

NRT N.Y., Inc. v B&G Hampton Props. LLC
2008 NY Slip Op 32351(U)
August 12, 2008
Supreme Court, New York County
Docket Number: 0600380/2006
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN

PART 7

Justice

NRT NEW YORK, INC. d/b/a THE CORCORAN GROUP,

INDEX NO. 600380/06

Plaintiff,

- v -

MOTION DATE 2/22/08

MOTION SEQ. NO. 003

B&G HAMPTON PROPERTIES LLC, ANNE BORSCH, JAMES GRIFFO, ANDREA KRINGSTEIN and RICHARD KRINGSTEIN,

MOTION CAL. NO. 100

Defendants.

The following papers, numbered 1 to 14 were read on this motion and cross motions for summary judgment

Notice of Motion— Affidavits — Exhibits A-H

PAPERS NUMBERED

1-2, 2a

Notice of Cross Motion— Answering Affidavits — Exhibits A-M

3-5

Notice of Cross Motion— Answering Affidavits — Exhibits A-M

6-7

Answering Affidavits to Cross Motions— Exhibit A, Exhibits A-C

8-11

Replying Affirmations — Exhibit A

12-14

FILED

AUG 19 2008

COUNTY CLERK'S OFFICE
NEW YORK

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

Cross-Motions (2): Yes No

Upon the foregoing papers, It is ordered that this motion and cross motions are decided in accordance with the annexed memorandum decision and order.

MICHAEL D. STALLMAN
J.S.C.

Dated: 8/12/08
New York, New York


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: IAS PART 7**

-----X
NRT NEW YORK, INC. d/b/a THE CORCORAN GROUP,

Plaintiff,

Index No. 600380/2006

- against -

B&G HAMPTON PROPERTIES, LLC, ANNE BORSCH,
JAMES GRIFFO, ANDREA KRINGSTEIN, and RICHARD
KRINGSTEIN,

Defendants.

Decision and Order

FILED

AUG 19 2008

COUNTY CLERK'S OFFICE
NEW YORK

-----X
HON. MICHAEL D. STALLMAN, J.:

In this action, plaintiff NRT New York, Inc. d/b/a The Corcoran Group (Corcoran) seeks to recover a real estate broker's commission allegedly due from the sale of property in the Hamptons owned by defendant B&G Hampton Properties, LLC (B&G). Defendants Anne Borsch and James Griffo are the alleged principals of B&G. Defendants Andrea and Richard Kringstein purchased the property from B&G.

BACKGROUND

It is undisputed that, in June 2005, B&G executed a six-month "Exclusive Right to Sell Agreement" with Corcoran for the sale of property located in Bridgehampton, at a gross price of \$7.45 million. It is undisputed that the property was sold to defendants Andrea and Richard Kringstein for \$7.75 million, pursuant to a Contract of Sale made as of November 5, 2005. Borsch allegedly informed Corcoran that the purchasers were friends of the builder, Joe Farrell of Farrell Construction Corporation, but did not inform Corcoran of their identity. Corcoran later learned that the Kringsteins had purchased the property. It is undisputed that Andrea Kringstein contacted

Corcoran in August 2005, and discussed the property with Judi Desiderio, a Corcoran Broker. However, Andrea Kringstein informed Desiderio in September 2005 that she and her husband were not interested in the property. B&G offered to pay Corcoran a 1% commission on the sale, but Corcoran demanded a 5% commission.

On February 7, 2006, Corcoran commenced this action for breach of contract and tortious interference with contract. B&G, Borsch, and Griffio asserted cross claims against the Kringsteins for contractual indemnification, common-law indemnification, and contribution. The Kringstein asserted a cross claim against B&G for contractual indemnification.¹

By decision and order dated October 26, 2006, this Court denied Corcoran's motion for summary judgment in its favor, dismissed the first cause of action against Borsch and Griffio, and otherwise denied defendants' respective cross motions for summary judgment. Corcoran now moves again for summary judgment in its favor. B&G, Borsch, and Griffio oppose Corcoran's motion, and cross-move for summary judgment dismissing the complaint and for summary judgment in their favor on their cross claims against the Kringsteins. The Kringsteins cross-move for summary judgment dismissing the complaint as against them, and for summary judgment against B&G for contractual indemnification.

DISCUSSION

The standards for summary judgment are well settled.

"[T]he 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 demonstrate the absence of any material issues of fact. Failure to make such prima

¹ Although the heading of the Kringstein's answer purports to assert a cross claim against B&G, Borsch, and Griffio, the allegations following the heading and the prayer for relief clarify that the cross claim is asserted only against B&G.

facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action”

Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986)(internal citations omitted).

As a threshold matter, B&G, Borsch, and Griffo argue that Corcoran’s motion should be denied because Corcoran is making a second motion for summary judgment. “[M]ultiple summary judgment motions in the same action should be discouraged in the absence of newly discovered evidence or sufficient cause.” Public Serv. Mut. Ins. Co. v Windsor Place Corp., 238 AD2d 142, 143 (1st Dept 1997). Given that the parties conducted discovery since the first motion and cross motions for summary judgment, and that the parties are again moving for summary judgment, the Court finds sufficient cause to permit the additional summary judgment motion and cross motions.

I.

It is undisputed that Corcoran is a licensed real estate broker, and that B&G executed an “Exclusive Right to Sell Agreement” for the Bridgehampton property “for a period of six (6) months, beginning June 11, 2005 and ending December 11, 2005 . . .” (Agreement). Margolin Affirm., Ex

B. Paragraph 3 of the Agreement states:

“The commission will be five [percent] (5%) of the actual selling price. The commission will be earned when a ready, willing, and able buyer is procured, and you have agreed to the price and terms. The commission will be due upon title closing as follows: (a) if the property is sold by [Corcoran], 100% of the commission shall be distributed to [Corcoran]; (b) if the property is sold by an agency with whom [Corcoran] has a co-broke agreement, the commission shall be distributed 50% to the selling broker and 50% to [Corcoran], (c) if the property is sold by an agency with whom [Corcoran] does not have a co-broke agreement, a commission of five [percent] (5%) shall be due and payable to [Corcoran] upon demand. If you [B&G] should sell the property through your sole efforts a one [percent] (1%) commission shall be due and payable to [Corcoran] upon demand. Should closing of title not

occur for any reason whatsoever, except willful default of the Seller, there shall be no commission due. In the event that the Seller defaults willfully, the commission shall be payable upon demand.”

See Ibid. The Contract of Sale between B&G and the Kringsteins was made as of November 5, 2005, which was during the period of exclusivity. Margolin Affirm., Ex F.

“[A]n exclusive right to sell agreement entitles the broker to receive a commission on a sale to any purchaser, whether or not the broker played a part in the negotiations.” Rachmani Corp. v 9 E. 96th Street Apt. Corp., 211 AD2d 262, 268 (1st Dept 1995); see Far Realty Assocs. Inc. v RKO Delaware Corp., 34 AD3d 261, 262 (1st Dept 2006); Audrey Balog Realty Corp. v East Coast Real Estate Dev., 202 AD2d 529 (2d Dept 1994). Thus, Corcoran is entitled to a commission from the sale of the property at issue to the Kringsteins. B&G, Griffo, and Borsch’s argument that Corcoran was not a procuring cause of the ultimate sale, which Corcoran argued in its prior motion for summary judgment, is not a valid defense to Corcoran’s right to a commission.

Corcoran argues that it is entitled to a 5% commission because B&G did not sell the property due to its sole efforts, but rather sold the property with the aid of Joe Farrell. Alternatively, Corcoran asserts that it is entitled to a 5% commission because the property was sold by an agency, i.e., Joe Farrell, with whom Corcoran had no co-broke agreement. Corcoran submits a printout from the website of the New York Department of State, which indicates that Joseph G. Farrell is a license real estate broker. Margolin Affirm., Ex H.

B&G, Borsch, and Griffo claim that Anne Borsch authorized Joe Farrell to act on behalf of B&G when he arranged the sale of the property, citing Limited Liability Company Law § 102 (c). Consequently, they argue that B&G, through Farrell, sold the property through B&G’s sole efforts. In addition, they argue that the Court’s prior decision denying Corcoran’s motion for summary

judgment ruled that Corcoran was entitled to a 5% commission only in the three specific instances mentioned in the Agreement: if Corcoran procures a buyer for B&G on its own; if it procures a buyer for B&G with another agency under a co-brokerage agreement (in which case the 5% commission is shared with that agency); or if another agency procures a buyer for B&G.

B&G, Borsch and Griffo fail to raise a triable issue of fact that Anne Borsch authorized Farrell to act on B&G's behalf. At her EBT, Borsch testified as follows:

- “Q. . . . Does or did Joe Farrell or his company ever have any interest in B&G?
 A. They don't have a direct interest, but we were business partners on the deal, and he benefitted from the sale of the property.
 Q. You shared in the profit?
 A. We did.
 Q. Is that pursuant to written agreement?
 A. No.
 Q. A handshake deal?
 A. Yes.
 Q. What was Mr. Farrell's percentage of the deal?
 A. We split the profits.”

Margolin Affirm. ¶ 14 (f); Margolin Opp. Affirm., Ex C, at 17. Borsch further testified:

- “Q. Did you ever sign an authorization in writing for him [Farrell] to be your or B&G's agent in connection with the sale of this property?
 A. No.
 Q. Had Mr. Farrell ever acted as an agent for you in connection with the sale of any other property?
 A. No. Joe did not act as my agent. He acted my [*sic*] business partner in negotiating the deal.”

Margolin Affirm. ¶ 14 (i); Margolin Opp. Affirm., Ex C, at 20.

Borsch's testimony does not support the contention that she authorized Joe Farrell to act on B&G's behalf, as an authorized agent of a limited liability company. Assuming Borsch's testimony were true, her testimony could establish, at best, that B&G and Farrell formed a joint venture or partnership to sell the property. Indeed, Borsch states that, “I on behalf of B&G, considered B&G

and Farrell joint venturers.” Blythe Affirm., Ex B [Anne Borsch Aff.] ¶ 4. In that case, the sale of the property would not be through B&G’s sole efforts, but through the efforts of a joint venture or partnership.

To the extent that Court’s prior decision described the Agreement as providing that Corcoran earned a 5% commission in only three specific instances, it was incorrect. As Corcoran points out, the Agreement states that “[t]he commission will be earned when a ready, willing, and able buyer is procured, and you [B&G] have agreed to the price and terms.” Margolin Affirm., Ex B. Given that B&G granted Corcoran an exclusive right to sell, and that the Agreement also states that “[t]he commission will be five [percent] (5%) of the actual selling price” (*ibid.*), the reasonable interpretation of the Agreement is that Corcoran is due a 5% commission unless B&G sold the property through its sole efforts. The Court’s prior description of Corcoran’s Agreement with B&G was not a correct or reasonable reading of the Agreement, because it would be otherwise impossible to determine the parties’ intention to split the 5% commission on a sale that did not fall within the three specific instances set forth in the Agreement.² The Court also rejects B&G, Borsch, and Griffo’s argument that “sole efforts” means only that B&G did not work with another real estate broker or agency (Blythe Affirm. ¶ 37), which is a strained interpretation of the language “sole efforts.”

In light of this interpretation of the Agreement, the Court need not reach the issue of whether the property was sold by an agency, i.e., Joe Farrell, with whom Corcoran had no co-broke agreement. However, as B&G, Borsch and Griffo point out, the printout from the Department of

² Thus, the law of the case doctrine does not preclude a court from “review[ing] a previously-decided matter where there is a need to correct clear error” (National Mtge. Consultants v Elizaitis, 23 AD3d 630 [2d Dept 2005]).

State, even assuming it is authentic, does not indicate that Farrell was a licensed real estate broker during the negotiations and sale of the property.

The Court grants Corcoran's motion for summary judgment in its favor on the first cause of action against B&G, for a 5% commission upon the \$7.75 million sale price of the property. Corcoran is entitled to prejudgment interest due to B&G's breach of contract. CPLR 5001. Interest shall run from the date when title closed, because that is the date when Corcoran's commission became due. According to Andrea Kringstein, the Kringsteins closed on April 20, 2006. Bernstein Affirm., Ex H [Andrea Kringstein Aff. ¶ 22]. Prejudgment interest is awarded at the statutory rate of 9% per annum, given that plaintiff has not demonstrated entitlement to a different, specific rate of interest. Hugh O'Kane Elec. Co., LLC v MasTec North Am., 45 AD3d 413 (1st Dept 2007); Spodek v Park Property Dev. Assocs., 279 AD2d 467, 468 (2d Dept 2001).

II.

Turning to the Kringsteins' cross motion for summary judgment, the second cause of action against them, for tortious interference with a contract, is dismissed. As in their prior cross motion for summary judgment, the Kringstein argue that they did not proximately cause B&G to breach its Agreement with Corcoran. That is, the Kringsteins argue that their purchase of the property did not prevent B&G from paying Corcoran a 5% commission.

The Kringsteins state that they had no contact with B&G, Borsch, and Griffo until after the they closed on the property. Andrea Kringstein Aff. ¶ 14. Borsch testified at her EBT that she had never met the Kringsteins. Bernstein Affirm., Ex L, at 15. At her EBT she was also asked:

- “Q. Did you consult with the Kringsteins at all before B&G decided to offer the one percent commission to Corcoran as opposed to the five percent commission?
A. No.

- * 9]
- Q. Was your decision in any way influenced by the Kringsteins, or any conversations with them?
- A. No.”

Id. at 33. Corcoran does not offer any evidence to rebut the Kringsteins’s contention that they did not induce B&G not to pay Corcoran a 5% commission. Corcoran only disputes that the Kringsteins had knowledge of the Agreement with Corcoran. Accordingly, the Kringstein are entitled to summary judgment dismissing the second cause of action.

The Kringsteins also seek summary judgment in their favor on their cross claim against B&G for contractual indemnification. The Contract of Sale provides, in relevant part:

“27. BROKER. Seller and Purchaser each represents and warrants to the other that it has not dealt with any real estate broker in connection with this sale. Seller and Purchaser shall indemnify and defend each other against any costs, claims, and expenses, including reasonable attorneys’ fees, arising out of the breach on their respective parts of any representation or agreement contained in this paragraph. The provisions of this paragraph shall survive Closing, or, if Closing does not occur, the termination of this contract.”

Bernstein Affirm., Ex C. The Kringsteins argue that B&G breached this provision because B&G had a granted Corcoran an exclusive right to sell the property. The Kringsteins also cite page 21 of Borsch’s EBT, where she states, in pertinent part:

“Q. Now, in Paragraph 27 of Exhibit 1, you signed your name to a statement that B&G had not dealt with any broker in connection with this sale.

As you sit here today knowing what you know now, is that a true statement?

A. Could you repeat that question, please?

Q. Yes. In paragraph 27 of Exhibit 1.

A. Right.

Q. You make the statement or you signed your name to the statement that B&G had not dealt with any broker in connection with this sale.

A. That's clearly not true. I mean, we had a relationship with Corcoran and with Judi Desiderio."

Margolin Opp. Affirm., Ex C at 21-22.

B&G, Borsch and Griffo oppose summary judgment because the Kringsteins' answer asserts a cross claim against B&G for indemnification and/or contribution only "in the even[t] the Kringstein's [*sic*] are liable to plaintiff." Margolin Affirm., Ex E. This argument is without merit. "While the general rule is that a party may not obtain summary judgment on an unpleaded cause of action, it is also true that summary judgment may be awarded on an unpleaded cause of action if the proof supports such cause and if the opposing party has not been misled to its prejudice." Weinstock v. Handler, 254 AD2d 165, 166 (1st Dept 1998)(internal citations omitted).

Nevertheless, summary judgment on the Kringsteins' cross claim against B&G is denied. The costs and expenses that the Kringsteins incurred did not arise out of a breach of B&G's representation that it had not dealt with any broker in connection the sale, but rather out of B&G's dispute with Corcoran over a 5% commission. In naming the Kringsteins as defendants, Corcoran believed that the Kringsteins were aware of B&G's Agreement with Corcoran, and the Kringsteins had conspired with Farrell, B&G, Borsch and Griffo to deprive Corcoran of the 5% commission. Thus, the Kringsteins would have been named as defendants even if the B&G had disclosed its Agreement with Corcoran, because that disclosure would only have reinforced Corcoran's belief of a conspiracy among the defendants. The Court grants reverse summary judgment to B&G dismissing this cross claim.

III.

The branch of B&G, Borsch, and Griffo's motion for summary judgment dismissing the

complaint is denied. As discussed in Section I, supra, Corcoran is entitled to a 5% commission from B&G from the sale of the Bridgehampton property.

The branch of B&G, Borsch, and Griffo's motion for summary judgment in their favor on their cross claims against the Kringsteins is denied. Three cross claims are asserted against the Kringsteins, but B&G, Borsch, and Griffo address only the first cross claim for contractual indemnification pursuant to the Contract of Sale. As discussed above in Section II, supra, the costs and expenses that B&G incurred did not arise out of a breach of B&G's representation that it had not dealt with any broker in connection the sale, but rather out of B&G's dispute with Corcoran over a 5% commission. The indemnification provision Paragraph 27 is therefore inapplicable here. Accordingly, the Court grants reverse summary judgment to the Kringsteins dismissing the first cross claim against them.

The Court also grants reverse summary judgment dismissing the second and third cross claims against the Kringsteins, for common-law indemnification and contribution. Because the Kringsteins have demonstrated that they played no role in inducing B&G to breach its Agreement with Corcoran, there is no factual or legal basis for common-law indemnification or contribution against the Kringsteins.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted on the first cause of action, and the Clerk is directed to enter judgment against defendant B&G Hampton in the amount of \$387,500, with prejudgment interest at the statutory rate from the date of April 20, 2006 until entry of judgment, and thereafter at the statutory rate; and it is further

ORDERED that the cross motion for summary judgment by defendants B&G Hampton Properties, LLC, Anne Borsch, and James Griffo is denied; and it is further

ORDERED that the cross motion for summary judgment by defendants Andrea Kringstein and Richard Kringstein is granted, and the second cause of action of the complaint is dismissed, and the cross claims by defendants B&G Hampton Properties, LLC, Anne Borsch, and James Griffo against these defendants are dismissed; and it is further

ORDERED that the cross claim of defendants Andrea Kringstein and Richard Kringstein against defendant B&G Hampton Properties, LLC is dismissed.

Dated: August 12, 2008
New York, New York

ENTER:



J.S.C.

MICHAEL D. STALLONI
J.S.C.

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