

**National Alliance of N.Y., LLC v
Florence Rostami Law, LLC**

2023 NY Slip Op 31256(U)

April 19, 2023

Supreme Court, New York County

Docket Number: Index No. 160658/2017

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

NATIONAL ALLIANCE OF NEW YORK, LLC, KANAOKO
KAKIHARA, TADASHI SAKAMOTO

Plaintiff,

- v -

FLORENCE ROSTAMI LAW, LLC,

Defendant.

-----X

INDEX NO. 160658/2017

MOTION DATE N/A, N/A

MOTION SEQ. NO. 002 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 135, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236

were read on this motion to/for JUDGMENT - SUMMARY.

Motion Sequence Numbers 002 and 003 are consolidated for disposition. Defendant’s motion for summary judgment dismissing the complaint (MS002) is granted in part and denied in part. Defendant’s motion for summary judgment on its counterclaims (MS003) is denied and plaintiffs’ cross-motion is granted in part and denied in part.

Background

This legal malpractice case relates to an action filed in Nassau County. Plaintiff National Alliance of New York, LLC (“National”) is a general contractor. During the time period

relevant to this case, it was not licensed to do construction work in New York City or in Nassau County. Plaintiffs Kakihara and Sakamoto are principals of National.

Plaintiffs allege that on August 11, 2013, they entered into a written contract with Daping Zhu for a project at Zhu's house in Syosset, New York (Nassau County). They contend that in October 2013, Mr. Zhu physically detained National's principals and threatened them. Plaintiffs maintain that this altercation prevented them from finishing the job for Zhu and so National sought to terminate the contract. They argue that at the time of the contract's termination, National was owed more than \$165,000 in labor and materials for the project.

After the incident with Zhu, plaintiffs sought legal advice and retained defendant. They argue that defendant recommended that in order to recover the amounts allegedly owed, plaintiffs should file a mechanic's lien and start a breach of contract lawsuit against Zhu. Plaintiffs maintain that defendant failed to investigate whether National, its client, was licensed to do work in Nassau County until November 2014, when the issue was raised during EBTs in the lawsuit plaintiffs had commenced in Nassau County. Plaintiff Kakihara testified that before that time, "She (defendant attorney) never asked us whether we had a license or not, not even once" (NYSCEF Doc. 80 at 146-147).

Plaintiffs blame defendant for not doing an investigation into the ramifications of plaintiffs' failure to possess a license to do construction work in Nassau County and that defendant subsequently let the mechanic's lien lapse without renewal. They point out that defendant recommended that plaintiffs apply for a contractor's license in Nassau County and this led to Zhu commencing an action against National and the Nassau County Consumer Affairs imposing a \$1,000 fine against National for doing construction work without a proper license.

Plaintiffs also complain about purported overbilling by defendant in connection with the Nassau dispute.

The Zhu litigation ultimately settled and the stipulation of settlement indicates that the parties simply walked away without any payments made to either side. Defendant withdrew as attorney for plaintiffs in the Zhu litigation before the settlement, although it claims that it had procured, essentially, the exact same settlement offer prior to its withdrawal.

MS002

In this motion, defendant seeks summary judgment dismissing plaintiffs' claims. It seeks to dismiss the first and second causes of action for legal malpractice on the ground that plaintiffs cannot establish the elements of such a claim.

Defendant contends that National was readily aware that it did not have the license required to perform the work required under the contract with Zhu and that defendant bears no blame for any damages that may flow from that business decision. It contends that even though National knew that it did not have a license to do work in Nassau County, it told defendant it had such a license. Defendant points to deposition testimony from one of National's principals where she admitted she had previously rejected the Zhu project because National did not have the proper license. It also stresses that National agreed to do the construction work long before plaintiffs contacted defendant for legal advice.

In opposition, plaintiffs contend that defendant was negligent when it commenced a lawsuit without even asking whether plaintiff possessed the proper license. In her deposition, plaintiff Kakihara explains that she was misinformed and thought she did not need a license because the home "was unregistered." Plaintiffs argue that defendant did not ask the question

about whether plaintiff had a license and that if defendant had asked and received the response that licenses were not necessary in unregistered buildings, then defendant could have researched the issue and exposed the falsity of that position. As it turned out, National did need a license and the lack of a license hindered its ability to recover under the contract with Zhu.

Plaintiffs point out that Zhu eventually saved about \$20,000 (he later hired another contractor to finish the job) and so Zhu would not have suffered any damages in the Nassau case—Zhu eventually brought his own affirmative claims against National. Plaintiffs argue that the instant dispute is not a disagreement about strategies—they insist they relied upon the legal advice from defendant and that defendant also insisted on pursuing allegedly worthless personal torts against Zhu related to the alleged false imprisonment. Plaintiffs argue that but for defendant's bad advice, they would not have expended as much in legal fees.

Plaintiffs also attach the affidavit of Jeffrey Spinner (a former judge) who claims that defendant failed to exercise ordinary care and reasonable skill by not considering whether or not plaintiffs had the requisite license before starting the Nassau County case.

In reply, defendant asserts that the expert affidavit of former judge Spinner should be disregarded because he is not an expert in the field of professional responsibility. It points out that plaintiff Sakamoto previously filed a complaint with the Grievance Committee and that complaint was dismissed. It argues that the commencement of the Nassau case was reasonable given plaintiffs' instructions and the failure to mention that National was unlicensed. Defendant emphasizes that plaintiffs' primary concern was that Zhu would sue them for breach of contract and so a lawsuit would, ideally, obtain a declaration that the contract was unenforceable.

Defendant also argues that even if it had not started the underlying lawsuit, plaintiffs would have incurred legal fees to defend against Zhu's breach of contract claims. It points out

that Zhu claimed that plaintiffs had to return monies for which Zhu had already paid and for which plaintiffs had not yet performed work and, therefore, any issues about a license is irrelevant for such a claim. Defendant insists that Zhu's attorney warned about legal action and Zhu's eventual counterclaim asserted that he had paid \$250,000 to National even though National had not completed more than 1% of the demolition and asbestos work.

The Causes of Action for Malpractice

“An action for legal malpractice requires proof of three elements: (1) that the attorney was negligent; (2) that such negligence was a proximate cause of plaintiff's losses; and (3) proof of actual damages. The failure to show proximate cause mandates dismissal of a legal malpractice action regardless of whether the attorney was negligent” (*Glob. Bus. Inst. v Rivkin Radler LLP*, 101 AD3d 651, 651 [1st Dept 2012] [internal quotations and citations omitted]).

The key issue in any legal malpractice claim is a “but for” analysis. The Court must consider but for the attorney's alleged negligence, that the client would have not suffered damages. Plaintiffs' first cause of action asserts legal malpractice on behalf of National for the unpaid services it rendered to Zhu and for the legal fees expended in that action. The second claim for malpractice is asserted on behalf of the individual plaintiffs and seeks damages related to the legal fees expended in the Nassau County action.

The Court dismisses the portion of the first cause of action that seeks to recover for the unpaid services allegedly owed to National by Zhu (the \$165,000). There is no dispute—in fact it is the central issue in this case—that National did not possess the required contractor's license to do the work on Zhu's home in Nassau County. Therefore, National cannot seek damages here that it could not recover in the Nassau County case. That defendant may have promised to

recover the money associated with that work is of no moment as National cannot show that the \$165,000 were damages it would have recovered, *but for* defendant's decision to bring a lawsuit seeking those damages. National could never recover those damages because it was not licensed.

However, the Court denies defendant's motion to the extent that it seeks summary judgment dismissing the legal malpractice claim for damages related to the legal fees incurred in the Nassau County case. A fact finder might find that defendant should have inquired about whether or not plaintiffs possessed the requisite license to do the work for which they sought recovery. Knowledge that plaintiffs did not have the license might have compelled an attorney to refrain from bringing an affirmative breach of contract claim or seeking relief through a mechanic's lien. Of course, a fact finder could also find that plaintiffs should have known that a license was required before they agreed to do work for Zhu (which was before they contacted defendant for representation) and should have mentioned that they were unlicensed to defendant. It may be that a fact finder concludes that defendant did the best job under the circumstances and the clients should have been more forthcoming.

Defendant's assertion that plaintiffs would have incurred legal bills regardless of whether or not it brought the Zhu matter does not compel the Court to grant this branch of the motion. Threats from Zhu's attorney about a possible litigation does not mean that a suit would have actually been brought (later-filed counterclaims do not prove this point as a matter of law, although it might be pointed to at trial). It could be that Zhu never followed through and spent the money to bring the case. And, in any event, if there were a subsequent lawsuit, then knowledge that National did not have a license would have potentially reduced the legal fee bill by eliminating certain claims (such as the mechanic's lien). Of course, the key finding on this

issue is that the Court is unable to find as a matter of law that either plaintiffs or defendant is solely to blame for the lack of license issue.

Third Claim for Overbilling

The Court grants the motion to the extent that it seeks to dismiss this claim. Plaintiffs admit in opposition that “While it is true that throughout the litigation the Plaintiffs paid their fees on time whenever Defendant presented its bill, it is also true that Defendant expended 890 hours - of \$89,000 in legal fees - on a case that should not have been commenced to begin with” (NYSCEF Doc. No. 186 at 22).

Plaintiffs’ claim that defendant overbilled or engaged in excessive billing is not actionable because they paid the bills and did not object to the invoices when they received them (*see Lapidus & Assoc., LLP v Elizabeth St., Inc.*, 92 AD3d 405, 937 NYS2d 227 [1st Dept 2012] [noting, in the context of an account stated claim, that the failure to dispute an invoice until after an action commenced foreclosed the ability to challenge the reasonableness of those invoices]). Although plaintiffs attempt to characterize this claim as part of their overall argument that the Nassau County case should never have been brought, their arguments amount, essentially, to questions about the reasonableness of various charges. Because plaintiffs did not object to these invoices until after they brought this lawsuit and they paid the bills, they cannot raise these questions here.

Fourth Cause of Action for Legal Fees

This claim seeks legal fees as sanctions for negligence in the underlying action and the frivolous conduct in this case.

“In this State, and indeed, in the rest of the country, the longstanding ‘American rule’ precludes the prevailing party from recouping legal fees from the losing party “except where authorized by statute, agreement or court rule” (*Gotham Partners, L.P. v High Riv. Ltd. Partnership*, 76 AD3d 203, 204, 906 NYS2d 205 [1st Dept 2010]).

The Court dismisses this claim. While plaintiffs are clearly unhappy with the representation they received from defendant, nothing described on this record comes close to constituting frivolous action. There is no dispute that plaintiffs came to defendant for help. It may be that a fact finder finds that defendant should have made different choices but even if defendant may have made a mistake (and the Court does not make that finding here), that does not mean that defendant’s actions were sanctionable and therefore permit plaintiffs to recover legal fees. In fact, plaintiffs admit that they filed complaints with the Grievance Committee and that these complaints were dismissed.

MS003- Defendant’s Motion on the Counterclaims

Defendant brings four counterclaims: a breach of contract against all plaintiffs for failure to pay additional fees, a breach of contract relating to another set of additional fees, a malicious prosecution claim against plaintiff Sakamoto and abuse of process claim against Sakamoto.

First and Second Counterclaims

The first counterclaim relates to additional compensation defendant seeks in relation to the Zhu action. Defendant contends that pursuant to an amended retainer agreement, plaintiffs agreed to a reduction in the firm’s billing amount in exchange for 20% of any recovery. It observes that plaintiffs eventually settled the case with Zhu under nearly identical terms that had

been presented to plaintiffs while defendant was still the attorney (before it withdrew).

Defendant speculates that plaintiffs intended to accept Zhu's offer all along, but waited until defendant withdrew as counsel.

Plaintiffs maintain that the settlement did not involve any recovery and that the case with Zhu was a walk-away settlement, meaning that no party received any money in the settlement. Plaintiffs seek summary judgment dismissing these claims in their cross-motion.

The subject retainer provides that "The Firm agrees to prosecute National Alliance's breach of contract claim and both of your personal claims for an hourly rate of \$100 and a contingency rate of 20% from any recovery, whether in a settlement between the parties, before or after filing a case with the applicable court, or from a judgment, for all of your personal claims" (NYSCEF Doc. No. 111). The second key provision at issue provides that "If at any time, you decide to abandon your personal claims or National Alliance's claims against Zhu, then you agree to pay the Firm an additional \$200 for every hour of services provided to prosecute National Alliance and your personal claims by the Firm" (*id.*).

The stipulation of settlement in the Zhu matter includes a provision that "Neither party shall recover of the other party any money, damages of any relief of any kind claimed to be owed from the other and each of the parties shall discontinue their respective claims as to the other without any payment being made or exchanged" (NYSCEF Doc. No. 126, ¶ 3).

This demonstrates that defendant is not entitled to any additional recovery from plaintiffs and that plaintiffs are entitled to summary judgment dismissing these two counterclaims. There is no basis to find that plaintiffs abandoned any claims against Zhu—settling a case is not the same as abandoning a litigant's claims. Defendant seemed to agree that settling is not the same as abandonment at its deposition (NYSCEF Doc. No. 158 at 201-02).

And defendant's argument that plaintiffs were entitled to retain some of the \$250,000 that Zhu initially paid to National does not transform it into a "recovery" for purposes of the retainer. The retainer specifically mentions a recovery and the settlement provides that no one was to recover anything from the other party. Defendant's attempt to reconfigure the meaning of these two documents is without merit. Moreover, defendant failed to show that plaintiffs obtained a recovery on their personal claims.

Third and Fourth Counterclaims

Defendant's third and fourth counterclaims assert that plaintiff is liable for legal fees and costs with respect to the grievance filed against defendant's principal and the fee complaint filed against the firm. It asserts that these complaints constituted both an abuse of process and malicious prosecution. Defendant complains that Sakamoto, against whom these claims are asserted, failed to appear for a deposition in this matter (although defendant did not move to strike a pleading based on this purported noncompliance).

Plaintiffs seek summary judgment dismissing these claims and contend that Sakamoto had every right to file the fee complaint and the grievance against defendant.

Defendant complains that it did a lot of work towards the ultimate settlement achieved in the Zhu litigation and that the issues raised before the Grievance Committee and in the fee dispute were frivolous.

"The elements of abuse of process are (1) regularly issued process ..., (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective" (*Casa de Meadows Inc. (Cayman Is.) v Zaman*, 76 AD3d 917, 921, 908 NYS2d 628 [1st Dept 2010]). "The elements of a claim for malicious prosecution are (1) the

commencement or continuation of a . . . proceeding by the defendant against the plaintiff; (2) the termination of the proceeding in favor of the plaintiff; (3) the absence of probable cause for the criminal proceeding; and (4) actual malice” (*Mendez v City of New York*, 137 AD3d 468, 471, 27 NYS3d 8 [1st Dept 2016]).

The Court severs and dismisses the third and fourth counterclaims. Filing complaints about legal fees and a grievance do not support either counterclaim. That defendant is unhappy with these actions is not a basis to sustain such claims. According to defendant, those claims (which were both unsuccessful) along with the filing of this action somehow constitute an abuse of process and malicious prosecution. The Court disagrees. The entire point of those dispute mechanisms (the fee dispute program and the Grievance Committee) is to provide a route for unhappy clients to seek relief. Sometimes, those claims are sustained while in other situations, such as here, the client’s assertions are dismissed. But that does not entitle the law firm to recover based upon claims for abuse of process and malicious prosecution.

Clearly, defendant is upset with the circumstances surrounding the dissolution of its relationship with plaintiffs. But that unhappiness does not sustain these counterclaims. Responding to such complaints is often unpleasant, but it is a part of being an attorney. The record on this motion reveals no basis upon which defendant could recover based on either the third or fourth counterclaims.

Summary

The Court observes that all parties seek sanctions; all of those claims are denied. The clear and obvious antipathy between the parties does not support any claim for sanctions. There

is no question that there were numerous issues with the Zhu litigation and many of them arise out of the fact that National did not have the proper license to do the work.


Defendant claims that plaintiffs told it they had the necessary license; plaintiffs claim that defendant never asked. Everybody agrees that whether National had a license was a fundamental part of *some* of the claims in the Zhu case. Certainly, had defendant known about the lack of a license it would likely have not filed a mechanic's lien and it may not have filed the Zhu litigation. Without a license, National could not collect unpaid amounts and might not have had to go back to that house altogether because the contract could have been avoided. But the question about who is to blame cannot be determined on a summary judgment motion. The fact finder might blame plaintiffs, or defendant, both or no one.

Accordingly, it is hereby

ORDERED that defendant's motion (MS002) to dismiss the complaint is granted ONLY to the extent that the portion of the first cause of action that seeks recovery based upon the unpaid services sought in the Zhu Action, as well as the third and fourth causes of action, are severed and dismissed and denied with respect to the remaining claims for relief; and it is further

ORDERED that defendant's motion (MS003) for summary judgment on its counterclaims is denied; and it is further

ORDERED that plaintiff’s cross-motion is granted only to the extent that defendant’s first, second, third and fourth counterclaims are severed and dismissed and denied with respect to the remaining relief requested.



ARLENE P. BLUTH, J.S.C.

4/19/2023

DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE