

Sclafani v Kahn

2015 NY Slip Op 32896(U)

October 29, 2015

Supreme Court, Rockland County

Docket Number: 030285/2015

Judge: Thomas E. Walsh II

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
JOSEPH SCLAFANI and MICHAEL SCLAFANI,

Plaintiffs,

-against-

PAUL B. KAHN, KAHN & LICKER, LLP and
DIVERSIFIED LAND SERVICES, LTD.,

Defendants.
-----X

DECISION & ORDER

Index No. 030285/2015

Mot. #1 & Mot. #2

Hon. Thomas E. Walsh II, A.J.S.C.

The following papers numbered 1-17 read on this motion by defendants, PAUL KAHN and KAHN & LICKER, LLP (Mot.#1)(hereinafter collectively "Kahn"), pursuant to CPLR §3211(a)(5) & CPLR §3211(a)(7), for an Order dismissing the complaint on the grounds that the action is barred by the statute of limitations, and, on the grounds that plaintiff's causes of action for breach of contract, breach of fiduciary duty, fraud and violation of Judiciary Law Section 487, fail to state a claim upon which relief can be granted, and for such other and further relief as to the Court may seem just and proper; and, this motion by defendant, DIVERSITY LAND SERVICES, Ltd. (Mot.#2)(hereinafter "Diversity"), pursuant to CPLR §3211(a)(5) & CPLR §3211(a)(7), dismissing this action on the grounds that the action is barred by the statute of limitations and on the grounds that the causes of action in the complaint fail to state a cause of action; together with such other and further relief as to the Court may seem just and proper:

Notice of Motion (Mot.#1)/Affirmation in Support (Flanagan)/
Exhibits(A&B)-1-3

Memorandum of Law (in Support)-4

Affidavit in Opposition (J. Sclafani)/Exhibits (A&B)-5-6

Plaintiff's Memorandum of Law-7

Reply Memorandum of Law-8

Notice of Motion (Mot.#2)/Affirmation (Cavaliere)/Exhibit-9-11

Memorandum of Law in Support-12

Affidavit in Opposition (Joseph Sclafani)-13

Plaintiff's Memorandum of Law in Opposition/Exhibits (A-F)-14-15

Defendant's Memorandum of Law in Support-16

Reply Memorandum of Law (Diversified's)-17

This Decision & Order will first address and decide the motion by Kahn (Mot.#1) and will thereafter address and decide the motion by Diversified (Mot.#2).

This complaint contains six causes of action, the first alleging Breach of contract, the second alleging Breach of fiduciary duty to the plaintiffs, the third alleging Fraud, the fourth

alleging Negligence, the fifth alleging Malpractice, and the sixth cause of action alleging the violation of Judiciary Law Section 487 by concealing relevant and necessary information from the plaintiffs.

In support of these causes of action the complaint alleges that: On or about April 4, 2008 plaintiffs lent money to Alfredo Zaldivar, Patricia Zaldivar and Melimex, a corporation wholly owned by Alfredo Zaldivar; on June 24, 2009 Joseph Sclafani executed an Extension & Modification Agreement with Alfredo Zaldivar and Patricia Zaldivar providing for the extension of the loan and the modification of the terms thereof, through another agreement, the modified loan was to be secured by mortgages and notes against three separate Rockland County parcels of real property, one in Orangeburg, one in Stony Point and one in Blauvelt; plaintiffs retained the defendants to represent them in the foregoing transaction, including the preparation of the mortgages and other documents necessary to effect the foregoing transaction, said documents to be executed by the parties at the closing on June 24, 2009 and to be recorded thereafter by Diversified as the closing agent; on a number of occasions prior to and at the June 24, 2009 closing plaintiffs informed the defendants and emphasized that the acquisition of a secured interest in the Orangeburg property was plaintiff's prime incentive and a sine qua non for the transaction; contrary to the agreement of the plaintiffs and defendants and the expressed intentions and instructions of the plaintiffs to the defendants a single mortgage was executed by the parties at the June 24, 2009 closing a lien against the Blauvelt and the Stony Point properties; the mortgage agreements and notes prepared by Kahn for the closing and closed on and recorded by Diversified did not conform to plaintiff's needs, wishes or instructions and failed to provide plaintiffs with a mortgage lien against the Orangeburg property; by the foregoing acts and omissions the defendants failed to draft accurate or appropriate documents to achieve plaintiff's known business purposes in entering into the transaction or their retention by plaintiffs; and, the defendants appeared and acted as the attorneys and or title agent on behalf of more than one party to the transaction and defendants withheld and concealed these facts from the plaintiffs and plaintiffs had no knowledge of this fact prior to the closing on June 24, 2009.

Motion #1 by defendants Paul B. Kahn and Kahn & Licker, LLP

Plaintiff's causes of action against Kahn accrued at the time of the closing on June 24, 2009.

The court finds that the letters to the defendant, Paul Kahn, from Frank J. Bennardo, Esq. dated November 7, 2012 and November 29, 2012, in which Mr. Bennardo explains his long standing attorney client relationship with the plaintiff, Mr. Sclafani, and in which he demands that Mr. Kahn provide him with certain documents and information concerning the essential facts underlying the foregoing transactions and potential claims, are not consistent with an attorney client relationship then existing between plaintiff, Mr. Sclafani, and defendant, Mr. Kahn. On the contrary they indicate an attorney client relationship between Mr. Bennard and plaintiff, Mr. Sclafani. Those letters also reveal that either Mr. Bennardo was preparing an action against Mr. Kahn or was representing Mr. Sclafani in some other potential action concerning the underlying loan documents. Of dispositive import is that the foregoing letters from Mr. Bennardo were dated more than three years after the June 24, 2009 closing—as was the transcribed phone conversation between Mr. Sclafani and Mr. Kahn on December 9, 2012. Thus any potential for the application of the continuing representation tolling provisions extending the three year statute

of limitations lapsed prior to Mr. Bennardo's letters and prior to the transcribed conversation between Mr. Sclafani and Mr. Kahon on December 9, 2012.

A review of the December 9, 2012 transcript of the conversation between plaintiff, Joseph Sclafani, and the defendant, Paul Kahn, reveals that Kahn said he would continue to search for the reason(s) why he failed to prepare the documents establishing a secured interest for plaintiff's benefit on the Orangeburg property, however it does not reveal that Kahn continued to represent Mr. Sclafani at any time within the three years following the closing on June 24, 2009. In his letter to Mr. Bennardo dated December 13, 2012 defendant, Kahn, clearly refers to his representation of Mr. Bennardo's clients as having taken place in the past, and even referred to his submission of Mr. Bennardo's letter to his malpractice carrier. This phone conversation and letter do not persuade the court that the words or circumstances evince a continuing attorney client relationship between Mr. Sclafani and Mr. Kahn.

It is therefore the opinion of this court that plaintiff's argument that these words and letters tolled the statute of limitations is unpersuasive.

The complaint was e-filed on January 22, 2015.

Based on the foregoing the court finds that the three year statute of limitations for plaintiff's legal malpractice cause of action and their negligence cause of action accrued at the closing and expired three years thereafter on or about June 24, 2012, prior to the date on which the complaint was filed. The causes of action for legal malpractice and negligence against Kahn should therefore be dismissed [CPLR §3211(a)(5)].

Plaintiff's breach of contract action is also barred by the three year statute of limitations and must also be dismissed [CPLR §214(6); CPLR §3211(a)(5); see also *Sage Realty v Proskauer Rose*, 251 A.D.2d 35 (1st Dept., 1998)].

Plaintiff's fraud cause of action is predicated on defendant's failure to disclose their malpractice rather than any allegations of one or more affirmative intentional misrepresentations and as such this cause of action is also subject to the three year statute of limitations. Where, as here, a fraud claim is asserted in connection with charges of professional malpractice, it is sustainable only to the extent that it is premised upon one or more affirmative, intentional misrepresentations—that is, something more egregious than mere concealment or failure to disclose one's own malpractice [*White of Lake George v. Bell*, 251 A.D.2d 777 (3d Dept., 1998), mot. for leave to appeal dismissed 92 N.Y.2d 947, 1998]. No allegations of such affirmative intentional misrepresentations appear in these pleadings and therefore the fraud cause of action should be dismissed [CPLR §3211(a)(7)].

The causes of action alleging breach of fiduciary duty and fraud are duplicative of the legal malpractice cause of action since they arise from the same facts [*Mackey v Morrone*, 125 AD3d 822 (2d Dept., 2015); *Mahler v Campagna*, 60 A.D.3d 1009 (2d Dept., 2009)]. Therefore the fraud cause of action should be dismissed [CPLR §3211(a)(7)].

Plaintiff's cause of action for violation of Judiciary Law §487 must also fail because the statute applies only to wrongful conduct by an attorney in an action that is actually pending [*Mahler v Campagna*, 60 A.D.3d 1009 (2d Dept., 2009)], a situation clearly not present in this matter. This statutory cause of action should also be dismissed [CPLR §3211(a)(7)]. Such a statutory cause of action, under the circumstances here, is also governed by the three year statute of limitations and is also therefore time barred [*Benjamin v Allstate*, 127 A.D. 3d 1120 (2d Dept., 2015)].

Motion #2 by defendant Diversified Land Services, LTD.

All defendants were named as co-defendants in the same complaint that was filed on January 22, 2015. The complaint asserts the same six causes of action herein-above referred to against all three defendants, except that the sixth and last cause of action pursuant to Judiciary Law §487 is not asserted against this moving defendant, Diversified. As previously stated herein Diversified has moved to dismiss on the grounds that all causes of action against it are either time barred [CPLR §3211(a)(5)] or fail to state a cause of action [CPLR §3211(a)(7)].

Diversified performed services in connection with the transaction sub judice as the title insurance agent at a mortgage loan closing.

Plaintiff's breach of contract action against Diversified is barred by the three year statute of limitations and should also be dismissed [CPLR §214(6); CPLR §3211(a)(5); see also *Sage Realty v Proskauer Rose*, 251 A.D.2d 35 (1st Dept., 1998)].

The causes of action for legal malpractice and negligence against Diversified should therefore be dismissed as time barred [CPLR §3211(a)(5)] and, because as to Diversified, it fails to state a cause of action [CPLR §3211(a)(7)].

Plaintiff's fraud cause of action is predicated on plaintiff's allegations that defendants failed to disclose their malpractice rather than any allegations of one or more affirmative intentional misrepresentations and as such this cause of action is also subject to the three year statute of limitations. Where, as here, a fraud claim is asserted in connection with charges of professional malpractice, it is sustainable only to the extent that it is premised upon one or more affirmative, intentional misrepresentations—that is, something more egregious than mere concealment or failure to disclose one's own malpractice [*White of Lake George v. Bell*, 251 A.D.2d 777 (3d Dept., 1998), mot. for leave to appeal dismissed 92 N.Y.2d 947, 1998]. No allegations of such affirmative intentional misrepresentations appear in these pleadings and therefore the fraud cause of action against Diversified should be dismissed [CPLR §3211(a)(7)].

The cause of action alleging breach of fiduciary duty is duplicative of the legal malpractice cause of action since they arise from the same facts [*Mackey v Morrone*, 125 AD3d 822 (2d Dept., 2015); *Mahler v Campagna*, 60 A.D.3d 1009 (2d Dept., 2009)]. Therefore the fraud cause of action should be dismissed [CPLR §3211(a)(7)].

Based upon the foregoing it is Decided and

ORDERED to the extent that the defendants, Kahn, move to dismiss the First, Fourth and Fifth causes of action based on the expiration of the applicable statute of limitations, the motion is granted and the First, Fourth and Fifth causes of action against the Kahn defendants are dismissed, and it is further

ORDERED the to the extent that the defendants, Kahn, move to dismiss the Second, Third and Sixth causes of action based on their failure to state a cause of action, the motion is granted and the Second, Third and Sixth causes of action against the Kahn defendants are dismissed, and it is further

ORDERED to the extent that the defendant, Diversified, moves to dismiss the Second cause of action based on the expiration of the applicable statute of limitations, the motion is granted and the Second cause of action against the defendant, Diversified, is dismissed, and it is further

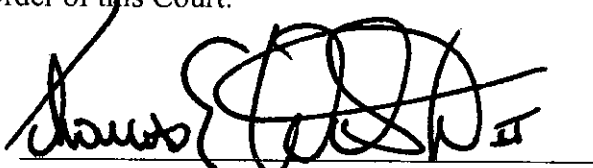
ORDERED the to the extent that Diversified moves to dismiss the First, Second, Third, Fourth and Fifth causes of action based on their failure to state a cause of action, the motion is

granted and the First, Second, Third, Fourth and Fifth causes of action against the defendant, Diversified, are dismissed.

In arriving at this decision the Court has reviewed, evaluated and considered all of the issues framed by these motion papers and the failure of the Court to specifically mention any particular issue in this Decision & Order does not mean that it has not been considered by the Court in light of the appropriate legal authority.

The foregoing constitutes the Decision & Order of this Court.

Dated: New City, New York
October 29, 2015



Thomas E. Walsh II, A.J.S.C.

To:
Steinberg & Cavaliere, LLP
Attorneys for Diversified Land Services, Ltd.
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