

**Ziming Shen v Morvillo, Abramowitz, Grand, Iason,
Silverberg, P.C.**

2017 NY Slip Op 30500(U)

March 8, 2017

Supreme Court, County of New York

Docket Number: 150808/2016

Judge: Erika M. Edwards

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

ZIMING SHEN & JOANNA FAN,

Index No.: 150808/2016

Plaintiffs,

DECISION/ORDER

-against-

MORVILLO, ABRAMOWITZ, GRAND, IASON,
SILVERBERG, P.C.,

Defendant.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits/Affirmations/ Memos of Law annexed	<u>1</u>
Notice of Cross-Motion and Affidavits/ Affirmations/Memos of Law annexed	<u>2</u>
Opposition to Cross-Motion and Reply	<u>3</u>
Sur-Reply (Motion Seq. 002)	<u>4</u>
Opposition to Sur-Reply (Motion Seq. 002)	<u>5</u>

ERIKA M. EDWARDS, J.:

Plaintiffs Ziming Shen and Joanna Fan (“Plaintiffs”) brought this action against Defendant Morvillo, Abramowitz, Grand, Iason, Silverberg, P.C. (“Defendant”) seeking to recover damages for Defendant’s alleged failure to conduct a sentencing hearing, called a *Fatico* hearing, in Plaintiff’s federal criminal case. Plaintiff’s causes of action include legal malpractice (Count I), breach of contract (Count II), breach of fiduciary duty (Count III), fraud (Count IV) and deceit under Judiciary Law § 487 (Count V). Defendant moves to dismiss all five causes of action for failure to state a cause of action and based on documentary evidence, pursuant to CPLR 3211(a)(7) and (a)(1) and because the breach of contract, breach of fiduciary duty and fraud counts (Counts II, III and IV, respectively) are duplicative of the legal malpractice count

(Count I). Defendant also moves for an award of costs, including attorney's fees and sanctions against Plaintiffs and Plaintiffs' counsel, pursuant to 22 NYCRR § 130-1.1, because the complaint and Amended Verified Complaint are frivolous.

For the reasons set forth herein, Defendant's motion to dismiss is GRANTED to the extent that Plaintiffs' Amended Verified Complaint is dismissed against Defendants and Defendant's motion for sanctions and other relief is DENIED.

BACKGROUND

It is undisputed that Plaintiffs retained Defendant to represent them in a federal criminal matter after Plaintiffs had already waived indictment and pleaded guilty to an Information, but they had not yet been sentenced. The government alleged that Plaintiff Fan was the executive director of a non-profit organization which provided nursery and kindergarten services to children and Plaintiff Shen owned various businesses, including one which sold food to Plaintiff Fan's organization. Plaintiffs were accused of submitting fraudulent reimbursement claims and misappropriating \$3 million by depositing the money into various personal and business accounts and using it for improper purposes.

Plaintiffs wished to challenge the alleged loss amount. Defendant reviewed numerous documents which were seized from Plaintiffs by the Internal Revenue Service during the execution of a search warrant. Plaintiffs and Defendant worked closely with a forensic accounting firm to obtain information necessary to prepare a report to challenge the loss amount in hopes of reducing the severity of Plaintiffs' sentences, including the amount of time of incarceration or probation, enhancements and the amounts of restitution and forfeiture.

On April 12, 2012, prior to Defendant's representation, Plaintiffs pleaded guilty and admitted to scheming to defraud and stealing from a federally-funded program designed to

reimburse service providers for the cost of feeding their clients. Defendant was contacted by Plaintiffs on June 26, 2012, and began conducting work on the case. Defendant provided Plaintiffs with a letter of engagement on June 29, 2012, and Plaintiffs signed it on July 20, 2012. During Defendant's representation, Defendant spent numerous hours reviewing the documents seized, researching issues, preparing arguments to present to the government to reduce the loss amount and Plaintiffs' sentences and representing Plaintiff Shen in a bond revocation hearing held on September 7, 2012. After the hearing, Plaintiff Shen was found to have violated the conditions of his release and the court remanded him until sentencing.

Prior to sentencing and before Plaintiffs advised the court of whether they wished to proceed with the hearing, Plaintiffs terminated Defendant's services and they each retained individual counsel. Plaintiff Shen retained new counsel on January 16, 2013, and Plaintiff Fan on March 12, 2013. While represented by new counsel, Plaintiffs and the government agreed on the disputed loss and restitution amounts and on April 5, 2013, the parties advised that court that there was no need for a *Fatico* hearing. On October 1, 2013, Plaintiff Fan was sentenced to 57 months' incarceration and on October 10, 2013, Plaintiff Shen was sentenced to five years' probation. Both Plaintiffs were held responsible for \$2.2 million in restitution and \$3 million in forfeiture. Plaintiffs both filed writs which included allegations of ineffective assistance of counsel and accused the attorneys who represented them at sentencing of failing to request a *Fatico* hearing. Neither accused Defendant of being ineffective in any manner.

PLAINTIFFS' AMENDED VERIFIED COMPLAINT

In their Amended Verified Complaint, Plaintiffs allege in substance that they hired Defendant for its expertise in their type of case and because the lead attorney agreed to conduct a *Fatico* hearing to challenge the loss amount. Plaintiffs allege that Defendant's attorneys spent

excessive hours on unnecessary matters, like editing letters from concerned parents, causing Plaintiffs to pay Defendant over \$630,000 in legal fees. Then, Defendant's lead attorney changed his mind and refused to conduct the *Fatico* hearing, causing Plaintiffs to terminate their relationship for cause, hire new attorneys and suffer damages from being sentenced without having the hearing.

DEFENDANT'S MOTION TO DISMISS AND FOR SANCTIONS

Defendant moves to dismiss Plaintiff's Amended Verified Complaint and argues in substance that all of Plaintiffs' causes of action must be dismissed because Plaintiffs' complaint is frivolous; Defendant never promised Plaintiffs that it would conduct a *Fatico* hearing; Plaintiffs never asked for such promise and there was no such promise made in Defendant's letter of engagement, nor in any document.

Defendant further argues that all legal work conducted was necessary and Defendant's billing was not excessive. Defendant alleged that it billed Plaintiffs \$400,213.35, Plaintiffs paid \$362,989.05 and Defendant forgave the remaining \$37,224.30. Plaintiffs did not object to Defendant's bills or the nature of its representation. Additionally, Plaintiff Fan complimented Defendant's work and continued to pay down the bills for eight months after she terminated Defendant's services. Defendant argues that Plaintiff Fan explained to Defendant's lead attorney in substance that although she like him and was very satisfied with his representation, she could not afford to continue to pay Defendant's fees so she had to retain new counsel. Plaintiff Shen advised Defendant's lead counsel in substance that he was retaining a new attorney because, since he was already incarcerated, he had nothing to lose and wanted to pursue a more aggressive defense to the loss amount without hurting his wife's case.

Defendant argues that Plaintiffs' legal malpractice claim also must be dismissed because Plaintiffs were convicted of a crime which prohibits them from filing a legal malpractice claim against their attorneys for claims arising out of their criminal case. Additionally, Defendant did not refuse to do a *Fatico* hearing, but Plaintiffs terminated Defendant's service prior to such decision being made. It was Plaintiffs and their subsequent attorneys who chose not to have the *Fatico* hearing and agreed to the amounts of loss, restitution and forfeiture. Therefore, since Defendant did not represent Plaintiffs during their pleas, when they chose to forego a *Fatico* hearing, or when they were sentenced, there is no proximate cause for Plaintiffs' damages.

Defendant also argues that Plaintiffs' causes of action for breach of contract, breach of fiduciary duty and fraud should be dismissed because they are duplicative and identical to Plaintiffs' malpractice claim. Defendant contends that the letter of engagement proves that Defendant did not promise to request a *Fatico* hearing, so Plaintiffs' breach of contract claim also fails. Plaintiffs' breach of fiduciary duty claim fails because Plaintiffs waived any potential conflicts involving Defendant's joint representation by signing the letter of engagement and on the record during the court's *Curcio* hearing, after having the opportunity to consult with separate conflict attorneys who were appointed by the court. Defendant further argues that Plaintiffs' fraud claim must be dismissed because Plaintiffs failed to allege that Defendant made a knowing misstatement to Plaintiffs and they only allege that Defendant changed its legal advice based on strategic considerations. Defendant further argues that Plaintiffs' claim of deceptive conduct under Judiciary Law § 487 must be dismissed because, as with the fraud claim, there is no allegation that Defendant engaged in egregious conduct required by this statute.

Finally, Defendant argues that sanctions against Plaintiffs and Plaintiffs' counsel are warranted because Plaintiffs' action lacks any colorable legal or factual basis, and even after

Defendant advised Plaintiffs' counsel of the frivolous nature of the suit, instead of discontinuing the action, he filed an Amended Verified Complaint.

PLAINTIFFS' OPPOSITION

Plaintiffs oppose Defendant's motion to dismiss and include attorney affirmations, an affidavit from Plaintiff Shen and a signed statement from Plaintiff Fan. Plaintiff Fan alleges that she could not get a notary to come to her prison. Although the court is aware that inmates incarcerated at most facilities have an opportunity to have documents notarized, the court will accept Plaintiff Fan's statement as part of Plaintiffs' opposition to Defendant's motion.

Plaintiffs argue in substance that the court should deny Defendant's motion to dismiss because Defendant failed to demonstrate that dismissal was warranted and the documentary evidence submitted failed to refute all of Plaintiffs' claims. Additionally, Defendant failed to include any invoices or billing records to support its claims.¹ Plaintiffs offered to voluntarily withdraw their First Cause of Action for malpractice and attempted to alter their theories to rely almost exclusively on their claims of Defendant's alleged unnecessary and excessive overbilling and Defendant's failure to fulfill its promise to conduct a *Fatico* hearing. Plaintiff also stated that if the court determined that their claims did not encompass Defendant's overbilling, then Plaintiffs requested an opportunity to amend the complaint to add unjust enrichment. However, Plaintiffs failed to include the proposed amended complaint, nor file a cross-motion for leave to file such amended complaint.

ANALYSIS

When considering Defendant's motion to dismiss Plaintiffs' complaint for failure to state a cause of action, pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal

¹ Defendant annexed its billing records to its Reply.

construction, accept all facts as alleged in the pleading to be true, accord Plaintiffs the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]).

Normally, a court should not be concerned with the ultimate merits of the case (*Anguita v Koch*, 179 AD2d 454, 457, 579 NYS2d 335 [1st Dept 1992]). However, these considerations do not apply to allegations consisting of bare legal conclusions as well as factual claims which are flatly contradicted by documentary evidence (*Simkin v Blank*, 19 NY3d 46, 52, 945 NYS2d 222, [2012]).

When considering Defendant's motion to dismiss based on documentary evidence, the court may grant the motion only where the documentary evidence submitted utterly refutes Plaintiffs' factual allegations, conclusively establishing Defendant's defenses as a matter of law (*Leon*, 84 NY2d at 88).

When considering Plaintiffs' request to amend the complaint, Plaintiffs must properly move for leave to amend the complaint and not simply request such amendment in their opposition to Defendant's motion to dismiss. Pursuant to CPLR 3025(b), the court has discretion to grant leave to amend pleadings at any time and such leave shall be freely given upon such terms as may be just, including the granting of costs and continuances (CPLR 3025[b]; *Fahey v County of Ontario*, 44 NY2d 934 [1978]).

Such leave to amend shall be freely given as a matter of discretion in the absence of prejudice or surprise, unless it is palpably insufficient or patently devoid of merit (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]). However, "to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated" so "a motion for leave to amend a pleading must be supported by an affidavit of merits and evidentiary

proof that could be considered upon a motion for summary judgment (*Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 354-355 [1st Dept 2005]). However, the movant must include the proposed amended or supplemental pleadings clearly showing the changes or additions to be made to the pleadings (CPLR 3015[b]).

In applying these legal principles to the facts in the instant matter, the court finds that Defendant demonstrated that dismissal of all of the causes of action in Plaintiffs' Verified Amended Complaint is warranted for Plaintiffs' failure to state a cause of action and based on documentary evidence through the engagement letter and email correspondence exchanged between the parties. Even though Plaintiffs were willing to voluntarily withdraw their malpractice claim, Plaintiffs' failed to establish each element of any of their other causes of action.

Additionally, the court declines to grant Plaintiffs' request to amend their complaint to add unjust enrichment as such claim would also be without merit based on the factual allegations and evidence presented. Furthermore, Plaintiffs failed to properly move for leave of court and Plaintiffs failed to attach a proposed amended complaint, as required by CPLR 3025(b). Therefore, the court denies Plaintiffs' request for leave to amend their complaint.

Plaintiffs' claims set forth in their Amended Verified Complaint must be dismissed because the causes of action in the complaint are primarily based on Defendant's alleged promise to conduct a *Fatico* hearing, Defendant's failure to conduct the hearing, Defendant's inherent conflict of interest through its joint representation of Plaintiffs and Defendant's excessive billing without conducting the *Fatico* hearing. Plaintiffs now attempt to withdraw their malpractice cause of action and attempt to change their primary factual basis to Defendant's excessive billing on unnecessary matters and for billing to prepare for a hearing they never intended to conduct.

However, such alteration would still be insufficient to support any of Plaintiffs' remaining causes of action.

Plaintiffs' malpractice claim is also dismissed because Plaintiffs failed to demonstrate Defendant's failure to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that such attorney's breach proximately caused Plaintiffs' actual damages (*McCoy v Feinman*, 99 NY2d 295, 301 [2002]). Plaintiffs also failed to establish that but for Defendant's negligence, Plaintiffs would have prevailed in the underlying matter in question (*Tydings v Greenfield, Stein & Senior, LLP*, 43 AD3d 680, 682 [1st Dept 2007]).

Plaintiffs' claims for breach of contract, breach of fiduciary duty and fraud are duplicative of Plaintiffs' malpractice claim as they arise from the same facts and seek the same damages as the malpractice claim (*see Sabo v Alan B. Brill, P.C.*, 25 AD3d 420, [1st Dept 2006]).

Plaintiffs cannot prove their breach of contract claim, as they failed to demonstrate Defendant's failure to perform a provision in an agreement, particularly the terms of the letter of engagement, and proximate cause of Plaintiffs' alleged damages.

Plaintiffs breach of fiduciary duty claim fails as Plaintiffs failed to prove Defendant's misconduct and proximate cause of alleged damages (*Pokoik v Pokoik*, 982 NYS2d 67, 70 [1st Dept 2014]). Plaintiffs' claim for breach of fiduciary duty based on the conflict of Defendant's joint representation is refuted by Plaintiffs' waiver of such conflict in the letter of engagement and their knowing and voluntary waiver in court when questioned by the judge at the *Curcio* hearing after consultation with other attorneys who were appointed by the court.

Plaintiffs' fraud cause of action fails as Plaintiffs failed to demonstrate that Defendant made a false representation of fact, that Defendant had knowledge of its falsity, that Defendant

made a misrepresentation to induce Plaintiffs' reliance, or the proximate cause of Plaintiffs' alleged damages (*see New York Univ. v Cont'l Ins. Co.*, 87 NY2d 308, 318 [1995]).

Plaintiffs' claim for deceit under Judiciary Law § 487 is dismissed as Plaintiffs failed to demonstrate that Defendant is guilty of or consents to deceit or collusion, that Defendant intended to deceive Plaintiffs or that Plaintiffs suffered damages as a result of Defendant's conduct (*Schindler v Issler & Schrage, P.C.*, 262 AD2d 226, 228 [1st Dept 1999]).

Although Plaintiffs argue that Defendant promised to conduct a *Fatico* hearing in emails prior to beginning its representation, according to the evidence submitted by both parties, it is clear that Defendant never promised to conduct a *Fatico* hearing, but merely advised Plaintiffs in substance that they had the right to challenge the loss amount, but based on the information provided at the time, Defendant could not assess the strength of the arguments of either side. Furthermore, the retainer agreement contemplated such hearing by requiring an additional \$100,000 retainer fee should a sentencing hearing be required where it would be necessary to present evidence and/or call and cross-examine witnesses regarding the loss amount and appropriate Sentencing Guidelines range. Such hearing was not promised, nor was it the sole basis for the scope of Defendant's representation. Clearly, the documents submitted refute Plaintiffs' claims that Defendant made such promise.

Furthermore, Plaintiffs allege that Defendant changed its mind and decided not to conduct the *Fatico* Hearing. This claim is also refuted by the documentary evidence as it is clear that at the time when Defendant's services were terminated, Plaintiffs had not yet decided whether to request a *Fatico* hearing. In fact, it was not until Plaintiffs both retained new counsel when the court was advised that Plaintiffs and the government agreed on the sentencing issues in dispute without the need to conduct a *Fatico* hearing.

Even if Defendant determined not to go forward with a *Fatico* hearing, based on the evidence presented in this case, such decision would not be a sufficient basis to support any of Plaintiffs' causes of action. In cases similar to Plaintiffs, it is often sound legal strategy for federal criminal defense attorneys to present evidence to the government in support of arguments for lesser loss amounts without going forward with a formal *Fatico* hearing because of the risk that the evidence introduced at such hearing could backfire and cause their clients to receive harsher sentences. Attorneys often fear having their clients testify under oath or having evidence presented at such hearings which would contradict their client's prior statements made on the record during plea allocutions, in written plea agreements or made to law enforcement and/or prosecutors. Such contradictory testimony or arguments could undermine their defense by causing their clients to lose acceptance of responsibility points, expose a client to additional charges or sentencing enhancements, or simply cause a client to lose sympathy or favor with the judge, which could all increase the severity of the sentence.

Therefore, none of Plaintiffs' causes of action survive Defendant's motion to dismiss and the court dismisses Plaintiffs' complaint against Defendant.


Accordingly, it is hereby

ORDERED that Defendant's motion to dismiss Plaintiffs' Amended Verified Complaint herein is granted and the Amended Verified Complaint is dismissed in its entirety as against Defendant with prejudice and without costs and the Clerk is directed to enter judgment accordingly in favor of Defendant; and it is further

ORDERED that Defendant's motion for costs, attorney's fees and sanctions is denied.

This constitutes the decision and order of the court.

Date: March 8, 2017



HON. ERIKA M. EDWARDS, Jsc