

**Yuko Ito v Suzuki**

2011 NY Slip Op 31317(U)

May 16, 2011

Supreme Court, New York County

Docket Number: 124399/2002

Judge: Jeffrey K. Oing

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

DEFENDANT

JEFFREY K. OING  
J.S.C.

PART 48

Index Number : 124399/2002

ITO, YUKO

vs

SUZUKI, SAM

Sequence Number : 012

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 \_\_\_\_\_

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

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

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

PAPERS NUMBERED

Cross-Motion:  Yes  No

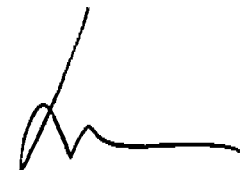
Upon the foregoing papers, it is ordered that this motion *is decided in accordance*  
*of the accompanying memorandum decision/order of the court*

**FILED**

MAY 18 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 5/16/11

  
\_\_\_\_\_  
JEFFREY K. OING  
J.S.C. J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check 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 48

-----x

YUKO ITO, individually and derivatively  
on behalf of KEYSTONE INTERNATIONAL,  
LLC,

Plaintiffs,

-against-

SAM SUZUKI, ET AL.,

Defendants.

Index No.: 124399/02

Mtn Seq. Nos. 012, 013,  
014, 015, 016

DECISION AND ORDER

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**JEFFREY K. OING, J.:**

Defendants, Markowitz & Roshco and Daniel Roshco ("Roshco") (collectively referred to as the "Roshco Defendants") move, pursuant to CPLR 3212, for summary judgment dismissing the legal malpractice cause of action (Mtn. Seq. No. 012).

Defendant Stuart I. Rich ("Rich") moves, pursuant to CPLR 3212, for summary judgment dismissing against him the cause of action of aiding and abetting a breach of a fiduciary duty (Mtn. Seq. No. 013).

Defendant Kudman Trachten LLP ("Kudman Trachten") moves, pursuant to CPLR 3212, for summary judgment dismissing against it the cause of action of vicariously aiding and abetting a breach of a fiduciary duty (Mtn. Seq. No. 014).

Plaintiff, Yuko Ito ("Ito"), individually and derivatively on behalf of Keystone International, LLC ("Keystone"), cross-moves, pursuant to CPLR 2221(e)(2) to renew and reinstate the fifth (malpractice) and sixth (conflict of interest malpractice)

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causes of action against Rich and Kudman Trachten based on newly discovered evidence (Mtn. Seq. No. 015). Ito also moves for an order directing the Clerk to file the original confession of judgment in the amount of \$320,000 in favor of Ito and against defendant Sam Suzuki ("Suzuki") (Mtn. Seq. No. 016).

### **Background**

Ito and Suzuki created Keystone to purchase the Chesterfield Hotel (the "Chesterfield") for \$9.5 million from Nomara Suzuki Properties in which Suzuki had an interest. The Chesterfield is a short stay tourist hotel composed of forty-four condominiums located on Manhattan's Upper Westside.

In November 1999, Suzuki and Tomohisa Ishino ("Ishino"), Ito's brother, executed a Purchase Agreement ("1999 purchase agreement"). At the signing, Rich represented Suzuki and Roshco represented Keystone. Some time thereafter, Roshco represented Ito, individually, in the sale of her 66<sup>th</sup> Street condominium. In February 2000, Roshco at Ito's direction transferred funds from the 66<sup>th</sup> Street condominium sale to the Chesterfield.

In August 2000, Ito signed the Operating Agreement (the "operating agreement") which allocated Keystone's membership - 66 2/3 percent to Ito and 33 1/3 percent to Suzuki - and designated Suzuki as Keystone's managing member. Specifically, the operating agreement stated:

The vote of the Manager only shall be required to approve the sale, exchange, lease, mortgage, pledge or

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other transfer or disposition of all or substantially all of the assets of this Company and all documents relating thereto shall be signed by the manager and no other signature will be required and no person shall inquire into the authority of said managers to execute such documents as the act and deed of this Company.

(Kudman Trachten Moving Papers, Ex. H).

The parties held the closing on September 5, 2000 at North Fork Bank on Long Island (the "closing"). Ito, Ishino, Ito's son, Suzuki, and Rich attended; Roshco was not present. Suzuki retained Rich to represent Keystone at the closing.

#### **Procedural History**

In a November 13, 2006 decision/order, Supreme Court (Justice Marylin G. Diamond) dismissed Ito's individual and derivative claims asserted against Kudman Trachten in the Third Amended Complaint. Ito appealed, and the First Department affirmed, but granted plaintiff leave to file a fourth amended complaint on the limited claim that Kudman Trachten vicariously aided and abetted a breach of fiduciary duty.

In August 2009, Ito settled with defendants Sam Suzuki, Katsuko Suzuki, Nomara Suzuki Properties, Ltd., Suzuki Associates, Ltd., Mansion Joho Center Inc., American Hotel Group, Inc. d/b/a American Hospitality Group, Keystone International, LLC, The Corcoran Funding Group and Suzuki Capital

Funding, Ltd. (collectively referred to as the "Suzuki Defendants") recovering in excess of \$1.6 million.<sup>1</sup>

**Markowitz & Roshco and Roshco's Summary Judgment Motion**

A plaintiff bringing a cause of action for professional malpractice must establish that the attorney failed to exercise the degree of care, skill and diligence commonly possessed by a member of the legal profession (Kaminsky v. Feinstein, 59 AD3d 1, 6 [1st Dept 2008]). Thus, to recover, plaintiff must demonstrate that: (1) the attorney was negligent; (2) the attorney's negligence was the proximate cause of the sustained loss; and (3) proof of actual damages (Id.).

Here, even if Ito were to establish defendants were negligent, if Ito cannot raise a factual issue as to whether defendants' negligence was a proximate cause of the alleged sustained damages, then the legal malpractice should be dismissed (Schwartz v. Olshan Grundman Frome & Rosenzweig et al., 302 AD2d 193, 198 [1st Dept 2003]). Conclusory allegations are insufficient (Id.). Having said that, proximate cause is demonstrated by showing "but for" an attorney's negligence, plaintiff would have prevailed in the matter or would not have sustained damages (Id.).

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<sup>1</sup>The Suzuki Defendants defaulted. Ito moves for an order directing the Clerk to file Suzuki's confession of judgment in the amount of \$320,000 (Mtn. Seq. No. 016).

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In a November 13, 2006 decision/order, Supreme Court (Justice Diamond) permitted the legal malpractice claim to proceed at the pleading stage "in view of the fact that [Markowitz & Roshco] concededly received compensation in connection with the closing, represented Ito in connection with the sale of property (the 66<sup>th</sup> Street condominium) where the proceeds were used, in part, to fund the Chesterfield transaction, and knew that Ito did not speak English" (Markowitz & Roshco Moving Papers, Ex. C, p. 39).

Here, the heart of Ito's claim for legal malpractice against Roshco and Markowitz & Roshco is that Roshco: (1) failed to attend the closing; (2) failed to advise Ito of the documents signed at the closing; and (3) failed to advise Ito of documents executed at the closing after payment was received.

What is established in this record is that Roshco represented Ito personally in the sale of her 66<sup>th</sup> Street condominium. Ito's claim that Roshco personally represented her in the Chesterfield transaction is rejected because the First Department has held that: "It is apparent that plaintiff was not individually represented by counsel with respect to either the formation of Keystone or the transfer of the subject property" (Ito v. Suzuki, 57 AD3d 205, 207 [1st Dept 2008]). Moreover, Ito's support in her moving papers is merely conclusory in that she relied on conversations with Katsuko, rather than on a formal

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retainer agreement or direct conversation with Roshco himself. Absent from the record is any evidence of conversations between Ito and Roshco prior to the closing to raise a factual issue of an attorney-client relationship, and her lack of inquiry as to Roshco's presence at the September 2000 closing is directly opposite to her belief that Roshco represented her individually.

Accordingly, that branch of the Roshco Defendants' motion for summary judgment dismissing Ito's individual claim for legal malpractice against is granted, and it is hereby dismissed.

Turning to Ito's derivative claim for legal malpractice, Ito retained Roshco to represent Keystone at the November 1999 signing of the 1999 purchase agreement. Thereafter, at Ito's direction, in February 2000 Roshco transferred funds to Suzuki for the purposes of financing the Chesterfield. After February 2000, Roshco maintains that he had no further communications with Ito or Ishino in his capacity as Keystone's counsel, but that he anticipated communications when financing for the Chesterfield was complete.

Although Roshco knew Ito was Japanese, and spoke and understood little English, her language barrier argument is not sufficient to raise a triable issue of fact. To begin, Ito has engaged in prior business transactions and has also previously partnered with Suzuki (Kudman Trachten Moving Papers, Suzuki Aff., p. 2). Indeed, the majority of communications, including

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requests to sign important documents were not between the party's attorneys, but rather conducted between Ito and Suzuki, with Ishino or Katsuko's involvement. Specifically, Ishino said he communicated with Suzuki directly by telephone, e-mail, and facsimile regarding Chesterfield matters, and that Ito signed documents without seeking Roshco's advice. In fact, Roshco did not receive the March 2000 Contract which Ito alleges altered the Chesterfield price from \$9.5 million to \$8.6 million. Nor did Roshco receive the operating agreement for review and comment. Although at no time did Roshco reach out to Ito to ascertain the transaction's status, Ito, as Keystone's majority member, did not attempt to reach out to Roshco either.

Particularly, at the September 2000 closing, Ito acknowledged that Roshco was not present, but made no effort to understand why he was absent nor did she object to his absence. Roshco did not hear from Ito, Ishino, Suzuki or Rich about the Chesterfield transaction until sometime after September 2000, nearly a year after the parties consummated the 1999 purchase agreement, when Roshco received a check from Rich in the amount of \$8,500, less than the originally agreed to \$12,500, for representing Keystone.

Under these circumstances, Ito has failed to raise a triable issue of fact that the Roshco Defendants were a proximate cause of any alleged sustained loss. Accordingly, that branch of the

Roshco Defendants' motion for summary judgment dismissing Ito's derivative cause of action for legal malpractice is granted, and it is hereby dismissed.

**Kudman Trachten and Rich's Motion for Summary Judgment**

The issue is whether defendants Rich and Kudman Trachten aided and abetted the breach of Suzuki's fiduciary duty, as Keystone's managing member, by purportedly assisting Suzuki to structure the Chesterfield transaction in a manner that was detrimental to Ito's interest as the holder of a majority interest in Keystone.

The principle is well settled that in order to establish a claim for aiding and abetting a breach of a fiduciary duty Ito must establish that: (1) there was a breach by a fiduciary of obligations to another; (2) defendants knowingly induced or participated in the breach, and; (3) plaintiff suffered damages as a result of the breach (Kaufman v. Cohen, 307 AD2d 113, 125 [1st Dept 2003]).

Here, Ito alleges that Suzuki, as managing member, breached his fiduciary duty to her. There is, however, a factual discrepancy between Ito and Suzuki (Suzuki Aff. pp. 4-5, 8-13; Ito 12/2/09 EBT at pp. 109-111, 117-119, 12/3/09 EBT at pp. 143-144, 181-183). As such, a factual issue exists as to whether

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Suzuki breached his fiduciary duty.<sup>2</sup> This factual issue if resolved in Ito's favor does not dispose of the issue with respect to the claim asserted against Kudman Trachten and Rich.

Assuming arguendo that Suzuki breached his fiduciary duty to Ito, defendants would be subject to liability if Rich knowingly induced or participated in the alleged breach. While Ito need not show that the alleged aider and abetter had an intent to harm, Ito must raise a triable issue of fact that Rich had actual knowledge of the breach. Constructive knowledge is insufficient (Kaufman v. Cohen, 307 AD2d at 125).

To establish that Rich had actual knowledge of the breach, Ito claims that "Rich was our attorney", and that "at the time of closing, therefore, he should know that my attorney was not at the site for closing" (Ito 12/3/09 EBT at p. 186); that she was never told about the balloon payments; that Rich altered the operating agreement; that Rich never reported alterations of documents to Roshco; that Rich failed to show her correspondence from North Fork Bank regarding the mortgages; and that Rich created payments.

Ito's assertions regarding Rich's knowing inducement or participation are, at best, conclusory. To begin, Rich's alleged

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<sup>2</sup>The parties' settlement stipulation provides that nothing contained in the stipulation "shall be deemed to be an admission of any Suzuki Defendants or any of the allegations contained in the Complaint nor an indication of the truthfulness thereof" (Plaintiff's Motion to Compel, Ex. A).

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failure to contact Roshco is flawed because Rich understood himself to be representing Keystone and so it was Ito's responsibility to contact her personal attorney.

Contrary to Ito's claim that she had no knowledge of the balloon payments Suzuki suggests that Ito was fully aware of the conditions of the mortgage (Suzuki Aff., at p. 10).

Further, although Rich drafted the operating agreement, Ito admits that she and Ishino signed it at Suzuki's office without consulting counsel or even reading the provisions. Ito's charges that Rich subsequently altered the operating agreement is unsubstantiated in this record as she offers no proof to support this claim.

Thus, when Ito signed the operating agreement, she authorized Suzuki to make business decisions on behalf of Keystone. As such, her allegations that Rich created payments and never contacted her about correspondence regarding the mortgages fall flat because Rich claims to have operated under the direction of Suzuki.

Ito's reliance on both Rich and Roshco gives her two bites at the proverbial apple in an effort to mollify her of any responsibility she has as a sophisticated business woman. At the closing, Ito relied on Katsuko's representation that Rich was Keystone's lawyer, but did not engage in a direct conversation with Rich. Ito, by relying on other's representations and not

asking questions, drew her own conclusions without conferring directly with the individual she believed to be representing her interests at the closing. Rather, once again, Ito signed a number of documents without reviewing them or asking that the documents be explained or translated.

Indeed, Rich stated that at the September 2000 closing, "I don't recall if he [Suzuki] was signing a guarantee on the loan, and I suppose if he was I was there in the capacity of counsel for him to sign anything as to do with the entity" (Rich 3/12/10 EBT at p. 66). When asked if there was any need for Ito to be personally represented, Rich responded, "Not that I can't think of" (Id.). When further asked who represented Ito in regards to the guarantee, he said, "It was the same guarantee so it would have been the same representation" (Id. at p. 74). Rich acknowledged that he represented Ito "in the same capacity that I represented Mr. Suzuki in conjunction with the loan and guarantee that anyone had to sign at the loan" (Id. at p. 77).

Damages must be actual and ascertainable, and not speculative or incapable of being proven without any reasonable certainty (Zarin v. Reid & Priest, 184 AD2d 385 [1st Dept 1992]). In 2002, when Suzuki sold units of the Chesterfield, Ito believed, based on her conversations with Tom Hoffman, her attorney at the time, that the units were sold below market value. Ito proffers no evidentiary support for this assertion

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other than Hoffman's advice. In 2009, Ito valued the remaining two Chesterfield units to be approximately \$500,000 each. Ishino calculated the losses to be approximately \$15 or \$16 million. Under these circumstances, Ito has failed to raise a triable issue fact as to her damages.

Accordingly, Kudman Trachten's and Rich's motion for summary judgment dismissing the fifteenth cause of action (aiding and abetting a breach of fiduciary duty) is granted, and it is dismissed as against them.

#### **Plaintiff's Motion to Renew**

The principle is well settled that renewal is proper where additional material facts which existed at the time that the prior motion was made were not then known to the party seeking leave to renew and that a valid excuse must be offered for not supplying such facts (CPLR 2221(e)).

Ito relies on the November 13, 2006 decision/order in which Supreme Court (Justice Diamond) dismissed Ito's legal malpractice and conflict of interest malpractice claims against Rich, and Kudman Trachten. In that regard, Supreme Court held that "[a]lthough Ito alleges in a conclusory fashion that at the closing Rich 'purportedly' represented Keystone and 'gave the appearance' that he was representing her and Keystone, she provides no basis for these assertions."

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Here, Ito asserts that after a long period of silence Rich's February 2010 and March 2010 EBTs revealed new evidence that confirms Ito's belief that Rich represented Ito and Keystone at the closing to warrant renewal of the fifth and sixth causes of action. In that regard, Rich testified that at the September 5, 2000 closing in which the purchase agreement was signed he and Kudman Trachten represented Keystone at the request of Suzuki, the managing member. Rich also testified that so far as any representation was needed pertaining to the Guarantee he represented Ito.

Ito's arguments are unavailing. Ito neglects to mention the October 26, 2007 decision/order in which Supreme Court (Justice Diamond) specifically stated:

As the court noted, the allegations in the complaint that Rich and, therefore, Kudman Trachten actually represented Keystone were conclusory at best and were contradicted by Ito's other allegation that "Rich knew that Markowitz & Roshco was Keystone's attorney." Moreover, Ito signed the operating agreement which gave Suzuki operational control of Keystone, including the right to sell Keystone's assets at the alleged urging of Suzuki, not Rich or Kudman Trachten. Seeking to avoid the effect of the operating agreement, Ito argues that she should be excused from having signed the agreement since it was written in English, a language she did not understand, she was not represented by an attorney, and she saw only the last page of the agreement. This argument is without merit. ... Thus, to the extent Ito seeks to sue Rich and Kudman Trachten derivatively on behalf of Keystone for actions they allegedly took at Suzuki's directive, she is barred from doing so by the document that she signed giving Suzuki the authority to make Keystone's business decisions.

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On appeal, the First Department held "absent actual representation by Rich and Kudman Trachten plaintiff's claims of legal malpractice are untenable as against those defendants" (Ito v. Suzuki, 57 AD3d at 205).

Further, at her EBT, Ito was asked about her legal representation at the September 2000 closing:

Q: At the closing, what was your understanding as to which attorney was representing you personally?

A: Yes.

Q: The question is, what was your understanding?

A: My understanding was Rich was representing Keystone.

Q: Who did you believe was representing you individually?

A: Roshco.

Q: And was Mr. Roshco present?

A: No.

Q: Did you call Mr. Roshco at any point in time at the closing?

A: I did not, no.

Q: Did you make any objection to the closing proceeding without Mr. Roshco present at any point during the closing?

A: I did not object.

(Ito 12/2/09 EBT at pp. 90-91).

Under these circumstances, the evidence Ito relies on is not "newly discovered" and, even if it were, Ito did not have a

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belief or reasonable reliance that she was personally represented by Rich at the closing.

Accordingly, Ito's cross-motion to renew its fifth (malpractice) and sixth (conflict of interest malpractice) causes of action is denied.

**Motion to Confirm Judgment**

That branch of Ito's cross-motion to direct the Clerk to enter the confession of judgment is granted. Ito's attorney's affirmation provides that Suzuki is in default of payment, and that a November 12, 2010 letter was sent certified mail to Suzuki's attorney notifying him of his default with no response.

ORDERED that Markowitz & Roshco and Daniel Roshco's motion for summary judgment dismissing against them the legal malpractice cause of action (Mtn. Seq. No. 012) is granted, and it is dismissed; and it is further

ORDERED that defendant Stuart I. Rich's motion for summary judgment dismissing against him the cause of action of aiding and abetting a breach of a fiduciary duty (Mtn. Seq. No. 013) is granted, and it is dismissed against him; and it is further

ORDERED that defendant Kudman Trachten LLP's motion for summary judgment dismissing against it the cause of action of vicariously aiding and abetting a breach of a fiduciary duty (Mtn. Seq. No. 014) is granted, and it is dismissed; and it is further

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ORDERED that plaintiff Yuko Ito's cross-motion to renew (Mtn. Seq. No. 015) is denied; and it is further

ORDERED that that branch of Ito's cross-motion for an order directing the Clerk to file the original confession of judgment in the amount of \$320,000 in favor of Ito and against defendant Sam Suzuki (Mtn. Seq. No. 016) is granted, and upon service of a copy of this order with notice of entry on the Clerk the Clerk is respectfully directed to enter and file the confession of judgment.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 5/16/11



HON. JEFFREY K. OING, J.S.C.

**FILED**

**MAY 18 2011**

NEW YORK  
COUNTY CLERK'S OFFICE