SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA **PART** 39
Justice

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ARGA CAPITAL, INC., ONLINE MORTGAGE GROUP LLC

Plaintiff,

- v -

KREINER & KREINER LLC,

Defendant.

INDEX NO. 651649/2014

MOTION DATE 3/3/2017

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 68, 69, 70, 71, 72, 73

were read on this application to/for Judgment - Summary .

Upon the foregoing documents, it is

In this action for, *inter alia*, legal malpractice, defendant Kreiner & Kreiner LLC ("K&K") moves for summary judgment against plaintiffs Arga Capital, Inc. ("Arga") and Online Mortgage Group LLC n/k/a Nue Resource Funding, LLC ("OMG") (collectively "Plaintiffs").

Arga is a Delaware corporation authorized to do business in New York and Alexander Gildengers ("Gildengers") is its founder and sole shareholder. In April 2011, Arga hired K&K to represent it in connection with the creation of OMG, an online

mortgage broker and lender.[1] Arga and K&K entered into a Retainer Agreement on April 15, 2011. After assisting Arga with setting up OMG, K&K continued to represent Arga and OMG on a variety of matters until July 11, 2013.

According to Gildengers, in early 2013 OMG hoped to increase its growth substantially through a capital raise, merger, or other business combination. Gildengers avers that he discussed different business options with Peter Kreiner ("P. Kreiner") and received legal advice about possible transactions, including the transaction with Equity Loans LLC ("Equity") that is the subject of this lawsuit.[2]

In late June or early July 2013, Philip Mancuso ("Mancuso"), OMG's Chief Executive Officer, commenced negotiations with Eddie Perez ("Perez") of Equity for "Equity to acquire the employees and operations of OMG (the 'Transaction')." Plaintiffs sought to wind down OMG's call center business and reconstitute it within Equity. Pursuant to the Transaction, Equity was to assume OMG's office space lease and hire certain of OMG's employees.

In a conference call on July 3, 2013, Gildengers, Mancuso and Perez discussed the idea of moving OMG employees to Equity before the parties signed and delivered a

[1] On January 1, 2014, Gildengers sold all of his individual interest in OMG and Arga sold 80% of its interest in OMG to Anthony Giordano and Peter Kizenko. In February 2014, the name of OMG was changed to Nue Resource Funding, LLC.

[2] In his deposition testimony, P. Kreiner confirms this, stating that "since about January [2013], Alex [Gildengers] had been asking about transactions, whether increasing the company or selling the company."

contract memorializing the proposed Transaction. During the call, OMG and Equity reached a general, verbal agreement concerning the Transaction.

It is undisputed that as of July 3, 2013, K&K represented both OMG and Equity and helped to create the structure for the Transaction. Plaintiffs allege that they were aware of the concurrent representation but that K&K neither advised OMG that this would create a conflict of interest nor requested a conflict waiver.

OMG and Equity did not memorialize the Transaction deal terms in a letter of intent. Instead, Seth Kreiner ("S. Kreiner") of K&K drafted a Mutual Nondisclosure and Non-Circumvention Agreement ("NDA"). S. Kreiner sent a copy of the NDA via email to Perez on July 5, 2013 and testified at his deposition that he intended for Perez to forward the NDA to OMG.

Subsequently, Gildengers and Mancuso had a phone conversation with K&K regarding the NDA (the "July NDA Call"). During the July NDA Call, and when K&K was drafting and revising the NDA, both Gildengers and Mancuso believed that K&K represented OMG.[3] In his deposition testimony about the July NDA Call, S. Kreiner stated that he didn't recall specifically discussing with Gildengers and Mancuso the issue of potential conflicts.

Gildengers testified that, because he was concerned that OMG's interests were not adequately protected prior to the close of the Transaction, he requested (during the July

[3] S. Kreiner maintains that he told Gildengers and Mancuso from the outset that K&K's role in the Transaction was solely as a representative of Equity. However, in an email sent to Perez, S. Kreiner stated "we represent omg as well so don't want an issue."

NDA Call) a mechanism to value the employees that would transfer from OMG to Equity, including segregating the revenue earned by those employees into a separate profit and loss statement, splitting the revenue equally among OMG and Equity, and allowing OMG to re-hire the employees.

S. Kreiner testified that he did not discuss with Gildengers and Mancuso the repercussions of transitioning employees from OMG to Equity prior to a final agreement between the parties. According to Plaintiffs, S. Kreiner recommended merely revising the NDA and he assured Gildengers that an accounting of revenue would provide sufficient protection. S. Kreiner also directed Plaintiffs to prepare employment packages to facilitate the transfer of OMG employees.

In an email to Gildengers and Mancuso, dated July 9, 2013, S. Kreiner wrote:

> Thanks for the calls earlier. As discussed, I have made the changes to the NDA to address the issues of the employees. The changes are contained in section 6 under subsection B, and addresses everything as to moving over [loan officers], issues of re-employment, and addressing request for accounting of revenue to be included at later date in finalized Transaction.

The revised NDA was signed by OMG and Equity on July 9, 2013.[4] Section 6(b) of the revised NDA states:

> [I]n furtherance of facilitating the Transaction that certain mortgage loan originators, who are currently employees of OMG will be offered employment with EQUITY prior to the consummation of the Transaction. Each such mortgage loan originator that accepts employment with EQUITY will in turn become an employee of EQUITY… OMG will have no further obligation to any of the mortgage loan originators that accept employment with EQUITY. The parties also acknowledge that should the

[4] Perez signed the NDA on behalf of Equity. However, there is no copy of the NDA with a signature on behalf of OMG. Mancuso testified that although he believes he signed the NDA, he "cannot say beyond a shadow of a doubt that that is correct."

> Transaction not be consummated that nothing in this Agreement shall be deemed a waiver to the extent that OMG shall not be permitted to offer to re-employ any mortgage loan originator that was previously in its employ and EQUITY conversely agrees that OMO is permitted to offer such re-employment. Additionally, OMG shall be entitled to an accounting of all revenue generated by the employment of the mortgage loan originators and each party acknowledges that all revenue generated shall be considered in facilitating the Transaction.

All OMG's employees except one transitioned to Equity: four employees left OMG between July 9 and July 15, 2013, and an additional three OMG employees left between July 16 and August 1, 2013. Mancuso was among the latter group.

On July 11, 2013, Gildengers met with P. Kreiner to discuss the Transaction (the "July 11th Meeting"). At his deposition, Gildengers noted that at the July 11th Meeting, P. Kreiner for the first time told him that K&K could no longer act as OMG's counsel; that OMG should get separate counsel "because of a potential conflict of interest;" and that K&K would continue to represent Equity.

Gildengers testified that he was aware that K&K represented both OMG and Equity but was "surprised and shocked" by P. Kreiner's disclosure about a conflict.[5] Following the July 11th Meeting, P. Kreiner sent an email, also dated July 11, 2013, to Gildengers with contact information for attorney Wayne Watkinson ("Watkinson") of Levy & Watkinson, P.C. ("L&W"). Plaintiffs retained L&W as counsel the same day.

[5] P. Kreiner testified that he did not recommend that OMG obtain different counsel but that he believes that it was S. Kreiner's recommendation.

After hiring OMG's employees, Equity did not take any additional steps in furtherance of the Transaction, including assuming OMG's lease. In fact, on December 13, 2013, S. Kreiner informed Watkinson, via email, that:

> Equity has elected not to enter into the sublet with OMG for the office space located in Fairfield and we would advise that OMG should work to mitigate any damages immediately. Second, as also discussed, circumstances have unfortunately changed and not for the better. Consequently, we will have to discuss working out an amicable resolution between Equity and OMG (Alex) taking into account Equity's change in circumstances. Third, if a resolution cannot be reached then as discussed we will both have to recuse ourselves because of our respective relationships with the parties herein, but of course any conversations, etc., that we have had to date are protected as being in furtherance of settlement negotiations, [sic]

After the collapse of the Transaction, Equity did not agree to a settlement to unwind the Transaction, and OMG did not offer re-employment to any OMG employee who transferred to Equity. Plaintiffs allege that OMG could not offer re-employment because the employee transfer deprived it of the revenue necessary to re-establish the regulatory requirements and hire staff.

OMG claims that because of the failed Transaction and, in particular, the transfer of OMG employees to Equity, "OMG's business was destroyed and its annual net income went from approximately $350,000 to less than zero." Plaintiffs filed the complaint in this action in May 2014, asserting claims for breach of fiduciary duty and legal malpractice and alleging that K&K: 1) did not inform them of its conflict of interest; 2) failed properly to advise Plaintiffs, and 3) negligently drafted an NDA that lacked significant and material legal protections that Plaintiffs expected the agreement to provide, based on K&K's prior assurances.

Now that discovery is concluded and a note of issue has been filed, K&K moves for summary judgment dismissing the complaint.

Discussion

"To succeed on a motion for summary judgment dismissing the complaint in a legal malpractice action, the defendant must present evidence in admissible form establishing that the plaintiff is unable to prove at least one essential element of his or her cause of action alleging legal malpractice." *Scartozzi v. Potruch*, 72 A.D.3d 787, 789-790 (2d Dept. 2010). If the movant makes a *prima facie* showing, then "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *Grasso*, 50 A.D.3d at 545 (citation omitted).

Legal Malpractice

To sustain a claim for legal malpractice, a plaintiff must demonstrate that the law firm 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 this duty proximately caused plaintiff to sustain actual and ascertainable damages." *Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP*, 26 N.Y.3d 40, 49 (2015); *Dombrowski v. Bulson*, 19 N.Y.3d 347, 350 (2012).

K&K argues that Plaintiffs' legal malpractice claim must be dismissed because: 1) K&K's alleged failure to comply with Rule 1.7 of the New York Rules of Professional Conduct did not constitute malpractice; 2) K&K's preparation of the NDA did not violate the applicable standard of care because Plaintiffs already knew of the economic risk

associated with the employee transfer prior to speaking with K&K and K&K did not have an obligation to warn Plaintiffs that OMG was making an economically risky decision; and 3) Plaintiffs cannot establish that K&K's actions were the "but for" cause of OMG's damages.

In opposition, plaintiffs argue that K&K's simultaneous representation of OMG and Equity constituted legal malpractice because it violated Rule 1.7 of the Rules of Professional Conduct and resulted in K&K's failure to "zealously" advocate on OMG's behalf when it drafted the NDA. Plaintiffs further allege that it was legal malpractice not to advise OMG to refrain from transferring employees before completion of the Transaction.

Rule 1.7(b)(4) of the New York Rules of Professional Conduct states:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that…
>
> (1) the representation will involve the lawyer in representing differing interests.
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> ***
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> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
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> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
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> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing.

K&K correctly states that violation of a disciplinary rule, without more, is not sufficient to support a legal malpractice claim. *Fletcher v. Boies, Schiller & Flexner LLP*, 140 A.D.3d 587, 587 (1st Dept. 2016). However, Plaintiffs here allege more than just a violation of New York Rule of Professional Conduct 1.7. Plaintiffs allege that because of the conflict, K&K negligently drafted the NDA and failed to give advice that an ordinary lawyer would give in the same circumstances, leading to OMG's damages.

On this issue, the parties submitted conflicting expert opinions. K&K proffered the expert affidavit of Nicole Hyland ("Hyland") who concluded that K&K's concurrent representation of OMG and Equity between July 3, 2013 and July 11, 2013 did not violate the applicable standard of care. According to Hyland, assuming K&K represented both OMG and Equity during the eight-day period in question, including the drafting of the NDA, such joint representation "would have involved K&K in representing parties with 'differing interests'" under New York Rule of Professional Conduct 1.7(b)(4).

Hyland opines, however, that parties could consent to the conflict, as K&K was "capable of providing (and did provide) both clients with competent and diligent representation in connection with drafting the NDA." Further, Hyland states that K&K did obtain OMG's "informed consent" to the joint representation because it knew of the joint representation and did not object to it, even though there is no record that OMG provided written confirmation of its consent.[6]

[6] Hyland concedes that "[t]he fact that there is no clear writing evidencing OMG's consent regarding the drafting of the NDA may technically violate the portion of Rule 1.7(b)(4) that requires consent to be 'confirmed in writing'" but asserts that the "absence

With respect to the NDA, Hyland states that the complained of advice – that OMG employees could transition to Equity pre-Transaction closing -- was not "unacceptable" from a legal standpoint, and even if it was an economically risky decision, K&K did not have a duty to warn OMG not to make risky business decisions. Hyland also concludes that OMG's awareness of the risk associated with allowing its employees to move to Equity pre-Transaction closing, "negates any causal link between K&K's work on the NDA… and OMG's purported damages."

Plaintiffs' expert, Judge Robert K. Holdman ("Holdman") states that K&K's representation of OMG and Equity clearly put the firm in a position of simultaneously representing differing interests because OMG, as a seller of assets, sought to maximize the assets' purchase price while Equity, as a buyer of assets, sought to minimize the purchase price. According to Holdman, the parties could not consent to the conflict because K&K could not competently and diligently represent both the buyer and seller in the proposed Transaction. Holdman also posits that there was not "informed consent" to the joint representation because K&K did not disclose the conflict to OMG until July 11th, K&K failed adequately to explain the nature of the conflict or the foreseeable risks, and OMG did not agree to waive the conflict of interest because a failure to object does not equal informed consent.

Holdman further states that K&K did not competently and diligently represent OMG when drafting the NDA, as evidenced by the fact that it failed to inform OMG, as

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of written confirmation does not, by itself, constitute legal malpractice or breach of fiduciary duty."

an ordinary, non-conflicted lawyer would, that the transfer of employees before the Transaction was finalized would risk that OMG might not be compensated for its revenue stream and that the transfer of OMG's biggest asset would not "increase its chances of entering into a final transaction agreement with Equity." Holdman also states that the NDA was negligently drafted because it did not address OMG's concerns about protecting its interests and appears to favor Equity.[7] Lastly, Holdman opines that K&K's "inappropriate and unreasonable" legal advice to OMG that it would be protected by the NDA caused OMG's loss of revenue stream.

The conflicting expert opinions of Hyland and Holdman raise issues of fact as to whether: 1) there was informed consent to the joint representation; 2) K&K met the applicable standard of care and 3) the causal link between K&K's work on the NDA and OMG's damages. Accordingly, I deny K&K's motion for summary judgment as to the legal malpractice claim. *See Silva v. Worby, Groner, Edelman, LLP*, 54 A.D.3d 634, 634 (1st Dept. 2008) (finding that lower court erred in granting summary judgment in legal malpractice action because the "conflicting deposition testimony and affidavits submitted by the parties present a material issue of fact…")

Breach of Fiduciary Duty

Where a claim for breach of fiduciary duty is "premised on the same facts and seek[s] the identical relief sought in the legal malpractice cause of action, [it] is redundant and should be dismissed." *Weil, Gotshal & Manges, LLP v. Fashion Boutique*,

[7] For example, Holdman notes that the NDA did not include language requiring Equity to negotiate in good faith or use its best efforts to finalize the Transaction.

10 A.D.3d 267, 271 (1st Dept. 2004) (citing *Estate of Nevelson v. Carro, Spanbock, Kaster & Cuiffo*, 290 A.D.2d 399, 400 (2002); *Murray Hill Invs. v. Parker Chapin Flattau & Klimpl, LLP*, 305 A.D.2d 228, 229 (2003)).

Here, plaintiffs allege that K&K violated its duty of loyalty by failing to "fully inform OMG of K&K's conflict of interest," violating New York Rule of Professional Conduct 1.7, promoting Equity's interests and using OMG's confidential/proprietary information for Equity's benefit. Both the breach of fiduciary duty claim and the legal malpractice claim assert that K&K should not have advised OMG that it was acceptable to allow Equity to hire OMG employees prior to the finalization of the Transaction. In addition, the two causes of action seek compensatory damages "in an amount in excess of $25,000.00."[8]

In an attempt to differentiate the breach of fiduciary duty claim from the legal malpractice claim, Plaintiffs allege that K&K also improperly disclosed OMG's confidential information to Equity. Plaintiffs note that "[t]here was no testimony as to whether K&K disclosed OMG's confidential information to Equity," but assert that "OMG is not required to affirmatively prove disclosure at this stage."[9] A conclusory

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[8] Although the complaint's prayer for relief section only requests damages "in an amount in excess of" $25,000, in its motion in opposition to summary judgment, Plaintiffs state that "[t]he legal malpractice claim asserts that OMG lost approximately $350,000 as a result of K&K's malpractice."

[9] Plaintiffs rely on *Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 16 Misc.3d 1051 (NY Sup. Ct. 2007), *aff'd as modified*, 56 A.D.3d 1 (1st Dept. 2008) to support its position that the misuse of confidential information allegation renders the breach of fiduciary duty claim non-duplicative of the legal malpractice claim. *Ulico* is factually distinguishable and involved specific, material, confidential information about

allegation that K&K disclosed OMG's confidential information, without any factual support, cannot save the breach of fiduciary duty claim from dismissal, especially because absent this bare contention, the remaining allegations supporting the breach of fiduciary duty claim are the same as in the legal malpractice claim. The crux of both claims centers on K&K's simultaneous representation of OMG and Equity during the eight-day period.

Because the claim for breach of fiduciary duty arises from the same set of facts as its legal malpractice claim, I dismiss it as duplicative. *Brookwood Cos., Inc. v. Alston & Bird LLP*, 146 A.D.3d 662, 669 (1st Dept. 2017) (dismissing a breach of fiduciary duty claim because it was duplicative of the legal malpractice claim in that it was "based on the same facts and allegations as the legal malpractice cause of action").

In accordance with the foregoing, it is

ORDERED, that defendant Kreiner & Kreiner LLC's motion for summary judgment against plaintiffs Arga Capital, Inc. ("Arga") and Online Mortgage Group LLC n/k/a Nue Resource Funding, LLC defendant D'Agostino Supermarkets, Inc. is denied as to the legal malpractice claim and granted as to the breach of fiduciary claim; and it is further

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plaintiff's business that was acquired by defendant law firm in its role as claims counsel for plaintiff and was forwarded to a competitor under a confidentiality agreement. *Ulico*, 16 Misc.3d at 1061. Here, there is no showing that material, confidential information was shared.

ORDERED that counsel are directed to appear for a conference in room 208, 60 Centre Street, on March 21, 2018, at 2:15 PM.

This constitutes the decision and order of the Court.

2/23/2018
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

- [ ] CASE DISPOSED
- [ ] GRANTED
- [ ] SETTLE ORDER
- [ ] DO NOT POST
- [ ] DENIED
- [X] NON-FINAL DISPOSITION
- [X] GRANTED IN PART
- [ ] SUBMIT ORDER
- [ ] FIDUCIARY APPOINTMENT
- [ ] OTHER
- [ ] REFERENCE