

<p>Weston v 35 Plank Rd Realty Corp.</p>
<p>2013 NY Slip Op 31417(U)</p>
<p>July 2, 2013</p>
<p>Supreme Court, Richmond County</p>
<p>Docket Number: 104141/08</p>
<p>Judge: Joseph J. Maltese</p>
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index No.: 104141/08
Motion No.: 007

LISA WESTON,

Plaintiff

DECISION & ORDER

against

HON. JOSEPH J. MALTESE

**35 PLANK RD REALTY CORP.,
DOUD ELDER,
FADEE ELDER,
MARVIN BLAKELY,
PHILLIP SIMON,
GARTH CELESTINE,
RELIANT ABSTRACT & SETTLEMENT CORP.,
THOMAS LAMPARILLO,
JAN ALEXANDER DASH,
LAW OFFICE OF JAN ALEXANDER DASH, and
ARGENT MORTGAGE COMPANY, LLC,**

Defendants

The following items were considered in the review of the following motion for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendants, Jan Alexander Dash and the Law Office of Jan Alexander Dash, (“Dash Defendants”) move for summary judgment dismissing the plaintiff’s complaint. The motion is granted to the extent that the plaintiff’s cause of action for fraud is dismissed.

Facts

The Jan Alexander Dash operated a law practice at 946 Fulton Street, Brooklyn, New

York. Located in the same building was Home Savers; a company that purportedly protected people from losing their homes in foreclosure operated by the defendants Phillip Simon and Garth Celestine. The defendants Simon and Celestine are currently serving sentences in federal prison for their involvement with the Home Savers company. Simon and Celestine referred real estate closings to Dash. While there was no mention of Dash's involvement with Home Savers in its decision, the Appellate Division, Second Department suspended Dash from the practice of law for a period of five years, beginning on May 19, 2009. In suspending Dash, the Appellate Division, Second Department found that Dash co-mingled personal funds and clients funds in his two IOLA accounts and improperly drew funds from these accounts. Furthermore, the court found that Dash had aided suspended attorney, Edwin E. Drakes in the practice of law.

In this case the plaintiff was purportedly approached by Simon to help prevent a bank from foreclosing on property owned by the defendant Doud Elder. The plaintiff states that she never had any dealings with Doud Elder. In connection with this transaction, the plaintiff was found to qualify for a mortgage. Once it was determined that the plaintiff could qualify for a home loan, Home Savers promised payment in the amount of \$10,000 to the plaintiff for her participation. According to the plaintiff she would obtain a mortgage for the purchase of Doud Elder's home at 35 Plank Road, Staten Island, New York. Thereafter, pursuant to a side agreement executed at the closing Home Savers or Elder would make the mortgage payments. The side agreement executed after the real estate closing reads as follows:

It is agreed by and among the parties that:

1. The purchaser, Lisa Weston, agrees to assist Elder Doud with regards to 35 Plank Road Staten Island. That Lisa Weston will hold the property and act as trustee for the term of one (1) year. That Lisa Weston does not now or at any time in the future intend to make claim for the property.
2. That Elder Doud will occupy the premises and make all payments necessary and incidental to the maintenance and management of the property, including but not limited to paying the mortgage and real estate taxes.
3. That Elder Doud will begin the process of transferring title in his

name and releasing Lisa Weston of all liabilities for the property. That Lisa Weston will assist with the transfer of the premises to Elder Doud.

4. That within ten (10) days of closing Elder Doud will open a bank account and deposit twelve (12) months mortgage payments for the sole purpose of paying the mortgage.

The home closing took place on February 3, 2006. The defendant, Argent Mortgage Company, LLC, (“Argent”) provided and recorded a mortgage on the property. However, the defendant Reliant Abstract & Settlement Corp., failed to record the deed transferring 35 Plank Road, Staten Island, New York from Doud Elder to Lisa Weston. While Argent issued a mortgage in the name of Lisa Weston, not one payments has been made on that account. As a result of the foregoing facts, Lisa Weston remains financially obligated on the mortgage, but does not have a recorded ownership in the property. Consequently, Doud Elder continues to reside in the premises and not pay a mortgage. Furthermore, without being a record owner of the property, Weston is unable to evict Elder from the premises.

The Dash Defendants conducted the closing on 35 Plank Road, Staten Island, New York for the plaintiff. During his deposition, Dash testified that he could not recall reviewing the contract of sale at the closing; or whether he discussed the contractual terms with the plaintiff. Furthermore, Dash testified that he did not look at the title report prior to the closing. It is also conceded that the plaintiff executed the side agreement at the closing that Dash attended, but Dash did not inform the plaintiff that this was contrary to the terms of the mortgage loan.

The Dash Defendants now move for summary judgment dismissing the plaintiff’s causes of action for fraud, breach of fiduciary duty and legal malpractice.

Discussion

A motion for summary judgment must be denied if there are “facts sufficient to require a

trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. “Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion”.¹ Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.² As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.³ On a motion for summary judgment, the function of the court is issue finding, and not issue determination.⁴ In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.⁵

Here, the plaintiff offers no opposition to the Dash Defendants motion to dismiss the plaintiff’s cause of action for fraud. Consequently, the plaintiff’s twentieth cause of action is dismissed.

The Dash Defendants do not dispute that a fiduciary duty existed with the plaintiff. Instead, the Dash Defendants argue that plaintiff has not provided any evidence that constitute a breach of fiduciary duty. A breach of fiduciary duty arises from the violation of a relationship of

¹ *Marine Midland Bank, N.A., v. Dino*, et al., 168 AD2d 610 [2d Dept 1990].

² *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

³ *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

⁴ *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff’d* 65 NY2d 732 [1985].

⁵ *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

trust and confidence.⁶ Here, Dash's own testimony causes doubt as to whether he fully prepared to conduct the real estate closing at issue here. Consequently, this cause of action must stand.

The plaintiff's nineteenth cause of action for legal malpractice requires a showing that the defendant attorney failed to exercise the ordinary reasonable skill and establish that the defendant 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 that duty proximately caused the plaintiff to sustain actual and ascertainable damages.⁷ Once again, the statements of Jan Dash during his deposition raise a question as to whether he properly conducted the real estate closing. Consequently, this cause of action must stand.

Accordingly, it is hereby:

ORDERED, that the motion for summary judgment made by Jan Alexander Dash and the Law Office of Jan Dash is granted to the extent that the plaintiff's twentieth cause of action for fraud is dismissed without opposition; and it is further

ORDERED, that the remainder of the motion is denied; and it is further

ORDERED, that the parties shall return to DCM Part 3, 130 Stuyvesant Place, 3rd Floor, on **Monday, August 12, 2013 at 9:30 a.m.** for a Pre-Trial Conference.

ENTER,

DATED: July 2, 2013

Joseph J. Maltese
Justice of the Supreme Court

⁶ See generally, *Rich v. New York Cent. & Hudson Riv. R.R. Co.*, 87 NY 382 [1882].

⁷ See, *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438 [2007].