

**Ocean Park Apts., Inc. v Maxem Realty LLC**

2024 NY Slip Op 33369(U)

September 24, 2024

Supreme Court, Kings County

Docket Number: Index No. 523732/2022

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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OCEAN PARK APARTMENTS, INC. and 430 OCEAN  
PARKWAY TOWER LLC,

Plaintiff, Decision and order

- against -

Index No. 523732/2022

MAXEM REALTY LLC, ERIC MARKEL, SHEIK SADDICK,  
ALMARC REALTY CORP., ANATOLY FINGERMAN, and  
GETTRY MARCUS CPA, P.C.,

Defendants, September 24, 2024

-----x  
MAXEM REALTY LLC and SHEIK SADDICK,  
Counterclaim Plaintiffs,

-against-

TUREK ROTH GROSSMAN LLP, ALLEN M. TUREK,  
JEREMY S. ROTH, JASON GROSSMAN, and JOHN DOES  
#1 THROUGH #10, the names being fictitious and  
unknown additional counterclaim defendants, being  
additional persons or entities which received  
transfer of the assets of TUREK ROTH GROSSMAN, LLP,  
Additional Counterclaim Defendants,

-----x  
PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #5

The counterclaim defendants Turek Roth Grossman LLP and  
Allen Turk [hereinafter 'TRG'] move pursuant to CPLR §3211  
seeking to dismiss the fifth and sixth counterclaims alleging  
malpractice and fraud respectively. The counterclaim plaintiffs  
oppose the motion. Papers were submitted by the parties and  
arguments held. After reviewing all the arguments this court now  
makes the following determination.

As recorded in prior decisions, on June 23, 2022 the  
defendants/counterclaim plaintiffs Maxem Realty LLC and Sheik  
Saddick sold 100% of the shares of a cooperative as well as the

proprietary leases regarding property located at 420/430 Ocean Avenue in Kings County to the plaintiffs. The Complaint alleges the defendants failed to furnish various financial documents that were required to close and that the plaintiffs agreed to close simply to secure the agreement. Further, the Complaint alleges the defendants failed to furnish various bank accounts and withheld funds that belong to the plaintiffs.

The defendants Maxem Realty and Sheik Saddick filed an answer and asserted counterclaims. Relevant to this motion the fifth counterclaim alleges legal malpractice against TRG. The basis for this counterclaim is that TRG was hired by Maxem to submit an amendment, namely the 6<sup>th</sup> Amendment, to the cooperative's offering plan to be submitted to the Attorney General. The plaintiff 430 Ocean Parkway Tower LLC was also represented by the same law firm, namely TRG, concerning this amendment and any conflict was waived by the parties. Concerning negotiations about the actual purchase and the purchase agreement, TRG continued to represent the plaintiff while Maxem secured new counsel. The fifth counterclaim alleges that when the 6<sup>th</sup> Amendment was filed it did not contain language concerning cash reserves that Maxem intended to disburse to its shareholders. The counterclaim argues if such language would have been included this entire lawsuit could have been avoided. Further, the 6<sup>th</sup> Amendment contained information that was not

disclosed to Maxem before it was filed. Thus, the counterclaim asserts TRG committed malpractice and damaged Maxem by essentially preventing them recovering the cash reserves. To be sure, the cash reserves are at the heart of this litigation. The sixth counterclaim alleges that TRG has since ceased operations and transferred assets in violation of Debtor-Creditor Law §273 and §276. TRG has now moved seeking to dismiss those counterclaims on the grounds they fail to state any cause of action. As noted, the motion is opposed.

#### Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (Pérez v. Y & M Transportation Corporation, 219 AD3d 1449, 196 NYS3d 145 [2d Dept., 2023]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (Archival Inc. v. 177 Realty Corp., 220 AD3d 909, 198 NYS2d 567 [2d Dept., 2023]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, Lam v. Weiss, 219 AD3d 713, 195 NYS3d 488 [2d Dept.,

2023]).

To succeed on a claim for legal malpractice it must be shown that the attorney failed to act with the "ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession" (Darby & Darby, P.C. v. VSI International, Inc., 95 NY2d 308, 716 NYS2d 378 [2000]). Preliminarily, of course, the party must demonstrate the existence of an attorney-client relationship (Zhang v. Lau, 210 AD3d 829, 178 NYS3d 545 [2d Dept., 2022]). To establish an attorney-client relationship "there must be an explicit undertaking to perform a specific task" (Willoughby Rehabilitation and Health Care Center LLC v. Webster, 190 AD3d 887, 136 NYS3d 753 [2d Dept., 2021]). Thus, the actions of the parties is the determining fact whether such relationship existed (Wei Cheng Chang v. Pi, 288 AD3d 378, 733 NYS2d 471 [2d Dept., 2001]).

Maxem asserts that TRG represented them in drafting the 6<sup>th</sup> Amendment and the failure to disclose the treatment of the reserve fund caused this entire lawsuit. The question that must be addressed is whether TRG ever had an attorney-client relationship with Maxem. The counterclaim alleges that "on or about March 8, 2022, Maxem retained TRG as its counsel to prepare and submit an amendment to the Cooperative's Offering Plan ("6th Amendment") to be filed with the Attorney General of the State of New York ("AG")" (see, Counterclaims, ¶289 [NYSCEF Doc. No. 53]).

Notably, that date is the same date the Purchase and Sale Agreement was dated and there is no contention TRG represented Maxem in that transaction. In fact, the Purchase and Sale Agreement specifically provides that Maxem as seller is represented by Federman Steifman LLP (Purchase and Sale Agreement, ¶¶3.1, 4.3, 19 [NYSCEF Doc. No. 10]). In any event, the following day Allen Turek sent a letter to Lee Edelson Esq., an attorney with Federman Steifman LLP, as counsel to Maxem, stating four times that Maxem was Edelson's client, requesting information to be able to complete the necessary amendment (see, Turek Roth Grossman LLP Memorandum [NYSCEF Doc. No. 104]). A few weeks later Mr. Turek forwarded a draft of the amendment to Maxem's counsel among others, for review and comment (see, Email from Allen Turke, dated March 30, 2022 at 5:42 PM [NYSCEF Doc. No. 105]). Later that same day Mr. Turek sent another email to Michael Federman Esq., another member of Federman Steifman LLP, counsel to Maxem, specifically stating that he was "not comfortable" providing legal advise to Maxem and would not do so (see, Email from Allen Turke, dated March 30, 2022 at 6:06 PM [NYSCEF Doc. No. 106]). Further, numerous emails between Mr. Turek and attorneys for Maxem demonstrate that Maxem was not represented by TRG at all and had secured its own counsel.

Maxem argues that there are questions of fact whether TRG represented them concerning the 6<sup>th</sup> Amendment and that it is

improper to conflate the undisputed fact Maxem was represented by others concerning the Purchase and Sale Agreement with this disputed contention. Maxem further argues that only Maxem as sponsor could prepare and file the 6<sup>th</sup> Amendment, therefore, "it follows that TRG could only be acting as counsel for Maxem - whether or not TRG was simultaneously co-counsel for 430 Ocean" (Memorandum in Opposition, page 8 [NYSCEF Doc. No. 128]).

However, the Purchase and Sale Agreement specifically states otherwise. It states that "Purchaser and Seller agree that the office of Turek Roth Grossman LLP (Purchaser's attorneys), coordinating and in consultation with Erica Buckley at Nixon Peabody LLP, shall each be retained to prepare and submit the Update Amendment and coordinate all correspondence with the A.G. Purchaser and Seller each waive any conflict of interest which may exist with respect to Turek Roth Grossman LLP and Nixon Peabody LLP acting as the law firms to coordinate the preparation and filing of the Update Amendment" (see, Purchase and Sale Agreement, ¶9.2 [NYSCEF Doc. No. 10]). Maxem concedes that clause indicates TRG was only counsel for the plaintiff. However, Maxem argues that "those words can also be read to say that TRG was the purchaser's attorneys for the PSA" (Emphasis in Original, Memorandum in Opposition, page 9 [NYSCEF Doc. No. 128]). Maxem further insists that such a reading is "not a stretch" (*id*) because otherwise there would be no need to include

waiver language. However, a more natural reading of the clause simply assigns the duty to prepare the amendment to plaintiff's counsel, even though it may be primarily Maxem's responsibility. The court need not speculate why this transfer of authority was made, however, it does not mean that TRG now represented Maxem. This is further supported by the fact TRG sent numerous emails to Maxem's actual counsel seeking comment. If TRG really represented Maxem in preparing and submitting the amendment there would have been no need for TRG to consult with Federman Steifman LLP at all. The simple fact it was necessary for TRG to actually engage with Federman Steifman LLP completely undermines any possibility that TRG actually represented Maxem. It may be unusual for buyer's counsel to prepare documents required of the seller. It may be common practice since the buyer is the party that will benefit from the amendment. To the extent buyer agreed to prepare the amendment in this instance, the waiver language served to protect against any potential litigation in the future.

Moreover, Federman Steifman LLP as actual counsel to Maxem who reviewed all the documents prepared did not raise the objection which forms the basis of the malpractice claim. It is curious that Maxem would seek to sue counsel which it does maintain any relationship instead of its retained counsel. In any event, there are no acts which demonstrate any attorney client relationship at all. Therefore, based on the foregoing,

the motion seeking to dismiss the fifth counterclaim is granted as to all parties.

Turning to the sixth counterclaim, Maxem asserts allegations of fraudulent transfers committed by TRG in violation of Debtor Creditor Law §273 and §276.

It is well settled that pursuant to §273 of the Debtor Creditor Law every conveyance made by a party which then renders the party insolvent is fraudulent without regard to intent if the conveyance is made without fair consideration (Paragon v. Paragon, 164 AD3d 1460, 84 NYS3d 582 [2d Dept., 2018]). Debtor Creditor Law former §276 states that "every conveyance made...with actual intent...to hinder, delay, or defraud either present or future creditors, is fraudulent" (id). Thus, a creditor must demonstrate, by clear and convincing evidence that a defendant had the actual intent to hinder, delay or defraud creditors (see, Jensen v. Jensen, 256 AD2d 1162, 682 NYS2d 774 [2d Dept., 1998]). The fraudulent transfer law contained within the Debtor Creditor Law is designed to prevent debtors from avoiding the payment of their debts (Leifer v. Murphy, 149 Misc 455, 267 NYS 701 [Supreme Court Bronx County 1933]). Preliminarily, it must be demonstrated that Maxem is a 'creditor' of TRG. A creditor is "a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent" (see, Debtor and Creditor Law §270). In this


instance, Maxem does not maintain any claims against TRG and thus cannot pursue claims based upon the debtor creditor law.

Therefore, the motion seeking to dismiss the sixth counterclaim is granted as to all parties.

So ordered.

ENTER:

DATED: September 24, 2024  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC