27 Misc. 3d 1205(A); 910 N.Y.S.2d 403, *;
2010 N.Y. Misc. LEXIS 1555, **; 2010 NY Slip Op 50549(U), ***

Frank Catalanotto, BARBARA CATALANOTTO, KEN BOVE and LISA BOVE, Plaintiff(s), against Tom Abraham, KENNETH KIRSCHENBAUM and LITTLE NECK DEVELOPMENT CORP., Defendant(s).

34987-2008

SUPREME COURT OF NEW YORK, SUFFOLK COUNTY

c

March 29, 2010, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT.

SUBSEQUENT HISTORY: Appeal dismissed by *Catalanotto v. Abraham, 94 A.D.3d 937, 942 N.Y.S.2d 600, 2012 N.Y. App. Div. LEXIS 2814 (N.Y. App. Div. 2d Dep't, Apr. 17, 2012)*

HEADNOTES

[***1205A] [*403] Attorney and Client--Disqualification.

COUNSEL: [**1] For Plaintiffs: Catalanotto and Coluccio, LLP, St. James, New York.

For Defendants: Kirschenbaum & Kirschenbaum, P.C., Garden City, New York.

JUDGES: Peter H. Mayer, J.S.C.

OPINION BY: Peter H. Mayer

OPINION

Peter H. Mayer, J.

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion (seq. # 001) by the defendant, Kenneth Kirschenbaum, which seeks an order, inter alia, granting summary judgment pursuant to *CPLR § 3212* in favor of that defendant, is hereby denied in its entirety; and it is further

ORDERED that the cross-motion (seq. # 002) by the plaintiffs for an order disqualifying the firm of Kirschenbaum & Kirschenbaum. P.C. as counsel for the defendants is hereby granted; and it is further

ORDERED that counsel for the plaintiffs shall promptly serve a copy of this Order upon Kirschenbaum & Kirschenbaum, P.C., as well as upon all named defendants, via first class mail, and shall thereafter promptly file the affidavit(s) of such service with the County Clerk; and it is further

ORDERED that, to permit all defendants time to retain new counsel, all proceedings are hereby stayed until the next Compliance Conference, which shall be held **May** [**2] **4, 2010, 9:30 a.m**., at which time counsel for the parties shall appear in the courtroom of the undersigned, located at One Court Street, Room A-259, Riverhead, New York 11901.

In July 2004, the Catalanotto plaintiffs, as buyers, entered into a Contract of Sale with defendant Little Neck Development Corp ("Little Neck"), as seller, for the purchase of property and construction of a new home, now known as 4 Muffins Meadow Road, St. James, New York. In addition, in February 2006, the Bove plaintiffs, as buyers, also entered into a Contract of Sale with Little Neck for the purchase of property and construction of their new home, now known as 2 Muffins Meadow Road, St. James, New York. The plaintiffs' complaint alleges that the defendants carelessly, negligently and improperly constructed both homes, thereby causing significant flood damage to the interior and exterior of the homes due to rain storms and snow melt.

It is well settled that the remedy of summary judgment is a drastic one and there is considerable reluctance to grant summary judgment in negligence actions (*Andre v Pomeroy, 35 NY2d 361, 320 N.E.2d 853, 362 NYS2d 131 [1974]).* Summary judgment should not be granted where there is any doubt as [**3] to the existence of a triable issue of fact or where an issue of fact is even arguable since it deprives a party of his day in court (*id; see also, Schwartz v Epstein, 155 AD2d 524, 547 NYS2d*

382 [2d Dept 1989]; *Henderson v City of New York, 178 AD2d 129, 576 NYS2d 562 [1st Dept 1991])*.

Issue finding rather than issue determination is the key to the procedure (*Sillman v Twentieth Century Fox Film Corp., 3 NY2d 395, 144 N.E.2d 387, 165 NYS2d 498 [1957])*. Since summary [***2] judgment is the procedural equivalent of a trial, if there is any doubt as to the existence of a triable issue, or where a material issue of fact is even "arguable," summary judgment must be denied (*Phillips v Kantor & Co., 31 NY2d 307, 291 N.E.2d 129, 338 NYS2d 882 [1982])*; *Rotuba v Ceppos, 46 NY2d 223, 385 N.E.2d 1068, 413 NYS2d 141 [1978]*; *Freeman v Easy Glider Roller Rink Inc., 114 AD2d 436, 494 NYS2d 351 [2d Dept 1985])*. Furthermore, the proof of the party opposing the motion must be accepted as true and considered in a light most favorable to the opposing party (*Dowsey v Megerian, 121 AD2d 497, 503 NYS2d 591 [2d Dept 1986]*; *Museums at Stony Brook v The Village of Patchogue Fire Dept., 146 AD2d 572, 536 NYS2d 177 [2d Dept 1989]*; *Matter of Benincasa v Garrubbo, 141 AD2d 636, 529 NYS2d 797 [2d Dept 1988])*.

In [**4] a contract action, when the intention of the parties is fully determinable from the language employed in the agreement, and there is no need to resort to evidence outside the written words to determine the intention of the parties, then summary judgment is proper (*Long Island R.R. Co. v Northville Industries Corp., 41 NY2d 455, 362 N.E.2d 558, 393 N.Y.S.2d 925 [1977]*). However, a motion for summary judgment should be denied if critical contractual language raises a question with respect to the true intent of the parties (*Mayland v Craighead, 144 AD2d 344, 533 N.Y.S.2d 946 [2d Dept 1988]*). In fact, "where the intent must be determined by disputed evidence or inferences outside the written words of the instrument, a question of fact is presented which warrants the denial of summary judgment" (*Id., 144 AD2d at 346, 533 NYS2d at 948*) (quoting, *Boyarsky v Froccaro, 131 AD2d 710, 516 N.Y.S.2d 775 [2d Dept 1987]*; *see also, Aronson v Riley, 59 NY2d 770, 451 N.E.2d 470, 464 NYS2d 723 [1983])*.

In arguing entitlement to summary judgment in his own favor, Mr. Kirschenbaum essentially contends that his only obligation was to deliver a deed to the plaintiffs upon full performance of their respective contracts. According to Mr. Kirschenbaum, [**5] as record owner of the parcels of land upon which the houses were built, his role was merely to convey title and act as the "bank" for the transactions. He further maintains that he was not the seller or builder, that he had no responsibility for the construction, and that he was not a principal or shareholder of the defendant builder, Little Neck. On these grounds, Mr. Kirschenbaum asserts that there "is no basis in law or fact to sustain a cause of action against me." This Court disagrees.

Paragraph 29 of the Catalanotto Contract and Paragraph 25 of the Bove Contract both state that "Ken Kirschenbaum is not the Seller and his only obligation is to deliver a deed upon Purchaser's full performance of this contract." Those provisions, however, also state that full payment under each contract was to be made to Mr. Kirschenbaum. In fact, under Paragraph 25 of the Bove Contract, even after Mr. Kirschenbaum conveyed title to Little Neck, the purchasers were, nevertheless, required to make "payment to Kenneth Kirschenbaum or his order."

The defendants' motion papers and the plaintiffs' opposition thereto raise issues of fact as to the control defendant Kirschenbaum exercised over the construction [**6] of the plaintiffs' homes, as well as his participation in Little Neck, the builder and purported Seller of those homes. Although Mr. Kirschenbaum denies any such participation, the plaintiffs' sworn opposition notes that Kenneth Kirschenbaum Often held himself out to be a partner with the defendant, Tom [***3] Abraham," and that "[Mr. Kirschenbaum played an active role in ensuring the completion of the construction." These sworn statements are supported by certain contract provisions. For example, Paragraph 29 of the Catalanotto Contract and Paragraph 25 of the Bove Contract reveal that "the property is owned by Kenneth Kirschenbaum, *with whom Seller has a business relationship*" (emphasis added).

Such provisions, coupled with the plaintiffs' assertions about Mr. Kirschenbaum's role in the construction, raise questions of fact concerning the nature of that "business relationship." This is particularly true given the fact that the defendants' own submissions reveal that the transfer of the subject properties from Kirschenbaum to Little Neck was without consideration and was not in connection with a sale. Given these questions of fact, and considering the plaintiffs' proofs on these issues in [**7] a light most favorable to the plaintiffs, the defendants' motion for summary judgment is denied (*Dowsey v Megerian, supra; Museums at Stony Brook v The Village of Patchogue Fire Dept., supra; Matter of Benincasa v Garrubbo, supra*). All other relief requested by the defendants are denied as without merit.

In their cross-motion, plaintiffs seek disqualification of the Kirschenbaum firm on the grounds that Mr. Kirschenbaum is a material witness in the case, and that he has competing interests with his co-defendant clients. The disqualification of an attorney is a matter which rests within the sound discretion of the court and will not be overturned absent a showing of abuse (*Death v Salem, 111 AD2d 778, 490 NYS2d 526 [2d Dept 1985])*.

Several Disciplinary Rules and Ethical Considerations must be taken into account in situations where an

attorney has a personal interest, either real or perceived. An attorney may not place himself in a position where a potential conflicting interest may, even inadvertently, affect or create the appearance of affecting his personal judgment or duty of undivided loyalty to his clients (*Death v Salem, supra*). *Disciplinary Rule (DR) 5-101(a)* states that a "lawyer [**8] shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be *or reasonably may be* affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest" (emphasis added).

In this regard, *Ethical Consideration EC 5-1* states that "[t]he professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Neither the lawyer's personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client." Likewise, *Ethical Canon 5-2* states that "[a] lawyer should not accept proffered employment if the lawyer's personal interests or desires will, or there is reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer [**9] carefully should refrain from . . . assuming a position that would tend to make his or her judgment less protective of the interests of the client." *Ethical Canon 5-3* also reminds us that "[t]he self-interest of a lawyer [***4] resulting from ownership of property in which the client also has an interest or which may affect property of the client may interfere with the exercise of free judgment on behalf of the client . . . A lawyer should not seek to persuade a client to permit the lawyer to invest in an undertaking of the client nor make improper use of a professional relationship to influence the client to invest in an enterprise in which the lawyer is interested."

The Court notes that the defendants' answer is verified only by defendant Kenneth Kirschenbaum, who is simultaneously a defendant and counsel for all other defendants. Similarly, the defendants' motion seeks summary judgment solely in favor of Mr. Kirschenbaum individually, and not in favor of any of his co-defendant clients. Also, Mr. Kirschenbaum's affidavit is the only affidavit submitted in support of his motion. Although an affidavit from defendant Tom Abraham was later submitted, this was only after the plaintiffs cross-moved [**10] for disqualification of the Kirschenbaum law firm. Mr. Abraham, President of co-defendant Little Neck, states in his affidavit that "I do not acknowledge a conflict and if there is any conflict I waive it."

Despite Mr. Abraham's purported conflict waiver, "where a lawyer represents parties whose interests conflict as to the particular subject matter, the likelihood of prejudice to one party may be so great that misconduct will be found, despite disclosure and consent . . ." (*Kelly v Greason, 23 NY2d 368, 244 N.E.2d 456, 296 NYS2d 937 [1968]).* This is particularly true where, as here, the lawsuit stems from a transaction in which the attorney-defendant has a personal interest (*EC 5-1, 5-2*). Indeed, there exist certain situations where, as here, "the [**11] circumstances establish such delicate conflicting relationships and inescapable divided loyalties that the likelihood alone of improper conduct or motivation, without any showing of harm and regardless of disclosure and consent, may give rise to professional misconduct. Where divided loyalties exist, a lawyer may inadvertently, and despite the best of motives, be influenced and act detrimentally to the client, or the appearance of misconduct will be unavoidable" (*id*).

It cannot be disputed that Mr. Kirschenbaum, as owner of the properties, had a financial interest in the construction of the plaintiffs' homes on those properties by his builder clients, Tom Abraham and Little Neck. In his own affidavit, Mr. Kirschenbaum states that he was essentially "acting as a bank for these transactions." Also, under Paragraph 29 of the Catalanotto Contract and Paragraph 25 of the Bove Contract, full payment under each contract was to be made to Mr. Kirschenbaum, even after he conveyed title to Little Neck. In addition, those provisions expressly state that Mr. Kirschenbaum did, in fact, have a business relationship with his own client, the purported Seller, Little Neck.

Mr. Kirschenbaum's financial [**12] interest may also be viewed as affecting his professional judgment with regard to the contract provisions that are self-protective in nature. For example, Paragraph 42 of the Catalanotto Contract states that Kenneth Kirschenbaum will act as escrowee. Similarly, Paragraph 37 of the Bove contract states that Kirschenbaum & Kirschenbaum PC will act as escrowee; however, this Paragraph further states that the Kirschenbaum firm "shall not be named in any suit between Seller and Purchasers." Both of these provisions also state that [***5] "[i]n the event of litigation between the parties the prevailing party shall be entitled to actual attorney fees. Kirschenbaum & Kirschenbaum PC shall be permitted to represent Seller . . . in any dispute [and] *Kenneth Kirschenbaum shall not be a party in any action* [except if] he has received the full purchase price . . . and has refused or failed to deliver a deed pursuant to this contract" (emphasis added). Even though Mr. Kirschenbaum delivered the deeds in satisfaction of this provision, no such performance can negate the appearance of impropriety that comes from an attorney's apparent attempt to insulate himself from liability

in a transaction in which [**13] he is personally involved with his client.

Paragraph 36d. of the Catalanotto's Contract states that defendant "Tom Abraham personally guarantees Seller's performance of [Seller's Warranty]," while Paragraph 56 of that Contract provides that "Purchaser shall have no lien against the property and shall look to Seller *and Tom Abraham* . . . in the event of Seller's failure to perform . . ." Interestingly, the italicized text was inserted by a handwritten change to the contract. It is not clear if Mr. Kirschenbaum or someone else inserted Mr. Abraham's name as the responsible individual under those circumstances. What is clear is that Kenneth Kirschenbaum, who had a personal financial interest in the transactions, executed the plaintiffs' contracts individually and as a member of the Kirschenbaum firm as escrowee. In effect, Mr. Kirschenbaum is acting simultaneously as his own attorney, the attorney for Tom Abraham, the attorney for Little Neck Development Corp., and as escrowee for both transactions. In this regard, any doubts as to the existence of a conflict of interest are to be resolved in favor of disqualification, and where there is even some doubt as to whether multiple representation [**14] will effectively further the interests of defendants jointly represented, a court must resolve all such doubts in favor of disqualification (*Death v Salem, supra*).

Lastly, *DR 5-102(b)* states that "[n]either a lawyer nor the lawyer's firm shall accept employment in contemplation or pending litigation if the lawyer knows or it is obvious that the lawyer or another lawyer in the lawyer's firm may be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony would or might be prejudice to the client. Likewise, *EC 5-9* instructs that "[i]f a lawyer is both counsel and witness on a significant issue, the lawyer becomes more easily impeachable for interest and thus may be a less effective witness. . . An advocate who becomes a witness is in the unseemly and ineffective position of arguing his or her own credibility. The roles of an advocate on issues of fact and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively."

Mr. Kirschenbaum's status as the property owner and his undisputed business relationship with builders Tom Abraham and [**15] Little Neck, coupled with the plaintiffs' claims that Mr. Kirschenbaum played an active role in the construction, render him a witness on material claims against him in this case. In addition, acting as attorney for himself and all other potentially liable defendants places him in the potential position of arguing his own credibility. Finally, since he benefitted from the very contracts upon which the plaintiffs seek to impose liability, there exists the heightened appearance of impropriety.

[***6] Based on the foregoing, the plaintiffs' cross-motion to disqualify Kirschenbaum & Kirschenbaum, P.C. as attorneys for the defendants is hereby granted.

Dated: *March 29, 2010*

Peter H. Mayer, J.S.C.

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