

Papazissimos v Medici
2008 NY Slip Op 31427(U)
May 16, 2008
Supreme Court, Suffolk County
Docket Number: 0010746/2007
Judge: Peter Fox Cohalan
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

RETURN DATE 8-2-07 (003)
4-19-07 (004 & 005)
8-16-07 (006)

CAL. DATE 2-6-08
MNEMONIC: # 003 - MD # 004 - MD
005 - XMD # 006 - MG

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Plaintiff,	:	Attorneys for Defendant Stephen Medici
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	:	
- against -	:	MARGOLIN & PIERCE, LLP
	:	Attys for Defts Marcantonio, Coldwell Bankers
	:	& Ruppert
	:	111 West 57 th Street
	:	New York, New York 10019
	:	
STEPHEN FRANCIS MEDICI, JAMIE	:	VITALE & LEVITT, P.C.
MARCANTONIO, COLLEEN MEDICI, MARY	:	Attys for Defts Colleen Medici & Coach
ALICE RUPPERT, COLDWELL BANKERS	:	445 Broad Hollow Road, Suite 124
RESIDENTIAL BROKERAGE, COACH REAL	:	Melville, New York 11747
ESTATE ASSOCIATES, INC. and NRT	:	
INCORPORATED,	:	
	:	NRT INCORPORATED, Pro Se
	:	399 Jefferson Road
Defendants.	:	Parsippany, New Jersey 07054
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Upon the following papers numbered 1 to 82 read on this motion and cross motions and order to show cause for summary judgment, stay arbitration, summary judgment and to serve an answer; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-13; Notice of Cross Motion and supporting papers (004) 14-19; (005) 20-33; (006) 34 - 41; Answering Affidavits and supporting papers 42-55; 56-60; 61-66; Replying Affidavits and supporting papers 67-68; 69-70; 71-82; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (003) by the defendants, Colleen Medici and Coach Real Estate Associates, Inc., pursuant to CPLR 3211(a)(7) and CPLR 3212 for summary judgment dismissing the complaint and for judgment by default on their counterclaim for a real estate commission on the sale of the subject premises is denied; and it is further

ORDERED that this cross-motion (004) by Order to Show Cause by the plaintiff, Anne Papazissimos, for an order granting a hearing to prohibit and enjoin the continuation of the arbitration proceeding commenced by NRT Incorporated against the plaintiff under the auspices of the American Arbitration Association has been rendered moot by withdrawal of the motion on February 6, 2008 and is accordingly denied; and it is further.

ORDERED that this cross-motion (005) by the defendant, Coldwell Banker Residential Brokerage, (hereinafter Coldwell), pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis the cause of action has no merit, has been rendered moot by withdrawal of the motion on February 6, 2008 and is accordingly denied; and it is further

ORDERED that this cross-motion (006) by Order to Show Cause by the plaintiff to compel the defendants Coach Real Estate (hereinafter Coach) and Colleen Medici (hereinafter C. Medici), to accept service of the answer to the counterclaim previously served and filed is granted and the answer to the counterclaim is deemed timely served nunc pro tunc.

The complaint of this action argues that the plaintiff formerly owned the residential unit known as 7 Durham Court, Northport, Suffolk County, New York (hereinafter Northport), which she offered for sale, listing it with Jamie Marcantonio (hereinafter Marcantonio) at Coldwell and NRT Incorporated (hereinafter NRT), defendants in this action. It is alleged that Marcantonio represented the fair market value of the property to be \$549,000.00 and the subject property was offered at that price. After a period of time without any sales activities, Marcantonio advised the plaintiff that the defendant, Stephen Francis Medici (hereinafter S. Medici), desired to purchase the property for \$468,000.00, but allegedly failed to advise the plaintiff that S. Medici was the husband of the real estate broker employed at the defendant Coach, *i.e.*, C. Medici, and that the defendants Coach and C. Medici were to share the real estate brokerage commission to be paid by the plaintiff.

After preparation of the proposed sales agreement by counsel for the plaintiff it is alleged that S. Medici made material changes to the proposed sales agreement, which changes the plaintiff said were unacceptable. Thereafter the plaintiff decided to sell the property to a third party for a higher sum of money. S. Medici then filed a notice of pendency against the Northport property which, the plaintiff alleges, made her unable to sell her property as she did not have clear title. The plaintiff also claims that she had already purchased her new residence in Stony Brook, Suffolk County, New York, and was required to bear the mortgage, interest, taxes and property insurance and maintenance charges for two homes simultaneously because of the notice of pendency filed by S. Medici and the commencement of a lawsuit against her.

The plaintiff asserts that CPLR 6514(c) provides for the court to direct payment for any costs and expenses occasioned by the filing and cancellation of the notice of pendency and any costs of the action, and she seeks the same. This Court, in an order, dated April 7, 2006 removed the notice of pendency from the Northport property as no written documents were produced signed by the seller which demonstrated a binding contract of sale. In that decision the Court determined there was no agreement signed by S. Medici and the plaintiff and that the pleadings, documents and averments of the parties did not conclude a "meeting of the minds" to form the requisite intent to sell and to withstand the scrutiny of the Statute of Frauds. The Court cancelled the notice of pendency pursuant to CPR 6514(b) upon a finding that the action was not prosecuted in good faith.

Upon the cancellation and discharge of the notice of pendency, the plaintiff sold the property to the third party for a higher price than that offered by S. Medici. The closing was delayed by the action and the notice of pendency. Thereafter Coldwell submitted bills to the plaintiff for commissions in the amount of \$18,800.00 alleged to be due and owing for the sale. The plaintiff alleges that NRT failed to notify her that the third party made an offer to Coldwell.

In the complaint, the plaintiff asserts a first cause of action alleging the defendant, S. Medici, wrongfully and improperly recorded the notice of pendency against the subject premises. It is alleged in the second cause of action that Coldwell, has wrongfully submitted bills to the plaintiff for a commission in the sum of \$18,800.00 for S. Medici's offer to purchase, and that NRT, alleged to be the parent company of Coldwell, instituted an arbitration proceeding against the plaintiff for the commission alleged to be due and owing relative to the sale of the plaintiff's property to a third party. The third cause of action set forth in the complaint asserts that the defendants, Marcantonio, Coldwell, C. Medici and Coach breached their duty of undivided loyalty to the plaintiff in that they failed to show the Northport property to ultimate customers and otherwise hindered any attempt by the plaintiff to sell the Northport property at a fair and reasonable price in an attempt to drive down the price for the property for the benefit of the Medici defendants and Coach.

In their counterclaim, Coach and C. Medici argue that they owed no fiduciary duty to the plaintiff as the seller of real property and that C. Medici was the agent for the purchaser, and asserts a claim premised upon malicious prosecution and abuse of process.

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. To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center*, supra). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1989]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In motion (003), C. Medici and Coach move for summary judgment dismissing the complaint against them and, in support of their application, they submitted, inter alia, an attorneys affirmation; the affidavit of Georgianna Finn (hereinafter Finn), secretary of Coach; a copy of their answer with a counterclaim; a letter, dated July 12, 2007, from counsel for the plaintiff rejecting the answer to the counterclaim by Medici and Coach; copies of two listing agreements, sales agreement, and residential property data; and the affidavit of Marcantonio.

The plaintiff opposes the motion (003) by submitting an attorneys affirmation; a copy of this Court's order, dated April 7, 2006, a copy of a facsimile cover sheet sent to counsel for plaintiff, dated July 18, 2005, from C. Medici, indicating a bill for commission in the amount of \$9,360.00 payable to Coach for the S. Medici purchaser in the amount of \$468,000; a copy of the top sheet of the Safe Harbor Home inspection of the subject premises by James H. Ruppert on behalf of S. Medici; and an answer to the counterclaim, dated July 5, 2007.

Finn states in her affidavit that she is secretary of Coach and that C. Medici is a licensed real estate salesperson employed by Coach. She states Coach and C. Medici were the agent for the purchaser, S. Medici, in his offer to purchase the plaintiff's property and that C. Medici drew up a sales document which S. Medici signed, which document was forwarded to the seller's agent Marcantonio at Coldwell. She further states that at no time did plaintiff enter into a listing agreement with Coach or C. Medici, and that the plaintiff made changes in the listing price from \$549,000.00 to \$529,000.00 on April 6, 2005, and then to \$499,000.00 on June 10, 2005, with a four per cent total commission. Finn further states that after the property listing price was reduced to \$499,000.00, S. Medici made an offer through his agent, C. Medici, to purchase the plaintiff's property for \$470,000.00 (later changed to \$468,000.00), with a sales agreement, dated June 27, 2005. She also states that two weeks before S. Medici's initial offer to purchase the plaintiff's house, the plaintiff was already in negotiations with purchasers Matthew Haeselin and Joseph Haeselin (hereinafter Haeselins) and that the Haeselins entered into a contract of sale in July, 2005 at a purchase price of \$470,000.00. Finn states that the plaintiff never entered into a fully executed contract of sale with S. Medici and that the Haeselins purchased the plaintiff's property for more money than offered by S. Medici.

Marcantonio states in her affidavit that she is a licensed real estate salesperson associated with Coldwell and that the plaintiff employed Coldwell as an agent with the exclusive right to sell the Northport premises, until August 14, 2005, at a commission of 4% of the selling price. She states she listed the house for \$549,000.00 in the Multiple Listing Service form. Marcantonio further states that Coldwell Banker found and procured the Haeselins as buyers through a co-brokerage agreement under terms of the Long Island Multiple Listing Services (hereinafter MLS), and that the Haeselins were ready, willing and able to and did agree to purchase the premises for \$470,000.00, all cash, as they had been actively bidding on the premises, and that their second offer through Julia Henry of Prudential Douglas Elliman was a written offer. She also states that the original listing price of \$549,000.00 was determined by the plaintiff and that the plaintiff voluntarily reduced that price to \$499,000.00. She further states that on June 27, 2005, C. Medici brought a written offer to Coldwell from S. Medici for \$470,000.00 all cash, and that she (Marcantonio) disclosed to the plaintiff that S. Medici was the

husband of the Coach broker C. Medici, but the plaintiff failed to execute and return the contract and instead agreed to sell the property to the Haeselins. Marcantonio contends that the original listing agreement was extended by the second exclusive listing agreement to August 14, 2005, and that the MLS Withdrawal was signed to remove the property from the MLS, but then immediately placed back on the MLS to refresh the listing and bring it to the attention of the broker community at the newly reduced price.

In her affidavit, C. Medici states she was a licensed real estate salesperson employed by Coach and asserts the plaintiff listed her property with Coldwell by written agreement which provided that the plaintiff authorizes the broker to cooperate with agents who represent buyers with the understanding that such buyer's agent would be representing only the interest of prospective purchaser. She states that after the plaintiff consented to Coldwell's change in the listing price to \$499,000.00 on or about June 10, 2005, that she communicated to Marcantonio of Coldwell an offer by S. Medici. C. Medici states that she and Coach acted solely as the purchaser's agent and at no time did she act in any other capacity. She further states that before viewing the property by appointment with the plaintiff's agent, Marcantonio, she told Marcantonio that she was representing her husband, S. Medici, in the possible purchase of the property, and that fact was further disclosed to Marcantonio, the plaintiff's agent, during negotiations leading to the preparation of the contract of sale between the plaintiff and S. Medici. She states she never spoke with the plaintiff. On July 18, 2005, she states she faxed a bill to plaintiff's attorney for the broker's commission in the sum of \$9,360.00, and later learned that the plaintiff entered into a contract of sale with the Haeselins. She states her husband S. Medici then filed a notice of pendency, and a law suit against the plaintiff, that she was not a party to that lawsuit, and that she was never the plaintiff's agent.

The plaintiff sets forth in her affidavit that Marcantonio represented to her that her home was worth approximately \$550,000.00, and that she signed a listing agreement and one subsequent extension with Coldwell, Marcantonio's employer. She states she advised Marcantonio that she could not afford to cover the carrying costs for the house she was purchasing in Stony Brook and the premises she was selling in Northport, and that she needed a relatively quick sale. After an extensive period of time, she states she received a telephone call from Marcantonio advising that S. Medici desired to purchase the subject property for \$468,000.00, and at no time was she advised by Marcantonio, Coldwell or S. Medici that S. Medici was a relative of C. Medici, a real estate broker, nor did they provide her with a writing disclosing the same. After her attorney prepared the sales agreement, she states that S. Medici made a material change that was unacceptable to her, so she never accepted his down payment or deposited the same into an escrow account. She states that thereafter she decided to sell the Northport property for a higher sum of money to the Haeselins by sales agreement dated July 11, 2005. She sets forth in her affidavit that Matthew Haeselin "represents that he has not dealt with any broker" and that "this representation shall survive delivery of the deed" and that he "agrees to indemnify the Seller against and hold harmless of and from any and all damages, costs or expenses...as a result of any broker claiming a brokerage commission." She further avers that both Marcantonio and her office manager, Alice Ruppert, threatened litigation against her if she did not proceed with the proposed sale of the subject premises to S. Medici, who filed a notice of pendency against the property, causing her to be unable to sell the property as she could not deliver clear title. She further states that upon the cancellation and discharge

of the notice of pendency, she then sold the real property to the Haeselins, and that due to the delay in the sale and having to carry two mortgages, she was caused to default on several financial obligations thereby suffering a tremendous blemish to her credit, and causing her to be able to only procure a long-term mortgage at an extremely high rate of interest. She further avers that Alice Ruppert has wrongfully submitted bills to her for commissions that were allegedly due and owing in the sum of \$18,800.00 for the sale of the Northport property. She states she only became aware of Haeselins' offer to purchase her property when Matthew Haeselin approached her, as he was her neighbor, and inquired as to why she did not make a counter-offer to his proposed offer. She states she did not know of his original offer. She further asserts that S. Medici made changes to the contract of sale after an inspection of the premises was performed by James H. Ruppert, the spouse of Alice Ruppert, the branch manager for Coldwell. She states that had she known that Matthew Haeselin and S. Medici had competing bids, she would have preferred to accept the Haeselins' offer as they had been friendly neighbors for years.

In reviewing the submissions in support of motion (003), it is noted that the Listing Agreement-Exclusive Right to Sell, dated February 14, 2005, is signed by the plaintiff, and the Listing Agreement, dated May 14, 2005, is somewhat illegible but is not signed by the plaintiff. The Residential Property Data sheets are not signed by the plaintiff. The Listing Agreement, dated June 10, 2005, is not signed by the plaintiff. The Listing Agreement-Exclusive Right to Sell, dated June 10, 2005, is not signed by the plaintiff. In a fax, dated June 9, 2005, from "Jamie/Marianne" on a Coldwell fax cover sheet, the person who signed her name as "Anne" set forth, "Marianne, I could not read the listing agreement because the fax copy was illegible-I spoke w/Jamie & she assured me everything was exactly the same deal. So I signed based on that assurance-Thanks-Anne." The fax was sent back to 754-4898 which is the number set forth on the fax cover sheet for Coldwell. The Residential Property Data sheet has a handwritten note on it which indicates "New listing agreement faxed to Anne. List Date 6/10/05, Expiration Date 8/14."

The Sales Agreement, dated June 27, 2005, indicates the purchaser's broker is Coach, the purchaser is S. Medici and the seller is Papazissimos. The agreement, stated in paragraph two to be an offer, states that "It is further understood and agreed that if this offer is not accepted by the seller in writing that the ...good faith deposit will be totally refunded to the buyer." This sales agreement is not signed by the plaintiff.

Based upon the foregoing, Coach and C. Medici have not demonstrated prima facie entitlement to summary judgment dismissing the complaint due to the existence of factual issues. Finn has set forth in her affidavit that C. Medici is a licensed real estate salesperson employed by Coach and that Coach and C. Medici were the agent for the purchaser, S. Medici, in his offer to purchase the plaintiff's property and that C. Medici drew up a sales document which S. Medici signed, which document was forwarded to the seller's agent, Marcantonio, at Coldwell. This raises a material factual issue as to whether C. Medici was acting on behalf of S. Medici or the plaintiff because Coach by C. Medici billed the plaintiff for a sales commission in the amount of \$9,360.00. There is thus a factual issue concerning whom C. Medici represented, to whom she owed a fiduciary duty, and why she sent the bill to the plaintiff rather than the co-broker Coldwell for the alleged sales commission.

Summary judgment is also precluded to Coach and C. Medici on the issue of whether said defendants owed a duty to disclose the relationship between S. Medici and C. Medici and Coach, and whether there was a breach of the fiduciary duty owed pursuant to 19 NYCRR §175.24. "It is well established that a real estate broker is a fiduciary with a duty of loyalty and an obligation to act in the best interests of the principal. There are also factual issues raised concerning Coldwell's use of James Ruppert in performing the inspection of the plaintiff's house on behalf of C. Medici's husband, S. Medici. Consequently, in dealing with the principal, a real estate broker must act honestly and candidly, and the broker must disclose all material information that it may possess or obtain concerning the transactions involved. A breach of duty of loyalty by a real estate broker may constitute a fraud for which the broker is answerable in damages" (*Precision Glass Tinting, Inc. v Thomas Long*, 293 AD2d 594, 740 NYS2d 138 [2nd Dept 2002]; see also, *Dubbs v Stribling Assoc.*, 96 NY2d 337, 728 NYS2d 138 [2002]; *Coldwell Banker Residential Real Estate v Berner*, 202 AD2d 949, 609 NYS2d 948 [3rd Dept 1994]; *Weissman v Mertz*, 70 NY2d 607, 512 NYS2d 1036[1987]). "A fiduciary owes a duty of undivided and undiluted loyalty to those whose interest the fiduciary is to protect. This is a sensitive and 'inflexible' rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty. Included within this rule's broad scope is every situation in which a fiduciary, who is bound to single-mindedly pursue the interests of those to whom a duty of loyalty is owed, deals with a person in such close relation to the fiduciary that possible advantage to such other person might consciously or unconsciously influence the fiduciary's judgment" (*Birnbaum v Birnbaum*, 73 NY2d 461, 541 NYS2d 746 [1989]). Here C. Medici claims to have been representing her husband, S. Medici, and James Ruppert performed the inspection of plaintiff's premises on which defendant S. Medici based the reduction of his offering price to the seller, this raises a factual issue concerning breach of fiduciary duty and the appearance of self-dealing, precluding summary judgment. It is therefore determined that Coach and C. Medici have failed to demonstrate prima facie entitlement to summary judgment dismissing the complaint.

Accordingly, that part of motion (003) by Coach and C. Medici for summary judgment dismissing the complaint is denied.

In motion (006), by way of order to show cause, the plaintiff seeks an order requiring the defendants Coach and C. Medici to accept service of the plaintiff's answer to the counterclaim.

This action was commenced by the filing of a summons and complaint on April 2, 2007, and the plaintiff asserts that thereafter, numerous adjournments were granted to the defendants to serve their answers or dispositive motions. The defendants, Coach and C. Medici, served their verified answer with a counterclaim dated May 7, 2007, and the plaintiff asserts she served her answer to that counterclaim, dated July 5, 2007, and that by letter, dated July 10, 2007, counsel for Coach and C. Medici rejected the plaintiff's answer to the counterclaim. Counsel for the plaintiff asserts that due to an error, the date for the answer to the counterclaim to be served and filed was not calendared, and therefore the answer to the counterclaim was not timely filed. The defendants did not move for default on the counterclaim

and have demonstrated no prejudice by the plaintiff's failure to timely serve the answer to the counterclaim. Therefore, the time to serve the answer to the counterclaim is hereby extended, and the answer dated July 5, 2007 previously served upon the defendants Coach and C. Medici is deemed served nunc pro tunc (***Methal v City of New York***, 2008 NY Slip Op 2978, 2008 NY App Div 2973 [April 1, 2008]). Thus the application of the defendants, C. Medici and Coach Associates, for default judgment on their counterclaim is rendered moot.

Accordingly, cross-motion (006) is granted and the answer to the counterclaim is deemed timely served nunc pro tunc; and that part of motion (003) for summary judgment by Coach and C. Medici for default judgment on the counterclaim is denied.

Dated: MAY 16 2008



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION