

Chi Lo Liu v Radmin

2011 NY Slip Op 33039(U)

November 10, 2011

Supreme Court, Nassau County

Docket Number: 9022-09

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

CHI LO LIU and HUAG SU YING LIU,

Plaintiffs,

**TRIAL/IAS PART: 20
NASSAU COUNTY**

- against -

**JOEL RADMIN, MICHAEL LANGONE,
EXTREME REALTY, LLC, REFSNART CORP.,
JAMES V. GUARINO, DAVID GALANTER , ESQ.,
JG CAPITAL, LLC, and JASON AU,**

**Index No. 9022-09
Motion Seq. Nos. 3 and 4
Submitted 9/16/11**

Defendants.

Papers Read on these Motions:

Notice of Motion, Affidavit in Support and Exhibits.....X
Notice of Motion, Affirmation in Support, Affidavits in Support and Exhibits..X
Defendants' Rule 19-A Statement.....X
Memorandum of Law in Support.....X
Attorney Affirmation in Opposition and Exhibits.....X
Plaintiffs' Rule 19-A Counter Statement.....X
Memorandum of Law in Opposition.....X
Reply Affidavit.....X
Memorandum of Law in Further Support.....X
Correspondence dated September 19, 2011.....X
Correspondence dated September 20, 2011.....X

This matter is before the court on 1) the motion filed by Defendants on May 16, 2011, and 2) the motion filed by Defendants on June 21, 2011, both of which were submitted on September 16, 2011 following oral argument before the Court. For the reasons set forth below, the Court 1) grants Defendants' motion for summary judgment and dismisses the Complaint; and 2) denies, as moot, Defendants' motion to vacate the note of issue and for other relief.

BACKGROUND

A. Relief Sought

Defendants move for an Order 1) striking Plaintiffs' Note of Issue pursuant to 22 NYCRR § 202.21; or 2) in the alternative, allowing Defendants to obtain post-Note of Issue discovery for a period of 60 days to permit Defendants to serve additional discovery demands on Plaintiffs; and 3) revising the summary judgment briefing schedule until 30 days following Plaintiffs' service of responses to Defendants' additional discovery demands.

Defendants also move for an Order, pursuant to CPLR § 3212, granting Defendants summary judgment and dismissing this action in its entirety.

B. The Parties' History

The parties' history is set forth in detail in a prior Order of the Court dated July 1, 2010 ("2010 Order"). As noted in the 2010 Order, the Complaint alleges as follows:

In or about January of 2006, Plaintiffs retained Defendants Extreme Realty and Langone, a representative of Extreme Realty, to perform real estate broker services on behalf of Plaintiffs in connection with the marketing and sale of mixed-use real estate located at 242 East 40th Street, New York, New York 10016 ("Property"). In or about January of 2006, Langone and Extreme advised Plaintiffs that they had received an offer to purchase the Property "at the highest market price" (Compl. at ¶ 4). Langone and Extreme introduced Plaintiffs to Defendant Radmin and his holding company Defendant Refsnart. These parties agreed to the sale of the Property for \$1.85 million. On or about February 1, 2006, Defendant Galanter "proffered" (Compl. at ¶ 19) a real estate contract in connection with this transaction. Plaintiffs allege that Radmin disregarded corporate formalities with respect to Refsnart to such an extent that Refsnart was simply a conduit through which Radmin conducted his personal business.

Guarino was a principal of Extreme Realty and JG, a financing broker. Au, Radmin and Guarino owned and operated JG. In connection with the Sale, Langone, Radmin, Extreme and Guarino arranged to purchase the Property "as a saleable valuable assignment, marketing the transaction as a 'flip contract'" (Compl at ¶ 24).

The closing on the Sale took place on or about May 10, 2006. The attendees at the Closing were Plaintiffs and principals of an entity known as Grand Central 888 Inc. ("Grand Central"), to whom Radmin, Guarino, Langone and Extreme had assigned their rights under the contract. Grand Central purchased the Property with financing arranged by Guarino, JG and Au.

Plaintiffs then learned that Grand Central paid a total of \$2.6 million to purchase the Property, which was \$750,000 more than the \$1.85 million price to which Plaintiffs agreed. Grand Central paid this additional \$750,000 to Radmin, Guarino, Langone and Extreme as commissions and other fees.

Plaintiffs submit that they are entitled to this \$750,000. Plaintiffs outline the allegedly improper conduct of the Defendants in connection with the Sale, including their failure to disclose to Plaintiffs their relationship to each other and interest in the Sale, which Plaintiffs submit constituted a material representation. The Complaint contains five (5) causes of action: 1) faithless service: broker fraud, 2) breach of fiduciary duty, 3) fraud, 4) deceptive trade practices, for which Plaintiffs seek damages pursuant to General Business Law (“GBL”) § 349, and 5) conversion and *prima facie* tort. By decision dated October 17, 2011, the Court denied Plaintiffs’ motion to amend the Complaint to assert additional causes of action against Radmin and Langone for violations of New York Real Property Law (“RPL”) §§ 440-a and 442-a.

In support of Defendants’ motion for summary judgment, Langone affirms that, at all times relevant to the sale and purchase of the Property, he was employed by Extreme. In late 2005/early 2006, approximately three to four weeks after he first became involved in the real estate business, Radmin advised Langone that he was interested in acquiring properties “to satisfy a 1031 tax-free exchange” (Langone Aff. in Supp. at ¶ 3). Langone began searching for appropriate properties for Radmin to purchase and, in so doing, came across the Property. Langone called Plaintiff Chi Lo Liu (“Chi”) and advised him of Radmin’s interest in buying the Property.

Langone affirms that he never asked Plaintiffs to act as their broker, and “made it clear from the very outset that I was contacting them for the purpose of finding a [property] for my boss” (Langone Aff. in Supp. at ¶ 4). Langone avers, further, that 1) he was never retained by Plaintiffs to be their broker in connection with the sale of the Property; 2) Plaintiffs never signed an agreement with Langone, or anyone at Extreme, to act as their broker in connection with the sale of the Property; 3) Plaintiffs never instructed Langone to market the Property on their behalf; and 4) Plaintiffs could not have so instructed Langone, in light of the fact that he was working for Radmin and Extreme. Langone also notes that the contract entered into by Plaintiffs to purchase the Property provided that Langone would be paid by the purchaser of the Property,

not by Plaintiffs. Langone affirms that he “was never to be paid by Plaintiffs since I did not work for them” (*id.* at ¶ 6).

In his Affidavit in Support, Radmin submits that Plaintiffs’ action is baseless, and is “predicated on the fallacious notion that ‘somehow’ the Defendants served as Plaintiffs[‘] agents for the sale of their real property” (Radmin Aff. in Supp. at ¶ 2). Radmin affirms that in late 2005/early 2006, he was looking for a replacement property to complete a tax-free exchange pursuant to § 1031 of the Internal Revenue Code, known as a “1031 exchange” (*id.* at ¶ 3). At that time, Radmin was a principal in Extreme, a brokerage firm, and he encouraged brokers employed by Extreme to find potential replacement properties and advise Radmin of any willing sellers. Langone, a salesman for Extreme, identified the Property and Radmin asked Langone to arrange a meeting with the Property’s owners. Two days later, Radmin and Langone met with Plaintiff Chi, and Langone introduced Radmin as his boss, as well as a potential buyer. Chi and Radmin toured the Property and began to negotiate a purchase price. Radmin affirms that he advised Chi of his role at Extreme.

Radmin subsequently agreed to purchase the Property through Defendant Refsnart, a “nominee corporation” (Radmin Aff. in Supp. at ¶ 5). Plaintiffs and Radmin entered into the Contract (Ex. L to Radmin Aff. in Supp.) for the purchase and sale of the Property which, by its terms, was assignable to third parties. Galanter was retained to represent the purchaser and he worked with Therese Liu, Esq. (“Attorney Liu”) to finalize the Contract. Radmin asked Au, a principal at JG which is a mortgage brokerage firm of which Radmin was a member, to obtain a mortgage commitment for financing Refsnart’s purchase of the Property.

As preparations were being made to close on the Contract, a real estate broker representing Grand Central advised Radmin that he had a client who was “intensely interested” in the Property (Radmin Aff. in Supp. at ¶ 8), and Grand Central subsequently made Radmin “an offer I could not refuse” (*id.*). Radmin decided not to pursue the 1031 exchange, and instead entered into a contract with Grand Central, through Tommy Sze, to assign Refsnart’s contractual rights to purchase the Property (“Assignment Contract”) (Ex. M to Radmin Aff. in Supp.). As part of the Assignment Contract, Radmin agreed, through Refsnart, to lend Grand Central \$1.4 million to finance its acquisition of the Property if Grand Central proved unable to take over Refsnart’s mortgage commitment. Grand Central was ultimately able to obtain Refsnart’s mortgage commitment that JG had previously secured. Plaintiffs and Attorney Liu were advised of the Assignment Contract and raised no objections. Radmin affirms that he had advised Chi of

Radmin's affiliations when they first met, and made it clear to Plaintiffs that Langone was representing only Radmin's interests in connection with the purchase of the Property.

Radmin submits that Plaintiffs' claims for fraud and deceptive trade practices cannot stand in light of the fact that he never misrepresented any fact to Plaintiffs, or misled them in any respect. Radmin notes that the Contract was negotiated by his counsel and Attorney Liu, the parties complied with the Contract, and Plaintiffs "received exactly what they contracted for" (Radmin Aff. in Supp. at ¶ 13). Radmin contends, further, that no fiduciary relationship existed in light of the fact that Plaintiffs never retained Langone or Extreme to represent them in connection with the sale of the Property, and none of the Defendants served as Plaintiffs' agents with respect to the sale of the Property. Finally, the cause of action for conversion lacks merit because Defendants did not take anything from Plaintiffs.

Defendants assert as follows in their Rule 19-A Statement of Undisputed Facts, which assertions include references to Chi, Radmin and Langone's deposition testimony as well as the language of the Contract: 1) Plaintiffs are the former owners of the Property; 2) in or around 2005, Chi was contacted by Langone by telephone at Chi's home; 3) at that time, Langone asked Chi if the Property was for sale; 4) a day after Langone's initial conversation with Chi, Langone called Chi again to arrange a meeting at the Property with the potential buyer; 5) Chi agreed to meet the potential buyer; 6) at the meeting, Langone introduced Radmin to Chi as a principal in Extreme and told Chi that Radmin was considering purchasing the Property as a partner in an entity; 7) Chi did not ask Langone to be his agent with respect to the Sale; 8) Chi did not ask Extreme to be his agent with respect to the Sale; 9) no written agency or brokerage agreement was executed between or among Plaintiffs and any Defendant; 10) no oral agency or brokerage agreement was entered into between or among Plaintiffs and any Defendant; 11) shortly after Chi's initial conversation with Langone, he met with buyers at the Property; 12) Chi did not ask Langone or Extreme to solicit other potential buyers after he met with Radmin; 13) Plaintiffs were represented during the Sale by Attorney Liu; 14) Galanter represented the purchaser of the Property; 15) Chi executed the contract to sell the Property after having an opportunity to fully discuss its terms with Attorney Liu;¹ 16) Refsnart was the Contract vendee; 17) the Contract did not prohibit assignment of the Contract vendee's purchase rights; 18) Chi discussed the Contract with Attorney Liu; 19) Plaintiff Huag Su Ying Liu ("Su Ying") discussed the Contract with Attorney Liu; 20) Plaintiffs received all money required under the Contract; 21) Plaintiffs had no

¹ Chi testified that Attorney Liu had been his attorney for over twenty years (Chi Dep. at p. 51, lines 2-3)

contract with JG; 22) Galanter never represented Plaintiffs; 23) Chi has never spoken to Galanter; 24) Chi has never spoken to Au; 25) Extreme was not Plaintiffs' agent; 27) Guarino was not Plaintiffs' agent; 28) Au was not Plaintiffs' agent; and 29) Plaintiffs did not sign any written agreement retaining Langone as their agent. Defendants cite, *inter alia*, pages 68-69 of Chi's deposition testimony (Ex. E to Clarke Aff. in Supp.) where he testified as follows:

Q. To your understanding, was Mr. Radmin your agent?

A. I don't know.

Q. To your understanding, was Extreme your agent?

A. No.

Q. To your understanding, was Refsnart your agent?

A. No.

Q. How about James Guarino, to your understanding, was he your agent?

A. No.

Q. Was JG, LLC your agent to your understanding?

A. No.

Q. Was Jason Au your agent to your understanding?

A. No.

In their Rule 19-A Counter Statement of Undisputed Facts, Plaintiffs do not dispute many of the facts asserted by Defendants in their Rule 19-A Statement. Plaintiffs dispute certain of Defendants' characterizations, including Defendants' claims that 1) Chi did not ask Langone to be his agent with respect to the Sale; 2) Chi did not ask Extreme to be his agent with respect to the Sale; 3) Chi executed the Contract after having the opportunity to fully discuss the Contract's terms with Attorney Liu; and 4) Plaintiffs received all money required under the Contract; Defendants claim that they did not receive all money owed to them as "Plaintiffs were never informed of Defendants' intentions to sell the property for \$600,000.00 in profit" (Ps' Rule 19-A Counter Statement at ¶ 20).

C. The Parties' Positions

Defendants submit that they have demonstrated their right to summary judgment dismissing the causes of action in the Complaint on the grounds that 1) the cause of action based on Faithless Service Broker Fraud cannot survive because there is no agency relationship between Plaintiffs and Defendants; 2) Plaintiffs have no cause of action for breach of fiduciary

duty because no fiduciary relationship existed between Plaintiffs and Defendants; 3) the cause of action for fraud cannot be sustained because a) any reliance by Defendants on Plaintiffs was unreasonable, given that the parties were “on the opposite side of the subject real estate transaction” (Ds’ Memorandum of Law at p. 10); and b) as Defendants Galanter, Guarino and Au had no conversations with Plaintiffs, they could not have made a statement on which Plaintiffs relied; 4) Plaintiffs have no cause of action for Deceptive Trade Practices under General Business Law § 349 in light of the absence of proof that the alleged conduct affects the public; and 5) Plaintiffs have no viable cause of action for conversion or *prima facie* tort in light of the fact that a) there can be no cause of action for *prima facie* tort given the Complaint’s failure to state a viable cause of action for a conventional tort; and b) Plaintiffs have not identified any money to which they were entitled that Defendants converted to their own use.

Plaintiffs oppose Defendants’ motion submitting, *inter alia*, that 1) Plaintiffs have viable causes of action for Faithless Service Broker Fraud and Breach of Fiduciary Duty in light of a real estate broker’s obligation to act honestly and disclose all material information, including the nature and extent of the broker’s interest in the transaction, and because representations were made to Chi that led him to reasonably believe that Extreme, Langone and Radmin were his agents acting on his behalf; 2) the fraud cause of action is meritorious based on the allegations that Defendants concealed material facts from Plaintiffs, including the fact that the Property was marketed to other purchasers prior to the Closing, on which Plaintiffs justifiably relied to their detriment; 3) Plaintiffs have alleged a viable cause of action pursuant to GBL § 349 because the Sale at issue is a real estate transaction that can affect the public at large; and 4) Plaintiffs have viable causes of action for conversion and *prima facie* tort in light of their allegations that Defendants participated in a scheme to mislead Plaintiffs regarding the Sale which resulted in Plaintiffs “miss[ing] out on an additional \$600,000.00 in profit, which Defendants instead took from them” (Ps’ Memorandum of Law at p. 22).

RULING OF THE COURT

A. Summary Judgment Standards

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 (2005); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The

Court must deny the motion if the proponent fails to make such a *prima facie* showing, regardless of the sufficiency of the opposing papers. *Liberty Taxi Mgt. Inc. v. Gincherman*, 32 A.D.3d 276 (1st Dept. 2006). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Mere conclusions or unsubstantiated allegations will not defeat the moving party's right to summary judgment. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

B. Relevant Causes of Action

One who owes a duty of fidelity to a principal and who is faithless in the performance of his services is generally not entitled to recover compensation, whether commissions or salary. *Royal Carbo Corp. v. Flameguard, Inc.*, 229 A.D.2d 430 (2d Dept. 1996), citing *Feiger v. Iral Jewelry*, 41 N.Y.2d 928, 929 (1977). The "faithless agent rule" is a part of the law of agency. *G.K. Alan Assoc., Inc. v. Lazzari*, 44 A.D.3d 95, 101 (2d Dept. 2007), citing *Feiger, supra*.

The essential elements of a cause of action sounding in fraud are 1) a misrepresentation or a material omission of fact which was false and known to be false by defendant, 2) made for the purpose of inducing the other party to rely upon it, 3) justifiable reliance of the other party on the misrepresentation or material omission, and 4) injury. *Colasacco v. Robert E. Lawrence Real Estate*, 68 A.D.3d 706 (2d Dept. 2009), quoting *Orlando v. Kukielka*, 40 A.D.3d 829, 831 (2d Dept., 2007).

A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession. *Colavito v. New York Organ Donor Network Inc.*, 8 N.Y.3d 43, 49-50 (2006), citing *State of New York v. Seventh Regiment Fund Inc.*, 98 N.Y.2d 249 (2002). Two key elements of conversion are 1) plaintiff's possessory right or interest in the property, *Colavito*, 8 N.Y.3d at 50, citing *Pierpoint v. Hoyt*, 260 N.Y. 26 (1932) and *Seventh Regiment Fund Inc.*, *supra*, at 259, and 2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights, *Colavito*, 8 N.Y.3d at 50, citing *Employers' Fire Ins. Co. v. Cotten*, 245 N.Y. 102 (1927).

The elements of a claim for breach of fiduciary duty are: 1) existence of a fiduciary relationship, 2) misconduct, and 3) damages directly caused by the wrongdoer's misconduct.

Fitzpatrick House III, LLC v. Neighborhood Youth & Family Services, 55 A.D.3d 664 (2d Dept. 2008); *Kurtzman v. Bergstol*, 40 A.D.3d 588, 590 (2d Dept. 2007). With respect to any causes of action dependent upon a fiduciary relationship, an informal fiduciary relationship is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another, and may be found to exist, in appropriate circumstances, between close friends or where the confidence is based upon prior business dealings. *Apple Records v. Capitol Records*, 137 A.D.2d 50, 57 (1st Dept 1988). The “‘exact limits’ of such relationship are impossible of statement,” *Penato v. George*, 52 A.D.2d 939, 942 (2d Dept 1976), *app. dismiss.* 42 N.Y.2d 908 (1977), and are “fact specific,” *Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 115 (1st Dept. 1998).

The requisite elements of a cause of action sounding in *prima facie* tort are 1) the intentional infliction of harm, 2) which results in special damages, 3) without any excuse or justification, 4) by an act or series of acts which would otherwise be lawful. *Smith v. Meridian Technologies, Inc.*, 86 A.D.3d 557, 558 (2d Dept. 2011), quoting *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 142-143 (1985).

The elements of a cause of action under General Business Law § 349, which declares deceptive acts and practices unlawful, are that 1) the challenged transaction was “consumer-oriented;” 2) defendant engaged in deceptive or materially misleading acts or practices; and 3) plaintiff was injured by reason of defendant’s deceptive or misleading conduct. *Denenberg v. Rosen*, 71 A.D.3d 187, 194 (1st Dept. 2010), *lv. app. dismiss.*, 14 N.Y.3d 910 (2010). For the conduct at issue to be consumer-oriented, it must have a broad impact on consumers at large. *Ng v. HSBC Mortgage Corp.*, 2011 U.S. Dist. LEXIS 88549, *17-18 (E.D.N.Y. 2011), citing, *inter alia*, *Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 25 (1995).

C. Application of these Principles to this Action

The Court concludes that Defendants are entitled to summary judgment dismissing the Complaint in light of the Court’s conclusions that 1) the causes of action for faithless service: broker fraud and breach of fiduciary are not viable in light of the Court’s conclusion, as demonstrated by the undisputed facts, that there was no agency and/or fiduciary relationship between Plaintiffs and any of the Defendants; 2) the cause of action for fraud is not viable in light of the fact that a) certain Defendants did not communicate with Plaintiffs and, therefore, could not have made misrepresentations on which Plaintiffs relied; b) any reliance by Plaintiffs on the misrepresentations of Defendants with whom they communicated was not reasonable, in

light of Plaintiffs' representation by counsel and the fact that the parties were on opposing sides of a substantial real estate transaction; and c) Plaintiffs have not established that Defendants made misrepresentations, and indeed the evidence supports the conclusion that Defendants complied with the terms of the Contract; 3) the cause of action for deceptive trade practices lacks merit, both because Plaintiffs have not established that Defendants engaged in deceptive trade practices and because, assuming *arguendo* they had made that showing, Plaintiffs have not established that the transaction at issue had a broad impact on consumers at large; and 4) the cause of action for conversion/*prima facie* tort cannot survive because Plaintiffs have not established that Defendants improperly converted Plaintiffs money to their own use and because Plaintiffs have not established the requisite *scienter* for *prima facie* tort.

In reaching these conclusions, the Court has considered many facts including but not limited to the following: 1) no oral agency or brokerage agreement was entered into between or among Plaintiffs and any Defendant; 2) Plaintiffs were represented during the Sale by Attorney Liu; 3) Galanter represented the purchaser of the Property; 4) the Contract did not prohibit assignment of the Contract vendee's purchase rights; 5) Plaintiffs received all money required under the Contract; 6) Chi never spoke to Galanter or Au; and 7) Chi conceded at his deposition that Extreme, Refsnart, Guarino and Au were not Plaintiffs' agents.

In light of the Court's dismissal of the Complaint, the Court denies, as moot, Defendants' motion to vacate the note of issue (motion sequence # 3).

All matters not decided herein are hereby denied.

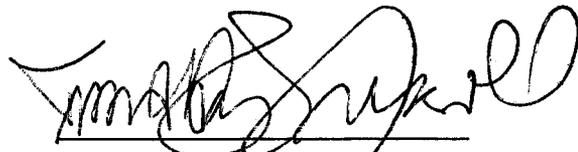
This constitutes the decision and order of the Court.

The Complaint is dismissed.

ENTER

DATED: Mineola, NY

November 10, 2011



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
 NOV 17 2011
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE