

**Ziemianowicz v Janowski**

2019 NY Slip Op 30326(U)

February 6, 2019

Supreme Court, Kings County

Docket Number: 521427/2016

Judge: Loren Baily-Schiffman

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At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 6<sup>th</sup> day of February, 2019.

**PRESENT: HON. LOREN BAILY-SCHIFFMAN**  
JUSTICE

JADWIGA ZIEMIANOWICZ,

Plaintiff,

- against -

ZBIGINEW ROBERT JANOWSKI a/k/a Z. ROBERT  
JANOWSKI,

Defendant.

Index No.: 521427/2016

Motion Seq. # 2

DECISION & ORDER

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	<u>PAPERS NUMBERED</u>
Notice of Motion, Affidavits, Affirmation and Exhibits	1
Affirmation in Opposition to Cross-Motion	2
Plaintiff's Reply Affirmation, Affidavit and Exhibits	3

Upon the foregoing papers Plaintiff, JADWIGA ZIEMIANOWICZ, moves this Court for an Order pursuant to CPLR § 3212 granting summary judgment in her favor. Plaintiff commenced the instant action on or about November 17, 2016 seeking damages based upon Defendant, Z. ROBERT JANOWSKI's, alleged legal malpractice. Specifically, the complaint alleges three causes of action for Legal Malpractice, Breach of Fiduciary Duty and for treble damages pursuant to Judiciary Law § 487.

Background & Facts of Underlying Action

Plaintiff was introduced to the property known as 886 Manhattan Avenue, Brooklyn, New York sometime in 2010 by Omega Realty of Greenpoint LLC ("Omega") and PDF Realty ("PDF"). Plaintiff purchased the property and in 2011 Omega and PDF commenced an action against Ms. Ziemianowicz to recover the commissions allegedly owed to them pursuant to a

binder agreement (Underlying Action, Index # 8006/2011, Supreme Court, Kings County). On or about February 16, 2012 Ms. Ziemianowicz substituted Mr. Janowski as her counsel in the underlying action after issue was joined as different counsel had interposed an answer on her behalf. Omega and PDF had moved for summary judgment against Ms. Ziemianowicz and Mr. Janowski submitted opposition to that motion and cross-moved to dismiss the complaint. By Order of Hon. David I. Schmidt both motions were denied on July 29, 2013.

A conference was scheduled for September 8, 2014 in the underlying action and Ms. Ziemianowicz failed to appear. An Order was issued by Hon. David I. Schmidt that if Defendant, (Plaintiff in the instant action) failed to appear on the adjourned date, October 15, 2014, a default judgment would be entered against her. No one appeared on Ms. Ziemianowicz's behalf on the adjourned date and a Special Referee was appointed to hear and determine the damages owed to Omega and PDF. On March 25, 2015 a judgment after inquest was entered against Ms. Ziemianowicz in the amount of \$50,000 plus interest from November 8, 2010 and fees plus costs in the amount of \$1250. A judgment in the amount of \$81, 633.09 was entered in the Office of the Clerk, County of Kings on or about March 19, 2015 against Ms. Ziemianowicz.

A Notice of the Sale and an Execution with Notice to Garnishee was served on or about December 28, 2015 in the underlying action. Ms. Ziemianowicz moved on or about February 19, 2016, by Order to Show Cause for an Order restraining Omega and PDF from executing upon the judgment and to vacate the default. That motion was denied by Hon. Larry D. Martin on or about July 18, 2016. Thereafter, Ms. Ziemianowicz filed a Notice of Appeal from the Decision

and Order dated July 18, 2016 and a Stipulation of Settlement between Ms. Ziemianowicz and Omega and PDF was entered in the amount of \$55,000 on September 21, 2016.

Analysis

Upon a motion for summary judgment, the moving party 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. ***Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP, 26 NY3d 40, 49 (2015), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986).*** Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers. ***Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985).*** In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney failed to exercise the ordinary 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". ***Delollis v Archer, 128 AD3d 755, 756 (2d Dept 2015), citing Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d 438 (2007).***

Plaintiff admitted in the underlying action that in fact it was Omega and PDF who introduced her to the subject property that she purchased and that it was her signature on the agreement which formed the basis of the brokers' claim for the commission owed. In support of the instant motion for summary judgment, Plaintiff submits the Expert Affirmation of Harry Issler, Esq. who states that he has practiced law in New York for 59 years. Mr. Issler states that he reviewed the entire file in the underlying action and that it is his "...opinion to within a reasonable degree of certainty that..." Ms. Ziemianowicz's claims for legal malpractice, breach

of fiduciary duty and treble damages pursuant to Judiciary Law § 487 are “meritorious” and that Mr. Janowski failed to provide skillful and competent representation. Mr. Issler further contends that Mr. Janowski was responsible for “more than 20 defaults” in the underlying action.

There has been absolutely no evidence submitted to this Court to support the claim that Mr. Janowski was responsible for “more than 20 defaults” in the underlying action. A review of the record indicates that scheduled conferences and motions were adjourned several times in the underlying action. However, there is absolutely no evidence whatsoever that there were “more than 20 defaults”. Moreover, the document submitted to support the claim that Mr. Janowski was responsible for “more than 20 defaults” is evidence only of the fact that some of the motions and conferences in the underlying action had been adjourned several times. Moreover, this E-courts document does not even indicate at whose request the conference or motion was adjourned. This Court finds therefore, that Mr. Issler’s affidavit is speculative and conclusory. “[M]ere speculation about a loss resulting from an attorney’s alleged omission is insufficient to sustain a prima facie case of legal malpractice.” *Barbieri v Fishoff*, 98 AD3d 703, 705 (2d Dept 2012), citing *Siciliano v Forchelli & Forchelli*, 17 AD3d 343, 345 (2d dept 2005).

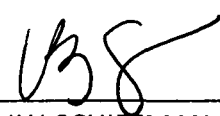
Plaintiff has failed to establish by admissible proof that Mr. Janowski did not exercise the ordinary skill and knowledge commonly possessed by a member of the legal profession. Moreover, Plaintiff has completely failed to demonstrate that she would have prevailed in the underlying action but for Defendant’s negligence and as a result she sustained actual and ascertainable damages. Plaintiff’s claim that Defendant breached his fiduciary duty to her is predicated upon the same facts upon which she based her legal malpractice cause of action.

Plaintiff has failed entirely to set forth proof in admissible form that would entitle her to a judgment as a matter of law that Defendant breached his fiduciary duty to her. *Schiller v Bender, Burrows & Rosenthal, LLP, 116 AD3d 756, 758 (2d Dept 2014)*.

The law is clearly established that the only acceptable liability standard recognized to support a claim that an attorney violated § 487 of the Judiciary Law is an intent to deceive. *Amalfitano v Rosenberg, 12 NY3d 8, 14 (2009)*. *Aristakesian v Ballon Stoll Bader & Nadler, P.C., 165 A.D.3d 1023, 1025 (2d Dept 2018)*. Moreover, “[a]llegations regarding an act of deceit or intent to deceive must be stated with particularity.” *Facebook, Inc. v DLA Piper LLP [US], 134 AD3d 610, 615 (2d Dept 2015)*. The allegations supporting Plaintiff’s claim that Defendant violated Judiciary Law § 487 do not set forth any facts from which an intent to deceive could be inferred. *Aristakesian v Ballon Stoll Bader & Nadler, P.C., supra at 1025*.

Mr. Janowski’s testimony has been consistent throughout the underlying action as well as the instant action that he never received notice of the September 8, 2014 settlement conference or its adjourned date of October 15, 2014. Plaintiff has failed entirely to sustain her initial burden of demonstrating the absence of a triable issue of fact for either legal malpractice, breach of a fiduciary duty or a violation of Judiciary Law § 487 and, therefore, is not entitled to summary judgment. *Aristakesian v Ballon Stoll Bader & Nadler, P.C., supra at 1025; Dupree v Voorhees, 102 AD3d 912, 913 (2d Dept 2013)*. Accordingly, Plaintiff’s motion for summary judgment is denied in its entirety.

ENTER,



LOREN BAILY-SCHIFFMAN  
JSC

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