[* 1]

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Justice

Index Number : 104945/2008

ESCAPE AIRPORTS [USA] INC

INDEX NO. _____

VS

KENT BEATTY & GORDON LLP

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

DISMISS COMPLAINT

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 ...	1, 2
Answering Affidavits — Exhibits	3, 4
Replying Affidavits	5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision.

FILED

APR 23 2009

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 4/20/09

JUSTICE SHIRLEY WERNER KORNREICH

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 54

----------X

ESCAPE AIRPORTS (USA), INC.,

Plaintiff,

-against-

KENT, BEATTY & GORDON, LLP,

Defendant.

----------X

Index No. 104945/08
DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.

In this legal malpractice action, defendant Kent, Beatty & Gordon, LLP (KBG) moves to dismiss the action based on documentary evidence and for failure to state a cause of action. CPLR 3211(a)(1) & (7).

I. Facts

A. Complaint

The complaint alleges the following. Plaintiff Escape Airports (USA), Inc. (Escape USA), a New York corporation that provides lounge services for passengers of various airlines at JFK International Airport, retained KBG in early January 2007. KBG was to provide legal services for, among other things, negotiation with JFK International Air Terminal (JFK IAT) for the use and occupancy of space at Terminal 4 at JFK and negotiations with air carriers.

The complaint further alleges that in January 2007, KBG, acting through Harry Beatty, a member, commented on a draft contract between Escape USA and JFK IAT for a use and occupancy permit for two, adjacent lounge spaces – the Old Swiss Lounge (Swiss space) and the Old Varig Lounge (Varig space) – at Terminal 4. The Old Varig Lounge was 4,403 square feet

in size, and the Old Swiss Lounge was 5,656 square feet. KBG was aware that Escape USA's business plan required occupancy of both lounges for 7 years, since it planned to renovate and combine the two spaces. Indeed, the agreements required Escape USA to make a minimum capital investment of $1.5 million in the space by December 31, 2007. Revisions were made based upon KBG comment and the contracts were finalized and signed. Escape USA then commenced planning the renovation, investing $75,000 in architect and design fees.

According to the complaint, JFK IAT served Escape USA with a 90 Day Notice to vacate the Old Swiss Lounge, on August 30, 2007. Escape USA knew nothing about this, but when Phillip Cameron, President of Escape USA and a director of its parent company, Escape Airports Ltd. (Escape UK), called KBG, KBG informed him that the Swiss Lounge agreement contained a three month termination clause which gave JFK IAT the right to terminate on 3 months' notice without cause. KBG never discussed this clause with plaintiff during negotiations. As a result of the termination, Escape USA: was forced to renegotiate the Old Varig occupancy agreement; spent $500,000 refurbishing the Old Varig Lounge; had to abandon its plans to create a flagship facility at JFK; had insufficient space to increase its business; lost $15 million dollars in projected profits; and suffered severe cash flow problems and damage to its reputation and good will.

In addition, the complaint contends that KBG advised Escape USA to challenge the termination notice. Consequently, Escape USA expended unnecessary money on KBG legal fees and lost goodwill with JFK IAT.

Further, Escape USA alleges that KBG provided it with a template for use in contracting with various air carriers. The template contained a sixty day termination of lease clause during

the initial period of the agreement. It did not provide for cancellation of the contract if JFK IAT terminated. Escape USA claims this "exposed [it] to, and continues to expose [it] to, tremendous financial and legal liability to a number of air carriers" should JFK IAT terminate. Moreover, Escape USA alleges that "[d]ue to the absence of any cancellation or modification clause in the template provided by [KBG] for the contracts with the various air carriers, Escape Airports was unable to even consider accepting a $685,000 offer of payment [as a buyout] made by JFK IAT in October 2007." Compl., para. 19.

Finally, the complaint alleges that the template failed to contain an exclusivity clause obligating the carriers to use plaintiff's services, but rather contained a minimum guarantee of a certain number of passengers, which several airlines refused to sign. As a result of the lack of an exclusivity clause, airlines were able to move to another lounge without penalty or notice.

Plaintiff seeks $15 million in damages for legal malpractice.

B. Defendant's Submissions on Its Motion to Dismiss

In support of its motion to dismiss, defendant KBG submits an affidavit from Harry Beatty, speaking to a number of annexed documents. It is Mr. Beatty's contention that the documents evidence that KBG was contacted on December 27, 2006 with regard to representing the London-based company Escape UK. Until then, Mr. Beatty claims, Escape UK had been dealing directly with JFK IAT and had been provided with JFK IAT's Standards and Conditions agreement and a Letter of Intent regarding the lease of the Varig space and negotiation of the Swiss space. According to Mr. Beatty, the documents further demonstrate that: Escape-UK took control of the Varig space on January 1, 2007, before meeting with or retaining KBG; KBG's advice was sought in regard to the jurisdiction of and type of business entity that should own the

lounge, help in obtaining a liquor license, international and domestic tax issues, immigration issues, trademark issues, accounting issues and financial issues; Escape UK never retained KBG to negotiate with JFK IAT and KBG never performed such services; Cameron met with KBG on January 5, 2007, and KBG was retained on that date; KBG formed Escape USA which was owned by Escape UK; at Escape UK's request on January 5, 2007, KBG prepared a draft template contract for Escape USA to use with various air carriers and the template draft was sent to Phil Cameron, James Layfield and Richard Whale, directors of Escape UK, on January 12, 2007; KBG never negotiated with these air carriers; on February 12, 2007, Escape Airports executed a Use and Occupancy Permit for the lease of the lounge space; KBG did not represent Escape Airports with regard to this document; by an August 31, 2007 letter, JFK IAT exercised its option to terminate the lease of Old Swiss Lounge; Escape Airports sought KBG's advice in regard to a legal challenge to the termination; and KBG last represented Escape USA in October 2007.

The first of the documents submitted are email headers from August 16, August 28 and November 15, 2006, indicating communications between Lawrence Hurwitz, General Counsel of JFK IAT, and Janice Holden of JFK IAT and Whale of Escape UK. The subject lines of the emails, state: "FW: Full Standard Terms and Conditions-Space Permit." The text of these emails is not annexed. Also submitted is the 45 page Standard Terms and Conditions agreement used by JFK IAT. Section 11.6 of that document provides:

> **Three Months Termination.** JFK IAT shall have the right to terminate this Permit and revoke the privileges granted hereunder, (a) without cause at any time, on three months notice to Permittee and (b) on twenty-four hours' notice to cure if Permittee shall fail to keep, perform and observe any term contained in this Permit and such failure results in a violation of Law. In the event of termination pursuant to this

> Section, this Permit and the privilege granted hereunder shall cease and expire as if the effective date of termination stated in the notice were the date originally stated herein for the expiration of this Permit.

A second set of emails is annexed. One is dated December 26, 2006, and is from Cameron to Hurwitz, regarding the Letter of Intent between JFK IAT and Escape UK. The Letter of Intent, dated December 22, 2006, is contained in that exchange. The letter, addressed to Cameron and Whale as directors of Escape UK, states that JFK IAT and Escape UK have agreed that Escape Airports is granted the right to operate a VIP Lounge at Terminal 4 "under the terms and conditions outlined herein." The letter is "subject to the Parties executing a more formal document leasing certain space" and states that effective January 1, 2007, Escape Airports will lease the Varig space for 7 years. The cost is set forth, and Escape Airports can terminate the Varig space upon 7 days notice prior to March 1, 2007. The letter further notes that the discussions regarding the Swiss space will take place and a decision will be made by JFK IAT by January 19, 2007. Should the lease to the Swiss space be granted to Escape Airports, the lease to Varig would be extended and the two leases would be co-terminus for 7 years. A second copy of the Letter of Intent, dated December 22, 2006, and addressed to Layfield and Cameron, also is included in the motion papers.

Additionally, email and other correspondence between KBG and Escape Airports is annexed. In a January 4, 2007 email, Cameron writes to KBG referencing a phone conversation and stating that the main focus of KBG's representation is the question of Escape UK's operating as a US entity, staff immigration and employment issues, liquor licenses and advice on the status of its directors, Cameron, Whale and Layfield. A January 5, 2007 letter to Cameron, titled "retainer Letter Agreement," states that KBG has been retained as general commercial counsel,

effective as of December 27, 2006, to give advice regarding United States operations. The fees are set forth, and KBG disclaims expertise in the areas of tax, immigration, intellectual property and liquor regulatory law. A draft of the "Airline Agreement" (Template) was then sent to Escape on January 12, 2007, by KBG. The draft Template contains a minimum monthly fee charge and a " Term; Termination" clause, which provides.

> 3.1 The term of this Agreement shall be effective as of the date set forth below (the **"Effective Date"**) and continue in full force and effect for a period of [seven (7)] years thereafter, unless sooner terminated by the Company by giving sixty (60) days prior written notice to the Airline or thirty (30) days should the Company chose [sic] or be required to cease operating the Lounge. In addition, the Airline may terminate this Agreement upon [sixty (60)] days prior written notice to the Company.

A January 15, 2007 email from Beatty to Whale, Cameron and Layfield speaks, among other things, to the formation of Escape USA and asks where they stand on the JFK IAT lease agreement.

The Use and Occupancy Permit is annexed. It is effective from January 1, 2007 to March 1, 2014 and covers both the Varig and Swiss spaces. Under the clause denominated "Term," the agreement states that it continues through February 28, 2014, "unless sooner terminated in accordance with the provisions herein." The agreement requires Escape USA to make a minimum capital investment of $1,500,000 in tenant improvements by December 31, 2007, and is signed by Cameron as president of Escape USA, as well as JFK IAT representatives. The date of the signatures is February 12, 2007.

Finally, defendant submits inter-office emails from August 2007, expressing doubt as to any legal challenge to the termination and referring to phone calls from Cameron allegedly suggesting legal action to delay vacatur and other legal avenues of challenge. The emails state

that Cameron was told of the weakness of these legal arguments.

C. Plaintiff's Opposition

In opposition, Phillip Cameron submits his affidavit. He avers that he is the president of Escape USA, that KBG was retained by Escape Airports to provide general commercial advice and that KBG was to provide, among other things, legal counsel regarding documents related to the negotiation of the occupancy of the premises to be leased at Terminal 4. Cameron also avers that KBG was to formulate a master airline agreement for contracts between Escape Airports and air carriers. He states that the January 4, 2007 email sent to KBG, listed only a few subjects on which legal counsel would be sought. Cameron contends that he and Whale attended the January 5 meeting at KBG and specifically asked KBG to advise Escape Airports regarding the ongoing negotiations with JFK IAT, and advised Beatty that Escape Airports would only convert the short term Letter of Intent to a long-term agreement if it received both the Swiss and Varig spaces for 7 years.

Moreover, Cameron avers that the Standards and Conditions document had never been a part of the Letter of Intent and, therefore, was never reviewed by him or anyone at Escape Airports. As a result, he claims, the document was provided to KBG to review and analyze. Beatty agreed to do this. According to Cameron, Beatty reviewed the document and suggested revisions to it which were conveyed to JFK IAT and then were made. No mention was made of the Termination clause.

Cameron states that he was shocked to receive the Termination Notice, that he discussed the Notice with Beatty and that Beatty advised him that eviction could be delayed through legal means. Beatty suggested an aggressive legal strategy. Furthermore, Cameron avers that a new

occupancy agreement for the Varig space was negotiated after termination and it provided for a 6 month termination notice. Cameron outlines loss of out-of-pocket expenditures and lost profit as a result of the termination.

In addition, Cameron avers that KBG was heavily involved in the drafting of the Template, the final version of which was submitted to Escape USA on March 13, 2007. This version failed to provide for cancellation should JFK IAT terminate and did not contain a clause either for exclusivity or an upper limit of passengers who could use the lounge.

Annexed to Cameron's papers are a number of documents. A February 5, 2007 invoice from KBG to Escape UK speaks of: "general commercial counseling," reviewing the letter of intent and the JFK space lease and reviewing and revising the airline Template. An email from KBG to Whale attaches the revised airline agreement. Whale, in a previous email, had stated in regard to Section 3: "In this clause we need to state that the term of the agreement as outlined in Schedule A is dependent upon the airline's continued operation at JFK Terminal 4. If an airline moves operations from Terminal 4 they may provide 60 days notice of termination, regardless of the initial term period." Thus, the following change was made in Section 3.1:

> The term of this Agreement shall be effective as of the date set forth on Schedule A (the "Effective Date") and continue in full force and effect for the minimum period (the "Initial Term") set forth in Schedule A; provided that should the Airline cease operations in Terminal 4 of JFK IAT, the Airline may terminate this Agreement upon no less than sixty (60) days prior written notice... After the Initial Term, either party may terminate this Agreement by giving sixty (60) days prior written notice to the other party.

Also, Section 1.3 now provides for a minimum number of passengers per month.

Subsequent invoices from September 6, October 1 and November 1, 2007, include charges for drafting and revising the airline Template, dealing with JFK IAT lease issues and

renegotiating the lease. The renegotiated lease for the Varig space is included. It provides for a six month termination notice and in case of termination, reimbursement to Escape USA of unamortized Capital Investments of up to $350,000 and of an "unamortized prior investment of $685,000."

II. Conclusions of Law

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v. Gani Realty* Corp., __N.Y.3d__, 2009 NY Slip Op 1852 (March 17, 2009); *Skillgames, L.L.C. v. Brody*, 1 A.D.3d 247, 250 (1st Dept. 2003) citing *McGill v. Parker*, 179 A.D.2d 98, 105 (1992); *see also Cron v. Harago Fabrics*, 91 N.Y.2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *Skillgames, id.,* citing *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavit submitted by the plaintiff. *Amaro, supra.* "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames, supra,* quoting *Caniglia v. Chicago Tribune-New York News Syndicate*, 204 A.D.2d 233 (1st Dept. 1994).

Further, in order to plead a cause of action for legal malpractice, a plaintiff must plead facts to support a conclusion that the attorney "'failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession' and that the attorney's breach of this duty proximately caused plaintiff to sustain actual damages." *Rudolf v. Shayne,*

Dachs, Staniscl, Corker & Sauer, 8 N.Y.3d 438, 442 (2007) quoting *McCoy v. Feinman*, 99 N.Y.2d 295, 301-2 (2002). To establish proximate cause, plaintiff must show that it would have succeeded in the matter or would not have sustained damages but for the malpractice. *AmBase v. Davis Polk & Wardwell*, 8 N.Y.3d 428, 434 (2007); *Brooks v. Lewin*, 21 A.D.3d 731, 734 (1st Dept. 2005). The failure to prove proximate cause, regardless of negligence, requires dismissal. *Brooks, id. See Sumo Container Station, Inc. v. Evans, Orr, Pacelli, Norton & Laffan, P.C.*, 278 A.D.2d 169 (1st Dept. 2000)(absence of damages fatal to legal malpractice claim).

Consequently, speculation as to future damages will not support a legal malpractice claim. *Brooks, supra* at 734-5. Nonetheless, a motion to dismiss a legal malpractice case for failure to specify damages, will be denied where plaintiff has set forth allegations sufficient to give rise to a reasonable inference of damages. *Lappin v. Greenberg*, 34 A.D.3d 277, 279 (1st Dept.. 2006); *InKine Pharmaceutical Co., Inc. v. Coleman*, 305 A.D.2d 151, 152 (1st Dept. 2003).

A. The Airline Template

Escape USA argues that KBG committed legal malpractice in failing to include in the Airline Template: a cancellation notice provision to protect Escape USA in the event that JFK-IAT exercised its cancellation clause; an upper limit of passengers who have to be accepted by Escape USA's lounge; and an exclusivity clause that would obligate the air carriers to use Escape's lounge services. KBG contends that this portion of the legal malpractice claim should be dismissed because: Escape USA has not sustained any actual damages as a result of this alleged malpractice and the exclusivity clause was not included based upon its professional judgment to use a minimum passenger clause instead.

KBG correctly argues that plaintiff has failed to plead any facts sufficient to give rise to actual and ascertainable damages stemming from the Templates's failure to include either an upper limit of passengers who could use the lounge space or an exclusivity clause. Plaintiff has not alleged that it has suffered any damages due to the lack of an upper limit clause. Moreover, the facts alleged cannot support damages for lack of exclusivity. It would be sheer speculation to assume that any of the airlines would have accepted an exclusivity clause. Indeed, Eos Airlines, the airline plaintiff complains left due to the lack of an exclusivity clause, refused to even sign a passenger minimum. Nor do the pleadings establish any loss to plaintiff from air carriers' terminations due to the lack of a cancellation provision. On the other hand, plaintiff has sufficiently amplified its pleadings with the affidavit of its president and director, Cameron, who states that due to the absence of a cancellation clause, it was unable to accept a $685,000 offer of payment made by JFK-IAT in October 2007, if Escape agreed to vacate the entire space. At the pleading stage, these allegations are sufficient to preclude dismissal regarding this claim.

KBG further contends that the Airline Template was a draft to be used by plaintiff, subject to alterations and modifications. KBG asserts that it never represented plaintiff with regard to the negotiation of any such contracts. Therefore, according to KBG, any omission in the template contract cannot be deemed the proximate cause of any damages allegedly sustained by plaintiff.

KBG's position is not compelling. Initially, if the Template should have contained a cancellation provision, the fact that it could have been modified to include one does not relieve KBG of its responsibility to draft a suitable contract. It was hired for its legal expertise. It cannot shift the blame for any error in drafting to its client solely because the client could have

changed it. Further, Escape USA contends that it consulted with KBG with regard to each of the Airline Agreements that it signed, even though KBG did not participate in the negotiations. Thus, for purposes of a CPLR 3211 motion, there is an insufficient basis to conclude that KBG's alleged failure cannot be a proximate cause of any damages. Contrary to KBG's argument, this is not a situation where another attorney took over representation of Escape. Therefore, the cases cited by KBG involving actions against attorneys who had ceased to represent the plaintiffs before the statute of limitations had run, are inapposite. *See e.g. Albin v. Pearson,* 289 A.D.2d 272 (2d Dept. 2001); *Golden v. Cascione, Chechanover & Purcigliotti*, 286 A.D.2d 281 (1st Dept. 2001).

B. The Lease Agreement

KBG argues that the portion of the cause of action based upon the agreement with JFK-IAT must be dismissed because defendant was not retained to review or negotiate plaintiff's agreement with JFK-IAT, plaintiff agreed to the terms of the agreement, and the damages alleged are based on pure speculation. In support of its position, KBG provides documentary evidence. However, this documentary evidence is insufficient.

Escape USA, by way of affidavit of Cameron, vociferously denies KBG's assertion that it was not retained to review the lease agreement. Indeed, the e-mails upon which KBG relies does not, on its face, purport to be an exhaustive list of the legal work that it was retained to do. Rather, Cameron's explanation that it was merely an outline for the meeting the following day is ample to refute KBG's assertion at this stage of the litigation.

KBG contends that, even so, the claim should be dismissed because Escape USA signed the agreement and is bound by its terms. It claims that, as a result, Escape USA cannot pursue a

legal malpractice claim.

It is beyond cavil that a party who signs an agreement is bound by its terms, whether or not that party read or understood the terms of the agreement. However, that does not mean that the party is necessarily precluded from bringing an action against the attorney who advised it with respect to the agreement.

This is not a situation in which a party signed an agreement which, on its face, contained provisions about which the party asserts it was unaware. Cameron avers that the 45 page Standard Terms and Conditions was supplied to KBG and KBG was specifically asked to review and revise it. According to Cameron, that was one of the purposes for which Escape USA retained KBG. "Counsel may not shift to the client the legal responsibility it was specifically hired to undertake because of its superior knowledge." *Hart v. Carro, Spanbock, Kaster & Cuiffo*, 211 A.D.2d 617, 619 (2d Dept 1995). Nor has KBG offered any basis to conclude that it would be reasonable to expect plaintiff to understand the ramifications of the Standard Terms and Conditions, in the absence of defendant's contracted-for advice regarding those ramifications. *Cicorelli v. Capobianco*, 90 A.D.2d 524, 525 (2d Dept. 1982), *aff'd for reasons stated* 59 N.Y.2d 626 (1983). The Standard Terms and Conditions is a document of approximately 45 pages, and according to Cameron, was subject to some negotiation. If Escape USA can demonstrate that it sought KBG's input into the import of those provisions and that KBG failed to advise it of the ramifications, KBG cannot shield itself from its obligation by saying that Escape USA signed the agreement.

Finally, KBG contends that any damages are too speculative to support a cause of action for legal malpractice. While it is true that damages that are purely speculative cannot be

recovered and cannot serve as the basis for a malpractice claim (*Russo v. Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP*, 301 A.D.2d 63, 67 [1st Dept 2002]), not all of the damages alleged by Escape are speculative. Escape contends that it wasted approximately $75,000 in architectural fees because it was unable to renovate the premises as planned and expended legal fees renegotiating the Varig space agreement. It also sets forth actual numbers regarding the income that it was generating before the lease was cancelled. Such information may be used to calculate damages that are not speculative in nature. Certainly, at this pleading stage, it would be improper to dismiss the cause of action based upon the lease agreement. Accordingly, it is hereby

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

ORDERED that the parties are directed to appear in Part 54, 60 Centre St., room 418, New York, N.Y., at 9:30 in the forenoon on May 6, 2009.

Dated: April 20, 2009

ENTER:

J.S.C.