Ladera Partners, LLC v Goldberg, Scudieri & Lindenberg, P.C.
2016 NY Slip Op 31512(U)
August 9, 2016
Supreme Court, New York County
Docket Number: 150703/2015
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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LADERA PARTNERS, LLC,

Plaintiff

v

GOLDBERG, SCUDIERI & LINDENBERG, P.C., f/k/a GOLDBERG, SCUDIERI, LINDENBERG & BLOCK, P.C., and MARK LINDENBERG,

Defendants.

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Index No. 150703/2015

DECISION AND ORDER

SEQ 001

NANCY M. BANNON, J.:

I. INTRODUCTION

In this legal malpractice action, the defendants move pursuant to CPLR 3211(a) to dismiss the complaint on the grounds that documentary evidence establishes a complete defense to the action (CPLR 3211[a][1]), the action is barred by collateral estoppel (CPLR 3211[a][5]), and the complaint fails to state a cause of action. (CPLR 3211[a][7]). The court grants the motion on the ground that the plaintiff does not have a cause of action against the defendants. See id.

II. BACKGROUND

In an underlying foreclosure action entitled West 45th St. Venture, LLC, v Ladera Partners, Inc., commenced in the Supreme Court, New York County, under Index No. 108893/2010 (Schlesinger,

J.), the lender alleged that Ladera Partners, Inc. (Ladera), defaulted in repaying its obligations on a $6.25 million mortgage loan. On October 27, 2010, the court appointed a receiver based on Ladera's failure to pay real property taxes. The lender's assignee, which had been substituted as plaintiff, moved for summary judgment on the complaint and for an order of reference, which was granted, without opposition, in an order dated March 30, 2011. In an order dated August 9, 2011, the court confirmed the referee's report, and directed the entry of a judgment of foreclosure and sale. The judgment was entered on September 22, 2011, the proposed sale of the subject premises was published in the New York Law Journal on October 26, 2011, and Ladera was served with notice of the sale by delivery of such notice to the Secretary of State. Nonetheless, Ladera did not appear at the sale, the premises were sold at auction for the sum of $8.5 million, and the referee delivered the deed to the lender's assignee, which was the highest bidder at the auction.

Several months after the sale, Ladera moved to vacate the sale, as well as the judgment of foreclosure and sale, alleging that it did not receive adequate notice of the sale, thus frustrating its right of redemption. In an order dated July 6, 2012, the court denied the motion, concluding that Ladera received notice of sale directly from the lender's assignee, that it did not deny that notice was properly served, and that it was

not entitled to additional notice from the referee. See West 45th St. Venture, LLC, v Ladera Partners, Inc., 2012 NY Slip Op 31834(U) (Sup Ct, N.Y. County 2012, Schlesinger, J.). The court rejected Ladera's argument that the judgment and sale should be vacated because litigation counsel did not receive notice of the sale, concluding that the notice given to Ladera, along with the service, upon counsel, of the notices of motion for summary judgment and entry of the prior orders, were sufficient to satisfy the notice requirements CPLR 5222 and RPAPL 1371. In a decision and order dated May 2, 2013 (see West 45th St. Venture, LLC, v Ladera Partners, Inc., 106 AD3d 412, 412 [1st Dept 2013]), the First Department affirmed the order, concluding that Ladera "failed to demonstrate any prejudice resulting from plaintiff's mailing of the notice of sale to it instead of to its counsel."

Ladera commenced this legal malpractice action against its litigation attorneys, contending that they committed legal malpractice, breached their fiduciary duty, and breached a contractual obligation to it by failing to oppose the summary judgment motion in the foreclosure action, and failing to notify it of the pendency of the resultant foreclosure sale. The complaint further alleges that, but for the defendants' malpractice and breaches of duty, Ladera would have successfully defended the foreclosure action, and been ready, willing, and able to obtain funds to redeem the subject property prior to the

sale. The defendants move to dismiss the complaint, alleging that documentary evidence establishes that it did not commit legal malpractice, the complaint fails to state a cause of action inasmuch as any act or omission on its part was not the proximate cause of any damages caused to the plaintiff, the plaintiff is collaterally estopped from asserting that the defendants committed any wrongful act, and the causes of action alleging breaches of fiduciary duty and contract are duplicative of the legal malpractice cause of action. The defendants further allege that the complaint must be dismissed against the individual defendant, Mark Lindenberg, since his liability is limited to the extent of his interest in the defendant professional corporation.

III. DISCUSSION

A. PERSONAL LIABILITY OF INDIVIDUAL ATTORNEY

In the first instance, Lindenberg is not immune from personal liability for legal malpractice solely because he is a shareholder of a professional corporation. Business Corporation Law § 1505(a) provides that "(e)ach shareholder, employee or agent of a professional service corporation . . . shall be personally and fully liable and accountable for any negligent or wrongful act or misconduct committed by him [or her] or by any person under his [or her] direct supervision and control while rendering professional services on behalf of such corporation."

Thus, Lindenberg can be held personally liable for the negligent performance of those services if he participated in the negligent acts or supervised and controlled the members of the corporation who committed those acts. See Lauder v Goldhamer, 122 AD3d 908, 909-910 (2nd Dept 2014); Beltrone v General Schuyler & Co., 223 AD2d 938, 939 (3rd Dept 1996); We're Assocs. Co. v Cohen, Stracher & Bloom, 103 AD2d 130, 134 (2nd Dept 1984), affd 65 NY2d 148 (1985).

B. COLLATERAL ESTOPPEL

Contrary to the defendants' contention, the action is not barred by the doctrine of collateral estoppel. The doctrine precludes a party "from relitigating in a subsequent action an issue clearly raised and decided against that party in a prior action." Ji Sun Jennifer Kim v Goldberg, Weprin, Finkel, Goldstein, LLP, 120 AD3d 18, 23 (1st Dept 2014); see Hudson v Merrill Lynch & Co., Inc., 138 AD3d 511, 515 (1st Dept 2016). To successfully invoke the doctrine, "the issue in the second action must be identical to an issue which was raised, necessarily decided and material in the first action," and "the party to be precluded must have had a full and fair opportunity to litigate the issue in the earlier action" Ji Sun Jennifer Kim v Goldberg, Weprin, Finkel, Goldstein, LLP, supra, at 23. Thus, although Ladera is collaterally estopped from contending that it was

injured by the manner in which notice of the sale was provided by its lender's assignee, as that issue was disposed of by the First Department, the issue of whether it was injured by the defendants' failure to oppose the assignee's motion for summary judgment has not been litigated or necessarily determined in any proceeding in which Ladera had a full and fair opportunity to contest the issue. Accordingly, dismissal pursuant to CPLR 3211(a)(5) is not warranted.

C. FAILURE TO STATE A CAUSE OF ACTION

Notwithstanding the above, Ladera does not have a cause of action against the defendants sounding in legal malpractice. In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the 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 this duty proximately caused plaintiff to sustain actual and ascertainable damages. McCoy v Feinman, 99 NY2d 295, 301-302 (2002); see Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d 438, 442 (2007). To establish causation, a plaintiff must show that it would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence. See Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, supra, at 442; Davis v Klein, 88 NY2d 1008, 1009-1010

(1996); Carmel v Lunney, 70 NY2d 169, 173 (1987). On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. The court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory, See Leon v Martinez, 84 NY2d 83, 87-88 (1994). "However, when evidentiary material is adduced in support of a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion has not been converted to one for summary judgment, the court must determine whether the proponent of the pleading has a cause of action, not whether he or she has stated one and, 'unless it has been shown that a material fact as claimed by the [plaintiff] to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, . . . dismissal should not eventuate.'" Vertical Progression, Inc. v Canyon Johnson Urban Funds, 126 AD3d 784, 786 (2nd Dept 2015), quoting Guggenheimer v Ginzburg, 43 NY2d 268, 275 (1977). Nonetheless, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration." Maas v Cornell Univ., 94 NY2d 87, 91 (1999); David v Hack, 97 AD3d 437, 438 (1st Dept 2012).

Since the defendants submitted evidentiary material in

support of their motion, the standard here is whether Ladera has a cause of action sounding in legal malpractice. Although Ladera alleges in its complaint that "but for" the defendants' failure to oppose the summary judgment motion in the foreclosure action, it would have successfully defended that action, its conclusory allegations in this regard are insufficient to support the legal malpractice cause of action, since Ladera did not, and cannot, allege that it had paid or was in the process of paying its mortgage loan obligations at the time the motion was pending. See Feinberg v Boros, 99 AD3d 219, 223 (1st Dept 2012); O'Callaghan v Brunelle, 84 AD3d 581, 582 (1st Dept 2011); Fenster v Smith, 39 AD3d 231, 231 (1st Dept 2007). Moreover, Ladera's allegation that the defendants were provided with the notice of the sale, but committed malpractice in failing to respond to it, is "not a fact at all," since Ladera, which based its motion to vacate the sale on defendants' nonreceipt of such notice, is judicially estopped from asserting that the defendants did receive notice. See Centech, LLC v Yippie Holdings, LLC, 138 AD3d 569, 569 (1st Dept 2016). Thus, the evidentiary material submitted by the defendants reveals that Ladera had no defense to the foreclosure action, and that any omission by the defendants was not a proximate cause of any loss. See David v Hack, supra.

The defendants correctly contend that the breach of contract and breach of fiduciary duty causes of action are duplicative of

the legal malpractice cause of action (see Mamoon v Dot Net, Inc., 135 AD3d 656, 658 [1st Dept 2016]; Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267, 271 [1st Dept 2004]; Sage Realty Corp. v Proskauer Rose, 251 AD2d 35, 38-39 [1st Dept 1998]) and, hence, must also be dismissed for failure to state a cause of action.

D. DEFENSE BASED ON DOCUMENTARY EVIDENCE

In light of the foregoing, the court need not reach the issue of whether the documentary portion of the evidentiary material submitted by the defendants established a complete defense to the action. See CPLR 3211(a)(1).

IV. CONCLUSION

Accordingly, it is

ORDERED that the defendants' motion pursuant to CPLR 3211(a) to dismiss the complaint is granted on the ground that the plaintiff does not have a cause of action against the defendants; and it is further,

ORDERED that the Clerk of the court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the court.

Dated: 8/9/16

ENTER:

J.S.C.

HON. NANCY M. BANNON