

Hanafy v Law Offs. of Fong Joe Hou, LLC

2009 NY Slip Op 32363(U)

September 29, 2009

Supreme Court, Queens County

Docket Number: 9134/09

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES
Justice

PART 17

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MOHAMED HANAFY,
Plaintiff,

Index No.: 9134/09
Motion Date: 9/23/09
Motion Cal. No.: 22

-against-

LAW OFFICES OF FONG JOE HOU, LLC,
FONG JOU HOU, ROOSEVELT ESTATE, LLC
and JIASHU XU,
Defendants.

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The following papers numbered 1 to 11 read on this motion by defendants **LAW OFFICES OF FONG JOE HOU, LLC**, (hereinafter, "Law Offices") and **FONG JOU HOU** (hereinafter, "Hou") for an order, *inter alia*, pursuant to CPLR 3211 (a) (1) and (a) (7) dismissing the complaint as against them.

	PAPERS NUMBERED
Notice of Motion-Affirmations-Exhibits.....	1-4
Memorandum of Law.....	5-6
Affirmation in Opposition-Exhibits.....	7-9
Reply Affirmation.....	10-11

Upon the foregoing papers it is ordered that this motion by defendants **LAW OFFICES OF FONG JOE HOU, LLC**, (hereinafter, "Law Offices") and **FONG JOU HOU** (hereinafter, "Hou") for an order, *inter alia*, pursuant to CPLR 3211 (a) (1) and (a) (7) dismissing the complaint as against them is granted for the following reasons:

According to the complaint, this action stems from an agreement between plaintiff and defendants **ROOSEVELT ESTATE, LLC** (hereinafter, "Roosevelt") and **JIASHU XU** ((hereinafter, "Xu") whereby plaintiff was to purchase the property located at 112-23 Roosevelt Avenue, Corona, New York. The purchase price was nine million dollars (\$9,000,000.00) and on August 12, 2008, plaintiff signed the contract and paid sellers two hundred thousand dollars (\$200,000.00) as an initial down payment. During the negotiations of the contract, Jiashu Xu represented to plaintiff that the fair market value of the property was ten million dollars (\$10,000,000.00). In November 2008, which was during the opt out period of the contract, plaintiff was informed from a possible financing bank that the property was

appraised in 2007 at a value of six million six hundred thousand dollars (\$6,600,000.00). Plaintiff also learned during the opt out period that there was a noise nuisance at the premises and the sellers, ROOSEVELT ESTATE, LLC and JIASHU XU were unable and or unwilling to remedy this condition. On January 15, 2009, which was during the opt out period, plaintiff notified sellers of plaintiff's intent to cancel the contract pursuant to the opt out clause and demanded the return of the down payment. Sellers refused to return the deposit and the instant action was commenced.

The above mentioned opt out clause of the contract reads as follows:

Buyer is hereby afforded due diligence and feasibility period up to January 15, 209 (the "Feasibility Period") within which to investigate and approve or disapprove title and to inspect, study and evaluate the Property. . . In the event that within the Feasibility Period, the [plaintiff buyer] notifies the Seller in writing (the "Termination Notice") that [plaintiff buyer] deems the Property to be unacceptable to Buyer, for any reason, and Seller is unwilling or unable to remedy any unacceptable conditions cited by [plaintiff buyer], then the Deposit shall be returned to [plaintiff buyer] with interest and thereafter each party will be relieved of any further obligation to the other hereunder."

Plaintiff's action claims defendants Law Offices and Hou committed legal malpractice, breached their fiduciary duty toward plaintiff, and made fraudulent or negligent misrepresentations of their expertise. Defendants Law Offices and Hou now seeks to dismiss the sixth, seventh, and eighth causes of action of the complaint on the grounds that the documentary evidence establishes that defendants have failed to state a cause of action and the documentary evidence support dismissal of the claim. Plaintiff opposes this motion.

CPLR 3211 (a) (1) provides that "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded on documentary evidence" In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim" (Fernandez v Cigna Property and Casualty Insurance Company, 188 AD2d 700, 702; Vanderminden v Vanderminden, 226 AD2d 1037; Bronxville Knolls, Inc. v Webster Town Center Partnership, 221 AD2d 248.)

Here, the documents submitted by the defendant on this motion, including the complaint and the Agreement, qualify as "documentary evidence" within the meaning of CPLR 3211(a)(1). Regarding the first cause of action, defendant's claim the documentary evidence show the defense that the complaint fails to state a cause of action. The sixth cause of action claims that plaintiff and Law Offices and Hou (whom were no licensed to practice law

in New York) had an attorney client relationship and defendants lawyers failed to exercise the degree of care, skill and diligence exercised by a member of the legal community in negligently failing to fully and properly draft and review the Agreement. It further claims a lack of competence and failure to advise plaintiff of the risks involved regarding the Agreement and this proximately caused plaintiffs damages of ten million dollars. To establish a cause of action for legal malpractice, a plaintiff must prove that defendant attorney failed to exercise the requisite skill, care and diligence commonly possessed by a member of the legal profession; the attorney's negligence was the proximate cause of the loss sustained; actual damages as a result of the negligence; and that but for the negligence, the plaintiff would have prevailed in the underlying action (see Levy v Greenberg, 19 AD3d 462 (2d Dept 2005.); Pistilli v Gandin, 10 AD3d 353 (2d Dept 2004.)

Here the documentary evidence regarding the legal malpractice action is sufficient to resolve plaintiff's claim. Based on the complaint, plaintiff sought to exercise the opt out clause of the Agreement, but, defendants Roosevelt and Xu refused to return the down payment. Based on the Agreement, there was a clearly articulated opt out clause that provided for a period in which plaintiff could terminate the Agreement and have his deposit returned. This evidence shows that the clause as written provides plaintiff with the necessary protections for the interests articulated in the complaint. Accordingly, defendants Law Office and Hou have shown sufficient documentary evidence to resolve plaintiff's claim in their favor.

In opposition, plaintiff has submitted an affirmation of an attorney, an affidavit of Mohamed Hanafy, and letters exchanged between Seller's attorney and defendant Hou. This evidence fails to qualify as documentary evidence and is rejected by this Court. Regarding what qualifies as "documentary evidence", it is well recognized that "[t]he word apparently aims at a paper whose content is essentially undeniable and which, assuming the verity of its contents and the validity of its execution, will itself support the ground on which the motion is based ... Neither the affidavit nor the deposition can ordinarily qualify under such a test" (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 21). It has been found that documentary evidence means judicial records, judgments, orders, contracts, deeds, wills, mortgages. Webster v. State of New York, 2003 N.Y. Misc. LEXIS 2009, 2003 WL 728780 (Court of Claims 2003). La Cara Mia Bar Lounge, Inc. v. Great Locations, Inc., 2009 NY Slip Op 50064U (N.Y. Sup. Ct. 2009.) Based upon the definition set forth above, this court finds that, the affidavit and the letters fail to constitute documentary evidence within the meaning of CPLR 3211 (a) (1) and as such, plaintiff has failed to raise an issue of fact regarding defendants' showing that all issues have been resolved in defendants' favor.

In any event, were this Court to consider this evidence, it would find the affidavit and the letters are insufficient to show any legal malpractice took place and that plaintiff's legal

needs were not protected by his attorney. In the affidavit, plaintiff refers to the attorney's status as unlicensed to practice in New York, however, such status is not relevant to the malpractice cause of action since there is no allegation of an activity that required the lawyer to be licensed in New York. Moreover, plaintiff claims to have directed defendant Hou to include a contingency clause that would enable plaintiff to terminate the contract for any reason during the period a feasibility study was to be done as well as a mortgage contingency clause. Both are in the contract and plaintiff is presumed to have read the contract prior to signing and upon signing is presumed to have agreed to the terms therein. In any event, the letters indicate that Hou sought to terminate the contract and have the down payment returned pursuant to plaintiff's request and defendant Sellers' attorney refused to do so based upon her understanding of the contract's terms. Accordingly, defendant's motion to dismiss pursuant to CPLR 3211 (a) (1) is granted.

The branch of the motion seeking to dismiss the action for failure to state a cause of action is also granted. "It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference. Jacobs v Macy's East, Inc., 262 AD2d 607. The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (*see, Stukuls v State of New York*, 42 NY2d 272; Jacobs v Macy's East Inc., *supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading. (*See, Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633.) However, the plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint. (*See, Rovello v Orofino Realty Co., Inc.*, *supra*; Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159.)

Defendants Law Offices and Hou claim that the allegations contained in the sixth, seventh, and eighth causes of action are facially defective and fail to state a cause of action for legal malpractice, breach of their fiduciary duty toward plaintiff, and fraudulent or negligent misrepresentations of their expertise. As set forth above, to establish a claim of legal malpractice, plaintiff must establish that, the attorney's negligence was the proximate cause of the loss sustained; actual damages as a result of the negligence; and that but for the negligence, the plaintiff would have prevailed in the underlying action. Here, a fair reading of the sixth cause of action, the malpractice claim, shows that the only cause of plaintiff's damages is the failure of defendants Roosevelt and Hou to return the down deposit, not any negligence by defendants Law Offices and Hou. The complaint also fails to allege actual damages as a result of the negligence. *See, Brown v Samalin & Bock, P.C.*, 168 AD2d 531, (2d Dept 1990.) Finally, there is no allegation that, but for the alleged negligence, the plaintiff would have

prevailed in the underlying action. Specifically, there is no claim that plaintiff has lost an underlying action that found Plaintiff is not entitled to the return of his down payment money. *See, Cannistra V. O'Connor, McGuinness, Conte, Doyle, Oleson & Collins*, 286 AD2d 314 (2d Dept 2001.) When viewed under the standard for this motion, it is clear that the plaintiff has not sufficiently stated a cause of action for legal malpractice and the branch of the motion seeking dismissal of this action is granted.

Regarding the breach of fiduciary duty claim in the seventh cause of action, and the negligent misrepresentation claim in the eighth cause of action, the Court finds that they are duplicative of the malpractice claim and arise from the same set of facts as that claim. *Shivers v. Siegel*, 11 A.D.3d 447 (2d Dept 2004.) *Mecca v Shang*, 258 AD2d 569 (2d Dept 1999.) Accordingly, these causes of action are dismissed.

Based on the above, the branches of the motion to dismiss the sixth, seventh, and eighth causes of action of the complaint based upon CPLR 3211 are granted and these causes of action are dismissed.

Dated: September 29, 2009

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ORIN R. KITZES, J.S.C.