

**Lum v New Century Mortgage Corp.**

2004 NY Slip Op 30116(U)

March 23, 2004

Supreme Court, Suffolk County

Docket Number: 1002778/2003

Judge: Denise F. Molia

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.



Although plaintiff now alleges that the signature on two pieces of the documentary evidence previously submitted is not hers, plaintiff does not dispute that the remaining documents—the actual closing documents between Lurn and New Century—are genuine and executed by Lum. Those documents, standing alone, demonstrate that:

- The broker fee now complained of was repeatedly and accurately disclosed to Lum.
- Lurn repeatedly agreed to the payment by New Century of the 0.5% broker fee to American Capital, in addition to the broker fee Lum would, herself, be paying to American Capital.
- Lum knowingly and voluntarily paid her broker's fee to American Capital, as well as paid her other closing costs.
- The 6.99% interest rate on Lum's mortgage was the result of *negotiations* from the 7.9% rate originally agreed to by New Century.
- Two weeks after the closing, represented by the same counsel that handled the loan transaction, Lum brought this action, challenging the same fees to which she had repeatedly agreed.

Against this backdrop of undisputed facts, evidenced by the documentary evidence that Lurn acknowledges as genuine, it is clear that all of Lum's claims must be dismissed as a matter of law. With respect to plaintiff's first cause of action, New Century has demonstrated in its moving papers that there is no private cause of action under New York law for "commercial bribery" (*see e.g. Sardanis v Sumitomo Corporation*, 279 AD2d 225, 718 NYS2d 66 [2001]). New Century has further demonstrated that to the extent plaintiff Lum is, instead, alleging a fraud claim, plaintiff has failed to allege: (i) any misrepresentations by New Century or (ii) a duty owed by New Century that would support a fraud claim based on omissions. It cannot be disputed that an allegation of a specific misrepresentation of a material fact is a prerequisite for a fraud claim (*see e.g. National Union Fire Ins. Co. of Pittsburgh PA v Red Apple Group, Inc.*, 273 AD2d 140, 710 NYS2d 48 [2000]). As the documentary evidence shows, the broker's fee paid by New Century to Lum's mortgage broker, the seeming basis for all of Lum's claims, was fully and accurately disclosed to Lum and her counsel in multiple documents. Given that disclosure, Lurn cannot, therefore, allege that New Century made any misrepresentations to her upon which a fraud claim could be sustained.

---

**Plaintiff challenges the authenticity of her signature on the Broker Fee Agreement between Lurn and American Capital and on the initial Good Faith Estimate from American Capital to Lum, each provided to defendant New Century by American Capital, as part of Lum's loan application with New Century.**

Lum v New Century Mortgage Corporation  
Index No. 03-27781  
Page No. 3

Second, to the extent Lum is instead claiming that New Century omitted information it should have disclosed, Lum fails to argue, much less adequately allege, that New Century owed Lum a duty to disclose, a prerequisite for any fraud claim based on an omission (*see e.g. Westchester County v Wetton Becket Assoc.*, 102 AD2d 34,478 NYS2d 305 [1984], *lv dismissed*, 64 NY2d 734,485 NYS2d 752 [1984]). Accordingly, plaintiff first cause of action must be dismissed.

Next, Lum's tortious interference with contract claim must fail as a matter of law because New Century has demonstrated that Lum's own allegations that New Century was acting in its own economic interest provides an absolute bar to Lum's tortious interference claim (*see e.g. Ruha v Guior*, 277 AD2d 116,717 NYS2d 35 [2000]; *State Street Bank and Trust Co. v Inversiones Errazuriz Limitado*, 246 F Supp2d 231 [SDNY 2002]).

Lum's cause of action for inducing a breach of fiduciary duty is fatally flawed in that Lum fails to adequately allege that the requisite fiduciary duty even existed. This claim ignores that, under New York law, a broker/customer relationship ordinarily does not give rise to a fiduciary duty (*see e.g. Liberman v Worden*, 268 AD2d 337,701 NYS2d 419 [2000]; *Perl v Smith Barney, Inc.*, 230 AD2d 664,646 NYS2d 678 [1996], *lv denied*, 89 NY2d 803,653 NYS2d 281 [1996]).

Furthermore, the Court of Appeals has made plain that courts should not "create" a fiduciary duty where the parties, themselves, in their contracting, did not (*see, Northeast General Corporation v Wellington Advertising Inc.*, 82 NY2d 158,604 NYS2d 1 [1993]). While Lum now claims that she did not execute the specific Broker Fee Agreement, the fact remains that American Capital's Broker Fee Agreement, signed or unsigned, cannot be read to create a fiduciary relationship between the broker and its clients, given its references to American Capital's specifically "limited" obligations and American Capital's "wholly advisory and administrative" role.

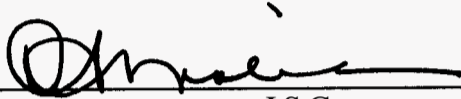
With respect to Lum's General Business Law § 349(a) claim, Lum fails to allege any "deceptive" conduct by New Century that could support such a claim, particularly given the undisputed and accurate disclosures made to Lum by New Century with respect to the fees at issue.

As for Lum's unjust enrichment and money had and received claims – each premised on the theory that New Century should be charging Lum a lower rate of interest – these quasi-contract claims are barred by the fact the parties have actual contracts specifically dealing with the very subject matter of the claim, the interest rate to be charged. It is well-settled that claims for both unjust enrichment and money had and received can only be maintained in the absence of **an agreement between the parties** (*see e.g. Clark-Fitzpatrick, Inc. v Long Island Railroad Co.*, 70 NY2d 382,521 NYS2d 653 [1987] [unjust enrichment]; *Parsa v State of New York*, 64 NY2d 143,485 NYS2d 27 [1984] [money had and received]).

Lum v New Century Mortgage Corporation  
Index No. 03-27781  
Page No. 4

In addition, the “voluntary payment” doctrine is a bar to each of plaintiffs claims. Plaintiff does not dispute that she voluntarily and knowingly paid her broker fee, only to sue two weeks later, represented by the same counsel that represented her in the loan transaction. This is the precise conduct the voluntary payment doctrine was intended to bar (see *e.g. Dillon v U-A Columbia Cablevision of Westchester, Inc*, 292 AD2d 25,740 NYS2d 396 [2002]; *Gimbel Brothers, Inc. v Brook Shopping Centers, Inc.*, 118 AD2d 532,499 NYS2d 435 [1986]). Accordingly, defendant’s motion to dismiss is granted in its entirety.

Dated: 3/23/04

  
\_\_\_\_\_  
J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION

**TO:**

BARRETT & ASSOCIATES  
30 North LaSalle Street, Suite 3900  
Chicago, Illinois 60602

LELAND **GREENE**, ESQ.  
1565 Franklin Avenue, 2<sup>nd</sup> Floor  
Mineola, New York 11501