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

PRESENT: HON. MARILYN SHAFER *Justice* **PART** 36

ABRAHAM BERKOWITZ,

Plaintiff(s),

-against-

FISCHBEIN, BADILLO, WAGNER & HARDING, RICK STEINER, SEGAL & FELL, P.C., f/k/a RICK STEINER, P.C., and JACK SEGAL,

Defendant(s).

INDEX NO. 10435912002

MOTION DATE _____

MOTION SEQ. NO. 001 & 002

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

In this legal malpractice action, plaintiff Abraham Berkowitz seeks damages of $500,000 from defendant attorneys and law firms Fischbein Badillo Wagner Harding s/h/a Fischbein, Badillo, Wagner & Harding (Fischbein), Rick Steiner, Segal & Fell, P.C., f/k/a Rick Steiner, P.C. (Steiner), and Jack Segal, for losses allegedly sustained when defendants neglected to make the appropriate public disclosures of plaintiff's sale of his equity interest in a real estate partnership. In two separate pre-answer motions, Fischbein, and Steiner and Segal, move to dismiss the Complaint, pursuant to CPLR 3211(a)(7), for failure to state a claim

upon which relief can be granted. Alternatively, Steiner moves to dismiss plaintiffs claims for breach of fiduciary duty and for breach of contract, as duplicative of that for legal malpractice. Plaintiff cross-moves for leave to amend his Complaint, pursuant to CPLR 3025(b), to include fraud allegations against Fischbein.

In May 1996, plaintiff, real estate developer Jack Lefkowitz, and architect Joseph Lombardi created 27 North Moore Associates, LLC (North Moore), a limited liability company, to function as the sponsor of a project to acquire property located at 27 North Moore Street, New York, New York (the property), for development and conversion into condominiums. Fischbein was retained to represent North Moore and drew up the Offering Plan for the condominiums, which was submitted to the Attorney General on September 29, 1997, and declared effective on November 12,1998. The offering Plan included a Certification, which stated, as relevant, that it was tendered by "the sponsor and the principals of the sponsor of the condominium." Affidavit of Abraham Berkowitz in Opposition of Motion to Dismiss (Berkowitz Aff.), Exhibit C. Public sales of the condominium units occurred between February 18,1999, and September, 23,1999.

At some point, a rift developed among North Moore's partners, and plaintiff retained Jack Segal of the Steiner firm to represent him in the preparation and execution of a Purchase and Sale Agreement (the buyout agreement) with Lefkowitz. Fischbein represented Lefkowitz in the negotiation of the buyout agreement, pursuant to which plaintiff sold Lefkowitz his 40% membership interest in North Moore, for $4.8 million, and terminated his association with the partnership, effective April 26, 1999.' Plaintiff signed a general release, which was

'Around that same time, Lefkowitz also bought out Lombardi's 20% interests.

incorporated into the buyout agreement, discharging Lefkowitz and his agents, among others, from liability in all actions or claims for any disputes arising out of matters related to North Moore.

In January **2001,** pursuant to Article **23-A** of the General Business Law (the Martin Act), the New York State Attorney General instituted an action against North Moore in this court, entitled ***State of New Yurk v 27 North Moore Assocs., LLC*** (Index No. **400215-01)** (the Attorney General's suit), alleging, among other things, fraud in the construction of the houses and omissions in the Offering Plan concerning the physical condition of the property. Plaintiff was a named defendant in the Attorney General's suit, which sought damages of approximately eight million dollars. Prior to that, plaintiff had also been named as a defendant in other suits, including one filed by North Moore's Board of Managers in this court, entitled The ***Board of Managers of the 27 North Moore Street Condominium v 27 North Moore Assocs.,*** *LLC* (Index No. **100460/00)** (the Board of Manager's action). The court granted a motion to consolidate the Attorney General's action and that of the Board of Managers on January **23, 2002;** and, in **a** so-ordered stipulation dated February 6, **2002,** plaintiff paid **$304,000.00** to settle **all** the claims that were brought against him in the consolidated action.

Plaintiff then filed this action on March **1, 2002,** alleging, among other things, that defendants were negligent, for failing to file an amendment to North Moore's Offering Plan, to advise that he had ceased to be a member or manager, when he executed the buyout agreement. Plaintiff states that he gave Segal and Steiner express instructions to insure that he would be free of any entanglements with North Moore, and that he would not be held liable for the negligence of others involved in the condominium venture. He alleges further that he

specifically informed Segal that he wished to sever all ties to North Moore, because he had learned that Lefkowitz was committing a fraud against the condominium.

Plaintiff claims that he relied upon defendants' claimed expertise and knowledge in real estate and condominium matters, and maintains that, but for their negligence and malpractice, he would not have spent $500,000 defending and/or settling the suits that alleged fraud in the construction and sale of the condominiums. To support this theory, plaintiff submits a letter from Assistant Attorney General Oliver A. Rosengart, dated February 13,2002, which stated that it was written in response to a query from Robert L. Rimberg, plaintiff's counsel in this action. Rosengart's letter indicates that plaintiff "would not have been named" in the Attorney General's suit, "if an amendment to the offering plan for 27 North Moore Street Condominium had been submitted by the attorney for Abraham Berkowitz to the Department of Law in April, 1999, which was during the sales period when many units had not yet closed, and that amendment disclosed that Abraham Berkowitz was no longer a principal of the sponsor." Berkowitz Aff., Exhibit D.

Defendants' motions to dismiss followed in June and July 2002.

On a motion to dismiss, the court must give the plaintiff the benefit of every possible inference, and find that the plaintiff has stated a cause of action, if one can be discerned within the four corners of the complaint. ***See, 511 West232nd Owners Corp. v Jennifer Renlty Co.,*** **98 NY2d 144,151-152 (2002);** ***Leon v Martinez,*** **84 NY2d 83, 87-88 (1994).** The question on such a motion is not whether the plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support his claims. ***See, 511 West232nd Owners Corp. v Jennifer Realty Co., supra.***

An attorney may be liable for malpractice where there is proof that he failed to exercise the skill commonly exercised by an ordinary member of the legal community, and that but for such negligence, the plaintiff would not have sustained the losses alleged. ***Epifano v Schwartz,*** 279 AD2d 501,502 (2d Dept 2001); ***Shopsin v Siben & Siben,*** 268 AD2d 578 (2d Dept 2000); ***Da Silva v Suozzi, English, Cianciulli, & Peirez,*** 233 AD2d 172,174 (1st Dept 1996). Absent fraud, collusion, malicious acts, or other special circumstances, an attorney is not liable to third parties not in privity with them for harm caused by professional negligence. ***Aglira v Julien & Schelisinger P.C.,*** 214 AD2d 178 (1st Dept 1995); ***Viscardi v Lerner,*** 125 AD2d 662 (2d Dept 1986). Generally, the parties in a legal malpractice action are permitted to submit expert testimony regarding the standard of care required in the profession, and the issue of whether malpractice was committed is a factual determination made by a jury. See, ***Greene v Payne Wood and Littlejohn,*** 197 AD2d 664,666 (2d Dept 1993); ***Corley v Miller,*** 133 AD2d 732,735 (2nd Dept 1987).

Steiner and Segal assert, among other things, that they never represented North Moore, and that North Moore was the only entity with legal authority to amend the Offering Plan. They contend, therefore, that the Complaint should be dismissed as a matter of law, as plaintiff cannot show that, "but for" their acts or omissions, he would not have sustained the losses alleged. According to Steiner and Segal, the indemnification provisions in North Moore's Operating Agreement provide plaintiffs sole remedy. They also cite provisions of the buyout agreement, which state that plaintiff's right to indemnification "shall survive as to any actions which occurred before the closing." Exhibit B, Peter L. Contini, Affirmation in Support of Defendant Fischbein's Motion to Dismiss.

Steiner and Segal have not responded to plaintiff's charge that the buyout agreement was defective, for failing to require that Lefkowitz or North Moore advise the Attorney General of the material change in North Moore's sponsors. Nor have they shown that they were precluded from filing the requisite amendment or notification with the Attorney General's Office, or from requesting that North Moore or Fischbein do so. ***See, Shopsin v Siben & Siben,*** 268 AD2d ***578, supra.*** Steiner and Segal offer no evidence or law to rebut the assertions in Rosengart's letter, that plaintiff was only named in the Attorney General's suit because he was still listed as a sponsor when the suit commenced. These defendants merely ask the court to disregard Rosengart's letter, as inadmissible hearsay. On this motion to dismiss, however, Rosengart's letter may be used to state plaintiff's claim, even though it might be deemed inadmissible at a trial or on a motion for summary judgment. ***See, Salles v Chase Manhattan*** *Bank*, __ AD2d __, 2002 WL 31894926, *2 (1st Dept) (court is not authorized to assess the relative merits of the complaint's allegations against the defendant's contrary assertions or to determine whether or not plaintiff has produced evidence to support his claims); ***see also, Greene v Payne Wood and Littlejohn,*** 197 AD2d 664, ***supra; Corley v Miller,*** 133 AD2d ***732, supra.***

On the record available, therefore, plaintiff has stated a claim for legal malpractice against Steiner and Segal, and is entitled to offer evidence to support his claims. ***See, 511 West 232nd Owners Corp. v Jennifer Realty Co., supra.*** Consequently, the motion to dismiss, pursuant to CPLR 3211(a)(7), must be denied. Plaintiff has also stated a claim for breach of contract, where he alleges that he retained Steiner and Segal for the express purpose of ensuring that he would not be liable for any construction defects at North Moore or for any of Lefkowitz'

fraudulent acts. ***See, Bloom v Kernan***, 146 AD2d 916 (3d Dept 1989). However, the cause of action for breach of fiduciary duty, as asserted against Steiner and Segal, is dismissed, pursuant to CPLR 3211(a)(7), as it merely duplicates the legal malpractice claim. See, ***Laruccia v Forchelli, Curto, Schwartz, Mineo, Carlino & Cohn, LLP,*** 295 AD2d 321 (2d Dept), lv ***dismissed in part and denied in part,*** 98 NY2d 753 (2002).

Plaintiff also alleges that Fischbein, as the sponsor's attorney, was responsible for filing the disputed amendment with the Attorney General. Fischbein disputes this, asserting that it functioned solely as North Moore's attorney for condominium matters, and as Lefkowitz' attorney with respect to the buyout agreement. Fischbein contends that it owed no duty to plaintiff, with whom it had neither a contract, nor a special relationship approaching privity. Fischbein also points to the indemnification provisions of North Moore's Operating Agreement, to argue that they provide the only remedy available to plaintiff - if his liability in the Attorney General's Martin Act suit was predicated solely on his membership in North Moore, and not on any personal wrongdoing.

While North Moore had a retainer with Fischbein, there is no evidence of any contract between Fischbein and plaintiff. To the extent that plaintiff alleges that he had a contract with Fischbein, or that Fischbein owed him a fiduciary duty, based on Fischbein's representation of North Moore, in which plaintiff was a principal, these claims would have no validity under the principles governing either partnerships or attorney-client relationships. See, ***Blank v Noumair***, 239 AD2d 534 (2d Dept 1997); ***see also,*** CK. ***Ind. Corp. v C.M. Ind. Corp.,*** 213 AD2d 846 (3d Dept 1995); ***Benedek v Heit,*** 139 AD2d 393 (1st Dept), ***lv denied,*** 73 NY2d 703 (1988). Although plaintiff claims to be a third-party beneficiary of Fischbein's contract with North

Moore, that status would be reserved for the investing public, or potential buyers of the condominium units, pursuant to the Martin Act. ***See, e.g., 511 West 232nd Owners Corp. v Jennifer Realty Co., supra,*** 98 NY2d, at 154 (sponsors in cooperative conversions must meet high standards of fair dealing and good faith toward tenants as purchasing tenants and sponsors do not deal as equals either in terms of access to information or business acumen). Thus, even if Fischbein was negligent for not ensuring that North Moore filed the disputed amendment, Fischbein would not be liable to plaintiff for that omission.

Hence, the Complaint fails to state a claim for legal malpractice or for breach of contract against Fischbein. The absence of a contract or a special relationship between plaintiff and Fischbein negates the cause of action for breach of a fiduciary duty. The Complaint, therefore, fails to state a claim against Fischbein, pursuant to CPLR 3211(a)(7), and must be dismissed.

Plaintiff requests leave to serve a proposed Amended Complaint, which asserts allegations of fraud against Fischbein. This request is governed by CPLR 3025(b), which provides that such leave should be freely given, where no prejudice or surprise would result. ***McCaskey, Davies & Assocs., Inc. v New York City Health & Hosp. Corp.,*** 59 NY2d 755 (1983).

Plaintiffs proposed Amended Complaint alleges that Fischbein owned a percentage of North Moore and conspired with Lefkowitz to loot North Moore, to drive plaintiff out of the partnership, in order to "allow Lefkowitz to takeover the operation of [Korth Moore] to the detriment of the other managing members and to force plaintiff to sell his partnership interest to Lefkowitz for less than it was worth. Berkowitz Aff, Complaint ¶¶ 17, 24. Plaintiff also alleges that Fischbein knowingly and maliciously failed to file the disputed amendment to the

offering plan, even though it filed several other amendments, so that plaintiff would remain individually liable for any actions instituted against North Moore, and in order to reduce Lefkowitz' exposure in any such suits. See, *id.* at ¶ 38.

The proposed Amended Complaint alleges that the Operating Agreement, which Fischbein drafted, required plaintiffs signature on any check whose value exceeded $5,000.00. Plaintiff attests that Fischbein received and cashed several checks and wire transfers, totaling $543,540.61, that were not authorized by plaintiff, and that were otherwise improperly issued from North Moore. Plaintiff lists dates, check numbers, and amounts involved for each of these alleged transactions. For example, plaintiff attests that a $25,000.00 payment to Fischbein was made with a North Moore check, which was numbered 997, dated January 28, 1998, and signed by Jerome Greenbaum. According to plaintiff, Fischbein had already been paid for work done in connection with the purchase of the property and for the closing of the construction loan for the development of the property, before the alleged unauthorized transactions occurred. Plaintiff asserts further that Fischbein received these payments before November 1998, when it started to render services for the closings on condominium unit purchases. Plaintiff concludes, therefore, that Fischbein received the improper payments for work that was not performed for North Moore, and as part of the conspiracy to allow Lefkowitz to dominate and takeover North Moore.

Plaintiffalleges that Fischbein, Lefkowitz, and Jerome Greenbaum created an account for S. Strulovitch Construction Corp. (Strulovitch), which was North Moore's general contractor, although Fischbein, Lefkowitz, and Greenbaum were not owners or principals of Strulovitch. According to plaintiff, Lefkowitz and Greenbaum paid Fischbein with funds from

the account, although Fischbein never did any work for Strulovitch. Specifically, the proposed Amended Complaint asserts that Fischbein "accepted a payment for $25,000.00 from a S. Strulovitch Construction, Inc., which was an account opened by Lefkowitz in order to convert money from" North Moore. Berkowitz Aff., Exhibit A, ¶ 19. In support of these allegations, plaintiff submits a letter from the law firm Smith, Buss & Jacobs, dated June 23,1998, and addressed to Greenbaum. The Smith, Buss & Jacobs letter demanded that Greenbaum explain why he was doing business under the name of one of the firm's clients, citing an account opened with "Republic National Bank entitled S. Strulovitch Construction Corp." Berkowitz Aff., Exhibit B.

Fischbein contends that the claims for fraud and collusion in the proposed Amended Complaint have never been raised before, and are only raised now, because plaintiff recognizes that his routine malpractice claim cannot stand. Fischbein denies the fraud allegations in an affidavit from Kenneth Haber, the partner who was responsible for the North Moore account. Haber attests that Fischbein provided detailed invoices to North Moore, for legal services that Fischbein had performed for North Moore and received payments in satisfaction of those invoices, including payments received in August 1998, for work done in connection with a **$40** million refinancing of the Property, before sales of the condominium units had started. Fischbein contends, also, that the general release, which plaintiff signed in connection with the buyout agreement, bars any subsequent claims against Lefkomitz, and, perforce, against Fischbein, based on theories of agency. In addition, Fischbein contends that the fraud claims, even if assumed true, arose before April 1999, when plaintiff's association with North Moore ended, and, therefore, have no bearing on plaintiff's primary complaint, that the attorneys'

failure to file the disputed amendment to the offering plan exposed him to personal liability in 2000 and 2001, when several suits were filed against North Moore.

The proposed Amended Complaint identifies the parties, transactions, and dates relevant to plaintiff's allegations that Fischbein committed fraud and colluded with Lefkowitz to loot North Moore and to drive plaintiff out of the partnership, in order to allow Lefkowitz to takeover North Moore, to force plaintiff to sell his partnership interest to Lefkowitz for less than it was worth, and to render plaintiff personally liable for North Moore's deficiencies. ***See,*** CPLR 3016(b); ***Stern v Consumer Equities Assocs.,*** 160 AD2d 993,994 (2d Dept 1990). Consequently, plaintiff need not allege privity with Fischbein for this malpractice claim, which is predicated on fraud, to survive. ***Id.*** Therefore, this claim will withstand a motion to dismiss, pursuant to CPLR 3211(a)(7). However, the proposed claims for breach of contract and breach of fiduciary duty, as asserted against Fischbein, can not stand, as they are merely redundant pleadings of the malpractice claim. ***See, Between the Bread Realty Corp. v Salans Hertzfeld Heilbronn Christy & Viener,*** 290 AD2d 380 (1st Dept), ***lv denied,*** 98 NY2d 603 (2002); ***Laruccia v Forchelli, Curto, Sckwartz, Mineo, Carlino & Cohn, LLP,*** 295 Ad2d 321, ***supra.***

Accordingly, it is hereby

ORDERED that the motion of defendants Rick Steiner, Segal & Fell, P.C., f/k/a Rick Steiner, P.C., and Jack Segal, for an order dismissing the Complaint, is granted in part, to the extent that the cause of action for breach of fiduciary duty is severed and dismissed, and is otherwise denied; and it is further

ORDERED that the motion of defendant Fischbein Badillo Wagner Harding s/h/a Fischbein, Badillo, Wagner & Harding is granted, and the Complaint, as asserted against

Fischbein, is dismissed; and it is further

ORDERED that plaintiff's cross motion for leave to serve an amended complaint is granted, and plaintiff is directed to serve an amended complaint consistent with this decision.

Dated: 2/5/07

MARILYN SHAFER
J.S.C.

J.S.C.

Check one: [ ] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION