

Hermance v Easton

2007 NY Slip Op 30081(U)

March 2, 2007

Supreme Court, New York County

Docket Number: 0602533

Judge: Karla Moskowitz

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

-----X
BARBARA A. HERMANCE d/b/a LAND SOURCE
REAL ESTATE,

Plaintiff,

-against-

KARL M. EASTON, JONATHAN EASTON, 3
LAFAYETTE AVENUE CORP. and COBBLE HILL
CENTER CORP.,

Defendants.
-----X

INDEX NO. 602533/2004
MOTION DATE _____
MOTION SEQ. NO. 002
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 accompanying Decision and Order.

MARCH 2
Dated: February 2, 2007

FILED
MAR 13 2007
COUNTY CLERK'S OFFICE
NEW YORK
G

KARLA MOSKOWITZ 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 3

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BARBARA A. HERMANCE d/b/a LAND SOURCE
REAL ESTATE,

Index No. 602533/2004

Plaintiff,

- against -

DECISION and ORDER

KARL M. EASTON, JONATHAN EASTON, 3
LAFAYETTE AVENUE CORP. and COBBLE HILL
CENTER CORP.,

Defendants.

-----X
Karla Moskowitz, J.:

Motions bearing sequence numbers 002 and 003 are consolidated for disposition.

In this action, plaintiff Barbara Hermance (“Hermance”) sues to recover a real estate brokerage commission of \$172,800 pursuant to a contract between plaintiff and defendant Karl Easton. In motion sequence 002, defendants move, pursuant to CPLR 3212, for summary judgment dismissing the Complaint. In motion sequence 003, plaintiff moves for summary judgment dismissing defendants’ counterclaims. For the reasons stated below, I deny both motions.

Hermance is a licensed New York State real estate broker. Defendants 3 Lafayette Corporation and Cobble Hill Center own three parcels of land that total, approximately, 345 acres in the town of Taghkanic in Columbia County. The property is located across the road from the home of defendant Karl Easton, who is a director of the two corporate defendants. Defendant Jonathan Easton is Karl Easton’s son. The Complaint states that Karl Easton acted as an agent for his family and was an agent, as well as a shareholder and director, of the corporate defendants.

Hermance alleges that in early 2004 non-party John Kanas (“Kanas”) contacted her. He

was seeking to purchase anywhere from 250 to 500 acres of land in the Columbia County area and indicated that he wanted property on which he could hunt. Sometime thereafter, Hermance learned that the defendants owned three contiguous parcels of land on Martindale Road in the town of Taghkanic, across from the farm where Karl Easton resided.

Hermance states that on May 11, 2004, she met with Karl Easton and they executed a written Open Listing Agreement. The Property Data Sheet annexed to the agreement contained a price of \$10,000 per acre. The Open Listing Agreement set forth a commission to Hermance of 5% of the purchase price “payable for procurement of a ready, willing and able buyer” and that “[a]n Open Listing means that the property is available for sale at the above price and terms and the owner will pay a commission to any Licensed Broker who procures a buyer at acceptable terms.” Further, “[t]he Owners agree that no price increase, or change in the terms or conditions of the listing shall take effect, for a particular buyer, sooner than thirty (30) days after the introduction of that prospective buyer to the property.” Finally, it stated that the “[c]ommission shall be deemed to be earned if [the broker] procures a purchaser at terms acceptable to the seller.”

The Open Listing Agreement did not define “terms acceptable to the seller.” Nor did it set forth any deed restrictions. However, Hermance states that, at the May 11th meeting, Karl Easton stated that a prospective buyer would be required to agree that it would make no additional curb cuts or driveways onto the property from Martindale Road and would sufficiently set back any new houses from the road so as not to be visible. Hermance states that she asked Easton about hunting restrictions and he said there would be none. On the other hand, Easton stated at his deposition that they had no discussion at the meeting about curb cuts, set backs, hunting or any other restrictions. It is undisputed that they put no restrictions into writing.

Hermance informed Kanas of the Easton listing and Kanas visited the property. On May 13th, Kanas made an all cash offer of \$9,000 per acre. The Eastons allegedly responded that their family wished to hold a purchase money mortgage on the property.

On May 16, 2004, Kanas visited the property and met with Karl Easton, with Hermance present, for approximately one hour and then for another fifteen minutes without Hermance. Hermance alleges that they discussed only the restriction for the curb cuts and the setbacks. Kanas reiterated the offer of \$9,000 per acre and Easton stated that the price would be \$10,000 per acre. The parties did not execute a written agreement or any other writing at the May 16th meeting. Hermance claims that sometime in the next few days, Kanas offered \$10,000, with a purchase money mortgage, that Hermance alleges Easton accepted.

On May 20th, Hermance sent a letter to Karl Easton's attorney stating that she had procured a buyer for the Easton property. The letter stated that the price was \$10,000 per acre, for 347 acres, with a 1.5 million dollar down payment and either a five or ten-year mortgage. The letter stated that "[l]anguage for restrictive covenants to be proposed by Seller's attorney" and "[c]losing to be subject to survey timetable."

Hermance states that on May 21st, the Eastons' lawyer indicated that the Eastons wanted to impose development restrictions with respect to minimum lot size and to change the price in the event that the survey showed the property to be less than 347 acres. Hermance states that Karl Easton subsequently began to repeatedly change his mind as to whether hunting would be permitted on the property, but hunting was Kanas's primary incentive in seeking the property.

On May 21st, the Eastons sent a draft contract to Kanas and his lawyer. The contract contained more than twenty restrictions, including restrictions on future lot size and property use. The draft contract did not contain any specific restrictions for hunting on the property. On June

4th, Kanas informed the parties that he objected to the new restrictions and that they did not comport with his understanding of the parties' agreement.

The parties continued to negotiate about the restrictions. Hermance states that in early July the Eastons notified her that they wished to impose a prohibition on hunting. Kanas immediately rejected that proposal. The parties then discussed partial restrictions for hunting on the property.

On July 14th, Kanas informed Hermance that he was no longer interested in purchasing the property. He stated in his letter, among other things, that the various covenants being discussed were never disclosed to him as part of the original listing and he believed that the Eastons had no intention of selling the land without imposing onerous restrictions on the use by the buyer.

Hermance commenced this action in August of 2004, seeking to recover a commission pursuant to the Open Listing Agreement. She alleges that she produced a ready, willing and able buyer in Kanas, that entitles her to a commission.

Defendants served an Answer containing eight counterclaims. The counterclaims are based on breach of contract, negligence and breach of fiduciary duty. Defendants assert that the deal with Kanas was not completed because of Hermance's negligence and that she breached the agreement by failing to use all reasonable efforts to procure an acceptable purchaser. They also assert that she breached her fiduciary duty by failing to disclose that she had been attempting to sell her own property in the area and had shown it to Kanas several weeks before she approached defendants about their own property. Hermance eventually sold her property to Kanas after Kanas withdrew from negotiations with the Eastons.

In motion sequence 002, defendants move for summary judgment dismissing the

Complaint on the grounds that Hermance is not entitled to a commission pursuant to the Open Listing Agreement. Their motion is not supported by an affidavit from Karl Easton or any other defendant. Instead, defendants rely on deposition testimony of the various parties and documentary evidence, particularly the Open Listing Agreement.

A party moving for summary judgment is required to make a prima facie showing that it is entitled to judgment as a matter of law, by providing sufficient evidence to eliminate any material issues of fact from the case. (Winegrad v NYU Medical Center, 64 NY2d 851 [1985]; Grob v Kings Realty Associates, LLC, 4 AD3d 394 [2d Dept 2004]). The party opposing the motion must then demonstrate the existence of a factual issue requiring a trial of the action. (Zuckerman v City of New York, 49 NY2d 557, 560 [1980]).

In general, "[t]o establish the right to a commission, a broker must demonstrate that he or she produced a ready, willing, and able purchaser who came to a meeting of the minds with the seller as to all of the material terms of the sale." (Heelan Realty and Development Corp v Ocskasy, 27 AD3d 620 [2d Dept 2006]; see also, RR Ragette, Inc v D'Incecco, 17 AD3d 436 [2d Dept 2005]; Fried v David Berry Realty, 17 AD3d 405 [2d Dept 2005]). The parties may vary the broker's right to a commission by agreement. (Battery Park Realty, Inc v RKO Delaware, Inc, 18 AD3d 680 [2d Dept 2005]).

Here, the Open Listing Agreement provided that Hermance was entitled to a commission of 5% of the purchase price in the event that she procured a "ready, willing and able" buyer at "terms acceptable to the seller." The Open Listing Agreement set forth an asking price of \$10,000 per acre. However, the Agreement did not define the phrase "terms acceptable to the seller." The Open Listing Agreement also did not contain any deed restrictions or restrictive covenants. Thus, any such restrictions, as well as any other relevant terms, were left for

negotiation between the buyer and seller.

The main issue here, whether Hermance procured a ready, willing and able purchaser, depends on whether at any point Kanas agreed to buy the property at terms acceptable to the Eastons. Hermance alleges that the May 16th meeting between Kanas and Easton eventually resulted in an agreement to purchase the property. She states in her affidavit that, between May 16th and May 19th, Kanas and Easton worked out a deal in which Kanas would pay \$10,000 per acre with a mortgage to be amortized over five to ten years. To memorialize this alleged agreement, Hermance sent a letter on May 20th to Easton's attorney stating that she had procured a buyer for the property at \$10,000 per acre, with a purchase money mortgage of either ten years at 5% or five years at 4%. The letter stated that "[l]anguage for restrictive covenants to be proposed by Seller's attorney."

Initially, defendants argue that Hermance could not have procured a ready, willing and able purchaser because Kanas and Easton never executed a contract of sale and Kanas ultimately withdrew from negotiations and decided that he was not willing to purchase the property. However, the lack of a fully executed contract of sale is not fatal to a cause of action to recover a brokerage commission. (RE/Max Homes and Estates, Inc v Leist, 308 AD2d 439 [2d Dept 2003] [citations omitted]). Moreover, a broker's right to its commission is not dependent upon performance of a real estate contract unless the parties have agreed otherwise. (See Kling Real Estate, Ltd v DePalma, 306 AD2d 445 [2d Dept 2003] [citations omitted]; Mecox Realty Corp v Rose, 202 AD2d 404 [2d Dept 1994]). Here, the parties did not specify that a commission would be earned only if the sale was completed. Therefore, that Kanas and Easton did not execute a written contract of sale does not automatically bar Hermance from recovering a broker's commission.

Hermance contends that Kanas was in fact a ready, willing and able buyer because he agreed to buy the Easton property at the price in the Open Listing Agreement. Despite this contention, Hermance has not moved for summary judgment. She does, however, maintain that the record supports the granting of judgment in her favor. Thus, she has invited the court to search the record and grant her summary judgment. (See Thirty-One Co v Forino, 35 AD3d 235 [1st Dept 2006]; Air Liquide Large Industries US LP v Praxair, Inc, 35 AD3d 188 [1st Dept 2006]). In making this request Hermance overlooks the general proposition that "mere agreement as to price on a proposed sale of real property does not constitute a meeting of the minds such as would entitle the real estate broker to a commission." (Norma Reynolds Realty, Inc v Miral, 301 AD2d 364 [1st Dept 2003], quoting Kaelin v Warner, 27 NY2d 352,355 [1971]).

Specifically, "where an owner merely specifies the purchase price of property, without fixing the other terms of sale, commissions are not earned until and unless the person produced by the broker reaches an agreement with the owner not only as to price but also as to the terms upon which the sale is to be made." (Kaelin, supra at 355. See Posson v Hayes, 2007 WL 414381 [3d Dept, Feb. 8, 2007]). Here, the Open Listing Agreement set forth the price but also clearly indicated that additional terms remained to be negotiated, i.e., terms acceptable to the seller. Moreover, Hermance has asserted that the parties did discuss restrictive covenants as a part of the deal. Therefore, Hermance is not entitled to a commission simply because Kanas agreed to the price in the agreement.

The court finds that questions of fact exist as to whether Easton and Kanas reached an agreement arising from the meeting on the 16th. Among other things, it is unclear whether Kanas and Easton came to an agreement with respect to restrictive covenants. Kanas stated in his

affidavit that the only restrictions discussed on May 16th were curb cuts and setbacks for new houses. He said that he told Easton that he agreed to both restrictions and inquired whether they would have a deal if Kanas agreed to pay \$10,000 per acre. Easton allegedly replied that they would have a deal. Kanas and Hermance both state in their affidavits that, shortly thereafter, Kanas agreed to the deal at those terms and, on May 19th, Easton allegedly informed Hermance that he agreed to those terms as well.

In contrast, Easton stated in his deposition that he specifically said at the meeting that the parties would have to determine the restrictive covenants. These covenants included restrictions on driveways on Martindale Road and the setbacks for new houses, as well as the lot size, in acres, for new houses. Easton stated that he made it clear that the restrictive covenants remained subject to further negotiation and that the lawyers for each side would work it out.

Questions of fact also exist about whether the parties reached an agreement on the issue of hunting on the property. Hermance asserts in her affidavit that Kanas asked Easton at the May 16th meeting if he objected to Kanas hunting on the property and Easton specifically said that he did not object. Kanas states in his affidavit that Easton specifically did not object to hunting on the property. However, this statement from Kanas's affidavit contradicts his deposition in which he stated that Easton was silent on the issue and did not respond to his inquiry about hunting.

For his own part, Easton stated in his deposition that he did not say anything about hunting, although Kanas raised the subject. Easton also stated that he did not initially object to Kanas's hunting, although that point became the subject of future negotiations. Thus, questions of fact exist that preclude summary judgment for either side.

Hermance argues that she is still entitled to a commission because Easton deliberately changed his demands on restrictive covenants in order to prevent the sale of the property. She

contends that he did so because defendants never intended to sell the property but merely wanted to gauge its market value.

Where the seller is responsible for the failure of one or more events that entitle a broker to a commission, the seller is not relieved of liability for the commission because of the failure of the event. (Dagar Group, Ltd v South Hills Mall, LLC, 12 AD3d 552,554 [2d Dept 2004] [citations omitted]; see also Eastern Consol. Properties, Inc v Lucas, 285 AD2d 421, 422 [1st Dept 2001]). At this point, Hermance's assertion that defendants deliberately acted to frustrate the sale of the property is speculative, and questions of fact remain. Therefore, the court denies defendants' motion for summary judgment and declines to grant summary judgment to plaintiff.

In motion sequence 003, plaintiff moves for summary judgment dismissing defendants' counterclaims, that are based on breach of contract, negligence and breach of fiduciary duty. As set forth above, defendants contend that the deal with Kanas did not close because of Hermance's negligence. Among other things, they allege that she breached the Open Listing Agreement by failing to use all reasonable efforts to procure an acceptable purchaser. They also argue that she breached her fiduciary duty by failing to disclose attempts to sell her own property in the area that she had shown to Kanas several weeks before she approached defendants about their property.

Hermance argues that the court should dismiss the counterclaims because defendants have failed to produce any proof that her representation was negligent. She also asserts that defendants have not demonstrated that she breached her fiduciary duty by showing her property to Kanas before representing Easton or by eventually selling the property to Kanas.

In response, defendants submit an expert affidavit from a licensed real estate broker. The expert opines that Hermance failed to exercise the level of care required of real estate brokers in

New York. He also asserts that she breached her duty to defendants by essentially acting as a dual agent for defendants and Kanas.

The expert affidavit raises issues of fact with respect to defendants' counterclaims warranting denial of the motion for summary judgment dismissing them.

Accordingly, it is

ORDERED that the motion for summary judgment, bearing sequence number 002, is denied; and it is further

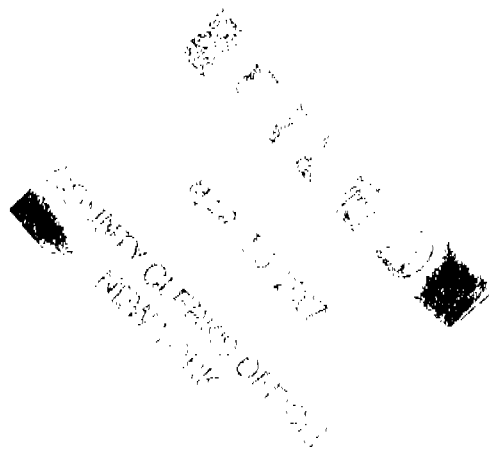
ORDERED that the motion for summary judgment, bearing sequence number 003, is also denied.

Dated: March 2, 2007

ENTER



J.S.C.



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