

Naldi v Grunberg

2008 NY Slip Op 33612(U)

December 10, 2008

Sup Ct, NY County

Docket Number: 600707/08

Judge: Herman Cahn

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

PRESENT: Cahn

PART 49

Index Number : 600707/2008

NALDI, ROBERT

VS

GRUNBERG, MICHAEL

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

_____ is motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits _____

Replying Affidavits _____

FILED

DEC 15 2008

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE

Dated: 12/10/08

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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 49

-----X
NALDI, ROBERT

Plaintiff,

-against-

Index No. 600707/08

GRUNBERG, MICHAEL and
GRUNBERG 55 LLC,

Defendants.

FILED

X DEC 15 2008

COUNTY CLERK'S OFFICE
NEW YORK

-----X
HERMAN CAHN, J.:

Defendants move to dismiss the complaint for failure to state a cause of action. CPLR 3211 (a) (7).

BACKGROUND

This action is based on defendants' alleged breach of plaintiff's right of first refusal in connection with the purchase and sale of real property located at 15-19 West 55th Street, New York, New York. The complaint alleges that defendants' real estate agent, acting on behalf of defendants, acknowledged plaintiff's offer to purchase defendants' property for \$50 million, in an e-mail. The broker is alleged to have made a counteroffer of \$52 million and to have granted plaintiff a right of first refusal in consideration of plaintiff's continuing interest in the property in that same e-mail message.

Plaintiff alleges that, relying on the right of first refusal granted in the broker's e-mail, he engaged in a due diligence inquiry regarding the property and incurred significant expenses in the process. Despite the broker's representation, defendants sold the property to a third party for \$52 million, without giving plaintiff an opportunity to exercise the right of first refusal.

Plaintiff now seeks damages from defendants for their asserted breach of the right of first refusal.

DISCUSSION

On a motion to dismiss for failure to state a cause of action, every fact alleged in the complaint must be assumed to be true, and the complaint is to be liberally construed. *M. Sobol, Inc. v Goldman*, 259 AD2d 526 (2d Dept 1999). A complaint should not be dismissed so long as a cause of action exists. *Id.*

Defendants move to dismiss on the ground that the complaint fails to plead facts sufficient to establish a contractual right of first refusal. Construing the pleading liberally, however, it sets forth a claim for the existence of a right of first refusal, and defendants' breach. *See* Compl ¶¶ 4-14. Although a series of communications are alleged to have followed this e-mail, the subsequent missives do not diminish the sufficiency of plaintiff's statement of a claim for breach of a right of first refusal.

Defendants also claim that even if a contractual right of first refusal were found to exist, the real estate broker's e-mail, in which the right was allegedly created, is not permitted by the recent amendments to the general statute of frauds. They further assert that the broker did not have authority to bind them, as required by the more specific real estate statute of frauds.

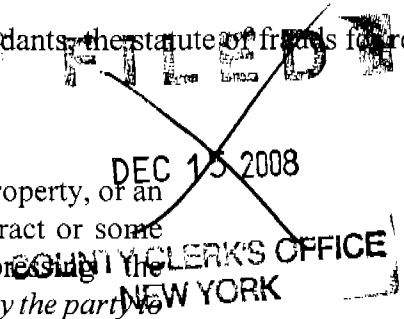
With respect to the validity of an e-mail signature, defendants argue that recent amendments to the General Obligations Law (GOL) § 5-701 (b), which permit e-mail signatures in certain specific financial transactions, are not applicable to real estate transactions, which are governed by GOL § 5-703, and that the broker's e-mail signature is therefore inadequate to bind

the defendants to the right of first refusal granted in an e-mail message. Although the recent amendments to the statute of frauds did create a new category of financial transactions which may be signed by electronic means, nothing in the recent amendments prohibits the parties to a real estate transaction from granting a right of first refusal via e-mail.

Generally, an e-mail will be considered a "signed writing" if the name of the party to be charged appears at the end of the e-mail. *Stevens v Publicis, S.A.*, 50 AD3d 253 (1st Dept 2008).

With respect to the broker's authority to bind the defendants, the statute of frauds for real estate transactions, states, in relevant part:

A contract for . . . the sale, of any real property, or an interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, *subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing.*



GOL § 5-703 (2) (emphasis added). The issue of the broker's authority to bind the defendant, i.e. whether the broker was defendant's "lawful agent" raises an issue of fact which is more appropriately determined after discovery has been completed.

The branch of the motion which seeks dismissal of the complaint against the individual defendant is granted. The complaint alleges defendant Michael Grunberg's ownership, domination and control of the corporate defendant in a conclusory fashion. A cause of action which seeks to impose personal liability on corporate officials for the corporation's conduct is governed by an enhanced pleading standard, requiring an allegation that the corporate officer was acting in his own behalf and was motivated by his own interests, rather than on behalf of the corporation and in the corporation's interest. *Petkanas v Kooyman*, 303 AD2d 303, 305 (1st

Dept 2003). Plaintiff has failed to meet this heightened pleading requirement.

Accordingly, it is

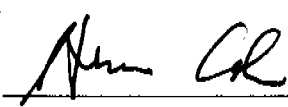
ORDERED that defendants' motion to dismiss is granted, in part and the complaint is dismissed against the individual defendant Michael Grunberg; and it is further

ORDERED that the motion is denied in all other respects, and it is further

ORDERED that defendants shall file a verified answer to the complaint within 20 days of service of a copy of this order upon their attorneys with notice of entry.

Dated: December 10, 2008

FILED
DEC 15 2008
CLERK'S OFFICE
NEW YORK



J.S.C.