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

PRESENT: HON. WALTER B. TOLUB Justice PART 15

0602745/2004

BAYSTONE EQUITIES INC
VS
HANDEL-HARBOUR, JACQUELINE

SEQ 1

DISMISS ACTION

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum opinion

FILED
FEB - 1 2005
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1/24/05

HON. WALTER B. TOLUB J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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BAYSTONE EQUITIES, INC.,

Plaintiff,

-against-

JACQUELINE HANDEL-HARBOUR,

Defendant.

----------x

Index No. 602745/04
Mtn Seq. 001

WALTER B. TOLUB, J.:

This is a case by which plaintiff seeks to recover damages from an attorney who plaintiff claims was responsible for drafting the papers of plaintiff's adversaries in an action where the adversaries prevailed.

Defendant is an attorney employed by the law firm of Sperber, Denenberg & Kahan, P.C. f/k/a Sperber & Denenberg, P.C. ("Sperber"). In 2001, Sperber represented Gerel Corporation, Ruradan Corporation and Timston Corporation ("the Corporations") in the action captioned, *Baystone Equities, Inc. v. Gerel Corporation, Ruradan Corporation, and Timston Corporation*, Index No. 601235/2001 (the "Gerel action"). Defendant was responsible for drafting many of the pleadings and papers in that action.

The Gerel action involved a contract to sell three parcels of real estate ("the properties") valued at one hundred million dollars. By decision dated January 2, 2002, Honorable Martin Schoenfeld determined that plaintiff, having failed to make the required payments, breached the contract between Baystone and the

Corporation defendants. This decision was affirmed by the Appellate Division, First Department, and the properties at the center of the Gerel action were sold to another entity.

In 2004, plaintiff commenced the instant action against defendant, seeking recovery on five causes of action: fraud, conspiracy to commit fraud, aiding and abetting fraud, breach of fiduciary duty, and malpractice. Plaintiff argues that defendant's inclusion of certain statements in the Corporations' pleadings in the Gerel action and her failure to disclose certain facts allegedly known to her, intentionally mislead the Court, improperly influenced the decision of Judge Schoenfeld, and directly caused plaintiff to lose its case in the Gerel action and the properties it sought to purchase. Defendant moves to dismiss the instant complaint against her pursuant to CPLR 3211(a)(1) and (a)(7), further charging that plaintiff should be sanctioned pursuant to 22 NYCRR 130.1 for commencing this action. Defendant's motion, including the request for sanctions, is granted.

Discussion

Accepting all of the allegations of the complaint as true, and affording plaintiff all favorable instances to be drawn from them (*People v. New York City Transit Authority*, 59 NY2d 343 at 348 [1983]), the only inquiry presently before this Court is whether plaintiff's facts, as alleged," fit within any cognizable legal theory" upon which plaintiff may succeed (*Leon v. Martinez*, 84 NY2d

83, 87-88 [1994];(*Campaign for Fiscal Equity, Inc. v. State of New York*, 86 NY2d 307 at 318 [1995]. *See generally*, Barr, Altman, Lipshie and Gerstman; *New York Civil Practice Before Trial* [James Publishing 2001-2003] §36.01 *et seq.*).

As creative as plaintiff's allegations are, plaintiff faces an insurmountable obstacle: plaintiff was never the defendant's client. A "claim for malpractice, whether by an attorney or other professional, requires privity between such professional and the party supposedly aggrieved" (*D'Amico v. First Union National Bank*, 285 AD2d 166, 172 [1st Dept. 2001]. See also, *Prudential Insurance Company of America v. Dewey Ballantine, Bushby, Palmer & Wood*, 80 NY2d 377, 382 [1992]; *Glanzer v. Shepard*, 233 NY 236 [1922]; *Ultramares Corporation v. Touche*, 255 NY 170 [1931]). Inasmuch as neither privity nor fiduciary duty existed between plaintiff and defendant in the instant action, plaintiff's fifth cause of action for malpractice, and for that matter, plaintiff's cause of action for breach of fiduciary duty (*see, Fried v. Bower & Gardner*, 46 NY2d 765 [1978]; *Briarpatch Limited, LP v. Frankfurt Garbus Klein*,2004 WL 2984774 [1st Dept. 2004]) fail, and are dismissed.

Plaintiff's remaining causes of action allege fraud, conspiracy to commit fraud, and aiding and abetting fraud. To establish a prima facie case of fraud, plaintiff must establish that defendant (1) misrepresented a material fact; (2) knew that the fact was a misrepresentation when made; (3) knew that plaintiff

would justifiably rely upon that misrepresentation; and (4) that plaintiff sustained damages resulting from the misrepresentation (*Abrahami v. UPC Construction Co., Inc.*, 224 AD2d 231 [1st Dept 1996]).

In the instant case, plaintiff's claim of fraud is largely predicated upon three sets of events: (1) the language defendant allegedly included in the affidavit of Daniel Elyachar, a principal of the Corporations in the Gerel action; (2) defendant's alleged failure to amend a July, 2001 affirmation in reply to reflect that there was no longer an inability to enter into a new transaction with respect to the properties litigated in the Gerel action; and (3) ethical violations allegedly committed by defendant and the Sperber law firm during the course of the Gerel litigation, including defendant's failure to disclose information concerning brokerage commissions allegedly earned by the Sperber law firm following the eventual sale of the litigated properties.

At the outset, the court cannot help but notice that plaintiff's claim of fraud is virtually entirely centered around defendant's alleged malpractice. Even if plaintiff could assert a malpractice claim against defendant, "an attorney's failure to disclose malpractice does not give rise to a fraud claim separate from the customary malpractice action (*Weiss v. Manfredi*, 83 NY2d 974 [1994]). As such, plaintiff's claim for fraud must fail.

Moreover, even if plaintiff's cause of action alleging fraud

was centered solely on the language included in the Elyachar affidavit, plaintiff's claim still fails.

Plaintiff's primary argument concerning the Elyachar affidavit centers around the following language included at paragraph 19:

> "plaintiff seeks, by this baseless lawsuit, to place a cloud on the title of the subject properties which are valued at well over One-Hundred Million and 00/100 ($100,000,000.00) dollars" (Order to Show Cause, Exhibit F)

and paragraph 38, which reads:

> "Defendants should be able to pursue other prospective buyers and/or enter into a proposed offer by a third party, as stated previously. However, without this court's immediate intervention, plaintiff shall be able to continue to prevent a third party sale of defendants' property valued currently well over One Hundred Million and 00/100 ($100,000,000.00) Dollars without possessing an enforceable contract for the sale of these properties" (Order to Show Cause, Exhibit F).

Plaintiff asserts that he only recently discovered[1] that in June, 2001 (one month after the submission of the Elyachar affidavit), the Corporations in the Gerel action had located alternate purchasers for the subject properties and had commenced new property transactions. This evidence, plaintiff argues, supports the contention that the language included in the Elyachar affidavit was intentionally included so as to mislead both the Court and plaintiff. Plaintiff further argues that had Justice

[1] Interestingly enough, plaintiff does not explain why he could not have discovered this evidence during the course of the Gerel action, as the sale was a matter of public record.

Schoenfeld known of the impending property transaction and the allegedly fraudulent statements, plaintiff would have succeeded in the Gerel action, and would have succeeded in purchasing the properties.

However, none of the arguments advanced by plaintiff supports the accusation that the statements included in the affidavit, or for that matter, defendant's alleged actions or inactions concerning the affidavit amounted to fraud. Even if this court accepts plaintiff's argument that the assertions contained within the Elyachar affidavit were misstatements, and even if this court accepts plaintiff's argument that defendant knew the statements being made were false and that plaintiff would rely upon them, plaintiff sustained no damages as a result of the alleged misstatements.

Contrary to plaintiff's assertions, Judge Schoenfeld's January 2, 2002 dismissal of the Gerel action was based

> "on the policy that when the parties to a contract manifest a desire and understanding that their compliance, or lack thereof, can be objectively and easily verified or belied, courts should not defeat this scheme by allowing lengthy, expensive litigation based merely on uncontemporaneous, undocumented, unlikely (indeed largely uncontradicted) ipse dixit assertions. Both the parol evidence rule and the Statute of Frauds, for all their differences, are meant to prevent law from impeding, or subverting business. If allowed to proceed through liberal disclosure and a full-blown trial, the instant litigation could take years. Meanwhile, a cloud

> would hover over defendants' titles [FN 18][2], perhaps costing defendants millions of dollars.
>
> Had the parties opted, or even allowed for such a possibility, then so be it, and this Court would have denied the instant motion. However, by providing for notices to cure and that any modifications be in writing, and by the general tenor of the agreements, the parties evinced a desire that disputes as to compliance vel non could be resolved in a simple objective manner. (Exhibit C, p. 16).

None of plaintiff's assertions in this action would have changed this outcome. Plaintiff did not lose its case in the Gerel action because Mr. Elyachar asserted in an affidavit that litigation would cloud title on the properties in issue, or because Mr. Elyachar did not disclose that there was another property transaction pending, or because defendant included language in the Elyachar affidavit, or because defendant did not disclose a purported brokerage agreement existing between the new purchaser and the Corporation defendants in the Gerel action, or because of alleged ethical violations occurring within the law firm that employs defendant. Plaintiff was not the prevailing party in the Gerel action because it failed to tender payments as required under the contract, thereby breaching, and defaulting under the contract. No amount of arguing will change this finding.

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[2] Footnote 18 of the decision continues, "This notwithstanding the fact that plaintiff apparently has not filed any notices of pendency against the properties" (*Id.*).

Inasmuch as plaintiff has failed to establish his cause of action for fraud, the cause of action alleging fraud is dismissed. Plaintiff's remaining causes of action for conspiracy to commit fraud and aiding and abetting fraud are also dismissed, as "a mere conspiracy to commit a fraud is never of itself a cause of action" (*Brackett v Griswold*, 112 NY 454, 467 [1889]; *Crispino v. Greenpoint Mortgage Corporation*, 2 AD3d 478 [2nd Dept 2003]; *Agostini v. Sobol*, 304 A.D.2d 395 [1st Dept. 2003]).

Addressing whether sanctions are appropriate in this instance, this Court is guided by 22 NYCRR 130-1.1, which allows the court the discretion to impose financial sanctions in addition to awarding costs in those instances where a party has engaged in frivolous conduct (22 NYCRR 130-1.1(a)). For the purposes of the statute, frivolous conduct includes conduct which is "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law (22 NYCRR 130-1.1(c)(1)).

Upon review of the papers in the instant motion, two things became alarmingly apparent. First, this motion was made entirely without merit in law, and plaintiff should have recognized this fact. Second, given the circumstances of this case, the action may very well have been commenced to harass the defendant. Accordingly, it is

ORDERED that defendant's motion to dismiss the instant

complaint is granted; and it is further

ORDERED that plaintiff is sanctioned in the amount of $500.00 (Five Hundred dollars), payable to the Lawyer's Fund for Client Protection, said amount to be paid within 14 days of service of a copy of this order with notice of entry; and it is further

ORDERED that plaintiff is further directed to pay defendant costs for necessitating this motion pursuant to CPLR 8201; and it is further

ORDERED that plaintiff shall pay defendant reasonable attorneys' fees expended for defense of this action; and it is further

ORDERED that counsel for the parties shall appear in IA Part 15, Room 335, 60 Centre Street, New York, New York on March 7, 2005 at 9:30 a.m. at which time this court shall conduct a hearing to assess reasonable attorneys' fees to be awarded to defendant.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 1/24/05

HON. WALTER B. TOLUB, J.S.C.