

**Merlin Biomed Asset Management, LLC v Wolf Block
Schoor & Solis-Cohen LLP**

2004 NY Slip Op 30095(U)

September 9, 2004

Supreme Court, New York County

Docket Number: 0111048/1048

Judge: Paula J. Omansky

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

PRESENT: PAULA J. OMANSKY

Justice

PART 47

0111048/2002

INDEX NO. _____

MERLIN BIOMED ASSET

MOTION DATE 2/16/04

VS

WOLF BLOCK SCHORR & SOLIS

MOTION SEQ. NO. _____

SEQ 2

MOTION CAL. NO. 4

PARTIAL SUMMARY JUDGMENT

The following papers, numbered _____

file motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

FILED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

SEP 14 2004

Cross-Motion: Yes No

NEW YORK
COUNTY CLERKS OFFICE

Upon the foregoing papers, it is ordered that this motion

*motion denied in accordance with
deemingly supporting memoranda*

NOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE _____

Dated: 9/9/04 *Paula J. Omansky*

[Signature]

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47**

-----X
MERLIN BIOMED ASSET MANAGEMENT, LLC;
MERLIN BIOMED GROUP, LLC;
MERLIN BIOMED INVESTMENT ADVISORS, LLC
MERLIN BIOMED, L.P.;
MERLIN BIOMED INTERNATIONAL, LTD.;
MERLIN BIOMED SERVICES, LLC;
MERLIN BIOMED ADVISORS, LLC;
MERLIN BIOMED NORTH, INC.;
MERLIN BIOMED PRIVATE EQUITY, LLC;
MERLIN BIOMED PRIVATE EQUITY ADVISORS, LLC
and STUART WEISBROD

Index No. 111048/2002

Plaintiffs,

DECISION AND ORDER

-against-

WOLF BLOCK SCHOOR & SOLIS-COHEN LLP
and JACK P. GOVERNALE
Defendants.

FILED
SEP 16 2004
NEW YORK
COUNTY CLERK'S OFFICE

-----X
PAULA J. OMANSKY, J.:

Plaintiff Stuart Weisbrod is one of the founders and a principal in a variety of Merlin Biomed companies named here as plaintiffs (hereinafter "Weisbrod" or "plaintiffs") which provide investment management and advisory services and operate domestic and offshore hedge funds for institutions and individuals who invest in the life sciences or health care industries. Michael Gotthelf was and is the owner of a company called MAG Portfolio Consult ("MAG"). In January 1998 Weisbrod and Gotthelf, acting through MAG (hereinafter "Gotthelf"), entered into partnership and employment agreements for the purpose of starting a group of financial advisory and hedge fund businesses using the Merlin Biomed name. Weisbrod and Gotthelf each owned 50% of the companies set up under their agreement and each made the same capital contribution to the new

businesses; namely, Merlin Biomed Asset Management LLC (“MBAM”), Merlin Biomed Advisors, LLC (“MB Advisors”) and Merlin Biomed Services LLC (“MB Services”).

Deutsche Vermögensbildungsgesellschaft mbH (“DVG”) was the investment manager for a German bank’s account which was maintained in the name of the German Doctor’s Pension Fund (in translation). Gotthelf was able to secure DVG as a client of the Merlin Biomed companies because he had a business relationship with the DVG employees who had management responsibility over the DVG account. As a result of Gotthelf’s connection, in February 1998, MBAM and DVG entered into an Investment Advisory Agreement whereby MBAM agreed to act as investment advisor to DVG in connection with that portion of the German Doctor’s Pension Fund which invested in Life Science Stocks (the “DVG Account”). By 1999 the assets under Merlin Biomed’s management in the DVG Account totaled approximately \$60 million. MBAM was compensated with a fixed fee for management services and a performance fee for advisory services.

In April 1999 Gotthelf advised Weisbrod that DVG intended to terminate its Agreement with MBAM.. By letter dated April 26, 1999, DVG so advised MBAM, terminating the Investment Advisory Agreement effective as of May 31, 1999. At first, Gotthelf advised Weisbrod that DVG would re-invest its \$60 million with the Merlin Biomed companies by “rolling-over” the \$60 million into one or both of the Merlin Biomed hedge funds, namely, Merlin Biomed, L.P., a domestic hedge fund, or Merlin Biomed International, Ltd, an offshore hedge fund.. This meant that DVG’s investment would go from a separately managed account (the DVG Account) to an investment in one or two the Merlin Biomed hedge funds.

In May 1999, Gotthelf revised his description of what DVG was planning to do. Instead of a roll-over of the DVG Account into the hedge funds, DVG intended to liquidate its holdings in the

DVG Account when the Investment Advisory Agreement was terminated, and then deposit the proceeds of the liquidation into a Merlin Biomed hedge fund.

DVG was the major client Gotthelf had brought to the Merlin Biomed companies; and once DVG withdrew its \$60 million and terminated its Investment Advisory Agreement with MBAM, this would trigger an option clause in Weisbrod's agreement with Gotthelf permitting Weisbrod to terminate their existing business relationship. Weisbrod proposed instead a different arrangement whereby he would buy out Gotthelf's interest in the various Merlin Biomed companies and Gotthelf would provide marketing services for certain Merlin Biomed companies. During April and May 1999, Weisbrod and Gotthelf conducted their negotiations themselves, communicating directly with one another primarily by fax and telephone. After a few weeks of negotiations, Weisbrod and Gotthelf reached the basic terms of their deal.

The principals then turned to lawyers to memorialize their agreement. Gotthelf hired Geoffrey Chinn, Esq. of Miller, Canfield, Paddock & Stone PLLC. Weisbrod retained defendants Jack Governale ("Governale") of Wolf Block Schorr Solis-Cohen LLP to represent the Merlin Biomed entities and himself.

Though Weisbrod and Gotthelf had only concluded their negotiations in mid-May, Gotthelf wanted to close the deal by the end of May. Weisbrod and Gotthelf asked Chinn to draft the appropriate papers. On May 21, 1999, Chinn circulated the first draft of a Purchase and Sale Agreement containing the Merlin Biomed buyout terms and the first draft of a Marketing Agreement containing the terms under which Gotthelf would try to secure an investment by DVG in Merlin Biomed's hedge funds. At least three subsequent drafts of the Purchase and Sale Agreement and the Marketing Agreement (the "Agreements") were circulated among the parties during the ensuing six

days. Weisbrod reviewed each draft and provided detailed written comments to Gotthelf. Governale also reviewed drafts of the Agreements, advised Weisbrod on certain aspects of the Agreements, and communicated with Chinn.

Weisbrod and Gotthelf executed the Agreements on May 27, 1999. The Purchase and Sale Agreement set forth the terms of Weisbrod's buyout of Gotthelf's interest in the Merlin Biomed businesses. For Gotthelf's ownership interest, Weisbrod agreed to pay him \$26,000 upon execution and the greater of \$10,000 or 10% of the net profits from the Merlin Biomed businesses in the years 1999 through 2003. The reason Weisbrod was willing to pay Gotthelf 10% of the profits earned under the Purchase and Sale Agreement for non-DVG accounts, the 10% "carry", was that he recognized that having DVG as a \$60 million client would assist the Merlin Biomed companies in securing other clients. The 10% carry for non-DVG fees was limited to five years because after five years of recruiting new clients, the presence of DVG as a client would no longer be a major recruiting point. It was Weisbrod's understanding that the Merlin Biomed companies would pay a 10% carry of the non-DVG profits only if Gotthelf used his best efforts to obtain a new investment from DVG. Notwithstanding Weisbrod's understanding as to his obligations under the Purchase and Sale Agreement, , nothing in the final documents executed by the principals linked the "best efforts" obligation under the Marketing Agreement to the Purchase and Sale Agreement.

The Marketing Agreement set forth the terms under which Gotthelf agreed to use his "best efforts" to cause DVG to invest in a Merlin Biomed hedge fund. If Gotthelf's "best efforts" were successful in causing DVG to invest, then Weisbrod would pay Gotthelf 40% of the profits earned by the Merlin Biomed businesses from any such investment. Focusing on his payment obligations, Weisbrod instructed Governale to make sure that Gotthelf was not paid twice if DVG re-invested,

once under the Marketing Agreement and again under the Purchase and Sale Agreement.

The Marketing Agreement does not refer to the Purchase and Sale Agreement, and the Purchase and Sale Agreement does not refer to the Marketing Agreement. Both Agreements have “entire agreement” clauses. The Purchase and Sale Agreement contained an arbitration clause; the Marketing Agreement did not. The Marketing Agreement had no fixed term, and was terminable by either party with a month’s notice.

Just prior to signing the Agreements and selling his stake in the Merlin Biomed business to Weisbrod, Gotthelf had purchased a German bank involved in asset management and had started a new financial management business, AP Asset Management. He hired an expert in biomedical investment analysis whose background was similar to Weisbrod’s to manage investments by clients of his new bank in the biotechnology sector. Weisbrod admits that he knew about Gotthelf’s plans in this regard prior to signing the Agreements, but he does not believe he told Governale; and he never told Governale that he doubted Gotthelf’s trustworthiness or that he was worried that Gotthelf might not use his best efforts.

Subsequent to DVG’s withdrawal of its funds from Merlin Biomed’s management, DVG became a client of Gotthelf’s new financial management business. In July 1999, Gotthelf’s secretary accidentally sent a fax, meant for Gotthelf at his hotel in New York, to Merlin Biomed’s number. The fax revealed that the exact portfolio of the DVG Account had been re-created at Gotthelf’s AP Asset Management. Weisbrod believed that Gotthelf had not used his best efforts under the Marketing Agreement, and, further, that Gotthelf’s default under that Agreement relieved him of his obligation under the Purchase and Sale Agreement to pay the 10% carry for non-DVG accounts. Governale advised Weisbrod that Gotthelf’s action amounted to fraud in the inducement

of the Agreements. In September 1999 Weisbord cut off all communications with Gotthelf and refused to pay Gotthelf 10% of the Merlin profits for 1999 under the Purchase and Sale Agreement.

In February of 2000, Gotthelf initiated arbitration against Weisbord and the Merlin Biomed entities pursuant to the arbitration clause in the Purchase and Sale Agreement, seeking to recover 10% of the Merlin profits for non-DVG accounts. For his part, Weisbord commenced an action in the U.S. District Court for breach of contract (the "Federal Court action"). The Federal Court ruled that the Purchase and Sale Agreement had to be arbitrated and stayed the Federal Court action pending final disposition of the Arbitration. Because the Marketing Agreement contained no arbitration clause, Merlin Biomed was not able to raise Gotthelf's breach of its "best efforts" provision as a defense in the arbitration to Gotthelf's claim for payment under the Purchase and Sale Agreement.

On or about March 21, 2002, the Arbitration panel found for Gotthelf on the issue of liability. At that point, Merlin Biomed was faced with further arbitration proceedings related to the damages phase, including discovery. Weisbord's then attorneys estimated attorneys' fees for the damages phase of the Arbitration and for prosecuting the Federal Court action to be multiple hundreds of thousands of dollars, perhaps as much as a million dollars. Weisbord's then attorneys could not and would not guarantee success in the Federal Court action. As a result, on September 12, 2002, the Merlin Biomed companies settled the arbitration proceeding and signed a Settlement Agreement with MAG and Gotthelf. Pursuant to the Settlement Agreement, the arbitration and Federal Court action were dismissed. The Settlement Agreement required Merlin Biomed companies to pay Gotthelf/MAG the sum of \$5.8 million to cover the companies' earnings for the period 1999, 2000 and 2001 (roughly 10% of the \$60 million in Merlin profits realized by Weisbord during that period),

with further payments of \$10,000 for the two succeeding years.

On or about October 4, 2002, Weisbrod and the Merlin Biomed companies, as plaintiffs, instituted this action against defendants Jack Governale, and Governale's law firm, Wolf Block Schorr & Solis-Cohen, alleging malpractice. On these cross-motions, plaintiffs seek summary judgment on the issues of liability and damages, and defendants seek partial summary judgment on the ground that without expert testimony, plaintiffs are unable to make out a prima facie malpractice case against defendants.

We turn first to plaintiff's motion for summary judgment. Plaintiff alleges that the Purchase and Sale Agreement and the Marketing Agreement were supposed to be "linked", that Governale knew they were to be linked and conceded that if they were to be linked and were not, he would be at fault.

Plaintiffs rely almost exclusively on statements made by Governale in the course of the litigation between the parties in affidavits, in the Arbitration, and in deposition, with hardly a reference to Weisbrod's own statements. Thus, in Governale's March 31, 2000 Affidavit submitted in connection with the Arbitration, paragraph 7, he states that "[t]he Purchase and [S]ale Agreement and the Marketing Agreement were interdependent components of an integrated transaction between MAG [Gotthelf] and MBAM [Weisbrod]." Again, in a July 11, 2000 Affidavit by Governale, he states:

Pursuant to the Marketing Agreement, MAG undertook to cause . . . DVG, Merlin's primary account during the Weisbrod and MAG partnership, to retain assets invested in the Merlin funds after the execution of the Purchase Agreement and Marketing Agreement. In exchange, MBAM agreed to pay MAG the greater of \$10,000 or 10% of the net profits of [MBAM, Merlin Biomed Services and Merlin Biomed Advisors] for a period of several years.

Also in that affidavit, Governale stated, para. 10, that

“If it is determined that MAG did not breach its obligations under the Purchase Agreement or the Marketing Agreement, MAG will be entitled to the greater of \$10,000 or 10 percent of the net profits of the LLC’s for a period of several years, as prescribed to the Marketing Agreement.

Once again, in Governale’s deposition in the Arbitration, he stated;

‘[t]he agreement that was ultimately struck was that Dr. Gotthelf, based on ... his representations and assurances given to Dr. Weisbrod during the negotiation process, would deliver the DVG, was able to deliver the DVG account to Merlin and that he would in the agreement undertake to use his best efforts to do that. . . Dr. Weisbrod took his partner under good faith . . .and believed what he had been told.’

In his deposition in this action, Governale stated:

“The representations that Michael [Gotthelf] had made that he would be able to deliver the DVG assets to the Merlin funds certainly were an important inducement to Stuart [Weisbrod] to enter into that [Purchase and Sale Agreement], and that [Weisbrod] hoped that whatever efforts were expended would be successful. And it was Michael Gotthelf’s representations to him as to his ability to cause that to happen that were the important element in his [Weisbrod’s] decision process.

Further, Weisbrod states that Governale told him that in his opinion Gotthelf’s failure to use his best efforts was a breach of the Marketing Agreement and the Purchase and Sale Agreement and that, therefore, Merlin Biomed had a defense to MAG’s demand for payment under the Purchase and Sale Agreement.

In addition, Governale made statements to plaintiff’s lawyers retained for the Arbitration that allegedly show that Governale considered that the two Agreements were part of a single overall agreement, and that Governale agreed with the view that MAG’s (Gotthelf’s) right to receive payment under the Purchase and Sale Agreement was contingent on Gotthelf’s use of his best efforts under the Marketing Agreement

Although plaintiffs allege that Governale knew that the two Agreements were supposed to be linked, in fact they define linkage to mean “contingency”, namely that Governale failed to make Weisbrod’s obligations to pay Gotthelf for his ownership interests in the Merlin Biomed companies contingent on his using his “best efforts” under the Marketing Agreement. Whether a “contingency” provision was a negotiated term between Weisbrod and Gotthelf or whether that Governale should have understood that Weisbrod wanted such a provision and failed to propose it is not clear.

By concentrating on Governale’s statements, plaintiffs obscure the uncertainty raised by conflicting statements made by him and Weisbrod’s own ambiguous testimony. To begin with, it is undisputed that Weisbrod never told Governale of any contingency limitation on his obligations to pay Gotthelf for his share of the Merlin Biomed companies. He never used the word “contingency” or any similar words to convey to Governale that the payment obligation under the Purchase and Sale Agreement was “contingent” on Gotthelf’s “best efforts” under the Marketing Agreement. In fact, counsel arrives at the word “contingency” to describe Weisbrod’s intentions through a process of dictionary definitions. Furthermore, Weisbrod specifically declined to say at deposition that a contingency provision was a term he had negotiated with Gotthelf. Rather, he stated that the “best efforts” provision “was a very important part of the overall deal”, that “without the Marketing Agreement, we never would have entered into the entire Purchase and Sale Agreement”, that both Agreements were “part and parcel of the sale deal” and “it was one agreement.”

Governale denies that any “contingency” qualification was ever discussed. When asked in what way the elements of the deal were “integrated” or “linked”, Governale testified at deposition that

There was one overall deal represented by two separate agreements which stood on their own, were independent of each other and there was nothing in either that was conditioned upon anything in the other. So, when we talk about there being an integrated transaction, if what we mean or what you mean is were two separate agreements part of one larger transaction, yes. This does not suggest and it certainly was not the case that there was any interdependence between the two agreements."

More significantly, even before any claim of malpractice was pending, Governale testified in the Arbitration that the 10% carry provision was not "consideration" or "in exchange" for Gotthelf's best efforts but was consideration for Gotthelf selling his interest in Merlin Biomed to Weisbrod. That Governale knew that the two Agreements were "interdependent components of an integrated transaction", or that Dr. Gotthelf's "best efforts" in obtaining a new DVG investment in Merlin was an important element in Weisbrod's thinking, or that Weisbrod would not have entered into one Agreement without the other, does not mean that Governale understood that Weisbrod wanted to make his payment obligation under the Purchase and Sale Agreement contingent on Gotthelf's "best efforts" under the Marketing Agreement.

Gotthelf for his part denies that there was any link between the two Agreements. He explained the payment provision in the Purchase and Sale Agreement on the ground that Weisbrod was worried about Merlin Biomed's cash flow and wanted a payout of the purchase price over time, resulting in the Purchase Agreement's provision of combining a small up-front payment (\$26,000) and a percentage of profits over time, with at least a \$10,000 annual payment. Gotthelf could not recall negotiating any business "conditions" with Weisbrod. Weisbrod had "no idea what Dr. Gotthelf believed" about his right to be paid under the Purchase and Sale Agreement being contingent on the Marketing Agreement.

Although it is hard to believe that Gotthelf would have agreed to such a contingency term,

or that it would not have been a deal-breaker, Weisbrod's conduct may have contributed to such an omission on Governale's part, if any. As discussed above, Governale was never told of any contingency on Weisbrod's obligation to pay; rather, he was told that the business terms had been agreed upon by the parties, as expressed in the draft. The only direction Weisbrod gave Governale with respect to his payment obligations was to make sure that Gotthelf did not get paid twice, once under the Marketing Agreement and again under the Purchase and Sale Agreement. Weisbrod does not think that he told Governale about Gotthelf's purchase of a bank or that Gotthelf had set up his own asset management company or that there was any reason to distrust Gotthelf. Weisbrod did not tell Governale anything that would put him on notice that provision should be made in the event of a betrayal by Gotthelf. Weisbrod himself trusted Gotthelf enough to go along with an amorphous "best efforts" provision in the Marketing Agreement. More significantly, there was a substantial incentive written into the Marketing Agreement to insure that Gotthelf would use his "best efforts"; namely, Gotthelf's 40% share of profits from any new DVG investment. In the last analysis, Weisbrod was not left without recourse if Gotthelf breached the Marketing Agreement, namely, the Federal Action, a route Weisbrod chose not to pursue, because of the potential cost and because his attorneys could not guarantee success in the Federal Action. (In this connection, we note parenthetically that Gotthelf claims he made some efforts to get DVG to re-invest in the Merlin funds before Weisbrod cut off communications with him.)

What Weisbrod told Governale, what Governale understood from that, and what as a lawyer he reasonably should have understood or done when reviewing, along with Weisbrod, companion Purchase and Sale and Marketing Agreements in the area of financial management of domestic and international hedge funds raise issues of fact which must be resolved by a jury. Contrary to

plaintiffs' position, it cannot be said that Governale's statements made in the course of litigation and at a time when Governale was trying to support Weisbord's claims, standing alone and without reference to Governale's conflicting statements or Weisbrod's own testimony, compel a finding of malpractice as a matter of law based on Governale's failure to insert a contingency clause linking the two Agreements.

Summary judgment is appropriate when there are no issues of material fact and the movant is entitled to judgment as a matter of law (see, Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]; Ferber v. Sterndent Corp., 51 NY 2d 782, 783 [1980]; S.J. Capelin Assocs. v. Glove Mfg. Corp., 34 NY 2d 338, 341-342 [1974]). Plaintiff has not proved as a matter of law the first of the three elements required to support a claim in malpractice, that Governale was guilty of negligence as a matter of law (see, Schwartz v. Olshan Grundman Frome & Rosenzweig, 302 Ad 2d 193, 198 [1st Dept. 2003]; Levine v. Lacher & Lovell-Taylor, 256 AD 2d 147, 149 [1st Dept. 2003}). Accordingly, plaintiff's motion for summary judgment on its legal malpractice claim is denied.

Turning now to defendants' cross-motion for partial summary judgment, they argue that on their cross-motion for summary judgment, plaintiffs' failure to come forward with an expert's affidavit supporting their claim entitles them to judgment in their favor as a matter of law. Put another way, defendants are saying that if this case went to trial, plaintiffs would not make out a prima facie case of legal malpractice without an expert's testimony, and they would be entitled to a dismissal of the complaint at the close of plaintiff's case without any need to put on any evidence of their own. Discovery in this case has closed; plaintiffs failed to disclose any prospective expert testimony under CPLR 3101(d), and have declared their intention, to their adversaries and to the court at oral argument, not to retain an expert. Plaintiffs argue that an expert's affidavit is not

needed on the facts of this case, namely, that Governale's failure is obvious. .

Legal malpractice consists of the failure of an attorney to exercise that degree of skill commonly exercised by a member of the legal profession (see, Darby & Darby v. VSI Intl., 95 NY 2d 308, 312 [2000]; Arnav Industries, Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steinert, L.L.P., 96 NY 2d 300, 303 [2001]): Expert testimony is generally required to establish a breach of the standard of professional care, except where the daily experience of the fact finder provides a sufficient basis for judging the adequacy of the professional service (see, Kulak v. Nationwide Mut. Ins. Co., 40 NY 2d 140, 148 [1976]; S & D Petroleum Co. Inc., v. Tamsett, 144 AD 2d 849 [3rd Dept. 1988]). Expert opinion testimony that the defendants' representation of the plaintiff failed to meet the appropriate standard of care exercised by attorneys in the community concerns an essential element in a legal malpractice action (see, Cramer v. Spada, 203 AD 2d 739, 740 [3rd Dept. 1994]. In order to make out a prima facie case that an attorney's conduct has breached the duty of care, a plaintiff must generally present expert testimony establishing the applicable standard of care from which the defendant allegedly deviated (see, Darby & Darby, P.C. v. VSI Int'l, Inc., *supra*; Estate of Nevelson v. Carro, Spanbock, Kaster & Cuiffo, 259 AD 2d 282, 283 [1st Dept. 1999]; Zasso v. Maher, 226 AD 2d 366, 367 [2d Dept. 1996]; Greene v. Payne, Wood, and Littlejohn, 197 AD 2d 664, 666 [2d Dept. 1993]). Failure to submit an expert's affidavit on the applicable standard of care supports a defendant's motion for summary judgment dismissing the malpractice complaint (see, Ehlinger v. Ruberti, Girvin & Ferlazzo, P.C., 304 AD 2d 925, 926 [3d Dept. 2003]; Zeller v. Corps, 294 AD 2d 683, 684 [3d Dept. 2002]; Schadoff v. Russ, 278 Ad 2d 222, 223 [2d Dept. 2000].

There are two exceptions to the general rule that expert testimony is needed to support a

malpractice claim: (1) where the attorney's conduct falls below any standard of due care; and (2) where a juror's ordinary experience would provide sufficient basis for judging the adequacy of the professional service (see, Darby & Darby, P.C. v. VSI Int's Co., supra; Greene v. Payne, Wood and Littlejohn, supra.

The first hurdle defendants must clear on their cross-motion is whether they have submitted sufficient proof to support their position without regard to the sufficiency of the opposing papers (see, Winegrad v NYU Medical Center, 64 NY2d 851, 853 [1985]; Silverman v Perlberg, 307 AD2d 230, 232 [1st Dept 2003]). Defendants have submitted an affidavit from Richard J. Flannery, Esq., designated as their expert, who opines, among other things, that it is standard practice to have the buyout and marketing agreements in two separate documents; that in standard deals it is not customary to make payment of a fixed purchase price, a "hard" obligation, contingent on a future "best efforts" or a "soft" obligation in a separate agreement; and that it would not be standard practice for an ordinary lawyer in a situation such as this when dealing with a sophisticated client to propose alternate business terms, especially when told by the client that he had negotiated the business terms. Although plaintiff challenges the Flannery affidavit on the ground, among other reasons that, it discounts Governale's statements and is conclusory, I find it sufficient to support defendants' motion at least to the extent of shifting the burden to plaintiff to come forward with rebuttal evidence.

Plaintiffs say that the standard of care is not in dispute: that Governale knew that the two agreements were supposed to be linked, admitted that if he was supposed to link the agreements and did not, he would be at fault, and yet failed to link them. In failing to link the two agreements,, plaintiff argues, Governale neglected to perform what was essentially little more than a ministerial

task: Governale's dereliction, they say, was obvious.

Contrary to plaintiff's argument, this is not an obvious case of malpractice falling below any standard of due care and thus obviating the need for expert testimony (see, Shapiro v. Butler, 273 AD 2d 657 [3d Dept. 2000][no expert testimony required where defendant attorney failed to file an answer on plaintiff's behalf in a federal action and caused plaintiff to default]). Plaintiffs are not alleging that Weisbrod instructed Governale, in so many words, to draft a contingency clause and that he failed to do so. Rather they allege that Governale understood that the two agreements were to be linked, based on what Governale says he understood in various stages of the litigation between the parties. What Governale understood in fact and what he should have understood implicates the standard of due care for a corporate attorney memorializing buyout and marketing agreements whose terms were negotiated by the principals.

Furthermore, the lawyer's role in drafting purchase and marketing agreements in the field of hedge funds and financial management companies is not part of the jurors' ordinary, daily experience; and without an expert's testimony, they are not equipped to measure an attorney's conduct (see, Greene v. Payne, Wood and Littlejohn, 197 AD 2d 664, supra, at 666 [an expert is needed in the "subtle and complex" area of pendent jurisdiction]).

In order to rebut defendants' motion for summary judgment in their favor, plaintiffs were required to offer an expert's testimony to the effect that Governale's conduct deviated from the standard applicable to corporate attorneys practicing in this area (see, Ehlinger v. Ruberti, Girvin & Ferlazzo, P.C., supra; Schadoff v Russ supra,). Put another way, plaintiff is unable to make out a prima facie case of legal malpractice without an expert testifying as to the applicable standard of care and defendants' deviation from that standard, and, at a trial, and without such testimony, defendants

would be entitled to judgment dismissing the complaint at the close of plaintiffs' case. Therefore, defendants' motion for summary judgment dismissing plaintiff's first cause of action is granted .

Plaintiff's cause of action for breach of contract alleges that the defendants contracted with plaintiffs to provide "reasonably competent" legal services, and that defendants breached their contract with plaintiffs. The breach of contract claims is duplicative of and subsumed by plaintiffs' malpractice claims, and must also be dismissed (see, Levine v. Lacher & Lovell-Taylor, 256 AD 2d 147 [1st Dept. 1998]; Sage Realty Corp. v. Proskauer Rose L.L.P., 251 Ad 2d 35, 38-39 [1st Dept. 1998]).


Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment in its favor is denied; and it is further

ORDERED that defendants' cross-motion for summary judgment dismissing the complaint is granted; and it is further

ORDERED that the clerk is directed to enter judgment in favor of defendants' dismissing the complaint.

DATED: September 9, 2004 ENTER:



PAULA J. OMSKY
J.S.C.

FILED
SEP 16 2004
NEW YORK
COUNTY CLERK'S OFFICE