Metro Realty Servs., LLC v Old Country Realty Corp.
2009 NY Slip Op 30462(U)
February 23, 2009
Supreme Court, Nassau County
Docket Number: 019549/05
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA
Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

METRO REALTY SERVICES, LLC and
AIRECO REAL ESTATE CORP.,

Plaintiffs,

INDEX No. 019549/05

MOTION DATE: Dec. 12, 2008
Motion Sequence # 005

-against-

OLD COUNTRY REALTY CORP. and
DAVID ZHANG,

Defendants.

The following papers read on this motion:

Notice of Motion.................................... X
Affirmation in Opposition......................... X
Reply Affirmation X

This motion, by defendants, for an order pursuant to CPLR 3212 for summary judgment dismissing the complaint as against the moving defendants, and granting such other and further relief as this Court deems just and proper, is determined as hereinafter set forth.

FACTS

This action involves a claim for a broker commission pertaining to sale of commercial property. On June 6, 2005, the plaintiff, Aireco Real Estate Corp. (hereinafter

"Aireco"), and the defendants, Old Country Realty Corp., (hereinafter "Old Country") and its sole shareholder David Zhang (hereinafter "Zhang"), entered into an Exclusive Real Estate Agreement for the sale of the commercial property owned by Old Country. In said agreement Old Country granted Aireco an exclusive right to sell its property from the date of execution until October 5, 2005, and in return Aireco would receive a commission based upon a specified schedule.

Plaintiffs' complaint alleges that the defendants failed to pay plaintiffs Aireco and co-broker Metro Realty Services, LLC (hereinafter as "Metro"), the sales commission owed to them for their procurement of a purchaser, A. Joseph Realty Corp., whom the plaintiffs assert was a ready, able and willing buyer for defendants' property. However, the property was not sold to the aforementioned purchaser. In the interim, the Exclusive Real Estate Agreement expired. Plaintiffs claim that defendants breached their contract by failing to pay the commission, and breached the implied contract for good faith dealing by refusing to cooperate and attempting to "buy-off" the plaintiff Aireco. The property was later sold to another buyer allegedly procured by another broker.

DEFENDANTS' CONTENTIONS

The defendants assert that plaintiffs failed to prove a prima facie claim for a brokerage commission, because they failed to establish that the subject purchaser (A. Joseph Realty Corp.) was ready, willing and able to buy defendants' property on the terms set forth by the defendants prior to the expiration of the exclusive agency; and that plaintiffs failed to show that there exists an agreement, a "meeting of minds," between the said purchaser and defendants either prior to or after the expiration of the agency agreement.

The defendants argue that the plaintiffs failed to state a cause of action for breach of contract against Zhang; and that the parties to the brokerage agreement was between Old Country and Aireco, and not Zhang as individual in his own capacity.

PLAINTIFFS' CONTENTIONS

The plaintiffs argue that the motion for summary judgment should be denied as premature, pursuant to CPLR 3212(f), that defendants are trying to prevent plaintiffs from conducting discovery, and, thereby preclude the Court from considering same; and that

further discovery will clearly and unequivocally prove defendants' "bad faith" and establish the only reason for failing to execute the contract of sale - avoiding to pay the brokerage commission.

Further, the plaintiffs assert that there are substantial issues of fact which remain to be resolved: whether Zhang acted in bad faith and committed fraud when Zhang requested that Mr. Alan J. Light (the principal of A. Joseph Realty Corp.) wait until the subject "brokerage agreement" expired, and when Zhang attempted to "buy-off" Aireco with $10,000. In support, the plaintiffs submitted affidavits of Frank Posillico (listing broker), Andrew Blumenthal (procuring broker), and Mr. Light. The plaintiffs further argue that the defendants did not address the above facts, therefore; they must be deemed to have admitted the facts as a matter of law, and the plaintiffs are entitled to summary judgment.

Finally, the plaintiffs argue that there are sufficient facts to pierce the corporate veil as a matter of law as against Zhang, and that there are sufficient assertions of fraud.

DEFENDANTS' REPLY

Defendant Zhang denies making the settlement offer, and that the evidence of a settlement offer or settlement negotiation is not admissible, as against the public policy, and cannot be used to defeat defendant's summary judgment.

The defendants also argue that the allegation of fraud is not material to the claim for a brokerage commission because the property was not sold to the prospective buyer introduced by plaintiffs; and with respect to the claim that Zhang should be held liable under the doctrine of piercing corporate veil is not contained in the pleadings, plaintiffs did not come forward with any evidence to substantiate such a claim; and an action for piercing a corporate veil is a derivative suit, only permitted when the plaintiff prevails in the action in chief.

DECISION

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in (**Stewart Title Insurance Company, Inc. v Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651, 1994):

> "It is well established that a party moving for summary judgment must make a **prima facie** showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (**Winegrad v New York Univ. Med. Center**, 64 NY2d 851, 853, 487 NYS2d 316, 476 NE2d 642; **Zuckerman v City of New York**, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (**State Bank of Albany v McAuliffe**, 97 AD2d 607, 467 NYS2d 944), but once a **prima facie** showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (**Alvarez v Prospect Hosp.**, 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572; **Zuckerman v City of New York**, **supra**, 49 NY2d at 562, 427 NYS2d 595, 404 NE2d 718)".

"The general rule is that a broker who 'produces a person ready and willing to enter into a contract upon his employer's terms... has earned his commission.'" (**Holiday Management Associates, Inc. v. Albanese**, 173 A.D.2d 775, 775, 570 N.Y.S.2d 643, 2nd Dept., 1991) (citations omitted). "... [T] he broker's right to compensation is not dependent upon the performance of the realty contract." (**Smith v. Walsh**, 209 A.D.2d 398, 399, 619 N.Y.S.2d 578, 2nd Dept., 1994). Furthermore, if parties reached an agreement on all of the essential terms of the contract, then the broker is entitled to a commission. (See **Holzer v. Robbins**, 141 A.D.2d 505, 529 N.Y.S.2d 130, 2nd Dept., 1988). However, " [m] ere agreement as to price on a proposed sale of real property does not constitute a meeting of the minds of buyer and seller so as to entitle the real estate broker to a commission." (**M.A. Salazar, Inc. v. Levy**, 237 A.D.2d 583, 584, 655 N.Y.S.2d 612, 2nd Dept., 1997) (citations omitted). If the parties fail to agree on terms customarily encountered in real estate sales transactions, including the date for contract or closing of title and price, and in the absence of agreement on essential terms, the broker did not earn any commission. (See **Blaufeux v. Paznik**, 162 A.D.2d 573; 556 N.Y.S.2d 762, 2nd Dept., 1990). "Failure to agree on a closing date is not fatal, as the law will presume the closing will take place within a reasonable time. A broker may recover a commission where a seller capriciously refuses to discuss missing terms of a sale and

thwarts its natural progress by wrongfully refusing to proceed." (**Linda M. Kirk Associates, LTD., v. McDonald Equities, Inc.**, 155 A.D.2d 281, 282, 547 N.Y.S.2d 44, 1st Dept., 1989) (citations omitted). Therefore, there is an exception from the general rule. If the employer "capriciously… changes his mind after the purchaser, ready and willing, and consenting to the prescribed terms, is produced, then the broker does not lose his commissions." (**Sibbald v. Bethlehem Iron Co.**, 83 N.Y. 378, 383-84).

In the case at bar, the defendants' argument that A. Joseph Realty Corp. was not ready, willing and able to purchase defendant's property on the terms of the Seller prior to the expiration of the Agency Agreement is based on the showing that the Purchaser rejected the terms in the Proposed Contract, and made his own proposal based on the Purchaser's terms, which the Seller did not agree to; and that the Purchaser withdrew his purchase offer on October 25, 2005. The terms that the Seller did not agree to are the following: a clause indicating that the Seller had to provide a Phase I report at no charge to the Purchaser; and that the Purchaser would be given thirty days after execution of the Contract to cancel it for any or no reason; and that the Seller had to deliver Phase I and II reports no later than 5 days from the date of the contract, and not older than 120 days. These terms are material, and would require Seller to make legal and financial concessions to Purchaser. Moreover, even though the parties agreed on the purchase price, they did not agree on the date for contract and essential terms; and, therefore, there was no meeting of the minds between the parties. Thus, the defendants sustained their burden of establishing its prima facie entitlement to summary judgment dismissing plaintiff's complaint for breach of contract through the submission of evidentiary proof including Zhang's affidavit and other documentary evidence.

However, the evidence submitted by the defendant in opposition to the motion, which included detailed affidavits from Frank Posillico, Andrew Blumenthal and Alan Light raised triable issues of fact as to whether Mr. Zhang capriciously refused to cooperate with Mr. Light and advised Mr. Light that he would not go forward with the contract of sale with the intent to avoid paying commission. There is clearly a factual issue whether Mr. Zhang defrauded the brokers out of the commission, and whether Zhang's refusal to cooperate and execute the revised contract of sale and "1031 Form" was in bad faith and unreasonable. Furthermore, these issues turn on credibility of witnesses which a court may not weigh on a motion for summary judgment unless it clearly appears that issues are not genuine but feigned. (See **Vigliotti v. DeNicola**, 304 A.D.2d 751, 759 N.Y.S.2d 635, 2nd Dept., 2003).

Furthermore, CPLR 3212(f) permits party opposing motion for summary judgment to obtain further discovery under certain circumstances. For the court to delay action on a summary judgment motion on the basis that facts essential to justify opposition to the motion may exist but cannot then be stated, there must be a likelihood of discovery leading to such evidence. (See **Spatola v. Gelco Corp.**, 5 A.D.3d 469, 773 N.Y.S.2d 101, 2nd Dept., 2004). Additionally, denial of the motion will result when the fact is one the opposing party cannot know, as where it turns on the scope of the movant's knowledge of his own agent's act. (See **Franklin Nat. Bank v. DeGiacomo**, 20 A.D.2d 797, 248 N.Y.S.2d 586, 2nd Dept., 1964). But speculation and unsubstantiated allegations are insufficient to defeat such a motion. (See **Judith M. v. Sisters of Charity Hosp.**, 93 N.Y.2d 932, 1999).

Herein, plaintiffs made discovery demands to produce the documents that may resolve the issue of whether Zhang acted in "bad faith" and establish the reason for which the contact of sale was not executed. Affidavits, submitted by the plaintiffs, may demonstrate that there is likelihood that the discovery will lead to evidence proving Zhang's alleged "bad faith" and unreasonableness, when purportedly refusing to cooperate and selling the property to another buyer. Consistent with that are the allegations of the plaintiffs in the complaint that pursuant to the agreement the defendants had an obligation to refer all "offers and inquiries with respect to the property" to Aireco, which defendants admit in their answer. Therefore, contrary to the defendants' assertion, plaintiffs have identified essential facts that are not available to them in order to necessitate further discovery.

The plaintiffs' argument that the defendants never denied or even addressed Mr. Light's and Mr. Posillico's factual allegations contained in their affidavits that Mr. Zhang requested Mr. Light wait until the brokerage agreement expired so that Mr. Zhang could avoid paying the commission, and, therefore, as a matter of law, those allegations should be deemed to have been admitted by the defendants, is without merit. It has been held that " [w] here a key fact appears in the movant's papers and the opposing party does not refer to it, that party is deemed to have admitted it."(**Mascoli v. Mascoli**, 129 A.D.2d 778, 780, 514 N.Y.S.2d 521, 2nd Dept., 1987) (citations omitted). Herein, contrary to the plaintiffs' assertion, the defendants do address the above allegations in their moving papers by arguing that there is no evidence to suggest that defendants acted unreasonably or in bad faith, and by arguing in the reply affirmation that these particular allegations of fraud are not material to the present claims because the property was not sold to the prospective buyer introduced by plaintiffs. Thus, the defendants cannot be held to have admitted those facts, and even though "...the court is permitted to search the record and grant the

defendants summary judgment without the necessity of a cross-motion (See CPLR § 3212(b), **Star v. Badillo**, 225 A.D.2d 610, 638 N.Y.S.2d 791, 2nd Dept., 1996), the plaintiffs are not entitled to summary judgment.

With respect to the issue of holding Zhang personally liable for breach of contract, the defendants have sustained their burden of showing that they are entitled to summary judgment, because there was never a legally binding contract between the plaintiffs and Zhang. Generally, in order for the plaintiffs to hold Zhang personally liable for breach of contract based on the doctrine of piercing the corporate veil, plaintiffs must allege in the complaint that Zhang " [(1)] exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury". (**Hyland Meat Co., Inc. v. Tsagarakis**, 202 A.D.2d 552, 552-53, 609 N.Y.S.2d 625, 2nd Dept., 1994) (citations omitted). Even though " [v] eil-piercing is a fact-laden claim that is not well suited for summary judgment resolution," (**First Bank of Americas v. Motor Car Funding**, 257 A.D.2d 287, 294, 690 N.Y.S.2d 17, 1st Dept., 1999) (citations omitted) and " [u] nder CPLR 3212(f), the court may deny a motion for summary judgment if it appears that 'facts essential to justify opposition may exist but cannot then be stated'" (Id.), the plaintiffs have failed to allege in their complaint that Zhang should be held liable under the doctrine of piercing the corporate veil. Moreover, the plaintiffs have not come forward with evidence that Zhang exercised complete domination over the corporation in their opposition to the moving papers. Plaintiffs' hope that the discovery will uncover facts sufficient to prove Zhang's domination is mere speculation, and cannot be used to defeat the motion for summary judgment. (See, **Judith M. v. Sisters of Charity Hosp.**, 93 N.Y.2d 932 (1999). It is insufficient for the plaintiffs to assert in their opposition that Zhang was the only one to make the business decisions for, and with regard to the corporate defendant. Furthermore, the plaintiffs have not sought evidence from the defendants relating to Zhang's relationship with Old Country, the observance of corporate formalities, and financial records that could show whether Zhang was Old Country's alter ego.

Notwithstanding the foregoing, "... a corporate officer may be held personally liable for committing fraud on the corporation's behalf." (**First Bank of Americas**, 257 A.D.2d at 294, (citations omitted). "It is well settled that agents or officers of a corporation may be held personally liable for their tortious acts committed in the performance of their corporate duties." (**Ideal Steel Supply Corp. v. Fang**, 1 A.D.3d

562, 563, 767 N.Y.S.2d 644, 2nd Dept., 2003) (citations omitted). (See also, **I. Towjer, Inc. v. Tarran**, 236 A.D.2d 518, 654 N.Y.S.2d 626, 2nd Dept., 1997) (denying summary judgment to sole shareholder and officer of corporate defendant, where the former negotiated the allegedly fraudulent transaction) and **American Express Travel Related Servs. Co. v. North Atl. Resour.**, 261 A.D.2d 310, 311, 691 N.Y.S.2d 403, 1st Dept., 1999) (citations omitted) (affirming that "a corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced").

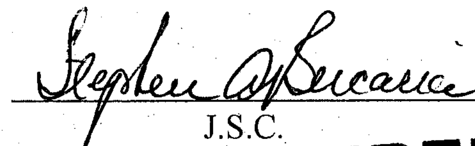
In the present case, the fifth cause of action in the plaintiffs' complaint appears to establish a fraud claim as against both defendants. The defendants met their burden by showing that there was no contract between the plaintiffs and Zhang in his individual capacity; however, there is a triable issue of fact with respect to whether Zhang should be held personally liable for his actions if they were fraudulent.

The defendants' argument, unsupported by any authority, that the allegation of fraud is not material to the claim for a brokerage commission because the property was not sold to the prospective buyer introduced by plaintiffs, is without merit and contrary to precedents. (See e.g. **Shulman v. Lin**, 99 A.D.2d 856, 472 N.Y.S.2d 777, 3rd Dept., 1984) (allowing the broker to recover his commission when the property was sold to someone else, and finding that the buyer procured by the broker was ready, able and willing to purchase the property), and **Lee Odell Real Estate, Inc. v. Fitzgerald**, 177 A.D.2d 360, 576 N.Y.S.2d 112, 1st Dept., 1991) (finding that it was the seller's intervening fraudulent conduct which effectively blocked the sale to a purchaser procured by the broker, and the property was not sold to that purchaser).

Defendants' motion for summary judgment is **denied**.

The parties are directed to expeditiously proceed with mutual disclosure. A status conference is scheduled for May 7, 2009 at 9:30 a.m. in Chambers of the undersigned.

Dated FEB 23 2009



J.S.C.

ENTERED

FEB 26 2009

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COUNTY CLERK'S OFFICE