

Telleys v Witkoff Group LLC

2007 NY Slip Op 30535(U)

March 30, 2007

Supreme Court, New York County

Docket Number: 0103729/2006

Judge: Doris Ling-Cohan

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 36

Gail H. Telleysk

INDEX NO.

103729/06

MOTION DATE

- v -

The Withoff Group, LLC

MOTION SEQ. NO.

001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion ^{4 cross-motion} to/for summary judgment

PAPERS NUMBERED

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

1, 2

Answering Affidavits Exhibits

Replying Affidavits

3, 4, 5, 6, 8

interim order

7

Cross-Motion: Yes No

3, 4

Upon the foregoing papers, it is ordered that this motion ^{4 cross-motion} for summary judgment are decided in accordance with the attached memorandum decision.

FOR THE FOLLOWING REASON(S):

FILED
NEW YORK
COUNTY CLERK'S OFFICE

HON. DORIS LING-COHAN

Dated: 9/30/07

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 36

-----X

GAIL H. TELLEYSH,
Plaintiff,

Index No. 103729/06

-against-

Motion Seq. No.: 001

THE WITKOFF' GROUP LLC,
Defendant.

Ling-Cohan, J.:

In the complaint, plaintiff Gail H. Telleysh (Telleysh) claims that she is owed commissions totaling \$1,267,500 for brokering defendant The Witkoff Group LLC's (Witkoff) purchase of two properties. Telleysh moves for summary judgment on her first cause of action for payment of a brokerage commission associated with the purchase of property located at 691 Eighth Avenue. Witkoff cross-moves for summary judgment dismissing the complaint.

Facts

Telleysh is a New York attorney who brokers real estate transactions. Witkoff claims that, in the spring of 2003, Witkoff and Telleysh discussed Telleysh brokering a deal whereby non-party 44th Street Development LLC (44th Street), an affiliate of Witkoff, would purchase 681 and 691 Eighth Avenue (Properties). Telleysh submitted a draft letter agreement, dated May 7, 2003, to 44th Street (5/7/03 Letter). The 5/7/03 Letter purports to confirm brokerage services to be provided by Telleysh. The letter states, in pertinent part, as follows:

If at any time during the term of this

Agreement, 44th Street Development LLC enters into a contract of sale to purchase either 691 8th Avenue, 689 8th Avenue or 687 8th Avenue, 44th Street Development LLC agrees that at closing of title to pay the undersigned a sum equal to 3% of the purchase price

The 5/7/03 Letter states that Telleysch shall have exclusive rights to pursue brokerage for a term of six months. The letter is signed by Telleysch but not by Witkoff or 44th Street. Neither Witkoff nor 44th Street executed a contract to purchase either of the Properties at issue in this lawsuit. Telleysch claims that she was, in fact, paid a fee for assisting Witkoff in acquiring air rights of 691 Eighth Avenue and the purchase of 699 Eighth Avenue.

In late 2004, the parties resumed discussions concerning Telleysch brokering Witkoff's purchase of the Properties. Telleysch claims that she entered into an oral agreement with Witkoff, whereby Witkoff agreed to pay her a brokerage fee of 3% of the purchase price if she could arrange the sale on terms acceptable to Witkoff.

Telleysch allegedly commenced negotiations with the owners of 691 Eighth Avenue for the transfer of the outstanding stock of 691 Eighth Avenue Corporation, the entity that owed this property. According to Telleysch, the seller and Witkoff agreed on a purchase price of \$10,250,000 and negotiated a Stock Purchase Agreement that contained terms and conditions agreed upon by Witkoff. Telleysch claims that most, if not all, of this agreement was drafted by Witkoff. Paragraph 2.17 of the Stock

Purchase Agreement contains a clause acknowledging that Telleysh was Witkoff's broker and stating that Witkoff "shall pay any commission due Broker pursuant to a separate agreement between [Witkoff] and Broker." The Stock Purchase Agreement is signed by the sellers, but Witkoff never signed such agreement. Plaintiff's first cause of action seeks a brokerage fee of \$307,500 on this property - 691 Eighth Avenue.

Telleysh claims that she also brokered the sale of 681 Eighth Avenue between its owner and Witkoff, upon terms and conditions that were agreed to by Witkoff, including the purchase price of \$32 million. The terms of this agreement were allegedly memorialized in written contracts which were never signed by Witkoff. The second cause of action seeks a brokerage fee of \$960,000 on this property - 681 Eighth Avenue.

Discussion

In seeking summary judgment on her first cause of action, Telleysh argues that Witkoff owes her a brokerage commission associated with the purchase of 691 Eighth Avenue, because she negotiated Witkoff's purchase of such property on terms proposed and agreed upon by Witkoff, and those terms were memorialized in a written agreement prepared by Witkoff's counsel. In opposition and in support of its cross-motion, Witkoff argues that Telleysh's claims should be dismissed, because, under the 5/7/03 Letter, the brokerage commission was conditioned upon execution of the contract of sale or a closing of the transaction, neither of which occurred.

The parties do not dispute that the oral brokerage agreement is permissible under section 5-701 (a) (10) of New York's General Obligations Law, because Telleys is an attorney at law. Generally, "a prospective purchaser of real estate is not liable for failure to accept an offer unless it appears that the broker was employed by the purchaser." *Duross Co. v Evans*, 22 AD2d 573, 574 (1st Dept 1965). The purchaser's breach of an employment contract with the broker results in the purchaser's liability for damages. *Id.* As stated by the First Department and the Court of Appeals:

Where ... the employer of the agent itself prevents the earning of the commission by refusing to deal on the basis which was offered to the agent, the purchaser is obligated to pay after the agent has procured a seller on the terms and for the consideration, quantity and quality proposed by the purchaser [citation omitted].

Id., quoting *Westhill Exports, Ltd. v Pope*, 12 NY2d 491, 496 (1963); see also *Battery Park Realty, Inc. v RKO Delaware, Inc.*, 18 AD3d 680, 681 (2d Dept 2005) (broker is entitled to a commission when it produces a party "who is ready, willing, and able" to consummate the transaction).

In *Duross Co. v. Evans*, (22 AD2d 573), the defendants hired the plaintiff broker to locate property in Manhattan. The broker located and submitted several properties to the defendants. The defendants selected one of the properties and authorized the broker to submit an offer to the owner on their behalf. The broker submitted the offer. The owner accepted the offer,

prepared a contract of sale and entered into a brokerage agreement to pay the plaintiff's commission. The defendants agreed to purchase based upon the alleged offer, but then arbitrarily refused to enter into the contract of sale and consummate the transaction, thereby depriving the broker of its commission. The Court held that these allegations were sufficient to state a cause of action for breach of the brokerage agreement. *Id.* at 574.

Here, Telleysch's affidavit states that Witkoff agreed to pay her a three percent brokerage commission if she was successful in arranging terms and conditions acceptable to Witkoff for it to acquire ownership to 681 and/or 691 Eighth Avenue. A purchase price was negotiated with the owners of 691 Eighth Avenue. Telleysch states that the owners' attorney prepared a draft contract of sale and forwarded it to Witkoff's counsel, but that Witkoff's counsel, Richard Cohen (Cohen), did not use that agreement. Instead, Witkoff prepared a new contract that the parties negotiated and agreed upon, and Cohen prepared a final contract that expressly identified Telleysch as the broker and stated that Witkoff would pay the brokerage commission pursuant to its separate agreement with Telleysch.

Telleysch also submits e-mail transmissions between Cohen and the sellers' attorney, Neil Greenberg (Greenberg), both dated June 23, 2005 (the day before the sellers signed the contract). Greenberg's e-mail proposed two changes to the contract: one dealing with where to send the deposit, the other acknowledging

that Telleysch is the broker and requesting that Witkoff agree to satisfying obligations to Telleysch as broker. Greenberg then states that the sellers "are ready to sign the agreement today if these last details can be worked out." [Plaintiff's Reply Aff, Exh. A]. Cohen's response e-mail acknowledges Greenberg's proposed changes, incorporates them into a revised Stock Purchase Agreement that "corrects the escrow and payment direction and clarifies that Purchaser will pay any brokerage fee due [to Telleysch] in connection with the transaction." [Plaintiff's Reply Aff, Exh. B]. Cohen's e-mail then reminds Greenberg "to have all of the landlord tenant documents executed as well." [Id.]

Telleysch also submits an affirmation by Greenberg, based on personal knowledge, which states how the transfer of title of 691 Eighth Avenue was to occur, that Telleysch was involved in the negotiations, that a substantial portion of the Stock Purchase Agreement was drafted by Witkoff's counsel, and that "there were no open items and a complete meeting of the minds between my client [the sellers] and defendant was had concerning this transaction." [Greenberg Aff. in Support, at 2]. Greenberg states that the sellers executed the contract but never received a signed copy from Witkoff, that Telleysch was Witkoff's representative on the transaction, that the contract provided that she was the broker, and that a meeting of the minds between the sellers and Witkoff was brought about by Telleysch.

According to Telleysch's affidavit, Witkoff requested that

the sellers execute the contract and forward it to Witkoff for execution, which was done on June 24, 2005. The same day, Telleysch forwarded the contract, signed by the sellers, to Witkoff for execution. Without explanation, Witkoff refused to sign the contract. This evidence submitted by plaintiff presents a prima facie showing that Telleysch "procured a seller on the terms and for the consideration, quantity and quality proposed by the purchaser," but that Witkoff "refus[ed] to deal on the basis which was offered to the agent," thereby obligating Witkoff to pay Telleysch's brokerage commission. *Duross Co.*, 22 AD2d at 574.

In opposition, Witkoff submits the affidavit of its vice president, Scott Alper (Alper). Alper does not deny the material facts set forth in the affidavits of Telleysch, nor Greenberg. Witkoff admits that it paid a brokerage fee to Telleysch for brokering the purchase of 699 Eighth Avenue for Witkoff's affiliate, 44th Street. Alper also admits that, in late 2004, he discussed the purchase of 681 and 691 Eighth Avenue with Telleysch, and that Witkoff negotiated with the owners of these properties.

Citing *Battery Park Realty, Inc.* (18 AD3d at 681), Witkoff acknowledges that a broker is entitled to a commission when she produces a party "who is ready, willing, and able" to consummate the transaction, but argues that "the broker's right to a commission may be varied by agreement." Witkoff's opposition and cross-motion are based upon the 5/7/03 Letter, which conditions payment obligations to the broker upon 44th Street entering into

a contract of sale and closing title, which never occurred with respect to 681 and 691 Eighth Avenue.

Significantly, however, the 5/7/03 Letter is not signed by Witkoff, and Witkoff admits in its reply papers that the 5/7/03 Letter is not binding upon Witkoff. Moreover, the transmittal facsimile sent with such letter expressly states that it is a draft. Moreover, the 5/7/03 Letter states that its term is 6 months, thereby expiring on November 7, 2003. Witkoff admits that the parties did not discuss the purchase of 681 and 691 Eighth Avenue until late 2004, long after the expiration of the unexecuted, draft 5/7/03 Letter. In addition, nothing in such letter refers to 681 Eighth Avenue, which is the subject of Telleys's second cause of action. Therefore, Witkoff's reliance upon this document is unpersuasive. Accordingly, Witkoff fails to show that the brokerage agreement was varied by another agreement, and, as a result, fails to rebut Telleys's prima facie showing on plaintiff's first cause of action for the fee associated with the 691 Eighth Avenue property.

With respect to plaintiff's second cause of action, Witkoff failed to make a prima facie showing of entitlement to dismissal as a matter of law. Thus, Witkoff's cross-motion is denied in its entirety.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted to the extent of granting partial summary judgment in favor of plaintiff and against defendant on the first cause of action in the amount of

\$307,500, together with interest at the statutory rate from the date of July 1, 2005 until the entry of judgment, as calculated by the Clerk of the Court; and it is further


ORDERED that defendant's cross motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the action shall continue as to the second cause of action.

Dated:

3/30/07

HON. DORIS LING-COHAN



Hon. Doris Ling-Cohan, J.S.C.

G:\Supreme Court\Summary Judgment\Telleysh v Witkoff Group.wpd

FILED

APR 05 2007

CLERK OF THE SUPREME COURT
STATE OF NEW YORK
JUDICIAL OFFICE