

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

WO YEE HING REALTY CORP., CHUN YEE YUNG,
CHUN HING YUNG and CHUN WO YUNG,

Index No.: 115517/2007

Motion Date: 5/18/10

Plaintiffs,

Motion Seq. No.: 004

- v -

Motion Cal. No.: _____

HOWARD STERN, ESQ.,

Defendant.

FILED

FEB 22 2011

The following papers, numbered 1 to ___ were read on this motion for summary judgment and cross motion for summary judgment

**NEW YORK
COUNTY CLERK'S OFFICE**

- Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
- Notice of Cross Motion/Answering Affidavits - Exhibits _____
- Replying Affidavits - Exhibits _____

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion: Yes No

Defendant attorney moves, pursuant to CPLR 3212, for summary judgment dismissing the action. Plaintiff Wo Yee Hing Realty Corp. (corporate plaintiff) cross-moves, pursuant to CPLR 3212, for summary judgment.

This is an action seeking damages for alleged legal malpractice with respect to the sale of property, in which plaintiffs claim that they were unable to take advantage of the Internal Revenue Code (IRC) § 1031 like-kind exchange tax deferral because of defendant's actions. The corporate plaintiff is the owner of the subject property, and the individual plaintiffs are principals of the corporate plaintiff.

Defendant is an attorney who alleges that, in 2006, plaintiff Chun Wo Yung (Chun Wo) approached him regarding the

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

sale of a building that Chun Wo and his family had owned since 1979. In November, 2006, Chun Wo called defendant to let him know that he was ready to have a contract drafted regarding the sale of the building, and Chun Wo faxed defendant a letter that Chun Wo had received from a real estate broker who was representing the purchaser.

Defendant reviewed the faxed letter, and states that he orally informed Chun Wo that he, defendant, had no expertise or experience with structuring an IRC § 1031 (1031) like-kind exchange, and that the 1031 tax responsibility would remain with Chun Wo. Defendant avers that Chun Wo stated that he understood, that he would take care of the 1031 part of the sale himself, and that he had done such like-kind exchanges in the past. Defendant never sent plaintiffs a letter of engagement limiting his responsibilities, nor did the parties execute a retainer agreement.

On November 2, 2006, defendant met with Chun Wo and his brother, plaintiff Chun Hing Yung (Chun Hing), to discuss the sales contract. Thereafter, defendant prepared a preliminary draft of the contract for review by Chun Wo and the purchaser's attorney. On November 17, 2006, Chun Wo, Chun Hing, the purchaser and the purchaser's attorney met in defendant's office to sign the contract.

Prior to the arrival of the purchaser and his attorney,

defendant, Chun Wo and Chun Hing reviewed some changes in the contract that had been added by the purchaser's attorney, which included some 1031 like-kind exchange language. Defendant contends that he told Chun Wo and Chun Hing that he did not have the requisite experience to handle the 1031 aspect of the transaction, and suggested that they call an accountant to discuss this part of the agreement. Defendant says that Chun Wo and Chun Hing told him that it was unnecessary to call an accountant, because they had experience with like-kind exchanges, that they knew what to do, and that they would take care of that aspect of the sale. When the purchaser and his attorney arrived, the contract was executed.

Defendant maintains that throughout the entire process, he constantly informed plaintiffs that he had no experience with 1031 like-kind exchanges, and that they always told him that they would take care of it.

The closing on the sale of the property took place on May 29, 2007, with the individual plaintiffs appearing on behalf of the corporate plaintiff that owned the property. When it came time for the purchaser to issue the checks, the bank asked whether the checks should be made payable to the corporate plaintiff, and, according to defendant, the individual plaintiffs said yes. Defendant states that he was concerned about the checks being issued to the corporate plaintiff, but that the

individual plaintiffs were adamant that the checks be issued in that fashion.

After the closing, defendant says that Chun Wo questioned whether the checks should have been issued to the corporate plaintiff, and defendant avers that he told Chun Wo that he was doubtful that the 1031 like-kind exchange could be consummated if the check was issued in that manner, but that Chun Wo reassured him that the accountant said that the checks should be issued that way.

Defendant states that, after the closing, he contacted a certified exchange specialist, who informed him that a 1031 like-kind exchange could not take place unless the proceeds from the sale of the first property were held by a Qualified Intermediary (QI), not the seller. Defendant goes on to say that he was advised that the sale should be undone, redone and redated, in order to take advantage of 1031 tax deferral benefits.

The following day, defendant contacted Chun Wo, and told him what the exchange specialist had said, and defendant testified that Chun Wo asked how much it would cost to do whatever had to be done. Defendant states that he contacted the exchange specialist and the purchaser's attorney over the next few days, but that the purchaser's attorney was not responding to his inquiries. Eventually, plaintiffs decided to engage a different attorney to pursue this matter. In his affidavit in support of

his motion, defendant states that, at no time did Chun Wo inform him of what property the corporate plaintiff wished to purchase with the proceeds from the sale.

The crux of defendant's argument with respect to his motion is that plaintiffs' allegations of damages are speculative, and that it is also speculative as to whether plaintiffs could have taken advantage of 1031 like-kind exchange provisions because there is no evidence that plaintiffs could have identified the replacement property within 45 days of the closing, or that they could have closed on such replacement property within 180 days of the closing, both of which are requirements under 1031.

In opposition to defendant's motion, and in support of their cross motion, plaintiffs assert that, at all times, defendant assured them that he was able to handle the tax aspects of a 1031 like-kind exchange. Plaintiffs further contend that, because defendant had the check issued to the corporate plaintiff rather than to a QI, they were unable to take advantage of a 1031 like-kind tax deferral.

Plaintiffs submit the affidavit of Stephen M. Breitstone (Breitstone), a licensed attorney, who affirms that defendant committed malpractice when he failed to have the check for the proceeds from the sale issued to a QI, and that it was further evidence of legal malpractice when defendant did not review any of the procedural requirements for 1031 like-kind exchanges

before the closing. He bases his opinion on his experience as an attorney who represented both sellers and buyers in numerous real estate transactions where the seller desired to take advantage of section 1031 as a basis to defer federal, state, and, if applicable, local income taxation on the gain from the sale of real estate held for investment or used in a trade or business. Breitstone concludes by opining, with a reasonable degree of legal certainty, that defendant deviated from accepted and reasonable legal care in his representation of plaintiffs, and that he committed legal malpractice.

In his EBT, Chun Wo stated, in contrast to defendant's testimony, that he was unfamiliar with how a 1031 like-kind exchange worked, and that he had never heard of a qualified intermediary. In his affidavit, Chun Wo avers that the corporate plaintiff paid approximately \$3,400,000 in federal taxes and approximately \$1,700,000 in local taxes. A copy of the corporate plaintiff's tax returns for the tax year in question is attached to the affidavit.

Plaintiffs' contention is that, but for defendant's malpractice, they would have been able to take advantage of the tax deferral provisions of 1031 like-kind exchanges, and that, therefore, they suffered significant monetary damages. Plaintiffs also maintain that defendant's failure to provide either a letter of intent or a written retainer agreement is

further evidence of defendant's malpractice.

Discussion

"The proponent of a summary judgment motion 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 [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Plaintiffs initially argue that defendant's motion must be rejected because defendant has failed to provide an affidavit of an expert to support his contentions. Plaintiffs base this argument on *Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo* (259 AD2d 282 [1st Dept 1999]). However, this is a misreading of that decision.

In *Nevelson*, the Court said that

"[g]enerally, plaintiffs in professional malpractice actions proffer expert opinion evidence on the duty of care to meet their burden of proof in opposition

to a properly supported summary judgment motion. However, the requirement that plaintiff come forward with expert evidence on the professional's duty of care may be dispensed with where ordinary experience of the fact finder provides sufficient basis for judging the adequacy of the professional service [internal quotation marks and citations omitted]."

Id. at 283.

In *Nevelson*, the Court denied the defendant law firm's summary judgment motion because it failed to establish its right to judgment, its motion having neither an expert affidavit establishing that it did not deviate from the requisite standard of care, or any other evidence to support that contention. The issue in *Nevelson* concerned the law firm's duty of care only.¹

¹Though the absence of an expert affidavit establishing prima facie that there was no departure from the requisite standard of care was fatal to defendant's motion for summary dismissal of the complaint in *Nevelson*, Breitstone's affidavit is not controlling on the court with respect to raising a prima facie issue as to legal malpractice.

In *Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP* (301 AD2d 63, 68-69 [1st Dept 2002]), a legal malpractice action in which the plaintiff relied on the affidavit of an attorney to oppose a summary judgment motion, the Court, in affirming the grant of summary judgment, stated:

"[e]ssentially, the affiant-attorney was offering a legal opinion as to what performance or absence thereof constitutes legal malpractice. But making those determinations is the function of a court. As we recently pointed out in another case, 'expert witnesses should not ... offer opinion as to the legal obligations of parties ...; that is an issue to be determined by the

In contrast, defendant argues that it is entitled to judgment dismissing the complaint as a matter of law, even assuming *arguendo* that the defendant deviated from the requisite standard of care, because plaintiffs have not provided any evidence that but for such deviation they would have received a benefit or they would not have suffered ascertainable damages.

In order to sustain an action for legal malpractice, the proponent must prove three elements: one, that the attorney was negligent; two, that such negligence was a proximate cause of plaintiff's losses; and three, proof of actual damages. *Brooks v Lewin*, 21 AD3d 731 (1st Dept 2005).

"In order to survive dismissal, the complaint must show that but for counsel's alleged malpractice, the plaintiff would not have sustained some actual ascertainable damages, so that a failure to establish proximate cause requires dismissal regardless whether

trial court. Expert opinion as to a legal conclusion is impermissible.' An expert may not be utilized to offer opinion as to the legal standards which he believes should have governed a party's conduct. We do not rely on an attorney's affidavits to tell us what constitutes malpractice. Moreover, the affidavit offered here raises an additional concern. It is tinged with the sense that since the affiant would have done things differently, therefore the attorney being challenged was incompetent. Such a contest of strategies is easily reduced to a malpractice standard that impermissibly compares the defendant-attorney's choice of strategies with the afterthoughts later offered by plaintiff's now-favored attorney, for whom bias is a necessary concern, rather than measuring counsel's performance against the much more objective standard of the profession's commonly prevailing practices [citations omitted]."

negligence is established. Even if counsel improperly advises the client, the advice is not the proximate cause of the harm if the client cannot demonstrate its own likelihood of success absent such advice. Moreover, speculative damages cannot be a basis for legal malpractice [internal citations omitted]."

Pellegrino v File, 291 AD2d 60, 63 (1st Dept 2002).

"Although the question of whether malpractice has been committed is ordinarily a triable factual issue, summary judgment may be granted if the attorney can establish that the client cannot prove at least one of the elements of malpractice [citations omitted]."
Guiles v Simser, 35 AD3d 1054, 1055 (3d Dept 2006).

In short, even if the record before the court raises an issue of fact with respect to whether defendant's legal services met the requisite standard of care, plaintiffs must proffer some evidence that such negligence was a proximate cause of any alleged injury to plaintiffs.

1031 provides that no gain or loss shall be recognized at the time real estate is sold if the seller performs an exchange of like-kind property. Under these provisions, any tax due on the sale of the initial property is deferred until the replacement property, the like-kind exchange, is sold. 26 USC § 1031. However, in order to take advantage of these provisions, a taxpayer must identify the like-kind replacement property within 45 days of the sale of the initial property, and close on the purchase of the replacement property within 180 days of the sale of the initial property. 26 USC § 1031 (a) (3) (A) and (B) (i). According to the regulations pertaining to this section of

the IRC, to identify the replacement property, the taxpayer must designate the property on a written document signed by the taxpayer and transmitted to either "[t]he person obligated to transfer the replacement property to the taxpayer...;" or "[a]ny other person involved in the exchange other than the taxpayer or disqualified person" 26 CFR § 1.1031 (k)-1 (c) (2) (i), (ii). Further, such identification must include an unambiguous legal description of the property. 26 CFR § 1.1031 (k)-1 (c) (3). See *Ravenswood Group v Fairmont Associates*, 735 F Supp 1285, 1287 (SDNY 1990) (denying plaintiff's motion to introduce expert testimony on tax liability aspect of consequential damages because taxpayer would not qualify for tax deferral under 1031(a)(3)(A) when, *inter alia*, it "did not bind itself to contingencies beyond its control that would determine which of the exchanged properties was to be purchased and did not identify such contingencies in writing.")

Plaintiffs have failed to provide any documentary evidence that identified the replacement property within 45 days of the closing, or that tended to show that they could have closed on the acquisition of such replacement property within the 180-day period. The affirmation of plaintiffs's attorney that avers that plaintiffs were negotiating to purchase replacement property, and approached a bank about financing, but that the opportunity to "identify" the replacement property "had not ripened" is not

evidentiary as the attorney lacks personal knowledge of the transaction. In addition, such affirmation does not constitute evidence of a writing identifying the replacement property. Moreover, plaintiff Sam Young states, under oath, that he "received a contract for a building located at 35 West 36th Street" approximately one month prior to the closing but attaches no copy of such a contract. The affirmation and the affidavit, without written substantiation of identifiable replacement property, are insufficient to meet plaintiffs' burden.

To defeat a motion for summary judgment, the opponent must be able to present arguments based on evidentiary facts, and not rely on surmise, conjecture or speculation. *Marino v Parish of Trinity Church*, 67 AD3d 500 (1st Dept 2009). Since plaintiffs offer no evidence that they could have obtained a written document identifying the replacement property in order to meet the replacement requirements of 1031 like-kind exchanges but for defendant's malpractice, they cannot assert that defendant's failure to have the check from the proceeds of the sale issued to an IQ caused it damage. Therefore, defendant's motion must be granted.

The court notes that plaintiffs maintain that defendant's failure to provide them with a letter of engagement or a written retainer agreement is further evidence of legal malpractice. In this, plaintiffs are incorrect.

By Joint Order dated December 30, 2001, the Appellate Divisions promulgated Part 1215 of Title 22 of the Official Compilation of Codes, Rules and Regulations of the State of New York (22 NYCRR 1215.1 [a]), which became effective on March 4, 2002. Pursuant to this rule, attorneys are mandated to provide a "client a written letter of engagement before commencing the representation, or within a reasonable time thereafter." Subsection (b) of section 1215.1 delineates the information that must be addressed in such a letter of engagement:

"(1) explanation of the scope of the legal services to be provided;

(2) explanation of attorney's fees to be charged, expenses and billing practices; and

(3) where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of this Title."

An attorney is also permitted to enter into a written retainer agreement with the client in lieu of providing a letter of engagement.

However, an attorney's failure to meet these requirements only precludes the attorney from suing the client for non-payment of fees; it has nothing to do with legal malpractice. See generally *Nabi v Sells*, 70 AD3d 252 (1st Dept 2009).

Based on the foregoing, it is hereby

ORDERED that defendant's motion for summary judgment is

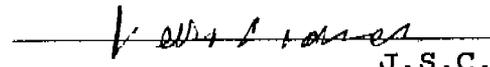
granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiffs' cross motion for summary judgment is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: February 10, 2011

ENTER:


J.S.C.
DEBRA A. JAMES

FILED

FEB 22 2011

**NEW YORK
COUNTY CLERK'S OFFICE**