

<b>Ho v Montgomery McCracken Walker &amp; Rhoads LLP</b>
2020 NY Slip Op 30190(U)
January 6, 2020
Supreme Court, New York County
Docket Number: 155360/2019
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 36

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ALISON HO and LAWRENCE SIMMS,

Plaintiffs,

- v -

MONTGOMERY MCCRACKEN WALKER & RHOADS  
LLP, ANDREW BRUCKER, and DENISE DENICOLA

Defendant.

INDEX NO. 155360/2019

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

-----X  
HON. DORIS LING-COHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22

were read on this motion to/for

DISMISSAL

Before this Court is defendants Montgomery McCracken Walker & Rhoads LLP (MMWR), Andrew Brucker, and Denise DeNicola's pre-answer motion to dismiss, pursuant to CPLR §§ 3211 (a) (1) and (7), based upon defenses of documentary evidence and failure to state a cause of action.

In seeking dismissal, defendants argue that the first cause of action for legal malpractice is barred by documentary evidence. As to the second cause of action for breach of fiduciary duty, defendants argue that such claim is duplicative of the legal malpractice cause of action. Defendants also assert that the parties' retainer agreement bars the unjust enrichment claim. Finally, defendants argue that plaintiffs' claims are barred by the doctrines of laches and waiver. For the below reasons, the Court denies the motion, except to the extent of dismissing the second cause of action.

According to the allegations in the complaint, which the court must accept as true for the purposes of this motion (*see Alden Global Value Recovery Master Fund, L.P. v KeyBank N.A.*, 159 AD3d 618, 621-622 [1st Dept 2018]), plaintiffs hired defendants, who are real estate attorneys, in connection with the sale of two adjacent condominium units, which plaintiffs had combined for their use, without combining the mortgages. Initially, defendants advised plaintiffs that, although their fees might be higher, an estimate for defendants' final bill was between \$4,000 and \$6,000. In November 2017, the units sold for \$3,750,000.

The complaint recounts various instances of alleged malpractice including that defendants incorrectly applied a commercial rather than a residential transfer tax in connection with the sale, and that this resulted in a \$45,000 real property transfer tax (RPTT) overpayment by plaintiffs. Plaintiffs state that Simms, who dealt with defendants on behalf of himself and Ho, told defendant DeNicola, who was managing the transaction, that he believed defendants should apply the residential tax rate. Because DeNicola was adamant that Simms was wrong and that he misunderstood the applicable law, Simms decided it was more prudent to go along with his counsel's advice for the purpose of the closing only. Separately, plaintiffs sought the advice of and retained another law firm, at a cost of \$15,000; such law firm commenced a successful proceeding to recoup the overpayment.

The complaint also states that defendants did not review the Department of Buildings (DOB) permits properly and, thus, they did not discover that one of the work permits was open. The purchaser's attorney learned of the open permit on January 9, 2018, less than two weeks before the originally scheduled closing date and informed defendants at that time. Defendants contended

that they relied on information provided to them by Simms – which, plaintiffs state, is another instance of malpractice. This oversight resulted in a six-week delay in the closing, which plaintiffs allege caused them financial harm. In addition, plaintiff claims that defendants billed them for redoing their allegedly negligent work. Ultimately, defendants charged plaintiffs \$12,999. Plaintiffs challenged the charge, particularly the final bill, which defendants presented to them at the closing and which contained charges for the second DOB search. Defendants refused to reduce or credit plaintiffs following their correspondence, and plaintiffs filed this lawsuit.

In the first cause of action, for legal malpractice, plaintiffs assert that defendants did not carry out their duties “with the skill, care and diligence of a member of the legal profession” (NYSCEF Doc. No. 1 [Complaint] ¶ 50). They seek damages of at least \$50,666.73. The second cause of action asserts that defendants breached their fiduciary duty to plaintiffs in that they did not provide legal services with the requisite skill, care, and diligence. The damages are alleged to be at least \$50,666.73. Finally, for the third cause of action, plaintiffs allege unjust enrichment, on the ground that defendants received \$12,999 for substandard work, and they ask for reimbursement.

In their pre-answer motion to dismiss, defendants argue that plaintiffs do not set forth a valid claim for legal malpractice. A legal malpractice cause of action requires not only that the defendant did not “exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession” and that this lack of skill resulted in damages, but that the plaintiff would not have incurred these damages but for the malpractice (*Leder v Spiegel*, 9 NY3d 836, 837 [2007] [internal quotation marks and citation omitted]). According to defendants, the complaint does not satisfy the “but-for” requirement. In particular, defendants rely on Simms’ admission that he told

defendants that there were no open DOB work permits, and his comments to DeNicola that the firm was not using the proper RPTT rate. Defendants argue that because Simms' information about the DOB permits was not correct, and because plaintiffs acquiesced to defendants' use of the commercial RTTP rate and went forward with the closing, his conduct was an intervening force which vitiates any purported malpractice.

The Court rejects defendants' argument at this juncture, on this pre-answer motion to dismiss. The allegations that an attorney-client relationship existed, that the firm did not exercise "ordinary and reasonable skill and knowledge," and that, among other things, the client sustained damages "flowing from additional costs in retaining substitute counsel", are sufficient to set forth a legal malpractice claim (*Exeter Law Group LLP v Immortalana Inc.*, 158 AD3d 576, 577 [1st Dept 2018]). Thus, the complaint herein satisfies the but-for component, by contending that but for defendants' alleged insufficient DOB research and intransigence concerning the RTTP rate, plaintiffs would not have suffered financially (*see Roth v Ostrer*, 161 AD3d 433, 434 [1st Dept 2018]). Defendants' contention that there was no financial harm because plaintiffs ultimately recovered the overcharge ignores the fact that, among other things, plaintiffs paid \$15,000 to recoup the overpayment.

Moreover, as plaintiffs correctly argue, the documentary evidence on which defendants rely does not prove that Simms was fully responsible for the problems that plaintiffs now ascribe to be legal malpractice. For example, defendants' memorandum in support quotes Simms' May 16, 2018 letter, which states, "Did I tell you all permits had been properly closed? Yes." (NYSCEF Doc. No. 12 at 12 [quoting NYSCEF Doc. No. 9]). However, defendants omit what Simms said right

after this: “Do you [defendants] ever rely exclusively on such assurances? Of course not: architects err, GC’s lie, and even the DOB sometimes makes mistakes needing correction. Besides – if MMWR *had* relied solely on info I provided, Denise wouldn’t have billed me for hours spent researching DOB records” (NYSCEF Doc. No. 9 [Simms’ May 16, 2018 email to Brucker]). This is far from a concession that defendants are not responsible for the error and it is far from conclusive documentary proof which would absolve defendants from liability, on a motion to dismiss. Thus, the email is not documentary evidence (*see Seaman v Schulte Roth & Zabel LLP*, 176 AD3d 538, 538 [1st Dept 2019]). In addition, although Simms wrote that he told DiNicola that she was wrong about the RTTP but allowed the closing to go forward, this was not a supervening act which would necessarily alleviate defendants of the responsibility for assessing the proper tax on the transaction. Thus, it does not definitively establish that the cause of action lacks merit (*see Spoleta Constr., LLC v Aspen Ins. UK Ltd.*, 27 NY3d 933, 936 [2016]).

Defendants allege that, nonetheless, plaintiffs must assume some responsibility or diminution in damages due to Simms’ sophistication in real estate matters and due to his comments. These are issues defendants may raise in their answer and explore during discovery, but do not warrant dismissal at this juncture. The issues herein are not resolvable as a matter of law, because their resolution requires an examination of facts and materials outside the scope of the complaint (*cf. Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 270 [1st Dept 2004] [trial court erred when it considered exhibits in order dismissing contributory negligence counterclaim under CPLR § 3211]). Notably, the cases cited by defendants in support of dismissal are either distinguishable or involve summary judgment motions, or cases which evaluated the apportionment of damages after trial and, thus, are not controlling here.

Defendants also argue that plaintiffs' unjust enrichment claim, the third cause of action, is barred by the retainer agreement's arbitration clause, or is waived by plaintiffs' failure to not pursue arbitration. The agreement, a copy of which defendants provide, states:

"If a fee dispute arises, under Rule 137 of the Rules of the Chief Administrator, *you have the right*, with limited exception as set forth in that rule, *to resolve the dispute by arbitration*. If you are entitled to arbitration. . . and *if you request arbitration, we are required to agree to arbitration*"

(NYSCEF Doc. No. 2, p 3 [emphasis supplied]). The agreement further states that defendants "encourage" plaintiffs "to bring . . . disputes and concerns to our attention as promptly as possible" in order to amicably resolve them (NYSCEF Doc. No. 2, p 2).<sup>1</sup> The document, therefore, allows, but does not mandate arbitration, and leaves the option to arbitrate with plaintiffs. Moreover, defendants have not provided other binding documents which, together with the retainer agreement, make it clear that binding arbitration is mandatory (*compare Edelman v Poster*, 72 AD3d 182, 185-186 [1st Dept 2010]).<sup>2</sup> Indeed, as indicated, the agreement expresses a preference for the route plaintiffs chose. Thus, dismissal of the third cause of action for unjust enrichment is denied.

In addition, defendants are wrong that laches or waiver bars this cause of action as a matter of law. They contend that waiver exists because plaintiffs participated in the closing despite Simms' concerns and because they paid the bill that defendants presented to them. In the context of the within facts, defendants' laches and waiver arguments are not appropriate for pre-answer

<sup>1</sup> The arbitration language in the agreement adheres to the rules of this State's courts, which leaves the option to arbitrate with plaintiffs (Rules of Chief Admin of Cts [22 NYCRR] § 137.2).

<sup>2</sup> Defendants' reliance on *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.* (70 NY2d 382 [1987]) is misplaced as it merely states that a valid contract can bar an unjust enrichment claim.

dismissal. Plaintiffs explain that defendants' alleged malpractice had already delayed the closing date by nearly six weeks. In the face of DeNicola's insistence that the commercial RTTP was appropriate, plaintiffs went ahead with the closing rather than cause further delays which might jeopardize their sale. Plaintiffs also state that they received the bill at the closing, and they challenged the bill at the time, but did not want to delay the closing further. Instead, Simms wrote to defendants shortly after the closing was concluded. Thus, dismissal is not warranted at this stage based upon laches or waiver.

Defendants are correct that the cause of action for breach of fiduciary duty is duplicative of the legal malpractice claim., as both "are premised on the same facts and seek the same relief" (*Eurotech Constr. Corp. v Fischetti & Pesce, LLP*, 155 AD3d 437, 437 [1st Dept 2017]), and they allege the same damages (*see Alphas v Smith*, 147 AD3d 557, 559 [1st Dept 2017] [claim was deemed duplicative even where "similar" damages were alleged]). Plaintiffs argue that, instead, the complaint's allegations relating to overbilling are distinct from their legal malpractice claim, and, therefore, both claims should stand. This is incorrect, however, as plaintiffs' complaints about the amount in the bill were directly related to the quality of the work (*compare Cascardo v Dratel*, 171 AD3d 561, 562 [1st Dept 2019]). The complaint expressly states that "Defendants' negligence also caused Plaintiffs to expend excessive legal fees" (NYSCEF Doc. No. 1 [Complaint] ¶ 44). In addition, Simms' May 16, 2018 email to Brucker stresses that DeNicola worked for 10 hours on a tax adjustment issue because of her negligence and failure to use common sense (*see* NYSCEF Doc. No. 9).

The Court has considered the parties' other arguments and they do not alter the court's conclusion.

Based upon the above, it is

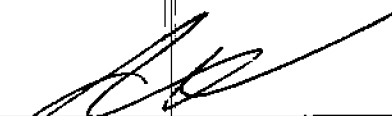
ORDERED that the motion to dismiss is granted to the extent of dismissing the second cause of action of the complaint and is otherwise denied; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that, within 30 days of entry of this order, plaintiffs shall serve a copy of this order upon defendants, with notice of entry; and it is further

ORDERED that discovery shall proceed, expeditiously, in accordance with this Court's Preliminary Conference Order dated January 6, 2020.

Dated: January 6, 2020



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DORIS LING-COHAN, J.S.C.