

**Georgia Malone & Co., Inc. v Nassau Bay
Assoc., LP**

2008 NY Slip Op 31789(U)

June 25, 2008

Supreme Court, New York County

Docket Number: 0109972/2005

Judge: Helen E. Freedman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HELEN E. FREEDMAN
Justice

PART 39

GEORGIA MALONE & COMPANY, INC.,
Plaintiff,

INDEX NO. 109972/05

-v-

MOTION DATE _____

NASSAU BAY ASSOCIATES, L.P., L.A.G. ASSOCIATES,
LIMITED PARTNERSHIP, L.A.G. CORP., MICHAEL N.
APPELL ASSOCIATES, INC. and MICHAEL N. APPELL,
Defendants.

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to for _____

FILED
JUN 26 2008

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

PAPER NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that motion sequences 004, 005, 006 and 007 are hereby consolidated for joint disposition and decided in accordance with the accompanying memorandum decision.

Dated: June 25, 2008


Helen E. Freedman, J.S.C.

Check one: FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

-----x
GEORGIA MALONE & COMPANY, INC.,

Plaintiff,

-against-

NASSAU BAY ASSOCIATES, LP,
LAG ASSOCIATES, LIMITED PARTNERSHIP,
LAG CORP., MICHAEL N. APPELL
ASSOCIATES, INC., and MICHAEL N. APPELL

Defendants.

-----x
Helen Freedman, J.:

Index No. 109972/05

FILED

JUN 26 2008

COUNTY CLERK'S OFFICE
NEW YORK

Motions bearing sequence numbers 004, 005, 006 and 007 are consolidated for disposition.

This is an action by plaintiff Georgia Malone & Company, Inc. (Malone), a real estate agent, for commissions it allegedly earned by producing two qualified buyers for a property owned by defendant Nassau Bay Associates, LP (Nassau Bay). The property was eventually sold to a third party.

In motion sequence 004, defendants Michael N. Appell Associates, Inc. (Appell Associates), and Michael N. Appell move for an order striking the pleadings of Nassau Bay, LAG Associates and LAG Corp. (collectively, Nassau Bay defendants), on the grounds that those defendants destroyed certain evidence during this action, failed to produce certain evidence and delayed in producing certain evidence. The Nassau Bay defendants cross move,

pursuant to CPLR 3212, for an order granting summary judgment dismissing Appell Associates' cross claim for a commission.

In motion sequence 005, Malone moves for an order striking the pleadings of Nassau Bay, LAG Associates and LAG Corp., also on the grounds that those defendants destroyed certain evidence during this action, failed to produce certain evidence and delayed in producing certain evidence. In motion sequence 006, the Nassau Bay defendants move for summary judgment dismissing the amended complaint. In motion sequence 007, the Nassau Bay defendants move for permission to serve and file an amended answer asserting an additional affirmative defense.

For the reasons stated below, the Nassau Bay defendants' motion for summary judgment dismissing the complaint is granted. The cross motion to dismiss Appell Associates' cross claim is also granted. The motions to strike are denied as moot. The motion to amend the answer is also denied as moot.

Malone is a licensed real estate broker. Nassau Bay is a Delaware limited partnership which formerly owned a building located at 240 West 35th Street in New York City. Nassau Bay's general partner is defendant LAG Associates. Defendant LAG Corp. is the general partner of LAG Associates. Defendant Robert Tannenhauser is LAG Corp.'s president. Appell Associates is also a real estate broker and Michael Appell is its president.

The amended complaint alleges that on November 1, 2004, Nassau Bay orally contracted with Malone and Appell Associates, as co-brokers, to locate a "qualified purchaser ready, willing and able to pay a net profit of \$27 Million to [Nassau Bay] for the Property." Malone states that it immediately began marketing the property and on November 9th it presented Nassau Bay with an offer for the full asking price from a "qualified prominent real estate family."

On November 19, 2004, Nassau Bay allegedly rejected the offer and raised the asking price to \$31 million, allegedly stating that it wanted to net \$30 million and leave the remaining \$1 million as payment for a brokerage commission.

Malone alleges that in January of 2005, it presented Nassau Bay with an offer from a second qualified buyer, the Burak Organization (Burak), which was ready, willing and able to purchase the property at the \$31 million asking price. The Complaint alleges that on January 26, 2005, Nassau Bay accepted the offer and requested certain financial information about Burak.

Malone alleges that Nassau Bay soon began to act in bad faith regarding the sale of the property to Burak. Specifically, Malone states that, contrary to industry norms, Nassau Bay demanded that Burak conduct a due diligence examination of the

Property before Nassau Bay would negotiate or sign a contract of sale. Nassau Bay then allegedly waited until March of 2005 before providing Burak with certain information that was required for Burak to perform such due diligence. Malone also states that Nassau Bay delayed in drafting a contract of sale and inappropriately inquired about the personal finances of Burak's principals during contract negotiations.

According to Malone, Nassau Bay delivered a proposed contract of sale to Burak's lawyers on March 30, 2005. Among other things, the contract stated that any commission due to Appell Associates or to Malone would be paid by Nassau Bay.

Malone states that negotiations continued through much of April. However, during that period, Nassau Bay was allegedly marketing the Property to other buyers and eventually obtained a bid which exceeded Burak's bid. Malone alleges that Nassau Bay never disclosed that it was marketing the Property to other parties. On May 3, 2005, Nassau Bay informed Appell that it intended to accept a higher offer from another buyer. The closing on that transaction occurred in October of 2005.

In the meantime, Malone commenced this action in July of 2005, asserting claims for breach of contract, quantum meruit and unjust enrichment. The gravamen of the complaint is that Malone is entitled to a commission because it presented Nassau Bay with

two qualified buyers for the Property. Specifically, Malone alleges that all of the defendants owe it \$1.6 million for presenting the first qualified buyer and a \$1 million commission for presenting a second qualified buyer, Burak. Malone further alleges that, to the extent that Appell Associates or Michael Appell has already received a commission, then Malone is entitled to a share of such commission.

Appell Associates asserted a cross claim against Nassau Bay for a commission. Among other things, Appell Associates asserts that it was retained by Nassau Bay to act as broker and it then orally agreed with Malone that they would operate as co-brokers and would share any commissions.¹ Thus, Appell Associates contends that Malone's presentation of two qualified buyers entitles Appell Associates to a commission pursuant to the agreement with Nassau Bay.²

In a decision dated March 1, 2006, this court dismissed the complaint as against defendant Tannenhauser, for failure to state

¹Malone states that in November of 2004, Appell solicited Malone to assist him in trying to sell the property. Malone states that it never dealt directly with Nassau Bay. However, it states that Nassau Bay knew "early on" that Malone was acting as a co-broker with Appell Associates.

²Malone and Appell Associates have not pursued the claim for a commission based on the presentation of the first buyer on these motions. Malone concedes that the "focus of the litigation has concerned the second buyer, [Burak]." (Malone Affidavit at ¶ 11).

a cause of action. The court declined to dismiss the complaint as against Nassau Bay and LAG Corp.

The Nassau Bay defendants now seek summary judgment dismissing the amended complaint and Appell Associates' cross claim. A party moving for summary judgment is required to make a prima facie showing that it is entitled to judgment as a matter of law, by providing sufficient evidence to eliminate any material issues of fact from the case. Winegrad v NYU Medical Center, 64 NY2d 851 (1985); Grob v Kings Realty Associates, LLC, 4 AD3d 394 (2d Dept 2004). The party opposing must then demonstrate the existence of a factual issue requiring a trial of the action. Zuckerman v City of New York, 49 NY2d 557, 560 (1980).

The central issue in this action is whether Malone and Appell presented Nassau Bay with a qualified buyer for the property such as would entitle one or both of them to a commission. It is well-settled that "[i]n the absence of an agreement to the contrary, a broker is deemed to have earned its commission when it produces a buyer who is ready, willing and financially able to purchase the property at the terms set by the seller." Central City Brokerage Corp. v Elyachar, 40 AD3d 452 (1st Dept 2007), citations omitted.

"In determining whether brokers will be deemed to have

earned their commissions, '[t]he prospective buyer's financial ability is...an essential element, and one which plaintiff [is] required to establish in order to recover.'" Id. at 453, quoting Rusciano Realty Servs v Griffler, 62 NY2d 696, 697-98 (1984); see Trenka Realty v Wedgewood Homes, Inc., 138 AD2d 875 (3d Dept 1988). Thus, a broker must put forth proof that the prospective purchaser was financially able to meet the purchase price. Id.; see e.g. Korin Group v Emar Bldg. Corp., 291 AD2d 270 (1st Dept 2002) (purchaser's brokerage account statement was sufficient proof of financial ability to purchase the property); Prime City Real Estate Co., Inc. v Hardy, 256 AD2d 80, 81 (1st Dept 1998) (purchaser's financial ability to consummate the transaction was established by his testimony concerning his assets and access to credit and substantiated by a financial statement setting forth his bank accounts, securities and real estate holdings); but see Posson v Hayes, 37 AD3d 936 (3d Dept 2007) (financial ability not established where offers to purchase were contingent on the prospective buyers obtaining financing within 45 days of the sales contract).

"The mere signing of a contract does not establish that the buyer is financially able to complete the transaction and meet the purchase price." F. Richard Wolff and Son, Inc. v Tutora, 50 AD3d 950, 951 (2d Dept 2008). However, it is not necessary for a

transaction to close for the broker to earn its commission. Korin Group v Emar Bldg. Corp., 291 AD2d at 271.

Here, the parties do not dispute that an oral agreement was reached whereby Appell and Malone were authorized to market the Property and seek a buyer. The parties sharply dispute the exact terms of that agreement. Malone and Appell contend that the only conditions set forth by Nassau Bay were a sale price of \$30 million net to Nassau Bay and the buyer's willingness to assume the existing mortgage.

Nassau Bay states that the parties did not discuss the amount of a commission that would be paid upon procurement of a buyer. Nassau Bay contends that it informed Appell that a prospective buyer would have to satisfy several conditions before Nassau Bay would negotiate a price and enter into a contract to sell the Property, including: (a) completion of all due diligence; (b) identifying itself and its partners or members; and c) providing Nassau Bay with sufficient financial information on itself to establish to Nassau Bay that the prospective purchaser was likely to secure consent to assume the mortgage on the Property.

Despite the foregoing factual disputes, Nassau Bay contends that Malone and Appell could not, in any event, have earned a commission by producing Burak as a potential buyer because Burak

was not financially able to purchase the Property. In support of this argument, Nassau Bay relies on an affidavit from Burak's principal, Jonathan Zich, who states that Burak "did not have and did not intend to provide the money that would be used to purchase the Building. Rather, it was [Burak's] intention to raise the money from other investors. [Burak] was unwilling to approach proposed investors until it had a signed contract of sale." Based on this affidavit, the court finds that the Nassau Bay defendants have made a prima facie showing that the potential buyer, Burak, was not financially able to purchase the property.

Malone and Appell contend that Burak was, in fact, financially able to purchase the property. Specifically, they assert that: 1) Zich had been a principal in approximately ten real estate acquisitions from 1997 through 2001; 2) in 2005, Zich closed the purchase of an apartment complex for \$17 million; and 3) Burak had investors who had participated in past acquisitions to whom it could turn in connection with the purchase of the property at issue here.

The court finds that these factors fail to raise an issue of fact as to whether Burak was financially able to purchase the Property here. At most, these factors demonstrate that Zich and/or Burak were active in purchasing real estate over a number of years. They do not demonstrate a specific financial ability to

* 11]
purchase the Property at issue here.

Malone and Appell also contend that one of Burak's potential investors, CAMM, LLC was prepared to fund the entire transaction. They rely on a May 3, 2005 letter to Malone from CAMM, LLC's president, stating that "[s]ubject to the successful completion of due diligence we are prepared to fund the full equity investment required to close on the transaction."

The court finds that this letter is insufficient to demonstrate Burak's ability to finance the purchase of the Property. At most, the letter demonstrates a potential willingness on the part of CAMM, LLC to finance the purchase. However, Malone has put forth no evidence to demonstrate that CAMM, LLC was, in fact, obligated to finance the purchase. As such, the letter is insufficient to demonstrate that Burak was, in fact, able to purchase the Property. See e.g. L.I.C. Commercial Corp. v Zirinsky, 142 AD2d 713, 716 (2d Dept 1988) (buyer's financial ability not demonstrated where there was no evidence that third party was legally bound to lend buyer funds to complete transaction); Blackmore v Wigne Land Corp., 97 AD2d 889 (3d Dept 1983) (oral agreement with third party for financial assistance insufficient to demonstrate that buyer had the financial ability to complete the transaction). Moreover, the court notes that the letter is dated May 3, 2005, which is

several months after Malone and Appell Associates contend that the commission was already earned by their earlier presentation in January of a ready, willing and able buyer in Burak.

Malone and Appell Associates contend that, at the time the contract was signed, the eventual buyer of the property was no better qualified than Burak to purchase the Property. However, the issue of whether a commission was earned here depends on a demonstration that Malone and Appell produced a buyer, Burak, that was financially able to purchase the property. The financial condition of the eventual buyer is not relevant to that issue. Therefore, Nassau Bay is entitled to summary judgment dismissing Malone's claim for breach of contract and Appell Associates' cross claim for breach of contract.

The Nassau Bay defendants also move to dismiss Malone's claims for unjust enrichment and quantum meruit. "To prevail on a claim of unjust enrichment, a plaintiff must establish that the defendant benefited at the plaintiff's expense and that equity and good conscience require restitution." Whitman Realty Group, Inc. v Galano, 41 AD3d 590, 592-93 (2d Dept 2007), citations omitted. "The elements of a claim in quantum meruit are: the performance of services in good faith, acceptance of the services by the person to whom they are rendered, an expectation of compensation therefor, and the reasonable value of the services."

Freedman v Pearlman, 271 AD2d 301, 304 (1st Dept 2000), citations omitted.

Both of Malone's claims are premised on its assertion that it is entitled to compensation for the services it provided to Nassau Bay. However, it is undisputed that Malone's compensation was dependent upon it presenting a ready, willing and able buyer for the property. As set forth above, Malone did not present a buyer who was financially able to purchase the Property. Therefore, the claims for unjust enrichment and quantum meruit are dismissed. See Orenstein v Brum, 27 AD3d 352 (1st Dept 2006) (broker not entitled to commissions for unsuccessful efforts).

Malone, Appell Associates and Michael Appell have moved for an order striking the pleadings of Nassau Bay, LAG Associates and LAG Corp. on the grounds that those defendants destroyed certain evidence during this action, failed to produce certain evidence and delayed in producing certain evidence. Factual questions exist as to whether defendants discarded certain items, including emails. However, there is no allegation that defendants destroyed any items relevant to the dispositive issue of Burak's ability to purchase the Property. Therefore, the motions to strike defendants' pleadings are denied as moot.

Finally, the Nassau Bay defendants have moved for permission

to serve and file an amended answer. Specifically, defendants seek permission to assert an additional affirmative defense that the brokerage agreement is an unenforceable "net listing." However, the motion is moot in light of the dismissal of the amended complaint and the dismissal of the cross-claim against the defendants.

Accordingly, it is

ORDERED that defendants Nassau Bay, LAG Associates and LAG Corp.'s motion for summary judgment (006) is granted and the amended complaint is dismissed as against defendants; and it is further

ORDERED that defendants Nassau Bay, LAG Associates and LAG Corp.'s cross motion for summary judgment (004) is granted and the cross claim of defendant Michael N. Appell Associates is dismissed; and it is further

ORDERED that defendants Michael Appell and Michael N. Appell Associates' motion (004) to strike the pleadings of defendants Nassau Bay, LAG Associates and LAG Corp. is denied; and it is further

ORDERED that plaintiff Georgia Malone & Company, Inc.'s motion (005) to strike the pleadings of defendants Nassau Bay, LAG Associates and LAG Corp. is denied; and it is further

ORDERED that defendants Nassau Bay, LAG Associates and LAG

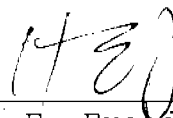
Corp.'s motion to amend their answer (007) is denied; and it is further

ORDERED that the remainder of the action, ^{if any,} shall continue.

ORDERED that the parties are directed to appear for a preliminary conference in Room 208 at 9:30 a.m. on August 5, 2008.

DATED: June 25, 2008

ENTER:



Helen E. Freedman, J.S.C.

FILED
JUN 26 2008
COUNTY CLERK'S OFFICE
NEW YORK