

**Ramirez v 164 W. 146 St. LLC**

2010 NY Slip Op 32323(U)

August 23, 2010

Supreme Court, New York County

Docket Number: 113935/09

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

**LOUIS B. YORK**

PRESENT: \_\_\_\_\_ J.S.C. *Justice*

PART 2

Index Number : 113935/2009

RAMIREZ, ANA

vs.

164 WEST 146 STREET LLC

SEQUENCE NUMBER : 002

DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
AUG 27 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

**DISPOSITION IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: 8/23/10

*[Signature]*  
\_\_\_\_\_  
LOUIS B. YORK 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

-----X  
ANA RAMIREZ,

Plaintiff,

Index No. 113935/09

-against-

164 WEST 146 STREET LLC,  
FLATIRON EQUITIES, LLC,  
CORNICELLO & TENDLER, LLP  
ALLICANCE LOGISTICS SERVICES, INC.,  
And CITY MARSHAL ROGER E. HAMMER,

Defendants.  
-----X

LOUIS B. YORK, J:

In this unlawful eviction action, Cornicello & Tandler, LLP ("Cornicello") moves to dismiss claims asserted by Ana Ramirez and all cross-claims asserted by Marshal Roger Hammer, pursuant to CPLR § 3211(a)(7). For the reasons stated below, the Court grants Cornicello's motion to dismiss against Ramirez and Hammer.

Background

Ana Ramirez is a rent-stabilized tenant who lives in Apartment A3 in 164 West 146 Street ("the apartment building.") On September 16, 2008, Paul Schneyer, as Temporary Receiver of the apartment building, commenced a summary nonpayment proceeding against Ramirez in the Civil Court of the City of New York, County of New York, in the matter of *Paul Schneyer as Temporary Receiver v. Ramirez*, 242 N.Y.L.J. 1, L&T Index Number 084738/2008. Cornicello, a law firm, represented Scheneyer throughout the proceedings. A week later the parties settled the proceeding by stipulation, which provided that Ramirez would pay the arrears

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by a certain date. The building's owner sold the apartment building to 164 West 146 Street LLC on May 23, 2008. Cornicello represented 164 West 146 Street after it became owner of the apartment building. Ramirez did not pay her arrears by the date designated in the stipulation settlement, and Schneyer restored the proceeding for a money judgment for the arrears as well as a possessory judgment. On October 23, 2008 Schneyer and Ramirez again settled the action. 164 West 146 Street LLC was not a party to the proceeding although it was the owner of the premises pursuant to the recorded deed.

Ramirez failed to make payments required under the October 23 stipulation and was served with a notice of eviction. The warrant of eviction was issued to City Marshal Hammer on December 1, 2008, under the caption *Paul Scheneyer as Temporary Receiver v. Ramirez*. Ramirez moved by order to show cause to vacate the judgment and warrant. Ramirez and Scheneyer settled the motion by substituting 164 West 146 Street LLC as petitioner in the place of Scheneyer and provided for a stay of the warrant of eviction, if Ramirez made certain delineated payments. Five months later, after subsequent orders to show cause, Ramirez was evicted from her apartment. Cornicello directed the marshal to serve and execute the eviction warrant. However, no one obtained a warrant indicating the new owner of the apartment building; the eviction warrant was still in the name of Scheneyer, instead of 164 West 146 Street LLC.

In response to the eviction, Ramirez brought an action in the Civil Court of the City of New York, County of New York, before Judge David J. Kaplan. Judge Kaplan ruled that the eviction warrant was invalid because the parties failed to

substitute the new owner of the apartment building, 164 West 146 Street LLC, in the warrant. *164 West 146<sup>th</sup> St. LLC v. Ramirez*, 2009 N.Y. Misc. LEXIS 2514 at \*5 (N.Y. Sup. Ct. 2009). Judge Kaplan ordered 164 West 146 Street LLC to restore Ramirez to her apartment. *Id.* at 6.

Ramirez subsequently commenced this action against Cornicello, attorneys for both Scheneyer and 164 West 146 Street LLC. Ramirez alleges that Cornicello is liable for procuring the eviction and illegal lockout. In addition, co-defendant Marshal Hammer asserts cross claims against Cornicello for legal malpractice.

#### Analysis

First the Court will address Plaintiff's argument that Defendant's motion is untimely. C.P.L.R. Rule 320 provides as follows:

- (a) Requirement of appearance. The defendant appears by serving an answer or notice of appearance, or by making a motion which has the effect of extending the time to answer. An appearance shall be made within twenty days after service of the summons.

Cornicello was served with the summons and complaint in this action on October 22, 2009, by service upon its authorized agent. Accordingly, the answer or motion was due to be served on or before November 11, 2009. Plaintiff, by counsel, agreed to extend Cornicello's time to answer or make the appropriate motion to December 15, 2009, pursuant to stipulation. Cornicello filed the motion three days after the deadline. Therefore, Plaintiff argues the Court should deny the motion to dismiss as untimely.

Although Plaintiff is correct that the motion is untimely, CPLR Rule 320 allows the Court to grant an extension "as provided in...section 3012." The Court "may extend the time to appear or plead...upon such terms as may be just and upon

a showing of reasonable excuse for delay or default.” CPLR 3012[d]. Moreover, “what constitutes a reasonable excuse for the delay lies within the sound discretion of the [trial] court.” *Amodeo v. Gellert & Quartararo, P.C.*, 26 A.D.3d 705, 706, 810 N.Y.S.2d 246, 247 (2006). Here, Cornicello asserts that it has a reasonable excuse for its delay in filing the motion to dismiss. Cornicello’s counsel did not have sufficient time to review the voluminous file. Counsel stated that the file was more complicated than originally thought and counsel needed more time to prepare the motion. The motion was filed only three days after the December 15, 2009 deadline. Because the short delay seems reasonable in light of the circumstances and because the Plaintiff has not alleged any prejudice due to the delay, the Court exercises its discretion and does not dismiss the motion as untimely.

Second, the Court evaluates the portion of Cornicello’s motion to dismiss that relates to Ramirez. Ramirez’s complaint alleges that Ramirez was injured as a result of Cornicello’s wrongful and improper exercise of authority, and that Cornicello illegally locked Ramirez out of her apartment. In addition, Ramirez requests treble damages in her complaint. Cornicello argues that Ramirez’s complaint fails to state a legally valid cause of action. It argues that the first two causes of action, procuring the eviction and illegal lockout, arise solely from a landlord-tenant relationship and cannot be pled against a law firm. Thus, Cornicello asserts that the claims sound solely in legal malpractice. However, Cornicello asserts that a claim of legal malpractice from a party that is not in privity with the attorney is not actionable unless the attorney committed fraud or collusion, or a malicious or tortious act. Cornicello argues that the Court must grant the motion to dismiss because Ramirez

has not alleged in the complaint that the law firm acted in bad faith or with a malicious or fraudulent intent.

The first two causes of action, procuring the eviction and illegal lockout, amount to an allegation of legal malpractice. As Cornicello notes, an attorney cannot be held liable for causes of action that arise entirely out of a landlord-tenant relationship. *Pearl v. 305 East 92nd Street Corp.*, 156 A.D.2d 122, 122, 548 N.Y.S.2d 25, 25 (1st Dep't 1986). Because eviction and illegal lockout require a landlord-tenant relationship, and because Cornicello is not Ramirez's landlord, Cornicello cannot be held liable for those causes of action. *See id.* Therefore, the Court need only decide if Ramirez can hold Cornicello liable for legal malpractice for facilitating the eviction and illegal lockout.

"In this State, the general rule is that absent fraud, collusion, malicious acts, or other special circumstances, an attorney is not liable to third parties, not in privity, for harm caused by professional negligence." *Prudential Insc. Co. v. Dewey, Ballantine, Bushby, Plamer & Wood*, 170 A.D.2d 108, 118, 573 N.Y.S.2d 981, 988 (1st Dept 1991). In order to state a valid cause of action for legal malpractice with an attorney or law firm one is not in privity with, one must allege that the attorney committed more than a mistake; an allegation of bad faith is necessary in that situation. Ramirez was never a client of or in privity with Cornicello. Thus, in order to survive the instant motion to dismiss, Ramirez's complaint must have alleged that Cornicello acted in bad faith or acted fraudulently. Plaintiff's complaint only alleges that Cornicello helped procure the eviction and that Cornicello is liable for illegal lockout. Plaintiff's complaint does not allege that Cornicello acted in bad faith.

Despite the above, plaintiff argues that the Court should deny the motion to dismiss because the facts of *Mayes v. UVI Holding, Inc.*, 280 A.D.2d 153, 723 N.Y.S.2d 151 (1st Dep't 2001) are almost identical to the instance action.

Plaintiff argues that the Court should deny the motion to dismiss because the facts of *Mayes v. UVI Holding, Inc.*, 280 A.D.2d 153, 723 N.Y.S.2d 151 (1st Dep't 2001) are almost identical to the instant action. However, the facts in *Hayes* are distinguishable from the facts in the present dispute. In *Hayes*, the law firm knew that the warrant was invalid when the eviction occurred and it admitted to a "major screw-up." N.Y.S. at 155. Because the law firm acted in bad faith, the Court held it responsible for the illegal eviction. *Id.* This case is more analogous to *Negron v. 1175 Holding, LLC*, 2005 NY Slip OP 51671U (1st Dep't 2005), where the landlord's attorney executed what he believed to be a valid warrant. The court held that without showing tortious, malicious or fraudulent conduct, the law firm could not be held liable for the eviction. *Id.* Here too, Cornicello did not know the warrant was invalid until after the eviction took place, when Judge Kaplan deemed it invalid. Thus, no bad faith is readily apparent.

The Court must consider the whole pleading when searching for a valid cause of action. *Dulberg v. Mock*, 1 N.Y.2d 54, 56, 150 N.Y.S.2d 180, 181 (1956). Courts look to "the substance rather than the form." *Feinberg v. Bache Halsey Stuart, Inc.*, 61 A.D.2d 135, 137, 40 N.Y.S.2d 187, 189 (get proper cite, 1978). The complaint "is deemed to allege whatever can be implied from its statements by fair and reasonable intendment." *Id.* at 138, 189. Plaintiff has failed to meet this liberal standard. Because Cornicello did not know the warrant was invalid at the time of

eviction, and because Ramirez has failed to allege that Cornicello acted in bad faith in her pleading, the Court grants Cornicello's motion to dismiss Ramirez's claim of legal malpractice.

Third, the Court evaluates the portion of Cornicello's motion to dismiss that relates to Marshal Hammer. "In this State, the general rule is that absent fraud, collusion, malicious acts, or other special circumstances, an attorney is not liable to third parties, not in privity, for harm caused by professional negligence." *Prudential Insc. Co. v. Dewey, Ballantine, Bushby, Plamer & Wood*, 170 A.D.2d 108, 118, 573 N.Y.S.2d 981, 988 (1st Dept 1991). Thus, in order to survive the instant motion to dismiss, Hammer must have alleged that Cornicello acted in bad faith or acted fraudulently somewhere in the pleadings. Because Hammer's did not allege bad faith, fraud or malicious acts in the pleadings, the Court must grant Cornicello's motion to dismiss.

It is therefore

ORDERED that motion of defendant Cornicello to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against Cornicello, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that motion of defendant Cornicello to dismiss the cross-claims asserted by co-defendant Hammer is granted and the complaint is dismissed in its entirety as against Cornicello, with costs and disbursements to said defendant as

taxed by the Clerk of the Court, and the Clerk is directed to enter judgment

accordingly in favor of said defendant.

Date: ~~July 27, 2010~~ 8/23/10

ENTER:

*By*

LOUIS B. YORK  
J.S.C.  
J.S.C.

**FILED**  
AUG 27 2010  
NEW YORK  
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