

**Candela Entertainment, Inc. v Davis & Gilbert, LLP**

2014 NY Slip Op 30977(U)

April 11, 2014

Sup Ct, New York County

Docket Number: 150553/2011

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART THREE

-----X  
CANDELA ENTERTAINMENT, INC. and  
CYNTHIA NEWPORT,

Plaintiffs,

-against-

Index No. 150553/2011  
Motion Date: 2/24/14  
Motion Seq. No.: 002

DAVIS & GILBERT, LLP,

Defendant.

-----X  
BRANSTEN, J.

This legal malpractice action comes before the Court on Defendant Davis & Gilbert, LLP's ("D&G") motion to dismiss Plaintiffs Candela Entertainment, Inc. ("Candela") and Cynthia Newport's (together with Candela, "Plaintiffs") Amended Complaint pursuant to CPLR 3211(a)(1) and (a)(7). Plaintiffs oppose. For the reasons set forth below, Defendant's motion is granted in part and denied in part.

**Background**<sup>1</sup>

According to the Amended Complaint, Plaintiff Candela Entertainment, Inc. retained D&G in October 2007 to assist in financing and transferring ownership of a movie entitled "Dance Cuba." (Am. Compl. ¶¶ 1, 3.) Since 1999, Plaintiff Cynthia Newport has invested nearly \$4,500,000 in "Dance Cuba" through her non-profit

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<sup>1</sup> All facts in this section are undisputed, unless otherwise noted.

organization, Illume Productions, Inc. (“Illume”). (Am. Compl. ¶¶ 1, 7.) In 2005, Newport formed Candela together with Curb Gardner, with both serving as co-presidents. (Affirmation of Vincent J. Syracuse (“Syracuse Affirm.”) Ex. 11 at 1-2.)

Candela retained D&G in order to transfer ownership of “Dance Cuba” from Illume to Candela, as well as to assist in “completion of the film with new investors.” (Am. Compl. ¶ 3.) Mary Luria is the partner at D&G who was responsible for the representation. (Am. Compl. ¶ 17.)

This action arises out of two October 2007 transactions. In the first transaction, Illume assigned all rights and agreements related to “Dance Cuba” to Candela in exchange for Candela assuming a portion of Illume’s outstanding debts. (Am. Compl. ¶ 16.) In the second transaction, a third party loaned funds to Candela, with “Dance Cuba” as loan collateral and Newport and Gardner providing personal guarantees. (Am. Compl. ¶ 3.)

On behalf of D&G, Luria revised and drafted several documents for both transactions, including a bill of sale, a trademark assignment, a deal memorandum and an “Assignment and Assumption Agreement” between Illume and Candela. (Newport Aff. ¶ 9.) However, D&G was not the sole attorney consulted during these transactions. Candela also retained an attorney named Kojo Bentil, who drafted a promissory note and a security agreement for the third-party financing transaction. (Newport Aff. ¶ 22.) In

addition, at a July 2008 meeting regarding “Illume tax issues,” attorneys from Patterson Belknap Webb & Tyler LLP were consulted. (Newport Aff. ¶ 27.)

Relevant to the instant litigation, significant portions of the “Dance Cuba” film incorporate copyrighted materials for which Illume had signed licensing agreements. (Am. Compl. ¶ 15.) These licensing agreements required that Illume obtain consent from the licensors before any transfer of intellectual property rights could be made. (Am. Compl. ¶ 19.) While there is a dispute as to whose duty it was to obtain the consents, the Complaint alleges that no licensor ever granted consent to any assignment. (Am. Compl. ¶ 19.) The Amended Complaint further alleges that Defendant’s failure to advise that obtaining consents was necessary created a cloud on the film’s title, which prevented Plaintiffs from seeking new investors and completing the film. (Am. Compl. ¶ 3.)

Plaintiffs filed the Amended Complaint on June 10, 2013, asserting that Defendant’s “failure[] to properly understand and advise Plaintiffs as to the structure, the transactions and the effect of the documents utilized in the transactions,” constituted (i) negligence, (ii) breach of contract, and (iii) breach of fiduciary duty. Defendant now seeks dismissal of the Amended Complaint. Plaintiffs oppose.

**I. Defendant's Motion to Dismiss**

Defendant moves to dismiss the Amended Complaint pursuant to CPLR 3211(a)(1) and (a)(7), on the grounds that Newport has failed to plead facts that establish an attorney-client relationship and that Candela has failed to establish that Defendant was negligent or that its negligence was the proximate cause of Candela's damages.

**A. *Motion to Dismiss Standard***

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in a light most favorable to the plaintiffs and the plaintiffs must be given the benefit of all reasonable inferences. *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). This Court must deny a motion to dismiss, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted).

However, on a CPLR 3211(a)(1) motion, "[i]t is well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly

contradicted by documentary evidence . . . are not presumed to be true on a motion to dismiss for legal insufficiency.” *O'Donnell, Fox & Gartner v. R-2000 Corp.*, 198 A.D.2d 154, 154 (1st Dep't 1993). The court is not required to accept factual allegations that are contradicted by documentary evidence or legal conclusions that are unsupported in the face of undisputed facts. *See Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 495 (1st Dep't 2006) (citing *Robinson v. Robinson*, 303 A.D.2d 234, 235 (1st Dep't 2003). Ultimately, under CPLR 3211(a)(1), “dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” *Leon*, 84 N.Y.2d at 88.

#### B. *Privity*

As a threshold matter, to maintain a cause of action for legal malpractice, the plaintiff must plead the existence of an attorney-client relationship. *See, e.g., AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 5 N.Y.3d 582, 595 (2005) (affirming dismissal of legal malpractice claim for failure to plead facts showing actual privity, near privity, or an exception to privity). In order to defeat a motion to dismiss, a party must plead facts showing the privity of an attorney-client relationship, or a relationship so close as to approach privity. *Cal. Pub. Employees Ret. Sys. v. Shearman*

& *Sterling*, 95 N.Y.2d 427, 434 (2000) (affirming dismissal of legal malpractice claim for failure to plead actual privity or near privity).

i. *Newport Cannot Establish Express Privity*

While it is undisputed that D&G represented Candela, Newport alleges that she too was represented by D&G. Newport argues that privity existed because she signed D&G's retainer agreement. Defendant argues that documentary evidence refutes the Amended Complaint's claims of express privity between Newport and D&G, and thus Newport fails to state a cause of action for legal malpractice. Defendant argues that there can be no privity because the retainer agreement is addressed solely to Candela and that Newport signed all pertinent documents simply on behalf of Candela.

When dealing with issues of contract interpretation, courts must construe the agreement according to the parties' intent, and the best evidence of what parties to a written agreement intended is what was said in the writing. *See, e.g., Slatt v. Slatt*, 64 N.Y.2d 966, 966 (1985). Courts may not fashion a new contract for the parties under the guise of interpreting the writing. *See, e.g., Tonking v. Port. Auth. of N.Y. & N.J.*, 3 N.Y.3d 486, 490 (2004) (holding that a court may not "rewrite the contract and supply a specific obligation the parties themselves did not spell out")

Here, documentary evidence submitted by D&G conclusively contradicts Newport's allegations that D&G expressly represented Newport. First, D&G's retainer agreement is addressed to "Candela Entertainment, Inc." *See* Syracuse Affirm. Ex. 9. Second, D&G's retainer signature line stated, "Agreed to and Accepted Candela Entertainment, Inc." *See* Syracuse Affirm. Ex. 9. Finally, all invoices from D&G were sent to Candela, "attn: Curb Gardner II." *See* Syracuse Affirm. Ex. 10. A corporate officer and sole shareholder does not create express privity simply by signing a retainer agreement as a corporate officer on behalf of the corporation. *See Griffin v. Anslow*, 17 A.D.3d 889 (3d Dep't 2005) (holding that there was no privity with corporate counsel where corporate officer and sole shareholder signed retainer agreement).

Newport point to no facts alleged in the Amended Complaint or elsewhere that rebut the documentary evidence enumerated above or that show express privity existed between Newport and D&G. Accordingly, this Court holds that there is no express privity between Newport and D&G.

ii. *Newport Cannot Establish Near-Privity*

Newport argues that the required element of privity is still present because the relationship between Newport and D&G was "so close as to touch the bounds of privity." Newport contends that near-privity was created in an October 2007 email, where

Candela's co-president Gardner stated that "the objective is for the Assignment to happen which minimizes the financial/tax risks/exposure to Newport, adequately return a FMV to illume [sic], and maximize Candela's profitability and investment in taking the film forward." See Syracuse Affirm. Ex. 9 at 5. Newport contends that "a key aspect of the work" performed by D&G was "to minimize 'the financial/tax risks/exposure'" to Newport. See Newport Aff. ¶ 6.

To show "near privity," a plaintiff must allege that the attorney was aware that its services were used for a specific purpose, that the plaintiff relied upon those services, and that the attorney demonstrated an understanding of the plaintiff's reliance. See *Cal. Pub. Employees Ret. Sys. v. Shearman & Sterling*, 95 N.Y.2d 427, 434 (2000).

Newport's argument for "near privity" falls short because the Amended Complaint does not allege that the specific purpose of the work done by D&G related to Newport personally. See *Fortress Credit Corp. v. Dechert LLP*, 89 A.D.3d 615, 616-17 (1st Dep't 2011) (stating there is "near privity" where the particular purpose of an attorney's opinion letter was to aid plaintiff in deciding merits of a loan transaction); *Topor v. Enbar*, 15 Misc.3d 1139(A) (Sup. Ct. N.Y. County May 24, 2007) (Fried, J.) (finding no privity where plaintiff failed to allege "any facts . . . establishing that there was an explicit undertaking to perform a specific legal task on behalf of [plaintiff] personally.").

The Amended Complaint fails to allege that the specific purpose of D&G's representation was anything other than transferring ownership of "Dance Cuba" from Illume to Candela or creating a third-party loan. Merely because one of three "objectives" listed in an email from Candela's co-president related to Newport does not mean that D&G was representing Newport in contravention of the express terms of the retainer agreement. *See O'Donnell, Fox & Gartner v. R-2000 Corp.*, 198 A.D.2d 154, 154 (1st Dep't 1993) ("factual claims, which are either inherently incredible or flatly contradicted by documentary evidence . . . are not presumed to be true on a motion to dismiss for legal insufficiency."). This is highlighted by the fact that no one claims D&G represented Illume, despite an "objective" of the transaction relating to Illume receiving a fair return. *See Syracuse Affirm. Ex. 9 at 5.*

The Amended Complaint does not allege any "specific undertaking to complete a specific task" that D&G embarked upon with the specific purpose of benefitting Newport individually. *See Fortress Credit Corp. v. Dechert LLP*, 89 A.D.3d 615, 616-17 (1st Dep't 2011); *Wei Cheng Chang v. Pi*, 288 A.D.2d 378, 380-81 (2d Dep't 2001) (finding no privity between attorney and plaintiff where "the record is devoid of any written or oral agreement that the defendant attorneys would perform a specific task for the plaintiffs").

Plaintiffs cite several inapposite cases in support of their “near privity” argument. *See Prudential Ins. Co. of Am. v. Dewey, Ballantine, Bushby, Palmer & Wood*, 80 N.Y.2d 377 (1992); *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172 (1st Dep’t 2004); *Caprer v. Nussbaum*, 36 A.D.3d 176 (2d Dep’t 2006). In *Prudential*, the court stated that “it should be stressed that the purpose of [an accountant’s] opinion letter is to offer assurances” to third-party creditors. *Prudential*, 80 N.Y.2d at 386-87. Unlike *Prudential*, the Amended Complaint here does not allege that the specific purpose of the transactions requiring legal advice was to benefit Newport personally.

In both *Allianz* and *Caprer*, the defendants communicated and advised the non-client plaintiffs even though there was no direct relationship between them. *Allianz*, 13 A.D.3d at 175; *Caprer*, 36 A.D.3d at 197. Here, D&G was simply communicating with its client, Candela, through one of its officers. Further, *Allianz* was decided on equitable subrogation grounds and the “near privity” relationship was mentioned in dictum. *Allianz*, 13 A.D.3d at 175 (stating “the issue of equitable subrogation is dispositive”); *see Federal Ins. Co. v. North Am. Speciality Ins. Co.*, 47 A.D.3d 52 (1st Dep’t 2007) (noting that the “near privity” analysis in *Allianz* is dictum).

In *Caprer*, the Second Department found privity between accountants and condominium owners hired by management because the particular purpose of the accountants’ employment was to benefit condominium members. *Caprer*, 36 A.D.3d at

197. The court found that the condominium members were the intended beneficiaries of the accountants' audits because the report would determine the common expenses each member would owe, and the condominium's by-laws required that an audited financial report be submitted to unit owners each year. *Caprer*, 36 A.D.3d at 197. As stated above, the Amended Complaint simply does not allege that the specific purpose of D&G's actions related to Newport in an individual capacity, nor does it allege that Newport was the intended beneficiary of either the retainer agreement or the transactions at issue.

In contrast, this case is factually analogous to *Griffin v. Anslow*, 17 A.D.3d 889 (3d Dep't 2005). In *Griffin*, an attorney signed a retainer agreement with a corporation and advised on corporate transactions. The corporate counsel was subsequently sued for malpractice by one of the corporation's owners, with the owner alleging privity because the plaintiff had provided a personal guarantee of corporate debt and communicated with the attorney directly. *Griffin*, 17 A.D.3d at 892. The Third Department affirmed dismissal of plaintiffs' claims based upon documentary evidence, holding that "[p]laintiffs' conclusory assertion that they considered defendant to be their personal attorney does not . . . confer upon them the status of defendant's clients," despite the personal guarantee of corporate debt and direct communication between the attorney and the plaintiffs. *Griffin*, 17 A.D.3d at 893. The court in *Griffin* also noted that the retainer

agreement was addressed to the corporation and that the plaintiffs were briefly represented by other attorneys. *Griffin*, 17 A.D.3d at 892.

Here, despite Newport's personal guarantee of corporate debt and direct communication with D&G, the retainer agreement states, "Agreed to and Accepted Candela Entertainment, Inc.," and at least two other attorneys were involved. *See* Syracuse Affirm.. Ex. 9. In addition, all invoices from D&G were sent to Candela, "attn: Curb Gardner II." *See* Syracuse Affirm. Ex. 9.

Therefore, as in *Griffin*, the Amended Complaint does not plead facts showing that D&G performed any task specifically to benefit Newport as an individual and apart from the corporation. The Amended Complaint fails to establish that an attorney-client relationship existed between Newport and D&G. Accordingly, Newport's causes of action arising out of D&G's representation of her personally is dismissed. However, Defendant concedes that privity existed with Candela, so the Court will now analyze Candela's legal malpractice cause of action.

### C. *Negligence*

Defendant argues that the Candela's allegations are too vague to support a cause of action for negligence and are contradicted by documentary evidence. Since Candela is the only remaining Plaintiff, the Court will focus solely on its allegations.

The CPLR requires only notice pleading, liberally construed, which puts an adversary on notice of the transactions and occurrences giving rise to a claim. *See* CPLR §§ 3013, 3026. Here, the Amended Complaint provided sufficient notice to Defendant by alleging that Luria failed to “properly advise[] Plaintiffs [to] obtain[] necessary material consents to assignments of licenses.” *See* Am. Compl. ¶ 42.

Defendant argues that documentary evidence precludes this claim. Defendant contends that an unsigned draft of an “Assignment and Assumption” agreement shows that Defendant did in fact advise Candela on the need to obtain consents. *See* Syracuse Affirm. Ex. 11. However, dismissal is not warranted because the documentary evidence does not conclusively establish a defense as a matter of law. *Leon*, 84 N.Y.2d at 88. Since the agreement was a draft and was unsigned, it merely raises a factual contention as to whether or not Candela ever saw the document and was ever informed of the need to obtain consents. Factual issues such as this are not properly determined on a motion to dismiss. *See Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994) (“We . . . determine only whether the facts as alleged fit within any cognizable legal theory.”)

#### D. *Causation*

In addition to privity and negligence, a plaintiff in a legal malpractice action must plead “that the defendant failed to exercise the ordinary reasonable skill and knowledge

commonly possessed by a member of the legal profession.” *AmBase Corp. v. Davis Polk & Wardwell*, 8 N.Y.3d 428, 434 (2007). Candela alleges that the Defendant was negligent in understanding and advising as to the structural, documentary, and intellectual property ramifications of the various transactions and the need to obtain licensor consents to any transfer of copyrighted material. *See* Am. Compl. ¶ 8. Candela alleges that Defendant’s negligence caused a cloud on the title to “Dance Cuba.” *See* Am. Compl. ¶ 8.

A critical element of a malpractice action is proximate causation. *See Zarin v. Reid & Priest*, 184 A.D.2d 385, 386 (1st Dep’t 1992). Candela must plead that Defendant’s negligence was the proximate cause of damages suffered. *See Zarin*, 184 A.D.2d at 386. Candela must plead that because of Defendant’s negligence, a positive outcome was transformed into a negative outcome. *See Zarin*, 184 A.D.2d at 386. Put another way, Candela must plead facts such that “but for” the attorney’s derelict conduct, “what would have been a favorable outcome was an unfavorable outcome.” *See Zarin*, 184 A.D.2d at 386; *Barnett v. Schwartz*, 47 A.D.3d 198, 203 (2d Dep’t 2007) (stating that alleged malpractice need be neither “a” proximate cause nor “the” proximate cause, but only that “‘but for’ the negligence of the defendant-attorney, the plaintiff-client . . . would not have incurred damages”).

Here, according every possible inference favorable to Candela, the Amended Complaint has sufficiently plead that but for D&G's negligence, Candela would not have suffered damages. The Amended Complaint alleges that if Defendant had properly advised Candela on the need to obtain consent from various licensors, Candela would have secured the requisite licensor consents and that Candela would still own the "Dance Cuba" film. *See* Am. Compl. ¶ 42. Therefore, Candela sufficiently alleges that D&G proximately caused Candela's damages.

E. *Damages*

Defendant also argues that Candela fails to establish a basis for its \$8 million damages claim. Defendant contends that Candela's allegations are too speculative to support a negligence cause of action. Candela argues that it has no burden to plead specific damages.

Candela's negligence cause of action withstands dismissal because the Amended Complaint alleges that there is a cloud on the title to "Dance Cuba." Candela "need not, at this early stage, offer a detailed pleading to support [] quantifying [its] alleged loss." *See Fletcher v. Boies, Schiller & Flexner, LLP*, 75 A.D.3d 469, 469 (1st Dep't 2010). Therefore, Defendant's motion to dismiss Candela's negligence cause of action is denied.

F. *Duplicative Claims*

Defendant also moves for dismissal of the breach of contract and breach of fiduciary duty claims as duplicative of the legal malpractice claim. Where a plaintiff's breach of contract and breach fiduciary duty claims arise from the same facts and allege similar damages as a legal malpractice action, they must be dismissed. *E.g., Waggoner v. Caruso*, 14 N.Y.3d 874, 874 (2010) (dismissing breach of fiduciary duty claim as duplicative of malpractice claim); *Sage Realty Corp. v. Proskauer Rose LLP*, 251 A.D.2d 35, 38 (1st Dep't 1998) (dismissing breach of contract claim as duplicative of malpractice claim).

Here, the facts on which the breach of contract and breach fiduciary duty claims are premised are identical to the set of facts Plaintiffs plead in support of the malpractice claim. All claims allege that Defendant "badly mishandled intellectual property matters," all claims plead that there is now a cloud on title to the "Dance Cuba" production, and all claims seek \$8,000,000 in damages.

Accordingly, Plaintiffs' second cause of action for breach of contract and the third cause of action for breach of fiduciary duty are duplicative of the first cause of action for negligence, and Defendant's motion to dismiss the second and third causes of action is granted.

G. *Punitive Damages*

Candela's claims for punitive damages must be stricken. "Here, there is no showing that defendant's repeated error was motivated by malice or a desire to benefit themselves at plaintiff's . . . expense, or that such error was so outrageous as to evince a high degree of moral turpitude and showing such wanton dishonesty as to imply a criminal indifference to civil obligations." *Bothmer v. Schooler, Weinstein, Minsky & Lester, P.C.*, 266 A.D.2d 154, 154 (1st Dep't 1999) (internal quotation omitted). *See also Walker v. Stroh*, 192 A.D.2d 775, 776 (4th Dep't 1993) ("the claim for punitive damages should have been stricken as insufficient as a matter of law [because] Plaintiff failed to allege . . . that [defendant's] conduct was so outrageous as to evince a high degree of moral turpitude and showing such wanton dishonesty as to imply a criminal indifference to civil obligations.") (internal quotation omitted).

The Amended Complaint is devoid of any allegation approaching wantonly dishonest or outrageous conduct of any kind. Accordingly, Candela's claim for punitive damages is dismissed.

The Court has considered the parties' remaining arguments and finds them unpersuasive.

*(Order of the Court follows on next page.)*

**Conclusion**

For the reasons set forth above, it is hereby

ORDERED that defendant D&G's motion to dismiss the Amended Complaint is granted in part, to the extent that all claims asserted by Newport are dismissed, with costs and disbursements to defendant D&G as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendant D&G against Plaintiff Newport; and it is further

ORDERED that defendant D&G's motion to dismiss is further granted in part, to the extent that the second and third causes of actions are dismissed in their entirety, and that any claims for punitive damages are dismissed; and it is further

ORDERED that D&G's motion to dismiss the Amended Complaint is otherwise DENIED; and it is further

ORDERED that plaintiff Candela's action is severed and continued against defendant D&G; and it is further

ORDERED that the caption be amended to reflect the dismissal of plaintiff Cynthia Newport from this action and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the defendant D&G shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial

Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

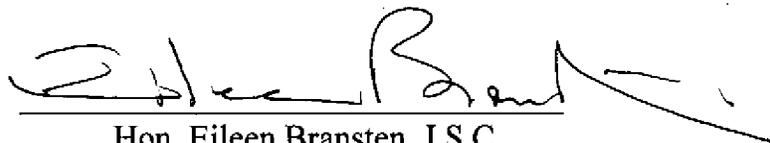
ORDERED that counsel for all parties are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on May 27, 2014, at 10:00 A.M.

This constitutes the decision and order of the Court.

Dated: New York, New York

April 11, 2014

ENTER:

A handwritten signature in black ink, appearing to read "Eileen Bransten", is written over a horizontal line. The signature is cursive and extends to the right of the line.

Hon. Eileen Bransten, J.S.C.