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

PRESENT: Hon. MICHAEL D. STALLMAN PART 7
Justice

NEIL P. ZUKERMAN and CREATIVE FISCAL MANAGEMENT INC. d/b/a CFM GALLERY,

Plaintiffs,

- v -

JEFFREY T. STRAUSS, ESQ. and WACHTEL & MASYR, LLP,

Defendants.

INDEX NO. 117761/2006

MOTION DATE 11/8/07

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 11 were read on this motion for summary judgment

	PAPERS NUMBERED
Notice of Motion— Affidavits — Exhibits A-X	1-3
Answering Affidavits — Exhibits A-M	4
Reply Affirm	5
Supplemental Affirm— Exhibits A-B; Opp. Affirm–Exhibits N-V	6-9
Response to Suppl. Papers — Exhibits A-B; Reply Affirm	10-11

Cross-Motion: ☐ Yes X No

Upon the foregoing papers, it is ordered that defendants' motion for summary judgment is decided in accordance with the annexed memorandum decision and order.

FILED

MAR 05 2008

COUNTY CLERK'S OFFICE

MICHAEL D. STALLMAN

Dated: 2/29/08
New York, New York

J.S.C.

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

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NEIL P. ZUKERMAN and CREATIVE FISCAL MANAGEMENT INC. d/b/a CFM GALLERY,

Plaintiffs,

Index No. **117761/2006**

- against -

Decision and Order

JEFFREY T. STRAUSS, ESQ. and WACHTEL & MASYR, LLP,

Defendants.

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HON. MICHAEL D. STALLMAN, J.:

In this action alleging legal malpractice, defendants moved to dismiss the complaint (Motion Seq. No. 001). Upon notice to the parties and an opportunity to submit further papers, the Court converted defendants' motion to dismiss into a motion for summary judgment, by order dated September 17, 2007. Plaintiffs moved, by order to show cause, for leave to amend the complaint to assert allegations of breach of fiduciary duty (Motion Seq. No. 002). This decision addresses both motions.

BACKGROUND

In 2005, 112 Greene Street Cooperative, Inc. commenced a declaratory judgment and ejectment action against its tenant, Jeffrey Lew, and the subtenants, Neil P. Zukerman and Creative Fiscal Management Inc. d/b/a CFM. In 1978, the Tribeca coop had entered into a 60 year lease with Lew for an annual rent of $500, plus additional rent charges for fuel and heating. Lew had subleased the space to Zukerman and CFM for ten years, with an option to renew in 2002, with a minimum annual rent of $144,000 starting in the first and second renewal years. The coop sought to terminate Lew's lease on the ground that Lew's principal residence was outside of a 150 mile radius of New

York City.

Lew hired Wachtel & Masyr, LLP to represent him in the action, and then Zukerman and CFM also hired the same firm to represent them in the action. By a letter agreement of the same date, Zukerman and CFM retained Wachter & Masyr, LLP. Paragraph 5 of that retainer letter states,

> "Conflict Waiver. You understand that we presently represent Jeffrey Lew in the Action. In a separate letter agreement among you, CFM, Mr. Lew and our firm, all parties have confirmed their agreement to waive any conflict that may exist as a consequence of this multiple representation, and you further confirm that, if we discontinue representing you and CFM during the pendency of the Action (for any reason whatsoever), we may thereafter continue to represent Mr. Lew ('the Conflict Waiver Letter')."

Jacobs Affirm., Ex H. By letter agreement dated June 1, 2005, Strauss requested Zukerman and Lew to waive any potential conflicts of interest arising from the joint representation, to which they both agreed. Jacobs Affirm., Ex I. A single attorney, Jeffrey Strauss, Esq., a partner at Wachtel & Masyr, LLP, represented Lew and plaintiffs in the action.

A settlement of the action was allegedly reached during a "mediation hearing" held on February 27, 2006, upon the terms stated in a letter (with handwritten changes) dated March 13, 2006. Pirrotti Affirm., Ex H. Lew would receive $750,000 from the Coop to surrender his lease; CFM would deliver a recognition agreement or attornment agreement recognizing the coop as its landlord.

By letter dated June 1, 2006, Zukerman informed Strauss that he wished to assign the sublease to a third party. Pirrotti Affirm., Ex J. Two weeks later, Strauss forwarded the settlement papers to Zukerman (Id., Ex R), but Zukerman refused to sign the papers. Zukerman insisted that Strauss obtain consent of the landlord for the assignment of the sublease, but Lew would not consent

to the assignment.[1] By letter dated June 26, 2006, Strauss resigned as counsel to Zukerman and CFM, stating, "there now appears to be a conflict between your interests and Mr. Lew's interests . . ." Jacobs Affirm., Ex K. In July 2006, the coop discontinued its action as against Lew by stipulation of discontinuance.

In November 2006, the coop moved, by order to show cause, to voluntarily discontinue the action against Zukerman and CFM. Zukerman and CFM cross-moved to add a counterclaim to set aside the coop and Lew's settlement, and a cross-claim against Lew. Over CFM's objection, the court (Helen Freedman, J.) granted the coop's motion to voluntarily discontinue the ejectment action. Although CFM contended that Strauss had a conflict of interest, the Court stated, "if Zukerman believes that he was wronged by that conflict, his remedy must be addressed in another proceeding." Jacobs Affirm., Ex S. This action alleging legal malpractice followed.

Here, plaintiffs allege that Strauss's joint representation of Lew and plaintiffs in the ejectment action violated DR 5-105, DR 5-108, and DR 7-101 According to plaintiffs, the joint representation created a conflict of interest, and Strauss did not disclose in the retainer agreement the advantages and risks associated with the simultaneous representation. Plaintiffs also maintain that Strauss did not inform them of the settlement discussions, and that Strauss purportedly acted only on Lew's behalf in the negotiations. Plaintiffs also argue that Strauss breached his duty of loyalty and duty to

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[1]Paragraph Eighth of the sublease prohibits assignment without the express written consent of the landlord. Jacobs Affirm., Ex B. "Landlord" in the sublease refers to the sublessor Lew, who signed as landlord. Technically, Lew's consent would be required for assignment prior to the surrender of Lew's lease to the coop.

However, because plaintiffs contemplated that the settlement would include the coop's consent to assign their sublease simultaneously with attornment of their sublease to the coop, Lew's consent would have become irrelevant. Whether or not the coop was willing to consent to any assignment is a separate issue from any conflict between plaintiffs and Lew that apparently arose.

act zealously on plaintiffs' behalf, in that Strauss did not obtain the coop's consent to assign CFM's lease. Plaintiffs maintain that, without a consent to assign its sublease, it lost the opportunity to sell CFM's gallery to a third party.

I

Defendants' Motion for Summary Judgment

The standards for summary judgment are well settled.

> "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action."

Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986)(internal citations omitted).

A letter agreement dated June 7, 2005 indicates that defendants explained to plaintiffs potential conflicts of interest arising from the joint representation of Lew and plaintiffs, and that their interests differ. See Jacobs Affirm., Ex I. By a retainer letter dated June 7, 2005, plaintiffs agreed to waive any conflict that may exist by virtue of the joint representation. See id, Ex H. Defendants have established a prima facie case that Strauss did not violate DR 5-105 (c), because he fully disclosed the potential conflicts and obtained the parties' consent to proceed in the joint representation. Hall Dickler Kent Goldstein & Wood, LLP v McCormick, 36 AD3d 757, 758 (2d Dept 2007).

By letter dated June 26, 2006, Strauss resigned as counsel for plaintiffs due to an actual conflict of interest between plaintiffs' interests and Lew's interests. Jacobs Affirm., Ex K.

According to Strauss, plaintiffs' insistence on obtaining the right to assign the sublease created the conflicts that prompted Strauss to resign. See id., Ex K [Strauss Aff.], at 3-4. Lew allegedly declined to give his consent to an assignment, because the coop wanted an estoppel letter from CFM representing that the sublease had not been modified or altered. See Jacobs Affirm., Ex W; see also footnote 1, supra. Strauss's decision to resign as counsel complied with DR 5-105 (b).

In any event, "[a] conflict of interest, even if a violation of the Code of Professional Responsibility, does not by itself support a legal malpractice cause of action." Schafrann v N.Y. Famka, Inc., 14 AD3d 363, 364 (1st Dept 2005). Thus, defendants have met their prima facie burden for summary judgment dismissing the complaint.

Plaintiffs fail to raise a triable issue of fact as to whether defendants fully disclosed the potential conflicts of interest, and the implications, risks, and advantages arising from the dual representation. The attorney affirmations of Pirrotti and Lewis, who have no personal knowledge of the facts, are without evidentiary value. Insofar as Zukerman claims that Strauss did not adequately explain the retainer or conflicts letter, the conflicts letter states, in plain English, "By your signature below, you confirm that you have agreed to this joint representation and that you waive any conflict that may exist as a consequence of this joint representation." Jacobs Affirm., Ex I. Given the clarity of the letters at issue, plaintiffs are responsible for their signature and are bound to read and know what they signed. Bishop v Maurer, 33 AD3d 497, 499 (1st Dept 2006), affd 9 NY3d 910 (2007). Plaintiffs' papers are devoid of any nonconclusory allegation of what aspect of the letters was not explained. Bishop, 9 NY3d at 911.

Swift v Ki Young Choe (24 AD2d 188 [1st Dept 1998]), upon which plaintiffs rely, is inapposite. That case involved negligent legal advice. Plaintiffs are not claiming that defendants

rendered negligent legal advice; the alleged failure to advise relates entirely to the alleged inadequacy of defendants' disclosure of the potential conflicts and implications arising from defendants' dual representation of Lew and plaintiffs. As discussed above, "even if a violation of the Code of Professional Responsibility had occurred, that, in itself, would not create a private right of action." Arkin Kaplan LLP v Jones, 42 AD3d 362, 366 (1st Dept 2007). Plaintiffs concede that Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker (16 Misc 3d 1051 [Sup Ct, NY County 2007]) is inapposite. Pirrotti Opp. Affirm. ¶ 13.

Plaintiffs essentially argue that, because they did not get any part of the $750,000 that Lew received to surrender what appears to have been a sweetheart lease, Strauss necessarily acted entirely on Lew's behalf in the settlement negotiations, instead of advocating for Zukerman and CFM. Pirrotti Opp. Affirm. ¶ 41. Although plaintiffs believe that they should have received some money as part of the settlement, plaintiffs themselves apparently had nothing to bargain with for such money. Plaintiffs were already obligated to pay for use of the space under the sublease, and the proposed settlement indicates that the coop was not seeking to eject plaintiffs once Lew surrendered his "sweetheart lease." Thus, plaintiffs, in effect, are arguing that another attorney would have convinced the coop to pay plaintiffs to remain in their space as part of the settlement. However, it is sheer speculation that another lawyer would have been able to obtain more than Zukerman and CFM's continued possession in the space (as Strauss had accomplished).

> "The fact that the plaintiff[s] subsequently w[ere]s unhappy with the settlement obtained by the defendant[s] does not rise to the level of legal malpractice. While the plaintiff[s] pose an alternative strategy which might have been pursued by the defendant[s], the "selection of one among several reasonable courses of action does not constitute malpractice."

Holschauer v Fisher, 5 AD3d 553, 554 (2d Dept 2004).

Plaintiffs argue that, "it would have been a simple thing for Defendants, who were busy negotiating a very nice deal for Lew, to negotiate a much simpler benefit for Defendant's other clients, Zukerman and CFM, namely the right to assign Plaintiff's sublease . . . ." Opp. Mem. at 8-9. However, plaintiffs overlook the fact that Strauss had memorialized the terms of Lew's settlement in March 2006, whereas Zukerman and CFM did not express a desire to assign the sublease until June 2006. Thus, plaintiffs would have urged Strauss, as part of a his fiduciary duty, to cause Lew to renege on the settlement terms as leverage to negotiate a right of assignment of the sublease on plaintiffs' behalf. The very act which plaintiffs argue Strauss should have taken would not only have created a conflict of interest, but also would have constituted a breach of Strauss's fiduciary duty to Lew.

Plaintiffs also maintain that Strauss did not to keep them advised of developments in the action in a timely manner. Zukerman claims that he was not aware of the mediation conference on February 27, 2006, neither was he specifically advised that the action against him and CFM was settled. Zukerman Aff. ¶¶ 17, 37. However, Zukerman admits that, in March 3, 2006, Strauss informed him that the action had been settled, and that he received the settlement papers from Strauss in June 2006 to sign. Assuming, for the sake of argument, that Strauss did not keep him apprised of the case in a timely manner, plaintiffs do not show any resulting injury. It is undisputed that Zukerman rejected the terms of the settlement agreement, prompting Strauss to resign as plaintiffs' counsel, and the parties did not attempt to enforce any settlement reached at the mediation conference upon Zukerman and CFM.

Plaintiffs argue that Strauss should have immediately moved for leave to withdraw as counsel of record for Zukerman and CFM, upon recognizing that he should not continue representing

plaintiffs, rather than having waited for plaintiffs to execute a substitution of counsel two months later in August 2006. The record contradicts plaintiffs' contention that Strauss "left [Zukerman] with no one to protect [his] interests." Zukerman Aff. ¶ 31. Plaintiffs themselves assert that, on June 15, 2006, prior to Strauss's resignation, plaintiffs consulted another attorney, Anthony Pirrotti (who represents plaintiffs here), about the settlement, and that Pirrotti advised Zukerman that Strauss had a conflict of interest. Zukerman Aff. ¶ 26. Plaintiffs have not shown any injury proximately caused by Strauss not having immediately moved to be relieved as counsel of record. The coop and Lew executed a stipulation of discontinuance of the action as against Lew before the substitution of counsel was executed, but this would likely have occurred even if Strauss had been relieved immediately as counsel of record for plaintiffs.

Finally, plaintiffs do not raise any triable issue of fact that defendants' conduct was a proximate cause of the alleged lost opportunity to sell CFM's gallery to a third party. By letter dated November 2, 2006 from Pirrotti to the coop's attorney, he states,

> "I wish to further confirm my telephone call to you yesterday wherein I told you that I am informed that the reason why your client [the coop] has withdrawn their consent to permitting my client to assign and/or sublet his lease is because of my 'aggressive posture' in trying to confirm their agreement. Ms. Baisley also confirmed that your client's umbrage at my 'aggressive stance' and that is the reason why they will not agree to an assignment."

Jacobs Affirm., Ex P. In response, plaintiffs argue that the coop cited Pirrotti's aggressive behavior as a convenient excuse, in that the coop never wanted to consent to plaintiffs' assignment of the sublease. If that were true, then defendants' conduct played no factor whatsoever in the coop's decision not to give consent to the assignment of plaintiffs' sublease.

Defendants' motion for summary judgment is granted. The Court need not reach defendants'

remaining argument that the scope of the representation did not include a duty to negotiate a consent to assign the sublease on plaintiffs' behalf.

II

Plaintiffs' Motion for Leave to Amend

"Leave to amend a pleading should be freely given as a matter of discretion in the absence of prejudice or surprise, although to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated." Zaid Theatre Corp. v Sona Realty Co., 18 AD3d 352, 355 (1st Dept 2005) (internal citations and quotation marks omitted).

Plaintiffs seek to add breach of fiduciary duty as an additional theory of liability, and to assert that defendants did not adequately warn plaintiffs of the consequences of joint representation.

It is clear that plaintiffs are adding this theory to address the very clear lack of injury flowing from defendants' alleged acts or omissions which plaintiffs contend constitute malpractice. In opposition to defendants' motion, plaintiffs asset that a breach of fiduciary duty does not require evidence of damages. Pirrotti Opp. Affirm. ¶ 34. Plaintiffs' theory of breach of fiduciary duty is based on the same transactions and occurrences as plaintiffs' theory of legal malpractice, and it fares no better.

As discussed above, the fact that Strauss obtained $750,000 for Lew but no money for plaintiffs does not constitute a breach of fiduciary duty. Strauss secured plaintiffs' continued possession of the sublease space, and it is sheer speculation that the coop would have paid plaintiffs any money at all as part of a settlement of the action. Moreover, plaintiffs have not alleged any injury resulting defendants' alleged breach of fiduciary duty.

Defendants' alleged failure to disclose fully to plaintiffs the implications, advantages, and

risks of joint representation do not give rise to a private right of action. Arkin Kaplan LLP v Jones, 42 AD3d 362, 366, supra.

Therefore, plaintiffs' motion for leave to amend the complaint is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment (Motion Seq. No. 001) is granted, the complaint is dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiffs' motion for leave to amend the complaint (Motion Seq. No. 002) is denied.

Dated: February 29, 2008
New York, New York

ENTER:

FILED
MAR 05 2008
COUNTY CLERK'S OFFICE
NEW YORK

J.S.C.

MICHAEL D. STALLMAN