

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

FREMONT INVESTMENT & LOAN)

Plaintiff,)

v.)

EVA S. BRECKENRIDGE, et al)
Defendants.)

██████████ Judge,)
Counter-Plaintiff)

v.)

Fremont Investment & Loan,)
Counter-Defendant)

██████████ Judge,)
Cross-Plaintiff)

v.)

Eva S. Breckenridge,)
Cross-Defendant)

██████████ Judge,)
Third Party-Plaintiff)

v.)

RYM Technology Holdings, LLC, et al)
Third-Party-Defendants)

No. 06 CH 920

Hon. Sophia H. Hall

DECISION

This case came on for trial on plaintiff ██████████ Judge's third party complaint against defendant Avalon Betts-Gaston for Count VII common law fraud, Count VIII unjust enrichment and Count IX breach of fiduciary duty. The Court heard the testimony of ██████████ Judge, Eva Breckenridge and Avalon Betts-Gaston. Also in evidence was an Amended Stipulation of Agreed Facts. The exhibits were stipulated to by the parties. This Court finds that plaintiff proved by a preponderance of the evidence that defendant breached her fiduciary duty.

FINDINGS OF FACTS

Plaintiff testified that she was in financial difficulty with respect to her property at 3213 W. Walnut, a three unit brick apartment, which she purchased in December 1995, where she lived and ran a daycare center. She had previously refinanced it, but due to health issues, she fell behind in her payment in 2004. She could not get another loan because her credit score was too low.

She testified that she learned about a RYM Technology Holdings ("RYM Tech") program from a friend and discussed it with the friend's husband. The expressed purpose of the RYM Tech program was to help people to save their homes from foreclosure. The program required plaintiff to temporarily transfer her property so that RYM Tech could place it into a trust. The program would allow her to remain in the property and make payments to RYM Tech for five years while RYM Tech invested the equity from her property. At the end of the five years, she would receive title back free and clear of any liens.

Plaintiff sought the advice of an attorney before she filled out an online application to participate in the program. Also, in evidence is a Real Estate Sale Contract dated October 1, 2004, bearing her signature.

Thereafter, plaintiff hired defendant, to whom RYM Tech had referred her, to represent her at the closing on the conveyance of her property.

Defendant had represented others who participated in the RYM Tech program. Defendant believed the RYM Tech program was a good one because, before undertaking to represent sellers in the program, defendant investigated the program. If clients would ask about the RYM Tech program, she would refer them to the RYM Tech people.

Defendant testified that her representation of the plaintiff was only as to matters around the closing. She testified that she did not undertake to represent plaintiff regarding her prior decision to participate in the RYM Tech program. Defendant testified that she did not explain the RYM Tech program to plaintiff, or explain other options she might have had such as bankruptcy, or explain the difference in procedure regarding default on a mortgage and default on a lease.

Defendant did not meet with plaintiff prior to the November 19, 2004 closing. She saw plaintiff for the first time at the closing. Defendant testified that an assistant in her office handled her day to day matters and was primarily responsible for communicating with clients. Defendant's testimony about any conversations between plaintiff and the assistant is hearsay. The assistant did not testify at trial. Plaintiff testified that she did not speak to the assistant.

Plaintiff testified the closing lasted 30 to 45 minutes. Defendant testified it took the standard time of around 2 hours.

Defendant testified that she explained all of the documents to plaintiff, breaking them down into common language. The specific documents which plaintiff signed were the Warranty Deed which conveyed her property to Breckenridge, the Quitclaim Deed from Breckenridge to RYM Tech, and the numbers on the HUD-1 Settlement statement for the \$360,000 Loan. The parties also stipulated that plaintiff signed a Real Estate Sale Contract, Authorization to Release Information, For Sale by Owner Showing & Compensation Agreement, Lead-Based Paint Disclosure, Residential Real Property Disclosure, Payoff Request Authorization, PTAX-203 Illinois Real Estate Transfer Declaration, Cook County Real Estate Transfer Declaration, Affidavit in Lieu of Survey First American Title Insurance Real Estate Transfer Statement and First American Title Insurance Title Indemnity- Escrow Agreement.

Defendant testified that she did not explain the Residential Lease and Trust Agreement, the Self-Amortizing Conditional Payment Note or the Lease Payment Calculation Sheet, to plaintiff.

Plaintiff testified that defendant did not explain any of the documents to her and simply pointed to where she was to sign. She also testified that she did not read any of the documents, nor ask defendant questions about them.

The value of plaintiff's property at the time of closing was \$360,000. Plaintiff's old mortgage of \$197,945.24 was paid off as were real estate taxes in the amount of \$1637.75, for a total benefit to her of \$199,582.99.

After the closing, plaintiff contacted defendant when plaintiff received a check for \$133,635, the amount which was the equity in her property. Plaintiff signed over the money to RYM Tech pursuant to the requirements of the program.

When plaintiff's property went into foreclosure, she contacted defendant. Defendant called Breckenridge to have her call plaintiff.

Defendant received an attorney fee of \$325.00 and a title agent fee of \$862.50.

Since 2004, plaintiff has continued to reside in the property. She has paid \$11,092.30 to RYM Tech.

CONCLUSIONS OF LAW

To prove fraud, plaintiff must show that defendant made a false statement of material fact with the knowledge that it was false and the intent to induce plaintiff to act, and that plaintiff relied on the truth of the statement and plaintiff's damages resulted from the reliance on the statement. *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 2d 482, 496 (1996).

The Court finds that plaintiff failed to prove a false statement or an omission of a material fact by defendant with knowledge that it was not true.

To prove unjust enrichment, plaintiff must prove that defendant unjustly retains a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience. *Adams v. American International Group, Inc.*, 339 Ill. App. 3d 669, 675 (1st Dist. 2003). Unjust enrichment applies where there is no contract between the parties. *Center for Athletic Medicine, Ltd. v. Independent Medical Billers of Illinois, Inc.*, 383 Ill. App. 3d 104, 114 (1st Dist. 2008). In the instant case, plaintiff has proven that an attorney client relationship existed between plaintiff and defendant and, therefore, the existence of a contract.

To state a claim for breach of fiduciary duty, a plaintiff must prove that a fiduciary duty exists, the duty was breached, and such breach proximately caused plaintiff's injury. *Johnson v. Matrix Fin. Serv. Corp.*, 354 Ill. App. 3d 684, 698 (1st Dist. 2004). A fiduciary relationship exists where a person can show that he placed trust and confidence in another so that the other gained influence and superiority over him. *Santa Claus Indus. Inc. v. First Nat'l Bank*, 216 Ill. App. 3d 231, 238 (1st Dist. 1991). The fiduciary relationship between an attorney and client is a personal and confidential one, requiring the attorney to exercise "the utmost degree of fidelity, honesty and good faith." *Christianson v. Jones*, 83 Ill. App. 3d 334, 338 (3d Dist. 1980).

Plaintiff argues that defendant is liable because she failed to advise her of the risks of the RYM Tech program and explain her other options rather than to participate in the program.

The Court finds that plaintiff did not hire defendant to advise her on the RYM Tech program. Before hiring defendant to represent her at the closing, plaintiff had already agreed to participate in the RYM Tech program, and had previously consulted an attorney.

The Court finds, however, that defendant breached her fiduciary duty to plaintiff in representing her at the closing by not explaining the three documents which plaintiff signed at the closing involving the leaseback part of the RYM Tech program.

Damages are awardable for failure to satisfy the obligations of the attorney client relationship where plaintiff provides sufficient proof. The Court has found that defendant did not have an obligation to advise plaintiff of the risks of the RYM Tech program, but even if she did have such an obligation, the evidence presented by plaintiff is not sufficient to award the damages plaintiff requests. The standard for such an award was set forth in *Metrick v. Chatz*, 266 Ill. App. 3d 649, 653-654 (1st Dist. 1994).

If a client suffers damage because of the happening of a foreseeable risk of which he or she was not informed, the attorney may be liable. In such a case, the attorney's liability is not predicated upon the impropriety of the chosen course of action but rather upon the failure to inform the client sufficiently to enable him or her to voluntarily accept the risk attendant thereto.

Even if negligence on the part of the attorney is established, no action will lie against the attorney unless that negligence proximately causes damage to the client. It is the plaintiff's burden to plead facts which, if true, establish a proximate causal relationship between the negligence of the attorney and the damages alleged to have been suffered as a consequence thereof.

In *Metrick*, the court further said that to establish proximate cause, a plaintiff must prove that "had the undisclosed risk been known, he or she would not have accepted the risk and consented to the recommended course of action." 266 Ill. App. 3d at 655. Thus, here, plaintiff must prove that she would have taken a different course of action having received further knowledge about the risk of the RYM Tech program. Plaintiff testified that she knew that she could not obtain another loan because of her credit rating. As to the bankruptcy alternative, her property was used for business and residential purposes. As a result, plaintiff presented insufficient evidence that she would have pursued a different course of action.

Plaintiff claims that she should receive the lost equity in the property, \$133,635.15, the check she received after the closing which she turned over to RYM Tech pursuant to her agreement with it. Plaintiff, also, claims damages for lost income of \$120,000 to \$ 168,000 from her day care business. The evidence presented regarding lost income was insufficient and speculative to satisfy her burden of proof to support an award of those damages. She testified generally about income received in the past, but did not offer any documentation in support. She presented no evidence about the projected expenses of her day care business, and does not specify if the amount she requests is net income or gross income. *Midland Hotel Corp. v. The Reuben H. Donnelly Corp.*, 118 Ill. 2d 306, 315-316 (1987). Thus, her evidence of business losses, even if proximately caused, is insufficient.

The Court finds that there was no proof that any losses were proximately caused by defendant's representation of plaintiff at the closing.

The Court, however, finds that since defendant failed to explain all of the documents to plaintiff, defendant did not earn the fee she was paid. Accordingly, plaintiff is awarded the \$325.00 attorney fee paid to defendant.

Entered _____

Date _____

