

<b>Schacker Real Estate Corp. v Vermont Partners, Ltd.</b>
2009 NY Slip Op 30384(U)
February 13, 2009
Supreme Court, Suffolk County
Docket Number: 19600-2008
Judge: Melvyn Tanenbaum
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SHORT FORM ORDER

INDEX NO. 19600-2008

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

PRESENT:  
HON. MELVYN TANENBAUM  
Justice

MOTION #003 004 **Mot. D**  
R/D: 10/17/08  
S/D: 12/04/08

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SCHACKER REAL ESTATE CORP.,

Plaintiff,

-against-

VERMONT PARTNERS, LTD.; ANTHONY  
COLLETTI; and JOSEPH GARTNER,

Defendant.

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PLTF'S/PET'S ATTY:  
REISMAN PEIREZ & REISMAN, LLP  
1305 Franklin Avenue  
PO Box 119  
Garden City, NY 11530

DEFT'S/RESP'S ATTY:  
KLEIN & VIZZI, LLP  
370 Sunrise Highway, Suite B  
West Babylon, NY 11704

Upon the following papers numbered 1 to 22 read on this motion for an order pursuant to CPLR §3212  
Notice of Motion/Order to  
Show Cause and supporting papers 1-12; Notice of Cross Motion and supporting papers 13-18 Answering Affidavits  
and supporting papers 19-20 Replying Affidavits and supporting papers 21-22 Other \_\_\_\_\_; ~~(and after hearing~~  
~~counsel in support and opposed to the motion)~~ it is,

**ORDERED** that this motion by plaintiff SCHACKER REAL ESTATE CORP. ("SCHACKER") for an order pursuant to CPLR Section 3212 granting partial summary judgment against the defendant VERMONT PARTNERS, LTD. ("VPL") on the first and second causes of action set forth in plaintiff's complaint and the cross motion by defendants VERMONT PARTNERS, LTD., ANTHONY COLLETTI ("COLLETTI") and JOSEPH GARTNER ("GARTNER") for an order pursuant to CPLR Section 3212 granting summary judgment dismissing plaintiff's complaint or in the alternative dismissing the action against defendant "GARTNER" are determined as follows:

On November 6, 2007 defendant/seller "VPL" entered into an exclusive brokerage agreement with plaintiff/broker "SCHACKER" to sell "VPL's" commercial realty. The agreement provides that if the premises are sold "the commission shall be 7% (6%(six) if procured by Schacker Realty) of the full sale price due and payable in full on closing of title." In January, 2008 Franchise Realty Corp. introduced PF Melville Realty Co., LLC ("PF Melville") as a potential buyer of the premises. By contract dated May 21, 2008 "PF Melville" agreed to purchase the property for \$4.168 million. By deed dated June 3, 2008 title to the premises was transferred to the purchaser. At closing the purchaser "PF Melville" paid \$388,000.00 cash and executed a purchase money mortgage in favor of the seller defendant "VPL" in the sum of \$3.78 million.

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Plaintiff complaint seeks to recover the brokerage commission earned pursuant to the parties agreement claiming that defendant "VPL" has refused to pay the 7% commission due in the sum of \$291,760. Plaintiff's motion seeks an order granting partial summary judgment against "VPL" on the first and second causes of action for recovery of the commission and reasonable attorneys fees.

In support plaintiff submits two affidavits from an associate broker and claims that partial summary judgment must be granted against "VPL" for the 7% brokerage commission based upon the purchase price of \$4.168 million. Plaintiff claims that the commission agreement is clear and unambiguous and requires the seller to pay the commission based upon the "full sale price due and payable in full at closing." Plaintiff asserts that "SCHACKER" (and Franchise Realty Corp. who introduced the purchaser to the seller) are entitled to the 7% commission based on the full purchase price rather than the down payment amount (\$388,000.00) made by the purchaser at closing. It is plaintiff's position that "VPL's" decision to finance the transaction by holding a purchase money mortgage in the sum of \$3.78 million did not reduce the commission amount since the commission agreement clearly states that the commission is earned based upon the "full sale price". Plaintiff claims that partial summary judgment must be granted against "VPL" for recovery of the commission (first cause of action) and for reasonable attorneys fees (second cause of action) since paragraph 16 of the May 21, 2008 contract of sale provides for an award of reasonable attorneys fees arising out of the seller's breach. Plaintiff contends that a hearing must be conducted to determine the amount of reasonable attorneys fees to be awarded "SCHACKER".

In opposition defendants submit two affidavits from defendant "COLLETTI" and an affidavit from defendant "GARTNER" and claim that plaintiff's complaint must be dismissed since pursuant to the terms of the commission agreement "SCHACKER" is not entitled to the commission amount set forth in the complaint. Defendants claim that the commission amount is to be calculated based upon the monies "payable in full on closing of title". Defendants assert that the purchaser paid the sum of \$388,000.00 at closing and therefore plaintiff's commission is limited to 6% of that amount. It is defendants position that the brokerage agreement clearly provides that "SCHACKER" is only entitled to a commission based upon that portion of the sales price paid at closing and therefore plaintiff's motion for partial summary judgment must be denied and the complaint dismissed. Defendants also argue that if an ambiguity exists, the contract provision must be construed against the plaintiff since "SCHACKER's" attorney drafted the agreement. Defendant "GARTNER" asserts that the complaint must be dismissed as to him, since he has never been a "VPL" officer, shareholder or signatory on any "VPL" account.

CPLR §3212(b) states that the motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth

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evidentiary facts, cannot support or defeat a motion by summary judgment ( OLAN v. FARRELL LINES INC., 105 AD 2d 653, 481 NYS 2d 370 (1<sup>st</sup> Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); SPEARMAN v. TIMES SQUARE STORES CORP., 96 AD 2d 552, 465 NYS 2d 230 (2<sup>nd</sup> Dept., 1983); Weinstein-Korn-Miller, NEW YORK CIVIL PRACTICE Sec. 3212.09)). Moreover, it is well settled that a party opposing a motion for summary judgment 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 AD 2d 1014, 435 NYS 2d 340 (2<sup>nd</sup> Dept., 1981)).

In the absence of an agreement to the contrary, a real estate broker is entitled to a commission when (it) produces a buyer ready, willing and able to purchase on terms acceptable to the seller (Lane-Real Estate Dept. Store v. Lawlet Corp., 28 NY2d 36, 42, 319 NYS2d 836 (1971)). However a broker's right to a commission may be varied by an agreement as where the parties agree that the commission would be owing "if and when title passes" (Lane-Real Estate Dept. Store v. Lawlet Corp., supra; Graff v. Billet, 110 AD2d 355, 475 NYS2d 122 (2<sup>nd</sup> Dept., 1984) affirmed 64 NY2d 899, 487 NYS2d 733 (1984)). Under such circumstances the fact that a broker produces a "ready, willing and able" buyer is irrelevant since the commission can only be earned pursuant to the agreement between the parties (Garnham & Han Real Estate Brokers, Inc. v. Oppenheimer, 148 AD2d 493, 538 NYS2d 837 (2<sup>nd</sup> Dept., 1989)).

In constructing the terms of a contract, the judicial function is to give effect to the parties intentions (MALLAD CONSTRUCTION CORP. v. COUNTY FEDERAL SAVINGS & LOAN ASSOCIATION, 32 NY 2d 285, 344 NYS 2d 925 (1973)). In interpreting a contract, the court must give all the provisions of the contract a reasonable meaning and due consideration must be given to the purpose of the parties in making the agreement (SELIGMAN v. MOUNT ARAFAT CEMETERY, INC., 112 AD 2d 928, 492 NYS 2d 445 (2<sup>nd</sup> Dept., 1985)). An agreement should be read as a whole so as to give each section meaning. Where a contract's language admits of only one reasonable interpretation, the court need not look to extrinsic evidence of parties intent or to rules of construction to ascertain the contract's meaning (BETHLEHEM STEEL CO. v. TURNER CONSTRUCTION CO., 2 NY2d 456, 161 NYS 2d 90 (1957)). However where the language implied is not free from ambiguity, the intent of the parties becomes a matter of inquiry and consideration must be given to the sense in which the words in issue were used, the relations of the parties and all the surrounding circumstances (See BRAY TERMINALS, INC. v. GRAND UNION CO., 74 AD 2d 965, 425 NYS 2d 886 (1<sup>st</sup> Dept., 1980)).

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The commission agreement provides:

“In the event of a sale, the commission shall be 7% (6%(six) if procured by Schacker Realty) of the **full sale price due and payable in full on closing of title.**” (emphasis supplied).

The full sale price set forth in the contract is \$4.168 million. At closing of title the full price was paid by the purchaser by payment of the down payment required and by execution of the purchase money mortgage. Pursuant to the terms of the commission agreement the broker became entitled to the commission which was 7% of the full sale price which was \$4.168 million. Plaintiff “SCHACKER” is therefore entitled to an order granting partial summary judgment for the commission earned at closing which amounts to \$291,760.00.

Plaintiff is also entitled to partial summary judgment with respect to the second cause of action seeking recovery of reasonable attorneys fees based upon the brokerage agreement provision which grants the prevailing party in litigation seeking recovery of the commission an award for reasonable attorneys fees.

With respect to defendant “GARTNER’s” cross motion, there is no relevant, admissible evidence submitted in opposition to “GARTNER’s” application which seeks to have the complaint dismissed against him. Defendant’s motion to dismiss the complaint against “GARTNER” must therefore be granted. Accordingly it is

**ORDERED** that plaintiff’s motion for an order pursuant to CPLR Section 3212 granting partial summary judgment against the defendant “VPL” with respect to the first two causes of action is granted, and it is further

**ORDERED, ADJUDGED AND DECREED** that the Clerk of the County of Suffolk is directed to enter judgment in favor of plaintiff SCHACKER REAL ESTATE CORP., 48 South Service Road, Suite 103, Melville, NY 11747 and against defendant VERMONT PARTNERS, LTD., 449 Hayes Drive, Hardwick, Vermont 05843 in the sum of \$291,760.00 with interest from June 3, 2008 \$\_\_\_\_\_ together with \$\_\_\_\_\_ costs and disbursements to be taxed and inserted by the Clerk totaling in all \$\_\_\_\_\_ and that plaintiff have execution therefor, and it is further

**ORDERED** that the issue of reasonable attorneys fees shall be reserved to the trial of this action against Anthony Colletti the remaining defendant, and it is further

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**ORDERED** that defendants cross motion for an order pursuant to CPLR Section 3212 is granted solely to the extent that the complaint is hereby dismissed as against defendant JOSEPH GARTNER. The action is otherwise severed and continued.

Dated: February 13, 2009

**MELVYN TANENBAUM**

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J.S.C.