SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

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BAUHOUSE GROUP I, INC.,BH SUTTON OWNER LLC (A DELAWARE LLC), SUTTON OPPORTUNITY, JOSEPH BENINATI, CHRISTOPHER JONES, DANIEL LEE,

Plaintiffs,

- v -

RICHARD KALIKOW, WILLIAM FRIED, HERRICK FEINSTEIN, LLP,

Defendants.

INDEX NO. 158277/2017

MOTION DATE 05/30/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

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HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32
were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

In this legal malpractice action, Defendants Richard R. Kalikow ("Kalikow"), William R. Fried ("Fried"), and Herrick Feinstein, LLP ("Herrick Feinstein") (collectively, "Defendants") collectively move to dismiss the complaint of plaintiffs Bauhouse Group I, Inc. ("Bauhouse"), BH Sutton Owner, LLC (a Delaware LLC) ("Sutton Owner"), Sutton Opportunity,[1] Joseph Beninati ("Beninati"), Christopher Jones ("Jones"), and Daniel Lee ("Lee") (collectively, "Plaintiffs").

[1] Sutton Opportunity was added as a plaintiff by a stipulation which consolidated this case with a related case and amended the caption; Sutton Opportunity has not been discussed in the complaint or any subsequent pleadings. However, in papers, Plaintiffs' attorney signed documents as "Attorneys for Plaintiffs." This decision and order applies equally to Sutton Opportunity as it does to the other Plaintiffs.

This action arises out of a failed residential real estate development project (the "Project") which resulted in several federal and state court actions. The facts of the underlying dispute have been set forth in extensive detail in a post-trial decision from a related adversary proceeding filed in the United States Bankruptcy Court of the Southern District of New York ("Bankruptcy Proceeding"), *In re BH Sutton Mezz LLC*, AP 16-01187 (SHL), 2016 WL 8352445 (Bankr SDNY 2016) (hereinafter, the "Bankruptcy Decision"), of which I take judicial notice.

Background[2]

Beninati, Jones, and Lee (collectively referred to as the "Principals") are the principals of Bauhouse, and Beninati is also the president of Bauhouse. *See* Bankruptcy Decision at 2. Principals also own 100% of the membership interests in BH Sutton Mezz LLC ("Sutton Mezz"), which owns 100% of the membership interests in both the Delaware LLC, Sutton 58 Owner LLC ("Sutton DE"), and the New York LLC, Sutton 58 Owner LLC ("Sutton NY") (Sutton Mezz, Sutton DE, and Sutton NY are collectively referred to as "Debtors"). *Id*.

The Principals set out to purchase plots of land located at 426-432 E. 58th Street, New York, New York 10022 and the related air rights (the "Property") on which to develop the Project. The Principals led the Project, and Bauhouse planned the development of the Project. Beninati hired numerous advisors to assist Plaintiffs and

[2] Unless otherwise specified, all facts are taken from the complaint, *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994), documents referenced in the complaint, or from court records and filings in the related proceedings, of which I may take judicial notice. *See RGH Liquidating Tr.*, 71 AD3d at 207.

Debtors in completing the Project, including several debt and equity financing advisors. On June 24, 2014, Beninati, on behalf of Sutton NY, retained Defendants to represent Sutton NY in the Project.[3] The complaint alleges that Plaintiffs retained Defendants in November 2014 to represent them in the Project.

In June 2014, Debtors entered into an agreement to purchase the Property. Thereafter, the Principals, with the help of their advisors, sought equity and debt investors to finance the purchase of the Property and the development of Project.

In November 2014, Kalikow and Beninati discussed the possibility of obtaining financing from Kalikow's cousins, N. Richard Kalikow and Jonathan Kalikow (collectively, "Lenders"), who were the principals of Gamma Funding, LLC. Shortly thereafter, the Principals met with the Lenders to discuss their financing options and subsequently sent the Lenders additional information about the Project.

During this time, the Principals, Debtors, and their advisors were actively pursuing other investors. These efforts later proved to be unsuccessful and "Debtors had significant difficulties getting financing because they had invested so little of their own

[3] The retainer agreement was addressed to "Sutton 58 Owner LLC c/o Bauhouse Group" and signed by "Sutton 58 Owner LLC." The retainer agreement provides that Defendants' "engagement is limited to representing [Sutton NY] as a separate and distinct entity and not its individual shareholders, partners, members, officers, directors or employees." *See* Selbst Aff., Ex. B (NYSCEF No. 10). It further provides that Defendants will not provide "legal advice to, or establish an attorney-client relationship with, any such affiliated party or person in their individual capacity and will not be expected to do so unless [Defendants] have been asked and specifically agreed to do so." *Id*.

money in the [P]roject, thus making traditional lenders unwilling to bankroll the project." Bankruptcy Decision at 14.

In December 2014, Beninati consulted with his advisors and was actively engaged in negotiating the terms of financing options with Lenders and submitted a counterproposal to the Lenders' offer. On December 5, 2014, Lenders' attorney sent Kalikow and Debtors a draft term sheet between one of Lenders' affiliates and Bauhouse. On the same day, Kalikow presented the Principals with a conflict waiver letter ("Waiver Letter"). The Waiver Letter was signed by Bauhouse and Gamma Funding, LLC and provides, in part, that

> [Herrick Feinstein] has been asked to represent Bauhouse [] and its affiliates . . . in connections with the Loan. In addition, with respect to matters unrelated to the Loan, this firm has in the past represented, and may continue to represent in the future, Gamma Funding LLC and its affiliates ("Lender"). By way of clarifying the nature of our intended representation of [Bauhouse and its affiliates] in the Loan and to further avoid any potential conflict of interest or the appearance of any such conflict, please note that this firm shall represent only [Bauhouse and its affiliates] in the Loan and we expressly shall not represent Lender . . . .

Debtors ultimately received loans from Lenders through two secured financing transactions, which were secured, in part, by a mortgage on the Property and on related zoning development rights. Among the documents executed in connection with the loans were personal guarantees by the Principals.[4]

[4] *See, e.g.*, June 19, 2015 Guaranty of Recourse Obligations, *Sutton 58 Associates LLC v Joseph Beninati, Christopher Jones, and Daniel Lee,* Index No. 651296/2016 (Sup Ct, NY County) (NYSCEF No. 5).

Debtors ultimately defaulted on their loan obligations and filed for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court of the Southern District of New York. The Debtors subsequently commenced an adversarial proceeding against the Lenders.

In November 2016, the Bankruptcy Court conducted a five-day trial, and the post-trial decision organized the Debtor's remaining thirteen claims (Debtors originally asserted 26 claims against Lenders) into seven categories: unconscionability; lender liability; breach of contract; breach of implied covenant; equitable subordination; fraudulent transfer; and criminal usury. The court ruled in favor of Debtors only for the criminal usury claim[5] and granted judgment for the defendants on all remaining claims.

Plaintiffs commenced this action in September 2017, asserting claims for professional negligence and/or legal malpractice, fraud under New York Judiciary Law §487, and breach of contract.

The complaint alleges that Plaintiffs retained Defendants to represent them in the Project in November 2014. During this period of representation, Kalikow introduced Plaintiffs to, and assisted them in obtaining financing for the Project from Lenders, who were principals of Gamma Funding, LLC and related to Kalikow. Kalikow allegedly failed adequately to inform Plaintiffs that he was related Lenders and that Defendants represented the Lenders on various other real estate matters, both of which constitute

[5] However, the Bankruptcy Court found that "there is no need to determine an appropriate remedy" for the criminal usury claim because the defendants there "agreed to waive their entitlement to interest on the Building Loan." Bankruptcy Decision at 38.

unwaivable conflicts of interest. To cover up these purportedly un-waivable conflicts, Defendants allegedly drafted and "coerced" Bauhouse to sign the Waiver Letter.

Plaintiffs allege that these conflicts were neither properly explained by Defendants nor adequately waived by Plaintiffs. The complaint also alleges that Defendants negligently put Plaintiffs into commercial transactions which were inconsistent with traditional commercial business transactions and which were guaranteed to fail.

Plaintiffs also claim that while Defendants were representing Plaintiffs in the Project, Defendants were engaged in a loan-to-own scheme to transfer control of the Project from Plaintiffs to the Lenders and that the Lenders "directly ordered and instructed [Defendants] to take certain actions with regard to" the Project without Plaintiffs' knowledge or consent. Complaint ¶51. Pursuant to this alleged scheme, the Defendants purportedly acted upon these orders, some of which Fried received via e-mails sent from the Lenders on June 11, 2015, June 12, 215, and June 17, 2015.

In furtherance of this loan-to-own scheme, the complaint alleges that on January 16, 2015, January 23, 2015, and June 19, 2015, Kalikow knowingly provided Plaintiffs with false advice by informing them that the loan agreements that they were signing were non-recourse loans which did not personally bind Plaintiffs and contained no personal guarantees; however, the documents did contain personal guarantees. Moreover, Kalikow allegedly did not explain the contents of these loan agreements to Plaintiffs, but rather instructed Plaintiffs to sign signature lines or pages that contained no attached documentation.

Defendants now collectively move to dismiss the complaint in its entirety pursuant to CPLR 3211(a)(1), (5), & (7). At oral arguments held on May 16, 2018, I granted Defendants' motion and dismissed the Judiciary Law §487 fraud claim and the breach of contract claim.

Although Plaintiffs were not parties to the Bankruptcy Proceeding, Defendants contend that Plaintiffs are in privity with Debtors because Bauhouse, Sutton Owner, and the Debtors are all owned and controlled by the Principals and were used to develop the Property. Defendants next contend that that the factual allegations underlying the malpractice claim in this action are identical to those that Debtors asserted in support of their unconscionability, lender liability, and equitable subordination claims against Lenders, which claims have already been decided against Debtors in the Bankruptcy Decision. Defendants thus argue that Plaintiffs may not relitigate the claims here.

Defendants also argue that the complaint fails to state a claim for legal malpractice because: (1) it fails to plead that Defendants' alleged misconduct was the proximate cause of Plaintiffs' financial loss; and (2) an inadequately waived conflict of interest is insufficient alone to support a malpractice claim.

In opposition, Plaintiffs argue that neither res judicata nor collateral estoppel apply because none of the parties in this action were parties to the Bankruptcy Proceeding and because the legal malpractice claim against Defendants was not litigated and decided in that action. Plaintiffs also argue that the complaint adequately states a malpractice claim.

Discussion

On a CPLR 3211 motion to dismiss, "the pleading is to be afforded a liberal construction" – the Court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon*, 84 NY2d at 87–88 (internal citations omitted); *see also Hedges v E. Riv. Plaza, LLC*, 126 AD3d 582 (1st Dept 2015). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003) citing *Caniglia v Chicago Tribune-New York News Syndicate, Inc.*, 204 AD2d 233 (1st Dept 1994).

I. Collateral Estoppel

"The doctrine of collateral estoppel, a narrower species of *res judicata*, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same." *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 (1984) (citations omitted); *see also Physicians' Reciprocal Insurers v Loeb*, 291 AD2d 541, 543 (2d Dept 2002) (Collateral estoppel "prevents repetitive litigation and potentially inconsistent judgments by providing, in general, that once a particular question of fact has been decided in one judicial forum, that same question of fact may not be reopened for further litigation in the context of a subsequent judicial proceeding." (citations omitted)).

Defendants – as the parties seeking to estop Plaintiffs from re-litigating certain issues already litigated by and decided against Debtors – bear the initial burden of "demonstrat[ing] that the decisive issue was necessarily decided in the prior action against" the parties to be precluded or "one in privity with" those parties. *Buechel v. Bain*, 97 NY2d 295, 304 (2001) (citation omitted). Once this is established, the burden shifts to Plaintiffs to "demonstrate[e] the absence of a full and fair opportunity to contest the prior determination." *Id.*

Privity "is an amorphous concept not easy of application and includes . . . those who control an action although not formal parties to it [and] those whose interests are represented by a party to the action." *Juan C. v Cortines*, 89 NY2d 659, 667-68 (1997) (citations and quotation marks omitted); *see also D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 (1990) ("a nonparty to a prior litigation may be collaterally estopped by a determination in that litigation by having a relationship with a party to the prior litigation such that his own rights or obligations in the subsequent proceeding are conditioned in one way or another, or derivative of the rights of the party to the prior litigation" (citations omitted)).

The documents submitted by Defendants provide that Sutton Owner[6] was formed by the Principals to purchase the Property and develop the Project. *See* Operating

[6] The membership interest in Sutton Owner is as follows: Beninati has 1% interest; Jones has 22.5% interest; Lee has 22.5% interest; and the Joseph Beninati 2015 Generation Skipping Trust ("Beninati Trust") has 54% interest. *See* Operating Agreement, Schedule A. Beninati, as Sutton Owner's only Manager, has the sole authority to manage its affairs. *See* Operating Agreement, Article 2.

Agreement §1.4. To achieve this purpose, Sutton Owner would "obtain one or more loans" and the Principals would, "[t]o the extent required by the lender(s), . . . provide personal guarantees of such loan(s)." Operating Agreement §1.4. The Operating Agreement further provides that the Principals and Beninati Trust would

> ratify all acts taken by the Manager with respect to the acts of subsidiary limited liability companies to acquire of the Property and enter into the loan or loans related thereto, and affirm the authority of the Manager to take all actions on behalf of [Sutton Owner] he deems necessary or appropriate to consummate the acquisition by subsidiaries of the company of the Property, the financing of . . ., and the development or subsequent sale thereof.

Operating Agreement ¶1.4.

Sutton Owner owns 100% of the interest in Sutton Mezz and is its sole member. *See* Sutton Mezz Agreement, Schedule B.[7] Sutton Mezz's purpose is, in part, to "acquire, hold, sell, transfer, pledge or otherwise dispose of a limited liability company interest in, and to be and act as a member of [Sutton DE] (the "Mortgage Borrower")." Sutton Mezz Agreement §7(a)(i). Sutton Mezz owns 100% of the interest in both Sutton NY and Sutton DE. *See* Bankruptcy Decision at 2. Beninati has sole authority to manage the Debtors' affairs and is also the "final decision maker" for each of the Debtors. *See* Bankruptcy Decision at 16.

The Principals are also Bauhouse's principals. *See* Bankruptcy Decision; Beninati Aff. ¶7. Bauhouse entered into a Development Agreement with Sutton 58 Owner, LLC (one of the Debtors) whereby Bauhouse was granted the right to develop the Property "on

[7] Sutton Mezz's principal place of business, as listed in the Sutton Mezz Agreement, is the same as Sutton Owner's principal place of business listed in the Operating Agreement. *Compare* Sutton Mezz Agreement §2 *with* Operating Agreement §1.5.

an exclusive basis due to [Bauhouse's] unique and proprietary relationship and understanding with (i) the parties, elements and issues of the assemblage of the Property, (ii) the parties, elements and issues related to the building, and (iii) the Services as they relate to the Property." Development Agreement ¶1.01.[8] The Development Agreement was executed solely by Beninati in his capacity as Sutton 58 Owner, LLC's Authorized Signatory and as Bauhouse's President.

Based on the foregoing, I find that Sutton Owner and Bauhouse are in privity with Debtors. *See BGC Capital Markets, L.P. v Tullett Prebon Am.'s Corp.*, 2013 N.Y. Slip Op. 32973[U], 2013 WL 6142927 at *7 (Sup Ct, New York County 2013) (finding privity between related corporate entities); *see also Laramie Springtree Corp. v Equity Residential Properties Tr.*, 38 AD3d 850, 851-522 (2d Dept 2007) (finding privity between entities that "have the same president . . . and the same principals," where the entities each entered into "nearly identical agreements" to convey adjoining plots of land and each commenced separate actions for breach of those agreements); *Stonehill Institutional Partners, L.P. v Frac Diamond Aggregates LLC*, 2014 N.Y. Slip Op. 33037[U] (Sup Ct, New York County 2014).[9]

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[8] The Development Agreement contains an additional provision whereby Sutton 58 Owner, LLC "acknowledges and agrees that [Beninati] is a key person to [Bauhouse] and Beninati's affiliation with [Bauhouse] is the key factor for [Sutton 58 Owner, LLC] entering into this Agreement with [Bauhouse] due to Beninati's unique and proprietary relationship and understanding with" the same factors set forth in ¶1.01 above. Development Agreement ¶ 3.05.

[9] *Cf. Cont. Cas. Co. v Rapid-Am. Corp.*, 80 NY2d 640, 650 (1993) (no privity between corporate entities where there was "no common ownership," no obligation to the other, or no "common financial interest"); *Americorp Fin., L.L.C. v Venkany, Inc.*, 102 AD3d 516

Similarly, the above-referenced facts show that Principals are in privity with Debtors. *See Hernandez v Nelson*, 143 AD2d 632, 633 (2d Dept 1988) (privity existed between individual defendant who was the principal of corporate litigant in prior lawsuit where that defendant "failed to submit an affidavit to rebut the obvious inference that he was a principal of" the corporate defendant).

Moreover, the claims in this action arise out of the same conduct underlying the Bankruptcy Proceeding, in which Debtors litigated the validity and enforceability of the Project's financial transactions and loans – Principals' interests of avoiding personal liability as guarantors of the loans are aligned with Debtors' interests of avoiding liability arising out of the loans. Therefore, Principals' interests were represented in the Bankruptcy Proceeding. *See Altegra Credit Co. v Tin Chu*, 29 AD3d 718, 720 (2d Dept 2006) (finding that a party was "collaterally estopped from proving that the underlying deed and mortgage should be given legal effect" where a "unity of interest" existed "inasmuch as both parties had a stake in establishing the validity of the mortgage/deed transaction").

Plaintiffs' argument that collateral estoppel cannot apply because the issue of Defendants' malpractice was not litigated in the Bankruptcy Proceeding is without merit. "[C]ollateral estoppel precludes assertion of the same wrong under a different legal theory," *Korea First Bank of N.Y. v Noah Enterprises, Ltd.*, 12 AD3d 321, 323 (1st Dept

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(1st Dept 2013) (no privity between corporate entities that have separate addresses and where one entity signed a lease containing a provision which expressly stated that it was neither affiliated nor related to the other entity).

2004) (citations omitted), and an issue arising "in an entirely distinct cause of action is no impediment to collateral estoppel." *Fallek v Becker, Achiron & Isserlis*, 246 AD2d 394, 395 (1st Dept 1998) (citations omitted).

Although there was no malpractice claim asserted against Defendants in the Bankruptcy Proceeding, the Bankruptcy Decision necessarily decided and "addressed issues identical to those raised by" Plaintiffs' malpractice claim here. *Sanders v Grenadier Realty, Inc.*, 102 AD3d 460, 461 (1st Dept 2013) (precluding re-litigation of issues underlying state claim where identical issues underlying claim were decided by federal court that had refused to exercise jurisdiction over state claims); *see also Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 515 (1st Dept 2016), *lv to appeal denied*, 28 NY3d 902 (2016) (party estopped from relitigating "discrete factual issues" decided against that party in prior federal litigation); *Women's Interart Ctr., Inc. v New York City Economic Dev. Corp. (EDC)*, 65 AD3d 426, 427 (1st Dept 2009).

For example, in support of Debtor's procedural unconscionability claim, Debtors argued that the terms of the financing agreements were unconscionable "due to the Debtors' inadequate representation by counsel and an inequitable bargaining position between Debtors and Lenders." Bankruptcy Decision at 12. The Bankruptcy Court rejected both arguments and found, in part, that Beninati was a sophisticated real estate developer who hired and consulted with numerous advisors while actively negotiating the terms and models of the financing transactions, *id.*, thereby "demonstrat[ing] his sophistication and independence from the [L]enders." *Id.* at 13. The Bankruptcy Court also found that, based on the full evidentiary record and Debtors' sophistication, it could

not support a finding of procedural unconscionability based on any unwaivable conflict of interest by Defendants. *Id.*

The Bankruptcy Court also rejected Debtors' substantive unconscionability claim based on its "conclusions about [Debtors'] level of sophistication as real estate developers." *Id.* at 14. "Each time, Beninati thought the financing was worthwhile, as he consistently ignored advice to consider a sale . . . . Thus, the market demonstrated what constituted a reasonable financing deal under these circumstances, a conclusion consistent with the opinion of the Defendants' expert . . . ." *Id.*

As to the Lender Liability claim, the Bankruptcy Court rejected Debtors' claims that the Lenders exerted control over the Project and found that "Debtors made their own decisions about whether to enter into the [financing transactions] after weighing the pros and cons of these financings and consulting with their advisors." *Id.* at 16-17.[10] In reaching this conclusion, the Bankruptcy Court also found that the Lenders' communications with Fried did not support a finding of control by the Lenders. *See id.* at 17. Likewise, the Bankruptcy Court rejected Debtors' argument, in support of their equitable subordination claim, that that the Lenders were engaged in a loan-to-own scheme. *See id.* at 30 & 33.

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[10] "[Lenders] were more involved in this project than a traditional lender because the project had more risk than a traditional project . . . and thus it was prudent for the [Lenders] to monitor the status of the Debtors' efforts to complete the assemblage. The credible evidence also establishes that this approach appears normal for a so called hard money lender, a lender who is used when more risk adverse traditional lenders won't finance a project because of the high level of risk. **But the evidence does not support the conclusion that the Defendants ceased to be Lenders and took control of the Debtors**." Bankruptcy Decision at 17 (citation omitted) (emphasis added).

While Defendants have met their initial burden of proof, Plaintiffs have failed to meet their burden of demonstrating that they lacked a fair opportunity to litigate these issues or to contest the Bankruptcy Decision. Therefore, Plaintiffs here are precluded from relitigating the above findings, including the complaint's allegations that Defendants negligently put Plaintiff's into risky commercial transactions that were guaranteed to fail, that Defendants failed to explain the risks involved in entering into these financing transactions, and that Defendants and Lenders were engaged in a loan-to-own scheme.

II. Legal Malpractice

The remaining allegations in the complaint underlying the malpractice claim are that: Defendants had unwaivable conflicts of interest while representing Plaintiffs because Kalikow was related to Lenders and because Defendants' represented Lenders in other, unrelated matters; these conflicts were not adequately explained or waived; and Defendants coerced Bauhouse to sign the inadequate Waiver Letter.

To state a claim for legal malpractice, the plaintiff must allege: "the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and proof of actual damages." *Between The Bread Realty Corp. v Salans Hertzfeld Heilbronn Christy & Viener*, 290 AD2d 380, 380 (1st Dept 2002) (internal citations omitted). In order to adequately allege proximate cause, the plaintiff "must plead specific factual allegations establishing that but for counsel's deficient representation, there would have been a more favorable outcome to the underlying matter," *Dweck Law Firm, LLP v Mann*, 283 AD2d 292, 293 (1st Dept 2001) (citation omitted), or that "plaintiff would

have prevailed in the matter at issue or would not have sustained any damages." *Between The Bread Realty Corp.*, 290 AD2d at 380 (citations omitted).

Here, the complaint does not contain factual allegations sufficient to establish that the purportedly ill-explained unwaivable conflicts of interest were the proximate cause of any alleged harm to Plaintiffs. *See Schafrann v N.V. Famka, Inc.*, 14 AD3d 363, 364 (1st Dept 2005) ("A conflict of interest, even if a violation of the Code of Professional Responsibility, does not by itself support a legal malpractice cause of action." (citation omitted)); *Coleman v Fox Horan & Camerini, LLP*, 274 AD2d 308, 309 (1st Dept 2000); *see also Kodsi v Gee*, 100 AD3d 437, 438 (1st Dept 2012) (citations omitted).[11]

Moreover, the complaint is devoid of any factual allegations to support the Plaintiffs' contention that Defendants coerced Bauhouse into executing the Waiver Letter. *See generally Rau v Borenkoff*, 262 AD2d 388, 388 (2d Dept 1999) (complaint containing conclusory allegations, "unsupported by any factual allegations, that the defendants negligently advised and coerced [plaintiff] to settle his claim, and that he would have obtained a higher settlement or judgment but for their negligence" failed to state claim for malpractice).

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[11] Plaintiffs' reliance on *Esposito v Noto*, 132 AD3d 944 (2d Dept 2015) is misplaced. There, the complaint alleged, *inter alia*, that the defendant attorney operated under an undisclosed conflict of interest by representing parties on both sides of a real estate transaction and that "but for the defendant's malpractice, [plaintiffs] would not have entered into the agreement and would not have lost the property without payment." *Id.* at 945. Plaintiffs' make no such allegation here.

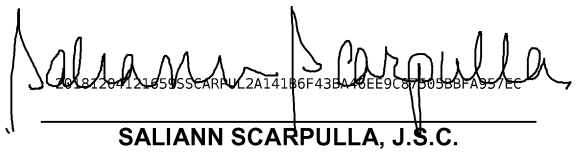
In sum, to the extent that Plaintiffs' allegations survive the application of collateral estoppel, they nevertheless fail to state a cause of action for malpractice.

In according to the foregoing, it is

ORDERED that the motion to dismiss the complaint is granted, and the complaint is dismissed in its entirety against defendants Richard R. Kalikow, William R. Fried, and Herrick Feinstein, LLP; and it is further

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

This constitutes the decision and order of the Court.



DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE