Ferousis v Santamarina

2018 NY Slip Op 32725(U)

October 24, 2018

Supreme Court, New York County

Docket Number: 154418/2018

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH, *Justice* — PART IAS MOTION 32

INDEX NO. 154418/2018

MOTION DATE

MOTION SEQ. NO. 002

KONSTANTINOS FEROUSIS,

Plaintiff,

- v -

GIL SANTAMARINA, SANTAMARINA & ASSOCIATES, SCOTT A. RUBMAN, ESQ.

Defendants.

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for DISMISSAL

The motion to dismiss by defendants Gil Santamarina and Santamarina & Associates ("Moving Defendants") is granted.

Background

This legal malpractice action arises out of the sale of a building owned by plaintiff. In September 2006, plaintiff entered into an exclusive real estate listing for the sale of his property located at 180 Borinquen Place in Brooklyn with D.J. Real Estate, Inc. ("DJ"). In January 2007, another real estate broker, Itzhaki Properties (NY) Inc. ("Itzhaki"), got involved. Itzhaki and DJ agreed to split any commission from a sale of the property.

Plaintiff received an offer for the building in February 2007 for $4.2 million but plaintiff declined. In October 2007, plaintiff entered into a contract to sell the building for $4 million with the same buyer that made the offer in February 2007. However, by that time DJ was

purportedly no longer the exclusive broker and Itzhaki received the entire broker's commission. DJ then commenced an action in Queens against both plaintiff and Itzhaki to recover its share of the commission. After trial, DJ was awarded a judgment for $60,000 against both plaintiff and Itzhaki. With interest, the judgment totaled over $100,000 and plaintiff paid the full amount of the judgment.

Plaintiff asserts legal malpractice claims against his first attorney (defendant Rubman) and the Moving Defendants. Plaintiff claims that the Moving Defendants, who took over the representation of both Itzhaki and plaintiff in the Queens case in 2010, should not have agreed to represent both parties. Plaintiff observes that there was an indemnification agreement between plaintiff and Itzhaki dated October 9, 2007 that required Itzhaki to hold plaintiff harmless if another broker made a claim for a commission. Plaintiff insists that this constituted a clear conflict of interest that should have compelled the Moving Defendants to decline to represent both Itzhaki and plaintiff.

Plaintiff also contends that the Moving Defendants failed to employ a proper legal strategy because a third-party complaint was never filed against Itzhaki and other parties, including the buyer and plaintiff's real estate attorney for the sale. Plaintiff maintains it would not have paid a judgment if the Moving Defendants had not committed legal malpractice.

The Moving Defendants seek to dismiss the complaint. They claim that by the time they took over the case from defendant Rubman, the defense strategy was in place for over two years. The Moving Defendants point out that Itzhaki was honoring the indemnification agreement by

paying the attorneys' fees for plaintiff in the Queens case. The Moving Defendants argue that no cross-claim for indemnification was necessary at that point. In the Queens case, both Itzhaki and plaintiff (Ferousis) argued that DJ was not entitled to the commission because its listing had expired, an argument that did not pose a conflict of interest between plaintiff and Itzhaki.

The Moving Defendants also claim that plaintiff cannot establish actual or ascertainable damages stemming from the alleged legal malpractice. The Moving Defendants argue that plaintiff still can seek indemnification from Itzhaki.

In opposition, plaintiff argues that the Moving Defendants have proffered no evidence that the legal fees were paid by Itzhaki during the Queens case. Plaintiff argues that he would not have paid any judgment had the proper parties (including Itzhaki, the buyer and his attorney at the closing) been brought into the Queens litigation. Plaintiff contends he had demonstrated actual and ascertainable damages.

Discussion

"When considering these pre-answer motions to dismiss the complaint for failure to state a cause of action, we must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference. We may also consider affidavits submitted by plaintiffs to remedy any defects in the complaint" (*Chanko v American Broadcasting Companies Inc.*, 27 NY3d 46, 52, 29 NYS3d 879 [2016]).

A motion to dismiss based on documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170 [2005]).

"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. To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence" (*Rudolf v Shayne, Dachs, Corker & Sauer*, 8 NY3d 438, 442, 835 NYS2d 534 [2007] [internal quotations and citations omitted]).

Here, the Court grants the Moving Defendant's motion to dismiss because plaintiff failed to state a cause of action. Plaintiff cannot demonstrate that he suffered damages because of the Moving Defendant's negligence. The post-trial order in the Queens case found that plaintiff specifically knew about the fifty percent commission split between DJ and Itzhaki (NYSCEF Doc. No. 36 at 8). Justice Nelson found that plaintiff "was aware that the proposal included a selling price of $4,000,000 for the subject property . . . and a fifty percent split of the real estate brokerage commission" and that there was no evidence that the commission split would expire (*id.*).

Both plaintiff and Itzhaki were found liable for not paying DJ the commission and the instant legal malpractice case *does not argue* that the Moving Defendants' alleged negligence caused plaintiff to be held liable. Instead, plaintiff complains about who paid the damages awarded to DJ. But that does not state a cause of action for legal malpractice because plaintiff can still commence an action for indemnification against Itzhaki. "Indemnification claims generally do not accrue for the purpose of the Statute of Limitations until the party seeking indemnification has made payment to the injured person" (*McDermott v City of New York*, 50 NY2d 211, 216, 428 NYS2d 643 [1980]). Plaintiff still has time to bring an indemnification claim against Itzhaki (*see* CPLR 213[2] [six-year statute of limitations for indemnity claims]).

The fact that it might have been more efficient to bring that indemnification claim during the Queens action does not establish that the Moving Defendants were negligent or that there was a conflict of interest that compelled the Moving Defendants to represent only plaintiff or Itzhaki. Moreover, that purported inefficiency only arises because DJ prevailed. Had plaintiff and Itzhaki successfully defended DJ's lawsuit, these parties would have likely preferred to have the same attorney to reduce legal fees.[1] And the point of a legal malpractice claim is not to second-guess the strategic choices made by counsel (*Pacesetter Communications Corp. v Solin & Breindel, P.C.*,150 AD2d 232, 234, 541 NYS2d 404 [1st Dept 1989]). Having separate counsel could have facilitated an indemnification claim via a third-party action, but it would

[1] While the Moving Defendants argue that Itzhaki paid the attorneys' fees for plaintiff during the Queens case, plaintiff (in his affidavit in opposition) curiously asserts that "I have no knowledge and have never seen documentary proof to date. . . that my legal fees in the commission lawsuit were paid by a third party" (Ferousis aff ¶ 29). Notably, plaintiff does not claim that *he paid* his own attorneys' fees, a fact he would certainly know. Obviously, if Itzhaki paid plaintiff's attorneys' fees, then the choice not to seek indemnity against Itzhaki would be a decision meant to reduce plaintiff's costs. And it certainly would not preclude plaintiff from bringing an indemnification claim when DJ prevailed. But because the Moving Defendants did not provide proof that Itzhaki paid all the bills, the Court cannot solely rely on this argument.

have delayed the case and increased plaintiff's costs (he would have had to pay for his own attorney). And because plaintiff can still potentially recover the amount he paid to DJ, there is no basis to find that the Moving Defendants committed legal malpractice.

The Court also rejects plaintiff's claims that the Moving Defendants should have impleaded the seller or his real estate attorney. If, for some reason, there is a cause of action against either of these parties, then plaintiff still has time under the applicable statute of limitations to commence such an action.

Summary

If plaintiff got a free ride in the Queens litigation by having Itzhaki pay the legal bills and joining in the defense -- that the original listing expired -- and plaintiff never waived his right to indemnification from Itzhaki, then where is the legal malpractice? Even if he did not get a free ride, the fact is that he can still pursue indemnification, as the statute of limitations has not yet run on the indemnification claim. Clearly, Itzhaki did not step up to pay the judgment, so plaintiff would have had to pay DJ and then chase Itzhaki.

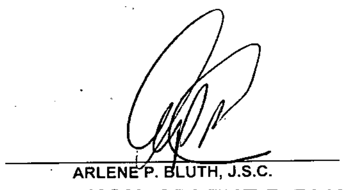
On NYSCEF, only defendants Santamarina and Santamarina & Associates were served and there is no affidavit of service for defendant Rubman. As more than 120 days has passed and no motion to extend the time to serve has been made, the case is dismissed in its entirety. It is dismissed against the moving defendants with prejudice and against Rubman without prejudice.

Accordingly, it is hereby

ORDERED that the motion by defendants Gil Santamarina and Santamarina & Associates to dismiss is granted and the complaint is dismissed in its entirety as against said defendants with prejudice, and with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is dismissed as against the remaining defendant Scott A. Rubman, Esq. without prejudice.

This is the decision and order of the Court.



10/24/18
DATE

ARLENE P. BLUTH, J.S.C.
HON. ARLENE P. BLUTH

CHECK ONE:	[X] CASE DISPOSED		[ ] NON-FINAL DISPOSITION	
	[X] GRANTED	[ ] DENIED	[ ] GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
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