

**Meltzer, Lippe, Goldstein & Breitstone, LLP v
McGrath**

2016 NY Slip Op 32732(U)

June 29, 2016

Supreme Court, Nassau County

Docket Number: 602517/2015

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 8 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

**MELTZER, LIPPE, GOLDSTEIN & BREITSTONE,
LLP**

Plaintiffs,

-against-

**ROBERT McGRATH, LAURA McGRATH and
ADVANCED REMODELING & MANAGEMENT
CORP.,**

Defendants.

Index No. 602517/2015

Motion Submitted: 05/05/16

Motion Sequences: 001, 002

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....	XX
Answering Papers.....	XX
Reply.....	XX
Briefs: Plaintiff's/Petitioner's.....	X
Defendant's/Respondent's.....	X

Defendants Advanced Remodeling & Management Corp., Robert McGrath (Robert) and Laura McGrath (Laura) (collectively defendants) move this Court for an Order pursuant to CPLR 3123 striking plaintiff's first and second Notices to Admit, and for sanctions (Motion Sequence 1). Plaintiff opposes the requested relief.

Plaintiff moves this Court for an Order pursuant to CPLR 3212 awarding it summary judgment in the principal sum of \$70,945.77, plus costs and disbursements, granting plaintiff partial summary judgment for attorney's fees incurred in collecting this debt, and dismissing the defendants' malpractice counterclaim with prejudice (Motion Sequence 2). Defendants oppose the requested relief.

In sum and substance, plaintiff seeks to collect from defendants the fees allegedly due and owing to it, based upon legal representation furnished to defendants in the context of two Suffolk County actions. The verified complaint asserts four causes of action sounding in breach of the retainer agreement, reasonable value of plaintiff's services rendered, unjust enrichment, and account stated.

Defendants' counterclaim for malpractice alleges that plaintiff failed to assess the availability of insurance coverage related to one of the Suffolk County actions, in failing to timely and properly assess the scope of such insurance coverage, and in failing to timely and properly file a notice of claim with the particular insurance carrier.

In connection with this action, plaintiff served two Notices to Admit upon defendants. CPLR § 3123 (a) provides in pertinent part that, "[e]ach of the matters of which an admission is requested shall be deemed admitted unless within twenty days after service thereof . . . the party to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters . . . or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters."

The Notices are dated June 23 and June 24, 2015. Defendants responded to each of the Notices, in writing, on or about July 16, 2015. Defendants made some admissions, but objected to, and denied, many of the other requests; thus, defendants made no admissions based upon default. Notably, plaintiff made no further application to this Court to compel defendants to further respond to the respective Notices, and defendants had not, until the instant motion, moved for a protective order. Accordingly, defendants' present application for a protective order regarding plaintiff's Notice to Admit is denied as moot, and defendants' request for sanctions is also denied (Motion Sequence 1).¹

The Court now turns to plaintiff's motion for summary judgment and dismissal of the counterclaim (Motion Sequence 2). It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (*Andre v. Pomeroy*, 35 NY2d 361 [1974]). Summary judgment should only be granted where the Court finds as a matter of law that there is no genuine issue as to any material fact (*Cauthers v. Brite Ideas, LLC*, 41 AD3d 755 [2d

¹Plaintiff served a First Set of Interrogatories and Notice to Produce at or about the same time as the Notices to Admit, to which defendants have responded. Although plaintiff notified defendants that their responses to the interrogatories and the demand were deficient, plaintiff has apparently adjudged that it is not in need of further discovery in order to make its summary judgment motion, which is presently under consideration by this Court as Motion Sequence 2.

Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the defendants (*Makaj v. Metropolitan Transportation Authority*, 18 AD3d 625 [2d Dept 2005]).

In support of its motion, plaintiff submits, *inter alia*, the verified pleadings, the retainer agreement, the pleadings related to the underlying Suffolk County actions, billing invoices for legal services rendered, an insurance policy naming Advanced Construction Management as the insured, various e-mails between Mr. McGowan and Mr. McGrath, and an affidavit from Thomas J. McGowan.

In his affidavit, Mr. McGowan acknowledges that he "was the attorney principally responsible for handling the [Suffolk County] action on Defendants' behalf," and he outlines the legal services provided in relation to the Suffolk County action in which the McGraths and "Advanced Remodeling, Inc."² were being sued by Frank and Debra Dolan, and also in relation to Advanced Construction Management Corp. suing the Dolans and others to foreclose on a mechanic's lien relative to the same property.

The complaint is verified by Thomas J. McGowan, Esq., a member of plaintiff law firm, and the attorney who executed the retainer agreement.

The complaint alleges that defendants signed a retainer agreement on July 25, 2007. The submitted retainer is addressed to Advanced Remodeling and Management Corp., Mr. Robert McGrath, and Ms. Laura McGrath, and it pertains to representation "in connection with a litigation commenced by Frank Dolan and Debra Dolan against you and your company." While it is true that the McGraths were sued individually by the Dolans, the retainer itself is unclear in what capacity or capacities Laura McGrath signed the retainer. The Chief Executive Officer of Advanced Remodeling & Management Corp. is listed in New York State Department of State (DOS) records as being Laura J. McGrath, but there is no delineation of capacity under the single signature line for Ms. McGrath.

The complaint further alleges that "from approximately July, 2007 through in or about May, 2013, the Firm [plaintiff] did in fact provide legal services to defendants and did in fact incur expenses and disbursements in connection with those services," that plaintiff regularly sent bills to defendants, who paid some of those bills in January and April, 2013. Despite some payments, plaintiff alleges that the outstanding principal sum

²Advanced Construction Management Corp. was improperly sued in Suffolk County as Advanced Remodeling, Inc. There is no record of the latter corporation filed with the New York State Department of State.

of \$59,885.33 is due and owing, and that defendants have refused to pay that outstanding balance, together with interest.

With respect to its breach of contract claim contained in the first cause of action, plaintiff must establish its *prima facie* entitlement to summary judgment by providing evidence in admissible form of the existence of a contract between the parties, plaintiff's performance and defendant's alleged breach. (*Furia v. Furia*, 116 AD2d 694 [2d Dept 1986]).

Concerning the amount allegedly due and owing, Mr. McGowan claims that the hourly rate of \$350 stated in the retainer agreement "was only a one year discount." Upon reading the agreement, the Court notes that there is no statement specifically delineating that the discounted rate was effective for only one year. In his affidavit, Mr. McGowan states that, "in good faith *and only for the purposes of the instant motion*, [plaintiff] agrees to amend its demand to \$70,945.77, which reflects a decrease of my hourly rate to \$350.00 for the duration [plaintiff's] representation of Defendants (sic)" (emphasis added). Thus, there appears to exist a question of fact as to the rate to be charged by Mr. McGowan, apart from his offer to amend the demand, which is apparently valid only for the purposes of this motion.

Moreover, the retainer agreement contains a provision whereby plaintiff and defendants agreed to a "Credit Limit" of \$5,000 for their legal matters. "If at any time, the aggregate of (i) all outstanding bills rendered to you which are unpaid and (ii) the value of all unbilled time for services rendered by the Firm and the amount of all unbilled disbursements incurred in connection therewith, exceeds the Credit Limit you will be promptly notified that your account has exceeded the credit limit. When you have exceeded the Credit Limit, we will call you and ask for an immediate payment. You agree to make an immediate payment to bring your account well under the Credit Limit."

The first submitted invoice contained in plaintiff's Exhibit H is in excess of the stated credit limit, and the invoices that follow demonstrate an ever-growing balance in excess of that credit limit; yet, there is no evidence submitted that plaintiff acted in accordance with the contract by contacting defendants about their credit limit excess.

In addition, the retainer agreement sets forth in detail that any fee dispute "shall be determined by binding arbitration before one arbitrator in Nassau County . . . in a proceeding by and before, and in accordance with, the rules of the Alternative Dispute Resolution Tribunal of the Bar Association of Nassau County, Inc. . . . By signing this Agreement, you acknowledge (i) that you have the right to use the arbitration procedures of The New York State Fee Resolution Dispute Program contained in Part 137 of the

Rules of the Chief Administrator of the Courts (hereinafter 'Part 137') and (ii) that you are not required to agree to arbitrate a fee dispute in any other arbitral forum outside Part 137. By signing this Agreement you and the Firm each agree to **waive their rights with regard to arbitration pursuant to Part 137, which includes the right to reject the arbitrator(s) award by commencing an action on the merits (trial de novo) in a court of law**" (emphasis in original).

By the terms of plaintiff's own retainer agreement, to which it was a signatory, it appears that plaintiff violated those terms by commencing this action to recover its fees. There is no evidence that this matter was submitted to binding arbitration as called for by the retainer agreement. Accordingly, and for all of the foregoing reasons, plaintiff has failed to establish its *prima facie* entitlement to summary judgment as a matter of law as to the first cause of action sounding in breach of contract.

An account stated is an agreement between parties to an account based on prior transactions between them with respect to the correctness of the account (terms and balances due) (*Landau v Weissman*, 78 AD3d 661 [2d Dept 2010]; *Jim-Mar Corp. v Aquatic Construction, Ltd.*, 195 AD2d 868, 869 [3d Dept 1993]). By retaining billing statements and failing to object to the account within a reasonable time, the recipient of the bill implies that he or she agrees with the sender regarding the amount owed (*see Rodkinson v Haecker*, 248 NY 480, 485 [1928]; *American Express Centurion Bank v Cutler*, 81 AD3d 761, 762 [2d Dept 2011]). Proof that an itemized bill was issued by an attorney and then held by the client without objection for an unreasonable period of time may, under certain circumstances, provides a basis upon which to find an implied assent so as to constitute an account stated (*see Werner v Nelkin*, 206 AD2d 422 [2d Dept 1994]; *Shea & Gould v Burr*, 194 AD2d 369 [1st Dept 1993]; *Sandvoss v Dunkelberger*, 112 AD2d 278 [2d Dept 1985]; *Epstein Reiss & Goodman v Greenfield*, 102 AD2d 749 [1st Dept 1984]).

The Court of Appeals, however, has stated that "mere silence and failure to object cannot be construed as an agreement upon the correctness of the accounts" (*Corr v Hoffman*, 256 NY 254, 266 [1931]; *see also Interman Indus. Prods. v R.S.M. Electron Power*, 37 NY2d 151, 154 [1975]; *cf., Rodkinson v Haecker, supra*). "Evidence of an oral objection to an account rendered is sufficient on a motion for summary judgment to rebut any inference of an implied agreement to pay the stated amount" (*Sandvoss v Dunkelberger, supra* at 279)], when those objections are sufficiently specified (*see Elmo Mfg. Corp., v American Innovations, Inc.*, 44 AD3d 703 [2d Dept 2007]).

While plaintiff in this case has demonstrated that the firm mailed defendants thirty-four (34) itemized invoices over a period of six years, during which time defendants did

not object thereto, some of the e-mails submitted by plaintiff itself raise questions of fact, as well as issues of credibility, precluding this Court from finding that plaintiff has established its *prima facie* entitlement to summary judgment as a matter of law.

In what is an e-mail exchange between Mr. McGowan and Mr. McGrath on May 13, 2014, after the plaintiff law firm was relieved of its representation of defendants, Mr. McGrath writes in pertinent part

Tom [McGowan] i have asked you many times to sit down and square up but I see the way your firm works i have been way over charged and billed at an hourly rate that i did not agree too (sic). . . i was there for you when u needed me for your law suit when your house was all screwed up i went to bat for u and stuck by your side never asked you for a dime you got \$100,000 because of me representing you in that case, you still owe me \$6567.35 for your bathroom renovation . . . i do hope your cfo and you reconsider and give me my paper work, give me a credit for the work done on your home and the 2 meetings and 2 days in court for your lawsuit sorry for sounding out but i thought we were people that we could count on to watch each others backs.

In response, Mr. McGowan denies the truth of Mr. McGrath's statements, stating that

You received my Firm's bills for years and never complained or paid them - yet I still represented you multiple times in Court. . . I suggested settling but you insisted that you were owed money and it was a principal (sic) thing since [Dolan] chose to sue you and your wife individually. Your claim about my bathroom is laughable. If you want to propose an amount to pay on the bill do so and stop the bs.

In an earlier exchange in February 2013, Mr. McGrath expressed surprise at the amount of the bill by stating, "Wow, what can I say I guess we need to sit down and see how we can move forward I never thought for one Minute that this bill would escalate to as high as it is this is outrageous . . ." Mr. McGowan responded in pertinent part, "I don't understand your claimed surprise as to the amount due my Firm given that our invoices have been sent to you monthly . . . your statement to me that you did not bother reading any of my Firm's invoices over the past several years is, I hate to say, less than credible."

Clearly, there are sharp issues of fact and credibility evident upon review of plaintiff's own papers. Accordingly, plaintiff has failed to establish its *prima facie*

entitlement to summary judgment as a matter of law with respect to the fourth cause of action sounding in account stated. For the same reasons, plaintiff has failed to establish its *prima facie* entitlement to summary judgment as a matter of law with respect to its causes of action sounding in the reasonable value of plaintiff's services rendered and unjust enrichment (the second and third causes of action, respectively).

In view of the foregoing determination, it is unnecessary to determine whether the defendants' papers submitted in opposition are sufficient to raise a triable issue of fact (See *Levin v Khan*, 73 AD3d 991 [2d Dept 2010]; *Kjono v Fenning*, 69 AD3d 581[2d Dept 2010]).

Nonetheless, the Court notes that defendant Robert McGrath's affidavit in opposition serves to establish that there is an approximately fifteen-year relationship between McGrath and McGowan. According to McGrath, he has performed various home improvement work for McGowan, and even some work for one of McGowan's relatives. With respect to expert services provided to McGowan by McGrath, McGrath explains that Mr. McGowan purchased a new home that experienced problems shortly after the purchase. Mr. McGowan sued the home inspection engineer he had hired to inspect the property/home prior to Mr. McGowan's purchase of same. According to McGrath, plaintiff was the attorney of record in that action. In connection with that litigation, McGrath inspected McGowan's home and provided an expert affidavit as to his own findings. McGrath also states that he "appeared at the trial of the action [against the home inspector] and provided two days of expert testimony" on behalf of McGowan, at no cost to him. According to McGrath, McGowan was awarded \$100,000 at trial.

McGrath further states that, after the trial was concluded, McGowan asked McGrath to "do a partial renovation on a bathroom in his home, which [McGrath] completed at no cost to him." According to McGrath, he "performed these services because [McGowan] was a valued customer and friend and he led me to understand that if I ever needed assistance he would provide same to me as I had repeatedly provided to him."

Later in his affidavit, McGrath states that the aforementioned retainer agreement was faxed to him by McGowan, who said "that he needed to have it signed as a formality 'for the court.' He also noted that he would lower his legal fee to \$350.00 from \$385.00 . . . In addition, Mr. McGowan did not request an upfront retainer payment for the [Suffolk County matters], because he already owed me over \$6,500.00 for the work performed on his bathroom . . . He led me to believe that the \$6,500.00 bathroom renovation would be credited toward the bills and I relied upon his representation." "As per what I understood our agreement to be, the subject of invoices or payment was not

addressed in the six years of [plaintiff's] representation. Consistent with my belief as to our arrangement, the Defendants did not make a payment and neither [plaintiff] nor Mr. McGowan ever contacted me or my wife about payment." "The fact that I made no payments during the years 2007 through 2013 is consistent with my belief that I was not really being charged for the work and that Mr. McGowan was looking out for me as I had looked out for him in the past."

McGrath further states that McGowan promised that his accounting department at the firm would "at least remove interest from the bill." According to McGrath, "the fees sought exclusive of interest would be \$33,620.00. This of course does not take into account the \$6,500.00 credit for the bathroom or the credit that should be given for expert witness services rendered to Mr. McGowan and [plaintiff]." McGrath explains that he made a \$3,000 payment to plaintiff in 2013 because he "was afraid of Mr. McGowan's withdrawal from my representation. Finally, as a last ditch effort just prior to filing the order to show cause, my wife paid \$500.00."³

Had plaintiff been able to establish its *prima facie* entitlement to summary judgment as a matter of law, McGrath's affidavit would have raised issues of fact and credibility in any event sufficient to defeat plaintiff's motion.

The Court notes that Mr. McGowan's reply affidavit acknowledges that Mr. McGrath provided the expert witness testimony referred to, and performed the bathroom renovation, although Mr. McGowan contends that defendants are not entitled to a setoff/credit. Mr. McGowan also denies that plaintiff, or himself, waived accrued interest on the alleged outstanding balance.

The fact that one affidavit is met with another affidavit, which is then replied to by yet a third affidavit confirms to this Court that plaintiffs are not entitled to summary judgment on this record. Issues of fact and matters of credibility of the respective parties are to be determined by the trier of fact with respect to the causes of action alleged in the complaint.

The Court will next address that branch of plaintiff's motion to dismiss the counterclaim alleging legal malpractice.

In an action to recover damages for legal malpractice the plaintiff must prove each of the following three (3) essential elements: (1) the negligence of the attorney; (2) that such negligence was the proximate cause of the loss sustained (*see Prudential Insurance*

³McGrath does not address the May 2012 payment of \$172.50.

Company of America v Dewey, Ballantine, Bushby, Palmer & Wood, 170 AD2d 108 [1st Dept 1991]); and (3) that the plaintiff sustained damages as a result of the attorney's action or inaction (*Bauza v Livingston*, 40 AD3d 791 [2d Dept 2007]). Moreover, a plaintiff must establish that the defendant 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 that duty proximately caused the 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 attorney's negligence (*see Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]; *Davis v Klein*, 88 NY2d 1008, 1009-1010 [1996]; *Cohen v Wallace & Minchenberg*, 39 AD3d 691 [2d Dept 2007]).

A defendant moving for summary judgment in a legal malpractice action must present admissible evidence that the plaintiff cannot prove at least one of the essential elements of a legal malpractice cause of action (*see Levy v Greenberg*, 19 AD3d 462 [2d Dept 2005]; *Crawford v McBride*, 303 AD2d 442 [2d Dept 2003]).

The malpractice counterclaim alleges that plaintiff failed "to assess the availability of insurance coverage;" failed "to timely and properly assess the scope of [defendants' insurance] coverage;" and failed "to timely and properly file a notice of claim with the Advanced defendants' insurance carrier," with respect to the Suffolk County action brought by the Dolans.

Plaintiff contends that the counterclaim should be dismissed with prejudice because plaintiff assessed the availability of defendants' insurance coverage relative to the Suffolk County actions, and that defendants did not have an insurance policy that provided coverage for the Dolans' claims. The commercial insurance policy defendants rely upon for their claim does not name Advanced Remodeling and Management Corp. as an insured; it does not provide coverage to defendants' for the Dolans' breach of contract, fraud, unjust enrichment, and negligence claims; instead, it expressly excludes coverage for the Dolans' claims, as well as the legal fees defendants' incurred.

Firstly, the counterclaim interposed in this action is brought in the name of Advanced Remodeling & Management Corp. and Laura McGrath. Defendants provided plaintiff with a copy of the insurance policy they allege covered Advanced Remodeling & Management Corp., for the Dolans' claims. The "Named Insured" under that policy is "Advanced Construction Management," not defendant Advanced Remodeling & Management Corp. Advanced Construction Management is a distinct entity from Advanced Remodeling according to DOS records, and Advanced Construction Management's chief executive officer is listed as being Robert McGrath. Thus, the

policy relied upon by the defendants in this case as the basis for their malpractice claim provides no coverage to Advanced Remodeling & Management Corp., or to the McGrath defendants.

In any event, insurance policies do not impose a duty to indemnify or defend an insured for the insured's breach of contract (*see e.g., Mid-Hudson Castle, Ltd. v P.J. Exteriors, Inc.*, 292 AD2d 355, 356 [2d Dept 2002]; *Structural Building Products Corp. v Business Insurance Agency, Inc.*, 281 AD2d 617, 619 [2d Dept 2001] ["[t]he general rule is that a commercial general liability insurance policy does not afford coverage for breach of contract, but rather for bodily injury and property damage. To hold otherwise would render an insurance carrier a surety for the performance of its insured's work"]).

Also, there is no duty to defend or indemnify one against a claim of fraud. "[A]llegations pertaining to fraudulent misrepresentation . . . cannot be viewed as unintended or unexpected from [the insured's] standpoint" (*Syvertsen v Great Am. Ins. Co.*, 267 AD2d 854, 856 [3d Dept 1999]). Defendants' CGL policy could not cover the Dolans' claim that defendants defrauded them. If the allegations, on their face, do not bring the case within the coverage of the policy, there is no duty to defend or indemnify (*see Lionel Freedman, Inc. v Glen Falls Ins. Co.*, 27 NY2d 364 [1971]).

Commercial general liability policies do not cover construction defects (*see e.g., Poulos v U.S. Fidelity and Guaranty Company*, 227 AD2d 539, 540 [2d Dept 1996] ["since all of the appellants' causes of action [are] related to defects in the construction of the extension [to appellants' home], these causes of action fell within the exclusion and were properly exempted from coverage"]; *see also National Union Fire Insurance Company of Pittsburgh, Pa. v Turner Construction Company*, 119 AD3d 103, 106 [1st Dept 2014] ["faulty design, fabrication or installation – do not constitute 'occurrences' under a commercial general liability insurance policy"]; *Baker Residential Ltd. Partnership v Travelers Insurance Company*, 10 AD3d 586 587 [1st Dept 2004]; *George A. Fuller Company v United States Fidelity and Guaranty Company*, 200 AD2d 255, 259 [1st Dept 1994] ["[t]he [CGL] policy was never intended to provide contractual indemnification for economic loss to a contracting party because the work product contracted for is defectively produced"]). In *George A. Fuller Co., supra*, the Court stated that, "[t]o interpret the policy as [covering the insured's work] would transform [the insurer] into a surety for the performance of [the insured's] work."

Paragraph 1a of the submitted policy provides:

We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage"

to which this insurance applies . . . However, we will have no duty to defend the insured against any “suit” seeking damage for “bodily injury” or “property damage” to which this insurance does not apply.

Paragraph 1b continues, “[t]his insurance applies to ‘bodily injury’ and ‘property damage’ only if: (1) the ‘bodily injury’ or ‘property damage’ is caused by an ‘occurrence’ . . .” (*Id.*).

The complaint does not allege that any “property damage” was caused by an “occurrence,” as defined by the policy. The policy defines property damage as: “a. [p]hysical injury to tangible property, including all resulting loss of use of that property,” or “b. [l]oss of use of tangible property that is not physically injured” (Policy, Section V, ¶17, p. 41). An occurrence is defined as “an accident, including continuous or repeated exposure to substantially the same general harmful condition” (*id.*)

There is no allegation in the Dolan complaint that would qualify as a claim for “property damage” as a result of an “occurrence.” An “occurrence” resulting in “property damage” under a CGL policy was not plead where “the asserted claims [arose] out of a contract dispute between the insured, a general contractor, and . . . the property owner” (*George A. Fuller C.*, *supra* at 259). The *Fuller* Court also stated that “[t]hese allegations do not involve damage caused by a “continuous or repeated exposure to substantially the same general harm condition,” but rather intentional cost-saving or negligent acts only effecting [plaintiff’s] economic interest in the building” (*Id.*).

Paragraph 2, (j)(5) of the policy excludes property damage to: “[t]hat particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the ‘property damage’ arises out of those operation.” Paragraph 2, (j)(6) excludes property damage to: “[t]hat particular part of any property that must be restored, repaired or replaced because ‘your work’ was incorrectly performed on it.” Analyzing an identically worded exclusion, the *George A. Fuller* Court held that both exclusions applied where the allegations set forth in the complaint related to defects in the construction of the building (*George A. Fuller Co.*, *supra* at 260).

Coverage would also be excluded under exclusion 1, “Damage to Your Work,” the construction management errors and omissions exclusion, and professional liability exclusion. Paragraph 2, exclusion 1, provides that “This coverage does not apply to: . . . ‘[p]roperty damage’ to ‘your “work” arising out of it or any part of it and included in the ‘products-completed operations hazard.’”

Similar to Paragraph 2 exclusions, the “Damage to Your Work” exclusion applies to “property damage” caused by the work performed. In the Dolan Action, defendants’ “work” was building the Dolans’ residence. The exclusions for construction management errors and omissions and professional liability are also applicable. Both exclusions overlap and exclude coverage where a construction manager’s architect fails to properly prepare drawings. The Dolans alleged that defendants’ architects improperly prepared the drawings for the residence, resulting in the residence being built too tall, and with the wrong windows.

Moreover, the insurance policy upon which defendants’ rely does not cover the legal fees defendants’ incurred in bringing the mechanic’s lien action against the Dolans, in connection with the same residence .

When there is nothing left to be resolved at trial, the claim should be summarily denied (*Andre v Pomeroy supra* 361, 364). Plaintiff has made a showing that a more favorable outcome would not have been obtained but for its alleged negligence, based upon the terms of the insurance policy, thereby establishing its *prima facie* entitlement to summary judgment as a matter of law (*Davis v Klein*, 88 NY2d 1008; *Goldfine v Sichenzia*, 73 AD3d 854).

In opposition, the defendants fail to rebut plaintiff’s *prima facie* showing the CGL policy does not cover any of the claims asserted by the Dolans against the defendants in the Suffolk action, nor do defendants raise a triable issue of fact as to the policy’s absence of coverage for attorneys’ fees. Notably, there is no admissible evidence from defendants’ insurance company included in defendants’ opposition papers rebutting plaintiff’s *prima facie* case of non-coverage. Defendants’ passing reference to another matter in which Advanced Construction Management Corp. was sued in Suffolk County is unpersuasive and insufficient to raise a triable issue of fact. Accordingly, the counterclaim sounding in malpractice is dismissed.

It is hereby determined that Motion Sequence 1 is denied in its entirety, and that Motion Sequence 2 is denied as to summary judgment on the complaint, but is granted as to dismissal of the counterclaim.

The foregoing constitutes the Order of this Court.

Dated: June 29, 2016
Mineola, N.Y.

ENTERED

JUL 05 2016

NASSAU COUNTY
COUNTY CLERK’S OFFICE


J. S. C.

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