SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------x

MICHAEL MARCANTONIO and MARY MARCANTONIO,

Plaintiffs,

-against-

MICHAEL PICOZZI, III, VIOLA, BENEDETTI, AZZOLINI & MORANO, LLC, PROJECT REAL ESTATE, INC., and JOHN McHUGH,

Defendants.

----------x

MICHELE M. WOODARD, J.S.C.
TRIAL/IAS Part 16
Index No.: 3739/08
Motion Seq. Nos.:01, 02,03 & 04

DECISION AND ORDER

Papers Read on this Decision

Defendants' Notice of Motion	01
Plaintiffs' Affirmation	xx
Defendants' Affirmation and Memorandum	xx
Defendants' Notice of Motion to Quash Subpoena	02
Defendants' Memorandum of Law	xx
Plaintiffs' Notice of Cross-Motion	03
Defendant Project Real Estate and John McHugh's Amended Notice of Cross-Motion	04
Plaintiffs' Affidavit in Opposition to Cross-Motion	xx
Plaintiffs' Affidavit in Opposition to Amend Cross-Motion	xx
Defendant Project Real Estate and John McHugh's Affirmation in Reply	xx

In motion sequence number one, Defendants Michael Picozzi, III, and Viola, Benedetti, Azzolini & Morano, LLC move pursuant to CPLR §3211(a)(7) for an order dismissing the complaint on the grounds that it fails to state a cause of action.

In motion sequence number two, Defendants Michael Picozzi, III, Viola, Benedetti, Azzolini & Morano, LLC move to quash the Subpoena *Duces Tecum* served by Plaintiffs upon the non-party

Valley National Bank, demanding production of attorney trust account records of Viola, Benedetti, Azzolini & Morano, LLC, for failure to comply with the notice requirements of CPLR§3120.

In motion sequence number three, the Plaintiffs cross-move for omnibus relief including but not limited to so ordering a Subpoena *Duces Tecum* with conditions or modification; directing the Defendants to respond to written interrogatories and dismissing the Defendants' motion to quash a subpoena.

In motion sequence number four, Defendant Project Real Estate, Inc. and John McHugh cross-move for an Order pursuant to CPLR §3212(a)(7) or in the alternative for an Order vacating the Preliminary Conference Order dated April 11, 2008.

This action involves the sale of unimproved real property located at 114 Jule Pond Drive in the town of Southampton, New York. Defendant Michael Picozzi, III, as purchaser and Michael and Mary Marcantonio, as sellers, entered into a contract of sale for the premises dated February 17, 2005 for a purchase price of $3,700,000. The contract did not provide for a mortgage or mortgage contingency as Defendant Picozzi has a net worth of $40,000,000. The down payment of $370,000 was to be held in escrow by Picozzi's counsel Thomas Benedetti.

With respect to the down payment, Schedule "A" appended to the contract states:

> DOWN PAYMENT IN ESCROW.. . .
>
> (d) The escrowee acknowledges receipt of the downpayment by check subject to collection and escrowee's agreement to the provisions of this paragraph by signing in the place indicated on the signature page of this contract.

On the signature page, above the signature of Thomas Benedetti as escrowee, the contract states:

> Receipt of the Downpayment is acknowledged and the undersigned escrowee agrees to act in accordance with the provisions of this contract and the rider

annexed hereto.

Defendant Viola, Beneditti, Azzolini & Morano, LLC mailed copies of the contract to Plaintiff Michael Marcantonio on February 18, 2005 with a cover letter which stated:

> Enclosed are four contracts of sale which have been signed by the Purchaser. Please return two countersigned originals to me. Mr. Picozzi *will wire* transfer the 10% deposit to my attorney trust account. *I will advise* you once I have confirmation of the transfer. (emphasis supplied)

In 2005 Defendant Picozzi had advanced $20,000 for building permits and $65,000 for architectural plans to build a luxury residence on the premises when Plaintiffs commenced litigation seeking to avoid the contract of sale. Plaintiffs did not prevail and Defendant Picozzi was awarded specific performance on the counterclaim. Defendant Picozzi proceeded to closing on January 24, 2008 on three weeks notice from Plaintiffs.

In this action Plaintiffs assert causes of action premised upon fraud and allege that the Defendant buyer did not timely place the downpayment in escrow and that Thomas Beneditti, as escrowee, falsely represented in the contract of sale that he was in receipt of the down payment and that it was in his escrow account. Plaintiffs seek damages for fraud and rescission of the contract and the deed of sale.

The facts are uncommon, as the Defendant's admitted failure to timely wire the deposit to his attorney's escrow account caused alleged damage only because Plaintiffs desired to get out of their contractual obligation to sell to Defendants, and alleged that they were unknowingly possessed of a cause of action for rescission before the deposit was made (*RR Chester, LLC v Arlington Bldg. Corp.*, 22 AD3d 652, 654 [2d Dept 2005]["failure to make the down payment required by a standard real estate contract will generally constitute a material breach of the agreement warranting rescission"]).

Both Defendant Picozzi and Thomas Benedetti aver that Picozzi was ready, willing and able to close at all times. Indeed Benedetti had attempted to schedule a closing on three separate occasions. Benedetti avers that the down payment was posted in a segregated attorney trust account in February 2006, and that Plaintiffs had knowledge of this fact at closing. Indeed, according to the affirmation of Benedetti, "[a] very heated dispute ensued over the timeliness of the contract deposit which culminated with Plaintiffs refusal to close at which time they stormed out of the closing room and promised litigation. This was all predicated upon Plaintiff's knowledge that the deposit was not posted in a segregated attorney account until February, 2006."

According to Benedetti, as he and Picozzi were packing up to leave, Plaintiffs' title agent entered the room and stated that "Plaintiffs will agree to close if Mr. Picozzi would assume responsibility for one-half of the $200,000 commission owed the broker, Project Real Estate." Picozzi agreed to the new term and Plaintiffs delivered a signed deed and closing documents via the title agent. Benedetti then caused a wire transfer of $3,728,019.45 representing the contract deposit plus interest in the amount of $19,331.45, other adjustments and the balance of the purchase price. Viola, Benedetti, Azzolini & Morano, LLC received a wire acknowledgment indicating receipt.

The required elements of a cause of action for fraud are " 'representation, falsity, scienter, deception, and injury' " (*Sabo v Delman*, 3 NY2d 155, 159 [1957], quoting *Ochs v Woods*, 221 NY 335, 338 [1917]). In order to establish deception, any reliance upon the false representation must be "justifiable under all the circumstances" (*Danann Realty Corp. v Harris*, 5 NY2d 317, 322 [1959]).

Plaintiffs' cause of action for fraudulent inducement must be dismissed because the

required element of reasonable reliance is negated by documentary evidence consisting of a letter from counsel for Picozzi which accompanied the signed written contract of sale. Counsel indicated that he did not have the downpayment in his escrow account at the time his clients signed the contract of sale and that he would advise when it was received.

It is well settled that " 'if . . . the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations . . . ' " (*Danann Realty Corp. v Harris*, 5 NY2d 317, 322 [1959], *quoting Schumaker v Mather*, 133 N Y 590, 596 [1892]). Plaintiffs knew before signing the Contract of Sale that Viola, Benedetti, Azzolini & Morano did not have the down payment in its escrow account. Thus the complaint cannot be found to state a cause of action in fraud because "the asserted reliance" on the alleged misrepresentation is not "justifiable under all the circumstances" (*Danann Realty Corp. v Harris, supra* at p 322; *cf. Hyland Meat Co., Inc. v Tsagarakis*, 202 AD2d 552 [1994]).

Not only does Plaintiffs' claim for fraudulent inducement suffer from a missing and critical element, an additional ground warrants dismissal. An affirmation by counsel for Defendant, based upon personal knowledge, indicates that Michael and Mary Marcantonio ratified the contract of sale on the closing date and demanded and received an additional $100,000 consideration before delivery of the deed. Specifically, Plaintiffs were fully cognizant that the $270,000 escrow was not deposited in the Valley National Bank escrow account of the Defendant firm until February 27, 2006, and they refused to close on this ground. They threatened litigation and left. Then in an about face they sent their title agent with an offer to

close if Picozzi assumed one half of the real estate agent's fee, i.e., $100,000.

This motion to dismiss pursuant to CPLR §3211 (a) (7) for failure to state a cause of action must be denied if there are factual allegations which "manifest any cause of action cognizable at law" (*Maldonado v Olympia Mechanical Piping & Heating Corp.*, 8 AD3d 348, 350 [2nd Dept 2004]). An "affidavit" may be submitted by Plaintiffs to remedy defects in the complaint, and the court will afford Plaintiffs "the benefit of every possible favorable inference" (*supra*). "Dismissal is warranted only when the stated allegations do not, together with all reasonable supporting inferences, state a legally cognizable claim for relief" (*CAE Indus. Ltd. v KPMG Peat Marwick,* 193 AD2d 470, 472 [1st Dept 1993). It is "seldom if ever" that an affidavit by a Defendant or affirmation of counsel will warrant a 3211 dismissal based upon failure to state a cause of action (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635, 636 [1976]).

Here counsel's affirmation makes a compelling case for relief and is admissible based upon personal knowledge (see, *K.I.M.Co. Refrigeration Corp. v CFS Bank*, 2001 WL 1221658 [N.Y.Dist.Ct. 2001] "an attorney's contentions pertaining to the facts of substantive transactions between the parties constitute proper, admissible evidence with probative force when based on first hand knowledge"; *Phoenix Assur. Co. of New York v C.A. Shea & Co.*, 237 AD2d 157 [1st 1997] "counsel played a crucial role in the negotiations underlying this dispute"). Plaintiffs closed on the contract and delivered a deed knowing of the falsity of the contract statement regarding escrow. They now claim they would not have entered into the contract if they knew of the falsity of the statement, and erroneously contend that the contract was void.

"'Fraud does not make a contract void, merely voidable" (*Coler v GCA Corp.*, 39 AD2d 656 [1st Dept 1972], *affd* 31 NY2d 775 [1972]; *Citibank, N.A. v Plapinger*, 107 AD2d 627, 630

[1st Dept 1985], *affd* 66 NY2d 90 [1985][contract is void for illegality. . . or . . . voidable because of fraud]). Under the doctrine of ratification, however, "a party loses the right to be released from his obligations under a voidable contract if: '(1) the circumstances that made the contract voidable have ceased to exist; and (2) either (a) the party manifests his intention to affirm the contract or (b) acts with respect to anything that he has received in a manner inconsistent with disaffirmance'" (*Sotheby's Financial Services, Inc. v Baran*, 2003 WL 21756126 [S.D.N.Y. 2003], quoting *Landau*, 97 Civ. 3465, 1997 U.S. Dist. LEXIS 14325, at *8).

There is really only one issue, *viz.*, whether Plaintiffs were aware that Defendant did not timely wire the down payment to the escrowee before closing and delivering the signed deed. Such knowledge is uncontroverted and thus Plaintiffs ratified the contract of sale. Accordingly, Defendants have established "conclusively that Plaintiff has no cause of action" for fraudulent inducement, and, based upon the foregoing, the relief requested in **motion sequence number one** is **granted** and the complaint is **dismissed** against Michael Picozzi, III, Viola, Benedetti, Azzolini & Morano.

Turning to the motion of Defendants Project Real Estate, Inc. and John McHugh for summary judgment, it is their contention that they did not have a fiduciary duty to Plaintiffs and that the complaint fails to assert one. They assert that they are merely middlemen or finders who owed no fiduciary duty to Plaintiffs, and that the elements of fraud have not been properly pled.

In essence, it is Plaintiffs' contention that Defendants were cognizant of the purchase price of neighboring property, that said price was higher than that which Plaintiffs had requested for their own, and that Defendants had a duty as brokers to inform Plaintiffs that their price was low, particularly since Plaintiffs made inquiry of them prior to entering into the contract of sale.

The inferred purpose of withholding the information was to allow Picozzi, who was also the purchaser on the neighboring property and a former client, to secure a better deal.

Whether the Defendants were real estate agents or finders is a question of fact. Defendants offer no admissible evidence addressed to this issue, except in reply, and thus it remains a question of fact.

In New York, it is well settled 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 (*Dubbs v Stribling & Associates*, 96 NY2d 337, 340 [2001]). The complaint alleges that Defendants were brokers who owed Plaintiffs a duty of disclosure "based upon the relationship of employment, trust and confidence." Accordingly the complaint adequately alleges a fiduciary duty.

Moreover, the complaint adequately alleges fraud based upon a failure to disclose material information. "[A] claim for fraud can be premised upon failure to disclose that which one has a duty to disclose . . . In order to trigger the duty to disclose, the fiduciary must have some reason to believe that the information is material and germane to a contemplated transaction such that the failure to disclose it has the same net effect as an affirmative misrepresentation" (*Botti v Russell*, 180 AD2d 947, 949-950 [3d Dept 1992]). The purchase price of the neighboring unimproved parcel is clearly "material and germane" to Plaintiffs' contemplated sale price. Accordingly the complaint states a cause of action, and Defendants must tender admissible evidence to eliminate questions of fact in order to prevail upon the summary judgment motion.

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" (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851,

853[1985]). Then the burden shifts to Plaintiff "to produce evidentiary proof in admissible form establishing the existence of material questions of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 326-327 [1986]). Defendants have offered only the affirmation of counsel. An attorney's affirmation that is not based upon personal knowledge is of "no probative or evidentiary significance" (*Warrington v Ryder Truck Rental*, 35 AD3d 455, 456 [2d Dept 2006]). Counsel had not averred that he has the requisite personal knowledge.

The affidavit of Kevin Sneddon, President of Project Real Estate, Inc., averring that Defendants were finders and did "nothing more than introduce Picozzi to Marcantonio" was submitted for the first time in reply papers and "therefore cannot be considered" in determining whether or not Project Real Estate, Inc. "demonstrated its *prima facie* entitlement to judgment as a matter of law" (*Morales v Coram Materials Corp.*, 51 AD3d 86, 95 [2d Dept 2008]).

The affirmation submitted by Plaintiff Michael Marcantonio may not be considered in lieu of an affidavit as he is a party to this action (CPLR §2106). However, Defendants' failure to meet their burden of proof "mandates denial of the motion regardless of the sufficiency of the opposing papers" (*1014 Fifth Ave. Realty Corp. v The Manhattan Realty Co.*, 67 NY2d 718[1986]).

The alternative request in **motion sequence number four**, vacating the preliminary conference order dated April 11, 2008 is **granted**, and the Preliminary Conference order is **vacated**. Project Real Estate, Inc. and John McHugh's request for leave to amend their answer to assert a counterclaim is **denied** without prejudice to renewal on proper notice of the requested relief pursuant to CPLR §2214(a). Casual requests for relief buried in the papers and not appearing in the Notice of Motion in accordance with CPLR §2214(a) will not be considered.

The remaining parties are directed to appear on Friday, September 25, 2008 at 9:30 a.m. in DCM for a new Preliminary Conference to schedule disclosure.

Motion sequence number two by Defendants Michael Picozzi, III, and Viola, Benedetti, Azzolini & Morano, LLC for an order quashing a subpoena served upon the Valley National Bank is **denied as moot**, and the **cross motion sequence number three** by Plaintiffs to so order the subpoena is **denied** in light the dismissal of the complaint as against Defendants Picozzi and Azzolini & Morano, LLC.

A new Preliminary Conference has been scheduled based upon Plaintiff Michael Marcantonio's unilateral action in submitting an order notwithstanding knowledge that Defendants were represented by counsel and were scheduled to appear for the conference. And as there was an automatic stay of disclosure pursuant to the summary judgment motion, the previously served interrogatories shall be encompassed in the new Preliminary Conference order.

Any further requests for relief shall be properly noticed, identify the grounds for the relief requested and be supported by authority.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: September 3, 2008
Mineola, N.Y.

ENTER:

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

H:\DECISION - SUMMARY JUDGMENT\Marcantonio v Picozzi - Fraud.wpd