Fulton County Superior Court
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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

GREENAVATIONS POWER, LLC and GREENAVATIONS POWER DUBLIN, LLC, Plaintiffs, v. ARNALL GOLDEN GREGORY, LLP, JOHN L. GORNALL, JR., and WILHELM ZIEGLER, Defendants.	CIVIL ACTION FILE NO: 2018CV306061

ORDER

The above-captioned matter is before the Court on the Motion for Partial Summary Judgment of Defendants Arnall Golden Gregory, LLP ("AGG"), John L. Gornall, Jr. ("Gornall"), and Wilhelm Ziegler ("Ziegler") (hereinafter collectively "Defendants"), which was filed on August 20, 2019. Also before the Court is Defendants' Motion to Dismiss Plaintiffs' Fraud Claim ("Motion to Dismiss"), which was filed on October 15, 2019. These Motions came before the Court for a hearing on November 26, 2019, and both sides appeared and were allowed an opportunity for oral argument.

Now, having considered Defendants' Motions; the Responses of Plaintiffs Greenavations Power, LLC ("GP") and Greenavations Power Dublin, LLC ("GPD") (hereinafter collectively "Plaintiffs") in opposition thereto; the Reply briefs; the entire record in this case; the arguments of counsel; and applicable Georgia law; the Court herein makes the following findings and conclusions:

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Overview

This action for legal malpractice and breach of fiduciary duty arises out of Defendants' concurrent representation of Plaintiffs and Non-Party MAGE Solar Projects, Inc. in 2012 and

2013. The record reflects that since approximately 2010, Defendants have served as counsel for MAGE Solar Projects, Inc. and its affiliated entities (collectively "MAGE Solar"). In April 2012, Defendants were retained by Plaintiffs to represent Plaintiffs in connection with a solar project involving solar panels and equipment Plaintiffs purchased from MAGE Solar.

In this action, Plaintiffs claim that Defendants intentionally and fraudulently concealed material information from Plaintiffs regarding MAGE Solar's financial losses between 2011 and 2013 in order to induce Plaintiffs to purchase over $2 million worth of unwarranted solar panels and equipment from MAGE Solar to Plaintiffs' detriment. Plaintiffs also assert that Defendants negligently failed to protect Plaintiffs' interests with respect to the underlying solar project.

Prior to the close of discovery in this matter, in August 2019, Defendants filed the Motion for Partial Summary Judgment presently before the Court, seeking summary judgment only on Plaintiffs' claims arising out of the alleged existence of a "non-waivable" conflict because, according to Defendants, these claims arose in April 2012, expired in April 2016, and as such, are now barred by the expiration of the applicable statute of limitation set forth in O.C.G.A. 9-3-25.

B. Facts

Because discovery has not yet been completed, some of the material facts in this case remain in dispute. However, as established by the limited evidence of record before the Court, viewed in a light most favorable to Plaintiffs as the non-moving parties, the following pertinent facts are essentially non-disputed:

Plaintiff GP is in the business of providing consulting and design services for the development of solar energy projects and assessing the solar energy potential of commercial real estate. Plaintiff GPD is a company that was created as a special purpose entity to facilitate the development of a solar power array in Dublin, Laurens County, Georgia.

Defendant AGG is a law firm based in Atlanta, Georgia. Defendants Gornall and Ziegler are attorneys licensed to practice in the State of Georgia who are partners with AGG.

MAGE Solar was a manufacturer and distributor of solar energy equipment and systems.

In early 2011, the Laurens County Development Authority ("LCDA") in Dublin, Laurens County, Georgia outlined a plan to finance, develop, integrate, and install a solar array (the "Project") at the Dublin City High School to facilitate the economic development of the manufacture of solar panels by MAGE Solar in Laurens County.

In September 2011, the Dublin City School District (the "School District") hired Plaintiff GP to perform an analysis of the economic viability of the Project.

In November 2011, the LCDA, the School District, and MAGE Solar decided to proceed with the Project and finance the $4.35 million solar array with a $3.585 million taxable lease revenue bond (the "Bond Deal") and a federal grant of approximately $1.2 million.

In December 2011, Plaintiffs and MAGE Solar entered into a vendor finance agreement whereby Plaintiffs purchased the solar panels and other components necessary for the Project from MAGE Solar.

On April 25, 2012, Plaintiffs retained Defendant AGG to represent them with respect to the Bond Deal and to negotiate the terms and conditions of an extended warranty with MAGE Solar to protect Plaintiffs' interests in the Project/solar array.

In furtherance thereof, on April 25, 2012, AGG sent an engagement letter to Robert E. Green ("Mr. Green"), President of Plaintiffs, confirming in writing "the nature of the legal undertaking or engagement [Plaintiffs] requested [AGG] to perform and to inform [Plaintiffs] of [AGG's] billing and payment arrangements concerning legal fees" (the "Retainer Agreement"). The Retainer Agreement provided the names of the attorneys who would be working with Plaintiffs; detailed the attorneys' hourly billing rates; and set forth the professional services to be rendered by AGG to Plaintiffs. The Retainer Agreement also enclosed AGG's Standard Terms of Representation regarding fees and other important matters related to AGG's representation of Plaintiffs.

The Retainer Agreement was executed by Defendant Gornall on behalf of Defendant

AGG on April 25, 2012. On May 1, 2012, Mr. Green accepted and executed the Retainer Agreement on Plaintiffs' behalf.

As stated above, at the time Plaintiffs retained AGG in April 2012, MAGE Solar was also an existing client of AGG. Because of Defendants' ongoing representation of MAGE Solar and current representation of Plaintiffs, on April 25, 2012, AGG asked Plaintiffs and MAGE Solar to execute a letter of "Waiver of Multiple, Concurrent or Conflicting Representation" (the "Waiver Letter").

In the Waiver Letter, AGG disclosed that while AGG had not been engaged by MAGE Solar to give advice specifically related to the Project or the warranty for the solar array, AGG previously advised MAGE Solar about standard terms and conditions of sale, including a limited warranty, for solar components sold by MAGE Solar. In addition, AGG disclosed that AGG represented a number of MAGE Solar's affiliates "on various legal matters, including acquisition, corporate, tax, contract and employment law matters as general outside counsel."

On April 30, 2012, Mr. Green executed the Waiver Letter on behalf of Plaintiffs, and Joe Thomas, CEO and President of MAGE Solar, executed the Waiver Letter on behalf of MAGE Solar. In doing so, both parties acknowledged that they were waiving the "multiple, concurrent or conflicting representation" presented by AGG's dual representation of MAGE Solar and Plaintiffs.

On January 29, 2013, the Bond Deal closed, naming Plaintiff GPD as the Owner, Borrower, and Lessor of the solar array, which is under lease for the next 25 years to the Laurens County Public Facilities Authority and the School District.

During the time period at issue, MAGE Solar incurred substantial financial losses. In June 2013, one of MAGE Solar's parent companies, MAGE Industrie Holding, AG, declared bankruptcy. In December 2013, MAGE Solar's other parent company, MAGE Solar AG, filed for bankruptcy.

In September 2013, AGG informed Plaintiffs of MAGE Solar's insolvency and financial

distress.

Construction of the solar array was completed in 2014.

As of October 2014, MAGE Solar was no longer in business. Accordingly, MAGE Solar could not honor any extended warranties on the Project or warrant the solar array at issue.

On January 20, 2017, Plaintiffs and Defendants AGG and Gornall executed a Standstill and Tolling Agreement (the "Tolling Agreement"), tolling the statute of limitation period on any of Plaintiffs' claims accruing on or after January 20, 2013. The Tolling Agreement was amended on November 17, 2017 and amended again on February 28, 2018.

The Tolling Agreement states that it "does not and is not intended to revive any claim or cause of action which is already barred in whole or in part by the applicable statute of limitation or repose or other time-related defenses."

C. Procedural History

On June 5, 2018, Plaintiffs initiated this litigation by filing a Complaint for Legal Malpractice against Defendants, asserting claims for legal malpractice, breach of fiduciary duty, punitive damages, and attorney's fees (the "Complaint").

In the Complaint, Plaintiffs assert, among other things, that (1) Defendants were negligent with respect to their representation of Plaintiffs in the Bond Deal; (2) Defendants knew, or should have known, that MAGE Solar was in financial distress in 2011, 2012 and January 2013 when the Bond Deal closed because of Defendants' prior and ongoing representation of MAGE Solar; and (3) Defendants concealed the truth about MAGE Solar's financial losses from Plaintiffs until September 2013 after the solar panels were delivered and installed. Plaintiffs argue that if Defendants had disclosed MAGE Solar's financial difficulties in a timely manner, Plaintiffs could have mitigated their damages by replacing all of the components of the Project with warranted components from another vendor.

As stated above, after the parties engaged in a period of discovery, Defendants filed the Motion for Partial Summary Judgment presently before the Court, seeking summary judgment

on certain of Plaintiffs' claims because these claims are allegedly barred by the four-year statute of limitation.

On September 24, 2019, Plaintiffs filed their Response in opposition to Defendants' Motion for Partial Summary Judgment.

On the same date, Plaintiffs filed their First Amended Complaint (the "Amended Complaint"), raising an additional claim for fraud against Defendants based upon Defendants' purported "actual knowledge" of MAGE Solar's financial status and incurred net losses in 2011 and Defendants' alleged intentional concealment of/failure to disclose this information to Plaintiffs.

On October 11, 2019, Defendants filed a Reply in further support of their Motion for Partial Summary Judgment, seeking summary judgment on Plaintiffs' recently-added fraud claim. On October 15, 2019, Defendants filed the Motion to Dismiss presently before the Court, seeking to dismiss Plaintiffs' fraud claim pursuant to O.C.G.A. § 9-11-12(b)(6).

Plaintiffs filed a Response in opposition to Defendants' Motion to Dismiss on November 18, 2019.

II. LEGAL FINDINGS

A. Defendants' Motion for Partial Summary Judgment

The Court will first address Defendants' Motion for Partial Summary Judgment.

Pursuant to O.C.G.A. Section 9-11-56, for a party to prevail on a Motion for Summary Judgment, the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, must show that there is no genuine issue as to any material fact and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law. O.C.G.A. § 9-11-56(c); *see also* Creeden v. Fuentes, 296 Ga. App. 96 (2009).

> The standard for summary judgment is familiar and settled: Summary judgment is warranted when any material fact is undisputed, as shown by the pleadings and record evidence, and

> this fact entitles the moving party to judgment as a matter of law. So, to prevail on a motion for summary judgment, the moving party must show that there is no genuine dispute as to a specific material fact and that this specific fact is enough, regardless of any other facts in the case, to entitle the moving party to judgment as a matter of law. When a defendant moves for summary judgment as to an element of the case for which the plaintiff, and not the defendant, will bear the burden of proof at trial the defendant may show that he is entitled to summary judgment either by affirmatively disproving that element of the case or by pointing to an absence of evidence in the record by which the plaintiff might carry the burden to prove that element. And if the defendant does so, the plaintiff cannot rest on his pleadings, but rather must point to specific evidence giving rise to a triable issue.

Whitlock v. Moore, 312 Ga. App. 777, 780-81 (2011) (citing Strength v. Lovett, 311 Ga. App. 35, 39-40 (2011)).

In ruling on a motion for summary judgment, the opposing party should be given the benefit of all reasonable doubt, and the court should construe the evidence and all inferences and conclusions arising therefrom most favorably toward the party opposing the motion. Moore v. Goldome Credit Corporation, 187 Ga. App. 594, 596 (1988).

> [T]he Court must construe the evidence most favorably towards the nonmoving party, who is given the benefit of all reasonable doubts and possible inferences. The party opposing summary judgment is not required to produce evidence demanding judgment for it, but is only required to present evidence that raises a genuine issue of material fact.

Nguyen v. Sw. Emergency Physicians, P.C., 298 Ga. 75, 82 (2015).

Here, Defendants argue that they are entitled to summary judgment on the following claims because these claims are barred by the applicable statute of limitation: (1) Defendants' failure to disclose that they had a "non-waivable" conflict of interest given their concurrent representation of Plaintiffs and MAGE Solar; (2) Defendants' failure to disclose that MAGE Solar could not honor its warranty obligations; (3) Defendants' failure to advise Plaintiff of MAGE Solar's financial distress; and (4) Defendants' failure to advise Plaintiffs to conduct financial due diligence on MAGE Solar.

Defendants also argue that Plaintiffs' breach of fiduciary duty claims are duplicative of

the legal malpractice claims and should be dismissed.

Defendants assert that in this case, the applicable statute of limitation is four (4) years and begins to run from "the date of the alleged negligent or unskillful act." Long v. Wallace, 214 Ga. App. 466, 467 (1994); O.C.G.A. § 9-3-25; *see* Duke Galish, L.L.C. v. Arnall Golden Gregory, L.L.P., 288 Ga. App. 75 (2007) (holding that "a cause of action for legal malpractice is subject to the four-year statute of limitation," and "[t]he cause of action arises immediately upon the wrongful act having been committed"); *see also* Hyman v. Jordan, 201 Ga. App. 853, 853 (1991) and Riddle v. Driebe, 153 Ga. App. 276 (1980).

In reliance upon this legal precedent, Defendants argue that "Plaintiffs' malpractice action accrued when the first injury arising from the alleged breach occurred in April 2012" – i.e. "when Defendants allegedly failed to disclose a 'non-waivable' conflict and commenced the concurrent (unrelated) representation of Plaintiffs and [MAGE] Solar." Defendants further argue that "because Plaintiffs' cause of action based on a 'non-waivable' conflict accrued in April 2012, the statute of limitations ran in April 2016," and "Plaintiffs' claims based on a 'non-waivable' conflict are time-barred, warranting summary judgment on those claims."

On a motion for summary judgment, if "the defendant presents evidence that the statute of limitation has run, plaintiff must come forward with some evidence to demonstrate ... that some evidence exists to create a material issue of fact that the statute has been tolled for jury determination." Douglas Kohoutek, Ltd. v. Hartley, Rowe & Fowler, P.C., 247 Ga. App. 422, 423 (2000).

In Plaintiffs' Response to Defendants' Motion for Partial Summary Judgment, Plaintiffs argue that Defendants' Motion should be denied on the following grounds: (1) Defendants' fraudulent concealment of the time when Defendants actually learned of MAGE Solar's 2011 financial losses tolled the statute of limitation; (2) Plaintiffs' fraud claims are sufficiently pled to toll the statute of limitations; and (3) Plaintiffs' claims arising on or after January 24, 2013 are subject to the Tolling Agreement.

Additionally, Plaintiffs argue that because a written contract for professional services exists between the parties, the applicable statute of limitation in this case is the six-year statute of limitation set forth in O.C.G.A. § 9-3-24. In furtherance thereof, Plaintiffs assert that their claims are not time-barred, and Defendants' Motion should be denied.

Defendants rely upon the Riddle case and its progeny in arguing that the statute of limitations for a legal malpractice action is four (4) years. Riddle, 153 Ga. App. at 279 (holding that "[i]n Georgia, legal malpractice is based upon the breach of a duty imposed by the attorney-client contract of employment, and as such, the applicable statute of limitation is four years").

In subsequent cases, the Court of Appeals continued to apply the four-year statute of limitation in professional malpractice actions, even when a written contract existed between the parties. *See* Old Republic Nat. Title Ins. Co. v. Attorney Title Servs., Inc., 299 Ga. App. 6, 9-10 (2009) (holding that "in Georgia[,] legal malpractice is based upon the breach of a duty imposed by the attorney-client contract of employment").

However, in the case of Newell Recycling of Atlanta, Inc. v. Jordan Jones & Goulding, Inc., the Supreme Court of Georgia overruled the Court of Appeals with respect to the applicable statute of limitation in a professional malpractice case where a written contract exists between the parties. Newell Recycling of Atlanta, Inc. v. Jordan Jones & Goulding, Inc., 288 Ga. 236, 239 (2010).

In Newell, the plaintiff, Newell Recycling of Atlanta, Inc. ("Newell"), hired the defendant, Jordan Jones and Goulding, Inc. ("JJG"), a professional engineering firm, to design an automobile shredding facility. In furtherance thereof, in 1997, JJG began work on the facility pursuant to a "Draft Scope of Work" document, a series of letters, and an agreement to prepare a concrete work platform to control drainage around the facility. Id. at 236. Approximately three (3) years later, in May 2000, the concrete platform around the facility began to fail. Id.

In August 2004, Newell sued JJG for breach of contract and professional malpractice. JJG then moved for summary judgment, "arguing that the complaint was barred by the four-year

statute of limitation applicable to actions upon any implied promise or undertaking contained in OCGA § 9-3-25." Id.

The trial court denied JJG's Motion for Summary Judgment, concluding that "an issue of fact existed as to the existence of a written contract, and ... therefore, the six-year statute of limitation of OCGA § 9-3-24 applicable to written contracts applied." Id.

JJG appealed, and the Court of Appeals reversed the trial court, holding that:

> [E]ven if one assumes, arguendo, that [JJG's] August 1997 letters to Newell, together with the Draft Scope of Work, were sufficient to constitute an enforceable, written contract between the parties, Newell's claim was nevertheless barred by the applicable four-year statute of limitation contained in OCGA § 9–3–25.... OCGA § 9–3–25 applies even to those professional malpractice claims premised on the breach of a written contract for professional services, and, because Newell's breach of contract claim was premised on a written contract for professional services and calls into question the conduct of professionals in their area of expertise, it was a claim for professional malpractice, and the four-year statute of limitation applied.

Id. at 236-37 (quotations omitted).

The Supreme Court granted certiorari to Newell to address the following issue: "whether the Court of Appeals erred in holding that a professional malpractice claim premised on a written contract is governed by the four-year statute of limitation in OCGA § 9-3-25, rather than the six-year statute of limitation in OCGA § 9-3-24." Id. at 237.

The Supreme Court ultimately answered this question in the affirmative, reversing the Court of Appeals. Id.

In furtherance thereof, the Supreme Court found as follows:

> The statute of limitations on all simple contracts in writing is six years; and this is true whether the promise sued on is expressed in the writing or implied and written into it by the law. In this regard, because an implied promise to perform professionally pursuant to a written agreement for professional services would be written into the contract for professional services by the law, an alleged breach of this implied obligation would necessarily be governed by the six-year statute of limitation of OCGA § 9–3–24. For this reason, the Court of Appeals was incorrect when it concluded that the four-year statute of limitation of OCGA § 9–3–25 applies even to

> those professional malpractice claims premised on the breach of a written contract for professional services. It is instead the six-year statute of limitation of OCGA § 9–3–24 that would apply to such a claim. By its plain terms, the four-year statute of limitation contained in OCGA § 9–3–25 does not apply where a contract is evidenced by a sufficient writing. The statute only applies where no sufficiently written contract exists and a cause of action can therefore be based solely on the breach of an express oral or implied promise. Thus, again, based on the Court of Appeals assuming arguendo that the relevant documents at issue here were sufficient to constitute an enforceable, written contract between the parties, the Court of Appeals should have concluded, as the trial court did, that the six-year statute of limitation contained in OCGA § 9–3–24 was applicable to Newell's claims as opposed to the four-year statute of limitations applicable to oral agreements as stated in OCGA § 9–3–25.

Id. 237-38 (quotations omitted) (emphasis added).

The Supreme Court further directed that "[i]n determining which statute of limitation applies, the threshold inquiry is to determine whether a written agreement actually exists between the parties such that any implied duties sued upon would have grown directly out of the existence of the written contract itself." Id. at 238 (emphasis added).

The Supreme Court then held that:

> Where a complete written contract exists and an action for breach of contract is pursued, the Legislature and this Court have made clear that the six-year statute of limitation of OCGA § 9–3–24 applies, regardless of whether the alleged breach stems from the express terms of the agreement or duties that are implied in the agreement as a matter of law. Where the agreement is incomplete, such that the writing does not form a contract or the promise allegedly broken stems from a purely oral agreement, the four-year statute of limitation of OCGA § 9–3–25 applies.

Id. (citations omitted) (emphasis added).

In light of the Newell decision detailed above, this Court must now "determine whether a written agreement actually exists between" Plaintiffs and Defendants in this case "such that any implied duties sued upon would have grown directly out of the existence of the written contract itself." Id.; Saiia Construction, LLC v. Terracon Consultants, Inc., 310 Ga. App. 713, 716 (2011); (holding that "when a professional malpractice claim arises from a standard of care

implied by law in a written contract for professional services, the statute of limitation for written contracts, OCGA § 9-3-24, applies").

This Court is guided in its "analysis, in general, by the well-established rules of contract construction." UniFund Financial Corp. v. Donaghue, 288 Ga. App. 81, 82 (2007).

In Georgia, "[t]o constitute a valid contract, there must be parties able to contract, a consideration moving to the contract, the assent of the parties to the terms of the contract, and a subject matter upon which the contract can operate." O.C.G.A. § 13-3-1. "Each of these essential terms must be certain. The requirement of certainty extends not only to the subject matter and purpose of the contract, but also to the parties, consideration, and even the time and place of performance." Drake v. Wallace, 259 Ga. App. 111, 112 (2003).

> It is well settled that an agreement between two parties will occur only when the minds of the parties meet at the same time, upon the same subject-matter, and in the same sense. In determining if parties had the mutual assent or meeting of the minds necessary to reach agreement, courts apply an objective theory of intent whereby one party's intention is deemed to be that meaning a reasonable man in the position of the other contracting party would ascribe to the first party's manifestations of assent, or that meaning which the other contracting party knew the first party ascribed to his manifestations of assent. In some instances, the only conduct of the parties manifesting intent is the express language of the agreement. In other instances, the circumstances surrounding the making of the contract, such as correspondence and discussions, are relevant in deciding if there was a mutual assent to an agreement, and courts are free to consider such extrinsic evidence.

Cox Broadcasting Corp. v. National Collegiate Athletic Association, 250 Ga. 391, 395 (1982).

"The cardinal rule of construction is to determine the intention of the parties." UniFund Financial Corp., 288 Ga. App. at 82; *see* Graham v. HHC St. Simons, Inc., 322 Ga. App. 693, 695–96, (2013) (holding that "[i]n making that determination, the circumstances surrounding the making of the contract, such as correspondence and discussions, are relevant in deciding if there was a mutual assent to an agreement"). "Unless and until there is a meeting of the minds as to all essential terms, a contract is not complete and enforceable." TranSouth Financial Corp. v. Rooks, 269 Ga. App. 321, 323 (2004).

In this case, the record reflects and the parties do not dispute that Plaintiffs retained Defendant AGG to represent them as counsel for the Project and the Bond Deal on April 25, 2012, and the parties entered into a corresponding written Retainer Agreement for the provision of Defendants' professional services on the same date. In furtherance of that attorney-client relationship, Plaintiffs accepted the explicit terms of the Retainer Agreement, and AGG represented Plaintiffs pursuant to the Retainer Agreement.

Accordingly, the Court finds that a "complete written contract for professional services" exists in this case, and the six-year statute of limitation applies. *See* Newell, 288 Ga. at 237-38; O.C.G.A. § 9-3-24. Moreover, "because an implied promise to perform professionally pursuant to a written agreement for professional services would be written into the contract for professional services by the law, an alleged breach of this implied obligation would [also] necessarily be governed by the six-year statute of limitation of OCGA § 9–3–24." Id.; *see* Saiia Construction, LLC, 310 Ga. App. at 716.

Having determined that the six-year statute of limitation applies to the claims at issue in Defendants' Motion for Partial Summary Judgment, the Court must now determine whether the statute of limitation expired prior to the filing of this action by Plaintiffs.

As stated above, in a legal malpractice case, the statute begins to run from "the date of the alleged negligent or unskillful act." Long, 214 Ga. App. at 467. "It is clear that an action for attorney malpractice accrues and the period of limitations begins to run, from the date of the attorney's breach, that is, from the date of the alleged negligent or unskillful act." Riddle, 153 Ga. App. at 279.

While, ordinarily, the Court would have found that Plaintiffs' claims for professional malpractice arising from the written contract expired in April 2018 and the claims are now barred, because the parties entered into the Tolling Agreement in January 2017, November 2017, and February 2018, the limitations period was tolled, and Plaintiffs' claims were still viable when they initiated this lawsuit in June 2018.

Based upon the above, the Court finds that Defendants' Motion for Partial Summary Judgment on Plaintiffs' legal malpractice claims related to Defendants' alleged "non-waivable" conflict and the alleged acts/omissions resulting therefrom should be denied.

With respect to Plaintiffs' breach of fiduciary duty claims arising under the same alleged "non-waivable" conflict, Defendants also assert that these claims should be dismissed because they are duplicative of the legal malpractice claims and because they are barred by the statute of limitation.

The Court agrees that the breach of fiduciary claims at issue in Defendants' Motion for Partial Summary Judgment are duplicative and should be dismissed.

"[T]hese allegations clearly call into question the degree of professional skill exercised, and therefore are duplications of the legal malpractice claim." Oehlerich v. Llewellyn, 285 Ga. App. 738, 740–41 (2007) (quotations omitted). Like the legal malpractice claims. Plaintiffs' claims for breach of fiduciary duty are also "based on the establishment of a fiduciary attorney-client relationship" and "are simply duplications of th[e] legal malpractice claim." Id. at 741.

Therefore, Defendants' Motion for Partial Summary Judgment on Plaintiffs' breach of fiduciary duty claims related to Defendants' alleged "non-waivable" conflict and the alleged acts/omissions resulting therefrom should be granted. However, the Court is not addressing Plaintiffs' remaining breach of fiduciary claims at this time.

Defendants also seek summary judgment on Plaintiffs' recently-added fraud claim. As to Plaintiffs' fraud claim, the Court finds that genuine issues of material fact remain with respect to this claim, and thus, Defendants' Motion for Partial Summary Judgment on this claim should likewise be denied at this time.

B. Defendants' Motion to Dismiss

Turning now to Defendants' Motion to Dismiss, the Court herein finds as follows:

On October 15, 2019, Defendants filed the Motion to Dismiss presently before the Court, seeking to dismiss Plaintiffs' fraud claim as "a misguided attempt to toll the statute of

limitations" and because Plaintiffs' Amended Complaint fails to state a "stand-alone claim for fraud against Defendants" pursuant to O.C.G.A. § 9-11-12(b)(6).

In furtherance thereof, Defendants argue that the "very premise of Plaintiffs' fraud claim is a duty to disclose that simply does not exist under Georgia law." Defendants assert that even if MAGE Solar's financial information were known to Defendants, Defendants had no duty to disclose that information to Plaintiffs, as Defendants were required to maintain any such information in confidence pursuant to Rule 1.6 of the Georgia Rules of Professional Conduct.

Defendants further assert that Plaintiffs' fraud claim fails because Plaintiffs did not justifiably rely on any purported omission by Defendants since Plaintiffs admit that if Defendants had disclosed MAGE Solar's financial losses in a timely manner, Plaintiffs could have "replaced the solar panels and related equipment for the Project with panels from another vendor." Defendants argue that because Plaintiffs purchased the solar panels and related equipment from MAGE Solar in December 2011 and did not retain Defendants until April 2012, Plaintiffs could not have relied on any failure by Defendants to disclose MAGE Solar's financial losses in Plaintiffs' purchase decision.

Plaintiffs filed a Response in opposition to Defendants' Motion to Dismiss on November 18, 2019. In responding to Defendants' Motion to Dismiss, Plaintiffs assert that the Motion should be denied because the allegations of the Amended Complaint are sufficient to support a claim for fraud and withstand a Motion to Dismiss.

Specifically, Plaintiffs assert that they will be able to show that (1) Defendants fraudulently concealed information from Plaintiff regarding MAGE Solar's financial status that was material to Defendants' representation of Plaintiffs' interests in the Project; (2) Plaintiffs justifiably relief upon Defendants' fraudulent omissions to their detriment and to the benefit of MAGE Solar; and (3) Defendants breached their duty to Plaintiffs to disclose the information regarding MAGE Solar.

Under Georgia law,

> A motion to dismiss pursuant to OCGA § 9–11–12(b)(6) will not be sustained unless (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought. A complaint need not set forth a cause of action in order to withstand a motion to dismiss but need only to set forth a claim for relief. In fact, a plaintiff may sue on one theory and recover on another so long as the complaint adequately states a claim for relief. The issue is not whether the complaint is perfectly pled but whether it sufficiently gave the defendant fair notice of the claim and a general indication of the type of litigation involved.

Walker v. Gowen Stores LLC, 322 Ga. App. 376, 376-77 (2013) (quotations omitted); Blockbuster Investors LP v. Cox Enterprises, Inc., 314 Ga. App. 506, 506 (2012) (holding that a motion to dismiss for failure to state a claim pursuant to O.C.G.A. § 9-11-12(b)(6) "should be granted only where a complaint shows with certainty that the plaintiff would not be entitled to relief under any state of facts that could be proven in support of his claim").

"In deciding a motion to dismiss, all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party's favor." Lam v. Allstate Indemnity Co., 327 Ga. App. 151, 153 (2014); Wylie v. Denton, 323 Ga. App. 161, 162-63, 169-70 (2013) (holding that in considering a motion to dismiss, the Court must "treat all well-pled material allegations by the nonmovant as true and all denials by the movant as false" and, in doing so, "pleadings are to be construed liberally and reasonably to achieve substantial justice consistent with the statutory requirements of the [Civil Practice] Act").

Here, after (1) construing the pleadings in a light most favorable to Plaintiffs as the non-moving parties; (2) accepting as true all well-pled material allegations asserted in Plaintiffs' Complaint and Amended Complaint; (3) recognizing that the requirements of notice pleadings in Georgia are very minimal; and (4) considering the nature of the parties' claims in this action and

the necessity that this Court consider and rely upon matters/evidence outside of the pleadings to render its determination on certain of the disputed issues before the Court, the Court finds that the issues presented in Defendants' Motion to Dismiss would be more appropriately addressed, if at all, through a Motion for Summary Judgment later in this litigation after the parties have conducted additional discovery on the claims at issue. *See* O.C.G.A. §§ 9-11-12(b)(7) and 9-11-56.

As such, the Court finds that Defendants' Motion to Dismiss should be denied.

III. CONCLUSION

Therefore, for the reasons set forth herein, IT IS HEREBY ORDERED AND ADJUDGED that Defendants' Motion for Partial Summary Judgment is DENIED in part and granted in part, and Defendants' Motion to Dismiss is DENIED.

SO ORDERED this the 11th day of March, 2020.

SHAWN ELLEN LaGRUA, Judge
Fulton County Superior Court
Atlanta Judicial Circuit

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