SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE PART 10

Justice

STUART A. GELB and NANCI GELB,

Plaintiffs,

- v -

EDWARD LEE CAVE, INC. and DENNIS DiLORENZO

Defendants.

INDEX NO. 400450/07

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

In accordance with this court's decision after trial, it is ordered that:

The parties may retrieve the exhibits proffered at trial from the courtroom on or before March 7, 2011. In the event the parties fail to pick up such exhibits, they will be filed with the County Clerk.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2/04/11

Hon. Judith J. Gische, *J.S.C.*

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE/SUBMIT ORDER

Supreme Court of the State of New York
County of New York: Part 10

Stuart A. Gelb and Nanci L. Gelb,

Plaintiffs,

Decision After Trial

-against-

Index# 400450/07

Edward Lee Cave, Inc. and Dennis DiLorenzo,

Defendants.

Present: Hon. Judith J. Gische.

Appearances:

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This action was tried, before the Court and without a jury, on September 13th and 15th, and October 15th and 18th all in 2010. The trial concerned the claims made by the plaintiffs (collectively the "Gelbs") against defendant, Dennis DiLorenzo ("DiLorenzo"), only.[1] Post trial memoranda were submitted on January 7, 2011. The underlying

[1]The plaintiffs and co-defendant, Edward Lee Cave, Inc., settled their disputes before the trial commenced. Edward Lee Cave, Inc. also discontinued its cross-claim against DiLorenzo.

action sets forth two causes of action against DiLorenzo, respectively for fraud (first cause of action) and breach of fiduciary duty (second cause of action). Both claims arise out of a common set of facts. DiLorenzo has interposed an answer denying the material allegations of the complaint and asserting two affirmative defenses and counterclaims. No evidence was adduced at trial regarding the counterclaims and they were eventually withdrawn in DiLorenzo's post trial memorandum of law.

The following fact witness were called by the Gelbs to testify at trial: Stuart Gelb; Beverly Draggon; Juliette Janssens; and DiLorenzo. Stanton F. Roth testified as the Gelbs' expert witness. The following fact witnesses were called by DiLorenzo to testify at trial: DiLorenzo; Kent Knutson; and Jeffrey Lewisohn. Elizabeth Kivlan was called as DiLorenzo's expert witness.

Based upon the credible evidence adduced at trial, the court makes the following findings of fact and conclusions of law:

In or about July 2003, the Gelbs purchased, as an investment, apartment 4LAW located at One Morton Square, New York, NY ("Gelb apartment") for a purchase price of $2,250,000. The Gelb apartment had 3 bedrooms and 3 ½ bathrooms. DiLorenzo and his then domestic partner, Kent Knutson, were co-owners and occupants of apartment 4LBW ("DiLorenzo apartment") which was immediately contiguous to the Gelbs' apartment. The DiLorenzo apartment had 2 bedrooms and 2 ½ bathrooms. DiLorenzo and Knutson had purchased the DiLorenzo apartment for a purchase price of $1,760.000. Both apartments were in a newly constructed condominium building and each of the parties was the original owner of their respective apartment.

In or about the Spring of 2005, the Gelbs decided to try to sell their apartment.

In April 2005, they signed an exclusive brokerage agreement to listl it with Beverly Draggon of Citihabitats. The listing price for the Gelb apartment, at that time, was $4,995,000.

DiLorenzo was a licensed real estate sales agent, then associated with Edward Lee Cave, Inc. ("Cave"). In the spring of 2005, he and Knutson had also been considering selling their apartment. Before then, DiLorenzo and Stuart Gelb had prior business dealings with each other. Stuart Gelb was a businessman in the garment industry, but he had recently become interested in investing in apartments in New York City. DiLorenzo had been showing Stuart Gelb potential properties to invest in. Stuart Gelb and DiLorenzo were in fairly regular contact. When DiLorenzo learned that the Gelb apartment was listed for sale, he contacted Stuart Gelb directly.

Among other things, the parties discussed the possibility of marketing the two apartments together. The suggestion was made by DiLorenzo. Both parties agreed that by marketing the two apartments together, as well as individually, they could reach an additional target market and increase the potential for a sale. At DiLorenzo's urging, not only would the parties jointly act as principals to sell their two apartments jointly, but DiLorenzo, through Cave, would become an exclusive co-broker of the Gelb apartment with Beverly Draggon and Citihabitats . In furtherance thereof, Gelb contacted Beverly Draggon and had the exclusive contract with her at Citihabitats revised to include DiLorenzo and Cave, as a co-exclusive broker. Under the new arrangement, the Gelb apartment was listed for sale individually at $4,695.000 and the combined apartments were listed collectively for sale at $7,725,000.

Stuart Gelb claimed that DiLorenzo never expressly notified him that there was

any conflict of interest in DiLorenzo acting both as the real estate agent attempting to sell the two apartments together and as owner of one of the apartments being offered for sale. DiLorenzo implicitly confirmed this, because he testified that he believed there was no conflict of interest. Up until there was a *bona fide* offer, the parties never reached any agreement about how the purchase monies would be allocated between the combined apartments. Following the decision to market the combined apartments together, DiLorenzo began to aggressively market them. He created marketing literature, showed the apartments and handled all of the negotiations with would-be purchasers.

In November 2005, Anson and Veronica Beard (the "Beards") expressed interest in purchasing both apartments for the purposes of combining them into a single residence for their growing family. The Beards were working with and negotiating through a real estate broker named Juliette Janssens. Negotiations broke down for a period of time. The Beards, however, resumed their interest in the apartments in January 2006. Eventually, the Beards offered $7,050,000 for the combined apartments.

DiLorenzo related the offer to Stuart Gelb, at which time the parties discussed and agreed in principle that they would accept the offer and that the Gelbs would receive $3,725,000 and DiLorenzo and Knutson would receiver $3,325,000 from the sale. DiLorenzo admitted that in reaching an agreement with Gelbs about the division of the gross proceeds, he relied on knowledge he had obtained from Stuart Gelb about his willingness to accept an offer at a particular amount. DiLorenzo also admitted that he and Knutson had an amount that they wanted to get for the sale of their apartment,

but that their bottom line amount was never communicated to the Gelbs before the parties reached an agreement on the division of the gross proceeds offered to purchase the combined apartments.

It was always understood that separate contracts would be executed with the Beards for each of the apartments. When DiLorenzo went to Janssens to accept the offer and discuss the particulars of the deal, Janssens told DiLorenzo that the Beards wanted to allocate $4,000,000 of the purchase price to the Gelb apartment and $3,050,000 of the purchase price to the DiLorenzo apartment. According to Janssens, she told DiLorenzo that "it was very important for the Beards that the distinction be made so when they wanted to resell the units and the tax records it showed that they paid more for [the Gelb apartment] because they felt that it was worth more than [the DiLorenzo apartment]." (Trial Transcript ["TT"] 9/15/10 p. 54).

DiLorenzo was upset and shocked by the Beards' allocation. He believed that the DiLorenzo apartment was worth more than the Beards were willing to pay for it. Janssens testified that she made it clear to DiLorenzo that her clients were insisting on the allocation of the purchase price their way because they believed that the Gelb apartment was worth more and they wanted the purchase prices to reflect that.

Very soon after his conversation with Janssens, DiLorenzo contacted Stuart Gelb. According to Stuart Gelb, DiLornzo said: "We have a problem [Anson Beard's] mother want to purchase the [Gelb] apartment, all cash, for $4,000,000." When Mr. Gelb asked why, DiLorenzo responded: "Well, she had some type of tax issue...I don't know how we're going to handle this." (TT 9/13/10 p. 28). According to DiLorenzo, he told Stuart Gelb that the Beards are "looking to allocate $4,000,000 towards your

apartment and three million fifty toward ours...this was not acceptable to us. This is not what we agreed to. I don't want to deal with [the Beards]." (TT 9/15/10 p.147-148).

Even at this point in their negotiations, DiLorenzo testified that he did not believe he had any conflict of interest with the Gelbs in connection with this transaction.

The parties then agreed among themselves that the contracts of sale would reflect the price allocation desired by the purchasers, but the parties would reallocate the money so that DiLorenzo and Knutson would receive an additional $275,000 for the DiLorenzo apartment. The agreement was memorialized in a writing, prepared by the Gelb's attorney, and dated March 31, 2006 ("Adjustment Agreement"). It was signed by the Gelbs, Dennis DiLorenzo and Kent Knutson. The Adjustment Agreement expressly provides in pertinent part:

> "...We decided that it would be in our mutual interest to sell the two units together for an aggregate purchase price of $7,050,000. We agreed that the total purchase price should be divided among us so that $3,725,000 is paid to Stuart and Nanci for the S & N unit and $3,325,000 is paid to Dennis and Kent for the D & K unit.
>
> Potential purchasers (the "Beards") have come forward who are willing to pay $7,050,000 for the two units and contracts of sale have been forwarded to their attorneys. The Beards intend to lease the D & K Unit for several months before purchasing it; and to purchase the S & N Unit within 30 to 60 days. The Beards insist, however, that for their purposes, the Beards will purchase the D & K Unit for $3,050,000 and the S & N Unit for $4,000,000.
>
> As a result of the foregoing, by signing and exchanging a copy of this letter, it will be agreed among us that at the closing of the sale to the Beards of the S & N Unit for $4,000,000 Stuart and Nanci will remit to Dennis and Kent a certified or cashiers check in the amount of $275,000 (the "Adjustment"), representing an adjustment of the purchase price of the two units so that the actual purchase price of the S & N unit will be $3,725,000 and, when closed, the actual purchase price of the D & K unit will be $3,325,000. Stuart and Nanci hereby guarantee to Dennis and Kent that if, as, and when the S & N unit is sold to the Beards for

$4,000,000, at closing the $275,000 Adjustment will be paid to Dennis and Kent. "

In an effort to get the deal done, DiLorenzo also asked, and Janssens agreed, to cut her commission. DiLorenzo, however, did not cut his own commission on the seller side, nor did he ask Beverly Draggon to do so.[2] Thereafter, two separate contracts were executed for the two separate apartments. The closing on the Gelb apartment took place before the closing on the DiLorenzo apartment.[3] At closing, Stuart Gelb claimed that he learned for the first time that the Beards wanted to pay $4,000,000 for the Gelb apartment because they thought it was worth that amount. Notwithstanding learning this at closing, the Gelbs honored their agreement with DiLorenzo to pay him and Knutson the $275,000 adjustment. It is this payment that largely forms the basis for the Gelbs' claim of damages.

Discussion

There are three preliminary evidentiary issues that the Court must address before turning to a discussion of the particular causes of action asserted. The first is whether the court should consider parole evidence about the events surrounding the Adjustment Agreement. The second is whether the court should consider the testimony of any expert in connection with the claims asserted for breach of fiduciary duty. The Gelbs called Stanton F. Roth to testify as an expert on the issue of ethical conduct of real estate sales persons and whether DiLorenzo had deviated from those

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[2]Although Janssens was clearly unhappy with DiLorenzo's self serving conduct with regard to the commission, this issue had no negative impact on the Gelbs.

[3] DiLorenzo and the Beards had legal disputes before the contract actually closed. Those disputes are not germane to the Gelbs' disputes with DiLorenzo.

standards of conduct. DiLorenzo objected, but after the Court reserved decision on the issue, he called Elizabeth Kivlan as his own expert, but without prejudice to his claim that no experts at all should have been permitted to testify at trial. The third issue, raised for the first time in DiLorenzo's post trial memorandum of law, is whether DiLorenzo is entitled to the benefit of an unfavorable inference, because the Gelbs failed to call Anson and/or Victoria Beard and Nanci Gelb to testify at trial.

Parole Evidence

DiLorenzo argues that because the Adjustment Agreement is clear and unambiguous, it should be enforced according to its terms and parole evidence should not be considered by the court to vary its terms. It is black letter law that the parole evidence rule bars the admission of extrinsic evidence to contradict or vary the terms of an unambiguous written contract, intended to embody the agreement between the parties. Marine Midland Bank-Southern v. Thurlow, 53 NY2d 381 (1981); Johnson v. Stanfield Capital Partners, LLC, 68 AD3d 628 (1st dept. 2009); Cole v. Macklowe, 40 AD3d 396 (1st dept. 2007). The parole evidence rule, however, does not apply to exclude evidence of fraud. Cleangen Corp. v. Filmax Corp. 3 AD3d 468 (2nd dept. 2004); Deutsch v. Tober Logistics, Inc., 2010 NY Slip OP 31431 (NY Co. Supreme, Gische, J.)(and cases cited therein).

At bar, the first cause of action is asserted for fraud, and is based upon the Gelbs' claim that DiLorenzo misrepresented and/or withheld information from them which induced them to enter into the Adjustment Agreement. Thus, the parole evidence rule does not apply.

Courts have also recognized that issues regarding fiduciary duties may exist,

even apart from written contracts executed between the parties. EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11 (2005). Further, a fiduciary cannot by contract relieve itself of the duty to disclose the very information the beneficiary needs in order to make an informed decision about whether to agree to the contract in the first place. Blue Chip Emerald LLC v. Allied Partners, Inc., 299 AD2d 278 (1st dept. 2002). In order to give effect to these legal principles, evidence surrounding the circumstances of the underlying agreement, must be admissible.

Accordingly, parole evidence regarding the events that led up to and the negotiation of the Adjustment Agreement is admissible in this action on both of plaintiff's causes of action and will not be stricken from the record.

Expert Witnesses

The Gelbs introduced the testimony of Stanton Roth, who opined that DiLorenzo had breached his ethical obligations to the Gelbs in connection with his conduct in this transaction. On direct examination, Roth testified that DiLorenzo violated his professional obligations to the plaintiffs as a licenced sales person. Roth testified that his opinion was based upon his "experience and from all the published treatises on the activities of real estate sales persons and brokers." (TT 10/15/10 p.8). On cross-examination, Roth testified that his opinion was based upon: The Code of Ethics of the Real Estate Board of New York; The Code of Ethics of the National Association of Realtors; all of the textbooks that he uses to teach broker/salesperson licencing law in the State of New York; The Constitution of the Real Estate Board of New York; and 50 plus years of experience in training real estate sales persons and brokers as to professionalism. Roth also stated that his opinions were based, in part, on the statutes

and regulations of the Department of State. Roth gave no express testimony citing or interpreting any specific statutes, regulations or industry code of ethics.

DiLorenzo argues that the Court should strike Roth's testimony because it is impermissibly based upon his interpretation of statutes and also because it impermissibly seeks to hold DiLorenzo to rules of a membership organization that exceed what is otherwise required under law.

In general, admissibility of expert testimony is addressed to the discretion of the trial court, with the guiding principle being whether it would help clarify an issue calling for professional or technical knowledge, possessed by an expert and beyond the ken of the trier of fact. DeLong v. Erie, 60 NY2d 296 (1983); People v. Cronin, 60 NY2d 430 (1983). An expert opinion may even be offered on an ultimate issue, if it otherwise meets the legal standard of admissibility. People v. Miller, 91 NY2d 372 (1998).

In the recent case of Pergament v. Roach, 18 Misc3d 1141(A)(Sup Ct. Nassau Co., Warshawsky, J.) the court discussed the admissibility of expert testimony in the context of a claim for breach of fiduciary duty arising in the securities industry. The court observed that the line between admissible and inadmissible expert testimony as to the customs and practices of a particular industry often becomes blurred when the testimony concerns a party's compliance with customs and practices that implicate legal duties. In defining what expert testimony would be allowed and what would be excluded, the court excluded any expert opinion on what was required under the securities law or whether defendant complied with the Securities Act. It permitted, however, testimony as to the level of trust reposed in a financial advisor based upon custom and practice in the securities industry.

The reasoning of Pergament, *supra*, is sound and directly applies to the case at bar. No testimony was proffered by Roth that DiLorenzo acted in violation of any state statute. Thus, it is only the Court that will decide the issue of whether DiLorenzo acted in violation of state law, without regard to the testimony of either expert. To the extent, however, that Roth, and consequently Kivilan, testified as to the level of trust reposed in the a real estate sales person, based upon custom and practice in the industry, it is considered by the court, along with all of the other evidence. Meason v. Greenwich and Perry Street Housing Corp., 268 AD2d 156 (1st dept. 2000).

The Court rejects DiLorenzo's argument that Roth's testimony should be entirely stricken because it is based, in part, on the code of ethics of certain organizations in the real estate industry. DiLorenzo's argument is based primarily on the Court of Appeals' decision in Rivera v. New York City Transit Authority (77 NY2d 322 [1991]), holding that an internal rule book and/or manual which imposes a higher standard of care than otherwise imposed by law is not admissible. Rivera, *supra*, and the other cases primarily relied upon by DiLorenzo, were decided in the context of the legal duty of care applied in a negligence action. In contrast, this case is based upon fiduciary duties, the scope of which can be established by, among other things, custom and practice in the industry, which may be informed by the codes of conduct developed within that industry. See: Pergament v. Roach, *supra*; Rokosz v. Belmont Watkins Realty Corp., 5 Misc3d 1003(A)(NY Civ. Ct. 2004).

Therefore, the testimony of Roth, and consequently, Kivlin, are not stricken from the trial record.

Missing Witnesses

DiLorenzo argues that because this case concerns the reasons that the Beards insisted that the contract price for the two apartments be allocated a certain way, the Gelbs' failure to call either or both of the Beards as witnesses, should give rise to a strong inference that their testimony would have been unfavorable to the Gelbs' case. Likewise, DiLorenzo argues that a negative inference should ensue because Nanci Gelb, a named plaintiff, did not testify at trial.

This argument fails. In order to get the benefit of a negative inference for an uncalled witness, the party seeking the inference has the burden to notify the Court as soon as practicable of the issue. This is to allow the opposing party to adjust the trial stategy, by possibly trying to call that witness and/or explaining at trial the reason for the failure. People v. Gonzalez, 68 NY2d 424 (1986); Spoto v. SDR Construction Inc., 226 AD2d 202 (1st dept. 1996). DiLorenzo only raised this request for the first time in his post-trial submissions.

In any event, the inference is not appropriate as to the Beards because they are not under the Gelbs' control. People v. Savinon, 100 NY2d 192 (2003). Nor is it available to Nanci Gelb, because there is no showing that she had any knowledge on any issue material to the trial. People v. Gonzalez, *supra*. While she was a co-owner of the Gelb apartment, Stuart Gelb was primarily responsible for, and involved in, all of the negations, transactions and occurrences. This was established not only in Stuart Gelb's testimony, but DiLorenzo's testimony as well.

Fraud

Although denoted a cause of action for fraud, as further amplified by the Gelbs in

their post trial memorandum of law, the claim is really one for fraudulent misrepresentation and/or concealment, that induced them to enter into a contract to split the proceeds of the sale of the combined apartments in a particular manner, disadvantageous to the Gelbs.

The elements for fraudulent inducement, are identical to the elements of fraud, which require the plaintiff to establish: [1] a misrepresentation of material fact; [2] known by the defendant to be false; [3] intended to be relied upon when made [4] justifiable reliance; and [5] resulting injury. Ventur Group. LLC v. Finnerty, 68 AD3d 638 (1st dept. 2009). It also requires a showing that the misrepresentation was made of a present fact, not future intent, which was the inducement for entering into the contract. Sandra Greer Real Estate, Inc. v. Johnansen Orgainization, 182 AD2d 468 (1st dept. 1992); Newmark & Co. Real Estate, Inc. v. Gallo Vitucci Klar Pinter & Cogan, LLP, 2010 WL 4682652 (NY Co. 2010)(nor). To the extent the inducement is based upon the concealment of facts, the plaintiffs must also prove a confidential or fiduciary relationship as a predicate for the duty to disclose. 900 Unlimited, Inc., v. MCI Telecommunications Corp., 215 AD2d 227 (1st dept. 1995).

Here, the Gelbs clearly knew that the Beards were insisting on allocating $4,000,000 of the purchase price to the Gelb apartment and $3,050,000 to the DiLorenzo apartment. This fact is expressly recited in the Adjustment Agreement. It is also clear because in the agreement between the Gelbs and Beards, the purchase price is clearly recited as $4,000,000. Moreover, while Stuart Gelb and DiLorenzo give somewhat differing accounts of their conversations after they accepted the Beards' offer, both admit that DiLorenzo told Stuart Gelb that the Beards wanted the contracts

to reflect that $4,000,000 was being paid for the Gelb apartment and $3,050,000 was being paid for the DiLorenzo apartment. Consequently, there was no misrepresentation and/or concealment about what the Beards were willing to pay for each of the apartments.

The Gelbs' claim that DiLorenzo misrepresented and concealed the real reason that the Beards were insisting on the particular purchase price allocation. Stuart Gelb claims that he did not know, until the date of the actual closing, that the reason the Beards were insisting on a particular allocation was because the Beards thought it reflected the actual relative values of the two apartments. While there is some conflicting evidence about what DiLorenzo told Stuart Gelb, even taking Stuart Gelb's testimony in its best light, and even accepting that DiLorenzo had a fiduciary obligation to the Gelbs (see decision, *infra*), DiLorenzo's failure to tell the Gelbs that the Beards believed the Gelb apartment was worth $4,000,000 does not support a claim of fraud.

The Beards' opinion about the true value of the Gelb apartment, is just that: an opinion. Fraud, however, is predicated on a misrepresentation and/or concealment of a material fact. Thomas v. McLaughlin, 276 AD2d 440 (1st dept. 2000). There is no evidence that the Beards had any superior knowledge, information or expertise in Manhattan residential real estate, not otherwise available to the Gelbs, which would have made their statement about the value of the Gelb apartment anything more than opinion. Consequently, that missing information was not crucial for the Gelbs in their negotiations with DiLorenzo about how to divide the gross sale proceeds. In addition, the element of reliance is totally lacking, because in the general course, sellers do not rely on the buyers to establish an accurate value of the property that is the subject of a

purchase contract between them. In this particular case, the Gelbs had access to their own agent, Beverly Draggon, with an expertise to advise them on the value of their apartment and whether the Adjustment Agreement was appropriate.

Breach of Fiduciary

It is well established that a real estate broker has a fiduciary relationship to a client. Sonnenschein v. Douglas, Elliman-Gibbons & Ives, 96 NY2d 369 (2001); Dubbs v. Stribling & Associates, 96 NY2d 337 (2001). This duty is independent of any written contract, and even where there are contracts made, the duties under the contract and the common law fiduciary duties are often viewed co-extensively. See: Coldwell Banker Residential Real Estate v. Berner, 202 AD2d 949 (3rd dept. 1994). Moreover, although there may be some differences, the general legal proposition that makes real estate professionals fiduciaries is used interchangeably for both licensed brokers and real estate sales agents. Coldwell Banker Residential Real Estate v. Berner, *supra*. Thus, there can be no dispute that DiLorenzo, as the co-exclusive sales person to sell the Gelb apartment, had fiduciary obligations to the Gelbs in connection with the sale transaction with the Beards. Dubbs v. Stribling & Associates, 96 NY2d 337 (2001)

A real estate broker/salesperson fiduciary duty includes a duty of good faith and loyalty and to act in the best interest of his/her/its principal. Precision Glass Tinting v. Long, 293 AD2d 594 (2nd dept. 2002). The duty is breached by failing to disclose information obtained during the period of engagement, which affects the transaction in which the broker/salesperson is retained, so that the principal may take steps to protect his or her interests. Coldwell Banker Residential Real Estate v. Berner, 202 AD2d 949 (3rd dept. 1994), *supra*. In addition, in order to prevail on a claim for breach of fiduciary

duty, the client must prove not only that some duty was breached but also that the offending conduct was a substantial factor in causing damages. Kurtzman v. Bergstol, 40 AD3d 588 (2nd dept. 2007).

The Gelbs argue that DiLorenzo violated his fiduciary duties in the following ways:

[1] he solicited Stuart Gelb to violate an existing exclusive broker agreement with Beverly Draggon to make him a co-exclusive broker;

[2] he failed to sell the Gelb apartment on the most favorable terms to the Gelbs;

[3] he served two masters;

[4] he breached his duty of confidentiality; and

[5] he breached his duty of full and complete disclosure.

The first claimed breach of duty is rejected. Regardless of whether DiLorenzo acted in violation of industry customs and ethics in insinuating himself into a co-exclusive agreement with Beverly Draggon to sell the Gelbs apartment, the Gelbs have not shown that such a violation caused them damages. The Gelbs paid the same commission, regardless of whether there were one or two co-exclusive brokers on the transaction. The loss of a more favorable sales price cannot be casually related to the fact that DiLorenzo became a co-exclusive agent on the deal.

The four remaining claims for breach of duty essentially flow from the claimed conflict in DiLorenzo acting as the broker for both himself and Knutson while he was also representing the Gelb's interest and then selling both apartments in a single transaction. Although historically, a fiduciary obligation of undivided loyalties carries with it a legal prohibition against serving two masters, the rule was always ameliorated

by full disclosure. People v. Davis, 33 NY Crim R 460 (NY Sp. Sess. 1915). As real estate transactions became more complex over time, the role of a broker, what did and did not constitute a divided loyalty, and the attendant duties of disclosure, likewise became more complex. Rivkin v. Century 21 Teran Realty LLC, 10 NY3d 344 (2008). In the seminal case of Dubbs v. Stribling &Assoc. (96 NY2d 337 [2001]), the Court of Appeals expressly addressed the rules of conduct governing the conduct of a real estate broker where s/he had a personal interest in the real estate transaction. The court held that:

> Where a broker's interests or loyalties are divided due to a personal stake in the transaction or representation of multiple parties, the broker must disclose to principal the nature and extent of the broker's interest in the transaction or the material facts illuminating the broker's divided loyalties. '[T]he disclosure to be effective must lay bare the truth, without ambiguity or reservation, in all stark significance' (citations omitted).

The duty requires that the broker disclose any information that could reasonably bear upon the buyer's consideration of the transaction. Dubbs v. Stribling & Assoc., *supra*; Dube-forman v. D'Agostino, 61 AD3d 1255 (3rd dept. 2009); Brown Harris Stevens Residential Sales, LLC v. Oxford Capital, 306 AD2d 112 (1st dept. 2003).

DiLorenzo's overarching argument, that the Adjustment Agreement precludes any claim for breach of fiduciary duty, is rejected. A fiduciary cannot, by contract, relieve itself of the fiduciary obligation of full disclosure by withholding the very information the beneficiary needs in order to make a reasoned judgment on whether to agree to the proposed contract. Dube-forman v. D'Agostino. *supra.*

The Court also rejects DiLorenzo's argument, relying on Dubbs v. Stribling & Assoc., *supra*, that the fact that a broker has a personal stake in a transaction does not

present an inherent conflict. Dubbs assumes that where a broker has a personal stake in the transaction there is an inherent conflict of interest, notwithstanding that the broker's fiduciary obligations may still be fulfilled by appropriate and full disclosure.

The issue in this case really pares down to whether the information disclosed to the Gelbs, before they signed the Adjustment Agreement, was sufficient for DiLorenzo to have fulfilled his fiduciary duty. For the reasons set forth below, the Court believes that the information known to the Gelbs was sufficient.

Although DiLorenzo did not use express language, in words or substance disclosing to the Gelbs, that acting as a co-exclusive salesperson for the sale of the combined apartments was a conflict of interest, all the operative facts were known to the Gelbs. At the outset of the co-exclusive brokerage arrangement, the Gelbs fully knew that DiLorenzo was an owner of the DiLorenzo apartment with Knutson. They knew from the beginning of their arrangement that DiLorenzo had a personal financial stake in selling the DiLorenzo apartment and that DiLorenzo, like the Gelbs, had a personal interest in maximizing his profit from any eventual sale. They knew, or should have known, from these facts that there was an inherent conflict that in selling the apartments jointly, the parties at some point would have to determine how to split the gross proceeds. [4]

At or about the time the parties had a *bona fide* offer of $7,050,000 for the combined apartments, and before the parties signed the Adjustment Agreement, the

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[4]In this regard, the court also rejects DiLorenzo's testimony that he did not believe there was any conflict. The facts lead to the inescapable conclusion that he either knew or should have known about the potential conflict of interest.

Gelbs knew that the Beards were insisting on allocating $4,000,000 of the combined purchase price to the Gelb apartment. While there is some dispute about what the Gelbs knew about Beards' reasons for the allocation, the Beards' subjective personal reasons for insisting on a particular allocation are not material facts which should have reasonably affected the Gelbs' decision about how to proceed with the transaction and structure it the way they did.

The parties' collateral dispute about whether Stuart Gelb was savvy about manhattan real estate has no impact on the court's conclusions. Even if he was unfamiliar with the Manhattan real estate market, Stuart Gelb was otherwise a savvy businessman with access to professionals, including their real estate salesperson, Beverly Draggon, acting solely for them in this matter. If there were issues about the relative values of the apartments and/or how to allocate the combined purchase price between the Gelbs and DiLorenzo, Stuart Gelb had access to information and resources to raise them.

The court's findings are limited to holding that the disclosures made in this case were sufficient to fulfill DiLorenzo's fiduciary duty. These findings are not undermined by the other facts in the record establishing that DiLorenzo: acted without fully understanding his duties to the Gelbs and in a personally opportunistic manner, maximizing his personal financial gain to the detriment of his clients. The disclosures made by DiLorenzo, even if they were not so intended, were sufficient for the Gelbs to have made reasoned decisions about whether and how to proceed with the transaction. Moreover, DiLorenzo's actions, by which he maximized his own profit to the detriment of the Gelbs, was fully known to the Gelbs when they negotiated and agreed to the

Adjustment Agreement.

Since the Gelbs were unable to sustain either of their two causes of action, they are not entitled to compensatory damages. Having failed to prove entitlement to compensatory damages, they are not entitled to punitive damages. Reads Co., LLC v. Katz, 72 AD2d 1054 (2nd dept. 2010).

Attorneys fees for frivolous action

Plaintiffs seek attorneys fees claiming that DiLorenzo frivolously interposed three counterclaims against them, which have no merit. The counterclaims were not litigated to conclusion and no proof about them was ever offered to or taken by the court. The counterclaims were withdrawn by DiLorenzo in his post trial Memorandum of Law.

Pursuant to 22 NYCRR §130-1, sanctions can be imposed when conduct complained of is frivolous. Conduct is frivolous within the meaning of Part 130 if:

> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false.

The Court must set forth the basis for the imposition of sanctions and the amount of sanctions imposed. Yemon Corp. v 155 Wooster Street, Inc., 33 AD3d 67 (1st dept. 2006). Any remedy must be dictated by fairness and equity. Levy v. Carol Management Corp., 260 AD2d 27 (1st dept. 1999). In determining whether the conduct was frivolous, the court shall consider, among other issues, the circumstances under which the conduct took place and whether the conduct was continued when its lack of

legal or factual basis was or should have been apparent. Tavella v. Tavalla, 25 AD3d 523 (1st dept. 2006).

The court denies the Gelbs' request for sanctions. The counterclaims were never pursued at trial and, ultimately, they were withdrawn. There is no basis on this record for the court to conclude one way or the other whether the counterclaims completely lacked legal merit, what was the motivation for the counterclaims and/or that they were predicated on false material factual statements.

Motion for a Directed Verdict

At the conclusion of the Gelbs' case, DiLorenzo moved for a directed verdict. The court reserved decision. This trial decision, finding that the Gelbs are not entitled to judgment, however, renders the motion for a directed verdict as moot. Accordingly, the motion for a directed verdict is denied.

Conclusion

In accordance with this decision, DiLorenzo is entitled to a judgment dismissing the complaint and the Gelbs are entitled to a judgment dismissing the counterclaims. This constitutes the Court's decision after trial. Any requested relief not otherwise expressly granted therein, is denied. Either party may settle a judgment on Notice.

Dated: New York, New York
February 4, 2011

ENTER:

J.G. J.S.C.