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

PRESENT: LOUIS B. YORK J.S.C. Justice

PART 2

Fairmont Funding, Ltd.

-v-

J+G et and

INDEX NO. 602778-03

MOTION DATE

MOTION SEQ. NO. 015

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
APR 10 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 4/2/07

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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FAIRMONT FUNDING, LTD.,

Plaintiff,

Index No. 602778/2003

- against -

J&G REALTY PROPERTIES, LLC., ANTONIO DUVAL, JR., EDWIN DRAKES, ESQ., JEROME REED, GAIL CROMER, ESQ., AUGUSTINE DIJI, ESQ., PRISCILLA MOSES, APOLONIA ROSADO, LAUNA MAYNARD, PAUL R. MEDINA, MILLENNIUM ABSTRACT CORP. and JOHN SERPICO, ESQ.,

Defendants.

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Louis B. York, J.:

The underlying complaint asserts that all of the named defendants except for Millennium Abstract Corporation and John Serpico, Esquire, devised and carried out a scheme to swindle plaintiff out of several hundred thousand dollars. According to plaintiff, defendant-conspirator Moses purchased a multi-family residence ("the property") from Sydney and Bernadette Pascall for $300,000, obtained a false appraisal of $625,000 on the property. On that basis, defendant-conspirator Rosado asserted to plaintiff that she wanted to buy the property from defendant-conspirator Moses for $620,000. Relying on the false appraisal value of the property, plaintiff loaned $496,000 to Rosado.

However, plaintiff asserts, the transfer never took place. Instead, the defendants directed plaintiff's lawyers to distribute the net loan proceeds of $452,162.78 to defendant-conspirator J&G rather than to Moses. Presumably, the parties divided the money as the results of their

successful swindle. Subsequently, Rosado defaulted on the loan. If plaintiff is able to obtain the property through foreclosure, it asserts, the foreclosure value is only $245,000.

In its complaint, plaintiff asserts claims against a number of defendants – including Serpico, who currently moves for summary judgment, dismissal and interpleader. Of relevance here, plaintiff alleges that Serpico is guilty of breach of contract and professional malpractice. Plaintiff expressly states that no fraud claims or other intentional tort claims are raised as to this defendant. In particular, plaintiff alleges movant "made no effort to determine the true identities and/or status of any payee," Complt. ¶ 238, or to determine whether the closing documents, including the appraisal, were "bona fide." Id. ¶ 239. Moreover, as Serpico knew J&G, the recipient of the $452,162.78, was not a party to the transaction, was not a mortgagee, and was not a lienor, his failure to ascertain J&G's right to the money was negligent and a breach of his duty as plaintiff's counsel. Plaintiff also accuses Serpico of similarly culpable conduct when he disbursed $1,000 to defendant-conspirator Duval, who asserted that he was Moses' counsel but was actually disbarred and not entitled to this amount; and, when he disbursed $300 to defendant-conspirator Maynard, the title-closer. Based on this purported malpractice, plaintiff seeks $360,000 or more – which allegedly is the amount of damages plaintiff has sustained as a result of the fraudulent transaction.

As indicated above, Serpico now moves for various relief. He moves for summary judgment, dismissing all claims that plaintiff and all cross claims that specific defendants have asserted against him. He also moves for dismissal of the action as against him based on plaintiff's repeated failure to provide him with demanded discovery. Finally, he moves under CPLR 1006, which governs interpleader, for permission to deposit with the Court the $5,000 that he has held in escrow since the closing in 2003.

As plaintiff and movant agree, to prevail on a claim of legal malpractice a party must show negligence, proximate cause and damages. Bishop v. Maurer, 33 A.D.3d 497, - 823 N.Y.S.2d 366, 367 (1st Dept. 2006). To prevail on a motion for summary judgment, a party must offer expert testimony regarding the standard of care of an attorney performing the kind of legal work at issue. Merlin Biomed Asset Management, LLC v. Wolf Block Schorr & Solis-Cohen LLP, 23 A.D.3d 243, –, 803 N.Y.S.2d 552, 553 (1st Dept. 2005). "Where legal malpractice is alleged, the failure to establish proximate cause requires dismissal regardless of whether negligence is established." Cohen v. Law Offices of Leonard & Robert Shapiro, 18 A.D.3d 219, 220, 793 N.Y.S.2d 764, 765 (1st Dept. 2005)(citations and internal quotation marks omitted). Thus, for defendant to succeed on his motion for summary judgment here, he must present evidence in admissible form establishing that plaintiff cannot prove at least one of these essential elements. See Crawford v. McBride, 303 A.D.2d 442, 442, 755 N.Y.S.2d 892, 892 (3rd Dept. 2003).

In support of his contention that he was not negligent, Serpico submits his own affidavit, in which he details the work that he performed and states that he did nothing wrong. He explains that there was nothing unusual in the documents he reviewed that should have alerted him to the underlying problems. He also states that plaintiff directed him not to review the title. Plaintiff's affidavit should have established his status as an expert in this area of law, and contained facts or details supporting the conclusion that, he was not negligent in his representation of plaintiff. Mega Group, Inc. v. Pechenik & Curro, P.C., 32 A.D.3d 584, – , 819 N.Y.S.2d 796, 801 (3rd Dept. 2006). The issue is whether the defendant exhibited the "care, skill, and diligence commonly possessed and exercised by a member of the legal profession" in this area. Terio v. Spodek, 25 A.D.3d 781, 784, 809 N.Y.S.2d 145, 148 (2nd Dept. 2006). Thus, he also should

have set forth the prevailing standards in sufficient detail for the court to determine whether his own conduct was adequate as a matter of law. Only if the defendant has properly supported his summary judgment motion must the malpractice plaintiff proffer expert opinion evidence on the duty of care. See Kaye Scholer LLP v. Estate of Ginsburg ex rel. Ginsburg, 4 Misc.3d 1020(A), 791 N.Y.S.2d 870 (Sup. Ct. N.Y. County 2004)(avail at 2004 WL 1977623, at *1).

Thus, Serpico's affidavit is evidence that supports his contention that he was not negligent. However, it is not dispositive. In opposition, moreover, plaintiff submits the affidavit of Steven Bakst, plaintiff's vice president, who is also the vice president of Nationwide Settlements, LLC ("Nationwide"), a company formed by plaintiff to serve as its closing agent. Bakst states that he has supervised closings for plaintiff for three years, and that he supervises and manages the attorneys at Nationwide. According to Bakst, "[t]he standard of care for an attorney performing real estate closings requires the attorney to examine the title report for any discrepancies." Bakst Aff. at ¶ 3. He further states that if, as here, the property is being "flipped" and that the price has doubled from one sale to the next, the attorney has a duty to inform him of this fact. He adds that 10% of the closings are delayed for this reason after the problems are "noted by the closing attorney and brought to my attention." Id. Though it does not appear that Bakst is an attorney, his extensive involvement in this area makes his affidavit sufficient, at the very least, to create an issue of fact as to whether Serpico fell short of the requisite standard of care in his representation of plaintiff.

As for the second element, the Court finds movant's argument unpersuasive. He alleges that his alleged negligence, even if established, would not be the proximate cause of the injury because plaintiff's underwriting department had the primary responsibility. However, there may be more than one proximate cause. See Alexander v. City of New York, 21 A.D.3d 389, 390,

800 N.Y.S.2d 436, 438; BF v. WC, 9 Misc.3d 1123(A), Index No. 208416 (Sup. Ct. Rensselaer County 2005)(avail at 2005 WL 2838138, *2). According to plaintiff, it relied on the underwriters and Serpico to perform the work at issue here; and, part of Serpico's work was to review the title report. Had that been done, Serpico would have discovered the underlying problems with the transaction. Therefore, it is possible that both alleged failures proximately caused the injury.

As to the third element, Serpico alleges that plaintiff has not been damaged. First, he states that plaintiff can recover damages from the other, more directly culpable, defendants, and thus his alleged malpractice does not injure plaintiff. This argument has numerous problems – including that it does not consider the cost of litigation and the possibility that the other defendants are judgment proof. Second, he states that because the market values of real estate have increased, the increase in property value wipes out plaintiff's alleged financial loss. However, plaintiff asserts that it sold the mortgage at a loss in the secondary market; and, it submits the affidavit of plaintiff's managing director to substantiate this contention. At the very least there is an issue of fact as to this point.

Thus, as to the claims of plaintiff against Serpico, there exist "triable questions of fact as to whether . . . defendant law firm committed malpractice in representing plaintiff's interests . . . and as to whether any such malpractice caused plaintiff to sustain actual damages." Transcare New York, Inc. v. Finkelstein, Levine & Gittlesohn & Partners, 23 A.D.3d 250, 251, 804 N.Y.S.2d 63, 65 (1st Dept. 2005). At this point, therefore, summary judgment is not appropriate.

Next, Serpico seeks to dismiss the cross claims of several defendants. Millennium, J & G Realty and John Reed all assert cross claims against Serpico although they did not have a

client-attorney relationship with him.[1] An attorney "has no duty to a third party not in privity . . . for harm caused by professional negligence or malpractice, unless it is alleged that the firm committed acts constituting fraud, collusion, malicious acts or other special circumstances." Berkowitz v. Fischbein, Badillo, Wagner & Harding, 7 A.D.3d 385, 387, 777 N.Y.S.2d 99, 101 (1st Dept.), lv dismissed, 3 N.Y.3d 767, 788 N.Y.S.2d 669 (2004)(table); see Weiss v. Manfredi, 83 N.Y.2d 974, 977, 616 N.Y.S.2d 325, 327 (1994). The cross claims asserted by Millennium in its Answer and by J & G Realty and Reed in their Answer state only that any damages were due to the culpable conduct or wrongful acts of the co-defendants, including Serpico. Nowhere in these Answers are the wrongful acts of Serpico articulated. Moreover, Millennium, J & G Realty and John Reed do not oppose the motion or otherwise specify whether Serpico was guilty of fraud, collusion, malicious or other acts sufficient to make him liable to them absent privity of contract. Therefore, the Court grants the motion as it relates to the cross claims asserted against Serpico by Millennium, J & G Realty and Reed.

Finally, Serpico moves, under CPLR 1006, to deposit the $5,000 he has held in escrow with the Court, thus relieving him of all responsibility for the escrow account. There is no objection to this application, which the Court grants. However, the Court notes that it is not clear whether the money was held in an interest bearing account. If so, Serpico must hand over not just the $5,000 but any interest that may have accrued in the four-and-a-half years since the closing date.

Accordingly, it is

[1] Serpico has not attached the other Answers to his motion and does not refer to the other defendants' claims. Therefore, the Court does address cross claims they may have asserted.

ORDERED that the motion for summary judgment dismissing the claims asserted against Serpico by plaintiff is denied; and it is further

ORDERED that the motion to dismiss for failure to provide discovery is denied without prejudice to renew if plaintiff does not fully respond to Serpico's demands within 30 days of its receipt of the case file; and it is further

ORDERED that the prong of the motion seeking to dismiss the cross claims asserted by Millennium in its Answer and by J & R Realty and Reed in their joint Answer is granted and these cross claims are severed and dismissed as they relate to Serpico; and it is further

ORDERED that the prong of the motion for interpleader is granted, and that the plaintiff shall pay into this court the sum of $5,000 with any interest awarded from the date of the creation of the account, to the date of discharge (which amount Serpico shall establish by submitting to the Clerk the statement of account), to be disposed of in accordance with the further order or final judgment of this court, and it is further

ORDERED, that upon payment of the sum into this court pursuant to this order, plaintiff be and is hereby discharged from liability in whole to any party in the above entitled action by reason of any matter or thing set forth in the pleadings herein.

ORDERED:

Dated: April 2, 2007

Louis B. York, J.S.C.