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M E M O R A N D U M

SUPREME COURT : QUEENS COUNTY
CIVIL TERM IAS PART 3

GEORGETOWN MEWS OWNERS' CORP., X BY: Justice John A.Milano
Plaintiff, : Index No.: 008863/92
- against - : Motion Date: November 21, 2000
CAMPUS ASSOCIATES, et al., : Motion Cal. No. 18
Defendants. X

Defendant Shanholt, Marinoff, Fleiss & Co. ("Shanholt") has moved for summary judgment dismissing the complaint against it. Plaintiff Georgetown Mews Owners Corp. has cross-moved for an order compelling the depositions of Mitchell Waxman and John Lama.

Plaintiff Georgetown owns a 929 unit cooperative housing complex in Kew Gardens, New York. Defendant Campus Associates, which sponsored the conversion of the housing complex into cooperative ownership, owned a majority of the plaintiff's shares until it sold most of what it owned to Overseas Commodities, Ltd. in December, 1989. In February, 1986, Campus Associates received a \$23,000,000 "wrap around" mortgage from the plaintiff, which required Campus Associates to make monthly principal and interest payments on the plaintiff's underlying mortgage, also in the principal amount of \$23,000,000. (The "wrap around" mortgage provided that as long as the plaintiff faithfully discharged its obligations under it, Campus Associates would have the obligation

of making principal and interest payments on the underlying mortgage.) The John Hancock Mutual Life Insurance Company ("Hancock") eventually refinanced the underlying mortgage, and Campus Associates continued to have the responsibility of making payments on the Hancock mortgage. The Hancock mortgage required payments on the first day of the month, and, if payments were late, interest was charged at the rate of 5 per cent over the mortgage rate for each day thereafter that payment was owed, which amounted to a penalty of over \$3,000 per day. According to defendant Shanholt, Hancock allowed a grace period of five business days for the payment of the monthly sums due. From the time that Campus Associates assumed the obligation to pay the Hancock mortgage, it failed to make payments in a timely manner, and interest arrears mounted. In February, 1987, defendant Shanholt, a certified public accounting firm, was retained to audit the plaintiff's financial statements for 1986, 1987, and 1988. Defendant Shanholt sent audit confirmation requests to Hancock's agent, NY Urban, which administered the Hancock mortgage, and, according to the defendant, the responses of NY Urban did not disclose sums due for defaulted interest or late charges. On the other hand, the plaintiff alleges that defendant Shanholt failed to discover or disclose the interest arrears which accrued during the years that the accounting firm performed the audits and which allegedly should have been set out in the plaintiff's financial statements as liabilities. According to the plaintiff, the audit confirmations showed the dates payments were due and the date they were made, and

defendant Shanholt failed to make any inquiry concerning the terms of the grace period and failed to discover that Hancock charged penalty interest despite the grace period. The plaintiff allegedly did not learn of the arrears until they totaled nearly \$1,100,000. The plaintiff paid over \$1,000,000 to Hancock to compensate it for the defaults of Campus Associates, and in 1992 this action ensued. In 1993, defendant Campus Associates, defendant Stephen Shalom, a principal of the sponsor, and defendant Arthur Cohen, another principal of the sponsor, settled with the plaintiff. The plaintiff continued to maintain this action against Shanholt, the sole remaining defendant, and the causes of action asserted against it are for accounting malpractice.

The opponent of a motion for summary judgment has the burden of producing evidence sufficient to show that there is an issue of fact which must be tried. (See, Alvarez v Prospect Hospital, 68 NY2d 320.) Plaintiff Georgetown successfully carried this burden. "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; Burke v Repetti & Co., 255 AD2d 483; Charlap v BDO Seidman, 251 AD2d 146.) The plaintiff must also show that the departure from accepted standards of professional practice caused actual and ascertainable damages. (See, Giambrone v Bank of New York, 253 AD2d 786; Charos v Esseks, Hefter & Angel, 216 AD2d 511.) In the case at bar, summary judgment is precluded by issues of fact pertaining to

whether defendant Shanholt departed from professional accounting standards (see, Bachmann, Schwartz & Abramson v Advance Intl., Inc., 251 AD 252) and whether the defendant's alleged malpractice was a proximate cause of the plaintiff's damages, if any. (See, Guardian Mortgage Acceptance Corp. v Bankers Trust Co., 259 AD2d 358; Bachmann, Schwartz & Abramson v Advance Intl., Inc., supra.) While, on the one hand, defendant Shanholt alleges that no notice of default was sent until April 14, 1989, four months after the period for which the defendant performed its last audit and that Hancock did not claim default interest for the time that the defendant had performed its audits until after defendant Shanholt had completed its services, on the other hand, the plaintiff alleges that the defaults by Campus Associates were stated on "audit confirmations" provided by NY Urban and that defendant Shanholt failed to accurately interpret the audit confirmations and to make proper inquiry regarding them. Moreover, even though interest arrears allegedly continued to increase after the plaintiff learned of the defaults by Campus Associates, the court cannot conclude here as a matter of law that the defendant caused no injury to the plaintiff because even if the former had informed the latter of the mounting arrears, the plaintiff was financially unable to prevent their accrual or was under the domination of Campus Associates to such an extent that their accrual could not have been prevented. Finally, in view of the conflicting allegations of the parties, the court cannot conclude here as a matter of law that the plaintiff sustained no damage as the result

of the defendant's alleged malpractice because of subsequent financial developments concerning the plaintiff housing cooperative.

Accordingly, defendant Shanholt's motion for summary judgment is denied.

In regard to the plaintiff's cross motion to compel the depositions of Mitchell Waxman and John Lama, the court notes that this case has been pending since 1992 and that a note of issue was filed in August, 2000. The plaintiff has had more than adequate time to complete discovery in this case, and there are no unusual or unanticipated circumstances which justify the plaintiff's attempt to obtain discovery after the filing of the note of issue. (See, Audiovox Corp. v Benyamini, 265 AD2d 135; Nisselson v Hercules Construction Corp., 260 AD2d 507.)

Accordingly, the plaintiff's cross motion is denied.

Short form order signed herewith.

Dated: February 14, 2001

Justice John A. Milano