

Pappas v New 19 West, LLC

2009 NY Slip Op 30140(U)

January 22, 2009

Supreme Court, New York County

Docket Number: 118980/06

Judge: Jane S. Solomon

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SCANNED ON 1/26/2009
* 1]
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON
Justice

PART 55

Index Number : 118980/2006

PAPPAS, JOHN

vs

NEW 19 WEST, LLC

Sequence Number : 004

DISMISS

INDEX NO. _____

MOTION DATE 8/18/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

1-3
4-7
8-9

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the original memorandum decision and order.

M.T.B. - a preliminary conference is scheduled for 1/26/09 at 12 noon

FILED
JAN 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/22/09

JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

----- X

JOHN PAPPAS and LOIS M. MCNALLY,

Index No. 118980/06

Plaintiffs,

- against -

NEW 19 WEST, LLC, JOSEPH MOINIAN, CANTOR
AND PECORELLA, INC., NINA FALK, JOSEPH M.
MATTONE, Jr., THE MATTONE GROUP LLC, IRENE
M. MATTONE, TERESA A. MATTONE, MICHAEL X.
MATTONE, JOSEPH M. MATTONE, SR., PHILIP W.
MENGA, CHRISTOPHER J. TODD, MATTONE,
MATTONE, MATTONE, LLP, MATTONE MATTONE
MATTONE MATTONE MATTONE MEGNA & TODD
and STARR ASSOCIATES, LLP,

DECISION and ORDER

Defendants.

FILED
JAN 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

----- X

JANE S. SOLOMON, J.:

Defendant Joseph M. Mattone, Jr. (Mattone), Irene M.
Mattone, Teresa A. Mattone, Michael X. Mattone, Joseph M.
Mattone, Sr., Philip W. Menga, Christopher J. Todd, Mattone,
Mattone, Mattone, LLP (First Mattone Firm) and Mattone Mattone
Mattone Mattone Mattone Megna & Todd (Second Mattone Firm)
(collectively, Mattone defendants) move, pursuant to CPLR 3211
(a) (1) and (a) (7), for dismissal of the amended complaint and
all cross claims.

The essential facts and allegations underlying this
action were discussed in a prior decision, dated February 20,
2008 (Prior Decision). Summarized, plaintiffs John Pappas and
Lois M. McNally (Buyers) are purchasers of two condominium units
in an apartment building, known as the Downtown Club Condominium,

located at 20 West Street in Manhattan. Buyers allege that they told defendant Nina Falk, who was employed as a broker by defendant Cantor and Pecorella, Inc. (Cantor), that they wanted to purchase a unit with outdoor space. Falk showed Buyers two adjacent units, and told them that the sponsor, New 19 West, LLC (Sponsor), intended to legalize a setback in the roof next to which the units were located, and assured them that they could use the roof space as their "exclusive outdoor space."

Attached to the "Offering Plan" was a letter from Cantor to the Sponsor (Cantor Opinion Letter) stating that, based upon its experience with new construction luxury condominium projects, the allocation of common interests was made in accordance with the Real Property Law. Also included was an opinion letter from defendant Starr Associates, LLP (Starr), issued pursuant to 13 NYCRR 20.3(y)(5) (Starr Opinion Letter), opining that the allocation of common interests shown on Schedule A of the Offering Plan was made in accordance with Real Property Law § 339-i(1)(ii).

On January 26, 2006, Buyers entered into contracts with the Sponsor to purchase units 39-B and 39-C, with the intention of combining the units. The contracts did not contain any representation that the Sponsor would legalize the roof setbacks. Prior to closing, Buyers submitted a punch list of work that they wanted performed, including the installation of paving stones on the roof outside unit 39-C, and a railing around the roof setback

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parapet, which work was done after the closing held on May 26, 2006. The roof setback has not been legalized as a terrace for Buyers' exclusive use, and it remained off limits to them as of the date of the commencement of this action in December 2006.

The amended complaint alleges that Cantor, through Falk, fraudulently misrepresented that Buyers would have exclusive use of the roof setback, and thereby induced them to purchase both units because of their desire to combine the units and have the use of outdoor space. It also alleges that Cantor negligently misrepresented that the use of the roof setback would be available for Buyers' use as their exclusive outdoor space. In addition, Buyers allegedly relied upon Cantors' false certification that it had complied with Real Property Law 339-i (1) (ii). The claims against Falk, individually, mirrored the claims against Cantor for fraud and negligence, with the exception of the claim based on the Cantor Opinion Letter.

The amended complaint also alleges that Starr fraudulently induced Buyers to purchase the units by certifying in the Starr Opinion Letter that the allocation of common interests was made in accordance with Real Property Law § 339-i (1) (ii). It alleges further that Starr knew that people would rely on the Starr Opinion Letter in deciding whether to purchase apartments in the building, thereby making it liable for negligent misrepresentation, and that that Starr is liable for fraud and negligent misrepresentation based upon the content of

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the Starr Opinion Letter.

As stated in the Prior Decision, the claims against Cantor, Falk, and Starr are not viable because (1) the Offering Plan accurately described that which Buyers purchased, (2) Buyers' alleged reliance upon Falk's statements about use of the outdoor space was not reasonable, because the terms of the Offering Plan contradicted those statements, (3) nothing in the contracts that Buyers signed obliged the Sponsor to convey to them an interest in exclusive use of the roof area, (4) statements in the Cantor Opinion Letter would not lead a reasonable purchaser to conclude that unit 39-C came with the exclusive right to use the roof area, (5) Buyers acknowledged that they had not relied upon the selling agents' description of the units' dimensions or physical properties except as specifically represented in the Offering Plan or contracts, and (6) there was no detrimental reliance on the Starr Opinion Letter. Thus, the court dismissed all claims against these defendants.

The moving defendants include: (1) the First Mattone Firm, a New York limited liability partnership; (2) the Second Mattone Firm, a New York general partnership; (3) Mattone, an attorney licensed to practice law in New York, and a member, or one with a pecuniary interest, in the First Mattone Firm; (4) Irene M. Mattone, a member, or one with a pecuniary interest, in the First Mattone Firm, and a member of the Second Mattone

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Firm; (5) Teresa A. Mattone, a member, or one with a pecuniary interest, in the First Mattone Firm, and a member of the Second Mattone Firm; (6) Michael X. Mattone, a member of the Second Mattone Firm; (7) Joseph M. Mattone, Sr., a member of the Second Mattone Firm; (8) Philip W. Megna, a member of the Second Mattone Firm; and (9) Christopher J. Todd, a member of the Second Mattone Firm. The amended complaint also names as a defendant nonmovant The Mattone Group, allegedly a New York limited liability company operating as a Queens-based development and construction company that holds itself out as being engaged in the practice of law.

The sixteenth and seventeenth causes of action are alleged against these defendants. The sixteenth alleges a violation of professional duties and obligations and professional malpractice. The seventeenth is for breach of fiduciary duty. These causes of action are based upon the following allegations (among others): Mattone made fraudulent representations about Buyers' qualification for financing so as to cause them to use him to procure the financing, and to place a mortgage through the First Mattone Firm and HSBC at a higher interest rate than would otherwise be the case. Mattone was paid a commission for procuring the loan, and failed to inform Buyers that he was also representing HSBC. As a further example of a conflict of interest, at the closing, Mattone told Buyers that they were required to give the representative from the title company a gratuity without disclosing that he had a pecuniary interest in

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the title company that procured title insurance for Buyers.

Moreover, prior to the expiration of the date in which to rescind the contracts, Buyers decided to exercise or extend their right of rescission, and they contacted Mattone for this purpose, but he failed, refused, and neglected to do so. Additionally, prior to the closing, Mattone erroneously represented to Buyers that the units would be subject to tax abatements pursuant to Real Property Tax Law § 421-g, which advice they relied upon in determining to purchase the units. Mattone also provided erroneous information regarding "Budgeted Common Charges" and the "Bulk Rate Tax." Buyers also allege the violation of various rules of the Code of Professional Responsibility, including DR 3-103 (prohibiting a lawyer from forming a partnership with a non-lawyer) and DR 5-101 (prohibiting a lawyer from engaging in conduct whereby the lawyer's judgment may be affected by the lawyer's own interests).

The Mattone defendants now seek dismissal of the complaint and all cross claims based upon CPLR 3211 (a) (1) (defense founded upon documentary evidence) and (a) (7) (failure to state a cause of action). They argue that (1) Buyers' claims are rebutted by their knowledge of the terms of the Offering Plan, (2) the amended complaint fails due to Buyers' inability to establish the prima facie elements of malpractice, (3) Buyers cannot rely upon ethical violations to allege legal malpractice, and (4) the fraud and breach of fiduciary duty claims are

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duplicative of the malpractice claim. In addition, all of the Mattone defendants, except Mattone, argue that the complaint should be dismissed against them because they are not in privity with Buyers. Movants also argue that Buyers have failed to plead fraud with requisite specificity, but Buyers state in their Opposition Memorandum (at 19, n 8) that they are not alleging fraud.

The motion is granted in part.

As a preliminary matter, the request by the Mattone defendants, other than Mattone himself, for dismissal of the complaint on the ground of lack of privity is granted. The amended complaint contains no allegations as against these defendants. Buyers argue that there is evidence in the record implicating defendant Mattone Group in the transactions at issue, but that defendant has not moved for dismissal of the amended complaint.

As for Mattone, dismissal of a complaint pursuant to CPLR 3211 (a) (1) and (7) is warranted only where there are no factual issues, and the documentary evidence definitely disposes of all claims as a matter of law in defendants' favor (*Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). Such is not the case here. Because the motion was made pursuant to CPLR 3211 (a) (1) and (7), the court is obliged to accept the complaint's factual allegations as true, according the plaintiff the benefit of every possible favorable inference and determining

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only whether the facts as alleged fit within any cognizable legal theory (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 270 [1st Dept 2004]). In so doing, the amended complaint validly states a legal malpractice claim against Mattone. An action for legal malpractice requires proof of the attorney's negligence, a showing that the negligence was the proximate cause of the plaintiff's injury, and damages (*Gladstone v Ziegler*, 46 AD3d 366 [1st Dept 2007]). The amended complaint alleges all of these elements.

On the prior motion, Cantor, Falk, and Starr were entitled to dismissal because, as stated above, as to the fraud and misrepresentation claims, the Offering Plan accurately described what Buyers had purchased, and the allegations in the amended complaint itself demonstrated that Buyers knew that the owners of adjacent units were prohibited from using the roof setbacks as terraces. Furthermore, nothing in the contracts obligated the Sponsor to convey to them an interest in exclusive use of the roof area, and Buyers represented in the contracts that they had not relied upon any representation made by the selling agent of the Sponsor apart from those contained in the Offering Plan and contracts.

As for Mattone, the situation is different. The amended complaint alleges that "Mattone failed, refused and/or neglected to inform Plaintiffs of any possible issues or problems which might exist concerning their exclusive use and enjoyment of

the Terrace for outdoor recreational use" (Amended Complaint, ¶ 293). Allegedly, on the day of the closing, Buyers informed Mattone that they did not want to proceed with the transaction because of the large scope of the closing punch list, but Mattone assured them that, because of the high value of the combined unit with the exclusive use of the terrace, they would make a lot of money on their purchase (*id.*, ¶ 317).

Thus, although Buyers are bound by the documents that they signed, vis-a-vis their claims against the other defendants, the conclusiveness of the Offering Plan "does not absolutely preclude an action for professional malpractice against an attorney for negligently giving to a client an incorrect explanation of the contents of a legal document" (*Bishop v Maurer*, 9 NY3d 910, 911 [2007]). Although in *Bishop v Maurer*, the Court affirmed the dismissal of the complaint, finding the allegations to be conclusory, here Buyers' allegations are detailed, and state a valid cause of action. Buyers submitted affidavits stating that they expressly told Mattone that "having the Terrace for our exclusive use and enjoyment was a key factor in our determination to purchase the Units."

Buyers allege other instances of negligence such as a miscalculation as to the value of a tax abatement that caused them to pay 10 times more at closing than that which Mattone had originally advised, and errors concerning common charges and the bulk rate tax. Mattone has not demonstrated that the documentary

[*11]
evidence conclusively disposes of these issues.

Defendants also argue that the alleged ethical violations cannot serve as predicate for a private right of action citing, among other decisions, *Shapiro v McNeill* (92 NY2d 91 [1998]). Buyers do not contest this assertion. Instead, they contend that Mattone failed to maintain the degree of skill commonly exercised by an ordinary member of the legal community. Thus, the alleged ethical violations are not an independent basis of the claims, but provide factual support for the malpractice assertions.

As for the seventeenth cause of action, the breach of fiduciary duty claim is dismissed because it alleges no additional facts and, therefore, it is duplicative of the malpractice claims (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, *supra*). In their opposition papers, Buyers state that they have asserted this claim only as an alternative in the event that the malpractice cause of action is dismissed, which is not the case here.

Finally, although Mattone also seeks dismissal of any cross claims, the papers lack any discussion about cross claims. Accordingly, it is

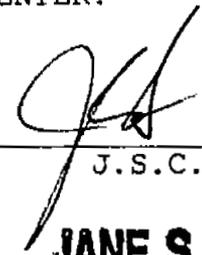
ORDERED that the motion to dismiss is granted to the extent that the seventeenth cause of action is dismissed, and, as against defendants Irene M. Mattone, Teresa A. Mattone, Michael X. Mattone, Joseph M. Mattone, Sr., Philip W. Megna, Christopher

J. Todd, Mattone, Mattone, Mattone, LLP, and Mattone Mattone
Mattone Mattone Mattone Megna & Todd, the amended complaint is
severed and dismissed, and the Clerk is directed to enter
judgment in favor of these defendants, with costs and
disbursements as taxed by the Clerk; and it is further

ORDERED that the remainder of the action shall
continue, and Mattone shall serve an answer, if he has not
already done so, within twenty days of receipt of a copy hereof
with notice of entry, but in no event shall it be served later
than February 27, 2009, and counsel for the remaining parties
shall appear for a further preliminary conference in Part 55 (60
Centre Street, Room 432) on March 2, 2009 at 12 noon.

Dated: January 22, 2009

ENTER:



J.S.C.

JANE S. SOLOMON

FILED
JAN 26 2009
COUNTY CLERK'S OFFICE
NEW YORK