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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Shlomo S. Hagler *Justice* PART: 17

HARVEY KATZENBERG and G.K. ALAN ASSOC., INC.,

Plaintiffs,

- against -

DONNA ZERBO and LOSQUADRO and ZERBO, LLP,

Defendant/Respondent(s).

INDEX NO.: 103162 / 2004

MOTION SEQ. NO.: 003

Motion by defendants for summary judgment, pursuant to CPLR § 3212, dismissing the complaint.

	Papers Numbered
Defendants' Notice of Motion & Exhibits A through N and Exhibits O through II	1, 2, 3
Affirmation of Defendant's Attorney Helen Benzie, Esq. in Support of the Motion	4
Affidavit of Defendant Donna Zerbo, Esq. in Support of the Motion	5
Affirmation of Attorney Harvey Greenberg, Esq. in Support of the Motion	6
Affirmation of Attorney David Gelfarb, Esq. in Opposition to the Motion	7
Affidavit of Plaintiff Harvey Katzenberg in Opposition to the Motion	8
Plaintiffs' Memorandum of Law in Opposition to the Motion	9
Reply Affirmation of Defendants' Attorney Helen Benzie, Esq. in Further Support of the Motion	10
Transcript of May 14, 2012 Oral Argument	11

Cross-Motion: ☑ **No** ☐ **Yes** **Number of Cross-Motions:** 0

Upon the foregoing papers, it is hereby ordered that this Motion is decided in accordance with the attached written decision and order.

FILED

OCT 10 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: September 28, 2012
New York, New York

Hon. Shlomo S. Hagler, J.S.C.

Check one: ☑ **Final Disposition** ☐ **Non-Final Disposition**

Motion is: ☑ Granted ☐ Denied ☐ Granted in Part ☐ Other

Check if Appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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HARVEY KATZENBERG and G.K. ALAN ASSOC., INC.,

Plaintiffs,

- against -

DONNA ZERBO and LOSQUADRO and ZERBO, LLP,

Defendants.

----------X

Index No. 103162/04
Motion Sequence #003

DECISION & ORDER

HON. SHLOMO S. HAGLER, J.S.C.:

STATEMENT OF FACTS

Defendants Donna Zerbo ("Zerbo") and Losquadro and Zerbo, LLP move, pursuant to CPLR § 3212, under motion sequence number 003, for summary judgment dismissing the complaint which alleges legal malpractice in connection with a business sale.

Zerbo, a principal of the law firm Losquadro and Zerbo, LLP, was the general counsel of four companies ("the Acme Companies" or "Companies") in which plaintiff Harvey Katzenberg ("Katzenberg") owned stock. The Acme Companies are in the business of repairing kitchen equipment. Katzenberg was the Companies' controller, president, and manager. He hired and fired, dealt with the unions and clients, and handled planning and finances. Katzenberg and his wife, Pearl Katzenberg, own the other plaintiff, G.K. Alan Assoc. Inc. ("G.K. Alan"), an insurance brokerage company. Pearl Katzenberg, G.K. Alan's president and CEO, procured general liability, automobile, workers compensation, and other insurance for the Acme Companies.

Katzenberg and nonparty Derval Lazzari ("Lazzari"), an employee of one of the Acme Companies, agreed that Lazzari would buy Katzenberg's stock in the Acme Companies for $6.4 million. Katzenberg arranged for Zerbo to serve as his attorney in the transaction, and she drafted

the sale documents. Katzenberg and Lazzari entered into a Stock Purchase Agreement, a Security and Pledge Agreement, an Escrow Agreement (with Zerbo), and a Promissory Note. Lazzari also executed a Guarantee and entered into a Consulting Agreement with Pearl Katzenberg as president of G.K. Alan.

Payment was structured in the following manner. Lazzari made a down payment of $400,000, assumed half of a $350,000 loan which had been made to one of the Acme Companies, agreed to pay Katzenberg $100,000 a year for 15 years (totaling $1.5 million), and agreed, under the Consulting Agreement, to pay G.K. Alan $25,000 a month for 15 years (total of $4.5 million). Under the Consulting Agreement, which is of pivotal importance, G.K. Alan was to make itself available to assist Lazzari regarding customer sales and services, marketing strategies, financial audits, and other services. Section 7 of the Consulting Agreement is a non-compete provision.

The sale of the Acme Companies closed in March 2001. That year, Lazzari paid off the assumed loan and began making the payments due under the Consulting Agreement and the other sale documents. In or about March or April 2003, Lazzari and other principals of the Acme Companies discovered that G.K. Alan was overcharging for insurance. Effective August 2003, Lazzari stopped making the payments under the G.K. Alan Consulting Agreement but continued making the other payments.

G.K. Alan sued Lazzari for breach of contract in Nassau County, seeking $3.9 million, the balance remaining under the Consulting Agreement (*G.K. Alan Assoc. Inc. v Lazzari,* 20 Misc 3d 1120[A] [Sup Ct, Nassau County 2008], *lv dismissed* 66 AD3d 830 [2d Dept 2009], *lv denied* 14 NY3d 703 [2010] [the Nassau County action]). After a thirteen-day trial, Justice Antonio Brandveen dismissed G.K. Alan's complaint. Judge Brandveen determined that G.K. Alan and the Katzenbergs

committed insurance fraud by overcharging the Acme Companies in excess of $700,000 for insurance. The trial court found that G.K. Alan and its owners also submitted false information to the insurance companies for many years, "ostensibly to obtain lower premiums for the companies" (*G.K. Alan*, 20 Misc. 3d at 3). The Second Department affirmed the trial court's findings (*G.K. Alan,* 66 AD3d at 831).

In the Nassau County action, Katzenberg admitted the fraud, but he argued that G.K. Alan was due the payments promised under the Consulting Agreement because those were part of the purchase price for the Acme Companies' stock. Katzenberg argued that the Stock Purchase Agreement and the Consulting Agreement represented a single integrated transaction for the sale of his stock to Lazzari. According to Katzenberg, by failing to make payments under the Consulting Agreement, Lazzari breached his obligation to pay for the stock he purchased from Katzenberg. As the Second Department stated, if the Consulting Agreement were a means for Lazzari to pay a portion of the purchase price for Katzenberg's stock, Lazzari would have to make the payments, regardless of G.K. Alan's and Katzenberg's misconduct, since Katzenberg had already provided the consideration for the purchase price by transferring the stock (*G.K. Alan*, 66 AD3d at 832-833).

Justice Brandveen found that G.K. Alan and Katzenberg actually engaged in consulting duties pursuant to the Consulting Agreement. The trial court held that the Consulting Agreement was an independent contract for consulting services, that it constituted an entire agreement of the parties, separate from the stock purchase, and that the Consulting Agreement created an agency relationship between G.K. Alan, as agent, and the Acme Companies and Lazzari, as principals. "The disloyalty of an agent entitles its principal to avoid the agent's claims for damages arising from the principal's termination of the agency relationship, at least to the extent such claims involve future

compensation." (*G.K. Alan,* 66 AD3d at 833). Thus, Lazzari had no obligation to make any more payments under the Consulting Agreement.

Justice Brandveen also determined that Lazzari was entitled to recover payments made under the Consulting Agreement. The Second Department disagreed. "At trial, Lazzari failed to establish that Alan's misconduct with respect to its insurance brokerage services had tainted or interfered with its performance of the advisory services it provided under the consulting agreement" (*G.K. Alan,* 66 AD3d at 833). In all other respects, the Second Department left undisturbed the trial court's decision.

In this action, Katzenberg and G.K. Alan allege that Zerbo should have fashioned the sale and the Consulting Agreement so that Katzenberg would receive full payment for his stock, regardless of any intervening event. The first cause of action, sounding in legal malpractice, claims that Zerbo should have negotiated adequate security for Katzenberg and G.K. Alan in the event that Lazzari defaulted on the Consulting Agreement. Plaintiffs complain that Zerbo failed to include a provision whereby Lazzari pledged his stock in the Acme Companies to plaintiffs as security for his obligations under the Consulting Agreement, failed to counsel plaintiffs of the importance of an arrangement to assure Lazzari's performance under that agreement, and failed to cross-reference the sale documents to show that they were integrated.

The second cause of action is for breach of fiduciary duty. In September 2003, the Acme Companies sued Katzenberg and his wife in federal court over the insurance fraud (*Acme American Repairs, Inc. v Katzenberg*, 2007 WL 952064, 2007 US Dist LEXIS 23097 [ED NY 2007] [the Federal Action]). Plaintiffs allege that Zerbo breached her duty to Katzenberg by assisting the Acme

Companies in that lawsuit, and divulging secrets and confidences. The third cause of action is for legal malpractice based on the same facts and allegations as the second cause of action.

DISCUSSION

Summary Judgment

The party seeking summary judgment under CPLR § 3212 has the initial burden of proving entitlement to relief by showing that there are no issues of fact needing to be determined at trial (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this burden is met, the opposing party defeats summary judgment by laying bare "his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial ... and it is insufficient to merely set forth averments of factual or legal conclusions" (*Schiraldi v U.S. Min. Products*, 194 AD2d 482, 483 [1st Dept 1993] [internal quotation marks and citation omitted]). If the opposing party fails to submit evidentiary facts to controvert the facts set forth in the movant's papers, the movant's facts may be deemed admitted and summary judgment granted since no triable issue of fact exists (*Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 544 [1975]). The court deciding a summary judgment motion must construe the evidence in favor of the party arguing against the motion (*Mullin v 100 Church LLC*, 12 AD3d 263, 264 [1st Dept 2004]).

Legal Malpractice and Attorney-Client Confidentiality

To prevail on a claim of legal malpractice, a party must prove that his or her attorney was negligent and that said negligence was a proximate cause of plaintiff's losses (*Brooks v Lewin*, 21 AD3d 731, 734 [1st Dept 2005]). In order to establish proximate cause, the client must demonstrate that but for the attorney's negligence, he or she would have prevailed in the underlying matter or

would not have sustained any ascertainable damages (*id.*). The failure to show proximate cause mandates the dismissal of a legal malpractice action, regardless of the attorney's negligence (*id.*; *see also Leder v Spiegel*, 31 AD3d 266, 268 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]). The attorney moving for summary judgment dismissing a legal malpractice claim has the burden of establishing, through the submission of proof in evidentiary form, that the plaintiff is unable to prove at least one of the essential elements of the cause of action (*Leone v Silver & Silver, LLP*, 62 AD3d 962, 962 [2d Dept 2009]).

The facts related here are taken from the depositions and affidavits submitted herein. Zerbo has represented the Acme Companies since 1994. Zerbo neither ever had a written retainer with the Companies nor with Katzenberg. Zerbo advised Katzenberg of the different ways to structure the sale of his stock to Lizzari. Katzenberg did all the negotiating with Lazzari. Lazzari was not satisfied with Katzenberg's initial proposal because it did not afford him, as buyer, enough tax deductions. Katzenberg suggested dividing the sale between a stock purchase agreement and a consulting agreement, as had been done when he purchased the company. The Consulting Agreement would afford the buyer, Lizzari, a tax break and, by making G.K. Alan the consultant, Lizzari could deduct payments under the Consulting Agreement as business expenses. It was essential for Lazzari, who would not have made the deal otherwise, to obtain such tax breaks under the Consulting Agreement.

Zerbo cautioned Katzenberg about writing off business expenses under the Consulting Agreement, telling Katzenberg not to deduct excessive amounts. Zerbo told Katzenberg that under the Consulting Agreement, Katzenberg would get paid without actually doing much consulting. Katzenberg alleges that when he purchased the stock from the previous owner, the previous owner

received part of the payment under a consulting agreement and did not do any consulting work. Katzenberg asked about collateralizing the Consulting Agreement payments. Zerbo told him it could not be done because then the Consulting Agreement would not be viewed as a valid consulting agreement by the IRS. Zerbo states that her advice would have been the same if Katzenberg, instead of G.K. Alan, had been the consultant in the Consulting Agreement. Also, Zerbo argues that since the agreement was with G.K. Alan, rather than Katzenberg, there was nothing to collateralize, presumably because G.K. Alan was not the party selling the stock.

Early in 2003, Lazzari and others told Zerbo about the insurance fraud. Before that Zerbo apparently knew nothing about the fraud. Zerbo told Katzenberg that she was representing the Acme Companies in connection with some insurance discrepancies. The possibility of a settlement in the insurance matter was raised, and Zerbo advised Katzenberg that the amounts at issue were large and that he should retain his own counsel if he was not interested in a settlement. Any subsequent contact Zerbo had with Katzenberg after that point was solely as attorney for the Acme Companies, as Zerbo told Katzenberg and his new attorney. Zerbo advised the Acme Companies to hire separate counsel if they were going to sue the Katzenbergs. Zerbo states that she never disclosed any confidential or privileged information to anyone, including the attorney for the Acme Companies.

The Acme Companies then retained attorney Harvey Greenberg ("Greenberg") who commenced the Acme Companies' case in federal court but no longer represents them. Greenberg submits an affidavit stating that Zerbo did not tell him any information about the Federal Action and states that, at the inception of his representation, it was agreed that no such discussion would be had.

Zerbo contends that she gave Katzenberg sound legal advice and that he cannot show any injury resulting from any alleged malpractice. Zerbo contends that the payments under the Consulting Agreement ceased only because of Katzenberg's misconduct.

Katzenberg does not deny Zerbo's factual allegations. In his affidavit in opposition to defendants' motion, Katzenberg states that "Zerbo was supposed to have drafted the documents so that anyone examining the consulting agreement would hold that it was no more than a tax favored means of paying part of the consideration" for his stock (Katzenberg Affidavit, ¶4). Katzenberg claims that in his discussions with Zerbo, he stressed the importance of securing the payout of the purchase price and that Zerbo knew that the bulk of the payment for his stock was to be paid under the Consulting Agreement. Katzenberg claims that due to Zerbo's alleged malpractice, he is receiving only $1.9 million instead of $6.4 million for his stock. He argues that Zerbo should have arranged a way for him to get paid, even in the event that the Consulting Agreement terminated.

Katzenberg also alleges that Zerbo was negligent in other ways. Katzenberg alleges Zerbo failed to identify what was being pledged in the Security and Pledge Agreement. Pursuant to the Escrow Agreement, Zerbo was to take possession of the stock certificates and deliver them to Lazzari when the entire purchase price was paid; however Zerbo did not take possession of the stock certificates. In the Guaranty, which Zerbo also drafted, Lazzari guaranteed his own performance, which Katzenberg alleges was improper.

A motion that Katzenberg made in the Federal Action sheds light on the allegation in this case that Zerbo violated attorney-client privilege and confidentiality. In the Federal Action, Katzenberg moved to disqualify the Acme Companies' succeeding attorney because that attorney,

Vincent McNamara ("McNamara"), is also representing Zerbo in this action. Katzenberg contended that McNamara was in a position to use privileged information about Katzenberg.

In the Federal Action, United States Magistrate Judge Gold denied Katzenberg's motion (*see Acme American*, 2007 WL 952064, *4-9, 2007 US Dist LEXIS 23097, *10-25 [discussing the motion]). The Magistrate Judge stated that the critical question in the Federal Action was whether G.K. Alan defrauded the Acme Companies by over-billing for insurance premiums. That question is irrelevant to this state court malpractice case. As the two cases do not concern the same issues, any information gained in the malpractice case is not sufficiently relevant to the Federal Action to warrant attorney disqualification. The Magistrate Judge also held that Katzenberg had waived the attorney-client privilege. Many of the communications between Zerbo and Katzenberg were described in deposition testimony and were likely to become part of the public record in this malpractice action. Katzenberg's counsel did not object to the deposition testimony. In the course of various proceedings in the Federal Action, Katzenberg made statements to the court about his conversations with Zerbo concerning the structure of the stock sale. By suing Zerbo for malpractice in connection with the sale of his stock, Katzenberg put his communications with her about that transaction at issue. Lastly, the Magistrate Judge held that, to the extent that Zerbo and Katzenberg discussed the insurance fraud during the course of their attorney-client relationship, the crime-fraud exception would most likely undermine any claim that those discussions were privileged.

For the same reasons, Katzenberg's claims that Zerbo violated the attorney-client privilege in the Federal Action have no merit in this case. Katzenberg waived the privilege, or the information about the fraud was not confidential and privileged. Furthermore, Zerbo alleges that she did not make any improper communications and Katzenberg has no evidence showing otherwise. The third

cause of action for legal malpractice must be dismissed. The second cause of action for breach of fiduciary duty based on the same allegations is likewise dismissed. A breach of fiduciary claim will be dismissed as redundant when it premised on the same facts and seeking the identical relief sought in the legal malpractice cause of action (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004]).

Regarding the sale, Katzenberg argues that the Consulting Agreement should have indicated that it was intended to pay some of the price for his stock. However, such a provision would most likely have put the parties at risk of losing their respective tax advantages. Business sales are "often fragmented, with payments being made to the seller under a covenant not to compete, consulting agreement, or both as well as under the sale agreement" (3 Advising Small Businesses ["ADVSB"] § 45:54 [2012] [Westlaw citation ADVSB § 45:54]). The purchaser can deduct payments made pursuant to a consulting agreement, provided that the seller actually renders services (ADVSB §§ 45:54, 46:13, 46:24). From the seller's viewpoint, a consulting agreement can be disadvantageous, because payments made thereunder are ordinary income, rather than capital gain (ADVSB § 45:54), and self-employment income, subject to self-employment tax (ADVSB § 46:24). Tax rates applicable to ordinary income are normally higher than those applicable to capital gains (*Muskat v United States*, 554 F3d 183, 188 [1st Cir 2009]; *Shann v Dunk*, 84 F3d 73, 76 [2d Cir 1996]).

As stated, the Consulting Agreement contains a non-compete section. An allocation of the purchase price to a covenant not to compete is taxable as ordinary income for the seller (ADVSB §§ 45:54, 46:13). However, as non-compete payments are not subject to the self-employment tax, such an agreement is more advantageous to the seller than a consulting contract (ADVSB § 46:24). Under

26 USC § 197, buyers may take deductions for amortization expenses related to non-compete agreements. Such payments must be amortized over 15 years (ADVSB §§ 45:54, 46:13).

The purpose of the Consulting Agreement was to allow the purchaser a tax advantage. Katzenberg states that the deal would not have gone through if Lazzari not been given the tax deductible Consulting Agreement. There was also an advantage for the seller. As Justice Brandveen stated:

> Katzenberg wanted a Consulting Agreement and payments thereunder so he could receive income to write off business expenses of G.K. Alan. The income derived as a capital gain, such as the sale of the stock, is passive income and could not be used as an income source to write off business expenses. Harvey and Pearl Katzenberg's personal tax returns for the years 2001 and 2002, fail to disclose profits of G.K. Alan of approximately $300,000.00.

(*G.K. Alan,* 20 Misc 3d at 5). G.K. Alan, rather than Katzenberg, was the consultant, "because Katzenberg applied for and received payments under a disability policy for a claimed full disability" (*id.*, *5). Presumably, if Katzenberg had been the payee under the Consulting Agreement, he would not have been eligible for disability payments.

Buyers and sellers may freely negotiate the terms of their agreements. The buyer can pay the seller pursuant to a consulting agreement that is, in reality, a sales agreement and the seller need not perform any consulting. However, once an arrangement comes to the attention of the courts or the IRS, the parties may end up with something that one or both did not intend. A consulting relationship which is a disguised purchase price payment is not an appropriate deductible expense by the acquirer-employer (Robert W. Wood, 1-5 Corporate Acquisitions and Mergers § 5.03 [d] [LEXIS citation Corporate Acquisitions and Mergers § 5]). To be enforceable by a court, a contractual allocation must have some "'economic reality', i.e., some independent basis in fact or

some arguable relationship with business reality so that reasonable persons might bargain for such an agreement" (*Heritage Auto Ctr., v Commissioner of Internal Revenue,* TC Memo 1996-21, *8 [1996] [overturning allocation to consulting/non-compete agreement agreed to by both buyer and seller, because the allocation had no relationship with business reality, and the seller ended up doing very little consulting over the life of the agreement]). Transactions where the parties allocate part of the purchase price to a consulting or non-compete agreement that neither expects to be honored or that is economically meaningless, are vulnerable to re-characterization under both tax and accounting principles (see *Recovery Group, Inc. v C.I.R.*, 652 F3d 122 [1st Cir 2011]; *Long Term Capital Holdings v U.S.*, 330 F Supp 2d 122 [D Conn 2004], *aff* 150 Fed Appx 40 [2d Cir 2005]). When a question arises as to the true nature of a consulting/non-compete contract, it will be carefully scrutinized (*Shann,* 84 F3d at 78 [the allocation of $500,000 for the seller's stock and $2,352,000 for his consult/non-compete agreement was a fiction that did not represent the views of either seller or buyer as to the relative worth of the separate elements of the transaction, but was inspired by the hope of securing tax benefits]).

In *Patterson v C.I.R.* (810 F2d 562, 569 [6th Cir 1986]), the buyer and seller could not agree what part of the purchase price should be allocated to the non-compete covenant. The seller treated the entire amount as capital gains. The court agreed with the seller that no amount had been allocated to the non-compete provision, and that the seller was entitled to pay tax at capital gains rates. On the other hand, "where the parties have clearly and unequivocally allocated a part of the total price to the covenant, courts, at the Commissioner's urging, have generally refused to allow a party to subsequently challenge that allocation without" strong evidence that the contract did not conform to the parties' intent (*id.*, 570).

Because Katzenberg argues that the agreements should have been integrated, it is instructive to turn to *Kennedy v C.I.R.* (TC Memo 2010-206 [US Tax Ct 2010]), where a sale of assets was effected by a goodwill agreement, an asset purchase agreement, and a consulting agreement. The consulting agreement contained a non-compete clause. The three agreements were functionally interdependent, and were expressly made contingent on each other. The court determined that the payments to the seller were taxable, not as capital gains on sale of capital asset/goodwill as the seller wanted, but rather as ordinary income/consideration for services to be performed or for the non-compete agreement. This case further indicates, that even if the Consulting Agreement and the Sale Purchase Agreement had been made contingent on each other, payments pursuant to the former still would not have been regarded as being part of the purchase price.

The purpose of the tax/federal cases cited here is to show that Zerbo's actions were not negligent. The selection of the Consulting Agreement as a means to provide the tax benefits desired by seller and buyer alike was reasonable. Zerbo's evidence shows that she realized what Katzenberg intended by the Consulting Agreement and that she did what he asked. Katzenberg requested the allocation of payment to the Consulting Agreement.

As defendants state, a party cannot make an agreement exculpating itself from its own willful, grossly negligent, fraudulent, or illegal acts (*Lago v Krollage*, 78 NY2d 95, 99 [1991]; *Banc of Am. Sec. LLC v Solow Bldg. Co. II, L.L.C.*, 47 AD3d 239, 244 [1st Dept 2007]). Nor may a party be indemnified for harm that it intentionally caused (*Austro v Niagara Mohawk Power Corp.*, 66 NY2d 674, 676 [1985]). In any event, even if it were possible for Katzenberg to be insulated from the consequences of his own misconduct, Zerbo did not have the duty to anticipate the misconduct or to plan for every eventuality.

The selection of one among several reasonable courses of action does not constitute malpractice, even where the attorney commits an error of judgment (*Rosner v Paley*, 65 NY2d 736, 738 [1985]). Here, plaintiffs fail to allege facts in support of their claim of legal malpractice that "permit the inference that, but for" the alleged negligence, they would not lost the payments under the Consulting Agreement (*Pyne v Block & Assoc.*, 305 AD2d 213, 213 [1st Dept 2003]).

Plaintiffs correctly state that one cannot guarantee one's own performance. A guarantee is an agreement to pay a debt owed by another which creates a secondary liability (*Midland Steel Warehouse Corp. v Godinger Silver Art Ltd.*, 276 AD2d 341, 343 [1st Dept 2000]). A guarantor will be required to make payment only when the party whose performance he has guaranteed has defaulted (*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 446 [1996]). But the Guaranty or the other alleged negligence did not cause Katzenberg to lose the payments under the Consulting Agreement or otherwise fail to receive the entire purchase price for the stock. The cause of the loss was the insurance fraud.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the complaint is granted and the Clerk is directed to enter judgment in favor of defendants Donna Zerbo and Losquadro and Zerbo, LLP dismissing this action, together with costs and disbursements to defendant, as taxed by the Clerk upon presentation of a bill of costs.

ENTER:

Dated: September 28, 2012
New York, New York

Hon. Shlomo S. Hagler, J.S.C.