

Palmieri v Mattimore
2014 NY Slip Op 30300(U)
January 16, 2014
Sup Ct, Suffolk County
Docket Number: 20155/2008
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
JusticeMario Palmieri and Palmieri Realty LLC,
Silvia Palmieri, Lidia Palmieri and
Marisa Palmieri,

Plaintiffs,

-against-

Timothy J. Mattimore,

Defendant.

Motion Sequence No.: 004; MOT.DMotion Date: 8/14/13Submitted: 10/23/13Index No.: 20155/2008Attorney for Plaintiffs:Flower, Medalie & Markowitz
24 E. Main Street, Suite 201
Bay Shore, NY 11706Attorney for Defendant:L'Abbate, Balkan,
Colavita & Contini, LLP
1001 Franklin Avenue
Garden City, NY 11530Clerk of the Court

Upon the following papers numbered 1 to 36 read upon this application for summary judgment: Notice of Motion and supporting papers, 1 - 24; Answering Affidavits and supporting papers, 25 - 33; Replying Affidavits and supporting papers, 34 - 36; it is

ORDERED that the motion by the defendant for an order pursuant to CPLR 3212 awarding summary judgment in his favor is granted to the extent that the claims asserted by the individual plaintiffs and the corporate plaintiff's claim for recovery of the cost of repairs performed on the subject property are dismissed, and in all other respects the motion is denied; and it is further



ORDERED that the caption of the action is hereby amended, as follows:

Supreme Court of the State of New York
County of Suffolk

-----X
Palmieri Realty LLC,

Plaintiff,

Index No. 20155/2008

- against -

Timothy J. Mattimore,

Defendant.

-----X

Plaintiffs commenced this action to recover for alleged legal malpractice action that arising out of the defendant’s representation of the plaintiffs in connection with the purchase of real property located at 1090 Suffolk Avenue in Brentwood, New York (the subject property). The plaintiffs allege that the defendant misinformed them as to the true rental income generated by the subject property, resulting in damages. The plaintiffs also seek to recoup money they expended to repair the subject property. The defendant now moves for summary judgment dismissing the complaint.

The plaintiff Mario Palmieri alleges that he was approached by the defendant with regard to a potential purchase of the subject property. The defendant had represented Mr. Palmieri and other family members in real estate, zoning, and other legal matters for a period of about 15 years. The original asking price for the property was \$900,000.00 but after negotiation the price agreed upon was \$700,000.00. According to the documentary evidence, the property was subject to a 50-year lease held by JP Morgan Chase Bank (“Chase”), which was set to expire in 2011. Under the lease, Chase paid a total of \$3,750 a year in rent. At the time of the sale, Chase no longer occupied the subject property and had subleased each of the buildings thereon. One was leased to the State of New York for a monthly rent of \$5,665.00. The other building was subleased to the Consulate of El Salvador for a monthly rent of \$4,025.00. Mr. Palmieri testified that the defendant did not inform him that he would only be receiving the rent under the main lease until that lease expired in 2011, and he testified that the defendant told him several times that he would be receiving \$9,500.00 in rent each month. He further claimed that he never saw the lease documents until after the closing and that the leases were not attached to the contract that he signed. Upon discovering that he would receive only \$312.00 per month (\$3,750.00 for the year) in rent from the property, he was outraged. He testified that he called the defendant, who apologized and said he made a mistake. He states in his affidavit that if he had known the lack of rental income from the property, he would have opted not to buy it. He also testified that he did not know until after the closing on the subject property on

September 21, 2007, that the defendant had acted as attorney for both sides and had been the real estate broker on the sale and purchase of the subject property. Mr. Palmieri's affidavit also notes that, although the contract of sale for the subject property originally named his three daughters as purchasers, it was decided at the closing to take title in the name of Palmieri Realty, LLC, a limited liability company.

The defendant denied at his examination before trial that he failed to disclose the rental income that Palmieri Realty LLC would receive under the Chase lease until it expired in 2011. He admitted, however, that he had acted as the seller's attorney and the broker on the transaction and that he had received fees from both activities. It is also clear from his testimony that he also represented the plaintiffs and was also paid a legal fee by them for his work. The defendant also submitted a real estate appraisal of the subject property from John Grossman, a qualified appraiser. The appraisal states that on the date of the closing, September 21, 2007, the fair market value of the subject property encumbered by the Chase lease was \$972,000, or \$272,000 more than the plaintiff paid for the property.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*id.*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

It is noted at the outset that the plaintiffs' claim that the defendant has not submitted proof in admissible form because no affidavit has been provided from a person with knowledge of the facts is without merit. The fact that supporting proof is placed in the record by way of an attorney's affidavit with an annexed deposition transcript and other documentary evidence, rather than an affidavit of facts on personal knowledge, does not defeat a party's entitlement to summary judgment (*see Ellman v Village of Rhinebeck*, 41 AD3d 635, 838 NYS2d 641 [2d Dept 2007]; *Blazer v Tri-County Ambulette Service, Inc.*, 285 AD2d 575, 728 NYS2d 742 [2d Dept 2001]; *see also Gaeta v New York News, Inc.*, 62 NY2d 340, 477 NYS2d 82 [1984]; *Pavane v Marte*, 109 AD3d 970, 971 NYS2d 562 [2d Dept 2013]).

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 the plaintiff to sustain actual and ascertainable damages . . . 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” (*Barnave v Davis*, 108 AD3d 582, 969 NYS2d 139 [2d Dept 2013]; *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442, 835 NYS2d 534 [2007], quoting *McCoy v Feinman*, 99 NY2d 295, 301-302, 755 NYS2d 693 [2002]). The plaintiff must show that the attorney’s breach of a professional duty caused actual damages; conclusory allegations of damages or injuries based upon speculation will not suffice (*Holschauer v Fisher*, 5 AD3d 553, 772 NYS2d 836 [2d Dept 2004]).

To succeed on a summary judgment motion dismissing a complaint in an action to recover damages for legal malpractice, a defendant must demonstrate that the plaintiff is unable to prove at least one of the essential elements of its legal malpractice cause of action (*Gershkovich v Miller, Rosado & Algios, LLP*, 96 AD3d 716, 945 NYS2d 567 [2d Dept 2012]; *Boglia v Greenberg* 63 AD3d 973, 882 NYS2d 215 [2d Dept 2009]; *Ali v Fink*, 67 AD3d 935, 936, 890 NYS2d 576 [2d Dept 2009]). Where the claims involve allegations that ordinary jurors could not evaluate based upon their own knowledge and experience, an expert’s affidavit delineating the proper standard of professional care and skill to which the defendant is required to adhere under the circumstances is required (*Natale v Jeffrey Samel & Assoc.*, 308 AD2d 568, 764 NYS2d 883 [2d Dept 2003], *appeal denied* 2 NY3d 701, 778 NYS2d 460 [2004]). However, where the plaintiff’s sole claim is for breach of an expressed promise to achieve a specific result, expert testimony is not necessary to make out a *prima facie* case (see *Serhofer v Groman & Wolf, P.C.*, 203 AD2d 354, 610 NYS2d 294 [2d Dept 1994]), and an attorney’s affirmation may serve as an expert opinion establishing the standard for determining the adequacy of the professional service rendered by the defendant (*Landa v Blocker*, 87 AD3d 719, 928 NYS2d 779 [2d Dept 2011]; *Zasso v Maher*, 226 AD2d 366, 640 NYS2d 243 [2d Dept 1996]).

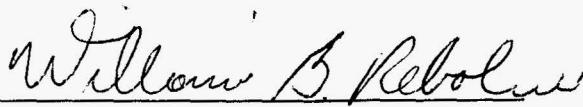
That portion of the motion for summary judgment which seeks dismissal of plaintiffs’ claim for damages resulting from repairs performed on the subject property is granted. Pursuant to the terms of the Chase lease and the subleases, the tenants were responsible for the cost of repairs on the subject property. Any damages sustained by plaintiffs are due to their failure to pursue their legal remedies under the terms of the Chase lease. Their choice not to do so does not impose any legal obligation on the defendant with regard to the cost of repairs to the subject property.

That portion of the motion for summary judgment which seeks dismissal of the claims of the individual plaintiffs must also be granted. While the contract of sale named three of the individual plaintiffs, title to the property was taken by Palmieri Realty, LLC. Thus, any cause of action for damages lies with the limited liability corporation alone, not with the individual members thereof.

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The defendant's application must otherwise be denied, since it has not been established that Palmieri Realty, LLC suffered no damages, and there exist issues of fact as to each of the essential elements of the malpractice claim.

Dated: 1/16/2014


HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** X **NON-FINAL DISPOSITION**