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

PRESENT: _____ Justice

PART 56

Index Number : 604357/2006

SF HOLDINGS GROUP, INC.

VS.

KRAMER LEVIN NAFTALIS

SEQUENCE NUMBER : # 002

DISMISS

INDEX NO. 604357-06

MOTION DATE 3/4/08

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

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

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

Dated: 6/13/08

_____ 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 56

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SF HOLDINGS GROUP, INC., DENNIS MEHIEL, as Stockholders' Representative of SF HOLDINGS GROUP, INC. and DENNIS MEHIEL,

Plaintiffs,

Index No: 604357/06

-against-

DECISION AND ORDER

KRAMER LEVIN NAFTALIS & FRANKEL LLP,

Defendant.

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RICHARD B. LOWE III, J:

This dispute arises out of professional legal services performed by Defendant Kramer Levin Naftalis & Frankel LLP ("Kramer Levin") for Plaintiffs SF Holdings Group, Inc. ("SFII"), Dennis Mehiel, as Stockholders' Representative of SF Holdings Group, Inc. ("Mehiel") and Dennis Mehiel (collectively "Plaintiffs") in connection with the acquisition by Solo Cup Company ("Solo") of Sweetheart Holdings, Inc. and its subsidiaries ("Sweetheart") from SFH (the "Merger") through an Agreement and Plan of Merger (the "Merger Agreement").

BACKGROUND

Unless otherwise noted, the facts below are taken from the allegations contained in the Amended Complaint and, for the purposes of this motion to dismiss, will be deemed true.

In 2003, Solo and SFH entered into negotiations for the Merger. Kramer Levin represented SFH in connection with those negotiations and the drafting of the Merger Agreement.

Prior to the Merger Agreement, SFH had historically rented one of its plant facilities,

called St. Thomas, to a third-party. The lease was to expire December 31, 2003, which was before the time SFH had arranged to sell the facility. Plaintiffs allege that Kramer Levin was aware of SFH's intention to sell the St. Thomas facility and close the transaction prior to the Merger closing.

SFH expected Kramer Levin to draft the Merger Agreement to reflect SFH's perception of the transaction in such a manner that the value of the St. Thomas facility, $5.6 million, would remain in working capital upon closing. SFH negotiated the right to sell St. Thomas between the date of the Merger Agreement and the closing. Kramer Levin drafted Section 6.1(d) of the Merger Agreement which prohibits the sale of SFH's assets, except "with respect to the sale of the assets set forth on Section 6.1(d) of the Company Disclosure Schedule . . . ." The Company Disclosure Statement, prepared by Kramer Levin, is titled "Sale of Assets" and includes the St. Thomas facility.

Kramer Levin also drafted the Merger Agreement to provide that "'Working Capital' shall mean current assets determined in accordance with GAAP consistently applied (including cash and assets held for sale) . . . ." However, Plaintiffs allege that Kramer Levin did not draft the Merger Agreement to provide that the St. Thomas facility was in fact an asset held for sale for the purpose of inclusion in SFH's working capital.

Plaintiffs allege damage as a result of not being paid $5.6 million by Solo for the St. Thomas facility because the St. Thomas facility was not classified as an asset held for sale. To explain, the Merger Agreement provided that Solo would pay dollar for dollar for SFH's working capital at closing. However, the Merger Agreement did not definitively ensure that the value of the St. Thomas facility would be classified as an asset held of sale to be included in SFH's

working capital. Solo took the position that the St. Thomas facility was not working capital.

Separately, Kramer Levin also drafted an Escrow Agreement as part of the Merger Agreement. The Escrow Agreement provided for a $15 million deferred payment retention to which the parties would have access for claims of indemnification and working capital adjustments under the Merger Agreement. The Escrow Agreement also provided that Solo would be given a credit for the interest earnings on the escrow property. Plaintiffs allege that Kramer Levin did not draft the Escrow Agreement to provide that interest on the escrow property received by Solo would be credited against interest awarded on claims for indemnification and working capital adjustments from the deferred payment retention. As a result, Plaintiffs allege that Solo received interest twice from the deferred payment retention.

After the Merger closing, Solo and SFH could not reach an agreement as to the working capital calculations. This resulted in an arbitration before a neutral auditor from an accounting firm (the "Working Capital Arbitration") and then a lawsuit in the Superior Court of the State of Delaware (the "Delaware Lawsuit") (Greenberg Aff Ex E at 14). In both the Working Capital Arbitration and the Delaware Lawsuit, SFH asserted claims related to the St. Thomas facility which were rejected in each forum. Ultimately, SFH did not receive $5.6 million for the St. Thomas facility.

Accordingly, Plaintiffs argue that Kramer Levin violated the duty of care owed to SFH by failing to follow the instructions of its client in negotiating and drafting the Merger Agreement. Plaintiffs commenced this action asserting one cause of action. Defendant now moves to dismiss pursuant to CPLR 3211 [a][1] and [a][7].

DISCUSSION

On a motion to dismiss made pursuant to CPLR 3211, the court should accept as true the facts as alleged in the complaint, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1999]; *Kliebert v McKoan*, 228 AD2d 232, 232 [1996]), and the criteria becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). "To succeed on a motion to dismiss pursuant to CPLR 3211[a][1], the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Teitler v Max J. Pollack & Sons*, 288 AD2d 302, 302 [1st Dept 2001]).

"In order to sustain a claim for legal malpractice, a plaintiff must establish both that the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession which results in actual damages to a plaintiff, and that the plaintiff would have succeeded on the merits of the underlying action 'but for' the attorney's negligence" (*AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]).

Kramer Levin argues that SFH is collaterally estopped from asserting that they were not paid for the St. Thomas facility. Kramer Levin claims that, in the Working Capital Arbitration, the Delaware Lawsuit, the Original Complaint, and the Amended Complaint, SFH sought to recover $5.6 million for the St. Thomas facility on the basis that SFH was not paid for the facility

as a result of the working capital adjustment.

SFII responds that the allegations or issue which Kramer Levin contends SFH is collaterally estopped from litigating does not appear in the Amended Complaint, and that the issues were not litigated in any prior proceeding.

The doctrine of collateral estoppel bars a party from relitigating in a subsequent proceeding an issue clearly raised in a prior proceeding and decided against that party where the party to be precluded had a full and fair opportunity to contest the prior determination (*Weiss v Manfredi*, 83 NY2d 974 [1994]; *see D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]; *Ryan v New York Tel. Co.*, 62 NY2d 494, 500-501 [1984]). "What is controlling is the identity of the issue which has necessarily been decided in the prior action or proceeding" (R*yan*, 62 NY2d at 500).

In *Weiss*, an issue was the application of collateral estoppel in an action for malpractice in connection with a prior action to vacate a settlement. The court explained that "[i]n the prior action to vacate the settlement, the sole issue necessarily decided was that--as between plaintiff and the settling defendants (the premises owner and decedent's employer)--there was no fraud, collusion, mistake or accident to vitiate the settlement" (83 NY2d at 976-77, citing *Hallock v State of New York*, 64 NY2d 224, 230 [1984]).

> At issue in the current action for legal malpractice, by contrast, is whether defendant attorneys were negligent in their representation of plaintiff. Because there is no identity of issue, plaintiff is not collaterally estopped in this action. Moreover, as neither the adequacy of the settlement nor plaintiff's role in prosecuting the action was in issue in the first action, the findings that the previous court was "satisfied with the amount of the settlement" and that "[p]laintiff, herself, created the situation which caused the misunderstanding in relation to her ability to settle the action for her children" are not entitled to preclusive effect.

(*Id.*)

Kramer Levin argues that SFH is seeking to recover $5.6 million on the same alleged fact that SFH was not paid for the St. Thomas facility because the facility was not included as working capital. However, Kramer Levin argues, a neutral arbitrator ruled that SFH was paid for the St. Thomas facility, even if it was not included as working capital. Therefore, according to Kramer Levin, SFH should be precluded from asserting that it was not paid for the St. Thomas facility.

Here, the alleged fact is that SFH did not receive the $5.6 million because Kramer Levin failed to draft the Merger Agreement such that the St. Thomas facility would be included as working capital. The Appellate Division has previously held that

> there is a significant distinction between the major issue presented in this action and that presented by the principal one, for even if plaintiff, pursuant to the terms of the agreement, consented to the work which was performed, he is not estopped from pursuing his claim against defendants for failing to draft an agreement which adequately protected his right to refuse such consent"

(*Schulkin v Stern*, 145 AD2d 326, 328 [1st Dept 1988]). Accordingly, this Court finds that collateral estoppel does not bar SFH from bringing a claim for legal malpractice.

Next, Kramer Levin argues that Plaintiffs were aware of the working capital provisions. SFH responds that Kramer Levin fails to conclusively establish awareness for the purposes of a motion to dismiss under CPLR 3211 [a][1].

The cases cited by Kramer Levin support the broad proposition that a claim for legal malpractice fails where the defendant attorney's alleged failure to make the plaintiff aware was negated by plaintiff's awareness (*Beattie v Brown & Wood*, 243 AD2d 395, 395 [1st Dept 1997] ["allegation that he was not advised by defendant law firm that a settlement agreement . . .

withdrew his counterclaims in that action with prejudice[] is flatly contradicted by the agreement itself because he is responsible for his signature and is bound to read and know what he signed"]; *O'Brien v Spuck*, 99 AD2d 910, 911 [3d Dept 1984] [allegation that the attorney improperly advised the plaintiff negated by the disclosure statement signed by the plaintiff]; *A&R Kalimian, LLC v Breger, Gorin & Leuzzi, LLP*, 307 AD2d 813, 813 [1st Dept 2003] [alleged failure to perform due diligence by not informing plaintiff about a pre-existing, long-term commercial lease in the building is immaterial because plaintiff knew about the lease prior to signing the contract]; *Stolmeier v Fields*, 280 AD2d 342, 343 [1st Dept 2001] [allegations of injury as a result of defendants' failure to advise of the need for a contractor's license contradicted by evidence, including the plaintiff's own deposition testimony that he was aware, that a license was required]; *Goldman v Akin, Gump, Strauss, Hauer & Feld, LLP*, 2006 NY Slip Op 50604U, *4 [Sup Ct, New York County 2006] [allegation that the defendants deceitfully and negligently advised the plaintiffs that they had a defense based on the wrong advice of counsel contracted where the plaintiffs were already aware of their potential liability]). However, the cases do not support Kramer Levin's suggestion that anytime a plaintiff signs document, legal malpractice for its negligent drafting cannot be sustained as a matter of law.

Kramer Levin argues that SFH should be charged with the knowledge of what the Merger Agreement contains. For the purposes of Kramer Levin's motion to dismiss, Kramer Levin must "conclusively establish" that the Merger Agreement discloses that the St. Thomas facility was not included under the definition of working capital (*see Held v Kaufman*, 91 NY2d 425, 431 [1998]). Here, SFH alleges that it expected Kramer Levin to draft the Merger Agreement to reflect SFH's perception of the transaction in such a manner that the value of the St. Thomas

facility, $5.6 million, would remain in working capital upon closing (Greenberg Affirmation Ex A ¶ 9). Kramer Levin drafted the Merger Agreement to provide that "'Working Capital' shall mean current assets determined in accordance with GAAP consistently applied (including cash and assets held for sale) . . . (Greenberg Affirmation Ex A ¶ 11)." However, SFH also alleges that Kramer Levin did not draft the Merger Agreement to provide that the St. Thomas facility was in fact an asset held for sale for the purpose of inclusion in SFH's working capital. Indeed, Kramer Levin argues that "[t]he only sensible parsing of this phrase is that an 'asset held for sale' must be a 'current asset determined in accordance with GAAP consistently applied' in order to be included as working capital" (Reply Mem at 6). Thus, Kramer Levin fails to demonstrate that the Merger Agreement conclusively establishes that the St. Thomas facility would not be included under the definition of "Working Capital."

Next, Kramer Levin argues that Plaintiffs cannot show that Solo would have agreed to treat the St. Thomas facility as working capital. SFH responds that for the purposes of opposing a motion to dismiss under CPLR 3211, SFH need not allege that Solo would have agreed to treat the St. Thomas facility as working capital.

"In order to establish the elements of proximate cause and actual damages in a malpractice case, the plaintiff must show that but for the attorney's negligence, what would have been a favorable outcome was an unfavorable outcome." (*Zarin v Reid & Priest*, 184 AD2d 385, 386 [1st Dept 1992]; *Katash v Kranis*, 229 AD2d 305, 305 [1st Dept 1996].)

Kramer Levin principally relies upon *Ainsworth, Sullivan, Tracy & Knauf v Mallia*, 127 AD2d 878, 879 [3d Dept 1987], in which the court affirmed the lower court's order granting plaintiff's motion for summary judgment dismissing defendant's counterclaim for legal

malpractice. On its counterclaim for legal malpractice, the client asserted that the attorney failed to draft a separation agreement that would obtain favorable financial assistance from the client's husband (*id.*). The attorney drafted an agreement which the client's husband refused to sign (*id.*). Thereafter, the client terminated the attorney (*id.*). The court held that the client "failed to show any malpractice whatsoever or how [the attorney] caused her any financial loss or detriment" (*id.*). Thus, a showing that the drafted agreement would have been agreed to was not required (*see id.*). Quite the contrary, it was the fact that the drafted agreement would not have been agreed to that established the absence of harm and, in turn, the absence of malpractice (*see id.*).

In *Arias v Kelner*, 243 AD2d 393, 393 [1st Dept 1997], also relied upon by Kramer Levin, the court held that the plaintiff failed to establish proximate cause sufficient to oppose the defendant's motion for summary judgment. The court stated:

> "To the extent plaintiff asserts that there was an oral promise of an extension after the deadline, which defendants negligently failed to reduce to writing, opposing counsel in the underlying action was without authority, under the terms of the settlement agreement, to make such an offer, especially without full compliance by plaintiff with the conditions precedent, which performance never occurred."

(*Id.*) Thus, the court reasoned that the failure did not lie with the attorney, but rather with the client since the client failed to satisfy the conditions precedent to allow the attorney to do what the client claims the attorney purportedly failed to do (*id.*). As in *Ainsworth*, the absence of proximate cause was established because the drafted agreement could not have been agreed upon.

Moreover, to the extent that the cited cases are in different procedural postures than the case here, the cited cases are inapplicable: *Ainsworth* and *Arias* were decided on summary judgment motions and this Court is deciding a motion to dismiss. On its motion to dismiss, Kramer Levin's attempt to shift the burden to SFH is unavailing. At this stage, SFH is not

required to raise a triable issue of fact regarding whether Kramer Levin's conduct proximately caused SFH's injury (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). To that end, this Court cannot conclude that "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion" Solo would have agreed to the terms that Kramer Levin purportedly failed to draft (*Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 552 [1998], citing *Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]; *see id.*).

Furthermore, Kramer Levin argues that SFH's own allegations of an intervening event also establishes the absence of causation. Specifically, Kramer Levin argues that SFH, in a previous action, alleged that Solo, not Kramer Levin, caused the asserted harm and, therefore, in this action, SFH should be estopped from alleging that Kramer Levin caused the asserted harm. SFH responds that on a motion to dismiss in which the movant asserts that estoppel bars the opponent from proving causation, the movant carries the burden of conclusively establishing estoppel, which Kramer Levin fails to do here.

Kramer Levin relies on *Brooks v Lewin*, which stated that "[w]here the record in a professional malpractice case demonstrates that an intervening cause was responsible for the injury, summary judgment will be granted to the defendant" (21 AD3d 731, 734 [1st Dept 2005], citing *D.D. Hamilton Textiles v Estate of Mate*, 269 AD2d 214, 215 [2000]). The court held that in opposing the defendant's motion for summary judgment, the plaintiff failed to establish a basis for the court to determine that the plaintiff's harm would not have resulted "but for defendants' failure" (*id.*). In addition to the procedural distinction between *Brooks* and this action, nothing in this record demonstrates that an intervening event caused the harm asserted by SFH (*see id.*). Moreover, despite asserting different allegations in a prior action, SFH did not obtain a judgment

in its favor, therefore, estoppel is inapplicable (*see Baje Realty Corp. v Cutler*, 32 AD3d 307, 310 [1st Dept 2006] ["The doctrine of judicial estoppel or the doctrine of inconsistent positions 'precludes a party who assumed a certain position in a prior legal proceeding *and who secured a judgment in his or her favor* from assuming a contrary position in another action simply because his or her interests have changed.'"] [citations omitted]). Accordingly, this Court cannot conclude that "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion" that Kramer Levin's conduct constituted causation (*see Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 552 [1998]).

Accordingly, Kramer Levin's motion to dismiss in connection with the Merger Agreement is denied.

Lastly, Kramer Levin argues that documentary evidence establishes a defense in connection with the Escrow Agreement. SFH alleges that "the Agreement negligently failed to provide that should Solo be awarded any of the deferred payment retention, the interest Solo had already received pursuant to Section 3(g) would be credited against interest awarded on claims for indemnification and working capital adjustments under the Merger Agreement" (Greenberg Affirmation Ex A at ¶ 17). In SFH's own words, they argue

> Solo was given 40% of the interest on th deferred payment retention of $15 million. Plaintiffs allege that Solo was then awarded interest on the working capital award and another award in a different arbitration, both taken from the deferred payment retention, so that Solo was paid twice. Kramer [Levin] did nothing to account for this interest in the Escrow Agreement, which should have provided that if Solo were awarded interest and was permitted to withdraw from the deferred payment retention - which occurred - the new interest would be credited against the interest it had already received under the Escrow Agreement.

(Mem in Opp at 23-24.) Unlike SFH's argument with respect to the working capital provision in

the Merger Agreement, the argument with respect to the escrow distribution provision in the Escrow Agreement does not refer to any allegations that SFH expected Kramer Levin to draft the Escrow Agreement in the manner different from what was drafted. In that regard, SFH offers no allegations, even if accepted as true, that would permit an inference that Kramer Levin should have drafted the Escrow Agreement in a different manner. SFH is bound to read and know what it signed (*Beattie*, 243 AD2d at 395). This Court need not accord favorable inferences to SFH where the assertions are plainly contradicted by documentary evidence (*see Robinson v Robinson*, 303 AD2d 234, 235 [2003]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1999], *affd* 94 NY2d 659 [2000]).

CONCLUSION

ORDERED that defendant's motion to dismiss is denied insofar as it seeks to dismiss that portion of plaintiffs' first cause of action based on the Merger Agreement; and it is further

ORDERED that defendant's motion to dismiss is granted insofar as it seeks to dismiss that portion plaintiffs' first cause of action based on the Escrow Agreement; and it is further

ORDERED that plaintiffs are directed to file an answer 20 days from the notice of entry of this Order; and it is further

ORDERED that the Clerk is directed to enter judgment.

Dated: June 13, 2008

ENTER:

J.S.C.