SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,
Acting Supreme Court Justice

TRIAL/IAS, PART 37
NASSAU COUNTY

ROBERTA SUSSMAN,

Plaintiff(s),

MOTION DATE: 8/10/07
INDEX NO.: 10392/06
SEQ. NO. 1 & 2

-against-

KELLY, SACKMAN, SPOLLEN & UPTON, a Partnership, and WILLIAM R. KELLY, DAVID W. SACKMAN, JOHN P. SPOLLEN and WILLIAM J. UPTON, individually,

Defendant(s)

The parties' respective applications, pursuant to CPLR 3212, for an award of summary judgment in this legal malpractice action are determined as hereinafter provided.

On June 5, 2004 the plaintiff executed a sales agreement to purchase premises located at 21 Cedar Lane North in Glen Head from two non-parties, Siegfried Groh and Patricia Groh, for $595,000.00 (see defendants' Exhibit L). On or about June 7, 2004 she retained the defendant Kelly, Sackman, Spollen & Upton to represent her in connection with the sale (see defendants' Exhibit I, David W. Sackman's April 4, 2007 deposition, p. 16, L9). Mr. Sackman received the proposed contract of sale from the sellers' attorney on or about June 7, 2004 or June 8, 2004(p. 25, L17). During a phone conversation with the plaintiff, he allegedly observed that, although the sales agreement provided for a $505,000.00 mortgage, the proposed contract contained a $476,000.00 mortgage commitment contingency (see defendants' Exhibit M, para. 8) (p. 27, L18- p. 28, L10). The plaintiff indicated that she wanted to arrange for ninety (90%) percent financing or a $535,000.00 mortgage (see defendants' Exhibit H, March 14, 2007 deposition p. 31, L12) and Mr. Sackman reportedly explained that he would "propose" that change to the sellers' attorney (p. 29, L12-19). He therefore deleted the existing mortgage commitment contingency amount (i.e., $476,000.00), inserted $535,000.00 on both the contract (see plaintiff's Exhibit C, para.

8) and rider (para. 9) and returned the proposed agreement to the sellers' attorney on June 8, 2007 (p. 33, L15; p. 34, L9).

On June 9, 2004 the sellers' attorney responded and rejected the proposal. Instead, in accordance with the terms of the sales agreement, the sellers agreed to allow up to eighty-five (85%) percent financing or a maximum mortgage of $505,750.00 (p. 36, L17-p.37, L9). It was allegedly Mr. Sackman's "understanding" that the plaintiff would accept "an eighty-five percent mortgage" (p. 38, L10). Consequently, the defendants contend that Mr. Sackman subsequently explained that the sellers were "insisting" upon that requirement (p. 39, L5). On June 11, 2004 the plaintiff reportedly visited their office, reluctantly agreed to the change, declaring "if I have to, I will" (p. 39, L14), and executed the contract with a $505,750.00 mortgage commitment contingency in both the contract and rider. Notably, none of the various changes were initialed. The agreement was thereafter forwarded to the sellers who executed it on June 23, 2004.

Conversely, the plaintiff alleges, in sum, that Mr. Sackman unilaterally altered these material provisions after she had executed the agreement while it contained a $535,000.00 mortgage commitment contingency (see plaintiff's Exhibit A, her June 26, 2006 verified complaint, paras. 13 & 14). In fact, Mr. Sackman allegedly failed to inform her that the sellers had demanded that change (p. 54, L17-p. 55, L6). She subsequently acquired a $476,000.00 conditional mortgage commitment and $59,500.00 home equity loan or a $535,500.00 total commitment which was sent to Mr. Sackman on June 25, 2004 (see plaintiff's Exhibit E) or a mere two days after the sellers had executed the contract. The fact that the plaintiff had obtained $29,750.00 in excess financing was reportedly discussed "in the course of conversation" (p. 65, L7).

The June 8, 2004 appraised value of the premises was $540,000.00 (see defendants' Exhibit P) or $55,000.00 below the contract price. Consequently, on August 2, 2004 the plaintiff's request for financing was declined (see defendants' Exhibit Q). On August 4, 2004 and August 9, 2004 Mr. Sackman demanded the return of the plaintiff's $59,500.00 down payment (see defendants' Exhibits T & V) and on August 6, 2004 and August 11, 2004 the sellers refused citing, inter alia, the plaintiff's acquisition of excess financing and her failure

to timely notify them of the denial (see plaintiff's Exhibit F). Ultimately, the plaintiff retained her current counsel and commenced an action against the sellers (Sussman v Groh, Nassau County, Index No. 12666/04) seeking the down payment. Each side moved for summary relief arguing, inter alia, that the plaintiff breached the contract by applying for excessive financing and failing to timely cancel and that, as a result of the various modifications to the mortgage contingency commitment provision, the agreement was ambiguous. On June 15, 2005 the Supreme Court (Martin, J.) denied both motions finding triable issues of fact e.g., "as to whether [the plaintiff] breached the contract by seeking more in financing than the agreed upon $505,750.00" (see plaintiff's Exhibit F, p. 4). Finally, on May 15, 2006 those parties settled the action (see plaintiff's Exhibit J) and on May 24, 2006 the sellers' attorney returned $42,000.00 of the $59,500.00 down payment (see plaintiff's Exhibit I).

Approximately, a month later, on June 28, 2006, the plaintiff filed this legal malpractice action (see defendants' Exhibit A). On July 17, 2006 the case was voluntarily discontinued without prejudice as against the defendant John P. Spollen in his individual capacity (see defendants' Exhibit B) and on or about October 20, 2006 issue was joined by the remaining defendants (see defendants' Exhibit C). Upon the completion of disclosure, the case was certified on May 24, 2007 (see defendants' Exhibit J) and on or about June 12, 2007 a note of issue was filed. It is presently on the Calendar Control Part I trial calendar.

The plaintiff asserts that the defendants' purported "conduct in failing to properly counsel plaintiff with regard to the contract's mortgage contingency clause, and the consequences for her down payment if that clause was not complied with" constitutes legal malpractice as a matter of law (June 6, 2007 affirmation of Mitchell J. Devack, Esq., para. 29). More specifically, the defendants were allegedly negligent "in that they failed to counsel plaintiff properly with regard to the consequences of applying for, and ... obtaining, a mortgage not in conformity with the requirements of the subject contract, and in not giving timely written notice of cancellation when the mortgage application was denied" (id. at para. 28). Alternatively, , the defendants argue, in pertinent part, that the plaintiff's behavior, rather than their actions, proximately caused her to forfeit the down payment because she breached the

contract by acquiring excessive financing. Consequently, their purported failure to timely cancel the contract is, allegedly, irrelevant. Moreover, the sellers reportedly waived the requirement of written notice of termination. As a result, the plaintiff's counsel could also have allegedly prevailed in the underlying action.

"To establish a prima facie case of legal malpractice, the plaintiff must prove that (1) the attorney departed from the exercise of that degree of care, skill and diligence commonly possessed and exercised by a member of the legal community, (2) the attorney's departure from the standard of care was the proximate cause of the loss sustained by the plaintiff, and (3) the plaintiff incurred damages as a direct result of the attorney's actions" (Caruso, Caruso & Branda, P.C. v Hirsch, 41 AD3d 407, 409).

Here, as Judge Martin's June 15, 2005 order implicitly recognized, the plaintiff and Mr. Sackman's contrary testimony creates a triable issue of fact as to, inter alia, the threshold issue of whether he unilaterally altered a material term of the contract without consent or whether she breached that provision by obtaining excessive financing.

The defendants were not parties to the preceding action and are therefore not bound by the prior order (see Lyons v Medical Malpractice Ins. Assoc., 275 AD2d 396; Mosher v Baines, 254 AD2d 467). In any event, that non-final order does not have collateral estoppel effect in this action (see Leder v Horowitz, 23 AD3d 626;D'Arata v New York Central Mutual Fire Insurance Co. , 76 NY2d 659, 664; Petersen v Lysaght, Lysaght & Keaemer, P.C., 250 AD2d 581). However, their reliance upon the $505,750.00 mortgage commitment contingency in the rider, which, pursuant to paragraph 16 therein, prevails over the related contract provision, is misplaced. The law is well settled that "a party who signs a document without any valid excuse for having failed to read it is conclusively bound by its terms" (see Daniel Gale Assoc., Inc. v Hillcrest Estates, Ltd., 283 AD2d 386, 387). In this instance, however, unlike Beattie v Brown & Wood, 243 AD2d 395; Larussia v Forchelli, Curto, Schwartz, Mineo, Carlino & Cohn, LLP, 295 AD2d 321 and the remaining case cited by the defendants, the plaintiff has specifically alleged that the contract was unilaterally altered without her consent after she signed it. Nor have the defendants established a prima facie entitlement to

summary judgment by demonstrating that the plaintiff's current counsel could have successfully argued in the underlying action that the sellers had affirmatively waived the requirement of timely written notice of cancellation (i.e., para. 8[e]).

Accordingly, the parties' respective applications, pursuant to CPLR 3212, for an award of summary judgment are denied.

Dated: Sept. 17, 2007

A.J.S.C.