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

PRESENT: DEBRA A. JAMES PART 59
Justice

FEINSTEIN & NISNEWITZ, P.C.,
Plaintiff,

- v -

EASTLAND CONSTRUCTION, INC.,
Defendant.

Index No.: 100972/10
Motion Date: 06/24/11
Motion Seq. No.: 01
Motion Cal. No.: _____

The following papers, numbered 1 to 4 were read on this motion to dismiss.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2
Replying Affidavits - Exhibits	3

FILED

NOV 14 2011

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☒ No

Plaintiff moves to dismiss defendant's counterclaims for breach of fiduciary duty and attorney malpractice in this action seeking payment of legal fees. The court shall grant the motion for the reasons that follow.

The Court of Appeals has stated that in order to state a claim for legal malpractice with respect to representation on an underlying action, the claim must state that "but for" such breaches on the part of the law firm, the client would have succeeded on the merits of the underlying action in which it was

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

☐ SETTLE/SUBMIT ORDER/JUDG.

represented by such firm. Davis v Klein, 88 NY2d 1008 (1996).

> As subsequently pronounced by the First Department,
>
> The basic rules for pleading and prosecuting a prima facie case in legal malpractice are well established. As we have often stated, an action for legal malpractice requires proof of the attorney's negligence, a showing that the negligence was the proximate cause of the injury and evidence of actual damages. In order to survive dismissal, the complaint must state that but for counsel's alleged malpractice, the plaintiff would not have sustained some ascertainable damages. A failure to establish proximate cause requires dismissal regardless of whether negligence is established. Notwithstanding counsel's purported negligence, the client must demonstrate his or her own likelihood of success; absent such a showing, a counsel's conduct is not the proximate cause of the injury . Nor may speculative damages or conclusory claims fo damages be a basis for legal malpractice.

Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP 301 AD2d 63, 67 (1st Dept 2002).

The Court has further stated that "[w]e have never differentiated between the standard of causation requested for a claim of legal malpractice and one for breach of fiduciary duty in the context of attorney liability. The claims are coextensive." Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267, 271 (1st Dept 2004).

Eastland is correct that plaintiff has not served a reply to its counterclaims and that since issue has not been joined, summary judgment is unavailable at this juncture.

When deciding a motion pursuant to CPLR 3211(a)(7), the court's task is to determine only whether the facts as alleged, accepting them as true and according the pleader every possible

favorable inference, fit within any cognizable legal theory (Ladenburg Thalmann & Co, Inc v Tim's Amusements, Inc, 275 AD2d 243 [1st Dept 2000]).

Under the above stated liberal pleading standards that pertain to this matter, defendant's counterclaims are nonetheless insufficient.

Eastland's counterclaims allege that plaintiff (1) breached its fiduciary duty to Eastland by communicating with Eastland's surety co-defendant in the underlying matter in a manner that prejudiced Eastland, (2) committed malpractice by pursuing a litigation strategy rather than choosing to attempt to remove the matter to arbitration, and that (3) "but for" such breaches Eastland incurred unnecessary legal fees, suffered certain business losses and would have achieved a "significantly better financial outcome".

As stated by the preceding authorities, irrespective of any alleged negligence by an attorney, a claim for malpractice does not lie unless the client pleads that in the absence of malpractice on the part of the law firm the client would have experienced a better outcome in the underlying action. See Bender Burrows & Rosenthal LLP v Simon, 65 AD3d 499 (1st Dept 2009). Neither Eastland's breach of fiduciary duty and malpractice counterclaims is sufficiently pled as each omits any allegation that but for the law firm's breaches, Eastland would

have been successful on the merits of the underlying action, or that it would have achieved a more favorable outcome in such action. In fact, Eastland alleges that it fired plaintiff law firm because it disagreed with the law firm's strategy, as was its right. "[A] purported malpractice claim that amounts only to a client's criticism of counsel's strategy may be dismissed as insufficient". Palazzolo v Herrick, Feinstein LLP, 298 AD2d 372 (2d Dept 2002). Moreover, that Eastland suffered "business" or "financial losses" is not tantamount to a claim that but for its attorney's negligence it would have achieved success on the merits of the underlying action.

Eastland's second counterclaim is also denominated as one for breach of contract. A breach of contract claim is viable against an attorney where there is a promise to achieve a particular result separate from the breach of general professional standards in his or her field (Sarasota, Inc. V Kurzman & Eisenberg, LLP, 228 AD3d 237 [1st Dept 2006]). On the other hand, a breach of contract claim, premised on an attorney's failure to exercise due care to abide by general profession standards, is considered a redundant pleading of a dismissed malpractice claim, and is subject to dismissal (Senise v Mackasek, 227 AD2d 184 [1st Dept 1996]).

Here, Eastland's counterclaim alleges that: "As a result, Eastland lacked sufficient truthful and correct advice, entered

into dangerous and disastrous litigation rather than arbitration with unnecessary attorney fees and was injured thereby." This counterclaim fails because it does not set forth any allegation that the law firm breached a promise to achieve a specific or assured result (Goldberg v Moskowitz, 262 AD2d 56 [1st Dept 1999]).

Accordingly, it is

ORDERED that the plaintiff's motion to dismiss defendant's counterclaims is GRANTED and the counterclaims are hereby DISMISSED; and it is further

ORDERED that the parties are directed to appear at a preliminary conference on December 6, 2011, at 9:30 A.M, in IAS Part 59, Room 103, 71 Thomas Street, New York, NY 10013.

This is the decision and order of the court.

Dated: November 7, 2011 ENTER:

DEBRA A. JAMES J.S.C.