Prudential Douglas Elliman R.E., Commercial Servs. v Smyles
2007 NY Slip Op 30780(U)
March 27, 2007
Supreme Court, Suffolk County
Docket Number: 0015858/2004
Judge: Robert W. Doyle

SHORT FORM ORDER

INDEX NO. 04-15858
CALENDAR NO. 06-01972-CO

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 10-30-06 (#001)
MOTION DATE 11-13-06 (#002)
ADJ. DATE 11-27-06
Mot. Seq. # 001 MD
Mot. Seq. # 002 XMD

PRUDENTIAL DOUGLAS ELLIMAN R.E., COMMERCIAL SERVICES,

Plaintiff,

– against –

ARTHUR SMYLES,

Defendant.

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East Meadow, NY 11554

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Upon the following papers numbered 1 to 44 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 22; Notice of Cross Motion and supporting papers 23 - 39; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers 40 - 44; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff for summary judgment in its favor is denied; and it is

ORDERED that the cross motion by defendant for summary judgment dismissing the complaint is denied.

Plaintiff Prudential Douglas Elliman R.E., Commercial Services, commenced this action to recover a broker's commission allegedly earned under an agreement with defendant Arthur Smyles. The property at issue is a commercial building located at 120 Voice Road, Carle Place, NY, and allegedly is owned by 120 Voice Road, LLC. Defendant Arthur Smyles and his wife allegedly are the managing members of 120 Voice Road, LLC. On December 4, 2003, plaintiff and defendant executed a written agreement that allegedly gave plaintiff the exclusive right, for a two-month period, to find a tenant to lease the property at 120 Voice Road. Plaintiff allegedly undertook various steps to obtain a tenant, including placing advertisements in The New York Times and soliciting prospective tenants, yet did not secure a lease agreement within the two-month period. On or about January 4, 2004, plaintiff's Executive Director, Michael Rescigno, sent a letter advising defendant that the various businesses listed therein had been contacted by plaintiff as prospective tenants for the subject property, and requesting that plaintiff be

notified if the property was leased to any of such businesses within six months after the expiration of the exclusive right to lease period. One of the 32 businesses listed in plaintiff's January 4 letter to defendant is Harrows. By letter dated February 2, 2004, defendant notified plaintiff that it was cancelling the agreement as of February 3, 2004.

Shortly thereafter, on February 16, 2004, 120 Voice Road, LLC and Harrow Stores, Inc. entered into a five-year lease for the subject premises. The lease states, among other things, that the fixed rent for the premises is $594,644 per year, and that the amount of the fixed rent shall increase 3% each year beginning the second year of the lease term. Moreover, it states that Gary Brody was the only real estate broker involved in the lease agreement between the parties, and that 120 Voice Road, LLC was responsible for paying the broker's commission. It is undisputed that 120 Voice Road, LLC paid a broker's commission to Mr. Brody in connection with the lease agreement with Harrow Stores.

Plaintiff now moves for summary judgment in its favor on the complaint, arguing that it is entitled to receive a commission from defendant, as it is entitled to a commission under the terms of the parties' agreement if, within six months after the expiration of the agreement, the subject property is leased to third party to whom the property had been submitted by plaintiff during the two-month exclusivity period. Defendant opposes the motion and cross-moves for summary judgment dismissing the complaint. Defendant argues, among other things, that he can not be liable for the commission, as he is not the actual owner of the subject property. Defendant also alleges that plaintiff is not entitled to a commission, as it did not "submit" the property to Harrow Stores and it was not the not the procuring cause of the lease agreement. The Court notes that plaintiff does not dispute defendant's claim that the subject property is owned by 120 Voice Road, LLC, and defendant does not dispute the allegation that plaintiff is a licensed real estate broker.

Generally, a real estate broker establishes its right to a commission with proof that it produced a purchaser or lessee who was ready, willing and able to purchase or lease at the terms set by the seller or lessor (*see*, ***Feinberg Bros. Agency v Berted Realty Co.***, 70 NY2d 828, 523 NYS2d 439 [1987]; ***Rusciano Realty Servs. v Griffler***, 62 NY2d 696, 476 NYS2d 526 [1984]; ***Heelan Realty & Dev. Corp. v Ocskasy***, 27 AD3d 620, 812 NYS2d 124 [2d Dept], *lv denied* 7 NY3d 708, 822 NYS2d 482 [2006]; ***Kaplon-Belo Assocs. v Farrelly***, 221 AD2d 321, 633 NYS2d 522 [2d Dept 1995]; ***Holzer v Robbins***, 141 AD2d 505, 529 NYS2d 130 [2d Dept 1988]). Typically, a plaintiff seeking to recover a broker's commission can establish its entitlement to summary judgment with proof that it is duly licensed, that it had a contract with the party to be charged with paying the commission, and that it was the procuring cause of the sale or lease (*see*, ***Hammer v Griffin***, 19 AD3d 450, 796 NYS2d 241 [2d Dept 2005]; ***Dagar Group v Hannaford Bros. Co.***, 295 AD2d 554, 745 NYS2d 34 [2d Dept 2002]; ***Buck v Cimino***, 243 AD2d 681, 663 NYS2d 635 [2d Dept 1997], *lv denied* 91 NY2d 807, 669 NYS2d 260 [1998]).

Of course, parties to a brokerage agreement are free to vary the terms of their agreement so as to require that certain conditions be met to earn a commission, such as the closing of title or the execution of a lease agreement (*see*, ***Srour v Dwelling Quest Corp.***, 5 NY3d 874, 808 NYS2d 128 [2005]; ***Signature Realty v Tallman***, 2 NY3d 810, 781 NYS2d 259 [2004]; ***Feinberg Bros. Agency v Berted Realty Co.***, *supra*; ***Kling Real Estate v DePalma***, 306 AD2d 445, 762 NYS2d 256 [2d Dept 2003]; ***Gumley Haft Kleier, Inc. v Bildirici***, 301 AD2d 390, 753 NYS2d 81 [1st Dept 2003]). Parties also may agree to a provision granting the broker an exclusive right to sell or lease the property, which entitles the broker to a

commission whether or not it was a procuring cause of the sale or lease of the subject property (*see*, ***Rennert Diana & Co. v Ziskind***, 191 AD2d 545, 595 NYS2d 68 [2d Dept 1993]; ***Charles E. Hyde Realty v Yerganian***, 150 AD2d 417, 540 NYS2d 735 [2d Dept 1989]; ***Hess v Kruse***, 131 AD2d 545, 516 NYS2d 271 [2d Dept 1987]; ***Solid Waste Inst. v Sanitary Disposal***, 120 AD2d 915, 502 NYS2d 835 [3d Dept 1986]). A contract will not be interpreted as creating an exclusive right to sell or lease, however, absent a clear and express provision that a commission is due upon the sale or lease of the property, regardless of whether the broker brought about the sale or lease (*see*, ***Charles E. Hyde Realty v Yerganian***, *supra*; ***Blake Realty v Gilligan***, 155 AD2d 816, 547 NYS2d 930 [3d Dept 1989]; ***Hammond, Kennedy & Co. v Servinational, Inc.***, 48 AD2d 394, 369 NYS2d 712 [1st Dept 1975]).

Here, the brokerage agreement between the parties states, in relevant part, that defendant grants plaintiff "the exclusive right to lease the property located at 120 Voice Rd., Carle Place, NY" and that defendant agrees to pay plaintiff "a leasing commission equal to 7% of the total base rental for the first three years and 3% of the total base rental for each year thereafter." It states that the agreement shall continue "in full force and effect for two months for two months from date of signing at which time owner may renew or cancel" and that a commission "shall be considered earned and payable for services rendered if, during the term of the agreement, the property is leased to a tenant (by broker, owner or anyone else)." Further, the agreement contains the following provision regarding the broker's right to a commission:

> Upon expiration of this agency, broker agrees to submit a list of prospective tenants to who the property has been submitted prior to the expiration of this agreement. Said list shall be delivered to owner within 20 days after the term of this agency expires. Owner agrees to pay broker the commission if the property is leased to any such prospective tenant within the following six mos.

It is noted that the clause "within the next six mos." is handwritten on the agreement.

The cross motion for summary judgment is denied, as defendant failed to demonstrate prima facie that he is entitled to judgment in his favor. Contrary to the conclusory assertion by defense counsel, the fact that title to the subject property is held by a limited liability corporation does not automatically relieve defendant of a contractual obligation to pay a broker's fee. A party who enters into a brokerage agreement is liable for a commission earned under such agreement even if such party does not own the property and cannot pass title thereto (*see*, ***Sholom & Zuckerbrot Realty Corp. v Citibank, N.A.***, 205 AD2d 336, 613 NYS2d 588 [1st Dept 1994]; ***Kalmon Dolgin Affiliates v Estate of Nutman***, 172 AD2d 917, 568 NYS2d 204 [3d Dept 1991]; ***Kennon v Poerschke***, 148 AD 839, 133 NYS 528 [1st Dept 1912]; *see generally*, ***Hammer v Griffin***, *supra*; ***Buck v Cimino***, *supra*).

Further, defendant's argument that he is entitled to judgment in his favor, because plaintiff failed to procure a tenant for the property prior to the expiration of the two-month exclusive right to lease period is rejected. The aim of a court when interpreting a contract is to arrive at a construction that gives fair meaning to all of its terms and provisions, and to reach a "practical interpretation of the expressions of the parties so that their reasonable expectations will be realized" (***Joseph v Creek & Pines, Ltd.***, 217 AD2d 534, 535, 629 NYS2d 75 [2d Dept], *lv dismissed* 86 NY2d 885, 635 NYS2d 950 [1995], *lv denied* 89

NY2d 804, 653 NYS2d 543 [1996]; *see*, ***Matter of Marco-Norca, Inc. v Dov Matz***, 22 AD3d 495, 802 NYS2d 707 [2d Dept 2005]; ***Tikotzky v City of New York***, 286 AD2d 493, 729 NYs2d 525 [2d Dept 2001]; ***Partrick v Guarniere***, 204 AD2d 702, 612 NYS2d 630 [2d Dept], *lv denied* 84 NY2d 810, 621 NYS2d 519 [1994]). As it is a question of law whether or not a contract is ambiguous (***W.W.W. Assocs. v Giancontieri***, 77 NY2d 157, 565 NYS2d 440 [1990]), a court must first determine whether the agreement at issue on its face is reasonably susceptible to more than one interpretation (*see*, ***Chimart Assocs. v Paul***, 66 NY2d 570, 498 NYS2d 344 [1986]). When a contract term or clause is ambiguous, and the determination of the parties' intent depends on the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the interpretation of such language is matter for trial (***Amusement Bus. Underwriters v American Intl. Group***, 66 NY2d 8778, 880, 498 NYS2d 760 [1985]; *see*, ***Brook Shopping Ctrs. v Allied Stores Gen. Real Estate Co.***, 165 AD2d 854, 560 NYS2d 317 [2d Dept 1990]).

Here, the parties' agreement states that plaintiff is granted an exclusive right to lease the subject property, that the agreement shall remain in effect for the two-month period after its execution, and that defendant may renew or cancel the agreement at the expiration of such two-month period. Plaintiff, then, did not need to be the procuring cause of the lease to earn a commission, as the agreement granted it the exclusive right to lease the subject property, albeit for a limited period of time (*see*, ***J.E. Horan Duffy Realty v Brighton***, 216 AD2d 358, 628 NYS2d 359 [2d Dept], *appeal dismissed* 86 NY2d 868, 635 NYS2d 941 [1995], *lv dismissed* 88 NY2d 920, 646 NYS2d 989 [1996]; ***Audrey Balog Realty Corp. v East Coast Real Estate Devs.***, 202 AD2d 529, 610 NYS2d 812 [2d Dept 1994]; ***Barnet v Cannizzaro***, 3 AD2d 745, 160 NYS2d 329 [2d Dept 1957]; *compare* ***Solid Waste Inst. v Sanitary Disposal***, *supra*). Moreover, the agreement includes a provision that apparently carves out an exception to the two-month exclusive period by making defendant liable for a commission if, during the six-month period after the expiration of such agreement, a lease is entered with a "prospective tenant" to whom plaintiff had "submitted" the property during the period it had the exclusive right to lease such property. The fact that the lease agreement with Harrow Stores was executed two weeks after defendant's letter advising plaintiff that he was cancelling the brokerage agreement, then, does not resolve the question of whether plaintiff is entitled to a commission.

Moreover, the parties' agreement does not explain what actions must be undertaken by plaintiff for the property to be considered "submitted" to a prospective tenant. The Court finds that the failure to define the term "submitted" renders the "carve out" provision in the agreement ambiguous and susceptible to at least two reasonable interpretations. Thus, a triable issue of fact exists as to whether plaintiff is entitled to a commission under the terms of the parties' agreement (*see*, ***Joseph v Rubinstein Jewelry Mfg. Co.***, 18 AD3d 615, 795 NYS2d 664 [2d Dept 2005]; ***Goldstein v AccuScan***, 307 AD2d 913, 762 NYS2d 903 [2d Dept 2003], *affd* 2 NY2d 811, 815 NYS2d 657 [2004]; ***DePasquale v Daniel Realty Corp.***, 304 AD2d 613, 757 NYS2d 477 [2d Dept 2003]; ***Yanuck v Simon Paston & Sons Agency***, 209 AD2d 207, 618 NYS2d 295 [1st Dept 1004]). Accordingly, plaintiff's motion for summary judgment also is denied.

Dated: MAR 27 2007

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION