CGreene v. Berger & Montague, P.C.
S.D.N.Y.,1998.
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.
Cliff GREENE, Plaintiff,
v.
BERGER & MONTAGUE, P.C., David Berger, Lawrence J. Lederer, Defendants..
No. 96 CIV. 9339(SHS).

March 5, 1998.

OPINION AND ORDER

STEIN, District J.

*1 Cliff Greene, appearing *pro se,* filed this action against the law firm of Berger & Montague, P.C., and two of its attorneys, David Berger and Lawrence J. Lederer. Greene alleges that he requested that defendants represent him in his federal securities claims against Drexel Burnham Lambert Group, Inc. ("Drexel") in connection with losses he suffered on 160,000 Wickes Company warrants and 3,000 shares of C.O.M.B. Company common stock. Plaintiff acknowledges that defendants told him they could not represent him because they already represented a class of claimants whose claims competed with plaintiff's (*see* Compl. ¶¶ 23-24; Exh. F), but alleges that defendants' actual reason for refusing to represent him was that he is African-American. Plaintiff has brought claims pursuant to a variety of constitutional, statutory, and common law theories, and defendants have now moved pursuant to Fed.R.Civ.P. 12(c) for judgment on the pleadings. For the reasons that follow, defendants' motion is granted.

BACKGROUND

The facts as set forth in this Opinion and Order are drawn strictly from plaintiff's complaint-as is appropriate on consideration of a Rule 12(c) motion for judgment on the pleadings (*see Bloor v. Carro, Spanbock, Londin, Rodman & Fass,* 754 F.2d 57, 61 (2d Cir.1985))-as well as from certain documents plaintiff has attached to his complaint. *See Brass v. American Film Technologies, Inc.,* 987 F.2d 142, 150 (2d Cir.1993) (motion to dismiss); *Greene v. WCI Holdings Corp.,* 956 F.Supp. 509, 511 (S.D.N.Y.1997).

The complaint arises out of alleged market manipulation and other wrongdoing by Drexel in connection with a number of securities, including those purchased by plaintiff. After Drexel filed for bankruptcy, *see In re Drexel Burnham Lambert Group, Inc., et al.,* 90 Civ. 6554(MP), Chapter 11 Case No. 90 B. 10421(FGC) (S.D .N.Y.), various lawsuits against it were consolidated in the Southern District of New York before Judge Milton Pollack. Judge Pollack certified a class of all securities-related claimants, with defendant Berger & Montague P.C. as one of four class co-counsel. (Compl.¶ 18). A settlement fund was established, and ultimately a class settlement was judicially approved. *In re Drexel Burnham Lambert Group, Inc.,* 130 B.R. 910 (S.D.N.Y.Bankr.1991), *aff'd,*960 F.2d 285 (2d Cir.1992).

In late June of 1992-after Berger & Montague had been appointed class co-counsel and the settlement had been approved-plaintiff visited the offices of Berger & Montague to discuss hiring the firm to represent him in bringing separate claims against Drexel. (Compl.¶ 19). Prior to coming to defendants' offices, plaintiff had telephoned the firm and "was lead to believe that he would be accepted as a client of the firm." (*Id.*). However, upon arrival, plaintiff claims, "when it became obvious that plaintiff was black, an African American, it was a different story." (*Id.*). Lawrence Lederer reviewed plaintiff's submitted proof of claim and "decided that it would be unethical ... and a conflict of interest for Berger & Montague, P.C., to represent plaintiff as a client[] in the [Drexel] matter ... [b]ecause[] of the positions the senior partner in the firm, David Berger, Esq., held on the court appointed subclass B executive committee." (Compl.¶¶ 22, 23). Plaintiff received a letter signed by Berger on June 29, 1992, which confirmed that "it would be inappropriate for [defendants] to represent [him] as requested." (Compl. ¶ 23; Exh. F).

*2 Although the committee that Judge Pollack appointed to evaluate claims concluded that plaintiff's

claim lacked merit and should receive a $0 valuation (Compl. ¶ 29; Exh. I-(b); Exh. J, at 25), it nonetheless offered him $20,000 in settlement, which Green refused and instead pursued objections to the $0 valuation before Judge Pollack. (Compl.Exh. I-(b); Compl. Exh. J, at 25). After the District Court overruled his objections (Compl.Exh. J), Greene appealed that ruling to the Second Circuit, which dismissed the appeal *sua sponte* on October 27, 1994. Plaintiff thereafter unsuccessfully petitioned for a writ of certiorari. *Greene v. Drexel Burnham Lambert Group, Inc.*, 514 U.S. 1012, 115 S.Ct. 1350, 131 L.Ed.2d 210 (1995).

In November 1995, plaintiff commenced this action in the Eastern District of New York, alleging that defendants' refusal to represent him amounted to discrimination on the basis of race, ethnicity and color. Plaintiff seeks to recover the same monetary relief he unsuccessfully sought in the Drexel bankruptcy proceedings. (Compl. ¶ 31; Compl. Exh. J, at 25). By opinion and order dated November 12, 1996, Judge Sterling Johnson of the Eastern District granted defendants' motion to transfer venue to the Southern District of New York. Plaintiff attempted to appeal that determination to the Second Circuit, which dismissed the appeal in January of 1997, and subsequently denied plaintiff's motion for rehearing.

DISCUSSION

Plaintiff's complaint contains four claims, brought pursuant to (1) 42 U.S.C. §§ 1981 and 1983 (Compl.¶¶ 34-49); (2) common law fraud (Com pl.¶¶ 50-56); (3) the New York Bill of Rights (Compl.¶¶ 57-63); and (4) the Pennsylvania Declaration of Rights (¶¶ 64-74). The Court concludes that all four of plaintiff's claims must be dismissed.

I. *Constitutional Claims*

Plaintiff's first claim for relief, premised on the alleged discrimination by defendants in refusing to represent plaintiff, who is African-American, even though they represented "members of the white race" in the Drexel bankruptcy proceedings, appears to rely on the 14th Amendment to the United States Constitution (Compl.¶¶ 40-41) and on 42 U.S.C. § 1983 (Compl.¶¶ 38, 43).

However, the rights secured by the Fourteenth Amendment "are protected only against infringements by governments." *Flagg Bros. Inc. v. Brooks*, 436 U.S. 149, 156, 98 S.Ct. 1729, 1733, 56 L.Ed.2d 185 (1978) (citations omitted). Thus, a plaintiff making a claim pursuant to the Fourteenth Amendment, or pursuant to 42 U.S.C. § 1983, must allege facts showing that state action deprived that plaintiff of a protected interest. *See Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974) (Fourteenth Amendment); *West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250, 2255, 101 L.Ed.2d 40 (1988) (Section 1983) (citations omitted); *Silverman v. The Newspaper and Mail Deliverers' Union of New York and Vicinity*, No. 97 Civ. 0040(SHS), 1997 U.S. Dist. LEXIS 17732, *3-4 (S.D.N.Y. Nov. 10, 1997) (Section 1983).

*3 Plaintiff's third claim for relief is that he was denied equal protection of the laws pursuant to Article I, § 11 of the New York Constitution. However, that section, too, has been interpreted to include a state action requirement. *See Rohan v. American Bar Ass'n*, No. 93 Civ. 1338(SJ), 1995 WL 347035, at *8-9 (E.D.N.Y. May 31, 1995), *aff'd*, 100 F.3d 945 (2d Cir.1996); *Holy Spirit Ass'n for Unification of World Christianity v. New York State Congress of Parents and Teachers, Inc.*, 95 Misc.2d 548, 552, 408 N.Y.S.2d 261, 265 (Sup.Ct.N.Y.Co.1978).

Finally, in his fourth claim for relief, plaintiff pleads a claim pursuant to Article I, § 26 of the Declaration of Rights of the Commonwealth of Pennsylvania. (Compl.¶ 63). That section, by its express terms, only prohibits discrimination by the Commonwealth of Pennsylvania or any of its political subdivisions.

Though plaintiff includes the conclusory assertion that defendants acted under color of state law (*see* Compl. ¶¶ 61, 73), he has made absolutely no showing that any of the defendants in this case are state actors, that they acted under color of law, or that their conduct could be fairly attributable to the state. Moreover, it is well-established that private attorneys, despite their status as officers of the court, do not act under color of state law for purposes of civil rights laws such as 42 U.S.C. § 1983 (*see Sturm v. Schrank*, 43 B.R. 755, 758 (S.D.N.Y.1984) (citations omitted)), even where the state retains the attorney to represent a client. *See Polk County v.*

HGreene v. Hanover Direct, Inc.
S.D.N.Y.,2007.
Only the Westlaw citation is currently available.
United States District Court,S.D. New York.
Cliff GREENE, Plaintiff.
v.
HANOVER DIRECT, INC., et al., Defendants.
No. 06 Civ. 13308(NRB).

Nov. 19, 2007.

Cliff Greene, Brooklyn, NY, for Plaintiff.
Andrew L. Morrison, Esq., Reed Smith LLP, New York, NY, for Defendants.

MEMORANDUM AND ORDER

NAOMI REICE BUCHWALD, District Judge.
*1*Pro se* plaintiff-shareholder Cliff Greene ("Greene" or "plaintiff") brought this action pursuant to § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, the federal RICO statute, 18 U.S.C. § 1962, the Delaware Securities Act, the United States Constitution, and the common law of New York, against Hanover Direct, Inc. ("HDI"), William Wachtel ("Wachtel"), Wayne P. Garten ("Garten"), and Stuart Feldman ("Feldman," and collectively "defendants") alleging federal securities fraud, civil RICO, violations of § 7323 of the Delaware Securities Act and the Equal Protection Clause, and common law fraud, negligent misrepresentation, and breach of fiduciary duty. Defendants moved to dismiss the complaint in its entirety. For the reasons discussed below, their motion is granted.

BACKGROUND

HDI, a Delaware corporation publicly traded on the American Stock Exchange ("AMEX" or "Exchange"), manufactured and marketed brand merchandise through its portfolio of catalogs and websites, various retail outlets, and third-party specialty stores. Plaintiff Greene purchased HDI stock over the course of a four year period beginning on April 14, 2000 and ending on June 23, 2004. The amended complaint alleges that HDI artificially inflated the revenue data reported in its consolidated financial statements for fiscal years 1998 through 2004 and that Greene sustained substantial investment losses when these misrepresentations were eventually disclosed in HDI's filings with the Securities and Exchange Commission ("SEC"). HDI is also alleged to have discriminated against Greene by not timely providing him with copies of the corrected financial statements even though other "similarly situated" shareholders received these statements from HDI soon after they were made publicly available. Greene's allegations more or less track the history of HDI's demise, which we recount below drawing from the pleadings as well as HDI's Form 8-K filings with the SEC.

HDI's Financial Accounting Errors

AMEX notified HDI on May 21, 2004 of HDI's failure to meet continued listing standards governing the financial condition and operating results of an Exchange-traded corporation. Rather than challenge AMEX's determination as to its financial health, HDI submitted a strategic management plan detailing the actions it had taken, or would take, to meet the standards in the near-term. By doing so, HDI hoped to avoid the penalties for noncompliance with the AMEX standards, which included formal suspension of trading activity or complete delisting of the security. AMEX was persuaded by HDI's submission and granted HDI until November 21, 2005 to demonstrate the requisite financial performance.

On August 10, 2004, HDI notified its shareholders of a revenue booking error in its annual and quarterly financial reports that resulted in revenue being recorded in advance of the actual shipment of merchandise to customers. Shortly thereafter, HDI issued revised financial statements correcting the error for all fiscal periods dating back to the 2000 fiscal year. HDI identified a second accounting irregularity in its financial statements on November 10, 2004, this time pertaining to the treatment of discount obligations owed to members of HDI's buyer's club programs and affecting the accuracy of its reported revenues as early as 1998. Though the SEC immediately granted HDI a five-day extension of the deadline to file its upcoming September 25,

2004 quarterly report, HDI soon reported that revisions to the calculated revenue data would require the input of independent, outside counsel following an internal investigation of all accounting-related matters, a process that could not be completed within the five-day extension period and would eventually take over one year.

*2 HDI's inability to file an accurate September 25, 2004 quarterly report violated a second set of AMEX continued listing standards requiring issuers to timely submit their financial statements to the Exchange. Given HDI's preexisting and ongoing violation of the financial performance standards, AMEX immediately halted trading in HDI common stock and, two months later, petitioned the SEC to delist HDI from the Exchange. Trading in HDI common stock was formally suspended on February 2, 2005. The SEC approved AMEX's application to strike HDI's registration on February 15, 2005, and thereafter, HDI continued to trade over-the-counter on the Pink Sheets, an electronic quotation system that publishes bid and ask quotation prices from brokers who buy and sell OTC securities.

In its February 4, 2005 press release and 8-K filing, HDI announced that the SEC had initiated an informal inquiry into its financial reporting starting in 1998. The SEC letter to HDI explicitly noted that the informal inquiry was not to be construed as an indication of a violation of federal securities laws. Over the course of the next two years, SEC officials periodically reviewed HDI's financial statements and offered their comments and revisions but the inquiry never ripened into a formal investigation. On February 21, 2006, HDI filed all past due financial reports and concurrently announced its preliminary financial results for the fourth quarter and fiscal year 2005.

HDI's Failure to Provide Greene With the Restated Reports

The vast majority of Greene's shares were issued in "street name," i.e., held by his brokerage firm in its own name or that of another nominee but recognizing Greene as the beneficial owner of the shares. After transferring the shares out of street name and into his own name on February 24, 2005, Greene stopped receiving any shareholder correspondence or financial statements from HDI. Most relevant for our purposes, Greene was not mailed copies of HDI's restated financial reports for fiscal years 1999 through 2004 and the annual report for 2005, which were publicly available on February 21, 2006.

Greene wrote to HDI on May 19, 2006 requesting an explanation for the failure to provide him with HDI's financial statements but received no immediate reply. After alerting the SEC to HDI's failure to respond, Greene received an undated letter from HDI on October 21, 2006 apologizing for the lack of a responsive communication and indicating that both the annual report for 2005 and quarterly report for the second quarter of 2006 were enclosed for Greene's review. The letter also directed Greene to all of HDI's publicly available SEC filings on the EDGAR database located at http://www.sec.gov. Greene alleges that the two reports mentioned in the October 21, 2006 letter were not, in fact, enclosed with that letter. Once again, Greene sought the SEC's intervention in obtaining HDI's financial statements and was informed by agency officials that HDI had been made aware of his situation and would be mailing him copies of its most recent filings. Though Greene eventually received a copy of HDI's 2005 annual report on November 16, 2006, he claims that HDI has yet to provide him with the corrected 2004 annual report.

DISCUSSION

I. Legal Standard

*3 In considering the defendants' 12(b)(6) motion to dismiss, we accept as true the facts alleged in the amended complaint, *Bolt Elec., Inc. v. City of New York*, 53 F.3d 465, 469 (2d Cir.1995), and draw all reasonable inferences in favor of Greene. *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 216 (2d Cir.2004). Though the amended complaint "does not need detailed factual allegations" to survive a motion to dismiss, a "formulaic recitation of the elements of a cause of action" cannot suffice. *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007). At a minimum, Greene must sufficiently plead the facts underlying the claims "to raise the right to relief above the speculative level on the assumption that all the allegations in the complaint are true."*Id.* For purposes of a 12(b)(6) motion, the amended complaint "is deemed to include any written instrument attached to it as an exhibit,""statement or

document incorporated by reference," and other document that is fairly "integral" to the allegations. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir.2002).

II. Section 10(b) and Rule 10b-5 Securities Fraud

In order to state a cause of action under section 10(b) and Rule 10b-5, "a plaintiff must plead that in connection with the purchase or sale of securities, the defendant, acting with scienter, made a false material representation or omitted to disclose material information and that plaintiff's reliance on defendant's action caused plaintiff injury."*Chill v. General Elec. Co.*, 101 F.3d 263, 267 (2d Cir.1996). The factual allegations in support of a securities fraud claim must satisfy the heightened pleading requirements of Fed.R.Civ.P. 9(b) and the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4(b).*ATSI Comm'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 99 (2d Cir.2007).

The defendants' motion to dismiss challenges the sufficiency of the plaintiff's allegations as to each element of the 10b-5 claim and further asserts that the three-year statute of limitations on such a claim has run. We need not address whether Greene's cause of action is time-barred or whether he has properly alleged fraud in connection with the purchase or sale of a security, identified any specific misrepresentations or omissions, or established loss causation because the amended complaint does not plead scienter with the requisite degree of particularity.

A. Greene's Allegations of Scienter Cannot Support His 10b-5 Claim.

The element of scienter requires a showing of "intent to deceive, manipulate, or defraud, ... or reckless conduct."*ATSI Comm'ns, Inc.*, 493 F.3d at 99. The Second Circuit has held that scienter may be alleged by setting forth (1) facts demonstrating that the defendants had both motive and opportunity to commit the subject fraud; or (2) strong circumstantial evidence of conscious misbehavior or recklessness. *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 168-69 (2d Cir.2000). However, bare allegations of scienter are insufficient; plaintiffs are required to "state with particularity facts giving rise to a strong inference" that the defendants acted with the requisite intent. *Id.* § 78u-4(b)(2)."[I]n determining whether the pleaded facts give rise to a 'strong' inference of scienter, the court must take into account plausible opposing inferences" and find that a "reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged."*Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S.Ct. 2499, 2510 168 L.Ed.2d 179 (2007).

*4 With respect to the motive-and-opportunity prong of scienter, the defendants' opportunity to commit fraud cannot be seriously contested. Therefore, the critical issue is motive: whether Greene has alleged "concrete benefits that could be realized by one or more of the false statements and wrongful disclosures."*Rothman v. Gregor*, 220 F.3d 81, 93 (2d Cir.2000). Notably, the alleged motive must be sufficiently particularized and personal to the defendants-generalized motives which could be imputed to any publicly-owned company or its managers do not warrant an inference of scienter. *See Rombach v. Chang*, 355 F.3d 164, 177 (2d Cir.2004); *Chill v. General Electric Co.*, 101 F.3d 263, 268 (2d Cir.1996); *Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 54 (2d Cir.1995).

Where the securities fraud claim is predicated upon recklessness or conscious misbehavior, the plaintiff must allege that the defendants had knowledge of facts contradicting their public statements, failed to review information that they were obligated to monitor, or ignored clear and obvious signs of fraud. *See Novak v. Kasaks*, 216 F.3d 300, 308 (2d Cir.2000). In each case, the burden remains on the plaintiff to set forth the specific reports, information, or other indicia of fraud that rendered the defendants conduct "highly unreasonable, representing an extreme departure from the standards of ordinary care."*In re Sotheby's Holdings, Inc.*, No. 00 Civ. 1041, 2000 WL 1234601, at *6 (S.D.N.Y. Aug. 31, 2000); *see also Novak*, 216 F.3d at 309.

Greene alleges that HDI's officers were motivated to overstate reports of revenue data by the prospect of maximizing their year-end bonuses. The Second Circuit has squarely rejected the sufficiency of allegations such as these, noting that "[i]ncentive compensation can hardly be the basis on which an allegation of fraud is predicated."*Acito*, 47 F.3d at 54. Thus, we cannot accept Greene's generalized

allegations of motive, which would be imputable to any executive whose compensation comprises a performance-based component.

Furthermore, Greene has not set forth any allegations that would satisfy the alternative prong of proving scienter-conscious misbehavior or reckless conduct. The facts alleged are entirely consistent with nothing more than the existence of accounting irregularities, which, standing alone, fail to state a securities fraud claim. *See* Novaks, 216 F.3d at 309. Because Greene has not pointed to any indicia of the defendants' recklessness beyond the acknowledged accounting errors, the section 10(b) and Rule 10b-5 claims are dismissed.

III. Civil RICO

To state a claim under the civil RICO statute, "a plaintiff has two pleading burdens."*Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir.1983). First, the complaint must allege that the defendant has violated "the substantive RICO statute ... commonly known as 'criminal RICO.' " *Id.* In order to meet this initial burden, a plaintiff must plead the defendant's(1) commission of two or more predicate acts (2) constituting a "pattern" (3) of "racketeering activity" (4) directly or indirectly investing in, or maintaining an interest in, or participating in (5) an enterprise, (6) the activities of which affect interstate or foreign commerce. *See id.*Allegations in support of predicate acts sounding in fraud, such as mail or wire fraud, must satisfy the rigors of Fed.R.Civ.P. 9(b).*See Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1176 (2d Cir.1993); *Zhu v. First Atlantic Bank*, No. 05 Civ. 96, 2005 WL 2757536, at *3 (S.D.N.Y. Oct. 25, 2005). Plaintiffs face a second pleading hurdle in the civil RICO requirement that the injury to business or property occur by reason of a violation of the criminal RICO statute. *See* Moss, 719 F.2d at 17.

*5 As with the 10b-5 securities fraud claim, the defendants contest the sufficiency of the allegations in support of each element of Greene's civil RICO cause of action. In light of our conclusions with respect to the deficiencies in pleading scienter, *supra* Section III, we hold that Greene has not adequately alleged the requisite intent for mail and wire fraud, the predicate acts of his RICO claim, and need not rule on the defendants' remaining arguments in favor of dismissal.

A. The Inadequacy of Greene's Scienter Allegations Is Fatal to His Civil RICO Claim.

Fraudulent intent is an element of mail and wire fraud and, as with Rule 10b-5 causes of action, the facts alleged in the complaint must give rise to a strong inference of such intent. *See Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1176-77 (2d Cir.1993). The Second Circuit courts apply the standard two-pronged approach-motive and opportunity or conscious misbehavior-in determining whether the complaint sufficiently alleges scienter to state a mail or wire fraud predicate act as part of a RICO claim. *Powers v. British Vita, P.L.C.*, 57 F.3d 176, 184 (2d Cir.1995); *Zhu*, 2005 WL 2757536, at *3;*Rothberg v. Chloe Foods Corp.*, No. CV-06-5712, 2007 WL 2128376, at *16 (E.D.N.Y. July 25, 2007). Having failed to justify an inference of intent for his 10b-5 claim, Greene cannot rely on mail and wire fraud as predicate acts because the scienter element of those acts is supported by the same underlying factual allegations and analyzed under analogous pleading principles. *See* Mills, 12 F.3d at 1176-77. Without more than the fact that HDI's senior managers were awarded performance-based compensation, the RICO claims must be dismissed for failure to adequately plead a predicate act. *See, e.g.*, Moss, 719 F.2d at 18, n. 14;*Sommerville v. Major Exploration, Inc.*, 576 F.Supp. 902, 913-14 (S.D.N.Y.1983).

IV. State Law Claims

Greene alleges common law fraud, negligent misrepresentation and breach of fiduciary duty arising out of the same nucleus of facts as the 10b-5 and RICO claims. For the reasons discussed *supra* Section II, the common law fraud claim is dismissed. *See Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 168 (2d Cir.2005) ("Any fraud must be pled with particularity, Fed.R.Civ.P. 9(b); but the rule is applied assiduously to securities fraud."); *S.O.K.F.C., Inc. v. Bell Atl. TriCon Leasing Corp.*, 84 F.3d 629, 633 (2d Cir.1996) (applying the heightened Rule 9(b) pleading standard to common law fraud).

With respect to breach of fiduciary duty and negligent misrepresentation, [FN1] New York courts have long-recognized that such claims are preempted by the Martin Act, N.Y. Gen. Bus. Law § 352 *et seq.*, which grants the Attorney General exclusive

enforcement powers over various fraudulent and deceitful practices in connection with the sale and purchase of securities. *See Castellano v. Young & Rubicam, Inc.*, 257 F.3d 171, 190 (2d Cir.2001) (citing cases addressing preemption of breach of fiduciary duty claims); *In re Marsh & McLennan Cos. Sec. Litig.*, 501 F.Supp.2d 452, 495 (S.D.N.Y.2006) (citing cases addressing preemption of negligent misrepresentation claim). Consequently, Greene's breach of fiduciary duty and negligent misrepresentation causes of action must be dismissed as well.

> FN1. Under New York choice-of-law principles, "the law of the jurisdiction with the most significant interest in, or relationship to, the dispute" should be applied. *White v. ABCO Engineering Corp.*, 221 F.3d 293, 301 (2d Cir.2000); *Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189, 491 N.Y.S.2d 90 (1985). The relevant state interests to be taken into account are, principally, the domicile of the parties and the locus of the tort, which for claims sounding in fraud and misrepresentation is the state where the injury occurred. *See BHC Interim Funding, L.P. v. Finantra Capital, Inc.*, 283 F.Supp.2d 968, 990-91 (S.D.N.Y.2003); *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories*, 201 F.Supp.2d 236, 287 n. 32 (S.D.N.Y.2002); *see also Sack v. Low*, 478 F.2d 360, 366 (2d Cir.1973) (most significant consideration is where plaintiffs "lived and conducted their investment activities").
>
> The only perceptible contact to Delaware is HDI's incorporation in the state. That connection, standing alone, is insufficient to give rise to an interest in this litigation that would justify the application of Delaware law. Thus, we are faced with a choice between the laws of New Jersey, where HDI maintains its principle place of business and the individual defendants are domiciled, and New York. Since Greene resides in New York and presumably (there is no suggestion to the contrary either in the amended complaint or the parties' briefs) his investment activities and losses occurred here as well, we apply New York law to his common law claims.
>
> Having concluded that New York law governs in this case, we need not address Greene's asserted right to relief under the Delaware Securities Act, which applies to transactions subject to Delaware law under traditional choice-of-law rules. *See Singer v. Magnavox Co.*, 380 A.2d 969, 981 (Del.1977), *overruled on other grounds by Weinberger v. UOP, Inc.*, 457 A.2d 701, 715 (Del.1983); *Dofflemyer v. W.F. Hall Printing Co.*, 558 F.Supp. 372, 377-78 (D.C.Del.1983)."[A] Delaware corporation is bound by the Act, if it is otherwise applicable. But it is not bound simply because the company is incorporated" there. *Singer*, 380 A.2d at 981. Because Greene has not alleged any nexus to Delaware other than HDI's incorporation in that state, the Delaware Securities Act claim is dismissed.

V. Federal Constitutional Claims

*6 Greene advances vague federal constitutional claims arising out of HDI's failure to timely provide him with the restated financial reports reflecting the corrected revenue data. The amended complaint does not specify the constitutional cause of action that Greene wishes to pursue and only alleges discrimination as compared to similarly situated shareholders who did receive the corrected financial statements at the time they were made publicly available. In the absence of any allegations that the defendants engaged in joint activity with federal and state officials or discrimination on the basis of race or ethnicity, an equal protection claim grounded in the federal constitution or 42 U.S.C § 1981 cannot succeed. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970) (noting requirement of willful participation in joint activity with government officials for constitutional claims); *Albert v. Carovano*, 851 F.2d 561, 572 (2d Cir.1988) ("Section 1981 was intended to combat racial or ethnic discrimination, nothing more."). Accordingly, the constitutional claims are dismissed.

CONCLUSION

For the reasons stated above, Greene's amended

HMedina v. Bauer
S.D.N.Y.,2004.
Only the Westlaw citation is currently available.
United States District Court,S.D. New York.
Mitchell MEDINA, Plaintiff,
v.
Irving BAUER, Alex Fischer, Matthew Fischer, Eli Kaufman, Randolph-Rand Corp. of New York, Magnetic Snap Corp., Lanfran Reality Corp., John Doe 1-10, and Abc Corps. 1-10, Defendants.
No. 02 Civ. 8837(DC).

Jan. 27, 2004.

Background: Sole shareholder of corporation that was transferee under invention agreement of all creator's inventions before corporation's liquidation sued individual patentees, corporation's successor, and affiliated businesses after patentees filed numerous patent applications on handbag magnetic snap inventions, asserting violations of the Copyright Act, Racketeer Influenced and Corrupt Organizations Act (RICO), and various state laws based on alleged misrepresentations in issued patents as to identity of inventor. Defendants moved to dismiss the complaint.

Holdings: The District Court, Chin, J., held that:
(1) District Court had subject matter jurisdiction over misjoinder and nonjoinder claims regarding alleged misidentification of true inventor in patents;
(2) sole shareholder had standing as interested party to move for correction of inventor in issued patents;
(3) alleged inventor was not indispensable party to action;
(4) complaint failed to allege that patentees engaged in predicate act establishing pattern of racketeering activity, as required to assert valid claim under RICO; and
(5) amended complaint failed to satisfy pleading requirements giving fair notice of the claim and the ground upon which it rested as to certain defendants, and would be dismissed as to those defendants.

Motion granted in part and denied in part.

West Headnotes

[1] Patents 291 ⚿126

291 Patents
291V Requisites and Validity of Letters Patent
291k126 k. Correction or Amendment. Most Cited Cases
District court had subject matter jurisdiction over claim that individual patentees had allegedly misjoined the wrong inventor of handbag magnetic snap inventions in issued patents, regardless of whether the misjoinder occurred with or without deceptive intent. 35 U.S.C.A. § 256.

[2] Patents 291 ⚿126

291 Patents
291V Requisites and Validity of Letters Patent
291k126 k. Correction or Amendment. Most Cited Cases
District court had subject matter jurisdiction over nonjoinder claim asserting that patentees misidentified inventor in patents issued on handbag magnetic snap inventions, even if court could not order correction of nonjoined inventor when inventor acted with deceptive intent; it was unclear whether inventor in fact acted with such intent. 35 U.S.C.A. § 256.

[3] Patents 291 ⚿126

291 Patents
291V Requisites and Validity of Letters Patent
291k126 k. Correction or Amendment. Most Cited Cases
Sole shareholder of corporation, that was transferee under invention agreement of all creator's inventions before corporation liquidated and successor assumed its assets which included invention agreement, had standing as interested party to move for correction of identity of inventor in patents issued to individual patentees and successor for magnetic handbag snap inventions based on claim that patents misidentified true inventor; there was no admissible evidence indicating that sole shareholder was not the assignee of any patent. 35 U.S.C.A. § 256.

[4] Patents 291 ⚿126

291 Patents
291V Requisites and Validity of Letters Patent
291k126 k. Correction or Amendment. Most Cited Cases
Alleged inventor was not indispensable party to action brought by sole shareholder of corporation that was transferee under invention agreement of all of alleged inventor's inventions against corporation's successor and individual patentees on handbag magnetic snap inventions to seek to have patent ownership changed to reflect true inventor; alleged inventor gave up whatever ownership interest he may have had in inventions when he entered into invention agreement. 35 U.S.C.A. § 256; Fed.Rules Civ.Proc. Rule 19(a), 28 U.S.C.A.

[5] Postal Service 306 ⚿35(10)

306 Postal Service
306III Offenses Against Postal Laws
306k35 Use of Mails to Defraud
306k35(10) k. Nature of Scheme or Device in General. Most Cited Cases
Complaint alleging that two individual patentees "committed pattern of acts of mail fraud" on the Patent and Trademark Office (PTO) by misrepresenting true identity of inventor in patent applications did not amount to allegation of mail fraud, and thus failed to allege a predicate act for purposes of establishing pattern of racketeering activity, as required to assert valid claim under Racketeer Influenced and Corrupt Organizations Act (RICO). 18 U.S.C.A. §§ 1341, 1961(1)(B), 1962(c).

[6] Copyrights and Intellectual Property 99 ⚿82

99 Copyrights and Intellectual Property
991 Copyrights
991(J) Infringement
991(J)2 Remedies
99k72 Actions for Infringement
99k82 k. Pleading. Most Cited Cases

Racketeer Influenced and Corrupt Organizations 319H ⚿69

319H Racketeer Influenced and Corrupt Organizations
319HI Federal Regulation
319HI(B) Civil Remedies and Proceedings
319Hk68 Pleading
319Hk69 k. In General. Most Cited Cases
Amended complaint that asserted that individual patentees and affiliated corporations had violated the Racketeer Influenced and Corrupt Organizations Act (RICO), the Copyright Act, and various state laws by misidentifying true inventor in patents issued on magnetic handbag snap inventions failed to satisfy pleading requirements giving fair notice of the claim and the ground upon which it rested, and would be dismissed as to those defendants; complaint lumped all the defendants together and did not distinguish their conduct so as to allege cognizable acts of wrongdoing. 18 U.S.C.A. § 1961 et seq.; 35 U.S.C.A. § 256.

Zimmerman & Levi, LLP, By: Jean-Marc Zimmerman, Westfield, New Jersey and Kakkar & Kadish, By: Balram Kakkar, New York, New York, for Plaintiff.
Jaroslawicz & Jaros, By: David Jaroslawicz, New York, New York, for Defendants.

MEMORANDUM DECISION

CHIN, J.
***1** Plaintiff Mitchell Medina brings the instant action pursuant to the Copyright Act, 35 U.S.C. § 256, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961*etseq.*, and various state laws. Defendants Irving Bauer, Alex Fischer, Matthew Fischer, Eli Kaufman, Randolph-Rand Corp. of New York ("RRNY"), Magnetic Snap Corp. ("Magnetic Snap"), and Lanfran Realty Corp. ("Lanfran Realty") (collectively "defendants") move (1) to dismiss plaintiff's first amended complaint pursuant to Fed. R. Civ. 12(b)(1), 12(b)(6) and 19; and (2) for costs and attorneys' fees pursuant to 28 U.S.C. § 1927. For the reasons set forth below, defendants' motion is granted in part and denied in part.

BACKGROUND

A. *Facts*

The relevant facts, as alleged by plaintiff and drawn

from the first amended complaint, are as follows:

In 1989, Randolf-Rand of Delaware ("RR-Del") and Robert Riceman ("Riceman"), who is not a party to this action, entered into a written agreement (the "Invention Agreement") whereby Riceman agreed to (1) transfer all of his inventions to RR-Del, of which plaintiff was the sole shareholder, and (2) disclose and market all of his inventions through RR-Del in exchange for compensation. (Am.Compl.¶ 11). Eventually, Medina, the principal of RR-Del, liquidated RR-Del and succeeded to all of its assets, including the Invention Agreement. (Am.Compl.¶¶ 19).

At some point, beginning in 1994 and continuing through 2001, Bauer, Alex Fischer ("A.Fischer"), and Kaufman filed patent applications on numerous handbag magnetic snap inventions identifying Bauer and/or Kaufman as the inventor(s) even though the actual inventor is Riceman and, pursuant to the Invention Agreement, the actual owner is Medina. (*Id.* ¶ 20). These applications eventually issued as U.S. Patent Numbers 5,515,581, 5,572,773, 5,868,445, 5,937,487, 5,953,795, 5,983,464, 6,009,601, 6,048,004, 6,182,336, 6,295,702 (the "Patents").(*Id.* ¶ 21).

With respect to each of the Patents, Bauer, A. Fischer, Kaufman, and others allegedly defrauded the United States Patent and Trade Office ("PTO") by (1) filing and prosecuting each Patent application with representations that Bauer and/or Kaufman were the Patent inventors and (2) concealing the fact that Riceman was the true inventor. (Compl.¶¶ 26, 27).

B. *The Instant Action*

Plaintiff commenced the instant action on November 6, 2002. On February 11, 2003, he served a first amended complaint, the subject of the instant motion, alleging (1) fraud on the PTO, (2) tortious interference with contract, (3) tortious interference with prospective economic advantage, (4) conversion, (5) misappropriation, (6) unjust enrichment, and (7) RICO violations.

On February 27, 2003, defendants moved to dismiss the amended complaint on the following grounds: (1) lack of subject matter jurisdiction pursuant to Civ. R. Fed. P. 12(b)(1), (2) failure to state a claim pursuant to Rule 12(b)(6) because plaintiff lacks standing, (3) failure to join an indispensable party pursuant to Rule 12(b)(7), (4) failure to state a claim for RICO,[FN1] (5) failure to state a claim for breach of contract; and (6) as against Magnetic Snap, A. Fischer, Matthew Fischer, and Lanfran Realty, failure to allege any wrongdoing. Defendants also request costs and attorneys' fees.

> FN1. Defendants also move to dismiss the RICO count for failure to plead fraud with specificity pursuant to Rule 9(b); in light of the rulings below there is no need to address that argument.

***2** For the reasons set for below, defendants' motion is granted in part and denied in part.

DISCUSSION

A. *Subject Matter Jurisdiction*

1. *Applicable Law*

a. *Fed.R.Civ.P. 12(b)(1)*

In considering a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), federal courts "need not accept as true contested jurisdictional allegations."*Jarvis v. Cardillo,* 98 Civ. 5793, 1999 U.S. Dist. LEXIS 4310, at *7 (S.D.N.Y. Apr. 5, 1999). Rather, a court may resolve disputed jurisdictional facts by referring to evidence outside the pleadings. *See Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi,* 215 F.3d 247, 253 (2d Cir.2000); *Filetech S.A. v. France Telecom S.A.,* 157 F.3d 922, 932 (2d Cir.1998). As the party "seeking to invoke the subject matter jurisdiction of the district court," the plaintiff bears the burden of demonstrating that there is subject matter jurisdiction in the case. *Scelsa v. City Univ. of New York,* 76 F.3d 37, 40 (2d Cir.1996).

b. *35 U.S.C. § 256*

Title 35 vests federal courts with the authority to order correction of named inventors in issued patents in accordance with § 256:

Whenever through error a person is named in an

issued patent as the inventor, or through error an inventor is not named in an issued patent and such error arose without any deceptive intent on his part, the Director may, on application of all the parties and assignees, with proof of the facts and such other requirements as may be imposed, issue a certificate correcting such error.

The error of omitting inventors or naming persons who are not inventors shall not invalidate the patent in which such error occurred if it can be corrected as provided in this section. The court before which such matter is called in question may order correction of the patent on notice and hearing of all parties concerned and the Director shall issue a certificate accordingly.

35 U.S.C. § 256.

This section addresses two types of inventorship errors-misjoinder and nonjoinder. *Stark v. Advanced Magnetics, Inc. et al .*, 119 F.3d 1551, 1553 (Fed.Cir.1997). Misjoinder occurs when a person who is not an inventor is listed as an inventor in error. *Id.* Section 256 provides for the deletion of a misjoined inventor "whether that error occurred by deception or by innocent mistake."*Id.* at 1555.Nonjoinder occurs when, in error, a person who is an inventor has not been listed as such. *Id.* at 1553.With respect to nonjoinder, however, "the error cannot involve any deceptive intention by the nonjoined inventor."*Id.* at 1553.Thus, subject matter jurisdiction exists "in all misjoinder cases featuring an error and in those nonjoinder cases where the unnamed inventor is free of deceptive intent."*Id.* at 1555.

2. *Analysis*

[1] This case involves both claims of misjoinder and nonjoinder. As to misjoinder, defendants contend that "the allegation [in the amended complaint] is that the defendants fraudulently and willfully put down the wrong inventor and that this was not an 'innocent error .' " (Mem. of Law in Support of Defs.'Motion to Dismiss ("Defs.' Mem.") dated Feb. 27, 2003 at 5) (emphasis omitted). "Where there is willful fraud," defendants state, "[§] 256 does not apply." (*Id.*). Plaintiff responds by asserting that "[t]he Federal Circuit has repeatedly held that correction of inventorship under [§] 256 is proper when a misjoinder occurred with deceptive intent."(Mem. in Support of Pl.'s Opp. to Defs.' Mot. to Dismiss ("Pl.'s Mem.) dated March 27, 2003 at 5).

*3 Contrary to defendants' belief that "*Stark* [a Federal Circuit case] is not binding on this Court" (*see* Defs.' Reply Mem. of Law ("Defs.' Reply Mem.") dated April 7, 2003 at 3), "Congress conferred exclusive jurisdiction of all patent appeals on the Court of Appeals for the Federal Circuit."*Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 142, 109 S.Ct. 971, 103 L.Ed.2d 118 (1989) (providing that Congress conferred such jurisdiction "in order to 'provide nationwide uniformity in patent law' ') (quoting H.R.Rep. No. 97-312, p. 20 (1981)). Accordingly, "all appeals in patent cases go to the same appellate court irrespective of the district in which they are determined." *Lonza Inc. v. Rohm and Haas, Inc.*, 951 F.Supp. 46, 47 (S.D.N.Y.1997). Thus, *Stark* is binding on this Court. Consequently, regardless of whether the misjoinder occurred with or without deceptive intent, this Court has subject matter jurisdiction over the alleged misjoinder pursuant to § 256. *Seeid.* at 1555.

[2] As to nonjoinder, defendants contend that the Court lacks subject matter jurisdiction to correct the Patents pursuant to § 256 because Riceman is not an innocent inventor. (*See* Defs.' Reply Mem. at 2). Although it is true that the Court may not order correction of a nonjoined inventor when that inventor acted with deceptive intent, *seeStark*, 119 F.3d at 1553, it is unclear at this juncture whether Riceman did, in fact, act with deceptive intent. In any event, because it is clear that the Court has subject matter jurisdiction over the misjoinder, defendants' motion to dismiss the amended complaint for lack of subject matter jurisdiction is denied.

B. *Standing*

Defendants move to dismiss for failure to state a claim on the basis that plaintiff lacks standing.

1. *Applicable Law*

a. *Fed.R.Civ.P. 12(b)(6)*

On a motion to dismiss pursuant to Fed.R.Civ.P.

*5Fed.R.Civ.P. 19(a)."If a party does not qualify as necessary under Rule 19(a), then the court need not decide whether its absence warrants dismissal under Rule 19(b)."*Viacom Int'l, Inc. v. Kearney*, 212 F.3d at 724 (citing *Associated Dry Goods Corp. v. Towers Fin. Corp.*, 920 F.2d 1121, 1123 (2d Cir.1990)).

2. *Analysis*

[4] Defendants claim that because Riceman is the alleged inventor of the Patents, he is a necessary and indispensable party to this action. (*See* Defs.' Reply Mem. at 11). The Court disagrees. Viewing the amended complaint in the light most favorable to plaintiff, Riceman gave up whatever ownership interest he may have had in his inventions upon entering into the Invention Agreement. Consequently, Riceman has no claim against defendants with respect to any ownership interest in the Patents. His presence as a party, therefore, is unnecessary to accord complete relief to the existing parties to this action.

As Riceman is not a necessary party, the Court need not decide whether his absence warrants dismissal under Rule 19(b).*See Viacom Int'l, Inc.*, 212 F.3d at 724. Thus, defendants' motion to dismiss the amended complaint for failure to join a necessary party is denied.

D. *RICO*

Defendants move to dismiss the RICO count for failure to state a claim.

1. *Applicable Law*

Pursuant to § 1962(c), "any person employed by or associated with any enterprise" is prohibited from conducting or participating in the "enterprise's affairs through a pattern of racketeering activity."18 U.S.C. § 1962(c). To state a claim under § 1962(c), a plaintiff must establish that a "person" (1) conducted or participated in the conduct of (2) an enterprise's affairs (3) through a pattern (4) of racketeering activity (5) that caused injury to the plaintiff's business or property. *See Lippe v. Bairnco Corp.*, 225 B.R. 846, 860 (S.D.N.Y.1998).

To plead a pattern of racketeering activity, a plaintiff must allege that each defendant committed at least two acts of racketeering activity ("predicate acts") within a ten-year period. 18 U.S.C. § 1961(5). The statute defines "racketeering activity" to include mail fraud. 18 U.S.C. §§ 1341, 1961(1)(B). In addition, where, as here, a RICO claim sounds in fraud, plaintiff must plead fraud with particularity, as required by Fed.R.Civ.P. 9. *See Mehrkar v. Schulmann*, 99 Civ. 10974, 2001 U.S. Dist. LEXIS 717, at *13 (S.D.N.Y. January 30, 2001).

2. *Analysis*

[5] Defendants argue that plaintiff has failed to state a RICO claim for a variety of reasons, including failure to adequately plead (1) a continuing unit, (2) a RICO enterprise, (3) a separate entity, and (4) a predicate act. (Defs.' Mem. at 7-8). Because plaintiff has failed to allege sufficient predicate acts in support of his RICO claim, however, the Court need not address defendants' arguments to the extent that they go beyond the predicate act requirement.

The law is clear that "inequitable conduct before the PTO cannot qualify as an act of mail fraud ... for purposes of the predicate act requirement."*Semiconductor Energy Laboratory Co. v. Samsung Electronics Co.*, 204 F.3d 1368, 1380 (Fed.Cir.2000); *see also Univ. of W. Va. v. Van Voorhies*, 278 F.3d 1288, 1303 (Fed.Cir.2002) (affirming district court's dismissal of plaintiff's § 1962(c) claim where the plaintiff asserted, as the specific predicate acts for his RICO claims, that defendants committed mail fraud by making false submissions to the PTO in prosecuting certain patent applications). Here, in pleading the predicate act requirement, plaintiff only alleges that Bauer and A. Fischer "committ[ed] a pattern of acts of mail fraud."(Am.Compl.¶ 98). Thus, plaintiff has failed to allege a valid RICO claim. Consequently, defendants' motion to dismiss plaintiff's RICO claim is granted.

E. *Breach of Contract*

*6 Defendants move to dismiss a breach of contract claim. (*See* Defs.' Mem. at 10 ("The complaint ... does not properly plead a breach of contract claim."); Defs.' Reply Mem. at 11 (same)). But no such claim is asserted in the amended complaint. Hence, this prong of the motion is denied.

F. *Notice to Defendants*

1. *Applicable Law*

Fed.R.Civ.P. 8 requires, at a minimum, that a complaint give each defendant "fair notice of what the plaintiff's claim is and the ground upon which it rests."*SeeFerro v. Ry. Express Agency, Inc.*, 296 F.2d 847, 851 (2d Cir.1961); *seealsoLippe v. Bairnco Corp.*, 96 Civ. 7600, 1998 U.S. Dist. LEXIS 16060, at *39 (S.D.N.Y. Oct. 14, 1998) ("plaintiffs cannot simply 'lump' all the defendants together and allege that the purported acts of every defendant can be imputed to every other defendant").

2. *Analysis*

[6] Defendants argue, for a variety of reasons, that the amended complaint fails to allege any wrongful acts on the part of A. Fischer, Matthew Fischer, Magnetic Snap, and Lanfran Realty. (Defs.' Mem. at 15).

Although the amended complaint often refers to the defendants collectively, the only allegations against Matthew Fischer, Magnetic Snap, and Lanfran Realty are as follows:

1. "[Mathew] Fischer is an officer of RRNY";

2. "In 1994, Riceman executed a contract with Magnetic Snap [ ] under which Riceman actually worked for RRNY"; and

3. "Lanfran Realty [ ] provided financial guarantees on behalf of Bauer as part of this transaction [the sale of a portion of RR-Del]."

(Am.Compl.¶¶ 6, 18, 17).

By lumping all the defendants together and failing to distinguish their conduct, plaintiff's amended complaint fails to satisfy the requirements of Rule 8. Specifically, the allegations fail to give adequate notice to these defendants as to what they did wrong. Accordingly, defendants' motion to dismiss the amended complaint for failure to state any valid claims as against Matthew Fischer, Magnetic Snap, and Lanfran Realty is granted. The amended complaint is dismissed as to these three defendants.

CONCLUSION

For the reasons set forth above, the defendants' motion to dismiss is granted in part and denied in part. Defendants' request for Rule 11 sanctions is denied, as is its request for costs and attorneys' fees. The parties shall appear for a pretrial conference in Courtroom 11A on February 13, 2004 at 11:00 am.

SO ORDERED.

S.D.N.Y.,2004.
Medina v. Bauer
Not Reported in F.Supp.2d, 2004 WL 136636 (S.D.N.Y.)

END OF DOCUMENT

HNordwind v. Rowland
S.D.N.Y.,2007.
Only the Westlaw citation is currently available.
United States District Court,S.D. New York.
Thekla NORDWIND, Greta Hoerman, and Gerald B. Taylor, as Executor of The Estate of Michael Franke, Plaintiffs,
v.
David J. ROWLAND, Rowland & Associates and Rowland & Petroff, Defendants.
David J. Rowland, Rowland & Associates and Rowland & Petroff, Third-Party Plaintiffs,
v.
Peter Franke-Rota, Willy Nordwind, Jr., Reed, Stover & O'Conner, P .C., Squire & Dempsey L.L.P., Clifford Chance Partnerschaftsgesellschaft, and Commission for Art Recovery, Inc., Third-Party Defendants.
Civil Action No. 04-9725 (SDNY) (LTS)(AJP).

Oct. 10, 2007.

OPINION

DONALD C. POGUE, Judge.
*1 DONALD C. POGUE, Judge [FN1]: This action involves claims of legal malpractice, breach of contract, negligence, breach of fiduciary duty, and for equitable relief arising from Defendants' legal representation of Plaintiffs Mrs. Nordwind, Ms. Hoerman, and Mr. Taylor as executor of the estate of Mr. Franke (collectively, "Plaintiffs"). Plaintiffs retained Defendants as counsel to assist in obtaining restitution for assets, originally belonging to their relatives Gustav and Clara Kirstein, that were confiscated by the Nazis. While representing Plaintiffs, Defendants contacted Ms. Christel Gauger [FN2] to inform her of her right to half of the recovery, and offered to represent her for that recovery-to which she agreed. (Ms. Gauger was a nurse to Erich Jacobsen whose wife, Gabrielle Jacobsen, inherited half the estate of the Kirsteins. The Jacobsen's son, Godfrey, left the residual of his estate to Ms. Gauger when he died.) Plaintiffs contend that Ms. Gauger does not have a right to half of the recovered assets, and that Defendants therefore should not have notified her, nor should Defendants have represented her without the Plaintiffs' informed consent, given that her interests were adverse to theirs. Before the court are cross-motions for summary judgment on all of the claims. The court resolves these issues by a ruling based on German law.

FN1. Sitting by designation.

FN2. Ms. Gauger is not a party to this action.

BACKGROUND

As noted above, this case arises out of the parties' successful attempt to obtain restitution for various assets, including artwork, businesses and bank accounts (collectively, the "Kirstein Assets"), that the Nazis confiscated from the estate of Clara Kirstein upon her death in 1939. Defendants and Third-Party Plaintiffs David J. Rowland, Rowland & Associates, and Rowland & Petroff (collectively, "Defendants") represented Plaintiffs, Third-Party Defendant Peter Franke-Ruta, Mrs. Miriam Reitz Baer and Ms. Christel Gauger in their actions for restitution.

History of the Kirstein Assets and Possible Heirs

In the 1930s, Gustav and Clara Kirstein lived in Leipzig, Germany, which became part of East Germany when the post-war socialist country was established. Gustav Kirstein predeceased his wife. Upon his death, Gustav Kirstein left Clara Kirstein a life estate in his assets, and upon her death, the remainder was to go jointly to their two daughters, Gabrielle Jacobsen and Marianna Baer. Clara Kirstein's estate also was to go jointly to their daughters upon her death, according to her will. Both daughters immigrated to the United States in the 1930s, before Clara's death.

Prior to her death, Clara Kirstein paid a "Jewish Tax" to the Nazi government. She made plans to emigrate to the United States, but died soon after her passport was confiscated and the Gestapo instructed her to report for deportation to Auschwitz. Upon her death, the Nazi government confiscated her estate.

Marianna Baer, one of the Kirstein daughters, died in

1986 in New York state, survived by her only child, son Klaus Baer. Klaus Baer died in 1987, survived by his wife, Miriam Reitz Baer. Klaus Baer's will gave Miriam Reitz Baer a life estate in his assets, with the remainder to go to the Oriental Institute of the University of Chicago upon her death. Miriam Reitz Baer and the Oriental Institute have assigned their inheritance rights to the Kirstein Assets to Plaintiffs and Third-Party Defendant Peter Franke-Ruta (collectively, the "Nordwind Parties"), in equal shares.[FN3]

FN3. The Nordwind Parties are all nephews and nieces of Clara Kirsten.

*2 The other Kirstein daughter, Gabrielle Jacobsen, was married to Erich Jacobsen, with whom she adopted their son Godfrey, an orphan from the Nazi concentration camp Theresienstadt.[FN4]The Jacobsens lived and died in New York state. Gabrielle Jacobsen died intestate in 1957. Erich Jacobsen died in 1977, leaving Godfrey as heir to his estate. Godfrey Jacobsen died in 1980. He named Christel Gauger as Executor of his estate, leaving $20,000, his residence, and any remaining property that he owned at his time of death to her. Pls.' 56.1 Statement of Undisputed Material Facts ¶ 19, *citing* Last Will & Testament of Godfrey Jacobsen, dated July 12, 1980 (*"Pls.' 56.1 Statement"*). Defendants contend, and Plaintiffs do not appear to dispute, that Godfrey Jacobsen thereby named Ms. Gauger as the residual heir to his estate. Defs.' Resp. and Objections to Pls.' 56.1 Statement ¶ 19.[FN5]

FN4. Theresienstadt is now known as Terezin, located in the Czech Republic.

FN5. The Nordwind Parties claim that under New York law, Godfrey Jacobsen could not have left his claims to the Kirstein Assets to Ms. Gauger, because those claims did not exist until they were created by law in 1990.

For the purposes of this action, the only relevant claims to the Kirstein Assets are those of the Nordwind Parties, nieces and nephews of Clara Kirstein who were assigned the inheritance rights of Miriam Reitz Baer and the Oriental Institute in the Kirstein Assets, and Christel Gauger, residual heir to Godfrey Jacobsen's estate.

Representation

Mrs. Nordwind spoke with Mr. Rowland about retaining his services to recover the Kirstein Assets in September, 1998, and entered into an agreement with him sometime between October and November, 1998.[FN6]The agreement entitled Defendants to a contingency fee, which consisted of 20% of any recovery Plaintiff Nordwind made. Mrs. Nordwind then furnished Mr. Rowland with the materials she and her father had gathered that were related to the Kirstein Assets and inheritance rights therein.

FN6. The extent of the representation first agreed to, and the dates on which the agreement was made are also in dispute. The Nordwind Parties contend that an attorney-client relationship existed as of October 1, 1998, based on a draft retainer agreement sent to Plaintiff Nordwind by Rowland, and accepted by way of a letter written by Mrs. Nordwind's husband. Defendants contend that Rowland initially agreed only to investigate the possibilities for recovery, and that he did not agree to file a claim with the Conference on Jewish Material Claims against Germany, Inc. ("JCC" or "Claims Conference") until November 4, 1998, when the retainer agreement was signed.

After Mr. Rowland identified Miriam Reitz Baer as a potential heir, Mrs. Reitz Baer stated her willingness to assign her interest in the estate to the Nordwind Parties, which she subsequently did.[FN7]Mr. Rowland suggested to Mrs. Nordwind that each of Mrs. Nordwind, the Klaus Baer trust and "other possible Kirstein heirs" hire him, so that he would "be assured of representing heirs." Letter from Mr. Rowland to Mrs. Nordwind Re: Kirstein Business Property and Art Works, Nov. 3, 1998, *Pls.' 56.1 Statement,* Exh. 15. Mrs. Reitz Baer thereafter retained Mr. Rowland to represent her, prior to assigning her interests to the Nordwind Parties. Mr. Rowland was then also retained by the remainder of the Nordwind Parties.[FN8]

FN7. The assignment was executed on 12/31/1999, though neither party states this. *Pls.' 56.1 Statement,* Exh. 8.

FN8. Ms. Hoerman and Mr. Franke signed letter agreements on December 8, 1998 and

December 16, 1998, respectively. Third-Party Defendant Mr. Franke-Ruta first assigned his rights to Mrs. Nordwind and gave her power of attorney to prosecute the claims on December 18, 1998, and then directly retained Rowland by letter agreement on July 15, 1999.

In researching the family history, Mr. Rowland obtained a copy of Godfrey Jacobsen's will, certified by the Clerk of Court from Monroe County, New York on November 17, 1998. Mr. Rowland testified in his deposition that upon reviewing Godfrey Jacobsen's will, Mr. Rowland determined that "the residual heir of the will was Christel Gauger."*Pls.' 56.1 Statement* ¶ 49 (citing Rowland Dep. Tr. I at 162-68).

Mr. Rowland told Ms. Gauger that he believed she had an interest in the Kirstein Assets on or about December 3, 1998, and offered to represent her in their retrieval, to which she agreed in writing on December 16, 1998. It is disputed whether Rowland had oral, informed consent of the Nordwind Parties to contact Gauger and offer his services.[FN9]However, it appears to be undisputed that Mr. Rowland did not inform the Nordwind Parties that there was a potential conflict of interest between them and Ms. Gauger, nor did he obtain signed waivers of any conflict of interest from the Nordwind Parties. Mr. Rowland contends that he "did not have a duty to advise Mrs. Nordwind of any 'conflict or potential conflict between her claims to the Kirstein Assets and the claims of other possible heirs,' because there were no conflicts or potential conflicts."Defs.' Resp. Pls.' 56.1 Statement ¶ 31.

FN9. It appears that the Nordwind Parties were under the impression that Ms. Gauger would assign them her interest in the Kirstein Assets, and that Mr. Rowland was aware of this possibility, at least as early as December 3, 1998, when Mr. Rowland wrote letters to Ms. Hoerman, Mr. Franke, and Mr. Franke-Ruta enclosing retainer agreements. Those letters stated that "[b]oth Miriam Reitz [Baer] ... and Christel Gauger have indicated that they may wish to assign their rights to Clare Kirstein's nieces and nephews at some time in the future."*See* Letters from Mr. Rowland to Ms. Hoerman, Mr. Franke, and Mr. Franke-Ruta (Dec. 3, 1998) *Pls.' 56.1 Statement,* Exhs. 21-23; *see also* Letter to Ms. Christel Gauger from Mr. Rowland (Dec. 3, 1998) *Pls.' 56.1 Statement,* Exh. 27 ("[r]ather than make any decision at this time as to whether there should be a renunciation of the inheritance or an assignment (which could have potential tax implications), our thought was that my law firm should represent all heirs or possible heirs to begin pursuing the matter."); *see also* Letter from Thekla Nordwind to Christel Gauger (June 14, 1999) Rowland Aff. in Supp. Defs./Third-Party Pls.' Mot. Summ. J. Exh. K ("[w]hen we discussed the Kirstein estate last year, you said you would like to assign your rights as legal heir, to Clare Kirstein's nephews and nieces.... If you have questions, or feel differently now, it would help to know ...."); *see also* e-mail from David Rowland to Thekla Nordwind (June 23, 1999) Rowland Aff. in Supp. Defs./Third-Party Pls .' Mot. Summ. J. Exh. J ("I am surprised to hear that Christel Gauger is not interested in making the assignment. I have not spoken to her since last year when we filed the claim. I will speak to her either tomorrow or when I am in Germany next week.").

*3 Mr. Rowland represented Ms. Gauger in her application for an *Erbschein* (a German certificate of inheritance). Mr. Rowland filed the application for the *Erbschein* after determining that Ms. Gauger was the residual heir to the estate of Godfrey Jacobsen, according to Jacobsen's will, and that she was therefore heir to 50% of the Kirstein Assets. There is a mechanism to dispute the issuance of an *Erbschein,* about which Mr. Rowland did not inform the Nordwind Parties; Defendants claim that such an action was never relevant nor contemplated.

Mr. Rowland also represented the Nordwind Parties, Mrs. Reitz Baer, The Oriental Institute and Ms. Gauger before the Claims Conference in their bid for restitution of the Kirstein Assets, but filed claims only for Mrs. Reitz Baer and Ms. Gauger.[FN10]The Claims Conference made an award of restitution for certain of the Kirstein Assets in February, 2003. Fifty percent of this award was paid to Ms. Gauger by the Claims Conference. There was also a recovery of

artwork, which was auctioned; fifty percent of those proceeds also went to Ms. Gauger. In January, 2004, the Swiss Claims Resolution Tribunal ("CRT") awarded Mrs. Reitz Baer and Ms. Gauger approximately $130,000 for bank accounts previously owned by the Kirsteins.

> FN10. The Claims Conference does not recognize assignments of claims. *See, e.g.*, Letter from I. Koenig & K. Hermann, Claims Conference, to David Rowland, Esq. (Apr. 4, 2005) *Pls.' 56.1 Statement*, Exh. 41 ("[a]ny assignments of claims by heirs among each other or to third parties are not recognized by us and are not given any consideration in rendering payment.").

The Nordwind Parties contend that it was unnecessary for Ms. Gauger to be joined in the claim filed with the Claims Conference. *Pls.' 56.1 Statement* ¶ 142-143. Defendants contend that, had Ms. Gauger not joined the claim, the Nordwind Parties (by way of Mrs. Reitz Baer) would still only have recovered the fifty percent to which Mr. Rowland contends they were entitled. For that reason, and because Plaintiffs thought Ms. Gauger would assign her rights to them, Mr. Rowland contends that including Ms. Gauger in the claim was the course of action more likely to result in a larger payout for the Nordwind parties. Defs.' Resp. Pls.' 56.1 Statement ¶ 142-143.[FN11]

> FN11. There was a time constraint on any parties contemplating filing claims; due to an amendment to the Rules, Ms. Gauger would not have recovered anything from the Claims Conference if she had filed later than December 31, 1998. Defendants contend that her 50% recovery would have been lost entirely had she not filed a claim. *See also*, Letter from I. Koenig & K. Hermann, Claims Conference, to David Rowland, Esq. (Apr. 4, 2005) *Pls.' 56.1 Statement*, Exh. 41 ("[i]f only one of several co-heirs in a community of heirs submits a claim, he/she will participate only to the extent of the share in his/her inheritance. The other shares remain with our organization.").

The Nordwind parties also filed claims relating to Swiss Bank accounts owned by the Kirsteins before the Swiss Claims resolution Tribunal ("CRT"). Mrs. Nordwind represented the Nordwind Parties. There is dispute as to her discussions and agreements with Ms. Gauger before the claims were filed. Defendants claim that Ms. Gauger had consented to Mrs. Nordwind filing at the CRT, but had not consented to be joined (or to participate at all), and had not agreed to assign her interest from any recovery to the Nordwind Parties. The Nordwind Parties contend that Ms. Gauger had agreed to assign her interest to them, and had agreed to sign over her power of attorney to Mrs. Nordwind, but that when Mr. Rowland, at the request of Mrs. Nordwind, contacted Ms, Gauger, the situation ended with Mr. Rowland representing Ms. Gauger and writing to the CRT to contest the award to the Nordwind Parties, and obtain a recovery for Ms. Gauger of 50% of the award from the CRT. Defendants claim that Mr. Rowland was just alerting the CRT to an administrative error. Mr. Rowland received 20% of Ms. Gauger's award.

*4 Defendants' representation of Plaintiffs terminated in or just after December, 2003. Defendants retained files relevant to the case despite Mrs. Nordwind's request for those materials after termination of their lawyer-client relationship. Mr. Rowland argues that he had a right to retain the files pursuant to a charging lien for the work he had already done.[FN12]

> FN12. Given Defendants' consented-to withdrawal without prejudice of counterclaims for breach of contract and quantum meruit, discussed *infra*, the court assumes that the parties have come to some agreement as to any files which the Nordwind Parties have yet to obtain from Defendants.

JURISDICTION

The parties to this action are diverse, and the amount in controversy exceeds $75,000. Therefore, the court has jurisdiction over this dispute pursuant to 28 U.S.C. § 1332(a). The claims brought are New York state law claims for breach of contract, breach of fiduciary duty, negligence, and legal malpractice, in addition to claims for restitution and unjust enrichment.

ANALYSIS

The Nordwind Parties' argument rests on their contention that they had a "colorable claim" to all of the Kirstein Assets, and that Defendants, who represented the Nordwind Parties, should therefore have obtained informed consent before commencing representation of Ms. Gauger, whose claims to the assets were adverse to theirs. The Nordwind Parties base this claim on an interpretation of the 1990 *Vermögensgesetz* ("German Property Claims Act" or "GPCA"). Because Godfrey Jacobsen died ten years before the GPCA was passed in 1990, the Nordwind Parties argue that they had a colorable claim to all of the assets, based on their theory that claims for restitution were not passed to Ms. Gauger through the Jacobsen will, because under New York state law, a statutory claim cannot pass from an estate until the effective date of the statute, and claims acquired posthumously cannot be devised by will.

The Nordwind parties argue that this interpretation of the facts and law constitutes at least a colorable claim which would strip Ms. Gauger of a right to restitution, and that the possible legal validity of the Nordwind Parties' claims creates a sufficient conflict of interest so that Defendants should have obtained the Nordwind Parties' informed consent before agreeing to represent and representing Ms. Gauger.

The Nordwind Parties move for Summary Judgment, claiming that Defendants breached their fiduciary duty to the Nordwind Parties. Defendants' Cross-motion for Summary Judgment claims that the breach of fiduciary duty claim was duplicative of the claim for legal malpractice, which was in turn ill-founded, and should therefore be dismissed.

I. Dismissal of Claims for Breach of Fiduciary Duty, Breach of Contract and Negligence as Duplicative of the Legal Malpractice Claim

Under New York law, where a claim for fiduciary duty is "premised on the same facts and seeking the identical relief" as a claim for legal malpractice, the claim for fiduciary duty "is redundant and should be dismissed." *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 780 N.Y.S.2d 593, 596 (App.Div.2004); *accord Ciocca v. Neff*, 2005 WL 1473819, at *5 (S.D.N.Y. June 22, 2005); *see also Serova v. Teplen*, 2006 WL 349624, at *4 (S.D.N.Y. Feb. 16, 2006). Here, the claim for breach of fiduciary duty is based on Mr. Rowland's alleged breach of his duties of loyalty, zealous representation, and confidentiality when, without the informed consent of the Nordwind Parties, already his clients, he contacted Ms. Gauger, advised her that he believed she had a claim to the Kirstein Assets, and represented her to the alleged detriment of the Nordwind Parties. These are the same facts that form the basis for the breach of contract, negligence and legal malpractice claims. *See Second Amended Complaint and Jury Demand* 3.[FN13] The damages alleged, $20 million, are also identical for these claims. *Id.* at 4.

> FN13. The Nordwind Parties argue that the different claims are based on different sets of facts. According to the Nordwind Parties, their claim for breach of fiduciary duty is based on Mr. Rowland having represented the Nordwind Parties and Ms. Gauger "without having first obtained any informed waiver of a conflict of interest," and that this constituted a breach of fiduciary duty because there was a conflict between their competing claims, given that the Nordwind Parties' experts have shown them to have claims to 100% of the Kirstein Assets that at least have a reasonable basis in law and fact. Amended Reply Mem. Supp. Mot. Summ. J. by Ps & Third-Party D. Ruta 3-4 (*"Pls.' Am. Reply Mot. Summ. J."*) 3-4. In contrast, according to the Nordwind Parties, the legal malpractice claim "turns on whether Mr. Rowland rendered faulty advice that fell below the standard of care, and is not premised upon his conflict of interest."*Id.* However, the advice to which the Nordwind Parties refer was rendered regarding decisions to contact Ms. Gauger and inform her of her potential claim, and to have Mr. Rowland represent Ms. Gauger-namely, the same set of facts and interactions that lead to the claim of legal malpractice.

*5 The Nordwind Parties argue, however, that a claim for breach of fiduciary duty carries a different standard of proof than a claim for malpractice, and that therefore, their claim is "not duplicative of the legal malpractice claim even when both claims arise from the same underlying legal representation."Amended Reply Mem. Supp. Mot. Summ. J. by Pls. & Third-Party Def. Franke-Ruta 2

(*"Pls.' Am. Reply Mot. Summ. J."*) (citing Ciocca v. Neff, 2005 WL 1473819);*see also* Mem. of Law of Pls. and Third-Party Def., Franke-Ruta, in Opp. to Defs.' Mot. for Summ. J. 10 (*"Pls.' Opp. Defs.' Mot. Summ. J."*). Specifically, the Nordwind Parties argue that a breach of fiduciary duty claim requires a showing that the lawyer's misconduct was a "substantial factor" in the client's loss, rather than the higher, "but-for" causation standard required to prove legal malpractice. *Pls.' Am. Reply Mot. Summ. J.* at 3 (citing Ciocca v. Neff, 2005 WL 1473819 at *6).

Under New York law, however, courts do not "differentiate[ ] between the standard of causation requested for a claim of legal malpractice and one for breach of fiduciary duty in the context of attorney liability."*Weil, Gotshal & Manges, LLP*, 780 N.Y.S.2d at 596;*see also* Schneider v. Wien & Malkin LLP, 2004 WL 2495843 at *17, n. 10 (N.Y.Sup. Nov. 1, 2004) (explaining that the higher "but for" standard of causation applies only to breach of fiduciary duty claims premised on allegations of legal malpractice); *see also* Trautenberg v. Paul, Weiss, Rifkind, Wharton & Garrison LLP, 2007 WL 2219485, at *3 (S.D.N.Y. Aug. 2, 2007) (in case alleging lawyer's breach of fiduciary duty, "but for" standard of causation applies). In *Ciocca*, the court dismissed claims for breach of contract which arose "from the same facts and alleged legal obligations" as a legal malpractice claim that centered on the defendant's representation of the plaintiff in the sale of a patent and defendant's allegedly overlapping representation of the entity to whom the patent was sold without informed consent. Ciocca v. Neff, 2005 WL 1473819 at *5. In that case, the court did not dismiss the claim for breach of fiduciary duty, finding that the claim was not duplicative. There were, however, two parts to the factual basis for the claim for breach of fiduciary duty: (1) the alleged overlapping representation, and (2) defendant's demand for an interest in the patent sale as repayment for his previous patent prosecution. *Id.* The court found that the breach of fiduciary duty claim was not duplicative of the legal malpractice claim for the dual reasons that the "standard of proof applicable to the fiduciary duty claim is different from that pertinent to the malpractice claim,"*Id.* at 6, and because the demand for payment was a separate fact from those alleged in support of the legal malpractice claim. *Id.* Although the court incorrectly stated that the level of causation necessary to prove the breach of fiduciary duty claim was the "substantial factor" level, the holding did not rely on that statement, because the additional fact, that was part of the claim for breach of fiduciary duty, rendered the claim not duplicative. Accordingly, Plaintiffs' and Third-Party Defendant Franke-Ruta's claims for breach of fiduciary duty, breach of contract and negligence will be dismissed as duplicative of the legal malpractice claim.

II. Legal Malpractice Claim

*6 The four elements of a legal malpractice claim in New York are (1)an attorney-client relationship, (2) attorney negligence, which is (3) the proximate cause of (4) actual damages. Flutie Bros. LLC v. Hayes, 2006 WL 1379594, at *5 (S.D.N.Y. May 18, 2006); Estate of Re v. Kornstein Veisz & Wexler, 958 F.Supp. 907, 920 (S.D.N.Y.1997). Defendants do not argue about the first three elements of malpractice, but rather argue that summary judgment is appropriate based on their contention that the Nordwind Parties were not damaged.

Here, ruling on matters of foreign law, Fed.R.Civ.P. 44.1, and considering facts plead in the complaint in the light most favorable to the non-moving parties, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986), the court finds that damages cannot be proved, and so Defendants are entitled to judgment as a matter of law.

Defendants move for the dismissal of the legal malpractice claim as a matter of law; therefore, all factual inferences are drawn in favor of Plaintiffs. However, interpretation of foreign law is a matter of law, which is for the court to decide.[FN14]Fed.R.Civ.P. 44.1. As noted, in this case, the interpretation and application of foreign law is dispositive. If the Nordwind Parties were entitled to 100% of the Kirstein Assets, then the question before the court would be whether they have pointed to sufficient evidence to show that Mr. Rowland was negligent in concluding that the Nordwind Parties were only entitled to 50% of the assets, and Ms. Gauger to the other 50%.[FN15]However, if the Nordwind Parties were entitled to 50% or less of the Kirstein Assets, then the Nordwind Parties are not damaged by Defendants' representation of Ms. Gauger without their informed consent, and cannot prevail on a claim for legal malpractice as a matter of law.

FN14. For this reason, the court will

identification of the legal successors, as New York is the *lex successionis* for Gabrielle Jacobsen (and her sister, Marianna Baer). Thus, the claim for restitution arose directly and originally in the legal successors of Gabrielle Jacobsen and Marianna Baer. New York probate law has already determined that Gabrielle's property was passed intestate to Erich Jacobsen, whose residual beneficiary was Godfrey Jacobsen, whose residual beneficiary, in turn, was Christel Gauger. The claim for restitution for 50% of the Kirstein Assets therefore arose directly and originally in Ms. Gauger in 1990. Likewise, Ms. Reitz Baer had a claim to a life interest in the other 50% of the assets.

This interpretation of the GPCA is further supported by a determination of the German Federal Administrative Court regarding the position of a testamentary heir as a legal successor. Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court] Sept. 7, 1998, BVerwG 8 B 118.98,*Bernstein Aff.* Exh. 39. The court in that case held that

[t]he testamentary heir of the injured party, as the latter's legal successor, is the eligible party within the meaning of [GPCA § 2(2)], because he succeeded to the injured party's legal position to the full extent and therefore the hypothetical assumption is justified that the confiscated *asset* is to be attributed to him under civil law, had it not been taken away from the injured party on the basis of illegal measures within the meaning of [GPCA § 1] ....

Id.(citations omitted, emphasis added).[FN19] The court explains that as a matter of German law, the claim first comes into being with the legal successor of the injured party (if the injured party is deceased), and that the legal successor is determined by a legal analysis of who would have inherited the asset, had it not been confiscated. Only then is New York law consulted, to determine who would have inherited the assets, had they not been confiscated, but rather, passed through the chain of heirs as described above.

FN19. That case further explains that:

> the legal succession to the confiscated asset must be determined only hypothetically by way of an implication in law .... After all, [GPCA § 2 1 1] evidently has the purpose to provide for compensation-*in personam*-for the illegal situation created by the expropriation and to the extent possible restore the *status quo ante.*Accordingly the BverwG saw the reason and purpose of the legal provision in the fact "that the asset, had it not been confiscated from the injured party by illegal means as defined in [GPCA § 1], would have been transferred to the intestate or testate heir at the death of the testator, together with the other assets forming part of the estate ..." and that "because of this hypothetical transfer of assets ... the illegal situation, which was created by the expropriation and for which the [GPCA] is to provide compensation, continues also in the person of the heir, whom the legislator, for that reason, declared a party eligible for the claim."
>
> BVerwG 8 B 118.98 at 2(a) (citing BVerwG, Buchholz 428 § 2 [GPCA] no. 23, page 30), *Bernstein Aff.* Exh. 39.

*9 Thus, the Nordwind Parties did not have an entitlement under the GPCA to the 50% of the Kirstein Assets that originally would have gone to Gabrielle Jacobsen. As a result, the Nordwind Parties were not eligible for restitution of that 50% under the Goodwill Fund rules, or for the 50% of the CRT recovery. It follows that where there was no entitlement, there was no damage done to the Nordwind Parties when they did not receive those monies. The court need not reach the other elements of the legal malpractice claim, as the claim fails as a matter of law for failure to prove damages.

III. The Nordwind Parties' Unjust Enrichment Claims

Defendants further move for Summary Judgment on the Nordwind Parties' claims of unjust enrichment for fees paid, and for an injunction disallowing his further representation of Ms. Gauger based on a continuing breach of New York professional responsibility rules 22 NYCRR § 1200.19 and 22 NYCRR § 1200.27.[FN20]Here, where the underlying claim for legal malpractice is dismissed based on a finding that the Nordwind Parties suffered no legally cognizable damages, the court finds it inappropriate to further consider Plaintiffs' requests that the court

SO ORDERED.

S.D.N.Y.,2007.
Nordwind v. Rowland
Slip Copy, 2007 WL 2962350 (S.D.N.Y.)

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HRadin v. Albert Einstein College of Medicine of Yeshiva University
S.D.N.Y.,2005.

United States District Court,S.D. New York.
Lidya RADIN, Plaintiff,
v.
ALBERT EINSTEIN COLLEGE OF MEDICINE OF YESHIVA UNIVERSITY, Yeshiva University, Norman Lamm, Richard M. Joel, Dominick P. Purpura, Michael J. Riechgott, Todd R. Olson, James David, Janice O. Bennett, Committee on Student Promotions of Albert Einstein College of Medicine 1994 to 1998, and John Does 1 to 50, Defendants.
No. 04 Civ. 704(RPP).

May 20, 2005.

Eric S. Pennington, P.C., Newark, New Jersey, By: Eric S. Pennington, for Plaintiff.
Sive, Paget & Riesel, P.C., New York, New York, By: Daniel Riesel, Kate Sinding, for Defendants.

OPINION AND ORDER

PATTERSON, J.

*1 In her Amended Verified Complaint ("Am.Complaint"), filed May 20, 2004, [FN1] Plaintiff Lidya Radin ("Plaintiff") asserts nineteen causes of action covering various New York common law claims, claims of discrimination and sexual harassment under state and federal statues and the federal Constitution, and a claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO") against Albert Einstein College of Medicine of Yeshiva University ("AECOM"), Yeshiva University, several administrators and instructors at AECOM, and the Committee on Student Promotions at AECOM ("Promotions Committee"). Plaintiff was a medical student at Defendant AECOM beginning in the fall of 1994, and her claims relate to actions taken by the Defendants in connection with: (1) Plaintiff's complaints concerning her first-year anatomy class in 1994; (2) her placement in AECOM's Deceleration Program in April 1995 following her failure of three classes; (3) her suspension and subsequent medical leave from AECOM in 1996; (4) her involuntary withdrawal from AECOM in January 1998; and (5) various other aspects of her educational experience at AECOM.

FN1. The original complaint in this action was filed on January 29, 2004.

Defendants move for dismissal of the Am. Complaint for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and due to the Am. Complaint's excessive length and verbosity pursuant to Rule 8(a)(2) of the Federal Rules of Civil Procedure. Specifically, Defendants state that under Rule 8(a)(2)"[w]here a complaint is too verbose and lengthy as to be understood by the defendant, it should be dismissed."(Defs.' Mem. at 10 (citing *United States v. Lockheed-Martin Corp.*, 328 F.3d 374, 376-79 (7th Cir.2003).) Though lengthy, the Am. Complaint is intelligible, and the Court declines to dismiss the Am. Complaint under Rule 8(a)(2). However, Defendants' motion to dismiss is granted for the reasons that follow.

BACKGROUND [FN2]

FN2. The facts that follow are taken from the Am. Complaint, and for the purposes of this motion, these facts are assumed as true, except in those instances when the documents cited in the Am. Complaint have been supplied by Defendants and contradict or supplement the facts alleged in the Am. Complaint. *See* Defs.' Notice of Mot. to Dismiss, dated July 14, 2004, Exs. B-G; *see also Rothman v. Gregor*, 220 F.3d 81, 88 (2d Cir.2000); *Schnall v. Marine Midland Bank*, 225 F.3d 263, 266 (2d Cir.2000).

A. *Parties*

Plaintiff is a Roman Catholic woman, a first-generation American of Croatian descent, and a resident of the State of New Jersey. From November 1993 until on or about January 30, 1998, Plaintiff was an applicant and matriculating student at Defendant AECOM. (Am.Compl.¶¶ 4-5.)

Defendant AECOM is a private, not-for-profit institution of higher education, authorized by the State of New York to award the degree of medical doctor ("M.D."). Its principal office is located at 1300 Morris Park Avenue, New York, New York. (*Id.* ¶ 7.) Defendant AECOM is a division of Yeshiva University.(*Id.* ¶ 8.)

Defendant Yeshiva University is a private, independent institution of higher education chartered under the laws of New York, and its principal office is located at Joel Jablonski Campus, 500 West 185th Street, New York, New York.(*Id.* ¶ 9.)

Defendant Rabbi Dr. Norman Lamm, "at all times mentioned," was the President of Yeshiva University and is a resident of the State of New York. (*Id.* ¶ 11.)

*2 Defendant Richard M. Joel succeeded Rabbi Dr. Lamm in 2002 as the President of Yeshiva University and is a resident of the State of New York.(*Id.* ¶ 12.)

Defendant Dr. Dominick P. Purpura, "at all times mentioned," was and is the Dean of AECOM and is a resident of the State of New York. (*Id.* ¶ 13.)

Defendant Dr. Michael J. Reichgott, "at all times mentioned," was the Associate Dean for Students and Graduate Medical Education at AECOM and is currently the Associate Dean for Clinical Affairs & Graduate Medical Education at AECOM. He served as co-chair and a non-voting member of Defendant Promotions Committee from 1994 to 1998. He is a resident of the State of New York. (*Id.* ¶¶ 14-16.)

Defendant Todd Olson, Ph.D., "at all times mentioned," was and is the lead course instructor for Defendant AECOM's first-year anatomy course and anatomy lab, which Plaintiff took during the 1994-1995 academic year at Defendant AECOM. Olson was a voting member of Defendant Promotions Committee "at all times mentioned." He is a resident of the State of New York. (*Id.* ¶¶ 18-19.)

Defendant Dr. James David, "at all times mentioned," was and is a psychiatrist and Associate Professor of Clinical Psychiatry in Defendant AECOM's M.D. program and is currently the Associate Dean for Students at Defendant AECOM. Dr. David was a voting member of Defendant Promotions Committee "at all times mentioned." He is a resident of the State of New York. (*Id.* ¶¶ 21-23.)

Defendant Janice O. Bennett, "at all times mentioned," was a psychologist and clinical instructor in Defendant AECOM's M.D. program and was supervised by Defendant Dr. David. She was a voting member of Defendant Promotions Committee "at all times mentioned." She is a resident of the State of New York. (*Id.* ¶ ¶ 25-26.)[FN3]

> FN3. The Am. Complaint contains a paragraph numbering error. There is a paragraph numbered 1 between paragraphs 23 and 24. This opinion lists the numbers of the paragraphs as they are listed in the Am. Complaint and does not renumber all of the paragraphs in light of this error.

Defendant Lloyd Greenberg, "at all times mentioned," was and is the Finance Officer at Defendant AECOM and is a resident of the State of New York. (*Id.* ¶ 28.)

Defendant Zoe Brown Weissman, "at all times mentioned," was and is the Director of the Cognitive Skills Office at Defendant AECOM and was a non-voting member of Defendant Promotions Committee. Weissman is a resident of the State of New York. (*Id.* ¶¶ 30-31.)

Defendant Committee on Student Promotions at Defendant AECOM was the Faculty-Student Committee charged with reviewing, making and executing decisions concerning Plaintiff's academic progress from August 1994 through Plaintiff's involuntary withdrawal effective on or about January 30, 1998. (*Id.* ¶¶ 33-34.)Excerpts of the By-Laws of the Committee on Student Promotions for the 1997-1998 academic year are provided in Exhibit C to Defendants' Notice of Motion to Dismiss, dated July 14, 2004.

B. *Facts*

Defendant AECOM accepted Plaintiff into its Fall 1994 M.D. Program as a student with minority status based on her socioeconomic disadvantaged background. (*Id.* ¶ 39.)After her acceptance, Plaintiff

paid a deposit to Defendant AECOM and in August 1994, enrolled as a matriculating medical student in the Class of 1998. (*Id.* ¶ 41.)Plaintiff was thirty-four years of age at the time. (*Id.* ¶ 42.)Prior to her matriculation, Plaintiff sold her automobile based on representations by Defendant Greenberg that she had to sell her car in order to obtain student loans. (*Id.* ¶¶ 52-53.)

*3 In the fall of 1994, Plaintiff was enrolled in the first-year anatomy course, which included an anatomy dissection lab. (*Id.* ¶ 55.)Defendant Olson was the course leader for both the course and the lab. (*Id.* ¶ 56.)Plaintiff formed a lab group with a woman, Robin Pattin, and, "without consulting with or the consent of Plaintiff and Robin Pattin," Defendant Olson arranged for a male, Kevin Reilly, to join Plaintiff's lab group. (*Id.* ¶ 59.)Shortly after Mr. Reilly joined the group, Plaintiff complained to Defendants AECOM and Olson that Mr. Reilly had made racist and sexist comments, which were disruptive to their group and others. (*Id.* ¶ 60.)Defendants AECOM and Olson spoke with Mr. Reilly about Plaintiff's complaint, and Mr. Reilly later told Plaintiff that his remarks were characterized by Defendant AECOM as a "unique brand of caustic humor that Plaintiff had failed to fully appreciate ."(*Id.* ¶ 61.)

Plaintiff also informed Defendants Reichgott, Olson, Bennett and Weissman that Plaintiff's anatomy lab partners used the "parasite method" of lab work, a form of professional misconduct, and that she wished to transfer into another lab group where professional misconduct was not an issue. (*Id.* ¶¶ 62-63.)Although Defendant Olson allowed other white, male, Orthodox Jewish students to change lab groups and receive assistance, he refused to allow Plaintiff to change groups or receive the assistance of other anatomy lab professors or other groups. (*Id.* ¶ 64.)

In addition, "contrary to defendant AECOM's published policy on Student Professional Misconduct in defendant AECOM's Bulletin and Compendium,"[FN4] Defendants required that Plaintiff and her lab partners meet with Defendant Bennett and participate in mandatory psychological treatment "that was not directly related to academic instruction in anatomy, not in Plaintiff's best interest, and against the wishes of Plaintiff and her lab partner Robin Pattin."(*Id.* ¶ 68.)Despite the express refusals of Plaintiff and Ms. Pattin, Defendants denied Plaintiff or Ms. Pattin their rights to refuse psychological counseling "that was not directly related to their academic instruction or that was not in their best interest."(*Id.* ¶ 70.)

> FN4. Excerpts from "A Compendium of Information on Examinations, Grades and Promotions 1995-1996," attached as Exhibit B to Defendants Notice of Motion to Dismiss, set forth the text of AECOM's applicable policy relating to allegations of student professional misconduct.

During a meeting or exchange between Plaintiff and Defendant Olson to resolve the professional misconduct issue, Defendant Olson "threatened to 'get' Plaintiff at some point during her medical school time or medical career without her knowing that the retaliation came from him," and he later admitted to threatening Plaintiff. (*Id.* ¶¶ 71-72.)Plaintiff informed Defendants AECOM, Reichgott, Olson, Bennett, Weissman and Promotions Committee that the actions of her anatomy lab partners and Olson's refusal to allow her to change lab groups forced her to work alone on much of her lab work, which would and did cause her to fall behind in all her other classes. (*Id.* ¶¶ 73-74.)

*4 Plaintiff failed her Genetics final exam in mid-February 1995 and her Embryology final exam and her Biochemistry final exam in mid-March 1995.(*Id.* ¶ ¶ 79-80.)

In or around April 1995, Plaintiff received a letter from Defendants that indicated she would be placed in AECOM's Deceleration Program. (*Id.* ¶¶ 81, 154.)This letter stated that Plaintiff would be placed on an adjusted academic schedule, would have a reduced course load, and would graduate in five rather than four years. (*Id.* ¶ 155.)Defendants represented that Plaintiff had ten days to decide whether to proceed in the Deceleration Program or appeal.(*Id.* ¶ 156.)Plaintiff signed the letter, indicating that she agreed to her placement in the Deceleration Program, and returned the letter to Defendant Reichgott. (*Id.* ¶¶ 82, 158.)In or about April 1995, an ad hoc subcommittee of the Promotions Committee "summoned Plaintiff to meet with it."(*Id.* ¶ 84.)During the meeting on or about April 10, 1995, they discussed Plaintiff's placement

into the Deceleration Program and produced a three-page report, including a four-point plan, which concerned management of Plaintiff's placement in the Deceleration Program. (*Id.* ¶¶ 85, 159, 163.)The four-point plan included:

(a) Plaintiff's study plans and habits should be reviewed by a faculty member in the first curriculum with the goal of offering guidance and advice;

(b) Plaintiff's performance should be periodically monitored;

(c) A mentor can be assigned if the Plaintiff agrees; and

(d) any contacts with the faculty, including defendant Bennett should provide a forum for Plaintiff to review her handling of current medical school difficulties and whether she's using necessary support systems.

(*Id.* ¶ 163.)

The Am. Complaint alleges that Plaintiff was never provided with a faculty advisor (*id.* ¶ 161), but also alleges that "defendant Reichgott claimed he undertook the role of the faculty advisor to Plaintiff upon her entry into defendant AECOM's Deceleration Program in April 1995"(*id.* ¶ 224).[FN5] In or about April 1995, Defendant Reichgott met with Plaintiff and discussed her placement in the Deceleration Program. (*Id.* ¶ 88 .)

FN5. Plaintiff alleges that "Defendant Reichgott breached [his duty as a faculty advisor] by failing" to perform certain tasks. (Am.Compl.¶ 226.)

From June 1995 through May 1996, Plaintiff worked on her Graduation Research Project at Long Island Jewish Medical Center ("LIJ"), an affiliate teaching hospital of Defendant AECOM, with Dr. William Rennie. (*Id.* ¶ 92.)

In or about August 1995, Defendant Reichgott met with Plaintiff, upon Plaintiff's request "for direction regarding implementation of her placement in the Deceleration Program."(*Id.* ¶ 93.)Defendant Reichgott prepared a half-page memo concerning Plaintiff's placement in the Deceleration Program, including a course schedule for Plaintiff. (*Id.* ¶ 94.)The schedule was for two academic years, 1995-1996 and 1996-1997, and indicated that Plaintiff would retake the three courses she failed in her first year, Genetics, Embryology and Biochemistry, and take two second-year courses, Infectious Diseases and Parasitology. (*Id.* ¶ 165.)Also, Plaintiff optionally could take the second-year course, Physical Diagnosis, which she declined to take in September 1995, after she learned that Physical Diagnosis had two co-requisites that she had not taken. (*Id.* ¶ 166.)

*5 By email on January 5, 1996, Plaintiff informed Defendants that the course and exam schedules of the two second-year courses she was supposed to take conflicted with the course and exam schedules of the three first-year classes she had to retake. (*Id.* ¶ 167.)In an email dated January 9, 1996, Defendants modified Plaintiff's schedule by informing her that her first priority was to successfully complete the first-year courses she was taking and, in accordance with published AECOM policies, that she would have to wait until the following year to take the second-year courses if they conflicted.[FN6](*Id.* ¶ 168.)Plaintiff, independently of Defendant Reichgott, arranged for tutoring services through the Office of Defendant Weissman.(*Id.* ¶ 95.)At some point, Defendant Weismann forced Plaintiff out of her Biochemistry tutoring group, and she was left without tutoring services for four to six weeks. (*Id.*)

FN6. It appears that Defendant Reichgott modified Plaintiff's schedule. (*Seeid.* ¶ 95.)

On or about May 14, 1996, Plaintiff had a discussion with Dr. Rennie, who informed her that in the fall of 1995 Defendant Olson told him that Defendants had diagnosed Plaintiff as having a personality disorder. (*Id.* ¶ 99.)On May 14, 1996, Plaintiff wrote an email to Defendant Reichgott, which the Am. Complaint characterizes as "object[ing] to the way defendants had misled her about the nature of defendants' M.D. degree program, mismanaged her medical school program, 'diagnosed' her without her knowledge and consent, and defamed Plaintiff."[FN7](*Id.* ¶ 100.)Plaintiff placed a printed copy of this email under the office door of Defendant Reichgott on or about the evening of May 14, 1996. (*Id.* ¶ 102.)

FN7. Although Plaintiff's email does contain complaints concerning the lack of privacy at AECOM and the conduct of professors and other students, the majority of the email consists of threats directed toward AECOM and Defendant Reichgott and contains numerous expletives and epithets. (*See* Defs.' Notice of Mot. to Dismiss Ex. D.)

In or about mid-May 1996, after the discussion with Dr. Rennie and the May 14, 1996 email, Plaintiff "was coerced by two people, working on behalf of and in concert with AECOM, to go to a hospital emergency room to address Plaintiff's concerns about episodes of harassment she experienced in connection with dealing with defendants, and Plaintiff eventually was admitted to an affiliate of that hospital."(*Id.* ¶ 104.)Plaintiff also asserts that in May 1996 she inhaled a patient's blood, became ill, and had no real access to medical care.(*Id.* ¶ 58.)

On or about May 21, 1996, Defendants locked Plaintiff out of her apartment on Defendant AECOM's campus.[FN8](*Id.* ¶¶ 105, 180(a).) On May 22, 1996, Plaintiff was suspended from AECOM. (*Id.* ¶¶ 106, 180(b).) The Am. Complaint alleges that Defendants "failed to give Plaintiff her right to appeal the suspension."(*Id.* ¶ 180(b).) In or about June 1996, Defendants placed Plaintiff on medical leave and stated that this leave was pursuant to AECOM's psychiatric policy.[FN9](*Id.* ¶¶ 109, 294.)Plaintiff made no written request for a leave, nor was she given an opportunity to appeal. (*Id.* ¶ 180(c).) Defendant Reichgott falsely told the Promotions Committee that Plaintiff had requested a leave of absence and that Plaintiff had indicated that she did not intend to return to AECOM for the 1996-1997 academic year.(*Id.* ¶ 111.)

FN8. Plaintiff also alleges that this housing had been noisy and detrimental to studying or sleeping. (Am.Compl.¶¶ 54, 271(a).)

FN9. Exhibit C to Defendants' Notice of Motion to Dismiss contains excerpts from Appendix III: Guidelines for Academic Status of Students with Psychiatric Illness, which is part of AECOM's A Student Guide to Academic Resources, Academic Committees, Academic Procedures & Policies 1997-1998 ("1997-1998 Student Guide").

*6 After Plaintiff's suspension in May 1996 and for the next one and a half years, Plaintiff sought a hearing to contest her "involuntary withdrawal" from AECOM. (*Id.* ¶ 113.)The Am. Complaint alleges that in or about June 1996, Defendants informed Plaintiff in writing that Defendants would reconsider her reinstatement and Defendants' recommendation of involuntary withdrawal if she agreed (1) "to admit in writing that she had a psychiatric illness"; (2) to consent to Defendants "obtaining medical records from her treating physician"; (3) to "submit to examination by a psychiatrist on the faculty of defendant AECOM and chosen by defendants to evaluate her"; and (4) to sign "a contract agreeing to hold the psychiatrist and defendants harmless and free from all liability and prior to the results of any evaluation."[FN10](*Id.* ¶¶ 144-45.)"Plaintiff refused to agree to hold defendants and the psychiatrist harmless and free from all liability prior to an evaluation, without any prior admission that she suffered from a psychiatric illness and without releasing her records."(*Id.* ¶ 146.)Plaintiff based this "refusal to consent and agree upon the fact that [she] had no treating physician, was unafflicted by mental illness, defect or disease, and that there was no question that Plaintiff was not properly admitted to the hospital during her brief stay in May 1996."(*Id.* ¶ 147.)

FN10. Exhibit F to Defendants' Notice of Motion to Dismiss is a copy of the letter to Plaintiff from Defendant Reichgott, dated June 17, 1996, setting forth the exact text of the communication to Plaintiff.

In or about June 1996, Plaintiff received notice from Dr. Rennie and the chairman of LIJ's Emergency Medical Department that she would be removed from her Graduation Research Project and given minimal credit for her participation. (*Id.* ¶ 258.)

On June 21, 1996, Plaintiff met with Defendant Reichgott to discuss how her loans would be handled during her suspension. His response was "dismissive." (*Id.* ¶ 134.)

In or about December 1996, Defendants "placed Plaintiff on an extended medical leave without written notice to or a written request from Plaintiff or

an opportunity to appeal this forced separation from her school."(*Id.* ¶ 180(d).)

In or about December 1996 or January 1997, "AECOM caused Plaintiff's school loans to come due."(*Id.* ¶ 137.)From January 1997 through July 28, 1997, Defendant Greenberg, AECOM's Finance Officer, refused to communicate with Plaintiff about her student loans or billing charges, except when Defendant Greenberg informed Plaintiff by a letter dated July 3, 1997, that he had determined he had no obligation to Plaintiff as she was not enrolled in classes. (*Id.* ¶ 138.)[FN11]

> FN11. Although named in the Am. Complaint, Mr. Greenberg is not listed in the caption.

On or before January 10, 1997, Defendants knew that Plaintiff had applied for a transfer to the M.D. program at Albany Medical College. (*Id.* ¶ 250.)In connection with Plaintiff's transfer application, Defendants sent a letter to the Albany Medical College that omitted certain complimentary information, over the objections of Plaintiff and her attorney.[FN12](*Id.* ¶ 253.)In January 1997, Dr. Rennie provided a "marginal" letter of recommendation to Albany Medical College in connection with Plaintiff's transfer application.(*Id.* ¶ 258.)On or about February or March 1997, Plaintiff received notice from Albany Medical College that the College had denied her transfer application, even though she had been accepted when she applied in the 1993-1994 application year. (*Id.* ¶ 259.)

> FN12. According to Plaintiff's current counsel, Plaintiff first retained an attorney in connection with this matter in August 1996 and was represented by an attorney in or about December 1998. (Transcript of Oral Argument on Mar. 17, 2005 ("Tr.") at 39-40, 62 .)
>
> A copy of Defendants' January 10, 1997 letter to Albany Medical College is attached as Exhibit E to Defendants' Notice of Motion to Dismiss. The letter is written by Defendant Reichgott.

*7 In or about August 1997, Defendants recommended Plaintiff's involuntary withdrawal from Defendant AECOM. (*Id.* ¶¶ 112, 180(f).) The decision of the Promotions Committee to involuntarily withdraw Plaintiff was made without the knowledge or participation of Plaintiff and communicated to Plaintiff by Defendant Reichgott. (*Id.* ¶ 116.)In or about October 1997, Defendants held a hearing concerning "Plaintiff's appeal of the decision that she be involuntarily withdrawn."[FN13](*Id.* ¶ 114.)Defendant Reichgott admitted that he "improperly lobbied" the Promotions Committee members to sustain Plaintiff's involuntary withdrawal. (*Id.* ¶ 115.)

> FN13. It is unclear whether this is the same hearing referred to in paragraph 113. (Am. Compl. ¶ 113 ("In or about the Fall 1997, Plaintiff was finally given a hearing at AECOM" to contest her involuntary withdrawal.).)

"On or about January 3, 1997, October 6, 1997 and December 1, 1997 Plaintiff informed defendants that defendants were engaged in persistent behavior that improperly provided professional advantages to a younger, white Orthodox Jewish male who was a similarly situated classmate of Plaintiff in the Deceleration Program at the same time as Plaintiff."(*Id.* ¶ 181.)On the above dates, "Plaintiff informed defendants that such persistent behavior on the part of defendants denied Plaintiff equal consideration, acknowledgement or access to educational or professional opportunities on the basis of her gender, age and religious beliefs."(*Id.* ¶ 182.)

On December 1, 1997, Plaintiff met with Defendant Purpura to appeal Plaintiff's involuntary withdrawal. (*Id.* ¶ 370.)In or about December 1997, Defendants again informed Plaintiff in writing that they would reconsider Defendants' recommendation of involuntary withdrawal under the same terms as described in the June 1997 writing, except that, after protests by Plaintiff and her attorney, Defendants had changed the psychiatric evaluation requirement to permit Plaintiff to choose the psychiatrist from a list of three psychiatrists chosen by Defendants. (*Id.* ¶ 144.)"Plaintiff refused to agree to hold defendants and the psychiatrist harmless and free from all liability prior to an evaluation, without any prior admission that she suffered from a psychiatric illness and without releasing her records"(*id.* ¶ 146), and "based her refusal to consent and agree upon the fact

that Plaintiff had no treating physician, was unafflicted by mental illness, defect or disease, and that there was no question that Plaintiff was not properly admitted to the hospital during her brief stay in May 1996"(*id.* ¶ 147).

On January 30, 1998, Defendant Purpura affirmed the Defendants' recommendation of involuntary withdrawal of Plaintiff by letter. (*Id.* ¶¶ 116, 148.)

The Am. Complaint alleges that "at all times" Plaintiff and her counsel were not allowed to "review all of Plaintiff's AECOM records"(*id.* ¶ 126) and that Defendants maintained an "official" and a "non-official file" (*id.* ¶ 127). Plaintiff also sought to correct her records at AECOM and "at all times" Defendants refused to permit her or her counsel to "correct all of Plaintiff's AECOM records."(*Id.* ¶ 131.)After June 21, 1996, Defendants Reichgott and Greenberg refused to provide Plaintiff with information about how to handle her school loans despite repeated inquires. (*Id.* ¶¶ 134-35.)From in or about the summer of 2002 to June 2003, "Plaintiff contacted and worked with John Austin of the New York Higher Education Services Corporation in order to have her billing and financial aid questions answered."(*Id.* ¶ 140.)"AECOM refused to respond to Mr. Austin for more than six months," until a June 2003 letter from Defendant Greenberg, in which he" refused to explain Plaintiff's bills or provide her with a rent refund." (*Id.* ¶ 142.)

DISCUSSION

A. *Standard of Review*

*8 In reviewing a motion to dismiss under Rule 12(b)(6), a court must limit its review to the complaint, documents attached or incorporated by reference thereto, and "documents that the plaintiffs either possessed or knew about and upon which they relied in bringing the suit."*Rothman,* 220 F.3d at 88;*see also Schnall,* 225 F.3d at 266.

A court must accept as true all factual allegations in the complaint and draw all reasonable inferences in favor of the plaintiff. *Schnall,* 225 F.3d at 266. Legal conclusions, however, are not presumed to be true. *First Nat'l Bank v. Gelt Funding Corp.*, 27 F.3d 763, 771 (2d Cir.1994), *cert. denied,* 513 U.S. 1079, 115 S.Ct. 728 (1995)."The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims."*Villager Pond, Inc. v. Town of Darien,* 56 F.3d 375, 378 (2d Cir.1995) (internal quotation marks omitted). A court may not dismiss a complaint under Rule 12(b)(6)"unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."*Conley v. Gibson,* 355 U.S. 41, 45-46 (1957) (footnote omitted).

B. *Causes of Action*[FN14]

FN14. The Am. Complaint asserts that this Court has jurisdiction over the federal claims under 28 U.S.C. § 1331 (federal question) and over the state law claims under 28 U.S.C. § 1332 (diversity of citizenship) and 28 U.S.C. § 1367 (supplemental). (Am.Compl.¶ 1.) When a federal court is sitting in diversity jurisdiction, a court must apply the substantive law of the forum state. *Eternity Global Master Fund v. Morgan Guar. Trust,* 375 F.3d 168, 177 n. 23 (2d Cir.2004). In applying supplemental jurisdiction, federal courts must apply the forum state's substantive law to the state claims. *Promisel v. First American Artificial Flowers,* 943 F.2d 251, 257 (2d Cir.1991). New York choice of law rules require courts to apply the law of the state that has the most "significant contacts with the matter in dispute."*Auten v. Auten,* 308 N.Y. 155, 160 (1954); *see also Matter of Allstate Ins. Co. (Stolarz),* 81 N.Y.2d 219 (1993). In this case, all of the allegations concern actions taken by Defendants in New York and all of the Defendants are residents of the State of New York. Therefore, this Court applies New York state law to Plaintiff's state claims and federal law to Plaintiff's federal claims.

1. *Breach of Contract*

The first three causes of action of the Am. Complaint allege common law breach of contract claims against Defendants.[FN15]The first cause of action covers various allegations of breach of contract in connection with Defendants' actions from the fall of

1994 until June 2003. (Am.Compl.¶¶ 36-152.) The allegations in the first group of claims for breach of contract encompass claims in the following areas: (1) Defendants' conduct related to Plaintiff's first-year anatomy course and lab in the fall of 1994 (*id.* ¶¶ 59-80); (2) Defendants' conduct related to Plaintiff's participation in the Deceleration Program and tutoring services from April 1995 to May 1996 (*id.* ¶¶ 81-96); (3) Defendants' suspension of Plaintiff in May 1996 and subsequent leave of absence from May 1996 to August 1997 (*id.* ¶¶ 97-111); (4) Defendants' involuntary withdrawal of Plaintiff from AECOM, which occurred on January 30, 1998 (*id.* ¶¶ 112-120); (5) AECOM's provision of inadequate student housing to Plaintiff (*id.* ¶ 54); (6) AECOM's violation of Plaintiff's privacy rights relating to her health information, which caused her to have "no real access to medical care in May 1996 when she inhaled a patient's blood and became ill"(*id.* ¶¶ 57-58); (7) AECOM's alleged violation of its policy condemning sexual discrimination (*id.* ¶ ¶ 48, 121-123);[FN16] (8) AECOM's refusal to allow Plaintiff to review and correct all of her records "at all times mentioned" (*id.* ¶¶ 124-33); and (9) AECOM's refusal to provide Plaintiff with financial records from June 1996 to June 2003 (*id.* ¶¶ 134-43). The second group of breach of contract claims focuses on AECOM's administration of the Deceleration Program (*id.* ¶¶ 154-74), while the third group of breach of contract claims centers around AECOM's mental diagnosis of Plaintiff and discrimination against Plaintiff (*id.* ¶¶ 176-85).

FN15. The fourth breach of contract claim alleges that AECOM breached its fiduciary duty to Plaintiff, which was created by AECOM's administration of financial aid programs in accordance with the Higher Education Act ("HEA") and its implementing regulations. (Am.Compl.¶¶ 187-193.) This claim will be addressed in the breach of fiduciary duty section. *Seeinfra* pp. 27-28.

The Am. Complaint also asserts related claims of recission (fifth), breach of good faith and fair dealing (seventh), and breach of quasi-contract and unjust enrichment (nineteenth). These claims are dismissed for the same reasons as the breach of contract claims.

FN16. Plaintiff alleges claims for gender, age, religious and ethnic origin discrimination under New York State Human Rights Laws (fifteenth cause of action) and Title IX and § 1983 (seventeenth cause of action). These claims are addressed *infra*, pp. 31, 33-38.

*9 Defendants contend that Plaintiff's claims of breach of contract are challenges to their academic and administrative determinations regarding Plaintiff, which were necessary to their administration of an academic institution, and as such, could only be asserted in a proceeding pursuant to Article 78 of New York's Civil Practice Law and Rules, which has a four-month statute of limitations. (Defs.' Mem. at 18.) Thus, Defendants argue all of Plaintiff's claims are time barred.

Plaintiff responds that an Article 78 proceeding is not appropriate because: (1) this case involves a conspiracy by the Defendants to impose, in the guise of an administrative procedure, a mental diagnosis on Plaintiff, breaching the contract between Plaintiff and AECOM (a "cause of action" not included in the Am. Complaint); (2) there were "no academic issues in Ms. Radin's case," and "[e]ven if there were, academic determinations are not subject to judicial review"; (3) AECOM chose an "unsuitable policy" to "apply to Ms. Radin's circumstance," and "[t]here is no precedent for a Court in an Article 78 review to discard an inappropriately chosen policy and substitute a more correct policy"; and (4) Plaintiff is seeking monetary relief, which is not available in an Article 78 proceeding.[FN17](Pl.'s Mem. at 18-20.) Plaintiff then argues that a breach of contract claim is the appropriate vehicle for these claims and that AECOM's various bulletins, compendia and regulations, which Defendants allegedly violated, provided the terms for an implied contract between Plaintiff and Defendant AECOM. (*Id.* at 20-21.)

FN17. Plaintiff also argues that there was "no final, administrative determination made by neutral objective hearing body" and therefore, an Article 78 proceeding is inappropriate. (Pl .'s Mem. at 18 (citing *Coffran v. Bd. of Trustees of New York City Pension Fund*, 842 F.Supp. 723 (S.D.N.Y.1994), *rev'd on other grounds*,46

> F.3d 3 (2d Cir.1995).) The Am. Complaint alleges that Plaintiff was involuntarily withdrawn on January 30, 1998 by a letter from Dean Purpura, and does not allege that any further procedure was necessary. (Am.Compl.¶¶ 116, 148.) Defendants have provided excerpts from Appendix I: By-Laws of the Committee on Student Promotions from the 1997-1998 Student Guide, which state that the "Dean alone may withdraw a student permanently from the College of Medicine."(Defs.' Notice of Mot. to Dismiss Ex. C ¶ II.D.) This 1997-1998 Student Guide is incorporated in the Am. Complaint as the Am. Complaint cites to AECOM's Bulletin, Student Guide, Compendium and the written rules and procedures of Defendant Promotions Committee. Therefore, there was a final administrative determination as to Plaintiff's involuntary withdrawal from Defendant AECOM.

Defendants respond that even if Plaintiff's claims were not time barred, the pleadings constitute claims of educational malpractice, as they do not identify any specific promise that AECOM failed to keep but rather make general allegations that AECOM violated its policies and procedures. (Defs.' Mem. at 18.) In addition, Defendants argue that the pleadings take issue with AECOM's application of its procedures but cannot showtany violation of its procedures because AECOM substantially complied with its procedures. Therefore, Defendants contend these claims must be dismissed because New York courts do not recognize claims for educational malpractice.

Federal district courts in this district and New York state courts have recognized that an implied contract arises between a student and a university once the student is admitted to the university. *SeeChira v. Columbia Univ.*, 289 F.Supp.2d 477, 485 (S.D.N.Y.2003); *Mostaghim v. Fashion Inst. of Tech.*, No. 01 Civ. 8090, 2002 WL 1339098, at *6 (S.D.N.Y. June 19, 2002); *Ward v. New York Univ.*, No. 99 Civ. 8733, 2000 WL 1448641, at *3 (S.D.N.Y. Sept. 28, 2000); *Gally v. Columbia Univ.*, 22 F.Supp.2d 199, 206 (S.D.N.Y.1998) (citing *Clarke v. Trustees of Columbia Univ.*, No. 95 Civ. 10627, 1996 WL 609271, at *5 (S.D.N.Y. Oct. 23, 1996)); *Keles v. New York Univ.*, No. 91 Civ. 7457, 1994 WL 119525, at *4-5 (S.D.N.Y. Apr. 6, 1994), *aff'd*,54 F.3d 766 (2d Cir.1995), *cert. denied*,516 U.S. 943 (1995); *Ansari v. New York Univ.*, No. 96 Civ. 5280, 1997 WL 257473, at *3 (S.D.N.Y. May 16, 1997) (citing *Paladino v. Adelphi Univ.*, 89 A.D.2d 85, 454 N .Y.S.2d 868 (2d Dep't 1982)); *Olsson v. Bd. of Higher Educ.*, 49 N .Y.2d 408, 413-14 (N.Y.1980); *Vought v. Teachers Coll., Columbia Univ.*, 127 A.D.2d 654, 511 N.Y.S.2d 880, 881 (2d Dep't 1987)).

***10** Implicit in the implied contract between the student and the university are the obligation of the university to act in good faith when dealing with the student and the student's obligation to satisfy the university's academic requirements and to comply with the institution's procedures if she wishes to receive her degree. *Gally*, 22 F.Supp.2d at 206 (citing *Olsson*, 49 N.Y.2d at 414).

The terms of the implied contract are "supplied by the [school's] bulletins, circulars and regulations made available to the student."*Id.* (citing *Clarke*, 1996 WL 609271, at *5 (citing *Vought*, 127 A.D.2d at 655, 511 N.Y.S.2d at 881)). However, to state a valid claim for a breach of contract, a plaintiff must state when and how the defendant breached the specific contractual promise. "[T]he mere allegation of mistreatment without identification of a specific breached promise or obligation does not state a claim on which relief can be granted."*Gally*, 22 F.Supp.2d at 207;*see alsoChira*, 289 F.Supp.2d at 486;*Ward*, 2000 WL 1448641, at *3 ("[B]ald assertions and conclusory allegations that the University's rules or procedures were not followed, do not state a valid claim."); *Maas v. Cornell Univ.*, 94 N.Y.2d 87, 93 (N.Y.1999) ("When a complaint merely 'recites a litany of academic and administrative grievances couched in terms of a violation of a contractual right to tenure' and is devoid of any reference to the contractual basis for the rights asserted, academic prerogatives should not be channeled into a cognizable contract action classification."); *Baldridge v. State*, 293 A.D.2d 941, 740 N.Y.S.2d 723, 725 (3d Dep't 2002) ("[W]hile a school may be subject to a cause of action for breach of contract, this requires a contract which provides for 'certain specified services' as 'courts have quite properly exercised the utmost restraint applying traditional legal rules to disputes within the academic community" ' (citations omitted)).

Thus, "if the contract with the school were to provide for certain specified services, such as for example, a designated number of hours of instruction, and the school failed to meet its obligation, then a contract action with appropriate consequential damages might be viable."*Paladino*, 89 A.D.2d at 92, 454 N.Y.S.2d at 873;*see also**Ansari*, 1997 WL 257473, at *3 (refusing to dismiss a breach of contract claim because the allegations that defendants promised state-of-the-art facilities, faculty tutor-advisors, and other identified promises were allegations of promises for specified services).

However, a breach of contract claim is not the appropriate cause of action for every dispute. The New York Court of Appeals has stated that "[c]ourts retain a 'restricted role' in dealing with and reviewing controversies involving colleges and universities" and that "CPLR article 78 proceedings are the appropriate vehicle" for such controversies. *Maas*, 94 N.Y.2d at 92. Under New York law, when a complaint alleges that a school breached its agreement with a student by failing to provide an effective education, the complaint must be dismissed because it asserts an impermissible claim for educational malpractice. *Gally*, 22 F.Supp.2d at 206-07. New York's refusal to recognize an educational malpractice cause of action is based on "courts' reluctance to make judgments as to the validity of broad educational policies" or "sit in review of the day-to-day implementation of these policies."*Ansari*, 1997 WL 257473, at *2 (internal quotation marks and citations omitted). Thus, review of academic and administrative decisions at private educational institutions has been limited to Article 78 proceedings. *Id.* (noting that the following academic decisions are reviewed in Article 78 proceedings: "grading disputes, dismissals, expulsions, suspensions, and decisions regarding whether a student has fulfilled the requirements for graduation.")

***11** Although New York courts have "traditionally reviewed the actions of private institutions of higher education where it is alleged that in its relations with the students or faculty the institution has failed to follow its own hearing of review procedures," it is unclear whether claims of this nature support a cause of action for breach of contract. *Gertler v. Goodgold*, 107 A.D.2d 481, 487, 487 N.Y.S.2d 565 (1st Dep't 1985) (citing *Matter of Carr v. St. John's Univ.*, 17 A.D.2d 632, 231 N.Y.S.2d 410 (2d Dep't 1962)(reviewing Article 78 proceeding), *aff'd*, 12 N.Y.2d 802 (N.Y.1962); *Matter of Kwiatkowski v. Ithaca Coll.*, 82 Misc.2d 43 (N.Y.Sup.Ct.1975)(Article 78 proceeding)). The New York Court of Appeals has held that "when a university has adopted a rule or guideline establishing the procedure to be followed in relation to suspension or expulsion that procedure must be substantially observed."*Tedeschi v. Wagner Coll.*, 49 N.Y.2d 652, 660 (N.Y.1980). However, the Court stated that the "[c]ontract theory is not wholly satisfactory" and did not decide whether this holding emerged under a contract theory. *Id.* at 659;*see also**Maas*, 94 N.Y.2d at 94-95.

It is unnecessary for this Court to decide whether most of the allegations in the Am. Complaint, such as the formation of Plaintiff's anatomy lab group, the refusal to transfer Plaintiff to a different lab group, and AECOM's administration of the Deceleration Program, constitute valid breach of contract claims because this action was filed on January 29, 2004, and thus, the only claims that are not barred by the six-year breach of contract statute of limitations involve acts of the Defendants occurring after January 29, 1998.[FN18] Therefore, this Court will only address the Am. Complaint's breach of contract claims relating to Defendants' involuntary withdrawal of Plaintiff and Defendants' actions in relation to Plaintiff's attempts to review and correct her records after January 29, 1998.

> FN18. Additionally, Plaintiff's breach of contract claims based on AECOM's anti-discrimination policy do not state valid claims because "broad pronouncements of the University's compliance with existing anti-discrimination laws, promising equitable treatment of all students ... cannot form the basis for a breach of contract claim."*Ward*, 2000 WL 1448641, at *4;*see also**Spychalsky v. Sullivan*, No. Civ. 010958, 2003 WL 22071602, *14 (E.D.N.Y. Aug. 29, 2003).

The Am. Complaint does not contain an allegation that Defendant AECOM breached any particular obligation or promise made to Plaintiff that would provide a basis for a breach of contract claim in

connection with AECOM's decision to involuntarily withdraw Plaintiff. Instead, the Am. Complaint pleads generally that Defendants "failed to adhere to the rules and requirements specified in defendant AECOM's Bulletin, Student Guide, Compendium and the written rules and procedures of defendant Committee of Student Promotions."(Am. Compl. ¶ 149; *see alsoid.* ¶¶ 117-18, 151.)Thus, even accepting all of Plaintiff's factual allegations as true and drawing all reasonable inferences in her favor, the Am. Complaint fails to state a valid claim for breach of contract based on these broad, non-specific allegations of violations of AECOM's policies and procedures. *See*Gally, 22 F.Supp.2d at 207 ("[T]he mere allegation of mistreatment without the identification of a specific breached promise or obligation does not state a claim on which relief can be granted.").

*12 This Court declines to grant Plaintiff the opportunity to amend her complaint to detail the specific policies and procedures that Defendants allegedly violated in connection with Plaintiff's involuntary withdrawal because Plaintiff cannot state a valid cause of action based on the alleged actions of Defendants in connection with her involuntary withdrawal, which, except for Dean Purpura's letter dated January 30, 1998, all occurred prior to January 29, 1998. Although leave to amend should be "freely given when justice so requires,"*see*Fed.R.Civ.P. 15(a), such leave need not be granted when amendment would be futile. *Acito v. Imcera Group, Inc.*, 47 F.3d 47, 55 (2d Cir.1995).

As to Plaintiff's claim that Defendants' involuntary withdrawal of Plaintiff on January 30, 1998 constituted a breach of her contract with AECOM, this is a claim for educational malpractice and is unsupportable. Plaintiff contends that she:

was informed by defendants in writing in or about June 1996 ... that defendants would reconsider her reinstatement ... if she agreed to admit in writing that she had a psychiatric illness, consented to defendants obtaining medical records from her treating physician and in connection with her voluntary admission to a hospital for a brief period, submitted to examination by a psychiatrist ... [on the faculty of defendant AECOM and chosen by defendants to evaluate her], and signed a contract agreeing to hold the psychiatrist and defendants harmless and free from all liability and prior to the results of any evaluation.

(Am.Compl.¶¶ 144-45.)

However, Defendants provide a copy of this "writing" which refutes most of Plaintiff's allegations. The letter, dated June 17, 1996, from Defendant Reichgott to Plaintiff, in pertinent part, states the Defendants' requirements of Plaintiff as:

1. You must present a written request to be reinstated to the curriculum.

2. The College must receive confirmation that your condition remains stable or continues to improve.

a. At the time of your request for reinstatement, you must provide a written report from your treating psychiatrist describing your status. The therapist should advise us as to whether you have regularly attended therapy sessions; whether you have a realistic understanding of your illness; whether the treatment regimen is stable; and whether, in the opinion of the therapist, you are ready to undertake the emotional and academic responsibilities and stresses that will be associated with return to the clinical curriculum.

b. You will be required to undergo independent evaluation by a Psychiatrist, selected by the College of Medicine, who will be asked to provide a written assessment to me and to the Committee on Student Promotions of the College. You will be required to sign a Consent and Authorization Form (copy attached) which will allow this administrative evaluation to be completed.

3. Based on the information received from your treating therapist and on the recommendations of the administrative evaluation, you may be required to remain in psychiatric treatment while in the College of Medicine. This would be with a therapist of your choice. In this circumstance, the Committee on Student Promotions will expect to receive, on a monthly basis, written reports documenting your attendance at therapeutic sessions and you will be required to authorize your therapist to provide such reports.

*13 (Defs.' Notice of Mot. to Dismiss Ex. F.)

The attached Consent and Authorization Form states:

Consent and Authorization to Release Information:

I hereby consent to an evaluation by a psychiatrist chosen by the Albert Einstein College of Medicine (AECOM) of my fitness to reenter the medical school curriculum. I also hereby authorize this psychiatrist to provide a written report(s) of the evaluation to the AECOM Committee on Student Promotions, which report may include but is not necessarily limited to: information about diagnosis, treatment(s) past and present, response(s) to these treatments, prognosis, and information regarding my educational activities, rotations, etc. I understand that this report(s) will became [sic] part of the record of the Committee on Student Promotions.

I also authorize AECOM to provide the psychiatrist with necessary background information, including materials I have provided to AECOM concerning my clinical condition, to enable him/her to perform the evaluation.

I hereby release from liability and hold harmless the evaluating psychiatrist, the Committee on Student Promotions and staff and faculty of AECOM *for any and all acts and omissions in connection with this administrative psychiatric evaluation.*

(*Id.* (emphasis added).)

As shown by the June 17, 1996 letter and contrary to Plainitiff's allegations, Defendants did not require Plaintiff to: (1) admit in writing that she had a psychiatric illness; (2) consent to Defendants obtaining medical records from her treating physician; or (3) agree "to sign a contract to hold the psychiatrist and defendants harmless and free from *all* liability and prior to the results of any evaluation."(*See* Am. Compl. ¶ 144 (emphasis added).) In addition, the requirements contained in the June 17, 1996 letter are, as a matter of law, substantially in accordance with the reinstatement procedures for students on extended medical leave for psychiatric reasons, as stated in Appendix III: Guidelines for Academic Status of Students with Psychiatric Illness in AECOM's 1997-1998 Student Guide. (*See* Defs.' Notice of Mot. to Dismiss Ex. C at 28-29, ¶¶ 5-6.) [FN19]

> FN19. Appendix III: Guidelines for Academic Status of Students with Psychiatric Illness states that:
>
> 5. Students placed on extended medical leave for psychiatric reasons who wish to be considered for reinstatement, must consent and request that their treating psychiatrist inform the [Promotions] Committee: a) of attendance at therapeutic sessions; b) whether the student has a realistic understanding of his/her illness; and c) of the student's readiness to undergo the academic and emotional stresses of the medical curriculum if reinstated. The treating psychiatrist must also inform the Committee of the student's treatment regimen and attest that the regimen is stable.
>
> 6. Prior to reinstatement, the student must consent and be evaluated by a psychiatrist selected by the College of Medicine, who will report to the Committee as to the student's readiness to reeneter the curriculum. The consent form shall provide that this evaluation is not confidential or privileged.
>
> (Defs.' Notice of Mot. to Dismiss Ex. C at 28-29, ¶¶ 5-6.)
>
> These reinstatement procedures apply because, as Plaintiff admits, Defendants stated that she had been placed on medical leave in May 1996 pursuant to AECOM's psychiatric policy. (Am.Compl.¶ 294.)

Plaintiff refused to consent to Defendants' requirements (Am.Compl.¶¶ 146-47), and in or about August 1997, "defendants recommended Plaintiff's involuntary withdrawal from defendant AECOM"(*id.* ¶ 112). In October 1997, Defendants "held a hearing concerning Plaintiff's appeal of the decision that she be involuntarily withdrawn."[FN20](*Id.* ¶ 114.)Plaintiff then met with Dean Purpura on December 1, 1997 to appeal the Promotions Committee's determination of her involuntary withdrawal, and the Associate Dean, Dr. Deborah Kligler, was also present during this

meeting.[FN21](*Id.* ¶ 370.)In December 1997, Defendants informed Plaintiff that they would reconsider her involuntary withdrawal on the same terms as presented to Plaintiff in June 1996 for reconsideration of her reinstatement, except, upon "the protests" of Plaintiff and her attorney, the psychiatric evaluation requirement was changed to permit Plaintiff "to choose from a list of 3 psychiatrists handpicked by defendants."(*Id.* ¶ 145.)Plaintiff again refused to comply with AECOM's requirements (*id.* ¶ 146), which were substantially in accordance with its written policies and procedures. Plaintiff based her refusal to consent and agree with AECOM's requirements on "the fact that Plaintiff had no treating physician, was unafflicted by mental illness, defect or disease, and that there was no question that Plaintiff was not properly admitted to the hospital during her brief stay in May 1996."[FN22](*Id.* ¶¶ 146-47.)Then, in or about January 30, 1998, Plaintiff received a letter from Dean Purpura, which finalized her involuntary withdrawal. (*Id.* ¶¶ 116, 148.)

FN20. Plaintiff alleges that "[o]n October 6, 1997 defendants illegally voted to recommend Plaintiff's involuntary withdrawal in a meeting in which, by design, Plaintiff was not permitted to fully participate, cross-examine or call witnesses, and at which defendants refused to answer questions or provide explanations."(*Id.* ¶ 369.)However, none of these "procedures" were required by 1997-1998 Student Guide submitted to this Court.

> Appendix I: By-Laws of the Committee on Student Promotions provides the following procedures for decisions of the Promotions Committee recommending the withdrawal of students from AECOM:
>
> 1. Students may appeal the decision and recommendations of the [Promotions] Committee.
>
> 2. Appeals must be presented in writing to the Associate Dean for Students for transmittal to the Committee, within 10 days of receipt of notification of the Committee's decision.
>
> 3. The Associate Dean for Students will assist the student in the preparation of an appeal if requested to do so. He/She will assure that the student is notified of the date of the Committee meeting at which the appeal will be heard at least 7 days prior to that meeting.
>
> 4. If necessary, a Sub-committee of the Promotions Committee will be appointed to interview the student prior to the date of the meeting of the full Committee.
>
> 5. The student may appear with a faculty advisor, and may present up to three advocates from the faculty and/or student body.
>
> (Defs.' Notice of Mot. to Dismiss Ex. C at 23, ¶ II.I.)
>
> After the completion of this appeal process, final recommendations of the Promotions Committee are submitted to the Dean. "The Dean alone may withdraw a student permanently from the College of Medicine, therefore a decision made by the Committee in favor of withdrawal is effected as a recommendation from the Committee to the Dean."(*Id.* Ex. C at 19, ¶ II.D.)

FN21. The applicable section of Appendix III: Guidelines for Academic Status of Students with Psychiatric Illness provides for an appeal of the Promotions Committee recommendation of withdrawal of a student who is on extended medical leave from AECOM. The procedures are as follows:

> The student will be notified of the Committee's recommendation within 7 days and may appeal the recommendation of the Committee within 10 days of notification. Such appeal shall be by written statement to the Dean, who may affirm or overrule the Committee's decision or return the matter to the Committee for further inquiry.

prospective economic advantage due to Defendants' alleged improper interference with her application for transfer to Albany Medical College, which was denied in February or March 1997, and her participation in an external graduation research project with Dr. Rennie, who provided a letter of recommendation for Plaintiff to Albany Medical College in January 1997. (Am.Compl.¶¶ 250-63.)

The statute of limitations for a cause of action alleging tortious interference with precontractual relations and prospective economic advantage is three years. *Demas v. Levitsky*, 291 A.D.2d 653, 658, 738 N.Y.S.2d 402 (3d Dep't 2002) (citing *Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90 (N.Y.1993)); N.Y. C.P.L.R. § 214(4). This case was filed on January 29, 2004, and therefore, any claims against Defendants for acts prior to January 29, 2001 are time barred. The allegations of tortious interference with precontractual relations involve acts committed by Defendants from 1995 to 1997, and thus, this claim is dismissed as untimely.[FN26]

> FN26. Plaintiff contends that the claims for tortious interference are not time barred because of the continuing violation doctrine. (Pl.'s Mem. at 22.) The Am. Complaint alleges that "Defendants' continuing refusal to correct Plaintiff's records is the direct and proximate cause of damages to Plaintiff, resulting in missed opportunities to transfer to other M.D. degree granting institutions ."(Am.Compl.¶ 262.) However, tortious interference with a contract is not a continuing tort. *Spinap Corp. v. Cafagno*, 302 A.D.2d 588, 756 N.Y.S.2d 86 (2d Dep't 2003). Additionally, this allegation fails to state a cause of action for tortious interference with precontractual relations because Plaintiff does not allege interference with any specific contract she would have received but for Defendants failure to correct her records. *See Gertler*, 107 A.D.2d at 489-90 (stating that "New York recognizes a cause of action for interference with precontractual relations where a party *would* have received a contract but for the malicious, fraudulent and deceitful acts of a third party" (internal quotation marks and citation omitted)).

4. *Fraud*

Plaintiff's tenth, eleventh, and twelfth causes of action allege fraud by the Defendants. The tenth cause of action concerns various alleged statements by Defendant AECOM about their medical program that induced Plaintiff to matriculate in August 1994. (Am.Compl.¶¶ 265-75.) The eleventh cause of action involves alleged statements, which occurred from 1995 to 1996, by various Defendants about AECOM's Deceleration Program. (*Id.* ¶¶ 277-90.)The twelfth cause of action alleges various statements by different Defendants concerning Plaintiff's placement on medical leave and eventual involuntary withdrawal from AECOM, all occurring between 1996 and December 1997.[FN27](*Id.* ¶¶ 292-308.)

> FN27. Plaintiff alleges that the involuntary withdrawal, which occurred on January 30, 1998, was retaliation against her for "her complaints about mistreatment," but does not allege any fraud by Defendants on this date. (Am.Compl.¶ 303(1).) Plaintiff's brief states that "[a]s alleged in the complaint, Defendants fraudulently withheld information from Ms. Radin regarding her appeal rights, and the proper procedure to be readmitted to AECOM, as late as February 1998, when her letters seeking an appeal of her involuntary withdrawal were returned to her unopened."(Pl.'s Mem. at 21.) Plaintiff has not articulated how the return of an unopened envelope by Defendants could constitute a "false representation of material existing fact," as required for an allegation of fraud. *See American Home Assurance. Co. v. Gemma Constr. Co.*, 275 A.D.2d 616, 621, 713 N.Y.S.2d 48 (1st Dep't 2000) (stating that under New York law, the elements of an allegation of fraud are "false representation of a material existing fact, scienter, deception and injury"). Additionally, the Am. Complaint does not include this allegation.

Under New York law, a cause of action in fraud must be commenced within two years from the time the fraud was discovered, or with the exercise of due diligence, should have been discovered, or six years from the date the alleged fraud was committed, whichever is longer. N.Y. C.P.L.R §§ 213(8), 203(g);

CRoss v. FSG PrivatAir, Inc.
S.D.N.Y.,2004.
Only the Westlaw citation is currently available.
United States District Court,S.D. New York.
Stephen M. ROSS, Plaintiff,
v.
FSG PRIVATAIR INC. d/b/a Privatair Defendant.
No. 03 Civ. 7292(NRB).

Aug. 17, 2004.

MEMORANDUM and ORDER

BUCHWALD, J.

*1 Plaintiff Stephen M. Ross ("plaintiff" or "Ross") initiated this action against defendant FSG PrivatAir Inc., d/b/a PrivatAir ("defendant" or "PrivatAir") claiming, through an Amended Complaint, breach of contract, breach of fiduciary duty and negligence, all related to Ross's prospective but ultimately unconsummated purchase of an aircraft from a third-party, Grafair. Defendant essentially acted as plaintiff's agent [FN1] in the failed transaction, and has now moved to dismiss plaintiff's Amended Complaint pursuant to Fed.R.Civ.P. 12(b)(6) on various grounds, including plaintiff's supposed failure to state a claim for any of his three causes of action. Additionally, defendant claims that in this suit plaintiff is advocating certain positions of law and fact that are inconsistent with those plaintiff advanced in prior related litigation, and as such plaintiff should be sanctioned pursuant to Fed.R.Civ.P. 11. For the reasons that follow, defendant's motion to dismiss is granted in part and denied in part, and its motion for Rule 11 sanctions is denied.

FN1. *See infra* note 2.

BACKGROUND

For purposes of this motion, the following facts, drawn from plaintiff's Amended Complaint unless otherwise noted, are taken as true, and all inferences are drawn in plaintiff's favor. *See Burnett v. Carothers*, 192 F.3d 52, 56 (2d Cir.1999).

A. *The Failed Aircraft Purchase.*

In or about 2001, plaintiff Ross, a New York resident, and defendant PrivatAir, a Delaware corporation with its principal place of business in the Connecticut, entered into an agreement whereby PrivatAir would act as Ross's agent [FN2] in connection with Ross's prospective purchase of an aircraft in exchange for a commission if the purchase was consummated. At all times relevant to this agreement, PrivatAir held itself out as an expert in aircraft purchases and sales and the contract negotiations accompanying such transactions. According to Ross, he relied on this expertise in entering into his agreement with PrivatAir.

> FN2. Ross alleges that PrivatAir was his agent. On a motion to dismiss, the Court need not credit legal conclusions included in a complaint's factual allegations. For purposes of this factual background, we refer to PrivatAir as Ross's "agent" only in a generic and not a legal sense. *See Papasan v. Allain*, 478 U.S. 265, 286 (1986) ("Although for the purposes of this motion to dismiss we must take all the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation.")

On behalf of Ross, PrivatAir located and negotiated the purchase of a used 1981 Challenger 600 aircraft (the "Aircraft") owned by Grafair, a Florida corporation. An Aircraft Purchase Agreement (the "Grafair Agreement") drafted by PrivatAir codifying the transaction was entered into by Ross and Grafair on October 29, 2001. *See* Am. Compl., Ex. A. At some unspecified point, PrivatAir represented to Ross that the Grafair Agreement was PrivatAir's "standard purchase agreement." *See* Am. Compl., ¶ 13.

Ross placed into escrow a $100,000 deposit on the Aircraft. Upon satisfaction of all applicable terms and conditions in the Grafair Agreement, Ross was to purchase the Aircraft for $6,650,000. The Grafair Agreement reserved to Ross prior to closing the right to inspect the Aircraft at his own expense. It is Ross's contention that PrivatAir represented to him that

pursuant to the terms of the Grafair Agreement Ross could terminate the Grafair Agreement after inspection for any or no reason. Ross further contends that if he chose to terminate, he would be refunded $85,000 of his deposit, and the $15,000 balance would be remitted to Grafair to cover the expense of relocating the Aircraft for inspection.

*2 The inspection uncovered problems with the Aircraft itself and its regulatory paperwork. After the inspection, PrivatAir, allegedly without Ross's authorization or knowledge, urged Grafair to undertake certain repairs of the Aircraft. Ross, however, in light of the inspection results, elected to terminate the Grafair Agreement. Grafair, in response, claimed that the Ross had no right to repudiate because the Grafair Agreement did not provide Ross such a right and because of PrivatAir's post-inspection statements encouraging Grafair to repair the Aircraft. Grafair took the position that Ross would be in breach of contract if he did not complete the purchase.

B. *The Florida Lawsuit.*

The contract dispute between Ross and Grafair prompted an interpleader action by the deposit's escrowee against the two transacting parties in Oklahoma state court. That action was removed to the United States District Court for the Western District of Oklahoma, and then transferred to the Southern District of Florida. *SeeInsured Aircraft Title Service, Inc. v. Stephen M. Ross and Grafair, Inc.*, 02-14081-Civ (S.D.Fla.) (the "Florida Lawsuit").

Ross and Grafair cross-claimed against each other in the Florida Lawsuit, the former alleging it had a right to terminate the Grafair Agreement, the latter alleging it was entitled to receive the entire $100,000 deposit, as well as consequential damages flowing from Ross's breach of the Grafair Agreement. Ross's motion for judgment on the pleadings on his cross-claim against Grafair was denied. *See* Florida Lawsuit, Order of Nov. 21, 2002.[FN3]

> FN3. Ross's motion for judgment on the pleadings was not denied on the merits, but instead because Grafair had not yet filed an answer to Ross's cross-claims. *Seeid.*, ¶ 5. In the Order, discovery was ordered completed by December 30, 2002, and a cutoff date of January 15, 2003 was set for dispositive motions. *Id.*, at ¶ 8.

Following the denial of Ross's motion, Ross and Grafair entered into a settlement which, *interalia*, provided for the escrowee's release to Grafair of the entire $100,000 deposit, and the discontinuation with prejudice of both Ross's and Grafair's cross-claims. *See* Affidavit in Support of Defendant's Motion to Dismiss of Russell J. Sweeting, Document 33 (Stipulation for Settlement). According to Ross's Amended Complaint, he entered into the settlement because the cost of discovery and trial would exceed his deposit, and to eliminate exposure to a potentially substantial verdict against him on Grafair's breach of contract cross-claims.

C. *Ross's Claims.*

On December 31, 2003, Ross filed an Amended Complaint in this action alleging that PrivatAir committed a breach of contract, breach of fiduciary duty, and negligence in the course of negotiating and executing the Grafair Agreement. Specifically, Ross claims that PrivatAir (1) drafted an Agreement with an ambiguity preventing Ross from recovering $85,000 of the deposit; [FN4] (2) misrepresented to Ross that the Grafair Agreement permitted Ross's recovery of $85,000 of the deposit; and (3) urged Grafair, without Ross's knowledge or authorization, to make certain repairs to the Aircraft. All three of these acts and omissions of PrivatAir's are alleged to constitute a breach of contract, a breach of fiduciary duty, and negligence. Ross claims that PrivatAir is liable to him for $169,612.65 plus interest, which is the sum of the $84,612.65 he paid in legal fees and disbursements in defending against the Florida Lawsuit, as well as the $85,000 partial deposit refund he believed he was entitled to upon terminating the Grafair Agreement.[FN5] On February 6, 2004, PrivatAir moved to dismiss the Amended Complaint. Oral argument on the motion was held on June 24, 2004.

> FN4. Oddly, Ross's Amended Complaint never identifies the alleged ambiguity in the Grafair Agreement which in part gives rise to this lawsuit.
>
> However, the arguments of the parties in their briefing papers and clarification provided at oral argument indicates that

the reference is to § 1.2(a) of the Grafair Agreement, which provides, in relevant part:

Upon Buyer's acceptance of the Aircraft, as defined by Exhibit "B" attached, Buyer shall cause the [$100,000] deposit to be paid to Seller. The balance of the [$6,550,000.00] purchase price ... will be due and payable in immediately available U.S. funds upon delivery of the Aircraft pursuant to this Agreement.

Exhibit "B" is a document headed "CONFIRMATION OF AIRCRAFT ACCEPTANCE". The document reads in relevant part:

Pursuant to the Aircraft Purchase Agreement dated October 29, 2001 between Steven Ross ("Buyer") and Grafair ("Seller"), this is to confirm that Buyer has inspected the above referenced Aircraft on this date. Buyer hereby accepts the Aircraft and the deposit is nonrefundable in accordance with the terms of the Agreement subject to Seller correcting or requiring the following items[.]

No items are identified, and the signature lines for Grafair and Ross are blank.

Section 1.2(b) of the Agreement reads in full:

If buyer does not accept the aircraft, Buyer will pay Seller, from the deposit, $15,000 to cover costs of moving aircraft to and from the pre-purchase facility.

Also relevant to these provisions is the right of inspection given to Ross under the Agreement in § 2.2, which reads in relevant part:

The sale is subject to Buyer's inspection and a one-hour test flight ... to determine [if] the Aircraft conforms with the conditions specified in Section 2.1 [related to the Aircraft's airworthiness] ... Buyer shall provide Seller with a written list of discrepancies within two (2) business days after completion of said inspection. All costs and expenses for repairs in order to make the Aircraft conform with conditions set forth in Section 2.1 shall be borne by Seller.

FN5. Although PrivatAir has not yet counter-claimed against Ross, Ross seeks also seeks a declaration that neither he nor anyone on his behalf owes PrivatAir $43,395.42 for services allegedly rendered.

DISCUSSION

I. *Standard of Review for Motion to Dismiss*

*3 In assessing a motion to dismiss under Fed.R.Civ.P. 12(b)(6), the Court is obligated to accept as true all well-pleaded factual allegations in the Amended Complaint, and view them in the light most favorable to plaintiff. *See*Scheuer v. Rhodes, 416 U.S. 232, 236;*Hertz Corp. v. City of New York*, 1 F.3d 121, 125 (2d Cir.1993). Defendant's motion is to be granted only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."*Still v. DeBuono*, 101 F.3d 888, 891 (2d Cir.1996) (*citing*Conley v. Gibson, 355 U.S. 41, 48 (1957)).

II. *Breach of Contract Claim*

According to plaintiff, he and PrivatAir entered into a contract under which plaintiff was to act as plaintiff's agent for plaintiff's purchase of an airplane, and plaintiff in turn would pay PrivatAir a commission upon purchase. *See* Am. Compl., ¶ 7-8. This contract was not reduced to writing.

Plaintiff alleges that defendant committed a breach of the contract by "(a) drafting the [Grafair] Agreement with an ambiguity that prevented Ross from recovering $85,000 of his deposit; (b) wrongly representing to Ross that the [Grafair] Agreement, as drafted, would permit him to recover $85,000 of his deposit; and (c) without Ross' knowledge or authorization, urging Grafair to proceed with certain repairs to the Aircraft."Am. Compl., ¶ 32. *See also*

Am. Compl., ¶¶ 12, 15, 19.

A breach of contract claim under New York law [FN6] must establish (1) the existence of a contract; (2) plaintiff's performance on the contract; (3) defendant's breach of contract; and (4) resulting damages. *SeeRexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 525 (2d Cir.1994). Additionally, where a breach of contract claim fails to denote the "essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated," it will be dismissed. *SeeHighlands Ins. Co. v. PRG Brokerage, Inc.*, No. 01 Civ. 2272(GBD), 2004 WL 35439, at *8 (S.D.N.Y. Jan. 6, 2004) (*quotingSud v. Sud*, 211 A.D.2d 423, 621 N.Y.S.2d 37, 38 (1st Dep't 1995); *seealsoWindow Headquarters, Inc. v. MAI Basic Four, Inc.*, Nos. 91 Civ. 1816(MBM), 92 Civ. 5283(MBM), 1993 WL 312899 at *3 (S.D.N.Y.1993) (stating that while a "plaintiff is not required to attach a copy of the contract or to plead its terms verbatim", a complaint in a breach of contract action must nevertheless "set forth the terms of the agreement upon which liability is predicated"). Defendant challenges the viability of plaintiff's breach of contract claim, contending that plaintiff has not alleged a breach of any term of the contract. While it is clear from the face of the Amended Complaint that plaintiff enumerates certain acts and omissions of PrivatAir's alleged to comprise breaches of the contract, PrivatAir maintains that this alleged conduct did not violate any contractual obligations actually existing between the parties. Based on Ross's recitation in the Amended Complaint of the contract's formation and terms, we agree with PrivatAir.[FN7]

FN6. There is agreement that New York law governs the consideration of this motion.

FN7. PrivatAir also charges that Ross's damages claim is impermissibly speculative as the Florida Lawsuit's settlement forever placed in doubt whether Ross was entitled to recoup the deposit. Because we find that plaintiff's Amended Complaint fails to allege a breach of a contract provision, we need not address the damages issue.

A. *$85,000 of the Deposit.*

*4 According to Ross, he contract with PrivatAir to "act as Ross' agent in connection with the prospective purchase of an aircraft by Ross."Am. Compl., ¶ ¶ 7 and 8. PrivatAir, in turn, was to receive a commission from Ross if he ultimately purchased an aircraft. *Seeid.*, ¶ 7. Ross asserts that because his Agreement with Grafair did not ultimately result in his recovery of $85,000 of his deposit, PrivatAir breached the contract it had with Ross.[FN8]

FN8. The Grafair Agreement specified that "[a] refundable deposit of [$100,000] has been placed in escrow" and that "[u]pon Buyer's acceptance of the Aircraft ... Buyer shall cause the deposit to be paid to Seller. The balance of the purchase price [$6,550,000.00] will be due and payable ... upon delivery of the Aircraft pursuant to this Agreement."Agreement, §§ 1.2, 1.2(a). The Grafair Agreement further provided that if Ross did not accept the Aircraft, "Buyer will pay Seller, from the deposit, $15,000 to cover costs of moving aircraft to and from the pre-purchase facility."*Id.*, at § 1.2(b).

Ross argues that PrivatAir, both before and throughout their engagement with Ross, held itself out as an "expert in aircraft sales and acquisitions, including without limitation, in negotiating contracts for the purchase and sale of aircraft."Am. Compl., ¶ 6. Moreover, Ross claims he relied on this self-professed expertise in choosing to contract for PrivatAir's services.*Id.* at ¶ 9.

These representations, however, are not alleged to have ever matured into specific, incorporated and binding terms of its contract with Ross. Thus, at most, the results of defendant's performance were inconsistent with general representations about its expertise and competence made incident to contract formation. Even if PrivatAir is to be held to an "as advertised" standard of performance, Ross's complaints are outside the scope of PrivatAir's representations. PrivatAir's self-praise related to contract *negotiation* (i.e. locating an airworthy aircraft and securing Ross a competitive price), not contract *drafting*.[FN9]Ross faults PrivatAir for misfeasance classifiable in the latter category.

FN9. Ross evidently understands this distinction, as in his Memorandum of Law in Opposition to Summary Judgment

("Opp.Mem.") he states "[a]s Ross' broker, PrivatAir not only found Ross an airplane, but *negotiated* the transaction with the seller on Ross' behalf and *drafted* for him a contract embodying the deal it had *negotiated*."Opp. Mem. at 11 (emphasis added). While the two pursuits are not mutually exclusive, neither are they are coterminous, or synonymous. An expert in contract negotiating is by no means necessarily an expert in contract drafting, and a skilled contract drafter might not have any aptitude for contract negotiation and bargaining.

More importantly, Ross does not allege that, as part of PrivatAir's contractual obligations, PrivatAir was to furnish Ross a aircraft purchase agreement that permitted Ross to abort the agreement after an inspection at-will and then reclaim eighty-five percent of the deposit. PrivatAir's assurances regarding Ross's right under the Grafair Agreement to recover his deposit did not concern terms of its contract with Ross susceptible to breach. Significantly, it was not until *after* Ross and PrivatAir consummated their agreement that PrivatAir is alleged to reference particular rights possessed by Ross under its prospective contract with Grafair. Specifically, Ross avers that PrivatAir located the Aircraft and negotiated a purchase and sale transaction on Ross's behalf with Grafair. *See* Am. Compl., ¶¶ 10-11. Thereafter, PrivatAir drafted the Aircraft Purchase Agreement, which was to be executed by Ross and Grafair. *Seeid.*, ¶ 12. PrivatAir informed Ross that the drafted Agreement was PrivatAir's "standard purchase agreement," one which allowed for Ross to terminate the Grafair Agreement after inspection of the Aircraft, for any or no reason, and then recover $85,000 of his $100,000 deposit. *Seeid.*, ¶¶ 14-15.

Any facts giving rise to an obligation on the part of PrivatAir to arrange the Aircraft purchase in a way that offered Ross an opportunity to terminate the purchase and recover the bulk of his deposit postdate the formation of the Ross/PrivatAir contract. Nor does Ross allege that his contract with PrivatAir was subsequently modified to include this obligation.[FN10] Thus, PrivatAir was under no such obligation, and PrivatAir's alleged failure to draft an agreement in this regard cannot be a breach of the contract.

FN10. In his opposition memorandum, Ross argues that "PrivatAir advised Ross that the contract was the standard agreement used for [aircraft] purchases, and that under it he could recover $85,000 of his deposit if he chose to terminate the deal. Ross reasonably relied upon such representations in signing the [Grafair] [A]greement."Opp. Mem. at 11. Ross's Amended Complaint does not seek recovery on a theory of promissory estoppel, although this appears to be the legal basis for this particular argument. Under New York law, a cause of action for promissory estoppel requires demonstration of the following: (1) a clear and unambiguous promise; (2) reasonable and foreseeable reliance on that promise; and (3) injury to the relying party as a result of the reliance. *See*Kaye v. Grossman, 202 F.3d 611, 615 (2d Cir.2000). Ross would face the difficult task of establishing that the prospective purchaser of a $6 million aircraft reasonably relied on what amounts to legal advise from a non-lawyer.

B. *Repairs to the Aircraft.*

*5 Ross also alleges that PrivatAir unauthorizedly petitioned Grafair to repair the Aircraft after Ross's inspection gave Ross reason to seek to terminate the Grafair Agreement. *See* Am. Compl ., ¶¶ 18-20. Because Grafair was urged to proceed with repairs, Grafair maintained that Ross could not then back out of the sale. *Id.*, ¶ 21. Ross argues that PrivatAir's unauthorized statements to Grafair, which had the purported effect of binding Ross to purchase the Aircraft, were a breach of contract.

Ross's allegations in this regard fail to articulate an actionable breach of contract. As with Ross's claim of a breach with respect to the deposit, this allegation does not identify what term of his contract with PrivatAir was breached by these statements or their consequences. Instead, it simply assumes the described conduct was proscribed by or inconsistent with the contract. If Ross limited PrivatAir's authority to act on his behalf, the Amended Complaint should at the very least demarcate the bounds on that authority. Otherwise, there is no way for the Court to

discern whether this particular act, if true, violated a provision of the contract agreed upon by the two parties.[FN11] *See Highlands Ins.*, 2004 WL 35439, at *8; *Sud*, 211 A.D. at 424, 621 N.Y.S.2d at 38; *see also Window Headquarters*, 1993 WL 312899, at *3.

> FN11. Ross cites to *William Wrigley Jr. Co. v. Waters*, 890 F.2d 594 (2d Cir.1989) for the proposition that "[i]t is well settled under New York law that negligent performance of a contract may give rise to a claim sounding in tort as well as one for breach of contract, which may be submitted to the trier of the case alternatively", and that by acting without authority with regard to the aircraft repairs, PrivatAir did not act with reasonable skill and care. For this reason, Ross claims he need not allege the specific supposedly broken terms of his agreement with PrivatAir because PrivatAir's failure to deliver its services with appropriate competence was itself a breach. We disagree with Ross's interpretation of *Wrigley*. The case merely stands for the proposition that negligent performance of contract can sometimes constitute a tort as well as a breach of contract. We do not think this means that every negligent performance of a contract is *itself* a breach of the contract. Instead, a negligent performance of a contract might *cause* a breach of contract. Under that circumstance, a plaintiff is not relieved of its obligation to identify what term of a contract was actually breached. Moreover, plaintiff's assertion that he need not specify the terms of the agreement on which he maintains defendant's liability is directly refuted by well-settled New York law. *See Highlands Ins.*, 2004 WL 35439, at *8; *Sud*, 211 A.D. at 424, 621 N.Y.S.2d at 38; *see also Window Headquarters*, 1993 WL 312899, at *3. To the extent Ross means to advance a breach of the term of good faith and fair dealing implied in every contract, it is subsumed by the discussion of plaintiff's breach of a fiduciary duty claim.

III. *Breach of Fiduciary Duty Claim*

Ross asserts that "[a]s Ross's agent, PrivatAir had a fiduciary duty to Ross." Am. Compl., ¶ 35. Ross's Amended Complaint does not define what that duty was or entailed.[FN12] As discussed above, Ross elsewhere alleges that PrivatAir "held itself out to be expert in aircraft sales and acquisitions, including without limitation, in negotiating contracts for the purchase and sale of aircraft," *id.*, ¶ 6, and that Ross relied on these representations in entering into its contract. *Id.*, ¶ 9. According to Ross, the same exact acts and omissions of PrivatAir's that violated the contract also constituted a breach of fiduciary duty, namely, again, "(a) drafting the [Grafair] Agreement with an ambiguity that prevented Ross from recovering $85,000 of his deposit; (b) wrongly representing to Ross that the [Grafair] Agreement, as drafted, would permit him to recover $85,000 of his deposit; and (c) without Ross' knowledge or authorization, urging Grafair to proceed with certain repairs to the Aircraft." *Id.*, ¶ 37.

> FN12. In his opposition memorandum, Ross asserts that "a broker owes fiduciary duties to his principal." Opp. Mem. at 10 (citations omitted). Nowhere in his Amended Complaint does Ross allege that PrivatAir was his broker. If being an agent is not synonymous with being a broker, then Ross's arguments about the responsibilities of a broker are an impermissible attempt to amend his complaint through a briefing memorandum. *See Jacobson v. Peat, Marwick, Mitchell & Co.*, 445 F.Supp. 518, 526 (S.D.N.Y.1977) (stating that party may not amend pleading through statements in briefs).

Under New York law, an actionable breach of fiduciary duty claim is comprised of the existence of a fiduciary relationship and damages caused by a breach of the fiduciary duty. *See, e.g., Cramer v. Devon Group*, 774 F.Supp. 176, 184 (S.D.N.Y.1991).

A. *Was There A Fiduciary Relationship?*

A fiduciary duty exists "when one has reposed trust or confidence in the integrity or fidelity of another who thereby gains a resulting superiority of influence over the first, or when one assumes control and responsibility over another", and "[w]hether one party is a fiduciary of another depends on the relationship between the parties." *Reuben H.*

Donnelley Corp. v. Mark I Marketing Corp., 893 F.Supp. 285, 289 (S.D.N.Y.1995). Attorney/client or doctor/patient relationships "are sufficiently rooted in trust and confidence to trigger super-contractual fiduciary duties."*Id.* However, "a conventional business relationship does not create a fiduciary relationship in the absence of additional factors."*Id.*,*quoting* *Feigen v. Advance Capital Management Corp.*, 150 A.D.2d 281, 283, 541 N.Y.S.2d 797, 799 (1st Dep't 1989). Indeed, "[u]nder New York law, parties to a commercial contract do not ordinarily bear a fiduciary relationship to one another unless they specifically so agree," or if "one party's superior position or superior access to confidential information is so great as virtually to require the other party to repose trust and confidence in the first party."*Calvin Klein Trademark Trust v. Wachner*, 123 F.Supp.2d 731, 733-34 (S.D.N.Y.2000).

**6 It is insufficient to merely allege the existence of a fiduciary relationship. Instead, "to plead a cause of action alleging that defendants became fiduciaries, plaintiffs must allege at least some factors from which a court could conclude that such a relationship has been established."*Boley v. Pineloch Associates, Inc.*, 700 F.Supp. 673, 681 (S.D.N.Y.1988). Moreover, it is well-settled that "a simple breach of contract is not to be considered a tort unless a duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract."*Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 389, 521 N.Y.S.2d 653, 656-57 (1987) (citations omitted). A tort claim is barred as redundant where it is "merely a restatement, albeit in slightly different language, of the 'implied' contractual obligations asserted in the cause of action for breach of contract."*Id.* at 657.

Fiduciary obligations are not imposed on one party merely because it possesses relative expertise as compared to the other. *See Mechigian v. Art Capital Corp.*, 612 F.Supp. 1421, 1430 (S.D.N.Y.1985) (finding that "[p]laintiff has provided no support for the proposition that mere expertise in a matter create fiduciary responsibilities, which is essentially the sum and substance of his argument"); *see also Boley*, 700 F.Supp. 673, 681 (holding that "[a]llegations of reliance on another party with superior expertise, standing by themselves, will not suffice").

Furthermore, where the parties' contract forms both the foundation and boundary of their relationship, fiduciary responsibilities have not attached. *See Reuben H. Donnelley Corp.*, 893 F.Supp. at 290 (refusing to find a fiduciary obligation where "absent ... contractual obligations" the complained of "conduct would not be actionable"); *see also Clark-Fitzpatrick, Inc.*, 521 N.Y.S.2d at 656-57, 70 N.Y.2d at 389 (barring a tort claim that was redundant of a contract claim).

With the foregoing authority in mind, for purposes of this motion we conclude that plaintiff has adequately pled that PrivatAir had a fiduciary relationship with Ross based on his allegation and description of an agency relationship with PrivatAir coupled with his claim that he both relied on PrivatAir's espoused expertise and over the course of their relationship had PrivatAir negotiate with Grafair on his behalf. *See Frydman & Co. v. Credit Suisse First Boston Corp.*, 272 A.D.2d 236, 237, 708 N.Y.S.2d 77, 79 (1st Dep't 2000) (holding that a fiduciary duty existed where bank provided plaintiff "with investment banking advice and other services, including conducting negotiations with ... on [plaintiff's] behalf ... in connection with the attempted acquisition" of a business); *see also Wiener v. Lazard Freres & Co.*, 672 N.Y.S2d 8, 15 (1st Dep't 1998) (holding that a fiduciary obligation has been adequately pled where *inter alia* the defendant assumed negotiations on behalf of plaintiff, where plaintiff relied on defendant's expertise).

B. *Was The Fiduciary Duty Breached?*

**7 To find a fiduciary relationship through agency only begins the inquiry, which also requires identifying, amongst other things, the particular obligations owed. *See SEC v. Chenery Corp.*, 318 U.S. 80, 85-86 (1943). Under New York law an agent owes its principal fiduciary duties of good faith and loyalty. *See Six West Retail Acquisition, Inc. v. Sony Theatre Management Corp.*, No. 97 Civ. 5499(LAP), 2004 WL 691680 at *19, (S.D.N.Y. Mar 31, 2004) (stating that all agents owe their principals "general fiduciary duties of good faith and loyalty"); *cf. Phansalkar v. Andersen Weinroth & Co., L.P.*, 344 F.3d 184, 200 (2d Cir.2003) ("Under New York law, an agent is obligated to be loyal to his employer and

is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties") (citations and quotations omitted). Additionally, there is authority for the general proposition that a fiduciary is "responsible to undertake reasonable diligence" upon matters within the fiduciary obligation. *BNY Capital Markets, Inc. v. Moltech Corp.*, 99 Civ. 11754(GEL), 2001 WL 262675 at *8 (S.D.N.Y. Mar. 114, 2001). A fiduciary obligation, however, is "limited to matters relevant to affairs entrusted."*Rush v. Oppenheimer & Co., Inc.*, 681 F.Supp. 1045, 1055 (S.D.N.Y.1988); *BNY Capital Markets*, 2001 WL 262675 at *8 (stressing that a "fiduciary is only responsible to undertake reasonable diligence or give advice for the benefit of another upon matters *within the scope of the relation*") (emphasis in original, citations and quotations omitted).

PrivatAir's alleged breaches with respect to the contract language are on their face outside the confines of its fiduciary obligations. PrivatAir is affirmatively alleged to only possess expertise in "aircraft sales and acquisitions" and in "negotiating contracts for the purchase and sale of aircraft."Am. Compl. ¶ 6. PrivatAir is not a law firm. Plaintiff cites no authority which supports holding a non-lawyer to a special standard of care for conduct that is the province of attorneys, such as contract drafting and interpretation. Regardless of how plaintiff may have interpreted PrivatAir's abilities or representations, PrivatAir cannot be held liable for what is essentially a legal malpractice claim when it never held itself out to be an attorney. *See*BNY Capital Markets, 2001 WL 262675, at *8.

Ross also claims that PrivatAir breached its fiduciary duty by urging Grafair to make repairs to the Aircraft. Unlike contract drafting and interpretation, PrivatAir's charge to communicate with prospective airplane sellers was attended by fiduciary duties. Thus, it would be inappropriate to dismiss this particular claim of Ross's at this time.[FN13]

> FN13. It is, however, appropriate to note that the authority which enables a portion of Ross's breach of fiduciary duty claim to survive contain affirmative allegations of active disloyalty and self-dealing. *See*Frydman, 708 N.Y.S.2d at 79;*Wiener*, 672 N.Y.S2d at 15. The absence of such claims here could make those cases distinguishable from the present one. Moreover, based on what has been presented to the Court thus far (in Ross's amended complaint, his opposition memorandum, and during oral argument), we are highly skeptical that Ross will be able to establish a breach of fiduciary duty sufficient to withstand summary judgment. For example, Ross will have to demonstrate that PrivatAir's statements to Grafair were actually unauthorized, a position which has yet been set out in any detail. But there is serious tension between Ross's claim that PrivatAir was his fiduciary, which depends in large part on PrivatAir possessing authority to negotiate on Ross's behalf, and the claim that PrivatAir had to seek permission from Ross before acting. It seems the more control Ross had over PrivatAir, the less PrivatAir can be considered a trusted and empowered fiduciary acting on Ross's behalf by virtue of its expertise as opposed to Ross's direction. Ross will also have to establish that PrivatAir's supposedly unauthorized actions actually caused the damage he claims. Again, based on the Court's current understanding of the allegations, this will be a challenge. This Court is not bound to Grafair's interpretation of PrivatAir's communications or the Grafair Agreement, which included specific provisions defining the mechanics of acceptance, as well as an integration clause.

IV. *Negligence Claim*

PrivatAir is alleged to have committed negligence for the same exact reasons PrivatAir is alleged to have breached its contract with and fiduciary duties owed to Ross. *See* Am. Compl., ¶ 42. The elements of a negligence claim under New York law are "(1) a duty owed by the defendant to the plaintiff; (2) a breach thereof; and (3) injury proximately resulting therefrom."*Solomon v. City of New York*, 489 N.E.2d 1294, 1294-95 (1985); *seealso*Stagl *v. Delta Air Lines, Inc.*, 117 F.3d 76, 79 (2d Cir.1997). In particular, Ross is accused of violating a duty to act with reasonable care and skill. *See* Am. Compl., ¶ 43;

seealso Opp. Mem., at 18. This allegation, framed as one for negligence, is subsumed by Ross's contract and fiduciary duty claims. Again, "a simple breach of contract is not to be considered a tort unless a duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract."*Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 521 N.Y.S.2d 653, 656-57, 70 N.Y.2d 382, 389 (1987) (citations omitted). The only possible sources of a duty of PrivatAir's to exercise reasonable care and skill in performing its contract with Ross are the contract itself, or from PrivatAir's fiduciary status. As such, plaintiff's negligence claim fails. *See, e.g.*, *Seybert-Nicholas Printing Corp. v. MLP U.S.A., Inc.*, No. 92 Civ. 6143(RPP), 1992 WL 315643, at *1 (S.D.N.Y. Oct. 22, 1992).

V. *Rule 11 Sanctions*

***8** Defendant's motion for Rule 11 sanctions is plainly deficient as a matter of procedure, and is therefore denied.

Rule 11 sanctions are appropriate only after the allegedly offending party has been afforded a remedial "safe harbor" period. Under Rule 11(c)(1)(A):

A motion for sanctions ... shall be made separately from other motions or requests ... [and] shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion ... the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

Here, Ross was not served with PrivatAir's Rule 11 motion twenty-one days prior to its filing. Instead, the Rule 11 motion, which was made as part of PrivatAir's motion to dismiss, was contemporaneously served on Ross and filed with this Court. Nor is the Court informed of any other pre-filing notice provided by PrivatAir to Ross substantially fulfilling the safe harbor requirement. In brief, Ross has been deprived of any opportunity to "withdraw [ ] or appropriately correct[ ]" the challenged matter, and therefore we will not consider the merits of PrivatAir's Rule 11 application. The motion is denied.

CONCLUSION

For the foregoing reasons, defendant's motion to dismiss is granted with respect to the breach of contract and negligence counts. With respect to the breach of fiduciary duty count, defendant's motion is granted except that it is denied with respect to Ross's allegation that PrivatAir urged Grafair to repair the Aircraft without Ross's knowledge or authorization. Defendant's motion for Rule 11 sanctions is denied.

By September 8, 2004, the parties are to confer about and submit for the Court's review a discovery and motion schedule that is prompt and targeted at the issues raised in footnote 13 of this Memorandum. Upon completion of this limited discovery the Court will entertain a motion for summary judgment from defendant.

IT IS SO ORDERED.

S.D.N.Y.,2004.
Ross v. FSG PrivatAir, Inc.
Not Reported in F.Supp.2d, 2004 WL 1837366 (S.D.N.Y.)

END OF DOCUMENT

Technical Packaging, Inc. v. Hanchett
Fla.App. 2 Dist.,2008.
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

District Court of Appeal of Florida,Second District.
TECHNICAL PACKAGING, INC., Appellant,
v.
Richard HANCHETT and Trenam, Kemker, Scharf, Barkin, Frye, O'Neill & Mullis, P.A., Appellees.
No. 2D06-3851.

May 9, 2008.

Background: Former client brought action against law firm for legal malpractice in giving advice that resulted in untimely filing of a lawsuit in federal court. The Circuit Court, Hillsborough County, Marva L. Crenshaw, J., entered summary judgment that former client abandoned claim by failing to appeal. Former client appealed.

Holdings: The District Court of Appeal, Farnell, Associate Senior Judge, held that:
(1) client's breach of contract actions against seller accrued, and five-year statute of limitations, if applicable, began to run, each time seller delivered allegedly defective product;
(2) client's failure to appeal federal court decision was not abandonment of malpractice claim with respect to untimely filed claims; and
(3) the District Court of Appeal was not the appropriate court to determine applicable statute of limitations.

Reversed.

Kelly, J., concurred in result only.

[1] Attorney and Client 45 ⚿0

45 Attorney and Client

The elements of legal malpractice are: (1) the employment of the attorney, (2) the lawyer's neglect of a reasonable duty, and (3) the attorney's negligence as the proximate cause of loss to the client.

[2] Attorney and Client 45 ⚿0

45 Attorney and Client
Where a party's loss results from judicial error occasioned by the attorney's curable, nonprejudicial mistake in the conduct of the litigation, and the error would most likely have been corrected on appeal, the cause of action for legal malpractice is abandoned if a final appellate decision is not obtained.

[3] Limitation of Actions 241 ⚿0

241 Limitation of Actions
A cause of action for breach of contract accrues, and the limitations period commences, at the time of the breach.

[4] Limitation of Actions 241 ⚿0

241 Limitation of Actions
Buyer's breach of contract against seller accrued, and five-year statute of limitations, if applicable, began to run, each time seller delivered allegedly defective product. West's F.S.A. § 95.11(2)(b).

[5] Attorney and Client 45 ⚿0

45 Attorney and Client
Former client's failure to appeal federal district court judgment that four-year statute of limitations applicable to oral contracts barred former client's breach of contract claims was not abandonment of malpractice claim against former attorney and law firm for allegedly giving incorrect dates for termination of limitations periods, since even the five-year statute of limitations for written contracts would have barred the claims. West's F.S.A. § 95.11(2)(b), (3)(k).

[6] Judgment 228 ⚿0

228 Judgment
An accurate and comprehensive record of the proceedings below is absolutely essential to fair and efficient appellate review.

[1] Judgment 228 0

228 Judgment
District Court of Appeal on review of summary judgment that former client abandoned malpractice action alleging incorrect advice about statute of limitations for breach of contract was not appropriate court to resolve issue whether four-year or five-year limitations period applied and former client could have successfully appealed federal district court judgment that four-year period applied, where the issue appeared to be one of first impression, the full record of the underlying lawsuit was not before the Court, and law firm focused its argument on legal issue without taking into account how appeal by former client would have proceeded. West's F.S.A. § 95.11(2)(b), (3)(k).

Appeal from the Circuit Court for Hillsborough County; Marva L. Crenshaw, Judge.
Warren R. Trazenfeld, P.A., Miami, and Patrice A. Talisman of Hersch & Talisman, P.A., Coconut Grove, for Appellant.
F. Wallace Pope, Jr., of Johnson, Pope, Bokor, Ruppel & Burns, LLP, Clearwater, for Appellees.
FARNELL, CROCKETT, Associate Senior Judge.
*1 Technical Packaging, Inc. ("Technical Packaging" or "Technical"), sued its former attorney Richard Hanchett and Hanchett's firm, Trenam, Kemker, Scharf, Barkin, Frye, O'Neill & Mullis, P.A. ("Trenam"; collectively, "Hanchett/Trenam"), for legal malpractice. The trial court granted Hanchett/Trenam's motion for summary judgment, ruling that Hanchett/Trenam had prevailed on its defense of abandonment. We reverse.

Background

Technical Packaging sold cellophane cigar tubes. In the late 1990s its cellophane supplier was UCB Films, Inc. ("UCB"). Technical ordered cellophane from UCB on approximately thirty-five occasions during this period, with each order reflected in its own set of documents. At some point Technical's customers began complaining about defects in cigar tubes that had not existed when Technical was purchasing cellophane from its previous supplier. Technical claimed that UCB's allegedly defective cellophane was delivered between December 1996 and May 1998.[FN1] Technical lost a significant amount of money. Trenam, which had had a long-term attorney-client relationship with Technical, assisted Technical in defending claims made by its customers; Hanchett was assigned to represent Technical. In March 2000, Technical consulted with Trenam about the possibility of suing UCB on a contingency-fee basis. After Trenam declined to undertake this representation in the summer of 2001, Technical hired another law firm and filed a complaint against UCB on March 3, 2003. UCB removed the suit to the federal Middle District of Florida. Technical's complaint recited eight causes of action, only one of which-breach of contract-forms the basis of the issue in the instant appeal. UCB pleaded statute of limitations as a defense and prevailed on its motion for summary judgment, with the court ruling that a four-year statute applied to all of Technical's claims, making the lawsuit untimely. The four-year period applied to the breach-of-contract claim because, the court ruled, the Technical-UCB sales agreements were oral contracts. *See* § 95.11(3)(k), Fla. Stat. (2002) (providing that "[a] legal or equitable action on a contract ... not founded on a written instrument, including an action for the sale and delivery of goods" entails a four-year limitations period). Technical did not appeal the judgment.

The gist of the present malpractice action is that during the consultations leading to Trenam's declining to represent Technical Packaging in a lawsuit against UCB, Hanchett allegedly gave Technical incorrect dates for the termination of limitations periods; as a result, Technical's March 2003 suit against UCB was untimely filed. For its part, Hanchett/Trenam raised several defenses, including abandonment-that is, that Technical, by not appealing the adverse judgment in the underlying lawsuit and winning a reversal, waived any malpractice claims against Hanchett/Trenam. Specifically, Hanchett/Trenam argued below and argue here that the federal district court erred in ruling that the agreements for the sale of cellophane from UCB to Technical were oral contracts, thus entailing four-year limitations periods. Hanchett/Trenam contend (as Technical did in the underlying lawsuit) that the sales agreements were written contracts entailing five-year limitations periods, *see* § 95.11(2)(b), and that Technical should

have prosecuted an appeal based on that legal theory. Relying on the defense of abandonment, Hanchett/Trenam moved for summary judgment and prevailed on that ground. Technical appeals.

Discussion

*2 This court reviews a final order of summary judgment de novo. *See* Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So.2d 126, 130 (Fla.2000).

> A movant is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Estate of Githens v. Bon Secours-Maria Manor Nursing Care Ctr., Inc., 928 So.2d 1272, 1274 (Fla. 2d DCA 2006) (quoting Fla. R. Civ. P. 1.510(c)). Furthermore,

> [i]n determining whether a genuine issue of material fact exists, this court must view every possible inference in favor of the party against whom summary judgment has been entered. It is the movant's burden to prove the nonexistence of genuine issues of material fact, and the burden of proving the existence of such issues is not shifted to the opposing party until the movant has successfully met his burden.

Id. (citations and quotation marks omitted).

[1] We begin by noting that the elements of legal malpractice that the plaintiff must prove are: (1) the employment of the attorney, (2) the lawyers neglect of a reasonable duty, and (3) the attorneys negligence as the proximate cause of loss to the client. Lenahan v. Russell L. Forkey, P.A., 702 So.2d 610, 611 (Fla. 4th DCA 1997). Further, the Florida Supreme Court in Peat, Marwick, Mitchell & Co. v. Lane, 565 So.2d 1323 (Fla.1990), pointed out that "[a] clear majority of the district courts have expressly held that a cause of action for legal malpractice does not accrue until the underlying legal proceeding has been completed on appellate review because, until that time, one cannot determine if there was any actionable error by the attorney." *Id.* at 1325 (citations omitted).

[2] If the principle of "complet[ion] on appellate review," *id.*, were required to be followed literally in all cases, then there would be no question that the trial court's granting of summary judgment to Hanchett/Trenam was correct, given that Technical did not appeal its loss in the underlying lawsuit. However, the generalization has been tempered:

> Where a party's loss results from judicial error occasioned by the attorney's curable, nonprejudicial mistake in the conduct of the litigation, and the error would *most likely* have been corrected on appeal, the cause of action for legal malpractice is abandoned if a final appellate decision is not obtained. Pennsylvania Ins. Guar. Ass'n v. Sikes, 590 So.2d 1051 (Fla. 3d DCA 1991)....
>
> ....
>
> Our cases should not be read to require every party who suffers a loss and attributes that loss to legal malpractice to obtain a final appellate determination of the underlying case before asserting a claim for legal malpractice. The test for determining when a cause of action for attorney malpractice arises remains when the existence of redressable harm has been established. In some cases, redressable harm caused by errors in the course of litigation can only be determined upon completion of the appellate process. In other cases, the failure to obtain appellate review should not bar an action for malpractice. We are unable to establish a bright-line rule that complete appellate review of the underlying litigation is a condition precedent to every legal malpractice action. To do so would, in many cases, violate the tenet that the law will not require the performance of useless acts.

*3 Segall v. Segall, 632 So.2d 76, 78 (Fla. 3d DCA 1993) (quotation marks and most citations omitted; emphasis added); *see also* Hunzinger Constr. Corp. v. Quarles & Brady Gen. P'ship, 735 So.2d 589, 595 (Fla. 4th DCA 1999) ("The circumstances in which a client's subsequent actions constitute an abandonment of a legal malpractice claim, as a matter of law, are very narrow.... In the instant case, we cannot say, as the court could in [Pennsylvania Ins. Guar. Ass'n v.] Sikes, [590 So.2d 1051 (Fla. 3d DCA 1991),] that the

F.2d 55, 57 (2d Cir.1985).

When jurisdiction is based upon diversity, a federal court applies the choice-of-law rules of the forum state. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *Jazini v. Nissan Motor Co., Ltd.*, 148 F.3d 181, 183-84 (2d Cir.1998) (citations omitted). Thus, to determine whether personal jurisdiction exists over the non-resident defendants, the Court must look to the forum state's long-arm jurisdictional statutes. *Savin v. Ranier*, 898 F.2d 304, 306 (2d Cir.1990). If the long-arm statutes do provide for personal jurisdiction, the focus of the court's inquiry must shift to whether exercising such jurisdiction comports with due process. *Whitaker v. American Telecasting, Inc.*, 261 F.3d 196, 208 (2d Cir.2001) (quoting *Bensusan Restaurant Corp. v. King*, 126 F.3d 25, 27 (2d Cir.1997)). Due process requires that the party, over whom personal jurisdiction is sought, has some minimum contacts with the forum state so that litigation of the action will not "offend traditional notions of fair play and substantial justice."*Fort Knox Music, Corp. v. Baptiste*, 203 F.3d 193, 196 (2d Cir.2000) (quoting *Calder v. Jones*, 465 U.S. 783, 788 (1984)).

Personal jurisdiction will exist over a foreign corporation, pursuant to N.Y. C.P.L.R. § 301 (McKinney 2001) ("CPLR"), if it is "doing business" in the state. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir.2000).[FN2] The imposition of jurisdiction, under this section, does not require that the cause of action against the defendants arise from their New York business transactions. A corporation will be found to be "doing business" and present in New York, if it does business with a "fair measure of permanence and continuity" and not merely "occasionally or casually." *Hoffritz*, 763 F.2d at 58 (quoting *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915, 917 (N.Y.1917)). In order to determine whether a foreign corporation is engaging in business on a continual basis, the following factors generally should be the focus: the existence of a New York office, solicitation of business in New York; corporate bank accounts or other properties located within the state; and the presence of corporate employees or agents in New York. *Landoil Resources Corp. v. Alexander & Alexander*, 918 F.2d 1039, 1043 (2d Cir.1990) (citing *Hoffritz*, 763 F.2d at 58).

FN2. Whether § 301 jurisdiction applies to individuals, as oppose to corporations, is unresolved under New York law. *Hoffritz*, 763 F.2d at 58;*Tyco Int'l Ltd. v. Walsh*, 2003 WL 553580, *3 (S.D.N.Y. Feb. 27, 2003)."Even assuming it does apply with regard to natural persons, the plaintiff must still establish that the defendant conducted business in New York as an individual and not simply as a corporate officer."*See,Tyco*, 2003 WL 553580, at *3 (citing *Laufer v. Ostrow*, 449 N.Y.S.2d 456, 460 (N.Y.1982)); *seealso,Black v. USA Travel Auth., Inc.*, 2001 WL 761070, *4 (S.D.N.Y. July 6, 2001). Plaintiff has not provided any factual allegations that Mr. Field or Ms. Martin were conducting their own, individual business in New York.

***4** Plaintiff has failed to allege any facts to demonstrate that E Commerce ever conducted any business within New York. Additionally, the uncontested affidavit of Mr. Field reveals that neither E Commerce, nor for that matter any of the movants, maintains a New York office, solicit business here, have employees or agents in New York, or possess a bank account, or other real or personal property, in New York. Accordingly, there is no basis to find personal jurisdiction exists over the movants pursuant to CPLR § 301.

New York's long-arm statute also allows for personal jurisdiction over a non-domiciliary who in person or through an agent "(1) transacts any business within the state or contracts anywhere to supply goods or services in the state; or (2) commits a tortious act within the state ...; or (3) commits a tortious act without the state causing injury to person or property within the state ..., if he [or she] (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or (4) owns, uses or possesses any personal property situated within the state."CPLR § 302(a). Personal jurisdiction may only be imposed provided the causes of actions against the defendants arise from the enumerated conduct set forth in CPLR § 302.

As already noted there has been no claim, much less a showing, that the movants possess or use personal or real property in New York that gives rise to the claims against them. Additionally, it cannot be concluded that any alleged tortious conduct occurred in New York. Although the complaint alleges, for venue purposes, that a substantial part of the events or omissions giving rise to the claims occurred in this district, it fails to specify what, if any, tortious acts occurred within the state. It cannot be inferred from reading the complaint that any of the wrongful conduct, which defendants allegedly committed, occurred in New York. The defendants are corporations situated in the United Kingdom, St. Kitt, and Aruba. The individual defendants reside in England. Defendants allegedly processed the credit card charges for plaintiff, and wrongfully withheld those funds, instead of depositing them in a bank in Aruba. There is no basis to suggest that such actions occurred in New York. Nor is there even any allegation that the contract, which defendants are accused of breaching, was negotiated or executed in New York. "To subject non-residents to New York jurisdiction under § 302(a)(2) the defendant must commit the tort while he or she is physically present in New York State."*Bensusan Restaurant Corp.*, 126 F.3d at 29 (citation omitted). Merely because plaintiff may have suffered injury in New York will not suffice in this regard. *Id.*

***5** Even if the tortious acts were committed outside of New York, plaintiff has failed to proffer any allegations showing that the acts complained of caused sufficient injury in New York to justify exercising personal jurisdiction over the movants. Generally, in order to determine whether there is sufficient injury in New York to warrant § 203(a)(3) jurisdiction, a "situs-of injury" test is to be applied requiring that the location of the "original event that caused the injury" be ascertained. *DeStafano v. Carozzi North America, Inc.*, 286 F.3d 81, 84 (2d Cir.2001) (quoting *Bank Brussels Lambert*, 171 F.3d at 791)). The "original event" is distinguishable from the initial tort, as well as from the final economic damages and resulting consequences flowing therefrom. "[T]he original event occurs 'where the first effect of the tort ... that ultimately produced the final economic injury' is located."*Id.* at 84-85 (quoting *Bank Brussels Lambert*, 171 F.3d at 792)). Plaintiff does not allege that the first effect, as a result of defendants purportedly withholding the plaintiff's monies instead of depositing them in the bank in Aruba, is located in New York. *Seegenerally,Whitaker*, 261 F.3d at 209 ("[T]he situs of the injury for purposes of asserting long arm jurisdiction is the place where the underlying, original event occurred which cause the injury."); *seealso,United Bank of Kuwait v. James M. Bridges, Ltd.*, 766 F.Supp.113, 166 (S.D.N.Y.1991) ("The occurrence of financial consequences in New York due to the fortuitous location of plaintiff[ ] in New York is not a sufficient basis for jurisdiction under § 302(a)(3) where the underlying events took place outside New York.").

Furthermore, plaintiff has not made a sufficient showing as to the other prongs necessary to exercise jurisdiction pursuant to § 302(a)(3). Plaintiff does not allege that movants derive substantial revenue from interstate or international commerce. Moreover, plaintiff fails to controvert Mr. Field's claim that the movants' solicit no business in New York, derive no revenue from goods or services used or consumed in New York, and they do not engage in any other persistent course of conduct in New York.

The only arguable basis to assert jurisdiction over the moving defendants is under subdivision (1) of CPLR § 302, *i.e.*, that they transact business in New York. The burden of showing that a non-domiciliary "transacts business," and can be sued for claims arising from that transaction, is a considerably less onerous one than that needed to establish "doing business" to sue such defendant even on an unrelated cause of action pursuant to CPLR § 301.*Hoffritz*, 763 F.2d at 58-59 (citations omitted). Where defendants purposely avail themselves of the privilege of conducting business in this state, and the causes of action arose out of activities occurring within the state, jurisdiction may be exercised over them. *Henderson v. I.N.S.*, 157 F.3d 106, 123 (2d Cir.1998) (quoting *Kronisch v. United States*, 150 F.3d 112, 130 (2d Cir.1998))."It is a 'single transaction statute' and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted."*Kreutter v. McFadden Oil Corp.*, 527 N.Y.S.2d 195, 198-99 (N.Y.1988). A cause of action "arises out" of a defendant's activities

order Defendants to discharge all fees collected on already-recovered property. Although the Nordwind Parties argue that Defendants used confidential information to pursue an attorney-client relationship with Ms. Gauger, and although information may be confidential even if it is available through public records, at this point in the proceedings, the court considers that relevant information has become generally known. Moreover, this allegedly "confidential" information did not relate to the Nordwind Parties but to Ms. Gauger. *See, e.g., Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer, Inc.*, 188 F.R.D. 189, 199, n. 14 (S.D.N.Y.1999) (confidential client information is defined to consist of "information relating to that client, acquired by a lawyer or agent of the lawyer in the course of or as the result of representing the client, other than information that is generally known."(quoting Restatement (Third) of the Law Governing Lawyers § 111 (Proposed Final Draft No. 1 1996)). The legal determination of this court, based on the record before it, that Ms. Gauger is entitled to a 50% share of the Kirstein Assets, does not allow for an interpretation of facts such that the Nordwind Parties would be entitled to payment from Defendants for retention of the benefits of previously confidential information that lead to the identification of Ms. Gauger as an heir. Therefore, because of the legal constraints established by the court's other rulings and, drawing all factual inferences against the Defendants, the court will not disturb Mr. Rowland's contractual agreement, either post-hoc or through restrictions on further representations, with Ms. Gauger-a non-party who cannot represent her interests before this court.

> FN20. Accepting the facts as plead, the relief sought in these claims is equitable in nature, and within the discretion of the court to grant.

IV. Defendants' Counterclaims against Plaintiffs and Franke-Ruta for Breach of Contract and Quantum Meruit

***10** Defendants move for Summary Judgment on their cross-claim for breach of contract, and in the alternative, for payment under a theory of quantum meruit for work done towards recovery of items that have not yet been recovered. However, during oral argument, Defendants expressed their intention to withdraw these counterclaims, subject to the withdrawal being without prejudice. The parties have subsequently agreed, and the counterclaims have therefore been dismissed.

V. Indemnification Claims Against Third-Party Defendants

Third-Party Defendants Willy Nordwind and Reed, Stover & O'Connor ("Reed, Stover") move for summary judgment dismissing Defendants' claims for indemnification, based on an argument that there was never an attorney-client relationship between Mr. Nordwind, Reed, Stover and any of the Nordwind Parties. Likewise, Third-Party Defendants Squire, Sanders & Dempsey, LLP ("Squire, Sanders") and Commission for Art Recovery, Inc. ("CAR") move to dismiss Defendants' claims for indemnification, based on an argument that any liability found in this case would arise from Defendants' wrongdoing, thus making unavailable a common law claim for indemnification, and that there is no evidence in the record of contractual indemnification. Lastly, Third-Party Defendant Clifford Chance Partnerschaftsgesellschaft moves for summary judgment dismissing Defendant's claim for indemnification with the same arguments as Squire, Sanders and CAR, that there is no contractual indemnification, and common law indemnification is inappropriate where the lawsuit was based on Mr. Rowland's allegedly tortious behavior.

Despite the possible merit of the arguments against indemnification, because the court finds that the Nordwind Parties suffered no legally cognizable damages, the issue of indemnification is moot.

VI. Third-Party Defendants Claims for Abuse of Process

Defendants move for dismissal of the abuse of process claims brought by Third-Party Defendants, based on an argument that the filing of a civil suit cannot support a claim for abuse of process, and further arguing that because the allegedly wrongful acts were directed at someone other than the complaining party, third-party defendants have no standing to bring their claim.

In New York, an "abuse of process claim lies against a defendant who (1) employs regularly issued legal

process to compel performance or forbearance of some act (2) with intent to do harm without excuse or justification, and (3) in order to obtain a collateral objective that is outside the legitimate ends of the process."*Cook v. Sheldon*, 41 F.3d 73, 80 (2d Cir.1994) (citing *Curiano v. Suozzi*, 469 N.E.2d 1324, 1326 (N.Y.1984); *Board of Educ. of Farmingdale v. Farmingdale Classroom Teachers Ass'n*, 343 N.E.2d 278, 282 (N.Y.1975)). Thus, New York requires more than the mere filing of a suit, even for an improper motive, as the basis for a claim for abuse of process. *See Curiano v. Suozzi*, 469 N.E.2d at 1326. In *Curiano v. Suozzi*, the court explained that the "gist of the abuse of process" claim was "the improper use of process after it is issued."*Id.* (citations omitted).

*11 Here, the Third-Party Defendants allege that process was abused by filing suit and subsequently using that wrongful filing to pressure Plaintiffs for an unreasonable settlement amount, inter alia. This attempt at unfair settlement, Third-Party Defendants contend, constitutes a collateral objective to the use of civil process sufficient to form a claim for abuse of process. However, Third-Party Plaintiffs fail to articulate how the complaint itself compelled performance or forbearance of an act other than the act of Third-Party Defendants defending themselves.[FN21]Although the act of bringing suit was allegedly directed to harass and inconvenience the Nordwind Parties, there was no legal compulsion to settle. *See, Williams v. Williams*, 246 N.E.2d 333, 335 (N.Y.1969) (dismissing claim that filing complaint and then mailing copies to multiple people in the trade constituted abuse of process because "there must be an unlawful interference with one's person or property under color of process in order that action for abuse of process may lie"); *see also, Board of Educ. of Farmingdale*, 343 N.E.2d 278 (abuse of process claim was properly brought where defendant issued subpoenas for 87 teachers to appear on the same day and refused to stagger those appearances, causing plaintiff school board to hire substitute teachers for numerous classes). Thus, Third-Party Defendants do not allege a wrongful action made "under color of process," and their claim cannot stand. As Defendants have noted, if there were unlawful interference, Third-Party Defendants may be able to bring a claim for malicious prosecution upon the conclusion of this action, and allegations of filing the complaint for the purpose of strong-arming Plaintiffs into settlement could be appropriately considered at that time. For the reasons discussed above, the claim for abuse of process will be dismissed.

FN21. For example, Third-Party Defendants argue that claims for indemnification were filed against:

> plaintiff's husband, the husband's former law firm, and the non-profit organization and two law firms that the plaintiffs credited with recovering their family's confiscated artwork. The third-party indemnification claims were asserted ... for the wrongful purpose and collateral objective of harassing the plaintiffs, pressuring them to settle for an unreasonable amount, and causing them to incur additional and unnecessary expenses in pursuing their claims.
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> Mem. of Law in Opp. to Third-Party Pls.' Mot. for Summ. J. by Third-Party Defs. Squire, Sanders & Dempsey LLP, Commission for Art Recovery, Inc., Willy Nordwind, Jr. And Reed, Stover & O'Connor, P.C. 6.

CONCLUSION

For the reasons discussed above, Plaintiffs' and Third-PartyDefendant Franke-Ruta's claims for breach of fiduciary duty, breach of contract, and negligence are incorporated into their claim for legal malpractice, and will therefore be dismissed; Defendants' motion for summary judgment on the claim for legal malpractice is granted; Plaintiffs' and Third-Party Defendant Franke-Ruta's claims for restitution and unjust enrichment is dismissed; Defendants' motion for summary judgment of breach of contract or, in the alternative, quantum meruit has been dismissed without prejudice; Third-Party Defendants Willy Nordwind, Jr.'s, Reed, Stover & O'Connor, P.C.'s, Squire, Sanders & Dempsey L.L.P.'s, Clifford Chance Partnerschaftsgesellschaft's, and Commission for Art Recovery, Inc.'s motions to dismiss Defendants' claims for indemnification are granted; and Defendants' motion to dismiss Third-Party Defendants' claims for abuse of process is granted.

within the three-year statute of limitations period. *Pell v. Trustees of Columbia Univ.*, No. 97 Civ. 0193, 1998 WL 19989, *8 (S.D.N.Y. Jan. 21, 1998)."Completed acts such as a termination through discharge or resignation ... are not acts of a continuing nature."*Malarkey v. Texaco, Inc.*, 559 F.Supp. 117, 121 (S.D.N.Y.1982) (internal quotation marks and citation omitted), *aff'd*,704 F.2d 674 (2d Cir.1983) (per curiam). Since Plaintiff does not allege discriminatory acts against her after her involuntary withdrawal, the continuing violation doctrine is inapplicable. Also, equitable tolling is inapplicable. *Seeinfra* pp. 37-38.

7. *Violation of and Conspiracy to Violate RICO, 18 U.S.C. § 1961*

Plaintiff's sixteenth cause of action alleges a civil RICO claim based on Defendants' acts to further five schemes, which were motivated by discrimination. (Am. Compl. ¶¶ 332-44; Pl.'s Civil RICO Stmt.[FN30]) Civil RICO claims are subject to a four-year statute of limitations.[FN31]*Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 156 (1987). The limitations period begins to run when plaintiff discovers or should have discovered her RICO injury. *Tho Dinh Tran v. Alphonse Hotel Corp.*, 281 F.3d 23, 35 (2d Cir.2002). Although Plaintiff does not allege what damages she suffered as a result of the Defendants' scheme or when she suffered these damages (*see* Am. Compl. ¶ 343), Plaintiff discovered her last possible RICO injury on or about January 30, 1998, when she received a letter notifying her of her involuntary withdrawal from AECOM. Therefore, the statute of limitations ran as of January 30, 2002,[FN32] and this cause of action is dismissed as untimely.[FN33]

FN30. Plaintiff's Civil RICO statement is not signed by an attorney of record as required under Rule 11(a) of the Federal Rules of Civil Procedure.

FN31. Plaintiff cites pre-1987 district court case law to support her contention that the six-year statute of limitations for actions based on fraud applies to civil RICO actions. (Pl.'s Mem. at 15 (citing *Estee Lauder Inc. v. Harco Graphics*, 621 F.Supp. 689 (S.D.N.Y.1984) and *Fustok v. Conticommodity*, 618 F.Supp. 1076 (S.D.N.Y.1985).) However, these cases have been overruled by *Agency Holding Corp.* as to their holdings on the applicable statute of limitations for civil RICO claims.

FN32. Plaintiff contends that the statute of limitations on her RICO claim is tolled because AECOM has engaged in fraudulent concealment to keep information from her. (Pl.'s Mem. at 15.) However, Plaintiff failed to plead any fraudulent concealment by Defendants in connection with her RICO claim. Furthermore, the Supreme Court has held that a plaintiff must have exercised reasonable diligence in attempting to discover her RICO claim to rely on the fraudulent concealment doctrine to toll the statute of limitations. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 194-96 (1997). Plaintiff knew or should have known of her last possible RICO injury when she was involuntarily withdrawn from Defendant AECOM.

FN33. Plaintiff argues that her RICO claim is timely because (1) the "last date of injury" to her is unknown because AECOM has not provided her with a summary letter, which she argues should be provided to all students upon their withdrawal; (2) the last date of injury is June 2003; (3) "the statute of limitations runs from the last injury or last predicate act which is part of the same pattern of racketeering," citing *Arab African Int'l Bank v. Epstein*, 10 F.3d 168 (3d Cir.1993). (Pl.'s Mem. at 15.)

First, the Am. Complaint does not mention the summary letter, nor is it explained how this summary letter would constitute an additional RICO injury. Next, the Am. Complaint alleges that in June 2003 Defendant Greenberg sent a letter in which he refused to explain Plaintiff's bills or provide her with a rent refund. (Am.Compl.¶ 142.) There is no explanation of how this letter creates a RICO injury or alters when Plaintiff