

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ASTERIA VIVES : CIVIL ACTION
: :
v. : :
: :
FRANK RODRIGUEZ, et al. : NO. 09-cv-2728-JF

MEMORANDUM

Fullam, Sr. J.

June 7, 2010

The plaintiff has filed suit against four members of her family, Frank and Miguelina Rodriguez (her brother and sister-in-law), and Domingo and Milagros Rodriguez (her parents), asserting claims for breach of contract, unjust enrichment, conversion, fraud, and intentional infliction of emotional distress.

The complaint alleges that the plaintiff entered into an agreement with defendants Frank and Miguelina Rodriguez, which provided that Frank and Miguelina would purchase, and ultimately sell, real property on the plaintiff's behalf. The plaintiff provided the \$55,000 purchase price for the property, and promised to pay Frank and Miguelina \$500 for their services once the property was resold. The plaintiff was to retain any other profits from the sale.

The plaintiff alleges that Frank and Miguelina purchased the property and resold it for \$95,000, but have not given her the profits.

Jurisdiction in this Court is premised on diversity. The plaintiff filed an earlier suit against defendants Frank and Miguelina Rodriguez in state court; that case is pending. The defendants have moved to dismiss the complaint on various grounds, and they also argue that the Court should abstain from exercising jurisdiction over this case pursuant to Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976). Oral argument was held on May 18, 2010.

I conclude that the plaintiff has failed to state a claim as to defendants Domingo and Milagros Rodriguez. The only allegation of wrongdoing by these defendants is found in Count IV of the complaint, which asserts a claim for fraud, and states in relevant part:

[s]hortly after receiving payment for the August 10, 2006 sale of the property, Defendants, Frank and Miguelina Rodriguez, with assistance from the Defendants Domingo and Milagros Rodriguez, satisfied the mortgage of their Florida home in large measure through proceeds from the net balance of the sale of 7322 Butcher Street, Historic LaMott, Pennsylvania 19027.

The plaintiff has not alleged the elements of a *prima facie* claim for fraud as to Domingo or Milagros, and certainly has not met the heightened pleading standard for fraud imposed by Federal Rule of Civil Procedure 9(b). I will, however, grant leave for the plaintiff to amend her complaint and correct its deficiencies if the facts allow.

I further conclude that defendants Frank and Miguelina's motions to dismiss the complaint will be denied without prejudice to the filing of a motion for summary judgment, if warranted, after further development of the facts. On the current record, I will deny without prejudice the defendants' request that the Court abstain from exercising jurisdiction over this case.

In addition, the plaintiff does not clearly identify which defendants are subject to each claim. If the plaintiff chooses to file an amended complaint, she is directed to specify the defendants against whom she asserts each individual count.

An order will be entered.

BY THE COURT:

/s/ John P. Fullam
John P. Fullam, Sr. J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ASTERIA VIVES : CIVIL ACTION
: :
v. : :
: :
FRANK RODRIGUEZ, et al. : NO. 09-cv-2728-JF

ORDER

AND NOW, this 7th day of June 2010, upon consideration of the defendants' motions to dismiss, and the plaintiff's responses thereto, and after oral argument, IT IS ORDERED:

1. That the complaint is DISMISSED WITHOUT PREJUDICE as to defendants Domingo and Milagros Rodriguez. The plaintiff is GRANTED LEAVE TO FILE AN AMENDED COMPLAINT within 30 days of the date of this Order.

2. That the motions to dismiss the complaint filed by defendants Frank and Miguelina Rodriguez are DENIED, and the defendants' motion for the Court to abstain from exercising jurisdiction over this case is DENIED WITHOUT PREJUDICE.

BY THE COURT:

/s/ John P. Fullam
John P. Fullam, Sr. J.