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**SHORT FORM ORDER
SUPREME COURT OF THE STATE OF NEW YORK**

Present:

**HON. LAWRENCE J. BRENNAN
Acting Justice Supreme Court**

-----x **TRIAL PART: 52**

MARTIN LEIBOWITZ

**NASSAU COUNTY
INDEX NO.: 10492/05**

Plaintiff,

**MOTION DATE: 10/31/05
SUBMIT DATE: 2/1/06
SEQ. NUMBER 2, /**

-against-

**IMPRESSIVE HOMES, INC.,
MARK DAYAN, EMPIRE HOME SALES, INC.,
ASAF DROR, ESQ., JOHN DOE
MORTGAGE BROKER, SUPERIOR ABSTRACT CORP.,
MARTIN WEISS, BRADLEY P. WEISS,
YOUNG, KLEIN & LONTOS, P.C., DREW R. LONTOS, ESQ.,
and UNITED GENERAL TITLE INSURANCE COMPANY**

Defendant

-----x
The following papers have been read on this motion:

**Defendant's Notice of Motion dated 9/30/05
Plaintiff's Notice of Motion dated 12/22/05
Affirmation in Opposition dated 11/23/05
Reply Affirmation dated 1/27/06
Reply Memorandum of Law dated 1/3/06
Memorandum of Law dated 9/29/05**

Motion by defendant Asaf Dror, Esq. for an order pursuant to CPLR

3211(a)(1) and (7) dismissing the complaint is granted. Motion by defendants

Impressive Homes, Inc., Mark Dayan, Empire Home Sales, Inc., Young, Klein &

Lontos, P.C. and Drew R. Lontos, Esq. for an order pursuant to CPLR 3211(a)(1)

dismissing the first, third, fourth and sixth causes of action set forth in the

closing, an Owner's Policy of Title Insurance was issued by co-defendants Martin Weiss and Superior Abstract Corp. ("Superior") as authorized agents to United General Title Insurance Co. Pursuant to the title insurance policy, "title or interest in the land is vested in: The INSURED by means of a deed made by Impressive Homes, Inc. dated 7/3/02 and duly transmitted for recording to the Nassau County Clerk's Office."

Due to a variety of circumstances, Impressive Homes was unable to complete the legalization of the subdivision until June 8, 2005. The deed conveying title to Leibowitz was signed on August 23, 2005.

On July 1, 2005, after the legalization had been completed, plaintiff commenced the instant action.

The complaint contains six causes of action asserted against eleven defendants including Impressive Homes, Inc. ("Impressive"), the seller of the subject premises; Mark Dayan, a principal of Impressive; Asaf Dror, plaintiff's attorney; Empire Home Sales, Inc., the broker for the real estate transaction; Superior Abstract Corporation, Martin Weiss, Bradley P. Weiss and United General Title Insurance, the title company; and Young, Klein & Lontos, P.C., Drew R. Lontos, Esq., Impressive's counsel.

The first and sixth causes of action which allege conspiracy to commit fraud and quiet title, respectively, are asserted against all defendants. The second cause of action which alleges breach of fiduciary duty is asserted against defendants

Dror, Weiss, Superior and United. The third cause of action which alleges breach of contract is asserted against defendant Impressive. The fourth cause of action which alleges breach of the escrow agreement is asserted against defendants Impressive, Impressive's counsel and Mark Dayan. The fifth cause of action which alleges legal malpractice is asserted against defendant Dror.

Defendant Dror moves to dismiss the entire complaint pursuant to CPLR 3211(a)(1) and (7). Defendants Impressive, Dayan, Empire, Young, Klein & Lontos, P.C. and Drew R. Lontos, Esq. seek to dismiss the first, third, fourth and sixth causes of action.

A dismissal motion based upon documentary evidence (CPLR 3211(a)(1)) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]; *Levenherz v Povinelli*, 14 AD3d 658 [2nd Dept. 2005]).

In considering a motion to dismiss for failure to state a cause of action (see CPLR 3211[a][7]), the pleading is to be liberally constructed (see CPLR 3026) and the facts alleged must be accepted as true (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Dye v Catholic Med. Ctr. of Brooklyn and Queens, Inc.*, 273 AD2d 193 [2nd Dept. 2000]; *Mayer v Sanders*, 264 AD2d 827 [2nd Dept. 1999]). Moreover, a pleading is accorded the benefit of every possible favorable inference, and reviewed in terms of whether the facts as alleged fit within any cognizable legal

theory (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 [2002]; *Leon v Martinez*, *supra* at p. 87-88; *see also Edmund v International Business Machines Corp.*, 91 NY2d 949, 951 [1998]; *Pepe v Tannenbaum*, 279 AD2d 620 [2nd Dept. 2001]).

The sixth cause of action for quiet title should be dismissed. Although the deed was recorded late, it is indisputable that the plaintiff is now the title owner of the subject premises.

Equally unavailing is plaintiff's fifth cause of action for legal malpractice. In order to establish negligence and proximate cause in a legal malpractice case, a plaintiff "must demonstrate that the attorney failed to exercise that degree of skill commonly exercised by an ordinary member of the legal community, and that but for the failure to exercise that requisite degree of skill the result sought by the plaintiff would . . . have been achieved." (*Caires v Siben & Siben, LLP*, 2 AD3d 282 [2nd Dept. 2003] quoting *Zeitlin v Greenberg, Margolos, Ziegler, Dratch, Fishman, Franzblau & Falkin, P.A.*, 209 AD2d 510 [2nd Dept. 1994]; *see Laventure v Galeno*, 307 AD2d 255 [2nd Dept. 2003]).

In support of its motion, defendant satisfied its *prima facie* burden of disproving at least one of the essential elements of a legal malpractice action (*Crawford v McBride*, 303 AD2d 442 [2nd Dept. 2003]; *Briggs v Berkman*, 284 AD2d 423, 424 [2nd Dept. 2001]; *Allen v Potrovich*, 282 AD2d 484, 485 [2nd Dept. 2001]). Plaintiff's claim of actual damages is speculative and lacking in merit (*see*

Postel v Jaffe & Segal, 237 AD2d 127 [1st Dept. 1997]; compare *Drucker v Mige Associates, II*, 225 AD2d 427, 428-429 [1st Dept. 1996], *lv den.* 88 NY2d 807 [1996]).

In response, plaintiff submitted an affirmation of an attorney and his own affidavit which contain conclusory and unsubstantiated statements that are insufficient to raise a triable issue of fact as to the defendant's negligence (*Caires v Siben & Siben, LLP, supra*; see *Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass*, 301 AD2d 63, 68-69 [1st Dept. 2002]).

The third and fourth causes of action which seek to recover \$330,500.00 based upon the assertion that the lack of a recorded deed renders the premises valueless should be dismissed.

In order to recover damages for breach of contract, a plaintiff must show: (1) a valid contract; (2) plaintiff's performance; (3) defendant's failure to perform; and (4) damages resulting from the breach (*see e.g. Furia v Furia*, 116 AD2d 694 [2nd Dept. 1986]).

While it is true that the deed was filed late, plaintiff has not sustained any actual damages.

The second cause of action alleging a breach of fiduciary duty, which is merely duplicative of a breach of contract claim, cannot stand (*Perl v Smith Barney, Inc.*, 230 AD2d 664, *lv den.* 89 NY2d 803 [1996]; see *Sergeants Benev. Ass'n Annuity Fund v Renck*, 19 AD3d 107 [1st Dept. 2005]). Furthermore, a

breach of duty claim requires that plaintiff demonstrate (a) a breach by a fiduciary of an obligation owed to plaintiff; (b) defendant's knowing participation in the breach; and © damages resulting therefrom (*see e.g. SCS Communications, Inc. v Herrick Co., Inc.*, 360 F.3d 329, 342 [2nd Cir. 2004]). No damages have been demonstrated here.

Dismissal of the first cause of action is also warranted. In order to establish a *prima facie* case for fraud, a plaintiff must establish that the defendant (1) made material representations that were false; (2) knew those representations to be false and made them with intent to deceive the plaintiff; (3) the plaintiff justifiably relied on the defendant's representations; and (4) the plaintiff was injured as a result of the defendant's representations (*Channel Master Corp. v Aluminum Ltd. Sales*, 4 NY2d 403 [1958]). Each of the foregoing elements must be supported by factual allegations containing the details constituting the wrong sufficient to satisfy CPLR 3016(b)" (*Cohen v Houseconnect Realty Corp.*, 289 AD2d 277 [2nd Dept. 2001]; *Black v Chittenden*, 69 NY2d 665, 668 [1986]).

The complaint does not contain any allegations setting forth the alleged material misrepresentations the defendant made to the plaintiff, and no such allegations are contained in the plaintiff's affidavit submitted in opposition to the dismissal motion (*see Cohen v Houseconnect Realty Corp.*, 289 AD2d 277 [2nd Dept. 2001]).

Furthermore, New York does not recognize a civil conspiracy to commit a

tort as an independent cause of action (*Ward v City of New York*, 15 AD3d 392 [2nd Dept. 2005]; see *Alexander & Alexander of New York, Inc. v Fritzen*, 68 NY2d 968 [1986]. Inasmuch as the fraud cause of action was dismissed, the cause of action which alleges a conspiracy to defraud plaintiff should be dismissed (*Pappas v Passias*, 271 AD2d 420, 421 [2nd Dept. 2000]).

As to the partial reimbursement of real estate taxes, paragraph 4 of the rider states that such reimbursement would be reimbursed “when the taxes are apportioned.” Since plaintiff has not alleged that the taxes have been apportioned, plaintiff’s claim is premature.

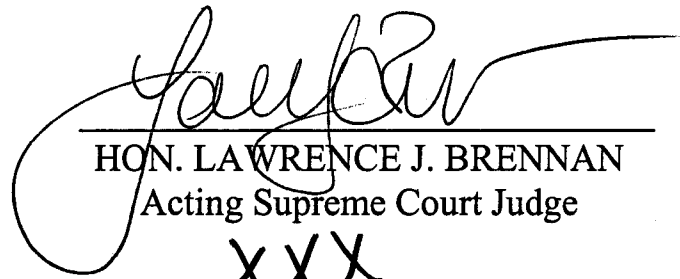
Nor can plaintiff maintain a claim for punitive damages as he had failed to establish that he was personally aggrieved by tortious conduct arising out of his contractual relationship (See *Rocanova v Equitable Life Assurance Society of U.S.*, 83 NY2d 603 [1994]; see also *Gellman v Seawane Golf & Country Club, Inc.*, 24 AD3d 415 [2nd Dept. 2005]).

In sum, plaintiff’s claims that he is entitled to the amount being held in escrow, reimbursement for an unspecified amount of taxes, and punitive damages are unavailing. The rider to the contract provided that the \$10,000 in escrow was to be paid or delivered to the plaintiff only in the event that he performed the necessary work to have the deed recorded. Plaintiff did not perform the work. Rather, defendant Impressive Homes performed the necessary work to have the deed recorded.

In view of the foregoing, the defendants' motions are granted and the complaint is dismissed.

It is so Ordered.

Dated: March 22, 2006



HON. LAWRENCE J. BRENNAN
Acting Supreme Court Judge
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ENTERED
MAR 27 2006
NASSAU COUNTY
COUNTY CLERK'S OFFICE