

Lee v West Side Cleaning Ctr., Inc.

2007 NY Slip Op 31937(U)

June 26, 2007

Supreme Court, New York County

Docket Number: 0601666/2002

Judge: Joan Madden

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

PRESENT: MADDEN
Justice

PART 11

Sony LEB

- v -

WEST SIDE CLEANING COMPANY INC

INDEX NO. 601666/02

MOTION DATE 4/11/07

MOTION SEQ. NO. 3

MOTION CAL. NO. _____

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

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 is decided in accordance with the annexed Memorandum Decision + Order

FILED
JUL 03 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: June 26, 2007

[Signature]
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

THIS CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X INDEX NO. 601666/02
SONNY LEE d/b/a SO FINE'S & COMPANY ,

Plaintiff,

--against--

WEST SIDE CLEANING CENTER, INC.,
MARK MIAO a/k/a FENG YO MIAO,
LANDE REALTY CORP., ROADWAY
COMMUNICATION INC., NEW WEST
SIDE CLEANER, INC., MICHAEL KIM
a/k/a MAN SOO KIM, KIMBERLY
KIM a/k/a KAP SOO KIM, and
JOHN DOES 1-5,

Defendants.

-----X
JOAN A. MADDEN, J.:

In this action seeking to recover a commission in connection with the sale of a business, defendants West Side Cleaning Center Inc. ("West Side Cleaning"), Mark Miao a/k/a Feng Yo Miao ("Miao), and Lande Realty Corp. ("Lande")(together "the Miao defendants") move for summary judgment dismissing the complaint against them and defendants Roadway Communication, Inc., New West Side Cleaner, Inc., Michael Kim a/k/a Man Soo Kim, Kimberly Kim a/k/a Kap Soo Kim (together the "Kim defendants") support the motion and seek dismissal of the claims against them. Plaintiff Sonny Lee d/b/a So Fine's & Company ("Lee") opposes the motion, which is granted to the extent below.

BACKGROUND

Until it was sold in 2001, Miao and his wife owned defendant West Side Cleaning, which had a Laundromat and dry cleaning store at West 82nd Street in Manhattan ("the Store"). The Store is located

in a building owned by Lande, a corporation owned by Miao. Michael Kim and Kimberly Kim (“the Kims”) own the defendant New West Side Cleaner, Inc., which purchased the Store in September 2001 for \$160,000. Defendant Roadway Communications Inc. was a business owned by the Kims until it was sold in 2001. Lee is a business broker in New York who Miao retained to sell the Store in 1999 after receiving a flyer from him in the mail.

In November 1999, Miao went to Lee’s offices where they entered into commission agreement for Lee to find a purchaser for the Store. Miao and Lee disagree as to the terms and the intent of the agreement. At his deposition, Miao testified that it was his understanding that the agreement was for an exclusive agency for a three month period for a selling price of \$440,000, with a ten percent commission (Miao Dep at 68). According to Miao, the typed agreement did not include the word “exclusive” or the \$440,000 so he included the \$440,000 in his own handwriting and Lee added the date (Id.) Miao and Lee both signed the agreement, although Lee, who explained that his copy machine was not working, did not give Miao a copy of the agreement on the day it was signed. Miao testified that although he repeatedly requested that Lee sent him a copy of the agreement, Lee did not fax him one until December 15, 1999, and that the faxed agreement was different from the one he signed in that it added to 11/9/99 date a dash and the date 11/9/02 (Miao Dep at 77-78). Miao testified that when he received the fax he “called right away to complain” and Lee told him “I only get a commission if I make the deal. This is not exclusive” so he did not bother changing the date (id., at 81).

Although the record does not contain a copy of the version Miao asserts he signed (hereinafter “Miao version”), the Miao defendants submit a copy of a document on a pre-printed form entitled “Commission Agreement” from Lee’s company signed by both Miao and Lee (hereinafter “Lee version,” Exhibit D to the Miao defendants’ motion). The date on top is “11/9/99-11/9/02” and identifies

Miao as the seller and includes the business address of West Side Cleaners. There is a blank line for the purchaser's name and address and a typed statement that "any purchasers from So Fine's (i.e. Lee's company) ok." The form also includes typed commission of 10% of the selling price with an adjacent handwritten note stating, "based on sales price \$440,000 and up." At the bottom is typed "the commission is due only if and when title passes except wilful default of sellers."

As indicated above, Miao testified that the Lee version was different from the Miao version that he signed at Lee's office in that it added to 11/9/99 date a dash and the date 11/9/02.

The record contains another version of a Commission Agreement, which has additional handwritten terms in darker print (hereinafter "the modified version," Exhibit F to the Miao defendants' motion). These additional terms provide for "an exclusive right to sell listing for thirty-six months" and a commission of not only 10% of the sales price but also "10% of total new lease (rent each month til end of lease)." The modified version also provides that "in the event of nonpayment or default, attorneys fees and court cost will be paid by West Side Cleaners and Mark Miao."

In his affidavit,¹ Lee states that the Lee version of the commission agreement was modified to include the additional terms with Miao's consent after the two met at a Starbucks shortly after he sent the fax of the agreement on December 15, 1999. According to Lee at the meeting:

I suggested to [Miao] that the \$3,000 rent rate [for the Store] was too low and the 10-year term too short, and that local market conditions would yield more. I recommended \$6,000 per month and a 15-year term, twice as much as he was ready to charge. In consideration for this amendment to sell the Store at this higher lease rate, Mr. Miao agree to include the lease revenues in my 10% brokers commission, being duly enforceable mutual promises. Together at the time in the Starbucks we made that and the other

¹The record includes an excerpt from Lee's deposition testimony, which does not relate to the commission agreement.

changes from [the] initial incarnation to [the] final incarnation of our written agreement.

Miao denies that he ever discussed modifying the terms of the commission agreement and testified that the additional terms contained in the modified version were subsequently added without his knowledge or consent, and that he did not see the additional terms until Lee brought this action (Miao Dep at 97-98).

Lee testified at his deposition that he showed the Store to the Kims in early July. Lee states in his affidavit that during this time he had multiple conversations with Miao about negotiations with the Kims and met with Miao on or about July 5, 2001, when he believed he had a deal to sell the Store to the Kims for \$375,000.

Lee maintains that two documents reflect the Kim's agreement to purchase the Store: (1) a pre-printed document dated July 2, 2001, which lists the Store as a property and includes Mrs. Kim's name, address and telephone number but has no signature (hereinafter "the Listing Agreement"). (Exhibit 1 to Lee's affidavit of merit), and (2) a pre-printed document dated July 5, 2001 entitled "Business Sales Agreement" which is signed by Mr. Kim, that is filled in to indicate a sales price for the Store of \$375,000, a \$30,000 deposit, a July 10, 2001 date for signing a formal contract and a July 15, 2001 closing date (Exhibit 2 Lee's affidavit of merit).

Lee states that after the Kims signed the Business Sales Agreement, he believed he had finalized a deal with the Kims, and that he then met with Miao who accepted the Kims' offer and indicated that the deal would be closed with the lawyers. However, according to Lee, a few days later when he met Mr. Kim in front of the Store, Mr. Kim said he no longer wanted to buy it since it was going to cost too much to fix the equipment. Lee states that he informed Miao that the

Kims had changed their minds. He also states that when he subsequently tried to introduce other purchasers for the Store, Miao told him that it was being purchased by a Chinese relative.

According to Lee, in fact, shortly after the Kims told him they were no longer interested in the Store, they conspired with Miao to purchase the Store, and thus to deprive him of his commission. In support of this position, Lee attaches a Subordination Agreement dated August 19, 2001, between Lande and New West Side Cleaner, which Lee argues shows that the Miaos and the Kims were negotiating a deal for the Store's purchase around the time that the Kims told him they did not want to purchase it.

The Kims dispute Lee's version of his dealings with them. Mr. Kim testified at his deposition that he never agreed to purchase the Store for \$375,000, and that he told Lee that he would not purchase the store unless the price was reduced by half because so much of the equipment was not working, that Lee said it was impossible and the negotiations ended there (Kim Dep. at 68). Mr. Kim testified that he had another telephone conversations with Lee a few days later but that when Lee refused to drop the price by half, negotiations ended (Id at 69). Mr. Kim testified at his deposition, and states in his affidavit submitted in support of the Miao defendants' motion, that unlike the version relied on by Lee, the Business Transaction Agreement he signed was blank.

According to the Kims, about three months after Lee had shown them the Store, it was shown to them again by David Li of Smile Business Brokers, and that at that time, the Store was being sold as a Laundromat without a dry cleaning operation. The price had been reduced to \$200,000 and they were discussing a twenty-year lease, and that after negotiating with Mr. Yi,

they reached an agreement to purchase the Store for \$160,000.²

For his part, Miao denies that he ever spoke to Lee about the Kims, and testified that the he first learned of the Kims' interest in purchasing the Store when he was introduced to the Kims by David Yi (Miao Dep at 106). He also testified that did not know that Lee showed the Kims the Store until the Kims raised the issue at the closing (id at 72).

On September 26, 2001, West Side Cleaning and the New West Side Cleaning entered into an Agreement and Memorandum of Sale for the purchase of the Store and its equipment.

Paragraph 8 of the agreement provides that:

Both parties, hereby, agree that David K. Yi of Smile Business Brokers is the only broker who brought about this sale, said broker to be paid under a separate agreement...Purchaser represents that Sonny Lee show the store or supplied information about this store to transferee. That no transaction occurred between the parties through the efforts of Sonny Lee. However, three (3) months later, David K. Yi showed this store to transferee and brought about this sale without the help of Sonny Lee.

David Yi collected a \$5,000 commission as a result of the transaction.

Lee subsequently brought this action asserting causes of action for (1) breach of the Commission Agreement against the Miao defendants, (2) breach of the Listing Agreement against the Kims, (3) fraud against all the defendants, (4) unjust enrichment against all the defendants, (4) tortious interference with contract against all the defendants.

DISCUSSION

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any

²The terms of the lease for the Store are unclear from the submissions.

material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

Breach of the Commission Agreement Against Miao Defendants

The Miao defendants seek summary judgment dismissing the claim against them based on their alleged breach of the commission agreement, arguing that the record shows that Lee was not the procuring cause of the sale, and that the modified version of the commission agreement, which purports to be an exclusive brokerage agreement, is not enforceable since it violates the Statute of Frauds.

In response, Lee argues that the record raises triable issues of fact as to whether he was the procuring cause of the sale to the Kims and as to whether Miao agreed to the modified version of the commission agreement. Lee also argues that he is entitled to a commission based on evidence that Miao acted in bad faith and conspired with Kims to have them back out of the deal negotiated by him, so that he could enter a later agreement with the Kims.

Where a broker has an exclusive right to sell agreement, he is entitled to a commission for any sale procured within the time frame specified in the agreement, regardless of who was responsible for bringing about the sale. See Rachmani Corp. v. 9 East 96th Street Apartment Corp., 211 AD2d 262, 268 (1st Dept 1995); Audrey Balog Realty Corp., Inc. v. East Coast Real Estate Developers, Inc., 202 AD2d 529 (2d Dept 1994). "A contract will not be construed to create an exclusive right to sell unless it expressly and unambiguously provides for a commission

upon sale by the owner or excludes the owner from independently negotiating a sale.” Far Realty Assocs. Inc. v. RKO Delaware Corp., 34 AD3d 261, 262 (1st Dept 2006); see also, CV Holdings, LLC v. Artisan Advisors, LLC, 9 AD3d 654 (3d Dept 2004).

In absence of an exclusive right to sale agreement, to be entitled to a commission, a broker must establish that it was the “procuring cause of the transaction, bringing together the minds of the buyer and seller.” Mautner Glick Corp. v. Edward Lee Cave, Inc., 157 AD2d 594 (1st Dept 1990)(internal quotations and citations omitted). To be awarded a commission as the procuring cause of a sale, a broker “must show substantially more than that he ‘initially called the property to the attention of the ultimate purchaser.’” Id., quoting, Greene v. Hellman, 51 NY2d 197, 206 (1980). Likewise, when the broker is responsible for opening negotiations between the parties, but ends the negotiations based on a failure to have the buyer agree to the seller’s terms, the seller is not liable to the broker for the commission even if the sale is made to the same prospective buyer. Bob Howard, Inc. v. Baltis, 178 AD2d 740, 741 (3d Dept 1991), appeal denied, 79 NY2d 757 (1992).. On the other hand, if the seller “acts in bad faith in rejecting a purchaser’s offer, his later sale to the same buyer would entitle the broker to a commission.” Id.

Here, the record is sufficient to raise a factual issue as to whether Lee was the procuring cause of the sale. Specifically, Lee states in his affidavit that the Kims agreed to purchase the Store for \$375,000 and that Miao informed him that he accepted their offer. Furthermore, while the Kims subsequently informed Lee that they were no longer interested in the Store, Lee asserts that Kims and Miao acted in bad faith to deny him his commission.

Although the court recognizes that Miao and the Kims dispute Lee’s version of the facts, and that the Store was sold on different terms than that proposed by Lee, the issue of whether

Miao and the Kims acted in good faith is best resolved after trial. See i.e. Howard, Inc. v. Baltis, 178 AD2d 740; Priestley v. Buildmaster Housing Corp., 28 AD2d 707 (2d Dept 1967).

In addition, there are factual issues as to whether Miao and Lec entered into an exclusive right to sell agreement such that Lee would be entitled to a commission even if he was not a procuring cause of the sale of the Store. While the Lee version of the commission agreement faxed to Miao on December 15, 1999 is insufficient to create an exclusive right to sell agreement, the modified version contains an express and unambiguous clause granting Lee "an exclusive right to sell listing for thirty-six months." Furthermore, although Miao denies he agreed to the modifications, Lee's statements to the contrary are sufficient to raise a triable issue of fact.

The Miao defendants also apparently argue that since the additions in the modified version are not initialed or signed by Miao, the Statute of Frauds bars its enforcement. This argument is unavailing. First, assuming that Lec is a licensed real estate broker, the Statute of Frauds specifically exempts him from the provision requiring a signed document. See General Obligations Law 5-701a(10); Fidelity Business Brokers, Inc. v. Gamaldi, 190 AD2d 709 (2d Dept 1993).³ In addition, contrary to the Miao defendants' argument, the cases on which they rely are distinguishable from the instant case insofar as the contracts at issue in those cases clearly fell within the Statute of Frauds and were found to be barred either because defendant lacked the authority to sign the contract as an agent for a corporation (Regal Music Co., Inc. v.

³On the other hand, the Statute of Frauds would apply to those terms of the modified agreement that cannot be performed within a year, such as the provision relating to the payment of 10% of the rents collected. See Gurney, Becker & Bourne, Inc. v. Simon, 89 AD2d 795 (4th Dept 1982)(oral agreement for owner's payment of real estate broker commissions over a ten-year period as a percentages of rent was unenforceable under the statute of frauds).

Hirsch, 16 Misc2d 365 (Sup Ct NY Co. 1959), or did not sign the contract at all. Dorian Holdings and Trading Corp. v. Brunswick Terminal and Railway Securities Co., 230 AD 514 (1st Dept 1930), aff'd, 256 NY 674 (1931).

Finally, as the modifications are in writing, they are not unenforceable for the alleged lack of consideration (See General Obligations Law § 5-1101)⁴ and, in any event, Lee's statements raise issues of fact as to whether there was consideration for at least some of the modifications.

Accordingly, the Miao defendants are not entitled to summary judgment dismissing the first cause of action.

Breach of the Listing Agreement Against the Kim Defendants

The Kim defendants request that the court search the record and dismiss the cause of action against them based on their alleged breach of the Listing Agreement. In their affidavits, the Kims deny signing the Listing Agreement and assert that there is no basis for their liability thereunder since the agreement only obligates them to pay a commission which is earned by the broker and not paid by the seller, and that the record indicates that Lee did not earn a commission.

The Listing Agreement provides that "prospective purchasers are requested not to introduce themselves to the seller," and lists the Store and its address. Under the Listing Agreement, the purchaser agrees to employ Lee's company as a "sole and exclusive agent to negotiate and obtain for me any business, store or properties listed above" It further provides

⁴General Obligations Law § 5-1103 provides, in relevant part, that "[a]n agreement promise, or undertaking to change or modify...any contract ...shall not be invalid because of the absence of consideration, provided that the agreement, promise or undertaking changing or modifying such contract ...shall be in writing...."

that:

For and in consideration of services rendered and confidential information given to me by said broker as to particulars, location and price of business herein mentioned and entrusted to me as a prospective buyer that I will not conclude or close any transaction or sale with respect to the business, property or store listed above or give a deposit thereon or after [sic] into a contract for the purchase thereof directly or indirectly, or take possession thereof and will not enter into any negotiations for the purposes thereof without informing the broker at their above address...and making provision for the immediate payment to them of compensation at a rate of 10%. Should I fail to comply with this agreement I shall be liable to the broker for the amount they would have earned from the seller had I informed him of the transaction.

At the bottom of the Listing Agreement is the name, address and telephone number of Mrs. Kim, but no signature. However, as indicated above, assuming that Lee is a licensed real estate broker, the agreement would not be barred by the Statute of Frauds, unless it is shown that it cannot be performed within a year. In addition, the record raises issue of fact as to whether either of the Kims agreed to the terms of the Listing Agreement, and as whether Lee is entitled to a commission from the Miao, such that the Kims could be held liable under the Listing Agreement.

Accordingly, the merits of the second cause of action must be determined at trial.

Fraud

The fraud claim alleges that after Lee introduced the Kims as potential buyers of the Store in or about July 2001, defendants acted together and "deliberately and fraudulently misrepresented to plaintiffs that the sales agreement had fallen through, that no further negotiations were continuing thereafter plaintiff's introduction of the parties as broker, that any possible sale between them of the Store had been abandoned, and that no agreement for the sale

had been reached or in fact thereafter closed.” It is further alleged that plaintiff reasonably relied in these “misrepresentations, concealment and nondisclosures and plaintiff has not received the brokers commission as promised.” In opposition to the motion, plaintiffs indicate that their fraud claim is based on their allegations in the amended complaint that the defendants concealed their relationship and made fraudulent misrepresentations to deprive them of a commission.

The fraud claim must be dismissed as duplicative of the breach of contract causes of action “since the identical benefit of the bargain recovery is sought.” Rockefeller University v. Tishman Construction Corp. of New York, 240 AD2d 341 (1st Dept), appeal denied, 91 NY2d 803 (1997); see also, Salvador v. Uncle Sam’s Auctions & Realty, Inc., 307 AD2d 609 (3d Dept), lv. denied, 1 NY3d 366 (2003).

Accordingly, summary judgment is granted dismissing the third cause of action.

Unjust Enrichment

A plaintiff “cannot recover for unjust enrichment while simultaneously alleging the existence of an express contract covering the same subject matter.” MJM Advertising v. Panasonic Indus. Co., 294 AD2d 265, 266 (1st Dept 2002). Here, while the parties dispute the terms of the commission agreement, there is no dispute that their relationship is governed by an express contract. Under these circumstances, the unjust enrichment claim must be dismissed. See Edward S. Gordon Company, Inc. v. TPD Corp., 233 AD2d 119 (1st Dept 1996)(dismissing unjust enrichment claim where broker sued for breach of an express commission agreement executed by the parties.)

Tortious Interference with Contract

The tortious interference claim alleges that the Miao defendants tortiously interfered with the Listing Agreement between the plaintiff and the Kims, while the Kim defendants tortiously interfered with the commission agreement between the plaintiffs and the Miao defendants. This claim must be dismissed since “the parties’ rights and obligations respecting the matter in dispute are governed by their [respective] contract[s] and the purported claim for tortious interference with contract does no more than restate the plaintiffs’ claim for the [respective] contract’s breach.” Allerand, LLC v. 233 East 18th Street Co, LLC, 19 AD3d 275, 277-278 (1st Dept 2005)(citation omitted).

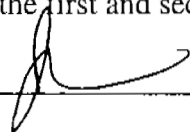
Conclusion

In view of the above, it is

ORDERED that motion for summary judgment by defendants West Side Cleaning Center Inc. ,Mark Miao a/k/a Feng Yo Miao (“Miao), and Landc Realty Corp. is granted to the extent of dismissing the third, fourth and fifth causes of action; and it is further

ORDERED that the action shall continue as to the first and second causes of action.

DATED: June 26, 2007



J.S.C.

FILED
JUL 03 2007
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