

**Audio Unlimited E. Meadow, Inc. v Perry**

2013 NY Slip Op 33565(U)

March 15, 2013

Sup Ct, New York County

Docket Number: 154887/2012

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT:

PART 15

Index Number : 154887/2012
AUDIO UNLIMITED OF EAST
vs
PERRY, ESQ, STUART
Sequence Number : 001
DISMISS

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 1
Answering Affidavits — Exhibits No(s) 2
Replying Affidavits No(s) 3

Upon the foregoing papers, it is ordered that this motion is

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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

Dated: 3/15/13

[Signature], J.S.C.

HON. EILEEN A. RAKOWER

- 1. CHECK ONE: [X] 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



Plaintiffs allege the following “material defects” in the Sale Agreement: (1) sale price of Plaintiffs’ total assets was stated as \$1.2 million, instead of \$1.5 million; (2) payments made pursuant to the “earn out” provision in the Sale Agreement were not guaranteed; (3) the earn out provision failed to provide Plaintiffs with the ability to audit the books and records of Planet Verte to determine if the earn out payments were properly calculated; (4) the Sale Agreement does not contain a provision that allows Plaintiffs to audit the books and records to determine if revenues of Planet Verte were been accurately represented to Plaintiffs; (5) the Sale Agreement does not contain any remedies for Plaintiffs upon the default of Planet Verte including: (a) a confession of judgment held in escrow; (b) stock certificates held in escrow; (c) a re-assignment of business lease upon default; (d) Plaintiffs [sic] corporate telephone number held in escrow; and (e) liquidated Damages provision; and (6) the Sale Agreement compels arbitration between Plaintiffs and Planet Verte in the event of any dispute concerning the Sale Transaction.

Plaintiffs allege the following “material defects” in the Promissory Note: (1) no acceleration clause in the event of a default; (2) interest on the Promissory Note is a simple interest rate, instead of the compound interest rate that Plaintiffs requested to be included in the Promissory Note; (3) contains a nominal penalty (5%) of any payment then due in the event of a default; (4) contains a lengthy period of time, i.e. 60 days before Plaintiffs are permitted to declare a default; and (5) no protection in the event that Planet Verte sells the total business assets to a third party.

On or about December 11, 2011, Planet Verte allegedly defaulted on both the Sale Agreement and Promissory Note, by failing to make the agreed upon payments to Plaintiffs.

Plaintiffs allege, “Due to that negligent manner in which the Sale Agreement and Promissory Note were drafted by SP [Defendant], Plaintiffs had no legal claims and/or protections against Planet Verte for their default pursuant to the Sale Agreement and Promissory Note.”

Defendant alleges that Plaintiffs have failed to set forth allegations sufficient to allege that Defendant was the “but for” proximate cause of Plaintiffs’ alleged damages. Defendants contend that they cannot “properly plead these elements because they have made no attempt to enforce the subject agreements against the breached parties and have [sic] cannot conclusively allege that the Sale Agreement and Promissory Note are unenforceable to create a nexus between Attorney Perry’s

conduct and Plaintiffs' damages.”

On a motion to dismiss pursuant to CPLR §3211(a)(7), the pleading is to be afforded a liberal construction and the plaintiff accorded the benefit of every possible inference. (*See, Leon v. Martinez*, 84 NY2d 83, 614 NYS2d 972, 638 NE2d 511 [1994]). In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]). Deficiencies in the Complaint may be remedied by affidavits submitted by the parties. (*Amaro v. Gani Realty Corp.*, 60 N.Y. 2d 491 [2009]). “However, factual allegations that do not state a 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, L.L.C. v. Brody*, 1 A.D. 3d 247, 250 (1<sup>st</sup> Dept 2003) (citations omitted). Further, when the defendant seeks to dismiss the Complaint based upon documentary evidence pursuant to CPLR §3211(a)(1), “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted).

“An action for legal malpractice requires proof of three elements: (1) that the attorney was negligent; (2) that such negligence was a proximate cause of plaintiff's losses; and (3) proof of actual damages.” *See Brooks v. Lewin*, 800 N.Y.S. 2d 695 [1<sup>st</sup> Dept 2005], *lv denied* 6 N.Y. 3d 713 [2006]) (citation omitted). Speculative damages or conclusory claims of damage cannot be a basis for legal malpractice. *See Russo v. Feder, et. al.*, 301 A.D.2d 63, 67 [1<sup>st</sup> Dept 2002]).

“In order to establish proximate cause, a plaintiff must demonstrate that but for the attorney's negligence, [the plaintiff] would have prevailed in the underlying matter or would not have sustained any ascertainable damages.” (*Id.*) (citation omitted).

“The failure to demonstrate proximate cause mandates the dismissal of a legal malpractice action regardless of whether the attorney was negligent.” *Leder v. Spiegel*, 31 A.D. 3d 266, 288 [1<sup>st</sup> Dept 2006], *aff'd* 9 N.Y. 3d 836 [2007], *cert. denied sub nom, Spiegel v. Rowland*, 522 U.S. 1257 [2008].

Even affording Plaintiffs every possible inference, the Verified Complaint fails

to allege facts that show that, but for Defendant's alleged negligence in the drafting of the Sale Agreement and Promissory Note, Plaintiffs would have prevailed in any underlying matter or would not have sustained any ascertainable damages.

Here, based on the Verified Complaint, the alleged damages sustained by Plaintiffs were caused by Planet Verte, who defaulted on the Sale Agreement and Promissory Note. See paragraph 9 of the Verified Complaint. Plaintiffs do not plead that but for Defendant's negligence, Planet Verte would not have defaulted. Rather, they contend as a result of the "material defects" and "due to that negligent manner in which the Sale Agreement and Promissory Note were drafted by SP [Defendant], Plaintiffs had no legal claims and/or protections against Planet Verte for their default pursuant to the Sale Agreement and Promissory Note." However, the Sale Agreement and Promissory Note contain certain terms in the event of default and afford Plaintiffs certain protections in the event of default. See paragraph 21.4, Remedies Upon Breach of Attempted Breach. For example, the Purchase and Sale Agreement provides, "Notwithstanding anything else in this Agreement, the website, as specifically noted on Exhibit C, will continue to be owned by the Seller IN ITS CORPORATE OR INDIVIDUAL CAPACITY OR THROUGH A THIRD PARTY until the Note is fully paid and/or satisfied." Yet, Plaintiffs do not plead, or otherwise dispute in their opposition papers, that they did not seek to enforce the Purchase and Sale Agreement and Promissory Note as against the defaulting party, Planet Verte. Thus, even assuming all the facts in the Complaint are true, Plaintiffs' claim and alleged damages as against Defendant is speculative at this juncture and insufficient to plead a cause of action for legal malpractice.

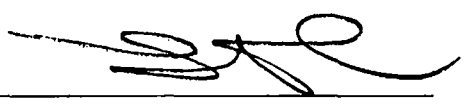
Wherefore it is hereby

ORDERED that defendant Stuart Perry, Esq.'s motion is granted and the Complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: 3/15/13



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EILEEN A. RAKOWER, J.S.C.