

Wagner Davis, P.C. v Kalypso Siskopoulos
2013 NY Slip Op 33592(U)
February 11, 2013
Supreme Court, New York County
Docket Number: 111965/04
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. [REDACTED]
BARBARA JAFFE
J.S.C. Justice

PART 12

Index Number : 111965/2004
WAGNER DAVIS, P.C.
vs.
SISKOPOULOS, KALYPSO
SEQUENCE NUMBER : 009
PARTIAL SUMMARY JUDGMENT

INDEX NO. 111965/04
MOTION DATE
MOTION SEQ. NO. 009

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
ACCOMPANYING DECISION / ORDER

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

Dated: 2/11/13

[Signature] BARBARA JAFFE
J.S.C.
J.S.C.

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
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 12

-----X
WAGNER DAVIS, P.C.,

Plaintiff,

- against -

Index No. 111965/04

Mot. seq. nos.: 009, 010
Subm.: 8/15/12

DECISION AND ORDER

KALYPSO SISKOPOULOS and JOHN SISKOPOULOS,
As Executor of the Estate of Angelo Siskopoulos,

Defendants.

-----X
BARBARA JAFFE, J.:

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By notice of motion dated February 12, 2012, defendants move pursuant to CPLR 3212 for an order granting them partial summary judgment on several of their affirmative defenses. Plaintiff opposes and, by notice of motion dated February 13, 2012, moves pursuant to CPLR 3212 for an order summarily dismissing defendants' counterclaims.

I. PERTINENT BACKGROUND

In 2000, defendants hired plaintiff law firm to defend them in a partition action commenced by the brother of decedent Angelo Siskopoulos seeking to evict them from their residence. A referee held a hearing and issued a report finding that defendants had not ousted the brother from the residence, and awarded defendants certain damages, including reimbursement of half of the mortgage payments paid by them and for repairs and maintenance of the property. (Affidavit of Bonnie Reid Berkow, Esq., dated Feb. 13, 2012 [Berkow Affid.], Exh. GG).

Between August 1, 2000 and December 21, 2003, plaintiff rendered legal services to them. As of January 31, 2004, defendants had paid plaintiff \$8,559.68 for its services, leaving a balance of \$45,577.92. (Affirmation of Alexandra Siskopoulos, Esq., dated Feb. 12, 2012 [Siskopoulos Aff.], Exh. A).

On or about August 16, 2004, plaintiff commenced the instant action against defendants, asserting causes of action for an account stated and quantum meruit. (*Id.*).

By verified answer dated September 22, 2004, defendants denied plaintiff's allegations and asserted 11 affirmative defenses: (1) failure to state a claim; (2) lack of subject matter jurisdiction; (3) unclean hands; (4) estoppel by "plaintiff's misrepresentations regarding the work negligently performed and work never done [which] prevented defendants from firing plaintiff at an earlier time"; (5) objections to plaintiff's statements of account; (6) termination of plaintiff for cause; (7) failure to provide workmanlike services; (8) breach of ethical duties; (9) fraud; (10) breach of fiduciary duty; and (11) breach of contract. (*Id.*, Exh. B).

Defendants also asserted counterclaims for fraud, breach of fiduciary duty, and breach of contract. In their counterclaim for fraud, defendants allege that plaintiff made material fraudulent representations and omissions by sending defendants invoices that reflected work never done and billing excessively for work allegedly done, that plaintiff knew the invoices were false, that plaintiff sent the invoices with the intent to defraud defendants into paying them and to prevent defendants from discovering that certain work was never done, and that defendants justifiably relied on the invoices given plaintiff's duty to disclose the truth accurately and paid plaintiff and did not fire them earlier. (*Id.*).

In alleging a breach of fiduciary duty, defendants contend that plaintiff owed them a

fiduciary duty as their attorney, and that plaintiff violated its ethical duty to represent them adequately and that its fraudulent billing practices constituted a breach of fiduciary duty. In their counterclaim alleging a breach of contract, defendants allege that plaintiff breached its retainer agreement by failing to render competent legal services and by increasing its fees without the required notice. In all three counterclaims, defendants assert that they have suffered damages of at least \$25,000, and that punitive damages are warranted given plaintiff's intentional, wrongful, and malicious actions. (*Id.*).

At an examination before trial (EBT) held on November 8, 2005, Steven R. Wagner, one of plaintiff's senior partners, testified as pertinent here, that he did not recall working on or reviewing a motion to confirm a referee's report in the partition action although plaintiff billed defendants for his work on it. (*Id.*, Exh. D).

In its response to interrogatories dated March 4, 2011, plaintiff stated that it could not recall any specific action for partition that it litigated before the year 2000, that associate Nancy Kim's only work on a partition action was defendants' action, and that Steven Wagner could not recall the number of real property actions taken to trial as the vast majority of them settle or are resolved on motion. (*Id.*, Exh. E).

II. DEFENDANTS' MOTION

A. Contentions

Defendants assert that the evidence establishes their affirmative defense of estoppel and/or fraud, preventing plaintiff from recovering herein, in that they hired plaintiff because it held itself out to be an expert in the field of real estate litigation and specifically in actions for partition whereas plaintiff had no prior experience with partition actions. They also contend that

they are entitled to judgment on their affirmative defense for an offset based on plaintiff's false claim of expertise in real estate law. Defendants rely on Wagner's EBT testimony, plaintiff's interrogatory responses, and a printout of plaintiff's website, which reflects that it was created in 2005. (Mem. of Law, dated Feb. 12, 2012).

Wagner asserts that he and plaintiff qualify as experts in real estate litigation and that his records reflect that he handled one partition action and other actions involving similar issues, that defendants have not demonstrated that he or plaintiff misrepresented their qualifications or were not qualified to handle the action, and that plaintiff's interrogatory responses do not contain any admission to the contrary. Plaintiff also observes that its website was created in 2005, after defendants retained it, that defendants fail to submit an affidavit from someone with personal knowledge of the relevant facts, and that defendants have impermissibly changed the theory of their estoppel defense from improper billing to the instant claim. Finally, plaintiff contends that defendants have not shown that its alleged inadequacies or misrepresentations resulted in any prejudice as the partition was resolved on favorable terms to them. (Affidavit of Steven R. Wagner, Esq., dated Mar. 7, 2012; Mem. of Law, dated Mar. 7, 2012).

In reply, defendants reiterate their prior arguments. (Mem. of Law, dated Mar. 15, 2012).

B. Analysis

Defendants' failure to plead the specific allegations in their affirmative defenses is not fatal here as plaintiff opposes them on the merits and defendants asked questions relating to them in discovery. (*See Drago v Spadafora*, 94 AD3d 1041 [2d Dept 2012] [no showing made that plaintiffs were taken by surprise or prejudiced by defendant's use of unpleaded affirmative defense in support of his motion for summary judgment]; *Sullivan v Am. Airlines, Inc.*, 80 AD3d

600 [2d Dept 2011] [unpleaded defense may serve as basis for granting summary judgment in absence of surprise or prejudice to opposing party]; *Joan Hansen & Co., Inc. v Everlast World's Boxing Headquarters Corp.*, 2 AD3d 266 [1st Dept 2003], *lv denied* 2 NY3d 702 [2004] [summary judgment may be granted on unpleaded defense where opponent of motion has not been surprised and fully opposed motion]).

A claim or defense of estoppel requires a showing of: (1) conduct which amounts to a false misrepresentation or concealment of material facts, (2) an intention or expectation that such conduct will be acted upon by the other party, and (3) actual or constructive knowledge of the real facts. (*Winners Garage, Inc. v Tax Appeals Tribunal of State of New York*, 89 AD3d 1166 [3d Dept 2011], *lv denied* 18 NY3d 807 [2012]; *BWA Corp. v Alltrans Exp. U.S.A., Inc.*, 112 AD2d 850 [1st Dept 1985]). The party asserting the estoppel must demonstrate a lack of knowledge of the true facts, reliance upon the conduct of the other party, and a prejudicial change in position. (*River Seafoods, Inc. v JPMorgan Chase Bank*, 19 AD3d 120 [1st Dept 2005], *app withdrawn* 6 NY3d 751).

Here, defendants have failed to establish, *prima facie*, that plaintiff is not an expert in the real estate field or had no experience dealing with partition actions as plaintiff's discovery response that it could not recall working on partition actions before 2000 does not constitute an admission that it had no experience working on such actions, and they cite nothing in Wagner's deposition testimony that is relevant to this claim. Thus, to the extent that plaintiff made certain representations to defendants, defendants have not shown that they were false misrepresentations.

In any event, as defendants fail to submit an affidavit from someone with personal knowledge of the circumstances underlying their retention of plaintiff, they cannot establish that

plaintiff made the representations to them on which they relied, and the printout of plaintiff's website is not probative. (*See eg Dombroski v Samaritan Hosp.*, 47 AD3d 80 [3d Dept 2007] [general accusation of deception not based on personal knowledge insufficient to establish estoppel]; *Cohen v Houseconnect Realty Corp.*, 289 AD2d 277 [2d Dept 2001] [complaint contained no allegations setting forth alleged misrepresentations, and no such allegations were contained in plaintiff's affidavit submitted on motion]; *Urquhart v Philbor Motors, Inc.*, 9 AD3d 458 [2d Dept 2004] [affidavit submitted by defendant insufficient to establish *prima facie* entitlement to summary judgment as it was not by person with first-hand knowledge of alleged misrepresentations]; *see also Nissan Motor Acceptance Corp. v Scialpi*, 83 AD3d 1020 [2d Dept 2011] [conclusory and unsubstantiated allegations of fraud and misrepresentation insufficient]; *cf Silber v Muschel*, 190 AD2d 727 [2d Dept 1993] [defendant submitted fact-specific affidavit evincing first-hand knowledge of misrepresentations made by plaintiff during parties' negotiations]; *Slavin v Victor*, 168 AD2d 399 [1st Dept 1990] [in alleging fraud, party appropriately offered affidavit of person with first-hand knowledge as to nature of misrepresentations]).

For the same reasons, defendants have not established their claim that plaintiff breached ethical rules by holding itself out as an expert in real estate.

III. PLAINTIFF'S MOTION

Plaintiff moves to dismiss defendant's counterclaims on the ground that they have failed to prove that they sustained any damages, that the fraud claim is insufficient as defendants have not identified any fraudulent invoices, that defendants' malpractice claim is fatally conclusory, and that defendants' breach of fiduciary claim is duplicative of their malpractice claim. (Berkow

Affid.).

A. Fraud counterclaim

1. Contentions

Plaintiff contends that defendants have failed to particularize which invoices and/or services they allege were fraudulent and have not shown that it intended to commit fraud.

Rather, it characterizes defendants' fraud claim as a dispute about billing. (Berkow Affid.).

Defendants claim that the invoices reflect that plaintiff overbilled or double-billed them, including billing for the work of William Fried at the rate charged for a partner even though he was only an associate at the firm, and for work allegedly performed after they terminated plaintiff's services. (Affidavit of Kalypso Siskopoulos, dated Mar. 2, 2004 [Siskopoulos Affid.]; Mem. of Law, dated Mar. 19, 2012 [Mar. Mem.]).

In reply, plaintiff asserts that defendants cannot claim as damages the amount that they were billed absent evidence they actually paid the bills, and that they have failed to offer proof of any other damages. (Reply Mem., dated Mar. 23, 2013 [Reply Mem.]).

2. Analysis

To establish a claim for fraud, a party must show: (1) a material misrepresentation of a fact; (2) knowledge of its falsity; (3) an intent to induce reliance; (4) justifiable reliance by the party; and (5) damages. (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553 [2009]).

While defendants point to several instances of possibly erroneous billing, they mainly argue that plaintiff overbilled them for work that, in their view, took too long to complete or was inadequate or unnecessary. Even if plaintiff billed them for Fried's services at the wrong rate or for services rendered post-termination, such allegations are insufficient to demonstrate that

plaintiff made a material misrepresentation of fact with knowledge of its falsity and with the intent to defraud them. (See eg *Platinum Partners Value Arbitrage Fund LP v Kroll Assocs., Inc.*, 957 NYS2d 336 [1st Dept 2013] [allegations did not state fraud claim but indicated at most that defendant made errors and do not give rise to inference of fraudulent intent]; *Sklover & Donath, LLC v Eber-Schmid*, 71 AD3d 497 [1st Dept 2010] [no viable counterclaim for fraud absent facts alleging that law firm knew its estimate of legal fees was false at time it was made]; *Ben-Zvi v Kronish Lieb Weiner & Hellman LLP*, 278 AD2d 167 [1st Dept 2000] [claim for fraud based on allegations that defendants billed him for services not performed or overstated properly dismissed absent any specificity]).

Defendants also fail to identify what damages they suffered as a result of the alleged overbilling as it is undisputed that they have not paid for most of plaintiff's invoices and they do not show that there were any erroneous charges on the invoices they paid. (See *Busino v Meachem*, 270 AD2d 606 [3d Dept 2000] [fraud claim properly dismissed, in part, as attorney's bills were never paid]).

B. Breach of fiduciary duty counterclaim

1. Contentions

Plaintiff denies that it committed legal malpractice by failing to exercise the degree of care, skill and diligence commonly possessed by a member of the legal community, and argues that defendants have not shown that any of its alleged acts or omissions proximately caused them harm or damages. (Berkow Affid.).

Defendants argue that plaintiff breached its duty to them by failing to conduct discovery timely in the partition action, and by committing other procedural errors and failing to apprise

them of its actions in the litigation. They deny that the claim is duplicative as they assert no malpractice claim. (Siskopoulos Affid.; Mar. Mem.).

In reply, plaintiff argues that defendants' claim that it breached a fiduciary duty actually constitutes a claim of legal malpractice, and that defendants have not shown that they suffered a loss in the partition action due to plaintiff's acts or omissions and that such loss caused them damages. (Reply Mem.).

2. Analysis

To establish a claim for legal malpractice, a party must show that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession, and that the attorney's breach of this duty proximately caused the party to sustain actual and ascertainable damages. (*Rudolph v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438 [2007]). To establish a breach of fiduciary duty, a party must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the misconduct. (*Kurtzman v Bergstol*, 40 AD3d 588 [2d Dept 2007]).

Here, plaintiff established, *prima facie*, that it did not breach the standard of professional care and that, in any event, defendants obtained a favorable outcome in the partition action and sustained no damages, much less damages that were proximately caused by plaintiff's allegedly negligent actions. (See *Schurz v Bodian*, 92 AD3d 753 [2d Dept 2012] [to obtain summary judgment, attorney must demonstrate that client is unable to prove at least one of elements of legal malpractice claim]; *Song v Woods Oviatt Gilman LLP*, 55 AD3d 1278 [4th Dept 2008] [attorneys met burden by establishing that they were not negligent and that plaintiff sustained no damages]).

In opposition, defendants' allegations only raise issues as to plaintiff's litigation tactics and strategy. Thus their counterclaim for breach of fiduciary duty is essentially a claim of legal malpractice, which requires that they demonstrate that "but for" plaintiff's conduct, they would have prevailed or received a more favorable result in the partition action or would not have sustained any ascertainable damages. (*Boone v Bender*, 74 AD3d 1111 [2d Dept 2010]). Even if the claim is construed as one for breach of fiduciary duty, defendants must meet the same standard. (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267 [1st Dept 2004] [same standard of causation for legal malpractice claim and claim for breach of fiduciary duty in context of attorney liability as claims are co-extensive]).

Defendants have not even alleged, much less established, that they did not prevail in the partition action or that the outcome would have been more favorable to them but for plaintiff's actions. (*See Cohen v Weitzner*, 47 AD3d 594 [1st Dept 2008] [attorneys breached no duty by making typographical error on spreadsheet prepared for clients as they ultimately succeeded in task for which they were retained]; *Agate v Herrick, Feinstein LLP*, 57 AD3d 341 [1st Dept 2008] [plaintiff did not demonstrate that but for attorneys' alleged negligence, outcome of underlying matter would have been substantially different or resulted in higher award by arbitration panel]; *Ambase Corp. v Davis Polk & Wardwell*, 30 AD3d 171 [1st Dept 2006], *aff'd* 8 NY3d 428 [2007] [malpractice claim based on attorneys' alleged failure to act in manner that would have resulted in underlying matter being resolved more expeditiously properly dismissed as speculative; attorneys achieved successful outcome for client]; *Tortura v Sullivan Papain Block McGrath & Cannavo, P.C.*, 21 AD3d 1082 [2d Dept 2005], *lv denied* 6 NY3d 701 [client failed to plead specific factual allegations that but for attorneys' alleged negligence, there would have been more

favorable outcome in underlying action]).

Nor have they shown that they sustained any ascertainable damages absent any proof that they paid plaintiff for services which they contend were performed improperly, and their claim for \$25,000 in damages is conclusory and unsupported. Thus, defendants cannot establish that plaintiff's actions proximately caused them to sustain damages. (*See eg Dempster v Liotti*, 86 AD3d 169 [2d Dept 2011] [while attorney may be held liable for ignoring rules of practice, failing to comply with conditions precedent to suit, neglecting to prosecute or defend action, or failing to conduct sufficient legal research, client must still show that he or she would have succeeded on merits but for attorney's negligence, and plead and prove actual, ascertainable damages resulting from negligence]; *Nason v Fisher*, 36 AD3d 486 [1st Dept 2007] [as client admitted that ultimate settlement of underlying litigation was favorable, client failed to establish that attorneys' conduct caused any loss]; *Taylor v Pulvers, Pulvers, Thompson & Kuttner, P.C.*, 1 AD3d 128 [1st Dept 2003] [no malpractice claim based on allegations that attorney did not expeditiously depose defendants in underlying matter as no non-speculative basis offered to show client sustained damages attributed to delay]; *Lavanant v Gen. Acc. Ins. Co. of Am.*, 212 AD2d 450 [1st Dept 1995] [plaintiff failed to establish legal malpractice absent proof of actual damages proximately caused by attorney's alleged negligence]).

Moreover, defendants' complaints about plaintiff's actions raise questions of judgment and strategy, which do not constitute legal malpractice. (76 NY Jur 2d, Malpractice § 42 [2013] [attorney not held liable for errors in judgment]; *see Sklover*, 71 AD3d at 498 [counterclaim for legal malpractice dismissed as litigation steps taken by attorney among many reasonable options, and no counterclaim for breach of fiduciary duty as client's contention that attorney prolonged

litigation to increase fees was speculative and conclusory and client alleged no facts showing that attorney followed inappropriate course of action]; *Diamond v Kazmierczuk & McGrath*, 15 AD3d 526 [2d Dept 2005], *lv denied* 5 NY3d 715 [selection of one among several courses of action not malpractice]; *Dweck Law Firm, LLP v Mann*, 283 AD2d 292 [1st Dept 2001] [malpractice claim consisting of allegations that amounted only to client's criticism of attorney's strategy may be dismissed]; *Alter & Alter v Cannella*, 284 AD2d 138 [1st Dept 2001] [errors of professional judgment did not constitute legal malpractice and client only speculated that litigation would have had outcome more favorable to him if attorney had made different tactical decisions in representing him]).

Defendants also fail to submit an affidavit from an expert or otherwise demonstrate how plaintiff failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession. (76 NY Jur 2d, Malpractice § 42 [expert testimony generally required to establish breach of standard of professional care, unless ordinary experience of fact-finder provides basis for judging adequacy of services]; *Healy v Finz & Finz, P.C.*, 82 AD3d 704 [2d Dept 2011] [same]; *Tran Han Ho v Brackley*, 69 AD3d 533 [1st Dept 2010], *lv denied* 15 NY3d 707 [attorney properly granted summary judgment on legal malpractice claim as client failed to submit expert affidavit despite pleading claims that raised issues of professional standards and causation beyond ordinary experience of non-lawyers]; *Orchard Motorcycle Distributors, Inc. v Morrison Cohen Singer & Weinstein, LLP*, 49 AD3d 292 [1st Dept 2008] [client failed to submit expert affidavit detailing appropriate standard of professional skill and care that attorney was required to adhere to under circumstances of underlying case]; *A.H. Harris & Sons Inc. v Burke, Cavalier, Lindy and Engel P.C.*, 202 AD2d 929 [3d Dept 1994] [allegation

that attorney failed to present admissible evidence at trial did not state legal malpractice claim absent showing of how or why such failure fell below standard of professional care]).

C. Breach of contract counterclaim

Whether characterized as malpractice or breach of fiduciary duty, defendants' counterclaim for a breach of contract is premised on the same allegations and seeks the same damages as the other counterclaims and thus, is duplicative. (*Voutsas v Hochberg*, 2013 NY Slip Op 00803 [1st Dept 2013]; *Dempster*, 86 AD3d 169).

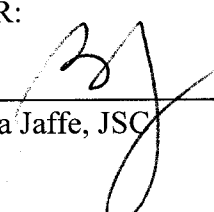
IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion for partial summary judgment is denied; and it is further

ORDERED, that plaintiff's motion for partial summary judgment is granted to the extent of dismissing defendants' counterclaims against it.

ENTER:



Barbara Jaffe, JSC

DATED: February 11, 2013
New York, New York