

**Good Life, Inc. v Massey Knakal Realty of
Manhattan, LLC**

2011 NY Slip Op 30048(U)

January 10, 2011

Supreme Court, New York County

Docket Number: 104500/2009

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 36

Index Number : 104500/2009
GOOD LIFE REALTY
VS.
MASSEY KNAKAL REALTY
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits cross

1, 2
5

Cross-Motion: Yes No

3, 4

Upon the foregoing papers, it is ordered that this motion *cross-motion* for
summary judgment are ~~denied~~ *decided* in accordance
with the attached memorandum decision.
The motion by defendant for summary
judgment of dismissal is granted +
the cross-motion by plaintiff is denied.

FILED

JAN 11 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/10/11

JUDGE DORIS LING-COHAN *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36

FILED

-----X
GOOD LIFE, INC.,

Plaintiff,

-against-

MASSEY KNAKAL REALTY OF MANHATTAN, LLC
a/k/a MASSEY KNAKAL REALTY SERVICES,
Defendant.

JAN 11 2011

NEW YORK
COUNTY CLERK'S OFFICE
Index No 104500709

Motion Seq. No.: 001

-----X
DORIS LING-COHAN, J.:

This case involves a dispute over a real estate co-brokerage commission for a commercial cooperative unit located at 227 West 17th Street G-1A, New York, New York (the Unit) which sold for \$3,900,000.00. The issue before the court is whether services performed by a third-party, who is not a licensed broker or an employee of a licensed real estate brokerage company, earn such brokerage company a commission.

Defendant Massey Knakal Realty Services (MKRS) moves, pursuant to CPLR 3212, for an order granting: (1) summary judgment dismissing the complaint; (2) summary judgment on its affirmative defenses; and (3) sanctions against plaintiff for commencing and prosecuting this action. Plaintiff Good Life Realty, Inc. (Good Life) cross-moves: (1) pursuant to CPLR 3212, for an order granting summary judgment in its favor; (2) pursuant to CPLR 3211 (a) (1) and (2), for an order dismissing defendant's affirmative defenses; and (3) for sanctions against defendant for its conduct with respect to this action.

The following facts are taken from the complaint, the parties' sworn affidavits and deposition testimony, and various other documents submitted in connection with the motion. By the Exclusive Right to Sell Listing Agreement (Listing Agreement) dated and executed on August 8, 2007, Sol Birnbaum of Birns Telecommunications employed MKRS and granted to it the exclusive right to sell a commercial cooperative unit owned by "Baum 227 Realty, Inc."

commission. Defendant further maintains that even if arguably Good Life was involved in the sale, any actions were by nonparty Joseph Klaynberg (Klaynberg), who was not an employee or associate of Good Life and did not hold a real estate license at the time of the subject sale; therefore, defendant argues that Good Life is statutorily barred from receiving a co-brokerage fee from the sale. Annexed to the motion are selected portions of both Klaynberg's and Tsyngauz's deposition transcripts.

According to Klaynberg's testimony, he is in the construction/renovation business and has held a license to perform renovation work in the City of New York for approximately 20 years. His company, Wonder Works Construction Corp. (Wonder Works), shares office space at 18 West 21st Street in Manhattan with Tsyngauz, who uses this location for his law practice and as one of two locations for his real estate business, the plaintiff Good Life.

When asked how he became involved with this particular property, Klaynberg testified that it was and still is common for him to look around the city for available properties in need of renovation, and that, in either late 2007 or early 2008, he saw an MKRS sign in the window of the subject property. Having attempted, albeit unsuccessfully, to buy the property once before, Klaynberg was both aware of, and still interested in purchasing the Unit for renovation purposes. He also stated that he was familiar with MKRS from prior business dealings, including one time when he granted MKRS an exclusive listing on one of his own properties. As a result, he did not hesitate to contact the Unit's listing broker, Emmetsberger, when he saw the sign in the window, at which time he inquired about the Unit and indicated that he and/or another entity might be interested in purchasing it.

When questioned about his connection to Dolfo, Klaynberg stated that he thought that the Unit might interest Dolfo, an associate and friend whom both he and Good Life/Tsyngauz knew

showings of the Unit, after which Dolfo and Klaynberg made an offer to purchase the Unit jointly. Ultimately, it was Dolfo's offer, only on behalf of Ca' Prima, Ltd., which was accepted by the seller in or about mid February 2008.

A transaction summary (also referred to by the parties as a term summary or memo), dated February 19, 2008, was prepared by Emmetsberger and distributed to Klaynberg, Dolfo, Sol Birnbaum and the attorneys for both buyer and seller. The memorandum, which did not mention Good Life or Tsyngauz, stated, in relevant part:

Dear Messrs. Klaynberg and Dolfo:

This letter is to serve as a memorandum outlining the terms and conditions upon which the owner is prepared to send you a contract for the purchase of the above referenced property. . . . we are prepared to send out a contract based on the following terms: . . . Purchaser: Gianmaria Dolfo or an entity to be controlled by them...Brokerage Commission: \$240,000 (Paid by Seller) Due at closing and made payable to: Massey Knakal Realty Services Broker: Brock Emmetsberger Massey Knakal Realty Services...

[Defendant's Motion, Exh. D].

By e-mail dated February 19, 2008, Klaynberg informed Emmetsberger as follows:

I spoke with Gianmaria Dolfo . . . The Purchaser entity is CA' PRIMA LTD c/o Ferrante PLLC . . . Attorney information: Giuliano Iannaccone . . .
P.S. - Please note that my identification on the term sheet as an addressee should be corrected to identify my participation as on behalf of Good Life Realty as introducing source - commission arrangements to be discussed.

[Id., Exh. H].

On February 20, 2008, Emmetsberger revised and distributed a second transaction summary which is directed to "Mr. Dolfo," and identifies the Purchaser as: "CA' PRIMA LTD c/o Ferrante PLLC; the "Attorney for Purchaser" as: "Giuliano Iannaccone"; and the "Brokers" as: "Brock Emmetsberger/ Massey Knakal Realty Services . . . and "Good Life Realty/ Joseph Klaynberg." One month later, Emmetsberger revised and distributed a third transaction

summary, dated March 19, 2008, which is notable only for a change in agreed upon purchase price from \$4 million to \$3.9 million, a reduced contract deposit from \$400,000.00 to \$390,000.00, and a reduced brokerage commission from \$240,000.00 to \$209,000.00, reflecting a reduced commission fee from six percent to five percent. [Defendant's Motion, Exh. I].

The executed Contract of Sale, dated April 16, 2008, identified "Baum 227 Realty Inc." as Seller and Thomas W. Smith, Esq. as Seller's attorney; "Ca' Prima Ltd." as Buyer and Giuliano Iannaccone, Esq. as Buyer's attorney; and "Massey Knakal Realty Services • Brock Emmetsberger & Good Life Realty (Joseph Klaynsberg)" as the real estate brokers. [Id., Exh. J].

Although neither Klaynsberg, nor Tsyngauz, were present at the closing, Tsyngauz claims to have asked the buyer's attorney (Giuliano Iannaccone) to pick up Good Life's co-brokerage commission check, based on a 50/50 split of the commission. No co-brokerage commission check was given to the buyer's attorney at the closing, nor was one sent to Good Life within the immediate days following the closing. As a result, Good Life, by Tsyngauz, sent MKRS an invoice, dated October 27, 2008, requesting a co-brokerage fee of three percent, or \$117,000.00.

By letter dated November 7, 2008, MKRS's attorney, on his client's behalf, refused to acknowledge Good Life's participation in the sale of the unit/shares, stating in relevant part: "I am advised that no co-brokerage arrangement has ever been made between MKRS and Good Life Realty, Inc. . . . that MKRS has had absolutely no dealings with your company; indeed, your invoices are the first communication MKRS has received, written or otherwise, from you" (Notice of Motion, Exhibit L). According to Emmetsberger, no commission was paid to Good Life because it was discovered that Klaynsberg was neither a licensed real estate broker, a licensed real estate salesperson, or an employee or associated of Good Life. [¶8, Emmetsberger Affidavit in Support]. When Good Life's continued efforts to obtain the co-brokerage fee proved futile,

the instant action was commenced.

It is undisputed that at all relevant times, Good Life, MKRS and Emmetsberger were licensed real estate brokers in the State of New York and that Klaynberg was not a licensed broker. It is also undisputed that, as a duly licensed real estate broker, Good Life is entitled to commence an action in the courts of the State of New York to recover its share of a commission when a property listed by another broker is purchased by a Good Life client. At dispute is whether the facts of this case support or preclude Good Life's recovery of a co-commission.

MKRS argues that it was improper for Good Life to even commence this action because the basis for its claim for relief is barred by Real Property Law (RPL) 440-a and 442-d, and, therefore, both plaintiff and its counsel should be sanctioned for prosecuting a frivolous action.

RPL 440-a provides, in relevant part:

No person, co-partnership, limited liability company or corporation shall engage in or follow the business or occupation of, or hold himself or itself out or act temporarily or otherwise as a real estate broker or real estate salesman in this state without first procuring a license therefor as provided in this article. . . .

Real Property Law (RPL) 442-d provides:

No person, copartnership, limited liability company or corporation shall bring or maintain an action in any court of this state for the recovery of compensation for services rendered, in any place in which this article is applicable, in the buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate without alleging and proving that such person was a duly licensed real estate broker or real estate salesman on the date when the alleged cause of action arose.

Defendant argues that, because neither Good Life, nor its sole owner, Tsyngauz, negotiated the terms of the sale, showed the Unit to Dolfo, or communicated with MKRS at any time prior to sending its post-closing invoice demand for \$117,000.00, it did not earn any part of the commission. Defendant further argues that, although Klaynberg was the individual

responsible for introducing the eventual buyer to the property,² he is statutorily barred from recovering any part of a commission because he was not licensed when he held himself out to defendant as a real estate salesperson, agent, and/or broker for Good Life (RPL 440-a).

Defendant also contends that because Good Life's only connection to the sale was the actions of this unlicensed individual, it commenced the lawsuit solely in Good Life's name in order to get around the prohibitions set forth in RPL 442-d. Finally, as a separate ground for dismissing plaintiff's complaint, MKRS asserts that Good Life cannot recover a co-broker commission because the parties never executed a co-broker agreement.

Good Life relies on *Hecht v Meller* (23 NY2d 301, 305 [1968]) for the proposition that "a real estate broker's right to commissions attaches when he procures a buyer who meets the requirements established by the seller." According to Good Life, once Klaynberg reported the Unit's availability to Tsyngauz, Good Life started the process that led to the sale of the unit/shares when it procured, and then produced, the buyer whose bid was ultimately accepted by the seller.

Good Life explains that it was due to Klaynberg's familiarity with both Dolfo and MKRS, and Tsyngauz's own busy schedule, which prompted Tsyngauz to ask Klaynberg to arrange the initial meeting and later on to handle the interactions between Dolfo and Emmetsberger, but this was only after he (Tsyngauz) had laid the ground work. In fact, Good Life offers Klaynberg's testimony as evidence that MKRS either knew, or had reason to know from its prior business interactions with Klaynberg, as well as from the (Wonder Works) e-mail

²MKRS alternates between its main argument that Klaynberg acted as an unlicensed agent on behalf of Good Life, and its secondary argument that MKRS/Emmetsberger was the only broker/agent which actively earned its commission.

address Klaynberg used during the exchange of information, that Klaynberg was not working for Good Life, but rather was facilitating a deal involving his friend and associate (Dolfo) in order to further his own renovation business. Good Life insists that there was never any confusion among the players as to Good Life's role as co-broker to the sale, as demonstrated by Emmetsberger's willingness to add Good Life's name to the transaction summary and not object to its inclusion in the Contract of Sale.

Good Life does not dispute defendant's assertion that there was no written co-broker agreement between it and MKRS with respect to this property listing. Rather, Good Life asserts that New York does not require licensed brokers to execute a written contract for a buyer's broker to receive an earned co-commission from the sale of a listed property (*see* GOL § 5-701 [a] [10]; *Strategic Alliance Partners, LLC v Dress Barn, Inc.*, 386 F Supp 2d 312, 316 [SD NY 2005]). Furthermore, Good Life contends that MKRS's sudden demand for a written co-broker agreement is a belated and improper attempt to find a way around splitting the large commission resulting from the sale of property for \$3.9 million. To this end, Good Life annexes the following information downloaded from the MKRS internet website:

Massey Knakal is committed to serving the best interest of our clients at all times, going above and beyond the traditional broker relationship to secure the perfect buyer for a property. To do so, we make it our goal to maximize every property's exposure to the fullest extent, and are willing to co-broke every listing we have, with a 50/50 commission split if a non-Massey Knakal broker procures the buyer.

To receive alerts about co-brokering listing opportunities with Massey Knakal, please complete the form below.

Good Life points out that the above language does not reference a written co-broker agreement, nor does it require non-MKRS, buyer producing, brokers to take any additional action in order to receive a 50% split commission. The only interaction suggested by the website (completing a

form) is for those brokers interested in receiving “alerts” about MKRS listings. Therefore, Good Life argues that MKRS’s failure to acknowledge its obligation to split its commission with Good Life, as the procuring broker, constitutes a breach of contract.

The standards of summary judgment are well settled. To grant summary judgment, it must be clear that no material or triable issues of fact are presented. *See Stillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957). The proponent of a summary judgment motion must “make a prima face showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so.” *Zuckerman v. City of New York*, 49 NY2d 557 (1980). However, the Court of Appeals has made clear that bare allegations or conclusory assertions are insufficient to create genuine, bona fide issues of fact necessary to defeat such a motion. *See Rotuba Extruders, Inc. v. Ceppos*, 46 NY2d 223, 231 (1978).

In order to establish as a matter of law that a broker is entitled to a commission for the selling of real estate, the broker must demonstrate that he/she: (1) is duly licensed; (2) has a contract with the party charged with paying the commission; and (3) was the procuring cause of the sale. *Brandenberg v. Waters Place Associates, L.P.*, 17 AD3d 615 (2d Dept 2005). Here, as detailed below, Good Life has failed to establish such criteria to be entitled to recover the brokerage commission at issue; moreover, in its motion for summary judgment, based upon the undisputed facts, defendant has established an entitlement to summary judgment of dismissal as a matter of law.

on behalf of a licensed broker. *See Siegel v. Henry Fippinger, Inc.*, 264 AD 203, 204 (1st Dept 1942); *Small Marchese*, 98 Misc 2d at 296 (“[a]n employer may not recover in an action brought for a brokerage commission if the employee, acting as broker, is an unlicensed salesperson, otherwise the statute could not be given practical effect, and the obvious purpose of the Legislature would be frustrated”).

Moreover, the fact that the term sheet and contract of sale name Klaynberg as the Good Life broker responsible for procuring the sale does not create an enforceable right, since Klaynberg was not a licensed broker and was not an employee or associate of Good Life.

Further, both Klayneberg & Tsyngauz testified that no express co-brokerage agreement ever existed between MKRS and Good Life. [Klyneberg EBT at 86, 93; Tsyngauz EBT at 36-38]. There is also no evidence of any implied brokerage agreement between MKRS and Good Life. If in fact there was any agreement, it would have been between MKRS and Klaynberg, who, by his own admission, was not an employee or associate of Good Life, and therefore unable to bind Good Life to any such agreement. Additionally, it is not disputed that Klaynberg and MKRS agreed to discuss a commission at a later date, which never occurred; therefore, Good Life cannot establish that co-brokerage agreement existed with MKRS.

Further, Good Life’s contention that it is entitled to a brokerage fee under an unjust enrichment theory is equally without merit. “Unlicensed persons cannot evade the licensing requirements by invoking equitable remedies to recover in tort rather than in contract.” *Coldwell Banker Mid Plaza Real Estate Inc.*, 23 Misc 3d 1132(A), 2009 WL 1477995 at *4 (Sup Court, Kings County 2009); *see also Small Marchese*, 98 Misc 2d at 296. Thus, defendant’s motion for summary judgment of dismissal is granted and the cross-motion for summary judgment by plaintiff is denied.

[*11]

In its discretion, the court denies the portion of defendant's motion which seeks sanctions against plaintiff and plaintiff's counsel for commencing and continuing an allegedly frivolous lawsuit. "Sanctions are to be imposed [in situations] where the action is 'completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law'" (*Wagner v Goldberg*, 293 AD2d 527, 528 [2nd Dept 2002] [internal quotation marks omitted]; 22 NYCRR 130-1.1 [c] [1]). While the court has determined that defendant is entitled to summary judgment of dismissal since there are no factual issues, it fails to conclude that the above standard for an award of sanctions has been established, as not every unsuccessful cause of action constitutes frivolous conduct.


Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted and the Clerk of this Court is directed to enter judgment dismissing the complaint in its entirety, with costs and disbursements; and it is further

ORDERED that plaintiff's cross motion is denied in its entirety; and it is further

ORDERED that within 30 days of entry of this order, defendant shall serve a copy upon defendant with notice of entry.

Dated: January 10, 2011



Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\Good Life Rlty.grant dismissal.wpd

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through their respective prior business dealings. Klaynberg explained that it was common for him to speak with Dolfo about real estate opportunities during Dolfo's four or five annual business trips to New York City, that he often took Dolfo for a drive-by viewing of available properties, and that the Unit was only one of several properties he spoke with Dolfo about in or about early 2008.

Klaynberg testified that a meeting was held at the 18 West 21st Street location at which Tsyngauz met with Dolfo to discuss available properties here in New York, including the Unit. Klaynberg stated that he was present when the meeting was held and that when Dolfo expressed an interest in the Unit, arrangements were made with the listing broker for a showing. A second meeting was held at the 18 West 21st Street location. This time, the meeting included Emmetsberger, Dolfo and Klaynberg. Klaynberg handed a Good Life business card to Emmetsberger, as per Tsyngauz's instruction, as Tsyngauz was unavailable to attend. When asked about the negotiating process, Klaynberg stated that they all "talked numbers" during their meetings, but that Dolfo "is a big boy, he do price negotiation on his own. He knew what the price is" (Klaynberg Deposition, at 81- 82). When asked whether he expected to receive a commission from the deal, Klaynberg replied that only Good Life was entitled to a co-broker fee (*id.* at 84 - 88).

With respect to the same time frame, defendant's deposition witness, Emmetsberger, testified to the following. Klaynberg initially inquired about the Unit and stated that he was interested in purchasing it jointly with another party. Emmetsberger met with Klaynberg and Dolfo to discuss the Unit and was handed a Good Life business card from Klaynberg. Although he was unable to recall much else about this initial meeting, including where it was located, he did recall attending several more meetings with Dolfo and Klaynberg. He also recalled several