

Raptis v Giamo/Einsidler Real Estate Servs. Inc.

2010 NY Slip Op 32097(U)

July 22, 2010

Supreme Court, Nassau County

Docket Number: 16731/08

Judge: John M. Galasso

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

.....
CHARLENE RAPTIS,

Plaintiff,

Index No. 16731/08
Sequence #s 004,005
Part 37

- against -

07/14/10

GIAMO/EINSIDLER REAL ESTATE SERVICES
INC., KATHLEEN GIAMO, DONALD EINSIDLER,
Defendants,

.....	
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Upon the foregoing papers, defendants' and plaintiff's motion and cross-motion for summary judgment and defendants' motion for summary judgment on the counterclaim pursuant to CPLR 3212 are determined as follows:

This action under the theories of fraudulent inducement, unjust enrichment and conversion is for \$18,500.00 in unpaid commissions for three condominium units (206,105 and 201) sold while plaintiff was affiliated with defendants' real estate brokerage firm. Plaintiff claims that she was assured when hired in 2005 that she was entitled to a commission for each transaction that closed. The counterclaim alleges that plaintiff, as an independent contractor, diverted and concealed business opportunities for her own gain with the knowledge she intended to leave their association for another.

Defendants' motion asserts that plaintiff was an associate broker working under the firm's license and that all commissions earned by the firm were deposited into the firm's account for its use to pay all business and related expense. Consequently, there can be no cause of action against defendants in their individual capacities. Furthermore, plaintiff's lawsuit sounding in tort instead of breach of contract is a spurious attempt to impose personal liability.

Defendants demonstrate that plaintiff was compensated for the 2006, 2007 and 2008 tax years that she was an associate broker. Defendants attest that plaintiff was informed when she was hired that in order to earn a commission she must be an associate at the time of closing.

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They allege that plaintiff voluntarily left defendants' firm before the 3 units closed and, in the interim, other salespeople had to continue to service the purchasing clients. Defendants have submitted evidence that plaintiff, in fact, did receive commissions while in their employ, although not for sales that closed after she voluntarily left. Moreover, the profits earned after payment of expenses were deposited directly into the corporate bank account without any diversion for defendants' own use.

On the counterclaim, defendants allege that just days before quitting suddenly plaintiff showed several units to a prospective buyer and, within 5 days on May 13, 2008, that individual purchased a unit with plaintiff and non-party Links Realty as broker of record. That fact plus having received telephone calls for plaintiff from the purchaser's broker, who would not identify which transaction she was calling about, lead defendants to believe that plaintiff deliberately kept quite about the negotiations for Unit 203 that were currently taking place in order to bring the deal to Links Realty.

Therefore, defendants argue, there is no legal or factual justification for plaintiff's tort claims (see *Weitz v. Smith*, 231 AD2d 518; see also *Hynes v. Griebel*, 300 AD2d 628; *Sokol v. Addison*, 293 AD2d 600; *Smith v. Chase Manhattan Bank*, 293 AD2d 598; *Sanyo Electric, Inc. v. Pinros and Gar Corp.*, 174 AD2d 452).

Defendants have sufficiently demonstrated their entitlement to summary judgment as a matter of law on the issue of liability and on the counterclaim. This includes against plaintiff for her efforts to impose individual liability by attempting to pierce the corporate veil (*Morris v. Department of Taxation and Finance*, §2 NY2d 143; *Aenta Electrical Distributing Co. v. Homestead Electric, Ltd.*, 279 AD2d 541; *Rose Ocko Foundation v. Lebovits*, 259 AD2d 685; *Total Health Care Industries v. Department of Social Services*, 144 AD2d 678).

In opposition, plaintiff must raise a legitimate, material issue of fact in order to overcome defendants' *prima facie* case.

Plaintiff maintains she was not an employee of defendants' firm but a licenced broker. When defendants lost the condominium listing, allegedly because defendant Giamo put family members in plaintiff's place as sales agents in the building, defendants decided to retain her rightfully earned commissions.

Plaintiff points out all 3 units went to contract before she left the firm, including unit 201 on May 13, 2009, in direct contradiction of defendant Giamo's affidavit that she left before May 13th.

On the counterclaim, plaintiff notes that it went to contract on June 9th and closed in July. Her share of the commissioner was \$2,400.

Plaintiff has failed to raise a material issue of fact under the theory of fraudulent inducement.

On this cause of action it must be established at the time plaintiff was hired in 2005 that there was an intent on defendants' part not to honor the contract (*Sanyo Electric v. Pinros, supra*). Yet plaintiff by her own admissions asserts defendants decided to deprive her of her commissions after they lost the condominium listing.

Moreover, when fraud is alleged on a breach of an agreement or contract, it cannot be related to the agreement but must be based upon a duty "collateral or extraneous" between the parties. That extra duty is not present here (*see Weitz v. Smith, supra*).

Plaintiff has, however, sufficiently raised material questions of fact on the causes of action for conversion and unjust enrichment.

Generally, a conversion claim cannot be maintained where the damages sought are for breach of contract (*Selinger Enterprises, Inc. v. Cassuto, 50 AD3d 766*). However, when the claim includes additional allegations of wrongdoing, the tort of conversion may lie (*Matzan v. Eastman Kodak Company, 134 AD3d 863*). When it is a matter of money, the amount must be specifically identifiable, as it is here (*id*).

Plaintiff has set forth evidence that defendant Giamo caused to have some listing records changed by removing plaintiff's name and inserting the name of a family member. These allegations are sufficient to deny defendants' application for summary judgment on the conversion cause of action.

Plaintiff has also presented evidence sufficient to require a trial on the quasi contract theory of unjust enrichment by the affidavits of several purchasers showing that defendants benefitted at plaintiff's expense because plaintiff was the agent who did all the work on the sale of the units. Unlike a claim for conversion, which requires a wrongful act by the defendant (*see Hamlet at Willow v. Northeast, 64 AD3d 85*), plaintiff has only to show that equity and good conscience may entitle her to restitution for her efforts.

Consequently, defendants are denied summary judgment on this cause of action.

Nevertheless, all causes of action against defendant Donald Einsidler individually are dismissed.

A corporate officer may individually be liable for torts if he or she participated in their commission for their own personal ends (*Hamlet at Willow, supra, at 116*). Here the record is devoid of any allegation against defendant Einsidler. The motivations plaintiff alleges behind the corporate action of failing to pay her commissions are due to the nepotism exhibited by defendant Giamo and her pique at losing the condominium listing.

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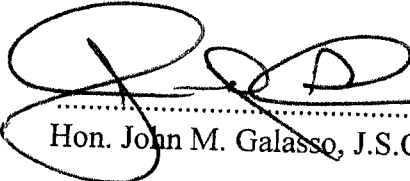
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Defendants' motion on the counterclaim must likewise be denied upon the opposing evidence that the subject unit did not go to contract until well after plaintiff joined Links.

Accordingly, defendants' motion is denied in part and granted in part as set forth above (Seq. #004).

Turning to plaintiff's cross-motion, the same rules of law apply. There are issues of fact that are heatedly contested by plaintiff and defendant Giamo on the causes of action for conversion and unjust enrichment. Consequently, plaintiff's cross-motion must be denied since the Court may not make determinations based upon credibility or hyperbole (Seq. #005).

July 22, 2010


Hon. John M. Galasso, J.S.C.

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