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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

COPY

PRESENT:

WILLIAM B. REBOLINI
Justice

Peter A. Colonna and Arlene Colonna,

Plaintiffs,

-against-

Banco Popular North America, Sankel Skurman & McCartin, LLP, Raymond Verdi, Esq., Craig Heller, Esq. and Heller & Verdi, LLP,

Defendants.

Index No.: 8024/2010

Motion Sequence No.: 001; MG
Motion Date: 7/20/10
Submitted: 10/6/10

Motion Sequence No.: 002; MG
Motion Date: 7/26/10
Submitted: 10/6/10

Motion Sequence No.: 003; MG
Motion Date: 10/6/10
Submitted: 10/6/10

Attorneys [See Rider Annexed]

Upon the following papers numbered 1 to 36 read on these motions to dismiss: Notice of Motion and supporting papers, 1 - 5, 6 - 22, 25 - 34; Other; memorandum of law, 23 - 24, 35 - 36.

This is an action arising out of protracted litigation between the plaintiffs and the defendant Banco Popular (the Bank). On March 15, 1996, the plaintiffs executed a mortgage encumbering three properties owned by them to secure two commercial loans made by the Bank to a corporation owned by the plaintiff Peter Colonna. Promissory notes containing personal guarantees to secure the loans were also executed by the plaintiffs. In June 1999, after the corporation defaulted on the notes, the Bank obtained a default judgment against the corporation and the plaintiffs in an action in the Superior Court of New Jersey. On October 25, 2000, the defendant Sankel, Skurman & McCartin LLP (Sankel), as attorney for the Bank, commenced an action to domesticate the New

11/29

Jersey judgment to permit the Bank to enforce its judgment in New York. On March 8, 2001, judgement for the Bank was entered pursuant to the order of the Hon. Ira Gammerman, Justice of the Supreme Court, New York County. On August 2, 2002, the Bank commenced a foreclosure action seeking a sale of the mortgaged property. The plaintiffs failed to answer the complaint. On March 25, 2004, a judgement of foreclosure and sale was entered based on the plaintiffs' default. An amended judgment of foreclosure and sale was entered on July 15, 2004 and it was served on the plaintiffs with notice of entry on July 22, 2004.

On April 8, 2008, the plaintiffs, represented by counsel, entered into a stipulation of settlement with the Bank in the mortgage foreclosure action. The plaintiffs acknowledged in the stipulation that they had no defense to the foreclosure action and they waived the right to interpose any defense therein. In addition, they agreed that, in the event of a default, the Bank could proceed *ex parte* and without notice to them in all future proceedings in its foreclosure action. After the plaintiffs defaulted under the stipulation of settlement, the Bank sold the property pursuant to its judgment on November 20, 2009. On December 15, 2009, the plaintiffs moved by order to show cause to vacate the judgment of foreclosure and sale and to vacate their default in answering the complaint. By order dated March 12, 2010, the Hon. Arthur G. Pitts denied the plaintiffs' motion in its entirety.

The plaintiffs commenced this action on or about March 16, 2010, raising many, if not all, of the factual allegations previously litigated in either the Bank's foreclosure action or the plaintiffs' motion to vacate, or both. The plaintiffs' complaint consists of five separate causes of action against the various defendants. The first cause of action alleges that the Bank "willfully deprived the plaintiffs of their property," and otherwise acted improperly. The second cause of action alleges, in substance, that Sankel acted maliciously or committed legal malpractice in prosecuting the Bank's foreclosure action. The third cause of action alleges that the defendant Raymond Verdi, Esq. (Verdi) caused the [plaintiffs] to lose their property due to his legal malpractice in a bankruptcy action on their behalf. The fourth cause of action alleges that the defendant Craig Heller, Esq. (Heller) caused the [plaintiffs] to lose their property due to his legal malpractice and that he "took excessive fees." The fifth cause of action alleges that the defendant Heller & Verdi LLP (H&V) is liable for all the damages caused by Verdi and Heller.

The defendants Verdi and H&V now move for an order pursuant to CPLR §3211(a)(5) dismissing the complaint on the ground that the action is barred by the statute of limitations. A defendant seeking to dismiss the complaint insofar as asserted against it as time-barred pursuant to CPLR §3211(a)(5) has the initial burden of proving through documentary evidence that the action was untimely commenced after its accrual date (see, Morris v. Gianelli, 71 AD3d 965 [2nd Dept., 2010]; Lessoff v. 26 Court Street Assoc., LLC, 58 AD3d 610 [2nd Dept., 2009]; Sabadie v. Burke, 47 AD3d 913 [2nd Dept., 2008]). Thereafter, the burden shifts to the plaintiff to aver evidentiary facts establishing that the action was timely or to raise an issue of fact as to whether the action was timely (see, Lessoff v. 26 Court Street Assoc., LLC, 58 AD3d 610 [2nd Dept., 2009]).

Here, the defendants have established their *prima facie* entitlement to dismissal pursuant to CPLR §3211(a)(5). A review of the documentary evidence indicates that the bankruptcy action was completed and the moving defendants representation of the plaintiffs therein ended, with the final decree of the bankruptcy court on December 13, 2006. This action was commenced in March, 2010 more than three years after the alleged cause of action sounding in legal malpractice accrued (CPLR §214[6]). The motion is unopposed. Accordingly, the motion to dismiss the complaint against Verdi and H&V is granted.

Sankel moves for an order pursuant to CPLR §3211(a)(1), (3), (5), and (7) dismissing the complaint against it. Initially, the Court notes that the subject cause of action, read with a most expansive and liberal interpretation, alleges that Sankel is liable to them for 1) fraud, misconduct and misrepresentation, 2) legal malpractice, 3) abuse of process, and 4) malicious prosecution. The Court will address each issue seriatim. A review of the record reveals that the allegations that Sankel acted improperly in commencing and prosecuting the mortgage foreclosure action for its client is without merit. In addition the allegations cannot be maintained because of collateral estoppel and res judicata (CPLR §3211[a][3]). The factual issues raised in the complaint have been litigated in either the Bank's foreclosure action or the plaintiffs' motion to vacate, or both.

Pursuant to CPLR §3211(a)(7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (see, Leon v. Martinez, 84 NY2d 83 [1994]). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (see, Guggenheimer v. Ginzburg, 43 NY2d 268 [1977]). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (see, Pacific Carlton Development Corp. v. 752 Pacific, LLC, 62 AD3d 677 [2nd Dept., 2009]; Gjonlekaj v. Sot, 308 AD2d 471[2nd Dept., 2003]). On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (see, Leon v. Martinez, 84 NY2d 83 [1994]; International Oil Field Supply Services Corp. v. Fadeyi, 35 AD3d 372 [2nd Dept.,, 2006]; Thomas McGee v. City of Rensselaer, 174 Misc2d 491 [Sup Ct, Rensselaer County 1997]). Upon a motion to dismiss, a pleading will be liberally construed and such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (see, Ming v. Hoi et al, 163 AD2d 268 [1st Dept., 1990]).

Regarding the allegations of malpractice against Sankel, it is clear that the cause of action should be dismissed. To recover damages for legal malpractice, a plaintiff must prove, inter alia, the existence of an attorney-client relationship (see, Nelson v. Roth, 69 AD3d 912 [2nd Dept., 2010]; Nelson v. Kalathara, 48 AD3d 528 [2nd Dept., 2008]; Rovello v. Klein, 304 AD2d 638 [2nd Dept., 2003]). It is well established that, with respect to attorney malpractice, absent fraud, collusion, malicious acts, or other special circumstances, an attorney is not liable to third parties, not in privity, for harm caused by professional negligence (see, Nelson v. Roth, 69 AD3d 912 [2nd Dept., 2010]; Breen v. Law Office of Bruce A. Barket, P.C., 52 AD3d 635 [2nd Dept., 2008]). The plaintiffs have

failed to state a viable cause of action for legal malpractice against Sankel, and they have not alleged any facts beyond those previously determined in favor of its client.

To establish a claim for abuse of process, a plaintiff must prove three essential elements, to wit, regularly-issued process either civil or criminal, an intent to do harm without excuse or justification, and the use of process in a perverted manner to obtain a collateral objective (see, Curiano v. Suozzi, 63 NY2d 113 [1984]; Marks v. Marks, 113 AD2d 744 [2nd Dept., 1985]). However, where the complaint fails to allege some irregular activity in the use of judicial process for a purpose not sanctioned by law, or that the process unlawfully interfered with the plaintiff's property, an action to recover damages based upon the alleged abuse of process must fail (see, Curiano v. Suozzi, 63 NY2d 113 [1984]; Williams v. Williams, 23 NY2d 592 [1969]; Mago LLC v. Singh, 47 AD3d 772 [2nd Dept., 2008]; Panish v. Steinberg, 32 AD3d 383 [2nd Dept., 2006]; Reisman v. Kerry Lutz, P.C., 6 AD3d 418 [2nd Dept., 2004]). Moreover, an action for damages against an attorney by a non-client generally will not lie unless the attorney has improperly abused his or her authority, or where he or she has committed fraud or collusion, or engaged in some malicious or tortious conduct (see, AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co., 5 NY3d 582 [2005]; Mokay v. Mokay, 67 AD3d 1210 [3rd Dept., 2009]). A review of the complaint establishes that the plaintiffs' claim for abuse of process based on Sankel's commencement and prosecution of the foreclosure action is not viable because it fails to allege any facts, beyond those previously determined against them, which indicate how Skankel employed legal process without justification.

To plead a cause of action for malicious prosecution a plaintiff must show the initiation of an action that terminated in the favor of the plaintiff, lack of probable cause for the prior action, malice and special injury (see, Gisondi v. Town of Harrison, 72 NY2d 280 [1988]; Colon v. City of New York, 60 NY2d 78 [1983]; Williams v. Barber, 3 AD3d 695 [3rd Dept., 2004]). Failure to establish any one of the elements required to bring a an action for malicious prosecution defeats the entire claim (see, Smith-Hunter v. Harvey, 95 NY2d 191 [2000]; Brown v. Sears Roebuck and Co., 297 AD2d 205 [1st Dept., 2002]; Maskantz v. Hayes, 39 AD3d 211 [1st Dept., 2007]). It is clear that the plaintiff cannot maintain a cause of action sounding in malicious prosecution herein as the mortgage foreclosure action herein has been terminated in favor of the Bank. Accordingly, Sankel's motion to dismiss the complaint against it is granted.

Banco Popular moves for an order pursuant to CPLR §3211(a)(1), (5), and (7) dismissing the complaint against it. A review of Banco Popular's submission reveals that it recites essentially the same facts and contains essentially the same documents as Sankel's motion to dismiss. For the reason set forth above, and upon review of the record herein, the Court finds that the allegation that Banco Popular acted improperly in its mortgage foreclosure action fails to state a cause of action and it is otherwise barred by collateral estoppel and res judicata. Accordingly, Banco Popular's motion to dismiss the complaint against it is granted.

Accordingly, it is

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the unopposed motion by the defendants Raymond Verdi, Esq. and Heller & Verdi, LLP for an order pursuant to CPLR §3211(a)(5) dismissing the complaint against them is granted; and it is further

ORDERED that the unopposed motion by the defendant Sankel Skurman & McCartin LLP for an order pursuant to CPLR §3211(a)(1), (3), (5), and (7) dismissing the complaint against it is granted; and it is further

ORDERED that the unopposed motion by the defendant Banco Popular for an order pursuant to CPLR §3211(a)(1), (5), and (7) dismissing the complaint against it is granted.

Dated: November 29, 2010

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**

RIDER

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Clerk of the Court