SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 3

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DOMUS ARBITER REALTY CORP.

Plaintiff,

Index No. 651970/2014
Motion Seq. 008

-against-

BAYROCK GROUP LLC, BAYROCK/SAPIR ORGANIZATION LLC, BAYROCK/ZAR SPRING LLC, PAOLO ZAMPOLLI, THE PARAMOUNT REALTY GROUP OF AMERICA CORP., JAY T. MCGORTHY and DOUGLAS ELLIMAN, LLC.

Defendants.

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Eileen Bransten, J.S.C.:

Defendant Jay T. McGorty (sued as "McGorthy") moves to dismiss the complaint pursuant to CPLR 3016, CPLR 3211(a)(7) and CPLR 3211(c).

I. BACKGROUND

This is an action against owners and sponsors of certain real property who are alleged to have defrauded the Plaintiffs in the amount of $10,956,547.00. *Amen. Comp. ¶1.* Plaintiffs were brokering agents for the sale of units located at 246 Spring Street, New York City, known as "Trump Soho". *Id at ¶2.* Defendants Bayrock Group LLC, Bayrock/Sapir Organization, and Bayrock/Zar Spring LLC (collectively referred to as the "Sponsor Defendants") are the owners of Trump Soho and were supposed to provide a 4% brokers' commission on sales of Trump Soho units. *Id at ¶27.* In 2013, Plaintiff found clients seeking to purchase property in New York for investment purposes. *Id at ¶28.* Unbeknownst to the Plaintiff the Sponsor Defendants are alleged to have devised a scheme with the help of Defendants Paolo Zampolli, Jay T. McGorty, The

Paramount Realty Group, and Douglas Elliman LLC (collectively referred to as the "Broker-Defendants") to divert and steal clients from the Plaintiff. *See id at ¶35.*

In January of 2013 an agent of the Plaintiff registered Plaintiff's clients with the sales office of the Sponsor Defendants, visited Trump Soho with them, requested further financial information, and later made an offer on behalf of those clients. *See id at ¶¶38-41.* At the same time the Sponsor Defendants are alleged to offered to contract with the Plaintiff's clients directly through Elliman LLC, thereby cutting the Plaintiff out of the transaction. *Id at ¶¶42-47.* Those clients ultimately decided to purchase 14 units for a total price of $10,856,547.00. *Id at ¶48.*

The Sponsor Defendants are alleged to have contracted with Defendant Paolo Zampolli and Elliman LLC to offer them a 6% commission if Zampolli could successfully sell more units to the Plaintiff's clients. *Id at ¶50.* Defendant Zampolli is then alleged to have transferred all proceeds received from the alleged fraud to his employer, The Paramount Realty Group of America Corp. *See id at ¶12, 19.* The sale of those units, in that one transaction, ultimately consisted of 50% of all sales during the first ten months of 2013. *Id at ¶54.* As a result of this conduct the Plaintiff has alleged ten causes of action.

II. DISCUSSION

Defendant Jay T. McGorty seeks to dismiss the second, fifth, and seventh causes of action pursuant to the law of the case doctrine. Defendant also moves to dismiss the Tenth cause of action for failure to state a claim.

When deciding a motion to dismiss pursuant to CPLR 3211 the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable

inference, and determine only whether the facts as alleged fit within any cognizable legal theory" *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994). Under CPLR 3211(a)(1), dismissal is warranted only if the documentary evidence submitted by the Defendants conclusively establishes a defense to the asserted claims as a matter of law. *See Id.* "Allegations consisting of bare legal conclusions, [however] as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration." *See Caniglia v. Chicago Tribune-New York News Syndicate, Inc.*, 204 A.D.2d 233, 233–34 (1st Dep't 1994).

CPLR 3016(b) provides that where a cause of action or defense is based upon fraud, "the circumstances constituting the wrong shall be stated in detail" sufficient to infer that a fraud was perpetrated by each defendant charged. *See Pludeman v. N. Leasing Sys., Inc.*, 10 N.Y.3d 486, 491 (2008).

A. Dismissal Based Upon Law Of the Case

Defendant first argues that the second, fifth, and seventh causes of action should be dismissed against him for the same reasons that they were dismissed against Defendants Paramount and Zampolli.

On August 25, 2016 this Court dismissed the second, fifth, and seventh causes of action against Defendants Paramount and Zampolli for failing to plead, with the requisite particularity, the precise conduct committed by each Defendant pursuant to CPLR 3016(b). *See August 25, 2018 Decision and Order.* Indeed, in re-examining its prior decision and the underlying causes of action, the court cannot discern why it should reach a different conclusion as it pertains to Defendant McGorty.

The second cause of action is pleaded against all of the broker-defendants collectively and merely alleges, in a conclusory fashion, that "Defendants Zampolli, McGorty, Paramount and Douglas Elliman knew about the underlying fraud and substantially assisted the Sponsor-Defendants." *See Amen. Comp. ¶63; see also Caniglia v. Chicago Tribune-New York News Syndicate, Inc.*, 204 A.D.2d 233, 233–34 (1st Dep't 1994) (determining that conclusory allegations need not be given deference).

The fifth cause of action is pleaded against all of the Defendants collectively with no specificity as to what actions Defendant McGorty took in perpetuating the tortious conduct. *See Amen. Comp. ¶¶75-80*. The same is true with both the sixth and seventh causes of action. *See Amen Comp. ¶¶81-90.* It has long been held that each defendant is entitled to have the pleading "specify the tortious conduct charged against each Defendant." *Aetna Cas. & Sur. Co. v. Merchants Mut. Ins. Co.*, 84 A.D.2d 736, 736 (1st Dep't, 1981) (holding that pleading in the collective failed to provide the Defendants notice as to "the material elements of each cause of action" against each individual defendant pursuant to the broader standard of CPLR 3013). Therefore, the Court dismisses the second, fifth, and seventh causes of actions as against Defendant McGorty.

B. Dismissal of the Tenth Cause of Action Pursuant to CPLR 3211(a)(7).

Plaintiff alleges that Defendant McGorty violated Real Property Law §442[1], by virtue of

[1] RPAPL §442 is actually a portion of Title 12-A of the RPAPL. Despite specifically alleging a cause of action of a violation of Section 442, it became apparent during briefing and at oral argument that the Plaintiff was stating a general violation of Title 12-A. *See e.g. Tr. 14:6-17:7* (March 30, 2017) (Jeanette Lake-Mason, OCR) (examining RPAPL §442, 442-c, 442-e.).

his being the principle broker at Paramount, when the fraud was committed. "A broker is responsible for the wrongful acts of a salesman employed by him if he has actual knowledge of such acts or retains the benefits or proceeds of a transaction wrongfully negotiated by such salesman after notice of the salesman's misconduct." *Diona v. Lomenzo*, 26 A.D.2d 473, 475 (1st Dep't 1966) (citing Real Property Law §442-c); *see also Short Term Hous., Inc. v. Dep't of State*, 176 A.D.2d 619, 619 (1991) (imputing the wrongdoing to the company).

Defendant argues, however, that there is no private right of action under Article 12-a of the Real Property Law. As stated by this court in *Sambrotto v. Bond New York Properties* LLC,

> "Real Property Law § 442-e sets forth the ramifications of violating Article 12-A of the Real Property Law. The only provision of RPL § 442-e that addresses the rights of private litigants to bring an action for violation of Article 12-A is RPL § 442-e(3) . . . Article 12-A of the Real Property Law does not contain any provision allowing a private right of action against licensed real estate brokers. Therefore, the statute does not provide for a private right of action against Defendants." *Sambrotto v. Bond New York Properties Brokerage, LLC*, 2013 WL 685223, at *1 (Sup. Ct. NY Cty. Feb. 20, 2013) (Bransten J.) *citing 2 Park Avenue Associates v. Cross & Brown Co.*, 36 N.Y.2d 286 (1975) (noting the private remedy is limited to suits against brokers that are not licensed under Article 12-A).

Absent a private right of action, the claim cannot stand. The tenth cause of action is therefore dismissed as against Defendant McGorty.

III. Respondeat Superior

Plaintiff has alleged, however, an alternative theory that Defendant McGorty is personally liable pursuant to the doctrine of *respondeat superior*. *See Tr. 14:6-17:7* (March 30, 2017) (Jeanette Lake-Mason, OCR). It is undisputed that Defendant Zambolli was an employee of Paramount Realty Group of America Corp. *See Amen. Comp. ¶¶12, 19, 21, 31-45, 51, 103, 105.* Plaintiff alleges, however, that Defendant McGorty, rather than Paramount Realty Corp., held the

broker's license under which Defendant Zampolli is alleged to have operated, thus constituting an employer subject to vicarious liability. *See Tr. 16:19-16:24* (March 30, 2017) (Jeanette Lake-Mason, OCR).

While Defendant McGorty may hold the broker's license under which Defendant Zambolli operated, the doctrine of respondeat superior does not impose liability on the individual supervisor, rather it serves to impose liability on the corporation. *See Yaniv v. Taub*, 256 A.D.2d 273, 275–76 (1st Dep't 1998) (finding the doctrine of respondeat superior did not impose liability on an individual who was also the principle shareholder of a corporate defendant). Absent a reason to pierce the corporate veil, New York's law protects a corporate officer from individual liability. *See Michaels v. Lispenard Holding Corp.*, 11 A.D.2d 12, 14 (1st Dep't 1960) (stating that "before a corporate officer can be held liable individually to third parties it must appear that the acts were other than the ordinary acts of corporate agents acting for their principal or that they were in exclusive control of the management and operation of the [corporation]"). Therefore, the doctrine of *respondeat superior*, is a nonviable cause of action against Defendant McGorty.[2]

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[2] Insofar as the Plaintiff would seek to use the doctrine of *respondeat superior* to revive the nonviable claim for breach of New York's real property law, the court notes that this argument cannot overcome the simple fact that there is no private right of action under RPAPL 12-A available to the Plaintiff. *See Sambrotto v. Bond New York Properties Brokerage, LLC*, 2013 WL 685223, at *1 (Sup. Ct. NY Cty. Feb. 20, 2013) (Bransten J.).

IV. ORDER

As a result of the foregoing it is

ORDERED the second, fifth, seventh, and tenth causes of action are dismissed without prejudice as against Defendant McGorty; and it is further

ORDERED the Plaintiff may not assert a claim for *respondeat superior* against Defendant McGorty.

DATED: 11/28/18

ENTER

HON. EILEEN BRANSTEN
J.S.C.