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| <b>Atlas Realty Group Partners LLC v Caller</b>  |
| 2026 NY Slip Op 30383(U)   |
| January 29, 2026   |
| Supreme Court, Kings County  |
| Docket Number: Index No. 502095/2024   |
| Judge: Peter P. Sweeney  |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS, PART 73  
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ATLAS REALTY GROUP PARTNERS LLC,

Index No.: 502095/2024  
Motion Date: 7-7-2025  
Mot. Seq. No.: 1, 2

Plaintiff,

-against-

**DECISION/ORDER**

MARK CALLER, individually, and in his capacity as  
Member of 11-19 FOAM PLACE HOLDINGS LLC, and  
11-19 FOAM PLACE HOLDINGS LLC, ,

Defendants.  
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The following papers, which are e-filed with NYSCEF as Document Numbers 28-61, 62-73, 75-82 , were read on this motion and cross-motion:

In this action involving a real estate transaction, in Mot. Seq. # 1. the Defendants' move of an Order pursuant to CPLR § 3212(a): (i) Granting summary judgment in their favor on their first, second and fourth counterclaims for breach of fiduciary duties, fraudulent concealment and fraud, and awarding Defendants damages in the amount of \$200,000.00, with interest from May 30, 2023; (ii) Dismissing Plaintiff's Verified Complaint; (iii) and Dismissing the Plaintiff's affirmative defenses to the Counterclaims. In Mot. Seq. #2, Plaintiff cross-moves for an Order pursuant to CPLR § 3212(a): (i) Granting Plaintiff summary judgment on its breach of contract and unjust enrichment claims and awarding Plaintiff \$192,000.00 for Defendant's breach of the Agreement. The motion and cross-motion are consolidated for disposition.

**I. Background**

Plaintiff commenced this action seeking to recover a broker's commission related to the sale of 11-19 Foam Place, Far Rockaway, New York (the "Property"). Plaintiff Atlas Realty Group Partners LLC ("Atlas") acted as Defendants broker for the sale of the Property. The record reveals that on May 24, 2023, the prospective buyer, Pinchas Abowitz, submitted a \$5,000,000.00 "all-in" offer to Atlas salesperson Aaron Heideman. Atlas, however, presented Defendants with a lower offer of \$4,800,000.00 on May 29, 2023, and explicitly advised Defendants that the buyer would not pay more. Relying on this representation, Defendants accepted the lower price and signed a commission agreement agreeing to pay Atlas a

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\$192,000.00 commission. Simultaneously, and without Defendants' knowledge, Atlas entered into a separate agreement with Abowitz to collect an additional \$200,000.00 commission—effectively "double-dipping" by capturing the spread between the buyer's actual offer and the price conveyed to the sellers.

After Atlas initiated this action to recover its \$192,000.00 commission, Defendants counterclaimed for breach of fiduciary duty, fraudulent concealment, and fraud.

## II. Discussion

### A. Existence of a Fiduciary Relationship

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 (*Dubbs v. Stribling & Assocs.*, 96 N.Y.2d 337, 340–41, 752 N.E.2d 850, 852 see also, *Northeast Gen. Corp. v. Wellington Adv.*, 82 N.Y.2d 158, 163, 604 N.Y.S.2d 1, 624 N.E.2d 129 [clarifying the distinction between a broker and a finder]; *Wendt v. Fischer*, 243 N.Y. 439, 154 N.E. 303). 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 (*id.*). "[T]he disclosure to be effective must lay bare the truth, without ambiguity or reservation, in all its stark significance" (*Id.*, see also *Wendt v. Fischer, supra*, 243 N.Y., at 443, 154 N.E. 303 [citations omitted]).

In support of their motion for summary judgment, Defendants established, *prima facie*, that Atlas' solicitation, marketing, and negotiation on behalf of Defendants in connection with the Property established a brokerage relationship. Defendants further established, *prima facie*, that Atlas breached this duty by failing to disclose the \$5,000,000.00 offer and its separate \$200,000.00 commission agreement. The vague "reservation of right" to collect from the purchaser in the seller's agreement falls far short of the full disclosure required of a fiduciary and is insufficient to create a triable issue of fact.

Where, as here, the duty of undivided loyalty is breached, plaintiff broker forfeits its right to a commission, "regardless of whether damages were incurred" (*Douglas Elliman LLC v. Tretter*, 84 A.D.3d 446, 448, 922 N.Y.S.2d 74, *aff'd* 20 N.Y.3d 875, 955 N.Y.S.2d 851, 979

N.E.2d 1178, *see also*, *P. Zaccaro, Co. v. DHA Cap., LLC*, 157 A.D.3d 602, 603, 70 N.Y.S.3d 458, 460). Further, it is a well-settled rule that “ ‘fraud vitiates all contracts, but as a general thing it is not presumed but must be proved by the party seeking to [be] relieve[d] ... from an obligation on that ground’ ” (*Matter of Gordon v. Bialystoker Ctr. & Bikur Cholim*, 45 N.Y.2d 692, 698, 412 N.Y.S.2d 593, 385 N.E.2d 285 [1978], quoting *Cowee v. Cornell*, 75 N.Y. 91, 99 [1878] ). However, an exception to that general rule provides that where a fiduciary relationship exists between the parties, the law of constructive fraud will operate to shift the burden to the party seeking to uphold the transaction to demonstrate the absence of fraud (*see Matter of Greiff*, 92 N.Y.2d 341, 345, 680 N.Y.S.2d 894, 703 N.E.2d 752 [1998] ). In addressing the doctrine of constructive fraud, the Court of Appeals has explained that when

“the relations *between the contracting parties* appear to be of such a character as to render it certain that they do not deal on terms of equality but that either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from overmastering influence, or on the other from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, there the burden is shifted, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood” (*Cowee*, 75 N.Y. at 99–100 [emphasis supplied] ).

(*Aoki v. Aoki*, 27 N.Y.3d 32, 39–40, 49 N.E.3d 1156, 1160 ).

Certainly, Atlas has not met the burden of affirmatively raising a triable issue of fact as to whether no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood. In any event, as stated above, Defendants established, *prima facie*, that Atlas breached its fiduciary duty by failing to disclose the \$5,000,000.00 offer and its separate \$200,000.00 commission agreement and Atlas failed to raise a triable issue of fact.

Accordingly, it is hereby:

**ORDERED**, that Defendants' motion for summary judgment dismissing plaintiff's complaint is **GRANTED**, and Plaintiff's Verified Complaint is **DISMISSED**; and it is further

**ORDERED**, that Defendants' motion for summary judgment on its counterclaims for breach of fiduciary duty, fraudulent concealment, and fraud is **GRANTED**; and it is further

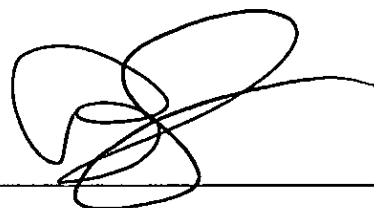
**ORDERED**, the Defendant established its entitlement to damages in the amount of \$200,000.00 on their counterclaims; and it is further

**ORDRED** that Defendants may enter judgment against Atlas in the amount of \$200,000,00, together with interest from January 10, 2024, the date of the closing, with costs and disbursements; and it is further

ORDERED that Plaintiff's motion for summary judgment is **DENIED**.

This constitutes the decision and order of the Court.

**Dated:** January 29, 2026



**PETER P. SWEENEY, J.S.C.**

**FILED**  
JAN 30 2026  
KINGS COUNTY CLERK'S OFFICE