

**North Fork Bank v Cohen & Krassner**

2006 NY Slip Op 30729(U)

July 12, 2006

Supreme Court, New York County

Docket Number: 106002/05

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY  
HON. JUDITH J. GISCHE

PRESENT: \_\_\_\_\_

PART 10

North Fork

- v -

Cohen

INDEX NO. 106 002/05  
MOTION DATE 5/4/06  
MOTION SEQ. NO. 01  
MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.**

**FILED**

JUL 17 2006

NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: JUL 12 2006

[Signature]  
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 10

-----X

NORTH FORK BANK,

Plaintiff,

-against-

COHEN & KRASSNER,

Defendant.  
-----X

**DECISION/ORDER**

Index No.: 106002/05

Seq. No.: 001

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

**Papers**

Def's motion [dismiss] w/MKA affid in support, exhs	.....	1
Pltf's affirm in oppos (JCS) w/exhs	.....	2
Def's reply affid in support (MKA)	.....	3
Non-Pty Eastside Holdings motion [intervene]	.....	4
Non-Pty Eastside Holdings affirm w/exhs	.....	5
Pltf's supplement affirm in opp (JCS) w/exhs	.....	6
Def's supplemental affirm in support (MKA) w/exh	.....	7
Non-Pty Eastside Holdings affirm in opp (MC) w/exh	.....	8
Def's supplemental affid (MKA)	.....	9

**FILED** Numbered  
 JUL 17 2006  
 NEW YORK  
 COUNTY CLERK'S OFFICE

*Upon the foregoing papers, the decision and order of the court is as follows:*

The court has before it two motions. One is defendant's pre-answer motion to dismiss the complaint on several bases, including that that at least one cause of action is time barred and another cause of action is not stated with sufficient particularity. CPLR §§ 3211 (a) (5) and 3016 (b). The second motion is by Eastside Holdings LLC, who seeks to intervene in this action ("Eastside"). As per stipulation so-ordered February 23, 2006, plaintiff, defendant and the proposed intervenor agreed that Eastside would be permitted to intervene as a named plaintiff in this action. Eastside

has since served and filed an amended complaint. Consequently, the motion to intervene has been granted on consent, but defendant's motion to dismiss still remains to be decided.

Although, the motion was initially opposed by North Fork Bank ("North Fork") on its own behalf, Eastside now joins in opposing the motion. Defendant Cohen & Krassner ("law firm" or "defendant") was given the opportunity to respond to Eastside's submissions, and address any new arguments. Therefore all parties have been afforded fair notice and an opportunity to be heard on all the issues raised in the original motion to dismiss.

### **Summary**

North Fork and Eastside each assert three causes of action against the defendant law firm. They are for negligent misrepresentation (1<sup>st</sup> cause of action), fraudulent misrepresentation (2<sup>nd</sup> cause of action), and for contribution and indemnification (3<sup>rd</sup> cause of action) in connection with another action pending in Supreme Court, New York County against North Fork (Decana, Inc., et al. v. Contogouris, Schanson Capital, North Fork Bank, et al., Index No. 604247/02) [hereinafter "Decana action"]. The law firm asserts that the first cause of action is time barred, the second cause of action fails because it is based upon the same facts as the first, and that the defendants have suffered no monetary damages, therefore the 3<sup>rd</sup> cause of action fails as well.

For the reasons that follow, the court finds that although the first cause of action must be dismissed because it is time barred, the 2<sup>nd</sup> and 3<sup>rd</sup> causes of actions survive plaintiffs' motion to dismiss.

## Background and Facts Alleged

Many of the salient facts in this case are not disputed; in any event, on a motion to dismiss, the court must accept plaintiff's factual allegations as true. Morone v. Morone, 50 NY2d 481 (1980); Beattie v. Brown & Wood, 243 AD2d 395 (1<sup>st</sup> dept. 1997). The following facts are considered.

Decana Inc. ("Decana") was represented by Cohen & Krassner in connection with a mortgage loan by North Fork to Decana secured by real property located at 10 East 62<sup>nd</sup> Street in New York County. The loan was in the amount of \$3,600,000. In connection with the closing of the mortgage, North Fork requested that the law firm prepare an "opinion letter" about the transaction, which it did on April 4, 2001.

In the defendant's letter to North Fork, the law firm wrote, in sum and substance, that the letter was being provided "in connection with the \$3,600,000 permanent mortgage loan to be made by you to [Decana]" and that the firm had "examined and was familiar with the proceedings taken in organizing the Borrower under the laws of its jurisdiction of organization." The law firm wrote also that,

"The Borrower has full power and authority to enter into and perform the Loan Documents executed by it, to borrow the Loan, and to pledge collateral and create the security interests and liens provided for in the Loan Documents to be delivered by it, all of which have been duly authorized by all necessary and proper action."

The law firm also prepared and delivered to North Fork a corporate resolution dated April 3, 2001. The resolution, signed by Spyro Contogouris, as director and shareholder, indicates that the mortgage was "approved by all shareholders and directors of [Decana]" and that Decana's president was "directed, authorized and

empowered to execute, acknowledge and deliver” the documents, etc., required to make a first mortgage with North Fork on the 62<sup>nd</sup> Street property.

The mortgage calls for periodic payments for a period of time with a final “balloon payment” at the end of the term. Decana made payments to North Fork totaling \$1.1 million in principal and interest, but then refused to make further payments under the mortgage. It then commenced the Decana action seeking *inter alia* to have the mortgage declared void and unenforceable, alleging that Decana was not authorized to obtain the mortgage, and it was obtained fraudulently by Mr. Contogouris (a named defendant in that action), with North Fork's knowledge and assistance.

In July 2004, after the Decana action was commenced, North Fork assigned the mortgage in exchange for \$3,366,475.12, the amount outstanding on the mortgage, to Eastside.

### **Legal Arguments**

Although North Fork was not the law firm's client, North Fork claims<sup>1</sup> that the document, acting as Decana's counsel, negligently prepared the letter and corporate resolution to induce the bank to make the loan to Decana.

The law firm argues that the 1<sup>st</sup> cause of action is time barred because it is subject to the same three year statute of limitation applicable to legal malpractice actions, whether the underlying theory is contract or tort. CPLR § 214 (6); In re R.M. Klimet & Frances, et al., 3 AD3d 143 (1<sup>st</sup> dept. 2004); IFD Construction Corp. v. Cordury Carpenter, et al., 253 AD2d 89 (1<sup>st</sup> dept. 1999). The law firm argues further that the if

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<sup>1</sup>Unless otherwise specified, Eastside embraces all of North Fork's arguments in opposition to dismissal of this action.

the 1<sup>st</sup> cause of action is dismissed, the other two causes of action must be dismissed as well because they are all based on the same factual allegations and they are, in fact, redundant.

North Fork and Eastside, however, each contend that this action, for negligent representation, is subject to the longer six year statute of limitations applicable to contract actions because of the quasi-contractual nature of the relationship. CPLR § 213.

Defendant further argues that because North Fork assigned all of its rights under the mortgage to Eastside, it no longer has any claims to bring because they were extinguished upon assignment.

### **Discussion**

The law of this state recognizes that a third party can allege a sustainable cause of action against a law firm with whom it is not in privity (e.g. it does not have an attorney/client relationship with). Prudential Insurance Company of America v. Dewey Ballantine, et al., 80 NY2d 377, 383-5 (1992). Therefore, attorneys may be held liable for damages arising from negligent representation where the negligent acts were carried out at the client's direction. Prudential Insurance Company of America v. Dewey Ballantine, et al., 80 NY2d 377 (1992). While actual privity may not be necessary, however, the parties relationship must be "so close as to approach that of privity." Parrott v. Coopers & Lybrand, L.L.P., 95 NY2d 479, 483 (2000) (*citing Prudential Insurance, supra*).

With the benefit of every favorable inference, plaintiff's factual claims state a cause of action for negligent misrepresentation.

The real dispute between the parties is whether this cause of action is controlled by a three year statute of limitations, as defendant argues, or a six year statute of limitations, as plaintiffs contend. In deciding this dispute, the court is guided by the analysis by the Court of Appeals in Prudential, *supra*. In Prudential, the court drew upon and affirmed the trial court's application of legal principles applicable in attorney and other professional (non-medical) malpractice actions. Prudential Insurance Company of America v. Dewey Balantine, 170 AD2d 108, 114 *aff'd* 80 NY2d 377, 383-5 (1992). Such professional malpractice cases (non-medical) are subject to a three year statute of limitations, whether the underlying theory is in tort or contract. CPLR § 214 (6); In re R.M. Klimet & Frances, et al., *supra*.

Consistent with the Court of Appeals, the rule in the First Department is that a negligent misrepresentation action is timely if brought within three years of the alleged negligent act. AHA General Construction, Inc. v. Edelman, 291 AD2d 239 (1<sup>st</sup> dept. 2002); IFD Construction Corp. v Corddry Carpenter, et al., 253 AD2d 89, 92 (1<sup>st</sup> dept. 1999). Although, plaintiff urges the court to consider appellate decisions from the Second Department which hold to the contrary, the court will not do so, in the face of clear appellate authority in the First Department. *For example*: Milin Pharmacy Inc. v. Cash Register Systems Inc., 173 AD2d 686 (2<sup>nd</sup> dept. 1991); Fandy v. Lung-Fong Chen, 262 AD2d 352 (2<sup>nd</sup> dept. 1999).

The negligent misrepresentation complained of by plaintiffs would have taken place when the law firm delivered the letter and corporate resolution to North Fork in



April 2001. Since North Fork did not commence this action until April 2005, one year beyond statute of limitations, the first cause of action (as amended) for negligent misrepresentation is time barred. Defendant's motion, to sever and dismiss the first cause of action, is therefore granted.

With respect to the remaining causes of action, the court rejects at the outset defendants argument that just because they are based on substantially the same facts as the 1<sup>st</sup> cause of action, they must be dismissed. Each cause of action must be examined separately.

Plaintiffs' second cause of action is for actual fraud. Since this action was commenced within six years of the alleged fraudulent act by the defendant law firm (e.g. April 2001), this cause of action is timely. CPLR § 213 (8); Monaco v. New York University Medical Center, 213 AD2d 167 (1<sup>st</sup> dept. 1995).

To set forth a cause of action in fraud, there must be allegations of a representation of a material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by plaintiff and resulting injury. Monaco v. New York University Medical Center, *supra* at 168.

North Fork alleges facts that establish these elements, if they can be proved at trial. Thus, North Fork alleges that the law firm intentionally made material misrepresentations in its April 2001 opinion letter and the corporate resolution, or omitted information therefrom, to induce the bank to make the mortgage to Decana, to the bank's detriment. These factual claims set forth the circumstances constituting the

wrong with sufficient detail to withstand this pleading stage motion. CPLR § 3016 (b); Black v. Chittenden, 69 NY2d 665 (1986). Therefore, defendant's motion, for an order dismissing plaintiffs' second cause of action is denied because it is not time barred, and has been stated in sufficient detail.

Plaintiffs' third cause of action is for contribution and indemnity. "The principle of common-law, or implied indemnification, permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party." 17 Vista Fee Associates v. Teachers Ins. and Annuity Ass'n of America 259 AD2d 75 (1<sup>st</sup> Dept 1999).

Defendant presents two arguments for dismissal of this cause of action. First that it is redundant with the negligence action and second, that North Fork has no recourse against the law firm because it assigned "all" of its rights to Eastside. Neither argument commands dismissal of this cause of action the pleading stage. Each plaintiff has articulated factual allegations of why they have different exposure in the Decana action. Therefore, defendant's motion for an order dismissing plaintiffs' 3<sup>rd</sup> cause of action is denied.

Since defendant has not answered the amended complaint, its time to do so is extended. It shall serve its answer by August 2, 2006. Plaintiffs may serve their reply, as provided in the CPLR.

This case is scheduled for a **preliminary conference on September 14, 2006 at 9:30 a.m. in Part 10, 80 Centre Street, Room 122.**

**Conclusion**

It is hereby:

**ORDERED** that Eastside Holdings, LLC motion to intervene is granted on consent as per the stipulation between the parties so-ordered February 23, 2006; and it is further

**ORDERED** that upon service of a copy of this decision/order upon the Clerk of the Court, the Clerk shall amend the caption to reflect the inclusion of this plaintiff so that it appears as follows:

Supreme Court of the State of New York  
County of New York:

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North Fork Bank and  
Eastside Holdings, LLC,

Index No.: 106002/05

Plaintiffs,

-against-

Cohen & Krassner,

Defendant.

-----X

; and it is further

**ORDERED** that defendant's motion for an order dismissing the first cause of action is hereby granted and the first cause of action is hereby severed and dismissed; and it is further

**ORDERED** that the Clerk shall enter judgment in favor of defendant Cohen & Krassner, against plaintiffs North Fork Bank and Eastside Holdings, LLC on the first cause of action; and it is further

**ORDERED** that defendant's motion for an order dismissing the 2<sup>nd</sup> and 3<sup>rd</sup> causes of action is hereby denied; and it is further

**ORDERED** that defendant shall serve its answer to the amended complaint, as provided herein, and plaintiffs may reply, as provided for in the CPLR; and it is further

**ORDERED** that this case is scheduled for a **preliminary conference on September 14, 2006 at 9:30 a.m. in Part 10, 80 Centre Street, Room 122.**

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York  
July 12, 2006

So Ordered

  
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HON. JUDITH J. GISCHE, J.S.C.

**FILED**  
JUL 17 2006  
NEW YORK  
COUNTY CLERK'S OFFICE