

McComsey v Kera Graubard & Litzman

2009 NY Slip Op 32949(U)

December 14, 2009

Supreme Court, New York County

Docket Number: 112796/08

Judge: Nicholas V. Midey

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: How Jour A. Middlew

PART 11

Justice

Index Number : 112796/2008

MCCOMSEY, ANYA

vs.

KERA GRAUBARD & LITZMAN

SEQUENCE NUMBER : # 001

DISMISS

INDEX NO. 112796-08

MOTION DATE 5/14/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

were read on this motion to/for _____

PAPERS NUMBERED

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 attached memorandum Decision & Order

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

FILED
DEC 18 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: December 17, 2009

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 11

-----X
ANYA McCOMSEY,

Index No. 112796/08

Plaintiff,

-against-

KERA GRAUBARD & LITZMAN and
JAY H. LITZMAN, ESQ.,

Defendants.
-----X

FILED
DEC 18 2009
NEW YORK
COUNTY CLERK'S OFFICE

In this action, alleging legal malpractice defendants move to ~~dismiss~~ under CPLR 3211(a)(1) and (a)(7) based on documentary evidence and for failure to state a cause of action¹. Plaintiff opposes the motion, which is granted for the reasons below.

Background

On or about February 28, 2005, Anya McComsey ("Plaintiff") signed a two year lease ("Lease") with Robert Wallis, M.D. for premises located at 11 East 67th Street, Apt. 4/5, New York, New York ("Apartment"). (Ver. Compl. ¶7.) Dr. Wallis passed away on August 7, 2006. (Affirmation of Jacquelin Cabrera Ex. F. ¶3). According to the Register of the City of New York, however, Dr. Wallis remains the last owner of record of the Apartment. (Id. at ¶4.) Roxanne Wehrman ("Wehrman" or "Managing Agent") and Ralph Perlberger ("Perlberger") (collectively referred to as "Landlord") are the Executors of Dr. Wallis's estate and have been granted temporary letters testamentary by a Surrogate Court in New York County. (Id. at ¶5.)

The Lease commenced March 1, 2005 and ended February 28, 2007. (Ver. Compl. ¶7.) There are two provisions in the Lease central to this case. The first relevant provision is Paragraph 3 to the Rider of the Lease, which states:

¹The complaint also alleges a violation of New York Judiciary Law § 487. As indicated later in the decision, at oral argument plaintiff agreed to withdraw this claim.

“Assuming rent is paid in a timely fashion, and terms of the Lease are satisfied, Tenant shall have an option to renew the Lease for a term consisting of an additional year to commence March 2, 2007, upon written notice to be received by Landlord not later than ninety (90) days before termination of the second year.”

(Ver. Compl. ¶8.) According to Defendants, Paragraph 3 required that the Landlord receive the notice no later than November 30, 2006. (Affirmation of Jacqueline Cabrera ¶24.) Plaintiff does not dispute this fact.

The second relevant provision is paragraph 25(B) of the Lease itself, which states:

“‘Notice to Owner’ If you wish to give notice to Owner, you must write it and deliver it or send it by registered or certified mail to Owner at the address noted on page 1 of this Lease or at another address of which Owner or Agent has given You written notice.”

(Cabrera Affirmation Ex. C.)

On or about November 30, 2006, Plaintiff composed a written notice indicating that she intended to exercise the option to renew. (Ver. Compl. ¶16.) Plaintiff addressed this letter to the Managing Agent and left the letter “on the console downstairs in the Landlord’s building.” (Id.) Plaintiff alleges that she gave notice in this manner because “from the inception of her tenancy, the managing agent asked Plaintiff to leave all rent payments and correspondence to her and the Landlord on the console.” (Id.) On or about December 6, 2006, the Landlord wrote Plaintiff a reply letter advising that Plaintiff’s exercise of the option to renew had been rejected because, *inter alia*, Plaintiff failed to provide notification prior to November 30, 2006, as required by Paragraph 3 of the rider to the Lease. (Cabrera Affirmation Ex. E.)

On or about January 22, 2007, Plaintiff retained Kera Graubard & Litzman (“KGL”) to represent her in an action against the Landlord for property damage to the Apartment. (Affidavit of Jay H. Litzman ¶4.) KGL and Jay H. Litzman, Esq. (“Litzman”), an attorney at KGL (collectively referred to as “Defendants”), are the Defendants in the instant case. On or about

March 9, 2007, Plaintiff commenced an action against the Landlord in Supreme Court, New York County. (Cabrera Affirmation Ex. F.) This action alleged breach of the warranty of habitability, constructive eviction, and property damages sustained to the Apartment and Plaintiff's personal property. (Cabrera Affirmation Ex. F ¶¶9-51; Litzman Affidavit ¶4.) The Landlord filed an Answer with Counterclaims. (Cabrera Affirmation Ex. G.) Plaintiff filed a reply. (Cabrera Affirmation Ex. H.)

Also on or about March 7, 2007, the Landlord filed a Notice of Petition in the Housing Part of the Civil Court of the City of New York ("Housing Part"), seeking possession of the Apartment based upon Plaintiff's holding over the Apartment despite the expiration of the lease (the "underlying action"). (Cabrera Affirmation Ex. I.) On or about April 23, 2007, Plaintiff filed an answer in the underlying action. (Cabrera Affirmation Ex. I.) During this time, KGL and Litzman in particular undertook efforts to negotiate a settlement between the Landlord and Plaintiff. (Litzman Affidavit ¶8.) Litzman obtained an offer of settlement that would have allowed Plaintiff to remain in the Apartment until December 31, 2007. (Id.) The Landlord was not requesting legal fees as part of this settlement offer, and Plaintiff would have been able to continue her action in the New York County Supreme Court against the Landlord. (Id.) Plaintiff rejected this settlement offer. (Id.)

On or about May 24, 2007, the Landlord filed a motion for summary judgment in the underlying action, requesting: a final judgment awarding the Landlord possession of the Apartment; a warrant to remove plaintiff from the premises; dismissal of Plaintiff's affirmative defenses and counterclaims; a money judgment in the amount of \$8,000; and attorney's fees. (Cabrera Affirmation Ex. K.) Attached to the summary judgment motion was an affidavit by the Managing Agent of the Apartment, Roxanne Wehrman. (Id.) In the affidavit, the Managing

Agent stated that she did not receive Plaintiff's notice of renewal until December 4, 2006, several days after the deadline per the lease of November 30, 2006. (Id. at 4.) Additionally, the Managing Agent's affidavit stated that Plaintiff "usually delivered important correspondence including her rent checks and complaints about the apartment, by slipping them under the management's office door," but Plaintiff did not deliver her notice of renewal in this manner, nor did Plaintiff deliver her notice via registered or certified mail as the lease required. (Id. at 8.) The Managing Agent's affidavit also stated that, even if the notice of renewal was timely delivered in an acceptable manner, Plaintiff was in breach of the lease by failing to maintain renter's insurance as required by Paragraph 9 of the rider to the Lease. (Id. at 4, 8.)

According to Defendants, Plaintiff was in Europe visiting family at the time the Landlord filed the summary judgment motion. (Litzman Affidavit ¶6; Affidavit of Martin S. Kera ¶5.) In order to obtain an affidavit from Plaintiff that could have been used to oppose the Landlord's summary judgment motion, Plaintiff would have had to notarize her signature at the nearest American Consulate in Europe and then use a courier to deliver the affidavit to KGL. (Kera Affidavit ¶5.) To obtain more time to accomplish this lengthy process, KGL requested an adjournment in the Housing Part. (Id.) The Housing Part denied the request. (Id.)

Meanwhile, KGL made multiple attempts to contact Plaintiff via email and phone to advise her that an affidavit was needed to oppose the summary judgment motion. (Litzman Affidavit ¶6; Kera Affidavit ¶5.) Plaintiff did not respond in time to allow KGL to procure an affidavit, even though Plaintiff had assured KGL that she would be carrying with her at all times a mobile device with working email capacity. (Litzman Affidavit ¶6; Kera Affidavit ¶5.)

Plaintiff does not submit an affidavit in opposition to the motion. However, the Verified Complaint in the instant action presents a different set of facts. Plaintiff states that she "stayed

in touch” with Litzman and advised him that she was able to return to New York City on three days’ notice if she was needed. (Ver. Compl. at ¶¶14, 15.) The complaint further alleges that Plaintiff never advised that her affidavit was needed to oppose the Landlord’s summary judgment motion and was not even informed about the existence of the motion until three days after the motion’s return date. (Id.) It is also alleged that Litzman “misrepresented” to the Housing Part that Plaintiff was unavailable to sign an affidavit. (Id. at ¶4.)

In any event, to oppose the Landlord’s summary judgment motion, KGL submitted an affirmation by Martin S. Kera (“Kera”), an attorney at KGL, in lieu of an affidavit by Plaintiff, (Kera Affidavit ¶5.) Attached to Kera’s affirmation as an exhibit was an email sent by Plaintiff to KGL in support of an affirmation in opposition to the summary judgment motion. (Id.) The email sent by Plaintiff to KGL stated that Plaintiff “left a request to renew the lease on November 30th, 2006. The request was left on the console downstairs, which was the customary place designated by Miss Wehrman [the Managing Agent] for leaving al [sic] written communications.” (Cabrera Affirmation Ex. L 6.)

By decision and order dated July 5, 2007, Housing Part Judge Gary F. Marton granted the Landlord’s summary judgment motion in the underlying action and issued a final judgment of possession and a warrant of execution. (Cabrera Affirmation Ex. M.) Judge Marton did not examine the merits of Plaintiff’s affirmative defense that she timely exercised her option to renew the lease was undercut because “only counsel’s affirmation,” which was not “probative,” was offered to support this defense. (Id at 3.) KGL filed a motion to renew and/or reargue, which was denied. (Litzman Affidavit ¶8.)

On September 6, 2007, attorneys for the Landlord and KGL entered into a “so ordered” stipulation agreement (“September 6 Stipulation”), whereby the parties agreed to an entry of a

\$17,000 money judgment in favor of the Landlord as a settlement of legal fees. (Cabrera Affirmation Ex. O.) The September 6 Stipulation was without prejudice as to: Plaintiff's right to appeal Judge Marton's ruling; Plaintiff's right to appeal Judge Marton's finding that Plaintiff was liable for the Landlord's attorney's fees; and the Landlord's rights to seek full legal fees, which were estimated to be approximately \$19,000. (Id.) In Plaintiff's Verified Complaint in the instant action, Plaintiff claims that Litzman entered into the September 6 Stipulation without Plaintiff's knowledge or consent. (Ver. Compl. ¶¶12, 25.)

Judge Marton's decision of July 5, 2007, while ruling against Plaintiff, nonetheless preserved Plaintiff's right to seek relief under the Real Properties Action and Proceeding Law §753. (Cabrera Affirmation Ex. N.) Relief under § 753 stays the warrant for eviction for up to six months if the tenant can attest that he or she cannot obtain equivalent premises in the neighborhood, or otherwise be subject to hardship if evicted. (Cabrera Affirmation ¶44, n.3.) On or about September of 2007, KGL moved the Housing Part for a § 753 order. (Id. at ¶46.) On September 21, 2007, Judge Marton granted Plaintiff's motion on the condition that Plaintiff pay the \$17,000 money judgment to the Landlord by September 30, 2007. (Cabrera Affirmation Ex. P.) Judge Marton also stayed the warrant of execution until December 31, 2007. (Id.) On September 26, 2007 KGL filed a Notice of Appeal of Judge Marton's September 21, 2007 decision to the Appellate Division, First Department in order to preserve Plaintiff's rights. (Cabrera Affirmation Ex. Q.)

Ongoing settlement discussions between the parties culminated in the execution of a "Stipulation of Settlement" dated November 12, 2007 ("November 12 Stipulation"). (Litzman Affidavit ¶9.) Under the November 12 Stipulation, the Landlord agreed to stay the execution of the warrant of eviction through December 31, 2007. (Cabrera Affirmation Ex. R ¶4.) In

exchange, Plaintiff agreed to pay \$36,000 both in satisfaction of the \$17,000 money judgment agreed upon in the September 6 Stipulation, as well as for all use and occupancy of the Apartment through December 31, 2007. (Id. at ¶8.) Additionally, Plaintiff agreed to sign a confession of judgment in the amount of \$17,000 to be held in escrow by the Landlord's attorneys. (Id.) On the day of November 12, 2007, Plaintiff was present at KGL's offices and read over the November 12 Stipulation personally before signing it. (Litzman Affidavit ¶9.)

On or about December 14, 2007, Plaintiff retained new counsel Zubi Rosner LLP ("Zubi Rosner") to replace KGL in the Housing Part proceeding. (Cabrera Affirmation Ex. S.) Plaintiff then filed an Order to Show Cause seeking to: stay the warrant of eviction; extend the stay of the warrant of execution in the November 12 Stipulation from December 31, 2007 through January 16, 2008; stay the enforcement of the \$17,000 confession of judgment through January 16, 2008; and replace the vacancy date of December 31, 2007 agreed upon under the November 12 Stipulation with a new vacancy date of January 16, 2008. (Cabrera Affirmation Ex. T.) By order dated December 19, 2007, Judge Marton denied Plaintiff's motion. (Cabrera Affirmation Ex. V.)

Plaintiff filed this action on August 11, 2008 against KGL and Litzman, alleging legal malpractice and violations of Judiciary Law § 487. (Ver. Compl. ¶¶17-25.). In the first cause of action, Plaintiff alleges that Defendants engaged in legal malpractice by: failing to submit an affidavit from Plaintiff in opposition to the Landlord's May 24, 2006 summary judgment motion in the underlying action; failing to inform the Housing Part that Plaintiff was out of the country and request an adjournment in the underlying action; and submitting an e-mail from Plaintiff as an exhibit attached to an affirmation by Plaintiff's counsel in opposition to the Landlord's May 24, 2006 summary judgment motion (Id. at ¶19.) It is further alleged that if it was not for these

acts and omissions, Plaintiff would not have lost her motion for summary judgment and would not have suffered eviction and a subsequent award of counsel fees against her in the amount of \$17,000 (Id. at ¶ 20). In the second cause of action, Plaintiff alleges Defendants violated Judiciary Law § 487 by entering into, without Plaintiff's knowledge or consent, September 6 Stipulation that obligated Plaintiff to pay \$17,000 to the Landlord for their legal fees, and seeks trebled damages. (Id. at ¶¶12, 25.)

On January 7, 2009, Defendants moved to dismiss based on documentary evidence and for failure to state a claim under CPLR 3211(a)(1) and (a)(7). Defendants deny that they were negligent or that any negligence on their part was a proximate cause of any harm suffered by Plaintiff. Defendants argue that Plaintiff's eviction and damages awarded against her were instead the sole result of Plaintiff's own conduct, specifically her failure to deliver a notice of renewal within the ninety day period prior to the expiration of the Lease. Defendants also contend that, because of Plaintiff's failure to comply with the lease, the lack of an opposing affidavit by Plaintiff in the underlying action was irrelevant to the outcome of proceeding. Defendants also argue that Plaintiff was fully informed and consented to the November 12 Stipulation, a provision of which called for Plaintiff to satisfy the \$17,000 money judgment originally agreed upon in the September 6 Stipulation.

Plaintiff opposes Defendants' motion but notably fails to submit an affidavit from Plaintiff and instead relies on counsel's affirmation. In this affirmation, Plaintiff's attorney points out that, in appeal of Judge Marton's September 21, 2007 decision authored by Defendants, Defendants themselves wrote that "[Plaintiff] timely complied with the renewal provision of her lease because she delivered notice to the landlord 90 days prior to the termination of her lease and by the use of a method established [by the landlord]." (Affirmation

of Plaintiff's Attorney Ex. E ¶31.) Plaintiff argues that this statement undercuts Defendants' argument that Plaintiff is solely responsible for her eviction and the subsequent damages awarded against her. Plaintiff also argues that Defendants failed to submit any evidence showing that Defendants advised Plaintiff that an affidavit was needed to oppose the Landlord's summary judgment in the underlying action. Finally, Plaintiff contends that Defendants entered into the September 6 Stipulation without Plaintiff's knowledge or consent, and that if the September 6 Stipulation had never been entered into, "[P]laintiff would not have been placed in the situation in which she agreed to enter into the November 12, 2007 Settlement Agreement wherein she agreed to pay the \$17,000.00."

In reply, Defendants note that Plaintiff does not raise object to the dismissal of Judiciary Law § 487 claim. Defendants also assert that Plaintiff fails to submit any documentary evidence supporting her claim that she delivered timely notification pursuant to the terms of the Lease, and that Plaintiff does dispute that was fully aware of, consented to, and involved in the creation of, the November 12 Stipulation.

At oral argument Plaintiff agreed to withdraw that part of the first cause of action for legal malpractice related to the \$17,000 in counsel fees that she paid pursuant to the November 12, 2007 Settlement Agreement and her second cause of action for relief under Judiciary Law § 487.

Discussion

On a motion pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the complaint must be liberally construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true. Guggenheim v. Ginzburg, 43 NY2d 268 (1977); Morone v. Morone, 50 NY2d 481 (1980). However, when extrinsic evidence is considered on a motion to

dismiss “the allegations are not deemed true” and “[t]he motion should be granted when the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted.” Biondi v. Beekman Hill House Apartment Corp. 257 AD2d 76, 81 (1st Dept. 1999), affd 94 NY2d 659 (2000). Likewise, under 3211(a)(1), “[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference” Morgenthau & Latham v. Bank of New York Company, Inc., 305 AD2d 74, 78 (1st Dept 2003) (quoting Biondi, 257 AD2d at 81). When the court considers extrinsic evidence in a 3211 motion, the standard of review is “whether the proponent of the pleading *has* a cause of action, *not* whether he has *stated* one.” Biondi, 257 AD2d at 81 (quoting Guggenheimer, 43 NY2d at 275) (emphasis added).

Legal Malpractice

To successfully state a legal malpractice claim, it must be alleged that “attorneys were negligent, that their negligence was the proximate cause of the plaintiff's damages, and that the plaintiff suffered actual damages as a direct result of the attorneys' actions.” Plentino Realty Ltd. v. Gitomer, 216 AD2d 87, 88-89 (1st Dept), lv denied, 87 NY2d 805 (1995). Additionally, Plaintiff must plead that “‘but for’ the attorney's negligence the plaintiff would have prevailed in the underlying case.” Id. Plaintiff alleges that Defendants were negligent: (1) by failing to submit an affidavit from Plaintiff in opposition to the Landlord’s motion for summary judgment;

²Plaintiff argues that the affidavits submitted by Defendants are not properly considered in a motion to dismiss based on documentary evidence. However, this argument does not take into account that Defendants are also moving to dismiss under 3211(a)(7), and that for 3211(a)(7) motions, the Court considers not only documentary evidence, but also affidavits. See Biondi, 257 AD2d at 80-81.

(2) by failing to inform the Housing Part that Plaintiff was out of the country and request an adjournment; and (3) by opposing the Landlord's summary judgment motion with an attorney's affirmation containing email from Plaintiff attached as exhibit, rather than opposing the Landlord's motion with an affidavit from Plaintiff. (Ver. Compl. ¶19.) Plaintiff additionally alleges that had it not been for these alleged negligent acts and omissions, Plaintiff would have prevailed in the underlying action. (Id. at ¶20-23.) Plaintiff alleges all the requisite elements of a legal malpractice claim, but the dispositive inquiry on this motion is whether Plaintiff *has* a legal malpractice claim. Biondi, 257 AD2d at 81

The terms of the Lease between Plaintiff and Landlord are clear and unambiguous. Paragraph 25(B) of the Lease states "if You wish to give a notice to Owner, you must write it and deliver it or send it by registered or certified mail to Owner." Paragraph 3 of the Rider to the Lease reads that the option to renew the Lease must be "received by Landlord not later than ninety (90) days before termination of the second year." Paragraph 2 of the Lease sets the termination of the second year at February 28, 2007. Taken together, these provisions unmistakably require that the Landlord had to receive written notice of Plaintiff's option to renew via registered or certified mail prior to December 1, 2006. In the underlying action, the Landlord asserted, and Plaintiff did not dispute, that Plaintiff failed to comply with these terms. However, Plaintiff argued that since you paid rent by leaving it on the console of the apartment building and the Landlord waived the requirement that written notice be sent.

Plaintiff now argues that had her affidavit been submitted in support of her position, it would have been sufficient to at least raise a triable issue of fact as to whether, through a course of conduct, it became acceptable for her to deliver her rent checks and other important correspondences by dropping them off on the downstairs console in her building, and that 'but

for' Defendants' failure to submit her affidavit, Plaintiff would have prevailed in the underlying action. This argument is unavailing. First, Paragraph 27 of the Lease is a 'no waiver' provision, which explicitly precludes any 'course of conduct' argument. Specifically, Paragraph 27 states that:

“Even if Owner accepts your rent or fails once or more often to take action against You when You have not done what You have agreed to do in this Lease, the failure of Owner to take action or Owner's acceptance of rent does not prevent Owner from taking action at a later date if You again do not do what You have agreed to do.”

(Cabrera Affirmation Ex. C.). Additionally, Paragraph 27 requires that “[o]nly a written agreement between You and Owner can waive any violation of this violation.” (Id.) Based on the non-waiver clause, even if the Landlord accepted rent on the console as alleged by Plaintiff, such conduct would not constitute a waiver of the Landlord's right to enforce other provisions of the Lease, including the provisions regarding the method of giving notice. Jepaul Garage Corp. v. Presbyterian Hospital, 61 NY2d 442 (1984).

Moreover, when a court interprets a Lease, “matters extrinsic to the agreement may not be considered” unless the Lease “on its face is reasonably susceptible of more than one interpretation.” Chimart Associates v. Paul, 66 NY2d 570, 572-73 (1986) (citations omitted). Under this rule, since the terms of the Lease are clear and unambiguous, Plaintiff's affidavit could not have been considered insofar as it conflicted with the terms of the Lease. See RM Realty Holdings Corp. v. Moore, 64 AD3d 434, 437 (1st Dcpt. 2009).

Thus, Plaintiff's allegations that she would have succeeded in the underlying action 'but for' Defendants' failure to submit her affidavit in opposition to the motion for summary judgment, are without merit. Finally, that Defendants made a good faith argument on behalf of Plaintiff in the underlying action that the Landlord should be estopped from asserting that it did

not have timely notice of renewal of the Lease based on its acceptance of rent payments left on the console, does not require a different result.

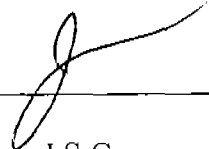
Conclusion

In view of the above, it is

ORDERED that Defendants' motion for summary judgment is granted; and it is further

ORDERED that the complaint is dismissed in its entirety and the Clerk is directed to enter judgment accordingly.

DATED: December 14, 2009



J.S.C.

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