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

PRESENT: DIANE A. LEBEDEFF Justice PART 8

0109540/2003

AMBASE CORP.
vs
PRYOR CAHSMAN SHERMAN & FLYNN

SEQ 3

REARGUMENT/RECONSIDERATION

INDEX NO.
MOTION DATE 8/19/04
MOTION SEQ. NO.
MOTION CAL. NO. 8

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

Amended
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits
Answering Affidavits — Exhibits
Replying Affidavits

PAPERS NUMBERED

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DENIED FOR MEMORANDUM

NYS SUPREME COURT
RECEIVED
APR 27 2005
IAS MOTION
SUPPORT OFFICE

FILED
MAY 2 2005
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 3/24/05

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: I.A.S. PART 8
----------X

AMBASE CORPORATION,

Plaintiff,

-against-

Index No. 109540/03
Mot. Seq. Nos. 003
& 004

PRYOR CASHMAN SHERMAN & FLYNN, LLP
and PETER D. WOLFSON,

Defendants.
----------X

DIANE A. LEBEDEFF, J.:

Plaintiff AmBase Corporation ("AmBase"), seeks leave to reargue and/or renew defendants' underlying motion to dismiss the legal malpractice complaint (CPLR 2221 [d]). If such relief is not granted, AmBase moves to vacate or modify the judgment entered herein (CPLR 5015 [a][1]), to the extent of deleting the phrase "with prejudice," so that the judgment will not be on the merits (see CPLR 205 [a]), and seeks leave thereafter to amend the complaint (CPLR 3025 [b]; CPLR 3211).

For the reasons stated below, the motion to reargue and/or renew is denied. And, although most branches of the motion to amend are denied, the request to amend the first and second causes of action is restored for further argument on April 4, 2005, at 9:30 a.m. in Part 8, and the request to modify the judgment is held in abeyance pending a full determination of such motion.

007

Motion to Reargue and/or Renew

The underlying facts were previously addressed in the decision of May 11, 2004. In essence, AmBase claimed that its counsel had lead it to believe that it was "guaranteed" that certain bonuses to its executives could be paid out of an escrow fund. The court dismissed the claims because a plain reading of the contract creating such escrow fund refuted the claim of a guarantee, for its terms required that such use was conditioned upon the consent of the other contracting party to such use. The damages claimed were the amount of an alleged alternate settlement, a sum of approximately $3 million.

A motion for reargument "is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law" (*Foley v. Roche*, 68 A.D.2d 558, 567 [1st Dept. 1979]). The granting of leave to reargue is a matter left to the court's discretion (*Rodney v. New York Polytecnic Products Co.*, 112 A.D.2d 410, 411 [2d Dept. 1985]). Plaintiff's motion fails to establish grounds for reargument and, in the exercise of the court's discretion, is denied.

It should be noted, at least in passing, that plaintiff takes great umbrage at any consideration that its chief operating officer, Richard Bianco, might have been considered by the court to have read and understood the clear terms of the contract. Although the court inferred no extraordinary sophistication, the court can properly consider business sophistication – which Mr. Bianco himself described at great length in his arbitration testimony presented to the court on the underlying motion (affirmation in opposition, exhibit G, tabs A-C) – on a motion to dismiss (*see generally, citing numerous cases,* Robert L. Haig, 4A N.Y.Prac., Com. Litig. in New York State Courts § 73:12, *Breadth of*

evidence on motion to dismiss: Impact on sophisticated investors [2d ed.]; *see, for example, Societe Nationale D'Exploitation Industrielle Des Tabacs Et Allumettes v. Salomon Bros. Intern., Ltd.*, 268 A.D.2d 373, 374 [1st Dept. 2000], "Plaintiff, a sophisticated institutional investor, cannot under the subject circumstances viably claim to have justifiably relied on defendants' allegedly materially incomplete disclosure").

As to the branch of the motion seeking leave to renew, such motion "must be based upon additional material facts which existed at the time the prior motion was made but were not known to the party seeking leave to renew and therefore not made known to the court" (*Silverman v. Leucadia, Inc.*, 159 A.D. 254, 255 [1st Dept. 1990]). Renewal is to be granted sparingly (*Matter of Beiny v. Wynyard*, 132 A.D.2d 190, 210 [1st Dept. 1987], *appeal dismissed* 71 N.Y.2d 994 [1988]). The motion fails to establish that the additional material submitted was not known by movant at the time of the prior motion and it generally appears to be material which was produced during or originated from the 2002 arbitration relating to plaintiff's claim of entitlement to recoupment of bonuses awarded. No showing having been made that the material is proper support for renewal, renewal is denied.

Motion for Relief From Final Judgment and Motion for Leave to Amend

In this instance, by an underlying decision dated May 11, 2004, the complaint was dismissed with the direction that judgment be entered by the clerk no sooner than five days after service of a copy of the order and a proposed judgment. On May 24, 2004, defendant served a copy of the order and a proposed judgment which recited that dismissal would be

"with prejudice." No protest was made nor was other action taken by plaintiff. The judgment was signed by the County Clerk on June 4, 2004.

The excuse tendered in the motion papers for a failure to act was that plaintiff's counsel was inactive because such counsel was being replaced. Some three weeks after service of the proposed judgment and two weeks after the judgment was signed, plaintiff substituted its counsel with the counsel who made the instant motion (motion, exhibit A).

When a motion to dismiss is based on a failure to state a cause of action, the plaintiff may be afforded an opportunity to seek leave to replead (CPLR 3211 [e]; *Varo, Inc. v. Alvis PLC*, 261 A.D.2d 262, 266 [1st Dept. 1999], *lv. denied* by *IMO Industries Inc. v. Alvis PLC*, 95 N.Y.2d 767 [2000]; *Elliman v. Elliman*, 259 A.D.2d 341 [1st Dept. 1999]; *see also* CPLR 5013, presumption that dismissal prior to close of proponent's case is not on merits unless otherwise specified). Further, the preclusive effect of a dismissal for failure to state a cause of action in a later proceeding extends only to presentation of "the same cause of action which fails to correct the defect or supply the omission determined to exist in the earlier complaint" (*see 175 East 74th Corp. v. Hartford Acc. & Ind. Co.*, 51 N.Y.2d 585, 590 [1980]).

Here, as noted above, plaintiff wishes to advance a facially different claim, involving a lawyer's alleged failure to give full advice on negotiations with an opposing party, which sounds more in breach of fiduciary duty than traditional legal malpractice. "In properly seeking to deny a litigant two 'days in court', courts must be careful not to deprive him of one" (*Matter of Reilly v. Reid*, 45 N.Y.2d 24, 28 [1978]), especially if it is facially apparent that no aspect of the claim was "necessarily decided" in the first litigation (*Parker*

v. Blauvelt Volunteer Fire Company, Inc., 93 N.Y.2d 343, 349 [1999]).

Accordingly, the court will consider the motion to amend on its merits, holding in abeyance the issue of whether the judgment need be modified until after a determination as to the merits of the proposed amended pleading. It is well established that, "in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted," and leave to amend will be denied where the proposed claim is "palpably insufficient" as a matter of law and where the lack of merit is "clear and free from doubt" (*Board of Managers of Alexandria Condominium v. Broadway/72nd Associates*, 285 A.D.2d 422 [1st Dept. 2001]; *Tishman Const. Corp. of New York v. City of New York*, 280 A.D.2d 374, 376-77 [1st Dept. 2001]; *Daniels v. Empire-Orr, Inc.*, 151 A.D.2d 370, 371 [1st Dept. 1989]). The movant is required to allege facts legally sufficient to support the proposed pleading, supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment (*Bonanni v. Straight Arrow Publishers, Inc.*, 133 A.D.2d 585, 588 [1st Dept. 1987]), although the standard on the motion is "much less exacting than on a motion for summary judgment" (*Baskin and Sears, P.C. v. Lyons*, 188 A.D.2d 307 [1st Dept. 1992]).

The court first considers the fraud claims asserted in the third through eighth proposed causes of action. Plaintiff impermissibly bottoms the largest part of its fraud damages claim upon a potential settlement offer by Zurich of $3 million, which was not accepted; this alternate settlement possibility cannot serve as fraud damages for, as stated in *Alpert v. Shea Gould Climenko & Casey*, 160 A.D.2d 67, 71-72 (1st Dept. 1990), "recovery of consequential damages naturally flowing from a fraud is limited to that which

is necessary to restore a party to the position occupied before commission of the fraud" and may not seek recovery under an agreement overlooked in favor of the actual agreement (*citing Reno v. Bull*, 226 N.Y. 546 [1919]). As to the next largest item claimed as damages, the $1.5 million legal fee paid to defendant in the Zurich-Ambase litigation previously described, plaintiff fails to articulate the manner in which such fee – originating under a written retainer agreement and later capped at $1.5 million – is touched by fraud with the particularity required for this cause of action (CPLR 3016[b]; *Pellegrino v. File*, 291 A.D.2d 60, 64 [1st Dept. 2002], *lv denied* 98 N.Y.2d 606 [2002], in relation to legal malpractice related claim, "detailed pleading requirements for fraud were not satisfied" and dismissal justified). The balance of the claimed fraud damages consists of the arbitration award imposed on Ambase following the Zurich-Ambase arbitration; there is no underlying pleading that plaintiff, a party who signed a contract agreeing to arbitration, reasonably relied upon any relevant false assurance regarding freedom from a risk of an adverse arbitration result and from the potential imposition of costs at the outcome of the arbitration (*Jo Ann Homes at Bellmore, Inc. v. Dworetz*, 25 N.Y.2d 112 [1969], to state a cause of action for actual fraud, defendant must set forth the material elements of actual fraud, including the false material representation knowingly or recklessly made, which induced reliance and led to injury).

In any event, such fraud claims are impermissibly duplicative of the proposed malpractice claim (*Sage Realty Corp. v. Proskauer Rose LLP*, 251 A.D.2d 35, 39 [1st Dept. 1998], "The fraud claim was equally duplicative of plaintiffs' malpractice claim, which was based on the same alleged acts of nondisclosure and misrepresentation"; *Mecca*

v. Shang, 258 A.D.2d 569, 570 [2d Dept. 1999], *motion lv app dismissed* 95 N.Y.2d 791 [2000], "the court did not err in dismissing Dr. Mecca's breach of fiduciary duty and fraud claims, since they arise from the same facts as his legal malpractice claim and do not allege distinct damages"). These proffered amended causes of action do not survive legal scrutiny.

Negligent misrepresentation is asserted in the ninth cause of action, which claims the same damages as set forth in the above paragraph, and the tenth cause of action, which adds the assertion that defendant's negligent misrepresentation caused AmBase to forego trial of its lawsuit against Zurich, at which it would have obtained a judgment of $25 million, resulting in a total damages claim in excess of $27 million. Such claims must also be seen as duplicative of the malpractice claims (*Mecca v. Shang, supra*, "the court should have also dismissed Dr. Mecca's negligent misrepresentation ... causes of action, since these claims similarly arise from the same facts as his legal malpractice claim and are duplicative of that cause of action").

In relation to some of these proposed causes of action, plaintiff adds allegations of a breach of fiduciary duty, and incorrectly urges that a breach of fiduciary duty claim is governed by a lower standard and should be treated differently than the malpractice claim (plaintiff's reply brief, p. 15). It is settled that any breach of fiduciary duty claim must meet the "but for" test applicable to all claims based on legal malpractice, however characterized (*Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267, 271 [1st Dept. 2004]), "We have never differentiated between the standard of causation requested for a claim of legal malpractice and one for breach of fiduciary duty in

the context of attorney liability. The claims are coextensive"). Certainly, a fiduciary duty claim coupled with a fraud claim, would not be governed by any lower standard.

The above determinations leave for consideration the proposed first and second causes of action. Plaintiff claims that the defendants, as negotiating attorneys, failed to convey Bianco's "deal breaker" requirement to Zurich's attorney, *i.e.*, that bonuses for executives must be compensable out of the escrow funds. Plaintiff's principal asserts that if he had known that his demand had not been conveyed to Zurich, he would have caused AmBase either to accept an alleged $3 million cash offer, or to pursue the litigation in which it sought to recover $25 million.

It should be observed that, in the original complaint, these allegations were stated, but such omissions were not alleged to constitute the basis of malpractice claims. The sworn testimony of Bianco at the arbitration, originally presented on the motion to dismiss, was as follows: (1) "$3 million ... we didn't think that was enough. We thought this was such a massive issue for us" that bankruptcy could result (arbitration transcript, p. 835); (2) AmBase "had to resolve the NV issue no matter what, it was just massive" (*id.*, at 837); (3) as to his conversations about the escrow agreement, "We went though significant detail on the escrow agreement ... into the details, line by line, detail by detail" (*id.*, at 835); and (4) as to the reasons for arbitration, "We were all afraid of Judge Gammerman ... and that was one of the reasons I had said I just didn't want to be in court again" and litigation was "a more expensive proposition" than arbitration (*id.*, at 836). In the face of the extrinsic evidence presented, the claim that AmBase would have proceeded to trial if it knew the bonus coverage was not guaranteed was not even originally urged. That posture may have

been based upon a recognition of the principle set out in *Biondi v. Beekman Hill House Apartment Corp.*, 257 A.D.2d 76, 81 (1st Dept. 1999), that "[i]n cases where the court [is asked to consider] extrinsic evidence on a CPLR 3211 motion, the allegations are not deemed true * * *. The motion should be granted where the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted. [A]llegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not presumed to be true and accorded every favorable inference", citations and internal quotation marks omitted.

Nonetheless, the court would benefit from focused arguments addressing the proposed first and second causes of action, as amended. To allow such opportunity, the motion to amend is restored as set forth above.

In relation to the motion to reargue and renew, this decision constitutes the order of the court. In relation to the motion to amend, this decision constitutes the interim order of the court and the request for modification of the judgment is held in abeyance pending complete determination of such motion.

Dated: March 24, 2005

DIANE A. LEBEDEFF

J.S.C.