

**Eshaghian v Dorsey & Whitney LLP**

2023 NY Slip Op 33102(U)

September 6, 2023

Supreme Court, New York County

Docket Number: Index No. 154087/2020

Judge: Shlomo S. Hagler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHLOMO S. HAGLER PART 17

Justice

-----X

DAVID ESHAGHIAN,

Plaintiff,

- v -

DORSEY & WHITNEY LLP, DAVID SINGER, DOES 1
THROUGH 10

Defendant.

-----X

INDEX NO. 154087/2020

MOTION DATE 07/26/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for DISMISS

In this action commenced by David Eshaghian ("plaintiff" or "David") alleging legal malpractice, breach of fiduciary duty and fraud, defendants Dorsey & Whitney LLP and David Singer, Esq. ("Singer") (collectively, "defendants") move to dismiss the first cause of action for legal malpractice, the second cause of action for breach of fiduciary duty and fraud, and the fourth cause of action for legal malpractice pursuant to CPLR § 3211 (a) (1), (a) (5) and (a) (7). Defendants are plaintiff's former attorneys.

BACKGROUND

Plaintiff David and his brother Eshagh Eshaghian (Ike), now deceased, maintained a decades long partnership relationship, engaging in the business of selling, buying, and developing real property. The complaint alleges that "the relationship was based upon love, family ties and mutual respect" (NYSCEF Doc. No. 1 [Complaint], ¶ 14).

In 2001, Ike was diagnosed with cancer and began a regime of surgery, chemotherapy, and radiation. At the time of the diagnosis, the brothers were in the midst of developing one of their buildings into a condominium (the York Avenue Project). They agreed to sell part of said project to a third party (the Buyer). David continued to work on the York Avenue Project, including negotiating with the Buyer, while undertaking significant responsibility for his brother's care.

Early in 2003, at a family gathering in California, Ike proposed that David prepare an agreement memorializing certain management and financial relationships in connection with the sale of the York Avenue Project. David alleges that this was the first time in more than thirty years of working together that Ike wanted to memorialize an agreement in writing.

The agreement between Ike and David is referred to as the Side Agreement. The Side Agreement provides in relevant part that: a) David is the managing member of the limited liability company which will enter into a joint venture with the Buyer to build the York Avenue Project; b) David and Ike would contribute equal capital for their participation in the joint venture; c) in lieu of compensation to David as a managing member, profits and losses in the joint venture would be divided 60% to David and 40% to Ike; d) David would receive an additional payment (negotiation fee) for obtaining the Buyer's agreement to pay more than originally anticipated for its share of the York Avenue Project; e) each brother would donate \$100,000 to Yeshiva University; and f) a payment from the proceeds of the sale based on moral obligation would be made to David's and Ike's older brother Jack (*Id.*, ¶ 26; NYSCEF Doc. No. 47 [Side Agreement]). Jack is now deceased.

David wrote the Side Agreement in longhand which was thereafter typed by his son Gabriel. David and Ike allegedly signed the printed agreement on the same date that the sales

agreement with the Buyer was signed on January 22, 2003. Ike maintained the original signed copy of the Side Agreement and David retained a photocopy.

Ike's will named David and Ike's wife as co-executors. The complaint alleges "[d]ays prior to his death, while heavily medicated at the [hospital] and under circumstances which raise questions as to his capacity, under the control and influence of his wife Mahrokh, [Ike] executed a codicil to his Last Will and Testament which removed David as Co-Executor and named Mahrokh and Tanaz as co-executors" (NYSCEF Doc. No. 1 [Complaint], ¶ 30). Tanaz was Ike's daughter.

On May 5, 2003, Ike passed away, three weeks before the scheduled sale of the York Avenue Project. Immediately after Ike's death, the executors of his will, Mahrokh and Tanaz, changed the locks on the office which David and Ike had shared since 1980, and denied David access to his office. Mahrokh and Tanaz allegedly caused huge amounts of papers and documents which were in that common office to be shredded and discarded. They claimed that the Side Agreement was invalid and refused to comply with its terms. Since then, litigation has "rage[d]" in the Surrogate's Court of Queens County regarding every aspect of the properties previously owned by David and Ike (*Id.*, ¶ 32). The original Side Agreement has never been found.

Thereafter, David and Ike's executors reached an accommodation in writing (the Letter Agreement). Defendants represented David in the negotiations of the Letter Agreement, whereby David was enabled to close the sale of the York Avenue Project and receive half of his negotiation fee. The other half of said fee was paid into an escrow account pending the outcome of Ike's estate's challenge to the validity of the Side Agreement. The Letter Agreement provided that Ike's estate could bring a proceeding claiming that the Side Agreement was invalid and not

legally binding against the estate. The prevailing party would have its legal fees reimbursed by the other party. In the event of a determination that the Side Agreement was invalid, David and the estate would each receive 50% of the distributions from the York Avenue Project and David would receive a management fee (*Id.*, ¶¶ 33-43). Under the Side Agreement, David was to receive a distribution of 60%.

On July 20, 2004, Ike's estate filed a petition against David and Jack in Surrogate's Court, Queens County pursuant to the Surrogate's Court Procedure Act § 1809, to determine the validity of David's claim against the estate as embodied in the Side Agreement. On May 11, 2015, a trial was held before the Honorable Peter J. Kelly, Surrogate of the County of Queens, who had presided over the proceedings from the inception. At trial, Singer and another attorney represented David. After a one-day trial, the court determined that David failed to bear his burden of proof as to the validity of the Side Agreement and that his claims were invalid and disallowed.

### DISCUSSION

#### Motion to Dismiss

Defendants move pursuant to CPLR § 3211 (a) (1), (5), and (7) to dismiss the first, second, and fourth causes of action. The motion is based in part on the Dead Man's Statute (CPLR § 4519), the best evidence rule, and the statute of limitations for legal malpractice.

Under CPLR § 3211 (a) (7), dismissal is warranted if the plaintiff "fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017] [internal quotation marks and citation omitted]). A court must accept all factual allegations as true, afford the pleadings a liberal construction, and accord

plaintiff the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Dismissal under CPLR § 3211 (a) (1) is warranted when “documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007] [internal quotation marks and citations omitted]). To lead to dismissal, the documentary evidence must utterly refute the plaintiff’s factual allegations (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). A submission qualifies as “documentary evidence” if it is unambiguous, of undisputed authenticity, and its contents are essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1<sup>st</sup> Dept 2019]).

#### Statute of Limitations

Defendants contend that the statute of limitations bars the fourth cause of action for legal malpractice and the second cause of action for breach of fiduciary duty. Plaintiff raises the doctrine of continuous representation and Executive Order No. 202.8, which tolled statutes of limitations during the Covid pandemic.

A legal malpractice claim and a breach of fiduciary duty claim seeking monetary relief have a three year limitations period (*Jemima O. v Schwartzapfel, P.C.*, 178 AD3d 474, 475 [1<sup>st</sup> Dept 2019] [legal malpractice in conjunction with fiduciary claim against attorney]). Defendants state that the wrongful conduct must have taken place by 2015 at the latest and was time barred when the complaint was filed on June 8, 2020. Defendants also refer to a consent to change attorney form, dated May 24, 2017, whereby defendants’ representation officially ceased as of that day in another case involving the Side Agreement (NYSCEF Doc. No. 151 in *David Eshaghian v Mahrokh Eshaghian*, Sup Ct, NY County, Crane, J., Index No. 654481/15).

According to defendants, even if they continuously represented David until May 24, 2017, their representation ended on that day, more than three years before the complaint was filed.

Generally, a claim for legal malpractice accrues on the date of the misconduct (*Glamm v Allen*, 57 NY2d 87, 93 [1982]), and a claim for breach of fiduciary duty accrues when damages are sustained (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 140 [2009]) or upon the breach (*In re Fischer*, 308 BR 631, 653 [Bankr ED NY 2004]). Under the doctrine of continuous representation, the statute of limitations is tolled and does not begin to run until the attorney ceases representing the client in the specific matter at issue (*Shumsky v Eisenstein*, 96 NY2d 164, 167-68 [2001]). The doctrine is applicable to breach of fiduciary claims against attorneys (*Patel v Jani*, 2016 WL 3637107, \*15, 2016 US Dist. LEXIS 85431 \*48 [SD NY 2016]; *Matter of Lawrence*, 24 NY3d 320, 344 [2014]). Where fiduciary obligations arise out of an attorney-client relationship and would not have otherwise existed, the attorney's fiduciary duty ends when the representation ends (*Access Point Med., LLC v Mandell*, 106 AD3d 40, 45 [1<sup>st</sup> Dept 2013]).

Here, defendants continued to represent David regarding the Side Agreement and the Letter Agreement, which are intertwined and part of the same real estate transaction (*Eshaghian v Eshaghian*, 146 AD3d 529, 529 [1<sup>st</sup> Dept 2017]). It was in this First Department action that the May 24, 2017 change of attorney form was filed, upon which defendants' representation and corresponding fiduciary duty ended and the three-year statute of limitations began to run. From then to June 8, 2020, the day that this case commenced, more than three years passed which means that this action would ordinarily be untimely under the continuous representation theory.

However, the Covid toll leads to a different result. Executive Order No. 202.8 (9 NYCRR 8.202.8) and several subsequent orders enacted a toll that extended from March 20,

2020 through November 3, 2020 (*see Espinal v Port Auth. of N.Y. & N.J.*, 213 AD3d 101, 104 [2d Dept 2023]). In this case, the statutes of limitations accrued on May 24, 2017 and normally would have run on May 24, 2020. Instead, the Covid toll stopped the running of the statutes of limitations on March 20, 2020 through November 3, 2020. The statute of limitations began running again on November 4, 2020, after this case was filed. Therefore, this action is timely, and the legal malpractice claims in the fourth cause of action and the breach of fiduciary claims in the second cause of action are not dismissed for untimeliness.

#### Dead Man's Statute

CPLR § 4519, the Dead Man's Statute, “disqualifies parties interested in litigation from testifying about personal transactions or communications with deceased” (*Poslock v Teachers' Retirement Bd. of Teachers' Retirement Sys.*, 88 NY2d 146, 150 [1996]). An “interested” person is one who would gain or lose by direct legal result of the judgment (*Smith v Kuhn*, 221 AD2d 620, 621 [2d Dept 1995]). The Dead Man's Statute prohibits not only direct testimony of the interested party that a personal transaction with the decedent did or did not take place, and what did - or did not – transpire between them, but also every attempt by indirection to prove the same thing (*Endervelt v Slade*, 162 Misc 2d 975, 980 [Sup Ct, NY County 1994], *affd* 214 AD2d 456 [1<sup>st</sup> Dept 1995]; 58A NY Jur 2d Evidence and Witnesses § 913). An interested party can testify to independent facts, that is, facts that do not involve personal transactions or communications with the deceased (*Durazinski v Chandler*, 41 AD3d 918, 920 [3d Dept 2007]; *Matter of Johnson*, 7 AD3d 959, 961 [3d Dept 2004]). A non-interested party may testify about transactions between it and the decedent (*Matter of Nealon*, 104 AD3d 1088, 1090 [3d Dept 2013], *affd* 22 NY3d 1045 [2014]).



### Best Evidence Rule

Where the contents of a document are in dispute and sought to be proved, the best evidence rule requires the production of the original document (*Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d 639, 643 [1994]). An exception to the rule allows secondary evidence, that is, evidence of the contents of an unproduced original to be admitted where the court makes a preliminary finding that the proponent has sufficiently accounted for the unavailability of the original and has established that the secondary evidence accurately portrays the original (*Id.* at 644–646; *Casanas v Carlei Group, LLC*, 200 AD3d 442 [1<sup>st</sup> Dept 2021]). Once this showing is made, “final determination” of the weight to be given to the secondary evidence is left to the factfinder (*Id.*, at 443).

Under CPLR § 4536, a writing may be compared with a disputed writing only if the former is proved “to the satisfaction of the court” to be that of the person claimed to have made the disputed writing. Here, under CPLR § 4519, David could not testify that the signature on the copy of the Side Agreement was in Ike’s handwriting (*see Matter of Otto*, 2018 NY Slip Op 32083[U], \*10 [Sur Ct, NY County 2018] [Dead Man’s Statute prevented witness from testifying that signature on checks was decedent’s]).

### Legal Malpractice

To plead a cause of action for legal malpractice, a plaintiff must allege facts showing: (1) that the attorney was negligent; (2) that such negligence was a proximate cause of plaintiff’s losses; and (3) proof of actual damages (*Brooks v Lewin*, 21 AD3d 731, 734 [1<sup>st</sup> Dept 2005]). Plaintiff must establish that but for the negligence of the attorney, plaintiff would have prevailed in the matter or would not have sustained any ascertainable damages (*RTW Retailwinds, Inc. v Colucci & Umans*, 213 AD3d 509, 510 [1<sup>st</sup> Dept 2023]).

The first cause of action for legal malpractice is based on the trial. It alleges that defendants failed to adequately research the law concerning the evidentiary issues pertinent to the proceeding, namely the Dead Man's Statute and the best evidence rule, that defendants were unprepared for trial, and that they did not adequately explain to David the risks which the evidentiary rules posed to his chances of prevailing. David contends that defendants should have called a handwriting expert as a witness who could have testified that Ike's signature on David's photocopy was a copy of Ike's real signature.

The trial transcript (NYSCEF Doc. No. 54) shows that counsel for Ike's estate objected to any question posed by Singer to David remotely touching on the Side Agreement or David's business relations with Ike and that the Surrogate sustained each objection. The complaint alleges that other evidence could have been introduced that might have shown the validity of the Side Agreement.

The complaint alleges further that at the trial, Singer failed to call any disinterested witnesses (witnesses whose testimony did not run afoul of the Dead Man's Statute) to testify about the circumstances attendant upon the making of the Side Agreement, failed to properly examine David, the one witness called by his side, and failed to offer any documents into evidence. The complaint also alleges that defendant made no attempt to offer the Side Agreement into evidence, "even though that document was the very gravamen of the proceeding" (NYSCEF Doc. No. 1 [Complaint], ¶ 102).

During the trial, Surrogate Kelly remarked on several occasions that Singer should be attempting to offer admissible evidence which did not run afoul of the Dead Man's Statute, documents that were of public record, or the testimony of witnesses who were not interested in or averse to the interests of the Estate. No such evidence was ever presented and no questions

were asked about Ike's illness or the circumstances relating to Ike's execution of the codicil to his will (*Id.*, ¶¶ 74, 78).

The complaint further alleges that Singer failed to offer evidence that Mahrokh's deposition testimony contradicted her trial testimony, although such evidence might have led to a finding that she did not, as she testified at trial, properly search Ike's office for the original Side Agreement and the admission of the photocopied Side Agreement over the best evidence rule. At her deposition, Mahrokh had testified that she did not search Ike's office for any document relating to the Side Agreement and that no one made such a search.

David alleges that immediately after Ike died, David was locked out of their office. At the trial, Tanaz testified that during the seven-day period of mourning for Ike, she and her mother changed the locks to the office and that David was denied access (NYSCEF Doc. No. 54 at 27-29). On redirect examination, her attorney asked Tanaz if the locks were changed to protect the carpets in the office and she answered yes (*Id.* at 29). Singer failed to follow up on this testimony as to the necessity to "protect the carpets" and to lock David out of the office so he could not retrieve the Side Agreement.

The complaint further alleges that Singer could have called David's son as a witness. David's son typed the Side Agreement and could have testified that the agreement which he typed was identical to the one under consideration in the trial.

The complaint alleges that the Side Agreement could have been supported by the testimony of Diana Ostrander ("Ostrander"), who worked for Ike as a managing agent for his real estate properties from 1999 until his passing in 2003 (NYSCEF Doc. No. 1 [Complaint], ¶ 81). Ostrander had previously testified that, on Ike's death bed, Ike told her of a loan which his brother Jack had made to David and Ike in connection with the York Avenue Project and asked

that she make sure that Jack was repaid (*Id.*, ¶ 82). Ostrander also testified that Ike had told her that there was a written agreement providing for Jack to be paid back (*Id.*, ¶ 83). David argues that the Dead Man's Statute would not have barred her testimony.

At the trial, Singer stated that Ostrander was unavailable to testify as she had moved out of state (NYSCEF Doc. No. 54 at 128). Singer offered Ostrander's deposition transcript as evidence. The complaint alleges that

“[Singer] did not produce ... sufficient evidence of her [Ostrander] unavailability to warrant admission of her deposition testimony. Finally ... Surrogate Kelly offered to admit the testimony if Defendant Singer could produce proof of her unavailability at a later date. Unbelievably, Defendant Singer then just handed the entire transcript of the deposition to the Surrogate without being prepared to enter the relevant portions into evidence through the customary means of reading those portions into the record”

(NYSCEF Doc. No. 1 [Complaint], ¶ 100).

The complaint alleges that it is unclear whether the relevant portions of Ostrander's deposition were entered into the record (*Id.*, ¶ 101).

David alleges that not only was the attorney's conduct inadequate at the hearing, but that at some point during the more than decade long litigation, defendants knew or should have known that they could not prove that the Side Agreement was enforceable. They did not inform David that the likelihood of success was minimal. Instead, they continued to prosecute the case and charge David legal fees. Plaintiff alleges defendants caused him millions in damages, consisting of his own legal fees, the estate's legal fees, loss of the escrow money, and 10% of the distributions from the York Avenue Project.

The fourth cause of action for legal malpractice is based on the provision in the Letter Agreement that, in the event it is judicially determined that the Side Agreement is invalid and not legally binding, David will receive a management fee, which will be the same as the management fee payable to the managing member of the “Operating Company.”

After the Side Agreement was declared invalid, the estate refused to pay David, since no “management fee” was ever paid to the managing member of the Operating Company, who was someone other than David and who was paid a “development fee”. The complaint alleges that defendants were charged with the professional responsibility to draft the Letter Agreement in a manner which protected David’s rights and accurately reflected the understanding between him and the estate.

Accepting the complaint as true and according plaintiff the benefit of every possible favorable inference, the subject complaint sufficiently alleges a cause of action to recover damages for legal malpractice (*see Endless Ocean, LLC v Twomey, Latham, Shea, Kelley, Dubin & Quartararo*, 113 AD3d 587, 589 [2d Dept 2014]). The complaint alleges that Singer and his firm breached their duty towards their client David by failing to exercise the ordinary reasonable skill and knowledge commonly possessed by attorneys, causing plaintiff to lose his case and/or to incur damages (*see McCoy v Feinman*, 99 NY2d 295, 301-302 [2002]).

*The September 15, 2004 Letter*

Singer submits a September 15, 2004 letter with an attached memorandum that he claims he wrote and sent to David (NYSCEF Doc. No. 26). The 23-page memorandum is a discussion of the law regarding David’s position that the Side Agreement is valid. The memorandum presents the obstacles presented by the Dead Man’s Statute and the best evidence rule, and the chances of overcoming those obstacles. The memorandum evaluates whether the copy of the Side Agreement will be admitted into evidence.

There is no evidence that David received such letter and memorandum. In his opposition affidavit, David states that he has no recollection of receiving it, and Singer’s claim that the letter was mailed does not give rise to the presumption of receipt, as he does not present evidence of

defendant firm's office practices pertinent to mailing (*see Lindsay v Pasternack Tilker Ziegler Walsh Stanton & Romano LLP*, 129 AD3d 790, 793 [2d Dept 2015]; *Morrison Cohen Singer & Weinstein, LLP v Brophy*, 19 AD3d 161, 162 [1<sup>st</sup> Dept 2005]).

Even if the presumption of receipt were to be established, the letter and memorandum would not show that the causes of action for legal malpractice should be dismissed. Singer contends that he adequately informed David of the evidentiary obstacles in his case. However, under CPLR § 3211 (a) (1) "dismissal is warranted only if the documentary evidence submitted utterly refutes plaintiff's factual allegations" (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433 [1<sup>st</sup> Dept 2014] [internal quotation marks and citation omitted]). The letter does not conclusively establish a defense to this action. While the letter may show that plaintiff was put on notice of the difficulties of his case, plaintiff's allegations regarding the trial, raise factual issues regarding defendants' alleged failure to present a sufficient case at the subject trial. "At this pre-discovery stage of the present litigation, th[is] submissio[n] do[es] not meet the CPLR 3211 (a) (1) requirement of conclusively establishing [the] defense as a matter of law" (*IMO Indus. v Anderson Kill & Olick*, 267 AD2d 10, 11 [1<sup>st</sup> Dept 1999]).

Second cause of Action for breach of fiduciary duty and fraud

The second cause of action, based on fraud and breach of fiduciary duty, is pleaded as an alternative in the event that the court finds that the Side Agreement litigation could not have been successful even if prosecuted with reasonable professional care. The fraud, malpractice and fiduciary claims are supported by the same factual allegations and the same allegations of damages. As such, plaintiff's second cause of action for breach of fiduciary and fraud claim are dismissed as redundant or duplicative (*Gourary v Green*, 143 AD3d 589, 523, 581-582 [1<sup>st</sup> Dept

2016)]; *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1<sup>st</sup> Dept 2003]).

CONCLUSION

On the basis of the foregoing, it is hereby

ORDERED that defendants' motion to dismiss the complaint is granted with respect to the second cause of action and is otherwise denied; and it is further

9/6/2023

DATE

SHLOMO S. HAGLER, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: