

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:

HON. RICHARD B. LOWE, III

E-FILE

PART 59

Index Number : 103456/2009

BERNARD, RUSSEL S.

VS.

PROSKAUER ROSE LLP

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO.

103456-09

MOTION DATE

4/24/09

MOTION SEQ. NO.

#001

MOTION CAL. NO.

were read on this motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

NYS SUPREME COURT RECEIVED OCT 20 2009 IAS MOTION SUPPORT OFFICE

FILED Oct 21 2009 NEW YORK COUNTY CLERK'S OFFICE

CASEY SP

Dated: OCT 19 2009

HON. RICHARD B. LOWE, III

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

----- X
RUSSEL S. BERNARD,

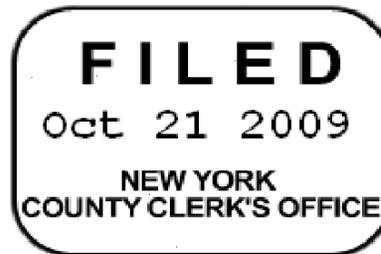
Plaintiff,

Index. No. 103456/09

-against-

PROSKAUER ROSE, LLP AND
MICHAEL ALBUM,

Defendants.



----- X
RICHARD B. LOWE, III, J.:

In this complaint alleging legal malpractice, breach of fiduciary duty and breach of contract, defendants Proskauer Rose, LLP and Michael Album (defendants) move, pursuant to CPLR 3211 (a) (5) and CPLR 3211 (a) (7), for an order dismissing the complaint on the grounds of collateral estoppel and failure to state a cause of action.

BACKGROUND AND FACTUAL ALLEGATIONS

In this action, plaintiff Russel S. Bernard is alleging that defendants failed to adequately advise him regarding his departure from his prior place of employment to start his own real estate investment firm. Plaintiff alleges that, as a result of following defendants' advice, he was sued in arbitration by his past employer, resulting in losses of approximately \$51.5 million. Plaintiff also alleges that defendants breached their fiduciary duty to him and breached their contract with him when they refused to represent him at the subject arbitration.

Plaintiff is a real estate investment analyst. In 1994, plaintiff joined Trust Company of the West (TCW) as a portfolio manager for certain real estate investment funds. Soon after, plaintiff and

some other TCW employees left TCW to create Oaktree Capital Management, LLC (OCM), a California-based firm that managed funds catering to high net-worth investors. This was a negotiated departure in which TCW and Oaktree entered into an agreement whereby OCM was compensated for managing TCW funds. Plaintiff became responsible for OCM funds which were invested in distressed real estate properties, and he managed an entire team of real estate investment professionals.

In 2004, plaintiff contemplated leaving OCM to start his own firm, provided that this could be fashioned in a way that would “protect his rights to millions of dollars in incentive and back-end fees and other monies owed him” (Amended Complaint, ¶ 18). In approximately October 2004, plaintiff met with defendant Michael Album, a partner in the New York office of defendant Proskauer Rose, LLP, an international law firm. According to plaintiff, he explained to defendants that, should he decide to leave OCM, he wanted to be able to obtain OCM’s permission to allow some of his team to join his new firm, preserve rights to his OCM and TCW incentive fees, and avoid any liability to OCM for his departure. Plaintiff maintains that defendants drafted an action plan for him, containing three different options, and that he agreed to Plan A, which involved “giving OCM some notice of resignation and seeking to negotiate a sub-advisory agreement and settlement prior to leaving OCM ...” (*id.*, ¶ 43).

Plaintiff asserts that, in accordance with OCM’s operating agreement, he knew that he had an obligation to stay at OCM for 120 days after giving notice of resignation. Plaintiff explains that defendants failed to advise him that, if he were to be found liable for violating the 120-day notice provision, this could be considered a breach of fiduciary duty to OCM. As such, OCM could justifiably expel him, and then he would potentially be voiding his rights to millions

of dollars in fees. Plaintiff continues that such expulsion would be subject only to "Delaware's particularly deferential business judgment rule," and that he was also subject to California's "exacting fiduciary duties and the duty of loyalty imposed by the Operating agreement" (*id.*, ¶ 79).

In the Spring of 2005, OCM began to plan for the launch of a new real estate investment fund called ROF IV. Plaintiff would be "directly responsible for designing the fund and promoting it to new and existing customers" (*id.*, ¶ 19).

In November 2005, plaintiff decided to leave OCM and arranged for defendants to negotiate with OCM regarding his impending departure. Plaintiff then alleges that on around November 17, 2005, OCM's counsel told defendants that executives from OCM were out of the country and could not be consulted for negotiations. Regardless, according to plaintiff, defendants drafted a letter which plaintiff submitted to OCM. According to the complaint, the letter stated as follows:

Over the last few weeks, after I advised you that I had decided to leave Oaktree, I was hoping to structure an amicable resolution and transition arrangement, before tendering my formal resignation. You have advised my counsel that Oaktree is still considering its options and is not prepared to respond to me. As a result I am left with no choice but to advise you that I am resigning effective immediately as an employee and Principal of Oaktree Capital Management, LLC ("Oaktree") and its affiliates and subsidiaries (collectively, the "Firm"), and that this letter is notice of my resignation and withdrawal as a member of Oaktree under Section 9.2 of the Oaktree operating agreement. I want to express my appreciation to the Firm over the years, and, as I have communicated, I am available to discuss transition and related matters. Payments with respect to my continued interests in the Firm and its investment entities should be wired in accordance with existing instructions and the related paperwork should be forwarded to my home address until you are notified otherwise. I will be coming to my office in the near term to clear out my personal possessions

(*id.*, ¶ 49).¹

Then, shortly thereafter, according to plaintiff, pursuant to defendants' advice, plaintiff immediately started his new firm, Westport. On November 30, 2005, OCM sent a letter to its investors about plaintiff's departure. On December 1, 2005, plaintiff issued a press release about the formation of Westport.²

Plaintiff was still considered a principal of OCM, and a member, for 120 days after his resignation on November 18, 2005. Under section 4.9 of the operating agreement, the executive committee may commence expulsion proceedings if the member is 1) convicted of a felony which materially affects Oaktree's business, 2) is convicted of fraud or another crime which materially affects Oaktree's business, or 3) has engaged in conduct which has resulted in substantial harm to Oaktree as a result of gross negligence or willful misconduct (Interim Arbitration Award [IA], at 21 [Defendants' Exhibit C]). On December 12, 2005, based on what it considered to be an abrupt departure and the formation of a competing entity, OCM voted to expel plaintiff as a member pursuant to the third prong of section 4.9, and to terminate him for cause.

In January 2006, plaintiff filed a demand for arbitration in California, pursuant to OCM's operating agreement. In his demand, plaintiff sought all direct incentive fees, indirect incentive fees and other compensation to which he claimed he was due. OCM filed counterclaims and then plaintiff filed a reply to its counterclaims. Plaintiff claims that, when he contacted defendants and requested that they represent him in the arbitration proceedings, they

¹Plaintiff did not provide a copy of the letter in its entirety as an exhibit.

²Plaintiff did not provide a copy of the press release for the court.

refused to do so, alleging a conflict of interest.

Upon further submission of briefs at the court's request, according to plaintiff, before he hired defendants, they ran a "conflicts check" to see if there was anything to preclude them from representing plaintiff in matters adverse to OCM. Defendants allegedly billed plaintiff for this conflicts check, and then proceeded to work with plaintiff for the next 18 months. During this time, according to plaintiff, since defendants were aware of the potential litigation that might have ensued due to plaintiff's anticipated resignation, plaintiff was introduced to several litigators in the firm. Plaintiff also states that the first legal memorandum prepared for him indicated that, if and when plaintiff were to resign, potential litigation might ensue.³ As such, according to plaintiff, defendants were aware that the relationship between him and OCM was likely to become adversarial. At no time was plaintiff told that, if litigation were to happen, defendants would no longer be able to represent him.

Plaintiff filed a demand for arbitration and allegedly defendants refused to represent plaintiff for that proceeding. According to plaintiff, he was told that there was a conflict of interest in defendants' Los Angeles office. Plaintiff indicates that, even after he was told of the conflict of interest, defendants still continued to bill him for work performed. As such, plaintiff claims that defendants' breaches of contract and fiduciary duty are "egregious" (Plaintiff's Supplemental Memo of Law, at 3). Plaintiff alleges that he was forced to hire new counsel for his arbitration proceeding, and this new counsel "[had] no history or knowledge of the relationship between Bernard and OCM, no knowledge of the advice that Proskauer had given to Bernard ..." (*id.* at 3).

³Plaintiff did not provide a copy of the memorandum to the court.

On further brief, defendants argue that they were never retained to “render litigation services for Bernard, or that Proskauer ever agreed to do so” (Defendants’ Supplemental Brief, at 2). They state that they informed plaintiff that they did not want to expand their representation to include litigating against a fund such as OCM.⁴ Defendants also allege that plaintiff did not sustain any damages as a result of their actions, as he was able to, and presumably did, find competent counsel. In any event, after the start of the arbitration proceedings, OCM claims to have discovered additional activities conducted by plaintiff which justified expulsion. In November 2004, plaintiff became aware of a possible real estate investment, referred to as 60 Main Street. Plaintiff provided OCM’s financial status as the proof of the ability to purchase the property. He did not obtain OCM’s permission to do so, nor did he mention this purchase to anyone at OCM. In November 2005, plaintiff entered into a purchase agreement for 60 Main Street, and the purchaser was plaintiff’s new company, Westport. On October 31, 2006, the parties amended the pleadings to incorporate this new information. While the arbitration was still proceeding, plaintiff was expelled from OCM for the second time, including additional grounds, on November 7, 2006.

Besides the diversion of the 60 Main Street property, after the commencement of the arbitration proceedings, it was determined that plaintiff misappropriated confidential and/or proprietary information. In the IA, the arbitrator noted that, in the summer of 2005, plaintiff asked his secretary to print out his contacts list for him and to put his quarterly investment letters onto a computer disk for him, something he had never done before. Plaintiff formed Westport on

⁴Defendants note that they sent plaintiff a retainer agreement which he never signed. Neither party presented this agreement to the court.

November 17, 2005. On that same day, plaintiff also e-mailed his wife some of OCM's financial information (Final Arbitration Award [FA], at 7 [Defendants Exhibit D]). It was also determined that, with regards to ROF IV, in early 2005, plaintiff began to act "uncharacteristically" by deflecting questions about the fund and declining to meet with potential investors (IA, at 30).

On May 31, 2007, Judge Ann Keough (arbitrator) issued the IA. She then issued the final award (FA) on July 12, 2007. OCM filed a petition in Los Angeles Superior Court seeking to confirm the FA. This award was confirmed on March 21, 2008. Plaintiff indicates that he is currently appealing this confirmation.

The arbitrator rejected all of plaintiff's claims. After addressing OCM's counterclaims, she awarded OCM compensatory damages of \$12,325,250.00, with interest starting May 28, 2007, based on one year of lost fees due to the delay in launching ROF IV. OCM was also awarded attorneys' fees in the amount of \$6,740,289.00. Plaintiff was ordered to disclose information to OCM regarding 60 Main Street, and was also required to return all of OCM's property in his possession, including copies of quarterly letters, contacts lists and financial documentation from which the Westport track record was created.

In her findings, the arbitrator related the facts and addressed the parties' claims. She found that plaintiff was not entitled to direct incentive fees because she found that "evidence is clear that no written contract regarding [plaintiff's] direct incentive fees was ever entered into" (IA, at 9-10). The expulsion of plaintiff was upheld, and, as a result, he was no longer entitled to receive indirect incentive fees either, pursuant to OCM's operating agreement. The arbitrator also held that, as a result of his termination for cause, plaintiff forfeited any vested management or incentive fees from TCW or OCM. As well as other violations not relevant to this proceeding,

the arbitrator found that plaintiff breached his fiduciary duty to OCM, and also breached the confidentiality agreement and the operating agreement, by collecting OCM's financial information for his own use. She also found that plaintiff's actions with regard to the 60 Main Street property constituted both a breach of fiduciary duty and a breach of contract.

Additionally, she found that by delaying ROF IV, plaintiff deprived OCM of the advantage of plaintiff's skills that he should have properly brought to the company.

Plaintiff filed a complaint on March 12, 2009, alleging that, as a direct result of defendants' improper legal advice, OCM terminated him for cause, expelled him as a member and sued him. Specifically, plaintiff claims that, by advising him to resign "effective immediately," and to stop performing his duties at OCM, specifically regarding the ROF IV fund, defendants "negligently ensured that OCM would justifiably expel Bernard and terminate Bernard for cause, thereby preventing Bernard from recovering millions of dollars in incentive fees" (Amended Complaint, ¶ 50). He also claims that he was "inexcusably" advised to immediately form his own company and issue a press release, all during the 120-day period of time that he was still a member of OCM. Besides the damages incurred to OCM as a result of the arbitration, plaintiff claims that, due to defendants' negligence, he forfeited \$30 million in back-end and incentive fees that he was entitled to, and also had to pay approximately \$2.5 million to defend himself in the arbitration. In sum, plaintiff is seeking at least \$51.5 million in damages from defendants based on a theory of legal malpractice.

In addition, plaintiff brings claims of breach of fiduciary duty and breach of contract against defendants for the same amount of damages.

Defendants argue that plaintiff's claims are barred due to collateral estoppel. They claim

that the arbitration award is final, and has already determined that plaintiff is owed no compensation from OCM.

Defendants also claim that plaintiff's claims do not state a cause of action for legal malpractice since its actions were not the "but for" cause of plaintiff's alleged damages.

DISCUSSION

I. Dismissal

Defendants moved to dismiss the complaint against them pursuant to CPLR 3211 (a) (7), for failure to state a cause of action. On a motion to dismiss pursuant to CPLR 3211, the facts as alleged in the complaint are accepted as true, the plaintiff is given the benefit of every possible favorable inference, and the court must determine simply whether the facts alleged fit within any cognizable legal theory (*P.T. Bank Central Asia v ABN AMRO Bank N.V.*, 301 AD2d 373, 375 [1st Dept 2003]; *see also Mendelovitz v Cohen*, 37 AD3d 670, 671 [2d Dept 2007]). Under CPLR 3211 (a)(7), "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one [internal quotation marks and citations omitted]" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

II. Collateral Estoppel

Defendants argue that collateral estoppel can be applied to arbitration awards, and that, due to the arbitration decision, plaintiff's claims against defendants are barred by collateral estoppel. Specifically, defendants state that plaintiff "breached his fiduciary duties to Oaktree in matters wholly unrelated to any alleged advice from Proskauer," and that he "clearly had a full and fair opportunity to litigate with Oaktree" (Defendants' Memo of Law, at 2, 14). Plaintiff

argues that the decision is not final, since an appeal is still pending, and additionally, that in the interest of equity, collateral estoppel should not apply. Intertwined with his other arguments, he also mentions how the arbitrator never ruled on whether defendants properly advised him, but rather, only ruled on his actions.

In their argument for why collateral estoppel is applicable, defendants cite to the exact reason why collateral estoppel is not applicable in the present case. The doctrine of collateral estoppel is an equitable one which is based on the notion that:

it is not fair to permit a party to relitigate an issue that has already been decided against it. ... Its essential ingredients are: [f]irst, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination [internal quotation marks and citations omitted]

(*Matter of Juan C. v Cortines*, 89 NY2d 659, 667 [1997]). As plaintiff asserts, in the arbitration and the subsequent confirmation by the California Superior Court, none of the issues in this present action were ever litigated. Only the claims between plaintiff and OCM were litigated, and the issue of the possible liability of plaintiff's counsel with respect to those actions was never addressed during arbitration. As such, defendants' argument that the complaint should be dismissed pursuant to 3211 (a) (5) fails as a matter of law.

III. Legal Malpractice

In order to establish a cause of action to recover damages for legal malpractice, a plaintiff must prove three elements: "(1) the negligence of the attorney; (2) that the negligence was the proximate cause of the loss sustained; and (3) proof of actual damages [internal quotation marks and citations omitted]" (*Ulico Casualty Company v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 10 [1st Dept 2008]). Proximate cause is shown if the plaintiff can establish

“that ‘but for’ the attorney’s negligence, the plaintiff would have prevailed in the matter in question” (*Tydings v Greenfield, Stein & Senior, LLP*, 43 AD3d 680, 682 [1st Dept 2007], *aff’d* 11 NY3d 195 [2008]).

A. ROF IV

Plaintiff claims that defendants advised him to resign abruptly and not continue to work on ROF IV during the 120-day notice period after his resignation on November 18, 2005. In a subsequent affidavit, plaintiff amends this argument to state that he was advised by defendants, in August 2005, not to work on ROF IV. Plaintiff characterizes the arbitrator as stating that plaintiff breached his fiduciary duties to OCM by not “promoting OCM’s new fund -ROF IV- during the 120-day notice period, which resulted in an award for OCM and against Bernard for \$12.3 million in damages” (Amended Complaint, ¶ 91). However, plaintiff neglects to mention that the arbitrator indicated that,

“[b]eginning in early 2005, when Oaktree would logically have begun to gear up to launch Fund IV, in the Fall and when Claimant led senior management to believe he was planning to launch Fund IV, Claimant began to act uncharacteristically. He deflected questions about Fund IV, told investors that as yet there were no plans for Fund IV, declined to meet with potential investors, and directed subordinates to refer all investor inquiries about Fund IV to himself but then declined to give those investors any information”

(IA, at 30).

Accordingly, even if defendants allegedly advised plaintiff to stop performing his duties with respect to ROF IV as of August 2005, plaintiff would not be able to sustain a claim for legal malpractice. Specifically, the arbitrator found that plaintiff acted inappropriately starting in “early 2005,” and as such, plaintiff cannot prove that “but for” defendants’ negligence, he would not have been liable for breach of fiduciary duty regarding the launch of ROF IV.

B. Incentive Fees

Plaintiff alleges that, as a result of defendants' negligent advice, he forfeited the back-end fees and incentive fees he was entitled to receive, which are valued at \$30 million. The arbitrator concluded that once plaintiff was no longer an employee of OCM, he was not entitled to direct incentive fees or back-end fees. Plaintiff explains, "[h]ad I not resigned, I would have continued to receive those direct incentive fees and know of no reason I would not have received those direct incentive fees" (Plaintiff's Affidavit, ¶ 4).

However, the final cause of plaintiff's expulsion, which inherently caused plaintiff's damages, was not due to any advice of the defendants. According to the OCM operating agreement, as indicated earlier, a member may be expelled if he has "engaged in conduct which has resulted in substantial harm to Oaktree as a result of gross negligence or willful misconduct." Even if plaintiff did not resign, or had resigned in a "proper" way, plaintiff's own actions, separate from any connection to defendants, would have eventually caused plaintiff to be expelled. The arbitrator found that plaintiff's "actions with regard to the 60 Main Street property constituted both a breach of contract and breach of fiduciary duty" (IA, at 28). As the arbitrator dictated, "[t]he evidence is clear that [plaintiff] made an offer on 60 Main Street using Oaktree's name and Oaktree's financial clout without Oaktree's permission and with no intention of actually purchasing the property for Oaktree" (*id.* at 26). Accordingly, regardless of whether plaintiff resigned or not, OCM would have justifiably expelled plaintiff, and such was not due to any advice given to plaintiff by defendants.

As defendants argue, plaintiff attempts to connect them with his 60 Main Street purchase by stating in his affidavit that he "occasionally purchased properties for my own account ... I

discussed these purchases with Proskauer and Album ..." (Plaintiff's Affidavit, ¶¶ 5-6). However, this statement does not indicate that defendants knew of, or advised plaintiff to purchase 60 Main Street, which purchase was the subject of the arbitration hearing. Plaintiff was ordered to disclose all information about 60 Main Street to OCM, and to allow OCM to purchase the property if it so chose. Plaintiff also attempts to argue that, since the arbitrator did not fashion a monetary remedy with respect to 60 Main Street, no liability was imposed on him. However, this argument is without import. Even if the arbitrator did not assign monetary damages to plaintiff's activity with respect to 60 Main Street, she still found that his activity was a breach of fiduciary duty, which would be a ground for expulsion.

Furthermore, the arbitrator found that plaintiff breached his fiduciary duty to OCM when he collected OCM's financial information for his own personal use. Plaintiff does not indicate that defendants advised him to e-mail OCM's financial information to his wife or to take OCM's quarterly investment letters and OCM's contact lists. As defendants maintain, under California law, which governs plaintiff's duties to OCM, "an employee who breaches a fiduciary duty to an employer forfeits any rights to compensation for his services" (Defendants' Memo of Law, at 16; *see e.g. Service Employees International Union, Local 250 v Colcord*, 160 Cal App 4th 362, 371 [1st Dist 2008]). Plaintiff could have been also justifiably expelled for his self-dealing, and plaintiff cannot prove that "but for" defendants' negligence, he would have sustained damages. Accordingly, defendants' motion for dismissal of the cause of action for malpractice is granted.

C. OCM's Attorney's Fees and Plaintiff's Legal Costs

Plaintiff was required to pay OCM's attorney's fees and costs as a result of the arbitration, as well as his own legal costs. Plaintiff explains, "[m]y decision to resign, how I

departed from OCM, and the resulting action I took to effect that decision and to being a new venture were based on and followed [sic] the advice of my lawyers, Proskauer and Alum” (Plaintiff’s Affidavit, ¶ 3). Plaintiff indicates that, had he not resigned, plaintiff would never have been in the “disadvantaged position of litigating with OCM” (Amended Complaint, ¶ 65). He also states that, “[t]he arbitration was a rout and resulted in a total victory for OCM and a complete loss for Bernard as a direct result of Proskauer’s negligent advice” (*id.*, ¶ 61). However, legal claims for malpractice which are based on speculation “are insufficient as a matter of law to establish that defendants’ negligence, if any, was the proximate cause of plaintiffs’ injuries” (*Phillips-Smith Speciality Retail Group II, L.P. v Parker Chapin Flattau and Klimpl*, 265 AD2d 208, 210 [1st Dept 1999]). Too much speculation exists to attempt to discuss whether plaintiff would have been able to hide his fraudulent activities, had arbitration proceedings not been started due to his resignation. Accordingly, plaintiff cannot prove that defendants’ alleged negligence was the cause of his costly legal fees.⁵

IV. Breach of Contract and Breach of Fiduciary Duty

In his complaint, plaintiff alleges the same set of facts and damages in his claims for breach of contract and breach of fiduciary duty as in his claim for legal malpractice. In his memorandum of law and in the additional briefs, plaintiff adds that defendants breached their contract and fiduciary obligations by refusing to represent him at the arbitration and also by not allowing OCM to extend negotiations. Defendants argue that plaintiff could have, and did obtain

⁵Plaintiff attempts to state that it would be speculation as to what the arbitrator would have done had plaintiff not resigned. He writes that the first time he was expelled, “OCM’s management knew nothing about 60 Main Street.” However, the court will not deliberate on whether plaintiff would have been able to “hide” his fraudulent activity had he not resigned.

counsel for the arbitration. As such, plaintiff did not suffer any damages.

It is well settled that claims arising from the same operative facts and seeking the same damages as the malpractice claims are duplicative (*see Weil, Gotshal and Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 270 [1st Dept 2004]). Furthermore, “a breach of contract claim premised on the attorney’s failure to exercise due care or to abide by general professional standards is nothing but a redundant pleading of a malpractice claim” (*Sage Realty Corp. v Proskauer Rose, LLP*, 251 AD2d 35, 38-39 [1st Dept 1998]). Accordingly, the claims for breach of contract and fiduciary duty are dismissed since they are predicated on the same allegations and seek identical relief as that sought in the malpractice claim.

CONCLUSION

If there is ever an example of a person coming into court with “unclean hands,” it is this plaintiff. Even if the court could find that defendants gave plaintiff poor legal advice, the “but for” standard in legal malpractice is a singular one. It was not just defendants’ advice which may have led to plaintiff’s termination. Other contributing factors, brought on solely by plaintiff himself, caused his termination. According to the arbitrator, plaintiff was required to carry out an “unyielding fiduciary duty,” and in her award, she concluded that the purchase of 60 Main Street alone constituted a breach of contract and a breach of fiduciary duty. Then, after the issuance of the IA, in the FA, the arbitrator found that plaintiff incredibly went so far as to “[thwart] the remedy as to 60 Main Street that the Arbitrator fashioned in the Interim Award ...” (FA, at 11). Accordingly, even if the court could conclude that defendants gave plaintiff “bad advice” when they advised him to leave immediately, and even if the court could conclude that defendants should have given plaintiff “better advice” with respect to his conduct regarding

ROF IV, and as a result of this "better advice," plaintiff was able to plan his departure so that OCM would never learn about 60 Main Street or plaintiff's theft of proprietary information, this court will not facilitate the recovery of damages by a person who throughout his employment breached his fiduciary duty on multiple levels.

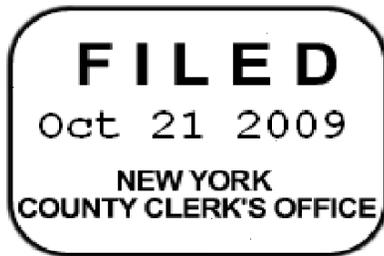
Accordingly, it is

ORDERED that the motion to dismiss the complaint brought by defendants Proskauer Rose, LLP and Michael Album is granted; and it is further

ORDERED that the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the presentation of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: October 19, 2009



ENTER:

[Handwritten Signature]
HON. RICHARD B. LOWE, III
J.S.C.