Marx Group to decedent's estate—the allegations sufficiently establish that petitioners were justified in relying on the representations of Yellen, a co-executor, who owed a duty of loyalty to them and to the estate, and who had extensive knowledge of the decedent's business dealings with the Marx Group. Again, assuming as true petitioners' allegations and averments, they retained Yellen, an individual with personal knowledge of the transactions in question, to conduct an investigation into the extent of the Marx Group's indebtedness to the estate. Petitioners reasonably assumed that Yellen, decedent's real estate lawyer, had access to the transactional documents related to decedent's dealings with Marx. In fact, Yellen's January 7, 2011 memorandum reveals that he looked at many of these documents. Finally, in light of the invoices provided by Yellen for this work, petitioners also reasonably concluded that Yellen was acting as their attorney and had conducted such investigation.

The next question is whether petitioners were justified in their reliance on the second category of misrepresentations–concerning Marx's financial condition and his inability to pay the debts he owed the estate. On this issue, however, petitioners received a contractual warranty.[11] It appears in Section 3 of the settlement agreement, and provides in its entirety:

> "Statements of Financial Condition. Within ten (10) days of this Agreement, the Marx Group agrees to provide the Schleifer Group with a detailed statement of financial condition for David Marx listing his assets and liabilities. Said statement shall be delivered to Richard Yellen, Esq. and may, at any time, be disclosed to and reviewed by the Schleifer Group; provided, however, that said

[11]Petitioners allege that they requested financials from Marx and that, when they did not receive them, they negotiated this express warranty as to Marx's inability to pay as part of their settlement agreement.

> statement shall be held by Richard Yellen, Esq. in escrow and not released to the Schleifer Group unless and until there is an Event of Default by the Marx Group under this Agreement. **David Marx hereby represents and warrants that he does not possess sufficient assets (net of liabilities) to pay the Estate** and the Schleifer Investors the outstanding principal amounts specified in the recitals of this Agreement, as established by the statement of financial condition to be provided in accordance with the provisions of this Section 3" (emphasis added).

Where a contracting party obtains a warranty in an agreement from the other that a certain fact is true, here, that Marx's financial condition made it impossible to pay the amounts recited as due, there is a basis for the party so insisting—here, petitioners—to justifiably rely on such a warranty without further investigation to confirm its truth (*see DDJ Mgt*, 15 NY3d at 154; *see also Lunal Realty, LLC v DiSanto Realty, LLC*, 88 AD3d 661 [2d Dept 2011]). Justifiable reliance is thus sufficiently alleged to support a claim of fraud regarding Marx's representation that he was unable to meet its obligations to decedent's estate.

Insolvency Misrepresentation as an Event of Default

The conclusion that the justifiable reliance element of fraud has been adequately pled does not end the court's analysis, however. As respondents emphasize, the parties agreed in Section 4, that "[a]ny inaccuracy in or breach of" the representations made in Section 3 would have a material adverse impact on decedent's estate, and explicitly defined such inaccuracy or breach as an "event of default" under the agreement. Moreover, Section 4 sets forth the agreed-to remedy for such defaults, requiring notice of default to the alleged offending party and a 30-day period to cure, after which time, in addition to declaring all amounts due under the agreement, plus accrued and unpaid interest, "the Schleifer Group shall be entitled to any and all remedies at law and in equity related to the enforcement of this Agreement, including the recovery of costs and attorney's fees associated therewith" (2011 Settlement, Section 4, at 6).

It is evident form the settlement agreement itself, however, that while the parties defined any inaccuracy as to the Section 3 warranty as an event of default, they did not limit the Schleifer Group's remedy to that contained in Section 4. In other words, nowhere does the agreement indicate that the relief available to petitioners under that section is their sole and exclusive remedy. Petitioners are thus not barred from claiming damages for fraud as a result of the Marx Group's alleged misrepresentations (*see Syncora Guarantee Inc. v EMC Mortg., LLC*, 39 Misc 3d 1211[A] [Sup Ct, NY County 2013]; *see generally Rubinstein v Rubinstein*, 23 NY2d 293, 298 [1968]).

Duplication of Breach of Contract Claim as a Bar to Fraud Claim

Marx argues that petitioners' fraud claim—to the extent that it is based on his alleged misrepresentations as to outstanding liabilities to the estate and his inability to satisfy them—must be dismissed because it is duplicative of petitioners' breach of contract claim.

The general rule is that "a cause of action for fraud does not arise when the only fraud charged relates to a breach of contract" (*Krantz v Chateau Stores of Canada Ltd*, 256 AD2d 186, 187 [1st Dept 1998]). If a party, however, alleges that "it was induced to enter into a transaction because a defendant misrepresented material facts, [it] has stated a claim for fraud even though the same circumstances also give rise to [its] breach of contract claim" (*First Bank of Ams. v Motor Car Funding, Inc.*, 257 AD2d 287, 291-292 [1st Dept 1999]).

As the Appellate Division, First Department has made clear, "a warranty is not a promise of performance, but a statement of present fact . . . . [and] a fraud claim can be based on a breach of contractual warranties notwithstanding the existence of a breach of contract claim" (*Wyle Inc. v ITT Corp.*, 130 AD3d 438, 441 [1st Dept 2015]). This is based on the policy that a

misrepresentation should not "be absolved of its tortious impact simply by incorporating it verbatim into the language of a contract" (*id.*, citing *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 294 [1st Dept 2011] [internal quotation omitted]). Such is the case of the Section 3 warranty here and thus petitioners' fraud claim need not be dismissed on the ground that it is duplicative of their breach of contract claim.

Disclaimer in the Settlement Agreement as a Bar to the Fraud Claim

Yellen and Marx further argue that Section 8(b) of the settlement agreement[12] effectively disclaims reliance by petitioners on any representations—including those in Yellen's January 7, 2011 memorandum—that are outside the four corners of the agreement. It is well established that a contracting party's "disclaimer of reliance [on statements not contained in the agreement] cannot preclude a claim of justifiable reliance on the [other party's] misrepresentations or omissions unless (1) the disclaimer is made sufficiently specific to the particular type of fact misrepresented or undisclosed; and (2) the alleged misrepresentations or omissions did not concern facts peculiarly within the seller's knowledge" *(Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d at 137, citing *Danann Realty Corp. v Harris*, 5 NY2d

[12]In its entirety that section reads: "This Agreement is entered into after such investigation has been made by each party hereto (or by its, his or her representatives) as is satisfactory to it, him or her, and no party hereto is relying upon any statement or representation made by any other party hereto that is not set forth in this Agreement. Each party hereto acknowledges that it, he or she has weighed all the facts, conditions, and circumstances likely to influence its, his or her judgment herein, that all matters herein contained, as well as all questions pertinent hereto, have been fully and satisfactorily explained to it, him or her by legal counsel of its or her own selection, that it or she has given due consideration to such matters and questions, that it, he or she clearly understands and consents to all of the provisions of this Agreement, and that it, he or she is entering into this Agreement freely, voluntarily, and with fully knowledge. This Agreement shall be construed as have been jointly drafted by counsel for the respective parties."

317, 323 [1959]; *MBIA Ins. Corp. v Merrill Lynch*, 81 AD3d 419 [1st Dept 2011]; *Capital Z Fin. Servs. Fund II, L.P. v Health Net, Inc.*, 43 AD3d 100, 111 [1st Dept 2007]).

As the court in *Basis Yield Alpha Fund* explained: "only where a written contract contains a specific disclaimer of responsibility for extraneous representations, that is, a provision that the parties are not bound by or relying upon representations or omissions as to the specific matter, is a plaintiff precluded from later claiming fraud on the ground of a prior misrepresentation as to the specific matter" (*Basis Yield Alpha Fund*, 115 AD3d at 137). Substantially similar to the general disclaimer that did not preclude reliance on extra-contractual statements in claiming fraud in that case, the disclaimer in Section 8(b) here is not as to specific matters, and more importantly is limited to representations outside of the agreement.

Moreover, since the representation as to Marx's financial condition appeared in the agreement itself, and, additionally, concerned matters specifically within the knowledge of those opposed to petitioners, the disclaimer here does not effectively preclude petitioners from pursuing their fraud claims. None of the movants' authority compels a contrary conclusion.

Yellen's Statements About a Possible Marx Bankruptcy as Fraudulent

The remaining part of the fraud claim regards Yellen's statements in his 2011 Memorandum about a possible bankruptcy by Marx, if a deal was not reached settling his debts to the estate. These are not actionable statements in fraud because they were either opinions or predictions about the future (*see Bd. of Mgrs. of 147 Waverly Place Condominium v KMG Waverly, LLC*, 129 AD3d 549, 550 [1st Dept 2015] [statements in the description of renovations by architects were predictions of future events and, therefore, could not sustain action for fraud], citing *Dragon Inv. Co. II LLC v Shanahan*, 49 AD3d 403, 403 [1st Dept 2008] [a prediction of

something which is expected to occur in the future will not sustain action for fraud]; *Platus Corp. Pension Plan v Nazareth*, 271 AD2d 422, 423 [2d Dept 2000] [the rule is that a representation of opinion or a prediction of something which is hoped or expected to occur in the future will not sustain action for fraud] [internal quotations and citation omitted]; *Lanzi v Brooks*, 54 AD2d 1057, 1058 [3d Dept 1976], *affd* 43 NY2d 778 [1977]).

Here, it was clear from Yellen's memorandum that, while a Marx bankruptcy was possible or even probable, the statements by him were his opinions or expectations as to agreements that had not yet been negotiated and the result of such negotiations or the form that a later agreement would take could not then be known for certain, which the petitioners must have then understood. The fact, as alleged, that Yellen was an attorney and a co-fiduciary for the estate at the time does not vary this analysis.

Releases as a Bar to Claims

As an additional ground for dismissal, the Marx Group argues that the release in the settlement agreement itself precludes petitioners' claims. For Yellen's part, the 2011 settlement agreement did not by its terms release him—he was only a party to that agreement as co-executor and a member of the "Schleifer Group" which released the "Marx Group" therein. He nonetheless claims that certain other general releases executed by petitioners in 2012 as part of a Florida real estate venture, unrelated to the settlement with the Marx Group, did release him from the claims petitioners make against him here. Neither argument has merit, and dismissal on the basis of these releases is not appropriate on this record (*Freeman v New York State Div. of Human Rights*, 51 AD3d 668, 669 [2d Dept 2008]).

Regarding the release against the Marx Group, the court's above determination of ratification of the settlement agreement, includes, without a doubt, ratification of the release contained therein (*Megibow v Caron.Org*, 105 AD3d 549 [1st Dept 2013]; *Allen v Riese Org., Inc.*, 106 AD3d 514 [1st Dept 2013]). Nonetheless, the release will not bar subsequent claims unless they are specifically embraced within it or fall within the fair import of its terms (*Rubycz-Boyar v Mondragon*, 15 AD3d 811, 812 [3d Dept 2005]). Here, the release specifically excludes claims for enforcement of the contract itself which would include its contractual warranties, such as the representation by Marx as to his financial condition that petitioners claim was a material misrepresentation. Consequently, the release in the settlement agreement itself does not bar claims against the Marx Group premised on this representation.

Regarding Yellen's claims of release, Schleifer initially claims that the 2012 releases, which were part of a separate transaction in Florida, are a forgery. The court need not address this issue because even if the signatures thereon are genuine, it has not been shown that the releases were intended to have effect beyond the venture for which they were executed. Their "meaning and coverage necessarily depend, as in the case of contracts generally, upon the controversy being settled and upon the purpose for which the release was actually given" (*Cahill v Regan*, 5 NY2d 292, 299 [1959]; *see Enock v National Westminster Bankcorp*, 226 AD2d 235, 235-236 [1st Dept 1996]; *Wechsler v Diamond Sugar Co.*, 29 AD3d 681, 682 [2d Dept 2006]; *see also Centro Empresarial Cempresa S.A. v Am. Movil, S.A.B. de C.V.*, 17 NY3d at 278 [release of fiduciary must be knowing]). The Florida releases have not been demonstrated to function as a bar to petitioners' claims against Yellen on his motion to dismiss (*Desiderio v Geico General Ins. Co.*, 107 AD3d 662 [2d Dept 2013]).

Accordingly, Yellen's and the Marx Group's motions to dismiss the fraud claims asserted against them in the second claim (except as to the claims based on Yellen's representations concerning a possible bankruptcy by Marx) are denied.

Breach of Promissory Notes and Membership Agreements by Marx and the Pascal and Conrad Companies (3rd Claim)

Breach of Membership Agreements/Assignments Regarding 37-11 Development LLC, 34-10 Development LLC, Conrad and Pascal Companies, 91-DMR of Queens, LLC, and Louisiana Nursing Realty, LLC (6th Claim)

Accountings Sought from Marx, 37-11 Development LLC, 34-10 Development LLC, Conrad Company, Pascal Company, and Louisiana Nursing Realty LLC (7th Claim)

Breach of Fiduciary Duty/Faithless Service Against Marx (8th Claim)

Marx and the various companies which he is alleged to control as well as their "affiliates" were part of the "Marx Entities" under the settlement agreement. They were explicitly given releases by Schleifer individually and the executors of decedent's estate as to all claims and causes of action and thus, the present claims against them for breach of promissory notes, membership agreements, and assignments, as well as for accountings and breach of fiduciary duty are barred by those releases. Petitioners' third, sixth, seventh and eighth claims are dismissed pursuant to CPLR 3211 (a)(5).

Unjust Enrichment and Constructive Trust

Relief under claims of unjust enrichment and constructive trust[13] is appropriate "where [there is a] bona fide dispute as to the existence of a contract or the application of a contract to the dispute in issue" (*Old Salem Dev. Group, Ltd. v Town of Fishkill*, 301 AD2d 639, 639 [2d Dept 2003]; *see generally Miller v Schloss*, 218 NY 400 [1916]). As discussed above, since there is no basis for rescinding the settlement agreement given petitioners' ratification of it, these equitable claims should not survive the motions to dismiss either (*Sergeants Benev. Ass'n Annuity Fund v Renck*, 19 AD3d 107, 112 [1st Dept 2005], quoting *Cornhusker Farms v. Hunts Point Coop. Mkt.*, 2 AD3d 201, 206 [2003] ["the existence of a valid and enforceable written contract precludes recovery on a theory of unjust enrichment"]). The fourth and fifth claims are thus dismissed.

Breach of Fiduciary Duty and Legal Malpractice Against Yellen

In support of his motion, Yellen argues that the breach of fiduciary duty claim against him and his law firm (the 9th claim) is merely a duplication of both the fraud claims asserted against him in the second claim, and the legal malpractice alleged in the tenth claim, requiring its dismissal. He further argues that, even if not duplicative of the other claims, no damages have been specified for the alleged breach, which likewise provides grounds for dismissal.

Regarding the legal malpractice cause of action, Yellen claims that no attorney-client relationship existed regarding the settlement agreement, and that petitioners have failed to plead "but for" causation necessary to state a legal malpractice claim. Because the allegations

[13]Petitioners other equitable claim, that of unilateral mistake, was asserted as a basis for rescission, and it was resolved by the determination that petitioners ratified the agreement.

supporting the claimed breach of fiduciary duty and legal malpractice are distinct and establish the necessary elements for each, dismissal of these two claims is not appropriate.

The allegations regarding breach of fiduciary duty must show the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that party's misconduct (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]). Here, they involve Yellen's actions as co-executor and co-trustee, and as attorney and, additionally, as escrow agent for Marx's financials under the agreement, which relationships are fiduciary in nature as a matter of law (*Sankel v Spector*, 33 AD3d 167 [1st Dept 2006] [trustee-beneficiary]; *Graubard Mollen Dannett & Horowitz v Moskovitz,* 86 NY2d 112 [1995] [attorney-client]; *Talansky v Schulman*, 2 AD3d 355, 770 NYS2d 48 [1st Dept 2003] [escrow agent]; *see Parker v Rogerson*, 49 AD2d 689 [4th Dept 1975] [co-fiduciaries]).[14]

No authority is provided by Yellen to support his assertion that a breach of fiduciary duty claim must be dismissed because it involves a claim of fraud for which relief is also sought. To the contrary, fraud claims can be integral to claims of breach of fiduciary duty (*see, e.g.*, *Carbon Capital Mgt., LLC v Am. Exp. Co.*, 88 AD3d 933, 939 [2d Dept 2011]; *Kaufman v Cohen*, 307 AD2d 113, 123 [1st Dept 2003]). In any event, the allegations supporting the claimed fiduciary

[14]As regards multiple fiduciaries in general, a co-fiduciary who is equally charged with an obligation - e.g. administering an estate – cannot prevail against another co-fiduciary charged with that same obligation (*Zimmerman v Pokart*, 242 AD2d 202, 203 [1st Dept 1997]). There is an exception, however, where the co-fiduciary, because of a special expertise, is delegated a specific task (*Matter of Goldstick*,177 AD2d 225, 238 [1st Dept 1992], op mod on other grounds on rearg, 183 AD2d 684 [1st Dept 1992]). Here, that was the case, because Yellen has the particular expertise and knowledge of decedent's dealings with Marx. Petitioners were not abdicating their fiduciary functions to Yellen; instead, they were actively seeking the financial and business information regarding decedent's dealings from Marx and, as alleged, were essentially stonewalled, except for the information that Yellen provided to them.

duty breach by Yellen are not limited to affirmative fraud as pled by petitioners in their second claim, but extend to his alleged failure as co-fiduciary and the estate's attorney to disclose documents and information concerning decedent's transactions with Marx (*see Dube-Forman v D'Agostino*, 61 AD3d 1255, 1257 [3d Dept 2009]; *see also Pokoik*, 115 AD3d at 429).

Concerning allegations of damages, a party asserting a claim for breach of fiduciary duty "must, at a minimum, establish that the offending parties' actions were 'a substantial factor' in causing an identifiable loss" (*Gibbs v Breed, Abbott & Morgan*, 271 AD2d 180, 189 [1st Dept 2000]). Here, the allegations that fees were paid to Yellen in his various fiduciary capacities and should be returned is sufficient to identify a loss and plead damages, and makes this case distinguishable from those relied upon by him (*compare Estate of Feder v Winne, Banta, Hetherington, Basralian & Kahn, P.C.*, 117 AD3d 541, 542 [1st Dept 2014] [damages claimed were speculation based on "uncertainties, including future tax laws, tax rates, and the future value of the trust property"]; *Greenberg v Joffee*, 34 AD3d 426, 427 [2d Dept 2006] [fact that real estate agent had known ultimate purchaser was interested in estate property for investment before its sale did not create issue of fact on summary judgment as to agent's breach of fiduciary duty]).

Nor does the fact that damages may overlap with those sought for Yellen's malpractice mean that the breach of fiduciary duty claim duplicates it since Yellen is being sued in capacities as co-fiduciary that are not a part of the legal malpractice claim (*Pillard v Goodman*, 82 AD3d 541, 542 [1st Dept 2011] [breach of fiduciary duty not dismissed as against corporate director, even though malpractice relief sought against director as attorney]).

A legal malpractice claim has three essential elements: (1) the attorney's failure to

exercise that degree of care, skill and diligence commonly possessed by a member of the legal profession; (2) causation; and (3) actual damages (*Prudential Ins. Co. of America v Dewey Ballantine, Bushby, Palmer & Wood*, 170 AD2d 108 [1st Dept 1991], *aff'd* 80 NY2d 377 [1992]). While an attorney-client relationship is a necessary prerequisite (*Moran v Hurst*, 32 AD3d 909 [2d Dept 2006]), Yellen cannot avoid having a malpractice claim stated against him by asserting that his attorney-client relationship had ended for purposes of negotiating the 2011 settlement. This is a misunderstanding of the claim which is based on the allegations that Yellen was retained and paid to duly and diligently provide petitioners with information concerning the extent of decedent's investments and loans with the Marx Group. The malpractice claimed is Yellen's negligent carrying out of this work, which, petitioners also allege, led them to enter into the settlement that they would not have otherwise agreed to, and which damaged the estate (*see Theresa Striano Revocable Trust v Blancato*, 71 AD3d 1122, 1124 [2d Dept 2010] [attorney may not shift to the client the legal responsibility he was specifically hired to undertake because of his superior knowledge]).[15]

Overall, these allegations are sufficient to claim malpractice. Additionally, petitioners have provided specific factual allegations in this instance, which satisfy the more stringent requirement of "but for" causation required to be alleged for legal malpractice (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]; *Urias v Daniel P. Buttafuoco & Assoc., PLLC*, 120 AD3d 1339, 1342 [2d Dept 2014]; *Gallet Dreyer & Berkey, LLP v Basile*,

[15]Petitioners are "'not obliged to show, at this stage of the pleadings, that [they] actually sustained damages . . . [they need only plead] allegations from which damages attributable to [respondent's conduct] might be reasonably inferred'" (*InKine Pharm. Co., Inc. v Coleman*, 305 AD2d 151, 152 [1st Dept 2003], quoting *Tenzer, Greenblatt, Fallon & Kaplan v Ellenberg*, 199 AD2d 45 [1st Dept 1993]).

2013 NY Slip Op 30101[U], at *6 [Sup Ct, NY County Jan. 16, 2013] [settlement compelled by mistakes of counsel actionable in legal malpractice]; *see also Gottlieb v Karlsson*, 295 AD2d 158 [1st Dept 2002]).

It follows that the motion by Yellen and his law firm to dismiss the ninth and tenth claims for breach of fiduciary duty and legal malpractice, respectively, is denied.

Civil Conspiracy Claim

New York does not recognize a cause of action for civil conspiracy, although a plaintiff may plead the existence of a conspiracy in order to connect the actions of the individual defendants with an actionable, underlying tort and establish that those actions were part of a common scheme (*see Levin v Kitsis*, 82 AD3d 1051, 1052 [2d Dept 2011]; *Litras v Litras*, 254 AD2d 395, 396 [2 Dept 1998]).

In this case, as discussed above, the underlying fraud claims against Marx and Yellen are viable. There are also sufficient allegations supporting a claim of conspiracy, specifically related to Yellen's and Marx's misrepresentations in order to induce petitioners to enter into the settlement agreement. Consequently, the motions to dismiss are denied as to this claim (the 13th claim).

Aiding and Abetting Breaches of Fiduciary Duty

Petitioners' claim that Yellen and his firm aided and abetted Marx in breaching his fiduciary duty fails because, in order to have a claim for aiding and abetting a breach, there must be viable underlying claim for breach of fiduciary duty (*Kassover v Prism Venture Partners, LLC*, 53 AD3d 444, 449 [1st Dept 2008]). Here, as noted above, the release contained in the settlement agreement barred the breach of fiduciary duty claims against Marx.

Conversely, the 2011 settlement agreement has released the Marx Group from claims such as this one, because the actions complained of here—Marx's alleged aiding and abetting any breach of fiduciary duty on the part of Yellen—do not involve the enforcement of the settlement, which was exempt from coverage by the release.

As a result, these aiding and abetting claims (the 11th and 12th claims) must be dismissed.

Breach of the 2011 Settlement Agreement by the Marx Group

The final claim is for breach of the settlement agreement itself by those in the Marx Group for (1) failing to provide a "detailed" financial statement of Marx's assets and liabilities within ten days after the agreement's execution and (2) failing to pay the amounts due thereunder.

Regarding the first, Marx Group does not contest that it was late in providing the required detailed financial statement, which is specifically defined in the settlement agreement to be a material term. The parties disagree as to whether Marx has provided a sufficiently "detailed" or accurate statement. These allegations are sufficient to satisfy the elements for a breach of contract (*see Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804 [2d Dept 2011]). As to the assertion by the Marx Group that damages have not been established, even if it were shown that no actual damages have been sustained, petitioners could be entitled to proceed on their contract claim if only to vindicate their right to nominal damages (*C.K.S. Ice Cream Co., Inc. v Frusen Gladje Franchise, Inc.*, 172 AD2d 206, 208 [1st Dept 1991] *citing Good Karma Productions v. Penthouse International, Ltd.*, 59 NY2d 775 [1983] and *Hirsch Electric Company, Inc. v. Community Services, Inc.*, 145 AD2d 603, 605 [2d Dept 1988]; *see also*

Kronos, Inc. v AVX Corp., 81 NY2d 90, 94 [1993]).

As stated previously, the Marx Group also takes issue with the second of petitioners' alleged breaches, claiming that payment was in fact tendered. In an affidavit, respondent David Marx explains in chronological detail the events leading up to the tender to the estate, on March 27, 2015, of the final payment due under the settlement agreement, and he claims that respondents simply failed to accept tender of the payment. However, despite this evidence of compliance and despite the Marx Group's arguments that respondents cannot create a breach in this fashion, the circumstances here are almost identical to those in the case of *Rovello v Orofino Realty, Inc.* (40 NY2d at 636). There, a defendant's affidavit was interposed to show that a tender of payment had not been made—the converse of what is sought to be shown here. As in *Rovello*, the version of the events in Marx's affidavit did not demonstrate that the fact of non-payment alleged in the petition "was undisputedly not a fact at all" (*see Hampshire Properties v BTA Bldg. & Developing, Inc.*, 122 AD3d 573, 573 [2d Dept 2014]).

The fourteenth claim for breach of the 2011 Settlement Agreement is thus not subject to dismissal.

[* 34]

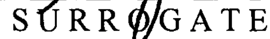
CONCLUSION

Accordingly, the Marx Group's and Yellen's motions to dismiss are granted in part and denied in part. The first, third, fourth, fifth, sixth, seventh, eighth, eleventh, and twelfth claims are dismissed. That portion of the second claim that seeks relief in fraud based on statements by Yellen in his 2011 Memorandum regarding Marx's possible bankruptcy is also dismissed.

This decision constitutes the order of the court.

Clerk to notify.

Dated: July 14, 2017



SURROGATE