Marcum LLP v L'Abbate, Balkan, Colavita & Contini, L.L.P.
2021 NY Slip Op 32530(U)
December 2, 2021
Supreme Court, New York County
Docket Number: Index No. 151586/2021
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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MARCUM LLP,

Plaintiff,

- v -

L'ABBATE, BALKAN, COLAVITA & CONTINI, L.L.P., MARIANNE CONKLIN

Defendants.

INDEX NO. 151586/2021

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 49, 50, 52

were read on this motion to DISMISS.

This is a legal malpractice case. It arises from Defendants L'Abbate, Balkan, Colavita & Contini, LLP's ("L'Abbate") and Marianne Conklin's ("Conklin") (collectively, "Defendants") representation of Plaintiff Marcum LLP ("Marcum") in a prior lawsuit in this Court, *Conway, et al. v. Marcum & Kliegman LLP, et al.,* Index No. 652236/2014 (Sup Ct New York County) (the "Litigation").

The Litigation involved liquidators' claims against Marcum in connection with Marcum's audits of an investment management company, N.I.R. Group, LLC ("NIR") (Complaint ("Compl.") ¶11). At the outset of the Litigation, Marcum notified its Insurers[1] of the claims made against it (Compl. ¶13). According to Marcum, the Insurers initially stood ready to fully

[1] Lexington Insurance Company, administered by AIG Claims, Inc. ("AIG"), which issued the primary policy, (2) Continental Casualty Company ("CAN"'), which issued the first layer excess policy, and (3) Fireman's Fund, which issued the second layer excess policy (collectively, "the Insurers") (Compl. ¶13).

indemnify Marcum in the Litigation. The case proceeded through discovery, and the parties completed their document productions in 2016 (*id.* ¶16). A bench trial was set to begin in October 2020 (*id.* ¶18).

Plaintiff alleges that during a mediation in May 2020, L'Abbate made an "eleventh-hour disclosure" of Marcum's two excess insurance policies, which caused the Liquidators to demand an explanation about why these documents were not produced during discovery (*id.* ¶19). L'Abbate thereafter produced additional documents that had been marked as responsive during its review but which it failed to previously produce to the Liquidators, and "in their haste" to do so produced certain attorney-client privileged materials (*id.* ¶¶20, 23).

In June 2020, the Liquidators filed a motion for sanctions, accusing Marcum of failing to timely produce documents, including but not limited to the two excess insurance policies and documents relating to a federal grand jury investigation of NIR (*id.* ¶21). The latter documents included a statement quoting a submission from an Assistant U.S. Attorney stating that "Marcum is also a subject of the government's investigation and has potential criminal exposure." (*id.* ¶28). On behalf of Marcum, L'Abbate filed a motion in the Litigation to claw back privileged documents that had been produced (*id.* ¶24).[2]

Marcum requested that L'Abbate place its professional liability carrier on notice of a potential claim relating to the Sanctions Motion. L' Abbate thereafter moved for leave to withdraw from its representation of Marcum in the Litigation on August 4, 2020 based on the conflict between Marcum's interests and L'Abbate's (*id.* ¶¶31, 33). Previously retained co-counsel, Hodgson Russ LLP, then had to prepare to first-chair the upcoming trial in October (*id.*

[2] It appears that the sanctions and clawback motions were never heard, as the Litigation was settled before oral argument took place (*see* NYSCEF 33 [Defendants' bf. in supp. at 3]).

¶32). In addition, based on the late-produced documents, Marcum's Insurers reserved new rights with respect to coverage of the claims against Marcum on the ground that Marcum had prior knowledge of the claims asserted in the Litigation or that the claims had already been asserted before the policies were issued (*id.* ¶35).

In August 2020, Marcum reached a settlement with the plaintiffs in the Litigation in the amount of $16.5 million (*id.* ¶¶36, 37). Marcum tendered the settlement amount to its Insurers for coverage. The Insurers refused to pay the full amount of settlement costs and remaining Litigation expenses and demanded that Marcum contribute to the settlement (*id.* ¶¶37, 38, 39). Ultimately, Marcum paid approximately 7.5 percent of $10 million on its primary layer of insurance and 10 percent of $6.5 million on its first layer excess coverage towards the settlement amount. Marcum also agreed to pay a higher premium in connection with its professional liability coverage (*id.* ¶¶41, 42).

In this action, Plaintiff alleges that Defendants committed malpractice by failing to timely produce relevant documents in discovery, particularly the information regarding the grand jury investigation of NIR and the excess insurance policies (*id.* ¶49). Plaintiff also alleges that Defendants negligently produced privileged and protected materials, failed to comply with court orders in the Litigation requiring Marcum to produce all responsive information by deadlines in 2016, and withdrew from the representation of Marcum in the Litigation just months before trial with a motion for sanctions pending (*id.*). Plaintiff claims that its insurers would have covered 100 percent of the $16.5 million settlement and remaining Litigation expenses if not for L'Abbate's correspondence, the untimely document production, and the resulting motion for sanctions in the underlying Litigation (*id.* ¶39). Plaintiff alleges that Defendants' action caused Plaintiff to suffer actual and ascertainable damages in an amount exceeding $1.6 million, relating

to additional attorneys' fees from Hodgson Russ and the contribution amounts demanded by Marcum's Insurers in connection with the settlement (*id.* ¶¶ 52-56). Plaintiff asserts these claims against both the firm and Conklin, on the basis that Conklin joined the L'Abbate team as a senior attorney representing Marcum and began representing Marcum at an early stage in the Litigation, prior to the completion of discovery (*id.* ¶12).

Defendants now move to dismiss the complaint on the ground that Plaintiff has not pleaded a viable claim of legal malpractice. For the reasons that follow, Defendant's motion is granted in part and denied in part.

DISCUSSION

Under CPLR § 3211(a)(7), dismissal is warranted if the plaintiff "fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141–42 [2017] [internal citation omitted]). When determining a motion to dismiss, the Court must accept all factual allegations as true, afford the pleadings a liberal construction, and accord plaintiff the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87–88 [1994]). However, allegations that are "bare legal conclusions" or that are "inherently incredible or flatly contradicted by documentary evidence," are not sufficient to withstand a motion to dismiss (*see JFK Holding Co., LLC v City of New York*, 68 AD3d 477, 477 [1st Dept 2009] [internal citation omitted]).

In order to prevail on a legal malpractice claim, a plaintiff must offer "proof of the attorney's negligence, a showing that the negligence was the proximate cause of the injury, and evidence of actual damages" (*Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP*, 301 AD2d 63, 67 [1st Dept 2002]). With respect to proximate causation, "[i]n order to survive

dismissal, the complaint must show that but for counsel's alleged malpractice, the plaintiff would not have sustained some actual ascertainable damages" (*Pellegrino v File*, 291 AD2d 60, 63 [1st Dept 2002]). "A failure to establish proximate cause requires dismissal regardless of whether negligence is established. Notwithstanding counsel's purported negligence, the client must demonstrate his or her own likelihood of success; absent such a showing, counsel's conduct is not the proximate cause of the injury. Nor may speculative damages or conclusory claims of damage be a basis for legal malpractice" (*Russo*, 301 AD2d at 67).

1. Claim Based on Partial Loss of Insurance Coverage

Plaintiff alleges that the Insurers initially were prepared to pay one hundred percent of the settlement of the Liquidators' claims but changed their position once they learned of L'Abbate's negligence (Compl. ¶¶ 13, 34–35). Plaintiff argues that but for Defendants' failure to timely produce certain documents, particularly the two excess insurance policies and documents relating to a federal grand jury investigation of NIR, Marcum would have had time to convince the Insurers to cover the settlement in full or would have been able to successfully prosecute insurance coverage claims against the Insurers while the Litigation was still at an early stage (Compl. ¶44). Notably, Plaintiff does not contend that the *amount* of the settlement was impacted by Defendants' alleged negligence.

Even taking Plaintiff's factual allegations as true, its theory of proximate causation is impermissibly speculative. As Defendants note, "[w]ithout engaging in gross speculation, Marcum cannot explain why a hypothetical 2016 coverage dispute would have gone differently than the real, 2020 dispute" (Defendants Memorandum in Reply at 3–4). Plaintiff's core claim is that the Insurers changed their position when they found out that a prosecutor had advised Marcum of its potential criminal exposure well before the Litigation was filed. It is the *fact* of

that communication, not when the Insurers learned about it, that purportedly provided the basis for the Insurers' change of position. Plaintiff' focuses on its assertion that it could have talked (or litigated) the Insurers out of their position if only the issue had arisen earlier in the litigation. This argument is pure speculation.[3]

Where proof is speculative and conclusory, a legal malpractice action must be dismissed (*see Russo*, 301 AD2d at 67). As the First Department has stated, "conclusory allegations of damages or injuries predicated on speculation cannot suffice for a malpractice action. Allegations that an expected event might not occur, or might not occur as anticipated, are speculative and conclusory" (*InKine Pharm. Co., Inc. v Coleman*, 305 AD2d 151, 154 [1st Dept 2003] [internal citations omitted]; *see e.g., Cusimano v Wilson, Elser, Moskowitz, Edelman & Dicker LLP*, 118 AD3d 542, 542 [1st Dept 2014] [finding that "[t]he contention that mere submission of the parents' personal income tax filings in the arbitration proceeding would necessarily have altered the arbitration panel's determination regarding the parents' ownership interest in the subject asset is grounded in speculation, and thus, insufficient to sustain a claim for legal malpractice"]; *RTW Retailwinds, Inc. v Colucci*, 2021 WL 3624933, at *11 [Sup Ct, New York County 2021] [The "assertion that the result at trial would have been different had Defendants acted differently during discovery is 'pure speculation,' and is thus inadequate to support a claim of legal malpractice."]). Here, Plaintiffs' conclusory assertion that they could have changed their Insurers' minds about funding the settlement is insufficient.

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[3] At oral argument, Plaintiff argued that the Insurers knew about the purportedly withheld information prior to L'Abbate's late document production, but the late production opened the door for the Insurers to change their mind. Essentially, Plaintiffs argue that L'Abbate's misstep gave the Insurers an opportunity to act in bad faith. Such a proximate causation theory remains impermissibly speculative.

2. Claim Based on Excess Legal Fees

By contrast, Plaintiffs' claims for recovery of legal fees paid to L'Abbate in connection with allegedly negligent work and compensation for its increased legal expenses arising out of L'Abbate's late withdrawal as counsel are sufficient to withstand motion to dismiss. Although the merits of the claim remain to be proven, the Court finds that Plaintiff's allegations of negligence and proximate causation with respect to this claim for relief are sufficient.

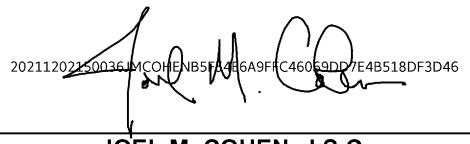
3. Claim Against Conklin

Finally, Plaintiff fails to make any specific allegations against Defendant Marianne Conklin, other than that she was a senior attorney on Marcum's case. Instead, Plaintiff attributes its allegations to both L'Abbate *and* Conklin, without distinction. "Such 'group pleading,' which fails to give each defendant fair notice of the claims against it, is improper" (*RTW Retailwinds, Inc. v ColucciI*, 2021 WL 3624933, at *10 [Sup Ct, New York County 2021], citing *Principia Partners LLC v Swap Fin. Group, LLC*, 194 AD3d 584 [1st Dept 2021]). Because dismissal of this claim is based on a pleading deficiency rather than on the merits, the dismissal is without prejudice to seeking leave to amend the Complaint to cure the deficiency.

* * * *

Accordingly, it is **ORDERED** that Defendants' motion to dismiss the complaint is **granted in part and denied in part**.

This constitutes the decision and order of the Court.



12/2/2021
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE