

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	Bankr. No. 03-10717
TCW/CAMIL HOLDING L.L.C.,	)	
	)	
Debtor.	)	
	)	
	)	
	)	Adv. No. 03-53929
	)	
_____	)	
TCW/CAMIL HOLDING L.L.C.,	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. No. 03-1154-SLR
	)	
	)	
FOX HARON & CAMERINI L.L.P.,	)	
	)	
Defendant.	)	

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Stuart M. Grant, Esquire, Grant & Eisenhofer, P.A., Wilmington, Delaware. Counsel for Plaintiff.

Ian Connor Bifferato, Esquire, Megan N. Haper, Esquire, Bifferato, Bifferato & Gentilotti, Wilmington, Delaware. Thomas W. Hyland, Esquire, Joseph L. Francoeur, Esquire, Wilson, Elser, Moskowitz, Edelman & Dicker, L.L.P., New York, New York. Counsel for Defendant.

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**MEMORANDUM OPINION**

Dated: May 12, 2004  
Wilmington, Delaware

**ROBINSON, Chief Judge**

**I. INTRODUCTION**

On June 17, 2003, plaintiff TCW/Camil Holding L.L.C. filed an adversary complaint against defendant Fox Haron & Camerini L.L.P. in the United States Bankruptcy Court for the District of Delaware. Plaintiff alleges that defendant, who served as its former legal counsel, committed legal malpractice in the course of providing legal representation and advice during an arbitration proceeding arising from a failed joint venture to acquire control of Josapar S.A., the largest Brazilian producer of rice. (D.I. 24, Complaint at ¶ 1; Adv. No. 03-53929) On August 8, 2003, defendant answered the complaint denying all legal malpractice allegations. (Id., Answer at ¶ 1)

On September 3, 2003, defendant filed a motion to dismiss the adversary proceeding for failure to state a claim. (D.I. 18; Adv. No. 03-53929) Plaintiff filed a motion for judgment on the pleadings on September 26, 2003. (D.I. 23; Adv. No. 03-53929) On December 19, 2003, defendant moved to withdraw the reference of the adversary proceeding from bankruptcy court. (D.I. 39; Adv. No. 03-53929) The court granted this motion on January 21, 2004. (D.I. 6) On March 26, 2004, defendant moved to transfer venue pursuant to 28 U.S.C. § 1404(a) to the United States District Court for the Southern District of New York. (D.I. 18) The court denied this motion on April 29, 2004. (D.I. 25)

Plaintiff is a limited liability company organized

under the laws of the State of Delaware with its principal place of business in New York. Defendant is a limited liability partnership registered in the State of New York with offices in New York City. The court has jurisdiction over this suit pursuant to 35 U.S.C. § 1331.

Presently before the court are plaintiff's motion for judgment on the pleadings and defendant's motion to dismiss.<sup>1</sup> For the reasons that follow, the court denies plaintiff's motion for judgment on the pleadings and denies defendant's motion to dismiss in part as to count I of the complaint and grants said motion in part as to count II of the complaint.

## **II. BACKGROUND**

Plaintiff, IRHE Holdings, Inc. ("IRHE"), and Garial S.A. ("Garial") entered into an agreement dated December 8, 1999 and an amendment dated April 17, 2000 to form a joint venture and acquire a direct or an indirect controlling interest in Josapar S.A. ("Josapar") ("Joint Venture Agreement").<sup>2</sup> (Id. at ¶ 16)

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<sup>1</sup>Plaintiff's motion for judgment on the pleadings and defendant's motion to dismiss were not decided by the bankruptcy court at the time this court granted defendant's motion to remove the reference. Consequently, these motions were transferred to this court, but not added to this court's docket. As a result, the court shall reference these motions using docket items numbers assigned by the bankruptcy court.

<sup>2</sup>IRHE is a member of the Perez Companc Group, a multinational group of companies based in Argentina with investments in a large number of economic sectors in numerous countries. (D.I. 21, Complaint at ¶ 10; Adv. No. 03-53929) Garial is a Panamanian investment company with interests in the

Plaintiff, IRHE, and Garial acquired ownership in Camil Holdings LLC ("Camil")<sup>3</sup> as part of the joint venture. Plaintiff contributed \$58.75 million to Camil under the Joint Venture Agreement to purchase these shares. (Id.) In exchange for this capital contribution, plaintiff received "New Camil Units"<sup>4</sup> representing a corresponding percentage of Camil's total issued and outstanding units. (Id. at ¶ 18) IRHE also made a capital contribution of \$10.4 million in return for an equity interest in the form of "New Camil Units." (Id. at ¶ 19)

Pursuant to the Joint Venture Agreement, plaintiff, IRHE, and Garial made a series of offers through Camil to purchase shares of Josapar from various shareholders, totaling in the aggregate not less than fifty-one percent of Josapar's issued and outstanding capital stock. (Id. at ¶ 17) When Camil failed to obtain control of Josapar by March 31, 2001, IRHE requested in writing that plaintiff, Garial, and Camil enter into good faith negotiations to adjust IRHE's interest in Camil. (Id. at ¶ 21) Such negotiations were provided for under Section 2(C) of the

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food industry. (Id. at ¶ 8)

<sup>3</sup>Camil is equally owned by plaintiff and Garial. (Id. at ¶ 9) Camil owns Camil Alimentos S.A., a major Brazilian producer and distributor of rice. (Id.)

<sup>4</sup>Since Camil formed as a limited liability company, units were issued instead of shares.

Joint Venture Agreement.<sup>5</sup> The parties failed to agree to IRHE's adjustment as of mid-June 2001. (D.I. 21, Complaint at ¶ 22; Adv. No. 03-53929) IRHE, therefore, claimed that Camil was obligated to repurchase all of its "New Camil Units" in an amount equal to that portion of IRHE's capital contribution up to \$10 million pursuant to Section 2(C) of the Joint Venture Agreement.<sup>6</sup>

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<sup>5</sup>Section 2(C) of the Joint Venture Agreement provides in pertinent part:

It is further understood and agreed by the Investor that in the event that Camil fails to acquire, through one or a series of Acquisition Offers, during the 12-month period from the date hereof (the "Acquisition Period"), the Control Right . . . , the Investor may, within 5 business days immediately following the end of the Acquisition Period, request [plaintiff], Garial[, ] and Camil Holdings to enter into good faith negotiations with the Investor to adjust the Investor's interest in Camil Holdings, . . . based on the total value of Camil Holdings (the "Camil Holding Value") on the first day after the end of the Acquisition Period (the "Calculation Date").  
(D.I. 24, ex. A; Adv. No. 03-53929)

<sup>6</sup>Section 2(C) of the Joint Venture Agreement provides in pertinent part:

[Plaintiff] and Garial agree to cause Camil Holdings LLC to repurchase all of the then fully subscribed and paid-in Investor's New Camil Units for a price equal to the portion of the Investor's Contribution that has actually been disbursed by the Investor pursuant to this Section 2 (the 'Repurchase Price'), provided however, that Camil Holdings shall not be obligated to make any such repurchase if the Repurchase Price for any such repurchase would be greater than \$[10] million. The Repurchase Price shall be payable, in cash and in immediately available funds, in one installment falling due on the day which is 180 days after the end of the Negotiation Period.  
(D.I. 24, ex. A; Adv. No. 03-53929)

(D.I. 21, Complaint at ¶ 22; Adv. No. 03-53929) On or about January 28, 2002, IRHE initiated an arbitration before the International Court of Arbitration to secure this repurchase. (Id. at ¶ 23)

In accordance with the rules of the International Court of Arbitration, the parties to an arbitration jointly must prepare a "Terms of Reference" setting forth a "Statement of Agreed Facts" and "Issues Raised by Both Parties." Defendant participated in drafting the "Terms of Reference" for plaintiff, Camil, and Garial. The "Statement of Agreed Facts" included the following: "Pursuant to Section 2(C) of the Agreement, in the event that [IRHE] and [plaintiff, Camil, and Garial] fail to agree on the value of Camil Holdings with a minority interest in Josapar within the Negotiation Period, **[plaintiff, Camil, and Garial] agree to repurchase [IRHE's] New Camil Units.**" (D.I. 25, ex. E; Adv. No. 03-53929) (emphasis in original) The "Issues Raised by Both Parties" identified two issues for the arbitral tribunal's consideration: (1) "Did [plaintiff, Camil, and Garial] breach Section 2(C) of the [Joint Venture] Agreement by failing to repurchase [IRHE's] New Camil Units?"; and (2) "Is [IRHE] entitled to an order requiring [plaintiff, Camil, and Garial] to repurchase [IRHE's] New Camil Units in the amount of \$10 million or, in the alternative, to pay [IRHE] \$10 million in exchange for [IRHE] releasing its New Camil Units?" (D.I. 21, Complaint at ¶

31; Adv. No. 03-53929) The arbitral tribunal conducted a hearing in September 2001 to address the "Terms of Reference." (Id. at ¶ 32) On November 12, 2002, the arbitral tribunal issued a final award imposing joint and several liability for the full extent of monetary damages against plaintiff, Camil, and Garial. (Id. at ¶ 33) The arbitral tribunal found that "[t]he evidence clearly demonstrates a failure by the parties to agree on reevaluation of IRHE's interest in Camil Holdings, and thus establishes, in accordance with the plain language of the [Joint Venture] Agreement, IRHE's right to require repurchase of this interest." (D.I. 25 at 8; Adv. No. 03-53929) The arbitral tribunal also determined that "[plaintiff, Camil, and Garial] breached Section 2(C) of the Agreement by failing to repurchase [IRHE's] New Camil Unit" and that "[IRHE] is entitled to an order requiring [plaintiff, Camil, and Garial] to repurchase [IRHE's] New Camil Units in the amount of US \$10 million or, in the alternative, to pay [IRHE] US \$10 million in exchange for [IRHE] releasing its New Camil Units."

On December 16, 2002, defendant requested clarification of the final award to the extent that Camil alone was required to pay the full amount of \$10 million. (D.I. 21, Complaint at ¶ 35; Adv. No. 03-53929) On December 23, 2002, IRHE filed a petition to confirm the arbitral award and to enter judgment in its favor in the United States District Court for the Southern District of

New York. (D.I. 21, Complaint at ¶ 36; Adv. No. 03-53929) On January 17, 2003, defendant filed a motion to dismiss or, in the alternative, to stay proceedings on IRHE's petition pending clarification from the arbitral tribunal. (Id. at ¶ 37) On January 29, 2003, the arbitral tribunal denied defendant's request for clarification. The arbitral tribunal commented:

[Plaintiff, Camil, and Garial], acting through their common counsel, collectively executed the Terms of Reference dated July 3, 2002. As [IRHE] properly points out, that document contained in its Section 5.15 the following Statement of Agreed Fact[s] accepted by all parties: Pursuant to Section 2(C) of the [Joint Venture] Agreement, in the event that [IRHE] and [plaintiff, Camil, and Garial] fail to agree on the value of Camil Holdings with a minority interest in Josapar within the Negotiation Period, **[plaintiff, Camil, and Garial] agree to repurchase [IRHE's] New Camil Units.**

(D.I. 25, ex. E; Adv. No. 03-53929) (emphasis in original)

Shortly after this denial, defendant stipulated to withdraw the motion to dismiss IRHE's petition. (D.I. 21, Complaint at ¶ 41; Adv. No. 03-53929) On February 13, 2003, the United States District Court for the Southern District of New York entered an order confirming the final award against plaintiff, Camil, and Garial. (Id. at ¶ 44) The Southern District of New York also entered judgment against plaintiff, Camil, and Garial jointly and severally in the amount of \$11,261,726.46 plus interest. (Id.) Upon receiving this judgment, IRHE immediately sought collection in full exclusively from plaintiff. (Id. at ¶ 45) Plaintiff

claims that it is unable to satisfy the judgment without selling its assets in a distressed sale. Consequently, to preserve the value of its assets, plaintiff filed for Chapter 11 bankruptcy in the United States District Court for the District of Delaware. (Id. at ¶ 46)

### **III. STANDARD OF REVIEW**

A motion for judgment on the pleadings made pursuant to Federal Rule of Civil Procedure 12(c) is treated under the same standard as a motion to dismiss for failure to state a claim under Rule 12(b)(6). See Jablonski v. Pan American World Airways, Inc., 863 F.2d 289, 290-91 (3d Cir. 1988). The difference between the two rules is purely procedural. That is, a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) must be "made before further pleading if further pleading is permitted." Fed. R. Civ. P. 12(b)(6). In other words, a motion to dismiss for failure to state a claim must be brought before, and in lieu of, filing an answer. Id. In contrast, a Rule 12(c) motion may be made "after the pleadings are closed but within such time as not to delay the trial." Notably, either motion must be treated as one for summary judgment and disposed of as provided in Fed. R. Civ. P. 56 if matters outside the pleadings are presented to and not excluded by the court. In the case at bar, plaintiff has not referred to any matters outside the pleadings in its Rule 12(c) motion.

Defendant, however, has referred to matters outside the pleadings in its Rule 12(b)(6) motion. The court, therefore, will treat plaintiff's motion as one for judgment on the pleadings, but will evaluate defendant's motion under the standard applicable to a motion for summary judgment.

**A. Motion for Judgment on the Pleadings**

When deciding a Rule 12(c) motion, a district court must view the facts and inferences to be drawn from the pleadings in the light most favorable to the non-moving party. Green v. Fund Asset Mgmt., L.P., 245 F.3d 214, 220 (3d Cir. 2001); Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 399, 406 (3d Cir. 1993). Judgment on the pleadings will only be granted if it is clearly established that no material issue of fact remains to be resolved and that the movant is entitled to judgment as a matter of law. Jablonski, 863 F.2d at 290.

**B. Motion for Summary Judgment**

A court shall grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). "Facts

that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." Horowitz v. Fed. Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted).

If the moving party has demonstrated an absence of material fact, then the nonmoving party "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pennsylvania Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, then the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In other words, the court must grant summary judgment if the party responding to the motion

fails to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof. Omnipoint Comm. Enters., L.P. v. Newtown Township, 219 F.3d 240, 242 (3d Cir. 2000) (quoting Celotex, 477 U.S. at 323).

#### **IV. DISCUSSION**

##### **A. Sufficiency of the Pleadings**

Plaintiff argues that defendant admitted that it had insufficient knowledge about the facts and legal issues underlying the Joint Venture Agreement, arbitration, and post-arbitrations proceedings to adequately represent it because defendant: (1) denied possessing knowledge and information sufficient to form a belief as to the truth of some of the allegations set forth in the complaint; and (2) failed to offer any reasonable excuse for this lack of knowledge and information. In rebuttal, defendant contends that its answers to plaintiff's complaint do not constitute any form of an admission. Rather, defendant avers that it denied allegations of the complaint due to insufficient information and knowledge to avoid conceding to plaintiff's characterization of the facts underlying the action at bar.

Under Fed. R. Civ. P. 8(b), a defendant has three choices when answering an allegation made in a complaint: (1) admit the allegation; (2) deny the allegation; or (3) state that it is without knowledge or information sufficient to form a belief as

to the truth of the allegation. When the defendant avails the third option, the Federal Rules consider this response to have the effect of a denial. Fed. R. Civ. P. 8(b). Besides these three choices, a defendant also may deny a part or a qualification of an allegation. A defendant in such case should specify so much of the allegation as is true and material and deny the remainder. Id. However, a defendant "may not deny sufficient information or knowledge with impunity, but is subject to the requirements of honesty in pleading. . . . An allegation will be deemed admitted when the matter is obviously one as to which defendant has knowledge or information." David v. Crompton & Knowles Corp., 58 F.R.D. 444, 446 (E.D. Pa. 1973) (citations omitted); see also Fidelity and Guaranty Ins. Co. v. Keystone Contractors, Inc., 2002 WL 1870476, \*3 (E.D. Pa. 2002) (finding the defendant's attempts to deny sufficient knowledge or information on matters clearly within the scope of its knowledge to be so blatantly evasive as to be ineffective denials).

The court construes defendant's statements that it lacks knowledge and information sufficient to form a belief as to the truth of some of plaintiff's allegations as denials only for certain allegations. The court finds that defendant must have had the knowledge and information to either deny or admit various other allegations, at the very least in part. For example, the court is hard pressed to believe that defendant lacked sufficient

knowledge or information about the "Terms of Reference" of the arbitration, the dates for the arbitration hearing, or the arbitral tribunals final award, since defendant admitted to representing plaintiff in connection with the contractual dispute at issue in the arbitration before the International Court of Arbitration. (See D.I. 24, Answer at ¶¶ 31, 32, 33; Adv. Pro. 03-53929) Similarly, the court is unpersuaded that defendant lacked sufficient knowledge or information about whether it filed a motion to dismiss IRHE's petition to confirm the arbitral award and to enter judgment in its favor, the arbitral tribunal denied a request for clarification of the final award, and the United States District Court for the Southern District of New York entered an order confirming the final award. (See *id.* at ¶¶ 36, 36, 44) The court, thus, concludes defendant's failure to comply in good faith with the basic federal pleading rules belies the existence of meritorious denials. Accordingly, the court shall treat the above denials as admissions for purposes of deciding the motions at bar.

**B. Legal Malpractice Under New York Law<sup>7</sup>**

Legal malpractice is a specific form of negligence. Schweizer v. Mulvehill, 93 F. Supp. 2d 376, 393 (S.D.N.Y. 2000).

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<sup>7</sup>The parties agree that New York law applies to plaintiff's legal malpractice allegations, given that the events underlying this action transpired in the State of New York.

To prevail on this claim under New York law, a plaintiff must establish the failure of an attorney to exercise the degree of skill commonly exercised by an ordinary member of the legal community, proximately resulting in damages to the client. Id. The four elements of a legal malpractice claim are: (1) the duty of the attorney to use such skill, prudence, and diligence as other members of his profession commonly exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual damage resulting from the attorney's negligence. Id. (citations omitted). To establish proximate cause, the plaintiff must show that "but for the defendant's negligence, he or she would have prevailed in the underlying action or would not have sustained any damages." Nobile v. Schwartz, 265 F. Supp. 2d 282, 289 (S.D.N.Y. 2003) (citations omitted). Put differently, if there is no showing that the outcome of the underlying action would have been different but for the defendant's alleged negligence, then the plaintiff cannot establish a prima facie case of legal malpractice. N.A. Kerson Co. v. Sahyne, Dachs, Weiss, Kolbrenner & Levy, 45 N.Y.2d 730, 730 (N.Y. 1978).

### **C. Count I of Plaintiff's Complaint**

As to count I of the complaint, plaintiff claims that defendant committed legal malpractice by failing to exercise reasonable care, skill, and diligence in clearly distinguishing

between the respective rights and obligations of plaintiff, Camil, and Garial when drafting, revising, and agreeing to the "Terms of Reference" submitted to the arbitral tribunal. (D.I. 21, Complaint at ¶ 48; Adv. No. 03-53929) In particular, plaintiff argues that defendant failed to recognize that the structure of the Joint Venture Agreement limited the liability of the participants if the joint venture failed. That is, Section 2(C) of the Joint Venture Agreement imposed the direct obligation to make payment for the New Camil Units on Camil alone; plaintiff and Garial were merely required "to cause" Camil to do so, not make payment themselves. Plaintiff contends that if defendant had properly drafted the "Terms of Reference" to reflect Section 2(C), then the arbitral tribunal would have enforced liability pursuant to terms of the Joint Venture Agreement rather than assign joint and several liability.

Defendant responds by alleging that count I fails as to the second, third, and fourth elements requisite to a legal malpractice cause of action.<sup>8</sup> In this regard, defendant claims that plaintiff cannot show that: (1) defendant breached its duty of care; (2) defendant's actions were the proximate cause of its loss; and (3) it suffered actual damages.

The court finds that questions of fact exist regarding the

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<sup>8</sup>Defendant appears not to contest the first element, namely, that it owed a duty to plaintiff.

second and third elements of plaintiff's legal malpractice claim with respect to count I.<sup>9</sup> It is unclear from the record whether defendant failed to exercise the degree of care, skill, and diligence that another member of the legal community would have exercised in assembling the "Terms of Reference."<sup>10</sup> It is equally unclear whether plaintiff would have prevailed in avoiding joint and several liability but for defendant's alleged negligence in framing the "Terms of References." While the arbitral tribunal implied in its original decision that it considered the plain language of the Joint Venture Agreement in deciding the repurchase issue, thereby suggesting that it did not reach its decision solely based upon the "Terms of Reference," the court notes that the arbitral tribunal focused on the specific "Statement of Agreed Fact" that stated "[plaintiff, Camil, and Garial] agree[d] to repurchase [IRHE's] New Camil Units" when responding to plaintiff's request for clarification. The court, therefore, finds that discovery is necessary to more fully address the aforementioned elements. Consequently, the

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<sup>9</sup>The court does not find any questions of fact as to the fourth element (i.e., whether plaintiff suffered actual damages). Under the court's reading of Section 2(C) of the Joint Venture Agreement, plaintiff was not directly obligated to repurchase the New Camil Units from IRHE. Plaintiff was only obligated "to cause" Camil to repurchase these units. By holding plaintiff liable for more than \$11.2 million, plaintiff necessarily suffers actual damages.

<sup>10</sup>Defendant did not participate in drafting the joint venture agreement.

court concludes that it is not possible to grant judgment as a matter of law at this stage in favor of either side. The court denies plaintiff's motion for judgment on the pleadings and denies defendant's motion to dismiss in part as to count I of the complaint.

**D. Count II of Plaintiff's Complaint**

As to count II of the complaint, plaintiff claims that when defendant negligently stipulated to joint and several liability during the arbitration proceeding, it created a conflict of interest between plaintiff, Camil, and Garial. Plaintiff argues that despite this conflict, defendant stipulated to withdraw plaintiff's, Camil's, and Garial's motion to dismiss IRHE's petition to confirm the arbitral award without plaintiff's consent before advising plaintiff to obtain separate legal representation. In response, defendant argues that conflict of interest claims are not actionable under New York law and constitute, at most, a violation of an attorney's ethical responsibilities.

At the outset, the court must evaluate whether a conflict of interest actually existed at the time of the district court proceeding before determining whether count II presents a cognizable cause of action. Plaintiff's interest arose from its individual obligation to repurchase IHRE's New Camil Units, since it was held jointly and severally liable pursuant to the

arbitration proceeding. Camil and Garial each had this same interest as they were also held jointly and severally liable. To this extent, plaintiff's, Camil's, and Garial's individual interests conflicted; none of the three entities wanted to be burdened with the obligation of repurchasing IHRE's New Camil Units. Accordingly, the court finds that defendant operated under a conflict of interest in jointly representing plaintiff, Camil, and Garial in the district court proceedings.

Having determined that a conflict of interest existed, the court agrees with defendant that a claim for legal malpractice premised on such conflict is not permissible under New York law.<sup>11</sup> In Sumo Container Station, Inc. v. Evans, Orr, Pacelli, Norton & Laffan, P.C., 278 A.D.2d 169 (N.Y. App. Div. 1<sup>st</sup> Dep't 2000), plaintiff commenced a legal malpractice action against his attorneys based upon a conflict of interest. Plaintiff claimed that his attorneys should have advised him of the conflict of interest posed by jointly representing him and his insurance carrier in the underlying action involving a car accident and of his right to independent counsel. The district court granted the

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<sup>11</sup>Plaintiff cites Rejohn v. Serpe, 478 N.Y.S.2d 799 (N.Y. Dist. Ct. 1984), to support its argument that a legal malpractice claim premised on a conflict of interest is cognizable. In this case, the court implies that such claim is permissible and simply requires plaintiff to prove the same elements required for any other legal malpractice claim. While favorable to plaintiff's position, this district court decision predates the appellate decision cited herein and, therefore, is not controlling.

defendant's motion for summary judgment dismissing plaintiff's third amended complaint and plaintiff appealed. The appellate court stated: "The cited conflict of interest, even if a violation of the Code of Professional Responsibility, does not by itself support a legal malpractice cause of action." Id. The appellate court, therefore, concluded that the plaintiff's malpractice claims were properly dismissed.

The court finds the facts in Sumo analogous to those at bar. Like the plaintiff in Sumo whose interest conflicted with that of his co-plaintiff at the time of the joint representation, plaintiff, Camil, and Garial also had conflicting interests when defendant jointly represented them in the district court proceeding. Applying the ruling from Sumo to the instant case, the court concludes that plaintiff's legal malpractice claim based on said conflict of interest is not a justiciable ground for legal malpractice liability. Consequently, the court denies plaintiff's motion for judgment on the pleadings and grants defendant's motion to dismiss in part as to count II of plaintiff's complaint.

#### **V. CONCLUSION**

For the reasons stated herein, the court denies plaintiff's motion for judgment on the pleadings. The court denies defendant's motion to dismiss for failure to state a claim in part as to count I of plaintiff's complaint and grants said

motion in part as to count II of plaintiff's complaint. An order shall issue.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	Bankr. No. 03-10717
TCW/CAMIL HOLDING L.L.C.,	)	
	)	
Debtor.	)	
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	)	Adv. No. 03-53929
	)	
_____	)	
TCW/CAMIL HOLDING L.L.C.,	)	
	)	
Plaintiff,	)	
	)	Civ. No. 03-1154-SLR
v.	)	
	)	
FOX HARON & CAMERINI L.L.P.,	)	
	)	
Defendant.	)	

**O R D E R**

At Wilmington this 12<sup>th</sup> day of May, 2004, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that:

1. The court denies plaintiff's motion for judgment on the pleadings. (D.I. 23; Adv. No. 03-53929)

2. The court denies defendant's motion to dismiss for failure to state a claim in part as to count I of plaintiff's complaint and grants said motion in part as to count II of plaintiff's complaint. (D.I. 18; Adv. No. 03-53929)

Sue L. Robinson  
United States District Judge