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No. 07711-07

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 12 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 001 - 11-10-07,
002 - 11-28-07
Submission Date: 12-5-07
Motion Sequence No.: 001,002/MOT D

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BELL BROTHERS OF NEW YORK, INC. d/b/a JOS. BELLAVIA & SONS

Plaintiff,

- against -

JOEL LIEBERMAN and DOBLER CHEVROLET, INC., d/b/a DOBLER CHEVROLET,

Defendants.

ORDER

The following papers were read on Defendants' motion for summary judgment and sanctions and Plaintiff's cross-motion for sanctions and to disqualify Defendants' attorney:

Notice of Motion dated October 15, 2007;
Affidavit of Joel Lieberman sworn to on October 10, 2007;
Affidavit of Alan Z. Richards sworn to on October 10, 2007;
Affirmation of James Sawyer, Esq. dated October 15, 2007;
Notice of Cross-motion dated November 12, 2007;
Affidavit of Joseph Bellavia sworn to on November 12, 2007;

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Affirmation of Barry M. Weiss, Esq. dated November 12, 2007;
Plaintiff's Memorandum of Law;
Affidavit of Joel Lieberman sworn to on December 4, 2007;
Affirmation of James Sawyer, Esq. dated December 4, 2007.

Defendants move for summary judgment dismissing the complaint and for sanctions pursuant to 22 NYCRR 130-1.1. Plaintiff cross-moves for sanctions pursuant to 22 NYCRR 130-1.1 and to disqualify counsel for Defendants.

BACKGROUND

Defendant, Dobler Chevrolet, Inc. ("Dobler"), operated a Chevrolet dealership on Franklin Avenue in Hempstead. Dobler ceased doing business and closed the dealership in late June or early July 2007. Dobler's business and assets were not sold. The dealership simply closed.

Defendant, Joel Lieberman ("Lieberman"), was the president and sole shareholder of Dobler.

Dobler operated its dealership on 8 parcels of real property owned by other corporations. Seven of these parcels were sold to John Staluppi ("Staluppi"). The closing on the sale of these parcels took place on May 14, 2007.

Plaintiff, Bell Brothers of New York, Inc. ("Bell"), is in the business of brokering the sale of automobile dealerships. Joseph Bellavia ("Bellavia") is the president of Bell.

In May 2006, Lieberman advised Bellavia that he was interested in selling Dobler and the property upon which it was located. Bellavia advised Lieberman that Staluppi might be interested in purchasing Dobler's business and the property. Lieberman told Bellavia he had spoken with Staluppi about buying Dobler's business and the real

property occupied by the business. Staluppi and Lieberman had been unable to reach an agreement on price.

Lieberman advised Bellavia he could try to broker a deal for the sale of the dealership and property. The agreement to permit Bell to sell the dealership and property was memorialized in a Letter of Understanding dated May 31, 2006 ("Letter") which reads:

> "Thank you for the opportunity to represent the potential sale of the assets of Dobler Chevrolet and the Real Property occupied by the business.
>
> It has been agreed on between Dobler Chevrolet (SELLER) and Jos. Bellavia & Sons (BROKER) that Seller has authorized BROKER to offer for sale the above mentioned entities for sale (*sic*) to John Staluppi or any entity owned or controlled by him.
>
> It is further understood that in the event a sale is entered into SELLER agrees to pay BROKER a commission equal to Five (5%) percent of the sale price. This commission shall be due and payable at time of closing. SELLER also agrees to execute a formal commission agreement at time of formal contract execution of such sale."

The Letter was signed by Joseph Bellavia and Joel Lieberman.

Bellavia attempted to negotiate a deal with Staluppi. Lieberman claims Bellavia told him Staluppi he was not interested in purchasing either the dealership or the property. Lieberman claims the next time he heard from Bell or Bellavia was when this action was commenced.

Lieberman maintains that the sale of the real property to Staluppi was not as a result of Bellavia's efforts.

In March and April 2007, Lieberman met with Dobler's accountants, Richards, Witt & Charles regarding the possible refinancing of Dobler's business and the mortgages on the properties on which Dobler operated its business. Alan Richards ("Richards"), who is also an attorney, had been representing Dobler in regard to the possible refinance. Richards advised Lieberman that the refinancing terms were onerous.

Richards knew Dobler was having financial difficulties. He suggested selling some of the real property without selling the dealership.

Richards, Charles & Witt was the accountant for other automobile dealerships, including dealerships owned by Staluppi. Richards had also represented Staluppi as an attorney.

In March 2007, Lieberman again spoke directly with Staluppi about the sale of the real property and the dealership for $10,000,000. Staluppi rejected this proposal.

In April, 2007, Richards advised Lieberman that Staluppi might be interested in purchasing some of real estate Dobler used for its business since Staluppi already owned real property and auto dealerships in that area.

Richards, acting on behalf of Staluppi, and Lieberman eventually negotiated a deal pursuant to which Staluppi agreed to purchase 7 of the parcels for the sum of $7,500,000. The purchase price was allocated $5,500,000 for the real property and $2,000,000 for Dobler's surrender of its leases.

Once the parties had agreed upon the price, Richards advised Lieberman he could not act as his attorney in connection with the transaction. Lieberman retained counsel to represent him. By April 30, 2007, Lieberman and Staluppi had entered into a contract to sell the seven (7) parcels. The sale closed on May 14, 2007.

Lieberman asserts that Bell and Bellavia had no involvement in the negotiations that resulted in the sale of the real property. Thus, Bell is not entitled to a commission.

Lieberman further asserts that even if Bell is entitled to a commission, he is not personally obligated to pay the commission. Lieberman asserts he signed the Letter in his capacity as the president of Dobler. He did not sign individually and is not personally obligated to pay the commission.

Bellavia asserts he was instrumental in the deal. Lieberman provided Bellavia with financial statements regarding the business and surveys of the property that were given to Staluppi. Bellavia claims Staluppi reviewed the material and advised him he was not interested in purchasing the dealership. However, Bellavia claims to have obtained an offer from Staluppi to purchase the real property for $8,000,000 and that he conveyed this offer to Lieberman.

In response to this offer, Lieberman advised Bellavia he wanted to receive something for Dobler. The parties discussed whether Staluppi would exchange a dealership he owned in Bay Shore for Dobler.

After several months of negotiations, Lieberman allegedly told Bellavia he would refinance the property and keep Dobler.

In July and August 2006, Bellavia attempted to re-open negotiations. He claims Lieberman advised him he was refinancing the property and keeping Dobler.

Bellavia asserts that Lieberman entered into negotiations directly with Staluppi and through Richards to avoid having to pay him a commission. Bellavia asserts that nearly a year earlier, he had received an offer from Staluppi to purchase the real property for $8,000,000. Bell would have earned a commission of $400,000 on this transaction. Lieberman would have netted $7,600,00 on this sale. Bellavia asserts the sale of the seven parcels to Staluppi was essentially this deal cutting out his commission.

Bellavia asserts that as soon as he learned that Lieberman had reopened negotiations with Staluppi, he sent Lieberman a letter dated March 15, 2007 stating that, if Lieberman sold the Dobler or any of real property Dobler used for its business to Staluppi, Bell would expect to be paid a commission. Lieberman does not recall having received this letter.

This letter was addressed to Lieberman at Dobler's address. The letter was sent by certified mail. The United States Post Office records reflect the letter was delivered on March 16, 2007.

DISCUSSION

A. Commissions

To recover a commission, a real estate broker must establish (1) he or she is duly licensed; (2) the broker had an express or implied contract with the party obligated

to pay the commission; and (3) the broker was the procuring cause of the sale. Brandenberg v. Water Place Assocs., L.P., 17 A.D.3d 615 (2nd Dept. 2005); and Ormond Park Realty, Inc. v. Round Hill Development Corp., 266 A.D.2d 523 (2nd Dept. 1999).

"Where the broker is not involved in the negotiations leading up to completion of the deal, the broker must establish that he created an amicable atmosphere in which negotiations proceeded or that he generated a chain of circumstances that proximately led to the sale." Dagar Group, Ltd. v. Hannaford Bros. Co., 295 A.D.2d 554, 555 (2nd Dept. 2002).

A broker does not lose its commission when the owner terminates the broker in bad faith or merely as a device to avoid paying commissions. Werner v. Katal Country Club, 234 A.D.2d 659 (3rd Dept. 1996); and Quantum Realty Serivces, Inc. v. ISE America, Inc., 214 A.D.2d 420 (1st Dept. 1995).

When considering a motion for summary judgment, the court must view the evidence in a light most favorable to the party opposing the motion and must give that party the benefit of all reasonable inference which can be drawn from the evidence. Negri v. Stop & Shop, Inc., 65 N.Y.2d 625 (1985); and Schuhmann v. McBride, 23 A.D.3d 542 (2nd Dept. 2005); and Erikson v. J.I.B Realty Corp., 12 A.D.3d 344 (2nd Dept. 2004). When deciding a motion for summary judgment, the court's function is to determine if triable issues of fact exist. Matter of Suffolk County Dept. of Social Services v. James M. 83 N.Y.2d 178 (1994); and Sillman v. Twentieth Century-Fox Film

Corp., 3 N.Y.2d 395 (1957). Summary judgment should be denied is the court has any doubt regarding the existence of triable issues of fact. Freese v. Schwartz, 203 A.D.2d 513 (2nd Dept. 1994); and Miceli v. Purex Corp., 84 A.D.2d 562 (2nd Dept. 1984)

Giving the Bell the benefit of every favorable inference, the Court finds that, at this stage, questions of fact exist which precluding summary judgment to Dobler. Bellavia certainly attempted to negotiate a deal with Staluppi. Bellavia obtained and provided Staluppi information that was or might have been relevant. Bellavia claims that he obtained an offer from Staluppi to purchase the real property for $8,000,000 and that this offer was conveyed to and rejected by Lieberman. The offer obtained by Bellavia was significantly similar to the agreement ultimately reached.

The parties have not yet been deposed. The parties submit very different factual statements regarding the negotiations.

Copies of the contracts of sale have not been provided. However, the Court notes that it is highly unusual for any real estate deal, especially a deal involving the sale of commercial real property to go from contract to closing in two weeks.

Although Defendants submit an affidavit from Richards, that affidavit does not address or resolve the issue of whether Bellavia's efforts created the atmosphere which permitted negotiations to proceed or generated the chain of events that culminated in the sale.

Neither party has provided an affidavit from Staluppi. He clearly possesses information germane to the negotiations with Lieberman, Bellavia and Richards.

Staluppi's affidavit would be highly relevant to the determination of what effect Bellavia's activities had on the negotiations that led to the sale of the real property.

Under such circumstances, questions of fact exist, and summary judgment must be denied as to Dobler. See, Hentze-Dor Real Estate, Inc. v. D'Allessio, 40 A.D.3d 813 (2nd Dept. 2007).

B. Personal Liability

A corporate officer is not subject to personal liability for action taken in furtherance of the corporation's business under the well settled rule "an agent for a disclosed principal 'will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal' (citations omitted). Worthy v. New York City Housing Auth., 21 A.D.3d 284, 286 (1st Dept. 2005). See also, Metropolitan Switch Board Co., Inc. v. Amici Assocs, Inc., 20 A.D.3d 455 (2nd Dept. 2005);and Gordon v. Teramo & Co., Inc., 308 A.D.2d 432 (2nd Dept. 2004).

There is no doubt that Lieberman did not reflect his corporate capacity in his execution of the Letter. There thus arises the question of whether Lieberman should be held personally liable for Bell's commission. The Court of Appeals in Solzman Sign Co. v. Beck, 10 N.Y. 2d 63, 67 (1961) resolves the question by establishing a two prong test. In Salzman Sign, the Court of Appeals found: In modern times most commercial business is done between corporations, everyone in business knows that an individual stockholder or officer is not liable for his corporations engagements unless he signs

individually, and where individual responsibility is demanded the nearly universal practice is that the officer signs twice once as an officer and again as an individual.

While there is no dispute that Lieberman executed the letter in his individual capacity, there has been no showing that the agreement called for or demanded individual responsibility. To the contrary, the Letter, drafted by Bellavia, clearly provides that it is Dobler which is responsible for Bell's commission upon the contemplated sale between Dobler and Staluppi. No personal obligations can be discerned from Bellavia's clear and unambiguous language.

Indeed, in the absence of any indicia if an intention to be personally liable, the claim against Lieberman must fail. See, American Media Concepts, Inc. v. Atkins Pictures, Inc., 179 A.D. 2d 446, 447-8 (1st Dept. 1992) where the court, citing *Salzman Sign*, denied personal liability against a corporate officer in the absence of "some direct and explicit evidence of actual intent" to be individually bound. See also, Maranga v. McDonald & T. Corp., 8 A.D. 3d 351 (2nd Dept. 2004); Westminster Construction Co., Inc. v. Sherman, 160 A.D. 2d 867, 868 (2nd Dept. 1990); and Matter of Estate of Gifford, 144 A.D. 2d 742, 744 (3rd Dept. 1988).

Under these circumstances, the commission on the sale was due from Dobler, not Lieberman. Therefore, Lieberman should be granted summary dismissing the complaint. Hentze-Dor Real Estate, Inc. v. D'Allessio, *supra.*

C. Sanctions

Sanctions can be imposed against a party for engaging in frivolous conduct as defined by 22 NYCRR 130-1.1. However, since the Court is granting Defendants' motion in part and denying it in part, there was merit to the arguments of each party. Thus, their conduct was not frivolous. Sanctions must be denied.

D. Disqualification of Counsel

Plaintiff also moves to disqualify Sawyer, Halpern & Demetri, Esqs. and James Sawyer, Esq. ("Sawyer") from representing Defendants in this action. Sawyer and his firm represented Dobler and Lee Realty Corp. and Blanche Realty Corp. in the sale of the real property to Staluppi. Plaintiff asserts that, as a result, Sawyer should be disqualified because he will be called as a witness in this action.

A lawyer should not accept employment in a matter "...if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issued on behalf of the client." 22 NYCRR 120.21(a) [DR5-102].

In response to Plaintiff's interrogatories, Defendants indicated that some time between March and May 2007, Sawyer conducted negotiations with Richards relating to the sale of the real property. The response further indicates Sawyer represented the sellers of the real property at the closing.

Bell asserts that Sawyer's communications with Richards in regard to these negotiations make him a necessary witness in the action requiring his disqualification.

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The Code of Professional Responsibility addresses attorney's professional conduct. However, when raised in litigation, the Code of Professional Responsibility cannot be considered as statutory or decisional law. It provides guidance to the court. S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., 69 N.Y.2d 437 (1987).

The right of a party to an action to select his or her own attorney is a valuable right. An attorney should not be disqualified unless there is a clear showing that disqualification is warranted. *Id.;* Unger v. Unger, 15 A.D.3d 389 (2nd Dept. 2005); and Eisenstadt v. Eisenstadt, 282 A.D.2d 570 (2nd Dept. 2001).

The party seeking to disqualify an attorney bears the burden of establishing that the attorney will be called as a witness at trial and that the attorney's testimony is necessary. *Id.*; and Morgasen v. Federated Consultant Services, Inc., 174 A.D.2d 656 (2nd Dept. 1991); and Luk Lamellen U. Kupplungsbau GmbH v. Lerner, 167 A.D.2d 451 (2nd Dept. 1990). Indeed, it has been held that the party seeking an attorney's disqualification "...carries a heavy burden of identifying the projected testimony of the advocate-witness and demonstrating how it would be 'so adverse to the factual assertions or account of events offered on behalf of the client as to warrant his disqualification.' (*Martinez v. Suozzi,* 186 A.D.2d 378)." Broadwhite Assocs. v. Truong, 237 A.D.2d 162, 163 (1st Dept. 1997).

When determining if the attorney's testimony is necessary, the court must take into account factors such as "...the significance of the matters, weight of the testimony, and the availability of other evidence." S & S Hotel Ventures Ltd. Partnership v. 777

S.H. Corp., *supra* at 446; and Eisenstadt v. Eisenstadt, *supra.* Conclusory statements that counsel's testimony may be necessary are insufficient to warrant disqualification. Haberman v. City of Long Beach, 298 A.D.2d 497 (2nd Dept. 2002).

Bell makes an unsupported statement that it believes it will have to call Sawyer as a witness. Bell has failed to establish precisely what testimony it seeks to elicit from Sawyer, how that testimony will be significant or that such testimony cannot be obtained from other sources. Both Staluppi and Richards can be questioned regarding the negotiations that culminated in the sale of the real property to Staluppi. Bell has also failed to establish any of Sawyer's projected testimony or how it would be adverse to that his clients. Certainly, Sawyer could not be questioned regarding any conversations and communications he had with Lieberman regarding this transaction since such conversations and communications are subject to the attorney-client privilege. CPLR 4503.

Since Bell has failed to establish that Sawyer should be disqualified from acting as Defendants' attorney, its motion to disqualify Sawyer and his firm must be denied.

Accordingly, it is,

ORDERED, that Defendants' motion for summary judgment is **granted** as to Defendant Joel Lieberman and is in all other respects **denied.** The complaint as to Joel Lieberman is hereby dismissed; and it is further,

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ORDERED, that Plaintiff's cross-motion for sanctions and to disqualify James Sawyer, Esq. and Sawyer, Halpern & Demetri, Esqs. from representing Defendants in this action is **denied**; and it is further,

ORDERED, that counsel for the parties shall appear for a status conference on March 25, 2008 at 9:30 a.m.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
March 5, 2008

Hon. LEONARD B. AUSTIN, J.S.C.