Saxon Mtge. Servs., Inc. v Hamilton
2009 NY Slip Op 33364(U)
September 24, 2009
Supreme Court, Queens County
Docket Number: 13251/08
Judge: Patricia P. Satterfield

Short Form Order

ORIGINAL

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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SAXON MORTGAGE SERVICES, INC.,

Plaintiff,

-against-

SANDRA HAMILTON, WILLIAM HAMILTON, BRENDA HAMILTON, et al,

Defendants.

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Index No.:13251/08
Motion Date: 7/1/09
Motion Cal. No.: 19
Motion Seq. No.:1

BRENDA HAMILTON, WILLIAM HAMILTON and SANDRA HAMILTON,

Third-Party Plaintiffs,

- against -

ARLINGTON CAPITAL MORTGAGE CORP., CARL ROSEN and FRANCIS X. OUNAN,

Third-Party Defendants.

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The following papers numbered 1 to 12 read on this motion by third party defendant Francis X. Ounan for an order dismissing the third-party complaint in its entirety, pursuant to CPLR §3211(a)(1), as being barred by the documentary evidence; and (ii) pursuant to CPLR 3211(a)(7), for failing to state a cause of action as a matter of law.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Memorandum of Law in Support.....	5 - 6
Attorney Affirmation in Opposition.....	7 - 8
Defendant William Hamilton's Affirmation in Opposition.....	9 - 10
Reply Affirmation.....	11 - 12

Upon the foregoing papers, it hereby is ordered that the motion is determined as follows:

This is a foreclosure action commenced by plaintiff Saxon Mortgage Services, Inc. ("plaintiff") against defendants/third-party plaintiffs Sandra Hamilton, William Hamilton and Brenda Hamilton ("defendants") to foreclose on a mortgage that is secured by property located at 200-20 34th Avenue, Bayside, New York. On September 7, 2006, defendants executed a mortgage on their property with Arlington Capital Mortgage Company ("Arlington") as security for a promissory note, pursuant to which they promised to repay $475,000.00. On March 2, 2009, the Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for Arlington, assigned the mortgage to plaintiff. This action was commenced following defendants failure to make the monthly payment on January 1, 2008, and each month thereafter. Defendants thereafter commenced a third party action against Arlington, and third-party defendants Carl Rosen and Francis X. Ounan ("Ounan"), alleging, with respect to Ounan, legal malpractice. The third party complaint sets forth, in its third cause of action against Ounan, the following:

> 49. The Third-Party defendant OUNAN was furnished to the Third-Party Plaintiffs as their attorney to represent them in the closing of the aforesaid loan.
>
> 50. Said attorney failed to properly represent the Third-Party Plaintiffs and committed malpractice in said representation.
>
> 51. OUNAN failed to inform the Third-Party Plaintiffs of the legal and financial consequences of transferring in part title to the premise to BRENDA HAMILTON.
>
> 52. OUNAN represented the transferors of the premise and the transferee of the premises, a conflict of interest.
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> 53. OUNAN failed to explain the terms of the Note to the Third-Party Plaintiffs and failed to delivered to the Third-Party Plaintiffs a copy of the Right to Rescind.
>
> 54. OUNAN failed to document the promise by ROSEN that the second mortgage would closed in a short time after the closing of the first mortgage.

Ounan now moves to dismiss the third-party complaint insofar as asserted against him, pursuant to CPLR §3211, on the grounds that it is barred by the documentary evidence; and it fails to state a cause of action as a matter of law.

It is well settled that "'[a] motion pursuant to CPLR 3211(a)(1), to dismiss the complaint on the ground that the action is barred by documentary evidence may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law (citations omitted)." Ruby Falls, Inc. v. Ruby Falls

Partners, LLC, 39 A.D.3d 619 (2nd Dept. 2007); Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561 (2005); Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314 (2002); 30th Place Holdings, LLC v. 474431 Associates, 54 A.D.3d 753 (2nd Dept. 2008); Levenherz v. Povinelli, 14 A.D.3d 658 (2nd Dept. 2005). "In order to prevail on a motion to dismiss pursuant to CPLR 3211(a)(1), the document relied upon must conclusively dispose of the plaintiff's claim (citations Omitted)." Mest Management Corp. v. Double M Management Co., Inc., 199 A.D.2d 479, 480 (2nd Dept. 1993); see also, Goshen v Mutual Life Ins. Co. of New York, 98 N.Y.2d 314 (2002); Montes Corp. v Charles Freihofer Baking Co., 17 A.D.3d 330 (2nd Dept. 2005); New York Schools Ins. Reciprocal v. Gugliotti Associates, Inc., 305 A.D.2d 563 (2nd Dept. 2003). Here, the documentary evidence submitted in support of the motion includes documents signed by defendants with respect to their right to cancel the loan, as well as the payment letter detailing the break down of the $3,805.87 monthly payment as to the amount allocated to principal and interest, insurance, and taxes. These documents conclusively refute defendants' claim that they received no information regarding their right to rescind.

Ounan also moves to dismiss, pursuant to CPLR § 3211(a)(7), for failure to state a cause of action. In applying this statutory provision, the pleading is to be afforded a liberal construction, the facts as alleged in the complaint are accepted as true and the plaintiff is afforded the benefit of every possible favorable inference. See, Nonnon v. City of New York, 9 N.Y.3d 825 (2007); Zumpano v. Quinn, 6 N.Y.3d 666 (2006); AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co., 5 N.Y.3d 582 (2005); Wald v. Berwitz, 62 A.D.3d 786 (2nd Dept. 2009); Reid v. Gateway Sherman, Inc., 60 A.D.3d 836 (2nd Dept. 2009); Edme v. Tanenbaum, 50 A.D.3d 624 (2nd Dept. 2008); Enriquez v. Home Lawn Care and Landscaping, Inc., 49 A.D.3d 496, (2nd Dept. 2008); Parsippany Const. Co., Inc. v. Clark Patterson Associates, P.C., 41 A.D.3d 805 (2nd Dept.2007); Klepetko v. Reisman, 41 A.D.3d 551, 839 (2nd Dept.2007); Santos v. City of New York, 269 A.D.2d 585 (2nd Dept.2000). The determination to be made is whether plaintiff has a cause of action, not whether one was stated (see, Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330 (1999); Walker v. Kramer, 63 A.D.3d 723 (2nd Dept. 2009); Gershon v. Goldberg, 30 A.D.3d 372 (2nd Dept. 2006); Steiner v. Lazzaro & Gregory, P.C., 271 A.D.2d 596 (2nd Dept.2000)] or whether the facts as alleged fit within any cognizable legal theory. Fitzgerald v. Federal Signal Corp., 63 A.D.3d 994 (2nd Dept. 2009); Farber v. Breslin, 47 A.D.3d 873 (2nd Dept. 2008); International Oil Field Supply Services Corp. v. Fadeyi, 35 A.D.3d 372 (2nd Dept. 2006); EBC I, Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11 (2nd Dept. 2005). Here, in viewing the third cause of action in its most favorable light, this Court finds that no viable claim of legal malpractice is asserted.

The threshold issue in a legal malpractice action is whether an attorney-client relationship exists, as it is well-recognized that "[t]o recover damages for legal malpractice, a plaintiff must prove, inter alia, the existence of an attorney-client relationship." Terio v. Spodek, 63 A.D.3d 719 (2nd Dept. 2009); Moran v. Hurst, 32 A.D.3d 909, 910-911 (2nd Dept. 2006); Velasquez v. Katz, 42 A.D.3d 566, 567 (2nd Dept. 2007). And, to establish an attorney-client relationship there must be an explicit undertaking to perform a specific task. Terio v. Spodek, 63 A.D.3d 719 (2nd Dept. 2009); Wei Cheng Chang v. Pi, 288 A.D.2d 378 (2nd Dept. 2001); Volpe v. Canfield, 237 A.D.2d 282, 283. (2nd Dept. 1997). Here, although the allegation in the complaint to the effect that Ounan was

"furnished to the Third-Party Plaintiffs as their attorney to represent them in the closing of the aforesaid loan," referenced a specific task, Ounan's allegation in support of the motion that he had no relationship with Arlington and never appeared at the closing coupled with defendant William Hamilton's statement in his affidavit in opposition that "we did not have an attorney representing us at the closing," are sufficient to establish that no attorney-client relationship existed between defendants and Ounan. Accordingly, as a matter of law, a cognizable cause of action for legal malpractice cannot lie.

However, even assuming the existence of an attorney client relationship, the third cause of action must be dismissed. It is well-established that to state a cause of action for legal malpractice, a plaintiff must allege: (1) that the attorney failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community; (2) that the attorney's negligence was a proximate cause of the loss sustained; (3) that the plaintiff incurred damages as a direct result of the attorney's actions; and (4) that the plaintiff would not have sustained damages had the attorney exercised due care. See, Wald v. Berwitz, 62 A.D.3d 786 (2nd Dept. 2009); Napolitano v. Markotsis & Lieberman , 50 A.D.3d 657(2nd Dept. 2008); Carrasco v. Pena & Kahn, 48 A.D.3d 395 (2nd Dept. 2008); Hartman v. Morganstern, 28 A.D.3d 423 (2nd Dept. 2006); Lichtenstein v. Barenbaum, 23 A.D.3d 440 (2nd Dept. 2005); Levy v. Greenberg, 19 A.D.3d 462 (2nd Dept. 2005); see, also, Suydam v. O'Neill, 276 A.D.2d 549 (2nd Dept. 2000); Shopsin v. Siben & Siben, 268 A.D.2d 578 (2nd Dept. 2000). "In other words, a plaintiff in a legal malpractice action must demonstrate that the attorney failed to exercise that degree of skill commonly exercised by an ordinary member of the legal community, and that but for the failure to exercise that requisite degree of skill the result sought by the plaintiff would or could have been achieved (citations omitted)." Zeitlin v. Greenberg, Margolis, Ziegler, Schwartz, Dratch, Fishman, Franzblau & Falkin, P.A., 209 A.D.2d 510 (2nd Dept.1994). Moreover, for a defendant in a legal malpractice action to successfully have such a claim dismissed, "evidence must be submitted in admissible form establishing that the plaintiff is unable to prove at least one of these essential elements [see, Ippolito v. McCormack, Damiani, Lowe & Mellon, 265 A.D.2d 303, 696 N.Y.S.2d 203 (2nd Dept.1999); Tibodeau v. Abrahams, 260 A.D.2d 367, 687 N.Y.S.2d 696 (2nd Dept. 2000)]." Shopsin v. Siben & Siben, 268 A.D.2d 578 (2nd Dept.2000).

Here, the complaint fails to allege facts sufficient to establish that any alleged negligence of Ounan proximately caused defendants to sustain actual and ascertainable damages. See Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer, 8 N.Y.3d 438, 442 (2007); "'To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence' (Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer, 8 N.Y.3d at 442, 835 N.Y.S.2d 534, 867 N.E.2d 385; see Davis v. Klein, 88 N.Y.2d 1008, 1009-1010, 648 N.Y.S.2d 871, 671 N.E.2d 1268; Barnett v. Schwartz, 47 A.D.3d 197, 203-204, 848 N.Y.S.2d 663)." Kutner v. Catterson, 56 A.D.3d 437 (2nd Dept. 2008); Northrop v. Thorsen, 46 A.D.3d 780 (2nd Dept. 2007). Defendants on their third-party complaint failed to do.

Based upon the foregoing, third party defendant Ounan's motion to dismiss the third party complaint insofar as asserted against him is granted, and the third party complaint hereby is dismissed as to him.

Dated: September 24, 2009

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J.S.C.