

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS** IAS PART 4

Justice

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LAW OFFICES OF ROBERT H. BRENT, ESQ.,
P.C., and ROBERT H. BRENT,

Index

No.: 710000/2017

Motion

Dated: October 31, 2017

Plaintiff(s),

-against-

Motion

Cal. No.: 4

WITTENSTEIN & WITTENSTEIN, P.C.
and ALYCE WITTENSTEIN,

Motion

Seq. No.: 3

Defendant(s).

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The following papers numbered 1-5 read on this motion by defendant for an Order: (1) pursuant to CPLR §3211(a)(4) dismissing this action in its entirety on the ground that there are two prior pending actions between the parties; (2) pursuant to CPLR §3211(a)(7) dismissing this action in its entirety on the grounds that the Complaint fails to state a claim for which relief can be granted; (3) pursuant to CPLR §602(a) staying and or consolidating this action with the prior pending action between the parties and (4) pursuant to Rule 130-1.1 et seq. of the Uniform Rules of the Trial Courts of the State of New York awarding sanctions and cost to defendants based on plaintiffs' frivolous conduct.

PAPERS

NUMBERED

Notice of Motion - Affid.-Exhibits.....	1- 4
Reply Affidavits - Exhibits	5

Upon the foregoing papers it is ordered that this motion by defendants is determined as follows:

The branch of defendants' motion for an order dismissing the complaint pursuant to CPLR §3211(a)(7) upon the ground that each cause of action alleged in the complaint fails to state a claim upon which relief can be granted, is denied. On a motion to dismiss pursuant to CPLR §3211, the pleadings are afforded a liberal construction and the Court accepts facts as alleged in the complaint as true, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory (*Morone v. Morone*, 50 NY2d 481; *Rovello v. Orofino Realty Co.*, 40 NY2d 633; *A.O. Fox Memorial Hospital v. American Tobacco, Inc.*, 302 AD2d 413;

Hornstein v. Wolf, 109 AD2d 129). To that end, on a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211, a court may freely consider affidavits submitted by a plaintiff in opposition thereto to remedy any defects in the complaint (*Vaz v. Sipsas*, 1 AD3d 503; *Lynch v. McQueen*, 309 AD2d 790; *Rovello v. Orofino Realty Co.*, *supra*) and the criterion is whether the plaintiff has a cause of action, not whether he has stated one (*Leon v. Martinez*, 84 NY2d 83; *Guggenheimer v. Ginzburg*, 43 NY2d 268). Here, after review of the verified complaint filed in this action as well as plaintiffs' opposition papers, the Court finds that the instant complaint, although inadequately drafted in some respects, adequately alleges for pleading survival purposes (*Leon v. Martinez*, *supra*), legally cognizable causes of action.

The branch of defendants' motion to consolidate the instant action with the prior pending actions is granted to the extent that the instant action shall be tried jointly with the action entitled *Wittenstein & Wittenstein v Law Office of Robert H. Brent, Esq., P.C.*, (NYS Supreme Court, Queens County Index Number 707485/2017). Separate index numbers, Requests for Judicial Intervention and Notes of Issue shall be filed for each action.

The title of the actions combined for joint trial purposes shall be:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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LAW OFFICES OF ROBERT H. BRENT, ESQ. P.C.
and ROBERT H. BRENT,
Plaintiff(s),
-against-

Index
No.: 710000/2017
Action No. 1

WITTENSTEIN & WITTENSTEIN, P.C.
and ALYCE WITTENSTEIN,
Defendant(s).

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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WITTENSTEIN & WITTENSTEIN P.C. and
ALYCE WITTENSTEIN,
Plaintiff(s),
-against-

Index
No.: 707485/2017
Action No. 2

LAW OFFICE OF ROBERT H. BRENT, ESQ. P.C.,
and ROBERT H. BRENT.
Defendant(s).

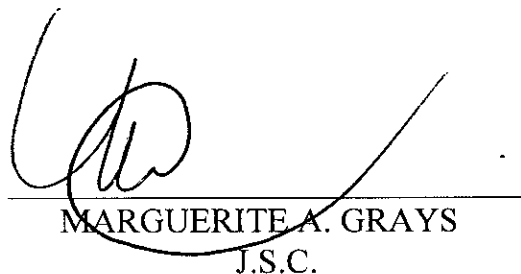
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A copy of this Order with Notice of Entry shall be served on all parties to the actions combined, the Clerk of Queens County and, at the time of filing Notes of Issue, on the Clerk of the Commercial Division Part B.

The branch of defendants' motion to dismiss the complaint pursuant to CPLR §3211(a)(4), is thus denied.

The branch of defendants' motion awarding sanctions and costs to defendants is denied. The conduct complained of is not frivolous within the meaning of 22 NYCRR 130-1.1 (*Miller v. Miller*, 96 AD3d 943 [2012]; *Burns v. Palazola*, 22 AD3d 779 [2005]; *Ortega v. Bisogno & Meyerson*, 2 AD3d 607 [2003]; *Del Ponte v. 1910-12 Ave. U Realty Corp.*, 7 AD3d 562 [2004]).

Dated: **MAR 28 2018**



MARGUERITE A. GRAYS
J.S.C.

