

**Gall v Colon-Sylvain**

2014 NY Slip Op 33923(U)

June 9, 2014

Supreme Court, Nassau County

Docket Number: 006536/07

Judge: Stephen A. Bucaria

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**ORIGINAL**

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

TRIAL/IAS, PART 1  
NASSAU COUNTY

\_\_\_\_\_  
ELEMER GALL, a/k/a CSABA GALL,

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Plaintiff,

-against-

FRANCES COLON-SYLVAIN WELLS  
FARGO, N.A., JOSEPH GRANT, EMPIRE  
LAND SERVICES CORP., ANTHONY  
MICHAEL CAMISA, DAVID M. FISH and  
JJRG ENTERPRISES, INC.,

Defendants.

\_\_\_\_\_  
WELLS FARGO, N.A.,

Counterclaim-Plaintiff,

-against-

ELEMER GALL, FRANCES COLON-SYLVAIN,  
JOSEPH GRANT and JJRG ENTERPRISES, INC.,

Counterclaim-Defendants.

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This action, sounding in breach of fiduciary duty and attorney malpractice, arises from a residential real estate transaction. By order dated, July 29, 2011, the court granted summary judgment to the title company, defendant Empire Land Services Corp, on the

ground that it owed no duty to plaintiff Gall, who is a 50 % shareholder of the seller. By order dated May 21, 2012, the court dismissed the action as against defendant Wells Fargo, the lender, for failure to prosecute, based upon Wells Fargo's argument that it was not vicariously liable for the actions of its settlement agent, defendant Anthony Michael Camisa. Defendant Frances Colon-Sylvain, the purchaser, received a discharge in bankruptcy on April 16, 2014. Defendant Joseph Grant, the other 50 % shareholder of the seller, filed a petition in bankruptcy on August 14, 2013, and the action as against Grant has been stayed by virtue of the bankruptcy petition. Having determined that trial as to the remaining defendants, Anthony Camisa and David Fish, had no immediate adverse economic consequence on Grant's bankruptcy estate, (*Queenie, Ltd. v Nygard Int'l*, 321 F.3d 282 [2d Cir 2003]), the court proceeded to trial as to defendants Camisa and Fish on April 15, 16, 21, 22, 23, and 24, 2014. The court issues its findings of fact and conclusions of law as to those defendants.

Around February 2005, plaintiff Elemer Gall and defendant Grant formed a joint venture for the purpose of acquiring and renovating a parcel of residential property located at 75 Oakdale Boulevard in Farmingdale. Gall contributed approximately \$200,000 as the down payment, and the balance of the purchase price, approximately \$190,000, was obtained through a purchase money mortgage. Although Grant contributed no cash to the deal, he was the sole party responsible for the mortgage debt and undertook to perform the renovation work on the property. While title was originally taken in Grant's name, he subsequently transferred the property to defendant JJRG Enterprises, Inc. Gall and Grant are each 50 % shareholders in the company. The partners had utilized the procedure of taking title in Grant's name with respect to other properties.

After Grant defaulted on the mortgage debt, New Century Mortgage, the mortgagee, commenced a foreclosure action against the property. In an effort to avoid a foreclosure sale, and unable to obtain conventional refinancing, Grant arranged for defendant Colon-Sylvain, his close personal friend, to purchase the property. Although Colon-Sylvain had no cash to put into the deal, Grant's plan was for Colon-Sylvain to obtain a new mortgage loan, in sufficient amount to pay off Grant's mortgage debt and to provide some additional cash to Gall, as a return on his investment.

Neither plaintiff nor defendants called Grant as a witness at the trial. From Gall's testimony, it appears that Grant disclosed to Gall that a foreclosure action was pending, and that an application had been submitted for a new loan. Nevertheless, from Gall's testimony, it appears that Grant did not tell Gall that title would be transferred to Colon-Sylvain, until just before or at the closing.

In any event, Colon-Sylvain, or Grant acting on her behalf, submitted a mortgage loan application to non-party Steven Valente, a home mortgage consultant for defendant Wells Fargo. Valente referred Colon-Sylvain, or Grant acting on her behalf, to defendant Michael Camisa, an attorney on Wells Fargo's approved list of mortgage closers. Camisa prepared a contract of sale, whereby JJRG would sell the property to Colon-Sylvain for a purchase price of \$468,000. Wells Fargo subsequently issued a mortgage commitment to make a new loan in the approximate amount of \$351,000. The commitment required the payoff of the existing first mortgage, held by New Century Mortgage in the amount of \$358,359.43, at the closing. Wells Fargo was to receive a conventional insured first mortgage as security for the new loan. On paper, the deal required the purchaser to contribute \$118,493.15. However, in reality, Colon-Sylvain was not required to come up with any cash, as Camisa planned to take her cash contribution out of the loan proceeds at the closing.

The deal included a "seller's concession," to help the purchaser pay her closing expenses. After the contract was signed by Grant on behalf of JRRG, Grant and Colon-Sylvain, pursuant to Camisa's direction, agreed to reduce the seller's concession to \$17,475. It appears that, when the seller's concession was reduced, Wells Fargo agreed to adjust, i.e. increase, the amount of the new loan accordingly.

Grant was apparently quite satisfied with Camisa acting as the attorney for the lender and the purchaser, as he instructed Colon-Sylvain to ask Camisa whether he could also represent the seller in the transaction. Camisa explained to her that he could not represent the seller, as he was already representing the purchaser and the lender. However, Camisa gave Colon-Sylvain the names of three attorneys, whom he felt comfortable working with in the transaction.

One of the three names, the attorney Grant actually retained on behalf of JRRG Enterprises, was defendant David Fish. Fish appears as an odd choice for the referral, as his main areas of practice were employment discrimination and criminal defense. Camisa did not testify as to the qualifications, or even the names, of the other two attorneys that he recommended.

In any event, Fish's sole role prior to closing appears to have been obtaining documents purporting to establish that Grant had authority to execute a deed on behalf of JRRG Enterprises. Among those documents, was an affidavit in which Grant claimed to be the 100 % owner of JRRG, and also a power of attorney, whereby Grant was granted power to transfer real property on behalf of Elmer Gall. Why a power of attorney was necessary,

if Grant was the 100 % shareholder of JJRG, and Gall had no interest in the company, was a question that appears not to have been addressed by Fish. For Fish was, as he put it, "a glorified messenger of documents," whose job was simply to obtain documents, purporting to show that Grant had authority to execute a deed, and forward them on to the title company.

The closing took place on December 26, 2006 at Camisa's office. Camisa, representing both Colon-Sylvain and Wells Fargo, acted as the "settlement agent," or loan closer, and prepared the HUD-1 settlement statement. As noted, defendant Fish was the attorney for the seller, JJRG. Having been notified by Grant, Gall attended the closing. Upon arriving at the closing, Gall notified Camisa that he was a 50 % shareholder in JJRG and was in fact Grant's "partner." Gall was then informed by Camisa that, after satisfying the existing loan, and paying off closing expenses, the net sales proceeds were \$82,048.13, of which Gall was to receive only \$52,620. Outraged that he was to be paid barely 25 % of his original \$200,000 investment, Gall informed all parties that he expected to clear at least \$100,000 on the transaction and strenuously objected to JJRG's selling the property.

The power of attorney, signed by Gall and notarized by Colon-Sylvain, which purported to give Grant the power to transfer real property on Gall's behalf, was produced at the closing. Its validity has not been established. Also produced was Grant's affidavit in which he claimed to be the sole shareholder of JJRG. Based upon these documents, the title company, defendant Empire Land, had concluded, in advance of the closing, that Grant had authority to execute the deed. A representative of the title company, Nelini Megnath, was present at the closing. However, it appears that Ms. Megnath was not sufficiently trained to appreciate the conflict between the affidavit and the power of attorney, or the significance, with respect to the power of attorney, of Gall's appearance at the closing.

In any event, Camisa and Fish determined to go forward with the sale transaction. Thus, the deed was accepted by Colon-Sylvain, and the mortgage was accepted by Wells Fargo. Camisa issued a check from his mortgage disbursement account to Gall in the amount of \$52,620. Although no check was issued to Grant, he benefitted through the payoff of the New Century Mortgage loan in the amount of \$358,359.43, for which Grant was solely responsible.

Camisa claims to have relied primarily on the title company's determination that Grant was authorized to issue a deed. Fish claims to have relied upon the title company and also upon Camisa. While Camisa and Fish testified that Gall consented to the transaction, the court rejects their testimony and finds that Gall unequivocally manifested his objection to

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Grant's delivery of the deed, both verbally and by refusing to sign any documents at the closing.

Fish testified that he and Camisa urged Gall to take the \$56,620, which Camisa offered, rather than "receive nothing," when the property was sold in foreclosure. However, there was no proof that a foreclosure sale was actually scheduled. Moreover, Camisa never explained why he had determined to give Gall only \$52,620, rather than \$82,048.13, the net cash proceeds to seller, as shown on the settlement statement.

Fish's other ostensible reason for pressuring Gall to consent to the sale was that the "payoff letter" was about to expire. However, the prudent course would certainly have been to pay even a few days interest, to buy the time to perform the rudimentary legal research, required to determine whether Grant was authorized to consummate the transaction. Nor was it in Colon-Sylvain's interest to accept a deed when there was clearly a question as to whether Grant had authority to execute it. From the perspective of the buyer and the seller, time was not "of the essence" in this real estate transaction. Why then was there such a hurry to finish the closing?

Even deducting the \$17,000 seller's concession, it is impossible to buy a \$451,000 home, with only a \$351,000 loan, and not put any cash into the transaction. Therefore, there must have been another \$100,000 loan, which is not shown on the settlement statement. Indeed, Camisa alluded to another loan in his testimony. In view of her subsequent bankruptcy, Colon-Sylvain's creditworthiness for a \$451,000 loan appears marginal, at best. From all the earmarks of the deal, Wells Fargo must have had an "exit strategy" for the loan, such as discounting it in the mortgage-backed securities market (See, Woods v Wells Fargo Bank, 733 F.3d 349 [1<sup>st</sup> Cir 2013]).

During his testimony, Camisa, when shown the figures on the HUD-1, readily conceded that there was \$25,923.02 unaccounted for in the borrower's transaction.<sup>1</sup>

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<sup>1</sup>According to the HUD-1, the gross amount due from the borrower, including sales price, settlement charges, and prepaid taxes was \$486,968.15. Deducting \$351,000 for the new loan leaves \$135,968.15. Deducting the seller's concession of \$17,475 leaves \$118,493.15. Deducting \$10,522.00 settlement charges leaves \$107,971.15. Minus \$82,048.13 net cash to seller leaves \$25,923.02 unaccounted for in the borrower's transaction.

Although Camisa testified that there was a second version of the HUD-1, he never produced it in court or offered it into evidence. Camisa prepared a purported reconciliation of the mortgage proceeds, but the court excluded it because the second version of the HUD-1 was never offered into evidence. Because the contents of the second version of the HUD-1 were in issue, the second version of the HUD-1 was itself the "best evidence" of the application of the proceeds of the mortgage (Schozer v Wm Penn Life Ins., 84 NY2d 639, 644 [1994]). Since Camisa failed to explain the unavailability of the second version of the HUD-1, the court prohibited him from offering the purported reconciliation, which was a form of secondary evidence.

Based upon the evidence admitted, the court cannot determine and declines to speculate as to what happened to the unaccounted for \$25,923.02 in the borrower's transaction. Nevertheless, from plaintiff Gall's perspective, these funds represented additional money which might have been available as additional cash due to seller at the closing.

On April 16, 2007, this action was commenced by Gall, at that time represented by attorney Judith Reardon. Gall had never deposited his \$52,620 check, apparently because he thought that accepting the check would prejudice his rights. In any event, Reardon requested Gall to sign an authorization, instructing Camisa to issue a new check in the same amount, payable to Reardon, as attorney. The \$52,620 thus became Reardon's retainer applicable to her legal fee. The retainer might seem high in view of the fact that it equaled fully 25 % of the amount which Gall invested in the original transaction and hoped to recover from Grant.

Wells Fargo subsequently commenced a third-party action against Reardon, on the (in retrospect) far-fetched theory that her \$52,620 retainer was the proceeds of a fraudulent loan transaction. More specifically, Wells Fargo's theory was that the loan was fraudulent as to Wells Fargo because Colon-Sylvain was a "straw buyer," who never intended to pay the loan or live in the property. Aside from the fact that there is no proof that Gall was aware of these "facts," it is highly unlikely that Valente or Camisa relied upon Colon-Sylvain's representations. Indeed, while Camisa testified that he "learned a lot of things" after the closing, he did not claim at trial that he was in any way defrauded in the loan transaction.

After Reardon was named as a party in the case, the court granted her motion for leave to withdraw. Gall proceeded pro se for the remainder of the case, including the trial. Reardon settled Wells Fargo's third party action against her before the court could reach the merits of the claim. While Gall was still finding his bearings as a pro se plaintiff, Wells Fargo moved to dismiss the complaint for failure to prosecute on the ground that Gall failed to file a timely note of issue. With regard to the merits, Wells Fargo argued that it was not vicariously liable for Camisa's actions at the closing. Because Camisa was the agent for Wells Fargo, his knowledge at the closing is attributed to Wells Fargo, unless he totally abandoned his principal's interests (*Kirschner v KPMG*, 15 NY3d 446, 466 [2010]). Since Camisa testified that his HUD-1's are reviewed by Wells Fargo, and he is still on the approved list, he cannot be found to have abandoned Wells Fargo's interests. The court will proceed to consider Camisa's actions at the closing.

Generally, the relationship between a borrower and a bank is contractual in nature and does not create a fiduciary relationship between them (*Baumann v Hanover Community Bank*, 100 AD3d 814, 817 [2d Dept 2012]). Because the seller in a real estate transaction ordinarily has no contractual relationship with the bank, the seller ordinarily deals at arm's length with the lender at the closing.

However, determining whether a fiduciary relationship exists necessarily involves a fact-specific inquiry (*AG Capital Funding v State Bank*, 11 NY3d 146, 158 [2008]). A fiduciary relationship exists between two persons when one of them is under a duty to act for or give advice for the benefit of another upon matters within the scope of the relation (Id). Essential elements of a fiduciary relation are reliance, de facto control, and dominance on the part of one of the parties (Id). Stated differently, a fiduciary relation exists when confidence is reposed on one side and there is superiority and influence on the other (Id).

Camisa, as the representative of the bank, clearly had de facto control, dominance, superiority, and influence with regard to the real estate transaction. Since Colon-Sylvain had no cash to put into the deal, and the property was in foreclosure, the borrower and the seller had little choice but to rely on Camisa to effectuate the transaction fairly. Camisa's relationship with Valente, the Wells Fargo mortgage consultant, ensured that he could control the terms of the loan, including not only the amount of money to be borrowed, but also the required documentation. Fish testified that he did nothing to prepare the contract or the amended contract. Thus, before Fish was ever retained, Camisa, representing the purchaser, and, in effect, also representing the seller, drafted the contract of sale, including a provision for the seller to pay the purchaser's closing expenses. Still in effect representing both seller

and purchaser, Camisa drafted an amendment of the contract, increasing the amount of the loan and reducing the seller's concession. Because Fish had no practical real estate experience, Camisa was basically assured of cooperation on the seller's side of the transaction. Also, Camisa had the power to determine how the mortgage proceeds were to be allocated, including the amount to be received by Gall. The court concludes that defendant Camisa was under a fiduciary duty of good faith to Gall, as well as the other parties to the real estate transaction (See, Brunetti v Musallam, 11 AD3d 280 [1<sup>st</sup> Dept 2004]).

The court further concludes that Camisa breached his fiduciary duty of good faith by allowing the transaction to go forward over Gall's objection. Camisa recognized that Gall and Grant were equal "partners." Thus, Camisa could not, in good faith, favor Grant over Gall by allowing the transaction to go forward over Gall's protest. Nor could Camisa in good faith rely upon the title company's determination that Grant was authorized to issue the deed. The title company's determination was based upon a discredited affidavit that Grant was the sole shareholder, as well as a power of attorney that was clearly revoked by Gall's appearance and actions at the closing. Moreover, the obligation of the title company ran to the lender and the purchaser. Camisa could not rely upon the title company to protect Gall's interest, because the title company had no obligation to the seller in the transaction. Thus, a reasonable loan closer in Camisa's position would not have gone forward with the transaction because he would have seen that the shareholders of the seller were deadlocked.

The court reaches a similar conclusion that defendant Fish breached his professional obligation as an attorney representing the seller in a real estate transaction. A corporation's attorney represents the corporate entity, not its shareholders or employees (Eurycleia Partners v Seward & Kissel, 12 NY3d 553, 562 [2009]). As the attorney for JJRG, Fish was responsible to determine whether Grant was authorized to act on behalf of the corporation.

An attorney is obligated to know the law relating to the matter for which the attorney is representing the client. It is the attorney's duty, if he is not familiar with the relevant law, to inform himself of the law relating to the matter (Wo Yee Hing Realty v Stern, 99 AD3d 58, 63 [1<sup>st</sup> Dept 2012]). Thus, despite his lack of familiarity with real estate law, and apparently partnership, close corporations, and agency as well, Fish, having agreed to be the attorney for the seller, was obligated to inform himself as to such matters. In discharging his responsibility as an attorney, Fish could not rely upon the title company or upon the attorney for the bank/purchaser.

Fish, as did Camisa, recognized that Gall and Grant were "partners." It is a fundamental principal of corporate law that a close corporation resembles a partnership, and the shareholders of a close corporation owe each other a fiduciary duty similar to that of partners (See, e.g. *Combs v Pricewaterhouse Coopers*, 382 F.3d 1196 [10<sup>th</sup> Cir 2004]). Thus, to acknowledge that Gall and Grant were "partners," is to recognize that Grant's affidavit that he was the sole stockholder of JJRG was fraudulent because Gall was a 50 % shareholder in the company.

Because the relationship of an attorney-in-fact to his principal is that of principal and agent, the holder of a power of attorney "must act in the utmost good faith and undivided loyalty toward the principal, and must act in accordance with the highest principles of morality, fidelity, loyalty, and fair dealing" (*Matter of Ferrara*, 7 NY3d 244, 254 [2006]). Even assuming that the power of attorney was originally valid, Gall revoked it by his appearance and actions at the closing. For Grant to purport to convey real property, based upon a power of attorney, over Gall's objection, was to make a travesty of Grant's duty of morality, fidelity, loyalty, and good faith. For Fish not to have understood that the power of attorney was revoked was not a mistake in judgment. It was malpractice.

As the attorney for JJRG, Fish could not favor Grant over Gall, as each of them was a 50 % shareholder. Fish admitted in his testimony that there was "tension" between Gall and Grant and that the two men were "sneering" at each other. From all the information available to Fish, a reasonable attorney would have known that the shareholders of JJRG were deadlocked and that Grant was no longer authorized to execute a deed on behalf of the company. Thus, a reasonably prudent attorney would have notified Camisa that the sale should be postponed and taken all possible action to cancel the closing.

Fish's professional performance at the closing was inadequate. Indeed, Fish himself seemed to recognize his dereliction of duty when he testified at trial. Fish admitted that he became "uncomfortable with my level of knowledge" with respect to the real estate transaction. Even in his testimony at trial, Fish insisted that Gall was "not a party to the transaction," and that Fish was "not sure" whether Grant had authority to execute the deed on behalf of the corporation. The court concludes that Fish breached his professional duty to JJRG, and his fiduciary duty to Gall, by allowing the sale of the property to take place over Gall's objection.

Damages in a legal malpractice case are designed to make the injured client whole (*Rudolf v Shayne, Dachs*, 8 NY3d 438, 443 2007]). The client's damages may include litigation expenses incurred in an attempt to avoid, minimize or reduce the damages caused

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by the attorney's wrongful conduct (Id). In the present case, the damages caused by defendants Camisa and Fish's wrongful conduct is the loss of Gall's equity interest in the property. The only evidence in the case as to the value of Gall's interest is his excited utterance that he expected to clear at least \$100,000 on the transaction. The statement was made by Gall immediately after the startling event, being offered \$52,620 for his \$200,000 investment, while his reflective capacity was stilled (*People v Nieves*, 67 NY2d 125 [1986]). Thus, the statement is admissible for its truth, that \$100,000 is the value of Gall's equity interest in the property. Gall's estimate as to the value of his interest appears reasonable, considering that the mortgage debt had grown from \$190,000 to \$358,000, and the property was now in foreclosure. The court concludes that Gall's out-of-pocket damages, the loss of his equity interest in the property, is \$100,000.

There is no need to deduct the \$52,620 which Gall was advanced by Camisa because it became his attorney's retainer, which was a reasonable litigation expense incurred in an attempt to minimize or reduce the damage caused by defendants' wrongful conduct. During the course of the trial, at Gall's request, the court conducted an in camera inspection of the Reardon-Wells Fargo settlement agreement. The settlement agreement reveals that Reardon paid \$47,000 of her \$52,620 retainer to Wells Fargo in settlement of its third party claim. That Wells Fargo has already received the lion's share of Reardon's retainer confirms that the retainer should not be offset against Gall's damages in the present action.

A shareholder may sue on his own behalf, as opposed to bringing a derivative action, when the thrust of his action is to vindicate his personal rights as an individual and not as a stockholder on behalf of the corporation (*Albany-Plattsburgh United v Bell*, 307 AD2d 416, 419 [3d Dept 2003]). Because all of the capital of JJRG was contributed by Gall, and Grant played a role in depriving Gall of his interest in the property, Gall is vindicating his personal rights and need not bring a derivative action on behalf of the corporation.

Settle judgment on notice to both defendants, in favor of plaintiff and against defendants Camisa and Fish, in the amount of \$100,000, without interest (See, *Rudolf v Shayne, Dachs, supra*, 8 NY3d at 443-44). Plaintiff is **granted** leave to renew and reargue defendant Wells Fargo's motion to dismiss for failure to prosecute, within 30 days of service of a copy of this order.

This constitutes the decision and order of the court.

Dated JUN 09 2014

*Stephen A. Searles*  
J.S.C.

**ENTERED**

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JUN 11 2014

NASSAU COUNTY  
COUNTY CLERK'S OFFICE