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

PRESENT: PART

Index Number : 114317/2010
STEVENS, ARTHUR H.
vs
SOKOLOW CARRERAS LLP
Sequence Number : 001
DISMISS

C

INDEX NO.
MOTION DATE
MOTION SEQ. NO.
MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Motion is decided in accordance with accompanying Memorandum Decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: Jan 18, 2012

CHARLES E. RAMOS J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

----------X

ARTHUR H. STEVENS,

Plaintiff,

-against-

Index No. 114317/10

SOKOLOW CARRERAS LLP,
LEBOW & SOKOLOW, LLP,
JACKSON & NASH LLP and
DONALD STUART BAB, Esq.,

Defendants.

----------X

Charles Edward Ramos, J.S.C.:

Motion sequence numbers 001 and 002 are consolidated herein for disposition.

In sequence number 001, defendants Sokolow Carreras LLP, Lebow & Sokolow, LLP (both, Sokolow), and Donald Stuart Bab, Esq. (Bab) move for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing the complaint and cross-claims with prejudice. In sequence number 002, defendant Jackson & Nash LLC (J&N, together with Sokolow and Bab, Defendants) moves for an order, pursuant to CPLR 3212, granting summary judgment in its favor and dismissing the complaint, and, pursuant to 22 NYCRR 130-1.1, granting sanctions against plaintiff Arthur H. Stevens (Stevens) for frivolous conduct.

Stevens founded and was the chief executive officer of non-party Lobsenz-Stevens, Inc., a public relations firm. In October 1999, Stevens sold Lobsenz-Stevens to non-parties Publicis S.A.

and Publicis USA Holdings, Inc. (both, Publicis) through means of stock purchase and employment agreements.

By retainer agreement dated May 16, 2003 (the Retainer), Stevens retained J&N to represent him in connection with the transaction, with Bab as the attorney assigned. Subsequently, Bab resigned from J&N and became Of Counsel to Sokolow Carreras LLP, and now Lebow & Sokolow, LLP. Acting under the Retainer, Bab continued to represent Stevens while employed at each of these law firms.

Believing that Publicis had engaged in a series of wrongful acts in breach of the stock purchase and employment agreements following the sale transaction's closing, Stevens directed Bab to commence legal action against Publicis (*see Stevens v Publicis, S.A.*, Sup Ct, NY County, Index No. 602716/2003 [the *Publicis* action]). In the *Publicis* action complaint dated August 27, 2003, Stevens alleges that Publicis wrongfully removed him from all managerial authority, terminated key Lobsenz-Stevens employees, and diverted Lobsenz-Stevens clients to other Publicis companies. On these allegations, Stevens asserts claims for fraudulent inducement, breach of contract, breach of the covenant of good faith, breach of fiduciary duty, and diversion of his ownership interest. He sought to recover $4 million, the allegedly unpaid balance of the stock purchase agreement, together with other related relief.

Following motion practice, the *Publicis* action court dismissed Stevens's claims arising out of the employment agreement, and did not dismiss those arising out of the stock purchase agreement (*see Stevens v Publicis, S.A.*, 50 AD3d 253 [1st Dept], *lv dismissed* 10 NY3d 930 [2008]). Although the parties engaged in settlement negotiations, Stevens chose to proceed to trial on the remaining claims, allegedly in accordance with Bab's legal advice. In June and July 2006, a jury trial was held, and the jury found in favor of Publicis and against Stevens.

In resolving the post-trial motions, the *Publicis* action court determined that, when Stevens commenced the *Publicis* action, he triggered the employment agreement's prevailing-party clause regarding payment of attorneys' fees and disbursements, and the court referred the issue of damages to a special referee. In a report dated October 31, 2008, the special referee determined that the *Publicis* action defendants were entitled to recover $828,503.62, consisting of $808,768.62 in reasonable attorneys' fees, together with costs and expenses.

As a result of Steven's legal representation, he was billed approximately $250,000. Pursuant to the Retainer, J&N agreed to represent Stevens in exchange for payment of a reduced hourly rate for work performed by its attorneys, with a $50,000 maximum fee cap on the aggregate amount of legal fees, and a percentage

of any recovery by Stevens. In the instant action, Stevens alleges that Defendants attempted to circumvent the fee cap by excessively assigning legal duties to paralegals, secretaries, and non-attorney personnel for work that should have been performed by attorneys.

In the complaint, Stevens alleges that Defendants overbilled during the course of their representation, and, while representing him in the *Publicis* action, improperly advised him to refuse a settlement offer, and to try the case to conclusion. On these allegations, Stevens asserts causes of action for breach of fiduciary duty and legal malpractice in tort and contract.

In its answer, J&N denies all allegations of material wrongdoing, and asserts cross-claims for common-law and contractual contribution and indemnification against Sokolow and Bab. Defendants now seek to dismiss the complaint and cross-claims asserted against them.

With respect to the motion to dismiss by Sokolow and Bab, this Court notes that, on a motion addressed to the sufficiency of the pleadings, this Court must accept each and every allegation as true and liberally construe the allegations in the light most favorable to the pleading party (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Joel v Weber*, 166 AD2d 130, 135-136 [1st Dept 1991]; *see* CPLR 3211 [a] [7]). "We . . . determine only whether the facts as alleged fit within any cognizable legal

theory" (*Leon v Martinez*, 84 NY2d at 87-88). However, "'allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence,' are not presumed to be true and [are not] accorded every favorable inference" (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000], quoting *Kliebert v McKoan*, 228 AD2d 232, 232 [1st Dept], *lv denied* 89 NY2d 802 [1996]; *see* CPLR 3211 [a] [1]).

With respect to the motion for summary judgment by J&N, the court notes that summary judgment is a drastic remedy, and will not be granted where genuine triable issues of material fact exist (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

Defendants contend that the first cause of action for breach of fiduciary duty is fatally defective on the ground that Stevens's admissions and the documentary evidence establish that the claim is, at bottom, a legal malpractice claim based on both negligence and breach of contract theories. In addition, J&N contend that its affirmative defenses based on the theories of account stated and voluntary payment operate as complete defenses to this claim.

In opposition, Stevens contends that he has adequately alleged three separate types of incidents that constitute breaches of Defendants' fiduciary duty owed to him, as his

attorneys. Stevens further alleges that these are incidents in which Defendants put their own financial interests ahead of his best interests.

Stevens alleges that the first incident occurred when Defendants, as his attorneys, failed to advise him prior to execution of the retainer that a claim for breach of the employment agreement asserted against the *Publicis* action defendants could trigger that agreement's prevailing-party clause, and failed to remind him that he could be held liable for legal fees, costs, and expenses incurred by those defendants, pursuant to the terms of the clause. The second incident allegedly occurred when Defendants advised Stevens to reject the settlement package suggested by the *Publicis* action defendants, and to proceed to trial. The third incident consists of Defendants' alleged shift of legal work from attorneys to paralegals and secretaries, in order to circumvent the $50,000 cap on attorneys' fees set forth in the retainer.

> "It is well settled that the relationship of client and counsel is one of 'unique fiduciary reliance' and that the relationship imposes on the attorney '[t]he duty to deal fairly, honestly and with undivided loyalty . . . including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the clients' interests over the lawyer's.' Thus, any act of disloyalty by counsel will also comprise a breach of the fiduciary duty owed to the client"

(*Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56

AD3d 1, 9 [1st Dept 2008] [internal citations omitted]).

> "Because the attorney-client relationship is both contractual and inherently fiduciary, a complaint seeking damages alleged to have been sustained by a plaintiff in the course of such a relationship will often advance one or more causes of action based upon the attorney's breach of some contractual or fiduciary duty owed to the client. The courts normally treat the action as one for legal malpractice only"

(*id.* at 8-9).

Where the fiduciary duty claim and the legal malpractice claim both arise out of the same facts, and seek identical relief, then both claims are governed by the same standard of recovery (*id.* at 10). Where the fiduciary duty claim is based upon facts different from those underlying the malpractice claim, then the claim is governed by a standard of recovery considerably lower than that required for recovery under a theory of legal malpractice (*see id.*).

Here, Stevens bases the breach of fiduciary duty claim on the same three incidents of alleged misconduct as those that underlie the legal malpractice claims, both the one sounding in tort and the one sounding in contract. In these claims, Stevens alleges that Defendants caused him to suffer monetary damages when they failed to render competent and truthful legal advice and service, from the inception of their representation, by advising him to commence the *Publicis* action, and to proceed to trial of that action, rather than settling the action, and by

overcharging him, in breach of the retainer terms. Therefore, all three claims are governed by the same standard of recovery.

Contrary to Stevens's contention, Defendants' alleged misconduct that occurred prior to, and during, execution of the retainer is not distinct from the legal malpractice claims, and are not held to a lower standard of recovery.

> "An attorney-client relationship arises . . . when one contacts an attorney in his capacity as such for the purpose of obtaining legal advice or services. Formality is not essential to create a legal services contract. Therefore, it is necessary to look to the words and actions of the parties to ascertain if an attorney-client relationship was formed"

(*Talansky v Schulman*, 2 AD3d 355, 358 [1st Dept 2003] [internal quotation marks and citations omitted]; *see EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005] [a fiduciary relationship arises "between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation"] [internal quotation marks and citation omitted]).

Here, Stevens clearly alleges that the fiduciary relationship arises out of his retention of Defendants to represent him during the sale of the Lobsenz-Stevens assets, and then, later, to commence legal action against the purchasers of those assets. Therefore, the fiduciary duty arises out of the attorney-client relationship that began prior to execution of the

retainer. The circumstances giving rise to the attorney-client relationship, and the alleged breaches of fiduciary duty, are identical to each other. Thus, the legal theories of breach of fiduciary duty and legal malpractice cannot be separated.

For these reasons, the branches of the motions to dismiss the first cause of action for breach of fiduciary duty are granted, and the claim is dismissed as duplicative of the tort and contract legal malpractice claims (*see William Kaufman Org., Ltd. v Graham & James LLP*, 269 AD2d 171, 173 [1st Dept 2000]).

The parties next dispute whether the legal malpractice claims asserted under tort and contract theories of liability are based upon adequate factual allegations or are fatally defective.

"[R]ecovery for professional malpractice against an attorney requires that a client prove three elements: '(1) the negligence of the attorney; (2) that the negligence was the proximate cause of the loss sustained; and (3) proof of actual damages (citation omitted)'" (*Kaminsky v Herrick, Feinstein LLP*, 59 AD3d 1, 9 [1st Dept 2008], *lv denied* 12 NY3d 715 [2009]). "The cause of action requires the plaintiff to establish that counsel failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and to meet the exacting standard that but for the attorney's negligence the outcome of the matter would have been substantially different" (*id.* [internal quotation marks and citation omitted]; *see Greene*

v Sager, 78 AD3d 777, 778 [2d Dept 2010]).

Stevens's factual allegations concerning Defendants' failure to advise him that a claim for breach of an employment agreement asserted in the *Publicis* action could trigger that agreement's prevailing-party clause is not sufficient to support a viable claim of legal malpractice. Similarly, Stevens's allegations that Defendants' advice to reject the *Publicis* action defendants' settlement offer, and to proceed to trial, which led to enforcement of the prevailing-party clause, are not adequate to support such a claim.

The "burden of proving a case within a case is a heavy one" (*Aquino v Kuczinski, Vila & Assoc., P.C.*, 39 AD3d 216, 219 [1st Dept 2007] [internal quotation marks and citation omitted]). "Mere speculation about a loss resulting from an attorney's poor performance is insufficient to sustain a prima facie case of legal malpractice" (*Bixby v Somerville*, 62 AD3d 1137, 1140 [3d Dept 2009] [internal quotation marks and citation omitted]).

The retainer provides, in relevant part, that Defendants "cannot guarantee the success of any given venture" (Retainer, § 1), and that Stevens has "sole discretion to accept or reject any Proposed Settlement" (*id.*, § 2).

Stevens does not allege that Defendants were negligent in prosecuting or trying the *Publicis* action; instead, he alleges merely that, had he settled the matter before trial, he could not

have been held liable for the *Publicis* action defendants' attorneys' fees, pursuant to the employment agreement prevailing-party clause.

There is no dispute that Stevens voluntarily executed the employment agreement. Stevens does not allege that Defendants committed legal malpractice in drafting the agreement, or in advising him to sign it. Therefore, he must be deemed to have knowledge of, and to understand, each of its provisions, including the prevailing-party clause. In addition, Stevens admitted during deposition in the *Publicis* action that he consulted with his attorneys regarding the employment agreement (*see Publicis* Action, Stevens Nov. 5, 2004 Dep Tr, at 170:11-24), and that he was aware of the existence of a counterclaim by those defendants to recover attorneys' fees (*id.* at 172:22-25). Stevens's admissions, in conjunction with his knowledge of the prevailing-party clause, constitute his recognition that, should he lose, he could be held liable for the *Publicis* action defendants' attorneys' fees. Thus, Defendants' alleged failure to competently advise Stevens, even if proven, cannot be held to have proximately caused his damages.

Therefore, Stevens's allegations of malpractice by failing to render competent legal advice regarding the prevailing-party clause and potential settlement are not sufficient to support legal malpractice claims sounding in tort or contract.

For these reasons, the branches of the motions to dismiss the second cause of action for legal malpractice sounding in tort and the third cause of action for legal malpractice sounding in contract based on these allegations are granted, and the branches of these claims based on these factual allegations are dismissed.

To the extent that the second cause of action for legal malpractice sounding in tort is based on allegations of breach of the Retainer's provisions regarding billing, the second cause of action is dismissed as duplicative of the claim for breach of the retainer.

However, to the extent that the third cause of action for legal malpractice is based on allegations of breach of the retainer by overbilling, it is legally viable. In relevant part, the Retainer expressly provides that Bab's fees are payable at $150 per hour, and that "other" fees are payable at $100 per hour. The Retainer also expressly caps the total fees at $50,000 (*see* Retainer, Schedule A). Stevens has adequately alleged that Defendants shifted work from attorneys to paralegals and secretaries, and billed approximately $250,000 in fees, in breach of the retainer.

Contrary to Defendants' contention, the doctrines of account stated and voluntary payment cannot be held to operate as complete affirmative defenses, at this juncture. "It has long been established that 'where an account is made up and rendered,

he who receives it is bound to examine the same, or to procure some one to examine it for him; if he admits it to be correct, it becomes a stated account and is binding on both parties - the balance being the debt which may be sued for and recovered at law'" (*Rosenman Colin Freund Lewis & Cohen v Neuman*, 93 AD2d 745, 746 [1st Dept 1983], quoting *Lockwood v Thorne*, 11 NY 170, 174 [1854]). However, evidence of an objection to an account rendered is sufficient "to rebut any inference of an implied agreement to pay the stated amount" (*Sandvoss v Dunkelberger*, 112 AD2d 278, 279 [2d Dept 1985]). The voluntary payment doctrine "bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law" (*Dillon v U-A Columbia Cablevision of Westchester, Inc.*, 100 NY2d 525, 526 [2003]). However, the doctrine is not applicable where payment is made under protest or the surrounding circumstances demonstrate the payor's right to preserve the payor's right to dispute the demand for payment (82 NY Jur 2d, Payment & Tender § 83).

Dismissal on these grounds at this juncture, prior to any discovery on this issue, would be premature, given Steven's contemporaneous correspondence in which he questions the accuracy of the invoices, and mentions that he has requested a copy of Schedule A to the retainer, which includes the fee cap provision (*see* Stevens's Aug. 7, 2006, May 23, 2008, May 29, 2008 E-Mails

to Bab).

Therefore, the branches of the motions to dismiss the portions of the third cause of action for legal malpractice by breach of the retainer by overbilling are denied.

That branch of the motion by Sokolow and Bab to dismiss J&N's cross-claims for contribution and indemnification is granted to the extent that the cross-claims are based on the first and second causes of action, or on the portions of the third cause of action arising out of allegations that Defendants did not render Stevens competent legal advice, and is denied to the extent that the cross-claims arise out of allegations of breach of the retainer by overbilling.

Last, the branch of J&N's motion for summary judgment on statute of limitations grounds is denied, pursuant to the bench order of this court (*see* Oral Arg. Oct. 5, 2011 Tr, at 22:11-15).

Accordingly, it is

ORDERED that motion sequence number 001 to dismiss this action is granted to the extent that the first cause of action for breach of fiduciary duty, and the portions of the second and third causes of action for legal malpractice arising out of allegations of improper advice regarding the retainer prevailing-party clause and potential settlement of the *Publicis* action asserted against Sokolow Carreras LLP, Lebow & Sokolow, LLP, and Donald Stuart Bab, Esq. are dismissed, and is otherwise denied;

and it is further

ORDERED that the portion of the third cause of action for legal malpractice by breach of the retainer payment provisions is severed and shall continue against Sokolow Carreras LLP, Lebow & Sokolow, LLP, and Donald Stuart Bab, Esq.; and it is further

ORDERED that Sokolow Carreras LLP, Lebow & Sokolow, LLP, and Donald Stuart Bab, Esq. are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that motion sequence number 002 for summary judgment is granted to the extent that summary judgment on the first cause of action for breach of fiduciary duty, and the portions of the second and third causes of action for legal malpractice arising out of allegations of improper advice regarding the retainer prevailing-party clause and potential settlement of the *Publicis* action is granted in favor of defendant Jackson & Nash LLP and against plaintiff Arthur H. Stevens, and is otherwise denied; and it is further

ORDERED that the portion of the third cause of action for legal malpractice by breach of the retainer payment provisions is severed and shall continue against defendant Jackson & Nash LLP; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 238, at 60 Centre Street, on

February 23, 2012, at 10:00am.

Dated: January 18, 2012

ENTER:

J.S.C.

CHARLES E. RAMOS