


<b>Xiujuan Jiang v Jin Hu</b>
2017 NY Slip Op 32971(U)
December 21, 2017
Supreme Court, Kings County
Docket Number: 508883/2016
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 21<sup>st</sup> day of December, 2017.

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2/8/19  


PRESENT:  
HON. CARL J. LANDICINO,  
  
Justice.

-----X  
XIUJUAN JIANG and XIU HUA FENG

*Plaintiffs,*

Index No.: 508883/2016

**DECISION AND ORDER**

- against -

**Motion Sequence #1**

JIN HU and JIN HU & ASSOCIATES, PLLC.

*Defendants.*

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**Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:**

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion and	
Affidavits (Affirmations) Annexed.....	1/2. _____
Opposing Affidavits (Affirmations).....	3 _____
Reply Affidavits (Affirmations).....	4 _____

After oral argument and a review of the papers, the Court finds as follows:

Plaintiffs Xiujuan Jian and Xiu Hua Feng (hereinafter “the Plaintiffs”) have initiated this action as against Jin Hu and Jin Hu & Associates, P.C. (hereinafter “the Defendants”) alleging a cause of action as against the Defendants for legal malpractice as well as a cause of action alleging a breach of fiduciary duty. The Plaintiffs claim that the Defendants represented them as their attorneys in a real estate transaction, involving a residential property located at 1544 West 8<sup>th</sup> Street, Brooklyn, New York. The Plaintiffs further claim that the Plaintiffs and the prior owner of that property, non-party Vito Cardinale, entered into an agreement that provided that certain violations issued by the Department of Housing Preservation and Development (HPD) and the Environmental Control Board (ECB) would be corrected by Vito Cardinale within a specific time period. Plaintiffs contend that pursuant to the agreement of the parties, in the event that the

violations were not cleared within one year, the Plaintiffs were authorized to suspend interest payments on a purchase money mortgage held by Mr. Cardinale (the "PMM"). Further, Plaintiffs allege that, if the violations were not cleared within two years, the sum of \$100,000.00 held in escrow would be released to the Plaintiffs. The Plaintiffs claim that the violations were not removed within the two year period as agreed. The Plaintiffs allege that notwithstanding that Defendants still authorized the release of the funds in escrow to Mr. Cardinale. What is more, the Plaintiffs contend that as a result of the Defendants alleged malpractice, Mr. Cardinale initiated a foreclosure proceeding on the PMM against the Plaintiffs as well (the "Foreclosure Action"). The Plaintiffs contend that as a result the Defendants action in authorizing the release of the escrow funds constituted both legal malpractice and a breach of fiduciary duty.

Defendants Jin Hu, Esq. And Jin Hu & Associates (hereinafter "the Defendants") now move (motion sequence #2) for an order seeking to dismiss the instant proceeding pursuant to CPLR §§ 3211(a)(5) and §3211(a)(7). The Defendants argue that the instant proceeding should be dismissed because the claims are barred by collateral estoppel and because the Plaintiffs have failed to plead a valid cause of action, respectively. Specifically, the Defendants argue that in the accompanying foreclosure action the Hon. Mark I. Partnow, J.S.C., issued an Order that granted a declaratory judgment determining that "the violations were cleared as per the Second Rider to Contract of Sale dated June 7, 2012 and the Plaintiff [Cardinale] is entitled to the escrow held in the amount of \$100,000.00." The Defendants argue that this determination prevents the Plaintiffs from pursuing their claims alleging that the release of the \$100,000.00 by the Defendants to nonparty Cardinale constitutes malpractice and a breach of fiduciary duty. As such Defendants aver that the complaint should be dismissed pursuant to CPLR §3211(a)(5). What is more, the Defendants also argue that Plaintiffs' second cause of action sounding in breach of fiduciary duty should be dismissed as duplicative of the legal malpractice claim.

In opposition, the Plaintiffs oppose the motion and argue that it should be denied. Specifically, the Plaintiffs argue that they were not afforded a full and fair opportunity in the related foreclosure proceeding to contest whether nonparty Vito Cardinale had properly cleared all of the violations as per the agreement between the parties. Specifically, the Plaintiffs argue that the Court in the Foreclosure Action made its finding after a brief hearing and that the issues addressed in each proceeding were not identical. What is more, the Plaintiffs argue that the Order in the Foreclosure Action resulted from Defendant Jin Hu stating in writing, to counsel for nonparty Cardinale, that the repairs had in fact been completed.

Turning to the merits of the Defendants' motion, the Court finds that the Plaintiffs' claims are barred by collateral estoppel. In general, "[c]ollateral estoppel comes into play when four conditions are fulfilled: '(1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits.'" *Conason v. Megan Holding, LLC*, 25 N.Y.3d 1, 17, 29 N.E.3d 215, 224, *reargument denied*, 25 N.Y.3d 1193, 37 N.E.3d 110 [2015], *quoting Alamo v. McDaniel*, 44 A.D.3d 149, 841 N.Y.S.2d 477 [1<sup>st</sup> Dept, 2007].

In the instant proceeding, the Order issued on November 28, 2016 by the Hon. Mark I Partnow, J.S.C. stated that a declaratory judgment was granted to the extent that it was determined that the violations were cleared in accordance with the Second Rider to Contract of Sale dated June 7, 2012 and that Plaintiff (Cardinale in the Foreclosure Proceeding) was entitled to the escrow held in the amount of \$100,000.00. A review of the underlying Order (Justice Partnow) shows that the issue of violations was explicitly addressed and that the Court found that the violations were cleared pursuant to the Contract of Sale. The Plaintiffs have not indicated whether they otherwise challenged the underlying Order. In fact, the Defendants did not represent the

Plaintiffs in that hearing, as Plaintiffs' had other counsel of record (See Defendants' Motion, Verified Answer as Exhibit "C") in the Foreclosure proceeding. Moreover, Justice Partnow clearly held that the Seller/mortgagee in the Foreclosure Action was entitled to the \$100,000.00 escrow. Accordingly, the Plaintiffs are estopped from seeking to relitigate the issue of whether the violations were corrected and whether the escrow funds were properly released since those identical issues were determined after a hearing in the Foreclosure Proceeding, in which the Plaintiffs participated. *See Milione v. City Univ. of New York*, 950 F. Supp. 2d 704 (S.D.N.Y. 2013), *aff'd*, 567 F. App'x 38 [2d Cir. 2014] (Federal District Court's Decision on a despositive motion served to collaterally estop state claims in state court). As a result, the Defendants motion made pursuant to CPLR §3211(a)(5) is granted.

Turning to the merits of the Defendants' application to dismiss the Second Cause of Action alleging a Breach of Fiduciary Duty, the Court finds that it is also barred by the doctrine of collateral estoppel. Moreover, it is duplicative of the Plaintiff's First Cause of Action for Legal Malpractice. The Plaintiff's Second Cause of Action States that "Defendants breached their duty by failing to conduct due diligence and appropriate measures to assure that all violations upon the property had been cleared and by giving inappropriate legal advice and explanations regarding the documents that Defendants and Plaintiffs sign, including the purchase money mortgage for the property." What is more, a review of the Second Cause of Action shows that this cause of action arises from the same facts as the legal malpractice cause of action, does not allege distinct damages, and is thus duplicative of the legal malpractice cause of action. *See Maroulis v. Friedman*, 153 A.D.3d 1250, 60 N.Y.S.3d 468 [2<sup>nd</sup> Dept, 2017]. *Rock City Sound, Inc. v. Bashian & Farber, LLP*, 74 A.D.3d 1168, 1171-72, 903 N.Y.S.2d 517, 520 [2<sup>nd</sup> Dept, 2010]; *Kvetnaya v. Tylo*, 49 A.D.3d 608, 854 N.Y.S.2d 425 [2<sup>nd</sup> Dept, 2008]. Accordingly, the Second Cause of Action alleging a Breach of Fiduciary duty is dismissed.

Based on the foregoing, it is hereby ORDERED as follows:

The Defendants' motion is granted. The complaint against the Defendants is dismissed, and the clerk is directed to enter judgment accordingly dismissing the complaint as against the Defendants.

The foregoing constitutes the Decision and Order of the Court.

Date: December 21, 2017

ENTER:

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*[Signature]*

~~HON. CARL J. LANDICINO~~

*2/8/19*

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 Carl J. Landicino  
 J.S.C.

*[Signature]*

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