

**Brown Harris Stevens Westhampton LLC v Post**

2007 NY Slip Op 33378(U)

October 11, 2007

Supreme Court, Suffolk County

Docket Number: 0005030/2005

Judge: Emily Pines

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

*Present:*

**HON. EMILY PINES**

Justice Supreme Court

\_\_\_\_\_  
**BROWN HARRIS STEVENS WESTHAMPTON**  
**LLC,**

**Plaintiff,**

-against-

**JANE POST, INDIVIDUALLY and as**  
**EXECUTOR of the ESTATE of GEORGE POST**  
**and PIII CO.,**

**Defendants.**

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**DECISION AFTER TRIAL**

Plaintiff, a licensed real estate brokerage business on eastern Long Island, commenced this action to collect a commission assertedly owed it from the sellers of real property located at 152 Dune Road in Quogue. It is Plaintiff's argument that its licensed real estate broker, Lawrence Porter, 1) had an implied contract with the Defendants for a broker's commission, due to Plaintiff's actual open listing agreement concerning the Defendants' proposed sale of an adjacent property (Plaintiff's 5); and 2) was the procuring cause of the sale of 152 Dune Road by the Defendants to the ultimate purchasers of that parcel, the Friedmans. Defendants argue that: 1) the property located at 152 Dune Road was not for sale when Plaintiff brought the Friedmans to the parcel set forth on the listing agreement; 2) that the 152 Dune Road property was subject to a leasehold and rights of the tenants to purchase the same until 2008; and 3) that it was the Friedmans and not the Plaintiff's agent, who took the many somewhat complex steps necessary to procure the purchase of 152 Dune Road throughout the Fall of 2004.

This case came before the Court for trial on June 11, 2007; Lawrence Porter testified on behalf of Plaintiff, Simmons Chase testified on behalf of Defendants and Robert Friedman testified under subpoena from both parties.

Lawrence Porter (“Porter”) testified that he has been a licensed real estate broker, in the employ of the Plaintiff for three years. He was introduced to the Friedmans by a mutual friend and they expressed their desire to build a new home on the ocean. He asserts that he convinced the Friedmans to seek property in Quogue rather than in Westhampton Beach, where they were originally inclined to purchase, and that he showed them a few sites. Mr. Porter had received in April 2004 an open listing for property located at 156 Dune Road in Quogue and owned by the Post family through the entity P III Co. Plaintiff’s 5 states that it is an “Open Listing,” that the broker’s commission is “5%,” and that Charlotte Post Chase and Simmons Chase are the contact persons on behalf of the owners of the 156 Dune Road parcel. Porter claims to have brought the Friedmans to look at the property on Memorial Day in 2004. While he acknowledges that he and the Friedmans were told about a previous offer by different parties, he states that when his clients demonstrated an interest, Mr. Chase did not turn them away. Thereafter, he referred the Friedmans to an attorney who had the Friedmans sign a proposed contract of sale for the property, prepared by the sellers’ attorneys. (**Plaintiff’s 8**). The proposed contract was forwarded to the Friedman’s attorney by letter of June 9, 2004 (**Plaintiff’s 7**) with a statement that there had been negotiations with another prospective buyer and that the proposed contract did not constitute an offer to sell to the Friedmans. Mr. Porter testified that Defendants required him to sign a document on June 16, 2004, stating that he released P III Co from all obligations to pay him a brokerage commission in the case of a sale by the Defendants of 156 Dune Road to the Friedmans (**Defendant’s C**).

According to Porter, there was some discussion about the adjacent parcel, located at 152 Dune Road during this Memorial Day initial meeting, at which he remembers Simmons Chase complaining that he was having problems with the existing tenants in that property and that it was not for sale. Porter claims that he brought the Friedmans back to 156 Dune Road in early June 2004 with a builder, so that they could discuss their proposed plans for the parcel. He asserts that he was told by Simmons Chase during the Summer 2004 negotiations to make an offer by “Monday”, July 12, 2004. When he telephoned the sellers on the day in question to offer of the full asking price, he asserts that he was told by Chase that he was fifteen minutes late and that Defendants had decided to sell to the other parties.

Porter states that he was unaware of any negotiations between the Defendants and the Friedmans after he was told that 156 Dune Road was being sold to another couple. He testified that he learned in the Fall of 2004 that the Defendants were selling the adjacent parcel, i.e. 152 Dune

Road, to the Friedmans. According to Porter, he was the procuring cause of the sale and the person who placed the parties in a position to carry on negotiations, having created an atmosphere where they felt comfortable with one another.

Simmons Chase testified that he is one of the members of a family partnership (P III Co) that owned four adjoining parcels on Dune Road in Quogue, including 156 Dune Road and 152 Dune Road. He states that he informed Porter and the Friedmans in May 2004 that another couple had made an offer to purchase 156 Dune Road but that he considered the Friedmans a back up should the other deal fall through. He also stated that he received a letter from an attorney representing the broker who showed the property to the other couple, threatening suit on behalf of his client should the Sellers not consummate the deal with the persons brought to the property by his client, after they signed a written proposed contract for the full asking price (**Plaintiff's 9**). He asserts that although he had two full price offers for the property, both Porter and the Friedmans acknowledged and indeed were informed all along that he had the discretion to go with the other parties who had made the first offer. He states that he told Porter in early July 2004 that time was running out and he wanted a final offer from the Friedmans by 10 a.m. on July 12, 2004, including their agreement to indemnify his partnership for any brokers' fee possibly owed to the broker for the other purchasers. At 10 a.m. on the date in question, he had not heard from Plaintiff and he decided to finalize the deal with the other couple for purchase of 156 Dune Road. When Porter telephoned one half hour later, he told him it was too late.

According to Simmons Chase, he first spoke to Mr. Friedman about 152 Dune Road in August or September 2004, and told him he had a proposed contract of sale out to the tenant, who had the right to purchase under his lease (**Defendant's A**), but that the tenant was dragging his heels. He was unaware that Mr. Friedman contacted the tenant on his own to offer to purchase the tenant's rights. Ultimately, Friedman informed Chase that he had negotiated with the tenant to purchase the tenant's leasehold interest; thereafter, Defendants entered into two separate contracts, in which the tenants waived their rights to purchase 152 Dune Road and the Friedmans paid \$4 million to Defendants and \$550,000 to the tenants to accomplish the final purchase of 152 Dune Road. Thus, according to Defendants, there existed neither a contract with Plaintiff for a commission for the sale of 152 Dune Road nor was Porter ever the procuring cause of the accomplished act.

Robert Friedman testified that he and his wife were introduced to Porter through a mutual friend ; that they told him they were interested in purchasing property and that he showed them several properties, including 156 Dune Road. He recalls seeing the property in the early Summer of 2004 and , upon making an offer through Porter, he learned that another couple had also made an offer and that the other purchaser's broker was threatening legal action if he did not earn his commission. At Chase's request, Friedman agreed to indemnify the Seller, should Friedman

ultimately purchase the property at 156 Dune Road. Although Friedman signed a proposed contract of sale for that parcel, he learned by mid July 2004 that the seller had chosen to sell to the other couple. According to Friedman, the issue of 152 Dune Road did not come up in the context of any of these negotiations or discussions.

In August 2004, Friedman stated that he contacted Simmons Chase to ask if he knew of any other properties and was told about Chase's frustrations with his attempts to sell 152 Dune Road to his tenants, who had the exclusive right to purchase that parcel. On his own, according to Friedman, he contacted the tenant in person and offered to buy out his right to purchase 152 Dune Road. Ultimately, he made the deal for \$550,000 and was able to purchase the property from Defendants for \$4 million. He states that he never discussed a broker's commission for Plaintiff on the deal; however, after the closing and learning of Porter's dissatisfaction, he did ask Chase if they could both contribute something to Porter who had done some work for them on the other property. According to Friedman, Simmons Chase refused. Friedman testified that the entire negotiation with the tenant occurred without Porter's involvement. Finally, Friedman asserts that there was no role for Porter or, indeed any broker with regard to 152 Dune Road, since it was not for sale. It was only Friedman's own initiative, along with the willingness of the seller that accomplished the deed.

It is well settled that a broker must meet several tests before recovery of a real estate commission. The broker must establish 1) that it is duly licensed; 2) that it had a contract expressed or implied with the party to be charged with paying its commission; and 3) that it was the procuring cause of the sale. **Hentze-Dor Real Estate v D'Allesio**, 40 AD 3d 813, 836 NYS 2d 265 (2d Dep't 2007). The fact that a broker calls the purchaser's attention to a property does not, in and of itself, absent an agreement to the contrary, give rise to a claim for real estate commissions. **See, Berry v Tilley**, 41 Ad 3d 628, 838 NYS 2d 647 (2d Dep't 2007). Thus, where the broker is not involved in the negotiations leading up to the sale of real property, it must demonstrate that it created the atmosphere in which the negotiations proceeded. **See, Dagar Group v Hannaford Bros**, 295 Ad 2d 554, 745 NYS 2d 34 (2d Dep't 2002).

In the case at bar, the Plaintiff has failed to demonstrate that it has complied with the second or third prong of the above test. Plaintiff never had an agreement with the Defendants concerning 152 Dune Road because the property was not for sale. Indeed, according to the existing lease (**Defendant's A**) only the tenants had the right to purchase that parcel from the sellers through 2008. It was Mr. Friedman's ingenuity and leg work that allowed that deal to move forward and eventually be accomplished. This Court found that witness' testimony to be the most credible, as he was not a party and had no stake in the outcome of this litigation. While there is much written concerning broker's commissions, the particular facts of this case present the issue from a slightly different

perspective than is usual. There is no question that Porter both introduced the purchaser and seller and that he took steps to help accomplish a deal on 156 Dune Road. On the other hand, he neither sought a role nor was there one for him concerning the other parcel, which was not for sale at the time he brought the parties together but also under a legal impediment to its sale.

In **Ormand Park Realty v Round Hill Development**, 266 AD 2d 523, 699 NYS 2d 116 ( 2d Dep't 1999) the Appellate Court stated that no cause of action for broker's commissions existed where broker showed an undivided estate to prospective purchasers which was subsequently subdivided and sold, in part, to purchasers. The Court found in that case that the particular part of the estate was not yet for sale when the broker brought the purchasers to the property. When the broker sued, months later, after the purchaser bought a portion of the original lot, the court held that there existed neither an express or implied contract between the broker and the seller and the broker was not the procuring cause of the sale. **Id.** At 524, 117.

In many aspects, this case is similar. The property purchased by the Friedmans was not subject to a broker's commission at the time the Plaintiff brought the Friedmans to see a different property. In addition, the Plaintiff did not suggest to nor involve itself in any way with the Friedmans' purchase of an adjoining parcel. There was no legal obligation remaining to the Plaintiff.

Accordingly, the Court grants Judgment in favor of the Defendants.

This constitutes the **DECISION** and **ORDER** of the Court.

Submit Judgment on Notice.

Dated: October 11, 2007  
Riverhead, New York

  
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**EMILY PINES**  
J. S. C.