STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

ALLEN HOMES, INC.,

Plaintiff,

v.

DECISION AND ORDER

Index #2005/13624

MITCHELL T. WILLIAMS, as executor of the Estate of Rita L. Schwalb,

Defendant.

MITCHELL T. WILLIAMS, as executor of the Estate of Rita L. Schwalb,

Third-Party Plaintiff,

v.

RYNNE MURPHY & ASSOCIATES, INC.,

Third-Party Defendant.

Plaintiff's motion for partial summary judgment on liability was granted at the conclusion of oral argument of these motions and an order was directed to be submitted to the court for signature. The court has yet to receive a proposed order for its signature.

Defendant Williams also moves for summary judgment on its third-party claim against the third-party defendant real estate appraiser firm. The appraiser firm cross-moves for summary judgment dismissing the complaint and for sanctions pursuant to

CPLR §8303-a.

The third-party complaint contains two causes of action (one sounding in negligence/malpractice which alleges that defendant "violated the professional duties of due care and diligence . . . [and] failed to exercise reasonable skill as a real estate appraiser and was guilty of professional malpractice," and the second which alleges that the third-party defendant breached an oral agreement "for professional services as a real estate appraiser" when "[s]uch services included, but were not limited to, the preparation of . . . appraisal reports . . . and the determination of whether sewer and water mains were available at the lot lines of lots 40 and 41 Avon Road." The second cause of action also alleges that the third party defendant "breach[ed] . . . its promise to use due care and diligence in performing its services."

The papers supporting the cross-motions and submitted in opposition thereto reveal a fundamental difference between the parties concerning what should reasonably be expected to be included in a "summary appraisal report" of the kind at issue here concerning utilities availability or hook-up. Williams contends that he had an oral agreement with the appraiser that bound the appraiser to ascertain whether the utilities hook-up at the two lots had been completed at least to the lot line, and he contends that the check mark on the appropriate box in the two

summary appraisal reports in question certified that such hook-ups had been completed. The appraiser firm, on the other hand, maintains that Williams never made the oral request of it to verify utilities hook-up to the lot lines, and that in any event it would have been required only to determine "availability" of utilities connections to the lot sites, not whether the utilities hook-up had been completed with respect to the two lots. The appraiser firm also insists that the certification on the summary appraisal report was only designed to represent availability, not actual completed construction work connecting the lots to the utilities in question. Moreover, the firm contends that summary appraisal reports are necessarily based on assumption derived from client provided information, not independent investigation.

Inasmuch as there is a sharp dispute between the parties whether Williams actually asked his appraiser to, on his own, verify whether the construction needed to complete the utilities hook-up to the lot lines was made, summary judgment on the second cause of action may not be awarded to either side. With respect to the first cause of action sounding in malpractice, I find that neither side has met its initial burden to show entitlement to judgment as a matter of law on the current record, and that accordingly each motion must be denied irrespective of the adequacy of the responding papers to raise an issue of fact. JMD

Holding Corp. v. Congress Financial Corp., 4 N.Y.3d 373, 384-85 (2005).

First, whether indeed a real estate appraiser is capable of professional malpractice is an open question in this state. Chase Scientific Research, Inc. v. NIA Group, Inc., 96 N.Y.2d 20, 27 (2001); Brothers v. Florence, 95 N.Y.2d 290, 298, 306. See also, EBC I, Inc. v. Goldman Sachs & Co., 5 N.Y.3d, 11 (2005)("leav[ing] open the question whether a financial advisor or underwriter may ever be treated as a professional for purposes of such liability"). The early enthusiasm of the federal courts, Federal Savings and Loan Insurance Corp. v. Texas Real Estate Counselors, Inc., 955 F.2d 261, 265 (5th Cir. 1992); Federal Savings and Loan, Ins. Corp. v. Derbes, 731 F.Supp. 755, 762 (E.D. La. 1990), and commentators, e.g., Mastaglia, Real Estate Appraisal Malpractice: Liability and Damages, 54 N.Y. State Bar J. 6 (Jan. 1982), for upholding a malpractice action against real estate appraisers independent of the client's remedy for contractual breach was not matched by the New York State courts. See authorities cited above, and Edelman v. O'Toole-Ewald art Associates, Inc., ___ A.D.3d ___, 2006 WL 910400 (1st Dept. April 11, 2006); Rotunno v. Stiles, 7 A.D.3d 504 (2d Dept. 2004); Chambers v. Executive Mortgage Corp., 229 A.D.2d 416, 417 (2d Dept. 1996).

There are exceptions to this. See Rodin Properties-Shore

Mall, N.V. v. Ullman, 264 A.D.2d 367, 368 (1st Dept. 1999), and the unpublished case discussed below. It may be that these cases may be reconciled on their facts inasmuch as in Ullman the lender sought to hold the borrower's appraiser liable in malpractice whereas in Chambers it was the seller itself which sought malpractice relief against the purchaser's mortgage broker's appraiser, and in Rotunno it was the purchaser who sought to hold the lender bank's appraiser liable.

In Early v. Rossback, unpublished N.Y.L.J. vol. 231 Thursday, March 11, 2004, at p. 21, col. 3 (Sup. Ct. Nassau Co.), the court observed that it had "found no precedent involving a claim of malpractice by a real estate appraiser," but held that the plaintiff homeowner, who hired the appraiser, had made out a malpractice case by reference to an expert affidavit that the defendant deviated from the appropriate standard of care in a number of respects, including failing to verify measurements provided by the client. Plaintiffs expert's affidavit stated that, since the defendant was a New York State licensed appraiser, his report "must conform to the reporting requirements as set forth under the Uniform Standards of Professional Appraisal Practice," and that the defendant's report failed to meet those standards in many respects, including the failure to re-measure the premises and the failure to re-inspect the premises when making subsequent appraisals. The second form of

evidence relied upon by the court was the defendant's admissions during his deposition to the deficiencies identified by the expert in his affidavit.

Even assuming that a real estate appraiser such as the third-party defendant here can ever be held liable in malpractice, plaintiff's motion is supported only by the check marks on the summary appraisal reports themselves, and is not accompanied by any reference to uniform or other standards in the appraisal industry defining the requisite level of professional duties appraisers owe to their clients. Given that this case involves only a summary appraisal report, and that the parties diverge considerably in their views concerning whether assumptions may be made on the basis of client provided information (itself very much in dispute) without independent investigation, the lack of expert proof in support of Williams' motion is fatal. Further, given the uncertain state of the law in this area, I find that it would be inappropriate to hold that Williams met his initial burden on summary judgment.

With respect to the third-party defendant's cross-motion, it is true enough that the third-party defendant appraiser submitted an expert affidavit of his own, but it makes no reference to the required level of professional skill sufficient to avoid liability in malpractice, particularly by specific reference to the information he provided in the summary appraisal reports at

issue here with respect to utilities hook-up. Although he says he "fully complied with the requirements of the Uniform Standards of Professional Appraisal Practice in both the inspection of lots 40 and 41 and in preparation of the summary appraisal reports," he does not describe what those standards are, how they applied to "summary appraisal reports" and the question of utilities availability or hook-up, to the property line or otherwise. The showing this is conclusory only. Accordingly, I find that the third-party defendant's motion papers are equally deficient in establishing the latter's entitlement to judgment as a matter of law and each motion must be denied irrespective of the sufficiency of the opposing papers.

The cross-motion for sanctions is denied.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: April 25, 2006
Rochester, New York