SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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CE RIVERHEAD, LLC

Index No. 650377/11

Plaintiff,

Subm.: 1/23/13
Motion Seq. No. 002

-against-

DECISION & ORDER

COHEN & PERFETTO, LLP,

Defendants.

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BARBARA JAFFE, JSC:

For plaintiff:
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Rex Whitehorn & Assocs., P.C.
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For defendant:
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By notice of motion dated September 29, 2011, defendant moves pursuant to CPLR 3211(a)(1) and (7) for an order dismissing the complaint. Plaintiff opposes. For the following reasons, the motion is granted.

At issue is whether a complaint and affidavit submitted in the course of prior related litigation refute the allegations underlying plaintiff's instant claims sufficiently to warrant a dismissal, and whether having asserted in the prior litigation that defendant timely cancelled a contract, plaintiff is now judicially estopped from claiming to the contrary.

Pursuant to CPLR 3211(a)(1), a party may move for an order dismissing a pleading on the ground that it has a defense based on documentary evidence. Such a motion may be granted where factual allegations in the complaint are flatly contradicted by documentary evidence. (*Kaisman v Hernandez*, 61 AD3d 565 [1st Dept 2009]; *Kliebert v McKoan*, 228 AD2d 232 [1st

Dept 1996], *lv denied* 89 NY2d 802 [1996]).

And, pursuant to CPLR 3211(a)(7), a pleading may be dismissed for failure to state a claim. In deciding the motion, the court must liberally construe the pleading, "accept the alleged facts as true, accord [the non-moving party] the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable theory." (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). However, "[f]actual allegations presumed to be true on a motion pursuant to CPLR 3211 may be properly negated by affidavits and documentary evidence." (*Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 269 [1st Dept 2005] [*quoting Biondi v Beekman Hill House Apt., Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]).

I. DOCUMENTARY EVIDENCE

"Prior statements or averments of parties or their agents in the course of litigation that refute an essential element of a plaintiff's present claim may constitute documentary evidence within the meaning of [] CPLR [] 3211(a)(1)." (*Morgenthow & Latham v Bank of N.Y. Co.*, 305 AD2d 74, 80 [1st Dept 2003], *lv denied* 100 NY2d 512 [2003]; *accord Biondi*, 257 AD2d 76).

An essential element of a claim for legal malpractice is the failure "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 NY3d 438, 442 [2007]).

In its complaint in the underlying action and in an affidavit of its principal supporting a motion for summary judgment, plaintiff argued that because its counsel, defendant in the instant action, timely cancelled a contract for the sale of real estate, it was entitled to a refund of its

$1,000,000 deposit. (Affirmation of Andrew R. Jones, Esq., dated Sept. 29, 2011 [Jones Aff.], Exhs. C, E). Now, by contrast, plaintiff accuses defendant of legal malpractice for failing to cancel the contract in a timely fashion, thereby "grossly deviat[ing] from the acceptable standards of conduct for attorneys." (Jones Aff., Exh. A).

As plaintiff took a contrary position in the underlying complaint and affidavit by asserting that the February 13, 2008 fax was a "valid and sufficient" cancellation of the contract and that it was agreed that plaintiff would have 30 days from the date of the seller's transmission of the signed agreement to cancel it (*id.*, Exhs. C, E), the factual allegations underlying its present malpractice claim are flatly refuted by documentary evidence such that dismissal is warranted pursuant to both CPLR 3211(a)(1) and (a)(7). (*See Kaisman v Hernandez,* 61 AD3d 565 [1st Dept 2009] [plaintiff's claim for intentional infliction of emotional distress dismissed pursuant to CPLR 3211(a)(7) where he admitted in affidavit submitted in prior action that he initiated conduct he now claims to have caused him distress]; *Morgenthow & Latham*, 305 AD2d 74 [party's fraud claim dismissed on 3211(a)(1) motion as its trustee's allegations in prior action, contained in complaint and affidavit, were irreconcilable with its allegation of justifiable reliance on representation]; *see also WFB Telecommunications, Inc. v NYNEX Corp.,* 188 AD2d 257 [1st Dept 1992], *lv denied* 81 NY2d 709 [1993] [letter from plaintiff's counsel in which he asserted that defendants terminated business relationship with plaintiff to achieve public relations goals contradicted allegation that they did so solely to injure plaintiff, thus warranting dismissal of *prima facie* tort claim]).

Notwithstanding this result, I address defendant's argument that plaintiff is judicially estopped from alleging that it committed legal malpractice.

II. JUDICIAL ESTOPPEL

To prevent "fraud upon the court and a mockery of [its] truth-seeking function" (*Festinger v Edrich*, 32 AD3d 412, 413 [2d Dept 2006]), and to ensure that parties are not "play[ing] fast and loose with the courts" (*Rogers v Ciprian*, 26 AD3d 1, 6 [1st Dept 2005]), judicial estoppel "precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed." (*Baje Realty Corp. v Cutler*, 32 AD3d 307, 310 [1st Dept 2006]; *Gale P. Elston P.C. v Dubois*, 18 AD3d 301, 303 [1st Dept 2005]). As the rationale for this rule "would not be served by limiting its application to cases where the legal position at issue was ruled upon in the context of a judgment" (*D & L Holdings, LLC v RCG Goldman Co., LLC*, 287 AD2d 65, 72 [1st Dept 2001], *lv denied* 97 NY2d 611 [2001]), it also applies where a party obtains some other type of success or relief through judicial acceptance of his or her position (*see Festinger*, 32 AD3d 412; *D & L Holdings*, 287 AD2d 65; *All Terrain Props. v Hoy*, 265 AD2d 87 [1st Dept 2000]; *see also Bianchi v N.Y. State Div. of Hous. & Community Renewal*, 5 AD3d 303 [1st Dept 2004]).

Generally, therefore, a party is not judicially estopped by having taken a contrary position in a prior matter where the prior matter was settled, as "a settlement does not constitute a judicial endorsement of either party's claims and theories and thus does not provide the prior success necessary for [an estoppel]." (*Matter of Costantino*, 67 AD3d 1412, 1413 [4th Dept 2009]; *Manhattan Ave. Dev. Corp. v Meit*, 224 AD2d 191, 192 [1st Dept 1996], *lv denied* 88 NY2d 803 [1996]). However, a court that so-orders a stipulation of settlement may be deemed to have endorsed a party's position sufficiently to estop it from later asserting a contrary position. (*See*

Manhattan Ave. Dev. Corp., 224 AD2d 191 [so-ordered stipulation settling prior bankruptcy proceeding constituted inferential endorsement of plaintiff's position as to his assets such that it was estopped from suing on debt it failed to list in its bankruptcy filing]; *Ennismore Apts., Inc. v Gruet*, 29 Misc 3d 48, 2010 NY Slip Op 20377 [App Term, 1st Dept 2010] [so-ordered stipulation settling prior holdover proceeding, pursuant to which plaintiff accepted $150,000 to vacate apartment, constituted inferential endorsement of plaintiff's position that he was tenant of record for apartment, and estopped him from later claiming to be tenant of another apartment during same time period]; *Rubio v Rubio*, 32 Misc 3d 1228[A], 2012 NY Slip Op 52218[U] [Sup Ct, Suffolk County Nov. 26, 2012] [having asserted in prior divorce action that transfer of interest in company had occurred and settled, pursuant to so-ordered stipulation, spouse's $568,761.11 claim for $200,000, plaintiff estopped from denying transfer]; *see also Borst v Bovis Lend Lease LMB, Inc.* 102 AD3d 519 [1st Dept 2013] [no judicial estoppel where prior matter settled as stipulation was "neither judicially endorsed nor approved"]).

Here, although that the stipulation settling the underlying action reflects that it is not "an admission or concession of any liability of any kind" by the plaintiff or the seller (*id.*, Exh. G), as the underlying action was premised on plaintiff's claim that defendant timely submitted the cancellation, plaintiff succeeded to the extent of persuading the seller to refund it 80 percent of the deposit in exchange for its discontinuance of the action. (*See Ennismore Apts., Inc., supra*). That success, however, is not dispositive. Absent a concession or admission in the stipulation as to the timeliness of the cancellation, there was no position for the court to endorse beyond the fact that the parties agreed to settle the case. Accordingly, plaintiff is not judicially estopped from proceeding in this action. (*See Borst, supra*).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion for an order dismissing the complaint is granted; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

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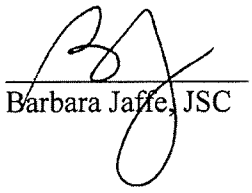

Barbara Jaffe, JSC

DATED: April 17, 2013
New York, New York