

G. Fiore Concrete & Constr., Inc. v Rosen

2013 NY Slip Op 33304(U)

February 27, 2013

Sup Ct, Richmond County

Docket Number: 150301/2012

Judge: John A. Fusco

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

-----X
G. FIORE CONCRETE & CONSTRUCTION, INC.,

DCM Part 4

Plaintiff,

**Present:
HON. JOHN A. FUSCO**

-against-

DECISION AND ORDER

**GARY S. ROSEN, GARY ROSEN LAW FIRM,
P.C., ANTHONY J. POCCHIA,
MARY A. WHITING and POCCHIA & WHITING,**

Index No. 150301/12

**Motion Nos. 2586-001
2761-002
2884-003**

Defendants.
-----X

The following papers numbered 1 to 21 were fully submitted on the 28th day of November, 2012.

	Papers Numbered
Notice of Motion to Dismiss the Complaint pursuant to CPLR 3211(a)(8) by Defendants Anthony J. Pocchia, Mary A. Whiting and Pocchia & Whiting, with Supporting Papers (dated August 16, 2012).....	1
Plaintiff's Affirmation in Opposition (dated August 31, 2012).....	2
Reply Affirmation by Defendants Anthony J. Pocchia, Mary A. Whiting and Pocchia & Whiting (dated September 5, 2012).....	3
Notice of Motion to Dismiss the Complaint pursuant to CPLR 3211(a)(1) by Defendants Anthony J. Pocchia, Mary A. Whiting and Pocchia & Whiting, with Supporting Papers (dated September 11, 2012).....	4
Notice of Pre-Answer Motion to Dismiss the Complaint pursuant to CPLR 3211(a)(1), 3211(a)(5), 3211(a)(7) and 3211(c) by Defendants Gary S. Rosen and Gary Rosen Law Firm, P.C., with Supporting Papers (dated September 21, 2012).....	5
Memorandum of Law in Support of Pre-Answer Motion to Dismiss	

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(dated September 21, 2012).....	6
Affirmation by Defendants Anthony J. Pocchia, Mary A. Whiting and Pocchia & Whiting in Partial Opposition to Co-Defendants' Motion to Dismiss (dated September 25, 2012).....	7
Plaintiff's Affirmation in Opposition to Motion to Dismiss by Defendants Anthony J. Pocchia, Mary A. Whiting and Pocchia & Whiting (dated October 1, 2012).....	8
Affidavit of Glen Fiore in Opposition to Motion to Dismiss by Defendants Anthony J. Pocchia, Mary A. Whiting and Pocchia & Whiting (dated September 19, 2012).....	9
Affirmation of Ronald Francis, Esq. (dated September 28, 2012).....	10
Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss (dated October 1, 2012).....	11
Plaintiff's Affirmation in Opposition to Motion to Dismiss by Defendants Gary S. Rosen and Gary Rosen Law Firm, P.C. (dated October 19, 2012).....	12
Affidavit of Glen Fiore in Opposition to Motion to Dismiss by Defendants Gary S. Rosen and Gary Rosen Law Firm, P.C. (dated October 19, 2012).....	13
Affirmation of Ronald Francis, Esq. (October 17, 2012).....	14
Plaintiff's Memorandum of Law in Opposition to Motion to Dismiss by Defendants Gary S. Rosen and Gary Rosen Law Firm, P.C. (dated October 19, 2012).....	15
Memorandum of Law in Support of Motion to Dismiss by Defendants Anthony J. Pocchia, Mary A. Whiting and Pocchia & Whiting (undated).....	16
Reply Affidavit by Anthony J. Pocchia	

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(dated October 12, 2012).....	17
Reply Affirmation by Defendants Anthony J. Pocchia, Mary A. Whiting and Pocchia & Whiting (dated October 12, 2012).....	18
Reply Affirmation in Continued Support of Pre-Answer Motion to Dismiss by Defendants Gary S. Rosen and Gary Rosen Law Firm, P.C. (dated November 28, 2012).....	19
Affidavit by Gary S. Rosen in Continued Support of Pre-Answer Motion to Dismiss by Defendants Gary S. Rosen and Gary Rosen Law Firm, P.C. (dated November 28, 2012).....	20
Memorandum of Law in Continued Support of Pre-Answer Motion to Dismiss by Defendants Gary S. Rosen and Gary Rosen Law Firm, P.C. (dated November 28, 2012).....	21

Upon the foregoing papers, the motions (Seq. Nos. 001 and 002) by defendants Anthony J. Pocchia, Mary J. Whiting and Pocchia & Whiting to dismiss the complaint pursuant to CPLR 3211 are granted as is the pre-answer motion (Seq. No. 003) by defendants Gary S. Rosen and the Gary Rosen Law Firm, P.C. for like relief.

In this legal malpractice action, plaintiff claims, *inter alia*, that defendants were negligent in failing to renew a certain mechanic's lien that was prepared and filed with the Richmond County Clerk on July 21, 2008 on behalf of plaintiff G. Fiore Concrete & Construction, Inc. (hereinafter, "Fiore") by defendants Gary S. Rosen and the Gary Rosen Law Firm (hereinafter, "Rosen"). The subject mechanic's lien relates to an alleged debt in the amount of \$238,000.25 owed to Fiore by nonparty Sunnymeade Leasing LLC (hereinafter "Sunnymeade") pursuant to a contract dated December 26,

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2007 whereby Fiore was retained to provide excavation and concrete services for the creation of a retail shopping plaza on real property leased by Sunnymeade and located at 4255 Amboy Road, Staten Island, New York. In the complaint, it is alleged that although Fiore had fully performed the excavation and concrete work by about May 15, 2008, Sunnymeade refused to pay the balance owed, *i.e.*, \$238,000.23¹, and instead, commenced a lawsuit on or about July 22, 2008 against Fiore for, *inter alia*, breach of contract. Nearly simultaneously therewith, Fiore retained Rosen to file a mechanic's lien against the subject property in order to secure the claimed debt. It is further alleged that on or about August 14, 2008, Fiore retained defendants Anthony J. Pocchia, Mary J. Whiting and Pocchia & Whiting (hereinafter, "Pocchia & Whiting") to provide a defense in the Sunnymeade action, and that on or about October 3, 2008, these defendants interposed an answer on behalf of Fiore which contained a counterclaim for breach of contract relating to the monies claimed to be due. During the pendency of that lawsuit, and on or about April 19, 2010, Sunnymeade filed a Chapter 11 Bankruptcy Petition with the U.S. Bankruptcy Court for the Eastern District of New York which listed Fiore as a creditor with an "unsecured" claim in the amount of \$263,000.00. It appears that Pocchia & Whiting appeared on behalf of Fiore in this bankruptcy proceeding, attended a hearing, and filed a Proof of Claim for their client. On June 5, 2012, the Bankruptcy

¹ Plaintiff concedes that on or about April 17, 2008, Sunnymeade made a partial payment of \$452,233.23 towards the total charge of \$690,233.48 for the excavation and concrete services rendered.

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Court allegedly approved the sale of the Sunnymeade lease for \$1,900,000.00, whereupon the disbursement of those funds was made pursuant to an Amended Plan of Liquidation that “allowed” claims by creditors who had properly filed and renewed a mechanic’s lien considered “additional rent” in accordance with the terms of the Sunnymeade lease, while those claims (*e.g.*, Fiore’s) predicated on mechanics’ liens that had not been renewed and/or for which an action to foreclose said lien had not been commenced, were allegedly discharged.

The gravamen of plaintiff’s legal malpractice claim is that both Rosen and Pocchia & Whiting rendered legal services to Fiore on a continuous basis during the relevant time period and departed from the accepted standard of practice by, *inter alia*, neglecting to renew the mechanic’s lien prior to its expiration on July 21, 2009 notwithstanding repeated requests to “protect the lien” and his ability to collect on the underlying debt. Fiore further maintains that defendants’ further failure to timely file a notice of pendency and commence either a third-party or a direct action against the property owner to foreclose the subject mechanic’s lien resulted in the discharge of the underlying claim against Sunnymeade.

In support of their separate motions to dismiss the complaint pursuant to CPLR 3211(a)(1), (a)(5) (Seq. Nos. 002 and 003), defendants rely upon certain documentary evidence which they contend disproves the seminal allegation that their legal representation was negligent and caused Fiore to suffer damages. More particularly, defendants point to an undated “Partial Discharge of Lien By Subcontractor”,

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admittedly signed by Glen Fiore on behalf of plaintiff, in acknowledgment of the partial payment he received from Sunnymeade in the amount of \$452,233.23 for the work performed “to the extent of [that] partial payment”. According to the moving defendants, this documentary evidence unequivocally and unambiguously demonstrates that, in consideration for that partial payment, plaintiff agreed to “waive, relinquish, release, and discharge all liens and claims of liens” which Fiore then had and could thereafter acquire for its work, “including the portion thereof not yet completed or paid for”. Defendants maintain that this documentary evidence constitutes a waiver and release which barred the filing and/or enforcement of any mechanic’s lien relating to work performed by Fiore, including the work which had not yet been completed, as per its agreement with Sunnymeade dated February 27, 2008. Therefore, defendants contend that since the subject mechanic’s lien was either invalid or void *ab initio*, there is no proximate cause between the alleged legal malpractice and plaintiff’s claimed inability to collect on the debt and Fiore’s damages were not actual and ascertainable absent adjudication. Therefore, defendants claim that this purported creditor was not entitled to receive any proceeds from the bankruptcy estate for its disputed claim.

In addition to the foregoing, Rosen maintains that they rendered “very limited legal services” solely in connection with the filing of the mechanic’s lien, for which they were paid \$250.00 by plaintiff. Somewhat similarly, Pocchia & Whiting purport to rely upon their Retainer Agreement dated August 14, 2008, contending that it expressly limits their legal representation of Fiore to the defense of the Sunnymeade action, and

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excludes “any services rendered in appellate courts of [sic] any action or proceedings other than the action for which [their] office [was] retained”.

It is well established that in considering a motion to dismiss pursuant to CPLR 3211(a)(7), the pleadings are to be liberally construed (*see* CPLR 3026; Leon v Martinez, 84 NY2d 83). Accordingly, the court will accept the factual averments in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the proponent of the pleading has stated a cognizable cause of action (*see* Goldman v Metropolitan Life Ins. Co., 5 NY3d 561, 571); Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, 96 NY2d 300, 303). Moreover, it is well settled that any affidavits submitted by plaintiff to remedy defects in the complaint may be freely considered, at which point the criterion for dismissal becomes whether the pleader “has” a cause of action, not whether he or she has stated one (*see* Leon v Martinez, 84 NY2d at 88; Rovello v Orofino Realty Co., 40 NY2d 633, 635-636). Further, in order to prevail on a motion to dismiss pursuant to CPLR 3211(a)(1), it is familiar law that the movant is required to demonstrate that “the documentary evidence utterly refutes plaintiff’s allegations, conclusively establishing a defense as a matter of law” (Goshen v Mutual Life Inc. Co. of N.Y., 98 NY2d 314, 326; *see* Goldman v Metropolitan Life Ins. Co., 5 NY3d at 571). In the absence of same, the motion will be denied.

Applying the foregoing principals to the case at bar, it is the opinion of this Court that the documentary evidence proffered by defendants resolves all the factual issues

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upon which the legal malpractice claims are based. In this regard, it is worth noting that in order to prevail in such a cause of action, a plaintiff must show not only that an attorney “failed to exercise the reasonable skill and knowledge commonly possessed by a member of the legal profession” (Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, 96 NY2d at 303), but that said negligent representation proximately caused plaintiff to sustain actual and ascertainable damages (*see* Dombrowski v Bulson, 19 NY3d 347, 350-351; Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d 438, 442; McCoy v Feinman, 99 NY2d 295, 301-302). In other words, a plaintiff must show that he or she would have *prevailed* in the underlying action, or would not have sustained damages, *but for* the attorney’s negligence (*see* Davis v Klein, 88 NY2d 1008, 1009-1010; Bells v Foster, 83 AD3d 876, 877).

With this established, the documentary evidence upon which defendants rely disposes of Fiore’s claim of negligent legal representation. More particularly, the Partial Discharge of Lien resolves the claims that (1) a legal basis existed for the filing of the subject mechanic’s lien and its renewal, and/or (2) Fiore would have prevailed in the Sunnymeade bankruptcy proceeding or would not have sustained damages, *but for* the attorneys’ failure “to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession” (McCoy v Feinman, 99 NY2d at 301-302; *see* Davis v Klein, 88 NY2d 1008, 1009-1010; Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, 96 NY2d at 303-304; Bells v

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Foster, 83 AD3d at 877). The Partial Discharge constitutes a “release and waiver” as it “unmistakably manifests” an intention on the part of plaintiff to surrender its rights to the alleged additional monies (*see* Navillus Tile, Inc. v Turner Constr. Co., 2 AD3d 209, 210-211). As such, dismissal of the complaint pursuant to CPLR 3211(a)(5) is required.

Defendant’s remaining contentions are academic and defendants’ request for the costs of this motion are also denied.

Accordingly, it is

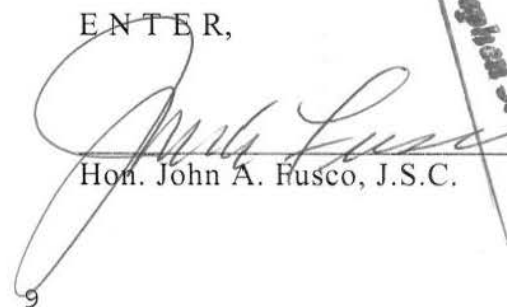
ORDERED, that the motion of defendants, Anthony J. Pocchia, Mary A. Whiting, and Pocchia & Whiting, pursuant to CPLR 3211 (a) (1) to dismiss the complaint based on the documentary evidence is granted; and it is further

ORDERED, that the motion of defendants Gary S. Rosen and Gary Rosen Law Firm, P.C. pursuant to CPLR 3211 (a) (1) to dismiss the complaint based on the documentary evidence is granted; and it is further

ORDERED, that the remainder of the motions are denied as academic; and it is further

ORDERED, the Clerk of the Court shall grant judgment accordingly.

Dated: Feb. 27, 2013

ENTER,

Hon. John A. Fusco, J.S.C.

Stamp: Stephen J. Blum
FEB 27 2013
GRANTED