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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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STEPHEN ROSENBERG and
LUCILLE ROSENBERG,

Index No.
151115/2015

Plaintiffs,

DECISION and ORDER

- v -

Mot. Seq. 001

TANIA HEDLUND and JONATHAN ROSENBERG,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

This breach of contract action arises from a "Letter of Understanding" (the "Agreement") executed by plaintiffs, Stephen Rosenberg and Lucille Rosenberg (collectively, "plaintiffs"), and defendants, Tania Hedlund and Jonathan Rosenberg (collectively, "defendants"), regarding the transfer of plaintiffs' two-thirds ownership of a cooperative apartment (the "Apartment") to defendants for a proportionate share of the net sale proceeds at the time of the Apartment's sale.

Plaintiffs now move for an order, pursuant to CPLR § 3212, granting summary judgment against defendants in the amount of $651,061.76, plus costs and disbursements. Plaintiffs also seek an order directing Post, Polak, Goodsell, MacNeill & Strauchler, P.A. (the "Escrowee") to release from escrow the amount of $651,061.76 to plaintiffs.

Plaintiffs submit the attorney affidavit of Stephen Rosenberg, Esq., which annexes, *inter alia*, the March 31, 2003 "Letter of Understanding," a settlement statement related to the 2014 sale of the Apartment, correspondence between defendants and the Escrowee, the 1996 contract of sale for the cooperative apartment and related documents, including the original note for $135,000, settlement statement, consent of the corporation, and stock certificate listing Stephen, Lucille, and Jonathan Rosenberg as joint tenants with rights of survivorship.

Defendant Tania Hedlund ("Defendant" or "Hedlund") opposes and cross-moves for summary judgment. Hedlund states that she has no memory of entering into the Agreement, and argues that the Agreement should be set aside because it is fraudulent. Hedlund further argues that, if she did enter into the Agreement, (1) she was in a fiduciary relationship with plaintiff Stephen Rosenberg and he breached his fiduciary duty to her, (2) she did so by accident or mistake, and (3) she did so without sufficient knowledge or time to satisfy the element of consideration.

Defendant submits the affidavit of Tania Hedlund, documents relating to the 2014 sale of the Apartment, the defendants' 2003 note for $170,000 and accompanying loan security agreement, and a stock certificate dated March 6, 2003 listing Jonathan and Tania as owners of the Shares of the Apartment. No affidavit of Jonathan Rosenberg is submitted.

The relevant facts are as follows. In March 1996, plaintiffs purchased the Apartment for $181,000, executing a note in the principal amount of $135,000. Plaintiffs' son, Jonathan Rosenberg, resided in the Apartment and held a one-third ownership interest in the Apartment as a joint tenant with rights of survivorship. In October 1999, Jonathan Rosenberg married Tania Hedlund. The couple lived in the Apartment until their divorce in 2012. Prior to March 2003, defendants paid rent to plaintiffs, and plaintiffs paid the mortgage and maintenance payments.

In March 2003, plaintiffs transferred their two-thirds interest in the Apartment to defendants. On March 31, 2003, defendants executed a new note and loan security agreement, borrowing the principal sum of $170,000 and assigning the proprietary lease for the Apartment to the lender, and entered into the Agreement with plaintiffs. The Agreement, dated March 31, 2003, has three provisions:

First, the Agreement states that Jonathan and Tania will be the sole owners of the Apartment and related 650 shares (the "Shares") of the cooperative corporation.

Second, the Agreement states that Jonathan and Tania are entering into a new note and mortgage in the principal amount of $170,000 (the "New Loan"), secured by the Apartment and the Shares, which will be used to pay off the existing loan having an original principal amount of $135,000 (the "Old Loan Amount"). Jonathan and Tania will retain any net proceeds from the New Loan. It further states that Stephen and Lucille have paid an aggregate amount of $80,000 (the "Cash Amount"), which includes the down payment and costs to improve the Apartment.

Third, the Agreement states that Jonathan and Tania will pay Stephen and Lucille a portion of the proceeds upon the sale of the Apartment "in consideration

of Stephen and Lucille's transfer of the Apartment and the Shares to Jonathan and Tania and also for the retention by Jonathan and Tania of the net proceeds of the New Loan." The amount defendants owe plaintiffs at the time of the Apartment's sale is to be computed according to a formula, which provides:

> a. There shall first be deducted from the proceeds of the sale the expenses relating to the sale, such as flip tax and commissions and the balance shall be the "Net Proceeds".
>
> b. Out of the Net Proceeds of the sale, Jonathan and Tania will pay off the outstanding balance of the New Loan and Jonathan and Tania will retain that portion of the Net Proceeds which equals the difference between the outstanding balance of the New Loan and $170,000.
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> c. Jonathan and Tania will then pay to Stephen and Lucille an aggregate amount equal to (i) the Cash Amount plus (ii) two-thirds of the difference between the Net Proceeds and the Old Loan Amount.
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> d. Jonathan and Tania will retain any balance of the Net Proceeds.

On October 9, 2014, defendants sold the Apartment for $1,200,000. The next day, the Escrowee advised defendants that the proceeds of the sale on deposit in its trust account amounted to $886,871.27. On November 4, 2014, Tania Hedlund instructed the Escrowee to release 40% of the funds to her, and 60% of the funds to Jonathan Rosenberg, with any disbursement to plaintiffs to be negotiated with Jonathan out of his 60% distribution. By a letter dated November 5, 2014, Jonathan provided conflicting instructions and directed the Escrowee to release the sum of $662,223.90 to plaintiffs.

A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. (*Zuckerman v. City of New York,* 49 NY2d 557, 562 [1980]; *Silman v. Twentieth Century-Fox Film Corp.,* 3 NY2d 395 [1957]; *Winegrad v. New York Univ. Med. Center,* 64 NY2d 851, 853 [1985]). In order to defeat a motion for summary judgment where the moving party has demonstrated its entitlement, the opposing party bears the burden of producing admissible evidence sufficient to establish disputed issues of fact sufficient to require a trial. Mere conclusions or unsubstantiated allegations are insufficient (*Zuckerman v. City of New York, 49* NY2d 557 [1980]).

"The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." (*Flomenbaum v. New York Univ.*, 71 A.D.3d 80, 91 [1st Dep't 2009]).

Here, plaintiffs have made a prima facie showing of entitlement to judgment as a matter of law with regards to liability on their breach of the contract claim against defendants. Plaintiffs have presented sufficient evidence establishing that the parties executed an agreement on March 31, 2003, whereby plaintiffs transferred their two-thirds interest in the Apartment to defendants—enabling defendants to execute a new note secured by the Shares—in exchange for a proportionate share of the net sale proceeds at the time of the Apartment's sale. Plaintiffs have also submitted evidence showing that Hedlund has refused to permit the Escrowee to distribute the sale proceeds in accordance with the Agreement.

"A party is under an obligation to read a document before signing it, and cannot generally avoid the effect of the document on the ground that he or she did not read it or know its contents." (*Augustine v. BankUnited FSB*, 75 A.D.3d 596, 597 [2d Dep't 2010]; *see also Ackerman v. Ackerman*, 120 A.D.3d 1279, 1280–81 [2d Dep't 2014] ["[A] cause of action [for fraud] only arises if the signor is illiterate, blind, or not a speaker of the language in which the document is written."]).

Defendant Hedlund does not deny signing the Agreement and has made no showing that the signature on the Agreement is not in her handwriting. Indeed, Hedlund signed the new note on the same date as the Agreement, under which she was entitled to receive the proceeds of the new loan. There is no indication that Hedlund was forced to sign the Agreement, prevented from reading the Agreement, or that she was suffering from any disability at the time the Agreement was executed.

Generally, when parties have entered into a contract, no fiduciary relationship is established "unless a party can show a separate duty, independent of the mere contract obligation." (*Savage Records Group, N.V. v. Jones*, 247 A.D.2d 274, 274–75 [1st Dep't 1998]). Thus, business relationships that are the result of arms-length transactions "do not create a relationship of confidence or trust sufficient to find the existence of a fiduciary duty," absent "extraordinary circumstances." (*Wilhelmina Artist Mgt., LLC v. Knowles*, 8 Misc. 3d 1012(A) [Sup. Ct. 2005]). "[C]ourts look to the agreement to discover the nexus of the parties' relationship; if the parties do not create their own relationship of higher trust, the courts do not ordinarily transport them to that higher relation and fashion a stricter duty." (*Bernstein v. GFI Realty Services, Inc.*, 2008 WL 8096759 [N.Y. Sup.]).

Here, defendants entered into a contractual relationship with plaintiffs by signing the Agreement, and no special circumstances creating a fiduciary relationship are shown. Without more, defendant Hedlund's subjective claims of reliance on plaintiff Stephen Rosenberg's financial or legal expertise in entering into the Agreement are not sufficient to establish a fiduciary relationship. (*See RNK Capital LLC v. Natsource LLC*, 76 A.D.3d 840, 842 [1st Dep't 2010]; *Societe Nationale D'Exploitation Industrielle Des Tabacs Et Allumettes v. Salomon Bros. Intern. Ltd.*, 251 A.D.2d 137, 138 [1st Dep't 1998] [noting that "the requisite high degree of dominance and reliance must have existed prior to the transaction giving rise to the alleged wrong, and not as a result of it"]).

Accordingly, defendant's allegations of fraud and breach of fiduciary duty are insufficient to defeat plaintiffs' motion for summary judgment. Defendant's cross motion for summary judgment similarly fails.

However, plaintiffs have not met their burden with respect to the amount of damages. Plaintiffs assert that defendants are obligated to pay plaintiffs $651,061.76. Stephen Rosenberg's affidavit contains a calculation of the amount defendants purportedly owe plaintiffs pursuant to the terms of the Agreement. Plaintiffs' calculations appear incorrect in the following respects:

First, plaintiffs deduct from the gross sales price of $1,200,000 the "expenses relating to the sale such as flip tax and commissions," which, according to plaintiffs, total $93,407.50 ($60,000 for realtor commissions, $9,750 for flip tax, $21,900 for taxes, and $1,757.50 for attorney and other costs and fees). The attached 2014 settlement statement (Exhibit I), however, details "settlement charges to sellers" totaling $100,033.62, which includes realtor commissions, title charges, government recording and transfer charges, the flip tax, closing fee, fees to attorneys, and other charges. Plaintiffs do not explain the discrepancy between the amounts plaintiffs deduct for "expenses relating to the sale" and the "settlement charges to sellers" listed in the settlement statement.

Second, plaintiffs fail to deduct the "Old Loan Amount" ($135,000) from the "Net Proceeds" in accordance with section 3(c)(ii) of the Agreement.

Third, plaintiffs err in calculating two-thirds of $856,529.50 as $571,061.67, instead of $571,019.67.

In light of the foregoing issues with respect to plaintiffs' amount of damages, the matter is referred to a referee.

Wherefore it is hereby,

ORDERED that plaintiffs' motion for summary judgment against defendants, Tania Hedlund and Jonathan Rosenberg, is granted; and it is further

ORDERED that the issue of determining the amount of damages is referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119A) to arrange for a date for the reference to a Special Referee and the Clerk shall notify all parties of the date of the hearing; and it is further

ORDERED that the firm Post, Polak, Goodsell, MacNeill & Strauchler, P.C. is directed to release from escrow to plaintiffs Stephen Rosenberg and Lucille Rosenberg an amount to be determined by the Special Referee.

This constitutes the decision and order of the Court. All other relief requested is denied.

Dated: FEBRUARY 3, 2016

FEB 04 2016

Eileen A. Rakower, J.S.C.