STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

SECURITY MORTGAGE GROUP LLC,

Plaintiff,

v.

OAK HILL FAMILY PARK, LLC, and ROBERT CASSIDY,

Defendant.

AMENDED
DECISION AND ORDER

Index #2006/11718

This is a motion by defendants for summary judgment dismissing the complaint for lack of long-arm jurisdiction, and also for failure to state a claim.

Defendants' arguments are contained in an affidavit by Robert Cassidy, one of the named defendants, who attaches the Summons and Complaint (Exh. A) and the Answer (Exh. B). He also attached the Mortgage Application as Exh. C. The other filing is a five page memo of law by counsel.

Plaintiff seeks $36,000.00 as a mortgage brokerage fee pursuant to the Mortgage Application, or at least $20,000.00 on a discounted account stated, on the ground that it produced a lender which was ready, willing, and able to accept terms set by the seller.

Defendants' principal argument in this motion is that plaintiff does not have jurisdiction over him in that he is a

resident of Massachusetts and does not do business in New York. They further aver that, in February 2005, Cassidy was a member of the LLC defendant, but it was formed in Massachusetts and has never conducted business in New York. Cassidy submits that all contacts were initiated by plaintiff and the matter involved a mortgage loan for a trailer park owned by Oak Hill in Massachusetts. He continues that the Small Loan Commercial Mortgage Loan Application was made on 2/25/05, "by Oak Hill to UBS Real Estate Investments, Inc." (Ex. C). Cassidy maintains that neither defendant solicited anything of plaintiff, but rather that plaintiff aggressively sought out defendants as a potential customer for its mortgage brokerage business.

Cassidy asserts that he only signed the application in his representative capacity for Oak Hill, and he is not personally liable regardless. He asserts that none of this business was transacted in New York. Moreover, no loan ever closed, and Oak Hill LLC ended up selling the trailer park.

On the merits, Cassidy asserts that there is no basis upon which to grant plaintiff a brokerage fee since such a fee was contingent upon the closing of the loan. He further contends that no account stated exists because he never agreed to pay a discounted rate.

He points to provisions of the application which he contends state that plaintiff is not entitled to a fee until the closing

of the loan, and since that did not occur, plaintiff is not entitled to the fee. Defendants maintain that the term is unambiguous, should be held to have force and effect and, accordingly, the case should be dismissed because plaintiff does not state grounds upon which relief can be awarded.

Plaintiff responds that Cassidy was a savvy businessman who negotiated a loan with a New York mortgage broker, which was approved by a New York bank, and which had been discussed between the parties for two years. Plaintiff further asserts that defendants overlook language in the application which provides that plaintiff would be entitled to a 1% origination fee if plaintiff found a lender ready, willing and able to lend. According to plaintiff, the fact that the fee would be paid from the proceeds at closing has no bearing on whether plaintiff became entitled to the fee. Moseley Associates, Inc. v. New Yorker Magazine, Inc., 135 A.D.2d 456 (1st Dept. 1987)("No writing was produced which indicated an agreement between the plaintiff and the defendant that the fee would be payable only if title closed.") ("The fact that the March 5, 1985 agreement between the buyer (defendant here) and the sellers and the March 6, 1985 letter from defendant to plaintiff both indicated that the buyer and sellers would each pay $60,000 to the plaintiff at the closing does not change the fact that the commission had been earned when a seller was produced for the defendant.")

DiMarco traces the history of the interaction between the parties beginning in 2003 when Cassidy and DiMarco, plaintiff's principal, discussed what is described in DiMarco's affidavit as Cassidy's desire "to reference a mobile home park he owned in Attleboro, Massachusetts." DiMarco admits in his affidavit that "Cassidy told me he owned a real estate company name 'Bob Cassidy Real Estate' and that he had been involved in Real Estate for over thirty years." According to DiMarco, in August 2003, "Mr. Cassidy began faxing me his profit and loss statements, expense reports, income statements and the like for his trailer park in order to begin the process of . . . determining what lender might refinance his trailer park." DiMarco states that he negotiated with Cassidy over a period of two months via "numerous phone calls and faxes" resulting in plaintiff's solicitation of three quotes from commercial lenders in Massachusetts, Georgia and UBS Real Estate Investments Inc. in New York, the latter of which, after a hiatus in the parties' dealings lasting from October 2003 until Cassidy called DiMarco in late 2004, undertook direct dealings with Cassidy in early 2005. DiMarco traces the history of Cassidy's dealings with UBS offices in New York, including an uncompleted wire transfer deposit to UBS offices and the scheduling of a 3.6 million dollar loan after UBS's loan committee approved which broke down only when Cassidy refused to

complete the deposit wire transfer. He later told DiMarco that he walked away from the deal after deciding instead to sell the trailer park. The two men, according to DiMarco, then negotiated a reduced fee of $20,000 and DiMarco sent a bill to Cassidy for that amount, which was retained without objection but was ignored.

Cassidy in reply denies ever agreeing to a reduced fee. He also contends that the loan was not completed because it was subject to a "borrower's" satisfaction, which did not occur here. He asserts that since there was no final approval of the loan, there would be no obligation to pay the 1% fee.

Analysis

There are two issues to be addressed in this matter, whether plaintiff has stated a claim with respect to the right to the broker's fee and the second, whether there is jurisdiction in New York.

The first is predicated upon whether there is an enforceable contract provision which obligates defendant to pay a fee to plaintiff. To that end, an unambiguous and clear contract can be enforced according to its terms, and thus, evidence outside the four corners of the document is not admissible to vary or alter the writing. Krystal Investigations & Security Bureau, Inc., v. UPS, Inc., 35 A.D.3d 817 (2d Dept. 2006), *citing*, Matter of

Wallace v. 600 Partners Co., 86 N.Y.543, 548. A contract is unambiguous if the language it uses has a precise and definite meaning, unattended by danger of misconception in the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion. Greenfield v. Phillies Records, Inc., 98 N.Y.2d 562 (2002), *citing*, Breed v. Insurance Co. Of North America, 46 N.Y.2d 351.355 (1978). The issue of whether an agreement is ambiguous is an issue of law for the court to decide. Greenfield v. Phillies Records, Inc., supra, 569. If a provision is clear and unambiguous, it must be enforced according to its terms. Foye v. Parker, 15 A.D.3d 907 (4th Dept. 2005).

The subject agreement at Section V(A), states that plaintiff, "has acted as a loan broker with respect to this transaction and shall be paid a fee of 1% of the Loan Amount, which will be paid by borrower out of the Loan proceeds upon Closing of the Loan." In regard whether plaintiff may be entitled to the fee, it is well settled that in the absence of an agreement clearly providing that the broker's fee is earned only upon "consummation" of the transaction, Wm. A. White & Sons v. La Touraine-Bickford's Foods, 50 A.D.2d 547, 548 (1st Dept. 1975)("language above quoted that nothing would be payable until and if a sale was consummated"), aff'd on op. below, 40 N.Y.2d 1039 (1976), a real estate broker is entitled to a commission

upon procuring a buyer who is ready, willing and able to accept the terms set by the seller. Posson v. Hayes, ___ A.D.3d ___ , 829 N.Y.S.2d 286 (3rd Dept. February 8,2007). *See also*, Real Estate Department Store v. Lawlet Corp., 28 N.Y.2d 36 (1971). A fair reading of the Agreement leaves one to conclude that whether the 1% broker's fee was earned under this contract is ambiguous at best for defendants. Plaintiff's reading of it that calls for payment basically without condition is more than merely plausible. The language about closing which defendant relies upon only addresses the timing, manner and device under which the fee is to be paid. Cases holding that a fee is not earned under contractual provisions specifying closing or consumation as a precondition involve contracts much clearer than this and which leave no possibility of a reading otherwise. In Corcoran Group, Inc. v. Morris, 107 A.D.2d 622 (1st Dept. 1985), for example, the contractual precondition read as follows:

> They entered into a brokerage agreement with plaintiff on February 24, 1983, which provided for a commission of $20,000, payable "only if, as and when title actually closes." The letter agreement provided in part as follows:
>
> > "It is understood that the above sum [$20,000] shall be payable only if, as, and when title actually closes. If, for any reason title does not close, except for the willful default of the seller, the undersigned agrees that it will be entitled to no compensation or commission in connection with this transaction."

Id. 107 A.D.2d at 622 (holding that "where the parties agree that

a commission will be due and payable only 'if, as and when title actually closes,' the broker's entitlement to a commission is contingent upon the actual closing"). See Eastern Consol. Props. V. Adelaide Realty Corp., 95 N.Y.2d 785 (2000)(commission due and payable "if and when title passes"); Liggett Realtors, Inc. v. Gresham, ___ A.D.3d ___, 2007 WL 611194 (1st Dept. March 1, 2007)("[a]t the closing of sale of the apartment, provided you have provided a qualified buyer and the deal consummates") (emphasis supplied); Donald Yoo (New York) Corporation v. Laszlo N. Tauber, M.D. and Associates, 281 A.D.2d 171, 172-73 (1st Dept. 2001)("upon consummation of the sale, to be drawn from 'the proceeds of the closing' or 'payable on closing'")(emphasis supplied); Thomas J. Hayes & Associates, LLC v. Island Jeep Eagle, Inc., 266 A.D.2d 386 (2d Dept. 1999)("payment of a commission to the plaintiff if 'the transaction is in fact consummated'; that is, 'when, as and if title and the business transaction actually close'"); Bersani v. Basset, 184 A.D.2d 996 (4th Dept. 1992); Graff v. Billet, 101 A.D.2d 355 (2d Dept. 1984), aff'd on op. below, 64 N.Y.2d 899 (1984) ("broker's right to receive a commission otherwise owed to him may, however, be varied by agreement as at bar where the parties agreed that the commission would be owing 'if and when title passes'")(quoting Lane-Real Estate Dept. Store v. Lawlet Corp., 28 N.Y.2d 36, 42-43).

By contrast, the agreement in this case does not employ words importing a "condition precedent." Graff v. Billet, 101 A.D.2d at 356. The agreement instead is much like that in Moseley Associates, Inc. v. New Yorker Magazine, Inc., 135 A.D.2d 456 (1st Dept. 1987)("No writing was produced which indicated an agreement between the plaintiff and the defendant that the fee would be payable only if title closed.") ("The fact that the March 5, 1985 agreement between the buyer (defendant here) and the sellers and the March 6, 1985 letter from defendant to plaintiff both indicated that the buyer and sellers would each pay $60,000 to the plaintiff at the closing does not change the fact that the commission had been earned when a seller was produced for the defendant.") This view is confirmed by a close reading of Srour v. Dwelling Quest Corp., 11 A.D.3d 36 (1st Dept. 2004), which was reversed on a separate point in id. 5 N.Y.3d 874 (2005). There the agreement had two aspects concerning when the commission would be earned. The first aspect, relevant here, was that "the commission would be payable upon the signing of the lease," and that "the parties did not insert in the agreement any 'precondition' requiring that the tenant be in occupancy in the residence before the broker's obligation is discharged and the commission earned." Id. 11 A.D.3d at 39-40 (emphasis omitted). The second aspect, upon which the Court of Appeals reversed quite without reference to the first aspect, was that the broker's task

was "assisting in the location and renting of a suitable apartment," a condition which failed because "the apartment had become uninhabitable by the time the landlord signed the lease." Id. 5 N.Y.3d at 875. At the very least, plaintiff has raised an issue of fact regarding whether he has earned the commission, and summary judgment should be denied. Feinberg Bros. Agency v. Berted Realty Co., 70 N.Y.2d 829, 831 (1987)(an agreement cryptically providing for a commission "due and payable in full upon closing" cannot be resolved under Graff v. Billett, supra, and was held to present an issue of fact for trial "to determine whether the broker and the seller intended to render the commission contingent upon closing or whether they agreed that the commission was already earned but that payment was only deferred until the time of closing"); Greiner-Maltz Co., Inc. v. Kalex Chemical Products, Inc., 142 A.D.2d 552 (2d Dept. 1988)("statement that 'All fees are payable in full upon closing' is ambiguous and presents an issue of fact. A trial is necessary to determine whether the parties intended to make the commission contingent upon a closing or whether the plaintiff earned its commission when it produced a ready, willing and able buyer, with payment of the commission deferred until the closing"); Sopher v. Martin, 243 A.D.2d 459, 461 (2d Dept. 1997)("would pay the commission 'at closing'" held ambiguous requiring a trial); NY PJI ¶4:31 *comment* (trial required "where the contract provides

that 'all fees are payable in full upon closing' whether the commission is contingent upon a closing or whether the broker earned the commission when a ready, willing, and able buyer was produced").[1]

It is well settled that CPLR §302 is a long-arm jurisdiction statute which provides that a court may exercise personal jurisdiction over any non-domiciliary who in person or through an agent, transacts any business within the state. Deutsche Bank Securities, Inc.,v Montana Board of Investments, 7 N.Y.3d 65 (2006). Moreover, CPLR §302(a) is a single act statute and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's actions were "purposeful" and there is a

[1] In light of Feinberg and the manner in which the Court of Appeals handled the issues in Srour v. Dwelling Quest Corp., supra, and in light of the authorities canvassed above, the case of Romeo v. Schmidt, 229 A.D.2d 992 (4th Dept. 1996) would appear to be an aberration, or at least distinguishable for reasons not disclosed in the reported opinion. The language in this case does not achieve a "conditioning . . . that commissions would only be paid out of the proceeds of the sale." Hecht v. Meller, 23 N.Y.2d 301, 306 (1968)(emphasis supplied), and when it is a condition precedent that is urged upon the court, the party seeking to avoid obligations under the contract must point to "clear language showing that the parties intended to make it a condition." Unigard Sec. Ins. Co., Inc. v. North River Ins. Co. 79 N.Y.2d 576, 581 (1992). See Hartford Steam Boiler Inspection and Ins. Co. v. Woodstock '99 LLC, 6 A.D.3d 1085, 1086 (4th Dept. 2004)("not a condition precedent to defendant's performance under the Agreement in the absence of 'clear language' to that effect"). "Moreover, where there is ambiguity in a contractual term, the law does not favor a construction which creates a condition precedent." Manning v. Michaels, 149 A.D.2d 897, 898 (3d Dept. 1989).

"substantial relationship between the transaction and the claim asserted." Deutsche Bank Securities, Inc. v. Montana Board of Investments, 7 N.Y.3d at 71. See Atwal v. Atwal, 24 A.D.3d 1297 (4th Dept. 2005).

Defendants rely on the ruling in Professional Personnel Management Corp. v. Southwest Medical Associates, Inc., 216 A.D.2d 958 (4th Dept.1995), which held that interstate negotiations by telephone, fax or mail are insufficient, without more, to impose personal jurisdiction upon nonresidents. Similarly, it has recently been held that a defendant's act of faxing an executed contract to New York and making a few phone calls do not qualify as purposeful acts constituting the transaction of business. Kimco Exchange Place Corp. v. Thomas Benz, Inc., 34 A.D.3d 443 (2d Dept. 2006). In citing to Deutsche Bank Securities, Inc., the court in Kimco, stated that, "these few contacts do not constitute purposeful availment of the New York forum, but rather were merely attempts to contact plaintiff. Moreover, the plaintiff marketed the defendants' properties nationally, not just within the State of New York." Id. 7 N.Y.3d at 443 (emphasis supplied).

In Deutsche Bank, the Court of Appeals, after noting that a single act may confer jurisdiction, discussed the facts, and noted that defendant was a "sophisticated institutional trader" and had entered into New York knowingly "initiating and pursuing"

a negotiation which resulted in $15 million dollar transaction. Moreover, the court further stated that, "over the preceding 13 months [defendant] had engaged in approximately eight other bond transactions" with plaintiff. Id. 7 N.Y.3d at 71.

A review of the facts in this case establish that, although one transaction, the negotiations took over two years. It is also pertinent that at one point the loan was basically rejected and only later was the business arrangement resurrected, at defendant's behest. As the result of the number of contacts, that defendant actively sought out a refinancing alternative for his trailer park, the multi-million dollar size of the transaction sought, and defendants' resurrection of the deal after a hiatus, the court concludes that defendants' actions constituted a purposeful "availing . . . of the benefits of doing business here." Id. 7 N.Y.3d at 72.

Cassidy seeks dismissal as to himself as an individual, and establishes by sufficient evidence in admissible form as a matter of law that he did not execute the loan application as an individual. He has averred as such and the application relied on in the complaint shows his signature only as a representative of Oak Hill Family Park, LLC. There is no personal guaranty clause in the agreement which would serve to make him liable for the fee in the event that Oak Hill failed to pay it. In response, plaintiff only presents the affidavit of DiMarco in which he

states that, prior to receiving the signed application form, he always dealt with Cassidy. Yet, there is nothing in writing to suggest Cassidy's personal liability. Compare Song v. MGM Development, LLC, 30 A.D.3d 1040, 1041 (4th Dept. 2006)("Neither document indicates that Millner was acting as an agent for MGM or, indeed, that MGM is a corporation").

Plaintiff emphasized in oral argument that the signed document came in to it well after DiMarco's negotiations with Cassidy in 2003, and that it was Cassidy who certified the rent rolls upon which plaintiff ultimately relied in entering into the contract.

But plaintiff's lawsuit and claim to a commission is upon a written contract which clearly names Oak Hill Family Park LLC as the party to the contract. Moreover, the documents attached to the DiMarco affidavit indisputably establish Cassidy as a disclosed agent for the LLC. Although DiMarco at ¶12 of his affidavit includes faxes with Cassidy's real estate company logo on it, the second page of the fax, Exhibit B, headlines "Oak Hill Family Park, LLC Profit and Loss," and was faxed to plaintiff September 17, 2003. Furthermore, the letter from Cassidy's Massachusetts counsel, evidently faxed to plaintiff's offices on March 3, 2005, identifies the LLC as the intended borrower ("I assume the borrower will be your LLC") and points out that because "the borrower cannot own any other property or have any

other debt," that the loan documents per force would exclude Cassidy, who was known to own a real estate company, as a potential borrowing entity. In addition, much of the correspondence from plaintiff to defendants references "Oak Hill MHP" and there is nowhere suggested in any of the paperwork that Oak Hill was anything other than a LLC. The UBS loan application of February 10, 2005 (Exh. H) leaves the "Borrowing Entity" line blank, but lists the property name in question as "Oak Hill Family Park" and Cassidy only as a "Key Principal" of the borrowing entity. So it should not have been much of a surprise to plaintiff that, when the completed application form came in to plaintiff on March 24, 2005, together with Massachusett's counsel's opinion letter, that the borrowing entity, and the entity with whom plaintiff contracted, was Oak Hill Family Park, LLC. If plaintiff objected that Cassidy should be bound personally to pay the commission due on the agreement, if raised no obligation in the next 3-4 days when the parties negotiated a higher loan amount and Cassidy sent back to plaintiff, via fax dated 03-28-05 a revised UBS loan application for $3.6 million listing the LLC as the borrowing entity and also containing Cassidy's signature in a representative capacity for "Oak Hill Family Park." Further evidence of notice to plaintiff of the principal LLC came in a faxed wire transfer record listing "Oak Hill Family Park LLC" which showed receipt by plaintiff on May

25, 2005, and on July 13, 2005, UBS wrote to Cassidy demanding, among other things "veri[fication] that you are a sole owner of Oak Hill Family Park, LLC," and UBS e-mailed plaintiffs on the same date attaching a copy of an e-mail by Cassidy "signed" on behalf of the LLC. Also, an "Oak Hill Family Park, LLC Profit and Loss" statement for the first half of 2005 was faxed to plaintiff on August 25, 2005. Finally, the discounted bill resulting from the disputed negotiations concerning plaintiff's fee was addressed to "Mr. Robert Cassidy, Oak Hill Family Park MHP, Attleboro MA and was slated to be, "for financing services rendered for Oak Hill Family Park."

Accordingly, on the basis of these documents attached to the DiMarco affidavit, there can be no question on this record but that Cassidy was acting for a disclosed principal, and that, even if he had not signed explicitly in his representative capacity, plaintiff would be bound to understand that he did. Weinreb v. Stinchfield, 19 A.D.3d 482 (2d Dept. 2005); Leonard Holzer Associates, Inc. v. Orta, 250 A.D.2d 737 (2d Dept. 1998). In any event, the contract documents are unambiguous in that regard, and were accepted by plaintiff in that form without objection, either initially or after execution of the revised application for the $3.6 million loan, or thereafter until plaintiff's opposition to this motion was filed.

CONCLUSION

The motion for summary judgment is granted dismissing the complaint as against Cassidy, and otherwise is denied.

SO ORDERED.

_____
KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: March 23, 2007
Rochester, New York