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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: PAUL G. FEINMAN Justice

PART 12

Gerald LIEBLICH and Hacan BIBERAJ

-v-

Peter J. PRUZAN, Esq.

INDEX NO. 104523/11

MOTION DATE

MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is granted in accordance with the annexed decision & order.

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

Dated: 4/28/2012

PHF J.S.C.

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: CIVIL TERM: PART 12

----------X

GERALD LIEBLICH and HASAN BIBERAJ,
Plaintiffs,

-against-

PETER J. PRUZAN, ESQ.,
Defendant.

----------X

INDEX NO. 104523/11

MOT. SEQ. NO. 001

Appearances:

For Plaintiffs
Davis, Saperstein & Salomon, P.C.
By: Bennett J. Wasserman, Esq.
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For Defendant
Peter J. Pruzan, Esq., *pro se*
48 Wall Street, 26th fl.
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Papers considered on review of this motion to dismiss:

PAPERS	NUMBERED
Notice of Motion, Aff. in Support, Exhibits 1 - 7	1
Wasserman Affirmation in Opposition, Exhibits 1 - 6	2
Biberaj Affidavit in Opposition	3
Lieblich Affidavit in Opposition	4
Reply Aff., Exhibits 8 - 12	5

PAUL G. FEINMAN, J.:

In this action for legal malpractice, defendant Peter J. Pruzan, Esq. (Pruzan) moves, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the action brought by plaintiffs Gerald Lieblich (Lieblich) and Hasan Biberaj (Biberaj). Defendant also moves, pursuant to CPLR 3211 (a) (3), to dismiss Biberaj from the action for lack of standing to sue.

Background

Pruzan, an attorney, was retained in 2006 by plaintiffs to represent them in, amongst other things, a litigation entitled *Nahzi v Lieblich*, Index No. 112000/06, brought in this court (underlying action). Biberaj was not a party in the underlying action. Fron Nahzi (Nahzi),

plaintiff in the underlying action, sued Lieblich over his claimed ownership interest in a company called Lot 1555 Corp. (Lot), a company that had been formed to purchase real property located at 1555 Bruckner Boulevard in the Bronx (property). Nahzi claimed that he had been deprived of his rightful 25% share in Lot when the property was sold. Nahzi claims to have paid $90,000 for his interest in Lot. The remaining 75% was owned by Lieblich. Biberaj was not a shareholder in Lot.

The arrangement between Nahzi and Lieblich as to their ownership in Lot is manifest in a Shareholders Agreement (Motion, Ex. 4)(Shareholder's Agreement), in which Nahzi (identified therein as Nazi[1]) is accorded 50 out of 200 shares in Lot, in exchange for a capital expenditure of $90,000.

Lieblich claimed, in the underlying action, that Nahzi borrowed $165,000 from Biberaj to purchase a cooperative apartment, and that the loan was made "upon [Nahzi's] representation that the payment of $165,000 was in consideration of [Nahzi's] interest in [Lot]." (Decision of Justice Barbara R. Kapnick, Aff. in Opp., Ex. 3, at 2 [Decision]). Thus, Lieblich claimed that Nahzi had been fully recompensed for his interest in Lot at the time of the sale of the property.

Nahzi was granted summary judgment in the underlying action. In her Decision, Justice Kapnick found that Nahzi was entitled to $500,000 (25% of the sale price of $2,000,000), plus interest, based on his ownership interest in Lot. The Decision was affirmed by the Appellate Division, First Department, in *Nahzi v Lieblich* (69 AD3d 427 [1st Dept 2010]). The Appellate Court found that Nahzi:

made a prima facie showing of entitlement to judgment with proof of the sale of

[1]The names Nahzi and Nazi are used interchangeably in the various documents and affidavits.

> the corporation's real property and a stock certificate showing his 25% interest in the corporation and bearing no endorsements that might indicate a transfer of the shares to another person or back to the corporation.

Id. at 427. The Court further noted that, while the defendants claimed that the purchase of the cooperative apartment was "in full consideration of [Nahzi's] interest in the corporation," the defendants "produced no evidence, such as corporate books and records or a cancelled stock certificate, tending to show that [Nahzi's] interest in the corporation had been transferred or that the apartment purchase was in consideration of [Nahzi's] interest in the corporation." *Id.* at 427-428.

Plaintiffs now claim that Pruzan committed malpractice when he failed to interpose a defense in the underlying action of "no consideration," establishing that Nahzi had never paid for his interest in Lot. Plaintiffs argue that Pruzan failed to conduct discovery which would have revealed evidence raising questions of fact as to Nahzi's interest in Lot, and his purchase of the cooperative apartment.

Specifically, plaintiffs point to evidence elicited in a second underlying action, *Lot 155 Corp v Nahzi*, Index No. 101973/09 (second underlying action), in which plaintiffs sought to recover the $165,000 loan allegedly made to Nahzi. In that action, plaintiffs obtained affidavits from the seller of the cooperative apartment, Daniel Perla (Perla), and Nahzi's accountant, Ronald Eletto (Eletto), which allegedly provide evidence that Nahzi paid no consideration for his interest in Lot, or that he surrendered any interest he might have had in Lot in exchange for the purchase of the cooperative apartment.

Plaintiffs moved to vacate the judgment in the underlying action based on "newly discovered evidence." CPLR 5015 (a) (2). The allegedly new evidence was the evidence

obtained in the second underlying action, and consisted of Nahzi's deposition testimony (in which he allegedly testified that he never paid for an interest in Lot), and checks purporting to show that Nahzi never invested in Lot. It also consisted of the Perla and Eletto affidavits. The motion to vacate was denied.

The complaint also raises allegations that Pruzan committed malpractice by, in the underlying action, failing to seek a recovery of various "Corporate Expenses" allegedly owed by Nahzi. Complaint, ¶ 27. Plaintiffs never attempt to defend Pruzan's motion to dismiss this claim, and it is dismissed.

Discussion

1. DISMISSAL STANDARD

> On a motion to dismiss pursuant to CPLR 3211, we must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory.

Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 (2001); *see also Leon v Martinez*, 84 NY2d 83 (1994). "'Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss.'" *Ginsburg Development Companies, LLC v Carbone*, 85 AD3d 1110, 1111 (2d Dept 2011), quoting *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005). A motion brought pursuant to CPLR 3211 (a) (1) "may be granted where 'documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.'" *Held v Kaufman*, 91 NY2d 425, 430-431 (1998), quoting *Leon v Martinez*, 84 NY2d at 88; *Foster v Kovner*, 44 AD3d 23, 28 (1st Dept 2007)("[t]he documentary evidence must resolve all factual issues and dispose of the plaintiff's claim as a matter of law").

2. PLEADING MALPRACTICE

To prevail on a claim for attorney malpractice, the plaintiff must allege "that the attorney 'failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession ... .'" *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 (2007), quoting *McCoy v Feinman*, 99 NY2d 295, 301-302 (2002). A claim for legal malpractice requires allegations of "'the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and actual damages.'" *O'Callaghan v Brunelle*, 84 AD3d 581, 582 (1st Dept 2011), quoting *Leder v Spiegel*, 31 AD3d 266, 267 (1st Dept 2006, *affd* 9 NY3d 836 (2007), *cert denied* 552 US 1257 (2008). The plaintiff must show that "but for" the attorney's malpractice, he or she would have prevailed in the underlying action (see *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer* [8 NY3d at 442), or at least would have received a more "favorable result." *Pozefsky v Aulisi*, 79 AD3d 467, 467 (1st Dept 2010). In effect, the plaintiff must successfully allege that he or she would have been victorious in the "case within a case." *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 272 (1st Dept 2004).

As Justice Kapnick and the Appellate Division, First Department, both found, plaintiffs herein have no documentary evidence to show that Nahzi accepted the loan for the cooperative apartment in consideration of a transfer of his interest in Lot. Their "smoking gun" is the affidavits of Perla and Eletto, obtained in the second underlying action.

Perla is in the business of investing in, and financing, real estate transactions. He claims to have been engaged in this business with Biberaj for many years. Perla relates how Biberaj paid the $165,000 purchase price for the cooperative apartment for Nahzi in a series of payments.

He claims that he "knew" that Biberaj was purchasing the property for Nahzi in exchange for Nahzi's interest in the property, and that Biberaj "explained to [Perla]" that Biberaj was buying out Nahzi's interest in the property. Opposition, Ex. 5, at 3. Perla claims to remember it "vividly," because the transaction was out of the ordinary for Biberaj (*Id.*), as, in the many years Perla knew Biberaj, he knew Biberaj to be "a borrower, not a lender," in that Perla has "never known [Biberaj] to make a loan to anyone." *Id.* at 4. Perla further states that Biberaj never told him that Nahzi had ever borrowed money from Biberaj, or that Biberaj was repaying a loan to Nahzi. Based on these allegations, Perla claims that be believes Nahzi's story to be "materially false." *Id.*

This affidavit has no probative value. It is based on conclusions, hearsay and speculation as to what the relationship was between Biberaj and Nahzi, and the nature of their transactions. It is insufficient to defeat a motion to dismiss. *See Harvey v Greenberg*, 82 AD3d 683 (1st Dept 2011) (allegations that are conclusory and speculative insufficient to defeat a motion to dismiss legal malpractice action); *Babikian v Nikki Midtown, LLC*, 60 AD3d 470 (1st Dept 2009)(hearsay statements cannot defeat a motion to dismiss).

Eletto was Nahzi's personal income tax preparer until 2005. The affidavit of Eletto is a puzzlingly vituperative diatribe against his ex-client, replete with bold and underlined passages emphasizing Eletto's manifest animus towards Nahzi.[2]

In his affidavit, Eletto remarked on an affidavit by Nahzi submitted in a preceding action, to the effect that Nahzi borrowed the $165,000 from Biberaj to purchase the cooperative apartment, and that, prior to the loan, Biberaj was indebted to Nahzi in excess of that amount for

[2]Eletto was, apparently, the accountant for Lieblich and Biberaj, as well as for Nahzi.

unpaid commissions from the sale of real estate and other loans. Eletto opines that these statements are "materially false and/or otherwise misleading" (Aff. of Eletto, at 3) because Nahzi had never told him about any earned commissions; that Nahzi worked for Biberaj; or was owed, or loaned money to, Biberaj. Eletto insists that he would have known these things, and, that if these statements were true "Nahzi should have reported that transaction as income to him for the year 2001, which he did not." *Id.* at 4. Eletto goes so far as to suggest that failure on Nahzi's part to report a commission earned by him "could be considered tax evasion." *Id.* Eletto enthusiastically offers to reveal his client's personal tax returns, if so subpoenaed.

Eletto's affidavit is based on the proposition that Nahzi should, and would, have told Eletto everything to do with Nahzi's business dealings with Biberaj, and that Nahzi's failure to do so shows that he was being duplicitous. However, Eletto's speculation as to why he was not told of Nahzi's business dealings with Biberaj does not amount to evidence of wrongdoing. It is mere speculation, culminating in conclusory assertions. And, speculation as to whether Nahzi is guilty of tax evasion is completely irrelevant to the underlying, and present, proceedings.

In short, there is nothing in the affidavits of Perla and Eletto which suffices to show that plaintiffs would have prevailed in the underlying action had this evidence been available.

As for defendants' claim that Nahzi testified at his deposition that he paid no consideration for his interest in Lot, the excerpts of Nahzi's deposition testimony produced by defendants herein (Opp., Ex. 4), do not reflect this allegation.

On page 109 of his deposition, Nahzi states that "the shares in 1555 Lot were purchased with $90,000." No reading of the excerpts requires any other interpretation. This evidence would not have changed the outcome in the underlying action.

This court notes that Biberaj was not a party to the underlying action, and defendants' bare assertions that he is "united in interest" with Lieblich, or a "beneficial shareholder" in Lot, are conclusory, and offer him no standing to sue in this action.

Conclusion

As a result of the foregoing, this court finds there are no factual allegations, which if established, would show the existence of evidence that would have allowed plaintiffs to succeed in the underlying action, the "case within a case." Rather, the plaintiffs' allegations and "evidence" are speculative and conclusory, and not sufficient to withstand a motion to dismiss. Simply put, there is no basis for a claim of legal malpractice as a matter of law.

Accordingly, it is

ORDERED that the motion to dismiss the complaint brought by defendant Peter J. Pruzan, Esq. is granted, and the complaint is dismissed with costs and disbursements to this defendant as taxed by the Clerk of the Court on presentation of an appropriate bill of costs; and it is further

ORDERED that the Clerk of Court is directed to enter judgment accordingly.

Dated: April 28, 2012
New York, New York

Paul G. Feinman
J.S.C.