

Janet Etessami Realty, Inc. v Khodadian

2007 NY Slip Op 32916(U)

September 13, 2007

Supreme Court, New York County

Docket Number: 2292-05/

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

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

JANET ETESSAMI REALTY, INC.,
Plaintiff,

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 12292/05

- against -

Motion Sequence No. 001 & 002

MOSHEH K. KHODADIAN a/k/a MOIZ
KHODADADIAN,

Defendant.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1, 2</u>
Answering Affidavits	<u>3</u>
Replying Affidavits	<u>4</u>
Briefs: Plaintiff's / Petitioner's	<u>5</u>
Defendant's / Respondent's	<u>6</u>

The defendant moves for an order pursuant to CPLR 3212 granting them summary judgment, and dismissing the complaint. The plaintiff cross moves for an order pursuant to CPLR 3212 granting summary judgment to the plaintiff. The underlying action arises from the plaintiff's contention the defendant is contractually obligated to pay it a brokerage commission as a result of the defendant's purchase of certain residential real property, to wit: 25 Split Rock Drive, Great Neck, New York.

The defense attorney states, in a supporting affirmation dated April 30, 2007, to the defense motion, the purported commission agreement which the plaintiff relies upon

is void and unenforceable as a matter of law because it is the product of the plaintiff's fraudulent acts and lacks any consideration to the defendant. The defense attorney states, even if one was to assume the truth of the plaintiff's claim that a commission agreement between the parties exists, which the defense denies, the defendant is nevertheless entitled to summary judgment because the plaintiff never fulfilled its obligations under that agreement. The defense attorney asserts it is undisputed the defendant never retained the plaintiff to act as his broker or agent, and the plaintiff never acted in such capacity. The defense attorney avers, to the extent it may be found there was a commission agreement between the parties, the defendant is entitled to summary judgment on the ground the plaintiff abandoned the agreement. The defense attorney provides factual background, in detail, about the parties and their and others dealings, including reference to activity on June 4, 2004, and the sworn statements and testimony.

The president of the corporate plaintiff, a New York State licensed real estate broker states, in supporting affidavit dated June 14, 2007, to the defense motion, personally conducting all of the negotiations with the seller of the property, and the defendant with respect to the subject matter of the underlying action. The president of the corporate plaintiff states on October 2, 2002, being contacted by the owner of the subject property, Leah Yaghoubi, with respect to the plaintiff assisting the owner as a real estate broker in connection with the sale of that property. The president of the corporate plaintiff provides factual background, in detail, about the transactions with Yaghoubi, the

actions taken with respect to the subject property, and the dealings with the defendant and others. The president of the corporate plaintiff challenges the factual contentions of the defendant, and submits the defendant's motion for summary judgment should be denied, and the cross motion for summary judgment should be granted.

The defense attorney states, in an affirmation dated July 2, 2007, in further support of the defense motion, and in opposition to the plaintiff's cross motion, the purported commission agreement being relied upon by the plaintiff is void and unenforceable as a matter of law, and points to sworn statements and testimony in support of that contention. The defense attorney contends the sworn statement of an attorney and an agent of the former owner satisfies the defense burden of establishing the plaintiff was never the broker of the former owner, and at the very least, shifts the burden of proof upon the plaintiff to come forward with credible evidence establishing it was the former owner's broker, a burden which the plaintiff fails to meet. The defense attorney notes the plaintiff fails to come forward with any contract or other written document which even suggests it was the former owner's broker. The defense attorney asserts the plaintiff failed to come forward with any affidavit or deposition testimony evidencing it was at anytime the broker of the trust which was the former owner of the property, there is a lack of consideration with respect to a commission agreement and the plaintiff falsely represented to the defendant. The defense attorney avers the plaintiff was not the procuring broker for the sale of the property, so the plaintiff is not entitled to any commission, and points to

sworn statements and testimony in support of that allegation. The defense attorney maintains the Court should reject the plaintiff's newly fabricated and the contradictory claim the defendant and the former owner purportedly entered into a claimed transaction on May 28, 2004, and points to sworn statements and testimony in support of that contention. The defense attorney notes, contrary to the plaintiff's specious contentions, the agreement finally reached by the parties was entirely contingent upon the former owner's ability to close title on another completely separate piece of property, and points to sworn statements and testimony in support of that contention. The defense attorney contends the case law relied upon by the plaintiff is completely inapplicable to the underlying action. The defense attorney states, in detail, relying upon sworn statements and testimony, the plaintiff's contention it had any involvement as the alleged proximate cause of the actual agreement entered by the defendant and the former owner is unsupported by evidence. The defense attorney insists the defendant is not obligated to pay the plaintiff any commission pursuant to the purported commission agreement because the plaintiff abandoned that agreement.

The plaintiff's attorney states, in an affirmation dated July 12, 2007, in further support of the plaintiff's cross motion, and in reply to the defendant's further support of the defense motion, the plaintiff relies on deposition testimony of an attorney who acted on behalf of the seller with respect to the transaction, but who was retained to do so long after the plaintiff's engagement as a broker, the meeting between the plaintiff, defendant

and the seller where the parties negotiated a proposed sale, and the defendant would be responsible to pay the plaintiff's commission, and after the execution of an agreement by the defendant to pay such a commission in the amount of \$60,000.00. The plaintiff's attorney, in detail, challenges the contentions of the defendant contained in the defense papers in support of the defense motion, and in opposition to the plaintiff's cross motion. The plaintiff's attorney contends the plaintiff is entitled to the commission which the defendant admittedly agreed to pay.

Under CPLR 3212(b), a motion for summary judgment "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion 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." "The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact."

Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325; *Andre v. Pomeroy*, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelen v. G.T.E. Sylvania Inc.*, 182 A.D. 2d 446).

The court's role is issue finding rather than issue determination (*see, e.g., Sillman*

v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395; *Gervasio v. Di Napoli*, 134 A.D.2d 235, 236; *Assing v. United Rubber Supply Co.*, 126 A.D.2d 590). Nevertheless, “the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated” (*Gervasio v. Di Napoli, supra*, 134 A.D.2d at 236, quoting from *Assing v. United Rubber Supply Co., supra*; see, *Columbus Trust Co. v. Campolo*, 110 A.D.2d 616, *aff’d* 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (see, *Andre v. Pomeroy*, 35 N.Y.2d at 364; *Assing v. United Rubber Supply Co., supra*).


The Court has carefully reviewed and considered the parties’ papers, including legal memoranda, and the Court finds neither side has met the burden on their motions. There are issues of fact which need resolution by the trier of fact.

Accordingly, the motion and cross motion are denied in all respects.

So ordered.

Dated: September 13, 2007

ENTER:


 ENTERED
 SEP 17 2007
 HON. ANTONIO J. BRANCO
 COUNTY CLERKS OFFICE

FINAL DISPOSITION NON FINAL DISPOSITION XXX