

Mayer v Pulte Homes of N.Y., Inc.

2007 NY Slip Op 30823(U)

March 14, 2007

Supreme Court, Suffolk County

Docket Number: 0030152/2003

Judge: Robert W. Doyle

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

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 12/22/06
ADJ. DATE 2/2/07
Mot. Seq. # 001 - MG; CASEDISP
002 - XMD

-----X			
TAMARA MAYER,	:	YOUNG & YOUNG, LLP	
	:	Attorneys for Plaintiff	
Plaintiff,	:	863 Islip Avenue	
	:	Central Islip, New York 11722	
- against -	:		
	:	CERTILMAN BALIN ADLER & HYMAN	
PULTE HOMES OF NEW YORK, INC.,	:	Attorneys for Defendant	
	:	90 Merrick Avenue, 9 th Floor	
Defendant.	:	East Meadow, New York 11554	
-----X			

Upon the following papers numbered 1 to 18 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers 12 - 14; Answering Affidavits and supporting papers 15 - 16; Replying Affidavits and supporting papers 17 - 18; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#001) by defendant, Pulte Homes of New York, Inc., for summary judgment pursuant to CPLR 3212 dismissing the action as against it is granted; and it is further

ORDERED that the cross motion (#002) by plaintiff, Tamara Mayer, for partial summary judgment is denied.

In this breach of contract action, plaintiff, Tamara Mayer, seeks to recover allegedly unpaid commissions for homes she sold for defendant, Pulte Homes of New York, Inc. (hereinafter referred to as "Pulte"). The complaint alleges in the first cause of action that defendant breached a contract by failing to pay her \$32,000.00 for commissions and unused vacation pay that she alleges she earned. The second cause of action alleges that defendant terminated her employment with the purpose of defrauding her of her commissions that would have been due upon closing of title. The third cause of action alleges that defendant tortiously defamed plaintiff and injured her professional reputation.

The undisputed facts are as follows: plaintiff, a licensed real estate broker, accepted employment with Pulte in or about April, 2003 as a sales manager to sell newly built houses in its Miller Place development. She executed a contract on April 21, 2003 which stated the following:

Pulte Homes, Inc. will pay Tami Mayer commission for Miller Place as follows:

Weekly Compensation: \$1,000.00 with \$2,000.00 Commission for homes that Tami Mayer has sold in Miller Place, half payable upon mortgage approval and signed contract and the other half upon closing of Title.

In the event that you should no longer be a Pulte Employee at the time upon closing of Title, you will forfeit the remaining half of the commission due you.

Compensation will be reviewed and/or adjusted by 12/31/03 as we anticipate sell out of the Miller Place Community.

A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (*Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v McAuliffe*, 97 AD2d 607, 467 NYS2d 944 [1983], *app den* 65 NY2d 741 [1985]), but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]).

In support of the motion, defendant contends that the employment contract is valid and plaintiff accepted its terms by signing it prior to beginning her employment. In addition, she was an at-will employee and is not owed commissions after the date of termination. Defendant further argues that the causes of action alleging fraud and defamation should be dismissed inasmuch as they were not pleaded with specificity pursuant to CPLR 3016. Defendant submits, among other things, the pleadings; a partial copy of plaintiff's examination before trial; a copy of the employment contract; a copy of the employee handbook; a personnel change form; a copy of plaintiff's earnings statement; and a personal affidavit by Donald Cowdell. The employee handbook reveals in paragraph 2.1 that plaintiff would be an employee at-will and the company may terminate an employee with or without cause and with or without advance notice. Plaintiff signed a form acknowledging receipt of the employee handbook. The personnel change form executed by Supervisor Donald Cowdell reveals that plaintiff was terminated on November 15, 2003 for unsatisfactory performance. The earnings statement reveals that plaintiff received gross pay of \$8,000.00 on or about February 20, 2004.

In his affidavit, Mr. Cowdell avers that he is the Division President of defendant Pulte. He states that plaintiff was hired on April 21, 2003 and signed an employment contract with the terms as stated above. In addition, plaintiff was given an Employee Handbook and executed acknowledgment of receipt on May 3, 2003. Plaintiff sold seventeen properties which went to mortgage approval while employed with defendant and was paid on nine of those properties. On or about November 15, 2003, plaintiff was terminated by defendant. After termination, plaintiff was paid the balance of \$8,000.00 for

the eight other properties which went to mortgage approval while she was an employee of defendant. While plaintiff acknowledged she received the check, she refused to cash it. He also states that at no point during her employment did any of plaintiff's properties go to closing.

In opposition, plaintiff claims that she was forced to sign the contract on April 21, 2003 or lose the employment opportunity, which she feels amounts to an adhesion contract. In addition, she claims that she was only terminated so that defendant could avoid paying the commissions. In support of the cross motion, plaintiff submits, among other things, her complete examination before trial transcript. Plaintiff testified to the effect that upon accepting the position with defendant she willingly forfeited a \$10,000.00 bonus that she would have earned had she stayed and completed a leasing project with her prior employer. She also stated that defendant's representative upon offering her the position omitted the fact that she would forfeit commissions if she was no longer employed. She stated that she relied upon these representations, tendered her resignation with her former employer and began work with defendant on April 21, 2003. On that day she was presented with a contract by an employee of defendant. After reviewing the contract, she learned that she had to be employed to be paid for commissions she had earned. She then signed the contract.

Plaintiff testified that on November, 2003 she was commended by a superior, Don Eversal, for doing a great job. However, she also stated that her immediate supervisor, Karen Striegl, had advised her to dress more casually and adopt a more casual attitude while communicating with potential buyers. Plaintiff stated that she was terminated on November 15, 2003 and was told that she was not a team player. Plaintiff stated that she sold a total of 17 homes and was initially paid \$9,000.00 as commissions for the buyers who obtained mortgages. After commencing this action, she received a check in the gross amount of \$8,000.00. Although plaintiff learned from a coworker that Ms. Striegl made defamatory comments about her, plaintiff conceded that she did not know to whom the comments were made or their substance.

In reply, defendant submits a portion of an examination before trial of Donald Cowdell who testified to the effect that the above stated check which was sent in February, 2004 to plaintiff was for payment of commissions on eight homes that had gotten mortgage approvals. He stated the delay occurred due to office procedures in verifying whether mortgage approvals had been obtained.

"When parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*W. W. W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440 [1990]). The responsibility of interpreting the contract rests with the court. The adhesion contract doctrine is intended to protect the innocent consumer who has no real choice but to accept terms even if unreasonable to acquire items fundamental to a decent standard of living (*see, Jones v Star Credit Corp.*, 59 Misc2d 189, 298 NYS2d 264 [1969]; *Gillman v Chase Manhattan Bank, N. A.*, 73 NY2d 1,537 NYS2d 787 [1988]). Upon review of the contract, the Court finds that the language is clear and unambiguous (*Chun Hye Kang-Kim v Feldman*, 121 AD2d 590, 503 NYS2d 855 [1986]) and does not apply to the doctrine. Here, there are two sophisticated parties dealing with real estate matters with which each is concededly familiar. The contract clearly states that commissions would be paid only if plaintiff was actively employed with defendant. Plaintiff had a clear choice, to either agree to accept the terms of the contract or decline the employment offer. Inasmuch as she had encountered the same circumstances in her prior employment and freely forfeited a bonus to accept new employment

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with defendant, she cannot now declare the agreement she signed with defendant to be an adhesion contract. In addition, she was well aware that as an employee at will, she could be terminated at any time for any reason without notice. Accordingly, the court is constrained to uphold the sanctity of this private agreement (*see, Harris v Shearson Hayden Stone, Inc.*, 82 AD2d 87, 94-95, 441 NYS2d 70 [1981], *aff'd* 56 NY2d 627 [1982]).

Turning to the fraud cause of action, such a cause of action does not lie where, as here, the claim is based upon the same allegations contained in the breach of contract cause of action (*see, Guerrero v Valiando*, 197 AD2d 667, 602 NYS2d 882 [1993]). Plaintiff's allegations that defendant terminated her employment with the express reason to defraud plaintiff out of her commissions is, in essence, the same allegation that was made in the first cause of action and is dismissed. In the third cause of action alleging defamation, pursuant to CPLR 3016, plaintiff must set forth in the complaint the particular words complained of. Inasmuch as plaintiff's testimony reflects that she is unable to identify the statements made by Ms. Striegl, her allegations fail to satisfy the requirements of particularity in the statute and are dismissed.

The Court finds that defendant Pulte has demonstrated its prima facie entitlement to judgment as a matter of law (*Zuckerman v New York, supra*). Plaintiff failed to meet her burden to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v Prospect Hosp., supra*). Accordingly, the defendant's motion for summary judgment is granted dismissing the action as against it. Plaintiff's cross motion for summary judgment is denied.

Dated: MAR 14 2007



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION