

Bajohr v Berg

2013 NY Slip Op 31471(U)

May 1, 2013

Supreme Court, Queens County

Docket Number: 702449/2012

Judge: Augustus C. Agate

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE

IA PART 24

CONSOLATA A. BAJOHR, x

Index

Number 702449 2012

Plaintiff,

-against-

Motion Date: January 9, 2013

STUART BERG, ESQ. and STUART R. BERG,
P.C.,

Motion Seq. No. 1

Defendants. x

The following papers numbered 1 to 7 read on this motion by defendants for an order dismissing the complaint pursuant to CPLR 3211 (a)(1), (7) and in the alternative to stay the action pursuant to CPLR 2201.

	<u>Papers Numbered</u>
Notice of Motion- Affirmation-Exhibits.....	1-3
Opposing Affirmation-Exhibits.....	4-6
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Memorandum of Law.....	

Upon the foregoing papers this motion is determined as follows:

Background:

This action arises out of the ownership and sale of real property known as 279 19th Street, Brooklyn, New York. Phyllis Longo, the sole owner of said real property, transferred ownership to herself, Gerald Rusello, Emelia Rusello, and Consolata Bajohr, as joint tenants with right of survivorship, pursuant to a deed dated February 7, 2005. Emelia Rusello subsequently died, so that the property was then owned by Phyllis Longo, Gerald Rusello and Consolata Bajohr, as joint tenants with right of survivorship. Gerald Rusello, pursuant to a deed dated April 18, 2007, transferred his interest in the subject property to Josephine Longo, and the deed was recorded on May 24, 2007. Josephine Longo is the daughter of Phyllis Longo. Gerald Rusello is now deceased.

In June 2007 a dispute arose between the Longos and Bajohr. The Longos were represented by The Law Offices of Stuart Berg, P.C., Ms. Bajohr was represented by Ravi Batra, and thereafter was self-represented due to an unspecified conflict of interest between herself and Batra. The Longos and Bajohr ultimately entered into a written agreement, dated November 15, 2007, whereby it was agreed, among other things, that the Longos would purchase Bajohr interest in the real property for the sum of \$87,500.00, to be paid at the closing of title upon the sale of the premises; that the Longos would select a broker and list the property for sale, and Bajohr would sign all necessary documents required to list the property for sale; and that prior to any sale, the Longos could purchase Bajohr's interest for the sum of \$87,500.00. The property was thereafter listed for sale.

Ms. Bajohr, in a letter dated January 31, 2008, sought to amend the settlement agreement, and the Longos rejected her demands in a letter dated February 12, 2008. On October 9, 2008, Ms. Bajohr informed either the Longos, or Mr. Berg that she had again retained Ravi Batra. Mr. Batra, in a letter dated October 10, 2008, informed Mr. Berg, that he and his client considered the November 15, 2007 settlement agreement to have been breached, and indicated that they would seek a partition action so that Ms. Bajohr would receive one-third of the property's fair market value. Mr. Berg, in a letter dated October 23, 2008, rejected the claimed breach.

In April 2009, as there was a prospective purchaser for the real property, Mr. Berg and Ms. Batra entered into an agreement whereby Phyllis Longo would receive a full one-third share of the proceeds of the sale, and Josephine Longo and Consolata Bajohr would each receive the sum of \$87,500.00, with the balance of the funds to be held in escrow by Mr. Berg's firm, and that "said sum shall not be released until either court direction, judgment, or stipulation amongst Connie Bajohr and Josephine Longo...". The property was thereafter sold and Phyllis Longo, Josephine Longo and Consolata Bajohr executed a deed dated July 27, 2009, conveying the property to Tadeusz Kordowski. Said deed was acknowledged and was recorded on August 6, 2009. At the July 27, 2009 closing, Phyllis Longo received the sum of \$145,337.00, and Consolata Bajohr and Josephine Longo each received \$87,500.00, with the sum of \$57,837.00 to be held in escrow for Bajohr and the sum of \$57,837.00 to be held in escrow for Josephine Longo. The remainder of the proceeds of sale totaling \$63,008.00, were dispersed to HSBC Mortgage Corporation in the sum of \$35,442.00; to Insignia National Title Agency LLC, in the sum of \$7,606.00; and to the broker, Century 21, in the sum of \$19,960.00. The court notes that there appears to be a mathematical error as to the total amount of the closing costs which were deducted from the sale price of \$499,000.00, as these costs totaled \$63,000.00 and not \$62,988.00.

On January 10, 2010, Mr. Berg, on behalf of the Longos commenced a declaratory judgment action against Consolata Bajohr, entitled *Josephine Longo and Phyllis Longo v*

Consolata A. Bajohr, in Supreme Court, Nassau County. The first cause of actions seeks a declaration to the effect that the November 15, 2007 settlement agreement is valid and binding on Ms. Bajohr, and that under the terms of the agreement she is only entitled to the sum of \$87,500.00, which she received at the closing and is not entitled to the funds held in escrow for her. The second cause of action seeks to recover costs and expenses. Ms. Bajohr served an answer and interposed affirmative defenses and counterclaims. The first counterclaim seeks a declaration to the effect that the settlement agreement was breached by the Longos and that she is entitled to an undivided one-third interest in the proceeds of the sale of the subject real property. The second counterclaim seeks an accounting and the imposition of a constructive trust with respect to any rental payments received by the Longos prior to the sale of the premises, and the third counterclaim seeks damages with respect to any rental payments received by the Longos prior to the sale of the premises.

The court in Nassau County granted Ms. Bajohr's motion for a change of venue to Kings County, in an order dated July 22, 2010. Said action was thereafter transferred to Queens County, pursuant to an administrative transfer order dated August 16, 2011, as Ms. Bajohr is employed as a secretary to a Justice of the Supreme Court in Kings County. Plaintiffs, in the action entitled *Josephine Longo and Phyllis Longo v Consolata A. Bajohr*, Index No.20392/2011, filed a note of issue and statement of readiness on September 21, 2012, and a jury demand was filed on October 1, 2012. Said action is presently on the trial calendar.

Plaintiff's complaint:

On October 11, 2012, plaintiff Consolata A. Bajohr commenced the within action against Stuart R. Berg, Esq. and Stuart R. Berg, P.C., and asserts five causes of action for a violation of Judiciary Law §487, breach of fiduciary duty, conversion, fraud and an accounting. In each of her first four causes of action plaintiff seeks to recover compensatory and punitive damages.

Plaintiff further alleges in her verified complaint, among other things, that the transfer of Gerald Rusello's interest in the subject property to Josephine Longo was made under duress, and that plaintiff was not consulted as to said transfer, and therefore this transfer was invalid. Ms. Bajohr claims that she is entitled to at least an undivided one-third interest in the proceeds of the sale of the subject property, and also claims that she had a one-half interest in the real property with Phyllis Longo, and therefore would be entitled to an undivided one-half interest in the proceeds of sale with Phyllis Longo. Ms. Bajohr further alleges that costs and expenses incurred in the sale of the property, which were paid out at the closing, were unreasonable and unnecessary, and therefore claims that she is entitled to at least \$75,833.33 from the sums held in escrow.

Plaintiff also alleges to be the owner or the beneficial owner of the proceeds of sale held; that defendants in a letter addressed to Batra, dated September 8, 2009, admitted to holding in escrow for Bajohr the sum of \$57,837.00; and alleges that the Longos commenced the declaratory judgment action in order to convert Bajohr's money and satisfy a confession of judgment obtained by Stuart Berg against the Longos in 2007. Plaintiff alleges that defendants, without the permission or consent of Bajohr, invaded the escrow account and converted funds in said account for their own personal use and gain.

Discussion:

It is well established that on a motion to dismiss pursuant to CPLR 3211(a)(7), “the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference” (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The court’s “sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail” (*Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Leon v Martinez*, 84 NY2d at 87-88; *Tom Winter Assoc., Inc. v Sawyer*, 72 AD3d 803 [2010]; *Uzzle v Nunzie Court Homeowners Assn. Inc.*, 70 AD3d 928 [2010]; *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703 [2010]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (*see Morone v Morone*, 50 NY2d 481 [1980]; *Gertler v Goodgold*, 107 AD2d 481 [1985], *affirmed* 66 NY2d 946 [1985]).

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 NY2d 268, 275, *supra*). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (*see, id.*; *accord*, Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3211:25, at 39)” (*Gershon v Goldberg*, 30 AD3d 372 [2006]; *Hispanic Aids Forum v Estate of Bruno*, 16 AD3d 294, 295 [2005]; *Sesti v N. Bellmore Union Free Sch. Dist.*, 304 AD2d 551, 551-552 [2003]; *Mohan v Hollander*, 303 AD2d 473, 474 [2003]; *Doria v Masucci*, 230 AD2d 764, 765 [1996], *lv. to appeal denied* 89 NY2d 811 [1997]; *Rattenni v Cerreta*, 285 AD2d 636, 637 [2001]; *Kantrowitz & Goldhamer v Geller*, 265 AD2d 529 [1999]; *Mayer v Sanders*, 264 AD2d 827, 828 [1999]; *Sotomayor v Kaufman, Malchman, Kirby & Squire*, 252 AD2d 554 [1998]).

At the outset, plaintiff's claim that she is entitled to sums held in escrow which represent a one-half interest in the proceeds of sale, based upon a nonexistent action to set aside the transfer of Gerald Rusello's interest in the premises to Josephine Longo pursuant to a deed dated April 18, 2007, is flatly contradicted by the law and the record. A joint tenant with right of survivorship may unilaterally sever a joint tenancy in real property without the consent of any nonsevering joint tenants by the execution and delivery of a deed that conveys legal title to the severing joint tenant's interest to a third person. (Real Property Law §240-c[1]). Such severance does not terminate the right of survivorship of the non-severing joint tenants as to the severing tenant's interest, unless the deed effecting the severance is recorded, prior to the death of the severing tenant, in the county where the real property is located. (Real Property Law §240-c[2]).

Gerald Rusello, as a joint tenant, had an absolute right to convey his interest in the property during his lifetime, and was not required to obtain the consent of, or consult with, the other joint tenants prior to conveying his interest to Josephine Longo. Furthermore, as the deed severing Gerald Rusello's interest was recorded in the City Register, the non-severing joint tenants right of survivorship to Mr. Rusello's interest has been terminated. Mr. Rusello is now deceased, and as Ms. Bajohr does not claim to represent his Estate, no possible basis exists to set aside his conveyance of his interest in the premises. Following the conveyance of Mr. Rusello's interest, the property was owned by Josephine Longo as a tenant in common with the remaining joint tenants, Phyllis Longo and Consolata Bajohr.

In addition, the documentary evidence submitted establishes the deed of sale to the third party was executed by Consolata Bajohr, as well as Josephine Longo and Phyllis Longo. Ms. Bajohr thus acknowledged that Josephine Longo and Phyllis Longo each had an ownership interest in the real property. Moreover, Ms. Bajohr, in the declaratory judgment action, states in her verified answer and counterclaims, that the settlement agreement was breached, and claims at paragraph 56 "That the Defendant [Bajohr] was and is entitled to an undivided one-third interest in the proceeds of sale of the improved real property located at 279 19th Street, Brooklyn, New York (Block 879, Lot 63)" and calculated, at paragraph 57, an amount equal to "an undivided one-third interest in the proceeds of the sale", which she stated was "166,333.33". Ms. Bajohr states that she received \$87,500.00 at the sale, and claims to be entitled to an additional sum of \$75,833.33, less unspecified costs and expenses paid at the closing. She also states that Stuart Berg, Esq. is holding in escrow the sale proceeds, less the sum of \$166,333.33 paid to Phyllis Longo, the sum of \$87,500.00 paid to Josephine Longo and the sum of \$87,500.00 which she received. At paragraph 62, she alleges that the balance of the sale proceeds believed to be in Stuart Berg's escrow account are approximately \$157,666.67, plus any accrued interest, and states at paragraph 63 that she is the lawful owner of \$75,833.33 held in escrow.

Sworn statements made in the verified answer and counterclaims constitute informal judicial admissions and evidence of the fact admitted, by which Ms. Bajohr is bound as a matter of law (*see Liquidation of Union Indemnity Insurance Co v American Centennial Insurance Co*, 89 NY2d 94, 103, [1996]; *Performance Comercial Importadora E Exportadora Ltda v Sewa Intl. Fashions Pvt. Ltd.*, 79 AD3d 673, 673-674 [1st Dept 2010]; *Ocampo v Pagan*, 68 AD3d 1077, 1078-1079 [2d Dept 2009]; *Bogoni v Friedlander*, 197 AD2d 281, 291-292 [1994], *lv denied* 84 NY2d 803, [1994] *see also Mich. Nat'l Bank-Oakland*, 89 NY2d 94, 103 [1996]). Plaintiff Bajohr therefore is bound by her statement that she had a one-third interest in the subject real property at the time of sale, as set forth in the verified pleading in the declaratory judgment action, and her present claim to anything more than a one-third interest in the proceeds of sale must be rejected.

Plaintiff also alleges in this action that she is entitled to one-third of the proceeds of sale, and therefore Mr. Berg was required to hold in escrow a total sum of \$157,666.67, less expenses paid at the closing. The documentary evidence presented demonstrates that the closing costs totaled \$63,008.00, so that after payments were made to Phyllis Longo, Josephine Longo and Consolata Bajohr, the remaining amount to be held in escrow was no more than \$115,661.33. To the extent that Ms. Bajohr claims that she is entitled to \$75,833.33, which is more than one-half of the amount held in escrow, this unfounded claim is contradicted by the record, and therefore will not be accorded any favorable inference.

Section 487 of the Judiciary Law broadly provides for a private civil cause of action for treble damages against lawyers who deceive any party or the court. Relief under this statute, however, is reserved for a chronic, extreme pattern of legal delinquency (*Gonzalez v Gordon*, 233 AD2d 191 [1st Dept 1996], *appeal denied*, 90 NY2d 802 [1997]; *Wiggin v Gordon*, 115 Misc. 2d 1071, 1072 [Queens Co. Civ. Ct. Queens Co. 1982]) or for misconduct that is “chronic” (*see Liebert v Gelbwaks*, 234 AD2d 164 [1st Dept 1996]; *Gonzalez v Gordon*, 233 AD2d 191, *supra*; *Bridges v 725 Riverside Drive, Inc.*, 119 AD2d 789, 789 [2d Dept 1986]). Furthermore, to recover under Section 487, a plaintiff must plead and prove both actual deceit by the attorney (*Bernstein v Oppenheim*, 160 AD2d 428, 432 [1st Dept 1990], and causation, that is, that the deceit or collusion actually caused plaintiff's damages (*see Manna v Ades*, 237 AD2d 264 [2d Dept 1997]; *DiPrima v DiPrima*, 111 AD2d 901 [2d Dept 1984]; *Brown v Samalin & Bock. P.C.*, 155 AD2d 407 [2d Dept 1989]).

Thus, even egregious misconduct will not rise to the level of a violation of Section 487 if there is no pattern of intentional deceit or wrongdoing. For instance, in *Liebert v Gelbwaks*, (*supra*), even though the lawyer violated his fiduciary duty to the client and misdirected escrow monies, there was insufficient proof to establish a violation. Here, plaintiff's Judiciary Law § 487 claim fails to allege the requisite pattern of wrongdoing or deceit necessary to sustain that claim (*see Pelegrina v File*, 291 AD2d 60, 64 [1st Dept

2002]; *Gonzalez v Gordon, supra*; *Liebert v Gelbwaks, supra*). Accordingly, that branch of the defendants' motion which seeks to dismiss the first cause of action for a violation of Judiciary Law §487, is granted.

An escrow agent owes the parties to the transaction a fiduciary duty (*Talansky v Schulman*, 2 AD3d 355, 359 [1st Dept 2003]), and therefore the agent, as a fiduciary, has "a strict obligation to protect the rights of [the] parties" for whom he or she acts as escrowee (*Grinblat v Taubenblat*, 107 AD2d 735, 736 [2d Dept 1985]). Moreover, an escrow agent has a duty not to deliver the monies in escrow except upon strict compliance with the conditions imposed by the controlling agreement (*Farago v Burke*, 262 NY 229, 233 [1933]; *Greenapple v Capital One, N.A.*, 92 AD3d 548, 549-550 (1st Dept 2012)). Here, as the complaint alleges that the Berg defendants failed to strictly comply with the conditions imposed by the escrow agreement, which mandated release of the monies only upon a judicial determination or a stipulation executed by Josephine Longo and Consolata Bajohr, and further alleges that some or all of the sums held in escrow were used to satisfy the Longo's confession of judgment, the complaint states a cause of action for breach of fiduciary duty. It is noted that defendants' have not submitted any documentary evidence with respect to the sums maintained in the escrow account. Therefore, that branch of the defendants' motion which seeks to dismiss the second cause of action for breach of fiduciary duty is denied.

Conversion is the unauthorized assumption and exercise of the right of ownership over another's property to the exclusion of the owner's rights (*Thyroff v Nationwide Mut. Ins. Co.*, 8 NY3d 283, 288-289 [2007]). "The rule is clear that, to establish a cause of action in conversion, the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question ... to the exclusion of the plaintiff's rights ... Tangible personal property or *specific money* must be involved" (*Batsidis v Batsidis*, 9 AD3d 342, 343 [2d Dept 2004] quoting *Independence Discount Corp. v Bressner*, 47 AD2d 756, 757 [2d Dept 1975] [citations omitted; emphasis in original]; see *Fiorenti v Central Emergency Physicians*, 305 AD2d 453, 454 [2d Dept 2003]).

Plaintiff in her third cause of action for conversion of funds held in escrow, fails to state the amount allegedly converted by the defendants. In addition, plaintiff only alleges a "beneficial" interest in the escrowed funds, and does not allege legal ownership or an immediate superior right to possession, as her claim to one-half of the escrowed funds is the subject of declaratory judgment action.

The court notes that plaintiff's claim to a beneficial interest in the entire amount that was to be held in escrow, is based upon the claim that the conveyance by Mr. Rusello to Josephine Longo was invalid. This claim, however, is based upon a bare and unsustainable

legal conclusion, and therefore will not be regarded as a true and will not be accorded any deference. Plaintiff in her complaint acknowledges that defendants are holding in escrow the sum of \$57,837.00. As this sum represents one-half of the proceeds after all distributions were made at the closing, and also represents the amount to be held in escrow for the plaintiff pending a judicial resolution of the seller's claims, or a stipulation by the sellers as to the distribution of the funds, plaintiff has failed to state a claim for conversion. Therefore, that branch of defendants' motion which seeks to dismiss the third cause of action for conversion, is granted.

In order to state a claim for fraud, or fraudulent inducement, plaintiff must allege with particularity that defendant made a material misrepresentation of an existing fact, which defendant knew to be false, with the intent and for the purpose of inducing the plaintiff's reliance thereon, that plaintiff justifiably relied upon such misrepresentations and suffered damages as a result (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 488 [2007]; *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421,[1996]) CPLR § 3016 [b]).

Here, plaintiff alleges that on July 27, 2009 defendants represented that they would maintain the undisbursed proceeds of the sale of the subject real property in escrow, until such time as there was a judicial disposition of the funds, or in the alternative, the Longos and Bajohr stipulated as to the disbursement of the funds. Plaintiff alleges that based upon the defendants representations she agreed to the defendants acting as the escrow agent; that she relied upon these representations; that said representations were "false and/or incomplete at the time they were made"; that defendants did not intend to maintain and safeguard the entire amount held in escrow, and intended to take or release some or all of the funds as a legal fee rendered to Phyllis Longo or Josephine Longo; that the defendants made false representations and omitted material facts so that plaintiff would agree to deposit the funds in escrow; and that plaintiff was damaged by the defendants' fraudulent conduct.

Plaintiff, however, also acknowledges in her complaint that defendants are holding in escrow the sum of \$57,837.00. As this sum represents one-half of the proceeds of sale after all distributions were made at the closing, and also represents the amount to be held in escrow for the plaintiff pending a judicial resolution of the seller's claims, or a stipulation by the sellers as to the distribution of the funds, plaintiff's allegations of are insufficient to state a claim for fraud. Therefore, that branch of the motion which seeks to dismiss the fourth cause of action for fraud, is granted.

The basis of an equitable right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest (*see Seneca v Novaro*, 80 AD2d 909 [2d Dept 1981] *Palazzo v Palazzo*, 121 AD2d 261, 265 [1st Dept 1986]; *Darlagiannis v Darlagiannis*, 48 AD2d 875 [2d Dept 1975]). Plaintiff's fifth cause

of action sufficiently states an action for an accounting based upon the fiduciary relationship between the defendants as the escrow agent and the plaintiff, and the alleged breach of the defendants' fiduciary duty. Therefore, that branch of defendants' motion which seeks to dismiss the fifth cause of action, is denied.

In view of the foregoing, defendants' motion to dismiss the complaint is granted to the extent that the first, third, and fourth causes of action are dismissed. Those branches of the motion which seek to dismiss the second and fifth cause of action are denied. Defendants' request for a stay of this action is denied.

Dated: May 1, 2013

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AUGUSTUS C. AGATE, J.S.C.