

**Trustee of the Jerome J. Nash Revocable Trust v
Harmon**

2018 NY Slip Op 31206(U)

June 14, 2018

Supreme Court, New York County

Docket Number: 153649/14

Judge: Jennifer G. Schechter

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----x
TRUSTEE OF THE JEROME J. NASH
REVOCABLE TRUST,

Plaintiff,

DECISION AND ORDER

-against-

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THOMAS HARMON, ROBERT EYCHNER, EYCHNER
ASSOCIATES and DOUGLAS ELLIMAN, LLC, d/b/a
PRUDENTIAL DOUGLAS ELLIMAN REAL ESTATE,
Defendants.

-----x
JENNIFER G. SCHECTER, J.:

Defendant Douglas Elliman, LLC, d/b/a Prudential Douglas
Elliman (PDE) moves for summary judgment pursuant to CPLR
3212. The motion is granted in part.

Background

Plaintiff, Trustee of the Jerome J. Nash Revocable Trust
(Nash) owns a property in Manhattan that contains 22
residential units and two commercial units (Property). In
December 2008, Nash hired Robert Eychner (Eychner), Thomas
Harmon (Harmon) and Eychner Associates (EA) to manage the
Property.¹ Eychner and Harmon were real estate agents with EA
(Affirmation in Opposition [Opp] at ¶ 3). Defendants managed
the Property through December 2013.

According to Nash, by oral agreement (Contract) and in
consideration for management services, EA would be paid a
monthly management fee of 4% of the gross rent collected each

¹ By Order dated 12/9/15 (NYSCEF DOC NO. 128), plaintiff
was awarded a default judgment against Eychner and EA.

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month and a commission for rental of the commercial units (Affirmation in Support [Sup], Ex A [Complaint] at ¶¶ 11-14; Opp at ¶¶ 4, 6).

In May 2011, PDE and Eychner entered into a written agreement (Agreement) whereby Eychner became an independent contractor of PDE with the title Associate Real Estate Broker and would "assign to PDE [Eychner's] current listings" effectively making PDE Nash's real estate broker for properties that were listed on "Schedule A" and "Schedule B" (Sup, Ex G at ¶¶ 5-8, "Schedule A" and "Schedule B"; see Opp, Ex N). The Agreement set forth that "PDE [was] not acquiring or merging with [EA] and [was] not in any manner whatsoever a successor to the business of [EA]" (*id.* at ¶ 7).

In PDE's letter of engagement with Harmon as an independent contractor with the title Salesperson or Associate Broker, Harmon agreed that he would "not engage in any real estate brokerage business . . . except on behalf of [Douglas Elliman, LLC and] . . . all commissions and other compensation resulting from [Harmon's] activities [would] be made payable to [Douglas Elliman, LLC]" (Sup, Ex I at ¶ 1). He further agreed that he would be "free to engage in other outside employment for [himself] or for other employers, provided that

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such employment does not involve any real estate brokerage or management activities" (*id.* at ¶ 4[d][emphasis added]).

According to Nash, the Contract "was in force from December 2008 up until the dissolution of EA on or about June 2011, when EA was subsumed by [PDE]" (Opp at ¶ 7). Nash further maintains that when PDE acquired EA it assumed EA's obligations under the Contract (Complaint at ¶¶ 15-16, 19). Nash explains that regardless of any agreements that PDE had with Eychner and Harmon, through its manager Gary Cannata, PDE was well aware that Harmon and Eychner continued to manage the Property and that they were using PDE office space, email addresses and telephone numbers to communicate with Nash and Property tenants (Opp at ¶¶ 8-12).

Nash commenced this action in 2014, alleging that between December 2008 and December 2013, Harmon and Eychner, among other things, wrote unauthorized checks made payable to cash in excess of \$75,000, wrote \$20,000 in unauthorized checks made payable to Harmon, paid themselves over \$5,000 in unauthorized bonuses, made \$10,000 in unauthorized purchases, made \$55,000 in unauthorized ATM withdrawals and received \$130,000 in unauthorized management and brokerage fees (Complaint at ¶¶ 22-38). Nash contends that because Eychner and Harmon were employed by PDE, PDE received payment of "a

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portion of the management and brokerage fees paid by [Nash] under the [C]ontract" (Complaint at ¶¶ 18, 29 [between 2008 and 2013 Harmon and Eychner paid EA and PDE brokerage fees in excess of \$30,000]).

As against PDE, Nash alleges that while Eychner and Harmon were working under the umbrella of PDE and being supervised by Gary Cannata, "Harmon stole money from Nash's building management account for personal use and without permission" (Opp at ¶ 14). PDE now moves for judgment on Nash's claims against it for breach of contract, breach of fiduciary duty, unjust enrichment, negligent hiring and supervision and conversion.

Analysis

Summary Judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of material triable issues (see *Glick & Dolleck v Tri-Pac Export Corp*, 22 NY2d 439, 441 [1968] [denial of summary judgment appropriate where an issue is "arguable"]; *Sosa v 46th Street Develop. LLC*, 101 AD3d 490, 493 [1st Dept 2012]). The burden is on the movant to make a prima facie showing of entitlement to judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any disputed

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material facts. Once the movant has made this showing, the burden then shifts to the opponent to establish, through competent evidence, that there is a material issue of fact that warrants a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Breach of Contract

Nash alleges that PDE assumed the Contract, that it is responsible for Harmon's breach of the Contract and that from 2011 through 2013, PDE received a portion of the management and brokerage fees paid under the Contract (Complaint at ¶¶ 16, 18, 21, 22-29, 100-108).

PDE failed to establish, as a matter of law, that it did not assume the Contract through its conduct by holding out Harmon and Eychner as its agents. Although PDE urges that its agreement with Harmon specifically stated that Harmon was not permitted to manage the Property and that it did not receive any management fees, it is undisputed that Harmon continued to manage the Property for Nash after he began working for PDE, that he used PDE's office, email address, telephone and fax to conduct services under the Contract and that a PDE supervisor who had interactions with Nash during the relevant period may have known of Harmon's activities and did nothing to dispel any objective appearance that Harmon was acting on its behalf.

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Breach of Fiduciary Duty

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 NY2d 337, 415 [2001]). "To state a claim for breach of fiduciary duty, a plaintiff must allege that defendant owed him a fiduciary duty, that the defendant committed misconduct, and that the plaintiff suffered damages caused by that misconduct" (*NRT New York, LLC v Morin*, 147 AD3d 589 at 589 [1st Dept 2017]). At a minimum, as Nash's real estate broker, PDE owed it a duty of loyalty and had an obligation to act in its best interests (*id.* at 90).

PDE urges that although a fiduciary relationship exists between a broker and principal, the complaint insufficiently alleges that it breached its duty. PDE explains that it provided Nash with brokerage services and received a commission for the rental of one commercial unit (Sup at ¶¶ 21-23). It contends that the cause of action must be dismissed because there is no evidence or allegation that PDE breached any duty in connection with its brokerage services or that it obtained the commission wrongfully. It emphasizes that the misappropriation of the Property's management funds

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is separate from the agreement with PDE for brokerage services (Sup at ¶ 19).

Nash responds that beginning in 2011 all of Eychner and Harmon's activities were under PDE's auspices. Significantly, Nash alleges that Eychner and Harmon represented that all of their activities were performed under PDE, they used PDE offices, held the Building's documents in PDE's office, used PDE email and that all the while PDE's office manager was aware that Eychner and Harmon were listing and managing the Property (Opp at 11-12). Nash further alleges that PDE received a portion of the management and brokerage fees paid under the Contract (Complaint at ¶¶ 16, 18, 21, 22-29, 100-108). Moreover, while Eychner and Harmon were working for PDE, even if PDE did not receive certain commissions or management fees, Eychner and Harmon were taking unauthorized commissions and management fees from the Property's bank account.

Generally, for licensing purposes "[a] real estate broker is responsible for the wrongful acts of a salesperson in the broker's employ if the broker is found to have actual knowledge of such acts or retains the benefits of a transaction wrongfully negotiated by such salesperson . . ." (*Matter of Razik v New York State Dept. of State Div. of*

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Licensing Servs., 60 AD3d 769, 771 [2d Dept 2009] [emphasis added]). The licensing sanctions contained in Real Property Law "were not designed and enacted to supplant existing common-law remedies" (*Matter of Roberts Real Estate v New York State Dept. of State Div. of Licensing Servs.*, 80 NY2d 116, 121-22 [1992]).² Because there is a question of fact as to whether PDE knew or should have known about Harmon's management activities, unauthorized withdrawals and the use of PDE's name and facilities when dealing with the Property, PDE's motion for judgment on this claim is denied.

Unjust Enrichment

Unjust enrichment "is an obligation imposed by equity to prevent injustice, in the absence of an agreement between the parties concerned" (*Georgoa Malone & Co., Inc. v Ralph Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd* 19 NY3d 511 [2012] [internal quotation marks omitted]). Here, both parties contend that there was an agreement, at a minimum, to list available space in the Building. The parties dispute whether the Contract, which included management of the Building, was assumed by PDE. Because any contract between the parties

² A consent order was entered into with the Department of State and Harmon, Eychner, EA and PDE in which defendants were collectively fined \$1,000 for failing to discover license activity under a brokerage name other than that with which Eychner and Harmon were associated (Opp, Ex J at ¶ 6).

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would govern the particular subject matter, plaintiff cannot recover under a quasi-contract theory and the unjust enrichment claim is dismissed (see *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388-89 [1987]; *Sivin-Tobin Associates, LLC v Akin Gump Strauss Hauer & Feld LLP*, 68 AD3d 616, 618 [1st Dept 2009]; *Stephen Pevner, Inc., v Ensler*, 309 AD2d 722 [1st Dept 2003][dismissing claim as duplicative of breach of contract claim and explaining that without revenue generation there is no benefit to defendant]). In any event, in response to PDE's showing, Nash has not established that PDE itself unjustly obtained any fees to which it was not entitled.

Negligent Hiring and Supervision

Nash alleges that because PDE supervisor Gary Cannata knew of Harmon's management of the Building, it should have properly supervised him and should have known of any misconduct (Opp Memo at 14-15). Nash, however, has failed to rebut PDE's showing that it had no knowledge or notice of Harmon or Eychner's misconduct or their propensity for misconduct (*Cross v Supersonic Motor Messenger Courier*, 140 AD3d 503 [1st Dept 2016][summary judgment dismissing negligent hiring and supervision claim when there was no reason to question employee qualifications]; *Vasquez v Sirkin Realty*

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Corp., 107 AD3d 410 [1st Dept 2013][negligent hiring and supervision causes of action not viable when there was no evidence that employer was on notice that employee had any propensity for violence]). PDE's motion for summary judgment on this cause of action is granted and the claim is dismissed.

Conversion

The cause of action for conversion is likewise dismissed. Conversion is an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights (*Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883 [1st Dept 1982]). Nash argues that PDE assumed control over brokerage fees obtained by Eychner and Harmon, which were a byproduct of their embezzlement (Opp Memo at 17). On this motion, however, the only evidence of payment to PDE was a commercial commission check that it was entitled to. There is no allegation that the amount of the commission or the manner in which it was obtained was improper. There is also no evidence to rebut PDE's showing or Harmon's testimony that it did not receive or control any money obtained from the management of the Building. Thus, it is uncontroverted that PDE did not convert anything belonging to Nash.

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Accordingly, it is ORDERED that PDE's motion for summary judgment is granted in part and the fourth (unjust enrichment), fifth (negligent hiring and supervision) and sixth (conversion) causes of action are dismissed as against PDE. In all other respects, PDE's motion is denied.

This is the decision and order of the court.

Dated: June 14, 2018



HON. JENNIFER G. SCHECTER