

STATE OF MAINE
YORK, SS.

SUPERIOR COURT
CIVIL ACTION

DOCKET NO. RE-12-142

JON-YOR-CU-12-059
8/2/2013

BNY MELLON, N.A. TRUSTEE OF)
THE JACK F. BENNETT)
REVOCABLE TRUST,)

Plaintiff,)

v.)

RE/MAX REALTY ONE,)

Defendant.)

ORDER

I. Background

Plaintiff, BNY Mellon, owned property in York, Maine, and entered an agreement to retaining Defendant, RE/MAX Realty One, to exclusively list and sell the property. The contract included the clause: "if any earnest money is forfeited by a Buyer, it shall be distributed one half to Seller, one half to Agency. In no event shall the Agency portion exceed the agreed upon commission set forth."

Joseph Sullivan entered a Purchase and Sales agreement for Plaintiff's property on May 12, 2011. Mr. Sullivan provided the escrow agent, also Defendant, with payments totaling \$86,900.00. Mr. Sullivan later decided he did not want to purchase the property. There was a dispute between Plaintiff and Mr. Sullivan as to which party had breached the Purchase and Sales agreement and was entitled to the escrowed monies. Through mediation, Plaintiff and Mr. Sullivan agreed that Mr. Sullivan would receive \$37,400.00 and Plaintiff would receive \$49,500.00. Defendant advised the parties that they needed to sign an authorization in order for the monies to be released. After both parties signed the releases prepared by Defendant, Defendant released the full \$37,400.00

to Mr. Sullivan and only \$24,750.00 to Plaintiff, retaining \$24,750 for itself. Plaintiff has filed this lawsuit seeking the \$24,750.00 Defendant retained, claiming breach of contract, breach of agency, violation of fair trade practices, fraud, and unjust enrichment. Defendant has counterclaimed for declaratory judgment, breach of contract, and indemnification and attorneys fees. Both Parties now move for Summary Judgment.

II. Standard of Review

Summary Judgment is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Beal v. Allstate Ins. Co.*, 989 A. 2d 733, 738 (Me. 2010); *Dyer v. Department of Transportation*, 951 A.2d 821, 825 (Me. 2008). When reviewing a Motion for Summary Judgment, the Court reviews the parties' statements of material facts and the cited record evidence in the light most favorable to the non-moving party. *Id.*

A genuine issue of material fact exists where the fact finder must make a determination between differing versions of the truth. *Reliance National Indemnity v. Knowles Industrial Services Corp.*, 2005 ME 29, ¶7, 868 A.2d 220, 224, citing *Univ. of Me. Found. V. Fleet Bank of Me.*, 2003 ME 20, ¶20, 817 A.2d 871, 877. Furthermore, "a fact is material if it could potentially affect the outcome of the case." *Id.*

III. Discussion

A. Breach of Contract

Defendant moves the Court for Summary Judgment on Plaintiff's claim of Breach of Contract. Defendant claims that the funds recovered by Plaintiff after settlement with Mr. Sullivan were forfeited funds subjected to division between Plaintiff and Defendant pursuant to the listing agreement. The parties both used the definition of forfeiture found

in Black's Law dictionary: "The divestiture of property without compensation. The loss of a right, privilege, or property because of crime, breach of obligation, or neglect of duty." *Blacks Law Dictionary* 722 (9th ed. 2009). The parties dispute whether funds determined by a settlement can be considered forfeited. The situation for mediation arose because Mr. Sullivan signed the purchase and sales agreement, deposited funds into escrow and then no longer wished to purchase the property. Potentially, Mr. Sullivan would have forfeited his deposit. Mediation occurred because Mr. Sullivan disputed the forfeiture of his full deposit. Mr. Sullivan did not concede to having breached the Purchase and Sales Agreement and therefore was unwilling to lose property as a result. Because the escrowed funds were divided through a settlement process involving a dispute of a breach of contract, they did not represent a loss of a property because of a finding of forfeiture. The parties to this contract were free to define terms to deal with this type of eventuality but the court cannot conclude that "forfeiture" encompasses this situation.

The Court grants Summary Judgment to Plaintiff in the amount of \$24,750.00.

B. Breach of Agency

Defendant moves the Court for Summary Judgment on Plaintiff's claim of breach of agency. While there is no recognized claim in Maine for breach of agency, Plaintiff appears to be making a claim for breach of contract against Defendant based upon the authorization form. Plaintiff did sign a form allowing Defendant to release the escrowed funds in the amount of \$49,500.00 to Plaintiff. Defendant released only half of that amount to Plaintiff. Plaintiff did suffer damages as a result of receiving only half of the

settlement amount. However, the authorization form was not an agreement by Defendant with Plaintiff, it was an authorization by Plaintiff allowing Defendant to act. Defendant did not breach the contract because there was no contract. Defendant's Motion for Summary Judgment is granted as to Plaintiff's claim of breach of agency.

C. Unfair Trade Practices

Defendant moves the Court for Summary Judgment on Plaintiff's claim of Unfair Trade Practices. "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are declared unlawful." 5 M.R.S. § 207, 213 (2012). Plaintiff alleges that it was unaware Defendant would take half of the settlement amount. Plaintiff alleges it would not have made that settlement agreement had it known. Plaintiff alleges that Defendant coerced Plaintiff into signing the authorization form without warning Plaintiff that Defendant was planning to withhold half of the settlement amount. Defendant argues that Plaintiff had notice that any settlement funds would be divided between Plaintiff and Defendant according to the listing agreement because the settlement funds were forfeited funds. The Court finds Defendant had no bad faith or intent to deceive Plaintiff in getting an authorization agreement and withholding the \$24,750. The Court grants Defendant's Motion for Summary Judgment as to Plaintiff's Claim of Unfair Trade Practices.

D. Fraud

Defendant moves the Court for Summary Judgment on Plaintiff's claim of fraud. "To prevail on a claim for intentional fraud, the plaintiff must prove by clear and convincing evidence: (1) that the defendant made a false representation, (2) of a material fact, (3) with knowledge of its falsity or in reckless disregard of whether it is true or false,

(4) for the purpose of inducing the plaintiff to act in reliance upon it, and, (5) the plaintiff justifiably relied upon the representation as true and acted upon it to the plaintiff's damage." *Rand v. Bath Iron Works Corp.*, 2003 ME 122, 832 A.2d 771, 773. Similarly to Plaintiff's claim of unfair trade practices, the Court finds that Defendant did not seek to deceive Plaintiff by failing to disclose its intent to withhold half the settlement amount from Plaintiff at the time Plaintiff signed the authorization form. Defendant acted under the belief that the settlement funds were forfeited. The Court grants Defendant's Motion to Dismiss Plaintiff's claim of fraud.

E. Unjust Enrichment

Defendant moves the Court for Summary Judgment on Plaintiff's Claim of unjust enrichment. Unjust enrichment refers to "recovery for the value of the benefit retained when there is no contractual relationship, but when, on the grounds of fairness and justice, the law compels performance of a legal and moral duty to pay." *In re Wage Payment Litig. v. Wal-Mart Stores, Inc.*, 2000 ME 162, ¶ 19, 2, 759 A.2d 217. Plaintiff and Defendant did have a contract in which they agreed to terms. Defendant performed on the contract. Defendant was not unjustly enriched. The Court grants Defendant's Motion for Summary Judgment on Plaintiff's claim of unjust enrichment.

F. Counter Claim – Breach of Contract

Plaintiff has moved the Court for Summary Judgment on Defendant's counterclaims. Defendant argues that Plaintiff had a contractual right under the Purchase and Sales agreement to collect the forfeited funds upon Mr. Sullivan's breach. "In the event of default by the Buyer (Sullivan), Seller (BNY Mellon) may employ all legal and equitable remedies, including without limitation, termination of this Agreement and

forfeiture by Buyer of the earnest money.” Purchase & Sales Agreement ¶ 17. Defendant argues that had Plaintiff pursued that remedy, Defendant would have been entitled to \$43,450.00. Defendant claims that Plaintiff’s failure to exercise the right to claim the money in escrow upon Mr. Sullivan’s default deprived Defendant of \$18,700. The Court finds that Plaintiff was not entitled to claim the escrowed funds as forfeited because it was contested which party to the Purchase & Sales Agreement defaulted. Plaintiff did not give up a right nor deprive Defendant of money that it would otherwise have had by entering into mediation. The Court grants Plaintiff’s Motion for Summary Judgment on Defendant’s counterclaim of breach of contract.

G. Indemnification

Plaintiff has moved the Court for Summary Judgment on Defendant’s Motion for Indemnification and Attorney’s Fees. “An indemnification claim based on contract must rest on a clear, express, specific, and explicit contractual provision, under which the party against which a claim is to be asserted has agreed to assume the duty to indemnify.”

Devine v. Roche Biomedical Laboratories, Inc., 637 A.2d 441, 446 (Me. 1994). The Defendant cites to three different clauses as support for its claim of indemnification:

- (1) “Seller agrees to hold Agency harmless from any loss or damage that might result from authorizations provided in the Agreement.” (Listing Agreement).
- (2) “In the event that the Agency is made a party to any lawsuit by virtue of acting as an escrow agent, Agency shall be entitled to recover reasonable attorney’s fees and costs which shall be assessed as court costs in favor of the prevailing party.” (Purchase & Sales Agreement ¶6)
- (3) The undersigned hereby agree to hold each other, all real estate brokerage agencies involved in the transaction and their licensees harmless from any and all claims, suits, actions and damages arising out of such agreement. (Authorization).

Due to the ruling on the various claims as detailed above, the Court cannot conclude that the Defendant was a "prevailing party" when viewing this case as a whole and to award costs and fees according to the second clause cited, as found in the Purchase and Sales Agreement.


IV. Conclusion

The Court grants Defendant's Motion for Summary Judgment as to: Plaintiff's claims of Breach of Agency, Unfair Trade Practices, Fraud, Unjust Enrichment and Indemnification.

The Court grants Plaintiff's Motion for Summary Judgment as to: Plaintiff's Claim of Breach of Contract, Defendant's Counterclaim of Breach of Contract.

DATE:

8/2/13



John O'Neil, Jr.
Justice, Superior Court

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