

<b>Elmakies v Sunshine</b>
2013 NY Slip Op 33977(U)
January 4, 2013
Supreme Court, Nassau County
Docket Number: 16965-11
Judge: Vito M. Destefano
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SUPREME COURT - STATE OF NEW YORK

Present:

**HON. VITO M. DESTEFANO,**  
Justice

TRIAL/IAS, PART 15  
NASSAU COUNTY

**NISSIM ELMAKIES, DOWNSTATE ELMIRA  
AQUISITION CORP., ELMEN INTERNATIONAL  
CORP.,**

**Decision and Order**

**Plaintiffs,**

**-against-**

**MOTION SEQUENCE: 01,  
02  
INDEX NO.:16965-11**

**JEFFREY SUNSHINE, ESQ., JEFFREY SUNSHINE  
P.C., MOORE & WOODHOUSE LLP, RICHARD  
WOODHOUSE, ESQ., and JOHN V. MOORE, ESQ.,**

**Defendants.**

**The following papers and the attachments and exhibits thereto have been read on the motions:**

Notice of Motion (Seq. 1)	1
Memorandum of Law (Seq. 1)	2
Affidavit of Elmakies	3
Plaintiffs' Memorandum of Law	4
Reply Affidavit (Seq. 1)	5
Reply Memorandum of Law (Seq. 1)	6
Supplemental Memorandum of Law in Support of Motion	7
Supplemental Affidavit of Woodhouse	8
Affidavit of Arthur Ambrose	9
Affidavit of Miltenberg	10
Plaintiffs' Supplemental Memorandum of Law	11

In this action to recover damages for legal malpractice and breach of fiduciary duty, the court, in an order dated September 24, 2012, *inter alia*, treated the branch of the motion by defendants Moore & Woodhouse LLP, Richard Woodhouse, Esq. and John Moore, Esq. (collectively "Moore & Woodhouse defendants") for an order pursuant to CPLR 3211 (a)(1) and (5) dismissing the complaint, as a motion pursuant to CPLR 3212 (CPLR 3211[c]) and permitted the parties to submit additional papers in support thereof. The court also held in abeyance decision on the branch of the motion which was to dismiss pursuant to CPLR 3211 (a)(7).

Upon review of all the papers submitted, it is hereby ordered that the motion by the Moore & Woodhouse defendants is denied.

In this regard, the court notes that the allegations contained in Mr. Woodhouse's affidavit which specifically allege that the "last date on which my firm represented plaintiff Downstate Elmira Acquisition Corp. \* \* \* occurred on February 1, 2008, well more than three years before the commencement of this action on December 11, 2011" (Affidavit of Woodhouse at pp.2-3 in Support of Motion) are belied by the June 9, 2009 retainer letter addressed to Downstate Elmira Acquisition Corp. (and signed by Woodhouse) in which he outlined a conflict of interest in connection with representation concerning various real property matters (Letter dated June 9, 2009 annexed to Miltenberg Affirmation). Under the circumstances, the Moore & Woodhouse defendants have failed to establish as a matter of law that the action is untimely and the branch of the motion pursuant to CPLR 3212 must be denied.

Concerning the branch of the motion seeking dismissal pursuant to CPLR 3211(a)(7), the following is noted:

Plaintiffs allege in their complaint that Elmakies and his related enterprises (the other plaintiffs) were induced by several individuals and entities identified therein as "business partners", to invest \$1.4 million, which was used to acquire real and personal property. Plaintiffs allege that the Moore & Woodhouse defendants were engaged by them to act as counsel on Elmakies' investments with the business partners and that they relied on defendants for such counsel. The complaint further alleges that: Elmakies delivered funds to the defendants, who were authorized to apply the funds for investment in his related enterprises; the defendants were not authorized to represent the business partners; that the defendants rendered advice to the business partners and others relating to the subject investments without disclosing the conflict of interest; the defendants performed a wide array of legal services, acting on plaintiffs' behalf and on behalf of the business partners, without disclosure, and enabling, assisting and permitting the business partners to benefit from the funds (which were provided for the investments); "the defendants made determinations as to which individuals were authorized signatories \* \* \* and directed and/or allowed them to sign documents and possess and control funds" (Exhibit "A" to Motion: Complaint at pp.6-7).

The first cause of action in the complaint alleges legal malpractice as follows: the defendants owed a duty of care to the plaintiffs; failed to exercise care in their professional relationship with the plaintiffs; such failure was the legal and proximate cause of injuries to plaintiffs and “but for” such failure and negligence, plaintiffs would have suffered no damages” (*Id.* at p.7). In paragraph 54 of the complaint, the plaintiffs allege, *inter alia*, that the defendants: mishandled funds, misapplied funds and used such funds for unauthorized purposes; allowed the business partners to dominate and control the real estate acquired for investment and the funds for their sole benefit; permitted only a portion of the funds to be used for real estate transactions, with the remainder being dissipated or lost; and permitted individuals to sign legal and other documents without proper authority and approval (*Id.* at p.8). The complaint seeks \$1.4 million in damages based on legal malpractice.

In the second cause of action for breach of fiduciary duty, plaintiffs allege that the defendants intentionally breached their fiduciary duty to them in that they were obligated to: proceed in a manner reasonably calculated to advance Elmakies’ and his entities’ interests; act with reasonable competence; comply with duties concerning plaintiffs’ confidences and property, avoid impermissible conflicting interests; deal honestly with the plaintiffs; not employ advantages arising from the lawyer client relationship in a manner adverse to the plaintiffs; and fulfill valid contractual obligations to the plaintiffs (*Id.* at p.9). The complaint seeks restitution of fees paid to the defendants based on breach of fiduciary duty.

In the opposition papers, Elmakies alleges that he discovered the defendants acted at the direction of the business partners instead of acting at his direction in purchasing, selling and financing real estate in New York. They allowed the business partners to determine the structure of these transactions and to execute the documents that effected them, at his expense, without authorization and without informing Elmakies that they were doing so. Elmakies also asserts that the defendants failed to provide him with proper documentation that would have kept him informed of the fate of his investment or to provide engagement letters setting forth their responsibilities. As a result, the business partners were able to form entities purportedly owned by him but controlled by them; the entities were governed by bylaws drafted by defendants and approved by business partners. “With the aid of the Defendants, the Business Partners used these entities to further a fraudulent scheme to defraud me of my investment. In the name of these entities and at the direction of the Business Partners, they purchased, sold, repurchased, resold pieces of real estate in the Elmira area between each of these entities, mortgaged them to the hilt, remortgaged them and used each as collateral for the other until the mortgages were all foreclosed upon and the properties lost. Defendants saw this was occurring, aided the Business Partners in furthering it, and never informed me or any other authorized representative of the business” (Elmakies Affidavit in Opposition to the Motion at ¶¶ 14 - 15).

Contrary to the defendants’ contentions, the complaint, when considered with the

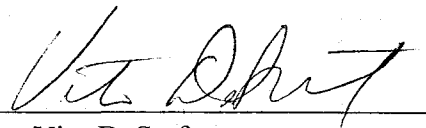
supporting affidavit, does state a cause of action for legal malpractice and breach of fiduciary duty (see CPLR 3211(a)[7]; CPLR 3016; *Heffez v L & G Gen. Constr., Inc.*, 56 AD3d 526 [2d Dept 2008]; *Haynes v CRC Information Systems, Inc.*, 69 AD2d 775 [1<sup>st</sup> Dept 1979]).

Accordingly, the branch of the motion seeking dismissal pursuant to CPLR 3211(a)(7) must be denied.

The attorneys for the parties shall appear for a conference in Part 15 on Monday, January 28, 2013 at 9:30 a.m.

This constitutes the decision and order of the court.

Dated: January 4, 2013

  
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Hon. Vito DeStefano

**ENTERED**  
JAN 08 2013  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE