Commonwealth of Massachusetts
County of Suffolk
The Superior Court

CIVIL DOCKET#: **SUCV2009-01961-C**

RE: Minkina MD v Frankl et al

TO: Christopher Maffucci, Esquire
Casner & Edwards
303 Congress Street
2nd floor
Boston, MA 02210

04-12-13A11:23 RCVD

NOTICE OF DOCKET ENTRY

You are hereby notified that on **06/29/2012** the following entry was made on the above referenced docket:

Defendants Laurie A Frankl, Johnathan J Margolis, and Rodgers Powers & Schwartz LLP's MOTION for Summary Judgment, pursuant to Mass.R.Civ.P. 56, as to Nataly Minkina MD's First Amended Complaint (w/opposition)
Dated at Boston, Massachusetts this 9th day of April, 2013.

Michael Joseph Donovan,
Clerk of the Courts

BY: Timothy Walsh
Assistant Clerk

Telephone: 617-788-8172

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NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION
NO. 2009-1961-C

NOTICE SENT
04.09.13
C.+E.
C.M.
P.+A.
G.A.B.
K.L.K.
M.J.S.

NATALY MINKINA, M.D.

v.

LAURIE A. FRANKL, ESQ., JONATHAN J. MARGOLIS, ESQ.,
and RODGERS, POWERS & SCHWARTZ, LLP

(JAT)

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS LAURIE A. FRANKL, ESQ., JONATHAN J. MARGOLIS, ESQ., AND RODGERS, POWERS & SCHWARTZ, LLP'S MOTION FOR SUMMARY JUDGMENT

From 2005 to 2006, the defendants in this action (collectively, "RPS") represented the plaintiff Nataly Minkina, M.D. ("Minkina") in a G.L. c. 151B discrimination and retaliation action against Minkina's employer. The case proceeded to arbitration and Minkina received an award of approximately $266,000 in damages, fees, and costs. Minkina now claims that if RPS had made certain arguments in opposition to a motion to compel arbitration, the case would have proceeded to trial rather than arbitration, and Minkina would have received punitive damages in addition to compensatory damages. She also argues that RPS wrongfully withdrew its representation in 2006 and made negligent misrepresentations regarding her case. Minkina has asserted claims for professional negligence (Count I), negligent misrepresentation (Count II), breach of fiduciary duty (Count III), and negligent infliction of emotional distress (Count IV). RPS has now moved for

summary judgment as to all counts. For the following reasons, RPS's Motion for Summary Judgment is allowed.

BACKGROUND

The undisputed facts, and the disputed facts viewed in the light most favorable to Minkina as the non-moving party, are as follows.

In 2002, Minkina began working at Affiliated Physician Group ("APG"), a physicians' group affiliated with Beth Israel Deaconess Medical Center. Minkina's Employment Agreement included the following language:

> Any dispute arising out of or relating to this [Employment] Agreement . . . shall be finally settled by arbitration conducted expeditiously in accordance with the rules of the American Association . . . . ("the Arbitration Clause").

In September 2004, APG terminated Minkina's employment and Minkina proceeded with her employment discrimination claim against APG. Minkina had filed a discrimination claim with the MCAD on December 17, 2003, through the representation of counsel other than RPS, and in November 2004, she removed the case to the Superior Court. APG did not seek to invoke the Arbitration Clause at that time.

In May 2005, Minkina retained RPS as new counsel. On June 9, 2005, APG moved to compel arbitration. RPS, on behalf of Minkina, opposed APG's motion on the grounds that (1) the Arbitration Clause's limitation on punitive damages rendered the Employment Agreement unconscionable and unenforceable; (2) APG's

delay in demanding arbitration constituted a waiver of its right to arbitrate; (3) APG's failure to comply with the procedural terms of the Arbitration Clause effected a waiver of the Clause; and (4) the Arbitration Clause did not apply to Minkina's claims against a necessary party, APG's president. In February 2006, after hearing arguments, the Superior Court (Hines, J.) issued a decision allowing APG's motion to compel arbitration.[1] RPS, on behalf of Minkina, filed a single justice petition pursuant to G. L. c. 231, § 118, which was denied in April 2006. Minkina did not appeal to the SJC.

In May 2006, Minkina directed RPS to commence arbitration proceedings against APG. Minkina asserts that on May 19, 2006, defendant Laurie A. Frankl ("Frankl"), an attorney at RPS, told her that APG would be responsible for all of the arbitration fees. On May 23, 2006, however, Frankl informed Minkina that she was mistaken, and that Minkina and APG would be required to split the arbitration costs. Frankl explained that Minkina would therefore be responsible for approximately $30,000 in arbitration fees. In an email dated May 24, 2006, Minkina complained to RPS that Frankl had exhibited "gross negligence and unprofessionalism" and "mistaken actions." She also accused Frankl of "being more concerned about

[1] The hearing took place in November 2005. In the interim, RPS had begun conducting discovery on Minkina's discrimination claims.

complying with APG's attorney [sic] demands than helping [her] case."[2] On the same day, RPS informed Minkina of its intent to withdraw from its representation of her.

In July 2006, Minkina filed a complaint with the Office of Bar Counsel ("OBC") asserting that RPS violated Mass. R. Prof. C. 1.1, 1.3, and 1.4 by misrepresenting the allocation of arbitration fees, and violated Mass. R. Prof. C. 1.16 by wrongfully withdrawing its representation. In a letter dated October 30, 2006, the OBC dismissed both allegations. First, the OBC concluded that Minkina's claim regarding arbitration fees constituted a negligence/malpractice claim that, while actionable in a court of law, did not warrant disciplinary action.[3] Second, with respect to the allegedly wrongful withdrawal, the OBC concluded that under the circumstances, "it was not unreasonable for [RPS] to determine that [the] allegations [concerning Frankl's malpractice and/or poor performance] placed them in a position of conflict of interest and, as a result, they were required with withdraw pursuant to Mass. R. Prof. C. 1.16(a)(1), or at the least, permitted to withdraw under Rule 1.16(b)(5) or (6)." Minkina's subsequent requests that the OBC reconsider its decision and that the SJC overturn that decision were both denied.

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[2] Minkina asserts that she sent this email after Frankl advised her that if she was unhappy with Frankl's services she could retain a new attorney.

[3] The OBC noted that "not every error or omission by an attorney constitutes a violation of these rules calling for the imposition of discipline."

Minkina retained new counsel and in October 2007, filed for arbitration before the AAA. During the arbitration hearing, Minkina's counsel argued, in part, that her claims warranted an award of punitive damages in addition to compensatory damages. In March 2009, the arbitrator issued a decision finding that APG had engaged in unlawful employment practices. He awarded Minkina approximately $266,000 in damages, fees, and costs. He did not, however, award punitive damages. Minkina did not move to vacate or modify the award by the August 17, 2009 deadline. Rather, on August 5, 2009, she filed a limited motion for reconsideration arguing that the Arbitration Clause did not apply to her claims against APG. The arbitrator denied the motion.

DISCUSSION

Summary judgment is appropriate where 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); *Cassesso* v. *Commissioner of Corr.*, 390 Mass. 419, 422 (1983); *Community Nat'l Bank* v. *Dawes*, 369 Mass. 550, 553 (1976). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue. *Pederson* v. *Time, Inc.*, 404 Mass. 14, 16-17 (1989). If the moving party does not bear the burden of proof at trial, it must either submit affirmative evidence negating an essential element of the non-moving party's claim, or demonstrate that the non-moving party's evidence is insufficient to establish its claim. *Kourouvacilis* v. *General Motors Corp.*, 410 Mass.

706, 711 (1991). "If the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts establishing the existence of a material fact in order to defeat the motion." *Pederson*, 404 Mass. at 17.

I. Legal Malpractice/Professional Negligence (Count I)

To prevail on a claim for legal malpractice, a plaintiff must establish: (1) an attorney-client relationship; (2) that the defendant attorney breached the relevant standard of care; (3) causation; and (4) damages.[4] See *Colucci* v. *Rosen, Goldberg, Slavet, Levenson, & Wekstein, P.C.*, 25 Mass. App. Ct. 107, 111 (1987). The plaintiff must also establish that she would have achieved a more favorable outcome had her attorney exercised adequate skill and care. See *Poly* v. *Moylan*, 423 Mass. 141, 145 (1996); *Jernigan* v. *Giard*, 398 Mass. 721, 723 (1986).

Minkina argues that had RPS included different arguments in its opposition to APG's motion to compel arbitration, Judge Hines would have denied the motion and the case would have proceeded in court. Minkina asserts that she would have received greater damages in court because a jury would have awarded punitive in addition to compensatory damages.[5] Specifically, Minkina asserts that RPS should have argued, in opposition the motion to compel arbitration, that arbitration clauses

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[4] The parties do not dispute the first element.

[5] Minkina asserts that alternatively, APG would have settled for a greater amount to avoid a punitive damages judgment. She therefore asserts loss in the form of unawarded punitive damages.

do not apply to employment discrimination claims unless explicitly stated in the clause, and that because this Arbitration Clause was narrow in scope, it precluded the arbitration of her discrimination claims.

A.

Contrary to Minkina's assertion, the record does not support an inference that she would have prevailed against APG's motion to compel arbitration had RPS offered the argument stated above. See *Poly*, 423 Mass. at 145 (to prevail on legal malpractice claim, plaintiff must establish that she would have achieved a more favorable outcome had the attorney exercised adequate skill and care); see also *Jernigan*, 398 Mass. at 723.

First, at the time RPS opposed APG's motion to compel arbitration (in June 2005), the existing case law supported the enforcement of arbitration clauses, even where the clause did not explicitly mention G.L. c. 151B discrimination claims. At the time, the controlling case law was *Mugnano-Bornstein* v. *Crowell,* 42 Mass. App. Ct. 347 (1997) which reflected a strong policy in favor of arbitration and held that "any doubts regarding arbitrability should be resolved in favor of coverage 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *Id*. at 351. *Mugnano-Bornstein* deemed arbitration clauses enforceable even if they did not list the specific claims (namely discrimination claims) to which they applied. *Id.* at 352-353. Given the

controlling law at the time, RPS's failure to argue that Minkina's discrimination claims were not arbitrable because the Arbitration Clause did not explicitly mention such claims, was not unreasonable. Even if RPS had made this argument, it would have failed under *Mugnano-Bornstein*, and the outcome of APG's motion to compel arbitration would not have changed.[6] See *Poly*, 423 Mass. at 145; *Jernigan*, 398 Mass. at 723.

Similarly, RPS did not breached the relevant standard of care by failing to predict a change in law regarding the arbitrability of employment discrimination claims.[7] See *Colucci* v. *Rosen, Goldberg, Slavet, Levenson, & Wekstein, P.C.*, 25 Mass. App. Ct. at 111. *Warfield* v. *Beth Israel Deaconess Medical Center*, 454 Mass. 390 (2009), rev'd on other grounds, overturned *Mugnano-Bornstein* 's ruling on the arbitrability of discrimination claims. *Warfield* held that employment discrimination claims are subject to arbitration *only* where specifically stated in the arbitration clause. *Id*. at 398-399 ("consistent with the public policy against workplace

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[6] In allowing APG's motion to compel arbitration, Judge Hines relied on *Mugnano-Bornstein*, and noted the strong policy in favor of arbitration, even with respect to G. L. c. 151B claims. Specifically, she stated that "statutory claims brought pursuant to G. L. c. 151B are subject to valid and enforceable arbitration agreements." Given the existing law at the time, and Judge Hines' reliance on *Mugnano-Bornstein*, there is no indication that the argument Minkina describes would have changed the outcome of the motion to compel arbitration.

[7] ,In her opposition to summary judgment, Minkina asserts that this characterization of her argument is improper and that she in fact argues that RPS erred by failing to distinguish her case from *Mugnano-Bornstein*. The court will address this argument *infra*.

discrimination . . . we conclude that an employment contract containing an [arbitration clause] to limit or waive the rights or remedies conferred by c. 151B is enforceable only if such an agreement is stated in clear and unmistakable term.").

Although the argument Minkina describes may have been successful under *Warfield*, RPS's failure to predict a subsequent change in the law cannot serve as a foundation for a legal malpractice claim. See *United States* v. *Sampson*, 820 F. Supp. 2d 202, 223-224 (D. Mass. 2011), citing *United States* v. *Fields*, 565 F. 3d 290, 296 (5th Cir. 2009)(counsel need not anticipate changes in law and failure to do so is not ineffective), *Knox* v. *United States*, 400 F. 3d 519, 522 (7th Cir. 2005) ("A failure to anticipate shifts in legal doctrine cannot be condemned as objectively deficient"), *Kornahrens* v. *Evatt*, 66 F. 3d 1350, 1360 (4th Cir. 1995)(failure to anticipate outcome of case pending before Supreme Court not unreasonable); see also *Pimental* v. *United States*, 2010 LEXIS 1386, *17-18 (D. Mass. 2010).

The court also rejects Minkina's assertion that RPS breached the relevant standard of care by failing to distinguish her case from *Mugnano-Bornstein* in opposing the motion to compel. According to Minkina, the arbitration clause at issue in *Mugnano-Bornstein* was distinct from hers because it referred to employment disputes in general and was not limited to claims arising under the employment agreement. The record does not support an inference that distinguishing Minkina's Arbitration Clause from that in *Mugnano-Bornstein* would have allowed her to prevail against the

motion to compel arbitration. In ruling on the motion, Judge Hines noted that the Arbitration Clause contained "broad language [which] encompasses not only claims based on the contract itself, but also, disputes *arising out of the contractual relationship.*" (emphasis added). There is no indication that drawing the court's attention to the purported distinction between this Arbitration Clause and that in *Mugnano-Bornstein* would have impacted its ruling. See *Poly*, 423 Mass. at 145; *Jernigan*, 398 Mass. at 723.

B.

Even if the arguments Minkina describes allowed her to prevail against the motion to compel arbitration, the record does not establish that she would have fared better at trial than in arbitration. Minkina's assertion that she would have received greater damages in court than in arbitration is too speculative to support a claim for legal malpractice. See *Poly*, 423 Mass. at 145; *Fishman* v. *Brooks*, 396 Mass. 643, 647 (1986). She offers no substantial evidence to support her conclusion.

Accordingly, Minkina's legal malpractice claim fails and RPS is entitled to summary judgment in its favor.

II. Negligent Misrepresentation (Count II)

Minkina asserts that Frankl negligently misrepresented that APG would be responsible for all of the arbitration fees, and that she suffered damages as a result. The record, however, does not support an inference that Minkina suffered damages as

a result of the alleged misrepresentation. See *Barrett Assoc. Inc.* v. *Aronson*, 346 Mass. 150, 152 (1963) (among other elements, to prevail on a claim for negligent misrepresentation, plaintiff must establish that she relied upon a representation to her detriment). In issuing the arbitration award in favor of Minkina, the arbitrator included a reimbursement of the $23,187.50 Minkina incurred in arbitration fees. Accordingly, as to Count II, RPS is entitled to summary judgment in its favor.

III. Breach of Fiduciary Duty (Count III)

Minkina asserts that RPS breached its fiduciary duties by wrongfully withdrawing its representation in May 2006. This assertion is without merit.

An attorney may withdraw representation where "the representation . . . has been rendered unreasonably difficult by the client" (Mass. R. Prof. C. 1.16(b)(5)); or where "other good cause for withdrawal exists." (Mass. R. Prof. C. 1.16(b)(6). The court agrees with the OBC's determination that Minkina's strong criticism of Frankl's performance, and her assertion that Frankl was unprofessional and may have committed legal malpractice, amounted to a breakdown of the attorney-client relationship sufficient to justify RPS's withdrawal. See *Phelps Steel, Inc.* v. *Von Deak*, 24 Mass. App. Ct. 592, 594 (1987) (breakdown of attorney-client relationship serves as good cause for withdrawal); *Freda* v. *Northern Estates*, 2011 LEXIS 186, *1-2 (Mass. Super. Ct. 2011) (attorney's withdrawal justified where serious rift in the attorney-client relationship deteriorated to the point where the client threatened legal

action against the attorney and the firm); *Salem Realty Co.* v. *Matera*, 10 Mass. App. Ct. 571, 575 (1980) (where foundations of attorney-client relationship deteriorate it is impractical to continue the relationship and diminishes integrity of the bar to do so), cited in *Phelps Steel, Inc.*, 24 Mass. App. Ct. at 594. Further, RPS's withdrawal of representation was permissible because there is no indication that it caused a "material adverse effect on the interests of the client." See *In re Kiley*, 459 Mass. 645, 648 (2011), citing Mass. R. Prof. C. 1.16(b). The record indicates that Minkina was able to retain new counsel without significant difficulty. *Phelps Steel, Inc.*, 24 Mass. App. Ct. at 593-594 (withdrawal permissible where client had engaged replacement counsel); cf., *In re Kiley*, 459 Mass. at 650 (firm's withdrawal would have material adverse effect on client's interest where client was unable to retain new counsel).

Accordingly, the record does not support an inference that RPS's withdrawal of its representation amounted to a breach of fiduciary duty. As to Count III, RPS is entitled to summary judgment in its favor.

IV. Negligent Infliction of Emotional Distress (Count IV)

Finally, Minkina asserts that RPS's withdrawal of its representation caused her to suffer emotional distress, and that as a result of that emotional distress, she sustained headaches, anxiety, vertigo, facial numbness, neck pain, and arm tingling. See *Sullivan* v. *Boston Gas Co.*, 414 Mass. 129, 132-133 (1993) (to prevail on claim for negligent infliction of emotional distress, plaintiff must establish she suffered

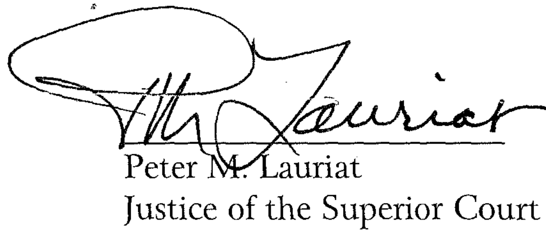
physical manifestation of the emotional distress). The record includes a letter from Minkina's physician which states that Minkina's physical symptoms may be stress-related. It does not, however, state that RPS's withdrawal of representation caused her distress. See *DiGiovanni* v. *Latimer,* 390 Mass. 265, 270 (1983) (plaintiff must show that defendant's negligence *caused* her emotional distress which resulted in physical manifestations).

In any case, negligent infliction of emotional distress claims based on an attorney's negligence are cognizable only where the alleged malpractice or negligence results in the loss of liberty. See *Iacono* v. *Boncore,* 16 Mass. L. Rptr. 681, *5 (Mass. Super. Ct. 2003), citing *Wagenmann* v. *Adams*, 829 F. 2d 196, 222 (1st Cir. 1987). In this case, there is no indication that the allegedly wrongful withdrawal caused Minkina to suffer a loss of liberty. Contrast *Wagenmann,* 829 F. 2d at 222 (attorney's malpractice resulted in client's civil commitment to mental hospital). Furthermore, it is well-established that a plaintiff can only recover damages which are reasonably foreseeable, and the "only foreseeable impact on the plaintiff from an attorney's wrongdoing is economic loss." *Iacono,* 16 Mass. L. Rptr. at *5-6, citing *Wehringer* v. *Powers & Hall,* 847 F. Supp. 425, 429 (D. Mass. 1995). Because the record does not support an inference that Minkina suffered damages that were reasonably foreseeable from her attorney's withdrawal of representation, her negligent

infliction of emotional distress claim must fail. Accordingly, as to Count IV, RPS is entitled to summary judgment in its favor.

ORDER

For the foregoing reasons, defendants Laurie A. Frankl, Esq., Jonathan J. Margolis, Esq., and Rodgers, Powers & Schwartz, LLP's Motion for Summary Judgment is **ALLOWED**.



Peter M. Lauriat
Justice of the Superior Court

Dated: April 4, 2013

Commonwealth of Massachusetts
County of Suffolk
The Superior Court

CIVIL DOCKET#: **SUCV2009-01961-C**

RE: Minkina MD v Frankl et al

TO: Christopher Maffucci, Esquire
Casner & Edwards
303 Congress Street
2nd floor
Boston, MA 02210

04-12-13/11:23 RC

NOTICE OF DOCKET ENTRY

You are hereby notified that on **04/10/2013** the following entry was made on the above referenced docket:

SUMMARY JUDGMENT (56) That the complaint of plff is Dismissed against the defts with costs entered on docket pursuant to Mass R Civ P 58(a) and notice sent to parties pursuant to Mass R Civ P 77(d)
Dated at Boston, Massachusetts this 10th day of April, 2013.

Michael Joseph Donovan,
Clerk of the Courts

BY: Timothy Walsh
Assistant Clerk

Telephone: 617-788-8172

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Commonwealth of Massachusetts
County of Suffolk
The Superior Court

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CIVIL DOCKET# **SUCV2009-01961**

Nataly Minkina MD,
Plaintiff(s)
vs.
Laurie A Frankl, Johnathan J Margolis, Rodgers Powers & Schwartz LLP,
Defendant(s)

SUMMARY JUDGMENT M.R.C.P. 56

This action came on to be heard before the Court, Peter M. Lauriat, Justice, presiding, upon motion of the defendant(s), Laurie A Frankl, Johnathan J Margolis, Rodgers Powers & Schwartz LLP, for Summary Judgment pursuant to Mass. R. Civ. P. 56- the parties having been heard - and the Court having considered the *pleadings-depositions-answers to interrogatories-admissions- and affidavits, finds there is no genuine issue as to material fact and that the defendant is entitled to a judgment as a matter of law,

It is **ORDERED and ADJUDGED:**

That the Complaint of the Plaintiff (s), Nataly Minkina MD be and hereby is **DISMISSED** against the Defendant (s), Laurie A Frankl, Johnathan J Margolis, Rodgers Powers & Schwartz LLP, with costs.

Dated at Boston, Massachusetts this 8th day of April, 2013.

Notice sent 4/10/13
CM
GAB
KUL
MJS

By: Timothy Walsh
Assistant Clerk

JUDGMENT ENTERED ON DOCKET 4/10 20 13
PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P.58(a)
AND NOTICE SEND TO PARTIES PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 77(d) AS FOLLOWS

4/10/13

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