STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

STEPHEN E. WEBSTER,

Plaintiff, DECISION AND ORDER

v. INDEX No. 2005/00211

TOTAL IDENTITY CORP. TOTAL IDENTITY SYSTEMS CORP., TOTAL DIGITAL DISPLAYS, INC., a/k/a TOTAL DIGITAL COMMUNICATIONS, INC., MATTHEW P. DWYER, RICHARD DWYER, PHILIP MISTRETTA, LESLIE KERNAN, JR., and LACY KATZEN, LLP (formerly known as LACY KATZEN RYEN and MITTLEMAN LLP,

Defendant.

Early in 2004, defendant TIC sought funding from plaintiff Webster and John Summers of Jasco Tools. The parties contemplated a sale of debenture notes to Webster for $125,000 and "barter credits" (some of the record indicates that Webster would eventually invest $250,000 but that is not an issue on these motions), and a sale of debenture notes to Summers/Jasco for $750,000. It was contemplated that the debenture notes to be given to Webster be junior, or subordinate, to the notes to be given to Summers/Jasco. Defendant Leslie Kernan, Esq., of Lacy Katzen, LLP, also a defendant, was retained by TIC to draw up the transaction documents for both the Webster and Jasco/Summers sides of the transaction, which was completed in a series of e-

mails (with attachments) on February 19th, the day before the Webster portion of the deal closed. Nothing in the closing documents suggested that one side of the transaction was contingent on closing the other side. But the closing documents Kernan prepared clearly made the Webster debenture notes subordinate to the Jasco/Summer debenture notes.

On February 20th, the Webster deal closed with the delivery, by Webster's agent, John Harbaugh, of Webster's check made payable to TIC in the amount of $125,000, the deliver occurring after the signing of the closing documents. As detailed more fully below, Harbaugh told Mistretta to hold the check in escrow until the Jasco/Summers deal closed. No lawyers were present at the Webster closing, and there is no showing that Kernan or Lacy Katzen knew of what on February 20th Harbaugh told Mistretta about the intended escrow.

Mistretta took the check and closing documents to the offices of Lacy Katzen and personally delivered it to Kernan, who thereafter deposited it into the firm's trust account. Ultimately, despite negotiations with Summers and agents of Jasco, the Jasco/Summers deal fell through. Mistretta, who came to TIC as its chairman, president, and corporate executive officer, on the strength of the previously commenced negotiations with Webster and Summers, resigned from TIC on April 19, 2004, and was replaced as CEO and president by defendant Matthew Dwyer. The next day, April 20th, Dwyer told Kernan to pay his firm's

fees out of the $125,000 and send the balance to him in his capacity as CEO of TIC. Kernan did so, but did not consult Webster, the maker of the check, or anyone else before he released the funds.

Plaintiff's theory of this case involves, at bottom, a claimed breach of an oral escrow agreement by reason of defendant Lacy Katzen's premature release of plaintiff's $125,000 investment in TIC to the only remaining officer of TIC, Matthew Dwyer, on April 20, 2004. The theory, oversimplified, is that Webster made the investment in TIC, in the form of a $125,000 check, when his part of a two part transaction (the Webster deal) closed on February 20, 2004, but that the investment was contingent on the closing of the second half of the transaction (for our purposes the Jasco/Summers deal for $750,000) and that defendants knew or were charged with knowledge of this contingency even though no writing associated with any aspect of the overall deal expressly said so, and no written escrow agreement was drawn up.

But the case was not pled that way. In the first cause of action, plaintiff seeks compensatory and punitive damages against the TIC defendants, including Mistretta and the Dwyers, by reason of their alleged intentional fraudulent inducement of the $125,000 TIC investment, which plaintiff believed to be contingent on the closing of the Jasco/Summers part of the transaction, but which the TIC defendants knew all along would be

converted to their own use. The second cause of action, also directed at the TIC defendants, including Mistretta, sounds in conversion. In the third and fourth causes of action, plaintiff seeks compensatory damages from Lacy Katzen and Kernan, but not Mistretta, for breach of fiduciary duties arising out of an oral escrow agreement to hold the funds "until the condition was first met that the Summers transaction close in its entirety." The fifth cause of action charges the TIC defendants, but not Mistretta, with a conspiracy to compel Kernan to release the funds. There are other causes of action, but they are derivitive of these.

Lacy Katzen and Kernan also move for summary judgment dismissing the complaint as against them. Plaintiff cross-moves, generally (according to the notice of motion) for summary judgment against Lacy Katzen and Kernan, but states in counsel's affidavit, at ¶60(B), that he seeks summary judgment only "on the basis that defendants Kernan and Lacy Katzen received the plaintiff's funds 'in escrow,' with undisputed knowledge of Mr. Webster's interests in those funds; and notwithstanding the factual dispute of whether there was an escrow agreement, or what the terms of that escrow agreement were, the defendants Leslie Kernan and Lacy Katzen breached their fiduciary and contractual obligations to the plaintiff by unilaterally misappropriating those funds to pay their attorneys fees and transferring the balance out of the escrow, without the knowledge and/or consent

of the plaintiff." That would appear to limit plaintiff's motion to the third and fourth causes of action.

THE FACTS AND DEPOSITION TESTIMONY

Harbaugh (Webster's agent) testified that, when he got the check at the closing of the Webster deal, he delivered it, again during the February 20th closing, to Mistretta (of TIC) with instructions to hold it in escrow until the Jasco, or what is also called the Summers, deal closed. Harbaugh maintained that he specifically told Mistretta that the funds must be held until the Jasco/Summers closing. The check was made out to TIC by Webster with no notation. Mistretta then said, according to Harbaugh, "We'll take care of it." Mistretta's affidavits on these motions agree with Harbaugh's account of this conversation.

Mistretta testified that he went directly to the Lacy Katzen offices after the February 20th closing and delivered the check to Kernan. But although Mistretta testified that he physically delivered the check to Kernan, and thus Mistretta claims to have discharged his commitment to Harbaugh (Webster's agent) to have it placed in escrow until the Jasco/Summers closing, he never maintained in his testimony that he told Kernan of this latter aspect, or otherwise informed Kernan that Webster retained an interest in the funds until the Jasco/Summers closing.

At first, Mistretta would not in his deposition answer directly any question about what was said between he and Kernan, and only maintained that he, Mistretta, "handed it [the check] to

him." Thereafter, Mistretta qualified his answer by saying that he only "assum[ed] that's the case," and otherwise gave his *understanding* of what Kernan was to do with the check (i.e., "put it in his account until we got our banking affiliations taken care of and so forth").[1] Later in his testimony, Mistretta maintained that, when he delivered to Kernan the check together with the February 20th closing documents, he told Kernan "to hold it until he got other instructions." It is undisputed that those closing documents do not expressly or otherwise condition the closing on the Jasco/Summers transaction nor did they include a written escrow agreement. Mistretta further elaborated: "I said, here is the check; here is the documents. You've got to hold these until we get all this other stuff done, and that's what I think I said to him."

Mistretta acknowledged that he may have used the word "escrow" but that he ultimately did not remember.[2] Mistretta

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[1] Given the amount of debt being restructured, resolving the "banking affiliations" could not have occurred without the substantial funds Summers was slated to commit, and therefore could not have occurred prior to the Jasco/Summers closing. But Mistretta never claimed in his deposition testimony that any discussion to that effect was had with Kernan.

[2] Contrary to plaintiff's characterizations of Mistretta's testimony as a "denial" of an escrow, this testimony is far from it. Neither in his testimony nor on this motion does Mistretta question that an escrow was created on February 20th as between him and Harbaugh. Cf., Farago v. Burke, 262 N.Y. 229, 233 (1933). Lacy Katzen and Kernan question whether an escrow was created on their motions, but Mistretta does not dispute the matter as between he and Harbaigh. Fyrdman & Co. v. Credit Suisse First Boston Corp., 272 A.D.2d 236 (1st Dept. 2000)(not mandatory

never in his testimony about what he said to Kernan linked the term escrow, or Kernan's holding of the funds, to completion of the Jasco/Summers deal, however, as he promised Harbaugh that he would, and he explained that what he meant by "until the other stuff was done" was his obligation, in response to Kernan's e-mail demands of February 13th, "to produce the documentation for the corporate resolutions." In his initial affidavit on these motions, Mistretta only states that he "directed Kernan to hold Webster's check until he received further instructions." Kernan's testimony was to the same effect, i.e., that he was to hold the funds until he received further instructions, although he had further illuminations that will be detailed below in connection with the cross-motions directed to his own liability.

MISTRETTA'S MOTION

If this was a breach of contract action against Mistretta, Mistretta would fail to establish as a matter of law his entitlement to summary judgment because he failed to testify or otherwise establish that he carried out Harbaugh's instructions (on behalf of Webster) to hold the check, or the funds, in escrow until the Jasco/Summers deal was consummated. In other words, Mistretta was given specific instructions by the maker of the check as to its handling (through Harbaugh as agent), and Mistretta fails to establish that he gave specific enough

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that fiduciary relationship be created in writing).

instructions to Kernan, shortly after receiving Harbaugh's instructions (agreed to by his assurance to "take care of it"), to alert Kernan to Harbaugh's escrow agreement with Mistretta (on behalf of Webster) geared to the Jasco/Summers closing condition, and thus to Webster's continuing interest in the funds until the Jasco/Summers closing.

Mistretta's motion insists that the breach of contract theory is all there is to his case, and that a fraud cannot be predicated on the same facts as a breach of contract. The breach alleged here, however, is more than a breach of contract, because, although plaintiff also has not named Mistretta in the causes of action alleging a breach of fiduciary duty, on these facts Mistretta owed Harbaugh's principal, plaintiff, a fiduciary duty to disclose to defendants Lacy Katzen and Kernan (TIC's agent) the true condition precedent to the release of the funds specified by Harbaugh, i.e., the closing of the Jasco/Summers portion of the deal. As the first "depositary" of the check, Farago v. Burke, 262 N.Y. at 233, Mistretta had a contractual and fiduciary duty to correctly explain to his agent, Kernan, the terms of the escrow specified by Harbaugh. Davis v. Dime Savings Bank of New York, FSB, 158 A.D.2d 50, 52 (3d Dept. 1990). Mistretta assured Harbaugh that he "would take care of it," and by all accounts he failed when he delivered the check to Kernan, telling Kernan only that the funds should be preserved pending delivery of transaction documents and further instructions.

Grinblat v. Taubenblat, 107 A.D.2d 735, 736 (2d Dept. 1985)("escrow agent is charged with the duty not to deliver the escrow deposit to anyone except upon strict compliance with the conditions imposed").

Yet plaintiff cannot on these facts make out a claim of fraudulent inducement, and virtually concedes, by not opposing Mistretta's motion seeking summary judgment dismissing the conversion claim, that there was no conversion of the funds by Mistretta, who never exercised dominion and control over the funds after delivering the check to Kernan on February 20th. The only representations by Mistretta plaintiff can rely on to support the fraud claim are (1) Mistretta's assurance to Harbaugh that the check would be held in escrow until the Jasco/Summers deal closed ("we'll take care of it"), and (2) a combination of silence and direct representations that the Jasco/Summers deal was proceeding expeditiously, that it was imminent to close.

Mistretta, however, establishes through his own testimony and affidavits that he did not know on February 20th that the Jasco/Summers transaction would not close, and that, therefore, he did not know that what representations he made about the Jasco/Summers deal were indeed false when made. Mistretta establishes, again through his own testimony and affidavits, that he did not learn that Summers would not invest in TIC until April 19th, the day he resigned from TIC for that very reason. Plaintiff, in opposition, fails to adduce any admissible evidence

that the Jasco/Summers deal was dead on February 20th, much less that Mistretta knew at that time that, ultimately, it would fall through. What evidence there is in this record is to the contrary.[3] See esp., Conte deposition, at 80-104, showing that the problem with the Jasco/Summers deal developed on March 17th when the parties discovered that a "default proxy" Jasco wished drawn up in the Jasco/Summers' favor had effectively already been given by the Dwyers to Bob David, an event which would have trumped the intended amendment of the Certificate of Incorporation the parties to the Webster deal intended as part of the February 20th closing, Conte deposition at 83-84, and that, on February 20th the parties assumed that there were no problems or issues associated with the Jasco/Summers closing other than putting the documentation together. Conte deposition, at 84, lines 5-15.

Therefore, plaintiff makes out his intentional fraud claim based only on the representation he made to Harbaugh that he would "take care of it" (i.e., holding the funds until the Jasco/Summers deal closed as Harbaugh demanded), and the ultimate

[3] As alluded to above, plaintiff's evidence of intentional fraud in this respect relies exclusively on a mischaracterization of Mistretta's deposition testimony as a "denial of there being an escrow," which plaintiff's counsel posits "creates the presumption" of Mistretta's intent to deceive. Evans affidavit, at ¶25, pp. 11-12. But as set forth above, Mistretta's deposition testimony reasonably cannot be characterized as a denial, and his position on this motion presupposes that an escrow was created and that it was geared to the Jasco/Summers closing despite his failure explicitly to so inform Kernan.

decision of Summers, not shown to have been foreseen by Mistretta at the time of his representation to Harbaugh, not to go through with the deal. The applicable rule with respect to an intentional fraud claim may be fairly stated as follows:

> [A]s to those allegations detailing various unfulfilled promises with respect to work that was to be performed, it is well settled that where, as here, "a party asserts a fraud cause of action based upon a claim that it was fraudulently induced to enter into a contract, 'the misrepresentations alleged in the pleadings must be more than merely promissory statements about what is to be done in the future; they must be misstatements of material fact or promises made with a present, albeit undisclosed, intent not to perform them'" (Laing Logging v. International Paper Co., 228 A.D.2d 843, 844, quoting Shlang v. Bear's Estates Dev. of Smallwood, N.Y., 194 A.D.2d 914, 915). Stated another way, "[t]he mere fact that the expected performance was not realized is insufficient to demonstrate that [the] defendant falsely stated its intentions" (id., at 845; see, Landes v. Sullivan, 235 A.D.2d 657, 660).

McGovern v. T.J. Best Bldg. and Remodeling Inc., 245 A.D.2d 925, 927 (3d Dept. 1997). Accord, Locascio v. James V. Aquavella, M.D., P.C., 185 A.D.2d 689 (4th Dept 1992); Inside Swing v. Le Chase, 236 A.D.2d 884 (4th Dept. 1997). In other words, the mere fact that Mistretta, when he met with Kernan, failed to "take care of it," coupled with 'Summers' ultimate and subsequent decision not to invest, is insufficient in the ordinary case to establish that Mistretta falsely stated his intentions to Harbaugh. But that is all the record shows in this case. See

Brown v. Lockwood, 76 A.D.2d 721, 732-33 (2d Dept. 1980).

The result is not altered by the rule that:

> a false statement of intention is sufficient to support an action for fraud, even where that statement relates to an agreement between the parties (Deerfield Communications Corp. v. Chesebrough-Ponds, Inc., 68 N.Y.2d 954, 956; Channel Master Corp. v. Aluminium Ltd. Sales, 4 N.Y.2d 403, 406-407; Sabo v. Delman, 3 N.Y.2d 155, 160; Prosser and Keeton, Torts § 109, at 763 [5th ed]).

Graubard Mollen Dannett & Horowitz v. Moskovitz, 86 N.Y.2d 112, 122 (1995). See also, Wright v. Selle, 27 A.D.3d 1065 (4th Dept. 2006), discussed at length in Pramco III, LLC v. Partners Trust Bank, 15 Misc.3d 1142(A), 2007 WL 1574479 (Sup. Ct. Monroe Co. 2007). These cases arguably apply here because in them, as is present here, there was proof that the statement of intention did not merely restate a contractual duty, but was extraneous to any obligation arising from the contract, such as the fiduciary obligations Mistretta owed Harbaugh here to correctly describe the conditions of the escrow. But in these cited cases, there also was proof, which we do not have here except by reference to Mistretta's failure of explanation to Kernan, that the defendant's statement of intention was known to be false when made. In other words, not every breach of fiduciary duty amounts to intentional fraud. Kaufman v. Cohen, 307 A.D.2d 113, 120 ("Thus, where a fiduciary relationship exists, 'the mere failure to disclose facts which one is required to disclose may constitute actual fraud, provided the fiduciary possesses the

requisite intent to deceive'")(quoting Whitney Holdings Ltd. v Givotovsky, 988 F. Supp. 732, 748 [S.D.N.Y.]).

Plaintiff may well have a constructive fraud claim against Mistretta.

> Constructive fraud is similar to fraudulent concealment except that the element of scienter need not be proven (Klembczyk v. DiNardo, 265 A.D.2d 934, 936 [4th Dept}). "[T]he element of scienter ... is dropped and is replaced by a requirement that the plaintiff prove the existence of a fiduciary or confidential relationship" (Brown v. Lockwood, 76 A.D.2d 721 [2d Dept]).

Ajettix Inc. v. Raub, 9 Misc.3d 908, 916 (Sup. Ct. Monroe Co. 2005). The circumstances of this case, and the analysis above, are analogous to the situation in Brown v. Lockwood, 76 A.D.2d at 732-34, but for the fact that, here, a fiduciary relation existed by reason of Harbaugh's entrusting of the check to Mistretta, whereas no such fiduciary relation supported the constructive fraud claim on Brown v. Lockwood, 76 A.D.2d at 733-34. But as plaintiff has drawn the first cause of action for fraudulent inducement, intentional fraud is the only theory implicated. Plaintiff did not advance a constructive fraud theory in opposition to Mistretta's motion, and it is doubtful, at best, whether he could so at this late date. Mainline Elec. Corp. v. Pav-Lac Indus., Inc., 40 A.D.3d 939, 939-40 (2d Dept. 2007); Comse Voque Union Free School District v. Allied-Trent Roofing Systems, Inc., 15 A.D.3d 523, 524 (2d Dept. 2005). Cf., McGrath v. Bruce Builders, Inc., 38 A.D.2d 1278, 1278-79 (4th Dept.

2007); Matacale v. County of Steuben, 289 A.D.2d 949 (4th Dept. 2001). Accordingly, the motion for summary judgment dismissing the first and second causes of action as against Mistretta is granted.

THE CROSS MOTIONS DIRECTED TO DEFENDANTS LACY KATZEN AND KERNAN

Turning to the cross motions for summary judgment brought by defendants Lacy Katzen and Kernan, their principal contention is that there was no escrow agreement as between them and Webster, because there were no notes or written instructions on the check that Mistretta delivered to Kernan and no separate escrow agreement, either contained in a discrete document executed by the parties or extrapolated from any correspondence between the parties, including Kernan. These defendants also contend that Kernan never agreed to act as a escrow agent, notwithstanding whatever was agreed at the February 20th closing between his client (Mistretta, on behalf of TIC) and Harbaugh (on behalf of Webster). These defendants contend that, as found above, Mistretta did not disclose to Kernan that TIC's right to use the funds was subject to any particular condition precedent, and that a direction to deposit funds into a trust account "pending further instructions" from the attorney's client does not, as a matter of law, create an escrow or any condition precedent to the release of the funds sufficient to create or imply an escrow.

> For an instrument to be held in escrow, there must be (a) an agreement regarding the subject matter and delivery of the

> instrument, (b) a third-party depositary, (c) delivery of the instrument to a third party conditioned upon the performance of some act or the occurrence of some event, and (d) relinquishment by the grantor (see generally, 55 N.Y. Jur. 2d, Escrows, § 3; 4 Warren's Weed, op. cit., § 7.01). Merely "[c]alling an act an escrow does not necessarily make it such. * * * The word is often used for a holding which has none of the effects which the law attributes to it" (Farago v. Burke, 262 N.Y. 229, 233; see, 4 Warren's Weed, op. cit., § 7.01).

Lennar Northeast Partners Ltd. Partnership v. Gifaldi, 258 A.D.2d 240, 243 (4th Dept. 1999).

In particular, Lacy Katzen and Kernan rely on the term sheets for the two separate transactions prepared by Kernan shortly before the February 20th closing of the Webster transaction, which do not condition a closing or funding on TIC's consumation of the Jasco/Summers transaction. Nor do they in so many words limit TIC's discretion in using the funds received from the Webster closing, because there is no language regarding a third-party depository or escrow agent, nor indication in the writings that the two transactions were interdependant. In addition, Lacy Katzen and Kernan rely on a subscription agreement, signed by Webster before a notary public on February 17, 2004, which, according to these defendants, evidences that the Webster transaction was a "stand alone" transaction, in that the subscription agreement contained no reference at all to the Jasco/Summers transaction. References are also made in defendant's motion papers to the merger and incorporation clause

of the subscription agreement.

In support of their motion, Lacy Katzen and Kernan established via the deposition testimony, an examination of the term sheets, the subscription agreement, the debentures, and the lack of notation on the check or any other writing delivered to these defendants that no written escrow agreement came into existence. Furthermore, they established via the undisputed deposition testimony that Kernan was not told of Harbaugh's directions to Mistretta at the February 20th closing that the funds could not be used until the Jasco/Summers deal closed; i.e., that he did not, because he could not, agree on terms not communicated to him to act as an escrow agent. In other words, these defendants establish in support of their motion that no oral escrow agreement came into existence of which Lacy Katzen or Kernan was a party. In re Apponline.com, Inc., 315 B.R. 259, 274 (E.D.N.Y. 2004)(proponent of escrow agreement must show more than delivery of investment or property to escrowee, and must show valid requisites of escrow agreement and that escrowee agreed to accept assignment on terms proposed)(cited in Great American Ins. Co. v. Canandaigua Nat. Bank and Trust Co., 23 A.D.3d 1025 (4th Dept. 2005)); Rocks Oak Estates v. Katahdin Corp., 280 A.D.2d 962 (4th Dept. 2001). "The evidence, fairly interpreted, supports a finding that the purported escrow agreement [between Mistretta and Harbaugh] was never communicated to the defendants [here Lacy Katzen and Kernan] and thus the defendants never undertook the

obligations contained therein." Rosenberg v. Canetti & Troudler, 309 A.D.2d 914 (2d Dept. 2003). See Shapiro v. Snow Becker Krauss, P.C., 208 A.D.2d 461 (1st Dept. 1994)("defendant could not be held liable as an escrow agent, it being undisputed that the purported agreement between plaintiff . . . and defendant's client, . . . , was never communicated to defendant before it disbursed the money")(check "made payable to defendant's escrow account did not transform defendant into an escrow agent with a fiduciary duty to inquire of plaintiffs as to any conditions attached to the payment of the check").

Even if Webster in the circumstances sent a letter to Kernan directly requesting him "to hold the check in escrow," in view of the unambiguous transaction documents at issue here which do not condition one part of the transaction on consummation of the other, such a request would be "in no way binding upon" Kernan, "because the requisite elements of an escrow agreement were lacking" and Kernan "never agreed to hold any sum put in his possession in escrow" for the benefit of anyone but his client. Grossman v. Fieland, 107 A.D.2d 659, 660 (2d Dept. 1985)(upholding libel verdict). The situation as set forth in defendant's motion papers are thus indistinguishable from those in Friedman v. Stern, unpublished, 1992 WL 58878 (S.D.N.Y. March 13, 1992)(cited in Apponline.com, supra, which in turn was cited

in Great American Ins. v. CNB, supra).[4] To the same effect is Carruthers v. Flaum 450 F. Supp.2d 288, 317-18 (S.D.N.Y. 2006), and this point of necessary acceptance on the part of the putative escrow agent is the whole point of the decision in Farago v. Burke, 262 N.Y. 229, 233 (1933), the lead case in New York on the subject. Thus Lacy Katzen and Kernan meet their initial burden on summary judgment.

In response, plaintiff only points to the fact that Kernan had the check deposited in his firm's trust account under the name of their client, TIC, with the notation "Escrow," and a general overview of the entire transaction as being dependant on the Jasco/Summers closing if it was to be successful as a whole, because the proceeds of the two transactions were to reduce or eliminate the M&T Bank debt of some $800,000, which well exceeded Webster's initial investment of $125,000. In particular, plaintiff refers to the term sheets as referencing "reduce bank debt" and the fact that Kernan knew and testified in deposition that he drew up the transaction documents to make Webster's interest in TIC subordinate to Summers' interest.

Plaintiff also relies on Kernan's February 13th e-mail in which he cautioned Mistretta, as a good lawyer might, against going through with the transaction without a number of

[4] The use of the word escrow by *plaintiff* on the checks in Friedman was held not to create an escrow. Here, not even plaintiff used those words.

preconditions met, including some contained in the term sheets themselves, and relies further on the fact that none of the required documentation the e-mail referred to was ever prepared, either in advance of the February 20th closing or thereafter. Plaintiff also refers to Swan's hearsay declaration[5] in an e-mail to Harbaugh, not sent to Kernan, that he spoke with Kernan about "holding all funds in escrow pending M&T's approval," a directive not coming from Harbaugh or Webster, indeed not strictly from Kernan's own client, and thus could not be binding upon Kernan unless he affirmatively accepted the condition, which plaintiff fails to show. Grossman v. Fieland, 107 A.D.2d at 660. In any event, importing such a condition would be contrary to the subscription agreement already signed by Webster, contrary to the lack of notation on Webster's check or any reservation of right contained in the other writings prepared for the transaction, and contrary to the failure of Mistretta to alert Kernan to Harbaugh's directive given at the closing itself.

Plaintiff also submits the affidavit of Peter V. Coffey, Esq., who holds himself out as an expert on attorney ethics in general, and attorney escrow accounts in particular. Given the actual decisions in Shapiro v. McNeill, 92 N.Y.2d 91 (1998), Leon v. Martinez, 84 A.D.2d 83 (1994), and Matter of Radio Engineering

[5] Swan did not execute an affidavit in connection with these motions, and an affidavit he executed in December 2004 that was submitted as an attachment to plaintiff's counsel's affidavit (Exh. F) does not reference any conversation he had with Kernan.

Industries, Inc., 30 A.D.3d 672 (3d Dept. 2006), each of which he cites, Coffey's opinion concerning Kernan's duty of inquiry, which assumes the transaction documents listed above but limits his assumption of Mistretta's direction to Kernan to their testimony that he was asked to hold the funds until further instructions came after the documentation was delivered to Webster, and which fails to deal with the authority set forth above, is truly breathtaking to the extent it is admissible. But see Entelisano Agency, Inc. v. Felt, 135 A.D.2d 1096 (4th Dept. 1987); People v. Johnson, 76 A.D.2d 983, 984 (3d Dept. 1980); Note, Expert Legal Testimony, 97 Harv. L. Rev. 797 (1984).[6] In Shapiro, the court found that no duty of inquiry existed and, even if the attorney violated a disciplinary rule, that alone will not "giv[e] rise to a cause of action that would otherwise not exist at law." Shapiro, 92 N.Y.2d at 97. An examination of the briefs on appeal reveals that the appellant in Shapiro sought to discredit the IAS court's reliance on Shapiro v. Snow Becker Krauss P.C., supra, and Friedman v. Stern & Destine, supra, both cited above, on the basis of arguments quite similar to those made by Coffey in his affidavit, yet the Court of Appeals quite clearly rejected appellant's argument.

Similarly, in Leon v. Martinez, supra, the attorney disbursed funds to a client at clear variance with the express

[6] Compare People v. Schwartz, 21 A.D.3d 304, 308 (1st Dept. 2005).

terms of an agreement he drafted, the court also observing that the attorney had notice "of the parties' objectives in entering into that agreement. Leon, 84 N.Y.2d at 89. By contrast, in this case, despite Kernan's furious effort to complete the transaction documents in time for the expected February 20th closing, with the aid of Mistretta, Conte, and Harbaugh, who revised them "throughout the day," Kernan deposition, at 161-66; Harbaugh deposition, at 39, 45-47 (describing his active involvement in the preparation of the transaction documents), evidently no one asked him to draft provisions expressly conditioning the Webster investment on the closing of the Jasco/Summers deal, or otherwise to include an express provision for an escrow or for restricting TIC's use of the funds. In the face of this history, Leon provides no authority holding Kernan liable, and Shapiro clearly is authority that he, and Lacy Katzen, are not liable for failure to make inquiry, especially given the failure of Mistretta to convey Harbaugh's directives. Even Harbaugh acknowledged in deposition that he and Webster should have had an escrow agreement drawn up.

This conclusion can only be reinforced by the peculiar dynamics here, which is that the businessmen protagonists of the deal persisted in plowing ahead with the February 20th closing against all advice of counsel (Feb. 13th e-mail), and in the absence of counsel, on the strength of their belief, as Webster candidly put it in his deposition, that lawyers are "not

particularly efficient" in this kind of deal making. Webster deposition, at 47-48. In other words, Harbaugh and Mistretta were making up their own rules for the closing of transaction, partially behind the attorney's back and after giving no notice during the drafting stage that use of the proceeds of one transaction was contingent on the closing of the other, despite the acknowledged overall objectives of the transaction. As Harbaugh admitted, he and Webster as a sophisticated investors had the means at their disposal to ensure that the funds be held in escrow, but did not avail himself of any of them. Trump v. The Corcoran Group, Inc., 240 A.D.2d 159 (1st Dept. 1997)("Had these sophisticated parties wanted a fiduciary-like relationship, they could have bargained for and spelled it out in their agreements"). The courts have "declined to find the existence of a fiduciary relationship where the parties failed to provide for it in their written agreements" when "the agreements in those cases were . . . extensive or comprehensive." Wiener v. Lazard Freres & Co., 241 A.D.2d at 122 (but finding the agreements before it "far" less extensive or comprehensive). These transaction documents are extensive and comprehensive, yet contain no provision conditioning the use of the Webster proceeds on the closing of the Jasco/Summers deal, and they "contai[n] no cognizable fiduciary terms or relationship." Northeast General Corp. v. Wellington Adv., Inc., 82 N.Y.2d 158, 162 (1993).

Finally, Matter of Radio Engineering Industries, supra, is

of no aid to plaintiff, and certainly is not supportive of Coffey's opinion testimony, because in that case, as in Leon, the distribution of funds arguably (a question of fact was raised on the issue, id. 30 A.D.3d at 674) violated the terms of an assignment the attorney drafted himself. Furthermore, the court declined to reach the issue whether the attorney "also was an escrow agent of the funds received." Id. 30 A.D.3d at 673.

To be sure, "it is not mandatory that a fiduciary relationship be formalized in writing, and any inquiry into whether such obligation exists is necessarily fact specific to the particular case." Weiner v. Lazard Freres & Co., 241 A.D.2d 114 (1st Dept. 1998). See Russell v. Demandville Mort. Corp. 11 Misc.3d 1056(A), 815 N.Y.S.2d 496 (Table), 2006 WL 448534, 2006 N.Y. Slip Op. 50231(U) (Sup Ct. Kings Co. March 16, 2006). In Great American Ins. Co. v. Canandaigua National Bank and Trust Company, 23 A.D.3d 1025 (4th Dept. 2005), the court found an escrow agreement from "the parties' correspondence dated July 18, 2000," despite the absence of a discrete escrow agreement executed by the parties, because an escrow was demonstrated "based on their words and conduct." In Iannizzi v. Seckin, 5 A.D.3d 555 (2d Dept. 2004), the court found that plaintiff's attorneys were escrow agents by virtue of a court order, a "preliminary infant compromise order," directing that the settlement proceeds be maintained in plaintiff's attorneys' escrow account and not be withdrawn "without further order of

this court" while plaintiff's attorney sought to vacate or compromise the DSS liens. Contrary to the court's order, plaintiff's attorney distributed the settlement proceeds to the plaintiff's guardians during the pendency of the motion to vacate a Medicaid lien "without leave of court." On these facts, the court easily found that the attorney was serving "[a]s escrow agents because "[t]he payment of the settlement proceeds into the plaintiff's attorney escrow account is not payment to the plaintiff." Id. 5 A.D.3d at 556.

Nothing of the kind of escrow arrangements found in these cases is present in this case. As in Shapiro v. McNeill, Kernan "accepted the funds not as custodian of . . . [Webster]'s property, but as . . . [TIC]'s agent, believing that the funds were [in] the rightful possession of his client," despite the conditions his client, not Webster or Harbaugh, communicated to him. Id. 92 N.Y.2d at 99. And that is why Kernan's acknowledgment in deposition that release of the funds from Lacy Katzen's trust account was contingent upon delivery of the debentures to Webster, coupled with Kernan's further acknowledgment that he made no effort to determine the status of that transaction before releasing the funds, does not raise an issue of fact. The contingency imposed, for all he knew only by his client, described a duty owed to his client, TIC, not a third party with which he had no agreement, or indeed any contact on the contingency issue whatsoever. Rosenberg v. Rosenberg, 180

A.D.2d 607, 608-09 (1st Dept. 1992)("language of the agreement imposes no duties or contractual undertaking on . . . [putative escrowee] in favor of plaintiff"); Menkis v. Whitestone Savings & Loan Assoc., 78 Misc.2d 329, 331 (Dist. Ct. Nassau Co. 1974).

The motion of Lacy Katzen and Kernan for summary judgment is granted and plaintiff's motion is denied.

SO ORDERED.

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KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: December 6, 2007
Rochester, New York