

Murphy v Malverne Realty Co.

2007 NY Slip Op 32912(U)

September 13, 2007

Supreme Court, New York County

Docket Number: 6402-05/

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

PATRICIA MURPHY,
Plaintiff,

- against -

MALVERNE REALTY COMPANY and ANNE
COFFEY, President and Broker,

Defendants.

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 6402/05

Motion Sequence No. 003

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The defendants move for an order to dismiss the complaint pursuant to CPLR 3211 (a) (7) as the plaintiff's pleading fails to state a cause of action, or in the alternative, dismissing the complaint against the defendant Anne Coffey, and dismissing those claims barred by the statute of limitations. The plaintiff opposes the motion. The underlying action arises from the plaintiff's allegation of nonpayment of commissions for several real estate transactions from 1998 through 2001. While it is the defendants' contention, all payments due to the plaintiff have been tendered. On January 1, 1997, the plaintiff executed an agreement with Malverne Realty Company setting forth the relationship

between the parties, and the defendants argue stated the broker or sales associate was engaged as an independent contractor.

The attorney for the defendants states, in a supporting affirmation dated May 8, 2007, the sections of the New York State Labor Law under which the plaintiff seeks relief govern the payment of wages in the employer-employee relationship which is not the situation here. The attorney for the defendants asserts the plaintiff seeks liquidated damages of 25%, and costs of this litigation pursuant to Labor Law §§ 198 (1-a) and 198 (1), but those statutory provisions are inapplicable here since the plaintiff was an independent contractor, not an employee.

The attorney for the defendants states the defendant Anne Coffey sued here as president and broker cannot be properly sued as individual or an officer of Malverne Realty Company, so the action as her must be dismissed. The attorney for the defendants avers the defendant Anne Coffey is an improper party to this action because corporate officers cannot be subject to corporate obligations.

The attorney for the defendants also states the plaintiff is seeking commissions from 1998 through 2001, but these transactions are governed by a six year statute of limitations, and any claim for commissions due for the transactions completed on or before May 25, 1999, are barred under CPLR 213. The attorney for the defendants points out a substantial number of the transactions, fully one-third of the total transactions, were closed and accrued more than six years prior to the commencement of this action. The

attorney for the defendants points to 66 transactions listed in the plaintiff's requests for interrogatories which are subdivided into years in which the plaintiff alleges the transactions were consummated, and the plaintiff is owed commissions. The attorney for the defendants notes the plaintiff admits in the classification of her interrogatories that 16 of the 66 transactions closed and accrued in 1998, and this is more than six years prior to the commencement of this action. The attorney for the defendants also claims, according to the defendants' response to the plaintiff's demand for interrogatories, an additional six transactions which the plaintiff identified as having closed in 1999, actually closed prior to May 25, 1999, which places those transactions outside of the applicable six year statute of limitations. The attorney for the defendants asserts the plaintiff failed to bring the action within a reasonable time, so the plaintiff allowed a significant amount of the evidence needed by the defendants to defend their case to dissipate, including contact with witnesses and lost or destroyed documents. The attorney for the defendants contends the plaintiff not only prejudiced the ability of the defendants to defend their case, and the plaintiff must not be allowed to continue to pursue claims since the claims are time barred under CPLR 213.

The defendant Anne Coffey reiterates the contentions, in detail, expressed by defense counsel in the supporting affirmation dated May 8, 2007, in an affidavit dated May 6, 2007. The defendant Anne Coffey contends the plaintiff brought the action in an attempt to extract from Malverne Realty Company money which are clearly not owed to

the plaintiff. The defendant Anne Coffey claims the defendants are prejudiced in their ability to defend the unsubstantiated accusations in the case because critical documents have been lost or destroyed, and contact with key witnesses has been broken.

The plaintiff's attorney states, in an opposing affirmation dated June 25, 2007, the plaintiff, an employee was abruptly terminated after asking for payment of earned and owed commissions, has shown cognizable claims for unpaid earned commissions, so the defense motion must be denied. The plaintiff's attorney states the Court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit with any cognizable legal theory. The plaintiff's attorney points out the plaintiff's allegation that the plaintiff was a commissioned salesperson who earned commissions by selling real estate for Malverne Realty Company, and its broker, Anne Coffey, which remain unpaid must be accepted as true. The plaintiff's attorney contends Labor Law § 190 et seq. applies to the plaintiff as the plaintiff was a commissioned salesperson engaged in the sale of real estate. The plaintiff's attorney claims the plaintiff was not a licensed real estate broker, and could not set prices, close deals, and was under the supervision of the licensed broker. The plaintiff's attorney challenges the defense contention the agreement with Malverne Realty Company engaged the plaintiff as an independent contractor who is not protected by the provisions of Labor Law § 198, rather the defense attorney argues the facts of the relationship between the parties involves a question of fact. The plaintiff's

attorney states notwithstanding the defense contention otherwise Labor Law § 198 is applicable to the plaintiff, even if the plaintiff is an independent contractor. The plaintiff's attorney asserts Malverne Realty Company is not a registered corporation in the State of New York, so the defendant Anne Coffey is not protected by the Limited Liability Laws. The plaintiff's attorney asserts the defendants' own allegations in their sworn statement prove the plaintiff's claims she was not paid commissions when the commissions were earned. The plaintiff's attorney avers the plaintiff is not claiming any cause of action for commissions earned prior to April 25, 1999, however the plaintiff do require the information of what commissions were owed before April 25, 1999, as the defendants made statements the payments were given after April 25, 1999, and were in consideration of commissions earned after April 25, 1999, but this contention is incorrect as many of the payments made after April 25, 1999, were in fact payments for commissions earned in 1998 and early 1999. The plaintiff's attorney insists the defendants' attempt to use later payments as proof of payment for commissions earned after April 25, 1999, is invalid since many of the payments made, were in fact for commissions earned and owed prior to April 25, 1999.

The plaintiff reiterates the contentions, in detail, expressed by defense counsel in the opposing affirmation dated June 25, 2007, in an affidavit dated June 25, 2007. The plaintiff claims her principal activity, while working for Malverne Realty Company as a licensed real estate agent from 1997 to 2001, was selling real estate for which the plaintiff

alleges earning commissions on many home sales or apartment leases from 1998 to 2001, for which the plaintiff was not paid. The plaintiff, in detail, describes the relationship and the processes of the transactions with the defendants, and claims being owed \$48,143.95 in commissions.

The attorney for the defendants addresses, in a reply affirmation dated July 6, 2007, what the affirmant claims are misstatements of law and fact. The attorney for the defendants contends the plaintiff has been unable to establish how \$48,143.95 is owed in outstanding commissions despite several requests from the defendants. The attorney for the defendants points out the defendants have responded to all of the plaintiff's demands for discovery, including the sales and commission information for an extensive list of properties in which the plaintiff alleges to have participated in the sale, but the plaintiff has been unwilling to provide any source documentation for this list of sales. The attorney for the defendants opines, despite the plaintiff's assertion in the opposition that the defendants admit the plaintiff is due commission on all of the transactions listed, there are several transactions the defendants deny that commissions are due to the plaintiff. The attorney for the defendants notes, as stated in affidavit of the defendant Anne Coffey dated May 6, 2007, the few weeks in 1998 in which the commissions were retained on the account were at her request, and shortly thereafter paid. The attorney for the defendants alleges, it should be noted the plaintiff's termination which was characterized by the defendants as abrupt after asking for payment of earned and owed commissions was

anything but abrupt. The attorney for the defendants reports instead, as stated in affidavit of the defendant Anne Coffey dated May 6, 2007, the defendants took great efforts, and incurred substantial expense to discuss with the plaintiff, and the plaintiff's then counsel the amounts that were due and outstanding to the plaintiff by providing the plaintiff with the supporting documentation relating to the plaintiff's sales. The attorney for the defendants asserts the defendants readily admit there is \$5,339.13 due and owing to the plaintiff, and the defendants have been ready, willing and able to make payment, but the plaintiff failed to deal in good faith as demonstrated by the plaintiff waiting four years to bring the current lawsuit, and claiming commissions that accrued seven years prior to the commencement of the lawsuit. The attorney for the defendants reiterates, despite the plaintiff's allegation, the plaintiff has not set out a cognizable claim, as plead, and according to the law, as set forth in the defendants' moving papers, the plaintiff's verified complaint must be dismissed. The attorney for the defendants reprises the plaintiff's status as an independent contractor, despite the plaintiff's opposition, and again points to the parties' agreement for support while challenging the allegations of the plaintiff.

CPLR 3211 (a) (7) provides: "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: the pleading fails to state a cause of action." The Second Department has held:

It is axiomatic that on a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory"

(*Leon v Martinez*, 84 NY2d 83, 87-88; *see, Lakeville Pace Mech. v Elmar Realty Corp.*, 276 AD2d 673; *U.S. Ice Cream Corp. v Bizar*, 240 AD2d 654). Moreover, a plaintiff may plead inconsistent causes of action (*see*, CPLR 3014, 3017 [a]; *Twitchell v MacKay*, 78 AD2d 125, 127) *Collins v. Telcoa Intern. Corp.*, 283 A.D.2d 128, 131, 726 N.Y.S.2d 679 [2d Dept, 2001]; *see also Farmer v. Green Bus Lines, Inc.*, 254 A.D.2d 389, 390, 679 N.Y.S.2d 88 [2d Dept, 1998].

The Second Department has also reiterated:

It bears repeating that, “[i]n the posture of defendants’ CPLR 3211 motion to dismiss, our task is to determine whether plaintiffs’ pleadings state a cause of action. The motion must be denied if from the pleadings ‘four corners’ factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 [2002] [citation omitted]). We must construe the complaint liberally, and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion, and accord plaintiffs the benefit of every possible favorable inference (*id.* at 152). Moreover, when the motion is based upon documentary evidence,” [d]ismissal under CPLR 3211 (a) (1) is warranted ‘only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law’” (*id.* [emphasis added], quoting *Leon v Martinez*, 84 NY2d 83, 88 [1994], and citing Siegel, NY Prac § 269, at 428 [3d ed]; *see also Goshen v Mutual Life Ins. Co.*, 98 NY2d 314, 326 [2002])

Richbell Information Services, Inc. v. Jupiter Partners, L.P., 309 A.D.2d 288, 289, 765 N.Y.S.2d 575 [2d Dept, 2003].

The Court reviewed and considered all of the parties’ papers. This Court cannot conclude, as a matter of law, the causes of action should be spurned, the factual allegations of the complaint cannot be rejected based upon the documentary evidence submitted by defendants. There is also a factual dispute whether the plaintiff was an employee entitled to the statutory aegis of the State’s Labor Law or an independent contractor as alleged by the defendants. Also, there is a factual dispute, raised by the

plaintiff, regarding the Malverne Realty Company possible corporate status. In addition, the plaintiff's claims are not time barred, as a matter of law.

Accordingly, the motion is denied in all respects.

So ordered.

Dated: September 13, 2007

ENTER:



J. S. C.

HON. ANTONIO I. BRANDVEEN

FINAL DISPOSITION

NON FINAL DISPOSITION XXX

ENTERED

SEP 17 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE