

**West Village Assoc. L.P. v Balber Pickard Battistoni
Maldonado & VanDerTuin, PC**

2012 NY Slip Op 31444(U)

May 25, 2012

Sup Ct, New York County

Docket Number: 108423/05

Judge: Saliann Scarpulla

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

PRESENT: SALIANN SCARPULLA
Justice

PART 19

West Village

- v -

Balber, Pickard

INDEX NO. 108423/05
MOTION DATE _____
MOTION SEQ. NO. 009
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

~~motion and cross-motion are~~ decided in accordance with accompanying memorandum decision.

FILED

MAY 30 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/25/12

Saliann Scarpulla
SALIANN SCARPULLA *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X

WEST VILLAGE ASSOCIATES LIMITED
PARTNERSHIP A/K/A WEST VILLAGE
ASSOCIATION AND WEST VILLAGE HOUSES,
WVH HOLDINGS LLC, ISLAND FUND I LLC, RAQZ
CORP., RAQZ LLC, WASHINGTON VILLAGE
HOUSING CORP., and WESTVILLE ASSOCIATES,

Plaintiffs,

Index No. 108423/05
Submission Date: 2/8/12

-against-

DECISION AND ORDER

BALBER PICKARD BATTISTONI MALDONADO &
VAN DER TUIN, PC, STULTS & BALBER, ERIC D.
BALBER, ESQ., and TODD S. PICKARD, ESQ.,

Defendants.

-----X

For Plaintiffs:
Ressler & Ressler
48 Wall Street
New York, NY 10005

For Defendants:
Wilson, Elser, Moskowitz, Edelman & Dicker LLP
3 Gannett Drive
White Plains, New York 10604

FILED
MAY 30 2012

NEW YORK
COUNTY CLERK'S OFFICE

HON. SALIANN SCARPULLA, J.:

In this legal malpractice action, the defendants Balber Pickard Battistoni
Maldonado & Van Der Tuin, PC, Stults & Balber, Eric D. Balber, Esq., and Todd S.
Pickard, Esq. (collectively "Balber") move for summary judgment dismissing the
complaint of plaintiffs West Village Associates Limited Partnership a/k/a West Village
Association and West Village Houses, WVH Holdings LLC, Island Fund I LLC, Raqz
Corp., Raqz LLC, Washington Village Housing Corp., and Westville Associates

(collectively “WVA”). WVA’s original complaint asserted claims against Balber for legal malpractice, negligent and/or fraudulent misrepresentation, and intentional concealment of the malpractice. By Decision and Order, dated January 17, 2007, this court (Lehner, J.), granted defendants’ pre-answer motion under CPLR 3211, dismissing all claims asserted in the amended complaint. On appeal, the First Department reversed the dismissal of the legal malpractice claim as time-barred, but affirmed the dismissal of the claims for negligent and/or fraudulent misrepresentation, and intentional concealment. *See West Vil. Assoc. Ltd. Partnership v Balber Pickard Battistoni Maldonado & Ver Dan Tuin, PC*, 49 A.D.3d 270 (1st Dept 2008). As such, the claim for legal malpractice is the only claim remaining in this case.

Background

According to the complaint, WVA retained Balber in June of 1999 to provide legal assistance to WVA in the planning and implementation of a complex, integrated real estate transaction (the “Conversion”) that was designed to enhance the value of a 43-building mixed-use complex (the “Complex”) by removing it from the rent-regulated Mitchell-Lama program without having residual federal, state and local rent regulation implications.

The planning and implementation of the Conversion was commenced in June of 1999 and concluded when the Complex was withdrawn from the Mitchell-Lama program

in June of 2004. Balber allegedly provided advice throughout that period, until their engagement ended in June 2004.

WVA allege that from the outset of their engagement, Balber knew that the Conversion would be compromised if the Complex were to receive tax benefits under New York City's so-called "J-51" tax-abatement program. WVA allege, through attorney affirmation only, that Balber authored several memoranda, which failed to caution that if the Complex was receiving tax abatements under the J-51 program at the time it was withdrawn from the Mitchell-Lama program, the Complex could be subject to ongoing rent regulation, and the value of the Complex would be substantially impaired.

According to the complaint, as of February 2000, Balber actively assisted in preparing the requisite applications and supporting documentation that resulted in the Complex being approved by, and becoming subject to, the J-51 program. Thereafter, despite Balber's alleged knowledge that J-51 status would have a material adverse affect on the Conversion, they intentionally continued to assure WVA that they knew of no impediment to the Conversion or any reason why the Complex would not be free of all rent regulation upon withdrawal from the Mitchell-Lama program.

In 2000 and 2001, allegedly with the help of Balber, WVA applied for, and received, in the subsequent years, J-51 benefits. In June of 2004, in continued reliance on the strategy purportedly devised by Balber and their ongoing advice, WVA satisfied all of the then-existing debt on the Complex in full, and withdrew it from the Mitchell-Lama

program. The Complex was, however, subject to ongoing rent regulation due to the J-51 benefits, which significantly impaired its value.

WVA argue that the rent regulation burden on the Complex “became evident as soon as its J-51 status was discovered by a third-party buyer in October 2004.” More specifically, after the withdrawal of the Complex from the Mitchell-Lama program, WVA entered into a sale agreement with the tenants’ association for the purchase of the Complex, but the tenants’ association discovered that the Complex had J-51 status, and advised WVA that, as a direct result, it was no longer willing to proceed with the sale on the original terms agreed. The tenants’ association then renegotiated the terms of the sale agreement, and obtained a substantially reduced purchase price. WVA wish to recover for the lost profit.

WVA maintain that as Balber worked on, and facilitated, their filing for the J-51 benefits, and were the only law firm to provide assistance in preparing the J-51 applications, Balber are liable for legal malpractice. Through affidavit testimony, counsel for WVA states that “[h]ad [Balber] simply alerted [counsel] to the J-51 applications on a timely basis, [counsel] would have instructed that they not be filed or directed that they be withdrawn.”

Balber now move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Balber maintain that they are entitled to judgment as a matter of law because:

(i) any representation services rendered to WVA were not specifically in relation to the

issue of J-51 benefits and rent regulation; (ii) Balber twice advised WVA of the implications of receiving J-51 benefits; (iii) the filings for J-51 benefits were accomplished without the assistance of Balber; (iv) WVA was receiving advice from another firm, and not Balber, on the issue; and (v) the statute of limitations has run on the malpractice action because Balber was not representing WVA at the time of discovery of the rent-regulation problem, and there is no “discovery rule” applying to legal malpractice, nor does the “continuous representation” doctrine apply.

In opposition, WVA assert that Balber’s motion for summary judgment is untimely. WVA note that, by a So-Ordered Stipulation dated April 20, 2011 (“Scheduling Order”), this Court fixed the last date for defendants to file their summary judgment motion as within 60 days of the completion of depositions. WVA maintains that depositions of all non-parties and parties were completed on May 26, 2011, resulting in a deadline of July 25, 2011 for summary judgment filing. WVA argues that although the parties entered into a Stipulation dated July 25, 2011 (the “July 25 stipulation”) extending the time for service of the motion for summary judgment, the motion is untimely because (1) the stipulation was never “So-Ordered” by the Court; (2) the motion was filed past the court ordered deadline; and (3) the motion was not served in compliance with the July 25 stipulation.

WVA also argue that even were the motion timely, it is made based on disputed issues of material fact, and therefore must be denied.

Balber assert that the motion for summary judgment is timely, pursuant to the stipulation entered into between the parties July 25, 2011, as the parties were expressly charting their own procedural course.

On or about August 30, 2011 WVA moved, by Order to Show Cause, for an order striking defendants' motion for summary judgment on the ground that it was filed after the deadline fixed by the Scheduling Order. On September 6, 2011, this court declined to sign the Order to Show Cause, indicating that "This is not an appropriate subject for an OSC."

WVA, pursuant to CPLR 5704, made a motion to the First Department, seeking an expedited order denying Balber's motion for summary judgment as untimely pursuant to CPLR 3212, without reaching the merits, and/or striking it for that reason. The motion to the First Department was returnable on September 15, 2011, but the First Department has not yet ruled on it.

Discussion

It is well settled that "statutory time frames [and] court-ordered time frames are not options, they are requirements, to be taken seriously by the parties." *Miceli v. State Farm Mut. Auto. Ins. Co.*, 3 N.Y.3d 725, 726 (2004) (citing *Kihl v. Pfeffer*, 94 N.Y.2d 118 [1999]). A Court has no "discretion to entertain nonprejudicial, meritorious post-note of issue motions made after a court-imposed deadline but within the statutory maximum 120-day period in CPLR 3212 (a)" *Glasser v Abramovitz*, 37 A.D.3d 194, 194 (1st

Dept 2007).¹ See also *Brill v. City of New York*, 2 N.Y.3d 648, 653 (2004). Therefore, the deadline included in the Scheduling Order – 60 days from the completion of depositions – is to be strictly followed. See also *Corchado v City of New York*, 64 AD3d 429 (1st Dept 2009).

The fact that the parties then entered into the July 25 stipulation, has no effect on this analysis. The July 25 stipulation states in pertinent part that “[a]lthough the time in which Defendants can move for summary judgment . . . may expire as early as July 27, 2011, the undersigned hereby stipulate and agree that the motion for summary judgment can be served on July 29, 2011, by hand and also by electronic transmittal (such as e-mail). . . .” Balber’s affidavit of service indicates that the moving papers were served on July 29, 2011 by priority mail and electronic mail, not by hand and electronic mail as specified in the stipulation. Further, the papers served that day were either incomplete or not final, as an “updated set of motion papers” were served via electronic mail on August 2, 2011. Additionally, the July 29, 2011 notice of motion was never filed with the court, but rather an Amended Notice of Motion, also dated July 29, 2011 and served via mail on September 9, 2011, was filed September 9, 2011. Even where parties are allowed to

¹ CPLR 3212(a) provides that “[a]ny party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.”

“chart their own course,” they are bound to follow that course, and comply with the stipulation they executed. *Mill Rock Plaza Assocs. v. Lively*, 224 A.D.2d 301 (1st Dep’t 1996) (“[s]trict enforcement of the parties’ stipulation . . . is warranted based upon the principle that the parties to a civil dispute are free to chart their own litigation course). *See also Powell v. Kasper*, 84 A.D.3d 915, 917 (2d Dep’t 2011) (summary judgment motion filed beyond deadline set forth in parties’ stipulation denied as untimely).

Moreover, the July 25 stipulation was never “so-ordered” by the Court. Defendants must obtain leave of court and show good cause for their delay when making a summary judgment motion beyond the time prescribed by court order. *See Martinez v. Tishman Construction Corp.*, 2010 N.Y. Slip Op 32022U (Sup. Ct. Queens Co. 2010). Relying on the July 25 Stipulation, which does not expressly extend the deadline for filing the motion for summary judgment, and was not so-ordered by the court, does not constitute good cause for Balber’s delay. *See Fine v. One Bryant Park, LLC*, 84 A.D.3d 436 (1st Dep’t 2011).²

² Balber’s attempt to characterize the fact that I declined to sign WVA’s order to show cause as “implicitly [finding] the motion to be timely in all respects,” is incorrect. As noted above, I declined to sign the order to show cause because the relief sought by WVA – striking the motion for summary judgment as untimely – was not an appropriate subject for an order to show cause. I did not rule on the merits or the timeliness of the motion for summary judgment. Nor did I indicate that I would hear the motion on the merits regardless of its timeliness, as suggested by WVA in its papers to the First Department.

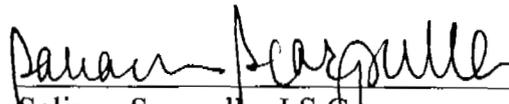
In accordance with the forgoing, it is

ORDERED that defendants Balber Pickard Battistoni Maldonado & Van Der Tuin, PC, Stults & Balber, Eric D. Balber, Esq., and Todd S. Pickard, Esq.'s motion for summary judgment dismissing the complaint is untimely, and therefore denied.

This constituted the Decision and Order of the Court.

Dated: New York, New York
May 25, 2012

ENTER:


Saliann Scarpulla, J.S.C.

FILED

MAY 30 2012

**NEW YORK
COUNTY CLERK'S OFFICE**