

<b>DL Rothberg &amp; Assoc., P.C. v 309 W. Owners Corp.</b>
2007 NY Slip Op 31834(U)
June 20, 2007
Supreme Court, New York County
Docket Number: 0601690/2006
Judge: Richard F. Braun
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY  
HON. RICHARD F. BRAUN

PRESENT: \_\_\_\_\_ J.S.C.  
Justice

PART 23

Index Number : 601690/2006  
DL ROTHBERG & ASSOCIATES, et al.,  
vs  
309 WEST OWNERS  
Sequence Number : 001  
DISMISS

INDEX NO. \_\_\_\_\_  
FILING DATE 11/16/06  
FILING SEQ. NO. \_\_\_\_\_  
FILING CAL. NO. \_\_\_\_\_

**FILED**

Motion to/for Summary Judgment

To dismiss counterclaims

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits  
Answering Affidavits - Exhibits  
Replying Affidavits

JUN 26 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

PAPERS NUMBERED	
1	
2	
3	

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is granted to the extent of dismissing the counterclaims and awarding plaintiff a summary judgment against defendant in the second cause of action in the verified complaint in the amount of \$111,802.36 plus interest from November 8, 2005, and it is further

*ORDERED* that the remaining claims are reversed and shall continue, and it is further

*ORDERED* that the Clerk shall enter judgment accordingly, and it is further

*ORDERED* that defendant shall pay plaintiff \$100 motion costs.

This constitutes the decision and order of the Court. See separate Opinion. ENTER

Dated: New York, New York, June 19, 2007 \_\_\_\_\_ J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 23

----- X  
DL ROTHBERG & ASSOCIATES, P.C. and  
HAMBURGER, MAXSON, YAFFE, WISHOD,  
KNAUER & ROTHBERG, LLP,

Index No. 601690/06

Plaintiffs,

OPINION

-against-

309 WEST 104 OWNERS CORP.,

Defendant.

**FILED**

JUN 26 2007

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----- X  
**RICHARD F. BRAUN, J.:**

This is an action for damages for breach of contract, an account stated, quantum meruit, and fees on fees. Defendant counterclaims for damages for negligence/legal malpractice, breach of fiduciary duty, breach of contract, and violation of the Code of Professional Responsibility. Plaintiffs move for dismissal of the counterclaims, pursuant to CPLR 3211 and/or 3212, and summary judgment on the complaint.

On a motion pursuant to CPLR 3211 (a) (1) and (7), a pleading must be liberally construed, the factual allegations therein must be accepted as true, the pleader must be given the benefit of all favorable inferences therefrom, and the Court must decide only whether the facts alleged fall under any recognized legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Wiener v Lazard Freres & Co.*, 241 AD2d 114, 120 [1<sup>st</sup> Dept 1998]). To succeed on a CPLR 3211 (a) (1) motion to dismiss, the documents upon which the movant relies must definitively dispose of the cause(s) of action of the opposing party (*Fischbach & Moore v Howell Co.*, 240 AD2d 157 [1<sup>st</sup> Dept 1997]).

A party moving for summary judgment must demonstrate his, her, or its entitlement thereto as a matter of law, pursuant to CPLR 3212 (b) (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d

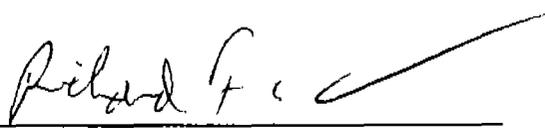
373, 382 [2005]). To defeat summary judgment, the party opposing the motion must show that there is a material question(s) of fact, which requires a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The counterclaim for breach of fiduciary duty grows of the same facts and seeks the same relief as the legal malpractice claim. Thus, it should be dismissed, pursuant to CPLR 3211 (a) (7) (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1<sup>st</sup> Dept 2004]). So should the breach of contract counterclaim because it is a restatement of the legal malpractice claim (*Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 38-39 [1<sup>st</sup> Dept 1998]). The counterclaim based on the alleged violation of the Code of Professional Responsibility also fails to state a cause of action and thus must be dismissed (*Shapiro v McNeil*, 92 NY2d 91, 97 [1998]).

Plaintiffs have demonstrated that an account was stated with defendant (*Salans Hertzfeld Heilbronn Christy & Veiner v Between Bread E.*, 290 AD2d 381, 381-382 [1<sup>st</sup> Dept 2002]; *Shea & Gould v Burr*, 194 AD2d 369, 371 [1<sup>st</sup> Dept 1993]). Defendant has not shown that there is any question of fact regarding such cause of action. That Ms. Rothberg may have stated that collecting attorney's fees in the prior action was "a slam dunk", which she denies, does not defeat the claim. Defendant did in fact receive an award of fees, just not in the amount sought. Plaintiffs did not commit legal malpractice (*see Darby & Darby v VSI Intl.*, 95 NY2d 308, 313 [2000]) based on Ms. Rothberg's failure to definitively advise defendant that it would not recover a larger amount of its fees, in light of the debatable advise that she gave and the recent decision in *AMCO Intl. v Long Is. R.R. Co.* (302 AD2d 338 [2<sup>nd</sup> Dept 2003]), which was yet to be interpreted by trial courts (*see Bistricher v Singer, Bienenstock, Zamansky, Ogele & Selengut, LLP*, 14 AD3d 468, 469 [1<sup>st</sup> Dept 2005]).

Therefore, by this court's decision and order of June 19, 2007, plaintiffs' motion has been granted to the extent of dismissing the counterclaims and awarding plaintiffs summary judgment against defendant on the second cause of action in the complaint in the amount of \$111,802.36, plus interest from the date sought of November 8, 2005. Pursuant to CPLR 8106 and 8202, plaintiffs have been awarded \$100 motion costs against defendant. Finally, defendant should not use gender-biased language, i.e. "her" on page 20 of defendant's Memorandum of Law should have been "her or him" or "him or her."

Dated: New York, New York  
June 20, 2007

  
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RICHARD F. BRAUN, J.S.C.

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