Fulton Mkt. Retail Fish Inc. v Todtman, Nachamie, Spizz & Johns, P.C.
2018 NY Slip Op 30276(U)
February 16, 2018
Supreme Court, New York County
Docket Number: 151002/15
Judge: Shlomo S. Hagler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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FULTON MARKET RETAIL FISH INC. DBA SIMPLY SEAFOOD, APPLE MAC & R CORP. DBA MACMENAMINS PUB, ROSLU CORP. DBA BERGINS BEER & WINE, LAKOUS INC, DBA PIZZA ON THE PIER, AINOLAHPEK, INC. DBA ATHENIAN EXPRESS, SEAPORT NOVELTY GIFTS & NEWS, LTD. DBA SEAPORT NEWS, RY-ALLIE CANDY CORP DBA NUTCRACKER SWEETS, WAXOLOGY, INC. DBA WAXOLOGY, HOT DOGS DEL MAR, INC. DBA NATHAN'S FAMOUS, ANDREW HUESTIS DBA THE NEW YORK SHELL SHOP, VIEW OF THE WORLD PRODUCTS, INC. T/A A VIEW OF THE WORLD AND ANDEJO CORPORATION DBA SEAPORT WATCH COMPANY,

Index No.: 151002/15

Motion Seq Nos.: 004, 005, 006, 007

Plaintiffs,

-against-

DECISION/ORDER

TODTMAN, NACHAMIE, SPIZZ & JOHNS, P.C., ROSENBERG FELDMAN SMITH LLP., STEPHEN M. ROSENBERG, ROBERT A. RUBENFELD, RICHARD B. FELDMAN AND MICHAEL H. SMITH,

Defendants.

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HON. SHLOMO S. HAGLER, J.S.C.:

In this action alleging legal malpractice, breach of contract and fraudulent inducement, defendant Todtman, Nachamie, Spizz & Johns, P.C. ("Todtman Nachamie") moves pursuant to CPLR 3211 (a)(1), (a)(3), (a)(5) and (a)(7) for an Order dismissing plaintiffs' amended complaint (the "Amended Complaint") [Motion Seq. No. 004], and defendant Robert A. Rubenfeld ("Rubenfeld"), a former employee of Todtman Nachamie, likewise moves pursuant to CPLR 3211 (a)(1), (a)(3), (a)(5) and (a)(7) for an Order dismissing plaintiffs' Amended Complaint [Motion Seq. No. 005]. Defendants Rosenberg Feldman Smith LLP ("RFS"), Stephen M. Rosenberg

("Rosenberg"), Richard B. Feldman ("Feldman") and Michael H. Smith ("Smith") (collectively, the "RFS Defendants") move pursuant to CPLR 3211 (a)(1), (a)(5) and (a)(7) and CPLR 3016 (b) for an Order dismissing plaintiffs' Amended Complaint [Motion Seq. No. 006]. Plaintiffs oppose defendants' motions. Plaintiffs move pursuant to CPLR 3025 (b) for leave to file and serve a Second Amended Complaint [Motion Seq. No. 007]. Defendants oppose plaintiffs' motion. Defendants Todtman Nachamie and Rubenfeld cross-move pursuant to NYCRR § 130-1.1(c) for an Order awarding them costs and attorneys' fees incurred in opposing plaintiffs' motion. Plaintiffs' oppose said cross-motion. All motions are consolidated herein for disposition.[1]

BACKGROUND AND FACTUAL ALLEGATIONS

In the Amended Complaint, plaintiffs allege causes of action for legal malpractice, breach of contract and fraudulent inducement in connection with defendants' representation of plaintiffs at various stages of an action known as *Andejo Corp. v South St. Seaport Ltd. Partnership*, 2013 N.Y. Slip Op. 32903(U) [November 13, 2013] [Hon. Shlomo S. Hagler, J.S.C.] ("Underlying Action Order") *aff'd* 130 AD3d 411 [1st Dept 2015] (the "Underlying Action").[2]

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[1]On or about February 3, 2015, plaintiff Fulton Market Retail Fish Inc. dba Simply Seafood ("Simply Seafood" or the "Tenant") filed the complaint in this matter against defendants alleging causes of action sounding in legal malpractice and breach of contract. Defendants filed motions to dismiss (Motion Seq. Nos. 001, 002, 003). On or about April 13, 2015, plaintiffs filed a Supplemental Summons and Amended Complaint adding additional plaintiffs and allegations, and a cause of action for fraudulent inducement. By Stipulation dated April 15, 2015, the parties stipulated to withdraw defendants' motions to dismiss, and to extend time for defendants' to move against the Amended Complaint, subsequently denominated as the subject Motion Seq. Nos. 004, 005 and 006.

[2]The eighty-four (84) page Amended Complaint (comprised of three-hundred five (305) paragraphs), makes many allegations against "defendants", and as such, in those instances fails to differentiate between Todtman Nachamie, RFS, Rosenberg, Rubenfeld, Feldman or Smith.

Underlying Action

Plaintiffs were commercial tenants at Pier 17 of the South Street Seaport ("Seaport") by virtue of certain written leases. Defendants in the Underlying Action, South Street Seaport Limited Partnership and Seaport Marketplace, L.L.C. (the "Landlord") were plaintiffs' landlord pursuant to certain leases and amendments between the City of New York and The South Street Seaport Corporation.

Plaintiffs[3] commenced the Underlying Action against defendants for breach of contract alleging that they suffered lost profits as a result of the Landlord's failure to maintain, repair, promote and/or market the Seaport.[4] Defendants denied these allegations and asserted counterclaims against plaintiffs for ejectment, unpaid rent and additional rent, and for an award of attorney's fees. Without reciting the entire lengthy history, all of the plaintiffs in the Underlying Action vacated their commercial spaces except for Simply Seafood. As such, the parties agreed in the Underlying Action to bifurcate the trial on the Landlord's counterclaim for ejectment of Simply Seafood. The contentious litigation relating to the Underlying Action arose in 2004, continued for almost a decade, spawned more than sixty (60) motions, and culminated in a protracted trial spread over many months.

In the Underlying Action Order, this Court determined that the Landlord was entitled to possession of the subject premises in the South Street Seaport, and to exercise all acts of ownership and possession of said commercial space. As is pertinent here, this Court made

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[3]The plaintiff tenants in the Underlying Action do not wholly correspond to the plaintiff tenants in this action.

[4]All other causes of action asserted were previously dismissed (*see Andejo Corp. v South St. Seaport Ltd. Partnership*, 40 AD3d 407 [1st Dept 2007]).

certain findings of fact as follows. From the time Simply Seafood moved into the subject premises in 1995 through 2005, it had a history of failing to pay its rental and additional rental obligations.[5] Since these defaults persisted, the Landlord exercised its option under the lease agreement (the "Lease") to serve a Notice of Termination, dated November 23, 2005, terminating Simply Seafood's tenancy effective November 29, 2005, as a result of its failure to pay $5,975.68.[6] In or about 2008 and 2009, Simply Seafood attempted to exercise its option to renew the Lease for an additional ten years, which the Landlord rejected and treated the Tenant's exercise of such option as a nullity. Under the Lease, this renewal option was conditioned upon the Tenant's "not [being] in default under any of the terms and conditions of [the] Lease." This Court held that "it is apparent that Simply Seafood was in monetary default at the time it purportedly exercised its conditional renewal option." Thus, "since the Tenant was in default under the terms of the Lease, it was precluded from exercising its conditional renewal option in August 2008."

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[5]The rental obligations were, in part, based upon the tenant's gross sales. Simply Seafood was required to report its gross sales to the Landlord every month and maintain the back-up documentation for three years, in order for the Landlord to bill the percentage rent payment. In addition to paying ten percent of gross sales, the Tenant was obligated to pay certain amounts for cooking gas and electricity and pay sales tax which was later adjusted based on actual charges. This Court noted that Simply Seafood acknowledged that it had deliberately under-reported gross sales to the Landlord for 2004 through 2007, immediately prior to the first time it attempted to exercise its renewal option in August 2008. This Court also noted that the Tenant utilized cooking gas and electricity without any payment whatsoever for almost ten (10) years.

[6]The Lease defined "Event of Default" as "the failure by the Tenant to pay any rental or other sum of money within seven (7) days after the same is due." Under the Lease, such event of default permitted the Landlord to terminate the Lease and tenancy by providing the Tenant with a notice of termination. By Order, dated November 28, 2005, the Hon. Marcy Friedman, J.S.C., denied Simply Seafood's motion to dismiss defendants' ejectment counterclaim challenging the sufficiency of the Notice of Termination, holding that the Notice of Termination was sufficient as a predicate for such counterclaim.

During oral argument on the subject motions in this matter, this Court read into the record certain equitable considerations addressed by the Court in the Underlying Action Order. In the Underlying Action Order, this Court determined that "Simply Seafood's failure to pay less than $6,000 alone would not normally be sufficient to allow for the forfeiture of a long-term lease because it primarily involved its long-standing dispute with the Landlord as to the legitimacy of the utility charges. However, considering Simply Seafood's deliberate and intentional misreporting of gross sales and its failure to pay any utility charges for about a decade, the [e]quitable considerations would not relieve the forfeiture since the Tenant has willfully committed an affirmative act in violation of its covenant [thereby precluding equitable relief]" (*Andejo Corp. v South St. Seaport Ltd. Partnership*, 2013 N.Y. Slip Op. 32903(U) [November 13, 2013]).

By Order, dated July 2, 2015, the Appellate Division, First Department affirmed the Underlying Action Order (*Andejo Corp. v South St. Seaport Ltd. Partnership*, 130 AD3d 411), holding that there is no basis to disturb the factual finding of this Court "establishing that plaintiff tenant was in default of its lease based on its failure to pay rent and utilities....The trial court also properly found, based on evidence that plaintiff tenant deliberately and intentionally violated other lease provisions by failing to pay any utility charges for approximately a decade and misreporting gross sales, that equitable considerations do not warrant a finding that plaintiff should not forfeit the lease" (*Id.* at 412).

DISCUSSION

Motion to Dismiss

In deciding a motion brought pursuant to CPLR § 3211(a) (7) for failure to state a cause

of action, the complaint should be liberally construed and the facts alleged in the complaint and any submissions in opposition to the dismissal motion accepted as true, according plaintiffs the benefit of every possible favorable inference (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *see* CPLR 3211 [a] [7]). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). A motion to dismiss must be denied, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.,* 98 NY2d at 152 [internal quotation marks and citations omitted]). On the other hand, while factual allegations contained in a complaint should be accorded a favorable inference, where "the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Beattie v Brown & Wood*, 243 AD2d 395, 395 [1st Dept 1997] [internal quotation marks and citation omitted]). Where a defendant has submitted evidentiary material in support of a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), "the criterion is whether the [plaintiff] has a cause of action, not whether he has stated one" (*Leon v Martinez,* 84 NY2d at 88 *quoting Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

"Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense as to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d at 88). As is pertinent to defendants' motions herein, CPLR 3211(a)(3) provides that an action may be dismissed on the ground that the plaintiff does not have legal capacity to sue, and CPLR 3211(a)(5) provides for a dismissal when a cause of action may not be maintained because of collateral estoppel or res judicata.

Legal Malpractice

"An action for legal malpractice requires proof of three elements: (1) that the attorney was negligent; (2) that such negligence was a proximate cause of plaintiff's losses; and (3) proof of actual damages" (*Global Bus. Inst. v Rivkin Radler LLP*, 101 AD3d 651, 651 [1st Dept 2012]). To recover damages, "a plaintiff must demonstrate that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages" (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007] [internal quotation marks and citation omitted]). "An attorney's 'selection of one among several reasonable courses of action does not constitute malpractice'" (*Rodriguez v Lipsig, Shapey, Manus & Moverman*, 81 AD3d 551, 552 [1st Dept 2011]) quoting *Rosner v Paley*, 65 NY2d 736, 738 [1985]; *see Boye v Rubin & Bailin, LLP*, 152 AD3d 1, 9 [1st Dept 2017]).

"To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action . . . but for the lawyer's negligence" (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d at 442). "[C]onclusory allegations of proximately caused damages cannot serve as a basis for a legal malpractice claim" (*Freeman v Brecher*, 155 AD3d 453, 453 [1st Dept 2017].

An action to recover for legal malpractice, "regardless of whether the underlying theory is based in contract or tort," must be commenced within three years [CPLR 214(6)]; *see 6645 Owners Corp. v GMO Realty Corp.*, 306 AD2d 97, 98 [1st Dept 2003]). "A legal malpractice claim accrues when all the facts necessary to the cause of action have occurred and an injured

party can obtain relief in court" (*Hahn v Dewey & LeBoeuf Liquidation Trust*, 143 AD3d 547, 547 [1st Dept 2016] [internal quotation marks and citation omitted]). Continuous representation tolls the statute of limitations "only where the continuing representation pertains specifically to the matter in which the attorney committed the alleged malpractice" (*Shumsky v Eisenstein*, 96 NY2d 164, 168 [2001]). A "general professional relationship" is not sufficient to establish continuous representation in a legal malpractice action (*CLP Leasing Co., LP v Nessen*, 12 AD3d 226, 227 [1st Dept 2004]; *see Shumsky v Eisenstein*, 96 NY2d at 168).

Breach of Contract

The requisite elements of a breach of contract claim are existence of a contract, plaintiff's performance pursuant to the contract, defendant's breach of the contract, and damages resulting from that breach (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). "Generally, a party alleging a breach of contract must demonstrate the existence of a contract reflecting the terms and conditions of their . . . purported agreement" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 181-182 [2011] [internal quotation marks and citation omitted]).

A breach of contract claim is duplicative of a legal malpractice claim when it arises out of the same set of facts as the legal malpractice claim and does not involve "distinct, additional damages" (*Xiong Ping Tang v Marks*, 133 AD3d 455, 456 [1st Dept 2015]). "Unless a plaintiff alleges that an attorney defendant breached a promise to achieve a specific result, a claim for breach of contract is insufficient and duplicative of the malpractice claim" (*Alphas v Smith*, 147 AD3d 557, 558 [1st Dept 2017] [internal quotation marks and citation omitted]).

Fraudulent Inducement

"In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or

a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *see also Albert Apt. Corp. v Corbo Co.*, 182 AD2d 500, 500 [1st Dept 1992]; *Bank Leumi Trust Co. of N.Y. v D'Evori Int'l*, 163 AD2d 26, 31 [1st Dept. 1990]). "To state a claim for fraudulent inducement, there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury" (*GoSmile, Inc. v Levine*, 81 AD3d 77, 80 [1st Dept 2010]). "A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b)" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). "Although there is certainly no requirement of unassailable proof at the pleading stage, the complaint must allege the basic facts to establish the elements of the cause of action. . . CPLR 3016(b) is satisfied when the facts suffice to permit a reasonable inference of the alleged misconduct" (*Id.* [internal quotation marks and citation omitted]).

Motion by Todtman Nachamie to Dismiss the Amended Complaint (Motion Seq. No. 004)

In support of its motion to dismiss, Todtman Nachamie argues that (1) the cause of action in the Amended Complaint for legal malpractice as directed toward Todtman Nachamie is barred by the statute of limitations [CPLR § 214(6)]; (2) in any event, plaintiffs have failed to state a cause of action for legal malpractice, breach of contract or fraudulent inducement; and (3) six of the plaintiffs' lack standing to sue Todtman Nachamie as they are dissolved corporations.[7]

[7]Todtman Nachamie also argues that the claims by plaintiff World Products, Inc. t/a A View of the World ("World") should be dismissed as Todtman Nachamie did not represent said

Legal Malpractice

Statute of Limitations

Todtman Nachamie argues that it is undisputed that it represented plaintiffs beginning in August 2004 and ending in April 2005. In fact, the Amended Complaint itself specifically states that Todtman Nachamie represented plaintiffs "in connection with matters relevant to the within suit from approximately August, 2004 until in or around April, 2005 when the defendant RFS commenced its representation of the plaintiffs" (Amended Complaint, ¶ 41; *see Id.*, ¶¶ 40, 189-190). Todtman Nachamie maintains that the statute of limitations expired no later than April 2008, three years after Todtman Nachamie's representation of plaintiffs ended.

In opposition, plaintiffs argue that the continuous representation doctrine applies to Todtman Nachamie (*McCoy v Feinman*, 99 NY2d 295, 306 [2002]). The Amended Complaint alleges that Todtman Nachamie represented plaintiffs from August 2004 until April 2005, whereupon RFS represented plaintiffs from April 2005[8] until April 2012.[9] Plaintiffs rely on two cases which apply the continuous representation doctrine to toll the statute of limitations as to a prior law firm's representation when attorneys from a prior firm left and moved to another firm

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plaintiff. In fact, World was not a named plaintiff in the Underlying Action. In opposition, plaintiffs state "with the exception of Todtman's motion concerning A View of the World, it is submitted the defendants' motions should be denied" (Affirmation in Opposition, ¶ 26). As such, this Court dismisses, without opposition, claims by plaintiff World against Todtman Nachamie.

[8]A Notice of Change of Counsel was filed with the court in or about May 2005 (*see* Affirmation of Thomas A. Leghorn in Reply and Further Support of [Todtman] Motion to Dismiss, Exhibit "A").

[9]The Amended Complaint states that in April 2012, RFS was relieved as plaintiffs' counsel (Amended Complaint,¶ 40).

(*HNH Intl., Ltd. v Pryor Cashman Sherman &* Flynn, 63 AD3d 534 [1st Dept 2009]; *Waggoner v Caruso*, 68 AD3d 1 [1st Dept 2009]).

Inasmuch as this Court has granted defendants' motion to dismiss on other grounds as set forth below, this Court need not decide whether plaintiffs' cause of action for legal malpractice is barred by the applicable three year statute of limitations [CPLR 214(6)]).

Failure To State A Cause of Action

Based on the discussion below, the Amended Complaint fails to state a cause of action for legal malpractice. Much of the three-hundred five (305) paragraph, eighty-four (84) page Amended Complaint refers to all of the defendants collectively, and as such, it is impossible to parse out what allegations are directed toward which defendant. The Amended Complaint fails to set forth the necessary elements of legal malpractice as it pertains to Todtman Nachamie, that any such negligence was the proximate cause of a loss suffered by plaintiffs and resulting damages.

The Amended Complaint attempts in a conclusory manner to plead a breach of the standard of care based on "defendants" purported failure to name the New York City Economic Development Authority ("NYCED") and The Related Companies ("Related") as defendants in the Underlying Action. Plaintiffs seem to suggest that Todtman Nachamie should have sued NYCED and Related in order to extract a settlement with them and/or their "involvement" somehow amounts to a claim for tortious interference with contract. Plaintiffs further assert that "defendants" failed to properly advise plaintiffs regarding the terms of their Lease. Plaintiffs allege that if properly advised, Simply Seafood would have complied with the condition precedent of not being in arrears on its rental payments which was required in order for Simply

Seafood to exercise the option to extend the term of the Lease (Amended Complaint ¶¶ 122-123, 179-182).[10]

The allegation that Todtman Nachamie's failure to name NYCED and Related in the Underlying Action evidences legal malpractice, is belied by plaintiffs' Amended Complaint. which avers that it was the RFS Defendants who became aware of the involvement of NYCED and Related in the Underlying Action (Amended Complaint, ¶ 192).[11] In addition, the Joint Claim Agreement entered into between the tenants in order to "more effectively pursue their claims" in the Underlying Action contradicts plaintiffs' argument. Such Agreement provides that plaintiffs in the Underlying Action would seek "assistance and cooperation from the [NYCED]" (Affirmation in Opposition, Exhibit "1", p. 1, ¶ 1).

Notwithstanding the above, plaintiffs allegation that Todtman Nachamie should have sued NYCED and Related in order to extract a settlement is insufficient as a matter of law (and most likely frivolous) as there needs to be a basis for such a lawsuit. Plaintiffs' only ground appears to be premised on the conclusory allegation that NYCED and Related somehow tortiously interfered with Simply Seafood's Lease based on evolving and incomplete negotiations between NYCED and Related to redevelop the Seaport. That basis alone is also insufficient to support a claim of tortious interference with contract. Moreover, plaintiffs have not alleged any

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[10]Plaintiffs, however, concede in the Amended Complaint that it was not until "May 26, 2005 [that] the plaintiff made payment in full to the Landlord of the alleged rental arrears in the amount of $36,814.28" (Amended Complaint, ¶ 197) which payment occurred after Todtman Nachamie's representation of plaintiffs was terminated (*Id.*, ¶¶ 40-41, 187-191).

[11]Todtman Nachamie also argues that the firm named additional defendants denominated as "John Does" which would have preserved plaintiffs' right to add parties to the Underlying Action.

facts to underpin a claim of tortious interference with contract given that the direct cause of the loss of the subject Lease was Simply Seafood's own actions in consistently failing to pay rent and additional rent as well as the deliberate under-reporting of gross sales, and the Landlord's termination of the Lease thereon.

Plaintiffs' argument that "defendants" failed to advise John Demane ("Demane"), President of Simply Seafood, that he risked termination of the Lease if Simply Seafood failed to timely pay rent is similarly unavailing (Affirmation of John O'Kelly ¶ 8). Todtman Nachamie was not involved in drafting of the Lease or amendments thereto, and furthermore, sophisticated business persons, are presumed to know the contents of contracts executed by them (*see Huang v Cheng*, 182 AD2d 600 [1st Dept 1992]). Simply stated, it is mere sophistry and inherently incredible that Demane, who occupied the subject premises for decades at the Seaport by virtue of several commercial leases and paid various rent and additional rent obligations during that period, did not know that Simply Seafood was obligated to pay the Landlord rent and additional rent, and he risked termination of the Lease if Simply Seafood failed to timely pay rent. In fact, it is quite apparent from Demane's deliberate under-reporting of gross sales that he understood his rental obligations. Assuming *arguendo* that Demane somehow was not knowledgeable as to his rental obligations, and had paid the outstanding rent, Simply Seafood could not have exercised its option because it was in violation of the terms of the Lease, in part, due to its deliberate under-reporting of gross sales as per the Underlying Action Order.

Breach of Contract

Likewise, plaintiffs' breach of contract cause of action against Todtman Nachamie does not lie as it is duplicative of their legal malpractice action. The breach of contract and legal

malpractice causes of action arise out of the same set of facts (*Xiong Ping Tang v Marks*, 133 AD3d at 456). Plaintiffs have failed to allege that Todtman Nachamie breached a promise to achieve a specific result, and as such, their claim for breach of contract is "insufficient and duplicative of the malpractice claim" (*Alphas v Smith*, 147 AD3d at 558). In opposition, plaintiffs argue that the failure of Todtman Nachamie to commence suit against NYCED and Related constitutes a breach of the engagement letter, dated October 11, 2004, between plaintiffs and Todtman Nachamie ("Engagement Letter"), and is not duplicative of plaintiffs' legal malpractice claim (Notice of Motion, Exhibit "F").[12]

In this case, the Engagement Letter merely states that Todtman Nachamie was retained to represent the plaintiff tenants in connection with an action to enforce plaintiffs' rights regarding "claims against Rouse and Company, Seaport Market Place, LLC and their subsidiaries and affiliates and others involved in the leasing redevelopment or demolition of Pier 17 at the South Street Seaport" (Notice of Motion, Exhibit "F" at 1). Furthermore, the Engagement Letter under a section entitled "Disclaimer of Guarantee" provides "it is impossible to predict the result or success of any engagement. Nothing in this agreement and nothing in any attorney's statement to the [c]lient should be construed to make promises or guarantees" (*Id.* at 1-2). Inasmuch as plaintiffs' breach of contract allegations is not premised upon "a promise to achieve a specific result," plaintiffs' claim for breach of contract is "insufficient and duplicative of the malpractice claim" as a matter of law (*Alphas v Smith*, 147 AD3d at 558); *see Mamoon v Dot Net Inc.*, 135

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[12]Plaintiffs do however concede that there is an "overlap" between the claims, to the extent that failure to sue NYCED and Related might constitute both a breach of contract and malpractice by the defendants (Plaintiffs' Affirmation in Opposition, ¶ 41).

AD3d 656, 658 [1st Dept 2016]).

Fraudulent Inducement

Plaintiffs have failed to plead fraud with the required particularity pursuant to CPLR 3016(b) which requires "the circumstances constituting the wrong [to be] stated in detail." The Amended Complaint alleges that "defendants' induced plaintiffs to commence and continue their lawsuit...by deliberately misrepresenting to the plaintiffs the strength of their cases" (Amended Complaint, ¶¶ 304-309). In their proposed Second Amended Complaint, plaintiffs make new allegations of concealment of a prohibited legal fees referral arrangement with Eddie Shapiro ("Mr. Shapiro") (Motion Seq. No. 007). Plaintiffs' conclusory allegations have failed to state any specific misrepresentation conveyed by Todtman Nachamie to plaintiffs. Moreover, the documentary evidence in the form of the Disclaimer of Guarantee in the Engagement Letter belies plaintiffs' claim that Todtman Nachamie induced plaintiffs by deliberately misrepresenting the strength of plaintiffs' case and any concealment of a referral arrangement with Mr. Shapiro. Nonetheless, while such an arrangement may be a violation of a disciplinary rule, as will be discussed below, it does not give rise to a separate cause of action for fraudulent inducement which is also duplicative of the legal malpractice claim. As such, the allegations in the Amended Complaint and the "circumstances surrounding the alleged fraud" fail to give rise to a "reasonable inference" that Todtman Nachamie fraudulently induced plaintiffs to commence or continue the Underlying Action (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d at 559).

Motion by Robert A. Rubenfeld to Dismiss the Amended Complaint (Motion Seq. No. 005)

In support of his motion to dismiss, Rubenfeld argues that (1) the cause of action in the

Amended Complaint for legal malpractice as directed toward him is barred by the statute of limitations [CPLR § 214(6)]; (2) in any event, plaintiffs have failed to state a cause of action for legal malpractice, breach of contract or fraudulent inducement; and (3) six of the plaintiffs lack standing to sue Rubenfeld as they are dissolved corporations.[13]

Statute of Limitations

Rubenfeld was employed by Todtman Nachamie from May 2003 until September 2009, and Todtman Nachamie represented plaintiffs from August 2004 until April 2005 (Notice of Motion, Affirmation of Thomas A. Leghorn, ¶¶ 8-9). According to Rubenfeld, his only role in this matter was to assist in the drafting of the original Summons and Complaint, dated November 5, 2004 while employed by Todtman Nachamie, and he had no further involvement (Notice of Motion, Affirmation of Thomas A. Leghorn, ¶ 13-14). In the over three-hundred (300) paragraph Amended Complaint, Rubenfeld is named individually in only nine paragraphs (Amended Complaint, ¶¶ 22-26, 162-163 and 168-170).[14] Plaintiffs concede that it was defendant Feldman

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[13] Given that Rubenfeld was employed by Todtman Nachamie, this Court is dismissing plaintiffs claims against Rubenfeld by plaintiff World (*see* footnote 7 above).

[14]Paragraphs 22 through 26 of the Amended Complaint allege that Rubenfeld as a partner in Todtman Nachamie represented plaintiffs from August 2004 through April 2005 (during the term of Todtman Nachamie's representation). Paragraphs 162 to 163 allege that Rubenfeld drafted the Summons and Complaint in November 2004 as a partner of Todtman Nachamie. Paragraphs 168 to 170 allege that Rubenfeld, as a partner of Todtman Nachamie, remained actively involved with plaintiffs' case "into 2005" and the work included email communications, formulation of strategy and participation in drafting the Amended Complaint, dated January 24, 2005. Paragraph 170 fails to name Rubenfeld but purportedly refers to work Rubenfeld conducted for plaintiffs as alleged in Paragraph 169. In addition, the allegations in plaintiffs' supporting affidavits fail to identify Rubenfeld individually (*see* Affidavit of John Demane, President and Owner of Fulton Market Retail Fish Inc. d/b/a Simply Seafood, sworn to on July 21, 2015; Affidavit of Gerard Nally, President and Owner of Andejo Corporation d/b/a Seaport Watch Company, sworn to on July 21, 2015).

rather than Rubenfeld who drafted the Amended Complaint (Amended Complaint, ¶ 183).

There is no allegation that Rubenfeld provided any legal advice to plaintiffs after January 2005. The continuous representation doctrine is unavailing given there is no evidence that "there [was] a mutual understanding [between Rubenfeld and plaintiffs] of the need for further representation" in the Underlying Action (*McCoy v Feinman*, 99 NY2d at 306). As such, plaintiffs' cause of action against Rubenfeld for legal malpractice is barred by the three year statute of limitations.

Legal Malpractice, Breach of Contract & Fraudulent Inducement

In any event, the legal malpractice, breach of contract and fraudulent inducement causes of action fail to state a cause of action for the same reasons stated above. Moreover, plaintiffs' cause of action against Rubenfeld for breach of contract is duplicative of plaintiffs' legal malpractice claim. In general, plaintiffs' claims against Rubenfeld for fraudulent inducement are conclusory and fail to plead the necessary elements of such a claim. More specifically, plaintiffs have not alleged any representation conveyed by Rubenfeld to plaintiffs.

Claims by Certain Dissolved Plaintiffs against Todtman Nachamie and Rubenfeld

Todtman Nachamie and Rubenfeld allege that given that certain of the corporate plaintiffs have dissolved and are inactive, such plaintiffs lack standing to commence this action. These defendants argue that a dissolved corporate entity can only maintain suit in connection with "winding up its affairs" (Business Corporation Law ["BCL"], § 1005). However, pursuant to BCL § 1006(b) "the dissolution of a corporation shall not affect any remedy available to...such corporation...for any right or claim existing or any liability incurred before such dissolution" (*see Moran Enters., Inc. v Hurst*, 66 AD3d 972, 975-976 [2d Dept 2009]). To the extent that the

dissolved plaintiffs, entered into a retainer agreement with Todtman Nachamie prior to their dissolution, such plaintiffs have standing to commence suit.[15]

Motion by the RFS Defendants to Dismiss the Amended Complaint (Motion Seq. No. 006)

In support of their motion to dismiss, the RFS Defendants argue that (1) the Underlying Action Order precludes recovery against the RFS Defendants given that (a) plaintiffs cannot meet the "but for" causation element of legal malpractice; and (b) the Underlying Action Order is collateral estoppel upon the legal malpractice claims in the instant matter; (2) the alleged failure by the RFS Defendants to take certain actions in connection with the Underlying Action would not have changed its outcome; (3) the cause of action for fraudulent inducement against the RFS Defendants is not properly pled and lacks merit; and (4) the plaintiffs newly added to this action in the Amended Complaint are barred by the statute of limitations.

According to the RFS Defendants, in April 2005, Rosenberg, Feldman and Smith left Todtman Nachamie and formed their own firm, RFS, and by written retainer agreement, dated April 20, 2005 (the "RFS Retainer Agreement"), the South Street Tenants Association retained RFS to represent them in the Underlying Action (Notice of Motion, Exhibit "I"). By Order, dated April 2, 2012, the motion by RFS to withdraw as counsel was granted (Hon. Marcy S. Friedman, J.S.C.) (Notice of Motion, Exhibit "M").

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[15]According to proof presented by Todtman Nachamie and Rubenfeld from the NYS Department of State Division of Corporations, it is unclear whether Todtman Nachamie was retained after plaintiff Roslu Corporation was dissolved on June 30, 2004, and as such, would lack the capacity to sue as this action does not relate to the winding up of its affairs (Notice of Motion [Todtman Nachamie, Motion Seq. 004, Exhibit "E"; Notice of Motion [Rubenfeld], Motion Seq. No. 005, Exhibit "E"; *Moran Enters., Inc. v Hurst*, 66 AD3d at 975-976). Todtman Nachamie and Rubenfeld allegedly represented the other dissolved plaintiffs before they became inactive (in 2008, 2010, 2012 and 2015) and accordingly would have standing to sue.

Legal Malpractice

In their long and redundant Amended Complaint, plaintiffs' claims for legal malpractice arising out of defendants' representation of plaintiffs in the Underlying Action are generally that (1) defendants failed to advise Simply Seafood concerning the terms of the subject Lease, including the option to renew before and after commencement of the Underlying Action (Amended Complaint, *see e.g.* ¶¶ 50, 59, 179, 253); (2) the defendants failed to advise Simply Seafood to exercise its Lease renewal option immediately upon it paying $36,814.28 in rent arrears in May 2005 (*Id.*, *see e.g.* ¶¶ 197-206); (3) defendants should have named NYCED and Related as defendants in the Underlying Action (*Id.*, *see e.g.* ¶¶ 47-48. 59, 193-194); (4) defendants failed to retain an expert to contest the utility and/or sales tax charges the landlord alleged plaintiffs owed (*Id.*, ¶ 226); (5) defendants failed to move to compel further discovery from the landlord (*Id.*, ¶ 228); (6) defendants failed to compel the landlord to provide privilege logs and unredacted discovery (*Id.*, ¶ 233-234); (7) defendants entered into an improper confidentiality agreement with the Landlord (*Id.*, ¶ 239); and (8) in opposition to the landlord's motion for summary judgment, defendants failed to (i) seek dismissal of plaintiff's claims concerning the misappropriation of merchant association funds by the landlord; (ii) adequately oppose the Landlord's counterclaims for back rent (*Id.*, ¶¶ 266-267); (iii) request a declaratory judgment determining that Simply Seafood had validly exercised its option to renew the Lease; and (iv) move for an order amending the complaint alleging that Simply Seafood validly exercised said option (*Id.*, ¶¶ 266-276).

Collateral Estoppel

Plaintiffs had a full and fair opportunity to litigate the issues in the Underlying Action in

proceedings before this Court and before Justice Friedman (*see Kinberg v Schwartzapfel, Novick, Truhowsky, Marcus, PC*, 136 AD3d 431, 432 [1st Dept 2016] ["Plaintiff is collaterally estopped from relitigating the merits of her underlying personal injury claim, since she had a full and fair opportunity to litigate the issue in the prior action"]). Many of the above plaintiffs' claims for legal malpractice have been necessarily decided by this Court's Underlying Action Order and the First Department Order (collectively, the "Prior Orders") .

This Court has already addressed and rejected plaintiff's first three and the eighth legal malpractice claims, and thus will not repeat said determinations. The majority of the remaining claims, listed as five, six and seven, deal with defendants' alleged failure to properly conduct appropriate discovery in the Underlying Action. These allegations must fail as defendants certainly had the leeway to select "one among several reasonable courses of action [in the discovery process which] does not constitute malpractice'" (*Rodriguez v Lipsig, Shapey, Manus & Moverman*, 81 AD3d at 552). Plaintiffs have also neither properly alleged nor demonstrated that but for the alleged negligence of defendants in somehow failing to properly engage in discovery, plaintiffs would have prevailed in the Underlying Action.

Plaintiffs fourth claim that RFS failed to retain an expert to contest the utility and/or sales tax charges the Landlord alleged plaintiffs owed is insufficient as a matter of law. To properly address this claim, it is necessary to repeat the dates when RFS was relieved as counsel for plaintiffs, and the then new incoming counsel took over as plaintiffs' counsel. It is clear that by Order, dated April 2, 2012, the Hon. Marcy S. Friedman, J.S.C. granted RFS's motion to withdraw as plaintiffs' counsel (Notice of Motion, Exhibit "M"). In fact, both the proposed incoming attorney, John L. O'Kelly, Esq. (Mr. O'Kelly"), and Hill Rivkins, LLP, made a

"limited appearance" on March 29, 2012, to attempt to demonstrate that RFS should be relieved "for cause." Plaintiffs' new attorney, Mr. O'Kelly, first appeared for oral argument on August 2, 2012, to oppose the Landlord's motion for reargument of Justice Friedman's denial of summary judgment on its ejectment claim (although it is likely that he earlier prepared papers in opposition to the motion). Approximately one year later, on May 27, 2013, the trial of the Underlying Action commenced. Thus, the plaintiffs and Mr. O'Kelly had almost a year to prepare for trial, including obtaining a qualified expert to contest said utility and/or sales tax charges. Of course, Mr. O'Kelly, as the trial attorney, failed to either retain such an expert or even request additional time to do so. Ironically, it appears that it was Mr. O'Kelly's trial strategy not to employ such an expert. Incredibly, as noted in Footnote 6 in the Underlying Action Order, Mr. O'Kelly "proffered in evidence the "'Gas Allocation Study"' which demonstrated the very gas factor that [Simply Seafood] seems to have historically disputed." Plaintiffs have also neither properly alleged nor demonstrated that but for the alleged negligence of RFS in somehow failing to retain such an expert (even though plaintiffs and Mr. O'Kelly had ample time to so), plaintiffs would have prevailed in the Underlying Action.

Breach of Contract

As with plaintiffs' cause of action against Todtman Nachamie, plaintiffs' breach of contract and legal malpractice causes of action against the RFS Defendants arise out of the same set of facts (*Xiong Ping Tang v Marks*, 133 AD3d at 456). Plaintiffs have failed to allege that the RFS Defendants breached a promise to achieve a specific result, and as such, their claim for breach of contract is "insufficient and duplicative of the malpractice claim" as a matter of law (*Alphas v Smith*, 147 AD3d at 558).

Fraudulent Inducement

As with the claims against Todtman Nachamie, plaintiffs have failed to plead fraudulent inducement with the required particularity pursuant to CPLR 3016(b) which requires "the circumstances constituting the wrong [to be] stated in detail." The Amended Complaint alleges that "defendants' induc[ed] plaintiffs to commence and continue their lawsuit...by deliberately misrepresenting to the [p]laintiffs the strength of their cases" (Amended Complaint, ¶¶ 304-309). Plaintiffs' conclusory allegations have failed to state any specific misrepresentation conveyed by the RFS Defendants to plaintiffs. Moreover, the documentary evidence in the form of the Disclaimer of Guarantee in the RFS Retainer Agreement belies plaintiffs' claim that RFS induced plaintiffs by deliberately misrepresenting the strength of plaintiffs' case. Said Disclaimer of Guarantee provides "[a]s you know, it is impossible to predict the result or success of any engagement. Nothing in this Agreement and nothing in any attorney's statement to the Client [the South Street Tenants' Association] should be construed to make any promises or guarantees" (Notice of Motion, Exhibit "I"). As with Todtman Nachamie, the allegations in the Amended Complaint and the "circumstances surrounding the alleged fraud" fail to give rise to a "reasonable inference" that the RFS Defendants fraudulently induced plaintiffs to commence or continue the Underlying Action or that the RFS Defendants deliberately misrepresented the strength of plaintiffs' case (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d at 559).

Motion by Plaintiffs for leave to file a Second Amended Complaint (Motion Seq. No. 007)

Plaintiffs move for leave to file and serve a Second Amended Complaint adding a fourth cause of action alleging that defendants breached "attorney rules of conduct and/or practice" (Notice of Motion, Exhibit "2"). Plaintiffs allege that the defendants breached disciplinary rules

by "failing to disclose to the plaintiffs that they promised a referral fee to Mr. Shapiro, principal owner of two of the original [p]laintiffs [in the Underlying Action], in return for his having referred/steered the plaintiffs[']] case to the defendants" (*Id.*). Plaintiffs also allege that defendants' representation of the various plaintiffs in the Underlying Action violated conflict of interest rules and that defendants failed to disclose such conflicts to plaintiffs (*Id.*). In support of their motion to serve and file a Second Amended Complaint, plaintiffs submit an unsworn heresay statement, dated March 16, 2012, of non-party Ali Ahmed (the "Ahmed Statement") which states that in connection with the Underlying Action, he asked his partner Mr. Shapiro how "we can pay for lawyers like this" whereupon Mr. Shapiro said "don't worry[,] I am getting a find fee from my brothers[']] lawyer Steve Rosenberg for giving this to him" (Notice of Motion, Exhibit "1").[16]

In opposition, defendants argue that (1) plaintiffs' motion to amend is prejudicial; and (2) is palpably insufficient and devoid of merit given that a violation of ethical rules does not create a private right of action. Further defendants argue that (i) plaintiffs waited until the subject motions to dismiss were fully submitted and oral argument held to make this motion, and as such, plaintiffs are merely once again seeking to delay dismissal of this action; (ii) plaintiffs are merely rehashing old arguments and manufacturing inappropriate claims; (iii) even if the Court were to consider the merits of the proposed amendment, violation of a disciplinary rule fails to support a cause of action for legal malpractice; and (4) the proposed amendment is based on an unsworn hearsay statement.

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[16]Plaintiffs failed to submit a sworn affidavit from an individual with personal knowledge in support of the motion to amend.

"Leave to amend a pleading is freely given (CPLR 3025 [b]), absent prejudice or surprise resulting directly from the delay. The determination of whether to allow such an amendment is reserved for the court's discretion" (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009] [internal citation omitted]). "[I]n order to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated. Leave will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law" (*Thompson v Cooper*, 24 AD3d 203, 205 [internal quotation marks and citations omitted]; *see Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590 [1st Dept 1990]).

Plaintiffs' proposed Second Amended Complaint adds a Fourth Cause of Action for "Breach of Attorney Rules of Conduct And/Or Practice" (Notice of Motion, Exhibit "2", ¶¶ 305-307). The Fourth Cause of Action alleges that defendants "breached the rules governing attorney conduct/and or practice. . . and that these breaches caused plaintiffs[']damages." Plaintiffs allege that defendants are liable to plaintiffs for damages caused by defendants' breach of the rules of attorney conduct and/or practice.

The proposed Second Amended Complaint is insufficient as a matter of law. "[T]here is no private right of action against an attorney or law firm for violations of the Code of Professional Responsibility or disciplinary rules" (*Weinberg v Sultan*, 142 AD3d 767, 769 [1st Dept 2016]; *see Kantor v Bernstein*, 225 AD2d 500, 501 [1st Dept 1996].[17] As such, plaintiffs' motion for leave to file and serve a Second Amended Complaint is denied.

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[17]Furthermore, an alleged violation of the disciplinary rules without more, does not support a claim for malpractice (*Cohen v Kachroo*, 115 AD3d 512, 513 [1st Dept 2014]). Of course, as stated above, all legal malpractice claims have been dismissed.

Cross-Motion by Todtman Nachamie and Rubenfeld for Costs and Attorneys' Fees

Todtman Nachamie and Rubenfeld cross-move for costs and attorneys' fees pursuant to NYCRR § 130-1.1(c) incurred in opposing plaintiffs' motion to file and serve a Second Amended Complaint. Under NYCRR § 130.1(c)(1), conduct is frivolous if "it is completely without merit in law." Here, plaintiffs' fourth cause of action asserted in their proposed Second Amended Complaint alleging a cause of action against defendants for violation of the disciplinary rules borders on frivolous conduct. However, at this time, this Court will refrain from exercising its wide discretion to award costs and attorneys' fees against plaintiffs and Mr. O'Kelly.

CONCLUSION

For the foregoing reasons, it is

ORDERED, that the motion by defendant Todtman, Nachamie, Spizz & Johns, P.C. to dismiss the Amended Complaint (Motion Sequence No. 004) is granted; and it is further

ORDERED, that the motion by defendant Robert A. Rubenfeld to dismiss the Amended Complaint (Motion Sequence No. 005) is granted; and it is further

ORDERED, that the motion by defendants Rosenberg Feldman Smith LLP, Stephen M. Rosenberg, Richard B. Feldman and Michael H. Smith to dismiss the Amended Complaint (Motion Sequence No. 006) is granted; and it is further

ORDERED, plaintiffs' motion for leave to file and serve a Second Amended Complaint (Motion Sequence No. 007) is denied; and it is further

ORDERED, the cross-motion by Todtman, Nachamie, Spizz & Johns, P.C. and Robert A. Rubenfeld for costs and attorneys' fees incurred in opposing plaintiffs' motion for leave to file

and serve a Second Amended Complaint (Motion Sequence No. 007) is denied without prejudice; and it is further

ORDERED, that the clerk shall enter a judgment accordingly.

Dated: February 16, 2018

ENTER:

J.S.C.

SHLOMO HAGLER
J.S.C.