

<b>108 Charlton Partners, LLC v 108 Charlton St. Realty, Inc.</b>
2014 NY Slip Op 30620(U)
March 7, 2014
Supreme Court, New York County
Docket Number: 151103/13
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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108 CHARLTON PARTNERS, LLC

Plaintiff,  
-against-

Index No. 151103/13  
Subm. Date: 11/6/2013  
Motion Seq. 001

108 CHARLTON STREET REALTY, INC.  
AND FONG & WONG, P.C.,

**DECISION AND ORDER**

Defendants.

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For Plaintiff:	For Defendants:
Olshan Frome Wolosky LLP	Fong & Wong P.C.
65 East 55 <sup>th</sup> Street	254 Canal Street, Suite 2002
New York, New York 10020	New York, New York 10013

Papers considered in review of the motion and cross- motion:

Notice of Motion.....	1
Notice Cross-Motion.....	2
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HON. SALIANN SCARPULLA, J.:

In this action to recover damages for, *inter alia*, breach of contract, plaintiff 108 Charlton Partners, LLC (“Charlton Partners”) moves to disqualify Fong & Wong, P.C. (“Fong”) from representing defendant 108 Charlton Street Realty, Inc. (“Charlton Street”) in this action, and defendants Charlton Street and Fong cross move for summary judgment dismissing the complaint, cancelling the notice of pendency, and severing the counterclaims.

On or about May 31, 2012, Charlton Street executed a letter of intent to sell the premises located at 108-110 Charlton Street in Manhattan to Charlton Partners. On or

about July 19, 2012, Charlton Partners executed a contract of sale for the property and deposited \$1,000,000 as down payment to be held in escrow by Fong. Charlton Street was not satisfied with the terms of the contract. Charlton Partners then commenced an action entitled *DHA Capital, L.L.C. and 108 Charlton Partners, L.L.C. v. 108 Charlton Street Realty, Inc.*, Index No. 155543/12 to enforce the letter of intent and to seek performance of the sale of the property. The parties settled that case.

After further negotiations, the parties executed a contract of sale with riders on or about October 26, 2012. The contract/riders contained a due diligence provision, which provided that Charlton Partners had 30 days from the execution of the contract to investigate and inspect the property, and included a “time is of the essence” clause. It also provided that during the due diligence period, the purchaser could perform inspections, however, “the premises shall be restored by purchaser to substantially the same condition as existed immediately prior to purchaser’s inspection.” Further, the purchaser was required to obtain an insurance policy to cover any liability of purchaser to seller arising out of investigative activities and physical inspection, and was required to protect, indemnify, defend and hold the premises, seller, and seller’s agents harmless from any claims, damages or losses arising from purchaser’s inspection and testing of the premises.

The contract also included a termination option, which provided that purchaser had “the option in its sole and absolute discretion, for any reason or no reason, to terminate

this contract by delivering a written notice to Seller of Purchaser's irrevocable election to exercise the termination option on or before the termination of the due diligence period...time is of the essence on purchaser to exercise its right to terminate."

Further, pursuant to the contract,

"if for any reason the closing does not occur and either party makes a written demand upon escrowee for payment of [the downpayment], escrowee shall give written notice to the other party of such demand. If escrowee does not receive a written objection from the other party to the proposed payment within 10 business days after the giving of such notice, escrowee is hereby authorized to make such payment. If escrowee does receive such written objection within such 10 day period or if for any other reason escrowee in good faith shall elect not to make such payment, escrowee shall continue to hold such amount until otherwise directed by written instructions from the parties to this contract or a final judgment of a court."

The rider to the contract provided that upon exercising the termination option, "each party shall promptly execute and deliver to escrowee such documents as escrowee may reasonably require to evidence such termination; escrowee shall remit to Purchaser all funds deposited into escrow" and "the respective obligations of Purchaser and Seller under this contract shall terminate, except for those expressly state to survive such termination."

According to Charlton Partners, its due diligence efforts were interrupted by Hurricane Sandy. As a result, on November 21, 2012, Charlton Partners and Charlton Street executed an extension amendment, allowing more time for due diligence. However, Charlton Partners was not able to complete its due diligence during that time

period. It approached Charlton Street for a further extension, which Charlton Street denied.

On November 16, 2012, engineer Sek Sun Eng (“Eng”) visited the premises, at Charlton Street’s instruction, to inspect the progress of Charlton Partners’ due diligence work. On December 14, 2012, he visited the property again and discovered damage resulting from the due diligence work. He prepared an itemized estimate of the cost to repair the damage.

On December 5, 2012, Charlton Partners sent written notice to Charlton Street and Fong advising them that it was exercising the termination option under the contract, and demanding the release of the down payment. According to Charlton Street’s president Kong Ip Wing (“Wing”), he objected to Fong’s immediate release of the entire amount of the downpayment based on Charlton Partners’ failure to repair the damage to the property caused by its due diligence work. Based on Eng’s estimate and the potential for asbestos contamination, Charlton Street instructed Fong to release only 90% of the downpayment and to hold 10% plus a small amount of interest in escrow pending repair and restoration and resolution of the parties’ respective rights to the escrow balance. Charlton Street later authorized release of an additional 5% after learning that no asbestos abatement was necessary.

Based on these instructions, Fong sent a letter to Charlton Partners dated December 6, 2012, indicating that “the downpayment will be returned after purchaser

restores the premises to its original condition prior to purchaser's investigation and inspection. Accordingly, please have purchaser and its engineer submit a plan including a reasonably detailed specification for the restoration work." By letter dated December 17, 2012, Fong sent a letter indicating, "as per my client's instruction and authorization, I am returning 90% of the downpayment in the amount of \$900,000 by the check enclosed herewith. I will continue to hold in escrow the balance of the downpayment which is \$100,000 plus small amount of interest earned pending your client's restoration of the premises to its original condition before the due diligence investigation." He further wrote, "my client objects to the release of the downpayment to purchase because your client failed to restore the premises to its original condition. For settlement purpose, my client suggests that my firm withholds a small portion of the downpayment sufficient to cover the estimated cost of the restoration work and return the balance to purchaser."

Charlton Partners commenced this action alleging that Charlton Street breached its duty to negotiate in good faith, breached the contract, and tortuously interfered with the escrow agreement. It also alleged that Fong breached its contractual obligations and its fiduciary duties when it refused to release the down payment in accordance with the terms of the escrow agreement, and permitted Charlton Street to influence and interfere with the release of the down payment.

Charlton Street and Fong answered the complaint and denied all material allegations. Charlton Street interposed counterclaims seeking (1) the cost of repairing the

damage and restoring the property resulting from the due diligence work; and (2) to dismiss or cancel the notice of pendency, and for damages based on the filing of the cause of action for specific performance and the notice of pendency in bad faith. Fong interposed a counterclaim seeking indemnification for expenses and attorneys fees incurred in defending itself in this action.

Charlton Partners now moves to disqualify Fong from representing Charlton Street in this action pursuant to New York Rules of Professional Conduct Rule 3.7. It maintains that Edmond J. Fong and Robert W. Wong, two partners from Fong, negotiated the terms of the contract and escrow agreement on behalf of Charlton Street, Fong was the escrow agent for the transaction and is now representing itself and Charlton Street in this action. Charlton Partners argues that Edmond J. Fong and Robert W. Wong are key witnesses and will testify about many factual issues, including the circumstances surrounding Fong's decision to only release 90% of the down payment.

Charlton Street and Fong cross move for summary judgment dismissing the complaint, cancelling the notice of pendency, and severing the counterclaims. They first allege that Charlton Street did not fail to negotiate the contract or perform in good faith. They also argue that pursuant to the contract, Charlton Partners had no right to sue for damages or loss of profit.

They next argue that Fong was acting in good faith as escrow agent and in accordance with the contract because if it would have released the entire downpayment

immediately upon termination, the rights of Charlton Street to be indemnified by Charlton Partners for the costs of restoration and repair would have been prejudiced. Further, there was no tortious interference with the escrow agreement because the escrowee did not breach any contract provision or duty of good faith owed, and, in any event, there lies no cause of action for tortious interference with a contract against a party that was a party to the contract. They further argue that the notice of pendency should be cancelled because Charlton Partners can not maintain a cause of action for specific performance, and is not entitled to any judgment that would affect title or possession of the property.

Finally, they argue that Edmond J. Fong and Robert W. Wong's testimony is not necessary in this action, and there is no basis to disqualify them as counsel.

## **Discussion**

### **Charlton Street and Fong's cross motion**

Charlton Street and Fong cross move for summary judgment dismissing the complaint, cancelling the notice of pendency, and severing the counterclaims. First, the court dismisses Charlton Partners' claims against Charlton Street alleging breach of the duty to negotiate and perform in good faith and breach of contract. Charlton Partners argues that its causes of action arise from Charlton Street's refusal to consent to an extension of the due diligence period, its "capricious behavior throughout the entire process," and "its refusal to execute the contract of sale (despite having executed a letter of intent)." The evidence presented demonstrates that the parties agreed upon a due

diligence provision in the contract, with a time is of the essence clause. Once Charlton Partners realized that it could not meet the due diligence deadline, Charlton Street agreed to a reasonable extension of the deadline, again with a time is of the essence clause. Charlton Partners was unable to meet that deadline. No evidence has been presented to raise a triable issue of fact as to whether Charlton Street's decision to deny Charlton Partners' request for a second extension was arbitrary, irrational, a breach of the duty to perform or negotiate in good faith or a breach of the contract. As such, the first and second causes of action are dismissed.

Further, Charlton Partners' claim for tortious interference with a contract must be dismissed. Only a "stranger to a contract, such as a third party, can be liable for tortious interference with a contract." *Koret, Inc. v. Christian Dior, S.A.*, 161 A.D.2d 156, 157 (1<sup>st</sup> Dept. 1990). Here, Charlton Street was a party to the escrow agreement and therefore, can not be held liable for tortious interference therewith.

As there are no remaining claims asserted that could affect title to real property, that branch of Charlton Street and Fong's cross motion which seeks to cancel the notice of pendency is granted. *See 3801 Review Realty LLC v. Review Realty Co. LLC*, 111 A.D.3d 509 (1<sup>st</sup> Dept. 2013).

However, the court denies that branch of the cross motion seeking summary judgment dismissing the causes of action asserted against Fong. An escrow agent owes the parties to the transaction a fiduciary duty, and therefore the agent, as a fiduciary, has a

strict obligation to protect the rights of both parties for whom he or she acts as escrowee. *Greenapple v. Capital One, N.A.*, 92 A.D.3d 548, 549 (1<sup>st</sup> Dept. 2012); *Takayama v. Schaefer*, 240 A.D.2d 21 (2nd Dept. 1998). Moreover, an escrow agent has a duty not to deliver the monies in escrow except upon strict compliance with the conditions imposed by the controlling agreement. *See Farago v. Burke*, 262 N.Y. 229 (1933).

Here, the contract clearly provided that if, after receiving the notice of termination and demand for the downpayment, the escrowee received written objection to the release of the funds or if for any other reason escrowee in good faith elected not to make such payment, the escrowee would continue to hold the downpayment until otherwise directed by written instructions from the parties or a final judgment of a court. Pursuant to the rider to the contract, the escrowee was required to release the funds to the purchaser upon termination. Nowhere in the contract or the rider is the escrow agent given the authority to take instructions only from its client, the seller, release only a portion of the downpayment to purchaser upon termination, and withhold the remainder of the downpayment pending the purchaser's restoration and repair of the premises. Fong is not entitled to summary judgment dismissing the claims asserted against it because issues of fact exist as to whether Fong's decision to comply with its client Charlton Street's instructions to withhold a portion of the downpayment constitutes a breach of the escrow agreement and a breach of its fiduciary duty as escrow agent.

Finally, Charlton Street and Fong's request to sever the counterclaims is denied.

*See generally Moniz v. National Constructors, Inc.*, 278 A.D. 855 (2<sup>nd</sup> Dept. 1951).

#### Charlton Partners' motion

The advocate-witness rule requires an attorney to withdraw from a case where it is likely that he will be called as a witness. N.Y. Rules of Prof. Conduct, Rule 3.7(a) (22 N.Y.C.R.R. § 1200.0). Disqualification is only required where the attorney's testimony is considered necessary. *S & S Hotel Ventures Ltd. Partnership v. 777 S. H. Corp.*, 69 N.Y.2d 437, 446 (1987) ("Testimony may be relevant and even highly useful but still not strictly necessary"); *see also Sokolow v. Lacher*, 299 A.D.2d 64, 74 (1st Dept. 2002); *Phoenix Assurance Co. of New York v. C.A. Shea & Company*, 237 A.D.2d 157, 157 (1st Dept. 1997).

As stated above, the claims asserted against Charlton Street in the complaint are dismissed. Therefore, the only remaining issue on this motion is whether Fong should be disqualified from representing Charlton Street on its counterclaims asserted against Charlton Partners. The court finds that Charlton Partners has not met its burden of proving that Fong should be disqualified from representing Charlton Street on its counterclaims at this time. The counterclaims interposed by Charlton Street seek the cost of repairing the damage and restoring the property resulting from Charlton Partners' due diligence work, and damages based on the filing of the cause of action for specific

performance and the notice of pendency in bad faith. Fong's testimony on these issues would not be necessary. As such, Charlton Partners' motion is denied.

In accordance with the foregoing, it is hereby

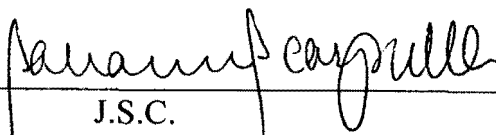
ORDERED that plaintiff 108 Charlton Partners, LLC's motion to disqualify Fong & Wong, P.C. from representing defendant 108 Charlton Street Realty, Inc. in this action is denied; and it is further

ORDERED that defendants Charlton Street and Fong & Wong, P.C.'s cross motion for summary judgment dismissing the complaint, cancelling the notice of pendency, and severing the counterclaims is granted only to the extent that the first, second and third causes of action in the complaint asserted against Charlton Street are dismissed, the notice of pendency is cancelled, and the motion is otherwise denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
March 7, 2014

ENTER:

  
J.S.C.

JULIAN SCARPULLA