

<b>Loggia v Somerset Inv. Corp.</b>
2014 NY Slip Op 32330(U)
August 27, 2014
Supreme Court, Suffolk County
Docket Number: 26429-2010
Judge: Emily Pines
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SHORT FORM ORDER

INDEX NO.: 26429-2010

**SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY**

*Present:***HON. EMILY PINES**

J. S. C.

Original Motion Date: 06-10-2014  
 Motion Submit Date: 07-15-2014  
 Motion Sequence No.: 005 MD  
 006 MD  
 Final  
 Non Final

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**CHARLES LOGGIA,**

**Plaintiff,****- against -**

**SOMERSET INVESTORS CORP., GREGG  
 MARCUS and RANDI MARCUS,**

**Defendants.**

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In this action, the plaintiff, Charles Loggia (“Plaintiff”), claims that defendant Somerset Investors Corp. (“Somerset”) failed to pay him all of the commissions he earned while employed as a loan officer by Somerset from 2004 until 2010, when Somerset went out of business. Defendant Gregg Marcus was Somerset’s Managing Director. Plaintiff alleges that Defendant Randi Marcus, Gregg Marcus’ wife, was a shareholder and Chief Executive Officer of Somerset.

On February 13, 2004, Plaintiff and Somerset entered into an agreement entitled, “LOAN

OFFICER COMMISSION STRUCTURE” (“2004 Agreement”), which provided, among other things, that Plaintiff’s commissions were based on total revenue for the month. Revenue was defined as “total of front and back ends.” Somerset paid Plaintiff commissions on a monthly basis and provided Plaintiff with a written breakdown of the calculation of the commission on each loan.

On February 5, 2008, Plaintiff and Somerset entered into a “Loan Officer Employment Agreement” (“2008 Agreement”). The 2008 Agreement states, among other things, that it “sets forth the entire understanding and agreement of the parties hereto and fully supersedes any and all prior or contemporaneous agreements or understandings between the parties with respect to the subject matter hereof.” With regard to commissions, the 2008 Agreement provides, in relevant part:

Subject to the deductions in connection with calculating commission, except as otherwise noted below, Employee will be paid 40% of the front end fees and 35% of the Back Net Revenue on all Somerset leads that Employee supervises, and originates through closing.

Subject to the deductions in connection with calculating commission, Employee shall receive 50% of the Net Revenue for loans that Employee originates without a lead from Somerset, if Employee supervises such loan through its closing.

\* \* \*

Employer and Employee hereby acknowledge and agree that the term Net Revenue, as used in this Agreement, equals gross commission actually received by Employer less Employer’s costs as applicable for lead generation (\$500.00 per lead), processing fees (equivalent to 0.25 basis points per loan), and a reserve for repurchases/indemnification.

The Amended Complaint alleges, among other things, that Defendants agreed to pay Plaintiff commissions “based upon the total revenue of the loans defined as forty percent of the front end fees paid to Somerset, plus thirty-five percent of the back end fees paid to Somerset on all of [Plaintiff’s]

loans that were generated through Somerset leads and fifty percent of the total front and back end revenue on loans that plaintiff originated himself' (Amended Complaint at ¶ 32), and that the foregoing percentages increased over time. Plaintiff claims that the Defendants intentionally provided him with inaccurate and false figures regarding total revenue received by Somerset when it sold loans generated by Plaintiff, thereby failing to pay him the full amount of commissions he was owed. Plaintiff asserts three causes of actions, i.e. violation of Labor Law § 191, breach of contract, and fraud.

The Defendants now move for summary judgment dismissing the Amended Complaint as asserted against them. In support of their motion the Defendants submit, among other things, an affidavit from Gregg Marcus. Mr. Marcus states, among other things, that as the Managing Director of Somerset, he was responsible for high-level management of Somerset's operations. Marcus states that the 2004 Agreement specified the commission structure that Plaintiff was to be paid. Marcus confirms that the 2008 Agreement superseded the 2004 Agreement as to Plaintiff's commission structure. Marcus states that Plaintiff complained in 2009 about not being paid a full commission for one of the loans he originated. Marcus looked into the matter and confirmed that Plaintiff's commission for that particular loan had been inadvertently issued incorrectly. Plaintiff was issued additional compensation to correct the error and he appeared satisfied. Mr. Marcus' affidavit does not otherwise address the calculation of Plaintiff's commissions during his employment with Somerset and he fails to rebut Plaintiff's primary allegation that the Defendants intentionally provided him with inaccurate and false figures regarding total revenue received by Somerset when it sold loans generated by Plaintiff, thereby failing to pay him the full amount of commissions he was owed.

In support of their motion for summary judgment the Defendants argue, among other things, that the Plaintiff has failed to present any evidence to support any aspect of his three causes of action. Specifically, Defendants argue that Plaintiff fails to offer any documents or testimony demonstrating that Somerset breached the 2004 Agreement or the 2008 Agreement or that they violated Labor Law § 191(1)(c) by failing to pay Plaintiff all commissions he was owed. Defendants argue that Plaintiff's fraud cause of action is duplicative of his breach of contract claim. The individual defendants argue that they should be granted summary judgment because (1) they were not parties to either the 2004 Agreement or 2008 Agreement, (2) Somerset was the principal pursuant to Labor Law § 191(1)(c), and (3) no allegations of fraud are made with respect to defendant Randi Marcus.

Plaintiff opposes Defendants' motion and cross-moves for partial summary judgment on the issue of liability on the breach of contract cause of action and the cause of action for violation of Labor Law § 191(1)(c). Plaintiff submits his own affidavit in which he states, among other things, that shortly after he signed the 2004 Agreement he and Mr. Marcus agreed that the sliding scale set forth therein would no longer apply, and Mr. Marcus agreed to pay Plaintiff a 35% commission of the total revenue to Somerset on the front and back ends of a loan less a lead fee of \$500.00 and a quarter point mortgage tax on loans that Plaintiff sold through a Somerset lead. Plaintiff points to Loan Officer Commissions spreadsheets produced by Somerset for the period April 1, 2005 through December 31, 2006, as confirming the foregoing. Plaintiff explains that:

Mr. Marcus agreed to pay me my agreed upon percentage of the total revenue on the front end plus the total revenue it received when it sold the mortgage to an investor (usually a bank). The revenue [Somerset] derived when it sold the mortgage on the secondary market is known in the mortgage industry as the back end revenue.

According to Plaintiff, the back end revenue to Somerset was listed on the Loan Officer Commissions spreadsheets as "TradeFee." He states that Somerset loan officers did not have access to the actual documents to verify the accuracy of Trade Fees as reported to them by Somerset. Plaintiff states that accounting documents provided by Somerset during discovery indicate that Somerset misrepresented the amount of Trade Fees it received on loans by reducing the amounts listed on the Loan Officer Commissions spreadsheets. Thus, Plaintiff alleges that Somerset skimmed off the back end from 2005-2010 on just about all of the loans listed on Plaintiff's Loan Officer Commissions spreadsheets and, by doing so, underpaid him the commissions owed on those loans. Plaintiff states that in 2009 he inadvertently came across a document that a Somerset employee left behind on a copy machine that seemed to indicate the Plaintiff had been underpaid his commission on that loan. He returned the document but when he inquired about its contents, Mr. Marcus allegedly fired Plaintiff. A few days later, Mr. Marcus admitted that Plaintiff had been underpaid on that loan, paid him the correct amount, and re-hired him at an increased commission percentage of 50%. Accordingly, Plaintiff argues that Defendants motion for summary judgment should be denied and his cross-motion for partial summary judgment on the issue of liability on the breach of contract cause of action and the cause of action for violation of Labor Law § 191(1)(c) should be granted.

In opposition to Plaintiff's cross-motion and in reply, Gregg Marcus submits an affidavit in which he states, among other things, that the accounting sheets produced by Somerset do not indicate the true back end revenue because back end revenue did not include the release of servicing rights, which could be retained and not sold with a particular loan. Mr. Marcus disputes Plaintiff's method

of calculating his commissions and offers a different method. He states that Plaintiff was paid the full amount of commissions owed to him pursuant to the applicable commission structures and he denies that Somerset skimmed off the top of the back end revenue or misrepresented the amount of back end revenue to Plaintiff.

#### *Discussion*

A party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 85 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). A movant cannot satisfy its initial burden by pointing to gaps in the plaintiff's case, but must affirmatively demonstrate the merit of its claim or defense (*River Ridge Learning Ctr., LLC v ADL Data Sys., Inc.*, 98 AD3d 724 [2d Dept 2012]). The key for the court on a motion for summary judgment is issue finding, not issue determination, and the court should not determine issues of credibility (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *Cerniglia v. Loza Rest. Corp.*, 98 AD3d 933, 935 [2d Dept. 2012]). Since summary judgment is the procedural equivalent of a trial, the motion should be denied if there is any doubt as to the existence of a triable issue or when a material issue of fact is arguable (*Salino v IPT Trucking, Inc.*, 203 AD2d 352 [2d Dept 1994]).

Here, upon review of the submissions in support of both the motion and cross-motion for summary judgment, including affidavits and deposition testimony of the parties, the Court finds that neither party has made a prima facie showing of entitlement to judgment as a matter of law as the submissions fail to eliminate the existence of all triable issues of fact. The contradictory positions of the parties as to terms of the contracts governing commission payments to Plaintiff, the meaning

of “back end revenue,” and the method of calculating Plaintiff’s commissions, are set forth in the affidavits and deposition testimony of the parties. Moreover, the individual defendants have not demonstrated, as a matter of law, that they were not “employers” within the meaning of Labor Law § 190(3)(*see Lauria v Heffernan*, 607 FSupp2d 403 [SDNY 2009])[factual issues as to whether individual defendant was employer under Labor Law § 190(3)]. Accordingly, the motion and cross-motion are denied to the extent that they seek summary judgment on the first cause of action (violation of Labor Law § 191), and on the second cause of action (breach of contract) as asserted against Somerset. Those claims will proceed to trial. However, the Plaintiff has failed to set forth any factual or legal basis for the imposition of liability against the individual defendants for breach of contract. The contracts at issue were clearly only between Plaintiff and Somerset. Neither Gregg Marcus nor Randi Marcus entered into any contract with Plaintiff in their individual capacities. Accordingly, the second cause of action is dismissed insofar as asserted against Gregg Marcus and Randi Marcus.

Defendants’ motion is granted to the extent that it seeks dismissal of the third cause of action for fraud. A breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated, and the legal duty must spring from circumstances extraneous to, and not constituting elements of the contract, although it may be connected with and dependent upon the contract (*Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382 [1982]). “[A] misrepresentation of material fact, which is collateral to the contract and serves as an inducement for the contract, is sufficient to sustain a cause of action alleging fraud” (*Yenrab, Inc. v. 794 Linden Realty, LLC*, 68 AD3d 755, 758 [2d Dept. 2009] quoting *WIT Holding Corp. v. Klein*, 282 AD2d 527, 528 [2d Dept. 2001]). Where, as here, a fraud claim is based on an alleged breach of a

contractual duties, and the allegations with respect to the purported fraud do not concern representations which are collateral or extraneous to the terms of the parties' agreement, a cause of action sounding in fraud does not lie (*Fromowitz v W. Park Assocs., Inc.*, 106 AD3d 950, 951 [2d Dept 2013]). Accordingly, the third cause of action for fraud is dismissed.

The parties' remaining contentions are without merit.

This constitutes the **DECISION** and **ORDER** of the Court.

**Dated: August 27, 2014**  
Riverhead, New York

  
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EMILY PINES  
J. S. C.