Amin v Ikhilov

2024 NY Slip Op 34755(U)

October 11, 2024

Supreme Court, Kings County

Docket Number: Index No. 505887/2016

Judge: Carolyn E. Wade

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: HON. CAROLYN E. WADE (PART 84)

KHANDAKAR R. AMIN., *Plaintiff*, -against- ERIK IKHILOV ESQ., *Defendant*.	**DECISION/ORDER** Index No.: 505887/2016 Motion Seq. No.: 3

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Upon the foregoing cited papers, and after oral argument, defendant Erik Ikhilov, Esq. moves for an Order granting him summary judgment, and dismissal of the Amended Complaint.

Plaintiff Khandakar R. Amin ("Plaintiff") commenced the underlying legal malpractice action against his former attorney, Defendant Erik Ikhilov, Esq. ("Defendant"), to recover damages as a result of Defendant's alleged failure to unilaterally cancel a contract for the sale of real property, and for the improper return of the purchaser's deposit.

The Plaintiff hired Defendant to represent him in the sale of two properties to Myrtle Hill LLC ("Buyer"). Mot. for Summ. J. Ex. A, ¶ 4. The Defendant drafted a contract for the sale of the properties at Plaintiff's request. *Id.* at Ex. N, p. 12, 11. 18-24. The Plaintiff and buyer entered into a contract for the purchase of the two contiguous properties for $1,775,000.00 in March 2013. *Id.* at Ex. C. The contract called for a closing date of "on or

about" April 15, 2013. *Id.* at Ex. C, ¶ 15. The contract provided that the sale was "as-is" in relation to the physical condition of the properties. *Id.* at Ex. C, ¶ 2. The contract also contained a provision which prohibited the contract from being orally modified. *Id.* at Ex. C, ¶ 28(b).

Communication between the Plaintiff and Defendant began to erode following a title search performed by the title company, hired by the buyer, around April of 2013, that returned with several exceptions to title, which required resolution before closing. *Id.* at Ex. E. Specifically, the title report indicated that there was a defect in the title chain for one property and raised questions as to whether the second property could be used as a three-family dwelling as represented by Plaintiff. *Id.* On or about April 22, 2013, the Buyer's attorney forwarded the title report to Defendant to inquire into Plaintiff's plan to remedy the defects. *Id.* at Ex. F. On or about April 23, 2013, Defendant wrote to Plaintiff to detail the exceptions found in the title report and raised by the buyer's attorney. *Id.* at Ex. G. In addition to the written communication, Defendant spoke with Plaintiff on the phone regarding the title report findings. *Id.* at Ex. N, p. 53, 11. 9-17. Prior to the "on or about closing date," Plaintiff told Defendant that he would cancel the contract and sell the properties to another seller if the buyer failed to close on April 15, 2013. *Id.* at Ex. M, p. 37, 11. 16-20.

Despite Defendant's documented attempts to contact the Plaintiff to determine if he remedied the exceptions raised in the title report, Plaintiff failed to remedy the title defects. *Id.* at Ex. N, p. 61, 11. 17-19; p 62, 11. 17-24; p. 84, 11. 9-10; p. 91, 11. 14-23; p. 92, 11. 25; p. 93, 11. 2-6. On June 18, 2013, Defendant sent an e-mail to Plaintiff requesting that Plaintiff

contact him and to advise him that the buyer wanted to close. *Id.* at Ex. H. Plaintiff failed to respond to the email.

Unknown to Defendant at the time, in July 2013, Plaintiff sent three letters directly to the buyer unilaterally canceling the contract despite the contracted closing date having been an "on or about date" and without remedying the title deficiencies. *Id.* at Ex. O. Further, Plaintiff, unbeknownst to Defendant, entered into contracts to sell the properties to a different buyer for an increase of two hundred thousand dollars ($200,000) over the agreed price in the first contract. *Id.* at Ex. P. The sale of the property to the second buyer closed on July 29, 2013. *Id.* at Ex. O.

On or about July 23, 2013, a few days prior to Plaintiff's closing on the sale to the new buyer, the first buyer's attorney sent a Time of The Essence Letter ("TOE") to Plaintiff and Defendant setting a closing date of August 23, 2013 and warning of potential legal action. *Id.* at Ex. I. On or about August 14, 2013, Defendant sent Plaintiff a letter, including a copy of the TOE letter, to advise Plaintiff to attend the closing, to call him immediately to discuss the closing, and to advise of the potential legal action. *Id.* Plaintiff did not respond.

On or about December 19, 2013, Defendant again attempted to contact Plaintiff to advise him that the buyer was demanding the return of the down payment; and that the Plaintiff should contact him within five days to discuss the matter. *Id.* at Ex. J. Defendant also advised that if he did not hear from Plaintiff within five days, he would release the down payment to the buyer. *Id.* Plaintiff once again failed to respond and Defendant released the down payment to the buyer from his escrow account, two weeks after he sent his letter. *Id.* at Ex. L.

As Defendant had warned Plaintiff, the first buyer commenced a breach of contract action against Plaintiff in February of 2014 (*see Myrtle Hill LLC v. Khandakar R. Amin, et al.* [Sup Ct, Kings Cty., Index No. 501784/2014). According to Plaintiff, that action was dismissed. Plaintiff seeks $175,000 in damages from Defendant, which is the amount of the returned deposit. Mot. for Sum. J., Ex. M, p. 106 11. 16-22.

DISCUSSION

The Defendant now moves for summary judgment, dismissing the Plaintiff's remaining legal malpractice claim, on the ground that there are no material issues of fact to support that cause of action against him. Specifically, Defendant avers that Plaintiff can not prove that "but for" any of the allegations contained in the Amended Complaint, Plaintiff would not have sustained the claimed losses in the underlying transaction. Plaintiff opposes this motion, arguing, among other things, that there are triable issues of fact as to whether the first buyer repudiated the contract and whether the "as-is" sale of the property related to the title issues as well as to the physical condition of the property. Plaintiff further claims that Defendant should have unilaterally canceled the underlying contract for not closing title on the "on or about" closing date.

The movant for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Medical Center*, 64 NY2d 851 [1985]). Once a party makes that showing, the burden shifts to the opposing party, here, the Plaintiff, "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v. Prospect Hosp.*, 68

NY2d 320, 324 [1986]). It is well settled that a "shadowy semblance of an issue or bald conclusory assertions, even if believable, are not enough to defeat a motion for summary judgment" (*Mayer v. McBrunigan Construction Corp.*, 105 AD2d 774 [2d Dept 1984]).

"On a motion for summary judgment in the legal malpractice context, the defendant must 'demonstrate that the plaintiff is unable to prove at least one of the essential elements of a legal malpractice cause of action'" (*Greene v. Sager*, 78 AD3d 777, 779 [2d Dept 2010]; see *Eisenberger v. Septimus*, 44 AD3d 994 [2d Dept 2007]; *Kotzian v. McCarthy*, 36 AD3d 863 [2d Dept 2007]). Further, to establish a cause of action based on legal malpractice, the plaintiff is required to prove that "but for" defendant's negligence, plaintiff would not have sustained the claimed loss in the underlying transaction (*AmBase Corp. v. Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]; *Cosmetics Plus Group, Ltd. V. Traub*, 105 AD3d 134 [1st Dept 2013]; see also, *Wo Yee Hing Realty, Corp v. Stern*, 99 AD3d 58 [1st Dept 2012]).

Here, Plaintiff first argues that repudiation of the contract by the first buyer is a triable issue of fact. However, this is a new theory that does not appear anywhere in the Amended Complaint. Even if this Court were to consider the theory of repudiation, it fails for several reasons. Plaintiff bases this claim on inadmissible hearsay evidence; specifically, an undocumented conversation by which the buyer demanded a reduction in sales price. It is undisputed that the purchase contract contained a clause that prohibited oral modifications to the contract. *Id.* Ex. C, ¶ 28. Additionally, for Plaintiff to claim repudiation, Plaintiff must have been ready, willing, and able to close on the properties (*Pesa v. Yoma Dev. Group, Inc.*, 18 NY3d 527 [2012]). Yet, Plaintiff admitted at his deposition that he was unable to close on

the properties because he refused to abide by his contract, and correct the title deficiencies. As such, Plaintiff's conclusory repudiation claim fails as a matter of law.

Next, Plaintiff avers that legal malpractice occurred because Defendant did not inform the purchaser that the underlying contract was canceled for not closing title on the "on or about" closing date. Plaintiff avers that if Defendant canceled the contract, the buyer would not have sued him for breach of contract. The "on or about" closing date contained in a contract for the sale of real property is not the "law date." It is black letter law that when a contract for the sale of real property contains an "on or about" closing day, a party is entitled to a reasonable adjournment of the closing (*DeCicco v. Staehle*, 11 AD3d 425 [2d Dept 2004]). Further, when the seller can not deliver clear title in accordance with the contract terms, and the seller breaches the contract (as happened here); the purchaser is entitled to the return of its down payment (*Yu Ling Hu v. Zapas*, 108 AD3d 621 [2d Dept 2013]; *see also*, *Rufeh v. Schwartz*, 50 AD3d 1000 [2d Dept 2008]).

Here, Plaintiff admits that if the buyer did not close on the "on or about" date, he intended to cancel the contract and sell both properties to someone else.

Significantly, Plaintiff does not dispute that there were title issues with the properties. However, he incorrectly claims that he did not have to correct them. Pursuant to the unambiguous terms of the Contract, the term "as is" only pertains to the physical condition of the Properties. Indeed, the printed portion of the Contract and rider required Plaintiff to resolve title issues; although, there were cost limitations on his obligation to do so. Ex. C, ¶¶ 2, 12, 16, 21 Rider ¶¶ 1, 3. Even assuming *arguendo*, that Plaintiff's allegations are true, he has failed to show that "but for" Ikhilov's alleged failure to cancel the contract on a theory of

repudiation by the buyer, he would have been entitled to retain the buyer's downpayment, and would have avoided a lawsuit. Notably, Plaintiff's repudiation theory was premised on an alleged verbal demand by the buyer for a decrease in the purchase price. This constituted inadmissible hearsay and was a new theory of liability not set forth in the Amended Complaint. Moreover, the Plaintiff did not correct the title defects before the closing, as required by the contract, and unilaterally canceled the contract with the first buyer. While the buyer sued Plaintiff in a separate action, despite receiving the returned down payment; that action was dismissed against him.

In conclusion, Plaintiff's legal malpractice claim against Ikhilov is, at best, speculative and conclusory. Plaintiff failed to establish any material factual predicate that would form the basis of "but for" causation (or any causation).

Accordingly, based upon the above, Defendant's Motion for Summary Judgment is **granted**; and the Amended Complaint is dismissed in its entirety. The Clerk of Court is directed to enter judgment in favor of Defendant Erik Ikhilov, Esq.

Hon. Carolyn E. Wade, J.S.C.
HON. CAROLYN E. WADE
JUSTICE OF THE SUPREME COURT

10/11/2024