

**Ambase Corporation v Pryor Cashman Sherman &
Flynn LLP**

2005 NY Slip Op 30208(U)

October 31, 2005

Supreme Court, New York County

Docket Number: 0109540/2003

Judge: Karen Smith

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

PRESENT: _____

PART 44

Justice

Ambase Corporation

INDEX NO.

109540/03

MOTION DATE

8/31/05

MOTION SEQ. NO.

4

MOTION CAL. NO.

- v -
Pryor Cashman Sherman & Flynn
and Peter D. Wolfson

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

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 is decided in accordance with the attached memorandum decision and order.

FILED

NOV 15 2005

NEW YORK COUNTY CLERK'S OFFICE

Dated: 11/15/05

J.S.S.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 44

-----X
AMBASE CORPORATION,

Plaintiff,

-against-

Index no.: 109540/2003
Motion seq.: 004
Motion date: August 31, 2005

PRYOR CASHMAN SHERMAN & FLYNN LLP
and PETER D. WOLFSON

Defendants.

DECISION AND ORDER

-----X
PRESENT: KAREN S. SMITH, J.S.C.:

Plaintiff Ambase Corporation’s motion, pursuant to CPLR §§ 5015 (a) (1) and 3025 (b), for an order modifying the judgment and for leave to amend the complaint, is denied.

In this action, plaintiff contends that defendants Peter D. Wolfson and Pryor Cashman Sherman & Flynn LLP (“Pryor Cashman”) committed legal malpractice in their representation of plaintiff in negotiating a settlement agreement with Zurich SF Holdings LLC (“Zurich”). On May 11, 2004, Justice Diane A. Lebedeff dismissed plaintiff’s complaint, pursuant to CPLR § 3211 on the ground that it failed to set forth a cause of action. Judgment was entered dismissing the complaint on June 4, 2004. Now plaintiff moves to modify the judgment and seeks leave to replead its complaint.

The facts of the case are set forth in the motion papers and Justice Lebedeff’s decisions of May 11, 2004 and March 24, 2005. They are briefly recited here. Pryor Cashman represented plaintiff in an action against Zurich, seeking among other things reimbursement for a potential tax liability faced by plaintiff. The parties refer to this potential liability as the “N.V. Withholding Issue”. At the time, plaintiff was litigating the N.V. Withholding Issue with the Internal Revenue Service in United States Tax Court. By June 2, 2000, all other issues in the two actions between Zurich and plaintiff had been resolved. The only outstanding issue was the NV Withholding Issue. On that date, plaintiff, by its president and Chief Executive Officer Richard Bianco, and Zurich, executed a agreement, settling the NV Withholding Issue (“Agreement”). In the Agreement, Zurich agreed to fund an escrow account in the amount of \$ 9.5 million. Paragraph 4 of the Agreement

reads as follows:

The purpose of the Escrow Account is to create a fund which will match, dollar for dollar, (i) any amount paid or to be paid along with the payment from escrow in paragraph 5 to the taxing authorities pursuant to a final resolution of AmBase's tax dispute captioned AmBase Corporation, formerly the Home Group Inc., Individually and AmBase Corporation, formerly the Home Group Inc., as designated agent of City Investing Company, Tax Court Docket No.: 11816-95 (the "N.V. Withholding Issue") or an appeal thereof (including tax, interest and/or penalty) after the date hereof, whether by settlement, court order or otherwise (for the avoidance of doubt, this would exclude a prepayment as defined below which AmBase agrees not to make) and (ii) the actual and reasonable out of pocket expenses, including but not limited to third party customary and usual professional fees and related disbursements (consistent with prior practices), incurred by AmBase after the date hereof directly relating to proceedings regarding the N.V. Withholding Issue paid by AmBase or to be paid with the payment from escrow in paragraph 5 (but specifically excluding the Davis Polk Contingency Fee provided for by letter dated July 9, 1992 from Davis Polk to AmBase.) The funds in the Escrow Account are not to be used for payment of any type of performance fee, contingency fee, or bonus unless mutually agreed by AmBase and [Zurich], which agreement will not be unreasonably withheld. In no event are the funds in the Escrow Account to be used for payments of fees in connection with any other matter than the above-referenced N.V. Withholding Issue. Said another way, funds will be released from the Escrow Account to cover 50% (i.e., one dollar will be released from the Escrow Account for each dollar AmBase actually pays or to be paid with the payment from escrow in paragraph 5) toward the items noted in (i) or (ii) above. [Zurich] acknowledges that actual and reasonable out of pocket expenses relating to the N.V. Withholding Issue may be incurred in the event any further work is required before a decision is rendered by the tax court, and thereafter either contesting an adverse ruling, defending a favorable ruling or otherwise dealing with the taxing authorities to resolve or settle the N.V. Withholding Issue.

Paragraph 5 of the Agreement provides that if Zurich objects to any payment of escrow funds, the matter shall be submitted to arbitration. Paragraph 9 of the Agreement provides that the losing party in an arbitration would be liable to pay all arbitration fees and expenses, as well as interest on any amount the arbitrator found should have been paid from the fund on the date it should have been paid. After the execution of the settlement agreement, defendants ceased representing Plaintiff.

On May 23, 2001, the Tax Court rendered a decision, finding that plaintiff had no tax liability on the N.V. Withholding Issue. The IRS did not appeal the Tax Court's ruling. In December of 2001, plaintiff awarded bonuses to Richard Bianco, John Ferrara, its chief financial officer, Joseph

Bianco, its treasurer, in the amounts of \$ 2.5 million, \$ 250,000, and \$ 200,000, respectively. Plaintiff then sought reimbursement for half of the amount of the bonuses from the escrow fund. Zurich objected and the matter was submitted to arbitration. The arbitrator determined that plaintiff was not entitled to recover any amount from the funds, and that plaintiff was liable to Zurich for more than \$500,000 for interest on the escrow fund and Zurich's arbitration expenses.

Plaintiff then commenced this action against defendants Pryor Cashman and Wolfson. In its original complaint, plaintiff alleged it had informed defendants that it would have accepted a settlement agreement that involved an escrow fund only if it could obtain reimbursement for executive bonuses from the escrow fund. It further alleged that defendants represented that the Agreement guaranteed that plaintiff could use the escrow fund to pay its executives bonuses and that, in the event that Zurich objected to a request to use escrow funds for bonuses, an arbitrator would determine a reasonable reimbursement amount. Plaintiff alleged that defendants failed to advise it of the risk that an arbitrator would determine that plaintiff would not be entitled to reimbursements for the bonuses. Plaintiff contended that, had it known of these risks, it would have taken Zurich's prior offer of \$3 million in cash.

On May 11, 2004, Justice Diane Lebedeff dismissed plaintiff's original complaint. In her decision, she held that the language of the contract was clear on its face and that, had Bianco read the Agreement before signing it, it would have been unreasonable for him to believe that the Agreement guaranteed that executive bonuses could be paid from the escrow funds. Justice Lebedeff found that the portions of the Agreement concerning the arbitration were equally clear. Justice Lebedeff also found that the proximate cause and "but for" elements of plaintiff's legal malpractice claim were lacking, in that the complaint stated that plaintiff's board voted to approve the bonus payments without the knowledge that they could conceivably be reimbursed for those payments from the escrow fund. Accordingly, Justice Lebedeff dismissed the legal malpractice claim. She further found that the breach of contract and breach of fiduciary duty claims were duplicative of the malpractice claim, and dismissed them as well. She directed the clerk to enter judgment accordingly.

On May 24, 2004, defendants served a copy of Justice Lebedeff's order and a proposed judgment on the county clerk. Defendants' proposed judgment recited that the claims against defendants would be dismissed "with prejudice". Plaintiff took no action at that time, and the clerk

signed the judgment on June 4, 2004.

In July of 2004, plaintiff moved to renew and reargue and, by separate motion, moved to modify the June 4, 2004 judgment to read that the claims against defendants would be dismissed without prejudice, and for leave to amend the pleadings. Plaintiff contended that it would have opposed the entry of judgment, but that it was in the process of replacing counsel at the time the judgment was entered.

With its motion for leave to amend the complaint, plaintiff submitted a proposed amended pleading that laid out ten separate causes of action. The first cause of action, for legal malpractice, alleged that defendants failed to inform plaintiff of the actual conduct of the settlement negotiations with Zurich, that defendants misrepresented that Wolfson had sufficient litigation experience to properly prosecute the action against Zurich, that defendants negligently drafted the Agreement by failing to incorporate a specific provision that guaranteed that bonuses could be paid from the escrow fund, that defendants negligently led plaintiff to believe that, pursuant to the Agreement, plaintiff would be entitled to reimbursement for bonuses from the escrow fund, and that defendants negligently led plaintiff to believe that defendants had informed Zurich that plaintiff would make a claim on the fund for bonuses. Plaintiff alleged that, but for defendants' malpractice, it would not have rejected the previous \$3 million cash offer from Zurich, that it would not have expended \$200,383.40 in legal fees for its arbitration, that it would not have incurred an arbitration award for \$521,746.56 plus arbitration fees expenses, and that it would not have expended \$1.5 million in legal fees to defendants. The second cause of action, also for legal malpractice, incorporates all the allegations of the first cause of action, except that plaintiff alleges that, but for defendants' negligence, it would have successfully prosecuted its claims against Zurich and would have won a \$25 million judgment.

The third and fourth causes of action allege that defendants made certain false statements that, based upon the fiduciary relationship between plaintiff and defendants, constitute constructive fraud. The fifth and sixth causes of action allege that defendants made fraudulent representations to plaintiff. The seventh and eighth causes of action allege that defendants breached their fiduciary duty to plaintiff. The ninth and tenth causes of action allege that defendants made certain negligent misrepresentations to plaintiff.

With the second proposed amended complaint, plaintiff has submitted an affidavit from Richard Bianco, in which Bianco alleges that he instructed Wolfson that he would not accept and sign the Agreement unless it allowed for the opportunity to recoup 50 % of executive bonuses from the escrow fund. Bianco further alleges that Wolfson assured him that the matter had been discussed extensively in negotiation settlements, that Zurich's only reservations concerning bonus payments to plaintiff's employees was the size of the bonus, and that the agreement definitely allowed plaintiff to make a claim for bonus reimbursement from the fund. Bianco maintains that his execution of the Agreement was premised on this point.

In a decision dated March 24, 2005, Justice Lebedeff denied plaintiff's motion to renew and reargue. Justice Lebedeff also denied the portion of plaintiff's motion to modify the judgment and replead as it applied to the third through tenth causes of action in the proposed amended pleading. With regard to the first and second causes of action, Justice Lebedeff expressed skepticism, noting that the plaintiff had claimed in the original complaint that it had told defendant that the bonus reimbursement issue was a "deal breaker", but that plaintiff had failed to allege a cause of action on that claim. Justice Lebedeff further noted that the claim that plaintiff would have accepted the \$3 million cash settlement, or that plaintiff would have proceeded to trial, if it was not guaranteed bonus reimbursement from the escrow fund was apparently contradicted by Bianco's deposition testimony, submitted on the previous motion to dismiss. In that testimony, Bianco stated that the NV Withholding Issue was so massive that it could mean bankruptcy for plaintiff, that it simply had to be resolved at all costs, and that the parties were afraid of litigating in front of Judge Gammernan (the Supreme Court judge assigned to plaintiff's case against Zurich) and felt that arbitration would be less costly than litigation. However, rather than dismiss those claims, Justice Lebedeff directed the parties to submit further argument.

On April 27, 2005, the parties appeared at a court conference before Justice Lebedeff. At that conference, Justice Lebedeff informed the parties that the action was being transferred to another judge. Over defendants' objection, Justice Lebedeff instructed plaintiff to "propound a final amended pleading as to the first and second cause [sic] of action only including any statement of facts that underlie it," (Ct. Transcript, April 27, 2005, p. 2), and gave defendants an opportunity to respond.

It is plaintiff's second proposed amended complaint that is now before the court for consideration. It alleges the same acts plaintiff alleged of defendants in the first amended complaint. It goes on to set forth two separate causes of action, both sounding in legal malpractice. As with the first amended complaint, the first cause of action contends that, but for defendants' malpractice, plaintiff would have accepted the \$3 million cash settlement. The second cause of action is identical, except that it alleges that, but for defendants' malpractice, plaintiff would have proceeded to trial and prevailed, recovering approximately \$17 million.¹

✓ Plaintiff has also submitted ~~arbitration~~ testimony from Laurie Foster and Stephen Germain, attorneys who represented Zurich during the negotiations, that indicates that Wolfson had not brought up the issue of executive bonuses in negotiation discussions.

Defendants now contend that both causes of action in the second proposed amended complaint are foreclosed by Justice Lebedeff's decision and order dismissing the original complaint. Specifically, they argue that Justice Lebedeff's finding that the language of the Agreement itself was clear enough to foreclose any claim that defendants had failed to adequately advise plaintiff of the risks involved, also forecloses plaintiff's claims that defendants failure to disclose the substance of the negotiations caused plaintiff injury. Accordingly, they contend that plaintiff's motion should be denied. Plaintiff contends that the allegations in the complaint are sufficient and that they are substantively different from the claims in the original complaint so that Justice Lebedeff's previous order is not controlling here.

CPLR §3211 (e) states that, when a motion has been dismissed on the grounds that it fails to set forth a cause of action, a party may seek leave to replead. It further states that "leave to plead again shall not be granted unless the court is satisfied that the opposing party has good ground to support his cause of action or defense". (*Id.*) While leave to amend a pleading is generally given freely, the court will not grant leave when the proposed amended pleading is devoid of merit and legally insufficient. (*Heller v. Louis Provenzano, Inc.*, 303 AD2d 20, 25 [1st Dept 2003]). When an issue has been previously raised and decided against a party, that party is precluded from

¹The first proposed amended complaint alleged that plaintiff would have recovered \$23 million had it gone to trial with Zurich. According to plaintiff's memorandum of law, the \$17 million figure represents a reduction based on another settlement agreement between plaintiff and Zurich.

relitigating that issue. (*Parker v. Blauvelt Volunteer Fire Company*, 93 NY2d 343, 349 [1999]).

On a claim for legal malpractice, the plaintiff must establish (1) conduct by an attorney that fell below the ordinary and reasonable skill and knowledge commonly possessed by a member of the profession, (2) that the attorney's conduct was the proximate cause of plaintiff's loss, and (3) actual damages. (*Prudential Life Insurance Company of America v. Dewey Ballantine, Bushby, Palmer, and Wood, et. al*, 170 AD2d 108, 114 [1st Dept 1991], *aff'd* 80 NY2d 377). To establish the proximate cause element, plaintiff must show that the attorney's alleged malpractice was the "but for" cause of his injury. (*Carmel v. Lunney*, 70 NY2d 169, 173 [1987]). Where a settlement agreement, signed by the plaintiff, flatly contradicts the allegations upon which a legal malpractice claim rests, that claim will be dismissed. (*Laruccia v. Forchelli, Curto, Schwartz, Mineo, Carlino & Cohn, LLP*, 295 AD2d 321 [2nd Dept 1001]).

Plaintiff has failed to satisfy the court that it has good ground to support the causes of action in its second proposed amended pleading. Specifically, it appears that plaintiff's claims are precluded by Justice Lebedeff's March 2004 decision and order. In that decision, Justice Lebedeff held that, regardless of the claims that defendants made misrepresentations of the legal effects of the agreement the language of the Settlement Agreement was clear on its face. Bianco's execution of it precluded plaintiff from arguing that it believed that the Agreement guaranteed reimbursement for bonuses. Now, plaintiff alleges that it was damaged based on factual misrepresentations concerning the negotiations. While defendants may have made factual misrepresentations that Wolfson had discussed the issue of bonus reimbursement from the fund with Zurich, that does not change the fact that the Agreement itself allowed Zurich to reasonably withhold its consent to reimbursing bonus payments from the escrow fund, and that the Agreement was so clear on this point that Bianco, who admits to reviewing the document line by line, should have realized that it allowed for this. Indeed, even if Zurich had stated in negotiations that it would not object to bonus payments, the Agreement in no obligated Zurich to honor such a statement.

Plaintiff's memorandum of law simply underlines the duplicative nature of the second proposed amended pleading. The central focus of plaintiff's argument is that the language in the Agreement was complex, and that plaintiff needed to rely on defendants' advice before executing it. However, Justice Lebedeff had previously held that the language was sufficiently clear, despite

any allegedly erroneous advice given by defendants.

In light of Justice Lebedeff's prior ruling, there is insufficient ground to support plaintiff's proposed amended pleadings with regard to defendants' alleged failures to inform Zurich that plaintiff intended to seek reimbursement for bonuses, their alleged misrepresentations to plaintiff concerning Zurich's position on bonus reimbursement, and their failure to draft a settlement agreement that allowed plaintiff to draw on the escrow fund for executive bonuses. Accordingly, plaintiff's motion for leave to replead its complaint based on these allegations is denied.

Neither side has addressed plaintiff's allegation that defendants failed to advise plaintiff that defendant Wolfson had insufficient trial and litigation experience to ~~be~~ successfully litigate plaintiff's claim against Zurich. However, this allegation, assuming it was true, lacks sufficient ground in the record to support a claim for legal malpractice. In his affidavit in support of the motion to replead, Bianco stated that, just prior to the trial date in plaintiff's action against Zurich, defendant Wolfson stated that he had very little litigation and trial experience. Bianco contends that, in light of this admission, he decided to enter into the Agreement rather than take the case to trial. This claim fails because plaintiff has not set forth what, if anything, it would have done differently if it had learned of Wolfson's alleged lack of experience sooner.

As plaintiff has not shown sufficient grounds to support the causes of action contained in its second proposed amended pleading, the portion of its motion seeking leave to amend the pleadings is denied. As the court is not granting plaintiff leave to amend the pleadings, the portion of its motion seeking leave to modify the judgment is denied as moot. Accordingly, it is hereby

ORDERED that plaintiff's motion to modify the judgment and amend its pleadings is denied.

This constitutes the decision and order of the court.

Dated: October 31, 2005
New York, New York

ENTER:

J.S.C.

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Plaintiff has also submitted arbitration testimony from Laurie Foster and Stephen Germain, attorneys who represented Zurich during the negotiations, that indicates that Wolfson had not brought up the issue of executive bonuses in negotiation discussions.

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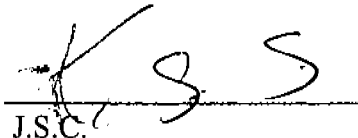
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ORDERED that plaintiff's motion to modify the judgment and amend its pleadings is denied.

This constitutes the decision and order of the court.

Dated: November 1, 2005
New York, New York

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J.S.C.

FILED

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