

**Brown Harris Stevens of the Hamptons, LLC v
Staubi**

2009 NY Slip Op 33373(U)

April 7, 2009

Supreme Court, New York County

Docket Number: 109687/2006

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

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BROWN HARRIS STEVENS OF THE
HAMPTONS, LLC,

Plaintiff,

INDEX NO. 109687/2006

-against-

DECISION AND ORDER

PAUL STAUBI, KAREN STAUBI, ERIC
MALLEY, THE MALLEY GROUP, and
ALLAN M. SCHNEIDER ASSOCIATES, INC.,

Defendants.

-----X

JANE S. SOLOMON, J.:

INTRODUCTION

In an action to recover a brokerage commission, plaintiff, Brown Harris Stevens of the Hamptons, LLC ("Brown Harris") moves for summary judgment (motion sequence no. 002). Defendants Eric Malley ("Malley"), The Malley Group, and Allan M. Schneider Associates, Inc. ("AMS")¹ also move for summary judgment (motion sequence no. 003). Plaintiff's motion is granted, and Defendants' motion is denied for the reasons set forth below.

¹Malley, The Malley Group, and AMS will be referred to as "Defendants." Malley and The Malley Group will be referred to as the "Malley Defendants."

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FACTUAL BACKGROUND

Paul Staubi and Karen Staubi (the "Sellers") owned a house located at 320 Hill Street, Southhampton, New York (the "Property"), where AMS is a real estate broker. In the Fall of 2005, they retained AMS to sell the Property, and AMS then entered into co-brokerage agreements with Brown Harris and other brokers. The standard form co-brokerage agreement provides that a co-broker will be entitled to receive half of AMS's 6% commission "if and when title passes to a buyer procured by you." (Co-Brokerage Agreement, attached as Exh. 1 to Reply Affidavit of Neal Schwarzfeld in Support of Plaintiff's Motion for Summary Judgment.) The Property was listed for \$1,850,000.

In November 2005, Malley contacted Brown Harris about purchasing property in the Hamptons. Malley himself was a licensed real estate broker who operated his own business as The Malley Group. Brown Harris showed a number of parcels to Malley, one of which was the Property. After several visits, Malley began to bid on it. After some negotiations, Malley made an offer of \$1,750,000, which was accepted by the Sellers. However, there then was some confusion. Malley claimed that the offer was made with a seller's concession of 6%,² effectively reducing the actual price to \$1,645,000, while the Sellers understood that

² A seller's concession is a percentage of the sales price that is refunded to the buyer at the closing. This device is said to enable a buyer to finance closing costs.

Malley's number was net, i.e. after deduction of the concession. (See Affidavit of John Vitello in Support of Plaintiff's Motion for Summary Judgment ("Vitello Affidavit"), ¶¶ 8-9.)

The Sellers subsequently agreed to accept a net offer of \$1,749,500 to address some concerns that Malley had about work that he believed needed to be done to the house. Malley continued to assert that he intended for his offer to be made with a six percent concession, effectively reducing his offer from \$1,749,500 to \$1,644,530 (See *id.*; e-mail from Eric Malley to Lawrence Ingolia (January 3, 2006), attached as Exh. 8 to Vitello Affidavit.)

On January 5, 2006, Brown Harris unsuccessfully attempted to bridge the gap between the parties by reducing its brokerage commission and by asking the Sellers to lower their asking price (E-mail from Eric Malley to Lawrence Ingolia, attached as Exh. 9 to Vitello Affidavit.) Just days later, on January 8, 2006, and on The Malley Group letterhead, Malley wrote directly to AMS offering to purchase the Property for \$1,750,000. This time there was no seller's concession, but Malley conditioned the offer on a "50/50 Co-broke between [AMS] and The Malley Group." (Letter from Eric Malley to Patricia Garrity, attached as Exh. 11 to Vitello Affidavit.) He then had The Malley Group enter into a new co-brokerage agreement with AMS, in which he acknowledged that AMS had a co-brokerage agreement with

plaintiff and that he had previously dealt with plaintiff. He specifically agreed to indemnify AMS for any claims brought against AMS by Brown Harris. The transaction for the \$1,750,000 sales price closed, and a 6% commission of \$105,000 was divided between The Malley Group and AMS, with each entity receiving \$52,500. In other words, the Sellers received \$1,645,000 and Malley paid \$1,697,500 net.

On July 13, 2006, Brown Harris commenced suit, alleging claims against: (a) the Sellers (first cause of action); (b) Malley and The Malley Group (second cause of action) for wrongfully diverting the brokerage commission from plaintiff; and (c) AMS (third cause of action) for facilitating Malley's breach of an implied brokerage agreement with plaintiff. Brown Harris sought \$43,750 on each cause of action.³ Defendants answered with a general denial of the allegations, and with AMS asserting a cross-claim against the Malley Defendants for indemnification.

Thereafter, Defendants made a motion to dismiss, which was converted by the Court into a summary judgment motion. On September 5, 2007, I granted the motion as to the Sellers, but denied it as to the other defendants. The instant motions followed the completion of discovery.

³ On this motion, Brown Harris claims that it is entitled to \$52,500, the co-brokerage commission that The Malley Group received. (Affidavit of Neal Schwarzfeld in Support of Plaintiff's Motion for Summary Judgment, ¶¶ 2-3.)

DISCUSSION

Plaintiff has established its entitlement to summary judgment, and Defendants have failed to raise a genuine issue of material fact in opposition.

The third cause of action in the complaint is set forth against AMS on the ground that it facilitated Malley's breach of an implied brokerage agreement between Malley and plaintiff. However, plaintiff has pressed a claim rooted in a breach by AMS of their co-brokerage agreement by failing to pay plaintiff even though plaintiff was the procuring cause of the sale. Defendants contend that this is a new theory that should not be considered because my prior order, addressing the complaint as written, is law of the case.

Plaintiff correctly argues that "summary judgment may be awarded on an unpleaded cause of action if the proof supports such cause of action and if the opposing party has not been misled to its prejudice." *Weinstock v. Handler*, 254 A.D.2d 165, 166 (1st Dept. 1998). Here, the complaint should be deemed amended to recast the claim against AMS as one for breach of contract. AMS cannot reasonably claim prejudice.

Plaintiff procured Malley as a purchaser of the Property, and AMS's failure to provide for the payment of plaintiff's commission is a breach of the co-brokerage agreement. Plaintiff not only introduced Malley to the Property, but also

facilitated his negotiations with the Sellers. It is well established that a "real estate broker is entitled to a commission if the broker is the procuring cause of the sale; the compensation is earned if the broker's communications brought the parties together, even though the broker does not negotiate the final terms of the transaction and/or was not present at the closing." *Sholom & Zuckerbrot Realty Corp. v. Citibank, N.A.*, 205 A.D.2d 336, 338-39 (1st Dept. 1994).

A broker is a "procuring cause" when there is a "direct and proximate link, as distinguished from one that is indirect and remote" between its introduction of the parties and the consummation of the sale. *Greene v. Hellman*, 51 N.Y.2d 197, 206 (1980); see also *Hagedorn v. Elwyn*, 229 A.D.2d 654, 656 (3rd Dept. 1996). Here, plaintiff's substantial role in bringing about the sale entitles it to compensation.

Defendants argue that plaintiff did not create a "meeting of the minds" because it did not present the *final* offer that was agreed to by the Sellers. According to Defendants, The Malley Group did so, entitling it to a commission. However, a broker need not present the final offer in order to have earned a commission. Moreover, a procuring broker cannot be deprived of its commission because a broker/buyer wants to effectively lower the asking price by interjecting himself into a deal. Here, despite plaintiff's pivotal role in bringing about the

transaction, Malley and AMS removed plaintiff from the deal so that Malley could reduce the asking price by using his brokerage license as a 3% discount card. It was a breach of contract for AMS to divert the co-brokerage commission to The Malley Group instead of plaintiff.

Defendants also argue that they justifiably extricated plaintiff from the negotiations because it caused the confusion over the seller's concession. However, that argument is belied by the fact that the misunderstanding was resolved and discussions proceeded after the parties clarified their respective positions. Accordingly, even if plaintiff caused the initial confusion, that was not a legitimate basis for cutting the plaintiff out of the deal. The Malley Group replaced plaintiff as the co-broker for Malley's economic benefit and not due to the confusion about the seller's concession.

With regard to the second cause of action, plaintiff argues that the Malley Defendants should be liable because they wrongfully diverted plaintiff's commission. Defendants' assertion that Malley himself cannot be liable because plaintiff was not Malley's broker misses the point. He is liable with The Malley Group for interfering with plaintiff's brokerage contract with AMS and diverting the commission. Discovery in this case has revealed that there was a valid contract between AMS and plaintiff and that Malley knew of it and nonetheless

intentionally procured the breacn, thereby damaging plaintiff.
See *Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 120 (1956).

CONCLUSION


Based on the foregoing, it hereby is

ORDERED that plaintiff's motion for summary judgment in the amount of \$52,500 with interest from March 29, 2006 (motion sequence number 002) is granted against Malley and The Malley Group on the second cause of action and against AMS on the third cause of action; and it further is

ORDERED that, upon searching the record, the Court grants summary judgment to AMS on its cross-claim against The Malley Group for indemnification.

SETTLE JUDGMENT

Dated: April 7, 2009



J.S.C.
JANE S. SOLOMON

FILED
JUN 01 2009
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