

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4 REALITY KATS, LLC, et al.,

5 Plaintiffs,

6 v.

7 MIRSYL, INC., et al.,

8 Defendants.

Case No. 16-cv-06957-CW

ORDER DENYING PLAINTIFFS'
MOTION TO DISMISS ACTION
WITHOUT PREJUDICE AND
GRANTING DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

9 (Dkt. Nos. 43, 45)

10 Before the Court are two dispositive motions. On January
11 29, 2018, Plaintiffs Reality Kats, LLC and Dennis Simpson moved
12 to dismiss this action voluntarily, without prejudice, pursuant
13 to Federal Rule of Civil Procedure 41(a)(2). Defendants Mirsyl,
14 Inc., David P. Lennon, and Novato Development, LLC oppose this
15 motion. On February 8, 2018, Defendants moved for summary
16 judgment against Plaintiffs. Plaintiffs filed an opposition to
17 this motion and Defendants filed a reply. On March 27, 2018, the
18 parties appeared for a hearing on these motions. Having
19 considered the papers and the arguments of counsel, the Court
20 DENIES Plaintiffs' motion to dismiss this action without
21 prejudice and GRANTS Defendants' motion for summary judgment.

22 BACKGROUND

23 I. Sale of Novato Development

24 Reality Kats is a limited liability company engaged in real
25 estate development. Declaration of David P. Lennon (Lennon
26 Decl.) ¶ 3; see also id., Ex. C at 16:1-25. Simpson is the
27 manager of Reality Kats. Id.
28

1 Novato Development is a real estate development company
2 which owns a residential development project in Novato,
3 California. Id. ¶ 2. Simpson and Jeffrey Hoyal owned Novato
4 Development and were partners in several other businesses. Id.
5 ¶ 5.

6 In 2015, Simpson and Hoyal's relationship fell apart. Id.
7 ¶ 6. They agreed to dissolve their various joint ventures.
8 Id. They decided to sell Novato Development to Lennon for
9 \$3 million. Id.; see also Lennon Decl., Ex. D (Purchase
10 Agreement). At that time, Reality Kats owned forty-three
11 percent of Novato Development, Simpson owned seven percent,
12 and Crater Lake Trust (a trust with Hoyal as trustee) owned
13 fifty percent. Purchase Agreement at 1. Lennon formed
14 Mirsyl to purchase Novato Development from Reality Kats,
15 Simpson, and Crater Lake Trust. Lennon Decl. ¶ 9.

16 Because Lennon had previously represented Simpson, Reality
17 Kats, Hoyal, Crater Lake Trust, and Novato Development as their
18 attorney, Lennon advised them orally and in writing that he could
19 not act as their attorney in conjunction with the sale of Novato
20 Development. On November 2, 2015, Lennon sent an email to
21 Simpson and Hoyal stating:

22 As I have already advised, since I have previously
23 represented both of you personally as your attorney, as
24 well as the various owners of Novato Development and
25 Novato Development itself, I cannot act as your
26 attorneys in connection with this transaction.
Accordingly, it is necessary for each of you to have
your own attorneys review and approve these documents
on your behalf.

27 Lennon Decl., Ex. F (11/2/15 Letter). Plaintiffs in fact engaged
28 William J. Braun, Esq. to represent them in the sale of Novato

1 Development. Lennon Decl., Exs. G and H.¹

2 On or about November 5, 2015, the parties executed the sale,
3 which was memorialized in a Purchase Agreement. Id. ¶ 10; see
4 also Purchase Agreement at 1. Mirsyl paid the purchase price by
5 executing a promissory note in the amount of that price, payable
6 in monthly installments to Reality Kats. Lennon Decl. ¶ 11, see
7 also id., Ex. I (Promissory Note) at 2. In conjunction with the
8 sale of Novato Development, Reality Kats also extended a \$500,000
9 line of credit to Mirsyl, by way of promissory note, to
10 facilitate further development of the property, which was
11 executed as a promissory note. Lennon Decl. ¶ 12, see also
12 Promissory Note at 1. Both promissory notes used Mirsyl's
13 ownership interest in Novato Development as collateral, as
14 governed by a Pledge Agreement. Lennon Decl., Ex. J (Pledge
15 Agreement).

16 II. This Lawsuit

17 On November 2, 2016, Plaintiff filed this suit in Marin
18 Superior Court, alleging claims for: (1) fraud; (2) legal
19 malpractice - constructive fraud; (3) legal malpractice - dual
20 representation of adverse interests; (4) breach of fiduciary duty
21 arising out of the attorney-client relationship; (5) member's
22 derivative action; and (6) restitution/constructive
23 trust/equitable lien. Docket No. 1., Ex. A. At the same time,
24 Plaintiffs filed a notice of pending action with the Marin County
25

26 ¹ Hoyal, who is not a plaintiff, decided to represent himself
27 in the transaction because he had an LLM in tax. See Declaration
28 of David P. Lennon in Support of Opposition to Motion to Dismiss
(Lennon Opp. Decl.) ¶ 11. Hoyal executed an acknowledgment that
he had been strongly advised not to do so and that Lennon did not
represent him or his entities in the transaction. Id., Ex. G.

1 clerk, creating a cloud on Novato Development's title. Lennon
2 Opp. Decl., Ex. K. On December 2, 2016, Defendants removed this
3 action to federal court. Docket No. 1.

4 LEGAL STANDARD

5 III. Federal Rule of Civil Procedure 41(a)(2)

6 Under Federal Rule of Civil Procedure 41(a)(1), a plaintiff
7 "may dismiss an action without a court order by filing: (i) a
8 notice of dismissal before the opposing party serves either an
9 answer or a motion for summary judgment; or (ii) a stipulation of
10 dismissal signed by all parties who have appeared." Otherwise, a
11 plaintiff must seek a court order dismissing an action "on terms
12 that the court considers proper." Fed. R. Civ. P. 41(a)(2). "If
13 a defendant has pleaded a counterclaim before being served with
14 the plaintiff's motion to dismiss, the action may be dismissed
15 over the defendant's objection only if the counterclaim can
16 remain pending for independent adjudication." Id.

17 "In ruling on a motion for voluntary dismissal, the District
18 Court must consider whether the defendant will suffer some plain
19 legal prejudice as a result of the dismissal." Hamilton v.
20 Firestone Tire & Rubber Co., 679 F.2d 143, 145 (9th Cir. 1982).
21 The decision of whether to grant a voluntary dismissal is
22 "addressed to the sound discretion of the district court." Id.
23 Plain legal prejudice does not necessarily result simply because
24 a defendant faces the prospect of a second lawsuit or a plaintiff
25 gains some tactical advantage. Id. Factors that may be
26 considered in determining whether there is legal prejudice
27 include: whether "it would be inequitable or prejudicial to
28 defendant to allow plaintiff to refile the action," whether

1 "plaintiff waited until the defendant is on the verge of triumph
2 to move for a Rule 41(a)(2) dismissal," "the defendant's effort
3 and expense in preparing for trial," "excessive delay and lack of
4 diligence on the part of the plaintiff in prosecuting the
5 action," and "insufficient explanation of the need to take a
6 dismissal." Williams v. Peralta Cmty. Coll. Dist., 227 F.R.D.
7 538, 540 (N.D. Cal. 2005).

8 IV. Federal Rule of Civil Procedure 56

9 Summary judgment is properly granted when no genuine and
10 disputed issues of material fact remain, and when, viewing the
11 evidence most favorably to the non-moving party, the movant is
12 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
13 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
14 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
15 1987).

16 The moving party bears the burden of showing that there is
17 no material factual dispute. Therefore, the court must regard as
18 true the opposing party's evidence, if supported by affidavits or
19 other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg,
20 815 F.2d at 1289. The court must draw all reasonable inferences
21 in favor of the party against whom summary judgment is sought.
22 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
23 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952
24 F.2d 1551, 1558 (9th Cir. 1991).

25 Material facts which would preclude entry of summary
26 judgment are those which, under applicable substantive law, may
27 affect the outcome of the case. The substantive law will
28 identify which facts are material. Anderson v. Liberty Lobby,

1 Inc., 477 U.S. 242, 248 (1986).

2 Where the moving party does not bear the burden of proof on
3 an issue at trial, the moving party may discharge its burden of
4 production by either of two methods:

5 The moving party may produce evidence negating an
6 essential element of the nonmoving party's case, or,
7 after suitable discovery, the moving party may show
8 that the nonmoving party does not have enough evidence
of an essential element of its claim or defense to
carry its ultimate burden of persuasion at trial.

9 Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc., 210
10 F.3d 1099, 1106 (9th Cir. 2000).

11 If the moving party discharges its burden by showing an
12 absence of evidence to support an essential element of a claim or
13 defense, it is not required to produce evidence showing the
14 absence of a material fact on such issues, or to support its
15 motion with evidence negating the non-moving party's claim. Id.;
16 see also Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990);
17 Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991).

18 If the moving party shows an absence of evidence to support the
19 non-moving party's case, the burden then shifts to the non-moving
20 party to produce "specific evidence, through affidavits or
21 admissible discovery material, to show that the dispute exists."
22 Bhan, 929 F.2d at 1409.

23 If the moving party discharges its burden by negating an
24 essential element of the non-moving party's claim or defense, it
25 must produce affirmative evidence of such negation. Nissan, 210
26 F.3d at 1105. If the moving party produces such evidence, the
27 burden then shifts to the non-moving party to produce specific
28 evidence to show that a dispute of material fact exists. Id.

1 that was pending against Lennon at that time.² See Reality Kats
2 LLC v. David Lennon, Jody Lennon, Case No. 17CV05360 (Jackson
3 Sup. Ct. Feb. 7, 2017) (Oregon state court action). The docket
4 shows that Plaintiffs voluntarily dismissed the action without
5 prejudice on the eve of trial, which was scheduled for February
6 13, 2018, and while motions for summary judgment, sanctions, and
7 abatement were pending. Plaintiffs misrepresented their intent
8 to consolidate this action with the Oregon state court action and
9 thus have not shown sufficient reason for dismissal without
10 prejudice. Williams, 227 F.R.D. at 540.

11 Over the course of nine months, Plaintiffs commenced five
12 different proceedings against Lennon, in four different forums
13 and three different states, many involving the same set of facts
14 asserted here. Id. ¶¶ 17, 30. Defendants allege that some of
15 these proceedings, such as a complaint with the Oregon state bar
16 regarding the same facts alleged here, were resolved in
17 Defendants' favor, while others, such as the Oregon state court
18 action, were voluntarily dismissed by Plaintiffs. Opp. to Motion
19 to Dismiss (MTD) at 8-13; Lennon Opp. Decl., Ex. N (Oregon state
20 bar decision). Defendants allege that Plaintiffs brought this
21 "campaign of frivolous litigation," not because they want
22 adjudication on the merits, but because they want to litigate
23 Defendants into the ground so that they will default on their
24 promissory notes and return the properties purchased, without a

25
26 ² In Defendants' Updated Case Management Statement,
27 Defendants provide information for a number of cases brought by
28 Plaintiffs, including Premier Trust of Nevada, Inc. and Simpson
v. Hoyal, Case No. 17CV21456 (Jackson Sup. Ct. May 25, 2017), an
Oregon state court action that is still pending. Defendants are
not parties to that case, however.

1 fight. Opp. to MTD at 2-3; Lennon Opp. Decl., Ex. T (email from
2 Simpson's CPA to Simpson speculating that Lennon might not have
3 "very much money to fight a lawsuit unless they sell assets" and
4 that he "might just return ownership to Novato to you without a
5 fight").

6 There is also evidence that Plaintiffs filed for voluntary
7 dismissal in this case to avoid an adverse ruling. See Batuhan
8 v. Assurity Financial Services, LLC, et al., Case No. 15-cv-4526-
9 WHO, Docket No. 50 (a court "may consider whether the plaintiff
10 is requesting a voluntary dismissal only to avoid a near-certain
11 adverse ruling."). On January 11, 2018, Defendants emailed
12 Plaintiffs asking them to confirm that they are "no longer
13 advocating in this action that [Lennon] represented plaintiffs in
14 connection with the Novato Development transaction." Lennon Opp.
15 Decl., Ex. P at 1. Defendants followed up on this request
16 several times. Id. at 2-5. On January 16, 2018, Plaintiffs
17 stated that they "expect[ed] to apply to dismiss the pending
18 action without prejudice." Id. at 6. Defendants followed up
19 again but received no response. Id. On January 24, 2018,
20 Defendants emailed Plaintiffs stating that the summary judgment
21 deadline was imminent and that they intended to move for summary
22 judgment on all of Plaintiffs' claims related to the issue of
23 Lennon's alleged representation of Plaintiffs in connection with
24 the Novato Development transaction. Id. at 10. On January 26,
25 2018, Plaintiffs stated that they were authorized to file a
26 motion to dismiss without prejudice. Id. A few days later, on
27 January 29, 2018, Plaintiffs filed their motion to dismiss,
28 asserting falsely that they intended to join their claims here

1 with the Oregon state court action. Plaintiffs' correspondence
2 indicates that they began considering voluntary dismissal of this
3 action only after Defendants indicated that they intended to move
4 for summary judgment on an issue they do not dispute, that Lennon
5 did not actually represent Plaintiffs in connection with the
6 Novato Development transaction.³ Thus, dismissal would allow
7 Plaintiffs again to avoid adjudication on the merits of their
8 claim and enable them to bring another action against Defendants
9 in another forum.

10 In sum, because several factors demonstrate that Defendants
11 will suffer legal prejudice if this action is voluntarily
12 dismissed, Plaintiffs' motion must be denied. Accordingly, the
13 Court proceeds to consider the merits of Defendants' motion for
14 summary judgment.

15 II. Motion for Summary Judgment

16 Plaintiffs fail completely to rebut the substantive
17 arguments of Defendants' motion for summary judgment. Instead,
18 they concede what they call the "single factual premise" of
19 Defendants' motion -- "that Plaintiffs were not represented by
20 Defendant David Lennon in the sale of Novato Development" -- and
21 advocate that the Court enter partial summary judgment on this
22 limited issue rather than on the entirety of Plaintiffs' claims.
23 Opp. to Motion for Summary Judgment (MSJ) at 2. Plaintiffs
24 request that the order "specifically preserve claims not
25 currently pled in the California action and specifically preserve

26
27 ³ At the hearing, Plaintiffs' counsel confirmed that he had
28 known that Defendants did not represent Plaintiffs in connection
with the Novato Development sale since the parties attended
mediation in August 2017.

1 claims that may be brought in the Oregon court.” Id. Plaintiffs
2 contend that this is justified because “additional facts have
3 surfaced” indicating a “broader pattern of misconduct” by Lennon,
4 Hoyal, and others, but provide no specific evidence to support
5 this allegation. Id. This does not excuse Plaintiffs’ complete
6 failure to oppose the motion for summary judgment. Nor does it
7 excuse Plaintiffs’ failure to conduct any discovery in this case
8 to develop their claims. In any event, Plaintiffs are mistaken
9 in arguing that Defendants’ motion is based on a single factual
10 premise. As explained below, Defendants have shown an absence of
11 evidence to support Plaintiffs’ case on each and every claim,
12 shifting the burden to Plaintiffs to produce “specific evidence,
13 through affidavits or admissible discovery material, to show that
14 the dispute exists.” Bhan, 929 F.2d at 1409. Because Plaintiffs
15 have not done so,⁴ summary judgment is warranted on all claims.

16 A. Fraud

17 Plaintiffs’ first cause of action contains two allegations
18 of fraud: (1) the balance sheet misrepresented Novato
19 Development’s assets and liabilities and (2) Lennon conspired
20 with others to create a “sham sale” of seventeen lots owned by
21 Novato Development to a third party, Rudnick Estates Realty

22
23 ⁴ Plaintiffs claim that they could not adequately respond to
24 the motion for summary judgment because they did not know whether
25 the Court would consider their motion to dismiss and thus their
26 time to respond was “shortened.” This does not provide an excuse
27 for not responding to a pending summary judgment motion, which is
28 required to be filed within fourteen days of filing the motion by
Civil Local Rule 7-3, unless otherwise ordered by the Court. If
Plaintiffs felt they needed more time to respond, they could have
sought an extension of time pursuant to Civil Local Rule 6-1. In
any event, Plaintiffs inexplicably filed their opposition twelve
days late, undermining their argument that they did not have time
to form an adequate response.

1 Group, Inc. (Rudnick).

2 The Purchase Agreement provides that the "Agreement shall be
3 construed in accordance with, and shall be governed by, the laws
4 of the State of Oregon." Purchase Agreement at 4, 10.d. Under
5 Oregon law, the elements of fraud are: "(1) a representation; (2)
6 its falsity; (3) its materiality; (4) the speaker's knowledge of
7 its falsity or ignorance of its truth; (5) his intent that it
8 should be acted on by the person and in the manner reasonably
9 contemplated; (6) the hearer's ignorance of its falsity; (7) his
10 reliance on its truth; (8) his right to rely thereon; (9) and his
11 consequent and proximate injury." Conzelmann v. Nw. Poultry &
12 Dairy Prod. Co., 190 Or. 332, 350 (1950). A plaintiff must prove
13 a fraud claim by "clear and convincing" evidence, which is a
14 higher standard than a mere preponderance of the evidence. Riley
15 Hill Gen. Contractor, Inc. v. Tandy Corp., 303 Or. 390, 402
16 (1987).

17 Defendants point out that Plaintiffs have not adequately
18 alleged that Defendants made any misrepresentation. With respect
19 to the first allegation of fraud, it was Plaintiffs, not
20 Defendants, who made representations about the assets and
21 liabilities of Novato Development. Section 5 states:

22 5. Seller hereby represents and warrants to Buyer, and
23 covenants to Buyer, as follows . . .

24 i. The Balance Sheet annexed hereto as Exhibit "D"
25 materially represents the current assets and
26 liabilities of the company as of the Effective Date.

26 Thus, Plaintiffs cannot show that this was a misrepresentation
27 made by Defendants.

28 Regarding the second allegation of fraud, Plaintiffs have

1 not identified a representation. A transaction between Novato
2 Development and Rudnick is not, in and of itself, a
3 representation. Accordingly, Plaintiffs have not met their
4 burden of showing a disputed issue of fact with respect to their
5 fraud claim.

6 B. Legal malpractice, dual representation of adverse
7 interests, and breach of fiduciary duty

8 Plaintiffs' second, third, and fourth causes of action all
9 rely on their allegation that Lennon represented Plaintiffs as an
10 attorney in connection with the sale of Novato Development. See
11 Complaint ¶ 33 (alleging reasonable reliance given "their
12 attorney-client relationship); ¶¶ 39, 41 (alleging Lennon "was
13 representing plaintiffs in the aforementioned matter" and "failed
14 to disclose the areas of potential conflict" between Mirsyl and
15 Plaintiffs); ¶ 45 (alleging breach of fiduciary duty based on an
16 "attorney-client relationship that existed between defendant
17 Lennon and plaintiffs"). Because Plaintiffs have already
18 conceded that Lennon did not represent Plaintiffs in connection
19 with the sale of Novato Development, these claims must fail.

20 C. Derivative action

21 Plaintiffs' fifth cause of action is a member derivative
22 action that alleges that Novato Development's assets were
23 undervalued. Defendants contend that Plaintiffs failed to make
24 the requisite demand and that they lack standing to bring this
25 claim. Defendants are correct that Plaintiffs have not alleged
26 that they made a demand on Mirsyl, the only member of Novato
27 Development, or Lennon, the manager. While Plaintiffs alleged it
28 was futile to make a demand on Hoyal, Hoyal resigned as a manager

1 almost a year prior to this suit, on November 5, 2015. Lennon
2 Decl., Ex. L. In addition, Plaintiffs cannot show that they have
3 standing to bring a derivative action because they sold their
4 ownership interest in Novato Development as a result of the
5 Purchase Agreement. Quinn v. Anvil Corp., 620 F.3d 1005, 1012
6 (9th Cir. 2010) (the "continuous ownership requirement" provides
7 that "[i]f a shareholder is divested of his or her shares during
8 the pendency of litigation, that shareholder loses standing").

9 D. Restitution/constructive trust/equitable lien
10 Plaintiffs' sixth cause of action for
11 restitution/constructive trust/equitable lien alleges that
12 Defendants wrongfully acquired Novato Development, requiring
13 imposition of a constructive trust in favor of Plaintiffs in
14 order to prevent unjust enrichment of Defendants. Complaint
15 ¶¶ 56-58. This is an equitable remedy rather than a substantive
16 right. Barnes v. E. & W. Lumber Co., 205 Or. 553, 596-97 (1955).
17 This claim does not stand on its own but, rather, depends on the
18 other causes of action. Because those claims fail, this claim,
19 too, must fail.

20 E. Attorneys' fees
21 Defendants counterclaimed for attorneys' fees pursuant to a
22 clause in the Pledge Agreement stating that a party is entitled
23 to attorneys' fees necessary to enforce the Agreement.
24 Plaintiffs oppose Defendants' request for attorneys' fees,
25 contesting that this action falls within the purview of the
26 Pledge Agreement's attorneys' fees clause. In Defendants' reply
27 brief, they represent that they will make a separate motion for
28 fees after the Court rules on the present motions, pursuant to

1 Federal Rule of Civil Procedure 54. At the hearing, Defendants
2 agreed to dismiss their counterclaim without prejudice so that
3 the Court could enter judgment. Defendants reserve the right to
4 bring a motion for attorneys' fees pursuant to Federal Rule of
5 Civil Procedure 54. Accordingly, Defendants' counterclaim is
6 dismissed without prejudice.

7 CONCLUSION

8 The Court DENIES Plaintiffs' motion to dismiss without
9 prejudice (Docket No. 43) and GRANTS Defendants' motion for
10 summary judgment (Docket No. 45) as to all Plaintiffs' claims.
11 Defendants' counterclaim is dismissed without prejudice. The
12 Clerk of the Court shall enter judgment in favor of Defendants,
13 who shall recover their costs from Plaintiffs.

14 IT IS SO ORDERED.

15
16 Dated: March 29, 2018



CLAUDIA WILKEN
United States District Judge