

McGuckin v Berkman

2009 NY Slip Op 30300(U)

February 5, 2009

Supreme Court, New York County

Docket Number: 104745/07

Judge: Milton A. Tingling

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

PRESENT: HON. MILTON A. TINGLING J.S.C.

PART 44

Justice
104745/07
McGuckin, Maureen
v
Berkman, Henoch
Sim 001

INDEX NO. 104745-07
MOTION DATE 4/9/09
MOTION SEQ. NO. #001
MOTION CAL. NO.

n this motion to/for

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

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NEW YORK

In this legal malpractice action, defendants move for a summary judgment to dismiss the complaint (motion sequence number 001). For the following reasons, this motion is granted.

Plaintiffs Maureen McGuckin (McGuckin) and Richard Callaghan (Callaghan) are both residents of New York County, and Low's Express, L.L.C. (Low's) is a New York State licensed corporation that is owned and controlled by McGuckin (collectively, plaintiffs). See Notice of Motion, Exhibit C (amended complaint), ¶¶ 1-3. McGuckin and Callaghan are evidently now married. See Callaghan Affidavit in Opposition, ¶ 54. Defendant Vinson Friedman, Esq. (Friedman) is an attorney admitted to practice in the State of New York, and is a member of the

Dated: 2/5/09 mat J.S.C.

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Check if appropriate: DO NOT POST REFERENCE

REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

defendant law firm of Berkman, Henoch, Peterson & Peddy, P.C. (BHPP; collectively, defendants). *See* Notice of Motion, Exhibit C (amended complaint), ¶¶ 4-5.

According to the allegations of the complaint, plaintiffs retained BHPP and Friedman on January 31, 2002, in connection with a project to convert the commercial space in a building located at 152 West 24th Street in the County, City and State of New York (the building) into residential condominium units. *Id.*, ¶ 6. Plaintiffs would then purchase the units for their own use. The retainer letter specifically stated that:

Our services shall include conferences with you, Vincent Callaghan¹ as President of Local 798, [and] architects and engineers relating to the preparation of the Offering Plan and processing of the Offering Plan to its acceptance for filing by the New York State Department of Law or obtaining the no-action letter. Specifically excluded from our services are any legal services relating to the closing of title to the individual condominium units and representation of the current owner with respect to current or future mortgages and the filing of the project with local municipal authorities, as well as certiorari services.

Id.; Exhibit C-2. Plaintiffs state that, prior to officially retaining defendants, they had met and decided to attempt to effect the condominium conversion project by obtaining a “no-action letter” from the New York State Department of Law. *Id.*; Exhibit C (complaint), ¶ 8. Plaintiffs further state that Friedman later advised them that they would have to obtain a valid certificate of occupancy for the building from the New York City Department of Buildings before they could obtain a no-action letter. *Id.*, ¶ 24. Plaintiffs claim to have expended considerable sums in renovating the building before the certificate of occupancy was eventually issued in November 2003. *Id.*, ¶ 25.

Plaintiffs allege that Friedman then prepared contracts of sale for the building’s three

¹ As will be discussed, non-party Vincent Callaghan is defendant Richard Callaghan’s brother.

newly renovated condominium units in December 2003, and that those contracts contained a clause that permitted both buyer and seller to cancel in the event that the New York State Department of Law failed to issue a no-action letter by February 27, 2004. *Id.*, ¶ 27. Plaintiffs next allege that Friedman failed to submit the application for the no-action letter until February 3, 2004, but lied to them, saying that he had submitted the application in mid January. *Id.*, ¶¶ 28, 30. Plaintiffs also allege that Friedman included in the application certain “M-10 tenant information forms” that were incompletely filled out as a result of Friedman’s failure to perform due diligence. *Id.*, ¶ 31. Finally, plaintiffs allege that the New York State Department of Law initially issued a no-action letter on March 1, 2004 (i.e., after the contractual cancellation deadline had passed), and later rescinded that no action letter *nunc pro tunc* in August 2004 on the ground that the underlying application contained false information. *Id.*, ¶¶ 30-32. As a result, plaintiffs claim that the condominium conversion project fell apart, and that they suffered considerable financial damages. *Id.*, ¶ 38. Plaintiffs specifically assert that “but for [Friedman]’s malpractice, the seller would not have been able to cancel the December, 2003 contracts.” *Id.*, ¶ 41.

The foregoing allegations fail to provide the full background of the instant dispute, which has its roots in another action pending before this court entitled *Local 798 Realty Corp. v 152 West Condominium, 152 Union Realty, Inc., Maureen McGuckin, Low’s Express, L.L.C., Richard Callaghan and Vincent Callaghan* (Index Number 602077/04, Tingling, J.) (the first action). In the first action, Local 798 Realty Corp. moved for a partial summary judgment to dismiss the defendants’ counterclaims for quantum meruit and unjust enrichment, and for a declaration that the December 2003 contracts were null and void. On July 27, 2007, this court

entered a decision that granted the requested relief, and further found (as germane to the current action): 1) that the actual owner of the building is Local 798 Realty Corp., a holding corporation formed by members of the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada (the Union); 2) that plaintiff Richard Callaghan's brother Vincent (who is not a party to the current action) was employed by the Union, but was not a member of its board of directors; 3) that Vincent Callaghan nonetheless entered into the condominium conversion project on behalf of the Union in an attempt to fraudulently convey the buildings' commercial units to plaintiffs herein; 4) that Vincent Callaghan himself filled out the above mentioned "M-10 tenant information forms," and both misrepresented thereon that he was a member of the Union's board of directors, and left out the names of the actual board of directors members who were required to sign those forms; 5) that Vincent Callaghan, as "seller," signed the contracts of sale for the three condominium units that Friedman prepared in December 2003; and 6) that Vincent Callaghan pled guilty to two felony counts of falsifying business records. See Notice of Motion, Exhibit A. The defendants appealed the court's decision. On October 21, 2008, the Appellate Division, First Department, affirmed this court's decision, and specifically found that:

Plaintiff, a realty holding corporation owned by Local 798, a labor union, established that although defendant Vincent Callaghan, its assistant secretary and a business representative for Local 798, lacked the authority to enter into any leases or contracts of sale, he participated in a scheme to defraud plaintiff of its assets by converting a commercial building it owns into a condominium and selling or leasing the units to his brother, defendant Richard Callaghan, and defendant Maureen McGuckin, Richard's live-in companion and the owner of defendants 152 Union Realty, Inc., and Low's Express, LLC. The attempted conversion never took place, it having become known that Vincent Callaghan had made numerous false representations in the "affidavit of owner" and "affidavit of tenants" included in the submission to the Attorney General for approval of a

condominium declaration. Vincent Callaghan eventually pleaded guilty to the Class E felonies of falsifying business records in the first degree and offering a false instrument for filing in the first degree. Under the circumstances, the motion court correctly concluded that all the alleged leases and contracts of sale between the parties are null and void.

The court correctly dismissed defendants' second counterclaim for quantum meruit, since plaintiff never sought, or agreed to accept, the work that defendants were performing on the property, and the services were rendered strictly to benefit defendants. The court correctly dismissed defendants' third counterclaim for unjust enrichment, since defendants failed to demonstrate either that plaintiff was enriched at their expense or that "it is against equity and good conscience" to permit plaintiff to retain the benefit of the renovation work that was undertaken in connection with an attempt to defraud it of its assets.

Local 798 Realty Corp. v 152 W. Condominium, 55 AD3d 414, 415-416 (1st Dept 2008) [internal citations omitted].

Prior to the Appellate Division's entry of its decision, however, plaintiffs had commenced this action in April 2007. Their amended complaint sets forth causes of action for: 1) legal malpractice; and 2) money damages and legal fees. *See* Notice of Motion, Exhibit C. Defendants now move for a summary judgment to dismiss the complaint in this action.

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g.* *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g.* *Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1st Dept 2003). Conclusory assertions which are unsupported by evidence

are insufficient to sustain a motion for summary judgment. *See e.g. Mason v Dupont Direct Fin. Holdings*, 302 AD2d 260 (1st Dept 2003).

“In order to sustain a claim for legal malpractice, a plaintiff must establish both that the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession which results in actual damages to a plaintiff ... and that the plaintiff would have succeeded on the merits of the underlying action ‘but for’ the attorney’s negligence [internal citations omitted].” *AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 (2007). Here, defendants argue that plaintiffs have failed to establish the existence of the elements of either negligence, proximate causation or damages. See Defendants’ Memorandum of Law, at 8-13. For the following reasons, the court agrees.

With respect to the first element, defendants argue that “[a]ccording to plaintiffs, Friedman was negligent in failing to ensure that the no-action letter was issued on or before February 27, 2004 ... and in failing to detect errors in the Form M-10,” but that “both of these claims are belied by [Callaghan’s] sworn statements.” *Id.* at 9. Regarding the former contention, defendants refer to an affidavit, dated December 8, 2005, that Callaghan submitted in the first action that states that:

I called Assistant Attorney General Kenneth Demario on Thursday, February 26, 2004. He advised me that the no-action letter had been granted and that the letter would go out the week of March 1st. ... The sending of this letter was a purely ministerial act which does not reflect accurately the date upon which the no-action letter was granted by the Attorney General’s office; accordingly, the fact that it is dated March 1, 2004 should be accorded no weight. The contractual date of February 27, 2004 in fact was met.

Id., Exhibit F, ¶ 27. Regarding the errors on the Form M-10, defendants refer to another affidavit, dated November 10, 2005, that Richard Callaghan also submitted in the first action that

states that:

There were certain errors made in the filing of the papers with the Attorney General which were immaterial and could easily have been corrected. ... [] for example, the broker-dealer M-10 registration form ... required that all officers of the Union ... sign the form. I construed this to mean that the signature of the Business Representative and the treasurer would have been sufficient for Union purposes. Instead, the signatures of the other union board members should have been submitted as well. ...

In my haste, I missed a number of technical points in the papers, partly because I relied upon Friedman, and partly because I assumed that Vincent [Callaghan] was giving his copy of the papers to the Union's attorneys, who were looking over the transaction. These errors could have been easily corrected and the no-action letter would have nonetheless been issued. Indeed, a no-action letter may still be issued upon proper submission of documents.

Id., Exhibit B, ¶¶ 49-50. Richard Callaghan responds that “the argument that the allegations in my affidavit[s] submitted in the underlying matter ... may have contradicted the allegations ... in this case should be disregarded because those arguments ... were not accepted in the other case.” *See* Callaghan Affidavit in Opposition, ¶ 57. Defendants reply that this argument reveals “plaintiffs’ propensity to submit affidavits tailored to fit whatever their current position is.” *See* Defendants’ Reply Memorandum, at 5, n 2. The court finds that none of the foregoing either disproves or proves the element of negligence.

Plaintiffs assert that Friedman failed to exercise due diligence to: 1) ensure that the no-action letter would issue before February 27, 2004; and 2) detect errors and incomplete information on the M-10 forms. Failure to exercise due diligence can certainly constitute a negligent act by an attorney. *See e.g. Katz v Paul, Hastings, Janofsky & Walker LLP*, 19 Misc 3d 1121(A) (Sup Ct, NY County 2008). Here, however, Friedman does not deny plaintiffs’ allegations, but merely points out that plaintiffs have contradicted them in other pleadings, with

the insinuation being that plaintiffs claims are unreliable. However, “‘averments merely stating conclusions, of fact or of law, are insufficient’ to ‘defeat summary judgment’.” *Banco Popular N.A. v Victory Taxi Mgmt.*, 1 NY3d 381, 383 (2004). Thus, the court cannot find that defendants have borne their burden of proving that Friedman did not commit any negligent acts. This does not end the inquiry, however.

The second element of a legal malpractice claim is proximate causation. In *Reibman v Senie* (302 AD2d 290 [1st Dept 2003]), the Appellate Division, First Department, noted that: In order to establish proximate cause, plaintiff must demonstrate that but for the attorney’s negligence, plaintiff would have prevailed in the matter in question or would not have sustained any ascertainable damages. Stated another way, plaintiff is required to prove a “‘case within a case.’” The failure to establish proximate cause mandates the dismissal of a legal malpractice action, regardless of the negligence of the attorney [internal citations omitted].

302 AD2d at 290-291. Here, defendants argue that plaintiffs cannot establish the “but for” connection between Friedman’s purported negligence and the collapse of the condominium conversion plan, because that collapse was directly and solely attributable to Vincent Callaghan’s illegal actions and plaintiffs’ own collusion. See Defendants’ Memorandum of Law, at 11-12. Defendants specifically aver that the Attorney General’s revocation of the no-action letter had the effect that no condominium ever came into being, and that there were, therefore, no condominium units to sell. *Id.* This latter argument restates the court’s reasoning as set forth in its July 27, 2007 decision in the first action. In response, plaintiffs argue that the court’s earlier decision misconceived both the facts and the law, and urge that the reasoning contained therein should not be relied on until their appeal of that decision is resolved by the Appellate Division,

First Department. *See* Callaghan Affidavit in Opposition, ¶¶ 60-62. Plaintiffs go so far as to say that “if the decision of [this court] in the [first action] is upheld on the grounds set forth therein, then we are prepared to concede that our claim for malpractice should be dismissed.” *Id.*, ¶ 3. As previously discussed, the Appellate Division, First Department, has indeed upheld the court’s July 27, 2007 decision in the first action, and found that “the attempted [condominium] conversion never took place” because “Vincent Callaghan had made numerous false representations” in connection with a “scheme to defraud” with the result that “all the alleged leases and contracts of sale between the parties [became] null and void.” *Local 798 Realty Corp. v 152 West Condominium*, 55 AD3d at 415-416. Because it has been unequivocally held that the subject condominium conversion project was undone as a result of Vincent Callaghan’s illegal actions and plaintiffs’ participation therein, plaintiffs are precluded from establishing a “but for” connection between defendants’ alleged negligence and the collapse of said project. Without proof of this connection, plaintiffs’ legal malpractice claim must fail as a matter of law. *Reibman v Senie*, 302 AD2d at 290-291. Accordingly, the court finds that the portion of defendants’ motion that seeks a summary judgment dismissing plaintiffs’ first cause of action should be granted.

Plaintiffs’ second cause of action alleges that:but for defendant’s malpractice, plaintiffs have suffered damages in an amount to be determined at trial of not less than \$250,000.00 ... for the monies and fair value of time expended by them in connection with obtaining a certificate of occupancy for the building that they would not have otherwise expended and the legal fees incurred by them in pursuing their claims for compensation and services.

See Notice of Motion, Exhibit C (amended complaint), ¶ 46. It is evident that this purported

cause of action is merely an allegation of the damages element of a legal malpractice claim, discussed *supra*. However, because the court has determined that plaintiffs' legal malpractice claim should be dismissed, it also finds that plaintiffs are not entitled to any of the relief that they seek in their cause of action for money damages resulting therefrom. Therefore, the court finds that the portion of defendants' motion that seeks a summary judgment dismissing plaintiffs' second cause of action should also be granted. Accordingly, the court finds that plaintiffs' complaint should be dismissed.

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of defendants Berkman, Henoch, Peterson & Peddy, P.C., and Vinson Friedman, Esq. is granted and the complaint is dismissed with costs and disbursements to the defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: February 5, 2009

HON. MILTON A. TENGLING
J.S.G.

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