Arbor Realty Funding, LLC v Herrick, Feinstein LLP
2012 NY Slip Op 33522(U)
August 28, 2012
Sup Ct, New York County
Docket Number: 651079/2011
Judge: Shirley Werner Kornreich

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 651079/2011
ARBOR REALTY FUNDING, LLC
vs.
HERRICK, FEINSTEIN LLP
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 2/24/12
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 4-9
Answering Affidavits — Exhibits _____ | No(s). 12-16
Replying Affidavits _____ | No(s). 20-21

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: 8/28/12

SHIRLEY WERNER KORNREICH
J.S.C. , J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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ARBOR REALTY FUNDING, LLC,

Plaintiff,

-against-

HERRICK, FEINSTEIN LLP,

Defendant.

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DECISION & ORDER

Index No. 651079/2011

KORNREICH, SHIRLEY WERNER, J.:

This is an action for legal malpractice and negligent misrepresentation in the context of an investment loss. Plaintiff, Arbor Realty Funding LLC (plaintiff or Arbor), alleges that defendant, Herrick, Feinstein LLP (defendant or Herrick), gave plaintiff erroneous legal advice and negligently drafted a collateral assignment of contracts. Defendant moves for summary judgment dismissing the complaint. Plaintiff opposes. For the reasons stated below, defendant's motion as to the claims arising out of the allegedly negligent drafting is granted, but denied as to the claims relating to the allegedly erroneous advice.

I. Background

The following facts are undisputed for the purposes of this motion. In April 2007, Arbor retained Herrick, a law firm, to represent it in connection with a series of bridge loans it was considering making to East 51st Street Development Company LLC (borrower) (defendant's statement of material facts, ¶ 2). The loans were to finance borrower's development of a residential tower at 303 East 51st Street in Manhattan (the Project) by providing funding for the acquisition of land, early development costs and the purchase of certain certificates entitling the

holder to a property tax abatement (the 421-a certificates) (*id.* at ¶¶ 3–4, 79). At Herrick's request, borrower's architectural firm issued a letter (the Zoning Letter) addressed to plaintiff certifying that the Project was in compliance with New York City's zoning code and could be built "as of right" (*id.* at ¶¶ 33–38). The conclusion reached by the Zoning Letter matched Herrick's interpretation of certain communications, known as pre-considerations or "precons," received by borrower from the New York City Department of Buildings (the DOB) prior to the start of the Project (*id.* at ¶¶ 26–32).

After reviewing Herrick's legal advice, between April and July 2007, plaintiff made a series of loans to borrower, each with a maturity date of May 7, 2008, for a total principal amount of approximately $70 million (the Loan) (*id.* at ¶ 40, 76). The Loan was secured, *inter alia*, by mortgages on certain real property, including the development site, and a general assignment of all of borrower's rights in all present and future contracts (the Assignment) (*id.* at ¶¶ 77, 80–81). The Assignment was drafted by defendant (*id.* at ¶ 80). On May 11, 2007, plaintiff filed UCC-1 financing statements with the Secretary of State of Delaware purporting to perfect its security interest under the Assignment (*Arbor Realty Funding LLC v Brooklyn Fed. Sav. Bank*, Sup Ct, New York County, Nov. 24, 2009, Edmead, J., index No. 101058/2009, slip op. at 3, *rearg denied* Mar. 15, 2010). Plaintiff would not have made the Loan but for the Zoning Letter (defendant's statement, ¶ 39).

In the Fall of 2007, borrower began negotiating with other lenders for construction financing for the Project, including The Union Labor Life Insurance Company (ULLICO) and Tishman Speyer Development Corporation (Tishman Speyer) (*see* Dwyer affirmation, exhibits K, L, M). It originally was contemplated that these loans would close in January 2008

(defendant's statement, ¶ 47). However, no loans were made by that time, though ULLICO agreed to extend its commitment period to March 31, 2008 (*id.* at ¶ 48).

On March 15, 2008, a construction crane being used at the development site collapsed, killing seven people (*id.* at ¶ 49). Five days later, the DOB inspector responsible for the crane in question was arrested, and one month later, the commissioner of the DOB resigned (*id.* at ¶¶ 53–54). Then, by letter dated May 20, 2008, the DOB notified borrower of its intent to revoke the Project's building permits and approvals unless borrower could satisfactorily respond to a list of twenty-eight objections the DOB had raised against the Project (*id.* at ¶¶ 58–59). Among these objections was the contention that the Project did not comply with the City's zoning laws (*id.* at ¶¶ 60–61). The borrower responded through its architect, but to no avail. The DOB revoked the Project's permits by letter dated June 13, 2008 (*id.* at ¶¶ 62–66).

Meantime, the financial crisis, which began in the summer of 2007, engulfed the world's credit markets. Less than two weeks after the crane collapsed on East 51st Street, Bear Stearns was "rescued" by JP Morgan with the help of the Federal Reserve. The market for mortgage loans seized up as lenders refused to extend new loans or refinance old ones. Without access to credit, the rates of mortgage defaults and foreclosures rose throughout the nation.

Plaintiff's Loan fared badly as well. ULLICO and borrower failed to reach agreement by the end of March (*id.* at ¶ 55). Though plaintiff and borrower agreed to extend the Loan's maturity date until June 30, 2008, no repayment was made, and plaintiff began foreclosure proceedings in July 2008 (*id.* at ¶¶ 74–76). Plaintiff sold the Loan in 2010 at a substantial loss (*id.* at ¶ 78). Plaintiff also moved to enforce its rights under the Assignment and in September 2008, sought to take possession or control of the 421-a certificates on the theory that they were

covered under the general terms of the Assignment (*id.* at ¶ 84). However, it was revealed that in November 2007, borrower had actually transferred its rights to the certificates to another entity, which in turn had pledged them as security to Brooklyn Federal Savings Bank (Brooklyn Federal) (*id.* at ¶¶ 85–86). Plaintiff subsequently sued borrower, Brooklyn Federal and others, seeking a judgment declaring that its security interest in the certificates was superior to Brooklyn Federal's, despite the fact that the Assignment did not mention the certificates specifically (*id.* at ¶ 88; *Arbor Realty Funding LLC*, No. 101058/2009, Nov. 24, 2009) and plaintiff prevailed in that action (*Arbor Realty Funding LLC,* No. 101058/2009, Nov. 24, 2009).

On April 25, 2011, plaintiff filed the instant action. Arbor alleges that defendant negligently advised it that the Project complied with the zoning laws; such advice, plaintiff claims, was erroneous, but induced it to make the Loan (complaint, ¶¶ 82–101). Plaintiff further alleges that defendant acted negligently in drafting the Assignment by failing to specifically reference the 421-a certificates as collateral; such omission, plaintiff claims, led to the certificates' transfer, the subsequent litigation with Brooklyn Federal, and the delayed sale of the certificates (*id.* at ¶¶ 102–07). Plaintiff claims that these alleged errors constituted professional malpractice and negligent misrepresentation. It seeks compensation for its loss on the Loan and alleged loss of proceeds from the delayed sale of the 421-a certificates.

Defendant denied the allegations, and, prior to discovery, filed the instant motion for summary judgment. Conceding (for the purposes of this motion only) that it breached its duty to plaintiff through some act or omission, defendant nevertheless maintains that its conduct was not the proximate cause of plaintiff's alleged damages (defendant's brief at 22, 34–35).

II. Plaintiff's Submissions

In opposition to defendant's motion, plaintiff has submitted emails between and among several parties involved in the negotiations surrounding the financing of the Project. Of note are the following emails:

(a) On February 6, 2008, William Connolly, an officer of plaintiff, wrote to Sheldon Chanales, an attorney at Herrick, requesting a copy of the zoning opinion, saying that "[t]he takeout lender[1] is stating that they are not comfortable with [zoning counsel's][2] opinion. They have not given us a reason why yet" (Syracuse affirmation, exhibit 12).

(b) On March 5, 2008, there was an email correspondence between an individual named Richard Horowitz[3] and representatives of ULLICO and borrower. Mr. Horowitz wrote that "[a]lthough construction continues at the site, the project was setback [sic] in terms of finalizing with ULLICO due do [sic] concerns that [ULLICO's counsel] had with the project zoning." Mr. Horowitz further wrote that "[t]he zoning issue has also put a hold on Tishman Speyer." Kevin Justh, a representative of ULLICO, responded that:

> "[a]t this point working out the zoning is the largest (but you are correct in pointing out not the only) thing we have to get our arms around . . . [ULLICO's counsel] made it very clear what he was seeking, and it sounds fairly simple - confirmation from the general counsel's office in the building department that they have reviewed and approved of the interpretation of the business side of that department . . . [ULLICO's counsel] has been quite consistent

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[1]The term "takeout lender" refers to the lenders with whom borrower was negotiating for longer term loans, such as Tishman Speyer or ULLICO. It is not clear from the email which lender is being referred to here.

[2]Connolly was apparently under the impression that zoning counsel, not borrower's architect, was the author of the zoning opinion (*see* Syracuse affirmation, exhibit 13).

[3]Mr. Horowitz's connection with the deal is unclear.

about what he's looking for to help get more comfortable"[4]

(Syracuse affirmation, exhibit 19)

(c) On May 14, 2008, Mitchell Korbey, an attorney at Herrick, wrote to Mr. Chanales about ongoing negotiations with another potential takeout lender, World-Wide Holdings, who were being represented by the same attorney who had represented ULLICO. Korbey wrote, "[World-Wide Holdings' counsel] is wholeheartedly opposed to the DOB interpretations and no matter what anyone says will tell [his client] to NOT proceed . . . As we know, [he] has had issues with this project from the beginning – when he repped another potential lender/developer" (Syracuse affirmation, exhibit 20).

(d) On December 24, 2008, Mr. Chanales wrote to Guy Milone, an officer of plaintiff, that "attorneys for ULLICO and Tishman expressed concern about some of the precons that were obtained" (Syracuse affirmation, exhibit 26).

III. Discussion

A. Legal Standards

Summary Judgment

To prevail on a motion for summary judgment pursuant to CPLR 3212, the moving party must "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Failure to make such a showing requires denial of the

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[4]According to defendant, the confirmation Mr. Justh believed would satisfy his attorney, had been produced that day (defendant's statement, ¶ 45). Nevertheless, per the email cited here as item (c), defendant was informed that even after this alleged confirmation, takeout lender's attorney continued to be dissatisfied.

motion, regardless of the sufficiency of the opposing papers (*id.*). Moreover, the court must view the evidence in the light most favorable to the party opposing the motion and give that party the benefit of every favorable inference (*Myers v Fir Cab Corp.*, 64 NY2d 805 [1985]). Once a prima facie showing is made, the burden shifts to the party opposing the motion to demonstrate by admissible proof that a factual issue requiring a trial exists (*GTF Marketing, Inc., v Colonial Aluminum Sales, Ins.*, 66 NY2d 965, 968 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Legal Malpractice

In order to prevail on a legal malpractice claim, a plaintiff must establish that the attorney's breach of duty proximately caused plaintiff to sustain actual damages (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]). Similarly, in a claim for negligent misrepresentation in the context of an investment loss "plaintiff must establish that the alleged misrepresentations . . . were the direct and proximate cause of the losses claimed" (*Laub v Faessel*, 297 AD2d 28, 31 [1st Dept 2002]). Plaintiff must not only show that the misrepresentations induced plaintiff to engage in the transaction, but also that the reason plaintiff sustained a loss in the transaction was because defendant's misrepresentation misled him into overvaluing the investment (*see id.* at 31–32, [dismissing claim where misrepresentation only concerned the competency of the advisor, not the financial condition of the investments]; *see also Sterling Nat'l Bank v Ernst & Young LLP*, 62 AD3d 39 [1st Dept 2009]). As in a legal malpractice action, mere speculation as to future events does not establish causation (*Pearlman v Friedman Alpern & Green LLP*, 300 AD2d 203 [1st Dept 2002]).

B. Causation

Generally, in a negligence action, plaintiff must show that "the defendant's negligence was a substantial cause of the events which produced the injury" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). Under the substantial factor test, "if two causes concur to bring about an event, and either one of them, operating alone, would have been sufficient to cause the identical result," then either tortfeasor may be held liable (Prosser & Keaton, Torts § 41 at 266–67 [5th ed 1984]).

In an action for legal malpractice, on the other hand, plaintiff must establish that he would not have sustained damages but for the attorney's negligence (*AmBase v Davis Polk & Wardwell*, 8 NY3d 428, 434; [2007]; *Brooks v Lewin*, 21 AD3d 731, 734 [1st Dept 2005]). To establish causation, plaintiff must demonstrate that it would have succeeded in the matter or would not have sustained damages but for the malpractice (*AmBase v. Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]; *Brooks v Lewin*, 21 AD3d 731, 734 [1st Dept 2005]). Under the substantial factor test generally used in negligence actions, since any cause would have been sufficient to bring about the result, neither is a "but for" cause of the injury (*id.*). The failure to prove proximate cause, regardless of negligence, requires dismissal (*Brooks*, 21 AD3d at 731). Mere speculation that had the attorney fulfilled his duty, other subsequent events would have unfolded in such a way that no damages could be sustained is insufficient to establish the attorney's breach as a proximate cause (*Brooks*, 21 AD3d at 734-5; *Sherwood Group, Inc. v Dornbush, Mensch, Mandelstam & Silverman*, 191 AD2d 292 [1st Dept 1993]).

The Second Circuit, applying New York law, has found that a law firm's breach of fiduciary duty constituted a "substantial factor" in plaintiff's failure to acquire certain assets,

even though plaintiff failed to place a bid on the property (*Milbank, Tweed, Hadley & McCloy v Boon*, 13 F.3d 537, 542–43 [2d Cir 1994]). In contrast, the Appellate Division rejected that approach in *Weil, Gotshal & Manges LLP v Fashion Boutique of Short Hills*, 10 AD3d 267, 272 [1st Dept 2004], holding that, as in a legal malpractice action, when a client sues his former lawyer for breach of fiduciary duty, he must prove causation under the "but for" standard (*see Sheehy v New Century Mtge Corp.*, 690 FSupp2d 51, 64 n.12 [EDDY 2010] [recognizing *Weil, Gotshal* as abrogating *Milbank, Tweed*]).

In all negligence actions, however, foreseeability that the breach identified as the cause would result in plaintiff's injury is required (*Tutrani v County of Suffolk*, 10 NY3d 906, 907 [2008] [finding defendant responsible for "normal and foreseeable consequences" of his actions]). An intervening act will sever the "causal nexus" between a defendant's negligent act and the injury where it is so extraordinary that the resulting course of events cannot be said to be the normal or foreseeable consequence of defendant's negligence (*Derdiarian*, 51 NY2d at 315). "Because questions concerning what is foreseeable and what is normal may be the subject of varying inferences, as is the question of negligence itself, these issues generally are for the fact finder to resolve," and are usually not appropriate for summary judgment (*id.*).

C. The Zoning Advice

Here, Arbor must establish that but for Herrick's zoning advice, it would not have made the Loan. Additionally, it must prove that the zoning advice was a proximate cause of its loss by showing that the notes' diminished value was due to the Project's violation of the zoning code. Defendant has conceded that the Loan would not have been made but for the Zoning Letter (defendant's statement, ¶ 39). Defendant, nevertheless, argues that the crane collapse, the DOB's

revocation of the Project's permits, and the financial crisis were superseding, intervening causes that broke the causal chain between defendant's breach and plaintiff's alleged loss.

A theory of intervening events can succeed where there is no evidence that defendant's negligence was the proximate cause (*see, e.g., GUS Consulting GmbH v Chadbourne & Parke LLP*, 74 AD3d 677 [1st Dept 2010] [dismissing legal malpractice claim when plaintiff failed to bring evidence that defendant law firm was proximate cause of injury rather than plaintiff's former employee]; *Brooks*, 21 AD3d 731 [dismissing legal malpractice claim where plaintiff brought only speculative claims to counter proof that proximate cause was plaintiff's production problems]; *First Nationwide Bank v Gelt Funding Corp.*, 27 F3d 763 [2d Cir 1994] [granting defendants' motion to dismiss where plaintiff failed to adequately allege that it had suffered any injury and where five year gap between loan and default indicated that source of trouble was general market conditions rather than alleged fraud]). Here, however, plaintiff has presented admissible evidence, in the form of the emails noted above, that strongly suggests that the question of the Project's zoning loomed large in the minds of some potential takeout lenders and of others involved in the negotiations, both before and after the collapse of the crane. It could reasonably be inferred that skittishness about the zoning contributed to the market's lack of interest in financing the Project. While defendant has argued that, despite revoking the Project's building permits, the DOB nonetheless conceded that the Project complied with the zoning requirements (defendant's brief at 13–14), the emails cited above (*II, supra*) are some evidence that the takeout lenders were not necessarily willing to accept the DOB's interpretation of the law as authoritative (Syracuse affirmation, exhibits 19, 20). Plaintiff ,therefore, has raised a material question of fact as to whether the Zoning Letter was in fact a proximate cause of plaintiff's

ultimate loss, a question that is best left to the finder of fact (*Derdiarian*, 51 NY2d at 315).

Defendant, however, argue that the requirement that legal malpractice requires a "but for" cause of plaintiff's injury, rather than a "substantial cause" of such injury, means that the demonstration of another cause is sufficient to defeat plaintiff's case (defendant's reply brief at 9–10). According to defendant's theory, a lawyer could only be found liable for malpractice if there were no other proximate cause of the injury. As explained above (*III (b)*, *supra*), this is incorrect: the difference between the "but for" and "substantial cause" standards is whether defendant is liable when the injury would have occurred even if defendant had not done what is alleged. The strict "but for" standard has been met here, as defendant has conceded that no Loan would have been made and, therefore, no money lost, had defendant not given the advice it gave. Once that is established and once plaintiff shows that its injury flowed from defendant's negligence in a reasonably foreseeable manner, it does not matter for purposes of establishing liability whether defendant was the sole proximate cause or one proximate cause among many. *See Schauer v Joyce*, 54 NY2d 1(1981) (lawyer found liable for malpractice could seek contribution from plaintiff's subsequent lawyer, first lawyer accused of causing further harm); *Wo Yee Hing Realty, Corp. v Stern*, 2012 NY Slip Op 05792 (1st Dept 2012) ("To prevail on its claim of legal malpractice, plaintiff must prove ...that defendant's negligence was ***a*** proximate cause of its losses" [emphasis added]); *Skinner v Stone, Raskin & Israel*, 724 F2d 264, 266 [2d Cir 1983] [holding in legal malpractice case that "[i]t is well-settled law in New York that, when there are several proximate or efficient causes of an injury, the injury may be attributed to any one or more of the causes"]). A multiplicity of proximate causes does not foreclose recovery in a legal malpractice action.

D. The Assignment

Plaintiff alleges that had defendant specifically mentioned its rights to the 421-a certificates in the Assignment, its first-priority lien would have been immediately recognized, borrower would not have encumbered the certificates, legal action would not have been necessary and it could have sold its rights to the certificates earlier and for a higher price than it otherwise did (complaint, ¶¶ 81, 104–05, 129). Plaintiff essentially assumes that had the Assignment been drafted differently, third parties such as borrower, the assignee, and Brooklyn Federal would never have infringed on plaintiff's rights to its collateral. Without any supporting proof, which plaintiff has not supplied, this amounts to mere speculation as to what other parties would have done had defendant acted differently and is insufficient to show that defendant's alleged breach caused plaintiff any injury (*Brooks*, 21 AD3d at 734-5; *Sherwood Group, Inc.*, 191 AD2d at 294; *Pearlman*, 300 AD2d at 203). Accordingly it is

ORDERED that the motion by defendant Herrick, Feinstein LLP against plaintiff Arbor Realty Funding, LLC, is granted as to plaintiff's third and sixth causes of action, and is otherwise denied; and it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre St., rm. 228, New York, N.Y., for a preliminary conference on September 13, 2012, at 10:00 am.

Dated: August 28, 2012

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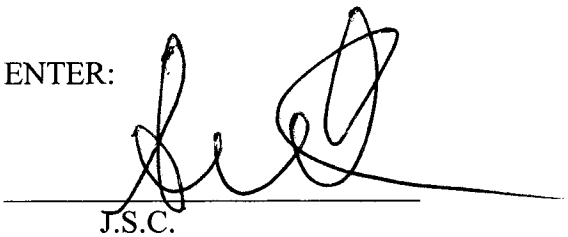

J.S.C.