

NRT New York, LLC v Morin
2015 NY Slip Op 31932(U)
October 19, 2015
Supreme Court, New York County
Docket Number: 152678/2013
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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NRT NEW YORK, LLC, d/b/a CORCORAN GROUP,
and CHARLES RUTENBERG, LLC,

Plaintiffs,

Index No.
152678/2013

- against -

**DECISION AND
ORDER**

CHRISTOPHER MORIN and MEI MORIN,

Mot. Seq. #003

Defendants.

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CHRISTOPHER MORIN and MEI MORIN,

Third-party Plaintiffs,

- against -

NATALIE ESPOSITO,

Third-party Defendant.

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

This is an action for breach of contract based on a brokerage agreement between plaintiff, Charles Rutenberg, LLC (“Rutenberg” or “Plaintiff”), and defendants, Christopher Morin and Mei Morin (collectively, the “Morins” or “Defendants”), dated June 23, 2009 (the “Agreement”), concerning the lease and eventual sale of the residential real property located at 201 E. 80th Street, Unit 3AB, New York, New York (the “Unit,” “Apartment” or “Premises”). Plaintiff claims that the Agreement authorizes Rutenberg, as principal broker, to locate a tenant for the Premises. In addition, Plaintiff claims that the Agreement entitles Rutenberg to a six percent commission fee for the sale of the Premises, if the

Premises are sold to a tenant procured under the Agreement. Plaintiff claims that Rutenberg procured tenants for the Apartment, pursuant to the Agreement, and that Defendants ultimately sold the Premises such tenants. Plaintiff now seeks to recover the six percent commission fee for the sale of the Premises to a lessee procured under the Agreement.

Former plaintiff, NRT New York d/b/a Corcoran Group (“Corcoran”), commenced this action on March 25, 2013, by Summons and Complaint. Corcoran filed an Amended Complaint on July 1, 2013, adding Rutenberg as an additional plaintiff in this case. On July 9, 2013, Defendants moved to dismiss the Amended Complaint; Corcoran and Rutenberg cross-moved for leave to file a Second Amended Complaint on July 22, 2013. By Order dated December 4, 2013, Corcoran and Rutenberg’s cross-motion was granted, and Defendants’ motion to dismiss the Amended Complaint was denied. Corcoran and Rutenberg filed a Second Amended Complaint on January 6, 2014. On January 30, 2014, Defendants moved to dismiss the Second Amended Complaint. By Order dated May 14, 2014, Defendants’ motion to dismiss the Second Amended Complaint was granted only with respect to former plaintiff Corcoran. Corcoran’s claims against Defendants were severed and dismissed, and Defendants were directed to answer Rutenberg’s Second Amended Complaint.

On June 10, 2014, Defendants interposed an Answer to Rutenberg’s Second Amended Complaint, asserting various affirmative defenses and counterclaims against Rutenberg. Defendants also commenced a third-party action against Natalie Esposito (“Esposito”), by Third-Party Summons and Third-Party Complaint filed on June 10, 2014 along with Defendant’s Answer to Plaintiff’s Second Amended Complaint and Counterclaims.

Plaintiff and Esposito now move for an Order, pursuant to CPLR § 3212, directing summary judgment in favor of Rutenberg and against Defendants in the sum of \$156,750.00, plus interest from June 9, 2011 and reasonable legal fees; and, pursuant to CPLR §§ 3211(a)(1), (a)(7), and 3016(b), dismissing Defendants’ Third-Party Complaint, Counterclaims, and Affirmative Defenses, on the basis of documentary evidence and failure to state a claim. In support, Plaintiff submits the affidavit of Esposito, dated July 30, 2014, and exhibits annexed thereto.

Defendants oppose¹. In support, Defendants submit the affidavit of Christopher Morin (“Mr. Morin”) and exhibits annexed thereto.

Oral argument was heard on Plaintiff’s motion. The minutes of the oral argument were provided to the Court thereafter.

Turning first to Rutenberg’s motion for summary judgment, the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). However, pursuant to CPLR § 3212(f), the court may deny a motion for summary judgment, “should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated”. (CPLR § 3212[f]).

“The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage.” (*Flomenbaum v. New York Univ.*, 2009 NY Slip Op 8975, *9 [1st Dep’t 2009]). On a motion for summary judgment in a contract dispute, it is the Court’s responsibility, if possible, to determine the intent of the parties from the four corners of the document. (*Diversified Group Inc. v. Sahn*, 259 A.D.2d 47 [1st Dep’t 1999]). “[W]hen parties set down their agreements in a clear, complete document, their writing should . . . be enforced according to its terms.” (*Vermont Teddy Bear, Inc. v. 538 Madison Realty Co.*, 1 N.Y. 3d 470, 475 [2004] [citations omitted]).

¹ Defendants cross-move for an Order, pursuant to CPLR § 2201, temporarily staying proceedings in this action pending the resolution of Defendants’ appeal of this Court’s May 14, 2014 Order denying Defendants’ motion to dismiss Rutenberg’s breach of contract claims asserted in the Second Amended Complaint. However, on January 31, 2015, the First Department issued a decision affirming the May 14, 2014 Order on appeal. Defendants’ cross-motion is therefore moot.

“Whether or not a writing is ambiguous is a question of law to be resolved by the courts.” (*W.W.W. Associates, Inc. v. Giancontieri*, 77 N.Y.2d 157, 162 [1990]). “A contract is unambiguous if the language it uses has ‘a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion.’” (*Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 [2002] quoting *Breed v. Insurance Co. of N. Am.*, 46 N.Y.2d 351, 355 [1978], *rearg denied*, 46 N.Y.2d 940 [1979]). “[I]f the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity.” (*Greenfield*, 98 N.Y.2d at 569-70).

When a contract is unambiguous, its construction is a matter of law “and the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms.” (*Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324 [2007]). Extrinsic and parol evidence may not be used to “create” an ambiguity in a written agreement which is complete, clear, and unambiguous on its face. (*W.W.W. Associates*, 77 N.Y.2d at 157). Thus, “matters extrinsic to the agreement may not be considered when the intent of the parties can be gleaned from the face of the instrument.” (*Teitelbaum Holdings, Ltd. v. Gold*, 48 N.Y.2d 51, 56 [1979]). Indeed, “[t]he best evidence of what parties to a written agreement intend is what they say in their writing.” (*Greenfield*, 98 N.Y.2d at 569 quoting *Slamow v. Del Col*, 79 N.Y.2d 1016, 1018 [1992]; *Breed v. Ins. Co. of N. Am.*, 46 N.Y.2d 351, 355 [1978] [“It is axiomatic that a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed.”]).

The elements of a cause of action for breach of fiduciary duty include: (1) the existence of a fiduciary relationship; (2) misconduct; and (3) damages caused by the misconduct. (*Armentano v. Paraco Gas Corp.*, 90 AD3d 683, 935 NYS2d 304 [2d Dep’t 2011]). A cause of action sounding in breach of fiduciary duty must be pleaded with particularity. (CPLR § 3016[b]).

In New York, it is “well settled” that a real estate broker is a fiduciary with a duty of loyalty and an obligation to act in the best interests of the principal. (*Dubbs v. Stribling & Assocs.*, 96 N.Y.2d 337, 340 [2001]; *Douglas Elliman LLC v. Tretter*, 84 A.D.3d 446, 448 [1st Dep’t 2011] [“During the process of facilitating a real estate transaction, the broker owes a duty of undivided loyalty to its principal.”]). A real

estate broker's fiduciary duties include "an obligation to keep her principal informed of all material facts within the broker's knowledge regarding the relevant transaction." (*Walker v. Insignia Douglas Elliman LLC*, 79 A.D.3d 511, 512 [1st Dep't 2010]). If the broker's interests are divided due to a personal stake in the transaction, "the broker must disclose to the principal the nature and extent of the broker's interest in the transaction or the material facts illuminating the broker's divided loyalties. 'The disclosure to be effective must lay bare the truth, without ambiguity or reservation, in all its stark significance.'" (*Dubbs*, 96 N.Y.2d 337 at 340-41, quoting *Wendt v. Fischer*, 243 N.Y. 439, 443 [1926]). Where a real estate broker breaches his or her fiduciary duty to the principal, "the broker forfeits his or her right to a commission, regardless of whether damages were incurred." (*Douglas Elliman LLC v. Tretter*, 84 A.D.3d at 448).

Generally, the applicable statute of limitations for breach of fiduciary claims depends upon the substantive remedy sought. (*Kaufman v. Cohen*, 307 A.D.2d 113, 118 [1st Dep't 2003]; *Yatter v. William Morris Agency*, 256 A.D.2d 260, 261 [1st Dep't 1998]). Where the relief sought is equitable in nature, the six-year limitations period of CPLR § 213(1) applies. (*Loengard v. Santa Fe Indus.*, 70 N.Y.2d 262, 267 [1987]). On the other hand, "where suits alleging a breach of fiduciary duty seek only money damages, courts have viewed such actions as alleging 'injury to property,' to which a three-year statute of limitations applies." (*Kaufman*, 307 A.D.2d at 118; CPLR § 214[4]).

Additionally, "[t]he case law in New York clearly holds that a cause of action for breach of fiduciary duty based on allegations of actual fraud is subject to a six-year limitations period." (*Kaufman*, 307 A.D.2d 113 at 119 [listing cases finding that six-year limitations period governed claims for breach of fiduciary duty and fraud]). However, there is an exception to the rule that the limitations period for causes of action sounding in fraud applies to breach of fiduciary duty claims based on allegations of fraud: "courts will not apply the fraud Statute of Limitations if the fraud allegation is only incidental to the claim asserted; otherwise, fraud would be used as a means to litigate stale claims". (*Kaufman*, 307 A.D.2d at 119, quoting *Powers Mercantile Corp. v. Feinberg*, 109 A.D.2d 117, 120 [1985], *aff'd*, 67 N.Y.2d 981 [1986]). Thus, "where an allegation of fraud is not essential to the cause of action pleaded except as an answer to an anticipated defense of Statute of

Limitations, courts ‘look for the reality, and the essence of the action and not its mere name’”. (*Id.* [citation omitted]).

If the timeliness of a cause of action for breach of fiduciary duty turns on whether the cause of action is based on “essential” allegations of fraud, the pleadings must contain sufficient allegations of fraudulent conduct so as to warrant a six-year limitations period. (*See AQ Asset Mgt., LLC v. Levine*, 119 A.D.3d 457, 462 [1st Dep’t 2014] [reinstating breach of fiduciary duty claim; contention that defendant misrepresented full benefits accruing to defendant under agreement, including personal interest in inventory sale proceeds, sufficiently alleged fraudulent conduct on defendant’s part so as to warrant a six-year statute of limitations]; *Access Point Med., LLC v. Mandell*, 106 A.D.3d 40, 44 [1st Dep’t 2013] [finding that breach of fiduciary duty claim based on an alleged conflict of interest and allegedly impaired professional judgment not entitled to six-year statute of limitations where complaint failed to plead the elements of fraud; “[t]he failure to disclose a conflict of interest does not transform a breach of fiduciary duty into a fraud.”]; *Buller v. Giorno*, 57 A.D.3d 216, 216 [1st Dep’t 2008] [contention that the essence of the plaintiff’s breach of fiduciary claim was actual fraud was insufficient to apply the six-year statute of limitations where fraud claim was not pleaded; “[e]ven if fraud had been pleaded, it would be insufficient to defeat the motion, as the allegations of fraud are incidental to those of breach of fiduciary duty.”]; *Kaufman*, 307 A.D.2d at 119 [“The timeliness of plaintiffs’ breach of fiduciary duty claim, therefore, turns on the viability of plaintiffs’ fraud cause of action.”]).

Here, Plaintiff makes a prima facie showing that Defendants entered into a clear and unambiguous Agreement with Rutenberg, and that the Agreement, on its face, not only authorizes Rutenberg to locate a tenant for the Premises, but also entitles Rutenberg to an additional six percent commission fee for the sale of the Premises if the Premises are sold to a tenant procured under the Agreement. It is undisputed that Rutenberg procured a tenant for the Premises, pursuant to a lease agreement dated August 11, 2009 (the Lease”), and that such tenant ultimately purchased the Unit from Defendants pursuant to a contract of sale dated January 10, 2011 (the “Contract of Sale”). In opposition, Defendants fail to raise a triable issue of fact as to whether the Agreement itself is ambiguous². Although Defendants

² In affirming this Court’s May 14, 2014 Order, the First Department observed: “The motion court correctly found that the plain terms of the parties’ brokerage agreement (*see Beal Sav. Bank v Sommer*, 8 NY3d 318, 324-325 [2007]), when construed in the context of the whole of the agreement, unambiguously provided that the five-month expiration

argue that, during the course of the Lease negotiations, Rutenberg and/or Rutenberg's agent, Esposito, verbally represented to Defendants that Rutenberg would not collect a commission fee for the sale of the Unit, as the Agreement is clear and unambiguous on its face, Defendants cannot seek to use extrinsic evidence to create an ambiguity as to the Agreement's terms, which must be enforced according to their plain meaning. Therefore, Plaintiff makes a prima facie showing that Plaintiff earned the subject commission fee for the sale of the Premises to a tenant procured under the Agreement.

Turning now to that portion of Plaintiff's motion to dismiss Defendants' counterclaims against Rutenberg, CPLR § 3211 provides, in relevant part:

(a) Motion to dismiss cause of action. 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; or

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

(CPLR §§ 3211[a][1], [7]).

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 Dep't 2003] [internal citations omitted]; 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*

period therein applied only to the broker's exclusive right to rent defendants' apartment, and not to the additional circumstances anticipated by the agreement where the renter, timely procured by the broker, ultimately purchased the apartment near the end of the initial two-year lease term. The agreement's fifth paragraph, which provided that the broker would receive a six percent commission if the renter it procured ultimately purchased the apartment, did not contain a time limitation regarding that right. Defendants' interpretation that the five-month time limitation set forth in paragraph two of the exclusive agency agreement applied to all provisions of the agreement is commercially unreasonable, and undermined by the various additional rights afforded under the agreement." (*NRT N.Y., LLC v. Morin*, 123 A.D.3d 590, 590 [1st Dep't 2014]).

Sav. Bank v. Sommer, 8 N.Y.3d 318, 324 [2007] [internal citations omitted]). A movant is entitled to dismissal under CPLR § 3211(a)(1) 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 Dep't 2007] [citation 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]).

Defendants' first counterclaim, for breach of fiduciary duty as against Rutenberg, alleges a fiduciary relationship between Defendants and Rutenberg arising out of the Agreement. (Counterclaim ¶ 40). Defendants' first counterclaim further alleges that Rutenberg deceived Defendants into signing the Lease by, *inter alia*, "assur[ing Defendants] that no sales commission would be due for a sale [of the Premises]" after a five-month period, (*Id.* ¶ 55), "misleading Morin with respect to Rutenberg's intention to attempt to collect a commission for the sale of the Apartment", "failing to exercise due care in advising Morin regarding appropriate and/or reasonable terms for the Lease including, but not limited to, the credit provision contained in the Lease", and "failing to disclose and/or misrepresenting to Morin the full range of financial consequences of the credit provision contained in the lease." (*Id.* ¶ 62). Defendant's first counterclaim further alleges that, "Rutenberg's conduct was in bad faith and for the purpose of, among other things, enriching Rutenberg at Morin's expense." (*Id.*). Defendants' first counterclaim asserts that, "[a]s a direct and proximate consequences of Rutenberg's breaches of fiduciary duties, among other things, Morin agreed to detrimental financial terms in the (a) Lease, including but not limited to, up to a \$114,000 credit, and (b) sales contract for the Apartment, including, but not limited to, a low sales price and credits." (*Id.* ¶ 63).

Accepting Defendants' allegations as true and drawing all inferences in favor of the non-moving party, Defendants' first counterclaim adequately pleads a breach of fiduciary duty as against Rutenberg. In addition, Defendants' contentions sufficiently allege fraudulent conduct on Rutenberg's part so as to warrant a six-year limitations period. (*AQ Asset Mgt., LLC*, 119 A.D.3d at 462). Insofar as the alleged breach of fiduciary duty might result in a finding that Rutenberg forfeited its right to collect a commission fee set forth under the Agreement, accepting Defendants' allegations as true, Defendants' second and third counterclaims, for a declaration

that Defendants “do not owe a sales commission to Rutenberg under the Rental Listing Agreement in connection with the sale of the Unit”, (Counterclaim ¶ 70), and injunctive relief enjoining Plaintiff from collecting such fee, respectively, stand.

In light of the foregoing, Defendants submissions are sufficient to demonstrate that issues of fact may exist as to whether Rutenberg forfeited its right to collect the additional sales commission fee for the sale of the Apartment under the Agreement. While the court finds that the Agreement provides for a sales commission for the sale of the Unit to the tenants procured under the Agreement, discovery may reveal an issue as to whether the alleged breach of a fiduciary duty, if established, compels forfeiture of such commission. Accordingly, Plaintiff’s motion for summary judgment must be denied as premature.

As for Esposito’s motion to dismiss Defendants’ Third-Party Complaint, which seeks to assert claims for breach of fiduciary duty, restitution, and injunctive relief against Esposito individually, a fiduciary relationship “exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.” (*EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19 [2005] quoting Restatement [Second] of Torts § 874, Comment a). “Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm’s length business transactions.” (*Id.*).

In determining whether a fiduciary relationship exists between parties who have entered into a contract, “courts look to that agreement ‘to discover . . . the nexus of [the parties’] relationship and the particular contractual expression establishing the parties’ interdependency’”. (*EBC I, Inc.*, 5 N.Y.3d at 19 quoting *Northeast Gen. Corp. v. Wellington Adv.*, 82 N.Y.2d 158, 160 [1993] [alterations in the original]). “If the parties . . . do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them”. (*EBC I, Inc.*, 5 N.Y.3d at 19 quoting *Northeast Gen. Corp.*, 82 N.Y.2d at 162 [alterations in the original]). Additionally, “[a]n individual acting solely in his capacity as agent of his corporate principal, without any showing of exclusively independent control of operations, cannot be held individually liable for alleged corporate wrongdoing.” (*Mendez v. City of New York*, 259 A.D.2d 441, 442 [1999]).

Here, Defendants plead an agreement with Rutenberg, a licensed real estate brokerage, providing for third-party defendant, Esposito, to act as exclusive agent to procure a tenant for the Apartment. (*See* Mr. Morin Aff., Ex. B [the Agreement]; Counterclaim ¶ 42). Even accepting Defendants' allegations as true, the Agreement establishes a fiduciary relationship between Defendants and Rutenberg, but does not give rise to a separate or independent fiduciary relationship between Defendants and Esposito individually. Defendants' Third-Party Complaint fails to allege any other facts indicating that a relationship grounded on a higher level of trust exists between Defendants and Esposito. Absent the requisite fiduciary relationship between Defendants and Esposito, Defendants third-party claims against Esposito, for breach of fiduciary duty, restitution, and injunctive relief, fail.

Wherefore it is hereby,

ORDERED that Rutenberg's motion for summary judgment is denied as premature; and it is further

ORDERED that Rutenberg and Esposito's motion to dismiss is granted only to the extent that Esposito's motion to dismiss Defendants' third-party complaint against Esposito is granted and Defendants' third-party complaint is dismissed and the Clerk is directed to enter judgment accordingly; and it is further

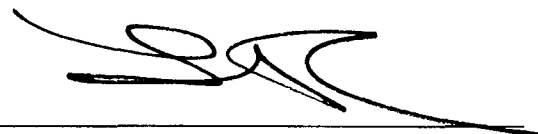
ORDERED that Defendants' cross-motion is denied as moot; and it is further

ORDERED that Rutenberg is directed to file an answer to Defendants' counterclaims within 30 days of 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: OCTOBER 19, 2015

OCT 19 2015



Eileen A. Rakower, J.S.C.