

**M & R Ginsburg, L.L.C. v Segel, Goldman, Mazzotta  
& Siegel, P.C.**

2012 NY Slip Op 33866(U)

November 15, 2012

Supreme Court, Saratoga County

Docket Number: 20094258

Judge: Jr., Thomas D. Nolan

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK

SUPREME COURT

COUNTY OF SARATOGA

M & R GINSBURG, L.L.C.,

Plaintiff,

-against-

**DECISION AND ORDER**

**RJI No. 45-1-2010-0769**

**Index No. 20094258**

SEGEL, GOLDMAN, MAZZOTTA & SIEGEL, P.C.  
and DEBRA J. LAMBEK, ESQ.,

Defendants.

SEGEL, GOLDMAN, MAZZOTTA & SIEGEL, P.C.  
and DEBRA J. LAMBEK, ESQ.,

Third-Party Plaintiffs,

-against-

GLEASON, DUNN, WALSH AND O'SHEA, P.C.  
and THOMAS F. GLEASON, ESQ.,

Third-Party Defendants.

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FILED

**PRESENT: HON. THOMAS D. NOLAN, JR.**  
**Supreme Court Justice**

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Following the reinstatement of plaintiff's legal malpractice action against defendants (90 AD3d 1208), defendants commenced a third-party action against the attorneys who represented the plaintiff in an action seeking rescission of a contract to sell real property to Orange Canyon Development Co. (Orange Canyon). see M&R Ginsburg, L.L.C. v Orange Canyon Dev. Co., 69 AD3d 1181 (3<sup>rd</sup> Dept 2010) and 84 AD3d 1470 (3<sup>rd</sup> Dept 2011). If judgment in plaintiff's favor is entered against them in the instant action, defendants/third-party plaintiffs seek common law indemnification and/or contribution premised on the third-party defendants' alleged negligence in advising plaintiff to sue Orange Canyon, the contract vendee, rather than closing the sale.

Third-party defendants move pre-answer to dismiss the third-party complaint pursuant to CPLR 3211 (a) (1) (5) and (7), or alternatively move for summary judgment pursuant to CPLR 3211 (c), on the assertion that there is no legal basis for the third-party plaintiffs' claim as a matter of law or fact. In their motion, third-party defendants rely on the past proceedings, including affidavits, depositions, and motion papers, and the two Appellate Division decisions in the rescission action and the Appellate Division decision in this case, all of which, third-party defendants contend, establishes that the third-party action lacks merit under the holding of Rosner v Paley, 67 NY2d 735 (1985).

In opposition, third-party plaintiffs contend first, that the motion is premature inasmuch as no discovery has occurred in this action while the parties awaited resolution of the rescission action and second, that if the merits were reached, when the evidence is viewed, as the court must at this juncture, in the light most favorable to them, the third-party complaint survives under the principles set forth in Schauer v Joyce, 54 NY2d 1 (1981).

### Background

Plaintiff owns commercial real estate in the Village of South Glens Falls, Saratoga County, New York. In 1995, it entered into a long term lease of a parcel to a Rite Aid pharmacy. The lease contained a restriction barring plaintiff's members from directly or indirectly permitting any other pharmacy to locate on any of its other parcels located within one mile of the Rite Aid pharmacy. In 2005, plaintiff attempted to negotiate the sale of a parcel to a developer but the deal fell through, in part, due to the restriction which defendants, plaintiff's then attorneys, specifically referenced in the proposed contract of sale. One year later, Orange Canyon, agreed to buy from plaintiff a 1.45 acre parcel directly across the street from the Rite Aid, but allegedly unbeknownst to plaintiff's principals, plaintiff's attorneys did not include or refer to the restriction in the sales contract plaintiff and Orange Canyon signed. Subsequently, plaintiff rejected defendants' advice to close and elected not to complete the sale. Plaintiff based its decision on the fact that Orange Canyon intended to build a drug store, and plaintiff did not want to expose itself to a lawsuit from Rite Aid and/or a hold back of rent based on plaintiff's breach of the restriction in the lease. Before making its decision, plaintiff consulted with Thomas F. Gleason, Esq. who, after reviewing the relevant documents and meeting with defendants and plaintiff, recommended that plaintiff commence an action seeking the rescission of the Orange Canyon contract. Plaintiff decided to follow Mr. Gleason's advice and retained third-party defendants to file suit. M&R Ginsburg, L.L.C. v Orange Canyon Dev. Co., Sup Ct, Saratoga County, index No. 20072990 (Ferradino, J.). After protracted proceedings, plaintiff's rescission claim was dismissed on the merits, and Orange Canyon's specific performance counterclaim was remanded for trial. see M&R Ginsburg, L.L.C. v Orange Canyon Dev. Co., 69

AD3d 1181 (3<sup>rd</sup> Dept 2010) and 84 AD3d 1470 (3<sup>rd</sup> Dept 2011). During the trial of the counterclaim, the parties settled with plaintiff paying \$120,000.00 in exchange for Orange Canyon's termination of the sales contract.

### **The Pending Motion**

As matters now stands, plaintiff still owns the 1.45 acre commercial site, and Rite Aid never asserted any claim under the covenant. This outcome was achieved at a cost to plaintiff - the settlement payment and legal expenses paid to third-party defendants. In this action, plaintiff contends that defendants' negligence consisted of its failure to include a pharmacy restriction in the Orange Canyon contract or to take other steps to protect plaintiff from the possibility that Rite Aid would sue to enforce the restriction and/or withhold rent if the sale to Orange Canyon were consummated and a competing pharmacy developed on the site (90 AD2d 1208). In short, plaintiff contends it was forced to sue for rescission to avoid the potential consequences of defendants' negligence and thereby incurred significant monetary damages. In their third-party action, defendants contend, even if it is assumed that they were negligent, that third-party defendants were also negligent in advising plaintiff to pursue the preemptive action in which plaintiff unnecessarily incurred legal fees and out-of-pocket expenses and seek contribution from the third-party defendants if defendants are found liable to plaintiff in the main action.

In their instant motion, the third-party defendants contend that given the prior proceedings in this action and specifically the findings made by the Appellate Division when it reinstated plaintiff's complaint and under the principles of Rosner, supra, it was not negligent as a matter of law for advising plaintiff to take what was a reasonable alternative course of action to block what plaintiff reasonably perceived to be a threat of potential liability to Rite Aid on a

breach of the lease's restrictive covenant.

In opposition, defendants/third-party plaintiffs urge that third-party defendants' advice was negligent since the pursuit of rescission against Orange Canyon was not a reasonable alternative course of action. One of the defendant's principals, Jeffrey Siegel, Esq., states he correctly in his opinion advised plaintiff that if it did not close, that it "will likely be sued by the buyer, but that if [plaintiff] does close, [plaintiff] may be sued by Rite Aid, but a Rite Aid suit should be defensible" and that starting a lawsuit to rescind would result "in immediate substantial expense and in exposure to substantial damages, all in order to defeat a hypothetical future lawsuit" (Affidavit of Jeffrey Siegel, Esq. dated July 17, 2012, paragraphs 4 and 10). In brief, defendants/third-party plaintiffs contend that if they are found liable in damages to plaintiff for its failure to have made reference to the restriction in the contract, that third-party defendants are successive tortfeasors whose own negligence increased or enhanced the damages plaintiff sustained.

#### **Analysis**

The key issue then is whether third-party defendants proposed a reasonable alternative course of action for plaintiff to follow. If it was, then under Rosner, only an error in judgment was made, and such error does not constitute malpractice.

Here, the Appellate Division's decision in this action - which is the law of the case - establishes for purposes of this motion and this action both that the Orange Canyon "intended to build a pharmacy" on the parcel and that the third-party plaintiffs "did not dispute that a pharmacy was planned by the developer". M&R Ginsburg, L.L.C. v Segel, Goldman, Mazzotta & Siegel, P.C., 90 AD3d 1208, 1208, 1210 (3<sup>rd</sup> Dept 2011). The first finding is apparently based

on the record presented on the summary judgment motion, and specifically the affidavit of Michael Ginsburg, one of plaintiff's principals, stating that "[i]n or about July of 2007, prior to the closing, I became aware that Orange Canyon intended to build a pharmacy on the premises" (Affidavit dated June 24, 2010, paragraph 14). The two findings forestall any argument now by third-party plaintiffs that third-party defendants' advice to plaintiff to initiate the rescission action was based on an incorrect assumption. Thus, faced with "a distinct possibility of potential liability", Rosner, supra at 738, if plaintiff were to convey the property to Orange Canyon and the site developed with a competing pharmacy, plaintiff's commencement of a rescission action was a reasonable alternative course of action. That plaintiff's action for rescission was ultimately dismissed on the merits does not require a different result here.

In the rescission action, although both the trial court and the Appellate Division found in dismissing the fraud claim that there was no evidence that the developers ever falsely stated to plaintiff how they intended to develop the parcel to induce plaintiff to sell the property to it, (69 AD3d at 1183), that finding is not inconsistent with Michael Ginsburg's representation that, after the contract was made, he learned that a pharmacy was indeed planned. And, though not relevant to plaintiff's decision to sue to rescind, Mr. Ginsburg's position that the buyer intended to develop the site with a pharmacy was subsequently validated by a third party - a nonparty witness who surfaced after the fraud complaint was dismissed. This independent evidence was deemed sufficient to allow the Appellate Division to find that there was an issue of fact whether Orange Canyon had "clean hands" and thus sufficient to deny Orange Canyon's motion to strike plaintiff's equitable defense notwithstanding plaintiff's inability to demonstrate that Orange Canyon had made an express, false misrepresentation of fact sufficient to support its claim of

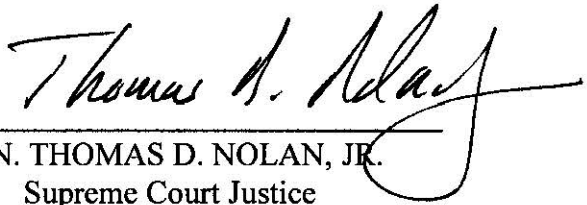
fraud.

Third-party defendants' motion is granted and the third-part complaint is dismissed, without costs.

This constitutes the decision and order of the court. The original decision and order is forwarded to counsel for third-party defendants. All original motion papers are delivered to the Supreme Court Clerk/County Clerk for filing. Counsel for third-party defendants is not relieved from the applicable provisions of CPLR 2220 relating to filing, entry and notice of entry of the decision and order.

So Ordered.

DATED: November 15, 2012  
Saratoga Springs, New York

  
HON. THOMAS D. NOLAN, JR.  
Supreme Court Justice

ENTERED  
Kathleen A. Marchione  
  
Saratoga County Clerk

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ENTERED