

Taylor v Barbara Kaye Rubin, Inc.

2018 NY Slip Op 33613(U)

February 27, 2018

Supreme Court, Saratoga County

Docket Number: 2016-2491

Judge: Ann C. Crowell

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This opinion is uncorrected and not selected for official publication.



ORIGINAL

STATE OF NEW YORK
SUPREME COURT

COUNTY OF SARATOGA

DEAN TAYLOR and SARA L. BERTOMEN,

Plaintiffs,

-against-

DECISION and ORDER
RJI #45-1-2016-1308
Index # 2016-2491

BARBARA KAYE RUBIN, INC., d/b/a REMAX
PARK PLACE and ROBERT I. GOODMAN,
individually, and as the Chief Executive officer of
BARBARA KAYE RUBIN, INC.,

Defendants.

APPEARANCES:

The Harding Law Firm, PLLC
Attorneys for Plaintiffs
1343 Balltown Road
Niskayuna, New York 12309

David M. Lenny, Esq.
Attorney for Defendants
25 Locust Avenue
Clifton Park, New York 12065

ANN C. CROWELL, J.

2016 MAR -8 AM 11:39
SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

FILED

Plaintiffs Dean Taylor ("Taylor") and Sara L. Bertomen ("Bertomen") request an Order pursuant to CPLR § 3212 granting summary judgment on their causes of action for breach of contract, breach of fiduciary duty and unjust enrichment against the defendants Barbara Kaye Rubin, Inc., dba Remax Park Place ("BKR") and Robert I. Goodman, individually, and as the Chief Executive officer of Barbara Kaye Rubin, Inc. ("Goodman"). Plaintiffs also seek an Order allowing them to receive payment for commissions they claim are due and owing from BKR funds being held in escrow. Defendants have filed a cross-motion seeking the dismissal of plaintiffs' breach of fiduciary duty cause of action; breach

of contract cause of action; and unjust enrichment cause of action. Defendants also seek an Order releasing the funds held in escrow to the corporate defendant BKR. Defendants have withdrawn that portion of their cross-motion seeking a protective order.

Taylor and Bertomen are licensed New York State real estate brokers. On January 4, 2001, Taylor entered into a written contract with BKR (Taylor affidavit, Exhibit E). Defendant Goodman executed the contract in his corporate capacity on behalf of BKR. The contract clearly defined the plaintiffs' status as independent contractors. The contract provides BKR's entitlement to 5% of real estate commissions earned from Taylor's sales and Taylor entitlement to 95% of those commissions. The contract also required Taylor to pay BKR management fees of \$505.00/month; office expenses of \$725.00/month; membership dues of \$360.00/year; and promotion funds of \$102.00/month. The contract terminated "on the last day of the 12th month from" January 4, 2001, "unless sooner terminated." Bertomen alleges that she entered into essentially the same written contract as Taylor, but the record does not include a copy of her contract. The contract provided for successive 12 month extensions (Section 9(A)(3)). Neither plaintiff has submitted any documentary proof he or she extended their contract. In the absence of any renewal, the contract between the parties ceased to exist. *Fritsch v County of Chenango*, 198 AD2d 650 [3d Dept. 1993]. Plaintiffs' causes of action based upon a breach of contract are dismissed. The parties' claims may be decided in an equitable cause of action. *Fritsch v County of Chenango*, *supra*. Plaintiff Taylor's First cause of action and plaintiff Bertomen's First cause of action sounding in breach of contract are dismissed. Defendants' First, Second and Third Counterclaims are dismissed.

Plaintiffs also assert a cause of action based upon a breach of fiduciary duty. A

fiduciary relationship between persons or entities exists “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.” *Restatement [Second] of Torts § 874, Comment a; EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]. A fiduciary relationship is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions. *EBC I, Inc. v Goldman, Sachs & Co.*, *supra*, citing *Northeast Gen. Corp. v Wellington Adv.*, 82 NY2d 158, 162 [1993]). Plaintiffs and defendants entered into an arms length written contractual agreement which they neglected to renew upon its expiration. Pursuant to the terms of that contract, plaintiffs acknowledged they were independent contractors of BKR with no joint venture, partnership or shareholder relationship to BKR. Goodman's only fiduciary relationship is with the sole shareholder of BKR (himself). *See Calabrese Bakeries, Inc. v Rockland Bakery, Inc.*, 102 AD3d 1033 [3d Dept. 2013]. Plaintiffs and defendants do not have any fiduciary relationship. Plaintiffs' causes of action based upon a breach of fiduciary duty are dismissed. If plaintiffs wanted a fiduciary-like relationship or responsibilities, they could have bargained for and specified them in a valid, unexpired contract. *Northeast General Corp. v Wellington Advertising, Inc.*, *supra*.

The parties do not dispute that they continued their business relationship under the terms of their long expired contracts. Defendant BKR continually collected sales commissions from real estate contracts secured by the plaintiffs on behalf of BKR. BKR did not pay plaintiffs a portion of the sales commissions pursuant to either their long established practice or the fair and reasonable value of their services. BKR represents it is insolvent except for funds held in escrow by plaintiffs' counsel. The funds are held on consent of BKR's counsel.

Plaintiffs assert causes of action sounding in unjust enrichment. “An unjust enrichment claim is rooted in the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another.” *Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012], quoting *Miller v Schloss*, 218 NY 400, 407 [1916]. To establish a cause of action for unjust enrichment, plaintiff must demonstrate that: (1) the other party was enriched; (2) at that party’s expense; and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered. *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]; see also, *NYS Workers’ Compensation Bd. v Program Risk Management, Inc.*, 150 AD3d 1589 [3d Dept. 2017].

Plaintiffs have established *prima facie* entitlement to summary judgment based upon an unjust enrichment claim against the corporate defendant BKR. Plaintiffs and BKR continued a business relationship for over ten years pursuant to the terms of a long expired contract. Plaintiffs were to receive 95% of any commissions earned on their sales for BKR. BKR collected 100% of the sales commissions earned on the plaintiffs’ real estate transactions. BKR retained more than its 5% share of those commissions. It is manifestly against equity and good conscience to permit BKR to retain the 95% of commissions that had been paid to the plaintiffs. BKR has failed to raise any issue of fact regarding the sums owed to plaintiffs, or that retaining the additional 95% of the commissions can be considered fair and reasonable compensation for their services.

Plaintiff Taylor is granted judgment against the defendant BKR in the sum of \$48,916.00 for the sales between June 21, 2016 and September 13, 2016, plus statutory interest on each individual commission from the date earned. See, *CPLR § 5001; Revell v Guido*, 124 AD3d 1006 [3d Dept. 2015]. Taylor’s November 14, 2017 affidavit is insufficient

with respect to the sale of 5 Longkill Road. A \$15,000 total commission is being claimed for that sale with \$6,000 held in escrow and \$11,000 still due from the seller (a mathematical impossibility). Additionally, another transaction with a \$30,000 commission due is allegedly still pending. Plaintiff Taylor is also granted a judgment against BKR in the sum of \$7,157.64 for reimbursement of advanced monthly fees and expenses. BKR has not opposed this relief. Plaintiff Bertomen is granted judgment against the defendant BKR in the sum of \$38,606.55 for the sales between August 15, 2016 and November 7, 2016, plus statutory interest on each individual commission from the date earned.

Plaintiffs' unjust enrichment claim may proceed. It does not duplicate a valid contract claim in this case. *Corsello v Verizon NY, Inc.*, 18 NY3d 777, 790 [2012]. However plaintiffs have failed to satisfy their initial burden that defendant Goodman was personally enriched at their expense. Plaintiffs' reply papers have attempted to remedy this deficiency by showing Goodman's withdrawals from the BKR accounts and describing some of the uses for those withdrawals. Although some of those uses may be personal, issues of fact preclude any judgment against Goodman personally on an unjust enrichment theory. Likewise, issues of fact preclude an award of summary judgment dismissing the unjust enrichment causes of action against Goodman. However plaintiffs have demonstrated BKR does owe them commissions. Plaintiffs' motion for summary judgment on its unjust enrichment cause of action is granted against defendant BKR only. Plaintiff Taylor is granted judgment against the defendant BKR in the sum of \$48,916.00 representing unpaid commissions and in the sum of \$7,157.64 representing reimbursement for advanced monthly fees and expenses. Plaintiff Bertomen is granted judgment against the defendant BKR in the sum of \$38,606.55 representing unpaid commissions. Plaintiffs' motion for

summary judgment against defendant Goodman is denied.

Defendants' motion for summary judgment dismissing plaintiffs' breach of contract and breach of fiduciary duty causes of action is granted. Defendants' counterclaims based upon a breach of contract are dismissed. Defendants' motion for summary judgment dismissing plaintiffs' unjust enrichment causes of action is denied.

Attorney Harding's request for authority to distribute the BKR funds held in escrow to make payment to the plaintiffs prior to entry of judgment is denied. Defendant BKR's request for the funds to be returned to BKR is denied.

Any relief not specifically granted is denied. No costs are awarded to any party. This Decision shall constitute the Order of the Court. The original Decision and Order shall be forwarded to plaintiffs' attorney for filing and entry. The underlying papers will be filed by the Court.


This action has been pending since September 22, 2016. Plaintiff is directed to file a Note of Issue in this case on or before April 16, 2018. A compliance/settlement conference is scheduled for **April 23, 2018 at 9:30 a.m.** The attorneys and the parties and/or principals of the parties are expected and required to personally attend the conference in the Saratoga County Courthouse, 30 McMaster Street, Ballston Spa, New York.

Dated: February 27, 2018
Ballston Spa, New York


ANN C. CROWELL, J.S.C.

Papers Received and Considered:

Notice of Motion, dated November 14, 2017

ENTERED
Craig A. Hayner

Saratoga County Clerk

2018 MAR -8 AM 11:39
SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

ENTERED

Affirmation of Christopher G. Kenyon, Esq., dated November 14, 2017, with Exhibit A

Affidavit of Dean Taylor, sworn to November 14, 2017, with Exhibits A-I

Affidavit of Sara L. Bertomen, sworn to November 14, 2017, with Exhibits A-H

Plaintiff's Memorandum of Law, dated November 14, 2017

Notice of Cross Motion, dated December 11, 2017

Affirmation of David M. Lenney, Esq., dated December 11, 2017

Affidavit of Robert I. Goodman, sworn to December 8, 2017, with Exhibit A

Affirmation of Christopher G. Kenyon, Esq., dated December 28, 2017, with Exhibit A

Affirmation of David M. Lenney, Esq., dated January 5, 2018