

Douglas Elliman LLC v Kislin
2008 NY Slip Op 32265(U)
July 14, 2008
Supreme Court, New York County
Docket Number: 0600532/2007
Judge: Doris Ling-Cohan
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PRESENT: Hon. Doris Ling-Cohan

PART 36

Index Number : 600532/2007

DOUGLAS ELLIMAN, LLC

VS.

KISLIN, DAVID

SEQUENCE NUMBER : # 002

AMEND COMPLAINT

_____ tice _____

INDEX NO. 600532-01

MOTION DATE _____

MOTION SEQ. NO. #002

MOTION CAL. NO. _____

ad on this motion to/for amend

PAPERS NUMBERED

<u>1, 2</u>
<u>3</u>
<u>4</u>

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 *to amend is decided in accordance with the attached memorandum decision (+ consolidated for disposition with cross-motion sequence 001).*

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

FILED

AUG 13 2008

COUNTY CLERK'S OFFICE
NEW YORK

DORIS LING-COHAN
J.S.C.

Dated: 7/14/08

[Signature]
J.S.C.

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, PART 36

-----x
DOUGLAS ELLIMAN LLC,

Plaintiff,

-against-

DAVID KISLIN, FRANKLIN PLACE LLC and GLENN
McDERMOT,

Defendants.
-----x

DECISION AND ORDER

Index No.: 600532/07

Motion Seq. No.: 001, 002

LING-COHAN, J.:

FILED
AUG 13 2008
COUNTY CLERK'S OFFICE
NEW YORK

In this action involving a dispute over a real estate brokerage commission, plaintiff Douglas Elliman LLC contends that it is entitled to a brokerage commission of \$ 549,244.23 for its assistance in defendants' purchase of 369-371 Broadway, New York, New York. Plaintiff had filed a motion for summary judgment pursuant to CPLR §3212; however, by stipulation dated February 14, 2008, such motion was withdrawn.

Defendants David Kislin ("Kislin") and Franklin Place LLC ("Franklin Place") cross-moved for summary judgment, arguing that plaintiff is not entitled to a commission as the brokerage agreement signed by Kislin and his then business partner, defendant Glenn McDermot (McDermot), only promised to pay a commission to plaintiff if the property was jointly acquired by Kislin and McDermot; such cross-motion has not been withdrawn and is decided below.

Subsequently, plaintiff filed a motion to amend the pleadings to add four additional defendants as parties, as well as three causes of action (motion seq 002). Plaintiff seeks to add as party defendants, Sleepy Hudson LLC, Ascendance Development LLC (Ascendance), Moezinia and the Esagh Moezinia Family Trust. Such motion is consolidated for disposition with the

Kislin/Franklin Place cross-motion for summary judgment, and decided below.

FACTUAL ALLEGATIONS

Defendant Kislin began a business relationship with McDermot in 2005 to purchase and develop commercial and residential properties in Manhattan. Shortly thereafter, McDermot proposed to Kislin that they should consider acquiring a commercial building located at 369-371 Broadway (the property). According to Kislin, McDermot had indicated that during 2004, he had discussions with Mr. Eshagh Moezinia (Mr. Moezinia), the owner of the property. Kislin contends that at no time during his pre-contract discussions with Mr. Moezinia did a real estate broker assist in finding the property or aid in negotiating any of the material terms of the transaction. Kislin also alleges that McDermot told him that he had conducted all prior discussions with Mr. Moezinia on his own.

In late June of 2005, a meeting was held at Mr. Moezinia's office and attended by Kislin, Kislin's attorney, and McDermot, to discuss the terms of the acquisition of the property. Kislin alleges that McDermot had proposed that he and Kislin would jointly acquire the property, either in their own names, through entities that they would own, separately, or through one entity that they would own together. ~~M7 Holding Inc. and 371 Development, LLC were two names~~ suggested at the meeting as possible entities through which Kislin and McDermot could accomplish joint ownership of the property.¹

Kislin states that it was at this meeting when he first was introduced to Sergio Rubinstein, a real estate broker from Douglas Elliman LLC. McDermot explained to Kislin that the deal was

¹ Kislin alleges that although the names M7 Holding Inc. and 371 Development, LLC were mentioned at the meeting, no such entities were formed and no contract of sale was entered into by these entities.

in jeopardy of being lost unless they agreed to pay Rubinstein the commission, as Mr. Moezinia refused to pay the commission for the property.² Kislin alleges that McDermot proposed that upon the joint acquisition of the property, that either he or an entity controlled by him would pay the commission and that McDermot would indemnify and hold Kislin harmless.

On June 23, 2005, defendants Kislin and McDermot entered into and signed a written brokerage commission letter for the property.³ This agreement states in relevant part:

This letter will confirm our agreement that Douglas Elliman, a licensed real estate broker, in the state of New York, shall be the sole representative for M7 HOLDING Inc. and 371 DEVELOPMENT, LLC or any other related entity on an exclusive basis regarding the potential purchase of the above referenced property.

It is hereby also understood and agreed to that in the event we purchase the above referenced properties, we will pay Douglas Elliman a commission of 1.5% percent of the purchase price at closing.

Sincerely,

Glenn McDermot

David Kislin

(Haber Aff., ex. D). According to Kislin, the letter agreement was “hastily prepared” by either Rubenstein or McDermot. [Kislin Affidavit in Support of Cross-Motion, at ¶ 12].

In early 2006, Kislin and McDermot agreed to abandon their business relationship. It was

² After the meeting took place, Kislin alleges that Mr. Moezinia informed him that he had never promised to pay a brokerage commission for the sale of the property and that to his knowledge, no broker had been involved in the transaction.

³ Plaintiff alleges that an original contract of sale was entered into by M7 Holding Inc. in June of 2005. Plaintiff attaches the unsigned contract of sale to the affidavit of its General Counsel and Executive Vice President, Kenneth Haber, and alleges that this contract was superceded by the sale to defendant Franklin Place LLC. (Haber Aff., ex. E). Kislin states that, to his knowledge, the allegation that a contract of sale was entered into by M7 Holding Inc is false. Kislin further states that prior to this motion, he was never made aware of the contract of sale entered into by M7 Holding and does not have any idea where the contract originated or how it came into plaintiff's possession.

originally alleged that Franklin Place LLC, a company co-owned by Kislin and his partner, Leo Tsimmer, purchased the property on October 10, 2006. The purchase price paid for the subject property was \$36,616,282. Rubinstein asserts that he was present at the closing held on October 10, 2006, but was excluded by Kislin and had to wait in a separate room.

Significantly, during the course of discovery, as further detailed below, the actual contract of sale and the name of the purchaser listed on the contract for the subject property “surfaced”.⁴ [See Motion to Amend, Cole Aff, Exh. G]. Such contract contains a specific provision obligating the purchaser, to pay the commission owed to Douglas Elliman. Paragraph 22 of the contract is titled “BROKER” and provides as follows:

This Agreement was brought about by direct negotiation between Seller and Purchaser without the intervention or assistance of any person, firm company or corporation or broker or otherwise, other than Sergio Rubinstein of Douglas Elliman, 205 East 42nd Street, New York, New York 10017 and who has been designated by Purchaser as a Broker and whose commission shall be paid by Purchaser pursuant to separate agreement. Neither Seller nor Purchaser knows of any broker other than Sergio Rubinstein of Douglas Elliman entitled to a commission in connection with this transaction...”

[See *id.* at 11, emphasis supplied]. The contract is signed by defendant David Kislin, for the purchaser, Sleepy Hudson, LLC, as listed in the contract.

On February 20, 2007, Douglas Elliman LLC commenced this action, alleging that it is owed a commission for the purchase of the property. Douglas Elliman LLC contends that the commission owed by the defendants is \$549,244.23, which is 1.5% of the \$36,616,282 purchase price.

⁴ Plaintiff claims that neither Kislin, nor his attorney Robert Flink (on the purchase of the subject property) responded to plaintiff’s subpoena duces tecum, and plaintiff only obtained it after service of a subpoena on a non-party (the seller’s attorney). This conduct is sanctionable, if true, and will not be tolerated.

DISCUSSION

Douglas Elliman's Motion to Amend the Pleadings

In moving to amend the pleadings, Douglas Elliman LLC seeks to add as defendants, Sleepy Hudson LLC, Ascendance Development LLC (Ascendance), Moezinia and the Esagh Moezinia Family Trust, as well as to assert three (3) additional causes of action.

Douglas Elliman LLC contends that following the September 5, 2007 deposition of Kislin, a notice for discovery and inspection was served on Kislin to produce the signed contract of sale for the subject property. Subpoenas duces tecum were also served on counsel for both the purchaser and the seller of the property which also sought the production of the original contract of sale as well as drafts of the agreement. Douglas Elliman LLC maintains that neither Kislin nor Robert Flink, the attorney who represented Kislin with the purchase, responded with the contract of sale. However, Douglas Elliman LLC represents that the seller's attorney, Sidney Ingber, produced a copy of the signed contract of sale as well as prior drafts (Cole Affirm., ex. G).

Douglas Elliman LLC states that as evidenced by such contract of sale, Kislin purchased the property not through Franklin Place LLC, but through Sleepy Hudson LLC. Douglas Elliman LLC further maintains that the contract of sale specifically designates plaintiff as the broker for the sale, with the purchaser agreeing to pay the brokerage commission due on sale, pursuant to a separate agreement. In the second amendment to the contract of sale, Sleepy Hudson LLC assigned its rights as purchaser to Ascendance, an entity also owned by Kislin. Ascendance further designated Franklin Place LLC to take title at closing. As Sleepy Hudson LLC was the named purchaser and as Ascendance was the assignee of the named purchaser, Douglas Elliman LLC argues that both parties must be made additional defendants.

In opposition, Kislin contends that neither Sleepy Hudson LLC nor Ascendance undertook an obligation to pay a commission to Douglas Elliman LLC, and therefore both parties should not be added to the complaint. Kislin states that the agreement reached between himself and McDermott required a commission to be paid only in the event that the property was purchased jointly, or through a jointly controlled entity.

CPLR 3025 (b) states that "[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances."

Here, an amendment to the pleadings to add Sleepy Hudson LLC, and Ascendance as defendants is warranted, since Kislin purchased the property, not through Franklin Place LLC, but through Sleepy Hudson LLC, who subsequently assigned its rights as purchaser to Ascendance.

An amendment is not warranted, however, with respect to adding Moezinia and the Esagh Moezinia Family Trust as defendants, since the contract of sale makes clear that it is the purchaser who is responsible for paying the brokerage commission, and not the seller. Moreover, Douglas Elliman LLC's representative, Rubenstein, admitted at his deposition that to the extent that a commission became payable to plaintiff, it would be paid by the purchaser and not by the seller. In addition, Moezinia testified in a non-party deposition that the Moezinia Family Trust sold the property for the price that it believed was appropriate without any brokerage commission. Thus, plaintiff's request to add Moezinia and the Moezinia Family Trust as defendants and two (2) additional causes of action against them, is denied

Douglas Eliman LLC also seeks to add a third party beneficiary cause of action under the

contract of sale, contending that it is the express and immediate beneficiary of the promise the purchaser made to the seller to pay the commission by separate agreement. The Court of Appeals has held that parties asserting third party beneficiary rights under a contract must establish “(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [their] benefit and (3) that the benefit to [them] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [them] if the benefit is lost.” *Mendel v Henry Phipps Plaza W., Inc.* 6 NY3d 783, 786 (2006) citing *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 336 (1983).

Based upon the submissions, the complaint is permitted to be amended to include the third party beneficiary cause of action, since a binding contract of sale exists which states that the commission of Douglas Elliman LLC, a beneficiary to the contract, would be paid by the purchaser pursuant to the separate agreement.

Kislin/Franklin Place LLC's Cross-Motion for Summary Judgment

Summary judgment is a drastic remedy which is granted only when the party seeking summary judgment has established that there are no triable issues of fact. *Andre v Pomeroy*, 35 NY2d 361, 364 (1974). The burden then shifts to the motion's opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact.” *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006). “In considering a summary judgment motion, evidence should be analyzed in the light most favorable to the party opposing the motion.” *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997).

In order to state a claim for a brokerage commission, “a broker must prove (1) that he or

she is duly licensed, (2) that he or she had a contract, express or implied, with the party to be charged with paying the commission, and (3) that he or she was the 'procuring cause' of the sale." *Buck v Cimino*, 243 AD2d 681, 684 (2d Dept 1997), citing *Greene v Hellman*, 51 NY2d 197, 206 (1980).

Applying the above principles to the within case, defendants Kislin and Franklin Place LLC's cross-motion for summary judgment is denied, as they failed to prove entitlement to judgment of dismissal as a matter of law; specifically, cross-moving defendants failed to establish that they are not responsible for the payment of plaintiff's brokerage commission. Plaintiff's provision of the actual contract of sale for the subject property is significant as it clearly obligates the purchaser to pay Douglas Elliman a commission:

This Agreement was brought about by direct negotiation between Seller and Purchaser without the intervention or assistance of any person, firm company or corporation or broker or otherwise, other than Sergio Rubinstein of Douglas Elliman, 205 East 42nd Street, New York, New York 10017 and who has been designated by Purchaser as a Broker and whose commission shall be paid by Purchaser pursuant to separate agreement...

[See Motion to Amend, Cole Aff, Exh. G, p.11, para. 22].

Significantly, the contract of sale is signed by David Kislin, for the purchaser, Sleepy Hudson, LLC. The court notes that this contract of sale, which arguably conclusively establishes that a commission is owed to plaintiff from the purchaser of the subject property (amount to be determined by separate agreement), is curiously not addressed at all by defendants Kislin/Franklin Place LLC in their motion for summary judgment, notwithstanding, as signatory for the purchaser, Kislin undoubtedly (as well as his attorney on the purchase) had a copy of the contract. It appears

that such omission was deliberate, as it is alleged that defendant Kislin failed to produce the contract in discovery, and plaintiff only obtained it after service of a subpoena on a non-party (the seller's attorney). Plaintiff claims that neither Kislin, nor his attorney Robert Flink (on the purchase of the subject property) responded to plaintiff's subpoena duces tecum. If true, this conduct is sanctionable, and will not be tolerated. In accordance with the above, defendants' cross-motion for summary judgment is denied.

CONCLUSION AND ORDER

Accordingly, it is

ORDERED that the cross-motion of defendants David Kislin and Franklin Place LLC for summary judgment is denied; it is further

ORDERED that plaintiff's motion to amend the pleadings is granted to the extent that plaintiff may serve amended pleadings adding as defendants Sleepy Hudson LLC and Ascendance Development LLC, as well as adding a third party beneficiary cause of action, ***provided that plaintiff serves such amended pleadings within 30 days of entry of this order***, or the motion to amend will be deemed denied; defendants shall serve answers/amended answers within 30 days of service of the amended pleadings; it is further

ORDERED that ***within 10 days of receipt of the newly added defendants' answers***, all discovery exchanged in this case to date, including deposition transcripts, shall be served upon such new parties, as well as any additional demands for discovery shall be served; it is further

ORDERED that any remaining discovery shall be ***expedited*** and completed ***within 45 days of service of newly added defendants' answers***; it is further

ORDERED that defendants Kislin and Franklin Place LLC shall provide any outstanding discovery within 30 days; **and shall review all previous discovery productions for accuracy and completeness, and shall provide an affidavit made under penalties of perjury from defendant Kislin that all previous discovery submissions are true, accurate, and complete, within 30 days of service of this order, with notice of entry; with a submission (consisting *inter alia* affidavit, affirmation and memorandum of law) as to why sanctions should not be imposed on Kislin and Franklin Place LLC for failure to comply with the subpoena duces tecum; it is further**

ORDERED that *all parties shall appear for a discovery compliance conference on September 12, 2008, at 9:30 a.m., Room 428, 60 Centre Street, New York, NY; it is further*

ORDERED that a note of issue shall be served and filed on or before September 30, 2008; it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy of this order upon all parties with notice of entry.

Dated: July 14, 2008

FILED
 AUG 13 2008
 COUNTY CLERK'S OFFICE
 NEW YORK

Hon. Doris Ling-Cohan, J.S.

S:\Supreme Court\Summary Judgment\douglas elliman. kislin\motion to amend complaint. cross motion sj.wpd