

Legier v Vanguard Tit. Agency, Inc.

2008 NY Slip Op 30408(U)

January 30, 2008

Supreme Court, New York County

Docket Number: 0602146/2007

Judge: Milton A. Tingling

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

PRESENT: **HON. MILTON A. TINGLING**

PART 44

Index Number : 602146/2007
LEGIER, RAPHAEL
vs.
VANGUARD TITLE AGENCY
SEQUENCE NUMBER : # 001
DISMISS COMPLAINT

J.S.C. *office*

INDEX NO. 602146-01
MOTION DATE 10/17/08
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

to be 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 pursuant to annexed decision.*

FILED
FEB 13 2008
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 1/30/08

MAA

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: IAS PART 44

-----x
LEGIER, RAPHAEL,

Plaintiff,

Index No. 602146/07

-against-

VANGUARD TITLE AGENCY, INC., J.P. MORGAN
CHASE & CO., F&G REALTY USA LLC C/O
ALLSTATE CORPORATE SERVICES CORP.,
GEORGE RUSSO & ASSOC. P.C., and LYDIA
ELLIOT,

Defendants.

-----x

MILTON A. TINGLING, J.:

Motions bearing sequence nos. 001 and 002 are consolidated
for disposition.

In motion sequence no. 001, defendant F&G Realty USA LLC
(F&G) moves, pursuant to CPLR 3211 (a) (1) and 3016 (b), for an
order dismissing the complaint.

In motion sequence no. 002, defendant George Russo &
Associates, P.C. (Russo) moves, pursuant to CPR 3211 (a) (1),
for an order dismissing the complaint. Russo further moves,
pursuant to NYCRR § 130-1.1, for an order awarding costs and
attorneys' fees.

Plaintiffs cross move, pursuant to CPLR 2106, for an order
consolidating the instant action with another action pending in
Kings County, entitled: Raphael Legier and Janie Legier v Joshua
Gotlib and First Meridian Mortgage, Index No. 31676/07.

Plaintiffs are seeking damages resulting from a real estate closing of plaintiff's former property. The complaint asserts three causes of action, to wit: conspiracy to commit a fraud as against all of the defendants, and breach of fiduciary duty and legal malpractice as against defendant law firm Russo. The complaint alleges that plaintiffs owned a four-family brownstone building located at 107 West 132nd Street, New York, New York (the Property). Plaintiffs claim that, on May 29, 2007, F&G contracted with plaintiffs to purchase the Property for \$1,725,000.00, and in turn, plaintiffs agreed that, at F&G's request, plaintiffs would enter into a contract of sale with any buyer F&G designated, for an amount agreed to by F&G and the buyer (the Agreement).

The closing took place on the same day as the signing of the Agreement. The ultimate purchaser was defendant Lydia Elliot.¹ In addition to plaintiffs, F&G and Lydia Elliot, also present at the closing were: plaintiff's then counsel Russo, defendant Vanguard Title Agency, Inc. (Vanguard), and JP Morgan Chase & Co. (JP Morgan). Plaintiffs claim that after paying off a first mortgage loan to defendant JP Morgan and settlement charges, they should have received the sum of \$1,187,914.55, but instead received only \$607,679.25.

¹Lydia Elliot was the buyer designated by F & G.

In the first cause of action, plaintiffs allege that the defendants conspired to commit fraud against them in order to prevent plaintiffs from receiving \$1,725,000.00 in proceeds from the sale of the Property. Plaintiffs refer to a HUD Uniform Statement, which they claim was signed by the "buyer and seller"² on the date of the closing, which indicates that the seller was to receive cash in the amount of \$1,187,914.55.

Plaintiffs claim that defendants misrepresented that plaintiffs would receive \$1,725,000.00 in proceeds from the sale of the Property, and that plaintiffs' reliance on defendants' misrepresentations caused plaintiffs to suffer injury. They further maintain that the closing statement fraudulently stated that the purchase price, and the balance due plaintiffs, was \$1,100,000.00, instead of \$1,725,000.00.

The second cause of action alleges that Russo breached its fiduciary duty to plaintiffs by failing to ensure that plaintiffs received \$1,725,000.00. Finally, the third cause of action for legal malpractice alleges that Russo was negligent in asking plaintiffs to sign the papers presented, which resulted in plaintiffs getting less than they bargained for.

Defendants move to dismiss the complaint on the grounds that the complaint fails to allege fraud with sufficient particularity

²Plaintiffs fail to identify the "buyer" and "seller" who allegedly executed the HUD Uniform Statement, or the purpose of the HUD Uniform Statement.

pursuant to CPLR 3013 and 3016 (b), and that the documentary evidence conclusively disposes of plaintiffs' claims (CPLR 3211 (a) (1)).

Although generally, on a motion to dismiss a complaint for failure to state a cause of action, the court must assume as true the facts alleged in the complaint (Kronos, Inc. v AVX Corp., 81 NY2d 90, 92 [1993]), when the moving party offers matter extrinsic to the pleading, the court need not assume the truthfulness of the pleaded allegation (Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]). In addition, on a motion to dismiss a claim on the basis of documentary evidence, dismissal is appropriate if the documents "definitively dispose of the claim" (Demas v 325 West End Ave. Corp., 127 AD2d 476, 477 [1st Dept 1987]). Applying these principals to the complaint, this court finds that the complaint should be dismissed based upon documentary evidence submitted by the defendants.

In their motions to dismiss, the defendants have submitted copies of the Agreement referenced in the complaint. The Agreement, which is signed by F&G and plaintiffs, states in relevant part:

The parties agree that at [F&G's] request [plaintiffs] will enter into a contract of sale with any buyer designated by [F&G] for such amount as agreed to by [F&G] and the buyer. From such sale [plaintiffs] will receive \$1,100,000.00 from which he [sic] will pay all liens on the premises as well as the transfer tax on \$1,100,000.00.

With regard to the first cause of action, allegations of a conspiracy to commit an underlying wrong or fraudulent act merely "connect[s] nonactors, who might otherwise escape liability, with the acts of their coconspirators" (Burns Jackson Miller Summit & Spitzer v Lindner, 88 AD2d 50, 72 [2d Dept 1982], affd, 59 NY2d 314 [1983]). The underlying tort must be viable for there to be a substantive tort of conspiracy (see Abrahami v UPC Constr. Co., 224 AD2d 231, 231-233 [1st Dept 1996]).

The elements of a common-law claim for fraud are: (1) misrepresentation or omission of a material fact; (2) scienter; (3) justifiable reliance; and (4) injury or damages (Lama Holding Co. v Smith Barney, Inc., 88 NY2d 413 [1996]; Channel Master Corp. v Aluminium Ltd. Sales, 4 NY2d 403 [1958]; P. Chimento Co. v Banco Popular de Puerto Rico, 208 AD2d 385 [1st Dept 1994]).

CPLR 3013 provides: "Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transaction or occurrences, intended to be proved and the material elements of each cause of action or defense."

CPLR 3016 (b) requires that to plead an action for fraud the circumstances constituting the wrong must be stated in sufficient detail to inform the defendant with respect to the incidents complained of (Foley v D'Agostino, 21 AD2d 60, 63 [1st Dept 1964]). Although the provision should not be interpreted so

strictly as to prevent an otherwise valid cause of action where it may be impossible to state in detail the circumstances constituting the wrong (Lanzi v Brooks, 43 NY2d 778, 780 [1977]), under the circumstances herein, no valid cause of action for fraud has been demonstrated.

The Agreement clearly and unequivocally provides that the plaintiffs will receive the sum of \$1,100,000.00 for the sale of the Property, and that F&G has a right to then resell the Property for an amount agreed to by F&G and its designated buyer. With regard to plaintiffs' reference in the complaint to the HUD Uniform Settlement Statement, F&G avers that it was never signed by F&G and that it has no relationship to F&G. Plaintiffs have not attached a copy of this purported statement.

In opposition to defendants' motions to dismiss, plaintiff Raphael Legier merely states that he is 74 years old; that his wife is 65 years old and is paralyzed on half of her body; that plaintiffs were supposed to receive a net amount of \$1,187,914.55 for the sale of the Property, but instead, received only \$607,679.25; and that, when he signed the Agreement, he did not realize that the price that he would receive for the sale of the Property would be \$1,100,000.00.

This court finds that the complaint is devoid of any but the most conclusory allegations that defendants made misrepresentations regarding the amount of monies plaintiffs

would receive for the sale of the Property. Plaintiffs do not dispute that they signed the Agreement, or that the Agreement is a simple agreement and not a complex legal document. Plaintiffs fail to allege that they did not read the Agreement, nor do they aver that their age and/or their health impacted on their ability to understand the Agreement, or that they lacked the capacity to execute the Agreement. The law is clear that parties are responsible for reading, understanding, and reviewing documents prior to signature, and that, absent a valid excuse, their failure to do so is not a defense (Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300 [2001]; Bishop v Maurer, 33 AD3d 497 [1st Dept 2006], affd 9 NY2d 910 [2007]; Beattie v Brown & Wood, 243 AD2d 395 [1st Dept 1997])).

Moreover, given the documentary evidence, plaintiffs have failed to establish justifiable reliance on the alleged misrepresentations that by signing the Agreement, they would receive the sum of \$1,725,000.00 for the sale of the Property (see e.g. Abrahami v UPC Const. Co., 224 AD2d 231, supra). Based upon the above, together with the complaint's silence as to how defendants misled plaintiffs, which specific defendants or individuals made the alleged misrepresentations, or when the alleged misrepresentations were made, mandates dismissal. These

details would not be peculiarly within the knowledge of the defendants.

Accordingly, even giving the allegations their most favorable intendment, the complaint fails to state in sufficient detail the circumstances constituting the claim for fraud, thus, plaintiffs have not sufficiently complied with the requirements of CPLR 3016 (b) and 3013. Since the underlying fraud claim is not viable, and there is no substantive tort of conspiracy (see Abrahami v UPC Constr. Co., 224 AD2d 231, supra), the cause of action for conspiracy to commit fraud is deficient. Accordingly, the first cause of action is dismissed.

A claim of legal malpractice must set forth the following elements: "the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and proof of actual damages" (Schwartz v Olshan Grundman Frome & Rosenzweig, 302 AD2d 193, 198 [1st Dept 2003]; Reibman v Senie, 302 AD2d 290 [1st Dept 2003]). Proximate cause must be established by demonstrating that "but for" the attorney's negligence, the plaintiff would either have prevailed in the matter at issue, or would not have sustained any "ascertainable damages" (Brooks v Lewin, 21 AD3d 731, 734 [1st Dept 2005]).

As a threshold matter, it is well settled that a claim for breach of fiduciary duty against an attorney which is "premised on the same facts and seeking the identical relief sought in the

legal malpractice cause of action, is redundant and should be dismissed" (Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267, 271 [1st Dept 2004]). In this case, all of the claims are predicated upon plaintiffs' allegations that the defendants prevented plaintiffs from receiving \$1,725,000.00 for the sale of the Property, and seek the same damages, thus, the breach of fiduciary claim is dismissed.

Furthermore, plaintiffs' allegations that Russo breached its fiduciary duty by negligently representing them at the closing by asking them to sign papers which did not assure that plaintiffs would receive \$1,725,000.00 for the sale of the Property, does not state a cognizable claim for either breach of fiduciary duty or legal malpractice in view of the clear and unambiguous documentary evidence.

Defendants' motions to dismiss the complaint are granted, and under the circumstances of this case, the complaint is dismissed as to the remaining defendants. That branch of Russo's motion which seeks attorney's fees is denied. Plaintiff's cross motion to consolidate is denied as moot.

Accordingly, it is

ORDERED that the motion to dismiss by defendant F&G Realty USA LLC (motion sequence no. 001) is granted and the complaint is

dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the motion to dismiss by defendant George Russo & Assoc. P.C. (Motion sequence no. 002) is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the complaint is dismissed against the remaining defendants; and it is further

ORDERED that plaintiffs' cross motion to consolidate this action with another action is denied as moot; and it is further

ORDERED that the Clerk is to enter judgment accordingly.

Dated:

FILED

FEB 13 2008

NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

1/30/08

MAA

**HON. MILTON A. TINGLING
J.S.C**