Supreme Court of the State of New York

Appellate Division: First Department

New York County Clerk Index No: _____

----------X

E.,

Plaintiff-Appellant, **Index No.** _____

-against-

F,

Defendant-Respondents.

----------X

PLAINTIFF-APPELLANT'S BRIEF

_____
_____
_____
_____

(*Attorney Name & Address*)

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QUESTIONS PRESENTED

1. Did the Trial Court err in denying Plaintiff-Appellant's First Cause of Action sounding in Breach of Fiduciary Duty in the Complaint for Legal Malpractice as duplicative of the Legal Malpractice claim? Yes.
2. Did the Trial Court err in denying Plaintiff-Appellant's Third Cause of Action sounding in Breach of Implied Contract in the Complaint for Legal Malpractice as duplicative of the Legal Malpractice claim? Yes.

PLAINTIFF-APPELLANT'S BRIEF

The Attorney for the Plaintiff-Appellant, E., _____, Esq., submits this brief in support of this Appeal from an Order and Judgment of the Supreme Court of the State of New York, County of New York, (Hon. _____ J.) dated _____, which dismissed Plaintiff-Appellant's Motion in Opposition to Defendant-Respondents' Motion to Dismiss the Complaint for Legal Malpractice (See pages ___ of the Record of Appeal). The Lower Court erred in denying Plaintiff-Appellant's First and Third Causes of Action sounding in Breach of Fiduciary Duty and Breach of Implied Contract, respectively, in the Complaint for Legal Malpractice, as duplicative of the Legal Malpractice Claim.

STATEMENT OF THE CASE

1. In this Action, on _____, Plaintiff-Appellant, E, ("**Plaintiff-Appellant**") filed a Complaint against the law firm F, ("**Defendant-Respondents**"), on the basis of underlying grounds. (See pages __ of the Record of the Appeal).
2. S, ("**S**") a New York based General Contracting Firm, subcontracted Plaintiff-Appellant to perform carpentry work at _____ under the sub-contract dated _____.
3. Plaintiff-Appellant obtained primary liability insurance from Q for an amount of $_____ per occurrence and $_____ in aggregate pursuant to Commercial General Liability policy no. _____between _____ and _____ between ___.
4. Plaintiff-Appellant also obtained excess insurance coverage from IC ("**IC**") pursuant to Commercial Umbrella liability policy no. _____ for an amount of $_____ on _____. (See pages _____ of the Record of Appeal). T was employed by the Plaintiff-Appellant at the relevant point of time as a carpenter. He alleges that he was injured at the construction site, while working, on _____. On the date of occurrence of alleged accident, Q and IC insurance policies were in force (See pages _____ of the Record of Appeal).
5. T's attorney advised S's Corporate Claims Manager V ("**V**") about T's claim through a letter dated _____. V forwarded the letter to AD. ("**AD**"), representative of S's primary insurer, N. AD, by a letter dated _____ and also informed Q of T's alleged accident and requested Q to provide indemnification to S in connection with T's claim.

6. T filed a personal injury action against S on _____. S filed a Third-Party Complaint on _____ against Plaintiff-Appellant in order to implead Plaintiff-Appellant as a Third-Party Defendant in T's Personal Injury Action. Defendant-Respondents were retained as defence counsel by Q to represent Plaintiff-Appellant in the said Third Party Complaint. Thereafter, S filed a Declaratory Judgment action on _____ against Plaintiff-Appellant, Q, and IC. On _____, the Court held in S's Declaratory Judgment Action that Q was obligated to provide, on a primary basis, coverage and a defense to S. At the same time, the Court also held that IC had no duty to provide coverage to and indemnify S.
7. Pursuant to Plaintiff-Appellant's Primary General Insurance Contract, for the period of _____ Q had a professional and a contractual duty to defend Plaintiff-Appellant in the litigation against T. Q assigned F.(Defendant-Respondents) to defend Plaintiff-Appellant in the aforementioned T action. Plaintiff-Appellant had absolutely no involvement in the decision to hire counsel on its behalf. That was the sole decision of Q.
8. The insurance contract in question dictated that Q provide written notice to the Plaintiff-Appellant as soon as practicable that the General Liability Limits were exhausted. Q's assigned counsel to Plaintiff-Appellant and Q were obligated to collaborate and exchange information concerning the underlying claim for damages and provide the Plaintiff-Appellant with written notice that said claim would exhaust the general policy limits. This obligation was to be discharged as soon as reasonable in order to allow the Plaintiff-Appellant the opportunity to provide notice to the excess carrier of said coverage limits. The written notice of the exhaustion of the underlying policy is a condition precedent to notifying the excess carrier. The date of the written notice was critical for the Plaintiff-Appellant to obtain excess coverage.
9. The Defendant-Respondents and Q became aware, or should have been aware, of the extent of T's injuries no later than _____, the date of T's deposition, or, in any event, no later than _____, the date of T's Supplemental Bill of Particulars. Defendant-Respondents were obligated to have an ongoing and continuous dialogue with Q concerning any claims in the T matter in order to properly discharge their duties relating to the required notice of exhaustion of the primary policy, if necessary.

10. In ____ Bill of Particulars, T provided details regarding the nature and severity of his injuries, hospitalizations, and treatments, which had included two total knee replacements, as well as details regarding his alleged pain, suffering, and likely permanent physical limitations and impairments caused by his injuries. T also reported approximately $____ to date in special damages for health care providers, for which a lien may exist.
11. The ____ Bill of Particulars indicated that T last worked on ____, and remained totally incapacitated from employment from that date. Based upon the itemized hourly wage rates and benefits that T was earning, pursuant to the union collective bargaining agreements under which T was employed at the time of his injury, T claimed lost earnings to date of $____ and lost annuities and benefits to date of $____.
12. In this ____ Deposition Testimony, T further detailed and described his injuries, treatments, surgeries, hospitalizations, and pain and suffering. Specifically, T testified that his injuries and damages included four hospitalizations, arthroscopic surgery on both knees, total knee replacements on both knees, prolonged periods of physical therapy and pain, permanent disability from work, as well as lost past and further income in excess of the amount already set forth in his ____ Bill of Particulars.
13. In his ____ Supplemental Bill of Particulars, T stated that he remained totally disabled from employment and was claiming continuing lost wages, at the previous rates claimed, in addition to continuing lost wages into the indefinite future. The Supplemental Bill of Particulars also stated that T had been advised by his doctor to anticipate future knee surgeries at a cost of approximately $____.
14. Pursuant to the independent fiduciary duties owed as lawyers for Plaintiff-Appellant, Defendant-Respondents had an obligation to communicate directly with Q and the Plaintiff-Appellant to put them on notice as to any potential exhaustion of the primary insurance policy limits as they related to the T litigation. Pursuant to the overwhelming evidence of the damages, that T presented, Defendant-Respondents clearly had an independent fiduciary obligation to inform the Plaintiff- Appellant of the significant damages.

15. Defendant-Respondents knew that Plaintiff-Appellant had an excess policy to cover damages that would be triggered upon proper notice. They knew that the excess carrier was IC. They knew that lack of proper notification, based upon the knowledge of the scope of T's injuries, to IC would preclude Plaintiff-Appellant's access to the excess coverage and expose it to uninsured catastrophic losses and actual legal fees that would be incurred as a result of the lost coverage.
16. In addition to the Independent Fiduciary Duty that the Defendant-Respondents owed to Plaintiff- Appellant, Said Defendant-Respondents owed the Plaintiff- Appellant an Implied Contractual Duty to Notify the Excess Carrier and the Plaintiff-Appellant that the General Liability policy would be exhausted. Defendant-Respondents acknowledged its Implied Contractual obligation as to the exhaustion of the policy, and sent a letter as late as ____ advising Plaintiff-Appellant of the potential for an excess insurance trigger. (See pages ____ of Record of the Appeal). Due to Q and Defendant-Respondents' late notice, Plaintiff-Appellant could not inform IC on a timely basis as to the exhaustion of the primary policy and IC declined coverage.
17. As a result of IC' s declination of coverage, Plaintiff-Appellant filed a Complaint Seeking Declaratory Judgment against IC, the excess carrier, on ____ demanding that IC defend and indemnify Plaintiff-Appellant in T's Personal Injury Action. On ____, IC filed a Summary Judgement, in which the Lower Court granted IC's Summary Judgement Motion, and dismissed Plaintiff-Appellant's Complaint by an Order and Judgment dated ____, determining that the notice to IC that the primary policy was exhausted was late. The Lower Court ruled that Plaintiff-Appellant knew or should have known that it was reasonably likely that T 's claim would exceed the one million-dollar Q primary policy limit by no later than ____, the date of T 's Deposition, or, in any event, no later than ____, the date of T 's Supplemental Bill of Particulars. The Court observed that the IC policy required Plaintiff-Appellant to provide notice" as soon as practicable" of any claim or suit "which is reasonably likely to involve this policy". These terms obligated Plaintiff-Appellant to provide notice to IC when it became clear that a potential excess claim to IC was likely to involve the IC policy, and not just when there was an evidence or substantiation that the primary policy was or would be exhausted. However,

Plaintiff-Appellant could not notify IC timely as Defendant-Respondents failed to fulfil its obligation pursuant to the contract.

18. Plaintiff-Appellant is now exposed to any potential damages arising out of the T litigation that are in excess of $____, as a direct result of the Defendant-Respondents inadequate representation of the Plaintiff-Appellant. Defendant-Respondents had an obligation to coordinate with Q, to ensure that Plaintiff-Appellant received timely written notice as to the extent of T's "claims", specifically if there was evidence that the primary insurance policy would be exhausted. Due to the afore-stated breach of the implied contract and the breach of fiduciary duty on the part of Defendant-Respondents, Plaintiff-Appellant did not receive timely notice that T's injuries exhausted the primary policy and thus could not timely notify IC that the excess policy was triggered.
19. Defendant-Respondents did not have a plausible cause for the aforementioned late notice. The belated notice of ____ by Defendant-Respondents exposed Plaintiff-Appellant to liability in the underlying Third-Party Complaint.
20. The only evidence on the record that substantiates that there were no communications to the Plaintiff-Appellant is the Affidavit sworn by W on ____. (See pages ____ of Record of the Appeal). The Defendant-Respondent's failure to refute those very specific allegations by W is a concession that it failed to notify Plaintiff-Appellant that the primary policy would be exhausted. The Defendant-Respondent demonstrated its loyalty to the insurer, who provides it with cases and the profits therefrom, rather than to its client, the Plaintiff-Appellant. Both the Defendant-Respondent and Plaintiff-Appellant agree that the Defendant-Respondent had an undivided loyalty to its client. The facts, as so stated herein, present irrefutable evidence that the Defendant-Respondent breached its fiduciary obligations to the Plaintiff-Appellant by pursing its pecuniary interest at the expense of its duty to inform said Plaintiff-Appellant of the exhaustion of the underlying policy. As a result, therefrom, Plaintiff-Appellant is exposed to significant losses and potential liability in the T action. Plaintiff-Appellant is already incurring losses due to expensive legal fees.

21. On _____, Plaintiff-Appellant filed a Complaint against the Defendant-Respondents on the grounds of Breach of Fiduciary Duty, Breach of Implied Contract, Breach of Covenant of Good Faith and Fair Dealing, and Legal Malpractice claiming relief of punitive, compensatory, and consequential damages, interest, costs, and attorney's fees. (See pages _____ of Record of Appeal).
22. On _____, Defendant-Respondents filed a Memorandum of Law in support of Motion to Dismiss Complaint for Legal Malpractice. Defendant-Respondents sought dismissal of Plaintiff-Appellant's causes of action of Breach of Fiduciary Duty, Breach of Implied Contract, and Breach of Covenant of Good Faith and Fair Dealing as duplicative of the Legal Malpractice claim. Defendant-Respondents also sought to dismiss the Legal Malpractice claim on the basis of failure to state a Cause of Action. (See pages _____ of Record of Appeal).
23. On _____, Plaintiff-Appellant filed Memorandum of Law in Opposition to Defendant-Respondents' Motion to Dismiss the Complaint for Legal Malpractice. The Plaintiff-Appellant sought denial of the Defendant-Respondents' Motion to Dismiss in entirety on the grounds that the Motion to Dismiss is based on fallacious legal arguments which are untenable in law. (See pages _____ of Record of Appeal).
24. On _____, Defendant-Respondents filed a Reply Memorandum of Law in further support of Motion to Dismiss the Complaint Seeking dismissal of the Legal Malpractice claim and also sought dismissal of other Causes of Action sounding in Breach of Fiduciary Duty, Breach of Implied Contract, and Breach of Covenant of Good Faith and Fair Dealing as duplicative of the Legal Malpractice claim. (See Pages _____ of Record of the Appeal).
25. The Supreme Court of the State of New York, New York County, (Hon. _____ J.) denied the Defendant-Respondents' Motion to Dismiss, in part, and granted the Plaintiff-Appellant's Second Cause of Action sounding in Legal Malpractice by an Order dated _____ and entered in the office of the Clerk of the County of New York on _____. The Supreme Court dismissed the First and Third Causes of Action sounding in Breach of Fiduciary Duty and Breach of Implied Contract respectively as duplicative of the Legal Malpractice claim.
26. On _____, Defendant-Respondents filed an Answer to Plaintiff-Appellant's Complaint.

27. However, the Plaintiff-Appellant has brought this action to file an appeal against the decision of the Lower Court.

SUMMARY OF ARGUMENTS

28. The Lower Court made erroneous factual findings and ignored settled precedents that Defendant-Respondents, being attorneys, owed a fiduciary duty to Plaintiff-Appellant. The claim is borne out by the fact that the Defendant-Respondents possessed unique/specialized knowledge and was in a position of trust and confidence. Defendant-Respondents and Q were the only parties who knew that the excess policy was triggered. Defendant-Respondents did not communicate this fact to its client, Plaintiff-Appellant, as so stated in W' Affidavit on ____ as previously pled herein. (See pages ____ of Record of Appeal). This evidence is bolstered by the Defendant-Respondents' concession by its failure to refute W's position with evidence. Moreover, Plaintiff-Appellant alleges that, by virtue of the attorney-client relationship that existed with Defendant-Respondents, Defendant-Respondents owed a duty to put the interests of its client first, above its own interests. However, Defendant-Respondents disregarded its duty and gave preference to its own pecuniary interests with Q. The Defendant-Respondents disregarded the interests of its client, constituting a Breach of Fiduciary Duty.
29. The Lower Court erred in holding that the Breach of Implied Contract is duplicative of the Malpractice Claim. Plaintiff-Appellant submits that the Defendant-Respondents should have maintained the dictated level of communications with its client, Plaintiff-Appellant, that arises as an implied duty pursuant to the attorney-client relationship between them.

ARGUMENTS

1. **Did the Trial Court err in denying Plaintiff-Appellant's First Cause of Action sounding in Breach of Fiduciary Duty in the Complaint for Legal Malpractice as duplicative of the Legal Malpractice claim?** Yes.

30. The Court of Appeals in *Chase Sci. Research v. NIA Group*, 96 N.Y.2d 20 (N.Y. 2001) observed that the Courts below erred by ignoring applicable New York law which holds that the existence of a special relationship between parties can result in the assumption of legal duties not existing at common law. The Court noted that the qualities shared by groups such as architects, engineers, lawyers, or accountants guide the Court in defining the term professional. The Court also observed that the aforesaid qualities include extensive formal learning and training, licensure, and regulation indicating a qualification to practice, a code of conduct imposing standards beyond those accepted in the marketplace, and a system of discipline for violation of those standards. The Court concluded that a professional relationship is one of trust and confidence, carrying with it a duty to counsel and advise clients.
31. In the case at bar, bearing in mind the general applicability of the special relationship theory in the professional scenario, it can be concluded that the relationship between Plaintiff-Appellant and Defendant-Respondents was sufficiently established to warrant and/or justify the existence of a special relationship based on trust and confidence between the attorneys and the client. Such a relationship gives rise to an exceptional duty to counsel and advise clients. There existed an attorney-client relationship between the Defendant-Respondents and Plaintiff-Appellant and, borne out of such relationship, was a special duty which, when betrayed, can be made actionable in tort as established above. Plaintiff-Appellant has sufficiently made a meritorious claim that the relationship between Plaintiff-Appellant and the Defendant-Respondents justified the reliance on the information/ advice provided by the Defendant-Respondents as its only

source of information as far as the issue regarding the exhaustion of primary policy was concerned.

32. The Appellate Division, First Department, in *Engelke v. Brown Rudnick Berlack Israels, LLP*, 45 A.D.3d 324, 326 (N.Y. App. Div. 2007) held that under New York law, the Complaint set forth viable claims for Legal Malpractice and Breach of Fiduciary Duty based upon law firm's alleged violation of a duty owed to the client.
33. In re *Engelke*, Defendant law firm represented plaintiff, a Florida client, in New York in connection with the sale of a company to a third-party. When the third-party and plaintiff were later sued, defendant represented the third-party. Plaintiff filed a complaint September 9, 2016 alleging legal malpractice and breach of fiduciary duty against defendant in New York, alleging Plaintiff had an attorney-client relationship with defendant and that defendant's representation of the third-party constituted malpractice. (See Pages 40 to 56 of Record of the Appeal). On September 30, 2016, Defendant moved to dismiss the complaint on the basis that its representation and advice to the third party was not actionable under Florida law. (See Pages 36 to 37 of Record of the Appeal). Supreme Court dismissed the complaint upon its determination that Florida law applied and plaintiff's claims were not viable under the laws of Florida. Plaintiff appealed. The Appellate Court reversed the judgment of the Supreme Court and reinstated the complaint. The Court determined that under both Florida and New York law, the complaint set forth viable claims for legal malpractice and breach of fiduciary duty based upon defendant's alleged violation of a duty owed to plaintiff.
34. Applying *Engelke* to the case at bar, it can be determined that both the Causes of Action of Legal Malpractice claim and Breach of Fiduciary Duty are viable causes of action as against a law firm. It is important to note that the Complaint alleges different factual assertions concerning the First Cause of Action for the Breach of the Fiduciary Duty versus the Second Cause of Action for Legal Malpractice. In paragraphs ____ of the Complaint, the Plaintiff-Appellant clearly states a factual pattern in which the allegations against the Defendant-Respondents is clear and puts said Defendant-Respondents on notice as to the nature of the charges. Paragraphs ____ of said Complaint also set a clearly separate factual assertion that puts the Defendant-

Respondents on notice as to the nature of the allegations. In the Breach of the Fiduciary Duty, the factual assertions are that the Defendant-Respondents placed their own interests ahead of their fiduciary duty of an undivided loyalty to the Plaintiff-Appellant. The allegations that are rooted in the First Cause of Action assert an intentional action in which it is claimed that the Defendant-Respondents pursued their pecuniary interests with the underwriters of the general liability carrier at the expense of their undivided duty to the Plaintiff-Appellant. (See pages ____ of Record of Appeal). In addition, the arguments that were made to the Lower Court make it clear as to the facts that were being asserted – the pecuniary interest that the Defendant-Respondents pursued at the expense of the Plaintiff-Appellant reveals their intent to protect the interest of the larger, more economically viable insurance carrier "who pays them and provides them cases" while ignoring their fiduciary responsibilities to the Plaintiff-Appellant. (See pages ____ of Record of Appeal). This action, so stated in the Complaint and articulated in the argument before the Lower Court, identifies an intentional act on the part of the Defendant-Respondents to ingratiate themselves with the insurance carrier and protect the insurance proceeds of the policy. Conversely, the allegations contained in the Second Cause of Action are rooted in acts of neglect, nonintentional deviations from standards of care.

35. In the case at bar, Plaintiff-Appellant has sufficiently pleaded a Legal Malpractice claim along with a tenable cause of action of Breach of Fiduciary Duty against the Defendant-Respondents, a law firm. The Fiduciary Duty owed to the Plaintiff-Appellant specifically required the Defendant Respondent to treat its counsel to Plaintiff-Appellant as the primary responsibility of the Defendant-Respondent. Instead, the Defendant-Respondent's sole focus and concern was its relationship with Q Insurance, the source of the Defendant-Respondent's pecuniary needs. The Defendant-Respondent updated Q regularly as to the development of the litigation, at the expense of the Plaintiff-Appellant, despite having a fiduciary responsibility to notify the Plaintiff-Appellant in the same if not a more thorough fashion of the mounting evidence as to T's injuries. Therefore, separate alleged facts substantiate that a Breach of Fiduciary Duty is viable and can stand independently of a Legal Malpractice claim.

36. The Appellate Division, Second Department, in the Legal Malpractice action of *Minsky v Haber*, 74 A.D.3d 763, 764 (N.Y. App. Div. 2010), concluded that the Cause of Action of Breach of Fiduciary Duty is sufficiently different from the Legal Malpractice claim.
37. In re *Minsky*, Plaintiff Minsky filed a complaint against Eugene Haber, Edward Cobert, and Amy Cobert, individually and doing business as Cobert, Haber & Haber (Haber defendants), to recover damages for legal malpractice, breach of contract, breach of fiduciary duty, and fraud. The Haber defendants moved to dismiss the complaint pursuant to CPLR 3211 (a) (1), (3), (5), and (7). Plaintiff cross moved for summary judgment to recover certain alleged escrow funds. The Supreme Court granted Haber defendants' motion to dismiss and denied plaintiff's cross motion for summary judgment. Plaintiff appealed. The Appellate court modified the order and denied Haber defendants' motion to dismiss. The Court concluded that the complaint sufficiently stated distinct causes of action to recover damages for legal malpractice, breach of contract, breach of fiduciary duty, and fraud. As such, other causes of action are sufficiently different from the legal malpractice claim to survive the Haber defendants' motion to dismiss which was pursuant to CPLR 3211 (a) (7).
38. Applying the *Minsky* case to the case at bar, it is determined that the Breach of Fiduciary Duty is not duplicative of the Legal Malpractice claim. In the case at bar, Plaintiff-Appellant has sufficiently alleged, by virtue of an attorney-client relationship, that Defendant-Respondents owed a duty to place Plaintiff-Appellant interests above their own pecuniary interests. Such inactions of Defendant-Respondents amount to Breach of Fiduciary Duty. On the other hand, Plaintiff-Appellant's claim for Legal Malpractice is based upon Defendant-Respondents failure to fairly represent Plaintiff-Appellant by not timely notifying it about the exhaustion of the primary policy. As such, Plaintiff-Appellant's Cause of Action of Breach of Fiduciary Duty is substantially different from the Legal Malpractice claim.
39. The Lower Court disregarded the facts on which the Breach of Fiduciary Duty claim was founded and erred in holding that Breach of Fiduciary Duty was duplicative of the Legal Malpractice action.

2. **Did the Trial Court err in denying Plaintiff-Appellant's Third Cause of Action sounding in Breach of Implied Contract in the Complaint for Legal Malpractice as duplicative of the Legal Malpractice claim? Yes.**

40. The Appellate Division, Second Department in a legal malpractice action of *Luk Lamellen U. Kupplungbau GmbH v. Lerner*, 166 A.D.2d 505 (N.Y. App. Div. 2d Dep't 1990), held that, "An attorney's breach of his implied duty to use reasonable care in exercising his professional skill can serve as a basis for liability in contract to the extent that the plaintiff Seeks recovery for damages to property or pecuniary interests."
41. In re *Luk Lamellen U. Kupplungbau GmbH*, Plaintiff client retained Defendant attorney to prepare a patent application. Plaintiff client entered into agreement with the defendant attorney by which Defendant attorney agreed to prepare, file and prosecute an application for a United States patent. The Defendant attorney undertook to perform those services with the care, skill, and diligence which is usually employed by attorneys. Some four years after the Plaintiff client discovered that the Defendant attorney made a mistake in the application, thus the Plaintiff client brought an action against the Defendant attorney alleging legal malpractice to recover damages and for breach of contract. Defendant attorney filed a motion to dismiss the complaint. The Supreme Court denied the motion of the Defendant attorney. Defendant attorney appealed. On appeal, the Appellate Court affirmed the denial of the motion to dismiss because the Defendant attorney failed to properly perform these services in breach of the agreement and the plaintiff has suffered pecuniary losses.
42. In an accountant malpractice action of *Ackerman v. Price Waterhouse*, 252 A.D.2d 179 (N.Y. App. Div. 1st Dep't 1998), the Appellate Division stated that under New York law, a breach of contract action for professional services may be based on an implied promise to exercise due care in performing the services required by the contract. No specific promise to achieve a specific result is required. Therefore, any purported reliance by the plaintiffs on actions or representations by the defendant is irrelevant. The court also stated that under New York law a malpractice action against a professional may properly be pleaded in contract or tort.

43. In *Deerkoski v East 49th St. Dev.* II, LLC, 120 A.D.3d 1387 (N.Y. App. Div. 2d Dep't Sept. 24, 2014) Appellate Division held that, "A contract implied in fact rests upon the conduct of the parties."
44. In *Maas v. Cornell Univ.*, 94 N.Y.2d 87 (N.Y. Nov. 23, 1999) the Court of Appeals held that, "An implied-in-fact contract would arise from a mutual agreement and an intent to promise, when the agreement and promise have simply not been expressed in. This type of contract still requires such elements as consideration, mutual assent, legal capacity and legal subject matter." *Id*. The court also held that, "a promise may be implied when a court may justifiably infer that the promise would have been explicitly made, had attention been drawn to it." *Id.*
45. In *Daou v Huffington*, 2013 NY Slip Op 30372(U) (N.Y. Sup. Ct. Feb. 14, 2013) the Supreme Court, observed that an implied contract, in order to be enforceable, must contain the same elements as an express contract.
46. In *AMCAT Global, Inc. v Greater Binghamton Dev.*, LLC, 140 A.D.3d 1370 (N.Y. App. Div. 3d Dep't June 9, 2016) Appellate Division held that, "Where there is no written contract between the parties, a contract may be implied in fact where inferences may be drawn from the facts and circumstances of the case and the intention of the parties as indicated by their conduct."
47. In *Jemzura v. Jemzura*, 36 N.Y.2d 496 (N.Y. 1975) the Court of Appeals held that, "A contract implied in fact may result as an inference from the facts and circumstances of the case, although not formally stated in words, and is derived from the "presumed" intention of the parties as indicated by their conduct. It is just as binding as an express contract arising from declared intention, since in the law there is no distinction between agreements made by words and those made by conduct. A waiver on the part of the promisee of a legal right is sufficient consideration."
48. In *JP Morgan Chase v. J.H. Elec. of N.Y.,* Inc., 69 A.D.3d 802 (N.Y. App. Div. 2d Dep't Jan. 19, 2010) the Appellate Division observed that the complaint adequately alleges all of the essential elements of a cause of action to recover damages for breach of contract: the existence of a contract, the plaintiff's performance under the contract, the defendant's

breach of that contract, and resulting damages Accordingly, the complaint sufficiently stated a cause of action to recover damages for breach of contract.

49. In the case at bar, the Lower Court erred in holding that the essence of Plaintiff-Appellant's Complaint is the failure of the attorney to provide legal services in the T action for which they were engaged. Paragraph ____ of the Complaint clearly establishes that the averments of Breach of Implied Contract are premised upon an entirely different set of facts, which are not analogous to the facts stated in the Legal Malpractice claims.
50. Particularly Paragraph ____ of the Complaint sets out the essential elements based on which the cause of Breach of Implied Contract arises. Plaintiff-Appellant reiterates that the arrangement of the Defendant-Respondents' professional status was the outcome of the insurance contract between Plaintiff-Appellant and Q. Further, the Defendant-Respondents assumed the responsibility under an Implied Contract as a result of the ____ letter from Defendant-Respondents notifying Plaintiff-Appellant about the possibility of exhaustion of the primary policy.
51. Defendant-Respondents had an Implied Duty to inform Plaintiff-Appellant about the exhaustion of the primary policy at the earliest when it came to the knowledge of the Defendant-Respondents. Plaintiff-Appellant has substantiated the fact that Defendant-Respondents knew that the excess policy would be triggered at the time of Supplemental Bill of Particulars submitted by T on or about ____. Defendant-Attorneys knew that failure to meet the implied contractual term would result in the Plaintiff losing its excess insurance coverage and still Defendant-Respondents disregarded its Implied Duty and failed to notify Plaintiff-Appellant in timely fashion and acted to the detriment of Plaintiff-Appellant. Further, the Lower Court utterly ignored that the Defendant-Respondents committed Breach of Implied Duty based on the specifics that the ____ letter laying out the reasons for exhaustion of primary policy was a dollar short and day late.
52. Paragraph ____ of the Complaint outlines the essential elements for the legal malpractice claims which are evidently diverse to those in implied contract claims as detailed above. Visibly, the legal malpractice claims rests on negligence on part of the

attorney and the resulting damages. The Breach of Implied Contract claims contains not one an iota of negligence claim, instead it revolves around the implied duty under a contract implied-in-fact arising from declared intentions of the Parties. As such, Plaintiff-Appellant's Cause of Action of Breach of Implied Duty is substantially different from the Legal Malpractice claim.

53. Therefore, the Lower Court ignored that the Implied Duty, is based on distinct facts and erred in holding the Breach of Implied Contract as duplicative of the Legal Malpractice action.

CONCLUSION

Based on the foregoing, the Court should:

(1) Grant Plaintiff-Appellant's First and Third Causes of Action sounding in Breach of Fiduciary Duty, and Breach of Implied Contract as stated in Plaintiff-Appellant's Motion in opposition to Defendant-Respondents' Motion to Dismiss the Complaint for Legal Malpractice filed in the Supreme Court of New York, New York County.

(2) Reverse the Lower Court's decision as against the dismissal of First and Third Causes of Action and order and direct the entry of judgment in favor of the Plaintiff-Appellant;

(3) Pass such other and further relief as the Court deems just and proper.

Dated: New York, New York

_____.

_____

_____

_____

_____

(*Attorney Name & Address*)