

Caso v Kessler

2008 NY Slip Op 31034(U)

April 1, 2008

Supreme Court, Nassau County

Docket Number: 4605-07/

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----X
RITA CASO f/k/a RITA GALLO,

TRIAL TERM PART: 48

Plaintiff,

-against-

INDEX NO.: 4605/07

**MOTION DATE: 2-7-08
SUBMIT DATE: 3-10-08
SEQ. NUMBER - 003**

**TROY KESSLER, MISIANO SHULMAN
CAPETOLA & KESSLER, LLP, and CAPETOLA
DODDATO,**

**MOTION DATE: 2-28-08
SUBMIT DATE: 3-10-08
SEQ. NUMBER -004**

Defendants.
-----X

The following papers have been read on this motion:

- Notice of Motion, dated 1-9-08.....1**
- Notice of Cross Motion, dated 2-21-08.....2**
- Affirmation in Reply and Opposition, dated 2-26-08.....3**
- Reply Affirmation, dated 3-7-08.....4**

This motion by defendants Troy L. Kessler, Misiano Shulman, Capetola & Kessler, LLP and Capetola & Doddato ("attorneys") for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint against them is denied.

This cross-motion by plaintiff for an order pursuant to 22 NYCRR 130-1.1(c) imposing sanctions on defendants and awarding her costs and attorney's fees is denied.

This is an action to recover damages for legal malpractice. The plaintiff alleges that the defendant attorneys were negligent in their representation of her in the action *Gallo v Bulfamante, et al.* In that action, the plaintiff sought to recover damages from the owner and landlord of her apartment for personal injuries she allegedly sustained on September 13, 1996, when the bathroom shower's ceramic ceiling tiles fell on her. She alleged that the defendants were negligent in their ownership and maintenance of her apartment building. In this present action, the plaintiff alleges, *inter alia*, that the defendant attorneys failed to oppose the defendant landlord/property owner Bulfamante's application to dismiss the complaint against him for want of personal jurisdiction; failed to appear for a compliance conference and to seek a default judgment against the defendant landlord/property owner Aberico; and failed to keep her apprised of the status of her case.

The defendant attorneys seek summary judgment dismissing the complaint. They maintain that assuming, *arguendo*, they committed the alleged malpractice, the plaintiff cannot recover of them for legal malpractice because she cannot prove that she would have been successful in the underlying action.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact."

Sheppard-Mobley v King, 10 AD3d 70, 74 (2d Dept. 2004), *aff'd. as mod.*, 4 NY3d 627 (2005), *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Winegrad v New York*

Univ. Med. Ctr., 64 NY2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Sheppard-Mobley v King*, *supra*, at p. 74; *Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. *Alvarez v Prospect Hosp.*, *supra*, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. *See, Demishick v Community Housing Management Corp.*, 34 AD3d 518 (2d Dept. 2006), *citing Secof v Greens Condominium*, 158 AD2d 591 (2d Dept. 1990).

"In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney 'failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession' and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages." *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438 (2007), quoting *McCoy v Feinman*, 99 NY2d 295, 301-302 (2002) (internal quotation marks and citation omitted). *See also, Town of North Hempstead v Winston & Strawn, LLP*, 28 AD3d 746 (2nd Dept. 2006), *lv den.*, 7 NY3d 715 (2006). "To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence." *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, *supra*, citing *Davis v Klein*, 88 NY2d 1008, 1009-1010 (1996) and *Carmel v Lunney*, 70 NY2d 169, 173 (1987); *see also, AmBase Corp. v Davis, Polk & Wardwell*, 8 NY3d 428, 434 (2007); *Town of North Hempstead v Winston*,

supra. "The burden of proving 'a case within a case' is a heavy one." *Aquino v Kuczinski, Vila & Associates, P.C.*, 39 AD3d 216, 219 (1st Dept. 2007), quoting *Lindenman v Kreitzer*, 7 AD3d 30, 34 (1st Dept. 2004). In fact, where a defendant attorney presents evidence in admissible form establishing that the plaintiff client would be unable to prove any one of these elements, the defendant attorney has sustained his *prima facie* burden of demonstrating his entitlement to summary judgment. *Town of North Hempstead v Winston & Strawn, LLP, supra*, at p. 748, citing *Ostriker v Taylor, Atkins & Ostrow*, 258 AD2d 572 (2nd Dept. 1999), *lv to app den.* 93 NY2d 809 (1999).

To hold the defendant property owner/landlord liable in the underlying action, the plaintiff would have had to establish that he created the defective condition or had actual or constructive notice of it. *Lau Tung Tsui v New Charlie Tsing Corp.*, 35 AD3d 390, 391 (2nd Dept. 2006), citing *Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 (1994); *Gordon v American Museum of Natural History*, 67 NY2d 836 (1986); *Singer v St. Francis Hosp.*, 21 AD3d 469 (2005).

The defendant attorneys allege that the plaintiff could not have made such a showing, and thus she would not have prevailed in that action. *See, Becovic v Poisson & Hackett*, ___ AD2d ___, 2008 WL 740290 (1st Dept. 2008); *Cohen v Wallace & Minchenburg*, 39 AD3d 691 (2nd Dept. 2007), *lv den.*, 9 NY3d 980 (2007); *Martin v Pasternack, Popish & Reif, P.C.*, 259 AD2d 526 (2nd Dept. 1999); compare, *Duffy-Duncan v Berns & Castro*, 45 AD3d 489 (1st Dept. 2007).

An Inspection Report was prepared on behalf of the City of New Rochelle's Section 8 Rental Assistance Program on April 8, 1996, which reflected that the bathroom

ceiling and the tub or shower unit failed inspection and needed to be fixed. There is also an indication in the insurance file that the plaintiff's "unit" failed inspection on February 12, 1997, some five months after the plaintiff's accident. At her examination-before-trial in the underlying action, the plaintiff testified that she repeatedly complained to her landlord about her bathroom until two months before her accident, at which time the bathroom was completely replaced. She admitted that after the new bathroom was installed, she did not complaint to the landlord at all.

The defendant Alberico in the underlying action sold the property to defendant Bulfamante before the plaintiff's accident. In fact, it was Bulfamante who replaced the plaintiff's bathroom approximately two months before her accident. Thus, the defendant Alberico had no duty and could not be held liable to the plaintiff. Any failure by the defendant attorneys to proceed against him therefore, was of no consequence. This does not dispose of the legal malpractice case in toto, however.

The inspection report of April 8, 1996, was prepared several months before the bathroom was replaced and the plaintiff's complaints about her bathroom ceased two months before her accident. Evidence of actual or constructive notice to the defendant owner/landlord therefore is lacking. Nevertheless, the defendant attorneys have failed to establish that defendant Bulfamante did not create the defective condition that caused the plaintiff's accident. The mere emergence or ultimate development of a dangerous condition as a result of environmental wear and tear does not constitute an affirmative act

of negligence which dispenses with the need for notice. *See, Yarborough v. City of New York*, 28 AD3d 650 (2d Dept. 2006), *affd* 10 NY3d 726 (2008).

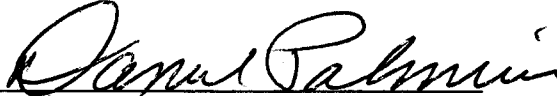
However, as noted, the evidence here indicates that the bathroom was entirely replaced approximately two months before the plaintiff's accident and that the shower's ceiling tiles inexplicably fell on her. No evidence whatsoever has been submitted regarding the quality of the work done or what actually caused the ceiling to collapse. Given this factor and the short period of time that passed between the renovation and the failure of the ceiling tiles, the attorney defendants have not shown as a matter of law that the personal injury defendant Bulfamante did not create the defective condition that led to the plaintiff's accident. Thus, the attorneys have not made out their *prima facie* case that the plaintiff could not have prevailed in the underlying personal injury action. *See Chetcui v Wal-Mart Stores*, 42 AD3d 419 (2nd Dept. 2007); *Feliciano v City of New York*, 304 AD2d 416 (1st Dept. 2003); *Grossman v Amalgamated Housing Corp.*, 298 AD2d 224 (1st Dept. 2002); *Collins v City of New York*, 273 AD2d 138 (1st Dept. 2000); compare, *Battaglia v Toys R Us, Inc.*, 271 AD2d 627 (2nd Dept. 2000). "Whether plaintiff [would have] prevail[ed] at a trial based on [this] evidence is not the issue. The only question before [this court] is whether [the defendant attorneys have] definitively demonstrated the absence of any disputed fact, not whether the plaintiff has proven her claim." *Grossman v Amalgamated Housing Corp.*, *supra*, at p. 226-227. The defendant attorneys have not established that the plaintiff could not have been successful "but for" their negligence and their motion must accordingly be denied.

The plaintiff's motion for sanctions, costs and attorneys fees is denied. The defendant's motion is not so lacking in merit as to warrant the imposition of a penalty.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: April 1, 2008


HON. DANIEL PALMIERI
Acting Supreme Court Justice

**TO: Law Offices of Sanford F. Young, P.C.
Attorneys for Plaintiff
225 Broadway, Ste. 2008
New York, NY 10007**

**Lindenbaum & Silber, PLLC
By: Joseph Silber, Esq.
Attorneys for Defendants
419 Park Avenue South, 2d Floor
New York, NY 10016**

ENTERED
APR 04 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE