

Island Assoc., Inc. v Caro Prop., Inc.

2009 NY Slip Op 32490(U)

October 21, 2009

Supreme Court, Suffolk County

Docket Number: 3673/2008

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: **HON. EMILY PINES**

J. S. C.

_____X

ISLAND ASSOCIATES, INC.,

Plaintiff,

-against-

**CARO PROPERTIES, INC, CARO
PROPERTIES LLC, A. J. CARO,**

Defendants.

_____X

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DECISION AFTER TRIAL

In this non-jury trial, the Plaintiff seeks a real estate brokerage commission from the Defendants based on Plaintiffs' actions in 2006 bringing Defendants a ready, willing and able purchaser of Defendants' commercial real property in Patchogue, New York. Before trial, counsel for Plaintiff and Defendants agreed that 1) all claims against Caro Properties, Inc. are withdrawn; 2) Defendants' liability for a brokerage commission is conceded by both the corporate and the individual Defendant, the issue remaining being

limited to the amount thereof; 3) Defendants' counterclaims are all withdrawn, although the allegations contained therein remain to the extent that they affect the issue of the amount of damages owed.

Richard Buono, a licensed real estate salesperson and employee of the Plaintiff, testified that he was employed by the Plaintiff in the Summer of 2006, when he first met A J Caro. He asserts that Mr. Caro contacted him at Island Associates Real Estate in connection with a building his employer was listing for sale in Islandia. Mr. Caro apparently wished to sell his commercial property in Patchogue and asked if an exchange could be negotiated. Buono asserts that he first brought the owner of the Islandia building to view Caro's property and, when that did not result in a deal, he decided to look for a developer, who would be interested in the site rather than the existing building. He located Peter O'Hara, who had done business with his brokerage firm in the past, generally as a buyer/developer and suggested the idea of a purchase in order to develop the site as a self storage area. Buono testified that he told A J Caro from the beginning that if he wanted Buono to find a purchaser, Buono was not interested in a co-brokerage deal and that Caro verbally agreed. He also stated that Caro told him specifically that he wanted to net \$1 million from the sale. According to Buono, a typical brokerage rate for a commercial development deal was 10% because a proposed development of the property normally brought the seller a higher price. He also stated that in a non development deal, the typical brokerage commission was between 6-7%.

According to Buono, Caro was taken aback when Buono returned with O'Hara's first offer of \$1.1 million so quickly. He stated that he faxed a "letter of intent" to Caro Properties LLC setting forth the proposed purchase price as well as the payment of a commission of \$100,000 payable to Island Associates at closing (Plaintiff's 7). Although the letter of intent is dated December 8, 2006, the facsimile transmission attached appears to be dated the evening of December 7, 2006. After receiving this transmission, according to Buono, Caro contacted him about the commission and told Buono that Caro wanted an extra \$100,000 for himself. Buono stated that he, therefore, reluctantly re-contacted the buyer and, telling him the truth, asked that the purchase price be increased by \$115,000 since that was the amount to which Buono now felt his company was entitled. After O'Hara agreed, Buono orally amended the offer and testified that Caro was very pleased. Buono asserts that he prepared and dropped off at Caro's, offices a "Commission Agreement", with Caro's in house counsel and got a signed copy in the

mail. Plaintiff's 4. He is aware that the actual closing of the sale occurred on January 17, 2008; however, he had left the employ of Island Associates at the time and did not learn of the Defendants' failure to pay any commission until after the closing. According to Buono, although he saw signs for Bridge Business and Property Brokers ("Bridge") in the Patchogue building that was the subject of the sale, he asserts that it was clear between him and the building owner, A J Caro, that Island Associates was to be the sole broker if it brought a purchaser to the sale. Although Mr O'Hara was a "long term client" of Island Associates and Buono, he stated that O'Hara's company, Capital Management, of Long Island, has never paid his employer's fee; it has, rather, always been paid by the seller. When shown the "listing agreement" between Caro Properties LLC and Bridge (Defendant's D) Buono asserted he had never seen the listing agreement before and was totally unaware, until the dispute arose, that Caro was claiming that Bridge was entitled to one half of a four percent commission.

Buono asserted that the building could not be sold as it existed for the price Caro wanted and if not for Buono's efforts, Caro would never have received the offers of \$1.1 and \$1.215 million.

Robert Monahan, a member of the Island Associates "Executive Team" testified that he was not involved in the negotiations between Buono and Caro; but that he learned of the closing shortly before it occurred. At the direction of his employer, he faxed a letter to the attorney for Capital Management, on January 17, 2008. Based on his understanding, he believed that the brokerage commission owed his company by the seller was \$100,000. He testified that Buono had left his company's employ at that time, and that it was not until after the closing that he was able to locate Buono's file, which contained the Commission Agreement (Plaintiff's 4) setting forth the number of \$115,000. When he found the hard copy of the Commission Agreement (Plaintiff's 4) he sent it to Caro and demanded payment. In the interim, in a series of e-mails including Caro, Monahan and O'Hara, Caro states that he will pay a commission to Island Associates but not the amount and ultimately Caro denies signing an agreement with the \$115,000 figure. Plaintiff's 6.

Peter O'Hara, owner of non party, Capital Management of L.I., testified that he purchased A. J. Caro's property in January 2008 as a developer and has spent 1 ½ years in a zoning process in order to be able to convert it into a storage facility. He claims that

Buono gave him the idea for the potential development ; that he originally offered \$1.1 million; and that he increased his offer to Caro specifically so that Buono could receive his commission. He stated that he was unaware of the entity known as Bridge until the closing and that he knew that Island Associates was representing the seller and would receive its commission from the seller. He is aware that Monahan wrote to his attorney, Roth, and asked that Roth pick up Island Associate's commission check at the closing. However, when the subject was raised at the closing, Caro's attorney declined, went outside to confer with is client , and the closing then proceeded without resolving the issue. He testified that he signed the contract of sale, which states at paragraph 16, that Bridge is the seller's broker and that Island Associates is his company's broker, and that Caro would be responsible for payment of the brokerage commissions at closing (Plaintiff's 2 and 3). However, he did not care about the wording and states he did not even read this section and was solely concerned that his bottom line was as agreed. Yet, he then stated that he has never seen a broker's commission unpaid despite all his years of buying commercial properties for development. O'Hara stated further that his second offer to Caro was above market value and he would never have made it if he knew that Caro was seeking some portion of the commission for his own brokerage company, Bridge.

Mark Davella, a licensed real estate broker with Remax, testified on behalf of the Defencants. He stated that he knows Defendant Caro and was familiar with the Patchogue commercial building. He claims he learned the property was for sale from the Mayor and offered Caro \$1.35 million approximately one year ago. He understood, at the time, that the property was under contract with O'Hara, but he asserted that his offer was a back-up and that he intended to develop the property as a supermarket. He states that despite the fact that his was a development offer, that he understood that he was to share a four percent commission with the listing broker, Bridge. He states that the has a letter of intent which set this forth but that it is in storage and did not bring such letter to the trial.

A. J. Caro testified that he is the sole owner of both Defendant, A J Caro Properties, LLC, and Bridge Business and Property Brokers. The LLC owed the commercial building in Patchogue, which Bridge listed for sale, pursuant to a one year exclusive listing agreement (Defendants' D) entered into on March 20, 2006. When Caro decided to attempt to sell the property in early 2006, he states he listed the property

for \$1.4 million on several commercial websites, including “LoopNet.com” (Defendants’ A). Caro used his own company Bridge as the listing broker. He asserts that Bridge generally obtains 4-6 % commission on a real estate brokerage deal but never the 10% that Plaintiff is seeking in this case. He avers that prior to the O’Hara offer, he received two other offers (one for \$1.25 million and one for \$1.2 million) but that neither came to fruition. He supports Buono’s story that he met him in the Summer of 2006 in response to an advertisement by Island Associates regarding a commercial building for sale in Islandia and that he was seeking an exchange. He asserts that he and Buono never discussed commissions and that Buono never told him he wanted an exclusive brokerage deal. When he received the first offer for \$1.1 million, he states he rejected it , as it was low and the LLC had expenned over \$200,000 in updating the building. He never advertised it as a “development property” and believes that the 4 % commission which Bridge would have received as the procuring broker was fair and the norm for the industry. He asserts that it was not until after the closing when he received the fax asking for \$100,000 that he first learned that the 2% that he intended always to be Island Associates’ commission was not acceptable. In addition, he believed at the time of the closing, which occurred in early 2008 that he should deduct approximately \$10,000 from the Plaintiff’s commission due to the delay in actual date of closing, which he asserts caused him to lose money on his purchase of yet another property. The \$10,000 deduction is somewhat contradicted by the fact that he entered into a second contract with O’Hara’s corporation on August 23, 2007 extending the closing date and containing the same reference to a sharing of the brokerage commission between Bridge and Island Associates (Plaintiff’s 2).

Caro testified that the first time he saw the “Commission Agreement” (Plaintiff’s 4) was after the closing when he received it attached to an e-mail from the Plaintiff. He asserts that he never signed it and it was generally agreed by both counsel at trial that the handwriting on Plaintiff’s 4 did not belong to Caro. He also stated that he did not authorize anyone else in his employ to sign on his behalf. Caro claimed he did not see the letter of intent (Plaintiff’s 7) until this lawsuit.. At the time of the closing , his LLC did pay his brokerage company, Bridge, its 2% commission, which amounted to \$25,947.46 (Defendant’s B). That is the most, he asserts that Island Associates should get in this case.

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Caro testified at trial that he never gave a copy of Bridge's listing agreement with his LLC to Buono nor did he inform Buono that Island Associates would receive its commission through Bridge. In addition, portions of Caro's EBT testimony were read into the record wherein he stated that O'Hara told him that he had purposely increased the purchase price due to his friendship with Buono in order that Buono would receive an increased commission after the closing.

The elements of a cause of action for breach of contract are 1) formation of a contract between the parties; 2) performance by the Plaintiff; 3) failure to perform by the Defendant; and 4) resulting damages. **Furia v Furia**, 116 AD 2d 694, 498 NYS 2d 12 (2d Dep't 1986). The requirements for the formation include, inter alia, mutual assent to the terms. See, generally Restatement Second, Contracts, §12. Mutual assent is often referred to a "(a) meeting of the minds of the parties on all essential terms of the contract". **Express Industries and Terminal Corp v New York State Dept of Transportation**, 93 NY 2d 584, 693 NYS 2d 857, 715 NE 2d 1050 (1999).

In order to receive a commission, a broker must establish 1) employment; and 2) that the broker procured a purchaser ready, willing and able to buy the property on the terms set by the seller. **Rusciano Realty Services Ltd. v Griffler**, 62 NY 2d 696, 476 NYS 2d 526, 465 NE 2d 33 (1984). Damages should be calculated upon an agreed upon rate, or, if no such rate has been agreed to, then on the basis of reasonable value. **Lockhart v Hamlin**, 190 NY 132, 82 NE 1094 (1907). Usually, this is the customary rate in the community at the time when the services were rendered. **Kaplon-Belo Associates v Cheng**, 258 AD 2d 622, 685 NYS 2d 768 (2d Dep't 1999).

Applying these basic principles to the case at Bar, the Court makes the following findings. Although the parties to this case clearly agreed that Island Associates through its licensed Real Estate Salesperson, Buono, would be entitled to a commission for procuring a ready, willing and able purchaser of the Patchogue building, no commission rate was ever agreed upon. There are too many problems with the contradictory dates on Plaintiff's 4 to rely on it as a Letter of Intent. The so-called "Commission Agreement" produced by Plaintiff, also clearly does not contain Caro's signature. On the other hand, the Court also finds that Caro did not inform Buono that his employer

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would be sharing the commission with Bridge nor did he ever discuss the commission rate, as set forth in his EBT testimony. There is no question that Island Associates, through its employee, Buono, procured a purchaser ready, willing and able to purchase the Patchogue building. The purchase for \$1,215,000 did occur in January 2008 and the seller was paid in full. The Court found credible O'Hara's testimony, as a more independent non party, that the increase in the purchase price was made so that Buono could, in fact, receive a decent brokerage commission on the deal.

Although there is insufficient evidence in the record that Caro agreed to a commission of \$115,000, there was testimony presented by both sides of the conflict concerning the proper rates for brokerage commissions in this kind of transaction. While both Caro and Buono supported a 6% commission on a commercial deal, the 10% sought by Buono does not appear to have support absent a specific agreement. On the other hand, there does not appear to be support in the record for a sharing of the commission, as the Court finds credible Buono's insistence on a sole commission. Under all of the circumstances, the Court finds that the Plaintiff is entitled to a 6% commission on the sales price of \$1,215,000, for a total of \$72,900 from the Defendants. The cause of action accrued on the date of closing.

This constitutes the **DECISION** and **ORDER** of the Court.

Submit Judgment on Notice.

Dated: October 21, 2009
Riverhead, New York



EMILY PINES
J. S. C.