

**Rosenberg Feldman Smith, LLP v Ninety Five
Madison Co., L.P.**

2019 NY Slip Op 30582(U)

March 7, 2019

Supreme Court, New York County

Docket Number: 653953/2018

Judge: Andrew Borrok

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

INDEX NO. 653953/2018

ROSENBERG FELDMAN SMITH, LLP

MOTION DATE 03/07/2019

Plaintiff,

MOTION SEQ. NO. 004

- v -

NINETY FIVE MADISON COMPANY, L.P.,

DECISION AND ORDER

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 79, 80, 81, 82, 83, 84, 85

were read on this motion to/for DISMISS

Upon the foregoing documents, and for the reasons set forth on the record (R. Portas, Ct.

Reporter, 03/07/2019), the decision/order of the court is as follows:

In this legal malpractice action, the plaintiffs/counterclaim defendants Rosenberg Feldman Smith, LLP (RFS), Richard Feldman, and Stephen Rosenberg move to dismiss the counterclaims asserted against them by defendant/counterclaim plaintiff Ninety-Five Madison Company, L.P. (NFMC). The underlying action concerns legal fees sought by RFS in connection with its representation of NFMC on seven separate matters from 2017-2018 totaling \$189,328.86. The counterclaims brought by NFMC against RFS, Feldman, and Rosenberg all relate to RFS's representation of NFMC in one particular case, Vitra, Inc. v Ninety-Five Madison Co., L.P., Index No. 652342/2017 (the Vitra Action).

THE RELEVANT FACTS

The Vitra Action involved a dispute relating to a commercial lease dated June 18, 2016 entered by and between Vitra, Inc. (Vitra) and NFMC. Vitra alleged that NFMC breached its lease

obligations by failing to complete work on the subject premises as agreed and by unreasonably refusing to approve plans for work that Vitra was obligated to perform, which prevented Vitra's occupancy and performance under the lease. After lengthy settlement negotiations over several months, the parties reached a tentative agreement to settle the case.

On December 6, 2017, RFS and Rita Sklar, a representative of NFMC, reviewed the proposed settlement agreement that was to be entered into the following day (Counterclaim, ¶ 14). The Counterclaim states that, after the meeting with Ms. Sklar, RFS conferred with opposing counsel without Ms. Sklar's knowledge or consent and agreed to make significant and material changes to the settlement agreement that were detrimental to NFMC's interests (*id.*, ¶ 15).

On December 7, 2017, the approximately 30 paragraph settlement agreement was read into the record in front of New York State Supreme Court Justice Saliann Scarpulla. Pursuant to the terms of the settlement agreement, among other things, the parties agreed that all disputes relating to the enforcement and interpretation of the settlement would be referred to arbitration, and the parties waived the rights to put on evidence or conduct any discovery at such proceeding (Feldman aff, exhibit Q at 15, lines 22-16; at 16, lines 9-15). After reading the settlement agreement into the record, the Court discussed the settlement agreement with Ms. Sklar:

THE COURT: Please state and spell your full name for the record.

THE WITNESS: Rita A. Sklar, S-K-L-A-R.

THE COURT: Do you want to allocute or I?

MR. FELDMAN: You can, Your Honor.

THE COURT: Ms. Sklar, you were in the courtroom this whole morning. In fact, you've been in the courtroom for the last couple of days. You've heard the terms

of the stipulation of settlement between the parties of this dispute. Do you understand the stipulation?

THE WITNESS: Yes.

THE COURT: Do you have any questions about the stipulation?

THE WITNESS: No.

THE COURT: Do you agree to the stipulation of settlement voluntarily?

THE WITNESS: Yes.

THE COURT: Has anyone coerced or forced you into agreeing to the settlement?

THE WITNESS: No.

THE COURT: Did you take any medication today or anything else that would impair your ability to enter into this stipulation?

THE WITNESS: No.

THE COURT: Do you feel comfortable and confident communicating in the English language or would you like me to have a translator come and translate the settlement?

THE WITNESS: No.

THE COURT: You're good with English?

THE WITNESS: Yes.

THE COURT: Good. Thank you very much.

(Feldman aff, exhibit Q at 17, lines 7-26; at 18 lines 1-26; at 19, lines 1-2). NFMFC alleges that the stipulation read in court was materially different from the one that Ms. Sklar agreed to and that she only agreed to its terms on the record because she was not informed by RFS that the terms had changed (Counterclaim, ¶¶ 21-27).

Arbitration proceedings commenced in 2018 during which RFS continued to represent NFMFC. The Counterclaim alleges that RFS "threatened" NFMFC into accepting certain terms to which they did not agree and that RFS was otherwise deficient in their representation, and NFMFC advised RFS that it wished to relieve the firm as counsel with regard to the Vitra Action (*id.*, ¶

31). The Counterclaim further states that RFS told Ms. Sklar that it would unconditionally reduce its fees by \$45,000 and promised to focus more attention on the Vitra Action (*id.*). NFMC alleges that, based on RFS's promises, NFMC did not replace RFS as counsel in the Vitra Action (*id.*).

During the arbitration proceedings, NFMC alleges that the arbitrator stated that RFS's papers were not effective in preserving NFMC's defenses and that RFS failed to raise a counterclaim in the arbitration to recover the balance of unpaid fees for NFMC (*id.*, ¶¶ 32-34). NFMC alleges that the arbitrator further admonished RFS for failing to request relief that would allow certain construction work to commence, and otherwise highlighted deficiencies in the settlement agreement (*id.*, ¶ 36). For example, the arbitrator observed that NFMC opened itself up to an unfavorable outcome by agreeing to arbitration (*id.*, ¶ 41). On June 20, 2018, NFMC relieved RFS as counsel in the Vitra Action (*id.*, ¶ 43).

RFS commenced this action to recover legal fees from NFMC in connection with the Vitra Action and other matters on August 9, 2018. RFS filed an amended complaint on October 18, 2018, and a second amended complaint on November 15, 2018, asserting causes of action for quantum meruit and account stated. On December 4, 2018, NFMC filed an answer with counterclaims for legal malpractice, breach of fiduciary duty, negligent misrepresentation, fraud, unjust enrichment, and violation of Section 487 of the Judiciary Law. RFS's motion to dismiss the counterclaims is now before the Court.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211, courts afford the pleading a liberal construction and accept the facts alleged in the complaint as true, according the plaintiff the benefit of every favorable inference (*Morone v. Morone*, 50 NY2d 481, 484 [1980]). The court's inquiry on a motion to dismiss is whether the facts alleged fit within any cognizable legal theory (*id.*).

Dismissal under CPLR 3211 [a] [1] is warranted only where the documentary evidence conclusively establishes a defense to the plaintiff's claims as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]).

First Counterclaim: Legal Malpractice

To state a claim for legal malpractice, the movant must establish "that an 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 plaintiff's actual damages" (*McCoy v Feinman*, 99 NY2d 295, 301 [2002] [internal citations omitted]).

The counterclaims raised by NFMC state a claim for legal malpractice. RFS argues that NFMC has failed to demonstrate that any of the alleged acts of malpractice proximately caused any damages to NFMC, *i.e.*, that "but for" the alleged acts, NFMC would have achieved a more favorable outcome. The Court does not agree. NFMC alleges that RFS's failure to conduct discovery, failure to pursue counterclaims, failure to adequately inform Ms. Sklar regarding the settlement, putting NFMC in a position where it had to settle, agreeing to settlement terms not approved by NFMC, and waiving critical rights in arbitration including the right to appeal

resulted in a highly unfavorable settlement and unsuccessful arbitration proceedings and caused NFMC to incur significant monetary damages (Counterclaim, ¶¶ 59, 60-71).

RFS further argues that Ms. Sklar's allocation in open court stating that she understood and agreed to the stipulation of settlement precludes an action for legal malpractice based on any alleged deficiencies in the settlement agreement or alleged failure to inform Ms. Sklar of any material changes to its terms. Simply put, the cases cited by RFS do not mandate this conclusion at this stage of the proceeding. Significantly, Ms. Sklar was not asked whether she was satisfied with her representation in the matter or whether she had an opportunity to discuss the proposed settlement and whether her attorneys satisfactorily answered all of her questions regarding the proposed settlement. *See Knox v. Aronson, Mayesfsky & Sloan, LLP*, 168 AD3d 70, 75-76 [1st Dept 2018]; *Harvey v Greenberg*, 82 AD3d 683, 683 [1st Dept 2011]; *Katebi v Fink*, 51 AD3d 424, 425 [1st Dept 2008]).

Finally, to the extent that RFS relies on an email dated December 7, 2017 sent by Ms. Sklar to RFS in which Ms. Sklar thanks RFS for working hard to reach a settlement and indicates that she believed "this was a great result for both," (Feldman aff, exhibit f), this misses the point. This communication occurred prior to the arbitration proceedings and before Ms. Sklar and NFMC claim to have discovered the alleged deficiencies in the settlement agreement.

Accordingly, NFMC has stated a claim for legal malpractice and the motion to dismiss is denied with respect to the first counterclaim.

Second Counterclaim: Breach of Fiduciary Duty

This counterclaim is dismissed as duplicative of the legal malpractice counterclaim as it is predicated on the same factual allegations and the same damages. (*Knox*, 168 AD3d at 75-76).

Third Counterclaim: Negligent Misrepresentation

The third counterclaim is dismissed as duplicative of the legal malpractice counterclaim (*Sun Graphics Corp. v Levy, Davis & Maher, LLP*, 94 AD3d 669, 669 [1st Dept 2012]).

Fourth Counterclaim: Fraud

The fourth counterclaim is also dismissed as duplicative of the legal malpractice counterclaim (*Knox*, 168 AD3d at 76).

Fifth Counterclaim: Unjust Enrichment

The elements of unjust enrichment are “(1) the other party was enriched, (2) at that party’s expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered” (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]). NFMC has alleged, among other things, that RFS induced NFMC to continue to retain them in connection with the Vitra Action by promising to reduce their legal fees by \$45,000, but that RFS did not actually reduce their fees and that it would be unjust and inequitable to allow RFS to retain its legal fees. Accepting the allegations in the counterclaim as true, NFMC has stated a claim for unjust enrichment. Accordingly, the motion to dismiss the fifth counterclaim is denied.

Sixth Counterclaim: Violation of Judiciary Law § 487

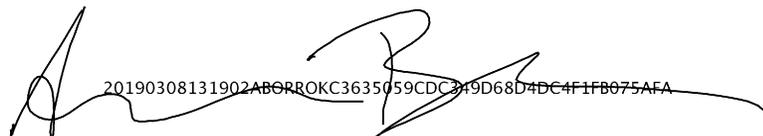
The sixth counterclaim is dismissed as duplicative of the legal malpractice counterclaim (*Knox*, 168 AD3d at 76).

Accordingly, it is hereby

ORDERED that the plaintiff/counterclaim defendants' motion to dismiss (mnt. seq. 004) is granted in part to the extent that the second, third, fourth, and sixth counterclaims are dismissed; and it is further

ORDERED that the defendant/counterclaim plaintiff is directed to serve an answer within 20 days after service of a copy of this order with notice of entry.

3/7/2019
DATE



20190308131902ABORROK3635059CDC319D68D4DC4F1FB075AFA

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: