

**Fariello v Checkmate Holdings, LLC**

2013 NY Slip Op 30046(U)

January 11, 2013

Sup Ct, New York County

Docket Number: 116159/09

Judge: Anil C. Singh

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

HON. ANIL C. SINGH  
SUPREME COURT JUSTICE

PRESENT: \_\_\_\_\_  
Justice

PART 61

— Index Number : 116159/2009  
BALESTRIERE, FARIELLO  
vs.  
CHECKMATE  
SEQUENCE NUMBER : 005  
AMEND SUPPLEMENT PLEADINGS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the annexed memorandum opinion.*

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

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

Dated: 1/11/13

ACC, J.S.C.  
HON. ANIL C. SINGH  
SUPREME COURT JUSTICE  
 NON-FINAL DISPOSITION

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 61

-----X  
BALESTRIERE FARIELLO,

Plaintiff,

-against-

Index No.

CHECKMATE HOLDINGS, LLC, JOE BOBKER and  
ELI BOBKER,

116159/09

Defendants.

-----X  
CHECKMATE HOLDINGS, LLC, JOE BOBKER and  
ELI BOBKER,

Counter-Plaintiffs,

-against-

BALESTRIERE FARIELLO,

Counter-Defendant.

-----X  
ANIL C. SINGH, J. :

The following motions are consolidated for disposition.

Plaintiff moves for leave to amend its amended complaint (Mot. Seq. No. 005). Plaintiff also moves to dismiss the counterclaims of defendants Checkmate Holdings, LLC (Checkmate), Joe Bobker (Joe), and Eli Bobker (Eli) (Mot. Seq. No. 006).

Plaintiff, a law firm, alleges in its complaint that defendants approached it in April 2009 regarding a financial dispute with Jeffrey Koo and Grand Pacific Holding, Inc. (Grand Pacific) over property holdings in Westchester, New York. On April 23, 2009, via email, plaintiff sent a retainer agreement describing the scope of representation and the nature of a contingency fee arrangement, should defendants decide to engage the firm. On May 19, 2009, Joe, in his alleged

capacity as principal of Checkmate, signed this agreement:

Plaintiff claims that from April 2009 until October 2009, it worked for defendants. Subsequently, plaintiff asserts that Joe had failed to disclose certain information about himself, specifically, that he was not the principal of Checkmate. On October 23, 2009, defendants terminated their relationship with plaintiff, and plaintiff drafted and executed a stipulation designating a new counsel for them. Plaintiff thereafter commenced a suit to recover unpaid fees.

The complaint herein originally alleged claims for fraudulent inducement, breach of contract, account stated, quantum meruit, promissory estoppel, and promissory fraud. Plaintiff later withdrew the account stated claim. Defendants moved for dismissal of this complaint, based on failure to state a cause of action and documentary evidence. They asserted that plaintiff was seeking recovery on the theory that Checkmate owed it via an hourly fee basis, contrary to the retainer agreement.

In a decision and order dated May 19, 2010, Justice James Yates granted the motion to dismiss. Upon appeal, the Appellate Division, First Department, in an order dated March 3, 2011, affirmed the decision, except for the quantum meruit claim, which it upheld. *Balestriere Fariello v Checkmate Holdings, LLC*, 82 AD3d 437 (1<sup>st</sup> Dept 2011). Plaintiff now moves for leave to replead its fraudulent inducement claim, and to add new claims, sounding in defamation and violation of section 487 of the Judiciary Law.

#### THE MOTION TO AMEND

Plaintiff argues that this motion is not prejudicial to defendants, nor does it lack merit. Plaintiff contends that when the Appellate Division dismissed the original fraudulent inducement

claim, it was due to a failure to plead the claim with sufficient particularity, specifically, to allege reasonable reliance. Plaintiff states that the dismissal was not with prejudice, and that it could cure the defects of the original claim in an amended complaint. The current claim alleges that defendants misrepresented that Joe was a principal and leading decision-maker at Checkmate. This is alleged to be the basis of the parties' contractual relationship. Plaintiff alleges that Joe lacked the legal ability to bind Checkmate to the agreement and had no financial liability regarding any future judgments. Eli, Joe's son, a 99% principal of Checkmate, was the alleged party actually concerned about his and Checkmate's liability. Plaintiff alleges a conflict of interest between the two Bobkers. According to plaintiff, had it known of the truth of Joe's relationship with Checkmate, it would have not engaged itself in defendants' legal matters.

The two additional claims that plaintiff proposes involve defamation and violation of the Judiciary Law. Regarding defamation, plaintiff alleges that, on May 24, 2010, Joe filed a Department Disciplinary Complaint (DDC) against firm member John Balestriere (Balestriere) with the Appellate Division's Department Disciplinary Committee (the Committee). Plaintiff was notified by the Committee of this DDC on June 22, 2010. Later, according to plaintiff, Joe produced the DDC to counsel for various third-party defendants in the action brought by Grand Pacific against defendants. Plaintiff alleges that the DDC is a false and defamatory document which states that plaintiff defamed and threatened Joe; refused to return defendants' escrow funds; and violated the attorney-client privilege by commencing this present suit.

The other new claim alleges that Eli violated section 487 (1) of the Judiciary Law by attempting to deceive the court by filing altered court documents as attachments in support of defendants' answer and counterclaims. Although not a claim in this amended complaint,

plaintiff also alleges in this motion that Joe violated section 90 (10) of the Judiciary Law by publically disclosing the DDC, alleged to be a confidential document, as the Committee's investigation of the firm pursuant to this DDC is still pending.

In opposition to this motion, defendants argue that the proposed fraud claim is meritless. In the original complaint, plaintiff alleged that Joe misrepresented his relationship with the "Bobker Group," defined as the Bobkers and Checkmate, prior to the execution of the retainer agreement. The Bobker Group was allegedly doing business as Checkmate. In their motion to dismiss, defendants asserted that plaintiff's reliance was not established because Joe could not have misrepresented his relationship with the Bobker Group, because the Bobker Group was merely a shorthand term for Joe, his sons Eli and Ben, and the various corporations and partnerships controlled by them. Moreover, the Bobker Group was not a party in any of the Grand Pacific litigation. The Supreme Court considered this argument in granting the motion. Defendants also assert that the Appellate Division confirmed the lower court order with respect to the fraud claim. Now, defendants argue that the repleaded claim fails again to particularize the fraud, specifically as to reliance.

Defendants argue that the additional claims should not be permitted. They state that Joe should not be held liable for bringing a DDC. They claim that a copy of the DDC is not submitted with the moving papers, and that there is no proof of its falsity. Defendants also dispute the claim that Eli intentionally deceived the court in his court filings. They contend that, at most, plaintiff can allege mistake or inadvertent omission, since plaintiff is essentially alleging that some verification of papers was missing.

In reply, plaintiff argues that the new fraudulent inducement claim is validly pleaded.

According to plaintiff, the elements for defamation have been alleged, and the public disclosure of the DDC violates the Judiciary Law. Regarding Eli's alleged attempt to deceive the court, plaintiff argues that the very intention to deceive the court is actionable under the Judiciary Law, and a plaintiff need not demonstrate that the court was deceived.

Plaintiff states that it did not attach the DDC to its papers because of the confidentiality imposed under section 90 (10) of the Judiciary Law, but noted in its papers its willingness to share the DDC with the court in camera, if necessary.

"[L]eave to amend a pleading should generally be freely granted, but the party seeking amendment has the burden of establishing the merit of the proposal. Leave to amend a complaint should be denied where the claim is palpably insufficient." *Manhattan Real Estate Equities Group LLC v Pine Equity NY, Inc.*, 27 AD3d 323, 323 (1<sup>st</sup> Dept 2006), citing *Bencivenga & Co. v Phyfe*, 210 AD2d 22 (1<sup>st</sup> Dept 1994).

"In order to sustain a cause of action for fraudulent inducement, plaintiffs must show 'misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury [citations omitted].'" *Shea v Hambros PLC*, 244 AD2d 39, 46 (1<sup>st</sup> Dept 1998). To show reliance, plaintiff must demonstrate that it was induced to "act [or] refrain from acting" to its detriment by virtue of the alleged misrepresentation or omission [citation omitted]. *Id.* at 46.

In the proposed amended complaint, plaintiff specifies the misrepresentations and material omissions. It alleges that Joe misrepresented that he was a principal of Checkmate and had the authority to bind Checkmate to the retainer agreement, and that Joe and Eli's interests

were aligned in the suits involving Grand Pacific. Other alleged misrepresentations were that defendants were not liable for the promissory notes in the underlying litigation, and that Grand Pacific defrauded them into a loan agreement. Plaintiff asserts that this is untrue. Omissions alleged in the proposed amended complaint include Joe's failure to disclose his not being a principal of Checkmate and Joe's failure to disclose his history of not compensating his lawyers for services rendered. The proposed amended complaint alleges that Joe and Eli, on behalf of Checkmate, repeatedly made false statements or material omissions to members of the firm. As for reliance, plaintiff alleges that, preceding engagement, it had conducted reasonable due diligence regarding defendants, and believed that Checkmate d/b/a the Bobker Group was a successful company. Its reliance on Checkmate's reputation led to the execution of the retainer agreement. Plaintiff alleges that the reliance resulted in damages which it seeks to recover in this suit.

The court finds that plaintiff has not made out a claim for fraudulent inducement. The repleaded claim has been drafted with more particularity than the previous claim and reliance has been specified. However, the reliance upon the reputation of Checkmate is not the same as the reliance on Joe's reputation as a representative of Checkmate. Moreover, the element of damages has not be clearly alleged. Damages have to be the alleged consequences of the inducement. The claim shall be denied.

Turning to plaintiff's claim of defamation, that term is defined as the making of a false statement which tends to "expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society [citations omitted]." *Foster v Churchill*, 87 NY2d 744, 751

(1996).

Pursuant to CPLR 3016 (a), the particular defamatory words shall be set forth in the complaint, but their application to plaintiff may be stated generally.

This claim is brought against Joe and relates to his public disclosure of the DDC to third parties. Plaintiff has made a general allegation against Joe. The alleged defamatory statements are that plaintiff defamed and threatened him; that plaintiff misused and refused to return escrow money; and that plaintiff violated the attorney-client privilege in commencing this action. Plaintiff alleges that all these statements were made in the DDC and are false.

The court finds that plaintiff has made out an adequate claim for defamation. The claim is acceptable and amendment is permitted.

The Judiciary Law claim is brought against Eli. Plaintiff alleges that Eli, who is a licensed attorney, filed false papers related to the answer and counterclaims brought by defendants. Defendants are arguing that plaintiff's conduct as their legal representative in the Grand Pacific litigation amounted to malpractice or negligence. With the answer, Eli allegedly submitted papers prepared in the Grand Pacific litigation, and failed to disclose that Joe had verified these papers. Plaintiff alleges that this is an attempt to mislead the court as to plaintiff's preparation of that litigation, and is a violation of section 487 (1) of the Judiciary Law.

Section 487 (1) provides that an attorney who is guilty of any deceit, with intent to deceive a court or any party, is guilty of a misdemeanor, and forfeits to a party injured treble damages, to be recovered in a civil suit. The court does not find that the allegation made against Eli rises to the level of deceit, which requires a criminal offense under the statute. The claim is without merit, and amendment is precluded.

## THE MOTION TO DISMISS THE COUNTERCLAIMS

On April 18, 2011, defendants served an answer to the amended complaint which contained counterclaims sounding in negligence and/or gross negligence, breach of contract, breach of fiduciary duty, injunctive relief and defamation.

Plaintiff moves for dismissal of these counterclaims on the grounds of failure to state a cause of action, statute of limitations and documentary evidence. First, plaintiff argues that the fact that defendants decided to serve the counterclaims over a year after the filing of the amended complaint indicates the baseless nature of these counterclaims. Plaintiff further contends that these counterclaims constitute a form of abuse and harassment.

Second, plaintiff refers to the Grand Pacific litigation in which it had been previously involved. One action, brought in Supreme Court, New York County, involved Joe and Eli, was captioned *Grand Pacific Finance Corp. v 97-111 Hale, LLC, et al.*, Index No. 601164/09 (New York Action). In the New York Action, Grand Pacific sought loan repayment from defendants pursuant to promissory notes and guarantees executed by them. The Bobkers, sued individually as guarantors, sought a defense of fraudulent inducement. As determined by the Appellate Division, First Department, a summary judgment motion brought by Grand Pacific with respect to the notes and guarantees which was granted by the Supreme Court was confirmed on the ground that the unconditional nature of the instruments effectively barred any defenses brought by the Bobkers. *Grand Pacific Fin. Corp. v 97-111 Hale, LLC*, 90 AD3d 534 (1<sup>st</sup> Dept 2011). Moreover, the Appellate Division, First Department, held that the Bobkers had not sustained any damages caused by Grand Pacific's actions or omissions.

Plaintiff states that defendants brought these present counterclaims against it because of

its conduct as their prior legal representative in the Grand Pacific litigation. Plaintiff denies that it acted improperly as a legal representative. For example, plaintiff claims that it could not assert that the Bobkers did not default in their loan repayment when there was clear evidence contradicting this. Plaintiff also claims that defendants reviewed and approved the pleadings made by plaintiff during its period of representing them. According to plaintiff, the firm's conduct is protected from liability as it relied on its professional judgment in determining the course of litigation.

Plaintiff specifically responds to the defamation counterclaim. Here, defendants allege that plaintiff defamed Joe by noting in a private email with his subsequent counsel and his son that Joe, by signing the engagement letter, had committed forgery. Plaintiff argues that this counterclaim is barred by the one-year statute of limitations for defamation claims; that Joe in fact committed forgery; and that defendants have failed to adequately allege any damages.

Plaintiff argues that the counterclaims for breach of contract and breach of fiduciary duty should be dismissed because they are duplicative of the malpractice counterclaim. Finally, plaintiff moves for dismissal of the injunctive relief counterclaim on the ground that defendants have not properly alleged any of the elements necessary to obtain either a preliminary or permanent injunction.

In opposition to this motion, defendants contend that plaintiff committed several acts of malpractice as their counsel. According to them, during the New York Action, they repeatedly advised plaintiff that the notes in question were invalid and could not be paid due to the alleged fraudulent conduct of Grand Pacific. However, plaintiff pleaded in their papers that they defaulted on the notes in question. Defendants argue that this was an incorrect admission which

eventually led to the granting of Grand Pacific's summary judgment motion.

Defendants also state that plaintiff also filed only one affidavit in opposition to Grand Pacific's summary judgment motion; made similar incorrect admissions in their behalf in a Westchester County action brought by Grand Pacific (the Westchester Action); threatened defendants with respect to legal payments; and improperly held escrow funds. They argue that plaintiff's arguments in favor of dismissal are insufficient and conclusory.

In reply, plaintiff asserts that defendants' opposition lacks evidentiary value because of their dependence on an affirmation from their personal counsel. Plaintiff states that the Bobkers cannot deny that they defaulted on their loans in the underlying litigation and as a result of the Appellate Division's decision, the counterclaims are barred. Moreover, plaintiff states that the Bobkers verified defendants' papers in the New York Action.

Plaintiff avers that the Westchester Action is pending, and, since the claims there have not been adjudicated, defendants have not sustained any damages as a result of its representation of them in that suit, and any such counterclaims are, at best, premature.

Plaintiff notes that defendants have failed to address the opposition to their counterclaims based on breach of contract and breach of fiduciary duty.

Generally, on a motion to dismiss brought pursuant to CPLR 3211, the court must accept the facts as alleged as true and determine whether the facts as alleged fit within any cognizable legal theory. *See Bishop v Maurer*, 33 AD3d 497, 498 (1<sup>st</sup> Dept 2006); *aff'd* 9 NY3d 910 (2007). "The court, however, is not required to accept factual allegations, or accord favorable inferences, where the factual assertions are plainly contradicted by documentary evidence." *Id.* at 498. "Dismissal under CPLR 3211 (a) (1) is warranted 'only if the documentary evidence submitted

conclusively establishes a defense to the asserted claims as a matter of law.” 511 W. 232<sup>nd</sup> Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152 (2002), quoting Leon v Martinez, 84 NY2d 83, 88 (1994).

Defendants allege that plaintiff indulged in negligent conduct during its tenure as their legal representative. They claim that the defense made by plaintiff in the New York Action was contrary to what Joe and Eli had wanted. However, plaintiff submits copies of their papers in that action, which indicates that the admission of a default in payment was verified. Defendants contend that plaintiff should have persisted in arguing that Grand Pacific indulged in fraudulent conduct.

“An action for legal malpractice requires proof of the attorney’s negligence, a showing that the negligence was the proximate cause of the plaintiff’s injury, and evidence of actual damages.” *Gladstone v Ziegler*, 46 AD3d 366, 366 (1<sup>st</sup> Dept 2007). “To prevail in a legal malpractice action, the plaintiff must prove that the attorneys were negligent and that a recovery would have been obtained but for that negligence.” *DeLeon v Sonin & Genis*, 303 AD2d 291, 292 (1<sup>st</sup> Dept 2003). “Attorneys may select among reasonable courses of action in prosecuting their clients’ cases without thereby committing malpractice, so that a purported malpractice claim that amounts only to a client’s criticism of counsel’s strategy may be dismissed [citation omitted].” *Dweck Law Firm v Mann*, 283 AD2d 292, 293 (1<sup>st</sup> Dept 2001).

The court finds that defendants’ allegations do not rise to the level of professional negligence. That plaintiff was unsuccessful in defeating Grand Pacific’s summary judgment motion does not indicate unreasonable conduct which could define negligence. This counterclaim shall be dismissed.

Defendants do not address plaintiff's argument that the counterclaims for breach of contract and breach of fiduciary duty should be dismissed as duplicative of the negligence counterclaim, where each counterclaim seeks the same damages. *See Bernard v Proskauer Rose, LLP*, 87 AD3d 412, 416 (1<sup>st</sup> Dept 2011). The argument is valid, and the court shall dismiss these counterclaims.

The injunctive relief sought shall be dismissed. "Injunctive relief will be afforded only in those extraordinary situations where plaintiff has no adequate remedy at law and such relief is necessary to avert irreparable injury." *Chicago Research & Trading v New York Futures & Exch.*, 84 AD2d 413, 416 (1<sup>st</sup> Dept 1982). This would apply to counterclaims as well. It is apparent that defendants could attain sufficient relief in the form of damages.

CPLR 215 (3) provides that defamation claims are subject to a one-year statute of limitations. Defendants allege that Balestriere, a partner of plaintiff, emailed a statement to Eli about Joe, claiming that Joe was guilty of forgery and could be jailed. This alleged act of defamation occurred on October 21, 2009. As the answer is dated April 17, 2011 and was filed on April 18, 2011, the counterclaim of defamation is barred by the statute of limitations.

In effect, plaintiff's motion to dismiss is granted, as none of the counterclaims are sufficiently pleaded or timely.

Accordingly, it is

ORDERED that plaintiff Balestriere, Fariello's motion for leave to amend its amended complaint is granted to the extent that the defamation claim is permitted, and the amended complaint annexed to the moving papers, as permitted, shall be deemed served upon service by movant of a copy of this order with notice of entry; and it is further

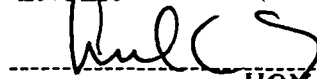
ORDERED that defendants shall serve an answer to the amended complaint or otherwise respond thereto within 20 days of said service; and it is further

ORDERED that plaintiff's motion to dismiss the counterclaims of defendants Checkmate Holdings, LLC, Joe Bobker and Eli Bobker is granted, and the counterclaims are dismissed, with costs and disbursements to said plaintiff as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: JAN 11, 2013

ENTER



HON. ANIL C. SINGH  
SUPREME COURT JUSTICE  
J.S.C.