

Central City Brokerage Corp. v Elayachar

2005 NY Slip Op 30323(U)

June 17, 2005

Supreme Court, New York County

Docket Number: 603894/02

Judge: Jane S. Solomon

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

JANE S. SOLOMON

PRESENT:

PART

55

0603894/2002

CENTRAL CITY BROKERAGE

vs
ELYACHAR, RALPH

SEQ 3

DISMISS ACTION

INDEX NO.

603894/02

MOTION DATE

6/10/05

MOTION SEQ. NO.

03

MOTION CAL. NO.

10

this motion to/for

summary judgment

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1-4

Answering Affidavits — Exhibits

5-8

Replying Affidavits

9-10

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the enclosed memorandum decision and order.

FILED

JUN 22 2005

COUNTY CLERK'S OFFICE
NEW YORK

Notes 7/25/05 conf
end

JANE S. SOLOMON

Dated:

6/11/05

J.S.

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

USE ONLY CUSTOMER CHECKED TO JUSTICE FOR THE FOLLOWING REASON(S)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X

CENTRAL CITY BROKERAGE CORP.,

Plaintiff,

DECISION AND ORDER

Index No. 603894/02

-against

RALPH ELYACHAR, DAN ELYACHAR,
RURADAN CORPORATION, GEREL
CORPORATION AND TIMSTON CORPORATION,

Defendants.

-----X

SOLOMON J.:

Two motions are before me in this action brought by a real estate broker to recover commissions. Defendants seek summary judgment dismissing the complaint and, separately, to suppress documents allegedly procured by plaintiff pursuant to a subpoena duces tecum improperly served upon a non-party. The motions are decided as follows.

Background

Plaintiff Central City Brokerage Corp. ("Central City") is a brokerage house primarily involved with investment properties in the New York City area. At the relevant time, it was owned by Jared Levine ("Levine") and Donald Clarke ("Clarke"). Defendants Ralph Elyachar and Dan Elyachar (together referred to as the "Elyachars") own and manage real estate in Manhattan, and are the principal owners of the defendant corporations, Ruradan Corporation ("Ruradan"), Gerel Corporation ("Gerel"), and Timston Corporation ("Timston"). Ruradan owned 8

East 48th Street (the "48th Street property"); Gerel owned 1100 Madison Avenue (the "Madison Avenue property"); and Timston owned 713 Second Avenue (the "Second Avenue property").

In the summer of 2000, the Elyachars decided to market the Madison Avenue property for sale. Gerel, the owner, entered into a non-exclusive brokerage contract with Gilbert Witzling ("Witzling"). The contract provided that Gerel would pay Witzling a commission of \$300,000 if and when a closing took place. Witzling entered into a subagency agreement with another broker, Harry Eisenberg ("Eisenberg"), agreeing that if Eisenberg found a buyer, he and Witzling would split the commission. Eisenberg then entered into a subagency agreement with Central City, whereby Eisenberg would split his portion of the commission if Central City found a buyer.

Clarke discussed the property with Dominick D'Allewa ("D'Allewa"), whom he had known for several years. D'Allewa was associated with a recently disbarred attorney, Francis Zarro ("Zarro"), who presented himself as a wealthy and sophisticated real estate investor.

In fact, Zarro was a con-man who specialized in parting wealthy individuals from their money through sham real estate transactions. Press clippings submitted in support of defendants' motion show that Zarro was indicted in February 2003 for his role in fraudulent real estate transactions across the

country, and was found guilty on thirteen counts in July 2004.

On October 6, 2000, Zarro, through an entity he owned called American Pastime Holdings, Inc. ("APHI"), communicated to Clarke at Central City his offer to purchase the Madison Avenue property for \$58,000,000 cash. Clarke sent the offer to Eisenberg. And to his surprise, he heard nothing in response for several days.

Then Witzling called Clarke to congratulate him on finding a purchaser. Clarke claims that he was unaware of Witzling's role in the transaction, and he was concerned because, in his experience, transactions with three brokers were rarely successful. So he decided to call Dan Elyachar directly, both to discuss the three-broker problem, and to learn the status of Zarro's offer. Plaintiff claims that Clarke and Dan Elyachar made an oral contract to give Central City a three percent commission on the purchase price of any building for which it procured a ready, willing and able buyer, including if a Zarro entity purchased the Madison Avenue property. The commission would be payable upon execution of a contract, not at closing. The owner would be responsible for paying additional commission to any other broker involved in the sale. This alleged oral contract is the basis for Central City's claim in this action.

Dan Elyachar denies that this conversation occurred as described. In support of that contention, defendants point to

records subpoenaed from Verizon New York, Inc. ("Verizon") which do not indicate any calls from Clarke to Dan Elyachar at the time Clarke claims the conversation occurred. However, Dan Elyachar testified at deposition that he and Clarke spoke about the proposed transaction by telephone in the year 2000.

Neither Central City nor defendants investigated Zarro. In the course of discussions between Zarro and the Elyachars, the 48th Street and Second Avenue properties also were offered for sale, and contracts for Zarro's nominees were executed in December 2000. The contracts provided for no money down, but full payment was due at the closing on January 21 and 22, 2001. The purchase price for the Madison Avenue property alone was \$62 million; the Second Avenue property was \$31 million; and the 48th Street property was \$15 million, for a total purchase price of \$108 million.

The closing date came and went, and no buyer appeared. Central City, however, demanded commissions both from APHI and from defendants. All refused to pay. APHI's lawyer promptly wrote to Central City and denied a contract. Not long thereafter, Central City enlisted the aid of Zarro's associate, D'Avella, in its effort to recover commissions from the failed transaction by offering him 12.5% of any recovery in return for "consultation." Defendants refer to this agreement, apparently made verbally in early 2001 but memorialized in a writing dated

April 2, 2002, as the "fee splitting agreement."

Central City commenced this action in October 2002. Four causes of action are alleged. The first three seek a commission for each parcel separately, and the fourth alleges unjust enrichment.

Following discovery, plaintiff served and filed a Note of Issue on September 2, 2004. On October 15, 2004, defendants moved for summary judgment. On October 20, Central City's attorney served a subpoena duces tecum upon Verizon, seeking records of incoming and outgoing calls for telephone numbers used by Central City, Clarke and Levine from September 1, 2000 through March 31, 2001. Central City's attorney did not serve a copy of the subpoena on defendants' counsel at the same time that it served it on Verizon, admittedly in violation of CPLR 3120(3). After the subpoena was served on Verizon, but before defendants learned of it, Central City's lawyers negotiated an adjournment for the pending summary judgment motion and executed a stipulation extending its time to respond. A copy of the subpoena was served on defendants' counsel by fax on the evening on November 4, 2004. Central City claims that the failure to give timely notice was inadvertent.

The material was sought by Central City to obtain better ammunition to oppose defendants' motion. Central City argues that records received from Verizon in response to

defendants' subpoenas issued in May and June 2004 were "incomplete" because the subpoenas did not cover all of its telephone lines and numbers. Defendants moved to suppress the records received in response to the October subpoena, and for sanctions. By an interim order, I directed that Central City did not have to respond to defendants' arguments regarding the telephone formation of the contract until further order. Accordingly, it has not used the new material in opposing the summary judgment motion.

The Motions

A. The Motion To Suppress Subpoenaed Material

"The party issuing a subpoena duces tecum . . . shall at the same time serve a copy of the subpoena on all other parties . . ." CPLR 3120 (3), and see, CPLR 2303(a). A litigant may obtain further disclosure after a note of issue is filed, but, as relevant here, only by permission of the Court upon showing that "unusual or unanticipated circumstances subsequent to the filing of a note of issue and statement of readiness which require additional pretrial proceedings to prevent substantial prejudice . . ." Rule 202.21(d) of the Uniform Rules of Court.

Trial courts have broad discretion to supervise disclosure and, in most circumstances, to relax rigid discovery rules where good cause is shown and in the interest of justice. Here, Central City was aware of the scope of defendants' May and

June subpoenas duces tecum seeking records from Verizon, and was content to go forward with the allegedly incomplete records until it received defendants' summary judgment motion weeks after it filed the note of issue and statement of readiness.

It is not credible that Central City did not know its own telephone number, or whether it had more than one line, so Central City has not shown good cause to be relieved of the obligation to notify opposing counsel. Since Dan Elyachar admitted having telephone conversations with Clarke, the existence of such conversations really is not at issue.

B. Defendants' Motion for Summary Judgment

In the absence of an agreement to the contrary, a real estate broker is deemed to have earned its commission when it produces a buyer who is ready, willing and able to purchase property at the terms set by the seller. Lane - - The Real Estate Dept. Store, Inc. v Lawlet Corp., 28 NY2d 36 (1971). The parties, of course, are free to provide otherwise by agreement, and can condition the seller's liability on the closing of title. Id. Moreover, the seller's signing of a contract with a procured buyer constitutes acceptance of it as ready, willing and able. There is an implicit endorsement of the buyer's bona fides once the seller executes a contract with it.

Central City maintains that Dan Elyachar, on behalf of

the corporate defendants, specifically agreed to pay a commission when they went to contract with a potential buyer, and that the commission was earned when the corporate defendants went to contract with the Zarro entities. Defendants' denial that they had an agreement with Central City presents the sort of straightforward factual dispute typically reserved for a jury.

Defendants maintain, however, that even if Clark and Dan Elyachar made an oral agreement, the complaint must be dismissed because (1) Zarro cannot be considered a ready, willing and able purchaser; (2) the alleged oral agreement is not enforceable; and (3) plaintiff breached fiduciary duties it owed defendants.

1. Questions of Fact Exist as to Whether Zarro was a Ready, Willing and Able Purchaser.

Defendants argue that since Zarro was a fraud, he never was a ready, willing and able purchaser. This argument is appealing because it seems intuitively correct. But Central City persuasively contends that Zarro is deemed a ready, willing and able purchaser because defendants entered into contracts for sale with him, so he met defendants terms for the sale. Lane, supra.

In the case of Gilder v Davis, the Court of Appeals held that ". . . a refusal to consummate the contract on the part of the purchaser for any reason is in no way attributable to the broker, . . ." 137 NY 503 (1899). It further held that the broker was entitled to commissions where the purchaser failed to perform the contract through no fault of the seller. None of the

decisions cited by Central City address the situation where the purported purchaser never legitimately intended to purchase the property, or made its offer in connection with a criminal enterprise. I am hesitant to extend the Gilder rule to the circumstances here. Although Central City had no duty to investigate the legitimacy of Zarro's offer, the facts strongly suggest that he never would have consummated the sale, making his status as a potential buyer illusory.

Nevertheless, summary judgment cannot be granted on this basis because it has not been established as a matter of law that Zarro was engaged in defrauding the defendants. The implication is clear from the press clippings submitted, and plaintiff does not contest the unsavory characterization of Zarro. However, an implication is not proof that the offer was illusory. Arguably, Zarro could have been seeking a legitimate investment for his ill-gotten gains, or sought to "flip"¹ his investment in the buildings, as plaintiffs suggest. In either

¹ "In a flip transaction, the person who initially entered into a contract with the seller to buy property (the "flipper") assigns the right to buy that property to another person who will ultimately seek the loan and actually purchase the property (the "flippee"). The flipper profits from the transaction by selling the property to the flippee, at the time of assignment, for a price higher than that stated in the original contract between flipper and seller." United States v Gross, 165 F.Supp. 2d 372, 375 (SDNY 2001). In this case, the structure of defendants' contracts with Zarro are consistent with the theory that a flip was contemplated because no money was required up front, so perhaps defendants knew he was dealing with other people's money.

case, defendants would have been obligated to pay commissions.

Defendants also argue that the contracts with the Zarro entities were options, not contracts for sale, and that they were never bound to sell the properties absent further performance by the purchaser. The argument fails because defendants accepted the purchasers, which fact is not negated by the manner in which they structured the transaction. Accordingly, this branch of the motion is denied.

2. The Oral Contract May Be Enforceable

Defendants argue that the alleged oral contract is unenforceable under General Obligations Law ("GOL") § 5-1103, which provides that:

An agreement, promise or undertaking to change or modify, or to discharge in whole or in part, any contract, obligation, or lease, or any mortgage or other security interest in personal or real property, shall not be invalid because of the absence of consideration, provided that the agreement, promise or undertaking changing, modifying, or discharging such contract, obligation, lease, mortgage or security interest, shall be in writing and signed by the party against whom it is sought to enforce the change, modification or discharge, or by his agent.

Defendants contend that Gerel had a written brokerage agreement with Witzling to market the Madison Avenue Property, that Central City was bound by that agreement as a subagent, and that Clarke attempted to orally modify that agreement when he called Dan Elyachar. The alleged new contract was made after Central City

had procured Zarro, and no additional consideration was contemplated with respect to the Madison Avenue Property.

Clarke and Dan Elyachar have differing recollections of their talk. Clarke says that when he called Dan Elyachar, only the Madison Avenue property was on the market, and it was the property they were talking about when they agreed that Central City would earn a three percent commission if it procured a buyer who contracted buy it. Dan Elyachar claims that Clarke referred to other properties not then on the market, and that he agreed to pay a commission only upon a closing. See, Transcript of Dan Elyachar Deposition at Exhibit 5 to Aff. Of Jay Gurfein in Opposition to Motion, p. 28.

Clarke's version of the conversation suggests that he attempted to modify the Witzling agreement regarding the Madison Avenue Property. Dan Elyachar claims an agreement involving other properties. With respect to the Madison Avenue Property, a written brokerage agreement existed binding both parties, and Clarke's effort to orally modify it is barred under GOL § 5-1103. Therefore, the first cause of action seeking commissions for procuring a buyer of the Madison Avenue Property is dismissed, as is the portion of the unjust enrichment cause of action attributable to that transaction. In light of triable issues of fact about when any commission would be earned, as well as the amount, the second and third causes of action may not be

dismissed as against the selling defendants, Ruradan and Timston. However, those claims are dismissed against all other defendants.

3. Breach of Fiduciary Duty.

A real estate broker is a fiduciary with a duty of loyalty and an obligation to act in the best interests of the principal. Douglas Holly, Inc. v Rice, 161 AD2d 560 (2d Dept 1990), lv to appeal denied 76 NY2d 709 (1990). Here, Central City demanded a commission from APHI after the closing date passed, and was rebuffed. Defendants say this demand indicates that Central City was Zarro's broker, not theirs, but it equally is evidence of aggressive over-reaching. The agreement with D'Avella, which Central City disingenuously calls a consulting agreement, began after the relationship with defendants terminated. In short, while there is some evidence of breach of fiduciary duty, defendants have not established the breach as a matter of law.

Defendants also contend that Central City forfeited its right to recover commissions because it violated ethical rules applicable to a licensed real estate broker. In particular, Clarke improperly circumvented Eisenberg, with whom he had a subagency agreement, and made a separate agreement directly with defendants. This undoubtedly violated Central City's duty of loyalty owed to Eisenberg and Witzling, and probably would be dispositive of any claim against them for commissions. However,

defendants point to no authority for the proposition that Clarke's conduct makes the agreement unenforceable as against defendants. Dan Elyachar was aware of defendants' agreement with Witzling, and it is alleged that he knowingly entered into an agreement directly with plaintiff. Defendants' arguments do not explain why they should be relieved of responsibility for Dan Elyachar's participation in circumventing his own brokers.

4. Unjust Enrichment

Central City's fourth cause of action alleges unjust enrichment. To prevail on a claim of unjust enrichment, a plaintiff must show that defendant was enriched at plaintiff's expense, and that it is against equity and good conscience to permit defendant to retain what is sought to be recovered. Lake Minnewaska Mountain Houses, Inc. v Rekis, 259 AD2d 797, 798 (3rd Dept 1999), citing Paramount Film Distrib. Corp. v State of New York, 30 NY2d 415 (1972). Although defendants move for summary judgment dismissing the entire complaint, this cause of action is not meaningfully briefed. The motion is nevertheless granted as to the unjust enrichment claim because Central City does not allege how defendants were enriched at its expense. Defendants obtained nothing more than an unsuitable potential purchaser, and incurred legal fees in connection with the failed transaction. Moreover, even if defendants' interaction with Zarro was deemed a benefit, equity and good conscience do not dictate that they owe

money to Central City beyond that contemplated in the subagency agreement. The record shows no equitable basis for further rewarding Central City in light of its conduct, including the work it performed in procuring Zarro; his unsuitability as a purchaser; the fact that no additional work was performed in connection with the Second Avenue or 48th Street properties; Clarke's breach of his duty of loyalty to Eisenberg and Witzling; and its demands for commissions from others whose interests were adverse to defendants.

5. Individual Defendants

Finally, the complaint does not state a claim against Ralph and Dan Elyachar, and there is no evidence that they acted in any capacity but on behalf of the corporate property owners. Therefore, the complaint is dismissed as against them.

CONCLUSION

Clarke contends that he convinced Dan Elyachar, said to be an experienced business person, to increase the cost of plaintiff's services from \$75,000 to over \$3 million with a single phone call and no supporting documentation. Defendants demonstrate that Central City can only succeed by straining credibility, but issues of credibility are reserved for trial. Accordingly, it hereby is

ORDERED that defendants' motion for summary judgment is

granted to the extent that the first and fourth causes of action are dismissed; and it further is

ORDERED that the complaint is severed and dismissed as against defendants Gerel, Ralph Elyachar and Dan Elyachar, and entry of judgment shall abide resolution of the entire lawsuit; and it further is

ORDERED that the motion for summary judgment otherwise is denied; and it further is

ORDERED that defendants' motion to suppress material obtained in response to a subpoena on Verizon is granted, and the material is suppressed, and defendants are awarded the costs of this motion in the amount of \$100; and it further is

ORDERED that counsel shall appear in Part 55 for a pre-trial conference on July 25, 2005 at noon.

Dated: June 17, 2005

ENTER:

[Handwritten Signature]
 J.S.C. *[Handwritten]* SOLOWAY
FILED
 JUN 22 2005
 COUNTY CLERK'S OFFICE
 NEW YORK