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| Reines v Raoul Felder & Partners, P.C. |
| 2018 NY Slip Op 32332(U) |
| September 20, 2018 |
| Supreme Court, New York County |
| Docket Number: 156145/2017 |
| Judge: O. Peter Sherwood |
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

----- X

MATTHEW REINES,

Plaintiff,

- against -

**RAOUL FELDER & PARTNERS, P.C.
and DANIEL B. NOTTES,**

Defendants.

----- X

O. PETER SHERWOOD, J.:

DECISION AND ORDER

Index No. 156145/2017

Motion Sequence Number: 001

Defendants Raoul Felder & Partners (“RFP”) and Daniel B. Nottes seek dismissal of the claim for professional negligence under theories of lack of standing, collateral estoppel under CPLR 3211(a)(5), and failure to state a claim under CPLR 3211(a)(7). Defendant RFP seeks dismissal of the claim for breach of contract as duplicative of the malpractice claim, a defense conceded by plaintiff.

BACKGROUND

As this is a motion to dismiss, the following background facts are taken from the complaint and supplemented by documentary evidence, specifically findings of a three-person arbitration panel (NYSCEF Doc. No. 9, Partial Final Award [“PFA”]) and the Decision and Order dated April 15, 2016 of Justice Scarpulla confirming the arbitral award (*see Reddy v Collins*, Index No. 651553/2015 [NYSCEF Doc. No. 99]).

Plaintiff Matthew Reines is one of four equal shareholders in 400 West 14th, Inc. (“The Gaslight”), which operated a bar on West 14th Street from 1996 until various disputes arose amongst the shareholders, culminating in a lawsuit filed in March 2013 (*Peter S. Collins and Matthew H. Reines, individually and derivatively on behalf of 400 West 14th, Inc. d/b/a The Gaslight v William C. Reddy, et al.* [100401/2014]). In that action, Reines and another shareholder, Peter Collins, individually and derivatively accused shareholders William Reddy and David Curran of theft, mismanagement, and other misconduct. Most notably, Reines and Collins claimed to have “discovered” significant discrepancies between The Gaslight’s monthly revenue and the amounts that were deposited in the company’s bank accounts each month.

Reines and Collins were originally represented by the same attorney, but Reines later hired defendant law firm RFP in April 2013. RFP managing partner Raoul Felder advised Reines that defendant Nottes, an associate who had four years of experience at the time, would act as lead attorney under his supervision for purposes of both the ensuing litigation and subsequent arbitration before the American Arbitration Association (“AAA”).

The court granted Reddy and Curran’s motion to compel arbitration in May 2013, and an arbitration was commenced before the AAA (*In the Matter of the Arbitration between Peter S. Collins and Matthew H. Reines, individually and derivatively on behalf of 400 West 14th, Inc., d/b/a The Gaslight and William C. Reddy and David A. Curran* [AAA Case Number 13 517 00477 13]). In the arbitration Collins and Reines sought “to recover for unlawful, fraudulent and ultra vires acts committed by Reddy and Curran giving rise to claims for, among other things, conversion, misappropriation, theft, embezzlement, fraud, breach of fiduciary duty, breach of contract, breach of the implied covenant of good faith and fair dealing, replevin and negligence” (NYSCEF Doc. No. 18, Statement of Claim ¶ 8, *see also* complaint ¶ 17). All of the claims were brought, at least facially, both individually and on behalf of the corporation. The Statement of Claim makes no recognizable distinction as to which claims are being brought in which capacity (Statement of Claim ¶¶ 53-82). Nottes represented Reines through the evidentiary hearing, but defendant RFP replaced him with Howard Benjamin, another attorney of counsel to RFP, just before the parties were to submit post-hearing briefs. Collins was represented at the hearing by Benjamin (PFA at 1).

In a unanimous thirteen-page Partial Final Award, the arbitration panel recited that it conducted eleven days of hearings and reviewed hundreds of exhibits. It found that claimants admitted that employees were often paid in cash. Plaintiff Reines admitted that “he never received a check for his commissions, only cash” but his accountant testified that “he had no knowledge about these cash commissions” (*id.* at 3-4). After first denying their existence, Reines and Collins conceded that The Gaslight corporate accountant “gave shareholders copies of two (2) sets of monthly financial statements – that is, [the accountant] literally kept two (2) sets of books to record cash receipts and payments, including cash payments to [Reines and Collins], separate and apart from the financial statements used for tax purposes.” (*id.*). The panel found that Reines and Collins knew Reddy used cash receipts generated by The Gaslight to pay bills and the four shareholders (*id.*).

The arbitration panel also found that Reddy and Curran gave “consistent, credible testimony and supporting exhibits” (*id.* at 4). In contrast, “the inconsistencies in [Reines’ and Collins’] testimony undermined their credibility . . .” (*id.* at 5). The panel also found that “respondents’ arguments and inferences were more persuasive than claimants’” (*id.*). The arbitrators also found that despite having been given access to years of credit card statements, claimants were unable to offer sufficient credible evidence that Reddy systematically used the corporate credit cards for his corporate use” (*id.*). The panel found no persuasive proof of claimants’ assertion of mismanagement or that “Reddy intentionally kept them in the dark as to the operations and finances of [The Gaslight] and prevented them from examining pertinent corporate information” (*id.* at 7).

The panel rejected “all of claimants’ claims, whether asserted individually or derivatively” (*id.* at 10). It then granted some of the respondents’ counterclaims and awarded The Gaslight damages and attorney’s fees against Reines in the amount of \$37,770.63 (*see id.*). It also declared that Reddy should continue as President and CEO of the corporation (*see id.* at 11).

Upon the motion to confirm and cross-motion to vacate, Justice Scarpulla of this court confirmed the arbitration award, denied the cross-claim of Collins and Reines and directed entry of judgment confirming the awards. (*see Reddy v Collins*, Index No. 651553/2015 [NYSCEF Doc. No. 92 at 6]) (“Scarpulla Decision”).

Plaintiff’s first cause of action in this case is for professional negligence on the part of defendants RFP and Nottes.¹ Plaintiff alleges that defendants failed to adequately and competently perform their obligations in undertaking to represent him in the arbitration, and have consequently caused him damages in an amount “no less than \$1,000,000.” (complaint ¶ 31) More specifically, plaintiff alleges that during the course of the arbitration, defendants failed to do the following:

- Identify and retain a forensic accountant capable of performing a proper forensic accounting of The Gaslight,
- Adequately and competently prepare for hearings and prepare witnesses for the hearings,
- Gain sufficient knowledge of the documentary evidence obtained during discovery to effectively cross-examine witnesses presented by Reddy and Curran,

¹ Collins brought a similar case in federal court. The case was dismissed pursuant to a motion to dismiss under Federal Rule Civil Procedure 12 (b)(6).

- Properly select arbitrators for the arbitration,
- Identify and present sufficient evidence of theft and other financial improprieties engaged in by Reddy and Curran,
- Appoint an experienced attorney to act as lead attorney in the arbitration,
- Depose Curran prior to the arbitration, and
- Request and obtain documents and testimony from Vincent Cunzio, an accountant who performed work for The Gaslight (complaint ¶¶ 30[a] – [h])

Plaintiff also supplements the complaint through the Reines Affidavit, filed with his opposition papers on this motion.² The affidavit alleges two additional examples of defendants' negligent representation – (1) that defendants completely failed to take part in the selection of arbitrators, resulting in a panel with little knowledge of tax law (NYSCEF Doc. No. 17, Reines aff ¶ 13), and (2) that defendants failed to attack through expert testimony the accuracy of the Amended Tax Returns filed by Reddy and Curran prior to the arbitration (Reines aff ¶¶ 14-18). Plaintiff contends that the Amended Tax Returns were inaccurate because they were only based on Reddy's memory, improperly attributed certain income and subsequent tax liability to plaintiff, and improperly influenced the arbitrators. (*id.*)

Defendants seek dismissal of the claim for professional negligence under theories of lack of standing, collateral estoppel under CPLR 3211(a)(5), and failure to state a claim under CPLR 3211(a)(7). Defendant RFP seeks dismissal of the claim for breach of contract as duplicative of the malpractice claim. Plaintiff has consented to dismissal of this claim.

DISCUSSION

A. Professional Negligence

1. Standing

Defendants argue that plaintiff lacks standing to bring a legal malpractice claim because the damages in the underlying action was to the corporation and not plaintiff individually (memo

² In opposing a motion to dismiss a complaint for failure to state a cause of action, "a plaintiff may submit affidavits to remedy defects in the complaint and preserve inartfully pleaded, but potentially meritorious claims" (25 Bay Terrace Assocs., L.P. v Pub. Serv. Mut. Ins. Co., 144 AD3d 665 (2d Dept 2016), citing *Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998] [internal quotations omitted]). "[A]ny deficiencies in the complaint may be amplified by supplemental pleadings and other evidence" (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]).

at 12-13). In response, plaintiff points out that in the arbitration he brought both individual and derivative claims, and that defendants represented him in both his individual capacity and on behalf of the corporation. Plaintiff seeks to recover damages that he suffered personally (opp at 17). Plaintiff makes no effort in either the Statement of Claim or his opposition to the motion here to distinguish between his individual and derivative claims. In reply, defendants address each of the claims in the arbitration in turn, concluding the following:

- That the allegations for conversion and embezzlement are all asserted with respect to the corporation, and are therefore derivative;
- That the allegations for breach of fiduciary duty and breach of shareholders agreement, while facially brought individually and derivatively, are all asserted with the respect to the corporation, and are therefore derivative; and
- That plaintiffs have not pled facts connecting defendants' alleged negligence to any other breach of the Shareholders Agreement claims (reply at 3-4)

It is well settled that "a stockholder has no individual cause of action against a person or entity that has injured the corporation" (*Serino v Lipper*, 123 AD3d 34, 39 [1st Dept 2014]). It therefore follows that an individual shareholder lacks standing to sue for legal malpractice in his own name for a wrong committed against a corporation (*Schaeffer v Lipton*, 243 AD2d 969 [3d Dept 1997]). There is, however, an exception when the defendant has "breached a duty owed to the shareholder independent of any duty owed to the corporation wronged" (*Behrens v Metro. Opera Ass'n, Inc.*, 18 AD3d 47, 50 [1st Dept 2005]). While this case is generally inapplicable to commercial disputes where a shareholder seeks to assert an individual claim for an economic wrong committed against a corporation (*id.* at 51, distinguishing *Schaeffer*), consideration is warranted in this case because the substance of plaintiff's claims is that defendants had a duty to represent him in his individual capacity, in addition to on behalf of the corporation, and that he suffered damages independent from those suffered by the corporation as a result of defendants' negligence.

Defendants also ignore the fact they themselves filed pleadings on behalf of plaintiff in the underlying arbitration which state that they in fact represent plaintiff "individually, and derivatively on behalf of [the corporation]" (Statement of Claim). Regardless of whether the claims corresponding to plaintiff's damages were brought individually or derivatively, the pleadings suggest that defendants had a contractual agreement with plaintiff to represent him in

his capacity as an individual, and therefore a duty distinct from that to the corporation. Accordingly, the complaint may not be dismissed for lack of standing.

2. Collateral Estoppel

Defendants argue that under CPLR 3211(a)(5), collateral estoppel precludes the legal malpractice claim against defendants because there are arbitral findings showing that plaintiff himself, and not defendants, was the cause of the losses alleged, and that the issue has therefore already been adjudicated. Defendants draw parallels between the facts in this case and those in *Bernard v. Proskauer Rose, LLP* (87 AD3d 412 [1st Dept 2011]), which held that “because the [underlying] arbitral findings establish as a matter of law that defendants were not the cause of plaintiff’s losses, the [] court properly dismissed plaintiff’s complaint” due to collateral estoppel (*id.* at 416).

In *Bernard*, plaintiff abruptly resigned from his hedge fund employer to start his own competing fund, giving 120 days’ notice of his resignation as a member. The fund then voted to expel him and refused to pay fees, provoking the plaintiff to sue the fund in an arbitration. During the arbitration, it came to light that plaintiff had also purposefully delayed the launch of the fund he was hired to develop for the employer, and that he had usurped an investment opportunity from the fund. The arbitrator concluded that the fund’s expulsion of plaintiff for “gross negligence and willful misconduct” amounted to termination for cause and precluded plaintiff from recovery. The plaintiff then sued his attorney for malpractice, alleging that the attorney advised him to take most of the actions described. The court found that because plaintiff initiated his course of conduct long before receiving any advice from defendants, and because the arbitrator “establish[ed] that it was plaintiff’s own misconduct prior to and apart from any advice from defendants that led to his termination for cause... [that] the arbitral findings establish as a matter of law that defendants were not the cause of plaintiff’s losses, [and] the motion court properly dismissed plaintiff’s complaint.” (*id.*)

Plaintiff here contends that there is no common decisive issue between that which was decided in the arbitration and that which plaintiff seeks to resolve through this action. There were a number of questions at issue in the arbitration, none of which were defendants’ negligence. Specifically, in this action, plaintiff raises the question of whether defendants were negligent in their representation of plaintiff during the arbitration, particularly through their failure to present expert testimony challenging the accuracy of the Amended Tax Returns, a document that plaintiff

claims was both inaccurate and dispositive for the arbitrators, and affected the assessment of damages against him (opp at 15). Plaintiff states it is not true that he received the cash as reported by Reddy in the Amended Tax Returns, that such finding is based on false information, and that it was therefore essential for defendants to challenge the document during the course of the arbitration (opp at 16). Defendants' negligence in failing to represent him effectively was not at issue in the arbitration.

CPLR 3211(a)(5) provides that "a party may move for judgment dismissing one or more causes of action asserted against him on the ground that... the cause of action may not be maintained because of arbitration and award, collateral estoppel [etc.]." "Collateral estoppel may be invoked against a party to preclude litigation of an issue decided against that party in a prior adjudication if there is 'an identity of issue which has been necessarily decided' in the prior proceeding and there was 'a full and fair opportunity to contest the decision now said to be controlling.'" (*Acevedo v Holton*, 239 AD2d 194, 195 [1st Dept 1997] [quoting *Schwartz v Public Administrator of Bronx County*, 24 NY2d 65, 71(1969)]) In the context of a malpractice suit following an arbitration, collateral estoppel may apply where the arbitrator has found as a matter of law that arbitration counsel was not the cause of the client plaintiff's losses. (*see Bernard*, 87 AD3d at 416).

The Amended Tax Returns are products of the corporation's participation in the Voluntary Disclosure Program ("VDP") before the Internal Revenue Service where the issue of the fraudulent scheme of the corporation and its shareholders was addressed (*see* NYSCEF Doc. No. 7, Affirmation of Daniel Hurteau ¶ 25). The settlement with the IRS pre-dated the arbitration hearing and RFP's involvement (complaint ¶¶ 10-13). Similarly, as to the claim that the amount shown on the Amended Tax Returns were inaccurate, that alleged error would have occurred during the VDP or earlier and should have been raised during the proceeding before the Internal Revenue Service.

In any event, the alleged failures of counsel would have made no difference in the outcome of the case as the arbitration panel's conclusions rested primarily on its finding that Collins and Reines participated in a fraudulent scheme and lacked credibility. The claim as to the adequacy of the attack on the accuracy of the Amended Tax Returns was considered and rejected by Justice Scarpulla in the cross-action to vacate the arbitration award (*see* Scarpulla Decision at 10-11).

The arbitrators made two relevant findings. First, the panel found that “[c]laimants knew to some extent, if not fully, that, from before 2006 to June 2012, Reddy used the cash receipts generated by The Gaslight to pay bills, pay employees and pay the four (4) shareholders ‘off the books’ to increase net profits and reduce tax liability for both the Corporation and its shareholders” (NYSCEF Doc. No. 9, PFA at 4) (emphasis in Partial Final Award). This finding is not based on the accuracy of the Amended Tax Returns, but instead on testimony by the shareholders themselves about their own complicity in a fraudulent scheme (*id.* at 4-5).

Second, the panel found that “[s]ince Claimants and Respondents knew of, and were complicit in, this pattern of concealment, there was no breach of fiduciary duty or acts of ‘bad faith’ with respect to each other, only to the best interests of the Corporation by all of the shareholders and directors” (*id.* at 9).

For these reasons, the complaint may be dismissed as precluded by collateral estoppel.

3. Failure to State a Claim

Defendants argue that plaintiff fails to state a claim under CPLR 3211(a)(7) for legal malpractice because he has failed to assert facts in support of two elements of the claim – (1) proximate cause and (2) actual damages (memo at 6-9). Plaintiffs allege a list of defendants’ negligent failures in representing plaintiff in the arbitration, but do not make a connection between such failures and the outcome of the arbitration (*id.* at 7). Furthermore, defendants argue that plaintiff’s allegations regarding damages are conclusory. Plaintiff alleges that he has been “damaged in an amount to be determined at trial, but in no event less than \$1,000,000” (memo at 8, citing complaint ¶ 31). Yet plaintiff provides no further indication of how he arrived at that sum. Plaintiff has failed to plead his claim with the required particularity, and therefore the claim should be dismissed.

In response, plaintiff argues that he adequately pled facts permitting the requisite inferences that (1) “defendant’s negligence caused plaintiff’s loss,” (opp at 10, citing *Garnett v Fox, Horan & Camerini LLP*, 82 AD3d 435, 436 [1st Dep’t 2011]) and (2) that plaintiff sustained actual damages (opp at 13, citing *Garnett*, 82 AD3d at 436). These facts include allegations that defendants represented plaintiff throughout the arbitration, and that defendants breached their duty of care during the course of that representation through, *inter alia*, failing to participate in the selection of the arbitration panel, and failing to present an expert who could dispute the accuracy

of the Amended Tax Returns filed by Reddy and Curran³ (opp at 11-12, Reines aff ¶¶ 13-16). Plaintiff contends that the Amended Tax Return purported to show that plaintiff falsely received certain money that was actually stolen by Reddy, and that plaintiff was thereby saddled with undeserved tax liabilities and other damages that he seeks to recover in this action (opp at 12-13, Reines aff ¶17). His other damages include legal fees, arbitration costs, distributions that he should have received from Gaslight (opp at 7-8).

As is discussed in detail below, the facts and law in this case are virtually identical to those before the court in the *Collins* litigation. Judge Stanton dismissed that case for failure to assert facts sufficient to show proximate cause. The reasoning in that case applies here as well. Further, a finding of failure to show proximate cause is reinforced by the Decision and Order of Justice Scarpulla.

a. Collins Legal Malpractice Claim

In the proceeding to confirm the arbitration award, Collins (represented by new counsel, Arthur Greig) and Reines (represented by Collins' former counsel, Benjamin) sought to vacate the award, arguing bias by the chair of the arbitration panel, among other things. In a Decision and Order dated April 15, 2016, Justice Scarpulla found "no basis for Respondents' claim that [the panel chair] Byrne was biased in favor of the Petitioners" (Scarpulla Decision, Index No.: 651553/2015, NYSCEF Doc. No. 92 at 6) and rejected Respondents' claim that Byrne prevented effective cross examination by limiting respondents' inquiry into Reddy's preparation of reconstructed financial records in the VDP. The court noted that "Respondents actually did question [Reddy] on [the] issue" and that "the arbitration panel found ample support for Reddy's story" (*id.* at 10). In the confirmation proceeding, neither Collins nor Reines expressed any dissatisfaction with their lawyers in the arbitration.

Thereafter, Collins commenced a civil action in the United States District Court for the Southern District of New York, against the respondents in this case, as well as Benjamin and Nicholas Perrella alleging legal malpractice. Collins also named Fiat Sarayli, an accountant, but

³ The first time that plaintiff introduced specific allegations regarding (1) defendants' failures to participate in the selection of the arbitration panel and (2) to present an expert to dispute the accuracy of the Amended Tax Return was not in the complaint, but in the opposition papers, supported by the Reines Affidavit. The new allegations have been considered in connection with this motion.

voluntarily dismissed the claim against him (*see Collins v Felder*, Civil Action No. 16 Civ. 8741 [LLC], SDNY). The allegations in the *Collins case* are virtually identical to the allegations in this case. That case was dismissed for failure to state a cause of action (*see Collins*, 2018 US Dist LEXIS 116972 [SDNY July 12, 2018] [“2018 Decision”]).

In the 2018 Decision and in an earlier decision, Judge Stanton reviewed the New York law governing legal malpractice claims in detail (*see id.* and 2017 US Dist LEXIS 211105 [SDNY December 21, 2017]) (“2017 Decision”). His detailed recitation of the law need not be recounted here, except to underscore that “a plaintiff in a legal malpractice case must prove his case – within – a – case by demonstrating that but for the attorneys conduct, the client would have prevailed in the underlying matter or would not have sustained any ascertainable damages” (internal citation and quotation marks excluded). The court found that the complaint made no such demonstration and dismissed the complaint for failure to state a claim upon which relief can be granted (*see* 2018 Decision at 3).

b. Reines Legal Malpractice Claim

On a motion to dismiss a plaintiff’s claim pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander’s, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to “afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court’s role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

In order to prevail in an action for legal malpractice, the plaintiff must plead factual allegations which, if proven at trial, would demonstrate that counsel had breached a duty owed to the client, that the breach was the proximate cause of the injuries, and that actual damages were sustained (*Franklin v Winard*, 199 AD2d 220, 221 [1st Dept 1993]). Unsupported factual allegations, conclusory legal argument or allegations contradicted by documentation, do not suffice (*id.*). Attorneys may select among reasonable courses of action in prosecuting their clients’

cases without thereby committing malpractice (*Rosner v Paley*, 65 NY2d 736, 738 [1985]), so that a purported malpractice claim that amounts only to a client's criticism of counsel's strategy may be dismissed. Moreover, the client must plead specific factual allegations establishing that but for counsel's deficient representation, there would have been a more favorable outcome to the underlying matter. (*Dweck Law Firm, LLP v Mann*, 283 AD2d 292, 293 [1st Dept 2001], citing *Franklin*, 199 AD2d at 220)

At this stage, plaintiff does not have to show a "likelihood of success," but is required to plead facts from which it could reasonably be inferred that defendant's negligence caused [plaintiff's] loss (*see InKine Pharm. Co. v Coleman*, 305 AD2d 151 [1st Dept 2003]). Plaintiff is not required to show that damages were actually sustained, but must "allege facts from which actual damages could reasonably be inferred." (*Garnett*, 82 AD3d at 436)

As in *Collins*, the complaint in this case fails to plead proximate cause. Reines has failed to allege facts to show he would have prevailed in the arbitration "but for" his counsel's alleged failures to challenge the accuracy of the Amended Tax Returns, to select an arbitration panel with tax law expertise, to properly prepare for and present his case and to make various tactical moves Reines now asserts should have been made in an arbitration hearing held over eleven days and resulting in a well-reasoned thirteen-page Partial Final Award.

As discussed above the Amended Tax Return is a product of a tax audit of The Gaslight and the Corporation's settlement with the IRS arising from a tax avoidance scheme in which all shareholders were complicit (NYSCEF Doc. No. 9, PFA at 4) ("Respondents' forensic accountant, working with Reddy, assisted by Curran, was able to reconstruct a credible and accurate financial picture for the Corporation for 2006 through 2012 which resulted in amended tax returns wherein Reddy and Curran admitted the concealment of tax receipts and payments thereby increasing the tax liability of the Corporation and each of the shareholders for this period") (*id.* emphasis in original). Any "challenge" to the Amended Tax Return Reines wished to assert should have been made before the tax authorities' prior to the time he hired defendants. The intricacies of state and federal tax laws were not involved in the arbitration and no special tax law knowledge by the arbitrators was needed. The length of the arbitration, the well-constructed findings of the panel and the record before Justice Scarpulla strongly suggest vigorous and competent representation.

Of decisive importance for purposes of this motion, the adverse award does not rest on any of the failures alleged but instead on detailed findings and conclusions that plaintiff admitted to

participation in fraud against government, credibility findings and a failure of Reines to meet his burden of proof. The motion to dismiss shall be granted.

It is hereby,

ORDERED that the motion to dismiss the complaint is GRANTED; and it is further

ORDERED that the complaint is dismissed in its entirety with costs and disbursements to defendants as taxed by the Clerk of the Court upon submission of a proper bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: September 20, 2018

ENTER,

O. PETER SHERWOOD J.S.C.