

**Cosentino v Sullivan Papain Block McGrath &
Cannavo, P.C.**

2010 NY Slip Op 31357(U)

May 20, 2010

Sup Ct, NY County

Docket Number: 121296/2003

Judge: Saliann Scarpulla

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5-24-10

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

PRESENT: SALIANN SCARPULLA

PART 19

Index Number : 121296/2003
COSENTINO, SAMUEL
 VS.
SULLIVAN PAPAIN BLOCK
 SEQUENCE NUMBER : 009
 SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *is decided in accordance with accompanying memorandum decision.*

This constitutes Decision & Order of the Court.

FILED
 MAY 24 2010
 NEW YORK
 COUNTY CLERK'S OFFICE

Dated: May 20, 2010

Saliann Scarpulla
SALIANN SCARPULLA J.S.C.

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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X

SAMUEL COSENTINO,
Plaintiff,

Index Number 121296/2003
Submission Date 3/3/10
Mot. Seq. No. 009

-against-

DECISION and ORDER

SULLIVAN PAPAIN BLOCK McGRATH &
CANNAVO, P.C

Defendant.

----- X

Appearances: For Plaintiff :
Curtis and Associates
By Robert Curtis, Esq.
155 Duane Street
New York, New York 10013

For Defendant:
Lewis, Brisbois, Bisgaard, & Smith, LLP
By Mark K. Anesh, Esq.
199 Water Street, 25th Floor
New York, New York 10038

Papers considered in review of this motion for summary judgment:

Papers	Numbered
Notice of Motion/Affid/Memo. in Supp. of Mot. for Summ. Judg.....	1
Affirm. of Counsel in Opp. to Defendant's Mot. for Summ. Judg.....	2
Affid. of Plaintiff Cosentino in Opp.....	
Reply Affid. in Further Supp.....	
Reply Memorandum in Further Supp.....	5

FILED
MAY 24 2010
NEW YORK
COUNTY CLERK'S OFFICE

HON SALIANN SCARPULLA, J.:

Plaintiff Samuel Cosentino ("Cosentino") commenced this action against defendant law firm Sullivan Papain Block McGrath & Cannavo, P.C. ("Sullivan") for legal malpractice. In his complaint, Cosentino alleges that on August 7, 1995, he entered into an attorney-client relationship with Sullivan to prosecute an action for personal injuries that Cosentino sustained at 584 Court Street in Brooklyn while on duty as an NYPD officer. On September 27, 1995, Cosentino, represented by Sullivan, commenced an action in against Dimitros Galatis, Mary Galatis, Spiridon Moshos, and Mary Moshos

(“the underlying defendants”), the owners of the real property on which Cosentino was injured. When the underlying defendants did not answer the complaint, Sullivan obtained a default judgment in Cosentino’s favor on March 25, 1996.

Cosentino alleges that Sullivan failed promptly to obtain an inquest on damages, settle the judgment, and attach the Galatis’ and Moshos’ personal assets and valuable property, with the result that the default judgment was vacated as abandoned. According to Cosentino, by the time Sullivan refiled the action and settled a second default judgment in the amount of \$755,800.00 on February 8, 2000, the underlying defendants fraudulently transferred their property and obtained discharge in bankruptcy to make themselves judgment proof.

Additionally, Cosentino argues that Sullivan negligently failed timely to inform him of the viability of a fraudulent transaction action against the underlying defendants, with the claim becoming untenable due to the delay.

Sullivan now moves pursuant to CPLR 3212 for summary judgment dismissing plaintiff’s entire action for legal malpractice. Sullivan does not argue the issue of the adequacy of its representation of Cosentino. Instead, Sullivan argues that irrespective of the quality of Sullivan’s legal representation, the record establishes as a matter of law that Cosentino would not have recovered anything on his judgment. According to Sullivan, the underlying defendants did not have any liability insurance covering the premises where the accident happened. Further, they did not possess any unencumbered property

or funds when Sullivan obtained the first default judgment, or at any time thereafter, making collection impossible. Thus, Sullivan concludes, the judgment had no value, and Cosentino suffered no damages as a result of any alleged negligent failure to pursue collection.

Discussion

Under CPLR 3212(b), summary judgment “shall be granted if, upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” To warrant a court’s directing judgment as a matter of law, it must clearly appear that no material issue is presented for trial. *Epstein v Scally*, 99 A.D.2d 713 (1st Dep’t 1984). When a party has made a prima facie showing to entitle it to summary judgment, the burden shifts to the opposing party to show by evidentiary facts that there is a material issue of fact for trial. *Indig v Finkelstein*, 23 N.Y.2d 728 (1968); *see also Vogel v Blade Contr. Inc.*, 293 A.D.2d 376, 377 (1st Dep’t 2002). Conclusory allegations or denials are insufficient to either warrant or defeat summary judgment. *McGahee v Kennedy*, 48 N.Y.2d 832, 834 (1979).

In a legal malpractice action, the plaintiff has a two-prong burden: the plaintiff must prove hypothetical success on the merits in the underlying litigation and the attorney’s negligence in handling the litigation. *See e.g., Aquino v Kuczinski, Vila & Associates, P.C.*, 39 A.D.3d 216, 219 (1st Dep’t 2007); *Lindenman v Kreitzer*, 7 A.D.3d

30 (1st Dep't 2004). An essential element of the plaintiff's case in any legal malpractice claim is the actual value of the injuries the plaintiff suffered, *i.e.*, the value of the judgment the plaintiff would have obtained but for the attorney's negligence. *Lindenman*, 7 A.D.3d at 31.

In the First Department, the ultimate collectibility of any judgment that could have been obtained in the underlying action is not an element that plaintiff must prove as a part of his or her prima facie case. *Lindenman*, 7 A.D.3d at 35-36. Instead, collectibility is treated as "a matter constituting an avoidance or mitigation of the consequences of the attorney's malpractice and the erring attorney should bear the inherent risks and uncertainties of proving it." *Id.* (citations omitted).

The time frame within which non-collectibility must be established in a particular case depends on the life span of the judgment and any other factual considerations the trial judge finds relevant in the process of balancing competing equities. *See Lindenman v Kreitzer*, 7 A.D.3d 30, 36 (1st Dep't 2004). Evidence of non-collectibility must fully cover the relevant period. *See Andrew Garrett Holding Corp. v Singer*, 2005 N.Y. Misc. Lexis 3255, *10 (Sup Ct, New York County 2005, Goodman, J.).

Having conducted thorough discovery, which included depositions of all of the underlying defendants, Sullivan argues that at no point between March 25, 1996, when Sullivan obtained original default judgment, and February 8, 2000, when the inquest was

held, did the underlying defendants possess any property that could satisfy Cosentino's judgment.

The crux of the matter is a piece of property at 584 and 586 Court Street, where the accident happened (hereinafter "the Court Street property"). Cosentino argues that Sullivan failed to prevent the underlying defendants from fraudulently transferring the Court Street property to their family friend John Doyamis ("Doyamis") to make themselves judgment proof shortly after Cosentino's accident .

Sullivan has shown, however, that the Court Street property was encumbered by two mortgages held by Joseph Drella and Vassilos Kefalas and a real estate tax lien. At the time of Cosentino's accident, the underlying defendants were falling behind on their mortgage payments, and foreclosure was imminent. (Sullivan Ex. X). After unsuccessfully trying to refinance the mortgages with Doyamis' help, the underlying defendants offered to sell Doyamis the Court Street property as a real estate investment in consideration of \$10.00 and full satisfaction of the outstanding mortgages. (M. Galatis Dep. 69:21-25).

At the time of sale, the Court Street property was valued at about \$ 200,000.00. (Doyamis Dep. 76). Doyamis purchased the Court Street property in September of 1997 for \$ 223,655.00, which was the amount paid at the closing, covering both mortgage and tax liens and attorneys' fees. (Doyamis Dep. 25:20-22). At the closing, Doyamis received

a check from his lender for about \$110,000.00, earmarked for the refurbishing of the Court Street property. (Doyamis Dep. 74:17-20).

Between September 1997 and May 1998, Doyamis fully repaired and upgraded the Court Street property, investing upwards of \$ 300,000.00, and subsequently leased it out. (Doyamis Dep. 26:26; 27:14). At the end of the year 2000, Doyamis sold the Court Street property to John Carlo and Floren Krasniqui for the aggregate amount of \$505,000.00. (Doyamis Dep. 27:19; 28:15; 84:6). From this evidence, Sullivan has successfully shown that the Court Street property held no equity when the underlying defendants transferred it to Doyamis, and that Doyamis obtained the Court Street property as a good faith purchaser for fair value.¹

This conclusion is further buttressed by the testimony of Matthew Schwartz of Siller & Wilk. Schwartz commenced a fraudulent conveyance suit on Cosentino's behalf on May 27, 2003, but later withdrew it when faced with a motion to dismiss and for sanctions. Schwartz testified at his deposition on March 30, 2006 that he suggested to Cosentino to withdraw the fraudulent conveyance action because Floren Krasniqui and John Carlo, the owners of the Court Street property at that time, were good faith purchasers from Doyamis. (Schwartz Dep. 47-49; 54-63; 71:2-5). Schwartz further

¹Cosentino argues that fraud can be inferred from the fact that Doyamis' purchase of the property was financed with a loan from Pinnfund USA, where Doyamis served as an Executive Vice President, and that Pinnfund USA had been indicted on federal fraud charges. Other than this bare assertion, however, Cosentino has submitted no evidence raising an issue of fact as to a link between Pinnfund USA's alleged fraud and the malpractice claim Cosentino asserts against Sullivan.

admitted that he did not have any evidence that would indicate that Doyamis was not a good faith purchaser as well. (Schwartz Dep. 96:10-25; 98:8-14).

Further, Sullivan has submitted sufficient, uncontradicted evidence showing that the underlying defendants did not have any personal assets from which to satisfy Cosentino's judgment. During the relevant time frame, Mary Galatis worked as a skin care specialist, with an annual income of about \$30,000 a year. (M. Galatis Dep. 14:14). Mary Galatis did not have any other source of income. (M. Galatis Dep. 16:6), and she never owned any stocks, bonds or financial plans, and only had a checking account where she received her pay by direct deposit. (M. Galatis Dep. 16:11-18, 72:20-25, 73:4-7). Aside from the Court Street property, Mary Galatis had never owned any other real property. (M. Galatis Dep. 16:7-10).

Dimitros Galatis lost his failed coffee shop located at the Court Street property due to foreclosure, did not own any other tangible or intangible property and was unable to find steady work after closing the coffee shop. (M. Galatis Dep. 66:13-20, 70; D. Galatis Dep. 89). Both Mary and Dimitros Galatis gave authorizations for the parties to receive their tax records, and the parties were unable to uncover any hidden assets.

Sullivan has also established that Spiridon and Mary Moshos were insolvent at the time of the underlying action. In 1996-1997 years, Mary Moshos worked as a teacher's aide, earning an annual income of between six and fourteen thousand dollars and owned no substantial personal property. (M. Moshos Dep. 20). At all relevant times, Spiridon

Moshos did not have stable employment, and was self-employed as a salesman with occasional attempts at opening his own business, all of which were unsuccessful. (S. Moshos Dep. 115-129).

Prior to filing for chapter 7 bankruptcy liquidation in February 1998, which among other debts discharged Cosentino's claim (S. Moshos Dep. Ex. 13), the only real property the Moshos owned was their respective one quarter shares in the Court Street property and their residence at 242 Munro Boulevard, Valley Stream, New York, which they purchased in 1988 for approximately \$278,000.00. (S. Moshos Dep. Ex. 11). By 1992, the Moshos had withdrawn all the equity from their residence by taking out two mortgages from Citibank and the Bank of New York in the aggregate amount of \$272,000.00. (S. Moshos Dep. Ex. 7, 8, 9).

In 1995, the Moshos took out a third mortgage of \$25,936.16, refinancing and consolidating all three mortgages with the total unpaid principle of \$253,300.00. (S. Moshos Dep. Ex. 7, 8, 9). As of May 1996, the fair market value of the Moshos' residence was \$220,000.00. (S. Moshos Dep. Ex. 11). In March of 1997, Citibank foreclosed on the property, auctioned it off through a forced sale three years later for \$225,250.00, and Citibank retained all of the sale proceeds. (S. Moshos Dep. Ex. 10, 12). Just as the Galatis, the Moshos provided tax record authorizations, and Cosentino has not submitted any evidence that contradicts their testimony.

In sum, through its submissions, Sullivan has satisfied its burden of proof of establishing that the original judgment that Cosentino received on March 25, 1996 was not collectible, because there was no insurance policy covering the premises where Cosentino's accident occurred and because the underlying defendants had neither sufficient income nor equity in real property with which to satisfy even a portion of the judgment. Given that the original judgment was not collectible, Cosentino cannot make out his claim for malpractice for Sullivan's allegedly negligent failure to settle the March 25, 1996 judgment and collect on it. *See Lindenman v Kreitzer*, 7 A.D.3d 30, 36 (1st Dep't 2004).

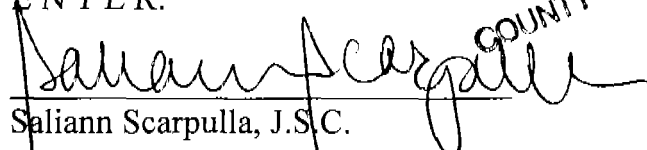
In accordance with the foregoing, it is

ORDERED that the motion by defendant Sullivan Papain Block McGrath & Cannavo, P.C. for summary judgment dismissing the complaint is granted, and the Clerk of Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
May 20, 2010

ENTER:


Saliann Scarpulla, J.S.C.

FILED

MAY 24 2010

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