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

PRESENT: Kornreich Justice PART 54

T. Delevan + M. Rice, TTS

-v- *

I.L. Berman and Assoc., As

INDEX NO. 109380/02

MOTION DATE 12/12/02

MOTION SEQ. NO. 001

MOTION CAL. NO. -

The following papers, numbered 1 to 5 were read on this motion to/for dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3-4
Replying Affidavits	5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Decision and Order.

SCANNED FEB 06 2003

Dated: 1/28/03

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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THOMAS DELAVAN and MARK RICE,

Plaintiffs,

Index No.: 109380/02

-against-

DECISION and ORDER

IRA BERMAN, and REGAL ABSTRACT CORP.,
d/b/a REGAL TITLE AGENCY,

Defendants

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HON. SHIRLEY WERNER KORNREICH, J.

A. FACTUAL AND PROCEDURAL BACKGROUND:

1. Plaintiffs seek to evict a tenant from 13 West 9th Street under Rent Stabilization Code 2524(a)(3):

This action to recover damages for legal malpractice arises out of the purchase by plaintiff Thomas Delavan ("Delavan") of an apartment building located at 13 West 9" Street, New York, New York ("the premises"), and the subsequent attempt by plaintiff Mark Rice ("Rice") as a putative "co-owner" to evict a rent-stabilized tenant ("the tenant") from it, pursuant to Rent Stabilization Code §2524(a)(3).

According to the allegations in the Complaint, plaintiff Delavan purchased the six-unit apartment building in 1999, and retained defendant attorney, Ira Berman ("defendant" or "Berman"), to handle the legal aspects of the purchase. Delavan and his friend Rice moved together into a vacant apartment in the premises, intending that Rice would eventually occupy the garden apartment -- after Delavan and Rice had succeeded in evicting its current rent-stabilized

tenant under Rent Stabilization Code §2524(a)(3). This enactment permits "one of the individual owners of any building, whether such ownership is by joint tenancy, tenancy in common, or tenancy by the entirety to recover possession of one or more dwelling units for personal use and occupancy."

Initially defendant advised Delavan to acquire the premises through a limited liability company. Delavan did so, taking title in the name of Weston Renwick LLC ("the corporation"), an entity of which Delavan was the sole shareholder. However, upon learning that the right to evict a rent-stabilized tenant by an "owner-user" was not available to a corporation such as Weston Renwick, but could only be invoked by an individual owner-user, in July 1999 Delavan had defendant Berman prepare a deed transferring title from the Corporation to Delavan as the 51% owner and to Rice as the 49% owner of the premises ("the deed"). Although defendant Berman was supposed to record the deed, he apparently did not do so until January 17, 2001, while plaintiffs' Civil Court eviction action against the garden-apartment tenant, commenced in 1999, was sub judice. Defendant Berman did not represent plaintiffs in the eviction action, where instead he acted as a witness.

2. The Civil Court's Decision

On February 21,2001, following a four-day trial, Civil Court Judge Ernest J. Cavallo issued a lengthy Decision and Order in which he carefully summarized the evidence and the law, ruled against the plaintiffs on their application to evict the tenant, and dismissed. plaintiffs' case. In arriving at its decision, the Court took note of, inter alia, the fact that "co-owner" Rice, who planned to occupy the tenant's apartment, had no copy of the deed reflecting his 49% ownership, and had no proof that he had paid anything for his interest in the premises. As the court noted,

"[t]his case rises and falls on the status of Mr. Rice."

In analyzing Mr. Rice's status under NYCRR §2524(a)(3), the Civil Court noted that an owner who sought to evict a tenant so that he could personally use the tenant's space was obliged to make a "good faith" showing "that he or she seeks to personally occupy the apartment as a primary residence" – the "good faith" requirement having been promulgated "to prevent landlords from obtaining stabilized apartments under false pretenses in order to evade rent stabilization laws." The Court went on:

> An owner satisfies the good faith requirement of RSC §2524.4(a)(1) if 'he or she seeks to gain possession with the honest or genuine intention to recover the tenant's premises for personal and/or family use.' [cases omitted] The fact that there may be other space in the building available for the owner does not establish a lack of good faith. [cases omitted] .... The issue of good faith is one of fact [cases omitted] and should be determined based on the totality of the facts presented....
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> As part of establishing a prima facie case, the petitioner must prove its interest in the building at issue. RPAPL §741(1). In considering whether a deed proves the interest of the petitioner, the court will accept an original, acknowledged [deed] pursuant to RPL 298-301-a (CPLR 4538; Richardson 9-414); a certified copy pursuant to CPLR 4540; or an attorney certified copy pursuant to CPLR 2105. 'Transfer of title is accomplished only by the delivery of an executed deed.' .... There is a presumption that there was a valid delivery of a recorded deed as of the date the deed was recorded. RPL§244.... Issues of title and ownership may not be litigated in a summary proceeding .... However, issues surrounding the validity of a deed may be litigated insofar as they impact whether the petitioner has brought the proceeding in good faith. This Court finds that the petitioners have not brought this proceeding in good faith.

The "good faith" issue, the Court noted, was a "factual determination," depending on "the credibility of witnesses as well as the other evidence presented." The Court found that

> Mr. Rice, Mr. Delavan and Mr. Berman all lacked credibility concerning the alleged transfer of the deed. Mr. Rice and Mr. Delavan presented an undated deed ... that has never been recorded. Although the respondent continuously attacked the transfer throughout the two-month trial, the petitioners never presented any proof of a recording. Although there is no requirement that new owners record a

> deed, this Court finds the 'facts' surrounding the transfer to be most peculiar. There is no credible evidence that a transfer of title ever occurred. The petitioners lack the good faith necessary to prevail in this action. The petitioners may very well have made some deal concerning the building, but they have failed to meet their burden concerning the validity of the transfer and hence, ownership, a necessary element of their prima facie case. Mr. Rice is like an illusory owner. There is other evidence that the petitioners lack good faith in this proceeding. Mr. Rice paid approximately $70,000 for a 49% interest in a 1.3 million-dollar property.... That is an extraordinary deal if the transfer occurred. That is not so extraordinary if there is some underlying separate deal between them. The alleged transfer occurred in a room with the two princip[als] and a notary. The Court never heard from the notary. Mr. Rice has no copy of the deed. The original mortgage naming Weston Renwick as the mortgagor is still in existence. Weston Renwick, i.e., Mr. Delavan in his corporate guise, still manages the building. The most recent RSA/DHCR filing lists Mr. Delavan alone as the owner. Mr. Rice's sole function as 'owner' seems to be that of a petitioner in this case. People who seek to prove good faith in an owner's use case should be able to show good faith in all transactions involving the property. As to Mr. Berman's value as a witness, the Court notes that he cannot even properly certify a simple deed. At best he is sloppy; at worst he is a conspirator [emphasis supplied].'

Finally, the Court noted that the Multiple Dwelling Registration ("MDR"), showing Delavan and Rice as the owners of the premises, was filed only after the eviction case was commenced – a fatal error in the Second Department, and only slightly short of fatal in the First Department. Although the Court had no power to declare either the deed or the MDR invalid, it could and did factor their doubtful validity into its assessment of petitioners "good faith" in the summary holdover proceeding before it.

3. The instant lawsuit and motion:

On or around May 8, 2002, Delavan and Rice brought the instant action against their former attorney, Berman, and the Regal Abstract Corp. d/b/a Regal Title Agency, alleging breach

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'Elsewhere, the Court noted that Berman had appeared at trial with a deed certified by him, which had been notarized and dated July 15, 1999. However, Delavan's and Rice's counsel (their second) in the Civil Court eviction action had submitted as Exhibit 1 a similar deed certified by Berman but lacking both a notary signature and a date.

of contract, breach of fiduciary duty, and legal malpractice. According to plaintiffs, Berman was derelict in that, first, with full knowledge of his clients' plans for the building, he arranged for the premises to be bought by Weston Renwick, when he should have known that only an individual owner could legally evict a rent stabilized tenant under Rent Stabilization Code §2524(a)(3). Second, plaintiffs charge, Berman neglected to record the deed transferring title from Weston Renwick to Delavan and Rice as individual co-owners. As a third instance of Berman's professional negligence, plaintiffs cite Berman's erroneous certification of an undated copy of the second deed to the premises as the true and correct copy – thereby further prejudicing his clients' Civil Court case. Plaintiffs underscore that Judge Cavallo criticized Berman's conduct in his Decision. It is their contention that they lost their eviction case, lost the opportunity to use the premises as they had intended, lost rents from the ensconced and now seriously hostile garden-apartment tenant, incurred litigation fees, and were forced to pay an unnecessary transfer tax, all because of Berman's incompetence.

The malpractice "but for" which plaintiffs claim they would have won their Civil Court, however, was Berman's failure to record the deed transferring title from Weston Renwick to Delavan and Rice. Plaintiffs insist that "recording that [second] deed was an essential prerequisite to the successful eviction of [the tenant] under the 'owner occupancy' provisions of the Rent Stabilization Code." "If the deed had been recorded," they argue, "Delavan and Rice would have successfully evicted [the tenant]."[2] Plaintiffs demand compensatory and punitive damages against

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[2]Co-defendant Regal Abstract Corp. d/b/a Regal Title Agency ("Regal") had allegedly been charged by Berman with the task of recording the deed. Plaintiffs contend that Berman was additionally negligent in not making sure that Regal did what he told it to do. In the spring of 2000, according to plaintiffs, Berman's office found out that the deed had not been recorded, but Berman still did nothing. Instead, over the ensuing months, Berman allegedly told his clients and

Berman in the sum of $590,000.

Berman now moves to dismiss the complaint insofar as asserted against him on the ground, inter alia, that his incompetence was not the proximate cause of plaintiffs' damages. It is his position that plaintiffs lost their eviction action not because Berman faded to record the deed, but rather because of Delavan's and Rice's own "bad faith." Berman additionally argues that the complaint fails to state a claim for breach of fiduciary duty, inter aha because this second claim is based upon the same allegations as the first, negligence, claim.

In opposition, plaintiffs contend that Berman's failure to record the deed reflecting the transfer of the premises from Weston Renwick to Delavan and Rice was malpractice per se. Had the deed been recorded, there would have been a presumption of a valid title transfer, and the tenant could not have argued "invalidity" during the eviction proceeding before the Civil Court. Indeed, plaintiffs argue, "the question of the good faith of Delavan and Rice would not have arisen in the Housing Court proceeding if Berman had not failed to record the deed." Plaintiffs suggest that the "appearance" that Rice had not substantially contributed to the premises' purchase price was at worst "contributory negligence," which does not bar recovery in a legal malpractice case. Even if Berman's actions were not the sole cause of plaintiffs' damages, plaintiffs submit, his actions clearly weakened his clients' position in a legal proceeding, with the result that the question of proximate cause, as well as that of comparative fault, should be left for

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their housing counsel various lies about the matter. The deed was finally recorded on January 17, 2001 – after the Civil Court trial had ended but before Judge Cavallo had issued his Decision. For reasons that are not clear, no one advised Judge Cavallo of the deed's recording in time for him to consider it in his Decision. A $4,877 transfer tax was imposed on the transfer of the property from the corporation to the individual plaintiffs -- a tax which Delavan and Rice would allegedly not have been charged if they had been the initial buyers.

the jury. If nothing else, plaintiffs argue, Berman's negligence cost them, e.g., more attorneys' fees in the eviction action, and two years of rents from the alienated tenant -- who after the dismissal of the Civil Court proceeding continued to occupy his garden apartment but refused to pay any rent, arguing that Delavan and Rice were not the legal owners of his building.

B. DISCUSSION:

1. Plaintiffs' breach of contract/negligence/malpractice claim:

The Court finds that the plaintiffs' claim is based on the impermissible speculation that, if only defendant Berman had recorded the deed transferring the premises from Weston Renwick to Delavan and Rice, no issue would have arisen regarding Rice's bona fides, and the plaintiffs would have prevailed in the Civil Court proceeding. In addition to being purely conjectural, this theory is implausible on its face.

The transfer of title to real property in New York occurs upon the delivery to and acceptance of an executed deed by the new owner. See In re Cahill, 264 A.D.2d 480 (2d Dept. 1999); McLoughlin v. McLoughlin, 237 A.D.2d 336 (2d Dept. 1997); Real Property Law $244. A presumption of proper "delivery" arises from the recording of a deed, but the presumption is not conclusive. See Myers v. Kev Bank, N.A., 68 N.Y.2d 744,745 (1986); Rametta v. Kazlo, 68 A.D.2d 579 (2d Dept. 1979), dismissal denied 48 N.Y.2d 69 (1979); Southern Associates, Inc. v. United Brands Co., 67 A.D.2d 199 (1st Dept. 1979). Indeed, in New York – as Judge Cavallo accurately noted – there is no requirement that new owners record a deed. See DRT Const. Co., Inc. v. BH Associates, 269 A.D.2d 783 (4th Dept. 2000). Rather, the existence of a deed in and of itself gives rise to a presumption that it was delivered and accepted as of the date of the deed. See Janian v. Barnes, 284 A.D.2d 717 (3d Dept. 2001); Gold v. New York State Business Group,

Inc., 282 A.D.2d 988 (3d Dept. 2001).

In the Civil Court proceeding – which had been disastrously prepared by plaintiffs' counsel, who was not defendant Berman -- Rice admitted that he had no copy of the deed. This admission on its face suggested that there had been no "delivery" to and/or no "acceptance" of title by Rice. Compounding this impression, the deed submitted by plaintiffs's housing counsel had no date and was not notarized. Moreover, Rice claimed to have purchased a 49% share in a $1.3 million property for only $70,000, and even that implausible amount was undocumented, The notary who had purportedly witnessed the transfer to Rice was not produced, and other filings regarding the property did not reflect Rice's ownership. In his assessment of Rice's good faith, Judge Cavallo expressly considered "the totality of the evidence" – not just the lack of a recording. That totality did not favor Rice's position, and raised serious questions regarding the bona fides of his application to evict the tenant under NYCRR §2524(a)(3).

Accordingly, on this record it cannot be said that "but for" defendant Berman's carelessness Judge Cavallo would have ruled in favor of plaintiffs in their eviction proceeding. It is well established that a claim of malpractice may only be maintained where it is demonstrable that plaintiff would have succeeded on the merits in the underlying action "but for" the negligence of the defendant attorney. See Davis v. Klein, 88 N.Y.2d 1008 (1996); DiPlacidi v. Walsh, 243 A.D.2d 335 (1st Dept. 1997); Cook v. David Rozenhokc & Associates, 226 A.D.2d 311 (1st Dept. 1996), appeal dismissed 88 N.Y.2d 1052 (1996). Here, plaintiffs' housing counsel and plaintiffs themselves must bear some of the blame for the evidence that was presented to the Civil Court. Finally, where, as here, plaintiffs' claims of causation are purely speculative, the malpractice action is properly dismissed. See Senise v. Mackasek, 227 A.D.2d 184 (1st Dept. 1996); Brown

v. Samalin & Bock, P.C., 168 A.D.2d 531 (2nd Dept. 1990).

2. Plaintiffs' breach of fiduciary duty claim:

Plaintiffs' second cause of action, alleging that Berman breached his fiduciary duty toward his clients, is also dismissed, inter alia because it is duplicative of their negligence/malpractice claim, as it is based on the same facts and asserts the same damages as does their first cause of action. See Mecca v. Shang, 258 A.D.2d 569 (2d Dept. 1999), appeal dismissed 95 N.Y.2d 791 (2000); DiPlacidi v. Walsh, supra; CVC Capital Corp. v. Weil, Gotshal, Manges, 192 A.D.2d 324 (1st Dept. 1993).

Accordingly, it is

ORDERED that defendant Berman's motion to dismiss is granted and the complaint insofar as asserted against him is dismissed, with costs and disbursements to defendant Berman as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action insofar as asserted against the remaining defendant is severed and continued; and it is further

ORDERED that counsel for the remaining parties are directed to appear in Part 54, Room 1227, Supreme Court, New York County, 111 Centre Street, New York, New York at 11:00 a.m. on February 20,2003 for a conference.

The foregoing constitutes the Decision and Order of the Court.

Dated: January 28,2003
New York, New York

SHIRLEY WERNER KORNREICH