

<b>Marcum LLP v L'abbate, Balkan, Colavita &amp; Contini, LLP</b>
2022 NY Slip Op 31913(U)
June 17, 2022
Supreme Court, New York County
Docket Number: Index No. 151586/2021
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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MARCUM LLP,	INDEX NO. <u>151586/2021</u>
Plaintiff,	MOTION DATE <u>03/18/2022</u>
- v -	MOTION SEQ. NO. <u>003</u>
L'ABBATE, BALKAN, COLAVITA & CONTINI, L.L.P., MARIANNE S. CONKLIN	<b>DECISION + ORDER ON MOTION</b>
Defendants.	
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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 59, 60, 61, 62, 63, 64, 65, 66, 72, 74, 76, 78

were read on this motion for LEAVE TO REARGUE.

In this motion, Defendant L'abbate, Balkan, Colavita & Contini, LLP ("LBCC" or "Defendant"), seeks an Order, pursuant to CPLR § 2221(d), granting LBCC leave to reargue the portion of the Court's Decision and Order, dated and entered on December 2, 2021, denying Defendants' CPLR § 3211(a)(1) and CPLR § 3211(a)(7) motion to dismiss Plaintiff Marcum LLP's ("Marcum") claim based on excess legal fees (see NYSCEF 54), and upon the grant of reargument, dismissing the entirety of the Complaint with prejudice. For the reasons set forth below, the **motion is denied**.

Plaintiff brought a single claim for legal malpractice against Defendants alleging, among other things, failure to timely produce relevant documents in discovery, negligently producing privileged and protected materials, and withdrawing from the representation of Marcum in the underlying litigation just months before trial with a motion for sanctions pending (NYSCEF 1). In its claim for damages, Plaintiff sought recovery of additional attorneys' fees incurred by

having to hire new counsel due to the negligence of L' Abbate (NYSCEF 1 ¶52) and disgorgement of attorneys' fees paid to L' Abbate since the inception of L' Abbate's allegedly negligent conduct and breaches of its duty, including a \$2.0 million self-insured retention paid by Marcum (NYSCEF 1 ¶57-58). Defendant moved to dismiss the Complaint in its entirety, but did not address the sufficiency of Plaintiff's claim for legal fees or disgorgement in its papers.

At oral argument, when the Court asked about the claims for legal fees and disgorgement, both parties admitted this was not something they focused on in this motion but made some preliminary arguments explaining their position (*see* NYSCEF 53 at 17-18, 45). In its December 2, 2021 Decision and Order, this Court dismissed the legal malpractice claim because Plaintiff's theory of proximate causation was impermissibly speculative (NYSCEF 54 at 5) but concluded that Plaintiffs' claims for recovery of legal fees paid to L' Abbate in connection with allegedly negligent work and compensation for its increased legal expenses arising out of L' Abbate's late withdrawal as counsel were sufficient to withstand motion to dismiss (NYSCEF 54 at 7).

Under CPLR 2221(d), "[a] motion for leave to reargue ... 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." However, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted" (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]).

In seeking leave to reargue the Court's denial of the motion to dismiss in its entirety, Defendant's core argument is that Plaintiff has not sustained any actual damages because it has not paid any fees that it was not otherwise required to pay under its primary policy. Defendant does not, however, establish that "the court overlooked or misapprehended the relevant facts, or

misapplied any controlling principle of law” (*Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971 [1st Dept 1984]).

Converting this motion into one to renew, which Defendant attempts in its reply brief, is unavailing. Defendant argues that “where the additional facts presented relate to an issue which had not previously been raised by the parties but, rather, has been raised *sua sponte* by the court in its memorandum...it [is] error for the court not to consider these additional facts” (*Kosovsky v. Park S. Tenants Corp.* 45 Misc3d 1216(A) [Sup Ct, NY County 2014]) But unlike *Kosovsky v. Park S. Tenants Corp.*, where the court denied plaintiff’s motion for summary judgment based on procedural grounds not raised by the parties, here the burden was always on Defendant to show that dismissal of the complaint in its entirety was warranted, which Defendant failed to do. The Court simply noted at argument that Defendant failed to address a portion of Plaintiff’s claim. A motion for leave to renew “is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation” (*Renna v Gullo*, 19 AD3d 472, 473 [2d Dept 2005]).

All of that said, if Defendant believes it can establish that there are no material issues of fact to be tried with respect to Plaintiff’s remaining claim for relief, it can make a motion for summary judgment.<sup>1</sup>

Accordingly, it is

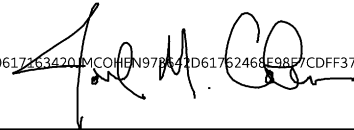
**ORDERED** that Defendant’s motion for leave to reargue and, upon reargument to grant their motion to dismiss, is **denied**.

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<sup>1</sup> The Court notes that Plaintiff has filed a motion seeking leave to file an amended complaint (NYSCEF 89), which is not yet fully briefed.

This constitutes the decision and order of the Court.

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JOEL M. COHEN, J.S.C.

6/17/2022  
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: