

Russo v Rozenholc

2013 NY Slip Op 33608(U)

October 18, 2013

Sup Ct, New York County

Docket Number: 650457/2012

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. JOAN A. MADDEN

J.S.C.

PRESENT: _____ Justice

PART 11

Index Number : 650457/2012
RUSSO, LOUIS A.
vs.
ROZENHOLC, DAVID
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO.
MOTION DATE
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).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the annexed decision and order.

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

Dated: October 18, 2013

HON. JOAN A. MADDEN J.S.C.

- 1. CHECK ONE: CASE DISPOSED
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 11

-----X
LOUIS A. RUSSO, AS EXECUTOR OF THE ESTATE
OF RONALD E. PECUNIES,

Plaintiff,

INDEX NO. 650457/12

-against-

DAVID ROZENHOLC, DAVID ROZENHOLC &
ASSOCIATES, MAHESH AGASHIWALA and LOMA
AGASHIWALA, JOHN C. ALEXANDER, THEODORE
and BERTINA BAER, NOLAN BAER, JUDY BECKER,
JOHANNA BENNETT, MARIEL BENNETT, JACK
BIDERMANN and ISABEL BARNARD BIDERMANN,
BARBARA E. BISHOP, TERRY and PAULA
CHABROWE, AMY R. COUSINS, CATHY MARSHALL,
LORI METZ, BRIGID O'CONNOR, LUCILLE PETINO,
DEBRA LYN SCHINASI, HYMAN and JEAN SCHINASI,
KALIA SHALLECK and JEAN SCHIMOTAKE,

Defendants.

-----X
JOAN A. MADDEN, J.:

In this action for legal malpractice and breach of contract, defendants David Rozenholc and David Rozenholc & Associates (collectively Rozenholc) are moving, and the remaining defendants are cross-moving for an order pursuant to CPLR 3211(a)(7) dismissing the complaint for failure to state a cause of action. Plaintiff opposes defendants' motion and cross-motion, and is cross-moving for partial summary judgment on its second cause of action for breach of contract.

The following facts are not disputed unless otherwise noted. Plaintiff's decedent, Ronald Pecunies, was one of a group of rent stabilized tenants who formed a tenants' association to

defend their landlord's attempt to terminate their tenancies and demolish their building located at 220 Central Park South, New York, New York. Pecunies was the tenant of apartment 16AB, which he occupied with his girlfriend, Emel Dilek. In May 2006, the landlord filed an application with DHCR for permission not to renew the tenants' leases and to demolish the building, so it could construct a new building. By written retainer agreement dated April 3, 2009, the tenants, including Pecunies, retained Rozenholc to represent them in the DHCR proceeding and in "negotiating" with the landlord. The retainer agreement also included an express agreement among the tenants to

specifically represent and warrant as follows:

Tenant signatories have agreed to share equally in any settlement offer made by landlord and, as such, each apartment represents a single share under this agreement, unless otherwise indicated herein.

It is further agreed that tenant, Ronald Pecunies who occupies combined apartment 16AB will receive two (2) shares and agrees to pay two (2) shares of any legal fees owed.

In April 2009, DHCR issued an order permitting the owner to evict the tenants and not renew their leases. On behalf of the tenants, Rozenholc, challenged DHCR's order in a PAR, which DHCR denied in December 2009. Rozenholc then commenced an Article 78 proceeding which included Pecunies and the other tenants as parties.

On May 22, 2010, Pecunies died. On September 24, 2010, counsel for his estate wrote to David Rozenholc authorizing him "to continue to represent the interest of the Estate of Ronald Pecunies, Deceased. This authority comes from the Executor of the Estate (Mr. Louis Russo)." It appears that a dispute arose between the estate and Pecunies' girl friend, Emel Dilek, as to her rights, including her rights with respect to the apartment. The estate and Dilek each had separate counsel who communicated with Rozenholc. According to Rozenholc, once the estate

“ultimately recognized” that it had no basis to assert a claim regarding the apartment, the estate “instructed” Rozenholc that the estate was relinquishing any claim regarding the apartment and authorized settlement with Dilek.

In December 2010, the Article 78 proceeding was settled for more than \$33 million. Each tenant and Dilek received a buyout of \$1.75 million, in exchange for agreeing to vacate their apartments. The owner of the building, the executor of Pecunies estate, and Emel Dilek executed a Stipulation of Settlement and Consent Judgment of Ejectment which states, *inter alia*, that “Louis Russo, as Executor of the Estate of Ronald Pecunies represents that the Estate has no right, title or interest in the Premises and the Estate is not entitled to nor is the Estate seeking any consideration as set forth in this Stipulation or the Agreement of Even Date [the Master Stipulation].” The stipulation refers to Dilek as the “tenant” and states that she “co-occupied the Premises with Ronald Pecunies prior to his death and succeeded to his tenancy,” and that the “Owner is willing to purchase all of Tenant’s [Dilek’s] rights in the Premises.”

In February 2012, Pecunies’ estate commenced the instant action asserting claims for legal malpractice and breach of contract against Rozenholc, and a breach of contract claim against the former tenants of the building, with the exception of Dilek. Defendants are now moving and cross-moving to dismiss the complaint in its entirety for failure to state a cause of action.

On a CPLR 3211 motion to dismiss addressed to the sufficiency of the pleadings, the complaint must be liberally construed, and the Court must accept all allegations as true and accord them the benefit of every favorable inference to determine whether they come within the

ambit of any cognizable legal theory. See Nonnon v. City of New York, 9 NY3d 825, 827 (2007) (quoting Leon v. Martinez, 84 NY2d 83, 87-88 [1994]); Cron v. Hargro Fabrics, Inc., 91 NY2d 362, 366 (1998); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Wise Metals Group, LLC, 19 AD3d 273 (1st Dept 2005); DeMicco Bros, Inc. v. Consolidated Edison Co, 8 AD3d 99 (1st Dept 2004). In assessing a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), “a court may freely consider affidavits submitted by plaintiff to remedy any defects in the complaint,” and the “criterion is whether the proponent of the pleading has a cause of action, not whether [it] has stated one.” Leon v. Martinez, *supra* at 88 (quoting Guggenheimer v. Ginzburg, 43 NY2d 268, 275 [1977]); accord Dollard v. WB/Stellar IP Owner, LLC, 96 AD3d 533 (1st Dept 2012); Amaro v. Gani Realty Corp, 60 AD3d 491, 492 (1st Dept 2009).

Here, the complaint together with plaintiff’s affidavit sufficiently allege claims for legal malpractice and breach of contract: To state a cause of action for legal malpractice, plaintiff must allege that “defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession which results in actual damages,” and that plaintiff “would have succeeded on the merits of the underlying action ‘but for’ the attorney’s negligence.” AmBase Corp v. Davis Polk & Wardwell, 8 NY3d 428, 434 (2007); accord Angeles v. Aronsky, 109 AD3d 720 (1st Dept 2013). “A client is not barred from a legal malpractice action where there is a signed ‘settlement of the underlying action, if it is alleged that the settlement of the action was effectively compelled by the mistakes of counsel.’” *Id* (quoting Garnett v. Fox, Horan & Camerini, LLP, 82 AD3d 435 [1st Dept 2001]).

Here, plaintiff alleges that Rozenholc breached its duty to the estate when it failed to inform the estate of the existence of the retainer agreement, which contained an express

agreement among the tenants to “share equally” in the proceeds of the settlement, and explicitly recognized Pecunies’s right to receive two shares of the proceeds based on his occupancy of two apartments. Plaintiff alleges that Pecunies’ contractual right to share in the settlement proceeds was an asset of the estate, which the estate was not aware of at the time it executed the documents settling the Article 78 proceeding and agreeing that it was neither entitled to nor seeking the “consideration set forth” in the settlement documents.

In his affidavit, Louis Russo, the executor of the estate, states that “[h]ad Mr. Rozenholc informed me of the Retainer Agreement’s terms, or provided me with a copy of the settlement, I would not have agreed to any settlement which resulted in no money to the estate.” Russo further states that “[g]ranted the estate forfeited its rights to the apartment under the RSC [Rent Stabilization Code], but the Estate did not knowingly or intentionally forfeit its rights to two shares of the settlement under the Retainer Agreement.” Russo asserts that Rozenholc “failed to represent the Estate in accordance with the Retainer Agreement, and that “but for” Rozenholc’s failure to properly advise the Estate of its rights under the Retainer, and Rozenholc’s failure to distribute two shares of the settlement proceeds to the estate, “I would not have consented to the settlement in its final form but rather would have insisted on payment of the two shares from the total proceeds.” Based on the foregoing, plaintiff sufficiently alleges a claim for legal malpractice. See Ehrenhalt v. Kinder, 85 AD3d 553 (1st Dept 2011).

Turning to the breach of contract claims, Russo states that “[t]o the extent each of the co-defendants/tenants received more than their fair share of the settlement under the Retainer Agreement to which they were all parties, they are in breach of that Agreement, or have

otherwise been unjustly enriched.” Plaintiff alleges that by the clear and express terms of the written retainer agreement, the tenants, including Pecunies, agreed to “pool” the settlement and pay two shares to Pecunies, and their failure to do so constitutes a breach of the retainer agreement.

Contrary to Rozenholc’s assertion, the breach of contract claim is not duplicative of the legal malpractice claim. “A cause of action to recover damages for breach of contract may be maintained against an attorney where there is a promise to perform and no subsequent performance, and such is not duplicative of a legal malpractice cause of action.” Reidy v. Martin, 77 AD3d 903 (2nd Dept 2010).

Plaintiff alleges that pursuant to express terms of the retainer agreement, Rozenholc was required to collect or “pool” the settlement proceeds and distribute the funds in accordance with the retainer agreement, i.e. in equal shares, including two shares for Pecunies’ estate. To support its assertion that the retainer agreement was a “pooling agreement,” plaintiff points to the language in the retainer requiring that “at least eighty (80%) percent of the underlying tenants will have to agree to accept the offer in order to bind the remaining undersigned tenants to the terms of the settlement offer.” Plaintiff alleges Rozenholc breached his contractual obligations under the retainer agreement by failing to pool the proceeds of the settlement and distribute two shares to the estate. Since those contractual obligations are separate from the attorney’s alleged negligence and failure to exercise due care, the breach of contract claim is not duplicative of the legal malpractice claim. See id.

Based on the foregoing, plaintiff sufficiently alleges legal malpractice and breach of contract claims against Rozenholc, and breach of contract claims against the tenants.

Defendants' motion and cross-motion to dismiss are therefore denied.

Plaintiff's cross-motion for partial summary judgment on its breach of contract claim is denied as premature.

Accordingly, it is

ORDERED that defendants' motion and cross-motion to dismiss the complaint are denied; and it is further

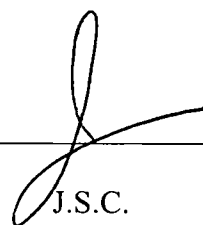
ORDERED that plaintiff's cross-motion for partial summary judgment is denied as premature; and it is further

ORDERED that if defendants have not already done so, they shall serve and file answers to the complaint within 20 days of the date of this decision and order; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on December 12, 2013 at 9:30 am, in Room 351, 60 Centre Street.

DATED: October 18, 2013

ENTER:



J.S.C.