

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

D35707
W/kmb

_____AD3d_____

Argued - June 7, 2012

RANDALL T. ENG, P.J.
REINALDO E. RIVERA
ANITA R. FLORIO
SHERI S. ROMAN, JJ.

2011-00640

DECISION & ORDER

Excel Realty Advisors, L.P., etc., appellant,
v SCP Capital, Inc., et al., respondents.

(Index No. 8730/10)

Jaspan Schlesinger LLP, Garden City, N.Y. (Steven R. Schlesinger and Seth A. Presser of counsel), for appellant.

Holland & Knight LLP, New York, N.Y. (Joseph P. Sullivan and Mitchell J. Geller of counsel), for respondents SCP Capital, Inc., SCP 2009-C34, L.P., Landes Investment Group, Inc., and LLWG Capital, Inc.

Barry S. Gedan, Riverdale, N.Y. (Beverly Johnson of counsel), for respondents SCP 2009-C34-009, LLC, formerly known as CVS 75705 FL, LLC, SCP 2009-C34-012, LLC, formerly known as CVS 4146 FL, LLC, SCP 2009-C34-014, LLC, formerly known as CVS 75296 FL, LLC, SCP 2009-C34-015, LLC, formerly known as CVS 75241 FL, LLC, Alan Potamkin, Robert Potamkin, 2427 TX Property 1, LLC, 2427 TX Property 2, LLC, and 2427 Investments, Inc.

Allyn & Fortuna LLP, New York, N.Y. (Nicholas Fortuna of counsel), for respondents CVS Pharmacy, Inc., and CVS Caremark Corporation.

In an action, inter alia, to recover a real estate brokerage commission, the plaintiff appeals from an order of the Supreme Court, Nassau County (Warshawsky, J.), entered December 8, 2010, which, in effect, granted those branches of the separate motions of the defendants SCP Capital, Inc., SCP 2009-C34, L.P., Landes Investment Group, Inc., and LLWG Capital, Inc., and the defendants CVS Pharmacy, Inc., and CVS Caremark Corporation, which were pursuant to CPLR 3211(a) to dismiss the first cause of action insofar as asserted against each of them, and those

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branches of the motion of the defendants SCP 2009-C34-009, LLC, formerly known as CVS 75705 FL, LLC, SCP 2009-C34-012, LLC, formerly known as CVS 4146 FL, LLC, SCP 2009-C34-014, LLC, formerly known as CVS 75296 FL, LLC, SCP 2009-C34-015, LLC, formerly known as CVS 75241 FL, LLC, Alan Potamkin, Robert Potamkin, 2427 TX Property 1, LLC, 2427 TX Property 2, LLC, and 2427 Investments, Inc., which were pursuant to CPLR 3211(a) to dismiss the first cause of action insofar as asserted against the defendants SCP 2009-C34-009, LLC, formerly known as CVS 75705 FL, LLC, SCP 2009-C34-012, LLC, formerly known as CVS 4146 FL, LLC, SCP 2009-C34-014, LLC, formerly known as CVS 75296 FL, LLC, and SCP 2009-C34-015, LLC, formerly known as CVS 75241 FL, LLC, and the second cause of action insofar as asserted against the defendants Alan Potamkin, Robert Potamkin, 2427 TX Property 1, LLC, 2427 TX Property 2, LLC, and 2427 Investments, Inc.

ORDERED that the order is affirmed, with one bill of costs to the respondents appearing separately and filing separate briefs.

The plaintiff commenced this action to recover a real estate brokerage commission from a number of defendants allegedly involved in the sale of four properties located in Florida and two properties located in Texas (hereinafter the seller defendants), and damages for fraud from several other defendants who allegedly purchased the Florida and Texas properties (hereinafter the buyer defendants). The Supreme Court subsequently granted the separate motions of the various groups of the seller defendants and the buyer defendants to dismiss those causes of action asserted against each of them, respectively.

Contrary to the plaintiff's contention, the Supreme Court correctly determined that, under the circumstances of this case, the plaintiff's right to recover a commission for its alleged efforts in procuring the sale of properties in Florida and Texas should be governed by the law of those states, respectively (*see Madison Realty v Neiss*, 253 AD2d 482, 483; *see also TDH-Berkshire Inc. v Korff*, 33 AD3d 437, 438; *Equis Corp. v Mack-Cali Realty Corp.*, 6 AD3d 264, 267; *cf. Rosenberg & Rosenberg v Hoffman*, 195 AD2d 343, 344). In that regard, since the documentary evidence that the seller defendants SCP Capital, Inc., SCP 2009-C34, L.P., Landes Investments Group, Inc., and LLWG Capital, Inc. (hereinafter collectively the SCP defendants), submitted with their motion established that the plaintiff is not a licensed real estate broker in Florida or Texas, the plaintiff may not recover a real estate brokerage commission with respect to each of the transactions at issue under the laws of Florida and Texas, respectively (*see Fla Stat Ann* § 475.41; *Tex Occ Code* § 1101.806[b][1]). Accordingly, the Supreme Court properly granted that branch of the SCP defendants' motion which was pursuant to CPLR 3211(a) to dismiss the first cause of action insofar as asserted against them based on a defense founded upon documentary evidence.

Moreover, although the Supreme Court properly granted those branches of the motions of the remaining seller defendants which were to dismiss the first cause of action insofar as asserted against each of them, we affirm on a ground other than that relied upon by the Supreme Court, specifically, the documentary evidence establishing that the plaintiff is not a licensed real estate broker in either Florida or Texas. The remaining seller defendants raised that ground before the Supreme Court, and as an alternative ground for affirmance on appeal (*see Parochial Bus. Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 544).

With respect to the buyer defendants, the Supreme Court properly determined that they were entitled to dismissal of the fraud cause of action for failure to state a cause of action (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559).

In light of our determinations, we need not reach the parties' remaining contentions.

ENG, P.J., RIVERA, FLORIO and ROMAN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court