

**Mansion Joho Center Co., Ltd. v Nomura Suzuki
Properties, Ltd.**

2004 NY Slip Op 30166(U)

September 9, 2004

Supreme Court, New York County

Docket Number: 0114143/1999

Judge: Karla Moskowitz

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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MANSHION JOHO CENTER CO., LTD.,

Plaintiff,

Index No. 114143/1999

- against -

NOMURA SUZUKI PROPERTIES, LTD., MANSHION
JOHO CENTER, INC., SAM SUZUKI, TOMONARI
NOMURA, and KI YOUNG P. CHOE,

DECISION & ORDER

Defendants.

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MOSKOWITZ, J.:

Defendants Nomura Suzuki Properties, Ltd (NSP), Manshion Joho Center, Inc., and Sam Suzuki move to modify the decision rendered at the trial on June 8, 2004 or for a new trial. Plaintiff cross-moves to modify the same decision. Post-trial motions are made pursuant to CPLR 4404, enabling the court to make new conclusions of law, render a new decision or order a new trial of a cause of action.

This action arises out of two agreements between plaintiff and NSP, both dated August 27, 1997. Plaintiff owned 44 condominiums in New York City that it rented to people in Japan for short-term stays. Through the Sale Agreement, plaintiff sold the condominiums to NSP. Through the Commission Agreement, plaintiff agreed to continue to recruit people in Japan for short-term stays at the condominiums. After a bench trial, the court ruled that NSP owed plaintiff \$1.5 million for breach of the Commission Agreement, that plaintiff did not owe NSP for prepaid rents under the Sale Agreement, and that NSP did not owe plaintiff lost profits under the Commission Agreement. Each side objects to the ruling against it.

NSP claims that the award of \$1.5 million is a commission, that is barred by Real

Property Law (RPL) § 442-d, entitled “Actions for commissions; license prerequisite.” The statute provides that only persons or entities who are licensed real estate brokers may maintain an action “for the recovery of compensation for services rendered, in any place in which this article is applicable, in the buying, selling, exchanging, leasing, renting ...” of real estate (RPL § 442-d).

Plaintiff was engaged in finding renters for the condominiums, but was not a licensed real estate broker in New York. Nonetheless, the court determined that the statute did not bar plaintiff’s recovery, because, as evidenced by the Commission Agreement, the \$1.5 million payment was not a commission.

When interpreting contracts, the court’s task is to ascertain what the parties intended at the time that they entered into the contract and give effect to their intentions (*Reiss v Financial Performance Corp.*, 279 AD2d 13, 19, *affd as modified* 97 NY2d 195; *Federal Ins. Co. v Americas Ins. Co.*, 258 AD2d 39, 44). At the same time, the court must keep in mind that RPL § 442-d is a penal statute, that must be strictly construed (RPL § 442-e; *Matter of Wertlieb [Greystone Partnerships Group, Inc.]*, 165 AD2d 644, 647; *2 Park Ave. Assoc. v Cross & Brown Co.*, 43 AD2d 37, 39, *affd* 36 NY2d 286). Lastly, in determining whether the requirements of RPL § 442-d apply to a party’s activities the court must examine the actual nature of the activities, and not rely only upon the parties’ statements (*see Levinson v Genesse Assoc.*, 172 AD2d 400, 401).

The Commission Agreement provided that, in return for acting as the condominium’s exclusive reservation agent in Japan, plaintiff would receive “a commission of 30% of the reservations and subsequent short term rental payments” and that NSP would receive 70% (Commission Agreement, ¶ 2 a). “Additionally,” on September 30, 1997, NSP would pay

plaintiff \$1.5 million for the following purposes: a) \$500,000 as a signing bonus; b) \$300,000 for advertising and promotion of the property; c) \$500,000 for office expenses and payroll; and d) \$200,000 for working capital (*id.*, ¶ 2 b). Plaintiff would not be entitled to “any additional payments for any reason except [for commissions]” (*id.*). The Commission Agreement was to exist from September 1, 1997 to August 30, 2017 (*id.*, ¶ 1).

It is true, as defendant contends, that the purpose of the \$1.5 million was to aid plaintiff in performing the function of recruiting renters, which, in turn, would lead to commissions. However, this fact does not mean that the payment is a commission, defined as a “fee paid to an agent or employee for a particular transaction, usu. as a percentage of the money received from the transaction” (Black's Law Dictionary [Westlaw 8th ed 2004]). The Commission Agreement makes a clear distinction between plaintiff's 30% commission, in return for obtaining renters, and the \$1.5 million payment, referring to the latter as a payment in addition to the commission. Under the agreement, the \$1.5 million was neither payment for a particular transaction, nor “compensation for services rendered,” in the leasing of real estate (RPL § 442-d). As the \$1.5 million payment is not included in the statutory prohibition regarding commissions, plaintiff is not barred from recovery, and the court must deny defendants' motion to vacate the award.

NSP also urges a modification of the ruling that it may not set off the prepaid rents that plaintiff owes it against the \$1.5 million that it owes plaintiff. The Sale Agreement provided that the purchase price for the condominiums would be reduced by the amount of prepaid rents that plaintiff had in its possession at the time that the sale was closed (Sale Agreement, ¶ 6). The adjustments would be calculated on the closing date of the sale, and the actual reductions would be made on the date that the mortgage on the condominiums was refinanced (*id.*). The actual

reductions were never made because, according to NSP, plaintiff's principal could not be located at the necessary time. The court determined that the time had passed for defendants to claim the prepaid rents.

The court's decision was erroneous. The Sale Agreement provided that NSP was entitled to offset the prepaid rents, and NSP proved the amount at trial. Therefore, the award to plaintiff is offset in the amount of \$104,015.58.

Turning to the cross motion, plaintiff seeks to modify the court's ruling that it is not entitled to lost profits under the Commission Agreement. NSP cancelled the agreement on March 24, 1998, effective the next day. Plaintiff sought the commissions that it would have earned if the agreement had continued until 2017. The court denied plaintiff lost profits on three grounds: 1) NSP was entitled to cancel the Commission Agreement prior to term; 2) plaintiff did not prove the amount of profits that it would have made.; and 3) the profits were commissions, barred by RPL § 442-d.

At trial, plaintiff's expert testified about the amount of commissions that plaintiff would have earned if NSP did not terminate the agreement. The court found that the expert's calculations were overly speculative, and that he failed to take into account the impact of September 11, 2001 on foreign travel to New York. Plaintiff has offered no version of the expert's testimony to change that decision.

Neither party could cancel the agreement prior to the end of the term, except that NSP had "the sole right to discontinue the short term rental activities at NSP's sole discretion upon 90 days written notice" (Commission Agreement, ¶ 1). Plaintiff claims that this provision should be interpreted to mean that NSP could terminate the agreement only if it totally discontinued rental

activities, which it did not. NSP terminated plaintiff's services, but continued to rent the condominiums.

At trial, the court determined that plaintiff's interpretation was based on a misreading of the contract that would lead to an unreasonable result. Plaintiff offers no reason for the court to change its mind. Defendant's construction, that NSP could terminate the agreement at any time with 90 days notice, is correct. Since NSP violated the 90-day notice provision, if it owed plaintiff any commissions, it would be for only 90 days. However, as already determined, plaintiff did not adequately prove the amount of commissions that it would have earned. Therefore, plaintiff will receive no commissions.

The court denied plaintiff the commissions that it would have earned for 90 days after NSP terminated the agreement, because of RPL § 422-d. At trial, plaintiff established that it found renters in Japan, made reservations there and took deposits there (Trial transcript, at 4, 13). The court found that plaintiff's services were performed solely in Japan, notwithstanding the fact that it faxed information about the rentals to New York (*id.*). Nonetheless, the court determined that RPL § 442-d applied, because the real estate was in New York, and New York had an interest in regulating the leasing of premises in the state (*id.* at 13). This determination was erroneous.

RPL § 442-d bars recovery by unlicensed persons "for services rendered, in any place in which this article is applicable," in renting or leasing real estate. It prohibits the performance of the acts of an unlicensed broker in New York, but says nothing about the location of the real estate. Whether a broker needs a license to bring an action for commissions depends upon where it performs its services, not upon where the real estate is located (*see Herbert A. LaRonge, Inc. v*

E. G. & B., Inc., 38 AD2d 889; *Gartrell v Jennings*, 283 App Div 879; *Baird v Hine*, 253 App Div 65; *Sutton v Transcontinental Inv. Corp.*, 31 Misc 2d 832, *affd* 17 AD2d 807; *Copellman v Rabinowitz*, 208 Misc 274, 278-279). As plaintiff did not perform its services in New York, the lack of a license does not prevent its recovery of commissions.

The cases defendant cites to prove the contrary are not effectual. In *Pallavicini v International Tel. & Tel. Corp.* (41 AD2d 66, *affd* 34 NY2d 913), a broker was denied commissions because she made phone calls negotiating the sale of a property in Mexico in her New York City hotel room. Unlike the broker in this case, that broker performed her services in New York.

Defendant also cites *J. I. Kislak, Inc. v Carol Mgt. Corp.* (7 AD2d 428), in which the main issue was whether a sale of stock constituted a real estate transaction requiring plaintiff to be licensed. The court answered that question in the affirmative (*id.* at 430). The court also noted that, although the property was in New Jersey, RPL § 442-d applied because the agreement in which the plaintiff agreed to act as broker for the defendant was executed in New York, and the defendant's place of business was in New York (*id.* at 430-431). The case says nothing else regarding place of performance. To the extent that *Kislak* may hold that RPL § 442-d applies where the brokerage agreement is executed in New York and the defendant is located in New York, this court declines to follow it. *Kislak* does not alter the significance of where the broker's services are performed. Here, although the parties executed their agreement in New York and NSP is located in New York, plaintiff performed its services in Japan.

Therefore, the lack of a New York license would not bar plaintiff's recovery of commissions, if plaintiff were otherwise eligible to receive any. This it failed to prove.

In conclusion, it is

ORDERED that the motion of defendants Nomura Suzuki Properties, Ltd, Mansion Joho Center, Inc., and Sam Suzuki to set aside the verdict rendered at the June 8, 2004 trial of this action is granted to the extent that Nomura Suzuki Properties may offset the amount of \$104,015.58 against the award to plaintiff and is otherwise denied; and it is further

ORDERED that the cross motion of plaintiff to set aside the verdict denying it lost profits is denied.

Dated: September 9, 2004

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J.S.C.

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