Saviano v Cornicello
2014 NY Slip Op 33124(U)
November 25, 2014
Sup Ct, New York County
Docket Number: 153168/2014
Judge: Anil C. Singh

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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CHRISTOPHER SAVIANO,

Plaintiff,

-against-

ANTHONY J. CORNICELLO, DAVID B.TENDLER, CORNICELLO, TENDLER & BAUMEL-CORNICELLO, LLP and LESTER EVAN TOUR ARCHITECT PLLC,

Defendants.

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DECISION AND ORDER

Index No. 153168/2014

HON. ANIL C. SINGH, J.:

In this action for professional malpractice and breach of contract, defendant Lester Evan Tour Architect PLLC ("Lester Tour Architect"), moves in motion sequence 001 for an order dismissing plaintiff's complaint pursuant to CPLR §3211(a)(7). Plaintiff opposes the motion.

Plaintiff alleges that prior to purchasing real property located at 218 East 30th Street, New York, NY ("the Subject Property") he informed the defendants that his intention in purchasing the Subject Property was specifically so that he could construct a rooftop addition in order to create a duplex apartment for himself and his family. Plaintiff entered into a contract for the Subject Property on February 3, 2011. Subsequently on February 11, 2011 defendant Anthony J. Cornicello ("Attorney Cornicello") arranged for a title search to be conducted on the Subject Property. The Title Report disclosed that a prior owner had sold the air and development rights over the existing building of the Subject Property to an adjoining neighbor in 1998 which would disallow any further upward expansion. Plaintiff alleges that Attorney Cornicello, David B. Tendler, and their law firm, Cornicello, Tendler & Baumel-Cornicello, LLP ("Attorney

Defendants") never read nor consulted the Title Report prior to the closing of the Subject Property.

Defendant Lester Tour Architect avers that they drafted an agreement for their architectural services in May 2011. On May 25, 2011 Lester Tour Architect provided plaintiff with a revised scope of work setting forth the details for constructing the rooftop addition. On June 21, 2011 a closing of title was held for the Subject Property. Plaintiff avers that had he been advised of the lack of development rights at the Subject Property he could have exercised a termination option in the Contract and mitigated his loses prior to closing.

Finally on June 23, 2011 defendant Lester Tour Architect concedes that it executed the agreement for architectural services with plaintiff. But it wasn't until May 2013 that plaintiff had a chance conversation with a neighbor during the initial construction did he first learn that an adjoining neighbor had purchased the development rights over the Subject Property preventing plaintiff's desired addition

In resolving a motion to dismiss for failure to state a cause of action, the court must accept as true the facts as alleged in the complaint and afford plaintiff the benefit of every favorable inference. (Guggenheimer v. Ginzburg, 43 NY2d 268, 275 [1977]). The court must determine only whether the facts as alleged fit within any cognizable theory. (Id.)

Plaintiff argue that Lester Tour Architect in contravention of his duties as plaintiff's architect never conducted a zoning analysis, consulted the title report or inquired as to the feasibility of constructing the rooftop addition. Plaintiff further states Lester Tour Architect did not forward nor provide advice regarding the Title Report to plaintiff. Moreover Lester Tour Architect did not read nor consult the Title Report prior to the closing of the Subject Property.

Lester Tour Architect responds arguing they never agreed or contracted to provide a title report, zoning analysis, feasibility study or any other type of services with regard to air rights or zoning at the Subject Property. Lester Tour Architect further argues that they were not provided with a copy of the title report, any zoning analysis, title report, or documentation relating to the restrictions on the Subject Property that they could have forwarded to plaintiff. In other words, defendant Lester Tour Architect argues that there can be no liability imposed upon them since there was no duty imposed by the contract, assumed voluntarily or imposed by law.

In regards to the professional negligence claim, defendant Lester Tour Architect's arguments for dismissal are based on factual disputes on whether they voluntarily assumed the scope of work that gave rise to plaintiff's damages. Factual disputes are not appropriate issues for review at the motion to dismiss stage (Correa v Orient-Express Hotels, Inc., 84 AD3d 651 [1st Dept 2011]. Accordingly, plaintiff has alleged facts which could fit within a cognizable theory for professional negligence (McPherson v Husbands, 54 AD3d 735, 737 [2d Dept 2008] (denying motion to dismiss based upon factual disputes for professional negligence).

Moving onto the breach of contract claim, plaintiff must allege facts of, "the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages." (JP Morgan Chase v J.H. Elec. of New York, Inc., 69 AD3d 802, 803 [2d Dept 2010]). The June 23, 2011 agreement between defendant Lester Tour Architect and plaintiff provides that the scope of work will include "[s]chematic and Preliminary Design for the alteration of the rear elevation and penthouse addition to the top floor of the apartment." (Exh. B to Lester Evan Tour Aff. at 1). Additionally, the contract states "[t]he Architect will sign and seal drawings and address all code compliance issues raised during the review and approval process." (Id. at 2). Notably absent within the agreement is there any express clause

which requires defendant Lester Tour Architect to provide a title report, zoning analysis, feasibility study or any other type of services with regard to air rights or zoning at the Subject Property.

Responding to defendant's argument, plaintiff argues that the agreement does not contain a merger clause so that all prior communication between the parties including the November 12, 2010 email constitutes aspects of the parties' agreement for architectural services whereby defendant Lester Tour Architect stated, "[b]ut you do have the ability to add a mezzanine or additional smaller apartment to the property, on the roof." While plaintiff is correct, the agreement is absent of a merger clause, the representation made by defendant does not create a contractual obligation to determine the feasibility of the addition with regard to air rights. Whether a reasonable architect would have made that representation is an issue of professional negligence, not one of breach of contract (see Cruz v NYNEX Info. Resources, 263 AD2d 285, 291 [1st Dept 2000](dismissing breach of contract claim where there is no express language in the contract requiring obligation); c.f. Children's Corner Learning Ctr. v A. Miranda Contr. Corp., 64 AD3d 318, 326 [1st Dept 2009] (allowing both professional negligence and breach of contract to co-exist only when a contractual obligation can be gleaned).

Accordingly it is,

ORDERED that the motion to dismiss is granted in part and the breach of contract cause of action of the complaint is dismissed; and it is further

ORDERED that defendant Lester Evan Tour Architect PLLC is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 320, 80 Centre Street, on February 28, 2015, at 9:30AM.

Date: November 25, 2014
New York, New York

Anil C. Singh

HON. ANIL C. SINGH
SUPREME COURT JUSTICE