Moncho v Miller
2020 NY Slip Op 31821(U)
June 12, 2020
Supreme Court, New York County
Docket Number: 155382/2017
Judge: W. Franc Perry

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

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LEE MONCHO, 261 LOFTS MANAGER LLC,

Plaintiff,

- v -

HARRY MILLER, SAM SPREI, JONATHAN PASTERNAK, DELBELLO DONNELLAN WEINGARTEN WISE & WIEDERKEHR LLP

Defendant.

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INDEX NO. 155382/2017

MOTION DATE 06/13/2019, 02/11/2020

MOTION SEQ. NO. 007 008 008 013

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 211, 212, 213, 214, 215, 216, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 305, 315

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 297, 298, 299, 300, 301, 302, 303, 304, 306, 307, 308

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 297, 298, 299, 300, 301, 302, 303, 304, 306, 307, 308

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 013) 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 394, 395, 396, 397, 398, 399

were read on this motion to/for CONTEMPT.

Motion sequence numbers 007, 008, 009, and 013 are consolidated for disposition.

This is an action for, inter alia, fraud and legal malpractice arising out of defendants Jonathan Pasternak (Pasternak) and DelBello Donnellan Weingarten Wise & Wiederkehr LLP's representation of plaintiff 261 East 78 Realty Corp. in a Chapter 11 bankruptcy proceeding captioned *In re 261 East 78 Realty Corp.*, Case No. 11-15624 (REG) (Bankr SD NY).

Defendants Harry Miller (Miller) and Sam Sprei (Sprei) move, pursuant to CPLR 3211 (a) (1), (7), and (10), and CPLR 1003, to dismiss the second amended verified complaint (motion sequence number 007).

Defendant DelBello Donnellan Weingarten Wise & Wiederkehr LLP (the DelBello firm) moves, pursuant to CPLR 3211 (a) (1), (3), (5), and (7), to dismiss the second amended verified complaint (motion sequence number 008).

Defendant Pasternak moves, pursuant to CPLR 3211 (a) (1), (3), (5), and (7), for an order dismissing the second amended verified complaint (motion sequence number 009).

The DelBello firm and Pasternak move, by order to show cause, for an order holding plaintiffs and their counsel, Thomas J. Goodman, Esq., in contempt of court, pursuant to Judiciary Law § 756, for: (a) improperly filing another complaint captioned *261 East 78 Lofts LLC v DelBello Donnellan Weingarten Wise & Widerkehr, LLP*, Index No. 159638/2019 (Sup Ct, NY County) against the DelBello firm, Pasternak, Miller, and Sprei based on the same underlying facts asserted against defendants in the instant action; (b) serving defendants with the new complaint on December 30, 2019; and (c) filing a motion in the Chapter 11 bankruptcy proceeding *In re 261 East 78 Lofts, LLC*, Case No. 16-11644 (SHL) (Bankr SD NY), against the DelBello firm and Pasternak, in violation of this court's decision and order dated January 10, 2019 and the court's decision and order dated December 4, 2019. Additionally, the DelBello firm and Pasternak seek an order permanently enjoining plaintiffs and Goodman from: (a) filing, commencing or serving any new actions against them; (b) filing motions in this action; and (c) serving or issuing subpoenas or other discovery in this action or any other pending actions or proceedings concerning the claims alleged against them in this action, except by order to show cause submitted to this court seeking permission to do so, accompanied by proof that they have posted a bond of $25,000 to secure any

award of attorneys' fees and expenses in the event that the court finds such application to be frivolous. In addition, the DelBello firm and Pasternak seek an order permanently enjoining plaintiffs and Goodman from communicating with the DelBello firm or Pasternak (other than through counsel of record) or harassing the DelBello firm or Pasternak by communicating with their respective family members, clergy, board members of their professional places of worship or professional colleagues. The DelBello firm and Pasternak also seek an order: (1) directing plaintiffs and Goodman to discontinue their new complaint and withdraw their motion in the bankruptcy proceeding; and (2) awarding the DelBello firm and Pasternak sanctions against plaintiffs and Goodman for their costs and expenses incurred in response to plaintiffs' and Goodman's repeated willful violations of this court's orders (motion sequence number 013).

On January 7, 2020, the court entered a temporary restraining order, pending the hearing and determination of this application, enjoining plaintiffs and Goodman from: (a) filing any motions against or concerning the DelBello firm and Pasternak in the instant action or any other action or proceeding, (b) filing, commencing or serving any new actions against the DelBello firm and Pasternak, (c) serving discovery demands or subpoenas upon any party or nonparty regarding the facts and claims alleged in the instant action, except by order to show cause submitted to the court seeking permission to do so, accompanied by proof that plaintiffs have posted a $25,000 bond to secure any award of attorneys' fees and expenses in the event that the court finds plaintiffs' application to be frivolous. The court also extended defendants' time to answer the complaint in the new action *sine die*.

BACKGROUND

The following facts are taken from the second amended complaint. Plaintiffs allege that, at all relevant times, Moncho was the sole shareholder of 261 East 78 Realty Corp. (NY St Cts Elec Filing System [NYSCEF] Doc No. 149, second amended verified complaint, ¶ 2). From April 1, 2007 through February 28, 2014, 261 East 78 Realty Corp. owned a six-story medical office building located at 261 East 78th Street in Manhattan (*id.*, ¶ 4). Miller was the sole member of 261 Lofts Manager, LLC (*id.*, ¶ 6). Sprei was Miller's business associate (*id.*, ¶ 8). On December 6, 2011, 261 East 78 Realty Corp. filed for Chapter 11 bankruptcy protection in the United States Bankruptcy Court for the Southern District of New York (*id.*, ¶ 27).

On January 1, 2013, Moncho, in his capacity as president of 261 East 78 Realty Corp., entered into a retainer agreement with the DelBello firm (*id.*, ¶ 11). Pursuant to the retainer agreement, the DelBello firm was to provide legal services to 261 East 78 Realty Corp., including, but not limited to, the prosecution of a Chapter 11 bankruptcy proceeding (*id.*, ¶ 12). Pasternak was one of the attorneys who was anticipated to offer services to 261 East 78 Realty Corp. (*id.*, ¶ 13). Pasternak was a non-equity partner in the DelBello firm (*id.*, ¶ 14). Plaintiffs allege that, upon confirmation of the bankruptcy plan, the DelBello firm and Pasternak continued to provide legal services to Moncho individually (*id.*, ¶ 16). The DelBello firm continued to send invoices to Moncho (*id.*, ¶¶ 18-19; exhibit C).

Approximately one week later, on January 10, 2013, Pasternak began suggesting that Moncho utilize Sprei as a plan funder and Madison Realty Capital as lender (*id.*, ¶ 29). Plaintiffs allege, upon information and belief, that neither Pasternak nor the DelBello firm performed any due diligence as to Sprei or Miller's suitability as plan funders (*id.*, ¶ 30). Plaintiffs allege that there were at least seven lawsuits filed against Sprei and/or Miller, with similar allegations and

which resulted in judgments against Miller and Sprei (*id.*, ¶ 31). Plaintiffs allege, upon information and belief, that Sprei induced Pasternak to recommend him to plaintiffs by promising to pay him a personal brokerage commission in the amount of $25,000 (*id.*, ¶ 32). According to plaintiffs, Sprei, in fact, paid Pasternak a $25,000 commission (*id.*, ¶ 33).

In September 2013, Pasternak negotiated a settlement of 261 East 78 Realty Corp.'s debt with the secured creditor (*id.*, ¶ 43). One of the key terms of the settlement was that the secured creditor would foreclose and plaintiffs would lose the property if the reorganization plan were not fully funded by Friday, February 28, 2014 (*id.*, ¶ 44).

Plaintiffs allege that, pursuant to the reorganization plan, a new corporate entity came into existence, 261 East 78 Lofts, LLC (*id.*, ¶ 74). Moncho became a 37.5% member and 261 Lofts Manager, LLC became a 62.5% member in 261 East 78 Lofts, LLC (*id.*).

According to plaintiffs, Pasternak, Miller, and Sprei worked with Madison Realty Capital to obtain $10,000,000 to pay the lion's share of the $10,700,000 debt (*id.*, ¶ 61). Miller and Sprei obtained an "after-hours loan" from Joseph Zelik (Zelik) in the amount of $1,750,000 (*id.*, ¶ 62). Zelik claims to hold a mortgage on the property pursuant to an assignment of mortgage dated February 27, 2014 and recorded on May 1, 2014 (*id.*, ¶ 21).

Plaintiffs further allege that "Miller and Sprei took exclusive possession of [261 East 78 Lofts, LLC's] assets and funds and prevented Moncho from gaining access thereto" (*id.*, ¶ 75). "Through Miller's position in Lofts Manager, Miller and Sprei engaged in subsequent transactions with [261 East 78 Loft, LLC]'s assets, including transferring the assets for their own benefit, and depriving Moncho of any benefit therefrom" (*id.*, ¶ 76). "Defendants Miller and Sprei have refused to return monies misappropriated from the operating account of 261 [East 78 Lofts, LLC], or to render any account thereof, although requested to do so by Moncho" (*id.*, ¶ 77). Upon information

and belief, "Miller and Sprei misappropriated $3 million from [261 East 78 Lofts, LLC] while acting through 261 Lofts Manager, LLC" (*id.*, ¶ 78). Plaintiffs allege that "[h]ad Moncho been able to use his preferred choice of plan funder, Lightstone Group, none of the injuries incurred as the result of Miller and Sprei's acts would have occurred" (*id.*, ¶ 169).

Plaintiffs allege that Sprei did not contribute more than $100,000 of his money but intended to raise funds through investors (*id.*, ¶ 110). Miller and Sprei ultimately failed to fund the $14 million reorganization (*id.*, ¶ 111). According to plaintiffs, "[b]ecause Defendants Miller and Sprei represented that they were able to fund the plan, but were clearly not able to, Plaintiffs ultimately lost their real property" (*id.*, ¶ 112).

According to plaintiffs, on July 7, 2017, Pasternak conveyed his home, which was purchased for $1,365,000, to his wife for $1 (*id.*, ¶ 96).

Plaintiffs allegedly became aware of the commission in July 2018 (*id.*, ¶ 97).

In a letter dated August 23, 2018 to the Chief Judge of the Bankruptcy Court of the Southern District of New York, counsel for the DelBello firm stated that:

> "Mr. Pasternak received a personal brokerage commission from a non-client buyer for unilaterally arranging the purchase of a property that was subject to the 261 East 78 Realty Corp. Bankruptcy proceeding. Moreover, he failed to disclose the personal brokerage Commission to the Bankruptcy Court or [the Delbello firm] which also appears to be a fraud on the Court"

(*id.*, ¶ 98; exhibit A).

According to the second amended complaint, although the DelBello firm asserted that no partners or employees of the law firm were aware of Pasternak's conduct, all relevant email communications were through Pasternak's firm email address (*id.*, ¶ 100). Plaintiffs allege that another partner at the DelBello firm, Erica Feynman, Esq., appeared in court on behalf of 261 East 78 Realty Corp. and that her name appears on the second amended reorganization plan (*id.*, ¶ 101; exhibit M).

The second amended complaint asserts the following 14 causes of action: (1) fraud against Miller and Sprei; (2) mortgage fraud against Miller and Sprei; (3) conversion against Miller and Sprei; (4) breach of fiduciary duty against Miller and Sprei; (5) breach of contract against Miller and Sprei; (6) fraud against Pasternak; (7) fraud against Pasternak; (8) legal malpractice against Pasternak; (9) legal malpractice against Pasternak; (10) legal malpractice against the DelBello firm; (11) fraudulent conveyance against Pasternak; (12) bankruptcy fraud against Pasternak and the DelBello firm; (13) vicarious liability against the DelBello firm; and (14) negligent supervision against the DelBello firm. Plaintiffs seek compensatory damages in an amount to be established at trial, punitive damages in the amount of $5 million, interest, and costs.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord [plaintiff] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Chapman, Spira & Carson, LLC v Helix BioPharma Corp.*, 115 AD3d 526, 527 [1st Dept 2014]). However, "'factual allegations . . . that consist of bare legal conclusions, or that are inherently incredible . . ., are not entitled to such consideration'" (*Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016], quoting *Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). "Whether the plaintiff will ultimately be successful in establishing those allegations is not part of the calculus" (*Landon v Kroll Lab. Specialists, Inc.*, 22 NY3d 1, 6 [2013], *rearg denied* 22 NY3d 1084 [2014] [internal quotation marks and citation omitted]).

Concerning "CPLR 3211 (a) (1) motion to dismiss on the ground that the action is barred by documentary evidence, such motion may be appropriately granted only where the documentary evidence utterly refutes 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]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2d Dept 2010]).

A. Miller and Sprei's Motion to Dismiss the Second Amended Complaint (Motion Sequence Number 007)

1. Fraud (First Cause of Action)

The first cause of action, labeled fraud, alleges that Miller and Sprei made numerous representations to the Bankruptcy Court, in particular, that they would be able to fund a $14 million reorganization (NYSCEF Doc No. 149, second amended verified complaint, ¶ 106). Plaintiffs allege that, because of multiple representations made to plaintiffs by Miller and Sprei, Moncho and 261 East 78 Realty Corp. reasonably relied upon these representations, and that Moncho decided to do business with Miller and Sprei to his lasting detriment (*id.*, ¶¶ 107-108). Plaintiffs allege that these representations were false when made and were known by them to be false (*id.*, ¶ 109). As admitted by Sprei, he did not contribute more than $100,000 of his own money, but rather intended to raise the money from investors (*id.*, ¶ 110). Miller and Sprei ultimately failed to fund the plan, which caused plaintiffs to lose the property (*id.*, ¶¶ 111-112).

Miller and Sprei now argue that the first cause of action should be dismissed based upon documentary evidence and for failure to state a cause of action. According to Miller and Sprei, although the second amended complaint alleges fraud against them for failing to fund the plan, this was a foreseen contingency that was contemplated in the reorganization plan and the term sheet.

As support for their argument, Miller and Sprei submit the First Amended Summary of Indicative Terms dated January 17, 2014, which states that "[i]n the event . . . that Sprei fails to fully fund the Plan as set forth above, the Deposit shall be forfeited as liquidated damages to the Debtor" (NYSCEF Doc No. 214 at 2).

In addition, Miller and Sprei offer the second amended reorganization plan, which provides:

> "3.2 Classified Claims
> ***
> (b) Class 2: Class 2 claims consists of the Allowed Secured Claim of MB in accordance with the MB Settlement Agreement and shall be treated as follows:
>
> (i) Satisfaction of Allowed Class 2 Claim by the Debtor. MB shall have an Allowed Class 2 Secured Claim in the amount of $10,700,000.00, and an Allowed Class 3 General Unsecured Claim in the minimum amount of $6,974,827.28, provided that MB's Allowed Class 2 Secured Claim shall increase to $11,000,000 ('Increased Allowed Class 2 Claim') in the event that its Class 2 Claim is not satisfied by the Debtor (or the Plan Funder on behalf of the Debtor) within 120 days after the execution date of the MB Settlement Agreement ('the 120-Day Dearline'), which Increased Allowed Class 2 Claim shall be paid in full from the proceeds of a Public Sale of the Property within 150 Days (the '150-Day Deadline') after execution of the MB Settlement Agreement implemented pursuant to Section 4.3 of the Plan. In the event that the $10,700,000.00 is not actually received by MB on or before the 150 Day Deadline, MB Financial will receive title to the Property pursuant to a Public Sale, free and clear of any Claims, interests or encumbrances of any kind, on the 150-Day Deadline or as promptly thereafter as is practicable as further provided in Section 4.3 of the Plan"

(NYSCEF Doc No. 215 at 13).

To state a cause of action for fraudulent misrepresentation, "a plaintiff must allege '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'" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011], quoting *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). Moreover, CPLR 3016 (b) requires that "the circumstances constituting the

wrong shall be stated in detail." Stated otherwise, the plaintiff must "'set forth specific and detailed factual allegations that the defendant personally participated in, or had knowledge of any alleged fraud'" (*Friedman v Anderson*, 23 AD3d 163, 166 [1st Dept 2005], quoting *Handel v Bruder*, 209 AD2d 282, 282-283 [1st Dept 1994]).

Here, the fraud claim against Miller and Sprei fails as a matter of law. Although the second amended verified complaint alleges that Miller and Sprei made representations "that they would be able to fund a $14 [million] reorganization" (NYSCEF Doc No. 149, second amended verified complaint, ¶ 106), "a representation of opinion or a prediction of something which is hoped or expected to occur in the future will not sustain an action for fraud" (*Zanani v Savad*, 217 AD2d 696, 697 [2d Dept 1995]; *see e.g. Chase Invs. v Kent*, 256 AD2d 298, 299 [2d Dept 1998] [alleged representations of defendants to the effect that plaintiff would successfully obtain a zoning variance, upon which the contract was conditioned, constituted nothing more than opinions or predictions of something which is expected to occur in future, and therefore cannot sustain claim for fraud]). Moreover, the allegations of the second amended complaint are directly contradicted by documentary evidence. The second amended complaint alleges that Miller and Sprei ultimately failed to fund the reorganization plan (NYSCEF Doc No. 149, second amended verified complaint, ¶ 111). Nevertheless, the second amended reorganization plan expressly contemplated that the plan would not be fully funded by the deadline. Therefore, the first cause of action is dismissed.

2. *Mortgage Fraud (Second Cause of Action)*

The second cause of action, denominated mortgage fraud, alleges that, prior to closing and acquiring any interest in the property, Miller and Sprei represented to nonparty Zelik that they possessed an ownership in the real property in order to obtain a loan from Zelik (NYSCEF Doc No. 149, second amended verified complaint, ¶ 115). Zelik thereafter gave a mortgage loan in the

amount of $1.75 million (*id.*, ¶ 116). Neither Miller nor Sprei disclosed the mortgage to plaintiffs, and later defaulted, causing principal to be due and owing and default interest to accrue (*id.*, ¶ 117). Plaintiffs were, therefore, allegedly damaged in an amount of $1,750,000 as a result of the prohibited loan, plus interest caused by defendants' default and "extraordinary damages" due to the cloud on the title (*id.*, ¶ 118).

Miller and Sprei argue that the second cause of action must be dismissed because it only alleges that they made misrepresentations to a nonparty, Zelik. Additionally, Miller and Sprei contend that plaintiffs' allegation that the alleged mortgage fraud resulted from a "prohibited loan" is not pleaded with particularity.

Here, as argued by Miller and Sprei, the second amended complaint alleges that Miller and Sprei made a misrepresentation to a nonparty, Zelik, in order to obtain a mortgage loan from him (NYSCEF Doc No. 149, second amended verified complaint, ¶ 115). Plaintiffs do not allege that Miller and Sprei made a misrepresentation to them (*see Mandarin Trading Ltd.*, 16 NY3d at 178). Accordingly, the second cause of action is dismissed.

3. Conversion (Third Cause of Action)

The third cause of action is labeled conversion. It alleges that Sprei and Miller "took exclusive possession of [261 East 78 Lofts, LLC]'s assets and funds and prevented Plaintiff Moncho from gaining access thereto," and that these defendants have "refused to return the money appropriated by them or to render any account thereof, although requested to do so by Moncho" (NYSCEF Doc No. 149, second amended verified complaint, ¶ 122).

Conversion "takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49–50 [2006]

[citations omitted]). "Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*id.*).

In this case, the second amended complaint alleges that Miller and Sprei "took exclusive possession of [261 East 78 Lofts, LLC]'s assets and funds and prevented Moncho from gaining access thereto," "engaged in subsequent transactions with [261 East 78 Lofts, LLC]'s assets, including transferring assets for their own benefit, and depriving Moncho of any benefit therefrom," and "have refused to return monies misappropriated from the operating account of [261 East 78 Lofts, LLC], or to render any account thereof" (NYSCEF Doc No. 149, ¶¶ 75-77). However, the alleged conversion resulted in an injury to 261 East 78 Lofts, LLC, and not to Moncho individually or 261 East 78 Realty Corp. (*see Paradiso & DiMenna v DiMenna*, 232 AD2d 257, 258 [1st Dept 1996] ["(t)he conversion . . . resulted in a corporate injury because it deprived [the corporation] of those [funds].' The injury to [plaintiff] was real but only derivative; therefore the funds should have been awarded to the corporation"] [citation omitted]; *see also Wolf v Rand*, 258 AD2d 401, 403 [1st Dept 1999] [shareholder in closely held corporation seeking vindication of her rights as a shareholder, and recovery of corporate assets and profits diverted from her in that status, was entitled to sue only derivatively]). Accordingly, the third cause of action is dismissed.

4. Breach of Fiduciary Duty (Fourth Cause of Action)

The fourth cause of action alleges that Miller and Sprei owed fiduciary duties to Moncho, 261 Lofts Manager, LLC and 261 East 78 Lofts, LLC by virtue of the 261 East 78 Lofts, LLC operating agreement (NYSCEF Doc No. 149, second amended complaint, ¶ 126). Plaintiffs further allege that "Sprei and Miller . . . enter[ed] into a scheme to defraud and deceive Moncho by

depriving him of his rightful share of and interest in [261 East 78 Lofts, LLC]" and "deliberately acted to deprive Moncho of knowledge of the financial transactions and worth of [261 East 78 Lofts, LLC]" (*id.*, ¶ 129). According to plaintiffs, the breaches of fiduciary duty have "resulted in injury to Moncho, including, but not limited to, the loss of [261 East 78 Lofts, LLC]'s assets and property due to the mismanagement and neglect, diversion of [261 East 78 Lofts, LLC]'s assets and outright theft" (*id.*, ¶ 131).

Miller and Sprei argue that the fourth cause of action should be dismissed because it fails to allege the existence of a fiduciary duty owed by Miller and Sprei to plaintiffs. More specifically, they contend that the second amended complaint fails to allege that either were members or managers of 261 East 78 Lofts, LLC.

To state a cause of action for breach of fiduciary duty, the plaintiff "must [allege] the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that party's misconduct" (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]). The members of a limited liability company may stand in a fiduciary relationship to each other and to the limited liability company (*Jones v Voskresenskaya*, 125 AD3d 532, 533 [1st Dept 2015]). Moreover, a managing member of a limited liability company owes a non-managing member a fiduciary duty (*Pokoik*, 115 AD3d at 429).

The second amended verified complaint alleges that Miller and Sprei owed a fiduciary duty to Moncho and 261 East 78 Lofts, LLC on account of 261 East 78 Lofts, LLC's operating agreement (NYSCEF Doc No. 149, second amended verified complaint, ¶ 126). In addition, plaintiffs allege that Moncho had a 37.5% interest and 261 Lofts Manager, LLC had a 62.5% interest in 261 East 78 Lofts, LLC, respectively (*id.*, ¶ 74). Plaintiffs do not allege that either Miller or Sprei were members of 261 East 78 Lofts, LLC. However, in response to Miller and

Sprei's motion, plaintiffs offer deposition testimony indicating that Sprei signed a document as "managing member of 261 East 78 Lofts, LLC" (NYSCEF Doc No. 277, Sprei tr at 72). The court may consider this testimony to supplement the complaint (*see Rovello v Orofino Realty Corp.*, 40 NY2d 633, 635 [1976]). Giving the second amended complaint and this testimony the benefit of every favorable inference, plaintiffs have a cause of action for breach of fiduciary duty against Sprei. As a managing member, Sprei would owe Moncho, a non-managing member, a fiduciary duty. Accordingly, the branch of Miller and Sprei's motion is denied only as to Sprei.

5. *Breach of Contract (Fifth Cause of Action)*

The fifth cause of action, labeled breach of contract, alleges that "Miller and Sprei promised to fund the total sum of $14 million, including a new loan of $10 million plus fresh capital of $4 million in the Second Amended Plan of Reorganization agreement, with the timetable set out in an accompanying term sheet" (NYSCEF Doc No. 149, second amended verified complaint, ¶ 134). However, plaintiffs allege, Miller and Sprei breached their contractual obligations to provide sufficient funding (*id.*, ¶ 135).

Miller and Sprei argue that the reorganization plan is not a contract, and that this claim fails for the same reasons as the fraud claim.

To state a cause of action for breach of contract, the plaintiff must allege: (1) the existence of a contract; (2) its performance under the contract; (3) the other party's breach of the contract; and (4) damages as a result of the breach (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]; *Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). The complaint must allege "the essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated" (*Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]).

Contrary to Miller and Sprei's contention, the confirmed reorganization plan became a binding contract (*see In re Bennett Funding Group, Inc.*, 220 BR 743, 758 [Bankr ND NY 1997] [debtor's confirmed plan "became a binding contract . . . and must be interpreted in accordance with general contract law"]; *accord In re Dynegy Inc.*, 486 BR 585, 590 [Bankr SD NY 2013]). However, even affording the second amended complaint the benefit of every favorable inference, it fails to state a cause of action for breach of contract. The second amended complaint fails to allege a breach of the second amended reorganization plan. To the contrary, the second amended reorganization plan expressly contemplated that the plan may not have been fully funded. Therefore, the fifth cause of action is dismissed.

6. *Whether 261 East 78 Lofts, LLC is a Necessary Party*

Miller and Sprei argue that 281 East 78 Lofts, LLC – the owner of the property that sustained all of the damages – is a necessary party to this action. According to Miller and Sprei, complete relief cannot be accorded between the present parties without 261 East 78 Lofts, LLC being joined to this action. Furthermore, Miller and Sprei argue that, because plaintiffs have failed to join a necessary party, this action should be dismissed.

Plaintiffs counter that 261 East 78 Lofts, LLC is not a necessary party because it does not have any interest that is not being represented in this action, and no longer has any assets.

CPLR 1001 (a) provides that "Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." "These compulsory joinder provisions are intended 'not merely to provide a procedural convenience but to implement a requisite of due process—the opportunity to be heard before one's rights or interests are adversely affected'" (*Mahinda v Board of Collective Bargaining*, 91 AD3d 564, 564 [1st Dept 2012]

[citations omitted]). As previously discussed, the court has dismissed plaintiffs' causes of action against Miller and Sprei, with the exception of the breach of fiduciary duty claim against Sprei. The breach of fiduciary duty claim can proceed against Sprei in the absence of 261 East 78 Lofts, LLC (*see Pokoik*, 115 AD3d at 432 ["The breach of fiduciary duty claim can proceed against Gary in the absence of the LLCs"]).

Accordingly, the branch of Miller and Sprei's motion seeking dismissal of the second amended complaint for failure to join a necessary party is denied.

B. Pasternak's Motion to Dismiss the Second Amended Complaint (Motion Sequence Number 009)

The second amended verified complaint asserts six causes of action against Pasternak. In the sixth cause of action, labeled fraud, plaintiffs allege that, pursuant to the retainer agreement and court order appointing Pasternak, Pasternak made an affirmative representation that he would not represent any other individual or entity in this case and would not share fees with anyone other than the DelBello firm (NYSCEF Doc No. 141, second amended verified complaint, ¶ 141). Nevertheless, Pasternak accepted a commission from Sprei, and in doing so, defrauded plaintiffs and committed fraud on the court (*id.*, ¶¶ 144-145). In the seventh cause of action, labeled fraud, plaintiffs allege that Pasternak made numerous false representations to Moncho and 261 East 78 Realty Corp. that Sprei had the ability to fund the reorganization plan, upon which plaintiffs reasonably relied to their detriment (*id.*, ¶ 147-155). In the eighth cause of action, plaintiffs allege that Pasternak committed legal malpractice by introducing his client to a plan funder who he knew lacked the ability to fund a reorganization plan, and failed to perform due diligence as to the suitability of an investor or lender in bankruptcy (*id.*, ¶¶ 161-164). Had Moncho been able to utilize his chosen plan funder, the Lightstone Group, none of the injuries incurred as the result of Miller and Sprei's acts would have occurred (*id.*, ¶ 169). In the ninth cause of action, plaintiffs

allege that Pasternak had a conflict of interest in representing plaintiffs while also accepting a commission from Sprei (*id.*, ¶ 177). In the eleventh cause of action, plaintiffs allege that Pasternak fraudulently conveyed his share of his home to his wife for one dollar (*id.*, ¶ 194). In the twelfth cause of action, plaintiffs assert a bankruptcy fraud claim against Pasternak (*id.*, ¶ 204).

1. *Whether 261 East 78 Realty Corp. Has Standing to Prosecute its Claims in this Action*

Pasternak argues that plaintiffs neither Moncho nor 261 East 78 Realty Corp. has standing to pursue these claims because they constitute the property of the bankruptcy estate that transferred to 261 East 78 Lofts, LLC upon confirmation of the plan. According to Pasternak, pursuant to the reorganization plan, "title to and possession of any and property of the estate, real or personal, shall be re-vested in the Reorganized Debtor and transferred to the Plan Funder" (NYSCEF Doc No. 243 § 7.1)

Plaintiffs contend that their causes of action accrued after January 2013, and thereafter accrued after the bankruptcy petition was filed. Therefore, plaintiffs maintain that they have standing to bring these causes of action because they retained ownership of these causes of action.

"It is well settled that the failure to schedule a legal claim as an asset in a bankruptcy proceeding deprives the debtor of standing to raise it in a subsequent legal action" (*Barranco v Cabrini Med. Ctr.*, 50 AD3d 281, 281-282 [1st Dept 2008]). As noted by the First Department in *Williams v Stein* (6 AD3d 197, 198 [1st Dept 2004]),

> "[w]hether the legal malpractice claim asserted in the complaint is viewed as having accrued prior to the filing of the bankruptcy petition, as the motion court held, or post petition, as plaintiff contends, the claim is still the property of the bankrupt estate pursuant to the Bankruptcy Code (11 USC § 541 [a] [1], [7]), and may not be maintained by plaintiff in his individual capacity"

(*accord Barranco*, 50 AD3d at 282).

Applying these principles, it is undisputed that 261 East 78 Realty Corp. did not list its claims in the schedule of assets in the bankruptcy proceeding. Although plaintiff argues that the causes of action accrued post petition, even if these causes of action accrued at that time, the claims are still the property of the bankruptcy estate (*see Williams*, 6 AD3d at 198). Contrary to plaintiffs' contention, the exculpation clause in the second amended reorganization plan does not provide for a reservation of any right to commence an action for malpractice. The exculpation clause states that nothing in the plan shall be deemed to release the Debtor, Reorganized Debtor or Plan Funder with respect to their obligations and covenants arising from "willful misconduct, gross negligence, breach of fiduciary duty, breach of contract, malpractice, fraud. . .." (NYSCEF Doc No. 220 at 29 ¶ 8.2). Thus, 261 East 78 Realty Corp. lacks capacity to bring the claims in the second amended complaint.

2. *Legal Malpractice (Eighth and Ninth Causes of Action)*

Pasternak next argues that the "inability to fund" legal malpractice claim should be dismissed because it is refuted by documentary evidence, and fails to allege but for causation. In addition, Pasternak contends that the legal malpractice claim based on his alleged conflict of interest in accepting a commission fails to allege but for causation. Pasternak maintains that he only represented 261 East 78 Realty Corp. Finally, Pasternak argues that the Bankruptcy Court's Fee Order granting fees bars the legal malpractice claims based on the doctrine of res judicata.

To state a cause of action for legal malpractice, the plaintiff must allege that "the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession," and that the "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], quoting *McCoy v Feinman*, 99 NY2d 295, 301-302 [2002]). Violations of

disciplinary or ethical rules do not, by themselves, give rise to a cause of action (*Sumo Container Sta. v Evans, Orr, Pacelli, Norton & Laffan*, 278 AD2d 169, 170-171 [1st Dept 2000]; *Lavanant v General Acc. Ins. Co. of Am.*, 212 AD2d 450, 451 [1st Dept 1995]). However, "liability can follow where the client can show that he or she suffered actual damage as a result of the conflict" (*Tabner v Drake*, 9 AD3d 606, 610 [3d Dept 2004]). "Unsupported factual allegations, conclusory legal argument or allegations contradicted by documentation, do not suffice" (*Dweck Law Firm v Mann*, 283 AD2d 292, 293 [1st Dept 2001]). "Moreover, the client 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" (*id.*).

"To recover damages for legal malpractice, a plaintiff must prove, inter alia, the existence of an attorney-client relationship" (*Moran v Hurst*, 32 AD3d 909, 910 [2d Dept 2006]). "Since an attorney-client relationship does not depend on the existence of a formal retainer agreement or upon payment of a fee, a court must look to the words and actions of the parties to ascertain the existence of such a relationship" (*Nelson v Kalathara*, 48 AD3d 528, 529 [2d Dept 2008] [citation omitted]; *see also Matter of Priest v Hennessy*, 51 NY2d 62, 71 [1980] [payment of fee by third party does not create attorney-client relationship between attorney and payor]). "[A]n attorney-client relationship is established where there is an explicit undertaking to perform a specific task" (*Wei Cheng Chang v Pi*, 288 AD2d 378, 380 [2d Dept 2001], *lv denied* 99 NY2d 501 [2002]). However, "[t]he unilateral belief of a plaintiff alone does not confer upon him or her the status of a client" (*Moran*, 32 AD3d at 911).

Pasternak has failed to establish the absence of an attorney-client relationship with Moncho. While Pasternak points out that the retainer agreement was between 261 East 78 Realty Corp. and the DelBello firm (NYSCEF Doc No. 240), an attorney-client relationship does not

depend on the existence of a retainer agreement. Moreover, the fact that the Bankruptcy Court authorized the DelBello firm to appear on behalf of 261 East 78 Realty Corp. is not dispositive (*see Terio v Spodek*, 63 AD3d 719, 721 [2d Dept 2009] ["the fact that it was purportedly not the attorney of record at the time of a hearing before the United States Bankruptcy Court to determine whether the particular asset at issue qualified as an exemption, is not dispositive of the existence of an attorney-client relationship during the period of the alleged negligence"]). The invoices relied upon by Pasternak do not conclusively establish that Pasternak was not Moncho's attorney. In any event, the legal malpractice claims are legally insufficient.

Although plaintiffs allege that Pasternak "introduce[ed] his client to a plan funder who he knew lacked the ability to fund a reorganization plan" (NYSCEF Doc No. 149, second amended verified complaint, ¶ 162), plaintiffs do not allege any damages resulting from this purported negligence (*see Lavanant*, 212 AD2d at 451). Moreover, plaintiffs' allegation that "had Moncho been able to utilize his preferred choice of plan funder, the Lightstone Group, none of the injuries incurred as the result of Miller and Sprei's acts would have occurred" (NYSCEF Doc No. 149, second amended verified complaint, ¶ 169) is too speculative (*see Brooks v Lewin*, 21 AD3d 731, 734-735 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006] ["speculation on future events is insufficient to establish that the defendant lawyer's malpractice, if any, was a proximate cause of any such loss"]).

The second amended complaint also alleges that Pasternak had a conflict of interest in representing plaintiffs and accepting a brokerage commission from Sprei (NYSCEF Doc No. 149, second amended verified complaint, ¶ 177). Nevertheless, the second amended verified complaint fails to allege facts indicating that plaintiffs suffered damages resulting from this alleged

misconduct (*see Fletcher v Boies, Schiller & Flexner LLP*, 140 AD3d 587, 588 [1st Dept 2016], *lv denied* 28 NY3d 914 [2017]).

In light of the above, the eighth and ninth causes of action must be dismissed. As a result, the court need not consider Pasternak's contention whether the legal malpractice claims are barred by the doctrine of res judicata.

3. Fraud (Sixth and Seventh Causes of Action)

Pasternak argues that the fraud claims should be dismissed as duplicative of the legal malpractice claims.

The seventh cause of action for fraud and the eighth cause of action for legal malpractice are based on the same allegations that Pasternak introduced Moncho to Sprei, and that he knew that he lacked the ability to fund the reorganization plan (NYSCEF Doc No. 149, second amended verified complaint, ¶¶ 148, 151, 162, 163). In addition, the sixth cause of action for fraud and the ninth cause of action for legal malpractice against Pasternak arise from his failure to disclose his conflict of interest (*id.*, ¶¶ 144, 177). The fraud claims also assert the same damages as the legal malpractice claims (*id.*, ¶¶ 146, 156, 170, 179). Since the fraud claims are "not based on an allegation of independent, intentionally tortious" conduct and fail to allege "separate and distinct damages" (*Carl v Cohen*, 55 AD3d 478, 478 [1st Dept 2008] [internal quotation marks and citations omitted]), the fraud claims must be dismissed as duplicative of the legal malpractice claims. Therefore, the sixth and seventh causes of action are dismissed.

4. Debtor and Creditor Law (DCL) § 273-a (Eleventh Cause of Action)

The eleventh cause of action asserts a claim under DCL § 273-a. Specifically, it asserts that Pasternak fraudulently conveyed his home to his wife, and that "the property should be considered the property of the Defendant, Jonathan Pasternak, for purposes of satisfying the

judgment for Plaintiff in the immediate lawsuit" (NYSCEF Doc No. 149, second amended verified complaint, ¶ 196).

> "To prevail on such a fraudulent conveyance claim, the movant must establish three elements: (1) that the conveyance was made without fair consideration; (2) that at the time of transfer, the transferor was a defendant in an action for money damages or a judgment in such action had been docketed against him; and (3) that a final judgment has been rendered against the transferor that remains unsatisfied"

(*Fischer v Sadov Realty Corp.*, 34 AD3d 632, 633 [2d Dept 2006]).

The second amended verified complaint fails to allege the existence of an unsatisfied judgment (*see Robles v Patel*, 165 AD3d 858, 860 [2d Dept 2018] [dismissing cause of action for fraudulent conveyance under DCL § 273-a where "plaintiff failed to allege the existence of an unsatisfied judgment against Kirit, which is an essential element of a cause of action pursuant to Debtor and Creditor Law § 273–a"]). Accordingly, this claim is dismissed.

5. *Bankruptcy Fraud (Twelfth Cause of Action)*

The twelfth cause of action asserts a cause of action for bankruptcy fraud against Pasternak. However, as persuasively argued by Pasternak, plaintiffs "have no standing to bring a claim pursuant to 18 U.S.C. § 152 because private citizens cannot generally enforce the U.S. Criminal Code" (*Truong v Litman*, 2006 WL 3408573, *4 [SD NY 2006], *affd* 312 Fed Appx 377 [2d Cir 2009]).

6. *Punitive Damages*

Pasternak also requests dismissal of plaintiffs' demand for punitive damages. "A demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action such as fraud" (*Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 616 [1994]). Because the claims against Pasternak have been dismissed, there is no

basis for punitive damages against him. Accordingly, plaintiffs' request for punitive damages fails and is dismissed.

C. The DelBello Firm's Motion to Dismiss the Second Amended Complaint (Motion Sequence Number 008)

The second amended complaint asserts four causes of action against the DelBello firm. The tenth cause of action for legal malpractice against the DelBello firm alleges that "[a]s of September 9, 2015 (at the latest) Pasternak along with at least two of his [DelBello firm] colleagues either provided legal counsel to and or represented Miller and Sprei before the bankruptcy court" (NYSCEF Doc No. 149, second amended verified complaint, ¶ 186). The twelfth cause of action alleges bankruptcy fraud against the DelBello firm pursuant to 18 USC § 152 (*id.*, ¶¶ 198-205). The thirteenth cause of action is for vicarious liability, and the fourteenth cause of action is for negligent supervision (*id.*, ¶¶ 206-212, 213-223).

1. Claims Asserted by 261 East 78 Realty Corp.

The Delbello firm correctly argues that 261 East 78 Realty Corp. does not have standing to bring the claims in the second amended complaint in this action (*see Barranco*, 50 AD3d at 281-282). It is undisputed that 261 East 78 Realty Corp. did not list these claims in its bankruptcy petition. Whether the claim accrued prior to the filing of the bankruptcy petition or post petition, the claim is still the property of the bankruptcy estate (*see Williams*, 6 AD3d at 198). Moreover, plaintiffs' reliance on the exculpation clause in the second amended reorganization plan is unavailing. Therefore, the claims asserted by 261 East 78 Realty Corp. must be dismissed.

2. Legal Malpractice (Tenth Cause of Action)

The tenth cause of action for legal malpractice against the DelBello firm alleges that "[the DelBello firm] had an apparent conflict of interest in continuing to represent plaintiffs while taking on matters for Miller and Sprei," and that "[b]ut for the continued advice of [the DelBello firm] as

counsel, Plaintiffs would not have continued to sustain damages from the acts of Miller and Sprei perpetrated on them during the time that the [DelBello firm] and Pasternak represented the other two parties in this action" (NYSCEF Doc No. 149, second amended verified complaint, ¶¶ 189, 190).

The DelBello firm maintains that the legal malpractice claim asserted against it should be dismissed because: (1) the doctrine of res judicata bars the second amended complaint; (2) an ethical violation is insufficient, without more, to support a legal malpractice claim; (3) there was no conflict in the DelBello firm representing Sprei and/or Miller in September 2005, because 261 East 78 Realty Corp. was a former client whose interests were not adverse to Sprei or Miller; and (4) all of the damages alleged in the second amended complaint were sustained by 261 East 78 Lofts, LLC, not Moncho or 251 East 78 Realty Corp.

Plaintiffs' mere allegation that the DelBello firm had a conflict of interest is insufficient to state a cause of action for legal malpractice (*see Hefter v Citi Habitats, Inc.*, 81 AD3d 459, 459 [1st Dept 2011]). In addition, plaintiffs' speculative and unsupported allegations are insufficient to allege but for causation (*see Brooks*, 21 AD3d at 734-735). Accordingly, the tenth cause of action is dismissed.[1]

3. Bankruptcy Fraud (Twelfth Cause of Action)

The DelBello firm seeks dismissal of the twelfth cause of action., for the same reasons as Pasternak. Since there is no private right of action under 18 USC § 152 (*see Truong*, 2006 WL 3408573, *4), the twelfth cause of action must be dismissed.

[1] Contrary to the DelBello firm's contention, it cannot be determined, as a matter of law, that plaintiffs were aware of the factual basis for the legal malpractice claim when the Bankruptcy Court approved the fee application, such that the doctrine of res judicata would apply (*see Breslin Realty Dev. Corp. v Shaw*, 72 AD3d 258, 263 [2d Dept 2010]; *Izko Sportswear Co., Inc. v Flaum*, 25 AD3d 534, 537 [2d Dept 2006]).

4. Vicarious Liability (Thirteenth Cause of Action)

The thirteenth cause of action, for vicarious liability, fails as a matter of law, given that "[a] claim of vicarious liability cannot stand when there is no primary liability upon which such a claim of vicarious liability might rest" (*Pistilli Constr. & Dev. Corp. v Epstein, Rayhill & Frankini*, 84 AD3d 913, 913 [2d Dept 2011] [internal quotation marks and citation omitted] [dismissing cause of action seeking to hold insurance company vicariously liable for malpractice of law firm and attorney]). As discussed above, plaintiffs' claims against Pasternak have been dismissed.

5. Negligent Supervision (Fourteenth Cause of Action)

The DelBello firm argues that the negligent supervision claim is duplicative of the legal malpractice claim against it.

> "To state a claim for negligent supervision or retention under New York law, in addition to the standard elements of negligence, a plaintiff must show: (1) that the tort-feasor and the defendant were in an employee-employer relationship, (2) that the employer knew or should have known of the employee's propensity for the conduct which caused the injury prior to the injury's occurrence, and (3) that the tort was committed on the employer's premises or with the employer's chattels"

(*Ehrens v Lutheran Churc*h, 385 F3d 232, 235 [2d Cir 2004] [internal quotation marks and citations omitted]).

Despite the DelBello firm's contention to the contrary, the fourteenth cause of action for negligent supervision is not duplicative of plaintiffs' tenth cause of action for legal malpractice (*cf. Vermont Mut. Ins. Co. v McCabe & Mack, LLP*, 105 AD3d 837, 839 [2d Dept 2013]). The negligent supervision claim is based on allegations that the firm was negligent in supervising attorneys, and that Pasternak engaged in misconduct which resulted in a conflict of interest and fraud on the court (NYSCEF Doc No. 149, ¶¶ 213-222). By contrast, the legal malpractice claim is based on allegations that the DelBello firm had a conflict of interest in representing plaintiffs

while taking on matters for Miller and Sprei (*id.*, ¶¶ 180-189). Accordingly, the DelBello's request for dismissal of the fourteenth cause of action is denied.

6. Punitive Damages

Plaintiffs' demand for punitive damages is dismissed, since plaintiffs fail to allege that the DelBello firm's conduct was "so outrageous as to evince a high degree of moral turpitude and showing such wanton dishonesty as to imply a criminal indifference to civil obligations" (*Zarin v Reid & Priest*, 184 AD2d 385, 388 [1st Dept 1992]).

In sum, plaintiffs have a viable negligent supervision claim against the DelBello firm.

D. The DelBello Firm and Pasternak's Motion to Hold Plaintiffs and their Counsel in Contempt (Motion Sequence Number 013)

The DelBello firm and Pasternak move for an order holding plaintiffs and their counsel, Thomas J. Goodman, Esq., in contempt of court pursuant to Judiciary Law § 756, for improperly (a) filing another complaint on December 10, 2019 against them and Miller and Sprei, based on the same underlying facts asserted against in the instant action; (b) serving Pasternak with the new complaint on December 30, 2019; and (c) filing a discovery motion in the Chapter 11 bankruptcy proceeding *In re 261 East 78 Lofts, LLC*, Case No. 16-11644 (SHL) (Bankr SD NY), concerning the claims asserted in the instant action, in violation of the court's decision and order dated January 10, 2019.

According to the DelBello firm and Pasternak, plaintiffs and Goodman have willfully harassed Pasternak, his family and colleagues by: (1) sending multiple emails to Pasternak's wife, despite discovery being stayed; (2) sending a defamatory email to members of Pasternak's synagogue, allegedly falsely claiming that he had been fired for "financial improprieties" and insinuating that Pasternak may have misappropriated synagogue finances; and (3) sending

Pasternak's wife a message on September 19, 2018, the day of Yom Kippur, claiming that she may face criminal liability and should seek legal counsel.

Thus, the DelBello firm and Pasternak seek an order: (1) enjoining plaintiffs and Goodman from filing any new action or motion or serving or issuing subpoenas or other discovery, except by order to show cause seeking permission to do so; and (2) permanently enjoining plaintiffs and Goodman from communicating with them or harassing them by communicating with their respective family members, clergy, board members of their places of professional worship and professional colleagues. The DelBello firm and Pasternak request that the court direct plaintiffs and Goodman to withdraw the new complaint and withdraw their motion seeking discovery in the Chapter 11 bankruptcy proceeding, and award them sanctions in the form of attorneys' fees incurred in response to plaintiffs' and Goodman's repeated willful violations of this court's orders.

In opposition, plaintiffs argue that neither plaintiffs nor their counsel have violated any orders sufficient to invoke a finding of contempt.

1. *Civil and Criminal Contempt*

The court's decision and order dated January 10, 2019 provides that:

> "Plaintiff shall not serve a proposed Third Amended Complaint, and no further motions shall be filed by Plaintiff, until after (a) all Defendants have answered the Second Amended Complaint and (b) the Court has rendered a decision on Defendants' motions to dismiss Second Amended Complaint, if any, without leave of court"

(NYSCEF Doc No. 204 at 2).

The court's decision and order dated December 4, 2019 stated that "[t]here is a stay of 60 days for Mr. Sprei and Mr. Miller to obtain new counsel" (NYSCEF Doc No. 378).

Pursuant to Judiciary Law § 753 (A),

> "[a] court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a

> party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced."

Under Judiciary Law § 750, "[a] court of record has power to punish for a criminal contempt, a person guilty of any of the following acts . . . 3. Willful disobedience to its lawful mandate."

"A motion to punish a party for civil contempt is addressed to the sound discretion of the court, and the movant bears the burden of proving the contempt by clear and convincing evidence" (*Lugo v Torres*, 174 AD3d 595, 596 [2d Dept 2019] [internal quotation marks and citation omitted]).

> "To prevail on a motion to hold a party in civil contempt, the movant must establish by clear and convincing evidence (1) that a lawful order of the court was in effect, clearly expressing an unequivocal mandate, (2) the appearance, with reasonable certainty, that the order was disobeyed, (3) that the party to be held in contempt had knowledge of the court's order, and (4) prejudice to the right of a party to the litigation"

(*Matter of Binong Xu v Sullivan*, 155 AD3d 1031, 1032 [2d Dept 2017], citing *El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]). Nevertheless, "it is not necessary that the disobedience be deliberate or willful; rather, the mere act of disobedience, regardless of its motive, is sufficient if such disobedience defeats, impairs, impedes or prejudices the rights of a party" (*Jim Walter Doors v Greenberg*, 151 AD2d 550, 551 [2d Dept 1989]). "Once the moving party makes this showing, the burden shifts to the alleged contemnor to refute the movant's showing, or to offer evidence of a defense, such as an inability to comply with the order" (*Matter of Binong Xu*, 155 AD3d at 1032).

To succeed on a motion for criminal contempt, the movant must establish a willful violation of a clear and unequivocal mandate of the court (*Soho Alliance v World Farm*, 300 AD2d 22, 22 [1st Dept 2002]).

Here, the DelBello firm and Pasternak have failed to demonstrate that plaintiffs or Goodman violated an unequivocal mandate of the court. Plaintiffs did not file a proposed third

amended complaint or any motions in this action. Rather, Goodman filed a new complaint. The court's decision and order dated January 10, 2019 is silent as to new actions. Moreover, the court's decision and order dated December 4, 2019 simply states that this action was stayed for 60 days so that Sprei and Miller could obtain new counsel. Accordingly, the branch of the DelBello firm and Pasternak's motion seeking to hold plaintiffs and their counsel in contempt is denied.

2. *The DelBello Firm and Pasternak's Request that the Court Direct Plaintiffs and their Counsel to Withdraw their Motion Before the Bankruptcy Court and the New Action*

The DelBello firm and Pasternak request an order directing plaintiffs and their counsel to withdraw the new action and their motion filed in the Bankruptcy Court.

> "It is well recognized that a Court of Equity may restrain parties over whom it has obtained jurisdiction from commencing or prosecuting an action in a sister State or in a foreign country where it sufficiently appears that irreparable injury therefrom will result to the plaintiff. . .. The rule, however, differs with respect to suits and proceedings in Federal Courts and it has frequently been held that the Courts of this State are without jurisdiction to restrain parties residing in this state from proceeding in a Federal Court

(*Thompson v Samson United Corp.*, 203 Misc 48, 49 [Sup Ct, Monroe County 1952] [citations omitted]). Therefore, this court declines to direct plaintiffs and their counsel to withdraw their motion pending before the Bankruptcy Court. Moreover, the court finds no basis to direct plaintiffs or Goodman to withdraw the new action.

3. *Injunction*

The DelBello firm and Pasternak also seek an order enjoining plaintiffs and Goodman from filing any motions, commencing new actions, and serving discovery demands or subpoenas. "Although public policy generally mandates free access to the courts, courts have imposed injunctions barring parties from commencing any further litigation where those parties have engaged in continuous and vexatious litigation" (*Matter of Robert v O'Meara*, 28 AD3d 567, 568 [2d Dept 2006], *lv denied* 7 NY3d 716 [2006] [citations omitted]). The court denies this request,

given the absence of "continuous and vexatious litigation" against defendants[2] (*see Banushi v Law Off. of Scott W. Epstein*, 110 AD3d 558, 558 [1st Dept 2013]).

4. Sanctions

Finally, the DelBello firm and Pasternak request sanctions against plaintiffs and their counsel. Sanctions are only appropriate when a party or an attorney has abused the judicial process, or wasted judicial resources by engaging in wholly frivolous litigation (*Drummond v Drummond*, 305 AD2d 450, 451 [2d Dept 2003], *lv denied* 1 NY3d 504 [2003]; *Levy v Carol Mgt. Corp.*, 260 AD2d 27, 34 [1st Dept 1999]). Frivolous conduct is defined as: "(1) completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) asserts material factual statements that are false" (22 NYCRR 130-1.1 [c]). Here, defendants have not shown that plaintiffs or their counsel engaged in frivolous conduct as defined therein. Accordingly, the court denies the DelBello firm and Pasternak's request for sanctions.

Accordingly, the DelBello firm and Pasternak's motion is denied in its entirety.

CONCLUSION

Accordingly, it is

ORDERED that the motion (motion sequence number 007) of defendants Harry Miller and Sam Sprei to dismiss the second amended verified complaint is granted to the extent of dismissing the first cause of action, the second cause of action, the third cause of action, the fourth cause of action as to defendant Harry Miller, and the fifth cause of action, and is otherwise denied; and it is further

[2] In this regard, the court notes that 261 East 78 Lofts, LLC and Moncho are plaintiffs in the new action, while 261 East 78 Realty Corp. is not (NYSCEF Doc No. 379).

ORDERED that the motion (motion sequence number 008) of defendant DelBello Donnellan Weingarten Wise & Wiederkehr LLP to dismiss the second amended verified complaint is granted to the extent of dismissing the tenth cause of action, the twelfth cause of action, and the thirteenth cause of action, and plaintiffs' request for punitive damages, and is otherwise denied; and it is further

ORDERED that the motion (sequence number 009) of defendant Jonathan Pasternak to dismiss the second amended verified complaint is granted, and the second amended verified complaint is severed and dismissed against said defendant with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion (sequence number 013) of defendants DelBello Donnellan Weingarten Wise & Wiederkehr LLP and Jonathan Pasternak to hold plaintiffs and their counsel in contempt is denied.

Any request for relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

6/12/2020
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE