

**538 Morgan Realty LLC v Law Off. of Aihong You,  
PC**

2024 NY Slip Op 32300(U)

July 2, 2024

Supreme Court, New York County

Docket Number: Index No. 153886/2023

Judge: Richard G. Latin

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. RICHARD G. LATIN PART 46M**

*Justice*

-----X

538 MORGAN REALTY LLC, SD INTERNATIONAL  
INC., DIAN KUI SU, QING MEI ZHAO, TIAN FANG SU

Plaintiff,

- v -

THE LAW OFFICE OF AIHONG YOU, PC, JOSEPH &  
SMARGIASSI, LLC, AIHONG YOU, JOHN SMARGIASSI,  
MARIO ALEX JOSEPH,

Defendant.

-----X

**INDEX NO.** 153886/2023

**MOTION DATE** 06/24/2024,  
06/24/2024

**MOTION SEQ. NO.** 001 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 56, 57, 58, 59, 60, 61, 71, 72, 73, 74, 75

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 62, 63, 64, 65, 66, 67, 68, 69, 70, 76, 77, 78, 79

were read on this motion to/for DISMISSAL.

Upon the foregoing documents and for the reasons spread across the record at oral argument on June 24, 2024, it is ordered that defendants' motions to dismiss are determined as follows:

Plaintiffs bring this action alleging defendants' legal malpractice in rendering legal services regarding a previous breach of contract and conversion litigation dispute. Defendant Aihong You moves pursuant to CPLR § 3211(a)(1), (5), and (7) for an order dismissing plaintiffs' complaint. Defendants Joseph & Smargiassi LLC move pursuant to CPLR § 3211(a)(1),(7), and CPLR § 3012 to dismiss. Plaintiffs oppose the motions.

## **Background**

Plaintiffs 538 Morgan Realty LLC, SD International Inc., Dian Kui Su, Qing Mei Zhao, and Tian Fang Su (“Plaintiffs”) were owners of a property located at 540 Morgan Avenue, Brooklyn, New York 1122 (the “Property”) (NYSCEF # 9 ¶ 14; NYSCEF # 31 at 2). On March 3, 2015, Plaintiffs entered into a contract to sell the Property to 538 Morgan Avenue Properties LLC and NY Stone Kitchen Depot, Inc. (“Buyers”) for \$4 million (“Property Contract”) (NYSCEF # 9 ¶ 15). On the same day on March 3, 2015, the Buyers also entered into a contract to purchase Plaintiff SD International Inc.’s business assets for \$702,793.00 (the “Business Contract”), which was located at the Property (NYSCEF # 9 ¶ 16). The Business Contract was fully performed (NYSCEF # 9 ¶ 16). Allegedly the Property Contract was not fully performed and on June 24, 2015, Buyers sued Plaintiffs in New York for the failed real estate deal (the “Underlying Litigation”) (NYSCEF # 9 ¶ 17). The action was captioned *538 Morgan Avenue Properties LLC, et al., v. 538 Morgan Realty LLC, et al.*, Index No. 507788/2015 (NYSCEF # 9 ¶ 18; NYSCEF # 31 at 3). The Underlying Litigation involved the Buyers suing Plaintiffs for breach of contract and sought the full \$5 million liquidated damages amount stated in the Property Contract’s liquidated damages clause (NYSCEF # 9 ¶ 20). Additionally, Buyers sued Plaintiffs for conversion, seeking \$1.8 million by alleging that Plaintiffs wrongfully took possession of that sum, which was purportedly made as a “cash down payment on the Property” (NYSCEF # 9 ¶ 20). In response, Plaintiffs denied these allegations and filed counterclaims regarding the alleged breach of contract claim (NYSCEF # 9 ¶ 20).

During the Underlying Litigation, Plaintiffs retained Aihong You and the Law Office of Aihong You for legal services. (NYSCEF # 9 ¶ 21). As the Underlying Litigation progressed, Plaintiffs also retained the legal services of Joseph Smargiassi and Mario A. Joseph of Joseph &

Smargiassi LLC on September 5, 2019 (NYSCEF # 9 ¶ 22). The Underlying Litigation went to trial on May 18, 2022 for the alleged claims of breach of contract and conversion (NYSCEF # 9 ¶ 23). On June 1, 2022, the verdict concluded in favor of the Buyers (NYSCEF # 9 ¶ 24). On September 14, 2022, a final judgement was entered against Plaintiffs for \$5 million in liquidated damages and \$3,020,580 in conversion damages, including interest and costs (NYSCEF # 9 ¶ 25). On March 2023, the Underlying Litigation settled and judgment was entered on March 24, 2023 (NYSCEF # 9 ¶ 26). The judgment required Plaintiffs to surrender the Property to the Buyers, which was claimed to be valued at \$9 million for \$4.58 million (NYSCEF # 9 ¶ 27).

On September 5, 2023, Plaintiffs commenced this action alleging professional negligence against defendants. The complaint alleges that defendants failed to file any motion challenging the enforceability of the liquidated damages clause. (NYSCEF # 9 ¶ 28). Plaintiffs claim that “by failing to file any motion as to the enforcement of the liquidated damages clause, Defendants negligently failed to present this question of law for resolution by the Court. Rather, the jury was just left with the question of fact of who was entitled to those liquidated damages” (NYSCEF # 9 ¶ 33). Plaintiffs also claim that the Defendants “failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession” (NYSCEF # 9 ¶ 36). Plaintiffs further claim that, but for Defendants’ negligence, Plaintiffs would not have been forced to settle the Underlying Litigation by surrendering a \$9 million property for half price (NYSCEF # 9 ¶ 36).

Defendants now move to dismiss the complaint. Defendant Aihong You avers Plaintiffs’ legal malpractice claim fails to satisfy the “but for” causation standard and Plaintiff’s allegations are conclusory and speculative (NYSCEF # 31 at 6). Defendant Aihong You also argues that the alleged breaches constitute non-actionable trial strategy and are collaterally estopped from

challenging the jury's verdict (NYSCEF # 31 at 9, 12). Defendants Joseph & Smargiassi LLC, John Smargiassi, and Mario Alexis Joseph aver that Plaintiffs' allegation of legal malpractice is precluded by documentary evidence (NYSCEF # 37 at 8). In addition, Defendants Joseph & Smargiassi LLC, John Smargiassi, and Mario Alexis Joseph argue that Plaintiffs' allegation must be dismissed because it fails to state a cause of action and the complaint was not timely served (NYSCEF # 37 at 8, 12).

### **Discussion**

#### **Cause of Action (CPLR § 3211(a)(7))**

On a CPLR § 3211(a)(7) motion to dismiss, the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide the plaintiff with "the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "[W]hether a plaintiff ... can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss" (*African Diaspora Mar. Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 211 [1st Dept 2013]).

"However, factual allegations presumed to be true on a motion pursuant to CPLR 3211 may properly be negated by affidavits and documentary evidence" (*Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 613 [1st Dept 2015]). A motion to dismiss pursuant to CPLR 3211(a)(1) may be granted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Morgenthau & Latham v Bank of N.Y. Co., Inc.*, 305 AD2d 74, 78 [1st Dept 2003]). And where "legal conclusions and factual allegations [in the complaint] are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference" (*id.* [internal citations and quotations omitted]).

To prevail in a legal malpractice action, plaintiff must plead "factual allegations which, if proven at trial, would demonstrate that counsel had breached a duty owed to the client, that the breach was a proximate cause of the injuries, and that actual damages were sustained" (*Dweck Law Firm, LLP v Mann*, 283 AD2d 292, 293 [1st Dept 2001]). Unsupported factual allegations, conclusory legal arguments or allegations contradicted by documentation, do not suffice (*id.*). Malpractice claims stemming over a client's criticism of counsel's strategy may be dismissed provided that an attorney pursues a client's case with reasonable courses of action (*id.*). In addition, a client must establish that "but for" counsel's deficient representation, there would have been a more favorable outcome to the underlying matter (*id.* [dismissing client's legal malpractice claim due to the claim of damages was speculative and unascertainable]).

### **Negligence**

Here, Plaintiff's allegations are sufficient to raise a reasonable inference that Defendants "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession" (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]). In addition, Plaintiffs' damages may include litigation expenses for the purpose of remedying wrongful conduct by an attorney (*id.* at 443 [finding that plaintiff was entitled to damages from legal malpractice because plaintiff incurred litigation expenses to correct defendant's error and paid a second time for expert fees for the retrial]). Plaintiff alleges that Defendants' failure to file any motion challenging the enforceability of the liquidated damages clause effectively harmed Plaintiffs with a verdict not favorable to the Plaintiffs (NYSCEF # 9 ¶¶ 28-29). Such a failure of contesting the liquidated damages clause in the Property Contract was negligence by Defendants (NYSCEF # 9 ¶ 34). Consequently, the allegation raises a reasonable inference that Defendants failed to exercise reasonable judgements as attorneys to contest the

liquidated damages provision because such a provision is a question of law for resolution by the court and not by the jury (NYSCEF # 9 ¶ 32). Furthermore, under a motion to dismiss, by accepting Plaintiffs' complaint as true by a liberal construction that Plaintiffs would not have been forced to settle the Underlying Litigation and resolve their ability by giving up a \$9 million property for half price, Plaintiffs' allegations are sufficient against Defendants Aihong You and Joseph & Smargiassi LLC (NYSCEF # 9 ¶ 36).

### **Causation and Damages**

However, negligence alone is insufficient to establish legal malpractice. For the reasons stated below, the malpractice claim is dismissed for failure to adequately allege causation and damages.

To satisfy the pleading requirement for causation, it must be alleged that "but for" the attorney's conduct, the client would have prevailed in the underlying action or would not have sustained any ascertainable damages" (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 272 [1st Dept 2004]; *Cosmetics Plus Group, Ltd. v Traub*, 105 AD3d 134, 140 [1st Dept 2013]). As to damages, "to survive a ... pre-answer dismissal motion, a pleading need only state allegations from which damages attributable to the defendant's conduct for nonfeasance] may be reasonably inferred" (*Lappin v Greenberg*, 34 AD3d 277, 279 [1st Dept 2006] [internal citations omitted]). But conclusory allegations of damages predicated on speculation cannot suffice for a legal malpractice action (*Volpe v Munoz and Associates, LLC*, 190 AD3d 661, 661 [1st Dept 2021] citing *Bua v Purcell & Ingraio, P.C.*, 99 AD3d 843, 848 [2d. Dept 2012] *lv denied* 20 NY3d 857 [2013]).

All of the Defendants argue that Plaintiffs' allegations for failure to argue or file a motion against the liquidated damages provision fail to prove causation that "but for" this failure, Plaintiffs

would not have suffered injury (NYSCEF # 31 at 6; NYSCEF # 37 at 11). Defendants also argue that Plaintiffs' allegations are mere speculation (NYSCEF # 31 at 6; NYSCEF # 37 at 11).

Plaintiffs respond that the claims are not speculative and satisfies the "but for" standard (NYSCEF # 61 at 5; NYSCEF # 62 at 10). In response to Aihong You's motion, Plaintiffs aver that the allegations meet the burden to survive a motion to dismiss because Plaintiffs need to only plead facts that permit the inference of causation and need not to establish causation (NYSCEF # 61 at 5; [citing *Voluto Ventures, LLC v Jenkins & Gilchrist Chapin LLP*, 46 AD3d 354, 355 [1st Dept 2007]]). Plaintiffs respond to Defendants Joseph & Smargiassi LLC's speculation argument that had the motion been filed contesting the liquidated damages provision, it would be highly likely that the provision would have been deemed an enforceable penalty, thus sufficiently establishing causation that "but for" Defendants' failure, Plaintiffs would have had a more favorable outcome (NYSCEF # 62 at 11).

Even under the standard of a motion to dismiss, after affording Plaintiffs every favorable inference, the court finds that the complaint fails to adequately plead causation to survive the motion at this stage.

Plaintiff sufficiently alleges that, "but for" defendants' negligence, it would have obtained a more favorable result through litigation (*see Katebi v Fink*, 51 AD3d 424, 425 [1st Dept 2008] [finding malpractice not viable since the settlement of the underlying action was the client's own choice and not compelled by the mistakes of counsel]). Alternatively, Plaintiffs claim but for Defendants' negligence, they would still have settled but obtained a better settlement outcome (*see Perkins v Norwick*, 257 AD2d 48, 51-52 [1st Dept 1999] [finding that plaintiff's allegations that he might have negotiated different terms but for defendant's negligence is "entirely speculative"]).



Plaintiffs' claim fails as it is based on mere speculation of uncertain future events (*id.*). Plaintiffs allege that if Defendants had argued against the liquidated damages provision, Plaintiffs would have won that argument, and therefore would have received a favorable outcome (NYSCEF # 61 at 5). The court disagrees.

It is speculative that Plaintiffs would claim and assume that they would have prevailed if the argument against the liquidated damages clause was made (*see Lisi v Lowenstein Sandler LLP*, 170 AD3d 461, 462 [1st Dept 2019] [rejecting plaintiff's claim of proximate cause as merely speculative]; *see also Sherwood Group v Dornbush, Mensch, Mandelstam & Silverman*, 191 AD2d 292, 294 [1st Dept 1993] [finding that hypothetical course of events on which any determination of damages would have to be based on constitutes "gross speculations on future events"]).

### **Liquidated Damages Clause**

Plaintiffs' argument regarding the liquidated damages clause, stems from claiming that the liquidated damages clause would automatically be deemed unenforceable (NYSCEF # 61 at 7). Plaintiffs reference Justice Silber's comments concerning Defendants' failure to file any motions contesting the liquidated damages clause within seven years of litigation and 39 motions during the Underlying Litigation (NYSCEF # 61 at 7-8). The court disagrees.

A liquidated damages provision is not automatically considered unenforceable but rather it would be based on what was stated in the provision, such as if damages flowing from a breach in contract were easily ascertainable at the time of the execution or if the damages are conspicuously disproportionate to the probable losses (*see JMD Holding Corp. v Cong. Fin. Corp.*, 4 NY3d 373, 380 [2005]).

The liquidated damages provision in the Property Contract provides:

“If Purchaser defaults hereunder, Seller’s remedy shall be to receive and retain the Downpayment and additional \$4,900,000 from Purchaser as liquidated damages, it being agreed that Seller’s damages in case of Purchaser’s default might be impossible to ascertain and that said amount constitutes a fair and reasonable amount of damages under the circumstances and is not a penalty.

If Seller defaults hereunder, it is agreed that Purchaser’s damages in case of Seller’s default might be impossible to ascertain and that Seller and its principals agrees to compensate Purchaser an amount of \$5,000,000 as a fair and reasonable amount of damages under the circumstances. However Purchaser shall reserve the right to sue for specific performance.” (NYSCEF # 24 Supplemental Contract Rider ¶ 2).

Here, damages are not ascertainable, and the damages are not disproportionate if the given Property value is alleged to be \$9 million, whereas the breach would result in payment of about half the amount (NYSCEF # 24 Supplemental Contract Rider ¶ 2). Plaintiffs fail to demonstrate how a liquidated damages provision would automatically be granted as unenforceable by the court; rather, this is speculative (*see Lisi v Lowenstein Sandler LLP*, 170 AD3d 461, 462 [1st Dept 2019]). In addition, as the Property Contract’s liquidated damages provision acknowledges that the damages would be “impossible to ascertain,” a liquidated damages provision may be enforced (*see Addressing Sys. and Products, Inc. v Friedman*, 59 AD3d 359 [1st Dept 2009] [finding that the liquidated damages provision will be upheld where the amount of potential damages from breach was “not readily ascertainable at the time the agreement was entered into”]).

Therefore, viewed in light most favorable to the plaintiff, Plaintiffs’ allegations do not give rise to an inference that "but for" defendants' negligence, Plaintiffs would have prevailed if a motion against a liquidated damages provision was made. Such an argument is merely speculative and uncertain that Plaintiffs would have won a favorable outcome if an earlier argument against

the liquidated damages provision was made. Thus, because Plaintiffs failed to sufficiently establish the element of causation for a legal malpractice claim, Plaintiffs' allegation is dismissed.

### **Collateral Estoppel (CPLR 3211(a)(5))**

Defendant Aihong You claims Plaintiffs' complaint must be dismissed under CPLR 3211(a)(5) for collateral estoppel (NYSCEF # 31 at 12). The court disagrees.

The collateral estoppel doctrine provides that “an issue in the present proceeding be identical to that necessarily decided in a prior proceeding, and that in the prior proceeding the party against whom preclusion is sought was accorded a full and fair opportunity to contest the issue” (*Katash v Richard Kranis, P.C.*, 229 AD2d 305, 306 [1st Dept 1996] [citing *Allied Chem., an Operating Unit of Allied Corp. v Niagara Mohawk Power Corp.*, 72 NY2d 271, 276 [1988]]). The issue resolved is not the same as the issue presented by a malpractice action (*Katash v Richard Kranis, P.C.*, 229 AD2d 305, 306 [1st Dept 1996]). The prior action that involved the Underlying Litigation was a breach of contract and conversion (NYSCEF # 9 ¶ 20). By contrast, currently at issue in the current action for legal malpractice is whether Defendant attorneys were negligent in their representation of Plaintiffs (NYSCEF # 9 ¶ 45). Because there is no identity of the same issues, Plaintiffs are not collaterally estopped in this action (*See Katash v Richard Kranis, P.C.*, 229 AD2d 305, 306 [1st Dept 1996]). Therefore a defense by collateral estoppel is dismissed.

### **Documentary Evidence CPLR 3211(a)(1)**

Defendant Joseph & Smargiassi (“JS”) avers that Plaintiffs' complaint should be dismissed based upon documentary evidence pursuant to CPLR 3211(a)(1). Defendants JS argue that when JS was retained as counsel for Plaintiffs, the time allotted for summary judgement motions had already elapsed, thereby freeing JS from liability contesting the liquidation damage provision (NYSCEF # 37 at 9). *The court disagrees.*

Under CPLR 3211(a)(1), a motion to dismiss is granted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]; compare *Fitzsimmons v Pryor Cashman LLP*, 93 AD3d 497, 498 [1st Dept 2012] [finding that documentary evidence including Form 5500s, minutes of a 1997 Board meeting, and Department of Labor letters does not conclusively disprove plaintiff's allegations]). In *Leon*, the court explained that a motion to dismiss based on CPLR 3211(a)(1) may be appropriately granted only where the documentary evidence “utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law” (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

Here, JS's argument that time elapsed for filing a summary judgment is unavailing (NYSCEF # 37 at 9). Because the time constraint to file is not absolute, and good cause exists for a party to file a summary judgment motion more than 120 days after the note of issue, JS's documentary evidence fails to conclusively establish a defense as a matter of law<sup>1</sup> (NYSCEF # 62 at 7; *see Fitzsimmons v Pryor Cashman LLP*, 93 AD3d 497, 498 [1st Dept 2012]).

### **Plaintiffs' Complaint Was Timely Served**

Defendant JS argues that Plaintiffs' complaint should be dismissed because it was not timely served (NYSCEF # 12). Defendant JS claims that Plaintiffs failed to properly serve the complaint within the twenty day window when Plaintiffs commenced the Instant Action via Summons with Notice on April 28, 2023 (NYSCEF # 12). Defendant JS demanded the complaint on Monday August 14, 2023, therefore the Plaintiffs must serve within twenty days of the demand

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<sup>1</sup> Nevertheless, JS does allege that it sought to vacate the note of issue which was denied and also sought to dismiss the liquidated damages and conversion claim via a motion in limine that was denied after oral argument and deemed to be an untimely motion for summary judgment. Likewise, after the motion to vacate the note of issue was denied except that certain discovery was allowed to take place, co-defendant made a motion for, inter alia, summary judgment which was denied by Judge Martin on January 22, 2020.

(NYSCEF # 12). Defendants JS claims that Plaintiffs served JS on September 5, 2023, which is over the twenty day limit, and therefore the complaint should be dismissed (NYSCEF # 12). The court rejects Defendant JS’s argument.

General Construction Law (GCL) § 25-a provides “[w]hen any period of time, computed from a certain day, within which or after which or before which an act is authorized or required to be done, ends on a Saturday, Sunday or a public holiday, such act may be done on the next succeeding business day” (GCL § 24). Plaintiffs properly responded that “[t]wenty days after August 14, 2023, fell on Sunday, September 3, 2023 (NYSCEF # 62 at 5). The next day was Monday September 4, 2023, which was Labor Day, a public holiday observed by the New York State Unified Court System (NYSCEF # 62 at 5). Thus, the last day of service for the complaint would fall under Tuesday, September 5, 2023, which Plaintiffs served Defendant JS (NYSCEF # 62 at 5). Accordingly, Plaintiffs properly and timely served Defendant JS.

**Conclusion**

In view of the above, it is

ORDERED that the motions of Defendants to dismiss the complaint are granted; and the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

7/2/2024  
DATE

  
RICHARD G. LATIN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE