

Tanning v Cavaliero

2004 NY Slip Op 30008(U)

August 17, 2004

Supreme Court, New York County

Docket Number: 0602306

Judge: Herman Cahn

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

PRESENT: HERMAN CARR
Justice

PART 49

Tanning, Dorothea

INDEX NO. 602306/03

- v -

MOTION DATE 3/1/04

Cavaliero, JOHN

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

AUG 20 2004

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE.....**

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: 8/17/04 [Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION [*1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49

-----X
DOROTHEA TANNING,

Plaintiff,

-against-

Index No. 602306/03

JOHN CAVALIERO,

Defendant.

-----X
JOHN CAVALIERO,

Third-Party Plaintiff,

-against-

Index No. 591118/03

WILLIAM H. ROTH and KELLY & ROTH,

Third-Party Defendant.

-----X
Herman Cahn, J.:

Third-party defendants William H. Roth and Kelly & Roth move to dismiss the third-party action which is brought under theories of legal malpractice and indemnification, CPLR 3211 (a) (7).

This action arises out of the sale in 2000 by plaintiff Dorothea Tanning of 60 bronze and 10 mixed media sculptures created by her late husband, Max Ernst, a leader in the Surrealist art movement, to defendant/third party plaintiff John Cavaliero, an art dealer. From 1978 until 2002, Cavaliero acted as Tanning's business manager and agent.

The final sales agreement, dated November 21, 2000, was drafted by Roth and his law firm, Kelly & Roth, Tanning's attorneys since 1988. The agreement sets forth Cavaliero's representation that he intended to resell the sculptures to a "German Entity." The "German Entity" was to pay \$7,000,000 for the sculptures, with \$6,000,000 of that sum going to Tanning, and \$1,000,000 to Cavaliero, as his commission.

The Main Action:

Tanning alleges that she believed the "German Entity" to be either the newly created Max Ernst Museum in Bruhl, Germany, or a German bank assisting in the financing of the Museum's purchase. Tanning had a particular interest in the Museum because it was named after her late husband and was located in Bruhl, his birthplace. Roth has identified the German Entity as Kreisbank Kolo Bank (a German Bank), located in Cologne, Germany.

The resale transaction to the German Bank was timely completed. Cavaliero duly paid Tanning \$6,000,000 for 70 sculptures and retained \$1,000,000 as his commission. However, although he transferred the bronze sculptures to the German Bank, Cavaliero admittedly retained possession of nine mixed media sculptures for resale by his art gallery to third parties. Cavaliero alleges that he had previously advised Tanning, her niece, and movants of his intention to retain the nine sculptures. Movants deny that Cavaliero so advised them, but admit that he did instruct them to redact nine of the sculptures from the final list that they forwarded to the German Bank's attorneys.

After completion of the sale and resale transactions, Tanning allegedly discovered that Cavaliero had retained some of the sculptures. She then commenced this lawsuit to recover them. In the complaint, Tanning alleges that Cavaliero intentionally falsely represented that he was purchasing the sculptures solely for resale to the Max Ernst Museum. Tanning further alleges that Cavaliero's misrepresentation induced her to enter into the transaction with him. On these allegations, Tanning asserts causes of action in the complaint for fraudulent inducement to contract and breach of the fiduciary duty Cavaliero owed to her as her business manager and agent. Tanning also seeks return of the retained sculptures, an accounting regarding the sale, if any, of the retained sculptures, recovery of the \$1,000,000 sales commission, and punitive damages.

In his answer, Cavaliero denied all allegations of misconduct and asserted affirmative defenses based on theories of the expiration of the relevant statutes of limitations, the doctrines of laches, estoppel, acquiescence, and unclean hands, and failure to join necessary parties.

In October 2003, Tanning and Cavaliero settled the main action. Tanning discontinued the action in exchange for Cavaliero's return of the retained sculptures to her and/or the Museum. A stipulation of discontinuance of the main action was filed on October 29, 2003.

Third-Party Complaint:

One month prior to the settlement, Cavaliero commenced a third-party action

against movants. In the third-party complaint, he alleges that, prior to execution of the sales agreement, he had advised Tanning and her niece that he intended to retain nine of the 70 sculptures. Cavaliero also alleges that, prior to executing the agreement with the German Bank and prior to taking possession of the 70 sculptures, he advised Roth that he would be retaining nine of the sculptures and provided Roth with documents identifying the retained sculptures. Cavaliero also alleges that at no time did movants advise him that they were acting as his attorneys as well as Tanning's on the sales transaction, although they now claim that they represented him as well as Tanning. The third-party complaint further alleges that the law firm never advised him that a conflict of interest might exist as the result of the dual representation or that his retention of any of the sculptures would be inconsistent with the terms of the sales agreement with Tanning and the fiduciary obligations he owed to Tanning as her agent, or that it might be held to constitute fraud.

In the third-party action, Cavaliero asserts a claim for common law indemnification on the ground that Roth and Kelly & Roth improperly failed to advise their client, Tanning, that Cavaliero intended to retain nine of the sculptures. Cavaliero also asserts a claim for legal malpractice, to the extent that movants were acting as his attorneys on the sales transaction, on the ground that, in failing to advise him of a potential or actual conflict of interest, they failed to exercise the ordinary and reasonable skill and knowledge commonly possessed by members of the legal profession.

Roth and Kelly & Roth now seek dismissal of the legal malpractice claim on

grounds that it is fatally defective on its face because Cavaliero's factual allegations do not demonstrate that their conduct, as alleged, caused Cavaliero to suffer actual and ascertainable damage or was the proximate cause of any alleged damages.

In opposition, Cavaliero contends that the claim is properly pleaded and adequately supported by factual allegations.

Discussion:

On a motion to dismiss a complaint for failure to state a cause of action, the court must accept each and every allegation as true, without expressing an opinion as to whether the plaintiff will ultimately be able to establish the truth of the allegations; if the plaintiff is entitled to recovery upon any reasonable view of the facts, the complaint is legally sufficient (219 Broadway Corp. v Alexander's, Inc., 46 NY2d 506 [1979]; see CPLR 3211 [a] [7]).

The legal malpractice claim is not legally cognizable. To plead a cognizable claim of legal malpractice, a plaintiff must allege facts sufficient to demonstrate three essential elements: that the attorney was negligent; that the negligence was the proximate cause of the loss sustained by the plaintiff; and that the plaintiff sustained actual and ascertainable damages (Between the Bread Realty Corp. v Salans Hertzfeld Heilbronn Christy & Vicner, 290 AD2d 380 [1st Dept], lv denied 98 NY2d 603 [2002]). Absent a showing of actual and ascertainable damages, a claim for legal malpractice must fail (Postel v Jaffe & Segal, 237 AD2d 127 [1st Dept 1997]). Here, the factual allegations, when deemed true,

do not demonstrate that Cavaliero sustained any actual damages as the result of movants' conduct.

Cavaliero alleges that his damages consist of the loss of the profit that he would have realized from the sale of nine sculptures, had he not returned them, and the attorneys' fees that he incurred in defending the main action. Significantly, however, Cavaliero's threshold assumption that, absent movants' alleged failure to advise Tanning that Cavaliero intended to retain some of the sculptures, Tanning would have permitted him to retain the sculptures, is mere speculation. "Mere speculation about a loss resulting from an attorney's alleged omission is insufficient to sustain a prima facie case of legal malpractice" (Giambrone v Bank of New York, 253 AD2d 786, 787 [2d Dept 1998]; Luniewski v Zeitlin, 188 AD2d 642 [2d Dept 1992]).

Cavaliero's assumption is belied by the allegations set forth in the main action's complaint and the terms of the sales and settlement agreements. In the complaint, Tanning unequivocally alleges that her sale of the sculptures was prompted by her wish to honor her late husband's life and contribution by arranging for his work to be displayed in a museum located in the town of his birth. In addition, Tanning required that Cavaliero return the sculptures in exchange for her discontinuance of the main action. The unambiguous terms of the sales agreement itself demonstrate that Tanning intended the sculptures to be resold by Cavaliero only to the purchaser defined in the sales agreement and not to any other purchaser. The agreement unambiguously requires Cavaliero to

resell the "Ernst works," defined in the agreement and exhibits as including 70 sculptures, to the German Entity. There is absolutely nothing in the agreement which might be construed to permit Cavaliero to retain any of the sculptures. The agreement, in the event the resale of the sculptures to the German Entity is not consummated, expressly requires Cavaliero to "reconvey ownership of the Ernst Works to Dorothea Tanning" and further requires that "this agreement will be of no force and effect" (Tanning/Cavaliero sales agr. at 1).

There is no dispute that Cavaliero is a sophisticated businessman and has been a successful agent and dealer in the art world since at least 1978, when he first began representing Tanning. Having executed the sales agreement with Tanning, Cavaliero is deemed to have read and understood its terms (Ginsberg v Fairfield-Noble Corp., 81 AD2d 318 [1st Dept 1981]).

Moreover, Cavaliero does not allege that he instructed movants to prepare an agreement which expressly permits him to retain some of the sculptures, that he advised movants that the agreement did not reflect his true intent or Tanning's intent, that Tanning agreed to permit him to retain some sculptures, or that he directed them to revise the agreement. Instead, he merely alleges that movants knew of his intent and should have so advised Tanning.

The agreement between Tanning and Cavaliero is effectively a written bill of sale executed by Tanning, wherein she transfers ownership of the Max Ernst art works, etc., to

Cavaliero. The consideration for the transfer is the payment to Tanning, of \$6,000,000.

In the agreement, signed by Cavaliero, it is stated as follows:

“Whereas, John Cavaliero has represented to Dorothea Tanning that he intends to resell the Ernst works to a German buyer (hereafter “German Entity”).

Thus, he acknowledged his representation and promise to transfer the works to the German Entity; nothing is said about his selling the works to anyone else.

Thus, it appears that, Cavaliero provided no consideration to Tanning in exchange for the retained sculptures. Basic contract law provides that, in the absence of fraud or unconscionability, the parties to a contract are free to make their own bargain, even if the consideration exchanged is grossly unequal or of dubious value, so long as something of " 'real value in the eye of the law' " is exchanged (Apfcl v Prudential-Bache Sec., 81 NY2d 470, 475-76 [1993], quoting Mencher v Weiss, 306 NY 1, 8 [1953]). Here, nothing of value is alleged by Cavaliero to have been given by himself to Tanning in exchange for the retained sculptures. Cavaliero does not allege that he was entitled to retain the nine sculptures, in addition to the \$1 million he was admittedly authorized to retain, as part of his commission. Therefore, in returning the sculptures to their rightful owner, Cavaliero merely complied with the terms of the agreement he executed and restored Tanning to the position that she would have been in, had he not breached the agreement.

Inasmuch as the factual allegations, even when deemed true, do not demonstrate that Cavaliero sustained any actual and ascertainable damages, the third-party claim for legal malpractice is not legally viable and the claim is dismissed.

In addition, the underlying facts alleged do not demonstrate that movants' alleged misconduct – in failing to advise him that retaining sculptures would constitute breaches of the agreement and his fiduciary duty toward Tanning – was the proximate cause of his damages. "In order to demonstrate proximate cause, plaintiff must establish that 'but for' the attorney's negligence, plaintiff would have prevailed in the matter at issue or would not have sustained any damages" (*id.* at 380; Scnisc v Mackasek, 227 AD2d 184 [1st Dept 1996]). Where, as here, the loss is caused by the plaintiff's own uncounseled actions plaintiff cannot demonstrate the essential element of proximate cause and, therefore, may not recover under a claim of legal malpractice (see M&S Bldg. Supplies, Inc. v Keiler, 738 F2d 467 [DC Cir 1984]; Stolmeier v Fields, 280 AD2d 342 [1st Dept], lv denied 96 NY2d 714 [2001]).

Cavaliero alleges that he did not know that movants were representing him until this lawsuit was commenced and that he assumed that they were representing Tanning in the underlying transaction, as they had in previous transactions. The parties agree that Tanning paid all the attorneys' fees generated in the underlying transaction and that movants had previously drafted agreements between Tanning and Cavaliero memorializing transactions in which Cavaliero was not represented by separate counsel.

Next, movants seek to dismiss the common law indemnification claim on grounds that, under the alleged facts, Cavaliero cannot demonstrate that he did not, personally, breach the sales agreement. Nor, movants argue, can he demonstrate that he sustained

any damages warranting indemnification.

"Indemnity involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another party who should more properly bear responsibility for that loss because it was the actual wrongdoer" (Trustees of Columbia Univ. v Mitchell/Giurgola Assocs., 109 AD2d 449, 451 [1st Dept 1985]).

"[T]he predicate for common-law indemnity is vicarious liability without fault on the part of the proposed indemnitee, [and] it follows that a party who has itself participated to some degree in the wrongdoing cannot receive the benefit of the doctrine" (*id.* at 453; 17 Vista Fee Assocs. v Teachers Ins. & Annuity Assoc. of Am., 259 AD2d 75 [1st Dept 1999]). Inasmuch as, under the facts as alleged and the terms of the sales agreement itself, Cavaliero can demonstrate no legal right to retain the sculptures and has merely returned the sculptures to their rightful owner, Cavaliero has sustained no damages warranting indemnification. Moreover, the facts alleged by Cavaliero indicate that he caused any damages he might have sustained by intentionally breaching his contract with Tanning.

In any event, by settling with the plaintiff in the main action, Cavaliero effectively ended his indemnification claims. (see, Abrams v Milwaukee Electric Tool Corp., 171 AD2d 930 [3d Dept 1991]). Therefore, Cavaliero is not entitled to common law indemnification.

For these reasons, that branch of the motion to dismiss the third-party claim for

common law indemnification, is granted.

Accordingly, it is

ORDERED that the motion to dismiss is granted and the third-party action is dismissed with costs and disbursements to third-party defendants William H. Roth and Kelly & Roth; and it is further

ORDERED that the clerk of the court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: August 17, 2004

ENTER:



J.S.C.

FILED
AUG 20 2004
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