Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Frank D. DePinto and Jeffrey R. D'Amico,

Plaintiff,

-against-

Prudential Douglas Elliman Real Estate, A. Enrique Leon (a/k/a Alonzo Leon) and John Does 1 - 10,

Defendants.

Motion Sequence No.: 003; MG
Motion Date: 11/10/09
Submitted: 8/4/10

Index No.: 20226/2005

Attorney for Plaintiff:

Fine, Fine & Associates, LLP
151 West Carver Street
Huntington, New York 11743

Attorney for Defendant Prudential Douglas Elliman Real Estate:

Certilman, Balin, Adler & Hyman, LLP
90 Merrick Avenue, 9th Floor
East Meadow, New York 11554

Clerk of the Court

Upon the following papers numbered 1 to 22 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 9; Answering Affidavits and supporting papers, 10 - 19; Replying Affidavits and supporting papers, 20 - 22.

This action arises from a purported oral agreement to share real estate commissions made between the plaintiffs and defendant A. Enrique Leon a/k/a Alonzo Leon, a real estate broker working with defendant Prudential Douglas Elliman Real Estate. The complaint alleges that in or about the summer of 2001, the plaintiffs entered into a contract with Leon, who was acting as an agent of Prudential. Pursuant to the oral agreement, DePinto would introduce Leon to his friend, Salvatore Panico, President and CEO of Cord Meyer Development Company, who would, in turn,

permit Leon to market certain of Cord Meyer's commercial real property holdings. The contract purportedly provided that, in consideration for such introduction, all commissions earned as a result of a sale by Leon and/or Prudential of a Cord Meyer's real estate holding, would be shared between the parties. Shortly thereafter, and pursuant to the terms of the agreement, DePinto introduced Leon to Panico. Panico purportedly agreed to the meeting because of his friendship with DePinto and because DePinto advised him of the agreement to split commissions. At the meeting, Panico agreed to permit the defendants to market certain Cord Meyer properties, under the condition that all commissions earned as a result of defendants' efforts be paid by the purchasers and not by Cord Meyer. In or about October of 2002, Leon introduced Panico to David Workman and Tucky Devlin, two real estate brokers working out of a different Prudential office. On behalf of Cord Meyer, Panico entered into a short-term listing agreement granting Workman and Devlin permission to market one of Cord Meyer's properties, referred to as the Ocean Park property, to an entity known as Related Companies, Inc. On or about April 16, 2003, Cord Meyer entered into a contract of sale for the Ocean Park property with Related Companies. This contract of sale closed on or about February 13, 2005 and resulted in earned commissions in excess of $345,000 to be paid to Prudential. The defendants refused to split these commissions with the plaintiffs.

The plaintiffs commenced this action in order to recover their share of the commissions for the Ocean Park property transaction. The complaint alleges causes of action for breach of contract, fraud, deceptive business practices and unjust enrichment. Prudential now moves for summary judgment dismissing the complaint against it. The plaintiffs oppose the motion to the extent that Prudential seeks dismissal of the causes of action for breach of contract and unjust enrichment. The plaintiffs concede that there is no evidence to support the causes of action sounding in fraud and deceptive business practices.

The proponent of a summary judgment motion 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 (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v. City of New York, 49 NY2d 557 [1980]).

In support of the motion for summary judgment, Prudential submitted, *inter alia*, the affidavit of Paul Brennan, an independent broker agreement between Dorothy Herman of Prudential Douglas

Elliman Real Estate and Leon as Sales Associate, and the deposition testimony of Jeffrey R. D'Amico. This evidence established Prudential's entitlement to summary judgment.

In order to recover against Prudential based on breach of contract, the plaintiffs would be required to establish that Leon had either actual or apparent authority to act on behalf of Prudential when he allegedly entered the oral commission agreement with the plaintiffs (see, Fitzgibbon v. Abatelli Real Estate, 214 AD2d 642 [2nd Dept., 1995]).

The evidence submitted in support of the motion established that Leon did not have actual authority to enter into an agreement to split commissions on behalf of Prudential (see, Fitzgibbon v. Abatelli Real Estate, 214 AD2d 642 [2nd Dept., 1995]; see also, Globus Realty Corp. v. Fleetwood Terrace, Inc., 301 NY 783 [1950]). In this regard, the evidence submitted indicated that only managers employed by Prudential had the authority to enter into commission agreements, and that Leon was not a manager. In his affidavit, Brennan, the manager of the Bridgehampton office of Prudential, avers that approval for a commission agreement must be obtained from him and that he was never advised by anyone that a commission agreement was entered into, or even contemplated, with the plaintiffs. To Brennan's knowledge, no one ever met with the plaintiffs on behalf of Prudential or agreed that the plaintiffs would be paid by Prudential. Brennan further averred that Leon was not an employee, general agent or manager of Prudential, but an independent contractor with no authority to bind Prudential to such an agreement. He averred that Leon was, in fact, prohibited from entering brokerage agreements on Prudential's behalf. Lastly, he averred that if Leon had met with the plaintiffs and/or orally agreed to split commissions, that it was without Prudential's knowledge and/or consent. This Court rejects the plaintiffs' contention that because Leon was authorized to act on behalf of Prudential in real estate transactions, he was authorized to act on behalf of Prudential in all capacities (see, Std. Funding Corp. v. Lewitt, 89 NY2d 546 [1997]; Greene v. Hellman, 51 NY2d 197 [1980]).

The evidence submitted likewise established that Leon did not have apparent authority to enter the commission agreement on behalf of Prudential. Apparent authority may exist in the absence of authority in fact, and, if established, may bind one to a third party with whom the purported agent had contracted even if, as in the present case, the third party is unable to carry the burden of proving that the agent actually had authority (see, Greene v. Hellman, 51 NY2d 197 [1980]). Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction (Std. Funding Corp. v. Lewitt, 89 NY2d 546 [1997]; Hallock v. State of New York, 64 NY2d 224, 231 [1984]; 150 Beach 120th St., Inc. v. Washington Brooklyn Ltd. Partnership, 39 AD3d 722 [2nd Dept., 2007]). In such circumstances, the third party's reasonable reliance upon the appearance of authority binds the principal (see, Std. Funding Corp. v. Lewitt, 89 NY2d 546 [1997]; Greene v. Hellman, 51 NY2d 197 [1980]). However, it is well settled

that a third party with whom the agent deals may rely on an appearance of authority only to the extent that such reliance is reasonable (Hallock v. State of New York, 64 NY2d 224 [1984]; Fitzgibbon v. Abatelli Real Estate, 214 AD2d 642 [2nd Dept., 1995]). Moreover, it has been held that "one who deals with an agent does so at his or her peril, and must make the necessary effort to discover the actual scope of authority" (Ford v. Unity Hosp., 32 NY2d 464, 472 [1973]; Fitzgibbon v. Abatelli Real Estate, 214 AD2d 642 [2nd Dept., 1995]).

Here, there was no evidence of any words or conduct on the part of Prudential, communicated to the plaintiffs, which gave rise to the appearance and reasonable belief that Leon possessed authority to enter the subject commission agreement (see, Std. Funding Corp. v. Lewitt, 89 NY2d 546 [1997]; Greene v. Hellman, 51 NY2d 197 [1980]; ER Holdings, LLC v. 122 W.P.R. Corp., 65 AD3d 1275 [2nd Dept., 2009]; 150 Beach 120th St., Inc. v. Washington Brooklyn Ltd. Partnership, 39 AD3d 722 [2nd Dept., 2007]; compare, Tyler v. Anglo-American Sav. & Loan Ass'n, 30 App Div 404 [2nd Dept., 1898]). Rather, the undisputed evidence indicates that Prudential never had any contact with the plaintiffs with respect to the commission agreement until approximately four years following the purported execution of such agreement, on the eve of closing of the Ocean Park property. The evidence further demonstrates that the plaintiffs' purported belief that Leon had authority to enter a commission agreement on behalf of Prudential was not reasonable (see, ER Holdings, LLC v. 122 W.P.R. Corp., 65 AD3d 1275 [2nd Dept., 2009]; Fitzgibbon v. Abatelli Real Estate, 214 AD2d 642 [2nd Dept., 1995]). Indeed, during his deposition, D'Amico testified that the commission agreement had come about after Leon had contacted to ask him if he knew any large commercial players. To his knowledge, Leon could not have contacted Panico on his own because he was only a part-time, beginning, associate broker with Prudential. He testified that after learning of the Ocean Park property closing he contacted Brennan to discuss his entitlement to commissions. He called Brennan and not Leon because Brennan was the manager. He admitted that he did not know whether Brennan was aware of the arrangement prior to the time of his phone call. Additionally, to the extent that the plaintiffs attempt to rely on the conduct of Leon in order to establish apparent authority, such reliance is misplaced. It is well settled that an "agent cannot by his own acts imbue himself with apparent authority" (Hallock v. State of New York,64 NY2d 224 at 231 [1984]; 150 Beach 120th St., Inc. v. Washington Brooklyn Ltd. Partnership, 39 AD3d 722 [2nd Dept., 2007]; Morgold, Inc. v. ACA Galleries, Inc., 283 AD2d 407 [2nd Dept., 2001]). This is especially true where, as here, the plaintiffs failed to conduct a reasonable inquiry into the scope of Leon's alleged authority (see, 150 Beach 120th St., Inc. v. Washington Brooklyn Ltd. Partnership, 39 AD3d 722 [2nd Dept., 2007]; Morgold, Inc. v. ACA Galleries, Inc., 283 AD2d 407 [2nd Dept., 2001]).

In opposition to Prudential's *prima facie* showing, the plaintiffs failed to raise a triable issue of fact as to whether Leon had actual or apparent authority to enter the purported oral commission agreement on behalf of Prudential. To the contrary, the evidence submitted in opposition, which

included the deposition testimony of Paul Brennan, the deposition testimony of Scott Bartlett, and the deposition testimony of Salvatore Panico, further supported the finding that Leon did not possess such authority. Accordingly, Prudential is entitled to summary judgment dismissing the plaintiffs' cause of action for breach of contract.

Prudential is also entitled to summary judgment dismissing the plaintiffs' cause of action for unjust enrichment. To prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered (see, Anesthesia Assoc. of Mount Kisco, LLP v. Northern Westchester Hosp. Ctr., 59 AD3d 473 [2nd Dept., 2009]; AHA Sales, Inc. v. Creative Bath Prods., Inc., 58 AD3d 6 [2nd Dept., 2008]; Old Republic Natl. Tit. Ins. Co. v. Luft, 52 AD3d 491 [2nd Dept., 2008]). Prudential made a *prima facie* showing that it was not unjustly enriched at the expense of the plaintiffs (see, Monex Fin. Servs., Ltd. v. Dynamic Currency Conversion, Inc., 76 AD3d 515 [2nd Dept., 2010]; Old Republic Natl. Tit. Ins. Co. v. Luft, 52 AD3d 491 [2nd Dept., 2008]; Citibank, N.A. v. Walker, 12 AD3d 480 [2nd Dept., 2004]; Smith v. Chase Manhattan Bank, USA, N.A., 293 AD2d 598 [2nd Dept., 2002]). Indeed, the plaintiffs contend that they are entitled to recovery solely based on the fact that they introduced Leon to Panico. However, it is undisputed that this introduction occurred more than two years prior to the time a purchaser was located for the Ocean Park property. It is, likewise, undisputed that the plaintiffs had no involvement in the procurement of the purchaser or in any other element of the transaction with respect to the Ocean Park property (see, Parker Realty Group, Inc. v. Petigny, 14 NY3d 864 [2010]; Greene v. Hellman, 51 NY2d 197 [1980]). In fact, D'Amico testified that he was unaware of the closing until the day prior. Moreover, Cord Meyer did not pay any commissions to Prudential and did not agree to pay any commissions as the seller of the Ocean Park property. Rather, it was the buyer, which was procured by Prudential, that was required to pay the commission. Under such facts, the plaintiffs do not have a sufficient basis to support a claim for unjust enrichment (see, Helmsley-Spear, Inc. v. 150 Broadway N.Y. Assocs., L.P., 251 AD2d 185 [1st Dept., 1998]; P.S. Burnham Inc. v. Irvine Realty Group, Inc., 2010 NY Slip Op 31642[U] [Sup. Ct., NY County 2010]; compare, Marciano v. Ran Oil Co. E., 63 AD3d 1118 [2nd Dept., 2009]).

For the aforementioned reasons, to the extent that the complaint can be construed to assert a cause of action to recover in quantum meruit, Prudential has also established its entitlement to summary judgment. To state a cause of action to recover in quantum meruit, a plaintiff must allege (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services allegedly rendered (see, AHA Sales, Inc. v. Creative Bath Prods., Inc., 58 AD3d 6 [2nd Dept., 2008]; Tesser v. Allboro Equip. Co., 302 AD2d 589 [2nd Dept., 2003]). Under the facts of this case, the plaintiffs do not have a sufficient basis to support such a claim (see, P.S. Burnham Inc. v. Irvine Realty Group, Inc., 2010 NY Slip Op 31642[U] [Sup. Ct., NY County 2010]).

In opposition to Prudential's *prima facie* showing of entitlement to summary judgment on the plaintiff's cause of action to recover for unjust enrichment and/or in *quantum meruit*, the plaintiff failed to submit sufficient evidence to raise a triable issue of fact.

Based on the foregoing, it is

ORDERED that the motion by defendant Prudential Douglas Elliman Real Estate for summary judgment dismissing the complaint insofar as asserted against it, is granted; the claims against Prudential, dismissed herein, are severed and the remaining claims shall continue.

Dated: December 6, 2010

William B. Rebolini
HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**