

<b>Saviano v Corniccelo</b>
2015 NY Slip Op 31447(U)
August 3, 2015
Supreme Court, New York County
Docket Number: 153168/2014
Judge: Kelly A. O'Neill Levy
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 19

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CHRISTOPHER SAVIANO and  
218 EAST 30<sup>TH</sup> ST. LLC,

Index No. 153168/2014  
Motion Sequence 003

Plaintiffs,

**DECISION & ORDER**

-against-

ANOTHONY J. CORNICCELO, DAVID B.  
TENDLER, CORNICELLO, TENDLER &  
BAUMEL-CORNICELLO, LLP and  
LESTER EVAN TOUR ARCHITECT PLLC,

Defendants.

-----X  
**HON. KELLY O'NEILL LEVY, J.:**

In this professional malpractice and breach of contract action, plaintiffs CHRISTOPHER M. SAVIANO (“Saviano”) and 218 EAST 30<sup>th</sup> St. LLC (“the LLC”) (collectively “Plaintiffs”) allege that defendants ANTHONY J. CORNICELLO, DAVID B. TENDLER, and the law firm CORNICELLO, TENDLER & BAUMEL-CORNICELLO, LLP (collectively “Defendants”) negligently represented Plaintiffs in the purchase of a four-story residential townhouse.

Saviano initially commenced this action by filing a Summons and Verified Complaint on April 2, 2014, naming only himself as the plaintiff. On August 5, 2014, the Complaint was amended (“the Amended Complaint”) to name both Saviano and the LLC as plaintiffs. Defendants now move for an order dismissing the Amended Complaint pursuant to CPLR

3211(a)(1),<sup>1</sup> CPLR 3211(a)(3),<sup>2</sup> CPLR 3211(a)(5),<sup>3</sup> and CPLR 3211(a)(7).<sup>4</sup> For the reasons stated herein, Defendants' motion to dismiss is granted in part and otherwise denied.

### **BACKGROUND**

Plaintiffs allege in their complaint that in or around September 2010, Saviano identified a four-story residential brownstone building located at 218 East 30<sup>th</sup> Street, New York, New York ("the Building"), then owned by Dianova USA, Inc. ("Seller"), for purchase. Saviano intended to add a fifth floor to the Building, combining the fourth and fifth floors to create a duplex for himself and his family ("the Planned Duplex"). Saviano retained Defendants in connection with the purchase thereof. Saviano concedes that he did not sign a retainer agreement with Defendants.

In November 2010, Saviano placed a formal bid on the Building, which the Seller accepted. On or about February 3, 2011, they entered into a Contract of Sale ("Contract") to purchase the Building for \$2.2 million. Prior to entering into the Contract, Saviano "specifically and explicitly" told Defendants he intended to create the Planned Duplex. (Amended Complaint, ¶ 20). Saviano told Defendants that he was a first-time buyer, inexperienced in real property matters, and was fully reliant on Defendants' knowledge, experience and expertise. (Amended Complaint ¶ 26). Defendants "promised" Saviano that there were "no legal impediments" to construction of the Planned Duplex. (Amended Complaint ¶ 21).

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<sup>1</sup> CPLR 3211(a)(1) allows a party to move to dismiss a cause of action on the ground that "a defense is founded upon documentary evidence."

<sup>2</sup> CPLR 3211(a)(3) allows a party to move to dismiss a cause of action if "the party asserting the cause of action has not legal capacity to sue."

<sup>3</sup> CPLR 3211(a)(5) allows a party to move to dismiss a cause of action if "the cause of action may not be maintained because of . . . statute of limitations."

<sup>4</sup> CPLR 3211(a)(7) allows a party to move to dismiss a cause of action if "the pleading fails to state a cause of action."

In June of 2011 Defendants received a title report for the Building which showed that the air and development rights over the Building had already been sold, effectively preventing any upward construction. Plaintiffs allege that Defendants neither consulted the title report nor informed Saviano of the contents thereof prior to the closing. (Amended Complaint ¶ 26).

On June 14, 2011, acting on the advice of the Defendants, Saviano assigned all rights and interests in the Contract to the LLC. Defendants told Saviano the assignment was “a nominal and ministerial act” designed to insulate Saviano from liability. (Amended Complaint ¶ 37). Saviano signed the Assignment of Contract individually and as a managing member of the newly created LLC. Saviano did not sign a retainer agreement with Defendants on behalf of the LLC. The closing was held on June 21, 2011. In or around May 2012, during a “chance discussion with a neighbor,” Plaintiffs learned that the air and development rights over the Building had been sold, making it impossible to construct the Planned Duplex. (Amended Complaint ¶ 40).

Plaintiffs assert that they would not have entered into any agreement to purchase the Building had they been aware of the title report, and that, but for the Defendants’ assurances and promises that construction of the Planned Duplex was permissible, Saviano would have exercised the termination option in the Contract to mitigate his losses prior to closing. Based on these allegations, Plaintiffs assert causes of action for professional malpractice and breach of contract. They seek to recover \$3 million in monetary damages for each cause of action and attorneys’ fees.

In their motion, Defendants contend that they represented Saviano and the LLC separately, Saviano during the negotiation and execution of the Contract of Sale, and the LLC at the closing. Defendants point out that Saviano assigned his rights to purchase the Building to the

LLC and argue that Saviano never owned the Building because it was deeded directly to the LLC at closing.

In opposition, Plaintiffs allege that Defendants never informed Saviano that they were not representing his personal interests at the closing. Plaintiffs further allege that Defendants represented both Saviano and the LLC's interests without interruption and maintain that Saviano not only retained a beneficial interest in the LLC but was also united in interest with the LLC at all times.

### DISCUSSION

On a motion to dismiss made pursuant to CPLR 3211, the court's "task is to determine whether plaintiffs' pleadings state a cause of action." *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 (2002). The court must construe Plaintiffs' pleadings liberally, *see Leon v Martinez*, 84 NY2d 83, 88 (1994); CPLR 3026, and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion.<sup>5</sup> *See 511 W. 232nd*, 98 NY2d at 152. The Court must accord Plaintiffs "the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon*, 84 NY2d at 87-88. The dismissal motion must be denied if, from the pleading's "four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977).

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<sup>5</sup> On a motion to dismiss under CPLR 3211(a)(7), the court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint. *McGuire v Sterling Doubleday Enterprises, L.P.*, 19 AD3d 660, 661 (2d Dept 2005). Consideration of affidavits and other extrinsic evidence "broaden[s] the court's inquiry from an evaluation of whether plaintiff stated a cause of action to an inquiry into whether plaintiff has a valid cause of action." *Rovello v Orofino Realty, Co., Inc.*, 40 NY2d 633, 635 (1976).

### ***Saviano Has Standing to Assert the Within Claims on His Own Behalf***

Pursuant to CPLR 3211(a)(3), a defendant may seek dismissal of an action where “the party asserting the cause of action has not legal capacity to sue.” *See also Hecht v Andover Assoc. Mgt. Corp.*, 114 AD3d 638, 640 (2d Dept 2014).

Standing is a threshold determination that the plaintiff has “an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant’s request.” *Caprer v Nussbaum*, 36 AD3d 176, 182 (2d Dept 2006). “A plaintiff generally has standing only to assert claims on behalf of himself or herself.” *Id.* Under long-standing common law, a court has “no inherent power to right a wrong unless thereby the civil, property or personal rights of the plaintiff in the action or the petitioner in the proceeding are affected.” *Soc’y. of Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761, 772 (1991)(internal citations omitted).

In this regard, Defendants argue that Saviano, having assigned his rights and interests in the Contract to the LLC, never actually owned the Building, and as such cannot maintain any claims which flow “exclusively” from losses sustained by the LLC. (Defendants’ Memorandum of Law, dated Sept. 11, 2014, p. 14). The court disagrees. Defendants’ position interprets the standing issue too narrowly. The appropriate inquiry is whether Saviano has been aggrieved by Defendants’ actions such that he should be “allowed access to the courts to adjudicate the merits” of his individual claims. *Caprer*, 36 AD3d at 182. Assuming Defendants failed to advise Saviano of the air rights issue and the existence of the title report before the closing, and Saviano consequently lost the opportunity to exercise a termination clause in the Contract of Sale and the ability to live with his family in the Planned Duplex, there are sufficient facts to “cast [Saviano’s individual claims] in a form traditionally capable of judicial resolution” such that

Saviano has standing to maintain them. *Schlesinger v Reservists Comm. to Stop the War*, 418 US 208, 220-221 (1974).

***Plaintiffs' Claims Are Not Barred By the Statute of Limitations***

Under CPLR 3211(a)(5), a defendant may obtain dismissal of one or more causes of action on the ground that the cause of action is barred by the statute of limitations. In general, a legal malpractice action must be commenced within three years of the date of accrual of the claim. CPLR 214(6); *see also Symbol Tech., Inc. v Deloitte & Touche, LLP*, 69 AD3d 191, 194 (2d Dept 2009).

Here, Defendants argue that the LLC's legal malpractice claim is barred by the three-year statute of limitations. According to Defendants, the claim accrued on June 21, 2011, the date of the closing, and the Amended Complaint (filed June 21, 2014), which for the first time asserted claims on behalf of the LLC, is untimely. Taken together with Defendants' assertion that Saviano has no standing to maintain his individual claims, Defendants argue that there are no valid pre-existing claims to which the LLC's claims can relate back. Thus, Defendants claim that sustaining the LLC's claims will "severely prejudic[e]" their defense and preparation of the case. (Defendants' Reply Memorandum of Law, dated Nov. 11, 2014, p. 7).

An otherwise untimely malpractice claim may survive a motion to dismiss if the claim relates back to an earlier duly filed complaint where (1) both claims arise out of the same transactions or occurrences, and (2) the new and original plaintiff are so closely related that the original plaintiff's claims would have given the defendant "notice of the transactions, occurrences ... to be proved [by] the amended pleadings." *Giambrone v Kings Harbor Multicare Ctr.*, 104 AD3d 546, 548 (1st Dept 2013). For a defendant to be prejudiced, there

must be some indication that the he was “hindered in the preparation of his case or has been prevented from taking some measure in support of his position.” *Id.*

Although the court agrees that Plaintiffs’ malpractice action accrued on June 21, 2011, Defendants’ arguments are unavailing. Here, the LLC’s claims satisfy both elements of the relation-back standard. There can be no dispute that both sets of claims arise from the same transactions and occurrences inasmuch as the LLC’s allegations in the Amended Complaint are essentially identical to Saviano’s original, timely complaint. In this same vein, the LLC and Saviano are so closely related that Saviano’s original claims gave Defendants notice of the transactions or occurrences underlying the LLC’s claims. Notably, Plaintiffs allege that Saviano assigned his rights and interests to the LLC on Defendants’ advice. Moreover, Defendants concede that they informed Plaintiffs that the original complaint failed to name the LLC as a party. (Defendants’ Memorandum of Law, dated Sept. 11, 2014, p. 5). Therefore, it is evident that Defendants were aware of the LLC’s claims as the actual Building owner when Saviano filed his original complaint.

Moreover, allowing the LLC to pursue its claims will not severely prejudice Defendants, who, from the outset of its involvement in the litigation, have “had sufficient knowledge to motivate the type of litigation preparation and planning needed to defend against the entirety of [both Saviano and the LLC’s claims].” *Giambrone*, 104 AD3d at 568. To deny the LLC the opportunity to pursue its claim would essentially “disregard[d] the purpose of the relation back doctrine, which enables a plaintiff to correct a pleading error – by adding either a new claim or a new party – after the statutory limitations period has expired.” *Id.*

Because the LLC’s claims satisfy both elements of the relation-back standard and Saviano has standing to assert his individual legal malpractice cause of action against Defendants

for the reasons stated above, the court deems the LLC's claims to have been interposed at the time of Saviano's original complaint. *See George v Mt. Sinai Hsp.*, 47 NY2d 170, 179 (1979) (“[A] necessary element of any attempt to utilize the ‘relation-back’ provisions [of the CPLR] is the existence of a valid pre-existing action to which the amendment can relate back.”).

### ***Plaintiffs Have Pled Ascertainable Damages***

A *prima facie* case of legal malpractice requires proof that the attorney failed to exercise the ordinary and reasonable skill and knowledge commonly possessed by a member of the legal profession, and that the attorney's breach of that duty proximately caused the plaintiff to sustain actual and ascertainable damages. *Sitar v Sitar*, 50 AD3d 667, 669 (2d Dept 2008). A plaintiff must show that, but for the attorney's alleged malpractice, the plaintiff would not have sustained some ascertainable damages. *Pellegrino v File*, 291 AD2d 60, 63 (1st Dept 2002). Although speculative damages cannot be the basis for a legal malpractice claim, *Pellegrino*, 291 AD2d at 63, Plaintiffs do not need to show that they actually sustained damages at the pleadings stage. *InKine Pharm. Co., Inc. v Coleman*, 305 AD2d 151, 152 (1st Dept 2003). Rather, Plaintiffs need only plead “allegations from which damages attributable to defendant's conduct might reasonably be inferred.” *InKine*, 305 AD2d at 152 (internal quotation marks omitted).

Here, Plaintiffs have sufficiently alleged that, but for Defendants' failure to disclose information about air and development rights, they would not have spent \$2.2 million to purchase the Building. Indeed, it appears that Plaintiffs had retained an architect and a construction firm and had begun renovating the Building when they discovered the lack of air and development rights. Such allegations permit a reasonable inference that Plaintiffs have suffered damages attributable to Defendants' alleged malpractice.

### ***Defendants' Documentary Evidence Fails to Disprove Plaintiffs' Claims***

To succeed on a motion to dismiss under CPLR 3211(a)(1), Defendants have the burden of submitting documentary evidence that, on its own, “resolves all factual issues as a matter of law and conclusively disposes of the plaintiff’s claim.” *Symbol*, 69 AD3d at 193. Dismissal pursuant to CPLR 3211(a)(1) “may be appropriately granted only where documentary evidence *utterly* refutes plaintiff’s factual allegations, *conclusively* establishing a defense as a matter of law.” *Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002) (emphasis added). The “signer of a written agreement is conclusively bound by its terms, unless there is a showing, absent here, of fraud, duress or some other wrongful act.” *Columbus Trust Co. v Campolo*, 110 AD2d 616, 617 (2d Dept 1985).

On this issue, Defendants offer the Contract of Sale, arguing that because it is silent as to air and development rights over the Building, Plaintiffs should have known that the sale of the Building did not include air or development rights. However, the Contract of Sale does not contain any explicit terms regarding those rights, and Defendants fail to cite any authority for the proposition that signatories to a written agreement are bound by terms *absent* from that agreement. In any event, the mere fact that the Contract is silent as to air and development rights does not *utterly* refute Plaintiffs’ factual allegations. Plaintiffs repeatedly allege that Defendants knew Saviano intended to construct the Planned Duplex, promised Saviano there were no legal impediments to its construction, and failed to advise Plaintiffs of the prior sale of air and development rights over the Building before the closing.<sup>6</sup>

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<sup>6</sup> Even if the Contract explicitly stated air and development rights over the Building were not included in the sale, Plaintiffs’ claims would not necessarily be dismissed. See *Escape Airports (USA), Inc. v Kent, Beatty & Gordon, LLP*, 79 AD3d 437, 439 (1st Dept 2010) (“[T]hat plaintiff[s] signed, and [are] thus bound by, the terms of [the Contract] does not preclude an action for malpractice against the attorney[s] who assisted in drafting it.”).

***Plaintiffs' Breach of Contract Claim is Redundant of its Legal Malpractice Claim***

Where a breach of contract cause of action is premised on the same facts and seeks the identical relief sought in the legal malpractice cause of action, the breach of contract cause of action is redundant and should be dismissed. *See Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 272 (1st Dept 2004); *Smith v Kaplan Belsky Ross Bartell, LLP*, 126 AD3d 877, 879 (2d Dept 2015).

It is evident that Plaintiffs' breach of contract and legal malpractice causes of action arise from the same factual allegations, i.e., that Defendants negligently failed to inform Plaintiffs that air and development rights over the Building had been sold. Moreover, the damages alleged in Plaintiffs' causes of action are essentially identical, i.e. that Plaintiffs suffered "damages to their property and pecuniary interests." (Amended Complaint ¶ 48). Plaintiffs' attempts to characterize the "indirect, direct, expectation and reliance damages," Amended Complaint ¶ 52, alleged in their breach of contract cause of action as distinct from the damages alleged in their legal malpractice cause of action are unpersuasive.

This action differs from *Ruffolo v Garbarini & Scher, P.C.*, 239 AD2d 8 (1st Dept 1998) cited by Plaintiffs. In *Ruffolo*, the plaintiff alleged that the defendant attorneys promised to "use their best efforts and skills" in providing legal services in addition to otherwise providing those same services. *Ruffolo*, 239 AD2d at 10. In contrast, Plaintiffs in this case do not allege Defendants made any promises or assurances beyond that of exercising due care or abiding by professional standards in their representations during the property transaction. *See Sage Realty Corp. v Proskauer Rose LLP*, 251 AD2d 35, 38-39 (1st Dept 1998) ("[A] breach of contract claim premised on the attorney's failure to exercise due care or abide by general professional standards is nothing but a redundant pleading of the malpractice claim.").

Moreover, “an action for breach of contract may be maintained in attorney-client agreements . . . only when . . . an attorney has explicitly undertaken to discharge a specific task and then failed to do so.” *Saveca v Reilly*, 111 AD2d 493, 494-95 (3rd Dept 1985). Thus, even if Plaintiffs’ breach of contract claim were not redundant of their legal malpractice claim, the breach of contract claim cannot survive dismissal because Plaintiffs fail to allege that Defendants undertook to perform any specific tasks in connection with the property transaction.

***Plaintiffs Are Not Entitled To Recover Attorneys’ Fees***

Under the so-called “American Rule,” “attorneys’ fees and disbursements are incident of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule.” *Mount Vernon City School Dist. v Nova Cas. Co.*, 19 NY3d 28, 39 (2012). The Court of Appeals has expressly declined to authorize plaintiff’s recovery of attorneys’ fees in legal malpractice actions as a form of damages. *Campagnola v Mulholland, Minion & Roe*, 76 NY2d 38, 45 (1990).

Plaintiffs do not cite any authority in support of their request for attorneys’ fees and do not allege any agreement between the parties that would support this court departing from *Campagnola*. Accordingly, Plaintiffs’ request for attorneys’ fees is denied.

Accordingly, it is hereby

ORDERED that Defendants’ motion to dismiss is granted only to the extent that the second cause of action for breach of contract is severed and dismissed; and it is further

ORDERED that Plaintiffs’ request for attorneys’ fees is denied; and it is further

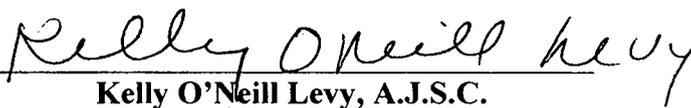
ORDERED that Defendants’ motion is otherwise denied; and it is further

ORDERED that the parties are directed to appear in Part 19 (111 Centre Street, Room 1164B) on September 2, 2015 at 9:30 a.m. for a preliminary conference.

This constitutes the decision and order of the court.

**ENTER:**

**Dated:** August 3, 2015

  
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Kelly O'Neill Levy, A.J.S.C.

**HON. KELLY O'NEILL LEVY**