

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

PRESENT: HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM

Justice

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KRISTINA ARMSTRONG,

Plaintiff,

- v -

BLANK ROME LLP, NORMAN HELLER, DYLAN MITCHELL,

Defendant.

INDEX NO. 651881/2013

MOTION DATE 07/17/2017

MOTION SEQ. NO. 008

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 451, 469, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 508, 515, 516

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents, this motion is denied as per the annexed decision and order.

10/11/2018
DATE


DAVID BENJAMIN COHEN, J.S.C.

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| CHECK ONE: | <input type="checkbox"/> CASE DISPOSED | <input checked="" type="checkbox"/> DENIED | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION | <input type="checkbox"/> OTHER |
| APPLICATION: | <input type="checkbox"/> GRANTED | | <input type="checkbox"/> GRANTED IN PART | |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> SETTLE ORDER | | <input type="checkbox"/> SUBMIT ORDER | |
| | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | | <input type="checkbox"/> FIDUCIARY APPOINTMENT | <input type="checkbox"/> REFERENCE |

**HON. DAVID B. COHEN
J.S.C.**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - IAS PART: 58

----- X
KRISTINA M. ARMSTRONG,

Index No. 651881/2013
[Motion Sequence No. 008]

Plaintiff,

- against -

BLANK ROME LLP, NORMAN S. HELLER,
and DYLAN S. MITCHELL,

Defendants.

----- X

DAVID B. COHEN, J.

This is an action to recover damages for legal malpractice and violation of Judiciary Law § 487, arising out of defendants' representation of plaintiff in an underlying divorce action that was settled by a written settlement. Defendants now move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and on their counterclaims for legal fees. Plaintiff opposes the motion. For the reasons that follow, the motion is denied.

BACKGROUND

Plaintiff Kristina M. Armstrong (plaintiff) married Michael Armstrong (the husband) in 1989. They had two children together, born in 1995 and 1997. Plaintiff had a modeling career, worked in television, sold real estate, and worked various other jobs. However, aside from the early part of the marriage, she stayed at home to raise the children.

Prior to the marriage, the husband earned an undergraduate degree from Duke University and a Masters in Business Administration from Harvard University, as well as several professional securities licenses, including a Series 63, Series 3, and Series 7. During the marriage, the husband earned two additional professional securities licenses -- a Series 8 license

in 1999 and a Series 24 license in 2007.

The husband began working as an entry level associate at Morgan Stanley in 1987. In 1997, he was promoted to Managing Director. In January 2002, he formed and headed the Fixed Income Middle Markets Group and in October 2006, became Morgan Stanley's Global Head of Private Wealth Management. In 2006, the husband also became a member of Morgan Stanley's Management Committee, a group consisting of 35 senior employees.

The Underlying Divorce Action

In June 2009, plaintiff initiated an action for divorce against the husband in the Supreme Court, Westchester County (the matrimonial action). Plaintiff initially retained attorney Eleanor Alter to represent her in the action. On or about November 17, 2009, she changed attorneys, retaining defendants Norman S. Heller and Dylan S. Mitchell of Blank Rome LLP (Blank Rome) (collectively defendants).

Defendants reviewed Alter's file and consented to a scheduling order obliging the parties to exchange documents by December 31, 2009 and sworn net worth statements by January 9, 2010. In April 2010, defendants hired Martin I. Blaustein, C.P.A. to (1) advise on marital spending and lifestyle, (2) value the husband's professional securities licenses, and (3) analyze the components of the husband's income.

The parties have differing accounts as to the communication that thereafter ensued between them regarding the value of the enhanced earning capacity (EEC) attributable to the professional securities licenses earned by the husband during the marriage. According to defendants, Blaustein advised them that while a very large number could be calculated as a value, it could not be sustained because of the uncertainty of the husband's future income, the impact of

the financial downturn taking place at that time, and the inability to identify and separate income streams attributable to the licenses earned before and during the marriage. Defendants claim they communicated this information to plaintiff. Further, defendants assert that plaintiff's primary focus was to obtain a substantial maintenance award. They explained to her that seeking a share of the husband's enhanced earnings from his securities licenses as a marital asset would mean that the licenses could not be considered part of the husband's earning capacity for the purposes of awarding maintenance. Defendants contend that they discussed the forgoing issues with plaintiff on numerous occasions between May 2010 and September 2010, and that based upon those discussions, she agreed to waive her right to obtain a valuation of the EEC attributable to the professional securities licenses earned by the husband during the marriage.

In contrast to defendants' version of events, plaintiff alleges that defendants never informed her that the securities licenses earned by the husband during the marriage provided him with an EEC subject to equitable distribution. Instead, she claims, Heller told her on May 10, 2010 that Blaustein "says the licenses have no value." According to plaintiff, this was the one and only time defendants discussed the licenses or the concept of valuing them with her.

It is undisputed that on September 21, 2010, plaintiff appeared at the Westchester County courthouse for a scheduled pre-trial conference. On that date, plaintiff signed a stipulation pursuant to which she waived her right to have the husband's securities licenses valued (the stipulation) (Stipulation, at ¶ 10 [Exhibit C to Complaint]). The stipulation further states that the parties agreed that the universe of assets in dispute was reflected accurately on the parties' Joint Statement of Proposed Disposition, also dated September 21, 2010 (Stipulation, at ¶ 7 [Exhibit C to Complaint]). The husband's EEC from his securities licenses is not listed as an asset on the

Joint Statement of Proposed Disposition.

The parties have differing accounts of the events surrounding plaintiff's execution of the stipulation. Defendants assert that they explained the stipulation to plaintiff, she was fully informed, and voluntarily consented to waiving her right to have the licenses valued in an effort to maximize her maintenance award. According to plaintiff, defendants never explained the stipulation to her. She claims that she arrived at the courthouse on the morning of September 21, 2010 prepared to sign a statement of proposed disposition and that the stipulation was part of a large stack of papers Mitchell handed to her in a crowded hallway, instructing her to "start signing" (Plaintiff's Affidavit, at 32). Plaintiff alleges that she asked Heller prior to signing the stipulation "What is this?," to which Heller replied "Just sign it" (*id.*). When she asked again, Heller instructed "It's fine, just sign it" (*id.* at 33). Believing the stipulation consisted of only undisputed personal facts, plaintiff followed Heller's instructions and signed the document.

According to plaintiff, she thereafter requested a copy of the documents she signed on September 21, 2010. When defendants delayed in providing her with copies, she decided to switch counsel.

On October 4, 2010, plaintiff retained attorneys Georgia Kramer and Patricia Hennessy to represent her in the divorce. Upon receiving a copy of the papers she signed on September 21, 2010 from defendants, plaintiff showed the papers to Kramer and Hennessy. Kramer and Hennessy asked plaintiff whether the securities licences were ever valued. She told them that defendants hired Blaustein as the accountant for her case, but she was not sure whether he actually calculated a value for the licenses. Plaintiff, Kramer, and Hennessy then contacted Blaustein. According to plaintiff, Blaustein stated that he never told Heller that the licences had

no value and that defendants instructed him not to go forward with the valuation. Plaintiff and her new attorneys then asked Blaustein to calculate a value for the EEC.

On October 13, 2010, Kramer contacted the matrimonial court asking for a pre-motion conference to address a motion to strike the note of issue and certificate of readiness, which had been filed by defendants on June 24, 2010, and to permit the filing of a valuation report of the EEC acquired by the husband during the marriage as a result of the acquisition of the series 8 and series 24 licenses. The husband's attorney objected on the ground that the parties and counsel already stipulated on September 21, 2010 that they were not going to value the licenses.

According to plaintiff, Kramer and Hennessy thereafter obtained a preliminary valuation from Blaustein, calculating the EEC from the licenses to be between \$13,380,000 (using a 7% discount rate) and \$18,000,000 (using a 3% discount rate). Kramer then wrote to the matrimonial court on October 25, 2010 seeking permission to offer an expert report setting forth the value of the husband's EEC. The husband's counsel objected, again on the ground that the parties and counsel already stipulated that they were not going to value the licenses.

Blaustein then issued a signed valuation dated October 27, 2010, wherein he calculated the EEC from the licenses to be between of \$16,176,000 (using a 3% discount rate) and \$12,606,000 (using a 7% discount rate). When plaintiff served an expert report related to the valuation, the husband's counsel objected on the ground that it was produced after the deadline for serving such reports and, again, because it was in contravention of the stipulation. According to plaintiff, when her counsel contacted the matrimonial court about the issue, the law secretary for the court stated that she did not see any basis or cause to repudiate the stipulation.

The parties thereafter appeared before the matrimonial court to address the issue, at which

time, the court stated that it would not accept Blaustein's expert valuation and that if plaintiff's attorneys wished to make a motion on the subject, they could do so on the first day of trial, which was scheduled to commence May 10, 2011. On May 6, 2011, the husband's attorney moved to enforce the stipulation and to preclude plaintiff from offering a late expert valuation of the husband's purported EEC from his securities licences (Touitou Affirmation, Exhibit 96). In the alternative, the husband sought sufficient time to allow him to revise his pre-trial submissions, submit a rebuttal report, and to conduct discovery on the issues presented (*id.*). On May 8, 2011, Kramer filed a memorandum of law opposing the husband's motion and asking the court to overturn plaintiff's waiver of her right to have the EEC from the licenses valued (*id.*).

According to plaintiff, when the parties appeared before the matrimonial court on May 10, 2011, the court stated: "I do not want to hear anything about the Licenses again" (Plaintiff's Affidavit at 41, ¶ 144). The court adjourned the matter and ordered the parties to engage in settlement discussions, instructing them that if they encountered an impasse, they could contact the court and the court would attempt to reach a mutual resolution (*id.* at 42, ¶ 144).

On May 20, 2010, the parties entered into a written settlement agreement, pursuant to which, according to defendants, plaintiff received roughly \$9.1 million, including a \$1,487,404 lump-sum, non-taxable payment of maintenance (Settlement Agreement, Touitou Affirmation, Exhibit 98, at 36). Pursuant to the settlement, plaintiff agreed that the husband's "interest in his career, education, degrees, licenses, business interests and earning capacity is and is hereby declared to be the sole and exclusive property of the Husband" and that she was "irrevocably and unconditionally" transferring any interest she may have possessed in those items to the husband (*id.*). In light of the settlement agreement, the husband withdrew his pending motion to preclude

plaintiff from offering Blaustein's valuation.

The Instant Action

In May 2013, plaintiff commenced this action against defendants to recover damages for, among other things, legal malpractice and violation of Judiciary Law § 487. Plaintiff claims that defendants purposefully concealed the value of the EEC attributable to the husband's securities licenses from her and deceived her into waiving her right to value them because defendants were operating under an undisclosed conflict of interest. Specifically, plaintiff alleges that at the time she retained defendants to represent her in the matrimonial action, Blank Rome was simultaneously representing the husband's employer, Morgan Stanley, in various matters. Although Heller ran a conflict check for Morgan Stanley, at the "client level," defendants never informed plaintiff that Blank Rome represented Morgan Stanley in matters dating back to 1982. Plaintiff contends that defendants thereby violated their obligation to disclose to her any conflicting interests that might cloud their representation.

In particular, plaintiff highlights that when she retained Blank Rome, the husband was not only a Managing Director at Morgan Stanley, but also sat on the Management Committee, which she contends is responsible for the day to day operations of Morgan Stanley, including the assignment to outside counsel for legal work. She further alleges that at the time she signed the retainer agreement, Blank Rome was representing Morgan Stanley in a \$400 million public finance matter.

The complaint states that because of the foregoing circumstances, defendants were more interested in protecting the husband and their relationship with Morgan Stanley, than they were with being a zealous advocate for plaintiff in the divorce action. This lead not only to defendants

purposefully concealing the value of the husband's securities licenses from her, but also never serving any independent discovery requests, such as a document demand or interrogatories, on Morgan Stanley to ascertain or verify whether there were assets, accounts, or earnings that were not disclosed by the husband. Additionally, they failed to engage in a detailed investigation of his finances.

The complaint alleges that just prior to her signing the stipulation waiving her right to have the licenses valued, unbeknownst to her, defendants engaged in negotiations with the husband's attorney, during which they agreed to waive that right. They never disclosed those negotiations to her and thereafter pressured her to execute the stipulation without explanation or discussion.

In addition, the complaint alleges that immediately after plaintiff signed the stipulation waiving her right to have the licenses valued, the husband sent Blank Rome a check in the amount of \$111,580.19, purportedly representing a portion of her bill. The complaint alleges that the husband was in actuality "paying for the service that Blank Rome had just rendered to [him] and Morgan Stanley, as this was the only time in the proceeding that [the husband] paid any of [plaintiff's] legal bills" (Complaint, at 11, ¶ 41). According to plaintiff, up until that point, she had always paid Blank Rome's invoices in full, and on time.

In the first cause of action, plaintiff contends that defendants committed malpractice by: failing to disclose the alleged conflict of interest; failing to adequately explain the risks and benefits of valuing the EEC attributable to the securities licenses earned during the marriage; pressuring her into signing the stipulation without explaining the terms, conditions, and consequences of signing it; failing to perform the necessary due diligence before waiving her

right to have the EEC attributable to the licenses valued; and negligently advising her that the licences had no value, even though they were the single largest asset of the marital estate and given either a distribution of their value or their use as a bargaining tool, were the single most important economic asset at play in the divorce proceeding. According to plaintiff, defendants' negligence caused her to have to settle the matrimonial action without the ability to value the licenses. She seeks to recover the loss of \$8,322,823.25 allegedly resulting from defendants' negligence.

The second cause of action is for violation of Judiciary Law § 487, pursuant to which plaintiff seeks to recover treble damages in the amount of \$24,968,469.78. This cause of action is premised upon the same allegations set forth above. In addition, plaintiff asks the court for an order directing the release of \$98,000 being held in escrow to her, which represents the amount Blank Rome billed for the services it rendered to her September 2010.¹

Defendants answered and counterclaimed for unpaid legal fees in the principal sum of \$98,979.06, plus interest. They now move pursuant to CPLR 3212, for summary judgment dismissing the complaint and on their counterclaims for unpaid legal fees.

DISCUSSION

“It is well settled that summary judgment is a drastic remedy that should be employed only when there is no doubt as to the absence of triable issues” (*Aguilar v City of New York*, 162 AD3d 601, 601 [1st Dept 2018]). “On a motion for summary judgment, facts must be viewed ‘in

¹ The complaint also included a cause of action seeking to recover damages for violation of General Business Law § 349. In an order, entered March 10, 2014, the court (Anil C. Singh, J.), granted that branch of defendants' motion which was to dismiss the General Business Law § 349 cause of action.

the light most favorable to the non-moving party” (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). The proponent of the “motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). “Once this showing has been made . . . , the burden shifts to the party opposing the motion . . . to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; see *Zuckerman v City of New York*, 49 NY2d at 562).

“When deciding a motion for summary judgment, the court’s function is issue finding rather than issue determination” (*Genesis Merchant Partners, L.P. v Gilbride, Tusa, Last & Spellane, LLC*, 157 AD3d 479, 481 [1st Dept 2018]). The motion “must be denied where there is any doubt as to the existence of a triable issue or where the issue is arguable” (*id.* [internal quotation marks and citations omitted]).

Legal Malpractice

“In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney’s breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages” (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007][internal quotation marks and citations omitted]; see *Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 49 [2015]).

“Neither an error in judgment nor in choosing a reasonable course of action constitutes malpractice” (*Hand v Silberman*, 15 AD3d 167, 167 [1st Dept 2005]; see *Rosner v Paley*, 65 NY2d 736, 738 [1985]; *Boye v Rubin & Bailin, LLP*, 152 AD3d 1, 9 [1st Dept 2017]). While courts “do not rely on an attorney’s affidavit to tell [them] what constitutes malpractice” (*Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP*, 301 AD2d 63, 69 [1st Dept 2002]),

“[a] lawyer seeking summary judgment dismissing a legal malpractice claim cannot satisfy its prima facie burden without providing an expert opinion that any or all of the foregoing elements were not met, so long as the subject matter is not within the ken of an ordinary person At the same time, a plaintiff in a malpractice action cannot create an issue of fact without his or her own expert’s submission rebutting defendant’s expert’s opinion”

(*Cosmetics Plus Group, Ltd. v Traub*, 105 AD3d 134, 141 [1st Dept 2013][internal citations omitted]). Generally, “[c]onflicting expert affidavits raise issues of fact and credibility that cannot be resolved on a motion for summary judgment” (*Bradley v Soundview Healthcenter*, 4 AD3d 194, 194 [1st Dept 2004]; see *Middleton v Kenny*, 286 AD2d 957, 958 [4th Dept 2001]; *Gleeson-Casey v Otis Elevator Co.*, 268 AD2d 406, 407 [2d Dept 2000]; *Vitale v Meiselman*, 2013 NY Slip Op 30910[U], *8 [Sup Ct, New York County, 2013]).

“A claim for legal malpractice is viable, despite settlement of the underlying action, if it is alleged that settlement of the action was effectively compelled by the mistakes of counsel” (*Bernstein v Oppenheim & Co., P.C.*, 160 AD2d 428, 430 [2d Dept 1990]). Further, “[w]hile a conflict of interest amounting to a violation of the Rules of Professional Conduct does not, in and of itself, amount to malpractice, liability can follow where the client can show that he or she suffered actual damage as a result of the conflict” (*Esposito v Noto*, 132 AD3d 944, 945 [2d Dept 2015][internal quotation marks and citations omitted]; see *Cohen v Kachroo*, 115 AD3d 512, 513 [1st Dept 2014]).

Here, defendants argue that their failure to inform plaintiff that they represented the husband's employer, Morgan Stanley, does not constitute malpractice. Defendants assert that there was no conflict of interest because the underlying matrimonial action was entirely unrelated to any matters in which they represented Morgan Stanley. Further, Morgan Stanley was not a multi-million dollar Blank Rome Client. Rather, in 2009 and 2010, Morgan Stanley accounted for only .156% and .161% of the firm's gross income. In addition, defendants assert that the Management Committee of which the husband was a member did not control the assignment of legal work to law firms and the husband had no knowledge of defendants' existence until plaintiff retained them to represent her in the matrimonial action.

In support of these assertions, defendants submit the affidavit of the Head of Human Resources for Morgan Stanley Wealth Management, wherein he states that the Management Committee, of which the husband was a member from 2006 until January 2010, was not responsible for, nor did it have any authority to make, any decisions concerning the retention of outside law firms (Frers Affidavit, Defendants' Motion for Summary Judgment, Exhibit 6, at ¶ 6). Those decisions were made by the legal division in accordance with the guidelines and policies applicable to that division (*id.* at ¶ 6).

Defendants also submit the husband's affidavit, wherein he states that plaintiff's characterization of him as being at the controls of Morgan Stanley is a fabrication (Armstrong Affidavit, Defendants' Motion for Summary Judgment, Exhibit 4, at ¶ 31). Morgan Stanley's Board of Directors, of which he was never a member, retained and exercised authority to govern the firm (*id.* at ¶ 32). During his tenure as a member of the Management Committee, he never recommended or suggested, and never discussed with another member of the committee, the

recommendation or suggestion that Morgan Stanley engage a particular outside law firm to preform services for the company (*id.* at ¶ 34). The Management Committee had no authority to make decisions concerning the retention of outside firms (*id.*). Those decisions were made by the general counsel's office (*id.*).

Defendants also submit the affidavits of Heller and Mitchell, wherein they state that they were not influenced by Blank Rome's relationship with Morgan Stanley and that they did not collude with the husband by demanding that he pay plaintiff's legal fees (Heller Affidavit, Defendants' Motion for Summary Judgment, Exhibit 2; Mitchell Affidavit, Defendants' Motion for Summary Judgment, Exhibit 3). They assert that the husband was directed by the court to pay plaintiff's legal fees *pendente lite* and without prejudice to reallocation in the event of a trial and judgment (*id.*). Plaintiff was aware that they demanded that the husband pay her outstanding bills and offered no objection (*id.*).

In his affidavit, Heller also addresses plaintiff's allegation that defendants' relationship with Morgan Stanley influenced their decision not to serve independent discovery requests on Morgan Stanley to ascertain or verify whether there were assets, accounts, or earnings that were not disclosed by the husband. Heller asserts in this regard:

"Plaintiff was suspicious that [the husband] was hiding substantial assets from her. I recommended that she engage a forensic accountant to assist her in her search for assets, but she declined my advice and worked instead with her friend, Colette Fleming. Plaintiff and Ms. Fleming conducted their own tracking and analysis of [the husband's] assets, but never advised me that they had uncovered the substantial hidden assets that they suspected existed. In fact, Ms. Fleming advised me that she found no evidence of hidden assets. At no time did Plaintiff identify any relevant financial or other information that was not disclosed by [the husband] and that was in the possession of Morgan Stanley. Had she done so, I would have served appropriate disclosure demands upon [the husband], Morgan Stanley or both, to obtain the information needed"

(Heller's Affidavit, ¶ 9).

In further support of their motion, defendants contend that their decision not to value the EEC attributable to the securities licenses was unrelated to any conflict of interest and did not violate the applicable standard of care inasmuch as their decision was entirely reasonable. Defendants claim that Blaustein advised them that a valuation of the EEC from the licences could not be sustained given, among other things, the uncertainty of the husband's future income, the looming financial crisis, and the inability to isolate the income streams attributable to the licenses. In addition, in order to establish a claim to equitable distribution of the value of the licenses, plaintiff would have to have established not only their value, but also that she made a specific and direct contribution to the husband's attainment of those licenses. Defendants assert that plaintiff would have been unable to do so.

Defendants further maintain that plaintiff's primary focus in the matrimonial action was to obtain a substantial maintenance award. They contend that seeking a share of the husband's EEC from the licenses would have undermined this goal, inasmuch as the licenses could no longer be considered part of the husband's earning capacity for the purposes of awarding maintenance. They concluded that in light of the problems involved in valuing the EEC from the licences for equitable distribution purposes, plaintiff's interests were better served by focusing her efforts towards maximizing her maintenance award.

In support of these contentions, defendants submit the affidavit of Blaustein, wherein he states:

"After reviewing and considering the pertinent documentation and information that was provided to me, including [the husband's] educational background, work history, earnings, record and licensures, I had several discussions between May and October 2010 with Mr. Heller, Mr. Mitchell and [plaintiff] about the concept of EEC, the facts surrounding this particular EEC (if any), and the impediments to establishing whether in fact the licenses attained during the marriage created EEC. I also discussed with Mr. Heller, Mr. Mitchell and [plaintiff] the risks associated with pursuing a distribution of

[the husband's] EEC (if any) in the Divorce Action, including the 'double dipping' issue" (Blaustein Affidavit, Defendants' Motion for Summary Judgment, Exhibit 5, at ¶ 6). Blaustein further states in his affidavit that they "did not need to calculate the numbers for EEC (if any) to discuss the foregoing," and that defendants' "recommendation that Plaintiff waive her EEC claim (if any) in the Divorce Action was, in [Blaustein's] opinion, reasonable" (id. at ¶ 7-8).

Defendants also submit the affidavits of three experts, each opining that it was reasonable, under the circumstances, for defendants to recommend that plaintiff waive her right to value the securities licences earned by the husband during the marriage and preserve the income stream attributable to them for the purposes of awarding maintenance (Bodnar Affidavit, Defendants' Motion for Summary Judgment, Exhibit 12, at ¶ 11; Spolzino Affidavit, Defendants' Motion for Summary Judgment, Exhibit 13, at ¶ 10; Johnson Affidavit, Defendants' Motion for Summary Judgment, Exhibit 14, at ¶¶ 9-12). According to defendants' experts, because of various factors, no identifiable component of the husband's future earning capacity could be attributable to the licences earned by the husband during the marriage and no further evidence would have enabled an expert to isolate the income stream attributable to these licences (Bodnar Affidavit, Defendants' Motion for Summary Judgment, Exhibit 12, at ¶ 21-26; Spolzino Affidavit, Defendants' Motion for Summary Judgment, Exhibit 13, at ¶ 19 Johnson Affidavit, Defendants' Motion for Summary Judgment, Exhibit 14, at ¶¶ 13-18).

Further, even if any enhanced income could be accurately and fairly attributed to the licences earned by the husband during the marriage, the stream of income attributable to them would have become unavailable for maintenance (Bodnar Affidavit, Defendants' Motion for Summary Judgment, Exhibit 12, at ¶ 11; Spolzino Affidavit, Defendants' Motion for Summary Judgment, Exhibit 13, at ¶ 8; Johnson Affidavit, Defendants' Motion for Summary Judgment,

Exhibit 14, at ¶¶ 9-12). In this regard, defendants rely on the prohibition against “double dipping,” highlighting that the Court of Appeals has held that “[o]nce a court converts a specific stream of income into an asset, that income may no longer be calculated into the maintenance formula and payout” (*Grunfeld v Grunfeld*, 94 NY2d 696, 705 [2000]; see also *McSparron v McSparron*, 87 NY2d 275, 286 [1995][cautioning courts to “be meticulous in guarding against duplication in the form of maintenance awards that are premised on earnings derived from professional licenses”]).

In addition, defendants’ experts opine that plaintiff did not have a viable EEC claim inasmuch as she did not make any direct contributions to the husband’s attainment of the securities licences (Bodnar Affidavit, Defendants’ Motion for Summary Judgment, Exhibit 12, at ¶ 27-29; Spolzino Affidavit, Defendants’ Motion for Summary Judgment, Exhibit 13, at ¶ 24-26; Johnson Affidavit, Defendants’ Motion for Summary Judgment, Exhibit 14, at ¶¶ 19-21). In this regard, they rely on case law holding that “[w]here only modest contributions are made by the nontitled spouse toward the other spouse’s attainment of a . . . professional license, and the attainment is more directly the result of the titled spouse’s own ability, tenacity, perseverance and hard work, it is appropriate for courts to limit the distributed amount of that [EEC]” (*Evans v Evans*, 55 AD3d 1079, 1080-1081 [3d Dept 2008][quotations marks and citations omitted]). The experts highlight that the husband’s deposition testimony indicates that he did not need contributions from plaintiff to obtain the license because he only needed to prepare to take the licencing examinations by reviewing a binder of materials provided by Morgan Stanley.

Lastly, defendants’ experts fault Blaustein’s October 27, 2010 valuation as not establishing that there is an EEC attributable solely to the licences obtained during the marriage (Bodnar Affidavit, Defendants’ Motion for Summary Judgment, Exhibit 12, at ¶ 30-32; Spolzino

Affidavit, Defendants' Motion for Summary Judgment, Exhibit 13, at ¶¶ 29-32; Johnson Affidavit, Defendants' Motion for Summary Judgment, Exhibit 14, at ¶¶ 22-24). They assert in this regard that Blaustein's report fails to establish an accurate and supportable nexus between the licenses and any identifiable component of the husband's earnings that were purportedly enhanced by them. Rather, Blaustein's valuation assumes that every dollar of the husband's increase in earnings after he acquired these licenses was attributable solely to these licenses and fails to explain or account for factors other than those licenses that could have contributed to the husband's earnings (*id.*). Blaustein's deposition testimony, which defendants submit in support of their motion, supports this view, inasmuch as he testified that "by the very nature of the calculation, it assumes that this enhancement is all attributable to the licenses earned during the marriage" (Blaustein's Deposition Testimony, Touitou Affirmation, Exhibit 8, at 102-103).

Defendants also contend that contrary to plaintiff's allegations, she was fully informed before she signed the stipulation waiving her right to value the licenses. In support of this assertion, defendants submit various e-mails which they claim imply that such conversations took place. Further, they submit the deposition testimony of Heller, during which he testified that when he discussed the issue of valuing the licenses with Blaustein, Blaustein advised that although in calculating their value, it "would be a very big number," his view was that plaintiff would get no more than 10% of that number because of the other licenses the husband earned prior to the marriage and the value could not be substantiated on cross-examination (Heller Deposition, Defendants' Motion for Summary Judgment, Exhibit 9, at 87-89). Further, Blaustein told Heller that there would be a problem with "double dipping" and recommended "going for maintenance" (*id.* at 89). Heller testified that he communicated this information to plaintiff in May 2010 and advised her not to have the licenses valued. Heller believed that introducing a

valuation would adversely impact the settlement negotiations, cause the husband to get his own expert to attack Blaustein's valuation, and there was nothing to be gained given Blaustein's opinion that the valuation could not be sustained at trial (*id.* at 97).

Defendants further contend that even assuming plaintiff could establish that they were negligent, she cannot establish that she sustained any actual or ascertainable damages as a result of their alleged conflict of interest and/or negligence. Defendants assert in this regard that plaintiff received a sizeable settlement of \$9.2 million which constitutes more than 50% of the total marital estate of \$16.2 million and also received a right to a portion of the husband's pension benefits (Johnson Affidavit, Defendants' Motion for Summary Judgment, Exhibit 14, at ¶ 25). Her contention that she would have received more if defendants valued the licenses attained during the marriage is entirely speculative.

Finally, defendants contend that plaintiff's malpractice claim is barred by the settlement agreement in the matrimonial action. They point out in this regard that pursuant to the settlement, plaintiff waived any interest she may have had in the husband's licenses and EEC, and accepted nearly \$1.5 million in maintenance. They assert that in light of the foregoing, she cannot now assert a claim for an amount equal to what she purports to be her share of the husband's EEC.

In opposition to defendants' motion, plaintiff maintains that defendants' simultaneous representation of Morgan Stanley without obtaining her consent constituted legal malpractice because it violated the Rules of Professional Conduct and resulted in defendants' failure to advocate for her in the matrimonial action, leading to a settlement that was not in her best interest. She asserts that defendants had an interest in maintaining and encouraging Blank Rome's lucrative relationship with Morgan Stanley which impacted their judgment, resulting in

their failure to give her the advice that an attorney possessing the skill and knowledge commonly possessed by a member of the legal profession would give.

In a sworn affidavit, plaintiff states that defendants did not advise her of their relationship with Morgan Stanley. Plaintiff further asserts that defendants never advised her of the potential benefits and consequences of valuing the EEC attributable to the licences earned by the husband during the marriage as a marital asset. She alleges that defendants negotiated away her right to conduct a valuation of the EEC without her knowledge and then pressured her into signing the stipulation without explaining it to her.

Plaintiff asserts that the only communication she had with defendants about the licences, was on May 10, 2010, when Heller told her that Blaustein “says the licenses have no value.” She points out that Blaustein testified during his deposition that he never told defendants that the licences were not worth going after or that they should not go forward and value the licenses (Blaustein’s Deposition, at 122-123). Blaustein also testified that he never made the recommendation to defendants that the EEC “be taken off the table” (*id.* at 80).

In response to Heller’s assertion that he did not serve any discovery demands on Morgan Stanley because plaintiff’s friend, Colette Fleming, was helping plaintiff to track or uncover the husband’s hidden assets, plaintiff submits Fleming’s affidavit. Fleming states that she has been a personal friend to the plaintiff for 25 years and worked at Morgan Stanley with the husband (Fleming Affidavit, Plaintiff’s Opposition to Motion for Summary Judgment, Exhibit 6, at ¶ 2). During the time period that defendants represented plaintiff in the divorce, Fleming was a stay-at-home mother (*id.* at ¶ 3). She tried to help plaintiff by preparing excel spread sheets organizing the information that had been supplied to her, or that she had, such as joint bank

account statements and tax returns (*id.*). However, she was never involved in searching for, uncovering, or tracking the husband's assets. She states that she did not and would not have had any independent access to the husband's financial information (*id.* at ¶ 5).

In further support of her opposition, plaintiff submits the affidavit of an expert in the field of professional responsibility and legal malpractice, who opines that Blank Rome had an impermissible conflict of interest and was required to obtain plaintiff's informed consent before representing her in the divorce (Simon Affidavit, Plaintiff's Opposition to Motion for Summary Judgment, Exhibit 3). In addition, plaintiff submits the affidavits of two other experts, both opining that a reasonably prudent attorney would have obtained a formal valuation of the EEC resulting from the licenses earned by the husband during the marriage inasmuch as this was potentially a substantial marital asset and defendants should have conducted discovery in connection with the licenses and their effect on the husband's EEC. Further, a reasonably prudent attorney would have explained to plaintiff the costs and benefits of claiming the EEC as a marital asset during settlement negotiations or at trial, before encouraging her to sign the stipulation waiving her right to obtain a valuation. Additionally, defendants did not competently and diligently represent plaintiff when they advised her to waive her ability to either use the value of this asset as leverage or as a bargaining chip in settlement negotiations and/or the right to seek a percentage of the value of such asset at trial (Shapiro Affidavit, Plaintiff's Opposition to Motion for Summary Judgment, Exhibit 4; Daniele Affidavit, Plaintiff's Opposition to Motion for Summary Judgment, Exhibit 5).

Plaintiff's experts point out that equitably distributing the EEC from the licences as marital property would not have precluded plaintiff from receiving a maintenance award (*see*

Hlinka v Hlinka, 22 AD3d 524, 525 [2d Dept 2005][“The Supreme Court did not impermissibly engage in the ‘double counting’ of income in valuing the plaintiff’s license, which was equitably distributed as marital property, and in awarding maintenance to the defendant”]). However, they do not dispute defendants’ assertion that if the EEC was equitably distributed as marital property, a downward adjustment would have to have been made in calculating her maintenance award (*see id.* [“Supreme Court avoided double counting of income by subtracting the excess earnings produced by the plaintiff’s master electrician’s license from his income in determining the amount of maintenance to which the defendant was entitled”]). Nevertheless, plaintiff’s expert opines that defendants’ mistake in waiving the right to value the licenses resulted in damages to plaintiff because, given plaintiff’s contributions to the marriage and to the husband’s career at a complete sacrifice to her own, the matrimonial court would have awarded her 35% of the EEC calculated by Blaustein, i.e. \$4,650,800 (3% discount) or \$3,626,000 (7% discount), and would also have awarded her lifetime maintenance using the husband’s annual salary or yearly gross income or earnings after that adjustment (Daniele Affidavit, Plaintiff’s Opposition to Motion for Summary Judgment, Exhibit 5 [citing *Jayaram v Jayaram*, 62 AD3d 951 (2d Dept 2009)]; Shapiro Affidavit, Plaintiff’s Opposition to Motion for Summary Judgment, Exhibit 4).

Finally, plaintiff’s expert asserts that deciding whether plaintiff would have been able to establish a nexus between the licenses earned during the marriage and an EEC involve questions of fact (Daniele Affidavit, Plaintiff’s Opposition to Motion for Summary Judgment, Exhibit 5, at ¶¶ 53-55; Shapiro Affidavit, Plaintiff’s Opposition to Motion for Summary Judgment, Exhibit 4, ¶¶ 55-57). They point out in this regard that defendants’ own experts concede that whether a license or professional degree results in EEC distributable in equitable distribution is a question

of fact (*id.*).

In light of the foregoing, the court finds that the conflicting affidavits, deposition testimony, and expert opinions raise issues of fact as to whether defendants acted under an undisclosed conflict of interest and, as a result, their professional judgment was impaired causing them not to seek a valuation of the EEC attributable to the husband's securities licenses and to pressure plaintiff into signing a stipulation waiving her right to a valuation without sufficiently explaining the issue or discussing the stipulation with her. The competing expert affidavits also raise issues of fact as to whether plaintiff suffered damages as a result. Therefore, that branch of defendants' motion which is for summary judgment dismissing the first cause of action sounding in legal malpractice is denied.

Violation of Judiciary Law § 487

Judiciary Law § 487 states that “[a]n attorney or counselor who . . . [i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . [i]s guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action” (Judiciary Law § 487 [1]). “Treble damages awarded under Judiciary Law [section] 487 are not designed to compensate a plaintiff for injury to property or pecuniary interests. . . . Rather, they are designed to punish attorneys who violate the statute and to deter them from betraying their special obligation to protect the integrity of the courts and foster their truth-seeking function” (*Jean v Chinitz*, 163 AD3d 497, 499 [1st Dept 2018][internal quotation marks and citations omitted]).

This cause of action is not duplicative of the cause of action seeking damages for legal

malpractice. “A violation of Judiciary Law § 487 requires an intent to deceive, whereas a legal malpractice claim is based on negligent conduct” (*Bill Birds, Inc. v Stein Law Firm, P.C.*, 164 AD3d 635, 2018 N.Y. App. Div. LEXIS 5735 [2d Dept 2018]).

Further, defendants failed to demonstrate that the Judiciary Law § 487 cause of action has no merit. Plaintiff alleges that defendants concealed their relationship with Morgan Stanley. She also alleges that defendants’ interest in maintaining and encouraging that relationship resulted in them intentionally deceiving her into believing that the securities licenses acquired by the husband during the marriage had no value. She further alleges that defendants engaged in negotiations with the husband’s counsel during which, without her knowledge, they agreed to waive her right to value the licenses. They concealed this from her for several months, and then pressured her to execute a stipulation waiving her right to value the licenses, without explanation or discussion. In addition, plaintiff alleges that as a consequence of defendants’ undisclosed conflict of interest, defendants never served any independent discovery requests on Morgan Stanley in order to ascertain or verify whether there were assets, accounts, or earnings that were not disclosed by the husband. In support of their motion, defendants submit affidavits denying that their decisions were influenced by a conflict of interest and asserting that they did not intend to deceive plaintiff. Defendants’ assertions are insufficient to warrant judgment as a matter of law in defendants’ favor. They merely raise an issue of fact (*see Mazel 315 W. 35th LLC v 315 W. 35th Assoc. LLC*, 120 AD3d 1106, 1107 [1st Dept 2014]). Therefore, that branch of defendants’ motion which is for summary judgment dismissing the second cause of action alleging a violation of Judiciary Law § 487 is also denied.

Defendants' Counterclaims for Legal Fees

In light of the foregoing, that branch of defendants' motion which is for summary judgment on their counterclaims for legal fees is also denied (*see Kluczka v Lecci*, 63 AD3d 796, 798 [2d Dept 2009][“An attorney may not recover fees for legal services performed in a negligent manner”]; *Tabner v Drake*, 9 AD3d 606, 611 [3d Dept 2004][“A nonfrivolous claim of legal malpractice is, by nature, inextricably intertwined with a claim for fees for the same representation claimed to have been deficient”]).

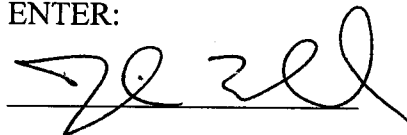
In accordance with the foregoing, it is hereby

ORDERED that defendants' motion is denied.

This constitutes the decision and order of the Court.

Dated: 10-11-2018

ENTER:



J.S.C.

HON. DAVID B. COHEN
J.S.C.