

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 9
NASSAU COUNTY

CHARLES McKIE,

Plaintiff(s),

-against-

ADAM SAHEED A/K/A SAHEED ADAM, DANIEL
KOGAN, ESQ., PRISANI FUNDING CORPORATION,
XYZ CORP. D/B/A AMERICAN HOMES, ISLAND
WIDE REALTY GROUP, INC. and FLAGSTAR BANK
FSB,

Defendant(s).

ORIGINAL RETURN DATE:08/10/06
SUBMISSION DATE: 09/07/06
INDEX No.: 4671/06

MOTION SEQUENCE #2,3

The following papers read on this motion:

Notice of Motion.....	A
Cross-Motion.....	C
Answering Papers.....	B,D
Reply.....	E

Motion by defendant Daniel Kogan, Esq. for an order pursuant to CPLR §3212 dismissing plaintiff's legal malpractice action against him is denied.

Cross-motion by plaintiff Charles McKie for an order pursuant to CPLR §3212 dismissing all counterclaims and affirmative defenses asserted by defendant Kogan is granted as to defendant Kogan's counterclaims and first, second and fifth defenses and denied as to his third and fourth defenses.

Defendant Kogan premises his motion for summary judgment dismissing plaintiff's legal malpractice claim on the alleged absence of damages sustained by plaintiff regardless of whether or not defendant Kogan committed malpractice (see, Murphy v. Stein, 156 AD2d 546).

As questions of fact exist as to whether plaintiff was to receive funds over and above those actually received by him or on his behalf at the closing held on February 6, 2004, it cannot be determined as a matter of law that plaintiff did not sustain any damages.

Summary judgment is, however, granted dismissing defendant Kogan's counterclaims. Defendant Kogan's first counterclaim does not assert a valid cause of action for defamation (see CPLR §3016(a); Gill v. Pathmark Stores, Inc., 237 AD2d 563) and all other causes of action are time barred (see CPLR §213). Defendant Kogan's contention that his counterclaims for recovery of unpaid legal fees in various other matters arose out of a "series of transactions or occurrences" so as to qualify under the provisions of CPLR §203(d) is unpersuasive. To apply, the counterclaim(s) must arise "from the transactions, occurrences or series of transactions or occurrences upon which [the] claim asserted in the complaint depends" (CPLR §203(d)). No such dependency has been shown to exist.

Regarding defendant Kogan's asserted defenses, the first, second and fifth defenses are dismissed as Kogan does not bear the burden of proving these claims. "To recover damages for legal malpractice, the plaintiff must prove not only that the attorney failed to exercise that degree of care, skill and diligence commonly possessed and exercised by a member of the legal community (citation omitted), but also that the attorney's negligence was a proximate cause of the loss sustained [and] that the plaintiff incurred damages as a direct result of the attorney's actions ..." (Volpe v. Canfield, 237 AD2d 282).

Dismissal of defendant Kogan's third defense of unclean hands is denied since plaintiff provides nothing of evidentiary value to establish his innocence in the transaction at issue. Likewise, defendant Kogan's fourth defense of "culpable conduct and contributory negligence" shall stand since it cannot be found as a matter of law that apportionment is not permitted in a legal malpractice action (see, Comi v. Breslin & Breslin, 257 AD2d 754) and plaintiff provides nothing to establish his freedom from culpability.

Dismissal, to the extent granted above, is without costs.

Finally, the court notes that insofar as the court has received a copy of a purported "Stipulation Discontinuing Action" dated August 10, 2006 whereby plaintiff agrees to discontinue his action against defendant Prisani Funding Corporation, said document is ineffective to release defendant Prisani.

Pursuant to CPLR §3217, to avoid the need for court approval a stipulation must either be executed by plaintiff before defendant's time to answer expired or be executed by all parties to the action.

The parties are reminded that pursuant to the Preliminary Conference Order dated July 11, 2006, a compliance conference is scheduled to be held before the undersigned on November 9, 2006 at 9:30 A.M.

This decision constitutes the order of the court.

ENTERED

OCT 23 2006

HON THOMAS P. PHELAN

Dated: 10-16-06

NASSAR DODD
COUNTY CLERK'S OFFICE

J.S.C.

RE: MCKIE v. SAHEED, et al.

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Law Office of Alan C. Stein, P.C.
Attorney for Plaintiff
479 South Oyster Bay Road
Plainview, NY 11803

Eric B. Schultz, Esq.
Attorney for Defendant Saheed Adam
33 Willis Avenue, Suite 200
Mineola, NY 11501

Daniel Kogan, Esq.
Defendant, Pro Se
94-09 101st Avenue
Ozone Park, NY 11416-2301

Fred L. Pollack, Esq.
Attorney for Defendant Prisani Funding Corporation
33 Willis Avenue, Suite 103
Mineola, NY 11501

Island Wide Realty, Inc.
7 Hill Lane
Smithtown, NY 11787

Solomon & Siris
Attn: Bill Tsevis, Esq.
Attorneys for Defendant Flagstar Bank FSB
50 Charles Lindbergh Boulevard #505A
Uniondale, NY 11553