SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

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ANDREA MAGDER,

Plaintiff,

- against -

BELTON LEE, MADHATTAN FILM COMPANY GLOBAL, LLC, CHRISTOPHER BONGIRNE, MARC JACOBSON, P.C., MARC JACOBSON,

Defendants,

- and -

DINING WITH ALEX, LLC,

Nominal Defendant.

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Index No. 653917/14

Motion Sequence Nos. 001, 002 and 003

HON. SALIANN SCARPULLA:

Plaintiff Andrea Magder ("plaintiff" or "Magder") brings this action against defendants Belton Lee ("Lee"), Madhattan Film Company Global, LLC ("MFCG"), Christopher Bongirne ("Bongirne"), Marc Jacobson, P.C. ("MJPC"), Marc Jacobson ("Jacobson") (Jacobson, together with MJPC, "Jacobson defendants") and nominal defendant Dining with Alex LLC ("DWA" or "Company"). The complaint asserts causes of action for: (1) breach of DWA's Operating Agreement ("operating agreement") against Lee and MFCG; (2) breach of the DWA Producer Agreement ("producer agreement") against Lee and MFCG; (3) tortious interference with contract against Lee, Bongirne and Jacobson; (4) breach of fiduciary duty against Lee; (5) breach of fiduciary

duty against the Jacobson Defendants; and (6) legal malpractice against the Jacobson Defendants.

The Jacobson defendants and Bongirne move to dismiss the complaint as against them (motion sequence numbers 001 and 002, respectively), pursuant to CPLR 3211 (a) (1) and (7). Lee, MFCG and DWA also move to dismiss the complaint as against them (motion sequence number 003), pursuant to CPLR 3211 (a) (1), (3), (7) and (8). Motion sequence numbers 001, 002 and 003 are consolidated for disposition.

Background

Unless indicated otherwise, the following facts are taken from the complaint and are presumed to be true for purposes of these motions.

In 2012, plaintiff and nonparty Quintin Cline ("Cline") collaborated on a screenplay titled "Dining with Alex" ("screenplay"). On May 28, 2013, the United States Copyright Office issues a Certificate of Registration for the screenplay.

In order to produce and distribute a feature film based on the screenplay ("project"), Magder entered discussions with Lee. Lee allegedly promised to secure 80 percent of the financing from Chinese investors, who would, in exchange, receive the right to distribute the film in China. Accordingly, MFCG, "the LLC vehicle Lee used to the [sic] finance the Project," entered into a "Co-Production Agreement" ("Co-Production Agreement") with Weishen (Shanghai) Film and Television Media Development LTD. ("Weishen"), the primary Chinese investor, regarding the production and distribution of the Chinese version of the film.

Magder, Lee and MFCG formed DWA to "serve as the vehicle for developing, financing, producing, distributing and otherwise engaging in transactions in connection with the Project." Lee and plaintiff filed DWA's Articles of Organization on May 23, 2014. Magder also recruited Bongirne to be a producer for the project.

According to the complaint, in June 2014, Lee and Bongirne hired the Jacobson defendants as DWA's legal counsel. Allegedly, Magder first became aware of the engagement through an email from Jacobson, dated June 7, 2014, which "confirm[ed] the arrangement to retain MJPC." Magder allegedly objected to the $100,000 retainer, but Lee signed the agreement without her and "Jacobson then held himself out to be not only DWA's legal counsel, but as 'production counsel.'" As alleged by Magder, "[a]lthough [she] did not approve of his engagement, upon Jacobson's formal retention as DWA's legal counsel, [Magder] requested that Jacobson keep her apprised of all communications regarding business arrangements and negotiations in connection to the Project."

On June 12, 2014, Magder and Cline entered into a "Purchase Agreement" with MFCG ("purchase agreement"), pursuant to which MFCG agreed to pay $65,200 for the rights to the screenplay. Magder and Cline were to be paid pursuant to a payment schedule, which included a payment upon payment to Ross Katz ("Katz"), whom DWA hired to rewrite the script. The purchase agreement also provided: "[n]otwithstanding anything contained herein, it is understood and agreed that [MFCG's] decision in connection with any and all creative decisions and business decisions in connection with the Picture shall be final and binding."

Simultaneous with the Purchase Agreement, MFCG entered into an agreement titled "Assignment and Assumption Agreement" with DWA ("assignment agreement"). Pursuant to the assignment agreement, MFCG "assigned to [DWA] (i) all of [MFCG's] right title and interest (including all copyrights) in and to the [screenplay], and (ii) the Purchase Agreement and all of [MFCG's] rights and obligations thereunder."

Also on June 12, 2014, Lee, Magder and MFCG entered into the operating agreement. Pursuant to which "Magder and Lee [were] Managing Members of DWA, with 30 and 70 membership units respectively [and] MFCG [was] its sole 'class A member' (with 80 Class A membership units)." The operating agreement provided that, except as otherwise provided by the agreement or law, "no approval or consent of the Class A members shall be required with respect to any actions taken by the Managing Members on behalf of the Company." With respect to the managing members' responsibilities and authority, the operating agreement states:

> **SECTION 8.1. Compensation and Appointment.** (a) Subject to the terms of this Agreement, the business, property and affairs of the Company shall be managed and directed exclusively by the Managing Members. No other Member shall have the power to so act or bind the Company unless agreed to in writing by the Managing Members. . . .
>
> **SECTION 8.2 Approval of Company Matters.** (a) subject to clauses (c) and (d) directly below and terms of any producer agreements entered into by the Company and a producer, and for so long as he is a Managing Member of the Company it is agreed that Lee will generally see to and control the day to day business operations of the Company and, accordingly, will (on behalf of the Company) see to the negotiation and execution of agreements with any other Persons (provided that any producer agreements must be

approved by both Managing Members), the disbursement of funds (which will be in accordance with the agreed to budget for the Picture) and other business matters relating to the production and distribution of the Picture, provided that (i) Lee will confer with Magder on all material decisions before taking any action in connection therewith, (ii) no third parties will be admitted as members of the Company unless agreed to in writing by both Lee and Magder, (iii) no distribution agreement will be executed with respect to the Picture without the prior written consent of both Lee and Magder, (iv) the Script will not be sold or licensed to any other Person without the prior written consent of Lee and Magder and (v) no accountants, sales agents, attorneys or other professional will be retained or terminated by the Company without the prior written consent of both Lee and Magder.

(b) Subject to clauses (c) and (d) directly below and the terms of any producer agreements entered into by the Company and a producer, and for so long as she is a Managing Member of the Company Magder will control all creative decisions regarding the Picture and, accordingly will (on behalf of the Company) (i) have final say over all decisions regarding the Picture's script, talent, the director and writers engaged for the Picture, and the final cut of the Picture, and (ii) execute and negotiate any agreements relating thereto, provided that Magder will confer with Lee on all material creative decisions before taking any actions in connection therewith. Magder approves of Ross Katz to re-write the script and as Director of the Picture. Magder approves of Chris Bongirne to be a Producer of the Picture.

(c) Notwithstanding the foregoing clauses (a) and (b), Lee and Magder recognize that under the Co-Production Agreement Weishen is granted the right to edit and distribute a Chinese version of the Picture in the Chinese Market, and Magder will not have creative control over such version of the Picture. . . .

(d) Per the Co-Production Agreement, and notwithstanding anything contained herein to the contrary, MFCG will have the right to approve all material actions taken by the Company, including but not limited to: (i) any single expenditure in excess of $5,000; (ii) approval of the

> casting of all material parts in the Picture; (iii) increasing the Budget in excess of $6,000,000; and (iv) hiring or firing the director, producers or other key crew members."

In addition, the operating agreement also provides in Section 13.15 that:

> In the preparation of this agreement, Marc Jacobson, PC represented Belton Lee, and Stephen Goldstein represented Andrea Magder. All parties to this agreement hereby waive any conflict of interest arising from the prior or concurrent representation of [MFCG] and any conflict that may arise as a result of the services provided by Mr. Goldstein in connection with the formation of the Company. If any action, arbitration or other proceeding is commenced among the parties to this agreement, then Marc Jacobson, PC shall not represent any party, and Stephen Goldstein shall not represent any party.

Lee, Magder, and Bongirne also entered into a producer agreement with DWA, dated June 12, 2014, which provides that Magder, Lee and Bongirne would "work cooperatively to produce a world class motion picture in an efficient, quality manner." In return for her services as producer, Magder would receive $125,000. However, up to $60,000 of that compensation could be deferred, and the remainder was to be paid at different phases of the project. The first payment was due "at the commencement of pre-production, now scheduled to commence on or about July 1, 2014." The producer agreement also provides that Magder would receive thirty percent of the net proceeds, "after payment . . . to all third parties," as her "Contingent Distribution."

In addition, the producer agreement incorporated "Standard Terms and Conditions," which provided, in pertinent part:

> A-1. Employee's Services: . . . Company's judgment shall be final and controlling in all matters respecting the

> rendition of Employee's services hereunder including but not limited to any and all matters involving artistic taste or judgment. . . .
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> . . .
>
> A-5. Default:
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> A-5.1. Upon any breach by Employee of any of the provisions of this Agreement, Company shall immediately have the right, exercisable at any time after becoming aware of such breach, to suspend Employee's engagement hereunder or to terminate this Agreement by so notifying Employee in writing after providing Employee forty-eight (48) hours to cure such breach (and any default under this Agreement will be subject to such right to cure).

Stephen Goldstein ("Goldstein") represented Magder during the negotiations of the producer agreement, purchase agreement, assignment agreement, and operating agreement (together the "agreements").

As alleged in the complaint, after Magder executed the agreements, Lee withheld material information regarding the project and DWA, acted on behalf of DWA to enter business arrangements without consulting Magder, and "even assumed full creative decision-making." In particular, Lee allegedly never told Magder the terms, or provided a copy, of the Co-Production Agreement and opened a bank account for DWA, without notifying Magder or allowing her access to the account. The complaint also avers that "Lee and Bongirne made sure that Magder would never see any of Katz's drafts, and would not be able to comment on them." Allegedly, the final version of Katz's script was the only draft Magder ever saw. According to the complaint, although Magder was dissatisfied with the final product, Lee and Bongirne "ignored [her] concerns and

disseminated the script to third parties for the purpose of moving forward with the production, **without Magder's knowledge or consent**, and . . . paid Katz $150,000.00 for his efforts." (Emphasis in original.) The complaint states that "Lee unilaterally designated the disbursement of Company funds to Katz and other individuals without consulting Magder prior to the disbursement," while simultaneously withholding payment that was due to Magder and Cline under the purchase agreement.

With respect to Jacobson, the complaint states that he "failed to apprise [Magder] of various business arrangements, communications, and negotiations that would have a material impact on DWA and the production of the film," and that when he did include Magder on e-mails, "they were not only carefully culled, but [Jacobson] extracted the attachments transmitted within the emails." Allegedly, when Magder sought to obtain a copy of the Co-Production Agreement, Jacobson responded, in a July 21, 2014 email, that he could not locate it and that he was not sure that he had it.

By letter dated July 25, 2014, Magder and Cline, through their attorney, informed MFCG and Lee that DWA had not paid $21,100 owed to Magder, and $16,300 owed to Cline, pursuant to the purchase Agreement, and that, as a result of the breach, "the transfer of the rights to the Screenplay as provided therein [was] null and void and all right, title and interest in and to the Screenplay remain[ed] [f]ully vested with [plaintiff and Cline]." The letter also stated that MFCG and Lee, in his individual capacity, were in breach of the operating agreement, because Lee excluded Magder from negotiations with Katz, prevented Magder from receiving earlier drafts of Katz's script and sent the

script to third-parties over Magder's objections. The letter gave Lee and MFCG 72 hours to cure.

In response, Jacobson, writing on behalf of DWA, sent a letter dated July 28, 2014, in which DWA denied that it breached any of the agreements and stated that Magder had violated the producer agreement by failing to work cooperatively and efficiently with the other producers. The letter also informed Magder that she had been terminated as a producer and removed as a managing member of DWA, and it warned her of possible counterclaims, should she pursue litigation. With respect to the payments owed under the purchase agreement, the letter stated:

> By now you are both aware that Mr. Cline received the balance of the payment due to him under the Purchase Agreement. The remaining $21,100 due under the Purchase Agreement is now in [MJPC's] Escrow/IOLTA account, so there should be no concern about whether the funds are available. [MJPC] is authorized to release these sums upon a complete resolution of all outstanding matters between the Company and Ms. Magder.

As alleged in the complaint, "[t]here was no prior discussion of 'reserving' any funds owed to [plaintiff] in MJPC's Escrow/IOLA account" and "[plaintiff] never signed an escrow agreement."

On September 23, 2014, Jacobson, on behalf of DWA, commenced an action against Magder, in this court, captioned *Dinning with Alex, LLC v Magder*, Index No. 652915/14, seeking "'judgment of no liability because Defendant [Magder] did not withdraw her instructions to her attorney to file suit unless certain requests or demands were met within a certain time frame, which time frame passed weeks ago.'" Shortly

thereafter, Magder filed an action in the United States District Court for the Southern District of New York, asserting causes of action for copyright infringement, breach of contract, and breach of fiduciary duties, against Lee, MFCG, Bongirne, the Jacobson Defendants and DWA, captioned *Magder v Lee*, Duffy, J. case No. 14 Civ 8461 [JFK] (the "federal action"). As alleged in the complaint in this action, after Magder commenced the federal action, Jacobson released the funds owed to her under the purchase agreement, and DWA removed Jacobson as counsel and voluntarily dismissed its state court action. Thereafter, on December 3, 2014, the Court in the federal action (Judge K. Duffy), without addressing plaintiff's breach of contract and breach of fiduciary duty claims, found that the purchase agreement precluded Magder's copyright infringement claim. Magder voluntarily dismissed the federal action, and commenced this action by filing a summons and complaint on December 22, 2014.

Discussion

"[O]n a motion to dismiss the complaint for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true." *Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 (1st Dept 2004). "However, allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration." *Caniglia v. Chicago Tribune-New York News Syndicate*, 204 A.D.2d 233, 233-234 (1st Dep't 1994). Where the defendant seeks to dismiss the complaint based upon documentary evidence, "the documentary evidence [must] utterly refute[] plaintiff's factual allegations, conclusively

establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (internal citation omitted).

Lee, MFCG and DWA contend that the complaint should be dismissed as against them because the court lacks personal jurisdiction over them due to improper service and because the complaint fails to state a cause of action. Magder counters that the allegations are sufficient to survive a pre-answer motion to dismiss and that, in any event, the motion should be denied in its entirety as untimely.

For the reasons set forth on the record at oral argument on April 22, 2015, the matter of service on defendants Lee and MFCG will be heard at a traverse hearing. Additionally, at oral argument, Magder's counsel acknowledged that DWA was named as a nominal defendant out of "an abundance of caution," without asserting any derivative or direct claims against it, and agreed to remove DWA as a defendant. Accordingly, the complaint is dismissed as against DWA.

The third cause of action alleges tortious interference with contract against Lee, Bongirne and Jacobson. Jacobson contends that the tortious interference with contract claim is duplicative of the legal malpractice claim and that, in any event, the complaint fails to identify any specific actions taken by Jacobson that induced the alleged breaches of the producer agreement and the operating agreement. Bongirne likewise contends that the complaint fails to allege how he procured the purported breaches. In addition, Bongirne argues that the claim fails because neither the producer agreement nor the operating agreement was actually breached.

To establish a cause of action for tortious interference with contractual relations, plaintiff must allege: "(1) the existence of a valid contract between [plaintiff] and [a third-party]; (2) defendant['s] knowledge of that contract; (3) defendant['s] intentional procuring of the breach of that contract; and (4) damages. Specifically, a plaintiff must allege that the contract would not have been breached "'but for' the defendant's conduct." *Burrowes v Combs*, 25 AD3d 370, 373 (1st Dept 2006) (internal citations omitted).

A claim that "[arises] out of the same facts as the legal malpractice action and [does] not involve any additional damages, separate and distinct from those generated by the alleged malpractice," will be dismissed as duplicative. *Lusk v Weinstein*, 85 AD3d 445, 445-446 (1st Dept 2011). "The key to determining whether a claim is duplicative of one for malpractice is discerning the essence of each claim." *Johnson v Proskauer Rose LLP*, 129 AD3d 59, 68 (1st Dept 2015).

Here, the complaint seeks damages in excess of $500,000 for the tortious interference with contract claim, whereas with respect to the legal malpractice claim, it seeks "other compensation," as well as disgorgement of legal fees and punitive damages. Even assuming that the $500,000 is "separate and distinct," (*Lusk*, 85 AD3d at 445) from the "other compensation," the "essence" of both claims is that Jacobson facilitated Lee in ousting Magder from the project. *Johnson,* 129 AD3d at 68. Therefore, the tortious interference with contract claim against Jacobson is dismissed as duplicative of the legal malpractice claim. *See Weksler v Kane Kessler, P.C.*, 63 AD3d 529, 531 (1st Dept 2009).

In any event, the complaint fails to allege that either Jacobson or Bongirne procured the alleged breaches of the producer agreement and the operating agreement. In other words, the complaint fails to allege that, but for Bongirne and Jacobson's conduct, Lee and MFCG would have performed. The complaint alleges that Bongirne acted in concert with Lee to breach the agreements. With respect to Jacobson, the complaint merely states that he "facilitated" the breaches, and "equipped" Lee and Bongirne with the legal tools to breach the Agreements.

Nothing in the complaint states or allows the reasonable inference that, but for Bongirne and Jacobson, Lee would have performed. To the contrary, the complaint alleges that Lee had a "pre-conceived plan to take over the Project," and that, "with the assistance of Jacobson and Bongirne, Lee wrested control of DWA and the Project from Magder. Consequently, Magder's contentions are insufficient to state a cause of action against defendants for tortious interference with contractual relations." *Burrowes*, 25 AD3d at 373.

For the foregoing reasons, the third cause of action is dismissed as against Jacobson and Bongirne.

The fifth cause of action alleges breaches of fiduciary duties against the Jacobson defendants, and the sixth cause of action asserts a cause of action against the Jacobson defendants for liability based upon legal malpractice.

The Jacobson defendants argue that the malpractice claim must be dismissed for lack of privity and failure to state actual damages proximately caused by the Jacobson

defendants' alleged negligence. Additionally, the Jacobson defendants assert that the complaint fails to states a claim for breach of fiduciary duty.

"An action for legal malpractice requires proof of the attorney's negligence, a showing that the negligence was the proximate cause of the plaintiff's loss or injury, and evidence of actual damages." *Pellegrino v File*, 291 AD2d 60, 63 (1st Dept 2002). While "[p]laintiff is not obliged to show, at this stage of the pleadings, that [she] actually sustained damages," she must plead "allegations from which damages attributable to [defendant's conduct] might be reasonably inferred." *InKine Pharm. Co. v Coleman*, 305 AD2d 151, 152 (1st Dept 2003) (internal quotation marks and citation omitted). "Moreover, [plaintiff] must plead specific factual allegations establishing that but for counsel's deficient representation, there would have been a more favorable outcome to the underlying matter." *Dweck Law Firm v Mann*, 283 AD2d 292, 293 (1st Dept 2001).

Generally, "New York courts impose a strict privity requirement to claims of legal malpractice; an attorney is not liable to a third party for negligence in performing services on behalf of his client." *Lavanant v General Acc. Ins. Co. of Am.,* 164 AD2d 73, 81 (1990), *affd* 79 NY2d 623 (1992). However, courts will permit a malpractice claim, in the absence of privity, where the "relationship sufficiently approach[es] privity," (*Estate of Schneider v Finmann*, 15 NY3d 306, 309 [2010]) or where a third party suffers harm as a result of "professional negligence in the presence of fraud, collusion, malicious acts or other special circumstances." *Good Old Days Tavern v Zwirn*, 259 AD2d 300, 300 (1st Dept 1999); *see also Green v Fischbein Olivieri Rozenholc & Badillo*, 119 AD2d 345, 350 (1st Dept 1986) ("an attorney may be held liable to a nonclient as a consequence

of the attorney's wrongful or improper exercise of authority, or where the attorney has committed fraud or collusion or a malicious or tortious act" [internal quotation marks and citations omitted]). A claim of fraud or collusion must be stated with particularity. CPLR 3016 (b); *see Griffith v Medical Quadrangle*, 5 AD3d 151, 152 (1st Dept 2004).

To establish a breach of fiduciary duty claim, a plaintiff must allege: (1) the existence of a fiduciary relationship; (2) misconduct by the defendant; and (3) damages. *Burry v Madison Park Owner LLC*, 84 AD3d 699, 700 (1st Dept 2011). Where the claim for breach of fiduciary duty is "premised on the same facts and seek[s] the identical relief sought in the legal malpractice cause of action, [it] is redundant and should be dismissed." *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 (1st Dept 2004); *see also InKine Pharm. Co.*, 305 AD2d at 152.

Here, the complaint states that Jacobson was in an "attorney-client relationship with [DWA]." While plaintiff contends that, as a managing member of DWA, she may maintain a malpractice claim in her own right, "[i]t is well settled that a corporation's attorney represents the corporate entity, not its shareholders or employees." *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 562 (2009) (stating that a law firm's representation of a "limited partnership, without more, did not give rise to a fiduciary duty to the limited partners"). *Good Old Days Tavern* (259 AD2d at 300), upon which plaintiff relies, does not require a different result. There, the court allowed the president and sole shareholder of a corporation to pursue a personal malpractice claim against the corporation's attorney, because their relationship was "tantamount to one of contractual privity." *Id.* at 300. Here, the complaint is devoid of allegations that Jacobson's

relationship with plaintiff approached privity and, in fact, plaintiff had her own attorney during the negotiations of the agreements and the subsequent dispute. Therefore, *Good Old Days Tavern* is distinguishable on its facts. The complaint fails to allege that an attorney-client relationship existed between Magder and the Jacobson defendants.

The complaint also seeks to extend liability to the Jacobson defendants under a theory of collusion, alleging that "Bongirne and Lee gave Jacobson a windfall retainer payment of $100,000 (while excluding [plaintiff] from the arrangement), with the apparent understanding that Jacobson and his firm would do their bidding rather than honor the objectives of the LLC as a whole." In support of this theory, the complaint states that, during the negotiations of the agreements, Magder's attorney, Goldstein, had "a personal relationship with both Bongirne and Jacobson," and that Jacobson "encouraged and facilitated such stifled negotiation" of the agreements "by neglecting to caution Magder to obtain independent uninterested counsel." The complaint also alleges that Jacobson "failed to apprise [Magder] of various business arrangements, communications, and negotiations," "carefully culled" emails, excluded "the attachments transmitted within the emails," and failed to provide plaintiff with a copy of the Co-Production Agreement.

These allegations are insufficient to allow a reasonable inference of collusion. First, plaintiff does not explain how Goldstein's possible conflict of interest or alleged failure to represent her interests gives rise to a malpractice claim against the attorney representing the counterparties to the agreements. Rather, as part of her effort to establish an exception to the privity requirement, Magder alleges that Jacobson failed to

advise her to hire an "independent uninterested counsel," but this presumes a duty to advise Magder, which as explained above, Jacobson did not owe Magder. *See Eurycleia Partners, LP*, 12 NY3d at 562; *Federal Ins. Co.*, 47 AD3d at 59.

Second, the complaint fails to plead collusion with requisite detail. It does not state in what manner Goldstein failed to represent Magder's interests during the negotiations of the agreements, what information Jacobson omitted from the "culled" emails, or which of the "various business arrangements, communications, and negotiations" Jacobson failed to apprise Magder. The only detailed allegation states that Jacobson failed to provide Magder with a copy of the Co-Production Agreement, but Magder fails to plead how this alleged failure constituted malpractice attributable to Jacobson.

Therefore, Magder's allegations are insufficient to allow a reasonable inference of collusion. *See Griffith*, 5 AD3d at 152 (affirming finding that plaintiff minority shareholder lacked standing to assert malpractice claim against corporate attorney, where "allegations of collusion and fraud were not pleaded in sufficient detail"); *see also Griffin v Anslow*, 17 AD3d 889, 893 (3d Dept 2005) (finding plaintiff failed to state a claim for malpractice against company's attorney, where, among other things, plaintiff had his own attorney during the dispute and the complaint contained only "factually unsupported assertions of collusion").[1]

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[1] The court has reviewed *NAMA Holdings, LLC v Greenberg Traurig, LLP* (62 AD3d 578 [1st Dept 2009]) and *Aranki v Goldman & Assoc., LLP* (34 AD3d 510 [2d Dept 2006]), upon which plaintiff relies. Both cases involved complaints that alleged collusion with "sufficient detail" and are, therefore, distinguishable on their facts.

The complaint also alleges in the July 28, 2014 letter, Jacobson "twist[ed] the language of the Operating Agreement to grant Lee and MFCG rights they did not actually possess," removed Magder as a producer and a managing member of DWA without following proper procedure, "converted funds due and owing to Magder" by "plac[ing] them in MJPC's escrow account," and "facilitated a lawsuit on behalf of DWA and Lee against Magder."

The allegations regarding the contents of the July 28, 2014 letter and the subsequent lawsuit fail to state a claim for malpractice against the Jacobson defendants. Magder was in an adversarial relationship with DWA, alleging that it had breached the purchase agreement, among other things, and Magder was represented by her own counsel. As explained above, Jacobson represented DWA and was not in privity with Magder. Therefore, any failure on his part to properly advise DWA with respect to Magder's removal, thereby "render[ing plaintiff] fully disenfranchised," did not give rise to a malpractice claim and Magder's conclusory allegations of collusion do not require a different result. *See Griffin*, 17 AD3d at 893 (plaintiffs failed to state a claim for legal malpractice based on "claims that defendant, as counsel for Griff-Inns, failed to require the directors to comply with proper corporate procedures in effecting plaintiffs' ouster from the corporation[, as such claims did] not establish privity" and neither did "factually unsupported assertions of collusion").

The allegation that Jacobson "converted funds due and owing Magder," by "plac[ing] them in MJPC's escrow account" without plaintiff's consent, in order to "punish" her for seeking to enforce her contractual rights, states the sort of "malicious or

tortious act" that serves as an exception to the strict privity requirement of a malpractice claim. *Green*, 119 AD2d at 350; *see also Brown v Mohammed*, 31 Misc 3d 1225(A), 2011 NY Slip Op 50847(U), *3 (Sup Ct, Kings County 2011) (third-party plaintiff stated claim for malpractice, in the absence of attorney-client relationship, by alleging, among other things, that attorney had "committed a 'tortious act' by converting [third-party plaintiff's] funds"). However, here, the complaint states that, while "not timely," Magder ultimately did receive the funds. Therefore, the complaint fails to allege that Magder "sustained some actual ascertainable damages" as a result of this conduct. *Pellegrino*, 291 AD2d at 63.

In addition, the complaint fails to allege that Jacobson's conduct proximately caused Magder's damages. The complaint states that, by "direct and proximate result of Jacobson's negligence and/or malpractice, Plaintiff was unable to protect her interests during the negotiations of the agreements. . . ." As explained above, the complaint is devoid of any factual allegations regarding how Magder's attorney failed to represent her interests during the negotiations or, for that matter, why such a shortcoming should be attributed to the Jacobson defendants. Therefore, the complaint's failure to "plead specific factual allegations establishing that, but for counsel's deficient representation, there would have been a more favorable outcome," requires dismissal of the malpractice claim. *Dweck Law Firm*, 283 AD2d at 293; *see also Pellegrino*, 291 AD2d at 64.

For the foregoing reasons, the Jacobson defendant's motion to dismiss the sixth cause of action is granted.

The breach of the fiduciary duty claim is dismissed as duplicative of the malpractice claim, "since [it] arose from the same facts as the legal malpractice claim and allege[s] similar damages." *InKine Pharm. Co.*, 305 AD2d at 152.

In addition, to the extent that the breach of fiduciary duty claim is based upon the Jacobson defendants' alleged conflicts of interest and commencement of a lawsuit against Magder on behalf of DWA, the claim is undermined by the documentary evidence. The operating agreement expressly provided that, "[i]n the preparation of [the operating agreement], Marc Jacobson, PC represented Belton Lee, and Stephen Goldstein represented Andrea Magder."

Moreover, section 13.15 of the operating agreement states that, "[i]f any action, arbitration or other proceeding is commenced *among the parties to this agreement*, then Marc Jacobson, PC shall not represent any party." (Emphasis added.) The parties to the operating agreement are Lee, Magder, and MFCG – and not DWA. As such, the lawsuit DWA brought against Magder was not "among the parties to [the operating agreement]." *See* Limited Liability Company ("LLC") Law § 102 (u) ("[o]perating agreement" defined as "any written agreement *of the members* concerning the business of a limited liability company and the conduct of its affairs" [emphasis added]). Therefore, the Jacobson defendants' representation of DWA did not constitute a conflict or a breach of fiduciary duty. *Cf Schwartz v Olshan Grundman Frome & Rosenzweig*, 302 AD2d 193, 199 (1st Dept 2003) (holding that the attorney defendants' dual representation of a corporation and its founder, the plaintiff, in negotiations with another entity did not, without more, support a breach of fiduciary duty claim, and that the defendants' representation of the

corporation in its action against the plaintiff, to enforce a different agreement, also did not support the claim, "as defendants did not represent any of the parties when the [that agreement] was executed, and plaintiff [was] unable to identify any confidential information improperly utilized by [the defendants]").

Plaintiff relies upon *Collins v Telcoa Intl. Corp.* (283 AD2d 128 [2d Dept 2001]) and its progeny for the proposition that a limited liability company's attorney owes a fiduciary duty to its members. However, since *Collins*, the Court of Appeals has stated that the well-settled rule "that a corporation's attorney represents the corporate entity, not its shareholders or employees," applies to limited liability partnerships, based on the "similarities between limited partners and [corporate] shareholders." *Eurycleia Partners, LP*, 12 NY3d at 562. The Court held that a law firms' "representation of [a] limited partnership, without more, did not give rise to a fiduciary duty to the limited partners." *Id.* By the same reasoning, here, the representation of a limited liability company, "without more, [does] not give rise to a fiduciary duty to [its members]." *Id.*; *cf Tzolis v Wolff*, 39 AD3d 138, 143 (1st Dept 2007) (stating that a limited liability company "is a hybrid of the corporate and limited partnership forms"), *affd* 10 NY3d 100 (2008).

Accordingly, the fifth cause of action is dismissed.

In accordance with the foregoing it is

ORDERED that the motion by defendants Marc Jacobson, P.C. and Marc Jacobson (motion sequence number 001) to dismiss plaintiff Andrea Magder's complaint is granted, and the complaint is dismissed in its entirety as against defendants Marc Jacobson, P.C. and Marc Jacobson, with costs and disbursements to said defendants as

taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the motion by defendant Christopher Bongirne (motion sequence number 002) to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the motion of defendants Belton Lee, Dining with Alex, LLC and Madhattan Film Company Global, LLC (motion sequence 003) is granted only to the extent of dismissing the complaint in its entirety as against Dining with Alex, LLC, pursuant to stipulation entered on the record on April 22, 2105, and the Clerk is directed to enter judgment accordingly in favor of said defendant, and the motion is otherwise severed, pending the determination of the traverse hearing, held pursuant to Order of Reference to Hear and Report, dated November 23, 2015.

This constitutes the decision and order of the Court.

Dated: New York, New York
November 23, 2015

ENTER:

Saliann Scarpulla, J.S.C.