

Skaats v Davis

2010 NY Slip Op 30550(U)

March 1, 2010

Supreme Court, Suffolk County

Docket Number: 19484-2005

Judge: Melvyn Tanenbaum

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**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XIII SUFFOLK COUNTY**

PRESENT:
HON. MELVYN TANENBAUM
Justice

MOTION #002 & 003 Mot D
R/D: 08/19/09
S/D: 11/10/09

TAMMY SKAATS,

Plaintiff,

-against-

JOHN F. DAVIS and STUART PUDELL,

Defendants.

PLTF'S/PET'S ATTY:
MARK C. STERNICK, ESQ.
105-14 Metropolitan Avenue
Forest Hills, NY 11375

DEFT'S/RESP'S ATTY:
EDWIN W. MILLER, ESQ.
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SCOTT KOSSOVE, ESQ.
(Deft. PUDELL)
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Garden City, NY 11530

Upon the following papers numbered 1 to 33 read on this motion for an order pursuant to CPLR Sec 3212
Notice of Motion/Order to Show Cause and supporting papers 1-6; Notice of
Cross Motion and supporting papers 7-18 Answering Affidavits and supporting papers 19-24,25-28 Replying
Affidavits and supporting papers 29-30,31-33 Other _____; ~~(and after hearing counsel in support and opposed
to the motion)~~ it is,

ORDERED that these motions by defendants STUART L. PUDELL ("PUDELL") and JOHN DAVIS ("DAVIS"), each seeking an order pursuant to CPLR Section 3212 granting summary judgment dismissing plaintiff's complaint are determined as follows:

Plaintiff TAMMY SKAATS ("SKAATS") is defendant JOHN DAVIS's daughter. Plaintiff claims that in October, 2001 her father, "DAVIS" agreed to assist "SKAATS" to sell her Huntington Station residence and purchase an East Northport residence. Defendant "DAVIS" sought mortgage financing and hired an attorney, defendant "PUDELL".

Plaintiff's home was sold on January 23, 2002. Two days later, on January 25, 2002, defendant "DAVIS" purchased the East Northport residence. Although title to the premises was conveyed to "DAVIS", plaintiff "SKAATS" together with her husband and three children resided in the dwelling. On June 26, 2004 "DAVIS" sold the East Northport premises.

Plaintiff's complaint alleges that the mortgage broker and attorney "PUDELL" advised her to permit her father "DAVIS" to obtain a mortgage and take title to the premises based upon

“SKAATS” poor credit rating. Plaintiff claims that she agreed provided that the deed would also contain her name as grantee and that after closing “DAVIS” would transfer title to her. Plaintiff claims that defendant “DAVIS” violated the parties agreement and refused to convey the East Northport premises and turn over the proceeds from the sale. Plaintiff’s complaint sets forth causes of action seeking to impose a constructive trust and for conversion against defendant “DAVIS” and legal malpractice against defendant “PUDELL”.

In support of his summary judgment motion, defendant “PUDELL” submits two affidavits and two affirmations of counsel and argues that plaintiff’s malpractice claims are time barred by the CPLR Section 214(6) three year limitation. Counsel contends that he represented plaintiff during the sale of her Huntington Station residence which closed on January 23, 2002 and therefore plaintiff’s commencement of this action on September 2, 2005 is untimely. Defendant denies representing plaintiff in any other matter including defendant “DAVIS’s” purchase of the East Northport residence on January 25, 2002. Defendant also claims that the “continuous representation” doctrine does not apply since the attorney never represented “SKAATS” after the January, 23 2002 closing.

In support of his summary judgment motion, defendant “DAVIS” submits an affidavit and two affirmations of counsel and claims that the relevant, admissible evidence submitted proves that plaintiff has no viable cause of action against “DAVIS”. Defendant claims that “SKAATS” has failed to produce any documentary evidence in the form of copies of checks, bank ledgers or tax statements to support her claim that she and her husband made 29 mortgage payments while residing in the East Northport residence. Defendant asserts that the verified complaint submitted in plaintiff’s divorce action concedes that neither she nor her husband made mortgage or utility payments for fourteen months prior to December, 2003 which directly contradicts her position in this action. It is defendant’s position that the relevant, credible evidence submitted proves that plaintiff did not make any mortgage payments and therefore plaintiff’s first cause of action must be dismissed since “SKAATS” cannot prove by “clear, unequivocal and convincing” evidence the existence of a constructive trust. Defendant “DAVIS” also claims that he provided his daughter and her family with free living accommodations for 29 months and that no viable unjust enrichment claim can be proven.

In opposition to both motions, plaintiff “SKAATS” submits two affidavits and two affirmations of counsel and claims that substantial questions of fact exist concerning defendant “PUDELL’s” continuous representation of plaintiff until autumn, 2004. Plaintiff claims that “PUDELL” represented “DAVIS” and her interests in the June 26, 2004 sale of the East Northport

residence and continued to represent her when "PUDELL" attempted to persuade "DAVIS" to turn over the proceeds of that sale to "SKAATS" in autumn, 2004. Plaintiff claims that the 3 year statute of limitations period was tolled by the attorney's continuing legal efforts performed on her behalf. Plaintiff also claims that significant factual disputes exist between defendant "DAVIS's" version and plaintiff "SKAAT's" description of what occurred between father and daughter sufficient to require a plenary trial. Plaintiff argues that "DAVIS" has been unjustly enriched since he used \$146,000.00 from the sale of her Huntington Station home to purchase the East Northport home and has refused to turn over the proceeds of the East Northport home sale to "SKAATS". Plaintiff maintains that while she and her family resided in the East Northport home she gave her father money to make all mortgage payments in reliance upon his promise that "DAVIS" would transfer title to her.

CPLR Section 3212(b) states that a motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion for summary judgment (Olan v. Farrell Lines, Inc., 105 AD2d 653, 481 NYS2d 370 (1st Dept., 1984); affirmed 64 NY2d 1092, 489 NYS2d 884 (1985)). Moreover it is well settled that a party opposing a motion for summary judgment must assemble, lay bare and reveal his proof in order to establish that the matters set forth in the pleadings are real and capable of being established (Castro v. Liberty Bus Co., 79 AD2d 1014, 435 NYS2d 340 (2nd Dept., 1981)).

Generally a constructive trust may be imposed "when property has been acquired in such circumstances that the holder of legal title may not in good conscience retain the beneficial interest." (Sharp v. Kosmalski, 40 NY2d 119,120, 386 NYS2d 72, 74(1976) citing Beatty v. Gugenheim Exploration Co., 225 NY 380, 386, 122 NE 378, 380 (1919), see also Scivoletti v. Marsala, 97 AD2d 401, 467 NYS2d 228 (2nd Dept., 1983); affirmed 61 NY2d 806, 473 NYS2d 949 (1984)). To establish a constructive trust it must be shown that there exists: 1) a confidential or fiduciary relationship; 2) a promise; 3) a transfer in reliance thereon; and 4) unjust enrichment (Sharp v. Kosmalski, supra.; Gargano v. VC&J Construction Corp., 148 AD2d 417, 538 NYS2d 955 (2nd Dept., 1989); Lester v. Zimmer, 147 AD2d 340, 542 NYS2d 855 (3rd Dept., 1980)). It is the existence of a confidential relationship which triggers the equitable considerations leading to the imposition of a constructive trust and the parties need not be husband and wife for such a relationship to exist (Sharp v. Kosmalski, supra.). Moreover the four elements "are not rigid but are flexible considerations for the Court to apply in determining whether to impose a constructive trust"

(Mendel v. Hewitt, 161 AD2d 849, 555 NYS2d 899,900 (3rd Dept., 1990) citing Hornet v. Leather, 145 AD2d 814, 535 NYS2d 799 leave denied 74 NY2d 603, 543 NYS2d 396 (1990); Lester v. Zimmer, supra.)).

Unjust enrichment occurs where a party holds or retains property under such circumstances that in equity and good conscience he ought not to retain it and does not require the performance of any wrongful act by the one so enriched (Simonds v. Simonds, 45 NY2d 233, 242 (1979); Chemical Bank v. Equity Holding Corp., 228 AD2d 338, 644 NYS2d 709 (1st Dept., 1996)). The tort of conversion is established when one who owns and has the right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner (Republic of Haiti v. Duvalier, 211 AD2d 379, 626 NYS2d 472 (1st Dept., 1995); Shmueli v. Corcoran Group, 9 Misc 3rd 589, 802 NYS2d 871 (NYCty., Sup. Ct., 2005)). The tort of conversion applies only to specific chattel and centers exclusively on the physical theft of specific, identifiable, corporeal, tangible, personal property (9310 Third Avenue Associates v. Schaffer Food Service Co., 210 AD2d 207, 620 NYS2d 255 (2nd Dept., 1994); Comprehensive Community Development Corp. v. Lebach, 223 AD2d 399, 636 NYS2d 755 (1st Dept., 1996)).

Based upon the submission of evidence by the parties, significant issues of fact exist concerning the transactions between plaintiff "SKAATS" and defendant "DAVIS" sufficient to require a plenary trial. Defendant "DAVIS's" motion for an order granting summary judgment dismissing plaintiff's complaint must therefore be denied.

With respect to defendant "PUDELL's" motion, the elements of a legal malpractice claim are the existence of an attorney-client relationship, negligence on the part of the attorney or some other conduct in breach of that relationship, proof that the attorney's conduct was the proximate cause of the injury to the plaintiff and proof that but for the alleged malpractice the plaintiff would have been successful in the underlying action (Volpe v. Canfield et al., 237 AD2d 282, 654 NYS2d 160 (2nd Dept., 1997)). An attorney is not liable to a person other than his client for the negligent performance of legal work (Viscardi v. Lerner, 125 AD2d 662, 510 NYS2d 183 (2nd Dept., 1986); Kramer v. Belfi, 106 AD2d 615, 482 NYS2d 898 (2nd Dept., 1984)).

The statute of limitations for legal malpractice actions is three years measured from the date the alleged malpractice was committed (CPLR Section 214(6); Shivers v. Siegel, 11 AD3d 447, 447, 782 NYS2d 752, 753 (2nd Dept., 2004)). Under the doctrine of "continuous representation" the three year limitations period may be tolled while the attorney continues to represent the client in the same matter after the alleged malpractice is committed (Hasty Hills Stables, Inc. v. Dorfman, Lynch, Knoebel & Conway, LLP, 52 AD3d 566, 567, 860 NYS2d 182,183 (2nd Dept., 2008)). In order for

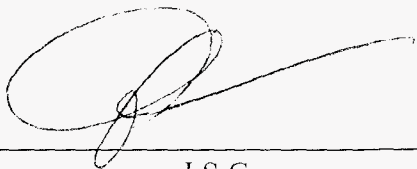
there to be "continuous representation" there must be a mutual understanding that further representation is needed with respect to the matter underlying the malpractice claim (McCoy v. Feinman, 99 NY2d 295, 306, 755 NYS2d 693, 700 (2002)).

The record shows that defendant "PUDELL" did not perform legal services on behalf of the plaintiff after the January 23, 2002 sale of her home. Although plaintiff asserts that "PUDELL" continued to represent her in the June 26, 2004 sale of the East Northport residence, the relevant admissible evidence shows that "PUDELL" represented the title owner of the premises, defendant "DAVIS" and not "SKAATS". Plaintiff's claim that two additional phone conversations with "PUDELL" concerning her interest in the proceeds of the East Northport property sale establish continuing representation, are insufficient to establish the required showing of the parties mutual understanding of a need for counsel's further representation. The proof submitted shows that defendant's representation of the plaintiff ended with the January 23, 2002 closing. Plaintiff's claim that defendants were obligated to transfer title to her commenced immediately after the closing. Plaintiff's legal malpractice claim is therefore time barred since commencement of this action against "PUDELL" occurred after expiration of the three year limitations period. Defendant "PUDELL's" motion seeking an order granting summary judgment dismissing plaintiff's complaint must therefore be granted. Accordingly it is

ORDERED that defendant "DAVIS's" motion for an order pursuant to CPLR Section 3212 is denied, and it is further

ORDERED that defendant "PUDELL's" motion for an order pursuant to CPLR Section 3212 is granted. The complaint is hereby dismissed against defendant "PUDELL". The action is otherwise severed and continued.

Dated: March 1, 2010



J.S.C.

MEYER TANENBAUM