

4777 Food Serv. Corp. v DeMartin & Rizzo, P.C.

2013 NY Slip Op 33007(U)

October 29, 2013

Sup Ct, Suffolk County

Docket Number: 05723/2009

Judge: Ralph T. Gazzillo

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SHORT FORM ORDER

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

COPY

POST-TRIAL DECISION

PRESENT:

Hon. RALPH T. GAZZILLO
A.J.S.C.

-----X	:	
4777 Food Services Corp.,	:	Anthony P. Gallo, PC
	:	6080 Jericho Turnpike
Plaintiff(s),	:	Commack, N.Y. 11725
- against -	:	
	:	Edward J. Boyle, Esq.
DeMartin & Rizzo, P.C., et.al.,	:	500 Manhasset Woods Road
	:	Manhasset, N.Y. 110030
Defendant(s).	:	
-----X	:	

The non-jury trial of this matter was held before the undersigned on July 8th and 9th, 2013. Prior to the testimony, a number of documents were pre-marked as exhibits and/or evidence. Additionally, a number of background facts which are not in serious dispute were stipulated and agreed to by the parties. Specifically, it was acknowledged by both sides that the subject commercial premises, an International House of Pancakes (IHOP) restaurant located at 513 Patchogue Road, Port Jefferson, New York, was rented by the plaintiff. The plaintiff retained the defendant law firm to represent it during the negotiation and securing of the lease as well as acquiring the franchise/business. The transfer took place on November 25, 2005. The initial landlord/lessor was David Chen; thereafter, ownership of the property was transferred to Salvatore Petrizzino who took it subject to the lease.

The plaintiff's two-fold contentions are that prior to the transfer from Chen the defendants: 1) failed to ascertain if the premises had a valid certificate of occupancy (hereinafter "C/O"), and 2) failed to advise the plaintiff that the amount of rent payable would be the greater of either: a) the specified, fixed and so-called "minimum" rent contained in the lease, or b) 10% of the store's gross yearly revenues after deductions for sales tax (hereinafter "the 10% clause"). Plaintiff's original complaint alleged two causes of action, the first sounding in contract, the second in legal malpractice. After motion practice and for the reasons stated by the undersigned in the order dated October 29, 2009, the first cause of action was dismissed. As to the remaining cause of action - the alleged malpractice - the plaintiff seeks money damages in the amount of no less than \$164,000.00. By counterclaim, the defendants seek money damages of \$11,500.00 based on their allegations that

the plaintiff did not entirely pay the fee for legal services.

With respect to the plaintiff's case, it called three (3) witnesses: Michael Belsito, Christopher Foerster, and Barry Warren. Joseph N. Rizzo, Jr. was called on the defendants' behalf.

At the conclusion of the proceedings, in lieu of summations and after the defendants' application for a trial order of dismissal, both sides were invited to submit written factual and legal arguments as well as any requests for findings of fact pursuant to CPLR §4213 by August 30, 2013¹. Those memoranda having since been received and reviewed, the Court notes the following:

TESTIMONY

The various contentions of the relevant and germane facts of this matter, as they were portrayed, purported, and alleged by each witness, may be summarized as follows:

Michael Belsito

Belsito began his testimony by indicating that he has known the defendant Rizzo for over twenty years. Belsito is the president of the plaintiff corporation, an IHOP restaurant. He also stated that it was years ago when - through his thereafter partner, Foerster - he first learned of the possibility of purchasing the franchise and store. After that, there were initial discussions of the terms of a lease with Chen, and meetings in Queens. The sale was outlined and there was a brief discussion as to lease and he was furnished with "tax returns, numbers" and other information, but nothing was said as to rent. Various negotiations followed and would span many months, starting in 2004 and ending in November of 2005. During this time they discussed the purchase of two stores, one in Lake Grove and one in Port Jefferson. Present during those discussions were, Belsito, Foerster, the defendant Rizzo, Chen and Chen's attorney. Initially, Belsito and Foerster were only interested in a Lake Grove store and not in the Port Jefferson location but Chen insisted that they take both or none at all.

As to the lease, its length and options were discussed and Rizzo represented them. At meetings held at Chen's attorney's office in Great Neck, there were several discussions about the rent. It started at \$7,000.00 a month with additional rent pursuant to the 10% clause. Belsito wanted a 10% rent reduction if sales went below \$840,000.00 a year. No documents, however, had yet been exchanged. When presented with a draft the monthly rent specified was not as agreed. At Chen's suggestion during a subsequent meeting it was adjusted to \$8,000.00 a month but with the 10% reduction clause as Belsito wanted it. Belsito agreed.

Present at the closing were Belsito, Foerster, Rizzo, two representatives from IHOP, a representative of GE Capitol (who lent Belsito the purchase money), Chen and his wife, as well as

¹ After plaintiff's counsel's request, the submissions were not received until mid-September 2013.

Chen's lawyer. Belsito signed loan documents, franchise documents, guarantees to IHOP, leases, and other papers. He did not review the lease prior to signing it, as he was handed it and told to sign. As to the rent, there was a brief discussion and he asked Rizzo, "Did we get what we asked for?" to which Rizzo replied, "Yes." When the closing was completed, Belsito left but without any documents as Rizzo had retained them all. It wasn't until months later—August 1, 2006—that Belsito received a document package, and that was the first time got a copy of the lease. He reviewed it briefly and filed it. The next time he reviewed it was late in 2006 or early 2007 after Chen called and said he was owed money, adding "Read your lease. There's a clause in there that says you owe me ten percent of your sales over \$960,000." Finally, in February of 2007, he spoke with spoke Rizzo who said he would see what he could do. Belsito didn't know what that meant, but expected Rizzo would look into it.

Belsito eventually negotiated Chen's claim from an upper \$30,000.00 range and instead paid him \$30,000.00 in additional rent. In 2007, the property was sold to Petrizzino and he too wanted the additional rent (specifically \$51,000.00) based on the recent sales. Belsito paid it, but had the lease amended to incorporate additional property, an increase in the rent, while removing the 10% clause.

Petrizzino had also raised the matter of the C/O. Apparently the issue had been raised by his lender at his closing for the purchase of the property and resulted in money being held in escrow pending its resolution. Specifically the problem was that the seating at the location was above that legally authorized. Petrizzino wanted Belsito to remedy it. Other than briefly before leasing the premises, Belsito had not discussed seating with Rizzo as it was not an issue at that time and Belsito expected the amount of seats would be enough for an IHOP. After he took possession, Belsito had had some work done on the premises, but not any remodeling, additional seating, or structural changes and even the mixer in kitchen was the same. Belsito did some of the work at a cost of \$5,000.00. The C/O was finally issued on July 20, 2010.

On cross-examination, he admitted that the C/O issue never resulted in a fine or disruption of business. He was unable to produce records showing how many customers came to the store. He believed IHOP had responsibility for the C/O and Rizzo had gotten a representation from IHOP that the premises was lawful for the franchise. Although Belsito didn't examine it before signing, the Lake Grove lease also had an additional rent clause. He paid \$1,250,000.00 for both stores; of the two, Lake Grove was the more attractive. As to the Port Jefferson lease, he admitted that the original lease contained the 10% rent increase. On a draft of that proposed lease he acknowledged that the word "deal" was handwritten, underlined, and followed by a question mark (i.e., "Deal?"). This is next to the rent increase clause and was written by Rizzo. Belsito indicated that had he seen the clause at the closing he would have objected to increase. He also acknowledged signing the addendum which also referred to "minimum rent." He could not, however, explain (nor at the closing did he inquire) why "minimal rent" and not "annual rent" was used. Subsequently, when Chen made his demand for additional rent, Belsito never put into writing any claim against Chen for fraud, never sued him for fraud or pursued any action grounded on allegations that the additional rent claim was made under false pretenses. Moreover, he never told Petrizzino that he had been

defrauded into signing the lease, but did say it was not what he agreed to and that the store couldn't sustain such a rent. He also indicated that the new lease with Petrizzino embraced additional property beyond the original Chen lease.

Belsito originally testified that Chen had told him that the only way he was going to get the property was a minimal rent plus part of the proceeds. Following the day's luncheon recess, however, he changed his testimony and volunteered that this was told to him through Rizzo.

As to the counter-claim, he admitted that the closing statement shows legal fees of \$31,500.00, payable in installments of \$10,000.00, followed by \$2,500.00 a month, and a final payment of the balance of \$1,500.00. He admitted that this was their agreement and that he had paid a total of \$20,000.00. Thereafter, there was a bill for other services which he rejected, and he couldn't recall retaining Rizzo for any other services after April 12, 2006. He admitted, however, that when he called him in February of 2007, they spoke about the C/O issue.

In February 2007, he found out about the C/O issue and just before a 2010 inspection, he removed seating; until then he utilized all the seating. Since the beginning, the Port Jefferson store produced increasing annual revenues, each exceeding one million dollars. The Chen-to-Petrizzino closing's escrow moneys reimbursed him for the expenses he had incurred to correct the C/O issue.

Christopher Foerster

Foerster testified that he was Belsito's business partner and a shareholder and officer in the corporation. He had 20 years in the IHOP business and had been involved in all aspects, including handling contracts. He had been looking for a site and was interested in the Lake Grove location and had negotiated with Chen, having had met with him and Belsito in 2003. In his words, the transaction was a "take both or nothing" deal as Chen drove a hard bargain. By the next meeting, they had retained Rizzo who attended "most of the meetings." After an initial meeting, Foerster met with Chen, his lawyer, Belsito, and Rizzo. After a few more meetings draft leases were given out, the first of which had the rent with the 10% clause. Both he and Belsito indicated to Rizzo that was not as agreed. The next draft increased the rent to \$8000.00 a month but contained the downward protection clause. The lease indicated a seating capacity of 110.

The closing consumed six hours during which he signed a number of papers including a guarantee with IHOP for the GE Capital note. There was no conversation as to lease's terms and Rizzo didn't explain any of the papers.

He first became aware of the C/O problem in early 2007, when an expeditor wanted to know "something" about wallpaper and other matters. Seating was reduced by six (6) seats sometime in 2007. (As indicated below, however, he was precluded from testifying as to calculations of damages, but, in essence, his estimate claimed \$90,000.00 a year, computing customer average, table-turn-over, and the days they were full to capacity.)

On cross-examination, he indicated that while the C/O issue arose in 2007, the verified complaint was not served until 2009. Also, the lease fixes the maximum number of seats at 110 and they never had more. He told Rizzo the maximum amount of rent they agreed to was \$7,000.00 a month but later said they'd agree to \$8,000.00 as long as there was the 10% reduction clause. This was not, however, memorialized in a writing to Rizzo. Foerster stated that he had reviewed the drafts and saw the additional rent provision. He also admitted that while rent is one of the most important aspects of the business, he never examined the lease at closing, nor ever saw a draft with the negotiated amount of rent. He also stated that Chen told him he'd give them the 10% safety net and this was before he saw the first draft; he told Rizzo when that draft didn't contain it.

Barry Warren

Warren's testimony was the least complex and contentious. A general practitioner admitted since 1970, he enjoys wealth of experience in private practice and is an active member of the Suffolk County Bar Association, including a term as its president and service as the chair of both its ethics as well as its grievance committees. During the course of his career he has represented sellers and purchasers of commercial real property. Also, as Village Attorney for the Incorporated Village of Port Jefferson he is familiar with permissible uses of property, and has lectured on land use.

His expertise having been established, he indicated that the defendant "did nothing" to "verify, much less ascertain what the C/O called for or what the permitted use of the property would allow." He added that in his expert opinion, that failure was malpractice. Moreover, he opined that an attorney is obligated to verify the legality of the proposed usage and the failure to do so fell below the standard of care due the client. Similarly, he faulted the asserted handling of the rent issue.

On cross-examination, he indicated that ordinarily, rent and similar issues are resolved by the parties prior to the entry of the any attorneys. He also admitted that an attorney might be retained not to negotiate but to memorialize the agreement and that in a six hour closing there would be down time. Also, in his preparation for his testimony he had never seen a document that conformed with the plaintiff's alleged desires *vis-a-vis* the rent.

Joseph N. Rizzo, Jr.

Rizzo testified as to his educational and professional history. In 2011 he ceased practice and moved to Vermont and has resigned from the New York State Bar. Prior to this, he has never been sued for malpractice. He first met Belsito in 1982 when he leased the first of many cars from him. Prior to the matter at bar, Rizzo had previously represented him, and they had had a long personal and professional relationship. In December of 2003 or January of 2004 (approximately a year prior to the closing), Belsito had called him about the IHOP purchase and retained him thereafter. Repeatedly, he contended he never took part in the negotiations and that Belsito was the "sole negotiator of the transaction" and conducted the financial negotiations and while his limited role was to oversee and negotiate the "boilerplate" aspects of the lease/transfer. He indicated he was never given any of the financial information regarding the Port Jefferson store, never analyzed such data,

nor made any recommendations as to whether the venture was a prudent investment. With respect to the lease drafts, he acknowledged receipt of the first and that some of the handwritten notes are his but others are not and were added after he saw it; he claimed never to have seen the second draft. He first saw the initial draft in January of 2005, and the notes indicate those were areas where he and Belsito “need[ed] to talk about” but other comments in margin are not his and were added after his review.

He also indicated that no one ever told him the negotiated terms of the rent were different than those contained within the lease. Additionally, he stated that the “plus 35 percent” and “plus 29 percent” indications *et cetera* on the draft lease (page 3) were not in his hand. He reviewed the lease page by page with his clients and spent several hours reviewing it with the lessor and his clients. By way of example of changes he caused, he pointed to the amended “Gross Receipts Defined” paragraph (11 (b)). He indicated that Belsito reviewed the lease but had no questions and never told him of a rent reduction demand. He indicated, adamantly, that if that were the case he would have discussed it with Belsito and that he first heard of the reduction demand in 2009 when he was served with this matter’s summons and complaint. He added that after closing he never heard any complaints from Belsito regarding the rent or any violations of the lease by Chen.

On cross-examination, he revealed that when he noticed an increase of the monthly rent from \$7,000.00 to \$8,000.00 he didn’t discuss it with his client as he didn’t take part in the financial negotiations. His role, he contended, was to focus on the “boilerplate”; that is, other than the lease’s definition of “gross receipts” he was not involved in the financial or dollars and cents issues and he had not been engaged to handle financial negotiations. Stated otherwise, he had “zero” input on the “dollar issues.” His deference to Belsito was based upon his view that Belsito was a sophisticated man and was being assisted by his father-in-law. Rizzo trusted Belsito knew what he was doing as Belsito and his father-in-law² knew the business. Additionally, Belsito had been the sales manager at Rallye Motors, a high end auto dealership, while his father-in-law had owned several IHOPs. They—not he—were familiar with the financial data and had the sales numbers on four (4) IHOPs. He indicated that he was not at all the meetings and Belsito had negotiated the financial terms before he entered the transaction. As far as he was concerned, Belsito was in charge with the financing and finances of the transaction. He indicated that the attorney-client relationship ended sometime before April 12, 2006, and the closing. He also stated his opinion that Chen was “shady.”

LAW

First and foremost, having observed the witnesses, “the very whites of their eyes,” on direct as well as cross-examination, the so-called “greatest engine for ascertaining the truth,” *Wigmore on Evidence*, §1367, the Court is satisfied that the exercise has been fruitful and more than sufficient to determine the credible information as well as to simultaneously filter out that which is less than

² As this portion of the record indicates, it is not clear whether he was referring to Belsito’s father, father-in-law, or both.

reliable. Secondly, it should go without saying that in evaluating each witness' contributions to the resolution of the controversies in this matter—as well as all such determinations—it is hornbook law that the quality of the witnesses, not the quantity, is determinative. *See, e.g., Fisch on New York Evidence*, 2d ed., §1090. As to the quality of any given witness, the flavor of the testimony, its quirks, a witness' bearing, mannerisms, tone and overall deportment cannot be fully captured by the cold record; the fact-finder, of course, enjoys a unique perspective for all of this, and the ability to absorb any such subtleties and nuances. Indeed, appellate courts' respect and recognition of that perspective as well as its advantages is historic and well-settled in the law. *See, e.g., Latora v. Ferreira*, 102 AD 3d 838 (2d Dept 2013); *Hom v. Hom*, 101 AD3d 816 (2d Dept 2012). Also worthy of examination is any witness' interest in the litigation. *See, e.g., 1 NY PJI2d 1:91 et seq.*, at p.172. The length of time taken by either side's case or any witness' testimony is, however, clearly non-conclusive. Lastly, it should be underscored and acknowledged that during the course of gauging a witness' credibility as well as conducting the fact-finding analysis, the undersigned's continuous tasks also included, of course, segregating the competent evidence from that which was not, an undertaking for which the law presupposes a court's unassisted ability. *See, e.g., People v. Brown*, 24 NY2d 168 (1969); *Matter of Onuoha v. Onuoha*, 28 AD3d 563 (2d Dept 2006).

Those tasks and duties aside, there is also the purpose and goal of the trial, *viz.*, to try or test the case. It is hornbook law that the yardstick for measuring causes of actions such as the matter at bar is the same whether the trial is by bench or jury: The burden of proof rests with the plaintiff who must establish the truth and validity of each claim by a fair preponderance of the credible evidence. Stated otherwise, in order for a plaintiff to prevail on any individual claim, the evidence that supports that claim must appeal to the fact-finder as more nearly representing what took place than the evidence opposed to it; if the evidence does not, or if that evidence weighs so evenly that the fact-finder is unable to indicate that there is a preponderance on either side, then the question is decided in favor of the defendant. Only when the evidence favoring a plaintiff's claim outweighs the evidence opposed to it may that plaintiff prevail.

Beyond those concepts generally applicable to most actions, there is also the law germane to the specific causes of action contained in the matter at bar. As to the plaintiff's complaint, “[i]n 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 (*see McCoy v. Feinman*, 99 NY2d 295, 301-302 [2002]) and that the plaintiff would have succeeded on the merits of the underlying action ‘but for’ the attorney’s negligence. (*See Davis v. Klien*, 88 NY2d 1008 [1996]).” *AmBase Corp. v. Davis Polk & Wardwell*, 8 NY3d 428 at 434 (2007)(emphasis supplied); *see also. Keness v. Feldman, Kramer & Monaco, P.C.*, 105 AD3d 812 (2d Dept 2013). Although not determinative, in allocating any fault, the client's sophistication and education may be of relevance. *See, e.g., Angeles v. Aronsky* ___ AD3d ___, NYLJ 9-27-13, p. 22, col. 1 (1st Dept.). Also, the duty to the client does not extend beyond the matters for which the attorney was retained. *AmBase Corp. v. Davis Polk & Wardwell, supra.*

Moreover, and as was noted in the October 29, 2009 decision of the undersigned, the doctrine

of continuous representation tolls the three year statute of limitations for any alleged legal malpractice. See, e.g., *Shumsky v. Eisensein*, 96 NY2d 164 (2001); *N & S Supply v. Simmons*, 305 AD2d 648 (2d Dept 2003).

That tolling caveat may be invoked where the attorney/defendant “was performing services in an attempt to *rectify* the alleged act of malpractice.” *Gravel v. Cicola*, 297 AD2d 620 at 621 (2d Dept 2002)(emphasis added).

Lastly, it has long been settled that in the absence of discharge prior to the retainer agreement’s expiration, an attorney who is to receive a specified sum under that contract is not relegated to an action in *quantum meruit*, but is entitled to recover as damages the stipulated value of his or her services. *Martin v. Camp*, 219 NY 170 (1916). Moreover, and notwithstanding that the relationship between an attorney and a client is of special concern to the court, retainer agreements are still considered as contracts and therefore governed by contract law. See, e.g., *Prial v. Sup. Ct. Uniformed Officers Assn.*, 91 Misc.2d 117 (Sup. Ct. App. Term N.Y. 1977). As such, in essence and as is the general rule *vis-a-vis* contracts, such litigation requires proof of: 1) at least two parties with legal capacity to contract, 2) mutual assent to the terms of the purported contract, and 3) consideration. See generally, Restatement (Second) of Contracts §§ 9,12,17: 1 Williston, *Contracts* (4th Ed) 200-09, § 3:2; 22 NYJur2d, *Contracts* §§ 11, 13; see, also, UCC 1-201, subs 3, 11. Perhaps in more simple, general terms, there must be a sufficiently credible demonstration of a mutual understanding and agreement regarding the performance or forbearance of an act. See generally, *410 Corp. v. Chmelecki Asset Mgt., Inc.* 51 AD3d 715 (2d Dept 2008).

Focusing initially on a preliminary issue of the matter at bar, the undersigned finds that the statute of limitations does afford the defendants an order dismissing the claimed malpractice. In so opining, the undersigned finds that while other facts of this case may be suspect, there is sufficient, satisfactory, credible (and logical) proof that Rizzo was contacted in February of 2007 regarding the rent issue. By agreeing to “look into it” the statute was tolled and the action remained viable. See *Gravel v. Cicola, supra*.

The resolution of that issue, however, does not end the inquiry. Indeed, and after reviewing all of the evidence under the light of the law and logic, the undersigned cannot find that the plaintiff has sustained its burden of proof. In this regard, the Court notes that its proffered testimonial evidence was not sufficiently persuasive, and its credibility undermined by cross-examination as well as its irreconcilable conflicts with the defendant’s presentation. Similarly, there was precious little, if any, in the way of corroboration or support for the plaintiff’s testimony. Additionally, while the plaintiff’s testimony has been memorialized within the cold record, some of the quality of that testimony has not. Indeed, having observed, first hand, the testimony, the undersigned must note that it was undermined by difficulties which albeit by nature *de hors* the record would be perceived by an objective, neutral and casual onlooker who was able to observe, hear, and sense the subtle nuances of the presentation. Stated otherwise, some of the difficulty with the plaintiff’s proffered testimony is not what was said, but how.

Moreover, that testimony has its own burdens. For example, Belsito began his testimony by indicating that at the first meeting with Chen, the lease was discussed and certain financial data was

received—but the rent was not discussed. While not completely beyond belief, this at least appears at odds with what normal experience would have expected. Such a contention became even more troubling later, however, when it was revealed that Belsito came to the table with two decades of successful auto sales experience—an occupation and arena where, common experience would suggest, price is not only a preliminary issue, it undoubtedly ranks high among the paramount issues.

Additionally worthy of comment is the “*Deal?*” notation which, the evidence demonstrates, was in Rizzo’s hand. That obvious inquiry seems to square with his claim of ignorance of the lease’s “dollars and cents” matters as well as his contention that his role did not include the financial aspects of the transaction. Belsito’s background further supports Rizzo’s deference: as Belsito would appear to be a likely candidate to conduct such negotiations. Clearly, he was a sophisticated and experienced salesman, skillful and accomplished. Moreover this proficiency was underscored by his back-to-back successful re-negotiation of his written rent obligations: first with the hard-bargaining, take-it-or-leave-it and so-called “shady” Chen, and then with Petrizzino. On both occasions he secured favorable terms and in the course thereof, overcame a written contract³. Moreover, his partner, Foerster, was by no means a stranger to business—nor was Belsito’s father-in-law. Individually, and most assuredly collectively, they were more than up to the task. Moreover, the conclusion that the negotiations were not Rizzo’s responsibility but were tasked and conducted by the plaintiff also comports with Warren’s statement that an attorney ordinarily might be hired to memorialize an agreement reached by the parties.

In sum, and contrary to that offered by the plaintiff, the defendant’s version of the facts and history regarding the rent issue is not only harmonious, it is logical and, albeit brief, sufficiently supported by the record. Moreover, of the two versions, the defense witness’s testimony was at the very least as equally persuasive as the plaintiff’s. In such cases, as noted above, the law requires the question regarding the negotiating responsibility *vis-a-vis* the rent must be, by default of the plaintiff’s evidence, resolved in the defendant’s favor.

This result is not disturbed by the plaintiff’s post-trial arguments or legal authorities. Indeed, the arguments are all predicated upon embracing the facts as contended by the plaintiff. For the reasons above-stated, the undersigned is disinclined to adopt that view.

The same factual finding does not apply, however, to the C/O issue. Clearly, there is no evidence to demonstrate that matter’s responsibility was one of the financial issues to which Belsito (or Foerster, or anyone else) preempted Rizzo. Instead, the C/O was one of the so-called “boiler-plate” matters left to him and contained within his professional responsibility. Equally clearly, the evidence establishes that his performance was unsatisfactory. Moreover, his unreasonable and

³Albeit parenthetically, it also deserves noting that while the record contains the favorable results of his efforts, it does not disclose that he retained - or needed - the skills or acumen of an attorney to conduct the negotiations.

inexcusable failure to verify and/or secure the proper C/O was a breach of his duty protect his client and his client's interests.

That, however, is not enough to support an award for the plaintiff. Indeed, the missing but essential proof of the element of damages is absent. Without that component, the cause of action must fail for, as noted in the maxim *damnum sine injuria est injuria sine damnum*, damages without liability is the same as liability without damages. Stated otherwise, there is no proof of the actual damages ingredient required. *AmBase Corp. v. Davis Polk & Wardwell, supra*. The plaintiff's failure in that regard has a number of causes. Initially, and as noted within the record, the plaintiff's neglect to provide the defense, pre-trial, with that information despite at least two (2) separate demands; as a result, the defense properly sought its preclusion during the trial. *See, e.g., Pagliaro v. City of New York*, 18 Misc.3d 1141(A) (2008). Moreover, even if, *arguendo*, the Court were to overlook that deficiency, its probative value is highly suspect. For example, the purported object of that evidence was to prove the number of customers who, upon arriving were *not* seated (due to the loss of six [6] seats) and chose *not* to wait. Such an exercise involves proving a negative, a feat not typically easily accomplished. Relatedly, the methodology proffered appears suspect and not a formula either typically embraced by a lay person or familiar to the undersigned; indeed, it is speculation based upon speculation. The law, however, has historically required some proven, satisfactory method which has some acceptable measure of precision. *See, generally, Goldberg v. Besdine*, 76 AD 451 (2d Dept 1902); *see, also, Kenford Co. v. County of Erie*, 67 NY2d 257 (1986). Lastly, the only other mention of damages is that which alluded to monies spent to correct the C/O violations. The plaintiff was made whole, however, when those monies were reimbursed from the Chen-to-Petrizzino closing's escrow fund.

Indeed, after careful, deliberate, protracted and cold consideration of the evidence, and conscious of the burden of proof, my oath of office, my duty and the applicable law, I am unable to reach the required comfort level with the plaintiff's contentions.

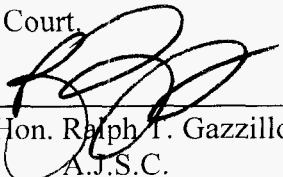
Lastly, remains the counter-claim. By more than a preponderance of the credible evidence, there is ample, uncontroverted proof to support the claim. Conversely, the plaintiff offered neither substantial evidence nor a defense to undermine that claim. Indeed, even in its Post Trial Memorandum (pg. 10) it merely states that "any fees paid to Rizzo by plaintiff in fact constitute an additional measure of damages."

In sum, having failed to sustain its burden of proof by a preponderance of the credible evidence, the plaintiff's complaint is dismissed.

The defendant's counter-claim is sustained and defendants shall be awarded judgment against the plaintiff in the amount of \$11,500.00 plus interest.

The foregoing constitutes the decision and order of the Court.

Dated: 10/29/13



Hon. Ralph T. Gazzillo
A.J.S.C.

Final Disposition