

Ateam Mgt. & Consulting, Inc. v Monteleone & Monteleone
2008 NY Slip Op 31954(U)
July 8, 2008
Supreme Court, New York County
Docket Number: 0112557/2007
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. DORIS LING-COHAN
Justice

PART 36

A TEAM MANAGEMENT & CONSULTING, INC.

INDEX NO. 112557/07

MOTION DATE _____

MONTELEONE & MONTELEONE,
a partnership - ANTHONY J. MONTELEONE

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion to/for Dismiss

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

PAPERS NUMBERED

1, 2

Answering Affidavits — Exhibits _____

3

Replying Affidavits _____

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion to dismiss is denied
in accordance with the attached memorandum
decision.

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

FILED
JUL 11 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/8/08

HON. DORIS LING-COHAN
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 36

-----X

ATEAM MANAGEMENT AND CONSULTING, INC,
Plaintiff,

-against-

MONTELEONE AND MONTELEONE, a partnership,
and ANTHONY J. MONTELEONE,
Defendants.

-----X

DORIS LING-COHAN, J. :

Defendants move to dismiss the complaint.

The complaint alleges the following: in 2004, plaintiff loaned \$200,000 to non-parties Ann and Theodore D'Agostino. Defendants, attorneys, had originally been retained by Ann D'Agostino. Defendants were the only attorneys in this transaction. The D'Agostinos gave plaintiff a promissory note ("Note") providing that "this Note shall be secured by a mortgage to be recorded on the premises" owned by Theodore D'Agostino. Defendants drafted this Note. The mortgage was executed on November 4, 2004, and was witnessed by defendant Anthony J. Monteleone. There was a delay in recording the mortgage. Plaintiff eventually directed defendants to record the mortgage "as per our original discussion."

In August 2005, Theodore D'Agostino mortgaged his premises to the Bankers Trust Company (Bankers) to secure a larger loan than plaintiff's. Bankers, with no knowledge of the mortgage at bar, recorded its mortgage in October 2005, there being no prior mortgage recorded by defendants. Defendants finally recorded plaintiff's mortgage on April 2, 2006.

Theodore D'Agostino defaulted on Bankers' mortgage and in June 2006, Bankers instituted a foreclosure proceeding. On December 4, 2006, Supreme Court, Westchester County issued its judgment of foreclosure. The premises was sold without a surplus to be applied to

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plaintiff's mortgage. Borrower Anne D'Agostino repaid plaintiff \$95,000. Plaintiff has not otherwise been able to recoup any of the other money loaned and has lost \$105,000, plus interest, as a result of defendants' alleged negligence.

Plaintiff brings this action against defendants for their alleged negligence and/or malpractice in failing to record the subject mortgage in a timely manner.

Defendants move for dismissal of the complaint based upon documentary evidence and failure to state a cause of action. They argue that plaintiff lacks standing to bring this action because at no time did they represent plaintiff in its legal capacity. Defendants claim to have legally represented the D'Agostinos and not plaintiff in the aforesaid transaction. They admit that they advised plaintiff to pay a mortgage tax before the mortgage could be recorded, but this was in their capacity as the D'Agostinos' counsel.

In opposition, plaintiff concedes that defendants were retained by the D'Agostinos. However, plaintiff states that it relied on defendants' promise to record the mortgage. Moreover, plaintiff claims that defendants are liable for not warning plaintiff to retain separate counsel and not disclosing the pitfalls of multiple representations.

A legal malpractice plaintiff must establish: (1) the existence of an attorney-client relationship; (2) negligence on the part of the attorney or some other conduct in breach of that relationship; (3) that the attorney's conduct was the proximate cause of the injury to the plaintiff; and (4) that plaintiff suffered actual and ascertainable damages. See Carmel v Lunney, 70 NY2d 169 (1987). Absent an attorney-client relationship, a cause of action for legal malpractice cannot be stated. Baystone Equities, Inc v Handel-Harbour, 27 AD3d 231 (1st Dept 2006). Here, it is clear that plaintiff was not defendants' legal client and a claim for malpractice cannot be brought

against defendants. Thus, any claim for legal malpractice is dismissed.

However, a claim for negligent misrepresentation could be brought against defendants. To impose liability on an attorney, there must be a showing that there was either actual privity of contract between the parties or a relationship so close as to approach privity. See Prudential Insurance Company of America v Dewey, Ballentine, Bushby, Palmer & Wood, 80 NY2d 377 (1992). In Prudential, it was decided that an attorney may be held liable to a third party where the elements of negligent misrepresentation exist. To establish such a claim, a party must allege (1) an awareness by the maker of the statement that it is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance. Id. at 384.

In examining the papers submitted on this motion, none of the documents provided by defendants conclusively establishes a defense as a matter of law. Defendants submit a copy of a fax to plaintiff covering a signed copy of the mortgage, and a copy of a letter from Anthony Monteleone to plaintiff stating that "if you wish to have the Mortgage recorded please advise me in writing." Plaintiff wrote across the letter, "Yes please record as per our original discussion." The documents do not mention the payment of a mortgage tax.

In determining whether the specific elements of negligent misrepresentation are present, the submitted papers show that defendants had communicated with plaintiff about recording the mortgage and that plaintiff had relied upon defendants' commitment to record. Defendants were aware that their services would be used for a specific purpose. It seems logical that they evinced some understanding that plaintiff would rely on the promise. The assertion of the need to pay a

mortgage tax is an issue of fact that does not have to be considered on a motion to dismiss.

Plaintiff has stated a cause of action for negligent misrepresentation pursuant to the elements provided in Prudential.

It is noted that in its opposition papers, plaintiff also asserts that defendants violated Disciplinary Rule 5-105, which requires an attorney to give ample warning and get unequivocal authorization when he represents adverse parties. Thus, a lawyer may not involve himself in representing differing interests except if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved. The general rule, however, is that disciplinary rules do not, in and of themselves, give rise to a cause of action that would not otherwise exist at law. See Shapiro v McNeil, 92 NY 2d 91,97 (1998). Moreover, the complaint does not refer to this violation and the matter was first introduced in the opposing papers.

Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint is granted *only to the extent that* any claim for legal malpractice is hereby dismissed; and it is further

ORDERED that defendants shall serve an answer within 30 days of service of a copy of this order with notice of entry; it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendants, with notice of entry.

DATED: July 9, 2008



Hon. Doris Ling-Cohan, J.S.C.

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