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

PRESENT: Hon. Ling-Cohan PART 36

Index Number : 104918/2006

GLOBAL BUSINESS INSTITUTE

VS

RIVKIN RADLER LLP

Sequence Number : 005

AMEND

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for amend/transfer

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion by plaintiff to amend & transfer this case to this Court from the Civil Court is denied, in accordance with the attached memorandum decision,

FILED
JAN 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

HON. DORIS LING-COHAN

Dated: 1/13/10

J.S.C.

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

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 36

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GLOBAL BUSINESS INSTITUTE,

Plaintiff,

-against-

RIVKIN RADLER, LLP,

Defendant.

Index No.: 104918/06
DECISION/ORDER

Motion Seq. 005

HON. DORIS LING-COHAN, J.S.C.:

In this legal malpractice action, plaintiff moves for leave to amend the complaint, and for an order to transfer this matter back to this court from the Civil Court of the City of New York; such transfer was made on or about June 15, 2007, over two (2) years ago, pursuant to CPLR 325(d) (motion sequence number 005). For the following reasons, this motion is denied.

BACKGROUND

This matter bears a 2006 index number, with a request for judicial intervention filed February 21, 2007, yet apparently, the parties are still engaging in pre-trial discovery.

The Parties

Plaintiff Global Business Institute (Global) is a New York State licensed not-for-profit corporation that operates a post-secondary vocational school. *See* Notice of Motion, Exhibit 1 (complaint), ¶ 1; Contino Affirmation in Opposition, ¶5 . Defendant Rivkin Radler, LLP (Rivkin Radler) is a law firm organized as a New York Stated limited liability partnership. *See* Notice of Motion, Exhibit 1 (complaint), ¶ 2.

On October 18, 2004, Global executed a lease (the lease) for commercial space in a building (the building) located at 145 East 125th Street in the County, City and State of New

York. *Id.*, ¶ 3; Contino Affirmation in Opposition, Exhibit A. Prior to that, in April of 2004, Global had retained Rivkin Radler as counsel in connection with the negotiation of that lease. *Id.*, ¶ 4. Global claims that Rivkin Radler committed malpractice during the course of that representation by failing to ensure that the lease contained certain provisions that would have protected Global's interests. *Id.*, ¶ ¶ 5, 7. The instant motion centers on the lease's tax escalation clause, which states as follows:

> B. TAXES
> i) Throughout the term of this Lease, as Additional Rent, tenant [i.e., Global] shall pay to the Landlord one sixth (1/6th) per floor, hereinafter referred to at the "Tenant's Tax," of the increases in real estate taxes and other governmental impositions affecting the Building over the base year 2004/2005.

See Contino Affirmation in Opposition, Exhibit A, at 4. Global states that, although it executed the lease in 2004, it was unable to take possession of its leased premises until March of 2008 as a result of the landlord's failure to timely complete certain build-out work in those premises. *Notice of Motion, Martin Affirmation* ¶ ¶5-8. Global claims that Rivkin Radler should have negotiated a tax escalation clause that provided that the "base year" used to calculate the above-mentioned "tenant's tax" payments would be the year in which Global's rent payment obligation actually began (i.e., 2008, when it took possession) rather than the year in which Global executed the lease (i.e., 2004). *Id.*, ¶¶ 11-16. Global further claims that it has suffered serious financial damages because its landlord's tax burden increased precipitously between 2004 and 2008, with the result that Global became liable for much greater "tenant's tax" payments over the course of the lease than it would have been if 2008 had been fixed as the base year of the calculation. *Id.* Global has submitted bills from its landlord to support its contentions, and wishes to amend its complaint to include those contentions as part of its legal malpractice claim against Rivkin Radler. *Id.*; Exhibit 6. Global also asserts that the dollar amount of "tenant's tax" liability for

which it will ultimately be liable is sufficiently large, in the aggregate, to warrant amending the complaint's ad damnum clause to name a figure greater than the jurisdictional limit of the Civil Court of the City of New York. *Id.*

Rivkin Radler first denies any malpractice, arguing that it would be commercially unreasonable to expect any landlord to agree to delay a tenant's obligation to make tax escalation payments, because such a delay would necessarily result in a "penalty" to the landlord and a "windfall" to the tenant. *See* Contino Affirmation in Opposition, ¶¶ 9-16. Rivkin Radler also asserts that *Global* was the party that actually negotiated the tax escalation clause. *Id.*, ¶¶ 17-32. To support this contention, Rivkin Radler presents the deposition testimony of Global's president, Michael J. Hatten (Hatten), who admitted that he had negotiated certain terms of the lease with the landlord's representatives before retaining and consulting with Rivkin Radler, including "the rent, real estate taxes, some information about the elevator, [and] the work." *Id.*; Exhibit G, at 26, lines 19-20. Hatten also stated that Global and the landlord had subsequently set forth these non-negotiable terms - including the tax escalation provision - on a "term paper." *Id.*, at 27, lines 4-5. Rivkin Radler presents copies of the term paper that Global's landlord sent to Global on February 23, 2004, and Global's response confirming the term sheet, which was signed by Hatten and dated March 17, 2004. *Id.*; Exhibits H, I. Both of those documents state that "Tenant [is] to pay its proportionate share of real estate taxes above a base year of 2004/2005." *Id.* Nonetheless, Hatten asserts that he "realized only recently that the base year in the lease was 2004/2005 and not 2008/2009." *See* Notice of Motion, Hatten Affidavit, ¶ 10.

Prior Proceedings

Global commenced this action on April 7, 2006, by serving a complaint that set forth one cause of action for negligence/legal malpractice. *Id.*; Exhibit 1. Rivkin Radler answered on May

31, 2006. *See* Contino Affirmation in Opposition, Exhibit C. On June 15, 2007, *sua sponte*, this court issued an order pursuant to CPLR 325 (d), transferring this action to the Civil Court of the City of New York (motion sequence number 002). Global initially sought to re-transfer this action to this court *via* order to show cause; however the court declined to sign the application on January 4, 2008 (motion sequence number 003). Thereafter, Global formally moved for leave to amend the complaint's ad damnum clause and to transfer this matter back to this court from the Civil Court of the City of New York (motion sequence number 004). On August 26, 2008, this court entered a decision that disposed of that motion, and stated, in pertinent part:

> Defendant asserts... that, in order to establish liability for legal malpractice based on the delay in occupancy of the new premises, plaintiff must establish that the landlord would have agreed to provisions in the lease and the annexed work letter, that both guaranteed completion of the required work by a given date and allowed the tenant to recover damages due to any delay in occupancy. Defendant demonstrates that the evidence produced in the course of discovery in this matter refutes, rather than supports, the position that the landlord would have agreed to such provisions. Indeed, the lease states that the landlord is not subject to liability for failure to give possession to the tenant on a specific date, except that the tenant's obligation to pay rent does not commence until the landlord gives written notice that the premises are substantially ready for occupancy. Additionally, in his deposition, Mr. Hatten acknowledged that he did not have a discussion with anyone from the landlord about putting in the lease both a deadline for the completion of the work on the new premises and consequences for the landlord if the work was not completed by that date. Mr. Hatten further admitted that he did not recall any discussions with anyone from Rivkin Radler about putting in the lease a deadline for the completion of the work and consequences for the landlord if the work was not timely completed. Lastly, defendant notes that plaintiff has failed to respond to its discovery request for documents concerning the number of students turned away from [Global] due to its inability to occupy the new premises, giving rise to plaintiff's claim for damages.
>
> Accordingly, plaintiff has failed to provide a sufficient factual basis to substantiate defendant's negligence and liability, as well as to establish that the damages actually sustained exceed the sum of $2.5 million sought in the original ad damnum clause. Therefore, plaintiff's motion for leave to amend the ad damnum clause is denied [internal citations omitted].

See Contino Affirmation in Opposition, Exhibit D, at 4-5. Global now moves for leave to amend

both the complaint and the ad damnum clause, and to transfer this matter back to this court from the Civil Court of the City of New York (motion sequence number 005)[1]. Rivkin Radler consents to the re-transfer of this matter to this Court, but not to Global's proposed amendments.

DISCUSSION

As it did in its August 26, 2008 decision, this Court will allow the re-transfer of this action, on consent and pursuant to CPLR 325 (b), for the limited purpose of deciding the branch of Global's motion seeking to amend the complaint.

"It is well established that leave to amend a pleading shall be freely granted absent prejudice or surprise resulting from the delay," unless "the proposed pleading fails to state a cause of action ... or is palpably insufficient as a matter of law." *Davis & Davis, P.C. v Morson*, 286 AD2d 584, 585 (1st Dept 2001). Here, the court finds that Global's proposed amendments fail for the former reason.

As the Court of Appeals held in *AmBase Corp. v Davis Polk & Wardwell* (8 NY3d 428, 434 [2007]):

> 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 [internal citations omitted].

Here, even if the court were to accept as true Global's contention that the failure to modify the tax escalation clause of the lease was an act of negligence, it would be unable to accept the

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[1] The court notes that the within motion is almost identical to plaintiff's prior motion to amend and for the transfer of this case back to this court, which was denied by order of this court dated August 26, 2008. Previously, plaintiff sought only to amend the addendum clause; now plaintiff seeks to amend the complaint and the addendum clause. Arguably, the within motion should have been brought as a motion to renew/reargue.

additional contention that there existed a "but for" connection between Rivkin Radler's failure to act and Global's purported damages. As was the case in the previous motion, the documentary evidence herein (consisting of Hatten's deposition testimony and the "term sheet" correspondence), makes it clear that Global, and *not* Rivkin Radler, was responsible for negotiating the lease's tax escalation clause. *See* Contino Affirmation in Opposition, Exhibits G, H, I. Because this evidence refutes the existence of a "but for" connection between any action or inaction by Rivkin Radler and Global's purported damages, Global's new contentions fail to state a cause of action for legal malpractice against Rivkin Radler. Thus, there is no basis for amending the complaint to include Global's tax escalation contentions. Since Global's instant request to amend the ad damnum clause of the complaint also depends completely upon the viability of its tax escalation clause claims, there is no basis for amending that portion of the complaint either. Accordingly, Global's motion is denied in its entirety.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED that the motion, pursuant to CPLR 3025 and 325 (b), of plaintiff Global Business Institute is in all respects denied; and it is further

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

Dated: New York, New York
January 13, 2010

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

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