Wiles v JLC & Assoc.
2020 NY Slip Op 33096(U)
September 22, 2020
Supreme Court, New York County
Docket Number: 150706/2017
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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INDEX NO. 150706/2017

NICOLE WILES and OWEN WILES,

Plaintiffs,

MOTION SEQ. NO. 002

- v -

JLC & ASSOCIATES,

DECISION + ORDER ON MOTION

Defendant.

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JLC & ASSOCIATES,

Third-Party
Index No. 596169/2019

Third-Party Plaintiff,

-against-

STACIA MURPHY,

Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 47, 48, 49, 51, 52, 53, 54, 55, 56, 57, 59, 60, 61, 62, 63, 64

were read on this motion to/for DISMISSAL.

In this medical malpractice action commenced by plaintiffs Nicole Wiles and Owen Wiles, third-party defendant Stacia Murphy ("Murphy") moves, pursuant to CPLR 3211(a)(7), to dismiss the third-party complaint of defendant/third-party plaintiff JLC & Associates ("JLC") for failure to state a cause of action. JLC opposes the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiffs commenced the captioned action against JLC by filing a summons and verified complaint on January 23, 2017. Doc. 1. In the complaint, plaintiffs alleged that, in April 2016, they retained Jean L. Chou, Esq. of JLC to represent them in connection with the purchase of a building, located at 292 West 137th Street in Manhattan ("the building"), from Murphy. Doc. 1 at pars. 2, 4, 5. Pursuant to that representation, JLC negotiated a purchase and sale agreement ("PSA") for the purchase of the building and represented plaintiffs at the closing on August 19, 2016. Doc. 1 at pars. 5, 8; Doc. 30. Although the PSA required, inter alia, that Murphy deliver the building vacant and without any tenants or other occupants, clear of all violations, and with a legal certificate of occupancy ("C of O") for a two-family dwelling, Murphy failed to do so. Doc. 1 at par. 6; Doc. 30 at par. 13.

Although Murphy represented that the building was a two-family dwelling, records of the New York City Department of Buildings ("DOB") reflected that the building was classified as a single-room occupancy ("SRO") building with no valid C of O. Doc. 1 at par. 10. According to plaintiffs, although JLC knew that the building was classified as SRO at the time the contract was signed and at the closing, it failed to apprise them of this fact, as well as the consequences of purchasing an SRO building, such as that tenants of SRO buildings were typically rent-stabilized; that a rent-stabilized tenant in the building ("the RST") was going to vacate "within a reasonable time after the [c]losing"; and that no proper C of O was obtained prior to the closing and that, had they known this information, they would not have purchased the building. Doc. 1 at pars. 11-15, 26, 27, 30, 32, 34. Had JLC performed proper due diligence in connection with the closing, alleged plaintiffs, it would have learned that Murphy had sued the RST in New York City Housing Court ("the Housing Court proceeding"), and that the Housing Court had vacated a stipulation

resolving the proceeding before it based on the RST's argument that she was rent-stabilized based, inter alia, on the building's status as SRO. Doc. 1 at pars. 28-29. Thus, argue plaintiffs, JLC should have obtained an estoppel letter from the RST confirming that she would be vacating the building. Doc. 1 at par. 31.

At the closing, JLC negotiated an escrow agreement with Murphy's attorney which, among other things, set aside $50,000 payable to plaintiffs if Murphy was unable to cure the defects to the C of O by December 31, 2016, which she still has not done. Doc. 1 at pars. 17-18. However, JLC never advised plaintiffs that the $50,000 sum set forth in the escrow agreement might not be sufficient to cover the costs necessary to cure the deficiencies with the C of O, and it never advised them to obtain an estimate of such costs. Doc. 1 at pars. 19-21, 34. JLC also failed to advise plaintiffs that, by signing the escrow agreement, their ability to sue Murphy could be jeopardized. Doc. 1 at par. 22.

Plaintiffs further alleged that the escrow agreement required Murphy to set aside $50,000 payable to them in the event the RST did not vacate the building by September 16, 2016 and that JLC should have known that the said sum would be inadequate to compensate them for the RST's failure to vacate the building. Doc. 1 at pars. 33-34. They asserted that the RST failed to vacate the building by September 16, 2016 and that, on or about September 19, 2016, JLC advised them that if a 30-day notice had been sent to the RST, an eviction proceeding could have been commenced against her. Doc. 1 at par. 37. Plaintiffs alleged that this advice was incorrect since the RST was rent-stabilized and that, had they known that the RST was protected by the Rent Stabilization Law, they would never have entered into the contract of sale or the escrow agreement and that, as a result of the RST's failure to vacate, they have lost rental income. Doc. 1 at pars. 38-40.

Further, plaintiffs claimed that, pursuant to paragraph 13(d) of the PSA, Murphy falsely represented that she had no knowledge of any violations at the building and that, given a title report ordered by JLC in April 2016, it should have known that there were numerous violations issued against the building by the New York City Department of Housing Preservation and Development ("HPD") in March 2016 which had not been resolved by the time the PSA was executed. Doc. 1 at pars. 42-44, 48. Plaintiffs asserted that: JLC failed to investigate whether such violations existed and/or never disclosed the existence of said violations to them; JLC did not provide them with a copy of the title report until after the closing; the violations could result in legal action against them; the violations did result in legal action against them by HPD on behalf of the RST; and that they would never have entered into the PSA or escrow agreement had they known about the violations. Doc. 1 at pars. 45-53.

Plaintiffs further claimed that JLC failed to include in the escrow agreement a provision holding them harmless from any "claim, action, liability, loss, damage or suit, including reasonable attorney fees, cost or disbursements incurred as a result of [said agreement] or any of Seller's obligations hereunder", which, they maintained, was a material term thereto. Doc. 1 at par. 55.

Further, plaintiffs alleged that, at the closing, JLC improperly represented their interests as well as the interests of their lender, Citizens Bank, N.A. ("CBNA") without obtaining a waiver of a potential conflict of interest. Doc. 1 at pars. 60-69. They claim that "[a]pproximately two hours before the [c]losing, [CBNA] informed [plaintiffs] that due to a miscalculation, [their] interest rate would be 0.125% higher unless they waited to close on their prior residence before purchasing the [b]uilding", but that JLC nevertheless recommended that the closing proceed at the higher interest rate. Doc. 1 at par. 69.

In light of the foregoing, plaintiffs claimed that JLC committed legal malpractice since it failed to exercise the ordinary care, skill and diligence that would reasonably be expected of a real estate attorney in New York City representing the purchaser of a residential building, thereby resulting in damages. Doc. 1 at pars. 23, 35, 41, 54, 72, 73 and pp. 10-11. Specifically, plaintiffs alleged that, "[b]y negligently failing to discover and disclose material information relating to the [b]uilding that was readily available, by failing to advise [plaintiffs] of the consequences of [the RST's] rent-stabilized status, and by failing to negotiate fair terms on behalf of [plaintiffs] for the [e]scrow [a]greement, JLC breached its obligation to provide competent legal services and representation to the [plaintiffs]." Doc. 1 at par. 72.

JLC joined issue by its answer filed March 3, 2017, in which it denied all substantive allegations of wrongdoing and asserted several affirmative defenses. Doc. 5.

By stipulation filed March 22, 2018, the captioned action was consolidated, for the purpose of joint discovery only, with the matter of *Nicole Wiles and Owen Wiles v Stacia Murphy*, pending in this Court under Index Number 159690/16. Doc. 15.

On December 26, 2019, JLC commenced a third-party action against Murphy in the captioned action. Doc. 29. In its third-party complaint, JLC alleged that, in the PSA, Murphy represented, inter alia, that:

> 1) there were "no tenants, former tenants or third parties currently claiming any right to occupy or possesses any portion of the [building], claiming that their former right to occupy or possesses any portion of the [building] was illegally terminated, or that they were illegally evicted from the [building]" (Doc. 30, rider to PSA, at par. 5[g]);
>
> 2) "[n]o tenant or former tenant has asserted any claim of which [Murphy] has written notice that could adversely affect the right of [Murphy]" (Doc. 30, Rider to PSA, at par. 5[h]);
>
> 3) Murphy had no knowledge of any pending violation(s) against the building (Doc. 30 at par. 13[d]);

> 4) that Murphy was to deliver to plaintiffs a C of O authorizing use of the building as a 2-family dwelling (Doc. 30 at par. 13[h]);
>
> 5) that Murphy had no knowledge of any actual or potential suits or proceedings affecting the building (Doc. 30 at par. 13[d]); and
>
> 6) that there was no action or proceeding pending before any governmental agency in connection with the building. Doc. 30, rider to PSA, at par. 5(e).

Doc. 29 at par. 12.

JLC alleged that Murphy knew that these representations were false, that she knew plaintiffs would rely on them, and that she made the same in order to induce plaintiffs to enter into the PSA and to induce JLC to advise plaintiffs to enter into the same. Doc. 29 at pars. 16, 17. Specifically, JLC claimed that Murphy knew that: 1) the RST claimed the right to remain in the building pursuant to the Rent Stabilization Code ("RSC"); 2) the RST had asserted this right in the Housing Court proceeding commenced in 2014; 3) the RST obtained a vacatur of a stipulation of settlement in the Housing Court proceeding pursuant to which stipulation the RST had agreed to vacate the building; 4) the DOB refused to approve Murphy's plan to convert the building to a two-family dwelling and that the HPD violations against the building prevented her from obtaining a C of O for a two-family dwelling. Doc. 29 at par. 18. JLC further claimed that Murphy falsely stated under oath that she believed that the Housing Court proceeding was still pending. Doc. 29 at par. 18.

JLC alleged that it and plaintiffs justifiably relied on Murphy's representations, would not have entered into the PSA if they knew that they were false, and that they suffered damages as a result of such reliance. Doc. 29 at pars. 19, 20. As a first cause of action against Murphy, JLC claimed contribution based on fraud. Doc. 29 at pars. 22-24. As a second cause of action against Murphy, JLC alleged contribution based on negligent representation. Doc. 29 at pars. 26-30.

Murphy now moves, pursuant to CPLR 3211(a)(7), to dismiss the third-party complaint on the ground that it fails to state a cause of action. Doc. 38. In support of the motion, Murphy argues that the third-party complaint must be dismissed against her because the two contribution claims it contains can only be asserted in actions involving damages for personal injury, injury to property, or wrongful death, none of which are asserted herein. Additionally, argues Murphy, since JLC was in a position to prevent the damages allegedly sustained by plaintiffs and failed to do so, its actions were the sole proximate cause of the damages claimed.

In opposition, JLC argues that it has properly pleaded claims against Murphy for contribution. Additionally, JLC asserts that it has properly pleaded that Murphy's fraud and/or negligent misrepresentation were the proximate cause(s) of plaintiffs' damages.

In reply, Murphy argues that no contribution claim can be brought by JLC since plaintiffs are seeking damages against JLC based on a breach of contract theory, i.e., a breach of the retainer agreement between plaintiffs and JLC.

LEGAL CONCLUSIONS:

In determining a motion to dismiss pursuant to CPLR 3211, "the pleading is to be afforded a liberal construction. [The court is to] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994) (internal citations omitted). Here, as noted above, the two claims asserted against Murphy in the third-party complaint are contribution based on fraud and contribution based on negligent misrepresentation. Doc. 29. Contribution is governed by CPLR 1401, which provides, in pertinent part, that:

> two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.

Although Murphy claims that no contribution claim may lie here, where there has been no allegation of personal injury, injury to property, or wrongful death, this contention is belied by longstanding legal precedent since "it is settled that any tortious act (other than personal injury), including conversion, resulting in damage constitutes an 'injury to property' within the meaning of CPLR 1401 (*see Lippes v Atlantic Bank*, 69 A.D.2d 127, 139-141 (1st Dept 1979)." *Masterwear Corp. v Bernard*, 3 AD3d 305, 307 (1st Dept 2004).

In asserting that Murphy's motion must be denied, JLC correctly relies on *Comi v Breslin & Breslin*, 257 AD2d 754 (3d Dep't 1999), in which the defendant attorneys in a legal malpractice case were entitled to seek contribution from parties whose fraud they had allegedly failed to discover during their representation of plaintiff in connection with the purchase of a business. In its decision, the Appellate Division held, inter alia, that:

> Initially, we reject the [third-party defendants'] contentions that there is no right of contribution against adverse parties in a legal malpractice action and that the alleged injury caused by them is separate and distinct from the alleged injury caused by defendants, and therefore contribution is not allowable. A contribution claim may be interposed when two or more parties are alleged to be liable for damages for the same injury (*see,* CPLR 1401). "[C]ontribution is available 'whether or not the culpable parties are allegedly liable for the injury under the same or different theories' " (*Raquet v Braun,* 90 NY2d 177, 183 [1997], quoting *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.,* 71 NY2d 599, 603 [1988]). "The critical requirement for apportionment under … CPLR article 14 is that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought" (*id.,* at 603).

> Here, plaintiff claims that [defendant attorneys] were negligent in failing to discover, and protect him against, the [third-party defendants'] misrepresentations. [Defendant attorneys] claim that any injury that may have been caused to plaintiff was due, at least in part, to the alleged fraudulent concealment by the [third-party defendants]. Thus, although different theories are offered as to the cause of injury (*see, Raquet v Braun,* 90 NY2d 177, 183 [1997]), it is plausible that defendants' and the [third-party defendants'] actions and/or omissions, together, may have contributed to plaintiff's alleged single injury (*see, Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp., supra,* at 603). Accordingly, defendants are entitled to seek contribution.

Comi v Breslin & Breslin, 257 AD2d at 756.

Tellingly, Murphy does not attempt to distinguish *Comi*, and does not even mention it, in her reply papers.

As noted above, plaintiffs allege that their damages were caused by JLC's legal malpractice insofar as JLC "negligently fail[ed] to discover and disclose material information relating to the [b]uilding that was readily available, by failing to advise [plaintiffs] of the consequences of [the RST's] rent-stabilized status, and by failing to negotiate fair terms on behalf of [the plaintiffs] for the [e]scrow [a]greement, [thereby breaching] its obligation to provide competent legal services and representation to [plaintiffs]." Doc. 1 at par. 72. Also noted above is that JLC claims in its third-party complaint that any damages sustained by plaintiffs were caused in whole or in part by the fraud and negligent misrepresentations by Murphy. Doc. 29 at pars. 22-24, 26-30. Since JLC clearly alleged that "the breach of duty by [Murphy had] a part in causing or augmenting the injury for which contribution is sought" (*Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.,* 71 NY2d at 603), Murphy's motion to dismiss the contribution claims must be denied.

Murphy's claim that JLC was solely liable for plaintiffs' damages because it was in a position to prevent said damages but failed to do so is specious. To accept this argument would

be to allow Murphy to avoid all potential liability despite committing what may have been intentionally fraudulent acts.

Finally, this Court declines to consider Murphy's argument that no contribution claim can be brought against her by JLC since plaintiffs are seeking damages against JLC based on a breach of contract theory, i.e., a breach of the retainer agreement between plaintiffs and JLC. Initially, this argument is improperly raised for the first time in Murphy's reply. *See Anderson v Pena*, 122 AD3d 484 (1st Dept 2014). In any event, plaintiffs' complaint contains no claim for breach of contract against JLC and is devoid of any mention of the retainer agreement. Doc. 1.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by third-party defendant Stacia Murphy seeking to dismiss the third-party complaint of defendant/third-party plaintiff JLC & Associates for failure to state a cause of action is denied; and it is further

ORDERED that, within 10 days after this order is filed with NYSCEF, counsel for JLC is to serve this order, with notice of entry, on all parties to this action, as well as on all parties in the matter of *Nicole Wiles and Owen Wiles v Stacia Murphy*, pending in this Court under Index Number 159690/16; and it is further

ORDERED that, if the parties to this action and the matter of *Nicole Wiles and Owen Wiles v Stacia Murphy* can agree on a discovery schedule, they are directed to enter into a so-ordered discovery stipulation prior to October 13, 2020, the date of the previously scheduled compliance conference, leaving the dates for the next compliance conference and the deadline for filing the note of issue blank, and emailing the same to Law Clerk Jonathan Judd at jjudd@nycourts.gov to be so-ordered by the court; and it is further

ORDERED that, if counsel for the parties to this action and in the matter of *Nicole Wiles and Owen Wiles v Stacia Murphy* cannot stipulate to a discovery schedule, then they are to participate in a telephonic compliance conference with Mr. Judd on October 13, 2020 at 12 noon (in which case counsel are to provide the court with a dial-in number and access code for the call OR are to have all parties on the line and then patch the court in at (646) 386-5655); and it is further

ORDERED that this constitutes the decision and order of the court.

9/22/2020
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE