

**Blatt v Ashkenazi**

2010 NY Slip Op 33432(U)

December 2, 2010

Supreme Court, New York County

Docket Number: 9556/07

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

TRIAL/IAS, PART 2  
NASSAU COUNTY

INDEX No. 9556/07

MOTION DATE: Sept. 27, 2010  
Motion Sequence # 008, 009, 010

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MURRAY WALTER BLATT, a/k/a MARTIN  
BLATT, individually and on behalf of the joint  
venture/partnership consisting of MARTIN  
BLATT and HERTZL MOEZINIA,

Plaintiff,

-against-

ALEXANDER ASHKENAZI,

Defendant.

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HERTZL MOEZINIA,

Plaintiff-Intervenor,

-against-

MURRAY WALTER BLATT, a/k/a MARTIN  
BLATT,

Defendant.

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HERTZL MOEZINIA,

Plaintiff,

-against-

ALEXANDER ASHKENAZI and ABS  
FLUSHING DEVELOPMENT, LLC,

Defendants.

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The following papers read on this motion:

Notice of Motion.....	XX
Cross-Motion.....	X
Reply Affirmation/Affidavit.....	XX
Memorandum of Law.....	XXX

Motion by defendant Alexander Ashkenazi for partial summary judgment is **denied**. Motion by defendant ABS Flushing Development, LLC for summary judgment dismissing the complaint is **granted**. Motion by plaintiff Hertzl Moezinia for summary judgment against defendants Alexander Ashkenazi and ABS Flushing Development, LLC and dismissing their counterclaims is **denied**.

This is an action for breach of contract. Plaintiff Hertzl Moezinia is a duly licensed real estate broker. On June 20, 2005, Moezinia, on behalf of Moezinia Bros. Capital, LLC, sent a letter to New York Community Bank, outlining his proposal to purchase a mortgage held by the bank on commercial property located in Queens. Although Moezinia's letter refers to the property only as "Flushing parcels of land," the property covered by the mortgage appears to be the Flushing Promenade located at 131-01 Roosevelt Avenue in Flushing.

On October 31, 2005, Moezinia Bros. Capital entered into a formal loan purchase agreement with New York Community Bank. The loan purchase agreement provided that Moezinia, "the assignee," would purchase a series of mortgages from New York Community Bank, "the assignor," for the amount of principal due, plus 90 days interest at the "contract rate," plus any tax escrow deficiency and the assignor's attorney's fees. The assignor was to transfer the mortgage by the earliest of certain dates, one of which was three business days following the purchase of the "mezzanine loan" by Prudential Insurance.

Moezinia never acquired the mortgage from New York Community Bank. According to Moezinia, the mortgage was purchased by Prudential, who, having acquired the mezzanine loan, obtained a right of first refusal on the New York Community Bank mortgage. In any event, Moezinia then attempted to acquire the fee by negotiating with the owner of the property. Although Moezinia claims to have reached an agreement to purchase the property from Flushing Promenade, LLC for \$26.5 million, a contract was never signed.

On February 16, 2006, Moezinia entered into a 1-page, handwritten agreement with

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defendant Alexander Ashkenazi, which forms the basis of the present action. The 1-page agreement provides that Ashkenazi agrees to pay Moezinia the sum of \$1,500,000, the “assignment fee,” “upon closing of the sale of the property known as Flushing Promenade pursuant to the contract dated February 16, 2006 between Flushing Promenade LLC as seller and Alexander Ashkenazi as purchaser.” The agreement provides that the payment is “in consideration of Hertzl having assigned his right and interest in said Flushing Promenade.” The agreement provides that “if for any reason the closing does not occur, no amount is due to Hertzl or any other broker related to Hertzl.”

Following the execution of the 1-page agreement, Ashkenazi entered into a written contract to purchase the property from Flushing Promenade, LLC for \$26.5 million. The contract provided that if seller is unable to convey title, purchaser may terminate the agreement by written notice, and the escrow agent shall repay to the purchaser the deposit and the “Due Diligence Fee,” together with any interest earned thereon, and the reasonable, actual out-of-pocket costs incurred by purchaser in connection with the transaction. The agreement was thereupon to be deemed canceled and void, and neither party was to have any obligations to the other. The agreement was signed on behalf of Flushing Promenade by Gary Podell, a member of JDMM, LLC, which was Flushing Promenade’s managing member.

On June 29, 2006, the property was purchased by defendant ABS Flushing Development, LLC. Moezinia attended the closing and alleges that Ashkenazi told him that the “A” in ABS stood for “Ashkenazi” because he was a member of the company.

This action was commenced in Kings County on August 14, 2007. Plaintiff Hertzl Moezinia asserts claims for breach of the handwritten agreement and unjust enrichment. Plaintiff alleges that ABS Flushing was “designated” by Ashkenazi to purchase the property and that he is its managing member. Plaintiff further alleges that during 2006 and 2007, Ashkenazi made partial payments of \$780,000, thereby acknowledging the validity of the handwritten agreement. Plaintiff seeks \$720,000, as the balance of the “assignment fee,” plus interest and costs.

In their answer, Ashkenazi and ABS Flushing assert a counterclaim, seeking to rescind the agreement for fraud on the ground that Moezinia falsely represented that he had an “assignable interest” in Flushing Promenade, when in fact he had no such interest in the property. Although Ashkenazi and ABS Flushing filed a joint answer, they are now

represented by separate counsel.

The action commenced by Moezinia in Kings County was consolidated with an action which was brought by Moezinia's partner, Murray Walter Blatt, in this court. By stipulation dated June 1, 2010, Blatt discontinued his claims against Ashkenazi.

Defendant Alexander Ashkenazi moves for partial summary judgment dismissing plaintiff's claim for the balance of the assignment fee. Defendant Ashkenazi argues that because Moezinia had no interest in Flushing Promenade the assignment agreement is void for lack of consideration. Defendant submits Flushing Promenade LLC's limited liability company agreement showing Janet Development, LLC as its sole member. The LLC agreement indicates that there are four members of Janet Development, including Gary Podell, but Moezinia is not a member.

Defendant ABS Flushing Development moves for summary judgment dismissing the complaint. ABS argues that it is not a party to the handwritten agreement and derived no benefit from it.

Moezinia cross moves for summary judgment against defendants Ashkenazi and ABS Flushing Development. In support of his motion and opposition to defendants' motions, Moezinia argues that the handwritten agreement was actually an agreement to pay a finder's fee. Moezinia further alleges that he advanced the transaction by negotiating an assignment of \$10,000,000 of the existing mortgages from Prudential to the new lender, Meridian Capital Funding.

A finder undertakes to introduce and bring the parties together, without any obligation or power to negotiate the transaction (*Northeast v Wellington Adv*, 82 NY2d 158, 163 [1993]). Unlike a broker, a finder is not under a fiduciary obligation to his "principal" (Id). Thus, a finder does not necessarily owe the party by whom he was engaged a duty of full disclosure. To the extent that a finder is engaged in "negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of any real estate," an agreement to pay a finder's fee must be in writing (See General Obligations Law § 5-701[a][10]).

The handwritten agreement refers to the \$1.5 million to be paid to plaintiff as an "assignment fee." However, in view of the circumstances surrounding the agreement, it may reasonably be construed as providing for a finder's fee, in consideration of plaintiff's having introduced Ashkenazi to the principals of Flushing Promenade, LLC and brought the parties

together. In order for plaintiff to be entitled to the fee, a purchase by a successor to Flushing Promenade, LLC, such as allegedly ABS Flushing Development, would have to be a “closing” contemplated by the agreement. Nevertheless, under such a construction, the handwritten agreement is not void for lack of consideration. Accordingly, defendant Ashkenazi’s motion for partial summary judgment dismissing plaintiff’s for the balance of the “assignment fee” is **denied**.

Nevertheless, plaintiff has not established prima facie that the parties intended that a purchase by a successor to Flushing Promenade, LLC would entitle plaintiff to the finder’s fee. Accordingly, plaintiff’s motion for summary judgment on his claim based on the handwritten agreement is **denied**. Because there are triable issues as to whether plaintiff fraudulently misrepresented his interest in Flushing Promenade, and whether Ashkenazi relied upon that representation, plaintiff’s motion for summary judgment dismissing defendant Ashkenazi’s counterclaim for rescission of the agreement is also **denied**.

Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded (*IDT Corp v Morgan Stanley*, 12 NY3d 132, 142 [2009]). Thus, plaintiff will be precluded from recovery in unjust enrichment, if the handwritten agreement is valid and enforceable. Plaintiff’s motion for summary judgment on his unjust enrichment claim is **denied**.

Defendant ABS Flushing has established prima facie that it was not a party to the handwritten agreement. Thus, the burden shifts to plaintiff to show a triable issue as to whether defendant is bound by the agreement (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]). Plaintiff asserts that Ashkenazi claimed an interest in ABS Flushing. However, plaintiff has not produced evidence that ABS Flushing assumed the finder’s fee agreement. Accordingly, defendant ABS Flushing’s motion for summary judgment dismissing plaintiff’s claim on the hand written agreement is **granted**.

Oral finder’s agreements are barred by the statute of frauds, unless the existence of the agreement is admitted to by the party from whom the fee is sought (*Stone Capital Advisors Fortrend Int’l*, 15 AD3d 300 [1<sup>st</sup> Dept 2005]). While ABS Flushing does not deny the finder’s agreement between plaintiff and Ashkenazi, it does not admit that it is a party to that agreement. The absence of a memorandum signed by the party to be charged is generally fatal to an action for a finder’s fee, even where the action is based on unjust

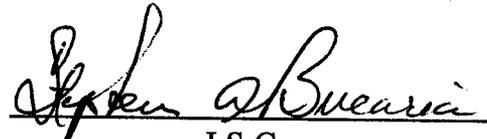
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enrichment (*Philo Smith & Co v US Life Corp*, 554 F.2d 34 [2d Cir 1977]). Accordingly, defendant ABS Flushing's motion for summary judgment dismissing plaintiff's claim for unjust enrichment is **granted**.

So ordered.

Dated DEC 02 2010

  
J.S.C.

**ENTERED**  
DEC 06 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE