

Docket: 1684CV01986-BLS1

Date: January 16, 2020

Parties: Caper v. Foley & Lardner, LLP, et al.

Judge: /s/ Brian A. Davis Associate Justice of the Superior Court

Decision and Order Regarding: (1) Defendants' Motion for Summary Judgment (Docket Entry No. 46); and (2) Defendant-in-Counterclaim's Motion for Summary Judgment (Docket Entry No. 45):

This is a legal malpractice action filed in June 2016 by plaintiffs Adam Caper ("Mr. Caper"), Synchrony Venture Management, LLC ("SVM"), and Synchrony Innovations, Inc. ("SI" or, collectively with SVM and Mr. Caper, "Plaintiffs"), against their former counsel, Foley & Lardner, LLP ("Foley"), and one of its partners, Gabor Garai, Esq. ("Attorney Garai" or, collectively with Foley, "Defendants"). Mr. Caper formed SVM, a software and consulting company, in 2006. SVM failed to thrive, and in 2013, Mr. Caper and SVM retained Defendants to advise them with respect to a proposed corporate restructuring, which resulted in the formation of SI. Defendants performed over \$70,000 worth of unpaid legal work forming SI and advising Plaintiffs on various related business matters.[1] SI, however, did not attract significant outside investment money and eventually failed. This litigation ensued.

Plaintiffs' claims against Defendants are essentially two-fold. First, Plaintiffs allege that Foley and Attorney Garai committed malpractice by erroneously advising SI in or about August 2013 that it was legally permissible for SI to defer salary payments to its new Chief Operating Officer, Jeffrey Dowling ("Mr. Dowling"), as an interim cost-saving measure. Mr. Dowling later sued Mr. Caper and SI for non-payment of wages under the Massachusetts Wage Act, causing them to incur (according to Plaintiffs) significant attorney's fees and other monetary losses. Second, Plaintiffs allege that Foley and Attorney Garai abruptly stopped work on SI's proposed financing in or about August 2014 in an effort to strong-arm Mr. Caper and SI into releasing their malpractice claim against Defendants based on SI's deferral of Mr. Dowling's salary, again to Plaintiffs' detriment. The specific claims asserted by Plaintiffs are negligence/malpractice (Count I), breach of fiduciary duty (Count II), intentional misrepresentation (Count III), negligent misrepresentation (Count IV), and violation of G.L. c. 93A (Count V).

Foley and Attorney Garai, for their part, deny committing any malpractice and deny trying to force Mr. Caper and SI to release them from any malpractice claim. Foley also has asserted a counterclaim against Mr. Caper for deceit/misrepresentation based on Mr. Caper's alleged misrepresentations to Defendants concerning his personal financial acumen and SI's financial status and business prospects in order to persuade Foley to

[1] Foley's legal fees for work related to SI exceeded \$70,000, but the unpaid balance at the time the parties' relationship broke down in mid-2014 was approximately \$70,000. The total of SI's actual payments to Foley from January through March 2014 came to only \$7,520.

take on and continue its representation of SI. Mr. Caper, in his answer to Foley's counterclaim, denies making any misrepresentations to Defendants.

The case came before the Court on Defendants' Motion for Summary Judgment on all of Plaintiffs' claims ("Defendants' Motion," Docket Entry

No. 46) and Defendant-in-Counterclaim's Motion for Summary Judgment on Foley's counterclaim ("Mr. Caper's Motion," Docket Entry No. 45). The Court conducted a hearing on both motions on October 23, 2019. All parties appeared and argued. Upon consideration of the written submissions of the parties and the oral arguments of counsel, Defendants' Motion will be ALLOWED IN PART, and Mr. Caper's Motion will be ALLOWED IN PART, to the extent, and for the reasons, summarized below.

The Facts

The following facts are effectively undisputed for summary judgment purposes:[2]

Plaintiffs' Retention of Defendants

Mr. Caper is an entrepreneur, businessman, and consultant who formed SVM in 2006 to provide proprietary software and consulting services to assist companies in analyzing certain investment options. Mr. Caper served, at all relevant times, as SVM's Chief Executive Officer.

Attorney Garai is a business lawyer and a Foley partner. In July 2013, Mr. Caper retained Attorney Garai and Foley to assist in a restructuring of SVM and a financing of Mr. Caper's new company, SI. Mr. Caper described himself to Attorney Garai at the time of the engagement as a "serial entrepreneur." It is Attorney Garai's usual practice to ask potential new clients whether "there is anything [he] should know about them that would be relevant to our attorney-client relationship" or that he "would be concerned about," but Attorney Garai has no recollection of asking Mr. Caper this particular question before entering into the engagement with Mr. Caper. See Affidavit of Gabor Garai in Opposition

[2] The undisputed facts recited herein are taken from the parties' respective statements of facts filed in conjunction with their summary judgment motions, and from the supporting materials cited and relied upon in those statements of facts. In some instances, a party's response to a purportedly disputed fact does not "cite ... the specific evidence, if any, in the Joint Appendix that demonstrates the dispute" as required by Superior Court Rule 9A(b)(5)(iii)(A). See, e.g., Defendants' Response to iff 8 of Mr. Caper's Statement of Material Facts (citing a voluminous thirty-seven page block of deposition testimony as the basis for Defendants' response that the alleged fact is "[d]isputed, in part."). In such cases, the Court has deemed any facts that are not specifically controverted as admitted for purposes of deciding the parties' summary judgment motions. See Superior Court Rule 9A(b)(5)(iii)(A) ("For purposes of summary judgment, each fact set forth in the moving party's statement of facts is deemed to have been admitted unless properly controverted in the manner forth in this Paragraph....").

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to Adam Caper's Motion for Summary Judgment ("Gabor Aff."), ¶4; [3] Transcript of Deposition of Gabor Garai ("Garai Depo.") at 102-103. [4] Foley's July 2013 engagement letter with Mr. Caper (the "Engagement Letter") required SI to pay an initial \$5,000 retainer (which Mr. Caper paid), and provided that "[I]nvoices are normally sent to the Company each month," and "[p]ayment is due promptly upon receipt." Mr. Caper contends, however, that Mr. Garai nonetheless told him when the Engagement Letter was signed that Attorney Garai "was responsible for collecting the legal fees," and Mr. Caper "could ignore the payment terms in the Engagement Letter because Attorney Garai "would not seek payment outside of an initial retainer until Synchrony completed its financing." See Affidavit of Adam Caper in Opposition to Motion for Summary Judgment ("Caper Aff."), ¶5. [5] Mr. Dowling's Compensation Agreement

In June 2013, Mr. Caper was searching for a Chief Operating Officer

("COO") for SVM and SI. Plaintiffs did not have the means to pay a COO meaningful cash compensation and, therefore, favored candidates who would allow SVM and SI to conserve cash.

Mr. Caper eventually hired Mr. Dowling as COO. Mr. Dowling started work for SI and SVM in early August 2013. At or around the time Mr. Dowling began his employment at SI and SVM, Mr. Caper consulted with Attorney Garai as to whether Mr. Dowling's salary could be legally deferred. Mr. Garai confirmed that it was legally permissible for Plaintiffs to defer payment of Mr. Dowling's salary until SI obtained an initial round of financing. As a result, Mr. Dowling's employment agreement with SI and SVM provided that his \$100,000 annual salary would be deferred until the first close of Series A financing, unless the amount owed was greater than 10% of the first close, in which case 10% of the first close would be paid, and the remainder would be paid when business conditions permitted. See Dowling Employment Agreement, dated August 5, 2013, at 2.[6]

SI's Financing Efforts

Foley provided various legal services to Plaintiffs both before and after the July 2013 engagement letter was signed. See, e.g., Foley Legal Invoices to SI for November and

[3] Attorney Gabor's Affidavit is included in the Joint Appendix to Defendant-in-Counterclaim's Motion for Summary Judgment ("Mr. Caper's Appendix") as Exhibit 37.

[4] Relevant excerpts of Attorney Gabor's deposition in this action are included in Mr. Caper's Appendix as Exhibit 3, and Defendants' Appendix as Exhibit 80.

[5] Mr. Caper's Affidavit is included in the Joint Appendix to Defendants' Motion for Summary Judgment ("Defendants' Appendix") as Exhibit 83.

[6] A copy of Mr. Dowling's Employment Agreement is included in Defendants' Appendix as Exhibit 14.

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December, 2013.[7] Much of Foley's work for Plaintiffs focused on assisting them in their efforts to secure \$300,000 in first round investor financing for SI. Mr. Caper shared a series of upbeat, but arguably untrue representations with Foley about SI's financial status and business prospects while the search for financing was underway, including the representation that SI had obtained "over \$100k in capital commitments" from prospective investors (see Mr. Caper's Appendix, Exhibit 53); the representation that SI was experiencing "Excellent Market Uptake" for its analytical software product among "29 large multinational firms with an aggregate revenue of \$1.03 trillion" (see *id.*, Exhibit 54); the representation that SI had [s]everal paid proof-of-concept implementations planned for November, 2013" (*id.*); and the representation that SI had "negotiated terms for a \$1.25MM financing with several investors" (*id.*, Exhibit 55). According to Attorney Garai, Mr. Caper affirmatively told him loin several occasions" that, "given the number of customer trials, proposals and financing sources Synchrony was a very short time away from being able to start paying Foley's bills." Garai Aff., ¶20.

The Litigation Arising from Mr. Dowling's Deferred Compensation

Following a dispute in early January 2014, Mr. Dowling resigned from SVM and SI and demanded his back salary. All told, Mr. Dowling was owed approximately \$42,300 in unpaid salary at the time of his resignation.

Mr. Caper conferred with Attorney Garai regarding Mr. Dowling's demand

for back pay. Attorney Garai advised Mr. Caper to send Mr. Dowling an e-mail message acknowledging SVM and SI's obligation to pay him his back salary, and confirming that Mr. Dowling would receive payment when SI first closed its Series A financing. See Garai Depo. at 236-237; E-mail from Mr. Caper to Mr. Dowling, dated January 13, 2014.[8] Defendants' Appendix, Exhibit 20. Mr. Caper's e-mail to Mr. Dowling precipitated a notice from Mr. Dowling's attorney that he would be pursuing litigation against SI and Mr. Caper personally for his unpaid salary. Id., Exhibit 86. Shortly thereafter, Attorney Garai belatedly informed Mr. Caper that he had "checked with [Foley's] employment lawyer" and confirmed that "it is indeed illegal not to pay anyone a salary until a given event like a [venture capital] funding." Id.

Mr. Dowling made good on his threat to pursue litigation against SVM, SI, and Mr. Caper by filing a complaint against them in Superior Court in May 2014 (the "Dowling Litigation"). Mr. Dowling's claims included, but were not limited to, a claim that Plaintiffs had violated the Massachusetts Wage Act, G.L. c. 149, § 148, by deferring the payment of his salary

[7] Samples of Foley's legal invoices to SI are included in Defendants' Appendix as Exhibits 5, 6 and 7.

[8] A copy of Mr. Caper's January 13, 2014 e-mail to Mr. Dowling is included in Defendants' Appendix as Exhibit 20.

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until SI first closed its Series A financing. See Dowling Complaint, dated May 5, 2014.[9] Mr. Caper forwarded a copy of Mr. Dowling's Complaint to Foley, but Foley declined to appear on Plaintiffs' behalf in the Dowling Litigation "due to the significant unpaid balance in [SI's] account." See E-mail from Thomas Elkind, Esq. to Mr. Caper, dated May 7, 2014.[10] Mr. Caper eventually retained the law firm of Ruberto, Israel, & Weiner, P.C. ("Ruberto Israel") to represent Plaintiffs in the Dowling Litigation. Foley's "Pens Down" E-mail

Beginning in July 2014, Mr. Caper, Ruberto Israel, and Foley had a series of discussions regarding Foley's potential culpability for the legal exposure that Plaintiffs faced on account of the Dowling Litigation. A "settlement meeting" took place at Foley's offices on July 14, 2014, and no resolution was reached, but Foley made it clear that any eventual resolution would necessarily include a release of Plaintiffs' potential claims against Foley.

On July 22, 2014, Mr. Dowling's attorney offered to settle the Dowling Litigation for a payment of \$60,000. Mr. Caper notified Foley of the demand and, in early August 2014, asked Foley to contribute up to \$40,000 towards a settlement with Mr. Dowling.

At the same time Mr. Caper, Ruberto Israel, and Foley were discussing Foley's potential culpability for the legal exposure that Plaintiffs faced on account of the Dowling Litigation, Foley attorneys were working on documenting a planned investment in SI by Daniel Gilbert ("Mr. Gilbert"). Mr. Gilbert is an experienced investor who has been involved with a variety of high-tech companies over the past twenty years, including Palm, Inc. and Cisco Systems, Inc. Affidavit of Daniel A. Gilbert in Opposition to Motion for Summary Judgment ("Gilbert Aff."), ¶¶ 2-5. [11] Mr. Gilbert signed a term sheet memorializing his intention to invest \$50,000 in SI on July 10, 2014, and agreed at the same time to raise an additional \$200,000 in capital from other investors. Id., ¶¶10-12. Foley attorney Michael Callahan ("Attorney Callahan") was in the process of drafting the documents necessary to complete Mr. Gilbert's investment in SI, including a stock purchase agreement and various consents, when Attorney Garai sent Mr. Caper and

Attorney Callahan an e-mail on the morning of August 26, 2014, stating, "[Oven the demand for damages we cannot continue to represent you. Mike, please put pens down.]"[12] Attorney Garai did not intend for his "pens down" e-mail to Attorney Callahan and Mr. Caper to

[9] A copy of Mr. Dowling's Complaint is included in Defendants' Appendix as Exhibit 27.

[10] A copy of Attorney Elkind's E-mail to Mr. Caper is included in Defendants' Appendix as Exhibit 92.

[11] Mr. Gilbert's Affidavit is included in Defendants' Appendix as Exhibit 99.

[12] A copy of Attorney Garai's "Pens Down" E-mail is included in Defendants' Appendix as Exhibit 105.

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effect a "formal termination" of Foley's relationship with Plaintiffs.¹³ Garai Depo. at 481. Rather, his intent was to persuade Mr. Caper "to pick up the phone and call [him]" about Mr. Caper's demand that Foley contribute to a settlement of the Dowling Litigation. Id. at 502-503.

Foley never picked up its pens again for Plaintiffs. According to Plaintiffs and Mr. Gilbert, Foley's, unwilling[ness] to finalize documents for a simple and straightforward transaction such as [Mr. Gilbert's] investment in Synchrony ... became a real impediment to [SI] raising additional investment money. Gilbert Aff., ¶15.

Mr. Gilbert walked away from SI after Foley went "pens down." Plaintiffs allege, with support, that his departure significantly undermined SI's fund-raising efforts. See Gilbert Aff., ¶¶15-17. See also Affidavit of Ash Kaluarachchi in Opposition to Motion for Summary Judgment ("Kaluarachchi Aff."), ¶¶6-10.[14] SI eventually failed for lack of funds. Discussion

Summary judgment is appropriate when, viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); Cargill, Inc. v. Beaver Coal & Oil Co., [424 Mass. 356](#), 358 (1997). A party who does not bear the burden of proof at trial may demonstrate the absence of a genuine issue of material fact either by submitting affirmative evidence negating an essential element of the nonmoving party's case, or by showing that the non-moving party has no reasonable expectation of proving an essential element of his or her case at trial. See Kourouvacilis v. General Motors Corp., [410 Mass. 706](#), 716 (1991).

[13] Attorney Garai's testimony in this regard is consistent with the deposition testimony of Michael Pontrelli ("Attorney Pontrelli"), Foley's Professional Responsibility partner. Excerpts of Attorney Pontrelli's deposition are included in Defendants' Appendix as Exhibit 106. Attorney Pontrelli was directly involved in Foley's discussions with Mr. Caper and Ruberto Israel concerning Foley's potential culpability for the legal exposure that Plaintiffs faced on account of the Dowling Litigation. He testified that it is Foley's "position in [this] lawsuit that there was no termination" of Foley's relationship with Plaintiffs "as of August 26th [2014]." Id. at 86.

[14] Mr. Kaluarachchi is the co-founder of New York University's Steintech EdTech Accelerator and Incubator program, which provides start-up companies with mentoring, legal services, development expertise, and other assistance. Kaluarachchi Aff., ¶2. A copy of his Affidavit is included in Defendants' Appendix as Exhibit 110. In it, he states, among other things, that "[t]he loss of [legal] counsel, after the receipt of investor money, is a significant change that the entrepreneur would expect to negatively impact the investor community," and that u[i]n this particular case, the disengagement of Mr. Gilbert based on [Foley's] withdrawal should have been expected." Id., ¶¶6,9.

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Applying the foregoing standard, the Court will address the parties' respective motions for summary judgment separately.

Defendants' Motion

Upon review and after a hearing, Defendants' Motion is DENIED with respect to Counts I, II, III, and V of Plaintiffs' Complaint, and ALLOWED with respect to Count IV.

As to Count I (negligence/malpractice), there is substantial evidence in the summary judgment record, discussed above, to support a finding that Foley committed legal malpractice by erroneously advising Mr. Caper that SVM and SI could defer Mr. Dowling's salary until after SI first closed its Series A financing, and that Plaintiffs sustained damages, including legal defense costs, as a result. See *Kiribati Seafood Co., LLC v. Dechert LLP*, [478 Mass. 111](#), 117 (2017) ("To prevail on a claim of negligence by an attorney, a client must demonstrate that the attorney failed to exercise reasonable care and skill in handling the matter for which the attorney was retained ...; that the client has incurred a loss; and that the attorney's negligence is the proximate cause of the loss...") (citations and internal quotation marks omitted). Accordingly, the entry of summary judgment is not appropriate with respect to Count I.

As to Count 11 (breach of fiduciary duty), there is a genuine issue of material fact regarding whether Attorney Garai's August 26, 2014, "pens down" e-mail message to Attorney Callahan and Mr. Caper constituted a legitimate effort on Foley's part to withdraw from its representation of Plaintiffs based on the conflict allegedly created by their demand that Foley contribute to a settlement of the Dowling Litigation (as Defendants now contend), or was merely an attempt by Foley to force Mr. Caper, at a vulnerable moment, to negotiate a resolution of that dispute on terms that were acceptable to Foley (as Attorney Garai has testified was the case). See Garai Depo. at 481, 502-503. See also *Cargill*, 424 Mass. at 358. Moreover, even if Attorney Garai's "pens down" e-mail message was a legitimate attempt by Foley to withdraw on account of a perceived conflict, there are genuine issues of material fact as to whether Foley's withdrawal was accomplished at a time and in a way that was "a substantial cause of injury" to its clients (see *Clark v. Rowe*, [428 Mass. 339](#), 345 (1998) ("Clark")), and whether Foley gave Plaintiffs adequate notice of its intention to withdraw (see Mass. R. Prof. Conduct 1.16(d) [15]). See *Clark*, 428 Mass. at 345 ("Breaches of client confidences, inappropriate conflicts of interest, and the use of advantages arising out of the client-

[15] Massachusetts Rules of Professional Conduct 1.16(d) states: "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred." (emphasis added).

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lawyer relationship may be intentional wrongs or may be negligent acts depending on the circumstances. If a breach of one of these fiduciary duties is a substantial cause of injury to the client, the lawyer could be liable to the client.") (emphasis added). Accordingly, the entry of summary judgment is not appropriate with respect to Count II.

As to Count III (intentional misrepresentation), the existence of genuinely disputed issues of material fact again precludes the resolution of this claim as a matter of law. In order to recover for intentional misrepresentation, Plaintiffs must "allege and prove that the defendant[s] made a false representation of a material fact with knowledge of its falsity for the purpose of inducing the plaintiff[s] to act thereon, and that the plaintiff[s] relied upon the representation as true and acted upon it to ... [their] damage." *Kilroy v. Barron*, [326 Mass. 464](#), 465 (1950) ("Kilroy"). See *Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co.*, [445 Mass. 411](#), 423 (2005) (same). Here, there is a genuine issue of material fact as to whether, among other things, Attorney Garai misrepresented to Mr. Caper that Plaintiffs could defer payment of Foley's legal invoices, outside of the initial retainer, until SI completed its financing, to Plaintiffs' detriment. Accordingly, the entry of summary judgment is not appropriate with respect to Count III.

In Count IV (negligent misrepresentation), Plaintiffs allege that Foley and Attorney Garai "negligently misrepresented their knowledge about the Wage Act and the ability of the Company to pay employees deferred salary" and that in making these statements, they failed to exercise reasonable care in obtaining or communicating this information to Plaintiffs. Plaintiffs' Complaint, ¶¶88-89. Defendants are entitled to summary judgment on Count IV because this count is duplicative of Plaintiffs' legal malpractice claim. *Id.*

As with Counts I, II, and III, the existence of genuinely disputed issues of material fact precludes the resolution of Count V (violation of G.L. c. 93A) as a matter of law at the present time. There is, for example, a genuine issue of material fact as to whether Foley's conduct in allegedly forcing Mr. Caper, at a vulnerable moment, to settle Plaintiffs' dispute with Foley over the cause of the Dowling Litigation constituted an "unfair or deceptive act or practice." See *Chervin v. Travelers Ins. Co.*, [448 Mass. 95](#), 112 (2006) (recognizing that on a G.L. c. 93A claim "whether a particular set of acts, in their factual setting, is unfair or deceptive is a question of fact....") (citation omitted). See also *Goodman v. Aetna Cas. & Sur. Co.*, [412 Mass. 807](#), 811 (1992) ("Summary judgment ... is not appropriate, and the question of law cannot be resolved, if the record fails to demonstrate that there is no dispute of material fact."). Accordingly, the entry of summary judgment is not appropriate with respect to Count V.

The Court is further persuaded that, as to each of Plaintiffs' surviving claims, they have come forward with sufficient evidence of actual, resulting losses to make their alleged damages non-speculative. See, e.g., *Gilbert Aff.*, ¶¶14-17; *Kaluarachchi Aff.*, ¶¶7-10,

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Dowling Complaint, Defendants' Appendix, Exhibit 27. See also *Ricky Smith Pontiac, Inc. v. Subaru of New England, Inc.*, [14 Mass. App. Ct. 396](#), 426 (1982) ("The plaintiff [is] not required to prove its lost profits with mathematical precision. Under our cases, an element of uncertainty is permitted in calculating damages and an award of damages can stand on less than substantial evidence. This is particularly the case in business torts, where the critical focus is on the wrongfulness of the defendant's conduct.").

Mr. Caper's Motion

Mr. Caper's Motion for Summary Judgment on Foley's single counterclaim for deceit/misrepresentation is ALLOWED IN PART. See Kilroy, 326 Mass. at 465 (recounting elements of misrepresentation claim). Mr. Caper is entitled to summary judgment on that portion of Foley's counterclaim that alleges Mr. Caper made various misrepresentations to Foley, prior to the execution of the Engagement Letter, concerning Mr. Caper's personal financial acumen because Defendants have presented no credible, admissible evidence that Mr. Caper actually made any such misrepresentations. Mr. Caper's statement to Attorney Garai that he is a "serial entrepreneur" has not been shown to be untrue, and Attorney Garai's ultimate acknowledgement that he has no specific recollection of any pre-engagement misrepresentations by Mr. Caper is fatal to this claim. See Garai Depo. at 94. The Court further agrees that Mr. Caper did not commit fraud by failing to disclose the specifics of his prior business ventures to Attorney Garai where he was under no legal obligation to do so. See *Urman v. South Boston Savings Bank*, [424 Mass. 165](#), 168 (1997) ("Silence does not constitute a basis for claiming fraud and misrepresentation" where defendant was under no fiduciary or other common law duty to disclose what it knew). In all other respects, Mr. Caper's Motion is DENIED.

/s/ Brian A. Davis Associate Justice of the Superior Court