

WHB Real Estate, Inc. v Mishkin

2008 NY Slip Op 31476(U)

May 28, 2008

Supreme Court, Suffolk County

Docket Number: 0018925/2006

Judge: Peter H. Mayer

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INDEX No. 06-18925

CAL. No. 07-02160-CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 12-18-07
ADJ. DATE 4-10-08
Mot. Seq. # 006 - MG; CASEDISP
007 - XMD

-----X	:		:	
WHB REAL ESTATE, INC.,	:		:	JOHN HOWARD LYNCH, ESQ.
	:		:	Attorney for Plaintiff
	:	Plaintiff,	:	4250 Veterans Memorial Highway, Suite 302
	:		:	Holbrook, New York 11741
	:		:	
	:	- against -	:	
	:		:	MARCUS, GOULD & SUSSMAN, LLP
SANDRINA MISHKIN,	:		:	Attorneys for Defendant
	:		:	222 Bloomingdale Road
	:	Defendant.	:	White Plains, New York 10605-1513
-----X	:		:	

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the defendant, dated November 30, 2007, and Notice of Cross Motion by the plaintiff, dated January 22, 2008 and supporting papers; (2) Affirmation in Opposition by the plaintiff, dated January 30, 2008, and supporting papers; and (3) Reply Affirmations by defendant, dated January 28, 2008 and February 14, 2008; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this motion (004) by defendant Sandrina Mishkin pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted; and it is further

ORDERED that this cross motion (005) by plaintiff, Westhampton Beach Real Estate, Inc., pursuant to CPLR 3212 granting summary judgment to plaintiff has been rendered academic by the dismissal of the complaint and is denied as moot.

This is an action sounding in breach of an oral agreement for a real estate commission relative to a condominium offered for sale, owned by defendant Sandrina Mishkin. Westhampton Beach Real Estate, Inc. (hereinafter WHB) was the real estate agency which procured the potential buyers, Mark Bibi and Shari Teitelbaum. The deal never consummated although multiple contracts were exchanged but never signed by any of the parties. The broker now seeks a real estate commission, in the negotiated amount of \$50,000.00 for the first cause of action, and the expired but previously agreed 6% commission in the

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amount of \$72,000.00 for the second cause of action, claimed to have been earned by them for procuring buyers whom they state were ready, willing and able to purchase the defendant's condominium.

On or about July 1, 2001, Sandrina Mishkin employed plaintiff, WHB, as a real estate broker pursuant to an oral agreement to procure a purchaser for the premises known as 580 Dune Road, Unit No. 7, Westhampton, New York, and agreed to pay plaintiff as compensation for its services in procuring a purchaser for said property a commission of 6% of the selling price, and that defendant set the sale price for \$995,000.00. This alleged oral agreement was never subsequently reduced to writing or modified. That agreement expired, but four years later in February, 2005, Ms. Mishkin was contacted by Elaine Saladino from WHB inquiring if she was still interested in selling her condominium as she had someone interested in seeing it. On about February 2, 2005, WHB showed the condominium to Mark Bibi and Shari Teitelbaum who made an offer of \$1,200,000.00, which Ms. Mishkin accepted over the phone. Ms. Mishkin then negotiated with Mr. Cosmo Ficara, president of WHB Real Estate, to pay plaintiff a reduced commission in the amount of \$50,000.00 instead of a commission of 6% or \$72,000.00 for its services, which amount plaintiff agreed to accept as payment as evidenced by a copy of the bill for commission in the amount of \$50,000.00, dated February 2, 2005, signed by Cosmo Ficara, as well as his affidavit submitted in support of the motion. Mishkin's attorney requested in writing that the following sentence be added to the bill, "The aforesaid commission is due and payable to the above named broker as, if and when title passes, except for willful default on the part of the seller." This statement appears on the aforementioned bill for the commission signed by Mr. Ficara.

There had been an appraisal done, but the condominium appraised lower than what the purchasers needed to qualify for the mortgage. Thereafter, Elaine Saladino contacted Mr. Mishkin and told him the purchasers wanted to make an offer lower than \$1,200,000 based upon the low appraisal, which counter-offer was refused. Mr. Bibi testified at his deposition that contracts were forwarded to his attorney on February 14, 2005, but he and Ms. Teitelbaum left for vacation February 16, 2005 without signing the contracts. Upon their return, they spoke with their attorney who transmitted the purchasers "comments" by way of a letter dated March 2, 2005 to the seller's attorney. On March 2, 2005, Mishkin advised WHB that she had changed her mind about selling her condominium and her attorney sent a letter dated March 7, 2005 to plaintiff confirming the same. No contract deposit had been paid by the purchasers and no contracts had been signed.

In or about April, 2005, WHB commenced a first lawsuit concerning this matter, which action was dismissed pursuant to a motion brought pursuant to CPLR 3211(a)(7) by order dated December 6, 2005 (Oliver, J.). That motion by WHB was supported with, inter alia, unsigned contracts for sale of the said premises. The court made a finding that the complaint merely alleged that defendant withdrew the offer to sell the property after she and purchasers were unable to reach an agreement on the terms of the sale.

By letter dated May 12, 2005, Mishkin's attorney conveyed a third draft of a contract to counsel for purchasers, and after some dialogue, a fourth draft of the contract was sent to Ms. Bak on May 19, 2005, but the seller and purchaser could not agree on terms proposed by Mr. Bibi with respect to covering any losses he might suffer as a result of losing their deposit on a lease.

On July 12, 2006, WHB commenced the instant action.

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Ms. Mishkin seeks summary judgment alleging that the transaction was never reduced to an executed contract of sale for the premises, no closing ever took place for the sale of the premises, and she still owns the condominium which was the subject of the never completed transaction, and therefore, no commission is due to plaintiff.

WHB seeks summary judgment on the issue that they produced a buyer ready, willing and able to purchase defendant's condominium and are therefore entitled to the broker's commission in the amount of \$72,000,000.00 and not the negotiated commission of \$50,000.00.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeraxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

A real estate broker earns a commission by procuring a buyer who is ready, willing and able to purchase the defendant's property in accordance with the defendant's terms (*see, Battery Park Realty v RKO Delaware*, 18 AD3d 680, 795 NYS2d 351 [2nd Dept 2005]; *R.R. Ragette v D'Incecco*, 17 AD3d 436, 793 NYS2d 141 [2nd Dept 2005]; *Drager Group v South Hills Mall*, 12 AD3d 552, 744 NYS2d 862 [2nd Dept 2004]). A broker's right to a commission, however, may be varied by agreement (*see, Battery Park Realty v RKO Delaware, supra; Pantigo Realty v Estate of Schrenko*, 249 AD2d 525, 672 NYS2d 369 [2nd Dept 1998]). To establish that it is entitled to recover a commission, a real estate broker must show that it is duly licensed, that it had a contract, express or implied, with the party to be charged with paying the commission, and that it was the procuring cause of the sale (*see, Brandenburg v Waters Place Assocs*, 17 AD3d 615, 794 NYS2d 80 [2nd Dept 2005]; *Stanzoni Realty Corp v Landmark Props. of Suffolk*, 19 AD3d 582796 NYS2d 549 [2nd Dept 2005]; *Battery Park Realty v RKO Delaware, supra; Dagar Group v Hannaford Bros. Co.* 295 AD2d 552, 745 NYS2d 34 [2nd Dept 2002]; *Greene v Hellman*, 51 NY2d 197, 433 NYS2d [1980]; *Sibbald v Bethlehem Iron Co.*, 83 NY 378 [1881]). In the instant action it is not disputed that there was an oral agreement between WHB and Ms. Mishkin concerning the procurement of buyers for the subject condominium. It is further undisputed that after

WHB procured Bibi and Teitelbaum as prospective buyers, that WHB and Mishkin negotiated the real estate commission down to \$50,000.00 from the 6% commission originally agreed upon at the time of the prior, expired agreement. By way of affidavit of the president of plaintiff corporation, Cosmo Ficaro, it is asserted that on February 4, 2005 plaintiff procured Mark Bibi and Shari Teitelbaum as purchasers for defendant's premises; that defendant called him on the phone to negotiate the 6% sales commission (\$72,000.00) to a flat \$50,000.00, which he agreed to accept, but states he agreed to the reduced commission only with respect to the sale of this particular real estate to facilitate the deal. It is therefore determined by this court that the agreed upon commission for the sale of the condominium after the prospective purchasers were presented was \$50,000.00.

“In the absence of an agreement to the contrary, a real estate broker will be deemed to have earned its commission only when it produces a buyer who is ready, willing, and able to purchase property under terms offered by the seller. Thus, should a broker produce a financially able purchaser who attempts to alter the terms of the sale, financial, or otherwise, offered by the seller, such alteration of the terms would be deemed a counter offer and the broker would not be entitled to a commission assuming the seller refuses to accede to the new terms” (*Jacob Gold Realty, Inc. v Stefan Skoczylas et al*, 178 Misc2d 409 [Civ. Court of the City of NY, Kings County [1998]). “A broker's right to receive a commission may be expressly circumscribed by agreement between the broker and seller. The receipt of a commission, for example, may be conditioned upon the actual closing of title, the actual passage of title, the consummation of sale, or any other event to which the parties agree. Where the broker's right to a commission is so conditioned and the condition precedent is not performed, the broker would not be entitled to a commission unless the agreement provides otherwise or it can be said, based upon the parties' intent, that the seller is responsible for the failure to perform the condition” (*Jacob Gold Realty, Inc. v Stefan Skoczylas et al*, supra). In the instant action, Herman Bishop, Esq., attorney for defendant, requested in writing that the following sentence be added to the bill for the broker's commission in the amount of \$50,000.00: “The aforesaid commission is due and payable to the above named broker as, if and when title passes, except for willful default on the part of the seller.” This statement was added to the bill for the brokerage commission and was signed by Cosmo Ficaro of WHB. Therefore, it is determined by this court that the commission was due and payable to WHB if and when title passed, except for the wilful default of the seller.

Before a broker may properly rely upon “wilful default” language in a brokerage agreement, the broker must demonstrate that a sales contract or agreement existed between the buyer and seller upon which the seller could be said to have defaulted (*Jacob Gold Realty, Inc. v Stefan Skoczylas et al*, supra). In the instant action, although contracts had been forwarded to the purchasers' attorney, Kara Bak, the same was not signed by the purchasers as they had gone to Europe for about two weeks after they made their offer, and upon returning there were several changes requested by Ms. Bak pursuant to her letter of March 2, 2005. Additionally, the purchasers requested a copy of the Condominium Offering Plan and By-Laws which they wished to review, and wanted an addition to the proposed contract that the Seller shall be responsible for the flip tax or any transfer taxes imposed by the condominium. They also wanted the contract to be contingent upon the purchasers having a written mortgage pre-approval for \$550,000.00.¹ On March 3, 2005, prior to receiving Kara Bac's letter of March 2, 2005, defendant

¹ The first draft contained a mortgage contingency in the amount of \$500,00.00.

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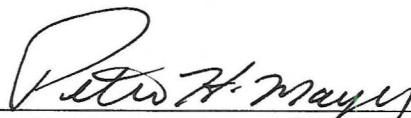
Mishkin withdrew the condominium from sale and notified WHB of the same. WHB, by way of an electronic communication, notified Ms. Bac that the condominium was no longer for sale. By letter dated March 7, 2005, sent by Mr. Bishop, counsel for defendant Mishkin, Ms. Bac was advised in writing that Ms. Mishkin no longer wished to negotiate further in this matter and the offer to sell is revoked. In May, 2005, Mishkin attempted to work with the purchasers and sent contracts again, but no contracts were signed. Accordingly, it is determined that there was no enforceable contract for sale of the condominium signed by the buyer and seller on March 2, 2005 when the condominium was withdrawn from sale, or at anytime before or after that date.

The Second Department has ruled that "since no deal between the prospective purchaser and the seller ever materialized in legal, written form," such as through a "sales contract," the seller cannot be deemed to have defaulted so as to become liable for the broker's commission (*see, Graff v Billet*, 101 AD2d 355, 475 NYS2d 122 [2nd Dept 1984], *aff'd* 64 NY2d 899 [1985]). Here, WHB has not demonstrated that a sales contract or agreement existed between the buyer and seller upon which the seller could be said to have defaulted. Without an enforceable contract, there can be no wilful default. It is therefore determined that defendant Mishkin did not default in the sale of her condominium and there was accordingly no commission earned by or due to plaintiff.

Accordingly, motion (004) for summary judgment by defendant Mishkin dismissing the complaint is granted, and motion (005) by plaintiff WHB for summary judgment for the real estate commission has been rendered academic and is denied as moot.

Dated: _____

5/28/08



PETER H. MAYER, J.S.C.