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

PRESENT: JUDITH J. GISCHE **PART** 10
Justice

Sun Graphics

- v -

Levy, Davis + Mahee LLP.

INDEX NO. 108339/10

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read 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

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

NYS SUPREME COURT
RECEIVED
APR 05 2011
MOTION SUPPORT OFFICE

Dated: 4/1/11

HON. JUDITH J. GISCHE *J.S.C.*

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

----------x

SUN GRAPHICS CORP., STEPHEN M. LEE, and ADRIANA SANTI,

Plaintiffs,

-against-

LEVY DAVIS & MAHER, LLP, and MALCOLM H. DAVIS,

Defendants.

----------x

DECISION/ ORDER
Index No.: 108339/10
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Defs' n/m (3211) w/MHD, JBB affids, exhs.	1
Pltfs' opp w/SML, AS affids, exhs.	2
Defs' reply w/JBB affid.	3

Upon the foregoing papers, the decision and order of the court is as follows:

Defendants bring this pre-answer motion to dismiss the complaint based upon: (1) the expiration of the statute of limitations (CPLR § 3211[a][5]); (2) res judicata and/or collateral estoppel (CPLR § 3211[a][5]); (3) failure to state a cause of action (CPLR § 3211[a][7]); and (4) a defense founded on documentary evidence (CPLR § 3211[a][1]). Plaintiffs oppose the motion.

Facts Presented and Arguments Considered

Plaintiffs, Stephen M. Lee ("Lee") and Adriana Santi ("Santi"), were directors and

officers of corporate plaintiff, Sun Graphics Corp. ("Sun"). In 2002, plaintiffs retained defendants, Levy Davis and Maher, LLP ("LDM"), a law firm and one of its partners, Malcolm H. Davis ("Davis"), (collectively "defendants") to represent them in a "broad variety of matters." Defendants assumed the role of Sun's "general counsel" in 2003 and continued to represent "Sun" even after the affairs of Sun were winding down. The complaint alleges that the matters on which defendants represented plaintiffs included the "duty to insulate" Sun's officers and directors from personal responsibility for Sun's obligations not otherwise agreed to, as well as "a duty in connection with winding down Sun's business to collect monies owed to Plaintiff Sun by third parties . . . and money due to Plaintiff Lee by Access Die and Display, LLC." (Complaint ¶7).

The complaint further alleges that defendants' representation of plaintiffs was "continuous until at least the present." (Complaint ¶8). Plaintiffs allege that defendants' representation fell below the ordinary and reasonable skill commonly possessed by members of the legal profession and that defendants committed "fraud, collusion, malicious acts, and other special circumstances" against plaintiffs. (Complaint ¶¶9,11). They allege that defendants' actions were "negligent, reckless and unskillful." (Complaint ¶13).

The complaint also alleges that, based upon defendants' advice, Sun agreed to entry of a money judgment against the company in an action filed by non-party, Kenneth De Vos ("De Vos Action 1"). (Complaint ¶14). Thereafter, in a separately commenced action before the United States District Court, EDNY, Lee and Santi were found responsible for the money judgment in their individual capacities and were ordered to pay the judgment that had been entered against Sun, based upon that court

piercing the corporate veil (De Vos v. Lee (docket # 07-CV-804) ("De Vos Action 2"). According to plaintiffs, the decision to pierce the corporate veil was based upon improper payments, "some of which were made from the account Defendants controlled, and did not properly document corporate events." (Complaint ¶16). Plaintiffs also allege, *inter alia*, that defendants wrongfully failed to use reasonable efforts to collect money due to Sun and Lee; wrongfully refused to represent plaintiffs in De Vos Action 2; and charged them excessive and unreasonable legal fees.

Plaintiffs set forth eleven causes of action in the complaint, all relying on the common set of facts plead, those claims are for: breach of contract ("1st COA"); breach of fiduciary duty ("2nd COA"); fraud ("3rd COA"); intentional misrepresentation ("4th COA"); negligent misrepresentation ("5th COA"); legal malpractice ("6th COA"); unjust enrichment ("7th COA"); accounting and constructive trust ("8th COA"); deceptive business practices ("9th COA"); misconduct by attorneys in violation of Judiciary Law §487 ("10th COA"); and conversion ("11th COA").

All of the underlying causes of action are based upon allegedly improper advice and services that defendants rendered in their capacity as attorneys. Defendants argue plaintiffs' 11 causes of action are all essentially malpractice claims that are barred by the applicable three-year statute of limitations.

Discussion

In the context of a motion to dismiss pursuant to CPLR § 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true, and provide the plaintiffs with the benefit of every possible inference. Goshen v. Mutual

Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); Leon v. Martinez, 84 N.Y.2d 83 (1994); Morone v. Morone, 50 N.Y.2d 481 (1980); Beattie v. Brown & Wood, 243 A.D.2d 395 (1st Dept. 1997). In deciding defendants' motion to dismiss, the court must determine whether the allegations support the causes of action asserted (Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 634 [1976]) and whether they fit within any cognizable legal theory (Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561 [2005]).

Where a motion to dismiss is based upon the documentary evidence, such evidence must definitively dispose of plaintiffs' claims. Bronxville Knolls Inc. v. Webster Town Center Partnership, 221 A.D.2d 248 (1st Dept. 1995).

Breach of Contract, Breach of Fiduciary Duty, Negligent Misrepresentation

Claims for breach of fiduciary duty that rely upon the same facts and circumstances as malpractice are considered duplicative. Rock City Sound, Inc. v. Bashian & Farber, LLP, 74 A.D.3d 1168 (2d Dept. 2010). Likewise, breach of contract claims, that are based upon the quality of attorney services (as opposed to a promise to perform), are also considered duplicative of malpractice claims, and cannot stand individually. Reidy v. Martin, 77 A.D.3d 903 (2d Dept. 2010); Sarasota, Inc. v. Kurzman & Eisenberg, LLP, 28 A.D.3d 237 (1st Dept. 2006). Malpractice is professional negligence; therefore, a cause of action asserted for negligence is also a duplication of a malpractice claim. Brooks v. Lewin, 21 A.D.3d 731 (1st Dept. 2005). The 1st COA, 2nd COA, 5th COA and 6th COA are all essentially duplicate causes of action that sound in legal malpractice. The causes of action are primarily based upon plaintiffs' claims that defendants failed to take measures to insulate them from personal liability in

connection with De Vos Action 2. They also all consist of general allegations that defendants failed to collect monies due to Sun and Lee. Accordingly, plaintiffs' 1st, 2nd, and 5th COA's are hereby dismissed as duplicative of the 6th COA for legal malpractice.

Claims of fraud and violations of the judiciary law, however, stand independently of a collateral malpractice claim. Good Old Days Tavern, Inc. V. Zwirn, 267 AD2d 147 (1st Dept. 1999).

Fraud / Intentional Misrepresentation

To state a cause of action for intentional misrepresentation or fraud, plaintiffs must show: (1) that defendants intentionally made a misrepresentation or material omission of fact; (2) that the misrepresentation or material omission of fact was false or known to be false to defendants; (3) plaintiffs' reliance; and (4) that the misrepresentation resulted in some injury to plaintiffs. Held v. Kaufman, 91 N.Y.2d 425 (2d Dept. 1998). CPLR § 3016(b) provides, "where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail."

Here, plaintiffs generally allege that false statements were made by defendants to induce plaintiffs to pay them. Plaintiffs' 3rd COA for fraud fails because it is not plead with the requisite specificity. CPLR § 3016(b).

Judiciary Law §487

New York Judiciary Law § 487 provides:

An attorney or counselor who:

> 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,
>
> 2. Wilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,
>
> Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

Section 487 permits a civil action to be maintained by any party who is injured by an attorney's intentional deceit or collusion on a court or on any party to litigation, and it provides for treble damages. Amalfitano v. Rosenberg, 533 F.3d 117 (2d Cir. 2008). While a "chronic and extreme pattern" of delinquency is a violation of Section 487 (*see* Galland v. Kossoff, 824 N.Y.S.2d 630, 631 (1st Dept. 2006); Solow Management Corp. v. Seltzer, 795 N.Y.S.2d 448, 448 (1st Dept. 2005); Havell v. Islam, 739 N.Y.S.2d 371, 372 (1st Dept. 2002), a "single intentionally deceitful or collusive act" has also been held as sufficient (*see* NYAT. Operating Corp. v. Jackson, Lewis, Schnitzler & Krupman, 191 Misc.2d 80 (N.Y.Sup. 2002) (single instance of lying under oath). Amalfitano v. Rosenberg, *supra* at 123-24.

The 10th COA for violation of Judiciary Law § 487 is dismissed because the general allegations of wrongful or deceitful behavior did not occur during a pending judicial proceeding in which plaintiffs were a party . Manna Fuel Oil Corp. v. Ades, 14 A.D.3d 666 (2d Dept. 2005); Bankers Trust Co. v. Cerrato, Sweeney, Cohn, Stahl & Vaccaro, 187 A.D.2d 384 (1st Dept. 1992).

Legal Malpractice

A claim for legal malpractice is subject to a three-year statute of limitations. CPLR § 214(6). A legal malpractice claim accrues when the malpractice is committed (Glamm v. Allen, 57 N.Y.2d 87 [1982]), not when the client discovers it. Under the doctrine of "continuous representation," however, a client cannot reasonably be expected to assess the quality of the professional service while it is still in progress. *See* Greene v. Greene, 56 N.Y.2d 86, 94-5 (1982). The doctrine is "generally limited to the course of representation concerning a specific legal matter," and thus is "not applicable to a client's . . . continuing general relationship with a lawyer . . . involving only routine contact for miscellaneous legal representation . . . unrelated to the matter upon which the allegations of malpractice are predicated." West Village Associates Ltd. Partnership v. Balber Pickard Battistoni, 49 A.D.3d 270 (1st Dept. 2008) *quoting* Shumsky v. Eisenstein, 96 N.Y.2d 164, 168 (2001). The pleading must assert more than simply an extended general relationship between the professional and client, and the facts are required to demonstrate continued representation in the specific matter directly under dispute. West Village Associates Ltd. Partnership v. Balber Pickard Battistoni, *supra* at 270.

It is undisputed that defendants represented the plaintiffs in De Vos Action 1, which was commenced on December 20, 2005, at which time plaintiffs consented to a judgment of liability in Kenneth De Vos's favor. On June 28, 2006, defendants notified plaintiffs that it would not be representing plaintiffs in De Vos Action 2. The letter from defendants states, in relevant part, as follows:

> Once the judgment awarded to De Vos was entered into court records, the case of Kenneth De Vos v. Sun Graphics Corp. was closed by the court and our representation of Sun in that matter similarly ended. De Vos has now opened a supplementary proceeding . . . Since Sun Graphics Corporation is defunct and has no assets, you have advised us that there are no available funds to retain counsel and thus Sun will not be retaining our firm in this supplementary proceeding.

De Vos Action 2 was, thereafter, commenced on February 23, 2007, in which the individual plaintiffs appeared *pro se.*

Although plaintiffs generally allege that defendants' representation of plaintiffs was "continuous until at least the present," and that they continued to represent plaintiffs "in many other matters pertinent to this lawsuit, including giving us legal advice in connection with [the De Vos] litigation," this is not sufficient to demonstrate that defendants continued to represent plaintiffs in either of the De Vos Actions, the matters directly under dispute, particularly in light of the correspondence exchanged.

Plaintiffs do not state what legal advice was given after June 28, 2006 (the date that defendants affirmatively stated that they would no longer be representing plaintiffs in the De Vos litigation) and/or how the purported legal advice given to plaintiffs related to the De Vos litigations. Additionally, all of the documentary evidence submitted by plaintiffs to support their argument of continuous representation is dated prior to June 28, 2006.

Plaintiffs have, therefore, failed to state a cause of action for legal malpractice against defendants. Accordingly, defendants' motion to dismiss the 6th COA is granted.

Conversion

In order to establish conversion, the plaintiffs must establish that they owned an identifiable piece of property and that defendants exercised dominion over or interfered with the property in defiance of plaintiffs' rights. *See* State v. Seventh Regiment Fund, Inc., 98 N.Y.2d 249 (2002); Ahles v. Aztec Enterprises, Inc., 120 A.D.2d 903 (1986). Conversion can be established even where one comes into lawful possession of the property, but then wrongfully detains or uses the property. A refusal to return the property can form the basis for a claim of conversion. Employers' Fire Ins. Co. v. Cotten, 245 N.Y. 102 (1927).

Here, plaintiffs allege that "Defendants wrongfully converted sums of money rightfully belonging to Plaintiffs." This is an apparent reference to the legal fees they paid. In any event, this claim is indistinguishable from plaintiffs' contract and quasi contract claims which the court has dismissed (*see supra* and *infra*). Plaintiffs' complaint does not further assert any facts tending to show that defendants wrongfully converted plaintiffs' money. Accordingly, plaintiffs' 11th COA is dismissed.

Unjust Enrichment and Accounting/Constructive Trust

To support a claim for unjust enrichment, plaintiffs must state facts tending to show that (1) defendants were enriched (2) at plaintiffs' expense, and (3) that it is against equity and good conscience to permit the defendants to retain what is sought to be recovered. Paramount Film Distrib. Corp. v. State of New York, 30 N.Y.2d 415, 421 *cert. den.* 414 U.S. 829 (1973).

A constructive trust is an equitable remedy in which four elements must be

established: (1) a confidential or fiduciary relationship; (2) a promise, express or implied; (3) a transfer in reliance thereon; *and* (4) *unjust enrichment*. Crown Realty Co. v. Crown Heights Jewish Community Council, 175 A.D.2d 151 (2d Dept. 1991) (emphasis added).

Plaintiffs generally allege that defendants were unjustly enriched. It appears from the complaint that they are referring to the attorneys' fees paid to defendants, which they allege were excessive and unreasonable. Here, plaintiffs do not allege that they paid money for services that were never rendered. Rather, they allege that they were overcharged by defendants. Even accepting all of plaintiffs' allegations as true, they do not satisfy the elements of an unjust enrichment claim. Accordingly, plaintiffs' 7th COA for unjust enrichment and 8th COA for an accounting/constructive trust are dismissed.

Deceptive Business Practices

The elements of a cause of action under GBL § 349 are (1) a deceptive consumer-oriented act or practice which is misleading in a material respect; and (2) injury resulting from such act. Stutman v. Chemical Bank, 95 N.Y.2d 24, 29 (2000); Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d 20, 25 (1995); Andre Strishak & Associates, P.C. v. Hewlett Packard Co., 300 A.D.2d 608 (2d Dept. 2002). The test is whether such act is "likely to mislead a reasonable consumer acting reasonably under the circumstances." Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, *supra* at 26.

Plaintiffs have not satisfied the threshold test for stating a cause of action under

this section of the General Business Law because plaintiffs have not alleged any act or practice that was misleading in a material way. Plaintiffs have not presented any facts tending to show that they were deceived or misled by defendants' conduct or what their specific damages are or how defendants' alleged representations were deceptive to anyone other than them (i.e., consumers at large). Plaintiffs allege that defendants "assured them that Sun alone would be liable for Sun's obligations." (Complaint ¶17). However, plaintiffs do not set forth how defendants "assured" them that only Sun would be found liable in the De Vos actions.

In fact, plaintiffs include a letter from defendants, dated June 12, 2006, in which defendants state that they will "fight any efforts to hold either or both of you personally responsible for this judgment against Sun." Defendants' efforts to *fight* on plaintiffs' behalf falls short of the statute's requirements of deception or being misleading in a material respect. Accordingly, plaintiffs' 9th COA is dismissed.

Since each cause of action asserted by plaintiffs have been dismissed, defendants' motion for the dismissal of the complaint is granted. The complaint is hereby dismissed.

Conclusion

In accordance with the foregoing,

It is hereby,

ORDERED that the Clerk shall enter judgment in favor of defendants, LEVY

DAVIS & MAHER, LLP, and MALCOLM H. DAVIS, dismissing the complaint against them; and it is further

ORDERED that any relief requested but not specifically addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
April 1, 2011

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.