Abatiell Associates v. Nicholas, No. 394-6-05 Rdcv (Cohen, J., Dec. 24, 2008)

STATE OF VERMONT
RUTLAND COUNTY

ABATIELL ASSOCIATES, P.C.	)	**Rutland Superior Court**
	)	**Docket No. 394-6-05 Rdcv**
Plaintiff,	)	
	)	
v.	)	
	)	
ROBERT AND DEBORAH NICHOLAS	)	
	)	
Defendant	)	

DECISION ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON DEFENDANT'S COUNTERCLAIM

This matter is before the Court on Plaintiff's Motion for Summary Judgment on Defendant's Counterclaim, filed July 14, 2008. A hearing was held in regards to the Motion for Summary Judgment on November 13, 2008.

Plaintiff, Abatiell Associates, P.C., is represented by Kaveh S. Shahi, Esq. Defendant, Deborah Nicholas, is represented by David J. Williams, Esq.

Summary Judgment Standard

Summary judgment is appropriate where there is no genuine issue of material fact and the party is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3). In response to an appropriate motion, judgment must be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, ... show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3). In determining whether a genuine issue

of material fact exists, the Court accepts as true allegations made in opposition to the motion for summary judgment, provided they are supported by evidentiary material. *Robertson v. Mylan Labs, Inc.*, 2004 VT 15, ¶ 15, 176 Vt. 356. The nonmoving party then receives the benefit of all reasonable doubts and inferences arising from those facts. *Woolaver v. State*, 2003 VT 71, ¶ 2, 175 Vt. 397. Furthermore, where, as here, "the moving party does not bear the burden of persuasion at trial, it may satisfy its burden of production by showing the court that there is an absence of evidence in the record to support the nonmoving party's case. The burden then shifts to the nonmoving party to persuade the court that there is a triable issue of fact." *Ross v. Times Mirror, Inc.*, 164 Vt. 13, 18 (1995) (internal citations omitted).

Background

On June 16, 2005, plaintiff Abatiell Associates, P.C. ("Law Firm"), filed a Complaint against Robert and Deborah Nicholas, seeking collection of legal fees in connection with the Law Firm's representation of the Nicholases in various matters, including *Harsch Properties, Inc. v. Robert Nicholas and Deborah Nicholas*, No. 196-6-03 Bncv. Robert Nicholas has passed away, and the litigation now involves Deborah Nicholas.

On September 8, 2005, defendants filed an Answer and Counterclaim against plaintiff, claiming the Law Firm breached its contractual duty to provide competent legal services in the *Harsch* suit. On December 8, 2005, the parties stipulated to a stay of the current action until the Supreme Court ruled on the appeal in the *Harsch* suit. The *Harsch* suit was finalized in an opinion by the Supreme Court in *Harsch Properties v. Nicholas*, 2007 VT 70, 182 Vt. 196.

The *Harsch* suit arose out of an exclusive listing agreement entered into between Robert and Deborah Nicholas and Harsch Properties, Inc., a real estate broker, in May 2001, for the sale of the Nicholas' property in Pownal, Vermont. *Id.* at ¶ 2. The listing agreement contained an attorney's fees clause which provided: "If the Broker is forced by collection or litigation to enforce the terms and conditions of this agreement, then the prevailing party will be entitled to reimbursement for all costs of collection, including attorney's fees." *Id.*

There were two potential buyers for the property, but neither was able to negotiate a purchase and sale agreement with the Nicholases. *Id.* at ¶ 3-5. Harsch Properties filed a complaint on June 20, 2003, asserting two counts: breach of the listing agreement, and breach of the covenant of good faith and fair dealing. *Id.* at ¶ 6. In its complaint, Harsch Properties alleged that the Nicholases breached the listing agreement by negotiating directly with the first potential buyers and by rejecting the second potential buyer's offer because they wanted to sell the property to the first couple. *Id.* The Nicholases denied negotiating directly with the prospective buyers and maintained that they were justified in rejecting the offer because it contained unacceptable contingencies. *Id.*

The court held a four-day jury trial. *Id.* at ¶ 7. At the close of evidence, the court instructed the jury on two claims: breach of contract and breach of the covenant of good faith and fair dealing. *Id.* Neither party objected to the jury instructions. *Id.* In a special form, the jury found the Nicholases had not breached the listing agreement, but they had breached the covenant of good faith and fair dealing, and awarded Harsch Properties $4,000. *Id.* at ¶ 8.

The court then awarded attorney's fees to Harsch Properties, as prevailing party, but denied its motion for additur to increase the $4,000 award to at least $30,000. *Id*. at ¶ 9-10 The Nicholases then appealed.

The appeal addressed two issues. First, whether the attorney's fee clause contained in the listing agreement applied to a claim for breach of the covenant of good faith and fair dealing. *Id*. at ¶ 13. The Court affirmed the trial court's ruling that Harsh Properties was the prevailing party, and ruled that although it was an implied term, the covenant of good faith and fair dealing was nonetheless a "term or condition" of the listing agreement and therefore its breach could trigger the attorney's fees clause. *Id*. at ¶ 18.

The second issue on appeal, raised by Harsh Properties, was whether the jury's award of $4,000 was inadequate and unsupported by the evidence, and whether Harsch Properties should have been awarded the loss of commission of $30,000. *Id*. at ¶ 21. The Court affirmed the trial court's ruling denying a new trial or additur. *Id*. at ¶ 24. The Court also noted that the trial court was correct in giving differing instructions to the jury on how to assess damages between a contract claim and an implied covenant claim. *Id*. at ¶ 23.

On November 18, 2007, defendant filed a Second Amended Answer and further specified her Counterclaim. On May 2, 2008, plaintiff Law Firm filed a Motion for Partial Summary Judgment. On July 17, 2008, this Court granted the Law Firm's Motion for Partial Summary Judgment for the recovery of unpaid legal bills in matters other than the defense of *Harsch Properties, Inc. v. Robert Nicholas and Deborah Nicholas*, No. 196-6-03 Bncv.

On July 14, 2008, plaintiff Law Firm filed a Motion for Summary Judgment on Defendant's Counterclaim. Defendant filed a Response to plaintiff Law Firm's Motion for Summary Judgment on August 28, 2008. Plaintiff Law Firm filed a Reply Memorandum in Support of the Motion for Summary Judgment on September 8, 2008. A hearing regarding the Motion for Summary Judgment was held on November 13, 2008.

Discussion

Defendant asserts in her Counterclaim that the Law Firm breached its contractual obligation to provide competent legal services to the Nicholases during the *Harsch* suit in two respects.

First, defendant claims that the Law Firm breached its contractual obligation to provide competent legal services by failing to advise defendant and her late husband that if Harsch Properties prevailed at trial, defendants might be liable for Harsch Properties' attorney's fees and expenses under the attorney's fees clause of the rental listing agreement.

Second, defendant claims that the Law Firm breached its contractual obligation to provide competent legal services to defendant by failing to file a motion with the Court to dismiss Harsch Properties' claim for breach of the covenant of good faith and fair dealing as duplicative before it was submitted to the jury.

While defendant has alleged in her Counterclaim that the Law Firm "breached its contractual obligation to provide competent legal services," an action to recover for legal malpractice in this instance lies in tort, on the theory of the attorney's negligence. *Bloomer v. Gibson*, 2006 VT 104, ¶ 24, 180 Vt. 397.

As in *Bloomer*, defendant Nicholas has not alleged in her Counterclaim that the Law Firm breached any special obligation contained in its employment contract with her. See *Id*. Under these circumstances, her claim is "a tort claim veiled as a contract claim." *Id*. (citing *Chavez v. Saums*, 571 P.2d 62, 65 (Kan. Ct. App. 1977) (holding that where breach concerns specific terms of contract, without reference to legal duties, action properly lies in contract, but where gravamen of action is breach of legal duty and not the contract itself, action is in tort); *Johnson v. Carleton*, 765 A.2d 571, 573 n.3 (Me. 2001) (directing that legal malpractice claims be analyzed under tort, not contract, where the claim does not refer to an express contract)).

A lawsuit against an attorney for negligence generally requires: (1) the existence of an attorney-client relationship which establishes a duty of care; (2) the negligence of the attorney measured by his or her failure to perform in accordance with established standards of skill and care; and (3) that the negligence was the proximate cause of harm to plaintiff. *Hedges v. Durrance*, 2003 VT 63, ¶ 6, 175 Vt. 588 (mem.) (citing *Brown v. Kelly*, 140 Vt. 336, 338 (1981); *Bresette v. Knapp*, 121 Vt. 376, 380 (1960)).

The Vermont Supreme Court has emphasized that an element of proximate cause in lawyer malpractice actions is "cause-in-fact." *Roberts v. Chimileski*, 2003 VT 10, ¶ 15, 175 Vt. 480, (mem.) (citing *Knott v. Pratt*, 158 Vt. 334, 336 (1992); *Brown v. Kelly*, 140 Vt. 336, 338 (1981)). In order to prevail in the lawyer negligence action, defendant has to show that she would have prevailed in her claim against Harsch Properties but for the Law Firm's failure. *Knott v. Pratt*, 158 Vt. 334, 336 (1992).

Defendant's first claim is that the Law Firm failed to advise defendants that if Harsch properties prevailed at trial, defendants might be liable for Harsch Properties'

attorney's fees and expenses under the rental listing agreement. Defendant makes no mention of proximate cause in her Counterclaim, only that the Law Firm "breached its contractual obligation to provide competent legal services" to her. The only time that causation is mentioned by defendant, she argues that if the law firm had advised her and her late husband of the fee shifting provision in the listing agreement, "the Nicholases would have been able to weigh the risks and benefits of particular strategies, including settlement of the Harsch claim. In the absence of such advice, their decision to go to trial was not a truly informed one." Cross-Plaintiff's Response to Abatiell Associates' Motion for Summary Judgment, p. 8, August 28, 2008.

There has been no evidence proffered by defendant that the outcome in the *Harsch Properties* suit would have differed "but-for" the Law Firms actions. See *Knott*, 158 Vt. at 336 (holding that in order to prevail in lawyer negligence action, claimant has to show that she would have prevailed but for law firms failure). The ability to "weigh" risks and benefits of trial is not evidence that the case would have turned out differently in the Nicholases' favor. Defendant, also, has not proffered any evidence that Harsch Properties would have settled had the Nicholases been informed of the fee shifting provision. Settlement is not a unilateral decision. Furthermore, even if Harsch Properties had settled, defendant has not proffered any evidence that the settlement amount would have been for less than Harsch Properties was awarded at trial.

Defendant's second claim is that the Law Firm breached its contractual duty to provide competent legal services by not filing a motion to dismiss the claim for breach of the covenant of good faith and fair dealing as "duplicative." Defendant claims that a properly filed motion would have resulted in dismissal of the covenant claim and the

Nicholases would have prevailed at trial because the jury found they had not breached the contract.

In order to prevail on this claim, defendant must show that the trial court would have dismissed Harsch Properties' claim for breach of the covenant of good faith and fair dealing as duplicative, had the Law Firm filed that motion to dismiss. This Court finds that the trial court would not have dismissed the claim on those grounds.

Defendant cites the case of *Monahan v. GMAC Mortg. Corp.*, which held that a separate cause of action for breach of the implied covenant of good faith and fair dealing will not be recognized when the plaintiff also pleads a breach of contract based upon the same conduct. 2005 VT 110, ¶ 54 n.5, 179 Vt. 167. However, breach of the underlying contract is not necessary before bringing a tort action under the covenant of good faith and fair dealing. *Id.* (citing *Carmichael v. Adirondack Bottled Gas Corp. of Vermont*, 161 Vt. 200, 208 (1993)).

The two claims were not based upon the same conduct. The contract claim was based upon conduct which would have breached the terms set forth in the listing agreement. The claim for breach of the covenant of good faith and fair dealing was based upon conduct which "violates community standards of decency, fairness, or reasonableness." *Harsch Properties, Inc. v. Nicholas*, 2007 VT 70, ¶ 14, 182 Vt. 196.

Defendant's claim is further belied by the fact that the jury delivered a verdict in favor of the Nicholases on the breach of contract claim. Harsch Properties did not get "two bites at the same apple" because the jury disposed of the contract claim under the evidence presented to them. Therefore, the jury did not "recognize" both the contract and covenant claims.

There are numerous instances when a contract is breached, but the covenant of good faith and fair dealing is not. Likewise, there may be breach of the covenant of good faith and fair dealing, without breach of the underlying contract. *Monahan*, 2005 VT 110, ¶ 54 n.5. This Court cannot find that a motion to dismiss the claims as "duplicative" would have been resulted in dismissal of the claim for breach of the covenant of good faith and fair dealing. The trial court would have properly denied the motion, and the claims would have proceeded to the jury, as they did.

Because defendant has failed to proffer any evidence as to proximate cause in either claim of legal malpractice, there is no triable issue of fact for a jury.

ORDER

Plaintiff's Motion for Summary Judgment on Defendant's Counterclaim, filed on July 14, 2008, is GRANTED.

Dated at Rutland, Vermont this _____ day of _____, 2008.

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Hon. William Cohen
Superior Court Judge