

**People v Salans Hertzfield Heilbronn Christy &
Viener**

2001 NY Slip Op 30006(U)

July 3, 2001

Supreme Court, New York County

Docket Number: _300602/8802

Judge: Martin Schoenfeld

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 28

..... X
BETWEEN THE BREAD REALTY CORPORATION,

Plaintiff,

Index No. 602880/00

- against -

DECISION AND ORDER

7 001

SALANS HERTZFIELD HEILBRONN CHRISTY &
VIENER and CHRISTY & VIENER,

Defendants.

-----X

MARTIN SCHOENFELD, J.:

In this action plaintiff Between the Bread Realty Corporation alleges that defendant law firm Christy & Viener and its successor, defendant Salans Hertzfeld Heilbronn Christy & Viener, committed malpractice in the course of representing plaintiff in negotiating and executing a commercial lease. Plaintiff now moves, pursuant to CPLR 3212, for summary judgment on all four causes of action in the Complaint or, alternately, for summary judgment on its first cause of action. Defendants now cross-move, pursuant to CPLR 3212, for partial summary judgment dismissing plaintiff's first cause of action. For the reasons set forth herein, the motion is denied; the cross-motion is denied; and, pursuant to CPLR 3212(b), according to which a motion for summary judgment "searches the record," defendants are granted summary judgment dismissing plaintiffs third and fourth causes of action.

Basic Background

To the extent here in issue, plaintiff is in the catering business. From 1996 through 1998 defendants represented plaintiff in seeking to lease commercial space in an office building located at

1633 Broadway, New York, New York (“the building”). Defendants knew that plaintiff was looking to operate an “off-premises catering” business. On July 1, 1997, plaintiff signed a lease (Moving Exhibit D) for space in the basement of the building. The rent was \$191,521 annually, and the purpose was for “off-premises catering” and related uses. Plaintiff alleges that after signing the lease, plaintiff hired an engineer, Michael Parlamis, to renovate the leased space to conform to plaintiff’s business. In October of 1997 Parlamis allegedly informed plaintiff that the building’s Certificate of Occupancy (“C of O”) precluded operation of plaintiff’s business. According to plaintiff, defendants then attempted, unsuccessfully, to negotiate an amendment to the lease, setting forth a protocol for amendment of the C of O. The landlord was allegedly reluctant to seek an amendment to the C of O for fear that the process would have a negative effect on the landlord’s ability to operate a “first-class” office building. Plaintiff claims that plaintiff was unwilling to expend the costs of pursuing the uncertain amendment process in light of the landlord’s intransigence and that plaintiff abandoned the lease amendment negotiations in January 1998.

In March 1998 plaintiff ceased paying rent, and in December 1998 the landlord commenced an action against plaintiff for rent due under the lease. Defendants commenced representing plaintiff in the landlord-tenant action, which was settled in or about June 1999 with plaintiff paying the landlord an undisclosed (but apparently small) sum.

Plaintiff’s first cause of action is for malpractice, and third cause of action is for breach of contract, in conducting the lease negotiations and execution. Plaintiff’s second cause of action is for malpractice, and fourth cause of action is for breach of contract, in defending the landlord-tenant action. Plaintiff seeks damages for costs and legal fees incurred in negotiating, signing, attempting to utilize, and abandoning the lease and for defending and settling the landlord-tenant action.

Defendants primarily contend that they were not responsible for determining whether the C of O allowed off-premises catering. Defendants also contend, among other things, the following: (1) that Parlamis was responsible for that determination; (2) that defendants provided Parlamis with a copy of the C of O in May 1997, two months before plaintiff signed the lease; (3) that Parlamis either failed to review the C of O prior to the lease signing or did so inadequately; and (4) that any losses which plaintiff might have sustained in connection with the broken lease were not occasioned by any limitations in the C of O, which the landlord was allegedly willing to have amended, with plaintiff assuming responsibility for the modest costs involved.

The parties submit expert affidavits that are in conflict as to whether the custom and practice is for real estate lawyers, on the one hand (and as claimed by plaintiff), or architects and engineers, on the other hand (as claimed by defendants), to advise clients about compliance with C of O's

No significant discovery has taken place in this action, even though there are subpoenas and discovery requests for documents outstanding. Plaintiffs motion was returnable a few days before depositions were scheduled to begin.

Discussion and Disposition

Legal malpractice claims require a showing that negligence on an attorney's part proximately caused actual damage. See Greene v Payne, Wood & Littlejohn, 197 AD2d 664,666 (2nd Dept 1993).

In order to show proximate cause, a plaintiff-client must establish that "but for" the attorney's negligence, the client would have prevailed in the matter at issue or would not have sustained any damages. See Senise v Mackasek, 227 AD2d 184, 185 (1st Dept 1996); Zarin v Reid & Priest, 184 AD2d 385,386 (1st Dept 1992).

To survive the summary judgment stage, the plaintiff in a malpractice action cannot rest on generalized allegations of deficiencies in defendant's conduct as its attorney, but must offer admissible evidence to establish the standard of professional care and skill that defendant allegedly failed to meet. Thaler & Thaler v Gupta, 208 AD2d 1130 (3d Dept 1994); Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo, 259 AD2d 282 (1st Dept 1999) (plaintiff must proffer expert opinion evidence on the relevant duty of care). If there is conflicting expert opinion, the trier of fact must weigh the testimony and make the requisite determination. See Greene v Payne, Wood & Littlejohn, supra, 197 AD2d at 665.

In the instant action there are several disputed issues of material fact. It is unclear when plaintiff retained its engineer to review the C of O and unclear under what circumstances defendants might have made the C of O available to the engineer. Most importantly, as noted, if the case goes to trial the trier of fact will have to determine whether defendants were responsible for reviewing the C of O and checking its compatibility with plaintiff's lease prior to its execution. See generally, Kleeman v Rheingold, 81 NY2d 270, 276 (1993) (a client's reasonable expectations and beliefs about who will render a particular service is a significant factor in defining an attorney's duties). There is also a dispute as to how difficult amending the C of O would have been, a question that impacts the proximate cause of plaintiff's damages. See generally, Pfeffer v Pernick, 268 AD2d 262, 263 (1st Dept 2000) ("issues of fact exist as to whether plaintiff's damages were proximately caused by her own or defendant's conduct").

Plaintiff argues that placing on the engineer the onus of determining whether the purpose set forth in the lease (off-premises catering) was compatible with the C of O would itself be incompatible with the prohibition against the unauthorized practice of law. While not without some surface appeal,

this argument is unavailing because attorneys must often rely on scientific or other experts to determine the underlying factual basis for legal opinions. Defendants and the engineer may both have had a role in determining C of O compatibility, with the engineer responsible for the preliminary investigation. If the case proceeds through disclosure and to trial, the trier of fact will have to determine the respective roles of the attorneys and the engineer in the normal custom and practice in the industry.

Plaintiff asks the court to grant it summary judgment because defendants' answer failed to deny several key allegations of wrongdoing in the complaint. Defendants attribute this failure to mere inadvertence and establish that they served an amended answer, as of right, within the 20 days provided in the CPLR, which answer contained the requisite denials. Plaintiff cannot claim any prejudice from the amendment as no significant discovery has been conducted. Therefore, defendants' failure to include the relevant denials in their original answer is not a basis on which plaintiff can receive summary judgment.

Plaintiffs third and fourth causes of action must be dismissed because New York law is well settled that a breach of contract claim premised on a professional's failure to exercise due care or to abide by general professional standards is nothing but a redundant pleading of a malpractice claim. State of California Pub. Empl. Retirement Sys. v Shearman & Sterling, 269 AD2d 221,223 (1st Dept), affd, 95 NY2d 427 (2000); Levine v Lacher & Lovell-Taylor, 256 AD2d 147, 151 (1st Dept 1998).

Finally, plaintiff argues that, pursuant to the doctrine of judicial estoppel, defendants should not be allowed to adopt any posture contrary to that taken in the landlord's action against plaintiff. Specifically, plaintiff urges that defendants not be allowed to claim now that plaintiff was aware that the C of O precluded operation of an off-premises catering business, when they had previously

contended, in defending plaintiff in the landlord's action, that the landlord fraudulently induced plaintiff to sign the lease by telling plaintiff that the C of O allowed for use of the premises as plaintiff intended. The doctrine of judicial estoppel precludes a party who assumed a certain position in a prior legal proceeding, and secured a judgment therein, from assuming a contrary position in another action because of a change in interest. See, European Am. Bank v Miller, 265 AD2d 374 (2d Dept 1999). The instant defendants were plaintiffs representatives, not parties to, the landlord-tenant action; hence, the doctrine of judicial estoppel is inapplicable here. See Hinman, Straub, Pigors & Manning, P.C. v Broder, 124 AD2d 392, 394 (3d Dept 1986) (declining to apply judicial estoppel against plaintiff based on its prior position as a representative for an infant plaintiff in a settlement proceeding).

Conclusion

Thus for the reasons set forth herein, plaintiffs motion for summary judgment is denied; defendants' cross-motion for summary judgment is denied; and plaintiffs third and fourth causes of action are hereby dismissed with prejudice.

This opinion constitutes the decision and order of the court.

Date: July 3, 2001


J.S.C.