

DiPardo v Theobald

2010 NY Slip Op 33687(U)

December 13, 2010

Supreme Court, Suffolk County

Docket Number: 47380/2009

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 47380/2009

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

COPY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

GINO DIPARDO,

Plaintiff,

-against-

MICHELE THEOBALD and PAMELA
ATANASIO, Individually and d/b/a
THEOBALD & ATANASIO, LLP, and
THEOBALD & ATANASIO, LLP,

Defendants.

ORIG. RETURN DATE: FEBRUARY 8, 2010
FINAL SUBMISSION DATE: MAY 13, 2010
MTN. SEQ. #: 001
MOTION: MOT D

ORIG. RETURN DATE: MAY 7, 2010
FINAL SUBMISSION DATE: MAY 13, 2010
MTN. SEQ. #: 002
CROSS-MOTION: XMOT D

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Upon the following papers numbered 1 to 12 read on this motion _____
TO DISMISS AND CROSS-MOTION TO AMEND PLEADINGS AND COMPEL
Notice of Motion and supporting papers 1-3; Memorandum of Law 4; Notice of Cross-motion
and supporting papers 5-7; Memorandum of Law 8; Replying Affidavit and supporting
papers 9, 10; Memorandum of Law 11; Reply Memorandum of Law 12; it is,

ORDERED that this motion by defendants, MICHELE THEOBALD
and PAMELA ATANASIO, individually and d/b/a THEOBALD & ATANASIO, LLP,
and THEOBALD & ATANASIO, LLP (collectively "defendants"), for an Order,
pursuant to CPLR 3211 (a) (1), (5) and (7), dismissing the complaint in its entirety
with prejudice on the grounds that plaintiff fails to state a cause of action and the
claims are barred by the statute of limitations, is hereby **GRANTED** solely to the
extent provided hereinafter; and it is further

ORDERED that this cross-motion by plaintiff, GINO DIPARDO (“plaintiff”), for an Order: (1) directing defendants to disclose their file with respect to their representation of plaintiff in connection with the transaction at issue in this action; and (2) granting plaintiff leave to serve an amended complaint, is hereby **GRANTED** solely to the extent provided hereinafter.

This action was commenced on or about November 30, 2009, and arises out of defendants’ representation of plaintiff, plaintiff’s deceased wife, plaintiff’s son John DiPardo (“DiPardo”), and DiPardo’s wife Nicole DiPardo, in connection with the transfer of title to the real property commonly known as 40 Denise Drive, North Babylon, New York (“Premises”), from plaintiff and his wife to DiPardo and his wife, wherein plaintiff and his wife would retain a life estate in the Premises. According to the Verified Complaint, defendants prepared the documents in connection therewith, including a contract of sale, a deed, and a “Life Estate Agreement.” The Life Estate Agreement, executed on or about July 21, 2005, recites, among other things, that plaintiff and his wife wish to “reserve for themselves the right to live in the apartment [within the house] for the rest of their lives . . . and to provide for an alternate place to live in the event that the Premises should need to be sold by [DiPardo and his wife] . . . without any cost or expense [to plaintiff and his wife].” In consideration therefor, plaintiff allegedly gave DiPardo a gift of equity in the Premises in the amount of \$216,000. As a result, the purchase price of the Premises was reduced from \$500,000 to \$284,000, which is reflected in the contract of sale, also dated July 21, 2005. Plaintiff contends, without dispute from defendants, that the Life Estate Agreement was never recorded in the Suffolk County Clerk’s office, nor was any other document to show the existence of the life estate. However, the Court notes that the Life Estate Agreement specifically states that, “[w]hereas the Sellers wish to retain a life estate in the Premises but chose not to do so within the deed because it would prevent the Purchasers from obtaining a conventional mortgage.” Plaintiff alleges that DiPardo obtained a purchase money mortgage in the amount of \$285,000, and then another mortgage in the amount of \$360,000 on or about December 15, 2005, but subsequently failed to make the required payments. As such, plaintiff claims that the mortgage was foreclosed, and that on or about October 1, 2009, plaintiff was “forced to leave the [Premises] under threat of being evicted by legal process.”

Plaintiff’s complaint alleges three causes of action, to wit: (1) legal malpractice for failing to advise plaintiff that his life estate could be extinguished if

DiPardo failed to pay the mortgage as the life estate was not set forth in the deed and the Life Estate Agreement was not recorded; (2) breach of fiduciary duty for a conflict of interest arising out of defendants' representation of both plaintiff and his wife, as sellers, and DiPardo and his wife, as purchasers; and (3) fraud, alleging that defendants' "willfully failed to disclose" to plaintiff that because his life estate was not set forth in any recorded document, it could be extinguished if DiPardo failed to pay the mortgage.

Defendants now move to dismiss plaintiff's complaint in its entirety, on the grounds that the claims are barred by the applicable statute of limitations, and that plaintiff fails to state a cause of action. With respect to defendants' statute of limitations arguments, CPLR 214 (6) provides that an action to recover damages for malpractice, other than medical, dental or podiatric malpractice, regardless of whether the underlying theory is based in contract or tort, must be commenced within three years of the date of accrual (see CPLR 214 [6]). Such a claim accrues when the malpractice is committed, not when the client discovers it (see e.g. *Glamm v Allen*, 57 NY2d 87 [1982], citing *McDermott v Torre*, 56 NY2d 399 [1982]). "To dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the Statute of Limitations, a defendant bears the initial burden of establishing *prima facie* that the time in which to sue has expired" (*Savarese v Shatz*, 273 AD2d 219, 220 [2000]; see *Tsafatinos v Wilson Elser Moskowitz Edelman & Dicker, LLP*, 75 AD3d 546 [2010]; *Morris v Gianelli*, 71 AD3d 965 [2010]). Thereafter, "the burden shift[s] to the plaintiff to aver evidentiary facts establishing that the case falls within an exception to the Statute of Limitations" (*Savarese v Shatz*, 273 AD2d at 220 [internal quotation marks omitted]).

Defendants argue that plaintiff's complaint indicates defendants represented plaintiff "in connection with providing for the life estate and the sale" of the Premises, all of which took place in 2005. As discussed, plaintiff claims that defendants, and in particular defendant PAMELA ATANASIO, committed malpractice by failing to advise plaintiff that his life estate could be extinguished if DiPardo failed to pay the mortgage in view of the fact that the life estate was not recorded. The Court notes that the Life Estate Agreement and contract of sale were both dated July 21, 2005, and the deed was allegedly executed on August 29, 2005 and recorded on October 20, 2005. Thus, it appears that the instant malpractice claim accrued in 2005, which would make it untimely.

However, plaintiff seeks to toll the statute of limitations based upon the continuous representation doctrine. This doctrine, which is applicable to legal malpractice actions, tolls the statute of limitations while the attorney continues to represent the client as to the same matter underlying the malpractice claim (see *Kvetnaya v Tylo*, 49 AD3d 608 [2008]). The Court of Appeals has held that where: (1) plaintiff and defendant attorney were acutely aware of the need for further representation (i.e., they had a mutual understanding to that effect); and (2) plaintiff was under the impression that defendant attorney was actively addressing his legal needs, the continuous representation doctrine tolled the limitations period for plaintiff's malpractice claim until plaintiff was put on notice by defendant's failure to return calls that she withdrew from representing him (see *Williamson v Pricewaterhouse Coopers LLP*, 9 NY3d 1 [2007]; *Shumsky v Eisenstein*, 96 NY2d 164 [2001]).

Here, the Court finds that defendants have demonstrated that plaintiffs' first cause of action to recover damages for legal malpractice accrued in 2005, more than three years before the commencement of the instant action in 2009 (see CPLR 214 [6]; *McCoy v Feinman*, 99 NY2d 295 [2002]; *Nickel v Goldsmith & Tortora, Attorneys at Law, P.C.*, 57 AD3d 496 [2008]). With respect to any tolling of the statute of limitations based upon the continuous representation doctrine, plaintiff avers that when "problems arose" between plaintiff and his son and daughter-in-law with respect to the use of a room and the driveway at the Premises, he spoke to defendant ATANASIO by telephone around July of 2006 to seek her advice. In addition, plaintiff claims that he attempted to speak to defendant ATANASIO again about a dozen times over an approximate two-month period following the conversation in July of 2006, but she failed to take or return his calls. Thus, based upon plaintiff's own allegations, the Court finds that even if the continuous representation doctrine is applied to the malpractice cause of action, the statute of limitations would be tolled until September of 2006 at the very latest, and plaintiff has failed to aver evidentiary facts establishing that the statute of limitations was tolled beyond September of 2006 (see *McCoy v Feinman*, 99 NY2d 295, *supra*). Instead, plaintiff merely argues that a question of fact exists as to whether the doctrine would toll the limitations period beyond that date.

Accordingly, as the instant action was commenced on November 30, 2009, over three years after September of 2006, the Court finds that the first cause of action for legal malpractice must be dismissed as time barred.

Regarding plaintiff's second cause of action for breach of fiduciary duty, the Court of Appeals has held:

New York law does not provide a single statute of limitations for breach of fiduciary duty claims. Rather, the choice of the applicable limitations period depends on the substantive remedy that the plaintiff seeks. Where the remedy sought is purely monetary in nature, courts construe the suit as alleging injuries to property within the meaning of CPLR § 214 (4), which has a three-year limitations period. Where, however, the relief sought is equitable in nature, the six-year limitations period of CPLR § 213 (1) applies. Moreover, where an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR § 213 (8)

(*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009]).

Defendants argue that as plaintiff solely seeks monetary damages herein, the three-year limitations period should apply, thereby also making the second cause of action for breach of fiduciary duty untimely. However, plaintiff alleges that defendants breached their fiduciary duty to plaintiff when defendants, although purportedly representing both plaintiff and his wife, and DiPardo and his wife, only represented the interests of DiPardo and his wife to the detriment of plaintiff and his wife. Plaintiff alleges that defendants intentionally failed to inform plaintiff that his life estate could be extinguished if DiPardo failed to pay the mortgage. This alleged fraudulent omission is an element of plaintiff's breach of fiduciary duty claim. Therefore, the Court finds that the six-year statute of limitations under CPLR 213 (8) applies herein (*see Kaufman v Cohen*, 307 AD2d 113 [2003]), and the second cause of action for breach of fiduciary duty has been timely interposed. The Court notes that defendants do not seek dismissal of the third cause of action sounding in fraud as untimely, as this cause of action is governed by a six-year statute of limitations (*see CPLR 213 [8]*).

Defendants further argue that the breach of fiduciary duty and fraud claims are duplicative of the legal malpractice claim, and must therefore be dismissed. Such causes of action have been held to be duplicative of a legal malpractice cause of action if they arise from the same set of facts and do not

allege distinct damages (see *Turner v Irving Finkelstein & Meirowitz*, 61 AD3d 849 [2009]; *Shivers v Siegel*, 11 AD3d 447 [2004]; *Daniels v Lebit*, 299 AD2d 310 [2002]). Here, the Court finds that plaintiff's Verified Complaint sufficiently asserts distinct causes of action to recover damages for legal malpractice, breach of fiduciary duty, and fraud (see *Minsky v Haber*, 74 AD3d 763 [2010]; see also *Lytell v Lorusso*, 74 AD3d 905 [2010]). Although the Court is aware that the three causes of action arise from defendants' representation of plaintiff in connection with the transfer of title to the Premises and the reservation of a life estate, plaintiff alleges that defendant's failure to advise plaintiff that his interest in the Premises could be extinguished and failure to record the Life Estate Agreement was motivated by defendants' conflict of interest. Moreover, plaintiff contends that defendants' conduct was not the result of inadvertence, but rather that defendants willfully failed to disclose that plaintiff's interest could be extinguished if DiPardo failed to pay the mortgage. Thus, plaintiff's fraud claim is premised upon one or more affirmative, intentional misrepresentations, i.e. something more egregious than mere "concealment or failure to disclose [one's] own malpractice" (*LaBrake v Enzien*, 167 AD2d 709, 711 [1990]; see *Weiss v Manfredi*, 83 NY2d 974 [1994]; *Simcuski v Saeli*, 44 NY2d 442 [1978]; *White of Lake George, Inc. v Bell*, 251 AD2d 777 [1998]). Accordingly, the Court finds that plaintiff's causes of action for breach of fiduciary duty and fraud action are sufficiently different from the legal malpractice claim to survive defendants' motion to dismiss (*Minsky v Haber*, 74 AD3d 763, *supra*; *Mitschele v Schultz*, 36 AD3d 249 [2006]).

Next, regarding that branch of defendants' motion to dismiss pursuant to CPLR 3211 (a) (1), where a defendant moves to dismiss an action asserting the existence of a defense founded upon documentary evidence, the documentary evidence "must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Trade Source, Inc. v Westchester Wood Works, Inc.*, 290 AD2d 437 [2002]; see *Del Pozo v Impressive Homes, Inc.*, 29 AD3d 621 [2006]; *Montes Corp. v Charles Freihofer Baking Co.*, 17 AD3d 330 [2005]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346 [2003]). In the instant application, the Court finds that the documentary evidence submitted by defendants, to wit: the Life Estate Agreement, does not resolve all factual issues raised herein as a matter of law. Accordingly, this ground cannot serve as a basis for dismissal.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true (see *Grand*

Realty Co. v City of White Plains, 125 AD2d 639 [1986]; *Barrows v Rozansky*, 111 AD2d 105 [1985]; *Holly v Pennysaver Corp.*, 98 AD2d 570 [1984]).

Generally, a cause of action for breach of fiduciary duty requires a plaintiff to merely identify a conflict of interest amounting to a substantial factor in the plaintiff's loss (see *Boone v Bender*, 74 AD3d 1111 [2010]; *Ullico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, *supra*). As discussed, plaintiff has identified a conflict of interest in his complaint, namely defendants' representation of both plaintiff and his wife, as sellers, and DiPardo and his wife, as purchasers, with respect to the transfer of title to the Premises, and that such conflict of interest directly resulted in plaintiff's life estate being extinguished.

Regarding the third cause of action sounding in fraud, the essential elements are: (1) a misrepresentation or a material omission of fact that was false and known to be false by the defendant; (2) made for the purpose of inducing the other party to rely upon it; (3) justifiable reliance of the other party on the misrepresentation or material omission; and (4) injury (see *e.g. Deutsche Bank Natl. Trust Co. v Sinclair*, 68 AD3d 914 [2009]; *J.A.O. Acquisition Corp. v Stavitsky*, 18 AD3d 389 [2005]). Where it is alleged that a defendant fraudulently concealed a material fact, in addition to the aforementioned elements, a plaintiff must also establish that the defendant had a duty to disclose the subject information (see *Sitar v Sitar*, 61 AD3d 739 [2009]; *E.B. v Liberation Pubs.*, 7 AD3d 566 [2004]; *Swersky v Dreyer & Traub*, 219 AD2d 321 [1996]). Also as discussed, plaintiff alleges that defendants willfully and fraudulently concealed that plaintiff's life estate would be extinguished if DiPardo failed to pay the mortgage, which was motivated by their conflict of interest and loyalty to DiPardo and his wife, plaintiff's very own son and daughter-in-law.

In view of the foregoing, upon favorably viewing the facts alleged in plaintiff's Verified Complaint as amplified and supplemented by plaintiff's opposing submissions (*Ossining Union Free School Dist. v Anderson LaRocca*, 73 NY2d 417 [1989]), and affording plaintiff "the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582 [2005]), without expressing opinion as to whether he can ultimately establish the truth of his allegations before the trier of fact, the Court finds that the second and third causes of action sufficiently plead causes of action for breach of fiduciary duty and fraud.

Accordingly, defendants' motion to dismiss is **GRANTED** solely to the extent that plaintiff's first cause of action for legal malpractice is dismissed. The remaining causes of action shall be severed and continued.

With respect to plaintiff's cross-motion, CPLR 3025 (b) provides in pertinent part that, "[a] party may amend his pleading . . . at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just" (CPLR 3025 [b]). Leave to amend a pleading is to be freely given absent surprise or prejudice resulting from the delay. Whether to grant such leave is within the trial court's discretion, the exercise of which will not be lightly disturbed (*Pergament v Roach*, 2007 NY Slip Op 5247 [2d Dept]; *Madeline Lee Bryer, P.C. v Samson Equities, LLC*, 2007 NY Slip Op 5234 [2d Dept]; *Surgical Design Corp. v Correa*, 31 AD3d 744 [2006]).

Plaintiff merely seeks to amend his complaint to correct a factual error contained therein. Specifically, plaintiff indicates that the complaint recites that defendant THEOBALD represented plaintiff and his wife, and defendant ATANASIO represented DiPardo and his wife. In actuality, plaintiff alleges that defendant ATANASIO represented him and his wife, while defendant THEOBALD represented DiPardo and his wife. The Court finds that defendants can neither be surprised nor claim prejudice from such an amendment. In view of the foregoing, that branch of plaintiff's motion for leave to serve and file an Amended Verified Complaint is **GRANTED** to the extent that plaintiff's proposed Amended Verified Complaint, annexed to plaintiff's cross-motion as Exhibit "C," shall be deemed served upon defendants as of the date the instant Order is served upon defendants with notice of entry. Defendants shall then serve responsive pleadings in accordance with CPLR 3025 (d). Of course, the first cause of action for legal malpractice contained in the Amended Verified Complaint remains dismissed as set forth hereinabove.

Finally, that branch of plaintiff's cross-motion to direct defendants to disclose their file with respect to their representation of plaintiff in connection with the transaction at issue in this action is considered under CPLR 3124 and is **DENIED**. CPLR 3124 provides in its entirety:

If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section

3123, the party seeking disclosure may move to compel compliance or a response

(CPLR 3124). Plaintiff has not alleged that he served a formal demand upon defendants pursuant to CPLR 3120, for the discovery sought herein, which would have given defendants an opportunity to formally respond thereto. If a stipulation of the parties is not forthcoming with respect to the discovery sought, then plaintiff is required to proceed by notice served upon defendants (see CPLR 3102 [b]). If the notice proved unavailing, then plaintiff may move to compel compliance under CPLR 3124. The motion should not be made unless a notice was used (see e.g. *Carroll v Williams*, 277 AD2d 414 [2000]; Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3124:1).

Accordingly, that branch of plaintiff's cross-motion to compel is **DENIED**, with leave to renew after service of a formal demand by plaintiff upon defendants, if compliance therewith is not forthcoming.

The foregoing constitutes the decision and Order of the Court.

Dated: December 13, 2010



HON. JOSEPH FARNETI
Acting Justice Supreme Court

_____ FINAL DISPOSITION

X NON-FINAL DISPOSITION