

Reveal Kingsland LLC v Newsag LLC

2009 NY Slip Op 31137(U)

May 8, 2009

Supreme Court, Nassau County

Docket Number: 021899/08

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

REVEAL KINGSLAND LLC and
SALVATORE TROVATO,

Plaintiffs,

INDEX No. 021899/08

MOTION DATE: March 9, 2009
Motion Sequence # 001, 002

-against-

NEWSAG LLC, PHILIP GALASSO and
COHEN & PERFETTO LLP,

Defendants.

The following papers read on this motion:

Notice of Motion.....	X
Cross-Motion.....	X
Affidavit in Opposition.....	X
Reply Affirmation/Affidavit.....	XX
Memorandum of Law.....	XXX

This motion, by defendant Cohen & Perfetto LLP (“C& P”), for judgment dismissing plaintiff’s fourth, fifth, and sixth causes of action against it pursuant to CPLR 3211(a)(1) and (7), is **granted** as to the sixth cause of action and **denied** as to the fourth and fifth causes of action. C&P’s additional request for sanctions against plaintiffs Reveal Kingsland LLC (“Reveal”) and Salvatore Trovato is summarily **denied**; and a cross-motion, by plaintiffs, for leave to serve and file an amended complaint pursuant to CPLR

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3025(b) is **granted**. Plaintiffs' additional request for judgment disqualifying Howard Benjamin, Esq., and the Law Office of Howard Benjamin, from representing C&P or defendant NewSag LLC ("NewSag") in this action is **denied**.

Plaintiff Reveal and defendant NewSag jointly owned property located at 460 Kingsland Avenue, Brooklyn, New York. Plaintiff Salvatore Trovato is the managing member of Reveal; defendant Philip Galasso is a member of NewSag. By Purchase and Sale Agreement dated July 30, 2008 ("the Agreement," annexed as Exhibit B to the moving papers), the parties agreed to sell the subject property to Allocco Realty Associates C o., LLC ("Allocco"), for \$18,750,000. C&P was the Escrow Agent; it held the down-payment deposit of \$700,000. According to the Agreement, all notices to the Seller were to be sent to both NewSag and Reveal "c/o Sagres Partners LLC, 2 Galasso Place, Maspeth, New York 11378 in writing by personal delivery, Federal Express, or US mail" (Agreement, par. 18).

By letter dated September 11, 2008, Allocco advised NewSag and Reveal that it was unable to close the transaction. Allocco authorized the Escrow Agent "to immediately deliver the deposit in the amount of \$700,000 to Seller as liquidated damages." Both NewSag, by defendant Galasso, and Reveal, by plaintiff Trovato, executed a Termination Letter dated September 11, 2008, releasing Allocco from any and all liabilities arising out of the Agreement. C&P distributed the funds via e-mail on September 12, 2008.

The record also contains a copy of an e-mail dated Friday, September 12, 2008, from defendant Philip Galasso to plaintiff Salvatore Trovato, setting forth "the breakdown of the Allocco deposit disbursements."

Reveal and Trovato commenced this action, alleging six causes of action in their complaint against NewSag, Galasso, and C&P. It is the last three causes of action against C&P for breach of fiduciary duty, an accounting, and permanent injunctive relief, that are the subject of C&P's motion pursuant to CPLR 3211(a) (1) and (7). C&P argues that it complied with its duties under the Agreement and that plaintiffs never objected to the disbursement of the escrow funds. Accordingly it seeks dismissal of the complaint and sanctions against plaintiffs.

According to the complaint, plaintiffs allege that C&P breached its fiduciary duty

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to plaintiffs by disbursing to themselves and others funds owned by plaintiffs without their consent or authorization. In addition to money damages, plaintiffs seek an accounting of all funds disbursed by C&P, and a permanent injunction enjoining defendants from disbursing or otherwise disposing of funds and other assets related to the property or the business of the property without the written consent of the plaintiffs.

On a motion to dismiss pursuant to CPLR 3211, the facts as alleged must be accepted as true, the pleader must be accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable theory (*Arnav Indus, Inc. Retirement Trust v Brown Raysman, Miller, Felder & Steiner, LLP*, 96 NY2d 300, 303, 2001). Where the ground for dismissal is 3211(a)(7), and evidentiary material is submitted, the criterion is whether the pleader has a cause of action, not whether it has stated one (*Leon v Martinez*, 84 NY2d 83, 87, 1994). Where the ground for dismissal is CPLR 3211(a)(1), the movant must demonstrate that the document at issue utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Town of Riverhead v Silverman*, 54 AD3d 1025, 1026, 2nd Dept., 2008). Whether the plaintiff can ultimately establish the allegations is not part of the calculus (*R.I. Island House, LLC v North Town Phase II Houses, Inc.*, 51 AD3d 890, 893, 2nd Dept., 2008).

An escrow agent can be liable for breach of fiduciary duty as escrowee; strict compliance with the conditions imposed is required (*Cash v Titan Financial Services, Inc.*, 58 AD3d 785, 789, 2nd Dept., 2008). Here C&P has not shown strict compliance with the Agreement, and indeed plaintiffs allege that a change in the notice provision as to the address for service upon them by service upon Sagres Partners LLC, was made without authorization. Neither the Agreement, nor the e-mails, utterly refute the claim that disbursements were made without authorization by Reveal. On this record, plaintiffs have a cause of action against C&P for breach of fiduciary duty and an accounting of the escrowed monies. Dismissal of the fourth and fifth causes of action against C&P pursuant to CPLR 3211(a)(1) and (7) are **denied**.

However, the factual basis for the sixth cause of action for permanent injunctive relief against C&P is unclear. According to plaintiffs themselves, the improper disbursements have already been made. In any event, as to C&P, plaintiffs have an adequate remedy at law in the fourth and fifth causes of action, and money damages will suffice (see generally, *Elow v Svenningsen*, 58 AD3d 674, 2nd Dept., 2009). Therefore, dismissal of the sixth cause of action against C&P is **granted** pursuant to CPLR

3211(a)(7).

Under all of the circumstances of this case, which includes a failure to show strict compliance with the Agreement by C&P to date, the request for sanctions against plaintiffs is summarily **denied**.

Leave to amend a pleading should be liberally granted absent prejudice to the opposing party, as long as the proposed amendment is not palpably insufficient to state a cause of action (*Dialcom, LLC v AT&T Corp.*, 50 AD3d 772, 2nd Dept., 2008; *RCLA LLC v 50-90 Realty, LLC*, 48 AD3d 538, 2nd Dept., 2008). Plaintiffs request leave to serve the amended complaint essentially for the purpose of correcting the amount of the down-payment deposit paid by Allocco. They seek to insert the information they learned from defendants' moving papers, and defendants have failed to allege any prejudice. Consequently plaintiffs' request for leave to serve and file an amended complaint is **granted**.

Plaintiffs seek disqualification of Howard Benjamin, Esq., and the Law Offices of Howard Benjamin from representing C&P and NewSag in this action. C&P had represented both plaintiff Reveal and defendant NewSag as sellers of the subject property. Plaintiffs allege that Mr. Benjamin's representation of C&P and NewSag in this action "will likely result in the disclosure of Reveal Kingsland's confidences and creates a conflict of interest for Mr. Benjamin and his law firm for which disqualification is warranted" (Fisher affirmation in opposition, par. 9). Plaintiffs argue that the conflict arises from Mr. Benjamin's representation of both NewSag and C&P in a matter involving a substantial relationship to the transaction sued upon herein, where they are in an adverse position to NewSag and C&P.

There is no conflict in Mr. Benjamin's representation of NewSag. As for C&P, a lawyer may reveal confidences or secrets necessary to defend against an accusation of wrongful conduct [22 NYCRR 1200.19, also known as DR 4-101(C)(4); *Nesenoff v Dinerstein & Lesser, PC*, 12 AD3d 427, 2nd Dept., 2004). Plaintiffs have accused C&P of wrongful conduct, and therefore C&P must be allowed to defend itself to the full extent of the law. Based on the foregoing, the motion for disqualification is **denied**.

A Preliminary Conference has been scheduled for June 25, 2009 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Dated MAY 08 2009 **ENTERED**

MAY 12 2009

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Stephen A. Scavaria
J.S.C.