

**Warburg Realty Partnership, Ltd. v Battery Place
Realty, LLC**

2014 NY Slip Op 30691(U)

March 17, 2014

Supreme Court, New York County

Docket Number: 153556/12

Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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WARBURG REALTY PARTNERSHIP, LTD.
a/k/a WARBURG REALTY a/k/a WARBURG
REALTY PARTNERSHIP,

Index No. 153556/12
Motion Date: 2/7/2014
Mot. Sequence: 002
Decision and Order

Plaintiff,

-against-

BATTERY PLACE REALTY, LLC,
EDWARD WILLNER, MINGSEN CHEN,
SHUIGUN CHEN, DAVID J. BARON,
BARON & BARON, ESQS., P.C.,
CHOI & DIMAS, P.C. and GAVIN CHOI,

Defendants.

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ELLEN M. COIN, J.:

By decision and order dated March 21, 2013, this Court granted the motion of defendants David J. Baron and Baron & Baron Esqs., P.C. (collectively, the "Baron defendants") to dismiss the Fifth and Sixth Causes of Action of the complaint, the only claims asserted against them in this case. Plaintiff Warburg Realty Partnership Ltd. ("Warburg") now moves pursuant to CPLR 2221 for an order granting reargument or renewal, and upon such reargument or renewal, vacating the prior order and denying the Baron defendants' motion to dismiss. Plaintiff also seeks discovery pursuant to CPLR §3211(d) and an order granting leave to replead.

The Baron defendants cross-move pursuant to CPLR 3211(a)(7) and 3025(a) for an order (1) dismissing the amended answer of

defendants Mingsen Chen, Shuigun Chen, Gavin Choi, and Choi & Dimas, P.C. as untimely, (2) disqualifying Gavin Choi, Esq. and Choi & Dimas from representing defendants Mingsun Chen and Shuigun Chen in this action; and (3) for costs and attorneys' fees.

Reduced to its essentials, the complaint alleges that Warburg was the procuring broker of the sale of a penthouse condominium unit in the Millennium Point Condominium ("Condominium"); that its right to a commission was recognized in the original contract of sale; and that at the closing the parties terminated the original contract and entered into a new contract eliminating any payment to Warburg. The complaint alleges that the Baron defendants represented the seller of the condominium in the transaction.

The motion to reargue and renew

Warburg's Fifth Cause of Action, while hardly a model of pleading, appears to allege that the defendants conspired to commit fraud. Since civil conspiracy is not a cause of action independent of the wrong that defendants allegedly conspired to commit, when plaintiff has failed to plead a predicate claim, the conspiracy claim fails with it. (*Kickertz v New York Univ.*, 110 AD3d 268, 281 [1st Dept 2013]; *Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 85 AD3d 457, 458-59 [1st Dept 2011]).

The elements of a cause of action for fraud require a material misrepresentation of fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Here Warburg fails to allege that the Baron defendants made any representation, fraudulent or otherwise, to it (see *National Westminster Bank v Wechsel*, 124 AD2d 144, 147 [1st Dept 1987]; cf. *Weinberg v Mendelow*, 113 AD3d 485 [1st Dept 2014]). Instead, it alleges that misrepresentations were made to the Condominium and to the lender, and that a "false" termination of the original contract of sale was prepared.

To the extent that the complaint alleges fraud by omission, "an omission does not constitute fraud unless there is a fiduciary relationship between the parties." (*Robinson v Crawford*, 46 AD3d 252, 253 [1st Dept 2007] [citation and interior quotation marks omitted]). No such relationship is alleged between Warburg and the Baron defendants.

On reargument plaintiff fails to demonstrate that the Court overlooked or misapprehended any law in dismissing its Fifth Cause of Action. Instead, its arguments are directed to its Sixth Cause of Action, for tortious interference with its contractual relations, as third party beneficiary of the original contract of sale.

In dismissing the Sixth Cause, this Court noted that an attorney is not liable for inducing his principal to breach a contract with a third person, at least where he is acting on behalf of his principal within the scope of his authority.

(*Burger v Brookhaven Med. Arts Bldg.*, 131 AD2d 622, 624 [2d Dept 1987]). Absent a showing of fraud or collusion, or of a malicious or tortious act, an attorney is not liable to third parties for purported injuries caused by services performed on behalf of a client or advice offered to that client. (*Halevi v Fisher*, 81 AD3d 504, 505 [1st Dept 2011]; *Beatie v DeLong*, 164 AD2d 104, 109 [1st Dept 1990]).

On this motion Warburg contends, as it did in its original motion, that its Sixth Cause of Action against the Baron defendants is viable, on the theory that an attorney may be liable to third parties for actions taken in furtherance of his role as counsel upon proof of the existence of fraud, collusion, malice, bad faith or special circumstances. (*Joel v Weber*, 197 AD2d 396, 397 [1st Dept 1993]). It relies on its allegation that one or more of the Baron defendants received \$150,000 from the proceeds of the sale at closing.

It is well settled that on a motion to dismiss pursuant to CPLR 3211(a)(7), the pleadings are to be afforded a liberal construction. See CPLR 3026. The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the

benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; see *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]).

Baron defendants' receipt of a considerable sum at the closing is in itself insufficient basis from which it could be inferred that the Baron defendants acted in self-interest. (*Kline v Schaum*, 174 Misc2d 988, 990 [App Term, 2d Dept 1997]). A mere receipt of legal fees at a real estate closing transaction does not place the attorney's conduct outside the scope of his legal representation. (*Id.*).

However, an affidavit of defendant Gavin Choi, the buyer's attorney, raises an inference that the disbursements made to Baron's firm went beyond the compensation for the work on the subject real estate transaction.¹ Choi alleges that prior to the closing, Edward Willner, the seller, "mentioned to [him] that he owed money to his attorney in connection with other matters that had nothing to do with the closing" (Affidavit of Gavin Choi, dated May 15, 2013, ¶6). Shortly before the closing, Baron asked Choi to issue his firm two separate checks at the closing, one for \$127,400.00 and another for \$47,600.00 (*Id.*). Accordingly,

¹On a motion to dismiss the complaint for failure to state a cause of action, the Court may consider evidentiary materials outside the four corners of the complaint to assess whether plaintiff has a cause of action, not whether he has stated one. (*Dollard v WB/Stellar IP Owner, LLC*, 96 AD3d 533, 533 [1st Dept 2012]).

Choi's affidavit supports an inference that a portion of the money that Baron received at the closing funds was in excess of his legal fees and was intended to cover certain outstanding account receivables. Viewed in the light most favorable to plaintiff, Choi's affidavit points to existence of evidentiary support to Warburg's claim that, at least partially, the Baron defendants acted in self-interest and should not be shielded from liability by reason of their apparent advocacy role.

Thus, to the extent that this motion seeks reargument as to the dismissal of the Sixth Cause of Action, the motion is granted, and the underlying motion to dismiss the complaint as to the Baron defendants is denied. In light of this determination, so much of Warburg's motion as seeks discovery pursuant to CPLR 3211(d) and an order granting leave to replead is denied as moot.

The cross-motion to dismiss

The Baron defendants seek dismissal of the amended answer and cross-claims of (1) Mingsen Chen, Shuigun Chen (collectively, the Chens) and (2) Choi & Dimas P.C. and Gavin Choi (collectively, the Chois). First, they contend that the amended answer was untimely, having been served more than 20 days after the initial answer of the Chens and Chois.

In response, counsel for the Chens and Chois alleges that after service of their original answer, which contained no cross-claims, he obtained an extension of time from plaintiff's counsel

to amend their answer. He notes that as at that time the Baron defendants had not served a responsive pleading, but had moved to dismiss the complaint. Thus, the service of the amended answer was not untimely. The Court concurs.

The amended answer asserts four cross-claims against the Baron defendants. The First Cross-Claim alleges fraud and seeks reformation of the revised contract, plus money damages. To the extent that the Chois and Chens seek reformation, such a claim cannot lie against the Baron defendants who were not parties to the contract. Accordingly, the First Cross-Claim against the Baron defendants must be dismissed.

The Choi and Chen defendants urge that their Second Cross-Claim alleges fraud in the execution. Such a claim requires allegation of all five of the traditional elements of fraud: representation of a material fact, the falsity of such representation, scienter, reliance and damages. (*Bank Leumi Trust Co. v D'Evori Int'l, Inc.*, 163 AD2d 26, 31 [1st Dept 1990]). Moreover, any cause of action based upon misrepresentation or fraud must state in detail "the circumstances constituting the wrong." (CPLR 3016[b]).

To the extent that the Second Cross-Claim purports to assert a cause of action on behalf of the Choi defendants, it is dismissed. The Choi defendants are not parties to the revised contract and therefore have no claim of damage.

The Chen defendants' cross-claim for fraud would be viable only if it contained an allegation that they reasonably relied on misrepresentations by the Baron defendants. (*Dabriel, Inc. V First Paradise Theaters Corp.*, 99 AD3d 517, 521 [1st Dept 2012]). The cross-claim alleges that Shuigun Chen's young daughter, Caiyun Chen, attended the closing with a power-of-attorney to execute all of the necessary documents. (¶42). The cross-claim alleges that the Baron defendants failed to disclose to Ms. Chen or to the Chois that the revised contract contained a new provision indemnifying the seller for any broker's fee. Most significantly, it alleges that Ms. Chen and the Chois "reviewed the Revised Contract [to] confirm the accuracy of the purchase price, **but did not notice** the New Provision which revised and altered the term relating to the payment of the Broker's Fee." (¶50; emphasis added).

The failure of Ms. Chen and her counsel to thoroughly read the Revised Contract precludes the Chens' fraud in the execution claim. (*Vulcan Power Co. v Munson*, 89 AD3d 494, 495 [1st Dept 2011]). Negligent failure to read a document precludes the assertion of justifiable reliance, an essential element of fraud in the execution. (*Id.*; *Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 266 [1st Dept 2008]). Accordingly, the Second Cross-Claim is dismissed.

The Third Cross-Claim is for indemnification. "[T]he key element of a common-law cause of action for indemnification is not a duty running from the indemnitor to the injured party, but rather is a separate duty owed the indemnitee by the indemnitor." (*Racquet v Braun*, 90 NY2d 177, 183 [1997][citations and internal quotation marks omitted]). Here the Chois and the Chens fail to allege that the Baron defendants owed any independent duty to them. In the absence of such duty, the Chois and the Chens are not entitled to indemnification. (*Breen v Law Office of Bruce A. Barket, P.C.*, 52 AD3d 635, 638 [2d Dept 2008]). Moreover, here the Chois and the Chens are not being held responsible for another's wrong, but are charged themselves with conspiracy to deprive Warburg of its broker's commission. (*Jakobleff v Cerrato, Sweeney & Cohn*, 97 AD2d 786, 786-787 [2d Dept 1983]). Accordingly, the Third Cross-Claim is dismissed.

In light of the consent of the Choi defendants to dismissal of their Fifth Cross-Claim, it need not be addressed.

The cross-motion to disqualify counsel for the Chen defendants

Rule 3.7 of the Rules of Professional Conduct (22 NYCRR 1200.0) provides that unless certain exceptions apply, "[a] lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact."

On this motion defendant Gavin Choi alleges that the Baron defendants prepared a revised version of the contract of sale that was not shown to him until the day of the closing, and that it contained a new hold-harmless provision providing that Choi's clients, the buyers, indemnify the seller against any claim by any real estate broker in lieu of the original provision requiring the seller to pay the broker's fee. Further, he alleges, "This provision was never agreed to by me or my clients, and was inserted without our knowledge or consent. Unfortunately, neither I nor my clients' representative spotted the New Provision at the closing...." (Choi Aff. sworn to May 15, 2013, ¶5 at 2-3).

It is clear that Choi's testimony supports his clients/co-defendants' position that they had no knowledge of the substituted provision that is at the heart of this action. The Choi defendants claim that Caiyun Chen, the "young daughter" of defendant Shuigun Chen, who attended the closing and who executed the new contract on behalf of Suigun Chen and Mingsen Chen, was not familiar with the terms of the sale transaction. (Verified Amended Answer and Cross-Claims of defendants Mingsen Chen, Shuigun Chen, Gavin Choi and Choi & Dimas, P.C., ¶s 42, 43). Thus, Choi is likely to be the critical witness for the Chen defendants on a significant issue of fact: whether, as he contends, he and Caiyun Chen were unaware of the contents of the

altered provision in the new contract of sale, or, as Warburg contends, the Chens participated in a conspiracy to deprive Warburg of its broker's commission. (*Fuller v Collins*, 2014 WL 624172 at *2 [2d Dept 2014]; *Delgado v Bretz & Coven, LLP*, 109 AD3d 38, 47 [1st Dept 2013]).

"Where an attorney representing a party was an active participant in a disputed transaction and has personal knowledge of the underlying circumstances, he ought to be called as a witness on behalf of his client and it is improper for him to continue his representation." (*Chang v Chang*, 190 AD2d 311, 318 [1st Dept 1993]; *Delgado v Bretz & Coven, LLP*, 109 AD3d at 47).

Choi has stipulated that he and his law firm will not represent the Chens after completion of discovery and dispositive motions; that he will not appear in court to argue any motion; and that he will not depose any witness. However, this is not a case where there is any question as to the substance and necessity of Choi's testimony. (*Dishi v Fed. Ins. Co.*, 112 AD3d 484 [1st Dept 2013]). He and his firm are defendants in the action and the answer his law firm served on behalf of the Choi and Chen defendants states that the only other person present at the closing on behalf of the buyers was the young daughter who was unfamiliar with the transaction. As defendants themselves, Choi and his law firm are in "a hopelessly compromised position" (*Chang v Chang*, 190 AD2d at 317), subject to a potential

malpractice claim unasserted in the amended answer Choi's law firm has served on behalf of the Chens. Under the circumstances here, disqualification of defendant Choi and defendant Choi & Dimas P.C. as counsel for Mingsen Chen and Shuigun Chen is required.

In accordance with the foregoing, it is hereby

ORDERED that plaintiff's motion to reargue the motion of the Baron defendants to dismiss the Fifth and Sixth Causes of Action in the complaint is granted, and it is further

ORDERED that upon reargument, the Court (1)adheres to so much of its Decision and Order dated March 21, 2013, as granted the motion to dismiss the Fifth Cause of Action in the complaint and (2)denies the motion to dismiss the Sixth Cause of Action in the complaint; and it is further

ORDERED that the balance of plaintiff's motion is denied; and it is further

ORDERED that the cross-motion of defendants David J. Baron and Baron & Baron Esqs., P.C. to dismiss the First, Second, Third and Fifth Cross-Claims is granted; and it is further

ORDERED that the First, Second, and Third Cross-Claims in the Verified Amended Answer of defendants Mingsen Chen, Shuigun Chen, Gavin Choi and Choi & Dimas, P.C. are dismissed in their entirety against David J. Baron and Baron & Baron Esqs.; and it is further

ORDERED that the Eighth Affirmative Defense and Fifth Cross-Claim is dismissed; and it is further

ORDERED that the First, Second, Third and Fourth Cross-Claims are severed and continued against the remaining cross-claim defendants; and it is further

ORDERED that the cross-motion to disqualify counsel for defendants Mingsen Chen and Shuigun Chen is granted and Gavin Choi and Choi & Dimas, P.C. are hereby disqualified from representing said defendants in this matter, and it is further

ORDERED that the action is stayed for 30 days from service of a copy of this order with notice of entry upon counsel for the parties and upon defendants Mingsen Chen and Shuigun Chen, who shall, within said period, retain another attorney in place of the attorneys named above; and it is further

ORDERED that the new attorney retained by defendants Mingsen Chen and Shuigun Chen shall serve upon all parties a notice of appearance and file same with the Clerk of the Trial Support Office and the Clerk of the Part within said 30-day period; and it is further

ORDERED that in the event that defendants Mingsen Chen and Shuigun Chen intend to proceed pro se pursuant to CPLR 321, they are directed to notify the Clerk of the Part in writing within said 30-day period; and it is further

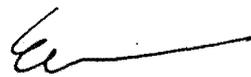
ORDERED that counsel are directed to appear for a conference

in Room 311, 71 Thomas Street, on May 21, 2014 at 2:00 PM.

This is the decision and order of the Court.

ENTERED:

Dated: March 17, 2014



Ellen M. Coin, A.J.S.C.