

Cohen v Allsettled Group, Inc.
2007 NY Slip Op 33140(U)
September 21, 2007
Supreme Court, New York County
Docket Number: 0600122/2005
Judge: Edward H. Lehner
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EDWARD H. LEHNER
Justice

PART 19

Index Number : 600122/2005

COHEN, STEPHEN

vs

ALLSETTLED GROUP

Sequence Number : 003

DISMISS

INDEX NO. _____

MOTION DATE 6/1/07

MOTION SEQ. NO. ~~003~~ 004

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion is decided in accordance

with accompanying memorandum decision

FILED

OCT 03 2007

NEW YORK
COUNTY CLERK'S OFFICE

SEP 21 2007

Dated: _____



J.S.C.

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

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19**

-----x

STEPHEN COHEN,

Plaintiff,

-against-

ALLSETTLED GROUP, INC.

Defendant.

-----x

LEHNER, EDWARD H., J.:

Index No.
600122/05

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Before the court is a motion by defendant to dismiss plaintiff's amended complaint pursuant to CPLR 3211(a) 5 based upon the statute of frauds.

Plaintiff's amended complaint alleges: that from October 2002 through October 2004 defendant requested him to render labor, services and work to obtain life insurance policies (¶ 9); that plaintiff managed, purchased and/or brokered at least 18 insurance policies (the "Policies") with a total face value of at least \$18,775,000 and perhaps as much as \$23,450,000 (Id. ¶¶ 10, 14); that he worked approximately 30 hours per week for two years (id. ¶ 22); and that he is entitled to recover the reasonable value of his services, calculated by different methods in the three causes of action.

Defendant contends: that it had a "purely oral" arrangement with plaintiff wherein he would use defendant's offices and attempt to find insurance brokers with policies to sell (Michael Krasnerman affidavit, ¶ 3); that the compensation was up to one percent (1%) of the face value of the Policies, but was not fixed, rather it was discretionary (id.); and that

there was “no note or memorandum in writing” as to the parties’ agreement and therefore plaintiff’s claim is barred by the Statute of Frauds.

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (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 (1994)]

General Obligations Law §5-701 (the “Statute of Frauds”) provides in pertinent part that:

“a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

10. Is a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein, ‘Negotiating’ includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction. This provision shall apply to a contract implied in fact or in law to pay reasonable compensation but shall not apply to a contract to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman.”

“The nature of the services rendered by business brokers and finders is such that a demand for payment is usually not made until they have completed their services. Thus, to allow recovery for the reasonable value of these services is to substantially defeat the writing requirement” [Minichiello v. Royal Business Funds Corp., 18 NY2d 521, 527 (1966)], cert. denied 389 US 820. Further, the purpose of the Statute of Frauds to include finder’s fees “ was based at least in part upon the premise that the ‘danger of erroneous

verdicts' in allowing juries to determine claims for brokerage and finder's fees on oral testimony warranted the writing requirement" [Intercontinental Planning, Limited v. Daystrom, Inc., 24 NY2d 372, 383 (1969)].

The court is cognizant that "(t)he Statute of Frauds was designed to guard against the peril of perjury; to prevent the enforcement of unfounded fraudulent claims. But as Professor Williston observed: 'The Statute of Frauds was not enacted to afford persons a means of evading just obligations; nor was it intended to supply a cloak of immunity to hedging litigants lacking integrity; nor was it adopted to enable defendants to interpose the Statute as a bar to a contract fairly, and admittedly made' (4 Williston, Contracts (3rd ed.)§ 567A, pp. 19-20)"[Morris Cohon & Company v. Russell, 23 NY2d 569, 574 (1969)]. See also, Blye v. Colonial Corporation of America, 102 AD2d 297, 300 (1st Dept. 1984).

Plaintiff described his position as "a commission salesman ... locating life insurance policies at various sources that Defendant Allsettled could purchase or broker to buyers ... (C)osts that would go into the computation of what would be offered for the policy would be (presumably) my commission (and) the commission to the insurance broker/producer who controlled the policy or customer," (Plaintiff affidavit dated August 19, 2006, ¶¶ 6, 8) This indicates that plaintiff was a finder. "(A) finder is not a broker, although they perform some related functions The finder is required to introduce and bring the parties together, without any obligation or power to negotiate the transaction in order to earn the finder's fee" [Northeast General Corp. v. Wellington Advertising, Inc., 82 NY2d 158, 162-163 (1993)].

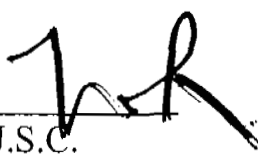
The Statute of Frauds specifically applies “to a contract implied in fact or in law to pay reasonable compensation.” Thus, in *Davis & Mamber, Ltd. v. Adrienne Vittadini*, 212 AD2d 424 (1st Dept. 1995); it was stated (p. 425):

“Where there was no memorandum in writing at all, the Court of Appeals, interpreting the pre-1964 statute to require the same conclusion as would be required after 1964, held that the absence of such memorandum precluded recovery in quantum meruit”

Since in this action defendant has stated that the parties’ arrangement was “purely oral ... (with) no note or memorandum in writing” and plaintiff has not controverted this, the Statute of Frauds bars plaintiff’s claim whether phrased as an implied contract, reasonable value or quantum meruit.

In sum, defendant’s motion to dismiss the complaint is granted and the Clerk shall enter judgment accordingly.

Dated: September 21, 2007



J.S.C.

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