Alrose Steinway, LLC v Jaspan Schlesinger, LLP
2017 NY Slip Op 32082(U)
September 29, 2017
Supreme Court, New York County
Docket Number: 151482/2017
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Andrea Masley, Justice **PART 48**

ALROSE STEINWAY, LLC
Plaintiff,

- v -

JASPAN SCHLESINGER, LLP; STEPHEN P. EPSTEIN, and SCOTT SCHLESINGER,
Defendants.

INDEX NO. 151482/2017

MOTION DATE ____________

MOTION SEQ. NO.01

MOTION CAL. NO. ____________

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits.	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ **Yes** ☐ **No**

Upon the foregoing papers, it is ordered that the motion to dismiss is denied.

The issue before the court is whether plaintiff Alrose Steinway LLC has stated a cause of action for legal malpractice. The elements for such a claim are (1) the negligence of the attorney; (2) the negligence was the proximate cause of the loss sustained; and (3) proof of actual damages. *Bishop v Mauer*, 33 AD3d 497, 498 (1st Dept 2006) (citations omitted).

In the complaint, plaintiff alleges that on February 1, 2014, it entered a 10-year ground lease covering two properties in Astoria, Queens (the Premises). The lease contained an option to purchase the Premises for $11 million after February 1, 2023 (the Option), as well as a right of first refusal to match any third-party offer to purchase the Premises during the term of the lease (the ROFR). Any interim purchaser would purchase the Premises subject to the Option.

On January 6, 2016, Allen Rosenberg, plaintiff's principal, executed an amendment to the lease which voided the Option if plaintiff's landlord sold the Premises to a third-party (the Amendment). Specifically, the Amendment states, "[t]enant's option to purchase during the final lease year under Article XXX shall be void." Plaintiff alleges that defendant Stephen P. Epstein, Esq., a real estate partner at defendant Jaspan Schlesinger, LLP, advised Mr. Rosenberg to sign the Amendment and told Mr. Rosenberg that the Amendment was for "housekeeping" purposes. In an November

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

17, 2015 email, Mr. Epstein writes, "[t]he attached shows the changes requested by [landlord]. The lease that was actually signed was the last version and I believe that is what we agreed to. However, this may be necessary for 'shalom bayit.'" Plaintiff alleges that it relied on Mr. Epstein's advice and, on January 6, 2016, executed the Amendment without reading it. On August 6, 2016, plaintiff exercised its ROFR and entered into a contract to purchase the Premises for $14.5 million. The purchase closed on November 1, 2016.

Plaintiff opines that the Premises were worth $25 million on the date of the malpractice based on an unsolicited offer it received within months of the Amendment to purchase one of the two buildings for $11 million and its sale of the other building for $12.5 million, just one month after the November 2016 closing.

Defendants Jaspan Schlesinger LLP, Mr. Epstein, and Steven Schlesinger rely on the legal axiom that "a party who signs a document is conclusively bound by its terms absent a valid excuse for having failed to read it." *Arnav Indus, Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 304 (2001) (citations omitted). Defendants argue that the documentary evidence submitted in support of their motion to dismiss, emails dated November 17, 2015 and December 30, 2015, establish that Mr. Rosenberg 'virtually' admitted to reading and understanding the Amendment. Defendants opine that Mr. Rosenberg's demand that the landlord issue a recognition agreement as a *quid pro quo* before he would sign the Amendment evidences his reading and understanding of it.

The court rejects defendants' reliance on this rule at this time. Plaintiff is not attempting to avoid the terms of the lease and the Amendment. In fact, plaintiff exercised the ROFR at $14.5 million. "The binding nature of that agreement between plaintiffs and a third party is not a complete defense to the professional malpractice of the law firm that generated the agreement to its client's detriment." *Arnav, supra* at 304-305 (motion to dismiss denied because plaintiffs were entitled to rely on their lawyers' representation that the revision, other than one minor correction, was identical to a document plaintiff had reviewed, agreed to and executed).

Rather, this is a motion to dismiss for failure to state a claim. The court is compelled to accept the facts as alleged in the complaint as true and accord the plaintiff the benefit of every inference. *Leon v Martinez*, 84 NY2d 83, 87-86 (1994). The procedural posture of this case is critical to this court's decision. For example, the court cannot accept defendants' invitation to conclude that Mr. Rosenberg's *quid pro quo* strategy conclusively refutes plaintiff's claim that it did not read the Amendment. Indeed, the absence of any consideration for the Amendment may support plaintiff's claim that Mr. Epstein did not understand the import of the change. Likewise, the court cannot consider on a pre-answer motion to dismiss defendants' claim that Mr. Rosenberg's alleged status as a sophisticated real estate developer preclude this malpractice action. *See Cicorelli v Capobianco*, 89 AD2d 842 (2d Dept 1982), *mod* 90 AD2d 524 (2d Dept 1982), *affd* 59 NY2d 626 (1983) (in a legal malpractice action, client's culpable conduct may be pleaded as an affirmative defense mitigating

attorney's negligence).

The emails submitted by defendants are not documentary proof of plaintiff's reading and understanding and do not contradict plaintiff's allegation that Mr. Epstein misadvised plaintiff about the impact of the Amendment. Even if Mr. Rosenberg read the November 2015 email and the draft Amendment attached, the issue of whether he understood the impact of the handwritten changes is an issue of fact and is relevant to the assessment of damages, if any. *Mandel, Resnik & Kaiser, PC v El Elecs, Inc.*, 41 AD3d 386, 387-88 (1st Dept 2007) ("Any negligence on the part of [client] in reviewing the agreement is merely a factor to be assessed in mitigation of damages."). Plaintiff is entitled to an opportunity to investigate and prove that Mr. Epstein either misunderstood the import of the Amendment or gave incorrect advice. This is not a case of failure to advise. *See Bishop v Maurer*, 9 NY3d 910 (2007).

In addition to malpractice, plaintiff asserts an interesting claim of failure to supervise in its third cause of action against defendants Jaspan Schlesinger LLP and Steven Schlesinger, the managing partner of the firm. There is no vicarious liability for a general partner in an LLP. New York Partnership Law § 26 (b). Although plaintiff argues that Mr. Schlesinger is liable under New York Partnership Law § 26 (c) (i), which provides that "each partner...shall be personally and fully liable and accountable for any negligent or wrongful act or misconduct committed by him or her or by any person under his or her direct supervision and control while rendering professional services on behalf of such registered limited liability partnership," it is undisputed that Mr. Schlesinger never communicated with plaintiff nor supervised Mr. Epstein, another partner. Thus, this causes of action against Mr. Schlesinger are dismissed.

Plaintiff also advances the argument that the absence of any supervisory structure of partners at the firm is malpractice under Partnership Law § 26 (c) (i). It argues that the law firm, as a whole, has an obligation to make reasonable efforts to ensure that its partners are appropriately supervised. Under this theory, Mr. Epstein's status as a partner and 39 years of experience is irrelevant. At this early stage, plaintiff may explore this unique theory against the firm alone.

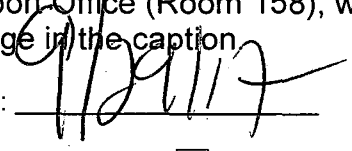
Accordingly, it is

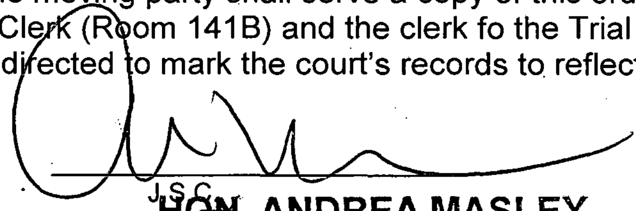
ORDERED that the motion of defendants Jaspan Schlesinger, LLP, Stephen P. Epstein, and Scott Schlesinger to dismiss the complaint is granted and the complaint is dismissed in its entirely as against defendant Scott Schlesinger, with costs and disbursements to defendant Schlesinger as taxed by the Clerk of the Court and the Clerk is directed to enter judgment accordingly in favor of defendant Schlesinger; and it is further

ORDERED, that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED, that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the clerk fo the Trial Support Office (Room 158), who are directed to mark the court's records to reflect that change in the caption.

Dated: 



J.S.C. HON. ANDREA MASLEY

Check one: ☐ **FINAL DISPOSITION** ☑ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**