

J.S.S.C., Inc. v Herman

2003 NY Slip Op 30258(U)

April 14, 2003

Supreme Court, Nassau County

Docket Number: 016569/2002

Judge: Burton S. Joseph

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MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NASSAU

PRESENT:

**Hon. Burton S. Joseph,
Justice.**

J.S.S.S.C., INC.,

Plaintiff,

- against -

Trial/IAS Part 17
Index No. 016569/2002
Motion No. 001
Motion Date Feb. 25, 2003

MARK D. HERMAN, ESQ. and HERMAN & BENNIN,

Defendants.

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Papers Numbered

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Upon the foregoing papers and for the following reasons, the motion by Defendants Mark Herman, Esq. and his law firm, Herman & Bennin (hereinafter collectively "Herman"), for a dismissal of the complaint, is granted.

In the 1990s, Plaintiff JSSSC, Inc. operated a restaurant located at 222 Sunrise Highway in Rockville Centre, New York, under a lease agreement with non-party Kings Development Construction, Inc., as landlord. Due to business reverses and the accumulation of rental arrears, JSSSC began renegotiating with Kings for permission to assign its lease or sublet the premises. It eventually found a group of investors collectively known as MGLI, Inc.

interested in buying the restaurant's chattels and equipment and subleasing the premises. To this extent, JSSSC retained Herman to represent it in any deal or agreement reached. In order to sweeten the deal to Kings, JSSSC suggested the inclusion of a so-called "good guy" clause in any prospective assignment or sublease, a provision in which the subtenant principals personally guarantee the rent for the period of time in possession and actually in business.

Following the ensuing negotiations, JSSSC and MGLI reached an agreement and executed several documents drafted by Herman, including an Asset Purchase Agreement, a Rescission and Escrow Agreement as well as a Sub-Lease Agreement for the subject premises of Kings. Relevantly to this action, the Sub-Lease Agreement contained a provision stating that "[t]he principals of Sub-tenant will execute a 'good guy' guaranty in a form mutually agreed upon by the parties and similar to the one contained in the Overlease." However, no personal guaranty agreement was ever agreed upon or executed. Ultimately, MGLI defaulted toward the end of 2000 in connection with both its Sublease and promissory note. JSSSC was only paid \$40,000 by MGLI, out of the total purchase price of \$175,000 exclusive of rental payments.

As a result, in 2002, JSSSC commenced the instant action to recover damages for legal malpractice against Herman, alleging that Herman negligently failed to negotiate, draft and execute on behalf of JSSSC the "good guy" agreement or personal guaranty by MGLI's principals. In lieu of answering, Herman moves, by Notice of Motion returnable February 25, 2003, for a dismissal of the complaint pursuant to CPLR 3211(1) and (7), on the grounds that JSSSC has failed to establish all the elements of a legal malpractice claim, including the required proximate cause and the actual damages suffered as a result of the alleged malpractice. In opposition to the motion, JSSSC argues that Herman's malpractice consisted of his failure to

obtain the requested guaranty. This Court disagrees.

In order to establish a cause of action to recover damages for legal malpractice, a plaintiff must prove that the attorney failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community (*Darby & Darby v VSI Intl.*, 95 NY2d 308, 313; *Merz v Seaman*, 263 AD2d 385, 389; *Ashton v Scotman*, 260 AD2d 332). In addition, the plaintiff must establish that the attorney's negligence was a proximate cause of the loss sustained, that he or she incurred actual damages as a direct result of the attorney's actions or inaction, and that but for the negligence, the plaintiff would not have sustained any damages (*Magnacoustics, Inc. v Ostrolenk, Farber, Gerb & Soffen*, ___AD2d___, NYLJ, Mar. 24, 2003, at 27, col 5; *Cannistra v O'Connor, McGuinness, Conte, Doyle, Oleson & Collins*, 286 AD2d 314, 316; *McCormack & Phillips v Krim*, 283 AD2d 464). On a motion for summary judgment to dismiss a legal malpractice cause of action, "the attorney must proffer admissible evidence establishing that the [client] is unable to prove at least one of the essential elements of his or her case" (*Suydam v O'Neill*, 276 AD2d 549, 550; *Shopsin v Siben & Siben*, 268 AD2d 578; *Ippolito v McCormack, Damiani, Lowe & Mellon*, 265 AD2d 303; *Lefkowitz v Lurie*, 253 AD2d 855).


Applying these principles to the matter at bar, Herman has sufficiently established an entitlement to a dismissal of the complaint since JSSSC has failed to establish a claim for malpractice. Specifically, there are no allegations or proof as to the necessary elements of proximate cause and the actual damages sustained by JSSSC. Not only it is undisputed that JSSSC never directed Herman to negotiate with MGLI or its counsel regarding the personal guaranty, but JSSSC never instructed Herman to draft a proposed guaranty for review by JSSSC or submission to MGLI's principals and its counsel. Nor has JSSSC provided any evidentiary

support that "but for" the alleged failure to prepare the guaranty, it would not have sustained damages under the Purchase and Sub-Lease Agreements with MGLI (*see e.g. Matter of Nevelson*, 259 AD2d 282, 284; *McCormack & Phillips v Krim, supra*; *Bloom v Kernan*, 146 AD2d 916). It would be pure conjecture to link Herman's alleged omission to MGLI's actions in vacating the premises and failing to make the rental payments. While pleadings are to be liberally construed, there is no allegation that MGLI's principals had sufficient personal assets to pay any judgment obtained, that they would have executed the guaranty or that its execution would have prevented the losses sustained by JSSSC. Under these circumstances, the complaint fails.

In accordance with the foregoing, Herman's motion is granted and the complaint is hereby dismissed in its entirety. This decision constitutes the order and judgment of the Court.

ENTER:

Dated: Mineola, New York
April 14, 2003



J.S.C.

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ENTERED

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