

Friedrich Real Estate, Inc. v Cordray

2007 NY Slip Op 33032(U)

September 24, 2007

Supreme Court, Suffolk County

Docket Number: 0015861/2003

Judge: Emily Pines

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 - State of New York
I.A.S. Term, Part 23, Suffolk County

Present:

HON. EMILY PINES
 Justice Supreme Court

COPY

_____X
FRIEDRICH REAL ESTATE, INC.,

Plaintiff,

-against-

**MARY ANN CORDRAY as the Administratrix of
 the ESTATE OF JOSEPH ALBARANO,**

Defendant.

_____X

Kreinces & Rosenberg, PC
 Howard Rosenberg, Esq.
 900 Merchants Concourse
 Westbury, New York 11590

Lite & Russell
 Justin Lite, Esq.
 212 Higbie Lane
 West Islip, New York 11795-2897

DECISION AFTER TRIAL

This is an action by Plaintiff to recover a broker's commission allegedly due and owing pursuant to a Commission Agreement between the parties and came on for trial before the undersigned on June 18, 2007. Counsel agreed to submit the matter to the Court on Stipulated Facts and the matter was submitted for decision on August 2, 2007. Counsel submitted a document entitled "Stipulated Facts and Exhibits" and each submitted a Memorandum of Law.

STIPULATED FACTS

Plaintiff is a licensed real estate broker and Defendant, Joseph Albarano¹ was the owner of certain property located at 182 The Helm, East Islip, New York ("the subject

¹Defendant Albarano died subsequent to the commencement of this action and Mary Ann Cordray was substituted as the Administratrix of decedent's estate. For purposes of this Decision, the Court will refer to decedent as "Defendant".

premises"). On or about April 25, 2003, Plaintiff brought Robert and Francine Frank to Defendant as a prospective purchaser of the subject premises and a sales binder in the amount of \$1,400,000.00, was entered into on or about April 25, 2003. Thereafter, on or about April 28, 2007, Plaintiff and Defendant entered into a Commission Agreement which stated in part as follows:

1. Friedrich Real Estate, Inc. is the sole listing and selling broker, and in accordance with the agreement of employment, brought about the above captioned contract.
2. The commission to be paid Friedrich Real Estate, Inc. in the amount of FIFTY SIX THOUSAND (\$56,000.00) Dollars. Commission is *payable on closing of title*, except that the commission shall be payable on [demand in the event title does not pass due to willful default of the seller.]²

(Emphasis added).

On May 5, 2003, Defendant's attorney sent a proposed contract of sale to the Franks' attorney. Subsequently, however, and prior to execution of the contract by Defendant, on or about June 5, 2003, he entered into a contract for the sale of the subject premises to a third-party, Jerold Nemetz for \$1,450,000.00. The Franks then commenced an action for specific performance in Supreme Court, Suffolk County, which was ultimately dismissed on a motion for summary Judgment by Defendant. In that case, the Court (BERLER, J.) held that the binder signed by the Franks was not sufficient, as a matter of law, for the sale of real property under the statute of frauds. Rather, the binder represented merely an unenforceable "agreement to agree". Therefore, since there was no enforceable contract, the Franks were not entitled to specific performance and the action was dismissed. Additionally, Nemetz commenced an action for breach of contract in Supreme Court, Suffolk County, which was also dismissed; notwithstanding, the subject premises was ultimately sold to Nemetz for \$1,450,000.00.

PLAINTIFF'S ARGUMENT

Plaintiff argues that Defendant breached the Commission Agreement dated April 28, 2007. Specifically, Plaintiff argues that it earned the real estate broker's commission

²Bracketed language was crossed out of agreement and initialed by plaintiff's representative and defendant.

upon its procurement of a ready, willing and able purchaser willing to purchase on the terms set by the seller. Plaintiff argues that the Franks' ready and willingness to close in this transaction is established by the fact that they entered into the sales binder agreement, retained counsel to handle the real estate transaction, had funds available to apply toward the purchase price, filed a notice of pendency to block the sale of the subject premises to a third party, and commenced an action seeking to compel the sale of the premises to them. Plaintiff urges the Court to find that it brought about a "meeting of the minds" between the Franks and Defendant and thus has earned its commission.

Plaintiff claims that the commission was not conditioned upon the actual transfer of title, but rather was earned once it produced the ready, willing and able buyer and the commission was only "payable" upon closing of title. That is, Plaintiff argues that the plain language of the Commission Agreement sets forth Defendant's obligation to pay Plaintiff \$56,000.00 and merely deferred payment of the obligation until the closing of title. Plaintiff further argues that its right to the commission was not contingent upon the Franks' execution of a contract of sale, and the fact that Defendant entered into an agreement for the sale of the subject premises for more money is irrelevant to its entitlement to the commission. Finally, Plaintiff argues that it is entitled to its commission as the Defendant thwarted performance of the transaction with the Franks by agreeing to sell the subject premises to Nemotz for more money. Therefore, Plaintiff seeks a Judgment for the commission in the amount of \$56,000 plus interest from April 25, 2003.

DEFENDANT'S ARGUMENT

Defendant argues that Plaintiff is not entitled to the \$56,000 commission because it never produced a buyer that was ready, willing and able to purchase the subject premises on terms set by defendant. Specifically, Defendant refers to the binder with the Franks, which specifically stated that a "more formal contract shall be signed by the purchaser and seller" and the cover letter from Defendant's counsel to Franks' counsel which stated in part "please do not consider the contracts a firm offer to sell until fully executed." Additionally, Defendant annexes a copy of the unsigned contract with the Franks, containing handwritten notations by the Franks' counsel, as indicative of the fact that there was never a meeting of the minds. Defendant also argues that the failure of the Franks to execute the contracts for approximately thirty (30) days, evidences the fact that they were neither ready nor willing to consummate the transaction. Finally, Defendant refers to the Order of Justice Berler, finding that there was no enforceable contract between

Defendant and the Franks and argues that such supports his contention that Plaintiff never produced a buyer who was ready, willing and able to purchase the subject premises.

Defendant also asserts that Plaintiff is not entitled to recover the commission because its payment was contingent upon the closing of title. Defendant argues that because the closing of the transaction with Franks never occurred, Plaintiff is not entitled to the commission. Defendant argues that the plain language of the Commission Agreement made the payment of the commission contingent upon the closing of title and that any doubt or uncertainty as to the meaning of the language of the agreement must be construed against the Plaintiff who drafted the agreement. Therefore, Defendant argues that Plaintiff is not entitled to recover the commission.

BROKER'S COMMISSIONS

It is well established common Law that a broker has earned his commission when he has produced a purchaser who is ready, willing and able to purchase the property on the terms set by the seller. *Rusciano Realty Services v. Griffler*, 62 N.Y.2d 696, 476 N.Y.S.2d 526, 465 N.E.2d 33 (1984). *See also, Marjorie Hausman Realty Co., v. Klaver*, 262 A.D.2d 613, 692 N.Y.S.2d 681 (2d Dept. 1999); *Balfour v. Passarelli*, 245 A.D.2d 72, 665 N.Y.S.2d 749 (3d Dept. 1997); *M.A. Salazar, Inc., v. Levy*, 237 A.D.2d 583, 655 N.Y.S.2d 612 (2d Dept. 1997); *Blaufeux v. Paznik*, 162 A.D.2d 573, 556 N.Y.S.2d 762 (2d Dept. 1990). However, the broker's right to receive the commission otherwise owed to him may be varied by agreement. *Graff v. Billet*, 101 A.D.2d 355, 475 N.Y.S.2d 122 (2d Dept. 1984). The parties to the agreement can impose whatever conditions they wish to the agreement, including that the commission is contingent upon the closing of title. *B.P. Vance Real Estate, Inc., v. Tamir*, 42 A.D.3d 343, 839 N.Y.S.2d 494 (1st Dept. 2007); *Donald Yoo (New York) Corp., v. Laszlo n. Tauber, M.D. and Assoc.*, 281 A.D.2d 171, 722 N.Y.S.2d 5 (1st Dept. 2001).

In interpreting commission agreements, the Court of Appeals has long recognized that:

Where... the contracting parties have stated the terms of their agreement by language which makes clear their intention, our decision is by the rule that –'The construction of a plain contract is for the court. The intention of the parties is found in the

language used to express such intention. If the court finds as a matter of law that the contract is unambiguous, evidence of the intention of the parties plays no part in the decision of the case. Plain and unambiguous words, undisputed facts, leave no question of construction except for the court.

Heller & Henretig, Inc., v. 3620-168th Street, Inc., 302 N.Y. 326, 98 N.E.2d 458 (1951)(internal citations omitted). *See, e.g., Mucci v. Munsey Park Assoc.*, 231 A.D.2d 501, 647 N.Y.S.2d 247 (2d Dept. 1996). However, if there is any doubt or uncertainty as to the meaning of the disputed language of the brokerage agreement, all ambiguity must be resolved against the broker who prepared it. *Graff v. Billet*, 64 N.Y.2d 899, 487 N.Y.S.2d 733, 477 N.E.2d 212 (1984).

Application of the above principles illustrates why Plaintiff's case must fail. First, it is the Court's determination that the Commission Agreement at issue is clear and unambiguous on its face and provided that "commission is payable on closing of title". The Court finds that such language imports the "notion that closing of title is a condition precedent to the broker's being entitled to a commission." *Levy v. Lacey*, 22 N.Y.2d 271, 292 N.Y.S.2d 455, 239 N.E.2d 378 (1968). Here, since it is undisputed that the Franks neither executed the contract of sale nor closed titled on the subject premises, the condition precedent to the commission did not occur and Plaintiff's claim must be rejected. Even *assuming arguendo* that the Commission Agreement could be considered ambiguous, any ambiguity must be construed against Plaintiff as the drafter of the agreement, thus, the same result would obtain. *Graff, supra*.

Even if the Court were to find that closing of title was not a condition precedent to plaintiff's entitlement to a commission, its still cannot prevail in this case. Plaintiff could only succeed if it demonstrated that it produced a buyer who was ready, willing and able to purchase the property on terms acceptable to defendant. That is clearly not the case on the facts before the Court. The binder signed by Defendant and the Franks was not a contract, but merely an unenforceable "agreement to agree" and was subject to a more formal contract being executed. Although Defendant's counsel sent the contracts to the Franks' attorney, they were not executed as written, it is patently obvious that there was never a meeting of the minds between Defendant and the Franks, and Plaintiff is thus not entitled to a commission. *Donald Yoo Corp., supra. See also, 2001 Real Estate v. DiBenedetto*, 207 A.D.2d 442, 615 N.Y.S.2d 751 (2d Dept. 1994); *Cook/Pony Farm Real Estate, Inc., v. Spartan Enterprises*,

Inc., 157 A.D.2d 766, 550 N.Y.S.2d 372 (2d Dept. 1990); *Garnham & Han Real Estate v. Oppenheimer*, 148 A.D.2d 493, 538 N.Y.S.2d 837 (2d Dept. 1989). Such finding is supported by the determination of Justice Berler which granted Defendant summary judgment dismissing the Franks' case against him since there was no enforceable contract between those parties. Moreover, Plaintiff's argument that Defendant thwarted performance of the real estate transaction with the Franks is without merit. Defendant's acceptance of a better offer cannot be deemed a willful attempt to thwart Plaintiff's entitlement to a commission. *Graff, supra*, 101 A.D.2d 355, 475 N.Y.S.2d 122 (2d Dept. 1984).

Based upon the foregoing, the Court finds in favor of Defendant and the Complaint is dismissed.

The foregoing constitutes the *DECISION* and *ORDER* of the Court.

Dated: September 24, 2007
Riverhead, New York



EMILY PINES
J. S. C.