Short Form Order **Index Number: 29552-2006**

Supreme Court - State of New York
Commercial Division, Part 46, Suffolk County

Present:
Hon. Emily Pines
Justice Supreme Court

Motion Date: 06-27-2007
Submit Date: 07-05-2007
Motion No.: 001 MG
CASPDISP

_____X
ALLAN M. SCHNEIDER ASSOCIATES, INC.,

Plaintiff,

-against-

JOSEPH MICHAEL D'AMICO and ISABEL L. D'AMICO,

Defendants.
_____X

Meyer, Suozzi, English & Klein, PC
990 Stewart Avenue
PO Box 9194
Garden City, New York 11530-9194

Barnes & Barnes, PC
1461 Franklin Avenue
Garden City, New York 11530

Defendants move by Notice of Motion (motion sequence number 001) for an Order dismissing the Plaintiff's action pursuant to **CPLR § 3211 (a) (7).** Plaintiff opposes the motion on several grounds arguing that certain of Defendants' arguments have been waived and that there remain questions of fact on others, preventing dismissal or summary judgment.

In this action for unpaid real estate brokerage commissions, the Plaintiff asserts, in its Complaint, that it entered into an exclusive agreement, entitled "Commission for Rental of Premises" wherein the Defendants agreed to pay the Plaintiff six (6%) percent of the purchase price of Defendants' residence upon execution of a contract of sale by particular parties, known as the Lichtmans. The basis of Plaintiffs' claim is a May 14, 2003 agreement, prepared by Plaintiff and signed by all parties hereto, stating, in relevant part that: " (A)MS has the exclusive right, and shall be accorded the opportunity, to negotiate any renewal, extension or amendment of the Lease and/or the sale of the Premises by Landlord to the Lessee. . ." This agreement, entitled Commission for Rental of Premises(Agreement #1), was executed on May 13, 2003, following the Plaintiff's procurement of the Lichtmans as tenants of the Defendants to lease the subject property for a period of two weeks in August 2003. By its terms, Agreement #1 states that upon any agreement by the Lessee to purchase the premises, the Defendants

would pay AMS 6% of the gross purchase price. Such agreement also stated that it superceded all prior agreements and that it could not be modified " (e)except in writing , signed by the parties hereto. . ." On December 20, 2005, the Defendants entered into a contract to sell the subject premises to the Lichtmans and, according to Plaintiff, it is entitled to recover a $136,500 commission based on the sale for $2,275,000.

Defendants move to dismiss the Plaintiff's action for Breach of Contract, Account Stated and Unjust Enrichment on several grounds. Defendants argue that the 2003 commission agreement is unenforceable for failure to comply with the mandatory disclosure requirements set forth under **19 NYCRR § 175.24.** In addition, Defendants assert that they terminated the Agreement in June 2005, when, after re-leasing the same premises to the Lichtmans and receiving a demand from Plaintiff for a commission, the Defendants sent Plaintiff $3,000 with an accompanying cover letter stating that no further commissions would be due. Defendants argue, in any case, that the May 2003 agreement was superceded, in writing, on November 1, 2004, when the same parties entered into written listing agreement, entitled "Co-Exclusive Agreement" (Agreement #2), in which Defendants granted Plaintiff a co-exclusive right to sell the property, and which set forth that it superceded all prior agreements and understandings relating to the subject matter. That Agreement was terminated by Defendants when they were made aware that the house they wished to purchase was no longer available. It is undisputed that Agreement # 2, even if not terminated, would have expired, in accordance with its terms, within nine (9) months of its execution by the parties hereto. Finally, Defendants assert that the May 2003 Agreement has no term , and that the Court of Appeals has set forth that a one year term, long since expired in this case, has been classified as reasonable in real estate matters. **See, Hampton v Realty of Bridgehampton, Inc**, 220 AD 2d 385, 631 NYS 2d 887 (2d Dep't 1995).

Pointing out initially that Defendants' motion is improperly characterized as a motion to dismiss rather than one for summary judgment, since issue has long since been joined, Plaintiff opposes the motion on several grounds. First, Plaintiff asserts that it is doubtful that the disclosure provisions of **19 NYCRR § 175.24** apply to cases, such as this, where the potential buyer has already been procured by the broker; that Plaintiff complied, in any case, in substance, with the disclosure provisions in Agreement # 1, and that Defendants have cited no authority for the proposition that a violation of this particular regulation would prohibit enforcement of the terms of the agreement. In addition, according to Plaintiff, Defendants have waived the illegality defense by failing to include it in their answer as an affirmative defense. With regard to Defendants' remaining arguments, Plaintiff asserts that there exist issues of fact,

precluding summary judgment. Thus, Plaintiff states that its client denies ever receiving a letter from Defendants' counsel terminating the 2003 agreement when Defendants sent the $3,000 lease commission to Plaintiff in 2005; that issues of fact exist as to the parties' understanding concerning whether Agreement # 2 superceded Agreement #1, since Plaintiff asserts that the two agreements do not concern the same subject matter. Plaintiff argues that it should be afforded the opportunity to demonstrate, through discovery, that the parties understood that the 2003 agreement was meant to have no termination date and that Plaintiff was given the exclusive right to sell the property to the Lichtmans, precluding the Defendants from separately procuring the sale without the Plaintiff's involvement. With regard to the account stated claim, Plaintiff opines that a question of fact exists concerning whether Defendants' counsel ever sent the letter terminating the parties' 2003 agreement; and with regard to the quantum meruit claim, Plaintiff argues that it should be held in abeyance, should this Court ultimately rule that the 2003 agreement is unenforceable, so as to provide the Plaintiff with a remedy.

CPLR § 3211 (c) provides, in pertinent part, that "(u)pon the hearing of a motion to dismiss, either party may submit any evidence that could properly be considered on a motion for summary judgment." This provision allows the court to treat a motion to dismiss as one for Summary Judgement, after adequate notice to the parties. At oral argument of this matter, on July 26, 2007, the Court set forth, on the record, that it was considering treatment of the Defendants' motion as one for Summary Judgment, in view of the fact that issue had already been joined and that the parties had provided the Court with evidentiary proof in support of their various arguments, essentially treating the motion as one brought under **CPLR § 3212.** On July 28, 2007, the Court instituted a teleconference with both counsel and gave the parties one week to provide the Court with any evidentiary material to support or oppose a **CPLR § 3212** motion that had not already been provided in their rather extensive papers. The Court afforded the parties the opportunity to provide any other and further evidence in view of its treatment of the motion. Plaintiff submitted a copy of an agreement between the Defendants and the Lichtmans, which requires the Lichtmans to indemnify the Defendants should the Plaintiff in this action seek a brokerage commission. Defendants refer to language in one of the Summer commission agreements with another broker, which contains a specific period of duration. The Court is making its determination having considered all materials submitted to date.

Summary Judgment is warranted where there exist no factual issues to be resolved by the trier of fact. **See, Hartford Accident & Indemnity Co. V Wesolowski**, 33 NY 2d 169, 305 NE 2d 907, 350 NYS 2d 895 (1973); **Sillman v Twentieth Century Fox Film Corp.**, 3 NY2d 395, 144 NE 2d387, 165 NYS 2d 498 (

1957). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the lack of any material issue of fact. **See, Winograd v New York Univ Medical Center**, 64 NY 2d 851, 476 NE 2d 642, 487 NYS 2d 316 (1985); **Zuckerman v City of New York** , 49 NY 2d 557, 404 NE 2d 718 427 NYS 2d 595 (1980); **Sillman, supra**. To defeat the motion, the opponent must present evidentiary facts sufficient to raise a triable issue of fact. **see, Freedman v Chemical Constr Co**, 43 NY 2d 260, 372 NE 2d 12, 401 NYS 2d 176 (1976).

The meaning of a written agreement is , at least in the first instance, an issue of law, within the province of the court. Contract interpretation by the court includes the court's consideration of whether the writing in question is ambiguous. **see, Master-Built Construction Co v Thorne**, 22 AD 3d 535, 802 NYS 2d 713 (2d Dep't 2005). Where the Court finds the agreement to be free from ambiguity, it is the Court's role to interpret the agreement giving fair meaning to all the language, to reach a practical interpretation of the writing. **Id.** The Court's goal, in following this procedure, is to permit the reasonable expectations of the parties to be realized. **See, Kafka Construction v New York City School Construction Authority**, 40 AD 3d 1038, 837 NYS 2d 280 (2d Dep't 2007).

There is no question that whatever else may have been intended by the parties' two agreements, the November 1, 2004 "Co-Exclusive Agreement" modified and superceded the April 2003 "Commission for Rental of Premises" with regard to the rights of the parties vis a vis the sale of the premises located at 68 Summerfield, in Bridgehampton, New York. Agreement #1 provided, as set forth above, that the Plaintiff would have the exclusive right to negotiate the sale of the premises located at 68 Summerfield in Bridgehampton to the Lichtmans, and that Plaintiff would receive six (6%) of the sales price at the execution of the contract of sale. Those rights were significantly modified by Agreement # 2, in which the Plaintiff now agreed that it had the "(c)o-exclusive right to sell listing for the property located at 68 Summerfield, Bridgehampton . . ." ; and that the Defendants **"(s)hall conduct through AMS or BHS all negotiations** with respect to the sale of the property"(emphasis added). Moreover, Agreement # 2 did not limit the rights of negotiation for sale (now relegated to two entities) to the Lichtmans as purchasers; and it provided that the commission fee had been changed both as to its percentage and to requiring that it be shared with another broker. Further, Agreement # 2 had a term - (9) months from the date of signing and contemplated that it could be terminated by Defendants, since it states that "(I)f (Defendants) terminate this listing agreement prior to its expiration, (Defendants) agree

to reimburse (Plaintiff) for its marketing costs". Moreover, Agreement # 2 states that it "(s)upercedes all prior agreements and understandings between the parties relating to the subject matter hereof".

Applying the law as set forth above to the facts of this case, the Defendants' interpretation of the two contracts is the only one that makes sense and the one that will be enforced by this Court. From a commercial perspective, the November 1, 2004 Agreement, while limiting and reducing the Plaintiff's right to sell to the Lichtmans, concomitantly greatly expanded the universe of purchasers. Taking Plaintiff's argument that the two agreements covered different situations to its logical conclusion would require a most bizarre reading of these two instruments. If, as Plaintiff argues, the November 1, 2004 Agreement left the 2003 Agreement in tact with respect to a sale to the Lichtmans, and if the sale had occurred while the 2004 Agreement was still extant, the co-exclusive broker, BHS, would have been left with nothing, despite a signed agreement clearly expressing the statement that BHS was entitled to a portion of the brokerage commission if the property was sold.

Plaintiff's legal argument that judicial interpretation of a contract is permissible only where it is established that the contract is ambiguous, is simply wrong. These contracts are not ambiguous as to their subject matter, vis a vis the sale of the premises and the respective rights of Plaintiff and Defendants. In such case, it is the court and not the Plaintiff that interprets them, not solely to give plain meaning to their terms; but, also, as stated, to permit the reasonable expectation of the parties to be realized. **See, Kafka, supra**. The 2004 Agreement superceded and modified the 2003 agreement by its terms. The 2004 agreement, having been terminated and, in any event having long since expired again by its terms, leaves the Plaintiff with no right to seek a commission fee from the Defendants concerning the sale of the Bridgehampton premises Accordingly, there being no issue of fact, Defendants' motion for Summary Judgment dismissing the Plaintiff's breach of contract claim is granted

Since, as found above, the rights of the Plaintiff and Defendants was governed solely by the November 1, 2004 contract, which superceded the 2003 Agreement and which, by its terms has long since expired, Plaintiff has no basis for its claim in quantum meruit and unjust enrichment. **see, Clark-Fitzpatrick v LIRR**, 70 NY 2d 382, 521 NYS 2d 653 (1987). The account stated claim is dismissed as well since there appears no dispute that the Defendants' counsel disputed the Plaintiff's assertion of right to a commission, whether it was done by letter or verbally. In a letter annexed to Plaintiff's opposition papers, written just days after the Plaintiff's demand for a commission in July 2006, Plaintiff's counsel acknowledged Defendants' disagreement that the money

was, in fact, owed. Whether that was as a result of a verbal or written communication, Plaintiff has thus acknowledged that the amount was in dispute, precluding a cause of action for an account stated. **see, Dynaforce v Bruno GMC Truck Sales Corp.**, 223 AD 2d 618, 637 NYS 2d 315 (2d Dep't 1996).

Since the Court has determined that Defendants are entitled to Summary Judgment, dismissing the Plaintiff's causes of action, as set forth in Plaintiff's Complaint for the reasons set forth, the Court need not reach the other bases for dismissal raised in Defendants' motion papers, including Defendants' assertion that the 2003 agreement violated **19 NYCRR § 175.14** ; that the 2003 agreement was void for failure to set forth a term and or that Plaintiff failed to perform any services which would lead to payment under the terms of the 2003 agreement.

This constitutes the ***DECISION*** and ***ORDER*** of the Court. Submit Judgment in accordance with terms of this ***DECISION***.

Dated: August 8, 2007
Riverhead, New York

EMILY PINES
J. S. C.