Roey Realty LLC v Jacobowitz
2022 NY Slip Op 34310(U)
November 3, 2022
Supreme Court, Kings County
Docket Number: Index No. 522177/2018
Judge: Devin P. Cohen
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

Supreme Court of the State of New York
County of Kings

Index Number 522177/2018
Seqs. 005, 013 and 014

Part 91

DECISION/ORDER

ROEY REALTY LLC AND ESTHER BROYDE,

Plaintiffs,

against

SAMUEL JACOBOWITZ, 469 EAST 98TH REALTY LLC, CHAIM SCHWARTZ, AND 469 HOLDINGS NY LLC,

Defendants.

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers Numbered	
Notice of Motion and Affidavits Annexed	1, 2
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	2, 3
Replying Affidavits	
Exhibits	
Other	

Upon the foregoing papers[1], plaintiff's motion for summary judgment (Seq. 005), the cross-motion for summary judgment and for sanctions filed by defendants 469 East 98th Realty LLC's, Chaim Schwartz and 469 Holding NY LLC (Seq. 013), and defendant Samuel Jacobowitz's cross-motion for summary judgment motion (Seq. 014) are decided as follows:

Introduction

Plaintiffs allege that defendants failed to pay them the commission they were due for their work in selling the subject property. Plaintiffs assert claims for breach of contract, common law entitlement to a broker commission, unjust enrichment and/or quantum meruit, tortious interference with contract, successor liability, and fraudulent conveyance.

[1] The court will not consider defendants' replies in further support of their cross-motions for summary judgment. Such papers are not permitted by CPLR 2214, and were not solicited by the court. Although titled as a "motion", motion sequence 013 is submitted both in support of the motion and in opposition to plaintiffs' motion, and otherwise described on the NYSCEF system as a cross-motion. Additionally, the parties accuse each other of failing to comply with the rules regarding statements of fact pursuant to 22 NYCRR 202.8-g. These rules, in their current form, state that the court may require the parties to file a statement of facts. As the parties have each set forth their own narrative of the facts, and no party has appeared to narrow any factual issues, I find that the separate statements of facts filed by the parties have no impact on my decision.

Factual Background

Plaintiff Esther Broyde states in her affidavit[2] that she is a licensed real estate broker with plaintiff Roey Realty LLC (Broyde affidavit at ¶ 6). In January of 2018, defendant 469 East 98th Realty LLC ("469 East 98th Realty") owned property located at 469 East 98th Street, Brooklyn, New York 11212 (*id.* at ¶¶ 7–8). At that time, defendant Samuel Jacobowitz was the principal, sole member, and manager of 469 East 98th Realty (*id.* at ¶ 9). In his own affidavit, Mr. Jacobowtiz confirmed this information (Jacobowitz affidavit at ¶¶ 4–5).

In early January of 2018, Ms. Broyde and Mr. Jacobowitz began discussing his retention of plaintiffs to sell the subject premises (Broyde affidavit at ¶ 11). To that end, the two of them had discussions and exchanged documents about the property's finances and a suitable listing price (*id.* at ¶¶ 11–14). They negotiated and ultimately signed a brokerage agreement (*id.* at ¶¶ 15–16; Jacobowitz affidavit at ¶¶ 6–8).

Ms. Broyde submits a copy of the brokerage agreement, dated January 11, 2018. The agreement is between Roey Realty and "469 e 98th Street LLC". Ms. Broyde claims that this was an inadvertent misspelling, and that she and Mr. Jacobowitz intended the contract to be binding as to 469 East 98th Realty (Broyde affidavit at ¶ 18). Pursuant to the brokerage agreement, Roey Realty had the exclusive right to list the property for 90 days, and Roey Realty would earn a 3% commission if the property sells for more than $3,850,000 or a 2.5% commission if the property sells for any price up to $3,800,000.

Ms. Broyde subsequently set a listing price of $4.35 million and created a "setup", which is a marketing sheet used to advertise and sell the property (Broyde affidavit at ¶¶ 19–20). She

[2] Although Ms. Broyde's affidavit was executed in Florida and does not have a certificate of conformity pursuant to CPLR 2309(c), the court will accept the affidavit (*U.S. Bank N.A. v Cope*, 175 AD3d 527, 529 [2d Dept 2019]).

provides a copy of the setup as well as emails exchanged with various potential buyers. Ms. Broyde describes her efforts to sell the property to potential buyers, including Chaim Schwartz (*id.* at ¶¶ 21–32). Ms. Broyde states that she had a series of discussions orally and in writing with Mr. Schwartz and Mr. Jacobowitz about the property (*id.*). Ms. Broyde provides copies of the texts and emails exchanged with them.

Mr. Schwartz acknowledges in his affidavit that he received solicitations from Ms. Broyde about the property (Schwartz Affidavit at ¶¶ 8, 13). He states that, at the time, he was not interested in the property (id. at ¶ 14). He characterizes his responses as short and polite, and contends that nothing came from these solicitations (*id.* at ¶¶ 14–15). He states that he never met Ms. Broyde and that she never showed him the property (*id.* at ¶¶ 10–12, 16). In contrast, Ms. Broyde states that she showed the property to Mr. Schwartz on March 20, 2018, and then followed up with him by email a week later (Broyde affidavit at ¶¶ 28–29).

Ms. Broyde also states that she discussed with Mr. Jacobowitz the challenges with selling the property due to the vacant commercial unit and the taxes (*id.* at ¶ 26). Mr. Jacobowitz does not deny that they had these discussions, but only describes his communication with Ms. Broyde to have been "minimal" (Jacobowitz affidavit at ¶ 13). Mr. Jacobowitz further claims that Ms. Broyde never identified Mr. Schwartz to him as a potential buyer (*id.* at ¶ 14).

Ms. Broyde claims that, on April 25, 2018, she emailed Mr. Schwartz to ask if he was still interested (Broyde affidavit at ¶ 31). Mr. Schwartz responded the same day by email that he was "going to make [his] numbers" and asked "what will make the deal happen?" (*id.*). Ms. Broyde replied the same day that "$3.7mm will do it." Ms. Broyde followed up but Mr. Schwartz did not respond (*id.* at ¶¶ 31–32).

Mr. Jacobowitz and Mr. Schwartz each claim that, in or around May 2018, Mr. Jacobowitz's brother-in-law, Jacob Stern, introduced Mr. Jacobowitz to Mr. Schwartz, who then expressed his interest in the property (Jacobowitz affidavit at ¶ 17; Schwartz affidavit at ¶ 22). Mr. Schwartz states that Mr. Stern showed him the property and that he (Mr. Schwartz) did not remember Ms. Broyde ever mentioning it (Schwartz affidavit at ¶ 23). Mr. Jacobowitz states that he and Mr. Schwartz negotiated the sale of the property without ever mentioning the plaintiffs (Jacobowitz affidavit at ¶¶ 17–18). Mr. Jacobowitz confirmed that the transaction price was $3.5 million (*id.* at ¶ 19).

On June 11, 2018, Mr. Schwartz created defendant 469 Holdings NY LLC ("469 Holdings"), of which he was the sole member (Broyde affidavit at ¶ 35; Schwartz Affidavit at ¶ 24; *see also* 469 Holdings operating agreement at [III][a]). By Assignment of Membership Interest, dated July 23, 2018, Mr. Jacobowitz assigned his interest in 469 East 98th Realty to Mr. Schwartz. By deed, dated July 23, 2018, 469 East 98th Realty transferred the property to 469 Holdings (Jacobowitz affidavit at ¶ 20; Schwartz affidavit at ¶ 24). These documents do not disclose the consideration given for these transactions. However, plaintiffs provide a "loan disbursement statement" that shows 469 Holdings borrowed $3.52 million to finance this transaction.

Analysis

All parties move for summary judgment. Defendants separately request sanctions against plaintiffs for, they claim, plaintiffs' fraud on the court. I will address the sanctions first and then the motions for summary judgment.

Defendants' Application for Sanctions

Defendants seek sanctions based on emails plaintiffs provided to them. Defendants claim

that plaintiffs fabricated these emails to support allegations is the complaint. The first email, dated January 24, 2018, from Ms. Broyde to Mr. Jacobowitz, states "My client, Chaim Schwartz, would like to get in today to tour the building." Defendants contend that Ms. Broyde never sent that email to Mr. Jacobowitz. Ms. Broyde was asked at her deposition if she sent the email. She replied, "It's not an e-mail, it's a document, and this is how I sent it to my attorney, my previous attorney, she asked me who the buyer was" (Broyde EBT at 72–73).

Defendants provide a copy of a similar email, also sent from Ms. Broyde to Mr. Jacobowitz on the same date and time, but which states "My client would like to get in today to tour the building." Ms. Broyde testified at her deposition that she sent that email to Mr. Jacobowitz (Broyde EBT at 78).

The second email, dated April 13, 2018, purports to show that Ms. Broyde advised Mr. Jacobowitz, "As per the exclusive agreement, below is the list of potential buyers that have seen the the [sic] listing and have shown interest" and the list of persons includes Chaim Schwartz. Defendants contend that Ms. Broyde never sent that email. When asked if she sent that email to Mr. Jacobowitz, she testified "This is not an e-mail, it's a document." (Broyde EBT at 77). She was then asked, "Was this document ever sent to Mr. Jacobowitz on April 13, 2018?" and she responded, "No" (*id.*)

Plaintiffs provided the alleged emails as attachments to a settlement demand letter. Plaintiffs assert that they did not produce the emails in discovery or file them with the court. Moreover, plaintiffs argue that the court should not consider these emails because they were part of a settlement demand. Pursuant to CPLR 4547, statements made during settlement discussions are inadmissible as proof of liability or damages (*McQueen v Bank of New York*, 57 Misc 3d 481, 484 [Sup Ct, Kings County 2017]). Accordingly, I will not accept them as such.

The Court of Appeals holds that a party who knowingly attempts "to hinder the fact finder's fair adjudication of the case and his adversary's defense of the action" by, among other things "fabrication of evidence, perjury, and falsification of documents" has committed a fraud on the court (*CDR Creances S.A.S. v Cohen*, 23 NY3d 307, 320–21 [2014]). Such fraud must be proved by clear and convincing evidence (*id.* at 320).

The Court of Appeals cautioned that dismissal "is an extreme remedy that 'must be exercised with restraint and discretion'" (*id.* at 321, citing *Chambers v NASCO, Inc.*, 501 U.S. 32, 44 [1991]). However, dismissal may be appropriate where the deceit is repeated, intentional, and goes to matters central to the case (*id.*). By contrast, isolated instances of perjury that do not go to material issues may warrant a lesser sanction, such as awarding attorney fees and costs or precluding testimony (*id.* at 322). The Court of Appeals further directs courts that find the fraud warrants dismissal to explain why lesser sanctions "would not suffice to correct the offending behavior" (*id.*).

As explained more fully, below, plaintiffs assert that Mr. Jacobowitz and 469 East 98th Realty breached the broker agreement. Section 7 of the agreement states that, within 3 days of the exclusivity period, Roey Realty should send a list of potential purchasers and that, if any of them buy the property within a year, Roey Realty will be entitled to its commission.

In their amended complaint, plaintiffs allege, "On or about on January 24, 2018, and thereafter, Broyde identified Schwartz to Sellers as a prospective purchaser for the Property. Particularly, Broyde sent to Sellers an email which identified Schwartz by name as a prospective purchaser interested in viewing and visiting the Property" (amended complaint at ¶ 28). Plaintiffs further allege, "On or about April 13, 2018, Broyde duly sent the Exclusivity List, pursuant to Section 7 of the Brokerage Agreement, which specifically designated Schwartz,

among others, to Seller" (*id.* at ¶ 32).

Plaintiffs state in their moving papers that they have withdrawn any claim for breach under Section 7 (see plaintiffs' Statement of Facts at ¶ 35). It also appears that plaintiffs are not relying on the January 24, 2018 email, the April 13, 2018 email, or any assertion that they ever identified Mr. Schwartz to Mr. Jacobowitz. By withdrawing these assertions from this action, plaintiffs have removed these matters as central issues in this case. Additionally, plaintiffs did not produce these documents in discovery or file them with the court. Accordingly, I will not dismiss this action. However, I still find that plaintiffs created false documents and provided those false documents to defendants, who may have been required to spend time, money and effort to uncover the falsity. Accordingly, defendants are entitled to their reasonable attorneys' fees and costs incurred in uncovering the truth of these documents and in bringing this issue before the court. To the extent that defendants acted improperly in any attempt to uncover information, as plaintiffs contend, I will address that should plaintiffs oppose defendants' application for fees.

The Motions for Summary Judgment

Plaintiffs seek summary judgment in favor of each of their claims and defendants seek summary judgment dismissing plaintiffs' claims. On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Breach of Contract

Plaintiffs assert a cause of action for breach of contract against 469 East 98th Realty and Mr. Jacobowitz. Plaintiffs seek summary judgment on their breach of contract claim against 469 East 98th Realty only. Both defendants also move for summary judgment seeking to dismiss the claim.

To prove a cause of action for breach of contract, plaintiffs must establish the contract's existence, plaintiffs' performance of the contract, defendants' breach of the contract, and damages resulting from the breach (*25 Bay Terrace Assoc., L.P. v Pub. Serv. Mut. Ins. Co.*, 194 AD3d 668, 670-71 [2d Dept 2021]). The parties do not dispute the existence of the broker agreement.

Plaintiffs assert that they performed in accordance with paragraph 1 of the broker agreement, which states "[469 East 98th Realty] hereby grant[s] ROEY REALTY the exclusive right to offer for sale the above-referenced Premises for a period of 90 days from the date you sign this Agreement. If during the Term, we, you, another broker, finder, or other person finds a purchaser for the Premises, you agree to pay to us the full commission set forth herein."

Plaintiffs argue that, because they "found" Mr. Schwartz during the exclusivity period, they are owed their broker commission. Plaintiffs further argue that it does not matter that the property was sold after the exclusivity period. However, the cases on which plaintiffs rely are not applicable. In *Julien J. Studley, Inc. v Coach, Inc.* (3 AD3d 358, 360 [1st Dept 2004]), the written agreement entitled the plaintiff to payment "if, during the term of the agreement, negotiations for a transaction were initiated even if the transaction was completed after termination." Likewise, the agreement in *CYC Realty, Inc. v Perl* (93 AD2d 960 [3d Dept 1983]) stated that the plaintiff was entitled to a commission "if the property was sold to anyone

to whom the property was shown during the duration of the listing agreement." The broker agreement here contains no such provisions. However, the holdings in *Julien J. Studley* and *CYC Realty* confirm that written agreements are enforced in accordance with their terms.

Here, paragraphs 1 and 7 of the broker agreement must be read together. Thus, paragraph 1 of the broker agreement states that plaintiffs are entitled to their commission if a "purchaser" is found within the exclusivity period, and paragraph 7 of the agreement provides a method for paying the commission when the property is sold to an identified purchaser after the exclusivity period expires.

In this case, no one purchased the property during the exclusivity period. Consequently, plaintiffs were not entitled to their commission pursuant to that paragraph. Plaintiffs admit that they did not send a list of potential buyers to 469 East 98th Realty pursuant to paragraph 7. Nevertheless, paragraph 7 remains part of the contract. Were I to construe the contract to require payment of the commission in accordance with paragraph 1, but in the absence of a sale during the exclusivity period, I would render paragraph 7 meaningless (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324-25 [2007]). Accordingly, plaintiff did not perform pursuant to the agreement, and the claim is dismissed.

Plaintiffs argue that their failure to identify their potential buyers to 469 East 98th Realty is immaterial. They provide no legal support for this proposition. In any event, the plain terms of the contract require plaintiffs to provide this information to the seller so that the seller knows the buyers for whom plaintiffs will request a commission. This has a direct bearing on the seller's choice and efforts to work with another broker who solicits bids from any of the same buyers. The requirement is sufficiently material to justify 469 East 98th Realty's election not to perform.

Additionally, the agreement is between Roey Realty and 469 East 98th Realty only. Mr. Jacobowitz is not a party to the agreement and clearly signed on behalf of 469 East 98th Realty only (*Weinreb v Stinchfield*, 19 AD3d 482, 483 [2d Dept 2005]). Plaintiffs confirm in their reply and opposition papers that they do not contend otherwise. For this additional reason, plaintiffs' claim against Mr. Jacobowitz is dismissed.

Common-law Entitlement to a Broker Commission
And Unjust Enrichment and/or Quantum Meruit

Plaintiffs assert claims for common-law entitlement to a broker commission against Mr. Jacobowitz and 469 East 98th Realty, and for unjust enrichment/quantum meruit against all defendants. "A real estate broker is entitled to recover a commission upon establishing that it (1) is duly licensed, (2) had a contract, express or implied, with the party to be charged with paying the commission, and (3) was the procuring cause of the transaction" (*Gluck & Co. Realtors, LLC v Burger King Corp.*, 164 AD3d 562, 562 [2d Dept 2018]).

Plaintiffs may establish that they were the procuring cause by proving that there "was a direct and proximate link, as distinguished from one that is indirect and remote, between the bare introduction and consummation" (*Gluck & Co. Realtors*, 164 AD3d at 562, quoting *Douglas Elliman, LLC v Silver*, 136 AD3d 658, 659 [2016]). Where, as here, plaintiffs may not have been involved in the completion of the deal, they may satisfy the procuring cause element by showing they "created an amicable atmosphere in which negotiations proceeded or that it generated a chain of circumstances that proximately led to the sale" (*Talk of the Town Realty v Geneve*, 109 AD3d 981, 982 [2d Dept 2013], quoting *Hentze–Dor Real Estate, Inc. v D'Allessio,* 40 AD3d 813, 816 [2d Dept 2007]).

Mr. Jacobowitz argues that the only express or implied contract is the broker agreement. The broker agreement was for a 90-day exclusive right to sell the property. The existence of a

written agreement does not preclude a separate contract with different terms either implied in fact or implied in law (*AHA Sales, Inc. v Creative Bath Products, Inc.*, 58 AD3d 6, 20 [2d Dept 2008]). The court may imply a contract as a matter of law where there are claims for unjust enrichment or quantum meruit (*Gluck & Co. Realtors*, 164 AD3d at 562; *Matter of Kummer*, 93 AD2d 135, 182-83 [2d Dept 1983]). A claim for unjust enrichment must show that: (1) defendants were enriched; (2) at plaintiff's expense; and (3) that it is against equity and good conscience to permit the defendants to retain the enrichment (*Main Omni Realty Corp. v Matus*, 124 AD3d 604, 605 [2d Dept 2015]). The elements of a quantum meruit claim are "the performance of services in good faith, acceptance of services by the person to whom they are rendered, expectation of compensation therefor, and reasonable value of the services rendered" (*Karimian v Time Equities, Inc.*, 164 AD3d 486, 490 [2d Dept 2018]).

Here, in addition to the work Ms. Broyde states she performed during the exclusivity period, such as her communications with Mr. Schwartz and showing him the property, Ms. Broyde continued to market the property after the exclusivity period ended. For example, Ms. Broyde avers that she emailed Mr. Schwartz on April 25, 2018 as part of a bulk email to several people, and then later that same day directly to him asking if he was still interested in the property. Mr. Schwartz responded, "It's interesting that I was about to text u back[.] I'm going to make my numbers[.] Can u tell me what will make the deal happen?" Ms. Broyde replied "3.7mm will do it". Ms. Broyde's affidavit testimony, together with the documentary evidence plaintiffs submit, is sufficient to make a prima facie claim for unjust enrichment and quantum meruit, and that plaintiffs were the procuring cause of the sale (*Talk of the Town Realty v Geneve*, 109 AD3d 981, 982 [2d Dept 2013]; *Buck v Cimino*, 243 AD2d 681, 684-85 [2d Dept 1997]).

In opposition, Mr. Schwartz denies ever meeting Ms. Broyde and claims that Ms. Broyde never showed him the property (Schwartz affidavit at ¶¶ 10–12, 16). He further claims that he only became interested in the property when he saw it with Jacob Stern (*id.* at ¶ 22). Although the communications Ms. Broyde had with Mr. Schwartz via email are undisputed, the evidence about who showed Mr. Schwartz the property is found in the affidavits of Ms. Broyde and Mr. Schwartz. This contrasting evidence about who showed Mr. Schwartz the property, and who ultimately closed the deal for a price different than what Ms. Broyde had communicated to Mr. Schwartz, constitutes triable issues of fact.

Tortious Interference with Contract

Plaintiff moves for summary judgment on her claim for tortious interference with contract against Mr. Jacobowitz, Mr. Schwartz, and 469 Holdings. Plaintiff must prove: (1) the existence of a contract; (2) defendants' knowledge of the contract; (3) defendants' intentional inducement of the other contracting party to breach or otherwise render performance impossible; and (4) damages (*Weiss v Bretton Woods Condominium II*, 203 AD3d 1100 [2d Dept 2022]). As held above, plaintiffs did not fully perform under the written contract. Consequently, neither Mr. Jacobowitz nor 469 East 98th Realty had a duty to perform, and so they did not breach. Because there was no breach, this claim is dismissed.

Fraudulent Conveyance.

Plaintiffs assert claims for violation of Debtor and Creditor Law ("DCL") §§ 273 and 276 against 469 East Realty and 469 Holdings. The DCL was amended effective April 4, 2020. However, the amendment does "not apply to a transfer made or obligation incurred before [the] effective date, nor . . . to a right of action that . . . accrued before [the] effective date" (L 2019, ch 580, § 7). As the alleged transfer occurred prior to April 4, 2020, plaintiffs' claims

must be reviewed under the prior versions of these statutes (*Diaz v 297 Schaefer St. Realty Corp.*, 195 AD3d 794, 795 [2d Dept 2021]).

Defendants initially contend that plaintiffs are not creditors. Former DCL § 270 defined "creditor" as any "person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent" (see *Bd. of Managers of E. Riv. Tower Condominium v Empire Holdings Group, LLC*, 175 AD3d 1377, 1379 [2d Dept 2019]). Under this definition, one becomes a creditor when a cause of action against the debtor accrues (*United Nat. Funding, LLC v Volkmann*, 25 Misc 3d 1233[A], 2009 NY Slip Op 52396[U], *13 [Sup Ct, NY County 2009]; *Finkelman v Greenbaum*, 14 Misc 3d 1217[A], 2007 NY Slip Op 50063[U], *6 [Sup Ct, Nassau County 2007]). Here, none of the parties submit any analysis of when plaintiffs' claims accrued against the defendants.

Former § 273 states that "a conveyance made by a person thereby rendered insolvent is fraudulent, without regard to actual intent, if the conveyance is made without fair consideration" (*Monitor Holding Corp. v I.B. Distrib. Corp.*, 189 AD3d 1577, 1578 [2d Dept 2020]; *Tayler-Outten v Taylor*, 248 AD2d 934, 395 [4th Dept 1998]). The prior version of DCL § 272(a) provides that fair consideration exists when, in exchange for property or an obligation, "as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied" (*Am. Panel Tec v Hyrise, Inc.*, 31 AD3d 586, 587 [2d Dept 2006]).

Plaintiffs argue that the transfer of the property from 469 East 98th Realty to 469 Holdings was without fair consideration because the transfer tax return indicates that 469 Holdings paid no money for the transfer. However, plaintiffs ignore what preceded this transfer. The transfer was part of a series of related events that began with 469 Holdings' purchase of 469 East 98th Realty. Following this purchase, 469 East 98th Realty transferred the property to 469

Holdings, and 469 East 98th Realty was subsequently dissolved. The parties do not address whether these related events should be considered a single overall transaction and, if so, whether the transaction resulted in a fraudulent conveyance (*see eg, HBE Leasing Corp. v. Frank,* 48 F.3d 623, 635 (2d Cir. 1995; *Orr v Kinderhill Corp.,* 991 F.2d 31, 35 [2d Cir. 1993]). Accordingly, no party is entitled to summary judgment on plaintiff's claim for violation of DCL § 273.

Former § 276 states that "[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors" (*5706 Fifth Ave., LLC v Louzieh*, 108 AD3d 589, 590 [2d Dept 2013]). To determine actual intent, courts use "badges of fraud" which are circumstances that commonly accompany fraudulent transfers such that they indicate fraudulent intent (*Milin v Pak*, 189 AD3d 1211, 1213 [2d Dept 2020]). Such badges include: "a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; the transferor's knowledge of the creditor's claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance" (*Goldenberg v Friedman*, 191 AD3d 641 [2d Dept 2021], quoting *Wall St. Assoc. v Brodsky,* 257 AD2d 526, 529 [1st Dept 1999]).

Plaintiffs contend that there is a close relationship because Mr. Schwartz owned both companies, that the transfer was not in the usual course of 469 East 98th Realty's business because it dissolved shortly after the transfer, that the transfer was without consideration, and that 469 East 98th Realty knew of plaintiff's claim.

However, as discussed above, plaintiffs ignore the preceding purchase of 469 East 98th Realty by 469 Holdings. This purchase is arguably the first in a series of events, after which came the transfer of the property from 469 East 98th Realty by 469 Holdings, and then the

dissolution of 469 East 98th Realty. There is a legal basis to conclude that this series of events are a single, entire transaction (*HBE Leasing Corp.*, 48 F.3d at 635; *Orr,* 991 F.2d at 35). In this light, the transaction does not include a close relationship, there is consideration, and the transferor did not retain control over the property. Accordingly, no party is entitled to summary judgment on plaintiff's claim for violation of DCL § 276.[3]

Successor Liability

Plaintiffs assert a claim for successor liability against 469 Holdings only. "A corporation may be held liable for the torts of its predecessor if (1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction [was] entered into fraudulently to escape such obligations" (*Menche v CDx Diagnostics, Inc.*, 199 AD3d 678 [2d Dept 2021], quoting *Schumacher v Richards Shear Co.,* 59 NY2d 239, 245 [1983] [alteration in original]).

For the second circumstance, the law will determine whether 469 East 98th Realty and 469 Holdings are merged using the following factors: "continuity of ownership; cessation of ordinary business and dissolution of the predecessor as soon as possible; assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and, a continuity of management, personnel, physical location, assets, and general business operation" (*Menche v CDx Diagnostics, Inc.*, 199 AD3d 678 [2d Dept 2021], quoting *Matter of AT & S Transp., LLC v Odyssey Logistics & Tech. Corp.,* 22

[3] Plaintiffs claim that "defendants" improperly attempted to evade transfer taxes. Plaintiffs assert no such claim in this action and it's unclear whether plaintiffs would have standing to assert such a claim. Plaintiffs seek punitive damages on their claims for fraudulent transfer based on the alleged tax evasion. Because no party is entitled to summary judgment on this claim, I need not reach plaintiffs' request for punitive damages.

AD3d 750, 752 [2d Dept 2005]). "These factors are analyzed in a flexible manner that disregards mere questions of form and asks whether, in substance, it was the intent of the successor to absorb and continue the operation of the predecessor" (*AT & S Transp.*, 22 AD3d at 752).

Although plaintiffs and 469 Holdings reference the standard for "de facto merger", none of the parties provide much analysis of the factors. There does appear to be cessation of 469 East 98th Realty's operation and its dissolution. Plaintiffs contend that continuity of ownership exists because, after 469 Holdings purchased 469 East 98th Realty, Mr. Schwartz owned both companies. Ms. Broyde states that Mr. Schwartz was and has always been the sole owner of 469 Holdings, and Mr. Schwartz does not dispute this (Broyde affidavit at ¶ 35; Schwartz affidavit at ¶ 24). However, plaintiffs continue to gloss over the Mr. Jacobowitz's preceding sale of 469 East 98th Realty to 469 Holdings. If this preceding sale is considered part of the entire transaction, then Mr. Jacobowitz, as the former owner of 469 East 98th Realty, would need to also be part of the ownership of 469 Holdings.

While not all of the factors need to be present, continuity of ownership must be present for successor liability to exist (*Washington Mut. Bank, FA v SIB Mort. Corp.*, 4 Misc 3d 1001[A], 2004 NY Slip Op 50594[U], *3 [Sup Ct, Kings County 2004], *affd sub nom. Washington Mut. Bank, F.A. v SIB Mortg. Corp.*, 21 AD3d 953 [2d Dept 2005]; *Priestly v Headminder, Inc.*, 647 F3d 497, 505–06 [2d Cir 2011]). Because there is no continuity of ownership, plaintiffs cannot rely upon the de facto merger theory to support their successor liability claim.

Plaintiffs also invoke the "mere continuation" theory of successor liability. Again, plaintiffs do not provide much analysis of this theory. The "mere continuation" theory invokes

situations akin to a "corporate reorganization, rather than a mere sale, with 'a common identity of directors, stockholders and the existence of only one corporation at the completion of the transfer'" (*Wass v County of Nassau*, 153 AD3d 887, 889 [2d Dept 2017], quoting *Ladjevardian v Laidlaw–Coggeshall, Inc.*, 431 F Supp. 834, 839 [SDNY 1977]). Because there was not continuity of leadership or ownership, plaintiffs cannot rely on this theory to support their successor liability claim.

Lastly, plaintiffs contend that 469 Holdings entered into the transaction to fraudulently escape successor liability. Plaintiffs' contention is based on their fraudulent conveyance claim (*see eg, E. Concrete Materials, Inc. v DeRosa Tennis Contractors, Inc.*, 139 AD3d 510, 513 [1st Dept 2016]). Because I hold that no party is entitled to summary judgment on this claim, this basis for successor liability remains a viable claim for trial.

Piercing the Corporate Veil

Plaintiffs argue that they could be allowed to pierce the corporate veil of 469 East 98th Realty and 469 Holdings to reach Mr. Schwartz under two distinct theories. The first theory holds that "[a] party seeking to pierce the corporate veil must establish that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury" (*Minico Ins. Agency, LLC v AJP Contr. Corp.*, 166 AD3d 605, 606-07 [2d Dept 2018], quoting *Millennium Constr., LLC v Loupolover*, 44 AD3d 1016, 1016 [2d Dept 2007] [internal quotations omitted]). The second theory provides that failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use may also allow veil piercing (*see eg, Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 48 [2018] [employing certain of those factors]; *see also Sky-Track*

Tech. Co. Ltd. v HSS Dev., Inc., 167 AD3d 964, 965 [2d Dept 2018]). As discussed above, plaintiffs' characterization of the transaction ignores the sale of 469 East 98th Realty to 469 Holdings. Accordingly, it remains to be seen whether there has been a fraud or other wrong[4], or if there was undercapitalization.

Additionally, plaintiff incorrectly contends that a fraudulent conveyance necessarily allows a court to pierce the corporate veil. In *Palmerone v Staples* (195 AD3d 736 [2d Dept 2021]) and *Agai v Diontech Consulting, Inc.* (38 AD3d 736 [2d Dept 2016]), cited by plaintiffs, the court pierced the corporate veil because the corporate owner dominated the corporation and did not respect corporate forms. Because there is no evidence of such domination of the corporations or disrespect of corporate forms, there is not sufficient basis to pierce the corporate veil at this time.

Defendants' Defenses

Plaintiffs argue that all of defendants' defenses should be struck as conclusory and unsupported, but they provide no analysis to support the argument. Accordingly, that application is denied.

Conclusion

For the reasons stated above, plaintiffs' motion for summary judgment (Seq. 005) is denied. The cross-motion for summary judgment and for sanctions filed by defendants 469 East 98th Realty LLC, Chaim Schwartz and 469 Holding NY LLC (Seq. 014) is granted to the extent that: (a) plaintiffs' claim for breach of contact against 469 East 98th Realty is dismissed; (b)

[4] For the first time in their reply, plaintiffs contend that Mr. Schwartz's alleged tax evasion is a basis to pierce the corporate veil. Because plaintiffs do not make this argument in their initial moving papers, it must be disregarded (*Allstate Ins. Co. v Dawkins*, 52 AD3d 826, 826–827 [2d Dept 2008]).

plaintiffs' claim for tortious interference with contract against Mr. Schwartz and 469 Holdings is dismissed; and (c) plaintiffs' claim for successor liability against 469 Holdings is dismissed, except to the extent of a claim that 469 Holdings entered into the subject transaction to fraudulently escape successor liability. Defendant Samuel Jacobowitz's cross-motion for summary judgment motion (Seq. 013) is granted to the extent that plaintiffs' claims for breach of contract and for tortious interference with contract against him are dismissed. Defendants' motions are further granted to the extent that they may, on or before November 21, 2022, submit to chambers and to plaintiffs, an affidavit with supporting time sheets that describe the attorneys' fees and costs they incurred in uncovering the truth of the false emails that plaintiffs provided. Plaintiffs shall respond to any such application on or before December 5, 2022.

This constitutes the decision and order of the court.

November 3, 2022
DATE

DEVIN P. COHEN
Justice of the Supreme Court