

<b>Aimco 240 W. 73rd St., LLC v Citi Habitats N.Y. Real Estate Inc.</b>
2016 NY Slip Op 31252(U)
June 29, 2016
Supreme Court, New York County
Docket Number: 157635/2015
Judge: Geoffrey D. Wright
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----x  
AIMCO 240 WEST 73<sup>RD</sup> STREET, LLC,

Plaintiff,

Index # 157635/2015

-against-

DECISION/ORDER

CITI HABITATS NEW YORK REAL ESTATE INC.,  
SANDU CALINESCU,

Defendants.

**Present:**

Hon. Geoffrey D. Wright

-----x Acting Justice Supreme Court

RECITATION , AS REQUIRED BY CPLR § 2219 (A), of the papers considered in the review of this Motion/Order for summary judgment.

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed.....	___ 1 ___
Order to Show Cause and Affidavits Annexed	_____
Answering Affidavits.....	___ 2 ___
Replying Affidavits.....	___ 3 ___
Exhibits.....	_____
Memoranda.....	___ - ___
Cross-Motion .....	_____

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Co-Defendant, Citi Habitats New York Real Estate, Inc., (“Citi”) moves for an order pursuant to CPLR 3212 dismissing Plaintiff’s, Aimco 240 West 73<sup>rd</sup> Street, LLC (“Plaintiff”) three causes of action against them. The causes of action allege that Citi breached numerous fiduciary duties owed to it, including a failure to inform Aimco of a potential conflict of interest between Citi and Calinescu; a failure to advise Aimco of alleged violations of the Rent Stabilization Code and Rent Stabilization Law; and a failure to prevent claims for rent overcharging from occurring. For the reasons discussed below, the motion is granted.

Citi is a residential real estate brokerage firm licensed in the State of New York. On or about February 22, 2012, co-defendant Sandu Calinescu (“Calinescu”) joined Citi as a real estate agent in which Independent Contractor Agreement was executed between Calinescu and Citi. In support of their motion, Citi includes a copy of the Independent Contractor Agreement outlining the nature of the relationship between Calinescu and Citi. The Nature of relationship section of the agreement states:

*“Nothing contained herein or in any document executed in connection herewith shall be construed to create an employer-employee between Citi and Agent. Agent is hereby engaged as a qualified real estate agent as such term is construed under Section 3508 of the Internal Revenue Code (a copy of which is attached) and under Article 12A of the New York State Real Property Law and as a independent contractor associated with Citi.”*

On or about June 6, 2012, Citi entered into an Agency Agreement (the “Agreement”) with Plaintiff, whereby Citi was engaged as a real estate broker for Plaintiff to show and lease certain apartments identified in the Agreement at the building located at 240 West 73<sup>rd</sup> Street (the “Building”). Calinescu was not involved in negotiating the terms of the Agreement with Plaintiff nor did he play a role in Citi’s relationship with Plaintiff that led to Citi’s engagement as a broker for Plaintiff. Citi includes a copy of the Agreement between Plaintiff and Citi. The Agreement clearly states that Plaintiff retained sole discretion over who to rent to and how much to charge. Moreover, the Agreement applied solely to certain listed units and did not provide Citi with an exclusive right to lease such units. Rather, the listed units could be rented by Citi for a commission of 15% or by Plaintiff directly. Citi had no involvement in setting, determining the rental rates and all prospective tenants were to be reviewed and approved by Plaintiff before entering a lease and they were subject to Plaintiff’s own application and approval process which included a credit and rental application in addition to providing information about their residency, employment and credit.

In November 2012, Calinescu approached Plaintiff directly to lease one of the listed apartments. Calinescu dealt directly with Plaintiff and was required to go through the application and approval process as any tenant leasing directly from Plaintiff. Calinescu entered into a lease for apartment #517, with a monthly rent of \$1779.00. The lease stated in bold typeface that **“This Lease and the Apartment are not subject to Rent Stabilization, Rent Control or any other Rent Regulation.”**

On or about February 6, 2015, Plaintiff filed a Notice of Petition for Nonpayment of Rent in the Housing Court in New York County against Calinescu. Calinescu filed an

amended answer to the proceeding in which he raised as a defense the defense of fraudulent and willful rent-overcharge, claiming that the apartment was indeed subject to rent stabilization.

On or about March 30, 2015 Calinescu submitted a rent-overcharge claim with the New York Division of Homes and Community Renewal (“DHCR”) in which it was revealed that prior to the execution of the lease with Plaintiff, the apartment was subject to rent stabilization.

On July 24, 2015, Plaintiff filed an Order to Show Cause seeking to enjoin Calinescu from pursuing his rent-overcharge claims in the DHCR and eviction proceedings. In response, Calinescu submitted an Affidavit in Opposition. As part of the action, Plaintiff sued Citi, alleging that under agency principles Citi had a fiduciary duty to advise Plaintiff of its rent stabilization violations and that it should be liable for any damages incurred by Plaintiff as a result of the rent overcharge.

By Decision and Order dated August 20, 2015, this Court denied injunctive relief “unconvinced that any potential loss to Plaintiff is enhanced by continuing this dispute in Housing Court or DHCR.” Plaintiff later moved to consolidate the housing proceeding with the instant action. By Decision and Order dated December 2, 2015, I denied that request.

A party seeking summary judgment bears the burden of making “a prima facie showing of entitlement to judgment as a matter of law,” by submission of sufficient admissible evidence to demonstrate the absence of genuine issues of fact for trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If this “showing has been made . . . , the burden shifts to the party opposing the motion . . . to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact” requiring a trial (*id.*). Facts must be “construed in a light most favorable” to the nonmoving party (*Insurance Corp. of N.Y. v Central Mut. Ins. Co.*, 47 AD3d 469, 472 [1st Dept 2008]), which is accorded the benefit of all reasonable inferences that may be drawn from the evidence (*see Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). “[C]onclusions, speculation and unsupported allegations are insufficient to defeat a motion for summary relief” (*Castro v New York Univ.*, 5 AD3d 135, 136 [1st Dept 2004]).

Citi argues it had no involvement in the Lease between Calinescu and Plaintiff and therefore owed no fiduciary duty to Plaintiff. They argue they received no commission for the transaction which is not disputed by Plaintiff.

A real estate broker has a fiduciary duty to act in the best interest of its principal

and that duty includes an obligation to keep the principal informed of all material facts within the broker's knowledge regarding the relevant transaction. (*Walker v Insignia Douglas Elliman LLC*, 79 A.D.3d 511, 512 (N.Y. App. Div. 1st Dep't 2010 citing *Dubbs v Stribling & Assoc.*, 274 AD2d 32, 35, 712 NYS2d 19 [2000], affd 96 NY2d 337, 752 NE2d 850, 728 NYS2d 413 [2001]).

In this case, the lease was negotiated between Plaintiff and Calinescu independent of his contractor position with Citi and was for his personal use. Moreover, it is undisputed that Citi did not receive a commission nor does the lease reflect Citi was involved in any way.

In respect to the cause of action alleging breach of duty for failing to disclose Calinescu's status as a real estate agent, Citi argues that Plaintiff knew before the execution of the lease that Calinescu was affiliated with Citi. However, they argue that even if Plaintiff was not aware before the lease, it was made aware as a result of the Application for Residency Calinescu completed as part of the application process. The application which is included in the motion papers clearly shows that Calinescu's affiliation with Citi.

With respect to the cause of action involving the rent regulation status of the apartment, Citi argues that Plaintiff's employee, Anthony Davis, a building compliance manager/agent affirmed he was fully familiar with rent stabilization and rent control with regard to management of New York City properties.

I find it disingenuous that Plaintiff, one of the largest owners and operators of apartment homes in the country, argues they were unfamiliar with rent stabilization and rent control especially since the information could easily have been obtained by visiting the New York City Rent Guidelines Board's website. As owner of the building, Plaintiff was expected to know the rent regulation status of its building. NY Rent Stab § 2523.7 (McKinney). It defies logic that Plaintiff alleges that somehow Citi had access to rent regulation information that they were not able to also attain, especially in light of the fact that the Agreement Plaintiff and Citi only covered certain units and left the final decision to rent one of the covered units with the Plaintiff. Plaintiff was obviously familiar with the terms, rent stabilization and rent control, since the lease stated the apartment was not subject to rent stabilization, rent control or any other rent regulation.

To the extent that Plaintiff argues that Calinescu's business cards lists him as Vice President, that discovery is needed to further investigate the relationship between Calinescu and Citi and that summary judgment would be premature, this argument fails. At the time Calinescu applied for the rental of the apartment, he was an Independent

contractor which is reflected in the signed Independent Agreement. That he chose to give himself the title of Vice President title does not negate the fact that the agreement between Calinescu and Citi is that of an independent contractor. Additionally, it is well settled that an argument opposing summary judgment on the grounds of insufficient discovery "is unavailing where the nonmoving party has failed to 'produce some evidence indicating that further discovery will yield material and relevant evidence'" (Heritage Hills Soc., Ltd. v Heritage Development Group, Inc., 56 AD3d 426, 427, 867 N.Y.S.2d 149 [2d Dept 2008], quoting Fleischman v Peacock Water Co., Inc., 51 AD3d 1203, 1205, 858 N.Y.S.2d 421 [3d Dept 2008]); Hayden v City of New York, 26 A.D.3d 262, 809 NYS2d 75, 76 [1st Dept 2006]. Frierson v Concourse Plaza Associates, 189 AD2d 609, 610, 592 N.Y.S.2d 309 [1st Dept 1993] ["Neither can [defendants] avoid summary judgment by claiming a need for discovery. The 'mere hope' of defendants that evidence sufficient to defeat such a motion may be uncovered during the discovery process is not enough . . . Defendants were bound to show there was a likelihood of discovery leading to such evidence, i.e., that facts "may" exist but cannot be stated at that time (CPLR 3212[f]). This they failed to do"]; Pro Brokerage, Inc. v Home Ins. Co., 99 A.D.2d 971, 472 NYS2d 661, 662 [1st Dept 1984].

In the instant case, plaintiffs have provided insufficient evidentiary basis in its opposition papers indicating that further discovery will yield material and relevant evidence. Therefore, plaintiffs' argument lacks merit.

Accordingly, it is Ordered that the motion by co-defendant, Citi to dismiss Aimco's first, second and third causes of action against is granted. The Court declines to impose sanctions at this time. The Clerk is directed to dismiss the first, second and third causes of action against Citi Habitats.

This constitutes the Decision and Order of the Court.

Dated: June 29, 2016

  
**GEOFFREY D. WRIGHT**  
**AJSC**

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 JUDGE GEOFFREY D. WRIGHT  
 Acting Justice of the Supreme Court