

Garfein v Estate of Ngo

2007 NY Slip Op 32692(U)

August 20, 2007

Supreme Court, New York County

Docket Number: 0103314/2006

Judge: Herman Cahn

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PRESENT: HERMAN CAHN

PART 49

Justice

Index Number : 103314/2006

INDEX NO. _____

GARFEIN, OSCAR

MOTION DATE 3/19/07

vs

NGO, IGNACIA U.

MOTION SEQ. NO. 001

Sequence Number : 001

MOTION CAL. NO. _____

DISMISS ACTION

is 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 28 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 8/20 107

Herman 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	
OSCAR B. GARFEIN,	:
	:
Plaintiff,	:
	:
-against-	:
	:
ESTATE OF IGNACIA U. NGO and	:
LIFSHUTZ & LIFSHUTZ, P.C.,	:
	:
Defendants.	:
	:
-----X	

Index No. 103314/06

Herman Cahn, J.

Defendants move to dismiss this action, CPLR 3211, as to defendant Estate of Ignacia U. Ngo, and for summary judgment, CPLR 3212, as to defendant Lifshutz & Lifshutz, ("L&L").

FILED
AUG 28 2007
NEW YORK COUNTY CLERK'S OFFICE

BACKGROUND

This action is based on the sale of a condominium apartment, Apt. 31-B, located at 30 West 61st Street, New York, New York, that was owned by plaintiff Oscar B. Garfein and the now-deceased Dr. Ignacia U. Ngo ("Ngo"), as tenants-in-common.

Plaintiff and Ngo entered into a Tenancy-in-Common Agreement at the time they purchased the condominium in 1993. They also co-owned Apt. 31-B at the same address, as tenants-in-common, but that apartment is not at issue in this action.

Marvin L. Lifshutz, Esq., a senior partner at I.&L., had represented Ngo for many years, in connection with her medical practice and personal matters. When she died, the Estate retained L&L to handle the probate proceedings.

After Ngo passed away, the Estate and the plaintiff agreed to sell their interests in the condominium. L&L initially agreed to represent them jointly. The two apartments were first listed as a package in November 2004. L&L alleges that it was plaintiff who decided to sell the apartments as a package, chose the broker and determined the asking price.

As the apartments remained unsold for many months, plaintiff and the Estate representatives began to have disagreements over possible changes that could be made to assist in selling the apartments.

In March 2005, a potential buyer made an offer to purchase both apartments, which was accepted by the sellers. However, the transaction ultimately did not go forward when the buyer could not obtain the necessary financing.

The Estate representatives and the plaintiff again began to dispute how to proceed with selling the apartments. For example, they disagreed on whether to continue with the same broker or to retain a different one. Ultimately, they decided that the original broker would continue to show the apartments while they selected a new broker, and the units would be sold individually.

Over several months, the parties continued to disagree regarding a new broker. However, a buyer was found for Apt. 31-B and the sale of that unit went forward. L&L alleges that, as a result of plaintiff becoming more disagreeable and his interfering with the sale of Apt. 31-B, it informed plaintiff that it was best for him to retain his own counsel.

L&L alleges that, on May 9, 2005, Robert Levine, Esq. ("Levine") contacted the law firm, stating that he was plaintiff's new attorney for the sale of the remaining apartment, Apt. 31-C.

The closing on Apt. 31-C occurred on December 7, 2005. L&L alleges that, although it represented the Estate at the closing, Levine was present to protect plaintiff's interests and was

consulted on each issue that arose. The parties agreed that L&I would hold the proceeds in escrow until the allocation between the sellers could be determined.

On February 7, 2006, L&I was contacted by Steven D. Zerlin, Esq. ("Zerlin"), plaintiff's present counsel. Zerlin informed L&I that he had been retained to commence an action against the defendants with regard to the allocation of the proceeds.

In his complaint, plaintiff alleged that, since the time of the closing of Apt. 31-C, L&I has improperly retained a portion of the proceeds of the sale, which should have been paid to plaintiff under the terms and provisions of the Tenancy-in-Common Agreement.

DISCUSSION

Motion to Dismiss

On a CPLR 3211 motion to dismiss, the pleading is given a liberal construction and the facts alleged therein are accepted as true. *Leon v Martinez*, 84 NY2d 83, 87 (1994). The motion to dismiss will only be granted if, upon giving the non-moving party every favorable inference, the facts do not fit within any cognizable legal theory. *Id.* at 87-88.

The Estate argues that it was not served with the summons and complaint within 120 days from the filing, CPLR 306-b, and, therefore, its motion to dismiss the complaint should be granted. The summons and complaint was filed on March 10, 2006. The Estate maintains that it was not served until October 19, 2006, by personal service on Ramon Ngo, the Executor.

Plaintiff contends that the clerk of the Surrogate's Court was served within the time limit required by the CPLR and that such service was sufficient to obtain personal jurisdiction. Plaintiff stated that Ramon Ngo was personally served in California, but his attorney then admits in his affidavit that "it appears that service and the previous filing of the complaint exceeded 120

days.” (Zerin Aff at 5.) Plaintiff also has not submitted the Affidavit of Service upon Ramon Ngo, as proof of the actual date of service. Without citing to any legal support, plaintiff states that failure to serve within the time limit is not necessarily a prerequisite to dismissal of his claims on jurisdictional grounds.

However, the CPLR requires that service of the summons and complaint be made within 120 days after the filing of the summons and complaint. If service is not made within the requisite time limit, then the court shall dismiss the action without prejudice, or upon good cause shown or in the interest of justice, extend the time for service. CPLR 306-b.

Not only does plaintiff not submit a copy of the Affidavit of Service upon Ramon Ngo, but he also admits that the executor of the Estate was served well beyond the 120-day time period, and offers no explanation for his almost three-month delay in serving the summons and complaint. Instead, he relies on a conclusory assertion that service on the clerk of the Surrogate’s Court is sufficient, without providing any legal support for such a statement.

Given plaintiff’s lack of explanation for the delay, the complaint is dismissed without prejudice as to the Estate.

Motion for Summary Judgment

A motion for summary judgment should be granted if the moving party has sufficiently established that it is warranted as a matter of law, CPLR 3212(b). *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). However, the motion will be denied if the opposing party presents sufficient evidence establishing that there is a genuine issue of fact remaining. *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980).

Plaintiff has brought, *inter alia*, the following causes of action against L&L: breach of

fiduciary duty; breach of contract; conspiracy and aiding and abetting the Estate in breaching contractual and fiduciary duties; and intentional misrepresentation.

Plaintiff argues that after I.&L took possession of the proceeds from the sale of the apartments, it refused to give plaintiff his share of the funds, which totaled over a half million dollars, even though the parties only disputed \$10,000. Plaintiff contends that instead of I.&L remitting to him the funds that were not in dispute and retaining the \$10,000 as to which there was disagreement, defendants withheld all the funds until after this action was instituted.

Plaintiff acknowledges that he has since been paid his share of the proceeds from the sale. However, he still seeks punitive damages from defendant L&L, based on his claims for breach of fiduciary duty and intentional misrepresentation regarding the closing statement.

L&L argues that it should be granted summary judgment because the law firm is immune from civil liability, as the allegations are based on the false implication that it represented plaintiff for the duration of the sale of Apt. 31-C. Instead, I.&L contends that plaintiff retained Levine to represent him in the sale. Therefore, L&L maintains that there was no fiduciary relationship between itself and plaintiff that could have been breached because it was no longer representing plaintiff at the time the apartment was sold. Although the complaint does contain allegations that, when the apartment was sold on December 7, 2005, I.&L was engaged as legal counsel for both plaintiff and the Estate, plaintiff has not submitted any proof to counter I.&L's evidence that Levine took over representation of plaintiff's interests well before then, as established in David B. Merkin's Affidavit. The pleadings themselves are not sufficient; evidentiary facts are required to oppose a summary judgment motion. *S. J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 343 (1974).

Plaintiff's current counsel, Zerlin, merely submits his own affidavit in opposition. However, Zerlin has no personal knowledge of the facts that occurred at the time of the sale. The affiant opposing a motion for summary judgment is required to have personal knowledge. *Id.* at 342. Zerlin, who was retained to represent plaintiff in this action in February 2006, could not have had first-hand knowledge of plaintiff's relationship with Levine or I.&L months earlier. Plaintiff himself has not submitted an affidavit to attest to these facts. As such, plaintiff has not put forth evidence sufficient to oppose this motion for summary judgment and, as a result, the summary judgment is granted as to L&L.

Accordingly, it is

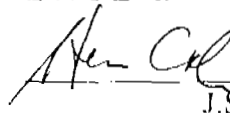
ORDERED that the motion to dismiss the complaint as against the Estate of Ignacia U. Ngo is granted without prejudice; and it is further

ORDERED that the motion for summary judgment dismissing the complaint is granted in favor of Lifshutz & Lifshutz, P.C.; and it is further

ORDERED that the clerk shall enter judgment accordingly.

Dated: August 20, 2007

ENTER:



J.S.C.

FILED

AUG 28 2007

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