SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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BRINEN & ASSOCIATES,

Plaintiff,

-against-

KAIHAN KRIPPENDORFF,

Defendant.

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Index No.: 653485/2014

DECISION AND ORDER

Motion Sequence 005

CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

This action arises from an agreement between Plaintiff Brinen & Associates, LLC ("Plaintiff"), a law firm, and Defendant Kaihan Krippendorff ("Defendant"), who retained Plaintiff for representation in certain transactional matters pursuant to an engagement letter (the "Agreement"). Plaintiff moves pursuant to CPLR 3211(e) to dismiss Defendant's sixth counterclaim for breach of fiduciary duty, arguing that the counterclaim duplicates Defendant's fifth counterclaim for breach of contract (*see NYSCEF 129* ["Second Amended Answer"]).[1]

BACKGROUND FACTS

Plaintiff's Complaint alleges non-payment pursuant to the Agreement. In his original Answer and Counterclaims, Defendant alleged, in sum and substance, that Plaintiff gave Defendant incorrect legal advice which led to substantial financial harm, and engaged in various malpractice and billing malfeasance.

In addition to previous motion practice (*NYSCEF 19, 34*), Defendant most recently moved pursuant to CPLR 3025 to Amend his Answer and Counterclaims, which the Court

[1] As discussed below, Plaintiff's motion is analyzed under CPLR 3211(a)(7).

granted in part and denied in part on May 9, 2016 (*NYSCEF 128*). As relevant here, the Court permitted Defendant to add the sixth counterclaim for breach of fiduciary duty.[2]

With respect to the breach of fiduciary duty counterclaim, Defendant asks for compensatory and punitive damages based on Plaintiff's alleged violation of "a duty to deal fairly, honestly and with undivided loyalty, avoid conflicts of interest, safeguard client property and honor Defendant's interests" through fraudulent billing, undisclosed conflicts, and misappropriation of the retainer payment (¶¶ 65-69). With respect to the breach of contract counterclaim, Defendant requests compensatory damages based on Plaintiff's alleged violation of the Agreement through billing malfeasance (*Second Amended Answer* ¶¶ 58-61), an undisclosed conflict of interest (¶¶ 61, 63), failing to facilitate fee arbitration (¶ 62), misappropriating an unearned retainer payment (¶ 63), misrepresenting qualifications (¶ 63), and violating other ethical standards (¶ 63).

Plaintiff now moves to dismiss the breach of fiduciary duty counterclaim, arguing that it duplicates Defendant's breach of contract counterclaim.

In opposition, Defendant argues: first, that Plaintiff's motion is improper because substantive opposition to the new counterclaim should have been raised in opposition to the previous motion to amend, not after the Court's decision on the motion to amend became "law of the case;" and second, that the new cause of action for breach of fiduciary duty is not duplicative of the breach of contract cause of action because the former raises distinct issues with respect to fraud and misrepresentation and requests distinct, punitive damages that are unavailable in

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[2] Because the Court struck a preceding counterclaim, the proposed, seventh counterclaim for breach of fiduciary duty was renumbered to sixth. Defendant asserts six total counterclaims: abuse of process, fraud, conversion, malpractice, and, as relevant here, breach of contract and breach of fiduciary duty.

breach of contract actions.

In reply, Plaintiff responds that its motion is permissible because the Court did not substantively address the new counterclaim's merits in its CPLR 3025 analysis, and therefore may do so here. Further, Plaintiff reiterates that the new breach of fiduciary duty is duplicative.

DISCUSSION

Procedural Arguments

As the initial matter, the Court rejects Defendant's contention that Plaintiff's motion is unauthorized by the CPLR. First, the "one-motion rule" of CPLR 3211(e) does not apply (*Kocourek v Booz Allen Hamilton Inc.*, 114 AD3d 567, 568 [1st Dept 2014] (the one motion rule does not bar a successive motion to dismiss that addresses causes of action made for the first time in an amended pleading)).

Second, the Court also rejects Defendant's contention that the Court's previous permission to add the new counterclaim is the "law of the case" and bars a motion to dismiss. A finding by the court that an action is meritorious for the purpose of allowing a late or amended filing is not "law of the case" and does not preclude exposure of the claim to subsequent evaluation under an elevated standard. The doctrine of law of the case "applies only to legal determinations resolved on the merits" (*Perini Corp. v City of New York*, 122 AD3d 528, 528 [1st Dept 2014] (motion to dismiss affirmative defenses and counterclaims as barred by statute of limitations not precluded by previous order granting permission to amend answer adding said defenses and counterclaims because the previous order did not mention the statute of limitations); *see also A.L. Eastmond & Sons, Inc. v Keevily, Spero-Whitelaw, Inc.*, 107 AD3d 503, 503 [1st Dept 2013] (" . . . the doctrine of the law of the case does not apply to bar the

denial of the motion for leave to amend based on a prior order denying defendant's motion to dismiss the cause of action for breach of fiduciary duty pursuant to CPLR 3211 given the difference in procedural posture")).

Applied here, the CPLR 3025(b) standard used in the Court's earlier order sets a liberal standard for amendment by providing that "[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances."

Although an examination of the underlying merits of the proposed causes of action is often warranted in order to conserve judicial resources, (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009]), the Second Department recently examined the history of CPLR 3025(b) jurisprudence and rejected a growing trend of courts requiring too much proof on the merits, including an affidavit of merit, before granting leave to amend (*Schron v Grunstein*, 39 Misc 3d 1213(A) [Sup Ct NY County 2013], *discussing Lucido v Mancuso*, 49 AD3d 220 [2d Dept 2008]). Importantly, the Court recognized that trend's practical effect: that "in the case . . . of a motion for leave to amend a complaint by adding a new cause of action, the motion for leave to amend will be denied, in the absence of prejudice or surprise, *only if the new cause of action would not withstand a motion to dismiss under CPLR 3211(a)(7)*" (*Lucido*, 49 AD3d at 225). In rejecting the new trend, the Court recognized that CPLR 3025(b)'s standard must be more forgiving than that of CPLR 3211(a)(7). The First Department impliedly adopted *Lucido*, holding that "[o]n a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations . . . but simply show that the proffered amendment is not palpably

insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499 [1st Dept 2010] (approving amendment of complaint upon affirmation of counsel and deposition transcript)).

Accordingly, as noted by Plaintiff, the Court followed CPLR 3025(b)'s liberal standard in its previous Order, substantively addressing (and discounting) only the minimal delay in Defendant's proposed amendment (*NYSCEF 128*). Thus, contrary to Defendant's argument, Plaintiff's motion is not inappropriate because the Court has not yet subjected the new counterclaim to CPLR 3211 standards. Where the merits are not fully tested, "the better practice is to allow amendment, with leave to a party so desiring to raise the substantive issue at a later date" (*Bonoff v Troy*, 187 AD2d 302 [1st Dept 1992]). That date has now arrived.

Substantive Arguments

Despite the notice of motion's invocation of CPLR 3211(e), motions to dismiss duplicative claims are generally analyzed under a CPLR 3211(a) framework (*see e.g. Johnson v Proskauer Rose LLP*, 129 AD3d 59, 67 [1st Dept 2015]). Accordingly, in determining a motion to dismiss a counterclaim pursuant to CPLR 3211(a)(7), the Court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 968 NYS2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 960 NYS2d 404 [1st Dept 2013]).

On a motion to dismiss made pursuant to CPLR 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs "the benefit of every possible favorable

inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss*, 104 AD3d at 401; *Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]).

Under CPLR 3211(a)(7), a cause of action for breach of fiduciary duty whose allegations are merely duplicative of a breach of contract claim cannot stand (*William Kaufman Org., Ltd. v Graham & James LLP*, 269 AD2d 171, 173 [1st Dept 2000], *accord Weight v Day*, 134 AD3d 806, 808–09 [2d Dept 2015] (affirming dismissal of breach of contract cause of action as duplicative of the causes of action alleging accounting malpractice and breach of fiduciary duty); *see also Joyce v Thompson Wigdor & Gilly LLP*, 2008 WL 2329227, 36 Media L Rep 2030 [SDNY June 3, 2008] (overlapping claims of negligence, breach of contract, breach of fiduciary duty, negligent misrepresentation, or fraudulent misrepresentation premised on the same facts and seeking identical relief as a claim for legal malpractice are generally dismissed as duplicative [collecting cases])).

Conversely, both causes of action may co-exist where a claim of breach of fiduciary duty rests on a duty separate and distinct from the breach of contract (*Savage Records Group, N.V. v Jones*, 247 AD2d 274, 274-275 [1st Dept], *lv denied* 92 NY2d 804 [1998] (when parties have entered into a contract, unless a party can show a separate duty, "independent of the mere contract obligation," no fiduciary relationship is established); *compare Mandelblatt v Devon Stores, Inc.*, 132 AD2d 162, 163 [1st Dept 1987] (breach of fiduciary duty for disparaging the employer was found to be separate and distinct from the former employee's alleged failure to perform his duties under the contract) *with William Kaufman Org,* 269 AD2d at 173 ("[h]ere, there is no such distinction. Indeed, the cause of action for breach of contract refers . . . to the

unethical conduct described in the . . . breach of fiduciary duty"); *see also MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 293 [1st Dept 2011] ("[u]nlike a misrepresentation of future intent to perform, a misrepresentation of present facts is collateral to the contract ... and therefore involves a separate breach of duty"); *Brooks v Key Trust Co. Nat. Ass'n*, 26 AD3d 628, 809 NYS2d 270, 272–73 (3d Dept 2006) (in order to survive a motion to dismiss, a claim for breach of fiduciary duty must "set[ ] forth allegations that, apart from the terms of the contract, the parties *created a relationship of higher trust than would arise from [their contracts] alone*" [emphasis added])).

An agreement that creates an attorney-client relationship can create a unique relationship and duty independent of the contract (*see e.g. Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 12 [1st Dept 2008] ("unlike a cause of action for breach of fiduciary duty, the circumstances of an attorney's discharge by a client may afford a basis for recoupment of legal fees independent of any claim of legal malpractice"), *citing Campagnola v Mulholland, Minion & Roe*, 76 NY2d 38, 43 [1990] ("[t]he unique relationship between an attorney and client, founded in principle upon the elements of trust and confidence on the part of the client and of undivided loyalty and devotion on the part of the attorney, remains one of the most sensitive and confidential relationships in our society"); *Chowaiki & Co. Fine Art Ltd. v Lacher*, 115 AD3d 600, 600–01 [1st Dept 2014] (fiduciary duty created by attorney-client relationship can be considered independent of contract)).

However, though an attorney-client relationship is unique and may create duties independent of the contract, the focus for the purposes of analyzing the claims' overlap must be on the "essence of the claims" - in other words, the manner in which the duties were alleged to

have been violated, and the alleged harm flowing from any violation (*Johnson v Proskauer Rose LLP*, 129 AD3d 59, 70 [1st Dept 2015]). Claims are duplicative where they arise from the same facts and seek the same damages for each alleged breach (*Amcan Holdings, Inc. v Can. Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept 2010]; *see e.g., Chowaiki*, 115 AD3d at 600–01 (dismissing duplicative claim because it was premised upon the same facts and sought identical damages, return of the excessive fees paid); *Shaub and Williams, L.L.P. v Augme Tech., Inc.*, 13 CIV. 1101 GBD, 2014 WL 625390, at *3 [SDNY Feb. 14, 2014] ("Defendant's breach of fiduciary duty and breach of implied duty of good faith and fair dealing counterclaims arise out of the same set of alleged excessive billing practices [and seek the same damages] as Defendant's breach of contract counterclaim); *Morgan, Lewis & Bockius LLP v IBuyDigital.com, Inc.*, 14 Misc 3d 1224(A) [Sup Ct NY County 2007] (counterclaim alleging that law firm breached its fiduciary duty by failing to abide by engagement letter's express promise duplicated breach of contract counterclaim premised on the same letter)). Even the presence of distinct fraud and non-fraud components that seemingly differentiate claims does not preclude dismissal when the claims allege "virtually identical" facts, theories, and damages (*NYAHSA Services, Inc. v People Care Inc.*, 141 AD3d 785 [3d Dept 2016]).

There is no appreciable difference between the disputed causes of action here. The breach of contract claim seeks damages pursuant to improper and fraudulent billing, misappropriation of a retainer, "conflict of interest-ridden advice," and misrepresentation of skills, experience, and ability (*Amended Answer* ¶ 63). In nearly identical language, including allegations of fraud, the breach of fiduciary duty counterclaim seeks damages pursuant to "fraudulent conduct by failing to disclose . . . a conflict of interest," fraudulent billing, and retainer malfeasance (*Amended*

Answer ¶ 67).

Defendant's attempts to disentangle the causes of action are unavailing to the extent that they address the general availability of damages in certain types of actions, but do not address the similarities inherent in the breach of contract and breach of fiduciary counterclaims at issue here.

First, Defendant argues that the two types of actions are categorically distinct, and therefore could not be duplicative, based on the availability of punitive damages in breach of fiduciary duty actions, but not breach of contract actions. To the contrary, such damages are available, if the requisite elements are met, under both types of action (*New York Univ. v Cont. Ins. Co.*, 87 NY2d 308, 315–16 [1995] (". . . damages arising from the breach of a contract will ordinarily be limited to the contract damages necessary to redress the private wrong, but . . . punitive damages may be recoverable if necessary to vindicate a public right . . . in those limited circumstances where it is necessary to deter defendant and others . . . from engaging in conduct that may be characterized as gross and morally reprehensible, and of such wanton dishonesty as to imply a criminal indifference to civil obligations")).

Second, and similarly, damages due to harm to business reputation are not, as Defendant argues, categorically unrecoverable in a breach of contract action. While such claims are generally not actionable, special exceptions are made upon "specific proof of lost business opportunities as a result of diminished reputation" (*Anderson Group, LLC v City of Saratoga Springs*, 805 F3d 34, 55 [2d Cir 2015]).

Third, Defendant attempts to distinguish between his breach of contract claim, which lacks scienter, and his breach of fiduciary duty claim, which contains one. However, as discussed above, when asserting alternative theories of liability, the claims need not be identical

to be duplicative (*NYAHSA Services*, 141 AD3d at 785; *see also Ellington Credit Fund, Ltd. v Select Portfolio Servicing, Inc.*, 837 F Supp 2d 162, 205 [SDNY 2011] ("Plaintiffs do not allege any damages for the breach of the implied covenant that are separate and distinct from those flowing from the breach of contract claim, and the claims themselves are *functionally* identical") [emphasis added]).

Fourth, Defendant's attempt to distinguish the misappropriation of the retainer as a breach of contract claim, and misrepresentation of intentions with respect to the retainer as a fraud-based breach of fiduciary duty claim lacks merit. To the extent that Defendant's allegations stem from the same series of acts – one alleges that Plaintiff used the retainer improperly, and the second that Plaintiff lied about the retainer's use – this is a distinction without a legal difference. The allegations are effectively interchangeable, and allege functionally identical actions.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that Plaintiff's motion to dismiss Defendant's sixth counterclaim for breach of fiduciary duty in the Second Amended Verified Answer is **GRANTED** and the sixth counterclaim is hereby severed and dismissed; and it is further

ORDERED that Plaintiff shall serve a copy of this order with notice of entry upon the Clerk of Court and all parties within 20 days.

ORDERED that Plaintiff shall serve and e-file a reply to Defendant's remaining counterclaims within 30 days.

This constitutes the decision and order of the Court.

Dated: September 29, 2016

Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.