SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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REEM CONTRACTING, JONA SZAPIRO, REEM PLUMBING AND HEATING, and the ESTATE OF STEVEN STEIN,

Plaintiffs,

- v -

ALTSCHUL & ALTSCHUL, MARK ALTSCHUL, ESQ, and COREY DWORKIN, ESQ.,

Defendants.

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INDEX NO. 104202/2011

MOTION DATE 10/27/2023

MOTION SEQ. NO. 016 017

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 016) 348, 349, 350, 351, 352, 353, 354, 357, 373

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 017) 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 374, 376, 377, 378

were read on this motion for SUMMARY JUDGMENT.

This is a legal malpractice action brought by plaintiffs Reem Contracting Corp. (Reem Contracting), Jona Szapiro (Szapiro), Reem Plumbing and Heating Corp. (Reem Plumbing), and the Estate of Steven Stein (Stein) (collectively, plaintiffs) against defendants Altschul & Altschul, Mark Altschul, Esq. (Altschul), and Cory Dworken, Esq. (Dworken) (collectively, defendants).

Defendants represented plaintiffs in a federal action seeking recovery under section 515 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 USC § 1145 (the underlying action). Defendants move, pursuant to CPLR 3212, for summary judgment: (1) dismissing the complaint; and (2) granting judgment on their counterclaims for an account stated (motion sequence number 016).

Plaintiffs also move, pursuant to CPLR 3212, for summary judgment on their legal malpractice claim and for an order setting this matter down for an inquest on damages (motion sequence number 017).

Motion sequence numbers 016 and 017 are consolidated for disposition.

BACKGROUND

Familiarity with the court's prior decisions and orders in this case is presumed.

Briefly, Reem Plumbing and Reem Contracting are entities that performed plumbing work in New York City (NY St Cts Elec Filing [NYSCEF] Doc No. 273 ¶ 4). Stein was the sole shareholder and officer of Reem Plumbing (*id.*, ¶ 1). Szapiro, Stein's brother-in-law, was the president of Reem Contracting (*id.*, ¶ 2).

In 2004, plaintiffs were named as defendants in the underlying action brought in the United States District Court for the Eastern District of New York, captioned *Trustees of Plumbers Local Union No. 1 Welfare Fund v Reem Plumbing & Heating Corp.*, 04-CV-4698 (CBA) (ED NY) (*id.*, ¶ 5). The trustees of certain benefit funds (the Trustees) alleged that Reem Plumbing and Reem Contracting were contractually obligated to contribute to certain union benefit funds (the Funds), as required by collective bargaining agreements (*id.*). Before filing suit, the Trustees conducted an audit for the period of January 1, 2002 through December 31, 2004, believing that there had been a significant shortfall in contributions (*id.*, ¶ 6).

In the lawsuit, the Trustee sought unpaid contributions, interest, liquidated damages, and attorney's fees (*id.*, ¶ 8). The Trustees also sought to hold Stein and Szapiro personally liable as fiduciaries as defined under ERISA (*id.*). Altschul & Altschul represented plaintiffs in the underlying action (*id.*, ¶ 9), and Altschul and Dworken were tasked with defending them (*id.*, ¶ 10).

At a deposition taken in this action, Altschul testified, as pertinent here, that defendants did not conduct any party or nonparty depositions because plaintiffs instructed him to save money (NYSCEF Doc No. 364, Altschul tr at 35-39, 112, 113, 120). Altschul stated that he told plaintiffs that "we needed to be able to prepare for the case and that we needed to have better ammunition. [Stein] did not want to spend money for ammunition. [Stein] wanted to go and try to settle the case" (*id.* at 191). As Altschul recalled at his deposition, he told Stein:

> you need to have an expert to review the audit. I also at the same time discussed with him the possibility of retaining other counsel who was familiar with some of these Union issues. [Stein] was insistent that at that point in time that he could settle the case with the Union.

(*id.* at 192). Altschul also testified that he had a discussion about potential conflicts of interest (*id.* at 155), and he told plaintiffs that "they could have [separate counsel for the different parties] and [he] told them that they might want it and [plaintiffs] told him they didn't want it" (*id.* at 156).

Szapiro testified at his deposition that he asked Altschul about deposing union delegates and the Association of Contracting Plumbers, to which Altschul replied "we didn't have a right to do that. We couldn't do that. They were suing us" (NYSCEF Doc No. 361, Szapiro tr at 62). Szapiro stated that the first time that he learned about a conflict of interest was at his current counsel's office (*id.* at 87). Furthermore, Szapiro testified that the first time that he learned that there was personal liability under ERISA was "when [he] read that [he] had lost the federal case in court, in federal court and it said that [he] owed it personally" (*id.*). He did not remember any discussion with defendants about hiring experts or auditors (*id.* at 89).

Defendants stipulated before the District Court that Reem Plumbing and Reem Contracting were alter egos of each other (*Trustees of Plumbers Local Union No. 1 Welfare Fund v Reem Plumbing & Heating Corp.*, 2009 WL 10700668, *4, 2009 US Dist LEXIS

154698, *13 [ED NY, Mar. 31, 2009, No. 04-CV-4698 (CBA/VVP), *affd in part, vacated in part sub nom. Reilly v Reem Contr. Corp.*, 380 Fed Appx 16 [2d Cir 2010]).

The Trustees moved for summary judgment, arguing that Reem Plumbing was contractually obligated to contribute to the Funds during the audit period, and that Reem Contracting was responsible as Reem Plumbing's alter ego (2009 WL 10700668, *5). The Trustees also argued that Stein and Szapiro were individually liable as fiduciaries of the Funds' assets (*id.*). Plaintiffs herein opposed the motion, arguing that there was no valid and binding collective bargaining agreement between the parties and that Stein and Szapiro could not be held individually liable as the entities' principals (*id.*).

By memorandum and order dated March 31, 2009, the presiding judge granted the Trustees' motion for summary judgment, determining that Reem Plumbing was obligated to make contributions to the Funds during the relevant audit period (2009 WL 10700668, *8). Moreover, since plaintiffs admitted that Reem Plumbing and Reem Contracting were alter egos, Reem Contracting was bound to the same collective bargaining agreements as Reem Plumbing (*id.*).

The judge further held that Stein and Szapiro were fiduciaries of the funds under ERISA, and thus were personally liable given their exclusive control of the entities (2009 WL 10700668, *10). Damages were awarded against plaintiffs, jointly and severally, in the amount of $1,337,707.63 (2009 WL 10700668). The amount of unpaid contributions was determined based solely on an audit of Reem Plumbing and Reem Contracting (2009 WL 10700668, *13).

Plaintiffs allege that they terminated defendants upon receiving the District Court's decision, and retained their current counsel, who immediately filed an appeal (NYSCEF Doc No. 293, Alessi affirmation ¶ 3). On appeal, the United States Court of Appeals for the Second

Circuit affirmed the District Court's judgment as to liability, but vacated and remanded the case on the issue of damages, finding that there were issues of material facts as to damages and that the Trustee's auditor's report submitted to establish the unpaid contributions "rested on a bald and unsupported assumption" that all work done by Reem Contracting was covered under the collecting bargaining agreements (*Reilly*, 380 Fed Appx at 20).

According to plaintiffs, upon remand to the District Court, the Magistrate Judge did not permit further discovery, limiting them to the evidence presented on the motion for summary judgment (NYSCEF Doc No. 1, verified complaint ¶¶ 14-17), allegedly because defendants had previously agreed that they had adequate discovery (*id.*, ¶ 15). Plaintiffs contend that, as a result, they were forced to settle the case for an excessive amount (*id.*, ¶ 16).

PROCEDURAL HISTORY

The instant complaint asserts a cause of action for legal malpractice, seeking full reimbursement of all legal fees and expenses paid, including for the appeal to the Second Circuit and to settle the underlying action, in addition to punitive and exemplary damages, and pre-judgment and post-judgment interest (*id.*, ¶¶ 8-17, wherefore clause, a.-g.).

Defendants assert two counterclaims seeking $44,638.07 in legal fees based on an account stated theory (NYSCEF Doc No. 125, amended answer with counterclaims ¶¶ 18-20).

By decision and order dated December 30, 2022, another justice of this court (O'Neill Levy, J.) denied the parties' prior motions for summary judgment (*Reem Contr. v Altschul & Altschul*, 2022 NY Slip Op 34430[U] [Sup Ct, NY County 2022]). As relevant here, the court determined that plaintiffs' unsworn expert report was not in admissible form, and therefore plaintiffs failed to meet their burden of demonstrating that defendant's conduct fell below the standard of care (*id.* at *7). Plaintiffs had also failed to eliminate issues of fact as to proximate

cause, especially as the informal audit prepared by counsel for settlement purposes was inadmissible (*id.*). The court also denied summary judgment to defendants on their counterclaims, finding that defendants had not dispelled questions of fact as to their malpractice (*id.* at *8).

DISCUSSION

A. Defendants' Motion for Summary Judgment (Motion Sequence Number 016)

Defendants again move for summary judgment, arguing that they have good cause for their second motion for summary judgment, relying on Executive Order No. 202.9 (9 NYCRR 8.202.8), issued during the COVID-19 pandemic, which allegedly prevented them from filing their motion until after the deadline to file motions had already expired. Further, defendants maintain that, as the court previously held that plaintiffs' expert report was not in admissible form, plaintiffs do not have an expert opinion that they can rely on to prove their case, and plaintiffs previously conceded that the Reem entities were alter egos of each other.

In response, plaintiffs contend that defendants have failed to demonstrate good cause for their second motion for summary judgment, as their initial motion for summary judgment was timely filed in compliance with the court's deadline of February 28, 2020. They assert that defendants should have raised the purported admission that the Reem entities were alter egos in opposition to plaintiffs' first motion for summary judgment. Finally, plaintiffs maintain that defendants have failed to obtain an expert and cannot serve as their own expert witness, and, thus, are unable to meet their burden of proving that plaintiffs' legal malpractice claim is without merit.

"'Successive motions for summary judgment should not be entertained without a showing of newly discovered evidence or other sufficient justification'" (*Maggio v 24 W. 57*

APF, LLC, 134 AD3d 621, 625 [1st Dept 2015], quoting *Jones v 636 Holding Corp.*, 73 AD3d 409, 409 [1st Dept 2010]; *see also Pough v Aegis Prop. Servs. Corp.*, 186 AD2d 52, 53 [1st Dept 1992] ["[A]s a matter of policy, multiple summary judgment motions are discouraged in the absence of newly discovered evidence or 'other sufficient cause'"]). As the Appellate Division, First Department has held,

> Parties will not be permitted to make successive fragmentary attacks upon a cause of action but must assert all available grounds when moving for summary judgment. There can be no reservation of any issue to be used upon any subsequent motion for summary judgment. A court, upon a motion for summary judgment, must examine all of the facts presented by the affidavits, pleadings and documents and decide whether a triable issue is raised. Once having done so, a court may not on a subsequent motion consider matters which a party has withheld or failed to urge as a ground for summary judgment theretofore denied.

(*Levitz v Robbins Music Corp.*, 17 AD2d 801, 801 [1st Dept 1962]).

Here, defendants do not rely on any newly discovered evidence and have failed to provide a sufficient justification as to why their arguments could not have been advanced on their prior motion for summary judgment (*see Polygenis v Stone Lounge Press, Inc.*, 204 AD3d 479, 479 [1st Dept 2022], *lv dismissed* 38 NY3d 1166 [2022] [successive motion for summary judgment properly denied where "it was based on matters that could have been raised, but were not raised, in its previous motion for summary judgment, and it showed no sufficient justification for the motion court to entertain a successive motion"]).

Moreover, defendants' first motion was filed timely as the note of issue was filed in this case on February 3, 2020 (NYSCEF Doc No. 240), and defendants have not sought leave to renew it. To the extent that defendants' current motion rehashes the same argument raised in their prior motion or introduces new arguments that could have been raised in the prior motion, they are not considered (*Nunez v Yonkers Racing Corp.*, 218 AD3d 480, 481 [2d Dept 2023] ["[s]uccessive motions for the same relief burden the courts and contribute to the delay and cost

of litigation. A party seeking summary judgment should anticipate having to lay bare its proof and should not expect that it will readily be granted a second and third chance"] [internal quotation marks omitted]).

Accordingly, defendants' motion for summary judgment is denied.

B. Plaintiffs' Motion for Summary Judgment (Motion Sequence Number 017)

Plaintiffs contend that they have good cause for their second motion, as the court previously denied their motion primarily because their expert report was unsworn. They now submit an affidavit from their expert, Bennett J. Wasserman, which annexes his report offered on the prior motion (NYSCEF Doc No. 359, Wasserman aff), and Wasserman opines therein that defendants' conduct fell below the standard of care in the underlying action in that, among other things: (1) defendants failed to investigate and marshal appropriate lay and expert evidence in a timely fashion; (2) defendants stipulated to the fact that the Reem entities were alter egos, notwithstanding the fact that Stein testified to the contrary; (3) defendants never advised plaintiffs about the existence of potential conflicts of interest; and (4) defendants failed to communicate with plaintiffs (*id.*, ¶ 10 [c], [d], [e], [f], [k]).

Plaintiffs argue that defendants must accept their expert report in its entirety, or, stated differently, by failing to obtain their own rebuttal expert, defendants are barred from raising an issue of fact as to whether their conduct fell below the standard of care or that their actions were not a proximate cause of plaintiffs' loss. Plaintiffs also maintain that the informal audit that their counsel prepared established the proximate cause element of defendants' legal malpractice, but admit that it is not admissible at trial (NYSCEF Doc No. 360 at 28). Plaintiffs further argue that, even if they had conversations with defendants about obtaining an ERISA expert or an audit to

determine the amount owed, defendants still breached their ethical duty and did not withdraw from the underlying action when they had an alleged disagreement about such strategic choices.

Defendants counter that plaintiffs fail to offer good cause for their second motion for summary judgment, and that they cannot be compelled to accept plaintiffs' expert report. Defendants argue that plaintiffs cannot make out a prima facie case based on defendants' conduct in the underlying action, as plaintiffs conceded that they did not wish to spend money to pursue discovery or to conduct an audit when litigating the underlying action. Moreover, defendants maintain, plaintiffs are unable to refute the evidence that the Reem entities were alter egos, and defendants' alleged failure to communicate with plaintiffs was not a proximate cause of plaintiffs' damages.

Here, plaintiffs have demonstrated good cause for their second motion for summary judgment (*see Darwick v Paternoster*, 56 AD3d 714, 715 [2d Dept 2008]), as the prior denial was based, in part, on the fact that their expert report was unsworn and therefore inadmissible. Now, plaintiffs have, in effect, moved to renew their prior motion for summary judgment to correct a procedural oversight and have submitted their expert's affidavit in admissible form (*see Feuerman v Marriott Intl.*, 201 AD3d 566, 567 [1st Dept 2022]; *Shaw v Looking Glass Assoc.*, 8 AD3d 100, 102 [1st Dept 2004]). The court, therefore, must determine whether plaintiffs are entitled to summary judgment.

"On a motion for summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc.*, 36 NY3d 69, 73-74 [2020] [internal quotation marks and citation omitted]). "Failure to make such showing requires denial of the motion, regardless of the

sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the moving party meets its burden, the burden shifts to the non-moving party "to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The court's function on a motion for summary judgment is "issue-finding, rather than issue-determination" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957] [internal quotation marks and citation omitted]).

To recover for legal malpractice, the plaintiff must demonstrate "that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorneys breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages" (*Dombroski v Bulson*, 19 NY3d 347, 350 [2012] [internal quotation marks and citation omitted]). In order to prove proximate causation, "[the] plaintiff must satisfy the "'case within a case requirement, demonstrating that but for the attorney's conduct the plaintiff client would have prevailed in the underlying matter or would not have sustained any ascertainable damages'" (*Carasco v Schlesinger*, 222 AD3d 476, 476 [1st Dept 2023], quoting *Lieblich v Pruzan*, 104 AD3d 462, 462-463 [1st Dept 2013]). "A plaintiff's burden of proof in a legal malpractice action is a heavy one. The plaintiff must prove first the hypothetical outcome of the underlying litigation and, then, the attorney's liability for malpractice in connection with that litigation" (*Nazario v Fortunato & Fortunato, PLLC*, 32 AD3d 695, 695 [1st Dept 2006] [internal quotation marks and citation omitted]).

The Appellate Division, First Department has explained that:

> [o]nly after the plaintiff[s] establish[] that [they] would have recovered a favorable judgment in the underlying action can [they] proceed with proof that the attorney engaged to represent [them] in the underlying action was negligent in handling that

> action and that the attorney's negligence was the proximate cause of the plaintiff[s'] loss since it prevented [them] from being properly compensated for [their] loss.

(*id.* at 695-696 [internal quotation marks and citation omitted]).

Moreover, when the alleged loss involves the settlement of an underlying action, the plaintiff must show that the settlement was compelled by its counsel's mistakes (*Maroulis v Friedman*, 153 AD3d 1250 [2d Dept 2017]), and that if the action had not been settled, the plaintiff would have obtained a more favorable outcome (*Schiller v Bender, Burrows and Rosenthal, LLP*, 116 AD3d 756 [2d Dept 2014]). A legal malpractice claim will fail if successor counsel had ample time and opportunity to correct any alleged mistakes (*Knox v Aronson, Mayefsky & Sloan, LLP*, 168 AD3d 70 [1st Dept 2018]).

Even considering Wasserman's affidavit, the court finds that plaintiffs are still not entitled to summary judgment. First, there are issues of fact as to proximate cause (*see Birnbuam v Misiano*, 52 AD3d 632, 634 [2d Dept 2008]). Plaintiffs argue that by conducting their own informal audit, they "met the proximate cause element of this litigation, through the 'case within a case' standard, as they successfully refuted the Funds' audit and refuted the uncontested judgment against Plaintiffs" (NYSCEF Doc No. 360 at 28). However, they concede that the audit is inadmissible at trial, and thus, as previously held on plaintiffs' first summary judgment motion, the audit is insufficient to demonstrate proximate cause (*see* CPLR 4547; *CNP Mech., Inc. v Allied Bldrs., Inc.*, 66 AD3d 1340, 1340 [4th Dept 2009] [subcontract summary prepared by defendants' counsel "was prepared for the purpose of settlement negotiations and was therefore inadmissible as proof of the amount of damages"]).

Although plaintiffs argue that their audit is nevertheless indicative of the type of evidence that defendants should have developed in the underlying action, they must tender evidence in admissible form in order to meet their prima facie burden (*see Zuckerman v City of New York*, 49

NY2d 557, 562 [1980] ["To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd [b]), and [the movant] must do so by tender of evidentiary proof in admissible form"]).

Plaintiffs also fail to establish that their subsequent counsel did not have the time and opportunity to correct any of defendants' alleged mistakes before they settled the underlying action (*see e.g., Somma v Dansker & Aspromonte Assocs.,* 44 AD3d 376 [1st Dept 2007] [legal malpractice claim properly dismissed as defendants no longer represented plaintiff when he agreed to settle underlying action, and successor counsel had sufficient time and opportunity to protect plaintiff's rights]).

Moreover, defendants' testimony raises issues of fact as to the strategic choices allegedly offered by defendants to plaintiffs and whether plaintiffs declined certain courses of action, therefore raising the issue of whether defendants' actions were a proximate cause of plaintiffs' damages (*see Affordable Community, Inc. v Simon*, 95 AD3d 1047, 1048 [2d Dept 2012] [issues of fact as to whether client limited attorney to presenting only certain unsuccessful defense arguments in course of representation in underlying personal injury action]; *Siciliano v Forchelli & Forchelli*, 17 AD3d 343, 345 [2d Dept 2005] [issues of fact existed as to whether counsel's failure to assert defense in nonpayment eviction proceedings on behalf of lessors' purported guarantor proximately caused purported guarantor's loss]; *Shopsin v Siben & Siben*, 268 AD2d 578, 578 [2d Dept 2000] [issue of fact as to whether defendant's failure to perform adequate research was a proximate cause of plaintiff's loss]; *see also Selletti*, 22 AD3d at 740 [issue of fact as to whether client's conduct contributed to imposition of monetary sanction in underlying federal action]).

Plaintiffs also argue that defendants were ethically required to withdraw from representing them in the underlying action (NYSCEF Doc No. 360 at 38). However, plaintiffs do not cite any authority for this proposition, and even assuming that plaintiffs rely on New York Rules of Professional Conduct rule 1.16 (b), they have failed to submit evidence supporting mandatory withdrawal.

Therefore, plaintiffs' motion for summary judgment is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion (seq 016) for summary judgment is denied; and it is further

ORDERED, that plaintiffs' motion (seq 017) for summary judgment and for an order setting this matter down for an inquest on damages is denied; and it is further

ORDERED, that the parties appear for the previously-scheduled settlement conference before Senior Settlement Coordinator Miles Vigilante, Esq. on September 13, 2024 at 11:00 am.

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8/19/2024
DATE

DAVID B. COHEN, J.S.C.

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