SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan **PART** 36
Justice

Index Number : 104918/2006
GLOBAL BUSINESS INSTITUTE
vs.
RIVKIN RADLER LLP
SEQUENCE NUMBER : 007
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 9 **, were read on this motion to/for** ~~partial summary judgment~~

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 1, 2, 3

Answering Affidavits — Exhibits _____ **No(s).** 4, 5, 6, 7

Replying Affidavits _____ **No(s).** 8, 9

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached memorandum decision, denying defendant's motion for partial summary judgment.

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

Dated: 4/16/12

_____, J.S.C.
JUDGE DORIS LING-COHAN

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

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GLOBAL BUSINESS INSTITUTE,

Plaintiff,

-against-

RIVKIN RADLER, LLP,

Defendant.

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Index No.: 104918/06
DECISION/ORDER

Motion Seq. No.: 007

HON. DORIS LING-COHAN, J.S.C.:

In this legal malpractice action, defendant moves for partial summary judgment to dismiss a portion of the amended complaint (motion sequence number 007). For the following reasons, this motion is denied.

BACKGROUND

Plaintiff Global Business Institute (Global) is a not-for-profit corporation that operates a post-secondary vocational school. *See* Notice of Motion, Contino Affirmation, ¶ 3. Defendant Rivkin Radler, LLP (Rivkin Radler) is a law firm that formerly represented Global in negotiating a lease (the lease) for commercial space in a building (the building) located at 145 East 125th Street in the County, City and State of New York. *Id.*, ¶ 10. Global executed the lease on October 18, 2004; however, as a result of construction delays suffered by the landlord, nonparty RE Broadway Real Estate II, LLC (RE), the building did not receive its certificate of occupancy for several years, and Global did not take possession of its commercial space until March 2008. *Id.*; Exhibit 1; Hatten Affidavit in Opposition, ¶ 15. Nonetheless, during that period before Global was able to open for business, Global was liable to RE for tax escalation payments. *Id.*, ¶ 17. Global now claims that Rivkin Radler committed legal malpractice during the course of the

lease negotiation by failing to ensure that it included provisions that would have protected Global against suffering both lost profits and tax liability to RE. *See* Notice of Motion, Contino Affirmation, ¶ 10. The pertinent portions of the lease herein are section 4 (B), which contains the tax escalation provisions, and the "work letter," annexed as a rider, that sets forth RE's responsibilities regarding the renovation of the building and obtaining a certificate of occupancy. *Id.*; Exhibit 1. Global maintains that, while negotiating the lease, Rivkin Radler improperly exposed it to liability to RE for taxes by failing to ensure that the "base rent date" in the tax escalation clause coincided with the initial date that Global took possession of the premises, and failed to protect it against loss of business by omitting a "time is of the essence" provision from the work letter.

Global commenced this action on April 7, 2006 by serving a complaint that set forth one cause of action for negligence/legal malpractice. *See* Notice of Motion, Exhibit 2. Rivkin Radler answered on May 31, 2006. *Id.*; Exhibit 3. Thereafter, Global served an amended complaint on March 17, 2011 that still sets forth a sole claim for negligence/legal malpractice, but specifies that such negligence/malpractice was committed in connection with: 1) the drafting of the work letter annexed to the lease that failed to specify that time was of the essence; and 2) the drafting of the tax escalation clause. *See* Notice of Motion, Exhibit 10. Rivkin Radler served an amended answer on May 24, 2011. *Id.*; Exhibit 11. Now Rivkin Radler moves for summary judgment to dismiss so much of Global's amended complaint that seeks damages for lost profits, consequential damages, and tax escalation charges (motion sequence number 007).

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by

competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1st Dept 2003). Here, Rivkin Radler has failed to sustain its burden of proof.

In its motion, Rivkin Radler first argues that "the doctrine of law of the case mandates dismissal of plaintiff's substantial completion/lost profit/consequential damages claims." *See* Defendant's Memorandum of Law, at 2-5. Rivkin Radler asserts that the Appellate Division, First Department's reversal of the Jan. 14, 2010 decision applied only to Global's tax escalation claims. *Id.* Global responds that the doctrine of law of the case is inapplicable to this situation, because it applies only to issues that the plaintiff had a full and fair opportunity to litigate on their merits, and argues that this court's earlier decision did not speak to the merits of either of the amendments that it sought to make to the damages portion of its negligence/legal malpractice claim. *See* Plaintiff's Memorandum of Law, at 13-15. It is an accurate statement of the law that the doctrine of law of the case constitutes a "the proscription against relitigation of an issue previously decided by a judge of coordinate jurisdiction," and "presumes that the parties were afforded a full and fair opportunity to litigate the issue in the course of the earlier proceedings." *Hass & Gottlieb v Sook Hi Lee*, 11 AD3d 230, 231 (1st Dept 2004)(internal quotations omitted). Global is also correct to note that the doctrine applies against a court's relitigation of the

decisions of "a judge of coordinate jurisdiction," and not against its own rulings, which may be reconsidered on a motion to renew or reargue pursuant to CPLR 2221. *See* Plaintiff's Memorandum of Law, at 14-15. However, both parties' arguments based on the doctrine of law of the case are inapposite herein, since the First Department's ruling reversing the Jan. 14, 2010 decision clearly stated that it applied to both "failure to sufficiently advise [Global] of the consequences of the tax escalation clause in the lease" *and* "the additional damages sought." *Global Business Institute v Rivkin Radler, LLP*, 82 AD3d at 553-554. Thus, Rivkin Radler's argument proceeds from an inaccurate reading of the First Department's decision, and this court rejects that argument as meritless.

Rivkin Radler next argues that both Global's "substantial completion/lost profit/consequential damages claims and tax escalation claims are substantively insufficient as a matter of law," and should be dismissed on that ground. *See* Defendant's Memorandum of Law, at 5-17. Global responds that there are issues of fact as to each element of its claims that preclude summary judgment and dismissal at this juncture. *See* Plaintiff's Memorandum of Law, at 15-23. After careful consideration, the court finds for Global.

In *Leder v Spiegel* (31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007]), the Appellate Division, First Department, noted that "[i]n 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." Further, with respect to the element of proximate cause, the First Department noted in *Fletcher v Boies, Schiller & Flexner, LLP* (75 AD3d 469, 469 [1st Dept 2010]) that a plaintiff must demonstrate that "but for defendants' malpractice in failing to advise her properly, she 'would have avoided

some actual ascertainable damage,' including sufficient detail as to the 'nature of' the underlying claim [internal citations omitted]." Here, with respect to what it terms Global's "substantial completion/lost profit/consequential damages claims," Rivkin Radler first argues that there was no "but for" causation, because the deposition testimony of RE's manager, Steven Kessner (Kessner), shows that RE would not have agreed to include a provision in the lease that would have exposed RE to liability to Global for lost profits etc. due to construction delays. *See* Defendant's Memorandum of Law, at 7-8; Notice of Motion, Exhibit 18. Global responds that Kessner's deposition testimony actually never touched this issue, and was instead directed solely to the question of when the "base year" for the lease would be set. *See* Plaintiff's Memorandum of Law, at 17-18. The court agrees with Global's reading of Kessner's deposition testimony. The court also notes that it is axiomatic that issues of "witness credibility are not appropriately resolved on a motion for summary judgment". *Santos v Temco Service Industries, Inc.*, 295 AD2d 218, 218-219 (1st Dept 2002). Therefore, the court rejects Rivkin Radler's proximate causation argument with respect to Global's substantial completion/lost profit/consequential damages claims.

Rivkin Radler next argues that the element of attorney negligence was not present with respect to those claims because it did not depart "from generally accepted standards of practice" during the negotiation of the lease. *See* Defendant's Memorandum of Law, at 8-9. Rivkin Radler supports this argument with an affidavit from one Lloyd Shor (Shor), who is described as a "commercial leasing expert." *See* Shor Reply Affidavit, ¶ 10. Global replies that Rivkin Radler did breach its duties to Global by departing from generally accepted standards of lease negotiating practice, and has presented affidavits from "damages expert" Morton Cohen (Cohen)

and attorney Martin Stein (Stein) to support its allegations. *See* Plaintiff's Memorandum of Law, at 16-17; Cohen and Stein Affidavits in Opposition. Without delving into the merits at this juncture, the court merely concludes that the competing experts affidavits indicate the existence of an issue of fact as to whether Rivkin Radler was negligent during the lease negotiations, and that that issue precludes any grant of summary judgment. Therefore, for the purposes of this motion, the court rejects Rivkin Radler's claim of no negligence.

Finally, with respect to Global's substantial completion/lost profit/consequential damages claims, Rivkin Radler argues that the damages element is insufficient because it is based on speculation. *See* Defendant's Memorandum of Law, at 9-11. Global responds that either lost profits or consequential damages are capable of being measured via formulae discussed by its experts in their affidavits. *See* Plaintiff's Memorandum of Law, at 21-23. "The damages claimed in a legal malpractice action must be 'actual and ascertainable' resulting from the proximate cause of the attorney's negligence [internal citation omitted]." *Zarin v Reid & Priest*, 184 AD2d 385, 387-388 (1st Dept 1992). The court agrees that lost profits and consequential damages as a result of an almost four-year delay in being able to enter the lease premises are the sorts of damages that are susceptible of calculation. *See e.g. Broadway 500 West Monroe Mezz II LLC v Transwestern Mezzanine Realty Partners II, LLC*, 80 AD3d 483, 484 (1st Dept 2011) ("even lost profits that are difficult to ascertain can be compensated by money damages "); *Plato General Const. Corp./EMCO Tech Const. Corp. v Dormitory Authority of State of New York*, 89 AD3d 819, 825 (2nd Dept 2011) ("plaintiff must furnish some rational basis for the court to estimate those damages [caused by a defendant's delays], although obviously a precise measure is neither possible nor required"). Therefore, the court rejects Rivkin Radler's argument. The

court also rejects Rivkin Radler's alternative argument, that the "doctrine of avoidable consequences" precludes Global from recovering lost profits or consequential damages, because that argument is based on the premise that Global ought not to have sought a *Yellowstone* injunction to secure its right to the premises, but should have instead negotiated further with RE. *See* Defendant's Memorandum of Law, at 11. Global was certainly within its rights to seek a *Yellowstone* injunction against RE. Accordingly, Rivkin Radler's motion should be denied with respect to Global's substantial completion/lost profit/consequential damages claims.

With respect to Global's tax escalation claim, Rivkin Radler once again argues that there was no "but for" causation because Kessner would not have agreed to a different base year for fixing Global's tax payments. *See* Defendant's Memorandum of Law, at 12-15. However, this argument is clearly inapposite since Global has not alleged that it suffered damages as a result of Rivkin Radler's failure to negotiate a different tax year, but because of Rivkin Radler's failure to ensure that, regardless of the tax year, Global's tax payment responsibilities would not begin until it took possession of the premises. *See* Notice of Motion, Exhibit 10 (amended complaint), ¶ 12. Therefore, the court rejects this argument.

Rivkin Radler next reprises its argument that it did not commit negligence with respect to Global's tax escalation claim because it did not depart "from generally accepted standards of practice" during the negotiation of the lease. *See* Defendant's Memorandum of Law, at 15-16. The court rejects this argument also for the reasons discussed above; i.e., that the competing experts' affidavits herein disclose an issue of fact as to what the "generally accepted standards of practice" for commercial lease negotiating during the operative period actually were.

Finally, Rivkin Radler argues that Global's purported damages from its tax escalation

claim are legally insufficient because they are too speculative. *Id.* at 16-17. It is difficult to see what is speculative about the amounts fixed in the lease that Global was obligated to pay during the period of 2004-2008. Therefore, the court rejects Rivkin Radler's final argument and the motion is denied with respect to Global's tax escalation claim. Thus, Rivkin Radler's motion is denied in full.

DECISION

Accordingly, for the foregoing reasons it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of defendant Rivkin Radler, LLP is denied.

Dated: New York, New York
April 16, 2012

Hon. Doris Ling-Cohan, J.S.C.

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