

Red Zone LLC v. Cadwalader, Wickersham & Taft LLP, --- N.Y.S.2d ---- (2014)

2014 WL 2765973, 2014 N.Y. Slip Op. 04570

2014 WL 2765973
Supreme Court, Appellate Division,
First Department, New York.

RED ZONE LLC, Plaintiff–Respondent,
v.
CADWALADER, WICKERSHAM &
TAFT LLP, Defendant–Appellant.

June 19, 2014.

Synopsis

Background: Client brought legal malpractice action against law firm, which allegedly negligently failed to draft side agreement to cap at \$2 million the amount of fees client's financial advisor was to receive in connection with client's effort to acquire control of corporation. The Supreme Court, New York County, [Melvin L. Schweitzer, J.](#), awarded client \$17.2 million. Firm appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] firm's motion for leave to amend answer to assert defense of assumption of risk was properly denied as devoid of merit;

[2] continuous representation doctrine tolled statute of limitations on malpractice claim;

[3] firm's drafting of side agreement constituted legal malpractice; and

[4] client did not fail to mitigate damages.

Affirmed.

West Headnotes (7)

[1] Pleading



Law firm's motion for leave to amend answer to assert defense of assumption of risk was properly

denied as devoid of merit in client's legal malpractice action alleging firm negligently failed to draft side agreement to cap amount of fees client's financial advisor was to receive in connection with client's effort to acquire control of corporation; supporting affidavit of firm's partner stated that he warned client that agreement was ambiguous, but affidavit directly contradicted partner's deposition testimony in advisor's litigation against client, in which partner stated agreement unambiguously capped fees.

[Cases that cite this headnote](#)

[2] Motions



Law firm's motion to renew motion for leave to amend answer to assert defense of assumption of risk was properly denied in client's legal malpractice action, where motion to renew was not based on new facts that were unavailable on the original motion, and there was no basis to find that the interest of justice and substantial fairness warranted granting renewal.

[Cases that cite this headnote](#)

[3] Limitation of Actions



Continuous representation doctrine tolled statute of limitations on client's legal malpractice claim alleging law firm negligently failed to draft side agreement to cap amount of fees client's financial advisor was to receive in connection with client's effort to acquire control of corporation; firm provided legal advice throughout advisor's litigation against client, apparently to rectify its earlier malpractice, and two year gap between drafting of side agreement and litigation did not end firm's prior representation, as gap simply indicated client had no need to consult firm and firm never communicated its prior representation ended.

[Cases that cite this headnote](#)

[4] **Attorney and Client**



Law firm's drafting of side agreement for client constituted legal malpractice; firm failed to draft side agreement as intended to cap amount of fees that client's financial advisor was to receive in connection with client's effort to acquire control of corporation, and firm's failure to properly draft side agreement allowed advisor to prevail in its lawsuit against client to recover \$10 million in fees.

[Cases that cite this headnote](#)

[5] **Equity**



Laches did not bar client's legal malpractice action against law firm for negligently failing to draft side agreement to cap amount of fees client's financial advisor was to receive in connection with client's effort to acquire control of corporation; client's action was timely commenced.

[Cases that cite this headnote](#)

[6] **Attorney and Client**



Client did not waive legal malpractice claim against law firm by attempting to defend terms of side agreement in litigation brought against client by financial advisor; client alleged firm negligently failed to draft side agreement to cap amount of fees client's financial advisor was to receive in connection with client's effort to acquire control of corporation.

[Cases that cite this headnote](#)

[7] **Damages**



Client did not fail to mitigate damages with respect to law firm's legal malpractice in failing to draft side agreement to cap amount of fees client's financial advisor was to receive in connection with client's effort to acquire control of corporation; contrary to firm's contention that client could have mitigated its damages by avoiding gaining control of corporation, side agreement was intended to limit client's liability in the event that it acquired control.

[Cases that cite this headnote](#)

Attorneys and Law Firms

Cravath, Swaine & Moore LLP, New York ([David R. Marriott](#) of counsel), for appellant.

[Jeffrey A. Jannuzzo](#), New York, for respondent.

[TOM, J.P.](#), [MOSKOWITZ, DEGRASSE, MANZANET-DANIELS, CLARK, JJ.](#)

Opinion

*1 Amended order and judgment (one paper), Supreme Court, New York County (Melvin L. Schweitzer, J.), entered May 5, 2014, awarding plaintiff \$17.2 million, unanimously affirmed, without costs. Appeals from orders, same court and Justice, entered May 24, 2013, September 3, 2013 and October 11, 2013, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff commenced this action for legal malpractice against defendant law firm based on the alleged negligent drafting of an agreement (Side Agreement) that was intended to memorialize an oral agreement between plaintiff and nonparty UBS Securities LLC (UBS) to cap at \$2 million the amount of fees UBS was to receive for acting as plaintiff's exclusive financial advisor in its effort to acquire control of nonparty Six Flags, Inc., unless plaintiff acquired more than 51% of the voting shares of Six Flags. Prior to the instant lawsuit, UBS successfully sued plaintiff for \$10 million in fees in connection with the Six Flags transaction. In the course of that lawsuit, we rejected plaintiff's argument that the Side Agreement, read in tandem with the main agreement (Engagement Agreement), capped UBS's fee at \$2 million

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(*UBS Sec. LLC v. Red Zone LLC*, 77 A.D.3d 575, 910 N.Y.S.2d 55 [1st Dept 2010], *lv denied* 17 N.Y.3d 706 [2011]) (UBS Decision).

[1] In this action, defendant moved for leave to amend its answer to assert the defense of assumption of the risk. In support of its motion, defendant submitted an affidavit from a partner at the firm who averred that he had warned plaintiff that the Side Agreement was ambiguous. This statement directly contradicts his earlier deposition testimony in the UBS litigation that the Side Agreement unambiguously capped plaintiff's fees and was improperly raised for the first time in opposition to plaintiff's motion (*see e.g. Ostrov v. Rozbruch*, 91 A.D.3d 147, 154, 936 N.Y.S.2d 31 [1st Dept 2012]). Contrary to defendant's contentions, this defense was not previously raised in its answer or motion papers, as those documents merely broadly deny that defendant acted negligently. The motion was properly denied since the proposed amendment is patently devoid of merit (*see Bishop v. Maurer*, 83 A.D.3d 483, 484–485, 921 N.Y.S.2d 224 [1st Dept 2011]).

[2] The motion court also properly denied defendant's motion to renew the motion for leave to amend its answer. The motion was not based on new facts that were unavailable on the original motion (*Chelsea Piers Mgt. v. Forest Elec. Corp.*, 281 A.D.2d 252, 722 N.Y.S.2d 29 [1st Dept 2001]). Nor is there any basis to find that the interest of justice and substantial fairness warrant granting renewal.

[3] The motion court properly concluded that the continuous representation doctrine applies to toll the statute of limitations on plaintiff's legal malpractice claim. Although defendant drafted the Side Agreement in 2005, it provided legal advice throughout the UBS litigation from 2007 through late 2010. Although plaintiff was represented by other counsel in the UBS litigation, plaintiff and its trial counsel continued to confer with defendant and share privileged documents regarding its defense strategy. In doing so, defendant apparently sought to rectify its earlier alleged malpractice, namely to prevent UBS from demanding more than \$2 million when the Side Agreement was intended to limit UBS's fee. In such cases, the continuous representation doctrine applies (*see Luk Lamellen U. Kupplungbau GmbH v. Lerner*, 166 A.D.2d 505, 506–507, 560 N.Y.S.2d 787 [2d Dept 1990]; *N & S Supply v. Simmons*, 305 A.D.2d 648, 649–650, 761 N.Y.S.2d 668 [2d Dept 2003]). There is no basis to find that

the earlier “gap” in representation from roughly 2005 to 2007 ended defendant's prior representation. There was simply no need to consult defendant during that time, and defendant never communicated to plaintiff that its prior representation had ended (*see Shumsky v. Eisenstein*, 96 N.Y.2d 164, 170–171 [2001]).

*2 [4] Plaintiff's motion for summary judgment on its legal malpractice claim was also properly granted. Notably, defendant does not dispute that the Side Agreement was intended to cap UBS's fees at \$2 million. Given our prior finding in the UBS litigation that the Side Agreement failed to do just that (*UBS Sec. LLC*, 77 A.D.3d 575, 910 N.Y.S.2d 55), summary judgment is warranted. Accordingly, no expert opinion evidence was necessary before granting the motion (*see Northrop v. Thorsen*, 46 A.D.3d 780, 782, 848 N.Y.S.2d 304 [2d Dept 2007]). There are no triable issues as to whether defendant, as opposed to plaintiff or its trial counsel in the UBS litigation, caused plaintiff's injuries. But for defendant's drafting of the Side Agreement, UBS would not have prevailed in its lawsuit seeking \$10 million (*see Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 N.Y.3d 438, 442 [2007]).

[5] [6] Regarding plaintiff's motion to dismiss defendant's affirmative defenses, having concluded that the action was timely commenced, the motion court properly dismissed the laches defense (*Cadlerock, LLC v. Renner*, 72 A.D.3d 454, 454, 898 N.Y.S.2d 127 [1st Dept 2010]). Plaintiff did not waive its claims by attempting to defend the terms of the Side Agreement in the UBS litigation. Thus, the waiver defense was also properly dismissed.

[7] In addition, the motion court properly dismissed the defense of failure to mitigate damages. Contrary to defendant's argument that plaintiff could have mitigated its damages by avoiding gaining control of Six Flags, the Side Agreement was intended to limit plaintiff's liability in the event that it acquired control. Defendant further argues that plaintiff could have invested more resources to adequately defending the UBS litigation, but it does not detail what strategies should have been pursued to persuade the trial court or this Court to look beyond the plain and unambiguous terms of the Side Agreement.

We have considered defendant's remaining contentions and find them unavailing or not properly before this Court.

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