

**Orlando v Robinson Brog Leinwand Greene
Genovese & Gluck, P.C.**

2021 NY Slip Op 32235(U)

November 9, 2021

Supreme Court, New York County

Docket Number: Index No. 155048/2020

Judge: Phillip Hom

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PHILLIP HOM PART 02M

Justice

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PATRICIA ORLANDO, DARREN ORLANDO

Plaintiff,

- v -

ROBINSON BROG LEINWAND GREENE GENOVESE &
GLUCK, P.C., GALLET DREYER & BERKEY, LLP,

Defendant.

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INDEX NO. 155048/2020

MOTION DATE July 2, 2021

MOTION SEQ. NO. 003 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 125, 129, 132

were read on this motion to/for REARGUMENT/RECONSIDERATION.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 116, 117, 118, 119, 120, 121, 122, 123, 124, 126, 130, 131

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER.

In the interest of justice and judicial economy, Motions Sequence Number 3 and 4 are considered together for the purpose of a decision.

Upon the foregoing documents, it is ORDERED that Motion Sequence Number 3 by Defendant Gallet Dreyer & Berkey, LLP (“Gallet LLP”) for an order granting leave to reargue its pre-answer motion to dismiss (Sequence Number 1) which denied in part its motion to dismiss is granted.

Upon reargument, it is ORDERED that Motion Sequence Number 1 to dismiss the Complaint is granted and the Complaint is dismissed, with prejudice.

It is further ORDERED that Motion Sequence Number 4 by Defendant Robinson Brog Leinwand Greene Genovese & Gluck, P.C. (“Robinson PC”) for an order granting leave to reargue its pre-answer motion to dismiss (Sequence Number 2) is granted.

Upon reargument it is further ORDERED that Motion Sequence Number 2 to dismiss the Complaint is granted.

Background

On December 22, 2005, Plaintiff Patricia Orlando bought a condominium Unit 1E Rear (“Orlando Condo”) at 104 Charlton Street, New York, NY (NYSCEF Doc. No. 1 ¶ 19). Gallett LLP did not represent her in that transaction. On May 29, 2015 Patricia Orlando conveyed title to the Orlando Condo from herself to Darren Orlando and Patricia Orlando (the “Orlandos”) as husband and wife and recorded the deed with the Office of the New York City Register on June 11, 2015 (*Id.* ¶ 20). The Orlandos claim that the Orlando Condo includes 1195 square feet of cellar space which they renovated and connected that space to the rest of the Orlando Condo with an open staircase (“Basement Space”) (*Id.* ¶ 55 and 80).

On August 14, 2013, P360 Spaces LLC (“P360”) bought Unit 1 E Front in the Condominium (“360 Condo”) and recorded the deed with the Office of the New York City Register on September 9, 2013 (*Id.* ¶22). According to the April 17, 2003 Declaration of Condominium (“Declaration”) and Offering Plan, the Basement Space was part of Unit 1 E Front. P360 sued the Orlandos for possession and money damages due to the Orlandos’ use and conversion of the Basement Space under Index Number 156534/2015 *P360 Spaces LLC v Patricia Orlando et al* (NYSCEF Doc. No. 10). The Orlandos hired Co-Defendant Robinson PC to represent them in the underlying action (NYSCEF Doc. No. 1 ¶57). The Orlandos also counterclaimed in the underlying action seeking a declaration that they were the owners of the Basement Space or alternatively for unjust enrichment for the renovations made (NYSCEF Doc. No. 13 ¶70-78).

P360 moved for summary judgment in the underlying action stating that the Declaration and the Offering Plan conclusively establish that the Basement Space belongs to the P360 Condo. On April 11, 2017, Hon Arthur F. Engoron, JSC denied the motion as premature, warranting further discovery (NYSCEF Doc. No. 16). On May 4, 2017, P360 noticed an appeal (NYSCEF Doc. No. 1 ¶ 75) and the Orlandos retained Gallett LLP to handle the appeal. The record on appeal did not include any tax maps (NYSCEF Doc. Nos 14-16). The Appellate Division unanimously modified Judge Engoron’s decision holding that “the Declaration and Offering Plan are unambiguous and clearly state that the disputed basement space was an element of the front unit owned by [P 360 SPACES]” (NYSCEF Doc. No. 18).

The Orlandos, as defendants in the underlying action, moved to reargue the Appellate Division’s decision (NYSCEF Doc. No. 19) and for leave to appeal to the Court of Appeals. Both branches of their motions were denied (NYSCEF Doc. No. 39). In accordance with the Appellate Division ruling, Justice Engoron directed the Clerk to enter judgment in P360’s favor and the Orlandos moved under §5015(a)(2) to vacate the judgment under Index Number 156534/2015, which was denied.

Justice Engoron held that “the tax maps would not have changed the Appellate Division holding...[r]ather the Appellate Division ruling apparently regarded the ‘unambiguous and clear’ Declaration and Offering plan to be definitive and positive. One more ambiguity, that the tax maps allegedly create, presumably would not have changed the Appellate Division’s ruling.” (NYSCEF Doc. No. 103 p. 2).

Parenthetically, the underlying action subsequently settled and the judgment was vacated on February 11, 2021 (NYSCEF Doc. Nos. 148-152 under Index Number 156534/2015).

Gallett LLP now moves under Sequence Number 3 to dismiss the Complaint against it for breach of contract and legal malpractice. Gallett LLP agrees with the Court’s dismissal of the

breach of contract claim as duplicative of the legal malpractice claim (NYSCEF Doc. No. 101 page 10, footnote 1).

Reargument

A motion for reargument allows a party to demonstrate that the court overlooked or misapprehended the law or facts pertinent to the original motion (*See* CPLR 2221[d][2]; *see also Delgrosso v 1325 Limited Partnership*, 306 AD2d 241 [2d Dept. 2003]; *Foley v Roche*, 68 AD2d 558 [1st Dept. 1979] *app denied by* 56 NY2d 507 [1982]). Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided or to present arguments different from those originally presented. (*See Gellert & Rodner v Gem Community Management, Inc.*, 20 AD3d 388 [2d Dept. 2005]; *see also McGill v Goldman*, 261 AD2d 593 [2d Dept. 1999]; *Foley v Roche, supra*).

Upon reargument, Gallett LLP's motion to dismiss is granted. The Court finds that it misapplied the law relative to the cause of action for legal malpractice. Upon reargument, this Court recalls and vacates the portion of its prior Order denying the branch of the motion dismissing the cause of action for legal malpractice and in its stead finds as follows:

“An action for legal malpractice requires proof of three elements: (1) that the attorney was negligent; (2) that such negligence was a proximate cause of plaintiff's losses; and (3) proof of actual damages” (*Global Bus. Inst. v Rivvkin Radler LLP*, 101 AD3d 651, 651 [1st Dept 2012] *citation omitted*). Courts consistently dismiss legal malpractice claims when a plaintiff fails to plead facts supporting causation (*Perkins v Norwick*, 257 AD2d 48, 51 [1st Dept 1999]).

In this case, the Orlandos cannot establish causation. The “but for” Gallett LLP's malpractice the court would have ruled in the Orlandos favor cannot be established given Justice

Engoron's holding in the underlying action. Justice Engoron found that even if the tax maps were considered it is of no consequence because the Appellate Division held that the "unambiguous and clear Declaration and Offering plan to be definitive and dispositive" on the issue of ownership of the Basement Area. Gallett LLP was also appellate counsel and could not have used the tax maps to defend the underlying action because the tax maps were not part of the appellate record. Since the Orlandos cannot establish that "but for" Gallett LLP's negligence, the disposition in the underlying action would have been different, they fail to establish an essential element of a legal malpractice claim.

Accordingly, Motion Sequence Number 3 for leave to reargue is granted and upon reargument, the remaining branch of Gallett LLP's motion to dismiss the cause of action for legal malpractice is granted and the complaint against Gallett LLP is dismissed in its entirety.

Motion Sequence Number 4

Defendant Robinson PC moves for reargument on that portion of Motion Sequence Number 2 denying Robinson PC's motion to dismiss the first cause of action for legal malpractice. This Court grants Robinson PC leave to reargue.

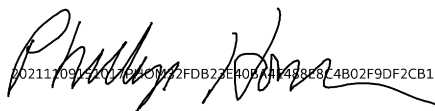
Upon reargument, this Court finds that it misapplied the law in Motion Sequence Number 2 and consequently grants the portion of Motion Sequence Number 2 seeking a dismissal of the cause of action for legal malpractice. As stated above, the Appellate Division held that the condominium documents were unambiguous and no other evidence such as tax maps could vary the interpretation of such documentation. Moreover, Judge Engoron found in the underlying action "that the Tax Maps would not have changed the Appellate Division's holding." These prior decisions held that the condominium documents are documentary evidence that prevented

the Orlandos from proving their cause of action in legal malpractice. CPLR §3211(a)(1) warrants dismissal of a cause of action where the court finds that the documentary evidence presented conclusively establishes a defense to the asserted claims as a matter of law (*150 Broadway N.Y. Assocs. L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]). Such is the case at bar.

Conclusion

In accordance with the foregoing, it is ORDERED that Gallett LLP’s Motion Sequence Number 3 for an order granting reargument is granted. Upon reargument, it is ORDERED that the cause of action for legal malpractice is dismissed and the Complaint against Gallett LLP is dismissed in its entirety.

Similarly, it is ORDERED that Robinson PC’s Motion Sequence Number 4 for an order granting reargument is granted. Upon reargument, it is ORDERED that the cause of action for legal malpractice is dismissed and the Complaint against Robinson PC is dismissed in its entirety.



11/9/2021
DATE

PHILLIP HOM, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: