Depetris & Bachrach, LLP v Srour
2011 NY Slip Op 34022(U)
June 20, 2011
Supreme Court, New York County
Docket Number: 111194/2008E
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN PART 12

Justice

Index Number : 111194/2008 E
DEPETRIS & BACHRACH, LLP
vs.
SROUR, CLAUDIA
SEQUENCE NUMBER : 010
DEFAULT JUDGMENT

INDEX NO. 111194/2008 E

MOTION DATE

MOTION SEQ. NO. 010

MOTION CAL. NO.

his 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

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

CC 8/24/11 2:15pm

Dated: 6/20/11

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

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

----------X

DEPETRIS & BACHRACH, LLP,
Plaintiff,

Index Number 111194/2008E
Mot. Seq. No. 010, 011

against

CLAUDIA SROUR, CHARLES B. MANUEL, JR., SHIBOLETH LLP, EZEQUIEL NASSER and JACQUES NASSER,
Defendants.

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CLAUDIA SROUR,
Counterclaim-Plaintiff,

against

DEPETRIS & BACHRACH, LLP, and MARION BACHRACH,
Counterclaim-Defendants.

----------X **DECISION AND ORDER**

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E-filed papers considered in review of this motion for a default judgment:

	Papers	**Efile Document Number**
Seq. 010	Notice of Motion, Affirmation & Exhibits	140 - 141-3
	Affidavit of Service	142
	Affidavit in Opposition, Exhibits	143 - 143-6
	Reply Affirmation	149
Seq. 011	Notice of Motion, Affidavit, Exhibits	145 - 147-2
	Memorandum of Law in Support	148
	Response in Opposition	150
	Reply Affidavit, Memorandum of Law	151, 152

PAUL G. FEINMAN, J.:

Plaintiff law firm DePetris & Bachrach (D&B) seeks to recover legal fees. By decision and order dated August 18, 2010 and entered August 19, 2010, this court denied as academic a motion to dismiss the counterclaim filed by the plaintiff counterclaim-defendant D&B and Marion Bachrach, Esq., a partner and member of the D&B law firm. The court found the motion was rendered academic because defendant counterclaim-plaintiff Claudia Srour had filed an amended answer and counterclaim. Srour's amended answer and counterclaim alleges malpractice, breach of fiduciary duty, breach of contract, fraud in the inducement, and punitive damages against both D&B and Bachrach (Doc. 132 [Amended Ans. & Countercl.]).
The court's August 18th order provided that it was "without prejudice to plaintiff filing a motion to dismiss the amended counterclaim within 20 days of entry of this order." (Doc. 139). The court did not direct the parties to serve notice of entry or run the deadline for filing a renewed motion to dismiss from the date of service of notice of entry inasmuch as the court's short form order was made in open court on the oral argument date. Nor did the order address how long D&B and Bachrach would have to answer or reply to the amended counterclaim in the absence of a renewed motion to dismiss.

In motion sequence 010, Srour moves for a default judgment pursuant to CPLR 3215 against D&B and Bachrach based on their failure to answer her amended counterclaim. This motion is opposed. In motion sequence 011, D&B and Bachrach move to dismiss the counterclaims in their entirety pursuant to CPLR 3211 (a) (7). For the reasons stated below, the motion for a default judgment is denied, and the motion to dismiss the counterclaims in their entirety is granted in part and otherwise denied.

Motion Sequence No. 010

There is a strong public policy that matters be disposed of on the merits in the absence of real prejudice to plaintiff (*Stephenson v Hotel Empl. and Rest. Empl. Union Local 100 of AFL-CIO*, 293 AD2d 324, 324 [1st Dept 2002]; *Lirit v S.H. Laufer Vision World, Inc.*, 84 AD2d 704 [1st Dept 1981]). Here, counterclaim-defendants sufficiently show that they have meritorious defenses to the counterclaims. The record establishes that within days of the August 18, 2010 court appearance, counsel for D&B and Bachrach, Andrew Kowlowitz, Esq., was on trial and requested from Srour's attorney a "brief" extension of time to answer, as memorialized in email correspondence made part of the motion record. Without being drawn into the back and forth by both sides about the lack of courtesies extended from one side to the other, it suffices to say that it was clear that D&B and Bachrach did not intentionally default and were still of the view that the counterclaim lacks merit. Certainly, it cannot be said that they stood by "idly, willfully and persistently, while the action proceeded to judgment and enforcement proceedings" (*see Wilf v Halpern*, 234 AD2d 154, 154 [1st Dept 1996] ["An intentional default is ipso facto inexcusable, and should not be vacated."]). While the motion papers also sharply dispute whether the time in which counterclaim-defendants were to file their answer was ever triggered due to the fact that there was no notice of entry served, the court need not resolve this procedural point. The issues raised by the amended counterclaim should be resolved on their merits. Contrary to Srour's argument, there is no real prejudice to her in allowing this answer/reply to her amended counterclaim, as the position of D&B and Bachrach has been known to her throughout the litigation. Indeed, some of the delay in this case was brought about by her own pre-answer motion to dismiss the complaint for lack of personal jurisdiction. She is hard-pressed to now complain that the other side has made motions to dismiss her counterclaim, thus delaying

discovery. Simply put, in the interest of justice, the motion for a judgment on default is denied (*see Rodgers v 66 E. Tremont Heights Hous. Dev. Fund Corp.* 69 AD3d 510, 511 [1st Dept 2010]) as it has always been clear in this vociferously contested litigation that no party was defaulting and that there are defenses to the alleged malpractice counterclaims.

Motion Sequence No. 011

In their notice of motion, D&B and Bachrach move to dismiss the amended counterclaim with prejudice on the ground that it fails to state a cause of action pursuant to CPLR 3211 (a) (7). Although the supporting affidavits and memorandum of law filed by D&B and Bachrach discuss whether the counterclaim should be dismissed on other grounds (i.e., a defense found in documentary evidence and collateral estoppel), the notice of motion does not reference these grounds nor the relevant subdivisions of CPLR 3211(a), that is subdivisions (1) and (5). As the practice commentaries for CPLR 2214 explain,

> The notice of motion will specify the relief the movant is seeking, and, unlike practice under the old Civil Practice Act, the notice of motion must also specifiy the grounds for the relief. In fact, 2214 (a) got into the CPLR just as the Advisory Committee originally planned it. *See* 2d Rep. Leg. Doc. (1958), No. 13, p. 184 (noting that under prior law it was sufficient if the grounds for relief were contained in the supporting papers rather than in the notice of motion).

(Connors, Practice Commentary, McKinney's Cons Laws of NY, Book 7B, CPLR C2214:3). Thus, on its face the notice of motion does not comply with CPLR 2214(a) by fully identifying the grounds for the relief sought and the court will only address the arguments made pursuant to CPLR 3211 (a) (7).

The counterclaim alleges that on about April 7, 2008, Srour, then employed by Merrill Lynch, was asked by that company to sign an affidavit containing untrue statements as part of a

lawsuit the company had commenced against certain of Srour's clients (Doc. 132 [Amended Ans. & Countercl.] ¶¶ 127-129).[1] Not wanting to perjure herself, she sought legal help, being "specifically" interested in, "among other things," her "employment with Merrill Lynch and participation in the lawsuit between Merrill Lynch and her clients" (Doc. 132 ¶ 131).

On April 14, 2008, she met with Bachrach, explained that she wanted advice and representation as to possible retaliation for her refusal to sign the affidavit, and advice concerning her rights and obligations under her employment contract as well as to the possibility of whistleblower claims (Doc. 132 ¶ 132). She wanted Merrill Lynch to honor her employment contract and if it did not do so, then she wanted D&B to defend her from any retaliatory actions the firm might take (Doc. 132 ¶ 138). She also discussed that she had limited means to pay for the litigation (Doc. 132 ¶ 139). She was assured that D&B could "get Merrill Lynch to pay for her legal fees," including the $25,000 retainer fee (Doc. 132 ¶ 134).[2]

A large part of the counterclaim focuses on the allegedly excessive fees billed to Srour which she argues represents work actually done on behalf of her former clients in their suit with Merrill Lynch. The counterclaim alleges that D&B and Bachrach violated Disciplinary Rule 1-102 (a) (22 NYCRR § 1200.11 [a]) which proscribes charging or collecting an excessive fee (Doc. 132 ¶ 174). In sum it alleges that D&B was solely interested in generating fees and being paid, and when Merrill Lynch would not agree to pay Srour's legal fees, D&B secretly approached the attorney of Srour's clients, the Nassers, who were being sued by Merrill Lynch while, at the same time, advising Srour to provide an affidavit in support of the clients and

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[1]These clients included members of the Nasser family, of whom Ezequiel Nasser is a defendant in the main action in this litigation.

[2]The retainer agreement was signed by Srour on about April 15, 2008 (Doc. 146-6).

against Merrill Lynch (Doc. 132 ¶¶ 144-145).[3] Srour was "shocked" by D&B's attempt to negotiate the fee issue without her permission, and believed that approaching the Nassers to pay her bills could destroy her credibility as an independent and unbiased witness in the litigation between Merrill Lynch and her former clients (Doc. 132 ¶¶ 146-147). Then, in a "desperate move" to force Merrill Lynch to pay Srour's bills, Bachrach drafted a letter which, in its final form sent on May 6, 2008, stated that until Merrill Lynch paid Srour's legal fees, she would not cooperate in its investigation and litigation (Doc. 132 ¶ 156). Two hours after the letter was sent, Srour was fired (Doc. 132 ¶ 156). A week later, on May 15, 2008, Srour terminated D&B's engagement because, according to the counterclaim, Srour realized that she was being used solely to rack up fees and had been given "incompetent and destructive advice" (Doc. 132 ¶ 157). Thereafter, on May 27, 2008, Srour received Bachrach's email demanding $62,964.76 in outstanding legal fees (Doc. 132 ¶ 163).

The counterclaim makes many claims of poor or incorrect legal advice given to Srour, negligence in D&B and Bachrach's failure to explain the issues facing her, and various breaches of ethical and fiduciary duties toward her. It contends that the retainer agreement was vague, and designed to allow the law firm to engage in fraudulent and grossly excessive billing (Doc. 132 ¶ 135). It alleges that the law firm failed to provide any advice about the consequences of cooperating or not cooperating with Merrill Lynch in its investigation of Srour's clients and in the lawsuit (Doc. 132 ¶ 150). It alleges D&B was incompetent in failing to get Merrill Lynch to pay her legal fees, and negligent in failing to bring a whistleblower suit against Merrill Lynch (Doc. 132 ¶ 183). It alleges that D&B breached its ethical and fiduciary duty by approaching the

[3]It is unclear if this refers to a second affidavit. According to D&B's counsel, there is no affidavit by Srour other than the one signed on April 15, 2008 (Memorandum in Reply ¶ 2).

Nassers through their attorney Charles B. Manuel, Jr., Esq., seeking payment for its work (Doc. 132 ¶ 149). It alleges that D&B tailored its legal advice based on who it thought would pay Srour's bills (Doc. 132 ¶ 149). Bachrach also allegedly threatened to disclose Srour's confidential information, threatened in a letter to Manuel, Jr., Esq., to disclose information protected by attorney-client privilege in an effort to receive payment, and revealed to unidentified third parties its detailed invoices, showing the work done in representing Srour (Doc. 132 ¶¶ 164, 189 [h]).

The counterclaim further alleges that after Srour was terminated, Merrill Lynch placed a "permanent, career-ending mark on her employment record," by filing a Form U5 containing charges against her (Doc. 132 ¶¶ 123, 159). Srour then had to undertake the expense of an arbitration with Merrill Lynch to clear the Form U5 (Doc. 132 ¶ 160). The arbitration resulted in an award on about March 24, 2010 which determined that "only the statement that Srour was terminated by Merrill Lynch for failing to cooperate with Merrill Lynch in an internal investigation and related litigation should remain on her Form U5, and that the remaining information should be expunged" (Doc. 132 ¶ 161).

Counterclaim-defendants' motion to dismiss is noticed under CPLR 3211 (a) (7), failure to state a cause of action. In assessing such a motion, the pleading is to be afforded a "liberal construction," the facts as alleged are accepted as true, the (counterclaim)-plaintiff is accorded "every possible favorable inference," and the court determines only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez,* 84 NY2d 83, 87-88 [1994] [citations omitted]; *Wiener v. Lazard Freres & Co.*, 241 AD2d 114, 120 [1st Dept 1998]). Where a motion to dismiss is brought pursuant to CPLR 3211 (a) (7), it will be denied if, "from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action

cognizable at law.'" (*Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 289 [1st Dept 2003], quoting *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]). Allegations consisting of bare legal conclusions or factual claims which are either inherently incredible or clearly contradicted by documentary evidence, are not entitled to such consideration (*Franklin v Winard*, 199 AD2d 220, 220 [1st Dept. 1993]; *see also Maas v Cornell Univ.*, 94 NY2d 87, 91 [1999]).

Legal Malpractice

An action for legal malpractice requires proof of three elements: (1) negligence of the attorney; (2) that the negligence was the proximate cause of the loss sustained, and (3) proof of actual damages. In order to show proximate cause, the client must establish that "but for" the attorney's negligence, she would have prevailed in the matter at issue or would not have sustained any damages (*Levine v Lacher & Lovell-Taylor*, 256 AD2d 147, 149 [1st Dept 1998]). Speculative or conclusory claims of proximate cause will not serve as a basis for legal malpractice (*Murray Hill Invs., Inc. v Parker Chapin Flattau & Klimpl, LLP*, 305 AD2d 228, 229 [1st Dept 2003]).

The first counterclaim sounds in malpractice. It alleges that D&B and Bachrach breached their fiduciary duty toward her and failed to exercise the skill and diligence commonly possessed by lawyers when they advised her to submit an affidavit on behalf of her former clients in litigation between them and Merrill Lynch; recommended that she not cooperate including not sitting for a deposition; failed to advise her about her rights and obligations in her employment agreement; failed to pursue a whistleblower claim; advised her to say she would not cooperate until Merrill Lynch paid her bills; revealed attorney-client privileged information in the billing; failed to advise Srour that they sought to get her former clients to pay her bills, and

potentially destroying her credibility as an independent witness (Doc. 132 ¶ 181-182).

D&B and Bachrach provide an affidavit by their attorney Andrew Kowlowitz, Esq., who avers he is "fully familiar with the facts and circumstances" and documentary evidence in support of their motion. They argue the counterclaim's allegations distort or overlook facts, are at some points incorrect, and generally fail to assert a claim of malpractice.

First, Kowlowitz provides a copy of the April 7, 2008, pleadings by Merrill Lynch which commenced its litigation in State Supreme Court against several defendants who were Srour's former clients including members of the Nasser family (Doc. 146-3 [*Merrill Lynch, Pierce, Fenner & Smith Inc., et al. v Global Strat, Inc., et al.*, Index No. 601012/2008]; see Counterclaim Doc. 132 ¶ 129). They provide a letter also dated April 7, 2008, from Merrill Lynch which placed Srour on paid administrative leave and directed her to have no contact with any of her clients (Doc. 146-4). Expanding somewhat on the counterclaim allegation, D&B explains through the averments of its attorney, that Srour was placed on leave after she refused to sign the Merrill Lynch affidavit presented to her in support of its litigation against Srour's clients (Doc. 146 [Kowlowitz Aff.] ¶ 13). Thus, she had already been placed on leave when she approached D&B.

The April 15, 2008 retainer agreement between D&B and Srour indicates that D&B had been retained "to represent [Srour] in connection with a lawsuit filed in New York State Supreme Court" (Doc. 146-6). Counterclaim-defendants strenuously argue through the affidavit of their attorney, that the allegations in the counterclaim misrepresent the scope of the parties' retainer agreement. They argue that they agreed to represent Srour in connection with her role as a prospective witness in the Merrill Lynch litigation but, as indicated in the wording of the retainer agreement, *not* retained to pursue employment claims by Srour against Merrill Lynch

(Doc. 146 [Kowlowitz Aff.] ¶ 42). As averred by D&B's counsel, the immediate issue for Srour was that the Nassers wanted to take her deposition to support their litigation, and D&B obtained an agreement from the Nassers' attorney to withdraw that request (Doc. 146 [Kowlowitz Aff.] ¶ 16). Srour instead signed an affidavit dated April 15, 2008, notarized by Bachrach, in which she avers that she had been the financial advisor for seven corporations and mutual funds, two of which were mutual funds managed by Ezequiel and Raymond Nasser, that it was her belief there had never been any personal guarantees made by and for the seven corporations, and that she had not been requested by Merrill Lynch to obtain personal guaranties or pledges (Doc. 146-5 ¶¶ 1-7). The affidavit also addresses a particular form signed by her clients which Merrill Lynch was arguing created a guarantee or pledge; Srour stated that the form did not, in her understanding, create any kind of personal guarantee and that she had not advised her clients otherwise (Doc. 146-5 ¶¶ 8- 12). When she discovered that Merrill Lynch was using this form to create a guarantee and a cross-collateralization, she contacted someone in Merrill Lynch's Compliance Department indicating that she had not been advising her clients as to this purpose of the form and was concerned that her clients might accuse her of misleading them (Doc. 146-5 ¶ 12).

According to D&B's attorney, shortly afterwards, Merrill Lynch sought to interview Srour (Doc. 146 [Kowlowitz Aff.] ¶ 16). D&B's attorney avers that because Srour was incurring legal fees both as a result of Merrill Lynch's demands and those of the Nassers, with Srour's permission the law firm requested that Merrill Lynch pay her fees as a prospective witness against the Nassers, pursuant to the terms of her employment agreement, and requested that the Nassers assume responsibility for Srour's ongoing fees since the legal fees were the result of "her being drawn into the litigation on their behalf" (Doc. 146 [Kowlowitz Aff.] ¶ 17). D&B submits a copy of an email from Srour to Bachrach, dated April 27, 2008, in which Srour states

that, "If they [Merrill Lynch] agree to pay my legal fees, I will be willing to talk to them" (Doc. 146-8). There is no documentary evidence submitted to show that Srour was aware and approved of the request that the Nassers pay her ongoing costs.

The documentary evidence shows that Bachrach and a Merrill Lynch representative were in ongoing discussion concerning what D&B termed Merrill Lynch's obligation under Sruour's employment agreement to advance her legal fees in its civil litigation, and in a letter dated May 6, 2008, Bachrach noted that by insisting on interviewing Srour concerning the accounts at issue in the pending litigation without agreeing to advance the fees, the company was acting unreasonably, suggesting bad faith and retaliatory action (Doc. 151, Ex. A [Bachrach letter to Amery, May 6, 2008]). Notably, the contents of this letter were given the "ok" by Srour (Doc. 151-1 [Ex. B, C]).

A week later, on May 22, 2008, Srour emailed Bachrach, requesting that D&B stop representing her, stating only that, "As you know, I was fired from Merrill Lynch last week. Due to this fact, I am no longer in a position to afford your fees." (Doc. 146-9).[4] Thereafter, on May 27, 2008, D&B issued its detailed invoice for legal fees and disbursements owed in the amount of $62,964.76 (Doc. 146-7). The annotated billing describes work including addressing the issue of advancement of legal fees; issues of constructive and retaliatory discharge; her employment agreement; ongoing review of the Merrill Lynch litigation papers and court documents; several discussions with attorney Manuel, Jr., including whether his clients' papers would include a request for Srour's deposition; a possible change in strategy with Merrill Lynch on April 28, 2008; and conversations on May 7, 2008 with and about Srour and her termination.

On June 11, 2008, Srour responded in "astonishment" to the invoice, noting that she had

[4]This statement differs markedly from the allegation in the counterclaim that she terminated her relationship with D&B when she realized she was being used solely to rack up fees and had been given "incompetent and destructive advice" (Doc. 132 ¶ 157).

advised the firm when she retained it that she was "practically unemployed" and that the bills could not exceed the retainer amount, a statement contradicted by the signed retainer agreement which makes no mention of a fee cap (Doc. 146-10; *cf.* Doc. 146-6 [Retainer]). Srour's letter states that she was particularly upset that she was being billed "for various works I did not require and I was not advised of." It also states that she will "have to hire another lawyer to defend [her] case against Merrill Lynch, because [she] was fired for cause," and she "will not have the means to pay for the services that are really necessary for me to be able to work again. I hope you understand my position." (Doc. 146-10). Bachrach responded by letter on June 17, 2008 (Doc. 147). She summarized in a footnote the various aspects of the work D&B performed while cooperating with the Nassers but at the same time protecting her interests, including an exploration of "legal options available" in the event Srour ultimately refused Merrill Lynch's demand for an interview, such as attempting to avoid her termination until after she had received her outstanding commissions. Her letter also spelled out the firm's understanding, which Srour was allegedly "well aware" of, that the Nassers had agreed to be primarily responsible for her legal fees because she had chosen to cooperate with them against Merrill Lynch, and indicated that D&B was forwarding a copy of the invoice to the Nassers' attorney (Doc. 147).

D&B commenced its litigation seeking attorney's fees in August 2008. At some point thereafter, Srour undertook an arbitration against Merrill Lynch, conducted through the Financial Industry Regulatory Authority (FINRA) (Doc. 147-1). According to the incomplete arbitration award provided here,[5] Srour had sought millions in compensatory and punitive damages as well as expungement of the Merrill Lynch Form U5 which stated in its "Termination Comment," revised on three separate dates, that she was terminated on May 6, 2008, for "failing to cooperate

[5]According to the attorney for the counterclaim-defendants, after many requests, Srour provided a copy of the award but without the first page, "which presumably sets forth the nature of the allegations and claims pertaining to Srour's employment dispute with Merrill Lynch" (Doc. 146 [Kowlowitz Aff.] ¶ 7).

in an internal investigation and related litigation with clients, providing incorrect information to office management concerning value of assets available to secure outstanding positions in the clients' accounts, and exposing the firm to risks and losses in the accounts." (Doc. 147-1, p. 2). The Panel issued its award on March 23, 2010, and determined that Srour should be awarded $25,000 in compensatory damages "for indemnity loss," and that the Form U5's "termination comment" was to be partially expunged, leaving only the description of her discharge involving the "fail[ure] to cooperate in an internal investigation and related litigation with clients."

Even if the court were to overlook the failure of the movants to identify subdivision (1) of CPLR 3211(a) as one of the grounds for dismissal of the counterclaim in their notice of motion, here the documentary evidence does not, contrary to counterclaim defendants' arguments, resolve all issues such that dismissal of the first cause of action sounding in legal malpractice is warranted. While the evidence shows that Srour retained D&B only after she refused to sign the Merrill Lynch affidavit, her allegation that she was terminated because D&B negligently counseled her not to cooperate thereafter is not disproved and is sufficient to allege here that "but for" D&B's negligence, she would have been retained. This is so simply because there is no documentary evidence that contradicts the counterclaim's allegations.

Many of the "background" facts are provided only by D&B's attorney's affidavit and simply are insufficient to disprove the allegations of the counterclaim which must be deemed as true (*Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 [1998]). Despite Kowlowitz's averment that he is fully familiar with the facts, without documentation showing, for instance, that the Nassers' attorney introduced her to D&B, that Srour retained D&B because the Nassers wanted her deposition, and that the Nassers agreed to pay her ongoing litigation expenses with the initial knowledge and approval of Srour, or that Srour wanted to cooperate with Merrill Lynch but was dissuaded (Doc. 148, p. 4 *et seq.* [Memo of Law in Supp. of Mot. to Dismiss]), dismissal of this

cause of action should not be granted. For these reasons, the branch of the motion seeking to dismiss the first cause of action of the counterclaim is denied.

Breach of Fiduciary Duty

The elements of a cause of action for breach of fiduciary duty are "the existence of a fiduciary duty, misconduct by the defendant, and damages directly caused by the defendant's misconduct (*Kurtzman v Bergstol*, 40 AD3d 588, 590 (2d Dept. 2007). The second counterclaim repeats the allegations recited in alleging the claim for malpractice but focuses on D&B's alleged revelation of confidential matters and its seeking payment without Srour's approval from the Nassers (Doc. 132 ¶ 189; Doc. 150, p. 22 [Response in Opp. to Mot.]). The allegation concerning revelations of confidential matters is not explicated and fails to adhere to the pleading standard set forth in CPLR 3016 (b). A claim of breach of fiduciary duty is redundant when premised on the same facts and seeks the identical relief sought in a legal malpractice cause of action (*see Weil Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept. 2004]). Therefore, the branch of the motion which seeks dismissal of the second counterclaim is granted.

Breach of Contract

To state a claim for breach of contract, a party must establish the existence of a valid contract, the plaintiff's performance of its obligations, the defendant's breach, and damages resulting from the breach (*see Morgan Stanley Altabridge Ltd. v ESE Funding SPC Ltd.*, 60 AD3d 497, 497 [1st Dept. 2009]). Here, the allegations pertaining to the third counterclaim are redundant of the claims for malpractice. It is accordingly dismissed (*see Schulte Roth & Zabel, LLP v Kassover*, 80 AD3d 500, 501 [1st Dept. 2011]).

Fraud in the Inducement

The elements of a cause of action alleging fraud in the inducement are representation of a

material existing fact, falsity, scienter, reliance, and injury (*Channel Master Corp. v Aluminum Ltd. Sales, Inc.*, 4 NY2d 403, 407 [1958]; *Urstadt Biddle Props., Inc. v Excelsior Realty Corp.*, 65 AD3d 1135, 1136-1137 [2d Dept 2009]). The circumstances constituting the fraud must be stated in detail (CPLR 3016 [b]). The fourth counterclaim alleges that counterclaim-defendants entered into the agreement with the intent of obtaining massive fees from Merrill Lynch or Srour's former clients; promised they would not charge more than $25,000 without first notifying her, would get Merrill Lynch to pay her fees, and would give her advice as to her rights and obligations concerning her employment agreement, and that Srour relied on these promises and was induced to enter into the retainer agreement. As noted above, the retainer agreement lacks any statement concerning a cap on fees. In fact, it clearly states that Srour "may be called upon to make additional advances to be applied toward legal fees and disbursements upon exhaustion of this retainer" (Doc. 146-6 [Retainer, p. 1). The remainder of these claims is duplicative of the malpractice claim and therefore the branch of the motion to dismiss the fourth counterclaim is granted (*see Carl v Cohen*, 55 AD3d 478, 479 [1st Dept. 2008]).

Punitive Damages

The fifth cause of action claiming punitive damages must also be dismissed. Punitive damages is not a separate cause of action but merely an element of the total claim for damages (*Mastro Jewelry Corp. v St. Paul Fire and Marine Ins. Co.*, 70 AD2d 854, 854 [1st Dept. 1979]). Punitive damages are available when the conduct associated with the breach of contract is first actionable as an independent tort for which compensatory damages are ordinarily available (*Rocanova v Equitable Life Assur. Soc'y of the U.S.*, 83 NY2d 603, 613 [1994]). The standard is that a private party seeking to recover punitive damages must demonstrate "egregious tortious conduct" and that such conduct was part of a pattern of similar conduct directed at the public generally (*Id.*).

For the reasons set forth above, it is

ORDERED that the motion for a default judgment (Motion Seq. 010) is denied; and it is further

ORDERED that the motion to dismiss the amended counterclaim is granted to the extent that the second, third, fourth, and fifth causes of action in the counterclaim are dismissed for failure to state a cause of action; and it is further

ORDERED that counterclaim-defendants are directed to serve their counterclaim answer to the remaining first counterclaim within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a discovery conference in Room 212, 60 Centre Street, on August 24, 2011, at 2:15 p.m.

This constitutes the decision and order of the court.

Dated: June 20, 2011
New York, New York

Paul G. Feinman
J.S.C.