ORIGINAL

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x	**TRIAL/IAS PART: 14**
KLIGER-WEISS INFOSYSTEMS, INC.,	**NASSAU COUNTY**
Plaintiff,	**Index No: 606457-14**
	Motion Seq. No. 1
-against-	**Submission Date: 5/4/15**
RUSKIN MOSCOU FALTISCHEK, P.C.,	
Defendant.	
----------x	

Papers Read on this Motion:

Notice of Motion, Affirmation in Support and Exhibits.....x
Memorandum of Law in Support.....x
Affidavit in Opposition and Exhibits.....x
Memorandum of Law in Opposition.....x
Reply Memorandum of Law in Support.....x

This matter is before the court on the motion filed by Defendant Ruskin Moscou Faltischek, P.C. ("Ruskin" or "Defendant") on January 30, 2015 and submitted on May 4, 2015, following oral argument before the Court. For the reasons set forth below, the Court denies the motion.

BACKGROUND

A. Relief Sought

Defendant moves, pursuant to CPLR §§ 3211(a)(1), (5) and (7), for an Order dismissing this action.

Plaintiff Kliger-Weiss Infosystems, Inc. ("KWI" or "Plaintiff") opposes the motion.

B. The Parties' History

The Complaint (Ex. 1 to Rice Aff. in Supp.) alleges as follows:

KWI is a New York corporation with its principal place of business in Greenvale, New

York. Ruskin is a professional corporation engaged in the practice of law in New York. KWI is in the business of providing cloud technology solutions and point-of-sale ("POS") systems to retailers. KWI's products incorporate proprietary software, some of which KWI wholly owns and some of which KWI licenses from technology vendors. KWI depends on the continual availability of the software that it licenses to maintain its products' functionality.

In 2001, KWI entered into a Software Sub-License and Service Bureau Agreement ("2001 Agreement") with STS Systems, Ltd., a predecessor-in-interest of NSB Retail Solutions, Inc. ("NSB") which was itself a predecessor-in-interest of Epicor Retail Solutions Corporation ("Epicor"), for the purpose of licensing certain software ("Software") to run KWI's POS systems in its customers' retail stores. Under the 2001 Agreement, Epicor supplied the Software and related technical support services to KWI and its retail customers and, in return, KWI agreed to meet annual minimum sub-licenses of the Software.

The 2001 Agreement provided for continual and automatic renewals, unless KWI or Epicor went bankrupt or materially breached the 2001 Agreement and failed to cure that breach within 30 days notice ("Evergreen Provision"). The Evergreen Provision in the 2001 Agreement consisted of several sections, which are set forth in the Complaint (*see* Comp. at ¶ 7(a) - (f)). After KWI signed the 2001 Agreement, it spent approximately $1 million to incorporate Epicor's Software into KWI's POS systems in its customers' retail stores, and on related training. KWI's investment in Epicor's Software was worthwhile because of the Evergreen Provision which was a "key component" (Comp. at ¶ 9) of KWI's relationship with Epicor.

In October 2004, NSB sued KWI, and other parties, in the United States District Court for the Eastern District of New York, for allegedly failing to meet its annual minimum sub-license obligations under the 2001 Agreement and breaching the restrictive covenant prohibiting the hiring of Epicor's employees. NSB also sought a declaration that the 2001 Agreement would terminate without cause as of December 2005. This action was later consolidated with a related action filed in the United States District Court for the Southern District of New York, titled *NSB Retail Solutions, Inc. v. Gary Brill*, Civil Case No. 04-09240 (collectively "Federal Litigation"). KWI's Answer denied the allegations in Epicor's complaint in the Federal Litigation.

In early 2007, representatives of KWI and Epicor discussed the resolution of the Federal Litigation, and KWI hired Ruskin as its legal representative to negotiate a settlement agreement ("2007 Settlement Agreement"). The 2007 Settlement Agreement amended the 2001 Agreement and Sam Kliger ("Kliger"), the co-founder of KWI, instructed Ruskin to draft the 2007 Settlement Agreement so that it maintained the Evergreen Provision. Plaintiff alleges that Ruskin "understood that it was vitally important to KWI's business" (Comp. at ¶ 14), and that it was a condition to KWI signing the 2007 Settlement Agreement, that the 2007 Settlement Agreement maintain the Evergreen Provision.

Ruskin's settlement negotiations were conducted and/or supervised primarily by Michael Faltischek ("Faltischek"), a senior partner at Ruskin. Between May and July of 2007, Ruskin reviewed and commented on the 2007 Settlement Agreement and exchanged drafts of that Agreement with Epicor's in-house counsel. During the settlement negotiations, Kliger directed Faltischek to ensure that the Agreement contained the Evergreen Provision and Faltischek assured Kliger that it would. Ultimately, the version of the 2007 Settlement Agreement that Faltischek advised KWI to execute did not contain an Evergreen Provision. When KWI executed the 2007 Settlement Agreement, it was unaware that it did not contain an Evergreen Provision, or that its termination provision was "ambiguous at best" (Comp. at ¶ 20). Plaintiff alleges that it relied on Ruskin's advice when it executed the 2007 Settlement Agreement.

In April 2011, Epicor commenced arbitration ("Arbitration") under the 2007 Settlement Agreement in which it asserted, *inter alia*, that it had the right to terminate the 2007 Settlement Agreement because of KWI's uncured breaches. Ruskin represented KWI in the Arbitration. On August 19, 2013, following a 5-day hearing, Ruskin submitted a post-hearing memorandum on behalf of KWI in the Arbitration ("Post-Hearing Memorandum"), portions of which are set forth in the Complaint (*see* Comp. at ¶¶ 32(a) - (d)). David Baum ("Baum"), Epicor's Corporate Counsel, testified at the Arbitration that the 2007 Settlement Agreement did not contain an Evergreen Provision and Ruskin argued in its Post-Hearing Memorandum that this testimony was not credible.

On September 11, 2013, the arbitrator ("Arbitrator") issued a Partial Final Award ("Award") in which he found, *inter alia*, that the 2007 Settlement Agreement "does not contain an 'evergreen' provision, but merely provides for a single three year renewal term upon the

expiration of the initial three year term ending on December 31, 2010" (Comp. at ¶ 34; quotation marks in original). The Arbitrator also found that the 2007 Settlement Agreement would "expire automatically as of December 31, 2013" (*id.*). The Arbitrator's finding weakened KWI's bargaining position with Epicor and, on December 31, 2013, KWI and Epicor executed a Software Sub-License Amendment, Settlement Agreement, and Stipulation of Dismissal of Arbitration ("Amended Agreement") which renews for "consecutive twelve (12) months terms" (Comp. at ¶ 35) unless either party terminates the Amended Agreement on notice. Ruskin continued to represent KWI until the Award was issued, at which time KWI terminated Ruskin and retained other counsel.

On or about December 18, 2013, Kliger met with Ruskin attorneys, including Faltischek, to discuss Ruskin's alleged "mishandling" (Comp. at ¶ 37) of the 2007 Settlement Agreement. During this meeting, Faltischek admitted to Kliger that the termination provision in the 2007 Settlement Agreement was, at best, "ambiguous" and subject to interpretation (Comp. at ¶ 38). Plaintiff alleges that, if Ruskin had properly advised KWI of the risks involved in entering into the 2007 Settlement Agreement or qualified its advice prior to the execution of the 2007 Settlement Agreement, KWI would have been on notice that the 2007 Settlement Agreement did not contain an Evergreen Provision, or was ambiguous at best, and KWI would not have executed the 2007 Settlement Agreement. KWI alleges that it has paid Ruskin over $500,000 in legal fees, a substantial portion of which were caused by Ruskin's alleged failure to properly advise KWI.

The Complaint contains three (3) causes of action: 1) professional malpractice, 2) negligent misrepresentation, and 3) breach of contract. Plaintiff seeks monetary damages including punitive damages. During oral argument on the motion, counsel for Plaintiff advised the Court that Plaintiff is withdrawing its request for punitive damages.

In support of its motion, Defendant provides copies of the 2001 Agreement (Ex. 2 to Rice Aff. in Supp.), the consolidated complaint filed in the Federal Action (*id.* at Ex. 3), the 2007 Settlement Agreement (*id.* at Ex. 4), the Award (*id.* at Ex. 5) and a Summary of Epicor's damages marked as an exhibit in the Arbitration (*id.* at Ex. 6). Defendant submits that Plaintiff has filed this action to avoid payment of $256,445 in legal fees owed to Ruskin as a result of its representation of Plaintiff. Counsel for Defendant affirms that Defendant has not received any

payments from Plaintiff since the Award was issued and provides copies of an email dated October 20, 2013 from the Chief Financial Officer of Ruskin to the Chief Financial Officer of KWI reflecting KWI's outstanding balance (Ex. 7 to Rice Aff. in Supp.) and the Open Accounts Receivable Report for all matters in which Ruskin represented KWI (*id.* at Ex. 8).

In opposition, Kliger disputes Defendant's contention regarding Plaintiff's motive in filing this action. Kliger affirms that he instructed Faltischek to draft the 2007 Settlement Agreement so that it maintained the Evergreen Provision, and Faltischek assured Kliger that he would do so. It was only after the issuance of the Award that Kliger learned that the 2007 Settlement Agreement did not contain an Evergreen Provision, and Kliger affirms that he would not have signed the 2007 Settlement Agreement if he had been advised that the 2007 Settlement Agreement did not contain an Evergreen Provision, or was ambiguous in any way.

Kliger affirms that Defendant continued to represent KWI from 2007 through 2011 in connection with its ongoing business disputes with Epicor and, during this period, Faltischek often communicated directly with Baum. Kliger provides copies of relevant emails during this time period (Exs. 1-5 to Kliger Aff. in Opp.). Kliger affirms that Defendant sent KWI invoices for legal services incurred on its behalf in its dealings with Epicor. Kliger submits that the invoices summaries submitted by Defendant with its motion confirm that Defendant advised KWI on legal strategy concerning its business disputes with Epicor during this period.

Kliger affirms that KWI has requested a copy of the Post-Hearing Memorandum from Defendant but it has not yet been produced. Kliger provides a copy of a draft of the Post-Hearing Memorandum that Ruskin sent to him on August 15, 2013, along with a draft of Kliger's affidavit in the Arbitration (Ex. 6 to Kliger Aff. in Opp.).

C. The Parties' Positions

Defendant submits that Plaintiff fails to state a cause of action for legal malpractice because 1) there are no allegations that Defendant could have litigated a more favorable result for Plaintiff in the Federal Action which resulted in the 2007 Settlement Agreement and, therefore, Plaintiff has not alleged that, but for the 2007 Settlement Agreement, it would have prevailed in the Federal Action; 2) it is mere speculation to assert that, had Plaintiff not executed the 2007 Settlement Agreement, Epicor would not have prevailed in the Federal Action; 3) Plaintiff's allegation that it was damaged by unknowingly giving up the Evergreen Provision contained in

the 2001 Agreement is contradicted by the Arbitrator's conclusion that the 2001 Agreement did not contain an Evergreen Provision; 4) KWI cannot contend that it signed the 2007 Settlement Agreement solely because Ruskin advised it do so because KWI is bound to read and know what it signed; and 5) even if the 2007 Settlement Agreement contained an Evergreen Provision, there was no guarantee that the Agreement would exist indefinitely.

Defendant also contends that Plaintiff's action is barred by the expiration of the statute of limitations because 1) as the allegedly negligent advice was provided in 2007, this action, filed in 2014, is barred by the applicable three year statute of limitations; 2) Ruskin's representation of Plaintiff concerning the 2007 Settlement Agreement is separate and distinct from its representation of KWI in the Arbitration and, therefore, the continuous representation doctrine does not apply; and 3) the statute of limitations expired due to the lapse of over three years between the 2007 Settlement Agreement and the 2011 Arbitration. Defendant also submits that the Court should dismiss the second and third causes of action as duplicative of the first cause of action.

In opposition, Plaintiff submits that 1) the Complaint states a cause of action for legal malpractice by alleging that Defendant failed to properly advise KWI that the 2007 Settlement Agreement did not contain an Evergreen Provision and that, but for that negligent advice, KWI would not have executed the 2007 Settlement Agreement, would not have been damaged and would not have subsequently incurred the legal expenses associated with defending the Arbitration; 2) KWI's allegations are not speculative or conclusory as evidenced by the fact that KWI makes numerous specific allegations, including but not limited to the allegations that Defendant's incorrect advice damaged KWI, caused KWI to unknowingly give up the Evergreen Provision contained in the 2001 Agreement and deprived KWI of the opportunity to make an informed business decision whether to sign the 2007 Settlement Agreement absent an Evergreen Provision; 3) the documentary evidence does not support Defendant's assertion that the 2001 Agreement did not contain an Evergreen Provision, and Defendant's assertion that the Award establishes that the 2001 Agreement never contained an Evergreen Provision is a misreading of the Award; 4) KWI's malpractice claim is not barred by the statute of limitations because documentary evidence, including but not limited to email communications attached to the Kliger affidavit, demonstrate that Defendant advocated on Plaintiff's behalf in its dealings with Epicor

in 2008, 2009, 2010 and 2011 as part of a continuous representation; 5) Defendant is incorrect in characterizing its representation of KWI in the Arbitration as separate and distinct from its representation of KWI in the Federal Litigation, and Defendant has not provided an engagement letter, or disengagement letter, as evidence of the limited nature of its representation of KWI or any change in the scope of that representation; and 6) the causes of action for breach of contract and negligent misrepresentation are not duplicative of the malpractice claim and, at a minimum, there is a question of fact regarding whether there is an independent basis to allege those claims.

In reply, Defendant submits *inter alia* that 1) the Court should dismiss the Complaint because Plaintiff fails to allege specific facts demonstrating that, had it not entered into the 2007 Settlement Agreement, there would have been a more favorable outcome in the Federal Action; and 2) Plaintiff's contention that the 2001 Agreement contained an Evergreen Provision is "flatly contradicted" (D's Reply Memo. of Law at p. 5) by the Arbitrator's decision.

RULING OF THE COURT

A. Dismissal Standards

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Bivona v. Danna & Associates, P.C.*, 123 A.D.3d 956, 957 (2d Dept. 2014), quoting *Alva v. Gaines, Gruner, Ponzini & Novick, LLP*, 121 A.D.3d 724 (2d Dept. 2014) (internal quotation marks omitted) and citing *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

A motion to dismiss a cause of action pursuant to CPLR § 3211(a)(1) may be granted only if documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law. *Bivona v. Danna & Associates, P.C.*, 123 A.D.3d at 957, citing *Indymac Venture, LLC v. Nagessar*, 121 A.D.3d 945 (2d Dept. 2014), quoting *Whitebox Concentrated Convertible Arbitrage Partners, L.P. v. Superior Well Servs., Inc.*, 20 N.Y.3d 59, 63 (2012).

On a motion pursuant to CPLR § 3211(a)(5) to dismiss a complaint as barred by the applicable statute of limitations, the moving defendant must establish, *prima facie*, that the time in which to commence the action has expired. *Beroza v. Sallah Law Firm, P.C.*, 126 A.D.3d 742

(2d Dept. 2015), quoting *Kitty Jie Yuan v. 2368 W. 12th St., LLC*, 119 A.D.3d 674 (2d Dept. 2014). The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is tolled or is otherwise inapplicable. *Beroza v. Sallah Law Firm, P.C.*, 126 A.D.3d at 742 citing, *inter alia*, *Kitty Jie Yuan v. 2368 W. 12th St., LLC*, 119 A.D.3d at 674.

B. Relevant Causes of Action

The elements of a cause of action sounding in legal malpractice are that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of that duty proximately caused the plaintiff to sustain actual and ascertainable damages. *Anisman v. Nissman*, 117 A.D.3d 657 (2d Dept. 2014) citing, *inter alia*, *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 N.Y.3d 438, 442 (2007); *Stuart v. Robert L. Folks & Assoc., LLP*, 106 A.D.3d 808, 808-809 (2d Dept. 2013). To sustain a claim for legal malpractice, a plaintiff must establish that 1) the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession; 2) the attorney's actions resulted in actual damages; and 3) the plaintiff would have succeeded on the merits of the underlying action but for the attorney's negligence. *Ambase Corp. v. Davis, Polk & Wardwell*, 8 N.Y.3d 428, 434 (2007). To make the requisite showing of success on the merits, plaintiff must establish that there would have been a more favorable outcome but for the attorney's negligence. *Ellsworth v. Foley*, 24 A.D.3d 1239 (4th Dept. 2005).

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986). *See also JP Morgan Chase v. J.H. Electric*, 69 A.D.3d 802 (2d Dept. 2010) (complaint sufficient where it adequately alleged existence of contract, plaintiff's performance under contract, defendant's breach of contract and resulting damages).

A claim for negligent misrepresentation requires the plaintiff to demonstrate 1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff, 2) that the information was incorrect; and 3) reasonable reliance on the information. *J.A.O. Acquisition Corp. v. Stavitsky*, 8 N.Y.3d 144, 148 (2007), *rearg. den.*, 8 N.Y.3d 939 (2007). Liability for negligent misrepresentation has been imposed

only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified. *Greenberg, Trager & Herbst, LLP v. HSBC Bank USA*, 17 N.Y.3d 565, 578 (2011), quoting *Kimmell v. Schaefer*, 89 N.Y.2d 257, 263 (1996).

C. Particularity Required by CPLR § 3016(b)

CPLR § 3016(b) provides that where a cause of action is based upon misrepresentation, fraud, breach of trust, and certain other claims the circumstances constituting the wrong shall be stated in detail. The purpose of this pleading requirement is to inform a defendant of the incidents which form the basis of the action. *Pludeman v. Northern Leasing Systems*, 10 N.Y.3d 486, 491 (2008). Where it is impossible to state the circumstances constituting the fraud in detail, CPLR § 3016(b) should not be so strictly interpreted as to prevent plaintiff from asserting an otherwise valid cause of action. *Id.* There is no requirement of unassailable proof at the pleading stage. Rather, the complaint must allege the basic facts to establish the elements of the cause of action. *Id* at 492. CPLR § 3016(b) is satisfied when the facts suffice to permit a reasonable inference of the alleged misconduct. In certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud. *Id* at 493.

D. Continuous Representation Doctrine

The three-year limitations period applicable to causes of action to recover damages for legal malpractice may be tolled by the continuous representation doctrine where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim. *Beroza v. Sallah Law Firm, P.C.*, 126 A.D.3d at 743, quoting *Aseel v. Jonathan E. Kroll & Assoc., PLLC*, 106 A.D.3d 1037, 1038 (2d Dept. 2013) (internal quotation marks omitted) and citing, *inter alia*, *Zorn v. Gilbert*, 8 N.Y.3d 933, 934 (2007). For the doctrine to apply, there must be clear indicia of an ongoing, continuous, developing, and dependent relationship between the client and the attorney. *Beroza v. Sallah Law Firm, P.C.*, 126 A.D.3d at 743, quoting *Aseel v. Jonathan E. Kroll & Assoc., PLLC*, 106 A.D.3d at 1038 (internal quotation marks omitted). One of the predicates for the application of the doctrine is continuing trust and confidence in the relationship between the parties. *Beroza v. Sallah Law Firm, P.C.*, 126 A.D.3d at 743, citing *Aseel v. Jonathan E. Kroll & Assoc.*, PLLC, 106 A.D.3d at 1038, quoting *Luk Lamellen U. Kupplungbau GmbH v. Lerner*, 166 A.D.2d 505, 507 (2d Dept. 1990).

E. Application of these Principles to the Instant Action

The Court denies the motion based on its conclusion that 1) accepting the facts as alleged in the Complaint as true and according Plaintiff the benefit of every possible favorable inference, Plaintiff has alleged legally sufficient causes of action for malpractice, breach of contract and negligent misrepresentation and the Complaint contains adequate particularity regarding Defendant's allegedly improper conduct; 2) the documentary evidence does not utterly refute Plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law, in part because the documentary evidence does not definitively establish whether the 2001 Agreement contained an Evergreen Provision; 3) there is an issue of fact as to whether the applicable statute of limitations was tolled by the continuous representation doctrine; and 4) the Court cannot rule, at this nascent stage of the litigation, that the breach of contract and negligent misrepresentation claims are duplicative of the malpractice claim.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Preliminary Conference on July 16, 2015 at 9:30 a.m.

ENTER

DATED: Mineola, NY
June 10, 2015

HON. TIMOTHY S. DRISCOLL
J.S.C.