COURT OF APPEALS OF GEORGIA

RETURN NOTICE

May 1, 2015

To: Jeffrey M. Butler, Esq., Woodard and Butler, LLC, 561 Greene Street, Augusta, Georgia 30901

Case Number: _____ Lower Court: County Superior Court

Court of Appeals Case Number and Style: _____

Your document(s) is (are) being returned for the following reason(s).

☐ **There is no case pending in the Court of Appeals of Georgia under your name.**

☐ **A Notice of Appeal is filed with the clerk of the trial court and not with the Court of Appeals of Georgia. See OCGA §5-6-37.** Once the trial court clerk has received and filed the Notice of Appeal, the trial court clerk will prepare a copy of the record and transcripts as designated by the Notice of Appeal and transmit them to this Court. Once the Notice of Appeal is docketed in the Court of Appeals of Georgia, a Docketing Notice with the Briefing Schedule and other important information is mailed to counsel for the parties or directly to the parties, if the parties are representing themselves. You do not need to provide this Court with a copy of the Notice of Appeal you filed with the superior court.

☐ **The Notice of Appeal must include a proper Certificate of Service.** A Certificate of Service must show service to the opposing counsel and contain the counsel's full name and complete mailing address. The opposing counsel must actually be served with a copy of your filing.

☐ **An Application for Writ of Habeas Corpus should be filed in the superior court of the county in which you claim you are illegally detained.** An appeal from a denial of an Application for Writ of Habeas Corpus is to the Supreme Court and not the Court of Appeals.

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☐ **Your appeal was disposed by opinion (order) on** _____. The Court of Appeals _____. The remittitur issued on _____ divesting this Court of jurisdiction. The case decision is therefore final.

☑ **Enclosed is Court of Appeals receipt #113083 for your $300.00 filing fee.**

☑ **Electronic filing is mandatory in this Court. The following Rule 46 became effective January 1, 2015.**

XXII. ELECTRONIC FILING OF DOCUMENTS

Rule 46. Electronic Filing of Documents.

Counsel is required to use the Court's electronic filing system and to follow the policies and procedures governing electronic filing as set forth in the Court's electronic filing instructions. The Clerk of Court may grant a request for exemption from mandatory electronic filing for good cause shown. An adverse decision by the Clerk of Court may be appealed by motion to the Court via a paper filing.

Rule passed October 21, 2014 - effective January 1, 2015

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April 29, 2015

Hon. Stephen E. Castlen
Clerk for the Court of
Appeals of Georgia
47 Trinity Ave. SW Suite 501
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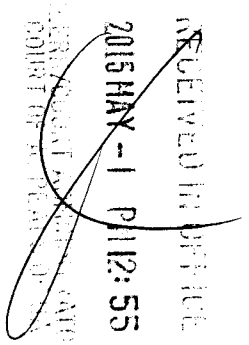
VIA OVERNIGHT MAIL



Re: Charlie Miller and Charles Dubee
Vs: Harbor Mortgage Company
Our file no. J10-229
Case No. A15A1618

Dear Mr. Castlen:

Please find enclosed the original Brief of Appellants together with three copies. Please file these with the other papers for the above-captioned matter. Please return a clocked copy to me in the envelope enclosed for your convenience.

If the Court requires anything further from me at this time please advise.

I do appreciate your kind cooperation and courtesy.

Very truly yours,

Jeffrey M. Butler

JMB/wb

Encs

Cc: Thomas J. Mahoney III
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Receipt No. 113083

DATE 5.1.15

RECEIVED OF Woodland & Butler

WE ACKNOWLEDGE RECEIPT OF THE FOLLOWING:

BRIEF OF APPELANT ✓

ENUMERATION OF ERRORS

WITHDRAWAL FEE

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CERTIFICATION FEE

APPLICATION COST

OTHER

AMOUNT $ 300.00
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CASE NUMBER A15A1618

MB
CLERK

IN THE COURT OF APPEALS

STATE OF GEORGIA

****

APPEAL NO. A15A1618

****

CHARLIE MILLER and CHARLES DUBEE

Appellants,

V

SODERLIND, INC. dba HARBOR MORTGAGE COMPANY

Appellee

****

BRIEF OF APPELLANT

****

JEFFREY M. BUTLER
State Bar No. 099644

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ATTORNEYS FOR APPELLANTS CHARLIE MILLER AND CHARLES DUBEE

IN THE COURT OF APPEALS
STATE OF GEORGIA

Charlie Miller and Charles Dubee,	)	
	)	
Appellants,	)	
	)	
V	)	
	)	
Soderlind Inc. dba Harbor Mortgage Company,	)	Appeal Case No. A15A1618
	)	
Appellee.	)	
	)	

BRIEF OF APPELLANTS

PART I.

A. STATEMENT OF JURISDICTION

Appellants hereby show that the Court of Appeals, rather than the Supreme Court of Georgia, has jurisdiction of this appeal in so far as it is not a case in which appellant jurisdiction has been exclusively conferred upon the Supreme Court of Georgia by the Constitution of Georgia.

B. STATE OF PROCEEDINGS BELOW AND MATERIAL FACTS

This case comes before this Court following the trial Court's denial of Plaintiffs/Appellants (hereinafter referred to as either Miller or Dubee, or jointly as Miller/Dubee) motion for new trial (R.199).

Miller/Dubee filed suit against Soderlind, Inc. dba Harbor Mortgage Company

("Harbor") alleging that they had suffered damages as a result of false statements made by and on behalf of Harbor and further that Harbor had been unjustly enriched at their expense (R.11-12). Moon River Investments, LLC ("Moon River") retained the services of Harbor. Harbor was to act as a mortgage broker and assist Moon River in obtaining loans to be used for the purchase of real property (P., L.7-12, R. 166).

Steve Staton ("Staton") was the specific employee of Harbor assigned to work on securing the loan on behalf of Moon River (T, P 12, L 23-25; P 13, L 1-10).

During the same period of time that Staton was working to secure the loan on behalf of Moon River he was also working as a personal consultant for the managing member of Moon River Paulie Ewaldsen ("Ewaldsen") and also as an agent and/or advisor to both Miller and Dubee. Staton was personally retained by Ewaldsen as an agent/consultant (T 22, L 13-19; T 47, L 1-5). He was to be paid a fee for these services at the closing of the Moon River loan (T 47, L 6-12). This fee was in addition to any brokers fee to be paid to Harbor for its services in obtaining the loan on behalf of Moon River (T 17 L 25, T 18 L 1-12, T 46 L 9-25). Ewaldsen, in addition to his duties as the managing member of Moon River, was also acting as a broker regarding the sale of the realty and was to be paid a commission once the real property was purchased by Moon River (T 18 L 16-19, T 148 L 1-3, 21-25; T 149 L1-13).

Miller/Dubee together with Ewaldsen, agreed to personally guarantee payments of the Moon River loans (T 16, L 22-25, T 17 L 1-8; R 166). At that time Miller was an investor in Moon River and would later become a member (R 152, Defendant's exhibit 8; T 86, L 11-15). At

the same time Dubee was an employee of Harbor and a coworker of Staton (T 14, L 11-13).

Staton was aware that Miller/Dubee had expected to receive cash bonuses at the time of the closing of the Moon River loan. The bonuses were to be paid for consideration of their personal guarantees (T 35 L 23-25, T 26 L 12-15; R 48 Plaintiff's exhibit 7). Prior to the loan closing Staton instructed Miller/Dubee as to how to secure their bonuses. Staton advocated to Ewaldsen on behalf of Miller and Dubee to arrange for payment of those bonuses (T 36, L 7-15).

Pursuant to the earlier agreements, Miller/Dubee expected to be paid their bonuses once they executed the personal guaranty agreements and the Moon River loan was complete (T 50 L 19-25; T 87 L 5-11). The Miller/Dubee guarantees were required by the lender in order for the loan to go through to Moon River and the subsequent acquisition of the realty by Moon River. If there were no guarantees there would be no loan. If there was no loan there would be no purchase of the realty. Without a loan closing there would be no commission to Harbor, no broker fee to Ewaldsen, and no separate fees to Staton. (T 21, L 18-25, T 22 L 1-3).

Staton had first tried to arrange the loan on behalf of Moon River from ING Corp. (ING) (T 15, L 17-24). Staton testified that had ING actually made the loan that Miller/Dubee would have been paid their bonuses in exchange for their personal guarantees (T 16, L 12-15; T 35 L 12-16). Unfortunately, the loan from ING could not be completed (T 15 L 17-25, T 18 L 1-3).

Subsequently, Staton was able to assist in obtaining approval of a loan on behalf of Moon River from the First National Bank ("FNB") (T 16 L 4-6). However, FNB would not permit the payment from its loan proceeds of Harbor's fees or the bonuses for Miller/Dubee (T 35 L 12-21;

T 45 L 22-25).

Prior to the closing of the loan from FNB Staton discussed the bonus issue with Miller/Dubee (T 87, L 12-16). Staton told Miller/Dubee that there would be no loan proceeds available to pay the bonuses (T 87, L 17-21). Staton told Miller/Dubee he (Staton) had "no dog in the hunt" or "dog in the fight" (T 51, L 19-24; T 87 L 22-25). Staton told Miller/Dubee that if the closing did not go forward the entire project would fail and everyone would lose their investments (T 52 L 10-15; T 88 L 7-10).

Miller/Dubee did agree to sign the personal guarantees for repayment of the FNB loan to Moon River even though they did not receive their bonus (R 49, Plaintiff's exhibit 8; R 51, Plaintiff's exhibit 9). However, on the same day as the closing of the loan, and with the advice and assistance of Staton, a document was prepared memorializing the earlier verbal agreement regarding the bonuses owed Miller/Dubee. The document was signed by Miller/Dubee, Staton and Ewaldsen (T 36, L 2-15; T 54 L 14-25; T 89 L 6-15; R 48, Plaintiff's exhibit 7).

Following the closing of the Moon River loan Harbor was paid its brokers fee of Eighty Three Thousand Dollars (T 118, L 19-23; R 45, Plaintiff's exhibit 4). Of the Eighty Three Thousand Dollars paid to Harbor, seventy percent of that fee was paid by Harbor to Staton for his commission (T 17, L 25, T 18 L 1-4). In addition to the fees he received from his employer, Harbor, Staton also received Twenty Five Thousand Dollars (T 18, L 5-15; R 46, Plaintiff's exhibit 6). Approximately two months following the closing Staton received another Thirteen Thousand Six Hundred and Eighty Dollars (T 125 L 15-25, T 126, L 1; R 53 Plaintiff's exhibit

10).

Ewaldsen received his broker's fee, paid by the seller of the realty, following the closing of the loan by FNB to Moon River (T 18, L 16-19; T 1418 L 1-3, 21-25; T 149 L 1-15).

Prior to the closing of the loan by FNB to Moon River Miller/Dubee were not aware that Staton would be paid a fee, at closing, for his services on behalf of Ewalden and in addition to any fees to be paid to Harbor (T 52 L 16-25 T 53, L 1-10; T 88 L 11-14). Prior to the actual closing there were no documents that described any fees to be paid to Staton (T 146, L 12-25; T 150 L 17-25; T 129 L 9-19). Unless Staton or the President of Harbor, David Soderlind ("Soderlind") volunteered this information there was no way Miller/Dubee could have learned of these fees prior to signing the guarantee agreements (T 151 L 7-22).

Soderlind testified that Harbor did have an obligation to disclose to its clients what it and Staton expected to receive as fees following the closing of the Moon River loan (T 144, L 5-11). However, Soderlind testified that Harbor's obligations were met since Ewaldsen was aware of these fees (T 144 L 16-24).

Following a bench trial, the Superior Court entered an order in favor of Harbor (R 165-171). Basically, the Superior Court ruled that Miller/Dubee failed to prove all of the elements of fraud (R 168); failed to prove that Staton's representations that there were no monies to pay bonuses was untrue (R 168); or that there was ever an agreement to pay bonuses at the time of closing (R 169). The Superior Court also made as a finding of fact that Staton specifically denied telling Miller/Dubee that there were no funds to pay bonuses at closing (R 167). However, the

Superior Court mistakenly attributes to Staton testimony actually made by Soderlind (T 139, L 8-10). Staton made no such denial although he did deny pressuring Miller/Dubee to sign the guarantees (T 35, L 3-9).

Miller/Dubee would ask this Court to reverse the decision of the trial Judge and to enter a judgment in their favor and against Harbor as to the issue of liability. Miller/Dubee would ask this Court to remand the case back the Superior Court to determine what damages they are entitled to receive as a result of misrepresentations made to them by Harbor and its employees. Finally, and in the alternative, Miller/Dubee would ask this Court to order a new trial on the grounds that the verdict of the trial Judge is not supported by the evidence.

B. STATEMENT OF METHOD BY WHICH THE ENUMERATION OF ERROR WAS PRESERVED

Appellants preserved the enumerated errors herein by making a motion for new trial following the entry of judgment.

PART II.

Enumeration of Error

1.

The trial Court erred when it failed to rule that Harbor's failure to disclose to Miller/Dubee the extent of its and Staton's fee expectations constitutes fraud as its obligation to communicate arises from the particular circumstances of the case.

2.

The trial Court erred when it failed to rule that Harbor's failure to disclose to Miller/Dubee the extent of its and Staton's fee expectation constitutes fraud as its obligation to communicate arises from the confidential relationship that existed between Harbor and Miller/Dubee.

3.

The trial Court erred when it failed to rule that Harbor's statements to Miller/Dubee that there was no money available to pay bonuses and that Staton had "no dog in the fight" was a misrepresentation of a material fact, known by Harbor and Staton to be false, with the intention to induce Miller/Dubee to act, that Miller and Dubee were entitled to reply on the representation, and that Miller and Dubee were damaged as a result.

PART III.

Argument and Citation of Authority

1.

A. The trial Court erred when it failed to rule that Harbor's failure to disclose to Miller/Dubee the extent of its and Staton's fee expectations constitutes fraud as its obligation to communicate arises from the particular circumstances of the case.

Pursuant to O.C.G.A. § 23-2-53 "suppression of a material fact which a party is under a obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case".

Miller/Dubee maintain the particular circumstances of this case required Harbor to disclose to them the fees that both Harbor and Staton expected to receive.

"The particular circumstances" referred to in the statute were described in Miller v Lomax 266 Ga App 93 596 SE 2nd 232 (2004). This refers to "any case where a person intentionally concealed the facts from a certain other person hoping thereby to derive a benefit, and knowing that only by silence and concealing the truth would the anticipated benefit accrue".

In this case the fees to Staton were not disclosed. Without the personal guarantees the fees would not be paid. There was no reason not to disclose these fees other than to prevent Miller/Dubee from learning that although they would not be paid a bonus that Staton would receive a large fee at closing.

The trial Judge's finding that Miller/Dubee had failed to prove the elements of fraud failed to address whether fraud that been proven under O.C.G.A. § 23-2-53.

Certainly, in any business transaction, there are many factors that must be considered. It is difficult to determine what factor might ultimately convince a person to go forward or not to go forward. In order to make the decision the person must have all of the facts.

Miller/Dubee were not given all of the facts. Regardless of whether the Court were to find that they were entitled to bonuses it is undisputed that they were not given all of the facts. Regardless of whether the business venture would have failed anyway does not excuse the failure to disclose the existence of the fees. The fact that this was a high risk venture does not excuse the failure to disclose the existence of the fees.

As admitted by Soderlind, the President of Harbor, there were no documents describing the existence of the fee arrangement with Staton. Therefore, there is no way, even through the exercise of due diligence, that Miller/Dubee could have learned of the fees. Soderlind and Staton remained silent.

2.

B. The trial Court erred when it failed to rule that Harbor's failure to disclose to Miller/Dubee the extent of its and Staton's fee expectation constitutes fraud as its obligation to communicate arises from the confidential relationship that existed between Harbor and Miller/Dubee.

As set forth in O.C.G.A. § 23-2-53, an obligation to communicate may also arise from the confidential relations of the parties.

In this case, Harbor was acting as an agent for Moon River. Miller was an investor in Moon River. Dubee was an employee of Harbor. This is not a case of an arm's length transaction between negotiating businessmen. Rather, the parties were working in concert to obtain the loan on behalf of Moon River. Their interests were the same as all were working toward a common goal.

Staton was an employee of Harbor. Therefore, Staton was acting as an agent for his employer and also as an agent for Moon River. As such, he should be considered a "sub agent". Dolvin Realty Co. v Holly 203 Ga 618, 48 SE 2nd 109 (1948). As a sub agent he would owe the same duties to the principal as the original agent. He should not have united his personal interests

and his representative interests in the same transaction. Dolvin Realty, ibid.

It is well settled that an agent must act primarily for the benefit of his principal. An agent must make a full disclosure of all pertinent facts regarding the transaction. AT&T Corp. v Property Tax Services 288 Ga App 679, 655 SE 2nd 295 (2007).

Miller/Dubee maintained that Harbor and Staton were also acting as their agent at the same time it was acting as an agent for Moon River.

Agency may be shown by proof of circumstances, apparent relations and consent of the parties. Clyde Chester Realty Co. v Stansell 151 Ga App 357, 259 SE 2nd 369 (1979) Nowell v Brown 187 Ga App 9, 369 SE 2nd 499 (1988).

The circumstances of this case and the relationship of the parties demonstrate that there was a "common business objective". Arko v Cirou 305 Ga App 790, 700 SE 2nd 604 (2010). Therefore, Miller/Dubee reasonably expected Harbor and Staton to make full disclosure to them of all facts relevant to the closing including the signing of the personal guarantee agreements.

The existence of the agency relationship is also demonstrated by the fact that Staton assisted Miller/Dubee in the preparation of the document memorializing the earlier verbal agreement to pay the bonuses and because he also advocated on their behalf to Ewaldsen to pay these bonuses.

3.

C. The trial Court erred when it failed to rule that Harbor's statements to Miller/Dubee that there was no money available to pay bonuses and that Staton had "no

dog in the fight" was a misrepresentation of a material fact, known by Harbor and Staton to be false, with the intention to induce Miller/Dubee to act, that Miller and Dubee were entitled to reply on the representation, and that Miller and Dubee were damaged as a result.

The trial Court was mistaken when it ruled that Miller/Dubee had failed to prove all of the elements of fraud. This finding is not supported by the evidence and testimony.

First, the representation that there were no money to pay bonuses and that Staton had "no dog in the fight" are clearly false. There were monies available to pay Harbor's fee in full and monies available to pay Staton's fees in full. There is no evidence indicating that their right to receive their fees had any greater priority then the fees Miller/Dubee had expected to receive as bonuses for their guaranty. There is nothing that would have prohibited Miller/Dubee from trying to negotiate with Harbor and Staton for some amount of a bonus which would have required Harbor and Staton to reduce their expectation so as to share the fees with Miller/Dubee.

Staton knew that he "had a dog in the fight" since he was working with Ewaldsen. He also knew that his fees would not be paid unless there was a closing. Therefore, he knew that not only was the statement false but that they were false at the time he made them.

The statements that were made by Staton to Miller/Dubee were made to induce them to sign the guarantee agreement without receiving a bonus. There is no reason why Staton would have made those statements other than to induce them to sign. He knew that there was money available and that he "had a dog in the fight".

As stated, all the parties were working toward a common interest and goal. Miller was an investor in the project and had the right to assume that Staton was acting in the best interest of Moon River. Dubee was an employee of Harbor and a coworker of Staton. He would have no reason to assume that Staton would not tell him anything other than the complete truth.

Finally, Miller/Dubee suffered damages. Not only did they not receive their bonuses but they suffered a loss when the business itself failed.

The Court's order disregards uncontroverted evidence contained within the record. Specifically, Miller/Dubee would call to this Court's attention the fact that Staton acknowledged the verbal agreement to pay bonuses to Miller/Dubee. Had the earlier ING loan gone through the bonuses would have been paid. (T, page 12-16). The earlier verbal agreement was acknowledged by Staton in the April 10, 2007 agreement following a meeting on April 5, 2007 (the same date as the actual loan closing) (R 48, Plaintiff's exhibit 7). The Judge's order also attributes statements made by Soderlind to Staton. In his earlier testimony Soderlind indicated that he was not involved in the securing of the loan. Therefore, the fact that he made no such statements to Miller/Dubee is not in dispute. Staton never denied making those statements to Miller/Dubee. The Superior Court also ignored O.C.G.A. § 23-2-52 which provides that "misrepresentation of a material fact, made willfully to deceive or recklessly without knowledge and acted on by the opposite party or made innocently or mistakenly and acted on by the opposite party constitutes legal fraud". Staton's statement to Miller/Dubee that he "had no dog in the fight" mislead Miller/Dubee. Had Staton told Miller/Dubee the truth they would have learned of the fees that

Staton was to receive at closing. That is a material fact that Miller and Dubee should have taken into account when deciding whether to guarantee the loans to Moon River.

As stated above the Superior Court also ignored O.C.G.A. § 23-2-53 and made no reference to whether the suppression of a material fact amounts to fraud as a matter of law.

The Superior Court also ignored the fact that these parties were working toward a common goal. Miller was an investor in Moon River. Dubee was an employee of Harbor. Pursuant to O.C.G.A. § 23-2-58 a confidential relationship was created under these circumstances. "Where one party is so situated as to exercise a controlling influence over the will, conduct and interest of another or where, from a similar relationship of mutual confidence, the law requires the utmost good faith, such as the relationship between partners, principal and agent, etc." (emphasis added)

Because they were all working together for the same purpose (obtaining a loan for Moon River) Miller/Dubee were entitled to be advised of the fees Staton was to receive at closing. The failure to disclose this vital information ultimately damaged Miller/Dubee.

B. The Standard of Review

The findings of fact made by the Superior Court shall not be set aside unless clearly erroneous O.C.G.A. § 9-11-52 (a).

The denial of a motion for new trial would be set aside if contrary to law in that it lacks any evidence by which it would be supported. As such, the Court of Appeals may conduct a de novo review. Cook v Huff 274 GA 186, 552 SE 2nd 83 (2001).

Conclusion

For the foregoing reasons, the Appellants respectfully request this Court to reverse the trial Court's denial of the motion for a new trial and remand the matter back to Superior Court for further proceedings.

Respectfully submitted the 29 day of April, 2015.

WOODARD and BUTLER
BY: _____
Jeffrey M. Butler
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CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the within and foregoing ***Brief of Appellants*** by depositing in the United States Mail, properly addressed and with sufficient postage affixed thereto to ensure delivery to the following:

Thomas J. Mahoney III
Attorney at Law
PO Box 786
Savannah, GA 31402

This 29 day of April, 2015.

WOODARD and BUTLER

BY: _____
JEFFREY M. BUTLER
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