

Metro Realty Servs., LLC v Old Country Realty Corp.

2009 NY Slip Op 31260(U)

June 2, 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: April 15, 2009
Motion Sequence # 006, 007

-against-

OLD COUNTRY REALTY CORP. and
DAVID ZHANG,

Defendants.

The following papers read on this motion:

- Notice of Motion..... X
- Cross-Motion..... X
- Reply Affirmation XX
- Supplemental Reply Affirmation..... X
- Sur-Reply Affirmation in Support..... X

This motion, by plaintiffs, for an order striking the defendants' Answer and/or in the alternative, precluding the defendants from offering any evidence upon trial of the above action, for the imposition of the costs and sanctions against the defendants for the instant motion, and for such other and further relief as this Court may deem just and proper; and a cross-motion, by defendants, for an order compelling plaintiffs, pursuant to CPLR§3124, to provide the disclosure requested in defendant's Notice for Discovery and Inspection and defendants' First Set of Interrogatories, dated September 22, 2008, or

preclude plaintiffs from offering evidence at trial pursuant to CPLR§3126, together with such other and further relief as to this honorable Court may seem just and proper, are **both** determined as hereinafter set forth.

The underlying action involves plaintiffs' claim for a real estate brokerage commission pertaining to a sale of commercial property owned by the corporate defendant. The plaintiffs claim they are entitled to and were defrauded out of their commission by the alleged bad faith conduct of the defendant. The subject property is located at 125 State Street in Westbury, N.Y. and was sold to a buyer procured by a third-party broker.

The plaintiffs contend there was an exclusive agreement between the parties (which took effect June 6, 2005 and expired October 5, 2005) which required the defendants to refer all offers and inquiries, with respect to the sale of the property, to the plaintiff, Aireco Real Estate Corp. During the course of the exclusive agreement, the plaintiff states it brought in two offers which were later withdrawn by the proposed buyers. The offer made by A. Joseph Light was terminated by letter dated October 24, 2005. Prior to his withdrawal, Mr. Light had insisted upon receiving a satisfactory environmental report and the removal of any existence of an environmental violation as a pre-condition for his purchase. The defendant, Zhang, states he was not willing to agree to these conditions, due to the stated technical difficulty to remove pre-existing negative environmental findings about the property by the N.Y.S. Department of Environmental Conservation. Six months after the agency agreement expired, the property was reportedly sold through a second broker to a Chinese buyer who accepted the property "as is," without any requirements for satisfactory environmental clearances.

It is the defendants' position that the plaintiffs are not entitled to any brokerage commission because they failed to produce a ready, willing and able buyer before the agency agreement expired on October 5, 2005 and that plaintiffs' failure to do so was not due to any bad faith on the part of the defendants.

The record reflects that the defendants timely served their responses to plaintiffs' Notice for Discovery and Inspection, dated September 15, 2008, on October 27, 2008. This was done in compliance with the extended schedule established by the Court. The defendants' counsel also argues that she was within her rights to request a stay of discovery in relation to her summary judgment motion. Said motion was recently denied on February 23, 2009, wherein the Court found there should be discovery pertaining to

plaintiffs' claim of the defendants' improper dealings with the subsequent buyer and the second broker who procured the final sale of the defendants' property. The defendants have now produced a separate response entitled Supplemental Response to plaintiffs' Notice for Discovery and Inspection which appears to include all of the following requested documents pertaining to the second transaction:

- (1) Copy of the Contract of Sale for sale of defendant's subject property that was executed by defendants and the purchaser who was procured by another broker;
- (2) Copy of any and all drafts of the Contract of Sale beyond October 5, 2005, pertaining to the sale of the subject property, 125 State Street, Westbury, New York;
- (3) Copy of all deeds prepared and filed with regard to the defendants' ownership and sale of the subject property, 125 State Street, Westbury, New York.
- (4) Copy of all closing documents pertaining to the sale of the subject property, 125 State Street, Westbury, New York.
- (5) Copy of all correspondence by and/or on behalf of the defendant and/or the "purchaser" of the subject premises, 125 State Street, Westbury, New York;
- (6) Copy of the Brokerage Agreement between defendants and A.O. Realty, the broker who procured the purchaser for the defendant's property;
- (7) Copy of checks evidencing payment of Brokerage fees to A.O. Realty and Success Realty Group Inc.

The plaintiffs' Reply Affirmation, dated March 27, 2009, states that the defendants have still not responded to demands numbered 6, 7, 9 and 15. The Court will address each of these demands individually along with plaintiffs' additional demands, dated February 26, 2009:

Plaintiffs' Demand Number 6

Since plaintiffs' demand number 6 seeks copies of any correspondence by and/or on behalf of the defendants and plaintiffs with respect to the subject premises which were not attached to the original response sent to plaintiffs, the defendants are directed to provide copies of the requested correspondence within thirty days of the date of service of this order upon defendants' counsel.

Plaintiffs' Demand Number 7

With respect to demand number 7, which requests copies of any correspondence by and /or on behalf of the defendants and/or the "purchaser" of the subject premises, 125 State Street, Westbury, N.Y., the Court finds that the defendants appear to have provided the correspondence requested. Since real estate contact negotiations are often discussed at a sit-down contract signing or on the telephone and are not necessarily or as a matter of law reduced to writing during the negotiation process, the court does not find it to be "incredible" that there is no additional contract negotiation correspondence in their file. The Court agrees that plaintiffs' demand for an authorization permitting the attorney, who handled the real estate file on behalf of the defendants, to provide a complete copy of the same, including "all correspondence to our office" is overly broad and those documents are protected from disclosure on the basis of both CPLR Sec. 3101(c), which protects an attorney's work product from disclosure, and CPLR Sec. 4503, which provides "unless the client waives the privilege, an attorney or his employee shall not disclose or be allowed to disclose . . . nor shall the client be compelled to disclose such communications." Thus, the court will not require the defendants to sign the authorization for the release of a copy of the defendants' attorney's file.

Plaintiffs' Demand Number 9

This demand seeks copies of any and all advertisements and/or listings by the defendants with regard to the sale and/or offering for sale of the subject property. The Court finds the information requested to be material and necessary to assist in establishing plaintiffs' *quantum meruit* or unjust enrichment claims. The defendants are therefore directed to produce the same within thirty days of the date of service of this order upon defendants' counsel.

Plaintiffs' Demand Number 15

The Court finds the request for a copy of the title report pertaining to the sale of the subject property to be material and relevant to the environmental issues raised in this matter and the issue of whether or not any financing was obtained to complete the purchase. The defendant has since provided the Plaintiff with a copy of the title report, so the court finds this demand has been satisfied.

Plaintiffs' Additional Demand for Copies of the Tax Returns of defendant Old Country Road Realty Corp. from 2004 to the present, all of the defendant corporation's financial records from 2004 to the present, all of the defendants' ledgers, shareholder meetings' records, books, minutes, identity of shareholders, accountants, etc.

The Court agrees with the defendants' arguments that this demand is patently objectionable and that there is no demonstration that such confidential records are related to the transaction alleged in the complaint. The production of the records requested will not lead to the discovery of material and relevant evidence. The portion of the plaintiffs' application which seeks an order compelling the production of such confidential and private records, is therefore **denied**.

Plaintiffs' Additional Demand for Copies of the Corporate Resolution authorizing the sale of the subject property and copy of defendant corporation's Certificate of Dissolution.

The Court does find the documentation requested here to be material and relevant to the subject action and the defendant is directed to produce the same within thirty days of service of this order upon defendants' counsel.

In addition to the foregoing, to the extent that the defendants' counsel, in responding to any of the discovery requests, referred plaintiffs to other documents and exhibits attached to other motions, without annexing the document itself, she is directed to produce such copies within thirty days of the date of service of this order upon defendants' counsel.

The last branch of plaintiffs' application which seeks costs and sanctions against the defendants for the instant motion, pursuant to CPLR § 8303 (a) and Title 22 NYCRR § 130-1.1(c), is **denied** in the discretion of the Court, as the record does not support plaintiffs' accusations of wilful, frivolous and contumacious conduct in responding to

discovery demands. (See, *Paca v City of New York*, 51 AD3d 991, 858 NYS2d 772, 2nd Dept., 2008), at page 993, which held striking a defendant's answer is a drastic remedy which is inappropriate absent a clear showing that failure to comply with discovery demands was wilful and contumacious.

The defendants' cross-motion for an order compelling plaintiffs, pursuant to CPLR 3124, to provide the disclosure requested in the defendants' Notice for Discovery and Inspection and the defendants' First Set of Interrogatories, dated September 22, 2008, or precluding plaintiffs from offering evidence at trial, pursuant to CPLR § 3126, is determined as follows:

Defendants' Demand No. 1

This demand seeks the production of documents pertaining to plaintiffs' status as a legal entity. The Court finds the information requested to be material and relevant to plaintiffs' standing to maintain the action and the plaintiffs are directed to provide the information requested within thirty days of service of this order to the extent the records requested have not already been provided to the defendants in exhibit "E" attached to plaintiffs' Reply Affirmation dated March 27, 2009.

Defendants' Demand No. 2

This demand seeks the production of documents to verify whether or not plaintiffs are properly licensed real estate sales agents now and during the period of the exclusive agreement June 2005 through October 2005. This is clearly material and relevant to whether or not they satisfy the legal prerequisite for plaintiffs' recovery of a broker's commission. While the current licensing information has been provided as exhibit "E" attached to plaintiffs' Reply Affirmation dated March 27, 2009, the licensing information for the June 2005 through October 2005 period has not yet been provided. Plaintiff is hereby directed to produce the same within thirty days of the date of service of this order upon plaintiffs' counsel.

Defendants' Demand No. 7

Demand No. 7 seeks the production of documents related to the finances and financial references of its' purported prospective buyer, Alan J. Light, to support plaintiffs' contention that its' alleged prospective purchaser was financially able to purchase the defendants' property, an allegation for which they do bear the burden of

proof, the Court finds the information sought to be material and relevant and hereby directs the plaintiff to produce copies of whatever documentation they may have in their possession upon which they based such allegation within thirty days of the date of service of this order upon counsel.

Defendants' Demands Nos. 4, 8 and 9

The plaintiffs are directed to produce copies of any documents in their possession evidencing the acknowledgment and acceptance of the offer by the defendants (demand No. 4) and the acceptance of the offer by purported purchaser, A.J. Light (demand no. 8), along with a copy of any agreement entered into between the defendant, David Zhang, in his individual capacity, and the plaintiff (demand no. 9). All of these documents are found to be material and relevant and Plaintiff is directed to produce the same within thirty days of the date of service of this order upon counsel.

Defendants' Request for the Identification of Witnesses

The plaintiffs' response as of October 22, 2008 was to state other than the parties to the subject action, the only other potential witness they intend to rely upon is Alan Light. In the event the defendants have since decided upon calling any additional witnesses, they are directed to disclose each of their names, addresses and telephone numbers to the defendants within thirty days of the date of service of this order upon counsel.

Plaintiffs' Response to Defendants' Interrogatories

CPLR § 3123(b) provides "Interrogatories shall be answered in writing under oath by the party served Each question shall be answered separately and fully and each answer shall be preceded by the question to which it responds." Based upon the foregoing, the Court finds the plaintiffs' response to the defendants' Interrogatories to be inadequate. Plaintiffs are directed to provide thorough and specific written responses under oath to the defendants' Interrogatories and shall not refer to other discovery responses in responding to the questions asked. The Court does not agree with plaintiffs' position that question number 5, pertaining to Mr. Allen Light's financial position "is an improper demand," as the plaintiff makes the affirmative allegation that Mr. Light had the financial means to complete the purchase of the property for \$1.575 million dollars. There is a logical assumption from such a statement that the party making that representation, upon which they are basing their claim of entitlement to a brokerage commission for

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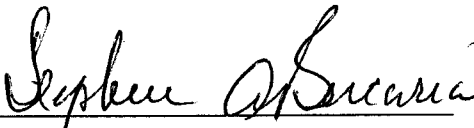
producing a ready, willing and able purchaser, have some documentation or correspondence in their possession to base their statement upon. A review of the record reflects plaintiffs' salesperson, Frank Posillico, stated in paragraph number 24, that the purchaser was selling a piece of property that he owned in Hicksville, N.Y. for approximately \$4.7 million dollars and that he intended to use a portion of the proceeds from that transaction towards the purchase of the defendants' property (see exhibit #1 attached to the defendants' Notice of Cross-Motion dated March 6, 2008). The information requested is material and relevant and the plaintiff is directed to respond to all of the defendants' Interrogatories hereinabove within thirty days of service of this order upon counsel.

The parties are further directed that their failure to comply with this discovery order in a timely manner may result in the preclusion from offering evidence at trial pursuant to CPLR § 3126.

Any other relief which has not been specifically granted, is **denied**.

This constitutes the decision and order of this Court.

Dated JUN 02 2009


J.S.C.

ENTERED

JUN 04 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE