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

PRESENT: HON. JUDITH J. GISCHE PART 10

Index Number : 123360/2001

MANDEL RESNICK & KAISER PC

VS

E.I. ELECTRONICS

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 3/28/06

MOTION SEQ. NO. _____

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: X Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

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

Dated: MAY 12 2006

_____ J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

----------x

MANDEL, RESNIK & KAISER, P.C.,
Estate of WILLIAM LIEBOWITZ,

Plaintiff,

-against-

E.I. ELECTRONICS, INCORPORATED,

-against-

Defendant,

MANDEL, RESNIK, KAISER, MOSKOWITZ & GREENSTEIN, P.C. formerly MANDEL, RESNIK & KAISER, P.C., BARRY H. MANDEL, RICHARD M. RESNIK, and NICHOLAS J. KAISER,

Third-Party Defendants.

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DECISION/ORDER
Index No.: 123360/01
Seq. No.: 002

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Pltf/3rd Party Defs motion [sj] w/NJK affid in support	1
Pltf/3rd Party Defs exhibits 1-26	2
Pltf/3rd Party Defs affid in support (BHM) w/exhs	3
Def/3rd Party Pltf x-motion w/PJH affirm in oppos, affid in oppos (EK), affid in oppos (AK), affirm (SG), affid (BLA), exhs	4
Def/3rd Party Pltf affirm 12/7/05 - table of contents	5
Pltf's affid in further support (RMR) w/exhs	6
Pltf/3rd Party Defs affid in support (NJK) w/exh	7
Pltf the Firm reply affid (BHM)	8
Def/3rd Party Pltf affirm in reply (PJH) w/affid in reply (EK), exhs	9

Upon the foregoing papers, the decision and order of the court is as follows:

This is a consolidated action. In the first action, plaintiff Mandel Resnik & Kaiser P.C. (and estate of William Leibowitz) sue to recover unpaid legal fees from defendant E.I. Electronics, Inc. ["EIE"]. In the second action, EIE has sued Mandel Resnik Kaiser, Moskowitz & Greenstein P.C. (f/k/a Mandel Resnik & Kaiser P.C.), Barry H. Mandel, Richard M. Resnik, and Nicholas J. Kaiser for malpractice. Messrs. Mandel, Resnik and Kaiser are each individually named defendants and members of the professional corporation. Plaintiff asserted malpractice counterclaims in the first action that are identical to the claims made in the second action. Hereinafter, all references to "Mandel Resnik" shall collectively mean the law firm and Mr. Kaiser, individually. Mr. Mandel has moved on separate grounds to have the claims against him dismissed, and EIE has, at this point, apparently discontinued this action against Mr. Resnik in his individual capacity.

Because the counterclaims asserted by EIE in the main action are the same as those asserted in the second case, the court will hereinafter simply refer to EIE's "claims" without distinguishing whether the claim is asserted in its answer or its complaint.

The court has before it Mandel Resnik's motion for summary judgment dismissing EIE's malpractice claims against it and Mr. Mandel in his individual capacity. EIE has cross moved for summary judgment on its malpractice claims. Alternatively, EIE seeks leave to amend its pleadings, or limit the issues for trial.

The timeliness of these motions was previously addressed by the court in its decision dated November 16, 2005, which is incorporated herein by reference. Suffice it to say that the motions are timely and may be heard.

Background and Facts Considered

Many facts are undisputed. EIE retained Mandel Resnik in September 1999 with respect to a transaction between itself and General Electric Company ["GE"] whereby GE would purchase an interest in a new company which would continue the business of EIE. Ultimately, GE and EIE signed a purchase agreement dated January 31, 2001 ["purchase agreement"] with GE purchasing a 35% membership interest in the company to be formed ["the company" or "LLC"] for $7,000,000. The purchase agreement contains the following recitation:

> "**WHEREAS**, Seller has agreed to sell, and GE has agreed to purchase, upon the terms and subject to the conditions hereinafter provided, a 35.0% Membership Interest (as defined below) in the Company;
>
> **WHEREAS**, Seller is willing to grant to GE a call option pursuant to which GE shall have the right, as set forth in Section 2.4 of this Agreement and upon the other terms and subject to the other conditions set forth in this Agreement, to acquire from the Seller an additional 14.0% Membership Interest in the Company;
>
> **WHEREAS**, GE has agreed to grant to Seller put options pursuant to which Seller shall have the right, as set forth in Section 2.5 of this Agreement and upon the other terms and subject to the other conditions set forth in this Agreement, to require GE to purchase additional Membership Interests from Seller; and . . ."

EIE granted GE a call option pursuant to which GE could acquire an additional 14% interest in the company ("GE call option"). The option was exercisable any time between January 31, 2002 and midnight January 31, 2003, at an agreed to price of

$7,000,000. Section 2.3 of the purchase agreement section provides as follows:

> "2.3 GE Call Option. At any time between January 31, 2002 and 12:00 midnight, New York City local time, on January 31, 2003 ("GE Call Option Period"), GE shall have the option to acquire all, but not less than all, of an additional 14.0% Membership Interest from the Seller ("GE Call Option") for Seven Million Dollars ($7,000,000) ("GE Call Option Purchase Price") in immediately available funds, provided that the GE Call Option period shall be suspended upon GE's receipt of a notice of a material breach of GE's obligations under this Agreement, the Membership Agreement or the Supply Agreement until such time as such breach has been cured (such suspension shall not result in any extension of the GE Call Option Period). GE shall exercise the GE Call Option by delivering a written notice duly signed by an authorized executive of GE to Seller during the GE Call Option Period ("GE Call Option Exercise Notice") stating that GE thereby exercises the GE Call Option. Following receipt of the GE Call Option Exercise Notice, Seller shall transfer to GE such additional 14.0% Membership Interest at a closing to be held at 10:00 a.m., New York City local time, on a Business Day within five Business Days after the Seller actually receives the GE Call Option Notice from GE at the offices of Mandel Resnik & Kaiser P.C., in New York City, or at such other place or time as shall be mutually agreed to by the Parties, against payment by GE of the GE Call Option Purchase Price by wire transfer to a deposit account of Seller designated by Seller in writing to GE within a reasonable time prior to such closing."

GE granted EIE a put option pursuant to which EIE (and its principals) could require GE to purchase all of the membership interests held by EIE and the Kagans[1] ("EIE put option"). The EIE put option is conditioned upon the "closing of the GE Call

[1]Members of the Kagan family are the principals of EIE.

Option." Section 2.4 in relevant part provides as follows:

> "2.4 Seller Put Option. At any time between the closing of the GE Call Option and midnight on June 30, 2009, Seller and the Kagan Group shall jointly have the right to require GE to purchase all of the Membership Interests held by Seller and the Kagan Group, on the terms and subject to the conditions set out in this Section 2.4 (the "Seller Put Option"):
>
> (a) Seller Put Option Price. Solely for purposes of calculating the consideration payable to Seller upon any exercise of the Seller Put Option, and for no other purpose, the entire issued and outstanding Membership Interests of the Company shall be deemed to be valued at Twenty Million Dollars ($20,000,000). The amount which GE shall be obligated to pay upon any exercise by Seller and each of the Kagan Group of the Seller Put Option (the "Put Option Exercise Price") shall be calculated as follows:
>
> Put Option Exercise Price = $20,000,000 x the percentage Membership Interest being put to GE (expressed as a percentage of all issued and outstanding Membership Interests)."

The purchase agreement was executed after GE and EIE exchanged several draft agreements. The first draft dated May 30, 2000 was prepared by GE. It provided that GE would purchase a 19.9% membership interest in the company. It contained no price for the purchase. It did, however, provide that GE had a call option for an additional 30% interest in the company exercisable at any time between the closing date of the transaction and March 31, 2002. The price to exercise that option was $10,000,000. EIE had a put option exercisable, without any condition precedent, after the expiration of GE's call option period. The price for the EIE put option was not

specified either. That contract, in relevant part, provided for the EIE put option to be exercisable "At any time after the expiration of the GE Call Option Period . . ."

After revisions, Mandel Resnik prepared a second draft agreement dated June 26, 2000. Like the initial draft, it called for GE to purchase a 19.9% interest, but at a set price of $4,000,000. The June 26th draft allowed EIE to exercise its put option after the expiration of the GE call option period. Thus, GE had until June 30, 2002 to "call" an additional interest and EIE had to wait until June 30, 2002 to require GE to acquire an additional interest, but then only in stages. The call option for an additional 30% and the price to exercise the option was $10,000,000.

The next draft, dated July 11, 2000 provided that EIE could exercise its put option "at any time between the Closing Date and midnight on December 31, 2007 . . ." The July 28, 2000 also allowed EIE to exercise its put option "at any time between the Closing Date and midnight on December 31, 2007 . . . " Thus, the put option in these drafts was not contingent on GE's exercising its call option first, or the call option's expiration. In relevant part, Section 2.4 of the July 28, 2000 draft provides as follows:

> "At any time between the Closing Date and midnight on December 31, 2008, Seller shall have the right from time to time to require GE to purchase all or some portion of the Membership interests held by Seller, in the minimum amount of 14.5% of all outstanding Membership interests (or such lesser amount which represents the sole remaining Membership Interest held by Seller) . . . "

The put option price was valued at $20,000,000 using a formula exactly like the one in the final signed purchase agreement: "$20,000,000 x the percentage Membership Interest being put to GE (expressed as a percentage of all issue and outstanding Membership Interests)."

The next draft of the purchase agreement, dated August 23, 2000 contains a material change from the July 11 and July 28th drafts. It contains a condition precedent that has to be fulfilled before EIE can exercise its put option. The redlined version of that draft reads exactly as follows:

> "2.4 Seller Put Option At any time between the ~~(Closing Date)~~ **[closing of the GE Call Option]** and midnight on December 31, 2008, Seller **[and the Kagan Brothers]** shall **[jointly]** have the right ~~(from time to time)~~ to require GE to purchase all ~~(or some portion)~~ of the Membership interests held by Seller ~~(, in the minimum amount of 14.5% of all outstanding Membership interests (or such lesser amount which represents the sole remaining Membership Interest held by Seller)~~ **[and the Kagan Brothers]**, on the terms and subject to the conditions set out in this Section 2.4 (the "Seller Put Option"):
>
> (a) Seller Put Option Price. Solely for purposes of calculating the consideration payable to seller upon any exercise of the Seller Put Option, and for no other purpose, the entire issued and outstanding Membership interests of the Company shall be deemed to be valued at Twenty Million Dollars ($20,000,000). The amount which GE shall be obligated to pay upon any exercise by Seller **[and each of the Kagan Brothers]** of the Seller Put Option (the "Put Option Exercise Price") shall be calculated as follows:

Put Option Exercise Price	=	$20,000,000	x	the percentage Membership Interest being put to GE (expressed as a percentage of all issued and outstanding Membership Interests)."

It is this August 23rd draft that marks the pivotal point in the parties' dispute. This provision remained in this form in all subsequent drafts and the executed version of the purchase agreement.

According to EIE and the Kagans, they were unaware of the distinction between making the put option exercisable "At any time between the Closing Date and midnight on December 31, 2008 . . ." as opposed to "At any time between the closing of the GE Call Option and [date] . . ." The Kagans alternatively contend the word "period" as in "closing of the GE Call Option Period," was a mistaken by their attorney.

In the August 23, 2000 draft and the executed purchase agreement, the terms "Closing" and "Closing Date" are contractually defined as the date GE is buying the initial interest in the company. However, the phrase "closing of the GE Call Option" uses the word "closing" in a different context. It refers to the date the "closing" of the transfer of additional membership interests GE is "calling" takes place. Thus, if GE does not exercise its call option, EIE and its principals cannot exercise their put option.

While the purchase agreement was being drafted, Mandel Resnik was also drafting the terms of the LLC agreement that would determine the corporate governance of the new company to be formed ("the company" or "LLC").

It is undisputed that during the ongoing negotiations, EIE and GE each endeavored to maximize their respective control of the company. Although GE would only be purchasing a minority interest, it sought extensive control rights with respect to 18 areas of company operations. GE demanded that these 18 areas of decision making require 100% vote of the membership interests in the LLC at any time GE owned a less than 50% interest in the company. Thus, a draft of the LLC agreement, before the August 30, 2000 revision contained the following language:

> "2.8.1. Formal Action by Members. Ordinarily, the act of Members owning a majority of the ownership interests at a meeting at which a quorum is present shall be the act

> of the Members. The following matters, however, shall require a vote of 100% of the Membership Interest in the Company at any time that GE owns less than a 50% Membership Interest in the Company, it being the intention of the Members that if GE acquires more than a 50% Membership Interest in the Company the Members shall in good faith negotiate minority protection rights . . ."

This language was modified in the LLC agreement when the purchase agreement was modified in August 2000. The August 23, 2000 draft of the LLC agreement provides exactly as follows:

> "2.8.1. Formal Action by Members. Ordinarily, the act of Members owning a majority of the ownership interests present at a meeting at which a quorum is present shall be the act of the Members. ~~[The following matter, however,]~~**[At any time following the closing of the purchase of Membership Interests resulting from the exercise of the GE Call Option, however, the following matters]** shall require a vote of not less than 85% of the Membership Interests of the Company . . ."

The final version of the LLC agreement, executed on January 31, 2001 (e.g. with the purchase agreement contains the following language:

> "2.8.1. Formal Action by Members. Ordinarily, the act of Members owning a majority of the ownership interests present at a meeting at which a quorum is present shall be the act of the Members, provided that the following matters shall require a vote of not less than 85% of the Membership Interests of the Company . . . " (*emphasis in the original*)

It further provides that:

> "In addition, at any time following the closing of the purchase of Membership Interests resulting from the exercise of the GE Call Option, the following matters shall also require a vote of not less than 85% of the Membership Interests of the Company . . ."

Whereas the first draft contained 18 areas of decision making that required a super majority, the final draft required an 85% vote in only 4 areas of decision making, unless GE purchased an additional membership interest in the company.

Mandel Resnik also prepared an employee stock option plan ["ESOP"] for the LLC. The ESOP Mandel Resnik prepared was never executed. Instead, EIE had the ESOP subsequently redrafted by another law firm it later hired.

In the first action, Mandel Resnik has sued to recover $48,547.21 in legal fees it claims EIE failed to pay for services rendered in connection with the GE/EIE transaction. EIE asserted legal malpractice counterclaims in that action and, thereafter, brought its own action against Mandel Resnik (and the individual members) for legal malpractice. Mandel Resnik claims that EIE has asserted malpractice claims without any good faith basis, and that EIE is simply unhappy with the deal it struck with GE. Mandel Resnik claims that EIE cannot prove the firm (or any of the individual partners) were negligent or committed legal malpractice because EIE cannot prove that "but for" Mandel Resnik's actions, EIE would not have sustained any ascertainable damages.

EIE contends that it was improperly advised by Mandel Resnik (Mr. Kaiser, in particular). The Kagans contend they did not understand the ramifications of the purchase agreement they signed. They contend that Mr. Kaiser was improperly supervised by Mr. Mandel, and that the ESOP Mr. Kaiser prepared was useless and had to be redrafted.

Discussion

Applicable law

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980).

To establish a *prima facie* case of legal malpractice, the client must plead and prove facts that show defendant 1) failed to exercise that degree of care, skill, and diligence commonly possessed and exercised by an ordinary member of the legal community, 2) that such negligence was the proximate cause of the actual damages sustained by the plaintiff, and that 3) "but for" the defendant's negligence, the plaintiffs would have been successful in the underlying matter. Laventure v. Galeno, 307 AD2d 255 (1st dept. 2003).

Thus, plaintiff must set forth facts demonstrating that "but for" the attorney's conduct, it would have prevailed in the underlying matter, or would not have sustained any ascertainable damages. Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., 10 AD3d 267 (1st dept. 2004). Pellegrino v. File, 291 AD2d 60, 63 (1st dept. 2002); Stroock, Stroock & Lavan v. Beltramini, 157 AD2d 590, 591 (1st dept. 1990). The proximate cause element, in particular, requires evidence that "but for" defendants' alleged negligence, plaintiff would have achieved a more favorable result. Wexler v. Shea & Gould, 211 AD2d 450, 621 NYS2d 858 (1st dept. 1995).

Where, as here, the malpractice claim is based upon advice for business transactions, rather than on representation in a pending court action, the element of causation is more difficult to prove, absent fraud or other unusual circumstances. *See*: Arnav Industries, Inc. v. Brown, Raysman, Millstein et al., 96 NY2d 300 (2001). This is because a competent client is responsible for his or her own signature and is bound to read and know what he or she actually signed. Beattie v. Brown & Wood, 243 AD2d 395 (1st Dept 1997).

Mr. Mandel's motion to for summary judgment dismissing the complaint

The court first considers whether the individual claims against Mr. Mandel should be dismissed.

Mr. Mandel claims that he only met twice with the Kagans and it was when they were first considering whether to retain the law firm. He provides Mandel Resnik bills that confirm he only billed for his time in September and October 1999, but not thereafter. Mr. Mandel asserts that he did not review any of the draft agreements nor did he supervise Mr. Kaiser's work.

While the Kagans now claim they expected Mr. Mandel to "supervise" Mr. Kaiser and the drafting of the purchase agreement, the record contains statements by the Kagans to the contrary. Brian Kagan has testified that Mr. Kaiser had "primary responsibility" for the drafts. Brian Kagan has also testified that he "did not want Barry [Mandel] to review the drafts" but wanted Mr. Kaiser to have the ability to turn to Mr. Mandel if he had questions. He also testified that he "assumed" Mr. Mandel would supervise Mr. Kaiser, but knew Mr. Mandel was not personally handling their transaction. EBT BK 2/1/05 p. 146 - 147.

Erran Kagan has likewise testified that the drafts would come from Mr. Kaiser and that he reviewed them only with Mr. Kaiser. Erran Kagan has stated in support of his motion that they retained the firm because of Mr. Kaiser and he knew "Nicholas Kaiser would be on the transaction. . ."

Members of a professional service corporation are not personally liable for the acts of other members of the corporation if they did not supervise those individuals or personally participate in the questioned actions with them. BCL § 1505 (a); Krouner v. Kaplovitz, 175 AD2d 531 (3rd dept. 1991); We're Associates Company v. Cohen, Stracher & Bloom, 103 AD2d 130 *aff'd* 65 NY2d 148 (1985).

Although Mr. Mandel may have known what clients the firm had, possessed a general awareness of why they had hired the firm, and even known what matters junior members or associates were working on, EIE has not proved that Mr. Mandel personally reviewed any one of the drafts in question or made revisions thereto.

The separate argument by EIE that Mr. Mandel *should* have done so, or that he failed to adequately supervise Mr. Kaiser, is also contradicted by Erran Kagan's testimony. He testified that he knew Mr. Mandel would not be personally working on the transaction, but he also knew that Mr. Kaiser had come from a large firm and had extensive experience with such transactions.

Mr. Mandel's leadership role at the firm is not, without more, enough to make him personally liable for malpractice. Therefore, Mr. Mandel is entitled to summary judgment severing and dismissing the claims against him asserted by EIE as counterclaims in the first action and in its complaint in the second action.

Mandel Resnik's motion for summary judgment

Mandel Resnik claims it is entitled to summary judgment dismissing the malpractice claims in their entirety for several reasons. Mr. Kaiser denies all claims by EIE and the Kagans that he ever misinterpreted any of the material terms of the purchase agreement. He denies that he was negligent in explaining what the "closing of the GE Call Option" meant, or that he overlooked the significance of that provision in the EIE put option.

The law firm and Mr. Kaiser contend that Erran Kagan knew full well what he was agreeing to and that he executed the agreement with a complete command of its terms. Relying upon the documents in evidence, Mandel Resnik maintains that not only did the earlier August 2000 draft clearly contain the now disputed language, each draft thereafter did as well. The firm contends that the change in when the put option could be exercised from the "Closing Date," to "the closing of the GE Call Option" was deliberate, contemplated, and intended by EIE and the Kagans because they obtained significant and valuable concessions from GE on other issues.

In further support of its motion, Mandel Resnik presents evidence that GE never wanted or intended for EIE (or the Kagans) to have a put option, and that earlier drafts containing such terms were being carefully dissected by GE's counsel, James Billingsley, Esq. and Paul Woods, Esq., each of whom negotiated the terms of the deal directly with Erran Kagan, one of EIE's principals.

Mandel Resnik presents the EBT testimony of Paul Woods, Esq. who testified that GE "had a strategic deal in concept. . ." When questioned about why the July 28, 2000 draft was changed, Mr. Woods testified that he warned Erran Kagan that

management was cautious about the purchase agreement and ready to walk away. He deposed that:

> "when we went for the final internal review with senior management, they were uncomfortable with certain of the minority rights, as I recall. And there [were] some changes made in the details of the call and the put."

Mr. Woods testified further that it was "[GE's] final offer, and there would be no more negotiating. And if that wasn't acceptable, then we were going to walk away from the deal."

Mandel Resnik also relies upon the fact that the final LLC agreement was ultimately revised to protect the Kagans' interests because a super majority was only required for four areas of decision, unless GE exercised its call option. GE had initially insisted on much broader powers, regardless of what membership interest it owned.

Mandel Resnik highlights that unlike previous drafts, the disputed language also provides that if GE exercises its call option, EIE can exercise its put option to have GE acquire "all of the Membership Interests held by Seller and the Kagan Group." Other drafts provided for various minimum percentages but not a put option for "all" the membership interests in the company. Ultimately, GE purchased a greater initial membership interest in the company at a greater price than had been contemplated in earlier drafts (*compare*: $7,000,000 for a 35% interest versus $4,000,000 for a 19.9% interest).

Thus, Mandel Resnik argues that although EIE may have given up rights regarding the put option it gained many other valuable rights as part of the ongoing negotiations.

Mandel Resnik maintains that Mr. Kaiser reviewed the drafts with Erran Kagan and incorporated all the changes he suggested or asked for. Mr. Kagan confirms that he personally reviewed each and every draft "line by line." Although Erran Kagan is an attorney by training, and admitted to the bar, there is no dispute that he is not presently in private practice. He is, however, the principal of his company, and was actively involved in the negotiations.

EIE offers no proof that Mandel Resnik did anything more than draft the agreements in acceptable legal terms; it did not have the right to "veto" or reject any proposal by GE, or make counter offers.

Mandel Resnik argues that Erran Kagan is presumed to have understood what he signed, not only because of his business acumen and hands on participation in negotiations, but also because Mr. Kagan approved the material terms of the contract. Mandel Resnik further argues that EIE (and the Kagans) are bound by the purchase agreement because the Kagans signed it, and any failure to read it carefully is their fault and to their sole detriment.

A related argument offered by Mandel Resnik is that the purchase agreement is unambiguous because it clearly states when the put option is exercisable. Mandel Resnik relies on the fact that the language in the purchase agreement appeared in the August 2000 draft, each draft thereafter, and in the final draft, but the Kagans did not object to it, or ask that it be changed. CPLR § 3211 (a) (1); Bronxville Knolls Inc. v. Webster Town Center Partnership, 221 AD2d 248 (1st dept. 1995).

Mandel Resnik has proved that it received a draft from GE's attorney (James Billingsley, Esq.) incorporating changes made by Mr. Kaiser on an earlier draft and also

incorporating other changes made as a result of "Paul Wood's recent conversations with Erran Kagan."

Finally, the firm and Mr. Kaiser contend that EIE cannot prove a material element of its case which is causation, or that EIE sustained any ascertainable damages.

B. EIE's cross motion for summary judgment

In opposition, and in support of its own cross motion for summary judgment, EIE contends that from the outset it was concerned that GE's option to buy a greater membership interest in the LLC would make the company difficult to sell or take public. EIE contends that it told Mr. Mandel and Mr. Kaiser about these concerns when they first met. Erran Kagan further contends that he told the partners that he wanted to make sure EIE, the LLC and the Kagans would be protected. Mr. Kagan claims that the firm and Mr. Kaiser were negligent because Mr. Kaiser assured him, up to the last moment, that the put option was "Rock Solid." Mr. Kagan claims further that Mr. Kaiser assured him that there "was no wiggle room in the Put Option, no matter what." Erran Kagan admits he went over the final draft that was signed, line by line, to make sure there were no loose ends. He admits further that the agreement was not immediately executed, but that it was signed months later.

EIE claims that during negotiations its put option was never contingent on GE's exercising its call option. This is flatly contradicted by the documentary evidence. While early drafts did not contain such a contingency, all of the drafts, beginning August 23, 2002 did contain such a contingency.

EIE maintains that the firm failed to fully explain that the meaning of "closing" in the EIE put option did not mean the same thing as the contractually defined "Closing,"

or that Mr. Kaiser himself failed to notice the difference in making EIE's put option contingent on GE exercising its call option. EIE and the Kagans claim that it is this failure to flag, highlight, underscore or warn them about the distinction, was a failure by Mandel Resnik to exercise that degree of care, skill, and diligence commonly possessed and exercised by an ordinary member of the legal community.

To support this claim, Erran Kagan offers the deposition testimony of Bruce Belsky, Esq. Mr. Belsky is an attorney for the Kagan family in other matters. He wrote the following letter (in relevant part) to Mrs. Kagan, the Kagans' mother:

> "4. GE's Option. Until December 31, 2002, GE will have the option to acquire from EI an additional 30% ownership in the LLC for $10 Million Dollars. If GE exercises its option, the LLC will be owned as follows:
>
> | | |
> |---|---|
> | EI | 49.1% |
> | Erran | .5% |
> | Andrew | .5% |
> | GE | 49.9% |
> | | 100% |
>
> 5. EI's Option. At any time from January 1, 2003 to June 30, 2009, EI has an option to require GE to purchase its remaining interest in the LLC based upon a valuation of $20 Million Dollars for 100% of the LLC. In other words, if GE exercises its option to purchase a 30% interest for $10 Million Dollars, EI can sell its remaining 49.1% interest to GE for an additional $9.8 Million Dollars. If GE never exercises its option, EI can still sell its remaining 79.1% interest to GE for $15.8 Million Dollars."

The Kagans contend Mr. Belsky prepared the letter after he had a telephone conference with Mr. Kaiser in November 2000, and based upon his discussions with Mr. Kaiser. They offer the letter to show that even Mr. Belsky, a trained attorney, was confused by the agreement, and that Mr. Kaiser failed to explain the agreement

properly. While the letter is unmistakable proof that Mr. Belsky himself either misunderstood the deal or misstated the purchase agreement, it does not prove any of the elements of malpractice.

Although there is no affidavit from Mr. Belsky in support of EIE's cross motion, he did testify at his deposition that he based his letter to Mrs. Kagan upon his own review of a draft of the purchase agreement and other documents he was provided with. Mr. Belsky also testified he only spoke to Mr. Kaiser about the transactions twice, but he also discussed them with the Kagans on several occasions.

Mr. Belsky admits that he was not familiar with the transaction, but that he relied upon these sources to prepare his letter to Mrs. Kagan. He did not review the final agreement, nor was he present at the closing. Mr. Belsky made no changes to the draft documents that he received, or recommend any. He admits further that he wrote the letter to Mrs. Kagan "for the purposes of estate planning," and not to opine on the benefits or drawbacks of the proposed GE/EIE deal.

EIE offers the affirmation of Steven Gerber, Esq. who opines that Mandel Resnik breached the standards of professional care and skill, based upon the facts that have been presented to him. Tabner v. Drake, 9 AD3d 606 (3rd Dept 2004). EIE also offers the valuation report/study of Benjamin L. Anderson, ASA, CFA dated November 30, 2005 to establish its damages and set them at approximately $3,000,000 or more.

The court's analysis

Legal malpractice actions involving business transactions are difficult to prove where, as here, the client is competent to execute agreement and no fraud is alleged. Beattie v. Brown & Wood, 243 AD2d 395 (1st Dept 1997). The purchase agreement

that is the subject of this dispute is unambiguous. It clearly states that the EIE put option is available only after GE exercises its call option. The change was clearly redlined in drafts dating back to August 23, 2000.

The agreement distinguishes between the "Closing" of the initial membership interest and the "closing" of GE's call option. Arnav Industries, Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, LLP, 96 NY2d 3001 (2001); Cicorelli v. Capobianco, 89 AD2d 842 (1st Dept 1982).

Erran Kagan, a sophisticated businessman, and the other Kagans, executed the purchase agreement. Erran Kagan negotiated its terms and read it line by line before its execution. GE's witnesses testified that this was the final deal and they would sign no other; they were prepared to walk away from the deal, if necessary. They also testified that the put and call options were heavily negotiated. The myriad of draft agreements provisions support their claim.

Mandel Resnik has thus established a *prima facie* case entitling it to summary judgment. EIE has neither established any entitled to summary judgment or any disputed material issue of fact precluding the granting of summary judgment to Mandel Resnik.

EIE offers Mr. Gerber as an "expert". Whether he qualifies or not, his opinion simply does not meet the legal standard of malpractice. The facts that Mr. Gerber relies upon to form his opinion are either disproved by Mandel Resnik or not proved by EIE. Thus, his opinion that Mandel Resnik, for example, "fail[ed] to insure that the terms of [the] agreement [were] understood by their client and acceptable to that client," dehors this record. Nor has EIE offered any proof that the law firm "fail[ed] to recognize

that an alteration of the terms set forth in [the August 23, 2000 draft agreement] could render an option such as the Seller's Put Option subject to a condition precedent of the Buyer (General Electric) first exercising its Call Option."

The valuation report of Benjamin L. Anderson, ASA, CFA dated November 30, 2005 offered by EIE does not establish that EIE sustained any damages as a result of any alleged malpractice. Mr. Anderson reports that "GE has the right of first refusal relative to the sale of the [Kagans 65% membership] interest, and if GE declines to exercise such right, it can prevent the sale of that interest to an unaffiliated third party . . ." GE has, however, from the inception of negotiations and in the final purchase agreement always had a say in whether the company could be sold to a third party, regardless (and independent) of any rights under the EIE put option. Thus, even under the version of the purchase agreement that EIE claims it really intended to enter into, GE had the power to exercise its minority rights, blocking a sale to a third party.

Any opinion about the damages the Kagans are alleged to have suffered, based upon the failed sale to Ametek is simply conjecture. The correspondence EIE provides does not explain why Ametek reconsidered the deal. Ametek's letter of interest makes any final offer contingent upon many factors, including a full review by its board of directors. There is no proof whatsoever that it was the EIE put option that soured the deal. Any claim by EIE and the Kagans that had the put option been "properly" drafted, their company would have been more profitable because they could have sold it to Ametek is simply conjecture.

Each side has seized upon the Court of Appeal's decision in Arnav Industries v. Brown Raysman to support its position on these motions. 96 NY2d 3001 (2001). In

Arnav, the issue was whether, as a matter of law, a client's failure to read an agreement was a complete defense against a malpractice action. The client claimed he was induced not to read the contract because the attorney represented it was identical to prior drafts, save for typographical errors. Arnav, involved a pre-answer motion to dismiss. CPLR § 3211 et seq.; Arnav Industries v. Brown Raysman, *supra*. Such a motion requires that the court ascertain whether a cause of action is pled, not the merits of the case. A motion for summary judgment, however, requires a party to lay bare his proof so as to establish there are material disputes that have to be tried. S.J. Capelin v. Globe, 34 NY2d 338 (1974). EIE has not identified any factual basis to excuse its claimed failure to understand the writing it actually signed. In view of the unambiguous language in the purchase agreement, it is immaterial whether in any of the Kagans' minds they believed or thought the language in the purchase agreement meant something else. Brown Bros. Elec. Contractors, Inc. v. Bean Const. Corp., 41 NY2d 397 (1977).

Mr. Kagan's argument that it relied on Mr. Kaiser's statement that the put option was "Rock Solid" is a red herring. EIE's put option is "Rock Solid." If GE exercises its option, then EIE can require GE to "purchase all of the Membership Interests held by Seller and the Kagan Group . . ." "Rock Solid," or any other such language, is not legal advice regarding what the EIE put option means.

EIE has also asserted a separate cause of action for damages it claims it sustained as a result of it having to have an ESOP plan Mandel Resnik prepared scrapped and redrafted by Mr. Belsky. Mr. Belsky testified at his EBT that he re-drafted the agreement because "much of the income was being paid out to executives in the

form of bonuses, et cetera, and also to GE as part of the sourcing agreement." Mr. Belsky also testified he was able to work with GE to have "proration of the compensation" modified. These changes were made after the purchase agreement was signed, and after EIE's relationship with Mandel Resnik broke down. There is no indication that EIE notified Mandel Resnik that the agreement had to be redrafted, or insisted that it do so at no additional charge.

EIE cannot offset the expenses it incurred in having the ESOP redrafted against the legal fees that remain unpaid. It has not proved Mandel Resnik failed to exercise that degree of care, skill, and diligence commonly possessed and exercised by an ordinary member of the legal community when it drafted the ESOP. Laventure v. Galeno, 307 AD2d 255 (1st dept. 2003).

CONCLUSION

In accordance with this decision, the court hereby grants the motion by Mandel Resnik, and Nicholas J. Kaiser, individually, for summary judgment dismissing all of EIE claims and counterclaims for negligence and legal malpractice against them. The court also grants the motion by Barney H. Mandel for summary judgment dismissing the claims and the counterclaims for negligence and legal malpractice against him individually.

The sole remaining claim or cause of action in these consolidated actions relates to Mandel Resnik's complaint for legal fees against EIE. The defense of negligence and malpractice as to that counterclaim and cause of action is, however, dismissed as well.

Although EIE has sought leave to amend its pleadings, the court has considered all of its facts and the record it has developed. Having presented its best case to the court, no purpose would be served by granting the motion to amend. Therefore, EIE's cross motion for summary judgment, including its motion for leave to amend its pleadings, is denied in its entirety.

The remaining claims are ready to be tried; plaintiff Mandel Resnik shall serve a copy of this decision on the trial support office so that these remaining claims can be scheduled and assigned for trial.

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision of the Court.

The parties are to settle an order and judgment on notice.

Dated: New York, New York
May 12, 2006

So Ordered:

Hon. Judith J. Gische, J.S.C.