

**Resmac 2 LLC v Backenroth, Frankel, & Krinsky,
LLP**

2012 NY Slip Op 33560(U)

October 15, 2012

Sup Ct, NY County

Docket Number: 652063/2012

Judge: Melvin L. Schweitzer

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

RESMAC 2 LLC

INDEX NO. 652063/2012

-v-

MOTION DATE

BACKENROTH, FRANKEL + KRINSKY, LLP, et al

MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).

Answering Affidavits — Exhibits No(s).

Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is to dismiss the Complaint is GRANTED per the attached Decision and Order.

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

Dated: Oct 15, 2012

Melvin L. Schweitzer signature and stamp

- 1. CHECK ONE: CASE DISPOSED (checked), NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED (checked), DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

-----X	
RESMAC 2 LLC,	:
	:
Plaintiff,	:
	:
-against-	:
	:
BACKENROTH, FRANKEL, & KRINSKY, LLP, and	:
ABRAHAM BACKENROTH,	:
	:
Defendants.	:
-----X	

Index No.: 652063/2012
DECISION and ORDER
Motion Sequence No. 001

MELVIN L. SCHWEITZER, J.:

This matter arises from the allegations that defendants Backenroth, Frankel, & Krinsky, LLP, a law firm (BKF), and Abraham Backenroth, an attorney affiliated with BKF, (collectively, “Defendants”) committed legal malpractice and were negligent in their representation of plaintiff Resmac 2 LLC (Resmac) with respect to the purchase of a mortgage held on certain properties that were part of a bankruptcy estate. Defendants now move to dismiss the Complaint in its entirety pursuant to Civil Practice Law & Rules (CPLR) § 3211(a)(1) and (a)(7). Resmac opposes the motion.

Background

Accepting the allegations in the complaint as true, the following facts emerge: On or about August 11, 2006, non-party Madison Realty Capital, L.P. (Madison) made a loan to non-party Victory Memorial Hospital (VMH) in the principal amount of \$5.2 million (the loan). Complaint, ¶ 4. On that day, Madison and VMH executed a Mortgage Note, a Mortgage Security Agreement, and an Assignment of Leases and Rents (collectively, the “Mortgage”). *Id.* The loan was secured by the Mortgage and certain real properties (the VMH Properties). *Id.*, ¶¶ 5-6.

Non-party Stewart Title Insurance Co. (Stewart Title) insured the Mortgage. *Id.*, ¶ 8. For reasons not specified in the Complaint, the Mortgage was not recorded with the New York City Register until October 20, 2006. *Id.*, ¶ 7.

On or about November 15, 2006, VMH filed a voluntary petition for bankruptcy pursuant to Chapter 11 of the United States Bankruptcy Code (the VMH Bankruptcy). *Id.*, ¶ 9.

Resmac Purchases the Mortgage

In late January 2008, Resmac sought to purchase the Mortgage from Madison, and hired Defendants - who held themselves out as experts in Bankruptcy law - to conduct due diligence on the proposed transaction. *Id.*, ¶ 11. Resmac specifically hired Defendants to review the Mortgage documents and ensure that Madison held a secured lien on the VMH Properties so as to avoid any challenges to its position as a secured lender in the VMH Bankruptcy. *Id.* On or about February 11, 2008, Resmac purchased the Mortgage from Madison for approximately \$4.7 million. *Id.*, ¶ 10.

Immediately after the sale closed, VMH's Committee of Secured Creditors (the Creditors' Committee) raised the specter that the Mortgage could be voidable as a preferential transfer under section 547 of the United States Bankruptcy Code (Section 547). *Id.*, ¶ 13. Section 547 permits a debtor to set aside a transfer that occurred within 90 days of the filing of the bankruptcy petition. *Id.*, ¶ 14. Since the Mortgage was recorded 26 days before VMH filed its petition, the Creditor's Committee argued that the Mortgage was voidable. *Id.*, ¶ 15.

The Adversary Proceeding

In May 2008, the Creditor's Committee commenced an Adversary Proceeding in the VMH Bankruptcy to set aside the Mortgage as a preferential transfer (the Adversary Proceeding). *Id.*, ¶ 18. After discovery and on the eve of trial, in October 2008, Resmac and the Creditor's Committee reached a settlement wherein Resmac could enforce a secured claim up to \$4.7 million against the VMH Properties. *Id.*, ¶ 19. Subsequently, Resmac foreclosed on the VMH Properties, obtained title, and sold some of the properties for \$3.4 million, but avers that it has yet to recoup the entirety of its initial investment of \$4.7 million. *Id.*, ¶ 20.

The Stewart Title Litigation

Resmac sought indemnification from Stewart Title for the costs incurred in the Adversary Proceeding, and commenced an action in New York Supreme Court seeking to recoup the associated defense costs (the Stewart Title Litigation).¹ *Id.*, ¶ 21. Resmac admitted in that action that it failed to provide Stewart Title with notice of the Adversary Proceeding and, consequentially, the court (Ramos, J.) dismissed the claims against Stewart Title because the insurance policy conditioned litigation coverage on notice. Affirmation of Robert J. Bergson in Support of the Motion (Bergson Aff.), Ex. B, Decision and Order Dated July 16, 2010, at pp. 14-15. The Appellate Division, First Department reversed, finding that while Resmac did not notify Stewart Title of the Adversary Proceeding, Stewart Title had in fact learned of it from another source, was therefore not prejudiced by Resmac's failure to do so, and ordered Stewart Title to reimburse the fees and costs to Resmac. *Id.*, Appellate Division Order dated July 7, 2011 (the

¹ The Stewart Title Litigation included additional claims, including some asserted against Madison, which are irrelevant to this motion.

Appellate Order), at p.103. Stewart Title and Resmac subsequently executed a stipulation wherein Stewart Title agreed to pay Resmac \$700,000 as reimbursement for the legal fees and costs incurred in the Adversary Proceeding. *Id.*, ¶ 22; Bergson Aff., Ex. E. Resmac alleges that it expended an additional \$300,000 in legal fees, plus interest and related expenses, in prosecuting the Stewart Title Litigation. *Id.*, ¶¶ 23, 32.

Resmac Commences This Action

On or about June 13, 2012, Resmac commenced this action against Defendants. In Count I, Resmac alleges that Defendants were negligent in their due diligence pertaining to the purchase of the Mortgage in that Defendants (a) had a duty to provide the type of care that an ordinary member of the legal profession practicing bankruptcy law would provide; (b) breached that duty in that they failed to advise Resmac that the Mortgage was not timely recorded and possibly subject to an objection under Section 547; and (c) that, as a result, Resmac has been damaged in the “loss of use” of its \$4.7 million investment in the Mortgage and \$300,000 in legal fees associated with the Stewart Title Litigation, totaling at least \$1.8 million in damages. *Id.*, ¶¶ 25-34. In Count II, Resmac alleges that Defendants committed legal malpractice in that Resmac would not have incurred legal fees in the Adversary Proceeding and the Stewart Title Litigation but for Defendants’ failure to advise Resmac of the bankruptcy-related issues, and seeks damages in an amount not less than \$1.8 million. *Id.*, ¶¶ 35-39.

The Instant Motion

On or about July 31, 2012, Defendants moved to dismiss the Complaint pursuant to CPLR § 3211(a)(1) and (a)(7), arguing that (a) documentary evidence proves that Resmac received \$700,000 to fully compensate it for expenses incurred in the Adversary Proceeding;

(b) Resmac now holds title to the VMH Properties and is in the exact same economic position that it would have been had it foreclosed on the Mortgage as originally intended; (c) Resmac fails to allege that Defendants are the “but for” cause for any damages that it allegedly sustained; (d) lawyers are not guarantors of their clients’ ultimate success; and (e) the negligence claim is duplicative of the legal malpractice cause of action.

In opposition, Resmac argues that it (a) has sufficiently stated a claim for legal malpractice and (b) can plead negligence in the alternative.

Discussion

The Standard for Dismissal under CPLR 3211

Defendants move to dismiss the Complaint pursuant to CPLR § 3211 for failure to state a claim upon which relief can be granted. In considering a motion to dismiss, the court must accept plaintiff’s allegations as true and the complaint must be accorded “the benefit of every possible favorable inference.” *CMMF, LLC v J.P. Morgan Inv. Mgt. Inc.*, 78 AD3d 562, 565 (1st Dept 2010) quoting *Leon v Martinez*, 84 NY2d 83, 87 (1994). The CPLR 3211 (a) (7) test is not whether the complaint states a cause of action, but whether plaintiff has one. See *Rovello v Orofino Realty Co.*, 40 NY2d 633 (1976). Furthermore, dismissal under CPLR 3211 (a) (1) is warranted only if documentary evidence conclusively establishes a defense to the asserted claims as a matter of law. *511 West 232nd Street Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 (2002).

Count II - Legal Malpractice

In order for Resmac to sufficiently state a claim for legal malpractice, it must allege that (a) Defendants were negligent; (b) the negligence was the proximate cause of the loss sustained –

colloquially referred to as the “but for” test; and (c) it suffered actual damages. *Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman, & Dicker*, 56 AD3d 1 (1st Dept 2008). Here, Resmac alleges that Defendants were negligent in their failure to advise Resmac that the Mortgage could be subject to an objection under Section 547, that it incurred legal fees in the Adversary Proceeding and the Stewart Title Litigation as a result of this negligence, and that it suffered damages in an amount not less than \$1.8 million. Complaint, ¶¶ 37-39. A close examination of the attending circumstances surrounding the legal fees reveals, however, that Resmac fails to sufficiently allege that they are the product of Defendants’ alleged failure to fully advise Resmac about the Mortgage.

First, Resmac has a judgment against, and an agreement with, Stewart Title to compensate it for the fees associated with the Adversary Proceeding. Complaint, ¶22; Bergson Aff, Ex. E. As such, Resmac has recouped the fees associated with defending the Adversary Proceeding, or is close to doing so, and therefore cannot allege that it continues to suffer actual damages resulting from that proceeding. *Reibman v Senie*, 302 AD2d 290 (1st Dept 2005).

Second, the fees associated with the Stewart Title Litigation are not the proximate cause of Defendants’ alleged malpractice, but rather Resmac’s failure to notify Stewart Title, as the title insurance agent, of the Adversary Proceeding. *Id.*, Ex. B, Decision and Order dated July 16, 2010, at pp. 14-15. Indeed, had Resmac advised Stewart Title of the Adversary Proceeding, there would have been no need for Resmac to commence an action for indemnification in New York Supreme Court. As such, Resmac’s dereliction in contacting its insurance agent is a superceding event that negates any contention, as a matter of law, that Defendants were the proximate cause of the fees expended in prosecuting the Stewart Title Litigation. *Pyne v Block*

Associates, 305 AD2d 213 (1st Dept 2003). Resmac, therefore, cannot state that the costs incurred in prosecuting the Stewart Title Litigation are attributable to Defendants.

For the foregoing reasons, the motion to dismiss the legal malpractice claim is granted.

Count I - Negligence

The standard for asserting a claim sounding in negligence is well established: a plaintiff must allege that the defendant owed a duty, breached that duty, and caused the ensuing damages. *Federal Deposit Ins. Co. v Lamattina*, 27 Misc 3d 1236(A) (NY Sup. Ct. 2010). Here, Resmac alleges that Defendants owed it a duty as its attorneys, that they breached that duty by failing to advise it of the potential Section 547 claim, and that it suffered damages for the “loss of use” of its \$4.7 million investment, thereby entitling it to interest believed to exceed \$1.5 million, and \$300,000 in legal fees incurred in the Stewart Title Litigation. Complaint, ¶¶ 29, 30, 32-34.

The allegations pled in support of the negligence claim are, for the most part, identical to those found under the legal malpractice claim, namely, that Defendants’ negligence is rooted in their failure to exercise due care and advise Resmac of the Mortgage’s susceptibility to a preference claim. The distinguishing factor is that while Resmac pleads that the byproduct of Defendants’ alleged legal malpractice are the legal fees associated with defending the Adversary Proceeding and prosecuting the Stewart Litigation, the negligence claim additionally alleges entitlement to the “loss of use” of Resmac’s \$4.7 million, an amount believed to exceed \$1.5 million in interest.

A review of the Complaint reveals that while Resmac sufficiently states that Defendants owed it a duty and breached that duty, it fails to allege that damages resulted therefrom.² Resmac states that it purchased the Mortgage for \$4.7 million in the hopes that it would be a secured creditor in that amount in the VMH Bankruptcy. Complaint, ¶¶ 10-11. After surmounting the hurdles of the Adversary Proceeding, Resmac's position was as a secured creditor in the VMH Bankruptcy for \$4.7 million, and it subsequently acquired title to the VMH Properties – the *exact* position it aspired to when it first retained Defendants and purchased the Mortgage. *Id.*, ¶ 19.

Resmac pleads, however, that its damages lie in the “loss of use” of the \$4.7 million that it invested in the Mortgage. Complaint, ¶ 32. Stated differently, Resmac alleges that had it not been for Defendants' negligent advice, it would have invested the \$4.7 million elsewhere, which could have produced a higher return than the \$3.4 million it has obtained to date through the sale of certain VMH Properties. Accordingly, the argument continues, Resmac is entitled to damages in the amount of interest on its loss of use of its \$4.7 million, calculated to be in excess of \$1.5 million.³

The contention that Resmac *could* have used the \$4.7 million in another venture and that its inability to do so is attributable to Defendants' incomplete legal opinion is far too speculative and attenuated to sufficiently state damages in support of a negligence or legal malpractice claim. *See Phillips-Smith Speciality Retail Group II, LP v Parker Chapin Flattau & Klimpl,*

² For the reasons stated *supra*, Resmac fails to sufficiently plead that the fees associated with the Adversary Proceeding and the Stewart Title Litigation are damages resulting from Defendants' negligence.

³ The authorities upon which Resmac relies to support this damages claim concern interest that accrues upon the issuance of a judgment, not the speculative lost ability to use monies for an alternative investment. *See Kaiser v Fishman*, 187 AD2d 623 (2d Dept 1992); *Prager v New Jersey Fidelity & Plate Glass Ins. Co.*, 245 NY 1 (1927).

LLP, 265 AD2d 208 (1st Dept 1999) (“contentions that are couched in terms of speculations are insufficient as a matter of law to establish that defendants’ negligence, if any, was the proximate cause of plaintiff’s injuries”). Attorneys are not guarantors that their clients’ transactions will result in a financial gain. *Ayala v Fischman*, 2001 WL 1491292 (SDNY Nov. 26, 2001). As such, Resmac cannot establish that Defendants’ negligence is the proximate cause of Resmac’s inability to profit from its initial \$4.7 investment in the VMH Properties, especially in light of the fact that Resmac now stands in the precise economic position it sought to be in when it purchased the Mortgage. Nor can Resmac’s hopeful objective of finding an alternative investment which could have produced a better return which did not materialize be said to have been caused by Defendants’ alleged negligence.

For the foregoing reasons, the motion to dismiss the negligence claim is granted.⁴

Accordingly, it is


ORDERED that the motion to dismiss the Complaint in its entirety is granted.

This shall constitute the decision and order of the court.

Dated: October 15, 2012

ENTER:

J.S.C.


MELVIN L. SCHWEITZER
J.S.C.

⁴ The court finds that the negligence claim duplicates the cause of action sounding in legal malpractice. While Resmac articulates an additional basis for damages under the negligence claim, to wit, the “loss of value” of its \$4.5 million, both claims are premised on the same facts and seek identical damages of at least \$1.8 million. *Carl v Cohen*, 55 AD3d 478 (1st Dept 2008).