Polychron Corp. v Acocella
2024 NY Slip Op 35074(U)
October 30, 2024
Supreme Court, Westchester County
Docket Number: Index No. 56932/2022
Judge: Janet C. Malone
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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POLYCHRON CORPORATION and ELECTRA DAVIS,

Plaintiffs,

-against-

FRANK ACOCELLA, ESQ. and THE ACOCELLA LAW GROUP, P.C.,

Defendants.

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Index No. 56932/2022

DECISION AND ORDER

Motion Seq. No. 1

MALONE, J.

Plaintiffs commenced this legal malpractice action on February 28, 2022, by Summons with Notice (NYSCEF Doc. No. 1) and Defendants appeared on April 5, 2022 (NYSCEF Doc. No. 3). On October 6, 2023, Plaintiffs served the Verified Complaint alleging one cause of action for legal malpractice in regard to Defendants' representation of Plaintiffs in the sale of real property known as 94 Hudson Park Road, New Rochelle, New York ("the premises"), a restaurant that operated at the premises known as "Dudleys" and a marina business that also operated at the premises (NYSCEF Doc. No. 4).

Now before the Court is Defendants' pre-answer motion by Notice of Motion to dismiss pursuant to CPLR R.R. 3012(b) and 3211(a)(7); *see also* CPLR R. 3211 (f). In support, Defendants submit the Affirmation of Lisa L. Shrewsberry, Esq. in Support, with Exhibits A-C attached, and Reply, with Exhibit A attached; Memorandum of Law in Support and Reply; and Decision and Order in the commercial mortgage foreclosure in *Polychron Corporation v. 94 Hudson Park Rd., LLC, Nadine Southwell et al.*, Index No. 59520/2020 (Westch. Co. Sup Ct.) (NYSCEF Doc. Nos. 8-9; 23-25).

In opposition to the motion, Plaintiffs relies on the Affirmation of Christoher S. Tramaglini, Esq. with Exhibits 1-8 attached; and Memorandum of Law in Opposition (NYSCEF Doc. Nos. 13-22).

Motion to Dismiss

CPLR R 3012(b)

Defendants argue that the action should be dismissed because Plaintiff did not serve the complaint within thirty days; that it was not until October 6, 2023 or 519 days after Defendants demanded service of the complaint on April 5, 2022 that the complaint was served.

"To avoid dismissal for failing to timely serve a complaint after a demand has been made pursuant to CPLR 3012 (b), …plaintiff has to demonstrate both a reasonable excuse for the delay and a potentially meritorious cause of action" *Percival v. Northwell Health Sys*, 173 AD 3d 916, 917 (2d Dept. 2019). "The determination of what constitutes a reasonable excuse is within the sound discretion of the court" *Belli v. Belli*, 207 AD3d 617, 618 (2d Dept. 2022).

Here, Plaintiffs have established they had a reasonable excuse for the delay in serving the Complaint in that they were engaged in settlement negotiations with Defendants' prior counsel. *Miller v. Stony Brook School*, 2024 WL 4139241 (2d Dept. Sept. 11, 2024) (**"**The determination of what constitutes a reasonable excuse for a delay in serving the complaint after a demand is made is within the discretion of the court"). However, Plaintiff has failed to show a meritorious defense.

In making this determination, the Court examined Defendants argument that the complaint should be dismiss for failure to state a cause of action.

CPLR R. 3211 (7)

In determining "a motion to dismiss for failure to state a cause of action pursuant to CPLR R. 3211 [a] [7], the "well-settled task [of the court] is to determine whether, accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated." *Aristy-Farer v State of New York*, 29 NY3d 501, 509 [2017] [citations and internal quotation marks omitted]; *see Morgenthow & Latham v Bank of N.Y. Co.*, 305 AD2d 74, 78 [1st Dept 2003]; see also *Held v Kaufman*, 91 NY2d 425, 432 [1998]. "In assessing a motion under CPLR R. 3211(a)(7), a court may freely consider affidavits and other evidence submitted by plaintiff to remedy any defects in the complaint." *Renaud v. Bedford-Carp Construction, Inc.*, 221 AD3d 739, 740 (2d Dept. 2023) The role of the court is only to determine whether the facts, as alleged, fit within any cognizable legal theory. "Whether a plaintiff can ultimately establish [his

or her] allegations is not part of the calculus." *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005).

Factual Allegations

Plaintiff Polychron Corporation is a New York Corporation and Plaintiff Electra Davis[1] is the President of Plaintiff Poylchron Corporation (individually, "Polychron" and collectively, "Plaintiffs"); Defendant Frank Acocella is an attorney duly licensed to practice law in the State of New York and Defendant The Acocella Law Group, P.C. is a law firm duly incorporated in the State of New York ("Defendants")(Complaint [NYSCEF Doc. No. 4] at ¶¶1-6)

Defendants represented Plaintiffs in a real estate transaction to sell the premises, Dudleys and the marina business. Defendants drafted two contracts: one dated November 30, 2018, which listed Defendants as representing the non-party Purchaser, Rudolph Southwell (Contract #1),wherein it stated generally that the transaction was to be an all-cash deal, under the terms of a purchase price of $3,700,000.00; down payment on contract of $50,000.00; cash due at closing of $3,650,000.00; and Defendants were listed as the attorney for the Purchaser, Rudolph Southwell. *Id.* ¶¶12-17, 24.

Defendants never formally cancelled Contract #1, but entered into a second contract dated December 19, 2018 with Plaintiff that listed Defendants as representing Plaintiffs as Sellers and non-parties Nadine Southwell and Rudolph Southwell as Purchasers ("Contract #2"), which caused confusion as to whom was being represented by Defendants. This confusion led to Nadine Southwell and Rudolph Southwell interposing counterclaims and Third-Party Claims implicating Defendants herein as their attorney and not Plaintiff's attorney in a separate foreclosure proceeding. *Id.* at ¶¶18, 25-26.

The general terms of Contract #2 were a purchase price of $3,700,000.00, down payment on contract of $50,000.00, cash due at closing of $1,050,000.00, and Plaintiff/Seller taking back a Purchaser Money Mortgage in the sum of $2,600,000.00. *Id.* at ¶19.

Contract #1 and Contract #2 were in the format of a real estate contract, and not that of a business asset sale or business stock sale. The Contracts included a provision that the sale was to include the good will of the businesses known as Beau Dudley Corp. and Polychron Marina Inc,

[1] *See* Verification annexed to Complaint, NYSCEF Doc. No. 4).

plus equipment, fixtures and improvements as referenced in an Exhibit "A" that was not attached to the Contracts. Although the businesses were three different assets consisting of the real estate, the restaurant, and the marina, all three were each independently owned by different entities, yet Contract #1 and Contract #2 erroneously had Polychron listed as a Seller of property it could not own. No Asset Sale Agreement or Stock Sale Agreements for Beau Dudley's Corp or Polychron Marina, Inc. were ever prepared or signed and accordingly ample terms of such transactions, including payment terms, collateral, contingencies, representations, etc. were absent from the Contracts. Further, the purchase price was not allocated to the sale of the marina business by Polychron Marina, Inc., or the restaurant business by Beau Dudley Corp. *Id. at* ¶¶20-23.

Defendants represented to Plaintiff that he knew the Purchaser and that the Purchaser always found a way to produce funding. Before the closing on March 1, 2019, the terms of the transaction changed, with the Purchaser allowed to close the transaction by borrowing the sum of $600,000.00 from a private lender, causing Plaintiff to be in second position for the $2,600,000.00 owed to Plaintiff. Defendants recommended that Plaintiff subordinate their $2,600,000.00 mortgage to another mortgage of $600,000.00, secured by Purchasers. Such recommendation caused Plaintiffs to bear an unbelievable risk which caused damage to Plaintiffs when the Purchaser defaulted on both the first mortgage and Plaintiffs' mortgage forcing Plaintiffs to purchase the first mortgage for $530,000. *Id.* at ¶¶ 27- 32.

After the closing, the Purchaser made one year's worth of interest only payments to Plaintiff; and starting with the payment due on June 2, 2020, Purchaser did not make that payment and all subsequent payments. *Id.* at ¶¶ 33-34.

Defendants continued to represent Plaintiffs after the closing with Defendants purportedly sending a Default Notice to the Purchaser after the Purchasers failed to make the June 2, 2020 payment; the default notice was undated and it was **not** sent Overnight Mail via Federal Express, UPS or DHL under the terms of the Mortgage Note. However, due to the default notice being defective, a second default notice had to be sent resulting in Plaintiff incurring damages of a year of lost interest given the delay. . *Id.* at ¶¶ 36, 40

Defendants then referred Plaintiffs to Stephen Florek to bring an action to foreclose. After the foreclosure was started, the Purchasers moved to disqualify Florek and Defendants from representing Plaintiffs because Defendants were listed as the Purchaser's attorney in Contract #1

and the Plaintiff/Seller's attorney in Contract #2. Florek's and Defendants' disqualification caused Plaintiff to suffer substantial legal expenses and to retain substitute counsel. *Id.* at ¶¶ 37-38.

Discussion

"To state a cause of action to recover damages for legal malpractice, a plaintiff must allege: (1) that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession; and (2) that the attorney's breach of the duty proximately caused the plaintiff actual and ascertainable damages" *Kasoris v. Bodnar & Milone, LLP*, 186 AD3d 1504, 1505 (2d Dept. 2020).

Defendants argue that Plaintiffs allegations are conclusory and merely allege that if the transaction had been structured differently, or a default notice issued earlier, then maybe the foreclosure action would be less expensive or litigated differently. *Bua v. Purcell & Ingrao, P.C.*, 99 A.D.3d 843, 848 (2d Dep't 2012)("Conclusory allegations of damages, or injuries predicated on speculation, cannot suffice for a legal malpractice action, and dismissal is warranted where the allegations in the complaint are merely conclusory and speculative")(internal citations omitted); *Janker v. Silver, Forrester & Lesser, P.C.*, 135 A.D.3d 908 (2d Dep't 2016); *See also* Memorandum of Law in Support [NYSCEF Doc. No. 9] at pgs. 5-6).

Here, Plaintiffs have failed to state a cause of action for legal malpractice. A scrivener's error in Contract #1 and Contract #2 and legal advice as to the structure of the financing with the for the sale of the premises and entities set forth herein, is not a basis to find that Defendants failed to exercise the ordinary reasonable skill and knowledge of a member of the legal profession and that Defendants breached any duty that proximately caused Plaintiffs actual or ascertainable damages that will not be addressed in the foreclosure action. *Silverman v. Eccleston Law, LLC*, 208 AD 3d 705, 707 (2d Dept. 2022) ("the selection of one among several reasonable courses of action does not constitute malpractice and an attorney may not be held liable for the exercise of appropriate judgment that leads to an unsuccessful result"); *Randazzo v. Nelson*, 128 AD3d 935, 937 (2d Dept. 2015)("A plaintiff must plead actual, ascertainable damages resulting from attorney's negligence")

It is clear from the decision granting summary judgment to Polychron in the foreclosure action that this Court (Giacomo, J.) found Plaintiffs to be entitled to seek recovery of all amounts due under the subject mortgage, from the date of default on June 1, 2021, and that all affirmative

defenses in opposition to same have been dismissed. Further, in deciding the three foreclosure summary judgment motions (Motion Seq. Nos. 5, 6 &7), Justice Giacomo dismantled Plaintiffs' argument here that the original notice of default was undated and not sent by overnight mail, ruling that a default notice was not required by the Polychron Note (Decision & Order (Giacomo, J.) dated January 2, 2024, NYSCF Doc. No. 25); *see also* Memo. Law in Opp.[NYSCEF Doc. No. 22] at pgs. 5,6; Tramaglini Affirm.in Opp. [NYSCEF Doc. No. 13] at ¶ 20)

Based on the foregoing the Plaintiffs have failed to state a cause of action pursuant to CPLR R. 3211 (a) (7), and therefore has failed to raise a potentially meritorious defense pursuant to CPLR § 3012(b). Accordingly, it is hereby

ORDERED, that the motion filed by Defendants Frank Acocella, Esq. and The Acocella Law Group, P. C. to dismiss the Complaint pursuant to CPLR § 3012(b) is GRANTED; and it is further

ORDERED, that Complaint is DISMISSED.

This constitutes the Decision and Order of the Court.

Dated: October 30, 2024
White Plains, New York

Janet C. Malone

HON. JANET C. MALONE
Justice of the Supreme Court