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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EDWARD H. LEHNER PART 9

Index Number : 400450/2007

GELB, STUART A.

VS.

EDWARD LEE CAVE

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

motion is decided in accordance with accompanying memorandum decision

FILED
NOV 19 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: NOV 13 2009

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 19

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STUART GELB and NANCI L. GELB,

Plaintiffs,

Index No.
400450/07

- against -

EDWARD LEE CAVE and DENNIS Di LORENZO,

Defendants.

EDWARD H. LEHNER, J.;

Before the court is: i) a motion by Edward Lee Cave, Inc. ("Cave") for summary judgment dismissing plaintiffs' complaint against it, and ii) plaintiffs' cross-motion for partial summary judgment declaring that Cave is responsible for the actions of defendant Dennis DiLorenzo ("DiLorenzo").

DiLorenzo was a real estate salesman working for Cave (tr. p. 4). Plaintiffs' complaint has two causes of action: i) fraud, and ii) breach of fiduciary duty. They allege that they are the former owners of a condominium unit L4AW (the "Plaintiffs' Condominium") in the building located at One Morton Square (verified complaint ¶ 5); that DiLorenzo and Kent Knutson ("Knutson") owned Unit L4BW (the "DiLorenzo Condominium") (Id. ¶ 6); that Plaintiffs' Condominium and the DiLorenzo Condominium are adjoining units; that DiLorenzo learned that plaintiffs listed their condominium for sale and reached an agreement with them to offer both condominiums for sale together (Id. ¶¶ 9, 10); that Veronica and Anston Beard (the

"Beards") offered to pay a total of $7.05 million for both condominiums, $3.05 million for DiLorenzo's Condominium, and $4 million for Plaintiffs' Condominium (Id. ¶¶ 14, 15); that DiLorenzo unsuccessfully sought to persuade the Beards to lower their offer for Plaintiffs' Condominium by $275,000 and increase their offer for his condominium by that amount (Id. ¶¶ 16, 17); that DiLorenzo communicated to plaintiffs that the Beards' offer for their condominium was $3.725 million but the documents would have to reflect a gross purchase price of $4 million (Id. ¶ 18) and an additional $275,000 would be paid to DiLorenzo and Knutson; that at the closing of the sale of Plaintiffs' Condominium, plaintiffs received $4 million and paid DiLorenzo and Knutson $275,000 (Id ¶ 24); that plaintiffs paid Cave a brokerage commission of $50,000 (Id. ¶ 25); and that Cave is responsible for DiLorenzo's action (tr. p. 7).

Cave contends: that plaintiffs didn't speak to anyone at Cave aside from DiLorenzo regarding the sale of their condominium (Stuart Gelb EBT p. 225-226); that DiLorenzo was acting in his capacity as the seller of his condominium and not on behalf of Cave; and that, therefore, it is not responsible for DiLorenzo's actions.

Real Property Law § 442-a provides that:

> No real estate salesman ... shall receive or demand compensation of any kind from any person, other than a duly licensed real estate broker with whom he associated, for any service rendered or work done by such salesman in the appraising, buying, selling, exchanging, leasing, renting or negotiating of a loan upon any real estate.

Real Property Law § 442-c provides that:

> No violation of a provision of this article by a real estate salesman or employee of a real estate broker shall be deemed to be cause for the revocation or suspension of the license of the broker, unless it shall appear that the broker had actual knowledge of such violation or retains the benefits, profits or proceeds of a transaction wrongfully negotiated by his salesman or employee after notice of the salesman's or employee's misconduct.

Plaintiff asserts that Cave is responsible for DiLorenzo's action since: a "broker is responsible for the wrongful acts of a salesman employed by him if he has actual knowledge of such acts, or retains the benefits or proceeds of a transaction wrongfully negotiated by such salesman after notice of the salesman's misconduct (Real Property Law, § 442-c)" [Diona v. Lomenzo, 26 AD2d 473, 475 (1st Dept. 1966)]. Cave contends that since Real Property Law § 442-c provides for the "revocation or suspension of the (broker's) license" as a penalty for alleged improper conduct, there is no statutory basis to attribute DiLorenzo's conduct to Cave for purposes of tort liability.

"As a general rule, employers are held vicariously liable for their employees' torts only to the extent that the underlying acts were within the scope of the employment.... The scope-of-employment limitation on employers' vicarious liability is a logical consequence of the policies underlying the ... doctrine ... (which is) that '(t)he losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise' are most fairly allocated to the

employer 'as a required cost of doing business.' ... (However) ... torts which are outside the scope of employment ... are therefore not part of the 'conduct of the employer's enterprise' (and) should not be made the responsibility of the employer" [Adams v. New York City Transit Authority, 88 NY2d 116, 119 (1996)]. See also, Riviello v. Waldron, 47 NY2d 297 (1979). "But an employer may not be held accountable to third parties for the conduct of employees who, while ostensibly acting for their employer, in fact totally abandon the employer's interest and act entirely for their own or others' purposes" [Prudential-Bache Securities, Inc. v. Citibank, N.A., 73 NY2d 263, 276 (1989)]. "The applicability of this doctrine, and the question of whether a particular act falls within the scope of the servant's employment, depends heavily on the facts and circumstances of each particular case and as a result, the determination of that question is normally left to the trier of fact" [Schilt v. New York City Transit Authority, 304 AD2d 189, 193 (1st Dept. 2003)].

Since Cave received a $50,000 brokerage commission for the sale of the condominiums, it has not shown that DiLorenzo totally abandoned its interests. However, plaintiffs have shown no basis to recover from Cave the $275,000 they paid to DiLorenzo. Therefore, Cave's motion to dismiss is denied with respect to the portion of plaintiffs' claim to recover the commission received by Cave, but granted with respect to the portion of the claim to recover from it the $275,000 paid by plaintiffs to DiLorenzo.

Similarly, plaintiffs have not established that as a matter of law DiLorenzo's actions were within the scope of his employment since they dealt only with DiLorenzo on the sale of their condominium. Therefore, their cross-motion for summary judgment is denied.

This decision constitutes the order of the court.

Dated: November 13, 2009

J.S.C.