SHORT FORM ORDER

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

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CHRISTOPHER and MARY MURPHY,

INDEX NO.:020843/05

Plaintiff,

MOTION DATE:2-9-09
SUBMIT DATE:4-20-09
SEQ. NUMBER - 001

-against-

CHRISTOPHER LIOTTA, ROSE MARIE CANTANNO and LIOTTA & CANTANNO, LLP.,

Defendants.

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The following papers have been read on this motion:

Notice of Motion, dated 1-8-09.....1
Memorandum of Law, dated 1-8-09.....2
Affirmation in Opposition, dated 4-13-09.....3
Reply Affirmation, dated 4-17-09.....4

This motion by the defendants for summary judgment dismissing the complaint is granted and the complaint is dismissed.

This case concerns a failed residential real estate transaction in which the defendant Christopher Liotta and his law firm, Liotta & Cantanno, LLP, represented the plaintiffs, the sellers of a home in Levittown, New York.

To the extent made relevant by the complaint, the transaction at issue was one in which a third party named Karen A. Johnson was to purchase the property. As alleged in

the complaint, defendant Liotta [1] was to act as both real estate broker and attorney on behalf of the plaintiffs. The plaintiffs allege that Liotta was not a licensed real estate broker. A contract was entered into in July of 2005 for Johnson to purchase the home from the Murphys for $375,000. According to the complaint, Johnson was employed by the defendants, and lacked the financial capacity to purchase the property.

The agreement specified that a closing was to take place on or before August 29, 2005. Relying on defendants' representations regarding Johnson, the plaintiffs took the house off the market on August 5. On August 11, defendants were informed that her deposit check, being held in escrow by them, had been returned for insufficient funds. However, the plaintiffs allege that they never were notified about this despite numerous contacts with the defendants regarding the status of the transaction , nor were they told that a deposit no longer secured the transaction. The Murphys moved into the new house they clearly were planning to purchase with the proceeds from the Levittown house, and began to pay rent until they could close. It was not until September 14, 2005, that defendants notified the plaintiffs that the deposit check had bounced and that there would likely be no closing. The Murphys later entered into a contract with another buyer for $350,000.

The complaint alleges losses sustained as a result of what is alleged to be a breach of the escrow agreeement, fraud, breach of fiduciary duty as both attorney and escrow agent, and professional negligence, *i.e.,* legal malpractice. The losses are alleged to be the loss of

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[1] The complaint refers only to "defendant" without specifying any particular person or entity. Given the liberal reading to be given pleadings (CPLR 3026), the Court has read "defendant" to apply to all defendants to the extent the context allows. It appears, however, that the allegation that "Defendant represented that he was a licensed real estate broker" refers to Mr. Liotta alone, given the use of the male pronoun and the fact that his partner is a woman, and that the claim againsts Ms. Cantanno is premised on a failure to supervise and a vicarious liability theory.

the deposit and the expenses of remarketing the premises, loss of favorable market conditions, loss of favorable interest rate on the new home they purchased, and monthly rent paid to occupy the second house.

In their motion for summary judgment, the defendants present the affidavit of defendant Christopher Liotta. Liotta states that after an initial contract with other purchasers did not bear fruit, plaintiffs entered into an agreement of sale with Johnson, described as a "former" employee of his firm. The dates of her employment are not given, but it appears that she had worked for some period of time before the events giving rise to this suit, had lived in "upstate New York" and had returned, looking for a home. In any event, Liotta acknowledges that Johnson "began to again work for Liotta, *albeit* for a short period of time." (Italics in original.) The purchase price was $390,000, with a down payment of $18,000 and an obligation by plaintiffs to pay $15,000 towards Johnson's closing costs.

The contract contained a mortgage contingency clause that Johnson had to obtain a conventional mortgage of no less than a 15 year term before August 22, 2005 in the amount of $312,000. The closing date was August 29,2005.

Notwithstanding the requirement of an $18,000 deposit, Johnson gave a check to defendants for $20,000 which was deposited into Liotta & Cantanno's escrow account at JPMorgan Chase Bank, N.A. on August 8, 2005. Under the contract, the escrow deposit was to paid to the sellers as liquidated damages in the event of a default by the buyer. Because it is key to this motion, the next event described by Liotta will be reproduced verbatim:

> "Following receipt and deposit of the down payment check, I was advised by Ms. Johnson that her estranged husband had frozen some of their assets and I was informed by Ms. Johnson that the down payment check might not clear. I

immediately contacted JPMorgan Chase to determine when the down payment check had cleared and when the funds would be available. I was informed by the bank that the funds were available.

In or about late August or early September 2005, it became apparent that Ms. Johnson was not longer interested in buying the Murphy's house. Ms. Johnson had left her employment and I was unable to contact her. Anticipating that Johnson would be forfeiting her down payment as per the terms of the contract, I called JPMorgan Chase and was informed for the first time that the check was returned for insufficient funds. Chase informed me that it should have returned the check to Liotta & Cantanno with advice that the check was dishonored, but that information was never received by the firm. I received a letter from JPMorgan Chase on October 20, 2005 advising me that the check was returned for insufficient funds with its regrets that I did not receive the check back or the returned item advice."

A copy of the letter referred to above is annexed to the Liotta affidavit. It states that "On 8/11/05 a check in the amount of $20,000... was returned back to your account for nsf [2] funds. You should have received this check back in the mail along with the returned item advice. We regret that you did not receive these items."

As indicated above, Liotta does not state exactly when he called the bank, when he called his clients informing them of the bounced check, and why the letter from the bank is dated October 20, 2005. Noteworthy is the absence of any acknowledgment by the bank that it had failed to mail the check and returned item advice, but only that it regretted that Liotta had not received it. Also noteworthy is the absence of any reference to bank statements that might have independently referred to the deposit.

To make out a claim in legal malpractice, the plaintiff must be able to prove 1) that

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[2] So in original.

the attorney failed to exercise that degree of care, skill and diligence commonly possessed and exercised by an ordinary member of the legal community (*i.e.*, professional negligence), 2) that such negligence was a proximate cause of actual damages sustained by the client, and 3) but for the attorney's negligence, the client would have been successful in the underlying action. *Barnett v Schwartz,* 47 AD3d 197 (2d Dept. 2007); *Cummings v Donovan,* 36 AD3d 648 (2d Dept. 2007); *Simmons v Edelstein,* 32 AD3d 464 (2d Dept. 2006); *Edwards v Hass, Greenstein, Samson Cohen & Gerstein, P.C.,* 17 AD3d 517 (2d Dept. 2005).

Summary judgment may be granted if the attorney can establish that the client cannot prove at least one of these requisite elements. *Carrasco v Pena & Kahn,* 48 AD3d 853 (2d Dept. 2008); *Briggs v Berkman,* 284 AD2d 423 (2d Dept. 2001); *Ippolito v McCormack, Damiani, Lowe & Mellon,* 265 AD2d 303 (2d Dept. 1999). It should be noted that in the *Barnett* case the Second Department reviewed recent authority on such claims, and upon such review made it clear that the finder of fact is not to apply a rigid formula to the issue of causation. Rather, the court indicated that the "but for" requirement meant that the client "need prove only that the defendant-attorney's negligence was a proximate cause of damages", as opposed to "the" cause. *Id.,* at 203-204.

Given the allegations of the complaint, the foregoing means that, at a minimum, the Murphys would have to prove that defendants did not inform them timely that the deposit was dishonored and the transaction would therefore likely not close, that they suffered actual damages as a result, and that this loss would not have occurred but for the professional negligence.

Because this is a motion for summary judgment, the well-established standards of review applicable to such motions also come into play. Generally speaking, to obtain summary judgment it is necessary that the movant establish his claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in his favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v City of New York*, 49 NY2d 557 (1980). The court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.,* 305 AD2d 385 (2d Dept. 2003); *Rizzo v Lincoln Diner Corp.,* 215 AD2d 546 (2d Dept. 1995). However, conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of a pleading or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v Harvey Hutter & Co., Inc.,* 207 A.D.2d 380 (2d Dept. 1994); *Toth v Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993).

The role of the court in deciding a motion for summary judgment is not to resolve

issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v Albank*, 307 AD2d 1024 (2d Dept. 2003).

Applying these standards to the case at bar, the Court finds that defendant attorneys have established their entitlement to judgment as a matter of law with regard to the legal malpractice claim, and with respect to the other theories advanced.

Initially, the Court finds that in his affidavit Liotta does not allege facts demonstrating that he timely notified his clients about a possible loss of the deal, irrespective of when he received actual notice that the Johnson check had been dishonored. He states that Johnson told him almost immediately that her estranged husband might be freezing assets, but there is no indication that he further questioned her about her ability to go though with the transaction in light of such problems. Nor did he notify his clients – certainly something he should have done, especially as he recites that a prior deal already had fallen through. Because he knew that they were to buy another house with the proceeds, these expressions from Johnson constituted a legitimate concern of which the plaintiffs should have been made aware. Further, and as noted above, Liotta is not specific about when he received actual notice of the dishonor, and the bank's letter does not indicate that they failed to mail the notice to the firm.

However, the defendants have demonstrated that notwithstanding the arguable negligence described above, the plaintiffs cannot demonstrate actual, ascertainable damages proximately caused by the malpractice, and that "but for" the malpractice they would have

been successful in selling the property when they wished to do so at the same or better price.

As noted, the malpractice claimed was the failure to notify plaintiffs about Johnson's apparent financial difficulty and the dishonored check, and the resultant impact on her ability to close the transaction. Even assuming that the house was off the market (disputed by defendants) and would have been placed on the market again, as the plaintiffs allege, there is no showing that they would have been able to secure another buyer if they had elected to cancel the Johnson contract, or that such a buyer, if found, would have completed the transaction for the same or a greater price within the time frame sought. The claim is simply too speculative. *See, Arkin Kaplan, LLP v Jones,* 42 AD3d 362 (1st Dept. 2007); *Pellegrino v File,* 291 AD2d 60 (1st Dept. 2002).

For the same reason, plaintiffs cannot show that they would not have had to rent the new home "but for" the malpractice – that is, had they been kept better informed, they would not have been placed in that circumstance. To the extent they chose to rent, as opposed to being forced to do so, they are claiming a form of detrimental reliance that is simply unreasonable, inasmuch as the contract had a standard and easily understood mortgage contingency clause that, if not satisfied, would have allowed Johnson to cancel the contract in any event. Contract ¶ 8. There is also no allegation that the defendants affirmatively induced the plaintiffs into renting, such that it might support a claim for fraud. *See generally, Yuko Ito v Suzuiki,* 57 AD3d 205 (1st Dept. 2008); *Dos v Scelsa & Villacara,* 200 AD2d 705 (2d Dept. 1994).

Finally, even though the bounced check constituted a default and entitled the Murphys to seek the amount of the down payment as damages (contract ¶ 23), there is no factual

allegation and that they asked the defendants to pursue this remedy and that he did not, or that he would have been successful. *Arkin Kaplan, LLP v Jones, supra.*

Accordingly, to the extent the action is premised on legal malpractice, an initial showing has been made that the plaintiffs cannot prove one or more of the requisite elements – actual damages that would not have occurred "but for" the malpractice. Further, the breach of contract claim, insofar as it is based on the defendants' breach of the sales contract or contract with the plaintiffs as their attorney, is based on the same facts . It is therefore redundant of the malpractice claim and cannot proceed as a separate basis for recovery. *See, e.g., Feldman v Jasne,* 294 AD2d 307 (1st Dept. 2002); *Pellegrino v File, supra.*

With regard to the other legal theories advanced by the plaintiffs, the Court agrees with the defendants that they have made a *prima facie* showing that they are not viable. The breach/violation of the escrow agreement falls in light of the contract rider covering the escrow agent. It recites, in pertinent part, that the escrowee shall have no liability under the agreement for acts or omissions "unless taken or suffered in bad faith or in willful disregard of this contract or involving gross negligence" or "except for gross negligence or willful misconduct." Contract ¶ ¶ 6, 45. *See, Macho Assocs. v Spring Corporation,* 128 AD2d 680 (2d Dept. 1987) [escrow agent held not liable under similar clause]. The Liotta statement, while not sufficient to exonerate him from negligence, does indicate a lack of willfulness or gross negligence, the latter of which is defined as conduct that evinces a reckless disregard for the rights of others or which smacks of intentional wrongdoing. *Gold Connection Discount Jewelers, Inc. v American District Telegraph Co., Inc.,* 212 AD2d 577 (2d Dept. 1995).

Finally, the defendants have made out their *prima facie* showing that the fraud claim is not pled with the requisite specificity (CPLR 3016[b]) and the breach of fiduciary duty is in this case duplicative of the cause of action for legal malpractice. *See, Mahler v Campagna,* 60 AD3d 1009 (2d Dept. 2009); *Adamski v Lama,* 56 AD3d 1071(3d Dept. 2008); *LaBrake v Enzien,* 167 AD2d 709 (3d Dept. 1990).

Accordingly, the burden shifts to the plaintiffs to demonstrate that issues of fact exist meriting a trial. This they have failed to do, as the affidavit in opposition is little more than a repetition of the complaint, which is inadequate on this summary judgment motion (*Fleet Credit Corp. v Harvey Hutter & Co., Inc., supra*; *Toth v Carver Street Associates, supra*), except for raising suspicions about the relationship between Johnson and defendants and further explaining their alleged losses. It should be noted that no separate set of facts or allegations are now made against Cantanno, and any separate claim against her thus has been abandoned.

As noted above, the Court does find a basis for professional negligence here against Liotta and his firm, and agrees with the plaintiffs that issues of fact exist in that regard. However, as set forth above the plaintiffs have been unable to show how that negligence was the proximate cause of their alleged losses, and that "but for" the failure to keep them informed about the progress of the Johnson transaction they would not have sustained these losses. Their attorney's affirmation is devoid of any authority beyond that referable to summary judgment motions generally, and thus has nothing to add with regard to the law affecting the plaintiffs' legal claims.

Finally, by way of resort to CPLR 3212(f), the plaintiffs ask that the motion be denied

to permit discovery to go forward, but do no offer any basis for doing so other than to explore the relationship between Johnson and the defendants. At best, however, this calls on the Court to permit the plaintiffs to look into a possible conflict of interest by their former attorneys. While this arguably might yield a finding that defendants acted contrary to the Disciplinary Rules, this factor does not support a claim of legal malpractice in the absence of ascertainable damages which would not have occurred "but for" the malpractice. As discussed above, this has not been demonstrated here. *See, Amodeo v Gellert & Quartararo, P.C.*, 26 AD3d 705 (3d Dept. 2006).

Accordingly, the motion should be granted.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: April 30, 2009

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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