SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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RICHARD SITOMER,

Plaintiff,

-against-

GOLDWEBER EPSTEIN, LLP and NINA S. EPSTEIN,

Defendants.

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Index No. 158325/13

Motion seq. no. 001

DECISION AND ORDER

BARBARA JAFFE, J.:

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By notice of motion, defendants move pursuant to CPLR 3211(a)(7) for an order dismissing the complaint against them. Plaintiff opposes.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This matter arises from defendants' representation of plaintiff in contentious divorce proceedings from 2005 to 2010.

By letter dated May 1, 2002, plaintiff, then married, signed a shareholder agreement whereby he transferred to several institutional investors 2,500 or his 5,000 shares in his holding company, International Star Investments Limited (ISI Ltd.) in exchange for capital contributions. (NYSCEF 44).

On April 1, 2005, plaintiff hired defendants to represent him in connection with an anticipated divorce action to be commenced against him. In signing the retainer agreement, plaintiff agreed, as pertinent here, that defendants would provide services in connection with

proceedings at the trial court level only. (NYSCEF 9). On April 11, 2005, plaintiff's ex-wife commenced the divorce action in New York County. (NYSCEF 10). At that time, in addition to his interest in ISI Ltd., plaintiff had an ownership interest in Blue Star Jets, LLC. (NYSCEF 8, 37).

Although plaintiff waived his answer and did not object to the grounds for divorce, he contested, *inter alia*, the distribution of marital assets. On August 15, 2005, the justice presiding in the matrimonial action so ordered the appointment of Klein Liebman & Gresen, LLC, a neutral valuation expert recommended by plaintiff and agreed to by his wife to appraise Blue Star. (NYSCEF 11). On July 16, 2007, Klein Liebman submitted its report, concluding that plaintiff owned a 45 percent interest in Blue Star valued at $4,829,000. (NYSCEF 15).

Dissatisfied with the Klein Liebman report, defendants retained Robert Vigna, another valuation expert, to review it. By email dated September 24, 2007, Vigna sent defendants a list of "critical deficiencies" in the report, claiming that Klein Liebman wrongly relied on projected gross revenue figures instead of the lower actual figures, and that it applied "subjective and speculative" discounts to adjust for the disparity. (NYSCEF 16).

On September 25, 2007, the divorce trial commenced. (NYSCEF 37). By email dated October 11, 2007, defendants approached Gordon Wilde, a director of ISI Ltd., to testify "about the dilution of [plaintiff's] stock interest in [ISI Ltd.] from 100% to 50% and the call for infusion of capital into the [real estate development] project in the amount of $675,000 for [plaintiff's] share[s]." (NYSCEF 57). Defendants followed up by email on November 2 in order to meet with Wilde and prepare him for his testimony; Wilde responded shortly thereafter and directed defendants to review his fee and expenses. (NYSCEF 58).

During the course of the trial, by letter dated November 7, 2007, counsel for the ISI Ltd. shareholders informed plaintiff that based on his failure to infuse capital into the company, they were "taking steps today to pay the sum of $575,000.00 into the Company's account" and "to have the value of the shares professionally determined." Annexed to the letter is a subscribed portion of a 2006 ISI Ltd. shareholder agreement, indicating that three entities, other than plaintiff, owned a combined 50 percent stake in ISI Ltd. (NYSCEF 45).

On November 15, 2007, the Klein Liebman report was admitted in evidence. Defendant Epstein cross-examined Glenn Liebman, a Klein Liebman partner and coauthor of the report, as follows:

> Q: Well, did you not say that it's well-established accounting methodology not to use post-commencement information which would have been the actual numbers that Blue Star Jets earned, the revenue they took in 2005, '6, and '7?
> A: . . . There are instances where I will use actual earnings up to the valuation date. It is my testimony that I would never use actual earnings post-commencement date, if it's three years or four years or five years or two years after the valuation.
> Q: But you had several years' worth of real numbers which you didn't [use]–leaving aside '01, which was part–startup, '02, '03, '04, and six months of '05, before your report was written.

(NYSCEF 17).

The court also questioned Liebman:

> Q: . . . But you did not finish your report until July 2007, correct, and by that time, presumably, there were available the actual numbers that the company earned in . . . the full year of 2005, the full year of 2006 and half a year of 2007?
> A: Right.
> . . . .
> Q: But how does that wash if what you are doing is relying on projected numbers and then, in fact, you have actual numbers that you can look at to at least verify whether there is–the projections were reliable?

(*Id.*).

On November 16, 2007, plaintiff was called to testify about his ownership interest in ISI Ltd., whereupon the following exchange occurred during his cross examination:

> Q: And together those entities [i.e., institutional investors] paid $1,200,000 for interest in the property?
> A: Correct.
> Q: And together they own 50 percent, according to your testimony?
> A: Yes.
> Q; And one million went into the property, correct?
> A: Yes.
> Q: And $200,000 went to you?
> A: Correct.
> . . . .
> Q: And did you provide any documents to [opposing counsel] that would reflect your receipt of the $200,000?
> A: I don't know.
> Q: You don't know?
> A: No.

(NYSCEF 56).

By letter dated November 20, 2007, defendants sent Wilde a $3,000 check covering his fee to testify. On a copy of the letter is a handwritten undated annotation: "Returned check to R Sitomer as Wilde not to be called at trial." (NYSCEF 59).

The trial concluded on December 7, 2007. Defendants did not call Vigna as a witness (NYSCEF 8, 37), nor did they offer in evidence the 2002 shareholder agreement or 2007 letter. On February 8, 2008, defendants submitted a post-trial brief wherein they argued, in pertinent part:

> Mr. Liebman admitted that the model he relied upon in the private placement memorandum [i.e., investor prospectus] was predicated on the fact that [Blue Star] would be able to raise the $3 ½ million they were seeking when in fact they only received 1/3 of the monies sought. Although the actual numbers were available to him at the time he finished his report in July 2007, he did not use them. . . .

> It is submitted that Mr. Liebman's valuation of the Blue Star Jets LLC is inflated. . . . In fact, since it's [sic] inception, Blue Star Jets has never been profitable . . . .

(NYSCEF 18).

By letter dated March 19, 2008, counsel for ISI Ltd. shareholders forwarded to plaintiff a proposed board resolution authorizing the transfer of 954 ISI Ltd. shares from plaintiff to an existing shareholder. (NYSCEF 45).

By decision and order dated December 16, 2008, the court found that plaintiff owned a 43.5 percent interest in Blue Star worth $4,668,120, to which plaintiff's ex-wife was entitled a 40 percent distribution, finding that:

> Although the husband presented no expert evidence in opposition to Mr. Liebman's analysis, he asks this court to discredit the testimony primarily because of Mr. Liebman's reliance on the projected figures in the Offering Plan. . . . [T]he husband contends that Mr. Liebman should have used the business' actual income numbers as opposed to the projected numbers.
>
> The court rejects the husband's arguments. . . .
>
> Furthermore, using historical income numbers would have been inappropriate in determining what value a willing buyer would have placed on the company . . . . As Mr. Liebman testified, Blue Star was undergoing an exponential growth. An arm's length investor would want to know the project growth of the business, as opposed to what the business had earned in the past. . . .
>
> The husband further argues that the court should find he has only a 43.5% ownership interest in Blue Star. Although he acknowledges that as of the date of commencement of this action, he held a 45% interest in Blue Star, the post commencement dilution of his interest was anticipated prior to the state of this action. On this point, the court agrees with the husband.

(NYSCEF 19).

The court also found that plaintiff owned a 60 percent interest in ISI Ltd. worth $1,667,633, to which his ex-wife was entitled a 50 percent distribution. The court credited the

expert testimony and related documentation offered by plaintiff's ex-wife in arriving at the figure. Conversely, the court observed that plaintiff had offered no documentation in support of his claim that is interest in ISI Ltd. had been diluted to 50 percent and that his testimony was "vague with respect to who were the other owners." (*Id.*).

On September 20, 2010, the judgment of divorce was entered and served with notice of entry on September 21, 2010. The court directed the equitable distribution of plaintiff's ownership interests in Blue Star and ISI Ltd. in accordance with the December 2008 decision. (NYSCEF 20).

By email dated October 5, 2010, Epstein alerted plaintiff that she would draft a notice of appeal to protect plaintiff's rights, and asked if he wanted "to proceed with an application before [the presiding justice], as well?"(NYSCEF 22). By email dated November 29, 2010, defendants asked plaintiff, among other things, if he was "proceeding with the Appeal?" They also advised that there were deadlines to be met and a need to compile the record on appeal. (NYSCEF 25). By email dated April 13, 2010, Epstein reminded plaintiff of the approaching deadline, that she his decision as to whether he wanted to pursue the appeal, that it would cost between $20,000 and $30,000 for the record alone, and that a new retainer had to be signed by him for the appeal. She otherwise informed him that she had completed a motion for a downward modification but awaited his net worth statement. (NYSCEF 26). Later that same day, plaintiff inquired as to "where are our odds better??" Epstein replied that she did not believe an appeal would be successful, but advised him to obtain a second opinion. (NYSCEF 27).

By email dated March 10, 2011, at 5:33 pm, Epstein advised plaintiff that she was "working on papers." On the same day, at 5:35 pm, plaintiff emailed defendants, "Hi guys, what[']s doing with the appeal to [the presiding justice]?" (NYSCEF 46 [emphasis omitted]).

By email dated June 7, 2011, defendants requested a $5,000 retainer fee to draft a prenuptial agreement in an unrelated matter and again alerted plaintiff of the deadline for filing the appeal, to which plaintiff replied that he "thought the appeal was well under way already." Defendants promptly responded, "How can it be underway when we never got any funds for the record or to work drafting the appeal[.] I told you it would cost about $40,000 to get record and do brief[.] You need to pay up front[.]" (NYSCEF 28). On October 5, 2011, plaintiff obtained defendants' consent to substitute counsel. (NYSCEF 29).

On January 10, 2012, defendants commenced an action against plaintiff in the Civil Court of the City of New York asserting claims of breach of contract, quantum meruit, and an account stated based on plaintiff's failure to pay $21,624.94 in attorney fees. (NYSCEF 30).

On September 6, 2013, plaintiff commenced this action asserting a cause of action for legal malpractice. In support, plaintiff alleges that defendants failed to (1) call Vigna as a witness to rebut the Klein Liebman report findings regarding Blue Star; (2) present appropriate evidence at trial to establish the correct value of plaintiff's interest in ISI Ltd.; (3) move to reappraise Blue Star and ISI Ltd. before the court rendered its decision and entered a divorce judgment; (4) move for reargument after entry of the divorce judgment; and (5) perfect an appeal from the divorce judgment. (NYSCEF 1).

II. DISCUSSION

A. General contentions

Defendants observe that at no time during the five years they represented plaintiff did he register any complaints about their services or inquire into the strategy they employed, nor does he address in his papers why he retained their services to draft a prenuptial agreement after the judgment was entered if he was so dissatisfied with their representation. Defendants thus maintain that plaintiff's present complaints are nothing more than post hoc criticism of a reasonable course of action. They also allege that plaintiff was present at meetings and involved in planning strategy, was active in every step of preparing the joint divorce judgment, and was amenable to its final terms. (NYSCEF 8).

In response, plaintiff alleges that he had numerous discussions with defendants about the court's valuation of his companies and issues arising therefrom. He asserts that, contrary to defendants' recollection, he registered complaints with them and inquired about their strategy. (NYSCEF 37).

B. General governing law

Pursuant to CPLR 3211(a)(7), a party may move at any time for an order dismissing a cause of action asserted against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference. (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court need only determine whether the alleged facts fit within any cognizable legal theory. (*Id.*; *Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013]). However, when

the court considers evidentiary material submitted by the parties, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one," and the motion should be denied "unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it." (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.* 115 AD3d 128, 145-146 [1st Dept 2014]).

To set forth a cause of action for legal malpractice, the plaintiff must show "that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages." (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]; *Pannone v Silberstein*, 118 AD3d 413, 414 [1st Dept 2014], *lv denied* 24 NY3d 917 [2015]). To establish causation, the plaintiff must show that it would have prevailed in the underlying matter or not sustained damages but for the attorney's negligence. (*Keness v Feldman, Kramer & Monaco, P.C.*, 105 AD3d 812, 813 [2d Dept 2013]). Reasonable strategic decisions made by the attorney or law firm cannot form the basis for a cause of action for legal malpractice. (*Wagner Davis P.C. v Gargano*, 116 AD3d 426, 426 [1st Dept 2014]).

The evidence offered by the movant on a motion pursuant to CPLR 3211(a)(7), must establish that a material fact alleged by the client in support of the legal malpractice claim is not a fact at all and that the client has no cause of action. (*Eg, Lindsay v Pasternack Tilker Ziegler Walsh Stanton & Romano LLP*, 129 AD3d 790, 792 [2d Dept 2015] ["Since the defendant's evidence failed to establish that a material fact as claimed by the plaintiff, namely, the existence of an attorney-client relationship, was not a fact at all and that no significant dispute exists

regarding it . . . [the court] properly denied that branch of the defendant's motion . . . ." (internal quotation marks omitted)]).

C. Failure to call Vigna as a witness

1. Contentions

Defendants allege that they did not call Vigna as a witness for strategic reasons, given the lack of an articulated basis for refuting Klein Liebman's valuation method, and Vigna's opinion that the report was not unreasonable and that its "weak points" could be effectively advanced by way of cross-examination and argument. Defendants also contend that calling Vigna would have undermined plaintiff's credibility as plaintiff had recommended Klein Liebman in the first instance and had prepared the Blue Star investor prospectus on which Klein Liebman extensively relied. (NYSCEF 8).

In response, plaintiff argues that he specifically asked that Vigna testify at trial and was assured by defendants that he would. He disputes defendants' assertion that Vigna had no basis to refute Klein Liebman's methodology or that he believed the report was reasonable, and he contends that advancing Vigna's points by way of cross-examination or argument was not as effective as having him testify, which he claims would have been dispositive of the issue. In any event, plaintiff characterizes defendants' cross-examination of Liebman and post-trial brief as ineffective absent an attempt to offer in evidence Blue Star's actual revenue for years 2005 through 2007. He also faults defendants for not moving for an order changing the valuation date of Blue Star from the commencement of the action to the time of trial. (NYSCEF 37, 49).

In reply, defendants note that plaintiff fails to acknowledge that the court considered and partly agreed with the arguments they advanced in cross-examining him and in their brief, and

that none of his alleged complaints about their representation is corroborated. They observe that the court asked the questions plaintiff wanted asked, and dispute his assertion that income statements for years 2005 through 2007 were "readily available" during the trial, relying on Liebman's testimony that when he prepared his report in 2007, the actual numbers for 2005 were partially unavailable and were entirely unavailable for 2006 and 2007. They also point out that the profit and loss statement dated January 7, 2015 was not available in 2007 at the time of trial as the figures reported therein went through the end of 2007. (NYSCEF 55, 62).

2. Analysis

Absent a basis for refuting Klein Liebman's valuation method, and given the court's questioning and findings and the concern that calling Vigna would undermine plaintiff's credibility, defendants have demonstrated that their decision not to call Vigna as a witness constituted a matter of strategy that, as a matter of law, forms no basis for a finding of legal malpractice. (*See O'Callaghan v Brunelle*, 84 AD3d 581, 581-582 [1st Dept 2011], *lv denied* 18 NY3d 804 [2012] [prior NYSE and SEC decisions revealed that uncalled witness could not help plaintiff and thus plaintiff could not establish causation]; *L.I.C. Commercial Corp. v Rosenthal*, 202 AD2d 644, 644-645 [2d Dept 1994], *lv dismissed* 84 NY2d 841 [decision not to call witness strategic as potential testimony confusing and unfavorable to plaintiff]; *see also A.H. Harris & Sons v Burke, Cavalier, Lindy & Engel P.C.*, 202 AD2d 929, 930 [3d Dept 1994] [failure to call witness appropriate course of action absent allegation of how failure fell below attorney standard of care]).

Morever, as matters concerning the date of valuation of marital assets and whether to consider projected or past income figures are committed to the court's discretion (*see generally*

McSparron v McSparron, 87 NY2d 275, 287 [1995]), a determination that the attorney's negligence resulted in a less favorable result is too speculative to provide a legal or factual basis for a finding of malpractice (*see Grant v LaTrace*, 119 AD3d 646, 647 [2d Dept 2014] [defendants' alleged failure to remedy defects in service turned on court's discretion in granting extension and thus required speculation as to whether different result would obtain absent attorney's failure]; *Bua v Purcell & Ingrao, P.C.*, 99 AD3d 843, 848 [2d Dept 2012], *lv denied* 20 NY3d 857 [2013] [whether attorney's failure to properly effect termination of contract for sale resulted in buyer later bringing action in specific performance was too speculative "inasmuch as it (was) premised on decision that were within the sole discretion of the buyer"]; *see also Sierra Holdings, LLC v Phillips, Weiner, Quinn, Artura & Cox*, 112 AD3d 909, 910 [2d Dept 2013] [whether attorney's failure to notify clients of upcoming foreclosure sale resulted in their inability to recoup losses was too speculative to support claim for legal malpractice]).

D. Failure to offer evidence

1. Contentions

Defendants maintain that plaintiff's allegation that they engaged in legal malpractice by failing to offer "appropriate evidence" at trial to establish that his interest in ISI Ltd. was only 50 percent is fatally conclusory and insufficient to state a claim for legal malpractice. (NYSCEF 8).

According to plaintiff, the 2002 shareholder agreement, whereby half of ISI Ltd.'s shares were transferred to three investors, conclusively establishes that at the time of valuation, plaintiff owned a 50 percent interest in the company. He blames defendants for failing to prove to the court's satisfaction that he in fact owned only 50 percent, claiming that they possessed the agreement at the time of trial but negligently failed to introduce it in evidence, relying instead on

plaintiff's testimony alone as to his percentage interest. Due to their failure, he argues, the court determined that he owned 60 percent, and that had they called to the court's attention the November 2007 letter from ISI Ltd. shareholders notifying him that his interest would be further diluted, or the March 2008 letter, and offered Wilde's testimony, the court would have found duly corroborated his claim of 50 percent ownership in ISI Ltd. (NYSCEF 37, 49).

Defendants deny having possessed the 2002 shareholder agreement and 2007 and 2008 letters during the course of representation, and that in any event, the probative value of the agreement and letters is negligible. They observe that when questioned during trial about the existence of documents evidencing the sale of shares to investors, plaintiff denied any knowledge. (NYSCEF 55, 62).

Although defendants initially arranged for Wilde to testify, copied plaintiff on their email correspondence with him, and sent him a check, he did not appear. In any event, they claim that plaintiff does not explain how calling Wilde would have altered the court's decision. (*Id.*).

B. Analysis

1. ISI Ltd. documents

The 2002 shareholder agreement on which plaintiff relies establishes that 50 percent of the available shares of ISI Ltd. were transferred to investors, leaving plaintiff with, at most, a 50 percent interest before commencement of the action. Defendants' contention that the document lacks probative value is controverted by the cover letter, in which counsel for the investors directed plaintiff to review and sign the agreement, and by the 2007 letter referencing the shareholder/investors' then-50 percent interest. As the court described plaintiff's testimony regarding his ownership interest in ISI Ltd. as "vague" and lacking corroboration, it is reasonably

inferred that the agreements would have altered the court's final calculation (*see Wahl v Wahl*, 277 AD2d 445, 446 [2d 2000] [court overlooked documentary evidence revealing additional stock purchases before commencement of action and thus improperly calculated amount of IBM stock husband owed; matter remanded to trial court]), and thus plaintiff sufficiently states a cause of action in legal malpractice (*see Pillard v Goodman*, 82 AD3d 541, 541-542 [1st Dept 2011] [plaintiff stated cause of action in legal malpractice alleging that defendants failed to proffer documentary evidence that plaintiff was not president of company at time it was sued, which would have exonerated him from liability]; *see also Biro v Roth*, 121 AD3d 733, 734 [2d Dept 2014] [plaintiff stated cause of action alleging that defendants failed to incorporate certain documentation in disability application resulting in denial of benefits]).

Defendants' denial that they possessed this documentation during the trial does not entitle them to a dismissal of this claim as it does not establish that no significant dispute exists regarding this alleged fact. (*See Weill v E. Sunset Park Realty, LLC*, 101 AD3d 859, 860 [2d Dept 2012] [defendants' denial of actual or constructive notice of plaintiffs' mortgage interest insufficient to resolve issue beyond dispute and warrant dismissal under CPLR 3211(a)(7)]; *cf. Fried v Tucker*, 22 Misc 3d 1122[A], 2008 NY Slip Op 52656[U], *5 [Sup Ct, Kings County 2008] [plaintiff's challenge of defendant's affirmative defense amounted to "bald and self-serving denial" warranting denial of summary dismissal of defense]). Moreover, defendants' claim that plaintiff's testimony reveals that he was unaware of documentation evidencing his interest in ISI Ltd. mischaracterizes his testimony, as plaintiff only denied recalling whether he had produced documentation pertaining to his receipt of the $200,000 cash distribution during the 2002 stock sale.

2. Wilde's testimony

For the reasons set forth (*supra* II.B.1.), plaintiff's allegation that defendants' failure to call Wilde as a witness to corroborate his testimony resulted in an inflated ownership figure, states a cause of action for legal malpractice (*see Iocovello v Weingrad & Weingrad*, 262 AD2d 156, 157 [1st Dept 1999], *abrogated on other grounds Brothers v Florence*, 95 NY2d 290 [2000] [plaintiff sufficiently stated cause of action in legal malpractice whose gravaman was attorney's failure, in personal injury action, to introduce certain documentary evidence that plaintiff had suffered "serious injury"]). Defendants' evidence is too ambiguous to prove that Wilde decided on his own not to testify. Nor do they offer a strategic rationale for not calling him. (*See Ackerman v Kesselman*, 100 AD3d 577, 579 [2d Dept 2012] [defendants failed to offer reasonable strategic explanation for decision to subject plaintiff, a nonparty to a contract, to arbitration proceeding for breach of contract]).

E. Failure to move to reappraise plaintiff's companies

1. Contentions

Defendants assert that the court had substantial discretion in setting valuation dates and appraising assets in the first instance. That plaintiff's companies declined in value after commencement of the action, defendants argue, does not warrant a reappraisal. (NYSCEF 33).

Given the more than two years elapsing from the commencement of the action to the time of trial, plaintiff argues that defendants should have foreseen the valuation issues and acted accordingly, and that the court would have considered the time in fixing a valuation date. He claims that defendants took no action to persuade the court to reappraise Blue Star or ISI Ltd.

from the end of trial until 2010, after the global financial crisis had reduced both companies' value. (NYSCEF 37, 49).

Plaintiff maintains that he approved the terms of the judgment of divorce only to the extent that they were consistent with the court's earlier decision, but otherwise reserved his right to challenge the court's findings, and claims that the justice advised him that he could apply for reappraisal or appeal the judgment. (*Id.*).

In reply, defendants reiterate their contentions, adding that plaintiff's opposition ignores that their decision to not seek reappraisal under the circumstances was strategic. (NYSCEF 62).

2. Analysis

A reappraisal of plaintiff's holdings in Blue Star and/or ISI Ltd. following trial would have required the filing of a motion to reopen the record or to set aside the judgment. On a motion to reopen the record, the movant must show that "it could not have previously discovered the evidence and that the new evidence is in admissible form." (*Da Silva v Savo*, 97 AD3d 525, 526 [2d Dept 2012] [internal citation omitted]). The motion should be denied when the party fails to disclose the nature of the omitted evidence and that the evidence is not newly discovered. (*Fischer v RWSP Realty, LLC*, 63 AD3d 878, 878 [2d Dept 2009]). The trial court's discretion to reopen a case after a party has rested should be exercised sparingly. (*Matter of John Jay Coll. of Criminal Justice of City of Univ. of New York*, 74 AD3d 460, 462 [1st Dept 2010], *lv denied in part, dismissed in part* 16 NY3d 889 [2011]).

Generally, the distributive award provisions of a judgment of divorce, once made, are not subject to change (*O'Brien v O'Brien*, 66 NY2d 576, 591 [1985]), and even post-trial changes in value "may not be used to reallocate the distribution of marital assets to strike a more equitable

balance" (*Greenwald v Greenwald*, 164 AD2d 706, 721-722 [1st Dept 1991], *appeal denied* 78 NY2d 855).

a. Blue Star

To the extent that defendants allegedly failed to introduce Vigna's testimony following the conclusion of the trial in 2007 until judgment was entered in 2010, for the reasons set forth *supra* (II.C.2.), there is no indication that the omitted testimony would have affected the court's decision (*see Wallace v Johnson*, 82 AD3d 994, 994-995 [2d Dept 2011] [denying motion to reopen record where new evidence was "either cumulative in nature or would not have produced a different result"]). In any event, as defendants were aware since before the trial of Vigna's potential testimony, it cannot be "newly discovered," and thus would not warrant reopening the record. (*See Sieger v Sieger*, 51 AD3d 1004, 1005 [2d Dept 2008], *lv denied* 14 NY3d 711 [2010] [where defendant possessed evidence before making motion, evidence not deemed newly discovered to warrant reopening the record]; *see also Noga v Noga*, 235 AD2d 1002, 1002 [3d Dept 1997] [denying motion to reopen divorce trial based on, *inter alia*, defendant's failure to offer "evidence that (he) was denied opportunity to submit proof on this issue"]). Similarly, new evidence of Blue Star's post-trial depreciation does not warrant reopening the case as it disturbs the finality of the award. (*See Simkin v Blank*, 19 NY3d 46, 54 [2012] [rejecting plaintiff's claim of mutual mistake to reform divorce settlement and holding that marital asset that lost value in Madoff's Ponzi scheme was "akin to a marital asset that unexpectedly loses value after dissolution of a marriage"]; *Greenwald*, 164 AD2d at 721-722 [for purposes of modifying distributive award, court would not permit evidence that in ten-month period after trial, husband's property reduced in value by 50 percent]).

b. ISI Ltd.

As plaintiff alleges that the 2002 shareholders agreement and 2007 letter were in defendants' possession at the time of trial, its admission post-trial would have been precluded. (*See Sieger*, 51 AD3d at 1005). Moreover, as a party to a divorce may not later disturb a court's equitable distribution of assets (*see Wasserman v Wasserman*, 103 AD3d 793, 793 [2d Dept 2013] [plaintiff could not modify equitable distribution award in light of evidence of changed circumstances]), any evidence discovered after the divorce trial, namely the 2008 letter, would not warrant reopening the matter and revising the award (*see Greenwald*, 164 AD2d at 721-722), and thus, any motion made would have been, in effect, futile (*see Cosmetics Plus Group, Ltd. v Traub*, 105 AD3d 134, 142 [1st Dept 2013], *lv denied* 22 NY3d 855 [no actionable malpractice where attorney's failure to expedite release of funds from court would have been futile]).

F. Failure to move to reargue

Defendants contend that to the extent plaintiff claims that they should have sought reargument, he fails to allege facts warranting a finding that any matter was overlooked, nor does he assert grounds on which the court would entertain a motion pursuant to CPLR 2221. (NYSCEF 8, 33). In response, plaintiff argues that there was ample basis for seeking reargument, namely, the inaccurate appraisal of Blue Star and miscalculation of his ownership interest in ISI Ltd. (NYSCEF 37, 49).

As a motion pursuant to CPLR 2221 is not the proper vehicle for relief from a decision and order following trial (*eg, Maddux v Schur*, 53 AD3d 738, 739 [3d Dept 2008] ["[W]e note that a motion to renew pursuant to CPLR 2221 is not the proper procedural vehicle to address a final judgment . . . ."]; *Sadowska v Wetzel*, 31 Misc 3d 150[A], 2011 NY Slip Op 51079[U], *1

[App Term, 1st Dept 2011]), I need not consider defendants' failure to move for reargument. In any event, plaintiff fails to articulate a ground on which the court would have reopened the matter, and failing to move to reargue generally does not amount to actionable malpractice. (*See eg, Allen v Potruch*, 282 AD2d 484, 485 [2d Dept 2001] [attorney's failure to move to reargue motion of expert fees was, at most, an error in judgment]; *compare Comprehensive Mental Assessment & Med. Care, P.C. v Gusrae Kaplan Nusbaum, PLLC*, 130 AD3d 670, 2015 NY Slip Op 05904, *1 [2d Dept 2015] [plaintiff could maintain claim for malpractice based on attorney's misrepresentation to client that it had filed motion to reargue, but did not]).

G. Failure to perfect an appeal

1. Contentions

Defendants assert that they advised plaintiff on several occasions that the deadline to appeal was approaching and that a new retainer was required to pursue the appeal. They claim that by not paying the retainer, plaintiff signaled an unwillingness to proceed, especially given their pessimism as to its merits. In any event, defendants argue that plaintiff alleges no basis to argue that an appeal would be viable, particularly as the court's valuation of marital assets is discretionary, and that even if a basis existed, their decision not to proceed is strategic. (NYSCEF 8, 33).

Plaintiff asserts that he was under the impression that defendants were working on his appeal, as evidenced by their response to his March 2011 email wherein they stated they were "[w]orking on papers," and he contends that defendants' claim that the appeal was futile evidences their awareness that they erred in failing to move earlier for reappraisal or reargument. (NYSCEF 37, 49).

In reply, defendants claim that plaintiff's reliance on their email advice that they were "[w]orking on papers" is deceitful, as the timestamp on the email reflects that it was sent before plaintiff's inquiry, and that the email is otherwise refuted by subsequent correspondence between them. Moreover, they likely referred to unrelated documents they were drafting, and that plaintiff's inquiry did not pertain to the appeal, but to an unspecified motion. (NYSCEF 62).

B. Analysis

Generally, the Appellate Division is limited to reviewing the record on appeal and may not consider evidence dehors the record (*Constantine v Premier Cab Corp.*, 295 AD2d 303, 304 [2d Dept 2002]), unless its accuracy is undisputed (*Bravo v Terstiege*, 196 AD2d 473, 476 [2d Dept 1993]).

Here, the parties' email exchanges reflect that defendants apprised plaintiff of his right to appeal, the deadline for pursuing it, and the attendant costs. Even if defendants' March 10, 2011 email was written in reply to plaintiff's email, it only demonstrates that defendants were working on papers to be submitted to the trial court, not on an appeal from the judgment. And, if not sent in response to plaintiff's email, defendants' email does not prove that defendants were working on an appeal of the judgment. Moreover, the correspondence reflects plaintiff's appreciation of the difference between relief at the trial court level and an appeal of the judgment.

Even assuming that defendants failed to accede to plaintiff's request that they file an appeal of the judgment, the evidence on which plaintiff relies is dehors the record and inadmissible on appeal absent any evidence that it is undisputed. (*See Gagen v Kipany Prods. Ltd.*, 289 AD2d 844, 846 [3d Dept 2001] [court did not consider arguments based on documents

outside the record]). Thus, plaintiff's evidence is insufficient to establish that an appeal would have been successful, particularly where, as here, the trial court acted within its broad discretion in appraising his businesses. (*See MacDonald v Guttman*, 72 AD3d 1452, 1456 [3d Dept 2010] [notwithstanding plaintiff's claim of appeal's likelihood of success based on her denial of evidentiary hearing, lower court had no obligation to hold such hearing and could accept or reject certain evidence on its own initiative]; *Weiner v Hershman & Leicher, P.C.*, 248 AD2d 193, 193 [1st Dept 1998] [plaintiff failed to allege specific facts to show lower court had improperly resolved issues and thus an appeal would likely be successful]).

For all of these reasons, defendants have satisfactorily demonstrated both the baselessness of plaintiff's allegation that they committed malpractice in failing to pursue an appeal, and that, in any event, there is no significant dispute that it would have been unsuccessful.

H. Stay pending further discovery

In the alternative, plaintiff seeks further discovery to oppose defendants' motion to determine defendants' "thought process or strategy," and he observes that defendants have not complied with his discovery demands. (NYSCEF 37, 49). In response, defendants argue that plaintiff fails to allege what evidence would be revealed that would remedy the legal insufficiency of plaintiff's malpractice claim, and that in any event, plaintiff improperly conflates the applicable standard with one for staying a motion for summary judgment.

Pursuant to CPLR 3211(d), the court may deny a motion to dismiss as premature if it "appear[s] from affidavits submitted in opposition to the motion . . . that facts essential to justify opposition may exist but cannot then be stated." especially where the facts are in the exclusive control of the moving party. (*Peterson v Spartan Indus., Inc.*, 33 NY2d 463, 466 [1974]).

Here, plaintiff does not specify what information further discovery would reveal or how it is essential to oppose defendants' motion beyond his vague desire to uncover defendants' "thought process." (*See Warshaw Burstein Cohen Schlesinger & Kuh, LLP v Longmire*, 106 AD3d 536, 537 [1st Dept 2013], *lv dismissed* 21 NY3d 1059 [defendant did not specific what facts warranted taking depositions of his attorneys so as to deny motion to dismiss defendant's legal malpractice claim]). Moreover, plaintiff's outstanding discovery demands are irrelevant especially where, as here, plaintiff's claims are precluded as a matter of law. (*See Sch. of Visual Art v Kuprewicz*, 3 Misc 3d 278, 289 [Sup Ct, NY County 2003] [information sought in outstanding discovery demands would not help establish viability of claims being dismissed]).

I. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss is granted to the extent that the allegations contained in paragraphs 32(a), 32(c), 32(d), 32(e), and 32(f) are dismissed, and the motion is otherwise denied.

ENTER:

Barbara Jaffe, JSC

DATED: August 14, 2015
New York, New York