

Santo Nostrand, LLC v O'Connor

2009 NY Slip Op 33260(U)

July 14, 2009

Supreme Court, New York County

Docket Number: 602415/2008

Judge: Eileen Bransten

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

PRESENT: Eileen Bransten
Justice

PART 3

Index Number : 602415/2008
SANTO NOSTRAND, LLC
VS.
COZEN O'CONNOR
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. 602415/08
MOTION DATE 4/6/09
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to/for dismiss

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

with attached

Memo

FILED
JUL 17 2009
COUNTY CLERKS OFFICE
NEW YORK

Dated: 7-14-09

Eileen Bransten
EILEEN BRANSTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check If appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART THREE

-----X

SANTO NOSTRAND, LLC

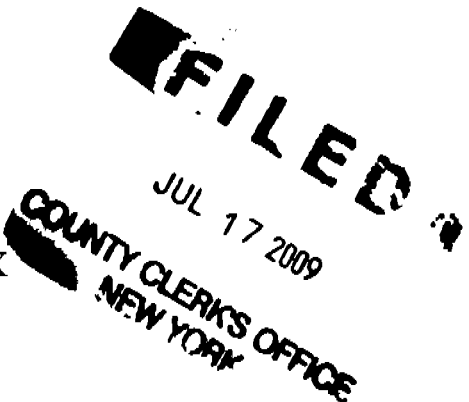
Plaintiff,

Index No.: 602415/08
Motion Date: 4/6/09
Motion Seq. No.: 001

-against-

COZEN O’CONNOR and PETER GEIS,

Defendants.



-----X

PRESENT: EILEEN BRANSTEN, J.*

Pursuant to CPLR 3211 defendants Cozen O’Connor and Peter Geis (collectively “Defendants”) move to dismiss plaintiff’s causes of action seeking recovery for negligence and breach of contract. Plaintiff Santo Nostrand LLC (“Santo”) opposes the motion.

BACKGROUND

Robert Korff (“Korff”) and Marc Steinberg (“Steinberg”), the two members of Santo, a limited liability company, approached Peter Geis (“Geis”) of Cozen O’Connor (“Cozen”) to determine whether or not they could build a Walgreens store on a particular parcel of land in Bedford-Stuyvesant Brooklyn consistent with New York’s zoning laws (Complaint at ¶ 9). Santo alleges that Walgreens’ requirements for their stores and parking lots were of particular importance (*id.* at ¶9). Geis sent a retainer letter, dated March 30, 2007, stating that

* The Court thanks summer intern Allison Riesel for her valuable assistance with preparing this Decision and Order.

the firm would “analyze the plans provided . . . by the project engineer/architect and research the relevant provisions of the New York City Zoning Resolution” in the form of an opinion letter (Retainer Agreement, Complaint Exhibit 2).

Geis issued the opinion letter on May 24, 2007 to Santo and Sovereign Bank (Opinion Letter, Complaint Exhibit 3). The letter sets forth that Cozen was retained to “render an opinion as to certain zoning matters related to the project” (*id.*). The letter goes on to state “we have reviewed the laws, records, documents and plans as are expressly listed below and have made such other investigation of the facts and circumstances as, in our judgment, is appropriate for the purposes of issuing this opinion” (*id.*). The letter advises that a drugstore is a permitted use for the zone, that the floor area and the building height are within the zone’s limits, that there is a parking waiver for sites like Santo’s which would require less than 25 spaces and details the signage requirements (*id.*) The letter’s concluding paragraph limits the opinion to the date of the letter and further states that it pertains only to Santo and Sovereign Bank (*id.*).

Thereafter, on May 25, 2007, Santo obtained an acquisition loan for the project from Sovereign Bank for \$4,005,056 (Complaint at ¶ 14). Santo also entered into a lease agreement with Walgreen Eastern Co., Inc. whereby they agreed to develop the site as detailed in the Site Plan (*id.* at ¶ 15). The lease was for a 75-year term, terminable after 25 years, beginning at the completion of construction, which was set for August 1, 2008 (*id.*).

Santo moved forward with development, obtaining a \$3,496,500 construction loan and a \$748,444 project loan from Sovereign Bank on November 29, 2007 (*id.* at ¶ 16).

Subsequently, Santo learned that on October 29, 2007 the City Council had approved changes to the zoning laws that prevented construction with the parking facilities contemplated by the Site Plan (*id.* at ¶ 17). Santo also learned that the changes had been certified by the Department of City Planning (“DCP”) since May 7, 2007, more than two weeks earlier than the date Geis issued the opinion letter (*id.* at ¶ 20). Santo petitioned both the DCP and the Board of Standards and Appeals to permit the development under discretionary action but was denied (*id.* at ¶ 23). In this action, commenced in August 2008, Santo alleges that as a direct result of Cozen and Geis’ failure to inform them of proposed zoning changes they have suffered damages in an amount exceeding \$5,000,000 as a result of Defendants’ negligence and breach of contract (*id.*).

Defendants now move to dismiss both causes of action.

ANALYSIS

Significantly, Defendants fail to specify the subsection of CPLR 3211(a) pursuant to which their motion is being made (Plaintiff’s Memorandum in Opposition, 2).

Assuming that Defendants’ motion is for failure to state a claim (CPLR 3211[a][7]), the “sole criterion is whether the pleading states a cause of action, and if from its four corners

factual allegations are discerned which taken together manifest any cause of action cognizable at law,” then “a motion for dismissal will fail” (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1997]).

To establish legal malpractice a plaintiff must allege that: 1) the attorney departed from the exercise of that degree of care, skill, and diligence commonly possessed and exercised by a member of the legal community, 2) the attorney’s departure from the standard of care was the proximate cause of the loss sustained by the plaintiff, and 3) the plaintiff incurred damages as a direct result of the attorney’s actions (*Edwards v. Hass, Greenstein, Samson, Cohen, Gerstein*, 17 AD3d 517,519 [2d Dept 2005]; *see also, Bishop v. Maurer*, 33 AD3d 497, 498 [1st Dept 2006]).

Here, Santo alleges Defendants knew of the importance it attached to being able to comply with Walgreens’ parking requirements, that they owed a duty to Santo to exercise the degree of care, skill and diligence commonly possessed and exercised by an ordinary member of the legal community (*see Logalbo v. Plishkin, Rubano & Baum*, 163 A.D. 2d 511, 513 [2d Dept 1990]), and that the departure from the standard of care was the proximate and the ‘but for’ cause of the damages it suffered (Memorandum In Opposition, 3-5). Accepting all of Santo’s allegations as true, and according every favorable inference, Santo has alleged sufficient facts to establish a cause of action (*Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]).

To the extent Defendants' motion can be construed as being based on CPLR 3211(a)(1) and seeks dismissal based on documentary evidence including the retainer and opinion letter, the motion must be denied as well. To obtain dismissal Defendants must establish that the documentary evidence that forms the basis of the defense resolves all the factual issues as a matter of law and conclusively and definitively disposes of plaintiff's claim (*see Ladenburg Thalmann & Co., Inc. v Tim's Amusements, Inc.*, 275 AD2d 243, 246 [1st Dept 2000], *Vanderminden v. Vandermiden*, 226 AD2d 1037, 1039 [3d Dept 1996]).

Negligence

Santo alleges that defendants owed them a duty to provide the standard of care employed by land use and zoning attorneys (Complaint at ¶ 25). Santo further maintains that Defendants breached that duty by issuing an opinion letter that did not incorporate known changes to the zoning laws that were of importance (*id.* at ¶ 26). As a direct result of reliance on the letter to secure the loan and purchase the property, Santo contends it has suffered damages exceeding \$5,000,000 (*id.* at ¶ 27).

Defendants argue that the disclaimers in their retainer agreement and the opinion letter defeat Santo's causes of action (Memorandum in Support, 1). Specifically, Defendants rely on the following language from the letters:

“Our firm will analyze the plans provided to us by the project engineer / architect and research the relevant provisions of the New York Zoning Resolution” (Complaint, Exhibit 2).

“This opinion speaks only as of its date, and we expressly disclaim any obligation to inform the addressee of any changes in law, regulations, or interpretations, or new or changed facts, which come to our attention” (Complaint, Exhibit 3).

Defendants’ letters, however, do not conclusively establish that the scope of its representation excluded matters relating to the alleged malpractice, namely failing to check for pending changes to the zoning law (*see Shaya B. Pacific, LLC, v. Wilson, Elsner, Moskowitz, Edelman & Dicker, LLP*, 38 A.D.3d 34, 39 [2d Dept 2006] [letter did not conclusively prove that scope of representation did not encompass responsibility with respect to possibly excess coverage]).

Additionally, the opinion letter sets forth:

“We have been asked by the Borrower to render an opinion **as to certain zoning matters related to the project**. In rendering this opinion, **we have reviewed the laws, records, documents and plans** as are expressly listed below **and have made such other investigation of facts and circumstances as, in our judgment, is appropriate** for the purposes of issuing this opinion” (Complaint, Exhibit 2) (emphasis added).

The phrase “certain zoning matters related to the project” could certainly be interpreted to encompass a search of the DCP for pending changes to the zoning laws

(*id.*). Further, the next sentence “in rendering this opinion, we have reviewed the laws” gives the impression of a comprehensive review and could induce reliance on the opinion rendered (*id.*). Lastly, the phrase “we have made such other investigation of facts and circumstances as, in our judgment, is appropriate” can be construed as including use of “judgment” to research anything that could be relevant in making a determination whether the site selected would be appropriate (*id.*). If, as Santo alleges, the Defendants knew of the importance of the parking requirements and the purpose of the loan and purchase, then Defendants’ “judgment” not to investigate pending changes in zoning could be below the standard of care.

Even if Defendants’ letters successfully limited the scope of its representation, that limitation does not necessarily eliminate the affirmative duty a lawyer owes a client under any circumstances (*see Campbell v. Fine, Olin & Anderson, P.C.*, 168 Misc. 2d 305, 308 [Sup. Ct. N.Y. County, 1996] [retainer alone did not demonstrate that attorney client relationship was limited]).

Indeed, in *Romano v. Ficchi*, the court concluded that knowledge of a client’s intent is material in evaluating the viability of malpractice claims (*Romano v. Ficchi*, 2009 WL 1460781 51011, May 22 2009, 2009 NY Slip OP 51011 [U] [2009]). There, the defendant represented the plaintiff in the purchase of a residential condominium. The defendant was aware of the adjoining property owner’s intent to build a structure that would obstruct the

plaintiff's view (*id.* at *1). The plaintiff alleged malpractice because the defendant knew the importance of the condominium's view, failed to inform the plaintiff of the adjoining property owner's plans, and that she suffered damages because the value of the condominium she purchased was less because of the view obstruction (*id.* at *2). In denying CPLR 3211 dismissal of plaintiff's complaint, the court explained that "if an attorney negligently or willfully withholds from [a] client information material to the client's decision to pursue a given course of action, or to abstain therefrom, then the attorney is liable for the client's losses suffered as a result of the action taken without benefit of the undisclosed material facts" (*id.*).

While factually distinguishable, Santo, like the plaintiff in *Romano*, alleges that it would not have purchased the property, or at the very least that it would have applied for discretionary action, had it known of the pending zoning change (Complaint at ¶ 20). It has pleaded sufficient facts to maintain a legal malpractice claim.

Defendants' reliance on their "disclaimers" moreover is insufficient to defeat the malpractice claim. Even assuming the retainer and opinion letters attempts to limit their involvement and potential liability the alleged failure to check for and apprise Santo of pending changes to the zoning laws could have constituted malpractice (*See Campbell*, 168 Misc.2d at 308). Thus, the retainer and opinion letters do not conclusively and definitively defeat Santo's claim and there are factual issues to be resolved (*see Landenburg Thalmann*

& Co., Inc. v. Tim's Amusements, Inc., 275 AD2d 243, 246 [1st Dept 2000]). Defendant's motion to dismiss the legal malpractice is therefore denied.

Breach of Contract

Defendants argue that the breach of contract claim can not be established because Santo fails to demonstrate an enforceable contract that has been breached (Memorandum in Support, 5). The Defendants further urge that the breach of contract claim should be dismissed as redundant of the negligence claim. (Memorandum in Support, 7).

When a breach of contract cause of action arises from the same facts as a malpractice claim, and distinct damages are not alleged, contract-based claims are duplicative (*Carl v. Cohen*, 55 A.D.3d 478, 478-79 [1st Dept 2008]; *Senise v. Mackasek*, 227 A.D.2d 184, 185 [1st Dept 1996]; *Contra, Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 A.D.3d 1, 7 [1st Dept 2008] (dismissal inappropriate because the two claims arose from different facts). As the Appellate Division, First Department made clear in *Sage Realty Corp., v. Proskauer Rose LLP* (251 AD2d 35, 37-8 [1st Dept 1998]): "While it is true that a breach of contract claim need not be based on an expressed promise to the client ..., a breach of contract claim premised on the attorney's failure to exercise due care or to abide by general professional standards is nothing but a redundant pleading of the malpractice claim." Here, the facts that form the basis of Santo's breach of contract claim are the very same ones as those supporting its claim for malpractice (Complaint at ¶¶ 7-8). The damages

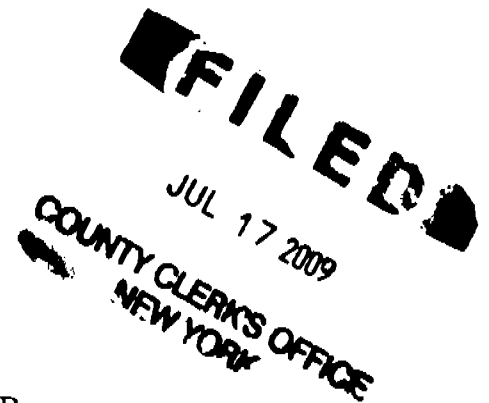
from the alleged malpractice are likewise the same alleged by plaintiff as resulting from the breach of contract (*id.*). To the extent that Santo argues that Defendants breached an express undertaking, it does not set forth any particular contractual obligation on which a distinct breach of contract claim can be based. Thus, Santo's breach of contract claim is dismissed.

Accordingly, it is

ORDERED that Defendants' motion to dismiss the complaint is GRANTED in limited part and Plaintiff's second cause of action for breach of contract is dismissed. In all other respects the motion is denied.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
July 14, 2009



ENTER

A handwritten signature in black ink, appearing to read "Eileen Bransten".

Hon. Eileen Bransten