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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Index Number : 101835/2010
SLININ, EDUARD
VS.
MARINA TRUBITSKY & ASSOCIATES
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO.
MOTION DATE 5/12/10
MOTION SEQ. NO. 001
MOTION CAL. NO.

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendants to dismiss the Complaint is granted as to the first, second, and third causes of action pursuant to CPLR 3211(a)(7) and the first, second and third causes of action are dismissed; and it is further

ORDERED that the motion by defendants to dismiss the Complaint is granted as to the fourth, fifth, and sixth cause of action for negligence and legal malpractice, pursuant to CPLR 3211(a)(1) and the fourth, fifth, and sixth cause of action are dismissed; and it is further

ORDERED that the motion by defendants to dismiss the Complaint is granted as to the seventh cause of action pursuant to CPLR 3211(a)(7) and the seventh cause of action is dismissed; and it is further

ORDERED that the Clerk may enter judgment dismissing the Complaint accordingly; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 5/20/10

HON. CAROL EDMEAD 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: PART 35

----------X

EDUARD SLININ and GALINA SLININ,

Index No. 101835-2010

Plaintiffs,

-against-

MARINA TRUBITSKY AND ASSOCIATES, PLLC and MARINA TRUBITSKY,

Defendants.

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HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

In this legal malpractice action, defendants Marina Trubitsky & Associates, PLLC (the "law firm") and Marina Trubitsky ("Trubitsky") (collectively "defendants") move to dismiss this action pursuant to CPLR 3211(a)(1) and (a)(7).

Factual Background

According to the Complaint, plaintiffs Eduard Slinin ("Mr. Slinin") and Galina Slinin (collectively "plaintiffs") retained defendants to prosecute a property damage action against Boris Gershkovich, Aza Wyckoff and others ("the underlying defendants") for alleged fraudulent, deceptive and illegal home construction practices (the "underlying action"). Defendants commenced the underlying action in the Southern District of New York.

The underlying action was scheduled for an initial pre-trial conference for June 17, 2008, which was adjourned for the failure to serve the summons and pleadings. On August 20, 2008 the law firm failed to appear at the scheduled pre-trial conference and caused the case to be discontinued. Defendants did not advise plaintiffs of such discontinuance. On August 28, 2008 Trubitsky asked the court to restore the case, which request was granted and the case was

scheduled for the next pre-trial conference. However, on October 18, 2008 the law firm again failed to appear at the pre-trial conference and again caused the matter to be discontinued. Following the second dismissal, the law firm requested to restore the matter to the calendar alluding to the fact that the firm was not aware that its motion for a stay dated September 29, 2008 was denied and that no one in the firm was admitted in Southern District except for Trubitsky who was in Russia at the time of the scheduled appearance. Plaintiffs allege that the court denied the request, stating the following: "[E]xplanation is not persuasive (and the record reflects a prior failure to appear, and request an adjournments). This is an abject failure to prosecute the case." Moreover, the invoice provided by the law firm to plaintiffs for the month of October, 2008 contains charges for the services allegedly provided by Trubitsky, who was supposed to be in Russia, which includes "[plreparation for and appearance for the court conference."

It is alleged that on October 27, 2008 the court issued a case management plan, which set dates for the completion of discovery and for a settlement conference. The law firm failed to comply with the deadlines and failed to obtain any evidence to prove plaintiffs' case. The law firm also failed to appear on any of the scheduled settlement conferences and on various occasions had their paralegals handle the case without due supervision. Tributsky, in her attempt to restore the case to the calendar misrepresented to the court that the parties were conducting arm-length negotiations. Plaintiffs have retained another attorney to represent them in the matter, which has been transferred to the New Jersey District Court.

In November 2008, the underlying defendants moved to change venue, which was granted on November 25, 2008. Plaintiffs' new attorney advised plaintiffs that the case was

completely mishandled by the law firm and that they are now precluded from conducting discovery in the case.

On April 14, 2010, the Court (United States District Court for the District of New Jersey) dismissed plaintiffs' underlying action stating:

> It having been reported to the Court that the above-captioned action has been settled, and that the request for an order of dismissal is not based on a desire to adjourn or delay the proceedings herein;
>
> IT IS on this 14th OF April, 2010
>
> ORDERED THAT:
>
> (1) This action is hereby DISMISSED without cost and without prejudice to the right, upon motion and good cause shown, within 60 days, to reopen this action if the settlement is not consummated; . . .

Plaintiffs allege three causes of action for fraud against Tributsky (first, second and third), one cause of action for "negligence" against both defendants (fourth), another cause of action for "negligence" against Tributsky (fifth), and malpractice and breach of contract causes of action against both defendants (sixth and seventh).

In support of dismissal, Trubitsky asserts that she performed her duties in a diligent, skillful prudent and professional manner. Thus, the legal malpractice causes of action (fourth, fifth and sixth claims) should be dismissed under CPLR 3211(a)(1) & (7). The docket entries for the underlying action in both the Southern District of New York and the District of New Jersey, as well as other filed documents including Court Orders contained in those files, demonstrate that – as a matter of law – the plaintiffs' claims cannot support their causes of action, claiming damages for legal malpractice.

As to the first dismissal of the underlying action, defendants claim that following the death of Trubitsky's grandmother in Russia, Trubitsky traveled outside New York to settle affairs

of the decedent. Upon speaking with the underlying defendants' counsel, Trubitksy was advised that said counsel was not yet admitted to the U.S. District Court for the Southern District of New York. Said counsel and Trubitsky understood that said counsel would not be appearing without first obtaining proper permission and that the first conference would be adjourned for this reason. As to the second conference, Trubitsky relied upon a stipulation signed by all counsel, which requested a stay and advised the Court that all parties believed they could reach a settlement. Plaintiffs' claim that Trubitsky improperly billed them for a court appearance is mistaken, since the billing had reference to Trubitsky's preparation and appearance for an October 27, 2008 conference during which the Court issued a case management plan. After both of those conferences, the discontinuances were withdrawn and the action was reinstated.

Further, defendants filed a timely opposition to the change of venue motion. There was a mishap in the electronic filing system which rejected defendants' submission because the reversal of the discontinuance was not logged in and did not recognize the case as active. However, defendants filed the opposition under a different category of submission. When the status of the case was corrected, defendants refiled the opposition, which was considered before the Court issued a decision on the merits.

Additionally, an associate from the law firm appeared for the settlement conference, and opposing counsel refused to discuss the case with her. And, Mr. Slinin refused to attend and provide a report from his accountant to facilitate settlement.

Furthermore, shortly after the case management order was entered, the underlying defendants moved to change venue, which was decided on January 7, 2009. Yet, by January 21, 2009, plaintiffs had already determined to retain new counsel, at which time, defendants advised

plaintiffs of the need to comply with discovery, *i.e.*, Mr. Slinin's deposition on January 27th. Defendants were given instructions to adjourn all discovery indefinitely, and defendants transferred the entire file to plaintiffs. The documentary evidence shows that plaintiffs' new counsel was advised of the underlying defendants' outstanding discovery requests as early as February 2009, there was every opportunity for new counsel to conduct discovery, new counsel made no effort to through September 2009 to conduct discovery, and that as a result, the underlying defendants moved to dismiss for lack of prosecution, which new counsel opposed in a cursory manner. The motion was *sub judice*, and mooted by the parties' advice to the Court on April 14, 2010 that they had reached a settlement. The Court dismissed the case, subject to reopening within 60 days if the parties are unable to consummate the anticipated settlement. The fact that the underlying action is not fully resolved is a separate basis for dismissal of the Complaint. Plaintiffs' new counsel's self-serving accusation is the sole conclusory basis for the present lawsuit.

Defendants argue that plaintiffs were not damaged in any regard by any of the discontinuances following defendants' missed court appearances, and were not damaged by the defendants' electronic filing mishap on the change venue motion.

Defendants argue that the first, second and third causes of action for fraud should be dismissed. The alleged misrepresentation that defendants were diligently handling plaintiffs' case, and alleged concealment of defendants' failure to appear at the conferences and oppose the change venue motions, are not actionable for fraud claims. And, such allegations lack the required specificity to support a fraud claim. no actual ascertainable damages were suffered by the transfer of the underlying case to New Jersey, or in the events leading to that transfer. As

noted, the venue transfer motion was fully briefed and entertained by the Court. The Court's inevitable decision – which ultimately was delayed by only six weeks because of the court computer mishap – appears to be fully justified both on the law and on the facts. It certainly is not legal malpractice to fail to obtain a successful result on a motion. Nor did the fact of the transfer to New Jersey cause actionable damages. The federal court in New Jersey was certainly capable of rending as fair an adjudication as the federal court in New York. And, any legal fees that the Slinins paid to new counsel for his representation in New Jersey are not recoverable as damages – had they continued to employ Trubitsky, they would have incurred these legal fees to Trubitsky. Further, no actual ascertainable damages were occasioned by Trubitsky's asserted failure to attend settlement conferences in late 2008, which were available throughout 2009. As shown in the District of New Jersey docket entries, settlement discussions have in fact ensued in the underlying action. Moreover, in the absence of another measure of actual damages, the attorney's fees paid by plaintiffs are not recoverable.

In opposition, plaintiffs argue that the entire complaint may stand if one of the causes of action is sustained. Plaintiffs argue that they state a claim for legal malpractice: it is uncontested that defendants improperly filed their case in New York, instead of New Jersey, causing unnecessary litigation on the issue of proper venue; defendants attempted to add an unauthorized provision to a stipulation to extend the time to answer, causing unnecessary additional expenses; Trubitsky failed to appear at the August 20, 2009 conference, demand discovery, and conduct settlement discussions; and defendants failed to appear at the conference on October 2, 2009, causing the case to be discontinued. Plaintiffs also add that new counsel was hired after the discovery deadline was past due. Further, defendants' dispute as to damages does not disprove

their existence, especially since defendants blame plaintiffs' new counsel in order to mitigate damages.

Further, defendants' willful misrepresentation deprived plaintiffs the opportunity to cure the damage caused by defendants' malpractice and induced plaintiffs to pay them attorney fees for the alleged malpractice. Thus, the fraud claim is valid.

Additionally, plaintiffs' claim for breach of contract rest upon a promise of a particular or assured result, *i.e.*, a promise to inform plaintiffs of the result of their representations, and not solely on a breach of general professional standard. Thus, such claim is valid.

Since the allegations of the complaint must be accepted as true, plaintiffs' complaint state causes of action.

Finally, the documents in support of plaintiffs' motion, *i.e.*, affidavits, emails, and portions of plaintiffs' underlying lawsuit, do not on their face refute plaintiffs' claim and thus, do not constitute "documentary evidence." Thus, the motion pursuant to CPLR 3211(a)(1) should also be denied.

Plaintiffs argue that if the Court treats the motion as one for summary judgment, then the Court must decide whether (1) the material facts claimed by plaintiffs are not fact at all and (2) significant dispute exists regarding the existence of claimed material facts.

In reply, defendants argue that all of the causes of action should be dismissed. As to the documentary evidence, nearly all of these documents are official federal court records, and judicial records would qualify as "documentary." Such documents establish conclusively that the discontinuances were promptly withdrawn, the motion to change venue was vigorously opposed, and upon transfer of the underlying action to New Jersey, plaintiffs promptly engaged new

counsel. Plaintiffs' allegations that they incurred "actual ascertainable damages" as result of Trubitsky's alleged failure to attend a settlement conference in the Fall of 2008, or to conduct discovery in January 2009, is speculative.

Trubitsky does not acknowledge that she was negligent. Further, as to the negligence/malpractice claims, the complaint fails to show that but for the alleged four instances of malpractice, plaintiffs would not have sustained some ascertainable damages.

Additionally, as to the fraud claims, they are duplicative of the malpractice claims and fail to allege fraud with the requisite specificity. The general allegation, common to all three fraud claims, that Trubitsky misrepresented that their case was diligently and professionally handled sets out an opinion, rather than a fact actionable for fraud. And the three allegations that Trubitsky failed to disclose her asserted derelictions also do not give rise to a fraud claim separate from the customary malpractice action.

The breach of contract claim should also be dismissed as duplicative.

Discussion

CPLR 3211 (a)(1): Defense is founded upon documentary evidence

Pursuant to CPLR 3211 (a)(l), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." Thus, where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law," dismissal is warranted (*Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972 [1994]). The test on a CPLR 3211 (a)(1) motion is whether the documentary evidence submitted "conclusively establishes a defense to the asserted claims as a matter of law" *(Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1st Dept 2001] *citing*

Leon v Martinez, 84 NY2d 83, 88, *supra*; *IMO Indus., Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1st Dept 1999]). The term "documentary evidence" as referred to in CPLR 3211(a)(1) typically means judicial records such as judgments and orders (*Webster Estate of Webster v State of New York*, 2003 WL 728780 [N.Y.Ct.Cl. 2003]; *Fontanetta v Doe*, 898 NYS2d 569 [2d Dept 2010] (Judicial records would qualify as "documentary evidence" in the proper case) citing 2 N.Y. Prac., Com. Litig. in New York State Courts § 7:60, 2d. ed.)).

CPLR 3211(a)(7): Failure to State a Cause of Action

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.,* 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR § 3026), and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]).

On a motion to dismiss for failure to state a cause of action, where the parties have

submitted evidentiary material, including affidavits, or where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence" the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS2d 532 [1st Dept 1989]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279 [1996]).

As to the first cause of action for fraud, the alleged misrepresentation that "Defendant Marina Trubitsky misrepresented to plaintiffs that their case was diligently and professionally handled by the Law Firm and herself and concealed the fact that she failed to appear at two consecutive pre-trial conferences, which caused the matter to be discontinued twice" fail to support a fraud claim. The second fraud cause of action adds the allegation that Trubitsky concealed that "she failed to oppose the motion to change venue, which caused the matter to be transferred to New Jersey District Court" (compare Exh. A, ¶¶ 27, 35). The third fraud cause of action adds that Trubitsky allegedly concealed that she "never advised Plaintiffs that the case she failed to appear at settlement conferences." However, "[a]n attorney's failure to disclose malpractice does not give rise to a fraud claim separate from the customary malpractice action" (*Weiss v Manfredi*, 83 NY2d 974, 977, 616 NYS2d 325 [1994]; *Kaiser v Van Houten*, 12 AD3d 1012, 1014, 785 NYS2d 569 [3d Dept 2004]). Further, the general allegation that Trubitsky misrepresented to the Slinins that their case was "diligently and professionally handled" amounted to no more than opinions, and is not actionable as a fraudulent misrepresentation

(*Jacobs v Lewis*, 261 AD2d 127, 689 NYS2d 468 [1st Dept 1999]).

Thus, the first, second and third causes of action fail to state a cause of action for fraud and are dismissed.

Legal malpractice is an attorney's failure to exercise reasonable skill and knowledge commonly possessed by a member of the legal profession (*Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 303-304 [2001]). An attorney may be held liable for ignorance of the rules of practice, failure to comply with conditions precedent to suit, or his neglect to prosecute or defend an action (*Bernstein v Oppenheim & Co.*, 160 AD2d 428, 430 [1st Dept 1990]). In order to prevail on their cause of action for legal malpractice, plaintiffs must allege and demonstrate that (1) defendant owed him a duty to exercise the degree of care, skill and diligence commonly possessed by a member of the legal profession, (2) defendant breached that duty, and (3) that actual damages were proximately caused by the breach (*Gonzalez v Ellenberg*, 5 Misc 3d 1023 [Sup. Ct. New York County 2004] citing *Hatfield v Herz*, 109 F Supp 2d 174, 179 [SDNY 2000]). To establish the third element of proximate cause and actual damages, plaintiffs "must meet the 'case within a case' requirement, demonstrating that 'but for' the attorney's conduct the client would have prevailed in the underlying matter or *would not have sustained any ascertainable damages had defendants exercised due care* (emphasis added) (*Levine v Lacher & Lovell-Taylor*, 256 AD2d 147 [1st Dept 1998]; *Rubinberg v Walker*, 252 AD2d 466 [1st Dept 1998]; *Perks v Lauto & Garabedian*, 306 AD2d 261 [2d Dept 2003]; *see also*, *Bazinet v Kluge*, 14 AD3d 324 [1st Dept 2005]; *Gonzalez v Ellenberg*, 5 Misc 3d 1023 [Sup. Ct. New York County 2004]).

With respect to the first discontinuance, the Complaint acknowledges that this

discontinuance was withdrawn by the Court on August 20, 2009. (Complaint ¶ 15; Southern District of New York Docket Entry 14). As to the second discontinuance, the docket entries from the Southern District of New York reflect that the case was discontinued "provided, however, that the Plaintiffs may apply, on or before 10/16/08 (noon), by letter showing good cause why this action should be restored to the calendar" (Southern District of New York Docket Entry 17). Although the first attempt to restore the action was rejected on October 3, 2008 (*id.* at Entry 18), upon a letter dated October 13, 2008 requesting "that the court agree that plaintiffs counsel did not act in a willful manner or in bad faith and should allow the action to proceed," the Court set a "Conference on 10/27" (*id.* at Entry 19) and directed "The Clerk of Court [] to reopen this action by restoring it to the Court's active case docket) (*id.* at Entry 31). Docket entry No. 22 reflects that the Court thereafter entered an "Order that case be referred to the Clerk of Court for assignment to a Magistrate Judge for General Pretrial (includes scheduling, discovery, non-dispositive pretrial motions, and settlement)" (*id.* at Docket Entry 22). Thus, based on the above documentary evidence, *i.e.*, the Docket Entries and plaintiffs' own Complaint, the defendants' failure to appear at two conferences and resulting discontinuances caused plaintiffs no prejudice and no actual ascertainable damages, since the underlying action was restored shortly after the discontinuances.

As to the complaint's allegation that defendants failed to oppose the underlying defendants' change venue motion, such claim is flatly contradicted by the documentary evidence. Defendants in fact filed papers in opposition to the change venue motion, and the Court considered the opposition papers in its decision on the merits (Exh. B, Docket Entries 30, 32, 33; Exh. E, Plaintiffs' Opposition Motion; Decision, page 2). The Complaint fails sufficiently allege

that plaintiffs suffered actual ascertainable damages from the delay resulting from the Court's computer mishap in the Order transferring the case from New York to New Jersey.[1]

As to the allegation that plaintiffs' are precluded from obtaining discovery in the underlying action, there are no allegations indicating that such preclusion is the result of actions undertaken by defendants. The case was restored on October 16, 2009, at which time a conference was scheduled for October 27, 2009. According to Docket Entry 23, on October 27, 2009, the Court referred the case to a Magistrate Judge for "General Pretrial" and a Case Management order was entered directing that "All discovery is to be expeditiously completed by: 1/27/09 (Final for Fact & Expert)"; the Docket Entry further indicates: "Status of settlement discussions: 2/9/09 at 9:00 A.M. (Discovery or Settlement). Less than two weeks later on November 10, 2008, the underlying defendants moved to change venue, which was ultimately decided on January 7, 2009.

Yet, it is uncontested that three weeks later, by January 21, 2009, Mr. Slinin had sought different counsel in New Jersey to represent plaintiffs, requested that defendants have the file "ready," and that on January 21, 2009, defendants advised plaintiffs of the need to complete discovery by January 27th.

While the record indicates that on February 6, 2009, counsel for the underlying defendants advised defendants and plaintiffs' new counsel that he would file a motion to dismiss

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[1] As to plaintiffs' new claim in their motion papers that defendants' also improperly venued their action in New York, the defendants' argued in opposition to the change venue motion that, *inter alia,* plaintiffs' action was brought pursuant to New York General Business Law for defective work performed at the plaintiffs' apartment located in New York, even though the underlying defendants also performed work for plaintiffs in New Jersey, and that defendants did not even provide the addresses of the witnesses/subcontractors that are allegedly located in New Jersey. There are insufficient facts to support any claim that the filing of the action in New York constituted legal malpractice.

in the event plaintiffs failed to produce documents by February 12, 2009 and appear for depositions, and it is unclear who was representing plaintiffs at the time this letter was issued, by the time the motion to dismiss was filed seven months later in September, plaintiffs' new counsel was counsel of record. Furthermore, the underlying action was not dismissed for lack of discovery, but was dismissed, without prejudice due to the fact that the parties were in settlement, subject to restoration in the event the settlement did not materialize. There are no allegations that defendants had any part in the seven- month delay in producing discovery, which led to the motion to dismiss for lack of prosecution.

Moreover, the documentary evidence indicates that on April 14, 2010, new counsel for plaintiffs and defendants informed the U.S. District Judge in New Jersey that they had tentatively reached a settlement of the case, and that the Court issued an Order "dismissing the case, "without prejudice to the right, upon motion and good cause shown, within 60 days, to reopen this action if the settlement is not consummated." Thus, it appears that the underlying action may not be concluded, and that plaintiffs had not yet sustained any actual damages attributable to the alleged malpractice (*see Parametric Capital Management, LLC v Lacher*, 15 AD3d 301, 791 NYS2d 10 [1st Dept 2005]).

Therefore, based on the above, the negligence and legal malpractice claims (fourth, fifth, and sixth causes of action) are dismissed based on documentary evidence pursuant to CPLR 3211(a)(1).

Finally, plaintiffs fail to state a claim for breach of contract (seventh cause of action). The breach of contract claim alleges that Trubitsky contracted with the Slinins "to promptly prosecute their cause of action against Aza Defendants," and that "[b]y failing to promptly prosecute the

action, inform plaintiff of its numerous discontinuances and the firm's failure to complete discoveries, [defendants] breached [their] agreement and contract with plaintiffs." (Exh. A, ¶¶ 71, 72). Since this cause of action "as pleaded, did not rest upon a promise of a particular or assured result," and "only claimed a breach of general professional standards" such cause of action is "a redundant pleading of a malpractice claim" and must be dismissed (*Senise v Mackasek*, 227 AD2d 184, 185, 642 NYS2d 241 [1st Dept 1996] citing *Pacesetter Communications Corp. v Solin & Breindel*, 150 AD2d 232, 236, 541 NYS2d 404 [1st Dept 1989], lv. dismissed 74 NY2d 892, 547 NYS2d 849; *Wilber v Tatem*, 1 Misc 3d 134, 781 NYS2d 628 [1st Dept 2004]; *Pascarella v Goldberg, Cohn & Richter, LLP*, 25 Misc 3d 1219 [Sup. Ct. Kings County 2009]; *see also, Natural Organics Inc. v Anderson Kill & Olick, P.C.*, 67 AD3d 541, 891 NYS2d 321 [1st Dept 2009]; *InKine Pharmaceutical Co., Inc. v Coleman*, 305 AD2d 151, 152, 759 NYS2d 62 [1st Dept 2003] ("The breach of contract and breach of fiduciary duty claims were properly dismissed as duplicative, since they arose from the same facts as the legal malpractice claim and allege similar damages")).[2]

Therefore, plaintiffs fail to state a claim for breach of contract and the seventh cause of action is dismissed.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendants to dismiss the Complaint is granted as to the first, second, and third causes of action pursuant to CPLR 3211(a)(7) and the first, second and

[2] The Court notes that defendants failed to point to any "documentary evidence" to warrant dismissal of the breach of contract claim pursuant to CPLR 3211(a)(1).

third causes of action are dismissed; and it is further

ORDERED that the motion by defendants to dismiss the Complaint is granted as to the fourth, fifth, and sixth cause of action for negligence and legal malpractice, pursuant to CPLR 3211(a)(1) and the fourth, fifth, and sixth cause of action are dismissed; and it is further

ORDERED that the motion by defendants to dismiss the Complaint is granted as to the seventh cause of action pursuant to CPLR 3211(a)(7) and the seventh cause of action is dismissed; and it is further

ORDERED that the Clerk may enter judgment dismissing the Complaint accordingly; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: March 20, 2010

Hon. Carol Robinson Edmead, J.S.C.