

**Stevens & Lee, P.C. v Levine**

2011 NY Slip Op 32752(U)

August 9, 2011

Supreme Court, New York County

Docket Number: 601847/09

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

STEVENS & LEE, P.C.,  
Plaintiff,

Index No.: 601847/09

Motion Date: 05/24/11

- v -

Motion Seq. No.: 01

CYNTHIA G. LEVINE and THE LEVINE FAMILY  
1999 TRUST,  
Defendants.

**FILED**

SEP 15 2011

The following papers, numbered 1 to 5 were read on this motion to dismiss.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits - Exhibits \_\_\_\_\_

NEW YORK	
COUNTY CLERK'S OFFICE	
No (s) .	1 2 3, 4
No (s) .	5

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is

The court shall grant plaintiff's motion to dismiss the counterclaims pursuant to CPLR 3211 only to the extent of ordering the dismissal of the first counterclaim and shall deny defendants' cross-motion for summary judgment on their counterclaims.

Plaintiff law firm sues for legal fees and defendants counterclaim for a declaration that plaintiff is not entitled to legal fees and owes defendants a refund of fees previously paid because of an alleged conflict of interest in violation of the attorney disciplinary rules. Defendants' first counterclaim is

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

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .. MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

[\*2]

for breach of fiduciary duty; second, for breach of contract; and third for declaratory judgment. Defendants argue that plaintiff breached its ethical obligations by failing to inform, and gain the consent of, defendants to plaintiff's concurrent representation of the opposing Bankruptcy Trustee in an unrelated matter.

For the purposes of this motion the court shall assume the truth of plaintiff's allegations. Le Bar Bat, Inc. v Shallo, 198 AD2d 49, 50 (1<sup>st</sup> Dept 1993) ("A motion to dismiss under CPLR 3211 (a) (7) assumes the truth of the material allegations and whatever can be reasonably inferred therefrom"). A client may maintain bring a claim for breach of fiduciary duty based upon a law firm's "failure to adhere to its duty to accord undivided loyalty to its client." Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker, 56 AD3d 1, 8 (1<sup>st</sup> Dept 2008). The Court continued that

Because the attorney-client relationship is both contractual and inherently fiduciary, a complaint seeking damages alleged to have been sustained by a plaintiff in the course of such a relationship will often advance one or more causes of action based upon the attorney's breach of some contractual or fiduciary duty owed to the client. The courts normally treat the action as one for legal malpractice only.

Id. (citations omitted). The Court then when on to hold, contrary to defendants' argument here, that "in the context of an action asserting attorney liability, the claims of malpractice and breach of fiduciary duty are governed by the same standard of

recovery" and that recovery "requires proof of three elements: (1) the negligence of the attorney; (2) that the negligence was the proximate cause of the loss sustained; and (3) proof of actual damages. It requires the plaintiff to establish that counsel failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that 'but for' the attorney's negligence the plaintiff would have prevailed in the matter or would have avoided damages." Id. at 10 [citations and internal quotations omitted]).

Finally it is clear that "violation of the ethical constraint against dual representation does not, without more, support a claim for recovery of damages (Schwartz v Olshan Grundman Frome & Rosenzweig, 302 AD2d 193, 199 [1<sup>st</sup> Dept 2003]); to recover against an attorney, a client or third party is required to prove both the breach of a duty owed to it (see Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood, 80 NY2d 377 [1992]) and damages sustained as a result." Ulico Cas., supra, 56 AD3d 1, at 10. Further, with particular relevance to defendants' counterclaims, the Court has stated,

Plaintiff cannot state a cause of action for legal malpractice based solely on defendant's disqualification for an alleged conflict of interest in a separate litigation. Plaintiff does not show any damages attributable to defendant's alleged ethical breach, other than the attorney's fees it incurred in litigating defendant's disqualification, the first application for which was denied. In any event, as the motion court noted, the request for fees, if recoverable, should have

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been raised in the proceeding in which the disqualification occurred.

Estate of Steinberg v Harmon, 259 AD2d 318 (1<sup>st</sup> Dept 1999).

Based upon these precedents, defendants' counterclaim for breach of fiduciary duty fails to set forth a viable cause of action because there is no allegation in defendants' pleading or in defendants' papers submitted in opposition to the motion or in support of their cross-motion that they have suffered any harm from plaintiff's violation of the disciplinary rules or that 'but for' such a violation a more favorable result would have been achieved. In the absence of such allegations, defendants' counterclaim for breach of fiduciary duty which sounds in malpractice fails to state a cause of action.

However, with respect to defendants' counterclaims for recoupment of legal fees paid and a declaration as to whether legal fees are still owed, different considerations apply. The Court states

The forfeiture of defendant's legal fees . . . involves different considerations. Unlike a cause of action for breach of fiduciary duty, the circumstances of an attorney's discharge by a client may afford a basis for recoupment of legal fees independent of any claim of legal malpractice. Because the attorney-client relationship demands undivided loyalty and devotion on the part of the attorney, it is settled that an attorney who is discharged by a client for cause has no right to compensation or a retaining lien, notwithstanding a specific retainer agreement. However, unless the question of the attorney's disloyalty can be resolved on the record a hearing is required to determine whether discharge was for cause.

Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker,  
supra, 56 AD3d at 12-13.

The court shall treat defendants' counterclaim for breach of contract, although inartfully pled, as a cause of action for recoupment of legal fees paid based upon the alleged disloyalty of plaintiff. The contract claim is not duplicative of the fiduciary duty claim because it is not based on an allegation that plaintiff's negligent performance of its professional obligations caused defendants' damages but rather that plaintiff's failure to comply with its ethical obligations requires it to disgorge any fees from the representation. The Court has held that "an attorney who engages in misconduct by violating the Disciplinary Rules is not entitled to legal fees for any services rendered." Shelton v Shelton, 151 AD2d 659, 660 (2d Dept 1989) citing Brill v Friends World Coll., 133 AD2d 729 (2d Dept 1987); see Yannitelli v D. Yannitelli & Sons Const. Corp., 247 AD2d 271, 272 (1<sup>st</sup> Dept 1998) (where attorney admitted committing numerous violations of the Code of Professional Responsibility in this case over a period of years attorney forfeits any entitlement to fees).

As there are factual issues as to whether plaintiff's representation violated the ethical rules, the court shall deny the motions and cross-motion concerning defendants' second counterclaim. Similarly, as defendants' third counterclaim

[\* 6]  
concerns whether plaintiff is entitled to unpaid fees, it is governed by the same legal standard as the second counterclaim and shall also be sustained for pleading purposes pending the ultimate resolution of outstanding factual issues.<sup>1</sup>

Accordingly, it is

ORDERED that plaintiff's motion to dismiss defendants' counterclaims is GRANTED only as to defendants' first counterclaim for breach of fiduciary duty and is otherwise DENIED; and it is further

ORDERED that defendants' cross-motion for summary judgment on their counterclaims is DENIED.

This is the decision and order of the court.

Dated: August 9, 2011

ENTER:

~~Debra A. James~~  
J.S.C.  
**DEBRA A. JAMES**

**FILED**

SEP 15 2011

NEW YORK  
COUNTY CLERK'S OFFICE

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<sup>1</sup> This decision and order differs slightly from that stated by the court on the record. Of course, this written decision controls and in most respect comports with the general tenor of the decision rendered on the record March 24, 2011.