Jonns v Fischbarg
2018 NY Slip Op 32353(U)
September 18, 2018
Supreme Court, New York County
Docket Number: 150729/2017
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2

Justice

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INDEX NO. 150729/2017

CHRISTOPHER JONNS,

Plaintiff,

MOTION SEQ. NO. 001

- v -

GABRIEL FISCHBARG,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is ordered that the motion is **decided as follows**.

In this action for, *inter alia*, legal malpractice, defendant Gabriel Fischbarg ("Fischbarg") moves, pursuant to CPLR 3211(a)(1), (7), and (8), to dismiss the complaint of plaintiff Christopher Jonns ("Jonns") in its entirety. After a review of the motion papers, as well as a review of the relevant statutes and case law, the motion is **decided as follows**.

FACTUAL AND PROCEDURAL BACKGROUND:

In August of 2010, plaintiff Jonns and a group of investors (collectively "the investors") attempted to purchase the assets of a Manhattan business known as the Charles Restaurant from Dorsia 8:30 LLC ("Dorsia").[1] (Doc. 21 at 3.) To facilitate the transaction, Jonns retained defendant Fischbarg as the attorney for he and the investors. In retaining him, Jonns and the

[1] Unless otherwise indicated, all references are to the documents filed with NYSCEF in this matter.

investors sought to ensure that a limited liability company ("LLC") would be formed absolving them of personal liability from their operation of the business once the transaction was completed. (Doc. 28 at 4–5.) The investors also wanted Fischbarg to apply for sale-of-liquor licenses from the New York State Liquor Authority ("the SLA"). (*Id.*) Fischbarg agreed to act as attorney for Jonns and the investors. (*Id.* at 5.)

During the course of the business transactions regarding the Charles Restaurant, Fischbarg acted not only as the attorney for Jonns and the investors but also as the attorney for Dorsia. (Doc. 21 at 3–4.) Fischbarg never obtained a conflict waiver from Jonns or the investors (*id.* at 4), and he never advised them that, if they wanted to shield their personal liabilities in maintaining the business, they should purchase it from Dorsia through an LLC (*id.*). On August 11, 2010, Jonns, acting in his personal capacity, signed a purchase agreement drafted by Fischbarg for the purchase of the restaurant's assets from Dorsia. (*Id.* at 5, Doc. 10.) Pursuant to the agreement, Dorsia was to sell the assets of the Charles Restaurant to Jonns for $180,000. (Doc. 10 at 2.)

Fischbarg assured Jonns that any rights, obligations, and liabilities which Jonns had incurred by signing the agreement in his personal capacity would subsequently be assigned to an LLC that would be owned by the investors. (Doc. 21 at 5.) As a result of having signed the purchase agreement in his personal capacity, Jonns assumed up to $200,000 of Dorsia's debt which existed on the date of the signing. (*Id.* at 6.) Jonns also assumed responsibility for Dorsia's obligations under the lease, and he agreed to pay Dorsia a 3-month security deposit. (*Id.* at 5.) Jonns also agreed to indemnify and hold Dorsia harmless for any claims arising from the operation of the Charles Restaurant after execution of the agreement. (*Id.* at 6.)

On September 7, 2010, Fischbarg formed an LLC known as Crazy Asylum LLC ("Crazy Asylum"), and made Jonns and the other investors its members. (*Id.*) On September 13, 2010, Jonns and Dorsia closed on the sale of Dorsia's assets, i.e., the Charles Restaurant. (*Id.*) The rights, obligations, and liabilities that Jonns had assumed from Dorsia under the purchase agreement were never assigned to Crazy Asylum prior to the closing. (*Id.*) However, after the closing, Fischbarg continued to make assurances to Jonns that any personal liability relating to the business would be transferred to Crazy Asylum. (*Id.* at 6–7.) Fischbarg also represented to Jonns that he would submit applications to the SLA to ensure that Crazy Asylum was the registered licensee of the business. (*Id.*)

The Charles Restaurant eventually closed in March of 2015.[2] By that time, the business owed, among other debts, over $115,000 in rent to its landlord.[3] Although Jonns had assumed personal liability for the Charles Restaurant pursuant to the purchase agreement, Dorsia expended over $180,000 in eviction proceedings instituted by the landlord and in satisfying the debts of the other business creditors.[4] On June 29, 2016, Dorsia commenced an action styled *Dorsia 8:30 LLC v Christopher Jonns*, Supreme Court, New York County Index Number 653442/2016 ("the Dorsia action"), seeking indemnification and damages from Jonns for breach of the purchase agreement.[5] In that action, Dorsia alleged that Jonns breached the purchase agreement by failing to pay the 3-month security deposit, by not paying rent to the landlord, and by failing to uphold the agreement's indemnification provision.[6]

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[2] See page 4 of the Verified Complaint filed with NYSCEF as Document 1 in *Dorsia 8:30 LLC v Christopher Jonns* (653442/2016), a separate, pending action involving the same facts.
[3] See id.
[4] See id. at page 5.
[5] See the Summons and Verified Complaint filed with NYSCEF as Document 1 in *Dorsia 8:30 LLC v Christopher Jonns* (653442/2016).
[6] See id. at pages 3–6.

On March 16, 2017, Jonns commenced the captioned action against Fischbarg, alleging legal malpractice, breach of contract, and breach of fiduciary duty. (Doc. 20 at 8–12.) On April 5, 2017, Fischbarg moved, pursuant to CPLR 3211(a)(1), (7), and (8), to dismiss Jonns' complaint. (Docs. 5, 6, 7.) On May 31, 2017, Jonns filed a first amended complaint. (Doc. 21.) The first amended complaint added allegations that Fischbarg continued to act as Jonns' and Crazy Asylum's attorney through July of 2016 (*id.* at 7), and that Fischbarg has represented Jonns in the Dorsia action by preparing a memorandum of law to dismiss Dorsia's complaint (*id.* at 7–8).

POSITIONS OF THE PARTIES:

Fischbarg argues that Jonns' legal malpractice claim is barred by the statute of limitations, which requires that actions to recover damages for legal malpractice be commenced within three years of the plaintiff's injury. In particular, Fischbarg maintains that the claim is time-barred because, while Jonns commenced the captioned action in 2017, any actionable injury Jonns suffered would have occurred when Fischbarg drafted the purchase agreement in August of 2010.

Additionally, Fischbarg asserts that Jonns' breach of contract claim is duplicative of his legal malpractice claim and that it must be dismissed as well. Moreover, he claims that he did not breach the contract because the purchase agreement made it Dorsia's, not Fischbarg's, responsibility to obtain a lease assignment and a liquor license transfer from the SLA in 2014. Fischbarg cites to Jonns' counterclaims against Dorsia in the Dorsia action to support his assertion that he did not breach the contract. In the Dorsia action, Jonns counterclaimed against

Dorsia for its failure to obtain a lease assignment. Thus, according to Fischbarg, plaintiff has failed to state a claim against him since it was Dorsia that breached the contract.

Fischbarg further asserts that Jonns' claim for breach of fiduciary duty is also duplicative of the legal malpractice claim and that it is time-barred under the statute of limitations. He also argues that, because Jonns is seeking damages for breach of contract from Dorsia in the Dorsia action, Jonns is precluded from suing him. Last, Fischbarg claims that the legal malpractice claim is premature, since Fischbarg cannot yet be deemed to have proximately caused any damages to Jonns because the Dorsia action has not been resolved.

Jonns' first argument in opposition is that Fischbarg's motion to dismiss is moot. He asserts that, because Fischbarg's notice of motion is dated April 5, 2017, and because Jonns filed an amended verified complaint on May 31, 2017, the motion to dismiss only applies to Jonns' original complaint, which is no longer a valid pleading.

In the alternative, Jonns claims that the motion has no merit. Regarding the legal malpractice claim, Jonns maintains that it is not time-barred by the statute of limitations because Fischbarg continued to represent him and Crazy Asylum through July 2016 in attempting to assign the lease, to assign Jonns' obligations to Crazy Asylum, and to obtain a liquor license from the SLA pursuant to the purchase agreement. Jonns also submits proof that Fischbarg represented him in the Dorsia action. Such continuous representation, asserts Jonns, tolls the statute of limitations for the legal malpractice claim, as well as the claims for breach of contract and breach of fiduciary duty.

Jonns maintains that the breach of contract claim is not duplicative of the legal malpractice cause of action. Specifically, he asserts that the breach of contract claim is separate from the legal malpractice claim because it arises from Fischbarg's failure to complete the

transaction on behalf of the investors through an LLC. Even if Dorsia breached the contract, Jonns maintains that Fischbarg cannot escape liability because he was acting as the attorney for both Dorsia and the investors during the transaction.

Jonns asserts that the breach of fiduciary duty claim is not duplicative of the legal malpractice claim because Fischbarg breached his fiduciary duty to Jonns by representing both Dorsia and the investors and by placing the interests of Dorsia above the investors' interests.

Additionally, Jonns argues that the action is not barred by collateral estoppel or res judicata because the issues and claims have not been conclusively decided in the Dorsia action. Last, Jonns argues that Fischbarg's actions have proximately caused damages because he personally incurred the debts and losses of the business, because he has had to defend the claims by the business's creditors, and because he has had to defend himself in the Dorsia action.

In response, Fischbarg asserts that the motion to dismiss is not moot because it applies to the amended complaint. He also argues that the statute of limitations has not been tolled because the "continuous representation" doctrine is inapplicable. In support of this argument, Fischbarg submits e-mails from 2014, in which he responded to inquiries from attorneys for Jonns and Dorsia about the business's liquor license from the SLA. Fischbarg further explains that he performed legal work for Jonns to assist him in defending the Dorsia action. According to Fischbarg, because there was a 4-year gap between 2010 and 2014 and a 6-year gap in representation between 2010 and 2016, the continuous representation doctrine did not toll the statute of limitations period. Fischbarg also reaffirms his position that he did not breach the contract because Dorsia, and not he, had the responsibility of obtaining a liquor license from the SLA. Moreover, Fischbarg claims that his alleged failure to create an LLC for the transaction does not constitute attorney negligence. He also claims that Jonns cannot prove that the Dorsia

action would not have been commenced but for his negligence. Last, he argues that the amended complaint should be dismissed because of judicial estoppel, which precludes a party from assuming inconsistent positions in different proceedings,[7] and because any damages Jonns might suffer in the Dorsia action are speculative.

LEGAL CONCLUSIONS:

In moving to dismiss Jonns' claims, Fischbarg relies on CPLR 3211(a)(1), (7), and (8). On a CPLR 3211 motion to dismiss a complaint, "the pleading is to be afforded a liberal construction. [The court is to] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994].)

CPLR 3211(a)(1) provides for dismissal based on documentary evidence. Should the reviewing court find that the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law, dismissal will be granted. (*See 150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]; *see also Leon*, 84 NY2d at 88.) If the "allegations are contradicted by documentary evidence, they are not presumed to be true or granted every favorable inference . . . ." (*Sterling Fifth Assocs. v Carpentille Corp., Inc.*, 9 AD3d 261, 261–62 [1st Dept 2004].)

[7] "The doctrine of judicial estoppel . . . 'precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed.'" (*Baje Realty Corp. v Cutler*, 32 AD3d 307, 310 [1st Dept 2006] (citations omitted).) Fischbarg asserts that Jonns has taken inconsistent positions because Jonns is seeking damages from Dorsia for breach of the purchase agreement in the Dorsia action and has thereby implicitly admitted that Fischbarg drafted a valid contract, i.e., the purchase agreement. According to Fischbarg, Jonns is therefore precluded from arguing in the instant action that he is entitled to damages from Fischbarg for drafting an invalid contract. (Doc. 29 at 8.)

A motion to dismiss a cause of action for failure to state a claim pursuant to CPLR 3211(a)(7) "test[s] the facial sufficiency of the pleading in two different ways." (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 [1st Dept 2014].) First, "the motion may be used to dispose of an action in which the plaintiff has not stated a claim cognizable at law." (*Id.*) Second, the court may dismiss a claim where the plaintiff has identified a cognizable cause of action but has nevertheless failed to plead a material allegation necessary to establish it. (*Id.*)

Last, dismissal of the complaint is warranted pursuant to CPLR 3211(a)(8) where the court does not have jurisdiction over the defendant. (*See* CPLR 3211[a][8].)

a. Did the Amended Complaint Render the Motion to Dismiss Moot?

"An amended pleading, when served, takes the place of the original pleading." (*100 Hudson Tenants Corp. v Laber*, 98 AD2d 692, 692 [1st Dept 1983].) Although "the lower court cases are in conflict over whether the filing of an amended pleading automatically abates a motion to dismiss that was addressed to the original pleading" (*Sage Realty Corp. v Proskauer Rose LLP*, 251 AD2d 35, 38 [1st Dept 1998]), the First Department has adopted the rule that the moving party has the option to decide whether its motion should be applied to the new pleadings (*id.*). An amended complaint therefore does not automatically render moot a motion to dismiss. (*See Fownes Bros. & Co., Inc. v JPMorgan Chase & Co.*, 92 AD3d 582, 582 [1st Dept 2012].)

Here, Jonns argues that Fischbarg's motion to dismiss is moot. The original complaint in this action was filed on March 16, 2017 (Doc. 8), and the amended complaint was filed on May 30, 2017 (Doc. 21). Fischbarg filed the instant motion on April 5, 2017, during the period between the two filings. (Doc. 5.) On May 31, 2017, Jonns' counsel sent Fischbarg a letter,

which stated: "We ask that you advise whether you elect to apply your motion to dismiss to the Amended Verified Complaint . . . ." (Doc. 22.) Because Fischbarg never responded (Doc. 19 at 1–2), Jonns argues that the motion is moot, as Fischbarg "has not elected to apply [the] motion to dismiss to the Amended Verified Complaint" (*id.* at 2).

This Court finds Jonns' argument unpersuasive. While Fischbarg does not dispute that he did not respond to the May 31, 2017 letter, his Reply Memorandum of Law supporting the motion to dismiss establishes his intent to apply the motion to the first amended complaint. (Doc. 29.) Moreover, instead of defending the pleadings in the original complaint when Fischbarg made his motion to dismiss, Jonns sought the amendment. (*See DiPasquale v Sec. Mut. Life Ins. Co. of New York*, 293 AD2d 394, 395 [1st Dept 2002] (applying a motion to dismiss toward the amended complaint where the plaintiff sought the amendment rather than to defend the original complaint).)

Additionally, this Court finds that the motion to dismiss can properly be directed toward Jonns' amended complaint because the amended pleadings make only insignificant changes to what was originally pleaded. The first amended complaint adds factual allegations that Fischbarg continued to act as Jonns' and Crazy Asylum's attorney through July of 2016 (Doc. 21 at page 7), and that Fischbarg has represented Jonns in the Dorsia action by preparing a memorandum of law to dismiss Dorsia's complaint (*id.* at 7–8). However, no new causes of action were asserted in the amended complaint. Where, as here, the "theory of the first complaint remains intact, unchanged and unsupplemented," application of a motion to dismiss to an amended complaint is proper. (*See D'Addario v McNab*, 73 Misc2d 59, 62 [Sup Ct, Suffolk County 1973] (applying a dismissal motion to an amended complaint where changes to the original complaint were "minuscule and unimportant."); *see also Livadiotakis v Tzitzikalakis*, 302 AD2d 369, 370 [2d

Dept 2003] ("It has long been the rule . . . that a motion to dismiss which is addressed to the merits may not be defeated by an amended pleading.").)

b. Does the Amended Complaint State a Claim for Professional Malpractice?

To prevail on a claim for legal malpractice, a plaintiff must establish three elements: (1) that the attorney failed to exercise the degree of care, skill, and diligence commonly possessed and exercised by a member of the legal community, (2) that such negligent failure was a proximate cause of the loss in question, and (3) that the plaintiff sustained actual and ascertainable damages. (*See Barbara King Family Trust v Voluto Ventures LLC*, 46 AD3d 423, 424 [1st Dept 2007].)

The plaintiff's burden of proof in a legal malpractice action is a heavy one. (*See Lindenman v Kreitzer*, 7 AD3d 30, 34 [1st Dept 2004].) In regard to the element of proximate causation, 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." (*Gallet, Dreyer & Berkey, LLP v Basile*, 141 AD3d 405, 405 [1st Dept 2016].) A plaintiff's damages in connection with such a claim may include "litigation expenses incurred in an attempt to avoid, minimize, or reduce the damage caused by the attorney's wrongful conduct." (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 443 [2007] (quotations omitted).) But mere "speculation of a loss resulting from an attorney's alleged omissions . . . is insufficient to sustain a claim for legal malpractice." (*Gallet, Dreyer & Berkey, LLP*, 141 AD3d at 405–06 (quotations omitted).)

A legal malpractice action must be commenced within the three-year statute of limitations. (*See McCoy v Feinman*, 99 NY2d 295, 301 [2002].) In determining when the statute of limitations begins to run, courts have held that the "accrual time is measured from the day an actionable injury occurs . . . ." (*McCoy*, 99 NY2d at 301.) "What is important is when the malpractice was committed, not when the client discovered it." (*Id.* (quotations omitted).) The limitations period, however, may be tolled where there is a continuing attorney-client relationship pertaining specifically to the matter in which the attorney committed the alleged malpractice (*see Shumsky v Eisenstein*, 96 NY2d 164, 168 [2001]), and where there was "a mutual understanding of need for further services in connection with that same subject matter" (*Davis v Cohen & Gresser, LLP*, 160 AD3d 484, 486 [1st Dept 2018]).

Here, Fischbarg argues that the purchase agreement that he drafted obligated Dorsia to assign the lease for the business premises to Jonns and to transfer the Charles Restaurant's liquor license to Jonns. (Docs. 6 at 8, 23 at 2.) He argues that, because it was Dorsia's responsibility to fulfill those obligations, Jonns' complaint fails to state a legal malpractice cause of action against him. (*Id.* at 8–10.) Viewing the pleadings in a light favorable to plaintiff and affording him the benefit of every inference, which this Court must do on a motion to dismiss (*see Leon*, 84 NY2d at 87–88), this Court finds that the amended complaint sets forth sufficient factual allegations that Fischbarg did not use the reasonable degree of care, skill, and diligence commonly exercised by one in the legal community. Specifically, Jonns alleges in his amended complaint that Fischbarg failed to properly act as his attorney by, *inter alia*, allowing Jonns to sign the purchase agreement in his personal capacity, representing the investors and Dorsia during the business transactions, and by failing to file the necessary papers and applications for a liquor license with

the SLA. (Doc. 21 at 9.) The amended complaint therefore alleges the first element of a professional malpractice claim.

Jonns further pleads that he would not have sustained actual damages but for Fischbarg's negligence. (*See Gallet, Dreyer & Berkey, LLP*, 141 AD3d at 405.) As stated above, "to establish proximate cause, [a] plaintiff must demonstrate that 'but for' the attorney's negligence, [the] plaintiff would either have prevailed in the matter at issue, or would not have sustained any 'ascertainable damages.'" (*Leder v Spiegel*, 31 AD3d 266, 267–68 [1st Dept 2006].) Because the underlying Dorsia action is still pending, Jonns cannot conclusively establish that he would have prevailed in that action but for Fischbarg's negligence. However, Jonns claims in the amended complaint that he has suffered damages as a result of Fischbarg's failure to draft the purchase agreement as being between Dorsia and an LLC because this caused Jonns to have to defend himself in the Dorsia action. (*See Rudolf*, 8 NY3d at 443 (litigation expenses to mitigate an attorney's negligence satisfy the element of actual damages in legal malpractice actions).) Contrary to Fischbarg's assertion, Jonns' litigation costs in the Dorsia action are not speculative. (Doc. 29 at 8–9.) Proximate causation is sufficiently alleged since Jonns would not have incurred those litigation costs if he did not sign the purchase agreement in his personal capacity, i.e., if Fischbarg had drafted the purchase agreement as being between Dorsia and an LLC, such as Crazy Asylum. Therefore, this Court finds that Jonns' amended complaint adequately alleges the elements of proximate causation and actual damages.

Jonns not only argues that he has properly pleaded a legal malpractice cause of action but also that he commenced the action before the statute of limitations expired. A defendant "who seeks dismissal of a complaint . . . on the ground that it is barred by the statute of limitations

bears the initial burden of proving, prima facie, that the time in which to sue has expired." (*Gravel v Cicola*, 297 AD2d 620, 620–21 [2d Dept 2002].)

Here, Fischbarg asserts that the three-year limitations period for legal malpractice (*see* CPLR 214[6]) expired because, although he drafted the purchase agreement in August of 2010 (Docs. 6 at 5, 23 at 2), Jonns commenced the instant action in March of 2017 (Doc. 8 at 11), more than three years after the purchase agreement was drafted and eventually signed by Dorsia and Jonns. However, the limitations period did not begin to run in August of 2010. As the Court of Appeals has held, the "accrual time is measured from the day an actionable injury occurs . . . ." (*McCoy*, 99 NY2d at 301.) Although Fischbarg may have improperly drafted the purchase agreement in August of 2010, his negligence did not become actionable until Jonns suffered actual damages. In this instance, Jonns allegedly suffered actual damages when he was forced to defend himself in the Dorsia action, which was commenced in June of 2016,[8] as a result of Fischbarg's failure to advise him not to sign the purchase agreement in his own personal capacity. Thus, Jonns' legal malpractice claim is timely.

c. Is the Breach of Contract Claim Duplicative of the Legal Malpractice Claim?

To state a cause of action against an attorney for breach of contract, a plaintiff must allege that the defendant "breached a promise to achieve a specific result." (*Goldberg v Moskowitz*, 262 AD2d 56, 57 [1st Dept 1999].) But if the plaintiff's breach of contract claim is premised on the same underlying facts and seeks relief that is identical to what is being sought in a legal malpractice cause of action, a court will dismiss the claim for redundancy. (*See Rivas v Raymond Schwartzberg & Assocs., PLLC*, 52 AD3d 401, 401 [1st Dept 2008].) While a plaintiff

[8] See the Summons and Verified Complaint filed with NYSCEF as Document 1 in *Dorsia 8:30 LLC v Christopher Jonns* (653442/2016).

may characterize the action as one for breach of contract, courts will construe the action as sounding in legal malpractice if it is premised on allegations arising from the defendant's allegedly inadequate legal representation of the plaintiff. (*Berkowitz v Fischbein, Badillo, Wagner & Harding*, 34 AD3d 297, 297 [1st Dept 2006]; *see also Scanio v Palmiere & Pellegrino, P.C.*, 251 AD2d 1018, 1018 [4th Dept 1998].)

Here, Jonns asserts that his claim for breach of contract is premised not on his legal malpractice claim, but rather arises from Fischbarg's failure to conduct the business transactions on behalf of Jonns and the investors through an LLC. (Doc. 28 at 18.) However, Jonns' characterization of the claim as one for breach of contract is merely an attempt to repackage what he has already alleged through his legal malpractice cause of action.

With respect to the facts underlying each claim, Jonns alleged in his amended complaint that Fischbarg is liable for legal malpractice because, among other things, Fischbarg allowed Jonns to sign the purchase agreement in his personal capacity, and because he represented the investors and Dorsia during the business transactions. (Doc. 21 at 9.) The amended complaint then premises the breach of contract claim on Fischbarg's "failing to properly protect [Jonns'] rights and interests . . . and to render complete, proper and competent professional services to [Jonns] and by failing to fully, properly and completely protect the rights and interests of [Jonns]." (*Id.* at 11.) Both allegations involve the same critical fact: that Fischbarg failed to conduct the business transactions on Jonns' and the investors' behalf through an LLC. To put it another way, both "allegations aris[e] from the defendant's allegedly inadequate legal representation of the plaintiff. (*See Berkowitz*, 34 AD3d at 297; *see also Ullmann-Schneider v Lacher & Lovell-Taylor, P.C.*, 121 AD3d 415, 415 [1st Dept 2014] (suggesting that a breach of

contract claim is duplicative of a legal malpractice claim when both concern the quality of the defendant's work).)

With respect to the relief being sought on each claim, the complaint seeks $1 million in damages from Fischbarg on both causes of action. (Doc. 21 at 13.) The breach of contract claim is therefore duplicative of Jonns' legal malpractice claim and is dismissed. (*See Rivas*, 52 AD3d at 401.)

d. Is the Breach of Fiduciary Duty Claim Duplicative of the Legal Malpractice Claim?

A plaintiff's claim for breach of fiduciary duty which is "premised on the same facts and seeking the identical relief sought in the legal malpractice cause of action . . . should be dismissed." (*See Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004].) Here, Fischbarg maintains that "[b]ecause the third claim for breach of fiduciary duty is based on the same facts and seeks the same relief sought in the first claim for malpractice, the third claim must be dismissed." (Doc. 6 at 11.) This Court disagrees with that analysis. The core of Jonns' claim for breach of fiduciary duty is that Fischbarg represented both the buyer and the seller during the business transactions over the Charles Restaurant (Doc. 21 at 11–12), whereas the crux of his claim for legal malpractice is that he has become personally liable for the losses of the business because Fischbarg failed to draft the purchase agreement as being between Dorsia and an LLC, which would have absolved Jonns of that liability (*id.* at 10). Thus, because the factual allegations underlying each claim are slightly different, dismissal of Jonns' third cause of action is not warranted on the ground that it is duplicative of his legal malpractice claim.

"To state a claim for breach of fiduciary duty, plaintiffs must allege that (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct." (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 699 [1st Dept 2011].) Here, the complaint sufficiently alleged that a fiduciary relationship arose between Fischbarg and Jonns because Fischbarg acted as the attorney for Jonns and the investors. (Doc. 21 at 3.) (*See Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 8–9 [1st Dept 2008] ("[T]he attorney-client relationship is both contractual and inherently fiduciary . . . .").) The complaint also alleged misconduct on the part of Fischbarg because he failed to disclose the conflict of interest in representing both the buyer and the seller in the transactional dealings over the Charles Restaurant. (Doc. 21 at 3–4.) "[A]ny act of disloyalty by counsel will . . . comprise a breach of the fiduciary duty owed to the client." (*See Ulico Cas. Co.*, 56 AD3d at 9.) Jonns suffered damages when Fischbarg failed to protect his financial interests over the course of the transaction. (Doc. 21 at 5.)

"New York law does not provide a single statute of limitations for breach of fiduciary duty claims. Rather, the choice of the applicable limitations period depends on the substantive remedy that the plaintiff seeks." (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009].) When the breach of fiduciary duty claim seeks only money damages, the statute of limitations is three years. (*See Yatter v William Morris Agency, Inc.*, 256 AD2d 260, 261 [1st Dept 1998].) On the other hand, where "the relief sought is equitable in nature, the six-year limitations period of CPLR 213(1) applies . . . ." (*IDT Corp.*, 12 NY3d at 139.) Importantly, however, the limitations period is tolled where there is continuous representation by the attorney on behalf of the client. (*See Access Point Med., LLC v Mandell*, 106 AD3d 40, 47 [1st Dept 2013].) In this case, Jonns is seeking $1 million in damages from Fischbarg on the breach of

fiduciary duty claim. (Doc. 21 at 11–13.) Because the complaint alleged that Fischbarg prepared a memorandum of law on behalf of Jonns to dismiss Dorsia's complaint in the Dorsia action (*id.* at 7–8), the statute of limitations was tolled until at least July 25, 2016 (*id.*). Thus, Jonns' claim for breach of fiduciary duty is timely.

e. Is this Action Barred by the Doctrine of Judicial Estoppel?

"The doctrine of judicial estoppel . . . 'precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed.'" (*Baje Realty Corp. v Cutler*, 32 AD3d 307, 310 [1st Dept 2006] (citations omitted); *see also Becerril v City of New York Dept. of Health & Mental Hygiene*, 110 AD3d 517, 519 [1st Dept 2013]; *Montefiore Med. Ctr. v Crest Plaza LLC*, 24 Misc3d 1201[A], 2009 NY Slip Op 51215[U], *14 [Sup Ct, Westchester County 2009] ("The principle of judicial estoppel applies where two elements are shown: first, the party against whom the estoppel is asserted must have argued an inconsistent position in a prior proceeding; and second, the prior inconsistent position must have been adopted by the tribunal in some manner.").)

Here, Fischbarg asserts that Jonns has taken inconsistent positions because Jonns is seeking damages from Dorsia for breach of the purchase agreement in the Dorsia action and has thereby implicitly admitted that Fischbarg drafted a valid contract, i.e., the purchase agreement. According to Fischbarg, Jonns is therefore precluded from arguing in the instant action that he is entitled to damages from Fischbarg for drafting an invalid contract. (Doc. 29 at 8.) However, because Jonns' inconsistent position has yet to be adopted by the presiding court in the Dorsia action, such as by the presiding court rendering a favorable judgment to Jonns in the Dorsia

action, this Court finds that the doctrine of judicial estoppel is inapplicable. (*See Baje*, 32 AD3d at 310.)

In accordance with the foregoing, it is hereby:

ORDERED that defendant Gabriel Fischbarg's motion to dismiss is granted as to the second cause of action, for breach of contract, set forth in the first amended complaint of plaintiff Christopher Jonns; and it is further

ORDERED that, within 20 days of the uploading of this order to NYSCEF, defendant is directed to serve a copy of this order with notice of entry on plaintiff's counsel and on the Clerk of the Court, who is directed to enter judgment accordingly; and it is further

ORDERED that the defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order and with notice of entry; and it is further

ORERED that the parties are to appear for a preliminary conference on January 15, 2019, at 80 Centre Street, Room 280, at 2:15 PM; and it is further

ORDERED that this constitutes the decision and order of this Court.

9/18/2018
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE