

STATE OF VERMONT
WINDSOR COUNTY, SS.

DANIEL W. BERNAZZANI and	:	WINDSOR SUPERIOR COURT
JANICE M. BERNAZZANI,	:	
Plaintiffs	:	CIVIL ACTION
	:	
v.	:	DOCKET NO. S265-95 WrC
	:	
THOMAS M. ROUNDS,	:	
Defendant	:	

DECISION RE: CROSS MOTIONS FOR SUMMARY JUDGMENT

INTRODUCTION

This case concerns plaintiffs' assertions that defendant failed to represent them properly in a 1983 purchase of real estate in West Windsor, Vermont. At issue is whether or not defendant complied with his duties as plaintiffs' attorney with respect to any discussions they had concerning conditions attached to the subdivision permit. Plaintiffs have advanced three claims, based on (1) negligence, (2) breach of contract, and (3) violation of consumer fraud act. The parties have filed cross motions for summary judgment with respect to each of the three claims.

FACTS

Based on the parties' submissions pursuant to V.R.C.P. 56(c)(2), and preserving the numbering used by the parties, the court will discuss both undisputed facts and disputed facts:

A. The parties used the following numbering in their documents concerning defendant's motion for summary judgment:

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1. Plaintiffs' Complaint was filed on July 19, 1995.

2. As of August 28, 1996, when defendant filed his motion for summary judgment, plaintiffs had not notified defendant of the identity of any person plaintiffs expected to call as an expert witness at trial. Plaintiffs identified their expert witness on September 30, 1996, when they responded to defendant's motion for summary judgment and also filed a cross motion for summary judgment. At that time plaintiffs filed an affidavit signed by their expert witness, Stephanie A. Lorentz, Esq.

3. Prior to the closing of plaintiffs' purchase of real estate on July 11, 1983, defendant confirmed by telephone that Vermont subdivision land use permit EC-2-1032 had been approved. However, the permit was not formally issued until July 27, 1983, and the parties to this case did not have a copy of the written document prior to that date.

4. The parties agree that, prior to the closing of plaintiffs' 1983 purchase of real estate, defendant informed plaintiffs that all necessary state permits had been issued. However, plaintiffs allege (1) that the information from defendant was a misrepresentation, and (2) that defendant did not inform plaintiffs of the specific terms and conditions contained in the land use permit.

5. Subsequent to plaintiff's real estate purchase, contractor Gary Burke dug the well, septic system and leachfield for them. In the process Burke gave plaintiffs advice concerning

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placement of the well and leachfield. The parties disagree about the nature of Burke's prior experience: Defendant asserts that Burke had prior experience in compliance with state permits; plaintiffs acknowledge only that Burke had experience with West Windsor zoning and building.

6. On July 11, 1983, defendant rendered a title opinion dated June 21, 1983, and he provided a copy to the plaintiffs.

7. On July 11, 1983, plaintiffs signed a property transfer tax return which contained a certification of permitting.

8. The parties agree that land use permit EC-2-1032 required that the septic system and well be located as indicated on a site map accompanying the permit. Plaintiffs aver that they "do not know whether the District Environmental office sent the approved site map with the permit."

9. The current location of the well and septic system violates the terms of land use permit EC-2-1032.

10. Defendant was hired to represent plaintiffs in their purchase of the unimproved property.

11. There is no evidence in the record that defendant was informed of or asked to oversee the actual construction of the plaintiffs' home, septic system, and well, or that plaintiffs asked him to make field inspections to determine, in 1983, whether or not they were locating the water and sewer systems in a manner consistent with the terms of land use permit EC-2-1032.

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12. There is no evidence in the record that defendant told plaintiffs that he would conduct a field visit or take any other steps to ensure that plaintiffs complied with land use permit EC-2-1032 after the closing to induce plaintiffs to form a contract with him. However, plaintiffs deny any implication "that the plaintiffs did not expect the defendant to give them the information so that they could use it to comply with the land use permit."

13. Defendant attended the July 11, 1983 closing.

14. The parties dispute whether or not defendant performed all the contractual duties required of an attorney hired to represent clients in the purchase of unimproved property in 1983. Each party's viewpoint is supported by an affidavit by an expert. Defendant has submitted an affidavit from Raffaele M. Terino, Esq., and plaintiffs have submitted an affidavit from Stephanie A. Lorentz, Esq.

15. The parties had no written contract.

B. The parties used the following numbering in their documents concerning plaintiffs' cross motion for summary judgment:

1. Plaintiffs were represented by defendant when they purchased real property located in the Town of West Windsor from Sabia Construction Company, Inc. on July 11, 1983.

2. Defendant, a lawyer licensed to practice law in Vermont, maintains an office in West Windsor, Vermont.

3. At the above-described closing on July 11, 1983,

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defendant had a telephone conversation with the State of Vermont Environmental District Commission. Defendant does not have a complete recollection of all the details of this phone conversation. Nevertheless, according to defendant's recollection, (1) the phone conversation concerned a land use permit for the land plaintiffs were buying, (2) defendant obtained some form of verbal assurance that the permit would be forthcoming, and (3) defendant had some discussion about the conditions. The parties disagree about (1) the extent to which the verbal assurances were reliable, (2) the extent to which defendant learned specific details about any conditions attached to the permit, (3) the extent to which the actual written permit was necessary before the land could be developed, and (4) the extent to which defendant discussed these matters with plaintiffs prior to the closing. Defendant indicates that it was his normal practice to discuss, with his clients, his knowledge of the conditions and how the lack of a permit might affect the buyer's options. Defendant believes he followed his normal practice in this case. Plaintiffs disagree.

4. Defendant's normal course of representing clients in such a situation was to advise them of the alternatives, for example to close on a particular day, to postpone the closing until the permits were in hand, or to close in escrow.

5. On July 11, 1983, defendant knew some information about the terms or conditions that would accompany the anticipated land use permit. However, it is unlikely that

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defendant knew the precise wording of the conditions that were eventually issued, because defendant did not have the document in hand at the closing.

6. The parties disagree about whether or not it is the obligation of an attorney, representing a client involved with a land use permit for the development of residential property, to tell the clients that they must comply with the permit conditions.

7. In the telephone conversation at the above-described closing on July 11, 1983, defendant learned some information about the conditions that were likely to appear in the anticipated land use permit. The parties disagree about (1) the extent to which defendant learned the specific details that would appear in the written permit, and (2) the extent to which defendant shared this information with plaintiffs.

8. Plaintiffs signed a property transfer tax return on July 11, 1983. The parties disagree about (1) the extent to which defendant discussed with plaintiffs the potential effects of conditions that might be attached to the permit, (2) the extent to which plaintiffs understood these issues, and (3) the extent to which the plaintiffs' signing of the property transfer tax return constitutes an acknowledgement of the plaintiffs' understanding of these issues.

9. Defendant knew that the development of the property would be subject to some conditions or terms to be found in the permit. The parties disagree about (1) the extent to which

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defendant understood what the conditions would be, and (2) the extent to which he discussed these issues with plaintiffs.

10. The parties disagree about the extent to which plaintiffs understood that the land they were purchasing would be subject to specific conditions to be described in the permit.

11. The parties disagree about the reliability of the information, obtained by defendant on July 11, 1983, that the permit would be issued with certain conditions. The written permit was issued on July 27, 1983, with specific conditions concerning the construction of an on-site water supply and an on-site subsurface disposal of wastewater.

12. Plaintiffs signed a property transfer tax return on July 11, 1983. The parties disagree about (1) the extent to which defendant discussed with plaintiffs the potential effects of conditions that might be attached to the permit, (2) the extent to which plaintiffs understood these issues, and (3) the extent to which the plaintiffs' signing of the property transfer tax return constitutes an acknowledgement of the plaintiffs' understanding of these issues.

13. Plaintiffs assert that they eventually sold the property with the residential improvements made by them to others (Obers) in November of 1987. Defendant disputes this assertion on the basis that plaintiffs have failed to support it with a specific citation to the record.

14. Plaintiffs assert that, in May of 1982 [sic], the purchasers of the land (Obers) filed suit against the plaintiffs

alleging a violation of the land use permit, because neither the well nor the subsurface disposal of wastewater system were constructed in accordance with the permit. Defendant disputes this assertion on the basis that plaintiffs have failed to support it with a specific citation to the record.

15. Plaintiffs assert that they had judgment entered against them by the buyers of the property (Obers) dated February 15, 1995 for the amount of \$15,362 and legal expenses and fees of \$10,381.88. Defendant disputes these assertions on the basis that plaintiffs have failed to support them with specific citations to the record.

16. The parties dispute whether or not defendant performed his duties with the degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in Vermont (in 1983). Each party's viewpoint is supported by an affidavit from an expert. Defendant has submitted an affidavit from Raffaele M. Terino, Esq., and plaintiffs have submitted an affidavit from Stephanie A. Lorentz, Esq.

DISCUSSION

SUMMARY JUDGMENT

Summary judgment is appropriate if the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. V.R.C.P. 56(c)(3). The moving party has the burden of proof, and the opposing party must be given the benefit of all reasonable doubts.

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and inferences in determining whether a genuine issue of material fact exists. Price v. Leland, 149 Vt. 518 (1988).

Count I: Negligence

Plaintiffs' first claim is one of attorney malpractice, which is a claim that defendant was negligent in performing his duties as an attorney. The elements required for a cause of action in common law negligence are:

- (1) the defendant must owe a legal duty to conform to a certain standard of conduct so as to protect the plaintiff from an unreasonable risk of harm;
- (2) the defendant must have committed a breach of this duty by failing to conform to the standard of conduct required;
- (3) the defendant's conduct must be the proximate cause of the plaintiff's injury; and
- (4) the plaintiff must have suffered actual loss or damage.

Langle v. Kurkul, 146 Vt. 513, 517 (1986) (citing Prosser and Keeton, The Law of Torts (5th ed. 1984), § 30, at 164-65) (original emphasis).

In the instant case, the parties' arguments concerning summary judgment have focused on the first and second elements. Defendant's liability turns on whether or not he breached any duty to plaintiffs. Plaintiffs employed defendant in his capacity as an attorney, but the fact of the attorney-client relationship does not define the scope of defendant's duties.

Expert testimony is generally required when professional malpractice is in issue. Meller v. Bartlett, 154 Vt. 622, 624 (1990). There is an exception to this requirement where the alleged violation of the standard of care is so apparent that it

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may be understood by a lay trier of fact without the aid of an expert. Id. (citing Larson v. Candlish, 144 Vt. 499, 502 (1984)).

The instant case does not fall within the exception. From all indications, defendant completed the specific tasks he was hired to do as a lawyer, as explicitly discussed by the parties, such as searching the title, attending the closing, and ascertaining that a land use permit was a component of closing documentation. The actions he took indicate that he also recognized that, as plaintiffs' attorney, his duties encompassed some additional tasks such as inquiring into the status of the land use permit. However, the precise scope of defendant's duties to the plaintiffs with respect to the terms of a land use permit can be determined only by reference to expert testimony concerning the standard of care at the time. Russo v. Griffin, 147 Vt. 20 (1986).

Based on the current record of this case, it is impossible to determine the scope of defendant's duties, because the parties offer conflicting expert testimony on the issue. Defendant had a strong argument for dismissal when he filed his motion. Defendant submitted an affidavit from expert Raffaele M. Terino, Esq., whereas plaintiffs had not yet identified an expert witness who would testify on their behalf. Plaintiffs cured the problem with their response to defendant's motion, which included an affidavit from expert Stephanie A. Lorentz, Esq.

It might have been helpful for plaintiffs to have identified

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an expert at an earlier stage of the litigation, but the tardiness of the notice does not justify dismissal of the case.

There are material facts in dispute with respect to Count I, neither party is entitled to judgment as a matter of law, and the motions for summary judgment of both parties are denied.

Count II: Breach of Contract

Plaintiff's second claim is breach of contract. The issue under this claim is identical to the issue under Count I: Defendant's liability turns on whether or not he breached a duty to the plaintiffs, and the scope of the duty may be determined only by reference to expert testimony. The parties have submitted conflicting expert testimony. There are material facts in dispute. Neither party is entitled to judgment as a matter of law. Summary judgment is not appropriate at this time.

Count III: Violation of Consumer Fraud Act

In essence, plaintiff's third claim is that defendant's alleged malpractice was also a deceptive act in the (commercial) practice of law. Plaintiff seems to argue that defendant's alleged failure to discuss all the ramifications of the permit conditions was a "misrepresentation" designed to induce plaintiffs to continue to retain him. Plaintiff's argument is unpersuasive.

The court's view is that defendant's alleged acts or omissions that form the basis of plaintiffs' complaint fall squarely within the practice of law. Such acts or omissions are not actionable under the consumer fraud act, all according to the

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logic of Judge Bryan's decision in Jackson v. Triggs, S503-94 CnC, 1 Vt.Tr.Ct.Rep. 69 (April 10, 1996).

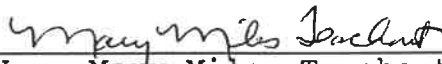
Defendant is entitled to judgment as a matter of law. The court will grant summary judgment to defendant with respect to Count III.

ORDER

Defendant's Motion for Summary Judgment is GRANTED in part and DENIED in part. Defendant's Motion is GRANTED with respect to Count III (consumer fraud act), DENIED with respect to Count I (negligence), and DENIED with respect to Count II (breach of contract). Plaintiffs' Count III is DISMISSED.

Plaintiffs' Motion for Summary Judgment is DENIED.

Dated this 14th day of April, 1997.



Hon. Mary Miles Teachout
Presiding Superior Court Judge

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