NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

LEWIS BRISBOIS BISGAARD & SMITH LLP,

Plaintiff,

-against-

HERBERT WILLIAM FISHMAN, ESQ. and HERBERT WILLIAM FISHMAN, P.C.,

Defendants.

Index No.: 655198/2017
DECISION/ORDER
Motion Seq. No. 006

Recitation, as required by CPLR 2221 (a), of the papers considered in reviewing defendants' CPLR 2221 motion to renew and reargue.

Papers	**NYSCEF Documents Numbered**
Defendants' Notice of Motion	156
Defendants' Affirmation in Support of their Motion	157-172
Defendants' Memorandum in Support of their Motion	173
Plaintiff's Affidavit in Opposition of Defendants' Motion	175-184
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Defendants' Reply Affirmation	187

Lewis Brisbois Bisgaard & Smith LLP, New York (Mark K. Anesh of counsel), for plaintiff.
Herbert William Fishman P.C., New York (Herbert William Fishman of counsel), for defendants.

Gerald Lebovits, J.

Plaintiff, Lewis Brisbois Bisgaard & Smith LLP, a law firm, was hired in 2009 by defendants, Herbert William Fishman P.C., a law firm, and Herbert William Fishman, Esq., to represent them in a legal-malpractice action brought by defendants' former clients, Stuart Levy and Susan Levy (Levys) in which defendants were sued for malpractice, conversion, breach of fiduciary duty, and accounting. In October 2010, Justice Arthur F. Engoron rendered a judgment against defendants and in Levys' favor on the conversion and breach-of-fiduciary-duty claims. Plaintiff continued to litigate and represent defendants in the underlying malpractice action until March 21, 2013. Following defendants' omissions to pay legal fees, accruing an outstanding balance of $61,515.67 plus interest since January 2011, plaintiffs moved to relieve themselves as counsel for the defendants, Justice James E. d'Auguste granted plaintiff's motion in his order dated March 21, 2013.

As a result of the accrued unpaid legal fees, plaintiff on August 4, 2017, commenced an action against defendants for materially breaching the retainer agreement and failing to pay outstanding legal fees. Defendants filed counterclaims for legal malpractice, breach of contract, breach of fiduciary duties, and unjust enrichment.

The parties filed several past motions that have culminated in the present motion. Plaintiff filed motion sequence number 001 to dismiss the counterclaims. In its order dated December 4, 2017, this court granted plaintiff's motion sequence number 001 on the ground that defendants failed to file opposition papers.

Defendants filed motion sequence number 002 to vacate this court's December 2017 decision. Defendants argue that they acted in good faith by e-filing and submitting their papers with the court. Around the same time, plaintiff filed motion sequence number 003 seeking summary judgment for breach of contract and to recover unpaid legal fees in the principal amount of $61,515.67, plus nine percent interest from July 28, 2011.

On March 9, 2018, this court granted defendants' motion sequence number 002, vacated its December 4, 2017 order, re-calendared plaintiff's motion to dismiss (motion sequence number 001), and allowed defendants to submit opposition papers.

Both of plaintiff's motions — motion to dismiss (motion sequence number 001) and motion for summary judgment (motion sequence number 003) — were placed on this court's calendar for June 20, 2018, for oral argument. Plaintiff did not appear, and this court denied plaintiff's motions.

Plaintiff later filed with this court a letter dated July 16, 2018, explaining that it was unaware that oral arguments were scheduled on the motions and requested the court's permission to refile its motions or to restore the motions to this court's calendar. (NYSCEF Document Number 169.) Plaintiff then refiled its motion to dismiss (motion sequence number 004) and its motion for summary judgment (motion sequence number 005).

In response, defendants filed an affirmation in opposition to plaintiff's motion to dismiss (motion sequence number 004) and plaintiff's letter dated July 16, 2018. Defendants argue that the refiled motions were procedurally improper and should be denied because plaintiff's only procedural options to rectify its non-appearance were to either appeal, move to vacate this court's June 20, 2018 decision, or move to reargue or renew this court's June 2018 decision. (NYSCEF Document Number 140.) Defendants did not submit opposition papers to plaintiff's motion for summary judgment under motion sequence number 005.

On August 27, 2018, the court granted plaintiff's refiled motion to dismiss (motion sequence number 004) as unopposed and dismissed defendants' counterclaims in their entirety. (NYSCEF Document Number 146.) The court also granted plaintiff's refiled motion for summary judgment (motion sequence number 005) for legal fees against defendants in the amount of $61,515 with interest from July 28, 2011, and costs. (NYSCEF Document Number 147.) Defendants now move to renew or reargue these two orders on motion sequence number 004 and 005.

Defendants' Motion to Renew/Reargue

Defendants' CPLR 2221 motion sequence number 006 to reargue this court's decisions dated August 27, 2018 which granted plaintiff's motion for summary judgment (motion sequence number 005) and plaintiff's motion to dismiss defendants' counterclaims (motion sequence number 004), is granted and upon reargument, the court adheres to its previous decisions dated August 27, 2018.

Different burdens exist under CPLR 2221 for a motion to renew and a motion to reargue. A motion to renew must be based on "material facts which, although extant at the time of the original motion, were not then known to the party seeking renewal and, consequently, were not placed before the court." (*Matter of Weinberg*, 132 AD2d 190, 209-210 [1st Dept 1987], citing *Foley v Roche*, 68 AD2d 558, 568 [1st Dept 1979].) In contrast, a motion for leave to reargue may be granted only upon a showing "'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision.'" (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992], quoting *Schneider v Solowey*, 141 AD2d 813, 813 [2d Dept 1988].) A motion for "reargument does not provide a party 'an opportunity to advance arguments different from those tendered on the original application.'" (*Rubinstein v Goldman*, 225 AD2d 328, 328 [1st Dept 1996], quoting *Foley*, 68 AD2d at 568.)

Defendants request this court to consider their previous opposition papers filed in response to plaintiff's motion to dismiss the counterclaims (motion sequence 001) and plaintiff's motion for summary judgment (motion sequence 003) as defendants' response to plaintiff's refiled motion sequences 004 and 005.

This court accepts and has considered defendants' previous opposition papers in reconsidering its decision on plaintiff's refiled motion papers. But considering that the defendants have not introduced any new material facts which would warrant a motion to renew, the court only considers defendants' request for a motion to reargue. Further, as a motion for reargument does not provide a party an opportunity to advance new arguments, different from those tendered on the original application, the court considers the original opposition papers filled by the defendants in response to plaintiff's motions. (NYSCEF Document Numbers 161 and 164.)

I. Plaintiff's Refiled Motions Sequence Number 004 and 005

Defendants contend that plaintiff's refiled motions are procedurally incorrect. Defendants contend that (i) plaintiff may move for a motion to reargue/renew under CPLR 2221 by a letter to the court and that (ii) plaintiff may not move to restore its motions to the court's calendar under CPLR 3404, because the motions were not marked off the calendar but were denied.

The first part of defendants' argument is moot. Plaintiff did not move for leave to reargue or renew under CPLR 2221. Plaintiff's letter submitted on July 16, 2018, asks the court to refile and/or in the alternative to restore its motions (motion sequence number 004 and 005) to the

court's calendar. (NYSCEF Document Number 169.) Thus, plaintiff's refiled motions shall not be analyzed against the procedural requirements of CPLR 2221.

Authority for the dismissal of an action based on a plaintiff's failure to attend a court scheduled call can be found in CPLR 3404 and 22 NYCRR 202.27 of the Uniform Rules for Trial Courts.

The standard to restore under CPLR 3404 is liberal. A motion to restore an action within one year of it being marked off the trial calendar should be granted automatically and without conditions. (*Acheson v Shepard*, 297 AD2d 271, 271 [2d Dept 2002]; *Mannino v Huntington Hilton Hotel*, 295 AD2d 577, 577 [2d Dept 2002]; *Basetti v Nour*, 287 AD2d 126, 131-133 [2d Dept 2001].) A "[s]trong policy [exists] that cases should be decided on their merits, (*Dixon v 2707 Ave. Corp.*, 272 AD2d 245, 246 [1st Dept 2000] ["it was an improvident exercise of the court's discretion, particularly without any showing of prejudice to defendants, to deny plaintiff's motion to restore the matter to the trial calendar..."].)

Under 22 NYCRR 202.27(c), if at any scheduled call of a calendar, neither party appears, the judge may make such order as appears just. However, the dismissal of an action pursuant to 22 NYCRR 202.27 based on a plaintiff's failure to appear at a calendar call should be vacated where the plaintiff shows a reasonable excuse for the default and a meritorious cause of action. (*Bloom v Primus Automotive Fin. Servs.*, 292 AD2d 410, 410 [2d Dept 2002]; *Harwood v Chaliha*, 291 AD2d 234, 234 [1st Dept 2002]; *Perez v New York City Hous. Auth.*, 290 AD2d 265, 265 [1st Dept 2002]; *Polir Constr., Inc. v Etingin*, 297 AD2d 509, 511-512 [1st Dept 2002].) The court has the discretion to determine whether a plaintiff's proffered excuse and statement of merits is sufficient. (*Navarro v Trenkman Estate, Inc.*, 279 AD2d 257, 258 [1st Dept 2001]; *Savitt v Falcinelli*, 2009 NY Slip Op 33339 [U], *1 [Sup Ct, NY County 2009].)

Exercising its discretion, this court sufficiently allowed the plaintiff's refiled motions (motion sequence number 004 and 005.) Plaintiff stated in its letter dated July 16, 2018, that it was unaware of the oral arguments scheduled for June 20, 2018, and has indicated its intention to not abandon its motions. (NYSCEF Document Number 169.) The court finds that plaintiff has shown a reasonable excuse for the default and a meritorious cause of action sufficient to warrant a reargument of the motion papers. Thus, the court allows the refiled motions paper in support of plaintiff's motions (motion sequence number 004 and 005).

II. Plaintiff's Motion to Dismiss Counterclaims (motion sequence 004)

Defendants in their opposition papers opposed plaintiff's motion to dismiss the counterclaims on four counterclaims (i) legal malpractice, (ii) breach of contract, (iii) breach of fiduciary duties, and (iv) unjust enrichment.

(i) Legal malpractice

Plaintiff's motion to dismiss defendants' first counterclaim for legal malpractice was appropriately granted.

A legal malpractice claim calls for three elements: (i) negligence of the attorney; (ii) that the negligence was the proximate cause of the damages sustained, and (iii) proof of actual damages. (*Bishop v Maurer*, 33 AD3d 497, 498 [1st Dept 2006].) "In order to sustain a claim for legal malpractice, a plaintiff must establish both that the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession which results in actual damages to a plaintiff, and that the plaintiff would have succeeded on the merits of the underlying action 'but for' the attorney's negligence." (*AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007] [internal citations omitted].)

Defendants assert that during the 2009 malpractice action, plaintiff failed to submit an affidavit from a party with knowledge (defendants' affidavit) attesting to the retention of $158,855.36 in an attorney escrow account in order to settle any outstanding medical liens, which in turn resulted in a conversion and breach of fiduciary duty judgment against the defendants. Plaintiffs counterargue that defendants have not suffered any actual damages as the defendants were never entitled to retain the $158,855.36 and the amount would be either paid to the Levys or to the court to pay outstanding liens.

Here, the defendants' allegations are insufficient to assert a claim for legal malpractice. Defendants have not set forth the requisite allegations that show actual damages resulting from plaintiff's alleged misconduct. Defendants state that damages they incurred was as a result of the conversion judgment which resulted in them paying over $200,000 to the Levys and this amount was $ 158,855.36 held in the attorney escrow account plus interest in the amount of $56,912.80. But defendants fail to specify any alternate scenario where they would have been allowed to retain any portion of the $ 158,855.36 held in the attorney escrow account or the interest thereon. As a result, defendants have failed to show actual damages and have not met the third element for a legal malpractice claim. Thus, the first counterclaim is palpably insufficient and is therefore dismissed.

(ii) Breach of contract, breach of fiduciary duties, and unjust enrichment

Plaintiff's motion to dismiss defendants' second, third, and fourth counterclaims for breach of contract, breach of fiduciary duties, and unjust enrichment was appropriately granted.

Where a breach of contract, breach of fiduciary duties, and unjust enrichment claims arise from the same facts and allege similar damages as a legal malpractice action, they must be dismissed. "The breach of contract and breach of fiduciary duty claims were properly dismissed as duplicative, since they arose from the same facts as the legal malpractice claim and allege similar damages." (*InKine Pharm. Co. v Coleman*, 305 AD2d 151, 152 [1st Dept 2003]; *accord Sage Realty Corp. v Proskauser Rose LLP*, 251 AD2d 35, 38 [1st Dept 1998] [dismissing breach of contract claim as duplicative of malpractice claim]; *Waggoner v Caruso*, 14 NY3d 874, 875 [2010] [dismissing breach of fiduciary duty claim as duplicative of malpractice claim]; *Town of Wallkill v Rosenstein*, 40 AD3d 972, 974 [2d Dept 2007] [dismissing unjust enrichment claim as duplicative of malpractice claim].)

In defendants' breach of contract counterclaim, defendants allege that plaintiff breached the contract by failing to ensure that Mark Anesh, an attorney at plaintiff's law firm, would

personally handle the matter. But the work was performed by various other associates at the firm which resulted in breach of the contract to the detriment of defendants.

Defendants' breach of fiduciary duty counterclaim is based on plaintiff's alleged legal negligence in failure to dismiss the Levys' amended complaint and plaintiff was unjustly enriched by charging unnecessary legal fees.

Defendants' unjust-enrichment counterclaim is based on plaintiff's alleged inadequate legal representation and charging of exorbitant legal fees.

Defendants' counterclaims for breach of contract, breach of fiduciary duties, and unjust enrichment are duplicative of the legal malpractice claim. Defendants' counterclaims for breach of contract, breach of fiduciary duties, and unjust enrichment provide that plaintiff breached the contract and its fiduciary duties by failing to provide the quality of legal representation which plaintiff law firm had promised and committed itself to provide and thereby was unjustly enriched.

Thus, all counterclaims arise out of the same fact that plaintiff mishandled defendants' 2009 malpractice action and do not involve any damages that are separate and distinct from those generated by the alleged malpractice. Accordingly, defendants' second counterclaim for breach of contract, third counterclaim for breach of fiduciary duty, and fourth counterclaim for unjust enrichment are duplicative of the first counterclaim for malpractice, and thus are dismissed.

III. Plaintiff's Motion for Summary Judgment (motion sequence 005)

Defendants in their opposition papers opposed plaintiff's motion for summary judgment on two grounds (i) statute of limitation, and (ii) inconsistencies in plaintiff's motion papers.

(i) Statute of limitation

Defendants' contention that defendants had stopped paying legal fees in the beginning of 2011 which bring plaintiff's motion for summary judgment outside of the six years statute of limitations is incorrect.

Under CPLR 213 (2), the statute of limitations on claims for breach of contract and accounts stated is six years "and it accrues on the date of the last transaction in the account." (*Elie Intl., Inc. v Macy's W. Inc.*, 106 AD3d 442, 443 [1st Dept 2013].)

This action was commenced on August 4, 2017, less than six years since the termination of plaintiff's representation (March 21, 2013) and the date of the last invoice (January 31, 2013). (NYSCEF Document Numbers 119 and 128.) Thus, the court finds that plaintiff's claim for legal fees in their summary judgment motion is timely.

(ii) Inconsistencies in plaintiff's motion papers

Defendants point out inconsistencies in plaintiff's account-stated claim and allege that defendants protested plaintiff's legal charges orally on several occasions and sent at least two letters of protest dated September 4, 2013, and November 26, 2013.

A cause of action for an account stated is

> "an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or the other. In the case of an existing indebtedness, the agreement may be implied as well as express. An agreement may be implied if a party receiving a statement of account keeps it without objecting to it within a reasonable time because the party receiving the account is bound to examine the statement and object to it, if objection there be. Silence is deemed acquiescence and warrants enforcement of the implied agreement to pay. ... In the absence of fraud, mistake or other equitable considerations making it improper to recognize the agreement, it is conclusive." (*Chisholm-Ryder Co. v Sommer & Sommer*, 70 AD2d 429, 431 [4th Dept 1979] [internal citations omitted].)

"A client's receipt and retention of an attorney's account, without objection within a reasonable time, and agreement to pay a portion of the indebtedness, gives rise to an actionable account stated." (*Rosenman Colin Freund Lewis & Cohen v Edelman*, 160 AD2d 626, 626 [1st Dept 1990].)

In the present case, plaintiff issued 12 separate invoices from June 2011 through January 2013. Defendants' letters of protest were dated September 4, 2013, and November 26, 2013, which were thus dated two years after the first outstanding invoice was issued and eight months after the last outstanding invoice was issued. Defendants' objections to legal charges in these letters do not preclude plaintiff's account stated claim as they were made past a reasonable time to object to the account. Further, defendants never disputed any of the invoices issued to them and never contested the accuracy of the bills or billing entries therein, but rather, merely responded to plaintiff's requests for outstanding legal fees. Thus, this court adheres to the initial determination made on plaintiff's account stated claim for legal fees in its decision dated August 27, 2018 on plaintiff's motion for summary judgment.

Accordingly, it is hereby

ORDERED that defendants' motion seq. 006 for leave to reargue is granted, and upon reargument, this court adheres to its decision dated August 27, 2018, to the extent this court granted plaintiff's motion for summary judgment for legal fees in the amount $61,515 with interest from July 28, 2011 and costs (motion sequence number 005) after considering the merits of the parties' arguments as explained in this decision; and it is further

ORDERED that upon reargument, this court adheres to its decision dated August 27, 2018, which granted plaintiff's motion to dismiss defendants' counterclaims (motion sequence number 004), after considering the merits of the parties' arguments as explained in this decision; and it is further

ORDERED that plaintiff serve a copy of this decision and order with notice of entry on defendants.

2/15/2019
DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
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