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SCANNED ON 9/11/2006

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

PRESENT: LOUIS B. YORK PART 2
J.S.C. *Justice*

Index Number : 104289/2005
AGATE, JAMES
vs.
HERRICK FEINSTEIN LLP
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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 IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
SEP 11 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/29/06

LOUIS B. YORK J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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JAMES AGATE,

Plaintiff,

Index No. 104289/05

-against-

HERRICK, FEINSTEIN LLP, ANTHONY JAKOBY, ESQ., and HARVEY FEUERSTEIN, ESQ.

Defendants.

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LOUIS B. YORK, J.:

Defendants Herrick, Feinstein LLP, Arthur Jakoby, Esq., and Harvey Feuerstein, Esq. (collectively, Herrick) move, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint.

Herrick, Feinstein LLP is a New York law firm and defendants Arthur Jakoby and Harvey Feuerstein are members of the firm. This action for legal malpractice arises out of defendants' representation of plaintiff James Agate (Agate) in an arbitration proceeding.

In 1998, one Spencer Segura (Segura), acting on behalf of Spencer Trask Securities (Trask), orally agreed to sell to both Agate and to another individual, Edward Kaminsky, 5% of Segura's interest in a Trask investment in an entity denominated NextLevel Communication (NextLevel) for $100,000 each. NextLevel later went public. Segura ultimately repudiated both oral agreements. Kaminsky, and subsequently Agate, retained Herrick to represent them in their respective lawsuits against Segura and Trask.

The claims of Agate and Kaminsky were ultimately adjudicated together before a

National Association of Securities Dealers (NASD) arbitration panel. Without any oral or written explanation, the arbitration panel awarded Agate and Kaminsky each the sum of $294,000 in compensatory damages, plus $50,000 in punitive damages. Dissatisfied with the amount of their respective awards, Agate and Kaminsky petitioned to vacate the award. Justice Cahn denied the motion to vacate the arbitration award and granted defendants' cross motion to confirm the award (Kaminsky v Segura, 4 Misc 3d 1019A [Sup Ct, NY County 2004]). Justice Cahn's decision was unanimously affirmed by the Appellate Division (Kaminsky v Segura, 26 AD3d 188 [1st Dept 2006]).

Plaintiff then commenced a legal malpractice action, contending that, but for the legal malpractice of Herrick, his recovery would have been far higher than the amount awarded by the arbitrators. In his complaint, Agate asserted a cause of action against Herrick for breach of the Code of Professional Responsibility (first cause of action), legal malpractice based on a failure to present proper proof at the arbitration regarding Agate's damages, and for treble damages pursuant to Judiciary Law § 487 (second cause of action), false representation and/or deceit (third cause of action), violation of Judiciary Law § 487 (fourth cause of action), and breach of fiduciary duty (fifth cause of action).

In a decision dated October 14, 2005, this court granted defendants' motion to the extent that the first, third, fourth and fifth causes of action were dismissed, and that the portion of the second cause of action, which sought recovery of treble damages pursuant to Judiciary Law § 487, was dismissed. In denying defendants' motion to dismiss plaintiff's cause of action for legal malpractice, the court reasoned: "[T]his court cannot determine, at the pleadings stage, whether or not Herrick failed to present proper proof of Agate's damages. None of the

documentary evidence submitted by plaintiff is conclusive, and defendants have not proffered any affidavits from Jakoby, Feuerstein or any other member of Herrick relating to the firm's work on the arbitration proceeding ... . The parties should take discovery and then, if so advised, move for summary judgment." Accordingly, all claims were dismissed on the pleadings, except the cause of action for legal malpractice, based on plaintiff's allegations that his attorney did not present proper proof to the arbitrators regarding Agate's damages. The court also granted plaintiff leave to file a second amended complaint to plead a cause of action for recovery of excessive fees paid, if any.[1]

In his amended complaint, Agate alleges that "[t]he measure of damages in both actions [Kaminsky's and Agate's] should have been calculated in a formula dependent upon the date of the breach of their respective damages" (amended complaint ¶ 36). More specifically, Agate argues that Herrick failed to present evidence in the arbitration regarding the date(s) on which his oral agreement with Segura was allegedly breached and the amount of damages that Agate suffered as a result of that breach.

Defendants move for summary judgment.

"An action for legal malpractice requires proof of three elements: 1) that the attorney was negligent; 2) that such negligence was a proximate cause of plaintiff's losses; and 3) proof of actual damages" (Brooks v Lewin, 21 AD3d 731, 734 [1st Dept 2005]).

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[1]Agate's malpractice claim was pled as the second cause of action in the original complaint. In the amended complaint, however, Agate changed the order of his claims and pled his malpractice claim as the first cause of action. Thus, although the first cause of action in the amended complaint was permitted to survive the motion to dismiss, that portion of the first cause of action of the amended complaint which sought treble damages, as well as the remaining causes of action, were dismissed for the reasons articulated in the court's decision.

Defendants argue that the record of the underlying arbitration proceeding, comprising some 4,839 pages, constitutes the best evidence of what occurred during the course of the arbitration proceeding, and that from the transcript of the proceeding, it is manifest that Herrick presented extensive evidence regarding the breach of Agate's alleged agreement with Segura, thereby vitiating plaintiff's contention of legal malpractice. Moreover, defendants argue that Herrick also presented extensive evidence regarding Agate's damages as a result of that breach and offered the arbitrators a variety of dates on which they could predicate their calculation of Agate's damages based on Agate's own testimony of his oral agreement with Segura. In sum, defendants contend that the arbitration record manifests Herrick's presentation of all available evidence adduced at the arbitration in support of all of Agate's claims for breach of contract based upon all of his theories of damages.

Furthermore, defendants argue that Agate's malpractice claim fails because Agate cannot establish that any malpractice by Herrick proximately caused any injury to him. The arbitrators did not furnish any reasons for their award. As a result, defendants urge that there is no rational basis to assert that some malpractice by Herrick caused the arbitrators to decide as they did.

Finally, defendants argue that a third necessary element of a malpractice claim cannot be proved because Agate's alleged damages are too speculative to support any claim for malpractice. In support of this argument, defendants state that Agate conceded under oath that had Segura delivered on his promise and sold him an interest in the subject stock, Agate would probably have kept the stock until it had become "worthless," a prospect that was close to reality by the date on which Agate testified at the arbitration, when the price of the stock was

approaching zero.

In his opposition papers, plaintiff fails to address the ample evidentiary record adduced in support of defendants' motion for summary judgment. Furthermore, in his opposing papers, Agate changes the theory of his malpractice claim. Agate now claims that Herrick committed malpractice because it did not "provid[e] the options trading expert David Krein in the case in chief" (Kressner affirmation, ¶ 25). Agate claims that "[i]t is just this negligence that forms the basis of the within action by Agate against the Herrick, Feinstein firm" (id., ¶ 18).

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd [b]), and he must do so by tender of evidentiary proof in admissible form" (Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065, 1067-1068 [1979]). On the other hand, to defeat a motion for summary judgment, the opposing party must come forward with evidentiary proof in admissible form that demonstrates the existence of material questions of fact on which the claims are based (see Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Reliance upon conclusory or irrelevant allegations is insufficient for that purpose (see Rotuba Extruders, Inc. v Ceppos, 46 NY2d 223, 231 [1978]). "A shadowy semblance of an issue is, like conjecture, surmise, or suspicion, insufficient to defeat a motion for summary judgment" (Brecher v Mutual Life Ins. Co. of N.Y., 120 AD2d 423, 426 [1st Dept 1986]).

In the case at bar, Agate's malpractice claim fails in light of the undisputed facts and settled law. "[A]n action for legal malpractice requires proof of the attorney's negligence, a showing that the negligence was the proximate cause of the injury, and evidence of actual damages" (see Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP, 301 AD2d 63, 67

[1st Dept 2002]). "To sustain a cause of action for legal malpractice, a party must show that an attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession" (Darby & Darby, P.C. v VSI Intl., Inc., 95 NY2d 308, 313 [2000] [internal quotation marks omitted]). Plaintiff must show that, but for the alleged negligence of the defendants, he would have prevailed in the litigation or arbitration (Hand v Silberman, 15 AD3d 167 [1st Dept 2005]). Neither an error in judgment nor choosing a reasonable course of action would constitute malpractice (id.).

In his opposition papers, Agate does not address Herrick's refutation of the allegations in the amended complaint, as supported by the arbitration record. Rather, Agate claims that Herrick committed malpractice because it did not call Krein on Agate's direct case and then was not allowed to offer Krein's expert testimony in rebuttal on Agate's behalf. In fact, Herrick did present expert testimony on Agate's behalf, as noted by Justice Cahn: "During their case-in-chief, petitioners called Robert Connor of Thornapple Associates as an expert witness" (Kaminsky v Segura, 4 Misc 3d 1019A, *3 [Sup Ct, NY County 2004]). Thus, Justice Cahn found that the matters with respect to which Agate claimed that Krein should have been allowed to testify were all presented by Herrick in Agate's case-in-chief. "According to petitioners, Conner's testimony covered the topic of hedging (including a description of hedging, different methods investors use to hedge, and the methods that would have been available to petitioners to hedge their NextLevel stock had Segura not breached their agreements), and the calculation of petitioners' damages ..." (id.). Justice Cahn found: "The two arguments that petitioners allegedly needed to rebut concerned the valuation of NextLevel prior to the IPO and the ability to monetize an interest in NextLevel after the IPO. However, these subjects were already raised during

petitioners' case-in-chief" (Kaminsky v Segura, at *5). Justice Cahn concluded: "[P]etitioners have not shown that the proposed rebuttal expert would have offered evidence that was pertinent and material to rebut issues newly raised during Segura's case. Rather, it appears that the rebuttal witness was intended to bolster testimony and issues that had already been raised during petitioners' case-in-chief" (id., at *6).

Having been found to have presented expert testimony to support Agate's claim for damages, Herrick cannot be accused of malpractice simply because, with the benefit of hindsight, Agate may have preferred a different witness to adduce the evidence (see Dimond v Kazmierczuk & McGrath, 15 AD3d 526, 527 [2d Dept 2005]). Since Justice Cahn and the Appellate Division have already found that there was no prejudice to Agate as a result of the arbitration panel's decision to prevent Krein from testifying on rebuttal, Agate is barred as a matter of law from asserting otherwise in this case (see Vavolizza v Kreiger, 33 NY2d 351 [1974]).

Nor did Herrick commit malpractice because Krein was not offered as a second expert witness on Agate's case-in-chief. As Agate himself admitted: "[a]ny argument that petitioners should have offered the testimony and evidence at issue during their case-in-chief is simply wrong because the proposed testimony and evidence were strictly in the nature of rebuttal" (see Agate's memorandum of law in support of petitioners' application to vacate arbitration award as to damages, Jakoby affidavit, exhibit G, at 3). Since Agate himself characterizes Krein's proposed testimony as classic rebuttal evidence, there can be no malpractice in failing to foresee the need to call Krein as an additional expert witness on Agate's case-in-chief.

In any event, the issue of whether Agate suffered prejudice or damages because Krein was not allowed to testify as a rebuttal expert has been squarely decided adversely to Agate by Justice Cahn, who, in denying Agate's request to vacate the arbitration award, found that Agate suffered no prejudice as a result of the arbitration panel's decision not to allow further expert testimony on rebuttal. Agate is collaterally estopped from asserting that he was prejudiced as to a matter for which no prejudice was previously found (see Kaufman v Eli Lilly & Co., 65 NY2d 449, 455 [1985]).

Agate's malpractice claim also fails because Agate cannot prove that any malpractice by Herrick proximately caused him any injury. To sustain a legal malpractice claim, a plaintiff must demonstrate the existence of "'actual and ascertainable' [damages] resulting from the proximate cause of the attorney's negligence" (Zarin v Reid & Priest, 184 AD2d 385, 387-388 [1st Dept 1992]). Proximate cause requires a showing that "but for the attorney's negligence, plaintiff would have prevailed in the matter in question or would not have sustained any ascertainable damages" (Reibman v Senie, 302 AD2d 290, 290 [1st Dept 2003]). "A failure to establish proximate cause requires dismissal regardless of whether negligence is established" (Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP, 301 AD2d at 67) . Since the arbitrators did not articulate any reasons for their award, it is impossible to opine the basis of their ruling. Accordingly, there is no basis to assert that some failing by Herrick caused the arbitrators to rule as they did. Nor will further inquiry by way of discovery affect this result (see Colletti v Mesh, 23 AD2d 245, 247 [1st Dept 1965], affd 17 NY2d 460 [1965]["Inquisition of an arbitrator for the purpose of determining the processes by which he arrives at an award, finds no sanction in law"]).

Furthermore, Agate's alleged damages are too speculative to support a claim for malpractice, in light of Agate's testimony that he would have held onto the stock until it became worthless (see Sherwood Group, Inc. v Dornbush, Mensch, Mandelstam & Silverman, 191 AD2d 292, 293 [1st Dept 1993]). It was clear that the investment in NextLevel was highly speculative. Plaintiff was always aware that he could lose the entire investment or, if the venture succeeded, make a substantial profit. Nothing in the record supports Agate's suggestion that he would have received any amount greater than he did receive had anyone else represented him at the arbitration.

Finally, defendants having supplied the affirmations of Arthur G. Jakoby, Esq. and Harvey S. Feuerstein, Esq, as requested by the court, plaintiff has failed to direct the court's attention to anything that occurred at the arbitration that is unavailable in the existing record. In light of defendants' submissions, as well as the Appellate Division affirmance of Justice Cahn's order, the court does not perceive any legitimate need for further discovery (see Pow v Black, 182 AD2d 484, 485 [1st Dept 1992]; Frierson v Concourse Plaza Assoc., 189 AD2d 609, 610 [1st Dept 1993]).

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 8/29/06

ENTER: _____
J.S.C.

LOUIS B. YORK
J.S.C.

FILED
SEP 11 2006
COUNTY CLERK'S OFFICE
NEW YORK