

<b>Walsam 316 LLC v Rosenberg &amp; Estis, P.C.</b>
2022 NY Slip Op 34012(U)
November 28, 2022
Supreme Court, New York County
Docket Number: Index No. 156357/2020
Judge: David B. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. DAVID B. COHEN **PART** **58**

*Justice*

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WALSAM 316 LLC, WALSAM 316 BOWERY LLC,  
WALSAM BLEECKER LLC, LAWBER BOWERY LLC, 316  
BOWERY NEXT GENERATION LLC

Plaintiff,

- v -

ROSENBERG & ESTIS, P.C.,

Defendant.

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**INDEX NO.** 156357/2020

**MOTION DATE** 08/10/2022

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 84

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Upon the foregoing documents, it is

By notice of motion, plaintiffs move for an order granting them leave to amend their complaint. Defendant opposes.

This case arises from defendant’s representation of plaintiffs in a lawsuit involving tenant claims for rent overcharges related to premises purchased by plaintiffs. According to the complaint, plaintiffs allege that defendant represented them at the same time it represented the predecessor-owner, 316 Bowery, which constituted an impermissible conflict of interest. Moreover, defendant failed to assert defenses on plaintiffs’ behalf, which, had it done so, would have resulted in a finding of non-liability against them. As a result of defendant’s negligence, plaintiffs contend, a judgment was wrongly entered against them. (NYSCEF 10).

In August 2020, plaintiffs commenced the action by serving a summons with notice, and, following defendant’s service of an answer with a demand for a complaint, served a complaint in

which they assert claims for legal malpractice and disgorgement of legal fees paid to defendant. (NYSCEF 10).

In December 2020, defendant filed an amended answer with counterclaims for breach of contract, an account stated, quantum meruit, and unjust enrichment, for failure to pay attorney fees. (NYSCEF 16).

Pursuant to CPLR 3025, a party may amend a pleading ““at any time by leave of court,” “[and] that leave ‘shall be freely given upon such terms as may be just’” (*Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014], quoting CPLR 3025 [b]). A movant is not required to establish the merits of his or her proposed amended allegations; rather, he or she “must simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit” (*Cruz v Brown*, 129 AD3d 455, 456 [1st Dept 2015] [internal quotation marks and citation omitted]).

Plaintiffs seek to amend their complaint to add additional facts gleaned from the exchange of discovery between the parties, related to their claim that defendant committed legal malpractice in its representation of plaintiffs. (NYSCEF 42). They also seek to add two additional causes of action, for fraud in the inducement and breach of fiduciary duty, and a demand for punitive damages. (NYSCEF 43).

Defendant argues that the proposed amendment is palpably insufficient, as the proposed fraud claim is untimely and as plaintiffs could not have reasonably relied on defendant’s representations. As to the breach of fiduciary claim, it is time-barred, fails to state a claim, and is fatally duplicative of the malpractice claim. It also contends that plaintiffs’ punitive damages claim is not pleaded sufficiently. (NYSCEF 73).

In reply, plaintiffs maintain that they relied on defendant’s representations, and that the fraud claim is timely as they only discovered the fraudulent misrepresentations in 2021, after

they received discovery from defendant. Plaintiffs also assert that the breach of fiduciary claim is timely for the same reason as the fraud claim is timely, and that the punitive damages claim is sufficiently pleaded. (NYSCEF 84).

A fraud claim is timely if it is asserted within six years from the date the claim accrued or two years from the time the plaintiff discovers the fraud or, with reasonable diligence, could have discovered it (CPLR 213[8]). As plaintiffs allege that they only learned of the fraud in 2021, when they received documents from defendant in discovery, their claim appears to be timely (*See Berman v Holland & Knight, LLP*, 156 AD3d 429 [1st Dept 2017] [denying motion to dismiss fraud claim as time-barred, as plaintiffs alleged they did not learn of fraud until they received legal file from defendant during discovery]). In any event, the issue of the timeliness of plaintiffs' discovery of the fraud should be decided by the trier-of-fact (*Id.* at 430).

Similarly, defendant's argument as to whether plaintiffs reasonably relied on its representations is more properly addressed in a motion to dismiss or for summary judgment, not on a motion to amend. Plaintiffs have sufficiently alleged that they reasonably relied on defendant's representations of their ability to defend against the tenants' claims, even if defendant disputes that the reliance was reasonable (*Gordon v Oster*, 36 AD3d 525 [1st Dept 2007] [court properly permitted amendment to add fraud claim as plaintiffs sufficiently alleged they reasonably relied on misrepresentations and suffering damages]).

However, as the breach of fiduciary claim relies on the same facts as the legal malpractice claim and seeks the same damages, it is duplicative of the legal malpractice claim (*Innovative Risk Mgt., Inc. v Morris Duffy Alonso & Faley*, 204 AD3d 518 [1st Dept 2022]).

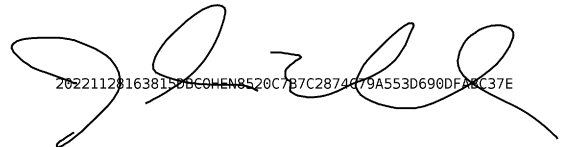
As plaintiffs contend that defendants deliberately gave them erroneous and conflicting legal advice in order to obtain hundreds of thousands of dollars in legal fees, they have pleaded a

claim for punitive damages (*See Green v Leibowitz*, 118 AD2d 756 [2d Dept 1986] [in action involving legal malpractice and fraud, dismissal of punitive damages claim was not warranted, as punitive damages may be awarded where alleged wrong involves violation of duty arising from relation of trust or confidence or abuse of professional status by fraudulent representations]; *see also Johnson v Proskauer Rose LLP*, 129 AD3d 201 [1st Dept 2015] [permitting punitive damages claim where clients alleged that attorneys intentionally and maliciously treatment them, and acted with wanton dishonesty toward them]; *Bank of India v Weg and Myers, P.C.*, 257 AD2d 183 [1st Dept 1999] [summary judgment on punitive damages claim denied as unresolved issues remained regarding law firm’s intent to defraud and its motive and wantonness]).

Accordingly, it is hereby

ORDERED, that plaintiffs’ motion to amend is granted to the extent of plaintiffs’ proposed claims for fraud and punitive damages, and denied as to the claim for breach of fiduciary duty; and it is further

ORDERED, that plaintiffs serve an amended complaint in accordance with this order by December 19, 2022.



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DAVID B. COHEN, J.S.C.

11/28/2022  
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: