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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER PART IA Part 16

Justice

Schwartz

-v-

Alshan

INDEX NO. 105694-98

MOTION DATE

MOTION SEQ. NO. 02

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 8/20/01 AUG 20 2001

ALICE SCHLESINGER J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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TOVA SCHWARTZ,

Plaintiff,

-against- Index No. 105694/98

OLSHAN GRUNDMAN FROME & ROSENZWEIG
and ROBERT FRIEDMAN,

Defendants.

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SCHLESINGER, J.:

Plaintiff Tova Schwartz commenced this legal malpractice action against defendants Olshan Gundman Frome & Rosenzzweig ("The Olshan law firm") and Robert Friedman claiming that she sustained millions of dollars in damages based on defendants' negligent representation in connection with a commercial transaction in 1995.

I. The Transaction

Schwartz founded Light Savers USA Inc. in 1991. Light Savers was in the business of designing and selling efficient lighting fixtures. In 1994 Light Savers went public and Schwartz was the controlling shareholder.

In 1995 the Olshan law firm was retained to negotiate the terms of an asset purchase agreement between Light Savers and Interior Services Company d/b/a Hospitality Restoration & Builders ("AGF"). The deal was consummated on August 17, 1995 wherein Hospitality Restoration and Builders, Inc. (HRB), a subsidiary of Light Savers purchased the assets of AGF from Watermark Investments Ltd. ("Watermark") in consideration for

delivery of a promissory note in the sum of $2.15 million and 2.5 million shares of common stock of Light Savers.

Schwartz's individual interests were also addressed in the Asset Purchase Agreement. The agreement obligated Watermark to purchase from Schwartz an additional 500,00 shares at $4.00 per share. In the event Watermark failed to purchase the shares, Schwartz was entitled to liquidated damages in the sum of $1 million dollars.

The assets purchased under the agreement included all rights, benefits and interests relating to AGF's restoration and rehabilitation projects in the hospitality industry. Plaintiff asserts that the primary asset of AGF were the services of its two key employees, Alan G. Friedberg, the president of AGF and Guilermo Montero. Schwartz states that these two individuals were responsible for the contracts with major hotel chains and the operation of the renovation business (Schwartz Aff. in Opp. @ ¶ 15).

Since it was imperative to retain the two employees after the acquisition, Schwartz states that defendants were required to make sure that valid and enforceable employment agreements were conveyed with the Asset Transfer Agreement (Id., @ ¶ 17). In fact, Schwartz contends that on the morning of the closing Friedman was asked whether the Friedberg and Monterro employment contracts were "locked up". Friedman allegedly represented that the contracts were "iron clad" (Id., @ 20).

Friedman and Montero took a different view of their contracts after Light Savers acquired AGF's assets. According to Schwartz, in October and November 1995, the two

made repeated threats to resign. At the same time Watermark did not comply with its contractual obligations to purchase Schwartz Light Saver shares or pay the stipulated liquidated damages of $1 million (Id., @ ¶ 24). On November 30, 1995 Friedberg tendered his letter of resignation asserting inter alia that Light Savers had not negotiated a mutually acceptable contract and by failing to provide 300,000 options.

Schwartz responded by letter dated December 1, 1995 noting that a three year employment contract was in effect and that the resignation was simply a tactic to force Light Savers into acquiescing to "outrageous demands". Schwartz threatened to enforce the existing employment contracts which contained non-competition provisions.

Some days prior to Friedberg's attempted resignation, Light Savers terminated its relationship with defendant law firm and retained new counsel. Schwartz states that her letter did not deter Friedberg. Schwartz's new attorney, Elliot Brecker of Cooperman Levitt Winikof Lester & Newman states that he reviewed the Asset Purchase Agreement. Although he prepared a letter demanding that the two employees honor the obligations, he concluded that the employment agreements were not one of the specified assets conveyed and in fact were specifically excluded.

According to Schwartz, Friedberg and Monterro were being aided by Watermark's chairman, Robert Berman, to bring Light Savers down. The three demanded a high price for retaining Friedberg and Montero as employees of Light Savers. Schwartz was forced to resign, to relinquish her majority share in Light Savers, and to waive the $1 million dollar

liquidated damages provision contained in the Asset Purchase Agreement. Schwartz maintains that she had no alternative. Since Friedberg and Monterro were essential to Light Savers, she was forced to succumb to these demands to protect her remaining interest in Light Savers [Id., @ ¶ 32].

These negotiations were memorialized on February 26, 1996 in a Divesture Settlement and Reorganization Agreement which contained a general release. Schwartz purchased the lighting business from Light Savers (which she maintains was now worthless). Light Savers purchased 500,000 shares for $250,000 from Schwartz. Light Savers was also given an option to purchase an additional one million shares. Watermark was released from its obligation to purchase $500,000 shares at $4.00 per share. Schwartz in turn agreed to waive her claim for liquidated damages.

In August, 1996 Light Savers sought to exercise its option to purchase Schwartz's shares under the Divestiture Agreement. Schwartz refused to turnover the shares and Light Savers commenced an action in September, 1996 seeking specific performance. Light Savers was represented by the Olshan law firm. The litigation was settled in October, 1996. Schwartz received $715,000 for 500,000 shares of her stock in Light Savers. Subsequently in May, 1997 Light Savers purchased another 500,00 shares for $2,210,000.

In April, 1998 Schwartz commenced this action alleging that the Olshan law firm committed malpractice in failing to secure enforceable employment agreements from Friedberg and Monterro. Plaintiff asserted that as a result of the malpractice she was forced

to give up controlling interest in Light Savers and did not realize the benefits of the Asset Purchase Agreement. The second cause of action alleged that defendants breached their fiduciary duty of undivided loyalty. The third cause of action charged defendants with negligently representing that the employment agreements were enforceable. The fourth count was for the negligent infliction of emotional distress. The fifth cause of action sounded in breach of contract.

Defendants now move for summary judgment. Plaintiff opposes the motion.

I. The Release

Defendants maintain that Schwartz gave them a general release in the Divestiture Agreement. Section 5.1 of this agreement provides in relevant part as follows:

> 5.1 Mutual Release between Schwartz and Watermark, Watermark-Bahamas, AGF, lSU and HRB. Each of Watermark, Watermark-Bahamas, AGF, LSU and HRB (collectively and individually referred to for the purpose of this release as the "Corporation") hereby fully, finally and forever remises, releases and discharges Schwartz and her heirs, legal representatives, successors and assigns and Schwartz hereby fully, finally and forever remises, releases and discharges collectively and individually the Corporation and its respective past and present affiliated corporations and related entities, and <u>its respective past and present officer, directors, agents, shareholders and employees</u>, and its respective legal representatives, successors and assigns, and any or all of them, of and from any and all actions, causes of action, suits.... (emphasis added)

Defendants' contention that this release discharged them because Olshan was an agent and legal representative of Light Savers and HRB is far from persuasive. Defendants' relationship with Light Savers and Schwartz had been terminated in November, 1995. Defendants did not represent any of the parties who were subject to the Divestiture Agreement. While there is no requirement that the parties to a release be specifically identified, it is doubtful that the parties to the February 1996 agreement ever intended to release the defendants who played no role in the negotiations or the drafting of the agreement.

II. Legal Malpractice

In order to establish a claim for legal malpractice plaintiff must prove the following: One, the attorney was negligent in failing to exercise that degree of skill and care commonly possessed by the legal community; two, that the negligence was a substantial factor in causing the injury; and three, actual damages. (Prudential Insurance Co. v. Dewey Ballantine, 170 AD2d 108 (1st Dept 1991) aff'd 80 NY2d 377 (1991). Causation is established by showing that the outcome in the underlying suit or transaction would have been different "but for" the attorney's negligence (Carmel v. Lunney, 70 NY2d 169 (1987).[1]

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[1]Defendants also contend that they represented the corporation and not Ms. Schwartz. While there was no retainer with Schwartz an issue of fact is raised as to whether defendants represented Ms. Schwartz. Ms. Schwartz contends that she believed that Mr. Friedman was representing her personal interests as well. She arguably had justification for this belief. She stood to personally benefit from the agreement as Watermark was obligated to purchase her shares or pay liquidated damages. Presumably it was the defendants who negotiated these benefits for Schwartz in her individual capacity.

Schwartz maintains that but for defendants' negligent advice that the employment agreements were enforceable, she would not have entered into the August 1995 Asset Purchase Agreement or at least would have structured it differently. Thus, plaintiff urges that defendants committed malpractice by failing to make sure that Light Savers was conveyed enforceable employment agreements.

The lynch pin to this lawsuit is whether the employment agreements were enforceable. Thus the Asset Purchase Agreement requires close scrutiny. Section I, entitled "Purchase and Sale of Assets", describes the assets conveyed to Light Savers. Specifically, § 1.1.1 provides, in relevant part, as follows:

> 1.1.1 Purchased Assets. The assets purchased hereunder (the "Assets") shall consist of those properties, assets and rights described below, which relate to the Seller's business of marketing, selling, contracting and constructing, renovation, restoration and rehabilitation projects in the hospitality industry, as such operations have been ordinarily conducted by the Seller (the "Business"), and such Assets, except as excluded and set forth on Schedule 1.1.2, include:
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> ***
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> (ii) all rights, benefits and interests under all contracts,...

While employment agreements are not specifically mentioned as assets in § 1.1.1, employment agreements are contractual obligations. Section 4.13 of the Asset Purchase Agreement lists contracts of the seller. This provision provides in relevant part, as follows:

> 4.13 Contracts. Schedule 4.13 hereto consists of

a true and complete list of all contracts, agreements and purchase commitments of the Seller and other instruments relating to the Assets or the Business to which the Seller is a party, and contemporaneous with the execution of this Agreement, Seller has delivered a true and complete copy of each such contract, agreement, commitment or instrument, certified as such by a duly authorized officer of the Seller delivering such item to Purchaser.

Schedule 4.13 lists the following contracts:

1. Commission and Employment Agreements

A. June C. McCutchen - No formalized agreement
Salary - $60,000.00
Commission - 3/4% of all gross contract amounts (including change orders)

B. Richard B. Bluestein - No formalized agreement
Salary - $104,000.00
Commission - 2% of all gross contract amounts and change orders over 1.5 million annually

C. Guillermo Montero Employment Agreement

D. Alan Friedberg Employment Agreement

Section 4.13 established that the Friedberg and Montero employment agreements were contracts. Since they were contracts, they fall with Section 1.1.1 the Asset Purchase Agreement and were conveyed as assets to Light Savers. Therefore, the two employment

agreements were arguably enforceable. Schwartz's contention that employment agreements were excluded lacks merit. Schedule 1.1.2 describes the excluded assets. It states, in relevant, as follows:

> 1.1.2. Excluded Assets. Notwithstanding anything in this Agreement to the contrary, Purchaser shall not purchase, receive, benefit from, or be under any obligation with respect to
>
> ***
>
> Schedule 1.1.2, or (iv) any Benefit Programs and Employment Policies as defined in Section 4.16.

Schedule 1.1.2 does not list the employment agreements as excluded assets. Section 4.16 of the Asset Purchase Agreement describes the employment benefit plans. It provides, in pertinent part, that:

> 4.16 Benefit Plans. The employee benefit plans and agreements listed in Schedule 4.16 hereto are the only employee benefit plans and agreements maintained by the Seller for the benefit of their respective officers, directors, employees, or independent contractors....

Significantly, Schedule 4.16 does not list any benefit programs and employment policies and states instead "NONE" (emphasis in original). Had the parties intended to exclude the employment agreements they would have appeared on either Schedules 1.1.2 or 4.16. The omission of the employment agreements from these schedules makes clear that the agreements were not excluded.

Accordingly, the court concludes that the employment agreements were assets that

had been transferred to Light Savers. This conclusion necessarily means that plaintiff as a matter of law can not establish the "but for" element. Plaintiff did not to seek to enforce the employment agreements. Rather she chose to enter a new transaction with Light Savers/AGF. Therefore, plaintiff is unable to show that there is a causal connection between any negligent advice and the waiver of the option, her resignation from Light Savers and the sale of her stock under the Divestiture Agreement.

Accordingly, the malpractice cause of action is dismissed.

III. Breach of Fiduciary Duty

Plaintiff contends that defendants breached their fiduciary duties in two respects. First, defendants did not advise Schwartz that only Light Savers was being represented in violation of DR 5-109(A).[2] If both Light Savers and Schwartz were being represented, the dual representation violated DR 5-105 as Schwartz and Light Savers had different interests. Schwartz argues that there was conflict because AGF and Light Savers in essence merged. The merged entity had Watermark as a parent which was required to purchase Schwartz's shares. This situation created a conflict resulting in defendants' failure to obtain security for Watermark's obligation to purchase Schwartz's shares.

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[2]DR 5-109(A) provides as follows:

When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

Second, plaintiff argues that the defendants violated DR 5-108(A)[3] by bringing the lawsuit to enforce the option agreement set forth in the Divestiture Agreement which was substantially related to the Asset Purchase Agreement.

Plaintiff's argument is based, in part, on the August 17, 1995 letter agreement between Light Savers and Tova Schwartz wherein it was agreed that if Watermark failed to meet its obligations, Schwartz would be entitled to one million dollars. The letter states in relevant part, that:

> In addition, in order to assure that the Obligor is able to fulfill its obligations to you pursuant to the preceding paragraph, each Obligor shall endeavor to provide you with security for its performance, such security may include the filing of a UCC-1 Financing Statement and the placement of cash and/or securities in escrow.

Plainly, there was no binding legal obligation to obtain security. Therefore, the failure to obtain security is not a breach of a fiduciary duty. Nor does the court discern a conflict which would give rise to a breach of fiduciary claim. Defendants represented Light Savers and arguably Schwartz. Watermark was a separate corporation represented

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[3]DR 5-108(A) states that:

...[A] lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure:

1. Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client.

2. Use any confidences or secrets of the former client except as permitted by DR 4-101(c) or when the confidence or secret has become generally known.

presumably by a different counsel.

Even if there was somehow a violation of DR 5-105, a breach of the Code of Professional Responsibility, standing alone, does not state a valid cause of action (Brown v. Samalin & Bach, 155 AD2d 407 (2nd Dept 1989).

Nor does defendants' representation of Light Savers in the subsequent litigation support a claim for breach of fiduciary duty. First, the Olshan law firm did not represent any of the parties to the Divestiture Agreement. Second, although the Divestiture Agreement was entered into between the same or related entities, it is difficult to see how the two are substantially similar. They were different agreements with different obligations and the defendants were simply seeking to compel compliance with the Divestiture Agreement. Schwartz's remedy was to move for the disqualification of the Olshan law firm. Instead she chose to settle the lawsuit. Furthermore, it is not clear to the court what confidences and secrets were utilized against Schwartz in the enforcement litigation. Plaintiff's objection that defendants were privy to Schwartz's "negotiating style and strategies" is not a confidence or secret that would support a claim for breach of fiduciary.

Therefore, the breach of fiduciary duty claim is dismissed.

IV. Breach of Contract and Neglect Misrepresentations

These causes of action are predicated on the claim that defendants made an explicit promise that they would protect her interests by having in place enforceable employment agreements. These claims are redundant of the malpractice claim and are insufficient based

on the court's conclusion that the employment agreements were conveyed to Light Savers and attempts to enforce them could have been made but weren't.

Therefore, the breach of contract and negligent misrepresentation causes of action are dismissed.

V. Infliction of Emotional Distress

This claim is dismissed because the defendants' conduct as a matter of law was not so outrageous and extreme, beyond all possible bounds of decency so as to be regarded as atrocious and utterly intolerable in a civilized community (Murphy v. American Home Prods. Corp., 81 NY2d 115 (1993)).

Accordingly, this claim is dismissed as well.

In view of the above, defendant's motion for summary judgment is granted and the complaint is dismissed.

This decision constitutes the order of the court.

Dated: August , 2001

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J.S.C.

ALICE SCHLESINGER