

Sasidharan v Piverger
2018 NY Slip Op 32669(U)
October 17, 2018
Supreme Court, Kings County
Docket Number: 2039/2013
Judge: Sylvia G. Ash
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of October, 2018.

P R E S E N T:

HON. SYLVIA G. ASH,

Justice.

-----X

SARALA SASIDHARAN, SUMIT SASIDHARAN
and SEVA MANAGEMENT CORPORATION,

Plaintiff(s),

DECISION AND ORDER

- against -

Index # 2039/2013

JACQUES-PHILIPPE PIVERGER, SCHELTON
ASSOUMOU, ASK CAPITAL, INC., RAVI J. MALLIK,
JASWANT S. MALLIK, O'KEKE & ASSOCIATES, PC,
ADANNA UGWONALI, ESQ., PATRICK O'KEKE, ESQ.
and GIAMPOLO RIVERA,

Mot. Seq. 9 - 12

Defendant(s).

-----X

The following e-filed papers numbered 304 to 416 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed _____

304 - 397

Opposing Affidavits (Affirmations) _____

398 - 410

Reply Affidavits (Affirmations) _____

411 - 416

Plaintiffs move for an Order granting them (1) partial summary judgment against Defendants, SCHELTON ASSOUMOU (“Assoumou”) and ASK CAPITAL, INC. (“ASK” and together with Assoumou, the “Assoumou Defendants”) on their first cause of action for breach of the subject note and guaranty; (2) partial summary judgment against Defendants, O’KEKE & ASSOCIATES, PC (“O’Keke PC”) and PATRICK O’KEKE (“Mr. O’Keke” and together with O’Keke PC, “O’Keke Defendants”) on their second cause of action for breach of the subject escrow agreement and breach of fiduciary duty; and (3) an inquest on damages.

Defendants, RAVIMALLIK (“Ravi”) and JASWANT S. MALLIK (“Jaswant” and together with Ravi, the “Mallik Defendants”) cross-move for an Order granting them summary judgment on the third and fourth causes of action asserted in the Amended Complaint, as well as dismissing the cross-claims asserted by the Assoumou Defendants and the O’Keke Defendants.

The O'Keke Defendants also move for summary judgment dismissing Plaintiffs' complaint and co-Defendants' cross-claims as against them.

The Assoumou Defendants also move for summary judgment dismissing Plaintiffs' complaint as against them on the grounds that the promissory note, which is the subject of this action, is criminally usurious and should therefore be cancelled and the debt discharged.

Background

For a more thorough recitation of the facts, this Court refers to the thorough Decision and Order dated June 3, 2014 (hereinafter the "June 2014 Decision") by Justice Carolyn E. Demarest, which largely addressed many of the substantive issues raised in the instant motions.

On or around February 1, 2013, Plaintiffs commenced this action seeking to recover monies loaned to ASK pursuant to a promissory note dated January 18, 2011 ("Note"). By way of background, in 2010, ASK sought to purchase a multi-family apartment building located at 18 Hancock Street in Brooklyn, New York (hereinafter the "Premises"). ASK, whose sole shareholder is Assoumou, is in the business of locating, buying, and developing distressed apartment buildings and single-family homes in foreclosure or in danger of foreclosure. Assoumou approached the owner of the Premises, nonparty Giampolo Rivera ("Rivera"), who agreed to sell the Premises which was in foreclosure. To assist in the renovation of the Premises and the buy-out of the Premises' then-existing tenants, the Assoumou Defendants borrowed \$150,000 from Plaintiffs, evidenced by the Note. The goal was to sell the Premises to Defendant JACQUES-PHILIPPE PIVERGER ("Piverger"). Pursuant to Section 7 of the Note, Assoumou, as principal of ASK, and Piverger, as buyer of the Premises, executed personal guaranties dated January 19, 2011.

In addition to the personal guaranties, ASK provided collateral to Plaintiffs by granting them, among other things, a security interest in a quitclaim deed to the Premises dated December 7, 2010, executed by Rivera in favor of Plaintiffs ("Quitclaim Deed"). The Quitclaim Deed was to be held in escrow, pursuant to an escrow agreement ("Escrow Agreement") by O'Keke PC. According to Section 7 of the Note, the Quitclaim Deed was to be released to Plaintiffs "subject to [the] Escrow Agreement" dated January 18, 2011. The Escrow Agreement was entered into by Plaintiffs, ASK, Piverger and O'Keke PC as the escrow agent. Pursuant to the Escrow Agreement, the Quitclaim Deed and \$63,000 in cash, which was taken from the \$150,000 loan from Plaintiffs, were deposited in escrow with O'Keke PC. Pursuant to Section 3 of the Escrow Agreement, if an Event of Default occurs under the Note, upon notice from Plaintiffs, O'Keke PC agreed to deliver the escrowed items,

including the cash, to Plaintiffs, who would record the Quitclaim Deed.

Ultimately, Piverger was unable to purchase the Premises. As a result, Assoumou contacted Ravi, with whom he had prior transactions, and offered him the opportunity to purchase the Premises for \$395,000, and to purchase and retire the Note that ASK had with Plaintiffs. Ravi agreed and on July 1, 2011, entered into a Contract of Sale with Rivera for the purchase of the Premises. The Contract of Sale listed O'Keke PC as the attorney for Rivera. It is undisputed that Ravi and Aaron Boyajian, Esq. ("Boyajian"), counsel for the Mallik Defendants in the purchase of the Premises, were advised of the existence of the Note and that Assoumou and Plaintiffs represented to them that the loan held by Plaintiffs was a lien on the Premises. In fact, Ravi had Boyajian draft a note purchase agreement ("Note Purchase Agreement") to purchase the Note for \$140,000.00.¹ However, after purchasing the Premises, the closing of which occurred on April 23, 2012, the Mallik Defendants failed to satisfy the Note. According to Ravi and Boyajian, after receiving a title report on the Premises, they discovered that ASK's loan transaction with Plaintiffs was not recorded as a lien against the Premises. The Mallik Defendants took the position that they did not have a legal obligation to pay the Note.

Within several months of this action's commencement in 2013 and before the benefit of any discovery, the Mallik Defendants, O'Keke Defendants and Piverger moved to dismiss Plaintiffs' claims against them pursuant to CPLR 3211. In the June 2014 Decision, Justice Demarest declined to dismiss Plaintiffs' claims against the Mallik Defendants finding that, based upon the undisputed facts, Plaintiffs stated viable causes of action against them for fraud and tortious interference with contract. Justice Demarest also declined to dismiss Plaintiffs' claims against the O'Keke Defendants finding that Plaintiffs stated viable causes of action against them for breach of the escrow agreement, breach of fiduciary duty as well as for fraud and tortious interference with contract. With regards to Plaintiffs' sole claim against Piverger for breach of the personal guaranty executed by him, Justice Demarest dismissed Plaintiffs' claim, finding that the interest charged under the Note was criminally usurious and, further, that Piverger could raise the defense of criminal usury as it was undisputed that he was not involved in drafting the Note.

On January 10, 2018, Plaintiffs filed their note of issue. The parties' summary judgment motions are addressed in turn.

¹ With the understanding that Assoumou would pay Plaintiffs \$8,000,00.

Plaintiffs' Motion for Partial Summary Judgment Against the Assoumou Defendants (Mot. Seq. 9)
& Assoumou Defendants' Motion for Summary Judgment Against Plaintiffs (Mot. Seq. 12)

It is undisputed that the Assoumou Defendants breached the Note by failing to pay. The only issue before the Court is whether the Assoumou Defendants may raise the defense of criminal usury. In the June 2014 Decision, Justice Demarest found “a triable issue of fact as to whether Assoumou (who admits that he has been criminally charged with mortgage fraud with respect to other transactions) should be estopped from raising usury as a defense in view of the fact that the note may have been drafted on behalf of Assoumou, who was represented by O’Keke & Associates, and who also may have induced reliance on the legality of the transaction [citations omitted].”

Now, in support of their motion for summary judgment against the Assoumou Defendants, Plaintiffs argue that the record evidence, including the deposition testimonies of Plaintiffs and Assoumou, establishes that John Njoku (“Njoku”), ASK’s employee who was represented to Plaintiffs to be ASK’s in-house counsel, drafted the Note. Further, that the Assoumou Defendants induced Plaintiffs’ reliance on the loan transaction by approaching them for the loan and having their counsel for the transaction, O’Keke PC, provide a letter dated January 18, 2011, opining that the loan documents, i.e., the Note, Escrow Agreement and Consulting Agreement constitute legal, valid and binding obligations of ASK and Assoumou (hereinafter referred to as the “Enforceability Opinion”). In addition to the Enforceability Opinion, Plaintiffs argue that Assoumou’s sophistication and experience in real estate investment compared to Plaintiffs’ lack of experience resulted in lopsided bargaining power which was used to Assoumou’s advantage. Based on the foregoing, Plaintiffs contend that they are entitled to summary judgment on their first cause of action for breach of the note and guaranty against the Assoumou Defendants. Further, that they should be entitled to recover the Note’s principal plus interest at the highest legal interest rate.

By way of their motion for summary judgment, the Assoumou Defendants argue that they are entitled to dismissal of Plaintiffs’ complaint because the Note was negotiated by Plaintiffs, who had counsel representing them. That although their own employee physically prepared the documents, same was overseen and reviewed by Plaintiffs’ attorney. Further, that Plaintiffs could not have reasonably relied upon the Enforceability Opinion because the letter was rife with exceptions and exclusions including possible defenses “affecting the enforcement of creditors’ rights.” According to the Assoumou Defendants, if they are not awarded summary judgment, whether they can avail themselves of the usury defense should be submitted to the trier of fact.

Upon consideration of the foregoing, the Court finds that the Assoumou Defendants are estopped from raising usury as a defense as a matter of law. New York recognizes that a borrower may be estopped from interposing a usury defense when, through a special relationship with the lender, the borrower induces reliance on the legality of the transaction (*Seidel v 18 East 17th St. Owners, Inc.*, 79 NY2d 735, 743 [Ct App 1992]). Thus, where defendant attorney induced the plaintiff's reliance, arranged the terms of the investment, and drafted the promissory note sued upon, defendant was estopped from asserting the defense of usury (*see Schaaf v Borsher*, 440 NYS2d 312, 313 [2d Dept 1981]).

Here, it is undisputed that Assoumou approached Plaintiffs for the loan, the Assoumou Defendants' representative, Njoku, drafted the Note and personal guaranties, and the Assoumou Defendants' counsel provided Plaintiffs with the Enforceability Opinion, the express purpose of which was to induce reliance on the validity of the loan transaction. The Assoumou Defendants' contention that Plaintiffs dictated the terms of the Note is conclusory and without any evidentiary support. Based upon this undisputed evidence, Plaintiffs are entitled to summary judgment against the Assoumou Defendants on their first cause of action. However, Plaintiffs are only entitled to recover the loan amount at a legal rate of interest (*see Hammelburger v Foursome Inn Corp.*, 54 NY2d 580, 588 [Ct App 1981]). Conversely, the Assoumou Defendants' motion for summary judgment against Plaintiffs must be denied.

Mallik Defendants' Motion for Summary Judgment (Mot. Seq. 10)

Since the June 2014 Decision, the facts surrounding the Mallik Defendants' purchase of the Premises remain unchanged. Nevertheless, the Mallik Defendants move for summary judgment dismissing Plaintiffs' claims for fraud and tortious interference with contract as alleged against them. The Mallik Defendants also move for summary judgment dismissing the cross-claims asserted by the Assoumou Defendants and the O'Keke Defendants.

According to the Mallik Defendants, all claims and cross-claims against Jaswant, the father of Ravi, must be dismissed because there is not a single allegation against him as an individual. Further, that in their respective depositions, Plaintiffs and Assoumou acknowledged that they had absolutely no communication with Jaswant. Jaswant's only involvement in the purchase of the Premises was the execution of a power of attorney to their attorney, Boyajian.

In addition, the Mallik Defendants argue that Plaintiffs cannot prevail on their fraud claim because two of the required elements - proximate causation and justifiable reliance - are absent. The Mallik Defendants argue that the Note and Escrow Agreement agreed to by Plaintiffs rendered the collateral ineffective because the Quitclaim Deed, on its own, was insufficient for recording and would not have been accepted by the Kings County Register without additional documents executed by the deedholder such as the NYC Real Property Tax Return and the TP-584 NYS Transfer Tax Return. Thus, that the Quitclaim Deed could never have prevented the sale of the Premises. Further, that despite the Note being breached on multiple occasions over the course of almost a year and a half, Plaintiffs did not declare an Event of Default until April 18, 2012, when Plaintiffs sent the Assoumou Defendants a notice of default and demanded that O'Keke PC release the Quitclaim Deed. That Plaintiffs also neglected to attend the closing on April 23, 2012 to assert their interest in the Premises. The Mallik Defendants contend that the aforementioned failures by Plaintiffs to protect their interests preclude a finding of justifiable reliance. The Mallik Defendants also argue that the basis for Plaintiffs' fraud claim is Ravi's failure to perform under a "gentlemen's agreement," and that this "agreement" is void for failing to comply with the statute of frauds.

Further, the Mallik Defendants argue that Plaintiffs' tortious interference with contract claim must fail because there is no evidence that Ravi intentionally induced the Assoumou Defendants to breach the terms of the Note and that the Note was actually breached multiple times by Assoumou from its inception and prior to Ravi's involvement in the Premises. For example, that the Note was breached on the date of its execution because ASK represented that it is the "true and lawful owner of the Collateral [including the Property], having good and marketable title thereto, free and clear of any and all liens..." but that ASK was not the lawful owner of the Premises and OneWest Bank had a recorded mortgage against the Premises. That the Note was again breached on February 18, 2011, when Piverger failed to close on the Premises. That the Note was breached for a third time on October 18, 2011, when payment became due and owing. Although the Note included an extension option, it required ASK to pay an extension fee of \$7,500 which was not paid. That lastly, the Note was breached on January 18, 2012, when payment became due under the unpaid-for extension, but as admitted to in his deposition, Assoumou did not have the money to pay the Note. Based on the foregoing, the Mallik Defendants argue that they did not intentionally induce the Assoumou Defendants to breach the terms of the Note, a Note that had been breached multiple times already because Assoumou simply could not pay.

With regards to the Assoumou Defendants' cross-claim for fraud against them, the Mallik Defendants argue that the fraud claim is an improper attempt to circumvent the statute of frauds because an agreement to pay the debt of another requires a written agreement.

In opposition to the Mallik Defendants' motion, Plaintiffs first argue that Jaswant should be held liable under an agency theory inasmuch as he benefitted from Ravi's fraudulent and tortious acts by acquiring the Premises at a significantly discounted price.

With regards to their fraud claim, Plaintiffs contend that the Mallik Defendants are not entitled to summary judgment because there can be more than one proximate cause of an injury, which is an issue for the jury to determine, and that the Mallik Defendants failed to establish that Plaintiff's negligence was the sole proximate cause of their loss. Similarly, that the issue of justifiable reliance is generally a question of fact. And that here, Plaintiffs had no way of discovering the falsity of Ravi's misrepresentations regarding purchasing the Note. Notably, that despite claiming to have learned sometime in the fall of 2011 that the subject loan transaction was not a lien on the Premises, neither Ravi nor his attorney ever communicated this salient fact to Plaintiffs and, instead, that Ravi and Boyajian continued to negotiate the terms and conditions of the Note Purchase Agreement until around the time of the closing in April 2012. That even as late as April 20, 2012, three days before the closing, Boyajian assured Plaintiffs that the Note Purchase Agreement would be finalized once Ravi returned from being away, two days after the closing. That notwithstanding Ravi's prior negotiations with Plaintiffs and his and Boyajian's representations with respect thereto, Ravi failed to purchase or satisfy the Note. In addition, Plaintiffs argue that the statute of frauds is inapplicable to their fraud claim inasmuch as their claim against the Malliks is not rooted in breach of contract. Further, had the Mallik Defendants purchased the Note like they were supposed to, they would have stepped into the shoes of the Plaintiffs, making them the obligee, not the obligor. That, as such, the consummation of the Note purchase would not have been a "promise to answer for the debt of another," as required for the statute of frauds to apply. In any event, Plaintiffs state that the Mallik Defendants waived the statute of frauds defense by failing to plead the defense in their answer, thus barring summary judgment on this ground.

With regards to the Mallik Defendants' argument for dismissal of their tortious interference with contract claim, Plaintiffs submit that Justice Demarest already found that Plaintiffs sufficiently alleged that the Malliks intentionally procured the breach of the loan transaction as a whole, as opposed to just the Note, or that they rendered performance impossible by causing the loss of the

collateral as security under the Note.

The Assoumou Defendants also oppose the Mallik Defendants' motion for summary judgment dismissing their fraud claim. They argue that the Mallik Defendants' statute of frauds defense is specious as numerous "writings" executed by the parties or their agents satisfies the statute of frauds including a chain of emails discussing the Premises and the transfer of Plaintiffs' "lien" to another property, the Note Purchase Agreement prepared by Boyajian, and post-closing emails which continue to acknowledge that Ravi will repay the loan. In addition, that even if the facts herein were insufficient to satisfy the statute of frauds, the Assoumou Defendants argue that that would not obviate Ravi's fraudulent conduct in agreeing to pay the debt to gain the benefit of securing a below-market price for the Premises.

The Court notes that the Assoumou Defendants allege unjust enrichment against the Mallik Defendants which the Mallik Defendants fail to address in their motion for summary judgment dismissing the Assoumou Defendants' cross-claims. The Mallik Defendants also do not explain why the O'Keke Defendants' cross-claims should be dismissed as against them.

As a preliminary matter, the Court finds that, with the exception of Assoumou Defendants' cross-claim for unjust enrichment, Plaintiffs' claims and the Assoumou Defendants' cross-claims must be dismissed as against Jaswant. There are no facts or allegations sufficient to support an agency theory of indirect liability against Jaswant for fraud or tortious interference.

Secondly, the Mallik Defendants are not entitled to summary judgment dismissing either Plaintiffs' or the Assoumou Defendants' fraud claims. It is well established that "[t]o recover damages for fraud, a plaintiff must prove (1) a misrepresentation or an omission of material fact which was false and known to be false by the defendant, (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it, (3) justifiable reliance of the plaintiff on the misrepresentation or material omission, and (4) injury" (*Ozelkan v Tyree Bros. Envtl. Servs., Inc.*, 29 AD3d 877, 878 [2d Dept 2006]). The issue of a party's justifiable reliance generally presents an issue of fact for the jury (*Braddock v Braddock*, 60 AD3d 84, 88 [1st Dept 2009]).

Here, the Mallik Defendants fail to establish the absence of justifiable reliance. The record evidence indicates that Ravi and/or his attorney, Boyajian, led Plaintiffs and Assoumou to believe that he would purchase or pay off the Note upon closing on the Premises, having received a below-

market purchase price on the Premises for that purpose. It is for the trier of fact to determine, whether given the circumstances, it was justifiable for Plaintiffs and Assoumou to rely on Ravi's misrepresentations. The Mallik Defendants also fail to establish that Plaintiffs' own conduct was the sole proximate cause of their loss.

Similarly, the Mallik Defendants are not entitled to dismissal of Plaintiffs' claim for tortious interference with contract. Tortious interference with contract requires "(1) the existence of a valid contract between the plaintiff and a third party; (2) defendant's knowledge of that contract; (3) defendant's intentional procurement of the third-party's breach without justification; (4) actual breach of the contract; and (5) damages" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [Ct App 1996]).

It is undisputed that Plaintiffs had a loan agreement with the Assoumou Defendants which was theoretically secured by the Premises and that the Mallik Defendants knew of said agreement. In the June 2014 Decision, Justice Demarest found that Plaintiffs "sufficiently alleged that the Malliks intentionally procured the breach of the agreement to provide the quitclaim deed as collateral under the note or rendered performance impossible by causing the loss of the collateral as security under the note." Here, the Mallik Defendants argue that it could not have induced a breach of the Note because the Note was breached multiple times before their involvement. While this is not untrue, the Mallik Defendants fail to address the issue of whether they intentionally procured Assoumou's *material* breach of the Note by rendering his performance under the Note impossible by causing the loss of the collateral. Accordingly, summary judgment on this claim is denied.

The Mallik Defendants' motion for summary judgment against the O'Keke Defendants must also be denied as they fail to proffer any arguments in support of their requested relief.

O'Keke Defendants' Motion for Summary Judgment Dismissing Plaintiffs' Complaint (Mot. Seq. 11) & Plaintiffs' Motion for Partial Summary Judgment Against the O'Keke Defendants (Mot. Seq. 9)

Plaintiffs seek partial summary judgment against the O'Keke Defendants on their causes of action for breach of fiduciary duty and breach of the Escrow Agreement. The O'Keke Defendants move for summary judgment dismissing all of Plaintiffs' claims against them. In addition to breach of fiduciary duty and breach of contract, Plaintiffs' Amended Complaint asserts fraud and tortious interference with contract against the O'Keke Defendants.

According to Plaintiffs, they are entitled to summary judgment against Mr. O'Keke and O'Keke PC based on the clear and unequivocal language in the Escrow Agreement, which required O'Keke PC to hold the Quitclaim Deed in escrow pending Plaintiffs' written authorization or a court order to release same. However, that O'Keke PC refused to deliver the Quitclaim Deed to Plaintiffs when Plaintiffs gave their unambiguous written instructions by letter dated April 18, 2012, in violation of the Escrow Agreement and in breach of their fiduciary duty. That, in fact, O'Keke PC destroyed the Quitclaim Deed in advance of the Premises's closing so that their client, Rivera, would be able to sell the Premises to the Mallik Defendants.

By way of their motion for summary judgment, the O'Keke Defendants assert several arguments that were already rejected in the June 2014 Decision based on the undisputed facts. First, the O'Keke Defendants argue that they considered the Escrow Agreement terminated when Plaintiffs withdrew their \$63,000 in escrow. However, Justice Demarest rejected this argument based on subsequent email communications by Mr. O'Keke assuring Plaintiffs that the Quitclaim Deed would not be released without written authorization as per the Escrow Agreement. Justice Demarest also rejected O'Keke Defendants' argument herein that the complaint must be dismissed against Mr. O'Keke individually because he is not a signatory to the Escrow Agreement. Justice Demarest found that Mr. O'Keke was personally involved in the holding of the Quitclaim Deed in escrow and that he personally refused to release the Quitclaim Deed upon Plaintiffs' demand.

The O'Keke Defendants also argue that Plaintiffs' claims for fraud and tortious interference should fail because Plaintiffs have no evidence or theory that Mr. O'Keke or O'Keke PC did anything fraudulent. Further, that Plaintiffs undisputedly approved the sale of the Premises to the Malliks. And that, in any case, even if the Quitclaim Deed were in Plaintiffs' possession at the time they requested it, it would not have prevented the Mallik Defendants from purchasing the Premises since the Quitclaim Deed was not recordable without certain ACRIS documents.

The O'Keke Defendants also seek dismissal of Plaintiffs' complaint for failing to join a necessary party, Adanna Ugwonal, Esq. ("Ugwonal"), who the O'Keke Defendants argue is the actual escrow agent because she is the signatory to the Escrow Agreement. It is undisputed that Plaintiffs attempted to serve Ugwonal at O'Keke PC. However, at or around the time of service, Plaintiffs were informed that Ugwonal was no longer employed by O'Keke PC and had moved out-of-state. There is no indication that Plaintiffs attempted to re-serve Ugwonal as they maintain that Ugwonal was properly served.

In opposition to the O'Keke Defendants' motion, Plaintiffs argue that Ugwonali is not a necessary party but merely an agent of O'Keke PC and that all of the documents reflect that O'Keke PC was the escrow agent, not Ugwonali personally.

With regards to their fraud claim, Plaintiffs argue that, at the very least there is an issue of fact as to whether Plaintiffs justifiably relied on Mr. O'Keke's December 26, 2011 e-mail confirming that he still had the Quitclaim Deed on file and would not release it except in compliance with the strict terms of the Escrow Agreement or pursuant to a court order. Secondly, that since the O'Keke Defendants provide no substantive argument for summary judgment on Plaintiffs' tortious interference claim, that that portion of their motion should be summarily denied.

“An escrow agent not only has a contractual duty to follow the escrow agreement, but additionally becomes a trustee of anyone with a beneficial interest in the trust with the ‘duty not to deliver the escrow to anyone except upon strict compliance with the conditions imposed’” (*Takayama v Schaefer*, 240 AD2d 21, 25 [2d Dept 1998] [*citations omitted*]). Thus, an escrow agent may be held liable for breach of contract and breach of fiduciary duty as escrowee (*see Greenapple v Capital One, N.A.*, 92 AD3d 548, 549 [1st Dept 2012]).

Here, Plaintiffs established their prima facie entitlement to summary judgment against the O'Keke Defendants by demonstrating that the O'Keke Defendants failed to strictly comply with the conditions imposed by the Escrow Agreement. As a matter of law, the Escrow Agreement could not have been terminated by the return of the escrowed funds since, by its terms, the Escrow Agreement could only be terminated “by an agreement in writing signed by the Lenders and the party to be bound thereby.” Furthermore, upon Plaintiffs written demand on or around April 18, 2012 that the O'Keke Defendants release the Quitclaim Deed, it is undisputed that the O'Keke Defendants refused in breach of the Escrow Agreement. To the extent that the O'Keke Defendants argue that Plaintiffs approved of the sale of the Premises to the Malliks, the O'Keke Defendants fail to explain how this relieves them of their obligation to comply with the Escrow Agreement. With regards to the argument that had the O'Keke Defendants complied with the Escrow Agreement, the Quitclaim Deed would have been insufficient to protect Plaintiffs' interest, the O'Keke Defendants fail to establish same as a matter of law and, in any case, in the event the breach did not directly cause Plaintiffs' damages, Plaintiffs may still be awarded nominal damages against the O'Keke Defendants (*see Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 95 [Ct App 1993][“Nominal damages are always available in breach of contract actions...”]). Secondly, the documentary evidence establishes that

O'Keke PC was the escrow agent, and that Mr. O'Keke and Ugwonali acted on behalf of O'Keke PC. Accordingly, dismissal on the basis that Ugwonali is a necessary party is denied. Based on the foregoing, Plaintiffs' motion for partial summary judgment against the O'Keke Defendants is granted.

With regards to that portion of the O'Keke Defendants' motion seeking summary judgment dismissing Plaintiffs' claims for fraud and tortious interference with contract, the Court finds that the O'Keke Defendants failed to establish their entitlement to dismissal of these claims as a matter of law.

Conclusion

In accordance with the foregoing, it is hereby

ORDERED that Plaintiffs' motion is granted; it is further

ORDERED that the Assoumou Defendants' motion is denied; it is further

ORDERED that the Mallik Defendants' motion is granted to the extent granted herein but otherwise denied; and it is further

ORDERED that the O'Keke Defendants' motion is denied.

This constitutes the Decision and Order of the Court.

E N T E R,



Sylvia G. Ash, J.S.C.