

**Brassell v Harbourview Abstract, Inc.**

2016 NY Slip Op 31817(U)

March 21, 2016

Supreme Court, Suffolk County

Docket Number: 09404-2008

Judge: W. Gerard Asher

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This action arises out of a real estate transaction in which the plaintiff, Len Mario Brassel (hereinafter Len), and his brother, the co-defendant Robert James Brassel, Jr. (hereinafter Robert) owned a home as tenants in common which they sold to the co-defendant Clifton D. Smith. At the closing, \$62,000.00 from the sale was set aside in an escrow account of the co-defendant Harbourview Abstract, Inc. (hereinafter Harbourview) contingent upon the "depositors" of the escrow money (Len and Robert) producing a satisfaction of an old mortgage which dated back to a time when their parents owned the home. Harbourview was retained by the buyer, Clifton D. Smith, to search the title and provide a title report.

The escrow arrangement - entered into on the day of the closing, December 21, 2005 - was embodied in a written escrow agreement on a form provided by Harbourview. The agreement stated that the depositors of the money in escrow were the sellers Len and Robert, listed them by their names and contained their signatures. The agreement as provided by the parties is a single page. Although page one in pre-printed language, refers to "terms and conditions" on the reverse side and has the handwritten notion, "see attached mtg schedule," no reverse side or attachments are provided by any of the parties. Nevertheless, there is no dispute that the money was being held in escrow by Harbourview pending the production of the mortgage satisfaction.

Len and Robert were represented by one attorney who, according to Len's affidavit, was recommended by Robert. That attorney is the co-defendant Louise M. Brown. A few months after the closing, Robert retained on his behalf alone the law firm of Abraham & Abraham, LLC (hereinafter Abraham), for the purpose of recovering the monies held in escrow. Abraham is also a co-defendant in this action.

On March 15, 2006, Irwin D. Abraham, Esq., a partner in the Abraham firm, faxed a letter to Harbourview, as a follow up to a phone conversation the day before, advising Harbourview that Abraham represented "Robert J. Brassel Jr.," attached a copy of the mortgage satisfaction and requested that the balance held in escrow be sent to Mr. Abraham's attention, "as attorney, as soon as possible," that the original of the satisfaction of mortgage would be forwarded under separate cover for recording purposes and requested a copy of the title report.

The next day, March 16, 2006, Harbourview sent to Mr. Abraham the check for the entire amount held in escrow (\$62,000.00) along with a copy of the title report as requested by Mr. Irwin Abraham.

After receiving \$62,000.00, Irwin Abraham caused payments to be made to Robert by a series of checks as follows: March 20, 2006-\$100; March 22, 2006-\$7,000; March 22, 2006-\$10,000; April 23, 2006-\$11,000; and July 7, 2006-\$2,900. These checks totaled \$31,000, exactly the amount that Robert was entitled to with regard to this transaction. On July 11, 2006, Abraham paid another check to Robert in the amount of \$31,000, with the grand total dispersed being \$62,000. At this point Mr. Irwin Abraham had not read the title report. The odd request for the funds by Robert Brassel should have been a red flag for Abraham to investigate.

There are no factual disputes regarding that Len and Robert were the sellers as tenants in

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common, that they were both listed as depositors of the escrow funds, that Abraham only represented Robert, that the entire escrow amount (not just half) was sent to Robert's attorneys and that the title report reflects that Len and Robert were the sellers of the property as tenants in common.

There is also no dispute that the \$62,000.00 was paid by check to "Irwin D. Abraham, Esq., As Attorney," was deposited in the Abraham IOLA escrow account and then paid to Robert as outlined above. According to the complaint, this was all done without Len's knowledge, consent or permission.

In support of his cross motion, the plaintiff submits the escrow agreement which clearly shows the depositors to be both Len and Robert, that the \$62,000.00 being held in escrow is to be paid upon the production of the pertinent mortgage satisfaction and notably contains no provisions providing for the payment of the entire amount to only one of the depositors. Indeed, the law requires an escrow agent to act under a "duty not to deliver . . . to anyone except upon strict compliance with the conditions imposed: in the escrow agreement (*Farago v Burke*, 262 NY 229, 233 [1993]; see also *Grinblat v Taubenblat*, 107 AD2d 735, 484 NYS2d 96 [2d Dept 1985] and to act on behalf of all the parties having a beneficial interest in the escrow funds (see *Farago v Burke*, 262 NY229, 233 [1993]; *Cash v Titan Finance Servs., Inc.* 58 AD3d 785, 873 NYS2d 642 [2d Dept 2009]; *Takayama v Schaefer*, 240 AD2d 21, 669 NYS2d 656 [2d Dept 1998]; *Plaut v HGH Partnership*, 59 AD2d 686, 398 NYS2d 671 [1<sup>ST</sup> Dept 1977]; *Oppenheim v Simon*, 57 AD2d 1006 394 NYS2d 500 [3d Dept 1977]).

The plaintiff also states, and it is not contested, that the entirety of the escrow funds were paid to "Irwin D. Abraham, Esq., As Attorney" as the attorney for Robert, that the funds were then deposited in Abraham's IOLA escrow account and then it was all paid to Robert only.

It is the position of the plaintiff that the defendant Abraham voluntarily assumed the role of escrow agent by initiating contact with the original escrow agent, Harbourview Abstract, and retrieving all funds held by Harbourview. It is noted that plaintiff has been granted summary judgment against Harbourview (Baisely, J. April 23, 2009). Counsel has advised that Harbourview is no longer in existence.

Notwithstanding defendant Abraham's position it was acting on behalf of its own client, Robert J. Brassell Jr., it is the Court's opinion that as the defendant took over the responsibilities of an escrow agent, it was bound by the contractual duty of same. To prove the existence of an escrow agreement, it must be shown that there is "(a) an agreement regarding the subject matter and delivery of the [funds], (b) a third-party depository, (c) delivery of the [funds] to a third party conditioned upon the performance of some act or the occurrence of some event, and (d) relinquishment by [the grantor or depositor]" (see *Rock Oak Estates v Katahdin Corp.*, 280 AD2d 960, 962, 721, NYS2d 208 [2001], quoting *Lennar Northeast Partners Ltd. Partnership v Gifaldi*, 258 AD2d 240, 243, 695 NYS2d 448 [1999], *lv denied* 94 NY2d NY2d 754, 723 NE2d 89, 701 NYS2d 340 [1999]; see *Calcagno v. Drew*, 263 AD2d 939, 940, 694, NYS2d 248 [1999])." *Mortgage Electronic Registration Systems, Inc. v. Sam Maniscalco*; 2007 NY Slip Op 10440, 46 AD3d 1279, 848 NYS2d 766.

"An escrow agent not only has a contractual duty to follow the escrow agreement, but

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additionally becomes a trustee of anyone with a beneficial interest in the trust with a duty not to deliver the escrow to anyone except upon strict compliance with the conditions imposed.,” *Takayama, supra*. The escrow agent, especially lawyers, have a duty to act as a fiduciary that is to act for the benefit of others. It is a position of significant trust and responsibility. The check from the title company was paid to Abraham and Arbraham, as attorneys. This alone alerts any law firm that they have an immediate fiduciary relationship for those that are entitled to the funds. The obligation is clearly within the Judiciary Law section 497(2)(a).

Once Harbourview sent the check for \$62,000.00 to Abraham and Abraham “as attorney,” the firm now had a duty to all persons that have an interest in those funds. Whether Irwin Abraham had actual knowledge of Len Brassell’s interest is of no consequence. He had a duty to find out and act accordingly.

It is clear from a review of the moving papers that the defendant did indeed receive a copy of the title report which contained both Brassell brothers names which would further indicate they held the property as tenants in common whereby each would equally share in the sale proceeds. Along with the title report the defendant received the entire proceeds from the sale of the premises totaling \$62,000.00.

The papers and the Court file show that Abraham never inquired about or contacted Robert’s prior attorney to determine the status of the sale/title/escrow agreement/mortgage. Further, although he requested a copy of the title report, Abraham never bothered to look at same. Abraham admitted in his EBT that he never looked at the title report. What would be the sense of requesting it if you are never going to inquire (as any lawyer should) what the contract said and the details of the transaction? Irwin Abraham could have easily become aware of Len Brassel by just looking at the title report. Even a glance would have alerted him.

Abraham also never contacted Attorney Brown who represented Robert and Len at the closing to inquire about the transaction. In fact, the appropriate action by Abraham the first time Robert called to see him would have been to put the responsibility on Attorney Brown to clear up the escrow situation, or at the bare minimum to learn of the detail of the sale, what, where, how, and why of the \$62,000.00 in escrow. In short, the effort (or lack thereof) of Abraham fell woefully short of the minimum due diligence required.

The court finds that Abraham & Abraham LLC by Irwin D. Abraham, Esq., voluntarily assumed the duty of a successor escrow agent, exercised dominion and control of the check sent by Harbourview, and as such had a duty to properly distribute the proceeds from the sale of the premises owned by Robert James Brassell Jr. and Len Mario Brassell in an equal distribution of \$31,000.00 each.

Wherefore, it is

**ORDERED** that plaintiff’s application by means of his cross motion for summary judgment against the defendant Abraham & Abraham LLC is granted in its entirety.

The defendant’s motion for summary judgment, Abraham & Abraham, fails to establish the

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existence of material issues of fact requiring trial (*see Zuckerman v City of New York, supra*).  
Conversely and for the same reasons for granting the plaintiff's cross motion for summary judgment,  
Abraham has failed in its motion to make a prima facie entitlement to summary judgment and, thus, that  
motion is denied.

Submit judgment on seven (7) days notice.

Dated: March 21, 2016

W. Gerard Asher  
HON. W. GERARD ASHER

FINAL DISPOSITION     NON-FINAL DISPOSITION