

ICAP Realty Advisors of N.Y., Inc. v Gessen
2009 NY Slip Op 31450(U)
June 29, 2009
Supreme Court, New York County
Docket Number: 603830/06
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN

PART 11

Index Number : 603830/2006

ICAP REALTY ADVISORS

vs.

GESSEN, HARVEY

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED _____

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

Answering Affidavits - Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *and cross-motion are determined in accordance with the annexed decision and order.*

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

FILED

JUL 02 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: June 29, 2009

HON. JOAN A. MADDEN 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: PART 11

-----X
ICAP REALTY ADVISORS OF NEW YORK, INC.,

Plaintiff,

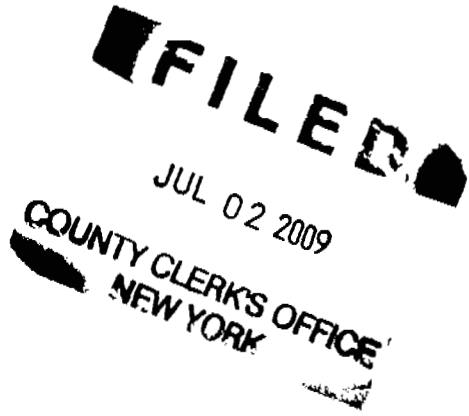
INDEX NO. 603830/06

-against-

HARVEY GESSEN, NORTH HILLS HOLDING
COMPANY, LLC, NORTH HILLS HOLDING
COMPANY II LLC and "XYZ CORP. 1-5" the last
five named defendants being fictitious and unknown
to Plaintiff,

Defendants.

-----X
JOAN A. MADDEN, J.:



In this action for a commission based on a mortgage brokerage agreement, defendants move for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint. Plaintiff opposes the motion and cross-moves for summary judgment in its favor, and dismissal of defendants' affirmative defenses, as asserted in the amended answer.

The following facts are not disputed unless otherwise noted. On September 13, 2001, plaintiff's predecessor, as "Broker," executed a mortgage brokerage agreement ("Agreement") with "a to-be formed LLC with Harvey Gessen as Managing Member," as "Borrower."

Paragraph 1 of the Agreement provides as follows:

Borrower hereby employs Broker to assist in securing a Commitment for a mortgage loan from FleetBoston Financial Corporation ("Lender") with terms and conditions satisfactory to Borrower and Lender in the amount of \$30,000,000 or such other amount acceptable to Borrower and Lender ("Loan Amount") secured by the following property:

Forestwood at North Hills
North Hills New York
(a To-Be-Built 86 Unit Condominium Development)

Paragraph 2 of the Agreement provides that “Borrower agrees to pay to Broker a Brokerage Fee . . . which . . . shall be earned upon issuance of a Commitment by Lender and acceptance by Borrower and payable by Borrower from loan proceeds or certified check at the closing of such mortgage.” Although Paragraph 2 originally specified a fee in the amount of “\$300,000,” the amount is crossed-out. Paragraph 5 of the Agreement is a non-circumvention provision which states as follows:

Borrower or any corporation, organization, firm or individual of which Borrower or any of its members is party to, member of, agent for, or employee of, agrees not to circumvent Broker by directing, approaching dealing, contracting, or entering into a transaction with any Lender with whom Borrower has executed an application to borrow and/or any Lender that issued a commitment to fund a mortgage loan on the property referenced in paragraph (1). This agreement not to circumvent Broker shall be for a duration of two years commencing on the date of this Agreement.

The Agreement includes a hand-written notation stating “see attached Amendment that is merged with this Brokerage Agreement.”

Simultaneously with the execution of the Agreement, the parties executed an Amendment to Mortgage Brokerage Agreement (“Amendment”), which amended the original Agreement with the proviso that “[i]n the event of a conflict between the Original Agreement and this Amendment the terms of this Amendment shall control.” Paragraph 2 of the Amendment provides as follows:

Paragraph 1 and 2 of the Original Agreement are amended to provide that the brokerage commission shall be earned only upon the written acceptance by the borrower of a loan commitment procured from a lender to whom the broker has submitted a loan application to [and] with the approval of the borrow and the loan closes.

Specifically with respect to the amount of plaintiff's fee, paragraph 3 of the Amendment states that

Paragraph 2 of the Original Agreement is amended to provide that [the] loan brokerage fee shall be \$150,000 based on a 30 million dollar loan. If the loan amount is adjusted downward, the fee shall be adjusted accordingly.

As to the non-circumvention provision, paragraph 6 of the Amendment states that

Paragraph 5 of the Original Agreement is amended to provide that Borrower specifically asserts, and the Broker acknowledges and accepts, that no commission shall be due upon the acceptance of any loan commitment from either Fleet Bank or Wells Fargo Bank (or any of their related banking entities).

Also with respect to plaintiff's commission or fee, paragraph 8 of the Amendment provides that

[t]he Borrower shall have no obligation to the Broker for any commissions for loans obtained for the purchase or development of property other than the property identified in paragraph 1 of the Original Agreement and section 2 if any.¹

It is not disputed that plaintiff procured a \$30 million commitment for an acquisition and construction loan from Well Fargo Bank, a closing was held on that loan, and plaintiff was paid a commission in the amount of \$150,000.

Plaintiff explains, and defendants do not dispute, that prior to defendants' involvement with the property in North Hills, the Village of North Hills (hereinafter the "Village") had imposed a restrictive covenant on a portion of the property defendants were seeking to develop. According to plaintiff, the restrictive covenant required that a 18.17 acre portion of the property to be maintained as open space and thereby limited its development and use.² Plaintiff explains

¹The final phrase "and section 2 if any" is a handwritten addition to the typewritten text of paragraph 8.

²The parties agree that this is the property they refer to as "Section 2."

that due to the restrictive covenant, defendant North Hills Holding Company II LLC ("North Hills II") was obligated to donate those 18.17 acres back to the Village. Plaintiff states that after the closing and in accordance with the restrictive covenant, North Hills II donated the property back to the Village. Plaintiff further states that North Hills II subsequently applied to the Village to repeal the restrictive covenant, authorize incentive zoning and permit development of those 18.17 acres for residential use. On August 30, 2005, the Board of Trustees of the Village adopted a decision granting North Hills II's applications.

Plaintiff states that in or about June 2006, it learned that North Hills II had re-acquired those 18.17 acres and closed on a loan from Wells Fargo in the amount of \$43,335,085.00, for the acquisition and development of the property. Defendants admit that North Hills II closed on that loan on January 13, 2006. Plaintiff's managing director, Harry G. Woods, Jr., states that he contacted defendant Gessen to request payment of a commission on this second loan, and Gessen requested that Woods send him an invoice. On June 1, 2006, Woods sent Gessen an invoice for the commission in the amount of \$216,675.40, but plaintiff was never paid.

On or about November 30, 2006, plaintiff commenced the instant action seeking its commission in the amount of \$216,675.40, based on claims for breach of contract, quantum meruit and an account stated. Defendants are now moving and plaintiff is cross-moving for summary judgment. The parties agree that the resolution of the motions turns solely on the interpretation of the Agreement and the Amendment.

Where the terms of a contract are straightforward, clear and unambiguous, its interpretation presents a question of law for the court, and the parties' intent must be gleaned

from the four corners of the agreement, based upon the language employed on the face of the contract without resort to extrinsic or parol evidence. See Greenfield v. Phillies Records, Inc., 98 NY2d 562, 569-570 (2002); 150 Broadway N.Y. Assocs, LP v. Bodner, 14 AD3d 1 (1st Dept 2004). In interpreting a written agreement, the court is obligated to give meaning to all of its terms, and should not adopt an interpretation that would operate to leave a provision without force and effect. See Mionis v. Bank Julius Baer & Co., Ltd., 301 AD2d 104, 109 (1st Dept 2002); Missionary Sisters of Sacred Heart Ill. v. New York State Division of Housing & Community Renewal, 283 AD2d 284, 288 (1st Dept 2001); Ruttenberg v. Davidge Data Systems Corp., 215 AD2d 191, 196 (1st Dept 1995). “[T]he court may not, under the guise of interpretation, fashion a new contract for the parties by adding or excising terms and conditions which clearly contradict the clearly expressed language of a contract.” Republic National Bank of New York v. Olshin Woolen Co., Inc., 304 AD2d 401, 402 (1st Dept 2003). Also, unless the agreement is ambiguous, parol or other extrinsic evidence “as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing.” WWW Assocs. Inc. v. Giancontieri, 77 NY2d 157, 163 (1990).

Applying these principles and reading the Agreement and the Amendment together, giving force and effect to the terms of both, the court concludes that plaintiff is not entitled to a commission on the second mortgage secured from Wells Fargo Bank in January 2006. By its clear and express terms, the non-circumvention provision in paragraph 5 of the Agreement is limited in duration to the two-year period commencing from the date of the Agreement. Since the Agreement is dated September 13, 2001, the two-year period expired on September 13, 2003, well before defendants secured the second loan.

Contrary to plaintiff's contention, paragraph 6 of the Amendment neither "eliminates" nor "vitiates" the non-circumvention language in the original Agreement. Paragraph 6 of the Amendment explicitly states that it "amends" paragraph 5, and simply creates a limited exception to the non-circumvention provision, for loans obtained from Fleet Bank or Wells Fargo Bank, i.e. during the two-year non-circumvention period, the borrower is permitted to obtain a mortgage loan from either Fleet Bank or Wells Fargo Bank without an obligation to pay the broker a commission.

Plaintiff further contends that based on paragraph 8 of the Amendment, it is entitled to a commission on the 2006 loan, since that provision does include any time limit on its right to such commission. Plaintiff submits an affidavit from its Managing Agent, Harry G. Woods, Jr., that "[i]n exchange for eliminating the non-circumvention language from the Agreement, the parties agreed that Plaintiff would be entitled to a commission on a loan with respect to Section 1 as well as Section 2, if and when it could be or was obtained." Woods states that when the parties entered into the Agreement and the Amendment, they "were aware that Section 2 could not be developed due to the zoning restriction" and that "Gessen advised that he planned to undertake measures to remove the restriction so that Section 2 could be developed." Woods asserts that "[t]o ensure that Plaintiff would receive a commission in connection with Section 2, Gessen" added the following handwritten notation to paragraph 8, "and section 2 if any."

Plaintiff's contentions are without merit, as paragraph 8 cannot be interpreted on its own, in isolation, but must be read in the context of the Agreement and the Amendment, as a whole, which as determined above, impose a two-year limit on the broker's right to non-circumvention.

See 150 Broadway N.Y. Assocs, LP v. Bodner, supra; Zodiac Enterprises, Inc. v. American Broadcasting Cos., 81 AD2d 337, 339 (1st Dept 1981), aff'd 56 NY2d 738 (1982).

Notably, the Amendment as drafted included a paragraph 7 that was crossed-out and stated as follows: "Paragraph 5 of the Original Agreement is amended to provide that the term of the agreement [not to circumvent the Broker] is one year rather than the two (2) years stated in the Original Agreement." Since the parties originally included but ultimately deleted that language, they clearly could have but chose not to alter or eliminate the two-year time period in paragraph 5 of the original Agreement.

Moreover, even if, as plaintiff urges, the parties negotiated to provide for a brokerage commission in the event a loan was ever obtained in connection with Section 2 of the property, such intent cannot be gleaned from the four corners of the writings. In reaching this conclusion the court notes and rejects plaintiff's argument that the interpretation that during the two-year non-circumvention period, plaintiff gave up rights to a commission on Section 2 if Wells Fargo or Fleet Bank financed the loan, is not plausible. Under that interpretation, plaintiff would be entitled to a commission if funds are obtained from a source to which plaintiff introduced defendant, other than Wells Fargo or Fleet Bank. While that interpretation is not as beneficial to plaintiff as the interpretation urged by plaintiff, it is consistent with the four corners of the writings. Where as here the Agreement and the Amendment are clear and unambiguous on their face as written, plaintiff's parol evidence is not properly considered to explain the parties intended meaning. See WWW Assocs. Inc. v. Giancontieri, supra.

Thus, as the second loan was not only secured well beyond the expiration of the non-circumvention period, but was also secured from Wells Fargo Bank, plaintiff is not entitled to a

commission. Defendants are awarded summary judgment dismissing the complaint and plaintiff's cross-motion is denied..


Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is denied.

DATED: June 29, 2009

ENTER:



J.S.C.

FILED
JUL 02 2009
COUNTY CLERK'S OFFICE
NEW YORK