SHORT FORM ORDER

INDEX NO. 9404/2008

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
Hon. Paul J. Baisley, Jr.

LEN MARIO BRASSEL

Plaintiff(s),

-against-

HARBOURVIEW ABSTRACT, INC., ABRAHAM & ABRAHAM, LLC., ROBERT JAMES BRASSEL, JR., LOUIS BROWN, ESQ. WC & SS, NORTHEASTERN, ROBERT B. HERMAN and CLIFTON D. SMITH.

Defendant(s).

ORIG. RETURN DATE: July 23, 2008
FINAL RETURN DATE: September 17, 2008
MTN. SEQ. #: 001-MD
MTN. SEQ. 002-MG
CROSS MTN. SEQ. 003-MD

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Upon the following papers numbered 1 to 63 read on this motion to dismiss pursuant to CPLR 3211 and this motion and cross motion for summary judgment: Notice of Motion and supporting papers 1 - 11; Affirmation in Opposition and supporting papers 12 – 23; Reply Affirmation and supporting papers 24 - 27; Second Notice of Motion and supporting papers 28 - 43; Affirmation in Partial Opposition 44 - 47; Cross Motion and supporting papers 48 - 57; Affirmation in Opposition/Reply 58 - 63; it is,

ORDERED that these two motions and one cross motion are considered together in this decision and order for purposes of judicial economy; and it is further

ORDERED that the pre-answer motion (001) by the defendant Abraham & Abraham, LLC for an order dismissing the complaint as to it pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) is denied; and it is further

ORDERED that the motion (002) by the plaintiff for partial summary as to the first cause of action against the defendant Harbourview Abstract, Inc. is granted; and it is further

ORDERED that the cross motion (003) by the defendant Harbourview Abstract, Inc. for summary judgment dismissing the first cause of action as to it is denied; and it is further

ORDERED that the preliminary conference previously scheduled for April 28, 2009 is adjourned to June 3, 2009 at the Supreme Court, DCM Part, Room A362, One Court Street, Riverhead, New York at 10:00 a.m. to allow enough time for the moving defendant, Abraham & Abraham, LLC, to serve its answer in accordance with CPLR 3211(f); and it is further

ORDERED that the plaintiff is directed to serve a copy of this decision and order with notice of entry upon the defendant within 30 days of entry of this decision and order with the Clerk of the Court and to file proofs of service of same with the Clerk of the Court.

This action arises out of a real estate transaction in which the plaintiff, Len Mario Brassel (hereinafter Len), and his brother, the co-defendant Robert James Brassel, Jr. (hereinafter Robert),owned a home as tenants in common which they sold to the co-defendant Clifton D. Smith. At the closing, $62,000.00 from the sale was set aside in an escrow account belonging to the co-defendant Harbourview Abstract, Inc. (hereinafter Harbourview) contingent upon the "depositors" of the escrow money (Len and Robert) producing a satisfaction of an old mortgage which dated back to a time when their parents owned the home. Harbourview was retained by the buyer, Clifton D. Smith, to search the title and provide a title report.

The escrow arrangement - entered into on the day of the closing, December 21, 2005 - was embodied in a written escrow agreement on a form provided by Harbourview. The agreement stated that the depositors of the money in escrow were the sellers Len and Robert, listed them by their names and contained their signatures. The agreement as provided by the parties is a single page. Although page one, in pre-printed language, refers to "terms and conditions" on the reverse side and has the handwritten notation, "see attached mtg schedule," no reverse side or attachments are provided by any of the parties. Nevertheless, there is no dispute that the money was being held in escrow by Harbourview pending the production of the mortgage satisfaction.

Len and Robert were represented by one attorney who, according to Len's affidavit, was recommended by Robert. That attorney is the co-defendant Louise M. Brown. A few months after the closing, Robert retained on his behalf alone the law firm of Abraham & Abraham, LLC (hereinafter Abraham), for the purpose of recovering the monies held in escrow. Abraham is also a co-defendant in this action.

On March 15, 2006, Irwin D. Abraham, Esq., a partner in the Abraham firm, faxed a letter to Harbourview, as a follow up to a phone conversation the day before, advising Harbourview that Abraham represented "Robert J. Brassel Jr.," attached a copy of the mortgage satisfaction and requested that the balance held in escrow be sent to Mr. Abraham's attention, "as attorney, as soon as possible," that the original of the satisfaction of mortgage would be forwarded under separate cover for recording purposes and requested a copy of the title report.

The next day, March 16, 2006, Harbourview sent to Mr. Abraham the check for the entire amount held in escrow ($62,000.00) along with a copy of the title report.

There are no factual disputes regarding that Len and Robert were the sellers as tenants in common, that they were both listed as depositors of the escrow funds, that Abraham only represented Robert, that the entire escrow amount (not just half) was sent to Robert's attorneys and that the title report reflects that Len and Robert were the sellers of the property as tenants in common.

There is also no dispute that the $62,000.00 was paid by check to "Irwin D. Abraham, Esq., As Attorney," was deposited in the Abraham IOLA escrow account and then paid to Robert on April 1, 2006. According to the complaint, this was all done without Len's knowledge, consent or permission.

On March 18, 2008 - almost two years after the $62,000.00 was paid to Robert - Len commenced this action against Harbourview, Abraham and others (only Harbourview and Abraham are directly affected by the motions and cross motion decided herein). Only one of the complaint's nine causes of action pertains to Harbourview; to wit, the first cause of action alleging a breach by Harbourview of the escrow agreement. As to Abraham, there is also only one cause of action; to wit, the second cause of action alleging a breach of Abraham's duty as a successor escrow agent.

Abraham now moves (001) for a dismissal of that second cause of action pursuant to CPLR 3211 (a)(1) and (7) upon the grounds of documentary evidence and failure to state a cause of action. Abraham's arguments all stem from its contention that it is being charged with legal malpractice. This premise, however, is false. The claim against them is for the breach of a fiduciary duty and there is no claim or allegation of legal malpractice.

The document provided in support of this motion is the letter of March 15, 2005 - with its attachments - sent by Abraham to Harbourview with regard to releasing the funds held in escrow. Abraham contends that this letter is proof that there can be no basis for a legal malpractice claim against it by Len as there was no privity with the plaintiff (Len), that Abraham represented no party in the underlying transaction, was not a party to the escrow agreement and that it was merely retained by Robert to obtain the escrow funds Abraham also states that it had no knowledge of the plaintiff or his involvement with the underlying transaction.

This motion to dismiss is denied as it is entirely misdirected as to what the pertinent cause of action is for. Moreover, and in any event, the proffered document, which is offered to show, inter alia, no privity with the plaintiff, does not conclusively resolve the underlying factual issues raised in the second cause

of action pertaining to an alleged breach of fiduciary duties (*see AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582, 808 NYS2d 573 [2005]; *New York Schools Ins. Reciprocal v Gagliotti Assocs.*, 305 AD2d 563, 759 NYS2d 372 [2d Dept 2003]).

In reviewing the second cause of action in question as well as the complaint in its entirety, taking the facts alleged in the complaint as true and according the plaintiff every possible inference (*see AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582, 808 NYS2d 573 [2005]; *New York Schools Ins. Reciprocal v Gagliotti Assocs.*, 305 AD2d 563, 759 NYS2d 372 [2d Dept 2003]), the court finds that the plaintiff has sufficiently pleaded a cause of action against Abraham for breach of a fiduciary duty. Accordingly, the motion (001) by the co-defendant Abraham to dismiss pursuant to CPLR 3211 is denied.

Turning now to the motion (002) by the plaintiff and the cross motion (003) by the co-defendant Harbourview for summary judgment, the court finds that the plaintiff is entitled to summary judgment on its cause of action claiming a breach of the escrow agreement against Harbourview and, thus, the cross motion by Harbourview is denied as academic.

On a motion for summary judgment, the moving party has the burden of making a prima facie showing of entitlement to summary judgment as a matter of law and must offer sufficient evidence to show the absence of material issues of fact (*Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). If the moving party fails in meeting this burden, the motion must be denied regardless of the sufficiency of the opposition papers (*see Smalls v AJI Industries, Inc.*, 10 NY3d 733, 853 NYS2d 526 [2008]). If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see Zuckerman v City of New York, supra*).

In support of this motion, the plaintiff submits the escrow agreement which clearly shows the depositors to be both Len and Robert, that the $62,000.00 being held in escrow is to be paid upon the production of the pertinent mortgage satisfaction and notably contains no provisions providing for the payment of the entire amount to only one of the depositors. Indeed, the law requires an escrow agent to act under a "duty not to deliver . . . to anyone except upon strict compliance with the conditions imposed" in the escrow agreement (*Farago v Burke*, 262 NY 229, 233 [1933]; *see also Grinblat v Taubenblat*, 107 AD2d 735, 484 NYS2d 96 [2d Dept 1985]) and to act on behalf of all the parties having a beneficial interest in the escrow funds (*see Farago v Burke*, 262 NY 229, 233 [1933]; *Cash v Titan Finance Servs., Inc.*, 58 AD3d 785, 873 NYS2d 642 [2d Dept 2009]; *Takayama v Schaefer*, 240 AD2d 21, 669 NYS2d 656 [2d Dept 1998]; *Plaut v HGH Partnership*, 59 AD2d 686, 398 NYS2d 671 [1st Dept 1977]; *Oppenheim v Simon*, 57 AD2d 1006, 394 NYS2d 500 [3d Dept 1977]).

The plaintiff also states, and it is not contested, that the entirety of the escrow funds were paid to "Irwin D. Abraham, Esq., As Attorney" as the attorney for Robert, that the funds were then deposited in Abraham's IOLA escrow account and then it was all paid to Robert only.

In this regard, the plaintiff has made a prima facie showing that Harbourview breached the agreement when it paid all the escrow monies, rather than one half, to the attorney who clearly stated that he represented only Robert. Harbourview offers no explanation or defense for its failure to inquire as to Len and his interests and its failure as the escrow agent and fiduciary to safeguard those interests (*id.*). Under these facts and circumstances, Harbourview is liable for the breach of the escrow agreement and of its fiduciary duty as the escrow agent (*see Grinblat v Taubenblat,* 107 AD2d 735, 484 NYS2d 96 [2d Dept 1985]).

Accordingly, the plaintiff has made a prima showing of entitlement to summary judgment on his first cause of action which charges Harbourview with a breach of the escrow agreement.

Harbourview opposes this motion and cross-moves for summary judgment based upon, inter alia, certain documents (the pleadings and the escrow agreement), an attorney's affirmation and an affidavit from the president of Harbourview, Kimberly Tomei (hereinafter Tomei). In referring to the letter to Harbourview from Irwin Abraham, both Tomei and counsel fail to mention or address the fact that Mr. Abraham expressly stated in his letter that he was retained only by Robert. That fact alone put Harbourview on notice that the interest of Len was not being considered in that correspondence and that Harbourview had a duty to protect that interest and, at most, to provide only one-half of the escrow amount to Robert's attorneys.

Ms. Tomei also contends that the terms of the escrow agreement only required it to hold the money until it was presented with the mortgage satisfaction and once that was done, it was obligated to release the funds. But such an argument ignores the obligation contained in the escrow agreement to pay the funds not to just anyone but to the depositors who had a beneficial interest in said funds. Harbourview's statement that the escrow agreement "did not limit or restrict the release of funds to any particular individual" is without merit as the escrow agreement expressly names the depositors who, by definition, have a beneficial interest in the funds amounting to one-half each. Harbourview's argument appears to be that it can pay the funds to anyone or, at least, to any one of the depositors. But such an argument is contrary to the law (*see Farago v Burke,* 262 NY 229, 233 [1933]; *Cash v Titan Finance Servs., Inc.,* 58 AD3d 785, 873 NYS2d 642 [2d Dept 2009]; *Takayama v Schaefer,* 240 AD2d 21, 669 NYS2d 656 [2d Dept 1998]; *Plaut v HGH Partnership*, 59 AD2d 686, 398 NYS2d 671 [1st Dept 1977]; *Oppenheim v Simon,* 57 AD2d 1006, 394 NYS2d 500 [3d Dept 1977]).

Accordingly, in opposition to the plaintiff's motion for summary judgment as to Harbourview, Harbourview fails to establish the existence of material issues of fact requiring trial (*see Zuckerman v City of New York, supra).* Conversely and for the same reasons for granting the plaintiff's motion for summary judgment, Harbourview has failed in its cross motion to make a prima facie entitlement to summary judgment and, thus, the cross motion is denied without consideration of the papers in opposition (*see Smalls v AJI Industries, Inc.,* 10 NY3d 733, 853 NYS2d 526 [2008]).

In summary, the motion (001) by the defendant Abraham for dismissal of the second cause of action pursuant to CPLR 3211 is denied and Abraham is to serve its answer in accordance with CPLR 3211(f); the motion (002) by the plaintiff for summary judgment in its favor on the first cause of action

which is against Harbourview is granted; and, the cross motion (003) by Harbourview for summary judgment in its favor on the same cause of action is denied.

This constitutes the decision and order of the court.

Dated: April 23, 2009

HON. PAUL J. BAISLEY, JR.

HON. PAUL J. BAISLEY, JR., J.S.C.