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

PRESENT: HON. PAUL WOOTEN Justice PART 7

BRILL & MEISEL,

Plaintiff,

- against-

JAMES M. BROWN and HELEN J. ALTMAN,

Defendants.

INDEX NO. 115685/08

MOTION SEQ. NO. 004

The following papers, numbered 1 to 4, were read on this motion by plaintiff for summary judgment, pursuant to CPLR 3212.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits (Memo)	3
Replying Affidavits (Reply Memo)	4

Cross-Motion: ☐ Yes ■ No

Motion sequence numbers 004 and 005 are consolidated for disposition.

In this action the law firm Brill & Meisel (B&M) (plaintiff), seeks $96,281.33 in fees for legal services from James M. Brown and Helen J. Altman (defendants), B&M's former clients.[1] B&M represented defendants for over two years in litigation against their cooperative corporation (Co-op) concerning leaks in defendants' master bedroom. The complaint asserts claims grounded in account stated, breach of contract and unjust enrichment theories. Defendants assert counterclaims grounded in legal malpractice, breach of contract, breach of fiduciary duty, negligence and unjust enrichment.

In Motion Sequence 005, plaintiff moves pursuant to CPLR 3212, for an order granting summary judgment in its favor on the complaint and for dismissal of defendants' affirmative defenses. Plaintiff also moves in Motion Sequence 004, with separate submissions, to dismiss defendants' counterclaims. Defendants cross-move, pursuant to CPLR 3212, for an order

[1]This decision discusses three other court cases and, to simplify, unless indicated otherwise, "plaintiff" refers to B&M and "defendants" to Altman and Brown.

3212, for an order granting summary judgment dismissing the complaint, on the ground that B&M was discharged for cause, dismissing the complaint's third cause of action, and, pursuant to CPLR 4547, for an order striking all references to settlement negotiations in the underlying action.

BACKGROUND

It is undisputed that in 2005, defendants, who are spouses, experienced massive leakage in the master bedroom of their cooperative apartment that was not quickly abated by the Co-op. This prompted defendants to hire counsel, and after hiring, and terminating, their first counsel, they hired B&M. The partner from plaintiff who represented defendants was non-party attorney Allen H. Brill (Brill). Defendants hired plaintiff pursuant to a retainer agreement, dated October 31, 2005, to represent them concerning their dispute with the Co-op. Defendants testified that their obligation to pay plaintiff was not contingent on the results of the litigation.

Defendants commenced an action in the Civil Court of the City of New York (Housing Court) against the Co-op concerning the leaks. They also commenced a separate action against the Co-op, for civil damages, in the New York Supreme Court (the Supreme Court Action). The leakage condition was of such a magnitude that the New York City Department of Housing Preservation and Development issued three "C" violations, indicating dangerous conditions, and, in the Housing Court case, by consent order dated December 13, 2005, the Co-op was ordered to remedy the condition within weeks (*see* Def. exhibit C, at 1). At or around this time, the Co-op was also involved in a separate litigation with defendants' upstairs neighbor, Mr. Stephen Gallup, that concerned, among other things, a greenhouse in Mr. Gallup's apartment which is above the defendants' master bedroom and leaks (the Gallup Action).

In March 2006, a civil contempt hearing was held in the Housing Court (*id.*, exhibit. D),

wherein B&M sought a maintenance abatement against the Co-op, on defendants' behalf, based on the conditions in their apartment. However, plaintiff did not submit evidence to demonstrate what portion of the apartment was allegedly uninhabitable or provide apartment maintenance records (*see id.*, exhibit. C, at 2-3, exhibit. D, at 210, 219). While these records were not submitted, Altman avers, and it is undisputed, that plaintiff instructed defendants to bring them to the proceeding, which they did. On May 21, 2006, the Housing Court denied the request for a maintenance abatement, without prejudice to defendants seeking it again (*id.*, exhibit. C, at 4). In its order, the Court noted that there was no testimony regarding either the monthly maintenance or the configuration of the apartment (*id.* at 3). The Housing Court also found the Co-op in contempt of the December 13, 2005 order, because it did not abate the leaks by December 30, 2005, and awarded attorneys' fees to defendants, as the prevailing party, and $250.00, stating that actual damages were not established.

Meanwhile, in the Gallup Action, the Supreme Court issued an order, dated April 27, 2006, which reflects that upstairs neighbor Mr. Gallup agreed to contract for removal of his greenhouse, to erect a new one on or before June 30, 2006, and to allow the Co-op to inspect and repair the Co-op building's facade. In the April 27, 2006 order, the Court also enjoined the Co-op from removing the old greenhouse. In or around July or August of 2006, the parties here disagree as to which, Mr. Gallup replaced the greenhouse. With its replacement, the leaks stopped (the Old Leaks). It is undisputed that Mr. Gallup's replacement of the greenhouse stopped the Old Leaks, and that defendants enjoyed freedom from the leaks for approximately seven months thereafter.

In July 2006, plaintiff brought another motion in Housing Court, seeking a contempt order against the Co-op for failing to abate the water condition. By Order dated December 12, 2006, the Housing Court denied the motion, stating that the Co-op was enjoined from removing the greenhouse by the April 27, 2006 Gallup Action Order, and that Mr. Gallup was a necessary

party who had not been joined. Altman states that the greenhouse had already been replaced when Brill brought this motion, but Brill avers otherwise, stating that the greenhouse was not replaced until mid-August 2006 (Brill Aff. [12/7/10], ¶¶ 20, 23). Brill also argues that the motion concerned the other building facade issues.

In January 2007, at a status conference in the Supreme Court Action, plaintiff agreed to consolidate the Supreme Court Action with the Gallup Action for purposes of discovery. Also in early 2007, defendants moved to renew and reargue portions of the Housing Court's December 12, 2006 order. By order, dated March 9, 2007, the Housing Court denied the motion, except to the extent of directing a hearing for attorneys' fees. At the attorneys' fees hearing, although defendants sought and submitted evidence to demonstrate that they had incurred approximately $69,000 in attorneys' fees and expenses, the Housing Court awarded them only $21,500. The Court opined that requiring the Co-op to pay all of the attorneys' fees was not appropriate, as defendants pressed on with motions against the Co-op in the Housing Court when the Co-op was restrained from removing the greenhouse by the April 27, 2006 Gallup Action order.

On March 17, 2007, after a storm, Altman states that new cracks developed in walls and the ceiling of the master bedroom (the New Condition). Within days after the March 17, 2007 storm, B&M notified the Co-op about the New Condition. The record is not definitive as to the connection between the Old Leaks and the New Condition, if any, but the parties here contend that there were two reasons for these conditions: Mr. Gallup's greenhouse and problems with the Co-op's building facade. The Co-op's position in the underlying action was that there was no active or continuing leakage problem caused by a building facade defect (*see* Def. exhibit. RR).

It is undisputed that the Co-op inspected the apartment on May 17, 2007, but did not otherwise take action. In summer and fall 2007, the Co-op exchanged settlement drafts with

Brill (*see id.*, exhibits. LL and OO). On August 1, 2007, Brill wrote a letter to the Co-op's lawyer, attaching a letter from Mr. Gallup's contractor stating that there was dampness under Gallup's flooring from the exterior wall of the building.

There is no dispute that the parties attended mediation sessions in fall of 2007, at which the Co-op agreed to cover some damages, and to credit defendants full maintenance from June 2005 through February 2007, for $44,628.37, but that there remained unresolved issues about the New Condition and reimbursement to defendants for their legal fees. Also undisputed is that the Co-op agreed to hire an independent engineer to inspect the building's facade and the apartment.

In October of 2007, the engineer performed an inspection, and thereafter produced a report dated December 5, 2007 (the Engineering Report) (*id.*, exhibit. YY). Brill signed a confidentiality agreement, dated December 20, 2007, precluding the Engineering Report's use against the parties in the litigation (The Confidentiality Agreement). Defendants provide a fax from February 2008, with an attachment dated December 19, 2007, which they contend is part of the Engineering Report, but which contains language that is not in the December 5, 2007 Engineering Report (Def. exhibit. CCC). The Engineering Report indicated that the engineer did not observe an active leak, but the plaintiff's submission, which appears partially redacted, provides for the repointing of masonry over a window and some other work.

In early 2008, Altman, represented by Brill, was deposed. At the deposition, Brill exchanged an outline prepared by Altman with the other parties. Altman avers that she did not want her outline exchanged with the other parties, and that it contained confidential and privileged information.

In April 2008, defendants made a $10,000 payment to plaintiff for fees against the retainer. The parties do not dispute that defendants previously had also made intermittent payments to plaintiff. In total, plaintiff received approximately $76,000.00 in fees and expenses

for services relating to the underlying litigation.

In correspondence in the second quarter of 2008, Altman wrote plaintiff that defendants were extremely frustrated that they were not getting the results that they desired from the Co-op and with plaintiff's responsiveness to their concerns, and that they desired that more be done to obtain the results they sought in the litigation (*id.*, exhibits. HHH, LLL, MMM). By letter dated June 30, 2008, defendants terminated plaintiff as their counsel. Defendants stated that they were frustrated with the direction that the case had taken over the past year, no longer felt heard or validated, and it was their opinion that plaintiff's legal representation had become ineffective. The letter informed plaintiff that defendants, "after much deliberation," had decided to retain another attorney to take over the case and to bring them the "closure that we have been asking for these past few years" (*id.*, exhibit. OOO). Defendants informed plaintiff of the identity of their new counsel, Wolf Haldenstein Adler Freeman & Herz LLP (WH), which is counsel for defendants in this action. Plaintiff asserts that WH charged defendants over $300,000.00 in the first year it represented them.

In early July, defendants received B&M's bill for $83,102.74. On July 31, 2008, WH, on behalf of defendants, protested the bill, as well as all previous invoices. On August 13, 2008 and October 6, 2008, plaintiff sent defendants letters stating that $83,102.74 was owed, and offered to submit the fee dispute to arbitration. Brill avers that at that time, defendants separately owed plaintiff $15,436.47 from the Housing Court action, as indicated on a statement on a separate account sent to defendants on October 9, 2007 (Brill Aff. [12/6/10], ¶ 32). Brill avers that defendants owe $96,281.33, which reflects the sum of these bills reduced by $2,257.84 for three accounting errors discovered after the commencement of this litigation.

In October of 2008, in the Supreme Court Action, WH made a motion to compel relief for defendants concerning the New Condition, which was not opposed by the Co-op. However, as of April 21, 2009, defendants' position was that the work still had not been done by the Co-

op (Sandberg Aff., exhibit. F). Defendants submit a copy of a settlement agreement, dated September 23, 2009, that they executed with the Co-op, and five other parties, including Mr. Gallup. Mr. Gallup contributed over $125,000 to the total $660,000 settlement amount. The Co-op and three other parties, including the management company and their insurers, also contributed, with substantial contributions to the settlement from two of these parties.

STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary

judgment should be denied *(see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

DISCUSSION

Plaintiff's Motions for Summary Judgment

Plaintiff moves for summary judgment on its complaint and for dismissal of defendants' five counterclaims and 26 affirmative defensives. Defendants oppose the motion and move for summary judgment dismissing the complaint on the ground of discharge for cause and malpractice. Plaintiff objects to defendants' cross-motion as untimely. Even without adequate excuse for tardiness, an untimely cross-motion for summary judgment may be considered where it involves issues relating to the timely-made summary judgment motion (*Osario v BRF Constr. Corp.*, 23 AD3d 202, 203 [1st Dept 2005]). This is so because, in the course of deciding the timely motion, a court may search the record and grant summary judgment to any party without the necessity of a cross motion (CPLR 3212[b]). "In such circumstances, the issues raised by the untimely cross motion are already properly before the court and, thus, the nearly identical nature of the grounds may provide the requisite good cause (*see* CPLR 3212 [a]) to review the merits of the untimely cross motion" (*Snolis v Clare*, 81 AD3d 923, 925-926 [2d Dept 2011]).

Plaintiff in its summary judgment motion moves for the relief on all of the causes of action in its complaint, arguing that it has made its prima facie showing and that defendants cannot establish any reasonable defenses. The elements of a breach of contract claim include the performance of the contract by the injured party, and quantum meruit and unjust enrichment require a demonstration of services with value. Defendants' discharge for cause assertions address the issue of performance of the contract by plaintiff, as well as the value of the performance, and, therefore, directly address issues related to the timely summary judgment motion. The timely motion is to recover fees for legal services; the cross motion concerns defendants' contentions as to why they are not obligated to pay those same fees and is not

precluded.

Plaintiff objects to defendants' assertion of discharge for cause as an unpleaded affirmative defense or counterclaim. A defendant may resist a summary judgment motion based on an unpleaded defense and "[a] party may raise even a completely unpleaded issue on summary judgment so long as the other party is not taken by surprise and does not suffer prejudice" (*Valenti v Camins*, 95 AD3d 519, 522 [1st Dept 2012]; *Weinstock v Handler*, 254 AD2d 165, 166 [1st Dept 1998] ["summary judgment may be awarded on an unpleaded cause of action if the proof supports such cause and if the opposing party has not been misled to its prejudice"]).

Plaintiff offers a conclusory assertion of surprise, but the predicate facts that constitute defendants' claim of discharge for cause are those that underlie defendants' counterclaims. Also, in their pleading, defendants seek, in addition to damages, the $66,000 they claim to have paid to plaintiff, on the ground that plaintiff "should not be compensated . . . because it utterly failed to competently pursue [their] rights and . . . severely prejudiced [their] rights and caused . . . hundreds of thousands of dollars in damages" (Pl. Mov. Mot. for SJ & to Dis. Aff. Def., exhibit. E, ¶ 136). Regarding prejudice, while plaintiff alludes to discovery not performed, it gives no specifics, and has "had an opportunity to address the merits of the alleged new theory as well as the proof submitted in support thereof in response to plaintiff's cross motion" (*Boyle v Marsh & McLennan Cos., Inc.*, 50 AD3d 1587, 1588 [4th Dept 2008]). Therefore, defendants' cross-motion for summary judgment will be permitted.

As to their cross-motion, defendants maintain that plaintiff was discharged for cause because it: (1) repeatedly refused and failed to follow defendants' instructions and to fulfil promises to them; (2) divulged information that defendants assert was confidential and privileged; (3) agreed in writing, against defendants' wishes and without notice to them, to retroactively designate the Engineering Report as confidential and unusable in the litigation; (4)

failed to offer the available proof to support defendants' maintenance rebate claim in Housing Court; (5) pursued a strategy in Housing Court that resulted in the loss of approximately $47,000.00 in attorneys' fees; (6) agreed to consolidate the Supreme Court Action with the Gallup Action for discovery without defendants' consent; and (7) failed to prosecute their action and accomplished nothing for years.[2]

"It is well settled that a client may terminate his [or her] relationship with an attorney at any time, with or without cause. Where the discharge is for cause, the attorney has no right to compensation" (*Friedman v Park Cake, Inc.*, 34 AD3d 286, 286-287 [1st Dept 2006] [citation and quotation marks omitted] [failure to identify and discuss specific liens on a plaintiff's settlement not grounds for depriving counsel of an earned fee]). Among other reasons, "[a]n attorney may be discharged for cause where he or she has engaged in misconduct, has failed to prosecute the client's case diligently, or has otherwise improperly handled the client's case or committed malpractice" (*Coccia v Liotti*, 70 AD3d 747, 757 [2d Dept 2010]; *see Doviak v Finkelstein & Partners, LLP*, 90 AD3d 696, 699 [2d Dept 2011] [violation of disciplinary rule]; *Yannitelli v D. Yannitelli & Sons Constr. Corp.*, 247 AD2d 271, 272 [1st Dept 1998] [fee forfeiture based on admitted violations of the disciplinary rules over a period of years]; *but see Fischbarg v Doucet*, 63 AD3d 628, 628 [1st Dept 2009] [fee recovery not barred by violation of writing requirement concerning fee and expense payment]).

Discharge for cause is not found based on "a client's dissatisfaction with reasonable strategic choices regarding litigation" (*Doviak*, 90 AD3d at 699 [citation and quotation marks omitted]; *see Rosner v Paley*, 65 NY2d 736, 738 [1985] [selection among reasonable courses of action not malpractice]), or "personality conflicts, misunderstandings or differences of opinion

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[2]While defendants, in presenting facts, assert many more complaints about plaintiff's conduct, the court must necessarily be guided by what they have sufficiently briefed concerning their numerous contentions.

having nothing to do with any impropriety by the lawyer" (*Klein v Eubank*, 87 NY2d 459, 463 [1996]). Generally, a hearing is required to determine if an attorney was discharged for cause (*see Teichner v W & J Holsteins*, 64 NY2d 977, 979 [1985]), unless the issue can be determined as a matter of law (*see Park Cake, Inc.*, 34 AD3d at 286 [conflicting claims require hearing]; *Hawkins v Lenox Hill Hosp.*, 138 AD2d 572, 572 [2d Dept 1988]).

Defendants argue that "[p]ursuant to the New York Rules of Professional Conduct [individually, Rule(s)], Mr. Brill was required to 'reasonably consult with the client about the means by which the client's objectives are to be accomplished' (Rule 1.4(a)(2)) and 'abide by a client's decisions concerning the objectives of representation' (Rule 1.2(a))" (Def. Memo. of Law, at 26). The Rules to which defendants cite, however, were not effective until after plaintiff's representation of defendants ended (*see Sullivan v Cangelosi*, 84 AD3d 1486, 1486 [3d Dept 2011] [analysis guided by former code "which was in effect at the time of the conduct in question"]).[3]

Disciplinary Rule (DR) 7-101(a) (22 NYCRR 1200.32), which was then in existence, provided that a lawyer shall not *intentionally* "[f]ail to seek the lawful objectives of the client through reasonably available means permitted by law and the Disciplinary Rules." As defendants have not addressed their argument to the correct governing rules, on this record, they have not demonstrated discharge for cause. Furthermore, the question of whether or not a lawyer intentionally failed to seek a client's objectives is generally one of fact.

Defendants assert that they discharged plaintiff for failing, on multiple occasions over

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[3]In a footnote, defendants state that the Rules 1.4 (a) and 1.2 (a) are similar in substance to Ethical Consideration (EC) 9-2 and DR 7-101(A). However, "Rule 1.4 had no equivalent in the Disciplinary Rules" (Simon, Simon's New York Rules of Professional Conduct Annotated, at 48 [2009 ed]), but carried forward the goals of [EC] 7-8 which provided that: "A lawyer should exert best efforts to ensure that decisions of the client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so" (*id.*). EC 9-2 provided, in relevant part, that "[i]n order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform the client of material developments in the matters being handled for the client."

the course of the representation, to follow their instructions and keep promises. Altman provides instances of what she asserts were plaintiff's failure to follow client instructions and to keep promises. These include that defendants instructed plaintiff to move for injunctive relief in the Supreme Court Action, compelling the Co-op to remedy the New Condition, or to settle the case, after Mr. Brill promised them at the 2007 mediation that the leaks would be fixed and the case settled, with the Co-op paying 100% of defendants' legal fees by the end of 2007. Brill denies that he made such a statement about when the case would end.

Altman also states that she requested a meeting with Brill in June 2008, voiced further objection to his inaction, and that he "promised"[4] to go into Court the next day to file an Order to Show Cause, compelling the Co-op to do facade work. Altman states that when she later called to inquire about this, Brill informed her that he had changed his mind, and would not be filing the motion. What defendants do not demonstrate, on this record, was that this was not merely a difference in opinion as to strategy, as Brill avers that he sent a letter to the Court concerning the facade issues.

Defendants also maintain that plaintiff was discharged for cause because of its repeated, deliberate refusal to follow its clients' instructions that the Co-op be required to perform facade repairs before the commencement of settlement negotiations for damages. Defendants' submit settlement agreements that plaintiff exchanged with the Co-op that included provisions concerning inspection and remedy of water conditions within the agreement, but as part of, and not a condition to, settlement. The evidence defendants submit is not dispositive

[4]Altman avers that Brill breached several "promises" to defendants, but does not always state the words that Brill used and therefore, these assertions, for summary judgment purposes, must be deemed characterization. For example, Altman asserts that when Brill did not attend an inspection of the apartment it "was just another broken promise that Mr. Brill made to us" (Def. Mov., Altman Aff., ¶ 68). However, the email message from Brill concerning this issue merely stated that he was *planning* to be there (Def. exhibit. BB [emphasis supplied]), and plaintiff asserts that a B&M associate attended the inspection.

as to whether or not plaintiff's conduct was an intentional disregard of the client's objectives (*see* Def. exhibit. II), but merely raises issues of fact. Furthermore, later correspondence raises factual issues as to whether defendants sought settlement when the New Condition still was not fixed, although this evidence may also merely reflect that defendants changed their mind about having work done prior to engaging in settlement discussions (*see* Def. exhibits. LLL, MMM). Altman's contention that she pushed plaintiff concerning moving the Supreme Court Action, which was for damages, throughout the course of the relationship with plaintiff, also raises a fact issue concerning defendants' communications with plaintiff about their desire for injunctive relief before entering into settlement discussions.

Defendants assert that Brill breached attorney-client privilege and revealed client confidences by producing Altman's outline, or notes, at her deposition in early 2008. At the deposition, Altman, an attorney, was present and aware of the exchange of the notes as it occurred. Regarding this event, and the other occasions where she claims that plaintiff disclosed confidential information, testimony is required to, among other things, determine whether plaintiff knowingly revealed what was to the client a confidence without the client's consent (*see* 22 NYCRR 1200.19).

Defendants also maintain that plaintiff's execution of the Confidentiality Agreement regarding the engineering report, without defendants' approval, when the Co-op knew of the report's contents, but plaintiff and defendants did not, is cause for discharge. However, Altman also avers that defendants did not know that Brill had executed the Confidentiality Agreement until after plaintiff's discharge. Therefore, this conduct was not the reason for discharge (*see King v Fox*, 2005 WL 3098933, *5, 2005 US Dist LEXIS 28638, *14 [SD NY 2005] [citing to *Campagnola v Mullholland, Minion & Roe*, 76 NY2d 38, 44 (1990) for the proposition "that factors identified only after the relationship has been severed cannot have played a role in causing the breakdown"]).

Defendants complain that they discharged B&M because it brought unnecessary, futile contempt motions against the Co-op in the Housing Court while the Co-op was constrained from removing the greenhouse. In fact, Altman avers that the greenhouse had already been removed, but, as previously mentioned, the parties appear to dispute this. Defendants also claim that plaintiff failed to submit maintenance receipts during a Housing Court hearing. Because all of this conduct occurred years before the discharge, however, there is a factual issue as to whether or not defendants actually discharged plaintiff for this conduct.[5]

Defendants assert that plaintiff's agreement, in January of 2007, to consolidate the Supreme Court Action with the Gallup Action, for purposes of discovery, without defendants' consent delayed resolution of their action, increased their attorneys' fees and constituted cause for dismissal. A selection of one among several reasonable courses of action does not constitute malpractice, even if the attorney committed an error of judgment (*Rosner v Paley*, 65 NY2d 736 [1985]; *see also e.g. Allstate Ins. Co. v Nandi*, 258 F Supp 2d 309, 312 [SD NY 2003] [material differences regarding strategic and tactical issues do not constitute cause]). Consolidating a case for discovery generally is not, in itself, misconduct or malpractice. However, Altman avers that defendants' objectives were to get to trial quickly, and their understanding with plaintiff was that involvement with the Gallup Action would be less likely to effect that result, as there were many parties to that action. Altman also avers that despite having advance notice, Brill failed to inform defendants that he intended to stipulate to consolidate, and then lied to her about it afterwards, informing her that the consolidation was Court ordered. Conversely, Brill avers that Altman agreed to the consolidation. These factual issues preclude the making of a determination.

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[5]Plaintiff asserts that defendants insisted upon a rebate of the full amount of their maintenance payments, but did not move out of the apartment, and that not providing the evidence in the Housing Court was a strategic move, designed to obtain full maintenance in the Supreme Court Action. A reading of the proceeding's transcript raises issues of fact about the credibility of this assertion.

Defendants claim that plaintiff was discharged for cause because it failed to prosecute the Supreme Court Action, and because the litigation went on for years accomplishing nothing. Failure to timely prosecute or abandonment of a case may constitute discharge for cause (*see Matter of Estate of Stevens*, 252 AD2d 654, 655-656 [3d Dept 1998] [discharge for cause for substantial delay in prosecuting action including failure to commence wrongful death actions]). The record does not reveal a failure to prosecute the action. In the Housing Court, plaintiff obtained an order requiring the Co-op to cure the violations, as well as a contempt order. As of April 2006, there was an order in place concerning the greenhouse. In summer 2006, the Old Leaks were remedied, and there were no leaks until March 2007.

The record also reveals that the case was prosecuted over 2007 and in 2008, as it is undisputed that an inspection took place in May of 2007, that several mediation sessions were conducted in fall 2007, as well as an engineering inspection, and that discovery proceeded in the Supreme Court case, as Altman was deposed in early 2008. While defendants may have desired that plaintiff move for affirmative injunctive relief or trial in the Supreme Court Action, they do not so much as demonstrate that discovery was complete in the action, and there is no dispute that the Co-op disagreed that there was a problem from a facade defect to be remedied (Def. exhibit. RR).[6] The parties here provide different documents that they claim were the product of the October 2007 engineer's inspection, and on this record, defendants certainly have not demonstrated, as a matter of law, that plaintiff could have achieved results defendants desired within the time-frame that they desired. It is well-known that an adversary's conduct in a case may greatly impact the length and difficulties encountered during litigation. In fact, even after plaintiff's discharge in June 2008, and a motion later brought by WH, the case did not settle until September 2009. As a general proposition, more than a client's mere dissatisfaction

[6]Hindsight reveals that the Co-op did not oppose WH's later motion, but the record does not reveal that, at the time, plaintiff could have known that this would happen.

with an attorney's ability to achieve the desired ultimate result in a disputed litigation within a desired time period is required to constitute discharge for cause, and this record does not demonstrate a failure to prosecute.

In addition to the aforementioned issues, however, Altman's 47-page affidavit is replete with complaints about plaintiff's services, and the reasons that defendants contend that they discharged plaintiff, such as a lack of responsiveness, Brill's failure to adequately prepare, and that Brill kept things from and lied to Altman.[7] The affidavit also contains characterization, which must be discounted on summary judgment. Plaintiff disputes defendants' assertions, characterizing them as transparent attempts to avoid payment. As is generally true concerning discharge for cause allegations, and in light of the material issues of fact discussed above, this case requires a hearing, which is directed below. In light of this, plaintiff's motion for summary judgment on its complaint, including its account stated claim, must be held in abeyance, pending the outcome of the hearing, and any ancillary motions relating thereto, as must defendants' motion for summary judgment dismissing the complaint for discharge for cause.

Plaintiff moves to dismiss defendants' counterclaims, and defendants oppose dismissal. Except for defendants' counterclaim for unjust enrichment, the other four counterclaims are based on defendants' assertions, discussed above, concerning discharge for cause, and seek the same type and amount of damages.

Defendants assert a claim for legal malpractice. "It is settled that an action for legal malpractice requires proof of three elements: the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and actual damages" (*Reibman v Senie*, 302 AD2d 290, 290 [1st Dept 2003]). The Court of Appeals has stated that to recover for this tort, "a plaintiff must demonstrate that the attorney failed to exercise the ordinary skill

[7]Altman avers that Brill was unresponsive to client inquiries, but at least one of the inquiries was made during a major holiday period. Brill disputes another.

and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused [the] plaintiff to sustain actual and ascertainable damages" (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007] [citation and quotation marks omitted]). It follows that for an attorney to prevail on "summary judgment, [counsel] must present evidence in admissible form establishing that the [former client] is unable to prove at least one of the above-cited essential elements" (*Pedro v Walker*, 46 AD3d 789, 790 [2d Dept 2007]). Generally, expert testimony is required to establish that an attorney breached the applicable standard of care (*see Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo*, 259 AD2d 282, 284 [1st Dept 1999]), with the finder of fact deciding whether there was a deviation from such standard. Of course, in determining whether malpractice occurred, "an attorney is not held to the rule of infallibility and is not liable for an honest mistake of judgment, where the proper course is open to reasonable doubt" (*Bernstein v Oppenheim & Co.*, 160 AD2d 428, 430 [1st Dept 1990]). "Absent such 'reasonable' courses of conduct found as a matter of law, a determination that a course of conduct constitutes malpractice requires findings of fact" (*id.*).

B&M argues that the malpractice claim should be dismissed because the Co-op's failure to timely remediate the water infiltration issue was the sole proximate cause of defendants' damages, and plaintiff could not have done anything more to further defendants' interests. "The failure to establish proximate cause mandates the dismissal of a legal malpractice action, regardless of the negligence of the attorney" (*Reibman*, 302 AD2d at 291). At trial, a former client maintains the burden to prove "that he or she would have prevailed in the underlying action or would not have incurred any damages but for the attorney's negligence" (*see Rudolf*, 8 NY3d at 442; *Reibman*, 302 AD2d at 290). It follows, that on summary judgment, the movant must demonstrate that the former client did not incur damages, or cannot produce evidence of damages, that were caused by the attorney's deviation from the applicable standard of care.

An issue of fact exists concerning whether B&M's conduct in making contempt motions in Housing Court, that it indicates it knew would be denied (see Pl. Memo. of Law in Sup. of Counterclaim Dis., at 8), was the proximate cause of damages to defendants, which precludes summary judgment. Clearly, the Housing Court indicated that it was denying a substantial portion of the attorneys' fees requested based on the making of these motions and, as discussed below, there are factual issues regarding, among other things, whether defendants were able to later recover these fees as well as defendants' role concerning the motion. Defendants also aver that they suffered damages as they had to spend additional funds in attorneys' fees in order to obtain the maintenance rebate, raising a fact issue.[8] Plaintiff has not met its burden to demonstrate that its execution of the Confidentiality Agreement concerning the Engineering Report was not negligence which caused the damages that defendants allege, especially as the contents of that report have not been established on this record. Defendants assert that Brill signed the Confidentiality Agreement as to the Engineering Report before Brill knew what was contained within the report, but opposing counsel did know. Among other things, defendants assert that they incurred additional attorneys' fees and costs to hire another engineer, when they should have been able to rely on the Engineering Report. While plaintiff asserts that the report was not admissible in the underlying action, as it was part of settlement discussions, this is disputed, as defendants' contend that the parties to the underlying dispute had already come to an agreement that repairs would be done based on the report.

Plaintiff argues that defendants did not incur actual, ascertainable damages due to Brill's

[8]The parties recitation of the facts concerning the occurrences at the Housing Court, and the reasons for the failure to obtain maintenance, vary considerably. In any event, if there was negligence, defendants may be entitled to a rebate on some fees paid (*Kluczka v Lecci*, 63 AD3d 796, 798 [2d Dept 2009]) or incurred, but not recovered through settlement, in attempting to obtain even a partial maintenance rebate.

exchange of outlines with other parties. At their depositions, defendants asserted that their hand was revealed by this exchange, which possibly aided and saved their opponents money. These are not actual ascertainable damages *suffered by defendants*, and Altman's discomfort at her deposition also is not an injury for which she may recover. Defendants' assertion that the outlines caused additional claims to be asserted, and other delays, is speculative, vague and conclusory, and their malpractice counterclaim is dismissed to the extent that it relies on those allegations. Therefore, it is unnecessary to reach plaintiff's argument that the information in the outline was not confidential.

Plaintiff argues that defendants recovered the entirety of the maintenance abatement and the attorneys' fees owed to both B&M and WH, and did not suffer damages. In making this argument, plaintiff relies on a document prepared by WH entitled Damages Analysis, dated December 2008.[9] Defendants' argument that the Damages Analysis is inadmissible, pursuant to CPLR 4547,[10] is unpersuasive (*see e.g. American Re-Ins. Co. v United States Fid. & Guar. Co.*, 19 AD3d 103, 104 [1st Dept 2005] ["The so-called 'settlement privilege' is inapplicable since the reinsurers seek the settlement-related materials for a purpose other than proving USF & G's liability in the *underlying* coverage action [emphasis added]"), and its motion to preclude consideration of it is denied.[11]

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[9]Plaintiff also relies on deposition testimony of defendants' current attorney, Steven Sladkus, to demonstrate that defendants recovered all of their damages through settlement, but the pages to which plaintiff refers were not found in Exhibit G to the Sandberg affidavit.

[10]CPLR 4547 provides that: "[e]vidence of (a) furnishing, or offering or promising to furnish, or (b) accepting, or offering or promising to accept, any valuable consideration in compromising or attempting to compromise a claim which is disputed as to either validity or amount of damages, shall be inadmissible as proof of liability for or invalidity of the claim or the amount of damages. Evidence of any conduct or statement made during compromise negotiations shall also be inadmissible."

[11]The parties' dispute here is regarding the admissibility of the Damages Analysis. Therefore, the order herein on defendants' motion to preclude or strike references to settlement negotiations in the underlying action is limited to that document, with no broad prospective determination made here concerning the admissibility of any other evidence.

Altman's averments, viewed in a light most favorable to defendants as non-movants, is that defendants did not recover all of their damages through the settlement, and particularly the Housing Court legal fees, which Altman claims that the Co-op refused to pay. Plaintiff contends that while defendants allege numerous errors committed by plaintiff in the Supreme Court Action, defendants have not and cannot establish that these errors resulted in actual and ascertainable damages precluding recovery. At trial, defendants will bear the burden of proving damages proximately caused by plaintiff's alleged conduct, and to do so will necessarily have to demonstrate all of the actual, ascertainable damages that they claim they would not have incurred except for plaintiff's negligence, and that they were forced to settle for less than these damages. However, regardless of whether or not defendants have demonstrated in the herein motion that they suffered damages by the many alleged errors made in the Supreme Court Action, summary judgment must be denied as to defendants' malpractice/negligence claims, as they have raised a fact issue concerning the Housing Court case.

Defendants' counterclaims for breach of fiduciary duty and breach of contract are dismissed as duplicative, since they arose from the same facts as the legal malpractice claim and did not seek distinct and different damages (*Bernard v Proskauer Rose, LLP*, 87 AD3d 412, 416 [1st Dept 2011]; *Schulte Roth & Zable v Kassover*, 80 AD3d 500, 501 [1st Dept 2011]).[12] Plaintiff moves for dismissal of defendants' affirmative defenses. Defendants have agreed to the dismissal of their second through sixth, eight, ninth, twelfth through fifteenth, eighteenth, twenty-fourth and twenty-sixth affirmative defenses, which are dismissed.

The first affirmative defense, of failure to state a cause of action, may be inserted in an answer as an affirmative defense, but is surplusage, because it may be asserted at any time

[12]While defendants appear to attempt to assert a counterclaim for breach of contract here, based on other facts, they have not moved for leave to amend the complaint. In addition, plaintiff does specifically address the unjust enrichment counterclaim, which, therefore, will not be dismissed.

whether or not pleaded and should not be subject to a motion to strike (*Riland v Todman & Co.*, 56 AD2d 350, 352-353 [1st Dept 1977]). Consequently, the defense remains.

The seventh affirmative defense, that plaintiff's damages were caused in whole or part by its own conduct, and that its claims are barred or diminished in proportion to its own culpable conduct, is dismissed. CPLR 1411 mandates that "[i]n any action to recover damages for personal injury ... the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant ... bears to the culpable conduct which caused the damages." This affirmative defense is not applicable in this case, for recovery of legal fees, which is not grounded in tort. This is not to say that defendants are precluded from seeking to defend against fees they contend they were charged for negligent work, or a determination concerning that issue.

The tenth affirmative defense, is that plaintiff's claims are barred by collateral estoppel. "The party seeking the benefit of collateral estoppel must demonstrate that the identical issue was necessarily decided in the prior adjudication and is decisive in the newly presented circumstance and forum. To block the use of estoppel, a contestant can show the absence of a full and fair opportunity to present relevant views in the prior contest" (*David v Biondo*, 92 NY2d 318, 322 [1998]). Plaintiff argues that the defense should be dismissed because no Court has adjudicated B&M's legal fee claims against it, and that defendants' contractual and independent obligation to pay their legal fees is separate and distinct from what the court awarded them against the Co-op. Plaintiff also argues that defendants should not be able to keep money paid to them by the Co-op to reimburse plaintiff. Defendants argue that the defense is proper because plaintiff obtained a final, binding ruling from the Housing Court that $47,687.44 of its fees were unreasonable.

The issue adjudicated in the Housing Court action was the Co-op's obligation to pay its tenant's attorneys fees and the amount, with defendants as the petitioners, not B&M. The

adjudication was against the Co-op, under the lease and Real Property Law § 234. Defendants and plaintiff did not have the opportunity to adjudicate the fee issue regarding what was owed against each other, and, as defendants' attorney, plaintiff could not have litigated this issue against defendants (*Wood v Wood*, 21 AD2d 627, 627 [1st Dept 1964] [counsel fee award to wife in matrimonial action on attorneys' application did not constitute adjudication on attorneys' fee claim against wife where award was not rendered in proceeding to which attorneys were parties or against adversaries regarding the issue]; *compare Wehle v Shanks*, 35 NYS2d 801, 804-806 [Sup Ct, NY County 1942] [where attorney not formally a party to proceeding was regarded by court in first action as intervenor, with an interest in a fund, and participated in proceedings to determine the reasonable value of his services, he was later bound in the subsequent case by earlier determination]).[13] Therefore, the tenth affirmative defense is dismissed.

Plaintiff seeks to dismiss the eleventh affirmative defense, that "[p]laintiff is barred because the obligation was fully paid," stating that it is a "negating defense" (Pl. Memo. of Law for SJ & to Dis. Aff. Def., at 17), and because defendants admit that they have not paid their legal bills in full. In opposition, defendants argue that they have overpaid given the services. Plaintiff's argument is predicated on its assumption that it will prevail on its complaint, but as no determination as to that issue is being made here, plaintiff's motion is denied as to this defense.[14]

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[13]The court did not specifically state that the fees were unreasonable, but opined that the Co-op should not have to pay all of them because some were occasioned by motions made by defendants for the Co-op's failure to comply with the court's prior order when the Co-op was restrained from removing the Gallup greenhouse by the Gallup Action order. However, the fact that the Housing Court denied defendants' attorneys' fees request because of the motions is indisputable, and plaintiff is not precluded from using the Housing Court order as evidence in this action (*see Wood v Wood*, 21 AD2d 627, *supra*).

[14]In addition, defendants may also be entitled to reductions in damages for what they state was plaintiff's mistake in failing to timely respond to a discovery demand that resulted in motion practice (*see* Altman Aff., ¶ 59) and, if true, for billing defendants for time spent listening to them complain about this, which is not the provision of legal services by the firm (*see* Def. exhibit. A [Retainer Agreement], at 1).

The sixteenth affirmative defense, that plaintiff's claim is barred by the terms of the parties' agreement, is not dismissed as plaintiff has not met its prima facie case on this motion by referring the Court to the retainer agreement and conclusorily asserting that it does not provide defendants' with grounds for asserting the defense. Plaintiff's argument that the defense should be dismissed because of defendants' failure to elaborate on it in their pleading is unpersuasive. Plaintiff was not precluded from seeking elaboration during the litigation.

Defendants' opposition to the motion to dismiss the affirmative defenses numbered 17, 19, 21-23 and 25 neither addresses the defenses individually, nor responds to the movant's arguments. However, plaintiff's motion for dismissal of these affirmative defenses is premised on the presumption that plaintiff prevailed on its motion on the complaint, and is denied without prejudice with leave to renew. The twentieth affirmative defense, that plaintiff is barred from recovering because it breached the parties' agreement, is dismissed as duplicative of the seventeenth affirmative defense.

Defendants' Motion for Summary Judgment

As discussed above, defendants' motion for summary judgment dismissing the complaint for discharge for cause is referred for a hearing. Defendants also move to dismiss plaintiff's claim for the reasonable value of its services. While, generally, "[a] claim for unjust enrichment, or quasi contract, may not be maintained where a contract exists between the parties covering the same subject matter" (*Goldstein v CIBC World Mkts. Corp.*, 6AD3d 295, 296 [1st Dept 2004], [citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987)]), in the case of attorneys fees' where an attorney is discharged without cause, courts may permit recovery on quantum meruit/unjust enrichment claims (*see Sae Hwan Kim v M & Y Gourmet Grocers*, 239 AD2d 170, 170 [1st Dept 1997]; *see generally Seth Rubenstein, P.C. v*

Moreover, plaintiff increased billing rates without providing the advance notice that the retainer states was to be provided prior to rate increases. No adjudication regarding these issues is made here.

Ganea, 41 AD3d 54 [2d Dept 2007]). Therefore, at this juncture, summary judgment dismissing the cause of action is denied. Defendants' motion concerning the Damages Analysis has already been addressed.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment dismissing the affirmative defenses raised in the answer (motion sequence number 004) is granted to the extent that the second through tenth, twelfth through fifteenth, eighteenth, twentieth, twenty-fourth and twenty-sixth affirmative defenses are dismissed; and it is further,

ORDERED that plaintiff's motion for summary judgment dismissing defendants' counterclaims (motion sequence number 005) is granted to the extent that the second (breach of contract) and third (breach of fiduciary duty) counterclaims are dismissed and the first counterclaim (legal malpractice) is dismissed to the extent that it relies on allegations concerning plaintiff's exchange of defendant Helen Altman's outline; and is otherwise denied; and it is further,

ORDERED that the issue of whether or not plaintiff was discharged by defendants for cause is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further,

ORDERED that plaintiff's motion for summary judgment in its favor on the complaint (motion sequence number 005) and defendants' cross-motion for summary judgment dismissing the complaint in its entirety for discharge for cause are held in abeyance pending the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further,

ORDERED that plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed information sheet,[15] upon the Special Referee Clerk in the Motion Support Office in Room 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further,

ORDERED that defendants' cross-motion to dismiss the third cause of action of the complaint (quasi contract, quantum meruit and unjust enrichment) and to strike is denied.

This constitutes the Decision and Order of the Court.

Dated: 7/10/12

Paul Wooten J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**

[15]Copies are available in Room 119 at 60 Centre Street, and on the Court's website.