

**Antonelli v Guastamacchia**

2013 NY Slip Op 32046(U)

August 22, 2013

Supreme Court, Richmond County

Docket Number: 100705/08

Judge: Joseph J. Maltese

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF RICHMOND DCM PART 3

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Index No.:100705/08  
 Motion No.:015, 016

NICHOLAS ANTONELLI and  
 7296-7304 REALTY CORP.,

*Plaintiffs*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

*against*

STEVEN GUASTAMACCHIA,  
 CATHERINE GUASTAMACCHIA,  
 VITO LENTINI,  
 ANNETTE LENTINI,  
 COUNTRYWIDE HOME LOANS,  
 HCI MORTGAGE a/k/a HOME CONSULTANTS, INC.,  
 EAM LAND SERVICES, INC.,  
 CPA ADVISORY GROUP,  
 LOUIS CANNIZZARO,  
 STEVEN DECKER, ESQ.,  
 DECKER, DECKER, DITO & INTERNICOLA, LLP,

*Defendants*

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STEVEN DECKER, ESQ. and  
 DECKER, DECKER, DITO & INTERNICOLA, LLP,

*Third Party Plaintiffs,*

*Against,*

SUSAN GUIFFRE,

*Third Party Defendant.*

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

| <u>Papers</u>   | <u>Numbered</u> |
|---|-----------------|
| Notice of Motion and Affidavits Annexed (Decker Defendants) | 1               |
| Memorandum of Law in Support                                | 2               |
| Affirmation in Opposition (EAM)                             | 3               |
| Affirmation in Opposition (CPA Advisory)                    | 4               |
| Affidavit in Opposition (Antonelli)                         | 5               |
| Memorandum of Law in Opposition (Antonelli)                 | 6               |
| Affirmation in Reply (Decker Defendants)                    | 7               |

|  |                           |
|--|---------------------------|
| <b>Memorandum of Law in Reply (Decker Defendants)</b>      | <b>8</b>                  |
| <b>Notice of Motion and Affidavits Annexed (Plaintiff)</b> | <b>9</b>                  |
| <b>Memorandum of Law in Support</b>                        | <b>10</b>                 |
| <b>Affirmation in Opposition (Decker Defendants)</b>       | <b>11</b>                 |
| <b>Memorandum of Law in Opposition (Decker Defendants)</b> | <b>12</b>                 |
| <b>Reply Affirmation</b>                                   | <b>13</b>                 |
| <b>Memorandum of Law in Reply</b>                          | <b>14</b>                 |
| <b>Exhibits</b>  | <b>Attached to Papers</b> |

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

The defendants, Steven Decker and Decker, Decker, Dito & Internicola, LLP, (“Decker Defendants”) in Motion No. 15 move for summary judgment dismissing the plaintiffs’ action as against them. The plaintiffs’ move in Motion No. 16 for partial summary judgment on liability against the defendants Steven Decker, Esq. and Decker, Decker, Dito & Internicola, LLP pursuant to plaintiffs’ cause of action for legal malpractice. The defendants’ Motion No. 15 is granted in its entirety and the plaintiffs’ Motion No. 16 is denied.

### **Facts**

This is an action that alleges legal malpractice against the defendants, Steven Decker and his law firm, Decker, Decker, Dito & Internicola, LLP, based upon real estate transactions. This decision will address only the cause of action for legal malpractice, breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, fraud, and aiding and abetting a fraud on the part of the Decker Defendants.

The plaintiff, Nicholas Antonelli, is a businessperson versed in real estate transactions and money lending. Antonelli operates several real estate businesses, including several mortgage brokerage firms. On or about December 27, 2004, Antonelli advanced the sum of \$600,000 for the purposes of purchasing property to construct, and eventually sell eight homes on Sprague Avenue and Amboy Road, on Staten Island, New York to the Decker Defendants’ escrow account to pay for expenses of the project, for which the 7296-7304 Realty Corp (“Realty Corp.”)

was established.

Steven Decker, Decker, Decker, Dito & Internicola, LLP and their predecessor firm represented Antonelli, his wife Susan Guiffre, and his various companies in connection with making mortgage loans for 20 years.

Guastamacchia and Lentini constructed the eight homes. The first six homes were sold without incident. According to the deposition testimony elicited in this action, Guastamacchia would keep Antonelli apprised of the status of the closings as they took place. During the first six closings the Decker defendants represented Realty Corp. in the transactions, with Guastamacchia appearing on behalf of the Realty Corp.

Steven Guastamacchia was apparently introduced to Antonelli by Guastamacchia's sister who worked for Antonelli. Thereafter, Antonelli made a loan to Guastamacchia for \$100,000 that was repaid. Yet, Antonelli has argued that Decker introduced him to Antonelli and set him up as a corporate officer of the Realty Corp. without Antonelli's knowledge.

However, Guastamacchia not only oversaw the development of the project, but also executed the necessary closing documents as an officer of the corporation to sell 6 of the 8 houses. Antonelli's assertion that he had no knowledge, nor did he consent to Guastamacchia representing the Realty Corp. and executing documents to close is simply not true as he testified that he never attended any of the closings. The plaintiff Antonelli, testified that he expected to be repaid the principal plus interest from the proceeds of the sales of the last three homes sold. It is undisputed that the Decker Defendants represented the plaintiff and the Realty Corp. in this venture.

The last two units to be sold were located at 7300 Amboy Road and 7302 Amboy Road on Staten Island. On August 28, 2007, the defendant Catherine Guastamacchia applied for a loan from the defendant HCI to "refinance" and "cash out" the properties located at 7300 Amboy

Road and 7302 Amboy Road. On September 13, 2007 and September 14, 2007 the Realty Corp transferred these to properties to Catherine and Vito Lentini and the properties were subsequently refinanced. These actions were taken without Antonelli's knowledge or consent. Indeed, there is no evidence that the Decker defendants were in anyway involved with the transfers and subsequent mortgages on the last 2 houses that Guastamacchia and Lentini transferred from the Realty Corp. unto themselves without Decker's knowledge or consent. This was a conversion by Guastamacchia and Lentini.

On or about February 10, 2006, Antonelli's corporation, Cucamonga, LLC made a loan in the amount of \$499,000 to V.E.V. Development LLC. In return Cucamonga, LLC received a mortgage on property located at 157 Kiswick Avenue, Staten Island, New York. The plaintiffs' allege that the Decker defendants failed to file a mortgage lien on this property. In deposition testimony in connection with this action, Antonelli testified that this loan was repaid in its entirety and consequently, there are no damages sustained by Antonelli. But more importantly, Cucamonga, LLC is not a party to this action.

### **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".<sup>1</sup> 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.<sup>2</sup> As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of

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

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

fact exist and the movant is entitled to judgment as a matter of law.<sup>3</sup> On a motion for summary judgment, the function of the court is issue finding, and not issue determination.<sup>4</sup> In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.<sup>5</sup>

Recovery based upon a professional malpractice claim against an attorney requires proof of four elements: (1) an attorney-client relationship; (2) the negligence of the attorney; (3) that the negligence was the proximate cause of the loss sustained; and (4) proof of actual damages.<sup>6</sup> A plaintiff must establish that the “. . . but for the attorney’s negligence the plaintiff would have prevailed in the matter or would have avoided damages.”<sup>7</sup> Here, the Decker Defendants demonstrated that they did not commit any acts of negligence. It is acknowledged by the plaintiffs that the Decker Defendants were not in any way involved in the transfer of 7300 Amboy Road and 7302 Amboy Road from the Realty Corp. to the Lentinis. Moreover, with respect to the Kiswick Avenue property, it is conceded that the plaintiff Antonelli’s loan was repaid in fully. Consequently, there is no evidence that Antonelli sustained any damage irrespective of whether the Decker Defendants failed to file a mortgage lien on the Kiswick Avenue property. Consequently, the plaintiffs’ failed to raise an issue of fact in opposition to the defendants’ motion for summary judgment, nor have they met their burden going forward on their own motion for summary judgment. Therefore, summary judgment is granted in favor of the Decker Defendants.

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

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

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

<sup>6</sup> *See, Ulico Casualty Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker, et al*, 56 AD3d 1 [1<sup>st</sup> Dep’t 2008]; *Fadden v. Satterlee Stephens Burke & Burke, LLP*, 52 AD3d 652 [2d Dep’t 2008].

<sup>7</sup> *Ippolito v. McCormack, Damiani*, 265 AD2d 303 [2d Dep’t 1999].

Accordingly, it is hereby:

ORDERED, that the plaintiff's motion for partial summary judgment is denied; and it is further

ORDERED, that the motion made by the defendants, Steven Decker, Esq. and Decker, Decker, Dito & Internicola, LLP for summary judgment dismissing the amended verified complaint filed by Nicholas Antonelli and 7296-7304 Realty Corp; the cross-claims filed by co-defendants CPA Advisory Group, LLC and EAM Land Services Inc. is granted; and it is further

ORDERED, that the defendants, Steven Decker, Esq. and Decker, Decker, Dito & Internicola, LLP shall settle judgment.

ENTER,

DATED: August 22, 2013

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Joseph J. Maltese  
Justice of the Supreme Court