SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 31

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G. WILLI FOOD INTERNATIONAL LTD.,

Plaintiff,

-against-

HERZFELD & RUBIN, P.C. and PETER J KURSHAN,

Defendants.

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Index No. 159040/16

DECISION/ORDER

Motion Sequence No. 003

**HON. KELLY O'NEILL LEVY, J.:**

This is an action for legal malpractice arising out of defendants' representation of plaintiff G. Willi Food International, Inc. and its subsidiary, WF Kosher Food Distributors, Ltd., in two related actions that were consolidated for joint trial captioned *WF Kosher Food Distribs., Ltd. v Laish Israel Food* Co., *Inc.*, Index No. 602005/08 (Sup Ct, NY County) (the WF Kosher action) and *860 Nostrand Assoc., LLC v G. Willi-Food Intl., Ltd.*, Index No. 602504/08 (Sup Ct, NY County) (the Nostrand action).

Defendants Herzfeld & Rubin, P.C. and Peter J. Kurshan (Kurshan) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff cross-moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability on its legal malpractice claim and for an order setting this action down for a hearing on damages.

## BACKGROUND

The following facts are gleaned from the submissions of the parties. Plaintiff is a corporation incorporated in Israel that is engaged in the food distribution business (NYSCEF Doc No. 157, Williger aff, ¶¶ 2, 3). In or around 2006, plaintiff became interested in expanding its business in New York (*id.*, ¶ 3). Plaintiff created a wholly-owned subsidiary in New York,

named WF Kosher Food Distributors, Ltd. (WF Kosher), to distribute kosher products throughout New York and the surrounding regions (*id.*). Plaintiff provided WF Kosher with $2 million in order to purchase an existing kosher food distributor named Laish Israeli Food Products, Ltd. (Laish), a corporation wholly owned by Ari Steiner (Steiner) (*id.*, ¶¶ 3, 8).

*The WF Kosher Action*

On July 3, 2008, WF Kosher retained Herzfeld & Rubin, P.C. to commence the WF Kosher action against Laish, Laish Dairy, Ltd., Ari Steiner, Josh Steiner, Eli Biran (Biran), 860 Nostrand Avenue, Ltd., Joel Zafir, Benzion Kelman, Abraham Greenberg, Joseph Schwartz, and Benzion Honig (collectively, the Steiner parties) (NYSCEF Doc No. 90, Hochboim tr at 91-95). On July 28, 2008, WF Kosher commenced the WF Kosher action against the Steiner parties (NYSCEF Doc No. 107). Kurshan represented WF Kosher in the WF Kosher action.

After several amendments to the complaint and motion practice, WF Kosher's remaining two causes of action sought recovery for: (1) conversion against Steiner; and (2) aiding and abetting a breach of fiduciary duty against Steiner.

*Nostrand Action*

The Steiner parties commenced the Nostrand action against plaintiff, seeking $149,949.30 in rent pursuant to a 2008 lease with WF Kosher and attorney's fees (NYSCEF Doc No. 108). The Steiner parties also alleged that plaintiff had guaranteed the lease (*id.*). On September 18, 2008, plaintiff entered into a retainer agreement with Herzfeld & Rubin, P.C. in connection with the Nostrand action (NYSCEF Doc No. 109). Kurshan represented plaintiff in the Nostrand action.

*Procedural History*

The Steiner parties served a subpoena on WF Kosher's accountants Arik Eshel, CPA & Assoc., P.C., which sought, among other things, WF Kosher's financial statements and general ledger, in computer file format (NYSCEF Doc No. 134, Wilck affirmation in support, exhibit WW). On February 16, 2012, defendants retained Phillip H. Kanyuk (Kanyuk) to prepare an expert report on damages. On March 22, 2012, Kanyuk issued a report which was produced to the parties, which set forth the damages incurred by WF Kosher as a result of the conduct alleged in the WF Kosher action (NYSCEF Doc No. 136, Wilck affirmation exhibit in support, exhibit YY). On June 25, 2013, Kanyuk issued an updated expert report (NYSCEF Doc No. 137, exhibit ZZ). Kanyuk calculated plaintiff's damages as follows: (1) $1,272,000 in losses incurred from closing down WF Kosher's operations; and (2) $1,900,00 in losses incurred from lost business opportunity (*id.* at 18).

Shortly before the case was due to go to trial, the Steiner parties moved to preclude WF Kosher from introducing QuickBooks records into evidence and to preclude Kanyuk from offering expert testimony at trial (NYSCEF Doc No. 138, Wilck affirmation in support, exhibit AAA).

On March 18, 2014, the parties appeared before Justice Shirley Werner Kornreich for pre-trial evidentiary rulings. With respect to the QuickBooks records, Justice Kornreich asked Kurshan, "Have you looked at the two CDs? Are they the same as what you claim are the QuickBooks?" (NYSCEF Doc No. 140, 3/18/14 tr at 28). Kurshan replied that "I don't know if they're the same, Judge. I can't make that decision" (*id.*). Justice Kornreich stated that "what your obligation is is to make sure these quote, unquote QuickBooks are the same, exactly the

same, as what was turned over. And if they are not, you better compare the two to those two disks. If they are not, they may not be used" (*id.* at 31). Justice Kornreich directed Kurshan, "I want you to make sure. Because if they are not, the QuickBooks cannot be used. And I am directing you to give the QuickBooks that you gave your expert to Mr. Zelmanovitz by the end of the day tomorrow" (*id.* at 32).

The Steiner parties made an emergency application to preclude WF Kosher and plaintiff from introducing the QuickBooks records into evidence and to preclude Kanyuk from offering expert testimony at trial. On April 23, 2014, Justice Kornreich granted the Steiner parties' preclusion motion. At the hearing on the motion, Justice Kornreich stated,

> "At this point, this Court, and I'm using the word appalled, and that is an understatement frankly. I am not going to have a hearing on contempt, I am not going to send this to the disciplinary committee. I am not doing any of that. But I will tell you right now I am precluding any use of QuickBook records that you've turned over or not turned over for many reasons. And to say fraud is one of them is one of the reasons. And that will not be turned over. But I will say that the reason is discovery and what was told the Court and your expert is precluded"

(NYSCEF Doc No. 141, 4/23/14 tr at 16). Justice Kornreich continued, stating that:

> "I'm granting this motion precluding your expert and the QuickBooks CD, because number one, it wasn't turned over when it was supposed to be turned over, neither timely nor fully. And it was not the same. And at this point, as far as I am concerned, just purely by the presumption that a copy could properly be compared wasn't compared wasn't turned over, that alone is enough. It was in violation of this Court's order. So, at this point you're precluding from using that"

(*id.* at 17).

The trial commenced on April 28, 2014. Gil Hochboim (Hochboim), plaintiff's chief financial officer, Zwi Williger (Williger), plaintiff's chief executive officer, Biran, WF Kosher's chief executive officer, and Steiner testified at trial.

At a charge conference held on May 14, 2014, Justice Kornreich stated that:

> "I am not going to charge aiding and abetting breach of fiduciary duty, because I don't see how I could charge on this record damages as a result, since there is really, you know, for the loss of the business, I would just need an expert, I would need financials and an interpretation and none of that is here"

(NYSCEF Doc No. 163, 5/14/14 tr at 3). Further, the court stated that "perhaps the jury could find an aiding and abetting breach of fiduciary from the record, but it is the damages that I can't charge on this" (*id.*).

On May 16, 2014, the parties agreed to settle the underlying actions with plaintiff agreeing to pay $600,000 to the Steiner parties. When the court asked whether the settlement was acceptable to Williger and the board, Hochboim stated "[u]nder the circumstances, what happened during this trial, yes, under the circumstances" (NYSCEF Doc No. 153, tr at 15). When asked whether Hochboim was satisfied with the services of his attorneys, he said, "I didn't say yes. I don't – I leave it with that" (*id.*). He further stated, "I don't want to say yes, I don't want to say no. Something happened in the trial" (*id.*).

The complaint in this action asserts three causes of action: (1) legal malpractice (tort); (2) legal malpractice (contract); and (3) breach of fiduciary duty (NYSCEF Doc No. 86). Plaintiff seeks no less than $4 million, pre-judgment and post-judgment interest, punitive damages, attorney's fees, and costs and disbursements (*id.*).

In their answer, defendants assert the following two counterclaims: (1) breach of contract; and (2) unjust enrichment (NYSCEF Doc No. 87).

## DISCUSSION

"It is well settled that 'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to

demonstrate the absence of any material issues of fact'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). It is well settled that "issue-finding, rather than issue-determination, is the key to the procedure" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957]).

*Whether Plaintiff Has Standing to Assert Claims for Damages by WF Kosher*

Defendants argue that plaintiff does not have standing to assert claims for damages incurred by its subsidiary, WF Kosher. Thus, according to defendants, plaintiff's claims should be dismissed with respect to the damages incurred in the WF Kosher action.

In opposition, plaintiff contends that it is the properly-named plaintiff, since it dominated and controlled WF Kosher. In addition, plaintiff maintains that it was required to pay the entire settlement, and lost its entire investment in WF Kosher. Furthermore, plaintiff asserts that defendants waived the defense of standing in their answer or in a pre-answer motion to dismiss.

In reply, defendants argue that: (1) plaintiff's control over WF Kosher did not constitute complete domination and control; and (2) they did not waive their right to dispute plaintiff's entitlement to damages incurred by WF Kosher. Defendants further assert that, even if they waived standing as a defense, they did not waive the defenses of failure to state a cause of action and failure to plead damages. Additionally, defendants argue that the court may grant defendants

leave to assert a standing defense, given that plaintiff cannot establish any prejudice or surprise from any amendment.

It is true that "one corporation will generally not have legal standing to exercise the rights of other associated corporations" (*Alexander & Alexander of N.Y. v Fritzen*, 114 AD2d 814, 815 [1st Dept 1985], *affd* 68 NY2d 968 [1986]). However, a defense of lack of standing is waived if not asserted in an answer or a pre-answer motion to dismiss (*see* CPLR 3211 [e]; *Matter of Fossella v Dinkins*, 66 NY2d 162, 167 [1985]; *Matter of Prudco Realty Corp. v Palermo*, 60 NY2d 656, 657 [1983]). Defendants did not assert standing as an affirmative defense and did not make a pre-answer motion to dismiss on this ground. Accordingly, defendants' defense of standing was waived (*see 32nd Ave., LLC v Angelo Holding Corp.*, 88 AD3d 986, 987 [2d Dept 2011]).

To the extent that defendants (1) request in reply that the court grant defendants leave to amend their answer, and (2) argue that the complaint fails to state a cause of action, the court has not considered these requests. "The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion" (*Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]). Plaintiff did not have an opportunity to respond to defendants' arguments made for the first time in reply.

*Legal Malpractice*

Defendants next argue that plaintiff cannot prove that any act or omission by defendants proximately caused its damages. Specifically, defendants contend that plaintiff cannot show that it would have prevailed on its claims at trial or would have obtained a more favorable settlement, but for defendants' malpractice. With respect to the Nostrand action, defendants argue that there

is no question of fact as to whether plaintiff would have avoided liability on the guaranty claim or incurred less than $600,000 in damages that it paid to settle the underlying actions. Hochboim had apparent authority to bind plaintiff to the guarantee. Moreover, Biran had apparent authority and implied actual authority to bind WF Kosher to the lease. In addition, plaintiff ratified the transactions by making a payment under the terms of the lease and by using the space. Furthermore, defendants argue that the QuickBooks records and Kanyuk's expert testimony had no bearing on plaintiff's liability or damages.

With respect to the WF Kosher action, defendants contend that there is no question of fact as to whether WF Kosher could have obtained a better result on the conversion claim. WF Kosher was not precluded from presenting testimony and evidence to support its claim. According to defendants, by WF Kosher's witnesses' own admission, the damages on the conversion claim were limited, and were, at most, approximately $23,000. Further, defendants argue that WF Kosher could not have met its burden at trial to show that Steiner aided and abetted Biran's breaches of fiduciary duty. Defendants assert that: (1) Biran did not breach his fiduciary duties; and (2) Steiner did not provide substantial assistance to Biran.

Plaintiff argues, in opposition, and in support of its cross motion, that defendants' motion does not include an affidavit from someone with personal knowledge of the facts, but rather just an attorney affirmation from an attorney who was not involved in the underlying actions. In addition, plaintiff contends that defendants point to gaps in plaintiff's proof. Plaintiff maintains that defendants have failed to demonstrate that plaintiff could not have prevailed in the Nostrand action. According to plaintiff, Biran testified at trial that Steiner knew that Biran did not have authority to sign the 2008 lease, and that the guarantee was invalid. As for the WF Kosher action, plaintiff contends that defendants' argument that it had a $23,000 claim that was

unaffected by defendants' malpractice, does not mean that it cannot prove the rest of its $4 million in damages. Plaintiff argues that it would have prevailed on its aiding and abetting a breach of fiduciary duty claim because: (1) Biran testified at trial that he breached his fiduciary duties, and did it with Steiner's prodding and assistance; and (2) Biran also testified that Steiner knew about, specifically induced, and participated in Biran's breach of fiduciary duty. Furthermore, Justice Kornreich specifically stated that she would have charged the jury on the aiding and abetting a breach of fiduciary duty had plaintiff's expert not been precluded.

Finally, plaintiff argues that it is entitled to summary judgment on defendants' liability on the legal malpractice claim. Plaintiff asserts that defendants failed to comply with Justice Kornreich's specific directive and warning. Thus, defendants' actions clearly fell below any permissible standard of care, and there is no issue of fact with respect to defendants' liability for legal malpractice.

Legal malpractice is an attorney's failure to exercise reasonable skill and knowledge commonly possessed by a member of the legal profession (*Arnav Indus., Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 303-304 [2001]). "It is well established law that [a]n action for legal malpractice requires proof of three essential 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" (*Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 170 AD2d 108, 114 [1st Dept 1991], *affd* 80 NY2d 377 [1992], *rearg denied* 81 NY2d 955 [1993] [internal quotation marks and citations omitted]).

"In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney 'failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession' and that the attorney's breach of this duty proximately

caused plaintiff to sustain actual and ascertainable damages" (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007], quoting *McCoy v Feinman*, 99 NY2d 295, 301–302 [2002]). "To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence" (*id.*).

> "Where the termination is by settlement rather than by a dismissal or adverse judgment, malpractice by the attorney is more difficult to establish but a cause of action can be made out if it is shown that assent by the client to the settlement was compelled because prior misfeasance or nonfeasance by the attorneys left no other recourse"

(*Titsworth v Mondo*, 95 Misc 2d 233, 239 [Sup Ct, Monroe County 1978] [internal quotation marks and citation omitted]). Stated otherwise, "[a] claim for legal malpractice is viable, despite settlement of the underlying action, if it is alleged that the settlement of the action was effectively compelled by the mistakes of counsel" (*Bernstein v Oppenheim & Co.*, 160 AD2d 428, 430 [1st Dept 1990]; *see also Lattimore v Bergmore*, 224 AD2d 497, 497 [2d Dept 1996] [plaintiff demonstrated "issues of fact as to their former attorney's negligence, the merits of their underlying personal injury claim, and whether they freely elected to settle their personal injury action such that a trial is warranted"]; *Cohen v Lipsig*, 92 AD2d 536, 536 [2d Dept 1983] [triable issues of fact existed, including, whether outside trial counsel negligently presented proof of special damages and other matters]). Nevertheless, "[m]ere speculation about a loss resulting from an attorney's poor performance is insufficient to sustain a prima facie case of legal malpractice" (*Antokol & Coffin v Myers*, 30 AD3d 843, 845 [3d Dept 2006]).

On a plaintiff's motion for summary judgment in a legal malpractice case, the plaintiff "will be entitled to summary judgment in a case where there is no conflict at all in the evidence,

the defendant's conduct fell below any permissible standard of due care, and the plaintiff's conduct was not really involved" (*Selletti v Liotti*, 22 AD3d 739, 740 [2d Dept 2005]).

> "In a legal malpractice action in which there was no settlement of the underlying action, it is well settled that, '[t]o obtain summary judgment dismissing [the] complaint . . . , a [law firm] must demonstrate that the [client] is unable to prove at least one of the essential elements of its legal malpractice cause of action'"

(*Chamberlain, D'Amanda, Oppenheimer & Greenfield, LLP v Wilson*, 136 AD3d 1326, 1327-1328 [4th Dept 2016], quoting *Boglia v Greenberg*, 63 AD3d 973, 974 [2d Dept 2009]). "Where, as here, however, the underlying action has been settled, the focus becomes whether settlement of the action was effectively compelled by the mistakes of counsel" (*id.* at 1328). "Where the law firm meets its burden under this test, the client must then provide proof raising triable issues of fact whether the settlement was compelled by mistakes of counsel" (*id.*).

*Defendants' Motion for Summary Judgment*

Contrary to plaintiff's contention, defendants' attorney's affirmation "may . . . serve as the vehicle for the submission of acceptable attachments which do provide 'evidentiary proof in admissible form', e.g., documents, transcripts," even though he has no personal knowledge of the facts (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]).

Defendants have demonstrated that the settlement was not the product of any of their actions. Justice Kornreich precluded plaintiff from offering QuickBooks (WF Kosher's financial records) and Kanyuk's expert testimony at trial (NYSCEF Doc No. 141, 4/23/14 tr at 16-17). However, WF Kosher's financial records and Kanyuk's expert testimony were not necessary to defend the Nostrand action on the guarantee. Plaintiff asserted an equitable defense of rescission to the guarantee, based upon Biran's breach of fiduciary duty and Steiner's knowledge that the guarantee was not valid and that any WF Kosher contract required two signatures. Rescission is

an appropriate remedy for a breach of fiduciary duty (*Rhodes v Buechel*, 258 AD2d 274, 275 [1st Dept 1999], *lv denied* 93 NY2d 906 [1999]).

Williger, Biran, and Hochboim testified at trial that Biran was not authorized to execute the 2008 lease on behalf of WF Kosher, and that Hochboim was not authorized to sign the guarantee on behalf of plaintiff. Williger testified that Hochboim did not have any authority to sign a guarantee for the 2008 lease (NYSCEF Doc No. 144, 4/30/14 tr at 39). According to Williger, for an Israeli publicly-traded company, there must be two signatures for any transaction above 5,000 Israeli shekels, unless the board authorizes the transaction (*id.*). Plaintiff's board did not authorize Hochboim to execute the guarantee (*id.*). Biran testified that, pursuant to WF Kosher's bylaws, two corporate representatives had to sign a lease (NYSCEF Doc No. 148, 5/7/14 tr at 80). There was no other signature on the 2008 lease other than Biran's signature (*id.*). Biran testified, with respect to Hochboim's signature on the guarantee, that Steiner told him "[t]hat if it comes to that one day WF will not honor the signature, he will have a case using the signature" (*id.* at 82). In addition, Hochboim testified that he told Steiner in Tel Aviv that he "cannot sign" the guarantee for plaintiff (NYSCEF Doc No. 150, 5/9/14 tr at 55). Steiner told Hochboim that he knew that Hochboim's signature alone "will not bind [plaintiff]and needs an additional signature. But from his standpoint it's okay. And he will not use it against [plaintiff]" (*id.* at 57). Thus, the precluded evidence had no bearing on plaintiff's liability under the guarantee.

Moreover, with respect to the conversion claim in the WF Kosher action, Williger, Hochboim, and Biran testified that Steiner took approximately $120,000 in checks and returned approximately $97,000 (NYSCEF Doc No. 144, 4/30/14 tr at 109-111; NYSCEF Doc No. 148, 5/7/14 tr at 33; NYSCEF Doc No. 151, 5/9/14 tr at 38-39). "A conversion takes place when

someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). "Money, if specifically identifiable, may be the subject of a conversion action" (*Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883, 883-884 [1st Dept 1982]). Consequently, WF Kosher's financial records and Kanyuk's expert testimony were not necessary to prove this claim.

Therefore, defendants have shown prima facie that the alleged negligence did not proximately cause plaintiff's damages (*see Leiner v Hauser*, 120 AD3d 1310, 1311 [2d Dept 2014] [complaint failed to plead specific allegations that, but for attorney's alleged negligence in causing preclusion order to be entered, the plaintiff would have obtained a more favorable outcome in the underlying action]; *Katebi v Fink*, 51 AD3d 424, 425 [1st Dept 2008] [attorney's alleged negligence did not compel settlement of matrimonial action]; *Katz v Herzfeld & Rubin, P.C.*, 48 AD3d 640, 641 [2d Dept 2008] [defendant established that alleged acts of malpractice did not cause any alleged reduction in amount of monetary settlement reached in underlying action]). Plaintiff's contention that defendants have pointed to gaps in plaintiff's proof is incorrect; defendants have shown that plaintiff is unable to prove one of the essential elements of its legal malpractice claim (*see Boglia*, 63 AD3d at 974).

Plaintiff argues that there were issues of fact as to whether the 2008 lease and guarantee were executed with proper authority. Therefore, accepting plaintiff's argument, plaintiff had other options besides settling the underlying actions – the jury could have decided whether there was a valid defense to the guarantee (*see Bellinson Law, LLC v Iannucci,* 102 AD3d 563, 563 [1st Dept 2013] ["even if plaintiff was negligent, there is evidence in the record indicating that defendant had other options besides settling the case"]). While plaintiff argues that it had an

equitable defense to the guarantee based upon rescission (NYSCEF Doc No. 159 at 16, 18), plaintiff has failed to explain how it was required prove this defense with WF Kosher's financial records.

Moreover, Kanyuk, plaintiff's proposed expert, was retained to calculate damages, including lost business opportunity, to WF Kosher in the WF Kosher action, not the Nostrand action (NYSCEF Doc Nos. 136, 137).[1] Likewise, although plaintiff argues that Kanyuk would have testified at trial that its damages on the aiding and abetting breach of fiduciary duty claim were valued at $3.2 million, plaintiff has failed to submit an expert affidavit valuing its damages (*see Antokol & Coffin*, 40 AD3d at 846).[2] Plaintiff's mere speculation is insufficient (*see Sevey v Friedlander*, 83 AD3d 1226, 1227 [3d Dept 2011], *lv denied* 17 NY3d 707 [2011] [plaintiff's contention that he would have received a more favorable result at trial was "entirely speculative"]; *Boone v Bender*, 74 AD3d 1111, 1113 [2d Dept 2010], *lv denied* 16 NY3d 710 [2011] ["plaintiff's allegations, in effect, that the defendants did not zealously advocate on her behalf, and that the settlement provided her with less monetary relief than that which she would have received after a trial, were speculative and conclusory"]). Plaintiff also states that it incurred $100,000 for Kanyuk's services (NYSCEF Doc No. 157, Williger aff, ¶ 29). Nevertheless, these expenses were "not the proximate result of any claimed negligence by defendants" (*Zarin v Reid & Priest*, 184 AD2d 385, 388 [1st Dept 1997]; *cf. Rudolf*, 8 NY3d at 443 ["A plaintiff's damages may include litigation expenses incurred in an attempt to avoid,

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[1] In this regard, the court notes that "in joint trials separate verdicts and judgments are entered and each may be appealed from" (*Kelley v Galina-Bouquet, Inc.*, 155 AD2d 96, 102 [1st Dept 1990] [internal quotation marks and citation omitted]).

[2] Plaintiff refers to Kanyuk's expert reports. However, the unsworn expert reports (NYSCEF Doc No. 136, 137) are not in admissible form (*see Ulm I Holding Corp. v Antell*, 155 AD3d 585, 596 [1st Dept 2017]).

minimize, or reduce the damage caused by the attorney's wrongful conduct"] [internal quotation marks and citation omitted]). Thus, plaintiff has failed to raise an issue of fact as to whether it would have obtained a more favorable outcome, but for defendants' negligence (*see Rogers v Ettinger*, 163 AD2d 257, 258 [1st Dept 1990 [plaintiff "completely failed to demonstrate a triable issue as to whether the settlement entered into was improvident or that Rogers would have been entitled to a more beneficial settlement, but for defendants' misconduct"]; *Becker v Julien, Blitz & Schlesinger*, 95 Misc 2d 64, 67 [Sup Ct, NY County 1977], *mod on other grounds* 66 AD2d 674, 677 [1st Dept 1978] [plaintiff failed "to make any showing that the settlement was improvident or was reluctantly agreed to by him because the previous actions by his attorneys left him no alternative"]).

Accordingly, defendants' motion for summary judgment is granted.

*Plaintiff's Cross Motion for Summary Judgment*

Plaintiff has failed to demonstrate prima facie that defendants' alleged malpractice was a proximate cause of its damages. Plaintiff has not shown that it would not have entered into the settlement or that it would have obtained a more favorable outcome in the underlying actions, but for defendants' negligence in causing the preclusion order to be entered (*see Rudolf*, 8 NY3d at 442). Therefore, plaintiff's cross motion must be denied, regardless of the sufficiency of defendants' opposition papers (*see Winegrad*, 64 NY2d at 853).

Therefore, plaintiff's cross motion for summary judgment is denied.

## CONCLUSION

Accordingly, it is

**ORDERED** that the motion (sequence number 003) of defendants Herzfeld & Rubin, P.C. and Peter J. Kurshan is granted and the complaint is dismissed; and it is further

**ORDERED** that the Clerk is directed to enter judgment accordingly; and it is further

**ORDERED** that the cross motion of plaintiff G. Willi-Food International, Inc. for partial summary judgment as to liability on its legal malpractice claim is denied.

This constitutes the decision and order of the court.

Dated: October 5, 2020

ENTER:

Kelly O'Neill Levy

KELLY O'NEILL LEVY, J.S.C.

HON. KELLY O'NEILL LEVY
J.S.C.

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