

**Brown Harris Stevens of the Hamptons, LLC v
Staubi**

2007 NY Slip Op 32741(U)

September 5, 2007

Supreme Court, New York County

Docket Number: 0109687/2006

Judge: Jane S. Solomon

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: SOLOMON

PART 55

Index Number : 109687/2006
BROWN HARRIS STEVENS OF THE
vs
STAUBI, PAUL
Sequence Number : 001
DISMISS

NO. 109687/2006
IN DATE 6-11-2007
IN SEQ. NO. 001
IN CAL. NO. _____

The following papers, numbered 1 to 10 were read on this motion to DISMISS

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

PAPERS NUMBERED	
1-4	
5-7	
8-10	

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

is decided in accordance with the annexed memorandum decision and order.

N.B. Counsel to appear at preliminary conference on Monday, October 1, 2007 in Part 55 at 12:00 Noon.

FILED
SEP 06 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/5/07

[Signature]
JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X

BROWN HARRIS STEVENS OF THE
HAMPTONS, LLC,

Plaintiff,

INDEX NO. 109687/2006

-against-

PAUL STAUBI, KAREN STAUBI, ERIC MALLEY,
THE MALLEY GROUP, and ALLAN M. SCHNEIDER ASSOCIATES, INC.,

Defendants.

JANE S. SOLOMON, J.

FILED
SEP 06 2007
NEW YORK
COUNTY CLERKS OFFICE

In this breach of contract action, defendants Paul Staubi, Karen Staubi, Eric Malley, The Malley Group and Allan M. Schneider Associates, Inc. (collectively, "Defendants") move to dismiss the Complaint. For the reasons described herein, the motion is granted as to Paul and Karen Staubi (collectively, "the Staubis") and is otherwise denied.

The Staubis owned a house located at 320 Hill Street, Southampton, New York (the "Property"). During the fall of 2005, they decided to sell it and hired defendant Allan M. Schneider Associates ("AMS") as their broker. AMS entered into certain co-brokerage agreements with other brokers, one of which was

plaintiff Brown Harris Stevens of the Hamptons, LLC ("Plaintiff").

In December 2005, Eric Malley ("Malley") used the services of Plaintiff to negotiate on his behalf as a potential purchaser. Malley states that he never agreed that Plaintiff would be his exclusive broker or entered into a written contract with it. Nevertheless, Plaintiff conveyed Malley's offer to AMS, which prepared a Memorandum of Sale dated December 14, 2005 that listed a price of \$1,750,000 and Plaintiff as the Selling Broker. Malley contends that Plaintiff miscommunicated his offer, and, because of this, the deal fell through and he terminated Plaintiff's authority to negotiate on his behalf in early January 2006.

Malley alleges that he then began to look at other houses in Southampton, but that a few weeks later he learned that the Property was still available and contacted AMS directly. Malley then negotiated for the Property and AMS drafted another Memorandum of Sale dated January 30, 2006. This second document has the same sales price of \$1,750,000 and has similar terms with the December 14, 2005 Memorandum of Sale, except that Malley's company, The Malley Group, is shown as the Selling Broker, and Malley agreed to indemnify the Staubis and AMS (the listing broker) for the amount The Malley Group received as a commission

plus attorney's fees. The sale closed and AMS split the commission with The Malley Group.

Plaintiff commenced this action in July 2006 seeking \$43,750, the commission for introducing the Property to Malley, contending that it was the procuring broker. AMS cross-claimed against Malley and The Malley Group for contractual indemnification. All Defendants moved under CPLR § 3211(a)(1) and (7) to dismiss the Complaint.

Discussion

Procedural Issues

First, while Plaintiff argued correctly that Defendants' failure to include a copy of the pleadings with their initial motion is a ground to deny the motion (Ayer v. Sky Club, Inc., 70 A.D.2d 863 [1st Dep't 1979]), Defendants cured this defect, so that the motion will be considered. Next, because Defendants have all answered the Complaint, it became apparent that the motion should be treated as one for summary judgment under CPLR § 3212. Accordingly, on August 24, 2007 the Court served an interim order stating so and inviting further submissions pursuant to CPLR § 3211(c). The time to do so has passed and the motion is ripe for decision.

A motion for summary judgment "shall be granted if upon all the papers and proof submitted, the cause of action or

defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

CPLR § 3212(b). The test is whether there are any remaining issues of fact to be resolved. Hartford Accident & Indemnity Co. v. Wesolowski, 33 N.Y.2d 169 (1973).

The Staubis

Accepting Plaintiff's contention that it was the procuring cause of the sale of the Property to Malley, Plaintiff has no claim against the Staubis. Even if the obligation to pay a commission to a co-broker exists pursuant to an implied contract (see Sonnenschein v. Douglas Elliman-Gibbons & Ives, 96 N.Y.2d 369 [2001]), under well-established New York law, a broker may recover only from its own principal (see Joseph P. Day Realty Corp. v. Chera, 308 A.D.2d 148, 151 [1st Dep't 2003]). The Staubis employed AMS as their broker, and paid it a commission on the sale. This commission included any amount due a co-broker, which was later paid to The Malley Group. Thus, Plaintiff has no claim against the Staubis, and the motion is granted as to them.

AMS

Although Plaintiff's opposition papers allege that AMS is liable to it under a *quantum meruit* theory, the only cause of action asserted in the Complaint against AMS is that it "facilitated and abetted Eric Malley's breach of the implied

* 6]
agreement with plaintiff by improperly permitting Malley and the Malley Group to deprive plaintiff of its commission."

In order to sustain a cause of action for tortious interference with the alleged brokerage contract, Plaintiff must plead and prove: (1) the existence of a valid contract; (2) AMS's knowledge of the contract; (3) that AMS intentionally procured the breach of the contract; and (4) the existence of damages (11 NY Jur 2d Brokers § 190, citing Israel v. Wood Dolson Co., 1 N.Y.2d 116, 120 [1956]). In addition, Plaintiff must allege that its purported contract would not have been breached by Malley "but for" AMS's conduct. See Burrowes v. Combs, 25 A.D.3d 370, 373 (1st Dep't 2006). Because AMS knew that Plaintiff had shown the Property to Malley and it nevertheless did not share the commission with Plaintiff when Malley bought the Property, it is not entitled to summary judgment on this motion.

Malley and The Malley Group

The Complaint alleges that "Malley and The Malley Group wrongfully diverted the brokerage commission from Brown Harris Stevens to the Malley Group in an effort to save on the payment of such commission." In order for Plaintiff to succeed in its claim, it must prove: (1) that Malley employed Plaintiff as his broker; (2) that Plaintiff found the Staubis, who were willing and able to sell the Property to him; and (3) that the failure to complete the transaction was Malley's fault. Parke-

Hayden, Inc. v. Loews Theater Management Corp., 789 F.Supp 1257, 1263 (S.D.N.Y. 1992).

Factual questions exist as to whether Plaintiff procured the Staubis as sellers willing to sell the Property on terms agreed to by Malley, and as to the reasons Malley terminated Plaintiff as his broker. As a result, Malley and his company are not entitled to summary judgment on this motion.

Accordingly, it hereby is

ORDERED that Defendants' motion is granted as to the Staubis, and is otherwise denied; and it further is

ORDERED that the Complaint as against Paul Staubi and Karen Staubi is severed and dismissed and the Clerk of the Court is directed to enter judgment accordingly, with costs and disbursements as taxed; and it further is

ORDERED that counsel shall appear at a preliminary conference in Part 55 on Monday, October 1, 2007 at 12:00 noon.

Dated: September 5, 2007

ENTER:



J.S.C.
JANE S. SOLOMON

FILED
SEP 06 2007
NEW YORK
COUNTY CLERK'S OFFICE