SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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WORLDVIEW ENTERTAINMENT HOLDINGS INC.,
WORLDVIEW ENTERTAINMENT HOLDINGS LLC,
and ROSELAND VENTURES LLC,

Index
No. 159948/2014

Plaintiffs,

- against -

CHRISTOPHER WOODROW, SARAH WOODROW,
THE ESTATE OF CONSTANCE WOODROW,
GOETZ FITZPATRICK LLP and
AARON BOYAJIAN, ESQ.,

Defendants.

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CRANE, J.:

Plaintiffs allege embezzlement of escrow funds intended to be invested in movie productions. Plaintiffs are the associated companies of Worldview Entertainment Holdings, Inc., Worldview Entertainment Holdings, LLC, and Roseland Ventures, LLC. Hereinafter "Worldview" refers to the two Worldview companies. Worldview produces and acquires feature films.

Defendants Goetz Fitzpatrick LLP (Goetz), a law firm that acted as attorney and escrow agent to Worldview, and Aaron Boyajian, Esq., an attorney at the firm (collectively Goetz), move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the amended complaint. The other defendants are Christopher Woodrow, former president and CEO of Worldview, his wife Sarah Woodrow, and the estate of his mother, Constance Woodrow.

The complaint alleges that Woodrow had primary responsibility for overseeing the

financial, management, and employee relations affairs of Worldview, that he was the only person authorized to handle certain transactions with Worldview's banks, creditors, and investors, and that he used his authority to misappropriate Worldview's escrow monies. The complaint alleges that Woodrow defrauded Worldview out of at least $700,000 of escrow funds and that Goetz is liable for part of this sum, because Goetz, acting on Woodrow's instructions, disbursed escrow monies to inappropriate recipients. Allegedly, Woodrow caused Goetz to pay money to Woodrow for his personal uses, to his mother's estate, to his wife, to three debt collectors to satisfy Woodrow's personal debts, and to an individual to settle a dispute for Woodrow. Allegedly, from May 2011 to May 2014, Goetz improperly disbursed $242,302 on Woodrow's behalf, and perhaps more.

Worldview manages movie financing entities known as Film Funds. The complaint alleges that Worldview, the Film Funds, investors in the Film Funds, and Goetz entered into several escrow agreements (hereinafter, the Film Fund Agreements). The Film Fund Agreements provided that Goetz, Worldview's attorney, would act as escrow agent. Each agreement related to the financing of a particular film and provided that the investors in that film would wire their investment funds to Goetz, and that Goetz would hold the funds in a bank escrow account. Each agreement provided that the escrow funds received pursuant to that agreement would be "segregated," i.e., would be used solely to pay Worldview's or the particular Film Fund's obligations to third-party movie production companies, and that Goetz would release the funds only after receiving specific authorization from Worldview. Goetz and Worldview entered into another escrow agreement (the Worldview Agreement), pursuant to which Worldview or third parties delivered funds belonging to Worldview to Goetz to hold in

escrow, to be disbursed as Worldview authorized and only to third-parties associated with Worldview's business.

The complaint alleges that Goetz violated the Film Fund Agreements by depositing the monies received pursuant to each agreement in a single IOLA account, along with the monies received pursuant to the Worldview Agreement. The complaint alleges that Goetz violated the Worldview Agreement by improperly disbursing the funds received pursuant to that agreement, and Goetz may have done the same regarding the Film Fund escrow monies. The complaint alleges that Goetz knew or should have known that some of the payees were not movie production companies or associated with Worldview's business. Plaintiffs do not allege that the instructions and authorizations directing Goetz to disburse money were defective.

Against the law firm of Goetz, plaintiffs assert causes of action for breach of the Film Fund Agreements (fifteenth cause of action), breach of the Worldview Agreement (sixteenth), breach of the implied covenant of good faith and fair dealing under the Worldview Agreement (seventeenth), aiding and abetting Woodrow's fraud (eighteenth), breach of fiduciary duty (nineteenth), negligence/professional misconduct (twenty-first), unjust enrichment (twenty-second), and accounting (twenty-third). Against Boyajian alone, there is a claim of aiding and abetting Goetz's breach of fiduciary duty (twentieth). The ad damnum clauses seek compensatory damages in the amount of all funds diverted from Worldview, punitive damages, indemnity for any damages assessed against plaintiffs as a result of Woodrow's conduct, and disgorgement of all fees associated with the improper use of the escrow account.

Terms of the Film Fund Agreement(s)

Each Film Fund Agreement recites that the express provisions of the agreement solely

determine the duties of the escrow agent, and that no other duties or responsibilities shall be implied, other than the escrow agent's obligations to act as escrow agent for the Film Fund, Worldview, and the investors (Film Fund Agreement, ¶ 1). The investors will wire funds to an escrow account held by Goetz, that will deposit the funds "in a segregated account" (¶ 2 [a]). The Film Fund and Worldview "shall pay all costs of the escrow and the Escrow Agent" (*id.*). "The Escrow Funds shall be used solely" to pay [Worldview's and the Film Fund's] obligations with respect to the Picture" and shall not be disbursed except as provided (*id.*). The escrow agent shall pay the funds to the production company, "upon the direction of [Worldview] . . . only after the Escrow Agent receives from [Worldview] a letter of direction and wire authorization form fully executed by [Worldview]" (¶ 2 [b]). The Escrow Agent shall wire the designated portion to the production company upon receipt of the fully executed signed documents from Worldview (¶ 2 [c]).

> "The Escrow Agent is neither required to nor authorized to investigate into any underlying matter concerning the payments to the Production Company or the documents, and unless the Escrow Agent has actual or should have had personal knowledge of some defect in the document, the Escrow Agent may rely entirely upon the documents to make payment. Simultaneously with releasing payments to the Production Company, the Escrow Agent shall be released from any further obligation as to that portion of the Escrow Funds"

(¶ 2 [c]).

Provided that the escrow agent holds the money in accordance with the agreement's terms and pays this money to the "designated production company," the third-party investors and Worldview release the escrow agent and indemnify the agent against all claims arising out of the escrow agent's following of instructions (¶ 2 [e]).

The escrow agent "shall not be liable to either party for any act or omission on its part

unless taken or suffered in bad faith or in willful disregard of this contract or involving gross negligence on the part of the Escrow Agent" (¶ 5). "The parties agree that the Escrow Agent may rely, and shall be protected in acting or refraining from acting, upon any written notice, instruction or request furnished to it hereunder and believed by it to be genuine and to have been signed by the proper party or parties" (*id.*). The escrow agent undertakes to perform only the duties expressly set forth herein and shall not be bound in any way by any other agreement between the parties, whether or not the escrow agent has knowledge thereof (*id.*).

Failure to provide a copy of the Worldview Agreement

Plaintiffs did not attach any agreement to their complaint. Goetz attaches a copy of a Film Fund Agreement to its motion and, as part of their opposition to the motion, plaintiffs attach two copies of the same document. No copy of the Worldview Agreement is provided. Goetz argues that plaintiffs cannot assert a breach of contract claim without a copy of the document.

A party is not required to attach to the complaint a copy of the contract or plead its terms verbatim in order to state a breach of contract claim, provided that the party pleads the provisions of the contract upon which the claim is based (*Griffin Bros., Inc. v Yatto,* 68 AD2d 1009, 1009 [3d Dept 1979]; *Mandarin Trading Ltd. v Wildenstein,* 17 Misc 3d 1118[A], 2007 NY Slip Op 52059[U], *6 [Sup Ct, NY County 2007], *affd* 65 AD3d 448 [1st Dept 2009], *affd* 16 NY3d 173 [2011]). The complaint must give notice of the transactions or occurrences underlying the breach of contract, but particularity is not required (*Kadosh v Kadosh,* 2013 NY Slip Op 31450[U], *5 [Sup Ct, NY County 2013], citing *Shilkoff, Inc. v 885 Third Ave. Corp.,* 299 AD2d 253, 254 [1st Dept 2002]). The allegation that the Worldview Agreement required Goetz to disburse funds to parties associated with Worldview and that Goetz disbursed funds contrary to

that provision gives sufficient notice of the claim for breach of contract.

Standard for Deciding Motions to Dismiss

Under CPLR 3211 (a) (1), the court may dismiss a cause of action when documentary evidence conclusively establishes a defense to the asserted claim as a matter of law (*Beal Sav. Bank v Sommer,* 8 NY3d 318, 324 [2007]). A moving party is entitled to dismissal under section (a) (1) when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint (*Rivietz v Wolohojian*, 38 AD3d 301, 301 [1st Dept 2007]). Under CPLR 3211 (a) (7), which allows dismissal for failure to state a cause of action, the court accords the complaint a liberal construction, accepting the allegations as true and providing plaintiffs with the benefit of every favorable inference (*Roni LLC v Arfa*, 18 NY3d 846, 848 [2011]). The court determines only whether the facts alleged fit within any cognizable legal theory (*see Sokoloff v Harriman Estates Dev. Corp.,* 96 NY2d 409, 414 [2001]). Provided that the allegations amount to a cause of action, the court at this stage does not inquire into whether the plaintiff can ultimately establish its allegations (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). However, "conclusory allegations - claims consisting of bare legal conclusions with no factual specificity - are insufficient to survive a motion to dismiss" (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]).

Res Judicata/Collateral Estoppel

Goetz argues that, as the claims here were determined in another action, this complaint must be dismissed according to the doctrines of res judicata and collateral estoppel. The plaintiff in the other action was Worldview's previous CFO. He sued Worldview and others for refusing to honor the terms of his separation agreement with Worldview, and Worldview filed a

third-party complaint against Woodrow and Goetz. In the third-party complaint, Worldview asserted that the separation agreement contained terms unfavorable to Worldview, that Goetz breached its duty to Worldview by drawing up the agreement, and that Woodrow did not have the authority to authorize Goetz to make this agreement on Worldview's behalf.

On July 27, 2017, Justice Rakower dismissed the third-party complaint against Goetz (*Morgan v Worldview Entertainment Holdings, Inc.*, 2017 NY Slip Op 31594[U] [Sup Ct, NY County 2017]). The Justice noted that Woodrow had the authority under Worldview's by-laws to bind Worldview, and that there exists "'a general presumption that the president of a corporation is clothed with the powers which, of necessity, inhere in the position of chief executive'" (*id.* at *7, quoting *Odell v 704 Broadway Condominium*, 284 AD2d 52, 56-57 [1st Dept 2001]). The court determined that Woodrow, as president of a corporation had apparent authority, even if he did not have the actual authority, to carry on the business of Worldview, and that Goetz was under no obligation to investigate Woodrow's status. "There are no allegations that if true, would show that Boyajian had any reason to question Woodrow's authority to bind Worldview Inc., as its CEO" (*id.* at *7).

The doctrines of res judicata and collateral estoppel prevent the litigation of claims and issues already determined in a previous action (*Matter of Hunter,* 4 NY3d 260, 269 [2005]; *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). However, the claims in this case have not already been determined. Plaintiffs do not base their claims in this case on the argument that Woodrow lacked authority to order Goetz to disburse the escrow funds. Rather, plaintiffs argue that, although Woodrow had the authority, Goetz should not have followed Woodrow's instructions to disburse funds. Plaintiffs are correct that the preclusive doctrines do not apply to

this case.

Negligence/Legal Malpractice

The legal malpractice claim is based on wrongful disbursements and commingling. To recover for legal malpractice, the client must prove that the attorney "failed to exercise that degree of ordinary and reasonable skill, knowledge, care, and diligence commonly possessed by a member of the legal profession," and that the attorney's breach of duty proximately caused plaintiff to ascertain actual and ascertainable damages (*Kimm v Chang*, 38 AD3d 481, 481 [1st Dept 2007]; *Hashmi v Messiha,* 65 AD3d 1193, 1195 [2d Dept 2009]). To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]).

Plaintiffs allege that Goetz breached its attorney-client duty by disbursing escrow funds to the wrong parties, that Goetz's act caused Worldview to lose this money, and that Goetz knew or should have known that the payees were not movie production companies or associated with Worldview's business. Goetz correctly contends that the complaint presents no facts from which to infer that Goetz had actual knowledge or should have had knowledge of Woodrow's defalcations. "Factual assertions coupled with conclusory allegations that defendants 'knew or should have known' or 'knew but concealed' are so broad and conclusory as to be meaningless" (*PetEdge, Inc. v Garg,* 234 F Supp 3d 477, 495 [SD NY 2017], quoting *Shields v Citytrust Bancorp, Inc.,* 25 F3d 1124, 1129 [2d Cir 1994]). Indeed, as Goetz points out, the complaint alleges that Woodrow routinely charged Worldview business-related expenses on his personal credit card and then submitted the statements to Worldview for payment (¶ 66). It is not

explained in the complaint how Goetz could have known that some payments were not business-related and were for Woodrow's personal expenses. The record of escrow fund recipients produced with plaintiffs' opposition to the motion lists both entities and individuals. It is not apparent how Goetz could have known which recipients were not associated with movie productions.

Nevertheless, one record that plaintiffs produce with their opposition to Goetz's motion somewhat compensates for the deficiency in the complaint. The record shows payments of $110,000 from the escrow account to a "Constance Woodrow," which, plaintiffs allege, actually identifies her estate. In his opposing affidavit, Patrick Thompson, a Worldview vice-president, alleges that Goetz performed services worth over $85,000 for Woodrow related to Constance Woodrow's estate, and that Goetz's fee for this amount (Goetz states that it was subsequently reduced to $1,757) came out of escrow money. It is alleged that the services that Goetz performed for Woodrow's mother's estate were not related to Goetz's agreements with Worldview, that Goetz knew or should have known this, and that it logically follows that Goetz knew or should have known that the payments to the estate were unrelated to the agreements, and instead related to Woodrow's personal concerns. By identifying the circumstances under which Goetz could have disbursed money to an inappropriate recipient, plaintiffs bolster their allegations of what Goetz knew or should have known about payments, and remove their claim out of the purely conclusory realm. The allegation of wrongful disbursement amounts to a malpractice claim that Goetz failed to act with diligence and care in paying out Worldview's monies in regard to Woodrow's mother's estate and perhaps in other aspects.

While the complaint itself does not allege that Goetz charged Worldview for services

performed for Constance Woodrow's estate, the court regards the allegation as having been added to the complaint. On a motion to dismiss a plaintiff may supplement the complaint with additional allegations in support (*Napoli v Bern,* 60 Misc 3d 1221[A], 2018 NY Slip Op 51193[U] [Sup Ct, NY County 2018]; *see North Star Contr. Corp. v MTA Capital Constr. Co.*, 120 AD3d 1066, 1070 n 1 [1st Dept 2014]). Thus, the court denies that part of the motion to dismiss the malpractice claim based on inappropriate disbursements.

Regarding the commingling part of the malpractice claim, allegedly Goetz's failure to segregate the Film Fund monies damaged plaintiffs in that "they have been unable to conclusively determine how certain of the Film Fund Escrow Funds were used and/or disbursed, and, upon information and belief, whether Film Fund Escrow Funds were distributed to third parties not authorized to receive same . . ." (complaint, ¶ 84). This kind of damage does not amount to the "actual and ascertainable damages attributable to defendants" that a client must allege in order to sustain a malpractice claim (*Fielding v Kupferman,* 65 AD3d 437, 442 [1st Dept 2009]). As plaintiffs fail to state a proper malpractice claim based on commingling, the court dismisses that part of the malpractice claim.

Breach of Contract

Nonetheless, the commingling allegation does add up to a claim that Goetz breached the Film Fund Agreements. While a breach of contract claim premised on the attorney's failure to exercise due care or to abide by general professional standards is redundant of the malpractice claim (*Senise v Mackasek*, 227 AD2d 184, 185 [1st Dept 1996]), a claim that the attorney promised to discharge a specific task and breached the promise states a claim for breach of contract (*Sage Realty Corp. v Proskauer Rose LLP,* 251 AD2d 35, 39 [1st Dept 1998], citing

Saveca v Reilly, 111 AD2d 493, 494-495 [3d Dept 1985]). A breach of contract claim can be based on a violation of a client's instructions (1 Legal Malpractice § 8:27 [Westlaw 2018 ed]). As Goetz points out, while New York Rule of Professional Conduct 1.15 prohibits commingling the lawyer's money with client or third-party money, it does not require the segregation of funds of multiple clients or third-parties (Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.15 [a]). However, plaintiff does not allege violation of rules. Instead, the allegations are that the Film Fund Agreements provided expressly for the segregation of the escrow funds and that Goetz violated this provision.

Goetz points out that damage allegedly caused by the commingling is not proper contract damage. Contract damages include the value of the promised performance, called general damages, or compensation for additional losses incurred as a result of the breach (*Schonfeld v Hilliard,* 218 F3d 164, 175-176 [2d Cir 2000]). Nothing like this is alleged but, as nominal damages are always available in contract actions, the court denies that part of the motion to dismiss the contract claim based on commingling (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 95 [1993]; *Matter of Schleifer v Yellen,* 158 AD3d 512, 513 [1st Dept 2018]).

Redundant Causes of Action

Where claims of negligence, breach of contract, and breach of fiduciary duty rely on the same facts and seek identical relief as a claim for legal malpractice, those claims are duplicative and will be dismissed (*Joyce v Thompson Wigdor & Gilly LLP,* 2008 WL 2329227, *14, 2008 US Dist LEXIS 43210, *40 [SD NY 2008] [collecting cases]; *Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 8–9 [1st Dept 2008]; *Murray Hill Invs. v Parker Chapin Flattau & Klimpl,* 305 AD2d 228, 229 [1st Dept 2003]; *Senise*, 227 AD2d at 185). This

rule applies as well to claims of aiding and abetting fraud and aiding and abetting fiduciary duty when based on the same alleged misconduct as the malpractice claim (*135 Bowery LLC v Meridith Young Sofer,* 2016 NY Slip Op 31012[U], *7 [Sup Ct, NY County 2016]; *Bodner v Grunstein,* 2011 NY Slip Op 33834[U] [Sup Ct, NY County 2011]). A fraud claim that is not based on an allegation of independent intentionally tortious conduct and that fails to allege separate and distinct damages is duplicative of a legal malpractice claim (*Carl v Cohen,* 55 AD3d 478, 478-79 [1st Dept 2008]). A cause of action for unjust enrichment based on the same allegations as a legal malpractice claim will be dismissed (*Spinale v Tenzer Greenblatt,* 309 AD2d 632, 632 [1st Dept 2003], *cf Johnson v Proskauer Rose LLP*, 129 AD3d 59, 70 [1st Dept 2015]).

Here, all of the claims are based on commingling or improperly disbursing escrow funds. The following claims are dismissed as duplicative of the legal malpractice claim: breach of contract based on wrongful disbursements under the Worldview Agreement; aiding and abetting fraud; breach of fiduciary duty; aiding and abetting Goetz's breach of fiduciary duty by Boyajian; and unjust enrichment claim.

As already discussed, the commingling claim amounts to a breach of contract claim, and is not dismissed as duplicative of the malpractice claim. The malpractice claim is based on wrongfully disbursing the client's funds, while the commingling claim is based on failure to segregate the funds.

With respect to unjust enrichment, the complaint alleges that Goetz paid itself out of Worldview's escrow funds for services performed for Woodrow unrelated to Worldview's business (¶ ¶ 87, 195). Goetz received "fees from Worldview Inc. for its time and expenses

associated with the maintenance and improper use of the Goetz IOLA account" (¶ 212). Plaintiffs seek the return of these fees. The return of fees is allowed as a remedy for malpractice claims (*Mecca v Shang,* 258 AD2d 569, 570 [2d Dept 1999]). A court will dismiss this claim as duplicative, when it relies on the same allegations as the malpractice claim, and seeks the same damages (*id.*; *see Balanoff v Doscher,* 140 AD3d 995, 997 [2d Dept 2016]; *Holloway v Rubman,* 2010 NY Slip Op 30471[U] [Sup Ct, NY County 2010]). Any wrongly paid fees are recoverable under the malpractice claim.

"[I]n the context of an action asserting attorney liability, the claims of malpractice and breach of fiduciary duty are governed by the same standard of recovery" (*Robinson v Day*, 2011 NY Slip Op 33758[U] [Sup Ct, NY County 2011], citing *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004]). Because the court dismisses the breach of fiduciary duty claim as duplicative, there can be no cause of action for aiding and abetting breach of fiduciary duty against Boyajian (*see Kassover v Prism Venture Partners, LLC,* 53 AD3d 444, 449 [1st Dept 2008]). Thus, the one claim against Boyajian is dismissed.

The court dismisses the breach of the implied covenant of good faith and fair dealing, based on the Worldview Agreement, as redundant of the breach of contract claim. When the same conduct forms the basis for breach of contract and for breach of the implied covenant, and the damages are from the same source, the latter claim is generally dismissed as duplicative of the former (*Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce,* 70 AD3d 423, 426 [1st Dept 2010]; *Canstar v J.A. Jones Constr. Co.*, 212 AD2d 452, 453 [1st Dept 1995]).

Accounting

"The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest" (*Palazzo v Palazzo*, 121 AD2d 261, 265 [2d Dept 1986]). "Where an attorney collects money and retains it, he is bound to render an account thereof to the client when called upon to do so" (*Kleckner v Levine,* 12 AD2d 788, 788 [2d Dept 1961]). Worldview and Goetz were attorney and client; that is a confidential and fiduciary relationship. The complaint alleges that Worldview entrusted its escrow funds to Goetz and that Worldview does not know exactly what was done with those funds. Goetz contends that there has already been an accounting because that is how plaintiffs found out about Woodrow's alleged misconduct. However, when there is a fiduciary relationship between the parties, as here, there is a right to an accounting even if all the relevant facts are already known to the party seeking the accounting (*Koppel v Wien, Lane & Malkin,* 125 AD2d 230, 234 [1st Dept 1986]). Moreover, plaintiffs say that they are not in possession of all the relevant information. Thus, the court declins to dismiss that part of the motion for an accounting.

Exculpatory provisions in the Film Fund Agreement(s)

Goetz argues that it is exculplated from plaintiffs' claims under the provisions of the Film Fund Agreements. While exculpatory agreements have applied to escrow agents who were not attorneys (*see Platinum Equity Advisors, LLC v SDI, Inc.*, 2014 WL 3670674, *4 [Sup Ct, NY County 2014]), these agreements are disfavored as to attorneys, particularly when the attorney drafted the agreement with the exculpatory provision (*see Galasso, Langione, & Botter, LLP v Galasso*, 53 Misc 3d 1202[A], 2016 NY Slip Op 51308[U], n 50 [Sup Ct, Nassau County 2016]).

Boyajian drafted the Film Fund Agreements.

Both as escrow agent and as attorney, Goetz owed Worldview a fiduciary duty (*Greenapple v Capital One, N.A.*, 92 AD3d 548, 549 [1st Dept 2012]; *Ulico,* 56 AD3d at 8). The attorney-client relationship comprises a "unique fiduciary reliance," whereby the client is entitled to depend on the attorney "maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the clients' interests over the lawyer's" (*Matter of Cooperman*, 83 NY2d 465, 472 [1994]). "An agreement prospectively limiting a lawyer's liability to a client for malpractice or other kinds of civil liability is unenforceable" (Restatement [Third] of the Law Governing Lawyers § 54, Comment *b*).

Section 2 (e) states that the escrow agent is released from liability provided that it holds the money in accordance with the agreement's terms and pays such money to the "designated production company . . . " This provision does not exculpate Goetz, because plaintiffs allege that Goetz paid at least some money other than to a production company. Goetz points out that the agreement does not require it to investigate any payments provided that the authorizing documents are correct and that the third-party investors and Worldview release Goetz against all claims arising out of Goetz following Woodrow's instructions (¶ 2 [e]). Nonetheless, the court does not see how an attorney can be exculpated in regard to the misappropriation of funds, even if the attorney had no duty to investigate or did not benefit.

The Film Fund Agreements provide that the escrow agent is not liable for any act unless taken in bad faith, willful disregard of the agreement, or gross negligence (¶ 5). Goetz argues that this provision means that it cannot be charged with negligence. As already stated, that is incorrect.

"Willful," is accorded at least two meanings. "Willful default merely means a voluntary act constituting a default of the agreement" (*Madison 68 Realty LLC v 11 East 68th Street LLC*, 2017 NY Slip Op 32051[U], *7 [Sup Ct, NY County 2017]). Insofar as "willful" means voluntary, a breach of contract, that is alleged against Goetz, is a willful act. The word may also denote "conscious wrong or evil purpose on the part of the actor, or at least inexcusable carelessness, whether the act is right or wrong" (Black's Law Dictionary [10th ed 2014]). Goetz is correct that plaintiffs allege nothing indicative of bad faith, gross negligence, or evil purpose.

It is hereby **ORDERED** that the motion to dismiss the complaint by defendants Goetz Fitzpatrick LLP and Aaron Boyajian, Esq. is partly granted and the sixteenth, seventeenth, eighteenth, nineteenth, twentieth, and twenty-second causes of action are dismissed as against those defendants; and the motion is otherwise denied; and it is further

ORDERED that the complaint is dismissed in its entirety as against defendant Aaron Boyajian, Esq., and it is further

ORDERED that defendant Goetz Fitzpatrick LLP is directed to file an answer to the complaint within 10 days after being served with a copy of this order with notice of entry; and it is further

ORDERED that the parties are to appear for a status conference on January 22, 2019 at 10:30am.

Dated: 12-24-2018

ENTER:

MELISSA A. CRANE, J.S.C.

HON. MELISSA A. CRANE
J.S.C.