

<p>Truss Group, LLC v Fischl</p>
<p>2013 NY Slip Op 30738(U)</p>
<p>April 9, 2013</p>
<p>Supreme Court, New York County</p>
<p>Docket Number: 601900/08</p>
<p>Judge: Saliann Scarpulla</p>
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SALIANN SCARPULLA
Justice

PART 19

Index Number: 601900/2008
TRUSS GROUP
vs.
FISCHL, RUTH
SEQUENCE NUMBER: 003
SUMMARY JUDGMENT

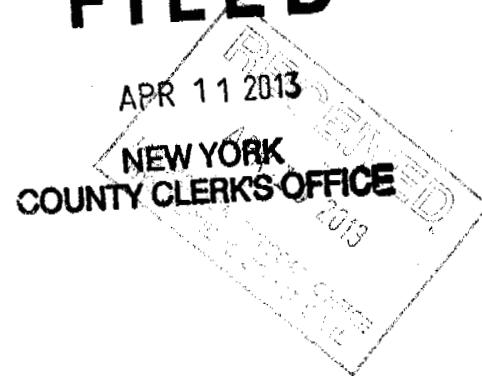
INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____
 Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **| No(s). _____**
 Answering Affidavits — Exhibits _____ **| No(s). _____**
 Replying Affidavits _____ **| No(s). _____**

Upon the foregoing papers, it is ordered that this motion is

~~motion and cross motion are decided in accordance~~
 with accompanying memorandum decision.

FILED



Dated: 4/9/13 J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER

3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

X

THE TRUSS GROUP, LLC,

Plaintiff,

Index No.: 601900/08
Submission Date: 12/12/12

-against-

RUTH FISCHL,

DECISION AND ORDER

Defendant.

X

RUTH FISCHL,

Defendant and Plaintiff
On the Counterclaims,

FILED

-against-

APR 11 2013

TREVOR MORAN,

NEW YORK

COUNTY CLERK'S OFFICE
Additional Party on the
Counterclaims.

X

For Plaintiff and Additional Party on the Counterclaims:
Law Offices Of Steven D. Isser
1359 Broadway, Suite 2001
New York, NY 10013

For Defendant and Plaintiff on the Counterclaims:
Suslovich & Klein
1507 Avenue M
Brooklyn, NY 11230

Papers considered in review of this motion for summary judgment:

Notice of Motion	1
Aff in Support	2
Mem of Law	3
Aff in Opp	4
Mem of Law	5
Reply Aff	6
Reply Mem of Law	7



HON. SALIANN SCARPULLA, J.:

In this action to recover a real estate broker's commission, plaintiff the Truss Group, LLC ("Truss"), and its principal, the additional party on the counterclaims Trevor Moran ("Moran") (collectively "plaintiff") move for summary judgment against defendant Ruth Fischl ("Fischl") on the complaint and dismissing and/or striking the counterclaims and affirmative defenses asserted by Fischl.

As alleged in the complaint, Truss is a licensed real estate broker which represented Maison Hudson River Inc. ("Maison") in connection with the purchase of Fischl's apartment located at 240 Riverside Boulevard, New York, New York, Apt. 7A (the "apartment"). There is no dispute that Moran is the principal of Truss, and is a licensed real estate broker.

Truss' complaint alleges that at all relevant times, the apartment was not listed as being for sale and to the best of Truss' knowledge, Fischl was not actively attempting to sell the apartment. Truss alleges that in or about July 2006, it contacted Fischl and told her that it represented clients who might be interested in purchasing the apartment. Truss further alleges that, acting as Maison's broker, it began to negotiate with Fischl concerning the purchase price and other terms of the proposed sale.

Truss further alleges in the complaint that on or about October 17, 2006, Fischl agreed by e-mail to sell the apartment for \$4,550,000. Truss and Fischl then entered into an agreement regarding Fischl paying Truss' commission (the "commission agreement").

The complaint further alleges that on or about October 26, 2006, Fischl's real estate counsel requested that plaintiff send a letter confirming the amount of plaintiff's commission to be paid by Fischl at the closing. Accordingly, on October 26, 2006, plaintiff sent Fischl's counsel a letter re-confirming that the parties had agreed that Fischl would pay plaintiff's commission, in the amount of 6% of the purchase price, or \$273,000. Plaintiff states in the complaint that it did not receive any objections from Fischl or her counsel.

Maison and Fischl entered into a contract of sale for the apartment (the "contract"). Pursuant to Section 22 of the contract, Truss was identified as the broker, and its commission was to be paid by the seller, Fischl.

The closing took place on February 2, 2007. On February 5, 2007, plaintiff sent Fischl an invoice in the amount of \$273,000. Plaintiff alleges that in violation of the commission agreement and/or in breach of the contract, Fischl refused and failed to pay plaintiff the agreed upon commission amount.

Plaintiff commenced this action alleging one cause of action for breach of contact. Fischl answered the complaint, denying all material allegations and asserting a number of affirmative defenses and counterclaims. The first affirmative defense asserts that plaintiff and Fischl entered into an agreement whereby plaintiff would act as Fischl's broker in connection with her sale of the apartment. Fischl alleges that plaintiff never notified Fischl that it was acting as a broker for the purchaser of her apartment.

Fischl further alleges that after entering into the contract to sell the apartment, she learned that the purchaser intended to purchase her apartment along with other neighboring apartments to create a large combined unit, and had she known that she would have declined Maison's offer. Fischl further asserts that plaintiff failed to notify her that the price for some of the neighboring units was higher than what she was offered for her apartment.

In addition, Fischl asserts that plaintiff received compensation from Maison in connection with the sale of her apartment, or in connection with the sale of the neighboring apartments, and had she known that she would have declined Maison's offer to purchase her apartment. Fischl alleges that the apartment was to be occupied by His Royal Highness Prince Nawaf bin Sultan bin Abdulazia Al-Saud (the "Prince"), that the Prince is the principal of Maison, and that had she known that the Prince was to reside in the apartment she would have declined Maison's offer.

Therefore, Fischl claims, plaintiff breached the broker agreement, breached its obligations as an employee, and breached its fiduciary obligations, "thus relieving Fischl from any obligations to pay any commission or other compensation to the" plaintiff.

As a second affirmative defense and first counterclaim, Fischl asserts that plaintiff fraudulently concealed and deliberately withheld information from her, in violation of its fiduciary obligations. Fischl further asserts that plaintiff forged her signature on paperwork submitted to the building's board of managers in an effort to prevent her from

knowing the name of the principal of the purchaser. As a result, Fischl claims, she is entitled to damages against plaintiff in the "amount of the difference in value of the Unit as a standalone single unit versus its value as a part of a large combined unit."

Fischl's third affirmative defense and second counterclaim asserts that plaintiff received compensation from Maison in connection with the sale of the apartment, which was never disclosed to Fischl, and therefore constitutes as secret profit. Fischl claims that this constituted a breach of plaintiff's fiduciary duties, and she is therefore entitled to a judgment against plaintiff in the amount of any commission it earned through the sale of her apartment.

As her fourth affirmative defense and third counterclaim, Fischl claims that plaintiff acted as broker for several or all of the neighboring apartments purchased by Maison and received substantial commission on those sales. Fischl further asserts that the sale of her apartment to Maison was required for Maison to purchase any of the neighboring apartments. Fischl asserts that as a result plaintiff was earning an undisclosed, secret profit, and therefore Plaintiff breached its fiduciary duty, and is required to disgorge that profit and pay these monies to Fischl. Plaintiff replied to the counterclaims, denying all material allegations and asserting a number of affirmative defenses.

Plaintiff moves for summary judgment on its complaint, and dismissing Fischl's affirmative defenses and counterclaims. Plaintiff argues that it is entitled to summary

judgment on its complaint for breach of contract for Fischl's failure to pay the commission of \$273,000.00 upon the sale of her apartment. Plaintiff argues that there are no issues of fact as Fischl does not dispute that the sale closed, that she agreed to pay plaintiff's commission upon the closing of the sale of the apartment, or that she signed both the commission agreement and contract of sale. As to Fischl's affirmative defenses and counterclaims, Plaintiff asserts that there is nothing in the record to demonstrate that Fischl can prove any of the elements necessary to prevail on a claim for breach of fiduciary duty. Plaintiff also argues that due to internal inconsistence in Fischl's deposition testimony, counterclaims and interrogatory responses, she cannot avoid summary judgment.

In opposition, Fischl argues that there is a question of fact as to whether she "was told or entitled to believe that the plaintiff was acting as her broker." Fischl also argues that pursuant to the faithless servant doctrine, plaintiff is required to forfeit his commission, regardless of whether actual damages can be proven as a result of plaintiff's actions. In reply, plaintiffs argue that Fischl cannot rely on the faithless servant doctrine, as Fischl raises it for the first time in opposition to the motion for summary judgment.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853

(1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). Credibility issues are “properly left for the trier of fact.” *Yaziciyan v. Blancato*, 267 A.D.2d 152, 152 (1st Dept 1999).

Plaintiff has met its initial burden and made a *prima facie* showing that it is entitled to judgment as a matter of law on the breach of contract claim. In support of its motion, plaintiff submitted a copy of the commission agreement, executed by both parties as well as a copy of the executed contract of sale.

The commission agreement provides in pertinent part:

Let this agreement serve to confirm our understanding that as the owner of the above-referenced apartment [240 Riverside Blvd. #7A, New York, NY 10069], you [Fischl] have agreed to pay, at closing, a 6% commission to The Truss Group, LLC. This check shall only be due if and when closing takes place. Thank you.

Beneath the words “Agreed and accepted” the agreement is signed by both Moran, as president of Truss, and Fischl.

Paragraph 22 of the Contact of Sale provides in pertinent part:

Broker, Seller and Purchaser represent and warrant to each other that the only broker with whom they have dealt in connection with this Contract and the transaction set forth herein is The Truss Group LLC and that they know of no other broker who had claimed or may have the right to claim a commission in connection with this transaction. The commission of such broker shall be paid by Seller pursuant to separate agreement.

The Contract of Sale is executed by Fischl and Gordon J. Weiss, President of Maison.

The terms of these agreements are clear, and establish that Fischl agreed to pay plaintiff a 6% commission upon the closing of the sale of her apartment. *See Continental Ins. Co. v. 115-123 West 29th St. Owners Corp.*, 275 A.D.2d 604, 605 (1st Dep’t 2000) (“It is well settled that when the terms of an agreement are clear and unambiguous, the court will not look beyond the four corners of the agreement and will enforce the writing according to its terms”).

There is no dispute that the sale closed, and that Fischl received the purchase price of \$4,550,000 for her apartment. Moreover, Moran testified at his deposition that Fischl has refused to pay the commission, which would constitute a breach of their agreement. Plaintiff also submits Fischl’s deposition testimony, in which she does not claim to have paid the commission. Therefore, I find plaintiff has established the existence of an agreement with Fischl whereby she agreed to pay a commission in the amount of 6% of the sale price, due when the sale of the apartment closed

As to plaintiff’s motion to dismiss Fischl’s affirmative defenses and counterclaims, I find plaintiff also met its initial summary judgment burden. All of Fischl’s affirmative defenses and counterclaims stem from an allegation that plaintiff represented Fischl as a real estate broker for the sale of her apartment, and that plaintiff’s alleged failure to disclose certain information, including the identity of the purchaser, whether plaintiff

represented the purchaser, and whether plaintiff may have received compensation from other related sales and /or from the purchaser, constituted violations of the agreement between Fischl and plaintiff and plaintiff's fiduciary duty to Fischl.

Plaintiff would only owe Fischl a fiduciary duty if it represented Fischl as a broker, putting the two parties in a fiduciary relationship. "In New York, it is well settled that a real estate broker is a fiduciary with a duty of loyalty and an obligation to act in the best interests of the principal." *Dubbs v. Stribling & Assocs.*, 96 N.Y.2d 337, 240 (2001). *See also Sebastian Holdings, Inc. v. Deutsche Bank AG*, 78 A.D.3d 446, 447 (1st Dep't 2010) ("lack of a fiduciary relationship between the parties is fatal to [counterclaim] plaintiff's claims for breach of fiduciary duty") (citation omitted). "In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct." *Kurtzman v. Bergstol*, 40 A.D.3d 588, 590 (2d Dep't 2007) (citation omitted). Plaintiff has made a *prima facie* showing that it was not Fischl's broker, and therefore did not owe her a fiduciary duty.

In support of the motion for summary judgment, plaintiff submits Moran's deposition testimony, in which he states that he never entered into an agreement with Fischl to represent her in the sale of her apartment. Moran maintains that Truss's client was Maison, and Moran contacted Fischl specifically to determine whether she would sell the apartment to plaintiff's client. Moran also testified that he told Fischl explicitly that he

was not her broker, making a *prima facie* showing. *LaGrega v. Farrell Lines, Inc.*, 156 A.D.2d 205 (1st Dep’t 1989) (on a motion for summary judgment, “[t]he moving party must sufficiently demonstrate entitlement to judgment, as a matter of law, by tender of evidentiary proof in admissible form [s]worn deposition testimony will suffice”) (citations omitted).

Plaintiff having met its initial burden, the burden then shifts to Fischl to establish the existence of questions of fact on both the breach of contract claim and Fischl’s affirmative defenses and counterclaims. I find that Fischl raises a question of fact as to both.

Fischl maintains in her pleadings, deposition testimony and affidavit submitted in opposition to plaintiff’s motion that she believed plaintiff was her real estate broker and represented her in relations to the sale of her apartment. Plaintiff argues that there are discrepancies regarding certain details about their alleged relationship, particularly exactly when Fischl believes plaintiff was retained as her broker, which prevent Fischl from establishing questions of fact. However, on a motion for summary judgment, this argument is misplaced. Any inconsistencies regarding certain details of their relationship go to questions of credibility, and credibility determinations are not appropriate on a motion for summary judgment. “It is not the court’s function on a motion for summary judgment to assess credibility.’ *Ferrante v. American Lung Assn.*, 90 N.Y.2d 623, 631 (1997). ‘Credibility determinations, the weighing of the evidence, and the drawing of

legitimate inferences from the facts are jury functions, not those of a judge, whether he [or she] is ruling on a motion for summary judgment or for a directed verdict.”” *Asabor v. Archdiocese of N.Y.*, 102 A.D.3d 524, 527 (1st Dep’t 2013) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). Therefore, as Fischl testified at her deposition that plaintiff was her broker, any purported inconsistency as to the timing and initiation of their relationship is a credibility issue for a jury to decide. *See Barber v. Roger P. Kennedy Gen. Contrs., Inc.*, 302 A.D.2d 718, 719-20 (3d Dept. 2003).

Fischl does not deny that she failed to pay plaintiff its commission as agreed in the commission agreement, arguing that plaintiff’s breach of its fiduciary duty excuses her obligation to pay the commission. Fischl maintains that she entered into the commission agreement with plaintiff as her broker, and that as her broker plaintiff breached its fiduciary obligations to her. “During the process of facilitating a real estate transaction, the broker owes a duty of undivided loyalty to its principal. If this duty is breached, the broker forfeits his or her right to a commission, regardless of whether damages were incurred.” *Douglas Elliman LLC v. Tretter*, 84 A.D.3d 446, 448 (1st Dep’t 2011) (internal citations omitted), *aff’d* 20 N.Y.3d 875 (2012). As Fischl has raised a question of fact as to whether plaintiff owed her a fiduciary duty, I find that she has also raised issues of fact as to whether she owes plaintiff the commission pursuant to the commission agreement.

Accordingly, because I find that Fischl raised questions of fact as to the nature of the parties' realtionship, plaintiff's motion for summary judgment is denied.

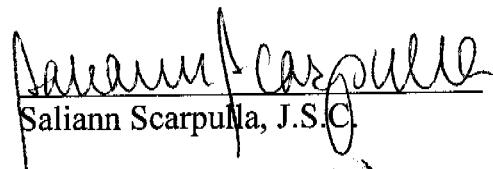
In accordance with the foregoing, it is hereby

ORDERED that the motion for summary judgment by plaintiff and counterclaim defendants the Truss Group and Trevor Moran on the complaint and dismissing defendant Ruth Fischl's affirmative defenses and counterclaims is denied.

This constitutes the decision and order of the Court.

Dated: New York, NY
 April 9, 2013

ENTER:


Saliann Scarpulla, J.S.C.

FILED
APR 11 2013
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