

**Lash v Schleider**

2020 NY Slip Op 30406(U)

February 11, 2020

Supreme Court, New York County

Docket Number: 650045/2019

Judge: Jennifer G. Schechter

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JENNIFER G. SCHECTER PART IAS MOTION 54EFM

Justice

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LORI LASH, ROBERT LASH, GOLDSHOLLE, LLC,

Plaintiffs,

- v -

JEFFREY SCHLEIDER, MIRON PROPERTIES, LLC, CITI HABITATS, CORCORAN GROUP, INC., NRT LLC, MANHATTAN GROUP PROPERTIES, LLC, B&B GLOBAL DEVELOPMENT CORP., 977 MANHATTAN AVENUE LLC

Defendants.

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INDEX NO. 650045/2019

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8-15, 18-20, 24-30 were read on this motion to/for DISMISS.

Defendants Manhattan Group Properties, LLC (MGP) and B&B Global Development Corp. (B&B) move, pursuant to CPLR 3211(a)(7), for an order (1) dismissing the first, fourth, fifth and sixth causes of action in the second amended complaint (SAC) as against the moving defendants and (2) dismissing the cross-claims of defendants Jeffrey Schleider and Miron Properties, LLC (Miron), Citi Habitats, Corcoran Group, Inc. (Corcoran) and NRT LLC as against the moving defendants. Plaintiffs Lori Lash, Robert Lash and Goldsholle, LLC (Goldsholle) oppose. None of the other defendants oppose. For the reasons set forth below, the motion of defendants MGP and B&B is granted.

I. Factual Background & Procedural History

As this is a motion to dismiss, the facts below are taken from the SAC. This case arises from a contract between the plaintiffs and moving defendants Jeffrey Schleider and Miron

1 References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF). Page numbers refer to the e-filed PDF.

Properties, LLC (Miron), to list for sale plaintiffs' property owned located at 977 Manhattan Avenue, Brooklyn, New York (the Property). Around August 2014, the Property was listed with a \$4,995,000 asking price. Through Schleider and Miron, plaintiffs accepted an offer from defendant 977 Manhattan Avenue LLC (977) to purchase the Property for \$5 million. Thereafter, 977 presented an architect's report alleging deficiencies of the Property and reduced their purchase offer by approximately \$1 million. In September 2014, plaintiffs contracted to sell the Property to 977 for a purchase price of \$4.1 million upon the advice of Schleider and Miron.

On the February 9, 2015 closing date, Goldsholle, MGP and 977 executed an assignment of contract of sale, pursuant to which 977 assigned its right to interest in the Property to MGP (Dkt. 29 [assignment agreement]). In connection with that assignment, unbeknownst to plaintiffs, MGP paid \$700,000 to 977 in addition to the \$4.1 million purchase price. Plaintiffs allege that Schleider and Miron, conspiring with MGP, had intentionally and falsely advised plaintiffs that \$4.1 million was the best price available. Plaintiffs further allege that the moving defendants, in return for the alleged "flip," retained Schleider and Miron as exclusive broker for the sale of condominiums to be developed at the Property. In 2016, Miron was acquired by defendant Citi Habitats, a division of Corcoran, which is owned and operated by defendant NRT.

On January 4, 2019, plaintiffs commenced this action against Schleider, Miron, Citi Habitats, Corcoran, NRT, MGP and B&B, and filed the original complaint on February 5, 2019. On March 6, 2019, MGP and B&B moved to dismiss the original complaint as against them. On April 22, 2019, plaintiffs filed an amended complaint (Dkt. 16). Pursuant to a court order and stipulation by the parties, on May 8, 2019, plaintiffs filed and served the SAC, adding 977 Manhattan Avenue LLC (977) as a defendant. MGP and B&B elected to apply their previously filed motion to dismiss to the SAC. On June 19, 2019, defendants Schleider, Miron, Citi, Corcoran

and NRT e-filed their answer to the SAC, asserting cross-claims against MGP, B&B and 977 for indemnification and contribution. At the August 13, 2019 preliminary conference (PC), the case was stayed as against MGP and B&B pending a decision on this motion, and discovery proceeded as against the remaining defendants (Dkt. 33 [PC order] at 1). 977 never appeared in this action.

The SAC asserts the following causes of action, numbered here as in the SAC: (1) fraud against all defendants; (2) breach of contract against Schleider, Miron, Corcoran and NRT; (3) breach of fiduciary duty against Schleider, Miron, Corcoran and NRT; (4) breach of the covenant of good faith and fair dealing against all defendants; (5) unjust enrichment against all defendants; and (6) constructive trust against all defendants. The SAC seeks damages of at least \$700,000 in connection with each of its six causes of action.

## II. Discussion

### a. Legal Standards on a Motion to Dismiss under CPLR 3211(a)(7)

On a motion to dismiss, the facts alleged in the pleading are accepted as true, as are all reasonable inferences in non-movant's favor that may be gleaned from them (*see Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009]; *Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration" (*Skillgames*, 1 AD3d at 250). Dismissal must be denied if the pleading sets forth a viable cause of action (*see id.*). Deficiencies in the pleading, moreover, may be remedied by proper affidavits (*see Amaro*, 60 AD3d at 492; *see also Leon v Martinez*, 84 NY2d 83, 88 [1994]).

### b. First Cause of Action: Fraud

The first cause of action for fraud alleges as follows, in relevant part:

Defendants knowingly and materially misrepresented material aspects as to the sale of the Property by conspiring for Plaintiffs to sell the Property to [977] for \$4,100,000 when, upon information and belief, Defendants intended to and did *immediately* “flip” the Property and/or the contract concerning the Property to [MGP] and/or [B&B] for \$4,800,000 (SAC ¶ 32).

“[A] cause of action for fraud require[s] a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages” (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Under CPLR 3016(b), where a cause of action is based upon fraud, the complaint must detail “the basic facts to establish the elements of the cause of action” (*Pludeman v N. Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008]).

Plaintiffs argue that the contract price for the Property was a “material fact” and that defendant Schleider misrepresented that \$4.1 million was “the best offer possible.” Setting aside the fact that it was 977—and *not* MGP or B&B—who is alleged to have offered \$5 million and then \$4.1 million for the Property, plaintiffs fail to plead facts with the requisite detail that MGP and B&B were responsible for Schleider’s statements regarding the *quality* of the offer. Assertions that Schleider—who was plaintiffs’ property broker—“conspired” or acted “on behalf of and in concert” with MGP and B&B are conclusory and are entitled to zero weight.<sup>2</sup> Moreover, MGP and B&B’s later purchase of the Property for \$4.8 million is insufficient to infer their knowledge of the falsity of statements made five months earlier. The cause of action for fraud is therefore dismissed as against MGP and B&B.<sup>3</sup>

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<sup>2</sup> The SAC does not assert what MGP and B&B stood to gain in paying a higher price for the Property.

<sup>3</sup> The Appellate Division, First Department’s decision in *Norcast S.ar.l. v Castle Harlan, Inc.* addressed similar allegations of fraud (147 AD3d 666 [1st Dept 2017]). In that case, a straw buyer convinced plaintiff seller to sell its business at a deflated purchase price of \$190 million by concealing the identity of the buyer, a competitor business, in exchange for a \$25 million fee. The

c. *Fourth Cause of Action: Breach of the Implied Covenant of Good Faith and Fair Dealing*

The fourth cause of action for breach of the implied covenant of good faith and fair dealing alleges as follows, in relevant part:

Defendants worked to thwart and undercut Plaintiffs' ability to sell the Property for the best price available, by conspiring for Plaintiffs to sell the Property to [977] for \$4,100,000 when, upon information and belief, Defendants intended to and did immediately "flip" the Property and/or the contract concerning the Property to [MGP] and/or [B&B] for \$4,800,000 (SAC ¶ 46).

Contracts interpreted under New York law include an implied covenant of good faith and fair dealing, which "embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract'" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002], quoting *Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 [1995]). Three contracts are at issue in this action: (1) a listing contract between plaintiffs and their real estate brokers—to which neither the moving defendants nor their predecessor-in-interest, 977, were a party; (2) a contract of sale between plaintiffs and 977; and (3) an assignment agreement between Goldsholle, MGP and 977.

A claim for breach of the covenant of good faith and fair dealing is not viable without a contract between the parties (*One Step Up, Ltd. v Webster Bus. Credit Corp.*, 87 AD3d 1, 13-14 [1st Dept 2011]). Plaintiffs concede that moving defendants were not parties to the listing contract; therefore, it cannot be the basis for any implied-covenant breach. The fixed-price contract of sale—which was the subject of the assignment agreement—contemplated that plaintiffs would be paid only \$4.1 million, not \$4.8 million or any other number (*see Jennifer Realty*, 98 NY2d at 153

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seller's claims for fraudulent inducement and unjust enrichment were dismissed as against the part-owner of the straw buyer, who was instrumental in the ruse.

["the duties of good faith and fair dealing do not imply obligations 'inconsistent with other terms of the contractual relationship'"], quoting *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304 [1983]). As plaintiffs' contractual objective—sale for \$4.1 million—was achieved, there was no breach of an implied or express duty under those two contracts by the movants (*see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 23 [2005]). The fourth cause of action is, therefore, dismissed as against MGP and B&B.

*d. Fifth and Sixth Causes of Action: Unjust Enrichment and Constructive Trust*

The fifth and sixth causes of action for unjust enrichment and constructive assert the same general allegations as the fourth cause of action (*compare* SAC ¶¶ 52 and 56 *with* SAC ¶ 46). To support a cause of action for unjust enrichment, plaintiff must plead facts showing defendant was enriched at plaintiff's expense, and that equity and good conscience require defendant to reimburse plaintiff (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

Plaintiffs assert that the moving defendants' receipt of the Property and proceeds from its development were "unjustly received." Plaintiffs' entitlement to the development proceeds is too speculative (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]; *Norcast S.ar.l. v Castle Harlan, Inc.*, 147 AD3d 666, 668 [1st Dept 2017]). As to receipt of the Property itself, it is not alleged that the moving defendants paid less than fair market value for the Property, and thus they were not "enriched." That moving defendants paid a premium to the incorrect party cannot, without more specific allegations, form the basis for an unjust enrichment claim.<sup>4</sup> The fifth cause of action is, therefore, dismissed as against MGP and B&B. As a constructive trust requires, among other things that are lacking here, unjust enrichment (*see Sharper v Harlem Teams for Self-*

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<sup>4</sup> Moreover, written contracts expressly governed the contract of sale and assignment, which ordinarily precludes recovery (*see IDT*, 12 NY3d at 142). Plaintiffs, however, assert that the contract of sale was a "fraudulent transaction." The court does not reach this issue.

*Help, Inc.*, 257 AD2d 329, 332 [1st Dept 1999]), the sixth cause of action is likewise dismissed as against MGP and B&B.<sup>5</sup>

*e. Cross-claims for Indemnification and Contribution*

The cross-claims against the moving defendants for indemnification and contribution are conclusory. As the court can divine no legal basis for these cross-claims, they are dismissed. Accordingly, it is

ORDERED that the motion of defendants Manhattan Group Properties, LLC and B&B Global Development Corp. to dismiss the second amended complaint is granted and the second amended complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the cross-claims of defendants Jeffrey Schleider, Miron Properties, LLC, Citi Habitats, Corcoran Group, Inc. and NRT LLC for indemnification and contribution are hereby dismissed as against defendants Manhattan Group Properties, LLC and B&B Global Development Corp.; and it is further

ORDERED that the action is severed and shall continue against the remaining defendants; and it is further

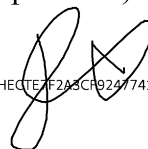
ORDERED that the caption be amended to reflect the dismissal of all claims against defendants Manhattan Group Properties, LLC and B&B Global Development Corp. and that all future papers filed with the court bear the amended caption; and it is further

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<sup>5</sup> Plaintiffs have not stated causes of action for aiding and abetting a breach of fiduciary duty or fraud, which are subject to a heightened pleading standard pursuant to CPLR 3016(b) and are not addressed by either the SAC or plaintiffs' opposition papers.

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

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2/11/2020  
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JENNIFER G. SCHECTER, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE