Alva v Gaines, Gruner, Ponzini & Novick, LLP
2014 NY Slip Op 32921(U)
April 8, 2014
Supreme Court, Westchester County
Docket Number: 58542/2011
Judge: William J. Giacomo

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

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GERALYN ALVA and JAMES ALVA,
Plaintiffs,

Index No. 58542/2011
DECISION & ORDER

-against-

GAINES, GRUNER, PONZINI & NOVICK, LLP and TED ALAN NOVICK,
Defendants.

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GAINES, GRUNER, PONZINI & NOVICK, LLP and TED ALAN NOVICK,
Third-Party Plaintiffs,

-against-

ROBERT B. MARCUS, PC and ROBERT B. MARCUS,
Third-Party Defendants.

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The following papers numbered 1 to 44 were read on plaintiffs' motion for partial summary judgment against defendants, defendants' cross motion for summary judgment dismissing the complaint and plaintiffs' motion to amend their complaint.

PAPERS NUMBERED

Notice of Motion/Affidavit/Exhibit A-H/Memo of Law	1-11
The Johnson's Affirmation in Opposition	12
Notice of Cross Motion/Affirmation/Exhibits A-Y	13-39
Plaintiff's Affidavits in Opposition to Cross Motion/Exhibits A-C	40-43
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Factual & Procedural Background

In 2005, Plaintiffs hired John Atzl and Atzl, Scatassa & Zigler Land Surveyors, PC ("Atzl"), to prepare a property survey for a proposed home's foundation stake-out and location and an "as built certificate of occupancy" for a home they were building in Tomkins Cove, NY. Thereafter, plaintiffs' hired an excavator to dig the foundation for the house pursuant to Atzl's measurements. Problems arose which plaintiffs claim are due to Atzl's negligence.

In April 2006, when plaintiffs refused to pay Atzl for their work, Atzl returned to the property to conduct a new survey for no charge, which included a new topographical survey of the area behind the home, contour base map, and grading plan.

In March 2008, plaintiffs retained Gaines, Gruner et. al. to represent them against Atzl in a professional negligence action. Gaines, Gruner did not commence an action against Atzl but, in February 2009, referred the case to third party defendant Marcus, after the statute of limitations expired with respect to the negligence claim arising out of the 2005 survey.

Upon realizing that the statute of limitations for the 2005 survey work had expired, Marcus decided to commence an action against Atzl and asserted two separate causes of action for each survey. (*See Alva v. Atzl*, Index # 2062/2009 Rockland County Supreme Court). In that action, Atzl successfully moved to dismiss the first cause of action pertaining to the 2005 survey as time-barred. In its decision, the Court (Berliner, J.) held that the 2005 survey and 2006 survey were separate transactions (as opposed to a continuous professional relationship). Plaintiffs' claims with respect to the 2006 survey were settled for a nominal amount, to wit, $4,000.

Plaintiffs commenced the instant legal malpractice case against Gaines, Gruner, who, in turn, commenced a third party action against Marcus for contribution and indemnification.

By order dated October 3, 2011, this Court granted third party defendants motion to dismiss the complaint and denied Gainer, Gruner's cross motion to amend the third party complaint.

Gainer, Gruner appealed that decision and order, however, the appeal was never perfected.

Plaintiffs now move for partial summary judgment against Gaines, Gruner on the issue of negligence claiming that when an attorney allows the statute of limitations to expire it is negligence as a matter of law.

In opposition, Gaines, Gruner argues that since plaintiffs have not shown that any alleged negligence proximately caused their damages the motion should be denied. It also argues that there are material issues of fact regarding whether the statute of limitations had expired.

In reply, plaintiffs note that they are seeking partial summary judgment on the issue of negligence, not liability so a proximate cause resolution is not part of the relief sought. Further, they argue that in this Court's October 3, 2011 decision and order it specifically held that the statute of limitations expired and, therefore, that finding is law of the case.

Gaines, Gruner also cross move for summary judgment dismissing the complaint on the ground that plaintiffs' damages were caused by the grading plan Atzl completed in June 28, 2001 therefore any viable cause of action to be asserted against Atzl was time barred by the time plaintiffs consulted them.

In opposition to the cross motion, plaintiffs argue that the alleged negligence took place in 2005 when Atzl staking did not conform to his 2001 plan. Plaintiffs allege that the negligence took place between May and October 2005. Plaintiffs note that they retained Gaines, Gruner in March 2008 well within the applicable 3 year statute of limitations. Plaintiffs note that their expert states that Atzl situated the house in the wrong place and not in accordance with the 2001 plan.

Plaintiffs also move for leave to amend their complaint to clarify that they seek damages from defendants for the 2005 work (staking) and the 2006 work (the two wall plan). Plaintiffs note that from the outset defendants have been on notice that they seek damages for the 2005 work as such claims were contained in their bill of particulars and Atzl was deposed regarding work performed in 2001, 2005 and 2006.

Gaines, Gruner oppose the motion on the ground that the amendment has no merit and could be prejudicial.

Discussion

Plaintiffs' Motion for Summary Judgment on the Issue of Negligence

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law. *(See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hospital*, 68 N.Y.2d 320 [1986]). "Once this showing has been made ... the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

It is well-settled that a plaintiff's burden in a legal malpractice case is a heavy one. To sustain a legal malpractice claim, a plaintiff must prove three elements, namely: (1) proof of the attorney's negligence; (2) a showing that the negligence was the proximate cause of the plaintiff's loss or injury; and (3) evidence of actual damages (*Ehlinger v. Ruberti, Girvin & Ferlazzo, P.C.*, 304 A.D.2d 925, 926, 758 N.Y.S.2d 195 [2003]; *Pellegrino v. File*, 291 A.D.2d 60, 63, 738 N.Y.S.2d 320 [2002], *lv. denied* 98 N.Y.2d 606, 746 N.Y.S.2d 456, 774 N.E.2d 221 [2002]).

Here, plaintiffs failed to establish their entitlement to summary judgment on the issue of negligence. Notably, while other Departments have granted summary judgment on the issue of negligence in legal malpractice actions (*see Bergain v. Grace*, 30 AD3d 1017, 1018 [3rd Dept 2007]; *Williams v. Kublick*, 302 AD2d 961 [4th Dept 2003]; *Stanski v. Ezerski*, 210 Ad2d 186 [1st Dept 1994]), the Second Department has not made such a finding. Rather, the Second Department cases resolve issues of liability, not negligence which in the context of a legal malpractice action is a subset of liability *(see Asia-Lee v. Gandin Schofsky and Rappaport, P.C.*, 276 A.D.2d 453, 713 N.Y.S.2d 753 [2nd Dept 2000]).

Accordingly, plaintiffs' motion for partial summary judgment on the issue of negligence is DENIED.

Plaintiffs' Motion to Amend their Complaint

Pursuant to CPLR 3025(b), leave to amend a pleading shall be freely granted absent prejudice to the adverse party. Nonetheless " ' it is equally true that the court should examine the sufficiency of the merits of the proposed amendment,' and, where the

proposed amendment is 'palpably insufficient as a matter of law or is totally devoid of merit, leave to amend should be denied'. " (*Hill v. 2016 Realty Associates*, 42 AD3d 432, 433 [2nd Dept 2007], *quoting Morton v. Brookhaven Mem. Hosp*, 32 AD3d 381 [2nd Dept 2006] *and citing Lee v. Health Force*, 268 AD2d 564 [2nd Dept 2000]).

Contrary to Gaines Gruner's arguments it has always been clear to all parties that plaintiffs sought damages for the work performed by Atzl in 2005. Notably, plaintiffs and Atzl were fully deposed about the work performed in 2005 and 2006.

In view of the fact that leave to amend a pleading should be freely granted and defendants cannot establish lack of notice or prejudice, plaintiffs's motion to amend the complaint is GRANTED.

Gaines, Gruner's Cross Motion for Summary Judgment

In view of the questions of fact regarding what occurred in 2005 and the damages plaintiffs incurred as a result of Atzl's 2005 work Gaines, Gruner' cross motion for summary judgment dismissing the complaint is DENIED.

Summary

Plaintiffs' motion for partial summary judgment is DENIED, Gainer, Gruner's cross motion for summary judgment dismissing the complaint is DENIED and plaintiffs' motion for leave to amend their complaint is GRANTED. The amended complaint annexed to their motion is deemed served.

The parties are to appear in the Settlement Conference Part on June 3, 2014 at 9:30 a.m. room 1600 for further proceedings.

Dated: White Plains, New York
April 8, 2014

HON. WILLIAM J. GIACOMO, J.S.C.

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