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| Esterman v Law Off. of Gideon Stephen Schwartz, P.C . |
| 2009 NY Slip Op 31523(U) |
| July 8, 2009 |
| Supreme Court, New York County |
| Docket Number: 114405/08 |
| Judge: Emily Jane Goodman |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN

PART 17

Justice

Esterman, NATALIE

INDEX NO.

1144057008

MOTION DATE

- v -

MOTION SEQ. NO.

001

Law Office of Gideon Schwartz
PC et al

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

*is denied as
affirmed*

*is denied as
affirmed*

FILED
JUL 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/8/09

7/8/09

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

EMILY JANE GOODMAN

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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NATALIE ESTERMAN, SHIMON AVIDOR,
ALEKSANDRA KRUPA, MACIEJ KRUPA, IOSIF
BABURASHVILI, DMITRY SHALVER, VITALY
NOVOFASTOVSKY, YURIY KALYAN, NATALYA
KALYAN, ELNA SOKOLOVSKI, SERGEY GUROV,
YAKOV FURMANOV, VALERIE TRETYAKOVA, ART
TRAKHTENBERG, DIANE TRAKHTENBERG, ANNA
KHALFIN, DIMITRY DORFM, JOEL KOTLER, JOANN
KOTLER, ALEX AFRAYMOVICK, LEONID LEVIT,
SUSANNA LEVIT, ANNA KOLODYNSKI, MAREK
KOLODYNSKI,

Index No.: 114405/08

DECISION AND ORDER

Plaintiffs,

-against-

LAW OFFICE OF GIDEON STEPHEN SCHWARTZ, P.C.,
And GIDEON STEPHEN SCHWARTZ, ESQ.,

Defendants.

FILED
JUL 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

-----x
EMILY JANE GOODMAN, J.S.C.:

This case involves, primarily, a legal malpractice claim by the plaintiffs in the above-captioned proceeding (collectively, Plaintiffs) against Gideon Stephen Schwartz, Esq. (Schwartz) and The Law Office of Gideon Stephen Schwartz, P.C. (collectively, Defendants). In their complaint, Plaintiffs assert four causes of action: negligence (legal malpractice); breach of contract; breach of fiduciary duty; and retention of unearned legal fees.

In response, Defendants file a motion seeking an order dismissing the complaint, or granting summary judgment in their favor, pursuant to CPLR 3211 (a) (1) and (a) (7). The motion also seeks costs and sanctions against Plaintiffs and their

attorney for commencing a frivolous litigation, pursuant to Rule 130-1 of the Rules of the Chief Administrator of the Courts.

For the reasons stated herein, the various reliefs sought by Defendants in the motion are granted in part, and denied in part.

Background

Plaintiffs are homeowners of a residential condominium development (Development) known as Skyline Point, located along Waterview Court, in the Rosebank section of Staten Island. The Development is comprised of twenty-seven individually-owned townhouses, nine of which are located adjacent to the waterfront, and the remaining eighteen are situated slightly further inland. Plaintiffs herein are owners of the eighteen townhouses. Plaintiffs, together with the other nine owners (Waterfront Owners), are members of the Skyline Point Homeowners Association, Inc. (Association), which owns the Development.

The instant action arose in connection with the collapse of the Development's retaining wall that runs immediately next to the waterfront houses. The collapse occurred on April 15, 2007 during the Nor'easter of 2007, which caused significant damages to certain locales of New York, including Staten Island. After the collapse, the Waterfront Owners brought suit against the Association and certain of its directors (who are Plaintiffs herein), and obtained a court order dated December 3, 2007, which determined that the retaining wall is a common area of the

Development. Schwartz Affidavit, Exhibit B. As such, all members of the Association, including Plaintiffs herein, are responsible for the costs and expenses of repairing the damage.

Plaintiffs first met with Schwartz in May 2008 to inquire about the possibility of suing the parties that were involved in the design and construction of the retaining wall, including the City of New York and certain of its municipal agencies (City). In the retainer agreement dated May 18, 2008 (May 2008 Retainer), Defendants agreed with Plaintiffs "to research and analyze [Plaintiffs'] status in regard to a possible lawsuit emanating from the alleged negligent construction of your [Development]." Schwartz Affidavit, Exhibit C. The May 2008 Retainer also stated that "[o]ur relationship is on an investigative basis only and should you decide to subsequently litigate, another retainer will be entered into." *Id.*

In June 2008, the Waterfront Owners commenced an action against Plaintiffs in the Supreme Court of Richmond County, Index No. 102685/08 (the Richmond County action), alleging that Plaintiffs had interfered with the repair work as well as the procurement/disbursement of a low-interest rate loan from the Small Business Administration (SBA Loan), the proceeds of which were to be used for the repair work. Schwartz Affidavit, Exhibit D. A hearing on the Waterfront Owners' motion, brought on via an Order to Show Cause as to why Plaintiffs should not be enjoined

from interfering with the repair, and why the court-appointed receiver for the Association should not be authorized to proceed with the SBA Loan, was scheduled to be heard on July 11, 2008. *Id.* Exhibit E. On July 8, 2008, Schwartz met with Plaintiffs and agreed to represent them in the Richmond County action, pursuant to a new retainer agreement signed by each Plaintiff on or about July 10, 2008 (July 2008 Retainer). Schwartz Affidavit, Exhibit F; Shakhnevich Affirmation, Exhibit I.¹

At the conclusion of the hearing held on July 11, 2008 on the Order to Show Cause, the court (Judge Fusco) granted the Waterfront Owners' motion. Shakhnevich Affidavit, Exhibit F. Thereafter, in another case, the Waterfront Owners obtained a court order from Judge Aliotta, dated November 12, 2008, granting them leave to file a late notice of claim against the City, and deeming such notice timely filed. *Id.*, Exhibit E. It is noteworthy that the last day to file a notice of claim against the City was ninety days after April 15, 2007, the day when the retaining wall collapsed, and the last day to commence an action against the City was one year ninety days after the day of the collapse (i.e. July 14, 2008). General Municipal Law, § 50.

In this action, Plaintiffs claim that Defendants were negligent (i.e. committed legal malpractice) in failing to

¹ Steven Shakhnevich is Plaintiffs' counsel in the instant action against Defendants.

commence an action on their behalf against the City before the July 14, 2008 deadline. Defendants counter that the claim must be dismissed because they were never retained by Plaintiffs to commence an action against the City. Hence, Defendants move to dismiss the claims asserted in the complaint pursuant to CPLR 3211 (a) (1), based on documentary evidence, and pursuant to CPLR 3211 (a) (7), for failure to state a cause of action.

Discussions

In considering a CPLR 3211 (a) (7) motion to dismiss, the court's task "is to determine whether plaintiffs' pleadings state a cause of action. The motion must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law [internal quotation marks omitted]." *Richbell Info. Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 289 (1st Dept 2003), quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 (2002). The pleadings are to be afforded a "liberal construction," and the court is to "accord plaintiffs the benefit of every possible favorable inference." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994).

On the other hand, while factual allegations in a complaint should be accorded "favorable inference," bare legal conclusions of law and inherently incredible facts are not entitled to any preferential consideration. *Sud v Sud*, 211 AD2d 423, 424 (1st

Dept 1995). Further, to prevail on a motion to dismiss based upon documentary evidence under CPLR 3211 (a) (1), the documents relied upon must resolve all factual issues as a matter of law. *Weiss v Cuddy & Feder*, 200 AD2d 665, 667 (2nd Dept 1994).

Negligence (Count I) and Breach of Contract (Count II) Claims

Plaintiffs' complaint alleges that, on or about July 9, 2008, they relied upon Schwartz's representation that he would undertake "all measures" and pursue "all remedies" to protect their interests in "all proceedings" stemming from the collapse of the Development's retaining wall, and executed the July 2008 Retainer. Complaint, ¶¶ 60, 83. The complaint also alleges that, due to the negligence or malpractice of Defendants, Plaintiffs have been damaged because Defendants failed to interpose a cause of action against the City on their behalf on July 14, 2008, the last day to bring an action against the City. Complaint, ¶¶ 74-81. In support of such allegation, several of the Plaintiffs (Anna Khalfin, Maciej Krupa, Valerie Tretyakova, Alex Afraymovich and Arkady Trakhtenberg) submitted affidavits which indicated, among other things, that at the meeting held on July 8, 2008, Schwartz expressly told Plaintiffs that he would file a lawsuit on their behalf against the City no later than July 14, 2008, and that at no time had he ever stated that he would not file a lawsuit on their behalf against the City.

In response, Defendants argue that, even if the allegation

that Schwartz might have orally agreed to bring suit on behalf of Plaintiffs against the City were true, the parol evidence rule requires dismissal of the claim because the scope of Defendants' representation of Plaintiffs was "expressly and narrowly limited" in the retainer agreements signed by the parties. Defendants' Reply Brief, at 2. More specifically, Defendants contend that (1) in the May 2008 Retainer, Schwartz only agreed to research and analyze Plaintiffs' status as to a possible lawsuit arising from the design and construction of the Development's retaining wall; and (2) in the July 2008 Retainer, Schwartz only agreed to provide legal services in connection with the Waterfront Owners' lawsuit against Plaintiffs (the Richmond County action), who were defendants in that suit. Defendants' Brief, at 6.

It is black letter law that "when parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms." *W.W.W. Associates, Inc. v Giacontieri*, 77 NY2d 157, 162 (1990). Further, the law is well-settled that "where the parties have reduced their agreement to an integrated writing, the parol evidence rule operates to exclude evidence of all prior or contemporaneous negotiations between the parties offered to contradict or modify the terms of their writing." *Marine Midland Bank-Southern v Thurlow*, 53 NY2d 381, 387 (1981).

In the instant case, the oral promise allegedly made by

Schwartz (i.e. he would sue the City on behalf of Plaintiffs) does not contradict the terms of the May 2008 Retainer and the July 2008 Retainer, because neither Retainer expressly states that Schwartz would not represent Plaintiffs in a suit against the City. Moreover, neither Retainer has a merger or integration clause that precludes an oral promise or representation. *Jarecki v Louie*, 95 NY2d 665, 669 (2001) ("The purpose of a merger clause is to require the full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to alter, vary or contradict the terms of the writing ... The merger clause accomplishes this purpose by evincing the parties' intent that the agreement is to be considered a completely integrated writing") (internal citations and quotation marks omitted).

Notably, in an e-mail purportedly written by Schwartz to Anna Khalfin (one of the Plaintiffs) prior to the July 14, 2008 deadline to bring suit against the City, Schwartz wrote: "I am preparing a 'late' notice [of claim against the City] and the court will decide whether to accept it. Unfortunately, I have to make up for the errors of former counsel. In the meantime, I am investigating claims against the contractors, engineer, architect etc. and plan on pursuing those entities as well." Shakhnevich Affirmation, Exhibit B. Further, in an e-mail that was sent by Maciej Krupa (another Plaintiff) to Schwartz on or about July 11, 2008, Krupa wrote: "Gideon, as discussed yesterday, here is the

notice of claim [of the Association] against the city. This was filed by [former counsel] Baron Associate. I know that the time to file [a suit] is running out however as we were told there is supposedly a way to file lawsuit and amend it later on. Hope this helps" *Id.*, Exhibit C. These e-mails seemingly corroborate with Plaintiffs' allegation that Schwartz had orally agreed to represent them in a suit against the City. Thus, the parol evidence rule does not bar Plaintiffs from introducing admissible evidence that purports to show that Schwartz had agreed to represent them.² While Defendants attempt to show that a third proposed retainer was later sent to Plaintiffs but was returned unsigned, Schwartz himself acknowledged in his affidavit that the proposed retainer "went out for signature on July 25, 2008," a date which was more than ten days after the limitations period to bring an action against the City had already expired. See Schwartz Affidavit, ¶ 10, Exhibit G. See also Schwartz Reply Affidavit, ¶ 11 ("I did forward to plaintiffs proposed retainer agreements for suit against the City. Not one was ever executed or returned to me").

Because the "documentary evidence" submitted by Defendants

² In such regard, Defendants' reliance is misplaced with respect to *Ambase Corp. v Davis Polk & Wardwell* (8 NY3d 248 [2007]), which stands for the proposition that a law firm is not liable for legal malpractice if the subject matter is beyond the scope of its representation of the client. Unlike this case, the *Ambase* case does not implicate the parol evidence rule.

does not conclusively establish a defense to the breach of contract/legal malpractice claim as a matter of law, and because this court is required to accord Plaintiffs the benefit of every possible favorable inference in the perspective of a motion to dismiss, Defendants' CPLR 3211 (a) (1) motion to dismiss based on documentary evidence is denied. *Tsimerman v Janoff*, 40 AD3d 242 (1st Dept 2007) (denying motion to dismiss based on documentary evidence because defendant's documents did not conclusively establish a defense to plaintiff's claim as a matter of law).

Alternatively, Defendants argue that the complaint should be dismissed pursuant to CPLR 3211 (a) (7), for failing to state a cause of action. In particular, Defendants argue that dismissal is required because (1) Plaintiffs cannot prove that they would have been successful on the merits in a suit against the City, as they did not even file a notice of claim against the City within 90 days after April 15, 2007, the day when the wall collapsed; and (2) Plaintiffs lack standing to bring an action against the City, as the Association is the only party with proper standing. Defendants' Brief, at 7-10.

Defendants' arguments are not persuasive. First, while the law requires that a notice of claim against a municipality be filed within 90 days of an incident, the courts have discretion to grant leave to file a late claim. Municipal Law, § 50-e (5). The factors relevant to a court's determination include: (1) a

reasonable excuse for the failure to timely file a notice of claim, (2) that the municipality acquired actual knowledge of the facts constituting the claim within 90 days of its accrual or a reasonable time thereafter, and (3) that the delay would prejudice the municipality in defending the claim. *Acosta v City of New York*, 39 AD3d 629, 630 (2d Dept 2007); *Matter of Henriques v City of New York*, 22 AD3d 847, 848 (2d Dept 2005).

Notably, the Association has timely filed a notice of claim against the City (Shakhnevich Affirmation, Exhibit D), and it appears that the City has notice of the facts surrounding the collapse of the retaining wall. *Id.*, Exhibit G. Indeed, the Supreme Court of Richmond County has granted the Waterfront Owners' motion for leave to file a late claim against the City. *Id.*, Exhibit E. Also, because the complaint in the instant case adequately asserts the essential elements for a legal malpractice claim (i.e. the alleged negligence of defendant attorney proximately caused plaintiff damages), it should not be dismissed at the pleading stage. *Greenwich v Markhoff*, 234 AD2d 112, 114 (1st Dept 1996) (appellate court reversed lower court's dismissal of legal malpractice claim based on failure to state a cause of action, and found no merit in the argument that complaint must establish that but for defendant's negligence plaintiff would have prevailed in the underlying action). In any event, any discussion at this time as to the merits or success of the action

against the City is speculative and premature because, based on the record before this court, that action (as brought by the Waterfront Owners and based on substantially the same facts) is still pending.

Defendants' reliance on *Caprer v Nussbaum* (36 AD3d 176 [2d Dept 2006]), for the proposition that an individual condominium unit holder has no standing to assert a claim for damages to the common interest of the condominium, is also misplaced. The complaint in this case alleges that, due to the City's alleged negligence, Plaintiffs' individual homes have been encumbered by liens, their market values have depreciated, and they have been compelled to spend money to remedy the damage caused by the collapse. In effect, Plaintiffs allege that, in addition to the damages suffered by the common areas of the Association, Plaintiffs have also sustained damages that are unique to themselves and their own residences. Complaint, ¶¶ 55-56. Construing the complaint's allegation favorably, *Caprer* is distinguishable and inapplicable.³ Hence, Defendants' motion to dismiss the complaint's legal malpractice and breach of contract causes of action based on CPLR 3211 (a) (7) is denied.

³ It is also noteworthy that if Plaintiffs truly lack standing to pursue an action against the City, as now argued by Defendants, it is dubious as to why Defendants sent a proposed retainer agreeing to represent Plaintiffs in an action against the City, where Defendants would only be compensated on a contingency fee basis.

Breach of Fiduciary Duty (Count III) and
Return of Unearned Legal Fees (Count IV) Claims

As a separate count, the complaint alleges that Defendants have breached their fiduciary duties to Plaintiffs. However, it is undisputed that the breach of fiduciary duty claim is redundant or duplicative of the legal malpractice and breach of contracts claims, and should be dismissed. *Weil Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 (1st Dept 2004). Hence, the motion to dismiss Count III of the complaint (breach of fiduciary duty) is granted.

Plaintiffs' complaint also seeks a return of the unused portion of the \$15,000 fees paid under the July 2008 Retainer. In his affidavit, Schwartz stated that the fees and expenses charged for the work in representing Plaintiffs (where they were defendants) in the Waterfront Owners' action exceeded \$16,820; he also annexed a copy of the invoice reflecting fees and expenses. Schwartz Affidavit, ¶¶ 18-19; Exhibit J. Because Plaintiffs have failed to contest the amount and/or reasonableness of such fees and expenses, the motion to dismiss Count IV of the complaint (return of unearned legal fees) is granted.

Motion For Sanctions Upon Plaintiffs and Their Counsel

In their motion to dismiss, Defendants also seek a court order imposing sanctions and costs against Plaintiffs and their counsel pursuant to NYCRR §130-1.1. Defendants argue that Plaintiffs and their counsel "acted frivolously in drafting the

complaint" with knowledge of the fact that there was no retainer agreement to represent Plaintiffs in an action against the City, and that the fees paid under the July 2008 Retainer had been fully exhausted before Defendants' services were terminated by Plaintiffs. Defendants Brief, at 11.

For the reasons discussed above, the legal malpractice and breach of contract claims asserted in the complaint should not be dismissed. In such regard, these claims are not frivolous at all. Further, Plaintiffs' claim for the return of any unused portion of the paid fees, although unavailing for the reasons explained above, is "not so utterly meritless as to be 'frivolous' within the meaning of [Rule 130]." *Vinci v Northside Partnership*, 250 AD2d 965, 966 (3d Dept. 1998). In this perspective and when viewed as a whole, Plaintiffs and their counsel did not act frivolously in drafting the complaint, as otherwise argued by Defendants. Therefore, Defendants' motion seeking to impose sanctions and costs is denied.

Accordingly, it is

ORDERED that the part of Defendants' motion seeking dismissal of the negligence/legal malpractice cause of action (Count I) and the breach of contract cause of action (Count II) of the complaint is denied; and it is further

ORDERED that the part of Defendants' motion seeking dismissal of the breach of fiduciary duty cause of action (Count

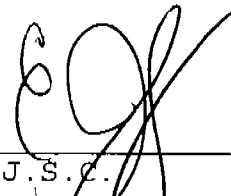
III) and return of unearned legal fees (Count IV) of the complaint is granted; and it is further

ORDERED that the part of Defendants' motion seeking to impose sanctions and costs upon Plaintiffs and their counsel is denied.

This constitutes the Decision and Order of the court.

Dated: July 8, 2009

ENTER:



J.S.C.

EMILY JANE GOODMAN

FILED
JUL 13 2009
COUNTY CLERK'S OFFICE
NEW YORK