

Nixon v Jackson

2009 NY Slip Op 31174(U)

May 12, 2009

Supreme Court, Nassau County

Docket Number: 1999/07

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 20 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ X

MINNIE B. NIXON,

Index No. 1999/07

Plaintiff(s),

Motion Submitted: 3/26/09

-against-

Motion Sequence: 006, 007

**LEON JACKSON, LARA M. HARMEL, ESQ.,
HARMEL, JR., ESQ., PATRICIA BURDEN, ESQ.,
et al.,**

Defendant(s).

_____ X

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....	XX
Answering Papers.....	XXXXXX
Reply.....	X
Briefs: Plaintiff's/Petitioner's.....	XX
Defendant's/Respondent's.....	XX

Motion by defendants Lara M. Harmel, Esq. and George M. Harmel, Jr., Esq. for an order pursuant to CPLR § 3212 granting summary judgment and dismissing the action against them, and pursuant to an unnoticed request dismissing the cross-claims against them, is denied in its entirety. Motion by defendant Patricia Burden Esq. for summary judgment dismissing the complaint against her is denied.

This is an action for fraud and legal malpractice brought by plaintiff Minnie B. Nixon against the named defendants. She alleges that her nephew defendant Leon Jackson, his attorney Lara M. Harmel, and Patricia Burden, an attorney hired by Harmel to represent Nixon at closing, all conspired to defraud the lender Aegis Funding in the sale of Nixon's

property, and that she too was a victim of the fraud. Nixon lost \$75,000 when her subordinate mortgage was extinguished in a foreclosure proceeding against Jackson. Nixon netted approximately \$297,000 from a purported \$500,000 purchase price on property that had a fair market value of \$375,000.

Just prior to the transaction in December of 2005, which is at issue in this proceeding, Nixon's property located at 120 Harbor Road, Port Washington, New York, was not encumbered, and was on the market for \$375,000. Nixon entered into a contract of sale with her nephew defendant Leon Jackson for \$375,000. The contract provided that Nixon would receive a \$10,000 down payment, \$290,000 at closing and take back a purchase money mortgage from Jackson for \$75,000. for the balance of the purchase price.

At the closing a contract of sale for \$500,000 was produced, Jackson took the surplus proceeds from the lender and borrowed \$75,000 from those proceeds designated for Nixon. The attorneys were paid and Interlink Mortgage, a mortgage broker associated with Jackson and Harmel, also profited. Jackson provided Nixon with a note and mortgage, which was subordinate to that of the primary lender Aegis Funding. Jackson defaulted on both loans, the property was put in foreclosure and sold, and Nixon's mortgage was extinguished. Jackson has defaulted in appearance in this proceeding. Nixon has sustained \$75,000 in damages.

In this action Nixon alleges fraud against all the defendants, plus legal malpractice against defendant Burden, who acted as her counsel at the closing, and breach of contract against Jackson.

The following represents a view of the facts in a light most favorable to plaintiff as required on defendants' motions for summary judgment (see, **Branham v. Loews Orpheum Cinemas, Inc.**, 8 N.Y.3d 931, 866 N.E.2d 448, 834 N.Y.S.2d 503 [2007]).

Plaintiff Minnie B. Nixon was 81 years old at the time she transferred the house in Port Washington to her nephew defendant Leon Jackson for a purchase price, she believed, of \$375,000. The property was on the market for \$375,000 when her nephew came to her and told her he would like to purchase the house. A contract of sale was prepared for Jackson by defendant Lara M. Harmel, Esq. Harmel denies having prepared the contract of sale for \$375,000, and points to her deposition testimony, which she claims is annexed to the "Affirmation to Clarify Statements." There is no Exhibit A attached to the court papers, and the particular pages to which she refers do not appear in the record. Moreover, Harmel fails to explain why her name appears on the contract of sale or how a rider naming other clients of hers was mistakenly attached thereto. Notably she does not state that the contract was not prepared at her direction. As noted above, this contract provided for Nixon to take a purchase money mortgage from Jackson for \$75,000.

At the closing, Harmel represented Jackson and Interlink, the mortgage broker for whom Jackson had worked from time to time and for whom Harmel regularly provided services. Harmel also arranged for defendant Patricia Burden to represent Nixon at the closing, calling her the day before and advising her it was a family transaction. In the meantime Nixon had retained attorneys, Anthony E. Core, P.C. to ensure that she was protected. Michael Halpern, Esq. of the Core firm sent two letters to Harmel by facsimile transmission, as well as regular mail and certified mail. He also made telephone calls to Harmel's office and cell phone regarding the purchase and sale of the premises on behalf of Nixon. Harmel did not return the call, or accept the certified mail. She contends she was unaware of Core or its representation of Nixon. Halpern's telephone log confirms that a call from the Core law firm (spelled Korps) by Michael Halpern regarding "Jackson from Nixon" was received by her office.

On the day of the closing, Jackson asked Nixon to come to a "meeting" and told her that she did not need her attorney present. The "meeting" was in fact the closing, with Burden appearing to represent Nixon. Burden waited for Nixon to arrive, examined the papers, and when Nixon did not appear she left for another closing, leaving behind a number where she could be reached. When Nixon arrived, she spoke with Burden on the telephone. Burden's cell phone records indicate that she did not receive any incoming calls on the date in question that lasted longer than six minutes. Thus her conversation with Nixon, and purportedly also with her daughter, providing representation and purportedly guiding Nixon through the closing, did not last longer than 6 minutes.

Nixon, whose deposition testimony indicates that she was confused at the closing and did not understand what transpired, apparently signed the documents presented to her at the closing at Burden's direction. Nixon did not understand that she signed a new contract of sale for a purchase price of \$500,000, more than the market value of the premises, and or understand the effect of her mortgage for \$75,000 being subordinated to Aegis Funding's mortgage in the amount of \$490,000. She was not provided with a closing statement or a check for the proceeds. Two days later she was provided with a check for \$290,300.97 from George Harmel as settlement agent, and delivered by Jackson together with a HUD statement indicating yet another purchase price, this time for \$530,000. The balance of the proceeds were distributed to Jackson, the attorneys, and the broker. It is noted that the downpayment check, which was supposed to have been provided to Nixon, e.g. a check for \$10,000, was redeposited in the account upon which it was drawn, and Nixon did not receive any downpayment. The broker's records, however, contain a photocopy of the check thus falsely indicating that Nixon had received a down payment (additional false down payment checks were part of the record). At deposition, Nixon testified that she did not remember what Burden told her or whether she signed any papers.

There appears to have been a fraudulent transaction in process against the lender for a loan beyond the property value, and each person at the closing furthered the fraudulent transaction. The facts suggest that Jackson never intended to pay the lenders, Aegis or Nixon

as the funds borrowed were well beyond the market value. The fraudulent scheme resulted in Nixon holding a mortgage, which could not be collected upon when the inevitable foreclosure action was instituted by the primary lender. It is noted that the property was foreclosed upon and sold, and Nixon's mortgage was extinguished.

Burden contends that she was not negligent and did not take part in the fraud. She was unaware of the \$375,000 contract and advised Nixon that she did not have to lend Jackson \$75,000. She avers that Nixon told her that she wanted to lend Jackson the money. Burden also avers that she advised Nixon that her mortgage was subordinate.

Lara Harmel contends that she did not make any misrepresentations to Nixon and that the proximate cause of her loss was the nonpayment by her nephew.

Addressing Burden's motion with regard to the malpractice claim, the elements of a cause of action for legal malpractice are that the attorney "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession" and that her breach of this duty "proximately caused plaintiff to sustain actual and ascertainable damages" (*Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 N.Y.3d 438, 442, 867 N.E.2d 385, 835 N.Y.S.2d 534 [2007]). To establish causation, plaintiff must show that she "would not have incurred any damages, but for the lawyer's negligence" (*Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer, supra*). In order to prevail defendant Burden must show that plaintiff "cannot prove at least one of the essential elements of the malpractice claim" (*Wray v. Mallilo & Grossman*, 54 A.D.3d 328, 329, 863 N.Y.S.2d 228 [2d Dept., 2008]).

Defendant Burden fails to offer the required expert affidavit, offering only "conclusory, self-serving statements with no expert or other evidence, which would tend to establish, prima facie, that [she] did not depart from the requisite standard of care" (*Estate of Nevelson v. Carro, Spanbock, Kaster & Cuiffo*, 259 A.D.2d 282, 284, 686 N.Y.S.2d 404 [1st Dept., 1999]). It cannot be said as a matter of law, that defendant had no obligation to advise Nixon with respect to the level of financing and the effect of having a subordinate mortgage, particularly with an inflated primary mortgage. Moreover, Burden did not advise Nixon that a vendor's purchase money mortgage would protect her by making her mortgage primary. "A vendor of real property has an equitable lien for the unpaid purchase price, and when the vendee gives a purchase-money mortgage the lien of such mortgage is substituted for the vendor's equitable lien. [Thus,] the rule is that a purchase-money mortgage has priority over all rights, claims, judgments, or liens of any kind arising through the mortgagor although they are prior in point of time" (*Boies v. Benham*, 127 N.Y. 620, 28 N.E. 657 [1891]; see also, *Giragosian v. Clement*, 199 A.D.2d 656, 604 N.Y.S.2d 983 [3d Dept., 1993]; 3A Warren's *Weed*, New York Real Property, Mortgages, § 8.04[2] [4th ed.]). Burden had a duty to explore Nixon's age and its effect upon her understanding of the

vicarious position she appeared willing to assume . Moreover, Burden's physical absence from the closing, with at best, just a six minute telephone consult during the closing, all but insured that she could not secure adequate background information from her eighty one year old client rather than Jackson or his attorney, or insure that any legal advice was properly understood.

With regard to causation, Burden's claim that Nixon would not have taken her advice does not alter the result, as the evidence offered, Nixon's deposition testimony, was insufficient to establish as a matter of law "that the individual plaintiff was the sole cause of [her] claimed losses" (*Estate of Nevelson v. Carro, Spanbock, Kaster & Cuiffo, supra*). At best, the evidence suffices "only to create a jury question with respect to comparative negligence" (*Estate of Nevelson v. Carro, Spanbock, Kaster & Cuiffo, supra*).

Nor has Burden shown that Jackson was the sole cause of Nixon's losses. Had Burden properly advised Nixon regarding the importance and effect of a vendor's purchase money mortgage to which she was entitled by the original contract of sale, and advocated on her behalf to secure same, Nixon would have been protected whether or not Jackson defaulted.

Under the circumstances, since Burden did not establish a prima facie right to judgment, plaintiff's "obligation to come forward with expert evidence" to rebut a prima facie case "was not triggered" (*Estate of Nevelson v. Carro, Spanbock, Kaster & Cuiffo, supra*).

Nor can Burden prevail as a matter of law on the fraud claim. Burden rests her argument on the fact that she did not make any misrepresentation to Nixon. However, it was the circumstances and the information Burden failed to provide to Nixon, which allows an inference that she was a party to the fraud perpetrated on the lender, and necessarily on her client.

A cause of action alleging fraud against a fiduciary may be premised upon a "material omission of fact" upon which the other party relies (*Apollo H.V.A.C. Corp. v. Halpern Const.*, 55 A.D.3d 855, 857, 867 N.Y.S.2d 115 [2d Dept., 2008]). Burden admits that she represented Nixon, even if Nixon is too infirm to remember. Thus, she had a fiduciary relationship with Nixon, which allows a claim of fraud based upon a material omission. She did not inquire regarding her client's awareness, or advise her client, that she had no recourse if the \$75,000 loan was not repaid.

While not directly on point, authority that addresses a fraud against creditors is instructive to the analysis necessary for the facts at hand (see, Debtor and Creditor Law § 276). The statute is generally applicable to a debtor who wishes to place assets beyond the reach of creditors, yet it is instructive in identifying the indicia of fraud. Because intent is

illusory, the courts will examine “badges of fraud” that are circumstances that “so commonly” accompany fraudulent transfers, that their presence “gives rise to an inference of intent” (*Dempster v. Overview Equities*, 4 A.D.3d 495, 498, 773 N.Y.S.2d 71 [2d Dept., 2004]). Among the identified badges of fraud are a close or family relationship among the parties, a questionable transfer not in the usual course of business, and the inadequacy of consideration. (*Dempster v. Overview Equities, supra*). Additional considerations include “the general chronology of the events and transactions under inquiry” (*Sullivan v. Kodsi*, 373 F.Supp.2d 302, [S.D.N.Y. 2005]).

The following factors, considered in a light most favorable to Nixon, raise an issue of fact as to whether Burden was a party to the fraudulent acts of Jackson and Harmel. They include the oddity of the transaction with multiple purchase prices, a contract of sale signed at closing at the inflated purchase price \$500,000, an eighty-one year old seller who netted only \$297,300.97 from the sale and for whom counsel was procured by the purchaser’s attorney, the utter lack of contact between Nixon and Burden, Nixon’s seeming confusion about the nature of the closing and the transaction, and the role Burden played in serving the purposes of the debtor by her failure to provide particular information to Nixon, as well as directing Nixon to sign documents at the closing that were thoroughly to her detriment. The chronology of events, with Nixon’s first arrangement being one that protected her, with Harmel actively avoiding direct knowledge of Nixon’s representation by the Core firm, with Jackson advising her that the closing was just a “meeting”, and with Harmel retaining Burden one day before the closing, also permit an inference that Burden was part of the conspiracy to defraud plaintiff. She has offered no evidence to dispel that inference.

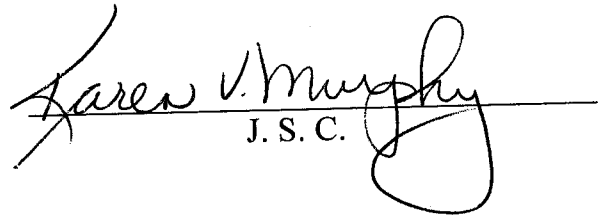
With respect to Harmel and Jackson, the evidence of fraud is compelling. Both contracts of sale show Harmel as the purchaser’s attorney. The first protected Nixon with a vendor’s purchase money mortgage for the \$75,000 she was willing to allow her nephew. It also called for a \$10,000 downpayment, which never materialized, except in a sham transaction apparently for the purpose of producing a copy of a check purporting to have been paid to Nixon. Then Harmel retained an attorney when she had multiple notices that Nixon was already represented by counsel. Fraudulent intent is evidenced by the successful attempt to keep Nixon’s personally retained counsel in the dark until after a closing. The inflated purchase price, the charade of having Jackson borrow to pay Nixon and then borrow back what he had just paid is clearly intended to deprive Nixon of her priority as a vendor’s purchase money mortgagee. The encumbrancing of the premises in an amount substantially beyond its fair market value also lends to the inference that Jackson did not intend to repay the debt to the lenders, both Aegis Funding and Minnie Nixon. Harmel and Interlink Funding and Jackson all had a prior relationship. Interlink used Harmel’s services on multiple occasions, and Jackson worked for Interlink at various times. There is also a letter from Harmel indicating that she was holding a \$110,000 downpayment in escrow, although she claims she did not create or sign this letter. She also denies drafting the first contract of sale in contradiction of the documentary evidence, as well as deposition testimony from

Mayra Romero, who testified at deposition that she prepared the contract for the Harmel firm at Lara's direction (T24).

The foregoing may be viewed as acts in furtherance of a conspiracy to defraud plaintiff, as well as Aegis Funding and/or HUD. Accordingly, the motions for summary judgment are denied.

The foregoing constitutes the Order of this Court.

Dated: May 12, 2009
Mineola, N.Y.


J. S. C.

ENTERED
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