

**Feit v Van Alstyne**

2009 NY Slip Op 32058(U)

September 11, 2009

Supreme Court, New York County

Docket Number: 08-1798

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF GREENE

JAMES G. FEIT and MARCELLA C. FEIT, his wife,

Plaintiffs,

-against-

**DECISION and ORDER**  
**RJI NO. 19-09-4062**  
**INDEX NO. 08-1798**

DAVID VAN ALSTYNE, JR., OPTION ONE  
MORTGAGE CORPORATION, ANGELO  
SCATURRO & LAND RESEARCH SOLUTIONS, INC.,

Defendants.

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Supreme Court Greene County All Purpose Term, August 25, 2009  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

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**TERESI, J.:**

Plaintiffs commenced this action, in part, claiming defendant Scaturro committed legal malpractice in representing them at a real estate closing. Previously, on August 10, 2009, this Court issued a Decision and Order which set forth the factual background of this action. Such

facts are incorporated in this Decision and Order by reference, and need not be restated.

Plaintiffs now move for summary judgment against defendant Scaturro, claiming entitlement to summary judgment of their legal malpractice claim against him. Defendant Scaturro opposes the motion, and moves for summary judgment claiming the Plaintiffs “fail[ed] to state a cause of action.” Plaintiffs oppose defendant Scaturro’s motion<sup>1</sup>. Because Plaintiffs demonstrated their entitlement to judgment as a matter of law, and no issue of fact was raised, Plaintiffs’ motion for summary judgment is granted and defendant Scaturro’s motion is denied.

“Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue.” (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]).

On a motion for summary judgment, the movant must “make a prima facie showing of entitlement to judgment as a matter of law.” (Ferluckaj v. Goldman Sachs & Co., 12 NY3d 316 [2009] quoting Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). “It... is incumbent upon the proponent to tender sufficient evidentiary proof in admissible form to warrant a judgment in its favor.” (Salas v. Town of Lake Luzerne, 265 AD2d 770 [3d Dept. 1999]; see CPLR §3212[b] [stating that a summary judgment motion “shall be supported by affidavit, [which] shall be by a person having knowledge of the facts...”]). Only if the movant establishes their right to judgment as a matter of law, will the burden then shift to the opponent of the motion to establish the

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<sup>1</sup> Defendant Option One Mortgage Corporation submitted opposition papers dated August 26, 2009. Defendant Scaturro submitted reply papers dated August 26, 2009. This motion was returnable on August 25, 2009. As such, each of these papers are untimely and no reasonable excuse has been offered to justify their consideration. Accordingly, these papers will not be considered on this motion and are herewith returned.

existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

“To sustain a cause of action for legal malpractice ... a party must show that an attorney failed to exercise the reasonable skill and knowledge commonly possessed by a member of the legal profession”. (Bixby v. Somerville, 62 AD3d 1137, 1139 [3d Dept. 2009] quoting Arnav Industries, Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, LLP, 96 NY2d 300 [2001]). It requires plaintiff to “establish the existence of an attorney-client relationship at the time of the alleged malpractice” (Tabner v. Drake, 9 AD3d 606, 609 [3d Dept.2004]); and, to demonstrate that “the attorney was negligent in handling the plaintiff's matter, such negligence proximately caused a loss and plaintiff suffered actual and ascertainable damages.” (Brodeur v. Hayes, 18 AD3d 979 [3d Dept. 2005] lv dismissed and denied 5 NY3d 871 [2005]).

It is uncontested that an attorney-client relationship existed between Plaintiffs and defendant Scaturro. The extent of defendant Scaturro's representation of Plaintiff was to act as their attorney in selling a 6.1 acre parcel of property to defendant Van Alstyne. Defendant Scaturro acted as Plaintiffs' counsel from the time of contract formation through the closing of title. At the closing, he represented Plaintiffs both as their counsel and as their attorney-in-fact, pursuant to a power of attorney. He signed the deed transferring Plaintiffs' property to defendant Van Alstyne on Plaintiffs' behalf. Plaintiffs' legal malpractice claim, as set forth in the complaint and the affidavit of plaintiff Marcella C. Feit, is based upon defendant Scaturro's representation of Plaintiffs for the transaction and at the closing; not, as implied by defendant Scaturro and opined by Plaintiffs' expert, for failing to subdivide Plaintiffs' property.

Plaintiffs further demonstrated defendant Scaturro's negligence. Plaintiffs demonstrated

such negligence by submitting the affidavit of plaintiff Marcella C. Feit, which set forth the factual underpinning of Plaintiffs' legal malpractice claim. She alleges that prior to Plaintiffs entering into their contract with defendant Van Alstyne, they obtained a survey of a 51 acre parcel of property they owned. The survey divided the property into two lots. One lot consisted of 6.1 acres with a residence, and the second lot consisted of the balance of the 51 acres. Plaintiffs' contract with defendant Van Alstyne was for the sale of the 6.1 acre lot and residence only, and required Plaintiffs to obtain subdivision approval of the two lots. Plaintiffs did not obtain subdivision approval prior to the closing or personally attend the closing. Rather they relied upon defendant Scaturro to complete the real estate transaction using a power of attorney. Defendant Scaturro completed the transaction for Plaintiffs, without the subdivision being approved, and signed the deed as their attorneys-in-fact. On this motion, defendant Scaturro does not contest any of the above allegations.

Nor does defendant Scaturro contest plaintiff Marcella C. Feit's hearsay allegation that he signed the Plaintiffs' deed without attaching a legal description of the land being sold to it. Defendant Scaturro candidly admits, in his papers, that he signed the Plaintiffs' deed without attaching a legal description of the land being conveyed. He states that he provided the deed to the title company without a legal description because it is "the title company... who determines what description is to be attached to the deed in any real estate transaction." It is undisputed that the deed from Plaintiffs to defendant Van Alstyne, signed by defendant Scaturro, transferred Plaintiffs' entire 51 acre parcel of property, not the 6.1 acres set forth in the contract. Defendant Scaturro's papers do not contest, but rather openly admit, each of the above factual claims, resolving all factual issues on this point.

In further support their negligence claim, Plaintiffs submit the expert opinion of attorney James Keefe. Attorney Keefe established his qualifications as an expert by demonstrating his experience as an attorney and his understanding of this legal subject matter. In his expert opinion, defendant Scaturro's actions in representing Plaintiffs constituted "a deviation from the accepted standard of practice of an attorney at law in dealing with the sale of real estate." His opinion is based upon a recitation of the above uncontested facts, and his experience in representing clients in real estate transactions within the same geographical area. It is his opinion that defendant Scaturro's failure to include a legal description of the property being conveyed with the deed he prepared and signed was "a complete deviation of the accepted standard of conduct". Such expert opinion, based upon uncontested facts, establishes defendant Scaturro's negligence, as a matter of law.

Plaintiffs also demonstrated proximate cause and actual/ascertainable damages. Due to defendant Scaturro's preparing and signing Plaintiffs' deed, without attaching a description of the property being conveyed, defendant Scaturro directly caused Plaintiffs to lose nearly 45 acres of unimproved real property. Moreover, while the damages have not yet been determined, they are actual and ascertainable due to the nature of the real property lost. Plaintiffs cannot demonstrate their specific damages, as of yet, because the damages defendant Scaturro is liable for are, in part, dependent upon the outcome of Plaintiffs' trial of this matter with the remaining co-defendants.

Accordingly, because Plaintiffs demonstrated the existence of an attorney-client relationship, defendant Scaturro's negligence, proximate cause and actual/ascertainable damages, they have established their right to judgment as a matter of law, thus shifting the burden on their

motion to defendant Scaturro.

As already set forth, defendant Scaturro's responding papers admit all of the acts constituting his negligence in representing Plaintiffs. He goes so far as to state that he "would not have allowed the closing to occur" had he been advised that the 6.1 acres had not been legally subdivided from the larger parcel. His reliance on his "being advised" about the subdivision of Plaintiffs' property, to create an issue of fact or to support his summary judgment motion, is misplaced and irrelevant. Defendant Scaturro's negligence was in both offering and signing, on behalf of Plaintiffs, a deed with no legal description of the property attached. Defendant Scaturro's claimed ignorance, which was self imposed by his failure to investigate, neither creates an issue of fact nor demonstrates his entitlement to judgment.

Defendant Scaturro's challenge to Plaintiffs' expert is likewise unavailing. First, Defendant Scaturro alleges, in conclusory fashion, that Plaintiffs failed to disclose Attorney Keefe as an expert during discovery. Defendant Scaturro fails to specify either the discovery demand he made or the response Plaintiffs provided. Nor does defendant Scaturro support such allegation with any documentary evidence. Such conclusory unsupported allegation fails to demonstrate the inadmissibility of Plaintiffs' expert opinion.

Similarly unconvincing are defendant Scaturro's self serving "standard in the industry" allegations. He both opposes Plaintiffs' motion, and supports his own motion, by claiming that the "standard in the industry" is that "the title company determine[s] the description to be attached to the deed." Such statement is not supported by any factual allegations, relative to the industry or the transaction at issue in this action. Nor does defendant Scaturro support such

contention with any documentary showing. “Where [an] expert's ultimate assertions are speculative or unsupported by any evidentiary foundation ... the opinion should be given no probative force and is insufficient to withstand summary judgment.” (Gray v. South Colonie Central School Dist., 64 AD3d 1125, 1128 [3d Dept. 2009] quoting Ann JJ. v. Schenectady Ass'n for Retarded Citizens, 59 AD3d 772 [3d Dept. 2009]). Defendant Scaturro’s unsubstantiated, conclusory and self serving allegations are insufficient to defeat Plaintiffs’ prima facie showing. (Jock v. Landmark Healthcare Facilities, LLC, 62 AD3d 1070 [3d Dept. 2009]).

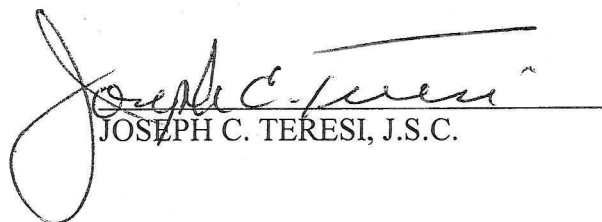
Accordingly, partial summary judgment on the issue of defendant Scaturro’s liability is granted. The extent of the damages defendant Scaturro caused Plaintiffs to suffer will be tried, with the co-defendants, at a non-jury trial scheduled to commence on December 2, 2009.

The parties’ remaining contentions have been examined and found to be lacking in merit.

This Decision and Order is being returned to the attorneys for the Plaintiffs. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: September 11, 2009  
Albany, New York

  
JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion, undated, Affidavit of Marcella Feit, dated July 31, 2009, Affirmation of Ralph Lewis, dated July 29, 2009, Affirmation of James Keefe, dated August 4, 2009, with attached Exhibits A-D.
2. Notice of Cross-Motion, dated August 21, 2009, Affirmation of Angelo Scaturro, dated August 29, 2009, with attached Exhibits A-H
3. Reply Affirmation of Ralph Lewis, dated August 24, 2009.