

Tai v Pour
2016 NY Slip Op 31572(U)
August 18, 2016
Supreme Court, New York County
Docket Number: 150443/2012
Judge: Joan M. Kenney
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
J.S.C. Justice

PART 8

Tai, Maria

INDEX NO. 150443/12

-v-

MOTION DATE _____

Pour, David et al.

MOTION SEQ. NO. 002

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Motion sequence nos. 002 and 003 under Index number 150443/2012, and motion sequence 005 under Index number 652769/2011, are herein consolidated for disposition only.

In motion sequence no. 002, defendants Joseph Berko and Berko & Associates LLC d/b/a Berko & Associates (the Berko defendants) move for leave to file their current motion for summary judgment, and upon the granting of such leave, move, pursuant to CPLR 3212 (e), for summary judgment dismissing plaintiffs' third, fourth, and fifth causes of action, respectively, breach of fiduciary duty, breach of Real Property Law (RPL) §§ 442 and 442-E (3), and unjust enrichment, and for summary judgment on the Berko defendants' second counterclaim and third-party claim for unpaid commission.

In motion sequence no. 003, defendants David Pour and David Pour & Associates LLP (the Pour defendants) move for summary judgment dismissing plaintiffs' first and second causes of action (respectively, legal malpractice and breach of fiduciary duty). Plaintiffs Maria Tai, Property 215 LLC (suing herein as Property 251 LLC) and Property 51 LLC (Property 51), (collectively, the Tai plaintiffs) cross-move for summary judgment.

In motion sequence no. 005, the Tai plaintiffs move for summary judgment as to liability, as to five of their causes of action, and for an order, pursuant to CPLR 3212, referring the issue of damages for immediate trial before a referee, directing an immediate hearing on the remaining amount of the funds received by defendants Daniel R. Broche and Estate of Agnes M. Broche (the Broche defendants) from the two sales of the premises known as 51-53 West 19th Street in Manhattan (the Premises), and enjoining defendants and any one acting for or on their behalf from receiving, disbursing, or otherwise disposing of the funds received by the Broche defendants from the two sales of the Premises. The Broche defendants cross-move for summary judgment dismissing the complaint.

These consolidated actions arise out of the purchase of the Premises by Property 215, a company owned by Tai, from the Estate. In a related action, Panasia Estate, Inc. (Panasia) obtained damages from Property 51, to which Property 215 assigned its contract, on a claim of tortious interference with Panasia's prior contract to purchase the Premises from the Estate, and the contract for the sale of the Premises to Property 51 was held to be void ab initio. See *Panasia Estate, Inc. v Broche*, 122 AD3d 454 (1st Dept 2014). The Pour defendants represented the Tai plaintiffs in their purchase of the Premises. The Berko defendants

Dated: August 18, 2016

Joan M. Kenney, J.S.C.
JOAN M. KENNEY
J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

were the broker in that transaction, and also in a subsequent unrelated transaction, in which Tai and third-party defendant NTD Building, LLC, as owner, sold a commercial condominium unit in the building located at 156-168 Bleeker Street in Manhattan.

In motion sequence no. 002, leave is granted. While successive motions for summary judgment are disfavored, they are allowed where, as here, new evidence is produced that was not available at the time of the initial motion. *Kobre v United Jewish Appeal-Fedn. of Jewish Philanthropies of N.Y., Inc.*, 32 AD3d 218, 222 (1st Dept 2006), citing *Fielding v Environmental. Resources Mgt. Group*, 253 AD2d 713, 713 (1st Dept 1998). This court denied the Berko defendants' initial motion for summary judgment solely on the ground that it was premature, inasmuch as discovery, which has now been completed, had not begun.

On the merits, the motion for summary judgment is granted for the following reasons.

Plaintiffs' third cause of action against the Berko defendants (breach of fiduciary duty) is dismissed, because it is predicated upon an alleged concealment of material defects in title to the Premises and upon Berko's having "allowed" Tai to close on the purchase. However, it is undisputed that Tai was informed of Panasia's prior contract and of the *lis pendens* that it filed, before Tai closed on the Premises. Indeed, the title report that Tai received disclosed both the contract and the action commenced by Panasia, and the contract that Property 215 entered into with Broche provides that it is subject to Panasia's accepting termination of its contract with Broche. The complaint alleges that Berko failed to advise Tai "of the wide range of liabilities, risks and perils inherent in proceeding with the Closing." Complaint, ¶ 50. A real estate broker has no duty to give legal advice. *Walker v Insignia Douglas Ellman LLC*, 79 AD3d 511, 513 (1st Dept 2010), citing *Donnelly v Margolis*, 265 AD2d 523, 523-524 (2d Dept 1999).

Plaintiffs' fourth cause of action against the Berko defendants (violation of RPL § 442) is untenable, because Pour is an attorney in good standing, and RPL § 442-f authorizes the splitting of a brokerage commission with "attorneys at law." Moreover, Tai expressly approved an additional payment of \$20,000 to Pour, half of which Berko would contribute from his own fee.

The fifth cause of action (unjust enrichment) is untenable, because "a real estate broker will be deemed to have earned his commission when he [or she] produces a buyer who is ready, willing and able to purchase at the terms set by the seller." *SPRE Realty, Ltd. v Dienst*, 119 AD3d 93, 97 (1st Dept 2014), quoting *Lane Real Estate Dept. Store v Lawlet Corp.*, 28 NY2d 36, 42 (1971). It is undisputed that the Berko defendants were the procuring cause of the contract of sale entered into by Property 215 and Broche, and the fact that that contract was subsequently held to be void, because Broche had previously contracted with Panasia, does not affect Berko's right to his commission. See *Lane*, in which the broker was held entitled to his commission, although the prospective buyer refused to close in light of a prior transfer of title.

The Berko defendants' second counterclaim, and their third-party claim, concern Tai's acknowledged refusal to pay the Berko defendants all but a portion of the commission that they earned representing Tai and third-party defendant NTD Building, LLC (NTD), as property owner, in the sale of a commercial condominium unit in the building located at 156-158 Bleeker Street in Manhattan. The closing on that unit took place on or about December 13, 2011. Rather than paying the \$500,000.00 commission due, Tai and NTD paid the Berko defendants \$73,980.00.

Tai neither contends that the Berko defendants failed to earn the full \$500,000.00 commission, nor disputes that she paid them \$73,980, but she asserts 10 affirmative defenses, the first eight and the 10th of which reprise the claims discussed, above. Those claims lack merit, and they have no bearing on the commission due for the sale of the Bleeker Street unit. The ninth affirmative defense alleges that the Berko defendants lack authority to sue, because they have failed to comply with section 206 of Limited Liability Law (LLL). Exhibit 16, attached to the Berko affidavit, contains the certification of publication, and the supporting affidavits, showing full compliance with the requirements of LLL § 16.

In motion sequence no. 003, the Pour defendants' motion to dismiss Tai's legal malpractice and breach of fiduciary duty claims is granted, and Tai's cross motion for summary judgment is denied. Tai's claims rest on her allegation that Pour failed timely to advise her of the Panasia action and the filing of the *lis pendens*. While Tai avers in her affidavit that Pour did not inform her of the action, or the *lis pendens*, until the day after the closing on the Premises, those statements are belied by Tai's acknowledgment at her deposition that, as Pour states in his affidavit, he had multiple telephone conversations with Tai on the day of the closing, told her about both the Panasia action and the *lis pendens*, and secured her agreement to enter into a joint defense to the Panasia action, with Broche. Moreover, Tai is collaterally estopped from denying

that she knew about both the Panasia action and the *lis pendens*, prior to the closing on the Premises. See *Tai v Broche*, 115 AD3d 577, 579 (1st Dept 2014) ("[Tai's] awareness of the pendency of [the Panasia] action, the filing of a notice of pendency, and Panasia's rejection of the Estate's attempt to terminate the Panasia contract defeats the justifiable reliance element of [plaintiffs'] fraud claim [against Broche]"). Tai does not contest Pour's averment that he advised Tai not to proceed with the closing until the Panasia action was resolved, but that she disregarded that advice, directed him to proceed with the closing, and several days prior to the closing, retained litigation counsel to bring a specific performance action against Broche.

Finally, Tai's allegation that Pour's post-closing request for an additional \$20,000 payment constituted a "kickback," or a "shakedown" is rejected, because Pour's post-closing request was based upon his additional services, including successfully persuading Broche that the Estate pay the entire mortgage recording tax, in the amount of \$115,000, and negotiating, with Tai's participation by telephone, a "Second Amendment" to the contract between Broche and Tai, that provided, among other terms, the extensive indemnification and hold harmless provision that Tai is now using to support her claims against Broche. Indeed, at the time, Tai agreed that Pour should receive additional compensation, but she persuaded Berko to contribute half of that additional payment, out of his fee, while paying nothing herself.

Tai's cross motion is based on the holding, in the Panasia action, that Tai and her companies tortiously interfered with Panasia's contract with Broche. Pour was not a party to that action, and he is not bound by that holding. More importantly, that holding cannot be used to attack Pour, inasmuch as Pour advised Tai not to close on the Premises until the Panasia action was resolved. That Pour acknowledged at his deposition that he did not know the elements of a tortious interference claim does not change the fact that his advice was correct, and that Tai ignored it.

In motion sequence no. 005, the causes of action as to which the Tai plaintiffs seek partial summary judgment are, respectively, the second (restitution), the third (breach of the implied covenant of good faith and fair dealing), the fourth (unjust enrichment), the fifth (breach of contract), and the sixth (money had and received). The causes of action all seek the same damages, and the Tai plaintiffs explain that they are pled in the alternative. This court previously dismissed the equitable claims for restitution, unjust enrichment, and money had and received on the ground that plaintiffs lacked clean hands. The Appellate Division, First Department, reversed on the ground that the Broche defendants were willing wrongdoers whose "conduct enabled plaintiffs to tortiously interfere with the Panasia contract." *Tai v Broche*, 115 AD3d at 578. It is undisputed that, having been paid by Panasia for his sale of the Premises, Broche also received money from the Tai plaintiffs for his attempt to transfer the Premises to them. Accordingly, to the extent that the Tai plaintiffs' equitable claims seek to recover sums that those plaintiffs paid to Broche, or to the Broche estate, the motion of the Tai plaintiffs is granted with regard to the quasi contractual claims.

However, the equitable claims also seek recovery of sums that Property 51 expended on the operation of, and improvements to, the Premises, as well as other costs and expenses, and damages for plaintiffs' loss of their bargain. None of these costs, expenses, and damages conferred a benefit upon Broche, and plaintiffs may not recover them on their equitable claims. Moreover, the claims for these damages are redundant with the claims asserted in plaintiffs' contractual claims, to which the court now turns.

For the following reason, the Tai plaintiffs' motion, with regard to the claims for breach of contract and breach of the implied covenant of good faith and fair dealing, are denied, and Broche's cross motion is granted with regard to those claims. The contract that Broche and Property 215 entered into was expressly subject to the Panasia contract, and provided for a year-long triple net lease of the Premises. Pour testified at his deposition that Tai decided that, notwithstanding Panasia's prior contract, she wished to purchase the Premises immediately. Toward that end, Tai retained counsel to sue Broche for specific performance and to file a *lis pendens*, and Pour negotiated the Second Amendment on her behalf, providing, among other terms, for the assignment of the Property 215 contract to Property 51, the immediate closing on the Premises, and the hold harmless clauses that are the basis of the Tai plaintiffs' contractual claims. The *lis pendens* was filed on April 1, 2009, five days before the execution of the Second Amendment and the closing on the Premises.

"The doctrine of *in pari delicto* mandates that the courts will not intercede to resolve a dispute between two wrongdoers." *Kirschner v KPMG, LLP*, 15 NY3d 446, 464 (2010) (footnote omitted). "The doctrine of *in pari delicto* bars a party that has been injured as a result of its own intentional wrongdoing

from recovering for those injuries from another party whose equal or lesser fault contributed to the loss." *Rosenbach v Diversified Group, Inc.*, 85 AD3d 569, 570 (1st Dept 2011) (citation omitted); see also *Symbol Tech., Inc. v Deloitte & Touche, LLP*, 69 AD3d 191, 196 (2d Dept 2009). It is a doctrine separate from that of unclean hands, which bars a wrongdoer from seeking equitable relief from a non-wrongdoing party. See *Sansum v Fioratti*, 128 AD3d 420, 421 (1st Dept 2015). Here, the Tai plaintiffs are barred from recovering the losses that resulted from their purchase of the Premises, despite Panasia's prior contract to do so, and from their assertion of dominance over the Premises while the Panasia action was pending.

In pari delicto is an affirmative defense (*Kirschner*, 15 NY3d at 477), and Broche does not use that phrase in his pleading. However, Broche's 14th affirmative defense states that plaintiffs' claims are barred, because they are "an attempt to recover alleged losses stemming from an unsuccessful scheme to tortiously interfere in the contract of a third party." That formulation states a defense of in pari delicto.

Accordingly, in motion sequence no. 002, it is hereby

ORDERED that the motion of defendants Joseph Berko and Berko & Associates LLC d/b/a Berko & Associates for summary judgment is granted, and the third, fourth, and fifth causes of action alleged against said defendants are dismissed; and it is further

ORDERED that said defendants' motion for summary judgment is granted to the extent of granting partial summary judgment in favor of said defendants and against plaintiff Maria Tai and third-party defendant NTD Building, LLC as follows:

1. Defendants are granted judgment on their second counterclaim and on their third-party claim, jointly and severally, in the amount of \$426,020.00, together with interest at the statutory rate from the date of December 13, 2011, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs, the second counterclaim and the third-party claim are severed and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that this action shall continue as to the first counterclaim; and it is further

ORDERED that, in motion sequence no. 003, the motion of defendants David Pour and David Pour & Associates LLP for summary judgment is granted and the first and second causes of action alleged against them are dismissed; and it is further

ORDERED that the cross motion of plaintiffs Maria Tai, Property 215 LLC, and Property 51, LLC for summary judgment is denied; and it is further

ORDERED that, in motion sequence no. 005, the motion of plaintiffs Maria Tai, Property 215, LLC, and Property 51, LLC for summary judgment is granted with regard to liability, as limited in the decision above; and it is further

ORDERED that an immediate trial as to the amount of damages shall be had before the court; and it further

ORDERED that the cross motion of defendants Daniel R. Broche and Estate of Agnes M. Broche for summary judgment dismissing the complaint is granted to the extent that the third and fifth causes of action alleged against them are dismissed; and it is further

ORDERED that the rest of this action shall continue and the parties proceed to mediation/trial, forthwith.


JOAN M. KENNEY
J.S.G.

8/18/16