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

PAULA J. OMANSKY

PART 47

0600304/1999

SNOW, BECKER & KRAUSS

vs

ISG SOLID CAPITAL MARKETS

SEQ 5

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 3/7/0

MOTION SEQ. NO. _____

MOTION CAL. NO. 10

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 decided in accordance with accompanying memorandum

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 8/22/03

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47
----------X
SNOW BECKER KRAUSS P.C.,

Plaintiff,

- against -

Index No. 600304/1999

ISG SOLID CAPITAL MARKETS, LLC,

Defendant.
----------X

PAULA J. OMANSKY, J.:

In this action to recover fees for legal services rendered, plaintiff law firm moves for summary judgment, pursuant to CPLR 3212, dismissing defendant's counterclaims, and granting judgment in plaintiff's favor on the complaint's causes of action for breach of contract and an account stated.

FACTUAL ALLEGATIONS

The facts from which this action arose were set forth in the court's decision and order dated January 9, 2002 (the Prior Order), and will not be repeated here, familiarity with the Prior Order being assumed. Defined terms used in this decision, and not otherwise defined herein, are used with the meanings ascribed to them in the Prior Order.

DISCUSSION

Plaintiff's motion is granted, defendant's counterclaims are dismissed, and judgment is granted in plaintiff's favor on its causes of action for breach of contract and an account stated.

Defendant's answer asserts five counterclaims for legal malpractice, breach of fiduciary duty, breach of contract, fraud, and a declaratory judgment. Defendant alleges that plaintiff

committed malpractice when plaintiff represented both defendant and Coleman simultaneously, as underwriters' counsel, in connection with the Stav initial public offering (IPO), in three respects: (1) by concealing facts from defendant which would purportedly have indicated that Coleman was unable, and unwilling, to adequately perform its obligations as co-managing underwriter; (2) by failing to advise defendant that there were inherent or potential conflicts of interest in plaintiff's simultaneous representation of the two entities; and (3) by drafting deal documents which favored Coleman at defendant's expense, and failing to advise defendant of the ramifications of those documents.

In order to establish a prima facie case of legal malpractice, a client must demonstrate "three elements: the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and actual damages" (*Reibman* v Senie, 302 AD2d 290, 290 [1st Dept 2003]). However, in opposition to plaintiff's motion, defendant has failed to raise a triable issue of fact as to the existence of the elements of negligence and proximate cause.

As regards the element of negligence, defendant has failed to raise an issue of fact, first, as to whether plaintiff concealed any information from defendant, indicating Coleman's inability and/or unwillingness to adequately perform its obligations as co-managing underwriter, which plaintiff had an obligation to disclose.

Defendant and Coleman apparently negotiated and agreed upon the business terms of their relationship, with respect to the Stav

IPO, substantially between themselves, and without plaintiff's involvement. Defendant and Coleman entered into a letter agreement, on November 6, 1998 (the Co-Management Agreement), pursuant to which they agreed to co-manage the Stav IPO, and to split the underwriters' compensation as follows:

> the management fees, the underwriters warrants, the non-accountable expense allowance, the consulting fees and all other fees (other than underwriting discounts and commissions) will be shared equally between us, except that as to the $50,000 advanced against the non-accountable expense allowance we [Coleman] shall be entitled to retain $27,500 and you [defendant] only shall be entitled to $22,500. Each of us shall be entitled to underwriting discounts and selling commissions for the Ordinary Shares we underwrite and/or sell in the Offering.

(Co-Management Agreement, Orenstein Affid., Ex. 3, at 1.) It was not until four days later, on November 10, 1998, that defendant and Coleman entered into the agreement to retain plaintiff to represent them, jointly, as underwriters' counsel (the Retainer Agreement). Defendant and Coleman also appear to have decided between themselves, without plaintiff's involvement, how many shares of stock each of them would underwrite in the Stav IPO *(see* Satloff EBT, at 339). Plaintiff has submitted an affidavit by its legal expert, David Miller, which asserts that the division of the underwriters' compensation is a matter which is always negotiated by and among the underwriters themselves *(see* Miller Affid., ¶ 9).

Accordingly, when defendant and Coleman retained plaintiff as underwriters' counsel, it was not to represent either of them individually, in the negotiation or establishment of the terms of the business deal as between them, but to perform, on behalf of the

underwriters jointly, the legal services necessary to consummate the Stav IPO. The Retainer Agreement provided that plaintiff was being retained "to perform all legal services required in connection with the proposed [Stav IPO]," and specifically enumerated plaintiff's duties to: (1) review Stav's registration statement and prospectus; (2) advise and consult with defendant and Coleman during the preparation for, and conduct of, the offering; (3) prepare the underwriting documents, ancillary documents, and filings with the NASD, which were necessary to effect the Offering; (4) assist defendant and Coleman in conducting a due diligence investigation of Stav; (5) negotiate a cold comfort letter from Stav's auditors with respect to the financial information contained in the prospectus; (6) cooperate with Stav's counsel in meetings concerning the offering; and (7) prepare for, and attend, the closing of the offering (see Retainer Agreement, Orenstein Affid., Ex. 4, at 1-2). Even assuming, arguendo, that plaintiff did possess confidential information relating to Coleman's regulatory history and prior dealings with Stav, defendant has failed to establish that any of that information was material and relevant to the services which were to be performed by plaintiff in its capacity as underwriters' counsel, such that plaintiff had an obligation to disclose the information to defendant.

It appears, in any event, that defendant had actual or constructive knowledge, when it agreed to Coleman's participation in the Stav IPO, as co-manager, of at least most of the facts which defendant claims plaintiff concealed, relating to Coleman's dispute

with Stav and Coleman's regulatory history.' The allegations contained in defendant's answer to the complaint indicate that defendant knew that Coleman's role as manager of the Stav IPO had terminated, and that defendant itself permitted Coleman to act as co-manager, on the basis of representations made by Coleman to defendant (*see* Answer, ¶¶ 35-39). Knowing that Coleman's original participation in the Stav IPO had ceased, defendant, as a sophisticated underwriter, would presumably not have permitted Coleman to participate in the offering again without investigating the circumstances surrounding the termination of Coleman's original involvement. That defendant was aware of the dispute between Stav and Coleman, before defendant agreed to permit Coleman to act as co-manager for the Stav IPO, is substantiated by the affidavit of Joel Gold, Coleman's vice president at the time of the offering. Gold asserts that he was directly involved in the offering, and that, in late October or early November 1998, he told Averell Satloff, defendant's president, that Coleman was experiencing problems with Stav, that Stav was dissatisfied with Coleman's delay in proceeding with the offering, and that Stav was on the verge of terminating Coleman as underwriter (*see* Gold Affid., ¶¶ 4-6).[2]

'While not essential to the court's determination of the instant motion, such a finding undermines defendant's contention that, had it known the facts which plaintiff allegedly concealed, it would not have permitted Coleman to participate in the Stav IPO, and might not have participated in the offering itself.

[2]Satloff has submitted an affidavit which contradicts the sequence of events alleged in defendant's answer. Satloff's affidavit asserts that defendant agreed to act as co-manager of the Stav IPO at Coleman's request, not Stav's, and that defendant had no reason to suspect any problem in the relations between Stav and

Defendant also alleges that plaintiff concealed the fact that Coleman was the subject of an NASD investigation, relating to Coleman's prior involvement in a failed IPO for a company named Hungarian Broadcasting. However, defendant was concededly aware of the investigation before it agreed to Coleman's participation as co-manager of the Stav IPO (*see* Satloff EBT, at 502-505).

For the foregoing reasons, defendant has failed to raise a triable issue of fact as to whether plaintiff was negligent in concealing from defendant any information which purportedly indicated that Coleman was unable, or unwilling, to adequately perform its obligations as co-managing underwriter.

Defendant has also failed to raise a triable issue of fact as to whether plaintiff was negligent in failing to advise defendant, before undertaking to represent both defendant and Coleman, that there were inherent or potential conflicts of interest in the simultaneous representation. As underwriters' counsel, plaintiff was retained to perform the legal services necessary to consummate the Stav IPO, a matter with respect to which defendant and Coleman were united in interest, and not to represent either of the underwriters individually, in the negotiation or establishment of

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Coleman (*see* Satloff Affid., ¶¶ 18, 20, 22). However, Satloff's affidavit is not credible, because it contradicts the answer which Satloff himself verified, as well as the affidavit of Joel Gold. Satloff's affidavit was presumably tailored to avoid the clear implication of the allegations set forth in the complaint, i.e., that defendant had knowledge of the dispute between Coleman and Stav before defendant agreed to co-manage the Stav IPO with Coleman.

the terms of the business deal as between them, a matter in which they might well have divergent interests. Thus, defendant has failed to raise a triable issue as to whether plaintiff's simultaneous representation of defendant and Coleman entailed any conflict of interest, concerning which plaintiff had an obligation to advise defendant. The foregoing conclusion is, again, consistent with the affidavit submitted by plaintiff's legal expert, which asserts that it is an industry-wide practice for a single law firm to represent all of the underwriters participating in an IPO, and that the underwriters share a common interest in completing the offering and earning their fees (*see* Miller Affid., ¶¶ 7-9; see *also* Orenstein Affid., ¶ 13).

Defendant has also failed to raise an issue of fact as to whether plaintiff was negligent in drafting deal documents for the Stav IPO which favored Coleman at defendant's expense, and/or in failing to advise defendant of the ramifications of those documents. Rather, it appears that plaintiff drafted the documents merely to reflect the terms of the deal which defendant and Coleman themselves negotiated and agreed upon, as regards the division of the underwriters' compensation, and the number of shares of Stav stock that each underwriter would underwrite. It was not incumbent upon plaintiff to advise defendant, an underwriter with previous involvement in stock offerings, of **the ramifications** of **the** deal which defendant itself had negotiated with Coleman, the terms of which were readily apparent on the face of the deal documents.

For the foregoing reasons, defendant has failed to raise a

triable issue of fact as to the existence of the first element of a legal malpractice claim, i.e., as to whether plaintiff was negligent. Defendant has also failed to raise a triable issue as to the existence of the second element, i.e., whether defendant's alleged damages were proximately caused by plaintiff's purported negligence. Insofar as defendant suffered any damages relating to Coleman's participation in the Stav IPO, those damages were evidently caused by the terms of the business deal which defendant itself agreed upon with Coleman, and by defendant's apparent overestimation of the level of demand for the shares being offered in the Stav IPO, rather than by plaintiff's failure to disclose any information relating to Coleman, or by plaintiff's favoring of Coleman at defendant's expense. "The failure to establish proximate cause mandates the dismissal of a legal malpractice [claim], regardless of the negligence of the attorney" (*Reibman v Senie*, 302 AD2d at 291). Accordingly, defendant's counterclaim for malpractice is dismissed.

Defendant's second, third, and fourth counterclaims, for breach of fiduciary duty, breach of contract, and fraud, are also dismissed. Those counterclaims are duplicative of defendant's counterclaim for malpractice, since they are predicated upon the same facts as, and seek relief identical to that sought in, defendant's malpractice counterclaim (*see e.g. Murray Hill Invs., Inc. v Parker Chapin Flattau & Klimpl, LLP*, 305 AD2d 228, , 759 NYS2d 463, 464 [1st Dept 20031; *Turk v Angel*, 293 AD2d 284, 284 [1st Dept 20021; *Nevelson v Carro, Spanbock, Kaster & Cuiffo*, 290

AD2d 399, 400 [lst Dept 2002]; *Sage Realty Corp. v Proskauer Rose LLP*, 251 AD2d 35, 38-39 [lst Dept 19981).

Were the second, third, and fourth counterclaims not being dismissed on the ground of redundancy, they would be dismissed, in any event, for the reasons already set forth in the discussion of defendant's counterclaim for malpractice. Defendant's counterclaim for breach of contract would be dismissed, additionally, because it does not allege either that there was "a promise to perform and no subsequent performance," or that plaintiff "explicitly [undertook] to discharge a specific task and then failed to do so" *(Saveca v Reilly*, 111 AD2d 493, 494-495 [3d Dept 1985] [citation and internal quotation marks omitted]; *see also Sage Realty Corp. v Proskauer Rose LLP*, 251 AD2d at 39). Defendant's counterclaim for fraudulent concealment would be dismissed, additionally, because defendant has failed to raise an issue of fact with respect to any of the elements of such a claim, namely: (1) that plaintiff had a duty to disclose material information; (2) that plaintiff failed to do so; (3) that the failure to disclose was intentional, in order to defraud or mislead defendant; (4) that defendant reasonably relied upon the omission; and (5) that defendant suffered damage as a result of its reliance upon plaintiff's omission *(see P.T. Bank Cent. Asia v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [lst Dept 20031).

Defendant's fifth counterclaim seeks a declaratory judgment that plaintiff's conduct constitutes malpractice, a breach of fiduciary duty, and fraud, and that, by virtue of these facts,

plaintiff is precluded from recovering the legal fees and disbursements which it seeks in the complaint. However, such relief is unnecessary, inappropriate, and unavailable, since it would merely be a declaration of the same rights, obligations, and liabilities as are being determined by reason of the causes Of action alleged in the complaint, and defendant's other counterclaims *(seeApple Records, Inc. v Capitol Records, Inc.,* 137 AD2d 50, 54 [lst Dept 19881).

Summary judgment is also granted in plaintiff's favor on the complaint's first and second causes of action for, respectively, breach of contract and an account stated. Pursuant to the Retainer Agreement, defendant agreed to pay plaintiff for its services at plaintiff's customary hourly rates, but not exceeding one percent of the gross proceeds of the Stav IPO, including the over-allotment option if it were exercised, plus plaintiff's out-of-pocket expenses. Defendant does not dispute plaintiff's assertions, and supporting documentary evidence, indicating: that plaintiff's time charges, at its customary hourly rates, were in excess of $84,000.00; that the gross proceeds of the Stav IPO, including the over-allotment option, which was exercised, amounted to $5,520,000.00, resulting in an upper cap on plaintiff's legal fees in the amount of $55,200.00[3]; that plaintiff's out of pocket expenses in connection with the Stav IPO were $2,779.48; that the

[3]As pleaded, the complaint's first and second causes of action seek only $50,000.00 in damages. That amount apparently did not take into account the fact that the over-allotment option was exercised, thereby increasing the amount of the one percent cap on plaintiff's hourly fees.

total fee owing to plaintiff in connection with the Stav IPO, if any fee is owed at all, is $57,979.48; and that defendant, as lead underwriter, is the party responsible for paying any legal fee owed under the Retainer Agreement. Defendant concedes that plaintiff substantially performed the services enumerated in the Retainer Agreement, by preparing the underwriting and other ancillary documents, conducting due diligence with respect to Stav, and attending the closing on the Stav IPO (*see* Satloff EBT, at 563-564). Thus, plaintiff has made a prima facie showing of entitlement to summary judgment, in the amount of $57,979.48, on its cause of action for breach of contract.

Plaintiff has also established its prima facie entitlement to summary judgment on its account stated claim, in the amount of $50,779.48, by coming forward with admissible evidence of defendant's receipt and retention of invoices in that amount, without an objection within a reasonable period of time (*see e.g. Manhattan Telecom. Corp. v Best Payphones, Inc.*, 299 AD2d 178, 178 [lst Dept 20021; *Ruskin, Moscou, Evans, & Faltischek, P.C. v FGH Realty Credit Corp.*, 228 AD2d 294, 295 [1st Dept 19961).

Satloff testified, at his deposition, that he did not recall ever having objected in writing to the amount of the invoices rendered by plaintiff. He further indicated his belief that he had voiced an oral objection, to Orenstein, but that he didn't recall when (see Satloff EBT, at 573-574). While "evidence of an oral objection to an account rendered is sufficient on a motion for summary judgment to rebut any inference of an implied agreement to

pay the stated amount," Satloff's testimony is insufficient to raise an issue of fact precluding summary judgment, because the testimony "[fails] to relate when ... the alleged [objection was] made or to specify the substance of the alleged conversation[]" (*Shea & Gould v Burr*, 194 AD2d 369, 370 [lst Dept 1993] [citations and inner quotation marks omitted]; *see also Fink, Weinberger, Fredman, Berman & Lowell, P.C. v Petrides*, 80 AD2d 781, 781-782 [1st Dept 1981]).[4]

Defendant argues that summary judgment in plaintiff's favor on its first two causes of action is precluded, because there are issues of fact as to whether plaintiff violated Code of Professional Responsibility (CPR) DR 5-105 (22 NYCRR 1200.24) by: (1) undertaking to represent defendant and Coleman simultaneously, without disclosing to defendant that such representation might involve plaintiff in representing differing or conflicting interests; and (2) by favoring Coleman's interests over defendant's. An attorney who violates the Disciplinary Rules of the CPR is generally not entitled to recover legal fees for the services rendered by him or her in the matter in which the misconduct occurred (*see e.g. In re Satin*, 265 AD2d 330, 330 [2d Dept 19991; *Yannitelli v D. Yannitelli & Sons Constr. Corp.*, 247 AD2d 271, 271-272 [1st Dept 19981; *Matter of Winston*, 214 AD2d 677, 677 [2d Dept 19951).

[4]Indeed, Satloff indicated that defendant was willing to pay plaintiff's fee at the time of the closing on the Stav IPO. Satloff stated that defendant gave Orenstein a check for plaintiff's fee, at the closing, but that Orenstein requested a wire transfer instead (*see* Satloff EBT, at 547-548).

However, defendant has failed to raise a triable issue of fact as to whether plaintiff violated DR 5-105. DR 5-105 (A) and (B) direct a lawyer to decline proffered employment, or to discontinue multiple employment, as the case may be, "if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected" by the proffered employment or the multiple representation, or if the employment "would be likely to involve the lawyer in representing differing interests, except to the extent permitted under'' DR 5-105 (C). As previously stated, defendant and Coleman retained plaintiff to perform the legal services required to consummate the Stav IPO, a matter with respect to which defendant and Coleman were united in interest. Plaintiff's performance of the required services was not likely to, and did not, adversely affect the exercise by plaintiff of its independent professional judgment on defendant's and Coleman's behalf, and was not likely to involve plaintiff in representing differing interests.

However, even assuming that DR 5-105 (A) and/or (B) had been implicated, as the Appellate Division has already found, plaintiff would not have violated DR 5-105. DR 5-105 (C) provides that "a lawyer may represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved." Under the circumstances, defendant has failed to demonstrate that plaintiff's

"full disclosure of the implications of the simultaneous representation and the advantages and risks involved" necessitated plaintiff's disclosure to defendant of any fact other than that plaintiff had previously represented Coleman in connection with the Stav IPO and other matters; such disclosure had already been made before plaintiff was retained as underwriters' counsel (*see* Snow *Becker & Krauss, P.C. v ISG Solid Capital Markets, LLC,* 298 AD2d 210, 211 [1st Dept 20021). That is to say, defendant has provided "no non-speculative basis for its contention that [any] confidential information about Coleman's regulatory history and prior dealings with [Stav], which plaintiff may or may not have possessed, was relevant to the specific services plaintiff was retained ... to perform" (*id.*). As previously discussed, defendant has also failed to adduce any evidence that plaintiff favored Coleman's interests over defendant's in drafting the Stav IPO deal documents, or by improperly failing to apprize defendant as to the ramifications of those documents.

Defendant argues that summary judgment in plaintiff's favor on its first two causes of action is precluded, additionally, by the doctrine of law of the case. When defendant previously moved for summary judgment dismissing the complaint, this court denied the motion, and the Appellate Division, First Department, affirmed the denial, determining, inter alia, that there were issues of fact as to whether plaintiff's simultaneous representation of both defendant and Coleman entailed a conflict of interest (*see id.*). Defendant contends that that determination is now the law of the

case, "at least to the extent of determining that [defendant] is entitled to present its proofs at trial" with respect to the question of whether there was a conflict of interest (Def. Mem. of Law, at 2).

However, "a ruling denying summary judgment does not have the effect of preclusion or law of the case establishing that there are triable issues of fact" (*Juarez by Juarez v Wavecrest Mgt. Team Ltd.*, 212 AD2d 38, 44 [lst Dept 19951, *revd on other grounds* 88 NY2d 628 [1996]). Defendant brought its summary judgment motion before the completion of discovery, and before plaintiff had had the opportunity to depose Satloff, defendant's sole witness. Accordingly, because plaintiff's summary judgment motion is based upon deposition testimony, and other evidence, adduced in discovery conducted after the court determined defendant's summary judgment motion, plaintiff's motion is not precluded by the doctrine of law of the case (*see e.g. Boston Concessions Group, Inc. v Criterion Ctr. Corp.*, *250* AD2d 435, 435 [lst Dept 1998]; *Smith v Metropolitan Transp. Auth.*, 226 AD2d 168, 168 [lst Dept 19961).

Defendant argues that summary judgment in plaintiff's favor on the first two causes of action is precluded, finally, by the doctrine of judicial estoppel. "[T]he doctrine of judicial estoppel is intended to prevent abuses of the judicial system by which a party ***obtains relief*** by maintaining one position, and later, in a ***different action,*** maintains a contrary position'' (*D & L* ***Holdings,*** *LLC v RCG Goldman Co., LLC,* 287 AD2d ***65,*** 71 [1st Dept 20011 [emphasis added]).

It is not clear that plaintiff may be said to have "obtained relief" on defendant's earlier summary judgment motion merely by obtaining denial of that motion. Nor is this a "different action" than the one in which plaintiff opposed the earlier motion. However, even assuming, arguendo, that the doctrine of judicial estoppel were otherwise applicable, the court does not find that plaintiff's position in support of its instant motion (i.e., that plaintiff's simultaneous representation of defendant and Coleman entailed neither a conflict of interest nor a violation of the CPR) is contrary to the position taken by plaintiff in opposition to defendant's prior motion (i.e., that defendant had failed to establish, to the preclusion of any issue of fact, that a conflict of interest did exist, or that plaintiff had violated the CPR).

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion is granted to the extent of granting partial summary judgment in favor *of* plaintiff and against defendant as follows:

(1) Plaintiff is granted judgment dismissing defendant's five counterclaims;

(2) Plaintiff is granted judgment on the first and second causes of action;

(3) Plaintiff is granted judgment on the first cause of action in the amount of $57,979.48, together with interest at the rate of 9% per annum, from the date of December 1, 1998 until the entry of judgment, as calculated by the Clerk of the

Court, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk, upon submission of an appropriate bill of costs, and the first and second causes of action are severed, and the Clerk is directed to enter judgment accordingly; and

(4) The action shall continue as to the third cause of action.

Dated: 8/22/03

ENTER:

J. S. C.