

Buttiglione v Diehl

2020 NY Slip Op 35101(U)

April 22, 2020

Supreme Court, Westchester County

Docket Number: Index No. 70215/2017

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT : STATE OF NEW YORK
 IAS PART WESTCHESTER COUNTY
 PRESENT : HON. JOAN B. LEFKOWITZ, J.S.C.

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ROBERT BUTTIGLIONE,

Plaintiff,

-against-

BARBARA DIEHL, ESQ., and MICHAEL A.
 MAMONE,

Defendants.

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DECISION AND ORDER

Index No. 70215/2017

Motion Return Date:
 November 22, 2019
 Motion Seq. #3

The following papers (e-filed documents 80-125; 137-140; 167-181; 192) were read on the motion by the defendant, Barbara Diehl, for an order granting summary judgment dismissing the complaint insofar as it asserts a cause of action against her, and dismissing the cross-claims asserted against her.

Notice of Motion, Affirmation, (Exhibits A-K)

Affidavit in Support (Exhibits A-F)

Affidavits in Support

Memorandum of Law in Support

Affirmation and Affidavit in Opposition, Memorandum of Law (Exhibits A-T) (Plaintiff)

Affirmation, Affidavits, Memorandum of Law In Opposition, Exhibits (Defendant -Mamone)

Reply Memorandum of Law

Upon reading the foregoing papers it is

ORDERED the branch of the motion which seeks an order granting summary judgment dismissing the specific performance cause of action is denied;¹ and it further

ORDERED the branch of the motion which seeks an order granting summary judgment dismissing the causes of action alleging a breach of contract is granted and the causes of action for breach of contract asserted against the defendant, Barbara Diehl, are dismissed; and it is further

¹ The court this date granted plaintiff's motion for summary judgment on the specific performance cause of action and directed the defendants to deliver the deed to plaintiff on or before May 5, 2020.

ORDERED the branch of the motion which seeks an order dismissing the cross-claims asserted by the defendant, Michael A. Mamone, against the defendant, Barbara Diehl, is granted, and the cross-claims are dismissed.

In March 20, 2017, the defendant, Michael Mamone, sold a commercial building to the plaintiff, a friend of Mamone's sister, for \$100.00 and attorneys fees. The contract of sale, the deed and the closing documents were all signed on March 20, 2017. That day the deed was given to Mamone's attorney, the defendant, Barbara Diehl, for recording. The deed was never recorded. When plaintiff insisted Diehl record the deed she refused claiming her client, Mamone, had reconsidered and refused to consent to the recording of the deed.

Plaintiff then commenced this action asserting causes of action for specific performance, breach of contract, and interference with a contractual relationship. Mamone's answer asserted a counterclaim against plaintiff for indemnification, and cross-claims against Diehl for legal malpractice and breach of a fiduciary duty. Diehl's answer asserted a cross-claim against Mamone for indemnification and contribution

In 2017 Mamone was interested in selling premises known as 26 North Highland Avenue in Ossining New York. He discussed the sale with one real estate broker and had another inspect the building. Mamone was concerned with the condition of the building and the safety of his tenants. He believed that repairing a structural "bulge," refitting improper plumbing, laying a new sewer line and installing a sprinkler system would cost him more than the building was worth. In a March 2017 email he proposed giving the building to his church. On March 17, 2017, he discussed with his attorney Diehl the possibility of gifting the property.

The morning of March 20, 2017, Mamone called his sister "in a panic," fearing for the safety of his tenants. As described by his sister, Mamone was "hysterical[ly] ranting," talking nonstop for 20 minutes, fearing his building was about to collapse. She thought her brother was having a "complete mental breakdown." She then telephoned plaintiff, "a trusted friend," who knew her brother and who had experience in building repairs, hoping he could talk "Michael off the ledge."

Plaintiff called Mamone. During that 20 minute conversation Mamone agreed to sell the building to plaintiff for \$100.00. Mamone called his attorney, Diehl, who prepared the documents including a contract of sale, deed, and the necessary transfer papers. The closing occurred at 3:00 p.m. that day. Mamone suggested contract provisions including responsibility for liens and the turnover of tenants' security deposits. He made sure the contract provided the property was sold "as is."

After the closing Mamone called his sister and with "palpable euphoria" said, "It's all done. We did a closing. Buttiglione [the plaintiff] is such a great guy." He told plaintiff to make sure he had insurance, and he cancelled his own insurance. He forwarded the rent checks he received from tenants to plaintiff. He told friends he was glad to be rid of the building.

However, at some point he reconsidered the sale and he directed Diehl not to record the deed, and this action ensued.

Following the completion of discovery the defendant, Barbars Diehl, moves for an order granting summary judgment on all causes of action asserted against her and all cross-claims asserted against her. The complaint alleges three causes of action against Diehl: specific performance (to record the deed), breach of contract (an alleged contract between plaintiff and Diehl to record the deed), and breach of contract (breach of the contract between plaintiff and Mamone). Mamone's answer included cross-claims against Diehl for legal malpractice and breach of fiduciary duty.

Specific Performance

The court, in a decision and order issued this date, granted plaintiff's motion for summary judgment on the specific performance cause of action, and directed the defendants to deliver the deed and recording documents to plaintiff. Thus, Diehl is not entitled to summary judgment on this cause of action.

Breach of Contract - Failure to Record Deed

Plaintiff claims he and Diehl had a contract whereby Diehl agreed to record the deed on plaintiff's behalf, and breached that contract by failing to record the deed. Diehl established her entitlement to judgment as a matter of law on this cause of action by demonstrating she made no promise to plaintiff and, even if a promise had been made, the promise was not supported by consideration. In opposition, plaintiff failed to raise a triable issue of fact.

Breach of Contract - Contract of Sale

Diehl established her entitlement to judgment as a matter of law by demonstrating she was not a party to the contract between plaintiff and Mamone. In opposition, plaintiff failed to raise a triable issue of fact.

Cross-Claim - Legal Malpractice

The Defendant, Mamone claims that but for the malpractice of Diehl he would not have sold the property for \$100.00.

“A plaintiff in an action alleging legal malpractice must prove that the defendant attorney's failure to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession approximately caused the plaintiff to sustain actual and ascertainable damages. An attorney's conduct or inaction is the proximate cause of a plaintiff's damages if but for the attorney's negligence, the plaintiff would have succeeded on the merits of the underlying action, or would not have sustained actual and ascertainable damages. It is a defendant's burden, when it is the party moving for summary judgment, to demonstrate

affirmatively the merits of a defense, which cannot be sustained by pointing out gaps in the plaintiff's proof. Once a defendant makes a prima facie showing, the burden shifts to the plaintiff to raise a triable issue of fact" (*Nil v Schneider*, 173 AD 753, 755 [2d Dept 2019] [internal quotation marks and citations omitted]).

Here, the defendant, Diehl, established as a matter of law that she did not commit legal malpractice in representing Mamone in the sale of his property to plaintiff. The contract of sale and the deed were properly prepared at the request of Mamone. Diehl demonstrated there was nothing legally improper about the transaction.

In opposition, Mamone failed to raise a triable issue of fact. Mamone relies on the apparent inequity of the transaction to argue that Diehl should have either convinced him not to go forward or should have refused to represent him. However, in making such an argument Mamone ignores his own role in the transaction. In 2017 Mamone became increasingly fearful for the safety of his tenants due to problems with the building, including structural issues in the attic and the need to replace plumbing and install a sewer hook-up and a sprinkler system. Mamone believed the cost of doing what was needed to make the building safe and code compliant would cost more than the building was worth. His belief that the building was unsafe and that repairs would cost more than the building's value made Mamone anxious to rid himself of the property quickly. When Mamone first proposed giving the property away Diehl advised him to hire a broker to market the property and to hire an engineer to provide cost estimates for the required repairs and improvements. Mamone chose not to follow Diehl's advice; and when plaintiff offered to acquire the property, Mamone saw an opportunity to rid himself of the building which was causing him so much grief. Diehl agreed to represent him; the closing occurred; and Mamone was elated to have the building's burden lifted from his shoulders. Only months later did Mamone reconsider.

Mamone argues that Diehl should have known that Mamone lacked the capacity to enter the contract. However, Mamone offered no evidence to support this thesis. Mamone submitted no medical records, no expert opinion, and no direct evidence to demonstrate he suffered from a mental illness making him incapable of understanding the transaction or make a rational judgment (*see, e.g., Horrell v Horrell*, 73 AD3d 797 [2d Dept 2010]). The only "evidence" Mamone cited to support his claim of lack of capacity was his new found belief that he might not have received enough for the building. However, this does not show a lack of understanding or irrational judgment. Mamone submitted no evidence that his fear for his tenant's safety was unfounded; and he submitted no evidence to refute his original assessment that required repairs exceeded the building's value.

In sum, Diehl counselled Mamone to hire a broker and an engineer. Mamone disregarded the advice and insisted on moving forward with ridding himself of the property. Diehl believed Mamone genuinely feared for his tenants' safety and for the prohibitive cost of repairs, and that, as a result, he fervently desired to sell the property for a nominal price to be relieved of this burden. She then represented him to help him achieve his goal. For months Mamone was happy with his decision. Mamone failed to produce any evidence which refutes Diehl's belief that Mamone was adamant and genuine in his desire to sell the building at any cost.

Cross-Claim - Breach of Fiduciary Duty

“As a general rule, where a cause of action alleging breach of contract or fraud arises from the same facts as a legal malpractice cause of action and does not allege distinct damages, the breach of contract or fraud cause of action must be dismissed as duplicative of the legal malpractice cause of action” (*Postiglione v Castro*, 119 AD3d 920, 922 [2d Dept 2014]).

Here, the cross-claims for legal malpractice and breach of fiduciary duty rely on the same facts, and no distinct damages are alleged. Thus, the cross-claim for breach of fiduciary duty is dismissed.

E N T E R

Dated: White Plains New York
April 22, 2020

HON. JOAN B. LEFKOWITZ, J.S.C.