

Cheong v Lau

2012 NY Slip Op 30725(U)

March 1, 2012

Supreme Court, Queens County

Docket Number: 22266/09

Judge: Darrell L. Gavrin

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN**
Justice

IA PART 27

FRANCIS CHEONG, SELINA CHEONG and
CHEONG LIVING TRUST

Index
Number 22266/09

Plaintiff(s),

Motion
Date October 25, 2011

- against-

JAY LAU, LAU & ASSOCIATES PC,
PARAMOUNT MANAGEMENT CORP.,
DANIEL LEE and PHILIP TSO

Motion
Cal. Number 3 & 4

Motion
Seq. Number 3 & 4

Defendant(s).

The following papers numbered 1 to 31 read on this motion by plaintiffs for partial summary judgment on the first cause of action for legal malpractice asserted against defendants Jay Lau and Lau & Associates PC. (Lau defendants), on the second cause of action to recover on a promissory note asserted against defendant Paramount Management Corp. (Paramount), and on the second cause of action to recover on a personal guaranty of a promissory note asserted against defendant Daniel Lee (Lee); and, by separate notice of motion, the Lau defendants move for summary judgment dismissing the complaint and all cross claims insofar as asserted against them; and on this cross motion by defendant Phillip Tso (Tso) to dismiss the complaint and all cross claims asserted against him pursuant to CPLR § 3211 (a) (1) and/or CPLR § 3212.

Papers
Numbered

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Upon the foregoing papers it is ordered that the motions and cross motion are determined as follows:

On July 13, 2007, plaintiffs met with Tso, a sales agent, and Lee, the principal of Paramount, whereupon plaintiffs agreed to purchase a condo unit and a parking space in a building owned by Paramount for \$628,000 with a \$100,000 down payment. On that same date, plaintiffs and Lee signed a terms sheet outlining the terms of the purchase. On July 19, 2007, plaintiffs retained the Lau defendants to represent them in the purchase of the condo unit and parking space. On July 25, 2007, plaintiffs and Paramount executed a contract of sale for the condo unit and parking space, and plaintiffs issued to Paramount's attorney a check for \$100,000 as the down payment. The contract did not provide for a condominium offering plan approved by the New York State Attorney General's Office. On July 27, 2007, the down payment was released to Paramount. On February 5, 2008, plaintiffs and Paramount executed a second purchase contract, which included an approved condominium offering plan, and plaintiffs issued an additional \$5,000 down payment. At that time, Jay Lau told plaintiffs that the \$100,000 down payment would be considered a loan to Paramount and that Lee would personally guaranty the loan. Plaintiffs received a promissory note stating that the \$100,000 would be applied to the purchase price upon closing. It is undisputed that Paramount never satisfied the promissory note and title to the condo unit has never been transferred to plaintiffs. Meanwhile, in January 2008, Tso asked plaintiffs to lend Paramount \$1,000,000 for a period of six months to complete construction on the building. Plaintiffs agreed to the loan and retained the Lau defendants to represent them in the transaction. Mr. Lau drafted the loan documents, which he advised plaintiffs would create a mortgage lien on the property. According to its terms, Lee also personally guaranteed the mortgage. On February 8, 2008, plaintiffs executed the mortgage documents and wired \$1,000,000 to Golden Eagle Capitol Corporation, as requested by Lee. On February 10, 2009, the mortgage was recorded. Paramount and Lee never made any payments on the mortgage. Soon thereafter, plaintiffs received notice that Chinatrust Bank was seeking to foreclose on its mortgage against the subject property. On August 14, 2009, plaintiffs commenced the within action alleging causes of action for legal malpractice and fraud against the Lau defendants, causes of action for fraud against Paramount, Lee, and Tso, and claims to recover on the \$100,000 promissory note and personal guaranty of the note against Paramount and Lee, respectively.

The court will not entertain Tso's untimely cross motion to dismiss the complaint and all cross claims asserted against him pursuant to CPLR § 3211 (a) (1) and/or CPLR § 3212. A cross motion for summary judgment pursuant to CPLR § 3212 made after the expiration of the statutory period or court-ordered deadline may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made on grounds nearly identical to that of the cross motion (*see Grande v Peteroy*, 39 AD3d 590 [2d Dept

2007]). Here, Tso's cross motion for summary judgment was served 20 days after the court-ordered deadline of October 1, 2011. Tso has not offered any excuse for the delay in making the cross motion (*see Thompson v Leben Home for Adults*, 17 AD3d 347, 348 [2d Dept 2005]). Moreover, the issues presented by Tso's cross motion and the separate motions for summary judgment by plaintiffs and the Lau defendants are not nearly identical. Tso's cross motion seeks summary judgment dismissing plaintiffs' complaint insofar as asserted against him, whereas plaintiffs' motion only seeks summary judgment on their causes of action against the Lau defendants, Paramount, and Lee. In addition, while Tso's cross motion seeks summary judgment dismissing the Lau defendants' cross claim for contribution or common-law and/or contractual indemnification against him, the Lau defendants' summary judgment motion seeks dismissal of plaintiffs' complaint insofar as asserted against them and the cross claim by Paramount, Lee, and Tso for contribution against them. Under these circumstances, the cross motion is time-barred (*see Podlaski v Long Is. Paneling Ctr. of Centereach, Inc.*, 58 AD3d 825, 826-827 [2009]; *Bickelman v Herrill Bowling Corp.*, 49 AD3d 578 [2d Dept 2008]).

Likewise, Tso's cross motion to dismiss plaintiffs' complaint and all cross claims asserted against him pursuant to CPLR § 3211 (a) (1) is untimely since it was not made within the time period during which defendants were required to serve an answer (CPLR § 3211 [e]; *see Bennett v Hucke*, 64 AD3d 529, 530 [2d Dept 2009]; *see also* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:52). In fact, Tso already served an answer to plaintiffs' summons and complaint on November 11, 2009.

The court will now address that branch of plaintiffs' motion for partial summary judgment on their legal malpractice claim asserted against the Lau defendants and the branch of the Lau defendants' motion for summary judgment dismissing said cause of action against them. In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused the plaintiff to sustain actual and ascertainable damages (*see Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]; *Von Duerring v Hession & Bekoff*, 71 AD3d 760 [2d Dept 2010]). To establish causation, a plaintiff must show that, but for the lawyer's negligence, he or she would have prevailed in the underlying action or would not have incurred any damages (*id.*). For a defendant in a legal malpractice action to succeed on a motion for summary judgment, evidence must be submitted in admissible form establishing that the plaintiff is unable to prove at least one of these essential elements (*see Mueller v Fruchter*, 71 AD3d 650 [2d Dept 2010]; *Shopsin v Siben & Siben*, 268 AD2d 578 [2d Dept 2000]).

Upon review of plaintiffs' and the Lau defendants' submissions on their respective summary judgment motions, the conflicting affidavits and depositions place in issue the credibility of the parties and reveal the existence of sharply disputed issues of fact, at least, as to the scope of the Lau defendants' duties with respect to the sale of the condo unit and the mortgage transaction and whether the Lau defendants' performance of legal services was negligent (*see e.g. John Grace & Co. v Tunstead, Schechter & Torre*, 186 AD2d 15, 16-17 [1st Dept 1992]). At his deposition, Mr. Lau testified that, with respect to the first contract of sale for the condo unit and parking space, the terms of the sale were negotiated between plaintiffs and Lee before he was retained by plaintiffs on July 19, 2007, and that the terms sheet, which was signed by plaintiff Francis Cheong and Lee on July 13, 2007, authorized release of the \$100,000 down payment to the seller. Mr. Lau further testified that he explained the first purchase contract in its entirety to plaintiffs and advised them that the contract was improper due to the absence of a condominium offering plan approved by the New York State Attorney General's Office and that, since the contract did not have an escrow clause, plaintiffs could lose the \$100,000 down payment if it were not held in escrow until title to the unit passed to plaintiffs. To the contrary, Mr. Cheong stated in his affidavit and deposition that Mr. Lau never explained to plaintiffs that the contract was improper for the aforementioned reasons prior to its execution, and that Mr. Lau told plaintiffs that the \$100,000 down payment would be held in escrow until title passed to plaintiffs. Furthermore, with respect to the mortgage transaction, Mr. Lau's deposition testimony indicates that, after plaintiffs and Tso negotiated the terms of the \$1,000,000 loan, he was retained merely to draft the mortgage documents and that, prior to execution, he performed a title search on the property and had an extensive discussion with plaintiffs during which he advised them of the risks of the transaction due to preexisting mortgages on the property. In contrast, Mr. Cheong stated in his affidavit that he asked Mr. Lau to represent plaintiffs in the mortgage transaction, including giving his legal advice about making the loan, investigating the property in order to protect plaintiffs' financial interests, and drafting the necessary mortgage documents. Mr. Cheong further indicated that Mr. Lau told him "not to worry, that he would take care of everything with regard to the transaction." In addition, Mr. Cheong stated in his affidavit that, prior to execution of the mortgage documents, Mr. Lau did not perform a title search on the property and did not investigate the financial status of Paramount and Lee. Based on the foregoing, neither plaintiffs nor the Lau defendants are entitled to summary judgment on the legal malpractice cause of action.

Turning to that branch of the Lau defendants' motion for summary judgment dismissing the cause of action sounding in fraud insofar as asserted against them, said defendants established their *prima facie* entitlement to judgment as a matter of law. In opposition, plaintiffs failed to raise a triable issue of fact. To make out a cause of action for fraud, the plaintiff must prove "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to

rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury” (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). Here, there is no evidence in the record demonstrating that the Lau defendants made false representations to affirmatively induce plaintiffs to enter into the contract to purchase the condo unit or the mortgage transaction. Moreover, contrary to plaintiffs’ contention, there is no evidence demonstrating that Mr. Lau acted in concert with Paramount, Tso, and Lee to defraud plaintiffs. Mr. Cheong’s deposition testimony reveals that Mr. Lau was not involved in the negotiations of the purchase of the condo unit or the \$1,000,000 mortgage; rather, Mr. Cheong himself negotiated those agreements with Lee. Additionally, Mr. Cheong testified at his deposition that he does not believe that Mr. Lau intended to defraud him in any way, that Mr. Lau never said anything that affected his decision to purchase the condo unit, and that Mr. Lau never exerted any pressure on him to give the \$100,000 down payment to Lee.

With respect to the branch of the Lau defendants’ motion seeking summary dismissal of the cross claim by Paramount, Tso, and Lee for contribution against them, the Lau defendants did not address those issues in their moving papers and failed to submit any evidence to demonstrate their entitlement to judgment as a matter of law. As such, the branch of the motion by the Lau defendants for summary judgment dismissing all cross claims asserted against them is denied.

Next, the court turns to those branches of plaintiffs’ motion for partial summary judgment on the second causes of action asserted against Paramount and Lee, namely to recover on the \$100,000 promissory note and a personal guaranty thereof. Plaintiffs failed to demonstrate their *prima facie* entitlement to judgment as a matter of law on their promissory note and personal guaranty claims against Paramount and Lee, respectively. Specifically, the promissory note at issue stated, “[i]n the event Paramount Management Corp. is unable to close by February 28, 2009, at the option of the holder of this note, the entire principal may become due and payable on March 1, 2009.” According to the terms of the note, since Paramount was unable to close on the condo unit by February 28, 2009, and still has not closed on the unit to date, the promissory note matured on March 1, 2009, at which point the debt became due and payable at the option of plaintiffs. Plaintiffs, however, did not offer any proof that they ever exercised their option under the note by demanding payment of the debt owed by Paramount and Lee (*see generally Sherman v Klein*, 2008 NY Slip Op 32567U [Sup Ct, Nassau County 2008]).

The court further notes that, with respect to plaintiffs’ arguments regarding recovery on the \$1,000,000 mortgage, plaintiffs’ second causes of action asserted against Paramount and Lee, as alleged in the complaint, only seek to recover on the \$100,000 promissory note. As such, those issues will not be considered herein.

Accordingly, plaintiffs' motion for partial summary judgment is denied in its entirety. The branch of the Lau defendants' motion for summary judgment dismissing the cause of action for fraud insofar as asserted against them is granted. In all other respects, the Lau defendants' summary judgment motion is denied. The cross motion by Tso to dismiss the complaint and all cross claims asserted against him is denied.

Dated: March 1, 2012

DARRELL L. GAVRIN, J.S.C.