

**South Shore Estates, Inc. v Guy Friedman Realty Corp.**

2020 NY Slip Op 32615(U)

February 21, 2020

Supreme Court, Nassau County

Docket Number: 600345/17

Judge: Stephen A. Bucaria

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This opinion is uncorrected and not selected for official publication.

*2*

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

\_\_\_\_\_  
SOUTH SHORE ESTATES, INC., SOUTH SHORE SALES & DEVELOPMENT, LLC and SUSAN HOLLANDER,

TRIAL/IAS, PART 1  
NASSAU COUNTY

Plaintiffs,

INDEX No. 600345/17

-against-

MOTION DATE: 12/12/19  
Motion Sequence 002, 003, 008

GUY FRIEDMAN REALTY CORP., FRIEDMAN GROUP, LLC, CONKLIN ESTATES, LLC, GUY FRIEDMAN d/b/a FRIEDMAN PROPERTIES, GUY FRIEDMAN d/b/a FRIEDMAN REALTY, GUY FRIEDMAN, individually, FRIEDMAN BUILDING GROUP, LLC, FRIEDMAN HOLDINGS, LLC, FRIEDMAN PROPERTIES, LLC, FRIEDMAN REALTY, CORP., FRIEDMAN PROPERTIES, INC., FRIEDMAN GROUP PROPERTIES, LLC d/b/a FRIEDMAN PROPERTIES, LLC, FRIEDMAN PROPERTIES INC. d/b/a FRIEDMAN PROPERTIES, LLC, FRIEDMAN REALTY, INC., d/b/a FRIEDMAN REALTY, CORP. and FRIEDMAN GROUP PROPERTIES LLC d/b/a FRIEDMAN REALTY CORP.,

Defendants.

The following papers read on this motion:

Notice of Motion.....XXXX  
Affirmation in Support.....XXXX  
Memorandum of Law in Support.....XX  
Memorandum of Law in Opposition.....XX  
Reply Memorandum of Law.....X  
Affirmation in Opposition.....XXX

*M*

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Upon the foregoing papers and oral arguments held on February 18, 2020, the motion (Seq. No. 002) by plaintiffs South Shore Estates, Inc.(hereafter as “SSE”), South Shore Sales & Development LLC (hereafter as “SSSD”), and Susan Hollander (hereafter as “Hollander”) which seeks an order pursuant to CPLR §3212 granting plaintiffs summary judgment; the motion (Seq. No. 003) by defendants Guy Friedman Realty Corp., Friedman Group, LLC, Conklin Estates, LLC, Guy Friedman D/B/A Friedman Properties, Guy Friedman D/B/A Friedman Realty, Guy Friedman, Individually, Friedman Building Group, LLC, Friedman Holdings, LLC, Friedman Properties, LLC, Friedman Realty, Corp., Friedman Properties, Inc., Friedman Group Properties, LLC D/B/A Friedman Properties, LLC, Friedman Properties Inc. D/B/A Friedman Properties, LLC, Friedman Realty, Inc., D/B/A Friedman Realty, Corp. And Friedman Group Properties LLC D/B/A Friedman Realty Corp (hereafter as “the Friedman defendants”) which seeks an order pursuant to CPLR §3211 (a)(5) and (7) and CPLR §3212 dismissing various causes of action in the consolidated action; and the Order to Show Cause (Seq. No. 008) by plaintiffs which seeks an order pursuant to CPLR §6513 seeking extension of the notice of pendency filed on January 24, 2017 in the action entitled South Shore Estates, Inc., et al v. Guy Friedman Realty Corp., et al, Index Number 1819/2016 which was later consolidated with the instant action, are determined as follows.

The within consolidated action involves a series of “agreements” between the parties involving, *inter alia*, the purchase, development and sale of real property. The parties herein have had an ongoing business relationship for approximately fifteen (15) years. Plaintiff, Hollander, is a real estate broker and president of SSE and the sole member of SSSD. Guy Friedman is a buyer/developer of real property for re-sale in the Five Towns area. He is also a member/officer of the various corporate defendants.

Plaintiffs’ complaint seeks damages for, *inter alia*, breach of contract alleging that pursuant to several agreements between the parties, plaintiffs are entitled to commissions on multiple properties; and the sale of fifty (50%) interest in a specific property to the plaintiffs based also upon an alleged agreement between the parties.

Plaintiffs are seeking summary judgment on the 1<sup>st</sup>, 4<sup>th</sup>, 7<sup>th</sup>, 14<sup>th</sup>, 17<sup>th</sup>, 20<sup>th</sup> and 24<sup>th</sup> causes of action in their complaint (which all sound in breach of contract) and dismissal of defendants’ counterclaims.

Defendants move to dismiss multiple causes of action under both complaints which have been consolidated and, also seek summary judgment and a cancellation of the Notice of Pendency filed by plaintiffs.

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Initially, this Court will address the 1<sup>st</sup>, 4<sup>th</sup> and 7<sup>th</sup> causes of action as they concern the first agreement between the parties annexed to movant's papers as Exhibit "A". Said agreement (hereafter as "the 2009 Contract") states as follows:

This Contract, effective Sept. 9, 2009 is between Guy Friedman Realty ("GFR and any LLC of which I am a member") and South Shore Estates, Inc., ("SSE"). **I hereby employ and grant South Shore Estates Inc. the exclusive right to sell and market all properties owned by GFR for a period of 18 months from the above date.** Exceptions will include 111 Palmyra Ave. and 475 Chestnut St. and any single family home that I buy for the purpose of renting it out.

The sales price shall be any price acceptable to me. **The commission due to SSE will be 3% of the sales price of each home/unit sold. And in addition, SSE will also receive 1% of the purchase price of any house purchased by GFR if SSE facilitated the negotiations to finalize the purchase.**

It will be the sole responsibility of SSE to pay any participating broker under the terms and conditions set forth in the MLS agreement, from the 3% commission paid to SSE. If however, I negotiate a deal with another person or broker without the prior written consent of SSE then the entire commission will become immediately due & payable to SSE.

**Since the home properties purchased by GFR are used to develop new home/units/projects and the construction time to complete a project may exceed 18 months, it is understood that SSE will continue to market properties until they are sold if the agreement expires, and the commission is due and earned, however, it is payable whenever the properties are sold.** (emphasis added)

Plaintiffs' first, fourth and seventh causes of action each seek commissions in the amount of three percent (3%) of the sales price for each of the properties listed in those causes of action contending that they were each sold pursuant to the above contract.

The property listed in plaintiffs' first cause of action is 756 Addison Street, Woodmere, NY; the property in the fourth cause of action is 446 Cedarhurst Avenue, Cedarhurst, New York; and the property listed in plaintiffs' seventh cause of action is 525 Monroe Street, Cedarhurst, New York.

Plaintiffs' first cause of action seeks the amount of \$37,500.00 for SSE's commission for the sale of 756 Addison Street, Woodmere, New York. Plaintiff contends that Friedman Group became the owner of said property on September 3, 2009 and sold it on March 16, 2010. Plaintiffs argue that since the defendants owned said property during the term of the 2009 contract, that they are entitled to the commission from the sale which took place on March 16,

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2010. Plaintiff annexes a copy of the deeds acquiring and selling the subject property to its moving papers as Exhibits "F" and "G" respectively.

Defendants contend that plaintiff's first, second and third causes of action should be dismissed as defendants "sold" the property prior to the effective date of the 2009 contract. Defendant annexes the signed contract of sale for the subject property, which is dated September 2, 2009, as Exhibit "K" to its moving papers.

"The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent. Where...the contract is clear and unambiguous on its face, the intent of the parties must be gleaned from within the four corners of the instrument, and not from extrinsic evidence. The construction and interpretation of an unambiguous written contract is an issue of law within the province of the court. The court's role is limited to interpretation and enforcement of the terms agreed to by the parties, and the court may not rewrite the contract or impose additional terms which the parties failed to insert...extrinsic evidence will be considered only if the contract is deemed ambiguous" (*Maser Consulting, P.A. v. Viola Park Realty, LLC* 91 A.D. 3d 836, 837, 936 N.Y.S.2d 693 [2<sup>nd</sup> Dept. 2012])(*internal citations omitted*).

The contract specifically sets forth that SSE was being *employed* and given the *exclusive right* to "market and sell" all properties owned by the Friedman defendants. However, the fact that 756 Addison Street (owned by the defendants) was already in contract prior to the effective date of the 2009 agreement precludes any right on the part of SSE to "market and sell" the property. A contract for its sale existed already and the Friedman defendants would not necessitate the services of a broker to "market and sell" the subject property. Finally, there is no evidence in plaintiffs' submissions or Hollander's affidavit that she marketed and sold the subject property to which she would be entitled commissions. Plaintiffs put great emphasis on the words "*any properties owned*", however this agreement is clearly an agreement in which plaintiffs, brokers, are being given the exclusive right to *market and sell* those properties owned by defendants. In the case of 756 Addison Street, a property already in contract for sale, there was no need for plaintiffs' services and the subject property, although not specifically excluded from the agreement, certainly does not fall within the category of properties in which plaintiffs were granted any rights thereto.

Plaintiffs' 4<sup>th</sup> and 7<sup>th</sup> causes of action seek commissions in the total amount of \$73,200.00, for the properties located at 446 Cedarhurst Avenue, Cedarhurst, New York and 525 Monroe Street, Cedarhurst, New York. The defendants do not put forth any arguments specifically disputing that plaintiffs are due commissions on the sale of those properties or that plaintiffs did not market and sell the properties pursuant to the 2009 agreement. The defendants do, however, contend that plaintiffs are not entitled to any commissions based upon the defendants' allegations in their counterclaims for breach of fiduciary duty which are discussed more fully in the latter part of this Court's decision.

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Accordingly, plaintiffs' motion for summary judgment as to its 1<sup>st</sup> cause of action is denied based upon the fact that the subject property does not fall within the ambit of the 2009 Agreement. Plaintiffs' motion for summary judgment as to the 4<sup>th</sup> and 7<sup>th</sup> causes of action in the complaint is denied based upon the question as to whether plaintiffs breached their fiduciary duty owed to defendants and the defendants suffered damages as a consequence of the alleged breach. Defendants' motion for summary judgment to dismiss the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> causes of action in the complaint is granted. Defendants' motion to dismiss the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> causes of action in the complaint is denied based on the issue of whether plaintiffs breached their fiduciary duty owed to defendants and whether such breach resulted in injury to the defendants.

Defendants also move for summary judgment dismissing the plaintiffs' 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, and 13<sup>th</sup> causes of action pursuant to the 2009 contract. Plaintiffs' 10<sup>th</sup> cause of action sounds in anticipatory breach of contract alleging that property known as 240 Woodside Drive, Hewlett Bay Park, New York (hereafter as the "Woodside" property) was owned by defendants during the 2009 contract term but has not yet sold. Plaintiff alleges that defendant Friedman has stated his intention to breach the 2009 Contract. Plaintiffs' 11<sup>th</sup> cause of action seeks a declaratory judgment that SSE is entitled to commission on the sale of the Woodside property and plaintiffs' 12<sup>th</sup> cause of action also sounds in anticipatory breach of contract for the property known as Conklin Avenue Development Site (hereafter as the "Conklin" property). Plaintiffs' 13<sup>th</sup> cause of action also seek declaratory judgment that SSE is entitled to commission on the sale of the Conklin property.

Defendants contend that plaintiffs' 10<sup>th</sup> and 11<sup>th</sup> causes of action, which seek a commission on the eventual sale of the Woodside property, must be dismissed as the property was never owned by Guy Friedman Realty or any LLC in which he is a member. Defendants claim that the Woodside property was purchased by Guy Friedman personally and it is the home in which Guy and Licethe Friedman reside. Based upon the affidavit of Guy Friedman and the deeds conveying the property to the Friedman's personally, it appears that said property was not included in the 2009 contract. Although the affidavits conflict as to whether said property was included in the 2009 contract, based upon the deeds submitted by defendants it is clear that the property was not owned by Guy Friedman Realty but by Guy Friedman personally and later on by Guy Friedman and his wife personally.

Accordingly, defendants' motion for summary judgment dismissing plaintiffs' 10<sup>th</sup> and 11<sup>th</sup> causes of action is **granted**.

Defendants contend that plaintiffs' 12<sup>th</sup> and 13<sup>th</sup> causes of actions, which sound in anticipatory breach and a declaratory judgment that plaintiffs are entitled to commission on the eventual sale of the Conklin property, must be dismissed as (1) the property was not owned by defendants during the term of the 2009 contract and (2) that the property is considered

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commercial and therefore excluded from the 2009 contract. In support of this contention, the defendants submit the affidavit of Guy Friedman who states that the Conklin property was a commercial property not subject to the agreement; and that the property was purchased by Conklin Estates LLC (an LLC formed by the Mr. Friedman on March 25, 2011) on March 29, 2011. In support of these contentions, defendants submit the subject deed and closing statement evidencing the purchase of the property on March 29, 2011 as Exhibits "L" and "M".

Notwithstanding the fact that the 2009 contract does not specifically exclude commercial properties, there are only references to single family properties, homes/ units etc. There is nothing in the 2009 contract that would reveal that the Conklin property, if commercial, is included therein. Furthermore, there is no evidence that the subject property is commercial other than the affidavit of Guy Friedman. However, it is evident that none of the defendants owned the Conklin property prior to the expiration of the 2009 contract and as such this property is not subject to the terms therein.

Plaintiffs' arguments that they requested the contract of sale for the subject property but never received it during discovery are without merit as the defendants did not actually own the property until after the expiration of the contract.

Accordingly, defendants' motion for summary judgment dismissing plaintiffs' 12<sup>th</sup> and 13<sup>th</sup> causes of action is **granted**.

The Court will now address the 14<sup>th</sup>, 17<sup>th</sup> and 20<sup>th</sup> causes of action as they pertain to the parties' second agreement annexed to movant's papers as Exhibit "B". Said agreement states in pertinent part as follows:

***This Agreement explains the business relationship between GFR and South Shore. It is understood under this Agreement that GFR will renovate and build new constructions on land either owned by a Customer or on land owned by GFR to buy and sell to that Customer (the "Project"), and South Shore will facilitate the procurement of land or Customer for that land for a Build Price.***

***The Build Price is the amount paid to GFR by the Customer for the renovation or new construction. In the event GFR buys the property, builds and sells it to the Customer, the Build Price is the initial Sales Price less the Purchase Price of the property.***

GFR hereby hires South Shore to procure Projects and hereby agrees to pay South Shore a fee of six percent 6% (hereinafter referred to as "Fee") of the Build Price for each and every Project that GFR undertakes during the two year term of this Agreement, including whether or not South Shore has facilitated a contract between GFR and Customer. During the two year Agreement GFR will

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forward to South Shore all prospective Projects and prospective Customers for a Project. The Fee shall be paid to South Shore as scheduled payments as set forth in a Payment Schedule that is contracted with the Customer.

GFR and South Shore agree and acknowledge that a log will be maintained by South Shore (the "log") to identify *Prospective Projects and Customers* procured during the term of this Agreement. South Shore will furnish GFR with a copy of the Log from time to time. If beyond the term of this Agreement GFR undertakes a Project with a Customer listed on the Log, GFR will pay South Shore the Fee for a period of one year beyond the expiration date of this Agreement. The Parties agree that completion of Projects once commenced may exceed beyond the term of this Agreement and therefore, the Fee will be paid to South Shore upon the completion and sale of the Project.

In the event that GFR obtains a project through a shared effort between South Shore, and agents or brokers, GFR's sole obligation shall be to pay South Shore the 6% Fee of the Build Price. It will be to South Shore's discretion on whether to share the Fee with another agent or broker.

***This Agreement does not include GFR's spec building, it's own commercial projects, or residential or commercial projects that do not include a customer.*** However, in the event that Guy Friedman will sell a spec house or any residential or commercial property or Project to a Customer listed on the Log, either during or for a period of one year beyond the expiration of this Agreement, then a commission for the sale of that property will be due and earned to South Shore Estates Inc. which will be mutually agreed upon at that time by GFR and South Shore Estates Inc. (emphasis added)

The Court notes that the above agreement was executed by both parties on November 29, 2011 and is for a two year term.

Plaintiff's 14th, 17<sup>th</sup> and 20th causes of action each seek commissions in the amount of six percent (6%) of the "Build Price" for each of the properties listed in those causes of action contending that they were each sold pursuant to the above contract.

The property in plaintiffs' fourteenth cause of action is 441 Albemarle, Cedarhurst, New York; the property in the seventeenth cause of action is 447 Oxford Road, Cedarhurst, New York; and the property listed in plaintiff's twentieth cause of action is 445 Oceanpoint Avenue, Cedarhurst, New York.

Plaintiff's fourteenth cause of action seeks the amount of \$52,500.00 for SSE's commission allegedly equating to six percent of the "Build Price" relative to 441 Albemarle,

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Cedarhurst, New York (hereafter as the “Albemarle Property”). Plaintiffs’ seventeenth cause of action seeks the amount of \$68,700.00 commission allegedly equating to six percent of the “Build Price” relative to 447 Oxford Road, Cedarhurst, New York (hereafter as the “Oxford Property”). Plaintiffs’ twentieth cause of action seeks the amount of \$24,627.00 commission allegedly equating to six percent of the “Build Price” relative to 445 Oceanpoint Avenue, Cedarhurst (hereafter as the “Oceanpoint Property”). Plaintiff contends that each of the aforementioned properties constituted “Projects” for which the plaintiffs are entitled to a commission. Further, plaintiffs contend that pursuant to the 2011 Agreement SSSD was asked to “facilitate” the procurement of land, or customers for that land, and that SSSD earns a fee whether or not it facilitated a contract between the seller and customer. However, in her affidavit, Ms. Hollander does not put forth any evidence that she “facilitated” the procurement of land or customers for the land (the “Project”). She merely states that since the projects were undertaken during the term of the agreement SSSD is entitled to commissions. The defendants contend that each of the subject properties were excluded from the 2011 agreement as they each constituted “spec building” by the defendants.

Based upon this Court’s review of the submissions herein, including the somewhat ambiguous language in the 2011 Agreement as to what constitutes a “Project”, and the conflicting affidavits of the parties, there are questions of fact which preclude summary judgment for either party with respect to the above properties.

Accordingly, the motion by plaintiffs which seeks summary judgment on its 14<sup>th</sup>, 17<sup>th</sup> and 20<sup>th</sup> causes of is **denied** and the defendants’ motion which seeks summary judgment and dismissal of plaintiffs’ 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup> and 22<sup>nd</sup> causes of action is also **denied**.

Plaintiffs 23<sup>rd</sup> cause of action which seeks damages for breach of the 2011 contract with respect to the provision of the contract which states that “an advertisement or information board may be posted at the Project site stating the builder as Friedman Group and the contract as Susan Hollander” is without merit and dismissed.

Accordingly, the motion by defendants dismissing plaintiffs’ 23<sup>rd</sup> cause of action is **granted**.

Both parties seek summary judgment as to the 24<sup>th</sup> cause of action in the plaintiffs’ complaint. The 24<sup>th</sup> cause of action sounds in breach of contract and concerns an agreement between the parties signed and dated by the parties on August 5, 2010 and entitled “1133 Broadway LLC Intent of Property”.

The plaintiffs allege that defendants Guy Friedman Realty Corp., Friedman Properties, LLC and Guy Friedman d/b/a Friedman Properties (hereafter as “Broadway defendants”) agreed to sell Hollander fifty percent (50%) of the property known as 1133 Broadway, Hewlett

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for the amount of Two Hundred Twenty-Five Thousand Seven Hundred Eighty Two and 93/100 (\$225,782.93) Dollars. Plaintiffs allege that the Broadway defendants breached the contract by failing to sell Hollander fifty percent of the subject property and seeks specific performance.

The subject agreement (hereafter as the “1133 Broadway Agreement”) annexed to plaintiffs’ moving papers as Exhibit “C”, states, in pertinent part, as follows:

**OWNERSHIP:** Friedman Properties LLC, sole owner of 1133 Broadway, Hewlett, New York, (“Property”) agrees to sell to Susan Hollander 50% ownership of Property for the amount of \$225,782.93 payable to Friedman Properties, LLC. Parties shall have equal ownership and name ownership of Property as 1133 Broadway, LLC (“LLC”).

The balance of the 1133 Broadway Agreement discusses the Occupants as being Friedman Realty Corp. and/or its affiliates i.e., Friedman Group, LLC and South Shore Estates, Inc. and the space that each shall occupy; how the expenses and revenue shall be handled by the “Owners”; the signage on the property; any construction to be done; the acquisition of tenants; bookkeeping and maintenance. The 1133 Broadway Agreement is signed by Susan Hollander and Guy and Licethe Friedman on behalf of Friedman Realty Corp.

The parties did not consummate the agreement. Plaintiff, Susan Hollander, alleges in her complaint that she has been ready, willing and able to perform under the agreement; that the Broadway defendants breached the agreement by failing to sell her the property; that the property has increased in value and that she has no adequate remedy at law and seeks an order directing specific performance of the 1133 Broadway Agreement. In support of her contentions, the plaintiff submits her own affidavit and a statement of an ITF (“in trust for”) account demonstrating she had the funds available to purchase the subject property.

In opposition and in support of their own motion, defendants contend that the 1133 Broadway Agreement is missing most of the essential terms of a real estate contract; that the 1133 Broadway agreement is not signed by the proposed seller; that the agreement was merely an “agreement to agree”.

“To be enforceable, a contract for the sale of real property must be evidenced by a writing sufficient to satisfy the statute of frauds (*see* General Obligations Law § 5-703 [1]). To satisfy the statute of frauds, a writing evidencing a contract must identify the parties, describe the subject matter, be signed by the party to be charged, and state all of

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the essential terms of an agreement (*see Piller v Marsam Realty 13th Ave., LLC*, 136 AD3d 773, 773-774, 25 NYS3d 273 [2016]; *Dahan v Weiss*, 120 AD3d 540, 541, 991 NYS2d 119 [2014]; *Matter of Licata*, 76 AD3d 1076, 1077, 908 NYS2d 441 [2010]). Insofar as relevant to this case, the "essential terms" of a contract for the sale of real property include the price and terms of payment, as well as the description of the property to be sold (*Nesbitt v Penalver*, 40 AD3d 596, 598, 835 NYS2d 426 [2007]; *see Sabetfard v Djavaheri Realty Corp.*, 18 AD3d 640, 641, 795 NYS2d 643 [2005]).”(*O’Hanlon v Renwick*, 166 A.D.3d 890, 891, 88 N.Y.S.3d 428, 430, [2d Dep’t 2018])

While this Court is of the opinion that the essential terms of the contract, such as the price, a description of the property and method of payment, do satisfy the statute of frauds with respect to the 1133 Broadway agreement; we also take note that there were ongoing negotiations with respect to draft agreements (proposed Operating Agreement/proposed sketches for renovation of the property/proposed Business Practice Agreement) in connection with the transaction. The evidence submitted by the parties establishes that the 1133 Broadway Agreement did not constitute a final binding agreement by the parties. (*See, Argent Acquisitions, LLC v. First Church of Religious Science*, 118 A.D.3d 441, 990 N.Y.S.2d 1 [1<sup>st</sup> Dept. 2014]). Further, the plaintiff puts forth no other evidence that she demanded a closing on the property other than proof of funds. There is no “time of the essence” letter which is typical in a transaction where it appears that one party to the contract is unwilling to consummate the terms. It appears that plaintiff took no action for at least five years in an attempt to close the transaction.

Accordingly, defendants’ motion for summary judgment which seeks to dismiss the 24<sup>th</sup> cause of action is **granted** and the Order to Show Cause by plaintiffs seeking an extension of the Notice of Pendency is hereby denied and said Notice of Pendency is hereby cancelled. Defendant is directed to serve a copy of this Order upon the Clerk of the Nassau County Supreme Court within ten (10) days and the Nassau County Clerk is directed to vacate and discharge the Notice of Pendency filed under Index No. 1819/2016 against property known as 1133 Broadway, Hewlett, NY, Section 41, Block 101, Lot 128.

Finally, plaintiffs seek summary judgment dismissing defendants’ first and second counterclaims sounding in breach of fiduciary duty and breach of contract.

Defendants allege that plaintiffs were hired to act as defendants’ real estate brokers and placed reliance and trust upon the plaintiffs with respect to their duties as brokers. Defendants further allege that plaintiffs used confidential information obtained while acting as the defendants’ brokers to compete with or to the defendants’ injury. Defendants further state, *inter alia*, that plaintiffs were diverting customers and business opportunities, which they were obligated to bring to defendants’, to businesses in which

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plaintiffs had an ownership interest. Defendants contend that plaintiffs should be disgorged of all commissions paid with respect to the agreements.

“In New York, it is well settled that a real estate broker is a fiduciary with a duty of loyalty and an obligation to act in the best interests of the principal (see, *Northeast Gen. Corp. v Wellington Adv.*, 82 NY2d 158, 163 [clarifying the distinction between a broker and a finder]; *Wendt v Fischer*, 243 NY 439). The broker/principal relationship and accompanying fiduciary duty can be severed by agreement of the parties or by unilateral action of the principal (see, *Midcourt Bldrs. Corp. v Eagan*, 31 NY2d 728 [broker/vendor relationship terminated when the vendor issued a written notice of cancellation of sales authorization]). Where a broker's interests or loyalties are divided due to a personal stake in the transaction or representation of multiple parties, the broker must disclose to the principal the nature and extent of the broker's interest in the transaction or the material facts illuminating the broker's divided loyalties. “The disclosure to be effective must lay bare the truth, without ambiguity or reservation, in all its stark significance” (*Wendt v Fischer, supra*, 243 NY, at 443 [citations omitted]).” (*Dubbs v. Stribling & Assocs.*, 96 N.Y.2d 337, 340-41, [2001])

Initially, this Court finds that, contrary to plaintiffs' contentions, the defendants' counterclaim sounding in breach of fiduciary duty is not time-barred. Plaintiffs cite to *IDT v. Morgan Stanley Dean Witter & Co.* 12 N.Y.3d 132, 907 N.E.2d 268, 879 N.Y.S.2d 355 (2009) for the proposition that defendants' first counterclaim sounding in breach of fiduciary duty is governed by a three year statute of limitations since it contains no claim for fraud and seeks only money damages. While this Court agrees that defendants' claims are only for money damages, the allegations in the complaint sufficiently allege fraud. “...where an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR 213 (8) (*Kaufman v Cohen*, 307 AD2d 113, 119, 760 NYS2d 157 [1st Dept 2003]).” *IDT Corp. at 139*. Further, “...a fraud cause of action may be predicated on acts of concealment where the defendant had a duty to disclose material information (*Swersky v Dreyer & Traub*, 219 A.D.2d 321, 326, 643 N.Y.S.2d 33 [1996], appeal withdrawn 89 N.Y.2d 983, 656 N.Y.S.2d 741, 678 N.E.2d 1357 [1997]). Thus, where a fiduciary relationship exists, ‘the mere failure to disclose facts which one is required to disclose may constitute actual fraud, provided the fiduciary possesses the requisite intent to deceive’ (*Whitney Holdings, Ltd. v Givotovsky*, 988 F. Supp. at 748; see also *American Baptist Churches v Galloway*, 271 A.D.2d 92, 100, 710 N.Y.S.2d 12 [2000]).” (*Kaufman v. Cohen*, 307 A.D.2d 113, 119-20, 760 N.Y.S.2d 157, 165 [App. Div. 1st Dept. 2003])

In their counterclaim, defendants allege that plaintiffs were hired by defendants as their real estate brokers; that defendants placed reliance and trust upon the plaintiffs with respect to their duties as brokers; that plaintiffs were under a duty to disclose any and all material information concerning a conflict of interest they possessed or obtained concerning the agreements; that plaintiffs were prohibited from using any confidential or

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proprietary information or trade secrets obtained while acting as defendants' brokers, including competition with or to the injury of defendants; and that plaintiffs' failure to disclose their conflicting ownership interest in businesses such as Paramount Building Group, LLC, the defendants have been damaged monetarily.

Based upon the parties' multiple agreements, and their ongoing business relationship, it is abundantly clear that plaintiffs were engaged by the defendants to act as their real estate brokers. Clearly, the plaintiffs cannot deny that they are seeking real estate commissions on the causes of action in the complaint related to the 2009 and 2011 Agreements. Further, in reviewing the allegations in the defendants' counterclaim, it is clear that the nature of the breach of fiduciary duty action is predicated upon fraud which has a six-year statute of limitations period.

Accordingly, the plaintiffs' motion to dismiss the defendants' first counterclaim is **denied**.

This constitutes the decision and Order of this Court. Any relief requested herein not expressly granted is denied.

**The parties shall appear before the undersigned on May 6, 2020 at 9:30A.M. for a Pre-Trial Conference in this matter.**

So Ordered

Date:           FEB 21 2020          

*Joseph A. Luciani*  
J.S.C.

**ENTERED**  
**FEB 24 2020**  
**NASSAU COUNTY**  
**COUNTY CLERK'S OFFICE**