Otkonomos, Inc. v Bahrenberg
2015 NY Slip Op 31658(U)
August 18, 2015
Supreme Court, Suffolk County
Docket Number: 23124-2009
Judge: Emily Pines

[* 1]

SHORT FORM ORDER

INDEX NUMBER: 23124-2009

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: HON. EMILY PINES
J. S. C.

Original Motion Date: 07-20-2015
Motion Submit Date: 07-28-2015
Motion Sequence No.: 016 MOTD

OIKONOMOS, INCORPORATED, STONEGATE SPRINGS, LLC SECOND REALTY 3399 ROUTE 112, LLC and EDUCARE SYSTEMS SOLUTIONS, INC.,

Plaintiffs,

-against-

JOHN CLAUDE BAHRENBERG, THE BRAYSON FOUNDATION, LTD., WINDWOOD MEADOW, INC., LAKE GROVE AT DURHAM, INC., HENRY CLARK AND JEFFREY DRYFOOS and THE MAPLE VALLEY SCHOOL, INC.,

Defendants.

WINDWOOD MEADOW, INC., LAKE GROVE AT DURHAM, INC., AND THE MAPLE VALLEY SCHOOL, INC.,

Third Party Plaintiffs,

-against-

ALBERT BRAYSON, II, BARBARA BRAYSON LITVAK, LLC, and FARLEY ROAD, LLC.,

Third Party Defendants.

This case arises from numerous leases, promissory notes, guarantees, and services agreements entered into between the Plaintiffs and the corporate Defendants, each of which is a not-for-profit entity. The various Plaintiffs, all for-profit corporate entities, owned by Albert and Barbara

Brayson ("the Braysons") (or, in the case of WDR Assets LLC, by the Braysons' children) are Oikonomos, Inc. ("Oikonomos"), Stonegate Springs, LLC ("Stonegate"), Educare Systems Solutions, LLC ("Educare"), 3390 Route 112, LLC ("3390") and WDR Assets LLC ("WDR").

The Plaintiffs assert claims against the various lessees, promissors on notes, and guarantors of the notes and leases, all named Defendants, for breaches of their agreements. The non-profit corporate Defendants include Lake Grove at Durham, Inc. ("Lake Grove") (which operates a school located in Connecticut), Maple Valley School, Inc ("Maple Valley") which operates a school in Massachusetts, the Brayson Foundation Ltd. ("the Foundation"), which provided financial support to these affiliated not-for-profit schools, and Windwood Meadow Inc. ("Windwood"), which provided management services to various entities. Additionally, the Plaintiffs have sued individual Defendant, John Claude Bahrenburg ("Bahrenburg"), the Braysons' alleged former close friend and attorney, for over a twenty year period, for legal malpractice. Plaintiffs' contend that Bahrenburg not only represented the Braysons but, in addition, all the corporate Plaintiffs at various times and each and every named corporate Defendant. Plaintiffs also have claims against individual Defendant, Jeffrey Dryfoos ("Dryfoos"), Chairman of the Board of Defendant Windwood (2001-2012) as well as Albert Brayson's close personal friend and college roommate, essentially for acting in concert with Bahrenburg, and utilizing their corporate positions to cause the losses that the corporate Plaintiffs have allegedly suffered.

Currently before the Court is a motion (Mot. Seq. 016) pursuant to CPLR 4401 by the Foundation, Dryfoos and Bahrenburg, made after the close of the evidence presented at trial by the

Plaintiffs, for judgment as a matter of law dismissing various causes of action. The arguments in support of and in opposition to the motion are summarized below.

Arguments of Parties

Twentieth cause of action for tortious interference with contract by plaintiffs Stonegate, Educare, 3390, and Oikonomos against Dryfoos must be dismissed

Plaintiffs allege that Dryfoos entered into a conspiracy with Bahrenburg to defraud plaintiffs, including an agreement to cause Lake Grove to occupy Stonegate's real property while refusing to authorize payment of Lake Grove's lease obligations. They also allege that Dryfoos agreed with Bahrenburg to tortiously interfere with the guaranty of the lease agreement by the Foundation to Stonegate.

Dryfoos argues that he cannot be held liable for tortious interference with the 2006 Agreement because he was not a third-party to that contract, as he was Chairman of the Board of Directors of Windwood. Dryfoos argues that the undisputed testimony shows that Windwood's Board agreed to cease making payments pursuant to the 2006 Agreement based upon the advice of the financial advisor to the Defendant entities, BDO Seidman. Dryfoos contends that Mr. Brayson's trial testimony is not sufficient to create a triable issue of fact that he intentionally procured the breach of the 2006 Agreement by Windwood.

As to Stonegate's allegation that Dryfoos entered into a conspiracy with Bahrenburg to tortiously interfere with the Foundation's 1998 Guaranty or its May 2002 Guaranty as to the July 2002 Lease Agreement of Windwood, Dryfoos argues that any breach of the July 2002 Lease was not

secured by any guaranty enforceable against the Foundation or any other party, and that the rights to enforce the May 2002 Guaranty had been assigned to the Bank of Smithtown. Dryfoos also argues there is no evidence that he knew that the May 2002 Guaranty was enforceable vis a vis the July 2002 Lease, or that he intentionally procured the breach of such guaranty after the breach of the July 2002 Lease. Dryfoos points out that Mr. Brayson's trial testimony was that it was "an assumption that Dryfoos conspired with Bahrenburg." Dryfoos also argues that he was not a third-party as he acted only in his capacity as Chairman of the Board of Windwood.

As to the allegations by 3390 and Educare that Dryfoos conspired to cause Windwood to breach its lease with 3390, and thereafter to misappropriate tangible property belonging to 3390, Dryfoos argues that there is no evidence to support the alleged conspiracy. Dryfoos notes that Brayson only testified that payment on the lease had not been made and that it was "an assumption" that Dryfoos conspired with Bahrenburg. Dryfoos also argues that he acted solely in his capacity as the Chairman of the Board of Windwood.

In opposition, as to the tortious interference claim against Dryfoos, Plaintiffs contend that they have presented evidence that Dryfoos engaged in independent tortious acts including his failure to wall off Bahrenburg, his signing the 2006 buyout contract while his co-conspirator was planning not to perform, and by joining in Bahrenburg's efforts to intimidate Plaintiffs.

Twenty first cause of action by Stonegate, 3390 and Educare against Dryfoos for aiding and abetting fraud

Plaintiffs allege that Dryfoos knew or recklessly disregarded Bahrenburg's wrongful conduct

and conflicts of interest and personally assisted him in causing Windwood not to perform its obligations to Plaintiffs.

Dryfoos again argues that as a result of an assignment, any breach of the 1998 Lease Agreement is enforceable by the Bank of Smithtown and not Stonegate. Dryfoos also argues again that the July 2002 Lease Agreement was not guaranteed by the Foundation such that any alleged breach thereof was not secured by any guaranty enforceable against the Foundation or any other party. Dryfoos also argues that no evidence has been presented by plaintiffs that any statement attributable to him was either a material misrepresentation of fact or the result of a material omission of fact which was false and known to be false by him when made. Dryfoos contends that Brayson's testimony was insufficient to demonstrate that Dryfoos committed fraud. With regard to the allegation that Dryfoos aided and abetted fraud by Bahrenburg, Dryfoos argues that all fraud allegations against Bahrenburg were dismissed by the prior order dated January 4, 2013, deciding defendants' motion for summary judgment. In any event, Dryfoos argues that Stonegate has produced no probative evidence to show that Dryfoos knew about the fraud by Bahrenburg or substantially assisted in the fraud. Dryfoos makes the same arguments with regard to the fraud claims against him by Oikonomos, 3390 and Educare.

In opposition Plaintiffs argue that the evidence of fraud by Dryfoos includes Brayson's testimony that Dryfoos, who knew that Bahrenburg was the long-time counsel and advisor to the Braysons and the entities they owned, permitted Bahrenburg, and agreed to permit him, to act adversely to his former clients and agreed to let him cause the corporate defendants to renege on

virtually every obligation they had undertaken to the plaintiffs. Plaintiffs argue that the fact that Dryfoos was paid $60,000 per year as a Board member gave him a financial incentive to conspire with Bahrenburg to harm the Braysons and the Plaintiffs. Plaintiffs contend that the only credible inference is that Dryfoos, who signed the lease, knew or should have known of the misappropriation of the property of 3390. Plaintiffs point out that although the fraud claims against Bahrenburg were dismissed by this Court's prior order as subsumed within the legal malpractice claims, such does not preclude a claim against Dryfoos for aiding and abetting Bahrenburg in acts of misrepresentation and concealment, and for joining the conspiracy by failing to wall off Bahrenburg and by other acts.

Twenty ninth cause of action by WDR Assets, LLC against Dryfoos for tortious interference with contract

In this cause of action, WDR claims Dryfoos tortiously interfered with the Foundation's guaranty of the Note given by Maple Valley.

In support of its motion, Dryfoos makes the same arguments (lack of a valid and enforceable guaranty, lack of evidence that Dryfoos intentionally procured a breach of the Note, Dryfoos acted only in capacity as Chairman of Board of Foundation and was not a third-party to the contract).

In opposition, Plaintiffs argue that Dryfoos ignores evidence that he decided not to wall off Bahrenburg, to support Bahrenburg's refusal to honor the guaranty, and to sanction, condone, and permit Bahrenburg to act adversely to his former clients.

Eighth cause of action by Stonegate against Foundation for breach of guaranty of lease between Stonegate and Lake Grove

In this cause of action, Plaintiffs allege that the Foundation expressly guaranteed to Stonegate the obligations of Lake Grove under its lease with Stonegate and that the Foundation unjustifiably

failed to refused to honor its guaranty.

In support of its motion, the Foundation argues that there was no guaranty of the July 2002 Lease Agreement. Defendants state that the 1998 Lease Agreement was assigned to the Bank of Smithtown and, as a result, the 1998 Lease Agreement is enforceable by the Bank of Smithtown and not Stonegate. When Stonegate and Lake Grove entered into a new lease in July 2002, a new guaranty was not executed. The Foundation argues that Stonegate has failed to produce any evidence that the Foundation guaranteed the July 2002 Lease. It also argues that the July 2002 Lease Agreement was not an extension of the 1998 Lease Agreement as it contained new and different terms.

In opposition, Plaintiffs argue that Mrs. Brayson testified that the 1998 Lease Agreement remained in effect into 2008, and provided for rent and annual cost of living adjustments. Plaintiffs cite to the 1998 Guaranty by the Foundation and argue that Bahrenburg signed an estoppel certificate acknowledging for Lake Grove that the 1998 Lease would remain in effect unless the bank approved a new lease in writing, which it did not. Therefore, Plaintiffs argue the 1998 Lease remained in effect, and also cite to the May 2002 Guaranty as evidence that the Foundation guaranteed the rent due Stonegate in 2002. Plaintiffs also rely on an estoppel certificate dated July 29, 1998, signed by Bahrenburg as supporting the argument that the 1998 Lease could not have been replaced without the prior written consent of the bank, which was never obtained.

Ninth and twelfth causes of action by Stonegate against Foundation for equitable estoppel

In these causes of action, Stonegate alleges that it reasonably relied on representations by the

Foundation that the Lake Grove Lease and guaranty of it by the Foundation were valid and would be honored, and that it would not have permitted Lake Grove to occupy the property but for said representation. Stonegate claims that the Foundation should be equitably estopped from denying the validity of the 2002 Lease and its guaranty thereof based upon the Foundation's representations that the guarantee was valid and would be honored.

Again, the Foundation argues that there was no guaranty of the 2002 Lease and that the May 2002 Guaranty guaranteed the 1998 Lease, not the 2002 Lease. Also, the Foundation points out that the May 2002 Guaranty ran in favor of the Bank of Smithtown and that the 1998 Lease was assigned to the Bank of Smithtown. Thus, the Foundation argues that Stonegate does not have standing to enforce the guaranty. The Foundation also argues that it was the Bank that required the guaranty and that Stonegate failed to produce any witness from the Bank in support of its position or as to an assignment. Thus, the Foundation argues that there is no evidence to support a finding that the 1998 Guaranty is enforceable. The Foundation also points out that Stonegate did not plead that the 1998 Guaranty was the enforceable guaranty. The Foundation argues that the record is devoid of any evidence that (1) it assured Stonegate that it would guarantee the 2002 Lease, (2) that the Foundation concealed from Stonegate the fact that the 2002 Lease did not have a guaranty provision or that the Foundation did not execute a separate guaranty (as it had done previously).

In opposition Stonegate relies on Mr. Brayson's testimony that Bahrenburg did legal work for Stonegate in 2002 and 2003 and never told him that the Foundation guaranty might be in default or that a new guaranty was needed, and that he relied on the advice of Bahrenburg and let payments on

the lease go into substantial arrears believing that the Foundation, under the guaranty, would pay the rent. Stonegate contends that such testimony adequately supports its estoppel claim.

Eleventh cause of action by Stonegate against the Foundation for unjust enrichment

In this cause of action Stonegate alleges that the Foundation was unjustly enriched by its failure to perform in accordance with the May 2002 Guaranty after Lake Grove defaulted on its lease.

In support of its motion, the Foundation argues that the evidence does not support an unjust enrichment claim because, in the absence of a guaranty as to the July 2002 Lease, there is no relationship between the parties to support such a claim. The Foundation also argues that there is no evidence of any benefit that the Foundation received from Stonegate as to the July 2002 Lease. The Foundation was not enriched. It simply did not pay on a guaranty that it claims does not exist.

In opposition, Stonegate again relies on Mr. Brayson's testimony that Bahrenburg did legal work for Stonegate in 2002 and 2003 and never told him that the Foundation guaranty might be in default and never told him a new guaranty was needed, and that Brayson relied on the advice of Bahrenburg and let payments on the lease go into substantial arrears believing that the Foundation, under the guaranty, would pay the rent. Stonegate contends that the Foundation was unjustly enriched by failing to pay the rent due.

Twenty fourth and twenty sixth causes of action by WDR against the Foundation for guaranty of note

The twenty fourth cause of action alleges that the Foundation executed an Unlimited Guaranty of the obligations of Maple Valley under a note entered into on January 14, 2000, pursuant to which Maple Valley borrowed $2,310,000.00 from the Bank of Western Massachusetts, and that

WDR subsequently purchased the note. WDR claims Maple Valley breached the note and owes the principal sum of $1,236,947.65, plus interest and late fees. WDR contends that as guarantor, the Foundation is liable to satisfy Maple Valley's obligations to WDR. The twenty sixth cause of action seeks an injunction "to protect, preserve, and enforce WDR's rights under the Note and guaranties."

The Foundation argues that WDR is represented as paying the full amount owed on Maple Valley's note which, under Massachusetts law, extinguishes the obligation of any guarantor. Therefore, WDR cannot recover against the Foundation under the guaranty and is not entitled to an injunction.

In opposition, WDR argues that the evidence and testimony confirm the agreement of the Foundation that the Bank could enforce the guarantee against **any** guarantor or release any guarantor and continue against another guarantor. WDR contends that under Massachusetts law where the entity paying the note is a different legal entity from the guarantor, the loan and guarantee are NOT discharged. WDR contends that it is a separate entity from the guarantors. Therefore, there is no basis under Massachusetts law for finding that WDR cannot enforce the guarantee against the Foundation.

Twenty seventh cause of action against Bahrenburg for legal malpractice

Plaintiffs allege that Bahrenburg advised Windwood, the Foundation and the Braysons that the guaranty of the obligations of Maple Valley by the Foundation and Windwood were valid and enforceable. WDR claims that it acquired the note and guaranties from the Bank in reliance on the advice of Bahrenburg to Windwood and the Foundation. It is further alleged that Bahrenburg

thereafter advised the Foundation and Windwood not to honor the guaranties. Plaintiffs allege that such conduct, including representing parties with conflicting interests, asserting positions adverse to former clients, and disclosure of privileged information constitutes legal malpractice which caused damage to plaintiffs.

In support of the motion, Bahrenburg argues that a prima facie case of malpractice has not been made out because no expert testimony was offered regarding whether or not his alleged conduct constitutes malpractice and the absence of expert testimony is fatal to the malpractice claims. Bahrenburg also argues that there is no evidence of an attorney-client relationship and that the malpractice claims were not commenced within the applicable three-year statute of limitations. Bahrenburg argues that because the Foundation did not guaranty the 2002 Lease any negligence/malpractice on his part could not have been the proximate cause of any breach of the lease or guaranty by the Foundation and his representation was not adverse to any former client. Bahrenburg also argues that there is no evidence that he ever represented or counseled WDR or that he knew or had reason to believe that WDR would buy the note from the Bank in reliance on oral advice "he probably gave eight years earlier." Thus, he claims there is no evidence that any malpractice on his part was the proximate cause of the Foundation not honoring its alleged guaranty of the Note. Bahrenburg also contends that plaintiffs failed to provide expert testimony as to the effect of the 1998 retainer agreement on the prior 1992 retainer agreement and whether the 1992 retainer agreement could have remained in effect after the 1998 retainer agreement became effective. Thus, Bahrenburg argues that any claim based on the 1992 retainer agreement is unsustainable.

Bahrenburg also argues that there is no evidence that he represented Oikonomos as to the 2006 Buyout Agreement as Mr. Brayson, as President of Oikonomos, wrote a letter to Bahrenburg in February 2006 releasing him from his attorney-client relationship with Oikonomos and advising him to continue to represent Windwood. He also contends that the evidence shows that thereafter Oikonomos was represented by Jonathon Skiba as to the 2006 Agreement. Bahrenburg also relies on the evidence that financial advisor BDO Seidman concluded that the 2001 Management Contract was void as the product of an insider transaction and that payment on the 2006 Agreement should not continue. Thus, it is argued that any malpractice by Bahrenburg was not a proximate cause of the alleged breach of the 2006 Agreement. Finally, Bahrenburg argues that he had a right to file affidavits in this action adverse to his former clients since he has a right to defend himself on the malpractice claims.

In opposition, as evidence that Bahrenburg committed malpractice, plaintiffs cite to a letter dated May 16, 2006, from Bahrenburg to the CEO of Windwood stating that "we enter into an agreement to buy OIK . . . [t]hen through litigation with them let all things get sorted out." Also, both Mr. and Mrs, Brayson testified that Bahrenburg continued to represent the Braysons and Oikonomos in connection with the 2006 Buyout Agreement and other matters at the time Bahrenburg wrote the aforementioned letter to Windwood in May 2006, at the time he advocated for Windwood to sign the 2006 Agreement and then breach it, and after writing the "Release Letter" dated February 2, 2006. Plaintiffs contend that the testimony and exhibits show that Bahrenburg continued to represent them into November 2006 while plotting not to pay Oikonomos, to gain leverage over the

Braysons and to otherwise violate his fiduciary duties to them. In any event, in subsequently representing Windwood, he gave advice and took legal positions adverse to Oikonomos, his former client. Plaintiff also point out that inasmuch as Bahrenburg's affidavit in this action sworn to June 26, 2009 was given before he was added as a defendant, he cannot claim that he was merely defending himself in taking positions adverse to his former client Oikonomos. Additionally, plaintiffs rely on Mr. Brayson's testimony that it was Bahrenburg who wrote the Release Letter and told Brayson to sign it and that Brayson did not know that Bahrenburg, in doing so, was violating his ethical obligations.

Plaintiffs argue that expert testimony regarding the malpractice claim is not necessary here because the Court, as the trier of fact, is competent to analyze and evaluate whether Bahrenburg's conduct violated the Code of Professional Responsibility and if so, decide whether such conduct constitutes malpractice. Plaintiffs cite to case law in the Second Department holding that expert testimony is required "unless the ordinary experience of the fact-finder provides sufficient basis for judging the adequacy of the professional service, or the attorney's conduct falls below any standard of due care" (*Northrop v Thorsen*, 46 AD3d 780, 782 [2d Dept 2007]). Plaintiffs argue that Bahrenburg's conduct in acting adversely to his client clearly falls below the standard of care set forth in the Code of Professional Responsibility.

Plaintiffs argue that the legal malpractice claim against Bahrenburg is not time-barred because of the continuous representation doctrine. Plaintiffs contend that the testimony and documents establish that Bahrenburg did legal work for Oikonomos and the Braysons at least

through November 2006, despite the Release letter dated February 2, 2006. Thus, Plaintiffs contend that there is a triable issue of fact as to whether the representation giving rise to the malpractice claims ended in February 2006, in which case the malpractice claims first asserted in November 2009 would be untimely, or whether representation continued until November 2006 tolling the commencement of the three-year statute until then.

Discussion

"To be awarded judgment as a matter of law pursuant to CPLR 4401, a defendant must show that, upon viewing the evidence in the light most favorable to the plaintiff, there is no rational basis by which the [trier of fact] could find for the plaintiff against the moving defendant. The plaintiff's evidence must be accepted as true, and the plaintiff is entitled to every favorable inference that can be reasonably drawn therefrom" (*Stewart v Heralall*, 116 AD3d 760, 760 [2d Dept 2014][citations omitted]). Therefore, the Court's examination of the evidence at this stage does not involve weighing credibility.

The elements of the tort of interference with contract are: (1) the existence of a valid contract, (2) defendant's knowledge of that contract, (3) defendant's intentional procuring of the breach, and 4) damages (*White Plains Coat & Apron Co. Inc. v Cintas Corp.*, 8 NY3d 422 [2007]; *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 [1996]). A causal relationship between defendant's actions and the third party's breach of contract must be demonstrated (*Cantor Fitzgerald Assoc., L.P. v Tradition N. Am., Inc.*, 299 AD2d 204 [1st Dept 2002]). A majority of New York Courts that have addressed the issue have held that defendant is liable for tortious interference only if the breach

would not have occurred but for defendant's conduct (*Schmidt & Schmidt, Inc. v Charlton*, 103 AD3d 1011 [3d Dept 2013]; *Sun Gold, Corp. v Stillman*, 95 AD3d 668 [1st Dept 2012]; *Ferrandino & Son, Inc. v Wheaton Bldrs., Inc., LLC*, 82 AD3d 1035 [2d Dept 2011]). Here, even viewing the evidence in the light most favorable to the Plaintiffs, accepting the Plaintiffs' evidence as true, and giving the Plaintiffs every favorable inference that can be reasonably drawn therefrom, there is insufficient evidence demonstrating that the purported breaches of the lease agreements and guaranties would not have occurred but for the conduct of Dryfoos. Rather, there is substantial evidence alleging that the purported breaches were caused, at least in part, by the actions of Bahrenburg. Additionally, since there is no cause of action in New York for conspiracy, there can be no cause of action for conspiracy to breach a contract (*North Shore Bottling Co. v C. Schmidt & Sons, Inc.*, 22 NY2d 171 [1968]). Accordingly, the motion is granted with respect to the twentieth and twenty ninth causes of action and said causes of action as asserted against Dryfoos are dismissed.

The elements of a claim for aiding and abetting fraud are (1) the existence of an underlying fraud, (2) knowledge of this fraud on the part of the aiding and abetting party, and (3) substantial assistance by the aiding and abetting party in achieving this fraud (*Oster v Kirschner*, 77 AD3d 51 [1st Dept 2010]). The knowledge element requires a showing of actual knowledge of the fraud, as discerned from the surrounding circumstances (*CRT Investments, Ltd. v BDO Seidman, LLP*, 85 AD3d 470 [1st Dept 2011]). Here, the Plaintiffs have failed to adduce any evidence to support a finding that Dryfoos had actual knowledge of the fraud allegedly perpetrated by Bahrenburg. Evidence that Dryfoos permitted Bahrenburg to act adversely to former clients and/or allowed the

corporate defendants to breach obligations owed to the Plaintiffs does not amount to actual knowledge of fraud. Accordingly, the motion is granted with respect to the twenty first cause of action and same is dismissed as asserted against Dryfoos.

"The elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, (4) resulting damage" (2B NY PJI2d 4:1, at 2 [2015]).

Although the ninth and twelfth causes of action are denominated as claims for equitable estoppel, they are, in fact, fairly read as claims for promissory estoppel, as this Court has already ruled in a prior decision. Where the existence of a valid contract cannot be established, the doctrine of promissory estoppel requires a showing of a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made and an injury sustained in reliance on the promise (*Rock v Rock*, 100 AD3d 614 [2d Dept 2012]; *AHA Sales, Inc. v Creative Bath Products, Inc.*, 58 AD3d 6 [2d Dept 2008]).

An action to recover for unjust enrichment rests upon the equitable principle that a person shall not be allowed to enrich himself or herself unjustly or at the expense of another (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511 [2012], and sounds in restitution or quasi-contract (*Edelman v Starwood Capital Group, LLC*, 70 AD3d 246 [1st Dept 2009]). Recovery in quasi contract may not be obtained where there is a valid enforceable contract between the parties as to the same subject matter and a conflict would result (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132 [2009]; *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561 [2005]). However, a party is

not precluded from proceeding on both breach of contract and quasi-contract theories where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in question (*see Krigsfeld v Feldman*, 115 AD3d 712 [2d Dept 2014]; *AHA Sales, Inc. v Creative Bath Products, Inc.*, supra). Thus, if the contract itself is not proved, recovery at trial may still be had for unjust enrichment (*O'Brien v Syracuse*, 54 NY2d 353 [1981]). The same is true for the doctrine of promissory estoppel, which rests upon equitable foundations essentially analogous to quantum meruit. The sole difference is that the promise is actual under the estoppel theory rather than inferred; however, the defendant is, in both instances prevented for equitable reasons from raising a defense to enforcement (*Binkowski v Hartford Acc. and Indem. Co*, 60 AD3d 1473 [4th Dept 2009]).

Here, the eighth, ninth, eleventh, twelfth, twenty fourth and twenty sixth causes of action all center around whether purported guaranties by the Foundation of lease obligations of Lake Grove and note obligations of Maple Valley are enforceable. Again, viewing the evidence in the light most favorable to the Plaintiffs, accepting the Plaintiffs' evidence as true, and giving the Plaintiffs every favorable inference that can be reasonably drawn therefrom, the documentary and testimonial evidence offered on the Plaintiffs' case demonstrates the existence of issues of fact as to whether the purported guarantees by the Foundation are enforceable contracts and, if not, whether Stonegate reasonably relied on representations by the Foundation in entering into the lease with Lake Grove and can recover under promissory estoppel or for unjust enrichment. Accordingly, the motion is denied as to the eighth, ninth, eleventh, twelfth, twenty fourth and twenty sixth causes of action.

An action for legal malpractice requires proof of the following three elements: (1) the attorney's failure to exercise that degree of care, skill and diligence commonly possessed by a member of the legal profession; (2) causation; and 3) actual damages (*Prudential Ins. Co. of America v Dewey Ballantine, Bushby, Palmer & Wood*, 170 AD2d 108 [1st Dept 1991], aff'd, 80 NY2d 377 [1992]; *Gray v Wallman & Kramer*, 184 AD2d 409 [1st Dept 1992]). To sustain a cause of action for legal malpractice, a party must show that an attorney failed to exercise "the ordinary reasonable skill and knowledge" commonly possessed by a member of the legal profession (*Darby & Darby, P.C. v VSI Intern., Inc.*, 95 NY2d 308 [2000]). The New York Rules of Professional Conduct Code contain provisions bearing on malpractice by an attorney. Such rules are clearly relevant to a malpractice claim. A malpractice cause of action was held to lie where defendant attorney represented both sides of a transaction and allegedly withheld critical information from the plaintiff client (*Sitar v Sitar*, 50 AD3d 667 [2d Dept 2008]), and where a law firm's divided loyalties impaired its professional judgment (*Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1 [1st Dept 2008]). In addition, a lawyer may not seek, by contract or other means, to limit prospectively the attorney's individual liability to a client for legal malpractice (New York Rules of Professional Conduct Rule 1.8(h)(1).

An action for legal malpractice is governed by a three year statute of limitations (CPLR 214[6]). The continuous treatment rule applied to medical malpractice actions has been extended to claims of attorney malpractice (*Zorn v Gilbert*, 8 NY3d 933 [2007]; *Sommers v Cohen*, 14 AD3d 691 [2d Dept 2005]).

To recover for an attorney's malpractice, a plaintiff must show that such proximately caused the loss (*Rudolf v Shayne, Dachs, Stanisi, Corker & Sauer*, 8 NY3d 438 [2007]). In addition, it has been generally recognized that a plaintiff in such cases must satisfy a more demanding test than usual by proving that "but for" the defendant's negligence, the plaintiff would not have sustained the claimed loss in the underlying transaction (*Waggoner v Caruso*, 14 NY3d 874 [2010]). The Court notes, however, that in *Barnett v Schwartz*, 47 AD3d 197 [2d Dept 2007], the Second Department held that the "but for" causation standard does not require a greater or more direct degree of causation than the "proximate cause" standard set forth in PJI 2:70; and, further, that the "but for" standard does not require a showing that the defendant's malpractice was the sole proximate clause, rather than a substantial cause, of the plaintiff's loss. This particular view has not yet been considered by the Court of Appeals.

Unless the ordinary experience of the fact finder provides a sufficient basis for judging the adequacy of the professional service or the attorney's conduct fell below any standard of due care, expert testimony will be necessary to established that the attorney breached a standard of professional care and skill (*Northrop v Thorsen*, 46 AD3d 780 [2d Dept 2007]; *Zasso v Maher*, 26 AD2d 366 [2d Dept 1996]).

Here, viewing the evidence in the light most favorable to the Plaintiffs, accepting the Plaintiffs' evidence as true, and giving the Plaintiffs every favorable inference that can be reasonably drawn therefrom, the Court finds that the Plaintiffs have set forth sufficient evidence to support a legal malpractice claim against Bahrenburg. The Plaintiffs have presented evidence of an attorney-

client relationship with Bahrenburg continuing into November 2006 such that judgment as a matter of law pursuant to CPLR 4401 dismissing the legal malpractice claim as time barred is not warranted. Contrary to Bahrenburg's contention, the Plaintiffs' failure to put forth expert testimony is not fatal as the ordinary experience of this Court, the fact finder on this case, provides a sufficient basis for judging whether Bahrenburg's alleged actions and omissions violated his fiduciary duties, which, as previously held, are subsumed within the legal malpractice claim. There has also been sufficient evidence submitted to allow the Court to determine whether any of the allegations against Bahrenburg constitute a violation of the Rules of Professional Conduct. Plaintiffs have also submitted evidence that they would not have entered into the transactions at issue and sustained losses had Bahrenburg acted properly. Therefore, the motion is denied as to the twenty seventh cause of action.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: August 18, 2015
Riverhead, New York

Emily Pines
EMILY PINES
J. S. C.

[ ] FINAL
[x] NON FINAL