

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. THOMAS P. PHELAN,**

*Justice*

TRIAL/IAS PART 9  
NASSAU COUNTY

STEVEN VONDUERRING and ARLENE HUBNER,

Plaintiff(s),

-against-

HESSION & BEKOFF; HESSION, BEKOFF &  
COOPER, LLP; MARTIN KATZMAN, RONALD  
JAY BEKOFF; THOMAS R. HESSION and  
ANDREW COOPER,

Defendant(s).

ORIGINAL RETURN DATE:09/29/06  
SUBMISSION DATE: 11/30/06  
INDEX No.: 17653/05

MOTION SEQUENCE #1

The following papers read on this motion:

Notice of Motion.....	1
Answering Papers.....	2
Reply.....	4
Plaintiffs' Brief.....	3

Motion by defendants for an order pursuant to CPLR §3212 awarding them summary judgment dismissing plaintiffs' complaint or, pursuant to CPLR §3211(a)(1), (3), (5) or (7), otherwise dismissing plaintiffs' complaint is determined as follows:

Plaintiffs bring this legal malpractice action alleging that they were negligently represented by defendants in the failed purchase of a house to be constructed on plaintiffs' behalf by third parties (sellers).

Defendants move to dismiss plaintiffs' complaint, inter alia, on the ground that plaintiffs' conceded failure to timely obtain a mortgage commitment as required by plaintiffs' contract with sellers entitled sellers to cancel the contract.

In response, however, plaintiffs present evidence of their financial ability and willingness to set aside in escrow sufficient funds to substantially comply with the underlying purpose of the mortgage contingency clause (see, Ting v. Dean, 156 AD2d 358) long before sellers' election to

cancel. Further, plaintiffs have provided expert testimony regarding defendants' alleged negligence in failing to advise plaintiffs of this option.

Under the circumstances, issues of fact exist, not precluding others, as to whether defendants breached this duty of care to plaintiffs notwithstanding plaintiffs' failure to comply with the mortgage contingency clause (see, Del Pozo v. Impressive Homes, Inc., 29 AD3d 621, 2006 Slip Op. 3712; Del Pozo v. Impressive Homes, *supra*, 2006 Slip Op. 3711; Ting v. Dean, *supra*).

Defendants' further contention that the damages sought by plaintiffs are too speculative to withstand summary judgment is rejected. "[D]amages based on the current value of the property are recoverable in an action for legal malpractice" (Barbara King Family Trust v. Voluta Ventures LLC, 2006 NY Misc. LEXIS 2709 [Sup. Ct., NY Co.], citing Reynolds v. Kandanoff & Haussman, 218 AD2d 732).

Summary judgment dismissing plaintiffs' complaint is, however, warranted as against defendants Hession, Bekoff & Cooper LLP [LLP] and Andrew Cooper. It is uncontroverted that defendants LLP and Cooper were not involved in the representation of plaintiffs during the period up to and including sellers' cancellation of the contract with plaintiffs.

Dismissal as against defendants LLC and Cooper is without costs.

Consistent with the foregoing, the title of this action is amended to read as follows:

"STEVEN VONDUERRING and ARLENE HUBNER,

Plaintiffs,

-against-

HESSION & BEKOFF; MARTIN KATZMAN, RONALD JAY BEKOFF; and THOMAS R. HESSION,

Defendants."

All parties are reminded that pursuant to the compliance conference order dated December 5, 2006, a certification conference is scheduled to be held before the undersigned on February 20, 2007 at 9:30 A.M.

This decision constitutes the order of the court.

ENTERED

HON THOMAS P. PHELAN

Dated: 12-20-06

DEC 27 2006

J.S.C.

ROBERT COUNTY CLERK'S OFFICE

**RE: VONDUERRING v. HESSION, et al.**

**Page 3.**

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