SCAN

SHORT FORM ORDER

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SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 8

WASHINGTON TITLE INSURANCE COMPANY,

Plaintiff,

-against-

INDEX NO.: 021167/2009
MOTION DATE: 06/18/2010
MOTION SEQUENCE: 001 and 002

SAND LANE TITLE AGENCY, LLC, ALEKSANDR POLYAKOV and YANA SHTINDLER,

Defendants.

The following papers read on these motions:

Notice of Motion, Affidavit, Affirmation & Exhibits Annexed	1
Memorandum of Law in Support of Motion to Dismiss Complaint against Yana Shtindler	2
Notice of Cross-Motion, Affidavit, Affirmation & Exhibits Annexed	3
Memorandum of Law in Reply to Plaintiff's Opposition to Motion to Dismiss Complaint and in Opposition to Cross-Motion	4
Reply Affirmation of Daniel G. Walsh, Esq.	5

PRELIMINARY STATEMENT

Defendant Shtindler moves to dismiss the complaint pursuant to CPLR § 3211. Annexed to the motion are an affirmation of counsel, an affidavit of Shtindler, and the affidavit of service. The point of the motion would appear to be that defendant was not properly served in that she did not maintain her office at the address identified as of the date of service. By stipulation dated April 23, 2010, defendant Shtinler appeared and withdrew her claim for dismissal based on improper service. (Exh. "G" to Cross-motion).

The memorandum of law in support of the motion, however, deals with substantive

claims that Shtindler was not a party to the underwriting agreement and is not liable to plaintiff. Movant does not attach a copy of the Underwriting Agreement to the motion. Cross-movant attaches only the first three pages of the Agreement, absent a signature page.

The cross-motion seeks leave to amend the complaint to add a cause of action against Shtindler for aiding and abetting a breach of a fiduciary duty. There is no copy of the proposed amended complaint annexed to the motion papers.

Notably, there does not appear to have been a Rule 24 conference prior to the making of the motion and cross-motion.

BACKGROUND

By agreement dated January 14, 2005, Washington Title Insurance Company ("Washington") agreed with Sand Lane Title, LLC ("Sand Lane")for the latter to act as an agent to issue policies of title insurance to purchasers and lenders in real estate transactions. No complete copy of the contract is annexed to either the motion or cross-motion.

Plaintiff alleges in its complaint (Exh. "A" to Motion) that defendant Yana Shtindler ("Shtindler") is an officer and agent of Sand Lane, and as such, owed plaintiff a fiduciary duty of skill, care and loyalty. The complaint further alleges that Sand Lane has failed to record documents obtained by them for recording, and has either misappropriated or converted Trust Funds received by defendants in connection with their operations on behalf of plaintiff.

The complaint alleges eleven causes of action:

Cause of Action	Claim	Against
FIRST	Breach of Contract	Polyakov and Sand Lane
SECOND	Breach of Fiduciary Duty	Polyakov, Shtindler, Sand Lane
THIRD	Conversion	Ployakov, Shtindler, Sand Lane
FOURTH	Negligence	Ployakov, Shtindler, Sand Lane

FIFTH	Fraud	Polyakov, Shtindler, Sand Lane
SIXTH	Contractual Indemnification	Ployakov, Sand Lane
SEVENTH	Equitable Accounting	Polyakov, Shtindler, Sand Lane
EIGHTH	Constructive Trust	Polyakov, Shtindler, Sand Lane
NINTH	Mandatory Injunction	Polyakov, Shtindler, Sand Lane
TENTH	Account Stated	Ployakov, Shtindler, Sand Lane
ELEVENTH	Attorneys' Fees	Polyakov, Sand Lane

The motion before the Court does not address the substantive issues as to whether the complaint states a cause of action against defendant Shtindler. The affirmation and affidavit in support are limited to the claimed defective service. As previously noted, this claim has been withdrawn by Stipulation dated April 23, 2010. The memorandum of law in support of the motion, however, addresses the sufficiency of the complaint and the opposition papers address these issues, and the Court will therefore treat the motion as one for relief pursuant to CPLR § 3211 (a)(7). The application for dismissal is addressed to the Second — Fifth, and Seventh — Tenth Causes of Action.

When determining a motion to dismiss for failure to state cause of action, the pleadings must be afforded a liberal construction, facts as alleged in the complaint are accepted as true, and the plaintiff is accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable legal theory. (*Uzzle v. Nunzie Court Homeowners Ass., Inc.* 55 A.D.3d 723 [2d Dept. 2008]). A pleading will not be dismissed for insufficiency merely because it is inartistically drawn; rather, such pleading is deemed to allege whatever can be implied from its statements by fair and reasonable intendment; the question is whether the requisite allegations of any valid cause of action cognizable by the state courts can be fairly gathered from all the averments. (*Brinkley v. Casablancas,* 80 A.D.2d 815 [1st Dept. 1981]).

The allegations against Shtindler are premised on the claim that she is an "officer

and agent of Sand Title", with whom plaintiff has an agency relationship. Simply being an officer or agent of a limited liability company, however, does not impose individual liability upon principals or agents. Were such to be the case, there would be no benefit to the formation of a limited liability company.

Breach of Fiduciary Duty

The mere fact of being a principal, member or agent of a limited liability company does not impose fiduciary obligations to other than the entity of which the individual is a principal, member or agent. While neither plaintiff nor defendant have submitted a full copy of the Underwriting Agreement, it is not even clear that Sand Lane itself owed a fiduciary duty to plaintiff. To the extent that the placement of title insurance by Sand Lane was non-discretionary in nature, the relationship is not one creating a relationship of trust and confidence giving rise to fiduciary duties. (*RNK Capital, LLC v. Natsource, LLC,* 2010 WL 3463586 (1st Dept. 2010).

The motion to dismiss the Second Cause of Action against Shtinler for breach of fiduciary duty is granted.

Conversion

A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession .(*State of New York v. Seventh Regiment Fund,* 98 N.Y.2d 249 [2002]. Two key elements of conversion are (1) plaintiff's possessory right or interest in the property (*Pierpoint v. Hoyt,* 260 N.Y.26 [1932]; (*Seventh Regiment Fund,* 98 N.Y.2d at 259) and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights. (*Employers' Fire Ins. Co. v. Cotten,* 245 N.Y. 102 [1927]); *see also* Restatement [Second] of Torts §§ 8A, 223, 243; Prosser and Keeton, Torts § 15, at 92, 102 [5th ed]).

There is no allegation in the complaint that Shtindler, acting in her individual capacity, intentionally and without authority exercised control over funds belonging to plaintiff. The

allegations, plain and simple, are that Sand Lane failed to turn over funds received by it in connection with closings of title on an unstated number of properties in which it served as title agent for plaintiff. Defendant Shtinler's motion to dismiss the Third Cause of Action for conversion is granted.

Negligence

To plead an action for negligence, plaintiff must show that defendant owed a duty to plaintiff, that plaintiff breached the duty, and that plaintiff was injured as a result of the breach. A claim arising out of an alleged breach of contract may not be converted to a tort absent the violation of a duty independent of that created in the contract. (*Givoldi, Inc. v. UPS,* 286 A.D.2d 220, 221 [1st Dept. 2001]). "This legal duty must spring from circumstances extraneous to, and not constituting elements of the contract, although it may be connected with and dependent upon the contract". (*Clark-Fitzpatrick, Inc. v. Long Island R. Co.,* 70 N.Y.2d 382, 389 [1987]).

Plaintiff is alleging nothing more than that defendants have not performed the contract in accordance with their obligations thereunder. More importantly, Shtindler is not party to the contract. The motion to dismiss the Fourth Cause of Action for Negligence is granted.

Fraud

The essential elements required to sustain a cause of action for fraud and deceit based on misrepresentation are: that a representation was made as a statement of a material, existing or preexisting fact, which was untrue and known to be untrue by the party making it, or, under certain circumstances, was recklessly or negligently made; that it was made with the intent to deceive and for the purpose of inducing the other party to act upon it; and that the other party did in fact justifiably rely on it and was thereby induced to act or refrain from acting, to his or her injury or damage. In short, they are "representation of a material existing fact, falsity, scienter, deception and injury". (*Daly v. Kochanowicz,* 67 A.D.3d 78, 89 [2d Dept. 2009]). (Internal citations and quotations omitted).

In the Fifth Cause of Action plaintiff alleges misrepresentations on the part of "Ployakov. Shtindler and/or Sand Lane" that Trust Funds were being used for proper purposes, and that all deeds, mortgages and other documents entrusted to the Defendants were being, or would be,

properly and promptly recorded. Reading between the lines, a fair interpretation of the complaint is to the effect that the foregoing was untrue, and known to be untrue by ~~plaintiff~~ defendant. There is no claim, however, that it was this misrepresentation which was intended to, and in fact succeeded in causing plaintiff to act, or not act, to its detriment. In fact, when such misrepresentations were made, the damage was already apparently done, since the money, according to the complaint, had been diverted to the personal benefit of defendants.

The complaint fails to allege a claim for fraud, and the Fifth Cause of Action as against Shtindler is dismissed.

Equitable Accounting and Constructive Trust

A constructive trust may be imposed "(w)hen property has been acquired in such circumstances that the holder of legal title may not in good conscience retain the beneficial interest." (*Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 386 [1919]). It is an equitable remedy, necessarily flexible so as to accomplish its purpose. (*Counihan v. Allstate Insurance Co.*, 194 F3d 357, 361 [2d Cir. 1999]), citing (*Simonds v. Simonds*, 45 N.Y.2d 233, 241 [1978]).

In *Sharp v. Kosmalski*, 40 N.Y.2d 119, 123 (1976), the Court of Appeals set forth four elements to establish a constructive trust: "(1) a confidential or fiduciary relation, (2), a promise, (3) a transfer in reliance thereon and(4) unjust enrichment." There are no rigid requirements for the establishment of a constructive trust, and these are more aptly considered as guidelines. Because the fundamental purpose is to prevent unjust enrichment, a constructive trust is appropriate whenever necessary to satisfy the demands of justice.(Matter of Estate of Knappen, 237 A.D.2d 677 [3d Dept 1997]).

Both of these equitable remedies require a showing of a fiduciary relationship. There was no fiduciary relationship between plaintiff and Shtindler, and the Sixth and Seventh Causes of Action are dismissed. (*Abacus Federal Savings Bank v. Lim,* 75 A.D.3d 472 [1st Dept. 2010]).

Mandatory Injunction

"To establish entitlement to a preliminary injunction, a movant must establish (1) a likelihood or probability of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of granting the injunction." (*De Fabio v.*

Omnipoint Communications, et al., 2009 WL 3210142 [N.Y.A.D. 2d Dept., 2009]); citing, CPLR 3201, *Doe v. Axelrod,* 73 N.Y.2d 748, 750 (1988), *W.T. Grant v. Srogi,* 52 N.Y.2d 496. 517 (1981); *See also, Automated Waste Disposal, Inc., v. Mid-Hudson Waste, Inc.,* 50 A.D.3d 1072 — 1073 (2d Dept. 2008).

"Irreparable injuries for the purpose of equity, has been held to mean any injury for which money damages are insufficient". (*Walsh v. Design Concepts,* 221 A.D.2d 454, 455 (2d Dept. 1995). On the contrary, "(e)conomic loss, which is compensable by money damages, does not constitute irreparable harm". (*EdCia Corp. v. McCormack,* 44 A.D.3d 991, 994 (2d Dept. 2007). Failure to enunciate non-economic loss constitutes a failure to demonstrate irreparable harm so as to warrant equitable relief in the form of an injunction (*Automated Waste Disposal* at 1073.

Likelihood of ultimate success on the merits does not import a predetermination of the issues, and does not constitute a certainty of success. The requirement is a protection against the exercise of a court's formidable equity power in cases where the moving party's position, no matter how emotionally compelling, is without legal foundation (*Tucker v. Toia,* 54 A.D.2d 322, 326 [4th Dept. 1976]).

In balancing the equities, the court must weigh the harm each side will suffer in the absence or in the face of injunctive relief. (*Washington Deluxe Bus, Inc. v. Sharmash Bus Corp.,* 47 A.D.3d 806 [2d Dept. 2008]). This is, by definition, a fact-sensitive inquiry. Thus, for example, where a pharmaceutical manufacturer of a non-prescription product was seeking to enforce exclusivity agreement and preliminarily enjoin defendant from importing and marketing the same product, the balance of equities favored defendant, since plaintiff could recover damages, while defendant would have to remove product from the shelves for an indeterminate length of time. (*OraSure Technologies, Inc. v. Prestige Brands Holdings, Inc.,* 42 A.D.3d 348 [1st Dept. 2007]).

Plaintiff's claims are of economic loss, replaceable by damages. The motion to dismiss the Ninth Cause of Action for "mandatory injunction" is granted.

Account Stated

"The receipt and retention of an account, without objection, within a reasonable period of time, coupled with an agreement to make partial payment, gives rise to an account stated entitling the moving party to summary judgment in its favor. (*Morrison, Cohen, Singer & Weinstein, LLP v. Ackerman,* 280 A.D.2d 355, 356 [1st Dept. 2001]).

There is, and never has been, an agreement between plaintiff and Shtindler to make payments. The agreement, as previously noted, is between plaintiff and Sand Lane. Plaintiff has not established a basis for piercing the veil of the limited liability company so as to make a statement of account binding on Shtindler.

The motion to dismiss the Tenth Cause of Action for Account Stated is granted.

Amend Complaint to Allege Aiding and Abetting Breach of Fiduciary Duty against Shtindler

At this point there is no viable claim remaining against Shtindler and therefore no complaint to amend. The motion to amend the complaint is therefore denied.

This constitutes the Decision and Order of the Court.

Dated: September 15, 2010

J.S.C.

ENTERED
SEP 17 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE