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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: FELIX PAUL G. FELIMAN J.S.C. PART 12

Index Number : 600151/2008
SHARBAT, SOLOMON
VS.
WOLK, MICHAEL B., P.C.
SEQUENCE NUMBER : 004
DISMISS

INDEX NO. 600151/2008

MOTION DATE

MOTION SEQ. NO. 004

MOTION CAL. NO.

motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits	3,4
Replying Affidavits by both P & D, Notice of Cross Motion	5, 6, 7, 8

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion

MOTION AND CROSS MOTION(S) ARE DECIDED IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

CC 2/16/2011 2:15 pm

FILED

JAN 14 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/12/2011

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

----------X

SOLOMON SHARBAT and QUALIFIED SETTLEMENT MANAGEMENT, LLC,
Plaintiffs,

-against-

LAW OFFICES OF MICHAEL B. WOLK, P.C. and MICHAEL B. WOLK,
Defendants.

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Index No.: 600151/2008
Mot. Seq. 004
Submission Date: 11/3/2010
Cal. No. 1

Appearances:

Plaintiffs
Nimkoff Rosenfeld & Schecter, LLP
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Defendants
Law Offices of Michael B. Wolk, P.C.
By: Edmund F. Wolk, Esq.
515 Madison Avenue, 5th Fl.
New York NY 10022

Papers considered on review of this motion for summary judgment:

PAPERS	NUMBERED
Notice of Motion, Aff. in Support, Exhibits, Memorandum of Law	1, 2
Aff. in Opposition to Motion and in Support of Cross Motion	3
Memorandum of Law in Opp. to Motion & in Support of Cross Motion	4
Notice of Cross Motion to Compel, Aff., Exhibits	5
Reply Aff. in Support of Motion & in Opp. to Cross Motion, Exhibits	6
Reply Aff. in Support of Cross Motion to Compel,Exhibits	7
Reply Memorandum in Support of Cross Motion to Compel	8

PAUL G. FEINMAN, J.:

In this action alleging, among other things, legal malpractice, breach of fiduciary duty and breach of contract, defendants Law Offices of Michael B. Wolk, P.C. (Wolk Firm) and Michael B. Wolk (Wolk) move, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint. Plaintiffs Solomon Sharbat (Sharbat) and Qualified Settlement Management, LLC (QSM) cross-move for an order compelling the production of documents and the deposition of Wolk.

BACKGROUND AND FACTUAL ALLEGATIONS

Sharbat is the president and sole equity holder of QSM. According to Sharbat, QSM is engaged in the business of "buying and re-selling certain qualified individual life insurance policies in the premium finance/life settlement arena - a niche industry." Sharbat Affidavit, ¶ 3. The Wolk Firm is a professional corporation authorized to practice law in the State of New York. Wolk, an attorney, is the president of the Wolk Firm.

In 2004, plaintiffs retained defendants in connection with some corporate transactions and upcoming litigation. Plaintiffs paid defendants approximately $23,000 in retainer fees. Plaintiffs state that, despite numerous requests, they never received a formal retainer agreement from defendants.

The facts of the underlying complaint are in dispute. Some of the disputed allegations include the following:

$125,000 in Legal Fees

Plaintiffs state that for one corporate transaction in January 2005, plaintiffs were entitled to a $275,000 commission from the sale of life insurance policies. The money was supposed to be wired to an attorney escrow account held by defendants. Defendants retained $125,000 of the total sum as a legal fee to which they claimed they were entitled.

With respect to this alleged fee, plaintiffs maintain that they never authorized defendants to keep this fee. Plaintiffs contend there was no written agreement which would create a fee arrangement by which defendants could keep the $125,000. Plaintiffs point to unsigned retainer agreements in the record, and also other letters which contain a signature line for Sharbat, but no signature. Plaintiffs also state that they did continue to use defendants as legal counsel for a

short period after defendants kept the $125,000, but this in no way ratifies the payment.

Defendants claim that plaintiffs authorized the $125,000 payment to defendants, both before and after January 2005. Defendants claim that plaintiffs authorized a lien, and therefore, "superior rights" to the commission. Wolk Affidavit, ¶ 66. Defendants also introduce a written fee agreement, drafted in December 2004, which was allegedly signed by plaintiffs, although no written signature is present on the copy. Defendants also claim that plaintiffs, during e-mail communications, did not object to this $125,000 fee, and continued to seek legal advice from defendants. They allege that plaintiffs did not object to the payment until almost three years later, via the present complaint.

Ehrlich Agreement

Sharbat states that, in January 2005, defendants negligently structured a contract between plaintiffs and Richard Ehrlich (Ehrlich and the Ehrlich Agreement). Defendants negotiated with Ehrlich and prepared a business agreement between plaintiffs and Ehrlich. According to plaintiffs, Wolk had asked to be a part of this business transaction. When plaintiffs denied Wolk's request, defendants "failed to adequately protect my interests in negotiating and preparing the Ehrlich Agreement." Sharbat Affidavit, ¶ 27. As a result, plaintiffs contend that Ehrlich was able to breach the agreement due to defendants' oversight in structuring this agreement, and that plaintiffs suffered financial damages as a result.

Plaintiffs' complaint and the Sharbat affidavit categorize the Ehrlich Agreement as one of the pivotal points where defendants gained access to plaintiffs' client lists and became "privy" to plaintiffs' confidential, proprietary and private business information. Sharbat Affidavit, ¶ 28. Specifically, plaintiffs allege that, while defendants were acting as counsel for plaintiffs,

defendants were exposed to plaintiffs' "business, business model, client base, strategies for earning profits, making contacts and recruiting clients." Sharbat Affidavit, ¶ 3.

Plaintiffs also claim that defendants structured the Ehrlich Agreement as a way for defendants to usurp plaintiff's business opportunities with Ehrlich.

OceanGate and Client Lists

Plaintiffs explain that, during the course of representation, plaintiffs shared confidential information with Wolk about the nature of plaintiffs' business. Sharbat refers to the business as largely "contacts" driven, bringing "these people and entities together at the right time to close life insurance premium finance deals ... ." Sharbat Affidavit, ¶ 7.

As a result of defendants' exposure to plaintiffs' business and business contacts, plaintiffs allege that defendants started a company called LifeSpring Brokerage, LLC (Lifespring). Michael Morrison (Morrison), one of the founders of LifeSpring, was working as an attorney for the Wolk Firm during its representation of plaintiffs. Morrison is e-mailed directly or carbon copied on several of the e-mails between plaintiffs and defendants. Plaintiffs submit a description of Morrison's accomplishments as listed on a web site as the following: "[p]rior to his entertainment endeavors, Mr. Morrison was the founder and CEO of LifeSpring, a structured finance company that generated over $2.5 billion in tradable life insurance assets ... Mr. Morrison began his career as an attorney with The Law Offices of Michael B. Wolk." Plaintiffs' Exhibit J, at 1.

Plaintiffs contend that LifeSpring is directly competing with QSM and solicits the contacts that defendants acquired after working with plaintiffs. Plaintiffs state that defendants misappropriated confidential information and that they now use the same methods that plaintiffs

use to generate profits for Lifespring. Plaintiffs provide the example of "OceanGate" as being a contact located by plaintiffs, to which defendants became privy. However, before plaintiffs were able to consummate a deal with OceanGate, plaintiffs were informed that Lifespring would be the aggregate provider for OceanGate's insurance policies. Plaintiffs also allege that defendants would never have learned about OceanGate, and other contacts, had they not worked with plaintiffs. Plaintiffs claim that they were damaged financially by Lifespring's business.

Defendants maintain that they were "never paid a penny" from any agreements from any of plaintiffs' purported clients. Wolk Affidavit, ¶ 32. They continue that there are no business transactions, which in the absence of defendants' conduct, would have belonged to plaintiffs. Defendants claim that plaintiffs cannot identify any client list which belonged to plaintiffs, including OceanGate. Defendants also contend there was no written non-compete agreement which would prevent defendants' alleged independent business efforts.

Plaintiff responds that, although Wolk claims that he did not receive a penny from the OceanGate transactions, this statement is meaningless due to the way commissions are structured within the industry, i.e., Wolk's statement does not refute that defendants made deals with these entities for a profit and to plaintiffs' detriment.

With respect to the client list, plaintiffs responded that they do not maintain exhaustive lists for all their clients. Plaintiffs allege that defendants could obtain the names of clients only through speaking with plaintiffs and also plaintiffs' other writings.

In any event, by March 2005, plaintiffs and defendants terminated their attorney-client relationship. Wolk drafted a letter which terminated the relationship, in which he stated that defendants were entitled to additional legal fees. Plaintiffs' new counsel responded to defendants

with the following, in pertinent part, "I am at a loss to understand how you could have any sort of retaining lien, let alone suggest that you have a right to recover any sums 'owed to this firm.'" Defendants' Exhibit F, at JJ, 2.

In January 2008, plaintiffs filed a summons and complaint commencing a legal malpractice claim. Plaintiffs contend, among other things, that defendants breached their professional duty to plaintiffs by misappropriating confidential information in order to compete with plaintiffs, that defendants stole $125,000 in commissions from plaintiffs as alleged legal fees, and that defendants' negligent representation in the Ehrlich Agreement caused plaintiffs to lose a substantial amount of money. Plaintiffs' complaint consists of the following nine causes of action: conversion of the alleged stolen commissions; conversion of the client list for defendants' use; commission money had and received; unjust enrichment on the commission; unjust enrichment by the use of the client list; violation of Judiciary Law § 487; legal malpractice; breach of fiduciary duty; and breach of contract.

In addition to the $125,000 in commissions, plaintiffs seek punitive and compensatory damages of at least $30 million.

Defendants move for summary judgment, pursuant to CPLR 3212, for an order dismissing the complaint. If the complaint is not dismissed in its entirety, defendants maintain that various causes of action are premised on the same allegations and seek the same damages, and should be dismissed as being duplicative of the legal malpractice claim.

Plaintiffs argue that, besides many issues of fact that remain, summary judgment is premature since Wolk has yet to be deposed. Plaintiffs claim that defendants committed malpractice by representing them in a substandard fashion in the Ehrlich matter, and that this

cause of action does not duplicate the one for breach of fiduciary duty.

Plaintiffs' Cross Motion

Plaintiffs cross-move for an order compelling the production of documents and also for the deposition of Wolk. Plaintiffs contend that their case cannot be adjudicated without Wolk's testimony. Plaintiffs also seek to depose non-parties, such as plaintiffs' confidential contacts, including Ehrlich and OceanGate.

Plaintiffs allege that Lifespring generated more than $2.5 billion in tradeable life insurance assets. Plaintiffs seek full disclosure from Lifespring including documents concerning Lifespring's business. Plaintiffs allege that defendants objected to these document requests from plaintiffs, stating, among other things, that Wolk is not the owner of LifeSpring and that LifeSpring is a non-party. Plaintiffs also seek billing invoices and other documents relating to defendants' representation of plaintiffs.

Plaintiffs seek to compel the production of certain documents so that they can calculate any alleged damages. According to plaintiffs, the Lifespring business opportunities have value, as do the commissions received, and plaintiffs need disclosure of Lifespring's business transactions.

Defendants oppose the cross motion by arguing that LifeSpring is a non-party that is not controlled by defendants. Although LifeSpring holds the documents, it is separate from defendants. As such, defendants allege that plaintiffs cannot obtain these documents from defendants. Defendants also claim that LifeSpring was started in May 2006, approximately a year after the attorney-client relationship ended.

In response, plaintiffs claim that Wolk holds himself out publicly as LifeSpring's owner.

Plaintiffs state that, on the internet, Wolk is listed as the only owner of the company. Plaintiffs also contend that any legal documents pertaining to LifeSpring are addressed to Wolk and that Wolk's previous office address is listed as the address for service upon LifeSpring. Taking these and other facts into consideration, plaintiffs seek to depose Wolk to ask him about LifeSpring documents and ownership. If Wolk himself does not have the LifeSpring documents, plaintiffs claim that they are entitled to subpoena LifeSpring documents from the appropriate person.

DISCUSSION

I. Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima face case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

a. First Cause of Action - Conversion of $125,000

In its first cause of action, plaintiffs allege that defendants wrongfully converted $125,000 in commissions for their own legal fee without plaintiffs' permission. Plaintiffs claim that they never agreed to a payment scheme in which defendants would be authorized to keep $125,000 out of a $275,000 business commission which plaintiffs received.

Defendants claim that plaintiffs authorized the $125,000 payment through written and

verbal agreements. Additionally, defendants argue that plaintiffs somehow ratified the payment by not protesting until allegedly three years later.

Among other things, the documents in the record reflecting any payment agreement do not appear to be signed by plaintiffs. Sharbat contends that he never received a "bill, statement or invoice" from defendants. Sharbat Affidavit, ¶ 3. Additionally, plaintiffs' counsel questioned the $125,000 payment shortly after plaintiffs terminated their attorney-client relationship with defendants.

> A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession. Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights [internal citations omitted].

Colavito v New York Organ Donor Network, Inc., 8 NY3d 43, 49-50 (2006).

Plaintiffs have met the criteria to satisfy the pleading requirement of a conversion claim. Plaintiffs claim that they did not agree to pay the defendants the $125,000. Plaintiffs demanded return of the money and it was not returned. On a motion for summary judgment, the credibility of the parties is not a proper consideration for the court. *Lawrence Props., Inc. v Brown Harris Stevens Residential Mgt., LLC*, 38 AD3d 377 (1st Dept 2007). As such, summary judgment is denied on plaintiff's first cause of action.

b. Second Cause of Action - Conversion of the Client Lists

Plaintiffs claim in their second cause of action that defendants illegally converted plaintiffs' clients lists. Plaintiffs allege that the client lists are plaintiffs' property, and that defendants interfered with plaintiffs' rights by purportedly using the lists to plaintiffs' detriment.

Although defendants may have contacted plaintiffs' clients or proposed clients,

defendants' contact did not prevent plaintiffs from also soliciting these same clients. As such, defendants did not "exercise control" over the client list or interfere with plaintiffs' ability to contact these clients. Accordingly, plaintiffs fail to raise a triable issue of fact with respect to this conversion claim, and this cause of action is dismissed.

c. Third Cause of Action - Money Had and Received for the $125,000

In their third cause of action, plaintiffs claim that "[d]efendants benefitted from their receipt of the Stolen Commissions in that, among other things, it [sic] converted those funds for their own use." Plaintiffs' Exhibit A, ¶ 40. Since this cause of action repeats the same allegations in the first cause of action for conversion, this cause of action is dismissed as being duplicative.

d. Fourth Cause of Action - Unjust Enrichment on the $125,000

In their complaint, plaintiffs' fourth cause of action maintains that "[b]y stealing and usurping the Stolen Commissions, Defendants seized Plaintiffs intended benefits for themselves" and defendants should make restitution to plaintiffs "in *quantum meruit*." Plaintiffs' Exhibit A, Complaint, ¶¶ 49,50.

The Appellate Division, First Department, has held that "where there is an express contract, no recovery can be had on a theory of implied contract. Without in some manner removing the express contract ... it is not possible to ignore it and proceed in *quantum meruit* [internal quotation marks and citation omitted]." *SAA-A, Inc. v Morgan Stanley Dean Witter & Company*, 281 AD2d 201, 203 (1st Dept 2001).

Even if, according to plaintiffs, a formal fee agreement was not drafted, plaintiffs and defendants were undisputedly involved in an attorney-client relationship which necessarily

involved a fee arrangement. The attorney-client relationship can be described as, "both contractual and inherently fiduciary." *Ulico Casualty Company v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 5 (1st Dept 2008). Unjust enrichment is classified as a quasi-contract claim. *IDT Corporation v Morgan Stanley Dean Witter & Company*, 12 NY3d 132, 142 (2009). Therefore, plaintiffs may not recover on this theory and this cause of action is dismissed.

e. Fifth Cause of Action - Unjust Enrichment by Defendants Use of the Client Lists

In their fifth cause of action, plaintiffs allege that defendants misappropriated and utilized plaintiffs' client lists, and, as a result, have been unjustly enriched. This cause of action is duplicative of the second cause of action for conversion, which has already been found to be without merit. As such, the fifth cause of action is also dismissed.

f. Sixth Cause of Action - Violation of Judiciary Law § 487

In this cause of action, plaintiffs allege that defendants violated Judiciary Law § 487. Judiciary Law § 487 states the following, in pertinent part, "an attorney who is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party ... forfeits to the party injured treble damages, to be recover in a civil action." *Schindler v Issler and Schrage, P.C.*, 262 AD2d 226, 228 (1st Dept 1999). The Appellate Division, First Department, has also denied claims for violation of Judiciary Law § 487 when the "alleged deceit did not occur during a pending judicial proceeding in which plaintiff was a party." *Bankers Trust Company v Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 AD2d 384, 386 (1st Dept 1992). *See also Singer v Whitman & Ransom*, 83 Ad2d 862, 863 (2d Dept 1981)("section 487 of the Judiciary Law provides for a cause of action against an attorney where the alleged deceit or collusion with the intent to deceive any party, occurred in a pending judicial proceeding").

Damages may only be recovered when the attorney has shown a "chronic, extreme pattern of legal delinquency [internal quotation marks and citation omitted]." *Schindler v Issler and Schrage, P.C.*, 262 AD2d at 228.

In the present case, the alleged deceit did not occur during a pending judicial proceeding. Nor are plaintiffs able to allege a "chronic, extreme pattern of legal delinquency" on the defendants' part. *Id.* As such, plaintiffs cannot sustain a cause of action for violation of Judiciary Law § 487, and the claim is dismissed.

g. Seventh Cause of Action - Legal Malpractice

In plaintiffs' seventh cause of action, they allege that defendants' representation of plaintiffs fell below the reasonable skill and knowledge ordinarily possessed in the legal profession. Plaintiffs lists the same nine claims as in the breach of fiduciary duty and breach of contract claims, including that the defendants wrongfully took the $125,000; failed to provide plaintiffs with a written retainer agreement and itemized bill; solicited plaintiffs' clients; misappropriated and used, without plaintiffs' knowledge or consent, plaintiffs' client lists; and unfairly competed with plaintiffs and otherwise engaged in unfair dealing.

However, plaintiffs clarify through Sharbat's affidavit and their memorandum of law that they are actually alleging malpractice in defendants' structuring of the Ehrlich Agreement. Sharbat Affidavit, ¶ 27. Plaintiffs retained defendants to draft the Ehrlich Agreement, which was an agreement by which Sharbat and Ehrlich would work together. The agreement specifically allowed Ehrlich to "structure life insurance premium finance transactions with non-recourse loans to Sharbat Clients collateralized by the Policies." *Id.* at 25. According to Sharbat, Wolk had asked to be a part of this business deal and plaintiffs said no. After the execution of the

agreement, plaintiffs allege that Ehrlich breached the agreement. Plaintiffs submit a copy of the proposed complaint against Ehrlich for his alleged breach of contract. Plaintiffs sought $3 million in damages for breach of contract. According to plaintiffs, due to financial reasons, this complaint was never filed.

In order to establish a cause of action to recover damages for legal malpractice, a plaintiff must prove three elements: "(1) the negligence of the attorney; (2) that the negligence was the proximate cause of the loss sustained; and (3) proof of actual damages [internal quotation marks and citations omitted]" *(Ulico Casualty Company v Wilson, Elser, Moskowitz, Edelman & Dicker,* 56 AD3d at 10). Proximate cause is shown if the plaintiff can establish "that 'but for' the attorney's negligence, the plaintiff would have prevailed in the matter in question" (*Tydings v Greenfield, Stein & Senior, LLP*, 43 AD3d 680, 682 [1st Dept 2007], *affd* 11 NY3d 195 [2008]).

In the scope of the legal malpractice claim, plaintiffs contend that defendants wrote a contract in such a substandard fashion that Ehrlich was able to find ways to breach the agreement. Specifically, plaintiffs note that, as part of the agreement, Sharbat was to deal exclusively with Ehrlich in certain circumstances, but that Ehrlich did not have to deal exclusively with Sharbat. Plaintiffs contend that Wolk may have prepared the Ehrlich Agreement in this fashion so that Wolk himself could eventually forge business opportunities with Ehrlich. According to plaintiffs, as a result of this alleged substandard work product, plaintiffs suffered financial damages by the loss of business opportunities that they expected to obtain from working directly with Ehrlich.

The record indicates that, years after the attorney-client relationship had ended, Sharbat testified that his contacts in the premium finance arena had told him that defendants had started

Lifespring with Ehrlich. Specifically, Sharbat testified that an insurance broker told him that "[Wolk] created a company with Richie Ehrlich called Life Springs and Michael Morrison is involved in it ... ." Plaintiffs' Exhibit C, TR, at 134.

"For a defendant in a legal malpractice case to succeed on a motion for summary judgment, evidence must be presented in admissible form establishing that the plaintiff is unable to prove at least one of the essential elements." *Crawford v McBride*, 303 AD2d 442, 442 (2d Dept 2003). Defendants do not address plaintiffs' allegations for substandard work with respect to the Ehrlich Agreement in their motion for summary judgment or in their reply papers.

The court notes that, in their legal malpractice claim, as well as in all of the other claims, plaintiffs allege that defendants' representation of plaintiffs fell below the ordinary standard when defendants, among other things, wrongfully took the $125,000; failed to provide plaintiffs with a written retainer agreement and itemized bill; solicited plaintiffs' clients; and misappropriated and used, without plaintiffs' knowledge or consent, plaintiffs' client lists, and unfairly competed with plaintiffs. Every allegation except the one for substandard work product falls under a different cause of action.

Given the record, defendants have not established their entitlement to judgment as a matter of law with respect to the seventh cause of action. As noted, defendants do not address whether or not their work on the Ehrlich transaction was or was not substandard. However, the legal malpractice cause of action should be narrowly tailored to encompass only the impact of the Ehrlich Agreement, as the other claims within the legal malpractice claims do not belong in a malpractice claim.

h. Eighth Cause of Action - Breach of Fiduciary Duty

Plaintiffs contend that defendants breached their fiduciary duty when they solicited plaintiffs' clients, misappropriated and utilized plaintiffs' client lists without plaintiffs' knowledge or consent, and unfairly competed with plaintiffs by starting an identical competing business.

With respect to Ehrlich, as previously mentioned, defendants drafted a contract between plaintiffs and Ehrlich. Sometime after the attorney-client relationship was over, plaintiffs discovered that defendants were pursuing business with Ehrlich. Defendants do not deny contacting Ehrlich and pursuing business with him. Defendants merely state that plaintiffs have failed to establish that they had an exclusive right to conduct business with Ehrlich. Defendants summarily state that they did not receive a "penny" from Ehrlich. Defendants do not, however, deny that Lifespring received a profit from Ehrlich. Defendants also maintain that Ehrlich made his own independent decision not to conduct business with plaintiffs. As such, according to defendants, any conduct which may have harmed plaintiffs was the conduct on the part of Ehrlich not to conduct business with plaintiffs, not defendants' conduct in pursuing business with him.

With respect to OceanGate, Sharbat testified that OceanGate assured plaintiffs that it would give plaintiffs exclusive business. However, when plaintiffs followed up, OceanGate stated that it had decided to give its exclusive business to Lifespring. In response, defendants make the same arguments, i.e., that they never received a penny from any transactions with Oceangate, Oceangate chose not to conduct business with plaintiffs, and Oceangate was not plaintiffs' exclusive client. Defendants do not deny pursuing business with Oceangate, nor do they deny that Lifespring received a profit from Oceangate.

With respect to the rest of the client lists, Sharbat testified that Tommy Archer, an

insurance broker who used to work with plaintiffs, stated to Sharbat that he "closed one transaction with Michael Wolk" and that this was a "premium finance transaction." Plaintiffs' Exhibit C, Sharbat Transcript, at 134. Sharbat also confirmed that, although there may not be a master list, per se, defendants learned about plaintiffs' clients from working with plaintiffs. As such, Sharbat claims that, even if no actual list was stolen by defendants, this does not necessarily indicate that defendants did not receive a benefit from plaintiffs' clients or contacts.

A client is required to prove a "breach of a duty owed to it and damages sustained as a result [internal citations omitted]," to recover against an attorney. *Ulico Casualty Company v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d at 5-6. The client is also required to establish the "but for" element of malpractice, since "the claims of malpractice and breach of fiduciary duty are governed by the same standard of recovery." *Id.* at 6. The Appellate Division, First Department, has held that "comparison of a party's conduct with the fiduciary standard of care is a question of fact [internal quotation marks and citation omitted]." *People v Grasso*, 50 AD3d at 548. Additionally, in a motion for summary judgment, the function of the court is one of issue finding, not issue determination. *Ferrante v American Lung Assn.*, 90 NY2d 623, 630 (1997).

Defendants owed plaintiffs a duty. As stated in *Ulico Casualty Company v Wilson, Elser, Moskowitz, Edelman & Dicker* (56 AD3d at 4 quoting *Matter of Cooperman*, 83 NY2d 465, 472 (1994), "[i]t is axiomatic that the relationship of attorney and client is fiduciary: 'The attorney's obligations, therefore, transcend those prevailing in the commercial market place.'". The Court in *Ulico Casualty Company* continues as follows:

> It is well settled that the relationship of client and counsel is one of unique fiduciary reliance and that the relationship imposes on the attorney the duty to deal

> fairly, honestly and with undivided loyalty ... including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the clients' interests over the lawyer's. Thus, any act of disloyalty by counsel will also comprise a breach of the fiduciary duty owed to the client. In *Greene* (47 NY2d 447, 451 [1978]), the Court of Appeals noted that attorneys historically have been strictly forbidden from placing themselves in a position where they must advance, or even appear to advance, conflicting interests, a rule that is intended to preclude breach of the attorney's duty of loyalty [internal quotation marks and citations omitted].

Id. at 5.

Plaintiffs have also submitted a description of LifeSpring, which lists its earnings as at least $2.5 billion. Plaintiffs also state that, but for defendants' breach of fiduciary duty, plaintiffs would have had financial dealings with at least Ehrlich and OceanGate.

As set forth below, the record indicates that not only have defendants not met their burden on a motion for summary judgment, but that plaintiffs have created a triable issue of fact as to whether defendants' professional judgment was impaired due to defendants' alleged divided loyalties. Factual issues remain with respect to Ehrlich, Oceangate, the client lists, and the use of plaintiffs' business models, and a potential breach of fiduciary duty.

For instance, with Ehrlich, the record is unclear as to the time that defendants started soliciting Ehrlich. Plaintiffs assert that Wolk had wanted to be a part of the Ehrlich Agreement, but Sharbat had said no. Morrison, the listed co-founder of LifeSpring, was an attorney working with defendants at the time that the Ehrlich Agreement was drafted. It is a question for the jury whether defendants solicited Ehrlich during the attorney-client relationship, and whether defendants created the Ehrlich Agreement in such a way as to allow the defendants to later benefit.

Questions of fact also remain as to whether a breach of fiduciary duty occurred with

respect to OceanGate. Defendants have alleged that OceanGate was not formed until June 2006, which was at least a year after the end of the attorney-client relationship. Sharbat claims that he was assured an exclusive agreement with OceanGate until it was approached by Lifespring. Plaintiffs have alleged a loss of income as a result of defendants' breach of fiduciary duty.

Sharbat testified that, although there may have been a client list, defendants were never furnished with this list. Sharbat further noted that, despite being contacted by plaintiffs, most of the names on the list were potential clients, and they had not ever entered into business with plaintiffs. Additionally, Sharbat testified that he had heard that defendants had solicited some of plaintiffs' potential contacts. However, these contacts, including OceanGate, willingly chose to enter into business with defendants. They also could have, presumably, decided to enter into business with someone else entirely. The record indicates that Lifespring was not formed until May 26, 2006, at least one year after the attorney-client relationship had ended. As such, many questions of fact remain with respect to defendants' alleged use of plaintiffs' client lists and business model.

Although plaintiffs list the same allegations in their complaint for breach of fiduciary duty and legal malpractice, the claims are not duplicative. *See Kurman v Schnapp*, 73 AD3d 435, 435 (1st Dept 2010)("[p]laintiff's breach of fiduciary duty cause of action is not duplicative of his legal malpractice cause of action, since it is premised on separate facts that support a different theory"). As further substantiated in the Sharbat Affidavit and plaintiffs' memorandum of law, the legal malpractice claim is premised on the Ehrlich agreement being a substandard work product. The facts supporting plaintiffs' breach of fiduciary claim are based on defendants' alleged financial conflict of interest between its own interests and a fiduciary obligation owed to

plaintiffs.

Additionally, although plaintiffs allege that defendants violated several rules of the Code of Professional Conduct in their claim for violation of Judiciary Law § 487, plaintiffs may be able to bring a cause of action for breach of fiduciary duty against defendants based on a violation of the Code of Professional Responsibility DR-4-101.[1] According to DR 4-101 (b), an attorney may not disclose or adversely use secrets confided in by former clients. When defendants used information that was confided to them in a way that disadvantaged plaintiffs, defendants may have violated DR 4-101. While "[t]he violation of a disciplinary rule does not, without more, generate a cause of action," plaintiffs in the present case properly pled a cause of action for breach of fiduciary duty. *Schwartz v Olshan Grundman Frome & Rosenzweig*, 302 AD2d 193, 199 (1st Dept 2003).

As an aside, while not denying soliciting plaintiffs' clients and venturing into the same business as plaintiffs, defendants state that there was no "non-compete" agreement with plaintiffs. Defendants' argument is without merit. The present situation is not an employer-employee relationship. Attorneys and clients do not ordinarily have non-compete agreements, since one who enters into an attorney-client relationship does not expect the attorney to form a competing business with his client. An assessment of whether plaintiffs' client lists or business model is a "trade secret" is not warranted at this time. This unusual situation is also not one where the defendants would be prohibited from representing clients with adverse interests to

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[1]Effective April, 2009, Part 1200 New York Rules of Professional Conduct superceded the Code of Professional Responsibility. DR-401 (b) is similar in substance to the New York Rules of Professional Conduct § 1.6 (a). Section 1.6 (a) states that "[a] lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person ... ."

plaintiffs, since, upon information and belief, defendants are not acting as attorneys, but as direct competition with plaintiffs in plaintiffs' line of business.

i. Ninth Cause of Action - Breach of Contract

Plaintiffs allege that defendants breached their contract with plaintiffs by, among other things, failing to act in good faith with undivided loyalty to plaintiffs. Plaintiffs also list the same allegations as the claims for breach of fiduciary duty and legal malpractice.

When the cause of action for breach of contract, "as pleaded, did not rest upon a promise of a particular or assured result, and only claimed a breach of general professional standards," it is dismissed as being "redundant" of the legal malpractice claim. *Senise v Mackasek*, 227 AD2d 184, 185 (1st Dept 1996). Applying the above principle to the present case, the ninth cause of action alleging a breach of contract is dismissed as being duplicative.

II. Plaintiffs' Cross-Motion:

Plaintiffs cross-move for an order compelling the production of documents and the deposition of Wolk. Inasmuch as the denial of summary judgment vacates any stay of discovery, defendant Wolk shall make himself for an examination before trial on a date agreed to mutually by counsel, but no later than March 3, 2011. To the extent that defendants have not yet responded to any outstanding document demands, they shall do so within 15 days of entry of service of a copy of this order together with notice of its entry.

Turning to the particulars of the Plaintiffs' First Demand for Documents (Nimkoff Aff., Ex. A) and the Defendants' Response and Objections to same (Nimkoff Aff., Ex. C), the court rules as follows:

Requests 1 through 15, 21 through 27, 44 through 46, 48 - 52 including sub-parts. The

objections are overruled and defendants shall produce all responsive documents to plaintiffs within 15 days of service of a copy of this order with notice of its entry.

Requests 16 through 17, including sub-parts. The defendants shall produce copies of any records regarding sums held in escrow by the law firm on plaintiffs' behalf, and records of how said sums were disbursed. Defendants shall also produce all bills, invoices, correspondence and emails allegedly sent to plaintiffs related to legal services rendered and records of monies received in payment thereof. Said records to be produced within 15 days of service of a copy of this order with notice of its entry. The objections of defendants are otherwise sustained.

Request 18. Adequately answered.

Request 28. Objection sustained.

Requests 29 through 31 and 40. Defendant shall provide any documents, correspondence and emails evidencing a retainer agreement and/or agreement regarding fees, disbursements and expenses with the plaintiffs for the period of claimed fees, or which evidence that plaintiffs authorized the defendants to take control of $125,000.00. Production to be completed within 15 days of service of a copy of this order together with notice of its entry.

Requests 32 through 39. Objections sustained. Some of these demands are so broad, so vague and so open ended that a court would have no idea what is being requested and would be unable to measure whether compliance the response was adequate. For example, "39. Documents concerning Plaintiffs."

Requests 41, 42, 47. Defendants shall provide a copy of the file for legal work performed by defendants for plaintiffs as well as all correspondence and emails with plaintiffs within 15 days of service of a copy of this order together with notice of its entry.

Requests 43, 54 through 60. Objection sustained.

Request 53. Objection sustained, without prejudice to renewal, if and when, a judgment is entered against defendants.

Requests 61, 63. Objection overruled.

Requests 62 and 64 through 84. Objection sustained, but without prejudice to service of a subpoena on non-party LifeSpring.

Requests 85 through 123, 125 and 126. Objection sustained. Some of these are simply too broad, or duplicative of other requests. Others are not limited in terms of time frame or scope, that is to say, limiting them to the issues in the litigation. The period 1994 to present in the definitions section is way to long a period of time to constitute a careful limitation of the information requested By way of example, Request 104 would require any contact the defendant law firm ever had with an insurance company, ever and regardless of the issue, over a 16 year period. While this may not have been the intent of the plaintiffs, it is not the job of the court to prune prolix, redundant, and vague demands.

Request 124. Objection overruled. This request is narrowly tailored to the years 2004 and 2005 and calls for a specific kind of document to the litigation over the $125,000.

The court reminds the parties that they are under a duty to consult in good faith before making further discovery-related motions. A compliance conference will be held on February 16, 2011 at 2:15 p.m. in Part 12 to ensure that document discovery has been completed and that a deposition date for Wolk fixed.

III Punitive Damages

In the complaint, plaintiffs seek punitive damages in excess of $25 million. To recover

punitive damages, a plaintiff must demonstrate by "clear, unequivocal and convincing evidence, egregious and willful conduct that is morally culpable, or is actuated by evil and reprehensible motives [internal quotation marks and citations omitted]." *Munoz v Puretz*, 301 AD2d 382, 384 (1st Dept 2003). Even assuming the allegations in the complaint to be true, plaintiffs cannot prove that defendants' conduct rises to the extraordinary level of egregious conduct that would permit an award of punitive damages. Accordingly, the claims for punitive damages are stricken.

CONCLUSION

Accordingly, it is

ORDERED that the defendants' motion for summary judgment dismissing the complaint is granted with respect to the second, third, fourth, fifth, sixth and ninth causes of action, and is denied with respect to the first, seventh and eighth causes of action; and it is further

ORDERED that plaintiffs' claims for punitive damages are stricken from the complaint dismissed; and it is further

ORDERED that the Clerk may enter judgment on the dismissed causes of action and sever and continue under this index numbers the first, seventh and eighth causes of action;

ORDERED that plaintiffs' cross motion to compel production of documents and the deposition of Michael B. Wolk is granted only to the extent that defendants shall provide the documents directed in the body of this decision within 15 days of service of a copy of this decision and order together with notice of its entry and that Mr. Wolk shall be produced for deposition on a date mutually agreed upon by counsel, but not later than March 3, 2010; and it is further

ORDERED that the matter is set down for a compliance conference on February 16, 2011

at 2:15 p.m. in Part 12 to monitor compliance with this order and otherwise address outstanding discovery.

Dated: January 12, 2011
New York, New York

J.S.C.