

Riebman v Eiselman

2001 NY Slip Op 30011(U)

December 27, 2001

Supreme Court, New York County

Docket Number:

Judge: Marilyn Shafer

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

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JOAN RIEBMAN,

Plaintiff,

INDEX NO.: 122155/96

-against-

**EMILY EISELMAN, STEPHEN R. SENIE, and
ROSENMAN & COLIN LLP,**

Defendants.

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MARILYN SHAFER, J.:

In this legal malpractice action arising out of the defendants'¹, representation of plaintiff in an underlying residential landlord/tenant dispute, each of the parties presently seek summary judgment relief. At issue is the representation rendered by defendants with respect to the plaintiff's tenancy rights, if any, under the New York City Loft Law ("Loft Law").

Plaintiff, Joan Reibman and her then spouse ("Slater"), had occupied in the latter part of 1990s a previously vacant, by way of eviction, 2000 square foot loft type residential apartment under an interim lease issued by the then owner of the Building. Plaintiff and Slater also had a contract to purchase the newly combined and renovated Apartment from the Owner. Under the Purchase Agreement, Reibman/Slater, as the purchaser, was to pay \$107,000, the estimated cost of renovating the Apartment, as an offset to the purchase price of the Apartment, and the Owner was to pay any cost of the renovation in excess of the \$107,000 payment. As part of the arrangements with the Owner, the six-year Lease for the Apartment provided that the substantially reduced, below market rental rate of \$800 per month, was to be escalated to \$4,500 per month 60 days after completion of the Apartment should Reibman/Slater fail to close on the Apartment. Due to the

¹ Captioned co-defendant Emily Eiselman is a former associate of co-defendant Rosenman & Colin LLP who left New York in 1994. She has never been served in this action.

substantial amount of renovation work needed in the Apartment, the couple took temporary possession and occupancy of another apartment in the Building pursuant to a similar Owner issued interim lease.

Though the couple moved into the Apartment upon substantial completion of the renovation and assumed payment of nearly \$50,000 in excess renovation expenses, the Purchase Agreement never closed. After due demand, they eventually recouped their purchase deposit. While in the process of converting the Building to condominium form of ownership and before the offering plan was ever declared effective, the Owner filed for protection under Chapter 11 of the U.S. Bankruptcy Code. A receiver was then judicially appointed for the Building. Neither the proposed condominium offering plan, nor the Lease made any reference to the rights of purchasers, or interim lessees, under the Loft Law. Nor did the Lease contain a 'nondisturbance clause'. Rather, the Lease was subordinate to existing or future mortgages on the Building. Nevertheless, the couple sought to remain in the Apartment until they had amortized, by way of rent reduction, their \$50,000 expenditures in renovating the Apartment which were allegedly to be credited toward the amount of rent due under the Lease.

In early 1991, defendants were initially retained by Reibman/Slater to render advice as to the effect of the Owner's Bankruptcy upon their rights and interests in the Apartment. Later that same year, defendants also represented the holder of a wrap-around mortgage on the Building and after advising the couple and the Bank about a potential conflict of interest, defendants continued its representation of both parties.

In early 1993, the Receiver commenced proceedings against Reibman/Slater as well as various other Building tenants/occupants seeking to either oust them from the Apartment for

nonpayment of any rent since his 1992 appointment, or obtain payment of fair market rent of \$3,800 per month for retroactive and prospective use and occupancy of the Apartment. Successful settlement negotiations ensued. Plaintiff and Slater were represented by defendant. Reibman alleges that she was uninvolved in these negotiations and that her former husband was for the most part primarily involved with defendants' representation of the couple. Under the resulting So Ordered Stipulation of Settlement dated December 17, 1993 ² [which is the gravamen of this action], Reibman/Slater received a new two-year lease at a monthly rent of \$800 per month with an option to receive an additional one-year lease at a monthly rental of \$824 per month if the Receiver was still in control of the Building. They were thereby permitted to reside in the Apartment for a total of at least six years [November 1990 through October 1996], and having paid no rent before December 1993 and paying only a significantly below market rent for three years thereafter, amortize the Excess expenses of renovating the Apartment. However, Reibman/Slater waived their statutory status as a tenant entitled to protection under the Loft Law and they agreed not to assert any claims of tenancy and occupancy rights against the Receiver.

This waiver of any rights under the Loft Law while the property was under the control of the Receiver was upheld by Justice David Saxe in a Decision dated October 14, 1997 (Index #: 20215/92).

The existence of potential tenancy rights with respect to the Apartment had been previously raised by and between Slater and defendants within the context of defendants' representation. Defendants had advised Slater that while there might be "statutory" defenses for a foreclosure or eviction proceeding, there was a problem in that the Apartment "had been vacant." Allegedly,

² At about the same time, Reibman and Slater separated as a couple.

Slater was further advised that if they wanted to explore the possibility of Loft Law status they should consider retaining another attorney. Plaintiff and Slater thereafter provided defendants with pertinent information regarding other tenants in the Building who Slater believed had "a more solid legal claim to occupancy." Defendants' representation continued only until execution of the Receiver's Settlement.

In June of 1996, Plaintiff filed a Loft Law application as against the Receiver with respect to the Apartment. That application, however, was eventually dismissed, pursuant to the Order of NYS Supreme Court Justice David Saxe, dated October 14, 1997, as barred by the waiver set forth in the Receiver's Settlement. Later that same summer, the Receiver gave Plaintiff another two-year lease at a significantly below market rental rate of \$873 per month.

The Mortgagee sold its mortgage, and the mortgage purchaser's successor in interest subsequently purchased the Building at a foreclosure sale. The January 1998 foreclosure sale conveyance documents specifically recited the assignment of the Waiver of Plaintiff's tenancy/occupancy rights contained in the Receiver Settlement. Shortly thereafter, the new owner brought an action in ejectment against the Plaintiff predicated upon the grounds that they had contractually waived any statutory interests/rights in the Apartment. However, in response, the plaintiff successfully argued that the waiver only constituted a "waiver of [their] rights to seek coverage rights under the Loft Law *while the property is under the control of the Receiver* [emphasis added]" - - - a situation which ended in early 1998 when the Building was sold at foreclosure - - - and that the Receiver's Lease issued in 1996 remains in full force and effect as having been judicially deemed (Order of NYS Supreme Court Justice Saxe, *Supra.*) an authorized and valid exercise of the Receiver's authority. As such, the Receiver's Settlement did not preclude the

plaintiff from asserting her Loft Law claims after the Receiver no longer controlled the Building.

Some six months after the Building was sold/transferred at foreclosure in early 1998, Plaintiff filed a renewed Loft Board application for protected tenancy/occupancy status under the Loft Law and applicable provisions of the Loft Board's regulations (see, 29 RCNY 2-09[b][3][i]). Specifically, she sought coverage "as a residential occupant [who] took possession of a residential unit [the Apartment] covered as part of an IMD ['interim multiple dwelling'], on or after June 21, 1982, . . . [who is] a prime lessee with a lease currently in effect . . ." (Ibid.). However, on the eve of the scheduled application hearing, the plaintiff, then represented by other legal counsel, entered into a settlement agreement with the New Owner of the Building whereby: (i) each withdrew their respective claims with prejudice, (ii) the plaintiff was permitted to remain in the Apartment through April of 1999 without paying any rent beyond that paid through October of 1998, and (iii) the plaintiff received a payment of \$120,000 for vacating the Apartment and surrendering all right, title and interest in the improvements made to the Apartment. Upon expiration of the agreed upon tenancy/occupancy term, the Plaintiff surrendered the Tribeca apartment which by then had an estimated fair market purchase price in excess of \$1.25 million and estimated fair market rental rate in excess of \$4,000 per month.

Plaintiff has since commenced this action predicated upon claims against Defendants for legal malpractice, breach of contract and breach of fiduciary duty arising from their representation of her and Slater in connection with the Apartment. In essence, she complains that Defendants wrongfully: (i) failed to adequately research, and correctly advise them as to, any Loft Law tenancy/occupancy rights/interests they may have had with respect to the Apartment; and (ii) negotiated and approved the Receiver's Settlement containing, the waiver of any of those

rights/interests. Plaintiff claims that her legal rights/interests with respect to her tenancy/occupancy of the Apartment under the Loft Law “were far superior before the Stipulation was entered into than they were afterward. Plaintiff argues that she unwittingly lost the right to (i) remain in the Apartment at a significantly below market base rent rate of some \$800 per month subject to statutory increases, as well as (ii) sell her Loft Law interests/rights. She further complains that she did not, and would not have, authorized the waiver provision of Receiver’s Settlement if defendants had adequately and correctly advised her of her Law Loft rights. In response, defendants have interposed an answer denying all material allegations of the complaint and asserting various affirmative defenses. Disclosure has proceeded, and the parties’ respective summary judgment motion and cross motion ensued.

Summary judgment relief will only be granted if there are no material and triable issues of fact (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Once the movant has made a prima facie showing of such entitlement, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Thus, it is imperative that a party opposing such relief ‘assemble, lay bare and reveal his proofs, in order to show that the matters set up in his [pleadings] are real and capable of being established upon a trial’ (*DiSabato v. Sffes*, 9 AD2d 297, 300 [2nd Dept. 1959]) However, ‘only a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment’ (*Rotuba Extruders v. Ceppos*, 46 NY2d 223, 231 [1978]), and mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Weingrad v. New York University Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New*

York, 49 NY2d 557 [1980]).

To prevail in an action for legal malpractice, the plaintiff must demonstrate: (1) the existence of a duty, (2) a breach of that duty, (3) that the claimant would have been successful in the underlying matter had the attorney exercised due care, and (4) that the actual damages were proximately caused by the breach of the duty (*Plentino Realty Ltd. v. Gitomer*, 216 AD2d 87, 89 [1st Dept. 1995]; *Barry v. O'Connor, Finkelstein & Robinson*, 98 F3d 36 [2d Cir. 1996], . . . settlement of a claim at a significantly depreciated value . . .). As to the breach of duty element, a plaintiff “must . . . establish that the attorney failed to exercise that degree of care, skill and diligence commonly possessed and exercised by a member of the legal community” (*Estate of Nevelson v. Carro Spanbock Kaster & Cuiffo*, 259 AD2d 282, 283 [1st Dept. 1999]) with recognition that attorneys “are entitled to significant discretion in determining which positions to advance on behalf of their clients, and in determining how best to advance those positions” (*DaSilva v. Suozzi English, Cianciulli, Peirez, P.C.*, 233 AD2d 172, 176 [1st Dept. 1996]; *Rodriguez v. Fredericks*, 213 AD2d 176 [1st Dept. 1995]). The ‘but for’ proximate cause element is not sufficiently set forth, where a plaintiff belatedly manifest unhappiness with an allegedly improvident settlement and contends that but for the attorney’s negligence a claim could have been successful (*Levie v. Lacher & Lovell-Taylor*, 256 AD2d 147, 149 [1st Dept. 1998]; *Kaufman & Kaufman v. Hoff*, 213 AD2d 197, 198 [1st Dept. 1995]).

The court takes judicial notice of the fact that any real estate attorney practicing in the City of New York in the early 1990's who represented a tenant/occupant with a loft type apartment in a known loft area of the city such as Tribeca, should have recognized that the Loft Law could be applicable. Hence, such an attorney would have an obligation to either (i) ascertain the significance and possible application of the law and advise his client accordingly, or (ii) advise his client to seek

legal representation elsewhere with respect to that issue.

While claiming that their representation of plaintiff and her former husband was limited in nature [maintain status quo of contractual rental terms and conditions] and did not encompass tenancy rights with respect to Loft Law matters, Legal Counsel, nevertheless, (i) sent correspondence to the Owner containing form letter language stating that it represented the couple with respect to “all rights . . . arising at law, in equity or by statute.”; (ii) exchanged references to that issue with the plaintiff by way of her former spouse; and (iii) counseled the couple to enter into the Waiver provision of the Receiver’s Settlement. Defendants claim that it was not important for plaintiff and her husband to be aware of their status, if any, as a tenant/occupant protected under the Loft Law because they were satisfied with the terms and conditions of the Receiver’s Settlement which, otherwise, maintained the terms and conditions of their contractual tenancy.

To be covered by the Loft Law, a building must satisfy the statutory definition of an “interim multiple dwelling” [emphasis added] (MDL §281[1]). In this case, the Building was repeatedly and without challenge registered by its former owners as a statutory interim multiple dwelling, albeit inconsistently. In pertinent part, the then applicable provisions of the Loft Board regulations provide:

(3) When a residential occupant took possession of a residential unit covered as part of an IMD, on or after June 21, 1982 . . . such occupant shall be qualified for protection of Article 7-C if:

(i) he/she is a prime lessee with a lease currently in effect,
or, . . . [Emphasis Added]

(29 RCNY § 2-09 [b][3]). “[T]he term prime lessee shall mean the party with whom the landlord entered into a lease or rental agreement for the use and occupancy of a portion of an IMD, which

is being used residentially, regardless of whether such lessee is currently in occupancy . . . ” (29 RCNY § 2-09 [a]).

The Loft Board has recognized only the following four methods by which a unit determined to be covered or voluntarily registered as a covered unit may be deregulated: (i) sales of improvements (29 RCNY § 2-07); (ii) sales of rights (29 RCNY § 2-10); (iii) Loft Board finding of abandonment (29 RCNY § 2-10[f]); and (iv) a recorded irrevocable covenant to use the premises for a non-residential purpose following the eviction of a covered tenant (29 RCNY § 2-08[j][2]).

Defendants contend that the Apartment was exempt from Loft Law coverage in that the former owner purchased the improvements and the rights of the previous occupant of the Apartment. However, the statutorily mandated “Sales Records” which would have substantiated such a claim were never filed with the Loft Board (29 RCNY §§ 2-07 and 2-10).

Defendants further contends that the plaintiff did not occupy a regulated unit because the original covered units no longer existed by the time the plaintiff entered into the lease with the Owner for the Apartment. The Loft Board, however, has no regulation permitting the deregulation of covered units by rearranging demising partitions, and has never recognized such a method of deregulating otherwise regulated loft units.

Lastly, defendants claim that inasmuch as the plaintiff entered into their Lease as an accommodation to further the underlying primary intention of both the Owner and the plaintiff to transfer ownership of the Apartment [the Purchase Agreement], the plaintiff should not be considered a “prime lessee” within the meaning of the Loft Law. Plaintiff initially moved into the Apartment as a prospective purchaser of a newly created condominium loft apartment. However, defendants have failed to set forth any authority upon which such a distinction has been made and

recognized as dispositive.

Upon review of the record - - - including, but not limited to the parties' respectively submitted testimonial and documentary material - - - and the foregoing applicable principles of law, it is apparent to this court that the plaintiff could have obtained protected tenancy/occupancy status under the Loft Law with respect to the Apartment had such rights/interests been properly pursued before the appropriate administrative agency. However, there exists material triable issues of fact with respect to the nature and extent of (i) the representation rendered by defendants on behalf of plaintiff and her former husband in connection with the Apartment; (ii) the discussions between the parties and Slater as to Reibman/Slater's goals in the litigation and (iii) the plaintiff and Slater's knowledge, or obligation to seek knowledge, of potential Loft Law issues with respect to the Apartment. Such factual issues cannot be resolved upon the papers presently before the court and require a plenary trial for proper disposition. The function of the court is issue finding, not issue determination (*Sillman v. Twentieth Century Fox-Film Corp, Supra.*).

However, where, as here, (i) an asserted contract claim against a professional does not rest upon a promise of a particular result, and only claims a breach of general professional standards (*Senise v. Mackasek*, 227 AD2d 184, 185 [1st Dept. 1996]; *Goldberg v. Moskowitz*, 262 AD2d 56, 57 [1st Dept. 1999]); and (ii) a purported claim for breach of fiduciary duty obligations is predicated upon the same allegations as the negligence claim (*DiPlacidi v. Walsch*, 243 AD2d 335 [1st Dept. 1997]), each of these claims must be viewed as a dismissible redundant pleading of a malpractice claim.

Furthermore, where, as here, a claimant has failed to establish that she would have prevailed in the underlying dispute but for the complained of attorney's allegedly undisclosed conflict of

interest, summary judgment dismissal is warranted (*Unger v. Paul Weiss Rifkind Wharton & Garrison*, 265 AD2d 156 [1st Dept. 1999]). Though not set forth in the complaint, such a claim has been proposed within the context of the subsequent summary judgment submissions.

Accordingly, the parties's respective applications for summary judgment relief are granted solely to the extent of dismissing in all respects plaintiff's breach of contract and breach of fiduciary duty claims as redundant of her legal malpractice cause of action; and denied in all other respects.

This shall constitute the decision and order of the court.

Dated: December 27, 2001

MARILYN SHAFER
J.S.C.

J.S.C.