SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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RONALD GARNER,

Plaintiff,

-against-

LIDDLE & ROBINSON, L.L.P. and
JEFFREY L. LIDDLE,

Defendants.

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Index No. 150058-2012

DECISION/ORDER

Motion Sequence 002

HON. GEORGE J. SILVER, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion, Affirmations & Collective Exhibits Annexed	1, 2, 3
Notice of Cross Motion, Affirmation & Exhibits Annexed	4, 5
Plaintiff's Reply Affirmation	6
Defendants' Reply Affirmation	7

In this action seeking damages for legal malpractice, plaintiff Ronald Garner ("plaintiff") seeks an order, pursuant to CPLR § 3212, granting him summary judgment against defendants Jeffrey L. Liddle ("Liddle") and Liddle & Robinson, L.L.P. ("L&R") (collectively "defendants"), and awarding Plaintiff $1,981,000.00, together with interest from August 5, 2007 and the refund of all legal fees paid defendants and dismissing defendants' counterclaim and declaring that defendants are not entitled to collect any additional legal fees or expenses from Garner. Defendants oppose the motion and cross-move, pursuant to CPLR § 3212, for an order granting them summary judgment dismissing plaintiff's complaint and granting them summary judgment on their counterclaim for unpaid legal fees. Plaintiff opposes the cross-motion.

The present action stems from defendants' representation of plaintiff in a dispute with plaintiff's former employer, Dillon Read Capital management, LLC ("Dillon Read"). The pertinent facts are as follows: On August 2, 1999, Garner was employed by Warburg Dillon Read LLC ("WDR"), a division of UBS AG ("UBS"), a global financial company, in accordance with an offer letter dated July 29, 1999 ("Offer Letter"). The Offer Letter provided that Garner

would receive an initial base salary of $140,000 a year and would be eligible to receive an annual incentive compensation award ("Bonus") based upon a variety of factors, including individual performance, departmental performance – performance of the Commercial Real Estate Group ("CRE Group"), and the global performance of WDR. The Bonus was contingent on plaintiff remaining employed on the "incentive compensation date," which generally fell on March of the following year. While employed at WDR, Garner partnered with Ahmed Alali ("Alali"), another member of the CRE Group, who's employment facts mirror plaintiff's and who was similarly represented by defendants.

In April 2006, UBS transferred all members of the CRE Group to the aforementioned Dillon Read, at the time a newly formed hedge fund affiliated with UBS. Concurrent with the move to Dillon Read, plaintiff received a transfer letter ("the Transfer Letter"), providing he would similarly be eligible for a Bonus, which might take into account the same individual, departmental, and global factors as the Bonus with WDR. Similarly, the Bonus with Dillon Read would be contingent on plaintiff being employed with Dillon Read on the incentive award payment date. There was no agreement, written or oral, that entitled plaintiff to a Bonus.

From 2001 through 2006, plaintiff, along with Alai, received an annual Bonus ranging from $5.1 million to approximately $9 million. Specifically, plaintiff and Alai each received, for the years 2001 through 2006, bonuses of $5.1 million, $7.25 million, $8.9 million, $8.3 million, $9 million, and $7.4 million respectively.

Then, in June 2007, UBS closed Dillon Read, and on June 20, 2007, plaintiff and Alai each received a letter terminating his employment and detailing the terms of his termination and the UBS Separation Program (the "Separation Letter"). The Separation Letter offered to pay plaintiff severance under the UBS Global Management Separation Program (the "Separation Program") consisting of (i) thirty nine (39) weeks of his base salary, and (ii) a Special payment of $1,850,000 ("Severance Offer"), for a total of $1,981,000.00. Alai received an identical termination letter.

The Separation Letter explained that the Special Payment of $1,850,00 had been determined at the sole discretion of Dillon Read's management and authorized under a supplement to the Separation Program for certain employees, and that in order to receive the Severance Offer, plaintiff was required to sign a Separation Agreement and General Release within forty five (45) days. Further, the Separation Letter explained that if plaintiff wished to challenge the Severance Offer or any aspect of the Separation Agreement, plaintiff was required to first consult with his Client Relationship Manager. The Separation Letter further stated that if plaintiff was unable to resolve the issues through such consultation, plaintiff had the right, within forty-five (45) days, to submit a written statement to a UBS committee (the "Committee") through Kiku Taura, the UBS Executive Director/Human Resources at UBS Global Asset Management (Americas), Inc., describing the basis for his claim.

Upon receiving the letter, plaintiff and Alali met with Liddle and Marc Susswein

("Susswein") and retained L&R for the purpose of obtaining "guidance and advice concerning their rights under the Separation Agreement Letter, the Separation Program, their employment agreements, and prevailing employment and contract laws", and ultimately, to obtain a higher Severance Offer. On May 2, 2008, plaintiff entered into a retainer agreement with defendants whereby plaintiff agreed to pay, in addition to retainer and contingency fees, disbursements and expenses.

Plaintiff alleges that Liddle advised him that he and Alali were each entitled to receive a minimum of 3% of the net profits of the CRE for the period from January 1, 2007 until their termination – approximately $6 million each, a sum that more closely represented their historical bonuses of 3% during the years 2001-06 – as opposed to the Special Payment of $1.8 million. Further, plaintiff alleges that Liddle advised him that he would respond to the Separation Letter, and "expressed confidence that they would each receive at least $6 million based upon the prevailing law and his familiarity with UBS' business practice and management, and that, in no event would they receive less than $2 million each."

On August 1, 2007, Liddle wrote to Rebecca White, Esq. (White), the Managing Director of UBS America's Legal Employment Section, to discuss the terms of the Settlement Letter and the Severance Offer on behalf of plaintiff and Alali. The letter asks White to share its contents with certain specified "senior business executives within UBS." Upon receipt of the letter, which had been forwarded to her as an email attachment by Susswein that same day, White emailed Susswein that she would forward the letter to "the UBS AM Severance Committee," and suggested in the future he deal directly with Kiku Taura, "as set forth in the plan." In response, Susswein told White, "Messrs. Garner and [redacted] are of the belief that given the substantial amounts that are at issue in their matter, that it is likely better addressed at a senior level outside of the UBS SM Severance Committee, which is why we have not submitted their letter directly to the committee." White responded, "Just so it is clear, the severance packages offered to these employees will expire by their terms. As you requested, we will address the issues you have raised after we have had the opportunity to discuss them with the appropriate members of management."

Despite this, the letter was in fact forwarded to Ms. Taura, but according to UBS, this did not preserve plaintiff's rights under the Severance Agreement, because the "Committee never processed [Plaintiff's] claims because Susswein explicitly instructed White that the August 1, 2007 Letter was not an appeal of the Severance payment Offer." And further, that the "letter fail[ed] to satisfy the Separation Program's requirements." Crucially however, plaintiff claims that defendants assured him that his rights under the Severance Agreement were preserved. Indeed, plaintiff testified that defendants advised him that there was no chance he would receive less than the approximately $2 million original Severance Offer. Defendants argue that they advised plaintiff there was no way to guarantee any result, that by litigating, plaintiff risked his ability to recover anything altogether, and that plaintiff had a 50/50 chance of winning at arbitration.

During the course of the following months, defendants successfully negotiated with UBS in an effort to increase the Severance Offer. Indeed, as plaintiff testified, Liddle communicated to him that there had been an increased offer of approximately $2.6 million from UBS (Revised Severance Offer). Alali confirmed the increased offer of $2.6 million in his testimony. According to Alali, he was prepared to accept the offer, but was unable to do so unilaterally because the offer was contingent on both he and plaintiff accepting, and plaintiff did not wish to do so. Indeed, plaintiff testified that he decided to "follow my attorney's instruction, which was to reject the offer" and that he understood that he did not have to follow his attorney's advice.

In October of 2008, approximately six months after plaintiff turned down the increased offer of $2.6 million, defendants initiated an arbitration proceeding on behalf of plaintiff before the Honorable Stephen Crane at JAMS. Judge Crane dismissed the majority of plaintiff's claims, and specifically determined that "because he failed to comply with the Separation program's appeal procedure, [plaintiff] has failed to exhaust his administrative remedies." As such, plaintiff was no longer entitled to the initial Severance Offer. Subsequently, on September 24, 2010, defendants asked Judge Crane to restore the Severance Offer, which Judge Crane declined to do. Twelve days later, Judge Crane issued his Final Award, dismissing plaintiff's remaining claims. As a result, plaintiff received no severance payment from UBS, and now seeks to recover from defendants the amount originally offered by UBS in its June 20, 2007 Separation Letter, as well as legal fees.

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]; *Bendik v Dybowski*, 227 AD2d 228 [1st Dept 1996]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 476 NE2d 642, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562, 404 NE2d 718, 427 NYS2d 595 [1980]; *Silverman v Perlbinder*, 307 AD2d 230 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]).

To defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR § 3212 [b]). Thus, where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717, 497 NE2d 680, 506 NYS2d 313 [1986]; *Zuckerman*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman*, 49 NY2d at 562). The opponent "must assemble and lay bare [its]

affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned, since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Stewart M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 385 NE2d 1238, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 386 NE2d 258, 413 NYS2d 650 [1978]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347 [1st Dept 1998]). Summary judgment is a drastic remedy that should only be employed where no doubt exists as to the absence of triable issues (*Leighton v Leighton*, 46 AD3d 264 [1st Dept 2007]). The key to such procedure is issue-finding, rather than issue-determination (*id.*).

To sustain his cause of action for legal malpractice, plaintiff must "establish that [defendants] failed to exercise the ordinary reasonable skill and knowledge commonly possessed by [members] of the legal profession and that [their] breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages" (*Dombrowski v Bulson*, 19 NY3d 347, 971 N.E.2d 338, 340, 948 N.Y.S.2d 208 [2012] [internal citations and quotations omitted]). An attorney's conduct or inaction is the proximate cause of a plaintiff's damages if "but for" the attorney's negligence "the plaintiff would have succeeded on the merits of the underlying action" (*AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434, 866 N.E.2d 1033, 834 N.Y.S.2d 705 [2007]), or would not have sustained "actual and ascertainable" damages (*Dombrowski*, 19 NY3d at 350; *Brooks v Lewin*, 21 AD3d 731, 734 [1st Dept 2005], *lv denied* 6 NY3d 713, 849 NE2d 972, 816 NYS2d 749 [2006]). Thus, in order for defendants to prevail on their summary judgment motion, they must establish that they provided the advice, and conducted the due diligence expected of counsel "exercis[ing] the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession" (*Dombrowski*, 19 NY3d at 350). If defendants fell short of this professional standard, they must demonstrate that their conduct was not the proximate cause of plaintiff's damages.

Neither party is entitled to summary judgment with respect to plaintiffs' causes of action for legal malpractice. Based upon the record before the court it is for jury to determine whether defendants' decision to attempt to negotiate a higher severance payment for plaintiff by means other than an appeal to the UBS AM Severance Committee, as called for in the Separation Agreement Letter, was a reasonable strategic decision which cannot serve as the basis of a malpractice claim (*see Wagner Davis P.C. v Gargano*, 116 AD3d 426 [1st Dept 2014]) or was "so unreasonable at the inception as to have manifested professional incompetence" (*Rodriguez v Fredericks*, 213 AD2d 176 [1st Dept 1995]).

There are also issues of fact as to whether defendants' alleged negligence proximately caused plaintiff actual and ascertainable damages. Plaintiff contends that when he rejected UBS' Revised Severance Offer of $2.6 million he did so under the belief that he was choosing between the Revised Severance Offer and original Severance Offer because he had never been advised that defendants, through the August 2007 correspondence with White, had not preserved his

rights to the original Severance Offer. Plaintiff claims that had he known that he did not have the right to any severance payment from UBS unless UBS renewed its offer or a court or arbitrator awarded him the payment he would have viewed the Revised Severance Offer differently and would have accepted it without hesitation. Plaintiff also claims that the Revised Severance Offer was conditional in that both he and Alali had to accept it and that he rejected it in light of the advice provided to him by defendants that he was entitled to a $6 million severance, based upon his past bonuses, and that he would receive, at worst, approximately $2 million. Defendants argue that their representation of plaintiff was not a proximate cause of plaintiff's alleged loss because their representation of plaintiff resulted in the Revised Severance Offer that was $750,000 higher than the initial Severance Offer. Defendants argue that in the face of an increased severance offer there can be no legal malpractice. Plaintiff's claim that his rejection of the significantly higher Revised Severance Offer was compelled by defendants' advice that plaintiff's rights to the Severance Offer had been preserved and that he that he was entitled to at most $6 million and at worst $2 million, in the face of defendants' claim that no such advice was given, raises issues of fact and credibility that must be resolved by a jury and which necessitate denial of both the motion and cross-motion for summary judgment.

However, defendants are entitled to dismissal of plaintiff's claim sounding in recklessness and/or gross negligence. Gross negligence differs from ordinary malpractice or negligence in that gross negligence is conduct that evinces a reckless disregard for the rights of others or "smacks" of intentional wrongdoing (*Gonzalez v 231 Ocean Assocs.*, 131 AD3d 871 [1st Dept 2015]). There is no evidence in the record that defendants' alleged negligence, if any, smacks of intentional wrongdoing or differs in any way from acts of ordinary legal malpractice (*see Lubell v Samson Moving & Storage, Inc.*, 307 AD2d 215 [1st Dept 2003]). Plaintiff's claim for punitive damages is also dismissed as defendants' alleged conduct was neither wantonly dishonest nor aimed at the public (*Apple Bank for Sav. v PricewaterhouseCoopers LLP*, 70 AD3d 438 [1st Dept 2010]).

Neither party is entitled to summary judgment with respect to legal fees. An attorney may not recover fees for legal services performed in a negligent manner even where that negligence is not a proximate cause of the client's injury (*Kluczka v Lecci*, 63 AD3d 796, 798 [2d Dept 2009]). Here, the submissions of both parties demonstrate that there is a sharply disputed issue of fact as to whether defendants' performance of legal services, as measured against that of an attorney of reasonable skill and knowledge, was negligent (*id.*). Thus, there is an issue of fact as to whether defendants are entitled to recover legal fees on their counterclaim (*id.*).

In accordance with the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied, and it is further

ORDERED that defendants' motion for summary judgment is granted to the extent that plaintiff's reckless/gross negligence and punitive damages claims are dismissed. Defendants' motion is otherwise denied; and it is further

ORDERED that the parties are to appear for a status conference in Part 10 on June 14, 2016 at 9:30 am in Room 422 of the courthouse located at 60 Centre Street, New York, New York 10007; and it is further

ORDERED that plaintiff is to serve a copy of this order, with notice of entry, upon defendants within 20 days of entry.

Dated: April 13, 2016
New York County

George J. Silver, J.S.C.

GEORGE J. SILVER