Cortland Apts., LLC v Simbari Design Architecture, PLLC
2020 NY Slip Op 30842(U)
January 31, 2020
Supreme Court, Cortland County
Docket Number: Index No. 2011-591
Judge: David H. Guy

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DECISION AND ORDER
Elizabeth Larkin, County Clerk

At a Term of the Supreme Court of the State of New York held in and for the County of Cortland at the Courthouse in Cortland, NY on December 3, 2019.

PRESENT: HON. DAVID H. GUY
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT : COUNTY OF CORTLAND

CORTLAND APTS., LLC,

Plaintiff,

v.

SIMBARI DESIGN ARCHITECTURE, PLLC and THOMAS J. SIMBARI,

Defendants.

DECISION AND ORDER

Index No. 2011-591
RJI No. 2014-0385-M

APPEARANCES:

Matthew D. Gumaer, Esq.
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Attorney for Plaintiff
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By Decision and Order dated March 19, 2019, the Court partially granted the motion for summary judgment filed by Defendants Simbari Design Architecture and Thomas J. Simbari (collectively referred to throughout as "Defendants"), dismissing Plaintiff's claims for breach of contract, negligence, and negligent misrepresentation. The Court denied summary judgment on Plaintiff's professional malpractice claim and set a trial date of December 3, 2019. On November 12, 2019, Defendants filed motions in limine, which were made returnable the morning of the trial date. Plaintiff filed an affirmation of Daniel J. Pautz, Esq. in opposition to the in limine

motions, and Defendants filed a reply affirmation of Matthew D. Gumaer, Esq. on November 27, 2019.

The Court adjourned the trial date indefinitely, based on the unavailability of Plaintiff's expert, but maintained the return date for the in limine motions. It heard oral argument on those motions on December 3, 2019, at which Mr. Gumaer and Mr. Pautz appeared. The Court reserved its decision and sent a letter dated December 9, 2019 to counsel requesting additional information. Mr. Pautz filed supplemental letter briefs on December 20, 2019 and January 3, 2020, and Mr. Gumaer filed supplemental letter briefs on December 23, 2019 and January 6, 2020.

MOTIONS

1. Defendants' in limine motions seek an order precluding Plaintiff from re-litigating facts found and conclusions of law previously reached by the Court in its March 19, 2019 Decision and Order. In furtherance of that preclusion, Defendants ask the Court to charge the jury in advance of opening statements regarding the determinations made by the Court in dismissing the Plaintiff's contract claims.

2. Defendants also seek dismissal of Plaintiff's claimed damages (a) flowing from the loss of a bedroom at 5 Monroe Heights; and (b) for professional legal and architectural services, wages associated with various employees of plaintiff and third-party costs for outside contractors and suppliers for construction at the properties at issue.

3. Defendants seek dismissal of the remaining malpractice claim in its entirety due to Plaintiff's alleged inability to meet its burden of proof at trial. Defendants argue that the scope of Plaintiff's expert disclosure necessarily results in its inability to offer proof on malpractice or causation.

1.The Court denies Defendant's motion with respect to a pre-opening statement charge to the jury. Defendants' request for this charge assumes that the Court has made certain findings of fact, which has not occurred. In deciding Defendant's summary judgment motion, the Court did not make credibility determinations or findings of fact but rather identified material issues of fact or the lack thereof. *See, e.g. Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012). The statements Defendants request pertain to factual determinations that must be made by the jury following the trial in this matter. Plaintiff certainly cannot relitigate the dismissed breach of contract claim, but Plaintiff and Defendants are both tasked with presenting testimony and other evidence at trial to develop their versions of the facts of the alleged malpractice, the remaining claim in the case.

2 (a). Defendant's motion is granted to the extent that Plaintiff may not claim his decision to remove a bedroom from 5 Monroe is due to any reliance upon or malpractice by Defendant. The motion is denied to the extent of precluding Plaintiff from presenting any evidence of damages relating to the 5 Monroe property. Plaintiff now concedes that he decided to remove the ninth bedroom on the second floor of 5 Monroe Heights prior to engaging Defendants for professional services. Plaintiff also concedes he is not intending to present proof on the reduction in appraised value of the property due to the loss of an apartment, hence his not disclosing a trial expert on that issue. Plaintiff nonetheless now asserts that he moved forward to add a bedroom to 5 Monroe in reliance upon Defendants' plans, and that Defendants' malpractice precluded that result, causing damages to Plaintiff.

The Court has found that Plaintiff's malpractice claim survives summary dismissal. It remains the Plaintiff's burden to establish Defendant's malpractice, that the malpractice caused damage, and the measure of those damages.

The measure of damages for architectural malpractice is the lesser of the costs of restoration or repair and the reduction in value of the property. *Prashant Enters. v State*, 228 A.D.2d 144, 147-148 (3d Dept 1996). Reduction in value may be established by evidence of change in market value, or by evidence of reduction in income. *Id.*; *Bethlehem Properties v. Patrick McGovern, Inc.*, 161 Misc. 111, 114-115 (Sup Ct, New York County 1936).

While the measure of damages may be the lesser of two calculations, the Plaintiff need only present evidence on one of the alternatives. *Fisher v Qualico Contr. Corp.*, 98 N.Y.2d 534, 539 (2002). It remains for "defendant to prove that 'a lesser amount than that claimed by [a] plaintiff will sufficiently compensate for the loss.'" *Id.* (citing *Jenkins v Etlinger*, 55 N.Y.2d 35, 39 [1982]).

Plaintiff's concession that it is neither offering proof on any change in appraised value nor alleging the decision to reduce bedroom count had anything to do with Defendant's professional services begs the question whether Plaintiff is effectively conceding that one of the alternative damage measures is zero, precluding recovery on the 5 Monroe claim.

The only thing preventing the Court from summarily making that finding is Plaintiff, at this very late date, in papers filed after the motion argument, effectively restating this claim to be one of detrimental reliance on Defendants. Plaintiff could move to amend his complaint or move to conform the pleadings to the proof presented at the trial. Requiring a motion at this point in this already prolonged case would work a hardship on both parties and seems inefficient and inappropriate. Defendants can bring this point forward in cross-examination or their direct case if counsel so chooses.

In the Court's view, the disputed facts surrounding this claim are most appropriately determined by the fact finder, not the Court on an in limine motion. To the extent that a

clarifying jury charge is needed on this claim for damages, the Court will provide such charge at the appropriate juncture.

2 (b). Defendant's motion to preclude Plaintiff from offering evidence on professional fees, wages and third-party costs is denied. These damages could, in theory, flow from the alleged malpractice and are not only tied to Plaintiff's dismissed breach of contract claim. Expert testimony (and related disclosure) is not mandated to establish the causal link between the malpractice and the professional fees incurred by Plaintiff, as discussed below.

Plaintiff will be required to present competent, primary evidence of these damages. To the extent primary evidence has been destroyed, it may be subject to a spoliation motion. Plaintiff's ability to offer competent, credible evidence of these damages, particularly given the passage of time, may present a substantial challenge. The Court will not allow unduly confusing or vague evidence to cloud the jury's ability to make a determination.

3. Defendants' motion to dismiss the remaining malpractice claim due to the lack of expert disclosure on the issue of causation is denied. The Court has found that Plaintiff's malpractice claim survives summary dismissal. "[E]xpert testimony is not necessary to establish a malpractice claim, including causation, where the relevant facts and legal theories fall within the competence of a lay jury to evaluate." *530 East 89 Corp. v Unger*, 43 N.Y.2d 776, 777 (1977). Moreover, in a professional malpractice case, "[a] proximate cause determination does not require a jury to identify the liable party as the sole cause of the harm; it only asks that the identified cause be a substantial factor in bringing about the injury." *Hydro Investors, Inc. v. Trafalgar Power, Inc.*, 227 F.3d 8, 15 (2d Cir. 2000). Plaintiff's expert's testimony will be limited to that upon which he has opined. Plaintiff's burden to establish causation remains. That burden may be great and challenging, but the Court will not summarily dismiss it at this point.

This Decision constitutes the Order of the Court.

In furtherance of this Decision, it is hereby

ORDERED, that Defendants' motion in limine is partially granted insofar as Plaintiff is precluded at trial from presenting evidence that his decision to remove a bedroom from 5 Monroe Heights was due to any reliance upon or malpractice by Defendants; and it is further

ORDERED, that all other requests for relief in Defendants' in limine motion are denied.

Date: January 31, 202

Hon. David H. Guy
Acting Supreme Court Justice