

1 COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT DEPT.
CIVIL ACTION NO 05-0407E

OLEG BATISHCHEV and
ALLA BATISHCHEVA,
Plaintiffs,

195

v.

BRENDA COTE as she is an Agent of
COLDWELL BANKER RESIDENTIAL
BROKERAGE, NRT NEW ENGLAND
INC., d/b/a COLDWELL BANKER
RESIDENTIAL BROKERAGE,
NATASHA AMITAN, PERCEPTION
VENTURES LLC, DAVID RENAUTTA,
RAJESH GILL, SABRINA LANZ, and
FEE, ROSS & LANZ, P.C.,
Defendants.

**MEMORANDUM AND ORDER ON PENDING MOTIONS,
AND ORDER FOR JUDGMENT**

1 The following orders on the pending post-trial motions and the order for judgment are the end result of a preposterous fraud committed on the plaintiffs. The plaintiffs, who are Russian-born scientists, were shown a condominium on the right hand side of the building, which the broker described to them as Unit A. When they asked for a floor plan, the broker (defendant Cote) provided them a floor plan which likewise showed Unit A on the right side. Later, the building owner's* manager confirmed the plan, which had been intentionally altered. Plaintiffs were also assured by Cote that the building had no water infiltration problems. Based on those assurances, plaintiffs signed the purchase and sale agreement, after which Perception's counsel (defendant Lanz) also confirmed the erroneous location of Unit A. They were then given the keys to the right hand unit

* Perception Ventures LLC

(which was actually Unit B) and moved in on Christmas Eve, 2004. On December 28, 2004 two other participants in the fraudulent scheme appeared at their door-step and told them that they were occupying what was actually Unit B which one of them already owned, and that they must move into the unfinished left-hand unit (Unit A), which they had actually purchased.

1. PLAINTIFF'S REQUEST, PURSUANT TO G.L. c. 93A, FOR AN AWARD OF REASONABLE ATTORNEY'S FEES AND COSTS AGAINST DEFENDANTS' COTE AND COLDWELL BANKER

In earlier rulings,¹ the Court found that the Cote defendants had violated c. 93A and awarded nominal damages of \$25 and ruled that said defendants should be jointly liable with Sabrina Lanz and her law firm, Fee, Ross and Lanz, P.C. (“the Lanz defendants”)² for the amount of plaintiffs’ reasonable attorney fees.

Cote’s counsel argues that the Court should apportion plaintiffs’ attorney fees between the plaintiffs’ attorney hours spent on Cote’s c. 93A violation³ as compared with plaintiffs’ attorney hours spent on the negligence claim against defendant Amitan and the c.93A violations of the Lantz defendants. However, apportionment is not required where, as here, the c.93 claims against all of the defendants were intertwined factually. See

¹ See “Rulings and Findings of the Court with Respect to G.L. c 93A counts of the Complaint” dated June 7, 2007, and “Memorandum and Order on Brenda Cote and New England Inc., Motion For Attorney Fees and Costs Pursuant to Rule 68”, dated September 24, 2007.

² The Lantz defendants subsequently reached a settlement with plaintiffs and thus are no longer in the case.

³ The jury found that Cote, acting as an agent of Coldwell Banker, intentionally misrepresented to the plaintiffs that there was no water infiltration problem in the building with the intention that plaintiffs rely thereon to their detriment. Although the jury also found that it was not proven that plaintiffs had reasonably relied therein to their detriment, the Court never-the-less found that the Cote defendants had violated c. 93A. See footnote 1, supra.

cases cited at p.8 of plaintiff's Request for Attorney Fees. Here, where the Court has found that all of plaintiffs' claims were intertwined factually, except possibly the negligence claim against Amitan (who was plaintiffs' real estate attorney), the Court sticks with its previous decision⁴ that the only apportionment reasonably practicable is to attribute one-sixth of the attorney fees incurred to the claim against her (who was not guilty of c.93 A violations) and the other five-sixths of the attorney fees jointly and severally to the other five named defendants who the Court finds conspired to mislead the plaintiffs in violation c. 93A⁵. As the Lantz defendants have now settled and the other c.93 defendants have absconded or are judgment-proof, the Cote defendants are left holding that bag.

It is true, as the Cote defendants point out in their Opposition, that Cote was found by the jury to have intentionally engaged in deception as to only some, but not all, of the mis-information provided to plaintiffs concerning the condo unit and that the jury further found that plaintiffs had failed to prove that they had reasonably relied to their detriment on such misrepresentations. The Court has found, however, that plaintiffs may, never-the-less, have been influenced by the Cote misrepresentations in their decision to close on the unit⁶, and finds that these misrepresentations were part and parcel of the over-all deception which resulted in plaintiffs purchasing a condo unit which they would not otherwise have purchased. In these circumstances, the Court concludes that the Cote defendants have not established any legitimate basis for an apportionment other than what the Court has already indicated.

⁴ "Memorandum and Order on defendants Brenda Cote and NRT New England Inc. Motion for Attorney Fees and Costs Pursuant to Rule 68" dated September 24, 2007.

⁵ See the Court's September 24, 2007 "Memorandum and Order," footnote 1, above.

⁶ See the Court's June 7, 2007 decision, footnote 1 supra.

It is also true that, because the jury concluded that plaintiffs had not relied to their detriment on Cote's misrepresentations, the Court awarded only nominal damages of \$25 against the Cote defendants, so that the damages trial, which determined plaintiffs' actual damages which resulted from their mistaken purchase of the wrong condo unit, involved only the single remaining damages defendant, Amitan⁷. The Cote defendants therefore contend that plaintiffs' attorney fees incurred as a result of the damages trial should not be awarded against them.

The facts of this case, however, give rise to the reasonable, if not inescapable, inference that all of Perception's agents in the deal (including the Cote and the Lanz defendants, who were Perception's realtors and attorneys) conspired to mislead the plaintiffs with the intention of having them close on the unit, and the Court, so finds. It was all of the defendants' combined wrongdoing which convinced plaintiffs to go through with the closing, which necessitated both trials⁸. The Court thus finds that in these circumstances, an allocation between the two trials of plaintiffs' attorney fees would be unwarranted.

Plaintiffs, in their Request for attorney fees and in their supporting Affidavit of Counsel, have requested attorney fees of \$586,595. Applying the lodestar method approved by the Supreme Judicial Court, the Court finds that this amount is reasonable. In consideration of the factors set forth in Stowe v. Bologna, 417 Mass 199, 203-204 (1994) and Linthicum v. Archambault 379 Mass. 381, 388-389 (1979), the Court finds that each of the factors weighs in favor of awarding the entire requested amount. Not only

⁷ The Jury returned a verdict of \$576,385.32 against Amitan.

⁸ The facts are succinctly and accurately summarized in the affidavit of Oleg Batishchev filed in support of plaintiff's "Application for Default and Assessment of Damages Against Perception Ventures, LLC."

have defendants' actions necessitated two lengthy jury trials, but the issues have been complex and difficult, and have been ably handled by experienced counsel.

Accordingly, the Court awards 5/6 of the total reasonable attorney fees of \$586,594, or \$488, 829, to the plaintiffs against the Cote defendants.

2. BILL OF COSTS AGAINST AMITAN

Plaintiffs have filed a bill of costs against Amitan for \$27,099.46. The Court agrees that most of the items totaling \$14,037.90 as to which Amitan objects should be excluded for the reasons stated in defendant's "partial objection", except as to the disputed \$2,437.95 witness fee. The fact that the parties agreed that, pending the outcome of the trial, each would pay for the other's expert witness fees for depositions does not mean that, to the extent that plaintiff is obligated to pay such fee, it may not be included as an allowable cost. Accordingly, the Court disallows \$11,599.95 of the claimed costs and awards costs against Amitan in the sum of \$15,499.51.

3. BILL OF COSTS AGAINST THE COTE DEFENDANTS and BILL OF COST OF BY COTE DEFENDANTS and NRT NEW ENGLAND INC.

Plaintiffs request costs of \$62,798.01 against the Cote defendants. These costs are separate and distinct from those awarded against Amitan. There never was a reasonable offer of settlement so as to justify an allocation of costs incurred before as opposed to those incurred after defendants' response to plaintiffs' c. 93A demand letter. Nor are the Cote defendants entitled to any appointment of the c. 93A costs as between them and the

Lanz defendants. As discussed above, all of the c. 93A defendants' acts were intertwined and combined to cause plaintiffs' injury.

As the actual damages against the Cote defendants (\$25) were less than their offer of judgment, however, the Cote defendants are entitled to off-set the amount of their own costs subsequent to their offer of judgment, which are \$14,533.39.

Accordingly, costs are awarded to the plaintiff's against the Cote defendants in the sum of \$48,264.62.⁹

4. MOTION OF DEFENDANT AMITAN FOR REDUCTION OF DAMAGES
AWARD AS A RESULT OF SETTLEMENT BY CO-DEFENDANT

The Lanz defendants settled with the plaintiffs for \$150,000, and Amitan moves to reduce the jury's damage award against her (\$576,385.32) by the amount of the \$150,000 settlement. For the reasons stated in defendant's motion, the Court agrees that the damage award against Amitan should be reduced by the entire amount of the settlement, as provided in M.G.L. c. 231B 1§4.

Although it may be true that a judge may not be prohibited from apportioning a pretrial settlement among a plaintiff's various claims in some circumstances, see Thayer v. Pittsburgh-Corning Corp., 45 Mass. App Ct, 435, 441 (1998), no case has been cited which requires a Court to do so, and G.L. c. 231 B 1§ 4, by its plain terms, would appear to indicate the contrary where, as here, all defendants contributed to the "same injury". Accordingly, the damage award against Amitan is reduced to \$426,385.32.

⁹ \$62,798.01 less Cote's allowable costs under Rule 68 of \$14,533.59

5. PLAINTIFFS' APPLICATION FOR RULE 55(b) (2) DEFAULT JUDGMENT
and ASSESMENT OF DAMAGES AGAINST PERCEPTION VENTURES, LLC.

Although Perception did initially appear by counsel and answer the complaint, its counsel withdrew and it was defaulted on October 11, 2006 for failure to have new counsel appear by October 10, 2006 as ordered by the Court. Since then, Perception has been entirely inactive in the case. New counsel did appear at the February 14, 2008 hearing on assessment of damages but did not object to the requested assessment or present evidence.

Accordingly, the Court assesses damages against Perception in the sum of \$3,878,548.90 as sought by plaintiffs' Application and as itemized in Oleg Batishchev's affidavit filed in support of thereof.¹⁰

ORDER FOR JUDGMENT

Final judgment shall be entered for the plaintiffs against Brenda Cote, Coldwell Banker Residential Brokerage, and NRT New England Incorporated d/b/a Coldwell Banker Residential Brokerage, in the sum of \$513,829¹¹ plus costs of \$48,264.62 and interest.

Final judgment shall be entered against Natasha Amitan in the sum of \$426,385.32¹² plus costs of \$15,499.51 and interest.

¹⁰ It appears, however, that Perception is probably judgment-proof


¹¹ \$25 nominal damages plus \$488,829(5/6 of plaintiffs' attorney fees)

¹² The jury award of \$576,385.32 less the \$150,00 settlement

Final judgment shall be entered against the defendant Perception Ventures LLC in the sum of \$3,878,548.90 plus interest.

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Dated: February 20, 2008



Thayer Fremont-Smith
Justice of the Superior Court

Commonwealth of Massachusetts
County of Middlesex
The Superior Court

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Oleg Batishchev, et al

vs.

Brenda Cote, Agent Of Coldwell Banker Residential Brokerage, et al

JUDGMENT

This action came on for bifurcated trials before the Court and juries, Thayer Fremont-Smith, Justice, presiding, the issues having been duly tried and the juries having rendered their verdicts, and the Court having filed its Memorandum And Order On Pending Motions and Order For Judgment and the court having defaulted and assessed damages as to defendant, **Perception Ventures, LLC**.

It is **ORDERED** and **ADJUDGED**:

That the plaintiff(s), **Oleg Batishchev and Alla Batishcheva**, recover of the defendant(s), **Brenda Cote, Agent Of Coldwell Banker Residential Brokerage and NRT New England Incorporated d/b/a Coldwell Banker Residential Brokerage**, the sum of **\$25.00** with interest thereon from 11/21/2005 to 03/07/2008 in the sum of **\$6.88** as provided by law, and attorney fees in the sum of **\$488,829.00** and their costs of action in the sum of **\$48,264.62**.

That the plaintiff(s), **Oleg Batishchev and Alla Batishcheva**, recover of the defendant(s), **Natasha Amitan**, the sum of **\$426,385.32** with interest thereon from 11/21/2005 to 03/07/2008 in the sum of **\$117,332.92** as provided by law, and their costs of action in the sum of **\$15,499.51**.

It is further **ORDERED** and **ADJUDGED**:

That the plaintiff(s), **Oleg Batishchev and Alla Batishcheva**, recover of the defendant(s), **Perception Ventures LLC**, the sum of **\$3,878,548.90** with interest thereon from 11/21/2005 to 03/07/2008 in the sum of **\$1,067,300.99** as provided by law, and its costs of action.

That the cross-claim defendant, **Perception Ventures LLC**, is declared to be jointly and severely liable to the cross-claim plaintiff, **Brenda Cote, Agent Of Coldwell Banker Residential Brokerage and NRT New England Incorporated d/b/a Coldwell Banker Residential Brokerage**, in the sum of **\$25.00** with interest thereon from 11/21/2005 to 03/07/2008 in the sum of **\$6.88** as provided by law, and attorney fees in the sum of **\$488,829.00** and their costs of action in the sum of **\$48,264.62**.

Dated at Cambridge, Massachusetts this 7th day of March, 2008.

BY: 

Assistant Clerk

C/m 3/11/08