

Miami Capital, LLC v Hurwitz
2017 NY Slip Op 31925(U)
September 12, 2017
Supreme Court, New York County
Docket Number: 150310/2016
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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MIAMI CAPITAL, LLC

Plaintiff,

- v -

SEYMOUR HURWITZ,

Defendant.

INDEX NO. 150310/2016

MOTION DATE 7/5/16

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this application to/for Dismiss

HON. SALIANN SCARPULLA:

In this action for legal malpractice, defendant Seymour I. Hurwitz, Esq. (“Hurwitz”) moves to dismiss plaintiff Miami Capital, LLC’s (“Miami Capital”) complaint on the grounds of a defense founded upon documentary evidence and failure to state a cause of action pursuant to CPLR 3211 (a)(1) and (a)(7).

In 2013, Miami Capital hired Hurwitz to provide legal services for its purchase of real property located at 218 West 116th Street, New York, New York (“the property”). The real estate transaction was consummated through two steps. First, the owner of the property, a non-for-profit corporation, Edith Pennamon Apartments Housing Development Fund Corporation (“Seller”), entered into a contract of sale for the property with 1111, Inc. Second, 1111, Inc. assigned all rights in the contract of sale and the

property to Miami Capital. The purchase price of the property under the contract of sale was \$1,400,000.

After the sale, West Harlem Community Organization, Inc. (“WHCO”) commenced an action against Miami Capital to rescind the purchase of the property and the deed. See *West Harlem Community Organization, Inc. v. Miami Capital, LLC* (Index No. 651003/2015). In that action, WHCO argued that the sale must be rescinded because the Seller’s officers failed to obtain approval from the New York State Supreme Court or the New York State Attorney General’s Office, as required under the New York Not-for-Profit Corporation Law. In addition, WHCO alleged that Miami Capital knew or should have known that it was necessary to obtain approval for the purchase of the property.

Shortly thereafter, Miami Capital commenced this legal malpractice action against Hurwitz. Miami Capital alleges that Hurwitz breached his duty of care by: (i) failing to obtain approval of the sale from New York Supreme Court; (ii) failing to obtain approval of the sale from the New York Attorney General; (iii) failing to comply with New York Not-for-Profit Corporation Law § 510; (iv) failing to comply with New York Not-for-Profit Corporation Law § 511; and (v) failing to obtain clearance of title exceptions prior to the closing of the transaction. Miami Capital seeks \$1,400,000 in damages, plus interest, costs, and attorney’s fees.

Hurwitz now moves to dismiss the complaint because: (1) his representation did not fall below the standard of care for a New York attorney; (2) no proximate cause exists between the alleged negligence and damages; and (3) damages are not sufficiently

alleged because Miami Capital remains the owner of the property and WHCO's action against Miami Capital was discontinued.

Discussion

To “state a cause of action for legal malpractice, the complaint must set forth three elements: the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and actual damages” (Leder v Spiegel, 31 AD3d 266, 267 [1st Dept 2006], affd 9 NY3d 836 [2007], cert denied 552 US 1257 [2008]). “[T]o establish proximate cause, plaintiff must demonstrate that ‘but for’ the attorney’s negligence, plaintiff would either have prevailed in the matter at issue, or would not have sustained any ‘ascertainable damages’” (31 AD3d at 267-268; Brooks v Lewin, 21 AD3d 731, 734 [1st Dept 2005]).

Hurwitz argues that the complaint should be dismissed because Miami Capital fails sufficiently to plead any damages. Hurwitz contends that Miami Capital is still in possession of the property and WHCO's action has been discontinued. In response, Miami Capital does not dispute that it remains in possession of the property and the prior action has been discontinued.

Miami Capital does not plead that it suffered any damages from the WHCO action, which has been discontinued. Instead, the damages alleged by Miami Capital relate to a subpoena issued by the New York Attorney General's Office. The subpoena seeks a deposition of “a person with knowledge concerning the title insurance for the sale of the Property” as well as documents related to Miami Capital's purchase of the property. Although Miami Capital has received a subpoena from the Attorney General,

Miami Capital does not plead any damages that it has suffered resulting from the subpoena or the Attorney General's investigation.

While Miami Capital anticipates that at some point in the future it could be subject to a rescission claim and could possibly lose the property because of the Attorney General's investigation, at this point in time these alleged damages are purely speculative and not yet ripe. Accordingly, I find that Miami Capital failed to adequately plead damages to support a legal malpractice action.

Moreover, Miami Capital does not adequately allege that Hurwitz breached his duty of care as a lawyer. NPCL § 510 requires a not-for-profit corporation to obtain approval for the sale of substantially all its assets from the New York Supreme Court or Attorney General's Office. The contract of sale for the property placed that burden on the Seller, requiring the Seller to obtain an order from the New York Supreme Court "[i]n the event that judicial consent is required in order for the Seller as a Not for profit Corporation to transfer and sell the Premises."¹

The Seller's attorney informed Hurwitz by letter dated November 13, 2013 that the Seller "does not need [court] approval because the property is not 'substantially all' of our assets and/or real property." The documents submitted thus show that the Seller, not Miami Capital was contractually obligated, to obtain court approval for the transaction if necessary, and that the Seller's attorney represented to Miami Capital that court approval

¹ Requiring the Seller to determine whether court approval was necessary for the sale of the property was entirely reasonable, as only the Seller would know whether sale of the property constituted the sale of substantially all its assets.

was not necessary under NPCL § 510. Under these circumstances, Miami Capital has not adequately plead that Hurwitz breached his duty of care as its lawyer by not obtaining court approval for the sale.

For the above stated reasons, Hurwitz's motion to dismiss Miami Capital's complaint is granted.

In accordance with the foregoing, it is

ORDERED that defendant Seymour I. Hurwitz, Esq.'s motion to dismiss the complaint is granted, and the complaint is dismissed; 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.

9/12/17
DATE

Saliann Scarpulla
SALIANN SCARPULLA, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: