

Sonnenschine v Giacomo

2001 NY Slip Op 30005(U)

April 9, 2001

Supreme Court, New York County

Docket Number: 6_30060/1329

Judge: Sheila Abdus-Salaam

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Hon. SHEILA ABDUS-SALAAM
Justice

PART 13

Samuel Sonnenschine, Aaron Brand,
Chamonix Associates, Red Bluff
Realty Corp., Chamonix Investors, Ltd., Sandpiper
Associates, Sandpiper Investors, Ltd., and
Pasadena Realty Corp.

INDEX NO. 601 329/00
MOTION DATE 11/15/00
MOTION SEQ. NO. 001
MOTION CAL. NO. 179

-v-

Paul Giacomo and Monroe Partners
International PC.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Papers Numbered

Notice of Motion/Order to Show Cause - Affidavits - Exhibits... | _____
Answering Affidavits - Exhibits _____ | _____
Replying Affidavits _____ | _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion by defendant Giacomo for an order pursuant to CPLR §§3211 (a) (1), and (7) dismissing the complaint is granted and plaintiffs' cross-motion for leave to serve an amended complaint is denied.

In this legal malpractice action, plaintiffs have failed to adequately allege that defendant's negligence was a proximate cause of actual damages, that plaintiffs would have succeeded in their defense of the underlying action but for their attorney's negligence (Hutt v. Kanterman & Taub, ___ AD2d ___, 720 NYS2d 781; Weiner v. Hershman & Leicher, P.C., 248 AD2d 193). Defendant has demonstrated here, based upon documentary evidence, that plaintiffs did not have a meritorious

defense to the underlying action (Sandcham Realty Corp. v. Sonnenschine, et al) and that therefore, plaintiffs should not be permitted to amend their complaint.

The Sandcham action was brought to recover \$425,000 owed to Sandcham for the purchase by Aaron Brand (one of the plaintiffs here) of Notes representing indebtedness of Sandpiper Associates and Chamonix Associates to Sandcham Realty. By letter agreements dated September 17, 1990, plaintiffs agreed to pay Sandcham a down payment of \$175,000 (this amount was paid) and to pay the balance of \$425,000 from amounts collected from the Satnick Group, and the remaining limited partners. The agreement provides that the balance of the purchase price for the notes shall be derived from capital calls made on the remaining limited partners of Chamonix Associates and Sandpiper Associates.

Defendant has shown here that the balance due was never paid and further, that tax returns for the years 1991 through 1995 show that capital contributions totaling \$1,969,022 were made to Sandpiper Associates and Chamonix Associates. Thus, argues movant, even if the answer of Sonnenschine, et al. in the underlying action had not been stricken based upon failure to comply with discovery orders, those defendants would not have prevailed because they had no meritorious defense to Sandcham's action on the notes and the September agreements.

Plaintiffs have taken the position here that they would have succeeded in the underlying action. Their main argument is that they did not breach the September agreements because no capital contributions were ever made to Sandpiper and Chamonix from which Sandcham could have been paid. As for the tax returns that reflect such contributions, Mr. Sonnenschine, a certified public accountant, claims that the capital contributions shown on the tax returns reflect "bookkeeping errors" by the two partnerships which he discovered in 1996 or 1997, and that he caused these capital contributions to be reclassified as loans on the books of the partnerships. However, Mr. Sonnenschine does not annex any copies of amendments to those tax returns indicating that amended returns were filed with the IRS correcting these bookkeeping errors. Plaintiffs' argument that five years of tax returns reflected incorrect information appears to be merely a post litem motam allegation, advanced only after Sandcham obtained a judgment against these

parties, and such an allegation is insufficient to raise any genuine issue as to whether plaintiffs can demonstrate proximate cause in this malpractice action. Additionally, the other defenses to the underlying action asserted by plaintiffs here are not supported by the record.

Finally, plaintiffs' breach of contract, intentional misrepresentation and negligent misrepresentation claims are redundant of the legal malpractice claims and must be dismissed (Sage Realty Corp. v. Proskauer Rose, LLP, 251 AD2d 35). Similarly, the breach of fiduciary claim is dismissed since it is based on the same facts as the legal malpractice claim and does "not allege distinct damages (citations omitted)." (Mecca v. Shang, 258 AD2d 569, 560, leave to appeal dismissed 95 NY2d 791).

Accordingly, it is

ORDERED that the Clerk enter judgment dismissing the complaint.

Dated 4/9/01

ENTER: SA-S
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION