

Luden v Nieroda
2011 NY Slip Op 33537(U)
December 9, 2011
Sup Ct, Nassau County
Docket Number: 022441-10
Judge: Vito M. DeStefano
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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 19
NASSAU COUNTY

**NEIL LUDEN, ARLENE LUDEN a/k/a ARLENE
ZVIA LUDEN**

Decision and Order**Plaintiffs,****-against-****MOTION SUBMITTED:****September 1, 2011****MOTION SEQUENCE:01****INDEX NO. 022441-10**

**DANIEL W. NIERODA, JR., ESQ. and
NIERODA & NIERODA, PC,**

Defendants.

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Notice of Cross Motion	2
Affirmation in Opposition to Cross Motion	3
Memorandum of Law in Support of Motion	4
Plaintiffs' Reply Affirmation	5
Defendants' Reply Affirmation	6

In an action, *inter alia*, to recover damages for legal malpractice, fraud, and breach of contract, Daniel W. Nieroda, Jr., Esq. and Nieroda & Nieroda, PC ("Defendants") move for an order pursuant to CPLR 3211(a)(1) and 3211(a)(7) dismissing the second through tenth causes of action in Plaintiffs' second amended verified complaint. The court notes that the Defendants had sought dismissal of the amended verified complaint, however, in response to a cross motion by the Plaintiffs pursuant to CPLR 3025(b) for leave to serve and file a second amended verified complaint, the parties stipulated to accept filing and service of the second amended verified complaint. Consequently, the parties have, in effect, agreed that the court should consider the

motion as seeking dismissal of the second amended verified complaint and also that it should consider the opposition papers to the (now moot) cross motion in rendering its decision on the motion to dismiss (Stipulation dated August 15, 2011; Letter dated August 24, 2011).

For the reasons that follow, the Defendants' motion is granted in part and denied in part.

Background

On May 18, 2005, the Plaintiffs herein were served with a summons and complaint in a foreclosure action commenced against them by Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2003-1 ("the bank") (Ex. "C" to Cross Motion).¹ On June 10, 2005, the Plaintiffs verified the answers which they sought to have filed in the foreclosure action (Ex. "B" to Cross Motion). The Defendants, who were legal counsel for the Plaintiffs in the foreclosure action, served the Plaintiffs' answers in the foreclosure action on August 17, 2005 and filed the answers with the court on August 19, 2005 (Ex. "B" to Cross Motion). The answers were rejected by the bank on August 17, 2005 (Ex. "D" to Cross Motion).

The bank thereafter obtained a default judgment against the Plaintiffs and, according to the Plaintiffs, the Defendants failed to do anything to remedy the default (Second Amended Verified Complaint at ¶¶ 33-36). On the day before the foreclosure sale, Plaintiff Arlene Luden a/k/a Arlene Zvia Luden ("Zvia Luden") filed for bankruptcy in the United States Bankruptcy Court for the Eastern District of New York ("bankruptcy court"), upon the purported advice of Defendants (the "first bankruptcy") (Second Amended Verified Complaint at ¶¶ 42-44). The first bankruptcy petition was dismissed (Second Amended Verified Complaint at ¶ 53).

On January 12, 2006, Zvia Luden filed a second bankruptcy petition along with a Chapter 13 Plan (Ex. "B" to Motion) ("second bankruptcy"). The Chapter 13 Plan was confirmed by the bankruptcy court on March 29, 2006 (Ex. "C" to Motion). In September 2006, the trustee for the second bankruptcy moved for dismissal on the ground that Zvia Luden had "failed to offer a feasible plan, in that the total amount of claims filed in the case exceed the total amount of payments to be made to the Trustee" (Ex. "D" to Motion). In an order dated December 12, 2006, the bankruptcy court dismissed the Chapter 13 bankruptcy petition (Ex. "E" to Motion). The following month, the December 12, 2006 order of dismissal was vacated and the case was reopened (Ex. "F" to Motion).

¹ The foreclosure action is entitled *Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2003-1 v Neil Luden, Arlene Luden a/k/a Arlene Zvia Luden, and "John Doe #1" through "John Doe #10"*, Index No. 6637/05 (Ex. "C" to Cross Motion).

Three years later, in March 2009, an unopposed motion by the bankruptcy trustee in the second bankruptcy proceeding was granted and the petition was dismissed on the ground that Zvia Luden defaulted in making the monthly payments under the Chapter 13 Plan (Exs. “G”, “H”, and “I” to Motion).

Discussion

As noted, the Defendants seek dismissal of the second through tenth causes of action asserted in the second amended verified complaint.² When deciding a CPLR 3211(a)(7) motion, the court must determine whether the plaintiff has a legally cognizable cause of action and not whether the action had been properly pled (*Well v Yeshiva Rambam*, 300 AD2d 580 [2d Dept 2002]). The complaint must be liberally construed and the plaintiff must be given the benefit of every favorable inference (*Tiffany General Holding Corp. v Speno, Goldberg, Steingart & Penn*, 278 AD2d 306 [2d Dept 2000]). The court must also accept as true the facts alleged in the complaint and any factual submissions made in opposition to the motion. If, from the facts alleged in the complaint and the inferences which can be drawn from the submissions in opposition, the court determines that the plaintiff has a cognizable cause of action, the motion to dismiss must be denied. It is noted, however, that legal conclusions and facts contradicted on the record are not entitled to the presumption of truth (*In re Loukoumi, Inc.*, 285 AD2d 595 [2d Dept 2001]).

Legal Malpractice

The fifth and seventh causes of action allege that the Defendants departed from accepted standards of legal representation in their representation of Zia Luden in the first and second bankruptcy actions (Second Amended Verified Complaint at ¶¶ 109-15, 120-26). In support of their motion, Defendants argue that the Plaintiffs’ legal malpractice causes of action should be dismissed because Plaintiffs failed to demonstrate that “but for” Defendants’ negligence, the bankruptcy actions would not have been dismissed and, on the additional basis that Plaintiffs have not suffered any damages - a requisite element to sustain a cause of action for legal malpractice (Defendants’ Memorandum of Law at p 18).

In order to establish legal malpractice, the claimant must show that an 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 professional duty caused the [claimant’s]

² The first cause of action asserted in the second amended verified complaint is one for legal malpractice allegedly committed by the Defendants in the foreclosure action. The Defendants do not seek dismissal of the first cause of action.

actual damages” (*McCoy v Feinman*, 99 NY2d 295, 301-02 [2002]). To survive a motion to dismiss, the complaint must allege that, but for counsel’s alleged malpractice, the claimant would have prevailed in the underlying action or not have incurred any damages (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438 [2007]).

At bar, the Plaintiffs allege that: Zia Luden was “coerced into filing for bankruptcy . . . on the eve of the sale” as “the only way to ‘save their home’”; that the Defendants were retained by Zia Luden to represent her in the bankruptcy proceeding; that Zia Luden paid money to Defendants for legal services in connection with the bankruptcy, and that despite not owing the Defendants any money, the Defendants listed themselves as creditors in the bankruptcy; that the Defendants failed to appear on at least one occasion for a conference; that the Defendants failed to oppose an application to dismiss the bankruptcy proceeding made by the trustee; and that the Plaintiffs were “monetarily damaged in excessive payments to the Trustee in bankruptcy” as well as having paid for legal services in connection with the bankruptcy actions (Second Amended Complaint at ¶¶ 42-52, 61-70).

In view of the foregoing allegations, the branches of Defendants’ motion seeking dismissal of the fifth and seventh causes of action are denied.

Moreover, the Defendants’ contention that the fifth and seventh causes of action are refuted by documentary evidence consisting of the court filings in both bankruptcy proceedings does not warrant dismissal under CPLR 3211(a)(1) as the facts set forth in the second amended verified complaint indicate that bankruptcy filings may not have been warranted under the circumstances and, further, that Zia Luden’s “precarious financial state” which led to dismissal of the bankruptcy actions may have arguably been attributed, in some respect, to Defendants’ representation in the bankruptcy actions.

Breach of Contract

The second, sixth and eighth causes of action asserted in the second amended verified complaint allege breach of contract. Each of those causes of action assert that the Defendants’ failed to properly and adequately represent the Plaintiffs in connection with the foreclosure and bankruptcy actions and that the Defendants breached the terms of the retainer agreement to properly represent Plaintiffs (Second Amended Verified Complaint at ¶¶ 90-93, 116-19, 127-30). The Plaintiffs’ opposition to Defendants’ motion fails to address Defendants’ argument with respect to dismissal of the breach of contract causes of action. The second, sixth, and eighth causes of action are dismissed, in any event, as such claims arise from the same set of facts as the legal malpractice causes of action and, thus, are duplicative of the legal malpractice claims (*Shivers v Siegel*, 11 AD3d 447 [2d Dept 2004]; *Malarkey v Piel*, 7 AD3d 681 [2d Dept 2004]; *Laruccia v Forchelli, Curto, Schwartz, Mineo, Carlino & Cohn, LLP*, 295 AD2d 321 [2d Dept

2002]).

Fraud

The Defendants argue that the Plaintiffs' claims for fraud alleged in the third, fourth, and ninth causes of action should be dismissed. In order to maintain a cause of action for fraud, a plaintiff must allege that the defendant made a misrepresentation of a material existing fact, or a material omission of fact, which was false and known to be false when made, for the purpose of inducing plaintiff's reliance, justifiable reliance on the alleged misrepresentation or omission, and injury (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]). CPLR 3016[b] requires that claims for fraud set forth, in detail, the circumstances constituting the wrong (CPLR 3016[b]; *Euryclei Partners, L.P. v Seward & Kissel, L.P.*, 12 NY3d 553, 559 [2009] [complaint must allege basic facts to establish the elements of the cause of action]).

In the third cause of action, the Plaintiffs allege that while the Defendants knew of the default obtained against Plaintiffs in the foreclosure action, and not having advised the Plaintiffs of the default, Defendants continued to represent that they would "take care" of the situation and that they continued demanding payment in cash from the Plaintiffs for legal fees associated with the foreclosure action (Second Amended Verified Complaint at ¶¶ 94-102).³ According to the Defendants, this cause of action fails to plead any facts tending to show that Defendants' failure to advise the Plaintiffs of the default was "done with the intent to somehow defraud the plaintiffs" or how Plaintiffs were damaged as a result of the fraud (Memorandum of Law at pp 15-16). Contrary to the Defendants' contention, the Plaintiffs have sufficiently pled a cause of action for fraud considering Defendants' failure to advise the Plaintiffs of the fact that a default had been entered against them in the foreclosure action yet Defendants continued to represent them and accept legal fees.

The fraud alleged in the fourth cause of action concerns the Defendants' "intent from the inception" not to defend the foreclosure action but to collect legal fees in connection with the bankruptcy (Second Amended Verified Complaint at ¶¶ 103-08). Specifically, the Plaintiffs alleged that "from the inception of the defendants' retention, defendants attempted to convince the plaintiffs to declare bankruptcy" and that the "failure of the defendants to properly and adequately represent the plaintiffs in connection with the foreclosure action ultimately led to the defendants convincing the plaintiffs to file for bankruptcy protection" (Second Amended

³ When Plaintiffs first learned of the impending foreclosure sale, which was not by the Defendants but a third party, the Defendants "assured the plaintiffs that the impending foreclosure sale 'must be a mistake' and they would 'take care' of the situation" (Second Amended Verified Complaint at ¶¶ 37-38).

Verified Complaint at ¶¶ 104-05). The Plaintiffs, however, have failed to set forth any misrepresentation, other than Defendants' 'advice' to file for bankruptcy and, thus, have failed to particularly set forth a claim for fraud in the fourth cause of action in the second amended complaint.

The Plaintiffs allege in the ninth cause of action that Defendant Daniel W. Nieroda, Jr. ("Nieroda"), who was not a creditor, improperly represented himself to be a creditor in connection with the bankruptcy action "for the purpose of improperly obtaining additional monies" (Second Amended Verified Complaint ¶¶ 131-37). This fraud cause of action must be dismissed, according to Defendants, because the Plaintiffs have "failed to plead with particularity that Nieroda made a misrepresentation of a material fact to plaintiffs pertaining to Nieroda's listing of itself as one of plaintiff's creditors"; nor have the Plaintiffs explained how Nieroda's "listing of itself as a creditor was somehow a false representation and that Nieroda knew it to be false" or how Zia Luden "was injured as a result of the misrepresentation" (Memorandum of Law at pp 21-22) (emphasis in original). Contrary to the Defendants' contentions, the allegation that Nieroda listed himself as a creditor when Zia Luden did not owe any money is a misrepresentation. Moreover, the damages allegedly resulting from the fraud, namely, the "paying of excessive and unnecessary monies under the bankruptcy plan", were sufficiently pled.

Judiciary Law § 487

Defendants argue that the second amended verified complaint fails to set forth factual allegations that demonstrate that "Nieroda's purportedly intentional deceitful conduct, i.e., representing that it was taking care of the foreclosure action at a time when a default judgment had already been rendered against the plaintiffs, proximately caused the plaintiffs to sustain damages, or that they were actually damaged" (Memorandum of Law at p 23).

Pursuant to Judiciary Law § 487, an attorney who is "guilty of any deceit or collusion . . . with intent to deceive the court or any party; or . . . [w]illfully delays his client's suit with a view to his own gain; or willfully receives any money or allowance for or on account of any money which he has not laid out . . . is guilty of a misdemeanor and . . . forfeits to the party injured treble damages, to be recovered in a civil action". The underlying purpose and intent of Judiciary Law § 487 warrants a denial of this branch of the Defendants' motion. The "evident intent" of Judiciary Law § 487 is to "enforce an attorney's special obligation to protect the integrity of the courts and foster their truth-seeking function" (*Amalfitano v Rosenberg*, 12 NY3d 8, 14 [2009]). Furthermore, "[s]ection 487 is not a codification of a common-law cause of action for fraud The operative language at issue - 'guilty of any deceit' - focuses on the attorney's intent to deceive, not the deceit's success" (*Id.*).

Here, the factual allegations in the complaint, including the allegation that Defendants

listed themselves as creditors in the bankruptcy when, in fact, no money was owed to them, sufficiently pleads a cause of action for violation of Judiciary Law § 487 (*see Ginsberg Development Companies, LLC v Carbone*, 85 AD3d 1110 [2d Dept 2011]). In this regard, the court notes Defendants' statement in its papers that "[w]hile terribly confusing, it appears that plaintiffs are alleging that [Defendants] made a misrepresentation to the bankruptcy court by identifying itself as a creditor in the filings it submitted on behalf of plaintiff Arlene Luden" (Memorandum of Law at pp 21-22). This court views any alleged misrepresentation made to the bankruptcy court as an affront to the integrity of the court and, thus, Plaintiffs have sufficiently pled a cause of action for violation of Judiciary Law § 487.

Based on the foregoing, it is hereby ordered that: the Defendants' motion seeking: dismissal of the second, fourth, sixth, and eighth causes of action is granted; and, in all other respects, the motion is denied. The Plaintiffs' cross motion is resolved as per stipulation between the parties.

A Preliminary Conference has been scheduled for January 17, 2012, at 9:30 A.M. in the Preliminary Conference Part.

This constitutes the decision and order of the court.

Dated: December 9, 2011


Hon. Vito M. DeStefano, J.S.C.

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