SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Hon. CAROL EDMEAD PART 35
Justice

Mama's Food Shop

-v-

Robrose Place, LLC

INDEX NO. 600706/04
MOTION DATE 6/28/05
MOTION SEQ. NO. 006
MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to/for ____

	Papers Numbered
Notice of Motion/Order to Show Cause - Affidavits - Exhibits...	____
Answering Affidavits - Exhibits ____	____
Replying Affidavits ____	____

Cross-Motion: ☐ Yes ☐ No

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant Abraham B. Krieger, Esq. is granted and the complaint is dismissed in its entirety; and it is further

ORDERED that plaintiffs' motion for leave to amend the complaint is denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that said defendant shall serve a copy of this order with notice of entry within 20 days of entry.

This constitutes the decision and order of the Court.

FILED
JUL 21 2005
COUNTY CLERK'S OFFICE
NEW YORK

Dated 6/29/05 ENTER: CAROL EDMEAD J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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MAMA'S FOOD SHOP and MICHAEL ROSENFELD,

Index No. 600706/04

Plaintiffs,

MEMORANDUM DECISION

-against-

ROBROSE PLACE, LLC, SKY MANAGEMENT CORP., JKW ENGINEERING, P.C., JAMES WAI, LEVEL CONSTRUCTION COMPANY, YELLOW SQUARE CONSTRUCTION, INC., SIMON CHAN, SINVIN REALTY CORP., NOAH SHUBE, ESQ., and ABRAHAM B. KRIEGER, ESQ.,

Defendants.

----------X

HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action alleging, *inter alia*, legal malpractice against defendant Abraham B. Krieger, Esq. for failing to conduct due diligence on the leased property at issue, Mr. Krieger moves for summary dismissal of such claim on the ground that (1) plaintiffs cannot demonstrate that he negligently rendered legal services or that (2) any loss was actually sustained by plaintiffs as a result of any such negligence. In response, plaintiffs cross move for leave to amend the complaint to set forth additional and subsequent occurrences relevant to their legal malpractice cause of action, and to amend the caption.[1] Mr. Krieger's motion to dismiss is granted, and plaintiffs' cross-motion is denied.

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[1]At an in-court conference of this motion on June 28, 2005, the parties represented that Mr. Krieger is the sole defendant remaining in the case.

Defendant's motion, bearing sequence #006 and plaintiffs' cross-motion, bearing sequence #007 are consolidated for joint disposition and are decided herein.

Analysis

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212 [b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor *(Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad,* 64 NY2d at 853; *Zuckerman*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman*, 49 NY2d at 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). The party opposing the motion must set forth evidentiary, affirmative proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman,* 49 NY2d at 562). And, the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]). Mere conclusions, expressions

of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).

In order to prevail on their cause of action for legal malpractice, plaintiffs must allege and demonstrate that (1) defendant owed him a duty to exercise the degree of care, skill and diligence commonly possessed by a member of the legal profession, (2) defendant breached that duty, and (3) that actual damages were proximately caused by the breach (*Gonzalez v. Ellenberg*, 5 Misc.3d 1023 [Sup. Ct. New York County 2004] citing *Hatfield v. Herz*, 109 F. Supp. 2d 174, 179 [S.D.N.Y. 2000]). To establish the third element of proximate cause and actual damages, plaintiffs "must meet the 'case within a case' requirement, demonstrating that 'but for' the attorney's conduct the client would have prevailed in the underlying matter or *would not have sustained any ascertainable damages had defendants exercised due care* (emphasis added) (*Levine v. Lacher & Lovell-Taylor*, 256 A.D.2d 147 [1st Dept 1998]; *Rubinberg v. Walker*, 252 A.D.2d 466 [1st Dept 1998]; *Perks v. Lauto & Garabedian*, 306 A.D.2d 261 [2d Dept 2003]; *see also, Bazinet v. Kluge*, 14 A.D.3d 324 [1st Dept 2005]; *Gonzalez v. Ellenberg*, 5 Misc.3d 1023 [Sup. Ct. New York County 2004]).

In this court's prior decision dated December 28, 2002, the Court dismissed the breach of contract claim against defendants JKW Engineering, P.C. and James Wai stating:

> . . . that plaintiffs' verified complaint contained no allegation that plaintiffs have in any way been precluded from operating an eat-in, take-out restaurant at the subject premises and that the record demonstrates that all Department of Buildings violations were dismissed, plaintiffs' breach of contract claim fails to allege any cognizable injury resulting from Wai or JKW's alleged failure to procure proper permits from the DOB. Defendants' claim that their application to expand the restaurant to a sidewalk café has been held in abeyance by the DOB pending the resolution of the violations resulting in "damages" is insufficient. A "party may not recover damages for lost profits unless they were within the contemplation of the parties at the time the contract was entered into and are capable of measurement with reasonable certainty.... The second requirement, that damages be reasonably certain, does not require absolute certainty.... It requires only that damages be capable of measurement based upon known reliable factors without undue speculation" (*cf. Heary Bros. Lightning Protection Co., Inc. v Intertek Testing Services, N.A., Inc.*, 9 AD3d 870 [4th Dept 2004]). And, where a party has failed to come forward with evidence sufficient to demonstrate damages flowing from the breach alleged and relies instead, on wholly speculative theories of damages, the breach of contract claim must be dismissed (*Lexington 360 Assoc. v First Union National Bank of North Carolina*, 234 AD2d 187, 189-90 [1st Dept 1996]). Damages, if any, resulting from any delay in DOB approvals are insufficiently alleged and speculative. Further, plaintiffs' claimed inability to procure tenants to assume the lease of the premises or sell the restaurant for profit due to the violations is insufficient to sustain the breach of contract cause of action as alleged.

Such holding is "law of the case" and supports dismissal of plaintiffs' legal malpractice claim against Mr. Krieger.

Although leave to amend a pleading shall be freely granted absent prejudice or surprise resulting from the delay (CPLR 3025 [b]; *Crimmins Contr. Co. v City of New York*, 74 NY2d 166; *McCaskey, Davies & Assocs. v New York City Health & Hosps. Corp.*, 59 NY2d 755) leave to amend will be denied where the proposed pleading fails to state a cause of action (*Tishman Constr. Corp. v City of New York,* 280 AD2d 374; Stroock & Stroock & Lavan v Beltramini, 157 AD2d 590), or is palpably insufficient as a matter of law (*Bankers Trust Co. v Cusumano,* 177 AD2d 450, *lv dismissed* 81 NY2d 1067; *Bencivenga & Co. v Phyfe,* 210 AD2d 22).

Except as to paragraph 26, the proposed amended verified complaint contains the same

allegations of damages this Court deemed insufficient in its prior order. In paragraph 26 of the proposed amended complaint, plaintiffs now allege that "On January 31, 2005, MAMA's was forced to cease operation of its eat-in and take-out restaurant because it was so restricted from operating its business at the leased premises." However, such allegation is incapable of measurement based upon known reliable factors without undue speculation. Furthermore, such allegation, as well as the submissions, are insufficient to demonstrate any ascertainable damages resulting from Mr. Krieger's alleged failure to exercise due care. Therefore, leave to amend the complaint is denied.

Based on the foregoing, it is hereby

ORDERED that the motion by defendant is granted and the complaint is dismissed in its entirety; and it is further

ORDERED that plaintiffs' motion for leave to amend the complaint is denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that said defendants shall serve a copy of this order with notice of entry within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: June 29, 2005

Hon. Carol Edmead, J.S.C.