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

PRESENT: HON. JOAN A. MADDEN PART 11
Justice

Gabrielle Laville,

Plaintiff,

- v -

Michael Shouris, et al.

Defendant.

INDEX NO.: 108858/07

MOTION DATE: 1-24-08

MOTION SEQ. NO.: 002

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	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order.

FILED
JUL 16 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: July 11, 2008

J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 11

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GABRIELLE LAVALLE,

Plaintiff,

Index No. 108858/07

-against-

MICHAEL SKOURAS, PUR CAPITAL, LLC, MATTHEW W. WOITKOWSKI, WOITKOWSKI & SCHMIDT, P.C., MIDLAND ABSTRACT, LTD.,

Defendants.

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JOAN MADDEN, J.:

Defendants Matthew W. Woitkowski (Woitkowski) and Woitkowski & Schmidt, P.C. (the Law Firm) (together "the moving defendants") move, pursuant to CPLR 3211 (a) (7) for an order dismissing the instant complaint for failure to state a cause of action. Plaintiff opposes the motion, except to the extent that the moving defendants seek to dismiss the second cause of action, alleging a violation of the Racketeer Influenced and Corrupt Organizations Act and the third cause of action for collusion.[1]

Plaintiff commenced the instant action, alleging that defendants engaged in a scheme to defraud her regarding certain investments in two separate condominium units, one located at 1600 Broadway, New York, New York (the Broadway Unit), and the other at 627 West 42nd Street, New York, New York (the West 42nd Street Unit).

Plaintiff alleges that she met defendant Michael Skouras ("Skouras") approximately ten years ago when they were co-workers, and both remain employed by the Fox News Channel, an affiliate of News Corp. It is alleged that Skouras introduced plaintiff to Matthew W.

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[1]Although plaintiff opposed the dismissal of the second and third causes of action in her papers, at oral argument, plaintiffs' counsel informed that court that plaintiff no longer opposed the dismissal of these causes of action.

Woitkowski ("Woitkowski") in or about December 2006 and that Woitkowski acted as an attorney for Skouras, defendant Pur Capital and plaintiff in connection with the transactions involving the Broadway Unit.

Plaintiff alleges that, based on certain misrepresentations made to her in April 2006 by defendant Michael Skouras (Skouras), she was induced to purchase a six percent ownership interest in the Broadway Unit. It is alleged that Skouras represented to plaintiff that he would be able to purchase the unit in a yet to be constructed building, and all investors would own an interest in the building. Skouras indicated the 6% ownership would require plaintiff to invest $15,000; $10,000 made payable to defendant Pur Capital, and $5,000 made directly payable to Skouras. Plaintiff alleges that Skouras told her that he had already raised $125,000 for the down payment and closing costs and investors would be responsible for their percentage portion of costs beyond what had already been raised. On April 4, 2006, plaintiff gave Pur Capital a check for $10,000 and Skouras a check for $5,000.

Subsequent to April 4, 2006, Skouras told plaintiff that the value of the Broadway Unit had increased. In or about September 2006, Skouras advised plaintiff that additional shares in the Broadway Unit had become available and that plaintiff could purchase an additional nine percent ownership interest in the Broadway Unit for an additional $13,500. Plaintiff issued a check made payable to Skouras for $13,500 in or about September 2006. It is alleged that Skouras intentionally failed to disclose to plaintiff that Skouras would be asserting an ownership in the Broadway Unit without making his own personal investment therein, that he was unable to qualify for secured financing to purchase the Unit, that the funds raised by Skouras and Pur Capital were not held in trust and were used for other purposes than the purchase of the Unit, and that Skouras would be compensating himself with the money paid by plaintiff and/or others

which was supposed to be used for purchasing the Unit.

In or about September 2006, Skouras advised plaintiff that there was a problem getting financing for the purchase of the unit and that plaintiff was in danger of losing her investment unless she applied for a bank loan in her individual capacity. In or about December 2006, Skouras introduced plaintiff to Woitkowski. In December 2006, based upon Skouras's alleged representation that she would lose her entire investment to date of $28,500 unless she obtained a personal loan for the purchase of the Broadway Unit, and upon Woitkowski's advice, plaintiff signed a contract to purchase the Broadway Unit, and applied for a mortgage. On the day of closing, plaintiff paid $30,204.96 of the $68,545.96 in closing costs, based on alleged representations by Skouras and Woitkowski that she would be reimbursed for the closing costs by other investors of the Broadway Unit. To date, there have been no other investors in the Broadway Unit.

At Woitkowski's suggestion, plaintiff engaged Midland Abstract, LTD. ("Midland") to provide title services in connection with the Broadway Transaction. Midland is an affiliate of the Law Firm, but Woitkowski failed to disclose his relationship with Midland to the plaintiff. The Broadway Unit closed on December 22, 2006, and title vested in plaintiff individually. Plaintiff alleges that the deed has never been recorded.

It is further alleged that, in February and March 2007, two prospective purchasers were interested in the Broadway Unit. After learning of this, Woitkowski allegedly advised plaintiff that the balance of the closing costs was needed in order to sell the Broadway Unit. After she paid these additional closing costs in the amount of $38, 340.40 on March 5, 2007, it is alleged that one purchaser withdrew its offer and the other was unable to secure financing. Plaintiff further complains that, since the closing, she has been solely responsible for all carrying costs of

the Broadway Unit, including mortgage payments, common charges, furniture rental and utilities.

With respect to the second investment involving the West 42nd Street Unit, plaintiff alleges that Skouras induced her to invest $11,000.00 in that unit on May 16, 2006 following Skouras' representations that he was in negotiations to purchase it. Skouras ultimately never purchased the unit. In April 2007, Skouras advised plaintiff he had received the return of his down payment. Plaintiff requests the return of her $11,000.00 investment for the property that was never purchased.

In the instant action, plaintiff asserts seven causes of action: the first, second and third (fraud, violation of the Racketeer Influenced and Corrupt Organizations Act [RICO], and collusion, respectively) against all defendants; the fourth and fifth (breach of fiduciary duty and accounting, respectively) against defendants Woitkowski and the Law Firm; the sixth against defendants Skouras, Woitkowski, the Law Firm and Midland Abstract, Ltd. (Midland) for an order directing that defendants record the deed for the Broadway Unit; and the seventh for money had and received against defendants Pur Capital, LLC and Skouras.

Woitkowski and the Law Firm now move, pursuant to CPLR 3211 (a) (7), for dismissal of the complaint as asserted against them. On a motion pursuant to CPLR 3211 (a) (7), the court is limited to ascertaining whether the pleading states any cause of action and not whether there is evidentiary support for the complaint (Guggenheimer v Ginzburg, 43 NY2d 268 [1977]). The complaint must be liberally construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true (id.; Morone v Morone, 50 NY2d 481 [1980]). Affidavits and other evidence submitted by plaintiff may be considered for the limited purpose of remedying any defects in the complaint and thus preserving inartfully pleaded, but potentially

meritorious claims (Rovello v Orofino Realty Co., Inc., 40 NY2d 633 [1976]).

The first cause of action purports to state a fraud claim against all defendants, alleging that the "defendants acted in concert with one another in order to deceive plaintiff into believing that she was making a sound and considered real estate purchase in connection with [the Broadway Unit and the West 42nd Street Unit]" (Complaint, ¶ 56). To plead a viable cause of action for fraud, plaintiff must allege that defendants made a misrepresentation of a material existing fact or a material omission of fact, which was false and known to be false by the defendants when made, for the purpose of inducing plaintiff's reliance, justifiable reliance on the alleged misrepresentation or omission by the plaintiff, and injury (Lama Holding Company v Smith Barney Inc., 88 NY2d 413, 421 (1996)). Additionally, CPLR 3016 (b) requires that the complaint set forth the misconduct complained of in sufficient detail to clearly inform each defendant of what their respective roles were in the incidents complained of (see P.T. Bank Central Asia v ABN AMRO Bank N.V., 301 AD2d 373, 376 (1st Dept 2003)).

Here, the complaint fails to contain any factual allegations asserting that the moving defendants made any fraudulent misrepresentations to plaintiff or allegations of fact from which it could be inferred that they had entered into any understanding with Skouras (against which particular acts of fraud were alleged) to cooperate in any fraudulent scheme (Abrahami v UPC Construction Co., Inc., 176 AD2d 180 (1st Dept 1991)). In an attempt to demonstrate a viable fraud claim, plaintiff counsel maintains, in the opposing papers, that Woitkowski made misrepresentations to plaintiff that the investment was sound, and that her interests were being protected, as he would prepare a contract for all investors regarding the Broadway Unit. However, the instant complaint is devoid of any allegations that the moving defendants made any representations regarding the soundness of the investment, or that they failed to draft a

contract for the other investors.

Additionally, although plaintiff alleges that Woitkowski failed to disclose an alleged relationship with the title company used regarding the closing for the Broadway Unit, or that the deed had not been recorded, she fails to assert any reliance or actual damages arising from such alleged omissions. Likewise, while the complaint alleges that Woitkowski "advised her" and Skouras, that if she provided $30,204.96 in closing costs in connection with the Broadway unit, he would "hide the file until [the other investors] came up with the balance," such alleged advice is insufficient to constitute a misrepresentation or omission sufficient to provide a basis for a fraud claim, particularly as there is no allegation that Woitkowski knew such advice was false. (Complaint, ¶ 23) Thus, the first cause of action does not set forth with particularity each of the elements of a fraud claim against the moving defendants (Bramex Associates, Inc. v CBI Agencies, Ltd., 149 AD2d 383 [1st Dept 1989]; P.T. Bank Central Asia v ABN AMRO Bank N.V.,301 AD2d 373, supra).

Accordingly, the first cause of action is dismissed without prejudice to plaintiff seeking leave to replead upon sufficient allegations that defendants have made fraudulent representations to plaintiff or facts from which it can be inferred that defendants had agreed to or entered into an understanding with Skouras to cooperate in any fraudulent scheme.

The fourth cause of action purports to allege a breach of fiduciary duty claim against the moving defendants, as her counsel in the Broadway Unit transaction. "In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct" (Kurtzman v Bergstol, 40 AD3d 588, 590 [2d Dept 2007]). Moreover, to support a breach of fiduciary duty claim in the context of attorney liability, a plaintiff must allege facts

that show that "'but for' the attorney's conduct the client would have prevailed in the underlying matter or would not have sustained any ascertainable damages" (Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267, 272 [1st Dept 2004]; see also, Cosentino v. Sullivan Papain Block McGrath & Cannavo, P.C., 47 AD3d 599 [1st Dept 2008]).

The moving defendants argue that the breach of fiduciary duty claim should be dismissed since it constitutes a claim for legal malpractice, and fails to allege that "but for" the moving defendants' conduct plaintiff would not have sustained ascertainable damages. In support of their argument that the claim should be dismissed since it seeks to recover damages for legal malpractice as opposed to breach of fiduciary duty, the moving defendants rely on Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., supra. Fashion Boutique held that a breach of fiduciary duty claim "premised on the same facts and seeking identical relief sought in the legal malpractice claim is redundant must be dismissed." 10 AD3d at 271. However, in this case, the breach of fiduciary duty claim is not redundant of a claim for legal malpractice, and it is well established that claim for breach of fiduciary duty is maintainable by a client against an attorney (Sage Realty Corp. v. Proskauer Rose, LLP, 251 AD2d 35 [1st Dept 1998]).

Here, plaintiff sufficiently states the existence of a fiduciary relationship, since there is no question that "an attorney stands in a fiduciary relation to (his or her) client."(Graubard Mollen Dannett & Horowitz v Moskovitz, 86 NY2d 112, 118 [1995]). Further, plaintiff characterizes the moving defendants' misconduct as Woitkowski's failure to advise her of the consequences associated with the delay in filing of the deed for the Unit; to record the deed for the Broadway Unit; and to provide her with information concerning the 1600 Broadway Transaction (Complaint, ¶¶ 73-75).

That being said, however, the complaint fails to allege facts showing that "but for" the alleged conduct, plaintiff would not have sustained ascertainable damages. Instead, the complaint generally alleges that, by reason of the moving defendants' misconduct, plaintiff was subjected to financial embarrassment, aggravation and monetary hardship (Complaint, ¶ 77).

However, in her opposing papers, plaintiff identifies her loss as "any penalties, and/or late fees attributable to any delay in filing the deed" (id., ¶ 86). Accordingly, although the breach of fiduciary duty claim must be dismissed, such dismissal is without prejudice to plaintiff seeking leave to replead to include the losses asserted in her opposition papers and factual allegations sufficient to show that "but for" the moving defendants' conduct, these losses would not have been sustained.

The fifth cause of action sufficiently states a claim for an accounting, in that there exists a fiduciary and confidential relationship between plaintiff and the moving parties required for an equitable accounting (see PVM Oil Futures, Inc. v Banque Paribas, 161 AD2d 220 [1st Dept 1990]). Additionally, the moving defendants have agreed to provide plaintiff's counsel with a complete accounting and an entire copy of all records in their possession (Moving Defendants' reply affirmation, at 2).

The sixth cause of action seeks an order directing that the deed in connection with the Broadway Unit be recorded, and that payment of any penalties and/or late fees attributable to the delay in filing the deed be made. Although, in her opposing papers, plaintiff acknowledges that Woitkowski filed and recorded the deed in response to an Order to Show Cause she previously filed, she properly notes that the issue of the penalties and late fees is still outstanding.

Accordingly, it is

ORDERED that the moving defendants' motion to dismiss is granted to the extent of

dismissing the second and third causes of action, and the second and third causes of action of the complaint are severed and dismissed as against all the defendants; and it is further

ORDERED that the moving defendants' motion to dismiss the first cause of action as against defendants Matthew W. Woitkowski and Woitkowski & Schmitdt P.C. is granted without prejudice to plaintiff seeking leave to replead with respect to this cause of action by moving by order to show cause for such relief on or before ~~July 25, 2008;~~ July 31, 2008 and it is further

ORDERED that the moving defendants' motion to dismiss the fourth cause of action is granted without prejudice to plaintiff seeking leave to replead with respect to this cause of action by moving by order to show cause for such relief on or before ~~July 25, 2008;~~ July 31, 2008 and it is further

ORDERED that the failure of plaintiff to seek leave to replead by order to show cause on or before July 25, 2008, will result in her waiver of any right to seek such relief subject to further court order; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that defendants Matthew W. Woitkowski and Woitkowski & Schmitdt P.C. are directed to serve an answer to the complaint within 20 days of the date of this decision and order; and it is further

ORDERED that a preliminary conference shall be held on August 14, 2008, in Part 11, room 351, 60 Centre Street, New York, NY.

A copy of this decision and order is being mailed by my chambers to counsel for the parties.

J.S.C.

Dated: July 11 2008