180 Ludlow Dev. LLC v Olshan Frome Wolosky LLP
2017 NY Slip Op 31780(U)
August 22, 2017
Supreme Court, New York County
Docket Number: 651473/2013
Judge: Debra A. James
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 59

----------x

180 LUDLOW DEVELOPMENT LLC,

Plaintiff,

-against- Index No. 651473/2013

OLSHAN FROME WOLOSKY LLP,

Defendant.

----------x

DEBRA A. JAMES, J.:

In this legal malpractice action, plaintiff 180 Ludlow Development LLC (Ludlow) moves for an order granting partial summary judgment of liability on its complaint against defendant Olshan Frome Wolosky LLP (Olshan). Olshan cross-moves for an order of summary judgment dismissing the complaint.

CONCLUSION

The motion of Ludlow for partial summary judgment of liability shall be denied, and the cross motion for summary judgment to dismiss the complaint against Olshan shall be granted.

BACKGROUND

In late 2006, Ludlow, a real estate developer, retained Olshan, a law firm, to represent Ludlow with respect to the acquisition of air rights over a parcel of land owned by Ithilien Realty Corp (Ithilien) that adjoined the property that Ludlow owned and was developing as a hotel at 180-184 Ludlow Street, on the Lower East Side of Manhattan (Project).

There is no dispute that Ludlow retained Olshan as its transactional lawyer to prepare documents for the Project, under which, among other things, Ludlow would purchase air rights from Ithilien, and Ithilien would consent to Ludlow's construction of a cantilever over Ithilien's parcel and its building (Building) thereon. Ludlow hired other lawyers, who provided consultations on light and air easement issues, including a land use attorney, who at Ludlow's request, reviewed Olshan's draft of the contract of sale and the Zoning Lot Development Agreement (ZLDA, including the cantilever provision, prior to their execution. Ludlow also retained other professionals in connection with the Project, including an architect; a building consulting firm; a building expediting service company; a land use planning consultant; and a specialist on regulatory issues, including the zoning code.

Ludlow and Ithilien executed the contract of sale on or about January 29, 2007, annexed to which was the negotiated ZLDA, which was to be executed at the closing in substantially the same form (Contract of Sale § 1.1[U]). According to the contract, the actual number of air rights, and the height of the light and air easement, were to be inserted in the ZLDA prior to the closing. The only express right to modify the ZLDA, provided in the contract, was in the event that, prior to the closing, Ludlow, as the purchaser, required additional real property or air rights from other properties (Contract of Sale § 12.2). Ten months

later, on November 14, 2007, Ludlow and Ithilien executed the ZLDA.

ZLDA, section 20, entitled "Cantilever," provided, in pertinent part, that Ludlow could build a taller building than permitted under the zoning and encroach over Ithilien's Building by construction of a cantilever, and that, during the construction of the cantilever, Ludlow "shall have the right to enter upon the Owner Parcel as reasonably necessary in connection with such construction, maintenance, repair and/or replacement".

ZLDA, section 11, granted an easement to Ludlow to use the Ithilien Building and parcel for the "construction or Rebuilding" of the hotel, and that if there are further

> "Department of Building requirements, [Ithilien] consents to [Ludlow] performing such work ('Compliance Work') as is necessary to comply with said requirements so long as (w) any Compliance Work is at the sole cost and expense of [Ludlow], (x) any Compliance Work is done in accordance with good construction practice and in a manner customary for such type of work so as to preserve the structural integrity of the [Ithilien] Building, (y) said Compliance work occurs after a letter from a licensed engineer, stating that said Compliance Work would not damage the [Ithilien] Building, is delivered to [Ithilien]".

Section 8 (a) of the ZLDA provided a remedy should a "Violation" exist on the Ithilien parcel and/or Building, which required Ithilien to cure such violation within 15 days of notice.

ZLDA, section 1.(e), defined "Violation" as

> "any violation of the Zoning Resolution or any building code, fire code, or other law, ordinance or regulation which

would adversely affect the issuance of a temporary or permanent Certificate of Occupancy for any building permit or any other permits or approvals required by law or prevent the issuance of a building permit or any other permits or approvals required by law to build on any parcel that is part of the Merged Zoning Lot or create a non-compliance by any building located on the Merged Zoning Lot with the Zoning Resolution."

In March 2007, seven months before execution of the ZLDA, Ludlow's architects and consultants exchanged e-mail messages that stated that were the cantilever structure built over the courtyard on Ithilien's parcel thereby enclosing such courtyard as then proposed, it would block the light and windows that provided the ventilation for Ithilien's Building. All such messages show that Ludlow was copied on these emails, but Olshan was not. In one such message sent to Ludlow's regulatory/building code consultant on March 21, 2007, Ludlow's building consultant wrote:

> "We need to briefly review this issue and advise if it is possible to cover (enclose) the courtyard and inform us of any provisions required by such.
> If we are unable to utilize these air rights, we will not purchase."

In an e-mail sent on that same day to Ludlow and all of its consultants, except Olshan, Ludlow's regulatory/building code consultant replied:

> "We have briefly looked at the plot plan, and it looks like you can cantilever on other areas over the adjoining building but you can not cantilever over the court. The court is being used for existing building light and ventilation windows and can not be covered. Unless you are able to alter the existing building and remove all the rooms that open to that court. (sic)"

Project meeting minutes from March 22, 2007, with Olshan present, indicate that Ludlow's ownership, design, and construction team were aware of the issue of the cantilever design that called for the blockage of the light and ventilation windows of Ithilien's Building. Minutes from meetings on March 28, April 5, and April 12, 2007, also indicate problems with the cantilever due to the plan to cover the air shaft, with Ludlow copied on the minutes, but not Olshan. According to the minutes of the June 21, 2007 project meeting, Ludlow's building consulting firm was tasked with "Owner authorization is required for the ventilation improvements". According to the minutes, Ludlow, but not Olshan, attended that meeting.

On June 7, 2007, Ludlow's building consultant e-mailed Olshan:

> "I have spoken with [Ludlow], and has authorized you to consult with [Ludlow's land use and zoning lawyers] on the light and easement issue. It is understood that your particular expertise is in Transactional Law, and that the input of a Land Use Attorney such as [Ludlow's land use and zoning lawyers] is required in this instance. While traditional easements begin 5'-10' above the highest point, we would like our easement to begin at the height of the roof with all bulkheads, chimneys, and vents considered permitted obstructions; this unique format for the easement requires a more nuanced interpretation of Zoning Law."

On November 3, 2007, about eleven days before the execution of the ZLDA, Ludlow's land use attorney alerted Ludlow via e-mail that he had received a letter from Ithilien's attorney seeking a "Time of the Essence" closing date for the development rights of

November 16, 2007. In its reply on that date, Ludlow wrote the land use attorney and Olshan that "I understand that the seller of the air rights is totally unreasonable, therefor I am preparing to close on time and not take a chance."

Less than a week before the closing, a member of Ludlow's team advised Olshan that a small wall from the Ithilien Building needed to be addressed as part of the hotel construction. On November 12, 2007, Olson emailed Ludlow's building consultant firm to ascertain whether the existing agreed-to language of the ZLDA would permit Ludlow to do whatever was needed to be done to that small wall short of removing it. Olshan was able to obtain Ithilien's consent to remove the small wall, without any change in the purchase price, and inserted language in section 11 (a) of the ZLDA, providing such consent subject to certain conditions.

By email dated November 12, 2007, Olshan addressed the following to Ludlow's professionals, i.e., its building code/zoning/building expediting service consultants, architects, and Ludlow, in connection with the upcoming closing, which was scheduled for two days later, i.e. on November 14:

> "Is there any building department - or building department related - form, application or document that needs the seller's signature? Seller is obligated post closing to sign such documents, if there are any, but if we can get seller to sign on Wed., we should probably take advantage of the situation."

Ludlow did not send, and Olshan did not receive, any such document.

On January 10, 2008, two months after the closing, Ludlow's architect wrote a letter to Ludlow, with a copy to Ludlow's building consulting firm, stating that Ludlow was very close to obtaining full approval from the Department of Buildings (DOB) for the building with the cantilever, and that

> "even though the DOB examiner had no objection to the airshaft obstruction at [Ithilien's] building, we are still required to vent the kitchens and bathrooms of each apartment. DOB may pick up on this at any time. This may affect the schedule, as it requires permission of the owner and tenants and also requires a separate DOB application. We would like to be proactive and resolve this issue before it becomes a problem."

The building consultant then instructed the architect to ask the mechanical engineer to design a code compliant ventilation system. On January 11, 2008, Ludlow responded: "I fully agree with you, we should start acting on this now".

Four months later, the project meeting minutes of May 8, 2008, indicate that Ludlow's architect advised that there should be a "stamped ventilation drawing in place soon for the cantilever area". The ventilation plans were discussed at June 2008 project meetings. By e-mail sent on June 10, 2008 to its building code/regulatory consultant, Ludlow stated that "perhaps some of the goodwill [Ludlow] has accrued through the air rights transfer deal can be used to cut through this process" of Ithilien's legal and engineering review of "the work we would like to perform to ventilate their building." Olshan was not copied on that e-mail.

The following week, by email dated June 17, 2008, which was sent seven months after the closing, Ludlow contacted Olshan:

> "We are waiting on the owners on 178 Ludlow [Ithilien] to sign an agreement with respect to the ventilation plan we are going to install on their building for their benefit. They have delayed a bit and I thought we could use the goodwill and written agreement per the acquisition to expedite this matter. Can we please discuss this AM".

At this point, construction on the cantilever was underway. Olshan then became involved in drafting letters to Ithilien about the proposed ventilation construction, such as making revisions to Ludlow's engineer's letter setting forth the proposal to install, inter alia, four exterior vent stacks along the sides of the Ithilien Building. In August 2008, in response to Olshan's inquiry, Ludlow's architect informed Ludlow, Olshan, and Ludlow's building consultant of the building code provisions that it determined required the installation of mechanical ventilation on Ithilien's Building.

Olshan was unable to obtain Ithilien's consent to the proposed installation of permanent mechanical ventilation on its Building. Ludlow asserts that, because it was unable to resolve the issue of whether the construction of cantilever rendered the Ithilien Building in violation of the building code, which would thus jeopardize Ludlow's ability to obtain a certificate of occupancy, Ludlow halted the Project construction work on December 3, 2008. Ludlow served a Notice to Cure dated October

20, 2008 (Notice to Cure) upon Ithilien asserting that Ithilien breached the ZLDA § 8(a) in neither curing nor allowing Ludlow to cure the Violation resulting from Ludlow's construction of the cantilever in a manner that blocked the light and window ventilation to Ithilien's Building, specifically, to the residential units therein.

Ithilien's Lawsuit Against Ludlow

On December 3, 2009, Ithilien commenced an action against Ludlow seeking property damages in tort as well as a declaratory judgment (the Ithilien lawsuit). Ithilien moved for a preliminary injunction to enjoin Ludlow from enforcing the Notice to Cure. On that provisional remedy motion, this court determined that Ithilien had shown a likelihood of success on the merits based on the ZLDA, which did not give Ludlow the right to determine that there was a New York City Department of Buildings Code violation, and held that Ithilien was obligated to cure a violation issued by a governmental agency only (Ithilien Realty Corp. v 180 Ludlow Dev. LLC, 2010 WL 11253126, 2010 NY Misc LEXIS 7061 [Sup Ct, NY County 2010]). This court also found that Ithilien established the remaining bases for a preliminary injunction, which holdings were affirmed by the First Department (Ithilien Realty Corp. v 180 Ludlow Dev. LLC, 80 AD3d 455 [1st Dept 2011]). The First Department found that the:

> "purported ventilation 'violation' caused by [Ludlow's] construction of a cantilever over

> [Ithilien's] building was likely not a violation of the Building Code or other law. Permitting [Ludlow] to install a mechanical ventilation system, which would consist of electric motors and a fan on the roof, external ventilation shafts with connections extending through the facade of the building into ten apartments, and interior exhaust fans, would permanently alter [Ithilien's] tenement building"

(id. at 455).

The Instant Lawsuit

Ludlow commenced this action against Olshan, alleging that Olshan committed legal malpractice based on its alleged negligence in drafting the ZLDA. Ludlow claims that Olshan's failure to draft the ZLDA so as to require Ithilien's consent to Ludlow's carrying out the remediation or cure of the alleged Violation by altering Ithilien's Building so that the cantilever would be code compliant, constituted legal malpractice. Olshan answered, denying the material allegations, and asserting a number of affirmative defenses, including comparative negligence on Ludlow's part.

Ludlow now moves for summary judgment, arguing that, as a matter of law, Olshan committed legal malpractice.

In its motion papers, Ludlow urges that it hired Olshan to draft a ZLDA giving it the right to build the cantilever of the hotel on the easement in conformance with law and regulation. More particularly, Ludlow contends that it retained Olshan to draft a ZLDA that gave it the right to access and permanently

modify the Ithilien Building, if needed, to build the cantilever structure of the hotel, as designed, and to obtain a certificate of occupancy. Ludlow argues that, based on Olshan's advice that the ZLDA enabled it to build a code compliant cantilever, it proceeded with construction of the hotel. It contends that Olshan's negligence in drafting the ZLDA that did not ensure Ithilien's obligation to consent to allow remediation in order to construct such cantilever, which construction was the consideration for which Ludlow bargained on its purchase of the air rights, resulted in damages arising from the halting of the Project, which hiatus was compounded by the 2010 crash of the New York City real estate market. Ludlow asserts that it suffered damages arising from Olshan's negligence in obtaining the contractual rights for which Olshan was retained, as without the Ithilien's consent to install the ventilation system to make the cantilever code compliant, it was forced to sell the hotel on an "as is" basis, realizing an eight-figure loss.

In opposition to Olshan's cross motion, Ludlow submits the affidavit of an expert in construction law with experience in negotiating easements and access agreements that give a developer the right of access to a neighbor's property. She asserts that she has reviewed many ZLDAs, and asserts that Olshan legal representation of Ludlow was below the required standard of care. She opines that in that drafting the language of ZLDA, section

11, entitled "Temporary Easements for Support, Protective Covering and Construction", where six easements for construction were listed, without covering the proposed permanent mechanical ventilation, Olshan was deficient in failing to include the qualification "without limitation". She opines that such phrase would have given Ludlow the ability to accommodate any access and encroachment issues that arose. She points to provisions in other ZLDAs in which the transferor gives the transferee an easement to enter over the transferor's premises to facilitate the "safe and timely" construction of the transferee's building, and that similar language should have been used in the Ithilien ZLDA. She opines that Olshan's contention that he had no knowledge of the issues related to the cantilever is contradicted by Olshan's June 1, 2007 email to Ludlow that stated "Let me know about cantilever analysis when done or if you need my input". She offers that "[a]t a minimum, the attorney should be asking the client and its design and construction team for information needed in the drafting process and raising potential issues for the client to consider", and that any attorney who "does not secure the right to build the cantilever, would have failed to exercise the ordinary reasonable skill and knowledge commonly possessed by an attorney practicing in the field".

Olshan counters that it was retained as the transactional lawyer and was free of negligence, having met its duty to draft

agreements, wherein air rights from Ithilien's parcel were effectively transferred to Ludlow, as well as the easement to build the cantilever over Ithilien's parcel and Building. Olshan points out that the cantilever was built and exists today, and that in drafting the agreements, Olshan was reasonable to rely on Ludlow's professionals to provide the required information, and that it had no duty to discover potential building code problems. Olshan argues that as a matter of law, it was not negligent because a ZLDA provision requiring Ithilien to permit Ludlow to make structural changes to its Building, was not pro forma as Ludlow claims, but non-standard and unique. Olshan urges that moreover, any losses sustained by Ludlow arose from Ludlow's own failure to timely provide Olshan with the information as to any ventilation issue the cantilever design and construction presented.

In opposition to Ludlow's motion and in support of its cross motion, Olshan submits the affidavit of an expert with experience in zoning, land use, and environmental law, including over 10 years of experience in reviewing and drafting ZLDAs. In his affidavit, the expert opines that a provision in a contract of sale or ZLDA that requires an air rights seller to consent to the purchaser's making unspecified permanent alterations to the seller's building to address a potential building code violation created by the buyer's design would be a unique provision.

Within a reasonable degree of legal certainly, he states that Olshan did not violate its duty of care as attorneys in failing to draft such provision in the agreements. Nor, according to the expert, did Olshan, as the transactional attorney have a duty to review the ultimate design of the cantilever, which final design did not exist at the time of the closing, to determine whether the design Ludlow developed complied with the building code.

DISCUSSION

To prevail on a legal malpractice claim, the plaintiff must establish that the defendant 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" (Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP, 26 NY3d 40, 49 [2015] [internal quotation marks and citation omitted]).

An error of judgment by an attorney, or the "selection of one among several reasonable courses of action does not constitute malpractice" (Rosner v Paley, 65 NY2d 736, 738 [1985] [citations omitted]).

Unless the fact finder's ordinary experience provides a sufficient basis to judge the attorney's professional service, or the conduct falls below any due care standard, expert testimony

is needed to demonstrate that the attorney failed to exercise the ordinary reasonable knowledge and skill commonly possessed by members of the legal profession (Feldman v Finkelstein & Partners, LLP, 131 AD3d 505, 506-507 [2d Dept 2015] [plaintiff's submissions, which included a conclusory affirmation from a legal expert, failed to raise a triable issue]; Healy v Finz & Finz, P.C., 82 AD3d 704, 706-707 [2d Dept 2011] [plaintiff's expert attorney's conclusory assertion that defendant simply chose the wrong experts is not enough to sustain malpractice claim]; Brady v Bisogno & Meyerson, 32 AD3d 410, 410 [2d Dept 2006] [defendants' attorneys' expert established prima facie that defendants followed accepted and customary legal profession practices, and plaintiff's expert's opinion was conclusory and failed to rebut]).

To establish proximate causation, the plaintiff client must show that "but for" the attorney's negligence, the client would have succeeded on the merits in the underlying action, or would not have incurred any "actual and ascertainable" damages (Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP, 26 NY3d at 50 [internal quotation marks and citations omitted]). "'The failure to demonstrate proximate cause requires dismissal of a legal malpractice action regardless of whether the attorney was negligent'" (Theresa Striano Revocable Trust v Blancato, 71 AD3d 1122, 1124 [2d Dept 2010], quoting Kluczka v Lecci, 63 AD3d 796,

797 [2d Dept 2009] [citations omitted]).

Here, the undisputed facts show that Olshan exercised the applicable standard of care of an attorney drafting a ZLDA, and there is no evidence to support a finding that any alleged negligence in negotiating or drafting proximately caused Ludlow's injuries.

First, the documents submitted by Olshan in its cross moving papers demonstrate that Olshan was retained as the transactional attorney to assist Ludlow in obtaining the air rights from Ithilien and its consent to cantilever over its property, and the contract of sale and the ZLDA drafted by Olshan achieved those goals. Indeed, on June 25, 2007, Ludlow's builidng consultant sent an email to Olshan in which it explicitly recognized that Olshan's particular expertise was in transactional law, and stated that Ludlow authorized Olshan to speak with Ludlow's land use attorney because the input of a land use attorney was required for the Project. Ludlow submits no evidence that tends to show that Olshan was hired to, or agreed to, obtain Ithilien's consent to any potential unspecified permanent physical alterations to Ithilien's Building so that a possible violation caused by the construction Ludlow was planning could be removed. Ludlow's contention that it retained Olshan to obtain from Ithilien an absolute agreement ensuring that the cantilever could be built with an absolute right to modify Ithilien's Building if

Ludlow deemed its construction of the ultimate cantilever design a potential violation, is unsupported by any evidence.

Nor does Ludlow come forward with any evidence, expert or otherwise, that shows that Olshan failed to include in the ZLDA "any requirement that a 'violation' on Ithilien's property caused by Ludlow's construction had to be remedied". Indeed, such assertion is belied by the plain wording of the ZLDA. The ZLDA did provide that a "violation" on Ithilien's property had to be remedied either by Ithilien or Ludlow, but "violation" was defined as "any violation of the Zoning Resolution or any building code, fire code, or other law, ordinance or regulation" in existence at the time of the construction. Furthermore, as determined by this court and affirmed by the Appellate Division, First Department in the Ithilien lawsuit, the definition of "Violation" in the ZLDA did not include Ludlow's unilateral opinion that there was a potential violation, but covered any violation issued by a governmental agency only.

This court finds that expert testimony is necessary to judge Olshan's professional service (see Healy v Finz & Finz, P.C., 82 AD3d at 706). Olshan's expert, with more than 10 years of experience reviewing and drafting ZLDAs, opined that Olshan, as the transactional attorney, exercising its ordinary reasonable skill commonly possessed by a member of the legal profession, would not have undertaken a review of whether a potential design

adopted by the developer would cause a condition in violation of the building code. Olshan's expert affirmation, as well as the affidavit of Olshan, neither of which Ludlow has refuted, establish that Olshan was not responsible to discover that, under the building code, the construction of a cantilever over the air shaft on Ithilien's parcel might require permanent alterations to Ithilien's Building or to include an explicit provision in the ZLDA authorizing Ludlow to make such alterations on the basis of Ludlow's unilateral determination that there could potentially be a building code violation. He further affirms that such a provision would be a unique one, which is unknown to him on any deal, and one which he never drafted. He states that there is no basis to conclude that Olshan was negligent in not having inserted such a provision in its drafts, nor any grounds to find that Olshan erred in not raising with Ludlow the possibility of proposing such a unique provision.

Ludlow's expert[1] affidavit, submitted for the first time only in reply to Olshan's cross motion, is conclusory and fails to rebut the proof of Olshan's expert. She does not dispute that Olshan was entitled to rely on Ludlow and its professionals, and, in fact, asserts that the attorney should ask the client and its

---

[1]Though the extent of expertise would be a matter for the fact finder to determine at trial, the court notes that, while Ludlow's expert states that she has experience negotiating easements and construction access agreements, she does not state that she has any experience drafting ZLDAs.

design and construction team for information on potential issues to consider for the drafting process. Although pointing out that Olshan did ask for the cantilever analysis and whether Ludlow needed his input on such analysis before the closing, she does not cite to any evidence in the record that Ludlow, and/or its consultants and experts responded to such request at any time before the execution of the ZLDA, nor is there any such evidence. Her conclusion that an attorney who specializes in securing rights for construction access and easements, who is aware that the construction of a cantilever is part of the access required, but does not secure the right to build the cantilever, would have failed to exercise the ordinary and reasonable skill required, is belied by the fact that the cantilever actually was built and exists today as part of the Project.

Her suggestion that Olshan erred by not including the phrase "including, without limitation" in the ZLDA that provides for construction easements is simply incorrect. Section 27 of the ZLDA includes a standard provision, which Ludlow's expert overlooked, that states: "[f]or purposes of this Agreement, unless the context otherwise requires: the terms 'include', 'including' and 'such as' shall be construed as if followed by the phrases 'without being limited to' or 'without limitation'". Ludlow's expert cites section 11 (which she misstates as section 10) of the ZLDA as evidence that Olshan drafted provisions that

permitted Ludlow to make permanent alterations with respect to other matters, such as underpinning and foundational work, and that Olshan was negligent in neglecting to do the same with respect to the cantilever, which was the raison d'etre of the ZLDA. Ludlow's expert misreads ZLDA § 11, since such provision relates to the means and methods of constructing the developer's building and protecting the neighboring property and are explicitly captioned as "temporary". Moreover, ZLDA § 11, specifically addresses alterations to the developer's planned cantilever height without amending the ZLDA. It did not involve, as Olshan aptly points out, any open-ended right to make a permanent physical alteration to the seller's own building, which alteration was proposed to avoid only a potential building code violation.

Moreover, where a client withholds obviously critical information from an attorney, and then seeks to hold the attorney liable for malpractice for the client's decisions, a legal malpractice claim will not be sustained. For example, in Stolmeier v Fields (280 AD2d 342 [1st Dept 2001]), the First Department found that the attorney's failure to draft an effective assignment of a home improvement contract did not proximately cause the client's damages. Instead, the client's failure to disclose that it did not have a home improvement license when it executed the agreement, and the evidence that the

client was aware that it needed the license, was the proximate cause, as a matter of law, of his damages, and not the attorney's failure to advise him about the license requirement (id. at 343-344; see Iannacone v Weidman, 273 AD2d 275, 276-277 [2d Dept 2000] [where client failed to tell attorney facts implicating another party until after statute of limitations expired, summary judgment granted dismissing legal malpractice claim]; Merz v Seaman, 265 AD2d 385, 389 [2d Dept 1999] [where client was experienced banker, well aware of risks, and in best position to evaluate transaction, no proximate cause]; Parksville Mobile Modular v Fabricant, 73 AD2d 595, 598 [2d Dept 1979] [attorney not liable for failing to discover fact which client neglected to tell him]; see also Town of N. Hempstead v Winston & Strawn, LLP, 28 AD3d 746, 748 [2d Dept 2006] [where sophisticated client imposes strategic decision on attorney, attorney absolved of malpractice liability]; Zinn v Salomon, Smith Barney, Inc., 14 AD3d 354, 355-356 [1st Dept 2005] [where client actively involved in investment decisions, closely monitored investments, attorney not liable for client's investment decisions]; DiPlacidi v Walsh, 243 AD2d 335, 335 [1st Dept 1997] [failure to close on proposed sales due to client's own action so no proximate cause on legal malpractice claim]).

Here, it is undisputed that Ludlow withheld obviously important information about the cantilever and air shaft - i.e.

that it might require the installation of permanent ventilation equipment on Ithilien's Building. For example, in March 2007, eight months before closing, it became apparent to Ludlow, Ludlow's building consultant and Ludlow's building code consultant, that enclosing or covering over Ithilien's courtyard with the cantilever could create a potential code problem, but Olshan was not copied on the emails discussing this, nor was Olshan included in any, but one, of the meetings. The record demonstrates that Ludlow's construction and design team were fully aware of the problem the cantilever as designed created with respect to the ventilation to Ithilien's Building and units therein. At the June 21, 2007 project meeting, four months before the closing, Ludlow's building consultant was tasked with obtaining authorization from Ithilien to install "ventilation improvements". Ludlow presents no evidence that Olshan was presented with such minutes, and the only document that gave Olshan any hint of an issue, before the closing, was in the form of a cryptic e-mail message from Ludlow's building consultant to Olshan referencing Olshan's role as the transactional lawyer and the need for a "nuanced" reading of the Zoning Law that would be required for the height specifications of the easement. In fact, it was not until six months after the closing, that Olshan was notified of the ventilation problem. Ludlow fails to present any evidence that it, in fact, advised Olshan of its concern, much

less asked Olshan to address this issue with Ithilien prior to the closing. Indeed, by e-mail message shortly before the closing, Olshan asked Ludlow and its consultants if there were any building department or building department-related documents, forms or applications that needed Ithilien's signature before the closing, and received no response. Contrary to Ludlow's contentions, there is not a scintilla of evidence in the record that the potential building code issue and the possible need to construct something permanent on Ithilien's Building was "obvious", or that Ludlow otherwise so informed Olshan.

Ludlow has neither established prima facie nor refuted Olshan's reference to Ludlow's argument, raised for the first time in its motion papers, that assuming arguendo that Ithilien would have agreed to a provision that allowed Ludlow to make unspecified permanent alteration to its Building, such provision would not been binding on the residential tenants of the Building, whose units would have been altered by the installation of permanent mechanical ventilation "improvements". Thus, with the absence of any evidence of Olshan having been advised of either the need for the permanent unspecified permanent alteration provision or for approvals by individual tenants of such alterations, Olshan has met its burden on summary judgment with respect to defeating the element of proximate cause (Global Business Institute v Rivkin Radler LLP, 101 AD3d 651, 651-652 [1st

Dept 2012] ("defendant met its burden on summary judgment of 'showing an absence of proximate cause' between the alleged negligence and plaintiff's losses").

Nor has Ludlow put forth any evidence that tends to show that after the closing, Olshan's actions in attempting to assist Ludlow in obtaining Ithilien's consent were negligent. This court disagrees with Ludlow's assertion that Olshan's advocacy in terms of interpreting the ZLDA as requiring Ithilien to consent to the installation of the permanent mechanical ventilation, in the course of either his negotiations with Ithilien or in defense of Ludlow in the Ithilien's lawsuit tends to show negligence in drafting on Olshan's part.

Red Zone LLC v Cadwalader, Wickersham & Taft LLP (118 AD3d 581 [1st Dept 2014]), cited by Ludlow for the proposition that courts "generally grant summary judgment for the client where an attorney undertakes to obtain effective contractual protection yet fails to accomplish the goal," has been modified by the Court of Appeals to reverse the grant of summary judgment to the client (id., 27 NY3d 1048, 1049 [2016]). Moreover, Red Zone is clearly distinguishable on its facts, in that in Red Zone there was evidence that the defendant law firm drafted an agreement without including the provision (i.e., the capping of the fees at $2 million) for which the client explicitly retained the firm. Here, the evidence is not refuted that Olshan drafted the ZLDA in

a manner that gave Ludlow the right to build the cantilever, which was built, though standing to reason, not in accordance with the design that was prepared only after the signing of the ZLDA. Thus, unlike in Red Zone, Olshan drafted an agreement that was effectual in achieving Ludlow's intention, in this case, to build a cantilever over Ithilien's parcel and Building.

The other cases upon which Ludlow relies are likewise easily and readily distinguishable. Hart v Carro, Spanbock, Kaster & Cuiffo (211 AD2d 617 [2d Dept 1995]), involved a firm which was engaged by clients to draft agreements for a sale collateralized by property owned by the buyer in the Bahamas. After the client obtained a favorable judgment against the buyer, the clients learned that, under Bahamian law, the agreement did not secure any interest in the Bahamian property. The court found that the firm committed malpractice in failing to properly investigate the foreign law and obtain foreign counsel, determining that where "counsel is retained in a matter involving foreign law [for which it had superior knowledge,] it is counsel's responsibility to conduct the matter properly and to know, or learn, the law of the foreign jurisdiction" (id. at 619). Here, in contrast, Olshan was hired as the transactional attorney, and was entitled to rely on Ludlow's entire team of specialists, including Ludlow itself, and the architects, engineers, and building code consultants, who were aware of and had expertise and "superior knowledge" relevant

to the issue, that, in Ludlow's own words, was not obvious, and of which Ludlow failed to advise Olshan before the closing.

Ludlow's reliance on cases involving clear evidence of malpractice, such as an attorney's failure to perfect a security interest by not filing a UCC financing statement (Lory v Parsoff, 296 AD2d 535, 536 [2d Dept 2002]), failure to obtain a stay keeping a notice of pendency in effect (Da Silva v Suozzi, English, Cianciulli & Peirez, 233 AD2d 172, 176-177 [1st Dept 1996] [particularly after court advised attorney upon earlier motion that, without stay, defendants would be entitled to cancel lis pendens]), and failure to follow a contract's requirement for a written notice of cancellation within a specific time frame (Logalbo v Plishkin, Rubano & Baum, 163 AD2d 511, 513-514 [2d Dept 1990]), are likewise clearly distinguishable on their facts.

ORDER

Accordingly, it is

ORDERED that the plaintiff's motion for partial summary judgment of liability is denied; and it is further

ORDERED that the defendant's cross motion for summary judgment dismissing the complaint is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment.

Dated: August 22, 2017

ENTER: