Bloostein v Morrison Cohen LLP
2019 NY Slip Op 30379(U)
February 18, 2019
Supreme Court, New York County
Docket Number: 651242/2012
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART** **IAS MOTION 53EFM**

Justice

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JONATHAN BLOOSTEIN, STEVEN BRANDIS, DAVID GREENBERG, RICHARD HUANG, SALVATORE ROMO, JOSEPH ROSENHECK, JB 1042 INVESTOR LLC, SBRAN 1042 INVESTOR, LLC, DG 1042 INVESTOR LLC, RH 1042 INVESTOR LLC, SR 1042 INVESTOR LLC, JR 1042 INVESTOR LLC,

Plaintiff,

- v -

MORRISON COHEN LLP, BRIAN SNARR, JOHN DOES 1 THROUGH 10,

Defendant.

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INDEX NO. 651242/2012

MOTION DATE N/A, N/A

MOTION SEQ. NO. 007 & 008

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 007) 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 320, 321, 322, 323, 324

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 315, 316, 317, 318, 319

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Borrok, J.S.C.

Jonathan Bloostein et al. (the **Plaintiffs**) are small to mid-sized business owners who engaged Morrison Cohen LLP (**Morrison Cohen**) to represent them in connection with a reinvestment transaction that was designed by Stonebridge Capital (**Stonebridge**). The terms of the transaction (the **Transaction**) are relatively straight forward and not in dispute. Stonebridge and the Plaintiffs each formed special purpose vehicles. Stonebridge formed the Stonebridge Pass-Through Trust (**Stonebridge Trust)**. The Plaintiffs each formed a single member limited liability company (each, a **1042 LLC**). The Plaintiffs sold shares in their businesses to their

employees through Employee Stock Ownership Plan (**ESOP**) transactions. Each 1042 LLC issued promissory notes (the **LLC Notes**) to Stonebridge Trust. Simultaneously, Stonebridge Trust issued promissory notes (the **Pass Through Notes**) to Nomura International PLC (**Nomura**). The LLC Notes were pledged as collateral for the Pass Through Notes. The proceeds of the LLC Notes as well as certain cash contributions made by the Plaintiffs were used to purchase certain corporate bonds (the **Underlying Bonds**) which were intended to be qualified replacement property (**QRP**) under 26 U.S.C. § 1042. The Underlying Bonds were pledged as collateral for the LLC Notes.

In connection with the Transaction, Brown Rudnick LLP (**Brown Rudnick**) was retained to provide an opinion (the **Tax Opinion**). The scope of the representation is defined on page 8 of the Tax Opinion which provides in relevant part:

> You have requested that we advise you regarding the requirements concerning QRP under Section 1042(c)(4) of the Code. You have also requested our opinion regarding the treatment of the Transaction under Section 1042 of the Code. Specifically, you have asked whether: 1) assuming the Section 1042 Investors have complied with all of the other substantive and procedural requirements to qualify for non-recognition under Section 1042 of the Code, whether purchase of the Underlying Bonds through the Section 1042 Investors LLC would qualify as a purchase of QRP in accordance with Section 1042; 2) assuming that the purchase of the Underlying Bonds by the Section 1042 Investor qualifies for non-recognition treatment under Code Section 1042, would the remaining components of the Transaction cause the Section 1042 Investors to be treated as having disposed of such QRP; 3) in the event that Section 1042 of the Code did not apply to the transaction, would additional tax liability be imposed upon the Securityholders as a result of the inability of the Section 1042 Investors to realize the benefits of Section 1042 of the Code; and 4) whether any Federal income tax imposed upon an Issuer will adversely effect its ability to make payments pursuant to the Pass-Through Notes.

> In addition, you have asked whether the Notes would be treated as Debt or Equity for U.S. Federal income tax purposes, and whether the ESOP will have any claim of ownership under the Code as to the Underlying Bonds or the LLC Notes.[1]

Page 33 of the Tax Opinion under the heading "Opinion" sets forth the actual opinion given by Brown Rudnick. It provides in relevant part:

> <u>Opinion</u>
>
> Based on and subject to the foregoing facts, and subject to the assumptions and qualifications contained herein, it is our opinion that the LLC will be disregarded as an entity separate from its owner within the meaning of Code Section 7701 and Treasury Regulation §§ 301.7701-2 and 301-7701-3, the Section 1042 Investor's purchase of the Underlying Bonds through his LLC will be treated as the purchase of QRP; in the event that Section 1042 of the Code did not apply to the Transaction, no additional tax liability would be imposed upon the Securityholders as a result of the inability of the Section 1042 Investors to realize the benefit of Section 1042 of the Code; any Federal income tax imposed upon an Issuer will not adversely affect its ability to make payments pursuant to the Pass-Through Notes; each class of the Pass-Through Notes will constitute indebtedness of the related issuer for U.S. federal income purposes; and the ESOP will not have any claim of ownership under the Code as to the Underlying Bonds or the LLC Notes.
>
> Based on and subject to the foregoing facts, and subject to the assumptions, qualifications, and exercise of its judicial discretion, and after full consideration of all of the relevant discussion contained herein and the reasoned analysis of analogous case law (though there is no precedent directly on point, the cases are extremely fact-specific, and the issue relies within the judgment of the courts, which have broad discretion), it is our opinion that if the matter were properly briefed and presented a U.S. federal court of competent jurisdiction more likely than not would hold that the remaining components of the Transaction would not cause a Section 1042 Investor to be treated as having disposed of the underlying bonds for purposes of Section 1042(e) of the Code.

In other words, and for the avoidance of doubt, the Tax Opinion was a "more likely than not opinion" given as to likelihood of success if the Internal Revenue Service (**IRS**) were to challenge the treatment of the pledge of the Underlying Bonds by attempting to recharacterize the Transaction as a sale and not as a loan (i.e., as opposed to an enforceability opinion,

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[1] *See* Pg. 8 of the Opinion Letter. Although as part of this determination, Brown Rudnick also opined as to whether the 1042 LLCs would be disregarded for tax purposes pursuant to Treas. Reg. 301.7701-3(b), this portion of their Opinion is not raised in this case and therefore will not be addressed here.

substantive non-consolidation or other opinion). Finally, and for the avoidance of doubt, the Tax Opinion provides that the opinion is "limited to the Federal tax treatment of the transactions or matters that are the subject of this Opinion."[2]

A few days prior to the closing of the Transaction, there was a change in the Event of Default section of the Nomura loan documents. The documents had provided that Nomura could declare an Event of Default (and sell the Underlying Bonds causing immediate tax recognition by the Plaintiffs) if (the **Original Rating Trigger Event of Default Provision)**:

> [T]he rating with respect to any Underlying Bond fails to or falls below "B2 by Moody's or "B" by S&P.[3]

Shortly before the closing, the provision was modified (the **Revised Rating Trigger Event of Default Provision**) to provide that Nomura could call a default if:

> [T]he rating with respect to any [sic] financial guaranty insurance policy related to any Underlying Bond fails to or falls below "B2 by Moody's or "B" by S&P.[4]

In other words, pursuant to the Original Rating Trigger Event of Default Provision (i.e., the original version of the provision), Nomura had the right to call a default if there was a downgrade in the ratings of the Underlying Bonds,[5] but in the Revised Rating Trigger Event of

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[2] Ex. C, Opinion Letter, Pg. 34, to Attorney Affidavit of Jamie R. Wozman, dated September 11, 2018.
[3] Morrison Cohen's Memorandum of Law in Opposition to Brown Rudnick LLP's Motion For Summary Judgment Pg. 3, Fn. 9, citing Affirmation of Brian B. Snarr in Support of Defendants' Motion for Summary Judgment, dated September 11, 2018 (NYCSEF Doc. No. 273) (**Snarr Aff.**), ¶ 15; *see also* the Affirmation of David Ebert in Opposition to Brown Rudnick LLP's Motion for Summary Judgment, dated October 5, 2018 (**Ebert Aff. in Opp.**), Ex. 1, ¶ 32.
[4] Morrison Cohen's Memorandum of Law in Opposition to Brown Rudnick LLP's Motion for Summary Judgment, Pg. 3, Fn. 10, citing Snarr Aff. ¶17; *see also* Ebert Aff. in Opp., Ex. 1, ¶ 40.
[5] Inasmuch as the bonds were "wrapped bonds," two ratings downgrades would have to occur to cause an Event of Default (i.e., the rating of the Underlying Bonds and the guarantor insurer of those Underlying Bonds). The credit rating of a "wrapped bond" is the higher of (i) the credit rating of the Underlying Bond and (ii) the credit rating of the insurer that issued the insurance policy guaranteeing payment of the Underlying Bond. *See* Morrison Cohen's Memorandum of Law in Opposition to Brown Rudnick LLP's Motion for Summary Judgment, Fn. 21, citing Snarr Aff., ¶ 16; *see also* Ebert Aff. in Opp., Ex. 1, ¶ 27.

Default Provision, Nomura could call a default if the insurer of the Underlying Bonds was downgraded regardless of the rating of the Underlying Bonds.

Following the closing of the Transaction on September 26, 2007, the rating of the insurer of the Underlying Bonds was downgraded, Nomura called a default and the Underlying Bonds (other than that of Mr. Bloostein, who covered) were sold causing the Plaintiffs to incur various damages, including having to pay significant capital gains taxes which the Plaintiffs had expected to defer until the maturity of the Underlying Bonds.

The Plaintiffs sued Morrison Cohen and Brian Snarr of Morrison Cohen (Mr. Snarr together with Morrison Cohen, hereinafter, collectively, the **MC Defendants**) alleging that they were negligent in failing to address the Revised Rating Trigger Event of Default Provision to which the Plaintiffs allege they did not agree. The MC Defendants commenced a third-party action against Stonebridge and Brown Rudnick. The third-party complaint stated three causes of action: (1) indemnification as against Stonebridge, (2) indemnification and contribution against Brown Rudnick in connection with the Tax Opinion, and (3) indemnification and contribution with respect to the documents drafted principally by Brown Rudnick in connection with the Transaction (the **Transaction Documents**). Motions to Dismiss were filed and on July 11, 2016, the Court (1) dismissed the claims against Stonebridge, (2) dismissed the indemnification but not the contribution claim against Brown Rudnick and (3) denied dismissal of the contribution against Brown Rudnick as to the Opinion Letter (the **July 2016 Decision**). On April 21, 2017, the Court dismissed the contribution claim against Brown Rudnick as to the Transaction Documents. Brown Rudnick impleaded Stroock & Stroock & Lavan LLP (**Stroock**)

as Stroock had also provided legal services to Stonebridge in connection with the drafting, editing, and reviewing of the Transaction Documents. Stonebridge commenced an arbitration proceeding against Stroock alleging legal malpractice relating to the Transaction, which was resolved pursuant to a settlement agreement. Pursuant to a certain Order of this Court, dated June 7, 2017, the claims against Stroock were dismissed.

Discovery in this case is now complete and note of issue was filed on August 13, 2018. Brown Rudnick now moves for summary judgment pursuant to CPLR § 3212 seeking dismissal of Morrison Cohen's contribution claim (mtn. seq. no. 007) and the MC Defendants move for summary judgment pursuant to CPLR § 3212 seeking dismissal of the Plaintiffs' claims (mtn. seq. no. 008).

Summary judgment should be granted when the movant presents evidentiary proof in admissible form that there are no triable issues of material fact and that there is either no defense to the cause of action or that the cause of action or defense has no merit. CPLR § 3212(b). The burden is initially on the movant to make a prima facie showing of entitlement to judgment as a matter of law tendering sufficient evidence in admissible form to demonstrate the absence of any material fact. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Failure to make such a prima facie showing requires denial of the motion. *Id.,* citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985). Once the showing has been made, the burden of going forward with the proof shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a material issue of fact, which requires a trial. *Alvarez*, 68 NY2d at 324, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

I. Brown Rudnick's Motion for Summary Judgment (Mtn. Seq. No. 007)

Reference is made to the July 2016 Decision. In the July 2016 Decision, the Court noted that under CPLR § 1401, a claim for contribution is limited to "personal injury, injury to property or wrongful death," and that a breach of contract is not an injury to property within the meaning of CPLR § 1401, citing *Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley,* 71 NY2d 21, 26 (1987) and *Structure Tone, Inc. v Universal Servs. Group, Ltd.*, 87 AD3d 909, 911 (1st Dept 2011). However, the Court noted that although CPLR § 1401 requires the existence of tort liability independent of a breach of contract, the mere existence of a contract does not preclude the possibility of tort liability, citing *Landon v Kroll Lab. Specialists, Inc.,* 91 AD3d 79, 83 (2d Dept 2011). In analyzing Brown Rudnick's motion to dismiss the contribution claim, the Court relied on *Millennium Import, LLC v Reed Smith LLP,* 104 AD3d 190 (1st Dept 2013) and *Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood,* 80 NY2d 377 (1992). In *Millennium Import,* the Court held that attorneys may be liable for their negligence both to those with whom they have actual privity of contract and to those with whom the relationship is so close as to "approach privity." In *Prudential*, the Court of Appeals held that a relationship "approaches privity" where (i) there is an awareness by the maker of a statement that is to be used for a particular purpose, (ii) reliance by a known party in furtherance of that purpose, and (iii) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance. The Court reasoned that Brown Rudnick was aware that the Tax Opinion was to be used for the purpose of the Transaction, the Tax Opinion was sent to each Plaintiff, and the Tax Opinion indicated that it could be relied upon by the Plaintiffs. Inasmuch as the MC Defendants alleged Brown Rudnick's tortious conduct

contributed to the injury, the Court denied Brown Rudnick's motion to dismiss the claim for contribution because in adjudicating a motion to dismiss, the Court must afford the pleadings a liberal construction, accepting the allegations as true, provide the plaintiff with every possible favorable inference, and only grant a motion to dismiss where the factual allegations, taken together, fail to manifest a cognizable cause of action. *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.,* 5 NY3d 582, 591 (2005); *Polonetsky v Better Homes Depot,* 97 NY2d 46, 54 (2001).

Now, Brown Rudnick brings this motion for summary judgment arguing that there are no issues of material fact for trial and that dismissal is mandated because there is no evidence that its conduct in issuing the Tax Opinion fell below the degree of skill commonly exercised by an ordinary member of the legal community or that the Tax Opinion was the proximate cause of the loss. In support of its position, Brown Rudnick argues that both Alexis Gelinas, Esq., the Plaintiffs' tax expert, and Stanley E. Bulua, Esq., Brown Rudnick's tax expert, opined that the conclusions provided in the Tax Opinion were correct, and similar to other opinion letters issued in connection with transactions like the Transaction, and the MC Defendants have failed to offer an expert disclosure or report supporting the allegation that Brown Rudnick deviated from the accepted standard of care in its issuance of the Tax Opinion.[6] In addition, Brown Rudnick argues that although there was a single reference to the Original Rating Trigger Event of Default Provision on page 25 of the 35-page Tax Opinion, the Tax Opinion is premised on the Revised Rating Trigger Event of Default Provision, and according to Mr. Bulua, the single reference to the Original Rating Trigger Event of Default Provision did not affect the conclusion reached in

[6] *See Merlin Biomed Asset Mgt., LLC v Wolf Block Schorr & Solis-Cohen LLP,* 23 AD3d 243 (1st Dept 2005); *Zeller v Copps,* 294 AD2d 683, 684 (3d Dept 2002); *Orchard Motorcycle Distribs., Inc. v Morrison Cohen Singer & Weinstein, LLP,* 49 AD3d 292 (1st Dept 2008); *Schadoff v Russ,* 278 AD2d 222 (2d Dept 2000).

the Tax Opinion. Moreover, Brown Rudnick argues that the MC Defendants cannot prove proximate cause – i.e., (1) that the Plaintiffs read the Tax Opinion, (2) noticed the single reference to the Original Rating Trigger Event of Default Provision, and (3) relied on that single reference to the Original Rating Trigger Event of Default Provision rather than the six references to the Revised Rating Trigger Event of Default Provision. Furthermore, Brown Rudnick argues that Mr. Greenberg testified that he did not read the Transaction Documents, let alone the Tax Opinion, and therefore could not have relied on it in determining whether to enter the Transaction, and the other four Plaintiffs (Mssrs. Huag, Rosenbeck, Brandis and Bloostein) testified that they either (x) did not recall if they read the Tax Opinion prior to entering the Transaction or (y) otherwise did not rely on the Tax Opinion for any other purpose than how the IRS would treat the transaction. Put another way, Brown Rudnick argues that as a factual matter, the Plaintiffs did not rely on the Tax Opinion as to what triggering event would result in Nomura being able to call an Event of Default. Finally, Brown Rudnick argues that reliance on the Stonebridge economic analysis, which the MC Defendants allege was flawed because it addressed the Original Rating Trigger Event of Default Provision and not the Revised Rating Trigger Event of Default Provision, cannot form a basis for finding that Brown Rudnick breached an accepted standard of care because the MC Defendants have failed to provide any evidence that the Plaintiffs entered into the Transaction even in part because the Tax Opinion stated that it relied upon the Stonebridge economic analysis in issuing the Tax Opinion.

In its opposition papers, the MC Defendants argue that the Tax Opinion suffers from a "fundamental flaw" in that the Revised Rating Trigger Event of Default Provision in the Transaction Documents is premised on an event that could never occur – i.e., the provision refers

to an insurance policy rating downgrade and insurance companies, not insurance policies, are rated.[7] In addition, the MC Defendants argue that the analysis performed by Brown Rudnick turned on, among other factors, the "burdens of ownership" and this, in turn, was based, at least in part, on the likelihood of a default under the Transaction documents, which included the "flawed provision" referred to above. Further, the MC Defendants argue that expert testimony is not necessary to create an issue of fact for the Court to determine that Brown Rudnick committed malpractice. And finally, the MC Defendants argue that there are issues of fact as to whether the Plaintiffs relied on the Tax Opinion and whether such alleged reliance proximately caused or contributed to the Plaintiffs' alleged damages.

In its reply papers, Brown Rudnick argues that the MC Defendants fail to allege an issue of fact as to whether Brown Rudnick deviated from the accepted standard of care in its issuance of the Tax Opinion because the MC Defendants' opposition papers do not include an expert opinion that controverts the expert opinion offered by Alexis Gelinas and Stanley Bulua, both of whom conclude that the Tax Opinion reached the correct conclusion (i.e., that it was more likely than not that the IRS would treat the transaction as a loan and not a sale)[8] and that Brown Rudnick did not deviate from the accepted standard of care in issuing the Tax Opinion. To the extent that the MC Defendants argue that the Revised Rating Trigger Event of Default Provision is not enforceable, this argument was flatly rejected by the First Department.[9] In addition, Brown Rudnick argues that although the MC Defendants correctly point out that Mr. Bulua

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[7] Morrison Cohen's Memorandum of Law in Opposition to Brown Rudnick LLP's Motion for Summary Judgment, Pg. 3, Fn. 11, citing Snarr Aff. ¶ 15; *see also* Ebert Aff. in Opp., Ex. 1, ¶ 32.
[8] Reply Memorandum of Law Submitted by Third-Party Defendant Brown Rudnick LLP In Further Support of its Motion For Summary Judgment, Pg. 3., citing Bulua Aff. and the Affidavit of Jamie R. Wozman, dated September 11, 2018, Ex. I, Pg. 52.
[9] *Stonebridge Capital, LLC v Nomura Intl. PLC,* Supreme Court, New York County, Index No. 602081/2008; *Stonebridge Capital, LLC v Nomura Intl. PLC,* 68 AD3d 546 (1st Dept 2009).

acknowledged that the risk of loss was a factor in analyzing whether Brown Rudnick deviated from the appropriate standard of care, risk of loss is one of seven factors that Brown Rudnick correctly considered. And, Mr. Bulua concluded that Brown Rudnick did not in fact deviate from the appropriate standard of care. Furthermore, Brown Rudnick argues that because the MC Defendants failed to submit an expert affidavit as to the applicable standard of care, it cannot create a genuine issue of material fact as to Brown Rudnick's negligence.[10] To the extent that the MC Defendants argue that expert testimony is not necessary, generally, a party seeking to prosecute a legal malpractice claim must adduce expert testimony delineating the appropriate standard of professional skill and care to which the attorney was required to adhere under the circumstances.[11] Although an exception exists where the ordinary experience of the fact finder may provide a sufficient basis for judging if the conduct falls below the requisite standard of care, the exception is limited to cases where the attorney ignores a well-established filing or notice requirement, as opposed to analyzing the inclusion of the incorrect version of an event of default provision in one of the six times that the event of default provision occurs in an opinion which effects one of seven factors analyzed by the professional in rendering a "more likely than not" opinion as to the tax treatment of the Transaction. Moreover, Brown Rudnick argues that as Mr. Bulua attests in his Reply Affidavit, dated October 31, 2018, even applying Mr. Snarr's interpretation of the risk associated with the Revised Rating Trigger Event of Default Provision, the Transaction would be treated as a loan and not a sale by the IRS and thereby Brown Rudnick did not deviate from the required standard of care.

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[10] Reply Memorandum of Law Submitted by Third-Party Defendant Brown Rudnick LLP in Further Support of its Motion for Summary Judgment, Pg. 9 citing *Merlin Biomed Asset Mgt., LLC v Wolf Block Schorr & Salis-Cohen LLP,* 23 AD3d 243 (1st Dept 2005); *Cosmetics Plus Group, Ltd. v Traub,* 105 AD3d 134 (1st Dept 2013).
[11] Reply Memorandum of Law Submitted by Third-Party Defendant Brown Rudnick LLP in Further Support of its Motion for Summary Judgment, Pg. 9 citing *Orchard Motorcycle Distribs., Inc. v Morrison Cohen Singer & Weinstein, LLP,* 49 AD3d 292, 293 (1st Dept 2008).

The Court agrees. The expert testimony indicates that Brown Rudnick's Tax Opinion was consistent with the types of tax opinions issued in connection with transactions like the Transaction at issue and did not fall below the degree of skill commonly exercised by an ordinary member of the legal community. In addition, the testimony of the Plaintiffs in this case establishes, at best, minimal reliance on the Tax Opinion – and the purpose for any such minimal reliance as a factual matter was solely in connection with the treatment of the Transaction if analyzed by the IRS under Section 1042 (i.e., recharacterization risk). Finally, and perhaps most importantly, Brown Rudnick's Tax Opinion is a limited Tax Opinion issued as to whether the Transaction would more likely than not be recharacterized by the IRS as a sale and not a loan triggering immediate tax. By its very terms, the Tax Opinion is limited to the foregoing. This simply is not what caused the harm/loss here. That is, the IRS did not recharacterize the Transaction as a sale and not a loan, triggering the capital gain recognition. Rather, the capital gain recognition was triggered by Nomura calling a default under the Transaction documents and selling the pledged Underlying Bonds because the rating of the insurer of the Underlying Bonds fell below the level required under the indenture agreement. Put another way, the Tax Opinion, even if relied on by the Plaintiffs prior to entering the Transaction and even if it had been tested and proved incorrect (i.e., because the IRS would in fact have recharacterized the transaction as a sale and not a loan), is wholly irrelevant in that the Tax Opinion was only issued to address the risk of IRS recharacterization, which did not happen. The loss here occurred due to the default called by Nomura. The Tax Opinion was not an enforceability opinion, a substantive non-consolidation opinion, or a business analysis of the risks of the Revised Rating Trigger Event of

Default Provision versus the Original Rating Event of Default Provision. Accordingly, summary judgment is appropriate, the motion is granted and the case is dismissed as to Brown Rudnick.

II. The MC Defendants' Motion For Summary Judgment (Mtn. Seq. No. 008)

In moving for summary judgment, the MC Defendants argue that the Plaintiffs' claimed damages, i.e., the capital gains taxes that they sought to defer or avoid, are highly speculative and otherwise not recoverable under New York law. In this regard, the MC Defendants contend that capital gains tax payments are not compensable as damages because they arise independently of any alleged malpractice, and that there is no "non-speculative" basis on which to determine each Plaintiffs' damages because damages could be calculated here in one of two ways: (1) that the Plaintiffs would have avoided capital gains entirely (assuming that the individual Plaintiff would predecease the bonds' maturity date), or (2) the Plaintiffs would have deferred the capital gains taxes (assuming that the individual Plaintiffs would have outlived the bonds maturity). Picking either scenario, the MC Defendants maintain, would be a matter of pure speculation, and damages that are contingent on unknowable future events are not recoverable under New York law. In other words, in short, the MC Defendants' essential point and basis for the motion is that "[a] lot could have happened" and the Plaintiffs cannot be permitted to recover damages as if the tax planning would have necessarily successfully deferred and, ultimately, avoided the tax, as this would put the Plaintiffs in a better position than if the alleged malpractice never occurred.

Relying primarily on *Alpert v Shea Gould Climenko & Casey*, 160 AD2d 67 (1990) and *Thies v Bryan Cave LLP,* 13 Misc 3d 1220[A] (Sup Ct, NY County 2006), the MC Defendants argue that taxes are not recoverable under New York law and that, in any event, Mr. Snarr acted reasonably under the circumstances and did not commit malpractice in that he made a strategic calculated decision based on a good faith belief that the Revised Rating Trigger Event of Default Provision was unenforceable because insurance companies are rated, not insurance policies,[12] to not either (i) reject the Revised Rating Trigger Event of Default Provision formulation set forth in the final version of the indenture and require the Original Rating Trigger Event of Default Provision be the version of the provision included in the final version of the documents so as not to change the risks of default to which the Plaintiffs were exposed, or (ii) to even discuss the change of the Revised Rating Trigger Event of Default Provision with the Plaintiffs.[13] Put another way, the MC Defendants argue that the MC Defendants did not commit malpractice when they gambled that they could play "I gotcha" the Revised Rating Trigger Event of Default Provision is not enforceable if Nomura in fact called a default (as they did) based on a downgrade of the insurance company. And, the argument continues, that the gamble was such a sure thing that Mr. Snarr did not even need to disclose either the gamble that he was taking as to the enforceability of the provision or the change in business risks between the Original Rating Event of Default Provision and the Revised Rating Event of Default Provision (i.e., Original Rating Trigger Event

[12] *See* Deposition Transcript of Brian Snarr, dated April 6, 2017, attached as Ex. B to the Affirmation in Opposition to Defendant's Motion for Summary Judgment, dated September 28, 2018, of James S. O'Brien, Jr., Pg. 134, lines 16-19, "It was my belief it would be difficult for the indentured trustee to deem that condition satisfied. I thought it was a drafting error in our favor."

[13] *Id.*, Pgs. 81-83, 97, 110-122, and 136-7, lines 23-6. "Q: Did you send off an email to your clients saying that this development had occurred? A: I don't recall. Q: Did you discuss with them at any point prior to the closing that this development had occurred? A: I don't recall." *See, also*, Pgs. 144-5, lines 18-2, "Q: That was a mistake, though wasn't it? A: Not from my perspective. Q: Really? A: I know that Stonebridge approached it as a drafting mistake. They believed that they made an error and they said as much in their complaint, but I did not regard this as an unfavorable development for my clients." *See, also,* Pg. 147, line 3-5, "**Q: You never told or discussed it with your clients at any time, did you? A: Not that I can recall"** (emphasis added).

of Default required for a downgrade in **both** the corporate bonds and the insurance company insuring the bonds to cause a default (i.e., a downgrade of the rating of two separate companies) to the Revised Rating Trigger Event of Default where a default was caused by merely a downgrade in the insurance company (a downgrade of only one of the two separate unrelated companies) with Jonathan Bloostein,[14] Steve Brandis,[15] David Greenberg,[16] Richard Huang,[17] Joseph Rosenheck,[18] his clients.[19] Finally, the MC Defendants argue that the Plaintiffs simply

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[14] *See* Affidavit of Jonathan Bloostein in Opposition to Defendant's Motion For Summary Judgment, dated September 28, 2018, ¶¶ 10-12. "10. Snarr never told me about the change that was made to the default trigger language that eliminated one of the protections. I only learned of it from Larry Kaplan of Stonebridge who had set up the Transaction, months after the closing. He told me that there had been a change in the Default Trigger language and that Nomura had declared an event of default because the insurance company insuring the bonds had been downgraded. 11. Snarr never told me that he knew about the change to the Default Trigger language before the closing or that he had failed to correct it, but deliberately allowed the changed language to remain in the documents. He basically made the decision for me to enter the Transaction with the changed Default Trigger language. But that was my decision to make, not his. 12. I only learned after Snarr's deposition in April 2017, 10 years later, that Snarr actually knew about the improper change to the Default Trigger language but decided to leave it in without telling us. He never revealed that. In fact, at a group meeting after we learned of the change, at which we discussed a lawsuit against Nomura to prevent the sale of the bonds based on 'mutual mistake' and 'scrivener's error,' Snarr did not tell us that he actually knew about the change before the closing but did not advise us. I feel that that was dishonest."

[15] *See* Affidavit of Steve Brandis in Opposition to Defendants' Summary Judgment Motion, dated September 27, 2018, ¶ 5. "5. He emphasized that each of the bonds was in a 'Separate Silo,' and **two separate unprecedented events would have to occur simultaneously** in order to put this transaction at risk" (emphasis added), clearly referring to the Original Rating Trigger Event of Default Provision and not the Revised Rating Trigger Event of Default Provision.

[16] *See* Affidavit of David Greenberg in Opposition to Defendants' Summary Judgment Motion, dated September 27, 2018, ¶¶ 6-8. "6. Snarr never told me about the changed language of the Default Trigger before, during or after the signing of the September 27, 2007 agreements. I only learned of the change from Larry Kaplan months after the closing. 7. In fact, at a group meeting after we learned of the change and Nomura's declaration of a default, at which we discussed a lawsuit against Nomura to prevent the default based on 'mutual mistake' and 'scrivener's error,' Snarr did not admit that he actually knew about the change before the closing but did not tell us. He never did. 8. I never knew that Snarr actually knew about the changed Default Trigger language before the closing (and failed to tell us) until I read his deposition transcript from April 2017, ten years later."

[17] *See* Affidavit of Richard Huang In Opposition to Defendants' Summary Judgment Motion, dated September 27, 2018, ¶¶ 5-8. "5. Snarr told me that I was well protected against an event of default, that I had a double security in protection (i.e., both the issuer and the insurer's ratings would have to fall below the default threshold not either/or). That was later confirmed by Larry Kaplan of Stonebridge, who put the deal together. 6. Snarr never told me about the changed language of the Default Trigger before, during or after the signing of the September 27, 2007 agreement. I learned of the change from Larry Kaplan months after closing. 7. In fact, at a group meeting after we learned of the change and Nomura's declaration of a default, at which we discussed a lawsuit against Nomura to prevent the default based on 'mutual mistake' and 'scrivener's error,' Snarr did not admit that he actually knew about the change before the closing but did not tell us. He never did. 8. I never knew that Snarr actually knew about the changed Default Trigger language before the closing (and he failed to tell us) until I read his deposition transcript from April 2017, ten years later."

[18] *See* Affidavit of Joseph Rosenheck in Opposition to Defendants' Summary Judgment Motion, dated September 28, 2018, ¶¶ 6-9. "6. Snarr never told me about the change that was made to the default trigger language that

cannot prove proximate cause because several intervening factors, e.g., the global financial crisis that commenced shortly after the Transaction causing the downgrade in the rating of the insurance company, break any chain of causation between the alleged malpractice and the claimed damages. The MC Defendants, however, misapprehend the holding in *Alpert* and *Thies* and their reliance is misplaced.

The *Alpert* case arises out of investments made by George Alpert and Lee Wolfman in a tax shelter known as the Logan Properties Program (**Logan**) and the issuance of tax opinions by the defendant law firms in that case. The deal which was structured by Esanu, Katsky and Korins (the **Esanu Firm**) and managed by the Churchill Coal Corporation offered the immediate deductibility of an advance minimum royalty which was to be paid by Logan for the right to mine coal. On December 30, 1977, Mssrs. Alpert and Wolfman each invested $52,500 in Logan and deducted $219,728 ($216,245 was in respect of the advance minimum royalty) on their federal income tax returns in respect of the deal in 1977, and $10,893 on their 1978 tax returns.

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eliminated one of the protections. I only learned of it from Larry Kaplan of Stonebridge, who set up the Transaction, months after the closing. He told me that there had been a change in the Default Trigger language and that Nomura had declared an event of default because the insurance companies insuring the bonds all had been downgraded. 7. In fact Snarr never told me that he knew about the change to the Default Trigger language before the closing and not only did not correct it, but never told me that it had been changed. He basically decided to enter the Transaction with the changed Default Trigger language. But that was my decision to make, not his. 8. I never knew that Snarr actually knew about the improper change to the Default Trigger language but decided to leave it without telling us until his deposition in April 2017, ten years later. He never admitted that to me. In fact, at a group meeting after we learned of the change and Nomura's declaration of a default, at which we discussed a lawsuit against Nomura to prevent the default based on 'mutual mistake' or 'scrivener's error,' Snarr did not tell us that he actually knew about the change before the closing but did not advise us. He never did. I feel that that was dishonest. 8. **If Snarr had corrected the change to the default trigger, there would have been no default, no capital gains taxes would have been due, no legal fees, and none of the emotional stress that I have suffered over the past eight years because, I understand, the rating of the bonds never fell to the default threshold. At the very least, he should have advised me about the change**" (emphasis added).

[19] Significantly; neither at his deposition as discussed in Fn. 12, nor in his Affirmation in Support of Defendants' Motion for Summary Judgment, dated September 11, 2018, does Mr. Snarr claim that he ever advised his clients of the change in the event of default trigger. In addition, each of the Plaintiffs allege in their affidavits (Fns.14-18) that (i) they understood the business risks to require both a downgrade of the Underlying Bonds and the insurance company as set forth in the Original Rating Event of Default Provision, and (ii) they were never advised as to the change in the indenture document to the Revised Rating Event of Default Provision.

The IRS disallowed the deductions. The problem was that on December 16, 1977 the United States Treasury Department had promulgated an amendment to Treasury Regulation 1.612-3(b)(3) disallowing previously permitted deductions from gross income of advanced royalties paid in connection with mineral property. Revenue Ruling 77-489 issued by the IRS on December 19, 1977 (11 days before the investment by Mssrs. Alpert and Wolfman) specifically advised that under the amendment, advance minimum royalties could be deducted only over the period for which they were paid and not in the year of payment (i.e., no immediate/advance upfront deduction). As a result, the Esanu Firm withdrew its previously rendered tax opinion that had been used in connection with the promotion of the Logan deal and, in fact, on December 21, 1977 delivered a letter to Logan's operating manager advising that the ruling "substantially increased the likelihood that the deduction by each Participant of his entire proportionate amount of the Advance Minimum Royalty will be attacked on audit."[20] Following receipt of this endorsement, Logan obtained a supplementary tax opinion, dated December 20, 1977, from Shea Gould Climenko and Casey (**Shea Gould**) which stated:

> Accordingly we believe there is a reasonable basis for concluding that Rev. Rul. 77-489 is invalid. Nevertheless we recognize that the foregoing arguments may not necessarily prevail in any future litigation with the Internal Revenue Service. In the event that the Service is successful in applying the material distortion of income except as set forth in Rev. Rul. 77-489 to the payment of the advance minimum royalty. Participants who acquire working interests may not be able to deduct the advance minimum royalty until such time as the coal in respect to which the royalty was paid is sold.[21]

After the IRS disallowed the deductions, Mssrs. Alpert and Wolfman sued the defendant law firms claiming, among other things, fraudulent misrepresentations. The IAS court granted the defendants' motion for partial summary judgment to the extent of dismissing damage claims for back taxes, but denied defendants' motion for partial summary judgment as to plaintiffs'

[20] *Alpert v Shea Gould Climenko & Casey*, 160 A.D.2d 67 (1990).
[21] *Id.*

recovery of interest paid. The court granted the plaintiffs' motion for leave to amend the complaint to the extent of permitting the assertion of breach of fiduciary duty claims against both defendants, but denied plaintiffs summary judgment as to the additional cause of action for fraud. On appeal, the First Department concluded that the IAS court was correct in rejecting plaintiffs claim for back taxes because "the recovery of consequential damages naturally flowing from a fraud is limited to that which is necessary to restore a party to the position occupied before the commission of the fraud," and concluded that the recovery of interest should have also been precluded.[22] In other words, the *Alpert* Court held that because the damages that the plaintiffs incurred in that case resulted from the change in the IRS ruling which Shea Gould ***disclosed and opined about,*** it was appropriate to deny summary judgment as to a cause of action based on fraud. In addition, because the cause of action was based on fraud, recovery for a tax liability potential which had been disclosed and which the defendant lawyers had specifically issued an opinion about (and which the plaintiffs affirmatively decided to accept) would have been inappropriate. Inasmuch as the plaintiffs had the use of the money, the Court concluded that recovery of the interest would have put the plaintiffs in a better position than they would have been but for the allegation. Notably, the Court permitted the plaintiffs to amend their pleadings to allege breach of duty. This is wholly different than the case in front of this Court.

Putting aside that *Alpert* involved fraud and not malpractice, although the MC Defendants attempt to argue that there was a good faith basis for believing the Revised Rating Trigger Event of Default Provision was not enforceable (i.e., like Shea Gould as to the tax provision), the critical difference here as it relates to the malpractice claim is that there simply is no evidence in

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[22] *Id.*, citing *Hotaling v Leach & Co.*, 247 NY 84, 87 (1928) (citing *Reno v Bull,* 226 NY 546 [1919]; *Orbit Holding Corp. v Anthony Hotel Corp.*, 121 AD2d 311, 315 [1st Dept 1986]; *Cayuga Harvester v Allis-Chalmers Corp.* 95 AD2d 5 [4th Dept 1983].

the record that this "reasonable belief" as to the lack of enforceability of the Revised Rating Trigger Event of Default Provision was ever disclosed to the Plaintiffs, that the Plaintiffs had use of the money, and that the Plaintiffs are trying to recover for interest charged by the IRS during the period in which they had the use of the money (i.e., unlike the plaintiffs in *Alpert*). In addition, the record does not include sufficient evidence that Mr. Snarr appreciated that the "drafting error" presented a material difference in the inherent risks of default (i.e., as opposed to merely the enforceability of the provision) between the Original Rating Trigger Event of Default Provision and the Revised Rating Trigger Event of Default Provision (i.e., that the revised provision required a single downgrade of the insurance company and that the original provision required a downgrade of **both** the insurance company and the Underlying Bonds) or that such different business risks were ever disclosed to the Plaintiffs.[23] Furthermore, the loss here did not merely stem from the mistake as it related to Mr. Snarr's gamble as to the enforceability of the provision, it also emanated from the change in inherent business risks of default between the Original Rating Event of Default Provision and the Revised Rating Event of Default Provision which revision, most significantly, was not discussed with the Plaintiffs.[24]

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[23] Indeed, the Plaintiffs indicate they never learned of the drafting change until they read Mr. Snarr's deposition, ten years later, and Mr. Snarr indicated that he considered the change to be advantageous. *Fns. 12-18, supra.*

[24] *See* Report of Howard Schneider, dated February 27, 2018, Pgs. 20-21, attached as Ex. E to Affirmation in Opposition to Defendants' Motion for Summary Judgment of James S. O'Brian, Jr., dated September 28, 2018, in which Mr. Schneider concluded that Morrison Cohen failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession because the Revised Rating Trigger Event of Default Provision was a material term of the Transaction that was key to the Plaintiffs' protection and Morrison Cohen failed to correct the Revised Rating Event of Default Trigger Provision to the Original Rating Event of Default Trigger Provision. Mr. Schneider specifically wrote: "The Term Sheet provided for a rating downgrade allowing an Event of Default to be declared only if the Underlying Bond (i.e., the wrapped bond) was downgraded to or fell below "B2" by Moody's or "B" by S&P. That required both that both the bond and the insurer fell to or below the threshold. Any change in so fundamental a term should have commanded the attention of the attorney's representing the Investor Plaintiffs. However, it did not, as it evident from subsequent events … not one of the Defendants followed up and got the Trigger back to where it was supposed to be. And, no one brought this critical change to the client's attention … All of the foregoing alone, or in combination, evidence Defendants' failure to meet customary standards in the handling of the Investor Plaintiffs' representation. That failure is compounded by the fact that no one at the Defendant law firm advised their client (the Investor Plaintiffs) that a significant adverse change to their detriment had found its way into the documentation of the Transaction."

Moreover, as it relates to damages, inasmuch as there is no evidence that the Underlying Bonds were downgraded (and, in fact, according to Mr. Rosenheck, the Underlying Bonds were never downgraded),[25] if the provision had not been changed (i.e., if the Original Rating Trigger Event of Default had been in the final documents), there would not have been a default under the Nomura indenture agreement. But, again, and most significantly, unlike in *Alpert,* where permitting the recovery of the interest that the IRS charged for the period where the plaintiffs in that case enjoyed the benefit of the money for which the plaintiffs had taken a deduction, in this case, the Plaintiffs are not trying to recover interest charged by the IRS for a period in time in which they enjoyed a deduction – i.e., which would have put them in a better position than they would have been in. In this case, the Plaintiffs are trying to recover capital gains tax paid by the Plaintiffs for a period of time where they did **not** enjoy the benefit of the use of the money. Recovery of the capital gains tax paid by the Plaintiffs as it relates to Mr. Snarr's alleged malpractice decision to gamble on the enforceability of the provision without disclosing the same to his clients and the fundamental change in the business risks which were also not disclosed to the Plaintiffs places the Plaintiffs in the exact position they would have been but for the alleged malpractice. Simply put, this recovery was not disallowed under *Alpert*.[26]

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[25] *See* Fn. 18.

[26] For the avoidance of doubt, reliance on *Alpert* and its progeny in this case would be appropriate by Brown Rudnick (and not the MC Defendants) if the loss had occurred here because the IRS had recharacterized the Transaction, disallowing treatment as a loan, causing the Plaintiffs to incur the capital gains tax in subsequent years where the Plaintiffs had enjoyed the use of the money and then were suing for past interest charged by the IRS. As explained above, the loss neither comes from disallowance by the IRS of the treatment (it comes from the realization of a greater business risk which they were not advised about by their transaction counsel, the MC Defendants), nor are the Plaintiffs suing their tax advisor for interest charged by the IRS during a period when they had use of the money. The Plaintiffs are suing for the very money that they lost as a result of the MC Defendants' alleged malpractice.

Reliance on *Thies* is equally inappropriate. *Thies* arises out of legal advice that Bryan Cave and Proskauer Rose LLP provided with respect to certain investment partnerships and their tax consequences. In 2003, Dennis Thies and Bruce Mills as trustees for the irrevocable trusts of Christopher J. Thies and Dennis P. Thies entered into a representation agreement with Proskauer regarding the tax consequences of these partnership investments. The plaintiffs sued Bryan Cave and Proskauer for malpractice and breach of duty, alleging that the IRS contacted them and questioned the validity of the partnership investments and that the law firms did not assist them with the investigation and, ultimately, the plaintiffs accepted a settlement with the IRS which required the payment of back taxes, interest and penalties. Bryan Cave moved to stay the action pending arbitration based on an arbitration clause contained in the retainer agreement. Based on the express language of the engagement letter which informed the client that disputes were to be resolved by arbitration and the consequences of the arbitration clause and New York County Lawyers' Association Ethics Opinion No. 723 which concluded that agreements to arbitrate disputes are enforceable if the consequences of the arbitration clause are disclosed, New York State Supreme Court Justice Charles Ramos granted the stay. With respect to the claims against Proskauer, Justice Ramos (i) dismissed the breach of duty and breach of contract claims as duplicative of the malpractice claim, citing *CVC Capital Corp. v Weil, Gotshal, Manges,* 192 AD2d 324 (1st Dept 1993), and (ii) held that the plaintiffs were not entitled to interest charged by the IRS, citing *Alpert* and *Jamie Towers Hous. Co. v William B. Lucas, Inc.,* 296 AD2d 359 (1st Dept 2002) because permitting plaintiffs to recover interest during a period where the plaintiffs "had use of the money during the period that their taxes remain unpaid … would put them in a better position, like the plaintiffs in Alpert."[27]

[27] *Thies v Bryan Cave LLP,* 13 Misc 3d 1220[A] (Sup Ct, NY County 2006). For the avoidance doubt, the MC Defendants also cite *Chang Yi Chen v Zhen Huang,* 2014 NY Slip Op 50517(U), a Kings County, Supreme Court

Next, the MC Defendants argue that summary judgment must be granted because the damages at issue here are too speculative because the Plaintiffs in this case might have outlived the maturity date of the bonds. That is, tax deferral occurs if the Plaintiffs out live the maturity of the Underlying Bonds and tax avoidance only occurs if the Plaintiffs predecease the maturity date of the Underlying Bonds and therefore get a "stepped up basis" in the Underlying Bonds. Reliance on actuarial tables, the MC Defendants argue, is inappropriate to ground damages. The argument however fails.

Damages in a legal malpractice action are "designed to make the injured client whole" and include "expenses incurred in an attempt to avoid, minimize, or reduce the damage caused by the attorney's wrongful conduct." *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 443 (2007) (internal citations and quotations omitted). Although it is true that damages cannot be purely speculative and "must be capable of proof with reasonable certainty, absolute certainty is not required; such damages must be capable of measurement based upon known reliable factors without undue speculation." *Campbell v Rogers & Wells,* 218 AD2d 576, 580 (1st Dept 1995) (internal citation omitted).

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case which involved a failed 1031 like-kind exchange. In that case, Justice Schmidt held that because the sale of the replacement property had not occurred, and in a 1031 exchange the plaintiff gets a carry-over basis, determining damages would be too speculative. In addition, Justice Schmidt noted that, "[o]n the other hand, plaintiff may be entitled to recover the amounts paid to the IRS as interest and penalties. Interest imposed by the IRS based on a failure to pay a tax generally may not be recovered as damages because the interest represents a payment to the IRS for taxpayer's use of the money while the taxpayer was not entitled to the use of the money (*see Shalam v KPMG LP*, 43 AD3d 752, 754 [1st Dept 2007]; *Alpert*, 160 AD2d at 72). Here, however, plaintiff, but for defendant's alleged malpractice, would have been entitled to the use of the money during the time for which IRS imposed interest. As such, plaintiff suffered a loss as the result of the IRS imposition of interest and plaintiff's recovery of damages for such a loss would not constitute a windfall (*see Jamie Towers Hous. Co. v William B. Lucas, Inc.*, 296 AD.2d 359, 359-360 [1st Dept]; *Ronson v Talesnick*, 33 F.Supp.2d 347, 355 [D NJ 1999]; *see also Liebowitz v Kolodny*, 24 AD3d 733, 733 [2d Dept 2005]; *Apple Bank for Sav. v PriceWaterhouseCoopers L.P.*, 2009 NY Slip Op 50948." Putting aside that the case is not binding on this Court, the analysis is not relevant to the case in front of the Court where the capital gains tax actually paid is not speculative which stems from the alleged malpractice and the balance of the analysis by Justice Schmidt is, at any rate, inopposite to the position taken by the MC Defendants.

Whether a plaintiff can ultimately establish its damages often presents a triable issue of fact precluding summary judgment. For example, in *Leggiadro, Ltd. v Winston & Strawn, LLP*, 151 AD3d 413 (1st Dep't 2017), the plaintiff claimed that but for its attorney's negligence in failing to raise a tax issue relevant to the transaction at issue, the landlord would have offered a higher buyout figure to cover the plaintiff's tax obligation. The Court denied summary judgment holding that (1) triable issues of fact existed as to whether but for defendant's failure to inform the plaintiff of the corporate tax obligation, the plaintiff would have declined the buyout offer, thus "avoiding any damages associated with having to pay, out of pocket, a corporate tax on the buyout sum," and (2) triable issues of fact existed as to whether but for the defendant attorney's negligence in failing to raise the tax issue, the landlord would have offered a higher buyout to cover the corporate tax obligation. *Id.* at 414. In this regard, the Court explained: "[a]lthough the claim is founded upon a discretionary decision residing in another over whom the corporate plaintiff had no control, the circumstances support plaintiff's contention that the landlord would have agreed to satisfy the tax liability." *Id.*

New York courts have used actuarial tables as an accepted basis to ground recovery from time immemorial. The Pattern Jury Instructions (**PJI**) specifically permit a fact finder to make a determination as to the life expectancy of a plaintiff.

Indeed, PJI 2:281 specifically provides:

> With respect to any of the plaintiff's injuries or disabilities, the plaintiff is entitled to recover for future pain, suffering and disability and the loss of (his, her) ability to enjoy life. In this regard you should take into consideration the period of time that the injuries or disabilities are expected to continue. If you find that the injuries or disabilities are permanent, you should take into consideration the period of time that the plaintiff can be expected to live. In accordance with statistical life expectancy tables, AB has a life

> expectancy of [*insert number*] years. Such a table, however, provides nothing more than a statistical average. It neither guarantees that AB will live an additional [*insert number*] years or means that (he, she) will not live for a longer period. The life expectancy figure I have given you is not binding upon you, but may be considered by you together with your own experience and the evidence you have heard concerning the condition of AB's health, (his, her) habits, employment and activities in deciding what AB's present life expectancy is.

The life expectancy tables for PJI 2:281 are provided in Civil Appendix A. Although PJI 2:281 is employed in personal injury trials, the point is that it is beyond cavil that in New York, fact finders are regularly asked to make determinations as to a plaintiff's life expectancy and to award damages accordingly.[28] The MC Defendants took discovery into the medical histories of the Plaintiffs and can offer evidence to the fact finder that the Plaintiffs are in fact healthier and will live longer than the well established tables used for calculating damages based on life expectancy and that therefore tax avoidance is not the appropriate measure of damages (i.e., the total capital gains tax paid) but rather tax deferral is what should be considered, if anything (i.e., as tax would have been due at maturity and there would have been no step-up on tax basis). In other words, the fact finder can make a decision as to each Plaintiff's life expectancy (as fact finders regularly do in New York trials) and can award damages, if appropriate, accordingly.

Finally, the MC Defendants argue that summary judgment must be granted at least as to Mr. Bloostein as he incurred no compensable damages because he covered by refinancing the Transaction with Deutsche Bank and at a lower interest rate. The argument misses the point. Although Mr. Bloostein was able to arrange a transaction with Deutsche Bank, the deal was on completely different terms than the deal he lost with Nomura as a result of the MC Defendants'

[28] The Court also notes that the purpose of damages in a personal injury case is to put the plaintiff in the position that the plaintiff would have been but for the injury. The same is true of damages in a case involving professional malpractice.

alleged malpractice. In his opposition papers, Mr. Bloostein offers a 31 page expert report of Frank Iacono.[29] Mr. Iacono does a side-by-side comparison of the two transactions. Under the Transaction, Mr. Bloostein borrowed $36.1 million, had a 24.4 year 6.19% fixed rate loan, had $3.5 million of cash collateral securing the loan, his risk of loss was limited to only 26% and he could repay 103% of the loan in the last four years. Under the Deutsche Bank replacement transaction, Mr. Bloostein borrowed $36.5 million, had a one year variable rate loan at 4.74%, had $13 million of cash collateral securing the loan, his risk of loss was 100% and he had to repay 100% of the loan unless it was refinanced. In Mr. Iacono's opinion and notwithstanding the lower interest rate, and based primarily on the loss of the use of an additional approximately $10 million of liquidity and unlimited recourse for the repayment of the loan (versus only 26%) and a fixed rate, Mr. Bloostein suffered damages in the amount of $8.97 million as of November 17, 2010 (i.e., excluding statutory judgment interest in the amount of 9%). Mr. Ianoco's report is certainly enough to present a triable issue of fact.

The MC Defendants' summary judgment motion is therefore denied in its entirety.[30]

Accordingly, it is hereby

ORDERED that Brown Rudnick LLP's motion for summary judgment dismissal (mtn. seq. no. 007) is granted and the second amended third-party complaint is dismissed with costs and

[29] Expert Report of Frank Iacono, dated March 12, 2018, Ex. 9 to Affirmation of David G. Ebert in Support of Defendants' Motion for Summary Judgment.

[30] For the avoidance of doubt, inasmuch as the loss here would not have occurred but for the alleged malpractice as the rating of the Underlying Bonds never fell below the level required by the Original Rating Trigger Event of Default Provision, it is axiomatic that changes in the world's economic condition are simply insufficient to raise a causation issue. *See Fn.18.*

disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

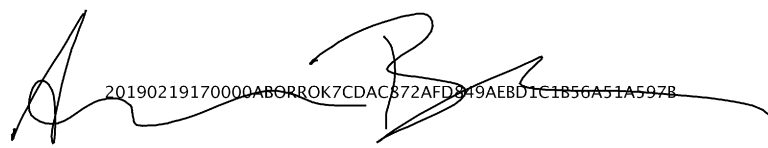
ORDERED that the caption is amended to reflect the dismissal insofar as the Third-Party action by Morrison Cohen LLP and Brian Snarr against Brown Rudnick LLP is dismissed, and the caption should now read:

> JONATHAN BLOOSTEIN, STEVEN BRANDIS, DAVID GREENBERG, RICHARD HUANG, SALVATORE ROMO, JOSEPH ROSENHECK, JB 1042 INVESTOR LLC, SBRAN 1042 INVESTOR, LLC, DG 1042 INVESTOR LLC, RH 1042 INVESTOR LLC, SR 1042 INVESTOR LLC, JR 1042 INVESTOR LLC,
>
> Plaintiffs,
>
> - against -
>
> MORRISON COHEN LLP and BRIAN SNARR,
>
> Defendants.

and all future papers filed with the Court should bear the amended caption; and it is further

ORDERED that Morrison Cohen LLP and Brian Snarr's motion for summary judgment (mtn. seq. no. 008) is denied; and it is further

ORDERED that counsel are directed to appear for a Pretrial Conference in Room 238 on February 25, 2019 at 11:30 AM.



2/18/2019
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	[ ] **CASE DISPOSED**		[X] **NON-FINAL DISPOSITION**		
	[ ] **GRANTED**	[ ] **DENIED**	[X] **GRANTED IN PART**	[ ] **OTHER**	
APPLICATION:	[ ] **SETTLE ORDER**		[ ] **SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ] **INCLUDES TRANSFER/REASSIGN**		[ ] **FIDUCIARY APPOINTMENT**	[ ] **REFERENCE**	