

3 Cottage Place LLC v Cohen, Tauber, Spievack & Wagner, LLP

2008 NY Slip Op 32618(U)

September 25, 2008

Supreme Court, New York County

Docket Number: 0118036/2005

Judge: Walter B. Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **WALTER B. TOLUB**

PART 15

Justice

Index Number : 118036/2005
3 COTTAGE PLACE
vs
COHEN, TAUBER, SPIEVACK
Sequence Number : 003
REARGUMENT/RECONSIDERATION

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

motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

**IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION
IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION**

FILED

SEP 30 2008

COUNTY CLERKS OFFICE
NEW YORK

Dated: 9/25/08

WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15**

-----X
3 COTTAGE PLACE LLC,

Index No.: 118036/05

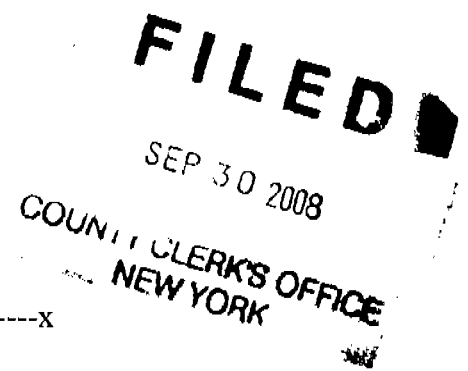
Plaintiff,

-against-

COHEN, TAUBER, SPIEVACK & WAGNER, LLP,

Defendant.

-----X
Tolub, J.:



This is an action for legal malpractice by plaintiff 3 Cottage Place LLC against its prior attorneys, defendant Cohen, Tauber, Spievack & Wagner, LLP, for damages associated with defendant's failure to timely commence an action on behalf of plaintiff against plaintiff's property damage insurance carrier within the contractual two year period.

Defendant moves, (1) pursuant to CPLR 2221 (d), for leave to reargue the decision of dated and entered on February 28, 2008, which granted plaintiff's motion for summary judgment, and upon reargument, to deny plaintiff's motion for summary judgment, or in the alternative, deny that portion of the plaintiff's motion that sought summary judgment on the issue of damages, and (2) pursuant to CPLR 3212, for partial summary judgment dismissing the second and third causes of action asserted in the complaint.

Plaintiff cross-moves (1) pursuant to CPLR 5001, to amend the Order to provide for pre-judgment interest at the judgment

rate of nine percent per annum on the sum of \$447,198.67 from August 28, 2004 through March 7, 2008, and (2) upon the court granting the foregoing relief, for an Order directing the Judgment Clerk to compute and amend Plaintiff's Judgment dated and entered on March 7, 2008 to include pre-judgment interest at the rate of nine percent per annum on the sum of \$447,198.67 from August 28, 2004 through March 7, 2008, or in the alternative, for an Order authorizing plaintiff to submit an Amended Judgment in conformity with the foregoing relief.

BACKGROUND

Plaintiff is the owner of a building located at 3 Cottage Place, New Rochelle, New York (the premises). On or about August 10, 2001, plaintiff entered into a ten year written lease with the State of New York Division of Parole (the State) for use of the entire building. The lease term was to commence on March 2, 2002, and construction was being performed at the premises to prepare it for occupancy. On or about August 28, 2002, an unknown person or persons broke into the premises and opened a water valve in the building, causing the premises to become flooded. The resulting water damage was extensive, causing the building to experience structural damage and mold. As a result, the State was not able to physically occupy the building until December 5, 2002.

Plaintiff maintained a property damage insurance policy (the

policy) for the premises with Federal Insurance Company (Federal), for the period of October 18, 2001 through October 18, 2003. The policy stated that no legal action could be brought against Federal unless the action was brought within two years of the date on which the direct physical damage occurred.

Following the flood, Federal claimed that it was unable to resolve plaintiff's claim, citing as its reason various subsequent revisions made by plaintiff to accommodate for the development of mold. On October 1, 2003, following an investigation to determine whether and to what extent plaintiff may have failed to mitigate its developing mold problem, Federal refused to pay plaintiff's property damage claim. Plaintiff then formally retained defendant to represent plaintiff in the matter.

On or about November 29, 2004, more than two years after the flood, defendant commenced an action against Federal, in the United States District Court of the Southern District of New York (the Federal action) for breach of contract due to Federal's rejection of plaintiff's property damage claim. Thereafter, Federal rejected the complaint on the ground that defendant had failed to timely commence the action. With defendant's assistance, plaintiff ultimately settled the claim with Federal for the sum of \$80,000.00. On December 30, 2005, plaintiff commenced the instant legal malpractice action against defendant.

DISCUSSION

CPLR 2221 (d) states, in pertinent part:

"(d) A motion for leave to reargue:

* * *

2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion."

On a motion to reargue, the movant must establish that the court overlooked or misapprehended facts or law, or "misapplied any controlling principle of law," in an earlier decision. (CPLR § 2221(d)(2); Foley v. Roche, 68 AD2d 558 [1st Dep 1979]; See also 300 W. Realty Co. v. City of New York, 99 AD2d 708, 709 [1 Dept 1984]). Reargument is not meant to provide the parties with an opportunity to reargue previously decided issues or to advance new arguments. (William P. Pahl Equipment Corp. v. Kassis, 182 AD2d 22, 27 [1 Dept. 1992], citing Pro Brokerage, Inc. v. Home Insurance Co., 99 AD2d 971 [1st dept 1984], Foley v. Roche, 68 AD2d 558 [1st Dept 1979]). Motions for reargument are addressed to the sound discretion of the court (Marini v Lombardo, 17 AD3d 545, 546 [2d Dept 2005]; Carrillo v PM Realty Group, 16 AD3d 611, 611 [2d Dept 2005]). A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to present arguments different from those originally presented (Pryor v Commonwealth Land Title Insurance Company, 17 AD3d 434, 436 [2d Dept 2005]; Amato v Lord & Taylor,

Inc., 10 AD3d 374, 375 [2d Dept 2004]). New questions which were not previously advanced may not be raised on a motion to reargue (Levi v Utica First Insurance Company, 12 AD3d 256, 258 [1st Dept 2004]).

Defendant maintains that it is entitled to reargue the court's prior decision, because the court did not apply the proper standard of review when it decided plaintiff's motion for summary judgment in its favor. To this effect, at the outset of its analysis, the court, citing Leon v Martinez (84 NY2d 83, 87-88 [1994]), stated that it had viewed the complaint in the light most favorable to the plaintiff, when, in fact, a court should view the evidence in the light most favorable to the nonmoving party (see Leon v Martinez, 84 NY2d at 87-88; see also Raju v Cortlandt Town Center, 38 AD3d 874, 874 [2d Dept 2007]; Camadeo v Leeds, 290 AD2d 355, 356 [1st Dept 2002]). Defendant maintains that, as a result of this error, the court failed to address any of the evidence submitted by defendant on the issues of liability and damages in its opposition to plaintiff's motion.

While the court admits that it misstated the proper standard of review in this case, this does not constitute grounds for granting defendant's motion for reargument, as a review of the underlying record and decision indicates that the court, did, in fact, properly view the evidence put forth by defendant in opposition to plaintiff's motion, and addressed that evidence in

the light most favorable to defendant. The use of the word "plaintiff" instead of "nonmovant" was a scrivener's error, which cannot form a basis for reargument.

However, defendant is entitled to partial summary judgment dismissing plaintiff's second and third causes of action asserted in the complaint,¹ as these causes of action arise from the same facts as the legal malpractice cause of action, do not allege distinct damages, and are thus duplicative of the legal malpractice cause of action (see Kvetnaya v Tylo, 49 AD3d 608, 609 [2d Dept 2008]; Shivers v Siegel, 11 AD3d 447, 447 [2d Dept 2004]).

Plaintiff cross-moves to amend the Order to provide for pre-judgment interest at the rate of nine percent per annum on the sum of \$447,198.67 from August 28, 2004, the day plaintiff's malpractice claim accrued, through March 7, 2008, the day the judgment was dated and entered.² Although plaintiff requested pre-judgment interest in both its underlying malpractice complaint and in its notice of motion for summary judgment, the

¹The second cause of action is also for legal malpractice, based on the allegation that defendant negligently advised plaintiff to accept the \$80,000 settlement in the underlying action. The third cause of action is for breach of contract based upon defendant's negligence in the underlying dispute.

²Plaintiff's underlying property damage claim occurred on August 28, 2002. Pursuant to plaintiff's property damage policy with Federal, upon Federal's refusal to pay plaintiff's damage claim, defendant had two years in which to commence an action against Federal on plaintiff's behalf. Thus, plaintiff's malpractice claim accrued on August 28, 2004.

Order did not specifically provide for prejudgment interest. In order to rectify this oversight, plaintiff's cross motion is granted. Plaintiff is entitled to an award of prejudgment interest. "CPLR 5001 operates to permit an award of prejudgment interest from the date of the accrual of the malpractice action in actions seeking damages for attorney malpractice" (Barnett v Schwartz, 47 AD3d 197, 208 [2d Dept 2007], quoting Horstmann v Nicholas J. Grasso, P.C., 210 AD2d 671, 673 [1994]; Butler v Brown, 180 AD2d 406, 407 [1st Dept 1992]).

Accordingly, it is

ORDERED that the part of defendant Cohen Tauber Spievack & Wagner, LLP's (defendant) motion, pursuant to CPLR 2221 (d), for leave to reargue the decision of this Court dated February 21, 2008 and entered on February 28, 2008, which granted plaintiff 3 Cottage Place LLC's motion for summary judgment is denied; and it is further

ORDERED that the portion of defendant's motion, for partial summary judgment dismissing the second and third causes of action asserted in the complaint, is granted, and these causes of action are severed and dismissed as to this defendant; and it is further

ORDERED that plaintiff's cross motion, pursuant to CPLR 5001, to amend the Order to include pre-judgment interest at the rate of nine percent per annum on the sum of \$447,198.67 from August 28, 2004 through March 7, 2008 is granted; and the

Judgment Clerk is to compute and amend plaintiff's judgment accordingly.

DATED: 9/21/08

ENTER:

WY
WALTER B. TOLUB J.C.S.

FILED
SEP 30 2008
COUNTY CLERK'S OFFICE
NEW YORK