SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** 2

Justice

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PAMELA KELD,

Plaintiff,

- v -

GIDDINS CLAMAN, LLP and SCOTT CLAMAN,

Defendants.

INDEX NO. 150289/2017

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33

were read on this motion to/for DISMISSAL

In this legal malpractice action, defendants move, pre-answer, to dismiss the complaint against them. Plaintiff opposes. After oral argument, and upon a review of the papers submitted, the motion is granted.

The instant dispute arises from defendants' representation of plaintiff in the purchase of the townhouse at 72 Poplar Street, Brooklyn, NY. In sum and substance, plaintiff contends that defendants negligently failed to warn her that, considering the age of the building and its prior use as a police station, there was a strong possibility that lead paint was present, and environmental testing should be performed. Plaintiff maintains that, had defendants properly warned her of the need to do environmental testing, she would have done so and, as a result of the testing, would have uncovered the unabated lead paint that was present in the unit notwithstanding the seller's representations to the contrary. Plaintiff further asserts that, with such information in hand, she would either have negotiated a better price or walked away from the purchase.

Defendants contend, among other things, that their limited retainer encompassed only the representation of their client in the closing on the property, and did not extend to general representation and advice on the subject of purchasing an older building.

"[R]egardless of which subsection of CPLR 3211 (a) a motion to dismiss is brought under, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Ray v Ray*, 108 AD3d 449, 451 [1st Dept 2013]; *see Nomura Home Equity Loan Inc. v Nomura Credit & Capital, Inc.*, ___ NY3d ___, 2017 NY Slip Op 08622, *4 [December 12, 2017]; *Simkin v Blank*, 19 NY3d 46, 52 [2012].) For a complaint to be dismissed pursuant to CPLR 3211 (a) (1), documentary evidence must "conclusively establish that [the plaintiff] has no cause of action." (*Rovello v Orofino Realty Co., Inc.*, 40 NY2d at 636; *see NRES Holdings, LLC v Almanac Realty Sec. VI, LP*, 140 AD3d 640, 640 [1st Dept 2016]; *see generally United States Fire Ins. Co. v North Shore Risk Mgt.*, 114 AD3d 408, 409 [1st Dept 2014]; *Matter of Walker*, 117 AD3d 838, 839 [2d Dept 2014]; *State of N.Y. Workers' Compensation Bd. v Madden*, 119 AD3d 1022; 1028-1029 [3d Dept 2014].)

By letter dated January 24, 2016, plaintiff, through her real estate agent Greg Williamson, made an offer to purchase in the amount of $6,975,000. (Doc. No. 12.) The letter represented that the offer was "not contingent upon financing and [plaintiff] is ready and willing to close within 60 days."

On January 25, 2016, plaintiff retained defendants "to represent [her] interests in the purchase of the condominium unit #TH at the building located at 72 Poplar Street, Brooklyn, NY." (Doc. No. 13.) The retainer delineated that the specific services would be "the review and analysis of the condominium offering plan, the review and analysis and negotiation of a contract

of sale, the preparation of certain of the closing documents, the ordering (at your cost), review and analysis of [a] title insurance report, the assisting in the clearing of title issues, the preparation of a pre-closing memorandum setting for[th] the credits and payments at the closing, the attending the closing and the preparation of a closing statement." It further provided that the "flat fee for this service shall be $5,000" in two installments.

By letter dated January 25, 2016, the seller's representatives informed defendants that plaintiff would be required to execute four purchase agreements, one Valley National deposit ticket, and to provide a down payment check in the amount of $697,500. (Doc. No. 41.) The letter further represented that, "[d]ue to the heavy demand for the condominiums, [the seller] shall only be able to hold [the unit] for [plaintiff] until February 1, 2016," and that the seller "shall not be bound by the terms of any agreement" until the purchase agreements are executed. The closing thereafter took place, and title successfully passed to plaintiff.

The documentary evidence submitted by defendants conclusively establishes that they were hired for the limited purpose of representing her in the closing on the property rather than for general advice regarding the purchase of older buildings. (*See generally AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428 [2007]; *see 180 E. 88th St. Apt. Corp. v Law Off. of Robert Jay Gumenick, P.C.*, 84 AD3d 582, 583 [1st Dept 2011]; *DeNatale v Santangelo*, 65 AD3d 1006 [2d Dept 2009], *lv denied*14 NY3d 701 [2010].) Plaintiff had already made an offer to purchase the property at the time that she retained defendants, and the limited retainer for a flat fee is more indicative of routine closing matters than extensive, general advice. There is no duty for attorneys engaged on a limited basis to review and prepare legal closing documents and deal with issues related to title, to advise their clients as to the many issues that may impact the value

of the property to be purchased. Plaintiff's assertions in the complaint and in her affidavit in opposition are utterly refuted by the documents submitted by defendants.[1]

This determination makes it unnecessary to turn to defendants' remaining arguments in favor of dismissal. The complaint could also be dismissed, however, on the ground that plaintiff's asserted hypothetical chain of events that would have occurred had defendants advised her properly is too speculative to form the basis of liability. (*See Brooks v Lewin*, 21 AD3d 731, 734-735 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006]; *Phillips-Smith Specialty Retail Group II v Parker Chapin Flattau & Klimpl*, 265 AD2d 208, 210 [1st Dept 1999], *lv denied* 94 NY2d 759 [2000]; *compare Taylor v Paskoff & Tamber, LLP*, 102 AD3d 446, 447 [1st Dept 2013].)

The remaining causes of action are duplicative. (*See Eurotech Const. Corp. v Fischetti & Pesce, LLP*, 155 AD3d 437 [1st Dept 2017].)

Accordingly, it is hereby

ORDERED that the motion is granted, and the complaint is dismissed.

3/7/2018
DATE

KATHRYN E. FREED, J.S.C.

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

[1] This Court notes that there is no dispute between the parties the seller's allegedly false representations as to the abatement of lead paint survived the closing and currently form the basis of another action by plaintiff, which remains pending, and in which she asserts that no exercise of reasonable diligence would have uncovered the presence of unabated lead paint in advance of the closing. (Doc. No. 11.)