

Battaglia v Grillo

2012 NY Slip Op 31588(U)

June 6, 2012

Supreme Court, Nassau County

Docket Number: 014807-10

Judge: Vito M. DeStefano

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 15
NASSAU COUNTY

**GIOVANNI BATTAGLIA, NANCY PIRAINO
and MACABAGI, LLC.,**

Decision and Order

Plaintiffs,

MOTION SUBMITTED:

-against-

March 26, 2012

MOTION SEQUENCE:04, 05

INDEX NO. 014807-10

**MASSIMO GRILLO, CALOGERO DRAGO,
ROBERT L. SPADACCINI, ESQ. and
BARTOLOMEO PIRAINO,**

Defendants.

MASSIMO GRILLO,

Third-Party Plaintiff,

-against-

**BARTOLOMEO PIRAINO a/k/a BART PIRAINO,
ROBERT L. SPADACCINI, ESQ. and THE COVE
CAFÉ, INC.**

Third-Party Defendants.

**The following papers and the attachments and exhibits thereto have been read on
this motions:**

Notice of Motion	1
Notice of Motion	2
Affirmation in Opposition	3
Reply Affidavit	4
Affidavit in Reply	5

Giovanni Battaglia and Massimo Grillo separately move pursuant to CPLR 2221 to renew and reargue a prior motion by Robert Spadaccini for dismissal pursuant to CPLR 3211(a)(7) which was resolved by order of this court (Warshawsky, J.) dated October 11, 2011.

For the reasons that follow, the motions are granted in part and denied in part.

The underlying motion by Spadaccini sought an order pursuant to CPLR 3211(a)(7) dismissing the complaint and amended third-party complaint insofar as asserted against Spadaccini.

Prior Order

In granting the underlying motions, Justice Warshawsky found that “[t]here is no evidence that Spadaccini was bereft of the legal knowledge necessary to carry out the transaction. Since ‘legal malpractice’ requires a showing that the Defendant lacked the ordinary and customary skill of a member of the legal community, Plaintiff Battaglia and third-party Plaintiff Grillo have failed to allege a claim for legal malpractice” (Ex. “A” to Motion at p 6). The court continued, “There is no evidence that Spadaccini made a legal error which resulted in the loss of the investments of Battaglia, much less the non-contribution of Grillo. If the parties to this enterprise have claims, they are against one another, not the attorney who undertook to provide each of them with a 25% interest in the company holding title to the real estate they sought to acquire to the extent that ostensibly three of the four joint ventures failed to contribute the opening investments to which they committed, it is hardly the fault of their attorney that the project has deteriorated into a fiscal disaster” (Ex. “A” to Motion at pp 6-7).

The court also dismissed the fraud allegations on the ground that “[n]owhere does the Plaintiff Battaglia or third-party Plaintiff Grillo identify a specific representation which was falsely made by Spadaccini, which he knew to be false, and which he made in order to induce others to act, or that they acted upon such misrepresentation to their damage” (Ex. “A” to Motion at p 6).

Another basis for dismissal of the legal malpractice causes of action set forth in the prior order was that there was “nothing more than speculation that those who have contributed to the

purchase and renovation of the premises will not be made whole” and that until there is a sale of the property at issue . . . [n]either Plaintiff [Battaglia], nor Defendant and third-party Plaintiff [Grillo] have yet to sustain actual or ascertainable damages” (Ex. “A” to Plaintiff’s Motion at p 5).¹

Plaintiff Battaglia and third-party Plaintiff Grillo each move to renew and reargue Spadaccini’s motion.

Spadaccini opposes the motion on procedural and substantive grounds. Initially, the court rejects Spadaccini’s contention that the motions should be denied because they do not contain copies of all of the prior motion papers. The failure to submit all of the original motion papers does not render the instant motions procedurally defective. In this regard, CPLR 2221 does not specify the papers that must be submitted on motions for renewal and reargument. Moreover, the decision to entertain such motions is within the sound discretion of the court (*Rostant v Swersky*, 79 AD3d 456 [1st Dept 2010]).

Regarding the merits of the motion, the following is noted:

Reargument

In the prior order, the court found that Battaglia and Grillo did not allege a claim for legal malpractice because they failed to show that Spadaccini lacked the ordinary and customary skill of a member of the legal community (Ex. “A” to Plaintiff’s Motion at p 6). In a legal malpractice action, the claimant must show that an attorney “failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession” and that “the attorney’s breach of this professional duty caused the [claimant’s] actual damages” (*McCoy v Feinman*, 99 NY2d 295, 301-02 [2002]). In order to survive a motion to dismiss, the complaint must allege that but for counsel’s malpractice, the claimant would have prevailed in the underlying action or *not have incurred any damages* (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438 [2007] [emphasis added]).

Here, the amended complaint and the third-party complaint each set forth a claim for legal malpractice. According to the amended complaint, Spadaccini was retained to represent the interests of the members of Macabagi, LLC (“LLC”) in purchasing the property; Spadaccini

¹ During the pendency of the underlying motions, the property was subject to a contract of sale for \$375,000. The court was aware of the contract and stated in its decision that, “[i]f title closes for that amount, the proceeds will not be sufficient to satisfy the mortgage which is in default, pay delinquent real estate taxes, and reimburse [Battaglia] for his initial \$100,000.00 investment. Nevertheless, unless and until that occurs, Battaglia has not sustained actual damages” (Ex. “A” to Motion at p 5).

advised Battaglia that the property was to be purchased by Battaglia, Bartolomeo Piraino, Massimo Grillo and Calogero Drago for approximately \$275,000; Spadaccini would close the transaction with each of the four members having a 25% percent interest in the LLC (Spadaccini had drawn up the operating agreement to the LLC which provided that each of the four members of the LLC would contribute a cash investment of \$100,000.00 for a total working capital of \$400,000); Spadaccini failed to advise Battaglia that only Battaglia's \$100,000 initial contribution would be used to purchase the property, in violation of the understanding between the four members of the LLC and in violation of Spadaccini's express representation to Battaglia; Spadaccini closed title to the property, placing legal title to the property solely in the name of Nancy Piraino,² who was not a member of the LLC; and closed title with a \$200,000.00 first mortgage on the property (Ex. "D" to Affirmation in Opposition). Battaglia claims that he was not advised that the purchase was being financed and, had he known, he would not have purchased or made an investment in the property.

According to the third-party complaint, Spadaccini suggested, and the parties agreed, that Spadaccini would form the LLC, with the intent of having the LLC purchase the property. However, "Spadaccini caused a mortgage to encumber the premises . . . [and] [h]ad Spadaccini told Grillo of the mortgage, Grillo would have objected and his investment would have been protected in full" (Ex. "F" to Affirmation in Opposition). The court notes that Grillo's approxiamte \$100,000 investment was not used for the initial purchase of the property but for the construction and "build-out" of the restaurant.

Viewing the allegations and evidence in the light most favorable to the non-moving parties, these actions on the part of Spadaccini as asserted in the amended complaint and third-party complaint plead a cause of action for legal malpractice.

Based on the foregoing, those branches of Battaglia and Grillo's motions seeking leave to reargue the underlying motions to dismiss the legal malpractice causes of action asserted in the amended complaint and third-party complaint, respectively, are granted. To the extent the motions also seek leave to reargue the branches of the underlying motion seeking dismissal of the fraud claims, leave is denied.

Renewal

Battaglia and Grillo also seek leave to renew those branches of the underlying motions

² The use of Nancy Piraino's name was necessary because her son, Bartolomeo Piraino, who was a member of the LLC, could not obtain a liquor license for the restaurant because he was a police officer.

which sought dismissal of the legal malpractice claims based upon new facts not offered on the underlying motions, namely, that the property had closed after the submission of the underlying motion but before the issuance of the court's prior order.

According to the prior order, one of the grounds for dismissal was that, until the property actually closed, the damages were not actual but merely speculative and, in the absence of damages, a cause of action asserting legal malpractice must fail.

The closing statement associated with the sale of the property and annexed to Battaglia's motion papers indicated that the property closed on September 27, 2011 for a purchase price of \$360,000, with the net proceeds of the sale totaling approximately \$102,150, an amount substantially less than Battaglia and Grillo's total investment of approximately \$200,000, thus constituting actual damages sustained by Battaglia and Grillo.

Given the new facts demonstrating the existence of actual damages, that branch of Battaglia and Grillo's motions seeking leave to renew is granted.

Based on the foregoing, it is hereby

Ordered that the branches of the motions of plaintiff Giovanni Battaglia and third-party plaintiff Massimo Grillo seeking renewal and reargument pursuant to CPLR 2221 are granted and, upon renewal and reargument, the branches of Robert Spadaccini's motion seeking dismissal of the causes of action in the complaint and the amended complaint for legal malpractice are denied and those causes of action are reinstated; and it is further

Ordered that, pursuant to CPLR 603 and CPLR 1003, the claims asserted against Robert Spadaccini in the first-party and third-party actions are hereby severed³ from the remaining claims and the caption shall be amended accordingly; and it is further

Ordered that the Clerk of the Court shall take all steps necessary to effectuate severance upon the completion of any steps that may be required of plaintiff Giovanni Battaglia and third-

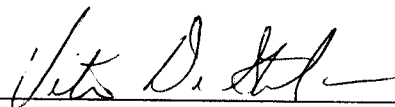
³ Spadaccini also seeks a stay "pending resolution of the parties' remaining claims against each other because any legal malpractice claim asserted against Mr. Spadaccini would not be ripe unless and until Battaglia and Grillo do not make a full recovery for their alleged damages from the remaining parties" (Affirmation in Opposition at ¶ 26). The court notes that on February 9, 2012, the parties (with the exception of Spadaccini) entered into a stipulation of settlement which, *inter alia*, divided the sale proceeds that were held in escrow, with Grillo receiving "roughly \$38,000" (Grillo Affidavit in Reply at ¶ 24) and Battaglia receiving \$51,848.80 (Battaglia Affidavit in Reply at ¶ 9). Following settlement, the only claims remaining were those asserted against Spadaccini. Accordingly, a stay "pending resolution of the parties' remaining claims against each other" is denied as academic.

party plaintiff Massimo Grillo, including the payment of any required fees; and it is further

Ordered that the motions are denied in all other respects.

This constitutes the decision and order of the court.

Dated: June 6, 2012



Hon. Vito M. DeStefano, J.S.C.

ENTERED
JUN 08 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE