

560 Colonial LLC v All Star Med. Mgt. LLC

2009 NY Slip Op 33148(U)

December 29, 2009

Supreme Court, New York County

Docket Number: 603211/08

Judge: Martin Shulman

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

PRESENT: **MARTIN SHULMAN**
J.S.C. Justice

PART 1

Index Number : 603211/2008

560 COLONIAL LLC

vs.

ALL STAR MEDICAL MANAGEMENT

SEQUENCE NUMBER : 002

DISMISS ACTION

INDEX NO.

603211/08

MOTION DATE

MOTION SEQ. NO.

002

MOTION CAL. NO.

this motion to/for

PAPERS NUMBERED

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-D

Answering Affidavits — Exhibits A-D

Replying Affidavits

1, 2
3
4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED

JAN 07 2010

NEW YORK
COUNTY CLERK'S OFFICE

DEC 29 2009

Dated: _____

MARTIN SHULMAN

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

-----X
560 COLONIAL LLC,

Plaintiff,

Index No.: 603211/08
DECISION/ORDER

-against-

ALL STAR MEDICAL MANAGEMENT LLC,
REZA NAGHAVI and STEVEN SHAYANI,

Defendants.

-----X
STEVEN SHAYANI,

Third-Party Plaintiff,

-against-

DAVID POUR and DAVID POUR ASSOCIATES,
LLP,

Third-Party Defendants.

FILED
JAN 07 2010
NEW YORK
COUNTY CLERK'S OFFICE

-----X
HON. MARTIN SHULMAN, J.S.C.:

In this action, third-party defendants move to dismiss the third-party complaint (motion sequence number 002). For the following reasons, this motion is granted.

BACKGROUND

The court discussed the facts of the primary action herein, a commercial landlord/tenant dispute, in its earlier decision that disposed of motion sequence number 001, and will not repeat that discussion here.

In the instant third-party action, defendant/third-party plaintiff Steven Shayani ("Shayani"), a New York State licensed cardiologist, alleges that third-party defendant David Pour, Esq. ("Pour"), a New York State licensed attorney, and his law firm, David Pour Associates, LLP, improperly represented Shayani in connection with his rental of certain professional office space, while at the same time representing his landlord. See

Notice of Motion, Third-Party Summons. Pour denies representing Shayani in connection with this transaction, and presents copies of correspondence that show that he represented only 560 Colonial LLC ("560 Colonial"), the plaintiff/landlord in the primary action, with respect to the subject professional office space. See Notice of Motion, Exhibits B, C, D. Shayani presents documentary evidence of his own that demonstrates that Pour did, indeed, represent him in connection with the rental of other medical office space at other locations. See Shayani Affidavit in Opposition, Exhibits A, B, C, D.

Shayani commenced this third-party action on March 16, 2009 by serving a complaint setting forth three causes of action for breach of fiduciary duty. *Id.* Pour has not yet filed an answer to the third-party complaint, but has instead served the instant motion to dismiss.

DISCUSSION

When evaluating a defendant's motion to dismiss pursuant to CPLR 3211 (a), the test "is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained." *Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae*, 243 AD2d 168, 176 (1st Dept 1998), quoting *Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46, 48 (1st Dept 1990). To this end, the court must accept all of the facts alleged in the complaint as true, and determine whether they fit within any "cognizable legal theory." *Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 96 NY2d 300, 303 (2001). However,

where the allegations in the complaint consist only of bare legal conclusions, or of factual claims which are inherently incredible or are flatly contradicted by documentary evidence, the foregoing considerations do not apply. See, e.g., *Tectrade Int'l Ltd. v Fertilizer Dev. & Inv., B.V.*, 258 AD2d 349 (1st Dept 1999); *Caniglia v Chicago Tribune-N.Y. News Syndicate, Inc.*, 204 AD2d 233 (1st Dept 1994). Here, the court finds that Shayani's causes of action are unsustainable under the foregoing standard.

To state a claim for breach of fiduciary duty, a plaintiff must plead the existence of a fiduciary relationship, the defendant's breach thereof, and resulting damages. See, e.g., *Kurtzman v Bergstol*, 40 AD3d 588 (2d Dept 2007). Shayani's third-party complaint begins by alleging that in January of 2006, Pour advised Shayani to personally guarantee the lease between All Star Medical Management LLC ("All Star") (a corporation of which Shayani was part owner) and 560 Colonial. The complaint next alleges that Shayani executed a personal guaranty on February 10, 2006, and that Pour breached his fiduciary duty with respect to this transaction by not disclosing to Shayani that he represented 560 Colonial at that time. See Notice of Motion, Third-Party Summons, ¶¶ 11-21. The complaint also alleges that in September of 2007, after All Star had failed to pay rent for a number of months, Pour interceded with 560 Colonial on Shayani's behalf and arranged an agreement by which Shayani would pay 560 Colonial \$85,000.00 in satisfaction of the rent arrears, and 560 Colonial would terminate All Star's tenancy and lease the subject premises directly to Shayani. *Id.*, ¶¶ 23-24. The complaint next states that Shayani made this payment via checks dated September 25 and December 10, 2007, but that 560 Colonial failed to honor its part of

[* 5]

the agreement, and instead commenced this action against Shayani. *Id.*, ¶¶ 25, 29. The complaint finally alleges that Pour breached his fiduciary duty to Shayani in connection with this transaction vis-a-vis their attorney client relationship, although it also alleges that Pour “purport[ed] to act as attorney[] for” 560 Colonial. *Id.*, ¶¶ 25-26.

In his motion, Pour first raises the purely legal argument that Shayani’s claims are time-barred because Shayani failed to commence the third-party action until March 16, 2009, which date fell past the applicable three-year statute of limitations. See Memorandum of Law in Support of Motion, at 8-9. Pour specifically contends that Shayani’s claims accrued on February 10, 2006 - the day on which he executed the lease and the personal guaranty. *Id.* Shayani responds that Pour committed related breaches of his fiduciary duty in September of 2007 (i.e., Pour’s negotiation of the settlement of Shayani’s rent arrears), and argues that his claims for said breaches are timely by operation of the continuous representation doctrine. See Memorandum of Law in Opposition to Motion, at 14-19. Pour replies that the continuous representation doctrine does not apply to the facts of this case. See Reply Memorandum of Law, at 3-9. After careful consideration, the court finds that Pour’s legal arguments are incorrect.

The Appellate Division, First Department, has found that the continuous representation doctrine may apply to claims of breach of fiduciary duty as well as to claims of legal malpractice. See, e.g., *Transport Workers Union of Am. Local 100 AFL-CIO v Schwartz*, 32 AD3d 710 (1st Dept 2006). It is also a longstanding rule that “[t]he continuous representation doctrine tolls the running of the statute of limitations on a cause of action against a professional defendant only so long as the defendant

continues to represent the plaintiff 'in connection with the particular transaction which is the subject of the action and not merely during the continuation of a general professional relationship.'" *Id.* at 713, quoting *Zaref v Berk & Michaels, P.C.*, 192 AD2d 346, 348, (1st Dept 1993). Here, Shayani alleges that the doctrine should apply during the period that Pour "actively represented him in real estate matters;" i.e., between February 10, 2006, when Pour advised him to sign the personal guaranty for the 560 Colonial lease, and early 2009, when Shayani discharged Pour from all representation. See Memorandum of Law in Opposition to Motion, at 19. Pour replies that the doctrine should not apply because the two 560 Colonial transactions that are at issue herein are clearly unrelated. See Reply Memorandum of Law, at 6-9. The court disagrees. Both of those transactions touched upon the exact same subject matter - Shayani's tenancy in the premises at issue. The first transaction involved the negotiation of the lease, while the second transaction involved the renegotiation of the lease after sizeable arrears had accrued. Pour has simply not explained why these transactions are unrelated or why a putative client, such as Shayani, would not be justified in relying upon his attorney (if Pour had been "his attorney") to negotiate them during the normal course of an attorney/client relationship. Nor has Pour presented any convincing legal authority to support his contentions. Therefore, the court finds that the continuous representation doctrine might indeed operate to defeat Pour's statute of limitations defense, and rejects Pour's first dismissal argument on purely legal grounds. However, this does not end the current inquiry.

Pour next argues that Shayani has failed to state a claim for breach of fiduciary duty. See Memorandum of Law in Support of Motion, at 9-13. As previously

mentioned, the proponent of a claim for breach of fiduciary duty must plead the existence of a fiduciary relationship, the defendant's breach thereof, and resulting damages. *Kurtzman v Bergstol, supra*. Here, Pour specifically argues that Shayani's claims fail for "lack of privity" because the two never had an attorney/client relationship with respect to the subject premises. See Memorandum of Law in Support of Motion, at 9. Pour has also presented copies of the lease and ensuing correspondence that unequivocally state that he represented 560 Colonial in connection with Shayani's rental of said premises. See Notice of Motion, Exhibits A-D. Shayani responds that "it is immaterial that [Pour] may not have purported to represent Shayani in the lease and the lease guaranty underlying this litigation," because "[Pour] represented Shayani in other (real estate) matters at the same time [he] represented [560 Colonial] in the transactions at issue in this case." See Memorandum of Law in Opposition to Motion, at 12. However, Shayani cites no legal authority whatsoever to support his claim. Further, as previously mentioned, the only documentary evidence that Shayani presents regarding his claim of an attorney/client relationship with Pour clearly concerns other premises than the one at issue in this action. See Shayani Affidavit in Opposition, exhibits A-D. Because the available documentary evidence clearly disproves the existence of the fiduciary relationship between Shayani and Pour that is central to Shayani's claims, the court must find that Shayani has, indeed, failed to state a requisite element of his causes of action. Accordingly, the court finds that Pour's motion should be granted in full, and that Shayani's third-party complaint should be dismissed.


Pour raises the final argument that Shayani's allegations that he violated certain Disciplinary Rules in the Attorney's Code of Professional Conduct are insufficient to state causes of action. See Memorandum of Law in Support of Motion, at 13-14. However, the court need not reach this argument because the court has already found that Shayani has failed to adequately plead his causes of action. Accordingly, for the foregoing reasons, it is hereby

ORDERED that third-party defendants David Pour and David Pour Associates, LLP's motion pursuant to CPLR 3211 is granted and the third-party complaint is dismissed with costs and disbursements to said third-party defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: New York, New York
December 29, 2009

ENTER:



Hon. Martin Shulman, J.S.C.

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JAN 07 2010
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