

**Wormser, Kiely, Galef & Jacobs LLP v Frumkin**

2020 NY Slip Op 33172(U)

September 28, 2020

Supreme Court, New York County

Docket Number: 160569/2013

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM**

*Justice*

-----X

WORMSER, KIELY, GALEF & JACOBS LLP,

Plaintiff,

- v -

JACOB FRUMKIN, individually and as managing member of  
Hamilton Heights Partners, LLC, and HAMILTON HEIGHTS  
PARTNERS,

Defendants.

-----X

INDEX NO.	160569/2013
MOTION DATE	
MOTION SEQ. NO.	011, 012
<b>DECISION + ORDER ON MOTION</b>	

The following e-filed documents, listed by NYSCEF document number (Motion 011) 436-442, 517-554, 596-598 and (Motion 011) 443-507, 557-593, 599-619

were read on this motion to/for SUMMARY JUDGMENT

Plaintiff Wormser, Kiely, Galeb & Jacobs LLP commenced this action seeking to recover unpaid legal fees arising from its representation of defendants Jacob Frumkin and Hamilton Heights Partners in a dispute with Mr. Frumkin's former business partner, Santarine Persaud and his construction company, P&S Construction N.Y. Inc. (P&S). Mr. Frumkin and Mr. Persaud were both 50% members of defendant Hamilton Heights Partners, an entity formed in 2005 to purchase and redevelop 469 and 479 West 152<sup>nd</sup> Street into luxury condominium units. After lengthy delays related to the construction of the project and after numerous buyers cancelled their contracts to purchase units because they remained unfinished, Mr. Frumkin decided to retain plaintiff to resolve this dispute.

**BACKGROUND**

Although the dispute between Mr. Frumkin and Mr. Persaud and Mr. Persaud's construction company was initially in litigation, it was referred by the court to binding arbitration

before the American Arbitration Association. After the parties conducted extensive discovery and after eleven days of hearings, the panel issued its decision and award on July 17, 2012. In its decision, the arbitration panel rejected Mr. Frumkin's claims that Mr. Persaud and his company P&S acted in bad faith or knowingly deceived Mr. Frumkin and Hamilton Heights Partners into entering the partnership agreement or the construction contracts, finding that there was no credible evidence to support these claims. The panel also found that the 2005 and 2006 construction contracts entered between Hamilton Heights Partners and P&S Construction were not representative of the parties' agreement concerning the project and were executed in order to obtain funding for the project. The panel found that, despite Mr. Frumkin's testimony to the contrary, the true arrangement between the parties was that P&S would perform the construction work at cost with no profit and that Mr. Persaud would earn a profit, if any, from his 50% interest in Hamilton Heights Partners.

With respect to the issue of delays in the completion of the project, the panel found that these delays fell "squarely on the shoulders of both parties." Hamilton Heights Partners contributed to the delays by making changes to the plans, scope of work, and apartment configuration while Mr. Frumkin took it upon himself to directly engage subcontractors and vendors. Likewise, Mr. Persaud and his company P&S hired subcontractors who did not devote the appropriate amount of attention to the project nor properly supervise the subcontractors and they failed to provide sufficient labor and supervision over their own work forces. The panel found that it was not until August 2008 that P&S provided a realistic commitment for the completion of the project with a Temporary Certificate of Occupancy anticipated for 469 West 152<sup>nd</sup> Street by August 30, 2008 and for 479 West 152<sup>nd</sup> Street by October 30, 2008. Nevertheless, the Temporary Certificates of Occupancy were not obtained until September 2008

and April 2010 respectively. The panel found that the record did not adequately demonstrate what caused this delay. Accordingly, they allocated responsibility for late completion on both parties. Although Mr. Frumkin and Hamilton Heights Partners moved to vacate the award, it was upheld by the court in January 2013 and is therefore final and binding.

After receiving the unfavorable award in 2012, Mr. Frumkin began questioning plaintiff's invoices, causing plaintiff to commence this action to recover \$326,858.39 in legal fees and disbursements from Mr. Frumkin and Hamilton Heights Partners. In its complaint, plaintiff asserts three causes of action for breach of contract, account stated and quantum meruit. In their answer, Mr. Frumkin and Hamilton Heights Partners asserted various counterclaims against plaintiff based on plaintiff's alleged failures in its representation of Mr. Frumkin and Hamilton Heights Partners in their dispute with Mr. Persaud. By decision and order dated November 13, 2014, this court granted in part plaintiff's motion to dismiss the counterclaims and thus the only remaining counterclaim asserted against plaintiff is for legal malpractice.

Defendant Mr. Frumkin now moves pursuant to CPLR 3212 seeking dismissal of the legal fees claims asserted against him (Motion Seq. #011). Plaintiff moves pursuant to CPLR 3212 seeking summary judgment on the claims asserted in its complaint and dismissal of defendants' counterclaim for legal malpractice, and for legal fees and costs (Motion Seq. #012). The motions are consolidated for purposes of this decision.

### **DISCUSSION**

With respect to Mr. Frumkin's motion seeking summary judgment dismissal of the claims asserted against him, this is Mr. Frumkin's second attempt to obtain this relief. Mr. Frumkin previously moved for this relief in motion sequence #007, by filing a cross-motion pursuant to

CPLR 3212 and 3211(b) seeking summary judgment dismissing all of the causes of action in plaintiff's complaint and dismissing plaintiff's sixth affirmative defense. NYSCEF Doc. #266. By decision and order dated December 20, 2017, defendants' cross-motion was denied. NYSCEF Doc. #319. Accordingly, Mr. Frumkin's second summary judgment motion seeking the same relief is barred and the motion must be denied. *See Jones v. 636 Holding Corp.*, 73 A.D.3d 409 (1<sup>st</sup> Dep't 2010) (successive summary judgment motions should not be entertained without a showing of newly discovery evidence or other justification).

Turning to plaintiff's motion, plaintiff first argues that they are entitled to a summary judgment order dismissing defendants' remaining counterclaim for legal malpractice because their alleged negligent conduct is not actionable as it concerns reasonable strategic choices. Further, plaintiff argues that defendants cannot possibly show that but-for plaintiff's alleged mistakes in the underlying arbitration proceeding they would have obtained a more favorable result. Finally, plaintiff argues that the counterclaim should be dismissed because defendants did not suffer any damages as a result of the alleged malpractice as Mr. Frumkin subsequently sold the condominium units in a sham transaction to an entity owned by his mother, bought out Mr. Persaud, and then resold the units for a generous profit.

It is well-established that an action for legal malpractice requires proof of an attorneys' negligence, a showing that the negligence was the proximate result of the injury, and evidence of actual damages. *Russo v. Feder, Kaszovitz, Isaacson, Weber, Skala & Bass*, 301 A.D.2d 63, 67 (1<sup>st</sup> Dep't 2002). While an attorney may be held liable for conduct which falls below the ordinary skill and knowledge commonly possessed by a member of the profession, "retrospective complaints about the outcome of defendant's strategic choices and tactics, without demonstrating that those exercises of judgment were so unreasonable at the inception as to have manifested professional

incompetence” are not actionable. *Rodriguez v. Fredericks*, 213 A.D.2d 176, 178 (1<sup>st</sup> Dep’t 1995). Thus, “[a]ttorneys may select among reasonable courses of action in prosecuting their clients’ cases without thereby committing malpractice.” *Dweck Law Firm v. Mann*, 283 A.D.2d 292, 293 (1<sup>st</sup> Dep’t 2002).

In support of its motion for summary judgment, plaintiff demonstrated via documentary evidence, the affidavits of defendants’ former attorneys and the expert affidavit of Gregory H. Chertoff, that their handling of the matter did not fall below the accepted standard of practice for similarly situated attorneys. *See* Affidavit of Gregory H. Chertoff sworn to on February 7, 2020; Affidavit of John T. Morin sworn to on February 7, 2020. In opposition, defendants argue that plaintiff’s “most obvious deviation from the professional standard of care is centered on, among other things, its failure to submit the relevant Department of Building (“DOB”) Records and elicit relevant testimony into the record at the Arbitration.” Affirmation of Ira M. Schulman dated June 18, 2020, para. 19 (emphasis removed). Defendants argue that these records, and Mr. Frumkin’s testimony regarding same, were material and relevant to demonstrate Mr. Persaud and P&S’s responsibility for the delays in obtaining temporary certificates of occupancy for the buildings after October 2008. *Id.*; *see also* Affidavit of Jacob Frumkin sworn to on June 22, 2020, paras. 30-31 (proposed testimony regarding specifics of post-October 2008 delays). In this regard, defendants focus primarily on one single sentence in the arbitrators’ decision, in which the arbitrators, in discussing P&S’s “realistic commitment” to obtain Temporary Certificates of Occupancy in August and October 2008 stated that “[t]he record does not adequately demonstrate why [the Temporary Certificates of Occupancy] were not obtained until September 2008 and April 2010 respectively.” Affidavit of Charles G. Banino dated sworn to February 7, 2020, Exhibit L (Arbitrators’ Award and Decision dated July 17, 2012).

However, as discussed in the reply affidavit of plaintiff's expert Mr. Chertoff, the fatal flaw of defendants' argument and their expert affidavit is their reliance on hindsight and the conclusions drawn by the arbitrators in their decision, to evaluate plaintiff's strategic decisions at the time of the arbitration proceeding. Affidavit of Gregory H. Chertoff sworn to on August 26, 2020, para. 2. This is not the appropriate standard for evaluating an attorneys' conduct for purposes of a malpractice claim. Rather, plaintiff's conduct must be evaluated in the context in which it was made, in comparison to the reasonable skill and knowledge commonly possessed by similarly situated attorneys, and without the knowledge of how the arbitrators ultimately ruled. *See Bernstein v. Oppenheim & Co.*, 160 A.D.2d 428, 430 (1<sup>st</sup> Dep't 1990); *see also Russo v. Feder, Kaszovitz, Isaacson, Weber, Skala & Bass*, 301 A.D.2d 63, 69 (1<sup>st</sup> Dep't 2002).

Here, plaintiff submitted ample evidence to the arbitrators to support their argument that the delays in completing the project were due to Mr. Persaud and his company, including the expert report and testimony of Wayne DeWald, who discussed in detail Mr. Persaud's failures and opined that the project could have been completed in time but for the delays caused by Mr. Persaud. Affidavit of John T. Morin sworn to on February 7, 2020, paras. 20-23 and Exhs. E, G, H, I. In addition, plaintiff submitted specific documentary evidence, namely a chart prepared by Mr. Persaud which was submitted to the New York State Attorney General's Office stating that he would obtain Temporary Certificates of Occupancy by October 2008. Morin Aff., para. 25; Shapiro Aff., Exh. J. Although defendants now complain that plaintiff failed to submit specific evidence regarding the post-October 2008 delay, it was a reasonable strategic decision by plaintiff to withhold this evidence from the arbitrators given the fact that such evidence could easily have been rebutted by Mr. Persaud, for example, by testifying that the delays were due to Mr. Frumkin and Hamilton Heights's failure to pay his company. Instead, plaintiff reasonably relied on the

evidence they presented of Mr. Persaud's responsibilities for the construction work and the un rebutted evidence of his commitment to obtain the Temporary Certificates of Occupancy by October 2008 to demonstrate that the delay in obtaining the Temporary Certificates of Occupancy after October 2008 rested entirely on Mr. Persaud. Morin Aff., para. 28; Chertoff August 26, 2020 Aff. paras. 9-18. Accordingly, defendants failed to raise an issue of fact to show that plaintiff's conduct fell below the profession's prevailing practices. Accordingly, the legal malpractice counterclaim must be dismissed.

Turning now to plaintiff's complaint, plaintiff seeks summary judgment on its causes of action for breach of contract, account stated and quantum meruit. With respect to the cause of action for account stated, this is plaintiff's second motion seeking this relief. Plaintiff previously moved for this relief in motion sequence #007, in which it sought summary judgment on its account stated claim. NYSCEF Doc. #248. This relief was denied by decision and order dated December 20, 2017. NYSCEF Doc. #319. Like defendants, plaintiff cannot make a second motion for summary judgment seeking this relief and accordingly, this branch of the motion must be denied. *Jones v. 636 Holding Corp.*, 73 A.D.3d 409 (1<sup>st</sup> Dep't 2010).

With respect to the breach of contract claim, in order to make a prima facie showing of entitlement to summary judgment on this claim, plaintiff must show that there was a valid and binding contract between the parties, plaintiff performed under the contract, defendants breached the contract and this breach caused damages to plaintiff. *Valenti v. Going Grain, Inc.*, 159 A.D.3d 645, 645 (1st Dep't 2018); *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010). Here, in support of its motion, plaintiff submits the 2010 retainer agreement with defendants. Banino Aff., Exh. B. However, as the First Department found in its decision and order dated February 19, 2015, this retainer agreement is ambiguous as to whether Mr. Frumkin may be

liable for attorneys' fees in his individual capacity. Shapiro Aff., Exh. R. Accordingly, the court may examine parol evidence submitted by the parties in interpreting the contract. *See Blue Jeans USA v. Basciano*, 286 A.D.2d 274 (1<sup>st</sup> Dep't 2001). Here, it cannot reasonably be disputed based on the pleadings in the underlying litigation and arbitration that plaintiff was representing Mr. Frumkin in his individual capacity in the dispute with Mr. Persaud. Indeed, Mr. Frumkin admitted in his deposition that plaintiff was pursuing individual claims on his behalf, including the claims for fraud and fraudulent inducement. Affirmation of Peter T. Shapiro dated August 27, 2020, Exh. N (Frumkin Dep. Tr. 68-69). Further, the 2010 retainer agreement was executed to supplement the 2007 retainer agreement in which Mr. Frumkin retained plaintiff to represent him in his pre-litigation dispute with Mr. Persaud and which was executed by Mr. Frumkin in his individual capacity. Banino Aff., Exh. C. In this context, the court finds that the parties intended to bind Mr. Frumkin to the 2010 retainer agreement with plaintiff.

Plaintiff also submits evidence that defendants only made partial payments for the legal services plaintiff performed and that \$392,858.39 remains outstanding. *See Banino Aff.* and exhibits attached thereto. In opposition, defendants fail to raise any issue of fact with respect to the amount due, arguing instead that summary judgment must be denied on this claim due to their counterclaim for malpractice. However, given that the malpractice claim lacks merit, plaintiff is entitled to summary judgment on its breach of contract claim against defendants. In light of this ruling, the plaintiff's quantum meruit claim is rendered moot. Finally, plaintiff does not offer any basis for an award of legal fees. Accordingly, it is

ORDERED that defendant Jacob Frumkin's motion to dismiss the complaint against him is denied (Motion Seq. #011); and it is further

ORDERED that plaintiff's motion for summary judgment is granted to the extent that the remaining counterclaim for legal malpractice is dismissed and summary judgment is awarded to plaintiff against defendants on the breach of contract cause of action in the amount of \$392,858.39, with interest as of June 14, 2013, and costs and disbursements awarded to plaintiff, and the Clerk shall enter judgment accordingly.

9/28/20  
DATE

  
PAUL A. GOETZ, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE