

Thull v Cushner

2022 NY Slip Op 32531(U)

January 4, 2022

Supreme Court, Bronx County

Docket Number: Index No. 807330/2021E

Judge: Lucindo Suarez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

Mtn. Seq. # 1

RACHEL THULL and RAFAEL PANTOJA,

Index No.:807330/2021E

Plaintiff,

- against -

DECISION and ORDER

TODD S. CUSHNER, ESQ. and CUSHNER &
ASSOCIATES, P.C.,

Defendants.

PRESENT: Hon. Lucindo Suarez

Defendants’ motion to dismiss this legal malpractice, fraudulent representation, breach of contract, and breach of a fiduciary duty complaint is granted. Plaintiff, a disbarred attorney, and his wife, lack the necessary standing as agents, and are unable to demonstrate “but for” the attorney’s negligence, Plaintiff would have prevailed in the underlying foreclosure and related matters at issue.¹

In one case, Plaintiffs allege that the Defendant Todd S. Cushner, Esq. and the Cushner & Associates, P.C., firm was retained to represent Pantoja and Thull as “authorized agents” of the debtors (Barrington and Tricia Williams) in a foreclosure action.² According to Plaintiffs, in October 2018, they retained Defendants to represent them as agents for BTW Trust Inc., in connection to a matter filed in New York State Supreme Court, Westchester County, entitled: *HSBC Bank, USA, National Association, as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates Series 2006-12 v. Barrington Williams and Tricia Williams* bearing Index No.: 69372/2013 (“HSBC action”). Plaintiffs represented to

¹ On the Rachel M. Pantoja v. Shellpoint Mortgage LLC., et. al. Queens County Index No.713051-2017, Defendants were relieved as the attorney of record.

² The retainer check was issued by Barrington and Tricia Williams.

Defendants that they are the owners of non-party Levanta Global Inc., (“Levanta”) who were working on behalf of the named Defendants Barrington Williams and Tricia Williams in the HSBC action to obtain a short payoff to settle the HSBC action or to obtain a loan modification agreement.

Plaintiffs claim that they specifically retained Defendants in the HSBC action to file a motion to allow BTW Trust, Inc., to intervene. In October 2018, Defendants filed the motion to intervene, which was denied by the court. After their unsuccessful attempt at intervening, Plaintiffs allege that Defendants suggested that they should enter into a loss mitigation process in order to obtain a short note payoff settlement in the sum of \$336,000. Ultimately, in February 2019, Defendants moved to be relieved due to their suspicion that Plaintiffs were perpetrating a fraud against named Defendants Barrington Williams and Tricia Williams.

Thereafter, the named Defendants Barrington Williams and Tricia Williams in the HSBC action independently retained Defendants to file a Federal bankruptcy action in the Southern District of New York. In November 2019, Defendants filed the Federal bankruptcy action on behalf of Defendants Barrington Williams and Tricia Williams. The bankruptcy action stayed the HSBC action. In April 2020, Defendants filed an adversary complaint in the bankruptcy action naming Plaintiffs, “Levanta” and others as Defendants. The adversary complaint alleged that Plaintiffs, “Levanta” and other Defendants conducted a fraudulent scheme to obtain money from Defendants Barrington Williams and Tricia Williams under false promises and it sought that Plaintiffs return to Defendants Barrington Williams and Tricia Williams \$331,500 dollars that was transferred to Plaintiffs and “Levanta.”³ Ultimately, Plaintiffs and “Levante” defaulted in

³ This court notes that one of the exhibits attached to Plaintiffs’ affirmation in opposition was a news article written by Bill Heltzel of the Westchester County Business Journal that Barrington Williams and Tricia Williams were fooled into paying \$331,500.00 to a disbarred attorney, Rafael M. Pantoja. See also Mount Vernon homeowner accuses ex-con disbarred lawyer of mortgage fraud (westfaironline.com) (last visited January 3, 2022.

the bankruptcy action and a default judgment was issued directing Plaintiffs, “Levante”, and other Defendants to pay \$77,500.00.

Additionally, in December 2018, Plaintiffs retained Defendants to represent them in two other foreclosure actions filed in New York State Supreme Court, Queens County, entitled: (1) *Federal National Mortgage Association v. Jose E. Montoya, et al.*, bearing Index No. 18513/2014 (“Murdock Foreclosure action”); and (2) *Rachel M. Pantoja v. Shellpoint Mortgage, LLC et al.*, bearing Index No.: 713051/2017 (“Murdock Quiet Title action”). Despite being retained in the Murdock Foreclosure action, Defendants claim that did not file a notice of appearance because in May 2018, an order was issued providing that Plaintiffs lacked standing as a non-party to make a motion to cancel the notice of pendency or to dismiss the Murdock Foreclosure action.

With respect to the Murdock Quiet Title action Defendants did file a notice of appearance. However, in January 2019, Defendants filed a motion to be relieved as counsel. Defendants alleged that they returned to Plaintiffs all unearned portions of the retainer in connection with the Murdock Foreclosure and Murdock Quiet Title actions. In June 2019, an order was issued relieving Defendants from representing Plaintiffs in the Murdock Quiet Title action. Plaintiffs claim that in the Murdock Quiet Title action that Defendants committed malpractice in that they lost, misplaced or destroyed Plaintiffs’ confirmatory Deed.

Defendants argue that Plaintiffs’ legal malpractice complaint should be dismissed as it failed to meet the requisite elements for a legal malpractice claim in that Plaintiffs have not alleged any negligence that caused Plaintiffs to sustain any ascertainable damages. Likewise, Defendants claim that in the Murdock Foreclosure and Murdock Quiet Title actions, Plaintiffs

have failed to allege any negligence that proximately caused Plaintiffs to sustain any ascertainable damages. Defendants argue that Plaintiffs' claim that they destroyed their confirmatory deed had no bearing on the outcome of those cases. Furthermore, Defendants argue that the fact that the Murdock Quiet Title action is still pending evidences that Plaintiffs cannot establish proximate causation.

In addition, Defendants argue that Plaintiffs' cause of action for fraudulent misrepresentation should be dismissed because the alleged misrepresentations were made during the course of an adversarial litigation. Further, they posit that any allegations made against Plaintiffs in the bankruptcy action were not false, and the entry of a default against them was due to their own conduct in not timely answering the complaint. Moreover, Defendants argue that Plaintiffs' breach of contract cause of action should be dismissed because Defendant did not make an agreement to obtain a specific result. Regarding Plaintiffs' cause of action for breach of fiduciary duty Defendants contend that even if Plaintiff could establish a conflict of interest arising from Defendants representation in the HSBC action, and their subsequent representation in the bankruptcy action, that in of it self cannot support a claim for breach of fiduciary duty. Finally, Defendants argue that Plaintiffs are not entitled to any injunctive relief as they lack a likelihood of success on the merits.

In opposition, Plaintiffs contend that their affidavit in opposition coupled with their accompanying exhibits demonstrates that they have a facially plausible legal malpractice claim against Defendants. They argue that they sustained actual damages proximately caused by Defendants' negligence in that: (1) they lost the financial commitment fees paid for by BTW Trust Inc in its loss mitigate process with the mortgagee banks, (2) they have been subjected to false claims and adversarial litigation by the trustee/mortgagor of BTW Trust Inc., (3) they have

been subject to criminal investigations resulting from Defendants' false police reports, and (4) they have suffered loss of business and profits resulting from Defendants' slanderous statements made to the Westchester Press.

This court finds that with respect to the HSBC action, Defendants legal malpractice claim cannot stand given the absence of an attorney-client relationship.⁴ Further, even if there was an attorney-client relationship, given the court had already signed the judgment of foreclosure and sale at the time Defendants were retained, Plaintiffs failed to demonstrate that they would have prevailed in the underlying proceeding but for Defendants' alleged negligence. *See Waggoner v. Caruso*, 68 A.D.3d 1, 886 N.Y.S.2d 368 (1st Dep't 2009).

Likewise, with respect to the Murdock Foreclosure action, this court finds Defendants demonstrated that there is no claim for legal malpractice as there was no attorney-client relationship. Further, Defendants did not file a notice of appearance in that matter, and since Plaintiffs were not named as a party in said action, it would not be possible that they would have sustained some ascertainable damages, a required element to prevail in a legal malpractice claim.

Similarly, with respect to the Murdock Quiet Title action, Defendants showed that Plaintiffs cannot claim that they sustained any actual harm or monetary damage resulting from Defendants' decision to judicially terminate their representation of Plaintiffs. Also, Plaintiffs did not show that either Defendants were in possession of the confirmatory deed or what significance the confirmatory deed played with respect to establishing their burden in the underlying action or

⁴ An action for legal malpractice requires proof of three elements: (1) the negligence of the attorney; (2) that the negligence was the proximate cause of the loss sustained; and (3) proof of actual damages. *Schwartz v. Olshan Grundman Frome & Rosenzweig*, 302 A.D.2d 193, 753 N.Y.S.2d 482 (1st Dep't 2003). In order to establish proximate cause, plaintiff must demonstrate that "but for" the attorney's negligence, plaintiff would either have prevailed in the matter at issue or would not have sustained any "ascertainable damages." *Leder v. Spiegel*, 31 A.D.3d 266, 819 N.Y.S.2d 26 (1st Dep't 2006). The failure to demonstrate proximate cause mandates the dismissal of a legal malpractice action regardless of whether the attorney was negligent. *Id.*

that Plaintiffs would have prevailed in the underlying action on the merits but for Defendants' decision to judicially terminate their representation of Plaintiffs.

In addition, this court finds that even if Plaintiffs could establish that Defendants violated the legal ethical cannons due to a conflict of interest by representing Plaintiffs in the New York State actions and then commencing the adversarial complaint in the bankruptcy action that in it of it self does not constitute legal malpractice. *See Schafrann v. N.V. Famka, Inc.*, 14 A.D.3d 363, 787 N.Y.S.2d 315 (1st Dep't 2005).

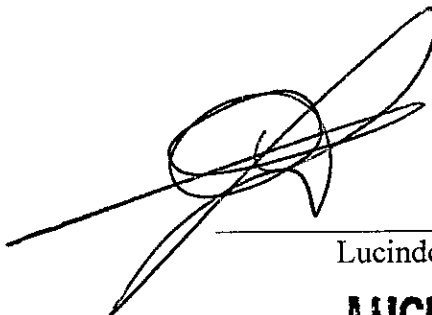
Finally, this court finds that Plaintiffs' fraud cause of action is duplicative of their legal malpractice cause of action requiring a dismissal of same. *See Hsu v. Liu & Shields LLP*, 127 A.D.3d 522, 7 N.Y.S.3d 119 (1st Dep't 2015). Likewise, Plaintiffs' causes of action for breach of contract and breach of fiduciary duty must be dismissed as duplicative of the legal malpractice claim. *See Lusk v. Weinstein*, 85 A.D.3d 445, 924 N.Y.S.2d 91(1st Dep't 2011).

Accordingly, it is

ORDERED, that Defendants' motion seeking the dismissal of the complaint is granted.

This constitutes the decision and order of the court.

Dated: January 4, 2022

A handwritten signature in black ink, appearing to read 'Lucindo Suarez', written over a horizontal line.

Lucindo Suarez, J.S.C.

LUCINDO SUAREZ, J.S.C.