

Attwood v Sokol

2012 NY Slip Op 32744(U)

October 25, 2012

Supreme Court, New York County

Docket Number: 112043/2010

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA
Justice

PART 19

Index Number : 112043/2010
ATTWOOD, MARIE HELENE
vs.
SOKOL, ANDREW L., ESQ.
SEQUENCE NUMBER : 004
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

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

FILED
NOV 08 2012
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 10/25/12

Saliann Scarpulla S.S.C.
SALIANN SCARPULLA

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X

MARIE HELENE ATTWOOD,

Plaintiff,

Index No.: 112043/2010
Submission Date: 8/08/12

- against-

DECISION AND ORDER

ANDREW SOKOL, ESQ., NORMAN
HOROWITZ, and HALSTEAD PROPERTY, LLC,

Defendants.

-----X

For Plaintiff:
Susan Warnock, Esq.
880 Third Avenue, 13th Floor
New York, New York 10022

Defendant, *pro se*:
Andrew Sokol, Esq.
420 Lexington Avenue
New York, NY 10170

Papers considered in review of this motions to dismiss and cross motion for summary judgment:

Notice of Motion	1
Aff in Support	2
Mem of Law	3
Notice of Cross Motion	4
Aff in Opp and Support.	5
Mem of Law	6
Aff in Opp and Reply Aff.	7
Reply Aff	8

FILED
NOV 08 2012
NEW YORK
COUNTY CLERK'S OFFICE

HON. SALIANN SCARPULLA, J.:

In this action stemming from a real estate purchase, defendant Andrew K. Sokol, Esq. ("Sokol") moves to dismiss plaintiff Marie Helene Attwood's ("Attwood") verified

complaint pursuant to CPLR 3211(a)(5). Attwood opposes Sokol's motion, and cross moved for summary judgment.¹

As alleged in the verified complaint, in or around September 2002, Attwood responded to an advertisement she saw in the New York Times Real Estate Section for an "open house" at 249 Elizabeth Street, Unit No. Prof. B, New York, NY 10012 (the "premises"). Attwood subsequently made an offer to purchase the premises, which the seller, Norman Horowitz ("Horowitz") accepted. Attwood retained Sokol, an attorney, to represent her in connection with the purchase of the premises. On or about October 21, 2002, Attwood purchased the premises from Horowitz for \$400,000. The deed indicates that Attwood became owner of the premises "known as Condominium Unit Professional B . . . located at 259 Elizabeth Street, New York, New York The use of said Unit is for residential purposes."

Attwood further alleges that subsequent to the closing, Sokol represented her in connection with refinancing the mortgage for the premises. The final mortgage refinance transaction took place in February 2008.

In or around Spring 2010, Attwood listed the premises for sale using a real estate broker. Attwood received an offer to purchase the premises for \$750,000. Attwood again retained Sokol to represent her and prepare a contract of sale. Attwood alleges that prior to

¹ Previously, in a decision and order dated March 21, 2011, I granted the motions to dismiss by defendants Norman Horowitz and Halstead Property, LLC. Sokol is the only defendant remaining in this action.

executing the contract of sale, the prospective purchaser's attorney conducted a "preliminary search" and learned that the certificate of occupancy designated the premises for use as a doctor's office, and did not permit the premises to be used for residential purposes.

Attwood then retained new counsel to handle the sale of her premises. Through her new counsel and an architect/expediter, Attwood was advised that the certificate of occupancy could not be changed from professional to residential use. As a result, the prospective buyers backed out of the purchase of the premises.

Attwood further alleges that she inquired about selling her premises as a commercial unit, and was advised that the value would be significantly less than if it was marketed as a residential unit. Attwood asserts that if she "had known of the issue with the Certificate of Occupancy at the time she purchased the [] Premises, she never would have purchased the [] Premises in the first instance."

Attwood's Fourth Cause of Action is styled "Legal Malpractice/Fraudulent/Negligent Misrepresentation" against Sokol. Attwood alleges that Sokol reviewed all relevant documents for the purchase of the premises, and knew or should have known that the premises could not be used for residential purposes. Attwood further asserts that at no time during the purchase or refinancing did Sokol advise her that the premises could not be used for residential purposes. In addition, Attwood alleges that Sokol committed fraud, negligent misrepresentation and legal malpractice in failing to advise her that the premises could not be used as a residence, and as a result Attwood purchased a condominium unit

she cannot use, occupy or convey as a residence, and which had a significantly diminished value as a commercial unit.

Sokol moves to dismiss Attwood's verified complaint, pursuant to CPLR 3211(a)(5), arguing that the cause of action asserted against him is barred by the statute of limitations. Sokol argues that pursuant to CPLR §214(6), the statute of limitations for legal malpractice is three (3) years, which would run from the day Attwood took title to the premises. Sokol also argues that to the extent Attwood makes any allegations against him for fraudulent inducement, that would have a six (6) year statute of limitations, and that time has also expired.

In opposition, Attwood argues that Sokol's motion should be dismissed because Sokol has failed to meet his burden of establishing *prima facie* that the time in which to sue has expired. Attwood asserts that the statute of limitations for her legal malpractice claim is tolled pursuant to the continuous representation rule, and accordingly her cause of action against Sokol is timely.

Attwood also cross moves for summary judgment, arguing that the building's certificate of occupancy makes clear that the premises are not to be used for residential purposes, and that because it is located in a cellar, it cannot be legally occupied as a residence. Attwood further argues that there is no material or triable issue of fact that Sokol committed legal malpractice by advising Attwood that the premises could be used as a residence, in contravention of the certificate of occupancy.

In opposition to the cross motion, Sokol argues that there was no continuous representation to toll the statute of limitations, and that because he has not yet had the opportunity to depose Attwood, the motion for summary judgment is premature.

Discussion

On a motion to dismiss pursuant to CPLR § 3211(a), the test is not whether the opposing party “has artfully drafted the [pleading], but whether, deeming the [pleading] to allege whatever can be reasonably implied from its statements, a cause of action can be sustained.” *Jones Lang Wootton USA v. LeBoeuf, Lamb, Greene & Macrae*, 243 A.D.2d 168, 176 (1st Dep’t 1998). *See also Rogal v. Wechsler*, 135 A.D.2d 384 (1st Dep’t 1987) (“Upon a motion to dismiss a complaint, the allegations of the complaint are deemed true”).

On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired. *Benn v. Benn*, 82 A.D.3d 548 (1st Dept 2011); *see also Baptiste v. Harding-Marin*, 88 A.D.3d 752 (2d Dept 2011). “Only if the defendant makes such a prima facie showing does the burden then shift to the plaintiff to ‘aver evidentiary facts establishing that the case falls within an exception to the [s]tatute of [l]imitations.’” *Philip F. v. Roman Catholic Diocese of Las Vegas*, 70 A.D.3d 765, 766 (2d Dept 2010) quoting *Savarese v. Shatz*, 273 A.D.2d 219 (2d Dep’t 2000). *See also Education Resources Institute, Inc. v. Hawkins*, 88 A.D.3d 484 (1st Dep’t 2011).

The parties do not dispute that the applicable statute of limitations for legal malpractice is three (3) years. *Waggoner v. Caruso*, 68 A.D.3d 1, 6 (1st Dep't 2009) (citing CPLR 241(6); 203(a)).

“A legal malpractice claim accrues when the malpractice is committed, not when the client discovers it. Under the ‘continuous representation’ doctrine, however, a client cannot reasonably be expected to assess the quality of the professional service while it is still in progress.” *West Village Assocs. Ltd. Partnership v. Balber Pickard Battistoni Maldonado & Ver Dan Tuin, PC*, 49 A.D.3d 270 (1st Dep't 2008). “The doctrine is ‘generally limited to the course of representation concerning a specific legal matter,’ and this is ‘not applicable to a client’s . . . continuing general relationship with a lawyer . . . involving only routine contact for miscellaneous legal representation . . . unrelated to the matter upon which the allegations of malpractice are predicated.’” *Id.*, quoting *Shumsky v. Eisenstein*, 96 N.Y.2d 164, 168 (2001).

Here, Sokol continued to represent Attwood on various real estate matters involving the premises, including her refinance in 2008 and her attempt to sell the property in 2010. *See Farrauto, Berman, Fontana & Selznick v. Vorasak Keowongwan*, 166 Misc. 2d 804, 808 (Yonkers City Court 1995) (where attorneys continued to represent client “on various real estate matters” involving the property . . . “the Statute of Limitations would be tolled until [defendant’s] representation ceased”).

Sokol’s attempt to establish that he did not continuously represent Attwood is unavailing. Sokol did not represent Attwood in relation to any other properties, or in any

other real estate transactions, or other non-real estate matters. Additionally, Sokol testified at his deposition that the issue of whether the premises could be used as a residence arose during the 2002 closing, when he had to “educate” the mortgage lender because the premises was not a “classic” residential apartment.

Sokol further asserts that his representation of Attwood in 2008 for the refinance of her mortgage was unrelated to her purchase, and that Attwood could have hired any attorney to assist her. However, Attwood submitted documents produced by Sokol in discovery in this action, which show the issue of whether the premises could be used as a residence was raised that during the course of the refinance.

The issue of the certificate of occupancy, therefore, was something which Sokol had to deal with continuously, from the time of the purchase and closing, to the refinance, and eventually when Attwood attempted to sell the premises in 2010. Accordingly, because Sokol continuously represented Attwood, the statute of limitations was tolled, and Attwood’s action against him is timely.

Attwood cross moves for summary judgment. A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

“To sustain a cause of action for legal malpractice, moreover, a party must show that an attorney failed to exercise the reasonable skill and knowledge commonly possessed by a member of the legal profession.” *Arnav Industries, Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 96 N.Y.2d 300, 303-304 (2001) (citations omitted). An action for legal malpractice requires proof of three elements: (1) that the attorney was negligent; (2) that such negligence was a proximate cause of plaintiff’s losses; and (3) proof of actual damages. *Barbara King Family Trust v. Voluto Ventures LLC*, 46 A.D.3d 423 (1st Dept. 2007); *Brooks v. Lewin*, 21 A.D.3d 731 (1st Dept. 2005).

“In order to establish proximate cause, plaintiff must demonstrate that ‘but for’ the attorney’s negligence, plaintiff would either have prevailed in the matter at issue, or would not have sustained any ‘ascertainable damages.’ The failure to demonstrate proximate cause mandates the dismissal of a legal malpractice action regardless of whether the attorney was negligent.” *Leder*, 31 A.D.3d at 267-268 (citations omitted).

Attwood fails to establish a prima facie showing of entitlement to judgment as a matter of law, as she fails to establish proximate cause and ascertainable damages. Attwood states in her complaint and her affidavit that potential purchasers decided to not go forward and purchase the premises when they discovered the Certificate of Occupancy designated her apartment as a professional unit. Attwood offers no other support for her claim that Sokol’s negligence proximately caused her damages. There is no first hand, admissible evidence as to why the sale of her apartment fell through. Attwood also states that she was “told” that the value of her property as a professional unit is less than what it

would be as a residential unit, however she submits no documents, affidavits or deposition testimony to support this claim. As Attwood submits only hearsay, she fails to make prima face showing. *See Suppiah v Kalish*, 76 A.D.3d 829, 832-33(1st Dept. 2010) (inadmissible hearsay is insufficient to make a *prima facie* showing of entitlement to summary judgment).

In accordance with the foregoing, it is

ORDERED that the motion to dismiss the verified complaint by defendant Andrew L. Sokol, Esq. is denied; and it is further

ORDERED that the cross motion for summary judgment by plaintiff Marie-Helene Attwood is denied; and it is further

ORDERED that the parties shall appear for a compliance conference on December 12, 2012 at 2:15 p.m. at 80 Centre Street, Room 279.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
October 25, 2012

FILED ENTER:
NOV 08 2012
NEW YORK COUNTY CLERKS OFFICE
Saliann Scarpulla, J.S.C.