

**Marilyn Weigner Assoc., Inc. v Davis**

2016 NY Slip Op 31937(U)

September 30, 2016

Supreme Court, New York County

Docket Number: 653127/2015

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK - PART 2**

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MARILYN WEIGNER ASSOCIATES, INC.,

Plaintiff,

-against-

BRUCE DAVIS, ESQ.,

Defendant.

**DECISION/ORDER**  
Index No. 653127/2015  
Motion Seq. No. 001

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**KATHRYN E. FREED, J.S.C.**

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

| PAPERS  | NUMBERED <sup>1</sup> |
|---|-----------------------|
| NOTICE OF MOTION, AFF. IN SUPP. AND EXHIBITS ANNEXED.....         | 6-13                  |
| DAVIS AFF. IN OPP., SEEMAN AFF. IN OPP. AND EXHIBITS ANNEXED..... | 17-27                 |
| REPLY AFF. AND EXHIBITS ANNEXED.....                              | 28-30                 |

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Plaintiff is a real estate brokerage company seeking a commission it claims defendant has wrongfully withheld following the sale a cooperative apartment unit. Following joinder of issue, plaintiff now moves for summary judgment in its favor, and defendant submits written opposition. After oral argument, a review of the papers submitted and the relevant statutes and case law, **the motion is granted.**

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<sup>1</sup> Unless otherwise indicated, the papers are numbered herein according to the document numbers assigned to them by the New York State Courts Electronic Filing System (NYSCEF).

## **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

In December 2014, defendant signed an agreement authorizing plaintiff to act as the exclusive agent for the sale of unit 9N, 11 Fifth Avenue, New York, New York. (Doc. No. 12.) Pursuant to that agreement, the unit was listed for sale at \$1.695 million. A buyer was found and, in February 2015, defendant entered into a contract to sell unit 9N for a purchase price of \$1.6 million. (Doc. No. 11.) The contract contained a provision that plaintiff had been “informed that [the p]urchaser [was] simultaneously [therewith] entering, or ha[d] already entered, into a contract of sale for Unit 9O . . . , the cooperative apartment adjacent to [defendant’s unit], and that the acquisition of the [a]djacent [u]nit by [the p]urchaser [was] a material inducement to [the p]urchaser’s entering into th[e] [c]ontract.” Plaintiff alleges that, following the closing, defendant became obligated to pay it five percent of the purchase price, or \$80,000.

After futile attempts to collect the commission, plaintiff commenced this action in September 2015. (Doc. No. 8.) Following joinder of issue (Doc. Nos. 9-10), plaintiff now moves for summary judgment in its favor. (Doc. Nos. 6-13.)

## **POSITIONS OF THE PARTIES**

Plaintiff argues that its submissions establish the existence of a valid brokerage agreement with defendant and a completed sale, thus entitling it to its commission thereunder.

Defendant contends in response that he has raised a triable issue of fact with respect to the question of whether plaintiff breached its fiduciary duty to him. Defendant concedes that he has not paid the commission fee demanded by plaintiff. (Doc. No. 17.) He maintains, however, that he had no obligation to pay plaintiff a commission, since Marilyn Wagner, plaintiff’s principal with whom he dealt, never informed him that plaintiff had also been retained to be the real estate agent for the

sellers of 90, the adjoining unit, which the buyers also purchased. He claims that plaintiff's representation of both him and his neighbor in a transaction that would encompass both apartment units constituted a violation of plaintiff's fiduciary duty to him. Defendant reasons that plaintiff was motivated as a result of this dual representation to allow defendant's apartment to be sold at less than market rate.

### CONCLUSIONS OF LAW

"A real estate broker is deemed to have earned his or her commission when he or she produces a buyer who is ready, willing and able to purchase the property, and who is in fact capable of doing so." *Douglas Elliman LLC v Tretter*, 84 AD3d 446, 448 (1st Dept 2011), *affd* 20 NY3d 875 (2012); *see Lane-Real Estate Dept. Store v Lawlet Corp.*, 28 NY2d 36, 42 (1971); *SPRE Realty, Ltd. v Dienst*, 119 AD3d 93, 97 (1st Dept 2014). Concomitantly, "a real estate broker is a fiduciary with a duty of loyalty and an obligation to act in the best interests of the principal" (*Dubbs v Stribling & Assoc.*, 96 NY2d 337, 340 [2001]; *see Cornwell v NRT N.Y. LLC*, 95 AD3d 637, 637-638 [1st Dept 2012]) and, where a broker violates this duty, he or she forfeits any right to compensation, regardless of whether damages were incurred. *See Lamdin v Broadway Surface Adv. Corp.*, 272 NY 133, 138-139 (1936); *Douglas Elliman LLC v Tretter*, 84 AD3d at 448; *TPL Assoc. Helmsley-Spear, Inc.*, 146 AD2d 468 (1st Dept 1989); *Ark Assoc. of Nassau, Inc. v Hill*, 7 Misc 3d 127(A), 2005 NY Slip Op 50437(U), at \*1 (App Term, 2d Dept, 9th & 10th Jud Dists 2005); *Rebenwurz v Swieca*, 50 Misc 3d 1210(A); 2016 NY Slip Op 50068(U), at \*10 (Sup Ct, Kings County 2016).

In this regard, "[w]here a broker's interests or loyalties are divided due to a personal stake in the transaction or representation of multiple parties, the broker must disclose to the principal the nature and extent of the broker's interest in the transaction or the material facts illuminating the

broker's divided loyalties.” *Dubbs v Stribling & Assoc.*, 96 NY2d at 340; *see* Real Property Law § 443 (3) (c); (4) (a); *Rivkin v Century 21 Teran Realty LLC*, 10 NY3d 344, 355-356 (2008); *Precision Glass Tinting v Long*, 293 AD2d 594, 595-596 (2d Dept 2002). However, representing multiple parties, in and of itself, is not a violation of this tenet, since, “in the absence of an agreement with a principal to the contrary, a broker owes no duty to refrain from offering the properties of all its principals to a prospective customer.” *Sonnenschein v Douglas Elliman-Gibbons & Ives*, 96 NY2d 369, 375 (2001) (internal quotation marks and citations omitted); *see Douglas Elliman LLC v Tretter*, 84 AD3d at 449. The Court of Appeals has found this approach to comport with “the nature and fundamental requirements of the real estate marketplace in New York,” and that “any other rule would unreasonably restrain a broker from simultaneously representing two or more principals with similar properties for fear of violating a fiduciary obligation in the event a buyer chose the property of one principal over that of another.” *Sonnenschein v Douglas Elliman-Gibbons & Ives*, 96 NY2d at 376.

Finally, “the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,” after which “the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986).

Here, plaintiff established prima facie entitlement to summary judgment by submitting evidence that defendant retained its services to act as his broker to sell his apartment unit, and that it thereafter found a buyer for the property who was ready, willing, able to (and, in fact, did) purchase the property. *See Douglas Elliman LLC v Tretter*, 84 AD3d at 448. In response, defendant failed

to raise a triable issue of fact. A broker's representation of two sellers of real property does not, without more, give rise to a breach of fiduciary claim. See *Sonnenschein v Douglas Elliman-Gibbons & Ives*, 96 NY2d at 375; *Douglas Elliman LLC v Tretter*, 84 AD3d at 449. Defendant does not claim or put forth any proof that plaintiff's dealings with the buyers rose to the level of acting as their agent and, thus, the claim that plaintiff acted as a dual agent is without a legal basis. Compare *Queens Structure Corp. v Jay Lawrence Assoc.*, 304 AD2d 736, 737-738 (2d Dept 2003); *Matter of Goldstein v Department of State, Div. of Licensing Servs.*, 144 AD2d 463, 464 (2d Dept 1988); compare also *Douglas Elliman LLC v Tretter*, 84 AD3d at 451 (Manzanet-Daniels, J., dissenting). Plaintiff has not alerted this Court of any authority to support its legal position and has failed to advance a policy reason why the duty of disclosure should extend to the instant set of facts.<sup>2</sup> This Court cannot discern how representation of multiple sellers under these circumstances would change a broker's interest in doing anything but sell both properties at as high a price as is attainable considering the market, in order to maximize the broker's commissions earned.<sup>3</sup> Thus, plaintiff is entitled to summary judgment in its favor.

There remains, however, defendant's counterclaim. (Doc. No. 5.) Plaintiff's motion papers do not address all of the sundry allegations contained in the counterclaim, nor do they explicitly request summary judgment dismissing the counterclaim. See CPLR 2214. Further, the allegations in the counterclaim relate to the conduct of plaintiff's principal during the real estate transaction, and

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<sup>2</sup> It is also worthy of note that the representation in the contract of sale that defendant knew of the buyer's intent to purchase both his and his neighbor's units cast doubt on any prejudice that may have occurred, even assuming for the sake of argument that there was a duty to disclose.

<sup>3</sup> Indeed, the possibility of combining multiple apartments may fetch a higher price for either. See generally Vivian S. Toy, *Combining and Conquer: Your Place and Mine*, NY Times, September 11, 2011, 8 RE at 1.

the demand exceeds the award to plaintiff. For all of those reasons, “entry of the summary judgment shall be held in abeyance pending the determination of [that] remaining cause of action.” CPLR 3212 (e) (2); see *Lapidus v 1050 Tenants Corp.*, 138 AD3d 783, 785-786 (2d Dept 2016); *Ayers v Snyder Corp.*, 125 AD3d 1379, 1380 (4th Dept 2015).

Therefore, in light of the foregoing, it is hereby:

ORDERED that plaintiff’s motion for summary judgment in its favor is granted; and it is further

ORDERED that plaintiff is awarded a judgment in the amount of \$80,000 in its favor, with interest at the statutory rate from the date of entry of the judgment; and it is further

ORDERED that entry of such judgment is held in abeyance pending the resolution of defendant’s counterclaim, and the clerk is directed not to enter judgment until further order of the court; and it is further

ORDERED that the parties are directed to appear for a preliminary conference at 80 Centre Street, Room 280, on November 1, 2016 at 2:30 p.m. to enter into a discovery schedule pertaining to the counterclaim; and it is further

ORDERED that this constitutes the decision and order of the court.

DATED: September 30, 2016

ENTER:



KATHRYN E. FREED, J.S.C.  
HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT