

**Kagan Lubic Lepper Findelstein & Gold LLP v 325
Fifth Ave. Condominium**

2015 NY Slip Op 31470(U)

August 6, 2015

Supreme Court, New York County

Docket Number: 151878/15

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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KAGAN LUBIC LEPPER FINKELSTEIN & GOLD,
LLP,

Plaintiff,

Index No. 151878/15

-against-

DECISION/ORDER

325 FIFTH AVENUE CONDOMINIUM and THE
BOARD OF MANAGERS OF 325 FIFTH AVENUE
CONDOMINIUM,

Defendants.
-----X

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

| Papers | Numbered |
|--|----------|
| Notice of Motion and Affidavits Annexed..... | 1 |
| Answering Affidavits..... | 2 |
| Replying Affidavits..... | 3 |
| Exhibits..... | 4 |

Plaintiff Kagan Lubic Lepper Finkelstein & Gold, LLP (“Kagan Lubic”) commenced the instant action against defendants 325 Fifth Avenue Condominium (“325 Fifth”) and The Board of Managers of 325 Fifth Avenue Condominium (the “Board”) seeking to recover attorney’s fees and expenses it allegedly incurred in its representation of 325 Fifth in another action. Kagan Lubic now moves for an Order pursuant to CPLR § 3211(a)(7) dismissing the counterclaims asserted by defendants. For the reasons set forth below, Kagan Lubic’s motion is denied.

The relevant facts according to the complaint are as follows. On or about February 25, 2015, Kagan Lubic filed its complaint against defendants seeking recovery of the attorney’s fees and expenses it allegedly incurred in its representation of defendants. Thereafter, defendants

filed an answer to the complaint asserting various affirmative defenses and three counterclaims for legal malpractice, violation of Judiciary Law § 487 and a declaratory judgment that plaintiff committed legal malpractice and that plaintiff is not entitled to any legal fees for its representation of defendants.

Specifically, defendants' answer alleges as follows. Defendants hired Kagan Lubic in October 2012 to represent them as general counsel and in an action against the sponsor of 325 Fifth and certain subcontractors arising from the defective design, construction, sale, marketing and management of the condominium building located at 325 Fifth Avenue, New York, New York (the "building"), which was allegedly plagued with defects from the outset. Defendants allege that Kagan Lubic failed to take even the most basic steps to secure remedies against those responsible for the defective design and construction of the Building and that for nearly two years, Kagan Lubic "churned the file" and generated enormous legal bills through prolonged negotiations and other pre-litigation tactics that were time consuming, costly and entirely ineffective, including, *inter alia*, (i) retaining duplicative, superfluous experts which caused defendants to incur thousands of dollars in additional fees; (ii) engaging in futile settlement discussions for nearly eighteen months; (iii) generating enormous legal fees by spending countless hours addressing inconsequential maintenance issues in the building which, in many instances, cost less to remediate than the time spent addressing them; (iv) frustrating any progress toward reaching a settlement with the sponsor with respect to the maintenance issues by delaying nearly four months before responding to the sponsor's offer to remediate certain conditions; (v) routinely raising additional maintenance issues which resulted in further delay and costs; and (vi) allowing nearly two years to lapse without filing a complaint in the action. Defendants further allege that "[b]ut for Kagan Lubic's dilatory tactics, the defects in the Building would have been

remediated by now, and the impaired value of the Condominium units in the Building resulting from the design and construction defects and ongoing litigation would have been restored.”

On a motion addressed to the sufficiency of [a pleading], the facts pleaded are assumed to be true and accorded every favorable inference. See *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover “a [pleading] should not be dismissed on a pleading motion so long as, when [the party’s] allegations are given the benefit of every possible inference, a cause of action exists.” *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept. 1990). “Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to ‘whether it states in some recognizable form any cause of action known to our law.’” *Foley v. D’Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (citing *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)).

As an initial matter, plaintiff’s motion for an Order pursuant to CPLR § 3211(a)(7) dismissing defendants’ first counterclaim for legal malpractice is denied. It is well established that in order to state a claim for legal malpractice, “the plaintiff must plead factual allegations which, if proven at trial, would demonstrate that counsel had breached a duty owed to the client [i.e. acted negligently], that the breach was the proximate cause of the injuries, and that actual damages were sustained.” *Dweck Law Firm, LLP v. Mann*, 283 A.D.2d 292, 293 (1st Dept 2001). Additionally, “the client must plead specific factual allegations establishing that but for counsel’s deficient representation, there would have been a more favorable outcome to the underlying matter.” *Id.* “Unsupported factual allegations, conclusory legal argument or allegations contradicted by documentation, do not suffice.” *Id.*

In the instant action, defendants’ answer sufficiently states a claim for legal malpractice. The first counterclaim alleges that plaintiff “committed legal malpractice by failing to exercise the skill and ability reasonably to be expected from a duly licensed attorney and/or law firm engaged

in the practice of law within the State of New York by, among other things, engaging in self-serving dilatory tactics that were ineffective and designed to impede settlement discussions and timely resolution of the dispute in order to generate enormous legal fees” and that as a result of said breach, defendants have been damaged. Specifically, defendants’ answer alleges that plaintiff negligently delayed the resolution of their claims against the sponsor and subcontractors only to increase their legal fees and that as a result, defendants have sustained damages, including, but not limited to, enormous legal fees and increased costs to investigate and address the defective conditions throughout the building, which include expert fees and rental fees for safety bridges and construction equipment. Additionally, defendants allege that as a direct result of plaintiff’s willful delay of the underlying claims, the building’s defects have yet to be remediated and that the building’s value and defendants’ access to credit financing has been impaired. It is well-settled that allegations that an attorney unreasonably delayed the resolution of his client’s claims are grounds for malpractice sufficient to defeat a motion to dismiss. See *Lappin v. Greenberg*, 34 A.D.3d 277, 280 (1st Dept 2006)(“the complaint sufficiently asserts that defendants’ inordinate delay...resulted in a loss of principal attributable to defendants’ lack of professional diligence”); see also *VDR Realty Corp. v. Mintz*, 167 A.D.2d 986, 986-87 (4th Dept 1990)(“[f]actual allegations of the complaint to the effect that defendant attorney unreasonably delayed the prosecution of a landlord-tenant holdover proceeding and engaged in dilatory tactics, thereby increasing the attorney’s fee and causing other consequential damages, state a cause of action for legal malpractice.”)

Plaintiff’s assertion that the first counterclaim must be dismissed on the ground that its pre-litigation tactics were a reasonable strategic decision and thus, may not constitute a claim for

malpractice, is without merit. Defendants do not allege that the decision to pursue certain pre-litigation tactics and settlement discussions with the sponsor was per se malpractice but rather that it was the manner in which that decision was implemented and pursued that constituted malpractice. Indeed, it is well-settled that while the attorney judgment rule protects “an attorney’s selection of one among several reasonable courses of action” from a claim for malpractice, the immunity provided for reasonable strategic decisions does not extend to incompetent or bad faith implementation of that decision. See *Ackerman v. Kesselman*, 100 A.D.3d 577 (2d Dept 2012); see also *Pillard v. Goodman*, 82 A.D.3d 541 (1st Dept 2011).

Plaintiff’s assertion that the first counterclaim must be dismissed on the grounds that the answer fails to allege that plaintiff’s malpractice proximately caused defendants’ damages and that defendants have not been damaged for the purposes of a legal malpractice claim is also without merit. To plead causation, a plaintiff must allege that defendants’ malpractice was a proximate cause of plaintiffs’ damages. See *Rudolf v. Shayne, Dachs, Sanisci, Corker & Sauer*, 8 N.Y.3d 438 (2007). Additionally, it is well-settled that cognizable damages in a legal malpractice action include consequential damages sustained as a result of the attorney’s malpractice, including expenses such as expert fees and attorney’s fees. See *Escape Airports (USA), Inc. v. Kent, Beatty & Gordon LLP*, 79 A.D.3d 437, 439-440 (1st Dept 2010); see also *Gelfand v. Oliver*, 29 A.D.3d 736 (2d Dept 2006). Here, the answer alleges that as a direct result of plaintiff’s dilatory tactics and other misconduct, defendants sustained increased expert fees, attorney’s fees and construction fees.

Further, plaintiff’s assertion that defendants have not sustained damages because it “has apparently been able to litigate its claims despite any of the alleged ‘dilatory tactics,’ so any delay

in filing suit has obviously not caused damages to the Condominium with respect to its attempt to recover against the Sponsor” is without merit. The mere fact that defendants have continued to pursue their claims against the sponsor with a different counsel is not a defense to a legal malpractice claim as it is well-settled that a client may recover increased attorney’s fees and other expenses sustained as a result of an attorney’s dilatory tactics even if it is ultimately successful in the underlying proceeding. *See VDR Realty Corp.*, 167 A.D.2d at 987.

Finally, plaintiff’s assertion that defendants’ legal malpractice claim must be dismissed as premature on the ground that the underlying lawsuit in which the alleged negligent representation occurred is still ongoing is without merit. New York courts have routinely entertained malpractice actions prior to the resolution of the underlying claim which gave rise to the malpractice claim. *See Rivas v. Raymond, Schwartzberg & Assoc., PLLC*, 52 A.D.3d 401 (1st Dept 2008)(denying defendants’ motion to dismiss and allowing the legal malpractice claim to proceed “even though there has not been an adverse disposition of the action”); *see also Johnston v. Raskin*, 193 A.D.2d 786, 797 (2d Dept 1993)(reversing dismissal of legal malpractice claim on the basis that it was premature and holding that “contrary to the defendants’ assertions, the plaintiff could commence her action although her damages were, as yet, unconfirmed.”) Here, defendants’ counterclaim for legal malpractice is not premature notwithstanding the fact that defendants’ lawsuit against the sponsor is ongoing because defendants’ malpractice damages are not contingent on the resolution of the underlying action.

Additionally, plaintiff’s motion for an Order pursuant to CPLR § 3211(a)(7) dismissing defendants’ second counterclaim for a violation of Judiciary Law § 487 on the ground that it fails to state a claim is denied. Judiciary Law § 487(2) provides, in pertinent part, that an attorney

who “willfully delays his client’s suit with a view to his own gain” is guilty of a misdemeanor and may be liable in treble damages. In order to sustain a cause of action for a violation of Judiciary Law § 487(2), the pleading must allege specific facts demonstrating the attorney’s alleged delay for his own gain and may not merely allege bare legal conclusions. See *Bernstein v. Oppenheim & Co., P.C.*, 160 A.D.2d 428 (1st Dept 1990); see also *Fleyshman v. Suckle & Schlesinger, PLLC*, 91 A.D.3d 591 (2d Dept 2012).

Here, defendants’ answer sufficiently states a claim for a violation of Judiciary Law § 487(2). The second counterclaim alleges that plaintiff, instead of diligently and vigorously pursuing defendants’ legal claims against the sponsor and the subcontractors, engaged in self-serving dilatory tactics that were designed to impede settlement discussions and the timely resolution of the dispute “in order to generate enormous legal fees with a view to its own gain.” Specifically, defendants allege that they retained plaintiff in October 2012, after an action had been commenced by Summons with Notice in July 2012, and that from the outset of the representation, plaintiff “failed to take even the most basic steps to resolve [defendants’] claims” and that “[i]nstead, for nearly two years, [plaintiff] simply churned the file and generated enormous legal bills through prolonged negotiations and other pre-litigation tactics that were time consuming, costly, and entirely ineffective,” such as requiring additional unnecessary expert investigations, delaying filing a complaint for almost two years, stalling all opportunities to settle the underlying matter and continuing to attempt to settle the matter despite the knowledge that settlement attempts were futile. As these allegations are sufficient to state a claim for a violation of Judiciary Law § 487, plaintiff’s motion to dismiss the second counterclaim is denied.

Finally, as this court has not dismissed defendants’ counterclaim for legal malpractice,

