

<b>Gendot Assoc., Inc. v Kaufold</b>
2007 NY Slip Op 34420(U)
April 3, 2007
Supreme Court, Suffolk County
Docket Number: 2005-5562
Judge: Jeffrey Arlen Spinner
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**SUPREME COURT OF THE STATE OF NEW YORK  
IAS PART XXI - COUNTY OF SUFFOLK**

PRESENT:

**HON. JEFFREY ARLEN SPINNER**  
Justice of the Supreme Court

**COPY**

<p><b>GENDOT ASSOCIATES, INC.,</b></p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">- against -</p> <p><b>EDMUND L. KAUFOLD, FLORENCE E. KAUFOLD</b> and <b>JOHN DOE #1</b> through <b>JOHN DOE #10,</b></p> <p style="text-align: right;">Defendants.</p>	
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INDEX NO.:	2005-5562
MOTION SEQ. NO.:	002 - Mot D
ORIG. MOTION DATE:	09/14/06
MOTION SEQ. NO.:	003 - MD
ORIG. MOTION DATE:	12/06/06
FINAL SUBMIT DATE:	01/24/07

UPON the following papers numbered 1 to 253 read on these Motions:

- Defendants’ Motion (002) & Supporting Papers (Pages 1-41 & Exhibits A-T);
- Plaintiff’s Cross-Motion (003) & Supporting Papers (Pages 42-157 & Exhibits A-MM);
- Defendants’ Support/Opposition (Pages 158-193);
- Plaintiff’s Support/Opposition (Pages 194-246);
- Defendants’ Reply (Pages 247-251)
- Plaintiff’s Counsel’s Letter, dated January 29, 2007 (Pages 252-253);

it is,

**ORDERED**, that the application of Defendants (002) is hereby granted in part; and the application of Plaintiff (003) is hereby denied in all respects.

Defendants move this Court (002) for an Order:

1. Pursuant to CPLR 3211(a) (1) and (7) and 3212, dismissing Plaintiff’s Complaint against Defendants;
2. Declaring the Contract of Sale for real property, dated February 28, 2002, null, void and of no force and effect, on the grounds that there was no meeting of the minds, that there was a mutual mistake as to the meaning of contractual terms, and that there existed an undisclosed and impermissible conflict of interest between Plaintiff and Defendants’ Attorney in connection with the subject transaction, or in the alternative;
3. In the event the Court determines the Contract to be valid, enforcing Paragraph 39 of the Rider to the Contract, declaring that Plaintiff is required to pay \$55,000.00 for the additional 22 lots, in the sum of \$1,210,000.00, in addition to the purchase price;
4. Severing the Counterclaim, retaining jurisdiction of the same and adjudicating the Counterclaims.

Plaintiff move this Court (003) for an Order, pursuant to CPLR 3212, granting Plaintiff summary judgment:

- a. Compelling Defendants to provide Plaintiff with specific performance of the February 28, 2002, Contract between the parties; and
- b. Declaring the Rider Paragraph 39 of the Contract did not survive closing.

To grant summary judgment, it must clearly appear that there are no material issues of fact (*See, Sillman v Twentieth Century-Fox Film Corp*, 3 NY2d 395, 404, 165 NYS2d 498, 144 NE2d 387 [1957] ). The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*See, Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718 [1980]; *Sillman v Twentieth Century-Fox Film Corp, supra*).

Once a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact is shown, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action. (*See, Zuckerman v City of New York, supra*).

The Court's function on in deciding a motion for summary judgment is issue finding, not issue determination (*See, Sillman v Twentieth Century Fox Film Corp., supra*). Summary judgment is a drastic remedy, and therefore should not be granted where there exists any doubt as to the existence of a triable issue (*See, Rotuba Extruders v Ceppos*, 46 NY2d 223, 385 NE2d 1068, 413 NYS2d 141). When the existence of an issue of fact is even arguable or debatable, a motion for summary judgment should be denied (*See, Stone v Goodson*, 8 NY2d 8, 167 NE2d 328, 200 NYS2d 627). It is the role of the Court to determine if bonafide issues of fact exist, not to resolve issues of credibility (*See, Gaither v Saga Corp.*, 203 AD2d 239, 609 NYS2d 654; *Black v Chittenden*, 69 NY2d 665, 503 NE2d 1370, 511 NYS2d 833).

In the within matter, Counsel for both parties have done an outstanding job of demonstrating that there are a plethora of issues of fact to be decided after trial, and this Court will not engage in determining issues of credibility between the parties. Normally, this would compel this Court to deny both Motions in all respects, however, in the matter at bar the Court finds no way of overcoming that part of Defendants' Motion for summary judgment regarding the existence of an undisclosed and impermissible conflict of interest between Plaintiff and Defendants' Attorney in connection with the subject transaction.

As is adeptly pointed out by Counsel for Defendants, it is well settled that a fiduciary owes a duty of undivided loyalty, and cannot act in their own self-interest (*See, Matter of Rothko's Estate*, 43 NYS2d 46 [1982]); that the relationship between attorney and client is a fiduciary one, where the attorney cannot take advantage of their superior knowledge or position (*See, Greene v Greene*, 56 NY2d 86, 436 NE2d 496, 451 NYS2d 46 [1982]); that it is indisputable that the attorney-client relationship is a highly fiduciary one, of a very delicate, exacting and confidential character, requiring a very high degree of fidelity and good faith (*See, Gair v Peck*, 6 Misc2d 739, 165 NYS2d 247 [SupCt, New York Co, 1957] *citing*, 5 AmJur, Attorneys at Law, § 45, p. 285); and that an attorney owes a duty to avoid not only the fact, but even the appearance, of representing conflicting interests (*See, Edelman v Levy*, 42 AD2d 758, 346 NYS2d 347 [2 Dpt 1973]; *Kelly v Greason*, 23 NY2d 368, 244 NE2d 456, 296 NYS2d 937 [1968]).

As further pointed out by Defendants' Counsel, rescission of a contract is appropriate where the relationship between the parties thereto appears to be of such a character as to render it certain they did not deal on equal terms, one side enjoying superior knowledge of the matter derived from a fiduciary relationship, or superior knowledge of the matter; weakness, dependence or trust justifiably reposed, unfair advantage in a transaction is rendered probable and the transaction is presumed void (*See, Meyers v Cohen*, 25 Misc2d 283, 205 NYS2d 787 [SupCt, Queens Co, 1960]; *Rosiny v Schmidt*, 185 AD2d 727, 587 NYS2d 929 [1 Dpt 1992]).

A contract is deemed unconscionable where it is demonstrated that there was an absence of meaningful choice on the part of one of the parties thereto, together with contract terms which unreasonably favor one party, and the determination of unconscionability is a matter of law for the Courts to decide (*See, Cayuga Harvester, Inc v Allis-Chalmers Corp*, 95 AD2d 5, 465 NYS2d 606 [4 Dpt 1983]).

In their attempt to explain away the fact that the Attorney who represented Defendants' in negotiating the Contract of Sale at the heart of this litigation also represented Plaintiff, both before and during said negotiations and attempts at enforcement thereof, were the attempts by Plaintiff, in its submissions, to explain these circumstances away. When the competing interpretations regarding various aspects of the Contract then dominate the litigation, the Court is left to wonder, in this conflicted situation, 'which party suffers by the Courts judgment?'. The answer, quite simply, is that one party or the other will suffer, and both enjoyed the expectation of a fiduciary relationship, and the protections such a relationship must afford, with the Counsel who represented both of them. This conflict cannot be resolved, and can only be exacerbated, and therefore the Contract of Sale is a nullity, and summary judgment is granted.

For future reference, Counsel for both parties are instructed to back off and get off each others' toes, as the Court sees no legitimate purpose served thereby.

For all the reasons stated herein above and in the totality of the papers submitted herein, it is, therefore,

**ORDERED**, that the application of Defendants (002) for an Order:

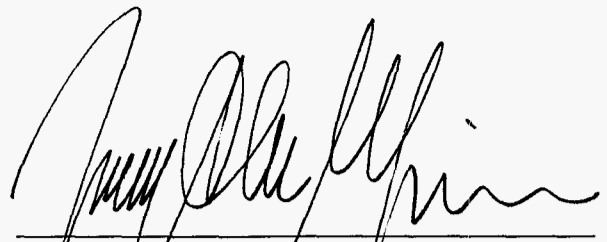
1. Pursuant to CPLR 3211(a) (1) and (7) and 3212, dismissing Plaintiff's Complaint against Defendants;
  2. Declaring the Contract of Sale for real property, dated February 28, 2002, null, void and of no force and effect, on the grounds that there was no meeting of the minds, that there was a mutual mistake as to the meaning of contractual terms, and that there existed an undisclosed and impermissible conflict of interest between Plaintiff and Defendants' Attorney in connection with the subject transaction, or in the alternative;
  3. In the event the Court determines the Contract to be valid, enforcing Paragraph 39 of the Rider to the Contract, declaring that Plaintiff is required to pay \$55,000.00 for the additional 22 lots, in the sum of \$1,210,000.00, in addition to the purchase price;
  4. Severing the Counterclaim, retaining jurisdiction of the same and adjudicating the Counterclaims;
- is hereby granted to the extent that summary judgment is granted on the grounds of the existence of an undisclosed and impermissible conflict of interest between Plaintiff and Defendants' Attorney in connection with the subject transaction, and therefore Plaintiff's Complaint is hereby dismissed and this action is hereby terminated; and it is further

**ORDERED**, that the application of Plaintiff (003) for an Order, pursuant to CPLR 3212, granting Plaintiff summary judgment:

- a. Compelling Defendants to provide Plaintiff with specific performance of the February 28, 2002, Contract between the parties; and
  - b. Declaring the Rider Paragraph 39 of the Contract did not survive closing;
- is hereby denied in all respects, and it is further

**ORDERED**, that Counsel for Defendants is hereby directed to serve a copy of this Order, with Notice of Entry, upon Counsel for all Plaintiff within 20 days of entry of this Order by the Suffolk County Clerk.

Dated: Riverhead, New York  
April 3, 2007



HON. JEFFREY ARLEN SPINNER, J.S.C.

✓ FINAL DISPOSITION	NON-FINAL DISPOSITION
✓ SCAN	DO NOT SCAN

TO:

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