

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. ANIL C. SINGH
PRESENT: SUPREME COURT JUSTICE
Justice

PART 61

Index Number : 651765/2011
GUTARTS, SEYMON
vs.
FOX, ESQ., JAY
SEQUENCE NUMBER : 002
DISMISS ACTION

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

in accordance with the decision and
order with respect to motion sequence 001.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1/25/12

HON. ANIL C. SINGH
SUPREME COURT JUSTICE
J.S.C.

- 1. CHECK ONE: CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH
SUPREME COURT JUSTICE
Justice

PART 61

Index Number: 651765/2011
GUTARTS, SEYMON
vs.
FOS, ESQ., JAY
SEQUENCE NUMBER: 001
DISMISS ACTION

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for
Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s)
Answering Affidavits — Exhibits No(s)
Replying Affidavits No(s)

Upon the foregoing papers, it is ordered that this motion is

decided in accordance with the annexed
decision and order.

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1/25/12

HON. ANIL C. SINGH
SUPREME COURT JUSTICE
J.S.C.

- 1. CHECK ONE: CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

-----X
SEYMON GUTARTS and ROMAN
NAVORLIANSKI,

Plaintiffs,

-against-

JAY FOX ESQ., O'DONNELL & FOX, P.C. and
LT SERVICE CORP.,

Defendants.
-----X

DECISION AND
ORDER

Index No:
651765/2011

HON. ANIL C. SINGH, J.:

This an action for legal malpractice and negligence. Defendant LT Service Corp. ("LT"), moves to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), contending that: 1) as a non-lawyer, LT is not an entity that may be sued for legal malpractice; and 2) there is neither any privity nor any duty between defendant LT and plaintiffs. Defendant O'Donnell & Fox, P.C., along with defendant Jay Fox, Esq. (collectively, the "Fox Firm"), moves to dismiss the first cause of action alleging legal malpractice pursuant to CPLR 3211(a)(1), (5) and (7), contending that: 1) loan documents and UCC financing statements drafted by the Fox Firm were effective and valid as a matter of law; 2) plaintiffs cannot demonstrate that any negligent act or omission by the Fox Firm constituted the

proximate cause of any damages; 3) plaintiff did not sustain any actual or ascertainable damages; and 4) the cause of action for legal malpractice is barred under the doctrine of judicial estoppel in light of the execution of a Stipulation of Settlement in the underlying Bankruptcy Court proceeding. Plaintiffs oppose the motions.

Plaintiffs Seymon Gutarts and Roman Narovlianski executed a written agreement with non-party Irina Chatkhan on September 27, 2007, to loan Ms. Chatkhan the sum of \$650,000.00 (Fox Firm's Motion to Dismiss, exhibit A). The loan agreement stated that the address of Ms. Chatkhan was 1311 Brightwater Avenue, Apt. 14J, Brooklyn, NY 11235.

Ms. Chatkhan also signed a Promissory Note and Pledge and Security Agreement dated September 27, 2007, which authorized plaintiffs to file "a Uniform Commercial Code financing statement against the shares of capital stock and proprietary lease allocated to the cooperative units 18I&J (2 units legally combined) at 1311 Brightwater Avenue, Brooklyn, New York 11235 (the 'Shares'), which are owned by the Debtor [Irina Chatkhan]" (Summons and Complaint, Exhibit B).

Plaintiffs retained the Fox Firm in October 2008 to execute the UCC Financing Statement.

The original UCC Financing Statement incorrectly listed the collateral as “Unit 14J” at 1311 Brightwater Avenue, Brooklyn NY 11235. By contrast, the Pledge and Security Agreement consented to a UCC filing on “Units 18I and 18J.”

In October 2008, the Fox Firm filed a UCC Amendment to correct the deficiencies of the original UCC Financing Statement.

In November 2008, the Fox Firm filed a UCC termination for the original UCC statement dated October 6, 2007.

Thereafter, Irina Chatkhan defaulted on the loan and filed a Chapter 13 petition in U.S. Bankruptcy Court. The case was converted to a Chapter 11 proceeding in April 2010.

Subsequently, plaintiffs moved for relief from the automatic stay. Ms. Chatkan opposed the motion on the grounds that plaintiffs were not secured creditors and did not have an interest under the UCC as they failed to properly assert their interest via the UCC Financing Statement as per the Pledge and Security Agreement.

Plaintiffs commenced the instant action by filing a summons and verified complaint in June 2011. The complaint alleges that the UCC Amendment filed by the Fox Firm to correct the deficiencies of the original UCC Financing Statement was also fatally defective. According to the complaint, defendants’ errors with

respect to the UCC filing left plaintiffs without status as secured creditors and effectively eliminated plaintiffs' standing to enforce the Promissory Note and Pledge and Security Agreement against Chatkhan.

The first cause of action of the complaint alleges legal malpractice on the part of all three defendants. The second cause of action alleges negligence on the part of defendant LT Service Corporation. Plaintiffs contend that they have sustained damages amounting to \$910,000.

Discussion

"On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must accept as true the factual allegations of the complaint and accord the plaintiff all favorable inferences which may be drawn therefrom" (Swift v. New York Med. Coll., 25 A.D.3d 686, 687-688 [2d Dept. 2006] (internal citations omitted)). "If the plaintiff can succeed upon any reasonable view of the facts alleged, the cause of action may not be dismissed" (Id.).

"An attorney's failure to file a UCC financing statement in the manner necessary to perfect his client's security interest constitutes malpractice as a matter of law" (Lory v. Parsoff, 296 A.D.2d 535, 536 [2d Dept. 2002]).

The Court finds that the facts alleged in plaintiffs' complaint are sufficient to state the elements of a cause of action for legal malpractice only against

defendants Jay Fox, Esq., and O'Donnell & Fox, P.C.

The cause of action alleging legal malpractice as against defendant LT Service Corporation must be dismissed, for the complaint fails to allege that defendant LT is a law firm or that an attorney-client relationship existed between plaintiffs and LT. Rather, LT appears to be a title agency, not a law firm.

Plaintiffs' second cause of action alleges that defendant LT Service Corporation was negligent. Specifically, the complaint alleges that defendant LT was used by the Fox Firm to perform the title searches necessary to file the UCC statement (Complaint, p. 5, para. 24). It is alleged further that defendant LT was responsible for recording the UCC filing and, as such, should have been aware of the improper filing (Id.).

"Liability for a negligent search can only arise from a contract for the title search" (1 N.Y. Jur.2d Abstracts section 54). "If plaintiff contracted with defendant to do title work, and same was negligently performed by the latter thus resulting in damage, then plaintiff has at least stated a cognizable cause of action against defendant" (Brackman v. Southern Tier Abstract Corp., 289 A.D.2d 630, 630 [3d Dept. 2001]).

Here, the complaint fails to allege the existence of a contract between plaintiffs and defendant LT. Rather, it states simply that defendant LT "was used

by defendants Fox and O'Donnell to perform the title searches necessary to file the UCC."

In short, the Court finds that plaintiff has failed to allege facts sufficient to state a cause of action against defendant LT for negligence, for there is no allegation that plaintiffs entered into a direct contractual relationship with defendant LT or that LT owed a duty directly to plaintiffs.

Accordingly, it is hereby

ORDERED that the motion to dismiss of defendant LT Service Corporation is granted and the first and second causes of action of the complaint as against defendant LT Service Corporation are dismissed; and it is further

ORDERED that defendants Jay Fox, Esq., and O'Donnell & Fox, P.C., are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 320, 80 Centre Street, on March 7, 2012, at 9:30 a.m.

The foregoing constitutes the decision and order of the court.

Date: 1/25/12
New York, New York



Anil C. Singh