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

PRESENT: Hon. Doris Ling-Cohen Justice PART 36

Index Number : 603307/2006

MATOS, BETTY

VS

KUCKER & BRUH, LLP

Sequence Number : 002

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4, 5

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion to dismiss by defendants Kucker + Bruh, LLP + Jason S. Garber, Esq is decided in accordance with the attached memorandum decision.

(consolidated for disposition with motion sequence 001)

FILED
DEC 27 2007
COUNTY CLERK'S OFFICE
NEW YORK

HON. DORIS LING-COHAN

Dated: 12/18/07

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36

----------X

BETTY MATOS,

Plaintiff,

INDEX NO. 603307/06

-against-

Motion Seq. No: 001 & 002

KUCKER & BRUH, LLP, SILVERSMITH & VERAGA, LLP and JASON S. GARBER, ESQ.,

Defendant.

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DORIS LING-COHAN, J.:

Motion sequence numbers 001 and 002 are consolidated herein for disposition.

In mot. seq. no. 001 defendant Silversmith & Veraja, LLP ("S&V") moves pursuant to CPLR 3211(a) (1) and (7) for an order dismissing plaintiff's complaint against it. In mot. seq. no. 002 defendants Kucker & Bruh, LLP ("K&B") and Jason S. Garber, Esq. (collectively the "K&B defendants") move pursuant to CPLR 3211(a) (7) for an order dismissing plaintiff's complaint.

This is an action for legal malpractice arising out of defendants' representation of plaintiff, Betty Matos, in connection with certain property damage to plaintiff's residence allegedly caused by vibrations emanating from road work and construction on the abutting thoroughfare.

In October 2003 plaintiff, through defendant Garber, retained S&V to represent her in the underlying action against the City and the Metropolitan Transportation Authority. On March 4, 2004, S&V filed a complaint and an order to show cause on plaintiff's behalf in Supreme Court, Richmond County. The complaint sought, *inter alia*, an injunction preventing the MTA from running its buses over utility cuts in the roadway in front of plaintiff's home at speeds in excess

of those permitted by the City, a direction that the MTA reduce the number of buses passing on the route in front of plaintiff's house, and an order requiring the City to repair the utility cuts. The complaint also sought damages of $500,000. The order to show cause moved for an order granting the injunctive relief sought in the complaint. On March 5, 2004 Mr. Garber left S&V and joined the firm of K&B taking plaintiff's case with him. K&B was formally substituted for S&V on March 16, 2004.

By decision and order dated June 25, 2004 the court (Mega, J) granted plaintiff's order to show cause to the extent of directing the Transit Authority (which had been substituted for the MTA) to monitor the speeds of its buses and to take all appropriate action to insure that applicable speed limits were being observed (see motion sequence no. 001, Furman February 15, 2007 supporting affirmation, exhibit H). The court denied plaintiff's remaining requests holding that she was not entitled to the drastic remedy of a mandatory injunction directing the City to repave the road and reduce the number of express buses (id.). Both sides appealed. The Appellate Division reversed that portion of Justice Mega's decision which granted relief to plaintiff, finding that she failed to sustain her burden to entitle her to such drastic and extraordinary relief (see Matos v. City of New York, 21 AD3d 936 [2d Dept 2005]). Plaintiff was directed to pay costs to the Transit Authority (id.).

In April 2005 the Transit Authority moved for summary judgment. By decision and order dated May 12, 2005 Justice Mega granted the motion, finding that the complaint alleged a nonjusticiable controversy with respect to the Transit Authority because the requested relief would involve the court in the routing and scheduling of the Transit Authority's buses (see Furman affirmation, exhibit J). In July 2006, the City moved for summary judgment. Plaintiff

cross-moved for leave to conduct additional discovery. By decision and order dated August 8, 2006, Justice Mega granted the City's motion based on absence of proof of causation and denied plaintiff's cross-motion (id., exhibit K).

Plaintiff commenced this action in September 2006. The complaint asserts 40 causes of action alleging legal malpractice, violations of General Business Law ("GBL") § 349, violations of Judiciary Law § 487, and claims for disgorgement of fees and punitive damages (id., exhibit A). According to plaintiff:

> The gravamen of Plaintiffs[sic] claim is premised on the over-all failure of Defendants to obtain meaningful 'informed consent' from the Plaintiff throughout [their representation of plaintiff] including wilfully misleading her concerning her claim. This conduct, coupled with Defendants[sic] continued abuse of their respective billing process.[sic] excessive, wantonly careless and abusive billing practices, caused the Plaintiff to sustain significant economic damages in her paying unnecessary and unneeded legal fees.

(see motion seq. no. 001, plaintiff's memorandum of law, p 2).

In support of its motion to dismiss the complaint, S&V contends that plaintiff has failed to plead the necessary elements of a legal malpractice claim such as negligence, proximate cause and actual damages resulting from the attorney's actions. According to S&V, it cannot be found liable for damages because it was substituted out before the underlying order to show cause was even opposed and before a response to the underlying complaint was interposed. S&V contends that plaintiff's claim that the underlying action was without merit is belied by the fact that Justice Mega initially found some merit to plaintiff's claims. Next, S&V argues that plaintiff fails to state a cause of action under GBL § 349 because that statute, which is aimed at protecting consumers at large and the general public from fraud, is not applicable herein. S&V argues further that the complaint fails to state a viable claim under Judiciary Law § 487 because there is

no allegation or evidence of any deceit of the court or deceit in a judicial proceeding. S&V concludes that plaintiff cannot state a claim for disgorgement of fees because she accepted S&V's invoices without complaint. S & V further argues that she cannot state a claim for punitive damages because a plaintiff suing in malpractice can recover only compensatory damages and there is nothing to indicate that S&V's conduct was so outrageous as to evidence a high degree of moral turpitude or wanton dishonesty.

In support of their motion to dismiss the complaint, the K&B defendants proffer the following arguments: (1) plaintiff's GBL § 349 claims are "palpably defective as a matter of law" because plaintiff cannot make a threshold showing that the act in question (i.e., the provision of legal services) was consumer oriented; (2) the complaint fails to state a cause of action for legal malpractice because plaintiff has failed to plead an actionable departure from the standard of care; (3) the advice given by the K&B defendants involved matters of attorney judgment; (4) the relief initially granted by Justice Mega shows that the underlying action was not frivolous; (5) Judiciary Law § 487 is applicable only to chronic, extreme patterns of legal delinquency where a false statement is made to the party or to a court with the intent to deceive and is not applicable to the giving of incorrect legal advice, which is the basis of plaintiff's claim herein; and (6) plaintiff's claim for punitive damages is devoid of merit because she has no cause of action for compensatory damages and she has not alleged and cannot establish that the K&B defendants engaged in behavior involving a high degree of moral turpitude.

In opposition to S&V, plaintiff contends that the underlying action should never have been commenced due to certain legal obstacles, including the burden required to obtain a mandatory injunction and related statute of limitations issues, of which plaintiff was never

informed. Plaintiff discounts Justice Mega's granting of limited relief on her order to show cause on the ground that such was reversed by the Appellate Division. Plaintiff defends her invocation of GBL § 349 by claiming that the attorney retainer constitutes a public interest area subject to the statute's provisions. Plaintiff defends her invocation of Judiciary Law § 487 by claiming that S&V engaged in numerous acts of deceit, misrepresentation and chronic delinquency. Acccording to plaintiff, the alleged acts of deceit involved the adjournment of a hearing before the Environmental Control Board in August 2003, failing to appear at an ECB hearing, limiting damage to plaintiff's home to vibrations caused by express buses although damage was caused by all heavy vehicles, and improperly billing plaintiff. Plaintiff concludes that S&V engaged in improper and unnecessary billing practices and charges for unnecessary work warranting disgorgement of the unnecessary fees and the imposition of punitive damages.

With respect to the K &B defendants, plaintiff contends that the "key" to her claims against them "is not the result *per se*, but the manner of their representation and failing to properly *explain* to her, in a meaningful way, the litigation, so that she could make an *informed* decision of whether to proceed" (see motion seq. no. 002, plaintiff's memorandum of law, p 13, emphasis in original). Plaintiff claims that "[s]imilar explanations were particularly lacking during the subsequent motions for summary judgment, which Defendants opposed without discussing with Ms. Matos" (id.). In addition, plaintiff contends that "early on", K&B misrepresented the total cost of the litigation at $20,000 (K&B eventually billed over $60,000), which is one of the examples called forth by plaintiff to support her Judiciary Law claim against K&B. Plaintiff concludes that K&B must disgorge fees unnecessarily charged and that K&B is liable for punitive damages because its billing conduct was unreasonable, reckless and improper

and because attorney's fees and billing practices are grave matters of public concern.

Upon moving to dismiss, S&V's reliance on CPLR 3211(a)(1) (defense based on documentary evidence) is misplaced. For this defense to succeed, the proffered documentation must definitively dispose of the claim (see Demas v. 325 West End Avenue Corp., 127 AD2d 476, 477 [1st Dept 1987]). Such is not the case herein. Although S&V no longer represented plaintiff as of March 2004, it laid the groundwork for the underlying action and took the first step in its prosecution. S & V also moves to dismiss pursuant to CPLR 3211 (a)(7).

"On a motion addressed to the sufficiency of a complaint pursuant to CPLR 3211 (a) (7), the facts pleaded are presumed to be true and accorded every favorable inference. However, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration" (Franklin v. Winard 199 AD2d 220 [1st Dept 1993], citing Mark Hampton, Inc. v Bergreen, 173 AD2d 220 [1st Dept 1991], lv denied 80 NY2d 788 [1992]).

"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 plaintiff's damages, and that the plaintiff suffered actual damages as a direct result of the attorneys' actions . ... [The complaint must allege] that 'but for' the attorneys' alleged malpractice, the plaintiff would not have sustained some actual ascertainable damages [citations omitted]" (Franklin v. Winard, supra, 199 AD2d at 221). To establish the elements of proximate cause and actual damages, the plaintiff must show that but for the attorney's negligence, what would have been a favorable outcome was an unfavorable outcome (see Zarin v. Reid & Priest, 184 AD2d 385, 386 [1st Dept 1992]; see also, Russo v. Feder, Kaszovitz, Issacson, Weber, Skala & Bass, 301 AD2d 63, 67 [1st

Dept 2002]).

The basis of plaintiff's claims herein is that defendants failed to obtain her informed consent to the underlying action and the decisions made therein. She also complains of defendants' billing practices. Even if, arguably, defendants may have made mistakes in handling plaintiff's case (for e.g., S&V's initial failure to join the Transit Authority), the record is devoid of allegations, sufficient to sustain a legal malpractice claim. Plaintiff's contention that the underlying action should never have been commenced because of "legal obstacles" such as the statute of limitations is based largely on theory and hindsight. For example, plaintiff's claims were not dismissed on statute of limitations grounds, nor for want of a notice of claim, and her failure to initially join the Transit Authority as a defendant was easily remedied. There is no objective showing that defendants' were unaware of the high burden of proof required for injunctive relief.

In addition, there is a distinction between misconduct and malpractice. Plaintiff alleges specific instances of misconduct by defendants. These allegations, if true, may violate the duty defendants owed plaintiff (see 22 NYCRR § 1210.1) and the Code of Professional Responsibility. However, they would not amount to malpractice, since plaintiff has not alleged that she would have prevailed in the underlying action but for such misconduct (Nitis v. Goldenthal, 128 AD2d 687, 688 [2d Dept 1987]). Based on the foregoing, the court finds that plaintiff's malpractice claims cannot withstand defendants' motions.

GBL § 349 is a consumer protection statute that prohibits deceptive and misleading business practices. Plaintiff's cause of action (35) pursuant to GBL § 349 do not survive the dismissal motions because the statute is directed at wrongs against the consuming public not

private disputes unique to the parties (see Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 NY2d 20, 25 [1995]). Plaintiff's arguments that GBL § 349 is triggered because the rules regulating legal retainer agreements are aimed at the consuming public is misplaced. However, plaintiff's arguments based on 22 NYCRR § 1215.1 may be pertinent to her disgorgement claim against the K&B defendants.

Judiciary Law § 487 provides in pertinent part that an attorney who is "guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or, wilfully delays his client's suit with a view to his own gain; ... is guilty of a misdemeanor, and ... forfeits to the party injured treble damages, to be recovered in a civil action." To maintain a cause of action under Judiciary Law § 487, the complaint must allege a chronic and extreme pattern of legal delinquency (see Solow Management Corp. v. Seltzer, 18 AD3d 399, 400 [1st Dept 2005], lv den 5 NY3d 712 [2005]; see also Knecht v. Tusa, 15 AD3d 626 [2d Dept 2005]; Havell v. Islam, 292 AD2d 210 [1st Dept 2002]; Schindler v. Issler & Schrage, P.C., 262 AD2d 226, 228 [1st Dept 1999], lv dism 94 NY2d 791 [1999], rearg den 94 NY2d 859 [1999]). Plaintiff's Judiciary Law § 487 claim, which is set forth in her fortieth cause of action, does not allege the requisite pattern of wrongdoing or deceit necessary to sustain such claim (cf. Pellegrino v. File, 291 AD2d 60, 64 [1st Dept 2002]).

Plaintiff's punitive damage claim cannot be sustained because such damages are not recoverable for a private wrong and there are no allegations of fraud involving a high degree of moral turpitude, wanton dishonesty, and conduct aimed at the public generally (see Rocanova v. Equitable Life Assurance Society of the United States, 83 NY2d 603, 613 [1994]; see also Williams v. Coppola, 23 AD3d 1012, 1013 [4th Dept 2005], rearg den 26 AD3d 904 [4th Dept

2006], app dism 7 NY3d 741 [2006]).

Plaintiff's claims for disgorgement of fees already paid to defendants, are sufficiently pleaded to warrant a denial of defendants' motions to dismiss such claims. S&V ceased representing plaintiff when Garber left them to join K&B. Since they were not discharged for cause, they are entitled to be paid on a *quantum meruit* basis for their work on plaintiff's behalf. Plaintiff alleges that, at the time she retained S&V to represent her in the underlying action, she gave them a $7,500 retainer. In addition, she had a $565 credit from monies paid to S&V in connection with their representation of her in a prior matter. S&V's billing for their work in the underlying action amounted to only $6,188.50; yet the unearned balance of her retainer and credit appears not to have been returned to plaintiff, and may be considered a non-refundable retainer in violation of public policy (see Matter of Cooperman, 83 NY2d 465 [1994]) and her retainer agreement with S&V (plaintiff's exhibit E). In addition, plaintiff alleges other billing improprieties by S&V, such as charging her for vacating a default judgment against her in the administrative hearing which resulted from Garber's failure to adjourn the hearing as promised. Although, arguably, plaintiff's recovery from S&V on this claim may be curtailed by an account stated, since she accepted many of their monthly billing statements without objecting within a reasonable time (see Rosenman Colin Freund Lewis & Cohen v. Edelman, 160 AD2d 626 [1st Dept 1990], app den 77 NY2d 802 [1991]), her claim for disgorgement cannot be dismissed at this stage as facially insufficient.

With respect to K&B, plaintiff alleges that she complained about "each and every" bill (see Matos May 16, 2007 affidavit in opposition ¶ 60, see also ¶ 81), particularly since Garber

told her K&B's fees would be under $20,000 and she was billed over $60,000. She also alleges that the K&B defendants' failure to apprise her of all the infirmities of her damages claim deprived her of the ability to make an "informed consent" as to whether to continue with the litigation.

Plaintiff has an additional argument against K&B, as to the lack of a retainer agreement. It seems that after Garber took plaintiff with him to K&B, no retainer agreement was executed with the new firm. Section 1215.1 of the Professional Disciplinary Rules (22 NYCRR § 1215.1) requires that attorneys who represent non-matrimonial clients for fees of more than $3,000 must have a written letter of engagement or signed retainer agreement addressing the scope and cost of the legal services to be provided. This requirement, however, and the mandated "client's bill of rights" [22 NYCRR § 1210.1] (which would also be violated if plaintiff's allegations are proven true) do not specifically provide for a penalty when a rule is violated other than attorney discipline, despite the explict edict "[a] lawyer or law firm shall not ... [v]iolate a Disciplinary Rule" [22 NYCRR § 1200.3[a](1). (Beech v. Gerald B. Lefcourt, PC, 12 Misc 3d 1167(A) [Civ Ct, NY Co, Hagler, J, 2006]). "[T]here is no private right of action for a violation of the Code of Professional Responsibility" (Kantor v. Bernstein, 225 AD2d 500, 501 [1st Dept 1996]). Nonetheless, the courts have fashioned remedies for some of those violations.

The situation is ambiguous with respect to violation of 22 NYCRR § 1215.1, a recently enacted rule evoked by plaintiff. Trial-level courts have inconsistently held that noncompliance with 22 NYCRR § 1215.1 bars the collection of a fee for the legal representation (see, e.g., Nadelman v. Goldman, 7 Misc 3d 1011(A) [Civ Ct, NY Co, Oing, J 2005]); Brown Rudnick Berlack Israels LLP v. Zelmanovitch, 2006 WL 1173832, *2-*3 [Sup Ct, Kings Co, Schmidt, J

2006]) and does not bar recovery in *quantum meruit* (see, e.g., Matter of Estate of Feroleto, 6 Misc 3d 680 [Sur Ct, Bronx Co, Holzman, S 2004]). Yet, others have held that the client may use the attorney's noncompliance as a shield to defend against the attorney's attempt to collect fees, but not as a sword to compel disgorgement of fees already paid (see Beech v. Gerald B. Lefcourt, PC, supra, 12 Misc 3d 1167(A); Lewin v. Law Offices of Godfrey G. Brown, 8 Misc 3d 622, 625 [Civ Ct, Kings Co, Bluth, J, 2005]). This is particularly relevant with respect to plaintiff's claim against K&B, since it appears that she has paid only a portion of the fees billed. Recently, another Justice of this court [Edmead, J] held that in a contingency fee case in which the retainer agreement did not explicitly provide for additional fees for appellate work, payment for such work must be deemed included in the contingency fee and ordered the attorney to disgorge all fees beyond the agreed-upon contingency fee (Siagha v. David Katz & Associates LLP, 16 Misc 3d 1130(A), 2007 WL 2418075 (Sup Ct, New York County 2007).

The issue has yet to be addressed by the First Department. Only two appellate courts have tackled the issue, both in recent months. The Second Department reviewed the lower court decisions and ruled that the attorney discharged without cause was not precluded from recovering in *quantum meruit* the fair and reasonable value of the legal services provided, but did not address the issue of whether fees already paid were disgorgeable (Seth Rubenstein, P.C. v. Ganea, 41 AD3d 54 [2d Dept 2007]). That issue was determined by the Appellate Term, 9th & 10th Judicial Districts, in Jones v. Wright,(2007 WL 2247199 [App Term, 9th & 10th JDs, July 2007]), where the court held that "while an attorney's failure to comply with the provision does not entitle a client to a return of legal fees where the services have already been rendered ... a client may seek to recover a fee already paid if it appears that the attorney did not properly earn

said fee." This appears to be consistent with the well established principles that an attorney who is discharged for cause does not have the right to recover legal fees (see Costello v. Kiaer, 278 AD2d 50 [1st Dept 2000]; Martin v. Aaron J. Broder, P.C., 233 AD2d 229 [1st Dept 1996], app dism, lv den 90 NY2d 841 [1997], rearg den 90 NY2d 937 [1997]) provided "the misconduct relates to the representation for which the fees are sought" (Decolator, Cohen & DiPrisco, LLP v. Lysaght, Lysaght & Kramer, P.C., 304 AD2d 86, 91 [1st Dept 2003]). In view of the foregoing, the Court finds that, at this juncture, plaintiff has stated valid causes of action for disgorgement of fees against both S&V and K&B.

Accordingly, the motion by S&V is granted to the extent that it is hereby

ORDERED that all claims against S&V are dismissed except for plaintiff's claim for disgorgement of legal fees (the 38th cause of action).

The motion by the K&B defendants is granted to the extent that it is hereby

ORDERED that all claims against the K&B defendants are dismissed except for plaintiff's claim for disgorgement of legal fees (the 39th cause of action).

All defendants are directed to serve their answers to the surviving causes of action in the complaint within 30 days of entry of this order with notice of entry; it is further

ORDERED that within 30 days of entry of this order, defendants shall serve a copy upon plaintiff with notice of entry.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

HON. DORIS LING-COHAN

FILED

DEC 27 2007

COUNTY CLERK'S OFFICE NEW YORK

DATED: December 26, 2007

Hon. Doris Ling-Cohan, J.S.C.

G:\Supreme Court\Dismiss\Matos.kucker & bruh.wpd