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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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NICHOLAS RALLIS and IRENE RALLIS,
Plaintiffs,

- against-

NANCY BRANNIGAN, BERTHA RECINIELLO and WENDY GRESS,
Defendants.

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NANCY BRANNIGAN,
Third-Party Plaintiff,

- against-

MAY KAPPELI and MAY KAPPELI, INC.
Third-Party Defendants.

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MICHELE M. WOODARD, J.S.C.
TRIAL/IAS Part 16
Index No. 03-16738

Decision After Trial

BACKGROUND

Plaintiffs as purchasers seek a judgment of specific performance directing the transfer to them of the lot and single family residence known as 65 Vanderbilt Avenue, Manhasset, New York ("Premises"), pursuant to a contract of sale dated December 23, 2002 ("Contract") entered into with defendant Brannigan ("Defendant"), and damages related to the rents collected from the Premises by Defendant. Defendant counterclaims for rescission of the Contract by reason of the alleged failure of plaintiff Irene Rallis to disclose a) her dual status as purchaser and selling broker of the Premises, and b) the fair and reasonable value of the Premises. Defendant also asserts as affirmative defenses the doctrine of unclean hands by reason of Mrs. Rallis' failure to disclose her dual status by use of the form set forth in §443 of the Real Property Law, and cancellation of the Contract pursuant to paragraph 21(b)(i) thereof because of a "Defect" resulting from the fact that Defendant and her parents are on the title with her, notwithstanding her representation in the Contract that she was the sole owner of the Premises and had full power to

sell the Premises. The third-party defendants May Kappeli and May Kappeli, Inc. ("Kapelli") seek a commission as the listing broker for the Premises.

According to the Plaintiff's post trial memorandum of law, the three primary issues involved in the case are: 1. Was there sufficient disclosure under the common law to Defendant of Mrs. Rallis's dual status as selling broker and purchaser? 2. Was the purchase price for the Premises fair and reasonable? 3. Are Defendant's parents mortgagees under §320 of the Real Property Law rather than fee owners of 2/3 of the Premises, thereby making Defendant the equitable owner of 100% of the Premises?

It is plaintiffs' position that the evidence shows that there was full disclosure to Defendant of Mrs. Rallis' dual status as purchaser and selling broker of the Premises under the common law of agency, that the evidence proves that the purchase price for the Premises was fair and reasonable and that Defendant's parents hold title to the Premises as mortgagees. Accordingly, plaintiffs contend that they are entitled to a judgment of specific performance, plus damages of $40,729.63, together with interest, representing the rents collected by Defendant from the Premises for the period November 2003 to May 31, 2005 and from February 1, 2006 through March 31, 2007 ($122,280.00), less $81,551.20, representing interest computed on the balance of the purchase price for the same period that rent was collected at the rate set forth in the mortgage commitment (5.375%) which plaintiffs had obtained from JP Morgan Chase Bank to purchase the Premises.

The case was tried before this Court over several days spanning a three-month period ending on March 27, 2007.

The Defendant Brannigan contends that Mrs. Rallis and Kapelli violated both statutory and common law duties as real estate agents to Mrs. Brannigan by failing to disclose Mrs. Rallis' dual

role as a buyer's broker, thereby, precluding both Plaintiffs and Kappeli's requested relief. The Defendant Brannigan also takes the position that both Mrs. Rallis and Kappeli conspired to defraud Mrs. Brannigan into selling her house at a depressed selling price, requiring a recission of the Contract of Sale.

THE EVIDENCE

Defendant, Nancy Brannigan ("Defendant"), by written agreement with May Kappeli ("Kappeli") ("Exclusive Listing Agreement") listed her one family residence known as 65 Vanderbilt Avenue, Manhasset, NY ("Premises") for sale at $599,000 on October 14, 2002 (T 236-37[1]; Plts.' Ex.[2] 21). Kappeli is a licensed real estate broker in Manhasset who deals primarily with residential properties in Manhasset and she and her corporation, May Kappeli, Inc., are third-party defendants in this action (T 227).

Defendant does not reside at the Premises but rents the Premises and holds them as an investment property (T 415).

In April 2002, some six months prior to the Exclusive Listing Agreement, Defendant and her husband, Lee Einzig ("Einzig"), had consulted with Kappeli about the sale of the Premises and in connection therewith Kappeli had prepared an informal market analysis of comparable properties in Manhasset dated April 15, 2002 reflecting an average sales price of $537,000 (T 232-33; Plts.' Ex. 20).

For a decade or more Defendant held a license to sell real estate and was affiliated with

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1 All "T" references are to the Trial Transcript.

2 All "Ex." references are to the exhibits received in evidence at the trial.

licensed real estate brokers. Defendant had known Kappeli since 1991 and Kappeli had held Defendant's real estate sales person license from about 1991 to 1998 (T 231; Def.'s Exs. K, L, M). Defendant had also worked as a sales person for Kappeli for a period in 1992 and Kappeli had acted as Defendant's agent in connection with the rental of the Premises (T 232-236). Defendant trusted Kappeli and relied on her advice (T 601).

The Premises were multiple listed by Kappeli with the Manhasset Port Washington Real Estate Board on October 23, 2002 for $599,000 (T 241; Plts.' Ex. 22). Shortly before the listing, Kappeli went through all the current listings and sales of comparable properties with Defendant and Einzig (T 239). Einzig wrote down some of the listings so he could drive by the properties (T 240). Kappeli informed Defendant and Einzig that in her opinion the Premises would sell for between $599,000 and $625,000 (T 239).

The listing reflected, among other things, that the house comprising part of the Premises had two floors and an attic, with seven rooms, three of them bedrooms on the second floor (Plts.' Ex. 22). The attic was shown on the listing as "finished with a full bath" (Plts.' Ex. 22). Although the attic was being used as a bedroom, it was not listed as such because it was not legal (T 241-42).

When Defendant and her former husband had acquired the Premises in 1984, the attic was unfinished (T 575-77; Plts.' Ex. 14). Defendant's former husband finished the attic and installed the bathroom (T 576-77). However, none of this work was performed with a building permit and neither a certificate of occupancy nor a certificate of compliance was ever received authorizing the bathroom or the attic for living purposes (T 576-77; Plts.' Ex. 3).

In connection with the listing of the Premises for sale, Kappeli informed Defendant that it was necessary for her to get a certificate of occupancy for the attic but Defendant never obtained

one (T 238; 577).

The Premises were also multiple listed with the Long Island Board of Realtors on November 25, 2002 (T 246; 467-68; Plts.' Ex. 31). The listing shows that the house has three bedrooms.

A "Round Robin" report dated October 24, 2002, which is circulated to brokers who are members of the listing organization, reflected that a contract of sale had been signed for the Premises (Def.'s Ex. F). The Premises had only been listed for sale on October 23, 2002 and Kappeli, the listing broker and the only person who could input information into the Round Robin report for the Premises, testified that the information in the report about a signed contract was a computer error (T 203; 223-24; 266-67).

Following the multiple listing of the Premises with the Manhasset Port Washington Real Estate Board, there was an open house for brokers which plaintiff, Mrs. Rallis attended (T 164-65). Mrs. Rallis was an associate broker with Coach Realty in Manhasset, having obtained her broker's license by reason of the fact that she was an attorney-at-law, although not practicing at the time she got her broker's license (T 166). Sometime after the inspection, Mrs. Rallis made an offer of $599,000 to purchase the Premises for herself and her husband (T 167). The offer was made to Kappeli as listing broker who knew that Mrs. Rallis was a broker and would be seeking a commission (T 269-270). Mrs. Rallis's offer of $599,000 was rejected because of the interest generated by the listing and the existence of higher offers (T 167; 243-44; Plts.' Ex. 23).

After the Premises were listed for sale on October 23, 2002 and notwithstanding the computer error about a signed contract in the Round Robin report, there were 17 offers (excluding

plaintiffs') made for the Premises ranging from $550,000 to two offers of $630,000 (T 242-245; Plts.' Ex. 23). The two offers of $630,000 were withdrawn, one of them following an engineer's inspection of the Premises which revealed that too much work was needed on the Premises (T 242-245). Following the withdrawal of the two offers of $630,000, Kappeli attempted to get Mrs. Rallis to increase her offer of $599,000 (T 210). Kappeli was successful in doing this and plaintiffs increased their offer $21,000 over the listing price to $620,000 (T 167-68; 406-07).

Kappeli recommended acceptance of Mrs. Rallis's offer of $620,000 to Defendant and her husband, Einzig (T 250; 245-49). Kappeli informed Einzig by telephone that Mrs. Rallis was a broker, that she would not be requiring an inspection because she was a broker and knew what she was doing, that Mrs. Rallis would be receiving a commission and that Mrs. Rallis and her husband had a mortgage commitment (T 248; 271). Einzig did not appear as a witness at trial and Kappeli's testimony on this point was undisputed. Kappeli also informed Defendant of Mrs. Rallis's offer and that she was a broker and would receive a commission on the sale (T 271).

The Defendant accepted plaintiffs' oral offer as communicated by Kappeli and thereafter Kappeli communicated the facts of the deal to Defendant's lawyer, Mitchell Glick, Esq., of Hayt, Hayt & Landau (T 53; 249-50).

The dual agency disclosure form set forth in Real Property Law §443 was not used by Mrs. Rallis due to an oversight (T 172). However, disclosure of Mrs. Rallis's dual status was affected by other means. The Plaintiffs were represented by William Thomas, Esq., of Thomas & Graham, LLP, and Mr. Thomas, after receiving the proposed contract of sale, wrote to Mr. Glick by letter dated December 4, 2002 and informed him, among other things, as follows:

"My client is one of the brokers on the deal and will be waiving her commission and

reducing the price by $7,285.00. The broker's agreement should reflect the reduction in the brokerage agreement." (T 59-61; Plts.' Ex. 5).

Based on the Thomas letter of December 4, 2002, the proposed contract of sale was revised to reflect, among other things, a reduction in purchase price of $7,285.00 ($620,000 to $612,715) to account for Mrs. Rallis's commission (T 61; Plts.' Ex. 4). Upon Mitchell Glick's receipt of the revised contract of sale signed by the plaintiffs, he wrote to Defendant by letter dated December 13, 2002 and specifically informed her of the following:

> "Enclosed are four copies of the contract of sale which have been signed by the purchasers. I have checks totaling $61,000.00 for deposit in my escrow account as soon as I receive the signed contracts back from you.
>
> Your initials and signatures are required as follows:
>
> Page 1. Next to the 3 numbered changes on the first page. These changes were made in order to reflect the fact that Mrs. Rallis, one of the purchasers, and also a broker, has obtained a credit against the purchase price of $7,285.00 in reduction of the brokerage commissions due the brokers involved. This reduces the selling price to $612,715.00. I have a brokerage agreement signed by May Kappeli (copy enclosed for your signature) which reflects the reduced 5% commission to $23,715.00 instead of $31,000.00 . . .
>
> Finally, enclosed are 2 letters, one from Coach Realtors reflecting the reduced commission and a letter from May Kappeli Realty reflecting the total reduced commission. Please sign both of these on the Kappeli letter after the word 'sellers' and on the Coach Realtors letter under the words 'accepted by'." (T 62-69; Plts.' Exs. 6, 7, 8). (Emphasis added).

Before the contract of sale was signed, Mr. Glick had extensive discussions with Einzig about the reduction in the purchase price to reflect a credit to plaintiffs of $7,285.00 on account of the broker's commission (T 83-84). Defendant also spoke to Mr. Glick about this before she signed the contract (T 409-10).

Mr. Glick recognized Mrs. Rallis's position as selling broker and purchaser as a dual

agency situation and so informed Defendant and Einzig (T 154; 83-84; 409; Plts.' Exs. 6, 7, 8).

Defendant also discussed the reduction in the purchase price with Kappeli before she signed the contract of sale (T 409-10; 550).

Following the foregoing discussions, Defendant signed the contract of sale and initialed all the changes to the contract of sale, including the change in purchase price (T 550-51; Plts.' Ex. 4). She also signed the brokerage agreement of Coach which had already been signed by Mrs. Rallis reflecting the reduced commission of $8,215.00 (T 549; Plts.' Ex. 8).

Mr. Glick received the fully signed contract of sale from Defendant on December 22, 2002, together with the fully signed brokers' agreements referred to in his letter to Defendant dated December 13, 2002, and on December 23, 2002, forwarded a counterpart of the fully signed Contract of Sale to plaintiff's attorney (T 72; Plts.' Ex. 10). The fully signed broker's agreement between Coach and Defendant was faxed by Mr. Glick to Mrs. Rallis (T 171-172).

The Contract of Sale with respect to the commission of the brokers expressly provides as follows:

> "27. Broker. Seller and Purchaser each represent and warrant to the other that it has not dealt with any real estate broker in connection with the sale other than May Kappeli and Coach Realtors, Inc. ("Broker") and Seller shall pay Broker any commission earned pursuant to a separate agreement between Seller and Broker . . . " (Plts.' Ex. 4).

Mrs. Rallis and her husband had signed the buyer's disclosure form set forth in §443 of the Real Property Law (T 189; Def.'s Ex. E). There was, however, no agreement on the part of the buyer to pay any commission (T 329). The commission is negotiated and if the seller agrees to pay it, the buyer does not pay it (T 193). The respective broker's agreements with Kappeli and Coach and the Contract of Sale provide for payment of the brokers' commissions by Defendant (Plts.'

Exs. 7, 8, 4). There is no dispute that this disclosure was not complete and was never given to Defendant Mrs. Brannigan.

Paragraph 7 of the Additional Rider to the Contract of Sale provided:

> "7. The parties agree that §16(b) of the printed portion of the Contract shall include a certificate of occupancy or compliance, as required by the municipality, for a finished attic to be used for recreation room, toilet room and shower as existing. With respect to that certificate, any construction or alterations required to legalize the existing improvements shall be done in a good and workmanship like manner." (Plts.' Ex. 4).

Plaintiff's obligation to purchase the Premises was contingent upon obtaining a mortgage commitment in the sum of $496,000 (Plts.' Ex. 4, ¶8) and plaintiffs satisfied this condition by obtaining a commitment from Indy Mac (T 173).

The closing date set forth in the Contract of Sale was to be on or about March 1, 2003 (Plts.' Ex. 4, ¶15). However, Defendant by March 1, 2003 had not been able to comply with paragraph 7 of the Additional Rider (T 85).

Based on an application made to the Department of State on December 24, 2002 filed on behalf of Defendant relating to the attic floor at the Premises, the Department of State ("Codes Division") by writing dated March 26, 2003, found that the Premises were three stories in height, of type 5 (wood frame) construction and that Defendant's alterations to the attic triggered compliance with the requirements of the Uniform Building Code, which prohibited living space in buildings of type 5 construction above the second floor ("Codes Decision") (Plts.' Ex. 3). The Codes Decision determined, among other things, that the attic could not be used as a bedroom, that the closets in the attic had to be removed and that interconnected smoke and fire detecting alarm devices had to be installed, together with a special sprinkler installation conforming to 9

NYCRR 1060.4(g) (Plts.' Ex. 3).

In Defendant's opinion, the cost of getting a certificate of occupancy for the attic was high and the certificate of occupancy was not obtained (T 255; 179). Defendant informed Kappeli that she might not close title to the Premises because the cost of obtaining the certificate of occupancy was too expensive (T 252; 255).

Plaintiffs and Defendant attempted to negotiate a reduction in the purchase price in lieu of requiring Defendant to obtain the certificate of occupancy (T 179). This, however, was not successful and by letter dated October 19, 2003, plaintiffs offered to take title to the house "as is" without any reduction in the purchase price (T 179-80; 337-38; Plts.' Ex. 19). Defendant received this letter but did not respond to it (T579). Defendant was aware that between the date of the Contract of Sale, December 23, 2002, and the date of plaintiffs' letter, October 19, 2003, prices in the real estate market were escalating (T 598-99).

Shortly after the Contract of Sale was signed, plaintiffs retained Genesis Mortgage to assist them to obtain a mortgage commitment and in connection therewith, Nancy Milback of First Choice Appraisals, Inc. appraised the Premises as having a value of $620,000.00 as of January 24, 2003 (T 14, 22; Plts.' Exs. 1, 1a). Ms. Milback testified that she is a certified real estate appraiser in New York State and she re certified the value of the Premises at $620,000.00 in July of 2003 (T 13; 22; Plts.' Ex. 1b).

The foregoing appraisal found the house at 65 Vanderbilt Avenue to have 1,706 square feet of gross living area ("GLA") on the 1st and 2nd floors (T 23-24; Plts.' Exs. 1a, 1b). The attic was not included in the GLA because the stairway to the attic was not the same construction as the staircase from the 2nd to the 3rd floor and this is a key issue, the listing for the house only showed

3 bedrooms which were all on the 2nd floor and there was no certificate of occupancy for the attic (T 24; Plts.' Exs. 1a, 1b). Ms. Milback's assessment of the attic was confirmed by the Codes Decision which determined, among other things, that the attic was "nonhabitable space" (T 25; Plts.' Ex. 3). According to Ms. Milback, an appraiser should not include space in GLA which cannot be lawfully used (T 26).

Ms. Milback used 55 Vanderbilt Avenue as one of three comparable properties to support her opinion of value (Plts.' Ex. 1a , 1b). This property is in close proximity to the Premises (.02 miles), on the same side of the street, has the same size lot, the GLA was substantially the same, the room count was the same, both properties had full unfinished basements, a fireplace and one car garage and both properties looked similar from the outside (T 27). 55 Vanderbilt Avenue sold for $565,000.00 on April 2002 (T 27; Plts.' Ex. 1a , 1b).

Gladys Rosenthal, plaintiffs' appraisal expert and a seasoned residential real estate appraiser, found that the Premises had a fair market value of $610,000 as of December 23, 2002 (T 289-90; Plts.' Ex. 26). Ms. Rosenthal holds a degree from Simmons College, a Masters Degree in Economics from Syracuse University where she was a member of the faculty, and she is certified in New York State as a Senior Residential Appraiser and approved as a Certified Appraiser for the FHA and HUD (T 274-75).

In forming her opinion of value, Ms. Rosenthal testified that she reviewed, among other things, the Contract of Sale (Plts.' Ex. 4) , the listing of the Premises dated October 23, 2002 (Plts.' Ex. 22), the appraisal performed by Nancy Milback (Plts.' Exs. 1a, 1b), purchase offers made for the Premises in response to the listing (Plts.' Ex. 23), the Codes Decision dated 3/26/03 (Plts.' Ex. 3), and the appraisal of Choice Appraisal performed by Brooke Kurash, a licensed but uncertified

appraiser, dated April 4, 2004 setting forth a fair market value of the Premises as of December 25, 2002 of $720,000.00 (Def's Ex. G; 280-82). The foregoing appraisal is referred to herein as the "Kurash Appraisal".

Ms. Rosenthal supported her opinion of value by using six comparable properties, including 55 Vanderbilt Avenue (T 282; 285; Plts.' Ex. 26). Ms. Rosenthal testified that she was familiar with the type of house at 65 Vanderbilt Avenue, that the 3rd floor was never a part of the GLA as it was not the same caliber construction as the lower floors, and that since she was unable to make an interior inspection of the house, she used the GLA (1,706 square feet) used in the Milback Appraisal and that the square footage of 1,706 was further supported by the Nassau County assessor's card (T 285-86). Specifically, the attic or 3rd floor at the Premises was not included in the GLA because it could not be used as a bedroom (T 286). Ms. Rosenthal's written report ("Rosenthal Appraisal") (Plts.' Ex. 26) expressly states that based on the Codes Decision, the attic floor was not an authorized use and could not be included in the GLA. The written Rosenthal Appraisal further states that the Kurash Appraisal incorrectly included the attic in GLA since the attic was not habitable space according to the Codes Decision (Plts.' Exs. 3, 26).

Ms. Rosenthal also found that the fair market value of the Premises at the time of Defendant's purported termination of the Contract of Sale on February 3, 2004 was $680,000 (T 291). Her written opinion for this value was admitted into evidence as Plts.' Ex. 27.

Patrick McEvoy testified as Defendant's expert appraiser. He is the owner of Choice Appraisal Network and he supervised the Kurash Appraisal (T 423;433; Def's Ex. G). Mr. McEvoy has no degrees in higher education and he testified that he supervises all appraisals that leave his office when he does not perform the appraisal (T 437). Appraisals performed for

mortgage purposes by an uncertified appraiser must be supervised by a state-certified appraiser (T 433). Brooke Kurash was only licensed and not certified by the State (T 431; 433). The Kurash Appraisal expressly states:

> "This summary appraisal report is intended for use by the Lender/Client for a mortgage finance transaction only. This report is not intended for any other use." (Def's Ex. G, p. 2 of 2).

Mr. McEvoy testified that he did not know what the purpose of the appraisal was but that it was not for mortgage purposes (T 433). He further testified that had he knew the purpose of the appraisal was for litigation, he would have done the appraisal himself (T 511).

The appraisal was ordered by Mr. Brannigan, i.e. Einzig (T 505; 616-17), and neither Einzig nor Defendant ever informed Mr. McEvoy or his office about the Contract of Sale or the Codes Decision (T 455-56; 463). Mr. McEvoy testified that had he knew about the Codes Decision, it would have affected his opinion of value and that his clients did not tell him the attic was nonhabitable space (T 463).

The Kurash Appraisal shows the Premises as having GLA of 2,145 square feet and 8 rooms, 4 of them bedrooms with one bedroom being on the attic floor (T 464; Def's Ex. F). Mr. McEvoy further testified that had he knew about the Codes Decision that he would not have included the attic in GLA and that if the attic were subtracted from the GLA, 65 Vanderbilt Avenue would have 1,600 to 1,700 GLA and only 3 bedrooms (T 470; 474). Mr. McEvoy admitted that if the attic were not included in the GLA of 65 Vanderbilt Avenue, the value of 55 and 65 Vanderbilt would be very comparable in square footage (T 475).

Pursuant to the Contract of Sale, paragraph 11(ii), the Defendant represented the following:

> "(ii) Seller is the sole owner of the Premises and has the full right, power and authority

to sell, convey and transfer the same in accordance with the terms of this contract;" (Plts.' Ex. 4).

Sometime in the late summer of 2003 when it appeared that title to the Premises might close, it was discovered that title to the Premises was certified in Defendant and her parents, Anthony and Bertha Reciniello, as tenants in common (T 86; Plts.' Ex. 11). This was the first time Plaintiffs learned that the Defendant held title to the Premises with her parents (T 183). Mr. Glick, counsel for Defendant, by letter dated September 15, 2003, wrote to Paul Holmes of STG Associates, the title abstract company that had prepared the title report for Fidelity National Title Insurance Company of New York, and informed him:

> "Your title report shows ownership in Nancy Brannigan, Anthony Reciniello and Bertha Reciniello as tenants in common.
>
> I have a copy of a deed (the original is with my client, the seller) dated November 11, 1993, a copy of which I am enclosing in this fax to you, wherein Nancy Brannigan, Anthony Reciniello and Bertha Reciniello, his wife convey the property back to Nancy Brannigan.
>
> The deed was delivered to Nancy Brannigan in 1993 in connection with a proposed mortgage refinancing which did not take place. I believe that the deed has not been recorded. Anthony Reciniello has since passed away." (T 86-88, Plts.' Ex. 12, 13).

Mr. Glick testified that the information set forth in his September 15, 2003 letter to Paul Holmes came from his client and that it was his understanding from his client that if there was a problem with title not being fully vested in the Defendant, steps would be taken to correct the title (T 113-15).

The chain of title to the Premises prepared by MKM Abstract (Plts.'. Ex 14) reflects the following conveyances in which Mrs. Brannigan was involved, including the transfer from

William Brannigan (Defendant's Ex- Husband)

to
Nancy Brannigan
Dated: 3/28/91 Recorded: 05/01/91 Liber: 10131 Cp. 526

Nancy Brannigan
to
Nancy Brannigan, Anthony Reciniello and Bertha Reciniello
Dated: 07/06/91 Recorded: 08/30/91 Liber: 10149 Cp. 812

Nancy Brannigan, Anthony Reciniello and Bertha Reciniello
to
Nancy Brannigan
Dated 11/11/93 Recorded: 12/03/93 Liber: 10373 Cp. 737

Nancy Brannigan
to
United Jersey Bank
Amt.: $203,000.00 Dated: 11/12/93 Recorded: 12/03/93 Liber 15748 Mp. 401
Mortgage Tax: $2,005.00, which mortgage was taken over by Fleet National Bank, Successor by Merger to Summit Bank

Nancy Brannigan
to
Nancy Branngian, Anthony Reciniello and Bertha Reciniello
Dated: 11/20/93 Recorded 01/13/94 Liber: 10385 Cp. 825
Last Recorded Owner: Nancy Brannigan, Anthony Reciniello and Bertha Reciniello.
In an affidavit made by Defendant in this action in opposition to plaintiffs' motion for partial summary judgment, Defendant explained her transfers of title to her parents, Anthony Reciniello and Bertha Reciniello, as follows:

> "By way of background, 65 Vanderbilt Avenue, Manhasset, New York, (hereinafter "the premises") was purchased by myself and my first husband. In the early 1990's, pursuant to a divorce settlement, I acquired title to the premises with the financial assistance of my parents, Anthony Reciniello and Bertha Reciniello who were placed into title with me. In or around 1993 I requested my parents permission to take equity out of the premises. My parents deeded the property to my name alone, and I took out a $203,000.00 mortgage in November 1993 in my name alone. Thereafter, to secure my parents interest, I again deeded a two-thirds interest back to my parents in 1994." (T 151-52; Plts.' Ex. 16, ¶ 2) (Emphasis added).

Defendant on direct examination at trial when asked: "Ms. Brannigan, did you add your parents to the ownership of that property as collateral for a debt that you owed to them?" She testified, "No, I did not." (T 349). Although Mrs. Brannigan denied at trial that the property was used as collateral for the $50,000 her parents lent her, this was inconsistent with her deposition testimony. (349, 561-68)

Defendant admitted on cross examination that she still owed her mother the money and that upon the sale of the Premises she would be able to repay her parents and protect her children (T 567-68).

Defendant's father, Anthony Reciniello, died in 1997, survived by his wife Bertha Reciniello, the Defendant and the Defendant's sister, Wendy Gress (T 569). Wendy Gress and Bertha Reciniello are defendants in this action and with the Defendant are the only persons who have an interest in the Premises (T 569; 371).

The Premises are an investment property and the Defendant and Einzig receive all the income from the Premises and pay all the expenses (T 415; 568-69).

The Premises as of the last date of Defendant's testimony, March 22, 2007, were leased to Mr. Russell who pays a monthly rent of $3,640.00 pursuant to a lease which started in February 2007 (T 533-34). Mr. Russell was also the tenant of the Premises from February 2006 to February 2007 during which period he paid $3,250.00 per month (T 533-35). Before Mr. Russell leased the Premises, the Premises had been vacant since May or June 2006 (T 535). Prior to that time, Mr. Kudo leased the Premises and he was paying a monthly rent in excess of $4,000.00 (T534-35). He had been a tenant for 11 years and his tenancy terminated in May 2005 (T 534-35).

This action was commenced on November 5, 2003 and Defendant took no steps to terminate

the Contract of Sale until February 3, 2004 (T571-72). The Defendant by writing dated January 27, 2004, directed her attorney, Mitchell Glick, to return plaintiffs' down payment.

> "Please return the down payment to the purchaser's attorney and advise them that pursuant to the contract, including but not limited to Paragraph 21, the contract is canceled." (Plts.' Ex. 15).

Paragraph 21 of the Contract of Sale deals with "Defects" which under certain circumstances permit a termination of the Contract (Plts.' Ex. 4; ¶21).

Defendant's January 27, 2004 letter did not direct Mr. Glick to return the down payment because Defendant held title to the Premises with her parents or because Mrs. Rallis did not disclose her dual status as selling broker and purchaser or that Mrs. Rallis and Kappeli were in cahoots to defraud Defendant of $100,000.00 (T572-75).

By letter dated February 3, 2004, Mr. Glick returned plaintiffs' down payment to Mr. Thomas and included with his letter a copy of Defendant's letter dated January 27, 2004 (T 116; Plts.' Ex. 15).

By Preliminary Statement of Complaint dated February 3, 2004, Defendant requested the Division of Licensing Services of the Department of State ("DOS") to investigate Kappeli and Mrs. Rallis with respect to the alleged breach of their respective fiduciary duties to Defendant in connection with the sale of the Premises (T 584; Plts.' Ex. 34). Defendant alleged the following in her Preliminary Statement of Complaint:

> "At no time prior to contract during our verbal negotiations, were we informed that Ms. Rallis was a broker herself, selling Real Estate in the Manhasset office of Coach Realty, or that May Kappeli and Mrs. Rallis knew each other." (T 584; Plts.' Ex. 34, p. 2).

Mrs. Brannigan's allegation in her complaint to the DOS is contrary to her sworn testimony that she was aware before she signed the Contract of Sale that Mrs. Rallis was both the selling broker

and one of the purchasers (T 542-50; Plts.' Ex. 6).

The DOS investigated Defendant's complaint and by letter dated January 17, 2007, informed Mrs. Brannigan that they had reviewed Defendant's requests to reopen the case and discipline Mrs. Brannigan and Kappeli but that Defendant's allegations were not supported by sufficient evidence to warrant disciplinary action. (T 586; 650; Plts.' Ex. 35). The letter concluded that "the Department will not, absent new evidence, reopen the investigation into your allegations, nor institute disciplinary action against Kappeli Realty or Ms. Rallis."

Plaintiffs' down payment that was returned by Defendant is currently held in escrow by John C. Schnaufer, Esq. (T 185). Plaintiffs are candidates for the mortgage they require to purchase the Premises and there has been no adverse change in their financial position (T 185). When plaintiffs thought they were going to close title in August 2003, they obtained a mortgage commitment from JP Morgan Chase Bank (T 174-76; Plts.' Ex. 18). In short, plaintiffs are ready, willing and able to purchase the Premises (T 185).

DISCUSSION

A selling broker does not breach her fiduciary obligation by purchasing her principal's property at a fair and reasonable price after disclosing her intention to purchase the principal's property. Yellot v. Poritzky, 170 AD2d 676, 677 (2d Dep't 1991). Indeed, there is no prohibition against a broker purchasing the property of her principal provided the broker's position is clearly made known to the principal. This is so even with respect to listing brokers whose duties are far more than ministerial and involve a relationship with the principal of trust and confidence.

19 NYCRR 175.4 provides:

"A real estate broker shall not directly or indirectly buy for himself property listed with

him, nor shall he acquire any interest therein without first making his true position clearly known to the listing owner."

The rule is that when a broker's interests are divided due to a personal stake in the transaction, full disclosure to the principal regarding the nature and extent of the broker's interest and the material facts clarifying the broker's divided loyalties is required. Dubbs v. Stribling & Associates et al, 96 NY2d 337, 340 (2001). Disclosure in order to be effective must "lay bare the truth, without ambiguity or reservation, in all its stark significance." Wendt v. Fischer, 243 NY 439, 443 (1926). The evidence proves that full disclosure was made to Defendant in all its stark significance and without ambiguity.

Mrs. Rallis admitted that the disclosure form relating to dual agency set forth in Real Property Law Article 12-a §443 was not signed by her and Defendant. Defendant's argument is that this disclosure form is the only manner by which Mrs. Rallis could have disclosed her dual capacity to Defendant and that the failure to use this form is a complete defense to this action. However, the failure to sign the disclosure form set forth in §443 of the Real Property Law does not entitle Defendant to terminate or rescind the Contract of Sale. Section 443 of the Real Property Law is disciplinary in nature and enforced by the Attorney General. Procidano v. Mautner, 70 Misc.2d 891 (Civ. Ct. N.Y. Co. 1972). More significantly, Real Property Law, §443, paragraph 6 provides as follows:

"Nothing in this section shall be construed to limit or alter the application of the common law of agency with respect to residential real estate transactions."

Consequently, it is not the disclosure form set forth in §443 of the Real Property Law which determines whether disclosure has been made to a seller by a selling broker and fiduciary obligations fulfilled but common law principles of agency law. In fact, the DOS which enforces §443 of the Real Property Law found that Defendant had not presented sufficient evidence to support her complaint to

the DOS against Mrs. Rallis and Kappeli for breach of fiduciary duty and closed its file on the matter.

In determining the fiduciary duties of a selling broker, it is necessary to understand exactly what it is a selling broker does. In this case, the Premises were listed for sale by Defendant with Kappeli at a purchase price of $599,000 and multiple listed with the members of the Manhasset/Port Washington Real Estate Board and the Long Island Board of Realtors. Coach is a member of both Boards and received the listing. Plaintiff, Mrs. Rallis, is an independent real estate broker who is associated with Coach. She saw the listing with the Manhasset/Port Washington Real Estate Board and sometime after a broker's inspection became interested in buying the Premises for herself and her husband and acted as the selling broker which made her a subagent of Kappeli's with fiduciary duties owed to Defendant and Kappeli.

According to the Restatement (Third) of the Law of Agency, §3.15:

> The mechanism through which a relationship of subagency arises is an offer of a unilateral contract of subagency, made by the listing broker to showing brokers, that is accepted by the showing broker who produces a buyer able and willing to purchase the property at the listing price and terms or at other terms acceptable to the seller. Such an offer is often made when a listing broker lists property with a multiple listing service ("MLS"). A multiple listing service is an agreement among brokers in a particular geographic market to pool information about their listings. (Emphasis added).

The mechanism described above is exactly the mechanism that was used to create the subagency with Mrs. Rallis and the fiduciary duty imposed upon Mrs. Rallis was to produce a purchaser able and ready to meet Defendant's terms and to act in good faith.

Mrs. Rallis as selling broker had nothing to do with fixing the listing price for the Premises. This had been determined between Defendant and Kappeli. Mrs. Rallis had no discretion and there

is no evidence that the Defendant in any way relied upon Mrs. Rallis' skill and advice. Aside from Mrs. Rallis's obligation to disclose her dual status which is, based upon the credible documentary and testimony evidence the Court finds, what she did, although not using the Real Property form , her sole duty was to find a buyer who would meet Defendant's terms. In fact, Kappeli in her testimony confirmed that when acting as a selling broker she has no power to change the listing price and that her job as a selling broker is to find a buyer ready, willing and able to buy at the best price (T 251, 252). Mrs. Rallis testified to substantially the same thing, that she had no ability to set the purchase price and never spoke to Defendant or Kappeli about setting the purchase price (T 172, 173). No evidence rebutted this testimony.

A selling broker has no discretion and her duties are ministerial. Bonwell v. Auld, 9 Misc. 65 (N.Y. Ct. of Com. Pleas., 1894); Ryer v. Turkel, 70 A. 68, 71-2, 75 N.J.L. 677, 684-85 (N.J. Err. & App., 1908). See also, 12 Am Jur 2d Brokers §104 and cases cited under footnote 57. As a selling broker, Defendant placed no trust or discretion in Mrs. Rallis. Mrs. Rallis' sole mission was to act as a "middleman" to find someone who would meet the Defendant's terms (Knauss v. Gottfried Krueger Brewing Co., 142 N.Y. 70 (1894); Pollatschek v. Goodwin, 17 Misc. 587 [App. Tr. 1st Dep't, 1896]) and this is precisely what Mrs. Rallis did.

Well in advance of the Contract of Sale being presented to Defendant for signature, Kappeli informed both Einzig and Defendant of Mrs. Rallis's dual status. Kappeli knew that Mrs. Rallis was a broker and seeking a commission and she communicated this to Einzig and Defendant and informed them that plaintiffs had mortgage financing and would be waiving an engineer's inspection because Mrs. Rallis was a broker and knew what she was doing. Thereafter, Mrs. Rallis by her attorney informed Defendant's attorney that Mrs. Rallis was the selling broker, that she was one of the

purchasers and that she was receiving a commission which would be deducted from her offer of $620,000.

Following this, Plaintiffs made changes to the Contract of Sale, including the reduction in the purchase price from $620,000 to $612,715 to account for Mrs. Rallis's commission, the plaintiffs signed the Contract and their attorney sent it to Defendant's attorney, Mr. Glick, together with the downpayment of $61,000.

Mr. Glick, upon receiving the Contract, sent the Contract to his client by letter dated December 13, 2002 being certain to inform Defendant of the changes made to the Contract, including the change in the purchase price and explaining the reason for it. With respect to the changes in the purchase price, he wrote:

> "These changes were made in order to reflect the fact that Mrs. Rallis, one of the purchasers, and also a broker, has obtained a credit against the purchase price of $7,285.00 in reduction of the brokerage commissions due the brokers involved. This reduces the selling price to $612,715.00. I have a brokerage agreement signed by May Kappeli (copy enclosed for your signature) which reflects the reduced 5% commission to $23,715.00 instead of $31,000.00." (Plts.' Ex. 6). (Emphasis added).

Thereafter and before the Contract was signed by Defendant, Mr. Glick had extensive discussions with Einzig about the change in purchase price and the reason for it. Mr. Glick also discussed the matter with Defendant and after these discussions, Defendant signed the Contract, initialed all changes, signed the broker's agreement with Coach reflecting the reduced commission which had already been signed by Mrs. Rallis, and returned them to Mr. Glick who received them on December 22, 2002. Defendant had held the Contract for at least seven days to reflect upon the changes that had been made to it, including the reduction in purchase price to account for Mrs. Rallis's commission.

Coach's commission agreement signed by Defendant and Mrs. Rallis, on behalf of Coach, expressly set forth a sales price of $612,715 and the reduced broker's commission due Coach of $8,215, i.e., Coach's commission of $15,500, less Mrs. Rallis's share of $7,285.00.

Defendant's contention that there was no disclosure of Mrs. Rallis's dual status lacks credibility and is not supported by the evidence. Moreover, Defendant is unable to establish any damages resulting from Mrs. Rallis's alleged breach of duty and thereby cannot avoid her contractual obligations. Douglas Holly, Inc. v. Rice, 161 AD 2d 560 (2d Dep't 1990), app. den. 76 NY2d 138 (1990).

The disclosure requirements of the common law of agency have been satisfied and Plaintiffs are entitled to specific performance of the Contract.

The Plaintiff contends that the purchase price of $612,715 set forth in the Contract of Sale was fair and reasonable and no credible proof supports Defendant's position that the Premises at the time of Contract had a fair market value of $720,000.

The evidence presented by plaintiff in the form of testimony and the respective written appraisal reports of Nancy Milback and Gladys Rosenthal establish that the fair market value of the Premises on January 16, 2003 and December 23, 2002, was $620,000 and $610,000, respectively.

The testimony of Defendant's own expert conclusively demonstrated that the Kurash Appraisal submitted as Defendant's expert evidence, was premised on incorrect facts, particularly the square footage, the number of bedrooms, and the purpose of the appraisal, thus causing the opinion of value of the Premises of $720,000 as of December 25, 2002, to be incorrect and unsubstantiated.

The Court is not convinced that Mrs. Rallis and Kappeli conspired to sell the Premises at a reduced price below fair market value.

Based on the Milback and Rosenthal Appraisals, the purchase price of $612,715 set forth in the Contract was fair and reasonable.

Thus, even assuming, the Defendant's position that full disclosure of Mrs. Rallis' status was lacking, there is no evidence that Mrs. Brannigan was harmed based upon this Court's finding that the sale price was fair and reasonable. The cases cited by the Defendant are factually distinguishable and not dispositive of the issues in this case.

Defendant expressly represented in the Contract, paragraph 11(ii), that she "is the sole owner of the Premises and has the full right, power and authority to sell, convey and transfer the same in accordance with the terms of this contract." See Plts.' Ex. 4.

Sometime in September 2003 when it appeared that the parties would close title to the Premises, Defendant's attorney, Mitchell Glick, became aware that record title was in the names of Defendant, Bertha Reciniello and Anthony Reciniello, as tenants in common, with each party holding a one-third interest. Mr. Glick had prepared the Contract based on information he had obtained from Defendant and on advice from his client expected the title situation with respect to the record title to be resolved.

The evidence with respect to title to the Premises shows that Defendant transferred the Premises to herself and her parents as tenants in common by deed dated July 6, 1991, that the Premises were transferred back to Defendant by her parents by deed dated November 11, 1993 so as to allow Defendant to place a mortgage on the Premises and that after the mortgage transaction, Defendant transferred the Premises back to herself and her parents by deed dated November 20, 1993. (Plts.' Ex. 14). The words "No Consideration" appear in the margin of each deed. (See deeds attached to Plts.' Ex. 14).

The acquisition by Defendant of her former husband's interest in the Premises by deed dated March 28, 1991 is reflected by MKM's chain of title (Plts.' Ex. 14) as is the mortgage that Defendant made to secure $203,000 on November 12, 1993.

In Defendant's affidavit sworn to September 7, 2004 (Plts.' Ex. 16) made in opposition to plaintiff's motion for partial summary judgment, Defendant explained the foregoing transfers as follows:

> "(2). By way of background, 65 Vanderbilt Avenue, Manhasset, New York, (hereinafter "the premises") was purchased by myself and my first husband. In the early 1990's, pursuant to a divorce settlement, I acquired title to the premises with the financial assistance of my parents, Anthony Reciniello and Bertha Reciniello who were placed into title with me. In or around 1993 I requested my parents permission to take equity out of the premises. My parents deeded the property to my name alone, and I took out a $203,000.00 mortgage in November of 1993 in my name alone (Plt. Ex. 17). Thereafter, to secure my parents interest, I again deeded a two-thirds interest back to my parents in 1994 (Plts.' Ex. 17)." (Emphasis added).

At Defendant's deposition, she testified that her parents had loaned her "around $50,000.00" to purchase her former husband's interest in the Premises and that she placed her parents in title as security for the $50,000.00 (T 561-67). Defendant also testified at her deposition that another purpose in placing her parents in title was to have them act as trustees for Defendant's two minor children "so if anything happened to me, I wanted them to have something to support my two daughters" (T 562).

In New York, deeds given to secure loans are deemed mortgages. Section 320 of the Real Property Law provides:

> "A deed conveying real property, which by any other written instrument, appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must be considered a mortgage; and the person for whose benefit such deed is made, derives no advantage from the recording thereof, unless every writing, operating as a defeasance of the same, or explanatory of its being desired to have the effect only of a mortgage, or conditional deed, is also recorded therewith and at the same time."

See also, Bean v. Walker, 95 AD2d 70 (4th Dep't 1983) (If an owner purports to convey title to real property as security for a loan, the deed, even though recorded, is deemed to create a lien rather than a transfer of title); Leonia Bank v. Kouri, 3 AD3d 213, 216 (1st Dep't 2004) (It is well settled that the giving of a deed to secure a debt, in whatever form and however structured, creates nothing more than a mortgage); Melenky v. Melen, 206 AD 46 (4th Dep't 1923) ("The doctrine has been long established in this state that a deed absolute in terms, but given simply as security for the payment of money, is a mortgage, with all the incidents of that instrument…").

It is significant that Real Property Law §320 "does not require a conclusive showing that the transfer was intended as security; it is sufficient that the conveyance 'appears to be' intended only as a security in the nature of a mortgage. Leonia Bank, 217. Oral testimony bearing on the intent of the parties and consideration of the surrounding circumstances and acts of the parties may be used as evidence to establish that a deed was intended as a mortgage. Corcillo v. Martut, Inc., 58 AD2d 617, 618 (2d Dep't 1977), aff'd, 45 NY2d 878 (1978); Mooney v. Byrne, 163 NY86 (1900).

Although Defendant testified at trial that she did not add her parents to ownership of the Premises as collateral for a loan, the Defendant's affidavit (Plts.' Ex. 16) clearly sets forth the facts and circumstances of the matter. According to Defendant's own words, Defendant borrowed money from her parents so that she could buy her former husband's interest in the Premises and she placed her parents in title to secure the loan. Moreover, Defendant's deposition testimony sets forth the amount of the loan (i.e., around $50,000). In view of Defendant's admissions, it was not necessary that there be a covenant to pay the debt or a time given for repayment of the debt. *Mooney v Byrne*, at 91.

Moreover, Mitchell Glick who represented the Defendant and who was qualified by the Court as a real estate expert, testified that he was familiar with Real Property Law §320, had seen a deed used as a mortgage in family transactions, and upon having paragraph 2 of Defendant's affidavit read to him (Plts.' Ex. 16), opined that Defendant's transaction with her parents was, in fact, a mortgage transaction.

Defendant's admissions on the subject and her contradictory trial testimony that her parents were not placed in title as collateral for a loan reflect Defendant's total lack of credibility on this point.

Defendant's father, Anthony Reciniello, died in 1997, without a will and his estate has not been administered. His heirs are his wife, Bertha, and his daughters, Wendy Gress, and the Defendant. Wendy Gress, who is a defendant in this action, did not testify and did not appear at trial. Bertha Reciniello did testify and she confirmed the fact that she and her husband provided money to Defendant to purchase the Premises (T 361). However, she had no recollection that any interest in the Premises had been transferred to her because her husband, Anthony, handled everything (T 364-65). Despite her testimony that she had no desire to transfer her interest in the Premises, Bertha Reciniello admitted that she did not list ownership of the Premises on her senior housing application in 2003 and that she receives no money from the Premises and pays no expenses in connection with the Premises (T 368-69).

There was no credible evidence presented by Bertha Reciniello or anyone purporting to represent the Estate of Anthony Reciniello that in any way contradicted the admission by the Defendant in her affidavit and deposition testimony that the Premises were deeded to her parents as security for a loan of about $50,000.00. The intent of the Defendant and her parents to have the deed serve as a mortgage is further evidenced by the fact that Defendant collects all the rent from the

Premises and pays all the expenses, that Defendant's parents transferred the Premises back to Defendant so she could place a mortgage on the Premises, and that Defendant entered into the Contract of Sale and represented that she was the sole owner and had full power to convey the Premises. Indeed, Defendant holds 100% of the equitable title to the Premises and her representations in the Contract conform to her equitable title.

Based upon all of the foregoing evidence, the Court is convinced that the deeds to Defendant's parents were, in fact, mortgages under Real Property Law §320, and as long as the instrument is one of security, the Defendant has a right to redeem title to the Premises upon payment of the loan. Mooney v Byrne, 163NY 86 at 92.

As such, the right of defendants Bertha Reciniello and Wendy Gress are limited to that of a mortgagee or lienholder and they hold no estate in the Premises. *Mooney v Byrne,* at 93, 94.

Based upon this reasoning, Plaintiffs are entitled to a judgment of specific performance and Bertha Reciniello and the heirs of Anthony Reciniello hold their interest in the Premises as mortgagees.

After this action for specific performance was commenced on November 5, 2003 and before Defendant answered the complaint, she gave her attorney the following instruction by letter dated January 27, 2004:

> "Please return the downpayment to the purchaser's attorney and advise them that pursuant to the contract, including but not limited to Paragraph 21, the contract is cancelled." Plts.' Ex. 15.

Paragraph 21 of the Contract deals with " Defects" in title and other matters and provides that Defendant may terminate the Contract and refund the downpayment if she is unable to convey title in accordance with the Contract.

Shortly before Defendant's January 27, 2004 instruction to Mr. Glick, another attorney representing Defendant, Daniel Gammerman, requested plaintiffs' attorney, William Thomas, by letter dated January 9, 2004 to voluntarily discontinue the action for specific performance because Defendant only held one-third of the record title to the Premises. (Plts.' Ex. 33).

The record is devoid of any evidence that prior to the commencement of this action on November 5, 2003, Defendant asserted that she was unable to convey title to the Premises in accordance with the Contract. In fact, Mr. Gammerman's letter of January 9, 2004 was the first time Defendant asserted that she could not comply with the Contract because of the title situation. It is also significant to note that neither Mr. Gammerman's letter nor Defendant's instruction to Mr. Glick to return the Contract deposit even referred to the alleged lack of disclosure of Mrs. Rallis's dual status as broker and purchaser or the inadequacy of the purchase price.

Defendant's alleged defect in title is self-created and a lien which can be satisfied at closing. Defendant has failed to act in good faith to correct the title situation and her purported cancellation of the Contract is without effect. *Sevilla v. Valiotis,* 29 AD3d 775 (2d Dept 2006) ("Where, as here, a provision in the contract provides that in the event that the seller cannot convey a clear title, the seller may refund the buyer's deposit, terminate the contract, and the buyer shall have no further claims against the seller, 'that limitation contemplated the existence of a situation beyond the control of the parties' and implicitly requires the seller to act in good faith" (citations omitted)); *Naso v. Haque,* 289 AD2d 309 (2d Dept 2001).

Both *Sevilla* and *Naso* involved contractual provisions similar to paragraph 21 of the Contract and under those cases and the authority cited therein, the defect must be one beyond the control of the parties and the seller is obligated to make a good faith effort to cure the defect. In *Naso*, the Court

found that a good faith effort had not been made to cure a defect which was self-created and that the provision in the contract of sale did not bar plaintiff from seeking specific performance. The Court in *Sevilla* similarly found that a good faith effort had not been made to correct the title defect wherein title to the property was in the seller's defunct partnership, and the Court granted plaintiff's motion for summary judgment in his action for specific performance.

In the present case, there is no evidence that Defendant made a good faith effort to correct the title situation, although before the commencement of this action, her attorney believed the title situation would be remedied based on information provided to him by Defendant. In fact, Defendant when asked if she would have cleared title if an agreement with the plaintiffs had been reached, responded: "I don't know." (T 578). It is significant that Defendant did not testify that she was unable to clear title.

The evidence shows that Defendant is the equitable owner of 100% of the Premises and there is no credible evidence to the contrary. Indeed, she receives all the income with respect to this investment property and pays all the expenses. Moreover, even if 2/3 of the title were placed in the names of her parents to create a trust for her daughters, the trust was revocable by Defendant and as Defendant admitted at trial, she can protect the interests of her daughters with the money she will receive from the sale.

The Plaintiffs are therefore, precluded from a judgment of specific performance. The defendants, Bertha Reciniello and Wendy Gress, are mortgagees whose debt can be satisfied at closing.

Defendant contends that based opon the doctrine of "unclean hands" the Plaintiff shoud be denied specific performance. Specific performance is a discretionary remedy which is an alternative to an award of damages to enforce a contract. *Hadcock Motors, Inc. v. Metzger*, 92 AD2d 1, 4, 5 (4th

Dept 1983). Although the granting of specific performance is a matter of sound judicial discretion, it is not an arbitrary or capricious one, depending on the pleasure of the court, but one which is controlled by established doctrines and settled principles of equity. *Da Silva v. Musso*, 53 NY2d 543, 547 (1981). There are circumstances where to deny specific performance would be an abuse of discretion as a matter of law. For example, to deny specific performance where the evidence fails to prove that specific performance would be a harsh or drastic remedy would be an abuse of discretion as a matter of law. *Da Silva*, at 547. Defendant has presented no Evidence that proves that an award of specific performance would be a drastic or harsh remedy.

Specific performance may be denied by reason of the doctrine of unclean hands. However, in order to support a denial of specific performance on this ground, the misconduct must be related to the subject of the action and the defendant must be injured as a result of the conduct. Clifton Country Roads Associates v. Vinciguerra, 195 AD2d 895, 896 (3d Dept 1993); Morey v. Sings, 174 AD2d 870, 872-73 (3d Dept 1991).

Defendant has raised the doctrine of unclean hands as her First Affirmative Defense but the Evidence does not support this defense. In order to prevail on the affirmative defense of unclean hands, the Defendant must prove that she was injured. This she cannot do, as her claim that the Premises were undervalued by $100,000 is not supported by credible evidence and Defendant failed to establish that the purchase price set forth in the Contract was unfair and unreasonable.

Moreover, Defendant's argument that Mrs. Rallis is barred from the remedy of specific performance because of her failure to use the disclosure form for dual agency set forth in Real Property Law §443 is without merit. The Court, by this decision finds that the disclosure of Mrs. Rallis' dual agency made under the common law of agency.

Specific performance has also been denied if the judgment is beyond defendant's right to perform it. *S.E.S. Importers, Inc. v. Pappalardo*, 53 NY2d 455, 458, 464-465 (1981). In this case, the plaintiffs have established that the Contract is within the power of the Defendant to perform. Although defendants Gress and Bertha Reciniello were not parties to the Contract, and Bertha Reciniello holds 1/3 of the record title to the Premises and her deceased husband's estate holds another 1/3 of the title, Bertha Reciniello and the heirs of Anthony Reciniello are lienholders and have no estate or equitable interest in the Premises. Mr. Reciniello died in 1997 survived by his wife, Bertha, and his two daughters, the Defendant, Nancy Brannigan, and the defendant, Wendy Gress. The Defendants are the only parties who have an interest in the Premises and they are before the Court and subject to the Court's decree.

Plaintiff's Damages

It is well settled law that a vendee suing for specific performance is entitled to damages equal to the rents and profits collected by his vendor after the vendor's refusal to close title, on condition that the vendee credit the vendor with interest on the balance of the purchase price for the same period. Cobble Hill Nursing Home, Inc. v. Henry and Warren Corporation, 196 AD2d 564, 568 (2d Dept. 1993); 4200 Avenue K Realty Corp. v. 4200 Realty Co., 123 AD2d 419 (2d Dep't 1986).

The Evidence establishes that Defendant collected rent from the time this action was commenced in November 2003, through March 2007, except for the eight month period from June 2005 through January 2006. The Defendant testified that the tenant in occupancy from November 2003 through May 2005 paid more than $4,000 per month and that the tenant in occupancy from February 2006 through January 2007 paid $3,250 per month and that the tenant's lease was renewed

for a year in February 2007, and his monthly rent increased to $3,640. Using Defendant's numbers, the rent Defendant collected for the period in question is as follows:

November 1, 2003 - October 31, 2004 ($4,000 x 12 mos.)	$48,000
November 1, 2004 - May 31, 2005 ($4,000 x 7 mos.)	28,000
June 1, 2005 - January 31, 2006	-0-
February 1, 2006 - January 31, 2007 ($3,250 x 12 mos.)	39,000
February 1, 2007 - March 31, 2007 ($3,640 x 2 mos.)	7,280
	$122,280

The balance of the purchase price under the Contract is $551,715. The interest rate that plaintiffs would have paid to JP Morgan Chase Bank pursuant to their commitment dated August 27, 2003 was 5.375%. Accordingly, the interest that would have been earned on the balance of the downpayment for the period that Defendant collected rent is as follows:

November 1, 2003 - October 31, 2004	$29,654.68
November 1, 2004 - May 31, 2005	17,298.56
June 1, 2005 - January 31, 2006	-0-
February 1, 2006 - January 31, 2007	29,654.68
February 1, 2007 - March 31, 2007	4,942.45
	$81,550.37

Plaintiffs' damages are $40,729.63 computed by taking the rents collected for the above period - $122,280 - and subtracting therefrom the interest that would have been earned on the balance of the purchase price for the same period, to wit, $81,550.37.

Plaintiffs are entitled to a judgment of specific performance and damages of $40,729.63, plus interest.

DEFENDANT'S COUNTERCLAIM

Recission is the converse side of specific performance and the essential facts alleged by Defendant in her counterclaim for rescission are that Defendant relied on Kappeli and Coach Realty

for a true market analysis of the Premises, that Kappeli and Coach intentionally provided Defendant with misleading material facts as to the value of the Premises, that Mrs. Rallis knew that the value of the Premises exceeded $700,000, that Mrs. Rallis did not disclose she was a real estate broker and purchasing the property substantially under its market value, that the Premises were worth $720,000 at the time the Contract was signed and Mrs. Rallis knew this, that Mrs. Rallis gave false information to Defendant regarding the value of the Premises, that Mrs. Rallis represented that she was purchasing the Premises for personal use when, in fact, she was purchasing the Premises as an investment, and that the Contract was obtained by fraud and breach of fiduciary responsibility. The Defendant also alleges that when she learned of the fraud and breach of fiduciary duty, she caused her attorney to return the downpayment to plaintiffs and demanded termination and recission of the Contract.

At trial, Defendant was unable to prove a single fact of her counterclaim regarding Mrs. Rallis or Kappeli.

Defendant never relied on Mrs. Rallis for a true market analysis of the Premises and there is no proof in the record that supports this allegation. Mrs. Rallis was the selling broker and she had no responsibility in fact or law to perform a market analysis for Defendant.

Mrs. Rallis' mission was to find a buyer who was ready and able to meet the Defendant's listing price of $599,000.00 which was developed by Defendant and Kappeli. Moreover, Mrs. Rallis never provided Defendant with any information regarding the value of the Premises and the record is devoid of any proof to the contrary. In fact, Mrs. Rallis and Mrs. Brannigan testified that they never spoke to one another.

Furthermore, Defendant never presented any proof that Mrs. Rallis knew the value of the Premises was in excess of $700,000 at the time of Contract. Contrary to Defendant's allegation on this

point, the Evidence convincingly establishes that the value of the Premises at the time of Contract was not in excess of $620,000.

Finally, Defendant presented no proof that Mrs. Rallis misrepresented her purpose in entering into the Contract. Mrs. Rallis testified that the Premises were being purchased for personal use and there is no Evidence that rebuts this testimony.

The Defendant's counterclaim for recission is without merit and must be denied.

Defendant's failure to obtain the certificate of occupancy or compliance for the attic does not give the defendant the unilateral right to terminate the Contract. Knight v. McClean, 148 AD2d 421 (2d Dep't 1989). As expressly set forth in paragraph 21(b)(i) of the Contract, plaintiffs were permitted to waive the Defect without any abatement in the purchase price. The Evidence shows that this is precisely what plaintiffs did by the letter of Dr. Rallis to the Defendant dated October 19, 2003. Accordingly, plaintiffs are entitled to specific performance. Knight, supra at 422.

The Defendant's position on value has no merit and with the value of the Premises no longer at issue, it is easily seen that the issues of non-disclosure, and conspiracy to defraud her title, were merely used as a pretext by Defendant to avoid her obligations under the Contract.

Third Party Counter Claim

In this specific performance action, Third-party Defendants have counterclaimed for broker's commissions due, owing and agreed to in the amount of $15,750.00 with interest from March 1, 2003, the projected closing date had not Defendant/Third-Party Plaintiff frustrated same. The failure to pass title to a buyer will not defeat a broker's entitlement to a commission where the seller prevents the consummation of transfer. *Lane-Real Estate Dept. Store v Lawlet Corp.*, 28

NY2d 36,42 (1971); *Eastern Consolidated v Lucas,* 285 AD2d 421 (1st Dept 2001); Kirk Assocs. Ltd. v McDonald Equities, Inc., 155 AD2d 281 (1st Dept 1989), 1v. Denied, 75 NY2d 706 (1990). As the Court of Appeals stated in *Sibbald v. Bethlehem Iron Co.,* 83 NY 378, 384, [i]f the efforts of the broker are rendered a failure by the fault of the employer; if capriciously he changes his mind after the purchaser, ready and willing, and consenting to the prescribed terms, is produced...then the broker does not lose his commissions." *Id.* at 383-84; *Tanenbaum v Boehm,* 202 NY 293 (1911); *Kirk Assoc. Ltd. v McDonald Equities Inc.,* 155 AD2d at 282; *Mengel v. Lawrence,* 276 AD 180, 182 (1st Dept. 1949) "[B]ad faith is not necessarily an essential ingredient to [a] finding of wrongful prevention." *Trylon Rlty. Corp. v DiMartini,* 34 NY2d 899, 900 (1974). The law is clear, when a broker procures an acceptable buyer, the broker has fully performed its part of the agreement and its right to a commission becomes enforceable. *Lane-Real Estate Dept. Store, Inc. v Lawlet Corp.,* 28 NY2d at 42; see also *Gilder v Davis,* 137 NY 504 (1893).

Based upon the foregoing, Kapelli is entitled to the commission. Werner v. Katal Country Club, 234 A.D. 2d 659 (3rd Dept 1996); and Quantum Realty Services, Inc. V. ISE America, Inc., 214 A.D. 2D 420 (1ST Dept 1995).

CONCLUSION

Plaintiffs are entitled to a judgment of specific performance. Defendants are directed to transfer the Premises to the Plaintiffs upon payment of the purchase price. Plaintiffs are entitled to credit of $40,729.63 as damages against Defendant's proceeds on the sale of the Premises. Kapelli is entitled to judgement for a commission earned in the amount of $15, 750, if not paid at the closing.

Settle Judgement on Notice.

DATED: January 11, 2008
Mineola, N.Y.

ENTER:

HON. MICHELE M. WOODARD
J.S.C.