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

PRESENT: LOUIS B. YORK PART 2

Justice

Kahramane

- v -

Coritsidis

INDEX NO. 119472/00

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on 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

Motion is decided in accordance with accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 11/30/01

LOUIS B. YORK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 2

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ABDELMAJID KAHRAMANE,

Plaintiff,

INDEX NO.
119472/00

-against-

DEMETRIOS CORITSIDIS, an Attorney at Law of the State of New York, and CORITSIDIS, SOTIRAKIS & SAKETOS, P.L.L.C., an entity or professional corporation licensed to practice law in the state of New York,

Defendants.

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LOUIS YORK, J.:

Defendants, pursuant to CPLR 3211(a)(1) and (7), move to dismiss this legal malpractice action.

The gravamen of plaintiffs claim is that defendants, while representing him personally, wrongfully released $55,000 being held in escrow by them to his prospective partner, non-party Youssef Dargham ("Dargham"), without prior authorization from him. The factual details provided by both parties are at best sketchy

According to defendants, plaintiff hired them to represent him in a real-estate transaction and placed the money in escrow so the transaction could be completed in plaintiffs

absence. Since plaintiff planned to be away during the scheduled closing, he appointed Dargham, with whom he planned to purchase the property, his attorney-in-fact so the appropriate documents could be signed at the closing. When the deal fell through, defendants released the escrow funds to Dargham. Defendants rest their instant motion to dismiss on the fact that plaintiff granted Dargham a general power of attorney which vested Dargham with the authority to receive the escrow funds (GOL § 5-1502A[6]).

Plaintiff denies that he ever executed such a broad power of attorney on Dargham's behalf, and avers that his signature and initials on the instrument proffered by defendants (exhibit B to moving papers), which was notarized by defendant Demetrios Coritsidis ("Coritsidis"), is a forgery. Plaintiff further avers he hired defendants to represent him in the real-estate matter at the suggestion of Dargham, who had had prior dealings with the firm, and denies that he expected to be away at the closing -- or that a closing was even specifically scheduled. According to plaintiff, Dargham has disappeared, and the money with him. It is unclear from either party's papers whether defendants were representing Dargham as well as plaintiff in the real-estate transaction.

The most unusual aspect of this motion to dismiss based on documentary evidence is movants' failure to submit material documents which, given the apparent nature of the underlying transaction, must perforce exist (see, e.g., Gen Bus L § 778-a[2]; DR 9-102[D][3], [D][4] & [J], 22 NYCRR § 1200.46[d][3], [d][4] & [j]). No retainer agreement, escrow agreement, property purchase agreement or real-estate closing documents have been presented to the court -- or even

referred to by the parties. Indeed, other than a copy of the $55,000 check defendants gave Dargham (exhibit C to moving papers), the only document furnished by defendants is the power of attorney which plaintiff contends is a forgery. "Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (Leon v. Martinez, 84 NY2d 83, 88 [1994]; Demas v. 325 West End Avenue Corn., 127 AD2d 476,477 [1st Dept 19871). The evidence submitted by defendants falls far short of this standard.

A different standard applies to the branch of defendants' motion which seeks dismissal of the complaint for failure to state a cause of action. "[O]n a motion to dismiss the complaint for failure to state a cause of action (CPLR 3211[a][7]), the court is required to view every allegation of the complaint as true and resolve all inferences in favor of the plaintiff regardless of whether the plaintiff will ultimately prevail on the merits" (344 E 72 Limited Partnershiu v. Dragatt, 188 AD2d 324 [1st Dept 19921; Khan v. Newsweek. Inc., 160 AD2d 425,426 [1st Dept 1990]). Not only is the court's inquiry limited to ascertaining whether the pleading states any cause of action rather than whether there is evidentiary support for the complaint (Guggenheimer v. Ginzburg, 43 NY2d 268,275 [1977]), but it may not even express an opinion as to whether plaintiff will ultimately be able to establish the truth of these averments (219 Broadway Corp. v. Alexander's Inc., supra, 46 NY2d 506 [1979]).

Plaintiffs complaint states three causes of action: (i) legal malpractice/negligent representation, (ii) breach of contract and (iii) breach of fiduciary duty.

"To establish a cause of action for legal malpractice, the plaintiff must show that the attorneys were negligent, that their negligence was the proximate cause of the plaintiffs damages, and that the plaintiff suffered actual damages as a direct result of the attorneys' actions (see, Marshall v. Nacht, 172 AD2d 727, 727-728 [2d Dept 1991]). ... [The complaint must allege] that 'but for' the attorneys' alleged malpractice, the plaintiff would not have sustained some actual ascertainable damages (Stroock & Stroock & Lavan v. Beltramini, 157 AD2d 590, 591 [1st Dept 19901)" (Franklin v. Winard, 199 AD2d 220,221 [1st Dept 19931).

As pleaded, plaintiff's first cause of action alleges all of these elements and states a cognizable claim. Defendants' contention that such facially valid claim is nullified because plaintiff empowered Dargham to receive the escrow funds is insufficient to warrant dismissal of this cause of action. "[F]actual claims ... flatly contradicted by documentary evidence are not entitled to [the] consideration" normally accorded to plaintiffs allegations on a motion pursuant to CPLR 3211(a)(7) (Caniglia v. Chicago Tribune-New York News Syndicate, 204 AD2d 233 [1st Dept 19941; Mark Hampton. Inc. v. Bergreen, 173 AD2d 220 [1st Dept 1991]), lv den 80 NY2d 788 [1992]). However, as discussed above, the documentary evidence submitted by defendants is simply not enough.

The power of attorney, presumed to be a legitimate document when initially offered by defendants, was assailed by plaintiff through sworn testimony. That sworn testimony was not rebutted by defendants with sworn testimony from anyone with personal knowledge of the facts,

such as Coritsidis, who notarized the document in question.' Furthermore, as plaintiff points out, the copy of the power of attorney submitted by defendants does not have a completed affidavit of effectiveness, and no document signed by Dargham accepting the power of attorney has been presented to the court. "[A]n attorney who asserts that an affirmative defense exists which would defeat the underlying claim bears the burden of proof on that issue" (Nitis v. Goldenthal, 128 AD2d 687,688 [2d Dept 19871; Romanian American Interests, Inc. v. Scher, 94 AD2d 549, 555 [2d Dept 19831). Defendants have not met this burden of proof.

The complaint's second cause of action alleges that defendants' conduct -- presumably in releasing the escrow funds to Dargham -- "constituted a breach of contract, oral, implied and/or express as to the plaintiff and a breach of the implied covenant of good faith and fair dealing" (complaint, ¶ 16, at exhibit **A** to moving papers). However, the pleading does not allude to a specific contract, written or oral. Even going outside the pleading for elucidation (see Guggenheimer v. Ginzburg, supra, 43 NY2d at 275), neither side has introduced evidence of the existence of a retainer agreement or an escrow agreement, so it is impossible to ascertain what contract defendant is alleged to have breached. Plaintiffs counsel argues that breach of an

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[1] In this context, the court notes that plaintiffs charge that defendants notarized a forged signature on a legal document submitted to this court is a grave accusation with ramifications well beyond the scope of this lawsuit. If true, at least Coritsidis would be subject to severe disciplinary action (see Matter of Kuperman, 285 AD2d 200 [2d Dept 20011). If false, plaintiffs counsel would be subject to those same sanctions (see DR 7-102[A][4], 22 NYCRR § 1200.33[a][4]) and plaintiff could be subject to criminal prosecution for perjury, a felony in this state (see Penal Law §§ 210.10, 210.15).

escrow agreement may serve as a predicate for claims of breach of contract and breach of fiduciary duty, but since the key issue is whether such an escrow agreement exists in the first place, such argument is immaterial.

"If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract.... [U]nless a court can determine what the agreement is, it cannot know whether the contract has been breached" (Cobble Hill Nursing Home. Inc. v. Henry and Warren Corporation, 74 NY2d 475,482 [1989], rearg den 75 NY2d 863 [19901, cert den 498 US 816 [19901, citations omitted). Hence, plaintiffs failure to specify the covenant which defendants allegedly breached is fatal to his breach of contract claim.

Affording plaintiff the benefit of all favorable inferences and implications that may be drawn from the complaint (Licensing Development Group, Inc. v. Freedman, 184 AD2d 682,683 [2d Dept 1992]), and presuming defendants' alleged contractual obligation to be the safeguarding of plaintiffs escrow'money, this cause of action can still not be sustained. "While it is true that a breach of contract claim need not be based on an express promise to the client..., a breach of contract claim premised on the attorney's failure to exercise due care or to abide by general professional standards is nothing but a redundant pleading of the malpractice claim [plaintiffs first cause of action]" (Levine v. Lacher & Lovell-Taylor, 256 AD2d 147, 151 [1st Dept 19981, citing Sage Realty Corn. v. Proskauer Rose, 251 AD2d 35, 38-39 [1st Dept 19981).

In his opposing affirmation, plaintiffs counsel has requested (but not cross-moved for) leave to amend the complaint in the event the court finds the pleading deficient (see CPLR

3211[e]; Bardere v. Zafir, 63 NY2d 850 [1984]). Such leave is to be freely granted (CPLR 3025[b]; Edenwald Contracting Co. v. City of New York, 60 NY2d 957 [1983]). However, leave is in the discretion of the trial court, and should not be granted where the proposed amendment is devoid of merit (Nasuf Construction Corn. v. State of New York, 185 AD2d 305,306 [2d Dept 1992]; Brennan v. City of New York, 99 AD2d 445 [1st Dept. 19841). The court is not required to "permit futile amendments which may lead to needless litigation" (Saferstein v. Mideast Systems. Ltd., 143 AD2d 82 [2d Dept 19881). As discussed above, plaintiff cannot state a cause of action for breach of contract without first alleging the existence of a contract and specifying which particular covenant in that contract defendants breached. Thus, plaintiff may have leave to amend his complaint only if the facts and documentary evidence support such allegations.

Plaintiffs third cause of action alleges that defendants "breach[ed] their fiduciary duties in their relationship with plaintiff" (complaint, ¶ 20, at exhibit A to moving papers).

A "fiduciary relationship exists between two persons when one of them is under a duty to act for or give advice for the benefit of another upon matters within the scope of the relationship" (Mandelblatt v. Devon Stores. Inc., 132 AD2d 162, 168 [1st Dept 19871). Attorneys owe to their clients "the fiduciary duties of loyalty and confidentiality" (Kassis v. Teacher's Insurance and Annuity Association, 93 NY2d 611, 616 [19991). An attorney who disburses escrow funds to a third party pursuant to a power of attorney without the client's authorization breaches his fiduciary duty to that client (Liebert v. Gelbwaks, 234 AD2d 164

[1st Dept 19961; Matter of Gelbwaks, 260 AD2d 47, 48 [1st Dept 19991; see also Matter of Boulanger, 61 NY2d 89 [19841).

Defendants do not dispute that plaintiff was their client or that they held plaintiffs $55,000 in escrow. Rather, they argue that this claim must be dismissed as duplicative of plaintiffs first cause of action, for legal malpractice. The court disagrees. Breach of fiduciary claims against an attorney are not necessarily redundant of legal malpractice claims against him (see, e.g., Goldberg v. Moskowitz, 262 AD2d 56, 57 [1st Dept 19991).

As alleged in the complaint, defendants owed and breached fiduciary duties to plaintiff in two separate contexts: as his attorneys, as discussed above, and as escrow agents (see National Union Fire Insurance Company Pittsburgh, Pennsylvania v. Proskauer Rose Goetz & Mendelsohn, 165 Misc 2d 539,544-546 [Sup Ct, NY Co, Schackman, J, 1994]; Judiciary Law § 497[2-a]; DR 9-102[A], 22 NYCRR § 1200.46[a]). In both capacities defendants had **a** relationship with plaintiff of confidence, trust, or superior knowledge or control (cf Chipman v. Steinberg, 106 AD2d 343 [1st Dept 19841, affd 65 NY2d 842 [1985]; Penato v. George, 52 AD2d 939,942 [2d Dept 19761, app dism 42 NY2d 908 [1977]), **which** imposed on them the duty of conducting themselves with "**the** utmost of good faith" (Christian v. Christian, 42 NY2d 63, 72 [1977]). This standard is different than what plaintiff must prove to establish his malpractice claim, which is based on mere negligence.

Accordingly, defendants' motion to dismiss is granted only to the extent that the second cause of action in the complaint is hereby dismissed, and is otherwise denied.

Defendants shall have twenty (20) days from service of a copy of this order with notice of entry to serve an answer to the remaining causes of action in the complaint.

This decision constitutes the order of the court.

DATED: 11/28 ,2001

J.S.C.