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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : CIVIL TERM : PART 48 Mot Seq 001

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UNITED MARINE DIVISION LOCAL 333 BENEFICIAL
FUND ANNUITY PLAN,

Plaintiff,

Index No.
652534/13

-against-

ANTHONY J. ORLANDO, a/k/a A.J. ORLANDO;
FEUER & ORLANDO, LLP; BRIAN FRANCELLA;
NOVAK FRANCELLA LLC; JUDITH P. BROACH;
BROACH & STULBERG, LLP; CARLO G. CHIAESE,
and C.G.C. ADVISORS, LLC,

Defendants.

-----x
May 7, 2014
60 Centre Street
New York, NY 10007

B e f o r e :

HON. JEFFREY K. OING, Justice.

A p p e a r a n c e s :

STARR, GERN, DAVISON & RUBIN, P.C.
Attorneys for Plaintiff
105 Eisenhower Parkway
Roseland, New Jersey 07068
BY: JONATHAN J. LERNER, ESQ.

BRAVERMAN | GREENSPUN, P.C.
Attorneys for Defendants BROACH and BROACH & STULBERG LLP
331 Madison Avenue
New York, New York 10017
BY: TRACY M. PETERSON, ESQ.

MINUTES OF PROCEEDINGS

Reported By:
William L. Kutsch
Senior Court Reporter

WLK

Proceedings

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2 were just phantoms.

3 This paragraph here indicates that the same thing
4 unfortunately happened here. So that whether or not, when
5 you came on board and everything, the fact of the matter
6 where they are now alleging that you committed legal
7 malpractice by failing to unearth this kind of scheme, the
8 best and the brightest were unable to unearth schemes that
9 went forward.

10 So that if you look at the Retention Agreement that
11 I have in front of me, I'm not so sure it expanded to the
12 scope that the plaintiffs are seeking. I mean, I just say
13 that, I put that out there in response to what you said.

14 All right. Anything else?

15 MS. PETERSON: I don't believe so, your Honor.

16 THE COURT: All right. This is my decision and
17 order with respect to the motion to dismiss.

18 There are two branches here. One is to dismiss for
19 the failure to state a cause of action, and the other one is
20 for summary judgment. I'm going to grant both branches of
21 the motion.

22 With respect to the branch of the motion to dismiss
23 for failing to state a cause of action, I note for the
24 record, in order to prove or at least state a claim for
25 legal malpractice, you need several things, and one of them
26 is: "In order to prevail on a claim for legal malpractice,

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2 a party must establish that the attorney failed to exercise
3 that degree of care, skill and diligence commonly possessed
4 and exercised by a member of the legal community, that such
5 negligence was a proximate cause of the loss in question,
6 and that actual damages were sustained." And that's Barbara
7 King Family Trust versus Voluta Ventures LLC, 46 AD3d 423,
8 First Department [2007].

9 Further, "In order to establish proximate cause,
10 plaintiff must demonstrate that 'but for' the attorney's
11 negligence, plaintiff would either have prevailed in that
12 matter at issue, or would not have sustained any
13 'ascertainable damages.'" And that's Leder versus Spiegel,
14 31 AD3d 266, First Department [2006].

15 Looking at the complaint here, focusing on the
16 legal malpractice, which is the fourth cause of action here,
17 I find that the complaint is insufficiently pleaded with
18 respect to the negligence as well as the proximate cause. I
19 pressed very hard towards plaintiff's counsel with respect
20 to the negligence and the proximate cause, and it's just not
21 filled out properly in terms of the complaint here. The
22 complaint doesn't set forth sufficient allegations for me to
23 sustain that claim in terms of being sufficiently pleaded.
24 I don't find that the proximate cause was properly pleaded
25 or sufficiently pleaded. Relying on Mr. Friedman's
26 affidavit does not help them because although he claims

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2 carry out their duties as attorneys for the Plan. I think
3 the way it is set out is, she did do something. She made it
4 from out of compliance into compliance with ERISA rules.
5 This Plan was started well before the Broach defendants came
6 on board. This Plan also had attorneys well before the
7 Broach defendants came on board. Nothing in this record
8 would raise a factual issue that would create a red flag for
9 the Broach defendants to go beyond or go further into their
10 investigations. Plaintiffs have failed to put forth any
11 such issue or such documentary proof to create such a
12 factual issue.

13 So under those circumstances, I'm going to grant
14 the motion for summary judgment and dismiss the fourth cause
15 of action for legal malpractice.

16 I will say it very clearly, just to save some time,
17 I'm looking at the remaining causes of action for the fifth
18 and seventh causes of action, they are part and parcel,
19 duplicative of the fourth cause of action. They sound the
20 same, they actually are based on the same allegations. If
21 you look at the complaint here, and I reviewed the
22 complaint, the fourth, the fifth and the seventh causes of
23 action, they are basically relying on the same allegations
24 put forth with respect to the legal malpractice. And under
25 those circumstances, I find that those two causes of action,
26 the fifth and the seventh causes of action, are duplicative

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2 of the fourth cause of action, and, accordingly, I'm going
3 to grant the motion either under 3211 or 3212 to dismiss
4 them as duplicative of the fourth cause of action.

5 That's my decision and order.

6 Counsel, please order the transcript, I'll So Order
7 it, and you will have it for your records.

8 You need a control date for the other folks; right?
9 Have you guys come in to see me yet or not yet?

10 MR. LERNER: Your Honor, we had a phone conference
11 with your Honor's law secretary.

12 THE COURT: Do you have a date to come back?

13 MR. LERNER: We have dates. I don't know if there
14 is an actual conference date, but there is a discovery
15 schedule.

16 THE COURT: You might want to check with my Part
17 clerk to make sure.

18 Okay. So you folks have a date already.

19 Thank you very much.

20 (At this time the proceedings were concluded.)

21 -oOo-

C E R T I F I C A T I O N

22 This is to certify the within is a true and
23 accurate transcript of the proceedings as reported by me.

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26 _____
William L. Kutsch, SCR