SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CARMEN VICTORIA ST. GEORGE PART 34
Justice

MELANIE ENGLESE and STEVEN SISSKIND,

Plaintiffs,

- v -

STEVEN SLADKUS, ESQ., WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP and SCHWARTZ, SLADKUS, REICH, GREENBERG & ATLAS, LLP,

Defendants.

INDEX NO. 101006/2015

MOTION DATE 02/26/2018

MOTION SEQ. NO. 001

INTERIM ORDER

The following papers were read on this motion for

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause – Affidavits – Exhibits	23-39
Answering Affidavits – Exhibits	42-46
Replying Affidavits	47

Upon the foregoing papers and for the reasons set forth in the accompanying decision, it is

ORDERED that the motion for dismissal under CPLR § 3211 is granted to the extent of dismissing those claims specified in the accompanying order, and the remainder of the motion is converted to one for summary judgment under CPLR § 3211 (c); and it is further

ORDERED that this motion is adjourned to May 15, 2018, by which time the parties shall submit a stipulation setting forth a timetable for discovery and for the briefing of the summary judgment motion; and it is further

ORDERED that the cross-motion to amend is held in abeyance for resolution with the summary judgment motion.

Dated: 4/25/2018

ENTER:

CARMEN VICTORIA ST. GEORGE, J.S.C.

HON. CARMEN VICTORIA ST. GEORGE
J.S.C.

1. CHECK ONE: .....
2. CHECK AS APPROPRIATE:....MOTION IS

□ CASE DISPOSED
X GRANTED in part

X NON-FINAL DISPOSITION
X Cross- Motion granted

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 34

MELANIE ENGLESE and STEVEN SISSKIND,

Plaintiffs,

- against -

STEVEN SLADKUS, ESQ., WOLF HALDENSTEIN, ADLER, FREEMAN, & HERZ LLP and SCHWARTZ, SLADKUS, REICH, GREENBERG & ATLAS, LLP

Defendants.

Index No.: 101006/2015
Motion Sequence No.: 001
INTERIM
DECISION/ORDER

ST. GEORGE, CARMEN, J.S.C.:

This legal malpractice action arises from an underlying lawsuit in which defendant Steven Sladkus, Esq., then at the law firm of defendant Wolf, Haldenstein, Adler, Freeman, & Hers LLP, represented plaintiffs Melanie Englese and Steven Sisskind.[1] Before the Court now is defendants' motion to dismiss under CPLR § 3211 (a) (1) and (a) (7). For the reasons below, the Court converts this motion to one for summary judgment (CPLR § 3211 [c]) and provides time for the parties to conduct limited discovery and then submit supplemental briefs on the motion.

The underlying action related to an apartment that plaintiffs purchased in the building located at 205-209 East 57th Street. Plaintiffs alleged that the apartment was defectively constructed and had toxic mold and that they relocated following an inspection which revealed the scope of the problems. Between June 2007 and August 2009 plaintiffs tried unsuccessfully to get defendant 205-209 East 57th Street Associates, LLC (Sponsor), the owner of the building, to

[1] Plaintiffs also sued Sladkus' current firm, Schwartz, Sladkus, Reich, Greenberg & Atlas LLP, but they have since discontinued against this firm.

remediate the problems. When these efforts failed, around November 2009, plaintiffs commenced the underlying lawsuit, with another law firm as their counsel. Subsequently, they hired defendants to replace the original firm. The complaint alleges that defendants assured them they would add the Clarett Group, which owned the building's Sponsor, as well as Clarett's CEO at the time, Veronica Hackett, as defendants. Plaintiffs assert that defendants also assured them they would research and confirm that the Sponsor had sufficient assets to satisfy any judgment.

According to the complaint, defendants did none of the things they promised, and in addition they allowed the statute of limitations to lapse. Because of this, and because the Sponsor now contained no assets, plaintiffs contend, they were forced to accept a poor settlement during the mediation that commenced in March of 2012. Plaintiffs assert that, had the case gone to trial, they would have "obtained a judgment against, and collected from, [the defendants in the underlying case] net money damages in excess of three million dollars" (Complaint, ¶ 48). They assert that defendants misled them deliberately in all the above actions. Accordingly, plaintiffs assert causes of action for negligence and legal malpractice, breach of contract, breach of fiduciary duties, fraud and/or negligent misrepresentation, and fee disgorgement.

Currently, defendants move to dismiss under CPLR §§ 3211 (a) (1) and (a) (7). They argue that dismissal is mandated because the settlement was extremely advantageous and they did a wonderful job on their clients' behalf. They state that their documentary evidence, inclusive of email exchanges between defendant's firm and the plaintiffs, establishes that plaintiffs were extremely happy with the outcome. They state that plaintiffs are incorrect in their assertion that defendants did not act in a timely fashion to add Clarett and Hackett to the underlying lawsuit, as they drafted a second amended complaint which added Hackett as a defendant and explained to plaintiffs they would refrain from filing it until after mediation. They challenge the assertion that

they led plaintiffs to believe they added Clarett. They state that plaintiffs are also incorrect in that the Sponsor did not sell the apartment until nine months after the mediation and that the Case-Shiller New York Condo Price Index shows that the apartment's value at the time of the mediation was less than $1.725 million. They state that plaintiffs pursued mediation as a "strategic decision" (Mem. in Support of Motion, p 10). In pursuing mediation, the motion asserts, plaintiffs also decided not to file the second amended complaint. They allege that plaintiffs were aware of this and were not surprised by this fact at the October 2011 deposition. They argue that the mediator's comments about their strength of plaintiffs' case underscores that defendants had represented plaintiffs very well and that plaintiffs did not feel pressured to settle. Defendants allege that plaintiffs' position that they are damaged by the alleged malpractice is speculative, insufficient under the prevailing law, and wrong on the facts asserted. They allege that plaintiffs' claims for breach of contract, fraud, and breach of fiduciary duty should be dismissed as duplicative of the legal malpractice claim (citing *Sun Graphics Corp. v Levy, Davis & Maher, LLP*, 94 AD3d 669, 669 [1st Dept 2012], among other cases), and that the cause of action for disgorgement of their legal fees should be dismissed because, among other things, plaintiffs acknowledge that they retained and paid these bills without objection (citing *Gamiel v Curtis & Reiss-Curtis, P.C.*, 60 AD3d 473, 474-75 [1st Dept 2009] [ruling made in summary judgment context]).

In support of the CPLR § 3211 (7) prong of their motion, defendants submit the following as documentary evidence which conclusively refutes plaintiff's claims:

1) Wolf's October 4, 2011 email, which annexed a proposed amended complaint;
2) A revised proposed verified second amended complaint, which adds Hackett, who also had been the principal and managing member of defendant 205-209 East 57th Street Associates, LLC (Sponsor), the building which included their apartment;
3) An October 11, 2011 email stating that a) they drafted an amended complaint wherein Hackett was added as a defendant because she was no longer working for Sponsor, and she was the individual who signed the certification in the offering plan and she directed the contractors to make repairs to the apartment, and b) as there was a mediation

scheduled to begin around October 31, the firm would not file the amended complaint until afterward, if necessary;[2]

4) A four-page, hand written settlement agreement which was signed by plaintiffs and dated March 6, 2012;
5) An email dated May 15, 2012 from Steven Sisskind, co-plaintiff, discussing the settlement and stating, "what's the status and when will we close this nightmare?";
6) Emails dated April 3, 16 and 24, 2012, asking about the status of the settlement and certain of the financial arrangements;
7) An email from defendant Wolf, copied to defendant Sladkus, which annexes a final invoice and states that the bill is discounted by $19,000 and describing other payments – of $10,000 and $60,000, which it would pay itself from the sale proceeds and through a settlement check from the sponsor, respectively;
8) Sisskind's letter confirming that the firm was due the $10,000 and $60,000, respectively; and
9) Two condo price indexes, which purportedly show that the settlement agreement, including the return of the purchase price rather than a higher price, was reasonably reflective of the market at that time.

In opposition, plaintiffs submit the affidavit of co-plaintiff Englese. She states that when she and her husband hired defendants as counsel, defendants informed them that their original complaint should have named the Clarett Group and Hackett as defendants. She states that based on the representations of counsel between July 2010 and October 2011 that they were protecting plaintiffs' interests, Englese believed that Clarett Group and various of its affiliates had been added to the action, and that she continued to believe as much even after October 2011. She stated that she did not realize that the Sponsor was not financially viable until her October 2011 deposition. She stated that defendants assured her they would add Hackett as a defendant and did not inform her that they had not added Clarett to the lawsuit earlier. She states that plaintiffs did not intend for defendants to abstain from filing the amended complaint when the mediation was adjourned for several additional months. In addition, plaintiffs assert that because they were the first individuals to purchase an apartment in the condominium, they received a substantial discount,

[2] The mediation ultimately was adjourned to March 2012.

and thus the $1.725 million was below the market price. They reiterate that several months after the settlement, the apartment was sold for $2.4 million.

Further, plaintiffs argue that defendants have not satisfied the standards for showing that dismissal is appropriate at this juncture. They stress that in a pre-answer motion to dismiss, the Court must take all the allegations in the complaint as true (CPLR § 3211 [a] [7]). In addition, under this provision, courts have the power to consider plaintiffs' affidavits to remedy defects in the complaint. Plaintiffs state that defendants' documentary evidence does not refute the allegations in their complaint. Defendants' arguments as to the second amended complaint in the underlying action, plaintiffs assert, presume that plaintiffs' allegation is that defendants did not *draft* the pleading, when their allegation is that defendants failed to file it in a timely fashion. They state that plaintiffs did not make a strategic decision not to file the amended pleading. They state that the October 2011 email from defendants does not show that plaintiffs made any determination concerning the litigation strategy. They state that the mediator's comments about the strength of their claims does not show that defendants did a good job preparing their case. They state that Sisskind's emails to defendants simply reflect plaintiffs' exasperation with the length of time it was taking to conclude the lawsuit and their eagerness to "get on with their lives" (Plaintiff's Mem. in Opp., p 14). They state they have adequately alleged damages and defendants' arguments about the real estate market are not proper in a pre-answer motion to dismiss. They assert that their claims for fiduciary duty and breach of contract are not duplicative of their malpractice claim despite some overlap, that their fraud claim is distinct, and that their disgorgement claim is viable.

In reply, defendants reiterate that they achieved a remarkable settlement for their clients, and that plaintiffs' subsequent dissatisfaction with it is not a proper basis for a malpractice claim. They argue that they did not let the case languish because they were not retained until July 2010.

They state that the Sponsor was already a shell company when they appeared in the case. Furthermore, they state, because plaintiffs participated in the mediation proceedings they waived their objections to it. Defendants also allege that they did not commit malpractice by failing to sue the Clarett Group because they "had sufficiently put [the group] on notice of its potential liability and exposure," thus securing their participation in and contribution to the settlement. They state plaintiffs cannot argue that defendants' failure to sue Clarett was malpractice because they do not assert this in the complaint. They state that the import of plaintiffs' emails concerning the settlement is indisputable. They challenge the assertion that plaintiffs have adequately pled damages, pointing out, among other things, that plaintiffs did not attempt to sell the apartment prior to the settlement. They state the Court should take judicial notice of the Case-Shiller price index and deem it documentary evidence which conclusively refutes plaintiffs' claims.

Discussion

Dismissal is proper under CPLR § 3211 (a) (7) if the allegations are duplicative of or encompassed by the legal malpractice claim (*see Kliger-Weiss Infosystems, Inc. v Ruskin Moscou Faltischek, P.C.*, -- AD3d --, --, 2018 Slip Op 01456, at *3 [1st Dept 2018]). Accordingly, much of the second cause of action, for breach of contract, duplicates the legal malpractice claim and cannot stand. The remainder of this cause of action, which asserts that defendants billed them for work they did not perform, or improperly billed them $30,000, cannot stand because of plaintiffs' acknowledgment that they paid the bills without objection (*see Gamiel*, 60 AD3d at 474-75). Therefore, the second cause of action is dismissed. The portions of the third and fourth causes of action which relate to the allegations of overbilling are dismissed for the same reason. The remainder of the third cause of action, for breach of fiduciary duty, and the fourth cause of action,

for fraud, are dismissed because the allegations are adequately encompassed by the claims for malpractice.[3]

Defendants have not satisfied their burden under CPLR § 3211 (a) (1), which requires them to "utterly refute plaintiff[s'] allegation, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]). In a legal malpractice case, a plaintiff must establish that the attorney was negligent, that the negligence proximately caused plaintiff's losses, and that the negligence damaged the plaintiff (*Global Business Inst. v Rivkin Radler*, 101 AD3d 651, 651 [1st Dept 2012]). Thus, to prevail on this argument, defendants must rely on documents that conclusively refute these elements. Defendants primarily rely on emails to support this prong of their motion. Emails and other correspondence may be sufficient to satisfy this burden in certain circumstances (*see Kolchins v Evolution Mkts., Inc.*, -- NY3d --, --, 2018 NY Slip Op 02209, at *5 [2018] [citing *Kolchins v Evolution Mkts., Inc.*, 128 AD3d 47, 58-59 [1st Dept 2015], *aff'd*, -- NY3d – [2018]), but only if they "negate beyond substantial question" the allegations in the complaint" (*Amsterdam Hospitality Group*,120 AD3d at 433), and "conclusively establish[] a defense to the asserted claims as a matter of law" (*Calpo-Rivera v Siroka*, 144 AD3d 568, 568 [1st Dept 2016] [citation and internal quotation marks omitted] [finding that the emails, affidavits, and contract at issue were not "documentary evidence"]). Here, defendants' documents do not satisfy this burden.

Along with the emails, the remaining contentions in the motion and the opposing papers raise issues of fact that are not proper in the context of a motion to dismiss but are eminently worthy of consideration in a summary judgment motion. Under CPLR § 3211 (c), the Court has

[3] The complaint elsewhere asserts that defendants misrepresented and mishandled their case in an effort to curry favor with sponsors and realtors, but this is not the basis of their fraud claim – nor can it be, as it is entirely speculative.

the discretion to convert this motion to one for summary judgment. The Court may do so regardless of whether issue has been joined, provided the Court gives ample notice to the parties to "make a complete record and to come forward with evidence that could be considered" (*Nonnon v City of New York*, 9 NY3d 825, 826 [2007]; *see also Mihlovan v Grozavu,* 72 NY2d 506 [1988] [reversing the court's conversion of pre-answer motion to dismiss to one for summary judgment solely because the court did not give the parties notice and the opportunity to brief the issue]). One of the bases for such conversion is that it can lead to an "expeditious disposition of the controversy" (CPLR § 3211 [c]).

In the action at hand, the Court concludes that "expeditious disposition of the controversy" is possible (CPLR § 3211 [c]). Although the documents on which defendants rely, such as the emails, are insufficient for the purposes of CPLR § 3211 (a), they raise clear issues of fact capable of summary resolution. Moreover, the emails coupled with the existence of the settlement agreement, along with the prompt payment of defendants' bills, raise serious questions as to the merits of plaintiffs' claims. In addition, although the Court does not accept the Case-Shiller price index as an indisputable authority based on defendants' conclusory assertion to that effect, the submission of the index suggests that the parties can quickly and efficiently assemble market information as to the estimated value of the condominium at the time the parties agreed to the settlement. Furthermore, the parties dispute the value of the apartment at the time of its subsequent sale. The parties can also effortlessly ascertain whether the condominium was sold after the defendants in the underlying lawsuit remediated the mold and otherwise made improvements which increased its value. Both sides, moreover, have submitted affidavits, defendants have submitted emails, and both sides have referred to matters – including plaintiffs' statements as to their level of sophistication and the purportedly negligent failure to add the Clarett Group as a

defendant in the underlying action – which fall outside the four corners of the complaint.

Accordingly, the Court exercises its discretion under CPLR § 3211 (c) and converts the remainder of the motion to one for summary judgment. Moreover, given the early state of the case, the Court shall allow for the discovery necessary to litigate this motion. The discovery shall be conducted on an accelerated basis.

Conclusion

As the Court converts this motion to one for summary judgment, it holds plaintiffs' cross-motion to amend in abeyance. Therefore, it is

ORDERED that the motion for dismissal under CPLR § 3211 (a) (1) and (a) (7) is granted to the extent that it seeks dismissal of the second, third and fourth causes of action; and it is further

ORDERED that, utilizing the Court's discretionary powers under CPLR § 3211 (c), the remainder of the motion is converted to a summary judgment motion under CPLR §3212; and it is further

ORDERED that this matter is adjourned until May 15, 2018, by which time the parties shall submit an accelerated timetable for the necessary discovery along with a briefing schedule for the summary judgment motion.

Dated: April 25, 2018

ENTER:

CARMEN VICTORIA ST. GEORGE, J.S.C.

HON. CARMEN VICTORIA ST. GEORGE
J.S.C.