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

PRESENT: JOAN M. KENNEY J.S.C. PART 8

Index Number : 116181/2010

DELGADO, MONICA P.T.

VS

BRETZ & COVEN, LLP

Sequence Number : 001

DISMISS ACTION

INDEX NO. 116181/10

MOTION DATE 8/5/11

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 9 were read on this motion to dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-5
Answering Affidavits — Exhibits + MEMO of LAW	6-7
Replying Affidavits	8,9

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

Dated: October 7, 2011

JOAN M. KENNEY J.S.C.

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

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MONICA PATRICIA TENESACA DELGADO and JARRET KAHN,

Plaintiffs,

-against-

BRETZ & COVEN, LLP, KERRY WILLIAM BRETZ, and MATTHEW L. GUADAGNO,

Defendants.

----------x

DECISION & ORDER
INDEX # 116181/2010
Mot. Seq. 001

JOAN M. KENNEY, J.:

Defendants Bretz & Coven, LLP (the Law Firm), Kerry William Bretz (Bretz), and Matthew L. Guadagno (Guadagno) (collectively, the Defendants) move to dismiss the complaint against them pursuant to CPLR 3211 (a) (1), (5) and/or (7), and to disqualify plaintiff Jarret Kahn (Kahn) from serving as the attorney for plaintiff Monica Patricia Tenesaca Delgado (Delgado) in this action.

Factual & Procedural Background

Delgado is a native of Ecuador. She had been refused entry to the United States and returned to Ecuador on May 5, 1999, when she presented a resident card belonging to a cousin with the same surname. In spite of a five-year ban on reentry, she returned to the United States in December 2000 by crossing the Mexican border. Delgado and Kahn married on January 8, 2006, resided together in Westchester County and had a daughter, now two years old. On May 26, 2010, Delgado was deported from the United States to Ecuador, where she remains with her daughter.

On February 23, 2006, Delgado retained the Law Firm to represent her before the United States Citizenship and Immigration Service (the CIS), formerly the Immigration and Naturalization Service (INS). Exhibit to the complaint, Ex. A to the motion. She sought its help in legalizing her status in the United States. The retainer agreement that she signed stated that the Law Firm "is a law firm concentrating in immigration law and deportation defense . . . [and t]he Client understands this case presents complex legal issues, that the immigration laws have [been] significantly modified, and

are currently very harsh." It concluded, "BRETZ & COVEN DOES NOT GUARANTEE THE OUTCOME OF THIS CASE." On July 11, 2006, the Law Firm filed several forms with CIS, including an I-485 Form for adjustment of status to lawful permanent resident, an I-212 Form for permission to reapply after deportation or removal, an I-601 Form for waiver, an I-785 Form for employment authorization, and an I-130 petition for classification of an alien as an immediate relative of a United States citizen.

On October 26, 2006, Delgado appeared for an interview with the CIS, which denied her requests on the I-485 form and the I-212 Form the same day. Ex. B attached to motion. The CIS found that Delgado was ineligible for adjustment of her status to that of a lawful permanent resident, because she had entered the United States without permission after having been removed. The CIS further found that no waiver was available for such inadmissibility, and that she did not meet the requirements, set forth in Section 212 (a) (9) (C) (ii) of the Immigration and Nationality Act, for the exception, because 10 years had not passed from the date of Delgado's last departure from the United States, and she did not seek permission for readmission before she reentered. She was immediately arrested by immigration authorities, who reinstated her prior expedited removal order of May 5, 1999, but then apparently soon released her. Ex. C attached to motion.

On October 27, 2006, Delgado executed another retainer agreement with the Law Firm to represent her in the United States Court of Appeals and the United States District Court in connection with the CIS determinations. Guadagno, a non-equity partner in the Law Firm, orally argued her petition to review the CIS rulings before the Second Circuit Court of Appeals (Second Circuit), on October 30, 2007.

On January 12, 2008, plaintiff Delgado retained her husband, Kahn, as her attorney and on January 16, 2008, Kahn filed a motion in the Second Circuit for further briefing and oral argument

on the petition to review. This motion was subsequently denied. On February 7, 2008, as a matter of first impression for the Second Circuit, it denied Delgado's petition for review, and reinstated the May 5, 1999 deportation order. *Delgado v Mukasey*, 516 F3d 65 (2d Cir 2008). Petitions for rehearing and a writ of certiorari to the United State Supreme Court were subsequently denied. *Delgado v Mukasey*, 555 US 887 (2008). Kahn then brought an action in the United States District Court for the Southern District of New York, on Delgado's behalf, seeking to compel the CIS to consider her I-212 Form application for permission to reapply after deportation. On March 2, 2010, the District Court granted the CIS's motion to dismiss that action on the ground of res judicata. *Delgado v Quarantillo*, 2010 WL 726`790, 2010 US Dist LEXIS 19654 (SD NY 2010). On June 17, 2011, after the instant motion was filed, the Second Circuit affirmed the District Court's decision on the basis of lack of subject matter jurisdiction. *Delgado v Quarantillo*, 643 F3d 52 (2d Cir 2011).

Plaintiffs commenced the instant action on December 14, 2010, asserting causes of action for legal malpractice, breach of contract and breach of fiduciary duty. According to the complaint, Defendants were "dishonest and deceitful with Plaintiffs to their detriment in an effort to create legal fees." Complaint, ¶ 11. Defendants encouraged Delgado to apply for an adjustment of status "as soon as possible," without informing her of "numerous material issues," and assuring her "that there was no risk of her being deported much less detained." *Id.*, ¶ 10. "At the consultation, Bretz was entirely misleading and, in fact, intentionally dishonest." *Id.*, ¶ 14. Defendants failed to give plaintiffs "a realistic assessment of the consequences of any action." *Id.*, ¶ 11. From the initial consultation with plaintiffs, Defendants were "hiding the true risks to them, in order to enter the first retainer with them which [they] knew would lead to additional money and potential notoriety for the firm." *Id.*, ¶ 14. Defendants did not inform plaintiffs of relevant statutes and case law. *Id.*, ¶¶ 15-17. Plaintiffs were never counseled that, even if they "wanted to make this risky application, you

may want to wait until it is 10 years since the last departure from the United States." *Id.*, ¶ 21. Defendants "hid all the reasons that would have deterred Plaintiffs from making the applications." *Id.*, ¶ 41. Delgado's applications to the CIS were denied and her deportation order reinstated, the result of Defendants' bad advice. Bretz "knew exactly what was going to happen by making the applications yet concealed the true facts from the Plaintiffs." *Id.*, ¶ 51.

With respect to the Second Circuit appeal, the complaint alleges that, in preparing the appellate brief, the "firm ignored BIA [Bureau of Immigration Appeals], Second Circuit and Supreme Court law." *Id.*, ¶ 52. They "did not cite any Second Circuit decision[s] that were applicable or any where the Second Circuit had adopted Supreme Court law." Kahn received a draft of the brief the day it was due, not one week in advance as agreed upon. *Id.*, ¶¶ 55-56. "The Government cited more substance on the issues including [8 CFR] 212.2 (i) (2) than the firm's brief did." *Id.*, ¶ 109. "Guadagno showed up at oral argument unprepared." *Id.*, ¶ 165.

In sum, the complaint charged that "Defendants failed to explain, advise and discuss with Plaintiffs the consequences of making the applications [to the CIS] and then after making them were not prepared, and did not properly, make adequate arguments to the Second Circuit." *Id.*, ¶ 184.

Discussion

"In order to establish a prima facie case of legal malpractice, a plaintiff must demonstrate that the plaintiff would have succeeded on the merits of the underlying action but for the attorney's negligence." *Davis v Klein*, 88 NY2d 1008, 1009-1010 (1996); *see also Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, LLP*, 96 NY2d 300, 303-304 (2001) ("To sustain a cause of action for legal malpractice, moreover, a party must show that an attorney failed to exercise the reasonable skill and knowledge commonly possessed by a member of

the legal profession").

At the onset, it is noted that Kahn does not have a cause of action for legal malpractice, breach of contract and/or breach of fiduciary duty against the named defendants. *Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417, 424 (1989) ("The long-standing rule is that recovery may be had for pecuniary loss arising from negligent representations where there is actual privity of contract between the parties or a relationship so close as to approach that of privity"); *Art Capital Group, LLC v Neuhaus*, 70 AD3d 605, 607 (1st Dept 2010) ("a viable tort claim against a professional requires the underlying relationship between the parties to be one of contract or the bond between them so close as to be the functional equivalent of contractual privity"). Both retainer agreements name Delgado solely as the client and are signed by her alone. The description of the work, in each instance, is particular to Delgado: "represent the above-referenced CLIENT before the UNITED STATES IMMIGRATION AND NATURALIZATION SERVICES for ADJUSTMENT OF STATUS WITH WAIVERS" (February 23, 2006) and "represent the above-referenced CLIENT before the U.S. Court of Appeals and U.S. District Court" (October 27, 2006).

Additionally, movant's application to disqualify Kahn as Delagado's counsel in this action, is granted, pursuant to the Code of Professional Responsibility, 22 NYCRR § 1200.0 Rule 3.7, the advocate-witness rule.

> "Recognizing that the roles of an advocate and of a witness are inconsistent, and that it is from a public image point of view 'unseemly' for a lawyer in a trial also to argue his own credibility as a witness, the Code of Professional Responsibility directs that a lawyer who *ought to be called* as a witness on behalf of his client shall withdraw from the conduct of the trial and his firm shall not continue representation in the trial."

S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp., 69 NY2d 437, 444 (1987). While Kahn was not the Law Firm's client, he clearly had intimate knowledge of the facts surrounding this case because he was closely involved with the immigration petition on behalf of his wife. "At the office,

the *Plaintiffs* told Bretz that *they* did not want to apply if there were any risks and would wait for immigration reform. Bretz stated that immigration reform could never help Patty [Delgado] and encouraged *them* to apply as soon as possible because it is three years to citizenship." Complaint ¶¶ 18-19 (emphasis added). Kahn's testimony would be critical in presenting Delgado's case that she was allegedly misguided by defendants.

It is noted that plaintiffs withdraw their breach of contract claim in opposing the instant motion. Plaintiffs' Memorandum of Law at 2. Moreover, the claim for breach of fiduciary duty is dismissed herein as duplicative of the legal malpractice claim. *Waggoner v Caruso*, 14 NY3d 874, 875 (2010) ("The court also properly dismissed plaintiffs' claim in this case for breach of fiduciary duty as duplicative of the claim for legal malpractice"); *Sage Realty Corp. v Proskauer Rose L.L.P.*, 251 AD2d 35, 38-39 (1st Dept 1998) ("a breach of contract claim premised on the attorney's failure to exercise due care or to abide by general professional standards is nothing but a redundant pleading of the malpractice claim").

The only remaining cause of action, therefore, is the claim for legal malpractice asserted by Delgado against defendants. "An action to recover damages for legal malpractice accrues when the malpractice is committed. 'What is important is when the malpractice was committed, not when the client discovered it.'" *Shumsky v Eisenstein*, 96 NY2d 164, 166 (2001), quoting *Glamm v Allen*, 57 NY2d 87, 95 (1982). Delgado signed a new retainer agreement with the Law Firm on October 27, 2006, to challenge the CIS denial of her applications the day before. Defendants argue that a legal malpractice claim cannot be pursued against them regarding their representation of Delgado through the CIS hearing, on October 26, 2006, more than three years before the action commenced on December 14, 2010. "An action for professional malpractice must be commenced within three years of the date of accrual (*see* CPLR 214 [6])." *Williamson v PricewaterhouseCoopers LLP*, 9 NY3d

1, 8 (2007).

The complaint states that "Guadagno had given up on the case by early January 2008." *Complaint*, ¶ 127. However, the last activity reported by plaintiffs was "a letter dated December 14, 2007 [received by them] in the mail filed by Guadagno in response to the Government's letter filed pursuant to the Federal Rules of Appellate Procedure 28 (j)."[1] *Id.*, ¶ 119. The complaint faulted Guadagno's letter for two reasons: it was not approved by Kahn before filing (*id.*, ¶ 120-121), and it ignored relevant case law (*id.*, ¶ 122-123).

"Since it is impossible to envision a situation where commencing a malpractice suit would not affect the professional relationship, the rule of continuous representation tolls the running of the Statute of Limitations on the malpractice claim until the ongoing representation is completed." *Glamm v Allen*, 57 NY2d at 94. While Delgado signed a second retainer agreement with defendants, it called for their ongoing representation in bringing an appeal to the Second Circuit and a mandamus action to the United States District Court regarding the CIS denial of her applications. Under these circumstances, commencing the action on December 14, 2010 brought defendants' conduct, from February 23, 2006 until at least December 14, 2007, within the three-year statute of limitations for legal malpractice.

While defendants continuously represented Delgado for over 21 months, their work, and the attendant allegations of legal malpractice, divided into two phases: the CIS applications and the challenge to the CIS determinations. Plaintiffs complained that defendants knew that presenting Delgado to the CIS was highly risky, hid that understanding from them, and failed to warn them

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[1]The rule reads, in relevant part: "If pertinent and significant authorities come to a party's attention after the party's brief has been filed – or after oral argument but before decision – a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations." No copy of the government's letter or Guadagno's response is provided.

adequately of the unsettled law in the Second Circuit, resulting in her deportation to Ecuador. This argument fails for two reasons. First, both retainer agreements contain the following language: "The Client further understands that this case represents complex legal issues, that the immigration laws have significantly modified, and are currently very harsh. An Attorney has fully explained that deportation and removal cases are difficult to win and BRETZ & COVEN DOES NOT GUARANTEE THE OUTCOME OF THIS CASE." "The court . . . is not required to accept factual allegations, or accord favorable inferences, where the factual assertions are plainly contradicted by documentary evidence." *Bishop v Maurer*, 33 AD3d 497, 498 (1st Dept 2006), *affd* 9 NY3d 910 (2007). The retainer agreements clearly identify the difficulty of her position and warn of a "harsh" legal environment.

Second, Defendants' allegedly unwise and imprudent urging of Delgado into the application process took place at or about the time she engaged them, February 2006. Her deportation occurred in May 2010, more than four years later. After that much time and intervening events, including change of counsel and several more legal proceedings, defendants' actions in soliciting her business cannot be identified as the "but for" cause of Delgado's deportation. *Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP*, 301 AD2d 63, 67 (1st Dept 2002) ("In order to survive dismissal, the complaint must show that but for counsel's alleged malpractice, the plaintiff would not have sustained some ascertainable damages").

Plaintiffs fault defendants for the quality of their representation in the appellate process. The complaint claimed that they ignored BIA, Second Circuit and Supreme Court law, did not cite any applicable Second Circuit decisions, and had inferior sources in the brief, as compared to the government's papers. Even if this were true, the Second Circuit's opinion, over 10 pages long, is

rife with citations to statutes, immigration rules and regulations, and federal case law from various jurisdictions, including itself. There is no reason for this court to rule that, as a matter of law, the Second Circuit's opinion was entirely contingent upon the contents of defendants' brief, especially where the opinion is so detailed and carefully reasoned. An unwelcome result is not the test of the adequacy of counsels' efforts. *Bernstein v Oppenheim & Co., P.C.*, 160 AD2d 428, 430 (1st Dept 1990) ("an attorney is not held to the rule of infallibility").

Moreover, plaintiffs fail to establish that they would have succeeded on the merits of the appeal, but for the attorney's negligence. Delgado was an alien living illegally in the United States, who had reentered the country about 18 months after being deported and was barred from reentry for five years. The complaint maintained that filing Delgado's forms with the CIS in July 2006 was "an overly aggressive application" (Complaint, ¶ 45), which "could be denied as a matter of discretion based upon the prior fraud or the reentry after removal and the decision could not be challenged" (*id.*, ¶ 31). Since, according to plaintiffs, her "reentry was a crime pursuant to 8 USC § 1326 and . . . [Delgado] could be charged with the crime of reentry" (*id.*, ¶ 41), the facts of her case seem to have limited her chances of success before the Second Circuit. Plaintiffs offer no examples where a similarly-situated plaintiff prevailed on appeal, presumably benefitting from a level of representation defendants denied to Delgado. Ultimately, as the complaint made clear, her deportation to Ecuador was consistent with prevailing law. Accordingly, it is

ORDERED that defendants Bretz & Coven, LLP, Kerry William Bretz, and Matthew L. Guadagno's motion is granted; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendants and against plaintiff, dismissing the complaint in its entirety.

FILED
OCT 17 2011
COUNTY CLERK'S OFFICE
NEW YORK

DATED: October 11, 2011 ENTER: _____
JOAN M. KENNEY
J.S.C.

identities of, and bring a complaint against, the anonymous person(s) or entity(ies) that provided the confidential financial information of Petitioner to Deadspin.com and the Associated Press.

Sufficient cause appearing therefore, let service by overnight mail of a copy of this Order and the papers upon which it is based upon Beazley on or before the __th day of October, 2011, be deemed sufficient service of notice of this motion.

ENTER

J.S.C.

Declined without prejudice to renew upon proper papers which shall include an affidavit from an individual with personal knowledge. The affirmation is insufficient as it lacks probative value.

FILED

OCT 17 2011

COUNTY CLERK'S OFFICE
NEW YORK

SHLOMO S. HAGLER, J.S.C.

10/12/11