

Milleris v Sullivan

2010 NY Slip Op 33901(U)

February 16, 2010

Sup Ct, Queens County

Docket Number: 15808/09

Judge: Howard G. Lane

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 6

EDUARDO MILIERIS and PATRICIA
MILIERIS,
Plaintiffs,

-against-

PATRICK J. SULLIVAN, ESQ., et al.,
Defendants.

Index No. 15808/09

Motion
Date February 2, 2010

Motion
Cal. No. 22

Motion
Sequence No. 1

	<u>Papers</u>
	<u>Numbered</u>
Notice of Motion.....	1-4
Opposition.....	5-7
Reply.....	8-10

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

Plaintiffs, Eduardo Milieris and Patricia Milieris commenced this action against defendant, Patrick J. Sullivan, Esq. (hereinafter "Sullivan") seeking to recover damages for legal malpractice by Sullivan. Plaintiffs allege in the complaint that they purchased a house in Queens County and that based upon the representations of their real estate broker and the seller/owner of the premises, plaintiffs believed they were purchasing a legal two-family house, when in fact the premises was only a legal one-family house. In a cause of action against defendant Sullivan, the complaint alleges that plaintiffs retained the legal services of Sullivan to represent them as buyers in the purchase of the premises, and that Sullivan undertook the representation of plaintiffs and subsequently failed to protect plaintiffs' interest by failing to notify them that the premises was not a legal two-family house, but was in fact only a legal one-family house. Plaintiffs allege in the complaint, inter alia, that as a result of defendant Sullivan's

negligence and legal malpractice, they sustained monetary and punitive damages. Defendant Sullivan moves to dismiss the verified complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action.

Defendant Sullivan contends that the complaint against him must be dismissed because as a matter of law plaintiffs failed to adequately plead the necessary elements of a legal malpractice claim, including, failure to allege that Sullivan's failure to advise was the proximate cause of plaintiffs' damages.

Plaintiffs oppose defendant's motion and argue that had they known that the house was only a legal one-family, instead of a legal two-family, plaintiffs would have not signed the purchase contract and would not have consummated the sale.

The defendant Sullivan's motion for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against plaintiffs for failure to state a cause of action is decided as follows:

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference ***." (Jacobs v. Macy's East, Inc., 262 AD2d 607, 608 [2d Dept 1999; see, CPLR 3211[a][7]; Tougher Indus. v. N. Westchester Joint Water Works, 304 AD2d 822 [2d Dept 2003]; 1455 Washington Ave. Assocs. v. Rose & Kiernan, 260 AD2d 770 [3d Dept 1999]); Leon v. Martinez, 84 NY2d 83 [1994]). In determining a motion brought pursuant to CPLR 3211(a)(7), the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory." (1455 Washington Ave. Assocs. v. Rose & Kiernan, supra, 770-771). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, Stukuls v. State of New York, 42 NY2d 272 [1977]; Jacobs v. Macy's East, Inc., supra), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (see, Rovello v. Orofino Realty Co., Inc., 40 NY2d 633). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (Given v. County of Suffolk, 187 AD2d 560 [2d Dept 1992]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of

correcting defects in the complaint (see, Rovello v. Orofino Realty Co., Inc., supra; Kenneth R. v. Roman Catholic Diocese of Brooklyn, 229 AD2d 159 [2d Dept 1997]).

In an action to recover damages for legal malpractice, "a plaintiff must demonstrate that the attorney 'failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession' and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages" (Rudolph v. Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d 438, 442 [2007], quoting McCoy v. Feinman, 99 NY2d 295, 301-302 [2002]). 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" (Rudolph v. Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d at 442).

At this preliminary stage of litigation, plaintiffs' verified complaint does state a cause of action for legal malpractice against defendant Sullivan, to wit: that as a result of his failing to exercise the care, skill and diligence possessed by a member of the legal profession, damage was proximately caused to plaintiffs by his negligence.

Here, accepting all the facts alleged in plaintiffs' complaint to be true and according plaintiffs the benefit of every possible favorable inference, plaintiffs have stated a cause of action against defendant Sullivan, as a matter of law. Plaintiffs allege in their complaint that defendant Sullivan represented them in the purchase of real estate. Plaintiffs also allege that defendant's failure to advise them of the legal status of the premises was the proximate cause of plaintiffs' damages. Specifically, the complaint alleges that but for defendant's conduct, plaintiffs would not have purchased a one-family house, as a legal two-family house has a greater value than a legal one-family house (¶17 of the Verified Complaint). Assuming that had the plaintiffs been advised by the defendant Sullivan that the premises was only a legal one-family house and not a legal two-family house, the plaintiffs would not have executed a contract of sale or purchased the premises.

Plaintiffs' allegation that the failure of defendant Sullivan to advise plaintiffs of the building status of the premises, or otherwise protect their interest may serve as some evidence of failure to exercise the care, skill, and diligence possessed by a legal professional. Therefore, plaintiffs have sufficiently alleged facts that establish a prima facie case of legal malpractice.

Accordingly, defendant Sullivan's motion pursuant to CPLR 3211(a)(7) to dismiss pursuant to CPLR 3211(a)(7) is hereby denied.

This constitutes the decision and order of the court.

Dated: February 16, 2010

.....
Howard G. Lane, J.S.C.