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

PRESENT: Hon. Marilyn Shafer Justice PART 8

Joanne Sorensen Leff, Plaintiff(s),

- v -

Fullbright & Jaworski, LLP et al Defendants

INDEX NO. 117424/06

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accord with the annexed memorandum.

FILED
JUL 02 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/30/09

MARILYN SHAFER J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8
----------X

JEANNE SORENSEN LEFF,

Plaintiff,

Index No. 117424/06

-against-

FULBRIGHT & JAWORSKI, LLP, WILLIAM BUSH, and RICHARD J. CUNNINGHAM,

Defendants.

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Marilyn Shafer, J.:

In this motion alleging legal malpractice, defendants Fulbright & Jaworski, LLP (Fulbright), William Bush (Bush), and Richard J. Cunningham (Cunningham) (together, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

I. Background

In this action, plaintiff Jeanne Sorenson Leff is alleging that defendants failed to adequately represent her interests with regard to the planning of her late husband, Joel B. Leff's (Leff) estate, causing a loss to her of over $9 million which, allegedly, her husband had intended would pass to plaintiff.

Plaintiff was Leff's third wife. Leff had one child, a son, Adam Leff (Adam) with his first wife, Jean Bodfish (Bodfish). In 1974, Leff and Bodfish were divorced. As part of the divorce settlement, these parties entered into a Separation Agreement

which provided that "[i]n the event the parties shall be divorced and the Wife shall have remarried, the Husband shall provide by Will that no less than one-half (½) of his probate estate shall pass to the Child ... ." Notice of Motion, Ex. K, at 21.

Leff retained Cunningham, at that time a partner in Reavis & McGrath, to prepare an estate plan sometime prior to the execution of the Separation Agreement. Bush was, at that time, also a partner at Reavis & McGrath. In 1989, Reavis & McGrath merged with Fulbright, in which both Cunningham and Bush became partners. Cunningham had nothing to do with the drafting of the Separation Agreement, but a copy of the document was retained in his files.

Plaintiff and Leff married in 1998. These parties entered into a pre-nuptial agreement which provided that each party "would have the right to dispose of his or her property ... as each party sees fit." Aff. of Warder, Ex. O. The pre-nuptial agreement provided that Leff would prepare a will which would provide plaintiff with their marital residence, and a bequest in a specified amount. This will was prepared in December 1998 (December 1998 Will). Plaintiff had no part in the preparation of this will, and did not receive a copy of it. At the time, Leff was allegedly worth in excess of $65 million.

In December 1999, Leff executed a codicil to the December 1998 Will (Codicil). This Codicil came about as a result of a

trip plaintiff and Leff contemplated to Cambodia, and was intended for the eventuality that both might die there in a common accident. The Codicil altered some bequests, and left relatively small sums to plaintiff's mother and sisters. This was, allegedly, the only instance where Leff included plaintiff's family in his will. The Codicil expired under its own terms upon the couple's return from Cambodia. Defendants claim that plaintiff was present at the signing of the Codicil, and was "generally aware" that bequests to her family were included therein. Defendants' Memorandum of Law, at 4.

In the ensuing years, according to defendants, Leff and defendants discussed and prepared wills in April 2000, and again in December 2000 (December 2000 Will), although the December 2000 will was not signed until June 2001 (the June 2001 Will). In the unsigned copy of the December 2000 Will, Leff bequeathed half of his adjusted gross estate to plaintiff. In both instances, it is alleged, and plaintiff does not deny, that plaintiff was not involved in the preparation of these wills in any way, and was not aware of their contents.

Leff gave a copy of the yet unsigned December 2001 Will to plaintiff as an anniversary present, at which time she first learned of the bequest to her of one half of Leff's adjusted gross estate. Defendants claim, and plaintiff does not deny, that she had no idea of Leff's worth at that, or any other, time.

Some time after receiving the December 2000 Will, and upon realizing that it was unsigned, plaintiff asked Leff for reassurance that her testamentary portion would not be changed to her detriment. Leff responded with a short letter dated June 5, 2001 (Defendants' Memorandum of Law, Ex. V), in which Leff stated:

> You have asked me to inform you if I should change my will. Without giving up the right to change my will in any way that I choose, I agreed to inform you if I should execute a new will with provisions that are less favorable to you than those in my current will. This does not mean that I will advise you every time I change my will but only if a change is made which would reduce your interest.

In March of 2002, plaintiff and Leff were in the process of purchasing a $10 million apartment in the Sherry-Netherland Hotel in Manhattan. While that deal was pending, it occurred that Leff was required to undergo emergency brain surgery relating to cancer. In preparation for the eventuality that he would not survive the surgery, Leff prepared another codicil to the June 2001 Will, in which he bequeathed to plaintiff a bond account worth approximately $20 million, which would cover the cost of the apartment. Plaintiff claims that she never saw a copy of this document, although she was there at its execution. She claims to have called both Cunningham and Bush to ask if the codicil changed her bequest under the June 2001 Will, and was reassured that it actually increased her bequest. Leff survived the surgery, but died shortly thereafter. His estate was

allegedly worth $90 million.

During their marriage, plaintiff also prepared her own estate plans, with defendants' assistance, which consisted of bequests for her own family. A will was prepared for plaintiff in December 1999. The will provided that any gifts to her family members would be reduced by any bequests from her husband should she and Leff perish in a common accident. A second will was prepared in 2000, but was never signed.

Defendants contend that, at no time during plaintiff's marriage to Leff did she ever discuss Leff's estate plans with defendants, and that defendants never discussed the content of plaintiff's will, or any other aspect of plaintiff's estate planning, with Leff. Thus, defendants claim that, although they represented both plaintiff and Leff with regard to each party's separate estate plans, they never revealed to either party any aspect of the other party's plans, or provided in any way for a joint plan with both plaintiff and Leff.

In June of 2002, shortly after his father's death, Adam made a claim pursuant to the Separation Agreement, for one half of the probated Estate. Apparently, the Separation Agreement was only found after Leff's death, in Cunningham's file cabinet, in response to Adam's claims, obviously too late to have it figure into Leff's estate plans. As a result of Adam's claim, Fulbright informed plaintiff that she would have to obtain new counsel with

regard to her estate planning.

Adam and Leff's estate entered into a settlement agreement to resolve Adam's claims. Under this agreement, Adam received approximately $20 million, as a creditor of the Estate. Warder Aff., Ex. GG. Plaintiff went on to purchase the Sherry-Netherland apartment, and, according to defendants, received a total inheritance of $62 million, which included the bond account.

II. The Parties' Contentions

Plaintiff contends that defendants committed legal malpractice by failing to tell Leff about the existence of the Separation Agreement, so that it could figure into his estate plans, and not interfere with his expressed intent, as set forth in the June 2001 Will, that plaintiff receive one half of his estate. She claims to have lost in the area of $9 million due to defendants' mishandling of Leff's estate plans.

In order to justify this contention, plaintiff argues that either she and Leff were "joint clients" of defendants, or that they had a "joint estate plan" in which defendants represented both her and Leff jointly. In either event, plaintiff insists that defendants would have had a duty to protect her interests in Leff's estate plan so as to fulfill his desire to see plaintiff in possession of one half of the entire estate. Plaintiff suggests that Leff might have chosen other estate planning

devices, such as inter-vivos gifts, which would have satisfied both her and Adam's claims, retaining plaintiff's right to one-half of Leff's total worth, so as to leave her in the same condition as she expected to be before Adam made his claim.

Defendants assert that they at no time represented plaintiff and Leff jointly in any capacity, and that both parties kept their plans privately from the other. Defendants contend that their representation of plaintiff never overlapped their representation of Leff, and that neither knew what was in the will of the other. Defendants base this claim in part on numerous instances in plaintiff's testimony where she denies having any knowledge of Leff's financial status, his estate plans, or intentions, other than his presentation to her of the June 2001 Will as an anniversary gift. Therefore, in the absence of any duty owed to plaintiff with regard to Leff's estate planning, defendants maintain that they cannot be charged with malpractice for any loss plaintiff believes that she has sustained.

Plaintiff has pled seven causes of action in her complaint: (1) the first, second and third causes of action for legal malpractice; (2) the fourth cause of action for negligent misrepresentation; (3) the fifth cause of action for breach of contract; (4) the sixth cause of action for breach of fiduciary duty; and (5) the seventh cause of action for fraud and

fraudulent concealment. Plaintiff has, in her opposition papers, clearly abandoned her causes of action for fraud and breach of contract.

III. Discussion

A. Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York University Medical Canter*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

B. Legal Malpractice

"In order to state a cause of action for legal malpractice, the complaint must set forth three elements: the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and actual damages." *Leder v Spiegel*, 31 AD3d 266, 267 (1st Dept 2006), *affd* 9 NY3d 836 (2007). Proximate cause is shown if the plaintiff can establish "that 'but for' the attorney's negligence, the plaintiff would have prevailed in the

matter in question." *Tydings v Greenfield, Stein & Senior, LLP*, 43 AD3d 680, 682 (1st Dept 2007), *affd* 11 NY3d 195 (2008).

i. Attorney-client Relationship

New York law imposes a "strict privity requirement to claims of legal malpractice; an attorney is not liable to a third party for negligence in performing services on behalf of his client [internal quotation marks and citation omitted]." *Federal Insurance Company v North American Specialty Insurance Company*, 47 AD3d 52, 59 (1st Dept 2007). Thus, where there is no attorney-client relationship, there can be no cause of action for legal malpractice. *Id.; see also Baystone Equities, Inc. v Handel-Harbour*, 27 AD3d 231 (1st Dept 2006).

A party's "subjective belief as to the existence of an attorney-client relationship is not dispositive." *Weadick v Herlihy*, 16 AD3d 223, 224 (1st Dept 2005); *see also Moran v Hurst*, 32 AD3d 909, 911 (2d Dept 2006)(a party's "unilateral belief" that there is an attorney-client privilege is insufficient to create such a relationship); *Volpe v Canfield*, 237 AD2d 282 (2d Dept 1997)(same). Allegations as to the existence of such a relationship which are "conclusory and self-serving" will not support a claim for legal malpractice. *Conti v Polizzotto*, 243 AD2d 672, 673 (2d Dept 1997).

Ordinarily, an attorney is not liable in negligence to a third party not in privity with the attorney. *Moran v Hurst*, 32

AD3d 909, *supra*. This rule is relaxed in the presence of "fraud, collusion, malicious acts, or other special circumstances." *Id.* at 911; *see also Good Old Days Tavern, Inc. v Zwirn*, 259 AD2d 300 (1st Dept 1999).

Plaintiff is quick to point out that the concept of privity between an attorney and a third party has been expanded to include "a relationship so close as to approach that of privity." *Prudential Insurance Company of America v Dewey, Ballantine, Bushby, Palmer & Wood*, 80 NY2d 377, 382 (1992).[1] While plaintiff insists that this is a new, more supple standard than heretofore existed, which must be applied to the present circumstances, the Court of Appeals in *Prudential* noted that it had "long held" this position. *Id.*

In *Prudential*, a case involving an opinion letter to a client upon which a third party allegedly relied, the Court found that an attorney could be found to have dealings with a third party sufficient to create an attorney-client relationship between it and the third party if there was:

> (1) an awareness by the maker of the statement that it is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance.

Id. at 384.

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[1] *Prudential* involved a claim against a law firm for negligent misrepresentation rather than legal malpractice.

Plaintiff maintains that, even if there was no direct attorney-client relationship with defendants, she had a relationship of "near privity" so as to allow her a claim against defendants in malpractice under *Prudential*.

In reaching any conclusion that plaintiff stood in a "near privity" relationship with defendants, she must overcome settled law that a beneficiary has no cause of action against the attorney who negligently drafted the will. *Spivey v Pulley*, 138 AD2d 563 (2d Dept 1988). Plaintiff's case rests on the premise that her communications with defendants, her alleged participation with defendants in the matter of Leff's estate planning, and other instances where she was allegedly represented by defendants in matters other than the drafting of Leff's wills, such as the purchase of the apartment in the Sherry-Netherland Hotel, render her in near privity with defendants, such as would make them liable to her for their failure to remind Leff of the existence of the Separation Agreement.

Plaintiff also relies on the instances where she was actively aware of some aspect of Leff's estate planning, such as the planning of the codicil which preceded the trip to Cambodia (which caused her to alter her own will), her knowledge of the contents of the June 2001 Will, when it was presented to her, and communications with defendants in which they allegedly assured

her that her legacy was ensured under the June 2001 Will, as well as her presence when Leff signed the codicil to the June 2001 Will, even though she admits that she did not know its contents. Defendants, on the other hand, argue that the "undisputed facts" show that plaintiff and Leff were "simultaneously but separately represented," and that the estate plans of the couple were "distinct and independent." Defendants' Memorandum of Law, at 12.

This court finds that the evidence does not indicate that plaintiff was ever involved in a joint estate plan with her husband, or that a relationship approaching "near privity" with defendants vis-`a-vis Leff's estate plan existed such as might make defendants plaintiff's attorneys with regard to Leff's personal estate plan. As previously stated, the mere fact that plaintiff might have had a "subjective belief as to the existence of an attorney-client relationship" is not enough to create an attorney client relationship. *Weadick v Herlihy,* 16 AD3d at 224. More is needed.

There have been situations wherein a beneficiary to a will becomes a client of the attorney who drafted the will, as in *Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo* (259 AD2d 282 [1st Dept 1999]), a case upon which plaintiff heavily relies. In *Nevelson*, the beneficiaries of the decedent's will were found to have standing to sue the attorneys involved with the

decedents' estate plan because the attorneys "represented all of the plaintiffs and advised each one of them with respect to variously related matters over the years in question," including helping decedent's son in setting up a corporation for tax purposes in regard to his mother's estate plan. *Id.* at 285.

The problem with using *Nevelson* as a template for the present case is the fact that, while it is true that defendants herein "represented all of the plaintiffs and advised each one of them with respect to variously related matters over the years in question" (*id.*), defendants did so in this case only with regard to plaintiff's personal estate planning, not Leff's. The evidence tends to show that plaintiff was never involved with Leff's estate plans, did not know what his estate plan entailed until he gifted plaintiff with a copy of his June 2001 Will (Notice of Motion, Ex. C, at 215), never asked for details of the extent of Leff's holdings and, as she flatly said, when asked at her deposition about her knowledge of whether Adam was a beneficiary of Leff's will, that it was "really none of my business." *Id.* at 230. Similarly, when asked about whether her sister received a copy of the will at the time of the trip to Cambodia, plaintiff said that she did not know if that had happened because it was "private." *Id.* at 186.

Defendants present the case of *Mali v De Forest & Duer* (160 AD2d 297 [1st Dept 1990]), in which the Court refused to find a

fiduciary duty running from attorneys to a son/beneficiary of their father/client's will with regard to the will, even though the attorneys had advised the beneficiary as to his own estate planning, and were a "long-time legal advisor to the entire family." *Id.* at 298.

Similar to the case in *Mali*, defendants here represented plaintiff over the years in her own estate planning, and represented Leff in his own estate plans, while also rendering services to the Leffs on other matters, such as the purchase of the apartment in the Sherry-Netherland Hotel, which did not involve Leff's wills. Despite the fact that defendants were "long time legal advisors" to the Leffs on a variety of matters, there is simply no evidence that plaintiff and Leff had a joint estate plan.

In the decision in *Schneider v Hand* (Index No. 108632/00 [Sup Ct, NY County 2001], *affd* 296 AD2d 454 [2d Dept 2002])(also brought to the court's attention by plaintiff), the plaintiff therein allegedly attended meetings with defendants/attorneys and the decedent concerning their estate plans, and that he was "'in the loop' as to any confidences and secrets of his parents as to the will." *Schneider*, at 3. However, this kind of contact and interaction, or indication of actual privity, is not evident in the present matter. While there is evidence that defendants represented the Leffs as to various matters over the years, there

is simply no evidence that defendants represented the Leffs in a joint estate plan.

Nor is there evidence of a relation of "near privity" between plaintiff and defendants in the drafting of Leff's will. There is only evidence that defendants explained the import of the June 2001 Will to her (which she admits that she did not read)(Notice of Motion Ex. C, at 217) and updated her on occasion as to the amount of money she would receive upon Leff's death ("[Mr. Cunningham] told me. He started talking numbers before [Leff] died"). *Id.*, at 246.

This court does not believe that these fleeting contacts between plaintiff and defendants explaining the meaning of Leff's June 2001 Will as it applied to plaintiff create any relationship between plaintiff and defendants "approaching privity" with regard to Leff's estate planning. Basically, plaintiff, in her deposition, makes clear that she was mostly in the dark as to Leff's estate plans. Thus, without any real contact between plaintiff and defendants in the matter of Leff's estate planning, plaintiff cannot rely on a theory of "near privity" to make defendants liable to her for any misdeeds or mistakes they might have committed in their representation of Leff.[2]

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[2]The court is not convinced by defendants' reference to discussions by the American College of Trust and Estate Counsel and the American Bar Association that, "in the absence of an agreement to the contrary" a husband and wife represented by the same counsel be presumed to be joint clients. No binding legal

ii. "But For" and Damages

Whether or not plaintiff can establish any type of attorney-client relationship between defendants and herself in regard to Leff's estate, her case falters inexorably on the issue of causation, simply because plaintiff cannot prove that she would have received more money from Leff "but for" defendants' failure to inform Leff of the existence and import of the Separation Agreement. Plaintiff speculates that Leff, in an effort to increase plaintiff's recovery, might have handled his estate in a manner which would have ensured that plaintiff received more than she eventually did after his death. However, plaintiff's claim that he would most likely have provided for inter-vivos gifts, created trusts, or joint accounts outside the probate estate to attain that goal is pure conjecture. A jury would only be speculating about how Leff might have solved the problem of the Separation Agreement. Further, Leff clearly left open the possibility that he could reduce his testamentary gift to plaintiff if he so chose, only promising her that he would let

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precedent has been cited for this proposition. Defendants' failure to obtain a retainer from plaintiff before her husband's death does not necessarily indicate joint representation.

What is more, defendants' reliance on New York's Disciplinary Rules concerning an attorney's obligation to obtain informed consent to dual representation where a conflict of interest might exist does not serve to create such joint representation. It merely directs attorneys' conduct. Further, plaintiff does not present facts creating a conflict of interest with her husband which might have obligated defendants to obtain informed consent.

her know if he did so. In light of this, plaintiff cannot establish that Leff would never, under any circumstances, diminish plaintiff's expectations under the June 2001 Will. Plaintiff cannot establish that "but for" defendants' failure to remind Leff about the Separation Agreement, she would have obtained more money from Leff. And, because plaintiff cannot establish that but for defendants' negligence, she would have come out of probate a richer woman, means that she cannot prove what, if any, loss she sustained as a result. This throws the question of damages into disarray. Plaintiff simply cannot prove any damages based on mere conjecture and surmise. *Miller v JWP Forest Electric Corp.*, 232 AD2d 615 (2d Dept 1996). Therefore, whatever the nature of the relationship between plaintiff and defendants, plaintiff cannot establish a cause of action for legal malpractice against them.

C. Negligent Misrepresentation and Breach of Fiduciary Duty

As these claims arise from the same allegations, and seek the same damages as the cause of action for legal malpractice, they are duplicative, and must be dismissed. *See Mecca v Shang*, 285 AD2d 569 (2d Dept 1999)(negligent misrepresentation claim duplicative of legal malpractice claim); *Mahler v Campagna*, 60 AD3d 1009 (2d Dept 2009)(breach of fiduciary duty claim duplicative of legal malpractice). Plaintiff was not defendants' client in the matter of the planning of Leff's estate, and so,

defendants never owed her any especial duty of care thereof.

D. Fraud and Breach of Contract

Both of these claims have been abandoned, as plaintiff makes no effort to defend them in response to this motion.

IV. Conclusion

As plaintiff has failed to establish the existence of an attorney-client relationship between herself and defendants, she has no case for malpractice against them. Further, she has failed to prove that "but for" defendants' failure to advise Leff about the Separation Agreement she would have received $9 million more from Leff's estate, and has failed to establish a basis for a finding of damages.

Accordingly, it is

ORDERED that the motion brought by defendants Fulbright & Jaworski, LLP, William Bush, and Richard J. Cunningham is granted; and it is further

ORDERED that the complaint is dismissed with costs and disbursement to defendants as taxed by the Clerk of the Court upon the presentation of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 6/30/09

ENTER:

MARILYN SHAFER J.S.C.

J.S.C.

FILED
JUL 02 2009
COUNTY CLERK'S OFFICE
NEW YORK