

**Halperin v Held & Hines, LLP**

2024 NY Slip Op 31415(U)

April 12, 2024

Supreme Court, New York County

Docket Number: Index No. 652124/2019

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

-----X

STEPHEN R HALPERIN and JAMIE BERMAN
HALPERIN,

INDEX NO. 652124/2019

Plaintiffs,

MOTION DATE --

- v -

MOTION SEQ. NO. 009 010 011

HELD & HINES, LLP, MARK J. HELD, DOUGLAS
ELLIMAN REALTY, LLC, JOHN-LUC BRIGUET, and
MAGGIE LEIGH MARSHALL,

DECISION + ORDER ON
MOTION

Defendants.

-----X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 009) 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 344, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 442, 445, 449, 450, 451, 452, 453, 464, 467, 473

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 010) 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 345, 441, 443, 446, 459, 460, 461, 462, 463, 465, 468, 474

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 011) 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 346, 439, 440, 444, 447, 448, 454, 455, 456, 457, 458, 466, 469, 475

were read<sup>1</sup> on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

In motion sequence numbers 009, 010, and 011 defendants Held & Hines, LLP

<sup>1</sup> The court reviewed, and where appropriate considered, the documents mentioned in the parties' papers that may be omitted in the autogenerated caption.

and Mark J. Held, Esq. (together, HH defendants) (seq. 009), John-Luc Briguet R.A.<sup>2</sup> (Briguet) (seq. 010), and Douglas Elliman, LLC (Douglas Elliman) and Maggie Leigh Marshall (together, Elliman Defendants) (seq. 011) move, pursuant to CPLR 3212, for summary judgment dismissing the amended complaint and cross-claims.

## Background

This matter arises from plaintiff Stephen R. Halperin<sup>3</sup> and Jamie Berman Halperin's purchase of a one-bedroom apartment located at 32 West 20th Street, Apartment 8S, New York, New York (Apartment) for \$2,530,000. (NYSCEF 279, Storgion<sup>4</sup> Appraisal Report at 3-4;<sup>5</sup> NYSCEF 278, Contract ¶¶ 1.1.1, 1.16.) On March 9, 2017, the Halperins executed a contract of sale for the Apartment. (NYSCEF 278, Contract.) The transaction closed on May 24, 2017. (NYSCEF 438, Response to Rule 19-a Statement ¶ 2.) The HH defendants represented the Halperins in connection with the transaction. (See NYSCEF 278, Contract ¶ 1.2.2; NYSCEF 273, Held's 2/8/2017 email to Stephen.) The Douglas Elliman Defendants were the Halperins' broker. (NYSCEF 278, Contract ¶ 1.5; NYSCEF 246, tr. At 22:5-11 [Stephen Depo].) Douglas Elliman, by nonparties Matthew George and Michael Moran, was also the broker of the sellers, Stephan Van Dam and Gail Pellett. (NYSCEF 278, Contract ¶¶ 1.1.1, 1.5; NYSCEF 248, tr. at 178:20-179:3 [Van Dam Depo].)

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<sup>2</sup> In his moving papers, this defendant refers to himself as Jean-Luc Briguet R.A. (See e.g., NYSCEF 304, Notice of Motion at 1 [mot. seq. no. 010].)

<sup>3</sup> In the omnibus opposition brief and certain other submissions, this plaintiff is referred to as Steven R. Halperin. The court respectfully refers to plaintiffs by their first names as they bear the same last name.

<sup>4</sup> Storgion prepared the appraisal report for the lender, JPMorgan Chase. (NYSCEF 279, Storgion Appraisal Report at 2.)

<sup>5</sup> NYSCEF pagination

Briguet “was retained, pursuant to oral agreement” on behalf of the Halperins for the design of “a gut renovation” of the Apartment. (NYSCEF 340, Briguet aff ¶ 3.) The renovation was completed by February of 2018. (*Id.* ¶ 13.) Prior to the renovation, the Apartment had a loft stretching along the southern, easterly, and northern walls. (See NYSCEF 339, Briguet drawings at 2.) The Apartment had seven southern windows and three easterly windows. (See *id.*<sup>6</sup>) As a result of the renovation, among other things, (i) the kitchen area was moved to the easterly wall to be part of the loft space; the kitchen area stretches along two easterly windows; (ii) the second bedroom was constructed along the easterly and northern walls and has one easterly window; and (iii) playroom was constructed along the northern wall adjacent to the second bedroom and has no immediate access to any windows. (See *id.* at 3.)

The premises adjacent to the Building<sup>7</sup> are owned by Panasia Estate Inc. (Panasia) and are known as 31-33 West 19th Street, Manhattan. (NYSCEF 383, Mehta<sup>8</sup> aff ¶ 1; NYSCEF 424, 3/11/2019 32 West 20th Street Board’s Letter.) On March 11, 2019, the Building’s Board of Directors notified the Halperins that “[I]ast week we received a letter from Panasia’s lawyers informing us that Panasia intended to construct the two-story addition, with the penthouse .... Their construction ... necessitates the elimination of the lot line windows on the east side of the 7th and 8th floors.” (NYSCEF 424, 3/11/2019 Board’s Letter.) The Apartment is located on the eighth floor and has

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<sup>6</sup> It appears that the drawings incorrectly designate the southern wall as the northern wall as indicated by the directional arrow with the letter “N.” (See NYSCEF 339, Briguet drawings at 2.) However, there is no dispute that there were seven windows on the southern wall of the Apartment and none on the northern wall.

<sup>7</sup> 32 West 20th Street, New York, New York.

<sup>8</sup> Hemant Mehta is Panasia’s vice president. (NYSCEF 383, Mehta aff ¶ 1.)

three easterly windows. (See NYSCEF 339, Briguet drawings at 3.) Thus, the Apartment would be affected by Panasia's construction. This action followed. (NYSCEF 1, Complaint.)

#### Procedural History

This action has been discontinued against Van Dam and Pellett, Thirty-Two West 20th Street Inc., the cooperative corporation that owns the Building, and Cornerstone Management Systems, Inc., the corporation's managing agent. (NYSCEF 472, June 25, 2023 Order; NYSCEF 471, June 8, 2023 Order; see NYSCEF 76, Amended Verified Complaint [AC] ¶ 4.) The third-party action filed by HH defendants has also been discontinued. (NYSCEF 129, Stipulation of Discontinuance.)

On June 1, 2020, the Halperins filed an amended complaint alleging claims for negligence and professional malpractice against the HH Defendants (third cause of action), fraudulent misrepresentation (fourth cause of action), fraudulent concealment (fifth cause of action), negligent misrepresentation (sixth cause of action), negligence and professional malpractice (seventh cause of action), gross negligence (eighth cause of action), and breach of fiduciary duty (ninth cause of action) against the Elliman Defendants, and negligence and professional malpractice (tenth cause of action) against Briguet. (NYSCEF 76, AC ¶¶ 62-114.) Briguet answered and cross-claimed against the remaining defendants for (i) contribution and/or common law indemnification, (ii) contractual indemnification, and (iii) breach of contract in that co-defendants failed to procure insurance and/or name Briguet as an additional insured on their policies. (NYSCEF 114, Briguet Answer to Amended Complaint with Cross-Claims at 31-33.) The Elliman Defendants answered and cross-claimed against the other

defendants for indemnification and contribution. (NYSCEF 195, Elliman Defendants Answer to Amended Complaint with Cross-Claims at 6.) The HH Defendants filed an answer on June 17, 2020. (NYSCEF 94, Answer.)

### Discussion

Under CPLR 3212, “the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) Once the movant has made such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts sufficient to require a trial, or summary judgment will be granted. (See *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].)

#### Motion Sequence 009 – HH Defendants’ Motion for Summary Judgment<sup>9</sup>

The Halperins allege a claim for professional negligence/legal malpractice against the HH Defendants on the ground that they failed to advise the Halperins that, pursuant the proprietary lease, rooms that contain lot-line windows are designated as “No sleeping’ rooms” which cannot be used “as bedrooms or for residential occupancy if obstructed” (NYSCEF 76, AC ¶ 63 [b]), failed to provide a full copy of the proprietary lease (*id.* ¶ 63 [c]), and falsely stated that lot-line windows were not disclosed on the offering plan. (*id.* ¶ 65 [a].) The Halperins allege that they sustained damages in the amount of \$5 million. (*id.* ¶ 66.)

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<sup>9</sup> The HH defendants’ counsel is reminded that “[p]arties shall clearly label/describe with specificity all documents in NYSCEF.... Each document shall have a description that identifies exactly what it is.” (Part 48 Procedure ¶ 5 [B].) For instance, an appropriate label for NYSCEF 247 is not “[d]eposition transcript” but “tr of Jaime Berman Halperin 4/21/2021 depo.”

“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 loss; and (3) proof of actual damages.” (*Brooks v Lewin*, 21 AD3d 731, 734 [1st Dept 2005] [citation omitted], *lv denied* 6 NY3d 713 [2006].) The third element requires proof of “actual and ascertainable” damages that are “clearly calculable.” (*Gallet, Dreyer & Berkey, LLP v Basile*, 141 AD3d 405, 406 [1st Dept 2016] [internal quotation marks and citation omitted].) A plaintiff cannot recover in tort for “for potential harm in the absence of actual injury.” (*Niagara Mohawk Power Corp. v Ferranti-Packard Transformers*, 201 AD2d 902, 903 [4th Dept 1994], *lv dismissed* 83 NY2d 953 [1994].) Indeed, “it is upon injury that a legal right to relief arises in a tort action.” (*Ackerman v Price Waterhouse*, 84 NY2d 535, 541 [1994] [citations omitted].) “The threat of future harm, not yet realized, is not enough.” (*IGEN, Inc. v White*, 250 AD2d 463, 465 [1st Dept 1998] [citation omitted].)

The HH Defendants have made a prima facie showing of their entitlement to judgment as a matter of law dismissing the amended complaint by submitting proof that the Halperins sustained no actual damages. In support of their motion, the HH defendants proffer Jamie’s deposition testimony where she states that the lot-line windows have not been blocked. (NYSCEF 247, tr. at 170:20-22 [Jamie depo].)

In response, the Halperins fail to raise an issue of fact as they submit no proof that they sustained actual damages due to losing the lot-line windows. Any damages that the Halperins may sustain in the future if the lot-line windows are lost are speculative, and thus, cannot support legal malpractice claim as a matter of law. (*IGEN, Inc.*, 250 AD2d at 465; *see also Gallet, Dreyer & Berkey, LLP*, 141 AD3d at 406

[granting summary judgment dismissing a legal malpractice claim “where the asserted damages are vague, unclear, or speculative” (citation omitted).] Plaintiffs concede that they have not lost the lot-line windows. (NYSCEF 438, Response to Rule 19-a Statement ¶ 10; NYSCEF 247, tr. At 170:20-22 [Jamie depo].) The mere fact that Panasia spent \$4 million dollars towards vertical expansion does not support the Halperins’ claim of actual damages. (See NYSCEF 253, tr. at 39:16-41:1 [Mehta depo].)

To the extent that the Halperins allege damages due to diminution in the Apartment’s value post-closing, the HH Defendants proffer appraisal reports showing that the market value of the apartment at the time around the closing was \$2,530,000 or \$2,566,065 (NYSCEF 279, Storgion Appraisal Report at 3 [value as of March 20, 2017]; NYSCEF 262, Rizk<sup>10</sup> Report at 4, 77 [value as of May 24, 2017]), and that as of June 1, 2021, its market value was \$3,236,243. (NYSCEF 262, Rizk Report at 4, 84.)

Again, the Halperins fail to raise an issue of fact as to whether the Apartment’s market value diminished subsequent to the transaction, causing them damage.<sup>11</sup> In the expert report that the Halperins proffer, Michael Vargas opines that, if the Apartment had lost the easterly lot-line windows, its market value would be \$2,099,500 as of June 21, 2021, or 25% less than the estimated market value of the apartment “As-Is.”<sup>12</sup>

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<sup>10</sup> Frederick A. Rizk Jr. is an expert retained by Briguet. (See NYSCEF 262, Rizk Report at 3.)

<sup>11</sup> The Halperins concede (NYSCEF 442, PI Opp MOL at 7 [NYSCEF pagination]) that the approval to vertically expand the adjacent building already existed when the transaction closed on May 24, 2017, as the approval was received in 2010 (NYSCEF 253, tr. at 23:9-25:21 [Mehta depo]) and extended until 2019 (*id.* at 53:14-17) and then until 2022. (*id.* at 60:11-14.)

<sup>12</sup> Vargas opines on the market value of the “As-Is” apartment, which he estimates at \$2,788,000 as of June 1, 2021, “under the assumption that [the Apartment] would NOT



(NYSCEF 359, Vargas Report at 47-48.) Such potential diminution of value is speculative, and thus, does not raise an issue of fact as to whether plaintiffs have sustained diminution of value damages.

To the extent Vargas states in the three-page document preceding the appraisal report<sup>13</sup> that the “that the 25% reduction in market value applies currently by reason of the prior approvals,” this statement does not flow from the appraisal report and is unsupported by any facts or data. (*Id.* at 2 [document preceding appraisal report].) Thus, this statement is “not sufficient to raise a triable issue of fact” regarding plaintiffs’ diminution of value or overpayment damages. (*Florsheim v Marriott Intl., Inc.*, 213 AD3d 554, 555 [1st Dept 2023] [citation omitted] [finding that a speculative expert report did not raise an issue of fact].)

Finally, to the extent the Halperins allege damages in overpaying for the Apartment, the HH Defendants proffer reports showing that the market value of the Apartment was not less than the purchase price of \$2,530,000 paid. (NYSCEF 279, Storgion Appraisal Report at HELD 0124 [\$2,530,000 valuation]; NYSCEF 262, Rizk Report at 4, 77 [\$2,566,065 valuation].)

Vargas’ report does not raise an issue of fact. In the document preceding the report, Vargas states “that the same or substantially same 25% reduction in market value would apply to the market value of the subject property as of the date of closing

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have the potential to lose its lot line windows.” (NYSCEF 359, Vargas Report at 38, 41.) Thus, this valuation is hypothetical, given the possibility that the adjacent building may expand vertically, as all parties seem to concede. Vargas offers no estimated market value of the Apartment in its true as-is condition at any point in time before or after signing or closing.

<sup>13</sup> The appraisal report is dated November 19, 2021, whereas the three-page document is dated December 2, 2021. (See NYSCEF 260, Vargas Report.)

when [plaintiffs] purchased their apartment on May 24, 2017” (NYSCEF 359, Vargas Report at 2 [document preceding appraisal report]); again, this statement is unsupported by any facts or data. (*Florsheim*, 213 AD3d at 555.) The Halperins proffer no other additional evidence of the value of the Apartment at the time of the closing so as to raise an issue of fact as to whether they overpaid.

Finally, plaintiffs’ argument that they have damages attributable to the need to reconfigure the apartment when the lot-line windows are lost cannot raise the issue of fact as any such potential damages are speculative. “[S]peculative damages cannot be a basis for legal malpractice. Conclusory allegations of damages also are insufficient.” (*Pellegrino v File*, 291 AD2d 60, 63 [1st Dept 2002] [citations omitted].)

Motion Sequence 010 – Briguet’s Motion for Summary Judgment

The Halperins allege a claim for professional negligence/architectural malpractice against Briguet on the theory that “during the pre-Contract period, [he] failed to advise [plaintiffs] as to the existence of lot line windows in the Apartment Residence and what the potential consequences of that would be to any potential renovation.” (NYSCEF 76, AC ¶ 109.) They also allege that Briguet was negligent in “preparing post-Contract Renovation Plans” that did not “comply with applicable laws, regulations and rules of the Apartment Corporation,” and as a result, they sustained damages in the amount of \$2 million. (*Id.* ¶¶ 107, 114.)

“A claim of professional negligence requires proof that there was a departure from accepted standards of practice and that the departure was a proximate cause of the injury.” (*D.D. Hamilton Textiles, Inc. v Estate of Mate*, 269 AD2d 214, 215 [1st Dept 2000] [citations omitted].) “In negligence, no recovery may be had even where there is

fault, if no injury follows. Injury or damage to the plaintiff causally related to the accident is an essential element of actionable negligence .... Although fault may exist, it is only the injury which constitutes the invasion of the personal right protected by law.” (*Brazos v Brumidge*, 6 AD2d 494, 496-97 [1st Dept 1958] [citations omitted].) “[A]ctual damages are an essential aspect of a negligence claim under New York law.” (*Mizrahi v Taic*, 266 AD2d 59, 60 [1st Dept 1999] [citation omitted].)

Briguet made a prima facie showing of his entitlement to judgment as a matter of law dismissing the complaint by submitting proof that the Halperins sustained no actual damages. Specifically, Briguet proffers evidence that the lot-line windows remain unobstructed. (NYSCEF 313, tr at 170:20-22 [Jamie depo].) Briguet further proffers evidence showing that the market value of the Apartment was not lower than the purchase price of \$2,530,000 that plaintiffs paid. (NYSCEF 337, Storgion Appraisal Report at 6 [\$2,530,000 valuation as of March 20, 2017]; NYSECF 338, Rizk Report at 4, 77 [\$2,566,065 valuation as of May 24, 2017].) Finally, Briguet proffers evidence that as of June 1, 2021, the apartment’s market value was \$3,236,243. (NYSECF 338, Rizk Report at 4, 84.)

As discussed above, the Halperins fail to raise an issue of fact as to whether they have suffered any actual damages.<sup>14</sup> Thus, Briguet is entitled to summary judgement dismissing the complaint.

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<sup>14</sup> The Halperins submitted an omnibus opposition brief with accompanying evidence addressing the three motions at issue.

Motion Sequence 011 – Elliman Defendants’ Motion for Summary Judgment

The Halperins allege six claims against Elliman defendants - fraudulent misrepresentation, fraudulent concealment, negligent misrepresentation, negligence and professional malpractice, gross negligence, and breach of fiduciary duty.

The Elliman Defendants argue that the Halperins suffered no damages due to Elliman Defendants’ alleged misconduct because the evidence shows that the Halperins paid fair market value for the Apartment, and thus, the causes of action against them fail. The Elliman defendants proffer Storgion’s appraisal report showing that the market value of the apartment at the time around the closing time was \$2,530,000, that is, equal to the purchase price. (NYSCEF 296, Storgion Appraisal Report at DE015615 [value as of March 20, 2017].) The Elliman defendants thus have met their summary judgment burden by demonstrating that there are no questions of fact that the Halperins have not suffered overpayment damages.

As discussed, the Halperins fail to raise an issue of fact as to whether they have suffered any actual damages. Thus, the Elliman Defendants are entitled to summary judgement dismissing the claims for fraudulent misrepresentation, fraudulent concealment, negligent misrepresentation, negligence/professional malpractice, gross negligence, and breach of fiduciary duty. (*See Ackerman*, 84 NY2d at 541 [“it is upon injury that a legal right to relief arises in a tort action” (citations omitted)]; *Gomez-Jimenez v NY Law Sch.*, 103 AD3d 13, 17-18 [1st Dept 2012] [damages are element of fraudulent misrepresentation and fraudulent concealment claims], *lv denied* 20 NY3d 1093 [2013]; *Brazos*, 6 AD2d at 496-97 [damages are element of negligence claim];

*Besen v Farhadian*, 195 AD3d 548, 549-50 [1st Dept 2021] [damages are element of breach of fiduciary duty claim (citation omitted)].)

### Cross-Claims

Based on the foregoing, Briguet's cross-claims for contribution and/or indemnification, contractual indemnification, and breach of contract, as well as the Elliman Defendants' cross-claims for indemnification and contribution are dismissed as moot.

The court has considered the parties' remaining arguments and finds that they do not change the outcome.

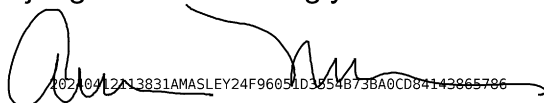
Accordingly, it is

ORDERED that Held & Hines, LLP and Mark J. Held, Esq.'s motion for summary judgment is granted and the amended complaint and cross-claims are dismissed with costs and disbursements to these defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that John-Luc Briguet R.A.'s motion for summary judgment is granted and the amended complaint and cross-claims are dismissed with costs and disbursements to this defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that Douglas Elliman, LLC and Maggie Leigh Marshall's motion for summary judgment is granted and the amended complaint and cross-claims are dismissed with costs and disbursements to these defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgments accordingly.



4/12/2024

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE