

NYC Living Realty, Inc. v 170 E. End Ave., LLC
2009 NY Slip Op 30725(U)
March 30, 2009
Supreme Court, New York County
Docket Number: 109172/08
Judge: Doris Ling-Cohan
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 36

NYC Living

INDEX NO. 109172108

MOTION DATE _____

- v -

MOTION SEQ. NO. 01

170 East End

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for Summary judgment & cross-motion

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

PAPERS NUMBERED

1, 2

Answering Affidavits — Exhibits _____

5, 6

Replying Affidavits _____

3, 4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion & cross-motion for Summary judgment are decided in accordance with the attached memorandum decision.

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

FILED
APR 02 2009
COUNTY CLERK'S OFFICE
NEW YORK

HON. DORIS LING-COHAN

Dated: 3/30/09

[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: IAS PART 36

----- X
NYC LIVING REALTY, INC.

Plaintiff,

Index. No. 109172/08

- against-

Motion Seq. No.: 001

170 EAST END AVENUE, LLC,

Defendant.

FILED

APR 02 2009

X
COUNTY CLERK'S OFFICE
NEW YORK

DORIS LING-COHAN, J.

Plaintiff NYC Living Realty, Inc. (NYC Living Realty) moves for an order, pursuant to CPLR 3212 (b), granting summary judgment against defendant 170 East End Avenue, LLC (East End) in the amount of \$122,000.00 plus interest from January 15, 2008, or, in the alternative, granting summary judgment against the defendant in quantum meruit for the amount of \$183,000.00 plus interest from January 15, 2008. Defendant cross-moves for an order granting defendant summary judgement against plaintiff, dismissing plaintiff's complaint in full, and awarding defendant attorney fees and costs.¹

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff was and is a licensed real estate brokerage firm

¹ In its reply affirmation, plaintiff seeks to be awarded \$42,500.00 plus interest from March 15, 2007 based upon its breach of contract claim, or, in the alternative, \$122,000.00 plus interest from January 15, 2008, based upon its quantum meruit claim.

in the state of New York. Defendant is the prior owner of property located at 170 East End Avenue, Unit 3F, New York, NY (the apartment). On or about March 13, 2007, an agent of the plaintiff, Cortnee Brooke Glaser (Glasser) introduced a prospective purchaser (purchaser) to the defendant. On March 20, 2007, plaintiff and defendant entered into a brokerage agreement which indicated, among other things, that plaintiff would be entitled to a 4% commission upon closing and title transfer. On or about April 15, 2007, the defendant and the purchaser entered into a contract of sale for the apartment for the agreed upon purchase price of \$3,050,000.00. The purchaser deposited 10% of the purchase price (\$305,000.00) with defendant's attorney. On or about October 15, 2007, the purchaser deposited additional money pursuant to the contract of sale.

On or about December 29, 2007, plaintiff alleges that, via e-mail communication, defendant was trying to sell the apartment to another purchaser. (Notice of Motion, Exh. D). Subsequently, the purchaser requested to be released from the sale of the apartment. On February 5, 2008, the purchaser terminated the contract of sale by entering into a release and stipulation agreement with defendant. (Notice of Cross-Motion, Exh. B). Also on February 8, 2008, defendant entered into another contract of sale for the apartment for the purchase price of \$3,399,825.00.

Plaintiff alleges that defendant was actively seeking a higher purchaser after the initial contract was signed. It also alleges that defendant would have never released purchaser from the contract of sale without first finding this new purchaser for a higher sales price, indicating a "willful default" by defendant. Plaintiff argues that since it was the "procuring cause of the [c]ontract of [s]ale with the [p]urchaser," it is entitled to a commission based upon the original purchase price. (Plaintiff Aff. in Support, ¶ 25). In the alternative, plaintiff maintains that in order to avoid "unjust enrichment" to defendant, the theory of quantum meruit should be invoked, and that plaintiff should be entitled to a 6% commission (the industry standard) on the new purchase price.

Defendant argues that the purchaser requested to be released from the contract of sale, and that, because Glasser was not responsible for the subsequent sale of the unit, plaintiff is not entitled to any commission. Defendant contends that the broker agreement by the parties provides that under no circumstance would a commission be due and owing unless a closing and transfer of title actually took place. According to the specific terms of the broker agreement: "[i]f title does not close for any other reason whatsoever, including but not limited to Sponsor's abandonment of the Offering plan or a right of rescission granted by Sponsor and accepted by a Purchaser, no Brokerage Commission

shall be deemed to be earned by you with respect thereto" (Notice of Motion, Exh. C). The agreement further provides: "[y]ou acknowledge and agree that you shall not be entitled to any Brokerage Commission if: (iv) Title to the Unit does not pass from Seller to Purchaser." *Id.*

In plaintiff's reply affirmation, plaintiff reiterates its belief that the purchaser was only allowed to be released from the contract because defendant had obtained a new purchaser with a higher offer. It cites the e-mail reference to defendant's search for another buyer in December 2007, and also states how it would be impossible under these facts, "[t]o market, procure, negotiate and finally execute such a Sales Contract in three days". (Plaintiff Reply Affirmation, at 2, emphasis in original).

DISCUSSION

I. Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York University Medical Canter*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima face case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in

admissible form sufficient to require a trial of material issues of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Furthermore, all of the evidence, must be "viewed in the light most favorable to the opponent of the motion." *Grasso* at 544, citing to *Marine Midland Bank, N.A., v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 (2d Dept 1990). The plaintiff contends that it was the "procuring cause of the sale" and that the defendant "willfully defaulted." However neither of these allegations can be factually substantiated.

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, plaintiff's motion for summary judgment is denied and defendant's cross-motion for summary judgment of dismissal is granted. The original brokerage agreement is clear in that it provides that defendant has no obligation to pay plaintiff a commission, since the sale to the purchaser supplied by plaintiff did not occur. Specifically, the brokerage agreement states: "[y]ou acknowledge

and agree that you shall not be entitled to any Brokerage Commission if: (iv) Title to the Unit does not pass from Seller to Purchaser." (Notice of Cross-Motion, Exh. A). Furthermore, the agreement continues that the plaintiff acknowledges that "[y]ou shall not be entitled to any Brokerage Commissions if: (I) The sale is not procured by you or your were not instrumental in bringing about the sale." Although plaintiff was the exclusive agent for the original contract of sale, such prospective deal, did not result in a closing and a transfer of title to the purchaser and plaintiff was not the exclusive agent for any subsequent contracts of sale; thus, plaintiff is not entitled to a commission.

Plaintiff's reliance on *Greene v. Hellman, supra.*, to support its argument that plaintiff was the procuring cause of the sale is misplaced. The court in *Greene* found that the plaintiff real estate broker was not the procuring cause of the sale and therefore not entitled to a commissions and stated that plaintiff did nothing to act as a direct and proximate link between defendant property owner and buyer. *Id.* at 197. Similarly in the within case, plaintiff was not involved in procuring the ultimate purchaser of the property and therefore, in accordance with the terms of the brokerage agreement, plaintiff is not entitled to a commission.

As to plaintiff's argument that the seller "willfully

defaulted" on its agreement with plaintiff, plaintiff cites to *Graff v Billet*, 64 NY2d 899 (1984). However in *Graff*, the Court of Appeals affirmed the Appellate Division which concluded that the plaintiff broker was unable to recover a commission when a seller decided to accept a better offer from someone else, since, like the within case, "the brokerage agreement explicitly provided that the commission would be owing when 'title passes', and not merely when the broker obtained a prospective buyer". See *id.* at 901.

Here, there is simply no proof that plaintiff introduced the subsequent buyer to defendant and whether it was due to the "fault" or "default" on the part of defendant is not relevant. Moreover, as defendant indicates it was the original purchaser who wanted to be released from the contract. The release agreement specifically provides that "[p]urchaser has requested that Sponsor release Purchaser from the Purchase Agreement." (Notice of Motion, Exh. B). The e-mail speculation that defendant was looking for a better offer for the apartment is also irrelevant to the terms of the parties' agreement.

II. Quantum Meruit and Unjust Enrichment

Plaintiff also argues that it is entitled to recover on the theory of quantum meruit based upon defendants' implied promise to pay for the benefits conferred to defendant and that quantum

meruit should be invoked to avoid unjust enrichment to defendant. Plaintiff cites to *Waldman v Englishtown Sportswear, Ltd.*, (92 AD2d 833 [1d Dept 1983]) where there was a factual issue as to the amount of compensation due to an employee who by express oral contract changed from a commissioned to a salaried employee. In the within case, plaintiff shows no oral contract in which it can be established that plaintiff was the sole broker for defendant, and that defendant was obligated to pay a commission regardless of whether plaintiff was the procuring cause of the sale. The only contract submitted herein is the written brokerage agreement in which it explicitly states that if the contract of sale does not lead to a closing, plaintiff is not entitled to a commission and that plaintiff must be instrumental in making the sale occur. It is not disputed here that plaintiff did not introduce the subsequent purchaser to defendant and plaintiff was not responsible for the ultimate sale.

Plaintiff further argues in its reply affirmation that defendant was unjustly enriched by plaintiff's efforts since defendant was able to procure an additional \$350,000.000 in the subsequent contract of sale. Plaintiff states that the original purchaser was only allowed to be released from the contract of sale due to a better offer and defendant used the original purchaser "as leverage." However, the submitted proof demonstrates that it was the original purchaser who opted out of

the contract of sale and not defendant who reneged on its agreement with plaintiff. The three-day time frame referenced in plaintiff's reply affirmation is of no relevance.

Plaintiff's reliance on *H.B.L.R., Inc. v Command Broadcast Assoc., Inc.*, (156 AD2d 151 [1st Dept 1989]), to support its quantum meruit theory, is also misplaced. In *H.B.L.R.*, the court determined that there was indeed a factual dispute "as to whether the letter agreement, drafted by the broker, conditions the payment of a commission upon closing of title." However, the appellate court dismissed the broker's cause of action seeking damages in quantum meruit by stating as follows:

[p]laintiff's second cause of action seeking damages in quantum meruit should have been dismissed. **Where, as here, an action is based upon a written expression of the agreement among the parties, recovery must be based upon the writing** (*Knobel v Manuche*, 146 AD2d 528, 530 [1st Dept 1989]; *Larme Estates v Omnichrome Corp.*, 250 App Div 538, 540 [1st Dept], affd 275 NY 426 [1937]) in the absence of compelling equitable grounds, not demonstrated in this instance, which warrant substitution of an alternate measure of damages (*La Rose v Backer*, 11 AD2d 314, 320 [3rd Dept] affd 11 NY2d 760 [1960])... It is clear, however, that quantum meruit will only be invoked where required to avoid unjust enrichment (*Miller v Schloss*, 218 NY 400, 407 [1916]; *Bradkin v Leverton*, 26 NY2d 192, 196-197 [1970])." *Id.* at 152.

Here, plaintiff did not introduce the subsequent purchaser to defendant and there was no written agreement which would guarantee plaintiff a commission based on any sale. Accordingly, this court concurs with the court in *H.B.L.R., Inc. v Command*

Broadcast Assoc., Inc. (156 AD2d 151, *supra*), and that there is no basis for plaintiff to recover on the theory of quantum meruit.

Thus, plaintiff's motion for summary judgment is denied, and defendant's cross-motion for summary judgment is granted, since it has been established as a matter of law that plaintiff is not entitled to a commission.

CONCLUSION, ORDER AND JUDGMENT

Accordingly, it is

ORDERED that the motion by plaintiff NYC Living Realty, Inc. for summary judgment is denied; and it is further

ORDERED that the cross motion by defendant 170 East End Avenue, LLC for summary judgment is granted and this case is dismissed, with costs and disbursements to defendant 170 East End Ave, LLC as taxed by the Clerk of the Court upon the submission of an appropriate bills of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that within 45 days of entry of this order, defendant shall serve a copy upon plaintiff with notice of entry.

Dated:

M. J. [Signature]

[Signature]
Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\NYC Living Realty. 170 east end.wpd

FILED
APR 02 2009
COUNTY CLERK'S OFFICE
NEW YORK