

**Webster v Lowe**

2011 NY Slip Op 30282(U)

January 21, 2011

Sup Ct, NY County

Docket Number: 11108953

Judge: Eileen A. Rakower

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. EILEEN A. RAKOWER  
*Justice*

PART 15

Index Number : 108953/2010  
**WEBSTER, MARK**  
vs.  
**LOW, ELIZABETH**  
SEQUENCE NUMBER : 001  
DISMISS ACTION

INDEX NO. 108953/10  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
1, 2	
3	
4, 5	

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.

**FILED**

JAN 25 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1/21/11

  
**HON. EILEEN A. RAKOWER**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X  
MARK WEBSTER and NICOLA ROBB WEBSTER,

Plaintiffs,

Index No. 11108953

- against -

Mot. Seq.: 001

ELIZABETH LOWE, THE CORCORAN GROUP,  
THE CORCORAN GROUP EASTSIDE, INC. and  
CHARLES ATTIAS,

DECISION/ORDER

**FILED**

Defendants.

JAN 25 2011

-----X  
HON. EILEEN A. RAKOWER, J.S.C.

NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiffs bring this action, alleging conversion and fraud as against defendants Elizabeth Lowe ("Lowe") and The Corcoran Group, The Corcoran Group Eastside, Inc., and Charles Attias (collectively, "Corcoran"). Plaintiffs, in May 2009, enlisted the services of Corcoran to lease residential premises owned by Lowe, located at 231 East 62<sup>nd</sup> Street in the County and State of New York. Plaintiffs executed a lease for those premises, paid Corcoran a commission, and paid one month's rent plus a security to Lowe. Prior to delivery of the fully executed lease with Lowe's signature, plaintiffs decided to rescind the lease. Plaintiffs seek return of the commission and rent and security paid. Corcoran now moves to dismiss plaintiff's complaint pursuant to CPLR 3211 (a) (1) and (a) (7). Plaintiffs oppose. Lowe does not submit papers.

CPLR §3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(1) a defense is founded upon documentary evidence;

(7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (see CPLR §3211[a][7]). On a motion to dismiss pursuant to CPLR 3211(a)(1) “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted) “When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

Corcoran, in support of its motion, provides the affidavit of Charles Attias, the summons and complaint, listing activity for the subject premises from the Corcoran website, an apartment rental application, a credit card transaction agreement signed by Nicola Robb Webster, a letter confirming Mark Webster’s employment and annual compensation from bcg partners, a copy of a lease agreement signed by plaintiffs and emailed to defendants, a fully executed copy of the lease agreement signed by both plaintiffs and Lowe and dated June 19, 2009, and a lease agreement executed for the same premises with a new tenant, lease term commencing August 29, 2009.

Corcoran argues that plaintiffs have failed to state a cause of action for conversion or fraud. Additionally, Corcoran provides documentary evidence it asserts will establish that it earned its commission.

Plaintiffs, in opposition, provide a draft copy of the lease Corcoran provided to them on June 10, 2009, the affidavit of Mark Webster, a copy of checks delivered to Corcoran and to Lowe, “REBNY’s rules,” a letter dated June 24, 2009 from plaintiffs to Dr. Lowe expressing that they “do not wish to enter into the Lease Agreement,” Dr. Lowe’s response to written interrogatories, and a license search for Mr. Attias. Plaintiffs urge that they rescinded the lease agreement prior to it being

delivered and effective. Nevertheless, Corcoran negotiated the check tendered for the commission, which plaintiffs claim, amounts to a conversion of said funds. Additionally, plaintiffs allege that Corcoran failed to disclose its agency relationship with Lowe, which they claim is fraud, and renders the lease agreement null and void.

While not stated in the complaint, plaintiffs allege, by sworn affidavit of Mark Webster, that they had an oral agreement with Corcoran, pursuant to which, Corcoran was not entitled to its commission until the lease was signed by Lowe, delivered to plaintiffs, and became effective. Plaintiffs provide Dr. Lowe's response to written interrogatories wherein she admits she did not deliver the dually signed lease to plaintiffs, but rather, to the "broker in charge." Finally, plaintiffs provide a NY License search for Mr. Attias which failed to disclose a valid real estate license.

By way of reply, Corcoran submits a printout from "eAccessNY Occupational Licensing Management System," which lists Mr. Attias' license type as "Associate Broker" and shows that his license is current until "05/08/2011." Corcoran also submits a copy of the stipulation between the parties to extend Corcoran's time to "answer, appear or otherwise move."

In order to state a cause of action for conversion, plaintiffs must allege that Corcoran "intentionally and without authority" exercised control over their "personal property," and that it interfered with plaintiff's right of possession. (*Colavito v. New York Donor Network, Inc.*, 8 NY3d 43[2006]).

Under common law, "A broker earns his commission when he brings his principal and a third party together and their minds meet on the essential terms of an agreement . . . [a]s long as the parties have agreed upon the essential terms the commission is earned, even if every term and condition which might appear later in the written contract has not been settled." (*Williamson, Picket, Gross, Inc. v. Hirschfeld*, 92 AD2d 289[1st Dept. 1983]). However, parties are free to add conditions to an agreement, including the requirement that a lease be consummated before a broker is deemed to have earned his commission. (*Levy v. Lacey*, 22 NY2d 271[1968]).

Mr. Webster, in his affidavit, attests that Corcoran agreed it would only collect a commission if the lease agreement was "dually signed, effectuated and closed." Although this is not specifically plead in the complaint, "in assessing a motion under

CPLR 3211(a)(7) . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, the criterion being not whether the proponent of the pleading has simply stated a cause of action, but whether he or she actually has one.” (*Amaro ex rel. Almazan v. Gani Realty Corp.*, 60 AD3d 491[1st Dept. 2009]).

The lease specifically provides that it becomes effective only when “Landlord delivers to Tenant a copy signed by all parties.” Dr. Lowe responds to interrogatories stating she signed the lease and delivered it to the broker. Plaintiff contends that a copy of the lease was never delivered to them. As such, the lease was never “effectuated,” a condition allegedly required by the parties’ oral agreement in order for Corcoran to receive its commission. Corcoran deposited and retained the commission check. Plaintiffs have stated a cause of action for conversion of the \$25,200 commission fee paid to Corcoran.

To establish a cause of action for fraud, plaintiffs must allege: a false representation of material fact, with intent to defraud, reasonable reliance on the misrepresentation and causation of damages to the plaintiff. (*Channel Master Corp. v. Aluminum Limited Sales, Inc.*[1958]). A plaintiff seeking to recover for fraud and misrepresentation is required to set forth specific and detailed factual allegations that the defendant personally participated in, or had knowledge of any alleged fraud.”(*Friedman v. Anderson*, 23 AD3d 163,165[1st Dept. 2005])(*see also* CPLR 3016[b]). “A mere recitation of the elements of fraud is insufficient to state a cause of action.”(Id.)

In their complaint, plaintiffs allege that:

. . . [d]efendants’ intentional failure to return the monies paid by the Plaintiffs before the Lease Agreement was signed or ever made effective, constitutes fraud.

Plaintiffs do not state what specific material misrepresentation induced them to enter into the lease agreement. Nor does the allegation that Corcoran “intentionally” failed to return monies to plaintiffs, satisfy the requisite pleading that Corcoran had the “intent to defraud” plaintiffs. Additionally, plaintiffs have failed to show that Corcoran’s failure to formally disclose their agency relationship with the landlord pursuant to Real Property Law §443 amounted to an intent to defraud, and plaintiff’s reliance on such failure to formally report caused them damages. Corcoran

[\* 6]

contends its relationship with the landlord was readily apparent since plaintiffs responded to Corcoran's listing of the property. Nevertheless, plaintiffs fail to allege specific misrepresentations, such as that "Corcoran was NOT an agent of the landlord." Indeed, no misrepresentations are specifically asserted. Plaintiffs conclusory allegations of fraud cannot stand.

Wherefore it is hereby

ORDERED that the motion to dismiss is granted to the extent that plaintiff's third cause of action dismissed as against defendants The Corcoran Group, The Corcoran Group Eastside, Inc., and Charles Attias; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

This constitutes the decision and order of the Court. All other relief requested is denied.

DATED: January 21, 2011



---

EILEEN A. RAKOWER, J.S.C.

**FILED**

JAN 25 2011

NEW YORK  
COUNTY CLERK'S OFFICE