

Rosenwald v Protax Consulting Servs. Inc.

2025 NY Slip Op 35004(U)

December 22, 2025

Supreme Court, New York County

Docket Number: Index No. 654954/2024

Judge: Kathleen Waterman-Marshall

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

PRESENT: HON. KATHLEEN WATERMAN-MARSHALL **PART** **31**

Justice

-----X

CARY ROSENWALD, VICTORIA FLYNN

Plaintiff,

- v -

PROTAX CONSULTING SERVICES INC.,MARC J
STROHL,

Defendant.

-----X

INDEX NO. 654954/2024

MOTION DATE 11/22/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, and following oral argument (the transcript of which was filed on September 9, 2025; NYSCEF Doc. No. 31), the motion by defendants Protax Consulting Services, Inc. (“Protax”) and Marc J. Strohl, CPA (“Mr. Strohl”) (collectively “Defendants”), for an order, pursuant to CPLR 3211(a)(1) and (a)(7), dismissing the Complaint, or, in the alternative, removing to this Court and consolidating with this action with a pending NYC Civil Court Small Claims action entitled *Protax Consulting Services Inc. v Rosenwald, et al*, (Index No. 60214-2023) (“the Small Claims Action”), is granted in part.

Brief Background

Plaintiffs Carey Rosenwald and Victoria Flynn (“Plaintiffs”) sue to recover alleged damages occasioned by Defendants’ alleged failure to perform accounting and tax preparation services (Complaint; NYSCEF Doc. No. 2). By way of apparent background, the Complaint alleges that Plaintiffs hired Defendants to perform “tax filing services” in 2018 (Complaint ¶ 7), and that interest and penalties assessed on Plaintiffs’ 2020 personal tax returns had been “ultimately resolved” in their favor (*id.* ¶¶ 11 – 19).

The core factual allegations of the Complaint are addressed to Defendants’ preparation and filing of Plaintiffs’ 2021 personal tax returns for which the parties entered into a Letter of Engagement dated September 19, 2022 (*id.* ¶¶ 20 – 37; and Exhibit “F,” NYSCEF Doc. No. 8). In the main, these allegations are that Defendants breached the agreement by failing to finish Plaintiffs’ 2021 tax returns and that Defendants “churned” the file and padded the billing with no intention of completing the tax services promised. Plaintiffs allege that on “multiple occasions” from August 2022 through December 2022

. . . Mr. Strohl ignored Mr. Rosenwald’s statements and correspondence, provided incorrect comments, made unproductive

inquiries, sent needless emails, asked questions that were already answered, and otherwise engaged in excessive, redundant, pointless, and/or unnecessary correspondence, which upon information and belief, was for the sole and intentional purpose of “churning” hours and increasing billable time (*id.* ¶¶ 23, 29, 33).

The Complaint also alleges that, despite Mr. Rosenwald’s various requests, Mr. Strohl failed to schedule a call with him to discuss tax matters (*id.* ¶¶ 24, 28, 32), refused to respond to Mr. Rosenwald’s emails until an open November 26, 2022 invoice was paid and “the account is brought up to date in full,” and then, by letter of disengagement dated December 10, 2022, terminated the engagement “without any further clarification” (*id.* ¶¶ 34 – 35). According to the Complaint, Defendants “failed to provide the agreed-upon 2021 tax filing services for which they demanded payment” (*id.* ¶ 37). Finally, the Complaint alleges that Defendants failed to return Plaintiffs’ “original documents upon their written request” for said documents, in violation of the Letter of Engagement (*id.* ¶ 36). Plaintiffs attach eleven exhibits to their Complaint, ten of which are email chains between the parties, and the eleventh is a letter from Defendants’ attorney addressing Plaintiffs’ request for their documents and Protax’ disengagement letter (NYSCEF Doc. Nos. 3 – 13).

Upon those core factual allegations, the Complaint asserts six causes of action against both Defendants, to wit: breach of contract (first cause of action); fraud (second cause of action); unjust enrichment (third cause of action); fraudulent misrepresentation (fourth cause of action); fraudulent business practices (fifth cause of action); and breach of implied covenant of good faith and fair dealing (sixth cause of action). Plaintiffs claim the same amount of damages – no less than “One Hundred Thousand Dollars (\$100,000), plus pre-judgment interest, plus compensatory, consequential and incidental damages,” plus attorney’s fees – for each cause of action.

Defendants now move to dismiss the Complaint or, in the alternative, remove to this Court and consolidate with this action the pending Small Claims Action, in which Protax seeks to recover the \$6,000 owed on its November 26, 2022 invoice. As to dismissal, Defendants argue that the Complaint fails to state any claims sounding in fraud, as such claims are not plead with the requisite specificity, are duplicative of the breach of contract claim, and otherwise fail to allege elements for the various iterations of fraud. They argue that the unjust enrichment claim is barred by the existence of a written agreement, i.e., the Letter of Engagement. Similarly, Defendants urge that the breach of implied covenant of good faith and fair dealing is duplicative of the breach of contract claim. Defendants also argue that the breach of contract claim fails as a matter of law against Mr. Strohl, who is not a signatory to the Letter of Engagement, and otherwise fails because Plaintiffs do not allege their own performance and their damages are “unspecified and undefined.” Finally, relying upon a November 1, 2024 Stipulation (NYSCEF Doc. No. 21), in which the parties “acknowledge that this action and the Small-Claims Action share common questions of law and fact,” Defendants request that the Small Claims Action be removed this Court and joined with any remaining causes of action herein.

In opposition, Plaintiffs assert that their Complaint adequately states fraud causes of action in that it alleges “unique facts and independent” allegations that Defendants intentionally

refused to provide agreed upon tax services and engaged in “deceit and subterfuge” by “churning billable hours.” Plaintiffs point to the various emails attached to the Complaint, and (to a lesser degree) the allegations in the Complaint, in defending their claims – they urge that the Complaint states fraud in that it alleges Defendants “convinced” and “fraudulently induced” Plaintiffs to sign the Letter of Engagement but “never intended” to provide tax filing services, and churned the file (Complaint ¶¶ 45 – 50); fraudulent misrepresentation in that it alleges Defendants “promised to assist” Plaintiffs with their taxes and “fraudulent misrepresented” their obligations to do so (*id.* ¶¶ 61 – 65); and fraudulent business practices in that, essentially, Defendants engaged in excessive billing and churned the file (*id.* ¶¶ 68 – 72). Plaintiffs urge that their “email evidence” establishes their performance under the Letter of Engagement and Defendants’ breach thereof; that their unjust enrichment claim, like their fraud claims, is based on “unique and independent allegations” outside of the contract allegations; that the breach of implied covenant claim is adequately plead by the allegations that Defendants churned the file then terminated the agreement; and that their claimed \$100,000 in damages is a proper *ad damnum* clause.

Discussion

The law on dismissal at the pleadings stage is clear and long well-settled. On all motions to dismiss under CPLR 3211, the complaint should be liberally construed, the facts presumed to be true, and the pleading accorded the benefit of every possible favorable inference (*see e.g. Leon v Martinez*, 84 NY2d 83 [1994]). On a motion to dismiss under CPLR 3211(a)(1) based upon documentary evidence, dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*id.*; citing *Heaney v Purdy*, 29 NY2d 157 [1971]). “An unambiguous contract provision may constitute documentary evidence warranting the dismissal of the complaint pursuant to CPLR 3211(a)(1)” (*Wilson v Poughkeepsie City Sch. Dist.*, 147 AD3d 1112, 1113 [2d Dept 2017]).

On a motion to dismiss under 3211(a)(7), the complaint is likewise afforded the benefits of liberal construction, a presumption of truth, and any favorable inference (*see e.g. M & E 73-75, LLC v 57 Fusion LLC*, 189 AD3d 1 [1st Dept 2020]; *Askin v Department of Educ. of City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]). The motion must be denied if, from the four corners of the pleadings, “factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001] [internal quotation omitted]). A complaint should not be dismissed so long as, “when the plaintiff’s allegations are given the benefit of every possible inference, a cause of action exists,” and a plaintiff may cure potential deficiencies in its pleading through affidavits and other evidence (*R.H. Sanbar Projects v Gruzen Partnership*, 148 AD2d 316, 318 [1st Dept 1989]). However, bare legal conclusions and factual allegations which are inherently incredible or contradicted by documentary evidence are not presumed to be true (*Mark Hampton, Inc. v Bergreen*, 173 AD2d 220 [1st Dept 1991]).

Plaintiffs conflate the standards on this 3211 pleadings motion with the standards imposed on a summary judgment motion. Peppered through their opposition papers is the argument that there are “questions of fact” raised by the exhibits attached to the Complaint, which preclude dismissal prior to discovery. In the main, Plaintiffs urge that the emails are “key” to their “churning” claims – which form the basis of all of the fraud, unjust enrichment, and breach of implied covenant causes of action – and raise “questions of credibility as to

Defendants' intent, purposefulness, and deliberateness with respect to the wasteful and meaningless correspondence" that resulted in excessive billing and reflect a churned file.

However, affording the allegations of the Complaint and the content of the attached emails liberal construction in Plaintiffs' favor, the Complaint fails to state anything other than a straightforward breach of contract claim. Indeed, viewing the pleading through the proper, applicable 3211 lenses, and considering the unambiguous terms of the parties' Letter of Engagement, the Complaint fails to state any claims sounding in fraud, unjust enrichment, or breach of implied covenant of good faith and fair dealing. Notably, Plaintiffs did not cite in their papers or identify at oral argument, any legal authorities which stand for the proposition that an allegation of padded billing or churning, without more, is sufficient to state a claim for fraud, unjust enrichment, or breach of implied covenant.

First Cause of Action, for Breach of Contract

A properly plead breach of contract cause of action "usually must allege that (1) a contract exists; (2) plaintiff performed in accordance with the contract; (3) defendant breached its contractual obligations; and (4) defendant's breach resulted in damages" (*34-06 73, LLC v Seneca Ins. Co.*, 39 NY3d 44, 52 [2022] [internal citations omitted]; *Second Source Funding, LLC v Yellowstone Cap., LLC*, 144 AD3d 445, 445-446 [1st Dept 2016] [same]). Here, the Complaint adequately pleads a breach of contract cause of action against Protax in that it alleges: (1) the existence of the Letter of Engagement pursuant to which Protax agreed to prepare Plaintiffs' 2021 Federal and State income tax returns (Complaint ¶ 25; Exhibit F); (2) Plaintiffs' performance under the Letter of Engagement by providing documents and information necessary to prepare the returns and payment of invoices (*id.* ¶ 31; *see also* ¶ 48 "Plaintiffs timely paid all of Defendants' invoices up to the last invoice, after which none of the contracted services were actually provided."); (3) Defendants' breach in that they failed to prepare the 2021 tax returns (*id.* ¶ 37); and (4) damages in the sum of no less than \$100,000 as a result of the breach.

The Complaint does not state a claim against Mr. Strohl, individually, as he did not sign the Letter of Engagement at all (Mr. Strohl's signature does not appear on the document) but rather sent the Letter of Engagement as the agent for a disclosed principal, Protax, which is identified on the letterhead and throughout the agreement (*see Bank of Am., N.A. v ASD Gem Realty LLC*, 205 AD3d 1, 7 [1st Dept 2022] ["Generally, an agent who acts on behalf of a disclosed principal is not liable for a breach of contract"; agent for disclosed principal may be personally liable for breach only if "there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal" as evidenced by the form of the signature] [internal citations omitted]; *see also Victory State Bank v EMBA Hylan, LLC*, 169 AD3d 963, 965 [2d Dept 2019] ["One cannot be held liable under a contract to which he or she is not a party"]).

The allegation in each cause of action that Plaintiffs sustained damages of "no less than \$100,000," although not tethered to any specific interest or penalty assessment on Plaintiffs' 2021 tax returns or to any amounts Plaintiffs had to pay to another accountant to prepare their 2021 taxes – which are foreseeable losses in the event of Protax' breach – is sufficient to plead damages (*see Ashland Mgmt. Inc. v Janien*, 82 NY2d 395, 403 [1993] ["The party breaching the contract is liable for those risks foreseen or which should have been foreseen at the time the

contract was made. The breaching party need not have foreseen the breach itself, however, or the particular way the loss came about. It is only necessary that loss from a breach is foreseeable and probable” and the “requirement, that damages be reasonably certain, does not require absolute certainty”]; *see also Kenford Co. v Erie Cnty.*, 67 NY2d 257, 261 [1986] [damages for breach of contract must be fairly “within the contemplation of the parties to the contract at the time it was made”]).

Finally, the question of whether Protax breached the contract by failing to prepare the 2021 taxes and/or by churning the file, or whether Plaintiffs breached by failing to pay the open November 26, 2022 invoice, raise questions of fact that must abide discovery and cannot be disposed on the pleading (*Trump v Trump*, 80 Misc3d 765, 782 [Sup. Ct. New York County 2023] [Hon. Robert Reed, JSC] [“While it is true that ‘performance by the plaintiff’ is a necessary element of a breach of contract claim, the other party will only be excused from performance if the breach is material. A breach is ‘material’ if it ‘goes to the root of the agreement between the parties.’ But determining whether a material breach has occurred is generally a question of fact.”]).

Consequently, the first cause of action, for breach of contract, is dismissed as to Mr. Strohl only and otherwise states a valid claim.

Second Cause of Action, For Fraud and
Fourth Cause of Action, for Fraudulent Misrepresentation

In order to satisfy the specificity and particularity requirements of CPLR 3013 and 3016(b), a cause of action for fraud must allege “misrepresentation of a material fact, falsity, scienter and deception” (*Barclay Arms, Inc. v Barclay Arms Assocs.*, 74 NY2d 644, 646-47 [1989]; *see also Century 21, Inc. v F.W. Woolworth Co.*, 181 AD2d, 620, 625 [1st Dept 1992] [“The essential elements of an action for fraudulent inducement are the representation of a material existing fact, falsity, scienter, deception and injury.”]; *Lanzi v Brooks*, 54 AD2d 1057, 1058 [3d Dept 1976] aff’d, 43 NY2d 778 [1977] [“each of these essential elements [of a fraud claim] must be supported by factual allegations sufficient to satisfy the requirement of CPLR 3016 (subd. (b)) that ‘the circumstances constituting the wrong shall be stated in detail’”]).

A virtually identical standard applies for a fraudulent misrepresentation claim (*Davidoff v Hershfield*, 233 AD3d 926, 927 [2d Dept 2024] [“To recover damages for fraudulent misrepresentation, a plaintiff must prove (1) a misrepresentation or an omission of material fact which was false and known to be false by the defendant, (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it, (3) justifiable reliance of the plaintiff on the misrepresentation or material omission, and (4) injury”]).

Assuming the truth of the allegations of the Complaint, and affording them liberal construction, the Complaint does not state a fraud or fraudulent misrepresentation claim. Rather, as to fraud, the Complaint merely alleges, in conclusory fashion, that Mr. Strohl “convinced” and “fraudulently induced” Plaintiffs to sign the Letter of Engagement but “never intended” to provide them with services. As to fraudulent misrepresentation, the Complaint is based upon the same conclusory allegations, to wit: Defendants “promised” to provide tax services under the

Letter of Engagement but failed to do so; “assured” Plaintiffs they could provide tax services and “fraudulently misrepresented” their obligations to provide such services.

The Complaint does not allege, nor could it be construed to allege, with any specificity, any material misstatements made by Defendants at the time the parties entered into the Letter of Engagement, which were known to Defendants to be false and upon which Plaintiffs relied to their detriment (*Lanzi*, 54 AD2d at 1058 [fraud claims that are not plead with specific facts “have consistently been dismissed”]; *see also Bramex Associates, Inc. v CBA Agencies, Ltd.*, 149 AD2d 383 [1st Dept 1989] [conclusory allegations of fraud insufficient under CPLR 3016(b)]).

Moreover, the fraud causes of action are based upon the same alleged facts as that of the breach of contract, not, as Plaintiffs’ assert, any unique or independent facts. The Complaint alleges that Plaintiffs performed under the agreement by providing requested information and documents, Defendants failed to schedule calls and then fired Plaintiffs five days before the 2021 taxes were due to be filed, and Defendants never intended to provide services while churning the file. In this regard, the fraud claims are duplicative of the breach of contract claim and do not allege “any representation that is collateral to the contract” – at best, the Complaint alleges that Defendants were not sincere when they entered into the agreement, which is insufficient (*MMCT, LLC v JTR Coll. Point, LLC*, 122 AD3d 497, 499 [1st Dept 2014] [“A fraud-based claim is duplicative of breach of a contract claim when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract.”] [internal citations omitted]). In addition, the fraud claims seeks the same \$100,000 damages as does the breach of contract claim (*see 110 E. 138 Realty LLC v Rydan Realty, Inc.*, 210 AD3d 513, 514 [1st Dept 2022] [“The fraud cause of action fails as duplicative of the contract claim, as it is based on the same facts that underlie the contract cause of action, is not collateral to the contract, and does not seek damages that would be unrecoverable under a contract measure of damages.”]; *Demurjian v Demurjian*, 190 AD3d 410, 411 [1st Dept 2021] [“Since the claimed fraud damages are identical both in means of calculation and amount to the claimed contract damages, ‘the fraud claim is duplicative and must be dismissed’”]).

As noted above, Plaintiffs cite no authority in their papers (and offered none at oral argument) which hold that an allegation of an accountant’s overbilling or churning a file is sufficient, without more, to state a fraud claim. Consequently, the second cause of action, for fraud, and the fourth cause of action, for fraudulent misrepresentation, are dismissed.

Third Cause of Action, for Unjust Enrichment

“The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter” (*Clark-Fitzpatrick, Inc v Long Is. R.R. Co.*, 70 NY2d 382 [1987]). Here, Plaintiffs’ unjust enrichment claim is barred because the Letter of Engagement governs the subject matter of the Complaint (*id.*).

In addition, Plaintiffs base their unjust enrichment claim on the same allegations and seek the very same damages for unjust enrichment as sought for breach of contract – Plaintiffs hired Defendants to perform tax preparation services, Defendants did not deliver any services, Plaintiffs paid Defendants’ invoices and were unjustly enriched by such payments in a sum no

less than \$100,000 (*see generally Soloviev v Ross Sch.*, 227 AD3d 746, 747 [1st Dept 2024] [unjust enrichment claim based upon same allegations as asserted for breach of contract, dismissed as duplicative]; *see also Hahn v Stone House Props. LLC*, 206 AD3d 408, 409 [1st Dept 2022] [“The claims for constructive fraud, unjust enrichment, and a constructive trust are duplicative of the breach of fiduciary duty claim as they arise from the same facts and seek identical damages”]).

Consequently, the third cause of action, for unjust enrichment is dismissed.

Fifth Cause of Action, for Fraudulent Business Practices

The Complaint also fails to state a claim for fraudulent business practices as it merely alleges a private dispute between Plaintiffs and Defendants and does not involve or affect “consumers at large or have an impact on consumer transactions involving the same type” of services (*Koblence v Mod. Pawn Brokers, Inc.*, 182 AD3d 496, 497 [1st Dept 2020]). Indeed, the Complaint does not even reference the public or consumers at large, and reiterates the same allegations about Defendants’ failure to prepare and file Plaintiffs’ 2021 tax returns and alleged improper billing practices as to Plaintiffs only.

Consequently, the fifth cause of action, for fraudulent business practices is dismissed.

Sixth Cause of Action, for Breach of Implied Good Faith and Fair Dealing

“Where a cause of action for breach of the implied covenant of good faith and fair dealing is based on the same operative facts and seeks the same damages as a cause of action for breach of contract the good faith claim is duplicative and should be dismissed” (*AEA Middle Market Debt Funding LLC v Marblegate Asset Management, LLC*, 214 AD3d 111 [1st Dept 2023] [Renwick, J.P.]). The Complaint, in the sixth cause of action, acknowledges the Letter of Engagement and goes on to allege that Defendants, by their “intentionally meaningless, excessive, redundant, pointless and/or unnecessary and unproductive correspondence and action. . . made it impossible” for Plaintiffs to get assistance with their tax filing. These are some of the same facts supporting the breach of contract claim. Moreover, the exact same breach of contract damages –\$100,000 – are sought on this cause of action.

Consequently, the sixth cause of action, for breach of implied good faith and fair dealing is duplicative of the breach of contract claim and is dismissed.

Consolidation is Denied

The Small Claims matter has been pending since June of 2023, now over two and one-half years, and should be ready for trial. On the other hand, this action, pending since September 2024, has just now crossed the pleadings stage and will be scheduled for a Preliminary Conference. In other words, this action is not close to trial. Thus, Defendant Protax – who is the Plaintiff in the Small Claims Action – will suffer substantial prejudice in the form of delay in the trial and resolution of its claim to recover on its \$6,000 invoice, which is a sufficient reason to deny consolidation notwithstanding the existence of common questions of law and fact between the two actions (*F&K Supply, Inc. v Johnson*, 197 AD2d 814, 814-15 [3d Dept 1993] [“It being well settled that the existence of substantial prejudice in the form of delay in the trial of another

action is sufficient reason to deny consolidation even in situations where common questions of law or fact exist’].

Consequently, Defendants’ motion to remove the Small Claims Action to this Court and consolidate it with this action, is denied.

Accordingly, it is hereby

ORDERED that Defendants’ motion to dismiss the Complaint is granted in part; and it is further

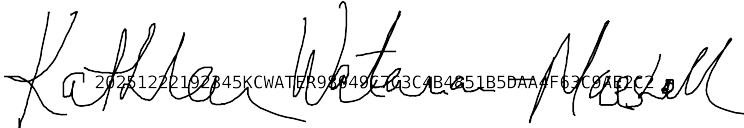
ORDERED that the first cause of action, for breach of contract, is dismissed as to defendant Marc J. Strohl, CPA, only, and otherwise remains viable as to defendant Protax Consulting Services, Inc.; and it is further

ORDERED that the second through sixth causes of action in the Complaint are dismissed in their entirety; and it is further

ORDERED that defendant Protax Consulting Services, Inc. shall serve its answer to the first cause of action in the Complaint, within twenty (20) days of the date of this Decision and Order; and it is further

ORDERED that Defendants’ motion to consolidate this action with the pending NYC Civil Court Small Claims action entitled *Protax Consulting Services Inc. v Rosenwald, et al*, (Index No. 60214-2023), is denied; and it is further

ORDERED that this matter is scheduled for a **Preliminary Conference in Part 31 on April 15, 2026 at 10:00 a.m.** Counsel are reminded of the Part Rules, particularly those governing conferences and conference orders.



12/22/2025
DATE

KATHLEEN WATERMAN-MARSHALL,
J.S.C.

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