

Bonin v Wells, Jaworski & Liebman, LLP

2017 NY Slip Op 32097(U)

October 4, 2017

Supreme Court, New York County

Docket Number: 153167/2016

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART 2

Justice

-----X

DELINDA BONIN,

INDEX NO. 153167/2016

Plaintiff,

MOTION DATE

- v -

WELLS, JAWORSKI & LIEBMAN, LLP, ANNMARIE PALERMO-SMITS

MOTION SEQ. NO. 001

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24,

were read on this application to/for Dismissal

Upon the foregoing documents, it is ordered that the motion is granted and the complaint is dismissed.

Defendants Wells, Jaworski & Liebman, LLP and Annmarie Palermo-Smits, Esq. move, pursuant to CPLR 3211 (a) (1), (a) (5), and (a) (7) and 3016 (b), for an order dismissing the complaint as barred by the relevant statutes of limitations and the documentary evidence.

FACTUAL AND PROCEDURAL BACKGROUND

In the complaint, plaintiff Delinda G. Bonin alleges that she and her husband, Carl J. Bonin ("Carl Bonin"), now deceased (collectively "the Bonins"), initially retained defendants to sell certain inherited real property. Subsequently, by written retainer

agreement executed October 10, 2007, the Bonins retained defendants to prepare an irrevocable trust to avoid having their assets, consisting primarily of the proceeds of that sale, affect their future eligibility for the Nursing Home Medicaid Program, in the event that either of them should require nursing home care in the future, and to prepare powers of attorney and living wills.

On December 14, 2007, the Bonins executed a trust agreement between them, as Grantors, and their son, nonparty Carl Gordon Bonin (a/k/a Gordon Carl Bonin), as the Trustee, prepared by defendants. The trust agreement created the Irrevocable Supplemental Benefits Trust (the Trust).

Plaintiff alleges that, in 2007, defendants advised the Bonins that the transfer of their assets into the Trust would insulate those assets from Medicaid's consideration after expiration of the 60-month look-back period. She further alleges that defendants advised the Bonins that, upon expiration of that period in 2013, they would be able to apply for institutional Medicaid, without being subject to a penalty period of ineligibility.

The Bonins funded the Trust in December 2007 and July 2008 by transferring \$227,269 into the same, allegedly with defendants' advice and assistance.

Plaintiff alleges that defendants improperly drafted and structured the Trust and that, therefore, Medicaid would have considered the entire Trust property as an available resource upon a Medicaid benefits application filed by either of the Bonins. Plaintiff alleges that, because the Trust was self-settled, the principal of the Trust property would be considered by Medicaid as an available resource of the Bonins, citing 42 USC § 1396p (d) (3) (B) and 18 NYCRR § 360-4.5 (b) (1) (ii). She also alleges that the structure of the

Trust would permit discretionary payments for the benefit of either of the Bonins to be considered by Medicaid as available income, upon an application for Medicaid benefits by either, citing 18 NYCRR § 360-4.5 (b) (1) (iii).

Plaintiff further alleges that the trust agreement cites to New Jersey law in one instance, although the Bonins were New York residents, and although the Trust was to be administered in accordance with the laws of New York. She further alleges that one provision of the trust agreement is void as against public policy, citing EPTL § 7-3.1 [c]). Additionally, plaintiff alleges that the Trust cannot be a supplemental benefits/needs trust, as promised by defendants, because the relevant law does not allow self-settled supplemental benefits/needs trusts for individuals over the age of 65.

Plaintiff maintains that, had the Trust been properly drafted by defendants, she could have filed an application for Community Medicaid in-home benefits, without the 60-month look-back period, and could have made such application in 2011, four years after the Trust was created.

She alleges that, in 2009, in furtherance of legal advice previously provided by defendants to the Bonins, defendants prepared a gift tax return, reflecting both the transfer of their assets to the Trust, and Carl Bonin's transfer of his interest in the Bonins' residence to plaintiff.

Plaintiff alleges that, in 2011, she hired home health aides to care for Carl Bonin, paying the cost from the Bonins' checking account and with at least one distribution from the Trust.

In February 2013, plaintiff allegedly sought Medicaid planning assistance from an attorney specializing in elder care, nonparty Martin Hersh, Esq., who advised her by letters dated February 21 and 27, 2013 that the Trust assets would not be insulated for purposes of Medicaid eligibility because the trust agreement prepared by defendants was not properly structured. Plaintiff alleges that Hersh also advised that any attempt to amend the trust agreement or transfer the Trust property would subject the Bonins to a penalty period.

Plaintiff maintains that defendants never advised her that the Community Medicaid Program would have paid the Bonins benefits, without subjecting their assets to a look-back period, in the event that the Trust were broken.

By letter dated March 6, 2013, plaintiff, through the Trustee, forwarded Hersh's letters to defendants, and requested a response to Hersh's legal opinion about the structuring of the Trust.

By letter dated April 15, 2013, defendants advised plaintiff that the Trust estate plan was a good plan, and that the assets placed in the Trust would not be considered for purposes of Medicaid because the Trust was a "gifting trust," pursuant to which the Bonins gave up total control of the Trust assets. Defendants recommended that plaintiff file a Medicaid application as originally contemplated in 2007.

Plaintiff took Hersh's advice, rather than defendants'. She broke the Trust, transferred the assets to herself, and subsequently secured Medicaid benefits for Carl Bonin.

Plaintiff claims that, as a result of defendants' misconduct and improper legal advice, she incurred additional and unnecessary legal expenses to obtain proper Medicaid

planning and home health care for Carl Bonin, while waiting for the five-year look-back period to expire. She also alleges that, should she require nursing home care within the five-year period ending in 2020, Medicaid will assess a penalty against her, and she will be required to spend her assets on her medical care.

On April 13, 2016, plaintiff commenced the instant action, in which she asserts causes of action against defendants for legal malpractice, breach of contract, fraud, and violations of General Business Law (GBL) §§ 349, 349-c, and 350. She seeks to recover monetary damages in an amount to be determined at trial, together with court costs, disbursements, and reasonable attorneys' fees incurred in connection with prosecuting this action.

MOTION TO DISMISS

Defendants now seek to dismiss the complaint on numerous grounds, including that the complaint is barred by the relevant statutes of limitations and by the documentary evidence.

Section 3211 (a) (5) of the CPLR permits dismissal of a claim that is barred by the applicable statute limitations.

"In moving to dismiss a cause of action pursuant to CPLR 3211 (a) (5) as barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired. The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether it actually commenced the action within the applicable limitations period"

(*City of Yonkers v 58A JVD Indus., Ltd.*, 115 AD3d 635, 637 [2d Dept 2014] [internal quotation marks and citations omitted]).

On a motion addressed to the sufficiency of the pleadings, the court must accept each and every allegation in the complaint as true, and liberally construe those allegations in the light most favorable to the pleading party (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; see CPLR 3211 [a] [7]). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d at 87-88).

"[W]here a written agreement . . . unambiguously contradicts the allegations supporting a litigant's cause of action for breach of contract, the contract itself constitutes documentary evidence warranting the dismissal of the complaint pursuant to CPLR 3211 (a) (1), regardless of any extrinsic evidence or self-serving allegations offered by the proponent of the claim" (*150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]; see CPLR 3211 [a] [1]).

The Legal Malpractice Claim Is Time-Barred

Defendants contend that the legal malpractice claim is time barred pursuant to CPLR 214 (6).

In opposition, plaintiff contends that the claim is timely asserted on the ground that the continuous representation doctrine tolled the running of the limitations period.

The legal malpractice claim is not timely asserted. An action to recover for attorney malpractice is governed by a three-year statute of limitations, regardless of whether the underlying theory is based on contract or tort (*McCoy v Feinman*, 99 NY2d 295, 301

[2002]; *see* CPLR 214 [6]). The three-year limitations period accrues "when the malpractice is committed, not when the client discovers it" (*Williamson v PriceWaterhouseCoopers LLP*, 9 NY3d 1, 7-8 [2007]). This is true even where the plaintiff is unaware of any malpractice, damages, or injury (*McCoy v Feinman*, 99 NY2d at 300-301).

For statute of limitations purposes, plaintiff's legal malpractice claim accrued no later than July 2008, when the Trust was fully funded. A legal malpractice claim accrues when the alleged injury to the client occurs, such as when the trust agreement was funded, regardless of the client's awareness of the malpractice (*Johnson v Proskauer Rose LLP*, 129 AD3d 59, 67 [1st Dept 2015]; *Pace v Raisman & Assoc. Esqs., LLP*, 95 AD3d 1185, 1187-1188 [2d Dept 2012]). Therefore, the legal malpractice claim should have been asserted no later than July 2011 for it to have been timely commenced. However, plaintiff commenced this action on April 13, 2016, almost five years after expiration of the limitations period.

Contrary to plaintiff's argument, the continuous representation doctrine is not applicable here because, once the Trust was funded, the attorney/client relationship between the Bonins and defendants ended.

The continuous representation doctrine tolls the accrual of the malpractice claim until completion of the professional's ongoing representation concerning the matter out of which the malpractice claim arises (*Shumsky v Eisenstein*, 96 NY2d 164, 168 [2001]). The doctrine "recognizes that a person seeking professional assistance has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected

to question and assess the techniques employed or the manner in which the services are rendered" (*Shumsky v Eisenstein*, 96 NY2d at 167 [internal citation and quotation marks omitted]). Where the doctrine is applied, the limitations period does not expire until the termination of the representation in connection with the subject matter of the alleged malpractice (*Droz v Karl*, 736 F Supp 2d 520, 527 [ND NY 2010] [applying New York law]; *Glamm v Allen*, 57 NY2d 87, 93-94 [1982]).

To toll the legal malpractice limitations period on a theory of continuous representation, the plaintiff must establish that there existed a mutual understanding between the attorney and client of the need for further representation on the specific subject matter underlying the malpractice alleged; a clear indication of an ongoing, continuous, developing, and dependent relationship between them pertaining specifically to the representation from which the alleged malpractice stems, that is not sporadic or intermittent; and a continuing relationship of trust and confidence between the attorney and the client (*Matter of Merker*, 18 AD3d 332, 332-333 [1st Dept 2005]).

Plaintiff has failed to plead any facts that suggest the existence of a continuing attorney/client relationship between defendants and herself. After the funding of the Trust in July 2008, no contact regarding the trust agreement is alleged to have occurred between the Bonins and defendants, until the Trustee's letter dated March 6, 2013, almost five years after the funding of the Trust and 1 ½ years after the expiration of the statutory limitations period. For purposes of the statute of limitations, an attorney/client relationship cannot be revived after the limitations period has expired (*see Droz v Karl*, 736 F Supp 2d at 527 [applying New York law]; *Maurice W. Pomfrey & Assoc., Ltd. v Hancock & Estabrook*,

50 AD3d 1531, 1533 [4th Dept 2008]). Therefore, the correspondence exchanged by the parties in 2013 does not constitute evidence of a continuing relationship, and cannot revive the relationship.

Defendants' reassurances that the Trust was properly created do not demonstrate the existence of a continuous representation. Repeated assurances by attorneys that they provided accurate advice and that they did nothing wrong do not constitute continuous representation, particularly where there exists no mutual understanding to maintain a professional relationship (*Arnold v KPMG LLP*, 543 F Supp 2d 230, 236 [SD NY 2008], *affd* 334 Fed Appx 349 [2d Cir], *cert denied* 558 US 901 [2009] [applying New York law]).

Plaintiff's consultation with Hersh demonstrates, at the very least, the absence of the required continuing relationship of trust and confidence.

Defendants' failure to advise in writing in 2013 that the attorney/client relationship had ended is not dispositive. The continuous representation doctrine does not provide that an attorney/client relationship continues indefinitely unless formally terminated in writing by either party.

Defendants' preparation of gift tax returns for the Trust in 2009 cannot establish the existence of a continuing relationship. Such preparation and legal representation was not related to the creation of the Trust, and, therefore, is not relevant to the issues raised here. Subsequent legal advice to an estate regarding tax liabilities is separate and distinct from the alleged negligence underlying the malpractice claim, and, therefore, cannot demonstrate the existence of a continuing relationship (*Pace v Raisman & Assoc. Esqs. LLC*, 95 AD3d at 1185).

In any event, the preparation of those returns would not render the legal malpractice claim timely commenced. Defendants prepared those returns more than three years prior to the commencement of this action in April 2016.

For the foregoing reasons, that branch of defendants' motion to dismiss the legal malpractice claim as untimely is granted, and that claim is dismissed.

Time-Barred Contract and Fraud Claims

The breach of contract and fraud claims are similarly time-barred.

Plaintiff cannot evade the three-year limitations period by re-characterizing the legal malpractice claim as one sounding in contract or fraud. Where the contract or fraud claim arises out of the same facts as does the legal malpractice claim, and does not seek to recover damages distinct from that claim, then the plaintiff may not benefit from the limitations periods applicable to contract or fraud claims (*Matter of R.M. Kliment & Frances Halsband, Architects [McKinsey & Co., Inc.]*, 3 NY3d 538, 542-543 [2004]; *Farage v Ehrenberg*, 124 AD3d 159, 169-170 [2d Dept 2014]; *see* CPLR 214 [2], 214 [8]).

The factual allegations underlying the contract and fraud claims are identical to those underlying the legal malpractice claim. In the contract claim, plaintiff alleges that she and Carl Bonin retained defendants "to prepare . . . an irrevocable trust, to take advantage of the maximum tax savings and asset protection techniques relative to Medicaid planning" (complaint, ¶ 31), and that defendants breached the retainer agreement by "performing legal services in a sub-standard, sloppy and deficient manner" (*id.*, ¶ 35). In the fraud claim, plaintiff alleges that defendants held themselves out as "experienced

attorneys with a substantial expertise in the areas of . . . trusts and estate planning and that they would assist the Bonins to take advantage of the maximum tax savings and asset protection techniques relative to Medicaid planning" (*id.*, ¶¶ 56 [internal quotation marks omitted]).

In addition, the breach of contract claim is time barred, without reference to the legal malpractice claim. A contract claim must be brought within six years after the alleged breach (CPLR 214 [2]). As held above, the breach occurred no later than July 2008, when the Trust was fully funded. Plaintiff commenced this action on April 13, 2016, almost eight years later.

The contract claim is also fatally defective on the ground that it duplicates the legal malpractice claim in all respects. "[A] breach of contract claim premised on the attorney's failure to exercise due care or to abide by general professional standards is nothing but a redundant pleading of the malpractice claim" (*Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 38-39 [1st Dept 1998]; *Xiong Ping Tang v Marks*, 133 AD3d 455, 456 [1st Dept 2015]).

The fraud claim is also time-barred, having been asserted more than six years after the fraud was allegedly committed in 2008, and more than two years from the time that the alleged fraud could have been discovered with due diligence, whichever is longer (*see Ghandour v Shearson Lehman Bros., Inc.*, 213 AD2d 304, 305 [1st Dept 1995]; CPLR 213 [8]). Here, plaintiff discovered the fraud no later than April 2013, upon her consultation with Hersh.

For the foregoing reasons, those branches of defendants' motion to dismiss the fraud and contract claims are granted, and those claims are dismissed.

Duplicity of Fraud And Legal Malpractice Claims

Defendants contend that the fraud claim is also fatally defective on the ground that it is duplicative of the legal malpractice claim.

In opposition, plaintiff contends that the fraud claim arises out of tortious conduct independent of the conduct giving rise to the malpractice claim.

A fraud claim that arises within the context of a legal malpractice claim will be dismissed as duplicative where it arises from the same facts as does the malpractice claim and does not allege separate and distinct damages (*Dinhofer v Medical Liab. Mut. Ins. Co.*, 92 AD3d 480, 481 [1st Dept 2012]; *Carl v Cohen*, 55 AD3d 478, 478-479 [1st Dept 2008]). No separate cause of action for fraud will lie where the plaintiff's allegations essentially "consist of accusations that defendants committed malpractice" (*Kaiser v Van Houten*, 12 AD3d 1012, 1014 [3d Dept 2004]).

Here, the fraud claim is duplicative of the legal malpractice claim. In both claims, plaintiff alleges that defendants failed to do what the Bonins allegedly hired them to do, i.e., create a trust that would allow the Bonins to take advantage of the maximum tax savings and asset protection techniques available with respect to Medicaid planning, and to discharge their duties in an expert, skillful, and knowledgeable manner (*see* complaint, ¶¶ 8, 11, 38-47, 56-57).

In both claims, plaintiff seeks to recover monetary damages of no less than \$100,000, incurred solely as a result of defendants' failure to properly discharge their duties with respect to creating a trust that would protect the Bonins' assets, in the event that either of the Bonins decided to apply for Medicaid benefits in the future (*see id.*, ¶¶ 46, 48, 57, 61). Plaintiff alleges that those monetary damages consist of additional and unnecessary legal expenses and disbursements incurred in obtaining Medicaid planning a second time and home care for Carl Bonin, while waiting for the five-year look-back period to expire, and health care expenses and Medicaid penalties to be incurred in the future, should plaintiff herself require nursing home care within the five-year period ending in 2020. Plaintiff also seeks to recover all sums that the Bonins paid to defendants for their estate and trust planning legal services.

The fraud claim is also fatally defective on the ground that the elements of fraud are not pleaded with the specificity and particularity required by CPLR 3016 (b).

To state a legally viable claim of fraud, a plaintiff must allege "a representation of a material existing fact, falsity, *scienter*, deception and injury" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995] [internal quotation marks and citation omitted]; *Nicosia v Board of Mgrs. of Weber House Condominium*, 77 AD3d 455, 456 [1st Dept 2010]). "Where a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust, or undue influence, the circumstances constituting the wrong shall be stated in detail" (CPLR 3016 [b]). The allegations must be sufficiently particularized to give adequate notice to the court and to the parties of the transactions and occurrences intended to be proved (*Accurate Copy Serv. of Am., Inc. v Fisk Bldg. Assoc.*

L.L.C., 72 AD3d 456, 456 [1st Dept 2010]; *Foley v D'Agostino*, 21 AD2d 60, 63-64 [1st Dept 1964], citing CPLR 3013, 3016 [b]). Mere conclusory language is insufficient to state a fraud claim (*Daly v Kochanowicz*, 67 AD3d 78, [2d Dept 2009]).

A fraud claim asserted against multiple defendants must include specific and separate allegations for each defendant, or it will be dismissed (*Aetna Cas. & Sur. Co. v Merchants Mut. Ins. Co.*, 84 AD2d 736, 736 [1st Dept 1981]).

Here, plaintiff has failed to plead any actionable misrepresentation or material omission of fact by either defendant.

Plaintiff's allegations that defendants misrepresented their legal expertise in estate and trusts planning are not sufficient to support a legally viable fraud claim. A law firm's alleged statements regarding its attorneys' familiarity and expertise in an area of law are mere puffery and opinion, and, as such, are not actionable as fraud (*Schonfeld v Thompson*, 243 AD2d 343, 343 [1st Dept 1997]). Mere puffery regarding professional experience is promissory in nature, and, therefore, is not actionable as fraud (*Sheth v New York Life Ins. Co.*, 273 AD2d 72, 74 [1st Dept 2000]; *Schonfeld v Thompson*, 243 AD2d at 343).

Further, plaintiff's allegation that defendants misrepresented their future intent to keep their promise to provide competent legal assistance regarding Medicaid planning is similarly insufficient. A fraud claim cannot be predicated upon statements which are promissory in nature at the time that they are made, and which relate to future actions or conduct (*P. Chimento Co. v Banco Popular de Puerto Rico*, 208 AD2d 385, 385 [1st Dept 1994]). A fraud claim "may not be based on disappointment that a promised future benefit did not materialize" (*Satler v Merlis*, 252 AD2d 551, 552 [2d Dept 1998]).

Plaintiff failed to allege any facts that might establish that defendants had a present intent to deceive her. A conclusory allegation of present intent is not adequate to plead sufficient details regarding the essential element of scienter (*Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 495 [1st Dept 2006]). Plaintiff's allegations that defendants never intended to assist her as promised are completely belied by the facts as alleged in the complaint and by the documentary evidence. Defendants created a Trust for the Bonins. As discussed above, plaintiff's current disappointment with that service is not actionable.

For the foregoing reasons, the branch of defendants' motion to dismiss the fraud claim is granted, and that claim is dismissed.

General Business Law Claims

Plaintiff's GBL §§ 349, 349-c, and 350 claims are time-barred, pursuant to CPLR 214 (2).

A claim based upon a liability created or imposed by statute is subject to a three-year limitations period (*Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201, 209 [2001]; see CPLR 214 [2]). A claim for a violation of either GBL § 349 or § 350 accrues when the plaintiff sustains injury as the result of a deceptive act or practice violating the statute (*Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d at 209).

Bonin's GBL §§ 349 and 350 claims accrued when plaintiff executed and funded the Trust in July 2008 because that was the point at which she allegedly sustained injury. Plaintiff alleges that, when she funded the Trust, the assets were not insulated from Medicaid, and her "expectations were not met" (complaint, ¶¶ 63-65). She commenced

this action on April 13, 2016, almost eight years later. Therefore, the GBL claims are time-barred.

The GBL § 349 claim is also fatally defective on the ground that plaintiff has not alleged that defendants engaged in consumer-oriented conduct that was deceptive or misleading in a material way. Nor can she demonstrate that she was injured as a result of such conduct. GBL § 349 provides, in relevant part, that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful" (GBL § 349 [a]).

Plaintiff's claim for violations of GBL § 349 is not legally cognizable. To state a claim for relief under GBL § 349, a plaintiff must allege "first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act" (*Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]).

The GBL's "threshold requirement of consumer-oriented conduct is met by showing that acts or practices have a broader impact on consumers at large in that they are directed to consumers or potentially affect similarly situated consumers" (*Cruz v NYNEX Info. Resources*, 263 AD2d 285, 290 [1st Dept 2000] [internal quotation marks and citations omitted]).

Bonin's GBL § 349 claim is not based on a transaction that affects the consuming public at large. Instead, it is based on an alleged breach of a retainer agreement unique to the parties. A private contract dispute, such as the dispute here, does not come within the scope of GBL §§ 349 and 350 (*Canario v Gunn*, 300 AD2d 332, 333 [2d Dept 2002]).

Contrary to plaintiff's contention, the Rules of Professional Conduct prohibiting false advertising by an attorney (*see* 22 NYCRR 1200.0, Rules 7.1 [a] [1], 7.3 [a] [2]) do not create a private cause of action, nor may violations of those rules form the basis of claims under the GBL. "The violation of a disciplinary rule does not, without more, generate a cause of action" (*Schwartz v Olshan Grundman Frome & Rosenzweig*, 302 AD2d 193, 199 [1st Dept 2003]).

Plaintiff's GBL § 350 claim for false advertising is fatally defective on that ground as well. False advertising is defined by the statute as "advertising, including labeling, of a commodity, or of the kind, character, terms or conditions of any employment opportunity, if such advertising is misleading in a material respect" (GBL § 350-a). The provision of legal services does not involve any commodity, product, or employment opportunity.

Finally, plaintiff's GBL § 349-c claim is defective on its face. Section 349-c of the GBL does not support an independent cause of action, but, instead, imposes an additional civil penalty for violations of sections 349 and 350 of the GBL, when the plaintiff is 65 years of age or older (*see* GBL § 349-c). Inasmuch as plaintiff's claims asserted under GBL §§ 349 and 350 are fatally defective, the GBL § 349-c claim is also fatally defective.

For the foregoing reasons, those branches of defendants' motion to dismiss the claims for violations of GBL §§ 349, 349-c, and 350 are granted, and those claims are dismissed.

Therefore, in light of the foregoing, it is hereby:

ORDERED that defendants' motion to dismiss the complaint is granted, and the complaint is dismissed in its entirety as against each defendant, with costs and disbursements to each defendant, as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of each defendant; and it is further

ORDERED that this constitutes the decision and order of the court.

10/4/2017
DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: