SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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NEXTERA ENERGY, INC., Index No.: 652484/2017

Plaintiff, **DECISION & ORDER**

-against-

GREENBERG TRAURIG, LLP,

Defendant.

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SHIRLEY WERNER KORNREICH, J.:

In this legal malpractice action, defendant Greenberg Traurig, LLP (Greenberg Traurig) moves, pursuant to CPLR 3211, to dismiss the complaint. Plaintiff NextEra Energy, Inc. (NextEra) opposes the motion. For the reasons that follow, Greenberg Traurig's motion is granted.[1]

[1] The facts recited are taken from the complaint and the documentary evidence submitted by the parties because, on a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1st Dept 1992); *see also Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable 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*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

I. Introduction

NextEra was the prevailing party in an action that was tried in the United States Bankruptcy Court for the Southern District of New York. *See In re Adelphia Commc'ns Corp. (Adelphia Commc'ns Corp. v FPL Group, Inc.)*, No. 02-41729, Adversary Proceeding No. 04-03295 (Bankr SDNY) (the Bankruptcy Action). After trial, the claims asserted by Adelphia Recovery Trust and its subsidiaries (collectively, Adelphia) against NextEra were dismissed, and the judgment entered in NextEra's favor was affirmed by the district court and the Second Circuit. *See In re Adelphia Commc'ns Corp.*, 512 BR 447 (Bankr SDNY 2014), *aff'd*, 2015 WL 1208588 (SDNY 2015), *aff'd*, 652 F App'x 19 (2d Cir 2016).

Between August 2002 and December 2010, NextEra was represented in the Bankruptcy Action by Greenberg Traurig. From December 2010 through the remainder of the proceedings, NextEra was represented by Skadden, Arps, Slate, Meagher & Flom LLP (Skadden). NextEra changed counsel due to Greenberg Traurig's failure to assert an affirmative defense at the outset of the Bankruptcy Action. As discussed herein, such delay resulted in the bankruptcy court (Gerber, J.), upon Skadden's motion, denying NextEra's motion for leave to amend. That said, Judge Gerber made it clear at oral argument that even if the defense had been timely pleaded by NextEra, it would have failed on the merits.

Now, NextEra sues Greenberg Traurig for legal malpractice for failure to timely assert the defense. NextEra contends that had the defense been asserted, it would have resulted in a victory on a motion for summary judgment and avoided the expense of trial.[2] Greenberg Traurig moves to dismiss, arguing, *inter alia*, that regardless of whether it was negligent in failing to

[2] NextEra's complaint, filed on May 8, 2017, asserts a single cause of action for malpractice. *See* Dkt. 2 at 29. References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF).

raise the subject defense in the Bankruptcy Action, it cannot be held liable for malpractice because there is no question that Judge Gerber would have stricken such defense had it been timely pleaded.[3] Simply put, Greenberg Traurig contends that since the only damages NextEra seeks are the expenses of trial and appeal [*see* Complaint ¶ 142], NextEra cannot show that the alleged malpractice was the proximate cause of such damages. The court agrees.

II. The Bankruptcy Proceedings

Adelphia's bankruptcy proceedings began in 2002. In June 2004, Adelphia filed the subject Bankruptcy Action as an adversary proceeding against West Boca Security, Inc. and FPL Group, Inc. (FPLG). *See* Dkt. 16. FPLG is now known as NextEra.[4] Adelphia alleged that a 1999 stock purchase agreement with FPLG was a fraudulent transfer because at the time it repurchased the stock, Adelphia was insolvent and failed to receive fair consideration. *See* Dkt. 15 (the SPA). As relief, Adelphia sought to recover the approximately $149 million it paid for the stock.

In September 2004, FPLG (NextEra), represented by Greenberg Traurig, filed an answer in the Bankruptcy Action. *See* Dkt. 17. That answer *did not* assert a defense under 11 USC § 546(e), a "safe harbor" provision that prohibits a bankruptcy trustee from challenging or unwinding certain securities transactions that affect trading markets.[5] Greenberg Traurig did not

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[3] While legal malpractice claims ordinarily are brought by an unsuccessful litigant in an underlying action, the litigant's ultimate success does not necessarily preclude a malpractice claim. *AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 431-32, 434 (2007); *see Brookwood Cos. v Alston & Bird LLP*, 146 AD3d 662, 666 (1st Dept 2017) (Hence, "the issue is not 'success,' but whether absent [the law firm's] alleged negligence, [the client] would have sustained the expense of having to proceed to trial.").

[4] "FPL" stood for "Florida Power and Light." It is a utility company in Florida.

[5] The current version of section 546(e) provides:

plead a section 546(e) defense because, in its view, that defense affected the bankruptcy trustee's standing and, thus, was a non-waivable subject matter jurisdiction defense.[6]

In any event, the Bankruptcy Action was put on hold in 2008 pending resolution of other aspects of Adelphia's bankruptcy proceedings.[7] In the Fall of 2010, the Bankruptcy Action

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> Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or **settlement payment**, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, or that is a transfer made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, **in connection with a securities contract**, as defined in section 741(7), commodity contract, as defined in section 761(4), or forward contract, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title

11 USC § 546(e) (emphasis added).

[6] In other words, as Judge Gerber explained, Greenberg Traurig sought to leverage the supposedly non-waivable nature of the defense to surprise Adelphia with it at a later stage of the proceedings. All of the facts necessary to prevail on that defense were within Greenberg Traurig's knowledge at the outset of the Bankruptcy Action. *See* Dkt. 22 (2/23/11 Tr. at 51) (Skadden admitting FPLG does not need discovery on its section 546(e) defense). The court will not speculate as to Greenberg Traurig's motive for not asserting the defense at the outset since, given the disposition of the instant motion, that inquiry is not relevant. The bottom line, as discussed herein, is that, in 2004, had Greenberg Traurig asserted the defense, there is no question that Judge Gerber would have dismissed it (i.e., the 2011 Second Circuit case, discussed herein, that might have impelled Judge Gerber to rule otherwise had not yet been decided). Of course, it bears mentioning that if Judge Gerber believed section 546(e) implicated his subject matter jurisdiction, regardless of whether the parties raised the issue, he presumably would not have denied FPLG the right to asset the defense on the grounds of waiver or prejudice. *See SPV Osus Ltd. v UBS AG*, 882 F3d 333, 347 (2d Cir 2018) (lack of subject matter jurisdiction not waivable; "Courts have an independent duty to assess subject-matter jurisdiction."), citing *Great S. Fire Proof Hotel Co. v Jones*, 177 US 449, 453 (1900).

[7] The deadline to amend pleadings in the Bankruptcy Action was January 2, 2007. It bears mentioning that the Bankruptcy Action might not have been put on hold had Greenberg Traurig timely raised the section 546(e) defense because the premise of the standstill was an overlap of issues (e.g., solvency) with other portions of the bankruptcy proceedings. *See* Dkt. 22 (2/23/11 Tr. at 4). Since there was no section 546(e) overlap, Adelphia likely would have sought to address the issue earlier. *See id.*

appeared destined for trial. At that time, dissatisfied with Greenberg Traurig's representation, FPLG began meeting with other law firms. Allegedly, all of those law firms were shocked that Greenberg Traurig had not pleaded a section 546(e) defense, and expressed concern that Greenberg Traurig's failure to do so could result in waiver of the defense. At a November 2010 meeting at which Greenberg Traurig made a pitch to stay on as counsel, it again advised FPLG that section 546(e) is a defense based on lack of standing, and expressed its intent to move for summary judgment on this ground. Nonetheless, FPLG decided to change counsel. On December 14, 2010, Skadden was substituted as FPLG's counsel in the Bankruptcy Action.

After Adelphia refused to stipulate to permit FPLG to amend its answer to assert a section 546(e) defense, in January 2011, Skadden, now representing FPLG, filed a motion for leave to amend. By order dated July 13, 2011, Judge Gerber denied FPLG's motion. *See In re Adelphia Commc'ns Corp.*, 452 BR 484 (Bankr SDNY 2011).[8] He explained that under the Federal Rules of Civil Procedure, leave to amend pleadings after a court-ordered deadline for doing so requires a showing of "good cause" and "diligence", and that FPLG's "request for leave to amend here is grossly untimely under the Court's earlier scheduling orders—four years after the deadline." *See id.* at 486. Critically, Judge Gerber explained that:

> it appears here that the late request arises not by reason of ignorance of the potential defense, but **because [FPLG] predecessor counsel [i.e., Greenberg Traurig] thought it could lie back and raise the [section 546(e) defense] whenever it chose to—a tactic that the Court finds to be debatable in its legal reasoning, and offensive in its gamesmanship.**
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> The Court finds that here [FPLG] has not come close to showing good cause for the delay. [FPLG's] delay here, with respect to an **arguable** defense of which it was always aware, was very troublesome in its duration and even more so in its lack of justification. And the Court does not believe that it should be rewarding

[8] By order dated September 18, 2012, the district court (Berman, J.) denied FPLG's motion for leave to take an interlocutory appeal of Judge Gerber's decision. *See In re Adelphia Commc'ns*

> failures to honor scheduling orders where those failures arise from tactical choices.

Id. at 486-87 (emphasis added).

Judge Gerber's ruling should have come as no surprise in light of his remarks to Skadden during the February 23, 2011 oral argument:

> You and your firm were diligent. I'm much less sure that your predecessor counsel was. Subject to your rights to be heard, it appears to me that your firm's acts and your predecessor counsel, sir, are both imputed to your client. The position your predecessor counsel wanted to take, **that a 546(e) Safe Harbor defense could be raised as first, as a standing objection, and then that this alleged standing objection would rise to the level of being a subject matter jurisdiction objection** which would be an exception to the rule that you got to preserve your positions was a very aggressive one. On the merits, **I cannot for the life of me see how I would agree with that.** The issue, of course, is not whether I would necessarily agree with it. And by "it" here, I'm talking about the ability to hold back and not raise it. I'll come back to the issue later if we need to, its underlying strength of the 546(e) defense. I would not have ruled that a failure to raise it could be excused, but I guess there is a different issue as to whether anybody could reasonably take that position.

Dkt. 22 (2/23/11 Tr. at 3-4) (emphasis added).[9]

Throughout the oral argument, however, Judge Gerber made numerous comments that leave no doubt that he did not believe FPLG had a viable section 546(e) defense that would obviate the need for a trial. For instance, after the Skadden attorney stated that "if you grant the motion to amend, as soon as you want, we're going to move to dismiss for judgment on the

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[9] Judge Gerber distinguished the cases on which Greenberg Traurig relied (and continues to rely here) in making its standing argument. *See* Dkt. 22 (2/23/11 Tr. at 4). Given this court's basis for dismissal, the court need not opine on whether Greenberg Traurig's "strategy" of relying on subject matter jurisdiction as a back-pocket argument qualifies as viable strategic decision that cannot give rise to malpractice liability. *See Rosner v Paley*, 65 NY2d 736, 738 (1985) ("an error of judgment" by counsel "does not rise to the level of malpractice."); *Brookwood*, 146 AD3d at 667 ("Decisions regarding the evidentiary support for a motion or the legal theory of a case are commonly strategic decisions and a client's disagreement with its attorney's strategy does not support a malpractice claim, even if the strategy had its flaws. An attorney is not held to the rule of infallibility and is not liable for an **honest mistake** of judgment where the proper course is open to **reasonable doubt**.") (emphasis added; citations and quotation marks omitted.).

pleadings. And if that wins, you've avoided a whole lengthy expensive fraudulent transfer trial," Judge Gerber responds: "if I were to arbitrage the likelihood of you winning on [section] 546(e), **I wouldn't be considering that a material factor,**" and that "I've already read what you've said on the merits. **It's not a likely winner.**" *See id.* at 10-11 (emphasis added). Judge Gerber explained that "if I accepted [FPLG's] position, since people pay money by using banks, would effectively destroy fraudulent conveyance litigation in any case in which a bank makes a payment, wouldn't it?" *See id.* at 11.[10]

Judge Gerber's comments were not surprising since, at the time the Bankruptcy Action commenced, a Circuit split regarding section 546(e)'s scope existed. To explain, the rule set forth in section 546(e) was enacted in 1978 and amended numerous times, including in 2006. In enacting section 546(e), "Congress recognized that the unwinding of settled securities transactions could create an environment hostile to capital formation, engendering diminished investor confidence, as well as increased costs and volatility of transactions in capital markets. To that end, strong policy reasons favor a statutory reading of settlement payments that protects participants in the securities markets and promotes finality of securities transactions, as a counterbalance to safeguarding the interests of creditors." *In re Adler, Coleman Clearing Corp.*, 263 BR 406, 479 (SDNY 2001). Some courts, however, reasoned that private securities transactions that did not affect the complex plumbing of the securities settlement system were

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[10] Judge Gerber also addressed the concern, as noted earlier, that a section 546(e) defense was not raised at the outset:

> I guess there's another possibility, that [Greenberg Traurig] didn't become aware of the 546(e) defense until a later time, even though most bankruptcy litigators, the people who do this stuff all the time ... would regard it as a pretty -- as something that people always raise, whether it's got any merit or not.

Id. at 18.

not considered to be covered by section 546(e). *See In re Grafton Partners*, 321 BR 527, 539 (BAP 9th Cir 2005) (threshold issue is whether trade "involve[s] the clearance and settlement process [or whether it is a] non-public transaction[] that do[es] not involve that process."). Consequently, if the trade "did not occur on a public market and did not involve the process of clearing trades," it fell "within the pattern of cases that have concluded that a statutorily-protected 'settlement payment' is not present." *Id.* at 540. Based on this reasoning, many courts, including those in the Second Circuit prior to *Enron Creditors Recovery Corp. v Alfa, S.A.B. de C.V.*, 651 F3d 329 (2d Cir 2011), held "that granting a safe harbor to a constructively fraudulent private stock sale has little if anything to do with Congress' stated purpose in enacting section 546(e): reducing systemic risk to the financial markets." *In re MacMenamin's Grill Ltd.*, 450 BR 414, 419 (Bankr SDNY 2011) (collecting cases).[11] The stock sale governed by the SPA is an example of a private transaction that does not implicate systemic market structure risk.

[11] It should be noted that the Circuit split was recently *partially* resolved by the United States Supreme Court. *See Merit Mgmt. Group, LP v FTI Consulting, Inc.*, 830 F3d 690, 691 (7th Cir 2016) ("we find it necessary to answer only one question: whether the section 546(e) safe harbor protects transfers that are simply conducted through financial institutions (or the other entities named in section 546(e)), where the entity is neither the debtor nor the transferee but only the conduit. We hold that it does not."), *aff'd*, 138 SCt 883 (2018); *see also In re DSI Renal Holdings, LLC*, 574 BR 446, 468-69 (Bankr D Del 2017) ("On May 1, 2017, the United States Supreme Court granted certiorari to review the decision of the [Seventh Circuit in *Merit*], which may resolve a split among circuit courts [] regarding the issue of whether the safe harbor of § 546(e) 'protects transfers that are simply conducted through financial institutions (or the other entities named in section 546(e)), where the entity is neither the debtor nor the transferee but only the conduit.'") (citation omitted). That being said, the Supreme Court in *Merit* did not reach the question of how broadly the term "settlement payment" should be construed. *See Merit,* 138 SCt at 892 n.5 ("The parties do not ask this Court to determine **whether the transaction at issue in this case qualifies as a transfer that is a 'settlement payment' or made in connection with a 'securities contract'** as those terms are used in §546(e), nor is that determination necessary for resolution of the question presented.") (emphasis added), *but see id.* n.6 (rejecting approach of *In re Quebecor World (USA) Inc.*, 719 F3d 94, 98 (2d Cir 2013), which had relied on *Enron*).

Though it is clear to this court that Judge Gerber did not think FPLG could avoid trial by interposing a section 546(e) defense, the wrinkle here is that after the February 23, 2011 oral argument, but shortly before Judge Gerber issued his written opinion on July 13, 2011 – on June 28, 2011, the Second Circuit issued an opinion that interpreted section 546(e) to apply to a broader range of transactions than other courts. *See Enron*, 651 F3d 329.[12] The question presented in *Enron* was whether section 546(e) applies to pre-maturity redemption of commercial paper. *See id.* at 330. The Second Circuit explained that "Congress enacted § 546(e)'s safe harbor in 1982 as a means of 'minimiz[ing] the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries.'" *Id.* at 334 (citation omitted). Specifically, the concern was "[i]f a firm is required to repay amounts received in **settled securities transactions**, it could have insufficient capital or liquidity to meet its current securities trading obligations, **placing other market participants and the securities markets themselves at risk**." *Id.* (emphasis added). Section 546(e) "limits this risk by prohibiting the avoidance of 'settlement payments' made by, to, or on behalf of a number of participants in the financial markets." *Id.*[13]

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[12] *See also In re Quebecor*, 719 F3d at 98 ("There is a split of authority regarding what role a financial institution must play in the transaction for it to qualify for the section 546(e) safe harbor. Three circuit courts have concluded that the plain language includes any transfer to a financial institution, even if it is only serving as a conduit or intermediary. Only the Eleventh Circuit has held that the financial institution must acquire a beneficial interest in the transferred funds or securities for the safe harbor to apply. In *Enron*, we cited the Third, Sixth, and Eighth Circuits' decisions with approval and concluded that 'the absence of a financial intermediary that takes title to the transacted securities during the course of the transaction is [not] a proper basis on which to deny safe-harbor protection.'") (citations omitted).

[13] Even the dissent in *Enron* recognized that redemption of commercial paper involves utilizing the mechanisms of the Depository Trust Company (DTC). *See Enron*, 651 F3d at 339 (Koetl, J., dissenting). Attempting to unwind transactions in a manner that affects the machinations of how DTC (like its affiliate NSCC) tracks securities ownership is an extremely difficult task. *See In re Dole Food Co.*, 2017 WL 624843, at *4 n.1 (Del Ch 2017), citing *In re Appraisal of Dell Inc.*,

The *Enron* court noted that federal courts outside of the Second Circuit had "rejected limitations on the definition [of 'settlement payment' in section 741(8), which applies to section 546(e), to] exclude transactions in privately held securities or transactions that do not involve financial intermediaries that take title to the securities during the course of the transaction." *See id.* The Second Circuit, however, rejected this interpretation. *See id.* at 334-36. The Court then held that the redemption of debt instruments, such as the commercial paper at issue in *Enron*, were covered by the safe harbor in section 546(e). *See id.* at 336 ("Because Enron's redemption payments completed a transaction in securities, we hold that they are settlement payments within the meaning of § 741(8).").

That said, the *Enron* court addressed the concern raised by the dissenting judge – "that applying the safe harbor to Enron's commercial paper redemption would contradict 'uniform case law spanning two decades' that allows 'avoidance of debt-related payments.'" *See id.* at 337. The Court noted that "[t]he cases on which Enron relies [] involve non-tradeable bank loans, not widely issued debt securities." *Id.* The Court further reasoned that "[c]oncluding that the safe harbor protects payments made to redeem tradeable debt securities does not contradict caselaw permitting avoidance of payments made on ordinary loans" because "[i]nterpreting the term 'settlement payment' in the context of the securities industry will exclude from the safe harbor payments made on ordinary loans." *Id.*

III. Discussion

There is no question that *Enron* was a stark change in the law. NextEra suggests that it may well have been able to prevail on a section 546(e) defense under *Enron*. NextEra relies on the fact that *Enron* was decided before Judge Gerber denied its motion for leave to amend and

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2015 WL 4313206, at *3-7 (Del Ch 2015). But here, the SPA governs a private stock sale that does not seriously implicate this concern.

takes the position that but for Greenberg Traurig's neglect in pleading a section 546(e) defense, Judge Gerber would have been constrained to consider the merits of the defense.[14] While the court, of course, assumes Judge Gerber would not disregard controlling Second Circuit authority, and assuming (without deciding) that *Enron* would indeed provide NextEra with a viable section 546(e) defense, those assumptions are of no moment to the viability of NextEra's malpractice claim. There is no question of fact that the only way NextEra could have had the opportunity to assert a section 546(e) defense was if Greenberg Traurig asserted it earlier in the Bankruptcy Action. But had it done so, at that point in time, Judge Gerber would have stricken the defense on the merits. Judge Gerber's pre-*Enron* view is no secret and was in accord with the pre-*Enron* consensus in the Southern District that a private sale of stock, such as that governed by the SPA, is not covered by section 546(e). *See* Dkt. 22 (2/23/11 Tr. at 10-11); *see also In re Global Crossing, Ltd.*, 385 BR 52, 56 n.1 (Bankr SDNY 2008) (Gerber, J.) ("Recovery of an improper dividend from the ultimate recipient—as contrasted to a clearing agent or broker that might have been a conduit or counterparty to dealings with others in the securities industry—raises no risks to the stability of the securities markets."). Hence, Greenberg Traurig's failure to plead a section 546(e) defense cannot be said to be the proximate cause of NextEra's need to expend money on a trial.[15]

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[14] *See generally In re Magnesium Corp. of Am.*, 460 BR 360, 366-76 (Bankr SDNY 2011) (Gerber, J.) (post-*Enron* analysis of section 546(e)).

[15] It is extremely unlikely that, had Judge Gerber stricken the defense years earlier, an appeal of that decision could have made its way to the Second Circuit sooner. Generally, there is no right to interlocutory appeal in federal court, and it is speculative at best to assume that leave to take an interlocutory appeal would have been granted. *See* 28 USC § 158. Indeed, as noted earlier – **after *Enron* was decided** – FPLG's motion for leave to take an interlocutory appeal from Judge Gerber's denial of leave to amend was denied by the district court.

This fact is dispositive. It is well settled that "in order to prevail in an action for legal malpractice, the plaintiff must plead factual allegations which, if proven at trial, would demonstrate that counsel had breached a duty owed to the client, **that the breach was the proximate cause of the injuries**, and that actual damages were sustained." *Dweck Law Firm, LLP v Mann*, 283 AD2d 292, 293 (1st Dept 2001) (emphasis added); *see Heritage Partners, LLC v Stroock & Stroock & Lavan LLP*, 133 AD3d 428, 428-29 (1st Dept 2015). On a malpractice claim, proximate causation is "but for" causation. *Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 50 (2015), citing *AmBase*, 8 NY3d at 434. Here, there is nothing that Greenberg Traurig could have done to avoid a trial and, therefore, its alleged malpractice was not the "but for" cause of NextEra's trial and appellate expenses. While it surely would have been better practice for Greenberg Traurig to plead a section 546(e) defense at the outset if that was a defense it intended to assert, the failure to do so in this instance did not end up harming NextEra. FPLG ultimately won at trial because Adelphia failed to prove insolvency.[16] The only marginally better outcome would have been a win on summary judgment. Given the timeline of the Bankruptcy Action, an earlier assertion of a section 546(e) defense could not have plausibly resulted in summary dismissal. *See Heritage Partners LLC v Stroock & Stroock & Lavan LLP*, 155 AD3d 561 (1st Dept 2017) (causation cannot be based on "speculative nature of plaintiffs' claim."). NextEra's section 546(e) defense had two possible fates: (1) early pleading, which would have resulted in dismissal based on Judge Gerber's clear pre-*Enron* view of the law; or (2) late pleading, which, as we know, resulted in dismissal for

[16] *Adelphia*, 512 BR at 453 ("I conclude that: (1) the two transactions—Adelphia's January 1999 repurchase of its stock, and its October 1999 purchase of the Olympus Partnership Interest—were not interdependent, and Adelphia's purchase of its stock was indeed without consideration; but that (2) at the time of the transaction, Adelphia was not yet insolvent, left with inadequate capital, or unable to pay its debts as they matured.").

inexcusable delay. Greenberg Traurig could not have avoided these outcomes. Ergo, it cannot be held liable for malpractice. Accordingly, it is

ORDERED that Greenberg Traurig's motion to dismiss the complaint is granted, and the Clerk is directed to enter judgment dismissing the complaint with prejudice.

Dated: April 11, 2018

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C