

**Pali Capital, Inc. v Reitler, Brown & Rosenblatt,
L.L.C.**

2008 NY Slip Op 30975(U)

April 3, 2008

Supreme Court, New York County

Docket Number: 0105472/2007

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 36

Index Number : 105472/2007

PALI CAPITAL, INC.,

VS.

REITLER BROWN & ROSENBLATT, LLC

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 105472-07

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

re read on this motion to/for dismiss

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1, 2

Answering Affidavits — Exhibits

3

Replying Affidavits none

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *to dismiss is denied in accordance with the attached memorandum decision.*

By separate order, re: [unclear]

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

FILED

APR 07 2008

COUNTY CLERK
NEW YORK
HON. DORIS LING-COHAN

Dated: 4/3/08

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
PALI CAPITAL, INC., a Delaware corporation on its own
behalf and as express agent for selected Investors/Lenders,

Plaintiff,

-against-

Index No. 105472/07

REITLER, BROWN & ROSENBLATT, L.L.C.,
a New York Limited Liability Company; Gary
Schonwald; and Leo Silverstein,

Defendants.

Motion Seq: 001

FILED

APR 07 2008

COUNTY CLERK'S OFFICE
NEW YORK

DORIS LING-COHAN, J.:

The defendants Reitler, Brown & Rosenblatt, LLC (Reitler Brown), Gary Schonwald and Leo Siverstein (collectively defendants) move, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing the complaint.

The plaintiff Pali Capital, Inc. (Pali) made a private offering of promissory notes, the proceeds to be used to purchase and place automatic teller machines (ATMs). The defendants are lawyers allegedly retained by Pali, to represent both Pali, and the investors/lenders in the transaction. The investors were loaning money to a special purpose LLC - Geronimo - which was to buy ATMs and repay the notes from the revenue generated by the ATMs (the Geronimo transaction).

This is an action to recover damages for legal malpractice. The complaint alleges that the defendants failed to ensure: (1) that the investments were actually used to acquire ATMs and contracts; (2) that the investor/lenders' security interests were properly perfected by filing accurate UCC-1 statements; (3) that the collateral listed on the UCC-1 filing statements did in

fact exist; (4) that Pali and the investor/lenders had copies of all contracts; (5) that unique identification numbers would be placed on the ATMs; and (6) that secured segregated bank accounts were established to receive the revenues from the ATM transactions. When the notes went into default, Pali, as agent for the investors, was unable to foreclose on the collateral, which is missing.

In support of their motion to dismiss, the defendants argue that, pursuant to their written retainer agreement, they did not represent the investor/lenders, that the plaintiffs did not sustain any damages attributable to the defendants, that the defendants were not the proximate cause of the plaintiffs' alleged damages, and that the instant action is premature and not ripe for adjudication.

In opposition, the plaintiffs argue that the written retainer represents a prior transaction, with a different law firm from Reitler Brown. The plaintiffs also argue that the words and actions of the parties establish an attorney-client relationship and that the scope of the retainer does not preclude this action.

On a motion to dismiss a complaint for legal insufficiency, the court accepts the facts alleged as true and determines simply whether the facts alleged fit within any cognizable legal theory (see Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300 [2001]; Morone v Morone, 50 NY2d 481 [1980]). The pleading is to be liberally construed, accepting all the facts alleged therein to be true and according the allegations the benefit of every possible favorable inference (see Leon v Martinez, 84 NY2d 83 [1994]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (see EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11 [2005]). Any deficiencies in the complaint may be amplified by supplemental pleadings and other evidence (see AG Capital Funding Partners, L.P. v State St. Bank and Trust Co., 5 NY3d 582

* 4]
[2005]; Rovello v Orofino Realty Co., 40 NY2d 633 [1976]). Where evidentiary material is adduced in support of the motion, the court must determine whether the proponent has a cause of action, not whether the proponent has stated one (Guggenheimer v Ginzburg, 43 NY2d 268 [1977]). On a motion to dismiss pursuant to 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 (see Goshen v Mutual Life Ins.Co. of N.Y., 98 NY2d 314 [2002]).

An action for legal malpractice requires proof of three elements: (1) that the attorney failed to exercise that degree of care, skill and diligence commonly possessed by a member of the legal profession; (2) that the negligence was a proximate cause of the loss sustained; and (3) actual damages (see Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood, 170 AD2d 108 [1st Dept 1991], affd 80 NY2d 377 [1992], rearg denied 81 NY2d 955 [1993]). The duty of the attorney depends on the nature and scope of the retainer, which is generally a question for the jury (Marshel v. Hochberg, 37 AD3d 559 [2d Dept 2007]). Whether or not the attorney's conduct meets the standard is also generally a question of fact for the jury (see Werle v Rumsey, 278 NY 186 [1938]).

Viewing the allegations in the complaint in the light most favorable to the plaintiffs, the complaint states a cognizable cause of action against the defendants for legal malpractice. The allegations adequately state a cause of action for legal malpractice resulting from the failure of the defendants to exercise reasonable skill and diligence commonly possessed by members of the legal profession.

In this case, the defendants adduce a written retainer between Pali and a different law firm, on a different underlying financial transaction. The documentary evidence, however, fails to disprove the plaintiff's allegation that there was an attorney-client relationship between the defendants and the investors on the Geronimo transaction. To determine whether or not an

attorney-client relationship exists, a court must consider the parties' actions; the existence of the relationship is not dependent upon an explicit agreement (see Pellegrino v Oppenheimer & Co. Inc., __ AD3d __, 851 NYS2d 19 [1st Dept 2008]; Wei Cheng Chang v Pi, 288 AD2d 378 [2001];, lv denied 99 NY2d 501 [2002]; Jane St. Co. v Rosenberg & Estis, 192 AD2d 451 [1993], lv denied 82 NY2d 654 [1993]).

Moreover, contrary to the defendants' assertion, a legal malpractice plaintiff need not, in order to assert a viable cause of action, specifically plead that the alleged malpractice falls within the agreed scope of the defendant's representation. Rather, a legal malpractice defendant seeking dismissal pursuant to CPLR 3211 (a) (1) must tender documentary evidence conclusively establishing that the scope of its representation did not include matters relating to the alleged malpractice (Shaya B. Pac. LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, 38 AD3d 34 [2d Dept 2006]); this the defendants fail to do.

Finally, the plaintiffs clearly allege that they have been unsuccessful in locating the collateral. Therefore, damages are clearly alleged without either speculation or prematurity.

Accordingly, it is

ORDERED that the motion to dismiss is denied, and it is further

ORDERED that the defendants are directed to serve and file their answer to the complaint within 20 days of service of a copy of this order with notice of entry; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve copy upon defendants with notice of entry.

Dated: 4/2/08



Hon. Doris Ling-Cohan, J.S.C.

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