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AMENDED SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 25**

**Present: HON. WILLIAM R. LaMARCA
Justice**

**FAHMI ARANKI and SEAMAN & EISEMANN,
INC., Individually and in their capacities as
minority Shareholders of Millennium
Alliance Group, L.L.C.,**

**Motion Sequence #001
Submitted June 20, 2005
XXX**

Plaintiffs,

-against-

INDEX NO: 3705/05

**GOLDMAN & ASSOCIATES, L.L.P., and
RONALD GOLDMAN, individually and as a
partner in Goldman & Associates, L.L.P.,**

Defendants.

The following papers were read on this motion:

Notice of Motion.....	1
Defendants Memorandum of Law in Support.....	2
Affirmation in Opposition.....	3
Reply Affirmation.....	4

The Court, *sua sponte*, recalls its order of September 22, 2005 to correct typographical errors and substitutes the following order in its place, *nunc pro tunc*:

Requested Relief

Defendants, GOLDMAN & ASSOCIATES, LLP, and RONALD GOLDMAN, individually and as a partner in GOLDMAN & ASSOCIATES, LLP (hereinafter referred to collectively as "GOLDMAN"), move for an order, pursuant to CPLR §3211(a)(7), dismissing

the complaint for failure to state a cause of action. Plaintiffs, FAHMI ARANKI and SEAMAN & EISMAN, INC. (hereinafter referred to as "S&E"), individually and in their capacities as minority shareholders of Millennium Alliance Group, LLC (MAG), oppose the motion which is determined as follows:

Background

This action deals with the responsibilities, if any, that an attorney, who represents a Limited Liability Company, has to the individual owners in the entity. ARANKI, who was a 10% owner of MAG, and S&E, which was a 35% owner, allege in their complaint that as MAG's financial condition deteriorated, ARANKI, the founder of MAG, who along with two (2) business partners each owned 10%, was cut out from MAG's management and GOLDMAN was increasingly included in management decisions. The complaint alleges that ARANKI's daughter, who provided bookkeeping services to MAG, was terminated for refusing to use escrow funds to pay operating expenses (which included GOLDMAN's attorney's fees), and ARANKI was denied access to MAG's financial records. Moreover, it is alleged that in April 2003, MAG's board ceased paying ARANKI and S&E its commissions and profit shares although GOLDMAN and other board members continued to be paid. It is alleged that, thereafter, GOLDMAN advised MAG's board to bring an action against ARANKI and S&E for theft and advised one of ARANKI's business partners to place him in default on a loan, to further weaken him financially. It is plaintiffs' position that GOLDMAN improperly failed to advise MAG to release financial records to ARANKI and improperly failed to advise MAG of the consequences of its alleged misuse of escrow funds. Furthermore, the complaint alleges that GOLDMAN represented to ARANKI's counsel that there were "no improprieties in [MAG's] accounting practices". In essence,

plaintiffs allege that GOLDMAN failed to protect plaintiffs' interests as minority owners by engaging in a number of activities contrary to plaintiffs' interests.

On March 11, 2005, plaintiffs commenced the instant action with the filing of the Summons and Complaint, which alleged four causes of action: 1) that GOLDMAN breached a fiduciary duty that was owed to plaintiffs in their capacity as minority owners of MAG; 2) for fraud and negligent misrepresentation; 3) for breach of contract and breach of good faith and fair dealing; and 4) for legal malpractice. GOLDMAN now moves to dismiss the complaint in its entirety and asserts that as attorney for MAG, GOLDMAN represented the company and not its individual owners, and thus owes no duty to plaintiffs herein. GOLDMAN further argues that plaintiffs have not identified any actionable misrepresentations, that plaintiffs did not have a contract with GOLDMAN, and that lack of privity prevents them from asserting a cause of action for malpractice.

In opposition to the motion, plaintiffs state that the Second Department has found that an attorney representing a company owes a fiduciary duty to minority shareholders of that company, citing *Collins v Telcoa International Corp.* 283 AD2d 128, 726 NYS2d 679 (2nd Dept. 2001), and that plaintiffs have plead sufficient facts to support their breach of fiduciary duty claim. As to fraud, plaintiffs have alleged that GOLDMAN made material representations that were false, particularly that MAG could legally commingle its operating funds and escrow funds and that GOLDMAN knowingly lied to MAG to ensure that the company continued to pay GOLDMAN's legal fees. It is plaintiffs' position that they justifiably relied upon GOLDMAN's representation and did not learn of its falsity until they hired their own attorney in 2003. As to negligent misrepresentation, plaintiff's assert that they have alleged each element of a negligent misrepresentation claim and that

GOLDMAN's argument that plaintiff's lack privity fails in that a duty exists between and attorney and a minority shareholder, again citing *Collins v Telcoa International Corp .*, *supra*. As to malpractice, plaintiff's allege that even without privity, when a third party sufficiently alleges fraud against the attorney defendant, privity is not required for standing to bring a malpractice action, citing *Stern v Consumer Equities Assoc.*, 160 AD2d 993, 554 NYS2d 714 (2nd Dept. 1990). Plaintiffs urge that they have sufficiently plead an action for fraud and, thus, they have satisfied the standing requirement to bring their malpractice action.

The Law

As to Breach of Fiduciary Duty

Appellate decisions throughout the State have held that a lawyer who is retained by a corporation or a partnership represents the entity and not the individual shareholders, partners or employees. See, *Polovy v Duncan*, 269 AD2d 111, 702 NYS2d 61 (1st Dept. 2000) ("a lawyer for a corporation represents the corporation, not its employees"); *Busino v Meachem*, 270 Ad2d 606, 704 NYS2d 690 (1st Dept. 2000) (attorney who personally represented principal shareholder in corporation owes no fiduciary duty to other shareholders); *Walker v Saftler*, 239 AD2d 252, 657 NYS2d 187 (1st Dept. 1997) (shareholder who sued attorney for negligence in prosecuting corporate causes of action lacks standing to sue in individual capacity); *Ormansky v 64 Moore Associates*, 269 AD2d 336, 703 NYS2d 471 (1st Dept. 2000) (law firms representation of defendant partnership did not render law firm counsel for plaintiff partner); *Briarpatch Limited v Frankfurt Garbus Klein & Seltz, P.C.*, 13 AD3d 296, 787 NYS2d 267 (1st Dept. 2004) (even if law firm represented partnership or general partner, no fiduciary duty to limited partner). When, as

here, there is no retainer agreement between plaintiff owners and the company attorney, and when a lawyer acts in furtherance of company interests that may be contrary to the interests of individual owners, it is clear that the interests of the company and the plaintiffs have diverged. An attorney allegiance is to the entity that retained him, rather than to any person connected with the entity. EC § 5-18. No reasonable person could conclude that defendant counsel was plaintiffs' personal attorney which created or breached any fiduciary duty. See, *Polovy v Duncan, supra*. An owner or member of a limited liability company does not have the right to bring a derivative action on behalf of the company. *Hoffman v Unterberg*, 9 AD3d 386, 780 NYS2d 617 (2nd Dept. 2004), citing Rich, Practice Commentaries, *McKinney's Cons. Laws of NY*, Book 32A, Limited Liability Company Law, 2004 Pamph., at 7; *Schindler v Niche Media Holdings, LLC., et al*, 1 Misc 3d 713, 772 NYS2d 781 (Sup. NY Co. 2003).

In *Collins v Telcoa International Corp., supra*, Second Department analyzed "whether a corporate shareholder may sue for money damages where the corporation sells all or substantially all of its assets, the sale is made in the usual or regular course of business, the corporation fails to give the shareholder the proper notice of that action as required by Business Corporation Law §909(a), and the shareholder does not bring the proceeding to value his shares pursuant to Business Corporation Law §623". The Court held that under these circumstances, a shareholder may sue the corporation for money damages. The Court further held that when plaintiff alleged that the attorney for the Telcoa companies "also represented the plaintiff individually" (emphasis supplied), said attorney had a duty to act responsibly to protect the plaintiff's interests and that said allegations adequately stated a cause of action against the attorney sounding in breach of

fiduciary duty. In the case at bar, plaintiffs have not alleged that GOLDMAN represented them individually, but instead, allege that GOLDMAN was advocating for the company's interests as opposed to their own, which were adverse. The Court distinguishes *Collins v Telcoa International Corp.*, *supra*, on the basis of the above and finds no basis for deviating from the established line of cases that an attorney who represents a company has no fiduciary duty to the individual owners of the entity.

As to Fraud and Negligent Representation

To establish a cause of action for fraud, plaintiff must establish that 1) defendant made a material misrepresentation that was false; 2) that the defendant knew the representation was false and made it with intent to deceive the plaintiff; 3) that plaintiff justifiably relied on defendant's representations and 4) that plaintiff was injured as a result of defendant's representations. *Leno v DePasquale*, 2005 WL 1109438 (2nd Dept., 2005).

To establish a cause of action for negligent misrepresentation, plaintiff must establish 1) an awareness by the maker that the statement 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. *Ford v Sivilli*, 2 AD3d 773, 770 NYS2d 414 (2nd Dept. 2003). Moreover, to recover for negligent misrepresentation, plaintiff must show either actual privity of contract between the parties or a relationship so close as to approach that of privity. *Prudential v Dewey, Ballantine, Bushby, Palmer and Wood*, 80 NY2d 377, 590 NYS2d 831, 605 NE2d 318 (C.A. 1992); *McNar Indus. v Feibes & Schmitt Architects*, 245 AD2d 993, 667 NYS2d 88 (3rd Dept. 1997).

In essence, plaintiffs allege that GOLDMAN fraudulently and negligently represented that, as MAG's attorney, he was representing ARANKI's and S&E's interests as well. They allege that GOLDMAN never informed plaintiffs that he had ceased representing their interests and, more importantly, that GOLDMAN never informed plaintiffs "of the legal consequences of their partners' commingling of escrow and operating funds". Plaintiff's claim that GOLDMAN falsely stated that there were no improprieties in MAG's accounting practices. Glaringly absent from the complaint are sufficient allegations that plaintiffs reasonably relied upon the representations at issue. In fact, plaintiffs assert that ARANKI's daughter, who provided bookkeeping services to MAG, was terminated for refusing to use escrow funds to pay operating expenses so it appears that plaintiffs did not rely upon the alleged representations of GOLDMAN but rather charted their own course of action. Reasonable reliance on the representation is a necessary element in both an action for fraud and negligent misrepresentation. See, *Fresh Direct, LLC. v Blue Martini Software, Inc.*, 7 AD3d 487, 776 NYS2d 301 (2nd Dept. 2004); *Rotanelli v Madden*, 172 AD2d 815, 569 NYS2d 187 (2nd Dept. 1991); *Water Street Leasehold, LLC. v Deloitte & Touche, LLP.*, 19 AD3d 183, 796 NYS2d 598 (1st Dept. 2005); *Miller v Doniger*, 272 AD2d 73, 707 NYS2d 170 (1st Dept. 2000); *Houbigant, Inc. v Deloitte & Touche, LLP.*, 303 AD2d 92, 753 NYS2d 493 (1st Dept. 2003).

As to Breach of Contract and Breach of Good Faith and Fair Dealing

Within every contract is an implied covenant of good faith and fair dealing. This covenant is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement. *Aventine Investment Management, Inc., v*

Canadian Imperial Bank of Commerce, 265 AD2d 513, 697 NYS2d 128 (2nd Dept. 1999).

Plaintiff's allege that MAG entered into a contract with GOLDMAN to act in MAG's best interests in return for money compensation and that ARANKI and S&E, as minority shareholders were parties to the contract. Plaintiffs allege that GOLDMAN breached this contract by failing to act in ARANKI and S&E's best interest as minority shareholders and claim that the duty of reasonable care in the performance of a contract is not always solely owed to the person with whom the contract is made but may inure to the benefit of others, citing *White v Guarente*, et al, 43 NY2d 356, 401 NYS2d 474, 372 NE2d 315 (C.A. 1977). The Court finds *White v Guarante* to be inapposite herein as it concerns the limited partners in the accounting firm of Arthur Anderson and Co., which the Court found must have been aware that a limited partner would necessarily rely on or make use of the audit and tax returns of the partnership which did not reflect that other partners had made improper withdrawals of funds. In the case at bar, plaintiffs herein have not demonstrated reliance upon the actions of GOLDMAN and the only contract that is alleged in the complaint is between GOLDMAN and MAG, the company. Upon a action to dismiss pursuant to CPLR §3211(a)(7), a court may consider affidavits submitted by plaintiff to remedy any defects in the complaint (*Fresh Direct, LLC. v Blue Martini Software, Inc .*, *supra*), but no affidavits of the plaintiffs have been submitted herewith. It is the judgment of the Court that the plaintiffs have not sufficiently demonstrated a basis to deviate from the general rule that an owner or member of a limited liability company does not have the right to bring a derivative action on behalf of the company, (*Hoffman v Unterberg*, 9 AD3d 386, 780 NYS2d 617 [2nd Dept. 2004], citing Rich, Practice Commentaries, *McKinney's Cons. Laws of NY*, Book 32A, Limited Liability Company Law, 2004 Pamph., at 7; *Schindler v*

Niche Media Holdings, LLC., et al, 1 Misc 3d 713, 772 NYS2d 781 [Sup. NY Co., 2003]), and have not pleaded sufficient facts to establish a breach of contract action.

As to Malpractice

In New York, the general rule is that absent fraud, collusion malicious acts or other special circumstances, an attorney is not liable to third parties, not in privity, for harm caused by professional negligence. *Stern v Consumer Equities Association*, 160 AD2d 993, 554 NYS2d 714 (2nd Dept. 1990); *Rovello v Klein, supra*; *Allianz Underwriters Insurance Company v Landmark Insurance Company, et al*, 13 AD3d 172, 787 NYS2d 15, (1st Dept. 2004). For a relationship to approach “near” privity’s borders for the purpose of extending liability to third-parties who are not in privity with counsel but intend to maintain a professional negligence claim, the professional must be aware that its services will be used for some specific purpose, the plaintiff must rely upon those services, and the professional must engage in some conduct evincing some understanding of the plaintiff’s reliance. *Allianz Underwriters Insurance Company v Landmark Insurance Company, et al, supra*. As found above, the plaintiffs have failed to sufficiently allege a claim for fraud in that no reliance on GOLDMAN’s statements or services has been demonstrated. Similarly, plaintiff’s have failed to allege sufficient facts to extend liability in the absence of privity. *Cf. Rovello v Klein, supra*.

It is well settled that on a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211 (a)(7), the Court must accept the plaintiff’s factual allegations as true and liberally construe the complaint in favor of the plaintiff . *EECP of AM, Inc. v Vasomedical, Inc.*, 265 AD2d 372, 696 NYS2d 837 (2nd Dept. 1999); *Smuker v 12 Lofts Realty Inc.*, 156 AD2d 161, 548 NYS2d 437(1st Dept. 1989); *Foley v D’Agostino*, 21 AD2d

60, 248 NYS2d 121 (1st Dept. 1964). On said motions, the Court looks to the substance of the motion rather than to the form. Such a motion is solely directed to the inquiry of whether or not the pleading considered as a whole fails to state a cause of action or whether any cause of action can be spelled out from the four corners of the pleadings. *Foley v D'Agostino, supra*; *Dye v Catholic Medical Center of Brooklyn and Queens*, 273 AD2d 193, 710 NYS2d 83 (2nd Dept. 2000).

Conclusion

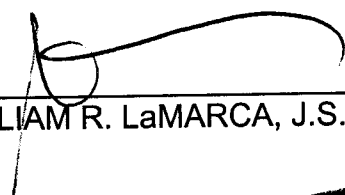
Based upon the foregoing, it is the Court's judgment that no reasonable view of the pleaded facts in Action "FIRST", "SECOND", "THIRD" and "FOURTH" set forth a cause of action upon which relief can be granted. Accordingly, it is hereby

ORDERED, that defendants motion to dismiss the complaint pursuant to CPLR § 3211(a)(7) is granted.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: September 26, 2005


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ENTERED

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