

**P. Zaccaro, Co., Inc. v DHA Capital, LLC**

2017 NY Slip Op 30640(U)

April 4, 2017

Supreme Court, New York County

Docket Number: 652141/2015

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ  
*Justice*

PART 13

P. ZACCARO, CO., INC. and  
NEW GOLDEN AGE REALTY, INC.,  
Plaintiffs,

-against-

DHA CAPITAL, LLC, JHM DEVELOPMENT, LLC,  
FIRST ATLANTIC REAL ESTATE, LLC,  
DING K. WAI A/K/A JOHN WAI,  
SENTRY OPERATING CORP., and  
NEST SEEKERS, LLC,  
Defendants.

INDEX NO. 652141/2015  
MOTION DATE 03/08/17  
MOTION SEQ. NO. 004  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 12 were read on this motion for a default judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_ cross motion \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>1 - 3</u>
<u>4-5; 6-7</u>
<u>8-9; 10-12</u>

Cross-Motion:  Yes  No

Upon a reading of the foregoing cited papers, it is ordered that Plaintiffs' motion for a default judgment pursuant to CPLR §3215 and motion to compel discovery pursuant to CPLR §3124 are denied. Defendants Sentry Operating Corp. and Ding K. Wai a/k/a John Wai's cross-motion to dismiss the Amended Complaint pursuant to CPLR §3211 [a][7] is granted.

P. Zaccaro Co. Inc. (herein "Zaccaro") is a licensed real estate brokerage firm. New Age Golden Realty, Inc. (herein "New Age"), is a licensed real estate brokerage firm and a franchisee of non-party Century 21. Sentry Operating Corp. (herein "Sentry"), is the owner of property located at 75 Kenmare Street, New York, New York (herein the "Property"). Ding Wai a/k/a John Wai (herein "Mr. Wai") is a principal of Sentry.

Plaintiffs allege that Mr. Zaccaro allegedly met with Mr. Wai in February of 2014 to discuss the sale of the Property. It is alleged that Mr. Wai provided criteria necessary for the sale to transpire and Mr. Zaccaro entered into a brokerage agreement with Sentry for the production of a buyer ready, willing and able to purchase the Property. Plaintiffs allege that the sale of the Property between DHA Capital, LLC and Sentry took place solely as a result of Plaintiffs efforts and that their oral or implied contract requires that Plaintiffs receive a one percent commission.

On June 16, 2015, Plaintiffs commenced this instant action. On July 31, 2015, Sentry and Mr. Wai (herein the "Sellers") appeared via the filing of an Answer with cross-claims. On October 30, 2015, Plaintiffs served Defendant Sellers First Demand for Production of Documents along with Notices of Deposition. On November 2, 2015, former Defendant DHA Capital, LLC moved to dismiss the action against it (herein "Mot. Seq. 003"), which effectively stayed discovery until the motion was decided by this court on September 23, 2016. On February 3, 2016, Plaintiffs filed and served an Amended Complaint. Defendant Sellers have failed to file an Answer to the Amended Complaint and have failed to respond to Plaintiffs' Discovery Demands.

Plaintiffs now move for an Order granting default judgment against the Defendant Sellers for failing to appear and answer the Amended Complaint. Plaintiffs also move for an Order to compel discovery against Defendant Sellers for failure to respond to Plaintiffs' Discovery Demands.

Defendant Sellers oppose the motion and cross-move to dismiss the Amended

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Complaint based upon this court's reasoning in Mot. Seq. 003. In the alternative, Defendant Sellers move for an extension of time to file and serve their respective Answers to the Amended Complaint.

Once a "complaint was formally amended and served, it superseded the original complaint, became the only complaint in the case, and therefore required that a new responsive pleading be substituted for the original superseded answer" (*Hoppenfield v. Hoppenfield*, 220 A.D.2d 302, 632 N.Y.S.2d 558 [1<sup>st</sup> Dept. 1995]), citing *St. Lawrence Explosives Corp. v. Law Bros. Contracting Corp.*, 170 A.D.2d 957, 566 N.Y.S.2d 127 [4<sup>th</sup> Dept. 1991]). A defendant opposing entry of a default judgment must demonstrate both a reasonable excuse and meritorious defense (*New Media Holding Co. LLC v. Kagalovsky*, 97 AD3d 463, 949 NYS2d 22 [1<sup>st</sup> Dept 2012]). Whether an excuse is reasonable is a determination committed to the sound discretion of the court (*Matter of Hye-Young Chon v. Country-Wide Ins. Co.*, 22 AD3d 849, 803 NYS2d 699 [2005]). Law office failure is an excusable delay (CPLR 2005). Moreover, courts have the inherent power to forgive even an unexplained default "in the interest of justice" (*B.U.D. Sheetmetal v. Massachusetts Bay Ins. Co.*, 248 AD2d 856, 670 NYS2d 228 [1998]).

It is important to note that the Defendant Sellers originally answered the Complaint and have shown a willingness to litigate. Defendant Sellers awaited the determination of Mot. Seq. 003 as the legal theory for dismissal is identical to their cross-motion herein. Defendant Sellers have offered law office failure as a reason for the delay in filing an Answer after the determination of Mot. Seq. 003. Defendant Sellers also contend that Plaintiffs filed this motion prior to the date Defendant Sellers signified they would file an Answer (Opposition Papers Ex. C). The legal theories outlined in Defendant Sellers cross-motion represent a meritorious defense. Under these circumstances, "given the questions of fact as to merit...the lack of intention on Defendants' part to default, the failure of Plaintiff to demonstrate any prejudice attributable to the delay and the policy preference in favor of resolving disputes on the merits, we conclude that Defendants' untimeliness should be excused in this instance" (*Cerrone v. Fasulo*, 245 AD2d 793, 794, 665 NYS2d 761 [1997]). Applying New York's principles, this is not an appropriate case for departure from this State's preference for resolving controversies on the merits and the interests of justice warrant an exercise of discretion in favor of excusing the delay in answering (*Zanelli v. JMM Raceway, LLC*, 83 AD3d 697, 919 NYS2d 878 [2001]).

CPLR §3214(b) provides that "[s]ervice of a notice of motion...stays disclosure until determination of the motion unless the court orders otherwise." Discovery Demands served on October 30, 2015, were stayed as of November 2, 2015, until this court issued a determination for Mot. Seq. 003 on September 23, 2016. Furthermore, Defendant Sellers's cross-motion pursuant to CPLR §3211 has further stayed discovery until its resolution.

Dismissal pursuant to CPLR §3211 [a][7] requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and it is properly pled. A cause of action does not have to be skillfully prepared but it does have to present facts so that it can be identified and establish a potentially meritorious claim (*Leon v. Martinez*, 84 NY2d 83, 638 NE2d 511, 614 NYS2d 972 [1994]). Pleadings that consist of bare legal conclusions and factual assertions which are clearly contradicted by documentary evidence will not be presumed to be true and are susceptible to dismissal (*Dragon Head LLC v. Elkman*, 102 AD3d 552, 958 NYS2d 134 [1<sup>st</sup> Dept., 2013]).

"The doctrine of the "law of the case" is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter" (*Clark v. Clark*, 117 AD3d 668, 669, 985 NYS2d 276 [2014], quoting *Martin v. City of Cohoes*, 37 NY2d 162, 165, 332 NE2d 867, 371 NYS2d 687 [1975]). " '[T]he "law of the case" operates to foreclose re-examination of [the] question absent a showing of subsequent evidence or change of law' " (*J-Mar Serv. Ctr., Inc. v. Mahoney, Connor & Hussey*, 45 AD3d 809, 809, 847 NYS2d 130 [2007], quoting *Matter of Yeampierre v. Gutman*, 57 AD2d 898, 899, 394 NYS2d 450 [1977]). "The doctrine 'applies only to legal determinations that were necessarily resolved on the merits in [a] prior decision' " (*Erickson v. Cross Ready Mix, Inc.*, 98 AD3d at 717, quoting *Baldasano v. Bank of N.Y.*, 199 AD2d 184, 185, 605 NYS2d 293 [1993]). Here, the issue disputed on the cross-motion

has already been decided in Mot. Seq. 003 and Plaintiffs have failed to provide subsequent evidence or change of law to warrant a different ruling.

Sellers contend that Zaccaro never disclosed that they were acting as agents on behalf of DHA as buyer, or on behalf of the Sellers, until the Amended Complaint (See Mot. Ex. D, p. 24 & 25). Sellers argue that Zaccaro together with New Age and Century 21's knowing assistance acted as a dual agent for the sale of the property, and the failure to ever disclose the dual agency or obtain Sellers' consent, warrants forfeiture of the right to collect any commission and dismissal of the amended complaint .

Real estate brokers have a fiduciary relationship with their client and an affirmative duty not to act for a party with adverse interests unless consent is obtained from the principal after being provided with full knowledge of the facts. A broker, "cannot act as agent for both seller and purchaser of the property" (Trylon Realty of Great Neck, Inc. v. Roth, 187 AD2d 715, 187 AD2d 715 [2<sup>nd</sup> Dept., 1992], Queens Structure Corp. v. Jay Lawrence Assoc., 304 AD2d 736, 758 NY2d 664 [2<sup>nd</sup> Dept., 2003]). A real estate broker forfeits the right to a commission regardless of the damages incurred if the fiduciary duty is breached (Douglas Elliman LLC v. Tretter, 84 AD3d 446, 922 NYS2d 74 [1<sup>st</sup> Dept. 2011] aff'd 20 NY3d 875, 979 NE2d 1178, 955 NYS2d 851 [2012]).

Plaintiffs oppose dismissal arguing that they simply introduced DHA Capital, LLC to Sentry, without being called upon to do anything more, and thus acted as a traditional finder, and not a fiduciary (Plaintiffs' Opposition P. 7). However, Plaintiffs own Amended Complaint states "Plaintiffs and DHA entered into an oral agreement wherein the Plaintiffs were authorized by DHA to act as the licensed real estate brokers" and "Plaintiffs disclosed to DHA the fact that Zaccaro had been retained by the Seller to market and sell the Premises, the affidavits submitted herewith leave no question that DHA was, at all times, aware of the dual agency" (Plaintiffs' Memorandum of Law NYSCEF No. 54, P. 13). The court is unpersuaded by Plaintiffs new theory that they merely acted as a traditional finder and therefore agree with Defendant Sellers that the doctrine of the "law of the case" applies to Sellers cross-motion to dismiss.

Accordingly, it is ORDERED that Plaintiffs' motion in its' entirety is denied, and it is further,

ORDERED that Defendants DING K. WAI A/K/A JOHN WAI and SENTRY OPERATING CORP.'s motion to dismiss this action pursuant to CPLR §3211[a][7], is granted, and it is further,

ORDERED, that the Plaintiffs' causes of action asserted in the Amended Complaint against DING K. WAI A/K/A JOHN WAI and SENTRY OPERATING CORP. are severed and dismissed, and it is further,

ORDERED, that the causes of action in the Complaint asserted against Defendant NEST SEEKERS, LLC, remain in effect, and it is further,

ORDERED, that the caption in this action is amended and shall read as follows:

P. ZACCARO, CO., INC. and  
NEW GOLDEN AGE REALTY, INC.,  
Plaintiffs,

-against-

NEST SEEKERS, LLC,  
Defendant.

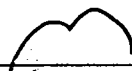
and it is further,

ORDERED, that within twenty (20) days from the date of entry of this Order the cross-moving party shall serve a copy of this Order with Notice of Entry on all parties appearing, and it is further,

**ORDERED, that within twenty (20) days from the date of entry of this Order, the cross-moving party shall also serve a copy of this Order with Notice of Entry upon the Trial Support Clerk located in the General Clerk's Office (Room 119) and upon the County Clerk (Room 141B), who are directed to amend the caption and the court's records accordingly, and it is further,**

**ORDERED that the Clerk of the Court enter judgment accordingly.**

ENTER:



**MANUEL J. MENDEZ,  
J.S.C.**

**MANUEL J. MENDEZ  
J.S.C.**

**Dated: April 4, 2017**

**Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION**  
**Check if appropriate:     DO NOT POST                     REFERENCE**