

Roumila v Christie's Intl. Real Estate Group, Inc.

2020 NY Slip Op 33043(U)

September 16, 2020

Supreme Court, New York County

Docket Number: 162223/2018

Judge: Debra A. James

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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: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

-----X

INDEX NO. 162223/2018

REGIS ROUMILA,

MOTION DATE 10/29/2019

Plaintiff,

MOTION SEQ. NO. 002

- v -

CHRISTIE'S INTERNATIONAL REAL ESTATE GROUP,
INC., SARINE ATAMIAN, and KATHY COUMOU,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 43, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 69, 70, 71, 73

were read on this motion to/for

DISMISS

ORDER

Upon the foregoing documents, it is hereby

ORDERED that the motion is granted to the extent that the ninth cause of action is dismissed in its entirety as to defendants Sarine Atamian and Kathy Coumu, and only as to repudiation of contract as to defendant Christie's International Real Estate Group, Inc., and the tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, and seventeenth causes of action are dismissed in their entirety against all defendants; and it is further

ORDERED that the remainder of the action is severed and shall continue; and it is further

ORDERED that defendants are directed to serve an answer to the Amended Complaint within 20 days after service of this order with notice of entry; and it is further ORDERED that counsel are directed to submit a proposed preliminary discovery conference order or proposed preliminary discovery conference counter order by sending such proposed order to the IAS Part 59 e-mail account box (59nyef@nycourts.gov) and filing with NYSCEF on or before October 23, 2020.

DECISION

Defendants, Christie's International Real Estate Group, Inc. ("CIRE"), Sarine Atamian, and Kathy Coumou, move, pursuant to CPLR 3211(a)(1) and (7), to dismiss the ninth through seventeenth causes of action in the Amended Complaint.

Background

Plaintiff, Regis Roumila, commenced this action seeking to recover damages from defendants for, among other things, breach of contract against CIRE. The factual allegations set forth in the Amended Complaint (NYSCEF Doc. No. 19) include as follows.

Plaintiff is a licensed real estate broker in the State of New York. Sarine Atamian and Kathy Coumou are employees of CIRE. Sarine Atamian serves as Business Operations Manager, and Kathy Coumou serves as Executive Director.

On August 9, 2018, plaintiff and CIRE entered into a Real Estate Salesperson Agreement (Independent Contractor) ("Salesperson Agreement"), pursuant to which plaintiff agreed to work for CIRE as a real estate broker for 6 years (Salesperson Agreement, NYSCEF Doc. No. 8). Section 3.05 of the Salesperson Agreement states:

"Salesperson shall work under the supervision of Corporate Broker and shall work collaboratively with other brokers and managers associated with Corporate Broker as required by Section 441 of the Real Property Law and Section 175.21 of the Real Estate License Law, such supervision to include: (i) regular, frequent and consistent personal guidance; (ii) instruction; (iii) oversight and superintendency with respect to the Brokerage Business conducted by the Corporate Broker; (iv) maintenance of written records of all listings obtained by Salesperson, including all sales transactions effectuated with the assistance of Salesperson during the period of such Salesperson's association with the Corporate Broker, and which clearly identify the transactions and indicate the dates thereof"

(*id.*). In addition, §7.02 states that "[i]f Salesperson commits any breach of the terms hereof, or fails to conduct his/her/its business in accordance with applicable law of with Corporate Broker's policies or business procedures, Corporate Broker shall be entitled to terminate this Agreement, effectively immediately, with or without notice to Salesperson" (*id.*).

At a meeting held on December 10, 2018, CIRE notified plaintiff that it intended to terminate the Salesperson Agreement due to employee complaints about his alleged

inappropriate social interactions with female employees in the workplace. Plaintiff declined CIRE's request to sign an "Independent Real Estate Salesperson Termination and Release Agreement" dated December 10, 2018 ("Termination Agreement") (NYSCEF Doc. No. 9). CIRE terminated plaintiff on December 18, 2018, and this lawsuit ensued.

The Amended Complaint alleges (i) causes of action under New York State Human Rights Law §296 for sexual harassment and discrimination (first cause of action), hostile work environment (second cause of action), and retaliation (third cause of action); (ii) causes of action under §8-107 of the Administrative Code of the City of New York ("Administrative Code") for sexual harassment and discrimination (fourth cause of action), retaliation (fifth cause of action), and hostile work environment (sixth cause of action); (iii) claims for aiding and abetting discrimination, harassment, hostile work environment, and retaliation under §296(6) of the New York State Human Rights Law and §8-107(6) of the Administrative Code (seventh cause of action), and violations of Administrative Code §8-107(29) and Labor Law §201-g (eighth cause of action); and (iv) claims regarding the Salesperson Agreement, including claims for breach and repudiation of contract (ninth cause of action), tortious interference with contract (tenth cause of action), tortious interference with prospective business opportunity/advantage

(eleventh cause of action), damages under Labor Law §190 et seq. (twelfth cause of action), a permanent injunction (thirteenth cause of action), breach of the implied covenant of good faith and fair dealing (fourteenth cause of action), conversion (fifteenth cause of action), trespass to chattels (sixteenth cause of action), and unfair competition (seventeenth cause of action).

Defendants seek to dismiss the ninth through seventeenth causes of action.

DISCUSSION

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (Leon v Martinez, 84 NY2d 83, 87 [1998]). "The Court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (id. at 87-88).

Under CPLR 3211(a)(1), dismissal is warranted if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (see 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152 [2002]). In assessing a motion under CPLR 3211(a)(7), however, the court may freely consider affidavits submitted by plaintiff to remedy any defects in the complaint (see Rovello v Orofino

Realty Co., 40 NY2d 633, 634 [1976]). The criteria is whether the plaintiff has a cause of action, not whether it has stated one (see Guggenheimer v Ginsburg, 43 NY2d 268, 275 [1977]).

At oral argument held on September 26, 2109, this Court (James, J.) ruled, in part, on the record. Upon further and more considered deliberation, the court vacates and rescinds such oral ruling and decides as follows.

As for the ninth cause of action for breach of contract, such action does not lie against the individual defendants as they were not parties to the Salesperson Agreement. However, the pleadings sufficiently allege that CIRE breached the contract, by failing to pay him commissions in the amount of \$25,312.50 for sale of a property. Defendants argue that the Salesperson Agreement provided that when such Agreement was terminated upon a material breach of its terms by plaintiff, plaintiff was entitled to 40% of the Gross Commissions and plaintiff was required to reimburse CIRE money for out of pocket expenses advanced to him. Such defense implicates facts that cannot be resolved on a motion directed at the pleadings.

To the extent that plaintiff alleges that CIRE breached the Salesperson Agreement by repudiation, such cause of action must be dismissed. The Amended Complaint does not allege that CIRE definitively communicated that it intended not to pay the commission plaintiff earned upon the sale of the property in

question, and therefore repudiation is insufficiently pled. See Jacobs Private Equity, LLC v 450 Park, LLC, 22 AD3d 347 (1st Dept. 2015).

The elements of a claim of tortious interference with contract are the existence of a valid contract, of which defendants were aware and wrongfully induced termination. This court concurs with defendants that the documentary evidence in the form of the Salesperson Agreement establishes irrefutably that the listings belonged to CIRE and did not constitute contracts with plaintiff. Nor does plaintiff allege that "but for" the interference of defendants, such "contracts" would have been consummated. See Burrowes v Combs, 25 AD3d 370, 373 (1st Dept. 2006). Thus, the tenth cause of action must be dismissed. Moreover, as in Kickertz v New York University, 110 AD3d 268, 275 (1st Dept. 2012), the tortious interference claims fail to allege that any of the defendants directed any improper conduct toward plaintiff's purported clients.

The eleventh cause of action for tortious interference with prospective business opportunity shall be dismissed as well, as "plaintiff did not allege that defendants engaged in tortious conduct separate and apart from their alleged failure to fulfill their contractual obligations." Susman v Commerzbank Capital Makts. Corp., 95 AD3d 589, 590 (1st Dept. 2012). Also fatal to plaintiff's claim is his failure to allege that defendants acted

with the sole motivation to harm him, asserting only that such defendants acted with the intent of benefiting themselves. See Thome v Calder Found., 70 AD3d 88, 108 (1st Dept. 2009).

Plaintiff's twelfth cause of action under the New York Labor Law must be dismissed as such statute does not apply to claims for unpaid wages, which plaintiff at bar seeks. Instead, Labor Law § 191 sets forth the requirements for how often, weekly, bi-weekly or monthly, employees, including sales representatives, must be paid. See Vega v CM and Associates Construction Management, LLC, 175 AD3d 1144 (1st Dept. 2019).

The thirteenth cause of action for a "permanent injunction" does not state a claim but is a remedy, which relief plaintiff seeks in the decretal paragraph of his Amended Complaint.

The fourteenth cause of action for breach of implied covenant of good faith and fair dealing does not survive against the individual defendants for the same reasons as there is no claim for breach of contract stated against same. No claim is stated against CIRE either, since the factual allegations are the same and seek the same damages as alleged in the breach of contract cause of action. See Mill Fin., LLC v Gillett, 122 AD3d 98, 104 (1st Dept. 2014).

With respect to the fifteenth cause of action for conversion, the sixteenth cause of action for trespass to

chattels, and the seventeenth cause of action for unfair competition, the court decides as follows.

"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]). "Money, if specifically identifiable, may be the subject of a conversion action" (id. at 883-884 [internal citations omitted]). "However, an action for conversion cannot be validly maintained where damages are merely being sought for breach of contract" (id. at 884).

Here, plaintiff alleges that plaintiff has immediate possessory rights and interests in client files, prospective client lists, other documents and information, and commissions in defendants' possession, and that defendants have declined to turn them over to him, despite his demand.

Section 3.07 of the Salesperson Agreement provides:

"Salesperson acknowledges that all files, listings, client information, correspondence, papers materials, documents, records, computer data and content, and other materials and information of and/or maintained by Corporate Broker and any of its agents, independent contractors, employees, principals, and affiliated entities, furnished or otherwise available to Salesperson by Corporate Broker (collectively, the "Proprietary Information"), are the exclusive property of Corporate Broker and shall be kept strictly confidential by Salesperson. After termination or expiration of this Agreement, Salesperson shall

return the Proprietary Information, and copies of all records and documents relating to Salesperson's activities under this Agreement to Corporate Broker. Salesperson agrees not to use such Proprietary Information and records to Salesperson's advantage or to the advantage of any other person or entity at the time. Any and all listings of Salesperson are subject to Corporate Broker's approval and shall remain the property of Corporate Broker, as the broker of record, during and after the term of this Agreement"

(Salesperson Agreement, supra). In addition, §3.08 states:

"Salesperson acknowledges that all information input by Salesperson or Corporate Broker's computers and/or computer server system shall be the Proprietary information of Corporate Broker upon such input. Salesperson hereby assigns to Corporate Broker, irrevocably and without any need for further consideration, all of Salesperson's right, title and interest in, and to, any copyright or other intellectual property rights in any property listing posted by Salesperson on or in the Corporate Broker's computer system, or provided to the Real Estate Board of New York Residential Listing Services (the "RLS") or other listing, advertising or communications medium (the "PI Assignment"). Such right, title and interest shall be deemed assigned as of the moment of creation without any further action on the part of either party. Salesperson agrees to execute and deliver to Corporate Broker, at any time during or after the term of this Agreement, any documents or instruments necessary to confirm the PI Assignment. Salesperson agrees to take any action necessary to enable Corporate Broker to secure, protect, enforce and defend its copyrights in such data and/or content and to protect its Proprietary Information"

(id.).

The claim for conversion of the client files, prospective client lists, and other documents and information must be


dismissed pursuant to §§3.07 and 3.08 of the Salesperson Agreement. The Court need not address plaintiff's assertion that §§3.07 and 3.08 are unconscionable and unenforceable since plaintiff notes that CIRE's attorneys turned over prospective client lists and data concerning his pre-existing relationships (Roumila Affid, NYSCEF Doc. No. 49). Furthermore, the claim for conversion of commissions is dismissed as duplicative of the ninth cause of action for breach and repudiation of contract (see Peters Griffin Woodward, Inc. v WCSC, Inc., supra). Thus, the fifteenth case of action must be dismissed.

The sixteenth cause of action, for trespass to chattel, shall also be dismissed. To state a claim for trespass to chattel, plaintiff must allege that defendants, intentionally, and without justification or consent, physically interfered with the use and enjoyment of plaintiff's personal property, and that plaintiff was harmed thereby (see School of Visual Arts v Kuprewicz, 3 Misc 3d 278, 281 [Sup Ct, NY County 2003]).

Plaintiff's allegations that defendants interfered with his possession, use, and enjoyment of his property, and failed to turn them over to him, must fail in light of §§3.07 and 3.08 of the Salesperson Agreement and the return of the items.

The Court also dismisses the seventeenth cause of action, for unfair competition. New York Courts have long recognized two theories of common law unfair competition, palming off and

misappropriation (see ITC Ltd v Punchgini, Inc., 9 NY3d 467, 478 [2007]). Palming off is the sale of goods as those of another, and misappropriation concerns "the taking and use of the plaintiff's property to compete against the plaintiff's own use of the same property" (id.). Plaintiff must allege the bad faith misappropriation of commercial advantage or property which belonged exclusively to him (see LoPresti v Massachusetts Mut. Life Ins. Co., 30 AD3d 474, 476 [2d Dept 2006]). Plaintiff must also allege special damages, and there must be a confidential relationship between the parties or a valid agreement to refrain from unfairly competing (see Private One of New York, LLC v JMRL Sales & Serv., Inc., 21 Misc 3d 1106[A] *14 [Sup Ct, Kings Count 2008]). Likewise, here, plaintiff's allegations that defendants used and are using misappropriated client/prospective client information fail in light of §§3.07 and 3.08 of the Salesperson Agreement, and the return of the information.

<u>9/16/2020</u> DATE	 DEBRA A. JAMES, J.S.C.		
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> REFERENCE
			<input type="checkbox"/> SUBMIT ORDER
			<input type="checkbox"/> FIDUCIARY APPOINTMENT