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At an IAS Term, Part 26 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on July 16, 2003.

P R E S E N T:

HON. MELVIN S. BARASCH,
Justice.

JOACHIM HARRIS,

Plaintiff,

Index No. 37234/2001

- against -

CHANDRA M. YOUNG, COURTNEY A. B. HAMILTON, d/b/a COURTNEY A. B. HAMILTON ASSOCIATES, CHRISTOPHEF LIOTTA, ROSE MARIE CANTANNO, WAVERLEY REALTY, LLC, DONNA SCHWARTZ, ALL STATE ABSTRACT, EARL RUSNAK, FINANCIAL DEPOT and JOHN DOES,

Defendants,

The following papers read on this motion: Papers Numbered

Notices of Motion/Cross Motion and Affidavit/Affirmation and Exhibits Annexed 1-2; 3-4; 5-6; 7-9; 10-11; 12-13; 14-15

Opposing Affidavit 16

Reply Affirmations and Exhibits annexed 17; 18

Memoranda of Law 19; 20; 21

The following motions, on separate papers, are currently before the Court:

1 Motion by plaintiff seeking a default judgment against defendant Courtney A. B. Hamilton, D/b/a Courtney A. B. Hamilton Associates ("Hamilton");

2. Motion by plaintiff seeking a default judgment against defendants Waverley Realty, LLC ("Waverley") and Earl Rusnak ("Rusnak");

3. Motion by plaintiff seeking a default judgment against defendants All State Abstract ("All State Abstract")and Chandra M. Young ("Young");

4. Motion by Young seeking an order dismissing the complaint.

5. Motion by defendant Rose Marie Cantanno ("Cantanno") seeking an order dismissing the complaint;

6. Motion by defendant Cristopher Liotta ("Liotta")seeking dismissal of the complaint;

7. Motion by plaintiff seeking an order deeming the service of the summons and complaint on Liotta' as being completed on July 27, 2003 nunc pro tunc and seeking leave to file an amended verified complaint;

Background

This action arises out of events surrounding a real estate closing held on August 24, 2001 involving the sale of plaintiffs property located at 176 Malta Street, Brooklyn, New York. Plaintiff had reiained Hamilton to represent him in the sale of the premises. Waverley, by its principal, Rusnack negotiated the purchase of the property and Liotta represented its interests at the closing held in Liotta's office. The parties disagree as to the nature of the deal and the purchase price negotiated.

Accordirg to Liotta, who neither negotiated the purchase price nor was present when the deal was made, he received a contract of sale for the subject premises from Hamilton's office several weeks before the closing date. The stated purchase price was $180,000. Waverly signed the contract and Liotta forwarded same to Hamilton to be countersigned by plaintiff. It never was. Liotta was informed by Waverly that it had a "handshake" agreement with plaintiff as to the sale of the property and its price but that it was further agreed that if Waverly was to find another buyer to purchase the premises at a higher price than that negotiated with plaintiff, then and, that if such event occurred, Waverly would assign the rights of purchase to that buyer, plaintiff would receive his negotiated price of $180,000 and Waverly would retain the profits in excess of $180.000.

Waverly did find a purchaser, Michael Greene ("Greene"), who agreed to purchase the premises for $255,000.

The attendees at the closing were defendant Chandra Young, a representative from Hamilton's office on behalf of plaintiff; [2] non-party Howard Sherman ("Sherman") — who was

[1] **The Notice of Motion refers to the subject defendant as "Charles"Liotta. The Court assumes and deem: the motion to be addressed to the defendant listed in the caption as Christopher Liotta.**

[2] **Young, unbeknownst to plaintiff and Liotta was not now and is not an attorney.**

the attorney for the purchaser's lender, non-party Alliance Funding Company ("Alliance"); defendant Rose Marie Cantanno — the attorney who represented the ultimate purchaser, Michael Greene[3] and Defendant Donna Schwartz ("Schwartz"), the title closer on behalf of defendant All State Abstract.

The closing, which was conducted by Sherman, proceeded initially without fanfare. Sherman, according to Liotta, was in a rush to get to another closing and began to hurriedly issue checks without the use of a checklist and without inquiring as to how the loan proceeds were to be disbursed. Sherman then left the checks of the closing desk and exited the office. After deductiori of costs, a check for the net proceeds of the sale, $211,877.66, was made out to Young as at'orney for plaintiff. Plaintiff became upset that he was not issued a check and called the police. Upon their arrival, it was agreed that plaintiff and Young would go together to Sherman's upstate office to have the checks reissued.

New checks were cut. Plaintiff received check for $176,524.17 representing the net proceeds of $180,000 and a check of $35,353.49 representing the net excess of proceeds beyond the $180,000 purchase price was issued to Hamilton, as attorney, to be held in escrow.

Subsequent to the closing, Waverly made a claim to Hamilton insisting that the money in escrow belonged to him. Plaintiff claimed that he, exclusively, was entitled to the escrowed funds since the HUD-1 statement indicated that the sale of the premises was between plaintiff and Greene for a sale price of $255,000 without any mention of Waverly being entitled to any of the proceed.;. [4]

Thereafter, plaintiff retained his current counsel, Sherwood Allen Salvan ("Salvan") who investigated the transaction and negotiated a settlement on behalf of plaintiff with Liotta who negotiated on his own behalf and on behalf of all of the participants in the subject transaction. On or around September 25,2001, Hamilton and Young turned over to Salvan the escrowed $35,353.44. On October 10, 2001 Liotta faxed to **Salvan** an offer to plaintiffs claims calling far separate general releases to be executed on behalf of all of the stated participants in the transaction in exchange for said participants waiving any claims to the $35,353.44 already forwarded to Salvan on plaintiffs behalf and in further consideration of Liotta turning over to plaintiff the additional sum of $38,100 then held in Liotta's escrow account. In a return faxed letter dated October 11, 2001, Salvan expressed to Liotta that, based on the HUD statement

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[3] **It appears that Ms. Cantanno was in Liotta's office awaiting a different closing. Greene had refused to retain an attorney and Sherman would not allow the transaction to close absent Greene being represented by counsel. Cantanno was then asked to represent Greene at the closing and explain the various documents to him.**

[4] **A** HUD-1 **is a settlement statement required to be filled out at every residential closing.**

and other closing papers, the correct additional sum plaintiff was entitled to was $38,596.34, that he had auihority from plaintiff to settle the matter for that sum and that upon confirmation from plaintiffs bank that such funds have been wired and received, he would have plaintiff execute separate general releases and forward same to Liotta.

Letters went back and forth to be signed and countersigned, the funds were transferred, and the releases were executed on October 12, 2001 and forwarded.

On October 9, 2001, just around the time the settlement was being negotiated, plaintiff filed with the Court the summons with notice dated October 5, 2001 that commenced this action. The summons named Young, Hamilton, Liotta, Cantanno, Waverly, Schwartz, All State Abstract, Rusnak and John Does as defendants. The "Nature of Action" was listed as: legal malpractice, fraud, unlicensed practice of law, conversion, and conspiracy to convert personal property.

On January 11, 2002, plaintiff filed an amended summons with notice dated January 10, 2002 adding F'nancial Depot, Inc. as an additional defendant to those named in the original summons. The "Nature of Action" listed claims identical to those in the original summons. The motions outlined above then ensued.

These several motions last appeared on the motion calendar of January 16, 2003. Decision was reserved pending the determination of a traverse hearing which was referred to JHO Leonard Silverman to hear and determine.

After the hearing, JHO Silverman issued an order dated April 23, 2003 sustaining the service of the amended summons on defendants Hamilton and Young as proper. As to defendant Liotta, the JHO found that the July 31, 2002 service of the amended summons did not conform with the order of this Court dated June 27, 2002 which extended plaintiffs time to serve any defendants not yet served but mandated such service be completed within 30 days of said order (July 27, 2002). The JHO therefore set aside the service on Liotta.

Liotta's Motion

Based upon the determination of the JHO, Liotta's motion (No. 6) is granted only to the extent that the action against him is dismissed for want of personal jurisdiction and that part of plaintiffs motion (No. 7) seeking an order deeming the service of the summons and complaint on Liotta as being completed on July 27, 2003 nunc pro tunc is denied.

The Remaining Motions

As to the remaining motions, all of the matters raised may be resolved by determination of one simple issue: Did the releases executed by plaintiff resolve all claims emanating from the subject real estate closing thus barring any further action by plaintiff, or did the releases pertain only to certain specific claims and thus did not bar plaintiff from pursuing other claims not released?

It is noted that defendant Schwartz was never served. However, the determination of the question presented would affect plaintiffs ability to proceed against her in the future.

Plaintiffs Contention

Plaintiff in an affirmation submitted in support of his motion seeking leave to serve and file an amended complaint and in opposition to the several motions to dismiss the release contends that the releases executed for all of the named defendants were intended only to release those "wrongs" set forth in the October 9,2001 summons. Despite plaintiff having received returr of the disputed escrow funds and, based upon his claimed intent at the time of the execution of the release and his interpretation of the delineated limitation, plaintiff now asserts he is entitled to proceed with additional claims seeking recovery for his having been deprived of the economic use of his property along with an adjudication of several other "theories of law which would permit the imposition of punitive damages as may be proper under the facts of this case."

Defendants' Contention

Defendants contend that the negotiated settlement required plaintiff to execute general releases, that the letters prefatory to settlement indicated such intent and that the plain language of the releases fail to evidence plaintiffs current claims.

Analysis

In the faxed letter dated October 10, 2001, Liotta advised Salvan that, upon acceptance of the terms of the letter, the following would occur:

1. Snlvan was authorized to release to plaintiff the $35,353.44 he was then holding in escrow to plaintiff and any claim against those funds would be waived; and

2. Liotta would overnight a check in the additional sum of $38,100 — then being held in Liotta's attorney trust account — to Salvan's attention payable to plaintiff.

As a quid pro quo for the above, the letter stated that Salvan was to prepare and have plaintiff execute individual general releases in favor of all eleven named parties and entities involved. The letter closed by asking Salvan to indicate his acceptance of the of the proposed terms and asked that it be returned by fax.

The legend at the bottom of the letter has the statement: "Agreed and Accepted *as to $38,596.34* [italics are handwritten]. It is dated (by hand) 10/11/01 and signed with Salvan's name typed underneath as attorney for plaintiff.

In a fax by Salvan also dated October 11, 2003 and addressed to Liotta, Salvan acknowledged Liotta's fax from the day before. He also insisted that plaintiff was entitled to the higher sum of $38,596.34 and stated further that he had authority to settle plaintiffs claim for that amount. The fax provided information where the funds were to be wired, and an indication that the releases would be executed and sent upon confirmation that the funds were received.

There is no dispute that the full $38,596.34 was received by plaintiff and that releases were executed and sent.

Contrary to plaintiffs position, it is clear that the negotiated settlement called for unequivocal general releases. The faxes cited above made no reference to any limitations now espoused by plaintiff. Similarly the releases themselves state no such limitation?

The language of releases issued to the named defendants reads as follows

GENERAL RELEASE

> TO ALL TO WHOM THESE PRESENTS SHALL COME OR MAY CONCERN, KNOW THAT, JOACHIM HARRIS, as RELEASOR in consideration of the sum of THIRTY EIGHT THOUSAND FIVE HUNDRED NINETY SIX DOLLARS AND THIRTY FOUR CENTS ($38,596.34) received from [*the named defendant]* and/or its agents, eriployees, or other entities having an interest in as RELEASEE receipt which is hereby acknowledged, releases and discharges [*the named defendant*] and/or its agents, employees, as RELEASEES,

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[5] It is interesting to note that plaintiff and Salvan themselves disagree as to what was released. While plaintiff asserts his intention was to only release his claims for conversion and conspiracy to commit conversion, Salvan's position is more expansive and encompasses all claims enumerated in the September 9 summons with notice.

> The RELEASEE, RELEASEE's heirs, executors, administrators, successors and assigns from all actions, causes of action, suits, debts, dues sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, contro-versies, agreements, promises, variances, trespasses, damages, judgments, extends, executions, claims and demands whatsoever, in law, admiralty or equity, which against the RELEASEE, the RELEASOR, RELEASOR's heirs executors, administrators, successors and assigns ever had, now have or hereafter can, shall or may have for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of this RELEASE, is executed.
>
> This RELEASE is specifically intended to release all claims against Releasee for all actions undertaken by Releasee on behalf of the RELEASOR, as are specifically stated in a summons with Notice filed in Supreme Court Kings County under index no. 37234/2001.
>
> THIS RELEASE and settlement constitutes complete payment for all damages and injuries and is specifically intended to release the RELEASEE and is also is specifically intended to release, whether presently known or unknown, all other tortfeasors liable or claimed to be liable jointly with the RELEASEE; and, whether presently known or unknown, all other potential or possible joint tortfeasors liable or claimed to be liable jointly with the RELEASEE. ...

Plaintiff argues that, notwithstanding the ***General Release*** heading and the all encompassing release terminology used in the document, the language of the third paragraph limited the scope of the release to the actions enumerated summons with notice filed under the index number of this action. He further asserts that such specification refers only to the September 9, 2001 summons and that he was thus allowed to maintain other claims by filing an amended summons.

Plaintiff supports his assertion by pointing out that the general releases issued to Sherman and to Alliance, both non-parties to the within action, failed to contain reference to any summons or action. Instead, their releases substitute the third paragraph with the following

> This RELEASE is specifically intended to release all claims against Releasee for all actions undertaken by Releasee on behalf of the RELEASOR.

The meaning and coverage of a general release necessarily depends upon the controversy being settled and upon the purpose for which the release was given *(Gale v Citicorp*, 278 AD2d 197). In reviewing the events surrounding the negotiations which culminated in the execution of general releases, the Court finds that the plaintiffs assertions are faulty on several grounds. First, plaintiffs claimed "intentions" alone are irrelevant and belied by the submitted documentation which evidences the true intention of the parties to fully resolve *all* of their disputes surrounding the subject real estate transaction. It is clear from the signed and countersigned faxes that the releasees bargained for unequivocal general releases, that the same was consented to and, contrary to plaintiffs position, nothing in the releases given alter that fact. Second, even if the claimed specification listed in the general releases affected only those causes of action stated in the October summons, the January 2002 amended summons with notice states the identical nature and relief sought in the original summons and is therefore effectively barred by the releases nonetheless. Furthermore, the specification was actually directed to an undated, non-specific summons under the current index number. There was, therefore, no basis for the defendants to assume that any further action could be brought under the current index number. Third, Plaintiffs argument, that the differing language between the releases given to the named defendants and those given to the non-parties, supports his claims is either specious or, at best, unpersuasive. Inasmuch as the non-parties were not named in the action, it would have made little sense for :hose releases to have been tied to claims in a summons. Additionally, it was Salvan, plaintiffs attorney who unilaterally put in those differentiating specifications which plaintiff and his counsel now attempt to interpret to their advantage. There is no evidence that defendants were ever informed of or consented to plaintiffs "intent" to reserve any rights beyond that of a general release nor is there any basis to support the notion that the plaintiff and the released individualslentities negotiated and/or intended that the type of releases granted to the Tamed defendants be different from those given to the releasees not named in the suit.

To the extent that any such unilateral provision can *so* remotely be interpreted as to allow plaintiff to have his **cake** and eat it too, such provision would appear to contradict the bargained for general release. Indeed, the document itself would be nothing more than a sham and not a general release. While it has been held that "[a] release may not be read to cover matters which the parties did not intend to cover" *(Gale v Citicorp*, 278 AD2d 197), it is clear from the facts of this case that the intent of the parties was to settle all claims relating to the subject real estate action and to have all individuals and/or entities associated with it released. Further, to the extent that the provision of the general release might lend itself to an interpretation allowing plaintiff to go forward with other claims emanating from the subject transaction, such interpretation is incongruous in light of the tenor of the rest **of** the document. Where there is ambiguity in the terms of an instrument prepared by one of the parties, reason and justice demands that any fair doubt as to the meaning of its own words should be resolved against such party *(see Rentways, Inc. v. O'Neill Milk & Cream Co.,* 308 NY 342).

Accordingly, any incongruity must be interpreted against plaintiff. As stated in a footnote above, even plaintiff and Salvan disagree as to what plaintiffs intent was in terms of the release. What is clear, however, is that no restriction or reservation was negotiated nor was any mention of one made when the October 11,2001 fax was countersigned by Salvan and faxed back to Liotta together with a letter of the same date from Salvan stating

> ... [Plaintiff] is entitled to receive $38,596.34 and I have authority to settle his claim for that amount. ...
>
> Upon [notice that the $38,596.34 has been wired to plaintiffs account,] I will have [plaintiff] execute the releases. ...

Plaintiff now raises his finger with a righteously punctuated "aha!" to recant his bargain. To his mind, the general release is not *really* a general release and he had the right to insert a surreptitious loophole into the form he drafted allowing him to vitiate his bargain. All this despite his having received at least every penny to which he previously claimed entitlement. Plaintiffs position is sheer "chutzpah" (see *Ulloa v City of* ***New*** *York,* 193 AD2d 487) and will not be countenanced by the Court.

Decision

Based upon the above, the Court grants all remaining defendants' motions seeking dismissal of the within action and the Clerk is directed to enter judgment and sever the actions accordingly. All of plaintiffs applications are denied. In light of this decision, any remaining items raised by the parties are denied as moot.

The Court further finds that the actions of plaintiff and his counsel in continuing this action and necessitating defendants to expend further sums to be improper and frivolous (22 NYCRR § 130-1.1). Plaintiffs counsel is therefore ordered, pursuant to CPLR 8202, to pay each moving defendant $100 **as** and for motion **costs** within 30 **days** of service of a copy of this order with notice of entry.

This constitutes the decision and order of the Court.

ENTER,

MELVIN **S. BARASCH, J.S.C.**