

Metropolitan Plaza WP, LLC v Goetz Fitzpatrick, LLP
2010 NY Slip Op 32389(U)
August 27, 2010
Supreme Court, New York County
Docket Number: 115519/09
Judge: Louis B. York
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

LOUIS B. YORK
J.S.C. Justice

PRESENT: _____

PART 2

Index Number : 115519/2009
METROPOLITAN PLAZA WP, LLC
VS.
GOETZ FITZPATRICK, LLP
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n 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

FILED
SEP 02 2010
NEW YORK
COUNTY CLERKS OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.**

Dated: 8/27/10

L. York
LOUIS B. YORK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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 2

FILED
SEP 02 2010
NEW YORK
COUNTY CLERK'S OFFICE

-----X
METROPOLITAN PLAZA WP, LLC, f/k/a
RIDGEMOUR MEYER PROPERTIES, LLC,
RIDGEMOUR DEVELOPMENT CORPORATION,
W&A DEVELOPMENT, LLC, WILLIAM A. MEYER
and A.J. ROTONDE,

Plaintiffs,

Index No.: 115519/09
DECISION/ORDER

-against-

GOETZ FITZPATRICK, LLP and DONALD J.
CARBONE, ESQ.,

Defendants.

-----X
HON. LOUIS B. YORK, J.S.C.:

In this action for legal malpractice and related relief, defendants move to dismiss the complaint (motion sequence number 001). For the following reasons, this motion is denied.

BACKGROUND

During the time period when the events that gave rise to this action took place, corporate co-plaintiffs Metropolitan Plaza WP, LLC (Metropolitan), Ridgemour Development Corporation (Ridgemour) and W&A Development, LLC (W&A) were all members of Ridgemour Meyer Properties, LLC (RMP), a New York State limited liability company that they formed to engage in the business of real estate development and commercial leasing. Individual co-plaintiffs William A. Meyer (Meyer) and A.J. Rotonde (Rotonde) were, respectively, a manager at W&A and the president of Ridgemour.

On December 17, 2003, RMP and non-party Ginsburg Development Companies, LLC (GDC) entered into a joint venture project called Pinnacle-Westchester, LLC (Pinnacle), for the

purpose of acquiring and developing certain real property in White Plains, New York. Evidently, GDC and RMP entered into an operating agreement, the rider to which included a “consent” which set forth an indemnification provision that provides as follows:

This Consent is executed and delivered by the undersigned in order ... (b) to induce [Ridgemour] to relinquish its management agreement with RMP; [and] (c) to induce RMP, as a member of Pinnacle, to transfer and convey all of [its] rights, title and interests in certain real properties and agreements, and perform any other of its obligations, as provided in the Operating Agreement. This Consent is made and delivered with the knowledge that the Pinnacle, Ridgemour ... and RMP will rely upon the truth of the statements contained in this Consent. Accordingly, the undersigned [i.e., GDC] agree to indemnify and hold harmless Pinnacle, Ridgemour ... and RMP from any loss, cost or damage (including, but not limited to, legal fees and expenses) which any or all of them may incur because of or arising from their reliance upon this Consent.

See Notice of Motion, Exhibit A (complaint), ¶ 28.

The Pinnacle project apparently progressed to the point where Pinnacle acquired the subject property, but later hit an impasse. In 2005 and 2006, disputes arose between RMP and GDC over RMP’s desire to develop the property, and GDC’s desire to pull out of Pinnacle because it felt that such development was not economically feasible. On November 22, 2007, GDC commenced an arbitration proceeding against RMP before the American Arbitration Association (AAA), which appointed arbitrator Thomas Scarola (Scarola) to oversee that proceeding. RMP was represented in the arbitration by defendant Donald J. Carbone, Esq. (Carbone), a partner at the defendant law firm of Goetz Fitzpatrick, LLP (Goetz Fitzpatrick). On September 10, 2007, Rotonde (on behalf of RMP) and Carbone (on behalf of Goetz Fitzpatrick) executed a retainer agreement (the retainer agreement), the relevant portions of which provide as follows:

6. Right to Withdraw. The Client may terminate services to be rendered

pursuant to this Agreement at any time upon written notice to the Firm. The Firm may terminate services to be rendered pursuant to this Agreement at any time upon written notice to the Client, subject to compliance with the Rules of Professional Conduct of the New York State Bar Association and applicable law and rules of the Court.

7. No Guarantee. The Firm has made no promises or guarantees to the Client about the outcome of the Client's matter, or the maximum amount of legal fees or costs which may be incurred, and nothing in this Agreement nor any estimates as to such matters shall be construed as such a promise or guarantee.

See Notice of Motion, Exhibit B.

During the arbitration proceeding, Scarola issued several rulings that plaintiffs now seek to rely on. On June 18, 2008, Scarola issued a ruling (the first ruling) that found, in pertinent part, as follows:

As a result of damages incurred by RMP resulting from actions by GDC with respect to managing Pinnacle, control of the property shall be returned to RMP This statement is being made so that both parties can prepare for the discussions planned for tomorrow centering on the proper method of dissolving the joint venture absent of ownership of the land and to provide RMP the opportunity to advance the development of the property without incurring further losses or delays.

See Notice of Motion, Exhibit A, ¶ 22. On June 28, 2008, Scarola issued another ruling (the second ruling) that found, in pertinent part, as follows:

It is my opinion from hearing the evidence presented regarding the projects considered that there was a time at which proceeding would have been beneficial to Pinnacle, but [GDC] did not wish to proceed because [it] did not believe that the project would have generated sufficient profit for GDC to warrant going ahead. GDC then elected not to approve the project. It is my finding that this along with other facts presented constitutes justification to award control of the property to RMP.

Id., ¶ 23. On July 9, 2008, Scarola issued an "interim award" (the interim award), the relevant portion of which directed as follows:

(i) the Property “be transferred and deeded from Pinnacle to [RMP] to provide [it] with the opportunity to advance [the Property’s] development without incurring further losses or delays,” and

(ii) RMP give GDC a \$14.629 million mortgage on the Properties which may be increased or decreased in a subsequent hearing on the parties’ competing damages claims.

Id., ¶ 24.

Following the issuance of this interim award, plaintiffs claim that, on June 30, 2008, Carbone executed deeds with which to transfer ownership of Pinnacle’s White Plains property to RMP. Plaintiffs state that RMP notarized and delivered the deeds to the Westchester County Clerk on July 21, 2008, and that the deeds were recorded by the Clerk on July 29, 2008. Plaintiffs allege that Carbone failed to inform either GDC or Scarola that he had effected this transaction and that GDC discovered it on its own on July 30, 2008. *Id.*, ¶¶ 35-37. Plaintiffs then state that GDC informed Scarola about the transaction, and that, on August 4, 2008, Scarola issued an order granting RMP until August 12, 2008 to execute the mortgage specified in the interim order, and also give GDC a \$3.5 million letter of credit and \$14.6 million in personal guarantees. Plaintiffs further state that they failed to comply with Scarola’s August 4, 2008 order, and instead, on Carbone’s advice, filed a Chapter 11 voluntary reorganization petition in the U.S. Bankruptcy Court for the Southern District of New York on August 11, 2008. At this point, defendants ceased their legal representation of plaintiffs. *Id.*, ¶¶ 14, 16. However, plaintiffs assert that defendants did so improperly in that they failed to send plaintiffs a written termination notice pursuant to section 6 of the retainer agreement, but instead, on September 3, 2008, sent a withdrawal notice to the AAA while the arbitration proceeding was still active.

On December 12, 2008, the bankruptcy court (Bernstein, J.) issued a decision that granted

GDC's motion to appoint a Chapter 11 Operating Trustee, that found, in pertinent part, as follows:

Based on the foregoing, I find that the debtor [i.e., RMP], its principal, Rotonde, and its lawyer, Carbone, acted dishonestly when they caused Pinnacle to transfer the Property secretly to the debtor, knowing that the delivery of a mortgage and other protections to GDC was a quid pro quo for the conveyance and that Rotonde lacked the authority to execute the deeds drafted by GDC as the agent for Pinnacle. They also acted with deceit when they failed to disclose the delivery or recordation of the deeds until GDC discovered what had occurred, and instead, stated or implied to the arbitrator and GDC's lawyers that the conveyance had not yet occurred.

Rotonde's conduct is exacerbated by the position of trust he abused. He was a member of the management committee of Pinnacle, and owed the same duties that a director of a corporation owes to the corporation and the shareholders. Consequently, he owed fiduciary duties to Pinnacle and GDC, ... and breached those duties by secretly transferring Pinnacle's assets to RDC. Making matters worse, the debtor had sold the Jomas Lot to Pinnacle, which had assumed a \$3.5 million mortgage and paid the debtor over \$3 million in cash. At the end of the day, Rotonde kept the cash and took the Jomas Lot back, without compensating Pinnacle. Under the circumstances, the appointment of a trustee is mandated under 11 U.S.C. § 1104(a)(1).

Id.; Exhibit C. Defendants note that Carbone was merely a non party witness in the RMP bankruptcy proceeding. *See* Notice of Motion, Jacobs Affirmation, ¶ 21.

Previously, however, on August 8, 2008, GDC commenced an action against the instant plaintiffs in the Supreme Court of the State of New York, Westchester County under Index No. 17369/08 (the Westchester action). Later, on October 29, 2008, GDC filed an amended complaint that also named Carbone and Goetz Fitzpatrick as defendants in the Westchester action. *Id.* The Westchester action was initially removed to the U.S. Bankruptcy Court for the Southern District of New York, where GDC eventually executed a stipulation of settlement that disposed of its claims against the plaintiffs herein. Thereafter, by an order dated October 1, 2009, the

Westchester action was returned to Westchester County Supreme Court, and GDC filed a second amended complaint that set forth claims against Carbone and Goetz Fitzpatrick for: 1) fraud; 2) violation of Judiciary Law § 487; 3) legal malpractice; 4) aiding and abetting a breach of fiduciary duty; and 5) aiding and abetting fraud. *Id.* Carbone and Goetz Fitzpatrick moved to dismiss that second amended complaint pursuant to CPLR 3211; however, in a decision dated February 19, 2010 (the Westchester decision), the court (Loehr, J.) granted that motion in part and denied it in part. The court specifically upheld GDC's causes of action for fraud, violation of Judiciary Law § 487, aiding and abetting a breach of fiduciary duty and aiding and abetting fraud; however, it dismissed GDC's cause of action for legal malpractice on the ground that Carbone and Goetz Fitzpatrick did not have an attorney/client relationship with GDC.¹ Later, in a second decision, dated May 17, 2010, the court (Loehr, J.) also denied Carbone's and Goetz Fitzpatrick's subsequent motion to reargue, and made the following pertinent finding:

Defendants next argues that this Court denied its motion to dismiss by improperly granting law of the case effect to Judge Bernstein's December 12, 2008 decision. To the contrary, while the Court considered the decision as part of the allegations in the case, the Court did not give it law of the case effect. The motion to reargue on this ground is therefore denied.

Ginsburg Dev. Cos., LLC v Carbone, 2010 WL 3073781 (Trial Order) (Sup Ct, Westchester County 2010).

In the meantime, plaintiffs had commenced this action on November 3, 2009, by filing a complaint that sets forth causes of action for: 1) violation of Judiciary Law § 487; 2) violation of Judiciary Law § 487; 3) legal malpractice; 4) breach of fiduciary duty; and 5) breach of contract.

¹ For reasons of brevity, the court will discuss - as needed - Justice Lochr's other findings in the Westchester decision later in this decision.

See Notice of Motion, Exhibit A. Rather than file an answer, defendants have now submitted the instant motion to dismiss (motion sequence number 001).

DISCUSSION

Defendants first argue that the entire complaint should be dismissed pursuant to the doctrine of “law of the case.” *See* Defendants’ Memorandum of Law, at 2-3. Defendants specifically contend that, because all of plaintiffs’ causes of action are predicated on the erroneous assertion that the findings in the bankruptcy decision also constitute the law of the case in this action, the documentary evidence herein (i.e., the complaint itself) establishes that those causes of action lack merit. Plaintiffs respond that they “do not rely upon” the bankruptcy decision, “nor claim reliance upon it, nor is it argued that it is the law of the case,” although they do claim that the bankruptcy decision “is informative.”² *See* Plaintiffs’ Memorandum of Law, at 14. Thus, plaintiffs argue that neither the complaint nor the bankruptcy decision can be deemed to constitute “documentary evidence” for the purposes of this motion. In their reply papers, defendants note that the allegations in each cause of action in the complaint are repeatedly preceded by the phrase “the facts found in the [bankruptcy] decision establish that,” and argue that this usage “speaks for itself” in concluding that the complaint does rely on the bankruptcy decision as law of the case. *See* Defendants’ Reply Memorandum, at 2-4. The court disagrees.

When evaluating a defendant’s motion to dismiss, pursuant to CPLR 3211 (a), the test “is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be

² As will be discussed, however, plaintiffs do argue that the Westchester decision should be accorded *res judicata* effect. *Id.*

sustained.” *Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae*, 243 AD2d 168, 176 (1st Dept 1998), quoting *Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46, 48 (1st Dept 1990). To this end, the court must accept all of the facts alleged in the complaint as true, and determine whether they fit within any “cognizable legal theory.” *Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 303 (2001). However, where the allegations in the complaint consist only of factual claims which are inherently incredible or are flatly contradicted by documentary evidence, the foregoing considerations do not apply. See e.g. *Tectrade Intl. v Fertilizer Dev. and Inv.*, 258 AD2d 349 (1st Dept 1999); *Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, the Court of Appeals has held that a “CPLR 3211 (a) (1) motion to dismiss on the ground that the action is barred by documentary evidence, ... may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002), quoting *Leon v Martinez*, 84 NY2d 83, 88 (1994). Here, it cannot be said that the documentary evidence “conclusively establishes” defendants’ law of the case argument. Certainly, the complaint itself does not specifically mention the law of the case doctrine. Further, in being mindful of its injunction to deem the complaint to allege whatever can be “reasonably implied” from its statements, the court finds that the most reasonable interpretation to be accorded to this complaint is to conclude that plaintiffs rely heavily therein on the persuasive effect of the bankruptcy decision, but not to the extent of asserting that it constitutes the law of the case in this action. Simply put, the complaint does not say what defendants say it does. Therefore, the court rejects defendants’ first dismissal argument.

Defendants next argue that plaintiffs' second cause of action should be dismissed as duplicative of their first cause of action. Plaintiffs' first two causes of action both allege violations of Judiciary Law § 487. That statute, entitled "Misconduct by attorneys," provides that:

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.

In their first cause of action, plaintiffs allege that defendants violated Judiciary Law § 487 by "deceit," whereas, in their second cause of action, plaintiffs allege that defendants engaged in "an extreme pattern of legal delinquency." Here, defendants argue that plaintiffs have pled their claims "twice ... solely on a 'throw it against the wall, maybe it will stick' basis," but that claims that are "duplicative of another cause of action ... cannot be maintained." *See* Defendants' Memorandum of Law, at 4. Plaintiffs respond that, pursuant to governing case law, a violation of Judiciary Law § 487 may be established under theories of either "deceit," or "engaging in an extreme pattern of legal delinquency." *See* Plaintiffs' Memorandum of Law, at 15-16. Defendants' reply papers merely restate their original argument. *See* Defendants' Reply Memorandum, at 4-5. After reviewing the applicable precedent, the court finds in plaintiffs' favor. Both the Appellate Divisions, First Department, and Second Department, have held that "[a] violation of Judiciary Law § 487 (1) may be established either by the defendant's alleged deceit or by [that defendant's] alleged chronic, extreme pattern of legal delinquency." *See Rock*

City Sound, Inc. v Bashian & Farber, LLP, 74 AD3d 1168, 1172 (2d Dept 2010); *Pellegrino v File*, 291 AD2d 60 (1st Dept 2002). Here, the complaint contains allegations both that defendants “deceived” Scarola and GDC during the arbitration, and that defendants continued this “pattern” of behavior while testifying in bankruptcy court. Clearly, the first set of allegations would tend to establish a violation of Judiciary Law § 487 under the first permissible theory of liability, while the second set of allegations might establish a violation under the second permissible theory of liability. Certainly, plaintiffs are permitted to plead alternative theories of liability. Thus, there is no basis for defendants’ assertion that plaintiffs’ second cause of action is duplicative of the first. Therefore, the court rejects defendants’ second dismissal argument.

Defendants next argue that plaintiffs’ fifth cause of action fails to state a claim for breach of contract with respect to the retainer agreement. *See* Defendants’ Memorandum of Law, at 5-6. The proponent of a breach of contract claim must plead the existence and terms of a valid, binding contract, its breach, and resulting damages. *See e.g. Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435 (1st Dept 1988). Here, the complaint recites that defendants “breached the [retainer agreement] by the nature of [their] legal representation of plaintiffs.” Defendants cite the decision of the Appellate Division, First Department, in *Pacesetter Communications Corp. v Solin & Breindel* (150 AD2d 232, 236 [1st Dept 1989]) that “[a] breach of contract claim against an attorney based on a retainer agreement may be sustained only where the attorney makes an express promise in the agreement to obtain a specific result and fails to do so.” Defendants then conclude that plaintiffs’ fifth cause of action is barred by the “no guarantee” clause set forth in paragraph 7 of the retainer agreement. Curiously, plaintiffs do not address this argument in their opposition papers - a fact that defendants note in their own reply papers. This is unavailing,

however, in view of the Court of Appeals' decision in *Santulli v Englert, Reilly & McHugh, P.C.* (78 NY2d 700, 705 [1992]), which distinguished *Pacesetter* on the facts, and held that: "[a] cause of action for breach of contract [against an attorney] may be based on an implied promise to exercise due care in performing the services required by the [retainer] contract." As previously discussed, plaintiffs' fifth cause of action contains allegations that comport with this rule. Therefore, the court rejects defendants' third dismissal argument.

Finally, defendants argue that plaintiffs' fourth and fifth causes of action should be dismissed as duplicative of their third cause of action, which alleges legal malpractice. Defendants cite the holdings of the Appellate Division, First Department, in *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.* (10 AD3d 267 [1st Dept 2004]) and the Appellate Division, Second Department, in *Turner v Irving Finkelstein & Meirowitz, LLP* (61 AD3d 849 [2d Dept 2009]) for the propositions that, respectively, a breach of fiduciary duty claim and a breach of contract claim that is based on the same facts, and seeks the same relief, as is sought in a legal malpractice claim, are redundant of said malpractice claim, and should be dismissed. *See* Defendants' Memorandum of Law, at 7-9. Defendants then assert that plaintiffs' breach of fiduciary duty claim and breach of contract claim should be dismissed as duplicative because "the same facts are alleged as the predicate for [both] ... and the same damages are claimed." Plaintiffs deny this assertion. Defendants' reply papers merely restate their original argument.

After carefully reviewing the pleadings, the court finds in plaintiffs' favor.

In order to sustain a claim for legal malpractice, a plaintiff must establish both that the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession which

results in actual damages to a plaintiff ... and that the plaintiff would have succeeded on the merits of the underlying action 'but for' the attorney's negligence [internal citations omitted].

AmBase Corp. v Davis Polk & Wardwell, 8 NY3d 428, 434 (2007). Here, the relevant portion of the complaint states that:

Defendants failed to exercise the ordinary, reasonable skills and knowledge commonly possessed by a member of the legal profession, especially attorneys who practice in arbitration, real estate transactional work, and Bankruptcy Court.

Plaintiffs' fourth cause of action for breach of fiduciary duty states, in pertinent part, that:

Defendants breached their fiduciary duty to Plaintiffs by their wrongful advice on execution of the deeds, their wrongful advice on how to deal with the documents in the transfer of real property, in withholding information from the arbitrator, in giving misleading information to the arbitrator, in their wrongful testimony to the court, in their wrongful advice on how to deal with the arbitration despite or because of a financial conflict of interest between its own interests in fees and reimbursements and its fiduciary obligation to plaintiff, in the manner by which they ended the representation of plaintiffs, and in their communications to the AAA.

Plaintiffs argue that the foregoing "allegations are completely separate from the allegations of plaintiffs' malpractice claim ... which essentially references AAA rule 46 and with respect to the deeds." Defendants' reply papers reference paragraph 71 of the complaint, which states that:

Defendants were under a duty to plaintiffs to act for them, to avoid conflicts of interest in its representation of them, to give advice for their benefit, on matters within the scope of the representation by Defendants of plaintiff.

See Notice of Motion, Exhibit A, ¶71. Defendants then argue that this language clearly shows that plaintiffs' breach of fiduciary duty claim derives from the same allegations as their legal malpractice claim. *See* Defendants' Reply Memorandum, at 6-7. Defendants are incorrect. Both of the paragraphs that defendants cite come from the same cause of action - plaintiffs' breach of fiduciary duty claim. Obviously, comparing these two paragraphs says nothing about the

allegations in plaintiffs' separate claim for legal malpractice. Thus, defendants' argument is clearly meritless. Plaintiffs' proffered construction of the complaint is plausible, however. AAA rule 46 would have permitted plaintiffs to seek an administrative appeal of the portion of Scarola's interim award that required plaintiffs to give GDC a mortgage, and such recourse would probably have been less costly than filing a Chapter 11 bankruptcy petition. It is reasonable to read plaintiffs' legal malpractice claim as referencing this issue, in that the complaint mentions "reasonable skills and knowledge commonly possessed by ... attorneys who practice in arbitration." It is also reasonable to read plaintiffs' breach of fiduciary duty claim as referring to a separate violation of the parties' attorney/client relationship, given that it mentions "a financial conflict of interest between its own interests in fees and reimbursements and its fiduciary obligation to plaintiff." Therefore, the court rejects defendants' dismissal argument with respect to plaintiffs' breach of fiduciary duty claim.

Plaintiffs' fifth cause of action for breach of contract states that:

Plaintiffs and Defendants entered into a contract in which Defendants agreed to represent Plaintiffs according to the standards of good and adequate representation by an attorney, to perform certain tasks of investigation, and Plaintiffs agreed to pay legal fees.

Plaintiffs granted a fee as demanded by Defendants, but Defendants breached the contract by the nature of its legal representation of Plaintiffs, and inter alia, failures as set forth above in its dealings with the Court, as more fully set forth in the [bankruptcy] decision.

Oddly, plaintiffs again fail to address this cause of action in their opposition papers - and for this reason, defendants again seek to have their dismissal application for said claim granted on default in their reply papers. *See* Defendants' Reply Memorandum, at 7-8. The court declines to do so, however. As was previously discussed, section 6 of the retainer agreement requires defendants to

provide plaintiffs with a written withdrawal notice, subject to all rules of professional responsibility and court rules, prior to withdrawing as plaintiffs' counsel and terminating their attorney/client relationship. Instead, the complaint alleges that defendants "abruptly withdrew as litigation counsel over a fee dispute ... by letter dated September 3, 2008 addressed not to [plaintiffs] but directly to the AAA." *Id.*; Exhibit A, ¶ 42. In deeming the foregoing to "allege whatever can be reasonably implied from its statements," the court finds that it is reasonable to read the complaint as alleging that defendants breached section 6 of the retainer agreement. The court further finds that this allegation is clearly distinct from the allegations set forth in plaintiffs' legal malpractice cause of action. Therefore, the court rejects defendants' dismissal argument with respect to plaintiffs' breach of contract claim.

The balance of plaintiffs' opposition papers are given over to the argument that defendants' motion should be denied on grounds of collateral estoppel, because the Westchester decision has res judicata effect. Defendants' reply papers vigorously dispute this argument. *See* Defendants' Reply Memorandum, at 8-10. The court notes that two of the causes of action that GCD asserted against defendants in the Westchester action appear to be identical to claims that plaintiffs raise herein. However, it declines reach plaintiffs' collateral estoppel argument in this decision, since it has already determined that there are sufficient other grounds on which to reject defendants' assertions herein. In any case, such an argument is probably better suited to a motion for summary judgment. Accordingly, the court finds that defendants' dismissal motion should be denied.

DECISION

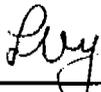
ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3211, of defendants Goetz Fitzpatrick, LLP and Donald J. Carbone, Esq. is in all respects denied; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within ten (10) days after service of a copy of this order with notice of entry.

Dated: New York, New York
August 27, 2010

ENTER:



Hon. Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.

FILED
SEP 02 2010
NEW YORK
COUNTY CLERK'S OFFICE