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SHORT FORM ORDER

INDEX No. 06-7874
CAL. No. 07-01747-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 10/11/07
ADJ. DATE 12/24/07
Mot. Seq. # 001 - MD

ALAN FITZGERALD and NICOLINA FITZGERALD, Plaintiffs, - against - ANTHONY P. GALLO and ANTHONY P. GALLO, P.C., Defendants.	DAVID A. GABAY, ESQ. Attorney for Plaintiffs 4250 Veterans Memorial Hwy., Suite 3040 Holbrook, New York 11741 L'ABBATE, BALKAN, COLAVITA & CONTINI, L.L.P. Attorneys for Defendants 1001 Franklin Avenue, 3rd Floor Garden City, New York 11530

Upon the following papers numbered 1 to 50 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 23; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 24 - 39; Replying Affidavits and supporting papers 40 - 47; Other 48-50 (stipulations of adjournment); ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that in this legal malpractice action, the within summary judgment motion by defendant is denied. Absent prima facie proof of entitlement, numerous questions of fact and credibility require jury determination (CPLR 3212[b]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NYS2d 557, 427 NYS2d 597 [1980]; ***S.J. Capelin Associates v Globe Mfg.***, 34 NY2d 338, 357 NYS2d 478 [1974]).

In a legal malpractice action the plaintiffs require proof of three elements which show: (1) that defendant failed to exercise the degree of care, skill and diligence commonly possessed and exercised by an ordinary member attorney of the legal community; (2) that such failure or negligence proximately caused actual damage; and (3) that but for the negligence, plaintiffs would not have been damaged and would otherwise succeed in an action against disputing family members.

Plaintiffs contend that defendant was negligent for failure to timely record a quitclaim deed executed on May 7, 2003 upon counsel's recommendation that plaintiffs' joint tenant and mother, Helen Fitzgerald, convey to plaintiffs her remaining interest, which would facilitate the sale of the premises located at 198 Seaman Neck Road, Dix Hills, New York. Both plaintiffs and their parents,

John and Helen Fitzgerald, were joint tenants who acquired the premises by bargain and sale deed, dated August 10, 1987. The deed conveyed the premises to each of the joint tenants, John and Helen Fitzgerald and Alan and Nicolina Fitzgerald, as tenants by the entirety. The deed also conveyed the property to each of the joint tenants without an express right to survivorship (Exh.B & G, Plaintiffs' Affirmation in Opposition). Plaintiffs' father/father-in-law, John Fitzgerald, died in 1983. Helen succeeded to John's interest in title to the premises as a tenant by the entirety. Helen remained a joint tenant in interest with plaintiffs, her son and daughter-in-law until she conveyed her interest to plaintiffs by quitclaim deed, signed May 7, 2003. These parties resided at the premises together for at least twenty years. Plaintiffs allegedly paid all repairs, maintenance and expenses, expecting an appropriate settlement and recovery upon sale.

The quitclaim deed, executed on May 7, 2003 which conveyed Helen's remaining joint interest in the real property owned by the parties jointly to plaintiffs was delivered by plaintiffs to the defendant attorney, who accepted the instrument for recording and retained the deed in his possession and control pending contract for sale signed June 1, 2003 and final closing to the bona fide purchasers, Spero and Elpetha Hope Markatos, which occurred on August 21, 2003. The deed was not recorded, purportedly to expedite the Markatos closing.

Following the May 7th conveyance of Helen's remaining interest to plaintiffs, her son and his wife as tenants by the entirety, Helen repeated the conveyance to her two elder sons, Ronald and Leroy Fitzgerald, on June 22, 2003. The latter sons had assumed responsibility for Helen when plaintiffs retired to New Hampshire in 2001, and Helen did not want to relocate. Her granddaughter unsuccessfully attempted to substitute for plaintiffs' care, and the elder sons replaced the care previously provided by plaintiffs followed by their niece, pending a conveyance of the premises. The elder sons, who resided in Connecticut and Virginia respectively, had Helen execute a power of attorney. They allegedly proceeded to withdraw available liquid assets and to place Helen in an assisted living facility, which was located in Pennsylvania. Pending the conveyance of the premises under contract signed June 1, 2003 to Markatos, Helen executed the second quitclaim deed to her elder sons on June 22, 2003. Independent counsel, Mr. Voorhees, was retained by the elder siblings to represent them in this transaction without notice to plaintiffs or defendant. Whether Helen had a title interest to convey at the time of this transaction is a critical issue.

However, Ronald and Leroy had knowledge of the long-term relationship and the title interest in the premises shared by plaintiffs and their parents. The quitclaim deed to plaintiffs was signed May 7, 2003, and the contract of sale to Markatos was signed on June 1, 2003. The second quitclaim deed was arranged without notice, signed June 22, 2003, immediately recorded and delayed the closing with Markatos, originally scheduled on August 4, 2003. To conclude the closing, defendant persuaded plaintiffs to compromise with John's siblings for the transfer of the second quitclaim deed back to plaintiffs. The compromise involved an agreement that the elder sons would hold 50% of the proceeds of sale in escrow pending determination of all claims or that the proceeds be delivered to the Ronald and Leroy in trust for Helen Fitzgerald to allocate in accord with her wishes, subject to the resolution of the dispute by all three brothers. The stipulation was signed solely by Leroy and approved by Alan and Nicolina Fitzgerald, as recommended and supervised by defendant. The closing to Markatos was

finalized on August 21, 2003. Defendant distributed the proceeds of sale equally by check on August 26, 2003 (Exh.M, N, O, Defendants' Cross Motion).

The failure to record the May 7, 2003 quitclaim deed is admitted by defendant with explanation that such was intended to expedite the Markatos closing. The failure to record is not determinative of plaintiffs' title or the validity of Helen's conveyance to plaintiffs under the circumstances (***James v Lewis***, 135 AD2d 785, 522 NYS2d 897 [1987]; ***DRT Constr. Co. v BH Ass.***, 267 AD2d 783, 702 NYS2d 738 [2000]). Only when two conveyances are made of the same property by the same member does an issue of priority over the earlier grantee arise. Here, Helen conveyed her outstanding interest on May 7, 2003. No interest remained to convey on June 22, 2003. Under the New York Real Property Law a subsequent grant of the same premises must be recorded in good faith to protect against unrecorded instruments. When actual notice exists of a prior unrecorded interest, instrument, title, legal or equitable, or any notice of facts that would precipitate a reasonable inquiry, good faith is challenged and defeats the benefit of a prior recording (***United Matura Realty, Inc. v Reade***, 155 AD2d 660, 547 NYS2d 892 [1989]; ***Peloke v Scheid***, 135 Misc2d 606, 515 NYS2d 1000 [1987];).

Defendant moves for summary judgment, claiming that failure to record the quitclaim deed conveying Helen's interest to plaintiffs was a professional decision, and not negligence. Moreover, defendant contends that plaintiffs incurred no damage upon receipt of one-half the joint share of the proceeds. This ignores the quitclaim deed executed on May 7, 2003 which transferred Helen's entire interest to plaintiffs and entitled plaintiffs to the entire proceeds realized subject to setoff.

The expert opinion submitted on behalf of defendant conflicts with the expert opinion submitted by plaintiffs. Conflicting opinions by qualified experts are subject to jury determination. Furthermore, neither expert addressed the limitations set forth in the recording statute or the issues raised with regard to degree of care, skill and diligence required by defendant or any member of the legal community under these circumstances. An inference is clearly drawn as to whether advice on these matters should have been provided and whether actual damages were sustained but for defendants failure to so advise (***Entelisano Agency, Inc. v Felt***, 135 AD2d 1096, 523 NYS2d 314, *app den* 71 NY2d 804, 528 NYS2d 829 [1988]; *writ of cert den* 489 US 1070 [1989]; ***Richardson v John Danna & Sons***, 245 AD2d 20, 664 NYS2d 780 [1997]; 58A NYJur2d §672; ***Dandrea v Hertz***, 23 AD3d 332, 804 NYS2d 106 [2005]; ***Shields v Baktidy***, 11 AD3d 671, 783 NYS2d 652 [2004]).

The facts reflect that movant has not prima facie demonstrated an entitlement to judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). The conflicts, omissions and limits of the expert opinions raise issues with respect to whether defendant related a full account of facts to the respective experts and the degree of care, skill and diligence possessed, warranted and required by an ordinary member of the legal community. There is no reference to the limitations of the recording statute where actual notice of interest or basis for inquiry exists, which may be fatal to good faith. Plaintiffs do not appear informed that the quitclaim deed signed by Helen on May 7, 2003 conveyed the entire remaining interest in the premises to plaintiffs. Plaintiffs were then persuaded to compromise their interest to Leroy and Ronald for the transfer of the second quitclaim deed the premises to plaintiffs in exchange for a one-half interest in the proceeds of sale, despite defendants' possession and control of a valid quitclaim deed to plaintiffs. There being no interest left to convey, the second quitclaim deed to Ronald

and Leroy Fitzpatrick on June 22, 2003 was more likely void, where known that the premises were jointly owned by their parents and plaintiffs for twenty-two years. Whether the June 22, 2003 deed to Leroy and Ronald divested plaintiffs of any part of the entire interest in the premises or the proceeds of sale to Markatos requires further proof. Delays in the Markatos closing for minor matters permitted the elder sons an opportunity to retain independent counsel, persuade Helen to sign a second quitclaim deed on June 22, 2003 and to record. This was accomplished, without notice to plaintiffs, without inquiry, absent consideration, and with knowledge of plaintiffs' long-term interest, pending the sale to bona fide purchasers under contract since June 1, 2003, (***James v Lewis***, *supra;* ***DRT Constr. Co. v BH Assocs.***, *supra*). Thereafter, Helen died intestate on March 24, 2004. There is no question of competency.

Outstanding issues concern whether Helen had any remaining interest to convey, the validity of the second quitclaim deed and the recording, the compromised closing, the division of the proceeds of sale, the reasonable exercise of due care, skill, diligence and supervision of counsel required. Whether the deed which conveyed Helen's entire remaining interest was signed and delivered to counsel entitled the plaintiffs to 100% of the proceeds and caused damage based on compromise made on advice of counsel to expedite the closing is subject to question. Judgment is premature, not warranted, and proof on all three elements of legal malpractice is required (***Simmons v Edelstein***, 32 AD3d 464, 820 NYS2d 614 [2006]; ***J-Mar Service Center v Mahoney, Connor & Hussey***, 14 AD3d 482, 787 NYS2d 390 [2005]). However, defendant failed to demonstrate that plaintiffs could not prove one of the elements to recover damages and that a trial is not necessary (***Zuckerman v City of New York***, *supra;* ***S.J. Capelin Associates v Globe Mfg.***, *supra*).

Dated: APR 0 1 2008

J.S.C.

____ **FINAL DISPOSITION** ___X__ **NON-FINAL DISPOSITION**