

**Cayuga Capital Mgt. LLC v Borah Goldstein,  
Atschuler, Nahins & Goidel, P.C.**

2009 NY Slip Op 32123(U)

September 15, 2009

Supreme Court, New York County

Docket Number: 102359/09

Judge: Joan A. Madden

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

PRESENT: HON Joan A. Midea  
Justice

PART II

Index Number : 102359/2009

CAYUGA CAPITAL MANAGEMENT LLC

VS.

BORAH, GOLDSTEIN, ALTSCHULER

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 102359-09

MOTION DATE 5/21/09

MOTION SEQ. NO. #001

MOTION CAL. NO. \_\_\_\_\_

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  No

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

**FILED**

SEP 18 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: September 15, 2009

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

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

-----X  
CAYUGA CAPITAL MANAGEMENT LLC, CCM  
VENTURES 5, LLC, CCM VENTURES 6 LLC, CCM  
VENTURES LLC

Plaintiffs

Index No. 102359/09

-against-

BORAH GOLDSTEIN, ATSCHULER, NAHINS  
& GOIDEL, P.C., HARRIET POLINSKY and  
STEVEN GOLDSTEIN,

Defendants.

-----X  
JOAN MADDEN, J.:

Defendants move, pursuant to CPLR 3211 (a) (7) and CPLR 3016(b) for an order dismissing the complaint for failure to state a cause of action. Plaintiffs oppose the motion, which is granted for the reasons below.

This action arises out of legal services provided by the defendants to plaintiffs in or about September 2007 in connection with various legal, real estate and landlord/tenant related matters. The complaint contains causes of action for negligence, legal malpractice, breach of fiduciary duty, fraudulent misrepresentation and fraudulent inducement. The complaint alleges the existence of an attorney-client relationship between plaintiffs and defendants, describes various duties owed by defendants to plaintiffs as a result of such relationship, and that defendants breached such duties and failed to competently handle the legal matters at issue. The claims for fraudulent misrepresentation and fraudulent inducement are based on defendants' alleged representations to plaintiffs that certain legal matters were proceeding as planned and that eviction orders would be obtained and that the matters were being diligently and competently

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prosecuted when in fact, these statements were not true.

Defendants now move to dismiss the complaint, arguing that the negligence, breach of fiduciary duty claim and the fraudulent misrepresentation claim are redundant of the legal malpractice claim. Defendants also argue that plaintiffs have failed to state a claim for legal malpractice as the complaint does not allege that “but for” the defendants’ negligence, plaintiffs would have either prevailed on the legal matter at issue or would not have sustained ascertainable damages. In addition, defendants argue that the breach of fiduciary duty and fraud claims are not pleaded with sufficiently particularity as required under CPLR 3016(b).

In opposition, plaintiffs submit an affirmation from their counsel who states that plaintiffs’ claims “are based on a sequence of events in which the defendant Borah, Goldstein, and its attorneys represented and advised plaintiffs over the course of many months that various landlord-tenant actions had been commenced by the Defendants on behalf [of plaintiffs] and that those actions were progressing toward a successful resolution, when in fact, no such actions had been commenced’ (Pfeffer Affirmation, ¶ 4). Plaintiffs also argues that it is premature to dismiss the complaint as discovery has not yet been conducted so that the details underlying the claims are not yet known. Plaintiffs further assert that the complaint adequately alleges a link between the defendants’ negligence and the damage to plaintiffs so as to state a claim for legal malpractice.

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]).

The first cause of action, labeled as one for negligence and legal malpractice, alleges that defendants were negligent and committed legal malpractice based on twelve enumerated failures committed by defendants in connection with their legal representation of plaintiffs, including, inter alia, the failure to adequately and timely perform legal services, to properly supervise the performance of such services, to zealously represent the plaintiffs, to properly counsel the plaintiffs, and to truthfully disclose the status of various legal matters. It further alleges that “[a]s a result of Defendants’ negligence/malpractice, [plaintiffs] have been and continue to be damaged in excess of \$250,000.” (Complaint, ¶ 21).

The second cause of action, for breach of fiduciary duty, alleges that defendants breached their fiduciary duties based on essentially the same twelve enumerated failures listed in connection with the legal malpractice and negligence claims. It further alleges that “[a]s a result of Defendants’ breaches of fiduciary duties owed to [plaintiffs], [plaintiffs] have been and continue to be damaged in excess of \$250,000.” (Complaint, ¶ 24).

In Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267, 271 (1<sup>st</sup> Dept 2004) the Appellate Division, First Department 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. Here, as the breach of fiduciary duty claim is based on the same facts alleged in the legal malpractice claim and seeks the same relief, it must be dismissed as redundant. Likewise, to the extent the first cause of action asserts a negligence claim and a legal malpractice claim, the negligence claim must also be dismissed as redundant. See Garten v. Sherman & Sterling, LLP, 52 AD3d 207, 208 (1<sup>st</sup> Dept

2008)(dismissing negligence claim as duplicative of legal malpractice claim).

Next, the legal malpractice claim is insufficient to state a claim. “A prima facie case of legal malpractice requires proof of defendant’s negligence, that such negligence was a proximate cause of plaintiff’s loss and actual damages.” Rau v. Borenkoff, 262 AD2d 388, 388-389 (2d Dept 1999). To establish proximate cause it must be shown that “but for the alleged malpractice plaintiffs would have prevailed or at least sustained a smaller judgment against them.”<sup>1</sup>

Sonnenschine v. Giacomo, 295 AD2d 287, 287 (1<sup>st</sup> Dept 2002). Here, the complaint provides no facts regarding the merits of the legal matters which were allegedly negligently handled by defendants, and therefore the legal malpractice claim must be dismissal.. Id.; McLoughlin v. Sullivan Papin Block McGrath & Connavo P.C., 18 AD3d 245 (1<sup>st</sup> Dept), lv. denied, 5 NY3d 709 (2005)(dismissing legal malpractice claim where the complaint set forth only conclusory allegations regarding causation). This dismissal, however, is without prejudice to plaintiffs seeking leave to replead to include sufficient facts from which it could be inferred that “but for” defendants’ malpractice, plaintiff would have prevailed in the matters at issue or otherwise would have suffered less damages.

The remaining two claims are for fraudulent misrepresentation and fraudulent inducement. To plead a viable cause of action for fraud, a plaintiff must allege that defendants made a misrepresentation of a material existing fact or a material omission of fact, which was

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<sup>1</sup>The court notes that to support a breach of fiduciary duty claim in the context of attorney liability, a plaintiff must also 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 at 272. Thus, even if the breach of fiduciary duty claim was not dismissed as redundant, it would be insufficient to state a cause of action.

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). CPLR 3016 (b) requires that claims for fraud set forth "the circumstances constituting the wrong...in detail." While the fraud claims are not redundant of the legal malpractice claims, they are not sufficiently pleaded to state a claim.

The claims for fraudulent misrepresentation and fraudulent inducement are based on defendants' alleged representations to plaintiffs that certain legal matters were proceeding as planned and that eviction orders would be obtained and that the matters were being diligently and competently prosecuted when, in fact, these statements were not true. The fraudulent inducement claim additionally alleges that based on these misrepresentations plaintiffs were "fraudulent induced to pay Borah Goldstein large sums of money" and that as a result defendants have been damaged in the amount of \$13,425.25.

To the extent the fraud claims are based on defendants' statement of future intent to obtain eviction orders, they do not state a claim since "[a]bsent a present intent to deceive a statement of future intentions, promises or expectations is not actionable on the ground of fraud." Non-Linear Trading Co. v. Braddis Assocs., 243 AD2d 107 (1<sup>st</sup> Dept 1998). The fraud claims are also deficient in that they fail to allege that plaintiffs' reliance of defendants' statements was justified and do not specifically allege that the statements at issue were false and known to be false when made. Accordingly, the fraud claims must be dismissed, without prejudice to

\* 7 ]  
plaintiffs seeking leave to replead such claims.<sup>2</sup>

In view of the above, it is

ORDERED that the defendants' motion to dismiss is granted, without prejudice to plaintiffs' moving, on or before October 30, 2009, for leave to replead the claims for legal malpractice, fraudulent misrepresentation, and fraudulent inducement; and it is further

ORDERED that the failure of plaintiffs to seek leave to replead on or before October 30, 2009, will result in their waiver of any right to seek such relief subject to further court order.

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

Dated: September 15, 2009

  
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J.S.C.

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<sup>2</sup>Plaintiff's reliance on Ulico Casualty Co. v. Wilson, Elser, Moskowitz, Edleamn & Dicker, 56 AD3d 1 (1<sup>st</sup> Dept 2008) to argue that dismissal is not warranted as discovery has not been taken is misplaced. Notably, Ulico Casualty Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker, supra, did not involve a pre-answer motion to dismiss but instead a cross motion for summary judgment, and thus the court considered certain discovery on the motion.