

<b>Desiderio v Weinroth</b>
2008 NY Slip Op 30687(U)
February 26, 2008
Supreme Court, Suffolk County
Docket Number: 0029765/2004
Judge: Paul J. Baisley
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SUPREME COURT - STATE OF NEW YORK  
DCM-J - SUFFOLK COUNTY

COPY

**PRESENT:**

**Hon. Paul J. Baisley, Jr.** \_\_\_\_\_

\_\_\_\_\_  
JOHN DESIDERIO and  
DESIDERIO ENTERPRISES, INC.

Plaintiff(s),

-against-

MARGERY WEINROTH

Defendant(s).

**ORIG. RETURN DATE:** May 29, 2007  
**FINAL RETURN DATE:** July 26, 2007  
**MTN. SEQ. #:** 001 - MD

**PLTF'S ATTORNEY:**  
KEITH A. FREDERICK, ESQ.  
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**DEFT'S ATTORNEY:**  
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Upon the following papers numbered 1 to 68 on this motion for summary judgment: Notice of Motion and supporting papers 1 - 28; Affirmation in Opposition and supporting papers 29 - 61; Reply Affirmation and supporting papers 62 - 68; it is

**ORDERED** that this motion (001) by the defendant seeking summary judgment dismissing this action sounding in legal malpractice is denied; and it is further

**ORDERED** that, pursuant to 22 NYCRR 202.8(f), the parties are directed to appear for a preliminary conference on March 5, 2008 at the Supreme Court, DCM Part, Room A362, One Court Street, Riverhead, New York at 10:00 a.m.

This is an action sounding in legal malpractice brought by the plaintiffs John Desiderio (hereinafter Desiderio) and Desiderio Enterprises, Inc. (hereinafter DE, Inc) against their former attorney, Margery Weinroth (hereinafter Weinroth), for legal malpractice arising out of her representing them with regard to various business deals involving the sale of a business and a lease to the new owner of the business.

The business which was sold was Mrs. D's Natural Foods, Inc. (hereinafter Mrs. D's). Mrs. D's was a retail health food store and Desiderio was its sole shareholder. The land and premises were owned by DE, Inc. - a corporation in which Desiderio was also the sole shareholder. Mrs. D's leased the premises from DE, Inc.

In 2000, a business deal was negotiated which entailed selling Mrs. D's to Peter Devani (hereinafter Devani) and entering into a new lease between DE, Inc. and Mrs. D's. According to Desiderio, he retained

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Weinroth (oral retainer) to negotiate and advise regarding the business deal as well as to draft the appropriate documents to effectuate the deal and to afford him protections in the event of defaults, etc. According to Weinroth, she was merely retained as a scrivener and her only discussions with Devani's counsel were as to what terms should be included.

In this regard, Weinroth drafted a Purchase Agreement (hereinafter the Agreement) for a \$90,000 purchase price. Payment of this amount was by a down payment of \$14,000 with the balance of \$70,000 to be paid over a nine year period in accordance with a Promissory Note (hereinafter the Note) drafted by Weinroth. In addition, Weinroth drafted a new lease (hereinafter the Lease), also for a nine year term, for \$48,000 in rent for the first year and specified percentage increases each ensuing year. Devani provided personal guarantees with regard to Mrs. D's performance under the lease. These documents were all executed on August 11, 2000.

At some point within the next two years, Devani sold a minority of his shares in Mrs. D's to Ms. Saraj Patel (hereinafter Patel). This transfer of shares was done without notice to Desiderio and is alleged to have been a breach of notice requirements as well as an abrogation of a right-of-first-refusal clause. In any event, sometime toward the end of 2002, Devani wanted to sell all or substantially all of the balance of his shares to a company called "Health Haven."<sup>1</sup>

When Devani gave notice (as required by the Agreement) to Desiderio of his interest in selling to "Health Haven," Desiderio learned for the first time of the prior transfer of a minority interest in Mrs. D's to Patel as well as learning for the first time that Devani failed to purchase liability insurance as required by the Lease in addition to being in arrears on rent.

Though purportedly not happy with these circumstances, Desiderio asked Weinroth to draft an "Agreement to Assign Lease" (hereinafter the Assignment) over to "Health Haven." This was done and Desiderio took Weinroth's silence with regard to this arrangement as tacit approval of it. The Assignment was signed on December 16, 2002. Meanwhile, arrears to one extent or another continued with regard to both the Note and the Lease which, according to Desiderio, he kept Weinroth apprised of. Indeed, it appears that no further payments were made from this point on under the Note or the Lease.

Next, Devani transferred about 45% of "Health Haven" shares - which then allegedly owned all of Mrs. D's - to another individual, Mr. Sunil Parikh. On July 1, 2003, Parikh executed a guarantee with regard to the monies due under the Note.

In March of 2004, Desiderio asked Weinroth to take legal action against some of these other parties and, instead, Weinroth withdrew from her representation. Another attorney was retained for the ensuing litigation.

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<sup>1</sup> It appears that the actual entity buying the balance of shares in Mrs. D's was "Health Haven" and not "Health Haven" and this discrepancy is an integral part of the plaintiffs' claims of legal malpractice.

In April of 2004, Desiderio claims he learned for the first time that “Health Haven” was actually “Health Heaven” and that at the time of the assignment of the Lease and the transfer of shares to “Health Haven” that “Health Haven” did not actually exist and that the pertinent UCC statements filed with regard to “Health Haven” were without effect - according to Desiderio.

In any event, Desiderio sued Devani and Parikh (as guarantor) on the Note and was awarded a default judgment (\$76,143.97) which was subsequently vacated and then reinstated upon appeal to the Appellate Division. Desiderio now complains that Devani and Parikh are judgment proof and blames Weinroth for not having done anything to protect the assets of Mrs. D’s on his behalf - notwithstanding the guarantees which were made part of some of the documents.

Around this time, Desiderio wanted to sell the premises and land but Devani and Parikh asserted a right-of-first-refusal in this regard which, they claimed, survived the lease Assignment. Rather than engage in further litigation, Desiderio “gave in” and settled all remaining claims for \$640,000 comprised of \$40,000 toward rent arrears and \$600,000 for the premises. In this regard, Desiderio claims he was compelled to settle for a grossly unfair amount on the sale of the property due to Weinroth’s failures in protecting his interests.

Desiderio also claims that a routine check in 2002 - when the Assignment was being drafted - would have revealed that “Health Haven” was not an existing corporation and Weinroth’s failure to make such a routine check comprised legal malpractice and, furthermore, if he had known that “Health Haven” did not exist, he would not have entered into any business arrangements with it. On the other hand, Weinroth testified at a deposition that she did routinely perform such checks and, therefor, must have done so in this regard although she had no records of such. Of course, it is quite possible that if she did a check it was under the name “Health Heaven” which would have shown a viable corporation and, in any event, if the “Health Haven” status was learned then, the mistake, if any, might have been deemed nothing more than a typographical error with the transaction then proceeding in the same manner.

All of this conjecture is nothing more than guess work due to the conflicting factual averments presented by the parties and, in the absence of any other compelling arguments, this state of circumstances may require the denial of this motion for summary judgment.

In order to sustain an action sounding in legal malpractice, a plaintiff must show that the attorney failed to exercise the degree of care, skill and diligence commonly possessed by members of the legal community, that the attorney’s conduct was the proximate cause of the plaintiff’s loss, that the damages were sustained as a direct result of the attorney’s actions and that the plaintiff would have otherwise been successful but for the attorney’s negligence if the attorney had exercised due care (*see Lamana v Pearson & Shapiro*, \_\_\_ AD3d \_\_\_, 843 NYS2d 143 [2d Dept 2007]; *Town of North Hempstead v Winston & Strawn, LLP*, 28 AD3d 746, 748, 814 NYS2d 237, 239 [2d Dept 2006]).

Although it is well settled that on a motion for summary judgment the moving party has the burden of making a prima facie showing of entitlement to summary judgment as a matter of law and must offer sufficient evidence to show the absence of material issues of fact (*Winegrad v New York University Medical*

*Center*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]), on a summary judgment motion with regard to legal malpractice, the attorney-defendant need only show, in admissible form, that just one of the essential elements cannot be proven (*see Lamana v Pearson & Shapiro*, \_\_\_ AD3d \_\_\_, 843 NYS2d 143 [2d Dept 2007]; *Kotzian v McCarthy*, 36 AD3d 863, 827 NYS2d 875 [2d Dept 2007]; *Ostriker v Taylor, Atkins & Ostrow*, 258 AD2d 572, 685 NYS2d 470 [2d Dept], *lv denied* 93 NY2d 809, 694 NYS2d 631 [1999]).

If the attorney-defendant fails to show that just one of the essential elements cannot be proven and, moreover, fails in his or her general burden to show entitlement to summary judgment as a matter of law and the absence of material issues of fact, then the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]) and, more specifically, that all of the essential elements of legal malpractice can be proven (*see Lamana v Pearson & Shapiro*, \_\_\_ AD3d \_\_\_, 843 NYS2d 143 [2d Dept 2007]; *Kotzian v McCarthy*, 36 AD3d 863, 827 NYS2d 875 [2d Dept 2007]; *Ostriker v Taylor, Atkins & Ostrow*, 258 AD2d 572, 685 NYS2d 470 [2d Dept], *lv denied* 93 NY2d 809, 694 NYS2d 631 [1999]).

#### Professional Standards:

With regard to whether the defendant exercised the degree of care, skill and diligence commonly possessed by members of the legal community in her representation of the plaintiffs, neither side submits affidavits from any experts. The defendant relies solely on her recitation of the facts in which she states that she did not engage in any negotiations and was merely a scrivener preparing the necessary documents to carry out the various business arrangements which Desiderio negotiated. She also points out that the documents contained clauses covering defaults, litigations costs, attorneys' fees as well as various personal guarantees. Moreover, she refers to the Appellate Division decision (*Desiderio v Devani*, 24 AD3d 495, 806 NYS2d 240 [2d Dept 2005]) which found both Devani and Parikh (as guarantor) personally responsible for the default judgment on the Note based upon the applicable documents as drafted by this defendant.

Taking into consideration these submissions by and on behalf of the defendant, the defendant has shown a prima facie entitlement to summary judgment on the issue of whether her legal representation met professional standards.

In opposition to this, the plaintiffs contend that an expert's affidavit is not needed in circumstances where an attorney fails to undertake responsibilities that are "inherent" in taking on the representation of the client. In such circumstances, the plaintiffs argue, the ordinary experience of the fact-finder is sufficient to determine the adequacy of the professional services rendered and to determine if an attorney's conduct falls below such standards (*see Northrup v Thorsen*, 46 AD3d 780, 848 NYS2d 304 [2d Dept 2007]; *Greene v Payne, Wood & Littlejohn*, 197 AD2d 664, 602 NYS2d 883 [2d Dept 1993]).

The conduct the plaintiffs particularly refer to here is the defendant's alleged failure to check on the bona fides of "Health Haven" when the Assignment was drafted and the corresponding UCC statement was filed.

Here, questions of fact have been raised as to whether or not the defendant checked on "Health Haven's" corporate status and whether such a check was done under the name "Health Haven" or "Health Heaven." For purposes of this motion, this sufficiently raises an issue of material fact as to the conduct of the defendant.

Proximate Cause/Damages:

The defendant argues that all the pertinent documents were properly drafted and contained clauses protecting the plaintiffs with regard to defaults, personal guarantees, rights of first refusal, notices, the recovery of legal fees, and, furthermore, these very clauses were the basis for the successful lawsuit brought against Devani and Parikh. Moreover, the defendant contends that she was not an active negotiator in the business deals, that she was merely the scrivener and, thus, was not obliged professionally to advise the plaintiffs on the business issues involved; only the legal issues. And the allegation that the defendant should have provided more protections such as with regard to protecting and preserving the business assets in order to ensure that the plaintiffs would be more fully protected in the event of defaults is without merit because adequate remedies were already specifically provided in the documents.

In addition, as to damages, the amounts alleged are not only not due to any professional negligence but are purely speculative and, thus, insufficient to support a cause of action for legal malpractice. Also, if there were any monetary damages, they were the fault of the plaintiffs for not commencing actions sooner for the various defaults and breaches of the applicable documents.

In opposition, the plaintiffs once again raise the issue of checking on the corporate status of "Health Haven" and that if the true status of "Health Haven" had been known, Desiderio would never have executed the Assignment and would have availed himself at that time of the remedies available to him. Of course, stated earlier, it is also possible that if a check had been undertaken, it was under the "Health Heaven" name and all was fine or, if under the "Health Haven" name, the mistake would have been discovered and the presumably typographical error would have been corrected and the deal would have still gone through. But, again, this speculation on the part of the court merely supports the plaintiffs' contention that there are material questions of fact in this regard.

As to damages, the plaintiffs argue that they had specific unforeseen expenses which were the direct result of the defendant's oversight and that they were "forced" to sell the building and property for substantially less than they could have otherwise demanded from a third party. In support of this, they offer appraisal evidence.

In short, as to proximate cause and damages, the plaintiffs raise questions of material fact sufficient to defeat a motion for summary judgment on the issues of proximate cause and damages.

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Success “but for” the defendant’s negligence:

As to the “but for” factor, the defendant contends that the plaintiffs have failed to show that the defendant did not exercise due care in the performance of her professional duties and even if, arguendo, she failed to exercise such due care, that the plaintiffs would have otherwise been successful collecting on their judgment and would have been able to sell the property in question at a greater price.

This argument relies on the proposition that the defendant was not an active negotiator in the business arrangements, thus, not providing her professional expertise to the business negotiations. Therefore, she argues, it could not be claimed that she failed to exercise the proper degree of care in those negotiations or that she was negligent in not ensuring sufficient assets and guarantees to make potential, future judgments meaningful. The defendant insists that was not her role, that she acted properly as an attorney in performing her responsibilities in being the scrivener of the pertinent documents and that, therefore, the damages claimed by the defendants cannot be attributed to her.

In opposition, the plaintiffs state that the defendant’s role was much more than that of a scrivener, that she actively engaged in the business negotiations, that she was negligent in these actions as well as in failing to check on the corporate status of “Health Haven” and her failure to take the necessary steps to ensure sufficient assets and guarantees were in place to protect the interests of the plaintiffs. This, according to the plaintiffs, shows that the plaintiffs would have succeeded in being made whole on their judgment and in obtaining a greater price for the property “but for” the defendant’s negligence.

Again, the court finds that the plaintiffs have met their burden of showing the existence of material facts sufficient to defeat a factor required in a legal malpractice action.

Conclusion:

While the opposition put forth by the plaintiffs on this motion for summary judgment may or may not ultimately be sufficient to support a trial verdict in their favor, such opposition does raise material issues of fact sufficient to defeat this motion for summary judgment. Accordingly, the defendant’s motion for summary judgment is denied.

This decision constitutes the order of the court.

Dated:

2/26/08

HON. PAUL J. BAISLEY, JR.

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HON. PAUL J. BAISLEY, JR., J.S.C.