27 Misc.3d 195, 893 N.Y.S.2d 851, 2010 N.Y. Slip Op. 20006
(Cite as: 27 Misc.3d 195, 893 N.Y.S.2d 851)

Supreme Court, Kings County, New York.
Frederick **CINAO**, Plaintiff,
v.
Richard REERS, Defendant.

Jan. 14, 2010.

Background: Client brought action against attorney, alleging legal malpractice related to attorney's assistance in connection with underlying proceedings related to trust created by client's mother. Client moved to amend his verified complaint.

Holdings: The Supreme Court, Kings County, Jack M. Battaglia, J., held that:
(1) attorney was not prejudiced or surprised by proposed amended complaint;
(2) proposed new claim under attorney misconduct statute related back to date of original complaint; and
(3) attorney misconduct statute was not limited in its application to conduct in connection with proceedings pending in New York.

Motion granted.

West Headnotes

[1] Attorney and Client 45 ⚿26

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k26 k. Duties and liabilities to adverse parties and to third persons. Most Cited Cases

Attorney and Client 45 ⚿109

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k109 k. Acts and omissions of attorney in general. Most Cited Cases

Attorney and Client 45 ⚿114

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k114 k. Fraud. Most Cited Cases

Violation of attorney misconduct statute may be established either by the attorney's alleged deceit or by an alleged chronic, extreme pattern of legal delinquency by the attorney. McKinney's Judiciary Law § 487(1).

[2] Pleading 302 ⚿233.1

302 Pleading
302VI Amended and Supplemental Pleadings and Repleader
302k233 Leave of Court to Amend
302k233.1 k. In general. Most Cited Cases

Pleading 302 ⚿241

302 Pleading
302VI Amended and Supplemental Pleadings and Repleader
302k241 k. Form and sufficiency of amended pleading in general. Most Cited Cases

Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit. McKinney's CPLR 3025(b).

[3] Pleading 302 ⚿245(1)

302 Pleading
302VI Amended and Supplemental Pleadings and Repleader
302k242 Amendment of Declaration, Complaint, Petition, or Statement
302k245 Condition of Cause and Time for Amendment
302k245(1) k. In general. Most Cited Cases

Pleading 302 ⚿246(1)

302 Pleading
302VI Amended and Supplemental Pleadings and Repleader
302k242 Amendment of Declaration, Complaint, Petition, or Statement
302k246 Subject-Matter and Grounds in General
302k246(1) k. In general. Most Cited Cases

Defendants cannot legitimately claim surprise or prejudice related to the plaintiff's motion to amend pleadings, where the proposed amendments are premised upon the same facts, transactions, or occurrences alleged in the original complaint. McKinney's CPLR 3025(b).

[4] Pleading 302 245(1)

302 Pleading
302VI Amended and Supplemental Pleadings and Repleader
302k242 Amendment of Declaration, Complaint, Petition, or Statement
302k245 Condition of Cause and Time for Amendment
302k245(1) k. In general. Most Cited Cases

Defendant's exposure to additional liability does not, in itself, constitute prejudice sufficient to bar the plaintiff from amending pleadings. McKinney's CPLR 3025(b).

[5] Pleading 302 245(1)

302 Pleading
302VI Amended and Supplemental Pleadings and Repleader
302k242 Amendment of Declaration, Complaint, Petition, or Statement
302k245 Condition of Cause and Time for Amendment
302k245(1) k. In general. Most Cited Cases

Prejudice necessary to bar the plaintiff from amending pleadings requires that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position. McKinney's CPLR 3025(b).

[6] Pleading 302 236(7)

302 Pleading
302VI Amended and Supplemental Pleadings and Repleader
302k233 Leave of Court to Amend
302k236 Discretion of Court
302k236(7) k. New or different cause of action or defense. Most Cited Cases

Pleading 302 248(10)

302 Pleading
302VI Amended and Supplemental Pleadings and Repleader
302k242 Amendment of Declaration, Complaint, Petition, or Statement
302k248 New or Different Cause of Action
302k248(10) k. Actions based on negligence in general. Most Cited Cases

Attorney was not prejudiced or surprised by client's proposed amended complaint in legal malpractice action, which, in addition to claim in verified complaint sounding in negligence, asserted claim under attorney misconduct statute that was subject to treble damages, and thus granting leave to amend was within court's discretion; other than facts related to two letters attorney wrote to judge in underlying action, of which attorney was presumably aware, amended complaint alleged same factual basis for claims. McKinney's Judiciary Law § 487.

[7] Limitation of Actions 241 127(3)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(H) Commencement of Proceeding; Relation Back
241k127 Amendment of Pleadings
241k127(2) Amendment Restating Original Cause of Action

241k127(3) k. Nature of action in general. Most Cited Cases

Original verified complaint in client's legal malpractice action provided attorney with sufficient notice of relevant transactions and occurrences in underlying Hawaii proceedings regarding trust created by client's mother, which client sought to prove in proposed amended complaint, and thus additional claim in proposed amended complaint, alleging violation of attorney misconduct statute, related back to date of original complaint for purposes of three–year statute of limitations; only new factual allegations in amended complaint related to two letters attorney allegedly sent to presiding judge in underlying proceedings to request adjournment of proceedings for which, according to verified complaint, attorney had failed to arrange client's appearance. McKinney's Judiciary Law § 487; McKinney's CPLR 203(f), 214(6).

[8] Limitation of Actions 241 ⚿127(1)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(H) Commencement of Proceeding; Relation Back
241k127 Amendment of Pleadings
241k127(1) k. In general. Most Cited Cases

Whether considered an aspect of prejudice or surprise, or of lack of merit of the new claim, where the new claim clearly would be barred by the statute of limitations, leave to amend to assert it should be denied. McKinney's CPLR 3025(b).

[9] Limitation of Actions 241 ⚿127(2.1)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(H) Commencement of Proceeding; Relation Back
241k127 Amendment of Pleadings
241k127(2) Amendment Restating Original Cause of Action
241k127(2.1) k. In general. Most Cited Cases

Sine qua non of the relation-back doctrine is notice; where the allegations of the original complaint gave the defendants notice of the facts and occurrences giving rise to the new cause of action, the new cause of action may be asserted. McKinney's CPLR 203(f).

[10] Attorney and Client 45 ⚿26

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k26 k. Duties and liabilities to adverse parties and to third persons. Most Cited Cases

Attorney and Client 45 ⚿33

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k33 k. Offenses in exercise of professional functions. Most Cited Cases

Attorney and Client 45 ⚿114

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k114 k. Fraud. Most Cited Cases

Attorney misconduct statute, which provides for both criminal and civil redress against an attorney who engages in deceit or collusion with intent to deceive the court or any party, was not limited in its application only to attorney's conduct in connection with proceedings pending in New York courts; statute contained no such express limitation, and state courts had sufficient interest in supervising conduct of attorneys admitted before its bar and in protecting resident clients who had been harmed by deceit of admitted attorney. McKinney's Judiciary Law § 487.

[11] Statutes 361 ⚿181(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature

361k181 In General
361k181(1) k. In general. Most Cited Cases

Statutory text is the clearest indicator of legislative intent.

[12] Attorney and Client 45 26

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k26 k. Duties and liabilities to adverse parties and to third persons. Most Cited Cases

Attorney and Client 45 33

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k33 k. Offenses in exercise of professional functions. Most Cited Cases

Attorney and Client 45 114

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k114 k. Fraud. Most Cited Cases

Generally, attorney misconduct statute, which provides for both criminal and civil redress against an attorney who engages in deceit or collusion with intent to deceive the court or any party, applies only to wrongful conduct by an attorney in an action that is actually pending. McKinney's Judiciary Law § 487.

[13] Attorney and Client 45 26

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k26 k. Duties and liabilities to adverse parties and to third persons. Most Cited Cases

Where an attorney's deception is directed against a court, a pending judicial proceeding is not required to bring an action against the attorney under misconduct statute; it is sufficient if the deception relates to a prior judicial proceeding or one which may be commenced in the future. McKinney's Judiciary Law § 487.

****853** Michael A. Freeman, Esq. of Greenberg Freeman, LLP, for Plaintiff.

A. Michael Furman, Esq. of Furman Kornfiled & Brennan LLP, for Defendant.

JACK M. BATTAGLIA, J.

***196** With a Verified Complaint dated June 9, 2004, plaintiff Frederick Cinao commenced this action for legal malpractice against defendant Richard Reers. Plaintiff allegedly retained Defendant in April 2000 to assist him in connection with a trust created by Plaintiff's mother, who died the previous August, including proceedings in the Circuit Court of the First Circuit of the State of Hawaii. According to Plaintiff, Defendant failed to arrange for an appearance by Plaintiff in the Hawaii proceedings on three occasions, with the result that Plaintiff was removed as trustee and ordered to pay the attorney fees of his brother, also a party to the Hawaii proceedings.

Defendant also allegedly failed to make a final distribution to Plaintiff's brother, as required by the trust and court order, and failed to sell trust securities as required by the trust. In addition to the attorney fees, the Hawaii court ordered Plaintiff to pay interest on the amount of the unpaid distribution from the trust, and held him liable for losses sustained with respect to the securities.

***197** The Verified Complaint clearly sounds only in negligence, and seeks damages in the approximate amount of $250,000.

Plaintiff now seeks leave, pursuant to CPLR 3025(b), to amend his Verified Complaint. The proposed Amended Verified Complaint purports to allege, in addition to a cause of action for legal malpractice, a cause of action pursuant to Judiciary Law § 487, which permits recovery of treble damages for certain attorney misconduct. The proposed Amended Verified Complaint alleges “negligent

acts and/or omissions" (Proposed Amended Complaint, ¶ 18), comprised of failures to act or act properly, and withholding information from Plaintiff, with respect to the trust and the court proceedings in Hawaii; and alleges "specific acts of intentional misconduct and deception" (*id.*, ¶ 20), comprised of false representations and statements, including two letters to the presiding judge, and withholding of material information from Plaintiff, concerning the trust and Hawaii proceedings.

The damages alleged in the proposed Amended Verified Complaint follow those in the pending complaint, with the addition of unnecessary and excessive fees and expenses paid to Defendant; and, based upon allegations that Defendant "intentionally deceived the court, opposing counsel as well as his own client in the Hawaii proceeding in a manner that demonstrated a chronic and extreme pattern of legal delinquency" (*id.*, ¶ 19), "treble damages as well as punitive damages" pursuant to Judiciary Law § 487 (*id.*, ¶ 35.)

Judiciary Law § 487 "descends from the first Statute of Westminster, which was adopted by the Parliament summoned by King Edward I of England in 1275." (*See Amalfitano v. Rosenberg*, 12 N.Y.3d 8, 12, 874 N.Y.S.2d 868, 903 N.E.2d 265 [2009].) The statute reads in its entirety:

§ 487. Misconduct by Attorneys

****854** An attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,

2. Wilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,

Is 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.

[1] "A violation of Judiciary Law § 487(1) may be established either by the defendant's alleged deceit or by an alleged chronic, ***198** extreme pattern of legal delinquency by the defendant'." (*Boglia v. Greenberg*, 63 A.D.3d 973, 975, 882 N.Y.S.2d 215 [2d Dept. 2009] [*quoting Knecht v. Tusa*, 15 A.D.3d 626, 627, 789 N.Y.S.2d 904 (2d Dept. 2005)].)

[2] "Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit." (*Tyson v. Tower Ins. Co., NY*, 68 A.D.3d 977, 979, 891 N.Y.S.2d 143 [2d Dept. 2009]; *see also* CPLR 3025 [b].) "Mere lateness, unless coupled with prejudice, does not bar an amendment." (*Matter of Rouson*, 32 A.D.3d 956, 958, 821 N.Y.S.2d 258 [2d Dept. 2006].) "Where no prejudice is shown, an amendment may be allowed during or even after trial'." (*Dinizio & Cook, Inc. v. Duck Creek Marina at Three Mile Harbor, Ltd.*, 32 A.D.3d 989, 990, 821 N.Y.S.2d 649 [2d Dept. 2006] [*quoting Dittmar Explosives v. A.E. Ottaviano, Inc.*, 20 N.Y.2d 498, 501, 285 N.Y.S.2d 55, 231 N.E.2d 756 (1967)].)

[3][4][5] "The defendants cannot legitimately claim surprise or prejudice, where the proposed amendments [are] premised upon the same facts, transactions or occurrences alleged in the original complaint." (*Janssen v. Incorporated Vil. of Rockville Ctr.*, 59 A.D.3d 15, 27, 869 N.Y.S.2d 572 [2d Dept. 2008].) "Exposure to additional liability does not, in itself, constitute prejudice." (*RCLA, LLC v. 50–09 Realty, LLC*, 48 A.D.3d 538, 539, 852 N.Y.S.2d 211 [2d Dept. 2008].) "Prejudice requires that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position'." (*Id.* [*quoting Loomis v. Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 23, 444 N.Y.S.2d 571, 429 N.E.2d 90 (1981)].)

In the absence of prejudice or surprise, the complaint in an action for legal malpractice may be amended unless the amendment is "patently devoid of merit." (*See McCluskey v. Gabor & Gabor,* 61 A.D.3d 646, 648, 876 N.Y.S.2d 162 [2d Dept. 2009].) "This means that ... the motion for leave to amend will be denied, in the absence of prejudice or surprise, only if the new cause of action would not withstand a motion to dismiss under CPLR 3211(a)(7)." (*Lucido v. Mancuso,* 49 A.D.3d 220, 225, 851 N.Y.S.2d 238 [2d Dept. 2008].)

[6] Although Defendant asserts prejudice and surprise, the only specific offered is that the proposed Judiciary Law § 487 claim is "a transparent attempt to gain leverage for the purpose of settlement" (Affirmation in Opposition to Motion to Amend the Complaint ["Affirmation in Opposition"],¶ ¶ 3, 11.) But that is not the type of prejudice or "surprise" that would warrant denial of leave to amend.

According to Plaintiff, and undisputed by Defendant, "due to various motions and ****855** procedural delays, including an unsuccessful***199** motion for summary judgment, a failed effort at settlement that led to additional motion practice and an appeal to the Second Department, and Plaintiff having switched attorneys, discovery is still ongoing"; Defendant has not yet served any written discovery responses or produced any documents," and "[n]either party has taken any depositions." (Affirmation of Michael A. Freeman, Esq. in Support of Plaintiff's Motion to Amend the Complaint ["Affirmation in Support"] ¶ ¶ 17, 19, 20.) Except for conclusory allegations as to Defendant's fault, the only additional factual allegations in the proposed Amended Verified Complaint relate to two letters Defendant wrote to the presiding judge in Hawaii, matters clearly within Defendant's knowledge. The possibility of treble damage liability alone is not sufficient to warrant denial of leave to amend.

[7][8] Defendant also contends, however, that the proposed cause of action pursuant to Judiciary Law § 487 is time-barred, and, assuming it is not, "such claim is patently devoid of merit as Judiciary Law § 487 applies only to actions by an attorney in *matters pending in the courts of New York.* " (Affirmation in Opposition, ¶ 17 [emphasis in original].) Whether considered an aspect of prejudice or surprise, or of lack of merit of the new claim, where the new claim clearly would be barred by the statute of limitations, leave to amend to assert it should be denied. (*See Shefa Unlimited, Inc. v. Amsterdam & Lewinter,* 49 A.D.3d 521, 522, 856 N.Y.S.2d 118 [2d Dept. 2008].)

In the Second Department, a claim for treble damages pursuant to Judiciary Law § 487 is governed by the "three-year malpractice Statute of Limitations" found in CPLR 214(6). (*See Jorgensen v. Silverman,* 224 A.D.2d 665, 665, 638 N.Y.S.2d 482 [2d Dept. 1996].) "Once a defendant has demonstrated that the statute of limitations has expired, [t]he burden is on the plaintiff to establish the applicability of the [relation back] doctrine' " of CPLR 203(f). (*See Cardamone v. Ricotta,* 47 A.D.3d 659, 660, 850 N.Y.S.2d 511 [2d Dept. 2008] [*quoting Nani v. Gould,* 39 A.D.3d 508, 509, 833 N.Y.S.2d 198 (2d Dept. 2007)].) "A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." (CPLR 203[f].)

Defendant makes no particular showing that Plaintiff's proposed cause of action pursuant to Judiciary Law § 487 is ***200** barred by the statute of limitations, other than to state that the "claim is time-barred because said claim does not relate back to the date of the original complaint." (Affirmation in Opposition, ¶ 12.) The only ground asserted for the contention that the claim "does not relate back" is that "the proposed amended complaint is not a mere extension' of the allegations of the original complaint." (*id.,* ¶ 16 [*quoting krioutchkova v. gaad*

realty corp., 28 A.D.3d 427, 428, 814 N.Y.S.2d 171 (2d Dept. 2006)]; *see also Shefa Unlimited, Inc. v. Amsterdam & Lewinter*, 49 A.D.3d at 522, 856 N.Y.S.2d 118.)

The most recent date alleged in the proposed Amended Verified Complaint is November 7, 2002. Apparently recognizing the significance, Plaintiff himself raises CPLR 203(f) in support of his motion (*see* Affirmation in Support, ¶ ¶ 28, 30), and nowhere contends that, even absent the relation-back doctrine, the Judiciary Law claim would be timely. Rather, he contends that the doctrine is applicable because "the only substantive difference between the complaint and the proposed ****856** amended complaint are the allegations regarding Defendant's state of mind, *i.e.*, were his acts and omissions merely negligent or did he intend to deceive the court, the other litigants and his own client?" (Plaintiff's Reply Memorandum of Law in Further Support of His Motion to Amend the Complaint at 4.)

[9] "The sine qua non of the relation-back doctrine is notice." (*Pendleton v. City of New York*, 44 A.D.3d 733, 736, 843 N.Y.S.2d 648 [2d Dept. 2007].) "Where the allegations of the original complaint gave the defendants notice of the facts and occurrences giving rise to the new cause of action, the new cause of action may be asserted." (*Id.*) "However, where the original allegations did not provide the defendants notice of the need to defend against the allegations of the amended complaint, the doctrine is unavailable." (*Id.*) "A new claim relates back to the allegations' of an original complaint, not the causes of action." (*Id.* at 737, 843 N.Y.S.2d 648.)

Plaintiff's characterization of the differences between his Verified Complaint and his proposed Amended Verified Complaint as merely relating to Defendant's "state of mind" is too facile. The allegations in the proposed amended complaint that Defendant made misstatements (at best) in letters to the judge presiding in the Hawaii proceedings, which, as will appear, are material to his Judiciary Law cause of action, cannot be gleaned from the allegations of the original complaint. If a plaintiff's cause of action pursuant to Judiciary Law § 487 is deemed sufficiently similar to a cause of action for fraud for statute of limitations purposes, caselaw would appear to require particular ***201** scrutiny of an attempt to add the cause of action to a complaint that previously only alleged negligence. (*See Martin v. Edwards Labs.*, 60 N.Y.2d 417, 429, 469 N.Y.S.2d 923, 457 N.E.2d 1150 [1983]; *Sabella v. Vaccarino*, 263 A.D.2d 451, 452, 692 N.Y.S.2d 475 [2d Dept. 1999]; *Monaco v. New York Univ. Med. Ctr.*, 213 A.D.2d 167, 168, 623 N.Y.S.2d 566 [1st Dept. 1995].)

Those decisions, however, must be considered in light of the special character of fraud actions, including a statute of limitations that determines accrual in part from discovery of the fraud. (*See* CPLR 213[8].) The special character of the fraud action colors the relation-back determination. (*See Martin v. Edwards Labs.*, 60 N.Y.2d at 429, 469 N.Y.S.2d 923, 457 N.E.2d 1150.) Moreover, unlike the First Department, which at one time applied the fraud statute of limitations to claims pursuant to Judiciary Law § 487 (*see New York City Tr. Auth. v. Morris J. Eisen, P.C.*, 203 A.D.2d 146, 146, 610 N.Y.S.2d 236 [1st Dept. 1994]), the Second Department treats the statutory claim as one for legal malpractice for statute of limitations purposes (*see Jorgensen v. Silverman*, 224 A.D.2d at 666, 638 N.Y.S.2d 482.)

At the end of the day, therefore, the question must be whether the original complaint gave the defendant sufficient "notice of the transactions, occurrences, or series of transactions, or occurrences, to be proved pursuant to the amended pleading" (*see* CPLR 203[f]), or, more specifically in a legal malpractice action, whether the defendant "will be required under the amended pleadings to undertake the same defense of the issue of malpractice liability as required by the original pleading" (*see Johnson v. Phillips*, 115 A.D.2d 299, 299–300, 495 N.Y.S.2d 824 [4th Dept. 1985].)

The only non-conclusory factual allegations in the proposed Amended Verified Complaint that do not appear in the Verified Complaint relate to the two letters Defendant allegedly sent to the presiding judge in the Hawaii proceedings. Those letters request adjournment of proceedings****857** for which, according to the Verified Complaint, Defendant failed to arrange Plaintiff's appearance, and, therefore, seem quite clearly to be part of the same "transaction" or "occurrence" (*see* CPLR 203 [f].) There is no suggestion in Defendant's opposition that, because of the passage of time, any defense related to those letters is in any way compromised.

Defendant's contention that the Judiciary Law § 487 cause of action would be barred by the statute of limitations is, therefore, rejected.

[10] Based as it is on a line of judicial decisions, beginning with the Second Circuit's decision in *Schertenleib v. Traum*, 589 F.2d 1156 [2d Cir.1978], Defendant's most serious objection to ***202** Plaintiff's motion is that Judiciary Law § 487 applies only to misconduct by attorneys in connection with proceedings pending in New York courts. As stated by the Second Circuit:

> "[S]ection 487 ... is ... intended to regulate, through criminal and civil sanctions, the conduct of litigation before the New York courts. We doubt it was the purpose of the New York legislature to fasten on its attorneys criminal liability and punitive damages for acts occurring outside the state. It seems more likely that the concern is for the integrity of the truth-seeking processes of the New York courts, not for injury to foreign litigants." (*Id.* at 1166.)

No authority or other source is cited by the court for its understanding of the New York Legislature's intent as to the scope of Judiciary Law § 487. *Schertenleib* was relied upon by a federal district court in dismissing a § 487 claim based upon a restraining order obtained from a federal district court in Florida, stating that "Section 487 only applies to conduct within the borders of New York State" (*see Papworth v. Steel Hector & Davis*, 2007 WL 2903944, *12, 2007 U.S. Dist LEXIS 72864, *33 [N.D.N.Y.2007]; *see also Nardella v. Braff*, 621 F.Supp. 1170, 1172 [S.D.N.Y.1985].) The subsequent decisions by federal courts have not added to *Schertenleib's* rationale.

Schertenleib has been relied upon in one New York state court decision. Civil Court held in *Southern Blvd. Sound v. Felix Storch Inc.*, 165 Misc.2d 341, 629 N.Y.S.2d 635 [Civ. Ct., N.Y. County 1995], *mod. on other grounds* 167 Misc.2d 731, 643 N.Y.S.2d 882 [App. Term, 1st Dept. 1996] that "Judiciary Law § 487(1) does not apply to acts committed in courts of States other than the State of New York" (*see id.* at 344, 629 N.Y.S.2d 635), offering the following rationale:

> "If the Legislature wanted to regulate the behavior of New York State attorneys in courts other than those of our State, it would have had to have been more specific or have stated any court' in Judiciary Law § 487(1). The use of the term the court' means a court of the State of New York." (*Id.*)

Civil Court's reading may be even narrower that the Second Circuit's if understood as precluding applicability of the statute to deceit on a federal court sitting in New York. In any event, this Court respectfully disagrees if either court would refuse to apply the statute here for the sole reason that the allegations relate to proceedings pending in a Hawaii court and not a court sitting in New York.

[11] ***203** The statute itself states no such limitation. "The statutory text is the clearest indicator of legislative intent." (*Maraia v. Orange Regional Med. Ctr.*, 63 A.D.3d 1113, 1116, 882 N.Y.S.2d 287 [2d Dept. 2009] [internal quotation marks and citations omitted].) "[A] court cannot amend a statute by inserting words that are not there, nor will a court read into a statute a provision which the Legislature ****858** did not see fit to enact." (*Matter of Charles S.*, 60 A.D.3d 954, 955, 875 N.Y.S.2d 263

[2d Dept. 2009] [internal quotation marks and citations omitted].)

"[T]he statute's evident intent [is] to enforce an attorney's special obligation to protect the integrity of the courts and foster their truth-seeking function" (*see Amalfitano v. Rosenberg*, 12 N.Y.3d at 14, 874 N.Y.S.2d 868, 903 N.E.2d 265), with a related "concern for curbing and providing redress for attorney overreaching vis-a-vis clients" (*see Liddle & Robinson v. Shoemaker*, 276 A.D.2d 335, 336, 714 N.Y.S.2d 46 [1st Dept. 2000].) The first New York statute on the subject, adopted in 1787, provided redress for attorney deceit or collusion "in *any* court of justice." (*See Amalfitano v. Rosenberg*, 12 N.Y.3d at 12, 874 N.Y.S.2d 868, 903 N.E.2d 265 [quoting L. 1787, ch. 36, § 5] [emphasis added].)

[12][13] Generally, Judiciary Law § 487 "applies only to wrongful conduct by an attorney in an action that is actually pending." (*See Mahler v. Campagna*, 60 A.D.3d 1009, 1012, 876 N.Y.S.2d 143 [2d Dept. 2009].) "Where the deception is directed against a court, a pending judicial proceeding is not required; it is sufficient if the deception relates to a prior judicial proceeding or one which may be commenced in the future." (*Singer v. Whitman & Ransom*, 83 A.D.2d 862, 863, 442 N.Y.S.2d 26 [2d Dept. 1981]; *see also Costalas v. Amalfitano*, 305 A.D.2d 202, 204, 760 N.Y.S.2d 422 [1st Dept. 2003]; *Hansen v. Caffry*, 280 A.D.2d 704, 705, 720 N.Y.S.2d 258 [3d Dept. 2001].) "Deception of a court is not confined to the actual appearance in court but has reference to any statement, oral or written, made with regard to a proceeding brought or to be brought therein and communicated to the court with intent to deceive." (*Fields v. Turner*, 1 Misc.2d 679, 681, 147 N.Y.S.2d 542 [Sup. Ct., N.Y. County 1955]; *see also Amalfitano v. Rosenberg*, 533 F.3d 117, 123 [2d Cir.2008].)

The limitation, in the case of deceit of a party, to a pending proceeding was first articulated by the Court of Appeals more than a century ago in *Looff v. Lawton*, 97 N.Y. 478 [1884]. "The party' referred to is clearly a party to an action pending in a court in reference to which the deceit is practiced, and not a person outside, not connected with the same at the time or with the court." (*Id.* at 482.) "In placing a construction upon the section cited," a predecessor to Judiciary Law § 487, "we should ***204** consider its provisions in connection with others which relate to the same general subject, and in view of the object to be attained." (*Id.* at 481–82.)

With respect to Civil Court's ruling in *Southern Blvd. Sound*, 165 Misc.2d 341, 629 N.Y.S.2d 635, there is nothing in Judiciary Law § 487 that would limit its applicability to deceit practiced on a court sitting in New York, and a limitation cannot be fairly implied from the use of the definite article "the," rather than the indefinite article "a." Section 487 appears as part of Article 15 of the Judiciary Law, "Attorneys and Counselors," with statutory provisions governing the admission and supervision of attorneys. The "integrity of the courts and ... their truth-seeking function" (*see Amalfitano v. Rosenberg*, 12 N.Y.3d at 14, 874 N.Y.S.2d 868, 903 N.E.2d 265) is no less worthy of protection because the court sits in a sister state, and, in any event, the statutory purpose extends to "curbing and providing redress for attorney overreaching vis-a-vis clients" (*see Liddle & Robinson v. Shoemaker*, 276 A.D.2d at 336, 714 N.Y.S.2d 46.)

This Court is not bound by the federal court decisions in *Schertenleib* and its progeny, nor is it bound by Civil Court's and Appellate Term's decision in *Southern Blvd. Sound*. (*See* ****859***Cox v. Microsoft Corp.*, 290 A.D.2d 206, 207, 737 N.Y.S.2d 1 [1st Dept. 2002]; *People v. Gundarev*, 25 Misc.3d 1204(A), 2009 N.Y. Slip Op. 51972(U), *1–*2, 2009 WL 3028941 [Crim. Ct., Kings County 2009]; *King Transp. Servs. v. State*, 185 Misc.2d 684, 687, 714 N.Y.S.2d 190 [Ct. Cl. 2000].) Nonetheless, a court should be reluctant to divert from an accepted view of the law, particularly where interpretation of a statute is at issue. Here, however, only the *Schertenleib* and *Southern*

Blvd. Sound courts offered any reasoning to support the implied limitation on the applicability of Judiciary Law § 487, and neither cited any authority or other support for its reading of the statute.

In light of the statutory language and purposes, this Court sees no basis for limiting the applicability of Judiciary Law § 487 to judicial proceedings pending in New York courts. A New York court has sufficient interest in supervising the conduct of attorneys admitted before its bar, and protecting resident clients who have been harmed by the deceit of an admitted attorney, to apply Judiciary Law § 487 to the attorney's conduct no matter where the action is pending.

Plaintiff's motion is, therefore, granted.

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