

<b>Baughner v Cullen &amp; Dykman LLP</b>
2017 NY Slip Op 33153(U)
March 27, 2017
Supreme Court, Nassau County
Docket Number: 603171-16
Judge: Jerome C. Murphy
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**SUPREME COURT: STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. JEROME C. MURPHY,**  
Justice.

**JONATHAN KIRK BAUGHER, as Preliminary  
Executor of the ESTATE OF PHEBE BAUGHER,**

**Plaintiff,**

**- against -**

**CULLEN AND DYKMAN LLP,**

**Defendant.**

**TRIAL/IAS PART 18**

**Index No.: 603171-16**

**Motion Date: 1/30/17**

**Sequence No.: 002**

**MD**

**DECISION AND ORDER**

The following papers were read on this motion:

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**PRELIMINARY STATEMENT**

Plaintiff brings this application for an order pursuant to CPLR § 2221, granting the argument of the decision and order of the Supreme Court of the State of New York, Nassau County, dated November 7, 2016, NYSCEF Doc. N. 26, on the grounds that the Court overlooked or misapprehended applicable law in determining the prior motion; vacating said decision and order, denying defendant's motion to dismiss the complaint; and granting plaintiff such other and further relief as to the Court may seem just and proper under the circumstances. Defendant has submitted opposition to this application

**BACKGROUND**

Plaintiff commenced this action by filing a Summons and Complaint dated May 5, 2016. The Complaint alleges that Cullen & Dykman, LLP breached their duty of loyalty to decedent Phebe Baugher and her estate, and, as a result, defendants are required to disgorge legal fees

obtained during the period of disloyalty.

Phebe's father, Hugh H. Hirshon, died in 1955. At that time he was the owner of a majority interest in W. S. Wilson. In his will, Hirshon left his interest in Wilson to a testamentary trust. Phebe's mother was the initial lifetime income beneficiary of the trust, and one of the trustees. Upon her mother's death in 1973, Phebe became the sole lifetime income beneficiary of the trust and successor as trustee.

In May 2005, Phebe retained Cullen and Dykman to provide a number of legal services, including estate planning, drafting of her last will and testament, analyzing her interest as a lifetime income beneficiary of the trust and formalizing her appointment as a successor trustee of the trust. In September 2005, Cullen and Dykman filed a petition in Surrogate's Court to have her appointed successor trustee in connection with their provision of legal services, counsel became aware that Phebe believed that she was entitled to all of Wilson's undistributed income ("Retained Earnings"), which, at that time, amounted to some \$20 million

In 2007, Cullen and Dykman became employed as Wilson's general counsel. The Complaint alleges that they did not disclose to Phebe the implications of its simultaneous representation of her, with her claim against Wilson for distribution to her of returned earnings. To the contrary, Cullen and Dykman submits to Waiver of Conflict of Interest letters dated February 22, 2008 directed to Phebe Baugher and Jeffrey Baugher, president and CEO of Wilson, advising them of a possible conflict of interest.

Phebe passed away on November 4, 2008, and Cullen & Dykman undertook the representation of her son, Jonathan, as preliminary executor of the estate. Cullen & Dykman withdrew as counsel for Wilson and instituted an action in Queens County Surrogate's Court against Wilson on behalf of the Estate to compel the Trust to turn over the retained earnings to the Estate. This action was dismissed for lack of jurisdiction and another action was filed in Nassau Surrogate's Court. Wilson moved for the disqualification of Cullen & Dykman, which the Nassau County Surrogate granted.

Defendant argues that plaintiff in this action is unable to establish damages caused by a tort, such as legal malpractice, that the existence of a conflict of interest does not entitle plaintiff to damages, which they would not have sustained but for the malpractice of the attorneys.

This Court granted defendant's motion to dismiss the Complaint on the ground that plaintiff did not allege damages sustained as a result of malpractice of defendants. Citing *Ullico*

*Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 A.D.3d 1 (1<sup>st</sup> Dept. 2008), the Court there determined that plaintiff was not entitled to recover damages for breach of defendant's fiduciary duty on legal grounds less rigorous than those required for recovery under a theory of malpractice. Violation of an ethical standard, without more, support a claim for recovery of damages. Citing *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills*, 10 A.D.3d 267 (1<sup>st</sup> Dept. 2004), the Court concluded that "to recover under a claim for damages against an attorney arising out of the breach of the attorney's fiduciary duty, the plaintiff must establish the 'but for' element of malpractice, irrespective of how the claim is denominated in the complaint." (*Id.* At 10 — 11. (See also *Fletcher v. Boies, Schiller & Flexner, LLP*, 140 A.D.3d 587 [1<sup>st</sup> Dept. 2016]).

#### DISCUSSION

Plaintiff contends that the Court misconstrued the meaning of the foregoing cases, and that she is entitled to recover legal fees paid to Cullen & Dykman during the period when the were representing both Wilson and Ms. Baugher and her estate, despite the fact that they are unable to point to any damages sustained as a result thereof.

Plaintiff's motion for reargument is denied. The Court did not misapprehend the import of the cited cases, or the fact that disgorgement of a legal fee is not warranted unless it represents damages resulting from a tort, in this case, legal malpractice. *Balanoff v. Doscher*, 140 A.D.3d 995 (2d Dept. 2016) involved a claim for unpaid legal fees. Defendant inserted an affirmative defense of malpractice, which would have been barred under the three-year statute of limitations, except for the saving provision of CPLR § 203 (a), which permits the assertion of a counterclaim which seeks to offset the claim for unpaid legal fees, which was timely.

Notably, however, the Court supported the dismissal of the counterclaim seeking disgorgement of legal fees paid to plaintiff, "as it is duplicative of the legal malpractice counterclaim."

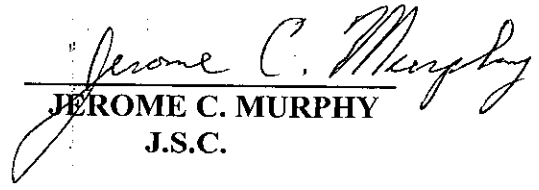
Thus the Court adheres to its original position that a claim for disgorgement of legal fees does not lie in the absence of a showing of damages, such as in a claim for legal malpractice. A breach of a duty does not mean that there was a loss, or that even any damages resulted. In this case, in paragraph 3 of the complaint, plaintiff presumes that legal fees must be disgorged automatically due to a breach of loyalty. That is not enough to plead a loss or to allege damages.

To the extent that requested relief has not been granted, it is denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York  
March 27, 2017

**ENTER:**

  
**JEROME C. MURPHY**  
J.S.C.

**ENTERED**

APR 03 2017

NASSAU COUNTY  
COUNTY CLERK'S OFFICE