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| <b>180 E. 88th St. Apt. Corp. v Law Off. of Robert Jay Gumenick, P.C.</b>                                                                                                                                                                                        |
| 2010 NY Slip Op 33848(U)                                                                                                                                                                                                                                         |
| December 21, 2010                                                                                                                                                                                                                                                |
| Sup Ct, NY County                                                                                                                                                                                                                                                |
| Docket Number: 23252                                                                                                                                                                                                                                             |
| Judge: Ira Gammernan                                                                                                                                                                                                                                             |
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## SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **IRA GAMMERMAN**PART 27

Index Number : 600039/2009

180 E. 88TH ST. APARTMENT CORP

vs

GUMENICK,P.C., ROBERT JAY

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

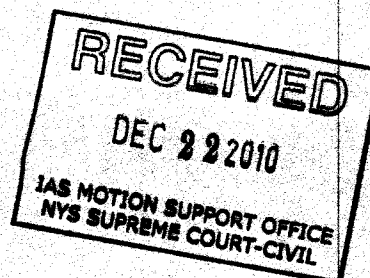
The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion: ☐ Yes ☐ NoUpon the foregoing papers, it is ordered that this motion IS DECIDEDIN ACCORDANCE WITH THE ACCOMPANYING  
MEMO DECISION.It is so ordered.ENTER:**IRA GAMMERMAN**Dated: 12-21-2010J.S.C. JKDCheck one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITIONCheck if appropriate: ☐ DO NOT POST ☐ REFERENCE☐ SUBMIT ORDER/JUDG.☐ SETTLE ORDER /JUDG.MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 27

----- X  
180 E. 88<sup>TH</sup> ST. APARTMENT CORP., MICHAEL  
BROD, UNDINE BROD, JOSEPH T. CANNUNE,  
PAULA EBBINS, BRIAN ESTRADA, MITCHELL  
FAGIN, SUMERA PATEL, and STEVEN SCHWARTZ,

*Plaintiffs,*

Index No. 600039/09  
PC No. 23252

- against -

LAW OFFICE OF ROBERT JAY GUMENICK, P.C.,  
and ROBERT J. GUMENICK,

*Defendants.*

----- X  
**IRA GAMMERMAN, J.H.O.:**

Defendants move for summary judgment, pursuant to CPLR 3212. Plaintiffs cross-move for summary judgment and for dismissal of defendants' counterclaims, pursuant to CPLR 3211 (a) (7). For reasons set forth below, summary judgment in favor of defendants is granted, and the counterclaims are dismissed.

**Background**

This is a legal malpractice action arising out of the sale of a co-operative building. Plaintiff 180 E. 88<sup>th</sup> St. Apartment Corp. is a New York co-operative corporation that formerly owned a building containing 10 apartments, located at 180 East 88<sup>th</sup> Street, New York, New York (the "building"). The individual plaintiffs are shareholders of the corporation and former building residents. Defendant Robert J. Gumenick is an attorney hired by plaintiffs to represent them with respect to the sale of the building.

Prior to Gumenick's retention, plaintiffs orally agreed to sell the building to nonparty

Extell Development Company ("Extell") for \$4.5 million. Plaintiff Michael Brod, as secretary of the corporation and a member of the building's board of directors, approached Gumenick to represent the sellers in the transaction. The corporation then executed a retainer letter, dated May 16, 2005 (the "retainer agreement"), engaging Gumenick to "negotiate and consummate the sale of the . . . premises," Bruno Aff., Ex. E.

The retainer agreement states that Gumenick has "been informed that the shareholders of the corporation have approved the sale and have agreed to terminate the cooperative regime," *id.* The agreement lists Gumenick's duties as including, "all necessary documentation to 'unwind' the cooperative, to cause surrender of the proprietary leases and the proper allocation of the consideration for the shares held by each shareholder," *id.* The retainer agreement provides that Gumenick "will not render tax advice in this matter but [] will be available to discuss the transaction with [the co-op's] tax advisor/accountant," *id.*

The sales contract, dated August 11, 2005, set a \$4.5 million purchase price and required closing within 180 days; it was subsequently amended to reschedule the closing and to increase the purchase price to \$4.55 million. Shortly before the closing, on or about March 22, 2006, the co-op's accountant notified Gumenick, by letter, that corporate income taxes totaling approximately \$1.8 million would be due on the sale, and that the shareholders would additionally owe capital gains taxes on the difference between the sales proceeds they receive and their cost basis. The accountant's letter further stated that if the sale had been structured as a sale of shares, rather than as a sale of the building, plaintiffs would have realized tax savings totaling approximately \$1.3 million. On or about March 27, 2006, the accountant wrote to the building's board questioning why he had not been consulted on the tax implications of the transaction until

the end of January 2006, rather than prior to the board's entry into the sales contract.

As a result of the accountant's letters, the board attempted to re-negotiate the transaction so as to avoid the increased tax liability, but Extoll refused. Plaintiffs were forced to consummate the sale as contracted. In bringing the instant action, plaintiffs allege a single cause of action for legal malpractice and seek \$1.3 million in damages.

In seeking summary judgment, Gumenick argues that he was not the "but for" cause of the corporation's damages because plaintiffs agreed to the structure of the sale before Gumenick was retained; that plaintiffs cannot show that Extol would have agreed to an alternate sales structure; and, that, in any event, the retainer agreement specifically provided that he would not "render tax advice in this matter." In cross-moving for summary judgment, plaintiffs argue that Gumenick was negligent in failing to consult an accountant regarding the tax implications of the sale, and that, because the retainer agreement provides that Gumenick was hired to "negotiate and consummate the sale," said failure constitutes malpractice. As concerns proximate cause, plaintiffs argue that they do not need to show Extoll would have agreed to the alternate sales structure; they only need to show that unnecessary capital gains taxes could have been avoided.

### **Discussion**

An action for legal malpractice "requires proof of three elements: (1) the negligence of the attorney; (2) that the negligence was the proximate cause of the loss sustained; and (3) proof of actual damages," *Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1 (1st Dept 2008). The proximate cause element has recently been subject to varying formulations, *see e.g., Barnett v Schwartz*, 47 AD3d 197 (2d Dept 2007); *Brooks v Lewin*, 21 AD3d 731 (1st

Dept 2005).<sup>1</sup> Generally, a plaintiff alleging legal malpractice has been required to satisfy a rigorous test by establishing that “but for” the defendant-attorney’s negligence, the plaintiff would have obtained a more favorable result in the underlying litigation, or would not have sustained the claimed loss in the underlying transaction, *Davis v Klein*, 88 NY2d 1008 (1996); *Waggoner v Caruso*, 68 AD3d 1 (1st Dept 2009), *affd* 14 NY3d 874 (2010); *Franklin v Winard*, 199 AD2d 220 (1st Dept 1993); *Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590 (1st Dept 1990). Recently, however, some courts have held that the defendant-attorney’s negligence need only be “a” proximate cause of the plaintiff-client’s damages, *e.g. Barnett v Schwartz*, *supra*; *Adamski v Lama*, 56 AD3d 1071 (3d Dept 2008); *The New Kayak Pool Corp. v Kavinoky Cook LLP*, 74 AD3d 1852 (4th Dept 2010); while other courts continue to hold that the defendant-attorney’s negligence must be “the” or “but for” proximate cause of damages to the plaintiff-client, *e.g. Pozefsky v Aulisi*, \_\_ AD3d \_\_, 2010 WL 4941702 (1st Dept 2010); *Boone v Bender*, 74 AD3d 1111 (2d Dept 2010); *Ryan v Powers & Santola, LLP*, 73 AD3d 1273 (3d Dept 2010); *Tydings v Greenfield, Stein & Senior, LLP*, 43 AD3d 680 (1st Dept 2007), *affd* 11 NY3d 195 (2008).

In *Barnett v Schwartz*, *supra*, the Second Department seemingly eliminated the “but for” requirement by holding that establishing proximate cause in a legal malpractice case does not require a greater or more direct degree of causation than the traditional proximate cause standard applied in most negligence cases. Thus, under *Barnett*, “a plaintiff in a legal malpractice action need prove only that the defendant-attorney’s negligence was a proximate cause of damages

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<sup>1</sup> Decision using both terms “a proximate cause” and “but for the attorney’s negligence in describing plaintiff’s burden with regard to the causal relationship.

[emphasis added],” *Barnett, supra*. In reaching its conclusion, the *Barnett* majority reasoned that:

the ‘but for’ language, which grew out of the lawsuit-within-a-lawsuit scenario . . . is merely a recognition of the factual particularities of proving proximate cause and damages in such an action. When applied in a case involving negligent legal advice (i.e., a case where there is no underlying cause of action to lose), it would appear that the “but for” formulation is merely a recognition of the factual complexities that may attend proving proximate cause when the legal advice was merely one of a myriad of factors that contributed to the plaintiff-client’s ultimate decision or course of action [citations omitted].

The *Barnett* majority found that Court of Appeals’ precedents offered no explicit support for a heightened causation requirement in legal malpractice cases. The Court reasoned that a requirement of sole causation was incompatible with the defense of culpable conduct allowed in malpractice actions to reduce the award amount, *id.*, citing *Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 96 NY2d 300, n 2 (2001).

The dissent in *Barnett* conceded that “in sustaining their burden in satisfying the ‘but for’ requirement of the legal malpractice cause of action, the plaintiffs need not show that the defendants’ conduct was the only or sole factor resulting in the plaintiffs’ damages,” but suggested a third standard, requiring plaintiff to “conclusively demonstrate that such conduct was the primary, direct, or predominant cause of the loss sustained,” *id.*

Subsequent to *Barnett*, the correct standard of causation in the Second Department – as well as in the other Departments – remains unclear. Following its decision, the Second Department has sometimes applied the “but for” standard of causation, *e.g.*, *Boone v Bender, supra*; *Anne Koplick Designs, Inc. v Lite*, 76 AD3d 535 (2d Dept 2010); *Kuzmin v Nevsky*, 74

AD3d 896 (2d Dept 2010); *Christ v Law Offices of William F. Levine & Michael B. Grossman*, 72 AD3d 721 (2d Dept 2010); *Fireman's Fund. Ins. Co. v Farrell*, 57 AD3d 721 (2d Dept 2008); *Kutner v Catterson*, 56 AD3d 437 (2d Dept 2008); and has sometimes utilized the test requiring only a showing that the malpractice be "a proximate cause" of the client's loss, e.g., *Bernardi v Spyrtos*, \_\_ AD3d \_\_\_, 2010 WL 5023209 (2d Dept 2010); *Frederick v Meighan*, 75 AD3d 528 (2d Dept 2010); *Soussis v Lazer, Aptheker, Rosella & Yehid, P.C.*, 66 AD3d 993 (2d Dept 2009); *DeNatale v Santangelo*, 65 AD3d 1006 (2d Dept 2009). In other cases, the Second Department has applied the two standards interchangeably, *Von Duerring v Hession & Bekoff*, 71 AD3d 760 (2d Dept 2010); *Ali v Fink*, 67 AD3d 935 (2d Dept 2009).

A similar state of confusion appears to exist in the Third and Fourth Departments, which have sometimes referred to the standard as requiring only that the malpractice be "a proximate cause" of the loss, *Adamski v Lama, supra*; *Ehlinger v Ruberti, Girvin & Ferlazzo, P.C.*, 304 AD2d 925 (3d Dept 2003); *Busino v Meachem*, 270 AD2d 606 (3d Dept 2000); compare with e.g. *Ryan v Powers & Santola, LLP*, 73 AD3d 1273, *supra*, (requiring proof of "but for" causation to establish legal malpractice claim); *Bixby v Somerville*, 62 AD3d 1137 (3d Dept 2009); see also *The New Kayak Pool Corp. v Kavinoky Cook LLP*, 74 AD3d 1852, *supra*; *Zulawski v Taylor*, 63 AD3d 1552 (4th Dept 2009); compare with e.g. *Mohamed v Cellino & Barnes, P.C.*, 300 AD2d 1116 (4th Dept 2002).

The First Department continues to apply the "but for" standard without addressing the lower standard sometimes applied by the other Departments, e.g., *Pozefsky v Aulisi*, \_\_ AD3d \_\_\_, 2010 WL 4941702, *supra*; *Snorkel Prods., Inc. v Beckman Lieberman & Barandes, LLP*, 62 AD3d 505 (1st Dept 2009); *Barbara King Family Trust v Voluto Ventures LLC*, 46 AD3d 423

(1st Dept 2007). However, in *Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker, supra*, decided one year after *Barnett*, the First Department reaffirmed the higher threshold required to establish the “but for” proximate cause element in a legal malpractice claim.

Discussing a claim for breach of fiduciary duty, the Court noted that whereas ordinarily such a claim “is governed by a considerably lower standard of recovery [,] . .

. in the context of an action asserting attorney liability, the claims of malpractice and breach of fiduciary duty are governed by the same standard of recovery. . . . [T]o recover against an attorney arising out of the breach of the attorney’s fiduciary duty, the plaintiff must establish the ‘but for’ element of malpractice, irrespective of how the claim is denominated in the complaint,” citing *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267 (1st Dept 2004) (explaining difference between “but for” standard of causation and “less rigorous ‘substantial factor’ causative standard;” rejecting application of “substantial factor” standard “in the context of attorney liability”); see also *Boone v Bender, supra*.

Despite the inconsistent and limited application of *Barnett* by New York courts, the confusion over the appropriate causation standard under New York law has spread to federal courts applying New York law, resulting in the various standards being used interchangeably, see, e.g. *Smartix Intl. Corp. v Garrubbo, Romankow & Capese, P.C.*, 2009 WL 857467 (SD NY 2009); *Kirk v Heppt*, 2009 WL 2870167 (SD NY 2009).

Faced with a similar question concerning the appropriate proximate cause standard to apply in a legal malpractice case, the California Court of Appeals in *Viner v Sweet*, 112 Cal Rptr 2d 426 (Cal App 2d Dist 2001), held that the “but for” causation standard should not apply to malpractice cases arising from transactions; instead, ordinary negligence and causation principles

suffice. The California court distinguished transactional malpractice from litigation malpractice by reasoning that, among other distinctions, “business transactions generally involve a much larger universe of variables than litigation matters,” *id.* As a result, a “jury would have to evaluate a nearly infinite array of ‘what-ifs,’ to say nothing of the many ‘if that, then whats,’ in order to determine whether the plaintiff would have ended up with a better outcome ‘but for’ the malpractice,” since in “contract negotiation[s] the number of possible terms and outcomes is often virtually unlimited,” *id.*

On appeal, the California Supreme Court rejected the distinction proposed by the lower court, explaining that there is “nothing distinctive about transactional malpractice that would justify a relaxation of, or departure from,” the well-established “but for” requirement in negligence cases, *Viner v Sweet*, 30 Cal 4th 1232 (CA 2003). In reaching its conclusion, the California Supreme Court reasoned that,

“[i]t is far too easy to make the legal advisor a scapegoat for a variety of business misjudgments unless the courts pay close attention to the cause in fact element, and deny recovery where the unfavorable outcome was likely to occur anyway, the client already knew the problems with the deal, or where the client’s own misconduct or misjudgment caused the problems.

The court noted that, “[i]t is the failure of the client to establish a causal link that explains decisions where the loss is termed remote or speculative,” *id.*

Arguably, malpractice cases arising from legal advice, as opposed to those arising from the mishandling of litigation, do make it more difficult for a plaintiff to establish a “case-within-a-case,” or to prove that “but for” the defendant-lawyer’s negligence, the plaintiff-client would not have suffered the harm. Unfortunately, New York cases applying a “but for” or “the” proximate cause standard as opposed to “a” proximate standard cannot be reconciled based on

whether they involve transactional or litigation malpractice claims. Perhaps the view expressed by the California Court of Appeals should merit consideration by the appellate courts of our state.

In the instant case, the distinction is, in any event, immaterial. Even if plaintiffs could establish proximate cause under either standard, the retainer agreement plainly states that Gumenick would not provide plaintiffs *any* tax advice, but was engaged only “to negotiate and consummate the sale of the . . . premises on terms and conditions satisfactory to the board of directors.” As previously noted, the retainer clearly provides that the corporation had “approved the sale and . . . agreed to terminate the cooperative regime as part of this transaction.” Although plaintiffs may, in retrospect, wish that Gumenick had taken the initiative to discuss the tax consequences of the building sale with plaintiffs’ accountant, the agreement does not require defendant to do so, and clearly notifies plaintiffs of this fact. Where a written retainer agreement plainly indicates the specific purpose of the representation, an attorney will generally not be held liable in malpractice for failing to explore legal issues outside the scope of the agreement, *AmBase Corp. v Davis Polk & Wardell*, 8 NY3d 428 (2007). Thus, however one frames the relevant proximate cause standard, Gumenick’s failure to advise plaintiffs of the tax consequences of the building’s sale cannot be either “a” or “the” proximate cause of plaintiffs’ sustained damages.

In light of the above, it is unnecessary to discuss the parties’ remaining arguments.

I am dismissing defendants’ counterclaims for indemnification and contribution. In a legal malpractice action, an attorney may plead the culpable conduct of a client only as an affirmative defense, not in the form of a counterclaim, *Arnav Indus., Inc. v Brown, Raysman*, 96 NY2d 300, *supra*.

Accordingly, it is hereby

ORDERED that plaintiffs' cross motion to dismiss defendants' counterclaims is granted and the counterclaims against plaintiffs are dismissed; plaintiff's cross motion for summary judgment is denied; and it is further

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: 12/21/10

ENTER:



**IRA GAMMERMAN**

J.H.O.