

SS Marks LLC v Morrison Cohen LLP

2014 NY Slip Op 31030(U)

April 16, 2014

Sup Ct, New York County

Docket Number: 650049/2009

Judge: O. Peter Sherwood

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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 SS MARKS LLC,

Plaintiff,

DECISION AND ORDER

-against-

Index No.: 650049/2009

Mot. Seq. No. 003

MORRISON COHEN LLP and
 STEPHEN SOLEYMANI,

Defendants.

-----X
 O. PETER SHERWOOD, J.:

On this motion for summary judgment, the following facts are drawn principally from plaintiff's Rule 19-a Statement of Material Facts ("Rule 19-a Stmt, ¶__") and the exhibits accompanying the Affirmation of A. Michael Furman ("Furman Aff, Ex__"). All facts in the Statement are admitted except where noted.

BACKGROUND

A. The Parties

Plaintiff, SS Marks LLC ("SSM") is a limited liability company whose sole member is Sandy Marks. Marks is well credentialed in the real estate mortgage business. He holds a bachelor of science degree with a major in finance, was a residential mortgage broker between 1992 and 1994 and a commercial mortgage broker for more than ten years. In 1988 he obtained a New York real estate salesperson license and got a brokerage license prior to 2001.

Defendant Morrison Cohen LLP ("Morrison") is a law firm which represented SSM in the transaction at issue in this case. Defendant, Stephen Soleymani, is an attorney at Morrison who worked with Marks on the transaction. Soleymani and Marks had been childhood friends.

Third party defendant Brett Marks¹ is Sandy Marks's brother. Brett Marks, who was also in the real estate business was involved in the transaction and personally guaranteed Sandy Marks's investment.

¹Hereinafter "Marks" refers to Sandy Marks. Brett Marks is referred to by his entire name.

B. The Deal

In 2005, Marks sold a condominium and received proceeds of \$1,050,000. He formed SSM as a vehicle to re-invest the proceeds as part of a tax-free like-kind exchange of property, pursuant to Section 1031 of the Internal Revenue Code.

Beginning in February 2005, Marks began working with non-party Peter Morris to obtain financing for real estate transactions. In December 2005, Morris informed Marks about a potential investment in real property located in Stanfordville, NY known as the Roseland Ranch (the "Property"). Originally, the parties contemplated a consulting agreement where Marks would be paid fees for his services. The proposed transaction involved acquisition of the Property and its subsequent operation as a dude-ranch style hotel, with the possibility of developing single family homes on a portion of the land. Brett Marks was also to invest in the transaction. Eventually it was proposed that the Marks invest, through SSM.

SSM agreed to invest \$1,050,000 toward purchase of the Property. In exchange, SSM was to receive an 89% ownership interest in the Property as tenant in common with Roseland Ranch Holdings, LLC ("RR Holdings"). Once acquired, the Property would be managed by Roseland Ranch Management, LLC (the "Manager").

The parties entered into a Lease and Management Agreement (the "Lease") in connection with the transaction. The Lease had a two year initial term, with automatic renewals, unless one party chose to terminate. Under the terms of the Lease, SSM was entitled to receive monthly payments of \$10,500 from the Manager. Upon termination of the Lease, SSM was entitled to a return of its investment in the form of a "termination payment" in the sum of \$1,050,000.

There were two lenders involved in the transaction, Bridge Funding, LLC and Fundex Capital Corporation (collectively, the "Lenders"). Pursuant to a demand of the Lenders, the Lease provided that the termination payment would be made only after the Lenders had been paid in full.

C. The Guaranties

SSM claims that Brett Marks and Peter Morris had promised to personally guarantee its investment in the Property. According to SSM, it would not have entered into the transaction without the guaranties (specifically Morris's) in place (*see* Marks Aff ¶ 7). Soleymani requested personal guaranties from Brett Marks and Morris on behalf of SSM. Morris testified that he never agreed to

provide a personal guaranty to SSM and would have refused to sign one if asked. Brett Marks, however, eventually executed a personal guaranty in favor of SSM.

D. The Closing

Marks was not physically present at closing. He was in California pursuing an acting career. Further, Soleymani had told him that because it was an escrow closing, “there was nowhere to be” (Marks Aff ¶11). Marks was also in the process of moving to a new apartment and had “very limited access to cellphone service or email” (*id* ¶ 12). Soleymani arranged for Marks to sign the closing documents at a law office in California (*id* ¶ 13). Marks states that did not have the full text of the final agreement when he signed on March 1, 2006. The signature pages were not sent by Marks to Soleymani until days later (*see* Furman Aff, Ex U). He states that he faxed the signature pages to Soleymani on March 6, 2006 (*see* Marks Aff ¶16).

On March 2, 2006, the Lenders demanded that a subordination clause be included in the Lease. The effect of the subordination clause was that SSM would not receive the termination payment until after the Lenders were repaid. According to Marks, this clause was inserted without his knowledge or consent after he had already executed the agreement. Marks also claims that Soleymani did not explain the effect of the subordination clause on the personal guarantees.

It is undisputed that Soleymani forwarded the Lenders’ demand to Marks within half an hour of receipt (Rule 19-a Stmt ¶45 and Furman Aff, Ex W). Two hours later, a draft of the Lease containing the subordination provision was emailed to Marks (*id*, Ex Y). Marks denies having read the emails (Response to Rule 19-a Stmt ¶¶45, 46). However an email exchanged on March 2, 2006 at 12:38 PM shows that Marks was aware of the subordination provision, understood it and sought to negotiate changes (Furman Aff, Ex U [“ We still need to discuss the lender’s requested revisions . . . Sandy wants to discuss . . .”]).

On March 3, 2006, Soleymani and Marks spoke by telephone. According to Marks, Soleymani advised him that the guarantees were signed. After the conversation, Marks authorized SSM to wire the funds to complete the transaction. On March 6, 2006, Marks faxed the signed signature page to Soleymani. Marks states that he was unaware of the subordination clause as of that date but did learn that Morris had not signed the guaranty prepared by Soleymani. Contemporaneous emails paint a different picture. As noted above, as of March 2, 2006 Marks was actively involved

in an attempt to revise the subordination provision. Further, in an email sent from New York on March 3, 2006 at 12:43 PM, copy to Marks, Soleymani asked Brett Marks to “please sign . . . the Guaranty and then have Peter Morris sign the Guaranty and then fax a copy to me” (*id*, Ex U). The contemporaneous documentary evidence also reveals that as late as March 3, 2006, Marks had not delivered his signature on the Lease. At that point, he had been advised of the subordination requirement multiple times (*id*, Ex W, Y) and that Morris had not signed the guaranty (*id*, Ex U). Marks proceeded with the closing nevertheless.

E. After the Closing

After the closing, Soleymani continued to seek the signed guaranties through Brett Marks. By the fall of 2006, the Property experienced financial difficulties. In October 2006, SSM and RR Holdings refinanced the Bridge Loan with a new lender, Libertypointe Bank. Soleymani and Morrison did not represent SSM in the refinance transaction. As with the March 2006 loan, SSM’s loan was subordinated to the Libertypointe loan. In January 2007, the Manager defaulted on the Lease, and ceased making monthly payments to SSM. Amounts still remained due and owing to Libertypointe.

Morris filed Chapter 11 bankruptcy in 2010. In or around 2005, Brett Marks transferred nearly all of his assets to his wife. He has yet not declared bankruptcy although he testified in his deposition that he is planning to do so. SSM claims it has requested that Brett Marks pay pursuant to the guaranty, but that he is incapable of paying. SSM has not sued Brett Marks.

F. Procedural History

On February 5, 2009, SSM brought this action against Morrison and Soleymani asserting a single cause of action for legal malpractice. On March 22, 2011, Morrison and SSM filed a third-party summons against Brett Marks. The Note of Issue was filed September 10, 2013. On December 6, 2013, the instant motion for summary judgment was submitted.

DISCUSSION

A. Summary Judgment Standard

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see*, CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329

[1986]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see, Alvarez v Prospect Hosp., supra; Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see, Kaufman v Silver*, 90 NY2d 204,208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see, Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see, Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "a shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *see, Zuckerman v City of New York, supra; Ehrlich v American Mominga Greenhouse Manufacturing Corp.*, 26 NY2d 255, 259 [1970]).

B. Legal Malpractice

SSM has asserted two bases for its malpractice claims. First, SSM claims Soleymani allowed a subordination provision to be inserted into the Lease without its consent. Second, Soleymani was negligent for failing to obtain a personal guaranty from Morris.

"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" (*Global Bus. Inst. v Rivkin Radler LLP*, 101 AD3d 651, 651 [1st Dept 2012]). The general rule is that a party is "conclusively bound by [an] agreement "irrespective of [his] testimony that he did not read it and was unaware of its terms" (*Gilman v Chase Manhattan Bank, N.A.*, 73 NY2d 1, 11 [1988]). This principle has been applied in the context of legal malpractice (*see Arnav Industries, Inc. Retirement Trust v Brown, Raysman, Millstein, Felder Steiner, L.L.P.*, 275 AD2d 640, 640 [1st

Dept 2000)). In *Arnav*, plaintiffs alleged that they signed a modification to a stipulation of settlement in reliance on their attorney's statement that the only changes were non-material typographical errors, when in fact the changes were detrimental substantive changes. The First Department affirmed dismissal of the legal malpractice action, holding that "even if such misstatement was made, plaintiffs would have 'immediately ascertain[ed]' the substantive nature of the changes being made had they read the modified stipulation and failed to offer a valid excuse for not having done so" (*id.*).

Admissible proof in the record, shows that Marks was advised of the subordination clause and of the unsigned guaranties prior to the closing. Marks's excuse for not having read his emails, even if credited, is insufficient to create a triable fact as to legal malpractice. Dismissal of a malpractice claim is appropriate when, as here, it is "inconceivable that plaintiff's principal was unaware of" that of which defendant allegedly failed to advise him (*see Delphi Easter Partners Ltd. Partnership v Prickett, Jones, Elliott, Kristol & Schnee*, 224 AD2d 349 [1st Dept 1996]).

The documents SSM points to in support of its contention that the personal guarantees were critical to the transaction do not support the assertion. In an email Marks sent to Soleymani on January 19, 2006, he insists that the consulting agreement must ensure that the other investors "cannot in any way get out of paying that money to me" and that "in the event they don't pay that the interest in the hotel is then pledged (100% to me)" (Marks Aff, Ex 1). The document does not reference guaranties. Instead it refers to a consulting fee Marks wanted, prior to the agreement to invest in the Property. In any case, the other investors did in fact receive an interest junior to SSM. The "interest in the hotel" was indeed pledged to Marks. A guaranty goes far beyond an "interest in the hotel." Marks also sent an email on January 20, 2006 where he stated that the consulting agreement is "the important agreement I have to make sure they pay me no matter what happens" (Marks Aff, Ex 2). Again the email refers to a consulting agreement. It makes no mention of a guaranty.

C. SSM's Arguments

SSM argues that cases such as *Garten v Shearman & Sterling LLP*, 52 AD3d 207 (1st Dept 2008) stand for the proposition that "failure to prepare and procure documents necessary to provide [plaintiff] with a first-priority security interest" rises to the level of legal malpractice. However, *Garten* is inapposite. The plaintiff in that case was a lender, not an investor. The court observed that defendants had a closing checklist that "included 'evidence that all other action that the [client] may

deem necessary or desirable in order to . . . protect . . . the [client's] . . . security interests' . . . has been taken Thus, [the lawyer] was obligated . . . to protect [the client's] expectation that the agreement that he would hold a senior security interest was protected." Here, SSM was informed that there would be lenders in the transaction. Although Marks testified that a guaranty was a *sine qua non* of the transaction, such a guaranty is not a standard element of an investment of this kind. More importantly, apart from Marks's self-serving *post-hoc* assertions, there is no evidence in the record that Soleymani was under any instruction to condition the closing on the procurement of a guaranty. Marks proceeded to the closing armed with knowledge that the guaranty had not been signed (*see* p. 3-4, *supra*).

Citing *Mortenson v Shea* (62 AD3d 414 [1st Dept 2009]), SSM argues that failure of Soleymani to advise of the effect of the subordination agreement constitutes the giving of faulty advice to a client. In *Mortenson*, however, the faulty advice was a failure to advise a client about the operative statute of limitations. Soleymani sent Marks the text of the subordination provision and of the amended Lease prior to the time Marks released signed signature pages. It beggars belief that Marks, a sophisticated long-time real estate mortgage broker, would not know the effect of a subordination clause. In any event, the record shows that Marks was aware of the subordination provision and understood it sufficiently well to be able to propose specific changes thereto (*see* Furman Aff, Ex U).

The subordination agreement was also consistent with several other documents SSM signed in connection with the transaction. Furman Exhibits I, J, K, and L are all documents that contain language referencing the Lenders' security interest in the Property. SSM's claim that Soleymani allowed subordination language to be slipped into the Lease at the last moment is belied by these four documents, all unchanged around the closing. These documents unambiguously alerted SSM to the contemplated subordination of SSM's interest in the Property. As the First Department recognized in *Abelco Fin. LLC v Hilson* 109 AD3d 438 (1st Dept 2013), documentary evidence (such as that present in the record) can refute "plaintiff's pivotal claim that it made [a] loan . . . without knowing that it was not getting a first priority lien."

Marks argues that Soleymani was on notice of his lack of access to email. There is no record support for this assertion. The sole document on which SSM relies on is an email dated February 14,

2006, over two weeks before closing, in which Marks told Soleymani that “Hey my cell phone is not working I live in a bad place for service (The Canyon)” (Marks Aff, Ex 4). The email makes no mention of spotty access to email. Further, there is no evidence of poor cell phone or internet service at the law office where Marks signed the transaction documents and elsewhere in Los Angeles, California. The evidence offered by SSM does not support Marks’s self-serving assertion that Soleymani knew he could not receive email regarding the transaction.

To the contrary, Marks admits that he received “a barrage” of emails leading up to the closing and spoke with Soleymani regularly. These concessions are inconsistent with its denials regarding key communications that he now claims not to have received at the critical times immediately prior to closing.

D. Proximate Cause

In a malpractice action a plaintiff must plead and prove that “but for the alleged negligence, the particular result sought would have or could have been achieved” (*Parker, Chapin, Flattau & Klimpl v Daelen Corp.*, 59 AD2d 375 [1st Dept 1977]). “To establish causation, a plaintiff must show that he . . . would not have incurred any damages, but for the lawyer’s negligence” (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]).

In order to establish proximate cause, SSM would have to establish that it would not have entered into the transaction if the termination payment was subordinated to Lenders loan and Morris and Brett Marks failed to provide guaranties. This is so because even had Soleymani obtained a personal guaranty from Morris, the subordination agreement would have precluded recovery from Morris. Similarly, even accepting SSM’s implausible argument that Marks would not have entered into the transaction had he known if it contained a subordination provision, SSM has not shown that defendants were negligent as to both the subordination clause and the personal guaranty. Furthermore, the alleged negligence is not proximately related to the damages claimed because the loan was refinanced in October 2006. Notably, in the refinancing, the termination payment was again subordinated to the Libertypointe loan.

Defendants also argue that Morris’s bankruptcy establishes that SSM suffered no damages and that SSM failed to mitigate its losses by declining to sue Brett Marks. Because there is no liability and issues need not be reached.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment dismissing the complaint is **GRANTED** in its entirety; and it is further

ORDERED that judgment be entered against plaintiff, SS Marks LLC and in favor of defendants, Morrison Cohen LLP and Stephen Soleymani, dismissing the complaint together with costs upon a proper bill of costs; and it is further

ORDERED that the third party complaint is **DISMISSED** as moot.

This constitutes the decision and order of the court.

DATED: April 16, 2014

ENTER,



O. PETER SHERWOOD

J.S.C.