

**Voluto Ventures, LLC v Jenkens & Gilchrist Parker
Chapin LLP**

2006 NY Slip Op 30495(U)

May 30, 2006

Supreme Court, New York County

Docket Number: 118051/04

Judge: Emily Jane Goodman

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number: 118051/2004

VOLVO VENTURES, LLC

vs

JENNIFERS & GILCHRIST

Sequence Number: 001

DISMISSAL ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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*

FILED
JUN 13 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/30/06

[Signature]
EMILY JANE GOODMAN *cc.*

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: IAS PART 17

-----x
VOLUTO VENTURES, LLC, derivatively on behalf of
Harbour Entertainment, Inc.

Plaintiff,

Index No.

-against-

118051/04

JENKENS & GILCHRIST PARKER CHAPIN LLP,
and HARBOUR ENTERTAINMENT, INC.,

Defendants.

-----x
EMILY JANE GOODMAN, J.S.C. :

Plaintiff Voluto Ventures, LLC (Voluto), a shareholder of defendant Harbour Entertainment, Inc. (Harbour), commenced this action on behalf of Harbour against Defendant Jenkens & Gilchrist Parker Chapin LLP (Jenkens) for legal malpractice in its representation of Harbour. Jenkens moves for a order dismissing the complaint for failure to state a cause of action. Voluto opposes the motion. For the reasons stated herein, the motion is granted.

Complaint Allegations

In December 2001, Voluto purchased an equity interest in, and loaned money to, Harbour based upon representations by Marlowe R. Walker, Jr. (Vic Walker) and Marlowe R. Walker III (Bob Walker), principals of Harbour, that Harbour was to obtain a long term lease for the Homeport property located on the waterfront in Staten Island (the premises), to develop a major motion picture studio and, through wholly-owned Harbour subsidiaries, a world class marina and upscale hotel (the project).¹ Vic Walker was at this time, and still is, the largest single

¹Voluto allegedly loaned \$935,550.00 to Harbour. The Walkers represented to Voluto that Stapleton would be 80% owned by Harbour.

shareholder of Harbour, followed by Voluto.

In October 2001, the Walkers contacted Martin Eric Weisberg, Esq. (Weisberg), then a shareholder of defendant Jenkins, concerning possible retention by Harbour in connection with ongoing negotiations between the Walkers and the New York City Economic Development Corporation (EDC) concerning the project. Weisberg informed the Walkers that one of his partners, Stephen Estroff (Estroff), was very experienced in dealing with the EDC. On October 29, 2001, Harbour retained Jenkins.

Shortly thereafter, a meeting was held at Jenkins' office to discuss the project, which was attended by Weisberg, Estroff and the Walkers. At this meeting, the Walkers informed Weisberg and Estroff that Bob Walker would be involved in the project producing films, television advertisements and other productions at the studio.

At some point after Jenkins was retained, Weisberg and Estroff learned that Bob Walker had been indicted for, and pled guilty to, violations of the federal securities laws. Weisberg was provided with and read a copy of the criminal indictment which alleged that Bob Walker had been permanently barred by the NASD from acting as a broker and associating in any capacity with any firm regulated by the NASD.

Notwithstanding their understanding and belief that a criminal indictment and/or regulatory bar of an individual principally involved with the project would adversely affect the application for a permit, and ultimately a lease to occupy the premises, neither Weisberg, Estroff, nor any other representative of Jenkins, advised Harbour, or the Walkers or anyone else affiliated with the project, that Bob Walker's involvement in the project would seriously compromise development of the project. Rather, Jenkins allowed Bob Walker to remain and to be principally

involved in negotiations with the EDC, and to deliberately conceal from the EDC Bob Walker's criminal history, advising that disclosure was unnecessary because Bob Walker was not officially a member, officer or director of Stapleton, the actual legal entity, to be owned and controlled by Harbour, which ultimately applied for possession of the premises.

In December 2001, Stapleton was formed by Jenkins as the legal entity intended to occupy the premises and develop the project. Weisberg made no inquiry at this time to determine the identity of Harbour's shareholder, or whether Harbour and Stapleton were commonly owned. In fact, Harbour and Stapleton were not commonly owned, and Harbour had numerous shareholders who had no ownership interest in Stapleton.

Notwithstanding that Harbour and Stapleton were not commonly owned, that Harbour was to be a major investor in Stapleton and that Jenkins had been retained by Harbour to represent its interests, Jenkins undertook to represent Stapleton not only in connection with its efforts to obtain a right to occupy the premises and to develop the project, but also in connection with its efforts to obtain funds for, by and through Harbour, in direct conflict with its duties and responsibilities to Harbour. This conflict of interest was never disclosed to, or waived, by the independent Harbour directors or shareholders.

On December 26, 2001, aided by Jenkins as its legal counsel, Stapleton was granted an Occupancy Permit pursuant to which it was entitled to occupy a portion of the premises for a six month period from January 1, 2002 until June 30, 2002 and which was terminable at will by the City of New York. This Occupancy Permit was later extended for an additional three months, through October 31, 2002. Thereafter, Harbour proceeded to invest approximately \$2,000,000

into Stapleton and the project.²

Voluto's co-managing members, Vincent Molinari and David Kotowski, became aware of a meeting with the EDC, on August 13, 2002, and informed the Walkers that they would attend. At that meeting, the EDC stated that it was completely unaware of the capital and management structure of Stapleton and had not been informed that Voluto, through Harbour, had to date been the largest source of funds for the project.

The EDC learned subsequent to the August 13 meeting that Bob Walker, who had attended all the meetings with the EDC concerning the project, had been indicted for, and pled guilty to, criminal federal securities violations, and had been permanently barred by the NASD from being affiliated with any NASD registered broker-dealer. The EDC informed Molinari and Kotowski that Stapleton's further occupancy of the premises, even on a short term basis, was in doubt.

In a last attempt to save the project, by letter dated August 20, 2002, Voluto wrote to Vic Walker and demanded: (1) that Harbour's Board of Directors immediately terminate Bob Walker for cause from any position as an officer, employee, consultant or representative of Harbour in any capacity; (2) that Bob Walker be barred from rendering any services for Harbour; (3) that Vic Walker resign all posts with Harbour; (4) and if he failed to resign, that Harbour terminate him for cause from all positions held with the company and bar him from rendering any services on the company's behalf. By letter dated August 30, 2002, Weisberg, as counsel for Harbour, advised Voluto that the Walkers would not accede to any of Voluto's demands.

²Although the complaint alleges when Voluto invested in Harbour, neither the complaint nor any other documents submitted indicate when "Harbour proceeded to invest approximately 2,000,000 into Stapleton and the project." (complaint ¶ 34).

The EDC subsequently informed Stapleton that its right to occupy the premises beyond October 31, 2002 would not be extended, and evicted Stapleton from the premises. Voluta contends that the determination not to extend Stapleton's right to occupy the premises was based in large measure upon Bob Walker's undisclosed and concealed regulatory and criminal history.

Discussion

According to Jenkins, Voluta has failed to properly allege that it acted negligently. Jenkins argues (but submits no affidavit in support) that Vic Walker was aware of his son's conviction, and took the position it was irrelevant. Jenkins also denies that there was a conflict of interest in Jenkins's dual representation of Harbour and Stapleton. Contrary to Voluta's contention that only a vote of disinterested Harbour and Stapleton directors and shareholders could waive the purported conflict, Jenkins maintains that any conflict was waived by Vic Walker. Moreover, Jenkins maintains that the formation and investments into Stapleton was part of Harbour's business plan and that an attorney may properly represent both a corporation and its subsidiary.

Jenkins further contends that Voluta has failed to plead "but for" causation. Jenkins states that Voluta has not made a connection between the alleged malpractice and the alleged investment loss, and, also, that damages are speculative. According to Jenkins, its legal conduct must have been the proximate cause of the loss of Harbour's investment, and Voluta, at best, has alleged that the disclosure of Bob Walker's criminal past is one of several causes resulting in the EDC's rejection of the project.

Moreover Jenkins maintains that because Voluta did not make a demand on the corporation prior to bringing the derivative suit, Voluta was obligated to demonstrate with

particularity why such a demand would be futile, and it failed to do so. In opposition to this argument, Volutto submits an affidavit from Vincent Molinari, maintaining that a formal demand upon Harbour's Board would have been futile because Vic Walker, Harbour's largest shareholder, controlled two other Directors of Harbour's five member Board, and that no action would be taken on behalf of the corporation unless Vic Walker willed it. Molinari states that he had conversations with Vic Walker concerning Volutto's filing of this lawsuit against Jenkens, based upon the facts alleged in Volutto's complaint, and was told by Vic Walker that he was concerned that the filing of this action would expose him to potential liability to Harbour shareholders, and that Harbour was not prepared to bring the lawsuit.

On a motion to dismiss, the court must accept the facts as alleged in the complaint as true and accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory. See Morgenthau & Latham v Bank of New York Co., 305 AD2d 74 (1st Dept 2003).

An action for legal malpractice requires proof of the attorney's negligence, a showing that the negligence was the proximate cause of the plaintiff's loss or injury, and evidence of actual damages. See Pellegrino v File, 291 AD2d 60 (1st Dept 2002). In order to survive dismissal, the complaint must show that but for the counsel's alleged malpractice, the plaintiff would not have sustained some actual ascertainable damages. See Kozmol v Law Firm of Allen L. Rothenberg, 241 AD2d 484 (2d Dept 1997); Ressis v Wojick, 105 AD2d 565 (3d Dept 1984). Thus, a failure to establish proximate cause requires dismissal. See Hwang v Bierman, 206 AD2d 360 (2d Dept 1994). Even if counsel improperly advises the client, the advice is not the proximate cause of the harm if the client cannot demonstrate its own likelihood of success absent such advice. See Hill

v Fisher & Fisher, 203 AD2d 328 (2d Dept 1994).

The complaint essentially alleges that Jenkins failed to exercise the requisite degree of care, skill and diligence in connection with its legal representation of Harbour (1) by failing to advise Harbour that, in light of his criminal and regulatory history, Bob Walker should not play a principal role in the project, and, in fostering the concealment of Bob Walker's history from the EDC based upon the technical fiction that Bob Walker was not an official member, officer or director of Stapleton; (2) by failing to advise Harbour that the Occupancy Permit granted only limited occupancy rights and by failing to properly advise Harbour regarding the requirements to extend the permit; (3) by failing to advise Harbour regarding the letter, dated April 3, 2002, sent by the EDC to Stapleton, and by failing to advise Harbour on an ongoing basis regarding the EDC's concerns as they arose; and (4) by representing both Harbour and Stapleton because Harbour's interest was in obtaining accurate investment information, whereas Stapleton's interest was in obtaining financing from Harbour. Had Jenkins properly and independently advised Harbour, the complaint alleges that Harbour would not have made the investments in Stapleton. Accordingly, due to Jenkins' negligence, Harbour was allegedly deprived of the right to make independent and considered judgment as to the likelihood that the project could be successfully completed, causing Harbour to sustain damages in an amount equal to the money it invested in the project, or approximately \$2,000,000.

However, the allegations fail to specifically state that as a direct and proximate result of Jenkins' negligence, the EDC cancelled the Occupancy Permit and evicted Stapleton from the premises. Voluta has not alleged that but for Jenkins' negligence, Harbour would have succeeded in its project and Stapleton would have occupied the premises beyond a temporary

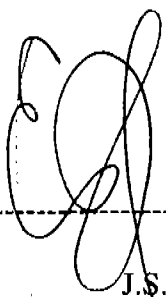
period. In fact, Voluto admits in the complaint that the project failed for reasons other than the criminal conviction of Bob Walker, such as problems with obtaining financing and providing a credible business plan (complaint ¶¶ 35, 41, 44, 46, 52, 58, 60). Instead, Voluto argues that the alleged negligence of Jenkens “wrongfully deprived Harbour of information and advice essential to its determination to invest in Stapleton,” and that the issue “is not whether the Project would have otherwise succeeded, but whether Harbour would have made its investments in Stapleton had it received independent counsel” (Plaintiff’s Memorandum of Law In Opposition To Motion To Dismiss at 19-20). Thus, Voluto argues that Harbour’s damages resulted merely from engaging in the transaction, based on negligent advice. Essentially, Voluto propounds a concept akin to transaction causation, which alone is insufficient to establish liability. See Laub v Faessel, 297 AD2d 28 (1st Dept 2000). In that case, the plaintiff claimed that it lost over 41 million dollars on a stock transaction, based on false investment advice. Because plaintiff did not allege that the purported misrepresentations caused the investment loss (which could also have been attributable to market forces), the complaint was dismissed. In addition to establishing that the misrepresentation induced plaintiff to engage in the transaction (transaction causation), the plaintiff also had to show that the misrepresentations directly caused the investment loss. Thus, the fact that the misrepresentations may have induced plaintiff to engage in the stock transaction was insufficient, absent proof that the misrepresentations caused the investment loss. With respect to legal malpractice, the concept is the same. Assuming Jenkens’ negligence, Harbour’s act of investing in Stapleton, in and of itself is not enough; Jenkens’ negligence must be the proximate cause of Harbour’s actual ascertainable damages. See Hill v Fisher & Fisher, 203 AD2d 328, supra. As Voluto admits that other factors, having nothing to do with Jenkens’

alleged counsel, contributed to the downfall of the project, the complaint is insufficient in its allegations of causation. Accordingly, the Court need not reach any of other arguments raised herein, including whether the derivative action should be dismissed for failing to meet the pleading requirements of Section 626 (c) of the New York Business Corporation Law.

Accordingly, it is

ORDERED that Jenkins' motion to dismiss is granted.

DATED: May 30, 2006

ENTER: 

J.S.C.
EMILY JANE GOODMAN

FILED
JUN 13 2006
COUNTY CLERK'S OFFICE
NEW YORK