

Battaglia v Grillo

2011 NY Slip Op 32691(U)

October 11, 2011

Sup Ct, Nassau County

Docket Number: 014807/2010

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU**

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 7

GIOVANNI BATTAGLIA, NANCY PIRAINO and
MACABAGI, LLC,

Plaintiffs,

INDEX NO.: 014807/2010
MOTION DATE: 8/2/2011
SEQUENCE NO.: 002, 003

- against -

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 documents were read on this motion:

- Motion Seq. 002 to dismiss claims of plaintiffs and third-party plaintiffs 1.
- Affidavit of Giovanni Battaglia in Opposition to Motion 2.
- Motion Seq. 003 to dismiss third-party plaintiff's amended claims 3.
- Memorandum of Law in support of motion to dismiss amended claims 4.

Affirmation of Francesco P. Tini, Esq. in opposition to Seq. 003 motion	5.
Reply Affirmation of Nicole Feder in Further Support of both motions	6.
Reply Memorandum of Law in Further Support of both motions	7.
Sur-reply Affirmation of Paul S. Sibener in opposition to Reply affirmation	8.

PRELIMINARY STATEMENT

This is an action involving putative interests in real property and a limited liability company formed to operate a restaurant on the premises. Plaintiffs initially commenced the action against Massimo Grillo (“Grillo”) and Calogero Drago (“Drago”). Grillo’s answer contained counter-claims, cross-claims, and a third-party complaint against Robert L. Spadaccini, Esq.(“Spadaccini”) Plaintiff amended their complaint to include claims directly against Spadaccini.

Spadaccini moves in Sequence 002 pursuant to CPLR § 3211 (a)(7) to dismiss the complaint against him on the grounds that they fail to state a claim upon which relief can be granted. In Motion Sequence 003 he moves to dismiss the amended third-party complaint against him, also pursuant to CPLR § 3211 (a)(7) on the same grounds.

BACKGROUND

Giovanni Battaglia (“Battaglia”), Nancy Piraino (“Nancy P.”), Massimo Grillo (“Grillo”), and Bartolomeo Piraino (“Bart P.”) embarked on a project of opening a restaurant to be known as The Cove Café, at 58-60 Landing Road, Glen Cove, NY. Drago was the builder they used to build-out the restaurant, and movant, defendant and third-party defendant, was the attorney who drafted the operating agreement for plaintiff Macabagi, LLC. He also represented Nancy Piraino in her acquisition of the real property in her own name, for which she obtained a \$200,000 mortgage against the purchase price of \$275,000.

The Second Amended Complaint includes a Second Cause of Action against Spadaccini, in which Battaglia alleges that he retained Spadaccini to represent his interests in connection with the purchase of the real estate. He claims that he was advised by Spadaccini that each of the four individuals were to contribute \$100,000 toward the purchase and development of the property, with each of them having a 25% interest in the real estate.

Instead, Spadaccini arranged for the property to be purchased in the name of Nancy P. only, with his contribution being used toward the purchase, and the property subjected to a

mortgage, thereby diluting whatever interest he was to obtain in the property. Nancy P. subsequently executed a deed to Macabagi, LLC on April 6, 2010. As a consequence, Battaglia, who has a 25% membership interest in Macabagi, is a 25% owner of the real estate, subject to a \$200,000 mortgage. He claims that his investment is in jeopardy because Grillo and Bart P., also each holding a 25% membership interest in the property, have not made their \$100,000 contribution.

Grillo's third-party complaint, contained in a verified answer dated June 7, 2011 (Exh. "D" to Motion Seq. 003), alleges that Spadaccini did not advise him of an inherent conflict of interest in representing each of the members of Macabagi, LLC in formulating the operating agreement. Grillo's primary language is Italian, and he was allegedly not fully apprised of the use of Nancy P. as a straw purchaser, because Bart P., her son, was a police officer and could not obtain a liquor license in his own name.

Gillo appeared at Spadaccini's office on January 6, 2010, when he thought he would be receiving a 25% interest in the real estate. He claims that he was unaware of the arrangement for a \$200,000 mortgage, and did not see anyone who appeared to be a representative of a lender at the closing. Of course, at that time Nancy P. received a deed in her name alone, subject to a \$200,000 mortgage. Grillo does not allege that he contributed the \$100,000 called for in the operating agreement, but that he had kept his promise by "making ready and available for use the sum of no less than \$100,000 for the construction of the restaurant . . .".

DISCUSSION

Defendant and Third-party defendant moves to dismiss the complaint and the third-party complaint on the grounds that they fail to state a claim upon which relief can be granted.

On a motion to dismiss pursuant to CPLR § 3211 (A)(7), the court must determine, "accepting as true the factual averments of the complaint and according the plaintiff every benefit of all favorable inferences, whether the plaintiff can succeed upon any reasonable view of the facts stated. (*Malik v. Beal*, 54 A.D.3d 910, 911 [2d Dept. 2008]).

"To prevail in an action to recover damages for legal malpractice, a plaintiff must establish that the defendant did not 'exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession, and that the attorney's breach of that

duty proximately caused the plaintiff to sustain actual and ascertainable damages' ", citing *Carasco v. Pena & Kahn*, 48 A.D.3d 395, 396 (2d Dept.2008).

Third-party plaintiff Grillo's third-party claim is reflected in his 131 paragraph Answer, Counter/Cross Claims and Third Party Complaint. (Exh. "D" to Motion Sequence 03). At ¶ 31, he alleges that Spadaccini never advised Grillo that there was an inherent conflict in representing all members of Macabagi. He allegedly followed Spadaccini's advice by "making ready and available for use the sum of no less than \$100,000". (¶ 41 of Answer). He further asserts that, despite the closing statement of Spadaccini, title was vested in Nancy P. alone. (¶ 47 of Answer). Despite never having invested the initial \$100,000 called for in the Operating Statement, he claims entitlement to \$500,000 from plaintiffs and third-party defendant.

He also alleges that Spadaccini, along with plaintiffs and codefendants, participated in a scheme, misrepresentations and fraud to deceive Grillo as a joint-venturer into believing that they had acquired the premises 58 — 60 Landing Road, Glen Cove, and that he held a 25% membership interest in the titleholder, Macabagi, LLC. He asserts that because of Spadaccini's actions or inactions, what he believed to be a secure investment of \$100,000 in a premises with an estimated current value of \$460,000, his investment is now placed in jeopardy because of the existence of the \$200,000 mortgage on the premises.

Allegations with respect to alleged violations of the disciplinary rules cannot, standing alone, substantiate a claim for professional malpractice. (*Pillard v. Goodman*, 82 A.D.3d 541 [1st Dept. 2011]). Where, however, the joint representation produces a circumstance in which counsel is precluded from asserting a defense on behalf of one, because it would act to the detriment of the others, a finding of malpractice may follow. *Pillard* involved a claim of malpractice in the representation of Elite Model Management Corp. and plaintiff, who was a 10% and majority shareholder. Plaintiff claimed that defendant counsel failed to proffer evidence at trial that he was no longer president of Elite when the plaintiff, who alleged employment discrimination, was hired, and that the co-defendants were the primary, if not the sole actors in the decision to terminate the employee. As a result, all defendants, including Pillard, were found jointly and severally liable.

Thus, it can be seen, that an ostensible violation of the disciplinary rules, the

representation of parties with differing interests, led to the imposition of liability on an individual who had no role in the hiring or firing of the complaining former employee. Such is not the case in this instance. The parties have a commonality in interest in acquiring title to a parcel of real property in the name of a limited liability company in which they each hold a 25% membership interest.

This is precisely what they now have, albeit subject to a \$200,000 mortgage obtained by Nancy P. in conjunction with the purchase of the property in her own name. Since the parties seem no longer interested in proceeding to the final step of operating The Cove Café at the premises, the remedy which they ought be seeking is the dissolution of Macabagi, LLC and the distribution of the assets in accordance with the contributions made by the members. There is nothing more than speculation that those who have contributed to the purchase and renovation of the premises will not be made whole.

Neither plaintiffs nor defendant and third-party plaintiff have yet to sustain actual or ascertainable damages, and certainly not because of the representation of all members of Macababi by Spadaccini. If the proposal to open a restaurant fails, it can be blamed on the lack of funding, with some persons not even making their initial \$100,000 contribution.

Battaglia claims that the premises are subject to a contract of sale for \$375,000, and even that is subject to obtaining a use variance. If 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 him for his initial \$100,000 investment. Nevertheless, unless and until that occurs, Battaglia has not sustained actual damages.

Third-party plaintiff also claims that Spadaccini was guilty of fraud. Pursuant to CPLR § 3016 (b), such allegations are subject to a heightened level of specificity. The statute provides in pertinent part as follows:

Rule 3016. Particularity in specific actions

(b) Fraud or mistake. Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.

The essential elements of a claim for fraud and deceit based on misrepresentation are: that a representation was made as a statement of a material, existing, or pre-existing fact; that the representation was untrue; that it was known to be untrue by the party making it, or, under certain circumstances, was recklessly or negligently made; that it was made with intent to deceive, and for the purpose of inducing the other party to act upon it; and that the other party did in fact justifiably rely on it and was thereby induced to act or refrain from acting, to their injury or damage.

Nowhere 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. As a practical matter, it appears that one of the four members made the requisite \$100,000 investment, and sent Spadaccini to represent them in the purchase of a \$275,000 property. Without the agreed-upon contributions, the additional funds had to come from somewhere, and they did: in the form of a \$200,000 mortgage. It would have been unnecessary were it not for the failure of three of the four "investors" to make their investment.

There 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. In *Malik v. Beal*, 54 A.D.3d 910 (2d Dept.2008), for example, defendant represented plaintiff in the purchase of multi-use commercial real property, and included in the contract a clause that "(a)t closing, the Seller shall deliver copies of all existing Certificates of occupancy for the premises."

Certificates of Occupancy for all additions requiring a certificate were required to obtain financing. When seller was unable to provide certificates for all buildings and improvements on the property, and refused to do so, since they were not existing at the time of contract, purchaser was unable to secure financing and was forced to forfeit the down payment of \$173,000.

This is far from the circumstances of this case. There is no evidence that Spadaccini made a legal error which resulted in the loss of the investments of Battaglia, much less the non-

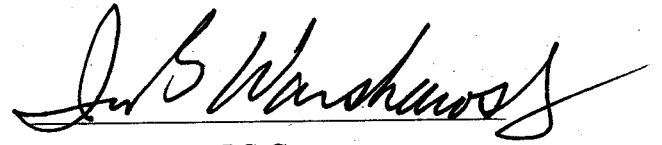
contribution of Grillo. If the parties to this enterprise have claims, they are against one another, not the attorney who undertook to provide each of them with a 25% interest in the company holding title to the real estate they sought to acquire. To the extent that ostensibly three of the four joint venturers failed to contribute the opening investment to which they committed, it is hardly the fault of their attorney that the project has deteriorated into a fiscal disaster.

Spadaccini's motions to dismiss the complaint against him and to dismiss the third-party claim of Grillo are granted.

Submit Judgment.

This constitutes the Decision and Order of the Court.

Dated: October 11, 2011



J.S.C.

ENTERED
OCT 14 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE