MEMORANDUM

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SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NASSAU

PRESENT:

Hon. Burton S. Joseph,

Justice.

DEBRA PUCCIO, BERNARD FIGLER, DEBRA PUCCIO, as Parent and Natural Guardian of ALEXANDRA FIGLER, and DEBRA PUCCIO, Parent and Natural Guardian of SAMANTHA FIGLER,

Plaintiffs,

- against -

THE TOWN OF OYSTER BAY, GARY BLANCHARD, KENNETH BOYCE, JOHN S. GUIDO, JR., JAMES CRONIN, THE PRUDENTIAL LONG ISLAND REALTY MITZI (MITSUKO) MARUME, CENTURY 21 REAL ESTATE, DONNA KUNZIG, LEONARD KUNZIG, DORMER WIZARD, ROSENTHAL & CURRY, ESQS., and EDWARD M. ROSENTHAL,

Defendants.

Trial/IAS	Part 18
Index No.	28681/1999
Motion No.	16, 18 & 19
Motion Date	July 19, 2002

Papers Numbered

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Upon the foregoing papers and for the following reasons, the latest motion on this contentious matter by Defendants Rosenthal & Cury, Esqs. and Edward M. Rosenthal, for summary judgment dismissing the thirteenth and fourteenth causes of action, is granted in part

and denied in part. The separate motion by Defendant The Town of Oyster Bay, for summary judgment dismissing the complaint, and the cross motion by Defendant Gary Blanchard, for summary judgment dismissing the complaint and all cross claims insofar as asserted against them, are granted.

In early August of 1998, Plaintiff Debra Puccio retained the Co-Defendant attorneys – Edward M. Rosenthal and Rosenthal & Curry, Esqs. (hereinafter collectively "Rosenthal") – in connection with the purchase of a single-family residence which had been substantially refurbished by Co-Defendants James Cronin, and then-owner John S. Guido, Jr. After Defendant Town of Oyster Bay issued a Certificate of Occupancy with respect to the construction work performed, the transaction closed in September of 1998.

Shortly thereafter, Puccio and her husband, Plaintiff Bernard Figler, allegedly discovered significant defects and problems with the Oyster Bay residence. According to the Plaintiffs, these defects were intentionally concealed by, *inter alia*, the sellers, the listing broker, and various Town employees – including the Town Building inspector – all of whom, it is alleged, were part of a conspiracy to cover up the defective condition of the premises. In November of 1999, Puccio and Figler, individually and in their representative capacities on behalf of their children, Alexandra and Samantha Figler, commenced the within action, alleging claims sounding in fraud, civil conspiracy, breach of contract, negligence and attorney malpractice.

Insofar as relevant to the Rosenthal movants, the Plaintiffs contend, in sum and substance, that after their offer had been accepted, the sellers transmitted a contract of sale to Co-Defendant Edward M. Rosenthal, who thereafter allegedly: (1) failed to explain the relevant terms of the agreement to Puccio and her husband; and (2) similarly failed to question, *inter alia,*

the absence of relevant warranties and the inclusion of an "as is" clause in the contract of sale. The Plaintiffs further contend that during pre-closing negotiations, the real estate agent representing the seller – Co-Defendant Leonard Kunzig – allegedly advised the Plaintiffs that it would be unnecessary to have an engineer inspect the premises because, among other things, the Town had "completely inspected the Premises during the construction process * * *".

According to the Plaintiffs, Rosenthal committed additional legal malpractice by failing to advise them to obtain an engineer's inspection, and by then permitting them to close the transaction without conducting such an inspection. The Plaintiffs also contend that when they discovered certain defects in the premises immediately prior to the closing, they apprised Rosenthal, who allegedly told them that nothing could be done at this juncture since as the sale was governed by the "as is" clause contained in the contract.

By Memorandum decision dated August 17, 2000, this Court denied an earlier application by the Rosenthal Defendants to dismiss the complaint, concluding in material part, that upon the papers submitted "the determination of whether the Rosenthal Defendants acted as reasonable lawyers * * * will have to be left for a jury to decide * * *." The Court also rejected the contention that the submission of the contract of sale alone resolved the issue of Rosenthal's alleged malpractice and observed in this respect that the "question of liability in a malpractice case rests in the attorneys conduct and not the work product that was produced as a result of that conduct."

Upon the instant Notice of Motion returnable July 19, 2002, the Rosenthal Defendants again move for summary judgment pursuant to CPLR 3212, dismissing the thirteenth and fourteenth causes of action sounding in attorney malpractice and breach of contract, arguing and providing additional proof, *inter alia*, that the Plaintiffs agreed to purchase the home "as is

and without warranties;" that off-sets and accommodations were, in fact, made at the closing to compensate them for certain defects discovered at the premises; that the Plaintiffs themselves inspected the house; and that the Plaintiffs knowingly agreed to forego an engineer's inspection and were therefore "bound by well settled contract principles." For similar reasons as the ones previously elucidated, the Rosenthal motion should be denied.

In order to establish a cause of action to recover damages for legal malpractice, a client must demonstrate that: (1) that the attorney failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community; (2) proximate cause; (3) damages; and (4) that the client would have been successful in the underlying action had the attorney exercised due care (*Fillippo v Russo,* ___AD2d___, 744 NYS2d 500, 502; *Cannistra v O'Connor, McGuinness, Conte, Doyle, Oleson & Collins*, 286 AD2d 314, 316; *McCormack & Phillips v Krim*, 283 AD2d 464; *Iannacone v Weidman*, 273 AD2d 275). Moreover, "[o]n a motion for summary judgment to dismiss a legal malpractice cause of action, the attorney 'must proffer admissible evidence establishing that the [client] is unable to prove at least one of the essential elements of his or her case'" (*McCormack & Phillips v Krim, supra* [quoting *Suydam v O'Neill*, 276 AD2d 549, 550]; *see Fillippo v Russo, supra; Shopsin v Siben & Siben*, 268 AD2d 578; *Lefkowitz v Lurie*, 253 AD2d 855). "Whether malpractice has been committed is ordinarily a factual determination to be made by the jury" (*see Greene v Payne, Wood and Littlejohn*, 197 AD2d 664, 666).

While the presence of the "as is" clause, the absence of relevant warranties and the alleged failure to provide advice concerning an engineer's inspection may diminish the prospect of recovery against the seller, the issue here is whether the Rosenthal Defendants committed legal malpractice in providing – or failing to provide – advice to the Plaintiffs and by

then allowing them to execute a contract which omitted relevant warranties and contained the foregoing "as is" provision. The Rosenthal Defendants cannot assert, on the one hand, that the Plaintiffs forfeited significant rights upon signing the contract, and on the other, theorize that, as a consequence, the Plaintiffs are somehow precluded from asserting a malpractice claim against the attorney who represented them in connection with that contract.

Moreover, in light of the Court's prior holding and the conflicting allegations advanced with respect to the operative facts and occurrences which surrounded the Rosenthal Defendants' conduct, the Court concludes that triable issues of fact exist with respect to the claim that these Defendants committed malpractice, and that "but for" their representation, the Plaintiffs would not have sustained the claimed damages allegedly flowing from the purchase of the subject premises (*see e.g. McCormack & Phillips v Krim, supra; Suydam v O'Neill, supra; Bloom v Kernan*, 146 AD2d 916).

However, that branch of the Rosenthal motion which is to dismiss the malpractice claims insofar as interposed by Plaintiffs Bernard Figler and the infant Plaintiffs, Alexander Figler and Samantha Figler, is granted. "'The well-established rule in New York with respect to attorney malpractice is that absent fraud, collusion, malicious acts or other special circumstances, an attorney is not liable to third parties, not in privity, for harm caused by professional negligence'"(*Andrewski v Devine,* 280 AD2d 992, 993 [citing *Matter of Spivey v Pulley,* 138 AD2d 563, 564]; *see Weiss v Manfredi*, 83 NY2d 974, 977; *Prudential Ins. Co. v Dewey, Ballantine, Bushby, Palmer & Wood*, 80 NY2d 377, 382).

Here, the Rosenthal Defendants have submitted evidence, including the relevant excerpts from Bernard Figler's deposition, demonstrating, *prima facie,* that the movants' contractual relationship was exclusively with Puccio, who owned the parties' previous family

residence; alone executed the operative purchase documents at issue, and then took exclusive title to the subject property upon the closing of the transaction. It bears noting in this respect that Figler himself testified, *inter alia*, that Puccio hired the Rosenthal Defendants and that they represented her exclusively.

The Plaintiffs' opposing submissions fail to generate triable issues of fact with respect to the allegation that an attorney-client relationship existed between Bernard Figler and the Plaintiffs' infant children, Samantha and Alexander Figler, or that there existed special circumstances otherwise supporting the claims against the Rosenthal Defendants alleged on behalf of Figler and the children (*Andrewski v Devine, supra; Conti v. Polizzotto*, 243 AD2d 672). The Plaintiffs' reliance upon the holding in *Baer v Broder* (86 AD2d 881), is misplaced inasmuch as the unique factual circumstances presented there are absent at bar.

By separate Notices of Motion, Defendants Gary Blanchard, the Building Inspector who had been assigned to the review the work performed at the premises, and the Town of Oyster Bay, which employed Blanchard, also move for summary judgment dismissing the complaint and all cross claims insofar as asserted against them pursuant to CPLR 3212. The gravamen of the Plaintiffs' claims is that the Town was on notice that significant and dangerous structural defects existed – or may have existed at the premises – but that instead of inquiring into the circumstances, the "Town turned a blind eye and improperly issued a certificate of occupancy which induced [the Plaintiffs] to purchase the Premises for [their] family's primary residence."

The Plaintiffs further contend that there were significant discrepancies between the configuration of the house that they purchased and the plans which were actually filed with the building department, and that Blanchard not only failed to take note of, or act upon, these

deviations, he also ignored purported structural defects and Code violations at the premises which should have – but did not – preclude the issuance of a certificate of occupancy.

Preliminarily, those branches of the Town Defendants' motions which are to dismiss the claims sounding in conspiracy are granted, there being no opposition thereto. The Court further notes – as it did in previously dismissing this claim against certain other Co-Defendants – that "New York does not recognize the tort of civil conspiracy as an independent cause of action" (*see Sokol v Addison*, 293 AD2d 600; *Red Cap Valet, Ltd. v Hotel Nikko (USA), Inc.*, 273 AD2d 289, 290).

A similar result follows from that branch of Defendant Blanchard's motion which is to dismiss the Plaintiffs' claims sounding in fraud. To establish a *prima facie* case of actual fraud, a Plaintiff must present proof that (1) the defendant made material representations that were false, (2) the defendant knew the representations were false and made them with the intent to deceive the plaintiff, (3) the plaintiff justifiably relied on the defendant's representations, and (4) the plaintiff was injured as a result of the defendant's representations (*see Cohen v Houseconnect Realty Corp.*, 289 AD2d 277, 278; *Laurel Ridge, LLC v Alfredo Nurseries, Inc.*, 286 AD2d 710; *Clarke v Wallace Oil Co., Inc.*, 284 AD2d 492, 493; *see also, Lama Holding Co. v. Smith Barney Inc.*, 88 NY2d 413, 421). "Each of the foregoing elements must be supported by factual allegations containing the details constituting the wrong sufficient to satisfy CPLR 3016(b)" (*see Cohen v Houseconnect Realty Corp., supra*).

Applying these principles herein, the relevant deposition testimony and other materials submitted by Blanchard have established his *prima facie* entitlement to judgment as a matter of law with respect to the Plaintiffs' fraud claims (*see Laurel Ridge, LLC v Alfredo Nurseries, Inc. supra*). More particularly, the moving papers demonstrate that Blanchard neither

intentionally concealed alleged defects, nor made any actionable representations to the Plaintiffs – or to anyone for that matter – upon which a claim sounding in fraud could be predicated (*see e.g. Great Atl. & Pac. Tea Co., Inc. v Friedman,* 289 AD2d 198; *Laurel Ridge, LLC v A. Alfredo Nurseries, Inc., supra*).

The Plaintiffs' opposing submissions appear to be grounded upon unsubstantiated, speculative contentions, which fail to create triable issues with respect to their claims that, *inter alia*, Blanchard "knowingly participated in a fraud" by "joining in with his buddies and either ignor[ing] * * * blatant and dangerous defects * * * or failing to inspect[ ] the Premises". At best, the Plaintiffs' allegations against Blanchard sound in negligence and principally rest upon the contention that he failed to conduct – or to properly conduct – the required inspection of the subject premises.

The Plaintiffs' negligence claims against both Blanchard and the Town of Oyster Bay are predicated, in part, upon the contention that a so-called "special relationship" arose since the Town allegedly issued a Certificate of Occupancy with knowledge that "blatant and dangerous" Code violations and conditions existed at the premises (*see Garret v Holiday Inns, Inc.*, 58 NY2d 253). The Court does not agree with Plaintiffs' characterizations.

As a general rule, absent a special relationship, a municipality and its officials are immune from liability for damages caused by quasi-judicial and discretionary acts – including the issuance of a building permit – even where those acts are wrongful (*see 154 East Park Ave. Corp. v City of Long Beach*, 52 NY2d 991; *Rottkamp v Young*, 21 AD2d 373, *affd* 15 NY2d 831; *see also City of New York v 17 Vista Assocs.*, 84 NY2d 299, 307; *O'Connor v City of New York*, 58 NY2d 184; *Rickson v Town of Schuyler Falls*, 263 AD2d 863, 864). Notably, "[m]uch more in the way of a special relationship need be alleged than the mere failure to uncover fire and

safety violations during an inspection to constitute a sufficient predicate for imposing liability on the municipality"(*Green v. Irwin*, 174 AD2d 879, 881).

Where, however, a violation is known and blatant, the municipality has a duty to refuse to issue the certificate of occupancy, and "[n]o exercise of judgment or weighing of competing factors [is] necessary"(*Garrett v Holiday Inns,* 58 NY2d 253, 263; *Okie v Village of Hamburg,*196 AD2d 228, 232-233; *Marshall v City of Watertown*, 181 AD2d 196; *Goudreau v City of Rensselaer*, 134 AD2d 709). Significantly, a municipal employee performing a discretionary act within the scope of his or her employment is generally entitled to a qualified immunity to suit (*see Rottkamp v Young, supra; Tango v Tulevech*, 61 NY2d 34, 41; *Stromberg v Town Oyster Bay*, 140 Misc 2d 295, 298 [a "review of the Town Law and the Local Laws of the Town of Oyster Bay reveals that a building inspector in the Town acting in his official capacity would be required to exercise discretion in interpreting and acting upon the ordinances he was to enforce"]).

Having submitted relevant deposition testimony, exhibits and the supporting affidavit of Alan Landman – the superintendent of the Town's Division of Buildings, the Town and Gary Blanchard have established an entitlement to judgment with respect to the claims sounding in negligence, and the related allegation that there existed "known, blatant and dangerous" Code violations at the subject premises. Specifically, Mr. Landman has averred that, upon review of parties' submissions and the original plans filed, there were no Code violations of dangerous safety conditions in existence at the premises. Landman has further alleged that while deviations from filed plans generally require an amendment thereto, "unless the deviation between the plans and the layout of the house created a safety concern, code violation or compromised the structural integrity of the house, the Inspector, in his discretion, may not require

an amendment to the plans." According to Landman, while there may have been certain deviations from the plans in this case, none of these deviations constituted Code violations.

Although the Plaintiffs have opposed the motion with an expert engineer's affidavit based upon an inspection performed some three years after Blanchard's final inspection was conducted, neither that report nor the engineer's opposing affidavit provides citations to any specific Town Building Code provisions which were violated, or identifies with requisite particularity, any blatantly dangerous conditions at the subject premises. Nor have any other grounds been established which would give rise to a "special duty" owed by the Town or Blanchard to the Plaintiffs, or which would create an issue of fact with respect to the applicability of the above-referenced immunity.

In light of the foregoing, and in the absence of demonstrable Code violations – much less, "known, blatant and dangerous violations" (*Garrett v Holiday Inns, supra*, at 263) – the Plaintiffs' claims sounding in negligence against Blanchard and the Town of Oyster Bay, must be dismissed (*see Sposato v Village of Pelham*, 275 AD2d 364; *Rickson v. Town of Schuyler Falls*, 263 AD2d 863).

Lastly, the Town moves to dismiss the sixteenth cause of action, which alleges that the it negligently hired and supervised co-defendant Kenneth Boyce, a plumbing inspector who performed plumbing work at the premises. Insofar as relevant, and as amplified and narrowed by the Plaintiffs' opposing submissions, the foregoing claim is based upon the fact that Boyce was subsequently arrested for performing private side jobs during his employment hours and then improperly inspecting his own work. To the extent that the Plaintiffs contend that the Town was negligent in hiring Boyce, that claim is lacking in merit.

It is well settled that, "'[a] necessary element of a cause of action for negligent

hiring is that 'the employer knew or should have known of the employee's propensity for the conduct which caused the injury'" (*Brancato v Dee & Dee Purchasing, Inc.*, ___AD2d___, 745 NYS2d 564 [quoting *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159]). There is nothing in the record indicating that the Town possessed such knowledge (*see id.*; *Melnik v Saks & Co.*, 292 AD2d 430).

Nor, in any event, have the Plaintiffs demonstrated that they sustained any relevant injury, proximately attributable to the Town's hiring and/or supervision of Boyce. While the Plaintiffs have repeatedly alleged that Town was aware of Boyce's misconduct and then did nothing to ensure that the premises "conformed with the applicable building codes", their moving affidavits and expert submissions fail to identify the actions undertaken by Boyce during his employment which resulted in specific Code violations at the premises. Under these circumstances, and since no pertinent injury and/or damage flowing Boyce's municipal employment has been identified, the Town's motion to dismiss the negligent hiring/supervision cause of action must be granted.

The Court has considered the remaining claims advanced by the Plaintiffs in opposition to the foregoing motions and concludes that they are lacking in merit.

In accordance with the foregoing, the Rosenthal motion is granted in part and denied in part; the Town's and Blanchard's motions are granted and the complaint is dismissed insofar as asserted against them. The above constitutes the decision and order of the Court.

ENTER:

Dated: Mineola, New York
September 9, 2002

Burton S. Joseph
J.S.C.

ENTERED

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COUNTY CLERK'S OFFICE