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

PRESENT: EDWARD H. LEHNER PART 19

Index Number : 102451/2007

WEBRECRUITER LLC

vs

ZIMMET, BRIAN J.

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

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: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

motion is decided in accordance

with accompanying memorandum decision

FILED

SEP 06 2007

NEW YORK

COUNTY CLERK'S OFFICE

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

Dated: AUG 31 2007

J.S.C.

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 19

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WEBRECRUITER LLC and
LAURENCE J. FOOTER,

Plaintiffs,

INDEX NO.
102451/07

- against -

BRIAN J. ZIMMET and ZIMMET BIEBER LLP,

Defendants.

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EDWARD H. LEHNER, J.;

Before the court is a motion by Brian J. Zimmet ("Zimmet") and Zimmet Bieber LLP (the "Law Firm") to dismiss the complaint pursuant to CPLR 3211(a) (1) and (7).

The complaint has two causes of action: i) legal malpractice and ii) negligent misrepresentation. Laurence J. Footer ("Footer") is the majority owner and chief executive officer of Webrecruiter LLC ("Webrecruiter") (complaint ¶ 2, Footer affidavit ¶ 1). The complaint alleges: that Footer was also the majority owner of Com. Sortium LLC ("Com.Sortium") (complaint, ¶ 3); that since 1996, Footer has had a relationship with Zimmet both for personal representation as well as counsel to Com.Sortium and to Webrecruiter (Id. ¶ 12); that in January 2001, Webrecruiter entered into a contract (the "Contract") with WPP Group USA ("WPP") assuming the rights and liabilities of Com.Sortium (Id. ¶¶ 9, 10); that in July 2003 WPP sued

Footer, Webrecruiter and Com.Sortium (the "Supreme Court action"), alleging problems with the software supplied under the Contract (Id. ¶ 13); that all parties agreed to arbitrate their dispute (the "Arbitration") and Footer, Webrecruiter and Com.Sortium interposed counterclaims in the Arbitration (Id. ¶¶ 15, 16); that prior to the Arbitration's scheduled commencement, a mediation (the "Mediation") was held on April 22, 2004 (Id. ¶ 20); that in the Supreme Court action, Zimmet represented Com.Sortium and Footer, and Webrecruiter was represented by Richard A. Roth ("Roth") (Id. ¶ 14); that at the Mediation, Roth left after the lunch break but "the Mediation continued, with Mr. Zimmet as the only attorney present for (Footer, Webrecruiter and Com.Sortium)" (Id. ¶¶ 22, 23); that in negotiations with WPP, Zimmet gave Footer and Webrecruiter legal advice to make a settlement proposal (the "Agreement") (Id. 24, 31); that Zimmet advised them that the Agreement was not binding unless confirmed by a subsequent document (Id. ¶¶ 28-31); the Agreement provided that Webrecruiter would pay $140,000 to WPP within 3 months and that "(t)he parties shall expeditiously (within five business days) set forth the terms of this agreement in a formal and detailed settlement agreement, and execute such agreement" (Exhibit N); that when Webrecruiter could not come up with financing, Zimmet acted as its attorney seeking additional time (Complaint ¶¶ 31-32); that WPP took action to enforce the Agreement leading to an Arbitration award of $193,103.22

that was paid for by Webrecruiter (Id. ¶¶ 36, 37) and that the counterclaims were dismissed (Id. ¶ 37).

Zimmet and the Law Firm contend that they represented only Com.Sortium (Zimmet affirmation dated March 23, 2007, ¶ 5); that Roth represented initially Webrecruiter and later Footer as well (Id.); that during the Mediation after Roth left, Zimmet never indicated he was representing plaintiffs (Id. ¶ 8); that his concern was solely for the minority shareholders of Com.Sortium (Id. 12); that therefore there was no attorney-client relationship; that plaintiffs' damages are speculative; that the negligent misrepresentation cause of action is duplicative of the legal malpractice cause of action; and that Footer's individual claims should be dismissed. Defendants assert that they only represented Com.Sortium at the Mediation.

> "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" [Leon v. Martinez, 84 NY2d 83, 87-88 (1994)]. (Internal citations omitted).

See also, Weil, Gotshal & Manges v. Fashion Boutique of Short Hills, Inc., 10 AD3d 267, 270-271 (1st Dept. 2004).

Here, defendants' evidence does not conclusively establish that Zimmet did not

act as plaintiffs' attorney during the Mediation after Roth left. Moreover, in his affirmation dated November 23, 2004 (¶7), Zimmet avers that: "at the mediation session, we told (WPP's) representatives that Webrecruiter was not presently able to make the payment called for by the Term Sheet, but that the company was in the process of attempting to arrange outside financing that it hoped would make such a payment possible ... (and) I directly advised [WPP's] counsel, both at the mediation and thereafter, that execution of the subsequent agreement contemplated by the Term Sheet was contingent upon the success of such financing efforts ... and that in the event financing was not secured, we would proceed with the arbitration." If this advice was given to WPP's counsel by Zimmet, it is fair to assume that he also discussed this with Footer. Accordingly, dismissal on the ground that defendants did not act as counsel for plaintiffs at the Mediation is denied.

Further, advice allegedly given that the Term Sheet signed by Footer was not binding sets forth a viable basis for a claim of malpractice as it is asserted that if Webrecruiter were not bound thereby and waived its counterclaims, it could have sustained a recovery based on breaches by WPP and would have been able to avoid any liability to it.

Regarding damages, plaintiffs were "only required to plead, with sufficient detail, that but for the attorneys' alleged malpractice, plaintiff would have avoided

some 'actual ascertainable damage'" [Home Insurance Company v. Liebman, Adolf & Charme, 257 AD2d 424 (1st Dept. 1999)]. At this pleading stage, a plaintiff "is not obligated to show ... that she actually sustained damages" as a pleading is sufficient if it contains allegations "from which damages ... might be reasonable inferred" [Tenzer, Greenblatt, Fallon & Kaplan v. Ellenberg, 199 AD2d 45 (1st Dept. 1993)]. See also, Lappin v. Greenberg, 34 AD3d 277 (1st Dept. 2006), where it was said that "[t]his court has consistently applied the Tenzer rule, (and thus to) survive a CPLR 3211 (a)(7) pre-answer dismissal motion, a pleading need only state allegations from which damages attributable to the defendant's conduct may reasonably be inferred." Here, the allegations are sufficient to infer damages from defendants' alleged negligence in advising Footer that he could sign the Term Sheet without its provisions being binding.

Dismissal of Footer's claims is granted since "(f)or a wrong against a corporation, a shareholder has no individual cause of action, though he loses the value of his investment or incurs personal liability in an effort to maintain the solvency of the corporation" [Abrams v. Donati, 66 NY2d 951, 953 (1985)]. While there is an exception to the above rule "when the wrongdoer has breached a duty owed to the shareholder independent of any duty owing to the corporation wronged" [Id. at p. 953], plaintiffs have not alleged the breach of any independent duty. Here

it is alleged that Webrecruiter paid $193,103.22 to WPP (complaint ¶ 36) and that Webrecruiter incurred additional attorneys fees and surrendered its counterclaims (Footer affidavit ¶ 15), and there is nothing to indicate that Footer incurred any damages aside from his investment in Webrecruiter.

The allegations of the second cause of action for negligent misrepresentation "arise from the same facts as (plaintiffs') legal malpractice claim and are duplicative of that cause of action" [Mecca v. Shang, 258 AD2d 569, 570 (2nd Dept. 1999)]. See also, Sonnenschine v. Giacomo, 295 AD2d 287 (1st Dept. 2002). Therefore, this cause of action is dismissed.

In sum, defendants' motion is granted solely to the extent of dismissing Footer's individual claims and the second cause of action, and is otherwise denied. The remaining action is severed and the Clerk is directed to enter judgment accordingly.

This decision constitutes the order of the court.

Dated: August 31, 2007

J.S.C.