Razinski v Katten Muchin Rosenman, LLP
2019 NY Slip Op 33422(U)
November 19, 2019
Supreme Court, New York County
Docket Number: 150326/2019
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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ALEXANDER RAZINSKI, TANYA RAZINSKI, XENIA RAZINSKI, and INVAR INTERNATIONAL HOLDING, INC.,

Plaintiffs,

-against-

KATTEN MUCHIN ROSENMAN, L.L.P.,

Defendant,

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DECISION AND ORDER
Index No.: 150326/2019

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

I. FACTS

As this is a motion to dismiss, these facts are taken from the verified complaint and accepted as true (NYSCEF Doc. No. 2).

The individual plaintiffs are a family, including husband Alexander Razinski (AR), wife Tanya Razinski (TR), and daughter Xenia Razinski (XR). The outstanding stock of plaintiff Invar International Holding, Inc., is held entirely by AR, TR, and XR. Defendant Katten Muchin Rosenman, LLP (KMR) is a law firm.

Non-party 136 Field Point Circle Trust (the Trust) owned the real property at 136 Field Point Circle, Greenwich, CT (the Property). On March 30, 2007, the individual plaintiffs (the Complaint refers to "the Rezinskis", but does not define the term) agreed to purchase the Property from the Trust for $19 million and entered into a Purchase and Sale Agreement (PSA). The transaction closed in June 2007, when the individual plaintiffs made a $10 million down payment (in addition to the initial payment of $1 million. The remaining $9 million was financed by the Trust, and the individual plaintiffs were to pay the interest on the mortgage in the form of monthly lease payments on the Property. The final $9 million was to be paid by May 30, 2012. Individual plaintiffs had a recorded lien affecting title to the Property as of June 1, 2007 (the Lien). The Trust caused certain liens and recordings to be filed with the Town of Greenwich, CT in June 2007. First American Title Insurance Company issued two policies on the Property (Complaint, ¶ 17).

In June 2010, plaintiffs wanted to raise some money and AR, TR, and Invar entered into an agreement with non-party Putnam Bridge Funding, which owned non-party 136 Field Point Circle Holding Company, LLC (Purchaser, and the agreement is the Master Agreement) (*id.* at ¶¶

25-27). AR then released the lien on the Property so the option to purchase the Property could be transferred to Purchaser, and AR, TR, and the Trust entered into a new agreement to allow that transaction (the Option Agreement). After a year of the individual plaintiffs leasing the Premises under the Master Agreement and paying certain expenses, they could purchase the Premises back. If they did not, the Property was to be listed for a price between $20-30 million, with the excess cash proceeds going to plaintiffs.

On May 31, 2013, individual plaintiffs provided notice to Purchaser that they wanted to use their option to extend the term of the Master Agreement by 6 months. Purchaser rejected the notice and invited brokers and appraisers to view the Property.

AR, TR, and Invar then retained KMR to represent them in litigation against Purchaser (652357/2013 in NY County Supreme Court) for breach of contract, specific performance, injunctive relief, equitable estoppel, and a declaratory judgment. On summary judgment, the court found the individual plaintiffs did not have an equitable mortgage. Plaintiffs contend it was malpractice for KMR not to introduce evidence of the lien the Razinskis put on the Property and subsequently released (the Released Lien). But for this omission, plaintiffs would have been entitled to a finding they were equitable mortgagors.

In this case, plaintiffs assert the following claims:

1) Malpractice- for KMR's failure to provide evidence of the liens to the court in the underlying litigation and failure to argue that the existence of the liens was enough to show questions of fact precluding summary judgment.
2) Breach of Fiduciary Duty- for failing to do necessary work and doing work which was unnecessary or counter-productive, so plaintiffs were billed for unnecessary or counter-productive work and had litigation expenses it would not otherwise have had.

II. ARGUMENTS

A. Defendant's Motion to Dismiss

KMR argues that the decision on the motions for summary judgment in the underlying case was based on the unambiguous terms of the Master Agreement which was negotiated long before KMR was retained (Memo at 1). Moreover, this case is untimely. KMR withdrew from representing plaintiffs in each of the three relevant actions in December 2015. It provided no services to defendants after January 2016. The summons filed in this case on January 11, 2019 did not commence the action or toll the statute of limitations. This action was properly commenced

more than three years later on February 25, 2019, when the Verified Complaint was filed (Memo at 2).

Plaintiffs have already acknowledged, in the Amended Engagement Agreement, that they were satisfied by the legal services provided by KMR and the firm's fees were fair and reasonable. The documentary evidence, which is the Amended Engagement Agreement dated October 16, 2015, definitively states that:

> "by signing this letter, you agree that
> 1. you have been satisfied with the services Katten has provided you in the Current Litigation;
> 2. you are not aware of any circumstances that would provide a basis for you to assert claims against Katten or seek a reduction of its fees;
> 3. the amounts that Katten has billed you for its services thus far have been reasonable and appropriate"

(attached as Exhibit D to Memo of Law, NYSCEF Doc. No. 9). The conduct now alleged to be malpractice all pre-dates the Amended Engagement Agreement, as did the decision in the underlying case. The parties were aware of the decision when they signed the Amended Engagement Agreement (Memo at 6).

The complaint also fails to state a claim for which relief can be granted. It would be impossible to prove that plaintiffs would have won the underlying litigation if KMR had introduced evidence of the Released Lien. Nor do plaintiffs allege they would have won the underlying suit, but for this failure (*id.* at 3, 7). The "but for" causation cannot be merely speculative (*id.* at 8). A reasonable but unsuccessful strategic decision is not malpractice (*id.*). Here, the Complaint barely states what the alleged malpractice was, and fails to plead "but for" causation. It only baldly states that "there would have been a more favorable economic outcome," not that they would have won the case or been able to purchase the Property if they had been granted the opportunity (*id.*).

The underlying decision turns on the language of the Master Agreement and does not concern itself with the Released Lien (*id.* at 10). The Master Agreement only gave AR and TR an option to purchase the Property, not an ownership interest in the Property (*id.*). There is no reason to believe evidence of the Released Lien would have affected that court's decision. Further, if the court had ruled in the plaintiffs' favor, plaintiffs' would have received the right to exercise the option to pay about $13 million to purchase the Property, and plaintiffs do not contend they would have been able to do so.

The breach of fiduciary duty claim is duplicative of the malpractice claim (*id.* at 11). No separate factual allegations are offered, only conclusory boilerplate statements. Plaintiffs claim KMR failed to do necessary work and did work which was useless and/or counterproductive, but does not specify what any of that work was.

The damages claim fails because it is merely speculative (*id.*) at 12. There is no reason to believe, if the motion for summary judgment had been denied in the underlying action, that plaintiffs would have gotten a better economic outcome. Plaintiffs would not have received any damages, only received an option to purchase the Property, which they do not claim they could have afforded.

B. Plaintiffs' Opposition

Plaintiffs contend that the dispositive question in the underlying litigation was whether the plaintiffs had an equitable mortgage, and that both the Supreme Court and the Appellate Division faulted plaintiffs in that action for failing to provide proof of a lien. Plaintiffs contend the underlying decision was based explicitly on the absence of liens (Opp at 1).

Plaintiffs contend these claims are timely. They began this action by filing a summons with notice on January 11, 2019 (*id.* at 2, citing Summons, NYSCEF Doc. No. 1). While a "bare summons" is insufficient to commence an action, the summons here was a "summons with notice," as it named the claims and stated that damages in excess of the jurisdiction of all lower courts (*id.* at 11). While the summons here was not accompanied by a complaint, it provided notice that there were claims for malpractice, breach of contract, and breach of fiduciary duty, and about the damages sought (*id.* at 12). The summons was then served on defendants along with the complaint (*id.*).

There is a three-year statute of limitations period, but the period is tolled by the continuous representation of plaintiffs by defendant. KMR represented plaintiffs through the date of oral argument before the First Department (*id.* at 13). There is no question this action was started within three years of that date, January 14, 2016 (*id.* at 13-15).

As far as defendant moves to dismiss with prejudice, dismissal pursuant to CPLR 3211(a)(7) for failing to state a claim is never with prejudice (*id.* at 16). As far as defendant claims there are unambiguous documents supporting its position, no such documents are part of the record. The Amended Engagement Agreement is irrelevant, as plaintiffs' uninformed, inexpert satisfaction with defendant's work at that time is irrelevant (*id.* at 17-18).

Absence of a lien was key in the underlying decision on this action. The Appellate Division noted "[p]laintiffs presented no evidence that the deed to the subject property was held as security for a loan pursuant to Real Property Law §320" (*id.* at 20). The Supreme Court stated that "[u]nder New York law, an equitable lien mortgage will be found if there is an express or implied agreement that there will be a lien on a specific property" (*id.* at 21).

The claims are properly pled (*id.* at 22-26 [largely discussing the elements of the claims]). Plaintiffs note that the damages for breach of fiduciary duty here include the disgorgement of legal fees and the sanctions in the underlying case, and the damages for this claim are distinct from the damages from the malpractice claim.

Regarding the portion of the motion to dismiss based on documentary evidence, the affidavits presented do not constitute documentary evidence and should not be relied upon (*id.* at 27-28).

III. DISCUSSION

a. Statute of Limitations

It is undisputed that the statute of limitations for legal malpractice is three years. Plaintiffs argue the period started running when KMR argued the appeal before the First Department on January 14, 2016. Three years later would be January 14, 2019. The Summons was filed on January 11, 2019, and the Complaint was filed on February 25, 2019. KMR argues the Summons is insufficient to start the action because it was not accompanied by a complaint and does not qualify as a summons with notice. A summons with notice "shall contain or have attached thereto a notice stating the nature of the action and the relief sought, and . . . the sum of money for which judgment may be taken in case of default" (CPLR 305[b]). The notice portion of the Summons reads as follows:

> "Notice: The relief sought is money damages in legal malpractice, breach of contract and breach of fiduciary duty based upon representation in New York County and other court matters. Upon your failure to appear, judgment will be taken against you by default for a sum in excess of the jurisdiction of all lower courts, with interest and the costs of this action."

The naming of actual claims is sufficient to describe the nature of the action (*see Scaringi v Elizabeth Broome Realty Corp.*, 154 Misc 2d 786, 789 [Sup Ct 1991], *affd,* 191 AD2d 223 [1st Dept 1993]). The notice also states that the damages are at least $500,000, the jurisdictional requirement of this court (although not in so many words). A "summons with notice [is] not

jurisdictionally defective merely because it omitted a specific dollar amount of money damages sought" (*Day v Davis*, 47 AD3d 750 [2d Dept 2008]). This provides sufficient notice to allow defendant to decide if it wishes to appear in response. This action is timely.

b. Malpractice

An action for legal malpractice requires the plaintiff prove the attorney's negligence, which was the proximate cause of the loss sustained, and actual damages (*Reibman v Senie*, 302 AD2d 290, 290 [1st Dept 2003], *Between the Bread Rlty. Corp. v Salans Hertzfeld Heilbronn Christy & Viener*, 290 AD2d 380 [1st Dept 2002], lv denied 98 NY2d 603 [2002], *Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 170 AD2d 108, 114 [1st Dept 1991] *affd*, 80 NY2d 377 [1992]). To show proximate cause, a plaintiff must demonstrate that but for the attorney's negligence, the plaintiff would either have prevailed in the underlying matter or would not have sustained damages (*Reibman*, 302 AD2d at 290, *Senise v Mackasek*, 227 AD2d 184 [1st Dept 1996]; *Stroock Stroock & Lavan v Beltramini*, 157 AD2d 590, 591 [1st Dept 1990]).

In the underlying action plaintiffs sought a declaratory judgment that they have an equitable mortgage on the property (*Razinski v 136 Field Point Circle Holding Co., LLC*, Index No. 652357/2013, NYSCEF Doc. No. 21, at 7). The Supreme Court considered whether an equitable lien mortgage existed and whether the facts suggested that the parties intended the Property to be held or transferred to secure an obligation. The court noted that since the transaction was between sophisticated parties and was "fully and unambiguously described in the documents" which did not describe a mortgage, plaintiffs had not obtained "a fee interest that would grant them standing as equitable mortgagers" (*id.* at 8). The courts held that the language of the Master Agreement "sets forth a transaction that is not a mortgage, as defendant was not providing funds to finance [plaintiff's] purchase of the property, thereby creating a debt on [plaintiff's] part that would be secured by the property" (*id.*). The Supreme Court interpreted section 1.1 of the Master Agreement to mean that the "Razinskis assigned their option to purchase the property to Field Point Circle in return for an "option acquisition payment" and not for a loan of any type, as they incorrectly assert [which] cannot be twisted into a mortgage" (*id.* at 9, internal quotations omitted).

In the Complaint, plaintiffs allege various liens had been established in 2007. Plaintiffs then state that the $10 million lien dated June 4, 2010 had been released when the Master Agreement was signed (Complaint, ¶ 28). Contrary to plaintiffs' statement, the Appellate Division did not "explicitly determine[] that no evidence of liens was presented" or decide the appeal on

that basis (Opp at 21). The Appellate Division noted that no evidence had been presented that the deed to the subject property was being held as security for a loan, but that the Master Agreement showed plaintiffs assigned their option to purchase to the defendant in exchange for money, meaning that there had been a sale. Nothing suggests that evidence about liens would have changed the Appellate Division's or the Supreme Court's decision about the meaning of the Master Agreement and the nature of the underlying transaction. Accordingly, plaintiffs have failed to allege facts supporting the conclusion that, but for the attorney's negligence, the plaintiff would either have prevailed in the underlying matter or would not have sustained damages. This claim shall be dismissed.

c. Breach of Fiduciary Duty

Where the complaint against an attorney alleges a breach of fiduciary duty which is predicated on the same allegations and seeks identical relief to the legal malpractice claim, the former claim should be dismissed as redundant of the malpractice claim (*see Ulico Casualty Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 14 [1st Dept 2008][dismissing breach of contract, breach of fiduciary duty, aiding and abetting breach of fiduciary duty and tortious interference with contractual relations claims as duplicative of the malpractice cause of action]; *Nevelson v Carro, Spanbock, Kaster & Cuiffo*, 290 AD2d 399, 400 [1st Dept 2002][dismissing claims for breach of contract and breach of fiduciary duty as those claims were "predicated on the same allegations and seek relief identical to that sought in the malpractice cause of action"] *Sitar v Sitar*, 50 AD3d 667, 670 [2d Dept 2008];[affirming dismissal of causes of action alleging fraudulent misrepresentation and negligent misrepresentations "insomuch as those causes of action arise from the same facts as the cause of action alleging legal malpractice and do not allege distinct damages"]; and *Sage Rlty Corp. v Proskauer Rose*, 251 AD2d 35, 39 [1st Dept 1998] [breach of contract and fraudulent misrepresentation claims dismissed as redundant of malpractice claim]). Plaintiffs argue there are distinct damages, because disgorgement of legal fees is available for a breach of fiduciary duty (Opp at 25).

In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages directly caused by the defendant's misconduct (*Pokoik v Pokoik,* 115 AD3d 428 [1st Dept 2014]). A fiduciary relationship is grounded in a higher level of trust than exists between those engaged in arms-length transactions in the marketplace (*Oddo Asset Management v Barclays Bank PLC*, 19 NY3d 584

[2012]). A fiduciary is "held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive" (*Meinhard v Salmon*, 249 NY 458 [1928]). The fiduciary is bound to exercise the utmost good faith and undivided loyalty to the principal throughout their relationship (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409 [2001]). As discussed above, plaintiffs have neither pled facts alleging misconduct by the defendant nor alleged damages caused by that misconduct. This claim too shall be dismissed. Accordingly, it is hereby

ORDERED that the motion to dismiss of defendant is GRANTED and the complaint is hereby DISMISSED in its entirety; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment against plaintiffs Alexander Razinski, Tanya Razinski, Xenia Razinski, and Invar International Holding, Inc., and in favor of defendant, Katten Muchin Rosenman, L.L.P., together with costs in an amount to be fixed by the Clerk upon presentation of a proper bill of costs; and it is further

ORDERED that as the court by separate order filed on this date stayed all further proceedings in this case for sixty (60) days in order to allow plaintiffs to substitute new counsel and in order to preserve the right of plaintiffs to take a timely appeal from this Decision and Order, defendant Katten Muchin Rosenman LLP is directed to refrain from taking any action that would trigger the time to take an appeal as of right from this Decision and Order or any judgment entered in connection herewith during the time this case is stayed.

This constitutes the decision and order of the court.

DATED: November 19, 2019

ENTER,

O. PETER SHERWOOD J.S.C.