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| Atlantic Beach Realty Group, Inc. v Ceslow |
| 2012 NY Slip Op 32737(U) |
| November 5, 2012 |
| Supreme Court, Suffolk County |
| Docket Number: 15246-2011 |
| Judge: Emily Pines |
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SHORT FORM ORDER

INDEX NUMBER: 15246-2011

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

COPY**Present: HON. EMILY PINES**

J. S. C.

Original Motion Dates: 4-24-2012 & 7-31-2012

Motion Submit Date: 8-14-2012

Motion Sequence No.: 002 MG

003 MOTD

 FINAL NON FINAL

_____ X
ATLANTIC BEACH REALTY GROUP, INC.,

Plaintiff,**-against-**

SUSAN CESLOW, OLSEN REALTY LLC aka
BLUE DAWG REALTY and JAN NELSON

Defendants.

_____ X

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In this action, *inter alia*, to recover real estate broker's commissions, defendant Susan Ceslow ("Ceslow") moves, and defendants Olsen Realty LLC a/k/a Blue Dawg Realty ("Olsen Realty") and Jan Nelson ("Nelson") separately move, pursuant to CPLR 3211(a)(1), (5), and (7), to dismiss the plaintiff's complaint as asserted against them. Plaintiff opposes the motions.

ORDERED that the motion by Ceslow (Mot. Seq. # 002) is granted and the Amended Complaint as asserted against her is dismissed; and it is further

ORDERED that the branch of the motion by Olsen Realty and Nelson (Mot. Seq. # 003) seeking dismissal of the Amended Complaint as asserted against Nelson is granted, and the Amended Complaint as asserted against Nelson is dismissed; and it is further

ORDERED that the branch of the motion by Olsen Realty and Nelson (Mot. Seq. # 003) seeking dismissal of the Amended Complaint as asserted against Olsen Realty is denied; and it is further

ORDERED that a preliminary conference before the Court is hereby scheduled for December 10, 2012.

Factual and Procedural Background

The following facts/allegations are gleaned from the Amended Verified Complaint. Plaintiff Atlantic Beach Realty Group, LLC (“ABRG”) is a duly licensed real estate agency in New York. Ceslow owned 50% of ABRG until April 1, 2009. ABRG alleges that Ceslow and Nelson “were key employees, shareholders, officers and/or directors” of ABRG. ABRG alleges that Ceslow and Nelson, while in the employ of and acting as agents of ABRG, introduced buyers to certain properties, were involved in the negotiations leading up to the sales of said properties, were the procuring cause in the sales, and were the direct and proximate link to the sales. ABRG also alleges that Ceslow and Nelson, while employed with ABRG, “engage[d] in a bad faith pattern of clandestine conduct with the intent to compete with the business of [ABRG] and also to convert the business interests of [ABRG]” for their own benefit, and that they in fact converted ABRG’s business. As a result of the conduct of Ceslow and Nelson, on behalf of Olsen Realty or other real estate agents, ABRG’s claims that it has lost good will and commissions.

The Amended Verified Complaint asserts nine causes of action. The first cause of action is asserted against Ceslow and Nelson and alleges breach of fiduciary duty. The second cause of action alleges that Ceslow and Nelson, while still employed by ABRG, formed Olsen Realty and obtained buyers and/or real estate contracts using ABRG’s confidential information, and seeks an accounting of all financial matters with regard to ABRG’s contacts, clients and/or customer information. The third cause of action seeks a permanent injunction preventing Defendants from doing business with ABRG’s customers/clients. The fourth cause of action is asserted against Ceslow and Nelson for interference with business relations. The fifth cause of action is asserted against all Defendants for interference with prospective business relations. The sixth cause of action asserted against all Defendants is for unfair competition. The seventh cause of action is asserted against all Defendants for breach of contract. The eighth cause of action is asserted against all Defendants for unjust enrichment. Finally, the ninth cause of action is asserted against all Defendants for quantum meruit.

In support of her motion, Ceslow submits, among other things, her own affidavit wherein she states that she had a 50% ownership interest in ABRG until April 1, 2010. Non-party Lynden Restrepo, Ceslow’s sister, owned the remaining 50%. In 2010, Restrepo commenced an action in this Court (Suffolk County Index No.: 6522-10) seeking to dissolve ABRG. The parties agreed to settle that action by Ceslow selling her 50% interest in ABRG to Restrepo. Ceslow and Restrepo entered into a Membership Interest Purchase Agreement which provided, among other things, that Ceslow was to remain with ABRG as a broker associate subject to her right to resign and obtain employment with other

brokers and subject to ABRG's right to terminate Ceslow's employment. On February 3, 2011, Ceslow's employment with ABRG was terminated. On February 16, 2011, ABRG and Ceslow exchanged mutual general releases pursuant to which the parties released and discharged:

"The RELEASEE, RELEASEE'S heirs, executors, administrators, successors, and assigns from all actions, causes of actions, suits, debts, dues, sums of money, accounts, reckoning, bonds, bills, specialities, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims, and demands whatsoever, in law, admiralty or equity, which against the RELEASEE, the RELEASOR, RELEASOR'S heirs, executors, administrators, successors and assigns ever had, now have or hereafter can, shall or may, have for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of this RELEASE.

As consideration for the release from Ceslow, ABRG agreed to pay Ceslow brokerage commissions on certain enumerated transactions, if and when collected by ABRG. According to Ceslow, the releases were prepared by counsel for ABRG/Restrepo. After her employment with ABRG was terminated, Ceslow became employed as an associate broker with Olsen Realty. Ceslow states that while she was employed by Olsen, she became the procuring broker for the sales of three properties in Montauk, 6 South Federal Street, 603 Old Montauk Highway, and 16 Navy Road, Unit # 123. ABRG now seeks to be paid commissions with regard to these transactions. Ceslow alleges that none of the three transactions were procured prior to the termination of her employment with ABRG, as there were never meetings of the minds between the buyers and sellers until after she was terminated by ABRG.

In support of their separate motion to dismiss, Olsen Realty and Nelson submit, among other things, an affidavit from Nelson. Nelson was employed as a broker associate with ABRG from 2007 through February 2, 2011, when she was terminated at the same time as Ceslow. Nelson and ABRG also exchanged mutual general releases on February 16, 2011, with the same provision quoted above. After her termination, Nelson became employed as an associate broker with Olsen Realty, during which time she was the procuring broker for the sales of three properties in Montauk, 20 Duval Avenue, 40 Dogwood Street, and 16 Navy Road, Unit # 123. ABRG now seeks to be paid commissions with regard to these transactions. Nelson alleges that none of the three transactions were procured prior to the termination of her employment with ABRG, as there were never meetings of the minds between the buyers and sellers until after she was terminated by ABRG.

Defendants contend that the Amended Complaint should be dismissed pursuant to CPLR 3211(a)(5) because the broad language of the General Releases dated February 16, 2011, serves to bar

all of ABRG's claims asserted in this action against Ceslow and Nelson, as the releases cover the entire period that Ceslow was an owner/employee and the entire period that Nelson was an employee of ABRG. Defendants also argue that any argument by ABRG that the releases should be invalidated due to fraudulent inducement should be rejected because ABRG has failed to allege the elements of fraud in the Amended Complaint, i.e. a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury. Olsen Realty and Nelson also argue that documentary evidence, including e-mail correspondence between Nelson and the purchasers and affidavits from the purchasers establishes that the transactions for which ABRG seeks commissions were procured after ABRG terminated Nelson's employment. Olsen Realty argues that the claims against it for commissions must also be dismissed because such claims "are derivative from and reliant upon ABRG's claims made against Nelson." Finally, Olsen Realty and Nelson contend that ABRG's claims are frivolous in light of the General Releases and they request an award of sanctions.

In opposition to the motions, ABRG submits an affidavit from Restrepo. Restrepo states, among other things, that on or about February 2, 2011, she "became aware of the Defendants, Susan Ceslow and Jan Nelson's intention to leave ABRG, compete with ABRG and to abscond files and clients of ABRG in the process." Restrepo immediately terminated both Ceslow and Nelson "to protect the files, data, customers and accounts of ABRG." Restrepo admits that mutual General Release were executed but she claims that she was not aware at the time that Ceslow and Nelson "had been acting in bad faith and concealing the fact that [they were] diverting various real estate deals from ABRG." Restrepo alleges that neither Ceslow nor Nelson "was forthcoming with this information at the time the General Releases were drafted nor at the time the Releases were executed" and that she did not find out about Ceslow and Nelson's conduct until after the execution of the General Releases. Additionally, Restrepo argues that ABRG is entitled to a commission on each of the transactions at issue because Ceslow and Nelson, while acting as agents of ABRG prior to their termination, were the direct and proximate links to each of the sales.

Plaintiff contends that the Defendants have not demonstrated that documentary evidence resolves all factual issues as a matter of law nor definitively disposes of Plaintiff's claims. Additionally, Plaintiff argues that the Restrepo affidavit demonstrates that the General Releases were procured through fraud based on Ceslow and Nelson's intentional concealment of various real estate deals from ABRG prior to the execution of the General Releases. ABRG points out that neither of the General Releases is in favor of Olsen Realty. ABRG concedes that it did not plead the alleged fraudulent conduct by Ceslow and Nelson with specificity, but it claims that it could not do so because Ceslow and Nelson are the only people aware of the facts regarding their concealment and attempt to divert the commissions from

ABRG. Finally, ABRG argues that its Amended Complaint sufficiently states the causes of action contained therein.

Discussion

As recently set forth by the Court of Appeals:

Generally, “a valid release constitutes a complete bar to an action on a claim which is the subject of the release” (*Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 98 [1st Dept. 2006]). If “the language of a release is clear and unambiguous, the signing of a release is a ‘jural act’ binding on the parties” (*Booth v 3669 Delaware*, 92 NY2d 934, 935 [1998], quoting *Mangini v McClurg*, 24 NY2d 556, 563 [1969]). A release “should never be converted into a starting point for . . . litigation except under circumstances and under rules which would render any other result a grave injustice” (*Mangini*, 24 NY2d at 563). A release may be invalidated, however, for any of “the traditional bases for setting aside written agreements, namely, duress illegality, fraud, or mutual mistake” (*id.*).

Although a defendant has the initial burden of establishing that it has been released from any claims, a signed release “shifts the burden of going forward . . . to the [plaintiff] to show that there has been fraud, duress or some other fact which will be sufficient to void the release” (*Fleming v Ponziani*, 24 NY2d 105, 111 [1969]). A plaintiff seeking to invalidate a release due to fraudulent inducement must “establish the basic elements of fraud, namely a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury” (*Global Mins.*, 35 AD3d at 98).

* * *

A sophisticated principal is able to release its fiduciary claims—at least where . . . the fiduciary relationship is no longer one of unquestioning trust—so long as the principal understands that the fiduciary is acting in its own interest and the release is knowingly entered into (*see*

Alleghany Corp., 333 F2d at 333 [“There is no prerequisite to the settlement of a fraud case that the (fiduciary) defendant must come forward and confess to all his wrongful acts in connection with the subject matter”]; *Consortio Prodipe, S.A. de C.V.*, 544 FSupp2d at 191).

(*Centro Empresarial Cempresa S.A. v America Movil, S.A.B. De C.V.*, 17 NY3d 269, 276-278 [2011]).

Initially, Olsen Realty has not met its burden of establishing that it has been released from any claims asserted ABRG. Olsen Realty has not presented a general release in its favor signed by ABRG nor has it provided any authority in support of its contention that a release executed in favor of Ceslow and Nelson, as individuals, has the effect of barring claims against it, their subsequent employer. Thus, the burden never shifted to ABRG and ABRG’s claims against Olsen Realty are not barred by the General Releases executed by ABRG in favor of Ceslow and Nelson.

However, Ceslow and Nelson met their initial burden as they have presented General Releases in their favor signed by Restrepo on behalf of ABRG. Thus, the burden shifts to ABRG to establish the basic elements of fraud. Although the Amended Complaint does not in any way allege that the Defendants fraudulently induced ABRG to enter into the General Releases by concealing from it the existence of pending real estate transactions, the affidavit by Restrepo submitted in opposition to Defendants’ motion alleges, among other things, that Ceslow and Nelson concealed that they had been diverting various real estate deals from ABRG, and that Ceslow and Nelson were the only ones with knowledge of their actions at the time the General Releases were executed. However, a claim for fraudulent concealment requires plaintiff to allege that the defendant had a duty to disclose material information (*E.B. v Liberation Publications, Inc.*, 7 AD3d 566, 567 [2d Dept 2004]). Here, neither the Amended Complaint nor Restrepo’s affidavit allege that Ceslow and Nelson each had a duty to disclose the existence of pending real estate transactions to ABRG prior to the execution of the General Releases. In fact, Restrepo admits that she terminated both Ceslow and Nelson two weeks before the General Releases were executed because she became aware of their intentions to leave ABRG, compete with ABRG, and abscond with ABRG’s files and clients. Thus, it is clear that well before the General Releases were executed any fiduciary relationship between the parties was no longer one of unquestioning trust as ABRG admits that it believed that Ceslow and Nelson were acting in their own interests. ABRG cannot now invalidate the General Releases by claiming ignorance of the depth of Ceslow and Nelson’s misconduct (*see, Centro Empresarial Cempresa S.A. v America Movil, S.A.B. De C.V., supra* at 278). Additionally, ABRG has failed to allege that it justifiably relied on the alleged non-disclosures from Ceslow and Nelson in entering into the General Releases.

ABRG's reliance on *Farber v Breslin* (47 AD3d 873 [2d Dept 2008]) is misplaced. The allegations of fraud in that case, unlike this case, were determined to be sufficient to support a possible finding that the release was obtained under circumstances which indicated unfairness. Here, the allegations of fraud fail to satisfy the requirements of CPLR 3016(b) as they are bare and conclusory, without any supporting detail (*see Stein v Doukas*, 98 AD3d 1024 [2d Dept 2012]). Accordingly, the Amended Complaint is dismissed as asserted against Ceslow and Nelson as the General Releases constitute a complete bar to the claims asserted against them.

Olsen Realty's argument that the Amended Complaint as asserted against it should be dismissed pursuant to CPLR 3211(a)(1) is without merit. "A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be granted only where the documentary evidence submitted by the movant utterly refutes the plaintiff's allegations against it and conclusively establishes a defense as a matter of law" (*Cog-Net Bldg. Corp. v. Travelers Indem. Co.*, 86 AD3d 585 [2d Dept 2011]). Here, the affidavits and e-mails submitted by Olsen Realty in support of its motion do not constitute "documentary evidence" (*see Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010]), and the contracts regarding the real estate transactions at issue do not utterly refute ABRG's allegations against Olsen Realty and conclusively establish a defense as a matter of law. Therefore, that branch of Olsen Realty's motion which seeks to dismiss the Amended Complaint as asserted against it pursuant to CPLR 3211(a)(1) is denied.

Finally, although Olsen Realty cites to CPLR 3211(a)(7) in its Notice of Motion, it fails to make any specific argument that the various claims in the Amended Complaint fail to state causes of action. Therefore, that branch of Olsen Realty's motion which seeks to dismiss the Amended Complaint as asserted against it pursuant to CPLR 3211(a)(7) is denied.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: November 5, 2012
Riverhead, New York



EMILY PINES
J. S. C.

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