

**Fenley & Nicol Envtl., Inc. v Kanet Enters., Ltd.**

2010 NY Slip Op 30921(U)

March 17, 2010

Supreme Court, Nassau County

Docket Number: 19478/07

Judge: F. Dana Winslow

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SUMN

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**FENLEY & NICOL ENVIRONMENTAL, INC.,**

**TRIAL/IAS, PART 5  
NASSAU COUNTY**

**Plaintiffs,**

**-against-**

**MOTION SEQ. NO.: 001, 002,  
003, 004**

**MOTION DATE: 12/15/09**

**KANET ENTERPRISES, LTD., JULIARD  
REALTY, LLC LEDERMAN ABRAHAMS &  
LEDERMAN, LLP as Escrow Agent, RICHARD  
BLAU and MAUREEN ROMIG,**

**INDEX NO.: 19478/07**

**Defendants.**

**KANET ENTERPRISES, LTD., JULIARD REALTY,  
LLC and RICHARD BLAU,**

**Plaintiffs by Cross-Claim,**

**-against-**

**MAUREEN ROMIG, as Executrix of the Estate of  
James M. O'Connell, and SEYMOUR SIGNET,**

**Defendants by Cross-Claim,**

**AND A THIRD PARTY ACTION**

**The following papers having been read on the Motion (numbered 1-4):**

<b>Notice of Motion.....</b>	<b>1</b>
<b>Affirmation in Opposition.....</b>	<b>2</b>
<b>Reply Affidavit.....</b>	<b>3</b>

The instant motions (sequences 001, 002, 003 and 004) are described and determined as follows:

Motion Sequence 001: The motion by the defendant Lederman Abrahams & Lederman,LLP, (“Lederman”) seeking: (1) an order pursuant to CPLR 3212 granting summary judgment dismissing all claims and cross claims against it, with costs and disbursements; and, (2) an order granting summary judgment on its counter claim and setting this matter down for a hearing to determine damages and the imposition of sanctions against the plaintiff, its officers Robert A. Abbate and Brian McCabe, its attorneys Zisholtz & Zisholtz, LLP, and the defendant Maureen Romig and her attorneys Lewis Johs, Avallone & Aviles, LLP, is **granted** to the extent provided hereafter.

Motion Sequence 002: The motion by the defendant Maureen Romig (“Romig”) seeking an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and the cross-claims against her is **granted** to the extent provided hereafter.

Motion Sequence 003: The motion by the additional cross-claim defendant Seymour Signet (“Signet”) seeking an order pursuant to CPLR 3212 granting summary judgment dismissing the cross-claims against him and an award of costs and disbursements is **granted** to the extent provided hereafter.

Motion Sequence 004: The motion by the plaintiff Fenley & Nicol Environmental, Inc. (“Fenley & Nicol”), which was allegedly retained by Romig and Kanet, seeking an order pursuant to CPLR 3212 granting summary judgment against the defendants Kanet and Romig is **granted** to the extent provided hereafter.

The facts pertinent to these determinations are as follows:

The defendant Kanet Enterprises, Ltd. (“Kanet”) retained the defendant Lederman to represent it in connection with the sale of its business and real property consisting of five tennis courts at 575 Merrick Avenue in Westbury to the defendants Richard Blau (“Blau”) and Juliard Realty, LLC (“Juliard”).

Defendant Romig and her siblings owned 50% of Kanet. Their uncle, Signet, held a 50% interest and ran the business on a day-to-day basis. The real property and the stock were transferred in two separate agreements; a contract of sale (the “Real Estate Contract”) and a Stock Purchase Agreement, entered into on the same day, May 13, 2005.

Kanet was the Seller pursuant to the Real Estate Contract. Kanet's shareholders, including (i) the defendant Romig, individually, and in the representative capacity of her siblings' interest, and (ii) Signet, were, collectively, the Sellers pursuant to the Stock Purchase Agreement.

Prior to the closing, an environmental condition requiring remediation was discovered by Impact Environmental Engineering, PLLC and/or Impact Environmental Closures, Inc., and/or Impact Environmental Consulting, Inc. ("Impact Environmental") which Fenley & Nicol had hired in the course of its due diligence. Pursuant to the Real Estate Contract, in the event of a report of environmental contamination, Kanet, as Seller, had the right to either cancel the sale or remediate the purported contamination on the property. No time limit was stated. In contrast, pursuant to the Stock Purchase Agreement, Blau and Juliard, as Purchasers, had a right to cancel the Stock Purchase Agreement on written notice, if contamination was discovered and notice given prior to the expiration of their extended due diligence period. In the event that they failed to provide notice, their right to cancel was deemed waived. In the event that the Purchasers elected to cancel the Stock Purchase Agreement, the Sellers Romig and Signet had the option to nullify the cancellation by either procuring a "no-action" letter from the New York State Department of Environmental Conservation, Nassau County Health Department and/or other governmental authority having jurisdiction or, alternatively, remediating the site at Sellers' cost and expense pursuant to the Purchasers' environmental consultant's recommendation. It appears that none of these contractual options were exercised. It is not disputed that as a result of Impact Environmental's finding and their negotiations, the parties entered into an Escrow Agreement entitled "ENVIRONMENTAL" (the "ENVIRONMENTAL Agreement") which was proposed by the Seller's attorney at the closing held on September 8, 2005. Pursuant to the ENVIRONMENTAL Agreement, \$30,000.00 was placed in escrow with Lederman for a period of one year. The ENVIRONMENTAL Agreement required the Sellers "to take all necessary steps to complete remediation." It further provided that upon receipt of documentation from an environmental entity "attesting to remediation or non-existence of

the findings,” the balance of escrow funds were to be paid to the Sellers, i.e., Romig and Signet. However, it further provided that “if remediation [was] not completed within one year, [the] balance of escrow shall be disbursed to [the] Purchaser who shall then be responsible for all further work.”

On or about December 10, 2005, Kanet, through Romig, retained Fenley & Nicol (by Brian McCabe) to prepare a remediation estimate which cost \$5,070.00. On February 6, 2006, a change order was executed by Romig, allegedly on behalf of Kanet, authorizing Fenley & Nicole to perform additional work costing \$7,420.00. Additional change orders were signed by Romig on May 10, 2006 and October 16, 2006. The October 16, 2006 change order/new agreement, which was addressed to Kanet, states “the total amount of asbestos impacted soil could not be quantified through surface observation, therefore the total volume to be removed cannot be calculated.”

All of the contractual documents were denominated “Kanet Enterprises” and signed by Romig as Kanet’s representative. All of Fenley & Nicole’s bills were addressed to Kanet Enterprises and Maureen Romig, c/o Lederman; they were sent to Lederman and paid by it from the escrow account created by the ENVIRONMENTAL Agreement.

On March 7, 2007, when advised that the final cost of remediation would exceed the remaining balance of escrow funds of \$13,297.66, Lederman disbursed the remaining escrow funds to Juliard and Blau’s attorneys, Rosenberg, Fortuna & Laitman, LLP., (“Rosenberg”) pursuant to the ENVIRONMENTAL Agreement. On or about September 6, 2007, Fenley & Nicol filed a Notice of Mechanic’s Lien. They commenced this action on or about October 31, 2007.

Finely & Nicol in its first cause of action, seeks to foreclose on its Mechanic’s Lien against all defendants. The second cause of action seeks to recover for breach of contract from all of the defendants. Its third cause of action seeks to recover against the defendants Kanet, Juliard, Blau and Romig for an account stated.

Fenley & Nicol alleges that all of the defendants hired it to perform the remediation work and that from January 5, 2006 until on or about June 19, 2007, it

performed pursuant to that agreement. It alleges that, of the agreed upon charges of \$89,797.55, only \$16,702.34 have been paid, leaving a balance owing of \$73,095.21. It further alleges that it filed a Notice of Mechanic's Lien in the Nassau County Clerk's office on or about September 6, 2007 which has not been satisfied, and that statements of account which were received without challenge or objection also reveal a balance owing of \$73,095.25.

The defendant Romig has cross-claimed against Lederman as well as all of the other defendants seeking indemnification and contribution.

Kanet, Juliard and Blau have made two cross-claims against defendant Romig and the additional cross-claim defendant Signet. The first cross-claim alleges that by retaining Fenley & Nicol to remediate the property, Romig and Signet breached the terms of their Stock Purchase Agreement. As and for their second cross-claim, sounding in fraud, they allege that Signet and Romig fraudulently misrepresented the condition of the property, in that Signet represented that only clay shavings from the operations of the tennis courts were present. They allege that Romig and Signet knowingly concealed the fact that they placed asbestos beneath the clay shavings. The claimants on the cross-claim (Kanet, Juliard and Blau) alleged that they relied on Romig and Signet's representations to their detriment.

The defendants Kanet, Juliard and Blau have also commenced a third-party action against Impact Environmental.

Lederman seeks summary judgment dismissing the complaint and Romig's cross-claim against it as well as costs, disbursements and sanctions pursuant to 22 NYCRR 130-1.1 against Fenley & Nicol and Romig.

Romig seeks summary judgment dismissing the complaint and any and all cross-claims against her.

Signet seeks summary judgment dismissing the cross-claims against him.

The plaintiff seeks summary judgment against the defendants Kanet and Romig.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering

sufficient evidence to demonstrate the absence of any material issues of fact.” Sheppard-Mobley v King, 10 AD3d 70, 74 (2d Dept. 2004), aff’d. as mod., 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986). “Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” Sheppard-Mobley v King, *supra*, at p. 74; Alvarez v Prospect Hosp., *supra*; Winegrad v New York Univ. Med. Ctr., *supra*. Once the movant’s burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v Prospect Hosp., *supra*, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. See, Demishick v Community Housing Management Corp., 34 AD3d 518, 521 (2d Dept. 2006).

Lederman’s Motion

“Liability for breach of contract does not lie absent proof of a contractual relationship or privity between the parties.” Hamlet and Willow Creek Development Co., LLC v Northeast Land Development Corp., 64 AD3d 85, 104 (2<sup>nd</sup> Dept. 2009), *lv. disp.* \_\_\_ NY2d \_\_\_, 2009 WL 4845568 (2009).

In support of its motion, Lederman maintains that it only acted as escrow agent for the environmental remediation funds and that it acted in full accord with the ENVIRONMENTAL Agreement. It notes that it never made any agreement with Fenley & Nicol. Fenley & Nicol’s agreements, invoices, change orders and correspondence refer to Kanet and Romig. Lederman alleges that when it received a copy of the Notice of Mechanic’s Lien on September 11, 2007 naming it a defendant as Escrow Agent, it promptly notified Fenley & Nicol’s attorney that it never employed Fenley & Nicol and that its designation in the Notice of Mechanic’s Lien was incorrect.

Lederman has established *prima facie* its entitlement to summary judgment dismissing the complaint and Romig’s cross-claim against it, thereby shifting the burden to Fenley & Nicol and/or Romig to establish the existence of a material issue of fact.

In opposition, Fenley & Nicol’s President, Paul Fenley, attests that Romig

represented herself as a principal of Kanet but she directed him to “take direction” from Lederman and to forward all of the invoices and correspondence to it because it was overseeing the remediation. Fenley represents that only when Fenley & Nicol stopped its work in June 2007 did he learn that Romig & Signet had sold the premises and Kanet to Juliard Realty and Blau before his company was even hired.

In support of her motion and in opposition to Lederman’s motion, Romig alleges that Lederman was managing the remediation. She represents that she did no more than sign the documents forwarded to her by Lederman and at its direction.

Assuming, *arguendo*, that all of Fenley’s representations are true, privity with Lederman is nevertheless lacking. It is clear that *vis a vis* Fenley & Nicol, Lederman did no more than act as an escrow agent. The complaint against Lederman is therefore **dismissed**.

Nevertheless, Lederman’s role *vis a vis* Romig is far from clear. Its motion to dismiss her cross-claim is **denied**.

Lederman’s motion for costs, disbursements and sanctions is **denied**. Sanctions under 22 NYCRR 130-1.1(a) lie when a party engages in frivolous conduct which has been defined as conduct “completely without merit in law,” “undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another.” Glenn v Annunziata, 53 AD3d 565, 566 (2<sup>nd</sup> Dept. 2008), citing 22 NYCRR 130-1.1(c)(1), (2). If sanctions are awarded, the court must articulate the offensive conduct giving rise to the sanction, why the court found the conduct offensive, and its justification for the amounts awarded. Glenn v Annunziata, *supra*, at p. 566. The commencement of this action and Romig’s advancement of her cross-claim under the circumstances do not warrant relief pursuant to 22 NYCRR § 130-1.1.

### Romig’s Motion

An “agent is a party who acts on behalf of the principal with the latter’s express, implied or apparent authority.” Maurillo v Park Slope U-Haul, 194 AD2d 142, 146 (2<sup>nd</sup> Dept. 1993). “The mere creation of an agency for some purpose does not automatically

invest the agent with ‘apparent authority’ to bind the principal without limitation.” Ford v Unity Hospital, 32 NY2d, 464, 472 (1973). “An agent’s power to bind his principal is coextensive with the principal’s grant of authority. One who deals with an agent does so at his peril, and must make the necessary effort to discover the actual scope of authority.” Ford v Unity Hospital, supra, at p. 473. “Apparent authority will only be found where the words or conduct of the principal - not the agent - are communicated to a third party, which give rise to a reasonable belief and appearance that the agent possesses authority to enter into the specific transaction at issue.” Edinburg Volunteer Fire Company, Inc. v Danko Emergency Equipment Co., 55 AD3d 1108, 1109 (3<sup>rd</sup> Dept. 2008); citing Hallock v State of New York, 64 NY2d 224, 231 (1984). “An ‘agent cannot by [her] own acts imbue [her]self with the apparent authority’ to act for a principal.” Edinburg Volunteer Fire Company, Inc. v Danko Emergency Equipment Company, supra, at p. 1109, quoting Hallock v State of New York, supra, at p. 231. The appearance of apparent authority may be relied upon only to the extent that such reliance is reasonable. Hallock v State, supra, at p. 231, Restatement, Agency 2d 38.

“When an agent acts on behalf of a disclosed principal, the agent would not be personally liable for a breach of contract unless there is clear and explicit evidence of the agent’s intention to be personally bound.” Weinreb v Stinchfield 19 AD3d 482, 483, (2<sup>nd</sup> Dept. 2005). “Nevertheless a person who purports to make a conveyance or representation on behalf of a principal over whom he has no power to bind thereby becomes subject to liability to the other party thereto upon an implied warranty of authority, unless he has manifested that he did not make such warranty or the other party knows that the agent is not so authorized.” Restatement of the Law of Agency § 330.

Blau attests that when the Phase II environmental study revealed the need for remediation, he “insisted that [Romig and Signet], as Sellers under the Stock Purchase Agreement, undertake to complete remediation at their sole cost and expense...” which led to the ENVIRONMENTAL Agreement. Blau alleges that \$30,000 was placed in escrow based upon Impact Environmental’s estimate of the costs of remediation. He also

attests that he never gave Romig permission to bind Kanet after he acquired ownership of the property nor did he ever deal with Fenley & Nicol let alone reach any agreement with them. He maintains that Romig was acting in her individual capacity.

Romig has established, through her affidavit as well as the documents, that her role in relation to Fenley & Nicole was ostensibly as an agent for the Sellers. Whether or not she actually had the authority to bind Kanet, especially for amounts in excess of those being held in escrow, whether or not she in fact exceeded her authority and whether or not Fenley & Nicol knew that she exceeded her authority, is far from clear. Thus, Romig's motion to dismiss the complaint against her is **denied**.

The ENVIRONMENTAL Agreement, which was created in conjunction with the sale, specifically required the Sellers "to take all steps to complete the remediation." To that end, Romig hired Fenley & Nicol on behalf of the Sellers. That agreement also allowed Romig and Signet to transfer responsibility for remediation to Blau and Juliard after one year. Whether Romig and/or Signet, *inter alia*, breached their obligations under the Escrow Agreement in the manner in which they handled their responsibilities with respect to time and expenses incurred cannot be determined as a matter of law at this juncture. A question of fact exists as to whether Romig "took all necessary steps to complete the remediation," thereby limiting her liability to the escrow funds. Romig's motion to dismiss Kanet, Juliard and Blau's first cross-claim sounding in breach of contract is **denied**.

#### Signet's Motion

In his affidavit, Signet has established that he did nothing to prevent Blau and Juliard, or whomever they retained to evaluate the property, from conducting any and all environmental studies they desired. Impact Environmental, which Blau and Juliard hired to perform due diligence, was afforded full unrestricted access to the entire premises unencumbered by the Sellers. In fact, after Impact Environmental's Phase I assessment, a Phase II assessment was performed, again, without restriction. Signet has no recollection

of being asked about asbestos nor does Impact's studies indicate that Signet was asked about the mounds of clay where Impact found asbestos. In fact, Impact determined in its assessment report that it was possible that asbestos containing materials may exist in the building materials based on the age of the building yet Blau and Juliard elected to close without taking further action in that regard. Nevertheless, James Cressy, a "certified inspector" employed by Impact Environmental, attests that he met with Signet when he conducted his Phase I inspection of the premises and discussed with him "the transport and disposal of hazardous materials at the premises." He attests that Signet told him that, to his knowledge, no hazardous materials were removed from the premises.

Blau and Juliard's attorney for the sale, Ronald Rosenberg, affirms that he had no knowledge of the excess remediation costs until one month after the Sellers, Romig and Signet, tendered the balance in the escrow account to him and Abbate of Fenley & Nicol contacted him seeking to collect the \$75,000.00 balance owing. The \$75,000.00 was attributable to the discovery of asbestos-laden materials. Ronald Rosenberg affirms that he immediately contacted Lederman and that Lederman told him that when Abbate had told Lederman in early 2007 that the costs were approximately \$40,000 and substantial additional work was required, Lederman instructed Abbate to cease work because only \$30,000.00 was available in escrow. Ronald Rosenberg further affirms that when confronted, Abbate did not deny this and could not explain how the charges continued to accrue in excess of \$70,000.00.

Absent conduct by the Seller which constitutes active concealment, New York adheres to the doctrine of *caveat emptor* and does not impose liability on a seller for failing to disclose information about the property when the parties deal at arm's length. Rozen v 7 Calf Creek LLC, 52 AD3d 590 (2<sup>nd</sup> Dept. 2008); see also, Mancuso v Rubin, 52 AD3d 580 (2<sup>nd</sup> Sept. 2008). To recover for active concealment, the plaintiff must demonstrate that the Seller or his agent " 'thwarted the plaintiff's efforts to fulfill his [or her] responsibilities fixed by the doctrine of *caveat emptor*.' " Rozen v 7 Calf Creek, supra, at p. 593, quoting Jablonski v Rapalje, 14 AD3d 484 (2<sup>nd</sup> Dept. 2005); see also,

Mancuso v Rubin, supra, Simone v Homecheck Real Estate Services Inc., 42 AD3d 518 (2<sup>nd</sup> Dept. 2007). Where “ ‘the facts represented were not matters peculiarly within the party’s knowledge,’ the plaintiffs had the means available to them of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, and as it was their responsibility to make use of those means, they would not be heard to complain that they were induced to enter into the transaction by misrepresentation.” McPherson v Husbands, 54 AD3d 735, 736 (2<sup>nd</sup> Dept. 2008).

As a consequence, Kanet, Juliard Realty and Blau’s second cross-claim against Romig and Signet is **dismissed**.

#### Fenley & Nicol’s Motion

In support of its motion, Fenley & Nicol has submitted the agreements entered into by Romig allegedly on behalf of Kanet and the invoices sent to Kanet and Romig in care of Lederman. In addition, in his affidavit, Fenley & Nicole’s president Paul Fenley attests that he had no knowledge of the agreements between the defendants. While neither the remediation work performed by Fenley & Nicol nor the amount owing appear to be in dispute, who is legally responsible to pay it is far from apparent.

Contrary to Blau’s allegations, it is far from clear that the Sellers Romig and Signet undertook the contractual obligation to fully remediate the site at their sole cost and expense pursuant to their Stock Purchase Agreement. The Court finds that Juliard/Blau never exercised their option to cancel nor did the Sellers Romig and Signet exercise their option to nullify a cancellation and in so doing assume **all** of the costs of remediation. Instead, the parties negotiated the ENVIRONMENTAL Agreement which redefined the parties’ rights and obligations.

All of the contractual documents with Finley & Nicol were executed by Romig **after** Kanet had been sold to Juliard and Blau. Nevertheless, Kanet’s former principals Romig and Signet retained actual authority to have the remediation work performed at

least to the extent of the funds held in escrow pursuant to the ENVIRONMENTAL Agreement.

Thus, plaintiff Fenley & Nicol is entitled to summary judgment against Kanet to the extent of the escrow funds, and all funds remaining in the escrow account, if any, shall be released and turned over to Fenley & Nicol.

However, Fenley & Nicol is not summarily entitled to any further relief from Kanet as there is no evidence of any conduct by Kanet which could have lead Fenley & Nicol to believe that Romig possessed the authority to act on its behalf beyond the ENVIRONMENTAL Agreement funds. Furthermore, payments from an attorney escrow account provided a basis for Fenley & Nicol to inquire of Romig's role and status.

Nor may Fenley & Nicol recover from Kanet based on account stated. "A cause of action alleging an account stated cannot be utilized simply as another means to attempt to collect under a disputed contract." Grinnell v Ultimate Realty, LLC, supra. There was no contract here with Kanet. Fenley & Nicol's agreement was with Romig who agreed to have Fenley & Nicol's invoices paid and, in fact, had her attorney as escrow agent do so. Additionally, where, like here, no account has been presented with Kanet, recovery under account stated does not lie. M & A Const. Corp. v McTague, 21 AD3d 610 (3<sup>rd</sup> Dept. 2005). Finally, as stated previously, Romig's personal liability is an issue of fact.

The Court has considered the remaining contentions of the parties and finds them to be without merit.

This constitutes the Order of the Court.

Dated: March 17, 2010



J.S.C.

**ENTERED**  
APR 13 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE