

Ressler v Farrell Fritz, P.C.

2022 NY Slip Op 31706(U)

May 25, 2022

Supreme Court, New York County

Docket Number: Index No. 156946/2020

Judge: David B. Cohen

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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. DAVID B. COHEN **PART** **58**

Justice

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INDEX NO. 156946/2020

BRUCE J. RESSLER, ELLEN R. WERTHER a/k/a ELLEN
WERTHER RESSLER,

Plaintiffs,

MOTION SEQ. NO. 001

- v -

FARRELL FRITZ, P.C., ANTHONY S. GUARDINO, and
PHILIP A. BUTLER,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY
DEMAND/FROM TRIAL CALENDAR.

This legal malpractice action arises from legal services provided to plaintiffs Bruce J. Ressler (Ressler) and Ellen R. Werther a/k/a Ellen Werther Ressler (together, plaintiffs) by defendants Farrell Fritz, P.C. (Farrell Fritz), Anthony S. Guardino (Guardino) and Philip A. Butler (Butler) (collectively, defendants). In motion sequence no. 001, defendants move, pursuant to CPLR 3402 and Uniform Rules for Trial Courts (22 NYCRR) § 202.21 (e), to vacate the note of issue and strike the action from the trial calendar. Plaintiffs cross-move for leave to amend the complaint under CPLR 3025 and for partial summary judgment on the issue of defendants' negligence under CPLR 3212.

FACTUAL BACKGROUND

Plaintiffs own residential real property located at 201 Pennant Walk, Saltaire, New York 11706 (the Property) (NYSCEF Doc No. 23, Kimberly Johnson Glenn [Glenn] affirmation, Ex 1, ¶ 12). Nonparty Village People, LLC (Village People) owns four parcels of land located at 201

and 203 Richards Walk and 200 and 202 Pennant Walk that abut the Property (NYCSEF Doc No. 40, Ressler aff, Ex 4 at 107; NYSCEF Doc No. 36, Ressler aff, ¶ 4). On August 28, 2017, the New York State Department of Environmental Conservation (the DEC) issued four tidal wetlands permits to Village People to develop the parcels (NYSCEF Doc No. 40 at 12). Plaintiffs claimed that the proposed development would substantially harm their Property (NYSCEF Doc No. 36, ¶ 4).

On September 19, 2018, plaintiffs executed an engagement letter (the Engagement Letter) retaining Farrell Fritz to represent them “in connection with the commencement of an action against Village People LLC, and its principal, John Zaccaro, Jr. asserting possible adverse possession and other claims relating to real property located at Pennant Walk” (NYSCEF Doc No. 39, Ressler aff, Ex 3 at 1; NYSCEF Doc No. 71, defendants’ counterstatement of material facts, ¶¶ 6-7). Guardino is a partner and Butler is an attorney at Farrell Fritz (NYSCEF Doc No. 71, ¶¶ 3-4).

On September 25, 2018, Farrell Fritz, on behalf of plaintiffs, filed a summons with notice in an action captioned *Ressler v Village People, LLC*, Supreme Court, Suffolk County, Index No. 618618/2018 (the VP Action) (*id.*, ¶ 9).

That fall, defendants wrote four letters to DEC regarding tidal wetlands permit nos. 1-4728-03511, 1-4728-05497, 1-4728-05498 and 1-4728-05499, which allowed Village People to construct four single-family residences on its properties (*id.*, ¶ 10; NYSCEF Doc No. 40 at 103, 107, 112 and 135). In the letter dated October 1, 2018, Guardino expressed plaintiffs’ objection to the permits and asked DEC to suspend the permits and related activities until a further review could be made (NYSCEF Doc No. 40 at 103 and 105).

In January 2019, defendants learned that Village People had applied to DEC to modify the permits issued for the tidal wetlands immediately to the west of the Property (NYSCEF Doc No. 71, ¶ 13). On May 3, 2019, DEC issued a permit modification (the 2019 Modification) for permit no. 1-4728-05497/00001 to allow Village People to combine two lots into a single lot for the construction of one single-family dwelling and discontinued permit no. 1-4728-05498/00001 (NYSCEF Doc No. 81, *Ressler aff*, Ex 5).

On July 12, 2019, defendants, on behalf of plaintiffs, commenced a hybrid Article 78 proceeding captioned *Ressler v New York State Dept. of Env'tl. Conservation, et al.*, Supreme Court, Suffolk County, Index No. 3668/2019 (the DEC Action) (together with the VP Action, the Actions) related to the 2019 Modification (NYSCEF Doc No. 71, ¶ 17). The petition sought to: (1) vacate, annul and reverse a permit modification dated May 3, 2019; (2) declare the permit modification null and void; and (3) enjoin the Village of Saltaire from processing, hearing or deciding any pending or future application seeking to develop the properties that were the subject of the proceeding (NYSCEF Doc No. 40 at 4-5 and 9).

DEC moved to dismiss the petition as untimely under Environmental Conservation Law (ECL) § 25-0404, which provides that a person aggrieved by DEC's issuance, denial, suspension or revocation of a tidal wetlands permit may seek judicial review within 30 days of the decision. DEC argued that it had made information pertaining to the 2019 Modification available on the DEC Permit Applications (DART) Search portal, where it publicly posts detailed information on applications for tidal wetlands permits (NYSCEF Doc No. 46, *Ressler aff*, Ex 10 at 3). DEC posted notice that the 2019 Modification had been granted on the DART system on May 9, 2019 (*id.* at 4). DEC also argued that it required permit applicants to conspicuously post a permit sign at the site (*id.*). Village People, which had also moved for dismissal, claimed it had posted

copies of the original permit and the 2019 Modification on the front gate and a tree in the walkway at its property (NYSCEF Doc No. 57, Ressler aff, Ex 21 at 4). In a decision and order dated January 29, 2020, the Supreme Court, Suffolk County (Santorelli, J.) granted the motions to dismiss (*id.* at 5). A motion for leave to reargue was denied on August 25, 2020 (NYSCEF Doc No. 23, ¶ 21).

Meanwhile, on February 24, 2020, Village People filed an application to modify permit no. 1-4728-05497/00001 a second time (NYSCEF Doc No. 59, Ressler aff, Ex 23). On May 8, 2020, DEC issued a second modification permitting Village People to “[r]evis[e] and relocate the proposed dwelling, the septic system, and pool towards the south” (the 2020 Modification) (NYSCEF Doc No. 60, Ressler aff, Ex 24). Plaintiffs allege defendants never notified them of this application and never challenged the modification by bringing an Article 78 proceeding (NYSCEF Doc No. 36, ¶¶ 7 and 35).

In June 2020, defendants moved to withdraw as plaintiffs’ counsel in the VP Action and the DEC Action (NYSCEF Doc No. 71, ¶ 30; NYSCEF Doc No. 66, order to show cause signed June 16, 2020, in the VP Action). At that time, discovery was ongoing in the VP Action and an appeal had been filed in the DEC Action (NYSCEF Doc No. 23, ¶ 24). The Supreme Court, Suffolk County (Santorelli, J.) granted defendants’ motions (NYSCEF Doc No. 58, Ressler aff, Ex 22; NYSCEF Doc No. 71, July 2, 2020 decision and order) in the VP Action. Defendants also withdrew as counsel on the appeal in the DEC Action (NYSCEF Doc No. 23, ¶ 25).

Plaintiffs claim they have paid defendants \$60,259.77 for their services, and they have refused to pay the additional \$57,454.39 demanded by defendants (*id.*, ¶¶ 28 and 30). Plaintiffs allege defendants have refused to turn over the case file and have wrongfully asserted a retaining and/or charging lien (*id.*, ¶¶ 31-32).

The plaintiffs assert four causes of action: (1) legal malpractice and negligence; (2) breach of fiduciary duty; (3) unjust enrichment; and (4) recovery of the case file. Plaintiffs seek \$5 million in damages, an order directing defendants to disgorge the monies paid to them by plaintiffs and an order directing defendants to turn over the case file. On March 9, 2021, plaintiffs filed a request for judicial intervention, a note of issue, a certificate of readiness and an affirmation of compliance and served the same the next day (NYSCEF Doc Nos. 14-17).

Defendants now move to vacate the note of issue on the ground that discovery is incomplete. Plaintiffs oppose, cross-move to amend the complaint, and seek partial summary judgment on the issue of defendants' negligence for failing to timely seek judicial review of the 2019 and 2020 Modifications.

DISCUSSION

A. The Motion to Vacate the Note of Issue

22 NYCRR 202.21 (e) provides, in relevant part, that:

“Within 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect.”

“Where a party timely moves to vacate a note of issue, it need show only that ‘a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of ... section [202.21] in some material respect’” (*Vargas v Villa Josefa Realty Corp.*, 28 AD3d 389, 390 [1st Dept 2006], quoting 22 NYCRR 202.21[e]).

Here, defendants have timely moved to vacate the note of issue within 20 days after it was served, and they have shown that the certificate of readiness and affirmation of compliance

erroneously state that discovery is complete (*see Sky Coverage, Inc. v Alwex, Inc.*, 202 AD3d 454, 454 [1st Dept 2022]; *Ruiz v Gramercy Owners Corp.*, 182d AD3d 471, 471 [1st Dept 2020]). The certificate of readiness states that “[t]here are no outstanding requests for discovery” (NYSCEF Doc No. 28, Johnson affirmation, Ex 6 at 2), and the affirmation states that “[d]efendants have not made any discovery requests” (*id.* at 3). However, defendants served plaintiffs with two notices dated December 22, 2020 seeking to take their depositions (NYSCEF Doc No. 25, Johnson affirmation, Ex 3). Although plaintiffs contend discovery on the issue of defendants’ negligence is unnecessary, they do not deny that their depositions have not taken place. Accordingly, defendants’ motion is granted, the note of issue vacated, and the action is stricken from the trial calendar.

B. The Cross Motion to Amend

Plaintiffs seek to amend their complaint to plead additional facts related to the 2020 Modification. Plaintiffs allege that, had defendants monitored DART, they would have learned of Village People’s application for, and DEC’s approval of, the 2020 Modification and could have commenced an Article 78 proceeding. However, claim plaintiffs, defendants failed to do so and the time to seek judicial review has long since expired.

Pursuant to CPLR 3025 (b), leave to amend the pleadings “shall be freely given upon such terms as may be just.” Leave to amend may be denied “only if there is ‘prejudice or surprise resulting directly from the delay’ or if the proposed amendment ‘is palpably improper or insufficient as a matter of law’” (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012] [citations omitted]). The motion must be supported by evidence similar to that submitted on a motion for summary judgment (*see Velarde v City of New York*, 149 AD3d 457, 457 [1st Dept 2017]). The party opposing the amendment “must overcome a presumption of validity in the moving party’s

favor, and demonstrate that the facts alleged and relied upon in the moving papers are obviously unreliable or insufficient to support the amendment” (*Peach Parking Corp. v 346 W. 40th St., LLC*, 42 AD3d 82, 86 [1st Dept 2007]).

The branch of the cross motion seeking leave to amend is granted since defendants have failed to demonstrate any prejudice or surprise as a result of the delay. Plaintiffs merely seek to add additional facts to buttress their claims and the proposed amendments are not palpably improper or insufficient as a matter of law. To the extent defendants contend that the amended complaint fails to plead specific facts regarding proximate cause, the amendments do not modify plaintiffs’ allegation of “but for” causation in any material way (NYSCEF Doc No. 35, Ressler aff, Ex 1, ¶ 49). Moreover, defendants never moved for dismissal based on the sufficiency the original complaint.

C. The Cross Motion for Summary Judgment

Plaintiffs also move for partial summary judgment on the issue of defendants’ negligence in failing to timely file Article 78 proceedings challenging the 2019 and 2020 Modifications. Plaintiffs argue that defendants should have known about DART since they had held themselves out as experts in matters involving the DEC. Plaintiffs allege that defendants failed to consult and monitor DART for information about Village People’s permit modification applications and that, had they done so, defendants would have learned when the DEC granted the modifications and could have moved for judicial review within the 30-day period fixed in ECL § 25-0404.

CPLR 3212 (e) provides that “summary judgment may be granted as to one or more causes of action, or part thereof, in favor of any one or more parties, to the extent warranted, on such terms as may be just.” A party moving for summary judgment “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]). The “facts must be viewed in the light most favorable to the non-moving party” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the moving party has met this prima facie burden, the burden shifts to the non-moving party to furnish evidence in admissible form sufficient to raise a material issue of fact (*Alvarez*, 68 NY2d at 324). The moving party’s “[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*id.*).

Legal malpractice concerns whether an attorney “failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession” (*AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]). A cause of action for legal malpractice requires the plaintiff to plead and prove the attorney’s negligence, that the attorney’s negligence was the proximate cause of plaintiff’s damages, and actual damages (*Federal Ins. Co. v North Am. Specialty Ins. Co.*, 47 AD3d 52, 59 [1st Dept 2007]). To establish proximate cause, the “plaintiff must demonstrate that ‘but for’ the attorney’s negligence, plaintiff would either have prevailed in the matter at issue, or would not have sustained any ‘ascertainable damages’” (*Leder v Spiegel*, 31 AD3d 266, 268 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied sub nom. Spiegel v Rowland*, 522 US 1257 [2008] [citations omitted]).

It is well settled that “[a]n attorney may not be held liable for failing to act outside the scope of the retainer” (*Genesis Merchant Partners, L.P. v Gilbride, Tusa, Last & Spellane, LLC*, 157 AD3d 479, 482 [1st Dept 2018], citing *Ambase Corp. v Davis Polk & Wardell*, 8 NY3d 428 [2007]). Here, plaintiffs have not dispelled all questions of material fact as to whether they had engaged defendants to monitor DART for changes to the four tidal wetlands permits issued to Village People and to commence Article 78 proceedings challenging potential modifications to

those permits. In defining the scope of defendants' representation, the Engagement Letter states that "[Farrell Fritz] will represent you in connection with the commencement of an action against Village People LLC, and its principal, John Zaccaro, Jr. asserting possible adverse possession and other claims relating to real property located at Pennant Walk" (NYSCEF Doc No. 39 at 1). The letter further states that defendants shall provide legal services "in connection with potential litigation involving title to real property located in Saltaire" (*id.*). While the phrase "and other claims" is ambiguous, the Engagement Letter does not mention the DEC, the permits issued to Village People or the commencement of any proceeding to challenge future modifications or amendments to those permits. Further, the DEC issued the permits to Village People in 2017, and the time within which to challenge that determination expired long before plaintiffs executed the Engagement Letter. Plaintiffs have not shown whether the Engagement Letter was ever modified to expand the scope of defendants' obligations to include continually monitoring the four permits issued to Village People and authorizing defendants to commence legal proceedings if DEC were to modify those permits. Given plaintiffs' failure to meet their prima facie burden, the branch of the motion seeking partial summary judgment on the issue of defendants' negligence is denied without regard to the sufficiency of defendants' opposition.

Accordingly, it is hereby:

ORDERED that the motion by defendants Farrell Fritz, P.C., Anthony S. Guardino and Philip A. Butler to vacate the note of issue (motion sequence no. 001) is granted, and the note of issue (NYSCEF Doc No. 14) is hereby vacated and the case is stricken from the trial calendar; and it is further

ORDERED that, within 15 days from the entry of this order, movant shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the General Clerk's Office (60

Centre Street, Room 119), who is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the court; and it is further

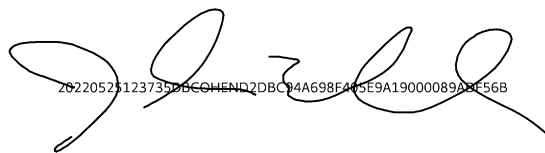
ORDERED that such upon the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the branch of the cross motion by plaintiffs Bruce J. Ressler and Ellen R. Werther a/k/a Ellen Werther Ressler for leave to amend the complaint herein is granted, and the amended complaint in the proposed form annexed to the moving papers (NYSCEF Doc No. 35) shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that defendants Farrell Fritz, P.C., Anthony S. Guardino and Philip A. Butler shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that the branch of the cross motion by plaintiffs Bruce J. Ressler and Ellen R. Werther a/k/a Ellen Werther Ressler seeking partial summary judgment on the issue of defendants’ negligence is denied.

5/25/2022
DATE


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DAVID B. COHEN, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE