

Chi Lo Liu v Radmin

2011 NY Slip Op 32717(U)

October 17, 2011

Supreme Court, Nassau County

Docket Number: 9022-09

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

CHI LO LIU and HUAG SU YING LIU,

Plaintiffs,

- against -

**JOEL RADMIN, MICHAEL LANGONE,
EXTREME REALTY, LLC, REFSNART CORP.,
JAMES V. GUARINO, DAVID GALANTER, ESQ.,
JG CAPITAL, LLC, and JASON AU,**

**Index No. 9022-09
Motion Seq. No. 5
Submitted 9/16/11**

Defendants.

Papers Read on this Motion:

- Notice of Motion, Attorney Affirmation and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Affirmation in Opposition.....X**
- Reply Affirmation in Further Support.....X**

This matter is before the court on the motion filed by Plaintiffs Chi Lo Liu and Huag Su Ying Liu on August 16, 2011 and submitted on September 16, 2011. For the reasons set forth below, the Court denies the motion.

BACKGROUND

A. Relief Sought

Plaintiffs move for an Order, pursuant to CPLR § 3025(b), granting them leave to serve an Amended Complaint.

Defendants oppose Plaintiffs' motion.

B. The Parties' History

The parties' history is set forth in detail in a prior Order of the Court dated July 1, 2010 ("Prior Order"). As noted in the Prior Order, the Complaint alleges as follows:

In or about January of 2006, Plaintiffs retained Defendants Extreme Realty and Langone, a representative of Extreme Realty, to perform real estate broker services on behalf of Plaintiffs in connection with the marketing and sale of mixed-use real estate located at 242 East 40th Street, New York, New York 10016. In or about January of 2006, Langone and Extreme advised Plaintiffs that they had received an offer to purchase the Building “at the highest market price” (Compl. at ¶ 4). Langone and Extreme introduced Plaintiffs to Defendant Radmin and his holding company Defendant Refsnart. These parties agreed to the sale of the Building for \$1.85 million. On or about February 1, 2006, Defendant Galanter “proffered” (Compl. at ¶ 19) a real estate contract in connection with this transaction. Plaintiffs allege that Radmin disregarded corporate formalities with respect to Refsnart to such an extent that Refsnart was simply a conduit through which Radmin conducted his personal business.

Guarino was a principal of Extreme Realty and JG, a financing broker. Au, Radmin and Guarino owned and operated JG. In connection with the Sale, Langone, Radmin, Extreme and Guarino arranged to purchase the Building “as a saleable valuable assignment, marketing the transaction as a ‘flip contract’” (Compl at ¶ 24).

The closing on the Sale took place on or about May 10, 2006. The attendees at the Closing were Plaintiffs and principals of an entity known as Grand Central 888 Inc. (“Grand Central”), to whom Radmin, Guarino, Langone and Extreme had assigned their rights under the contract. Grand Central purchased the Building with financing arranged by Guarino, JG and Au. Plaintiffs then learned that Grand Central paid a total of \$2.6 million to purchase the Building, which was \$750,000 more than the \$1.85 million price to which Plaintiffs agreed. Grand Central paid this additional \$750,000 to Radmin, Guarino, Langone and Extreme as commissions and other fees.

Plaintiffs submit that they are entitled to this \$750,000. Plaintiffs outline the allegedly improper conduct of the Defendants in connection with the Sale, including their failure to disclose to Plaintiffs their relationship to each other and interest in the Sale, which Plaintiffs submit constituted a material representation. The Complaint contains five (5) causes of action: 1) faithless service: broker fraud, 2) breach of fiduciary duty, 3) fraud, 4) deceptive trade practices, for which Plaintiffs seek damages pursuant to General Business Law (“GBL”) § 349, and 5) conversion and *prima facie* tort.

Plaintiffs now seek to amend the Complaint to assert additional causes of action against Radmin and Langone for violations of New York Real Property Law (“RPL”) §§ 440-a and 442-a which, Plaintiffs maintain, “have only recently become apparent to Plaintiffs in light of the timing of Defendants’ submissions” (Blodnick Aff. in Supp. at ¶ 4).¹ Specifically, Plaintiffs maintain that, upon reviewing Radmin’s deposition testimony and his affidavit submitted in connection with Defendants’ pending summary judgment motion, Plaintiffs realized that Langone was not a licensed real estate salesperson while employed at Extreme and while working under the direct supervision of Radmin. Plaintiffs submit that this information forms the predicate for their additional proposed causes of action pursuant to RPL §§440-a and 442-a.

C. The Parties Positions

Plaintiffs argue that, while employed at Extreme and under Radmin’s direction, Langone held himself out to be a real estate broker and/or salesman when soliciting their business when he was not properly licensed. They cite Langone’s deposition testimony (Ex. C to Blodnick Aff. in Supp.) which, they submit, establishes that 1) while employed at Extreme and under Radmin’s direction, Langone held himself out as a real estate broker and/or real estate salesman, when soliciting Plaintiffs; and 2) Langone improperly solicited a commission.

Defendants submit that the Court should deny Plaintiffs’ motion on the basis that it is untimely. Defendants contend, further, that the proposed amendment lacks merit. Defendants argue that while Plaintiffs “vaguely note” that Langone and Radmin received proceeds from the underlying real estate transaction (Clarke Aff. in Opp. at ¶ 18), they do not allege that the proceeds were a commission, or that they paid them. Langone testified that he was paid by his Employer, Extreme, in connection with the underlying real estate transaction (Tr. at pp. 19-20, outlined *infra*). And Plaintiff Chi Lo Liu admitted that he did not pay Langone a commission, as reflected by Liu’s deposition testimony (Ex. D to Blodnick Aff. in Supp.) regarding a meeting concerning the transaction at issue:

¹ Also pending before the Court are 1) Defendants’ motion to strike the Note of Issue or, alternatively, permit post-Note of Issue discovery and 2) Defendants’ motion for summary judgment dismissing the Complaint.

Q: What was the result of this meeting?

A: We came to the conclusion to accept an offer of one point eight-five million, but I will not give out commission to Michael.

Q: Did Michael protest the decision to not pay him his commission?

A: Well, originally I was supposed to get one point nine million, but because I agreed to take the one point eight-five million so I told him that you can get the rest of the fifty thousand as your commission.

Q: That was not responsive to my question. My question was, did Michael protest when you told him you weren't going to give him his commission?

A: Yes, but I didn't agree with him.

Liu Dep. at p. 44

Langone testified that he became a licensed real estate salesman within a month of beginning his employment with Extreme in 2005 or 2006 (Langone Dep. Tr. at p. 8). Langone also testified as follows:

Q: What did you normally say to people when you called their properties?

A: My name is Mike Langone, I'm with Extreme Realty, are you interested in selling your property. If they said yes or if, you know, they asked, do you have a buyer, yes, we do, the owner of my company is looking to buy properties, and we also have a buyer in the neighborhood.

That was pretty much my pitch.

Q: So you always told them that the owner was looking to buy properties?

A: Yes. That's what I was told to do.

Langone Dep. at p. 11

Furthermore, Langone testified that when he received a listing from a seller as a result of telephone calls he had placed, he asked the seller to sign something to agree to give him the right to sell the property (Dep. at 19). With respect to the commissions under the listings he acquired on Radmin's behalf, Langone testified as follows:

Q: Was there any discussion with Jim or Joel with regard to commissions?

A: I was asked to -- I was told to ask if [the seller, *i.e.*, the Lius] would pay the commission on it, and he [the Lius] said no, and Joel [Radmin] said, fine, that is -- I'll [Joel Radmin will] pay the commission.

Q: You initially asked Tommy [Liu] to pay the commission?

A: Yes.

Q: And he [Tommy Liu] said no?

A: No. He [Tommy Liu] said ask my buyer, meaning Joel [Radmin], to pay the commission.

Q: Did you get a check at the closing?

A: No.

Q: Did you get a check afterwards?

A: I got a check about a week later from Joel [Radmin].

Langone Dep. at pp. 19-20

RULING OF THE COURT

A. Leave to Amend

CPLR §3025(b) provides that leave to amend the pleadings shall be “freely given” unless the proposed amendment clearly lacks merit or the opposing party demonstrates prejudice or surprise. *Acuri v. Ramos*, 7 A.D.3d 741 (2d Dept. 2004); *Matter of Rouson*, 32 A.D.3d 956 (2d Dept. 2006).

Where a motion for leave to amend a complaint is made long after the case is certified for trial, however, judicial discretion in allowing the amendment should be discrete, circumspect, prudent and cautious, and where the motion is made on the eve of trial, judicial discretion should be exercised sparingly. *Tesser v. Allboro Equipment Co.*, 73 A.D.3d 1023, 1026 (2d Dept. 2010), quoting *Morris v. Queens Long Is. Med. Group, P.C.*, 49 A.D.3d 827, 828 (2d Dept. 2008). If a grant of leave to amend under such circumstances causes prejudice or surprise, the grant of leave constitutes an improvident exercise of discretion, especially in cases where there is no reasonable excuse offered for the delay in seeking leave to amend. *Id.*, citing *Countrywide Funding Corp. v. Reynolds*, 41 A.D.3d 524, 525 (2d Dept. 2007) and *Velez v. South Nine Realty Corp.*, 57 A.D.3d 889, 892 (2d Dept. 2008).

B. Real Property Law Article 12-A

Article 12-A, Real Property Law (“RPL”) §§ 440-442-k, titled “Real Estate Brokers and Real Estate Salesmen,” is a regulatory statute setting up a comprehensive plan to assure, by means of licensing, that standards of competency, honesty and professionalism are observed by real estate brokers and salesmen. *2 Park Avenue Associates v. Cross & Brown Co.*, 36 N.Y.2d 286, 289 (1975). RPL § 440-a requires real estate brokers and real estate salesmen to be licensed. *Id.* RPL § 442-a bars a real estate salesman from receiving or demanding a commission from anyone but a duly licensed real estate broker with whom he is associated. *Wong v. Loh*, 162 A.D.2d 683, 684 (2d Dept. 1990). RPL 442-e(3) permits an aggrieved party to recover a penalty from the offender of “not less than the amount of the sum of money received by him as such commission, compensation or profit and not more than four times the sum so received by him, as may be determined by the court[.]” As the licensing provisions contained in Article 12-A of the RPL are penal in nature, they are to be strictly construed. *Kreuter v. Tsucalas*, 287 A.D.2d 50, 55 (2d Dept. 2001).

C. Application of these Principles to this Action

The Court denies Plaintiffs’ motion based on the Court’s conclusion that the deposition testimony does not support Plaintiffs’ claims, *inter alia*, that 1) Langone held himself out as a licensed real estate salesperson at a time that he was not in fact licensed; and 2) Langone demanded compensation from someone with whom he was associated, *i.e.* Radmin, who was not a duly licensed real estate broker. A complete reading of Langone’s sworn testimony confirms that Langone’s inquiry of Liu surrounding the payment of his commission was part and parcel of the questioning surrounding the listing; the Court does not interpret that questioning to be a specific “demand” of the payment of his commission as contemplated by RPL § 442-a. Moreover, the record does not support Plaintiffs’ assertions that Radmin is liable to Plaintiffs “because he supervised Langone and permitted him to violate [RPL] §§ 442-a and 440-a” and “not only permitted Langone to violate these sections but on both occasions...directed him to do so” (Ps’ Memo of Law at p. 7). There is no factual support for these claims, particularly given the Court’s obligation strictly to construe these statutes.

In light of the foregoing, the Court concludes that the proposed amendment lacks merit and denies Plaintiffs’ motion.

All matters not decided herein are hereby denied.

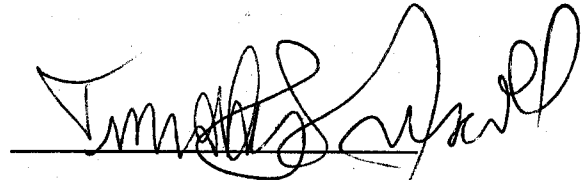
This constitutes the decision and order of the Court.

The Court reminds counsel of their required appearance before the Court for a Pre-trial Conference on December 9, 2011 at 9:30 a.m.

ENTER

DATED: Mineola, NY

October 17, 2011



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
OCT 20 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE