UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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JAMES COLLITON,

Plaintiff,

- against -

CRAVATH, SWAINE & MOORE LLP

Defendant.

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MEMORANDUM AND ORDER

08 Civ 0400 (NRB)

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Plaintiff James Colliton, a disbarred attorney, brings this suit pro se against his former employer, the law firm Cravath, Swaine & Moore LLP, ("Cravath") for alleged breach of contract, intentional infliction of emotional distress, unjust enrichment and breach of fiduciary duty in violation of the Employee Retirement Income Security Act ("ERISA") in connection with Cravath's operation of the Savings Plan for Senior Attorneys and Associates.

Presently before the Court is defendant's motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. Defendant also moves for sanctions pursuant to Fed. R. Civ. P. 11, on the ground that Colliton has asserted frivolous claims with no legal or factual merit for the purpose of harassing defendant and

extorting a settlement. For the reasons set forth below, defendant's motion to dismiss is granted. Furthermore, defendant's application for Rule 11 sanctions is also granted.

BACKGROUND[1]

A. Colliton's Employment at Cravath

Plaintiff was employed by Cravath from December 26, 2000 to March 1, 2006, during which time he worked in the Executive Compensation and Benefits Department of the firm ("the Benefits Department").[2] (Am. Compl. ¶¶ 13-14.)

At the outset, we note that the nature of plaintiff's employment is at issue. A November 9, 2000 letter from Cravath confirmed Colliton's employment as a "special associate," (Baron Decl. Ex. 9, Letter from Patricia Geoghegan to James Colliton, dated November 9, 2000),[3] but Colliton asserts that only 35% of his time at the firm was devoted to the provision of services that would qualify as "the practice of law." (Am. Compl. ¶¶ 17-

[1] These facts are primarily drawn from Colliton's Amended Complaint ("Am. Compl."), and are assumed to be true for the limited purposes of this motion. Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 164 (1993).

[2] At the outset of Colliton's employment, there appear to have been only associates and no partners in the Benefits Department. Partner(s) in the Tax Department oversaw the Benefits Department. Am. Compl. ¶ 34.

[3] For purposes of a motion to dismiss, the amended complaint "is deemed to include any written instrument attached to it as an exhibit," "statement or document incorporated by reference," and other document that is fairly "integral" to the allegations. Chambers v. Time Warner, Inc., 282 F.3d 147, 152-53 (2d Cir.2002).

21.) He claims that the remaining 65% of his time was spent providing "Specialist Services" that did not depend upon his status as an attorney or upon his admission to the bar of the State of New York.[4] (Id.) These "Specialist Services" included, among other things, training and advising associates in the Benefits Department on legal and non-legal matters, advising Cravath and its attorneys on issues relating to finance and market conditions, assisting in recruitment efforts, and various other internal tasks. (Am. Compl. ¶ 24.) Colliton suggests that there was a clear distinction between this "specialist" work and his work as an attorney.

Colliton's claims arise out of various acts allegedly committed by Cravath while Colliton was employed at the firm. Colliton's claims are of three varieties.

First, plaintiff claims that Cravath breached various employment contracts and promises made to him regarding his salary and bonuses. Plaintiff claims that between 2004 and 2006 he was repeatedly assured by Cravath partners that his annual compensation "would equal or exceed the total current dollar value . . . paid and provided to any other non-partner employed

[4] Colliton claims that during certain periods these "specialist services" comprised more than 85% of his work for Cravath, and that in the aggregate these services constituted 85% of the value of his services for the firm. (Am. Compl. ¶¶ 20, 23.) He also alleges that Cravath would have hired him solely for the specialist services even if he were not an attorney. (Am. Compl. ¶ 36.)

in the [Benefits] Department . . . ." (Am. Compl. ¶ 46.) Plaintiff alleges that the compensation provided to one non-partner in the Benefits Department exceeded his own salary by $350,000 in both 2004 and 2005, and by $50,000 for the period in 2006 during which plaintiff was employed by Cravath. (Am. Compl. ¶¶ 15, 52-54.) Plaintiff also claims that he did not receive a "Make-Up" bonus of $50,000, promised by Cravath to all attorneys at some point "subsequent to January 1, 2002." (Am. Compl. ¶¶ 58-59.) Finally, plaintiff alleges that he was assured that, should he leave the firm at any time without completing a full year of employment, he would be paid a pro rata bonus for that year, (which he claims should have been $15,000); and furthermore would be compensated for any time off that he had accumulated but not used in all years prior to his departure (an amount Colliton alleges was $120,000). (Am. Compl. ¶¶ 61-65.)

Second, plaintiff alleges that Cravath breached its fiduciary duty towards him in its management of the Savings Plan for Senior Attorneys and Associates ("the Plan"), in violation of certain provisions of ERISA. Plaintiff claims, inter alia, that he was never provided with a "summary plan description" ("SPD") as required by 29 U.S.C. § 1022(a); that the SPD failed to include certain required information; that Cravath failed to

appoint competent co-fiduciaries; and that Cravath's "material fiduciary breaches" prevented the plan from being operated prudently, all of which resulted in a loss of $15,000. (Am. Compl. ¶¶ 122-38, 155-58.)

Third, and finally, plaintiff characterizes the work environment at Cravath as hostile and stressful, and he claims to have suffered emotional distress as a result. He alleges that Cravath illegally discriminated against Jewish, female, Hispanic and African-American attorneys, all of which made his attempts to recruit new lawyers to the firm extremely difficult. (Plaintiff does not, however, identify himself as a member of any of these victimized groups).[5] (Am. Compl. ¶¶ 76-104.) Colliton also alleges that partners in the Tax Department violated numerous criminal statutes, both through their unauthorized practice of law in certain states (Am. Compl. ¶¶ 114-21) and in their negligent supervision of the Tax and Benefits Departments, in violation of the New York Lawyer's Code of Professional Responsibility (Am. Compl. ¶¶ 105-13). More generally, plaintiff alleges that Cravath engaged in numerous other abuses, such as hiring individuals to "spy" on plaintiff and other employees, sexual harassment, insensitivity and tax fraud. (Am. Compl. ¶ 186.) These factors combined to

[5] According to Colliton, Cravath is "the personification of THE ultimate alpha WASP male." (Letter to the Court attached to Memorandum Opposing Defendant's Motion to Dismiss, dated May 16, 2008.)

"inflict[] severe emotional distress on plaintiff, causing plaintiff to experience an invasion of privacy, psychological pain, emotional distress, mental anguish, embarrassment, humiliation and financial loss." (Am. Compl. ¶ 294.)

B. Colliton's Criminal Acts

Colliton's employment at Cravath came to an abrupt end in early 2006. On February 16, 2006, a warrant was issued for Colliton's arrest on charges of statutory rape and patronizing a prostitute. (Baron Decl. Ex. 6, Felony Arrest Warrant against James Colliton, dated Feb. 16, 2006.) Colliton fled to Canada, where he was arrested by local authorities in Toronto on February 24, 2006. (Baron Decl. Ex. 7, Decision and Order of Justice A. Kirke Bartley dated June 20, 2007, at 2-4.) Plaintiff was terminated by Cravath on March 1, 2006. ((Def's Mem. in Supp. of Mot. To Dismiss ("Def's Mem.") 7.) He subsequently pled guilty to the charges against him in New York state court, and was sentenced to three concurrent terms of twelve months in prison. (See Baron Decl. Ex. 2, Transcript of Plea, New York v. Colliton, Indictment Nos. 0861/06, 1748/06, dated Oct. 2, 2007, at 10.)

In his plea allocution, Colliton acknowledged that both prior to and during his employment at Cravath, he engaged in

repeated illegal sexual activity with at least three girls under the age of 17, the youngest of whom was 13 years old at the time. (Baron Decl. Ex. 2, Transcript of Plea, New York v. Colliton, Indictment Nos. 0861/06, 1748/06, dated Oct. 2, 2007, at 10-12.) Indeed, one of the dates on which Colliton acknowledged having sexual intercourse with a girl under the age of 17 was December 25, 2000, the very night before he started work at Cravath. (Id.)

C. Instant Suit

Colliton filed his complaint against Cravath on December 27, 2007 in New York state court. Cravath removed the case to federal court on January 15, 2008. Following this Court's individual practices, on January 16, 2008 Cravath submitted a pre-motion letter highlighting what it perceived to be numerous deficiencies in Colliton's complaint. Colliton subsequently sought permission to amend his complaint, which this Court granted by letter dated January 23, 2008. In that letter, this Court advised Colliton that he would have the opportunity to amend his complaint, "if he believes that he can do so consistently with Fed. R. Civ. P. 11 and in a fashion that addresses the issues identified by defendants."

After Colliton filed his Amended Complaint, Cravath moved to dismiss on April 14, 2008. On that date Cravath also served, but did not file, a motion for Rule 11 sanctions, in accordance with Fed. R. Civ. P. 11(c)(2). When Colliton did not amend any of the allegations in his Amended Complaint within twenty-one days, Cravath filed its Rule 11 motion.

Subsequently, on July 8, 2008, Colliton wrote an e-mail to two partners at Cravath suggesting that he is "contemplating" bringing suit against each of Cravath's clients for tortious interference with his employment contracts with Cravath. Colliton insisted he would bring such suit unless all of Cravath's partners swear under oath, for his benefit, that they never talked to a particular client about Colliton or Colliton's suit against Cravath. (Gold Decl. Ex. A, Email from James Colliton to Stuart Gold and Robert Baron, dated July 8, 2008). Colliton said that he was "not willing to await discovery in our current action to commence this suit; consequently, I am making this offer outside the discovery parameters of our action . . . Please let me know today or tomorrow if you will supply the requested partner declarations before the end of the week." (Id.)

Cravath did not supply the declarations. (Gold Decl. Ex. B, Email from Stuart Gold to James Collition, dated July 11, 2008).

DISCUSSION

I. Standard of Review

In considering a motion to dismiss, the court must accept as true plaintiff's factual allegations, and draw all reasonable inferences in favor of plaintiff. Zinermon v. Burch, 494 U.S. 113, 118 (1990). The court's function is "not to weigh the evidence that might be presented at trial but merely to determine whether the complaint itself is legally sufficient." Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombly, --- U.S. ---, 127 S. Ct. 1955, 1964, 167 L.Ed.2d 929 (2007)(internal quotation marks, citations, and alterations omitted). Indeed, a plaintiff must assert "enough facts to state a claim to relief that is plausible on its face." Id. at 1974. This "plausibility standard" is a flexible one,

"oblig[ing] a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible." Iqbal v. Hasty, 490 F.3d 143, 158 (2d Cir. 2007) (emphasis in original), cert. granted, 76 U.S.L.W. 3654 (U.S. June 16, 2008)(No. 07-1015).

II. Analysis

A. Breach of Contract Claims

Colliton alleges that Cravath breached several purported oral agreements with him. He claims that each year that he was employed at the law firm, various partners promised him annual compensation equal to that of any other non-partner in the Benefits Department. (Am. Compl. ¶ 46.) Plaintiff alleges that, notwithstanding these agreements, he was not paid as much as another non-partner in the Benefits Department. (Am. Compl. ¶¶ 52-54.) Plaintiff further claims that he was promised a "make-up bonus" some time subsequent to January 2002, but was never paid that bonus. (Am. Compl. ¶¶ 58-60.) He also claims that he was assured a "pro-rata annual bonus" for any year in which he was not employed by Cravath for the entire year, and that he was never paid this bonus for 2006 (the year in which he was fired on March 1). (Am. Compl. ¶¶ 61-63.) Finally, Colliton alleges that Cravath promised to compensate him for "all of the time off

that plaintiff accrued . . . but did not use, including . . . vacation, sick leave, holidays and bereavement leave" any time when he left the firm, but has refused to pay him for certain accrued days in 2004, 2005 and 2006. (Am. Compl. ¶¶ 64-68.)

We find that in light of Colliton's felonious conduct both prior to and during his employment at Cravath, Colliton has failed to state a claim for breach of contract. Any alleged employment contracts between Colliton and Cravath were either induced by fraud; unenforceable because Colliton committed a prior material breach; or are barred by New York's faithless servant doctrine.

i. Fraudulent Concealment

Under New York law, a defendant may unilaterally rescind a contract that was induced by fraud. See Energy Capital Co. v. Caribbean Trading and Fid. Corp., No. 93 civ. 8100, 1996 WL 157498, at *7 (S.D.N.Y. Apr. 4, 1996); Jafari v. Wally Findlay Galleries, 741 F. Supp. 64, 68 (S.D.N.Y. 1990). Colliton's failure to disclose his criminal behavior at the time he was hired constitutes fraud, given his ethical duties as an attorney. Therefore, he is barred from recovering on his contract claims.

In order to render a contract unenforceable due to fraudulent concealment, a defendant must show that: "(1) the opposing party had a duty to disclose material information, yet (2) made a materially false representation, (3) intended to defraud, (4) upon which the party reasonably relied and (5) suffered damages as a result." Ferguson v. Lion Holdings, Inc., 312 F. Supp.2d 484, 496 (S.D.N.Y. 2004).

The New York Court of Appeals has held that there is an implied in law obligation between associates and law firms such that "both the associate and the firm in conducting the practice will do so in accordance with the ethical standards of the profession." Weider v. Skala, 80 N.Y.2d 628, 636, 593 N.Y.S.2d 752 (1992). Furthermore, it is indisputable that Colliton's felonious criminal activity - spanning several years and occurring both before and during his time at Cravath - was a violation of his ethical duties under the New York State Bar Code of Professional Responsibility, Disciplinary Rule 1-102, and the Appellate Division Rules of Practice, N.Y. Comp. Codes. R. & Regs. tit. 22, § 603.2(a). It is also clear that Colliton never informed Cravath of his criminal activities, and if he had, Cravath would have been aware that Colliton was unfit to practice law and would not have hired him to provide any attorney services.

Colliton attempts to argue that Cravath did not rely upon his misrepresentations when it hired him, and that it suffered no damage as a result of hiring him. (Pl.'s Mem. in Opp'n to Mot. to Dismiss ("Pl.'s Mem.") 2-7.) Colliton claims that because Cravath continued to make profits and retained its position in various law firm rankings, his indiscretions did not "harm" the firm.[6] (Am. Compl. ¶¶ 163-67.) These assertions are irrelevant. In order to prove damage resulting from fraud, it is not necessary to demonstrate a tangible, monetary loss: it "is sufficient that plaintiff received something different from what she contracted for and that she might not have accepted the same had the facts not been misrepresented to her." Krinsky v. Title & Guar. Trust Co., 163 Misc. 833, 839, 298 N.Y.S. 31 (1st Dept. 1937). Here, Cravath contracted to hire an employee with Colliton's managerial skills, who was also capable of working as an attorney. See Baron Decl. Ex. 9, Letter from Patricia Geoghegan to James Colliton, dated November 9, 2000 (confirming Colliton's employment as a "special associate," and a "lawyer hired as an associate.") Given his ethical violations, Colliton was not able to work as an attorney, and therefore his employment was the product of fraudulent concealment.

[6] Plaintiff claims that "[Cravath] cannot possibly establish that it was sufficiently injured by plaintiff's conduct [unless it can] prove that [Cravath] had ceased to be the premier American law firm as a result of plaintiff's conduct." (Am. Compl. ¶ 164.)

ii. Material Breach

Beyond the question of whether Colliton's concealment of his crimes defrauded Cravath, the commission of those crimes during his employment constituted a material breach of his contractual obligations, and bar recovery on any alleged subsequent breach by the firm. Jafari, 741 F. Supp. at 68.

Under New York law, a party may rescind a contract where the other party's breach is "material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract." Septembertide Publishing, B.V. v. Stein & Day, Inc., 884 F.2d 675, 678 (2d Cir. 1989) (quoting Callanan v. Powers, 199 N.Y. 268, 284, 92 N.E. 747 (N.Y. 1910)).

As discussed above, Colliton's criminal acts rendered him unable to fulfill his contractual obligations as an attorney, because he could not meet the ethical standards required of officers of the court. Such conduct during the course of employment represented a material breach of Colliton's employment contract with Cravath, and discharges the firm from any obligations.

iii. New York's Faithless Servant Doctrine

Furthermore, under New York's "faithless servant" doctrine, an employer may refuse to pay compensation to an employee "who is faithless in the performance of his service," and such employee is not entitled to recover wages for the period in which he was disloyal. Feiger v. Iral Jewelry, Ltd., 42 N.Y.2d 928, 928-29, 394 N.Y.S.2d 626, 626 (1977). See also Phansalkar v. Andersen Wainroth & Co., 344 F.3d 184, 201-02 (2d Cir. 2003). (under New York law, an employee has a duty of loyalty to his employer, and any "substantial" breach of that duty renders him ineligible to recover his contractual compensation).

New York courts have found breaches to be "substantial" in a variety of circumstances, and have only found breaches to be "insubstantial" where they constituted single, isolated incidents, or where those breaches were performed with the knowledge and acceptance of the employer. Id. Furthermore, "[i]t does not make any difference that the services were beneficial to the principal, or that the principal suffered no provable damage as a result of the breach of fidelity by the agent." Id. at 200 (quoting Feiger, 42 N.Y.2d at 928-29 (internal quotation marks omitted). Colliton's criminal conduct - rendering him incapable of fulfilling the terms of his contract - constituted a substantial breach of his duty of loyalty to Cravath.

iv. Colliton's "Specialist" Services Argument

Colliton tries to argue that the implicit ethical requirements imposed by Wieder and various codes of professional ethics are not applicable to his case because his abilities as an attorney were not "the only basis for the employment relationship," as they were in Wieder. 80 N.Y.2d at 637. Instead, Colliton's amended complaint asserts that he was employed a "specialist" who provided both "attorney services" and "specialist services." (Am. Compl. ¶¶ 13, 16-17.) In the alternative, he argues that even if his claims for compensation as an attorney are barred, he should still be compensated for his "specialist services," which, he claims, comprised 85% of his value to the firm. (Am. Compl. ¶ 45.)

Colliton's distinction between his "specialist" and "attorney" functions is simply an attempt to plead around the applicable law. In his original, verified complaint ("Orig. Compl."), Colliton asserted that he "was continuously employed as an attorney by [Cravath] between December 26, 2000, and March 1, 2006." (Orig. Compl. ¶ 5.) There was no mention of plaintiff's provision of "specialist services" anywhere in the original complaint. Moreover, a letter from Cravath to Colliton confirming his employment at the firm identified his position as

that of a "special associate," indicating that he was a "lawyer hired as an associate." (Baron Decl. Ex. 9, Letter from Patricia Geoghegan to James Colliton, dated November 9, 2000.) See Wieder, 80 N.Y.2d at 635. Colliton himself signed that employment letter.

After Cravath argued in a pre-motion letter to this Court that the decision in Wieder barred Colliton's suit because he was employed as an attorney, Colliton's amended complaint for the first time asserted that 85% of his value to the firm consisted of his work as a "specialist," not an attorney. This is a transparent attempt by plaintiff to amend his pleading in order to avoid a dispositive defense raised by Cravath. Where a "plaintiff blatantly changes his statement of the facts in order to respond to the defendant['s] motion to dismiss . . . [and] directly contradicts the facts set forth in his original complaint," a court is authorized "to accept the facts described in the original complaint as true." Wallace v. New York City Dep't of Corr., No. 95 Civ. 4404, 1996 WL 586797, at *2 (E.D.N.Y. Oct. 9, 1996). Under the facts alleged in Colliton's initial complaint, he was employed by Cravath as an attorney. Therefore, recovery is entirely barred by the holding in Wieder.

In any event, the faithless service doctrine bars his recovery on all of his contractual claims during the period he

was employed at Cravath, even if he was employed to some extent as a "specialist" rather than as an "attorney." Under the faithless servant" doctrine, where an employee is substantially disloyal in one of his tasks, he is prevented from recovering compensation for any of his tasks performed for that employer. See Phansalkar, 344 F.3d at 203-07. An employee is only permitted to recover wages for individual tasks when he is able to demonstrate three things:

> (1) the parties had agreed that the agent will be paid on a task-by-task basis (e.g., a commission on each sale arranged by the agent), (2) the agent engaged in no misconduct at all with respect to certain tasks, and (3) the agent's disloyalty with respect to other tasks "neither tainted nor interfered with the completion of" the tasks as to which the agent was loyal.

Id. at 205 (citing Musico v. Champion Credit Corp., 764 F.2d 102, 114 (2d Cir. 1985) (emphasis added). Here, Colliton never alleges that he was compensated on a task-by-task basis, nor does he indicate that his salary for the "specialist services" was calculated separately and independently of his salary for his "attorney services." Colliton's disloyalty in the provision of his attorney services therefore bars him from recovering on his "specialist services" to the firm, even if we assume that he was not disloyal in providing those services.[7] Therefore,

[7] We refuse to read Wieder so narrowly as to create implied ethical duties only where a firm hires a lawyer solely for the provision of legal services, as plaintiff urges. (Pl.'s Mem. 1-2.) Such a reading would allow

Colliton is not entitled to enforce his contracts with Cravath, and all claims associated with such contracts with Cravath are dismissed.

B. Unjust Enrichment Claim

Colliton next argues that even if his contract claims are unenforceable, he should still be able to recover the wages and bonuses promised to him under a theory of unjust enrichment.

In order to prevail on a claim of unjust enrichment under New York law, plaintiff must demonstrate 1) defendant was enriched; 2) defendant's enrichment came at plaintiff's expense; and 3) "circumstances were such that in equity and good conscience [defendant] should compensate [plaintiff]." R.B. Ventures, Ltd. v. Shane, 112 F.3d 54, 60 (2d Cir. 1997).

Plaintiff is not entitled to compensation "in equity and good conscience" because of his unclean hands. Colliton only obtained employment at Cravath through concealment of his criminal acts and violations of numerous codes of legal ethics. See Riggs v. Palmer, 115 N.Y. 506, 511-12, 22 N.E. 188, 190

attorneys who spent 10% of their time at a firm performing what could be characterized as "administrative services" (or something similar) to avoid their professional ethical obligations altogether. Instead, we read Wieder to hold that when a law firm hires an employee in reliance on their ability to practice law, that employee is required to comply with his or her ethical obligations when providing those legal services. Colliton's criminal and fraudulent acts rendered him incapable of performing his contractual obligations in accordance with his professional ethical duties, and therefore constituted a breach of that contract and a violation of his duty of faithful service to the firm.

(1889); Barker v. Kallash, 63 N.Y.2d 19, 25-26, 479 N.Y.S.2d 201 (1984).

Colliton argues that Cravath cannot raise a defense of unclean hands 1) because the firm was not damaged by his conduct; 2) because his criminal actions were not related to the transactions for which he requests relief; 3) because Cravath's own misconduct prevents them from raising the defense; and 4) because public policy considerations demand that we find in his favor. (Am. Compl. ¶¶ 159-88.)

These arguments are without merit. First, as we have already discussed, Cravath suffered damage as a matter of law as a result of Colliton's misrepresentations and criminal conduct. Second, Colliton's contention that his criminal acts and misrepresentations were unrelated to his employment activities at Cravath is without merit: as the Court in Wieder opined, attorneys are "independent officers of the court responsible in a broader public sense for their professional obligations." 80 N.Y.2d at 635. When Colliton violated those ethical obligations through his criminal acts and misrepresentations, he became unfit to provide legal services. Third, Cravath's alleged misconduct has no bearing on whether or not it can bring a defense of "unclean hands" to dismiss Colliton's equitable claims. See Precision Instrument Mfg. Co. v. Auto Maint. Mach.

Co., 324 U.S. 806, 814-15 (1945).[8] Finally, there is no argument that Colliton is entitled to equitable relief on public policy grounds. See Furman v. Krauss, 26 N.Y.S.2d 121, 123-24 (N.Y. Sup. Ct. 1941).

C. ERISA Claims

Colliton alleges that Cravath breached its fiduciary duties to him in its management of its Savings Plan for Senior Attorneys and Associates, in violation of ERISA. He claims that Cravath, as a fiduciary of the plan, violated 29 U.S.C. § 1104(a)(1)(A) and (a)(1)(B) in sixteen separate ways, including inter alia: (1) violating numerous provisions of 29 U.S.C. § 1022 (mostly concerning the provision of Summary Plan Descriptions ("SPDs"); (2) failing to select, appoint, and monitor competent co-fiduciaries; (3) failing to cause the Plan to satisfy the tax qualification rules; (4) failing to permit plan participants to invest in stocks on a daily basis; (5) failing to create appropriate procedures for establishing funding policies; (6) failing to establish procedures for allocating responsibilities for the operation and administration of the Plan; (7) failing to analyze investments to ascertain

[8] Contrary to plaintiff's assertions, the common law principles of in pari delicto and in princeps criminis have no bearing on this case, as they are only applicable in circumstances involving deliberate, joint criminal activity by the two parties. See Furman v. Furman, 34 N.Y.S.2d 699, 704 (N.Y. Sup. Ct. 1941).

"diversification opportunities"; and (8) "failing to monitor whether any plan funds are invested in assets which are beyond the reach of United States Courts." (Am. Compl. ¶ 155.) Ultimately, Colliton alleges that Cravath's "material breaches" of its fiduciary duties resulted in a loss of $15,000. (Am. Compl. ¶ 156.)

i. The Design of the Plan

To the extent that Colliton alleges that the design of the Plan resulted in his losses, Cravath owed no fiduciary duty in this respect. The Supreme Court in Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 444 (1999) held that "ERISA's fiduciary duty requirement simply is not implicated where [an employer], acting as the Plan's settlor, makes a decision regarding the form or structure of the Plan." The Court noted that under ERISA the term "fiduciary" with respect to a plan encompasses "management" and "administration" of a plan, but does not include plan design. 525 U.S. at 444. Therefore, any claims raised by Colliton relating to the design of the Plan are dismissed.

ii. The Administration of the Plan

We also dismiss Colliton's allegations that relate to the administration of the plan for failure to allege any causal link between the alleged fiduciary breaches and his losses.

Although Colliton asserts that Cravath failed to meet its fiduciary duties in numerous ways, he does not provide any factual details that identify when and how each of those breaches occurred, and moreover he fails to indicate how those alleged breaches resulted in any injury. For example, Colliton alleges that Cravath breached its duties to him by "failing to explore the management of Plan operations by examining whether cash is deposited promptly." (Am. Compl. ¶ 155(k).) Yet Colliton does not allege that had the firm done so, they would have discovered any irregularities that would have required them to take action. Similarly, Colliton alleges that Cravath breached its fiduciary duty by failing to "monitor whether any plan funds are invested in assets which are beyond the reach of United States Courts." (Am. Compl. ¶ 155(o).) But Colliton fails to allege why U.S Court jurisdiction impacted the Plan, and, moreover, the Plan explicitly allowed participants to choose to invest in global funds such as the Tweedy, Browne Global Value Fund.

After listing all these alleged fiduciary breaches, Colliton concludes that he was injured in the amount of $15,000.

(Am. Compl. ¶ 156.) Yet Colliton does not assert how he arrived at this figure, whether the figure is an actual loss or failure to make an additional $15,000, or, even which of the sixteen different breaches actually caused the "loss."

Colliton's failure to allege any link between the breaches and the amount of loss is fatal to his claims. Colliton brings suit under 29 U.S.C. § 1109(a) and 29 U.S.C. 1132(a)(2), both of which "require [a plaintiff] to show that his losses "result[ed] from each such breach." See Silverman v. Mutual Ben. Life Ins. Co., 138 F.3d 98, 104 (2d Cir. 1998). Courts have dismissed ERISA suits where plaintiffs have failed to provide sufficient notice of the nature of their claims. See Smith v. Local 819 I.B.T. Pension Plan, 291 F.3d 236, 241 (2d Cir. 2002); In re McKesson HBOC, Inc. ERISA Litig., No. 00-20030(RMW), 2002 WL 31431588, at *15-*16 (N.D. Cal. Sept. 30, 2002) (dismissing claims that a fiduciary breached its ERISA duties "by failing to monitor the performance of the . . . Plan, failing to communicate truthful information . . . , and failing to provide a mechanism in which participants could be provided with truthful information" on the ground that it did not meet the pleading requirements of Rule 8). Compare Crowley ex. Rel. Corning, Inc. Inv. Plan v. Corning Inc., 234 F. Supp. 2d 222, 230-31 (W.D.N.Y. 2002) (dismissing claims that an advisory

committee for a pension plan "knew or should have known" not to invest in a particular stock as excessively conclusory under Rule 8, in the absence of information identifying how and when the committee should have known) with In re Dynegy, Inc. ERISA Litig., 309 F. Supp. 2d 861, 880-82 (S.D. Tex. 2004) (allowing similar claims to proceed when such factual allegations were pleaded). See also Chudnovsky v. Leviton Mfg. Co., Inc., 158 Fed.Appx. 312, 313-14 (2d Cir. 2005).

Accordingly, we dismiss Colliton's ERISA claims for failing to meet the notice pleading requirements of Fed. R. Civ. P. 8(a). See also Bell Atl., 127 S. Ct. at 1965 (citing Conley v. Gibson, 355 U.S. 41, 47 (1957)).[9] Colliton's conclusory allegations simply do not render plausible his claim that the alleged fiduciary breaches caused him any injury.

iii. Leave to Amend

Colliton seeks leave to amend his complaint. We deny this request because Colliton already has had an opportunity to amend his complaint. See Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd., 85 F.Supp.2d 282, 304 n. 27 (S.D.N.Y.2000) ("Leave to amend is appropriately denied where, as here, the

[9] To meet this standard, the Second Circuit requires that "a pleader [] amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible." Iqbal, 490 F.3d at 158 (emphasis added).

plaintiff has already had an opportunity to replead after specific warnings as to a complaint's deficiencies"); Chill v. General Electric Co., 101 F.3d 263, 271-72 (2d Cir. 1996); In re Hyperion Securities Litigation, No. 93 Civ. 7179, 1995 WL 422480, at *8 (S.D.N.Y. Jul. 14, 1995) (denying leave to amend where plaintiffs had been given "more than two bites at an apple they have not been able to get their teeth into") aff'd 98 F.3d 2 (2d Cir. 1996). Moreover, Colliton himself was an ERISA lawyer whose job was to provide financial advice to Cravath, and he submitted an Amended Complaint that is voluminous - 299 paragraphs, and 60-pages. There is no reason to believe that further amendment would be productive. Therefore, Colliton's ERISA claims are dismissed with prejudice.

D. Intentional Infliction of Emotional Distress Claims

Finally, Colliton's Amended Complaint asserts a claim of intentional infliction of emotional distress, alleging inter alia that Cravath spied on him, Cravath partners discriminated against minorities and women and made "racist" and "sexist" remarks, created an inhospitable work environment, Cravath partners practiced law without a license and negligently supervised associates, and more generally Cravath embarked on a "pattern of abuse and fraud." (See generally Am. Compl. ¶¶ 182 -

186.) We dismiss Colliton's claim of intentional infliction of emotional distress on two alternate grounds. First, any such claims are barred by the relevant one-year statute of limitations. Second, the complaint fails to state a claim upon which relief can be granted.

i. Statute of Limitations

New York law provides a twelve-month statute of limitations period for intentional tort claims, including intentional infliction of emotional distress. N.Y. C.P.L.R. § 215(3); See Forbes v. Merrill Lynch, Fenner & Smith, Inc., 957 F. Supp. 450, 455 (S.D.N.Y. 1997). Where a plaintiff is subject to a sustained pattern of abuse, the continuing tort doctrine applies, and the statute of limitations begins to run after the last actionable abuse has occurred. See Shannon v. MTA Metro-North R.R., 704 N.Y.S.2d 208, 209, 269 A.D.2d 218, 219 (1st Dep't. 2000).

The instant action was commenced on December 27, 2007, more than twenty-one months after Colliton was fired from Cravath on March 1, 2006. In Colliton's original complaint, his only allegations of intentional infliction of emotional distress consisted of claims that "[d]uring plaintiff's employment with the [firm]. . . defendant breached . . . privacy rights of

plaintiff . . . ." (Orig. Compl. ¶¶ 62-63.) However, after the time-bar was noted by Cravath in a pre-motion letter to this Court, (Baron Decl. Ex. 3, Letter to the Court from Robert H. Baron, dated January 16, 2008, at 3) Colliton's subsequent Amended Complaint includes a host of new allegations relating to intentional infliction of emotional distress, including that Cravath's pattern of tortious actions extended past when Colliton was fired and through January 16, 2008. (Am. Compl. ¶ 182.)

However, Colliton has provided no credible details of any actions taken by Cravath in the period after Colliton was fired that caused him any emotional distress. At best, he makes conclusory assertions of a "pattern of abuse and fraud." (Am. Compl. ¶ 185.) Such vague allegations fail to provide defendant with notice of the grounds upon which the claim is based, and are dismissed. See Fed. R. Civ. P. 8(a)(2); Bell Atl., 127 S. Ct. at 164-65. Given that there can be no question that Collition was aware of whatever emotional distress he may have suffered at the hands of Cravath when he filed his initial complaint in December, 2007, because he included a claim of intentional infliction of emotional distress in that complaint, he simply cannot plead around a time bar by changing dates.

Colliton also attempts to plead around the time bar by arguing that he only "discovered" Cravath's tortious conduct in January, 2008, a month after he filed his initial complaint in this action. (Am. Compl. ¶ 185.) Under New York law, a claim of intentional infliction of emotional distress only becomes actionable and triggers the statute of limitations at the point when the emotional damage occurs. See Dana v. Oak Park Marina, Inc., 660 N.Y.S.2d 906, 910-11, 230 A.D.2d 204, 209-11 (4th Dep't. 1997) Colliton now claims that it was only in January 2008 that he "first figured out" that Cravath had induced the New York District Attorney's Office to charge him with crimes as of dates earlier than the District Attorney's Office had intended, and Cravath had done so "in order to argue in this action that [it] is not liable because Plaintiff's misconduct preceded his employment." (Pl.'s Mem. 28-29, 32)(emphasis in original.) This argument is clearly frivolous. There is no reason to believe that Cravath would have the desire, ability, or prescience to influence the New York District Attorney's Office so as to gain an advantage in this lawsuit, which Colliton did not even file until almost two years after his sex crimes were exposed in 2006. See infra D.ii.

Thus, given that plaintiff has failed to allege any acts that occurred in the year prior to filing this complaint that

caused him emotional distress, his claims of intentional infliction of emotional distress are dismissed as time-barred.

ii. Failure to State a Claim

Even if plaintiff's claims of intentional infliction of emotional distress were not time-barred, he has failed to state a claim for this tort. To state a claim for intentional infliction of emotional distress under New York law, a plaintiff must allege four elements: "(1) extreme and outrageous conduct, (2) intent to cause severe emotional distress, (3) a causal connection between the conduct and the injury, and (4) severe emotional distress." Bender v. City of New York, 78 F.3d 787, 790 (2d Cir. 1996). Colliton has failed to plead facts that would support an inference of "extreme and outrageous conduct" by Cravath; or any intent to cause him severe emotional distress.

Conduct is considered "extreme and outrageous" only "where . . . [it] has been so outrageous in character, and so extreme *in degree, as to go beyond all possible bounds of decency, and* to be regarded as atrocious, and utterly intolerable in a civilized community." Murphy v. Am. Home Prod. Corp., 58 N.Y.2d 293, 303 (1983)(quoting Restatement (Second) of Torts § 46 (1965)). Courts have explicitly held that a hostile or

stressful work environment cannot meet this high bar. Lydeatte v. Bronx Overall Econ. Dev. Corp., No. 00 civ. 5433, 2001 WL 180055, at *2 (S.D.N.Y. Feb. 22, 2001). Colliton's claims against Cravath are largely limited to claims of a stressful work environment, and fail as a matter of law to rise to the necessary level of indecency.

Nor does Colliton sufficiently allege intent on the part of Cravath. The vast majority of Colliton's claims allege "abuses" by Cravath that would constitute mistreatment of all of its employees, and are in no way targeted towards Colliton individually. See Three Crown Ltd. P'ship v. Caxton Corp., 817 F. Supp. 1033, 1048-49 (S.D.N.Y. 1993).

III. Sanctions

Cravath has also moved for sanctions pursuant to Fed. R. Civ. P. 11(c). Under Rule 11(b), a party presenting the court with a pleading certifies, among other things, that

> (1) it is not being presented for any improper purpose, such as to harass or to cause . . . needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or the establishment of new law . . .[and] (3) the allegations and other factual contentions have evidentiary support.

Fed. R. Civ. P. 11(b)(1-3). In determining whether a party has engaged in conduct violating these requirements, courts apply an objective standard of reasonableness. See Bus. Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 U.S. 533, 550-51 (1991). A court finding a violation or violations has the discretionary authority under Rule 11(c) to impose sanctions. See, e.g., Clinton v. Jones, 520 U.S. 681, 709 n.42 (1997) ("Sanctions may be appropriate where a claim is presented for any improper purpose, such as to harass, including any claim based on allegations and other factual contentions [lacking] evidentiary support or unlikely to prove well-grounded after reasonable investigation.")(internal citations omitted).

The 1993 Advisory Committee Note to Rule 11 sets forth certain factors that may be considered by the court when deciding whether to impose sanctions or what sanctions are appropriate in the given circumstances. Those factors include:

> (1) whether the improper conduct was willful, or negligent; (2) whether it was part of a pattern or activity, or an isolated event; (3) whether it infected the entire pleading, or only one particular count or defense; (4) whether the person has engaged in similar conduct in other litigation; (5) what effect it had on the litigation process in time or expense; (6) whether the responsible person is trained in the law; (7) what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case.

Kochisarli v. Tenoso, No. 02-CV-4320, 2006 WL 721509, at *8 (E.D.N.Y. Mar. 21, 2006) (citing Simpson v. Putnam County Nat. Bank of Carmel, 112 F.Supp.2d 284, 291-92 (S.D.N.Y. 2000)); see also Fed. R. Civ. P. 11 advisory committee note to 1993 amendments.

As discussed below, all the considerations that would lead a court to impose sanctions are all present here. When by letter, dated January 23, 2008, this Court granted Colliton's request to amend his complaint we advised him of his obligations under Rule 11. Despite this warning, Colliton - a former attorney - has filed an amended complaint consisting of self-contradictory allegations without legal or factual support. Further, Colliton has harassed Cravath and threatened the firm and its clients with further frivolous litigation unless they settle this case. Accordingly, we grant defendant's motion for Rule 11 sanctions.

A. Contradictory Pleadings

Colliton's Amended Complaint contradicts his verified original complaint, in a transparent attempt to plead around the legal defenses presented by Cravath in its pre-motion letter to this Court. In his original complaint, Colliton alleged that he had been "continuously employed as an attorney by [Cravath]

between December 26, 2000, and March 1, 2006." (Orig. Compl. ¶ 5.) Furthermore, a letter from the firm confirming his employment refers to his position in the firm as that of a "special associate" and a "lawyer." (Baron Decl. Ex. 9, Letter from Patricia Geoghegan to James Colliton, dated November 9, 2000.) However, after Cravath demonstrated that under Wieder an attorney owes a contractual obligation to behave in accordance with his professional ethical obligations, Colliton changed his story, claiming instead that Cravath employed him primarily as a "specialist," and that he "was never, at any time during the Employment Period, an associate, a senior attorney or counsel." (Am. Compl. ¶ 22.)

Similarly, Colliton's original complaint alleged that his claims of intentional infliction of emotional distress arose out of events "[d]uring [his] employment with the defendant." (Orig. Compl. ¶ 62.) After Cravath argued that such claims would be barred by the one-year statute of limitations, Colliton amended his complaint to include allegations that defendant's abuses continued "throughout the Employment Period and thereafter, through January 16, 2008." (Am. Compl. ¶ 182).

Under Rule 11(b)(3), plaintiffs must have an adequate, non-frivolous basis in fact for their claims. It is clear that sanctions are appropriate where facts have been "concocted."

See Levine v. F.D.I.C. 2 F.3d 476, 479 (2d Cir. 1993)("the creativity of an attorney may not transcend the facts of a given case; counsel in his attempts at creativity concocted 'facts' that were not well grounded, and therefore exceeded the bounds of conduct . . . incorporated in Fed. R. Civ. P. 11."(internal quotation omitted). Self-contradictory assertions, such as Colliton's, clearly lack reasonable evidentiary support, in violation of Rule 11(b)(3). Polar Int'l Brokerage Corp. v. Reeve, 196 F.R.D. 13, 18 (S.D.N.Y. 2000) *aff'd in part, dismissed in part on other grounds sub. nom.*, Corroon v. Reeve, 258 F.3d 86 (2d Cir. 2001).

In sum, given the dubious and contradictory factual allegations in the complaint, Rule 11 sanctions are appropriate.

B. Harassment

Not only are plaintiff's claims frivolous, it is clear that they are intended at least in part to harass Cravath and its clients, and possibly also intended to extort a settlement.

In his recent e-mail correspondence with Cravath, Colliton indicated that he is "contemplating" suing clients of Cravath for tortious interference with his employment contract with the firm, unless every Cravath partner swears that they never discussed Colliton or this suit with that particular client.

(See Gold Decl. Ex. C, E-mail from James Colliton to Stuart Gold, dated July 11, 2008). Colliton indicates in his e-mail that Cravath should "[b]e prepared to be questioned by your clients and the media about why, given the small amount I am due and seeking, relative to your wealth . . . [you persist] in your unlawful refusal to pay me what I am owed, so that I can support my Family." (Id.) He also suggests that "once the media discloses that my children are ready to go onto the welfare roles," Cravath and its clients might re-evaluate their legal position, and he questions why Cravath would defend this lawsuit when doing so would necessarily disclose the tortious acts of their clients. (Id.) He concludes with the suggestion that he, "remain[s] willing to accept a reasonable settlement," and he will "inform Judge Buchwald of his efforts to settle." (Id.)

Colliton's threats of further litigation are clearly not empty. Since March 2007, Colliton has filed at least five lawsuits against various defendants, including Cravath, the police officers involved in his arrest and confinement, the New York District Attorney, American Express, IBM Corporation, Time Warner Corporation and others.[10] For, as Colliton himself has publicly stated in an interview, "I have all the time in the

[10] See Colliton v. Donnelly, No. 07 Civ. 01922 (S.D.N.Y. filed Mar. 5, 2007), Colliton v. Gonzalez, No. 07 Civ. 02125 (S.D.N.Y. filed Mar. 13, 2007), Colliton v. Morgan, No. 07 Civ. 08269 (S.D.N.Y. filed Sept. 24, 2007), Colliton v. Am. Express Co., No. 08109880 (N.Y. Sup. Ct. filed Jul. 18, 2008).

world because I doubt I'll be reinstated to the bar if I ever tried." (Nate Raymond, Shameless: The Lolita Lawyer Sues Cravath in Longhand, Am. Law., Feb. 2008).

Colliton's litigation tactics border on extortion, and should not be condoned.[11]

C. Pro Se Status

Colliton's pleadings are not saved from Rule 11 sanctions by the mere fact that he is proceeding pro se. Pro se plaintiffs, as lawyers, are subject to the requirement of Rule 11. See, e.g., Malley v. New York City Bd. Of Educ., 207 F. Supp. 2d 256, 259 (S.D.N.Y. 2002); Patterson v. Aiken, 841 F.2d 386, 387 (11 Cir. 1986)("one acting pro se ha no license to harass others, clog the judicial machinery with meritless litigation, and abuse already overloaded court dockets."). Moreover, as a former attorney with experience, Colliton is fully capable of conforming with the demands of Rule 11. As the Second Circuit has written in the context of an action brought by an attorney proceeding pro se, "Courts look with disfavor on this sort of unfounded spite action. When the litigant is an

[11] The filing of meritless claims by experienced counsel has been found to give rise to a "strong inference ... [of] an improper purpose" in the Rule 11 context. Huettig & Schromm, Inc. v. Landscape Contractors Council, 582 F.Supp 1519, 1522 (N.D.Cal 1984), aff'd, 790 F.2d 1421 (9th Cir. 1986). The lack of merit of Colliton's ERISA claims, given that he is an ERISA lawyer, strongly suggests the presence of an improper purpose, and provides an alternative ground for Rule 11 sanctions. Fed. R. Civ. P. 11(b)(1).

attorney, sanctions are particularly appropriate." Fox v. Boucher, 794 F.2d 34, 38 (2d Cir. 1986).

D. Nature of Sanctions

Under Rule 11, a District Court retains broad discretion to fashion an appropriate sanction based on the facts and circumstances of a particular case. Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp., 222 F.3d 52, 57 (2d Cir. 2000). Colliton's pro se status, and his apparent lack of current income complicate the task. See, e.g., Wiideman v. McKay, 132 F.R.D. 62, 66 (D. Nev. 1990).

One appropriate sanction is the dismissal of Colliton's Amended Complaint with prejudice. Although the Court has already decided to dismiss the Amended Complaint for failure to state a claim, this sanction under Rule 11 serves as an alternative ground for dismissal. See Abdelhamid v. Altria Group, Inc., 515 F.Supp.2d 384, 400 (S.D.N.Y. 2007)(dismissing a complaint pursuant to Fed. R. Civ. P. 12(b)(6) and in the alternate pursuant to Fed. R. Civ. P. 11(c)).

We have reviewed the law with regard to sanctions awarded for Rule 11 violations. As a practical matter, many of the sanctions which are typically imposed may not be utilized here. For example, reprimanding a disbarred attorney is meaningless.

Similarly, fining someone who has lost his job, his license to practice law and an ability to readily find comparable employment seems inappropriate.

However, this conduct should not go unsanctioned. If Colliton ever endeavors to apply for readmission to the bar, he must submit this opinion to the appropriate bar authorities. Furthermore, he is placed on notice that another sanction that has been employed is to bar a party from pursuing additional litigation without leave of court. We anticipate that this decision would figure into the calculus of future courts if Colliton continues to pursue equally frivolous claims.

CONCLUSION

For the foregoing reasons, defendant's motion to dismiss the complaint in its entirety is granted. Defendant's motion for sanctions pursuant to Fed. R. Civ. P. 11 is also granted.

IT IS SO ORDERED.

Dated: New York, New York
September 23, 2008

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Copies of the foregoing Order have been mailed on this date to the following:

James Colliton
28 Millbank Road
Poughkeepsie, NY 12603

Robert H. Baron, Esq.
Cravath, Swaine & Moore LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475