SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN PART 12

Index Number : 111356/2007
EMAR BUILDING CORP
vs
CODISPOTI & MANCINELLI, LLP
Sequence Number : 005
DISMISS ACTION

INDEX NO. 111356/2007E
MOTION DATE
MOTION SEQ. NO. 005
MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-8 (e-filed)
Answering Affidavits — Exhibits	20,21
Replying Affidavits	23

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/15/11

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

----------X

EMAR BUILDING CORPORATION,
Plaintiff,

- against -

CODISPOTI & MANCINELLI, LLP, STEVEN MANCINELLI, Esq., BRUNO F. CODISPOTI, Esq., and NASSAR NAGI,
Defendants.

----------X

Index No. 111356/2007E
Mot. Seq. No. 005

DECISION AND ORDER

For the Plaintiff:
Andrew Lavoot Bluestone, Esq.
233 Broadway, 27th fl.
New York, NY 10279
(212) 791-5600

For Defendants Codispoti & Mancinelli, LLP, Steven Mancinelli, Esq., and Bruno F. Codispoti:
Furman Kornfeld & Brennan LLP
By: Joshua B. Sandberg, Esq.
545 Fifth Ave., ste. 401
New York, NY 10017
(212) 867-4100

Papers considered in review of this motion to dismiss:

Papers	E-File Document Number
Notice of Motion and Sandberg Affirmation and Exhibits	18
Plaintiff's Affirmation in Opposition	20
Plaintiff's Memorandum of Law in Opposition	21
Reply Affirmation and in Further Support	23

PAUL G. FEINMAN, J.:

Defendants Codispoti & Mancinelli, LLP, Steven Mancinelli, Esq., and Bruno F. Codispoti, Esq. (collectively, the "defendants") move to dismiss the amended complaint as against them in its entirety for failure to state a cause of action and based upon the doctrine of collateral estoppel (*see* CPLR 3211 [a] [5],[7]). Plaintiff Emar Building Corporation opposes. For the reasons discussed below, defendants' motion to dismiss is granted as to first and second causes of action.

Background

Plaintiff Emar Building Corporation is a New York business corporation whose only asset was a building with twenty apartment and two commercial units located at 755 Ninth Avenue, New

York, New York (Doc. 13, Am. Comp. ¶ 11). According to the amended complaint, in June of 1999 plaintiff's then attorney entered into a contract to sell plaintiff's property despite lacking written authority to do so. The day after the contract was entered, plaintiff's attorney cancelled it, prompting the buyer, Rudolph Brilliant-Alonzo, to commence an action for specific performance. A separate action was brought against plaintiff by the Korin Group seeking broker's fees for the sale of the property. After a bench trial before the Honorable Charles E. Ramos, in July 2002, a final judgment was entered against plaintiff, requiring specific performance of the agreement (*Alonzo v Emar Bldg. Corp.*, Sup Ct, NY County, July 22, 2002, Ramos, J., index No. 603171/1999). A judgment was also entered against plaintiff in the related action for broker's fees in the sum of $129,000.00. According to plaintiff, these judgments were eventually affirmed by the Appellate Division, First Department, on February 14, 2002 (*see Korin Group v Emar Bldg. Corp.*, 291 AD2d 270, 270-271 [1st Dept 2002]). Thereafter, the judgment was executed against plaintiff's bank accounts, causing it to fall behind in its payment obligations on a mortgage on the 755 Ninth Avenue property, eventually leading to its holder commencing a foreclosure action (Doc. 13, Am. Comp. ¶¶ 28 - 29).

Plaintiff in need of cash "[i]n order to finance an appeal of the judgments" (*id.* at ¶ 31), took out a second mortgage on the 755 Ninth Avenue property from Genuine Realty, an entity allegedly doing business on behalf of defendant Nassar Nagi (*id.* at ¶ 30). The amended complaint alleges "[d]efendants were then retained to handle the appeal of the specific performance order, and post trial proceedings. However, they participated in the second mortgage negotiation and closing and prepared documents for the closing" (Doc. 13, Am. Comp. ¶ 38). This closing allegedly took place on December 3, 2002. The amended complaint omits any reference to the date defendants' representation of plaintiff actually commenced, but defendants claim say they were retained "in or

about April of 2002" (Sandberg Affirm. ¶ 6).

The amended complaint alleges "[d]efendants were unsuccessful in obtaining a stay of the specific performance order pending appeal, and [d]efendants advised [plaintiff] to file a petition in bankruptcy" (Doc. 13, Am. Comp. ¶ 39). Defendants recommended another attorney to handle the petition, Louis J. Posner, Esq., formerly a defendant in this action. Thereafter, plaintiff filed a voluntary petition on March 23, 2003, in the United States Bankruptcy Court, Southern District of New York. During these proceedings, and "under the aegis of the Bankruptcy court," (*id.* at ¶ 63), the property at 755 Ninth Avenue was sold to Genuine Realty Corporation with the closing date of August 27, 2004 (*see* Doc. 18, Exhibit C, Contract of Sale; *see also* Doc. 13, Am. Comp. ¶ 45). The amended complaint alleges defendants participated in the sale of the property, and the contract itself lists defendants as the escrow agent (*see* Doc. 18, Exhibit C, Contract of Sale at 9).

On February 17, 2005, the Bankruptcy Court issued an order granting the separate applications of Louis Posner, as "Counsel to the Debtor," and defendants, as "Special Counsel to the Debtor," for allowance of final compensation and reimbursement of expenses (Doc. 18, Exhibit E, Bankruptcy Fees Order). This order was issued only after a hearing was held in the Bankruptcy Court, and notice had been given pursuant to the Federal Rules of Bankruptcy Procedure 2002 (a)(7) and (c)(2) (*id.*). Defendants' application for fees had been made on September 30, 2004, covering the period of April 23, 2003, through September 1, 2004 (*id.*).

Plaintiff Emar Building Corporation commenced this action by the filing of a summons with notice on or around August 20, 2007. A verified complaint was subsequently filed and served, alleging three causes of action against the defendants, Lois J. Posner, Esq., and Nassar Nagi. Initially, Lucie Shader, a shareholder of Emar, was also named as a plaintiff to the action. Defendants moved to dismiss arguing that allegations as against it had already been conclusively

resolved by the Bankruptcy Court's order approving defendants' application for fees. The motion was granted in its entirety with respect to those claims asserted on behalf of Shader, as the court concluded that defendants represented only the corporation, not the individual shareholders (Doc. 18, Exhibit 1, Settled Order at 2). In addition, defendants' motion was granted "to the extent that the complaint allege[d defendants] provided negligent legal representation in connection with and/or during the course of the bankruptcy proceeding" (*id.*). However, the motion was denied to the extent the complaint alleged defendants "provided negligent representation before the filing of the bankruptcy petition and/or after the bankruptcy proceeding concluded" (*id.*). Plaintiff was further granted leave to re-plead its complaint within thirty days of entry of the order (*id.* at 3). Notice of entry of that order was filed January 6, 2010 (Doc. 9, Notice of Entry).

Plaintiff filed its amended verified complaint on February 10, 2010 (Doc. 13, Am. Comp. ¶ 57). This amended complaint was nearly identical to the original complaint, except plaintiff inserted language in several paragraphs to conform the complaint to the court's order regarding defendants' first motion to dismiss. For example, in several places plaintiff adds "[n]o claim is made as to attorney activity during the bankruptcy," (*id.* at ¶ 66) or that defendants performed acts pursuant to the attorney-client relationship with plaintiff "prior to and during the bankruptcy, after the bankruptcy was concluded" (*id.* at ¶ 57). However, no factual allegations were added as to what specific negligent tasks were actually performed.

Plaintiff's first cause of action against defendants sounds in attorney malpractice. In short, plaintiff alleges that certain monies that were in escrow did not get properly credited during the closing of the sale of the 755 Ninth Avenue property, and that defendants were negligent in not catching these issues at the time of the final closing. The second cause of action against defendants sounds in breach of contract, alleging defendants' actions breached its contract to perform legal

services on behalf of plaintiff. The third cause of action is against Nagi only, alleging breach of a contract under which Nagi or his agents agreed to represent plaintiff "as a *de facto* escrow agent or holder" by failing to "engage in certain actions, to manage the transaction, provide escrow documents, provide escrow accounting, account for monies in escrow, account for monies to be held in escrow, to account for payments to be made from those escrowed monies, to perform due diligence tasks and return the funds if not used or accounted for (*id.* at ¶ ¶ 88 - 90).

It should be noted that the amended complaint is purportedly verified by Lucie Shader, as president of Emar Building Corporation. However, this verification, notarized December 12, 2007, is the exact same one submitted in connection with the original complaint. Thus, Shader could not possibly have verified the additional allegations inserted into the amended complaint pursuant to the court's order granting leave to re-plead. As such, at the very least, these additional paragraphs could not be considered verified. Nonetheless, even if plaintiff was required to provide a verified amended complaint, defendants have not given notice with due diligence to plaintiff's attorney they elect to treat the unverified pleading as a nullity, thus waiving any objection to the defective verification (CPLR 3022; *Leokowski v State*, 1 NY3d 201, 210 [2003]).

Analysis

Defendants move to dismiss the amended complaint in its entirety for failure pursuant to CPLR 3211 (a) (5) and (a) (7). In the context of a motion to dismiss under 3211 (a) (7), the court must "determine only whether the facts alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see Thomas v Thomas*, 70 AD3d 588, 590 [1st Dept 2010]). "It is axiomatic that . . . the pleading is to be afforded a liberal construction, the facts alleged in the complaint accepted as true, and the plaintiff accorded the benefit of every possible favorable inference" (*Mandarin Trading Ltd. v Wildenstein*, 65 AD3d 448, 458 [1st Dept 2009]). "Whether a

plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

A motion to dismiss may be brought on the basis that the action is barred by res judicata and collateral estoppel (CPLR 3211 [a] [5]). In New York, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). The doctrine of collateral estoppel bars relitigation where "there is identity of issue which has necessarily been decided, although not actually litigated, in the prior action which is decisive of the present action and where the party seeking to defeat the application of the doctrine ... have had a full and fair opportunity to contest the decision...." (*Lanzano v City of New York*, 202 AD2d 378, 379 [1st Dept 1994]).

Where a prior determination fixes the value of an attorney's legal services, it has necessarily decided that there was no legal malpractice (*Chalpin v Caro*, 265 AD2d 155, 155 [1st Dept 1999]). As such, a subsequent action for attorney malpractice is barred by the doctrine of res judicata (*id.*). An action "alleging legal malpractice in connection with defendant's representation of plaintiffs in bankruptcy court is barred by res judicata" where such claims could have been raised in the bankruptcy court (*Source Enterprises, Inc. v Windels Marx Lane & Mittendorf, LLP*, 2011 NY Slip Op 03179 [1st Dept 2011]).

Here, the amended complaint alleges plaintiff retained defendants to provide legal representation in connection with plaintiff's appeal of the specific performance order, the sale of plaintiff's property located at 755 Ninth Avenue, and plaintiff's bankruptcy proceedings. As this court held when granting, in part, defendants' prior motion to dismiss, plaintiff's cause of action for legal malpractice is barred by res judicata to the extent the alleged negligent acts of defendants

occurred in connection with or part of plaintiff's bankruptcy proceedings. The Bankruptcy Court's prior determination of the value of defendants' legal services necessarily decided that there was no legal malpractice (*Chalpin*, 265 AD2d at 155). That determination was made after notice had been given pursuant to the Federal Rules of Bankruptcy Procedure 2002 (a) (7) and (c)(2) and a hearing was held before the court, giving due consideration to all positions asserted therein (Doc. 18, Exhibit E, Bankruptcy Fees Order). That order specifically addressed legal services provided by defendants from the period of April 23, 2003, to September 1, 2004 (*id.*). Thus, it includes any representation by defendants in connection with the sale of plaintiff's property, which the amended complaint says took place on August 27, 2004, "under the aegis of the Bankruptcy court" (Doc. 13, Am. Comp. ¶ ¶ 45, 63). Furthermore, the amended complaint cannot be saved by plaintiff's insertion of unverified and bare statements that defendants' negligent representation was not in connection with the bankruptcy proceeding, or took place prior to or after the bankruptcy proceeding. None of the allegedly negligent acts in the amended complaint are said to have taken place after the bankruptcy proceedings were completed.

The only aspect of defendants' representation alleged in the verified complaint that may not be precluded by the Bankruptcy Court's order is defendants' effort to appeal the specific performance judgment previously entered against plaintiff. It is unclear whether the fees awarded in that order covered these particular services. The verified complaint says defendants failed to obtain a stay of the specific performance judgment pending resolution of the appeal, but a settlement was reached in July of 2004 between Nagi and Alonzo, the party entitled to specific performance of the contract (Doc. 13, Am. Comp. ¶¶ 41 - 42). This settlement required plaintiff to "forego [its] appeal" of the specific performance judgment (*id.* at ¶ 42). However, the cause of action for legal practice is based on defendants' alleged "negligent[] fail[ure] to render competent legal service,

when it supervised and engaged in the property sale closing and transaction prior to the bankruptcy" (*id.* at ¶ 62). Furthermore, even accepting all facts in the amended complaint as true, any alleged damages said to have been the result of such negligence bear no causal relation to defendants' representation of plaintiff in the appeal.

An action for legal malpractice requires proof of three elements: (1) that the attorney was negligent; (2) that such negligence was a proximate cause of plaintiff's losses; and (3) proof of actual damages (*Brooks v Lewin*, 21 AD3d 731, 734 [1st Dept 2005]). It requires the plaintiff to establish that "'but for' the attorney's negligence" the plaintiff would have prevailed in the matter or avoided damages (*AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]). Here, not only is there a lack of any allegation that defendants were negligent in pursuing the appeal, there is no assertion that "but for" defendants' actions, plaintiff would have prevailed or avoided damages. Any damages plaintiff had incurred at the time were the result of the judgment entered against plaintiff prior to the commencement of its attorney-client relationship with defendants. Therefore, to the extent any allegation made in furtherance of plaintiff's amended complaint survives dismissal on the basis of res judicata (CPLR 3211 [a] [5]), the first cause of action must nonetheless fail for failing to state a claim under CPLR 3211 (a) (7).

The second cause of action relies on the same alleged facts and injuries as the first cause of action, only framed as a breach of contract claim rather than legal malpractice. Thus, the second cause of action is dismissed as unnecessarily duplicative (*see Rivas v Raymond Schwartzberg & Assoc., PLLC*, 52 AD3d 401, 401 [1st Dept]). Moreover, dismissal is warranted because the relief sought therein is barred by the doctrine of res judicata based on the Bankruptcy Court's order granting legal fees to the defendants (CPLR 3211 [a] [5]).

Defendants have moved to dismiss the amended complaint in its entirety. However, the

third cause of action asserts a breach of contract claim as against only defendant Nagi, who has not appeared in connection with the instant motion. As such, the court need not determine whether this cause of action appropriately states a valid claim at this time.

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted and the first and second causes of action of plaintiff's amended complaint are dismissed; and it is further

ORDERED that the remainder of the action is severed and shall continue as against defendant Nagi.

This constitutes the decision and order of the court.

Dated: June 15, 2011
New York, New York

Paul G. Feinman
J.S.C.

(2011 Pt 12 D&O_111356_2007_005_daz(M2D).wpd)