

GBC Prop., LLC v Weinstein

2008 NY Slip Op 31492(U)

May 29, 2008

Supreme Court, New York County

Docket Number: 0103369/2004

Judge: Walter Tolub

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PRESENT: _____

Justice

PART _____

Index Number : 103369/2004
GBC PROPERTY
 vs.
WEINSTEIN, ARTHUR I., ESQ.
 SEQUENCE NUMBER : 005
 SUMMARY JUDGMENT

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

JUN 02 2008

Cross-Motion: Yes No

COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: _____

8/29/08

WALTER B. TOLUB^{S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----x
GBC PROPERTY, LLC and
MATTHEW A. BLESSO,
Plaintiffs,

Index No.: 103396/04

-against-

DECISION AND ORDER

ARTHUR I. WEINSTEIN, ESQ. and
LAW OFFICES OF ARTHUR I. WEINSTEIN,
ESQ.,

Defendants.

-----x
TOLUB, J.

FILED
JUN 02 2008
COUNTY CLERK'S OFFICE
NEW YORK

BACKGROUND

The instant action commenced with a complaint alleging seven causes of action against the defendant attorney and his law offices, hereinafter referred to collectively as "defendant": (1), legal malpractice; (2) breach of contract; (3) fraudulent inducement; (4) breach of fiduciary duties; (5) false imprisonment; (6) violation of plaintiff's state and federal civil rights; and (7) malicious prosecution. The attorney for the plaintiffs, GBC Property, LLC and Matthew A. Blesso, hereinafter referred to collectively as "Blesso", has withdrawn the sixth cause of action for malicious prosecution.

The first four causes of action are based on the retention of defendant attorney to create a condominium conversion plan.

On July 25, 2001, Blesso retained defendant to convert a

residential building to condominium status. The retainer agreement states that defendant was to be paid a total of \$30,000 for the work, of which it is undisputed that only \$15,000 has been paid. Along with the retainer agreement, defendant provided Blesso with a list of information that would be needed to prepare the offering plan for the Attorney General's approval.

Both parties agree that it was Blesso's desire to have the conversion completed by calendar year 2002; however, Blesso alleges that defendant orally promised to have the work and approvals completed within that time frame, an allegation defendant refutes. There is nothing in any written document indicating a specific time frame for completion and approval of the work.

Defendant asserts that he did not receive many of the items he requested from Blesso until February, 2002. The red herring was submitted to the Attorney General in June of 2002, one month after defendant received the engineering report from Blesso's initial architect, and the conversion plan was finally accepted by the Attorney General on May 30, 2003. Blesso alleges that the delay was caused by defendant's malpractice. Defendant asserts that the delays were caused by Blesso failing to provide defendant with the information he needed to complete the work; problems Blesso had with his initial architects (who filed a mechanic's lien against the building on December 26, 2002); and

problems with the Attorney General's office associated with 9/11 and its forced move of offices.

On July 31, 2003, Blesso informed defendant that he was terminating his services in conjunction with the conversion plan. Evidence shows that in September, 2002, Blesso retained another law firm to complete the conversion work, but that firm never did any work on the plan.

After defendant was initially retained, Blesso indicated that he did not want to act individually as the sponsor for the building, and at Blesso's request defendant created plaintiff GBC Properties, LLC to act as the sponsor. The instant lawsuit does not involve any problems associated with this work, which was not part of the subject retainer agreement.

The last two remaining causes of action concern Blesso's request for the file defendant created for the conversion. The request was made when Blesso terminated defendant's services.

According to defendant, defendant advised Blesso that because there was still \$15,000 left outstanding pursuant to the retainer agreement, the law office had a right to retain the file until that amount was paid. Defendant states that he told Blesso that he would turn over the file on condition that they executed mutual general releases. Blesso e-mailed defendant agreeing to the releases, and arranged to come to defendant's offices on August 7, 2003, to sign the releases and obtain the file.

On August 7, 2003, Blesso came to defendant's offices and took the file and a copy of the file that were laying on a table, without signing any release. Defendant asserts that Blesso then attempted to run from the office with the files and, when defendant attempted to stop him, Blesso physically attacked him. Blesso states that he was defending himself against defendant who initiated the attack. Nevertheless, an employee in defendant's office called the police who arrested Blesso.

Blesso was charged with Menacing and Petit Larceny. At arraignment, the matter was Adjourned in Contemplation of Dismissal. Blesso contends that defendant's actions in this matter constitute false imprisonment and malicious prosecution.

After extensive discovery, which has been included with the motion, defendant now moves to dismiss the causes of action pursuant to CPLR 3211 (a) (1) and (7) and for summary judgment pursuant to CPLR 3212 (b), as well as for summary judgment on defendant's fourth counterclaim for breach of contract based on the unpaid balance of \$15,000 allegedly due defendant pursuant to the retainer agreement, together with interest from August 7, 2003.

DISCUSSION

CPLR 3211 (a), Motion to dismiss cause of action, states that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(1) a defense is founded upon documentary evidence; or ...

(7) the pleading fails to state a cause of action

Under CPLR 3211 (a) (1) a dismissal is permissible only when the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law. *Leon v Martinez*, 84 NY2d 83 (1994). As stated in *Ladenberg Thalmann & Co., Inc. v Tim's Amusements, Inc.*, 275 AD2d 243, 246 (1st Dept 2000),

[t]he court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory (*Leon v. Martinez*, 84 NY2d 83, 87-88 (1994)). Dismissal pursuant to CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*id.* at 88).

To defeat a motion to dismiss pursuant to CPLR 3211 (a) (1), the opposing party need only assert facts which "fit within any cognizable legal theory." (internal quotation marks and citations omitted) *Bonnie & Co. Fashions, Inc. v Bankers Trust Co.*, 262 AD2d 188, 188 (1st Dept 1999).

Summary judgment under CPLR 3212 (b) is appropriate when the movant establishes a prima facie entitlement to judgment as a matter of law by the submission of competent evidence. See *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Summary judgment is warranted where there are no genuine issues of material fact and, therefore, the moving party is entitled to judgment as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d

320, 324 1986).

The court notes at the outset that, in opposition to the instant motion, Blesso has only submitted an affirmation by an attorney unsupported by an affidavit of any person with personal knowledge of the facts. Courts have held that an "affidavit of plaintiffs' attorney, the only one, submitted in opposition to defendants' motions for summary motion [sic] was made without personal knowledge, contains only conclusory allegations, and is of no probative value." *Meyer v United States Life Ins. Co.*, 181 AD2d 643 (1st Dept 1992); *Noel v L & M Holding Corp.*, 35 AD3d 681 (2d Dept 2006); *Ramnarine v Memorial Center for Cancer and Allied Diseases*, 281 AD2d 218 (1st Dept 2001). Regardless of the lack of legally sufficient opposition, in order to prevail on a motion for summary judgment the movant must still make out a prima facie case. *Zuckerman, Id.*

First Cause of Action for Legal Malpractice.

In order to prevail on a cause of action for legal malpractice, a plaintiff must prove each of the following elements: (1) the attorney was negligent; (2) the attorney's negligence was the proximate cause of an injury to the plaintiff; and (3) the plaintiff suffered actual damages. To demonstrate that the attorney was negligent, the plaintiff must prove that, but for the lawyer's actions, he or she would either have prevailed in the matter or not suffered any damages. *Bishop v*

Maurer, 33 AD3d 497, 498 (1st Dept 2006), *aff'd* 9 NY3d 910 (2007). Negligence or malpractice exists when the attorney fails to exercise that degree of skill commonly exercised by an ordinary member of the legal community. *Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo*, 259 AD2d 282, 283 (1st Dept 1999).

The only basis proffered for the legal malpractice claim is the length of time it took to obtain approval for the conversion plan from the State Attorney General's office, an assertion by Blesso himself, a non-attorney. Although the original submission of June 6, 2002, was rejected on October 8, 2002, because of 14 items that needed to be addressed, a review of those items indicates that they are, for the most part, items prepared by the sponsor's architect or engineer, not the attorney. The evidence submitted further shows that Blesso had problems with his initial architects and had to hire a new firm, which could account for the delay.

The motion papers include an Examination Before Trial of Anthony P. Colombini, Esq. a member of the law firm hired by Blesso to take over the condominium conversion started by defendant. Mr. Colombini states that Blesso was the client of another member of the firm and that he, Colombini, only reviewed some of the documents. Mr. Colombini testified that he has prepared approximately 40 condominium conversions, and that the average time it has taken him to have a plan approved by the

Attorney General's office is 4-5 months, although it has taken him up to one year to obtain approval on occasion. He further states that by the time his firm became involved the plan submitted by defendant had already been approved.

Mr. Colombini indicates that some of the items defendant requested for inclusion in the plan could have been obtained either from the client or public records, but some items had to come either from the client or third persons, such as an architect. Nowhere in his testimony does Mr. Colombini render any opinion regarding defendant's skill or performance with respect to the legal work subject of this litigation.

No evidence in admissible form has been provided to indicate that defendant did not use the skill commonly exercised by ordinary members of the legal community. Consequently, the first element of a legal malpractice claim has not been established.

Further, there is no proof that Blesso suffered any damages because of the delay in gaining the Attorney General's approval for the conversion plan. As stated by the court in *Gazzola Building Corp. v Shapiro* (181 AD2d 718 [2d Dept 1992]), a case similar to the one at bar in which a legal malpractice claim was brought against an attorney for a delay in approval of a condominium offering plan, "[w]hile sales of condominium units were legally delayed because of the absence of an approved plan, proof was not established ... that units would have been sold as

originally scheduled at the desired price." *Id.* At 718.

Furthermore, documents submitted with this motion indicate that one of the units in the subject building sold for a record high price. Consequently, Blesso has failed to demonstrate any but speculative damages.

To prevail on a motion for summary judgment, a defendant must provide evidence in admissible form that the plaintiff is unable to prove at least one of the essential elements of a legal malpractice claim. *Oberkirch v Eichinger, P.C.*, 35 AD3d 558 (2d Dept 2006). In the instant matter, defendant has demonstrated that Blesso could not prevail on two of the essential elements; Blesso has provided no admissible evidence of an attorney opining that defendant did not exercise the common skill of an ordinary lawyer, nor did Blesso provide evidence of any but speculative damages. Therefore, based on the foregoing, defendant's motion to dismiss the legal malpractice claim is granted.

Second Cause of Action for Breach of Contract.

A breach of contract claim may only be sustained where there is an express promise in the retainer agreement to achieve a specific result and the attorney fails to do so. See *Aglira v Julien & Schlesinger, P.C.*, 214 AD2d 178 (1st Dept 1995); *Pacesetter Communications Corp. v Solin & Breindel, P.C.*, 150 AD2d 232, 236 (1st Dept 1989). The only exception would be an implied promise to exercise due care in performing the

contractual promise. *Santulli v Englert, Reilly & McHugh, P.C.*, 78 NY2d 700 (1992) (retainer said the attorney would perform all services in relation to preparing a mortgage and the defendant attorney failed to record the mortgage).

In the instant matter the documentary evidence supports defendant's position that he did perform all the work detailed in the retainer agreement except for assisting in the closing of the sales of individual units which were to be subject to separate legal fees. Defendant failed to assist in the closings because defendant was fired prior to the units being sold. Blesso has not alleged any breach of the written terms of the agreement, maintaining that the breach is based on oral representations as to when the final approval for the conversion plan would be forthcoming from the Attorney General. That assertion by Blesso goes far beyond an implied promise to exercise due care.

Based on the foregoing, defendant's motion to dismiss the cause of action for breach of contract is granted.

Third Cause of Action for Fraudulent Inducement.

To maintain a cause of action for fraudulent inducement, there must be a material misrepresentation, known to be false, made with the intention of inducing reliance, upon which the victim actually relies and consequently sustains a detriment. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 275 (1st Dept 2005). In the case at bar, Blesso

has only alleged that defendant induced him into retaining defendant's services by misrepresenting his (defendant's) background and expertise with respect to condominium conversions.

The documents submitted with this motion, and supplied to Blesso during discovery, support defendant's assertions that he has extensive experience and expertise in condominium and co-operative conversions. He has been a licensed attorney for forty years, has successfully converted approximately 200 buildings, has been the Vice-President of the Council for New York Cooperatives & Condominiums since 1996, and is cited as an expert in the field.

Based on all the documents and evidence submitted, the court finds that Blesso has failed to sustain a cause of action for fraudulent inducement and, therefore, defendant's motion to dismiss this cause of action is granted.

Fourth Cause of Action for Breach of Fiduciary Duties.

The underlying facts alleged by Blesso for this cause of action are the same facts as those used to support the cause of action for legal malpractice and, as such, are duplicative and therefore should be dismissed. *Inkine Pharmaceutical Co., Inc. v Coleman*, 305 AD2d 151 (1st Dept 2003); *Sonnenschine v Giacomo*, 295 AD2d 287 (1st Dept 2002).

Fifth Cause of Action for False Imprisonment.

To establish a cause of action for the tort of false

imprisonment the a plaintiff must show that: the defendant intended to confine him, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement and, (4) the confinement was not otherwise privileged. *Broughton v State of New York*, 37 NY2d 451, 456 (1975). However, a civilian who provides the police with the information that results in another's arrest cannot be found liable for false imprisonment unless that civilian actively induced the police action in a manner other than just supplying information. *Wasilewicz v Village of Monroe Police Dept.*, 3 AD3d 561 (2d Dept 2004).

Nothing in the documents submitted indicates that defendant actively induced the police action, nor is it alleged that defendant personally confined Blesso. Therefore, defendant's motion to dismiss the cause of action for false imprisonment is granted.

Sixth Cause of Action for Violation of Federal and State Civil Rights.

This cause of action was withdrawn. Plaintiff's counsel stated that "the facts of this case do not set out a proper claim for the civil rights violation and this cause of action (number 6 in the complaint) is hereby withdrawn." (Plaintiff's Affirmation in Opposition p. 3 para. 8).

Seventh Cause of Action for Malicious Prosecution.

The elements of malicious prosecution are: (1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding, and (4) actual malice. *Broughton v State of New York*, supra. Consequently, if the criminal proceeding does not terminate in the accused's favor, one of the essential elements of the tort of malicious prosecution is missing.

In the instant case, Blesso's criminal case was adjourned in contemplation of dismissal. An adjournment in contemplation of dismissal is not a determination of guilt or innocence, and as such a person's acceptance of such a plea bars an action for malicious prosecution. *Christenson v Gutman*, 249 AD2d 805, 809 (3d Dept 1998). As the court said in *Molina v The City of New York*, 28 AD3d 372 (1st Dept 2006), when the criminal prosecution does not "terminate in an acquittal or an unqualified dismissal, but merely an adjournment in contemplation of dismissal [citations omitted], plaintiff's claims for malicious prosecution ... were properly dismissed [citations omitted]."

Therefore, based on the foregoing, the court grants defendants' motion to dismiss the cause of action for malicious prosecution.

Counterclaim for Breach of Contract

Defendant also moves for summary judgment on his counterclaim for the balance due on the work he performed plus interest from August 7, 2003.

It is well-settled that an attorney forfeits his or her right to a fee if he or she is discharged for cause resulting from attorney misconduct with respect to the work for which the fee is sought. *Wingate, Russotti & Shapiro, LLP v Friedman, Khafif & Assoc.*, 41 AD3d 367 (1st Dept 2007). However, in the instant matter, defendant did perform all of the work for which he was retained, and the previous discussion indicates that he was not liable for any legal malpractice with respect to that work. As a consequence, defendant is entitled to the remainder of the fee specified in the retainer agreement, plus interest from the date Blesso repudiated the agreement by his actions, August 7, 2003.

Accordingly, it is

ORDERED that the part of defendant's motion seeking to dismiss 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

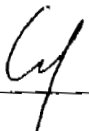
ORDERED that the part of defendant's motion for summary judgment on defendant's fourth counterclaim for breach of contract is granted; and it is further

ORDERED that the issue of the reasonableness of the attorney's fees and amount to be awarded is referred to a Special referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee.

Dated: 5/29/08



WALTER B. TOLUB, J.S.C.

FILED
JUN 12 2008
COUNTY CLERKS OFFICE
NEW YORK