

**Baughner v Cullen & Dykman LLP**

2016 NY Slip Op 33074(U)

November 7, 2016

Supreme Court, Nassau County

Docket Number: 603171-16

Judge: Jerome C. Murphy

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**SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. JEROME C. MURPHY,  
Justice.**

**JONATHAN KIRK BAUGHER, as Preliminary  
Executor of the ESTATE OF PHEBE BAUGHER,**

**Plaintiff,**

**- against -**

**CULLEN AND DYKMAN LLP,**

**Defendant.**

**TRIAL/IAS PART 19  
Index No.: 603171-16  
Motion Date: 9/19/16  
Sequence Nos.: 001**

**DECISION AND ORDER**

*MG*  
*XXX*

The following papers were read on this motion:

Notice of Motion, Baylis Affidavit and Exhibits.....	1
Memorandum of Law in Support.....	2
Plaintiff's Memorandum of Law in Opposition and Exhibits.....	3
Affirmation of Joshua L. Seifert and Exhibits.....	4
Reply Memorandum of Law in Support.....	5

**PRELIMINARY STATEMENT**

Defendant brings this application for an order pursuant to CPLR § 3211(a)(1) and (7) dismissing the complaint; and for such other, further and different relief as the Court may deem just and proper, including costs. Plaintiff has submitted opposition to this application.

**BACKGROUND**

Plaintiff commenced this action by filing a Summons and Complaint dated May 5, 2016. The Complaint alleges that Cullen & Dykman, LLP ("Cullen") breached its duty of loyalty to decedent Phebe Baugher and her Estate. As a result, plaintiffs contend that defendant must disgorge legal fees which it obtained during the period of disloyalty.

When Phebe Baugher's father, Hugh H. Hirshon ("Hirshon") died in 1955, he was the owner of a majority interest in W.S. Wilson ("Wilson"). In his will, Hirshon left his interest in Wilson to a testamentary trust. Phebe's mother was the initial lifetime income beneficiary of the

trust, and one of the trustees. Upon her mother's death in 1973, Phebe became the sole lifetime income beneficiary of the trust, and successor as trustee.

In May 2005, Phebe retained Cullen to provide a number of legal services, including estate planning, drafting of her last will and testament, analyzing her interest as lifetime income beneficiary of the trust, and formalizing her appointment as a successor trustee of the trust. In September 2005, Cullen filed a petition in Surrogate's Court to have her appointed successor trustee. In connection with their provision of legal services, Cullen became aware that Phebe believed that she was entitled to all of Wilson's undistributed income ("Retained Earnings"), which, at that time, amounted to some \$20 million.

In January 2007, Cullen became employed as Wilson's general counsel. The Complaint alleges that Cullen did not disclose to Phebe the implications of its simultaneous representation of her, with her claim against Wilson for distribution to her of retained earnings. To the contrary, Cullen submits two Waiver of Conflict of Interest letters dated February 22, 2008, directed to Phebe Baugher and Jeffrey Baugher, president and CEO of Wilson. Each of the letters states that "[b]ecause Phebe Baugher is a director of the Company and an income beneficiary of the trust created under the will of Hugh H. Hirshon (the 'Hirshon Trust') that owns all of the issues and outstanding shares of stock of the Company, and because she is seeking to be appointed trustee of the Hirshon Trust, the Firm's simultaneous representation of both the Company and Phebe Baugher creates the potential for conflict of interest." Copies of these letters were signed by Phebe Baugher and Jeffrey Baugher, on behalf of Wilson.

Phebe passed away on November 4, 2008, and Cullen thereafter represented her son, Jonathan Kirk Baugher, as preliminary executor of her estate. In July 2009 Cullen filed a petition in Surrogate's Court, Queens County, to compel the Trust to turn over the retained earnings to the Estate. This action was dismissed for lack of jurisdiction. Cullen withdrew as counsel for Wilson in August 2009, and, in October 2009, they filed an action on behalf of the Estate against Wilson in Surrogate's Court to recover the retained earnings. Counsel for Wilson moved to disqualify Cullen based on a conflict on the ground that Cullen had previously represented Wilson.

By Decision dated December 23, 2011, and Order dated January 18, 2012, Surrogate's Court (Hon. Edward W. McCarty, III) granted the motion for disqualification and directed the Estate to appoint another attorney to represent them in the matter. The Court rejected the



contention that the waiver letter of 2008 was binding upon Wilson. The Court noted that Phebe Baugher had indicated that she may revise her estate plan in favor of Jeffrey Baugher, and he therefor had a potential interest in the recovery being sought by Phebe, and that this interest was adverse to the interests of the corporation and the majority of the shareholders. His consent to the dual representation was determined not to be binding on Wilson (Exh. "1" to Affirmation of Joshua L. Seifert at p. 7).

Defendant opposes the contention of plaintiff that this disqualification entitles plaintiff to a disgorgement of legal fees received by Cullen in the representation of Phebe and her Estate. Cullen argues that the violation of a disciplinary rule, without more, is insufficient to support a legal malpractice cause of action. Since plaintiff cannot prove that she sustained damages that were proximately caused by their alleged misconduct, the cause of action must be dismissed.

Plaintiff responds that they are not seeking damages for malpractice. Rather, they claim entitlement to disgorgement of legal fees paid to defendants while they were involved with a conflict of interest. In reply, defendants assert that the recoupment of legal fees is an item of damages, and that there is no cause of action for recoupment. In order to recover, they contend, plaintiff must plead the elements of a tort, including the existence of damages which they would not have sustained were it not for the malpractice of the attorneys.

There is no claim that the defendant did not do and complete the work for which the defendant billed. There is also no claim that any of the work done by the defendant had to be redone.

#### DISCUSSION

*Ullico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 A.D.3d 1 (1<sup>st</sup> Dept. 2008) involved claims for breach of fiduciary duty and malpractice. Plaintiff there established that defendant was instrumental in the establishment of a competing insurance company specializing in trustee and fiduciary liability, the same area in which the plaintiff concentrated. The trial court determined that defendant breached its fiduciary duty and directed the return of the fees it received for the duration of the firm's breach, and directed an assessment.

In reversing this portion of the trial court decision, the Court stated that plaintiff is not entitled to recover damages for breach of defendant's fiduciary duty on legal grounds less rigorous than those required for recovery under a theory of malpractice. Violation of the ethical constraint against dual representation does not, without more, support a claim for recovery of

damages (*Id.* at 8, 10). Citing *Weil, Gotshal & Manges, LLP, v. Fashion Boutique of Short Hills*, 10 A.D.3d 267 (1<sup>st</sup> Dept. 2004), the Court concluded that “to recover under a claim for damages against an attorney arising out of the breach of the attorney’s fiduciary duty, the plaintiff must establish the ‘but for’ element of malpractice, irrespective of how the claim is denominated in the complaint.” (*Id.* at 10 — 11). (*See also, Fletcher v. Boies, Schiller & Flexner, LLP*, 140 A.D.3d 587 [1<sup>st</sup> Dept. 2016]).


Plaintiff has not alleged any damages or losses which they claim to have sustained as a result of defendant’s representation of them while there existed a conflict of interest.

Defendant’s motion to dismiss the Complaint for failure to state a cause of action is granted.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York  
November 7, 2016

**ENTER:**

  
HON. JEROME C. MURPHY  
J.S.C.

**ENTERED**

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NASSAU COUNTY  
COUNTY CLERK'S OFFICE