

Wong v Yeung-Ha

2020 NY Slip Op 31832(U)

June 11, 2020

Supreme Court, Kings County

Docket Number: 505276/18

Judge: Karen B. Rothenberg

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of June, 2020.

P R E S E N T:

HON. KAREN B. ROTHENBERG,

Justice.

-----X

ANGIE WONG a/k/a ANGIE WONG SIE YING,

Plaintiff,

- against -

Index No. 505276/18

PAULINE YEUNG-HA, GRIMALDI & YEUNG LLP,
WENDY WONG HOI YING a/k/a WENDY WONG,
ALAN WONG CHI HANG a/k/a ALAN C. H. WONG,
MICHAEL WONG KIN HANG a/k/a MICHAEL K. H.
WONG and ESTHER MAK WONG, individually and
As Trustee of THE ESTHER MAK WONG
REVOCABLE TRUST and THE ESTHER MAK WONG
REVOCABLE TRUST II,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc. Nos.

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>19-22</u>	<u>28-43</u>
Opposing Affidavits (Affirmations) _____	<u>29-43</u>	<u>44</u>
Reply Affidavits (Affirmations) _____	<u>44</u>	

Upon the foregoing papers in this fraud and legal malpractice action, defendants Pauline Yeung-Ha (Yeung-Ha) and Grimaldi & Yeung LLP (the G&Y Law Firm) move (in motion sequence [mot. seq.] one) for an order: (1) dismissing the complaint, pursuant to CPLR 3016 (b) and 3211 (a) (1) and (a) (7), and (2) awarding them costs, disbursements and attorney’s fees, pursuant to 22 NYCRR § 130-1.1 (Part 130) and CPLR 8106.

Plaintiff Angie Wong a/k/a Angie Wong Sie Ying (Angie) cross-moves (in mot. seq. two) for an order: (1) amending the caption to reflect that she brings this action “individually and as Executor of the Estate of Bill Wai Wo Wong,” pursuant to CPLR 2001, and (2) granting her leave to file an amended complaint, pursuant to CPLR 3025 (b), including a cause of action against defendants Yeung-Ha and the G&Y Law Firm under Judiciary Law § 487.

Background

On March 15, 2018, Angie commenced this action against attorney Yeung-Ha, the G&Y Law Firm, her mother, Esther Mak Wong (Esther), individually and as Trustee of the Esther Mak Wong Revocable Trust and the Esther Mak Wong Revocable Trust II (the Trusts), her sister, Wendy Wong Hoi Ying a/k/a Wendy Wong (Wendy), and her brothers, Alan Wong Chi Hang a/k/a Alan C.H. Wong (Alan) and Michael Wong Kin Hang a/k/a Michael K.H. Wong (Michael).

The Allegations in the Complaint

The complaint alleges that Angie’s father, Bill Wong a/k/a Bill Wai Wo Wong (Bill), died on September 7, 2014, “leaving a large estate . . .” (complaint at ¶ 10). Bill allegedly “left a will devising, in relevant part, one half of all of [his] tangible personal property (including all insurance policies pertaining thereto) to Esther, with the other half to be divided equally (one eighth each) among Angie, Alan, Michael, and Wendy” (*id.* at ¶ 12). Bill’s will allegedly “devised one half of [his] residual estate to Esther, and the other half to be divided equally among Angie, Alan, Michael, and Wendy, so that each

would receive an eighth of [his] residual estate” (*id.* at ¶ 13). Angie was allegedly named Executor of her father’s will (*id.* at ¶ 14).

The complaint alleges, upon information and belief, that “in or about July 2014 Michael and Alan met with Yeung-Ha and G&Y and then or thereafter Michael and Alan decided [that] Yeung-Ha and H&Y should do legal work for Bill’s estate” (*id.* at ¶ 15). When Bill died, Michael allegedly “contacted Angie and suggested [that] she retain Yeung-Ha and G&Y as her attorneys to represent her in the probate of Bill’s estate” (*id.* at ¶ 16). On September 23, 2014, Angie and Esther allegedly executed a written retainer agreement (retainer agreement) hiring attorney Yeung-Ha’s law firm, the G&Y Law Firm, to do legal work regarding Bill’s estate (*id.* at ¶ 17).

Yeung-Ha allegedly advised Angie that “the size of Bill’s estate subjected it to the federal and estate tax, and that the portion of the estate available for distribution to Bill’s heirs would be reduced by at least five million dollars if something was not done to reduce the potential estate tax liability” (*id.* at ¶ 18). Yeung-Ha also allegedly advised Angie that the estate tax could be reduced if the family implemented the following estate plan: (1) Angie, Alan, Michael and Wendy would renounce their inheritances, pursuant to EPTL § 2-1.11; (2) Angie would renounce her appointment as Executor of Bill’s estate; (3) Bill’s estate would pass to Esther through intestacy; and (4) Esther would establish multiple limited liability companies (LLCs) and grantor retained annuity trusts (GRATS) to hold the properties devised by Bill’s estate, and pay Angie, Alan, Michael and Wendy the income from those properties (*id.* at ¶ 19). Esther, Michael, Alan and Wendy allegedly

agreed to go forward with Yeung-Ha's proposed estate plan (*id.* at ¶ 21). Angie, based on her family's encouragement, allegedly "agreed to the renunciations and to the appointment of Esther as administrator . . . of the estate" (*id.* at ¶ 24).

On March 27, 2015, Angie, Michael, Alan and Wendy each allegedly executed a "Qualified Disclaimer and Renunciation" (Renunciation), all of which were allegedly prepared by Yeung-Ha of the G&Y Law Firm (*id.* at ¶¶ 25-26). Angie's Renunciation, a copy of which is annexed to the complaint, allegedly states that Angie did irrevocably and unqualifiedly renounce and disclaim her residuary interest in Bill's estate, which consisted of eight parcels of real property located in Brooklyn (Brooklyn Properties) and six parcels of real property located in Hong Kong (Hong Kong Properties), with a total appraised value of more than \$14 million (*id.* at ¶¶ 27-28).

After Angie executed the Renunciation, Yeung-Ha allegedly advised Angie that "she and Esther would then promptly begin setting up the GRATS and [LLCs] for the express purpose of passing the income from the Properties to Angie, Michael, Alan, and Wendy" (*id.* at ¶ 30). Yeung-Ha allegedly filed the renunciations with the Queens County Surrogate's Court and filed a petition for the issuance of Letters of Administration naming Angie and Esther as co-administrators (*id.* at ¶¶ 31-32). Subsequently, on March 2, 2015, the Surrogate's Court issued Letters of Administration, naming Angie as Executor and Esther as Administrator of Bill's estate (*id.* at ¶ 33).

Later in 2015, Angie and Esther allegedly deeded seven of the Brooklyn Properties from Bill's estate to Esther (*id.* at ¶ 34). The complaint alleges that "[t]his transfer was

made according to the plan, wherein Esther was supposed to pass the [Brooklyn] Properties into the GRATS and the [LLCs] yet to be organized” (*id.* at ¶ 35). The complaint further alleges that “[t]hat last step has not happened . . . and if the status quo is maintained it will never happen” (*id.* at ¶ 36). Angie allegedly “has not received anything from Bill’s residual estate . . .” (*id.* at ¶ 37).

The complaint alleges that Angie’s siblings, Alan, Michael and Wendy “began exploiting the assets of Bill’s estate[,]” “drawing income from the [Brooklyn] Properties, and ‘cutting’ Angie out, by refusing to share information or income derived from the estate with her” (*id.* at ¶¶ 43-44). Alan, Michael and Wendy have allegedly “drained Bill’s estate of more than \$300,000 in cash, and Bill’s valuable property . . . has also been illegally distributed to [them]” (*id.* at ¶ 47). Alan, Michael and Wendy allegedly used powers of attorney “and various forged documents . . . to drain money and other assets from Bill’s estate . . .” with the assistance of Yeung-Ha and/or the G&Y Law Firm (*id.* at ¶ 48).

In January 2018, ownership of six of the Brooklyn Properties was allegedly transferred from Esther to Esther as Trustee of the Trusts (*id.* at ¶ 49). Angie has allegedly “been denied access to the Trusts’ documents, and has no way of knowing the terms that govern the Trusts . . . all while being denied the ownership interest she was promised . . .” (*id.* at ¶ 50).

The complaint asserts the six causes of action for: (1) breach of fiduciary duty against Yeung-Ha and the G&Y Law Firm; (2) legal malpractice against Yeung-Ha and the G&Y Law Firm; (3) the imposition of a constructive trust; (4) conversion against

Esther, Alan, Michael and Wendy; (5) fraud against all of the defendants; and (6) unjust enrichment against all of the defendants. The complaint seeks the imposition of punitive damages against defendants, in addition to other relief.

Specifically, the first cause of action for breach of fiduciary duty alleges that Yeung-Ha and the G&Y Law Firm “had a duty to represent Angie and her family in regard to Bill’s estate in an unbiased and impartial manner so as not to favor any one of them over another and to provide equal legal protection to each party” and that they had “a duty to Angie in her capacities as both Executor and an heir of Bill’s estate to appropriately see to it that Bill’s testamentary wishes were followed . . .” (*id.* at ¶¶ 53-54). The complaint alleges that Yeung-Ha and the G&Y Law Firm breached their fiduciary duty because they “actively and knowingly engaged in a scheme to disinherit Angie by having [her] sign and deliver her Renunciation without having set up the GRATS and organized the [LLCs] so that Angie would receive an interest in the GRATS and the [LLCs] equivalent in value to the interest in Bill’s estate that she renounced . . .” (*id.* at ¶ 45).

The second cause of action for legal malpractice alleges that Angie “employed Yeung-Ha and G&Y to represent her interests in the disposition of Bill’s estate” and “among other things, [to] assist her in serving as the Executor of Bill’s will, provide legal services and advice and insure [that] Bill’s testamentary intent was realized” (*id.* at ¶¶ 62 and 64). The complaint alleges that Yeung-Ha and the G&Y Law Firm negligently represented Angie and “failed to protect Angie’s rights as an heir of the estate, by causing Angie to execute and file her Renunciation[,]” resulting in her disinheritance (*id.* at ¶¶ 65-

66). In addition, the complaint alleges that Yeung-Ha and the G&Y Law Firm failed to “serve and protect Angie in her role as Executor . . . by failing to incorporate any kind of protections . . . that would allow Angie to recover assets necessary to pay estate expenses” and “failed to consider and offer the family other alternatives for handling the estate tax . . .” (*id.* at ¶¶ 67-68).

The fifth cause of action for fraud alleges that “[a]ll of the Defendants have participated in . . . a fraudulent scheme to enrich themselves at Angie’s expense . . .” (*id.* at ¶ 89). The complaint alleges that Angie justifiably relied on Yeung-Ha and the G&Y Law Firm’s false representations that “her interest in the Properties would be held for her benefit by the GRATS and [LLCs], when in fact that plan was merely an artifice contrived by the Defendants to convince Angie to disinherit herself” (*id.* at ¶¶ 90 and 92).

The sixth cause of action alleges that Yeung-Ha and the G&Y Law Firm have been unjustly enriched because they “have been paid legal fees by Angie and by Bill’s estate in compensation for their participation in and enabling of the above-described scheme to disinherit Angie . . .” (*id.* at ¶ 96).

Defendants’ Dismissal Motion

On May 22, 2018, Yeung-Ha and the G&Y Law Firm filed a pre-answer motion to dismiss the complaint, pursuant to CPLR 3016(b) and 3211 (a) (1) and (a) (7). Defendants’ notice of motion also seeks an award of costs, disbursements and attorney’s fees, pursuant to Part 130 and/or CPLR 8106.¹

¹ While the notice of motion seeks sanctions, defendants’ moving papers do not address this branch of their motion. Consequently, this branch of the motion is denied.

Defendants' motion seeks to dismiss the complaint in its entirety on the ground that Angie lacks standing and "may not sue in her individual capacity to recover her alleged interests in the Decedent's estate, or in her own capacity to recover estate assets." Defendants further argue that the first (breach of fiduciary duty) and second (legal malpractice) causes of action are subject to dismissal because the complaint fails to plead facts showing that they owed Angie a "duty" as a beneficiary of Bill's will, since Angie "retained them to represent her as a co-executor."

In addition, defendants argue that the second cause of action for legal malpractice is "fatally flawed as a matter of law[,] and subject to dismissal, based on the terms of the retainer agreement, which "conclusively refutes Plaintiff's claim that the Moving Defendants failed to properly mitigate estate taxes and warn her of the consequences of joint representation . . ." Defendants submit a copy of the retainer agreement and argue that it "contained no provision for advising Plaintiff of the tax implications of the Decedent's will, creation of [LLCs] or settling a [GRAT]." Rather, according to defense counsel, the retainer agreement "simply defines the limited scope of the Moving Defendants' services herein as guiding the estate through probate; preparing and arranging the *filing* of its tax returns and *payment* of any estate tax; and arranging for the estate's closing." Defendants claim that they "owed no duty to Plaintiff to advise her specifically or the Estate generally regarding the estate tax consequences of the Decedent's will."

Defendants also contend that Angie's first (breach of fiduciary duty), fifth (fraud) and sixth (unjust enrichment) causes of action must be dismissed "as redundant" of the

second cause of action for legal malpractice, because they “involve the same underlying facts and do not allege damages separate and distinct from those caused by the alleged malpractice.” In addition, defendants assert that Angie’s sixth cause of action for unjust enrichment is “invalid in the legal malpractice context, where the complained-of representation is governed by an express retainer agreement.”

Finally, defendants contend that Angie’s request for punitive damages as against them “must be stricken” since “Plaintiff fails to set forth allegations affecting the public interest, involving a wrongdoing to the public, or implying a criminal [in]difference to the [their] civil obligations.”

Angie’s Opposition and Cross Motion

Angie opposes defendants’ dismissal motion, and cross-moves for an order: (1) amending the caption to reflect that she brings this action “individually and as Executor of the Estate of Bill Wai Wo Wong[,]” and (2) granting her leave to file an amended complaint, pursuant to CPLR 3025 (b), including a claim against Yeung-Ha and the G&Y Law Firm under Judiciary Law § 487.

Angie, in opposition to the dismissal motion, contends that she has standing to sue in both her individual capacity (as an heir to Bill’s estate) and in her representative capacity (as co-executor). Angie asserts that “[t]he complaint specifically alleges that Yeung-Ha proposed a plan to Angie to benefit Angie and the other beneficiaries of Bill’s will, by reducing the amount of estate taxes, and that Angie agreed to engage Yeung-Ha to do the necessary legal work[,]” including the preparation and filing of the renunciations, and the

creation of the GRATS and LLCs “for the express purpose of passing . . . the income from the Properties to Angie, Michael, Alan, and Wendy.” Angie argues that “[t]he allegations that [she] retained the G&Y Defendants and authorized them to execute the plan that Yeung-Ha proposed, ‘support an inference of an attorney-client relationship.’”

Angie further argues that the retainer agreement, which was allegedly altered,² “does not state that the G&Y Defendants are being retained to represent Angie as ‘co-Executor.’” Angie contends that the moving defendants’ position that they only represented her as a co-executor of Bill’s estate defies logic, since she did not become the “co-executor” until March 2015, six months after Yeung-Ha and the G&Y Law Firm had begun legal work regarding Bill’s estate. Angie also argues that the retainer agreement “does not refute the allegations in the Complaint that, ‘Plaintiff employed Yeung-Ha and G&Y to represent her interests in the disposition of Bill’s estate,’ and ‘Plaintiff employed Yeung-Ha and G&Y to, among other things, assist her in serving as the Executor of Bill’s will, provide legal services and advice and insure Bill’s testamentary intent was realized.’”

Angie also counters the moving defendants’ argument regarding the limited scope of the retainer agreement. Angie argues that “[w]hile the Retainer Agreement identifies a series of tasks to be performed[,]” it is premised with: “*In general*, the tasks that need to be performed in connection with the estate *include* the following, as needed . . .” (*emphasis added*). Angie notes that the retainer agreement further provides that “*We are prepared*

² Angie claims that “someone wrote “*co-*” and “*s*” around the word “Executor” on the first page” of the retainer agreement, “either before or after Angie signed . . .”

to handle all work which is required to be performed that you request us to perform . . .” (*emphasis added*). Angie argues that the retainer agreement, which does not contain a merger clause, does not disprove the allegations in the complaint. Additionally, Angie submits copies of the moving defendants’ billing records that were produced during the Surrogate’s Court proceeding and argues that the G&Y Law Firm billed her and the estate for estate tax planning.

Angie further argues that, “even if the G&Y Defendants never represented [her], she could still plead a cause of action for legal malpractice against them, based on the particular allegations of fraud and collusion set forth in the Complaint.”

Angie contends that her claims for breach of fiduciary duty, fraud and unjust enrichment are not subject to dismissal as duplicative of her legal malpractice claim because causes of action may be pleaded alternatively, as a matter of law.

Finally, Angie claims that she is entitled to punitive damages because “the conduct alleged was directed at the public at large because [she] has alleged that the G&Y Defendants assisted the Wong Defendants in defrauding not only her, but also the federal government.” Angie claims that “[t]he G&Y Defendants’ participation in a fraudulent scheme to disinherit [her] and defraud the IRS plainly rises to the level of ‘gross, wanton, or willful fraud or other morally culpable conduct’ . . .”

Angie, in support of her cross motion, contends that the caption should be amended to clarify that she brings this action “individually and as Executor of the Estate of Bill Wai

Wo Wong,” since the complaint sufficiently alleges “that the G&Y Defendants harmed her in both her capacity as an individual, and in her capacity as Co-Executor of Bill’s estate.”

In addition, Angie seeks to amend her complaint to pursue an additional cause of action against Yeung-Ha and the G&Y Law Firm under Judiciary Law § 487 based on allegations that they “trick[ed] Angie into signing her Renunciation [and] execut[ed] and fil[ed] the Renunciation and other fraudulent documents . . . with the Surrogate’s Court. Angie also seeks to amend the complaint to add additional allegations regarding defendants’ alleged fraud.

Angie submits an affidavit attesting that “[w]hen I signed G&Y’s retainer agreement in September 2014, I understood that G&Y would represent me both as Executor and as a beneficiary of my father’s estate, as alleged in my Complaint.” Angie further attests that “Yeung-Ha represented to me that she was working to advance my personal interests[,]” and seeks to amend the complaint to plead this with greater specificity.

Angie also attests that Yeung-Ha and the G&Y Law Firm produced their billing records during the course of the Surrogate’s Court proceedings, which reflect that “Yeung-Ha met with Michael, Alan, Wendy, and [Esther] on August 13, 2014, about a month before [her] father died.” The records produced by the G&Y Law Firm further reflect that “Michael paid G&Y \$400 for an initial consultation that took place on August 11, 2014, and that Michael paid G&Y a \$3,000 retainer on September 20, 2014, *three days before* [Angie] signed the retainer agreement” (emphasis added). Although Michael was not the Administrator or Executor of Bill’s estate, Angie asserts that “G&Y’s billing records

identify him repeatedly as the ‘client[,]’” and that she believes that the G&Y Defendants followed Michaels instructions, “while misleading me into disclaiming my inheritance to enrich him.”

Angie further attests, in support of her proposed cause of action against Yeung-Ha and the G&Y Law Firm for violation of Judiciary Law §487, that she recently learned that “Yeung-Ha falsely notarized [her] signature on an Acknowledgement of Receipt of [her] sister Wendy’s Renunciation” and her brother Alan’s Renunciation. Angie alleges that “[t]he G&Y Defendants filed these fraudulent documents in the Queens County Surrogate’s Court, together with all of [their] Renunciations . . . all as part of the scheme to disinherit [her] and defraud the Internal Revenue Service.”

Defendants’ Opposition to the Cross Motion and Reply

Defendants, in reply, argue that Angie “fails to refute that the retainer agreement undisputedly demonstrates the Moving Defendants owed no duty to her as a beneficiary” and “conclusively establishes [that] the Moving Defendants supplied tax preparation and estate administration – *not* tax and estate planning – services to the estate of [her] deceased father.” Defendants reiterate that “[t]he retainer agreement does not include tax planning of any kind, estate planning, creation of a [LLC] or settling a [GRAT].” Defendants claim that Angie “mischaracterizes” their billing records, which “reveal that the Moving Defendants discussed estate taxes with Plaintiff’s family, performed tax analysis, and prepared tax returns.”

Defendants also reiterate that Angie’s breach of fiduciary duty, fraud and unjust enrichment claims should be dismissed as duplicative of her legal malpractice claim, and argue that Angie failed to “differentiate these claims . . .”

Regarding that branch of Angie’s cross motion seeking to amend the complaint to add a cause of action for violation of Judiciary Law § 487, defendants argue that the “proposed allegations are insufficient to support this claim because they (1) fail to demonstrate that Plaintiff suffered actual damages proximately caused by the purported deceit; (2) are not sufficiently egregious; and (3) do not concern litigation conducted before a New York Court.” Defendants contend that “the alleged deceit did not occur during the course of a pending judicial proceeding” because they allegedly persuaded Angie to proceed with the proposed estate plan and renounce her inheritance before the Surrogate’s Court proceeding was initiated. Defendants further argue that their alleged misconduct was not sufficiently egregious to support a claim under Judiciary Law § 487.

Discussion

(1)

Defendants’ Dismissal Motion

“On a motion to dismiss pursuant to CPLR 3211 (a) (7), the pleading must be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory” (*Trump Vil. Section 4, Inc. v Bezvoleva*, 161 AD3d 916, 917 [2018]; *see also Nonnon v City of New York*, 9 NY3d 825,

827 [2007]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Rodriguez v Daily News, L.P.*, 142 AD3d 1062, 1063 [2016], *lv denied* 28 NY3d 913 [2017]).

Affidavits and other documentary evidence submitted in opposition to the motion “may be used freely to preserve inartfully pleaded, but potentially meritorious, claims” (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]). To the extent that extrinsic evidence, including affidavits and documentary evidence, is considered, “the standard of review under a CPLR 3211 motion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one” (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1999], *affd* 94 NY2d 659 [2000] [internal quotations omitted]). “Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims . . . plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss” (*Shaya B. Pacific, LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2006]).

“A motion to dismiss made pursuant to CPLR 3211 (a) (1) will fail unless the documentary evidence that forms the basis of the defense resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim” (*Shaya B. Pacific, LLC*, 38 AD3d at 37). “In order for evidence submitted in support of a CPLR 3211 (a) (1) motion to qualify as documentary evidence, it must be unambiguous, authentic, and undeniable” (*Feldshteyn v Brighton Beach 2012, LLC*, 153 AD3d 670, 670-671 [2017]).

The Legal Malpractice Claim

“To plead a claim for legal malpractice, a plaintiff must allege (1) that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession; and (2) that the attorney’s breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages” (*Gorbatov v Tsirelman*, 155 AD3d 836, 838 [2017]). “To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer’s negligence” (*Garcia v Polsky, Shouldice & Rosen, P.C.*, 161 AD3d 828, 830 [2018] [internal quotations omitted]).

In assessing the adequacy of a claim for legal malpractice, “a court must first look to the relationship of the parties” (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Company*, 5 NY3d 592, 595 [2005]). “To recover damages for legal malpractice, a plaintiff must prove, inter alia, the existence of an attorney-client relationship” (*Nelson v Kalathara*, 48 AD3d 528, 529 [2008]). However, the Court of Appeals has held that “[i]n New York, a third party, without privity, cannot maintain a claim against an attorney in professional negligence, ‘absent fraud, collusion, malicious acts or other special circumstances’” (*Estate of Schneider v Finmann*, 15 NY3d 306, 308-309 [2010] [quoting *Estate of Spivey v Pulley*, 138 AD2d 563, 564 (1988)]; see also *Rhodes v Honigman*, 131 AD3d 1151, 1152 [2015] [holding that “(l)ack of privity with an estate planning attorney is a bar against a beneficiary’s claims of legal malpractice against that attorney absent fraud, collusion, malicious acts, or other special circumstances”]).

Importantly, the Second Department has held that “a legal malpractice plaintiff need not, in order to assert a viable cause of action, specifically plead that the alleged malpractice fell within the agreed scope of the defendant’s representation” because “[l]egal malpractice actions . . . are not subject to special pleading requirements” (*Shaya B. Pacific, LLC*, 38 AD3d at 39). “Rather, a legal malpractice defendant seeking dismissal pursuant to CPLR 3211 (a) (1) must tender documentary evidence conclusively establishing that the scope of its representations did *not* include matters relating to the alleged malpractice” (*id.*).

Here, the retainer agreement submitted in support of defendants’ dismissal motion does not conclusively establish that the scope of defendants’ representation did not include matters relating to the alleged malpractice. Although the retainer agreement generally lists certain “tasks that need to be performed in connection with the estate[,]” it also states that “[w]e are prepared to handle *all work* which is required to be performed or that you request us to perform . . .” (emphasis added). In addition, while the retainer agreement initially states (on page one) that “I am writing in order to set forth an agreement between us concerning our representation of Esther as proposed Executor of [Bill’s] estate[,]” it later states (on page two) that “we are undertaking joint representation . . .” of Angie and Esther. Contrary to defendants’ contentions, the retainer agreement does not expressly limit the scope of that legal representation and does not expressly state that defendants’ legal representation of Angie is in her representative capacity only. Furthermore, Angie’s signature on the retainer agreement does not indicate that she executed it in her representative capacity as Executor of Bill’s estate.

In any event, even absent privity, Angie may maintain a legal malpractice claim against Yeung-Ha and the G&Y Law Firm in her individual capacity, as a matter of law, since the complaint specifically alleges that those defendants engaged in a fraudulent scheme to induce Angie to execute the Renunciation and thereby relinquish her inheritance. In addition, the complaint sufficiently alleges the elements of a legal malpractice claim. Accordingly, defendants' motion to dismiss Angie's second cause of action for legal malpractice is denied.

The Fraud Claim

The fifth cause of action against Yeung-Ha and the G&Y Law Firm sufficiently alleges a cause of action for fraud. "To state a cause of action sounding in fraud, a plaintiff must allege that (1) the defendant made a representation or a material omission of fact which was false and the defendant knew to be false, (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it, (3) there was justifiable reliance on the misrepresentation or material omission, and (4) injury" (*Caravello v One Management Group, LLC*, 131 AD3d 1191, 1192 [2015] [internal quotations omitted]).

Here, the complaint states a cause of action against Yeung-Ha and the G&Y Law Firm for fraud because the complaint sufficiently alleges that defendants knowingly participated in a fraudulent scheme to disinherit Angie and advanced its commission. Specifically, the complaint alleges, among other things, that Yeung-Ha and the G&Y Law Firm "falsely represented to Angie that her interest in the Properties would be held for her benefit by the GRATS and [LLCs], when in fact that plan was merely an artifice contrived

by the Defendants to convince Angie to disinherit herself”; “Defendants never had any intention of following through with the plan . . . but falsely stated to Angie that they did so intend in order to induce her reliance . . .” and that “Angie justifiable relied on the Defendants’ misrepresentations . . .” causing her damages because she was allegedly tricked into renouncing her inheritance (*see* complaint at ¶¶ 90-93). Accordingly, defendants’ motion to dismiss the fifth cause of action for fraud is denied, since the complaint specifically alleges the necessary elements of a fraud claim.

The Unjust Enrichment Claim

The sixth cause of action against Yeung-Ha and the G&Y Law Firm for unjust enrichment sufficiently alleges that they were “unjustly enriched at Angie’s expense” because they “have been paid legal fees by Angie and by Bill’s estate in compensation for their participation in and enabling of the above-described scheme to disinherit Angie . . .” (*id.* at ¶¶ 96 and 98) (*see Comprehensive Mental Assessment & Medical Care, P.C. v Gusrae Kaplan Nusbaum, PLLC*, 130 AD3d 670, 671 [2015] [holding that unjust enrichment claim against law firm was erroneously dismissed because “(t)he complaint alleged that the Plaintiffs paid GKN large sums of money (for) legal fees associated with the work being performed on the Plaintiffs’ behalf”]).

Contrary to defendants’ contention, Angie’s unjust enrichment claim is not duplicative of her cause of action for legal malpractice because the complaint alleges damages (i.e., the legal fees paid to defendants) that are distinct from the damages allegedly caused by defendants’ legal malpractice (i.e., Angie’s disinheritance) (*Blanco v Polanco*,

116 AD3d 892, 896-897 [2014] [holding that unjust enrichment and breach of fiduciary duty claims should have been dismissed because “the complaint did not allege damages distinct from the damages that were allegedly caused by legal malpractice”]). Thus, defendants’ motion to dismiss the sixth cause of action for unjust enrichment is denied.

The Breach of Fiduciary Duty Claim

In contrast, the first cause of action for breach of defendants’ fiduciary duties is subject to dismissal, since the breach of fiduciary duty allegations in the complaint are essentially duplicative of the legal malpractice allegations, and do not allege damages distinct from those arising out of defendants’ alleged malpractice (*Putnam County Temple & Jewish Center, Inc. v Rhineback Sav. Bank*, 87 AD3d 1118, 1120 [2011] [upholding dismissal of breach of fiduciary duty claim as duplicative of the legal malpractice allegations]; *Kvetnaya v Tylo*, 49 AD3d 608, 609 [2008] [holding that breach of fiduciary duty claim was properly dismissed because it arose from the same facts as the legal malpractice cause of action, does not allege distinct damages, and is thus duplicative of the legal malpractice cause of action]).

The Request for Punitive Damages

Finally, Angie’s demands for punitive damages in the complaint are stricken because the complaint fails to set forth any facts or allegations to support her contention that defendants “committed a fraud ‘evincing a high degree of moral turpitude, and demonstrating such wanton dishonesty as to imply a criminal indifference to civil obligations . . . where the conduct [is] aimed at the public generally’” (*Stewart v Berger*,

137 AD3d 1103, 1105 [2016] [quoting *Reads Co., LLC v Katz*, 72 AD3d 1054, 1057 (2010)] [emphasis added]). The crux of the complaint is that defendants defrauded Angie into renouncing her inheritance. Contrary to Angie’s contention, the fact that defendants’ alleged plan sought to defraud the IRS does not indicate that the alleged misconduct was “aimed at the public generally.”

(2)

Plaintiff’s Cross Motion to Amend

“In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit” (*Betz v Blatt*, 160 AD3d 689, 693 [2018], quoting *Markowitz v Friedman*, 144 AD3d 993, 995 [2016]; see also CPLR 3025 [b]; *Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015]).

Furthermore, in the absence of prejudice to the other party, “[a]mendments of pleadings are liberally allowed to correct a mistake, omission, irregularity or defect in the pleadings” (*Meyers v Teitelbaum*, 19 Misc 2d 1080, 1081 [Sup Ct, Kings County 1959]; see also CPLR 2001). As previously discussed, the retainer agreement does not conclusively prove that Angie only retained Yeung-Ha and the G&Y Law Firm in her representative capacity, and the complaint sufficiently alleged otherwise. Thus, that branch of Angie’s cross motion seeking to amend the caption to reflect that she is suing in both her individual and representative capacities is warranted, pursuant to CPLR 2001.

Angie also seeks to amend the complaint, pursuant to CPLR 3025 (b), to add additional allegations to support her claims and to add another cause of action against Yeung-Ha and the G&Y Law Firm for violation of Judiciary Law § 487. “Under Judiciary Law § 487, an attorney who ‘[i]s guilty of any deceit or collusion . . . with intent to deceive the court *or any party* . . . [i]s guilty of a misdemeanor and [is liable for] treble damages, to be recovered in a civil action” (*Gorbatov v Tselrelman*, 155 AD3d 836, 838 [2017] [quoting Judiciary Law § 487]).

Here, the proposed amended complaint sufficiently alleges that:

“The G&Y Defendants breached Judiciary Law § 487 by falsely promising Angie that she would still receive her rightful interests in the Properties, through the establishment of GRATS and [LLCs] that would hold the Properties for her benefit, and by making this promise, deceived Angie into renouncing her rightful inheritance.

“The G&Y Defendants made these false representations during the course of, and in furtherance of, an estate proceeding they commenced in the Queens County Surrogate’s Court for the administration of Bill’s estate.

“The G&Y Defendants also misled the Court in that proceeding, by filing Angie’s Renunciation and the other Renunciations, which were all falsely premised on the representation that the parties that signed the Renunciations intended to give up all of their interests in the Properties.

“Yeung-Ha falsely notarized Alan’s Renunciation, and his Acknowledgements of Receipt of the other Renunciations . . . and also falsely notarized Acknowledgements of Receipt of Alan’s Renunciation . . .

“Yeung-Ha also falsely notarized Angie’s Acknowledgement of Receipt of Wendy’s Renunciation . . .

“The G&Y Defendants knowingly filed Alan’s forged Renunciation and the improper Acknowledgements of Receipt with the Queens County Surrogate’s Court” (proposed amended complaint at ¶¶ 102-108).

Defendants, in opposition to the cross motion, have failed to demonstrate that Angie’s proposed claim for violation of Judiciary Law § 487 is palpably devoid of merit, or that they would be prejudiced by the amendment. Angie’s cross motion to amend the complaint is, therefore, granted.

Conclusion

Accordingly, it is

ORDERED that the branch of defendants’ motion (in mot. seq. one) seeking to dismiss the complaint is granted only to the extent that the first cause of action for breach of fiduciary duty is dismissed and the demands for punitive damages are stricken, and defendants’ dismissal motion is otherwise denied; and it is further

ORDERED that the branch of defendants’ motion (in mot. seq. one) seeking an award of costs, disbursements and attorney’s fees, pursuant to Part 130 and CPLR 8106, is denied, and it is further

ORDERED that the branch of plaintiff’s cross motion (in mot. seq. two) seeking to amend the caption, pursuant to CPLR 2001, to reflect that plaintiff brings this action “individually and as Executor of the Estate of Bill Wai Wo Wong” is granted, and the caption is hereby amended; and it is further

ORDERED that the branch of plaintiff's cross motion (in mot. seq. two) for leave to amend the complaint, pursuant to CPLR 3025 (b), is granted, the amended complaint is deemed served and defendants shall have 30 days to answer the amended complaint from service of this order with notice of entry thereof.

The court, having considered the parties remaining contentions finds them unavailing. All relief not expressly granted herein is denied.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.