

**Echevarria v Shahar**

2016 NY Slip Op 32103(U)

August 11, 2016

Supreme Court, Queens County

Docket Number: 34136/09

Judge: Allan B. Weiss

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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS

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TANIA ECHEVARRIA AND ARTURO PEROCIER,

Plaintiff,

-against-

RON SHAHAR, TRS, INC., EXCLUSIVE HOMES  
ENTERPRISES CORP., RAJESH MADDIWAR,  
BENJAMIN AMIRIAN, MORTGAGE ENTERPRISE,  
LTD, AND WELLS FARGO BANK NATIONAL  
ASSOCIATION,

Defendants.  
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Index No: 34136/09

Motion Date: 4/13/16

Motion Seq. No.: 3

The following papers read on this motion by self-represented defendant Rajesh Maddiwar for an order granting summary judgment dismissing the complaint on the grounds of statute of limitations and failure to state a cause of action

Papers  
Numbered

Notice of Motion-Affidavit-Exhibits.....	1-3
Opposing Affirmation-Exhibits.....	4-6
Reply Affirmation-Exhibits .....	7-9

Upon the foregoing papers the motion is determined as follows:

In December 2005 plaintiffs Tania Echevarria and Arturo Perocier entered into a contract of sale with TRS, Inc. to purchase improved real property known as 114-11 Augusta Court, Jamaica, New York, for the sum of \$495,500.00. The contract of sale provided that the purchaser had inspected the building on the premises and agreed to purchase it in their “as is” condition, and to order a title report with “Register Abstract old title nos: R-4071Q (718) 423-5333”.

The December 2015 rider to the contract of sale provides, at paragraph 6 that “[s]eller represents premises as they exist constitute a legal 2 family dwelling, Seller will deliver a Certificate of Occupancy for all existing structures at closing if required by the Municipality in which the property is located. However, if the Municipality requires an updated survey before they will issue any certificate, Purchaser must furnish an updated survey satisfactory to the Municipality at its cost and expense. If the cost of compliance with this paragraph exceeds \$500.00 Seller shall have the option to cancel the contract and upon return of the downpayment the contract shall be deemed null and void.”

Said rider is typewritten and the words “2 family” that were inserted in said paragraph 6 are handwritten. The December 2015 contract and rider were executed by Ms. Echevarria and Mr. Perocier, and by Ron Sharar “as Pres” of the seller.

The Certificate of Occupancy report provided S. J. Carroll Jr. Inc., for Register Abstract Co. Inc., dated July 27, 2005, states that according to the Department of Buildings index, no Certificate of Occupancy was issued for said building; that it was an old building erected prior to the enforcement of Certificate of Occupancy regulations; and that it is a “TWO STORY FRAME BUILDING; ONE FAMILY DWELLING; “BUILDING CLASS -“B3” (CONVERTED TWO FAMILY DWELLING)”, with a garage.

The closing was held on January 20, 2006, at which time said real property was conveyed to Ms. Eschevarria and Mr. Perocier by TRS Inc. pursuant to a bargain and sale deed.

Defendant Rajesh Maddiwar represented the plaintiffs at the closing. At the closing, Ms. Eschevarria and Mr. Perocier executed an “ATTORNEY DISCLOSURE AND WAIVER” typed on Mr. Maddiwar’s letterhead and dated January 20, 2006, pertaining to the real property known as 114-11 Augusta Court, Jamaica, New York, which provides as follows :

“1. The purchasers above fully understand that they are purchasing a property that may not be a legal two family house. The property was originally built as a one family house and is now being taxed as a two family house. However, simply because the property is being taxed as a two family does not mean that it is a legal two family. A property must be taxed as a legal two family dwelling prior to 1938 for it to be recognized as a legal two family house. In this case a tax assessor’s letter could not be obtained because according to the title company, the City does not issue tax assessor’s letters anymore. As a result it is impossible to determine whether or not the property was taxed as a two legal family before 1938.”

“2. Tania Echevarria and Arturo Perocier hold attorney Raj Maddiwar harmless for any problems with respect to the above property in the event it is later determined that the property is a legal one family and not a legal two family house.”

“3. Tania Echevarria and Arturo Perocier fully understand the above terms, agree to close and hold Raj Maddiwar harmless in the event the property is a legal one family dwelling.”

Contemporaneously with the closing, Mr. Maddiwar provided Ms. Echevarria and Mr. Perocier with a letter dated January 20, 2006, addressed “To Whom it May Concern” stating, in pertinent part, that he had represented them “on the purchase of the property located at 114-11 Augusta Court, Jamaica, New York and that the premises is being taxed as a legal two family house”.

Ms. Eschevarria received a letter from the New York City Department of Buildings (DOB) dated August 24, 2009, stating that the agency had received a complaint on July 15, 2009, regarding alleged illegal conditions at the Augusta Court property and requested that she schedule an appointment for an inspection of the premises. The DOB inspected said premises on August 17, 2009, and issued a Notice of Violation for the failure to properly maintain the premises and a Notice of Violation for work without a permit finding that the, water and waste lines for a three piece bathroom on the first floor had been installed and that there was an extension of the first floor at the rear of the premises that was being used as a bedroom. The owner was directed to maintain the premises and to obtain a permit or restore the premises to the original condition.

Plaintiffs commenced the within action against on December 21, 2009, and allege a fraudulent real estate transaction with respect to their purchase of the Augusta Court property, naming as defendants Ron Shahar, the seller, and his companies TRS Inc. and Exclusive Homes Enterprises Corp., their own attorneys Rajesh Maddiwar and Benjamin Amirian, Mortgage Enterprise Ltd., and Wells Fargo Bank, National Association<sup>1</sup>.

Plaintiffs allege in their complaint that although the contract of sale required the seller to convey a “legal 2 family dwelling”, it failed to do so; that the prior owner Shahar and TRS Inc., purchased the subject property, a one family house February 9, 2005; that Shahar knew that the property was a one-family property; that Shahar, and/or TRS Inc. or Exclusive Homes made alterations without a permit; that between February 9, 2005 and January 20,

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<sup>1</sup>The complaint against Wells Fargo Bank, National Association, the servicer of the loans, was dismissed, pursuant to an order dated December 15, 2010.

2006, Shahar individually or as an agent of TRS Inc. or Exclusive Homes represented to the plaintiffs on more than one occasion that the subject real property was a legal two-family house; that Shahar knew that said representations were false and that plaintiffs would reasonably rely upon said representations, to their detriment.

Plaintiffs allege that on or after they entered in to the contract of sale on December 1, 2005, defendant Shahar introduced them to Mortgage Enterprises LTD; that they engaged the services of this defendant in order to obtain the necessary funding; and that Mortgage Enterprises LTD, knew or should have known that the premises was a one-family property.

Plaintiffs also allege that on or before January 20, 2006, defendant Shahar introduced them to defendants Maddiwar and Amirian; that defendants Maddiwar and Amirian represented the plaintiffs in this transaction at the January 20, 2006 closing to their detriment; and that defendants Maddiwar and Amirian knew or should of known that the subject property was a one-family dwelling.

Plaintiffs allege that all of the defendants acted in concert and conspired against them and that all of the defendants pursuant to the terms of contract of sale restricted and limited information regarding the title to the property, in order to sell the property at a sum above the its real market value, and obtain fees and payment for their services in connection with this transaction.

With respect to defendant Maddiwar, the third cause of action alleges that all of the defendants “acting in concert and conspiring against the Plaintiffs fraudulently transferred title of the subject property to Plaintiff for value grossly in excess of its true market value”, and that as a result the plaintiffs have suffered damages of not less than \$250,000.00, and that defendants acting in concert and conspiring against the Plaintiffs acted with reckless and wanton disregard for the truth, and seek an award of punitive damages. The fourth cause of action alleges that all of the defendants acting in concert and conspiring against the plaintiffs caused them to secure two mortgages and loans, in violation of Banking Law §6-1 and seeks to seek aside the mortgages and recover damages. The fifth cause against Maddiwar is for legal malpractice.

Defendant Maddiwar served an answer and interposed affirmative defenses including statute of limitations.

Defendant Maddiwar now seeks summary judgment dismissing the complaint on the grounds of statute of limitations and failure to state a cause of action.

With respect to the fifth cause of action for legal malpractice, an action for

professional malpractice must be commenced within three years of the date of accrual (*see* CPLR 214 [6]). A claim accrues when the malpractice is committed, not when the client discovers it (*see Williamson v PricewaterhouseCoopers LLP*, 9 NY3d 1, 7-8 [2007]; *McCoy v Feinman*, 99 NY2d 295, 301 [2002]; *Glamm v Allen*, 57 NY2d 87, 93[1982], *McDermott v Torre*, 56 NY2d 399 [1982]; *Farage v Ehrenberg*, 124 AD3d 159, 163-165 [2d Dept 2014]).

The three-year limitations period applicable to causes of action to recover damages for legal malpractice (*see* CPLR 214 [6]) may be tolled by the continuous representation doctrine where “‘there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim’ ” (*Alizio v Ruskin Moscou Faltischek, P.C.*, 126 AD3d 733, 735[ 2d Dept 2015], *quoting McCoy v Feinman*, 99 NY2d at 306). “For the doctrine to apply, there must be clear indicia of an ongoing, continuous, developing, and dependent relationship between the client and the attorney. One of the predicates for the application of the doctrine is continuing trust and confidence in the relationship between the parties” (*Beroza v Sallah Law Firm, P.C.*, 126 AD3d 742, 743 [2d Dept 2015] [internal quotation marks and citations omitted]; *see Zorn v Gilbert*, 8 NY3d 933, 934 [2007]; *Singh v Edelstein*, 103 AD3d 873, 874 [2d Dept 2013]). “It requires more than a continuing, general, professional relationship; it ‘tolls the [s]tatute of [l]imitations only where the continuing representation pertains specifically to the matter in which the attorney committed the alleged malpractice’ ” (*Deep v Boies*, 121 AD3d 1316, 1318-1319 [3d Dept 2014], *quoting Shumsky v Eisenstein*, 96 NY2d 164, 168 [2001]). “The essence of a continuous representation toll is the client’s confidence in the attorney’s ability and good faith, such that the client cannot be expected to question and assess the techniques employed or the manner in which the services are rendered” (*Farage v Ehrenberg*, 124 AD3d 159, 167-168 [2014], *citing Shumsky v Eisenstein*, 96 NY2d at 167 [2014]; *Glamm v Allen*, 57 NY2d at 93-94; *Greene v Greene*, 56 NY2d 86, 94[1982]). “What constitutes a loss of client confidence is fact specific, varying from case to case, but may be demonstrated by relevant documentary evidence involving the parties, or by the client's actions” (*Farage v Ehrenberg*, 124 AD3d at 167-168; *see also Tantleff v Kestenbaum & Mark*, 131 AD3d 955, 956-957 [2d Dept 2015])

A defendant moving for summary judgment in a legal malpractice action on the ground that it is untimely must make a prima facie showing that the malpractice action was commenced more than three years after the date on which the cause of action accrued (*see Farage v Ehrenberg*, 124 AD3d at 163-165). If the defendant makes a prima facie showing, the burden then shifts to the plaintiff to raise a triable issue of fact as to whether the statute of limitations was tolled or is otherwise inapplicable (*see Kitty Jie Yuan v 2368 W. 12th St., LLC*, 119 AD3d 674 [2d Dept 2014]; *Wei Wei v Westside Women’s Med. Pavilion, P.C.*, 115 AD3d 662, 663 [2d Dept 2014]).

Here, defendant Rajesh Maddiwar has established prima facie that the within action for legal malpractice was commenced more than three years after January 20, 2006, the date on which the action accrued. Although plaintiffs contend that the statute of limitations was tolled by the continuous representation doctrine, they have failed to raise a triable issue of fact as to this issue. Contrary to plaintiffs' counsel's assertions there is no evidence that plaintiffs retained Mr. Maddiwar to investigate and research the information contained in the contract of sale and to pursue any corrective measures. Rather, the evidence presented establishes that plaintiffs did not meet Mr. Maddiwar prior to the closing; that they executed the attorney disclosure and waiver statement at the closing; that plaintiffs did not speak to or see Mr. Maddiwar after the closing, and that they did not retain Mr. Maddiwar to do any work for them after the closing. In view of the foregoing, that branch of defendant Rajesh Maddiwar's motion which seeks to dismiss the fifth cause of action for legal malpractice on the grounds that it is barred by the statute of limitations, is granted.

To establish a cause of action to recover damages for fraud, the plaintiff must demonstrate that "(1) the defendant made a false representation of fact, (2) the defendant had knowledge of the falsity, (3) the misrepresentation was made in order to induce the plaintiff's reliance, (4) there was justifiable reliance on the part of the plaintiff, and (5) the plaintiff was injured by the reliance" (*Pace v Raisman & Assoc., Esqs., LLP*, 95 AD3d 1185, 1188-1189[2d Dept 2012]; see also *Fulton v Hankin & Mazel, PLLC*, 132 AD3d 806, 807 [2d Dept 2015]). Here, plaintiffs have not alleged that Mr. Maddiwar made any material misrepresentations upon which they relied (see *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]).

A " 'mere conspiracy to commit a fraud is never of itself a cause of action' " (*MBF Clearing Corp. v Shine*, 212 AD2d 478, 479 [1s Dept 1995], quoting *Brackett v Griswold*, 112 NY 454, 467 [1889]; see *Agostini v Sobol*, 304 AD2d 395 [1st Dept 2003]). With respect to the cause of action to recover damages for aiding and abetting fraud, Mr. Maddiwar has established, prima facie, that even if some underlying fraud was perpetrated by an actor other than himself, he did not render any substantial assistance in connection with the alleged fraud (see generally *Nabatkhorian v Nabatkhorian*, 127 AD3d 1043, 1043[ 2d Dept 2015]; *CRT Invs., Ltd. v BDO Seidman, LLP*, 85 AD3d 470, 472 [1st Dept 2011]).

In opposition, plaintiffs have failed to raise a triable issue of fact. To the extent that plaintiffs allege that Mr. Maddiwar "knew or should have known" that the subject property was a one-family house, this allegation is insufficient to support a claim for fraud, or for conspiracy to commit fraud. Furthermore, the evidence presented establishes that Mr. Maddiwar reviewed the information regarding the subject property's lack of a certificate of occupancy and its tax status, and as he could not determine the property's pre-1938 tax status, he prepared a disclosure and waiver, which the plaintiffs' signed, stating that they

were purchasing a property that may not be a legal two family house. Plaintiffs' counsel's claim that plaintiffs were somehow "negligently induced" into signing the disclosure and waiver agreement, is not supported by the evidence and is rejected. Accordingly, that branch of the defendant's motion which seeks to dismiss plaintiffs' third cause of action for fraud, or conspiracy to commit fraud, and aiding and abetting fraud, is granted.

With respect to the fourth cause of action, plaintiffs have failed to allege any conduct on the part of defendant Maddiwar which induced them into entering into the loan and mortgage agreements. Therefore, that branch of the defendant's motion which seeks to dismiss the fourth cause of action is granted.

In view of the foregoing, defendant Maddiwar's motion to dismiss the complaint insofar as it is assarted against him in its entirety, is granted.

Dated: August 11, 2016

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J.S.C.