

**City Center Real Estate, Inc. v Berger**

2006 NY Slip Op 30357(U)

January 31, 2006

Supreme Court, New York County

Docket Number: 0600585/2005

Judge: Sherry Klein Heitler

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

PRESENT: **HON. SHERRY KLEIN HEITLER**

PART 30

Index Number : 600585/2005

CITY CENTER REAL ESTATE, INC.

INDEX NO.

600585/05

vs

**B**ERGER, DAVID M.

MOTION DATE

Sequence Number : 002

MOTION SEQ. NO.

002

SUMMARY JUDGMENT

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the memorandum decision dated 1-31-06.

This judgment is subject to the entry of a writ of Habeas Corpus by the Clerk and notice of entry shall be given to the parties and counsel. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: \_\_\_\_\_

1.31.06

Sherry Klein Heitler  
SHERRY KLEIN HEITLER J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 30**

-----X  
CITY CENTER REAL ESTATE, INC.,

Plaintiff,

-against-

DAVID M. BERGER, LAIB FLEISCHMAN and  
JOHN J. NIGRO,

Defendants.

-----X  
**SHERRY KLEIN HEITLER, J.:**

Index No. 600585/05

**DECISION & ORDER**

This case involves a dispute over a brokerage fee allegedly earned in connection with the sale of a property located at 15 Huron Street in Brooklyn. Plaintiff, City Center Real Estate, Inc. ("City Center") was the exclusive listing agent for the property. In accordance with written agreements dated December 2, 2003 and March 4, 2004, Edward Gambella, the owner of the property ("the owner"), agreed to pay City Center a brokerage fee of 4% of the gross sale price of the property, "less the entitlement of any qualified broker."

In a letter dated December 2, 2003, Laib Fleischman ("Fleischman") conveyed to plaintiff his interest in purchasing the property. However, Fleischman later determined that he would not purchase the property; instead, he informed attorney David M. Berger ("Berger") that he knew of another prospective purchaser, Miriam Chan ("Chan").

On December 30, 2003, Berger wrote to plaintiff, indicating that he had a client who wished to purchase the property for \$13,500,000. In that letter, Berger informed plaintiff that "I am not acting now, nor will I be acting, as the buyer's attorney, but rather ~~is~~ as a co-broker in this matter. As such, kindly signify your agreement to pay to the undersigned 50% of any brokerage commission earned with regard to or that results from this offer, or any deal brokered by you or

your office with my client.”<sup>1</sup>

On January 2, 2004, Berger forwarded letters of reference for Miriam Chan to plaintiff, reiterating Chan’s offer to purchase the property for \$13,500,000.000, as well as Berger’s understanding “that I would be entitled to a co-broker fee of 2% of the sales price should this transaction close.”

Thereafter, plaintiff drafted a “Co-Broker Agreement,” which both Berger and Fleischman signed on or about January 14, 2004. The agreement provides, in pertinent part:

In letters dated December 31, 2003 and January 2, 2004, Co-Brokers acting on behalf of Purchaser offered to purchase 15 Huron Street for \$13,500,000.000. Co-Brokers also requested a “co-broker fee of 2% of the sales price should this transaction close.”

...

It is expressly agreed that a 2% co-broker fee to the Co-Brokers shall be earned and payable only if and when title to the property actually passes by the delivery of the deed, and Owner pays Broker its brokerage fee of 4% of the gross sales price.

Co-Brokers represent that no other broker was instrumental in bringing about this sale and that the Co-Brokers were the only other brokers involved in this transaction. Co-Brokers agree to indemnify and hold Broker harmless from any claims from any other broker in connection with the sale of 15 Huron Street to Purchaser.

All prior agreements or understandings, oral or written by any of the Parties hereof or their agents, servants, employees, affiliates or Partners, shall merge in this Agreement.

Following the sale of the property on October 14, 2004, plaintiff requested proof from defendant David M. Berger (“Berger”) and Laib Fleischman (“Fleischman”) verifying that Berger

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<sup>1</sup> Counsel for both parties have submitted a copy of this letter to the court. Interestingly, the copy submitted by plaintiff has the name “Laib Fleischman” handwritten under Berger’s name, whereas the copy submitted by Berger does not and also bears a different signature, indicating that it is not a copy of the letter submitted by plaintiff.

was an attorney and Fleischman was a licensed real estate broker. In response, Berger provided plaintiff with a copy of his attorney license, while Fleischman sent plaintiff an affidavit withdrawing his claim to any portion of the brokerage fee, asserting that

I did not play a principal part in this matter, and hereby confirm that I have no interest in the Co-Broker fee set forth in said agreement. I am a signatory on the agreement only as a matter of protection for the parties thereto so as to cut off any claims I may separately have. It was and is my intention that the entire 2% Co-Broker fee be paid unto David M. Berger.

The crux of this dispute lies in the parties' interpretation of the provisions of Article 12-A of the Real Property Law. Plaintiff contends that R.P.L. § 442-d prevents the payment of the brokerage commission to Berger, because Berger signed the brokerage fee agreement as a "co-broker" with Fleischman, who was, apparently, not a licensed real estate broker.<sup>2</sup> Berger, however, asserts that his status as an attorney exempts him from the provisions of Article 12-A entirely, including § 442-d's fee-splitting provision. Therefore, Berger claims he has a right to share in the brokerage commission.

Plaintiff now moves for summary judgment and a declaration, pursuant to C.P.L.R. § 3001, that "1) the Co-Broker Agreement in connection with the Property is unenforceable in that it violates New York Real Property Law § 442 which prohibits fee-splitting; 2) payment of any portion of the broker commission to either Berger or Fleischman jointly or to Berger separately is prohibited in that Fleischman is not a licensed broker and Berger joined with him as a co-broker; and 3) that John Nigro, Esq. deliver the escrow funds he is holding to City Center." Defendant Berger cross-moves for summary judgment on his breach of contract claim for 2% of the commission, or \$260,000, plus interest from October 14, 2005.

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<sup>2</sup> Defendants do not deny this allegation or submit proof to the contrary.

Real Property Law § 442, titled “Splitting commissions,” provides as follows:

No real estate broker shall pay any part of a fee, commission or other compensation received by the broker to any person for any service, help or aid rendered in any place in which this article is applicable, by such person to the broker in buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate including the resale of a condominium unless such a person be a duly licensed real estate salesman regularly associated with such broker or a duly licensed real estate broker or a person regularly engaged in the real estate brokerage business in a state outside of New York ... .

Real Property Law § 442-d, titled “Actions for commissions; license prerequisite,” 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.

Together, these provisions prevent an unlicensed real estate broker from either collecting a commission on a sale of real property through fee-splitting with a licensed broker, or bringing an action to recover a commission on the sale of real property. The purpose of this legislation is to “protect dealers in real estate from unlicensed persons acting as brokers, and to protect the public from inept, inexperienced or dishonest persons who might perpetrate or aid in the perpetration of frauds upon it, and to establish protective or qualifying standards to that end.” Small v. Marchese, 98 Misc.2d 295, 296 (1<sup>st</sup> Dept. 1978) (internal citation omitted).

Here, the Co-Broker Agreement is, on its face, illegal because it purports to split fees between an attorney (Berger), who is authorized to act as a real estate broker under R.P.L. § 442-f, and a person who acted as an unlicensed real estate broker (Fleischman). That Fleischman later sought to disavow any such intention by disclaiming his anticipated share of the

commission is irrelevant. “[A] contract with several persons for the payment to them of a sum of money is a joint contract with all and all the payees have therein a joint interest; so that no one can sue alone for his proportion.” Brandenburger & Marx, Inc. V. Heimberg, 34 N.Y.S.2d 935, 937 (Municipal Ct., Bklyn 1942) (internal citation omitted). Consequently, the rights of Berger and Fleischman to the brokerage commission are “interdependent, interrelated and joint.” Id.

Here, it is undisputed that Fleischman had no right to any part of the commission, as he was not a licensed broker. See, e.g., Fieger v. Pitney Bowes, 2002 U.S. Dist. LEXIS 17416, \*1, \*22 (S.D.N.Y. 2002); Ava v. Olympic Tower, 259 A.D.2d 315, 316 (1<sup>st</sup> Dept. 1999); Kennedy v. Hartford, 31 A.D.2d 616, 616 (1<sup>st</sup> Dept. 1968); S. Kornreich & Sons, Inc. v. Goldsmith Murphy, Inc., 156 Misc.2d 207, 208 (S.Ct. N.Y. Cty. 1992); Magoba Mgmt. v. Central Zone Property Corp., 3 Misc.2d 824, 827-28 (S.Ct. N.Y. Cty. 1956); Brener & Lewis v. Fawcett Publications, 197 Misc. 207, 208 (S.Ct. N.Y. Cty. 1949). As Fleischman’s rights are inextricably bound together with Berger’s, Berger may no more sue for this commission than may Fleischman. In essence, “[s]ince the transaction between [Berger] and [Fleischman] was illegal and their contract void (Real Prop. Law § 442-d), no right to enforce it could be acquired either by assignment or otherwise. It was not purged of invalidity by transfer to a party [here, Berger] who might lawfully have made a contract for brokerage.” Siegel v. Fippinger, 264 A.D. 203, 204 (1<sup>st</sup> Dept. 1942).

Berger’s assertion, that R.P.L. § 442-f exempts him, as an attorney, from application of the fee-splitting prohibition found in R.P.L. § 442-d, has been squarely rejected by the First Department. See id. See also Meltzer v. Crescent Leaseholds, 315 F.Supp. 142, 146-47 (S.D.N.Y. 1970), aff’d, 442 F.2d 293, 295 (2<sup>nd</sup> Cir. 1971). Moreover, to hold otherwise would

negate the protective purpose of Article 12-A's fee-splitting prohibition by enabling attorneys to do what licensed brokers may not – namely, to enter into co-brokering agreements with unlicensed brokers who are otherwise ineligible to collect brokerage commissions. This court declines to so find, as such a holding would prevent the fee-splitting prohibition from being “given practical effect, and the obvious purpose of the Legislature would be frustrated.” Small v. Marchese, 98 Misc.2d at 296-97 (internal citations omitted).

Rather, the court construes R.P.L. § 442-f to provide only that an attorney may “act as a broker without a license,” and not that the attorney is exempt from all other provisions of Article 12-A. See Matter of Cianelli v. Dept. of State, 16 A.D.2d 352, 353 (1<sup>st</sup> Dept. 1962) (noting that attorney status permits individual to exercise some – but not all – of the rights of a licensed broker). Cf. Manor Homes, Inc. v. Sava, 73 Misc.2d 660, 662 (Civ. Ct. Queens Cty. 1973) (noting that the provisions of the Real Property law are to be strictly construed). The court's position in this regard is buttressed by the fact that it is the status of one co-broker as unlicensed which renders a co-brokering agreement unenforceable without regard to the second broker's status. See, e.g., Meltzer v. Crescent Leaseholds, 442 F.2d 293, 295 (2<sup>nd</sup> Cir. 1971) (“an action on the underlying brokerage contract is barred by reason of the participation of an unlicensed co-broker”); Real Estate Multiple Listing Exchange v. Rubin, 7 Misc.2d 194, 196 (Cty. Ct. Rockland Cty. 1957) (“Where one of the cobrokers was unlicensed or is unlicensed it has been held that no recovery may be had”). Where, as here, one of the co-brokers is unlicensed, “the transaction falls squarely within the scope of Article 12-A of the Real Property Law. The public policy embodied in that article bars . . . recover, either in contract or in tort, for the services in question.” Kennedy v. Hartford, 31 A.D.2d at 616.

It should be noted that, even assuming, *arguendo*, that the court agreed with Berger's assertion that this action is one for "money had and received which [plaintiff] promised to pay over to [defendants]," Wiener v. Benson, 213 A.D. 347, 347 (2<sup>nd</sup> Dept. 1925), Berger's claim to the brokerage commission would still fail, as Fleischman has relinquished any claim to the brokerage commission and suit for a co-brokerage commission may be brought only by the co-brokers jointly. See id. See also Brandenburger & Marx, Inc. v. Heimberg, 34 N.Y.S.2d at 937.

Finally, as to Berger's third counterclaim, alleging tortious interference with Berger's "economic advantage," the court notes that "relief cannot be granted on a tort cause of action that requires proof of the [defendant's] knowing entry into an illegal contract." Sabia v. Mattituck, 2005 N.Y. Slip Op. 9403, \*1, \*2, 805 N.Y.S.2d 346 (1<sup>st</sup> Dept. 2005). While Berger has alleged facts tending to suggest that he was fraudulently induced into signing the illegal Co-Broker Agreement, he does not deny knowing, at the time the Agreement was signed, that Fleischman was not a licensed broker who was prohibited from fee-splitting with him; rather, he asserts only that his conversations with plaintiffs misled him into believing the Agreement was not real and binding, despite its merger clause providing that "[a]ll prior agreements or understandings, oral or written by any of the Parties hereof or their agents, servants, employees, affiliates or Partners, shall merge in this Agreement." Under these circumstances, no recovery may be had. See id.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted and it is hereby

ADJUDGED and DECLARED that the Co-Broker Agreement related to property located at 15 Huron Street, Brooklyn, New York is unenforceable in that it violates New York Real

Property Law § 442; and it is further

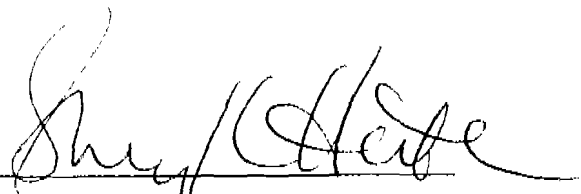
ADJUDGED and DECLARED that payment of any portion of the brokerage commission to defendants David M. Berger or Laib Fleischman is prohibited due to the illegality of the Co-Broker Agreement; and it is further

ORDERED that defendant John Nigro, Esq. shall deliver the escrow funds in his care, which funds constitute the remainder of the brokerage commission in this matter, to plaintiff City Center within ten (10) days of plaintiff's service of a copy of this order upon him; and it is further

ORDERED that defendant David M. Berger's cross-motion for summary judgment is denied.

This shall constitute the decision and order of the court.

DATED: January 31, 2006

  
SHERRY KLEIN HEITLER  
J.S.C.

**UNRECORDED JUDGMENT**  
This judgment has not been recorded with the County Clerk and notice of entry cannot be given until noon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).