

Superior Tech. Solutions, Inc. v Rozenholc
2013 NY Slip Op 30690(U)
April 1, 2013
Sup Ct, New York County
Docket Number: 100856/12
Judge: Joan A. Madden
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SCANNED ON 4/9/2013

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

PRESENT: Hon Joaw A Modew
Justice

PART 11

Index Number : 100856/2012
SUPERIOR TECHNOLOGY
vs.
ROZENHOLC, DAVID
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE 10/3/13
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 *decided in accordance with the annexed Memorandum Decision + Order*

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

FILED

APR 09 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 1, 2013

 _____, J.S.C.

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, PART 11

-----X
SUPERIOR TECHNOLOGY SOLUTIONS, INC.
And JONG S. LEE

INDEX #: 100856/12

Plaintiffs,

- against -

DAVID ROZENHOLC,
Defendant.

FILED

APR 09 2013

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JOAN A. MADDEN, J.

NEW YORK
COUNTY CLERK'S OFFICE

In this attorney malpractice action, defendant David Rozenholc ("Rozenholc") moves to dismiss plaintiffs' complaint pursuant to CPLR 3211(a)(1), (5) and (7) on the grounds that: (1) plaintiffs are barred from bringing the instant action pursuant to the law of the case doctrine and other estoppel theories; (2) plaintiffs have failed to plead a cognizable cause of action for legal malpractice; and (3) documentary evidence provides a complete defense to plaintiffs' claims. Plaintiffs Superior Technology Solutions ("Superior") and Jong S. Lee ("Lee") oppose the motion, which is denied for the reasons below.

Background

Lee is the sole owner, President, chairman, and chief executive officer of Superior, which is a computers sales and services business. In 2002, Lee contracted with 110 West 31st Street Realty Corporation ("the landlord") to lease space for commercial use on the first floor, second floor and basement of the four-story building located at 110 West 31st Street, New York, NY ("the building") on behalf of Superior's predecessor, Advanced Access Systems, Inc. The lease commenced in 2002 and ended in 2005. On January 25, 2005, Lee negotiated and executed a second lease on behalf of Superior,

commencing on February 1, 2005 and ending on January 31, 2011. The 2002 and 2005 leases contained identical renewal clauses, in the rider to the lease, stating, "Tenant shall have the option to renew this lease for an additional four-year (4) term (the "Renewal Term")...Said option shall be exercised by notice ("Tenant's Notice") to Landlord not less than four (4) months prior to the expiration of the initial five year term and time shall be of the essence as to the date of the Tenant's Notice." The lease also set forth a notice provision stating that "[a]ny notices or demands, which under the terms of the lease...must be given or made to the parties [thereto] in order to be effective shall be in writing and shall be given or made by mailing the same by registered or certified mail..."

On September 11, 2007, plaintiffs retained Rozenholc on a contingency basis to represent them in any action in connection with various issues arising out of their relationship with the landlord. Specifically, the retainer agreement executed between plaintiffs and Rozenholc on that date states:

This is to confirm the terms upon which this law firm has been retained to represent you in connection with your landlord's attempt to terminate your tenancy. Our services will include representing you in any action brought by your landlord to terminate your lease and in any action brought by you in order to protect your tenancy. In addition, we will represent you in negotiations with your landlord or successor-landlord.

Rozenholc maintains that he was not retained to handle, nor asked to handle any transactional dealings of the plaintiffs with the landlord, and that he never functioned as plaintiffs' transaction counsel.

Around the time Rozenholc was retained, a developer, 855 Realty Owner LLC ("855 Realty"), expressed interest in purchasing the building as part of a group of parcels, which would

[* 4]

form a major development project. The landlord and 855 Realty signed a contract of sale dated October 29, 2007.

On or about February 1, 2008, the landlord served plaintiffs with a 10-Day Notice to Cure in an alleged attempt to empty the building for the sale to 855 Realty. The landlord alleged that Lee was in default under the terms of the lease for entering a sublease of the premise without prior written consent from the landlord and for refusing access to the basement of the premise to conduct borings necessary to preserve the walls and structures of the premise.

On or about February 15, 2008, Rozenholc commenced a Yellowstone action on behalf of plaintiffs against the landlord in response to the 10-day Notice to Cure. Rozenholc filed an Order to Show Cause in New York Supreme Court (Index No. 102569/08), seeking a temporary restraining order and preliminary injunction, enjoining the landlord from terminating plaintiffs' lease and tolling their time to cure any alleged violations of the tenancy under the lease.

On August 20, 2008, Justice Marilyn Diamond granted the Yellowstone injunction. After the injunction was granted, Rozenholc allegedly used it as leverage to negotiate a buyout for plaintiffs, wherein the proposed developer of the building would pay plaintiffs to relinquish their leasehold rights and vacate the premises. The rights were not set to expire until January 2011, or if renewed, January 2015. Plaintiffs were orally offered \$4 million, which plaintiffs rejected in September 2008. In his affidavit, Lee states that the offer was rejected after numerous meetings and conversations between him and Rosenholc and that Rosenholc "believed he could secure [plaintiffs] a more lucrative buy-out arrangement which would include the cost of relocating [plaintiffs'] business." (Lee Aff. at 2).

* 5]

855 Realty did not go forward with the development as a result of financial difficulties and changes in the real estate market. In November 2008, a foreclosure action was commenced against 855 Realty by its lender, iStar FM Loans LLC.

On January 26, 2010, Rozenholc negotiated for the landlord to enter a stipulation agreement in which he agreed to withdraw the notice of default and to release \$50,000 that had been held in escrow as a condition of granting the temporary restraining order. Following the resolution of the Yellowstone action, Rozenholc alleges he had very limited involvement and interaction with the plaintiffs and did not handle any further litigation on their behalf.

On or about January 26, 2011, plaintiffs filed the instant action for legal malpractice against Rozenholc, alleging that he was negligent in failing to give the landlord the requisite notice to renew the lease and failing to advise them of the date by which the renewal option had to be exercised to preserve their right to remain as tenants. Plaintiffs also assert that the landlord's buyout offer was withdrawn due to Rozenholc's negligence. Plaintiffs allege that they became holdover tenants subject to eviction and were subjected to a significantly higher rent because of Rozenholc's negligence.

On or around February 2, 2011, the landlord commenced a lease expiration summary holdover proceeding in New York County Housing Court (110 West 31st Street Realty Corp v. Superior Technology Solution, Inc., L&T No. 54590/11)(hereafter "the landlord-tenant action"). The landlord alleged that plaintiffs' lease expired on January 31, 2011.

On February 3, 2011, Lee informed Rozenholc that he had forgotten to exercise his option to renew Superior's lease in accordance with the lease terms, which required written notice no later than September 30, 2010. Rozenholc alleges that plaintiffs never requested that he provide written notice to the landlord with regard to the option to renew.

* 6]

On or around March 3, 2011, Rozenholc's attorney-client relationship with the plaintiffs ended as they retained successor counsel, Solomon Zabrowsky. Rozenholc delivered the plaintiffs' files to their new counsel at that time. On or about April 4, 2011, Zabrowsky interposed an answer on plaintiffs' behalf in the landlord-tenant action.

In May 2011, Zabrowsky commenced an action on plaintiffs' behalf in New York County Supreme Court against the landlord by filing an Order to Show Cause. Plaintiffs sought a stay of the landlord-tenant action and for an equitable finding by the lower court that the lease term for the premises was renewed and extended until 2014 based upon the alleged verbal exercise of an option to extend. In opposition, the landlord denied receiving oral notification of plaintiffs' intent to renew. In a decision dated May 11, 2011, Justice Keeney denied plaintiffs' requested relief, dismissed the matter, and awarded the landlord costs. The court held:

Plaintiff admits that he erroneously believed that he had orally renewed his commercial lease with the defendant landlord. In fact, paragraph 45 of the lease clearly states that notifications are to be made in writing and mailed by certified or regular mail. Plaintiff does not deny that he failed to properly notice his intention to renew the lease. Under said circumstances, plaintiff cannot prevail in this matter and present an entitlement to a lease renewal having failed to comply with the terms of the lease renewal notification requirements.

Plaintiffs sought re-argument of the dismissal, which was denied, and filed a Notice of Appeal of the Decision before the Appellate Division, First Department, which was later withdrawn.

In July 2011, Superior filed for Chapter 11 bankruptcy protection in the United States Bankruptcy Court, Southern District of New York (Case No. 11-12291, SMB). Regarding the plaintiffs' alleged oral lease renewal, the court stated:

I've read the papers; it appears to me that your argument regarding the existence of a lease depends upon the argument that you orally renewed it or on some theory that the landlord should be estopped from denying that you orally renewed it. According to

7]

paragraph 40 - - I guess it's 40.2 of the lease or maybe 40(A) of the rider - - you have to let the landlord know not less than four months before the expiration whether or not you want to renew; you have to give notice. Under paragraph 45, all notices have to be given in writing by registered or certified mail; under paragraph 79, the lease can't be modified except in writing subscribed by the parties; just strikes me that - - it leads to the conclusion that there is no renewal lease and there is no automatic stay; but to the extent there is an automatic stay, I'll grant relief, and, you know, this is really a two-party dispute at this point between the landlord and the tenants. (Record at 14-15).

On November 3, 2011, the New York Supreme Court holdover proceeding settled.

Plaintiffs voluntarily entered into a stipulation with the landlord, agreeing to vacate the premises on or before November 30, 2011, in exchange for the landlord's waiver of all claims to rent and arrears. Plaintiffs also received a \$175,000 payment from the landlord and agreed to waive the right to appeal from any order or judgment entered in the proceeding and in the Supreme Court action.

On or around April 16, 2012, Rozenholc filed the instant motion to dismiss, arguing that (1) plaintiffs are barred from bringing the instant action pursuant to the law of the case doctrine, since in the decision dated May 11, 2011, Justice Keeney addressed and summarily rejected plaintiffs' argument as to the sufficiency of Lee's alleged attempt to orally renew the lease on Superior's behalf. Rozenholc also argues the law of the case doctrine should apply because the Bankruptcy Court discussed the insufficiency of plaintiffs' alleged oral renewal of the lease in the bankruptcy proceeding. Rozenholc alleges that plaintiffs have not pled, and the evidence contradicts, a cognizable cause of action for legal malpractice. Rozenholc argues that he cannot be held responsible for plaintiffs' own failure to act in rejecting the \$4 million buy-out and not renewing the lease in writing at least four months prior to the expiration of the lease term. Rozenholc also asserts that plaintiffs never requested that he give the landlord notice on their

[* 8]

behalf, and that plaintiffs have not pled and cannot establish actual and ascertainable damages. Additionally, Rozenholc argues that he is not liable for successor counsel's negligence in failing to adequately represent plaintiffs.

In his affidavit, Rozenholc states he is "exclusively a real estate litigator with over forty years of experience representing tenants in landlord-tenant related litigation cases." (Rozenholc Affidavit at 1). He asserts, "I do not represent clients in transactional matters." (Id.). Rozenholc states that plaintiffs retained him "to represent their interests in connection with any action by the landlord to terminate their tenancy, any action brought by plaintiffs to protect their tenancy, and to negotiate with the landlord on plaintiffs' behalf." (Id., at 2). Rozenholc further states that, "the scope of my representation was, by its terms, not transactional in nature, but was solely for litigation/settlement purposes." Rozenholc alleges that after the successful resolution of the plaintiffs' 2008 action against the landlord, "I had very limited involvement and/or interaction with the plaintiffs and did not handle further litigation on plaintiffs' behalf." (Id., at 4).

In opposition, plaintiffs argue that the Supreme Court's decision dated May 11, 2011 has no preclusive effect on plaintiffs' action against Rozenholc for legal malpractice, since the decision concerned whether the plaintiffs' alleged verbal renewal of their 2005 lease was sufficient to renew the lease under the lease terms. Plaintiffs further argue that the documentary evidence submitted on the motion is insufficient to establish Rozenholc's right to a judgment as a matter of law, particularly as the retainer agreement states that Rozenholc's services would include representation in any action brought by the plaintiffs to protect their tenancy.

As for Rozenholc's argument that plaintiffs were not damaged by any alleged malpractice, plaintiffs assert that the right to renew the lease was a substantial economic asset

that was lost as result of Rosenholc's negligent failure to renew the lease, as was their right to participate in a future buy-out offers once the landlord sold the building to another buyer. Plaintiffs also argue that the complaint meets the requirements of affirmative pleading and therefore cannot be dismissed for failure to state a cause of action.

In further support of their opposition, plaintiffs submit Lee's affidavit. Lee states that, "as I had retained Mr. Rozenholc as my attorney, all communications between myself and my landlord were through the defendant. I was no longer communicating directly with my landlord as Mr. Rozenholc was acting as my agent and negotiator." (Lee Affidavit at 3). He further states that, "[i]n light the fact that I was under the impression that it was Mr. Rozenholc who would exercise the renewal option, I did not notify my landlord directly of my intention to renew my lease." (Id.).

In reply, Rozenholc argues that the plaintiffs' opposition does not adequately refute that this action is barred under the law of the case doctrine, or that documentary evidence provides a complete defense to their purported claims, and plaintiffs' opposition fails to address the issue of whether the retention of a successor counsel precludes their claim for malpractice against him.

Discussion

As a preliminary matter, the court rejects Rozenholc's argument that the law of the case doctrine bars this action. The law of the case doctrine is a rule of practice which provides that once an issue is judicially determined, either directly or by implication, it is not to be reconsidered by Judges or courts of co-ordinate jurisdiction in the course of the same litigation." Holloway v. Cha Cha Laundry, 97 A.D.2d 385, 386 (1st Dept 1983)(citations omitted); see also, Clark v. New York Telephone Co., 52 A.D.2d 1030 (4th Dept 1976) aff'd 41 N.Y.2d 1069(1977).

Rozenholc argues that the law of the case doctrine applies, since the issue as to the

sufficiency of plaintiffs' oral lease renewal was previously addressed and rejected in the prior New York Supreme Court and Bankruptcy Court actions. However, the issue of whether Rozenholc had a duty to renew the plaintiffs' lease is different from whether the plaintiffs' orally renewed their lease, and this issue was not addressed in the prior two actions. In the New York Supreme Court decision dated May 11, 2011, the court merely determined that Lee's alleged attempt to orally renew the lease was insufficient under the terms of the lease. The Bankruptcy Court similarly discussed the validity of Lee's oral lease renewal. A determination of whether the lease renewal was within Rozenholc's duties was not made within the course of either litigation, so the doctrine of law does not apply.

On a motion pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court will, "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." Nonnon v. City of New York, 9 NY3d 825, 827 (2007); quoting Leon v. Martinez, 84 NY2d 83, 87-88 (1994). At the same time, "[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference" Morgenthau & Latham v. Bank of New York Company, Inc., 305 AD2d 74, 78 (1st Dept 2003), quoting, Biondi v. Beekman Hill House Apt. Corp., 257 AD2d 76, 81 (1st Dept 1999), aff'd, 94 NY2d 659 (2000). In such cases, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." Leon v. Martinez, supra at 88 (citations omitted).

To maintain an action for malpractice, plaintiffs must show: "(1) the negligence of the attorney; (2) that the negligence was the proximate cause of the loss sustained; and (3) proof of actual damages (internal quotation marks and citation omitted). Ulico Cas. Co. v Wilson, Elser,

Moskowitz, Edelman & Dicker, 56 AD3d 1, 10 (1st Dept 2008). It requires "plaintiff to establish that counsel failed to exercise the ordinary skill and knowledge commonly possessed by a member of the legal profession," and that "but for the attorney's negligence the plaintiff would have prevailed in the matter..." Id. (internal citations and quotations omitted).

Under this standard, the complaint adequately states a cause of action for legal malpractice based on allegations that Rozenholc failed to advise the plaintiffs of the date that the renewal option had to be exercised, and/or failed to exercise the renewal option on behalf of plaintiffs and that but for Rozenholc's negligence, Superior would not have become holdover tenant, subject to an eviction proceeding and ineligible for a buyout offer, and therefore damaged.

The court also rejects Rozenholc's argument that he is not the proximate cause of plaintiffs' damages due to successor counsel's liability. While it has been held that predecessor counsel's negligence may not be the proximate cause of plaintiffs' alleged damages when subsequent counsel had a sufficient opportunity to protect plaintiffs' rights (See Perks v. Lauto & Garabedian, 306 A.D.2d 261, 262 (2nd Dept 2003), this rule is inapplicable here, as the right to renew the relevant lease expired on October 31, 2010, before the subsequent counsel was retained.

Finally, the documentary evidence and in particular the retainer agreement does not establish that the legal malpractice action is insufficient as a matter of law. Specifically, the retainer agreement which describes Rozenholc's services to include which includes bringing actions to protect plaintiffs' interest in the lease and representing plaintiffs in negotiations with the landlord arguably can be interpreted to include exercising plaintiffs' renewal option under the lease. See Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz & Dicker, LLP, 38 AD3d 34

[* 12]

(2d Dept 2006)(finding that letter submitted by defendant law firm failed to conclusively establish that the scope of its representation did not include matters relating to the alleged legal malpractice); see also, Fitzsimmons v. Pryor Cashman LLP, 93 AD3d 497 (1st Dept 2012)(holding that plaintiffs were not required to alleged the specific scope of defendant law firm's agreed upon representation and that trial court properly denied motion to dismiss legal malpractice claim).

Accordingly, it is

ORDERED that Rozenholc's motion is denied and it is further

ORDERED that Rozenholc shall answer the complaint within 30 days of the date of this decision and order, and it is further

ORDERED that the parties shall appear for a preliminary conference in Part 11, room 351, 60 Centre Street on May 23, 2013 at 9:30 am.

April 1, 2013
DATED: ~~March~~, 2013

ENTER:


J.S.C.

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