

Lambroza v Tworny, Latham, Shea, Kelly, Dubin & Quartararo, LLP
2009 NY Slip Op 32333(U)
October 8, 2009
Supreme Court, New York County
Docket Number: 105455/09
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

J. JANE S. SOLOMON

PART 55

Index Number : 105455/2009

LAMBROZA, ODELL

VS.

TWORNEY LATHAM SHEA KELLEY DUBIN

SEQUENCE NUMBER : # 001

DISMISS

Justice

INDEX NO.

105455-09

MOTION DATE

6/12/09

MOTION SEQ. NO.

#001

MOTION CAL. NO.

were read on this motion to/for

PAPERS NUMBERED

1-3

4-5

6

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 the annexed memorandum decision and order.

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

FILED

OCT 13 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated:

10/8/09

JANE S. SOLOMON

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X

ODELL LAMBROZA,

Plaintiff,

Index No. 105455/09

-against-

DECISION AND ORDER

TWORNY, LATHAM, SHEA, Kelly, Dubin,
& QUARTARARO, LLP,

Defendant.

-----X

SOLOMON, J.:

By complaint filed on April 17, 2009, plaintiff, Odell Lambroza, commenced this action against defendant law firm Tworney, Latham, Shea, Kelly, Dubin & Quartararo, LLP. The plaintiff's one count complaint alleges that the defendant breached its contract with plaintiff. The defendant now moves to dismiss the complaint on the ground that the breach of contract claim is, in actuality, a legal malpractice claim and is barred by the statute of limitations pursuant to CPLR 214 (6). The motion is granted for the reasons set forth below.

FACTS

Plaintiff entered into an agreement with defendant to represent and provide legal services to plaintiff in connection with plaintiff's purchase of real property located at 1075 Seven Ponds Towd Road, in Watermill, New York (the Property). The plaintiff alleges that defendant would: (1) "perform a comparison

between the survey for the Property . . . and the existing deed for the Property"; (2) "analyze the survey for any legal issues that may affect the plaintiff"; and, (3) "inform plaintiff of any discrepancies between the survey and the deed and of any legal issues presented by the survey" (Complaint, ¶3).

Plaintiff purchased the Property on May 6, 2003. In January of 2009, plaintiff entered into negotiations to sell the Property to a third party purchaser. At this time, plaintiff learned of an encroachment on the Property that defendant had not informed plaintiff of at the time of the initial purchase. As a result of this encroachment, plaintiff was forced to reduce the sale price of the Property by \$50,000 to compensate the purchaser for the expense of rectifying the encroachment.

Plaintiff claims that defendant's failure to inform him of the encroachment constitutes a breach of contract, and now seeks to recover his losses from defendant.

DISCUSSION

The statute of limitations for actions to recover damages for legal malpractice is three (3) years from the time of accrual, "regardless of whether the underlying theory is based in contract or tort" (CPLR 214 [6]). The Legislature specifically amended this statute in 1996 to counteract the effect of decisions that "abrogat[ed] and circumvent[ed]" the original legislative intent by allowing actions that were technically

malpractice actions to proceed under a six-year contract statute of limitations (Revised Assembly Memo in Support, Bill Jacket, L 1996, ch 623). The legislative history makes clear that "where the underlying complaint is one which essentially claims that there was a failure to utilize reasonable care or where acts of omission or negligence are alleged or claimed, the statute of limitations shall be three years . . . regardless of whether the theory is based in tort or in a breach of contract" (*In re R.M. Kliment & Frances Halsband, Architects*, 3 NY3d 538, 542 [2004]). Accordingly, the court will dismiss a breach of contract claim if it is duplicative of a legal malpractice claim and brought after the time allowed in CPLR 214 (6) (see, *Maiolini v. McAdams & Fallon, P.C.*, 61 AD3d 644 [2009]; (*Gelfand v. Oliver*, 29 AD3d 736 [2006])). Thus, the pertinent inquiry is whether the present claim is essentially a malpractice claim.

In its motion to dismiss, Defendant argues that the underlying claim in the complaint is a legal malpractice claim and is, therefore, barred by CPLR 214 (6). The alleged wrongdoing occurred prior to or upon the purchase of the Property on May 6, 2003, and the action was brought on April 17, 2009; well past the statute of limitations. Plaintiff counters that he properly alleged that he and defendant entered into a contract in which defendant agreed to perform a task beyond its professional obligations. Thus, plaintiff argues that he has pleaded that the

agreement goes beyond malpractice, and establishes a breach of contract.

The complaint established that defendant was tasked with comparing the survey to the existing deed for the purpose of informing Plaintiff of any discrepancies. Plaintiff argues that "the attorney for the purchaser is not tasked as part of his ordinary professional obligations with comparing the survey to the deed." (Plaintiff's Memorandum in Opposition, ¶6).

"A deed is a written instrument by which land is conveyed" (Blacks Law Dictionary 423 [7th ed 1999]). Comparison of a deed to a survey for the purpose of legal representation in a real estate transaction is within the realm of legal services. For example, according to the New York Practice Guide: Real Estate, a lawyer in pre- and post-closing duties should obtain a survey and use it to compare to a deed or title policy to ensure no discrepancies (Morris & Holtzschue, New York Practice Guide: Real Estate, vol. 1: 1-102.33 [2008]; and, vol. 2: 6-27 [2008]).

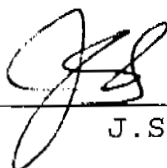
The court is not persuaded that the allegations in the complaint establish anything more than a standard agreement for legal services. Plaintiff's complaint does not allege a breach of contract. Rather, the complaint is essentially a malpractice claim that is merely "couched in breach of contract terms in order to benefit from the six-year statute of limitations" (*In re R.M. Kliment & Frances Halsband, Architects*, 3 NY3d at 543). As

[*6]
the present cause of action sounds in legal malpractice, the statute of limitations is three years. The injury occurred on or before May 6, 2003, but the complaint was filed on April 13, 2009, nearly three years after the statute of limitations expired. Accordingly, it hereby is

ORDERED that defendant's motion to dismiss is granted, and the complaint is dismissed, and the Clerk is directed to enter judgment accordingly with costs and disbursements as taxed.

Dated: October 8, 2009

ENTER:



J.S.C

JANE S. SOLOMON

FILED
OCT 13 2009
COUNTY CLERK'S OFFICE
NEW YORK