Board of Mgrs. of the Sedona Condominium v Ansell Grimm & Aaron, P.C.
2018 NY Slip Op 31758(U)
March 22, 2018
Supreme Court, New York County
Docket Number: 655393/2017
Judge: David B. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN **PART** 58
Justice

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THE BOARD OF MANAGERS OF THE SEDONA CONDOMINIUM,

Plaintiff,

- v -

ANSELL GRIMM & AARON, P.C., MARK WIECHNIK

Defendant.

INDEX NO. 655393/2017

MOTION DATE 10/17/2017

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this application to/for DISMISSAL.

Upon the foregoing documents, it is

This matter involves a malpractice claim by plaintiff against their former attorneys. Plaintiff is the Board of Managers of the property located at 346 East 119th Street, New York, New York (the "Property"); Ansell Grimm & Aaron PC is a law firm and Mark Wiechnik is an attorney who works for Ansell Grimm. Pursuant to the engagement letter dated February 2, 2015, plaintiff engaged defendants to represent them in connection with the "valuation of the condition of the common areas and the defects and deficiencies as set forth in the Becht report and negotiation with the Sponsor/Developer" of the Property. Defendant was to "provide advice and guidance in relation to negotiations with the Sponsor/Developer, any implicated subcontractors, or insurance carriers. As part of this process, Ansell will review the Association's

governing documents, meet with the Association's experts, review documents and insurance policies to the extent they are available. We will present formal demands to the Sponsor/Developer and others and develop a formal plan dependent upon the response received from the Sponsor and others." In September 2016, the representation ended.

Plaintiff filed this suit and alleges that during the time that defendants represented them, defendants failed to inform plaintiff of the applicable statute of limitations for it to file an action against the Sponsor. That despite paying defendants for the representation, during the negotiations with the Sponsor, the statute of limitations ran out on September 14, 2016, without any advice as to the running of the statute or a tolling agreement. Plaintiff alleges multiple causes of action including (1) malpractice, (2) breach of fiduciary duty, (3) breach of contract; (4) negligence; and (5) disgorgement of legal fees.

Defendants filed this motion to dismiss and argue that plaintiff's entire case relies on the incorrect statement that the statute of limitations ran out. Specifically, the Complaint states that the statute of limitations against the sponsor began to run on the date of the first sale of a condominium unit. Defendants argue plaintiff is incorrect about that date and that the Complaint "is devoid of any allegations regarding the dates and nature of continuing work at the premises, the actions of the Sponsor with respect to the alleged construction defects, whether there were possible claims against contractors or sub-contractors, and whether any repairs took place." Defendants also argue that the claim is too speculative, that the retainer agreement did not contemplate the filing of litigation and only discussed negotiations with the sponsor, that there has been no proceeding that ruled that the claims has been time barred, and that because plaintiff had engaged other counsel and in the absence of any facts that establish that it was the specific

acts of defendants that led to an actual monetary loss by plaintiff, the instant lawsuit must be dismissed.

When deciding a motion to dismiss pursuant to CPLR §3211, the court should give the pleading a "liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff the benefit of every possible favorable inference" (*Landon v. Kroll Laboratory Specialists, Inc.*, 22 NY3d 1, 5-6 [2013]; *Faison v. Lewis*, 25 NY3d 220 [2015]). However, if a complaint fails within its four corners to allege the necessary elements of a cause of action, the claim must be dismissed (*Andre Strishak & Associates, P.C. v. Hewlett Packard & Co.*, 300 AD2d 608 [2d Dept 2002]).

A motion to dismiss pursuant to CPLR § 3211(a)(1), should not be granted unless the documentary evidence submitted is such that it resolves all factual issues as a matter of law and conclusively disposes of the claims set forth in the pleading (*Art & Fashion Grp. Corp. v Cyclops Prod., Inc.*, 120 A.D.3d 436, 438 [1st Dept 2014]).]). It is true that "[t]he court [] is not required to accept factual allegations, or accord favorable inferences, where the factual assertions are plainly contradicted by documentary evidence" (*Bishop v Maurer*, 33 AD3d 497, 498 [1st Dept 2006]).

Under CPLR § 3211(a)(7), the court "accepts as true the facts as alleged in the complaint and affidavits in opposition to the motion, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged manifest any cognizable legal theory" (*Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 199 [1st Dept 2013] (quoting *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001])).

The gravamen of defendant's argument is that plaintiff has applied the incorrect statute of limitation. Although there are cases that have held that the statute of limitations for an action against a sponsor is at a time later than the first condominium sale (*see Golden Wheel Condominium Bd. of Managers v. Lee*, 2017 WL 3638319 [NY Sup 2017]), there is also a body of case law that the statute of limitations accrues on "the date of the first condominium sale and therefore the date on which the Board's claims accrued" (*Bd. of Managers of the South Star v. WSA Equities, LLC*, 2014 WL 5390551 [NY Sup 2014])[1]. A review of these cases shows that in *Golden Wheel* there was specific reasons why the statute did not run from the date of the first condominium sale. In *Golden Wheel* the offering plan required substantial completion. In *Bd. of Managers of Chelsea Quarter Condominium v 129 W. Residential Partners LLC* 914 Misc 3d 1212(A) [Sup Ct 2007]), the Court held that the very earliest day a claim could accrue, and thus the statute begin to run, was the date of the first sale of a condominium. In other words, *Chelsea Quarter* stands for the proposition that the statute of limitations could be from the date of the first sale, but not necessarily so.

Here, although the offering plan required completion of the project and to obtain a certificate of occupancy, the offering plan does not state with specificity as to what completion is. The offering plan requires that all work, alterations and building be complete – but does not define completion. Whether completion has occurred is a factual question that is not susceptible to dismissal at this pleading stage. Giving all favorable inferences to the plaintiff as this Court

[1] The Court notes that despite plaintiff's assertion that this question was resolved by the Appellate Division, First Department in deciding the *WSA* appeal, in affirming Justice Engoron's decision, the Appellate Division, First Department did not make any holding on this particular issue.

must do, the Court must view that the statute of limitations on certain claims may have expired during defendants' representation.[2]

Defendants also argue that even if the statute of limitations did expire, the malpractice claim should be dismissed because the claim is too speculative, that the retainer agreement did not contemplate the filing of litigation and only discussed negotiations with the sponsor, that there has been no proceeding that ruled that the claims has been time barred, and that because plaintiff had engaged other counsel who may also have culpability. Those arguments are without merit. The failure to advise a client about a potential statute of limitations may be actionable malpractice (*Mortenson v Shea*, 62 AD3d 414 [1st Dept 2009]). The Court held in *Mortenson* that the lower Court erroneously dismissed the action on the grounds "that the limited services provided by defendant law firm in attempting to settle the underlying claim did not include a duty to advise plaintiff about the applicable New York statute of limitations" (*id.*).

Defendants argue that *Mortenson* is distinguishable because there, the engagement letter specifically authorized the defendant law firm to "to proceed with any potential" claim, whereas here, the engagement was to "provide advice and guidance in relation to negotiations with the Sponsor/Developer." Defendants' argument is not persuasive. First, in *Mortenson* the Appellate Division, First Department explicitly stated that it was error to dismiss that action on the grounds that attempting to settle or negotiate does not include a duty to advise about applicable New York statute of limitations. Second, the engagement letter here includes a duty to provide guidance, which could easily be read to include understanding the legal rights and responsibilities. Finally, the engagement letter states that defendants would "develop a formal

[2] The Court is making no ruling at this time that any claims are actually barred by the statute of limitations. Similarly, the Court makes no ruling that even if certain claims were barred that all claims expired on September 10, 2016. This Court holds that for purposes of this motion, there could have been certain claims that are barred by the statute of limitations.

plan dependent upon the response received from the Sponsor and others." A formal plan certainly could include legal action. Thus, as the *Mortenson* Court permitted a malpractice action to go forward on the basis of a law firm's failure to advise about a potential statute of limitations issue, defendants' arguments that the claim is too speculative, that the retainer agreement did not contemplate the filing of litigation and only discussed negotiations with the sponsor and that there has been no proceeding that ruled that the claims has been time barred is without merit. In *Cabrera v Collazo* (115 AD3d 147 [1st Dept 2014]), the the Appellate Division, First Department clarified:

> Whether *Mortenson* establishes an affirmative duty to advise a client with respect to the running of a limitations period, which the parties dispute, is not a question requiring immediate resolution. What *Mortenson* signifies is that an attorney will be held accountable for any misconduct that contributes to damages incurred because a statute of limitations is allowed to expire against a client (*id.* at 154).

While not affirmatively placing a duty to inform a client of a statute of limitation, the Court held that an attorney who contributes to damages because a statute of limitations is allowed to expire can be held accountable. Here, plaintiff seeks redress for the damages relating to defendants' alleged allowance of the statute of limitations to expire. The argument that plaintiff had engaged other counsel who may also have culpability is a potential defense and not a basis to dismiss this action.

However, defendants' motion to dismiss the remaining causes of action as duplicative is granted. All the causes of action arise out of the same issue as the malpractice claim(*see Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016]["Unless a plaintiff alleges that an attorney defendant "breached a promise to achieve a specific result, a claim for breach of contract is "insufficient" and duplicative of the malpractice claim" *citing Sage Realty Corp v. Proskauer Rose*, 251 AD2d 35 [1st Dept.1998]; *see also IMO Indus. v Anderson Kill & Olick,*

P.C., 267 AD2d 10, 12 [1st Dept 1999]; *Pellegrino v File*, 291 AD2d 60, 64 [1st Dept 2002] [breach of contract claim found redundant of malpractice claim]; *see also Cusack v Greenberg Traurig, LLP*, 109 AD3d 747, 748 [1st Dept 2013] [claim for negligence is dismissed as duplicative of the legal malpractice claim]); *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004]) [breach of fiduciary duty claim duplicative of malpractice claim]). This point is not addressed in plaintiff's opposition and thus, unopposed.

Defendants' motion to have plaintiff's counsel disqualified is denied at this time with leave to renew. It is premature at this juncture to determine whether counsel will be a witness or needed for this action in any other capacity besides as attorney for plaintiff. The ability to choose one's counsel is of great import and is only disturbed if necessary. At this juncture, prior to the Answer even being filed, the Court will not disqualify counsel. Accordingly, it is therefore

ORDERED, that defendants' motion to dismiss the malpractice claim set forth in the first cause of action is denied; and it is further

ORDERED, that defendants' motion to dismiss the remaining causes of action is granted; and it is further

ORDERED, defendants' motion to disqualify plaintiff's counsel is denied without prejudice.

3/22/2018
DATE

DAVID BENJAMIN COHEN, J.S.C.
HON. DAVID B. COHEN
J.S.C.

CHECK ONE:		CASE DISPOSED			[X]	NON-FINAL DISPOSITION	
		GRANTED		DENIED	[X]	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE