

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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CENTURY HOMES REALTY GROUP LLC,

-Plaintiff,

-against-

Index No. 711325/2017

MAN TUNG CHENG, BENJAMIN CHUNG-TENG LIN,
TENG FEI REN, HORKEEN CHENG, ESQ., and LAW
OFFICES OF HORKEEN CHENG, PLLC.,

**MEMORANDUM OF
LAW IN SUPPORT**

-Defendants.

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PRELIMINARY STATEMENT

Plaintiff is a real estate broker that entered into separate commission agreements with the seller and buyers of a house for a total commission of 8.1%. Apparently, Plaintiff neglected to tell either side what it had done until the contract of sale was signed, and feeling aggrieved, they refused to pay the commission. Hence, this lawsuit for commissions.

Inexplicably, Plaintiff chose to sue the Seller's attorneys, Horkeen Cheng, Esq. and his law office (the "Moving Defendants") for an alleged violation of Real Property Law § 294-b(5). That section sets forth a procedure that a broker may use to obligate sellers to deposit brokerage commissions with the county clerk. However, attorneys have no obligations under that section. Moreover, Plaintiff did not comply with the requirements of Real Property Law § 294-b(4)(a) in that there is no allegation that the fee set forth in § 294-b(5)(c) and required to be provided by Plaintiff to Seller pursuant to § 294-b(4)(a) was actually provided. Therefore, the claim against Mr. Cheng and his office are frivolous.

Furthermore, there is no evidence that Plaintiff provided the statutory dual-agency disclosure to the seller. By representing both sides to a purchase and sale transaction without that

disclosure, Plaintiff has violated its fiduciary duty to Seller, and consequently, Plaintiff may not collect a commission from the seller. And without a claim against Seller, Plaintiff's claim against the Seller's counsel also disappears.

Lastly, there is a likely violation of legal professional ethics by The Law Offices of Geng & Zhang, PLLC, which was Seller's original transaction counsel. The members and attorneys of that firm, conducting business under another firm name, have aided Plaintiff in this lawsuit against Seller. The original complaint was filed by Geng & Associates, PLLC, a law office that shares the same office suite as Geng & Zhang, PLLC, and the same name partner, Ting Geng, Esq. The attorney who signed the original complaint also filed the § 294-b(5) affidavit for the broker at the time that The Law Offices of Geng & Zhang, PLLC represented the Seller. Both law firms should be expressly barred from participating in any manner from this action, and ordered to disgorge any funds paid by Seller on this matter.

In conclusion, this motion seeks to dismiss the complaint because it fails to state a cause of action against the seller's attorney under Real Property Law § 294-b(5), and because it does not state a cause of action for brokers' commission against the seller due to its failure to provide the statutory dual-agency disclosure.

FACTS

For the purposes of this motion, the allegations set forth in the Amended Complaint and its exhibits are assumed to be true pending discovery. On or about August 25, 2016, Plaintiff entered into a commission agreement with Seller Man Tung Cheng to list the real property located at 136-37 35th Avenue, Flushing, NY 11354 (the "Premises"). (Am. Compl. ¶ 6.) The commission was three percent, with one percent of said commission to be shared with a cooperating broker. (Am. Compl. ¶ 6, Ex. A.) On or about October 6, 2016, Plaintiff entered into

a commission agreement with Buyer Benjamin Chung-Teng Lin with a commission of 5.1% for the purchase of the Premises. (Am. Compl. ¶ 8, Ex. D.) A copy of the New York State Disclosure Form dated October 6, 2016 and signed by the Buyer is annexed to the Amended Complaint as part of Exhibit D thereof. However, even though Plaintiff was already representing Seller by that time, the disclosure form did not disclose that Plaintiff was acting as a dual agent representing the Seller and Buyer. (Am. Compl. Ex. D.) Rather, Plaintiff obtained Buyer's *advance* informed consent to dual agency. (Id.) Plaintiff has not included a copy of the statutory dual agent disclosure signed by Seller, and does not allege that any such disclosure was provided to Seller. (See Am. Compl. Ex. A.)

On or about October 19, 2016, Seller and Buyers entered into a contract of sale for the Premises with a purchase price of \$980,000.00. (Am. Compl. ¶ 9., Ex. B.) Seller was represented by the Law Offices of Geng & Zhang PLLC, with an address at 39-07 Prince Street, Suite 3E, Flushing, NY 11354. (Id.) On or about April 13, 2017, Plaintiff, through its counsel, filed an Affidavit of Entitlement to Commission for Completed Brokerage Services pursuant to Real Property Law § 294B(5)(j) (the "Affidavit"). (Am. Compl. ¶ 10, Ex. C.) The Affidavit was notarized by Pu Hui Tsai on April 6, 2017. (Am. Compl. Ex. C.)

At some point in time, the closing of title presumably occurred even though this fact is not expressly alleged in the Amended Complaint. Plaintiff filed this action on or about August 16, 2017 by the filing of a summons and complaint. Sylvia Pihui Tsai, Esq. of Geng and Associates, P.C., having an address at 39-07 Prince Street, Suite 3E, Flushing, NY 11354, signed the Summons and Complaint. (Compl.) The verification of the complaint was notarized by Pi Hui Tsai. (Compl.) The address for Geng and Associates, P.C. is the same as the address for the Law Offices of Geng & Zhang PLLC.

On or about October 20, 2017, Plaintiff substituted counsel and contemporaneously filed an Amended Complaint. (Am. Compl.) In the Amended Complaint, Plaintiff's first cause of action is against Buyer and Seller for breach of contract, and the second cause of action is against Buyer and Seller for unjust enrichment. Plaintiff's third cause of action is against Seller, Horkeen Cheng, Esq., and the Law Offices of Horkeen Cheng, PLLC for failure to comply with Real Property Law § 294-(b)(5.)

ARGUMENT

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (N.Y. 1994). The facts as alleged in the complaint are accepted as true, and the Plaintiff is to be accorded the benefit of every possible favorable inference. *Id.* The Court is to determine only whether the facts as alleged fit within any cognizable legal theory. *Id.* However, the Court may also treat the motion as one for summary judgment under CPLR § 3211(c) and § 3212 after adequately notifying the parties. *Rovello v. Orofino Realty Co.*, 40 NY 2d 633, 636 (N.Y. 1976); CPLR § 3211(c).

I. Plaintiff has not stated a cause of action under Real Property Law § 294-b(5).

The sole cause of action asserted against moving defendants Horkeen Cheng, Esq. and the Law Offices of Horkeen Cheng, Esq. is the failure to comply with R.P.L. § 294-b. That section creates a statutory scheme where a seller of certain types of real property may be required to deposit brokerage commissions. Pursuant to Real Property Law § 294-b(1), real estate brokers may file an affidavit of entitlement to commission for completed brokerage services with the county recording officer. Within five business days of filing the affidavit, the broker shall serve a copy of the affidavit along with the fee required pursuant to § 204-b(5)(c) upon the seller by registered or certified mail, return receipt requested or by personal delivery, to the address set

forth in the written contract of brokerage employment. R.P.L. § 294-b(4)(a). Failure to serve the affidavit of entitlement upon the seller shall cause a forfeiture of the broker's rights under subdivision 5. *Id.* If the seller is represented by counsel, the broker shall provide a copy of the affidavit to the seller's attorney as well. R.P.L. § 294-b(4)(b).

Moving Defendants are being sued in their capacity as Seller's counsel. (Am. Compl. ¶¶ 5; 11, 12, 23, and 25.) Plaintiff has not alleged that Moving Defendants has done anything tortious other than to represent their client. Real Property Law § 294-b does not create any obligation upon the seller's attorney, only the seller. For this reason, Plaintiff has failed to state a claim against the Moving Defendants.

Plaintiff also failed to state a claim to the extent that it did not allege its compliance with the statutory requirement to serve the required filing fees to the Seller along with the affidavit. R.P.L. § 294-b(4)(a). Plaintiff does not allege that it served the fee to Seller, and a copy of the check is not annexed to the Amended Complaint.

For these reasons, the lawsuit should be dismissed for failure to state a claim against Moving Defendants.

II. Plaintiff is not entitled to commission because it violated its fiduciary duties to the Seller and the Buyers.

Real estate brokers working for sellers have an affirmative duty not to act for the purchaser unless the sellers had full knowledge of the facts. *Queens Structure Corp. v. Jay Lawrence Associates, Inc.*, 304 AD.2d 736, 737-738 (2nd Dept. 2003). Brokers may not act for a party whose interests are adverse to those of the principal unless consent of the principal is given after full knowledge of the facts. *In re Goldstein*, 144 A.D.2d 463, 464 (2nd Dept. 1988). Thus, a broker may not represent the seller and purchaser of real property without this disclosure. *Id.* A broker who represents both parties without making this disclosure may not collect a fee. *Trylon*

Realty of Great Neck v Roth, 187 A.D.2d 715, 715 (2nd Dept. 1992); *Douglas Holly, Inc. v. Rice*, 161 A.D.2d 560, 560-561 (2nd Dept. 1990) (“a broker who secretly represents both parties to a transaction cannot recover compensation from the party kept in ignorance of the dual employment”).

Plaintiff is seeking commission from both the Seller and Buyers, which is an admission that it represented adverse parties in this transaction. However, Plaintiff has not claimed that it disclosed its conflicted dual representation to the Seller. Listing agents such as the Plaintiff are required by Real Property Law § 443(3)(a) to provide a statutory disclosure regarding who the agent is representing, and to disclose if the agent is representing both parties. There is no allegation by Plaintiff that this disclosure was provided to Seller, or that Seller refused to sign an acknowledgement of receipt. Plaintiff has not attached a copy of the statutory disclosure signed by the Seller to its Complaint or Amended Complaint.

Plaintiff does provide a copy of the statutory disclosure and commission agreement for the Premises signed by one of the Buyers on October 6, 2016 as Exhibit D to the Amended Complaint. By then, Plaintiff had already entered into a commission agreement with Seller dated August 25, 2016 to list the Premises. The statutory disclosure to Buyers should have identified Plaintiff has either a dual agent or dual agent with designated sales agent. Instead, Plaintiff checked off “advance informed consent dual agency” and “advance informed consent to dual agency with designated sales agents.” Thus, Plaintiff’s disclosure to Buyers was deceptive to the extent that Plaintiff was already representing the Seller, and had an undisclosed financial interest that Buyers purchase the Premises.

In any event, Plaintiff’s complaint admits that it was acting as a dual agent, but did not allege that it made the necessary disclosures to Seller. As Plaintiff was representing both sides

without an allegation that it disclosed this fact to Seller, it may not seek its brokerage fees from Seller. Without any earned commission fees, Plaintiff's actions under Real Property Law § 294-b(5) did not create any obligation upon Seller to deposit monies. Therefore, Plaintiff cannot recover against the Moving Defendants, who were Seller's counsel.

- III. The law firms of The Law Offices of Geng & Zhang, PLLC and Geng & Associates should be barred from participating at all in this action, and to disgorge any fees paid by Seller.

An attorney may not accept a matter that is materially adverse to the interests of a former client if the matter is the same as or substantially related to a matter that the lawyer handled for the former client. DR 5-108(a)(1). The same is true if another attorney in the firm handled the matter for the former client under DR 5-105(D). Even after representation has concluded, a lawyer may not reveal information confided by a former client, or use such information to the disadvantage of the former client or the advantage of a third party. *Taekni-Plex v. Meyner & Landis*, 674 N.E.2d 663 (N.Y. 1996).

Under DR 5-108 (A) (1), a party seeking disqualification of its adversary's lawyer must prove: (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse. *Taekni-Plex v. Meyner & Landis*, 89 N.Y.2d 123, 131 (N.Y. 1996).

In this action, Seller was represented by the Law Offices of Geng & Zhang PLLC on the transaction. Plaintiff's original complaint was signed by Sylvia Pihui Tsai, Esq. as an attorney with Geng and Associates, P.C. However, Ms. Tsai's email address is sylvia@law-gz.com, which is the same domain as the website for the Law Offices of Geng & Zhang PLLC, and her address on the complaint has the same address as that law office. (Aff. Of William W. Chuang in Supp. Ex. A and Ex. B.) Furthermore, Ms. Tsai notarized the Plaintiff's affidavit of entitlement

on April 6, 2017, while Seller was still represented by Law Offices of Geng & Zhang PLLC. The same attorney, Ting Geng, is associated with both law firms. (Chuang Aff. Ex. C.) Ms. Tsai, who was affiliated in gengsome manner with Seller's law firm, and is still using its email systems, may not be allowed to represent Plaintiff, and neither can her "new" firm of Geng and Associates, P.C.

The matters involved in both representations are identical, as the lawsuit for commissions stemmed from the underlying transaction. Furthermore, as noted above, Ms. Tsai helped Plaintiff prepare and file the affidavit that gave rise to the cause of action being asserted in this action. And, of course, Plaintiff is currently suing the Seller, so the interests of the present client and former client could not be more adverse.

For these reasons, both the Law Offices of Geng & Zhang PLLC and Geng and Associates, P.C. should be barred from participating in any manner with regard to this case.

CONCLUSION

Plaintiff's complaint should be dismissed as against Moving Defendants pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, and pursuant to CPLR §§ 3211(c) and 3212 for summary judgment, and for such other and further relief as this Court deems just and proper.

Dated: New York, NY
November 22, 2017


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