

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

PRESENT: SCARPULLA, SALIANN
Justice

PART 39

JOHN P. GOURARY, AS LIMITED ADMINISTARTOR
C.T.A OF THE ESTATE OF PAUL GOURARY,
DECEASED

INDEX NO. 651932/10

MOTION DATE

- v -

ALICE GREEN, AS EXECUTOR OF THE ESTATE OF
PAUL GREEN, DECEASED, ET AL.

MOTION SEQ. NO. 002

The following papers, numbered 1 to , were read on this application to/for
Notice of Motion/ Petition/ OSC - Affidavits - Exhibits No(s)
Answering Affidavits - Exhibits No(s)
Replying Affidavits No(s)

Upon the foregoing papers, it is

ORDERED that the motion is decided per the accompanying memorandum
decision, which disposes of motion sequence 002.

DATE: 1/15/16

Signature of Sal Scarpulla
SCARPULLA, SALIANN, JSC

- 1. CHECK ONE : [] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. APPLICATION : [X] GRANTED [] DENIED [] GRANTED IN PART [] OTHER
3. CHECK IF APPROPRIATE : [] SETTLE ORDER [] SUBMIT ORDER
[] DO NOT POST [] FIDUCIARY APPOINTMENT [] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 39

-----X
JOHN P. GOURARY, AS LIMITED ADMINISTRATOR
OF THE ESTATE OF PAUL GOURARY, DECEASED,

Plaintiff,

DECISION/ORDER
Index No. 651932/2010

-against-

ALICE GREEN, AS EXECUTOR OF THE ESTATE OF
PAUL GREEN, DECEASED, ELIZABETH LASTER,
AS EXECUTOR OF THE ESTATE OF OLIVER
LASTER, DECEASED, SCOTT A. MACOMBER, AND
GREEN & ETTINGER,

Defendants.

-----X
HON. SALIANN SCARPULLA, J.:

In this action to recover damages for, *inter alia*, legal malpractice, defendants Alice Green, as Executor of the Estate of Paul Green, and Green & Ettinger (“Green defendants”) move for summary judgment dismissing the complaint insofar as asserted against them.

Paul Gourary (“Gourary”) and Oliver Laster (“Laster”) were longtime friends who each owned 50% of the shares in the closely held corporation 127-131 West 25th St. Corp. (“corporation”) since the 1940s. They were also the directors of the corporation. The corporation’s principal asset was a commercial building located at 127-131 West 25th Street in New York City. The corporation also held interests in six limited partnerships, of which Paul Green (“Green”) was the general partner. Those partnerships owned and

operated retail shopping centers. Green, a longtime friend of Gourary, and his law firm Green & Ettinger, were the attorneys for Gourary and the corporation.

In May 2005, Gourary became ill, was admitted to a nursing home, and remained a resident there until his death on January 29, 2007. When Gourary had become ill, Laster took over the supervision of the building and corporation.

Laster's son-in-law Scott A. Macomber ("Macomber") expressed interest in purchasing Gourary's share of the building and retained appraiser James Levy ("Levy") to prepare an appraisal of the building. The appraisal valued the building as of October 24, 2005 at \$12.3 million, and provided that "the intended user of the report [was] Scott Macomber, the client" for his use "in connection with the disposition of the asset."

On January 11, 2006, Gourary, Gourary's wife Marianne, Green, Macomber, Laster and Laster's wife Elizabeth met in Gourary's room in the nursing home to discuss Macomber's purchase of Gourary's share of the building. Green represented Gourary and the corporation in the transaction, however there was no engagement letter for the transaction, and no document reflecting any communication between Green and Gourary concerning the transaction. At some time before the meeting, Green told Macomber to make the price proposal directly to Gourary at the meeting.

Macomber proposed a purchase price of \$6.15 million for Gourary's half interest in the building, and Marianne suggested that the purchase price be higher. They agreed on \$6.25 million. On January 26, 2006, Green informed Macomber that he would instead have to purchase Gourary's 50% interest in the corporation (as opposed to 50% of the

building) and that the limited partnership interests owned by the corporation could not be separated from the deal. He also told Macomber that the limited partnerships generated income of approximately \$50,000 per year, but carried a negative tax basis of approximately \$500,000.

By email dated January 31, 2006, Macomber told Green, “it’s unfortunate that you concluded it is more tax efficient for [Gourary] and [Laster] if I purchase [Gourary’s] share of the S-corp rather than 50% of the building outright. However we all knew this was a possibility.” In February 2006, Macomber spoke to Green and discussed different ways that the proposed transaction could be structured, and Green’s prior conversation with Ernst and Young about the tax implications of the transaction.

After being told that the proposed transaction would have to take the form of a purchase of shares of the corporation rather than a purchase of an interest in the building, Macomber told Green that Macomber would need to come up with a new price for that type of purchase. In March 2006, Macomber conveyed a new offer to Green for Gourary’s half-interest in the corporation of \$5.75 million. \$1.45 million was paid by Macomber personally and the remaining \$4.3 million was paid via mortgage loan to the corporation.

In or about February 2007, the corporation entered into a contract with a buyer to sell the building for \$32 million. Laster passed away in September 2008, Green passed away in February 2009, and Marianne passed away in October 2014.

Plaintiff John P. Gourary, Gourary's son ("John") commenced this action alleging that Green, Laster and Macomber schemed to take advantage of Gourary while he was ailing in the nursing home, and deceive him into selling his 50% interest in the corporation to Macomber for \$5.75 million, which was below market value. According to the allegations of the complaint, Gourary, in his infirm state, reasonably relied upon Green and Laster, and as a direct and proximate result, received millions of dollars less than he should have for his interest in the corporation.

John further alleged that Green committed legal malpractice by failing to take action that may have prompted Gourary to obtain an independent appraisal, negotiate for a higher price, or pursue other potential buyers who may have paid more than \$5.75 million for his interest in the corporation. John also claimed that Green's representation of both Macomber and Gourary in the transaction was a conflict of interest, and the dual representation was not with Gourary's consent. He also alleged that Green conspired with Laster and Macomber to fraudulently conceal from Gourary information regarding the market value of the building and that the appraisal used was based on a bias in favor of a low valuation, which would only best serve the interest of Macomber. Finally, he alleged that Green knew of Laster and Macomber's plan to keep the valuation of Gourary's corporate interest low to minimize the valuation of Laster's own 50% interest for his estate tax purposes, because he intended to pass his corporate shares to Macomber in his will so that Macomber would become complete owner of the corporation and building.

John asserted causes of action (a) against Green and Green & Ettinger for legal malpractice, breach of fiduciary duty, fraudulent concealment, and civil conspiracy to commit fraudulent concealment; (b) against Laster for breach of the fiduciary duties he owed to the corporation and Gourary, fraudulent concealment, and civil conspiracy to commit fraudulent concealment; and (c) against Macomber for aiding and abetting Green's and Laster's breaches of fiduciary duty and for civil conspiracy to commit fraudulent concealment.

The Green defendants now move for summary judgment dismissing the complaint insofar as asserted against them. First, they maintain that they met the applicable standard of care, and therefore, the legal malpractice claim must be dismissed. They refer to Marianne's deposition testimony, in which she testified that she and her husband had, over the years, discussed selling his interest in the corporation. They finally decided to sell because they were getting older, not in good health, and wanted money to use for expenses. She also explained that her husband was advised that a 50 percent interest in a corporation would be difficult to sell, so they wanted to try and sell it while they still could.

Marianne explained that when Gourary decided to sell his interest, he talked to Green about it. She explained that she was not involved with any of the details of the transaction because it was none of her business. She stated that Gourary's mind and memory were clear during the period of time that he was negotiating the sale. Marianne recalled that the January 11, 2006 meeting lasted for about an hour, but she did not recall

what anyone said, other than that when someone mentioned a purchase price, she asked for a little more money. She was shocked when she was told “yes” immediately. She did not know if any other discussions about price were had other than that day. Marianne explained that she and her husband were happy that Green was able to have the transaction completed because they knew it would not be easy to sell a half interest in a building.

The Green defendants also maintain that Marianne’s testimony is the only evidence that relates to whether they met the standard of care, because there exists no other evidence in this case. Specifically, there is no evidence of any communication between Green and Gourary concerning the transaction, and there exists no document memorializing what objectives Gourary told Green he sought to achieve, no directions Gourary provided to Green, no advice or recommendations Green gave to Gourary, whether Gourary accepted or rejected such advice, or what other communications occurred between Gourary and Green.

Further, the Green defendants argue that there is no evidence that Gourary was not mentally capable of entering into the transaction. In fact, Marianne testified that he was of sound mind at the time of the transaction, and Rachna Sachdev, Green’s paralegal at the time, testified that when she visited Green in the nursing home on April 28, 2006 to obtain his signature on various documents for the transaction, Gourary read each document before signing and seemed to understand them. In any event, even if there is evidence that he was mentally diminished or impaired, there is no evidence to support the

claim that Green knew or reasonably believed Gourary to suffer from diminished mental capacity, and that if he did, he failed to carefully explain the relevant considerations to Gourary or otherwise take protective action.

Second, the Green defendants argue that the legal malpractice claim must fail because there was no conflict of interest, and there was no failure to disclose the alleged simultaneous representation or obtain Gourary's consent or waiver of the conflict of interest. Macomber testified that he had consulted the law firm of Herzfeld and Rubin with regard to the transaction up until the time he was going to apply for a loan. He testified that "as of early April [Green] was handling all the documentation. He was working directly with the lender. He handled all of that." He further testified that he "thought [Green] was the corporation's attorney. He was acting on the corporation's behalf. The corporation ultimately was getting a loan." Green explained that after Herzfeld & Rubin stopped representing him, he was without personal representation.

The Green defendants contend that there is no other evidence that Green represented Macomber at the same time that he represented Gourary in the transaction, and the two documents submitted by John to demonstrate that a conflict of interest did allegedly exist are not probative. The first document was an opinion letter that Green wrote to the corporation's mortgage lender after the parties' bargain had been struck and it became necessary to obtain financing to complete the deal, wherein Green stated that he has acted as counsel for the corporation as "borrower" and Macomber as "guarantor" of the loan. However, according to the Green defendants' expert witness, Professor

Bruce Green (“Professor Green”), there was no impropriety in that limited concurrent representation and it does not raise any issue of fact as to whether Green had represented Macomber earlier in the transaction.

The second document referred to by the Green defendants is a January 15, 2009 letter from Marianne’s counsel before the Surrogate’s Court to John’s Surrogate Court’s counsel stating, that “Paul Green represented the purchaser and seller of the 50% interest.” However, that counsel was not involved in the underlying transaction in any capacity and had no first-hand knowledge of Green’s legal work concerning the transaction. Therefore, that letter cannot raise any issue of fact as to whether Green represented Macomber.

The Green defendants claim that the fact that Green provided information to Macomber about the corporation, the results of tax analyses, and corporate and other documents required by the corporation’s mortgage lender to effectuate the transaction does not raise any issue of fact as to whether Green represented Macomber. According to Professor Green, a lawyer for one party to a transaction, in dealing with an unrepresented counter-party, is permitted to prepare documents for the counter-party’s signature, give information to the counter-party or explain his review of the relevant law. Further, even though Green did represent the corporation, Green did not affirmatively agree to act or did act as Laster’s personal attorney or Macomber’s attorney.

Third, the Green defendants argue that there is no evidence of causation because there is no causal link between Green’s alleged negligence and Gourary’s failure to sell

his shares for more than \$5.75 million. Even if Green had taken every action that John claims was required of him, Gourary is unavailable and therefore, one cannot state, without engaging in speculation, whether such actions would have prompted Gourary to forego Macomber's \$5.75 offer in the hopes of finding another buyer. In addition, even if 'but for' Green's alleged negligence, Gourary would have pursued a buyer other than Macomber, or asked Macomber to pay more, the evidence demonstrates that Gourary wanted to sell his shares as soon as possible, Macomber was the only known purchaser for the interest and Macomber would pay no more than \$5.75.

Finally, they maintain that the additional tort claims must be dismissed as duplicative of the legal malpractice claim.

Laster and Macomber submit a memorandum of law in support of the motion. They argue that (1) no evidence exists to support John's claim that Green's alleged malpractice proximately caused Gourary to enter into the transaction; and (2) no evidence exists to establish that Gourary's decision to sell his shares to Macomber for \$5.75 million was made in reliance on anything Green did or did not do.

In opposition, John argues that issues of fact exist as to Green's professional negligence. John refers to the appraisal by Howard C. Gelbtuch ("Gelbtuch"), the principal of Greenwich Realty Advisors, Incorporated, of the fair market value of the property, which indicates that the value as of April 20, 2006 was \$29 million and as of March 16, 2015 was \$64 million.

John submits an affidavit in which he avers that by late 2005, his father was bedridden and confused and he was not aware of basic facts, such as his age or the date. John, who had a power of attorney and was the health care proxy, received many phone calls from the nursing home that his father had fallen, and was refusing physical therapy and medication.

In December 2005, Gourary mentioned to John that he was considering selling his interest in the building, however John did not even know that the transaction had taken place until his father's death. John had a contentious relationship with his mother. She disinherited John, and used her power of attorney to cut off any donations Gourary was making to John's children's college funds and their schools. When John learned of the subject transaction, he directed his attorney to proceed with an application for limited letters of administration to pursue document discovery concerning the subject transaction, because his mother would not cooperate with his desire to investigate the transaction and the possibility that there was fraud or malpractice involved. On June 30, 2009, his application was granted. According to John, his father's assets at the time of his death totaled approximately \$13 million and he had enough assets to cover his medical costs and caretaking expenses, without needing to sell his interest in the corporation.

John also refers to the affidavit of Dr. Robert Cancro ("Cancro"), an expert witness who was not Gourary's doctor. Cancro avers that Gourary suffered from substantial cognitive decline, impairing his ability to comprehend and evaluate anything other than the most basic activities of everyday life. According to Cancro, the likelihood that Gourary could have independently comprehended and processed the subject

transaction was remote, and such fact would have been readily apparent to those personally interacting with him on any recurring basis.

John first argues that Green failed to advance Gourary's interests by reasonably available means especially in light of Gourary's diminished capacity, and Gourary never gave informed consent to narrow Green's duties and obligations. Specifically, he maintains that Green failed to (1) apprise Gourary of all of his options, such as selling the building itself, or winding up any of the corporation's remaining assets; (2) take extra care and protective actions given Gourary's diminished capacity; (3) have Gourary conduct an independent evaluation into the fair market value of the building and the corporation's other assets; (4) advise Gourary to negotiate the proposed purchase price with Macomber; (5) advise Gourary that the purchase price could be negotiated not only based upon the purported value of the building but also the other corporate assets; and (6) ensure that Gourary obtained objective advice about the value of the building. According to Macomber's testimony, Green never asked for a copy of the buyer side appraisal, and there was only one discussion about price where they allegedly reached agreement in the nursing home.

Second, John argues that the evidence presented demonstrates that Green represented both Gourary and Macomber in the transaction, which was a clear conflict of interest, in violation of New York's Code of Professional Responsibility, including DR 5-105, and the evidence presented gives rise to the inference that Green did not advocate for Gourary's best interests because his loyalties were divided between his clients.

Specifically, (1) Marianne testified that she believed that Green represented both Gourary and Macomber; (2) Green identified himself as counsel for the corporation and Macomber “in connection with the above-captioned loan” for \$4.5 million in an opinion letter to ReliaStar Life Insurance Company, a lender that provided part of the purchase amount; (3) a closing statement dated May 5, 2006 sent from Green to Macomber and Laster, set out the amounts paid for Gourary’s interest in the corporation, and any debts, including an accounting fee, and a legal fee of \$75,000 owed to Green’s law firm; (4) Eric Meyer, an employee of the management company for the building, testified that he regarded Macomber to have used Green as his attorney for the transaction and was told by Macomber to give Green any information about the building Green requested; (5) Green did not obtain a waiver from Gourary to allow the dual representation; (6) Green advised Macomber regarding the structure and tax treatment for the transaction as Macomber requested; and (7) Green worked for the benefit of Macomber by trying to resolve Macomber’s concerns about the tax implications of the purchase, by not questioning the value of the building set forth in the appraisal obtained by Macomber, by not recommending that Gourary obtain his own appraisal, and by not speaking on Gourary’s behalf at the meeting in his nursing home room.

John submits the affidavit of expert witness Roy Simon (“Simon”) who opines that the evidence is consistent with the view that Green represented both Macomber and Laster during the relevant time period in which price and structure were discussed. Even if Gourary had wanted to sell his interest expeditiously, Green fell below the standard of

care in pursuing that objective. A competent attorney would have advised his client, who had more than adequate liquid assets, to wait a reasonable time to find a buyer, to obtain an independent appraisal, demand a fair price, or to seek an alternative buyer to Macomber.

Third, John argues that there is evidence of proximate cause. He contends that had Green ensured that Gourary obtain an impartial appraisal of the market value of the building, had Green not engaged in dual representation without Gourary's informed consent, and had Green taken extra care and protective actions given Gourary's diminished capacity, it is reasonable to assume that the transaction would not have gone forward as it did. But for Green's negligence and breach of his professional duties, Gourary would not have sold his shares at Macomber's price. John indicates that the evidence does not demonstrate that Gourary was strapped for cash, and needed money to pay his medical bills. The evidence does demonstrate that Gourary suffered from deteriorating mental capacity at the time of the transaction.

Finally, John argues that the other tort claims are not duplicative of the legal malpractice claim because they are based on allegations that Green intended to deceive Gourary, whereas the legal malpractice claim stems from Green's negligent conduct.

Discussion

An action for legal malpractice requires proof of three elements: (1) that the attorney was negligent; (2) that such negligence was a proximate cause of the plaintiff's losses; and (3) proof of actual damages. *Global Business Institute v. Rivkin Radler LLP*,

101 A.D.3d 651 (1st Dept. 2012). In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages. *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 N.Y.3d 438, 442 (2007) (internal quotation marks and citations omitted).

An attorney's conflict of interest, as a result of dual representation of clients in violation of the Code of Professional Responsibility, does not alone support a cause of action for legal malpractice. See *Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 A.D.3d 1 (1st Dept. 2008). However, liability can follow where the client can show that he or she suffered actual damage as a result of the conflict. *Tabner v. Drake*, 9 A.D.3d 606, 610 (3rd Dept. 2004).

The evidence submitted here depicts a transaction that, to the objective observer, may raise a concern as to the transaction's fairness. However, as to the moving defendants, John has failed to submit evidence sufficient to adequately support the claims against them. Unfortunately, the key players to the subject transaction passed away before they could provide any probative evidence. Thus, neither Gourary's instructions to Green nor his motivation for executing the transaction will ever be known. Similarly, there is no competent evidence reflecting any advice Green gave to Gourary concerning the transaction. Most importantly, there is simply no competent, probative evidence that a trier of fact could rely upon to determine that any negligence on the part of Green

defendants was a proximate cause of Gourary's failure to receive a higher price for his share of the corporation. Based on the evidence provided by the parties, and based on the fact that much of the circumstances surrounding the transaction will never be known, the Green defendants have met their prima facie burden of showing that John cannot adequately support a claim legal malpractice against the Green defendants.

The evidence presented, as set forth above, could potentially lead to a reasonable inference that Green represented both Macomber and Gourary during parts of the transaction. However, as the Green defendants properly argue, no evidence exists to demonstrate that the dual representation presented a conflict of interest, or that any alleged conflict of interest was a proximate cause of Gourary's failure to sell his share of the corporation for more than \$5.75 million.

The evidence presented could also potentially lead to a reasonable inference that Gourary's mental capacity was diminished or impaired at the time of the transaction, and that he was not strapped for cash and had no motivation to sell quickly. However, even if it is found that Gourary's mental capacity was diminished and that he was not strapped for cash and had no motivation to sell for a low price, there is no evidence as to the advice Green gave Gourary or what they actually discussed.

Whether Green advised Gourary to get his own appraisal or look for other buyers with higher offers, or said nothing at all about another appraisal or the potential for a higher offer, is equally likely and will never be known. Whether Gourary told Green that a high selling price was important for him or whether he told Green that he would have

sold his interest no matter what the price, is also equally likely and will never be known. Because there is no evidence as to what advice, if any, Green gave to Gourary, there is no evidence that Green failed to perform his duties to ensure that the transaction was fair to Gourary's interests, and that such alleged failure was a proximate cause of Gourary's failure to sell his share of the corporation for a higher price. Any finding of legal malpractice would, in these circumstances, would be based on sheer speculation.

Further, the competing expert affidavits submitted by the parties do not preclude the dismissal of the causes of action asserted against the Green defendants because they do not raise any triable issue of fact as to proximate cause.

John's remaining claims asserted against the Green defendants are also dismissed. The key to determining whether a claim is duplicative of one for malpractice is discerning the essence of each claim. *Johnson v. Proskauer Rose LLP*, 129 A.D.3d 59 (1st Dept. 2015). Plaintiff cannot set forth his claim as a different cause of action when that cause of action is premised on the same facts and seeking the identical relief as his malpractice claim. *Dinhofer v. Medical Liab. Mut. Ins. Co.*, 92 A.D.3d 480 (1st Dept. 2012); *Scott v. Long Island Power Auth.*, 294 A.D.2d 348, 348 (2nd Dept. 2002). Here, the additional claims alleged against the Green defendants are clearly based on the same facts as the legal malpractice claim, and there is no allegation that distinct damages would be sought for these claims. As such, they are dismissed.

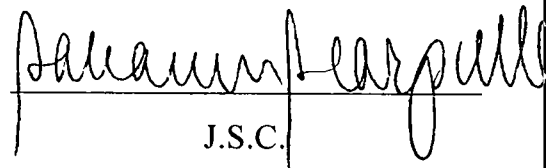
In accordance with the foregoing, it is hereby

ORDERED that defendants Alice Green, as Executor of the Estate of Paul Green, and Green & Ettinger's motion for summary judgment dismissing the complaint insofar as asserted against them is granted, the complaint insofar as asserted against them is dismissed, and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that the claims asserted against the remaining defendants are severed and shall continue.

This constitutes the decision and order of the court.

Dated: January 15, 2016
New York, NY


J.S.C.