

Mid City Elec. Corp. v Peckar & Abramson

2021 NY Slip Op 33876(U)

April 12, 2021

Supreme Court, Kings County

Docket Number: Index No. 505935/2020

Judge: Wavny Toussaint

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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 12th day of April, 2021.

P R E S E N T:

HON. WAVNY TOUSSAINT,

Justice.

----- X

MID CITY ELECTRICAL CORPORATION, TERRIC MCFARLIN, AND JOHN J. HOLZER,

Plaintiffs,

- against -

DECISION AND ORDER
Index No. 505935/2020

PECKAR & ABRAMSON, A PROFESSIONAL CORPORATION
D.B.A. PECKAR & ABRAMSON, P.C., CHARLES E. WILLIAMS, III, ESQ., DAVID FULTZ, ESQ. AND CHRISTOPHER BLETSCH, ESQ.,

Defendants.

----- X

The following e-filed papers read herein:

NYSCEF Doc Nos.¹

Notice of Motion, Affidavit/Affirmation/Annexed Exhibits
Opposing Affidavits (Affirmations)/Annexed Exhibits
Reply Affidavits (Affirmations)
Other (Memorandum of Law)

6-18
25-26, 28-33
36²

Upon the foregoing papers, defendants Peckar & Abramson, a Professional Corporation D.B.A. Peckar & Abramson, P.C. (Peckar), Charles E. Williams, III, Esq.

¹ New York State Courts Electronic Filing Document Numbers

² Enumerated herein, as no reply affirmation was submitted.

(Williams), David Fultz, Esq. (Fultz) and Christopher Bletsch, Esq. (Bletsch) (collectively, defendants) move, (motion sequence 001), for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing the complaint against them.

Background

On March 10, 2020, plaintiffs Mid City Electrical Corporation (Mid City), Terric McFarlin (McFarlin) and John J. Holzer (Holzer) (collectively, plaintiffs) commenced this action for legal malpractice and other relief by filing a summons and complaint. The complaint alleges that McFarlin, an African-American individual, is a 51% majority shareholder in Mid City, and has allegedly had authority to make decisions on behalf of Mid City since its incorporation in 1997. While McFarlin does not hold a master electrician license, in order to comply with New York City Department of Buildings (NYCDOB) regulations, Mid City employed a licensed master electrician as the company's responsible representative/licensee since its incorporation. The complaint alleges that NYCDOB regulations do not require McFarlin or any other Mid City principal to hold a master electricians license.

As of February 16, 1999, Mid City was certified as a Disadvantaged Business Enterprise (DBE) to participate in the United States Department of Transportation (USDOT) Disadvantage Business Enterprise Program (DBEP) as administered by the New York State Unified Certification Program (NYSUCP). The NYSUCP's composition includes the Metropolitan Transportation Authority.

By letter dated September 18, 2015 regarding a proposal to remove DBE certification (the removal of certification proposal), the NYSDOT informed McFarlin that it has reviewed Mid City's DBE certification eligibility and determined that there is reasonable cause to believe that it does not currently meet the standards for DBE certification under the criteria set forth in USDOT regulations in Title 49, Part 26 of the Code of Federal Regulations. The removal of certification proposal, which defendants have attached in support of their motion, noted that it was proposing to remove Mid City's DBE certification in accordance with 49 CFR 26.87 (b). The letter continued that the facts in the record do not demonstrate that McFarlin controlled the firm within the meaning of the DBE regulations. The basis for the NYSDOT's determination was that McFarlin, Mid City's majority shareholder and also a part of a "disadvantaged" minority group, was not a master electrician despite the fact that Mid City was a Master Electrician Business, and thus McFarlin's ability to select, supervise, and control Mid City's business and employees was restricted. NYSDOT further informed that while individuals who are not disadvantaged may be involved in the firm in key positions, the DBE regulations require that these individuals must not possess or exercise the power to control the firm. For Mid City, the firm's master electrician, rather than McFarlin, was the person responsible for controlling and approving work performed by firm's employees. NYSDOT also found that McFarlin does not have the technical competence necessary to run an electrical business in accordance with regulations, and that McFarlin's job was

mostly administrative in nature; technical operations appear to be controlled by Holzer and the master electrician.

In conclusion, the removal of certification proposal recommended finding Mid City ineligible for continuation in the DBE program and removing Mid City's certification in accordance with 49 CFR 26.87. The letter notified McFarlin of his rights, pursuant to Regulation 26.87 (d), to have an informal hearing at which Mid City may respond to the proposed determination in person and provide information and arguments as to why it should be recertified. According to the removal of certification proposal, if McFarlin wished to have an informal hearing, he had to contact NYSDOT's office within 10 days of the September 18, 2015 letter to schedule a date for the informal hearing. The letter further advised that Mid City could elect to present information and arguments in writing without going to a hearing. If McFarlin wished to respond in writing, the written response, including any documentation, had to be provided within 14 days of the date of the letter. If McFarlin failed to respond either in writing or by requesting an informal hearing, the firm's DBE certification would be removed.

Thereafter, on September 22, 2015, plaintiffs met with Williams regarding the removal of certification proposal, at which time Williams allegedly held himself out to be an expert in Minority/Women-owned Business Enterprises (MWDBE) and construction matters. Williams thereafter allegedly represented that he was on a committee with a former New York City Mayor and knew all the "right players." The complaint alleges

that as a result of Williams' reassurances that Mid City will be reinstated into the DBE program, on September 22, 2015, "Mid City and its shareholders" signed a retainer agreement with defendants. The retainer agreement was signed by Williams on behalf of Peckar and acknowledged and agreed to by signature of McFarlin on behalf of Mid City. The retainer agreement, submitted by defendants in support of their motion, states that Mid City engaged Peckar to represent it for the appeal of NYSDOT's determination that Mid City did not satisfy the requirements for certification as a DBE.

Williams allegedly told plaintiffs that the removal of certification proposal was based on the NYSDOT determination that changes occurred to Mid City's circumstances since the firm was originally certified in 1999, and that its initial decision to certify Mid City may have been erroneous. Peckar chose to respond to the removal of certification proposal in writing by submitting an appeal to the NYSDOT dated October 5, 2015, opposing the September 18, 2015 determination. The appeal focused on NYSDOT's purported failure to comply with 49 CFR 26.87, which authorizes grounds upon which terminations of DBE certifications are permitted. In that regard, Peckar argued that NYSDOT wrongfully subjected Mid City to a "recertification" process, rather than determining whether, by a preponderance of the evidence, Mid City's circumstances had changed since originally certified as a DBE.

By letter dated February 12, 2016, the NYSUCP, which is NYSDOT's certifying partner, acknowledged Peckar's appeal, but agreed with NYSDOT's determination to

terminate Mid City's DBE certification. NYSUCP advised Peckar that a firm that has had its certification removed may take an administrative appeal to the External Civil Rights Program Division of the USDOT within 90 days of the date of the certified removal letter. By letter dated March 1, 2016, NYSDOT affirmed the termination of Mid City's DBE certification and affirmed its right to appeal to the USDOT.

Rather than appeal to the USDOT, Peckar, by letter dated March 18, 2016, chose to send a demand to NYSDOT and NYSUCP vacating the February 12, 2016 decision and demanding reinstatement of Mid City as a DBE. The grounds for this application were that McFarlin, despite not having a master electrician license, actually controlled Mid City through his responsibilities for staffing jobs to the New York Electrical Contractors, Inc., the Association of Electrical Contractors, Inc., and Local Union No. 3 of the International Brotherhood of Electrical Workers, AFL-CIO (Local 3).

On April 20, 2016, an order to show cause that Peckar had prepared was signed by Justice Manuel Mendez, Supreme Court New York County, commencing an Article 78 proceeding to annul NYSUCP's February 12, 2016 decision to terminate Mid City's DBE certification on constitutional grounds. By a May 23, 2016 order, Justice Mendez denied the petition, finding that Mid City's constitutional rights were not violated, and that Mid City did not appeal NYSUCP's decision to USDOT, thereby failing to exhaust its administrative remedies (*see Mid City Elec. Corp. v Metropolitan Transit Authority*, Sup

Ct, NY County, May 23, 2016, Mendez J., index No. 100572/16; NYSCEF Doc No. 16, annexed as exhibit I to the moving papers).

The complaint herein alleges that plaintiffs were not notified of the Article 78 proceeding and of Justice Mendez's decision until a few weeks after the decision was issued, when McFarlin called Williams. Plaintiffs allege that Peckar continued to bill Mid City in an effort to cover up their legal mistake.

Thereafter, Peckar appealed the dismissal to the Appellate Division, First Department. By decision dated March 15, 2017, the Appellate Division affirmed the dismissal, holding that petitioner was afforded due process and that it thus "cannot avoid the consequences of its failure to exhaust its administrative remedies" (*Mid City Elec. Corp. v Metropolitan Transp. Authority*, 148 AD3d 497, 498 [1st Dept 2017]). Peckar moved to reargue, and reargument was denied by order dated June 20, 2017.

The complaint asserts the following causes of action: (1) legal malpractice (first, second and third cause of action; (2) breach of contract (fourth cause of action, inadvertently labeled the third cause of action, as well as the sixth cause of action, inadvertently also labeled the fifth cause of action, which discusses excessive billing); (3) fraudulent concealment (fifth cause of action); and (4) negligent infliction of emotional distress on behalf of McFarlin and Holzer (seventh cause of action, inadvertently also labeled the fifth cause of action).

Defendants' Contentions

Defendants contend that the complaint fails to state a viable cause of action for legal malpractice. In that regard, defendants first argue that McFarlin and Holzer cannot demonstrate privity with Peckar, since the retainer agreement demonstrates that the attorney-client relationship was between Peckar and Mid City, rather than with the individual plaintiffs.

Defendants next contend that plaintiffs cannot demonstrate Peckar's negligence was the proximate cause of their injury. In that regard, defendants argue that plaintiffs have not established that their application to reinstate Mid City's DBE certification would have been successful had Peckar elected an informal hearing before the NYSDOT, rather than a formal appeal, and thereafter, if they would have appealed to the USDOT, rather than the NYSDOT. Defendants note that the complaint concedes that Mid City had the option to either request a formal hearing or to submit a written response. Defendants argue that it is not possible to base a legal malpractice claim on the law firm's strategic choice to submit a written appeal to the removal of certification proposal rather than to request a formal hearing, as an attorney's selection of one among several reasonable courses of action does not constitute malpractice.

Defendants further argue that Peckar's failure to seek an administrative appeal to the USDOT does not constitute malpractice because the USDOT does not conduct a de novo review, and because the following facts underlying the decision were indisputable: (1) Mid City's sole "disadvantaged" owner, McFarlin did not have a master's electrician

license; (2) McFarlin's duties were mostly administrative in nature and he did not have the technical competency necessary to run an electrical business; and (3) McFarlin's salary was significantly lower than that of other Mid City employees. Defendants note that the complaint is silent with respect to the basis for plaintiff's contention that the USDOT would have come to a different conclusion than the NYSDOT.

Defendants argue that plaintiffs do not demonstrate that Mid City would have been successful in keeping its DBE certification, even if an appeal had been made to the USDOT. As such, plaintiff will not be able to establish the "but for" causation required for legal malpractice. Defendants contend that any allegation that Mid City would have been successful is conclusory and based on speculation, which cannot form the basis of a malpractice claim. Defendants also contend that plaintiffs have failed to plead actual and ascertainable damages as a result of the attorneys negligence, as plaintiffs have not demonstrated that Mid City would have been able to reverse the loss of its DBE certification even had an appeal to the USDOT been made.

Defendants note that in response to NYSDOT's March 1, 2016 affirmance of the termination of certification, Peckar did not recommend an appeal to the USDOT, as such review is limited to a review of the underlying record for prejudicial or procedural error pursuant to 49 CFR 26.89 (e). In that regard, defendants contend that the USDOT does not have the ability to conduct a de novo review or to conduct a hearing, and would affirm a decertification decision unless the decision was not supported by substantial

evidence or inconsistent with substantive or procedural provisions concerning certification, pursuant to 49 CFR 26.89 (f) (1). For this reason, defendants contend that Peckar elected to send the March 18, 2016 demand to NYSDOT and NYSUCP seeking reinstatement, rather than appealing.

With respect to the causes of action for breach of contract, defendants contend that this cause of action is redundant of the claim for legal malpractice, as they are based on the same factual allegations. As to the cause of action for fraudulent concealment, defendants contend that this cause of action is not recognized under New York Law, and that there is no independent cause of action for concealing legal malpractice. Additionally, as to the cause of action for negligent infliction of emotion harm, defendants contend that this cause of action should be dismissed because it is entirely based upon the alleged legal malpractice, and legal malpractice only allows recovery for pecuniary loss and not for emotional or psychological injury.

Plaintiffs' Contentions

Plaintiffs contend that defendants committed legal malpractice by failing to file an appeal of the removal of the certification proposal and the March 1, 2016 NYSDOT determination to the USDOT. With respect to the malpractice claim, plaintiffs argue that they have properly pleaded the existence of an attorney-client relationship with the individual defendants. Plaintiffs assert that attorneys may be liable in negligence both to

those with whom they have privity of contract as well as to those with whom the relationship is so close as to approach privity.

Plaintiff also argues that New York courts have found that an attorney's failure to exhaust their clients' available administrative remedies might constitute a cause of action for legal malpractice. Plaintiffs contend that defendants committed malpractice when they failed to exhaust administrative remedies, and in doing so, violated their retainer agreement and their duty of care to plaintiffs. Plaintiffs claim that they were never informed by defendants that an appeal to the USDOT was not taken. Rather, they contend that defendants tried to correct their failure to appeal by filing the Article 78 petition. Plaintiffs state that defendants continued to collect money and send invoices to Mid City while appealing the denial of the Article 78 petition and, at the same time, keeping the decision of the lower court and the Appellate Division a secret. Plaintiffs contend that defendants made no effort to obtain an extension to file an appeal with the USDOT. Plaintiffs claim that as a proximate cause of defendants' negligence, plaintiffs sustained damages, such as challenges to their MBE status, and were forced to incur additional attorneys' fees and other damages in an undetermined amount.

Plaintiffs contend that the complaint adequately alleges causation and cognizable damages. In that regard, plaintiffs argue that defendants could have appealed the removal of certification proposal by requesting an informal hearing, but never informed plaintiff that they had this option. Plaintiffs contend that live, in-person testimony would have

overturned the removal of certification proposal. Plaintiffs further argue that in the event an appeal would have been needed, plaintiffs could have then submitted the transcript of the hearing to the USDOT. Plaintiffs contend that it is clear that they are substantially injured by the failure to present the appeal to the USDOT prior to filing the Article 78 proceeding. Plaintiffs argue that defendants failed to exercise the reasonable skill and knowledge commonly possessed by members of the legal community, and therefore, committed malpractice.

Plaintiffs also note that Peckar concedes that it advised them that it would prepare an appeal on Mid City's behalf. Plaintiff states that defendants further concede that they submitted an untimely appeal letter consisting of statements and an argument in support of Mid City. The letter is purportedly untimely because it was dated on March 18, 2016, beyond the 90-day requirement set forth in the NYSDOT letter of October 5, 2015 to file an appeal. They allegedly failed to preserve plaintiff's rights and committed malpractice by not appealing. Plaintiffs note that this was recognized by the Article 78 court when it held that plaintiffs should have appealed to the USDOT to exhaust their administrative remedies. Plaintiff further states that proximate cause is an issue of fact for the trier of facts to determine.

Both McFarlin and Holzer submit affidavits in opposition to the motion to dismiss. McFarlin and Holzer³ state that plaintiffs were never told that defendants would file an

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In his affidavit, Holzer, apparently erroneously states that he is the majority shareholder of Mid City with 51% interest.

Article 78 action. McFarlin and Holzer further assert that they were not told of the mistake and/or malpractice performed by the defendants while they kept being billed for fees associated with the Article 78, the subsequent appeal to the Appellate Division and the motion to reargue the Appellate Division's decision.

Plaintiffs argue that the documentary evidence submitted by defendants raises questions of fact, does not resolve all factual issues as a matter of law, and therefore, does not resolve plaintiffs' claim.

Discussion

Dismissal is warranted under CPLR 3211 (a) (1) only if “documentary evidence” conclusively refutes a plaintiff's allegations (*see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]) or establishes a defense to the asserted claims as a matter of law (*see Spoleta Const., LLC v Aspen Ins. UK Ltd.*, 27 NY3d 933, 936 [2016]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). The scope of the evidence that is statutorily “documentary” is exceedingly narrow and “[m]ost evidence does not qualify” (*see John R. Higgit, CPLR 3211 [a] [1] and [a] [7] Dismissal Motions – Pitfalls and Pointers*, 83 NY St BJ 32, 33-35 [Nov/Dec. 2011]). The evidence submitted in support of such motions must be “documentary” or the motion will be denied (*see Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2d Dept 2010], quoting David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 22).

To be considered “documentary,” “evidence must be unambiguous and of undisputed authenticity” (*Minchala v 829 Jefferson, LLP*, 177 AD3d 866, 877 [2d Dept 2019] quoting *Fontanetta*, 73 AD3d at 86). At the same time, “[n]either affidavits, deposition testimony, nor letters are considered documentary evidence” for the purposes of CPLR 3211 (a) (1) (*Granada Condominium III Ass’n v Palomino*, 78 AD3d 996, 997 [2d Dept 2010] [internal quotation marks omitted]; see also *Suchmacher v Manana Grocery*, 73 AD3d 1017[2d Dept 2010]). However, statements made by a party or his/her attorney in pleadings, motion papers, affidavits, or depositions in another judicial proceeding are deemed to be informal judicial admissions and are admissible against the party (*Matter of Liquidation of Union Indem. Ins. Co. of New York v American Centennial Ins. Co.*, 89 NY2d 94, 103 [1996]).

In determining a motion to dismiss pursuant to CPLR 3211 (a) (7), a court must “accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Kolchins v Evolution Mkts., Inc.*, 31 NY3d 100, 105-106 [2018] quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; see also *Strujan v Kaufman & Kahn, LLP*, 168 AD3d 1114, 1115 [2d Dept 2019]; *Gorbatov v Tsirelman*, 155 AD3d 836, 837 [2d Dept 2017]). A court may consider affidavits submitted by plaintiff to remedy any defects in the complaint, but not for the purpose of determining whether there is evidentiary support for the pleading (see *Leon*, 84 NY2d at 88; *Sokol v Leader*, 74

AD3d 1180, 1181 [2d Dept 2010]). “If the court considers evidentiary material, the criterion then becomes whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Sokol*, 74 AD3d at 1181-1182). Allegations consisting of bare legal conclusions must not be considered (*see Connaught on v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141-142 [2017]). “Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss” (*Gorbatov*, 155 AD3d at 837, quoting *Shaya B. Pacific, LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, [2d Dept 2006]).

To recover damages for legal malpractice, a plaintiff must demonstrate that (1) the attorney “failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession,” and (2) that the attorney's action or inaction proximately caused plaintiff to sustain “actual and ascertainable damages” (*Rudolph v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]; *see also Gorunkati v Baker Sanders, LLC*, 179 AD3d 904, 905 [2d Dept 2020]). Proximate cause is established by demonstrating that the plaintiff would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence (*see Rudolph*, 8 NY3d at 442; *Davis v Klein*, 88 NY2d 1008, 1009-1010 [1996]). To establish a prima facie case of legal malpractice, a plaintiff must demonstrate that he or she would have succeeded on the merits of the underlying action but for the attorney's negligence.

(see *Grace v Law*, 24 NY3d 203, 211 [2014]; *Davis*, 88 NY2d at 1009-1010; *Rudolph*, 8 NY3d at 442-443). Conclusory allegations of damages or speculative injuries are insufficient to sustain a legal malpractice action (see *Gall v Colon-Sylvain*, 151 AD3d 698, 700 [2d Dept 2017]).

Additionally, in order to properly plead a cause of action for legal malpractice, a plaintiff must establish the existence of an attorney-client relationship (see *Moran v Hurst*, 32 AD3d 909, 910-911 [2d Dept 2006]; *Volpe v Canfield*, 237 AD2d 282, 283 [2d Dept 1997]). Such a relationship exists when there is an explicit undertaking to perform a specific task (*Volpe*, 237 AD3d at 283; *Sucese v Kirsch*, 199 AD2d 718, 719 [3d Dept 1993]). Although privity does not depend on an express agreement or upon payment of a fee, a plaintiff's unilateral beliefs and actions do not confer client status upon him or her (see *Volpe*, 237 AD2d at 283; *Jane St. Co. v Rosenberg & Estis*, 192 AD2d 451 [1st Dept 1993]). An attorney will not be liable to a nonclient for malpractice absent fraud, collusion, or malicious or tortious acts (see *Griffin v Anslow*, 17 AD3d 889, 892 [3d Dept 2005]). Moreover, corporate counsel is not in privity with the directors or shareholders of a corporation, unless counsel affirmatively assumes that duty (see *Griffin*, 17 AD3d at 893; see also *Kalish v Lindsay*, 47 AD3d 889, 891 [2d 2008]; *Kushner v Herman*, 215 AD2d 633, 633-634 [2d Dept 1995]).

In the instant matter, the documentary evidence, including the retainer agreement and additional documents, established that Peckar's work relating to plaintiffs was

directed to Mid City, rather than to the individual defendants (*see Griffin*, 17 AD3d at 892). The retainer agreement, which explicitly states that Mid City engaged Peckar to represent it for the appeal of NYSDOT's determination, establishes that the attorney-client relationship formed pursuant to the agreement was not between the law firm and the individual plaintiffs, but rather between the law firm and Mid City (*id.*). Further, there is no evidence here that the individual plaintiffs considered the law firm to be their individual attorneys (*id.*). There are also no allegations or evidence that defendants committed any fraud, collusion, or malicious or tortious acts upon McFarlin or Holzer. Accordingly, the legal malpractice causes of action on behalf of McFarlin and Holzer are dismissed.

However, viewing the complaint in the light most favorable to the plaintiff, the court finds that the complaint adequately states a cause of action for legal malpractice with respect to Mid City. In that regard, the allegations that Peckar and its attorneys failed to exhaust Mid City's administrative remedies by not taking an appeal of the removal of certification proposal and the determination to the USDOT may constitute legal malpractice. Construing the complaint liberally in plaintiffs' favor, plaintiffs' allegation that defendants failed to exhaust administrative remedies by appealing to the USDOT prior to filing the Article 78 may constitute negligence (*see Kirk v Heppt*, 532 F Supp 2d 586, 592 [SD NY 2008]; *see also Cavlak v Helbraun*, 2013 NY Slip Op 32704(U), *3 [Sup Ct, NY County 2013], citing *Catuzza v Rodriguez*, 93 AD3d 1214, 1214-1214 [4d

Dept 2012] [failure to exhaust administrative remedies may be a factor in determining whether an attorney's negligence was a proximate cause of a plaintiff's damages]). In that regard, the lower court's Article 78 decision, submitted by defendants, demonstrates that Justice Mendez did not reach the merits in that action because Mid City, by their attorneys, did not appeal the underlying administrative determination to the USDOT. There is a possibility that Mid City would have prevailed on their action had an appropriate administrative appeal been taken. In addition, had Peckar chosen to have a hearing regarding the certification removal proposal, that hearing transcript would have been part of the record, and, according to Mid City's allegations, would have assisted Mid City's case. For these reasons, defendants' motion to dismiss Mid City's legal malpractice causes of action is denied.

Plaintiffs' breach of contract causes of action are dismissed as duplicative of the legal malpractice causes of action. A breach of contract cause of action is duplicative of a legal malpractice cause of action when it asserts the same facts and does not allege different or distinct damages (*see Gorunkati*, 179 AD3d at 907; *Kliger-Weiss Infosystems, Inc. v Ruskin Moscou Faltischek, P.C.*, 159 AD3d 683, 685 [2d Dept 2018]; *Thompson v Baier*, 84 AD3d 1062, 1064 [2d Dept 2011]). Here, the breach of contract cause of action, in sum and substance, alleged, as the malpractice claim did, that defendants breached their professional duties to plaintiffs by failing to appeal the administrative determination. In addition, the breach of contract action did not allege any different or

distinct damages from what had already been alleged in the legal malpractice cause of action (*see Gorunkati*, 179 AD3d at 907). Accordingly, the breach of contract causes of action are dismissed.

Plaintiffs' cause of action for fraudulent concealment fails, as it, likewise, is predicated upon the same facts as the legal malpractice claim. In addition, there is no independent cause of action for concealing legal malpractice (*see Weiss v Manfredi*, 83 NY2d 974, 977, *rearg. denied* 84 NY2d 848 [1994]). The mere failure to disclose malpractice does not give rise to an independent cause of action separate from the legal malpractice (*see Reichenbaum v Cilmi*, 64 AD3d 693, 695 [2d Dept 2009]). Accordingly, the fraudulent concealment cause of action is dismissed.

With regard to McFarlin's and Holzer's claim that they suffered emotional distress, including humiliation, mental anguish and physical distress, that claim is also dismissed. "A cause of action for legal malpractice does not afford recovery for any item of damages other than pecuniary loss so there can be no recovery for emotional or psychological injury" (*see Wolkstein v Morgenstern*, 275 AD2d 635, 637 [1st Dept 2000]; *see also Gaskin v Harris*, 98 AD3d 941, 944 [2d Dept 2012] ["damages in a legal malpractice action are limited to pecuniary loss"]).

The court has reviewed the parties' remaining contentions and finds them to be without merit. Accordingly, it is

ORDERED, that the defendants' motion, (mot. seq. 001), for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing the complaint against them is granted to the extent that all of the causes of action in the complaint are dismissed except for defendant Mid City's causes of action for legal malpractice, which shall remain.

This constitutes the decision and order of the court.

ENTER,



J. S. C.



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