EDJ Realty Inc. v Siegel
2018 NY Slip Op 34393(U)
January 16, 2018
Supreme Court, Westchester County
Docket Number: Index No. 67058/2016
Judge: Charles D. Wood

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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EDJ REALTY INC.,

Plaintiff,

-against-

DECISION & ORDER
Index No. 67058/2016
Sequence Nos. 2&3

MARK A. SIEGEL, ESQ.

Defendant.

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WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 37 through 74 were read in connection with defendant Mark A. Siegel, Esq. ("Siegel") motion for summary judgment, and plaintiff EDJ Realty Inc. ("EDJ") motion for partial summary judgment.

EDJ brought this action to recover damages for alleged legal malpractice by Siegel. In the prior motion to dismiss brought by Siegel, the court found (among other things) that as it was a prediscovery motion to dismiss, not a summary judgment motion, the complaint stated a cause of action to recover damages for legal malpractice insofar as asserted against Siegel.

By the instant motion, Siegel moves pursuant to CPLR 3212 on the grounds that the underlying Article 78 proceeding is void, and EDJ's time to serve a Notice of Appeal has never started to run; or in the alternative, Siegel is entitled to summary judgment because EDJ would

not have prevailed on an appeal from the Order dismissing the Article 78 proceeding, as EDJ was obligated to immediately retain another attorney to file a notice of appeal. EDJ brings its motion for partial summary judgment on the grounds that the Order with notice of entry is valid, and EDJ would have prevailed in connection with the Appeal.

Upon the foregoing papers, the motions are decided as follows:

It is well settled that "a proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). Conclusory, unsubstantiated assertions will not suffice to defeat a motion for summary judgment (Barclays Bank of New York, N.A. v Sokol, 128 AD2d 492 [2d Dept 1987]). A party opposing a motion for summary judgment may do so on the basis of deposition testimony as well as other admissible forms of evidence, including an expert's affidavit, and eyewitness testimony (Marconi v Reilly, 254 AD2d 463 [2d Dept 1998]). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). The court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any

doubt as to the existence of a triable issue" (Kolivas v Kirchoff, 14 AD3d 493 [2d Dept 2005]); Baker v Briarcliff School Dist., 205 AD2d 652,661-662 [2d Dept 1994]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (68 NY2d 320,324).

To state a cause of action to recover damages for legal malpractice, a plaintiff must allege: (1) that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession; and (2) that the attorney's breach of the duty proximately caused the plaintiff actual and ascertainable damages' (Siwiec v Rawlins, 103 AD3d 703, 704 [2d Dept 2013]). "To survive dismissal, the complaint must show that, but for counsel's alleged malpractice, the plaintiff would not have sustained some actual ascertainable damages" (Simmons v Edelstein, 32 AD3d 464, 466 [2d Dept 2006]). Mere speculation about a loss resulting from an attorney's alleged omission is insufficient to sustain a prima facie case of legal malpractice (Giambrone v Bank of NY, 253 A.D.2d 786, 787 [2d Dept 1998]). Rather, plaintiff must prove that it was the attorney's negligence which proximately caused the actual and ascertainable damages that resulted (Simmons v Edelstein, 32 AD3d 464 [2d Dept 2006]). In other words, "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" (Bells v Foster, 83 AD3d 876, 877 [2d Dept 2011]).

Here, the underlying action arose from a New York State House and Community Renewal ("DHCR") complaint by a tenant Ben Alfano, at a New York City apartment building owned by EDJ, accusing EDJ of wrongfully denying Alfano the use of a rooftop patio adjacent to his apartment. On May 3, 2012, DHCR's Rent Administrator found that the removal of tenant's private fenced in yard located on the roof of the garage constituted a decrease in

service, and EDJ was directed to restore the service of the fenced in private patio ("DHCR Order").

Attorney Zadrima then filed (on EDJ's behalf), a petition for administrative review of the DHCR's Order, which was denied. After the DHCR Order denying Review was issued and the DHCR administrative proceedings were concluded, EDJ retained Siegel to bring an Article 78 Proceeding against the DHCR to annul and reverse the DHCR Determination reducing rent and directing EDJ to restore a patio. On November 12, 2013, the Bronx Supreme Court dismissed EDJ's declaratory action (the one that Siegel drafted), substantially on the grounds that "it cannot be said that DHCR's determination that tenant's [Alfano's) long-standing patio space was a required service was irrational. Nor has EDJ established that the determination was arbitrary or capricious" (*see, Siegel's Ex H).*

Siegel provided EDJ with a copy of the November 2013 Decision by email on December 12, 2013. However, Siegel moved his business office, and never received a true copy of that decision with notice of entry that DHCR's General Counsel served on November 21, 2013.

Almost two years later in August 2015, EDJ's attorney in this action, Richard Monaco filed a Notice of Appeal from the November 2013 Decision and Order.

DHCR thereafter moved to dismiss the appeal on the ground that the August 2015 Notice of Appeal was untimely, and EDJ cross-moved for an Order determining the November 2013 Decision and Order to be a decision and not an order. The First Department ruled in DHCR's favor, and granted DHCR's motion ,dismissed the appeal, and denied EDJ's cross-motion.

Siegel argues that there is no factual or legal basis to find that an appeal from the November 2013 Decision and Order would have been successful. Moreover, Siegel contends that he did not breach any duties owed to EDJ under the terms of his retainer agreement with EDJ. Through his affidavit, Siegel affirms that he did not represent EDJ in the DHCR administrative proceedings prior to the Article 78 proceeding, and had no role in determining the proof submitted, or the strategic decisions made by EDJ, in those proceedings.

In support of its motion for partial summary judgment, EDJ offers an affidavit from Douglas A. Emanuel, Esq., who affirms that he is aware of good and accepted practice for attorneys in the Supreme Courts of the State of New York, and opines that Siegel was under a duty to notify his opposing counsel that he had changed his office address. Siegel relocated his office at a time when there was an outstanding decision he was awaiting in connection with the underlying Article 78 case, and that it is his understanding that Siegel did not notify his adversary of his change of address, which is not proper or accepted practice in the Supreme Court. He also points out that Siegel actually did obtain a copy of the Decision and Order dated November 12, 2013, on or about December 12, 2013, which should have put Siegel on an even more heightened alert that a Notice of Entry would soon be served upon him (if it had not already been served) because his adversary was the prevailing party.

Emmanuel concludes that, as a result of Siegel not notifying his adversary (DHCR) of his change of address, he did not receive the Notice of Entry of the Decision and Order, and he did not provide the Notice of Entry to EDJ, giving EDJ insufficient time to serve and file a Notice of Appeal. But for the negligence of Siegel, EDJ would have been able to pursue an Appeal from the order. It is his professional opinion to a reasonable degree of certainty in the

fields of civil litigation and appellate practice that defendant committed legal malpractice as set forth above and that said malpractice proximately caused plaintiff to sustain monetary loss.

Generally, "if the alleged malpractice is based on the attorney's failure to perfect an appeal from an order dismissing a cause of action in an underlying action, the plaintiff must show that, had the attorney perfected that appeal, the appeal would have been successful, the cause of action would have been reinstated, and the plaintiff would have prevailed on that cause of action in the underlying action" (McCluskey v Gabor & Gabor, 61 AD3d 646, 648, [2d Dept 2009]).

In reviewing an administrative agency determination, a court must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious (Gilman v New York State Div. of Hous. & Cmty. Renewal, 99 NY2d 144, 149 [2002]). EDJ argues that it would have prevailed on an appeal of the November 2013 Decision and order under the Rent Stabilization Code because tenant Alfano's recreational use of the patio was not specifically set forth in the lease submitted in the DHCR administrative proceedings. From this record, plaintiff EDJ has failed to demonstrate that it would have prevailed on an appeal from the November 2013 Decision and Order. Notably, DHCR has broad discretion in ascertaining whether a required service is not being properly provided, and customarily given deference (Roberts v Tishman Speyer Properties, L.P., 13 NY3d 270, 283 [2009]; Croes Nest Realty, LP v New York State Div. of Hous. & Cmty. Renewal, 92 AD3d 402, 403 [1st Dept 2012]).

Accordingly, Siegel demonstrated his entitlement to judgment as a matter of law by establishing, prima facie, that his conduct was not a proximate cause of EDJ's alleged damages, and EDJ failed to raise a triable issue of fact. Similarly, EDJ failed to demonstrate a prima facie case, and its motion is denied as academic.

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

NOW THEREFORE, it is hereby

ORDERED, that defendant Siegel's motion for summary judgment (Seq 2) is granted, and plaintiff EDJ's complaint is dismissed; and it is further

ORDERED, that plaintiff EDJ's motion for partial summary judgment (Seq 3) is denied.

The Clerk shall enter judgment in accordance herewith.

Dated: January 16, 2018
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF