SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN PART 58
Justice

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LOUIS F. BURKE PC,

Plaintiff,

- v -

AHMED AEZAH, RICHMAN PLAZA GARAGE CORP.

Defendant.

INDEX NO. 654778/2016

MOTION DATE 11/30/2016

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55

were read on this application to/for DISMISSAL

Upon the foregoing documents, it is

Defendants Ahmed Aezah and Richman Plaza Garage Corp. (collectively "defendants") engaged Louis F. Burke P.C. ("LFB" or "plaintiff") as legal counsel on August 27, 2014. On October 23, 2014, defendants orally informed LFB to cease all work on their behalf. The Complaint alleges that defendants had made a payment on October 17, 2014, there remained an outstanding balance of $42,937.50. As plaintiff was still the attorney of record, it sought information from defendants relating to new counsel. As such information was not provided, LFB remained as the attorney of record, and incurred an additional $17,520 in legal fees until relieved by the Court in May of 2015, leaving a total outstanding balance of $60,457.50. Plaintiff sent and defendants received invoices on July 28, 2015, September 10, 2015, and April

21, 2016 of the outstanding balance. On October 20, 2016, plaintiff filed the instant matter seeking to recover lost fees and alleged breach of contract, *quantum meruit* and accounts stated. Defendant answered and asserted six counterclaims for (1) breach of contract, (2) ordinary negligence, (3) breach of fiduciary duty, (4) professional malpractice,[1] (5) violation of Judiciary Law 487, and (6) "reasonable legal fees." In the instant motion, plaintiff moved for partial summary judgment on the fourth cause of action of account stated and for dismissal pursuant to CPLR 3211(a)(1) and (7) of all counterclaims. Following several attempts at resolving the motion and the action in its entirety, plaintiff has withdrawn the summary judgment portion of this motion and now only seeks the dismissal of the counterclaims portion.

When deciding a motion to dismiss pursuant to CPLR § 3211, the court should give the pleading a "liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff the benefit of every possible favorable inference" (*Landon v. Kroll Laboratory Specialists, Inc.*, 22 NY3d 1, 5-6 [2013]; *Faison v. Lewis*, 25 NY3d 220 [2015]). However, if a complaint fails within its four corners to allege the necessary elements of a cause of action, the claim must be dismissed (*Andre Strishak & Associates, P.C. v. Hewlett Packard & Co.*, 300 AD2d 608 [2d Dept 2002]).

Although defendants have tried to re-write the counterclaims, the first counterclaim is for breach of contract arising out plaintiff's actions that allegedly led to defendants not having proper legal representation. The breach of contract claim is dismissed as duplicative of the malpractice counterclaim (*Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016]["Unless a plaintiff alleges that an attorney defendant "breached a promise to achieve a specific result, a claim for breach of contract is "insufficient" and duplicative of the malpractice claim" *citing*

[1] The header for this cause of action states breach of contract. However, the first counterclaim was for breach of contract and the allegation contained in this cause of action state malpractice.

Sage Realty Corp v. Proskauer Rose, 251 AD2d 35 [1st Dept.1998]; *see also IMO Indus. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 12 [1st Dept 1999]; *Pellegrino v File*, 291 AD2d 60, 64 [1st Dept 2002] [breach of contract claim found redundant of malpractice claim]). Thus, the first counterclaim is dismissed.

Similarly, the second counterclaim for negligence is dismissed as duplicative of the legal malpractice claim (*see Cusack v Greenberg Traurig, LLP*, 109 AD3d 747, 748 [1st Dept 2013]. This point is not contested by defendants. In addition, defendants have not stated any facts that give rise even to an allegation of negligence. The second counterclaim is dismissed.

Although defendants argue that the third cause of action is really a fraudulent inducement claim, the third cause of action alleges a breach of fiduciary duty. As the breach of fiduciary claim arises out of the same facts as the legal malpractice claim and seeks the identical relief sought in the legal malpractice cause of action, is redundant and should be dismissed (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004]). In fact, other than a conclusory statement that defendant breached its fiduciary duty, the facts portion of the Complaint contains no allegations of any acts contrary to defendants'' duties as the plaintiffs' attorneys. Thus, the third counterclaim is dismissed.

Further, even if the Court would read the counterclaim to be for fraudulent inducement. This counterclaim would be denied. Although defendant discusses the law regarding an integration clause, the engagement letters contain an additional paragraph that provides:

> The Client acknowledges that the Firm has made no guarantees regarding the successful outcome and that any expressions by the Firm regarding the potential outcome are only opinions based on limited familiarity with the facts. The Firm cannot guarantee the outcome as the likelihood of the ultimate success in an action depends on many different factors, some of which are beyond the Firm's control.

Hence, defendants were clearly informed that expressions regarding outcomes were only opinions and that no quick outcome was guaranteed. Thus, any supposed reliance upon an expression of an opinion by plaintiff could not be based upon fraud and the third cause of action would be dismissed under that reading as well.

Defendants' fourth counterclaim is for malpractice. "In an action to recover damages for legal malpractice, a 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 attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages. To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]). The First Department succinctly states that 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 (*Excelsior Capitol LLC v K&L Gates LLP*, 138 AD3d 492, 492 [1st Dept 2016], *lv to appeal denied sub nom. Excelsior Capital LLC v K & L Gates LLP*, 28 NY3d 906 [2016]). The facts alleged by defendant do not give rise to any claim that the attorney was negligent or that defendants would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence. Therefore, the fourth cause of action is dismissed.

The fifth cause of action is also dismissed. Judiciary Law § 487 provides recourse only where there is a chronic and extreme pattern of legal delinquency (*Jaroslawicz v Cohen*, 12 AD3d 160 [2004]; *see also Dinhofer v Med. Liab. Mut. Ins. Co.*, 92 AD3d 480 [1st Dept 2012]. Giving claimant every favorable inference, the counterclaims sets forth but one alleged

misrepresentation by defendant and accordingly does not allege a cognizable claim under Judiciary Law § 487 (*Solow Mgt. Corp. v Seltzer*, 18 AD3d 399 [1st Dept 2005]. Based upon the forgoing, defendants' counterclaim for attorney's fees is also dismissed.

For the above reasons it is therefore

ORDERED, that plaintiff's motion to dismiss all of defendants' counterclaims is granted.

This constitutes the decision and order of the Court.

12/14/2017
DATE

DAVID BENJAMIN COHEN, J.S.C.

HON. DAVID B. COHEN
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT		REFERENCE