

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

GEORGE TSUNIS REAL ESTATE, INC.,

Plaintiff,

-against-

GEORGE W. BENEDICT and GWB ROOSEVELT, LLC,

Defendants.
_____x

MOTION DATE: 2-15-12
SUBMITTED: 2-16-12
MOTION NO.: 003-MOTD
005-XMD

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Upon the following papers numbered 1-34 read on this motion and cross-motion for summary judgment ;
Notice of Motion and supporting papers 1-19 ; Notice of Cross Motion and supporting papers 20-32 ; Answering
Affidavits and supporting papers 33 ; Replying Affidavits and supporting papers 34 ; it is,

ORDERED that the motion by the plaintiff and the cross motion by the defendant for summary judgment are determined as follows:

This action arises out of the purchase by Beechwood Benedict, LLC, of a parcel of real property located in Hempstead, New York. On February 25, 2003, the defendant GWB Roosevelt, LLC (“GWB”), purchased an option to buy 52 acres of land that was formerly part of Roosevelt Raceway. GWB is owned by the defendant George W. Benedict and another individual. After purchasing the option, Benedict spoke to George Tsunis of the plaintiff, George Tsunis Real Estate, Inc., a licensed real estate broker, about finding a buyer for the property. Tsunis arranged a meeting on May 16, 2003, between Benedict and Michael Dubb of the Beechwood Organization, among others, at which Beechwood’s purchase of the property was discussed. What happened after the meeting is disputed. According to Tsunis, Benedict agreed to pay him a \$1 million brokerage commission. According to Benedict, he offered to give Tsunis \$100,000 as a gift for introducing him to various people. It is undisputed that Tsunis did not have a written brokerage agreement with either Benedict or GWB.

On March 15, 2004, Beechwood Benedict, LLC, was formed as a joint venture to

develop the property and construct condominiums thereon. Beechwood Benedict was owned by GWB (45%) and Beechwood Roosevelt Building Corp. (55%), in which Michael Dubb had an ownership interest. GWB sold its option to purchase the premises to Beechwood Benedict for \$18.2 million pursuant to a purchase and sale agreement dated March 15, 2004. That agreement provided, in pertinent part, as follows:

8. Brokerage Commissions.

(a) Each party represents and warrants to the other that it has not dealt with any broker in connection with this transaction other than George Tsunis Real Estate Inc. (the "Broker") and other than any brokerage commissions owed to the Broker, no other broker commissions are due in connection herewith. Each party hereto acknowledges and agrees that the other party is relying upon the foregoing representations, which representations shall be binding upon each party hereto and any successors and assigns.

(b) Each party hereto agrees to indemnify the other against all loss, liability and expense including any reasonable attorney's fees, arising out of any claims which may be asserted against such party by any other real estate broker, arising out of this transaction, provided such claims are attributable to the acts of the indemnifying party, its members, managers, employees, agents and/or representatives.

(c) Seller agrees to pay any brokerage commission owed to the Broker in connection herewith or the Option Agreement.

The closing took place on the same day, March 15, 2004. Tsunis did not attend the closing, nor was he paid a commission when the transaction closed. Tsunis alleges that he sent Benedict invoices and commission agreements, which Benedict did not pay or sign, in September 2003, July 2005, September 2007, and July 2008, respectively. In an e-mail to Tsunis dated July 16, 2008, the subject of which was the "Race Track," Benedict stated, "When I get paid you will. No one has taken a dollar from the job till it is done. [T]hat was my deal and agreement with Mike." In January 2010, Tsunis sent an e-mail to Benedict stating, "I know you said when you get paid I get [paid] but I was wondering if you could start sending me some money." Benedict responded, "I said when job is done. [J]ob is not done there will be no money distributed till it is finished[.] [B]ank agreement."¹ In a subsequent e-mail to Tsunis dated February 11, 2010, Benedict stated, "George, I understand you are looking for a WITNESS TO SOME ARRANGEMENT BETWEEN YOU AND ME. I do not have ANY ARRANGEMENT with you. Do not call me do not write forget my name and number." Tsunis commenced this action, which

¹The defendants challenge the authenticity of the later e-mails on the ground that they were produced from an electronic note file prepared by Tsunis. Tsunis testified at his deposition that he saved them by copying and pasting them into a note file on or about January 13, 2010. The record does not reflect that Tsunis altered or changed the e-mails in any way when he copied and saved them.

sounds in breach of contract, to recover his commission on June 28, 2010. Both sides move for summary judgment.

The court finds that the plaintiffs have established, prima facie, their entitlement to judgment as a matter of law. When, as here, a contract of sale or lease agreement admits the broker's performance of services and includes an express promise by the seller to pay the broker's commission, the broker is entitled to summary judgment on its claim for a commission as a third-party beneficiary of the contract or lease (*see, Joseph P. Day Realty Corp. v Chera*, 308 AD2d 148, 152 [and cases cited therein]). The fact that the parties did not execute a separate written brokerage agreement is of no moment (*see, Helmsley-Spear, Inc. v New York Blood Ctr.*, 257 AD2d 64, 67, *citing William B. May Co. v Monaco Assocs.*, 80 AD2d 798; *see also*, General Obligations Law § 5-701 [a] [10]; *Fidelity Business Brokers v Gamaldi*, 190 AD2d 709).

Seeking to avoid the clear terms of the purchase and sale agreement and relying on affidavits from Benedict and Dubb, among others, the defendants argue that Tsunis was not the procuring cause of the purchase and sale agreement; that he did not produce a buyer who was ready, willing, and able to purchase the property; and that he acted solely as a finder. "Interpretation of an unambiguous contract provision is a function for the court, and matters extrinsic to the agreement may not be considered when the intent of the parties can be gleaned from the face of the instrument" (*Helmsley-Spear, Inc. v New York Blood Ctr.*, *supra* at 68, *quoting, Teitelbaum Holdings v Gold*, 48 NY2d 51, 56). The clear and unambiguous language of paragraph 8 of the purchase and sale agreement represents an admission by the defendants that Tsunis was the broker for the transaction and that he is entitled to the reasonable value of his services (*see, William B. May Co. v Monaco Assocs.*, *supra*; *see also, Helmsley-Spear, Inc. v New York Blood Ctr.*, *supra* at 67). The defendants' self-serving arguments are nothing more than an effort, by parol, to controvert a contractual admission that is clear from the instrument itself (*Id.* at 68).

The defendants have produced affidavits from Benedict, Dubb, and the attorneys who represented them in connection with the purchase and sale agreement. They aver that paragraph 8 was included in the agreement solely to indemnify Dubb and Beechwood Roosevelt Building Corp. in the event any claims for brokerage commissions were asserted and that paragraph 8 was not intended to confer a benefit on Tsunis. Since only subparagraph (b) addresses the subject of indemnification, acceptance of the defendants' argument would require that subparagraphs (a) and (c) be ignored, disregarding a cardinal rule of contract construction (*see, Helmsley-Spear, Inc. v New York Blood Ctr.*, *supra*). Courts should construe a contract so as to give meaning to all of its terms and avoid an interpretation that effectively renders a part of the contract meaningless (*Id.* at 69, *citing Two Guys from Harrison v S.F.R. Realty Assocs.*, 63 NY2d 396, 403). The defendants' interpretation of paragraph 8 fails to give full meaning and effect to all of its provisions (*see, Kaung v Board of Managers of the Biltmore Towers Condominium Assoc.*, 22 Misc 3d 854, 865, *aff'd* 70 AD3d 1004). Moreover, as previously discussed, paragraph 8 is clear on its face. Thus, extrinsic evidence as to its interpretation is irrelevant (*see, Helmsley-Spear, Inc. v New York Blood Ctr.*, *supra* at 68). Accordingly, the defendants' interpretation of paragraph 8 is rejected.

The defendants contend that the plaintiff's claim is time-barred. Pursuant to CPLR

213, the six-year limitations period applies to causes of action based on breach of contract (*see*, **CB Richard Ellis-Buffalo, LLC v Kunvarji Hotels, Inc.**, 94 AD3d 1458). The statute of limitations begins to run when the cause of action accrues (CPLR 203 [a]; **Ely-Cruishank Co. v Bank of Montreal**, 81 NY2d 399, 402). In New York, a breach-of-contract cause of action accrues at the time of the breach (**Id.**). In a real estate transaction involving numerous collateral agreements and requiring many different acts to be performed by the respective parties to effectuate the closing of title, the breach is measured from the law day (**Rachmani Corp. v 9 East 96th Street Apartment Corp.**, 211 AD2d 262, 268). Not only is performance due on the closing date, but the obligation to pay the real estate broker a commission also arises at that time (**Id.**, *see also*, **CB Richard Ellis-Buffalo, LLC v Kunvarji Hotels, Inc.**, *supra*). Thus, the plaintiff's causes of action accrued when Tsunis earned his commission, i.e., the date on which the purchase and sale agreement was executed and the transaction closed, i.e., March 15, 2004 (**Id.**). This action was commenced more than six years later, on June 28, 2010.

The plaintiffs contend that the Benedict's e-mails to Tsunis constitute an acknowledgment of the debt, which takes the action outside of the operation of the statute of limitations (*see*, General Obligations Law § 17-101). The defendants argue in opposition that the e-mails were only conditional promises to pay, which do not take the action outside of the statute of limitations unless the condition is satisfied, which it was not.

To constitute an acknowledgment of a debt, a writing must recognize an existing debt and contain nothing inconsistent with an intention on the part of the debtor to pay it (**Knoll v Datek Securities Corp.**, 2 AD3d 594, 595). In determining the effectiveness of an acknowledgment, the critical determination is whether the acknowledgment imports an intention to pay (**Id.**). An express promise to pay conditioned upon the debtor's future ability to pay has been held sufficient to start the statute of limitations running anew when the creditor meets its burden of showing that the condition has been performed (**Flynn v Flynn**, 175 AD2d 51, 52).

The court finds that, while the e-mails acknowledge the existence of Benedict's indebtedness to Tsunis, they are conditional promises to pay. The burden is, therefore, on the plaintiff to establish that the condition has been performed. The plaintiff contends that Benedict's promise to pay Tsunis was conditioned the defendants being paid and that the condition has been performed because the defendants have already been paid \$18.2 million plus interest. In support thereof, the plaintiff has submitted evidence that, at the closing, GWB received \$1.5 million in cash (\$1 million having been previously paid) and an unsecured promissory note in the amount of \$15.7 million, which has been satisfied. The defendants do not dispute these facts, but argue that the condition has not been performed because any payment to Tsunis was conditioned on the defendants being paid when the property is fully developed and all of the condominiums have been sold, which has not occurred yet. The court finds that the defendants have raised a triable issue of fact as to whether or not the condition has been performed.

The plaintiffs contend that the defendants should be estopped from asserting the statute of limitations as a defense. New York courts have long had the power to preclude a defendant from using the statute of limitations as a defense when the defendant's affirmative wrongdoing has produced a long delay between the accrual of the cause of action and the institution

of the legal proceeding (**Costello v Verizon, N.Y., Inc.**, 77 AD3d 344, 367, *affd as mod* 18 NY3d 777). A defendant may be estopped from pleading the statute of limitations when the plaintiff was induced by fraud, misrepresentations, or deception to refrain from filing a timely action (**Id.**). Courts may also look to whether the defendant engaged in conduct that was calculated to mislead the plaintiff and whether the plaintiff, in reliance thereon, failed to commence a timely action (**Id.**). When a plaintiff claims that a defendant should be equitably estopped from asserting a statute of limitations, the plaintiff must show due diligence in bringing the action (**Zumpano v Quinn**, 6 NY3d 666, 683). Due diligence means that the plaintiff must seek to bring an action against the defendant as soon as the plaintiff learns of the misrepresentation (**Id.**).

The court finds that there is an issue of fact as to whether Benedict's promises to pay Tsunis sometime in the future were calculated to mislead Tsunis or to induce him to postpone bringing suit. The court also finds that there is an issue of fact as to whether Tsunis exercised due diligence in commencing this action. Although Tsunis first learned of Benedict's purported misrepresentations on February 11, 2010, approximately one month prior to the expiration of the statute of limitations on March 15, 2010, this action was not commenced until June 28, 2010.

In addition to seeking summary judgment on the two causes of action in the complaint, the plaintiff seeks summary judgment on an unpleaded cause of action for an account stated. In support thereof, the plaintiff relies on invoices that Tsunis purportedly sent to Benedict on September 16, 2003; July 18, 2005; September 17, 2007; and July 16, 2008, respectively. Summary judgment may be awarded on an unpleaded cause of action if the proof supports such a cause of action and the opposing party has not been prejudiced (**Fofana v 41 West 34th Street, LLC**, 62 AD3d 522). Benedict denies receiving the invoices and contends that they were not produced by the plaintiff until after the close of discovery. The court finds that, under these circumstances, the defendants would be prejudiced if the plaintiff were awarded summary judgment on the unpleaded cause of action. Moreover, there is a triable issue of fact as whether the defendants received and retained the invoices without objection (*see*, **Herrick, Feinstin v Stamm**, 297 AD2d 477, 478).

In sum, the court finds that the plaintiffs have established, prima facie, their entitlement to judgment as a matter of law on the issue of liability with regard to the two causes of action in the complaint. Although those causes of action are time-barred, there are issues of fact as to whether Benedict's conditional promises to pay Tsunis had the effect of restarting the statute of limitations (i.e., whether the condition was satisfied) and whether the defendants are estopped from asserting the statute of limitations as a defense. Accordingly, the parties are directed to proceed to trial on those issues, on the plaintiffs' unpleaded cause of action, and on the issue of damages.

DATED: July 6, 2012

J. S.C.