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

PRESENT: [redacted] PART 49

0100219/2004

BARBARA KING FAMILY TRUST
vs
VOLUTO VENTRUES LLC.

SEQ 1

DISMISS ACTION

INDEX NO. _____

MOTION DATE 7/12/04

MOTION SEQ. NO. 001

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

FILED

JAN 12 2005

COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 1/7/05

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

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THE BARBARA KING FAMILY TRUST and BARBARA KING,

Plaintiffs,

-against-

Index No. 100219/04

VOLUTO VENTURES, LLC, DAVID KOTOWSKI, VINCENT MOLINARI, CONSOLIDATED FIBERS, LLC, KURZMAN EISENBERG CORBIN LEVER & GOODMAN, LLP and ANDREW GOODMAN,

Defendants.

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HERMAN CAHN, J.:

Defendants Kurzman Eisenberg Corbin Lever & Goodman, LLP and Andrew Goodman (collectively, Kurzman) move to dismiss the eighth and ninth causes of action of the complaint as against them for failure to state a cause of action, CPLR 3211(a)(7). These causes of action are the only ones pleaded against movants.

The 111 paragraph complaint alleges that in June of 2001, King opened a securities account with UBS PaineWebber, into which she transferred securities with an approximate value of #20,000,000. Defendant David Kotowski, the head of the group, was designated financial advisor for the accounts.

In September of 2001, King agreed to designate Kotowski as the primary adviser for all of her financial affairs.

In the fall of 2001, King entered negotiations to purchase a brownstone at 337 West 22nd Street (Chelsea Mansions). The

asking price for the brownstone was $3,550,000. King agreed that Kotowski would advise her on the purchase of the brownstone. King had advised Kotowski that she wanted to purchase the brownstone.

Kotowski told King that he discussed the matter with Kurzman who told him that Chelsea Mansions was in foreclosure proceedings, and that King should, rather than attempt to buy the building, seek to purchase the outstanding mortgages. In reliance on that advice, King broke off negotiations to purchase Chelsea Mansions and authorized Kotowski to arrange to purchase the mortgages. Kotowski arranged for Kurzman to handle the transaction and represent King in associated legal proceedings. Kurzman never sent King a retainer letter, neither did they communicate with her about Chelsea Mansions.

The holders of the mortgages assigned three outstanding mortgages to King for $1,850,000. The Kurzman firm was substituted as attorneys for the plaintiff in the foreclosure proceeding. Unbeknownst to King, Chelsea Mansions was continuing to attempt to sell the property while the foreclosure was pending.

Prior to March 12, 2002 Kurzman submitted a proposed judgment of foreclosure, to the court. The owner of the premises moved to vacate the default. Kurzman apparently stipulated to "extend the deadline for sale of the building until April 15,

2002" (complaint ¶ 36-37), allegedly without King's knowledge or consent.

After obtaining the stipulation, the building owner contracted to sell Chelsea Mansions. Apparently both Kotowski and Kurzman knew that Chelsea Mansions was under contract, and neither of them informed King.

Prior to this time, King had made several loans to, and investments in, Voluto. After the sale of Chelsea Mansions, Kotowski told King that the mortgages had been satisfied by a payment of $2,000,000; that she would not be able to purchase the building, and that she would have to assign the mortgages. Kotowski recommended that King use the $2,000,000 she received for the mortgages to purchase additional interests in Voluto.

Kotowski was a partner in Voluto, and Kurzman were the attorneys for both Kotowski and Voluto. King had not been advised of either of these facts.

According to the complaint, Kurzman then prepared documents indicating that King would receive 2,060,000 shares in Voluto in return for her investment, and she would become a partner in the company. Neither Kurzman nor Kotowski ever revealed to King that Voluto was in fact a limited liability company for which shares would not be issued, and that she would not become a partner.

Kurzman prepared mortgage assignment documents, and King signed them. King then instructed Kurzman to send $2,000,000 to

Voluto. The entire investment was lost.

King brings this action against Kurzman for breach of fiduciary duty and legal malpractice (the eighth and ninth causes of action, respectively). The breach of fiduciary duty claim seeks recover for Kurzman's failure to: (i) disclose that at the same time they were representing King, they were representing Kotowski and Voluto; (ii) advise her to seek separate counsel because of the conflict of interest created by her investment in Voluto, a Kurzman client. King also states that in representing her, Kurzman put the interests of Kotowski and Voluto ahead of hers without disclosing the conflict of interest.

The ninth cause of action, the legal malpractice claim, seeks recovery for Kurzman's failure to: (i) send King a retainer letter; (ii) advise her about the attendant risks of purchasing the mortgages instead of attempting to buy the building directly; (iii) inform her that the owner of the building was still attempting to sell it; (iv) tell King of the ongoing events attendant to the foreclosure litigation; and (v) inform King that Kotowski and Voluto were clients, or obtain a waiver for the conflict of interest. King claims that "but for" these failures, she would have been able to purchase Chelsea Mansions.

As Kurzman has moved to dismiss for failure to state a claim, the test to be applied is whether, upon examination of the four corners of the complaint, the factual allegations indicate

the existence of any cause of action cognizable at law. Guggenheimer v Ginzburg, 43 NY2d 268, 275 (1977).

Legal Malpractice

King's action for legal malpractice requires proof that Kurzman was negligent, that such negligence was the proximate cause of King's inability to purchase Chelsea Mansions, and that damages resulted. See Franklin v Winard, 199 AD2d 220, 221 (1st Dept 1993); Mendoza v Schlossman, 87 AD2d 606, 606-607 (2nd Dept 1982).

In addition, an action for legal malpractice must be based upon privity of contract. Calamari v Grace, 98 AD2d 74, 79 (2nd Dept 1983) ("New York has not retreated from the requirement of privity in legal malpractice cases"); Spivey v Pulley, 138 AD2d 563, 564 (2nd Dept 1988) (an attorney is not liable to third parties, not in privity, for malpractice absent fraud, collusion, malicious acts or other special circumstances); accord Town Line Plaza Assoc. v Contemporary Props., Ltd., 223 AD2d 420, 420 (1st Dept 1996).[1]

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[1]New York courts have been reluctant to allow variation in the privity rule. Jordan v Lipsig, Sullivan, Mollen & Liapakis, P.C., 689 F Supp 192, 195-196 (SD NY 1988). Nonetheless, in Baer v Broder (106 Misc 2d 929 [Sup Ct, Suffolk County 1981], affd 86 AD2d 881 [2nd Dept 1982]), the court borrowed standards from California (see Donald v Garry, 97 Cal Rptr 191, 192 [1971]) to assert that the privity requirement may be excused in consideration of the extent to which the transaction was intended to affect plaintiff, whether harm to plaintiff was predictable, the degree of actual injury, propinquity between the attorney's conduct and the injury, and the ethics of the attorney's conduct.

Kurzman and King were in privity with respect to the mortgage assignments since Kurzman represented her; it drafted the documents for her, and charged her directly for the services.

In a legal malpractice action damages must be ascertainable and proximately caused by the defendant's conduct. Kenford Co. v County of Erie, 67 NY2d 257 (1986). Although King has not set forth a detailed calculation of the damages she claimed to have incurred, the cause of action will not be dismissed at this early stage of the proceedings. The defendants may seek discovery as to plaintiffs' damage calculations, and thereafter, if they be so advised, may again move to dismiss on this ground.

Further, the allegations as to Kurzman's negligence are skimpy, at best. The court will not dismiss the cause of action at this time. If movants wish, they may renew this motion after discovery on this issue has been completed.

Breach of Fiduciary Duty

King claims that Kurzman breached their fiduciary duty to her: (I) by failing to advise her of the conflict of interest created by their representation of Voluto and Kotowski on the one hand, and King on the other; and (ii) by furthering the interests of Voluto and Kotowski in obtaining her investment, without recommending that she seek counsel. As a result, King claims that Kurzman's actions prevented her from making a fully informed

decision whether to transfer the $2,000,000 received in satisfaction of the mortgage, to Voluto, and her entire investment was lost.

Kurzman argues that its retention was limited to assisting King in purchasing the mortgages, pursuing the foreclosure action, and ultimately completing an assignment of the mortgages. As movant, Kurzman must demonstrate the extent of their fiduciary obligations. However, the lack of a written retainer renders any undocumented allegations of Kurzman little more than speculation, which is insufficient to grant a motion to dismiss, especially given the concomitant favorable inference that the court is obligated to give the factual allegations of the complaint. See e.g. Mark Hampton Inc. v Bergreen, 173 AD2d 220, 220 (1st Dept 1991).

A major issue is what fiduciary obligations, if any, Kurzman owed to King. Although Kurzman and King did not enter into a written retainer agreement, such formality is not required for the formation of a contract; the words and actions of the parties may indicate that an attorney-client relationship was formed. See C.K. Indus. Corp. v C.M. Indus. Corp., 213 AD2d 846, 847-848 (3rd Dept 1995), citing Kubin v Miller, 801 F Supp 1101, 1115 (SD NY 1992).

Here, King paid Kurzman $32,700.12 in fees and disbursements for the mortgage assignments and for representing her in

litigation. As such, an attorney-client relationship was established. Matter of Newman, 172 App Div 173, 179 (1st Dept 1916) (appearance in litigation on behalf of client establishes the attorney-client relationship). Further, King was an investor in Voluto, Kurzman's client. Such a relationship may give rise to an independent obligation to King. See e.g. White v Guarente, 43 NY2d 356, 361 (1977) (accounting services performed for a company can give rise to liability to a fixed, definable, and contemplated group whose reliance upon the services can be reasonably expected).

It is well established that the "relationship between an attorney and his client is a fiduciary one and the attorney cannot take advantage of his superior knowledge and position." Greene v Greene, 56 NY2d 86, 92 (1982). Here, Kurzman failed to substitute King as a plaintiff in the foreclosure proceeding, or keep her fully informed of their actions on her behalf.

The complaint alleges that Kurzman was conflicted, in that they undertook to represent King, while at the same time representing Voluto and Kotowski. King asserts she was not informed of Kurzman's said conflict, and that on account thereof, her legal and economic interests were compromised. See Kaufman v Cohen, 307 AD2d 113 (1st Dept 2003).

In view of the factual allegations of the complaint, sufficient has been alleged to warrant denial of the motion to

dismiss this cause of action.

The complaint that there may have been collusion between Kotowski and Kurzman, and misrepresentation by Kotowski with the aid of Kurzman.

"The unique relationship between an attorney and client, founded in principle upon the elements of trust and confidence on the part of the client and of undivided loyalty and devotion on the part of the attorney, remains one of the most sensitive and confidential relationships in our society." Demov, Morris, Levin & Shein v Glantz, 53 NY2d 553, 556 (1981). The fiduciary obligations are the foundation of that relationship. U.S. Ice Cream Corp. v Bizar, 240 AD2d 654, 655 (2nd Dept 1997).

Accordingly it is

ORDERED that the motion to dismiss is denied; and it is further

ORDERED that movants are directed serve an answer to the complaint within 15 days after service of a copy of this decision and order with notice of entry.

Dated: January 7 , 2005

ENTER:

J.S.C.