

**James A Netter Real Estate, Inc. v holland**

2014 NY Slip Op 32598(U)

October 2, 2014

Supreme Court, Suffolk County

Docket Number: 19811/2012

Judge: Ralph T. Gazzillo

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

Supreme Court - State of New York  
IAS PART 6 - SUFFOLK COUNTY

**\*\*Amended\*\***

Mot. Seq.: 003 MD  
004 MD

Hon. RALPH T. GAZZILLO  
A.J.S.C.

<hr/>		X
James A. Netter Real Estate, Inc.,	:	
	:	
Plaintiff(s),	:	
	:	
- against -	:	
	:	
Carmela Maria Holland, Anthony De' Angelo a/k/a	:	
Anthony D' Angelo, Elaine D' Angelo a/k/a	:	
Elaine De' Angelo, Robert Romeo, Romaz	:	
Properties, Ltd.,	:	
	:	
Defendant(s),	:	
<hr/>		X

Carmela Maria Holland,		
Third Party Plaintiff(s),		
-against-		
New York Community Bank,		
Third Party Defendant(s)		
<hr/>		X

Upon the following papers numbered 1 to 29 read on this motion pursuant to CPLR §3211(a)(1) and (a)7); Notice of Motion and supporting papers 1 -16 ; Answering Affidavits and supporting papers numbered 17-19 and 20-22; Replying Affidavits and supporting papers numbered 23-24; Notice of Motion to Strike and supporting papers numbered 25-29; it is,

**ORDERED** that the motion (mot seq 003) by the third party defendant for an order pursuant to CPLR 3211 dismissing the third party complaint, is denied, and it is further

**ORDERED** that plaintiff's motion to strike (mot seq 004) is denied without prejudice since it was brought prior to the pre-motion conference required pursuant this Court's published Part 6 Rules, and it is further

**ORDERED** that the portion of Holland's reply which requests the disqualification of NYCB's counsel is denied without prejudice to renew at the conclusion of discovery; and it is further

**ORDERED** that counsel for third party plaintiff shall serve a copy of this Order with Notice of Entry upon counsel for all other parties, pursuant to CPLR §§2103(b)(1), (2) or (3), within thirty (30) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court

This is an action commenced to recover a real estate sales commission in the amount of \$96,000.00 that the plaintiff alleges was due and owing on residential real estate sale. Specifically, plaintiff claims that defendant Carmela Marie Holland (Holland) owes it the commission pursuant to a Listing Agreement dated July 1, 2011 for a single family residence that Holland sought to sell located at 20 Dover Court, Bayshore, NY. At the time the Listing Agreement was executed, the subject residence was the subject of a foreclosure action initiated by third party defendant New York Community Bank (NYCB). According to the movant, Holland sought a "short sale" on the property and therefore engaged the services of plaintiff, James A. Netter Real Estate, Inc. On or about December 2011, Holland entered into a contract of sale for the subject premises with Anthony D'Angelo and Elaine D'Angelo. The agreed upon purchase price for the house was \$1,600,000.00 with a down payment of \$100,000.00 and the balance due at closing. The contract provided that upon the sale, Holland was to pay Netter a brokerage commission of six percent (6%) of the sale price. The contract was conditioned upon the plaintiff obtaining the agreement of NYCB to provide a satisfaction of the outstanding mortgage upon receipt of the net proceeds of the sale. Over a period of several months, through counsel, Holland and NYCB exchanged correspondence relating to the proposed sale of the premises and the satisfaction of the mortgage. In or around July 2012, title to the premises was transferred to defendants Anthony D'Angelo and Elaine D'Angelo and NYCB accepted \$1,502,220.00 in full satisfaction of the mortgage and the foreclosure action was discontinued. Despite the fact that correspondence between Holland's attorney and NYCB contemplated payment of at least a portion of the commission due to plaintiff pursuant to the Listing Agreement, no monies were ever paid to Netter. This action (commenced by Netter against Holland) and third party action (commenced by Holland against NYCB) ensued.

In support of its motion, third party defendant NYCB asserts that the documentary evidence entitles it to dismissal of the third party complaint against it. Specifically, NYCB indicates that it was not a party to the Listing Agreement. Moreover, NYCB argues that it never agreed to pay or ensure payment of the sales commission in any correspondence or otherwise. In support of its application, NYCB submits copies of the pleadings together with copies of the Listing Agreement, Contract of Sale for the real property

and correspondence between the parties. Finally, NYCB argues that since it was under no obligation to accept less than the full amount due on the mortgage as whatever Holland agreed to with Netter was her sole responsibility.

In response, Holland argues that NYCB's attorneys should be disqualified from representing NYCB since the matter "cannot proceed without Lynch & Associates providing witnesses to testify at trial". With regard to the merits of the motion, Holland argues that NYCB's original agreement to settle the foreclosure action for \$1,450,000.00, (which is memorialized in correspondence and which Holland relied upon in negotiating a sale price which included payment of necessary expenses) was retracted without a legitimate basis at the last minute, thereby forcing her to close but unable to cover her expenses. Accordingly, Holland argues that, but for NYCB's breach of its original agreement to accept \$1,450,000.00 instead of the \$1,502,220.00 that she had to pay, she would not have breached her Listing Agreement with the plaintiff.

Counsel for the plaintiff also opposes NYCB's motion indicating an intention to amend the complaint to include NYCB as a defendant in the main action and further asserts that NYCB was actively engaged in negotiating the short sale with Holland and was well aware that the contract price paid by the purchasers was designed to cover the expenses of the transaction including the commission due pursuant to the Listing Agreement between the plaintiff and the defendant Holland and that plaintiff was instrumental in those negotiations. Therefore, plaintiff argues that NYCB's assertion that it had no privity of contract, interaction or involvement with the plaintiff is "disingenuous". Rather, plaintiff argues that NYCB was an active participant in the sale of the premises "who with full knowledge that the plaintiff was to be paid its commission from such sale, directed the Plaintiff in regards to negotiation of the sales price." Plaintiff claims that NYCB's actions in demanding additional funds to settle the foreclosure action just prior to the closing was in "bad faith".

Initially, the Court will address plaintiff's claim that NYCB's counsel should be disqualified from representing NYCB pursuant to the "advocate witness rule". The law with regard to the advocate witness rule in this State was recently reiterated by the Court of Appeals in *People v. Townsley*, 20 NY3d 294, where the Court said as follows:

"The word "conflict" does not fully describe what is sometimes called the 'advocate-witness' problem. A lawyer who is both an advocate and witness does not necessarily have conflicting interests, though that possibility exists. But whether or not there is a conflict, such a mixture of roles may confuse the fact finder and impair the fairness of the trial, and a lawyer is ethically required, subject to certain exceptions, to withdraw from a representation when he or she (in the words of the ethical rule as it existed when defendant was tried) 'learns or it is obvious that the lawyer ought to be called as a witness on behalf of the client' (former Code of Professional Responsibility DR 5-102 [a] [22 NYCRR 1200.21 (a)]; cf. Rules of Professional

Conduct [22 NYCRR 1200.0] rule 3.7 [a] [current, similar provision]). One of the exceptions—where withdrawal “would work a substantial hardship on the client because of the distinctive value of the lawyer as counsel in the particular case” (Code of Professional Responsibility DR 5-101 [b] [4] [22 NYCRR 1200.20 (b) (4)];” 20 NY3d at 299.

Here, it is clear that NYCB’s counsel was intimately involved with his client’s efforts to settle the foreclosure action and, indeed, their correspondence and interaction with the parties would likely make them witnesses at a trial on the action should one occur. That being the case, the Court is disinclined to totally remove counsel from the case at this juncture as discovery has not been concluded. Accordingly, Holland’s request for disqualification is denied without prejudice to renew at the conclusion of discovery.

With regard to the portion of the defendant’s motion that seeks to dismiss the third party complaint based upon documentary evidence, Assured *Guar. Mun. Corp. v. DB Structured Products, Inc.*, 33 Misc.3d 720 outlined the standard of review for such motions as follows:

“On a motion to dismiss, the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Morone v. Morone*, 50 N.Y.2d 481, 484, 429 N.Y.S.2d 592, 413 N.E.2d 1154 (1980); *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634, 389 N.Y.S.2d 314, 357 N.E.2d 970 (1976); *Skillgames, L.L.C. v. Brody*, 1 A.D.3d 247, 250, 767 N.Y.S.2d 418 (1st Dept. 2003). CPLR 3026 mandates that “[p]leadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced.” “[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” *Rovello*, 40 N.Y.2d at 636, 389 N.Y.S.2d 314, 357 N.E.2d 970. In assessing the motion, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint. *Rovello*, 40 N.Y.2d at 635–36, 389 N.Y.S.2d 314, 357 N.E.2d 970. When the moving party submits affidavits or other documentary evidence in support of its motion, dismissal under CPLR 3211 is warranted “only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” *Leon v. Martinez*, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 638 N.E.2d 511 (1994). The standard of review in a third-party defendant’s motion to dismiss is even more liberal: “the mere possibility of a claim over sustains the sufficiency of the third-party pleading.” *Braun v. City of New York*, 17 A.D.2d 264, 268, 234 N.Y.S.2d 935 (1st Dept. 1962). The First Department explained the policy behind this lower scrutiny in *Humble Oil & Refining Co. v. M.W. Kellogg Co.*:

We should not expect the third-party complaint to spell out a cause of action against the third-party defendant with the same precision required of the complaint in the main action. To compel it to do so would be to compel it to make out the plaintiff’s case in advance. It is defending that case and not prosecuting it. To compel it to plead

with precision could well lay a foundation for a motion by the plaintiff for summary judgment or for judgment on the pleadings against it. Its complaint is really a defensive measure for its protection only in the event that it should, upon trial, be held liable to the plaintiff solely because of another's primary negligence." ***Assured Guar. Mun. Corp. v. DB Structured Products, Inc.***, 33 Misc.3d 720 at 733-734.

In evaluating the parties' affidavits and the documentary evidence against the aforementioned standards for third party complaints, it is clear that the movant has failed to establish that not even the "mere possibility" of a claim exists in the third party complaint. Specifically, claims may exist in relation to plaintiff's alleged good faith efforts to negotiate a short sale and NYCB's alleged bad faith in demanding more funds just prior to the closing. In addition, the correspondence between the parties could establish a claim that there was a verbal "agreement" between the parties to pay the commission due to the plaintiff under the Listing Agreement from the proceeds of the short sale of the premises.

Accordingly, NYCB's motion must be denied.

Dated: \_\_\_\_\_

Riverhead, N.Y.

*10/2/14*

\_\_\_\_\_  
 Hon. Ralph T. Gazzillo  
 A.J.S.C.

Non-Final Disposition

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