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

PRESENT: MARILYN SHAFER J.S.C. Justice

PART 36 (SN)

Solars Hartzfeld

- v -

The Baku Group

INDEX NO. 115887/01

MOTION DATE

MOTION SEQ. NO. 001

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	AUG 02 2002
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion + cross-motion

denied pursuant to attached Decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 7/29/02

MARILYN SHAFER J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36

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SALANS HERTZFELD HEILBRONN CHRISTY & VIENER,

Plaintiff,

-against-

Index No. 115887/01

THE BAKU GROUP, LTD. and GARADAG HOLDING, LTD.,

Defendants.

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Marilyn Shafer, J.:

Defendants move for an order, pursuant to CPLR 3212, granting them: (i) summary judgment dismissing the complaint, and (ii) partial summary judgment on their counterclaim in the amount of $10,000.00, representing the return of the retainer previously paid by defendants to plaintiff. Plaintiff cross-moves for partial summary judgment on their second cause of action for account stated, and for dismissal, pursuant to CPLR 3211, of defendants' counterclaim.

BACKGROUND

In this action, plaintiff law firm is seeking its legal fees for its representation of defendants in connection with defendants' participation in a 1999 tender bid competition, conducted in Azerbaijan by the Azerbaijan State Property Committee ("SPC"), for the right to privatize Garadag Cement, a state-owned cement plant. Originally, in July 1999, defendant Garadag Holding, Ltd. ("Garadag") was named the winning bidder. Garadag claimed that even after it won the bid, the second-place bidder, Holderbank Financiere Glans Ltd. ("Holderbank"), continued to negotiate with, and was bribing, the Azerbaijan government to undermine Garadag's purchase and acquire the cement plant for itself. Eventually, the SPC executed a

purchase agreement with Holderbank, purportedly on the ground that Garadag was not meeting its obligations under its purchase agreement in a timely manner. Garadag claims that it negotiated a partnership agreement with Holderbank regarding the purchase, but that Holderbank reneged on that agreement. Accordingly, Garadag sought to, and did, bring an action in this court against Holderbank and A.J.G. Investments (Cyprus) Ltd. ("AJG"), a brokerage firm in Azerbaijan which held a large number of the cement company shares and recruited Holderbank to participate in the bid.

Earlier, in 1997, when Garadag first began investigating the purchase of the cement plant, it retained a law firm, in Baku, Azerbaijan, by the name of the Wicklow Group, Ltd. Sometime in June 1999, the Wicklow Group was acquired by, or merged with, plaintiff, and thereafter became the Baku office of plaintiff. Affidavit of Samuel Brumberg, dated October 17, 2001, ¶¶ 4-6. Defendants assert that, without their knowledge, the Wicklow Group had undertaken the representation of Holderbank, including representing Holderbank's present and future interests in the possible purchase of the cement plant. Id., ¶ 7. In December 1999, defendants assert that they met with plaintiff regarding problems Holderbank was making for them with respect to the proposed cement plant purchase, and to discuss their legal rights and remedies. Id., ¶ 9. During these meetings, defendants assert that plaintiff, for the first time, informed them that it had previously represented Holderbank in connection with this cement plant, but that its engagement by Holderbank had been a limited one, which was recently terminated, and which would not constitute a conflict of interest. Id., ¶¶ 11-13. Based on plaintiffs assurances that there was no conflict, on December 22, 1999, defendants assert that they executed a retainer agreement with plaintiff, in which plaintiff states:

> We have previously pointed out to you that our firm's Baku office recently undertook a small project for Holderbank involving limited post-acquisition due diligence on the Garadag Cement Plant. This engagement did not involve the relationship between Baku Group, Garadag Holdings and Holderbank or any of the events leading up to the privatization or involving the privatization contract executed by Holderbank, subsequent to the successful bid of Garadag Holding in the privatization tender. Our firm's representation of Holderbank was terminated by Holderbank in favor of Baker & McKenzie. Termination of this engagement was confirmed orally and in writing by the billing partner for this matter, Robert Starr of our London office, on December 13,1999. Consequently, we do not believe that there is any actual conflict of interest at the present time.

Exhibit 2 to Defendants' Notice of Motion, at 2. Pursuant to the retainer, defendants made an initial retainer payment of $10,000.00.

Almost immediately, plaintiff notified Holderbank that it was representing defendants in their claims against Holderbank regarding the purchase of the cement plant. Holderbank responded that plaintiffs representation was a conflict of interest, since it had previously represented Holderbank and had received confidential information from, and furnished legal advice to, it in connection with the purchase of Garadag Cement, and that Holderbank would move to disqualify if plaintiff commenced a suit on behalf of defendants. Brumberg Aff., ¶ 15. Despite this warning, on March 10,2000, plaintiff commenced suit on defendants' behalf against Holderbank and others in this court, Index No. 601070/00. Id., ¶ 16. On May 30,2000, Holderbank moved to disqualify plaintiff. Allegedly, only after Holderbank moved to disqualify, plaintiff discovered that its Baku office had some confidential documents of Holderbank's related to the purchase, and to the issues in the litigation. Plaintiff contacted defendants and stated that it could not successfully oppose the motion to disqualify, nor could it continue to

represent defendants. It then voluntarily withdrew, and defendants retained the firm of Ohrenstein & Brown, LLP to represent them. By decision and order, filed on July 10,2001, defendants' action against Holderbank was dismissed for lack of personal jurisdiction. Exhibit D to Plaintiffs Notice of Cross Motion.

On August 17,2001, this action was commenced in which plaintiff is seeking over $129,000.00 in legal fees. Defendants answered the complaint and counterclaimed, asserting breach of contract and breach of fiduciary duty, and seeking the return of the $10,000.00 retainer paid to plaintiff.

In moving for summary judgment, defendants contend that plaintiffs representation of them violated at least one and possibly several disciplinary rules, and that it was aware from the inception of its representation of defendants that it would and should be disqualified, and thus, it is not entitled to any fees for the services performed. They urge that plaintiff violated DR 5-108, by representing defendants against Holderbank, a former client, in litigation about the purchase of the cement plant, a substantially related matter, where the interests of defendants and Holderbank are materially adverse. They further urge that plaintiff had access to confidential information in the course of its representation of Holderbank, and that such information was substantially related to defendants' action against Holderbank.

In opposing defendants' motion, and in seeking summary judgment on its claim for account stated, plaintiff contends that defendants should not be allowed to use plaintiffs former representation of Holderbank as an absolute bar to recovering any legal fees or disbursements. Plaintiff claims that, in or around December 1999, defendants asked plaintiff to represent them in connection with three matters: (1) their claims against Holderbank, and AJG and its president,

regarding the privatization of the cement plant; (2) claims by Baker & McKenzie, defendants' former counsel, against defendants for legal fees; and (3) claims against defendants made by Baku Cement, an organization formed by the workers at the cement plant, and CCM, part owners of Baku Cement. Affidavit of Glenn Kolleeny, dated December 18,2001, ¶ **2.** Plaintiff asserts that before agreeing to the representation, it investigated and concluded that its relationship with Holderbank had been terminated, and that its limited representation of Holderbank did not relate to defendants' claims against Holderbank. See, Exhibit E to Plaintiffs Notice of Cross Motion. Thus, it disclosed this, and defendants agreed to proceed with the engagement. Id., ¶¶ 3-6. Plaintiff further asserts that after it received Holderbank's motion to disqualify and reviewed it with its Baku office, it then discovered the confidential Holderbank documents. Id., ¶ 12. Based on this, plaintiff asserts that it concluded it would be better to withdraw, rather than oppose the disqualification motion. Id., ¶¶ 13-14. It contends that it then cooperated by transferring the case to defendants' new counsel, and wrote off all the time after the filing of the complaint on March 10,2000, except for time directly related to negotiations with Baker & McKenzie, which was seeking legal fees from a past representation of defendants, and with Baker Botts LLP, in connection with the claims by Baku Cement and CCM, which plaintiff asserts are unrelated to the Holderbank litigation. Plaintiff states that it further discounted all time by 10%. Thus, plaintiff issued an invoice to defendants in the amount of $129,053.70, dated June 30,2000. Exhibit B to Plaintiffs Notice of Cross Motion.

Plaintiff argues that defendants waived their right to object to fees, based on any conflict, by plaintiffs disclosure and defendants' acknowledgment in the retainer agreement. It urges that its good faith belief that there was no conflict, that the representation of Holderbank was limited

and was not substantially related, and that it had no confidential information of Holderbank, notwithstanding that this later proved to be untrue, does not warrant an absolute bar to recovery of fees. It maintains that it did not violate any disciplinary rules. At the least, plaintiff argues that it should be entitled to its fees for the work performed on matters that did not involve Holderbank, such as its negotiations on defendants' behalf regarding Baku Cement, CCM and Baker & McKenzie, which allegedly amounts to fees of approximately $11,500.00. With respect to defendants' counterclaims, plaintiff urges that issue has not been joined so summary judgment to defendants would be premature. It also maintains that these counterclaims should be dismissed as duplicative, and for failure to allege ascertainable damages that were actually caused by its alleged conflict of interest.

DISCUSSION

Defendants' motion is granted to the extent that plaintiff is barred from the recovery of any legal fees incurred in their representation of defendants in connection with the litigation against Holderbank, and is denied with respect to fees for its negotiations regarding Baker & McKenzie's fees, and fees for its representation of defendants against Baku Cement and CCM. Summary judgment to defendants also is denied with regard to defendants' counterclaims. Plaintiffs cross motion is granted only to the extent of dismissing the counterclaims for failure to state a claim, and is otherwise denied.

On the issue of plaintiffs fees for its representation of defendants in the Holderbank action, defendants are correct in arguing that plaintiff should be barred from recovering such fees. It is well settled that "an attorney who engages in misconduct by violating the Disciplinary Rules is not entitled to legal fees for any services rendered." Shelton v Shelton, 151 AD2d 659,

659 (2d Dept 1989); see also, Teichner by Teichner v W & J Holsteins, Inc., 64 NY2d 977 (1985) (no attorneys' fees if attorney was discharged for cause); Griffin v F. J. Sciame Constr. Co., 267 AD2d 100 (1st Dept 1999) (no fees incurred during conflict-ridden representation); Pessoni v Rabkin, 220 AD2d 732 (2d Dept 1995) (no legal fees for multiple representation which created a conflict of interest and violated the Disciplinary Rules); Matter of Winston, 214 AD2d 677 (2d Dept 1995) (no fees where violation of Disciplinary Rules by representing present client against former client). Disciplinary Rule 5-108 precludes "attorneys from representing interests adverse to a former client on matters substantially related to the prior representation." Tekni-Plex, Inc. v Meyner and Landis, 89 NY2d 123, 130 (1996). This is based on the attorney's fiduciary duties of confidentiality and loyalty to their clients, which continue even after the representation of that client has concluded. Id. Thus, Disciplinary Rule 5-108(A) provides as follows:

> Except as provided in section 1200.45 (b) of this Part with respect to current or former government lawyers, a lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure:
>
> (1) Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client.

22 NYCRR 1200.27(a)(1). To disqualify the adversary's lawyer, a party must prove: (1) the existence of a prior attorney-client relationship between the movant and the attorney; (2) that the matters are substantially related; and **(3)** that the former and present client's interests are adverse. Tekni Plex, Inc. v Meyner and Landis, supra, at 131. If all the criteria are met, there arises an irrebuttable presumption of disqualification. Id.

Here, it is undisputed that Holderbank was plaintiffs former client, and that the interests of Holderbank and the present defendants were adverse, since they were competing to purchase the same cement plant, with defendants accusing Holderbank of undermining their attempts to purchase. Plaintiffs attempt to argue that the matters were not substantially related are completely undermined by its admission of its discovery of confidential Holderbank documents regarding the privatization. Plaintiff basically conceded the conflict by admitting that it could not oppose Holderbank's disqualification motion. To now argue there was no misconduct in the form of a violation of DR 5-108, which would bar it from recovering fees, is disingenuous. Plaintiff knew, or should have known, from the inception of its representation of defendants, in a matter adverse to its former client Holderbank, that there was a clear conflict of interest which violated the Disciplinary Rules, and which would result in its disqualification. Plaintiffs argument that defendants waived their right to object to payment of a fee because it disclosed the possible conflict arising from its prior representation of Holderbank in the retainer agreement, is rejected. Not surprisingly, plaintiff fails to cite any authority for the proposition that a client could waive misconduct in the form of a violation of the Disciplinary Rules. Moreover, plaintiff appears to be placing the burden on the client, defendants in this case, to assess whether there was an actual conflict of interest, when plaintiff repeatedly told them "we do not believe there is any actual conflict of interest," but that Holderbank might raise the matter and "mischaracterize" it as a conflict. Exhibit 1 to Defendants' Notice of Motion, at **2.** Further, the disclosure in the retainer agreement stated that the Holderbank representation involved only "limited post-acquisition due diligence," and, plaintiff has conceded, the actual Holderbank representation was not so limited. Therefore, plaintiff is not entitled to recover fees for its representation of

defendants in connection with the Holderbank litigation.

Plaintiffs claim for fees for matters not directly related to the Holderbank litigation, however, is not barred. Plaintiffs time spent negotiating with Baker & McKenzie, on defendants' behalf, regarding a fee dispute, is not related to the Holderbank action and the conflict of interest. While its negotiations with Baku Cement and CCM relate to the privatization of the cement plant, they do not directly relate to its Holderbank representation. The amount of such fees, however, cannot be decided based on the papers submitted, and must await a trial or a hearing on this issue. The $10,000 retainer, and any other payments made by defendants, of course, will be credited against any fees owed with respect to these matters. Accordingly, partial summary judgment to plaintiff on this portion of its claim is denied.

Defendants' counterclaims for breach of fiduciary duty and breach of contract, pleaded as one counterclaim, is dismissed for failure to state a cause of action. First, the breach of fiduciary duty claim is duplicative of the breach of contract claim. See, William Kaufman Org., Ltd. v Graham & James L.L.P., 269 AD2d 171, 173 (1st Dept 2000). Second, while the allegations of violation of a disciplinary rule are properly pleaded as evidence of plaintiffs breach of the retainer agreement, defendants have failed sufficiently to set forth the manner in which this breach caused them to sustain damages. See, One Times Sauare Assocs. v Calmenson, 292 AD2d 174 (1st Dept 2002); Coleman v Fox Horan & Camerini, L.L.P., 274 AD2d 308 (1st Dept), lv denied 95 NY2d 767 (2000); Tuckman v Wachtel, 200 AD2d 507 (1st Dept 1994); see also, Sumo Container Station, Inc. v Evans, Orr, Pacelli, Norton & Laffan, P.C., 278 AD2d 169 (1st Dept 2000) (if breach due to conflict of interest is not the proximate cause of any harm sustained, then claim must be dismissed). Approximately one year after plaintiff withdrew as counsel to

defendants in the Holderbank action, that action was dismissed for lack of personal jurisdiction. Defendants fail to allege that anything plaintiff did or did not do would have changed the outcome of the action. Even if, as defendants assert, there were some delay because of plaintiffs withdrawal, defendants fail to allege or demonstrate how any purported delay caused any damages to defendants. Speculation with respect to damages is not sufficient to support the claim. See, Pellegrino v File, 291 AD2d 60 (1st Dept 2002). Therefore, the counterclaims are dismissed.

Accordingly, it is

ORDERED that the motion for partial summaryjudgment dismissing the complaint is granted only to the extent that plaintiff is barred from the recovery of any legal fees incurred in its representation of defendants in connection with defendants' litigation with non-party Holderbank, and is otherwise denied, and it is further

ORDERED that the cross motion is granted only to the extent of dismissing the counterclaims, and is otherwise denied.

Dated: 7/29/07

ENTER:

MARILYN SHAFER J.S.C.

J.S.C.