Cenlar, FSB v Berkman, Henoch, Peterson, Peddy & Fenchel, P.C.

2024 NY Slip Op 31225(U)

April 9, 2024

Supreme Court, New York County

Docket Number: Index No. 151585/2020

Judge: Lori S. Sattler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02M

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CENLAR, FSB,

Plaintiff,

- v -

BERKMAN, HENOCH, PETERSON, PEDDY & FENCHEL, P.C.,

Defendant.

INDEX NO. 151585/2020

MOTION DATE 07/24/2023

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

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BERKMAN, HENOCH, PETERSON, PEDDY & FENCHEL, P.C.

Plaintiff,

-against-

LOCKE LORD LLP

Defendant.

Third-Party
Index No. 595301/2020

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HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 131, 132, 133, 134, 135, 136, 137, 138

were read on this motion to/for JUDGMENT - SUMMARY.

In this action alleging legal malpractice and breach of contract, Defendant Berkman, Henoch, Peterson, Peddy & Fenchel, P.C. ("Berkman") moves for summary judgment dismissing the Complaint of plaintiff Cenlar, FSB ("Cenlar") in its entirety pursuant to CPLR 3212. Cenlar opposes the motion and cross-moves for summary judgment on its malpractice cause of action against Berkman, which opposes the cross-motion.

This action arises out of Berkman's representation of Cenlar in a foreclosure proceeding in Kings County Supreme Court, *Federal National Mortgage Association v Goldberger et al*, Kings County Index No. 21480/08 ("Foreclosure Action"). The Foreclosure Action stems from a mortgage loan made in connection with a property located at 1670 42nd Street in Brooklyn ("the Property"). Federal National Mortgage Association was the lender and Cenlar was the loan servicer. The borrower defaulted on the mortgage on May 1, 2008 and the Foreclosure Action was commenced on July 23, 2008 (NYSCEF Doc. No. 66).

Berkman's predecessor in the matter moved for an Order of Reference in the Foreclosure Action on December 15, 2009. A consent to change attorney was filed and Berkman became counsel for Cenlar in December 2011 (NYSCEF Doc. No. 67). The motion for an Order of Reference was granted on December 18, 2012 and entered with the County Clerk on February 4, 2013 (NYSCEF Doc. No. 68). At that time, Rule 8 of the Uniform Civil Term Rules for Kings County Supreme Court, Part F ("Rule 8") required an application for a Judgment of Foreclosure and Sale to be made within one year after the signing and entry of an Order of Reference and provided that failure to comply would result in an automatic dismissal of the action.

Berkman filed a motion for Judgment of Foreclosure and Sale on June 13, 2014 (NYSCEF Doc. No. 71), four months and nine days beyond the Rule 8 deadline. The trial court granted the motion on default on September 23, 2014 as the defendants in the Foreclosure Action had not appeared (NYSCEF Doc. No. 72). The Order provided that the papers were being forwarded to the Foreclosure Department for review (*id.*). Then, more than nine months later, the court reversed its decision and dismissed the Foreclosure Action in an order dated July 7, 2015 (NYSCEF Doc. No. 73, "2015 Decision"). Notice of Entry of that decision was not filed (NYSCEF Doc. No. 77).

Following the dismissal, in March 2016, Cenlar retained third-party defendant Locke Lord LLP ("Locke Lord") to advise it on issues related to Berkman's failure to timely obtain a foreclosure judgment. Discussions were held between Cenlar, Berkman, and Locke Lord about how to proceed in the Foreclosure Action in May and June 2016 (NYSCEF Doc. Nos. 74-77). On May 12, 2016, Berkman wrote to Cenlar, "Yesterday the Appellate Division ruled on the propriety of a Rule 8 dismissal in two separate cases, reversing the trial court in both cases. . . . At this time, given the recent appellate authority, we believe that a motion to reargue is the best way to proceed" (NYSCEF Doc. No. 74). On May 27, 2016, Locke Lord wrote to Cenlar:

> I read over the decision. I think it is good authority for the bank on that limited issue, which would allow remand and a chance to be heard on the prejudice issue of dismissal at the lower court. Although there are some dissimilarities in our case, I think the overarching case premise is consistent with at least providing a basis to allow the lender to revisit with the lower Court. However, given the circumstances, an appeal to the appellate division based on this decision (not the validity of the local rule) may be the best way to go. Do we know when our deadline to perfect the appeal is? Re-argument is good, but not at the cost of prejudicing an appeal based on this case. I would move on both.

(NYSCEF Doc. No. 76).

Cenlar decided to both move to reargue the dismissal at the trial court and to appeal the 2015 Decision (NYSCEF Doc. No. 77). Berkman filed the motion to reargue on June 27, 2016. With respect to the appeal, Cenlar wanted Berkman to file the Notice of Appeal and Locke Lord to then prosecute the appeal, and Berkman recommended that Locke Lord do both (*id.*). Neither Berkman nor Locke Lord filed a Notice of Appeal at that time. Concurrently, at Locke Lord's advice, Cenlar made efforts to settle its lien on the Property with a junior lienholder who had obtained a judgment of foreclosure (NYSCEF Doc. No. 86).

On June 28, 2016, the day after Berkman filed the motion to reargue, Cenlar notified Berkman that it believed it had a claim for malpractice and requested that Berkman or its

malpractice carrier cover losses suffered as a result of the failure to timely move for judgment in the Foreclosure Action (NYSCEF Doc. No. 85). Berkman responded in a letter dated July 26, 2016 (NYSCEF Doc. No. 103). It denied that Cenlar had suffered any losses and opined that Cenlar still had the ability to obtain a judgment via the pending motion to reargue the 2015 Decision, by appealing that decision, or by filing a new foreclosure action (*id.*). It refused to pay Cenlar for any shortfall, and wrote, "we believe it is premature to accept less than the full amount that Cenlar and FNMA could recover from a completed foreclosure sale of the premises. If Cenlar and FNMA decide to accept any lesser amount, then they do so at their peril" (*id.*). On July 28, 2016, a vice president at Cenlar wrote internally: "We need not take the advice of a firm who has already put Cenlar at serious risk of a large financial loss and whom we will likely be suing to obtain the difference between the junior lien and our payoff to FNMA" (NYSCEF Doc. No. 86).

Berkman withdrew the motion to reargue on September 13, 2016. It is not clear from the record why this was done, however it appears from the deposition of Hillary Prada, Berkman's managing attorney, that the motion was withdrawn at an appearance during which Berkman had been informed that the borrower in the Foreclosure Action had died (NYSCEF Doc. No. 79, Prada EBT at 35-40). Cenlar claims that Berkman withdrew the motion without Cenlar's knowledge or consent (NYSCEF Doc. No. 70, Scoliard EBT at 110). Prada was unable to recall when Berkman notified Cenlar that it had withdrawn the motion, but she conceded that the firm's records indicated that Cenlar was not notified until November 14, 2016 (Prada EBT at 35-40). On that day, Prada also notified Cenlar by email that the Property owner had filed for bankruptcy, writing "[i]n order to expeditiously move in the foreclosure action, we recommend permission to file a Motion for Relief" (NYSCEF Doc. No. 87). Cenlar's deputy general counsel

for litigation, Jennifer Scoliard, replied on November 15, 2016: "Corporate legal is handling this. Do not take any action" (*id*.).

Thereafter, according to Berkman, the Foreclosure Action was scheduled for a court appearance on May 9, 2017 pursuant to a Kings County Administrative directive calendaring all pending active foreclosure actions (NYSCEF Doc. No. 100). It is not clear why the action would have been pending and active at that time. Nevertheless, and in spite of the communication it received from Cenlar, Berkman represented that it appeared at a calendar call and billed Cenlar for the appearance (*id.*). Cenlar rejected this bill on the basis that the "Case is being handled in corporate legal" (NYSCEF Doc. No. 132).

Meanwhile, Locke Lord continued settlement negotiations on behalf of Cenlar with the junior lienholder over a period of years (NYSCEF Doc. No. 135). Then, in June 2018, more than 18 months after Cenlar told Berkman to stop working on the case, Locke Lord prepared a memorandum delineating a cost-benefit analysis of appealing or moving to vacate the 2015 Decision versus settling with the junior lienholder (NYSCEF Doc. No. 80, Howard EBT at 77; NYSCEF Doc. No. 98). On October 15, 2018, more than three years after the 2015 Decision was issued, Locke Lord filed a Notice of Appearance in the Foreclosure Action (NYSCEF Doc. No. 28) and appealed the 2015 Decision. The Notice of Appeal, filed by Locke Lord, listed Berkman as co-counsel (NYSCEF Doc. No. 102). Berkman was also named as co-counsel on the Record on Appeal dated April 11, 2019 (NYSCEF Doc. No. 101). Neither party provides documentation as to Berkman's role, if any, in the appeal or whether it was aware that it had been listed as co-counsel on these filings. Indeed, Cenlar told Berkman in May 2016 that it intended on having Locke Lord handle the appeal (NYSCEF Doc. No. 75-76). In March 2019,

Locke Lord filed a second motion to reargue the 2015 Decision (Howard EBT at 68). The Court denied that motion as untimely.

Cenlar commenced this action against Berkman on February 12, 2020 asserting causes of action for malpractice and breach of contract. On March 23, 2020, Cenlar settled its lien on the Property with the junior lienholder, who paid Cenlar $250,000 of the $445,000 owed at the time the Foreclosure Action was dismissed. Cenlar then withdrew its appeal of the 2015 Decision. On May 27, 2020, Berkman filed the third party action against Locke Lord seeking indemnification and contribution.

Berkman now moves for summary judgment dismissing the Complaint in its entirety, arguing that the malpractice cause of action is time-barred or, in the alternative, that its purported malpractice in the Foreclosure Action did not cause Cenlar's loss because of Cenlar's decision not to pursue an appeal on which it was likely to succeed. It further argues that the breach of contract cause of action should be dismissed as duplicative of the malpractice claim. In its cross-motion, Cenlar maintains that there are no material issues of fact as to Berkman's liability for malpractice.

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 eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853). Should the movant make its prima facie showing, the burden shifts to the opposing party, who must then produce admissible evidentiary proof to establish that material issues of fact exist" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

The statute of limitations for a legal malpractice cause of action is three years (CPLR 214[6]; *see Debevoise & Plimpton LLP v Candlewood Timber Group LLC*, 102 AD3d 571, 572 [1st Dept 2013]). "A legal malpractice claim accrues 'when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court'" (*McCoy v Feinman*, 99 NY2d 295, 301 [2002], quoting *Ackerman v Price Waterhouse*, 84 NY2d 535, 541 [1994]). The statute of limitations may be tolled under the continuous representation doctrine "only where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim" (*McCoy*, 99 NY2d at 306; *Shumsky v Eisenstein*, 96 NY2d 164, 168 [2001]). The continuous representation toll ends upon the conclusion of the matter or upon the attorney's withdrawal from representation (*see Shumsky*, 96 NY2d at 170-171; *Williamson ex rel. Lipper Convertibles, L.P. v PricewaterhouseCoopers LLP*, 9 NY3d 1, 9-10).

Cenlar's malpractice cause of action accrued on February 4, 2014, the last day on which Berkman could have filed a motion for Judgment of Foreclosure and Sale in the Foreclosure Action without being subject to dismissal under Rule 8. The statute of limitations therefore would have expired on February 4, 2017 absent a toll for continuous representation. Berkman argues that it did not continuously represent Cenlar after that date, as it was discharged in June 2016 when Cenlar notified it of the potential malpractice claim, or at the latest on November 15, 2016 when Cenlar instructed it not to perform further work on the Foreclosure Action. In opposition, Cenlar maintains Berkman continuously represented it well after that date, citing Berkman's appearance in court on May 9, 2017, Berkman's being listed as co-counsel on the 2018 and 2019 appellate documents, and the fact that a substitution of counsel was never filed in the Foreclosure Action.

The Court finds that there are issues of fact as to whether the statute of limitations was tolled by Berkman's continued representation of Cenlar. While Cenlar explicitly instructed Berkman to take no further action on the case in November 2016, and refused to pay Berkman for the appearance it made thereafter, Locke Lord included Berkman's name on court filings in 2018 and 2019. It is also unclear what the May 2017 appearance was for and why Berkman appeared despite being told to take no action on the case. Whether or not Berkman's involvement in the matter after February 2017 amounted to a mutual understanding of the need for further representation on the subject matter underlying the malpractice claim is an issue of fact and precludes the granting of summary judgment on this basis.

Berkman alternatively argues it is entitled to dismissal of the malpractice claim on the grounds that its alleged negligence was not the proximate cause of Cenlar's damages. Specifically, it contends that the chain of causation was broken by Cenlar's decision to abandon its appeal of the 2015 Decision because the appeal would have likely succeeded (NYSCEF Doc. No. 89, Berkman Memorandum of Law at 8). In opposition, Cenlar contends that the success of the appeal was more uncertain and that its decision to withdraw the appeal as part of a settlement with a junior lienholder was reasonable under the circumstances.

"[P]rior to commencing a legal malpractice action, a party who is likely to succeed on appeal of the underlying action should be required to press an appeal. However, if the client is not likely to succeed, he or she may bring a legal malpractice action without first pursuing an appeal of the underlying action" (*Grace v Law*, 24 NY3d 204, 210 [2014]). This requirement aims to "obviate premature legal malpractice actions by allowing the appellate courts to correct any trial court error and allow attorneys to avoid unnecessary malpractice lawsuits by being given the opportunity to rectify their clients' unfavorable result" (*id.*). A malpractice claim is

subject to dismissal where the plaintiff does not pursue an appeal that is likely to succeed, as that decision, rather than the defendant's alleged negligence, was the proximate cause of the client's damages (*see id*. at 209; *Buczek v Dell & Little, LLP*, 127 AD3d 1121, 1124 [2d Dept 2015]).

The Court finds that Cenlar was likely to have succeeded on its appeal of the 2015 Decision. The Appellate Division, Second Department has long held that "[a] court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal" (*U.S. Bank, Natl. Assn. v Emmanuel*, 83 AD3d 1047, 1048 [2d Dept 2011]). The Second Department has specifically reversed prior instances where the Supreme Court, Kings County has sua sponte dismissed a foreclosure action pursuant to its Rule 8 on the grounds that no extraordinary circumstances existed to justify a sua sponte dismissal and that doing so in those cases without notice or hearing, as was done to Cenlar in the Foreclosure Action, amounts to a denial of a plaintiff's due process rights (*Chase Home Fin., LLC v Kornitzer*, 139 AD3d 784 [2d Dept 2016]; *U.S. Bank Nat. Assn. v Ahmed*, 137 AD3d 1106 [2d Dept 2016]; *see also U.S. Bank, N.A. v Guichardo*, 90 AD3d 1032 [2d Dept 2011]; *HSBC Bank USA, N.A. v Forde*, 124 AD3d 840, 841 [2d Dept 2014]). Any factual dissimilarities between these decisions and the Foreclosure Action favor Cenlar. In *Chase*, the trial court sua sponte dismissed a foreclosure action after the plaintiff moved for a second order of reference nearly three years after the first order of reference and had not moved for a judgment of foreclosure. Here, Cenlar's motion for judgment was made only four months after its time to do so under Rule 8 had expired, and Cenlar does not raise any other circumstances that could be considered extraordinary such that sua sponte dismissal would have been proper.

Because the Court finds that Cenlar was likely to succeed on an appeal of the 2015 Decision, Cenlar was required to pursue such an appeal before commencing a malpractice claim

against Berkman. Cenlar instead made a strategic and calculated decision to settle its lien on the Property with the junior lienholder, which Locke Lord negotiated for more than three years, and chose to withdraw its appeal. Therefore, Berkman's alleged malpractice was not the proximate cause of Cenlar's alleged damages (*see Rabasco v Buckheit & Whelan, P.C.*, 206 AD3d 770, 772 [2d Dept 2022]). Accordingly, the branch of Berkman's motion for summary judgment dismissing Cenlar's cause of action for malpractice is granted, Cenlar's cross-motion for summary judgment on that claim is denied, and the first cause of action is dismissed.

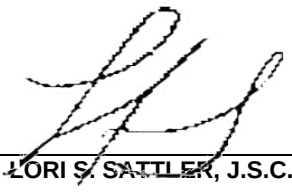
Berkman also moves for summary judgment dismissing Cenlar's cause of action for breach of contract. A cause of action is duplicative where it "arise[s] out of the same facts and seek[s] the same damages as" another claim (*Courtney v McDonald*, 176 AD3d 645, 645-646 [1st Dept 2019]). Here, the breach of contract cause of action is duplicative of the legal malpractice claim. This branch of Berkman's motion is granted and Cenlar's breach of contract cause of action is accordingly dismissed.

Accordingly, it is hereby:

ORDERED that Defendant's motion is granted and the Complaint is dismissed in its entirety; and it is further

ORDERED that Plaintiff's cross-motion is denied.

This constitutes the Decision and Order of the Court.



4/9/2024
DATE

LORI S. SATTLER, J.S.C.

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