

Barbara King Family Trust v Voluta Ventures LLC

2006 NY Slip Op 30279(U)

August 21, 2006

Supreme Court, New York County

Docket Number: 0100219/2004

Judge: Herman Cahn

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

PRESENT: Cahn
Justice

PART 4am

The Barbara King Family Trust

INDEX NO.

100219/04

MOTION DATE

5/1/06

- v -

MOTION SEQ. NO.

006

Voluto Ventures LLC

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

FILED
AUG 22 2006
COUNTY CLERKS OFFICE
NEW YORK

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

Dated: 3/21/06 Alan Cahn
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
THE BARBARA KING FAMILY TRUST, and
BARBARA KING,

Plaintiff,

-against-

Index No. 100219/04

VOLUTO VENTURES LLC, et al.

Defendants.

-----X
CAHN, J.

Defendant Kurzman Eisenberg Corbin Lever & Goodman LLP (Kurzman LLP) moves for summary judgment on plaintiffs' claims of breach of fiduciary duty and attorney malpractice, alleged in the eighth and ninth causes of action in the complaint, CPLR 3212.

The claims in issue arose in 2001, in connection with plaintiffs' failed attempt to purchase a building located in Manhattan, referred to in the pleadings as the "Chelsea Mansions," and plaintiffs' subsequent investment of \$2 million in an "alternative" investment which failed, and a \$750,000 loan, which has never been repaid.

The complaint alleges that in the fall of 2001, plaintiff Barbara King (King) became interested in purchasing the Chelsea Mansions, located at 337 West 22nd Street, New York, New York. King claims that defendant David Kotowski, her financial advisor, called Andrew Goodman (Goodman), an attorney and a partner in Kurzman LLP law firm, and asked to have Kurzman LLP represent King in the purchase of the real

FILED
AUG 26 2006
COUNTY CLERK'S OFFICE
NEW YORK

estate.

When Kurzman ordered a title report on the property, he learned that the mortgages on the property were in foreclosure. It is alleged that Kurzman then recommended a “parallel strategy” to Kotowski, for obtaining the property, suggesting that King purchase the mortgages on the property in order to strengthen her position in negotiating for the purchase of the property itself.

King purchased the mortgages on Chelsea Mansions on February 6, 2002, for \$1.85 million, by transferring funds from an account at Paine Webber to Kurzman, for payment to the mortgagee. Effectively, King through attorney Kurzman took over control of the foreclosure proceeding. Kurzman submitted a proposed judgment of foreclosure for signature by the court. However, without King’s knowledge, on March 18, 2002, Kurzman allegedly entered into a stipulation vacating the judgment of foreclosure and agreeing to extend the deadline for the sale of the building to April 15, 2002. In the interim, the owner of Chelsea Mansions sold the property to a third party, and redeemed the mortgages held by King. Sometime after March 18, 2002, Kotowski informed King that the mortgages on Chelsea Mansions had been satisfied, that King would make a \$150,000 profit after the \$1.85 million mortgage had been paid, but that the property had been sold to someone else.

Kotowski then urged King to invest the \$2 million proceeds of the mortgage satisfaction in a venture capital company, defendant Voluto Ventures LLC (Voluto).

On March 26, 2002, Kurzman LLP sent King a series of documents assigning the Chelsea Mansions mortgages to another party. King executed the documents and returned them to Kurzman. Without legal advice, King then agreed that the \$2 million she was to receive in satisfaction of the mortgages could be transferred directly from Kurzman's escrow account to Voluto for use in a Voluto investment venture with BillboardLive.com. On March 27, 2002, King became a partner in Voluto's limited liability company. Kotowski was a majority shareholder in Voluto at the time, and, in order for the funds to be transferred to Voluto, Kotowski allegedly asked Goodman to wire the funds directly to Voluto's account at Paine Webber.

King claims that Kurzman LLP had previously represented Voluto, that no one from Kurzman LLP discussed either King's proposed investment in Voluto with her, or Kurzman LLP's possible conflict of interest, and that no one advised her to seek independent legal advice.

On April 1, 2002, Kurzman LLP collected approximately \$2 million at the closing on the Chelsea Mansions mortgage, as King's attorney. Kurzman LLP transferred \$2 million to Voluto, paid itself \$32,700.12 in fees and disbursements, and gave King a check for the balance, \$553.18.

The main action alleges two claims against Kurzman LLP. The eighth cause of action alleges that Kurzman LLP breached its fiduciary duty to King through its dual representation of Voluto and Kotowski's interests, while representing King at the same

time, and by raising funds for Voluto's investments, to the detriment of King. Kurzman LLP is alleged to have been unable to give independent legal advice to King regarding the investment in BillboardLive.com, a Voluto venture, because of Kurzman LLP's competing obligations to Voluto and Kotowski. King argues that Kurzman LLP sacrificed her interests in favor of Voluto's, causing her to incur damages in excess of \$2 million.

In the ninth cause of action, King claims that Kurzman LLP committed legal malpractice by: failing to send her a retainer letter; failing to advise her of the risk of pursuing the purchase of a mortgage lien, when it was the purchase of the real property that she was interested in; failing to advise her of the impending sale of the subject real estate to a third party; failing to keep her informed about the foreclosure proceedings surrounding the mortgage lien she had purchased; and failing to inform King of Kurzman LLP's potential or actual conflicts of interest, or to obtain a waiver of those conflicts from her.

Kurzman LLP now moves for summary judgment claiming that it neither knew about nor represented either party to the transaction involving Voluto, complained of in the eighth cause of action, and that King's independent actions constitute an intervening cause as a matter of law.

With respect to the eighth cause of action, for breach of fiduciary duty, King claims that Kurzman LLP represented Kotowski in an arbitration proceeding with Paine

Webber, involving issues about Kotowski's departure from Paine Webber's employ in October 2001. Also around this same time, Kotowski and his partner, Vincent Molinari met with two partners at Kurzman LLP to discuss the corporate structure of Voluta and its affiliated companies, which discussions were memorialized by the Kurzman LLP partners in a memo to Kotowski and Molinari dated November 2, 2001.

Meanwhile, King had become interested in purchasing Chelsea Mansions, and asked Kotowski to handle the negotiations for her. In December 2001, Kotowski contacted Goodman, who had worked on the Voluta corporate structure, to ask Kurzman LLP to handle the legal work in connection with King's purchase of the property. Although another attorney, in the firm's Westchester office, was assigned to do the real estate work, allegedly it was ultimately Goodman who wired the proceeds of the mortgage payoff to Voluta on King's behalf.

With respect to the ninth cause of action, Kurzman LLP claims that it was not involved in and was never retained to represent King in the negotiations surrounding the attempt to purchase Chelsea Mansions. Further, defendant claims that it was only contacted to draft a real estate contract "when and if" the parties arrived at a meeting of the minds. Defendant states that it was told that Kotowski was negotiating on King's behalf, that King sought to purchase the property at less than the asking price, and that there was a "substantial difference" between the asking price and what King was offering. Defendant admits that it suggested a "parallel strategy" to King's advisors, i.e. that she

might want to purchase the existing mortgages on the property as leverage during the negotiations in an effort to reach a meeting of the minds on the purchase price.

Defendant claims that King's allegation that it recommended that she purchase the mortgages *instead of* purchasing the building is refuted by the all of the evidence, and specifically by the testimony of the attorneys at Kurzman LLP who worked on King's matters at the firm. Molinari is alleged to have confirmed that King was advised that she would be purchasing the mortgages as leverage only, and Kotowski is alleged to have corroborated this. King is alleged to have conceded that Kotowski informed her that purchasing the mortgages did not guaranty that she would be able to purchase the property.

Moreover, claims defendant, the evidence is overwhelming that Kurzman LLP only communicated with King through Kotowski: a call to King confirmed that all communications were to go through Kotowski; and copies of numerous correspondence relating to the transaction and directed to Kotowski, with copies to King, were offered as evidence. King conceded that Kotowski and Molinari were receiving documents on her behalf.

Thus, claims defendant, King failed to establish the necessary element of negligence in her claim for malpractice, and the ninth cause of action must be dismissed. Further, the strategy suggested by defendant, to purchase the mortgages as leverage in the proposed purchase of the house, was a good investment for King, even if the purchase of

the house did not take place, and thus is not actionable at law. King's failure to reach a meeting of the minds with the seller was another intervening cause which can not be attributable to defendants, refuting King's claim that Kurzman LLP's acts or omissions were the proximate cause of any alleged damages.

Finally, defendant claims that King has failed to allege damages that are cognizable at law, such as the value of living in the home of her choice, and the property's anticipated appreciation in market value.

A movant's burden on a motion for summary judgment is to establish that there are no material issues of fact. *Zuckerman v City of New York*, 49 NY2d 557 (1980). Once a movant has met this burden, the party opposing the motion must come forward with proof of the existence of a triable issue. *Indig v Finkelstein*, 23 NY2d 728 (1968).

In determining whether summary judgment is appropriate, a court must examine the evidence "to ascertain whether it discloses a real issue, a triable issue, rather than a formal, feigned, perfunctory or shadowy one." *Schillinger v North Hills Realty Corp.*, 15 AD2d 539, 540 (2nd Dept 1961), *aff'd* 11 NY2d 1044 (1962). "[W]hen there is no genuine issue to be resolved at trial, the case should be summarily decided." *Andre v Pomeroy*, 35 NY2d 361, 364 (1974).

"Where the record in a professional malpractice case demonstrates that an intervening cause was responsible for the injury, summary judgment will be granted to the defendant." *Brooks v Lewin*, 21 AD3d 731, 734 (1st Dept 2005).

Summary judgment must be denied if a party shows facts sufficient to require a trial of any issue of fact. *Phillips v Joseph Kantor & Co.*, 31 NY2d 307 (1972).

Defendant claims that King failed to produce any evidence establishing any of the elements of a claim for either legal malpractice or breach of fiduciary duty. Kurzman LLP argues that it was King's own actions, through her agents Kotowski and Molinari, which caused the losses King would now attribute to Kurzman LLP. It was King's own conduct, through her agents, which resulted in her failure to achieve a meeting of the minds with the seller of the Chelsea Mansions.

King claims that, with respect to the breach of fiduciary duty claim in the eighth cause of action, in 2002 while the mortgage foreclosure proceeding was still ongoing, Kurzman LLP was drafting business documents for Voluto. In the course of that representation, Jay Jacobson, Esq. (Jacobson), a Kurzman LLP partner, discovered that King had made an uncounseled and inadequately documented \$1 million investment in Voluto, and had also made a \$750,000 loan to a Voluto affiliate. Despite the knowledge that King was an investor in its client, Voluto, and that the two clients were potentially adverse to each other, Kurzman LLP and Goodman went ahead and acted on King's instructions to transfer \$2 million from the mortgage proceeds to Voluto, without advising her of their conflict of interest, or the improper documentation issues discovered by Jacobson, and without suggesting that she consult independent counsel. After sending King's funds to Voluto, Kurzman LLP then back dated documentation of King's initial

investment in an effort to retroactively clean up the problems with King's investment. These acts constituted breach of fiduciary duty and are alleged to have resulted in King making the \$2 million investment that was later lost by Volutto.

King asserts that as soon as Kurzman LLP discovered its joint representation of King and Volutto, and the legal problems with King's earlier investments in Volutto, the firm was obligated to take action to notify King and protect her interests, citing Disciplinary Rule 5-105 (B) (C). When it then disbursed King's funds from its escrow account to Volutto without disclosing the conflict, or taking any action to protect her, Kurzman LLP breached its fiduciary duty to King, and became responsible for the loss of her investment in Volutto.

As in claims of legal malpractice, in order to establish a claim for breach of fiduciary duty against an attorney, plaintiff must prove a "case within a case," and show that "but for" the attorney's conduct, plaintiff would not have sustained any ascertainable damages. *Zarin v Reid and Priest*, 184 AD2d 385 (1st Dept 1992). An attorney's failure to disclose a conflict of interest is not itself actionable, absent allegations that such failure was the proximate cause of actual damages. *Unger v Paul Weiss Rifkind Wharton & Garrison*, 265 AD2d 156 (1st Dept 1999).

King argues that had she been advised to seek independent counsel, she would have done so, and would have been protected from her ill-advised investment in Volutto. By failing in its duty to advise her to seek independent counsel, Kurzman LLP is

responsible for the consequences of its inaction. These assertions, however, create too speculative a set of circumstances on which to impose liability on defendant for King's loss of her investment in Voluto. There is no evidence in the record which tends to establish what King would have done had she been advised of Kurzman LLP's conflict of interest. Without a clear connection between proof of defendant's conflict of interest as the proximate cause of the loss of King's investment in Voluto, the motion for summary judgment on the claim for breach of fiduciary duty, in the eighth cause of action, is granted.

In a legal malpractice action, a plaintiff must show that an attorney "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession." In addition, the plaintiff must show that the attorney's breach of this professional duty caused the plaintiff's actual damages.

McCoy v Feinman, 99 NY2d 295, 301 (2002) (citations omitted).

While an attorney may not be held liable for an error of judgment in choosing among several reasonable courses of action, an attorney may be held responsible where an unreasonable course of conduct has been recommended. *See Rosner v Paley*, 65 NY2d 736 (1985).

The motion for summary judgment with respect to plaintiff's ninth cause of action, for malpractice, is denied. Questions of fact exist as to the impact defendant's parallel strategy, for purchasing the mortgages, may have had on the negotiations for King's purchase of Chelsea Mansions. Further, whether the firm's entering into the stipulation

effectively extending the owner's time to find a buyer of the property prevented King from purchasing the property and, if so, whether such extension was malpractice, is an issue of fact and law which can not be decided on papers alone. It cannot be said, as a matter of law, that Kurzman LLP's strategic advice had no effect on the outcome of the real estate negotiations, as defendant would urge. *See Terio v Spodek*, 25 AD3d 781 (2nd Dept 2006). Proximate cause remains an issue of fact. *See Frank v Pepe*, 186 Misc 2d 377, 381-381 (Sup Ct, Nassau County 2000).

Plaintiff's damages, based on the current value of the property, are recoverable in an action for legal malpractice. *Reynolds v Kadanoff & Haussman, P.C.*, 218 AD2d 732, 733 (2nd Dept 1995). Unlike lost profits, which may be too speculative to award, damages based on the appreciation in value of a lost asset may be recovered, so long as they are reasonably capable of being ascertained. *See Bamira v Greenberg*, 295 AD2d 206 (1st Dept 2002); *see also Campbell v Rogers & Wells*, 218 AD2d 576 (1st Dept 1995).

Accordingly it is

ORDERED that defendant's motion for summary judgment is granted in part and the eighth cause of action is dismissed, and is denied in all other respects.

Dated: August 21, 2006

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J.S.C.

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