

Ferenets v Kenworthy
2019 NY Slip Op 33751(U)
November 22, 2019
Supreme Court, Queens County
Docket Number: 712299/2019
Judge: Cheree A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: HONORABLE CHEREÉ A. BUGGS
Justice

IAS PART 30

FILED
NOV 25 2019
COUNTY CLERK
QUEENS COUNTY

IRYNA FERENETS and ALEXANDER
FERENETS

Index No. 712299/2019

Plaintiffs,

Motion

Date: October 30, 2019

-against-

Motion Cal. No.: 17

TAMARA KENWORTHY, ESQ., and
KENWORTHY LAW PLLC,
Defendants.

Motion Sequence No.: 1

The following e-file papers numbered EF 8-25 submitted and considered on this motion by defendants Tamara Kenworthy, Esq. and Kenworthy Law PLLC (hereinafter referred to as "Defendants") seeking an Order pursuant to Civil Practice Law & Rules (hereinafter referred to as "CPLR") 3211 (a) (1) and (7) dismissing plaintiffs Iryna Ferenets and Alexander Ferenets' (hereinafter referred to as "Plaintiffs") Verified Complaint.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits.....	EF 8-19
Affirmation in Opposition-Affidavits-Exhibits.	EF 20-24
Reply Affirmation-Memorandum of Law.....	EF 25

This action arises out of an attorney-client relationship that existed between Plaintiffs and Defendants. Plaintiff Iryna Ferenets (individually referred to as "Iryna") alleges that as a licensed real estate broker she visited Roosevelt Island on numerous occasions because her brokerage office is located at 552 Main Street. She observed an already existing bubble tea business located at 559 Main Street and visited the shop on September 14, 2018. During Iryna's visit she met with Guanghao Zhang ("Zhang"), who represented that he was the owner and operator of the business Sparkling Bubble Tea Inc. (hereinafter referred to as "Business"), and "briefly observed the operation of the business". Iryna alleges that the co-plaintiff her husband Alexander Ferenets expressed interest in becoming a manager of a bubble tea business. Subsequently, Plaintiffs met with Zhang and informed him of their interest. Zhang informed the Plaintiffs that he was looking for a partner and the Business was worth approximately \$100,000. Plaintiffs and Zhang agreed that Plaintiffs would purchase 45 out of the 100 shares of the business for \$45,000. On September 18, 2018, Plaintiffs visited the

Business and Zhang showed them a Shareholders Agreement signed the prior day illustrating that Zhang held a 100% shareholder interest in the company and an individual named Shiwei Pan (“Shiwei”) held a 0 % interest.

Iryna represents that due to a referral and subsequent search of Defendants’ website the Plaintiffs decided to contact the Defendants seeking legal representation related to the purchase of the stock. On September 20, 2018, Plaintiffs contacted Defendants via phone and email. Iryna alleges on September 20, 2018 she forwarded the store lease including the rider, the Shareholders Agreement, the filing receipt of the business and the employer identification number for Defendants’ review. Plaintiffs entered into a retainer agreement with the Defendants on October 2, 2018 (hereinafter referred to as “Retainer Agreement”).

An acknowledgment by Zhang signed by Zhang before a notary and dated October 19, 2018 indicates the following payments were made by Plaintiffs to Zhang in furtherance of their purchase of 45 shares of the Business:

September 23, 2018- \$20,000
September 26, 2018- \$5,000
October 5, 2018- \$7,000
October 17, 2018- \$5,000
October 19, 2018- \$8,000

Iryna alleges the Defendants authorized \$32,000 out of the \$45,000 payments.

The relevant portions of the Retainer Agreement signed between the parties reads as follows:

1. Scope of Representation

This law firm (“The Law Firm”) has been retained by both of you (collectively “You”) to prepare the Shareholders Agreement for Sparkling Bubble Tea Inc. (the “Company”) that has already been formed with the New York State Department of State Division of Corporations. The Law Firm will be representing Your interests, not the interests of the Company or the other shareholder(s).

All of our services in this matter will end upon the preparation an execution of the Shareholders Agreement. Not included within the scope of our representation is tax or financial advice, any other transactional document, or the commencement of any litigation, which would be subject to a separate Retainer Agreement.

Additionally, the Retainer Agreement states in part:

2. Fees, Expenses and Billing Practices

You agree to pay the Law Firm for legal services at the *reduced courtesy rate*

of Two Thousand Eight Hundred and Fifty Dollars (\$2,850) for the services rendered in connection with the Scope of Representation, which fee will include the corporate kit of the Company.

Finally, the Retainer Agreement states in part:

5. Entire Understanding

This Agreement constitutes full and complete understanding between us... It is essential that You understand all of the terms and conditions set forth in this Agreement. If you do not understand any particular term, you should not sign this document until you do so. Once you sign this Agreement, it will be presumed that You understood and agreed to all the provisions detailed below. Moreover, this document will form a legally binding contract enforceable at law.

Zhang and the Plaintiffs executed the Shareholders Agreement drafted by the Defendants on October 23, 2018. On the same day, Defendants sent an email to Plaintiffs formalizing the termination of the legal representation in accordance with the Retainer Agreement.

Now, Defendants move to dismiss the Complaint.

Legal Standard

“To succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.” (*Hoeg Corp. v Peebles Corp.*, 153 AD3d 607 [2d Dept 2017]; *Teitler v Pollack & Sons*, 288 AD2d 302 [2d Dept 2001]; *see also Held v Kaufman*, 91 NY2d 425 [1998]). “To qualify as documentary evidence, the evidence ‘must be unambiguous and of undisputed authenticity’ ” (*Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010]). “Judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other paper, the contents of which are essentially undeniable,’ qualify as documentary evidence in proper cases...” (*Hartnagel v FTW Contr.*, 147 AD3d 819 [2d Dept 2017]). “On a motion to dismiss pursuant to CPLR 3211 (a) (7), the claim must be afforded a liberal construction, the facts therein must be accepted as true, and the plaintiff must be accorded the benefit of every favorable inference” (*Sawitsky v State*, 146 AD3d 914 [2d Dept 2017]; *see also Leon v Martinez*, 84 NY2d 83 [1994]).

Plaintiffs Claims

The Plaintiffs allege Defendants committed legal malpractice by deviating from the standard of care in their failure to exercise reasonable due care and due diligence in the performance of their legal services and legal representation on behalf of the Plaintiffs when Defendants:

- failed to properly ascertain and determine the names and percentage of ownership of each shareholder of the Business;
- failed to advise as to conducting either a trial period or review of the corporate tax records, books and records prior to purchase of the shares;
- failed to conduct and order a corporate lien search of the Business to ascertain corporate liens, judgments, obligations and liabilities;
- failed to conduct a corporate lien search against Shiwei and inquire as to his relationship and ownership of the Business;
- failed to properly advise that a separate written escrow agreement for different types of taxes should have been entered by and between Plaintiffs and Zhang;
- failed to file a Notification of Sale, Transfer of Assignment in Bulk with the New York State Department of Taxation prior to Plaintiffs purchase of the stock to determine whether the Business has sales tax liability;
- failed to advise to conduct a trial period to properly assess the accurate value of the shares of stock;
- failed to determine whether the Business had any rent arrears and whether the lease was in full force and affect;
- failed to obtain written consent from the landlord in compliance with paragraph 56.4 of the rider to the lease;
- failed to indicate who the Defendants represent in the Shareholders Agreement;
- failed to obtain information regarding Zhang's citizenship.

In *Ahdy Attallah v Milbank, Tweed, Hadley & McCloy LLP*, 168 AD3d 1026, 1027 [2d Dept 2019] defendant agreed to assist plaintiff pro bono on a limited basis in attempting to get plaintiff reinstated in to New York College of Osteopathic Medicine following plaintiff's dismissal. The letter of engagement stated in part " Our services will include all activities necessary and appropriate in our judgment to investigate and consider options that may be available to urge administrative reconsideration of your dismissal from the New York College of Osteopathic Medicine (the 'College'). This engagement does not, however, encompass any form of litigation or, to the extent ethically prohibited in this circumstance, the threat of litigation, to resolve this matter... The scope of the engagement may not be expanded orally or by conduct; it may only be expanded by a writing signed by our Director of Public Service" (*id*). According to the court, plaintiff has the burden to show the defendant attorney "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this professional duty caused the plaintiffs actual damages" (*id* [internal citation and quotations omitted]). The college refused to reconsider plaintiff's dismissal, thereafter, plaintiff commenced this action (*id*). The court reiterated that "[a]n attorney may not be held liable for failing to act outside the scope of a retainer" (*id* at 1029). Therefore, the court held that plaintiff's allegations that the defendant failed to: negotiate with the school, commence litigation against the school and to properly advise plaintiff on the efficacy of a defamation action against non-school parties fell outside the scope of the letter of engagement and those causes of action were dismissed pursuant to CPLR 3211 (a)(1) (*id*).

CPLR 3211 (a)(1)

Defendants allege Plaintiffs' contention that Defendants **failed to obtain written consent from the landlord in compliance with paragraph 56.4 of the rider to the lease** is refuted by the actual lease and must be dismissed pursuant to CPLR 3211 (a)(1).

Paragraph 56.4 of the rider to the lease states in relevant part:

56.4. Either a transfer (including the issuance of a treasury stock or the creation and issuance of new stock or a new class of stock) of a controlling interest in the shares of Tenant (if Tenant is a corporation or trust) or a transfer of a majority of the total interest in Tenant (if Tenant is a partnership or other entity) at any one time or over a period of time through a series of transfers, shall be deemed an assignment of this Lease and shall be subject to all of the provisions of this Article 56, including, without limitation, the requirement that Tenant obtain Owner's prior consent thereto. The transfer of shares of Tenant (if Tenant is a corporation or trust) for purposes of this Section 56.4 shall not include the sale of shares by persons other than those deemed "insiders" within the meaning of the Securities Exchange Act of 1934, as amended, which sale is effected through the "over-the-counter market" or through any recognized stock exchange."

At the time of Defendants' representation of Plaintiffs up until conclusion of the same Plaintiffs only sought an ownership interest in 45 out of the 100 shares or 45% of the Business. 45% is neither a controlling interest nor a majority interest which would deem this transaction an assignment of the lease, since Zhang retained a 55% interest in the Business. Therefore, no duty existed to obtain the landlords prior consent before completing the transaction.

Defendants allege Plaintiffs' contention that Defendants **failed to conduct a corporate lien search against Shiwei and inquire as to his relationship and ownership of the Business** is refuted by the Shareholders Agreement dated September 17, 2018. The document (Defendants' Exhibit E) indicates that on September 17, 2018, Zhang owned a "100%" interest in the Business and Shiwei owned "0%" the document was executed by Zhang and Shiwei stamped by a Notary Public on September 17, 2018. The documentary evidence refutes Plaintiffs' claim. Similarly, this documentary evidence refutes Plaintiffs' claim that Defendants **failed to properly ascertain and determine the names and percentage of ownership of each shareholder of the Business.**

Plaintiffs allege Defendants failed to: **advise as to conducting either a trial period or review of the corporate tax records, books and records prior to purchase of the shares; advise to conduct a trial period to properly assess the accurate value of the shares of stock; and to properly advise that a separate written escrow agreement for different types of taxes should have been entered by and between Plaintiffs and Zhang.** As noted earlier the Retainer Agreement states in part "[n]ot included within the scope of our representation is tax or financial advice, any other transactional document, or the commencement of any litigation, which would be subject to a separate Retainer Agreement." The documentary evidence refutes Plaintiffs' claim.

Similarly, Plaintiffs allege Defendants failed to file a **Notification of Sale, Transfer of Assignment in Bulk with the New York State Department of Taxation** prior to Plaintiffs purchase of the stock to determine whether the Business has sales tax liability. Defendants allege Plaintiffs' claim is refuted by the limited scope of the Retainer Agreement which states in part "[n]ot included within the scope of our representation is tax or financial advice, any other transactional document, or the commencement of any litigation, which would be subject to a separate Retainer Agreement". Plaintiffs' expectation that Defendants would prepare a transactional document other than the Shareholders Agreement is refuted by the documentary evidence.

CPLR 3211 (a)(7)

"In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney 'failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession,' and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages. To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence." (see *Rudolf v Shayne, Dachs, Staisci, Corker & Sauer*, 8 NY3d 438 [2007]; see also *McCoy v Feinman*, 99 NY2d 295 [2002]; *Seidman v Einig & Bush LLP*, 151 AD3d 1095 [2d Dept 2017]).

Plaintiffs allege Defendants failed to **conduct and order a corporate lien search of the Business to ascertain corporate liens, judgments, obligations and liabilities and failed to determine whether the Business had any rent arrears and whether the lease was in full force and affect**. Based upon the language in the Retainer Agreement there is no indication that Defendants had a duty to perform the above conduct. Nevertheless, Plaintiffs failed to establish causation. Iryna within her affidavit confirms that the Defendants agreed to purchase 45 shares of the Business prior to retaining the Defendants. The Defendants paid \$25,000 out of the agreed upon \$45,000 purchase price for the shares prior to retaining the Defendants. Therefore, in light of the already existing agreement to purchase, Plaintiffs have failed to plead facts that indicate that Defendants' lack of conduct caused the damages they allegedly sustained.

Finally, Plaintiffs allege Defendants failed to **indicate who the Defendants represent in the Shareholders Agreement and failed to obtain information regarding Zhang's citizenship**. Plaintiffs have failed to establish a correlation between the above conduct and the damages they sustained. Nonetheless, within the Retainer Agreement Defendants state "[t]he Law Firm will be representing Your interests, not the interests of the Company or the other shareholder(s)." Plaintiffs have not plead facts indicating that the either themselves or the other shareholders were unsure or unclear about who the Defendants represented. Furthermore, Plaintiffs have not plead facts that indicate how, if in anyway Zhang's immigration status in this country affected the damages they allegedly sustained. Therefore it is,

ORDERED, that the Defendants' motion is granted in its entirety. The Verified Complaint is dismissed.

The foregoing constitutes the decision and order of this Court.

Dated: November 22, 2019



Hon. Chereé A. Buggs, JSC

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