

Ragunandan v Donado
2015 NY Slip Op 31957(U)
October 23, 2015
Supreme Court, Queens County
Docket Number: 12332 2012
Judge: David Elliot
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December 17, 2014, pursuant to CPLR 3215 (c), for plaintiff's failure to enter a default judgment against Donado within the time prescribed by said Rule.

Plaintiff seeks to recover from Lozada, the attorney who represented her at a real estate closing, because the proceeds of the sale were ultimately stolen by a nonparty. Plaintiff alleges that Lozada failed to properly advise her against putting the proceeds of the sale into an account where it was ultimately stolen. Lozada moves to dismiss the complaint on the ground that plaintiff cannot show that she suffered actual damages as a direct result of his alleged action or inaction. Plaintiff opposes the motion, and cross-moves for summary judgment in her favor.

Facts

Plaintiff testified upon an examination before trial, as follows: In or about 2009, plaintiff owned and rented out multiple properties in Queens, New York. In July 2009, plaintiff began experiencing financial difficulties as a result of her tenants having failed to pay rent and having caused property damage. Around that time, plaintiff spoke to Imran Badoolah, a person who she had known for several years, about her financial woes. Badoolah told plaintiff that he was in the real estate business. Plaintiff, in turn, informed Badoolah that she was thinking of selling her properties to pay off the outstanding mortgage on her residence. Plaintiff told Badoolah that she wanted the balance of any sale proceeds from the sale of the properties to be put towards her daughters' education. Plaintiff further informed Badoolah that three of her relatives – Chandika Persaud, Indranie Saphi, and Aari Arif Saphie – were potential purchasers for the property at issue herein. Badoolah offered to help plaintiff sell the property and to handle her financial difficulties. Plaintiff agreed. Specifically, plaintiff felt that Badoolah would be able to relieve her of the “headache” of selling the property since she had known Badoolah for years and he had never given her any reason to doubt his intentions. According to plaintiff, Badoolah arranged to have the subject property sold to her relatives. Plaintiff stated that she never discussed her financial difficulties with her relatives and never informed them of her plans with the sales proceeds. Plaintiff testified that her relatives did not meet Badoolah until the date of the closing.

Badoolah arranged for a contract of sale to be prepared and one was drawn up dated August 3, 2010. It is undisputed that Lozada did not draft the contract of sale. The contract of sale indicated that Donado would represent plaintiff and Lozada would represent the relatives/purchasers at the closing. However, at the actual closing, Lozada represented plaintiff/seller and Donado represented the purchasers. Plaintiff (as seller) and her relatives (as purchasers) all signed the contract of sale prior to meeting Lozada or Donado.

Lozada testified at an examination before trial, and submitted an affidavit as follows: the closing took place on January 12, 2011. Prior to the closing, Lozada received a telephone call from a real estate agent, Arthur Giraldo, who asked if he would do a closing. Giraldo informed Lozada that Donado would be representing the purchasers at the closing. Plaintiff, Lozada, plaintiff's relatives (the purchasers), Donado, Badoolah, Giraldo, and the bank's attorney all attended the closing. Lozada testified that he met plaintiff and Badoolah for the first and only time at the closing. He further stated that he was unaware of Badoolah's relationship to plaintiff and did not know that the purchasers were related to plaintiff. Lozada testified that, at the closing, he made clear to plaintiff that he was representing her and made sure to explain every relevant document to her. Lozada told plaintiff that if she did not understand anything that was taking place, she could and should ask him.

At some point during the closing, Lozada was told that the sale proceeds would be wired into his escrow account. While Lozada had never done this himself, he had seen sellers' attorneys in other transactions receive sale proceeds into their escrow accounts. Lozada was then told that he was to disburse the sale proceeds to two entities: AMG3, LLC and Maryann Smith, LLC. Lozada discussed the disbursement arrangement with plaintiff and, after doing so, he drafted disbursement instructions which explicitly outlined the disbursement arrangement. Pursuant to the disbursement instructions, Lozada was to receive a wire into his escrow account of \$442,390.00. He was to disburse \$70,000.00 to AMG3, LLC, and the remaining balance was to be disbursed to Maryann Smith, LLC. Plaintiff reviewed the disbursement instructions and signed them. Plaintiff did not inform Lozada as to what she planned to do with the sale proceeds. However, she verbally and in writing authorized the disbursement instructions that were discussed and agreed to at the closing.

The sale proceeds were wired into Lozada's escrow account. Once Lozada confirmed that the wire was effective, Lozada issued two checks from his IOLTA account, one for \$70,000.00 to AMG3, LLC, and another for \$372,390.00 to Maryann Smith, LLC (the disbursement checks).

Plaintiff testified that, sometime after the closing, she contacted Badoolah, who acknowledged stealing the sale proceeds. He explained that he needed to pay certain individuals and would eventually return the sale proceeds. However, to date, he has not done so. After realizing that Badoolah had stolen the sale proceeds without satisfying the mortgage on her residence, plaintiff's attorney in this action, Ira Cooper, contacted Lozada. Cooper was informed by Lozada that Lozada had disbursed the sale proceeds in accordance with the written disbursement instructions which plaintiff signed at the closing. Lozada also faxed to Cooper a copy of the disbursement document along with copies of the issued checks.

Plaintiff further testified that she owned other properties which she used as rental properties and for her own personal use. She acknowledged that the transaction at issue in this action was not her first real estate transaction and plaintiff states that she trusted Badoolah to take care of her financial difficulties. Plaintiff also signed over deeds to various other properties to third parties, at Badoolah's direction, allegedly to help plaintiff deal with her financial difficulties.

It is noted that, prior to this action, plaintiff commenced an action in the Supreme Court, County of Queens, against Badoolah and others, entitled *Bhanmattie Ragunandan v Imran Badoolah, Abdelaziz Tatou, John Harrison, LLC, Garcia & Weinstein Holding Corp., AMG3, LLC, and Maryann Smith, LLC*, under Index No. 5530/2011 (related action). In the related action, plaintiff sued the various individuals and entities for permanent injunction, rescission of deeds, transfer of certain properties back to plaintiff, and money damages in the sum of \$442,390.00. In the related action, plaintiff alleged that, as a result of her financial difficulties, Badoolah arranged for her to execute three deeds in 2009: (1) a deed to her property at 111-27 169th Street to Abdelaziz Tatou; (2) a deed to plaintiff's residence located at 101-68 121st Street to Garcia & Weinstein Holding Corp., and (3) a deed to a property at 116-04 Rockaway Boulevard, to John Harrison, LLC. Plaintiff alleged that Badoolah was going to work out various mortgage problems she was having but that he would not file the executed deeds. Sometime in December 2010, however, the three deeds were filed. Plaintiff alleged that, when she confronted Badoolah about him recording the deeds, he assured that he would take care of it and deed the properties back to her, but it was never done.

Plaintiff also alleged in the related action that Badoolah arranged the sale of the property located at 111-29 169th Street, the same property involved in the transaction which forms the basis of plaintiff's instant claim against Lozada. Plaintiff again alleged that she believed that the sale proceeds were going to be used to satisfy the mortgage on her residence. Nonetheless, a Short Form Order dated December 6, 2011, was issued in that action which restrained the defendants therein from directly or indirectly selling, transferring, conveying, mortgaging or in any way encumbering the three deeded properties during the pendency of the action. Further, in another Short Form Order also dated December 6, 2011, the court therein set the matter down for an inquest. At the inquest, the three deeds that had been filed were rescinded and ownership of the deeded properties reverted back to plaintiff. Also, as a result of the inquest, plaintiff obtained a judgment against all of the defendants in the amount of \$442,390.00, which represented the stolen sales proceeds regarding the subject premises. To date, the related action judgment remains outstanding and has not been satisfied. Plaintiff acknowledged, during her deposition, that the related action judgment remains outstanding and plaintiff has failed to provide any discovery relating to her efforts to collect on that judgment.

Lozada claims that it is also relevant to note that Badoolah was indicted on charges of defrauding various lending institutions by obtaining mortgages on properties through fraudulent means, including falsifying mortgage loan applications and other documents (*United States of America v Imran Ismile Badoolah*, Case No. 1:12-cr-00774-KAM (EDNY) (the criminal action). Plaintiff assisted the FBI in its investigation of Badoolah in the federal criminal action. Badoolah has since pleaded guilty to the first count of the indictment, and was sentenced.

Discussion

The motion by defendant for summary judgment in his favor is granted.

“In order to establish a cause of action to recover damages for legal malpractice, a plaintiff must prove that (1) the attorney failed to exercise the care, skill, and diligence commonly possessed by a member of the legal profession, (2) the attorney’s conduct was a proximate cause of the loss sustained, (3) the plaintiff suffered actual damages as a direct result of the attorney’s actions or inaction, and (4) but for the attorney’s negligence, the plaintiff would have prevailed in the underlying action” (*Lichtenstein v Barenbaum*, 23 AD3d 440 [2d Dept 2005]; *Pistilli v Gandin*, 10 AD3d 353 [2d Dept 2004]) or, as in this case, that the plaintiff would not have sustained damages (*see Aversa v Safran*, 303 AD2d 700 [2d Dept 2003]; *Senise v Mackasek*, 227 AD2d 184 [1st Dept 1996]). “For a defendant in a legal malpractice case to succeed on a motion for summary judgment, evidence must be presented in admissible form establishing that the plaintiff is unable to prove at least one of the essential elements” (*Moran v McCarthy, Safrath & Carbone, P.C.*, 31AD3d 725 [2d Dept 2006]; *Pistilli v Gandin, supra* at 354).

The only specific negligent act or omission plaintiff alleges is that Lozada failed to properly advise plaintiff against transferring the proceeds of the closing to accounts controlled by Badoolah, who subsequently stole the proceeds. For purposes of Lozada’s motion, he principally argues that the damage alleged to have been sustained by plaintiff was not caused by any action or inaction on his part, whether or not that action or inaction constituted negligence.

As noted above, to establish a claim for legal malpractice, a plaintiff must demonstrate, *inter alia*, the existence of damages that were directly caused by the attorney’s misconduct (*see Barbara King Family Trust v Voluta Ventures LLC*, 46 AD3d 423 [1st Dept 2007]; *see also, Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267 [1st Dept. 2004]; *Cohen Lans, LLP v Litow*, 2009 NY Slip Op 30720[U] [Sup Ct, New York County 2009]). In this regard, it is noted that in her deposition, plaintiff entirely refutes her claim that Lozada’s malpractice caused her loss. Plaintiff acknowledges that she

entrusted her acquaintance Badoolah with the proceeds of the sale and that he misappropriated them.

On this point, Badoolah's misappropriation of the sale proceeds precludes liability as against Lozada. Courts have routinely rejected that a defendant's negligence was a direct and proximate cause of a plaintiff's loss when another party committed a misappropriation and or defalcation that directly caused the alleged loss (*see e.g. Liberman v Worden*, 268 AD2d 337 [1st Dept 2000] [finding that a subsequent misappropriation of properly deposited funds was the proximate cause of a decedent's loss]; *Geotel, Inc. v Wallace*, 162 AD2d 166 [1st Dept 1990] [any loss was a result of the manipulation of accounts by a third nonparty over which the defendant exercised no control]; *Nat'l Market Share, Inc. v Sterling Natl Bank*, 392 F3d 520 [2d Cir 2004] [an intervening defalcation by a non-party broke the causal link between the defendant's breach and the complained-of damages and was an integral part of the proximate cause analysis]).

In opposition to Lozada's prima facie showing, plaintiff failed to raise any triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). To survive a motion for summary judgment in a legal malpractice action, plaintiff must (1) offer proof in the form of expert opinion evidence to establish the standard of professional care and skill that defendant allegedly failed to meet and (2) offer evidence to show that there are material issues of fact as to the elements of malpractice which defendant claims plaintiff is unable to prove (*see Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo*, 259 AD2d 282 [1st Dept 1999]). To the extent plaintiff argues any point but that of proximate cause, same is irrelevant, as all Lozada needed to show was that plaintiff did not prove just one of the elements of malpractice, as noted, *supra*. To the extent plaintiff indicates that proximate cause has been established by virtue of the fact that, but for Lozada having negligently disbursed the funds, the funds would not have been stolen, same is insufficient to raise a triable issue of fact, inasmuch as: (1) plaintiff failed to reconcile the point that Lozada cannot be held liable for another's misappropriation of funds; and (2) to that end, the damage suffered could not have been as a *direct* result of Lozada's action or inaction.

Plaintiff's speculative argument – that her own poor judgment in permitting the funds to be disbursed in accordance with the disbursement instructions was based upon the alleged failure of Lozada to advise her against depositing the money in accounts controlled by Badoolah – is unavailing and similarly insufficient to establish a causal nexus between any inaction on Lozada's part and plaintiff's damages (*see Luniewski v Zeitlin*, 188 AD2d 642 [2d Dept 1992]; *Geraci v Bauman, Greene & Kunkis, P.C.*, 171 AD2d 454 [1st Dept 1991], *appeal dismissed*, 78 NY2d 907 [1991]). The issue of proximate cause cannot be left to speculation, and the record at bar amply supports the conclusion that any damages allegedly incurred by the plaintiff were not the result of any acts or omissions by Lozada.

Turning to the cross motion, while same was made more than 120 days after the note of issue was filed and, therefore, was untimely (*see Brill v City of New York*, 2 NY3d 648 [2004]), “an untimely motion or cross motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made on nearly identical grounds” (*Homeland Ins. Co. of New York v Nat'l Grange Mut. Ins. Co.*, 84 AD3d 737 [2d Dept 2011]), *citing Grande v Peteroy*, 39 AD3d 590 [2d Dept 2007]; *see Whitehead v City of New York*, 79 AD3d 8580 [2d Dept 2010]; *Lennard v Khan*, 69 AD3d 812 [2d Dept 2010]; *Bressingham v Jamaica Hosp. Med. Ctr.*, 17 AD3d 496 [2d Dept. 2007]). In such circumstances, the issues raised by the untimely cross motion are already properly before the motion court and, thus, the nearly identical nature of the grounds may provide the requisite good cause (*see CPLR 3212 [a]*) to review the merits of the untimely cross motion (*see Grande v Peteroy, supra* at 592). Based on the same, the court entertained the instant cross motion and herewith denies it for reasons provided above.

Accordingly, Lozada’s motion for an order granting him summary judgment dismissing the complaint is granted. Plaintiff’s cross motion for summary judgment in her favor is denied. The complaint against Lozada is dismissed.

Dated: October 23, 2015

J.S.C.