Furgang & Adwar, LLP v S.A. Intl., Inc.
2018 NY Slip Op 31151(U)
June 6, 2018
Supreme Court, New York County
Docket Number: 651192/2014
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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FURGANG & ADWAR, LLP,
Plaintiff,

- against -

S.A. INTERNATIONAL, INC.,
Defendant.

Index No. 651192/2014
Decision and Order
Mot. Seq. 005

--X

FURGANG & ADWAR, LLP,
Plaintiff,

- against -

DAN PURJES, JOSEPH WRONA, and SA INTERNATIONAL INC.,
Defendants.

Index No. 651478/2014

--X

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Furgang & Adwar LLP ("F&A"), commenced the above action (bearing index number 651192/2014) on April 17, 2014 by way of motion for summary judgment in lieu of complaint. The Court denied the motion, and F&A proceeded to file a complaint on October 18, 2014 ("First Action"). The complaint seeks payment of unpaid invoices for legal services rendered to defendant, S.A. International, Inc., ("SAI") in connection with a trademark dispute between SAI and SAI's competitor. On December 15, 2014, SAI interposed an answer and third-party complaint alleging counterclaims against F&A and claims against third-party defendant Philip Furgang, Esq.

SAI's first counterclaim alleges that F&A and Furgang breached their fiduciary duty during their representation of SAI in the trademark dispute. Specifically, SAI claims that F&A and Furgang *inter alia* overcharged for work allegedly performed approximating $300,000 including costs. As a second counterclaim, SAI alleges that F&A and Furgang committed legal malpractice. The reason being that F&A and Furgang *inter alia* incorrectly assessed the strength of SAI's position in the trademark litigation, incorrectly assessed the strength of a motion to dismiss filed by SAI's adversary and competitor, advised against

negotiation and settlement efforts, and "embroil[ed] SAI in costly litigation." (SAI Answer at 15) SAI adds that "But for Furgang's[1] departure from the ordinary standards of professional conduct and breach of Furgang's fiduciary duties, SAI would not have become embroiled in a costly lawsuit and would have benefitted by saving more than $300,000 in legal fees." (SAI Answer at 15) As a third counterclaim, SAI alleged that that F&A and Furgang breached its contract with SAI by *inter alia* pursuing a costly and aggressive litigation strategy that avoided settlement, charging exorbitant amounts that were not justified, and causing SAI to sustain losses in the amount of $300,000. As a fourth counterclaim, SAI alleges that F&A and Furgang breached the implied covenant of good faith and fair dealing by: pursuing resolution of the trademark litigation in a reckless manner that increased expenses and destroyed SAI's right to receive the fruits of the contract. This claim especially holds according to SAI because F&A's agreement with SAI to pursue the trademark litigation in a matter that "did not cost a large sum of money constituted a contract." (SAI Answer at 16)

As a fifth counterclaim, SAI alleges that F&A and Furgang committed fraud. Allegedly, on February 19, 2013, F&A and Furgang sent SAI an invoice for $10,758.00. However, when F&A and Furgang sent another invoice on March 22, 2013 for $25,399.00, it "included charges from dates that also appeared on Furgang's February 19, 2013 invoice." (SAI Answer at 11) Similarly, F&A and Furgang's "June 13, 2013 invoice also included charges from dates that also appeared on Furgang's March 22, 2013 invoice." (SAI Answer at 11) SAI additionally claims that this pattern ensued in the subsequent months. Accordingly, SAI claims that F&A's invoices contained material misrepresentations regarding the work actually performed on behalf of SAI and the amount of time spent by attorneys on behalf of SAI. Additionally, SAI asserts that F&A and Furgang were aware of the misrepresentations contained within the invoices and "provided SAI with such invoices with the intent to deceive SAI into paying larger sums of money to Furgang than the actual work performed by Furgang would justify." (SAI Answer at 16) The Answer further states that, "SAI reasonably relied upon the accuracy and truthfulness of Furgang's misrepresentations in its invoices." (SAI Answer at 16) Lastly, SAI avers that "[a]s a direct result of Furgang's misrepresentation, SAI was deceived into paying more money to Furgang that Furgang was legitimately entitled to based upon the services that Furgang actually rendered on SAI's behalf." (SAI Answer at 16) SAI's ultimate prayer for relief seeks an amount "not less than $300,000." (SAI Answer at 18)

[1] In its pleading, SAI defines Furgang to mean F&A and Furgang individually. (SAI Answer at 6)

F&A moved to dismiss the counter-claims and third-party action by notice of motion on December 15, 2014. This motion was marked "Motion Sequence 003." F&A *inter alia* argued for the dismissal of the legal malpractice counterclaim on the grounds that the underlying trademark litigation was dismissed in SAI's favor. Additionally, F&A argued that the counterclaim should be dismissed because it is only based on the excessive attorney fees. F&A also asserted that the counterclaims for breach of fiduciary duty, breach of good faith and fair dealing, and fraud are duplicative of the breach of contract counterclaim and therefore should be dismissed. In support, F&A noted that these counterclaims are based on the same set of facts as the breach of contract counterclaim and seek damages that are not separate or distinct. F&A however did not move to dismiss the third counterclaim for breach of contract as indicated by the preliminary statement wherein it provides that F&A seeks an order "dismissing count one, two, four and five" of SAI's counterclaims. (SAI's Memorandum of Law at 2) SAI lastly moved for "other and further relief as this Court deems just and proper." (SAI's Memorandum of Law at 2)

On May 14, 2014, F&A commenced a separate action under Index Number 651478/2014 against SAI, Dan Purjes ("Purjes") and Joseph Wrona ("Wrona") for libel per se, quantum meruit, anticipatory breach of contract, and civil conspiracy among other things ("Second Action"). SAI, Purjes and Wrona moved to dismiss the Second Action on or about October 30, 2014. This motion was also marked "Motion Sequence 003."

On August 28, 2015, this Court heard oral argument. F&A stated its appearance on the record as "Attorneys for Furgang & Adwar L.L.P. and Philip Furgang." (F&S's exhibit I at 2) F&A presented its oral argument and at times, Philip Furgang himself joined in the oral argument. Indeed, F&A addressed a portion of Motion Sequence 003 from the First Action but did not draw the Court's attention to any irregularities with the motion or oral argument. With respect to the First Action, this Court dismissed the claims in the third-party complaint against Furgang individually. (F&A's exhibit I at 40) As to the Second Action, this Court dismissed the claims for libel per se, anticipatory breach of contract and civil conspiracy. (F&A's exhibit I at 37) Thereafter, this Court entered a written order that provides,

> "After oral argument, and for the reasons stated on the record Philip Furgang's motion to dismiss counterclaims as against him individually is granted . . . The remainder of this action shall be consolidated with 651478/2014 under this index number."

(F&A's exhibit J)

Presently before the Court is F&A's motion pursuant to CPLR 2221 (d) and (e) seeking leave to renew and reargue its motion to dismiss. F&A also seeks to dismiss SAI's counterclaims pursuant to CPLR 3211 based on documentary evidence and for failure to state a claim. (CPLR §§ 3211[a][1]; [7].) F&A argues that although this Court rendered a decision as to F&A's motion to dismiss the claims against Furgang individually, it did not adjudicate the motion to dismiss the counterclaims against F&A. Therefore, F&A maintains that the instant Order to Show Cause does not request relief that has already been adjudicated and reargument is proper. Additionally, F&S asserts that "No notice of entry with respect to Justice Rakower's August 28, 2015 decision has been served and thus, the instant application . . . is timely." (affirmation of Skala at 5) F&A also argues that its counsel specifically retained for the First Action and not the Second Action, was not notified of the August 25, 2015 oral argument and this information serves as new facts warranting renewal.

F&A argues that SAI's counterclaims one, three, four, and five must be dismissed because they are duplicative of SAI's legal malpractice claim. (affirmation of Skala at 8) The purported breaches and damages for the malpractice claim are allegedly identical to those of the other counterclaims. (affirmation of Skala at 6) Additionally, F&A asserts that SAI's counterclaim for breach of contract must be dismissed because it fails to cite the provisions of the contract that were breached. F&A also notes that it is contradicted by the engagement letter between the parties dated January 21, 2013. (F&A's exhibit K) Lastly, F&A argues that the cause of action for fraud must be dismissed because it was plead without particularity. Indeed, F&A maintains that SAI's fraud counterclaim is "based upon the conclusory allegation that the invoices contained material misrepresentation regarding . . . the work actually performed by Furgang . . . and . . . the amount of time spent by attorneys with Furgang performing tasks on behalf of SAI." (affirmation of Skala at 10) F&A further argues that the malpractice claim must be dismissed because SAI failed to plead facts tending to show that but-for F&A's conduct, SAI would have been successful in the underlying litigation. Again, F&A argues that the malpractice is solely based on the excessive fees.

Standards

Renewal and Reargument

CPLR 2221 provides,

> (d) A motion for leave to reargue:
>
> 1. shall be identified specifically as such;
>
> 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and
>
> 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals.
>
> (e) A motion for leave to renew:
>
> 1. shall be identified specifically as such;
>
> 2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
>
> 3. shall contain reasonable justification for the failure to present such facts on the prior motion.

"[R]egardless of statutory time limits concerning motions to reargue, every court retains continuing jurisdiction to reconsider its prior interlocutory orders during the pendency of the action." (*Liss v Trans Auto Systems, Inc.*, 68 NY2d 15, 20 [1986].) Indeed, "renewal/reargument [is] an appropriate way to dispel any confusion as to which issues ha[ve] implicitly been resolved" and "which issues ha[ve] been left for trial . . ." (*Lindgren v New York City Housing Authority*, 269 AD2d 299, 302 [1st Dept 2000].)

However, "[r]eargument does not provide a party 'an opportunity to advance arguments different from those tendered on the original application', and renewal 'is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation." (*Rubinstein v Goldman*, 244 AD2d 328, 328-329 [1st Dept 1996].) Stated otherwise, "[r]eargument is not available where the movant seeks only to argue 'a new theory of liability not previously advanced.'" (*DeSoignies v Cornasesk House Tenants' Corp.*, 21 AD3d 715, 718 [1st Dept 2005].) Accordingly, in *Grosso Moving & Packing Co., Inc. v Damens*, the First Department stated, "To the extent that part of a motion seeking leave to reargue raises arguments not raised in the previous motion," it "might be considered a new and unrelated motion" and therefore is "precluded by the single motion rule of CPLR 3211(e), since defendant already made one preanswer motion to dismiss under CPLR 3211(a)." (*Grosso Moving & Packing Co., Inc. v Damens*, 233 AD2d 128, 128 [1st Dept 1996].)

Failure to State a Cause of Action: Generally

CPLR 3211 (a) (7) provides that, "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the pleading fails to state a cause of action . . ." Any motion made pursuant to CPLR 3211, requires the court to give the pleadings a liberal construction and accept the facts alleged as true. (*Leon v Martinez*, 84 N.Y.2d 83, 87 [1994].) The court will accord plaintiff the benefit of every possible favorable inference to determine if the facts as alleged in the complaint fit within any cognizable legal theory. (*id.* at 87-88) Whether plaintiff can ultimately establish his allegations is not part of the calculus. (*EBCI, Inc, v Goldman. Sachs & Co.*, 5 N.Y.3d 11 [2005].) The Court's analysis of plaintiff's claims is "limited to the four corners of the pleading." (*Johnson v Proskauer Rose LLP*, 129 AD3d 59, 67 [1st Dept 2015].) "These guidelines apply . . . to a motion to dismiss for failure to state a cause of action under CPLR 3211 (a)(7)." (*id.*)

Failure to State a Cause of Action: Legal Malpractice

To sustain a cause of action for legal malpractice, the plaintiff must show that the 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 this duty proximately caused the client to sustain actual and ascertainable damages. (*Brookwood Companies, Inc., v Alston & Bird LLP*, 146 AD3d 662, 666 [1st Dept 2017].) "An attorney's conduct or inaction is the proximate cause of a plaintiff's damages if 'but for' the attorney's negligence 'the plaintiff would have

succeeded on the merits of the underlying action', or would not have sustained 'actual and ascertainable' damages." (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 50 [2015].) Accordingly, "the successful conclusion of the underlying action does not preclude the maintenance of a malpractice action where a claim is made that the defendant attorney's neglect increased litigation expenses." (76 NY Jur 2d, Malpractice § 2) Indeed, in *Skinner v Stone, Raskin & Israel* (724 F2d 264, 265 [2d Cir 1983]), the Court noted, "Whether appellant wins or loses in the [underlying] action, he still will be out of pocket for his expenses in opposing enforcement of the defective default judgment . . . If these expenses resulted from [the attorney's] negligence and were reasonably incurred, they should be recoverable." (*see also VDR Realty Corp. v Mintz*, 167 AD2d 986, 986 [4th Dept 1990]) (stating "Plaintiff VDR Realty Corp. may recover damages even though it was successful in the underlying action.")

Failure to State a Cause of Action: Breach of the Covenant of Good Faith and Fair Dealing

"Within every contract is an implied covenant of good faith and fair dealing." (*Aventine Inv. Mgmt., Inc. v. Canadian Imperial Bank of Commerce*, 265 A.D.2d 513, 513-514, [1st Dept 1999].) "This covenant is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement." (*id.* at 514). "For a complaint to state a cause of action alleging breach of an implied covenant of good faith and fair dealing, the plaintiff must allege facts which tend to show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff." (*id.* at 514) A claim for breach of the implied covenant of good faith and fair dealing is properly dismissed as duplicative of a breach of contract claim where both claims arise from the same facts. (*MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 87 A.D.3d 287, 297, [1st Dept 2011].) Stated otherwise, a counterclaim for breach of the implied covenant of good faith and fair dealing cannot be maintained where it is premised on the same conduct that underlies the breach of contract cause of action and is intrinsically tied to the damages allegedly resulting from a breach of the contract. (*MBIA Ins. Corp. v Merrill Lynch*, 81 AD3d 419, 419-420 [1st Dept 2011].)

Failure to State a Cause of Action: Breach of Fiduciary Duty

In *Ladera Partners, LLC v. Goldberg, Scudieri & Lindenberg, P.C.* (157 A.D.3d 467, 468 [1st Dept 2018]), the First Department stated that "[t]he breach of fiduciary duty claim alleges that defendants made excessive demands for attorneys' fees and billed excessively, and seeks a disgorgement of attorney's fees. Since this

claim is premised on the same facts and seeks the same relief as the breach of contract claim, it is duplicative of that dismissed claim."

Failure to State a Cause of Action: Fraud

"To state a cause of action for fraud, a plaintiff must allege a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury." (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003].) The plaintiff "need only provide 'sufficient detail to inform defendants of the substance of the claims.'" (*id.* at 121) Accordingly, in *Kaufman v Cohen* (307 AD2d 113, 120 [1st Dept 2003]), the First Department of the Appellate Division stated, "we disagree with the IAS court's holding that plaintiffs' fraud allegations failed to satisfy CPLR 3016(b) because they failed to specify the exact date, time, or the precise contents of [defendant's] misrepresentations, nor indicated how they came to rely on [defendant's] statements."

"A fraud claim asserted within the context of a legal malpractice claim 'is sustainable only to the extent that it is premised upon one or more affirmative, intentional misrepresentations – that is, something more egregious than mere 'concealment of failure' to disclosure [one's] own malpractice." (*Kaiser v Van Houten*, 12 AD3d 1012, 1014 [3d Dept 2004].) "In addition to establishing each element of fraud, plaintiff has the burden of proving that the alleged fraud 'caused additional damages, separate and distinct from those generated by the alleged malpractice.'" (*id.*) For instance, in *LaBrake v Enzien* (167 AD2d 709, [3d Dept 1990]), the Third Department held, "We find that Supreme Court erred in ruling that plaintiff stated a cause of action for fraud, separate and distinct from the cause of action for malpractice, because the measure of the damages sustained in each cause of action is essentially the same. Damages here would be the value of plaintiff's negligence claim."

Thereafter, in *Johnson v Proskauer Rose LLP* (129 AD3d 59 [1st Dept 2015]), the First Department affirmed the trial court's declination to dismiss plaintiffs' fraud claim as duplicative of the legal malpractice claim because "the former was founded upon allegations indicating something more than mere concealment of malpractice." (*id.* at 66) "The court found the fraud claim alleged independent, intentionally tortious conduct, particularly concerning Proskauer's failure to disclose its true relationship with TDG and that such conduct allegedly gave rise to separate and distinct damages from the malpractice claim." (*id.*)

The First Department noted that "Plaintiffs allege not only that defendants failed to adequately advise them with respect to the tax strategy. They also claim that Proskauer pressured them into the scheme because, at the outset, Proskauer's paramount concern was preserving its lucrative arrangement with TDG . . ." (*id.* at 69) In addition, the First Department stated that

> "the damages plaintiffs seek for the fraud and malpractice causes of action do not completely overlap with each other. Thus, the claims are not one and the same . . . Indeed, Proskauer's narrow focus on what each claim seeks in damages ignores . . . what the focus should be . . . that is, the essence of the claims. Here, the essences of the fraud and malpractice claims are sufficiently distinct from one another that the court properly did not invoke the duplicative claims doctrine."
>
> (*id.* at 70)

Duplicative Claims Doctrine

The Court of Appeals, citing to the First Department case of *Johnson v Proskauer Rose LLP*, (129 AD3d 59, 68 [1st Dept 2015]), has stated that "[t]he key to determining whether a claim is duplicative of one for malpractice is discerning the essence of each claim." (*Cortlandt Street Recovery Corp. v Bonderman,* 31 NY3d 30, 50 [2018].)

In *Johnson*, the plaintiffs were contacted by Proskauer Rose LLP ("Proskauer"), a law firm that had previously represented them in other matters. Proskauer informed the plaintiffs of a tax minimization strategy that would allow the plaintiffs to sell their stocks without incurring a large tax. To explain and implement this strategy, Proskauer introduced the plaintiffs to another Proskauer client, The Diversified Group, Inc ("TDG"). Proskauer informed the plaintiffs that this tax strategy, a shelter transaction, would likely not generate any gain or loss, or accrue any penalties if disallowed by the IRS. Proskauer also informed the plaintiffs that it had represented TDG in unrelated matters. Thereafter, the plaintiffs and Proskauer executed a retainer agreement providing that Proskauer would "continue to

represent TDG fully in unrelated matters notwithstanding [its] ongoing representation of [plaintiffs]," and that plaintiffs had waived "any conflict of interest" arising in connection with Proskauer's representation of TDG "in unrelated matters notwithstanding [its] ongoing representation of [plaintiffs]." (*Johnson v Proskauer Rose LLP*, 129 AD3d at 63) Upon receiving a request from the IRS to provide detailed information about the shelter transaction, the plaintiffs contacted Proskauer. However, Proskauer informed them that Proskauer was conflicted by its representation of TDG. The IRS ultimately declined to bless the transaction and instead assessed plaintiff's back taxes, penalties, and interest amounting to millions of dollars. The plaintiffs later became aware of a federal case in Massachusetts District Court wherein the District Court found that Proskauer attorneys had executed similar shelter transactions with other clients having "agreed in advance to provide favorable legal opinions in order to induce taxpayer-investor[s]." (*Johnson v Proskauer Rose LLP*, 129 AD3d at 64)

Subsequently, Plaintiffs commenced an action in New York State Supreme Court New York County asserting "causes of action . . . sounding in fraud, legal malpractice and unjust enrichment . . . [and seeking] recovery of legal fees, which they claimed were grossly excessive." (*id.*) Proskauer moved to dismiss and argued that the legal malpractice claim was time barred. (*id.* at 65) Similarly, it argued that the other claims were time barred based on the duplicative claims doctrine. (*id.*) Proskauer also asserted that even if the fraud claim survived, it did not give rise to punitive damages. (*id.*)

"The [trial] court . . . declined to dismiss the claim alleging that Proskauer's fee was excessive, since this claim . . . was distinct from the legal malpractice claim inasmuch as it did not relate to the quality or content of [Proskauer's] legal advice to plaintiffs." (*id.*) "For similar reasons, the court declined to dismiss plaintiffs' . . . cause of action for unjust enrichment, as it was predicated upon the same excessive fee claim, and was thus not duplicative of the legal malpractice arguments." (*id.*) The court also declined to dismiss plaintiffs' punitive damages claim because Proskauer "participated in a scheme that targeted hundreds of clients, notwithstanding their fiduciary duty to those clients, and that they did so strictly in the pursuit of profits and without full disclosure of the nature of their relationship to TDG." (*id.* at 66-67)

On appeal, the First Department provided that "[t]he excessive fee and unjust enrichment claims are also not duplicative of the malpractice claim." (*id.*) The

excessive fee claim is "stated regardless of the quality of the work performed, so long as a plaintiff can reasonably allege that the fee bore no rational relationship to the product delivered." (*id.*) The First Department added, "Here, plaintiffs did so, since they asserted that defendants collected a $425,000 fee for a 'cookie cutter' legal opinion." (*id.*) "By the same logic, the unjust enrichment claim, which is predicated on the excessiveness of the $425,000 fee, also properly survived the motion to dismiss." (*id.*)

Discussion

Renewal and Reargument Analysis

The instant Motion Sequence 005 is best categorized as a motion for leave to reargue because it is "based upon matters of fact . . . allegedly overlooked . . . by the court" insofar as F&A argues that this Court did not entirely adjudicate Motion Sequence 003 from the First Action. (CPLR 221 [d][2]) Although F&A also identifies Motion Sequence 005 as one for leave to renew, F&A fails to proffer "new facts not offered on the prior motion that would change the prior determination." (CPLR 2221[e][2]) Even if F&A's counsel specifically retained for the First Action and not the Second Action was not notified of the August 25, 2015 oral argument, F&A stated its appearance on the record as "*Attorneys for Furgang & Adwar L.L.P.* and Philip Furgang." (F&A's exhibit I at 2) Indeed, F&A addressed a portion of Motion Sequence 003 from the First Action during the August 25, 2015 oral argument. However, F&A did not draw the Court's attention to the fact that F&A intended for another law firm to present argument on that very motion, a fact it had knowledge of at the time. Even Furgang, who was present in the courtroom, and at times argued Motion Sequence 003 from the Second Action, did not address this matter. Accordingly, the Court declines to categorize Motion Sequence 005 as a motion to renew.

Regardless of F&A's argument that Motion Sequence 005 is timely (affirmation of Skala at 5), this Court "retains continuing jurisdiction to reconsider its prior interlocutory orders" with respect to Motion Sequence 003, "regardless of statutory time limits concerning motions to reargue." (*Liss v Trans Auto Systems, Inc.*, 68 NY2d 15, 20 [1986].) In accordance with *Lindgren v New York City Housing Authority*, Motion Sequence 005 to reargue is "an appropriate way to dispel any confusion as to which issues ha[ve] implicitly been resolved" and "which issues ha[ve] been left for trial . . ." (*Lindgren v New York City Housing Authority*, 269 AD2d 299, 302 [1st Dept 2000].)

However, F&A's motion for "[r]eargument does not provide [F&A] 'an opportunity to advance arguments different from those tendered on the original application.'" (*Rubinstein v Goldman*, 244 AD2d 328, 328-329 [1st Dept 1996].) In the original application brought by notice of motion on December 15, 2014, F&A did not move to dismiss SAI's third counterclaim for breach of contract, however F&A now argues that the breach of contract counterclaim must be dismissed. (F&A's exhibit K) Indeed, in the original application F&A argued that the counterclaims for breach of fiduciary duty, breach of good faith and fair dealing, and fraud were duplicative of the breach of contract counterclaim and therefore should be dismissed. Additionally, F&A argued for the dismissal of the legal malpractice counterclaim on the grounds that it was based on the excessive attorney fees and because the underlying trademark litigation was dismissed in SAI's favor. Now, F&A argues that the counterclaims for breach of fiduciary duty, breach of contract, breach of the implied covenant of good faith and fair dealing, and fraud are duplicative of the malpractice counterclaim. (affirmation of Skala at 6) F&A again argues that the malpractice claim must be dismissed because SAI failed to please facts tending to show that but-for F&A's conduct, SAI would have been successful in the underlying litigation. Again, F&A argues that the malpractice is solely based on the excessive fees. In accordance with *Grosso Moving & Packing Co., Inc. v Damens*, "[t]o the extent that part of [this] motion seeking leave to reargue raises arguments not raised in the previous motion," it "might be considered a new and unrelated motion" and therefore is "precluded by the single motion rule of CPLR 3211(e), since [F&A] already made one preanswer motion to dismiss under CPLR 3211(a)." (*Grosso Moving & Packing Co., Inc. v Damens*, 233 AD2d 128, 128 [1st Dept 1996].) Therefore, this Court declines to consider F&A's new arguments not advanced in the original application brought by Notice of Motion on December 15, 2014. The Court considers F&A's arguments to dismiss as originally presented in Motion Sequence 003 in the First Action.

Motion To Dismiss Analysis

This Court gives SAI's pleading a liberal construction and accepts the facts alleged as true. (*Leon v Martinez*, 84 N.Y.2d 83, 87 [1994].) The Court accords SAI the benefits of every possible favorable inference to determine if the facts as alleged in the complaint fit within any cognizable legal theory. (*id.* at 87-88) Whether SAI can ultimately establish its allegations is not part of the calculus. (*EBCI, Inc, v Goldman. Sachs & Co.,* 5 N.Y.3d 11 [2005].) This Court's analysis of SAI's claims is "limited to the four corners of the pleading." (*Johnson v Proskauer Rose LLP*, 129

AD3d 59, 67 [1st Dept 2015].) These guidelines apply to F&A's motion to dismiss for failure to state a cause of action under CPLR 3211 (a)(7). (*id.*)

Legal Malpractice Analysis

SAI states a counterclaim for legal malpractice. Because SAI alleges that F&A incorrectly assessed the strength of SAI's position in the trademark litigation, incorrectly assessed the strength of a motion to dismiss filed by SAI's adversary and competitor, advised against negotiation and settlement efforts, and embroiled SAI in costly litigation, SAI alleges that F&A "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession." (*Brookwood Companies, Inc., v Alston & Bird LLP*, 146 AD3d 662, 666 [1st Dept 2017]; SAI Answer at 15) In this regard, SAI's counterclaim for legal malpractice is not solely based on the excessiveness of F&A's fee because it is premised on the quality or content of F&A's legal advice. (*Johnson v Proskauer Rose LLP*, 129 AD3d at 65) Because SAI claims that "[b]ut for Furgang's[2] departure from the ordinary standards of professional conduct, SAI would . . . have [saved] more than $300,000 in legal fees", SAI states that "'but for' [F&A's] negligence[,] [SAI] . . . would not have sustained 'actual and ascertainable' damages." (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 50 [2015].) That the underlying trademark litigation was dismissed in SAI's favor does not preclude the maintenance of the malpractice action because the counterclaim alleges that F&A's neglect "increased litigation expenses." (76 NY Jur 2d, Malpractice § 2) "If these [300,000] expenses resulted from [F&A's] negligence and were reasonably incurred, they should be recoverable." (*Skinner v Stone, Raskin & Israel* (724 F2d 264, 265 [2d Cir 1983]) Accordingly, SAI "may recover damages even though it was successful in the underlying action." (*VDR Realty Corp. v Mintz*, 167 AD2d 986, 986 [4th Dept 1990].)

Good Faith and Fair Dealing Analysis

SAI fails to allege "facts which tend to show that [F&A] sought to prevent performance of the contract or to withhold its benefits from [SAI]." (*Aventine Inv. Mgmt., Inc. v. Canadian Imperial Bank of Commerce*, 265 A.D.2d 513, 514, [1st Dept 1999].) To the extent that SAI argues that F&A pursued resolution of the trademark litigation in a reckless manner that increased expenses and destroyed

[2] In its pleading, SAI defines Furgang to mean F&A and Furgang individually. (SAI Answer at 6)

SAI's right to receive the fruits of the contract, SAI merely recasts its counterclaim for breach of contract. Indeed, SAI's counterclaim for breach of contract also alleges that F&A pursued a costly and aggressive litigation strategy that avoided settlement, and charged exorbitant amounts that were not justified. In this regard, the counterclaim for breach of the implied covenant of good faith and fair dealing arises from the same facts underlying the breach of contract counterclaim and is therefore duplicative. (*MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 87 A.D.3d 287, 297 [1st Dept 2011].) Because SAI's good faith and fair dealing counterclaim is premised on the same conduct that underlies the breach of contract counterclaim, it cannot be maintained. (*MBIA Ins. Corp. v Merrill Lynch*, 81 AD3d 419, 419-420 [1st Dept 2011].) Additionally, the damages alleged for the good faith and fair dealing counterclaim are "intrinsically tied to the damages" alleged for the breach of contract counterclaim because both sets of damages are for increased expenses resulting from F&A's conduct. (*id.*)

Breach of Fiduciary Duty Analysis

Like the claim in *Ladera Partners, LLC v. Goldberg, Scudieri & Lindenberg, P.C.* (157 A.D.3d 467, 468 [1st Dept 2018]), SAI's "breach of fiduciary duty [counter]claim alleges that [F&A] made excessive demands for attorneys' fees and billed excessively" approximating $300,000. (*Ladera Partners, LLC*, 157 A.D.3d at 468) However, the breach of contract counterclaim also alleges that F&A charged exorbitant amounts that were not justified alleging damages in the amount of $300,000. Because the breach of fiduciary duty counterclaim "is premised on the same facts and seeks the same relief as the breach of contract claim, it is duplicative of that . . .[counter]claim." (*Ladera Partners, LLC*, 157 A.D.3d at 468)

Fraud Analysis

SAI alleges a representation of material fact because it avers that F&A represented that as of March 22, 2013 per its invoice, F&A was owed fees in the amount of $25,399.00. However, this invoice "included charges from dates that also appeared on Furgang's February 19, 2013 invoice." (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003]; F&A Answer at 11) Similarly, F&A's "June 13, 2013 invoice also included charges from dates that also appeared on Furgang's March 22, 2013 invoice." (F&A Answer at 11) SAI additionally claims that this pattern ensued in the subsequent months. SAI alleges that F&A had knowledge that the representation was false when made because F&A and Furgang were aware of the

misrepresentations contained within the invoices and "provided SAI with such invoices with the intent to deceive SAI into paying larger sums of money to Furgang than the actual work performed by Furgang would justify." (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003]; S&A Answer at 16) SAI also alleges justifiable reliance on its part by stating that "SAI reasonably relied upon the accuracy and truthfulness of Furgang's[3] misrepresentations in its invoices." (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003]; S&A Answer at 16) SAI also alleges resulting injury by stating that "[a]s a direct result of Furgang's misrepresentation, SAI was deceived into paying more money to Furgang that Furgang was legitimately entitled to based upon the services that Furgang actually rendered on SAI's behalf." (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003]; S&A Answer at 16)

Accordingly, SAI appears to state a fraud claim premised "upon one or more affirmative, intentional misrepresentations – that is, something more egregious than mere 'concealment of failure' to disclose [F&A's] own malpractice." (*Kaiser v Van Houten*, 12 AD3d 1012, 1014 [3d Dept 2004].) At first blush the essence of the fraud counterclaim appears to be distinct from the malpractice and breach of contract counterclaims. (*Cortlandt Street Recovery Corp. v Bonderman*, 31 NY3d 30, 50 [2018].) However, SAI does not state specifically the damage amount alleged for the fraud counterclaim. In this regard, SAI fails to state "damages, separate and distinct from those generated by the alleged malpractice." (*Kaiser*, 12 AD3d at 1014) Therefore, the Court cannot determine based on SAI's pleading whether "the damages . . . do not completely overlap with each other [and] [t]hus, the [counter]claims are not one and the same." (*Johnson v Proskauer Rose LLP* (129 AD3d 70 [1st Dept 2015].)

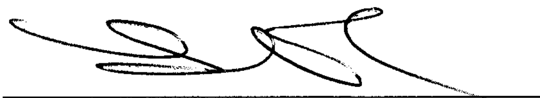
Wherefore, it is hereby,

ORDERED that Furgang & Adwar, LLP's motion pursuant to CPLR 2221 (d) is granted in that S.A. International, Inc's counterclaims for breach of fiduciary duties, breach of the implied covenant of good faith and fair dealing, and fraud are dismissed.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: June 6, 2018

[3] F&A's Answer defines the term "Furgang" to mean F&A and Furgang individually.



EILEEN A. RAKOWER, J.S.C.