

Transaction Advisory Services, LLC v Silver Bar Holding, LLC

2006 NY Slip Op 30527(U)

May 5, 2006

Supreme Court, New York County

Docket Number: 404025/2005

Judge: Richard B. Lowe

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SUPREME COURT OF NEW YORK - NEW YORK COUNTY

Index Number : 404025/2005

TRANSACTION ADVISORY

vs.

SILVER BAR HOLDING

SEQUENCE NUMBER : 001

DISMISS ACTION

PART 56

INDEX NO. _____

MOTION DATE 5/2/2006

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Answering Affidavits – Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED


MAY 17 2006

NEW YORK COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 5/5/2006



RICHARD B. LOWE III J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

-----x
TRANSACTION ADVISORY SERVICES, LLC,
Plaintiff,

- against -

Index No. 404025/2005

SILVER BAR HOLDING, LLC, SILVER BAR INVESTMENTS,
LLC, BARBERRY ROSE MANAGEMENT COMPANY, INC.,
POST 204 HOLDING LLC, BRM PROPERTY PORTFOLIO
FUND ONE LLC, and BRM FUND MANAGEMENT LLC,
Defendants.

DECISION
AND ORDER

FILED
MAY 17 2006
NEW YORK
COUNTY CLERK'S OFFICE

-----x
RICHARD B. LOWE, III, J.:

Defendants Silver Bar Holding, LLC (Silver Bar Holding), Silver Bar Investments, LLC (Silver Bar Investment), Barberrry Rose Management Company, Inc. (Barberrry Rose), Post 204 Holding LLC (Post 204), BRM Property Portfolio Fund One LLC (BRM Property), and BRM Fund Management LLC (BRM Fund) bring this motion to dismiss pursuant to CPLR 3211 (a) (3) and (7) and pursuant to Real Property Law § 442-d for, inter alia, breach of contract and for compensatory damages.

BACKGROUND

Pursuant to a letter agreement between Silver Bar Holding and Crusader Investments, LLC (Crusader), the parent company of plaintiff Transaction Advisory Services, LLC (TAS), Silver Bar Holding engaged Crusader and its successors and assigns on an exclusive basis to act as Silver Bar Holding's financial advisor (*see* Heller Aff, Ex. A [Complaint, Ex. A]). As part of its engagement, Crusader was to introduce Silver Bar Holding to various capital sources for the purpose of funding the acquisition of real estate properties and to arrange for the requisite capital for that purpose. In furtherance of this purpose, Crusader introduced Silver Bar Holding to EDM Equities, Inc. and ESM

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Realty Partners, LP (the "Crusader source").

The Crusader source and Silver Bar Holding formed defendant Post 204 for the purpose of jointly acquiring property located at 586 West 204th Street, New York, New York. The investment from the Crusader source for the acquisition was raised as equity, and the Crusader source contributed the sum of \$1,680,000.00 as capital for the acquisition of the property.

Pursuant to the letter agreement between Silver Bar Holding and Crusader, Silver Bar Holding is obligated to pay a placement fee at each closing at which the Crusader source provides the requisite capital for the purpose of acquiring of real estate property. If it is an equity placement, the placement fee would be equal to 10% of the equity placement amount. If it is a mezzanine placement, the placement fee would be equal to 7% of the mezzanine placement amount. If it is for debt financing, a fee equal to 1% of the debt placement amount would be paid.

It is alleged that acquisition of the 586 West 204th Street property was completed on February 4, 2005, though Crusader was not permitted to attend. Thereafter, Crusader requested payment of \$168,000, representing 10% of the equity contributed by the Crusader source in accordance with the letter agreement. However, it is alleged that Silver Bar Holding did not pay. It is also alleged that Silver Bar Holding has closed on other transactions without the knowledge of Crusader.

On April 1, 2005, Crusader assigned its interest in the letter agreement between itself and Silver Bar Holding to plaintiff TAS. Accordingly, the plaintiff, on May 3, 2005, brought action against the defendants by Summons and Complaint in Suffolk County, alleging breach of contract and for compensatory damages. The defendants moved to dismiss this action or, in the alternative, to change the place of trial. The court in Suffolk County transferred this action to New York County, and, before this court, the defendants move to dismiss the Complaint in its entirety or, in the

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alternative, to dismiss all defendants not signatories to the agreements save Silver Bar Holding.

DISCUSSION

The defendants move pursuant to CPLR 3211 (a) to dismiss the Complaint against them. They assert that the plaintiff does not have the legal capacity to sue, pursuant to CPLR 3211 (a) (3), because the plaintiff is not a “duly licensed real estate broker” pursuant to Real Property Law § 442-d and, as such, has no authority to request these fees. Accordingly, because the plaintiff has no legal capacity to sue pursuant to CPLR 3211 (a) (3), TAS has no cause of action, and, pursuant to CPLR 3211 (a) (7), fails to state a cognizable claim. Further, the defendants assert that the plaintiff is bringing claims against those who are not signatories to the letter agreement, and, pursuant to CPLR (a) (1) and (a) (7), those defendants should be dismissed.

In a motion to dismiss pursuant to CPLR 3211 (a), the court takes the facts as alleged in the Complaint as true and accords the benefit of every possible favorable inference to the non-movant (*see Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 634 [1976]).

I. Real Property Law § 442-d

The defendants argue that the plaintiff is basically requesting a commission for the acquisition of the 586 West 204th Street property as a transaction for real estate services. As such, the defendants argue, TAS needs to be licensed as a real estate broker and, because the plaintiff is not licensed, the defendants aver that the plaintiff has no cause of action against the defendants pursuant to Real Property Law § 442-d. The plaintiff argues that its only task was to procure an investor for the formation of a partnership, which would in turn acquire title to real property. Accordingly, the plaintiff avers, this is not a transaction within the boundaries of Real Property Law

§ 442-d. The court agrees with the plaintiff.

Real Property Law § 442-d provides that:

No person, copartnership 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.

Here, it is undisputed that the plaintiff sought out sources of funding for Silver Bar Holding pursuant to the letter agreement in order for Silver Bar Holding to fund the acquisition of real estate properties. Indeed, pursuant to the letter agreement between the parties, TAS was granted “the right to represent [Silver Bar Holding] . . . in [its] efforts to arrange the Requisite Capital to acquire the Acquisition Properties on a best efforts basis” (see Heller Aff, Ex. A [Complaint, Ex. A at 2] [emphasis added]). As the Court of Appeals in *Reiter v Greenberg* noted, this transaction is but the first of “two separate transactions” (21 NY2d 388, 391 [1968]), one pertaining “to the organization of the limited partnership by obtaining investors” and the other involving “the acquisition of the property by the limited partnership” (*id.*). Here, the plaintiff is only obtaining investors for the organization of the limited partnership. After the Crusader source and Silver Bar Holding formed the partnership of Post 204, the second transaction commenced in the acquisition of 586 West 204th Street.

The defendant reads the sentence “the right to represent . . . to arrange the Requisite Capital to acquire the Acquisition Properties” to mean that the “dominant feature” of Silver Bar Holding’s retention of Crusader was to acquire properties. However, that reading of the sentence would, if accepted, render the agreement as a whole ineffective. The letter agreement specifically provides

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that Silver Bar Holding engaged Crusader “as its financial advisor” to aid Silver Bar Holding’s “effort to acquire real estate properties” (see Heller Aff, Ex. A [Complaint, Ex. A at 1]). To read it otherwise would “leave one of its provisions without force or effect” (*350 East 30th Parking, Ltd. v Bd. of Managers of the 350 Condo.*, 280 AD2d 284, 287 [1st Dept 2001]), and that would be contrary to the court’s obligation to interpret a contract so as to give meaning to all of its terms (*Corhill Corp. v S. D. Plants, Inc.*, 9 NY2d 595, 599 [1961]; see also *Mionis v Bank Julius Baer & Co.*, 301 AD2d 104, 109 [1st Dept 2002]).

Furthermore, the defendants’ interpretation of the letter agreement would be contrary to the provision of Real Estate Law § 440 defining a “real estate broker:”

Whenever used in this article “real estate broker” means any person, firm or corporation, who, for another and for a fee, commission or other valuable consideration, lists for sale, sells, at auction or otherwise, exchanges, buys or rents, or offers or attempts to negotiate a sale, at auction or otherwise, exchange, purchase or rental of an estate or interest in real estate, or collects or offers or attempts to collect rent for the use of real estate, or negotiates or offers or attempts to negotiate, a loan secured or to be secured by a mortgage....

Here, the plaintiff has not listed for sale, sold, exchanged, bought or rented, or otherwise negotiated a sale of or purchased real estate or an interest in real estate. Nor has the plaintiff negotiated or attempted to negotiate a loan to buy real estate. It is not even disputed that at the closing for the 586 West 204th Street property, the plaintiff was not even permitted to attend. The court is at a loss as to how TAS would be a “real estate broker” if it did not do any of the above, but, instead, only *introduced* Silver Bar Holding to various capital sources for the purpose of funding the acquisition of real estate properties and to arrange for the requisite capital for that purpose.

For the reasons set forth above, the court denies the defendants’ motion to dismiss.

II. Defendants not Signatories to Letter Agreement

The defendants also move to dismiss the Complaint against all defendants other than Silver Bar Holding, arguing that because they were not parties to the written agreement, they are not liable for any breach.

The general rule is that parties not signatories to a contractual agreement are not bound by the contents thereof (*see Brainstorms Internet Mktg. v USA Networks, Inc.*, 6 AD3d 318 [1st Dept 2004]; *see also Manhattan Real Estate Equities Group LLC v Pine Equity NY, Inc.*, ___ AD3d ___, 2006 NY Slip Op 2141 [1st Dept 2006]).

The plaintiff argues that, pursuant to the letter agreement, “any affiliate, parent, subsidiary, and/or fund owned directly or indirectly by [Silver Bar Holding] and/or its principals” may be held liable (*see Heller Aff, Ex. A [Complaint, Ex. B]*), and provides documentary evidence indicating that at least one of the defendants, Silver Bar Investments, would be liable for the payment of the fee should the plaintiff receive its placement fee (*see Penn Aff, Ex 3*). Further, it is undisputed that Post 204 is a creation of Silver Bar Holding because of plaintiff’s introduction of Silver Bar Holding to the Crusader source. Though Silver Bar Investments and Post 204 are not signatories to the contractual agreement, both are nonetheless indispensable parties pursuant to CPLR 1001 since “complete relief” could not be accorded if these two defendants are not joined. However, as to defendants Barberry Rose, BRM Property, and BRM Fund, while the plaintiff tries to connect these defendants to Silver Bar Holding, at this stage the plaintiff has not shown that these parties need to be included for complete relief. Nor has the plaintiff shown that these defendants may be joined pursuant CPLR 1002 under the same transaction or occurrence standard.

For the reasons stated, the court denies the defendants’ motion to dismiss defendants Silver

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Bar Investments and Post 204, but grants the motion to dismiss as to defendants Barberrry Rose, BRM Property, and BRM Fund. Should the plaintiff, during the course of discovery, find grounds to join the dismissed defendants, the plaintiff may request the joinder thereof pursuant to CPLR 1003.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants' Motion to Dismiss the Complaint as against Silver Bar Holding, LLC is denied; and it is further


ORDERED that defendants' Motion to Dismiss the Complaint as to defendants Silver Bar Investments, LLC, Barberrry Rose Management Company, Inc., Post 204 Holding LLC, BRM Property Portfolio Fund One LLC, and BRM Fund Management LLC is granted as to defendants Barberrry Rose Management Company, Inc., BRM Property Portfolio Fund One LLC, and BRM Fund Management LLC, and the Complaint is dismissed as against these defendants, and otherwise denied; and it is further

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ORDERED that remaining defendants Silver Bar Holding, LLC, Silver Bar Investments, LLC, and Post 204 Holding LLC are directed to serve an Answer to the Complaint within 10 days after service of copy of this order with notice of entry.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: May 5, 2006

ENTER:


RICHARD B. LOWE III
RICHARD B. LOWE, III, J.S.C.

FILED
MAY 17 2006
NEW YORK
COUNTY CLERK'S OFFICE