

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D15862  
O/gts

\_\_\_\_\_AD3d\_\_\_\_\_

Submitted - June 5, 2007

HOWARD MILLER, J.P.  
WILLIAM F. MASTRO  
ROBERT A. LIFSON  
EDWARD D. CARNI, JJ.

---

2007-03041

DECISION & ORDER

RWSP Realty, LLC, d/b/a Prudential Rand  
Realty, respondent, v John C. Agusta, et al.,  
appellants.

(Index No. 970/04)

---

Agusta & Ross, Glendale, N.Y. (Michael J. Agusta of counsel), for appellants.

Condon Resnick, LLP, Nyack, N.Y. (Ellen O'Hara Woods of counsel), for  
respondent.

In an action to recover a real estate brokerage commission, the defendants appeal, as limited by their brief, from so much of an order of the Supreme Court, Rockland County (Weiner, J.), dated March 7, 2007, as denied those branches of their motion which were to dismiss the complaint pursuant to CPLR 3211 (a)(1) and (7).

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, and those branches of the motion which were to dismiss the complaint pursuant to CPLR 3211 (a)(1) and (7) are granted.

The plaintiff, a real estate broker, alleged that while acting as a "buyer's agent," it procured a ready, willing, and able buyer for a residence owned by the defendants. The plaintiff commenced this action against the defendants seeking a real estate broker's commission based upon the terms and conditions of an exclusive right-to-sell agreement between the defendants and the nonparty listing broker. The defendants moved, inter alia, to dismiss the complaint on the ground that, based upon documentary evidence, the complaint failed to state a cause of action. The Supreme

July 17, 2007

Page 1.

RWSP REALTY, LLC, d/b/a PRUDENTIAL RAND REALTY v AGUSTA

Court found that the listing agreement did not conclusively establish a defense to the claims asserted and that the complaint set forth a cognizable legal theory. We disagree.

The plaintiff, a buyer's agent, had no cause of action against the defendants because it had no contract, express or implied, with them (*see Fischer v RWSP Realty, LLC*, 19 AD3d 540; RPL 443[1][c]). Rather, the defendants' sole contract was with the listing broker. The plaintiff's claim for compensation for its efforts, therefore does not lie against the defendants (*see Fischer v RWSP Realty, LLC, supra; Re/Max Homes & Estates v Leist*, 308 AD2d 439, 440; *Geoffrey S. Matherson & Assoc. v Calderone*, 190 Misc 2d 775).

Accordingly, the Supreme Court erred in denying those branches of the defendants' motion which were to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7).

MILLER, J.P., MASTRO, LIFSON and CARNI, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court