SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

----------X Index No. 710000/2017

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

Plaintiffs,

-against-

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

Defendants.

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MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS

FEATHER LAW FIRM, P.C.
Attorneys for the Defendants
666 Old Country Road
Suite 304
Garden City, New York 11530
(516) 745-9000

David S. Feather, Esq.
On the Brief

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INTRODUCTION

This action was commenced by the filing and service of a Summons and Complaint on or about July 11, 2017. The Complaint, which is annexed to the Affirmation of defense counsel, Marc E. Elliott as Exhibit "A", alleges eleven causes of action.

The first cause of action seeks a declaratory judgment that an oral partnership existed between the Plaintiff Brent and Defendant Wittenstein, while the second, third and fourth causes of action lie in breach of an oral contract, breach of an implied contract, and breach of the duty of good faith and fair dealing, respectively. The fifth cause of action requests an accounting, the sixth alleges a breach of fiduciary duty, while the seventh is as and for conversion. The eighth cause of action is for unjust enrichment, while the ninth cause of action accuses the Defendant Wittenstein of defamation *per se*. The tenth cause of action alleges that the Defendants tortuously interfered with the Plaintiffs' contractual relations, while the eleventh and final cause of action is for "Money Had and Received".

Defendants have now brought a motion to dismiss the Complaint in its entirety. For the reasons set forth herein, this motion should be denied in its entirety.

STATEMENT OF FACTS[1]

Throughout their Memorandum of Law in Support of their Motion, the Defendants continually state facts that are not in the Complaint, and editorialize on the facts that are in the Complaint. Obviously, a motion to dismiss is no place for counsel to add facts, or to attempt to interpret them. Rather, as set forth below, in determining a motion to dismiss, a court must accept each fact as set forth by the plaintiff in the four corners of the Complaint as true. The Court should not, indeed cannot, accept any "facts" outside of the plain reading of the

[1] This Statement of Facts are only a synopsis of the facts set forth in Plaintiffs' Complaint, and is set forth herein solely for the convenience of the Court. The Court is respectfully referred to the Plaintiffs' Complaint, which is annexed to the Affirmation of Marc E. Elliott as Exhibit "A".

Complaint, and should not make any determination as to the validity of the facts that are set forth in the Complaint.

The facts of this matter, as are set forth in the Plaintiffs' Complaint, are as follows.

INTRODUCTION

The Plaintiff Brent and Defendant Wittenstein were married on November 3, 2002. There are two minor children of the marriage. Complaint, ¶11. From March of 2014 to the present the Plaintiff Brent and the Defendant Wittenstein have lived separate and apart. Plaintiff Brent and the Defendant Wittenstein are currently going through a divorce proceeding, which was commenced in this Court on March 9, 2017. Complaint, ¶13-¶14.

THE LAW FIRM OF WITTENSTEIN & WITTENSTEIN, ESQS., P.C.

Both Plaintiff Brent and Defendant Wittenstein are attorneys, and both are duly licensed to practice law in the State of New York. Complaint, ¶15. Defendant Law Firm is a personal injury law practice. Defendant Wittenstein bought the Defendant Law Firm from her father in or about 2000. However, payment for the Defendant Law Firm was through a promissory note. Complaint, ¶16-¶17. Since the commencement of their marriage and until late April, 2017, Defendant Wittenstein was a stay-at-home mother and did not actively practice law. Rather, Plaintiff Brent was the only attorney actively practicing law in Defendant Law Firm during this time period. Complaint, ¶18-¶19.

Indeed, from 2002 until late April, 2017 the Plaintiff Brent handled all the Defendant Law Firm's cases from initiation to completion. Complaint, ¶20. Plaintiff Brent's duties and responsibilities during this time period included, but were not necessarily limited to, obtaining new clients through marketing efforts, keeping in contact with referral sources, handling all client matters, contact with the courts, attorneys, physicians, insurance companies, and others,

generating and handling the computer and hard-copy files for the cases, negotiating settlements on cases, paying all of the Defendant Law Firm's clients, lienholders and operating expenses from the Defendant Law Firm's bank accounts, managing and maintaining the Defendant Law Firm's operating and escrow accounts, and managing and supervising the Defendant Law Firm's two paralegals. Complaint, ¶21.

PLAINTIFF BRENT WAS A PARTNER WITH THE DEFENDANT WITTENSTEIN IN THE DEFENDANT LAW FIRM

During most of the fifteen (15) years that Plaintiff Brent operated the Defendant Law Firm, he did not receive payroll checks, but rather received a distribution of profits from the business. He was paid primarily through "draw payments" on profits, through Officer Exchanges and with the transfer of business profits into the parties' joint account. Complaint, ¶22-¶23. In addition, at various times Plaintiff Brent Plaintiff Brent made capital contributions, both directly and indirectly, to the Defendant Law Firm. These capital contributions, which totaled over $400,000.00, were made in the form of direct payments into the Defendant Law Firm's operating account, as well as through paying the parties' personal expenses. The monies used for these capital contributions came from the Plaintiff's separate, and not marital, funds, and were used to pay for the Defendant Law Firm's expenses, such as payroll, rent, utilities and office supplies. Complaint, ¶24-¶25, ¶27. In addition, monies that the Plaintiff earned at the Defendant Law Firm during the marriage was used to pay Defendant's father for the purchase of the Defendant Law Firm. Complaint, ¶28.

As a result of the Plaintiff's monetary support of the Defendant Law Firm, and the use of marital funds to purchase the Defendant Law Firm, the Plaintiff is also asserting that he has an equity stake in said firm. Complaint, ¶29. In addition, throughout the parties' fifteen (15) year marriage, the Defendant herself treated the Plaintiff as if he was a partner in the Defendant Law

Firm, and represented to the public that he was, indeed, a partner in said law firm. Indeed, it was the parties' intention that the Plaintiff Brent and Defendant Wittenstein be partners in their law practice. Complaint, ¶30-¶31. Lastly, Plaintiff Brent reasonably and justifiably relied upon the Defendant Wittenstein's conduct in this regard.

EVICTION OF THE PLAINTIFF BRENT BY THE DEFENDANTS

In or about December, 2016, Defendant Wittenstein signed a five-year lease for new office space for the law firm, without allowing Plaintiff Brent to assist in finding the new law office space. In fact, Defendant Wittenstein refused to even inform Plaintiff Brent where the new law office was located. Complaint, ¶34-¶35. Despite the Defendant Wittenstein's failure and refusal to provide Plaintiff Brent with access to the Defendant Law Firm's new case management system, Plaintiff Brent was able to manage the cases through his existing Outlook system. Complaint, ¶39.

From September 2016 through April 2017, Defendant Wittenstein and Steve Ostringer, one of the Defendant Law Firm's paralegals, who is a personal friend of Defendant Wittenstein, began a campaign of constant harassment, verbal abuse and physical assault against Plaintiff Brent, as well as threats of future violence against Plaintiff Brent. Mr. Ostringer, with Defendant Wittenstein's encouragement, verbally and physically confronted Plaintiff Brent, spat on him, punched him in the face, and threatened to kill him. Complaint, ¶40-¶49. The verbal and physical harassment and threats as set forth above made working in the office intolerable for Plaintiff Brent. Complaint, ¶50.

In late April, 2017 Defendant Wittenstein locked Plaintiff Brent out of all of the office files, out of his own computer at the office, out of the firm's computer programs, and refused to provide him with an access code to the Defendant Law Firm's Cloudex and the new case management system. Defendant Wittenstein further denied Plaintiff Brent access to the

QuickBooks program and discontinued his authorization to sign checks. After Defendant Wittenstein locked Plaintiff Brent out of the case files and computer system of the office, including the office accounting program QuickBooks, he repeatedly requested that total access be restored. Defendant Wittenstein repeatedly denied and refused this request. Complaint, ¶58.

Furthermore, on or around that same date, Defendant Wittenstein cancelled Plaintiff Brent's Citibank credit card, discontinued his gmail account, removed files and personal items from on and in his desk, removed file cabinets from his office, confiscated mail addressed to him, refused to pay certain of his bills which had customarily been paid by the Defendant Law Firm and, upon information and belief, directed the staff to no longer answer his telephone calls when he called the office. Shortly thereafter, Defendant Wittenstein contacted the Defendant Law Firm's clients, their physicians and various insurance companies and informed them that Plaintiff Brent was no longer working for the firm, that he had quit and that she would be handling the Defendant Law Firm's cases. Complaint, ¶54-¶57.

The Defendants' actions were intentional and were designed to force Plaintiff Brent to leave the Defendant Law Firm's premises and cease practicing law on behalf of Defendant Law Firm. Complaint, ¶59. Due to the hostile environment that Defendant Wittenstein created and maintained, in April, 2017 Plaintiff Brent obtained a new office for the practice of law in Forest Hills, New York. Complaint, ¶57.

POST-EVICTION ACTIONS BY DEFENDANT WITTENSTEIN

Since evicting Plaintiff Brent from the Defendant Law Firm, Defendant Wittenstein has, without Plaintiff Brent's consent, appropriated to herself all of the assets of the Defendant Law Firm, including but not limited to all attorneys' fees and reimbursements for disbursements for settled personal injury cases in an amount presently unknown to Plaintiff Brent. This includes

cases which Plaintiff Brent had settled just prior to his eviction from the Defendant Law Firm, as well as several cases that were close to settling and had offers ready to be processed. Defendant Wittenstein has appropriated these settlements to herself, and has refused to share any of these proceeds with Plaintiff Brent. Defendant Wittenstein has repudiated the parties' partnership, effectively dissolving it, and has taken the position that Plaintiff Brent was an employee of Defendant Law Firm and not a partner therein. Complaint, ¶64-¶72.

POST-EVICTION ACTIONS BY PLAINTIFF BRENT

After being evicted by the Defendants, the Plaintiff Brent began practicing law in his own, separate law firm located in the town of Forest Hills, New York. Shortly thereafter, Plaintiff Brent was contacted by a number of clients from the Defendant Law Firm who requested that he continue to work on their case(s). Complaint, ¶73-¶74. Plaintiff Brent informed these individuals that he could not work on their matters for the Defendant Law Firm, but if they wished for his representation of them to continue they would have to retain him and the Plaintiff Brent Law Firm separately. Complaint, ¶75. Those clients who decided that they wanted Plaintiff Brent and the Plaintiff Brent Law Firm to represent them in their legal matters signed retainer agreements with the Plaintiff Brent Law Firm, signed Consent to Change Attorney forms, and executed "Stop work" letters directed to the Defendant Law Firm. Complaint, ¶76.

In the "Stop work" letter referenced above, these individuals requested that the Defendant Law Firm and Defendant Wittenstein cease and desist working on their matters, and that the Defendant Law Firm, and Defendant Wittenstein, refrain from contacting them. These letters were served on Defendant Wittenstein and Defendant Law Firm via their attorney, Marc E. Elliott of Marc E. Elliott, P.C. on June 29, 2017. Complaint, ¶77-¶78. Despite this, the

Defendants have continued to contact these individuals by telephone, e-mail and regular mail. In these communications, the Defendants have not only attempted to solicit these individuals to return to the Defendant Law Firm, many times by fraudulent and dishonest means, but have also defamed Plaintiff Brent. Complaint, ¶79-¶83.

The Defendant Wittenstein has also gone on a rampage of defaming Plaintiff Brent in his professional capacity as an attorney-at-law. For example, on June 22, 2017, Defendant Wittenstein, in an e-mail to Michelle Katwaroo, a former client of Defendant Law Firm and currently a client of the Plaintiff Brent Law Firm, Defendant Wittenstein falsely stated that Plaintiff Brent had quit his job with the Defendant Law Firm. In this same e-mail, Defendant Wittenstein further accused Plaintiff Brent of unethically encouraging Ms. Katwaroo to substitute law firms after an insurance policy had been tendered, solely for the purpose of collecting the fee. Defendant Wittenstein also falsely informed Ms. Katwaroo that her settlement funds had been on hold for a month due to Plaintiff Brent's interference with her case after leaving the Defendant Law Firm's employment. Complaint, ¶84-86.

Soon thereafter, in an e-mail dated June 24, 2017 to a Mr. Syed Hassan, who was formerly a consultant to the Defendant Law Firm and who was, at the time of said e-mail, a consultant to the Plaintiff Brent Law Firm, Defendant Wittenstein accused Plaintiff Brent of acting unethically and illegally by stealing documents from the Defendant Law Firm, sending those documents to insurance companies and pretending that he was still working for the Defendant Law Firm. Complaint, ¶89-¶90.

Thereafter, on July 7, 2017, Defendant Wittenstein e-mailed Ms. Kelly Jefferson, a former client of Defendant Law Firm and current client of the Plaintiff Brent Law Firm. In this e-mail, Defendant Wittenstein made several false, misleading and defamatory statements

regarding Plaintiff Brent. For example, Defendant Wittenstein stated to Ms. Jefferson that if she wanted Plaintiff Brent to work on her legal case, she needed papers to that effect. However, as set forth above, said papers had been served upon Defendant Wittenstein on June 29, 2017. Complaint, ¶91-¶92.

On that same date, Defendant Wittenstein e-mailed Ms. Denise Hooks, a former client of Defendant Law Firm and current client of the Plaintiff Brent Law Firm. In this e-mail, Defendant Wittenstein made several false, misleading and defamatory statements regarding Plaintiff Brent to Ms. Hooks. For example, Defendant Wittenstein stated that Plaintiff Brent quit the Defendant Law Firm and that he sent an unauthorized letter on the Defendant Law Firm's letterhead, both of which are untrue statements of fact. Complaint, ¶93-94. In addition, in this e-mail, Defendant Wittenstein stated to Ms. Hooks that Plaintiff Brent never sent her or Defendant Law Firm any papers at all on her case, and never communicated to her or Defendant Law Firm that she had changed attorneys. However, as set forth above, said papers had been served upon Defendant Wittenstein and Defendant Law Firm on June 29, 2017. Complaint, ¶93-¶95.[2]

On July 18 and 20, 2017, Defendants served upon Plaintiffs two signed Consents to Change Attorney forms and "Stop Work" letters from two current clients of Plaintiffs (and hereinbefore former clients of Defendants), Natalie Fuertes, Ana Canas and Bertram Collins. Complaint, ¶98-¶99. In retaining these three individuals, Defendants tortuously interfered with the Plaintiff Brent Law Firm's contractual relations with them. Complaint, ¶100. The Defendant were aware that the Plaintiff Law Firm had a valid contractual relationship with these individuals. Despite this, the Defendants intentionally procured Ms. Fuertes', Ms. Canas' and Mr. Collins' breach of this contract. Complaint, ¶101-¶102.

[2] The e-mails referenced herein are annexed to the Plaintiff's Complaint as Exhibit "A".

Furthermore, this procurement was completed through wrongful means. For example, Defendants contacted Mr. Collins in contravention of his explicit instructions not to do so. When they did, they informed Mr. Collins that they had settled, or were going to settle, his personal injury matter. Complaint, ¶103-¶104. When Mr. Collins went to the offices of Defendant Law Firm, he was informed that his case had not actually been settled. He was also told that Plaintiffs did not have his case file, nor his medical records, and thus could not work on his legal matter. Complaint, ¶105-¶106. The Defendants also told Mr. Collins that for that reason, the Defendants were better suited to represent him. Complaint, ¶107. Upon information and belief, Defendants used these same fraudulent and wrongful means to procure the termination of Ms. Fuertes and Ms. Canas' contracts with Plaintiffs. Complaint, ¶108.

STANDARD TO BE APPLIED

The legal standards to be applied in evaluating a motion to dismiss pursuant to CPLR §3211(a)(7) are well-settled. In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR §3211(a)(7), the sole criterion is whether the pleading states a cause of action. If, from the four corners of the complaint, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail. 511 West 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152, 773 N.E.2d 496, 746 N.Y.S.2d 131 (2002).

The court's function is to "accept … each and every allegation forwarded by the plaintiff without expressing any opinion as to the plaintiff's ability ultimately to establish the truth of these averments before the trier of the facts.'" 219 Broadway Corp. v Alexander's, Inc., 46 NY2d 506, 509, 387 N.E.2d 1205, 414 N.Y.S.2d 889 (1979). The pleading is to be liberally construed and the pleader afforded the benefit of every possible favorable inference. 511 West 232nd Owners Corp., supra.

POINT I

THE COMPLAINT'S FIRST FOUR CAUSES OF ACTION STATE ALL STATE VIABLE CAUSES OF ACTION

The Plaintiffs' first cause of action seeks a declaratory judgment of an oral partnership, the second alleges a breach of oral contract, the third asserts a breach of implied contract, and the fourth alleges that the Defendants have breached the covenant of good faith and fair dealing.

The Defendants argue that these causes of action must fail because the Plaintiffs have failed to assert that there was any contract between the parties, and further that no specific damages have been alleged. For the reasons set forth herein, the Defendants are incorrect.

A. The Plaintiffs' First Cause of Action seeking a declaratory judgment that he had an oral partnership with Defendant Wittenstein

The Plaintiff's first cause of action is brought pursuant to New York State Partnership Law §11, as well as common law, and seeks a declaratory judgment that there existed between Plaintiff Brent and Defendant Wittenstein an oral partnership.

In seeking the dismissal of this cause of action, the Defendants assert that the Plaintiffs have failed to establish the existence of a contract, and that the oral partnership agreement was in violation of the New York Statute of Frauds (New York General Obligations Law §5-701). In addition, the Defendants seem to make a factual argument against the finding of a partnership, which is an argument that is inappropriate on a motion to dismiss and is more akin to what should be argued in either a motion for summary judgment after discovery has been completed or at trial.

For the following reasons, the Defendants arguments must fail.

Partnerships in New York can certainly be oral. Vilkelis v. Holmes, 2011 N.Y.Misc. Lexis 320 (N.Y. Cty. Supr. Ct. 2011); see also Missan v. Schoenfeld, 95 A.D.2d 198 (1st Dept.

1983); Di Chiara v. Calvo, 299 N.Y.S.2d 634 (2d Dept. 1969). The Appellate Division, First Department has held that the statute of frauds is generally inapplicable to an agreement to create a joint venture or partnership, because, absent a definite term of duration, an oral agreement to form a partnership or joint venture for an indefinite period of time creates a partnership or joint venture at will. Foster v. Kovner, 44 A.D.3d 23 (1st Dept. 2017).

A partnership is an association of two or more persons to carry on as co-owners a business for profit. See Partnership Law §10; see also Caradaris v. Bulow, 244 N.Y.S. 600 (New York Cty. Supr. Ct. 1930). New York State Partnership Law §11, entitled "Rules for Determining the Existence of a Partnership", states, in relevant part, as follows:

"In determining whether a partnership exists, these rules apply:

4. the receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business...."

Whether an oral partnership exists turns on a number of factors, including the sharing in profits and losses, exercising joint control over the business and the making of a capital investment. Vilkelis, supra; see also Keen v. Jason, 19 Misc.2d 538 (Suff. Cty. Supr. Ct. 1959)(the receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business). As the court stated in Lee v. Slovak, 81 A.D.2d 98 (3rd Dept. 1981), a partnership is a contract of two or more persons to place their money, effect, labor or skill, or some or all of them, in lawful business, and to divide the profits and bear the losses in certain proportions.

In Slovak, supra, the parties, who were not married but lived together and held themselves out as husband and wife, shared the labor of a wholesale and retail produce operation, shared profits from the business, deposited monies in a joint account, and that the

plaintiff participated in decisions involving the business. Based on these (and other) factors, the court held that an oral partnership agreement to equally share the profits and losses was entered into between the parties.

Based on the allegations in the Complaint, the Plaintiffs have certainly set forth a cause of action as and for an oral partnership between Plaintiff Brent and Defendant Wittenstein. See Complaint, ¶¶22-33.

B. The Plaintiffs' Second, Third and Fourth Causes of Action Alleging the Breach of an Oral Contract, Breach of an Oral Contract, and Breach of the Duty of Good Faith and Fair Dealing

The Plaintiffs' Second, Third and Fourth Causes of Action allege the breach of an oral contract, the breach of an implied contract, and breach of the duty of good faith and fair dealing, respectively. The Defendants' arguments in support of their motion to dismiss these causes of action are twofold: first, that the Plaintiffs have failed to establish a breach of contract between the parties, and second, that those claims are barred by New York General Obligations Law §5-701. For the reasons set forth herein, the Defendants are incorrect on both counts, and thus these causes of action should survive.

The Plaintiffs have certainly set forth a breach of both an oral and an implied contract. The Plaintiffs have asserted, that by their words and their actions, the parties agreed to form a partnership for the practice of law. In addition, the Complaint sets forth that Plaintiff Brent performed under this contract, that the contract was breached by the Defendant, and that, as a result of said breach, Plaintiff Brent has been damaged. Complaint, ¶¶19-63; ¶¶112-113; ¶¶116-118; ¶¶120-123; ¶¶125-126.

Finally, as stated above, an oral agreement to form a joint venture does not violate the statute of frauds because it forms a contract which is terminable at will. See Foster v. Kovner, supra.

The Defendants further argue that the Plaintiffs' fourth cause of action, as and for the breach of the duty of good faith and fair dealing, must be dismissed because it is duplicative of their contract claims. However, it is well settled that where the existence or meaning of a contract is in doubt, a party may plead a claim for the breach of the covenant of good faith and fair dealing in the alternative. Lehman Bros. Intl. v. AG Fin. Prods., Inc.,38 Misc.3d 1233(A)(New York Cty. Supr. Ct. 2013)(internal citations and quotations omitted).

POINT II

THE PLAINTIFFS' FIFTH CAUSE OF ACTION, AS AND FOR AN ACCOUNTING, ASSERTS A VIABLE CAUSE OF ACTION

The Defendants argue that the Plaintiffs' fifth cause of action, which requests an accounting of the finances of the Defendant Law Firm, the legal matters which have been settled to date, any and all monies obtained by Defendants which were rightfully the property of Plaintiff Brent, and the monies owed to Plaintiff Brent as and for his interest in the Defendant Law Firm, must be dismissed. Defendants base this argument on their assertion that the parties did not have a confidential or fiduciary relationship. For the reasons set forth herein, the Defendants are incorrect.

The Complaint in this action asserts that the Plaintiff Brent and the Defendant Wittenstein had a fiduciary relationship based not only on the fact that they were (and still are) husband and wife, but also because they were partners. It is well settled that partners and joint venturers have a fiduciary duty to one another, and owe each other the utmost good faith, fairness and loyalty. See, e.g., Pace v. Perk, 81 A.D.2d 444 (2nd Dept. 1981); Gibbs v. Breed,

Abbott & Morgan, 271 A.D.2d 180, 184-185, 710 N.Y.S.2d 578 (1st Dep't 2000); Northern Shipping Funds I v. Icon Capital Corp., 921 F. Supp. 2d 94, 102 (S.D.N.Y. 2013). Under New York law, spouses also owe each other a fiduciary duty. Christian v. Christian, 42 N.Y.2d 63, 365 N.E.2d 849, 396 N.Y.S.2d 817, 823 (N.Y. 1977); Petracca v. Petracca, 101 A.D.3d 695, 697, 956 N.Y.S.2d 77 (2d Dep't 2012).

Once a partnership between the parties has been judicially established, a plaintiff is entitled to an accounting. Murray v. Murray, 32 Misc.3d 1234(A) (Rockland Cty. Supr. Ct. 2011)(internal citations omitted). Thus, for the reasons set forth herein, it is clear that Plaintiffs' Complaint sets forth the factual and legal elements necessary to request an accounting of the Defendant Law Firm's finances.

POINT III

THE PLAINTIFFS' SIXTH CAUSE OF ACTION, AS AND FOR THE BREACH OF FIDUCIARY DUTY, MUST ALSO SURVIVE

The Plaintiffs' sixth cause of action asserts that the Defendant Wittenstein has breached her fiduciary duty toward the Plaintiff Brent. The Defendants argue that the Plaintiffs have failed to plead the elements necessary to set forth such a cause of action. For the reasons set forth herein, this cause of action should certainly survive this motion to dismiss.

In order to establish a breach of a fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct. Kurtzman v. Bergstol, 40 A.D.3d 588, 590, 835 N.Y.S.2d 644 (2nd Dep't 2007); see also Pokoik v. Pokoik, 982 N.Y.S.2d 67, 70, 115 A.D.3d 428 (1st Dep't 2014).

The Defendants primarily argue that the Defendant Wittenstein had no fiduciary duty toward the Plaintiff Brent, apparently because there was no express agreement between the two parties giving rise to a fiduciary relationship. However, as is set forth in Point II, supra, there is

always a fiduciary duty between partners, as well as between spouses. As for the other elements of a breach of fiduciary duty claim, the Defendant Wittenstein's misconduct, as well as the damages suffered by the Plaintiff Brent, are clearly set forth in the Complaint. Complaint, ¶¶32-66, 114-116. Thus, this cause of action should not be dismissed.

POINT IV

THE PLAINTIFFS' SEVENTH CAUSE OF ACTION, AS AND FOR CONVERSION, STATES A VALID CLAIM

The Plaintiffs' seventh cause of action sounds in conversion. Specifically, the Plaintiffs assert that the Defendants wrongfully converted Plaintiff Brent's interest in certain settlement monies as well as his interest in the Defendant Law Firm.

Conversion under New York State law is defined as the unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights. Hamlet at Willow Cr. Dev. Co., LLC v. Northeast Land Dev. Corp., 64 A.D.2d 3d 85 (2nd Dept. 2009). Conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession. Colavito v. New York Organ Donor Network, Inc., 8 N.Y.3d 43 (New York Ct. App. 2006). The two key elements of conversion are (1) the plaintiff's possessory right or interest in the property and (2) the defendant's dominion over the property or interference with it, in derogation of the plaintiff's rights. Id.

The Defendants argue that Plaintiff Brent has failed to assert a superior possessory interest in the property at issue herein, which they characterize as the settlement fees arising from the Defendant Law Firm's case. However, the Defendants are missing the point. The personal property to which Plaintiff Brent has a superior possessory interest is not the entirety of the settlement monies, but only his interest, as a partner in the Defendant Law Firm, of those fees.

In addition, the Complaint clearly sets forth that Defendant Wittenstein has exercised control over Plaintiff Brent's interest in the Defendant Law Firm itself, by evicting him from the partnership and refusing to valuate the property and compensate him for his interest. Certainly Plaintiff Brent has a superior possessory interest in his portion of those legal fees, as well as his interest in the Defendant Law Firm.

For those reasons, the Defendants' arguments must fail, and the Plaintiffs' seventh cause of action should not be dismissed.

POINT V

THE PLAINTIFFS' EIGHTH CAUSE OF ACTION, AS AND FOR UNJUST ENRICHMENT, STATES A VALID CLAIM

The Plaintiff's eighth cause of action sounds in unjust enrichment.

To plead unjust enrichment under New York State law, a complaint must assert the following elements: (1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. Mobarak v. Mowad, 117 A.D.3d 998 (2nd Dept. 2014).

The Defendants argue that the Plaintiffs have failed to allege any facts demonstrating that the Defendants have been enriched at the Plaintiffs' expense, or that it would be against equity and good conscience to permit the Defendants to retain what the Plaintiffs seek to recover. For the following reasons, the Defendants' arguments in this regard fail.

Plaintiff Brent asserts that he was a partner in the Defendant Law Firm. For fifteen (15) years he managed and operated the Defendant Law Firm, handled all of its cases from initiation to completion, oversaw the staff, and obtained new clients through his marketing efforts. He also made capital contributions to the business totaling over $400,000, and shared in its profits and losses.

From September 2016 through April 2017, Defendant Wittenstein and Steve Ostringer, one of the Defendant Law Firm's paralegals, who is a personal friend of Defendant Wittenstein, began a campaign of constant harassment, verbal abuse and physical assault against him Plaintiff Brent, as well as threats of future violence against him, culminating in his eviction from the Defendant Law Firm by Defendant Wittenstein in late April, 2017.

Since evicting Plaintiff Brent from the Defendant Law Firm, Defendant Wittenstein has, without Plaintiff Brent's consent, appropriated to herself all assets of the Defendant Law Firm, including but not limited to all attorneys' fees and reimbursements for disbursements for settled personal injury cases in an amount presently unknown to the Plaintiff. This includes cases which Plaintiff Brent had settled just prior to his eviction from the Defendant Law Firm by Defendant Wittenstein, as well as several cases that were close to settling and had offers ready to be processed. Defendant Wittenstein has also repudiated the parties' partnership, effectively dissolving it, and has taken the position that Plaintiff Brent was an employee of Defendant Law Firm and not a partner therein. Complaint, ¶64-¶72.

Thus, it is clear that the Complaint sets forth a cause of action as and for unjust enrichment against Defendant Wittenstein. Her constructive discharge of Plaintiff Brent from the Defendant Law Firm, her repudiation of their partnership, and her subsequent appropriation of all legal fees the Defendant Law Firm earned, as well as her appropriation of the Defendant Law Firm itself, is certainly unconscionable. Thus, the Complaint certainly sets forth a valid cause of action as and for unjust enrichment.

The Defendants also argue that the Plaintiffs cannot assert causes of action for unjust enrichment because they have also asserted a claim for breach of an oral and/or implied contract. However, it is well settled that if there is a bona fide dispute as to the existence of a contract, as

there is here, a plaintiff may proceed under the theory of quasi contract as well as contract. Foster v. Kovner, supra; see Shirley Elfie Life Trust v. Pinkesz, 44 Misc.3d 1226(A)(Kings Cty. Supr. Ct. 2014).

POINT VI

THE PLAINTIFFS' NINTH CAUSE OF ACTION, AS AND FOR DEFAMATION, SHOULD NOT BE DISMISSED

The Plaintiffs' ninth cause of action accuses the Defendant Wittenstein of defaming Plaintiff Brent via a series of e-mails to the Plaintiffs' clients as well as to an outside consultant to the Plaintiff Law Firm. In these e-mails, which are collectively annexed to the Complaint as Exhibit "A", the Defendant Wittenstein defamed the Plaintiff by stating the following: (1) that Plaintiff Brent had acted unethically, (2) that certain settlement funds had been on hold for a month due to Plaintiff Brent's interference, (3) that Plaintiff Brent was merely employed by the Defendant Law Firm, (4) that the Defendant Law Firm was the "attorney-of-record" on a particular case, (5) that Plaintiff Brent had acted unethically and illegally by removing papers from her office and sending them to insurance companies, (6) that Plaintiff Brent had quit the Defendant Law Firm, (7) that Plaintiff Brent had sent an unauthorized letter on the Defendant Law Firm's letterhead, (8) that Plaintiff Brent had failed to send any papers on a client's case to the Defendant Law Firm, and (9) that Plaintiff Brent had never communicated to the Defendants that a particular client had changed attorneys. These statements were false and constituted defamation *per se*. See Complaint, ¶¶84-97; 152-159.

The Defendants argue that this cause of action must be dismissed because the Complaint fails to state the particular words that constituted the false assertions regarding the Plaintiff. This argument is bizarre because, as set forth above, not only were the defamatory statements set forth

with particularity in the Complaint, but the actual e-mails authored by the Defendant Wittenstein which contain those statements are annexed as an Exhibit to the Complaint.

The Defendants further argue that the words spoken by Defendant Wittenstein were not defamatory, but rather were simply Defendant Wittenstein's opinion. However, that is clearly a question of fact, one that cannot be resolved by this motion. In any event, it cannot be compellingly argued that Defendant Wittenstein was expressing her opinion when she wrote the allegations that are set forth in the Complaint and in her own e-mails.

Finally, the Defendants argue that the Plaintiffs' cause of action for defamation must fail because they have failed to plead damages with specificity. However, the cause of action clearly sounds in defamation *per se*. See Complaint, ¶¶88, 97, 157. Writings which tend to disparage a person in the way of his office, profession or trade are considered defamatory *per se*, and do not require any allegation or proof of special damage. Martin v. Daily News, L.P., 2009 N.Y. Misc. Lexis 3858 (N.Y. Cty. Supr. Ct.). A related rule is that where a statement impugns the basic integrity or creditworthiness of a business, an action for defamation lies and injury is conclusively presumed. Celle v. Filipino Reporter Enters., 209 F.3d 163 (2nd Cir. 2000)(quotations omitted).

Statements which constitute defamation *per se* with regard to an attorney include statements which show a lack of character or a total disregard of professional ethics, such as statements that indicate an attorney has been disloyal to the best interests of his client or statements that accuse an attorney of unprofessional conduct, and statements that indicate a lack of due diligence on the part of an attorney. Grayson v. Ressler & Ressler, 2019 U.S. Dist. Lexis 151807 (S.D.N.Y. 2017)(quotations omitted); see also Handelman v. Hustler Magazine, Inc., 469 F.Supp. 1048 ((S.D.N.Y. 1978); see Four Star Stage Lighting, Inc. v. Merrick, 392 N.Y.S.2d 297

(1st Dept. 1977)("words are libelous if they affect a person in his profession, trade, or business by imputing to him any kind of fraud, dishonesty, misconduct, incapacity, unfitness or want of any necessary qualifications in the exercise thereof").

In the case at bar, the Complaint sets forth a number of written statements authored by Defendant Wittenstein to third persons which disparage Plaintiff Brent in his profession as an attorney-at-law, his integrity to practice law, his character and his ethics. Thus, injury is conclusory presumed, and no special damages need be pled.

For the reasons set forth herein, the Complaint has stated a cause of action for defamation *per se*.

POINT VII

THE PLAINTIFFS' TENTH CAUSE OF ACTION, AS AND FOR THE TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS)

The Plaintiffs' tenth cause of action sounds in tortious interference with contractual relations. In particular, the Complaint alleges that despite being aware that the Plaintiff Law Firm had valid contractual relationships, in the form of signed retainers, with Natalie Fuertes, Ana Canas and Bertram Collins, the Defendants intentionally procured those individuals' breach of these contracts through fraudulent and wrongful means.

The Defendants did this by lying to these individuals regarding their legal matters, specifically by informing them that that their legal matters had been settled, and that they needed to come to the Defendant Law Firm's office, when in fact their cases had not been settled. In addition, the Defendants deliberately and without good cause failed to provide the Plaintiffs herein with these clients' case files, and then informed these individuals that the Plaintiffs could not work on their cases because they did not have said case files and medical records! See Complaint, ¶98-108.

Defendants argue that since a client can change lawyers at any time and for any reason or for no reason, this cause of action must fail. For the following reasons, the Defendants are incorrect.

While it is true that an attorney's retainer agreement is a contract that is terminable at will, a plaintiff may sustain a cause of action for tortious interference with contract by showing wrongful conduct. Lowenbraun v. Garvey, 60 A.D.3d 916 (2nd Dept. 2009). This includes, *inter alia*, fraudulent representations. Id.; see also Strougo & Blum. Esqs. v. Zalman & Schnurman, Esqs., 2010 N.Y.Misc. Lexis 1685 (Supr. Ct. N.Y. Cty.).

In the case at bar, the Defendants wrongful conduct, as set forth above, is egregious. By acting in this fashion, the Defendants are guilty of just the type of wrongful conduct that forms the bases of a claim for the tortious interference with contract. The Defendants' bad conduct should not be condoned, and this cause of action should not be dismissed.

POINT VIII

THE PLAINTIFFS' ELEVENTH CAUSE OF ACTION, AS AND FOR MONEY HAD AND RECEIVED, STATES A VIABLE CAUSE OF ACTION

The Plaintiffs' Eleventh cause of action is for money had and received. In order to set forth such a cause of action, a Complaint must allege (1) the receipt of money belonging to plaintiff by defendant; (2) defendant's benefit of said money, and (3) principles of equity and good conscience require that defendant not be permitted to keep the money. Yevoli v. Yevoli, 2009 N.Y.Misc. Lexis 5427 (Nassau Cty. Supr. Ct.).

The Plaintiff has certainly pled such a cause of action. The Complaint asserts that Defendant Wittenstein has received monies, in the form settlement proceeds, that belong, at least in part, to the Plaintiff Brent. She has obviously benefited from the illicit receipt of those funds. Finally, due to Plaintiff Brent's partnership interest in the Defendant Law Firm, the fact that he

brought most, if not all, of the legal matters into the Defendant Law Firm between 2002 and April, 2017, that he worked on each case from commencement through completion, that he operated and managed the Defendant Law Firm for the past fifteen (15) years, that he shared in the profits and losses of the Defendant Law Firm, that he invested his own personal separate funds into the Defendant Law Firm, and Defendant Wittenstein's despicable conduct in throwing him out of the Defendant Law Firm, and for all the other reasons set forth in the Complaint, Defendant Wittenstein should not be permitted to keep all of the settlement monies and value of the Defendant Law Firm.

The Defendants also argues that the Plaintiffs cannot assert causes of action for money had and received because they have also asserted a claim for breach of an oral and/or implied contract. However, as is set forth in Point V, supra, if there is a bona fide dispute as to the existence of a contract, as there is here, a plaintiff may proceed under the theory of quasi contract as well as contract. Foster v. Kovner, supra; see Shirley Elfie Life Trust v. Pinkesz, supra.

POINT IX

THIS ACTION SHOULD NOT BE DISMISSED, STAYED, OR CONSOLIDATED WITH OR DUE TO THE PARTIES SEPARATE ACTION

Defendants argue that the Plaintiffs' Complaint should be dismissed because the same issues are being litigated in the parties' divorce action. Specifically, Defendants argue that Plaintiff Brent's claim to be a partner in the Defendant Law Firm is a critical issue in both litigations, and thus there is a risk of conflicting rulings relating to the same matter. For the reasons set forth herein, the Defendants' arguments should be discounted.

First, the Defendants fails to attach a copy of the pleadings in the matrimonial action. Thus, neither the undersigned nor this Court have any idea whatsoever what the issues are in that litigation. While the Defendants states that Plaintiff Brent's claim to be a partner in the

Defendant Law Firm is the "critical" issue in that litigation, there is no proof of that. Presumably, the "critical" issues in the parties' matrimonial action are those that are customary in such an action: grounds for divorce, custody of the children, child support, maintenance, equitable distribution of marital property, etc. Even if the Defendant Law Firm is deemed to be marital property in that action, the fundamental question would be the amount of the increase in value of that marital property over the course of the parties' marriage. In the case at bar, Plaintiffs seek an Order declaring Plaintiff Brent a partner in said Law Firm, and thus a judgment in the amount of his interest in the Defendant Law Firm, as well his interest in the settlement monies obtained from the Defendant Law Firm's cases.

In addition, there are a plethora of issues in dispute herein that are most certainly not being litigated in the parties' matrimonial action: for example, Defendant Wittenstein's blatant defamation of Plaintiff Brent, as well as the Defendants' tortious interference with the Plaintiffs' clients. Thus, the issues are not, in any way, shape or form, "substantially similar" in these two, separate actions.

The same holds true for the Defendants' arguments that this case should be stayed or dismissed (or consolidated) based on the fact that Defendants filed a lawsuit in this Court six weeks prior to the institution of this action. First, the Defendants have failed to annex the "other" Complaint to this motion, so the Court cannot even make a determination regarding the Defendants' arguments in this regard. Second, the Plaintiffs herein (who are the Defendants therein) have made a motion to dismiss that Complaint, which was fully briefed and submitted on October 3, 2017, and the Plaintiffs herein are fully confident that that matter will be dismissed in its entirety.

Finally, the issues presented in both of these cases vary significantly. In Wittenstein & Wittenstein, Esqs., P.C. v. Law Office of Robert H. Brent, Esq., P.C. Index No. 707485, Alyce Wittenstein is accusing Mr. Brent of two things: wrongfully soliciting Wittenstein & Wittenstein clients and wrongfully interfering with Wittenstein & Wittenstein's right to receive fees from its cases. In the matter at bar herein, however, the Plaintiffs are asserting, *inter alia*, that Plaintiff Robert Brent is a partner in Wittenstein & Wittenstein, that Defendants have tortuously interfered with Plaintiffs' contractual relations, that Plaintiffs are entitled to an accounting, and that Defendant Wittenstein has defamed Plaintiff Brent in his professional capacity. Thus, the facts and legal issues herein are much broader in many ways than the issues presented in the other case and do not significantly overlap.

The Defendants argument that the Plaintiffs herein won't be harmed by a stay of the present action is absolutely incredulous. The Plaintiffs are seeking monetary and equitable relief, including a declaratory judgment that Plaintiff Brent was a partner in the Defendant Law Firm, a judgment as and for his ownership interest in the Defendant Law Firm, monetary damages for the Defendants' tortious interference with his contractual relations with his clients, and monetary damages as and for the Defendant Wittenstein's reprehensible defamation of his professional reputation and character. The Defendants have apparently not heard the legal maxim that "justice too long delayed is justice denied".

The Plaintiffs have also filed a motion herein for various relief, including injunctive relief, which was also fully briefed and filed on October 3, 2017. In this motion, the Plaintiffs are seeking, *inter alia*, an Order directing the Defendants to provide the Plaintiffs with the case files on those matters in which the Plaintiff Law Firm has been substituted as legal counsel; an Order directing the Defendants to cease and desist working on these matters; an Order

authorizing Plaintiff Brent to endorse Defendant Wittenstein's name on certain settlement checks so that the Plaintiffs may deposit these checks into their escrow account and disburse the settlement funds; and an Order directing the Defendant Wittenstein to stop defaming Plaintiff Brent. Of course the Defendants desire to have this matter stayed - so long as it is stayed they can continue their bad acts as set forth in the above-referenced motion!

For the reasons set forth herein, the matter at bar should not be dismissed nor stayed, nor should it be consolidated with any other matter.

CONCLUSION

For the reasons set forth herein, this Court should issue an Order (a) denying the Defendants' motion in its entirety, and (b) granting Plaintiffs such other and further relief as may appear just and proper.

Respectfully submitted,

David S. Feather, Esq.
FEATHER LAW FIRM, P.C.
Attorneys for the Plaintiffs
666 Old Country Road, Suite 304
Garden City, New York 11530
(516) 745-9000

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

----------X Index No. 710000/2017

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

Plaintiffs,

AFFIRMATION OF SERVICE

-against-

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

Defendants.

----------X

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

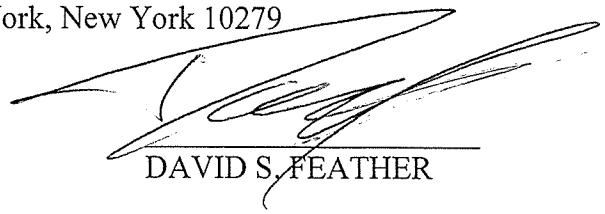
David S. Feather, being duly sworn, deposes and says:

I am not a party to the foregoing action, am over the age of 18 years, with a business address of 666 Old Country Road, Suite 605 in Garden City, New York. On October 24, 2017, I served the within document:

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

By e-mail and regular mail in an envelope addressed to the following person or persons at the addresses set forth:

Marc E. Elliott, P.C.
The Woolworth Building
233 Broadway – Suite 2707
New York, New York 10279



DAVID S. FEATHER

Index No. 710000/2017

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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

Plaintiffs,

-against-

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

Defendants.

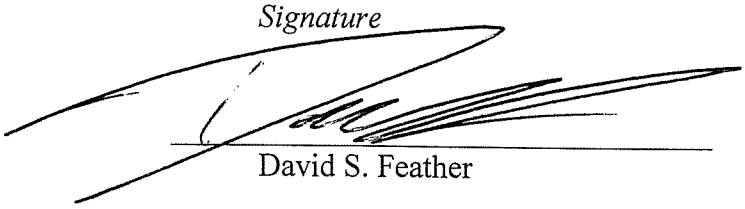
MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS

Feather Law Firm, P.C.
Attorneys for Defendants
666 Old Country Road, Suite 605
Garden City, New York 11530
(516) 745-9000
Fax (516) 908-3930

Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contentions contained in the annexed document are not frivolous.

Dated: October 24, 2017

Signature



David S. Feather