

US 1 Laffey Real Estate Corp. v Holzman

2010 NY Slip Op 30268(U)

January 26, 2010

Supreme Court, Nassau County

Docket Number: 003374-09

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
US 1 LAFFEY REAL ESTATE CORPORATION
d/b/a CENTURY 21 JUNE SHAPIRO FINE HOMES
AND ESTATES

Plaintiff,

TRIAL/IAS PART: 22
NASSAU COUNTY

-against-

Index No: 003374-09

Motion Seq. Nos.: 2 & 3

MONA HOLZMAN,

Defendant.

Submission Date: 11/30/09

-----X
The following papers having been read on these motions:

- Order to Show Cause, Affirmation in Support and Exhibits.....X**
- Notice of Cross Motion, Affidavits in Opposition/Support (2),**
- Affirmation in Opposition/Support and Exhibit.....X**
- Affirmation in Further Support/Opposition.....X**
- Reply Affidavit..... X**

This matter is before the Court for decision on the 1) Order to Show Cause filed by Plaintiff on July 8, 2009, and 2) the Cross Motion filed by Defendant on September 2, 2009, both of which were submitted on November 30, 2009. For the reasons set forth below, the Court's decision is as follows: With respect to the Order to Show Cause (motion sequence # 2), the Court directs that a hearing will be held on Plaintiff's application to hold Defendant in contempt of court for her alleged violation of the parties' so-ordered Stipulation of Settlement. The Court denies the Cross Motion for sanctions (motion sequence # 3).

BACKGROUND

A. Relief Sought

In its Order to Show Cause, Plaintiff US 1 Laffey Real Estate Corporation d/b/a Century 21 June Shapiro Fine Homes and Estates ("Century 21" or "Plaintiff") moves for an Order punishing Defendant Mona Holzman ("Holzman") for contempt of Court for her alleged failure to comply with the parties' stipulation dated March 18, 2009, which was so-ordered by the Court (Austin, J.) ("Stipulation"). Defendant opposes Plaintiff's application.

In her Cross Motion, Defendant Mona Holzman ("Holzman" or "Defendant") moves for an Order, pursuant to 22 NYCRR §§ 130-1.1 *et seq.*, imposing sanctions against Plaintiff for filing the allegedly frivolous Order to Show Cause. Plaintiff opposes Defendant's application.

B. The Parties' History

In support of its Order to Show Cause, Plaintiff provides an Affirmation in Support of counsel dated July 2, 2009. In that Affirmation, Plaintiff's counsel affirms as follows:

Century 21 is a licensed real estate broker with over four hundred (400) agents in fourteen (14) offices located on the North Shore of Queens and Nassau Counties. In or about April 2001, Century 21 purchased an existing real estate office located at 200 Middle Neck Road, Great Neck, New York known as June Shapiro Realty ("Great Neck Office"). Holzman is a real estate agent.

After working for a salesperson for approximately six (6) months, Holzman became the manager of the Great Neck Office. In connection with that employment, Holzman entered into an agreement with the Great Neck Office dated October 20, 2001 ("Agreement") (part of Ex. A to Order to Show Cause). ¶ 7 of the Agreement contained a restrictive covenant provision ("Restrictive Covenant") pursuant to which Holzman agreed, *inter alia*, that if her employment relationship with the Great Neck Office was terminated, she would not 1) accept employment with, or acquire an ownership interest in, another real estate brokerage firm located within a five (5) mile radius of specified Century 21 offices within twenty four (24) months of the termination; 2) solicit any employee or agent to terminate his/her relationship with the Great Neck Office; or 3) solicit any customer or client of the Great Neck Office for twenty four (24) months.

Holzman continued to work as the manager of the Great Neck Office for several years.

In January 2009, without notice, Holzman notified Plaintiff that she was resigning. Plaintiff, allegedly in violation of the Restrictive Covenant, accepted the position of Manager of the Prudential Douglas Elliman Real Estate office ("Prudential") located a few blocks from the Great Neck Office.

In light of Holzman's alleged breach of the Agreement, Plaintiff filed a Summons and Complaint, as well as an Order to Show Cause that Justice Leonard B. Austin signed on February 26, 2009 ("Prior Application"). In the Prior Application, Plaintiff sought an Order enjoining Defendant from 1) owning a real estate brokerage firm within the restricted geographic area identified in the Agreement; 2) soliciting Plaintiff's customers; 3) soliciting Plaintiff's agents and/or employees; and 4) otherwise breaching the restrictive covenants and confidentiality provisions in the Agreement.

The parties agreed to a resolution of certain aspects of the Prior Application. They subsequently entered into the Stipulation that resolved the balance of the issues. Paragraph 4 of the Stipulation provides as follows:

That from the date hereof [March 18, 2009] through August 26, 2009, Defendant shall not solicit any real estate listings of the Great Neck Office that were listed with Plaintiff as of January 20, 2009. In the event that any of such listings have a current termination date after August 26, 2009, then the Defendants shall not solicit those specific listings until the current termination date of each such listing has expired. For example, in the event that Plaintiff has a listing executed and dated on January 1, 2009, and which has a current termination date of September 1, 2009, then Defendant shall not be permitted to solicit that listing until September 2, 2009.

Plaintiff alleges that Defendant violated the Stipulation on March 19, 2009, one day after its execution. Specifically, Plaintiff alleges that Defendant listed property located at 320 East Shore Road, Apt. 19C, Great Neck, New York ("Property"), and provides a copy of a printout from the Multiple Listing Service ("MLS") reflecting a listing date of March 19, 2009 by Mona Holzman of Prudential (Ex. C to Order to Show Cause). Plaintiff also provides a copy of a printout from the MLS confirming that this property was listed with Plaintiff from January 7, 2009 through March 6, 2009 (Ex. D to Order to Show Cause).

In support of its Cross Motion, and in opposition to Plaintiff's Order to Show Cause, Defendant provides Affidavits of Holzman and Mark Solomon ("Solomon"). Holzman submits

that she did not violate the Stipulation because she did not solicit a listing for the Property.

Holzman affirms as follows:

Defendant and Solomon have had a close personal relationship for approximately eleven (11) years. Following the end of his listing with Plaintiff, Solomon sought out Defendant and repeatedly asked her to list the Property. When Solomon first decided to sell the Property, he approached Defendant when she was still employed by Plaintiff, and Holzman signed the listing on behalf of Plaintiff. Holzman concedes that this listing is subject to the restrictions in the Stipulation.

Holzman avers, further, that she did not advise Solomon that she was leaving Plaintiff's employ. A representative of Plaintiff called Solomon to advise him that Holzman no longer worked for Plaintiff, and that a different agent was being assigned to list the Property. Solomon spoke with that agent, Roberta Moldawsky ("Moldawsky"), and another representative of Plaintiff, and was dissatisfied with their services. When Solomon's listing with Plaintiff expired on March 6, 2009, he refused to renew his listing with Plaintiff.

Solomon learned that Plaintiff was working at Prudential, and contacted Plaintiff to give her the listing to the Property. Holzman affirms that she encouraged Solomon to remain with Plaintiff, or retain the services of another agency, but Solomon insisted that Holzman list the Property.

Solomon reaffirms the above in his Affirmation. He also affirms that Plaintiff never contacted him to determine the circumstances under which he selected Holzman to list the Property.

In his Affirmation in Further Support, counsel for Plaintiff submits that Defendant did violate the Stipulation by listing the Property, because the term "solicit" in the Stipulation did not require Defendant to have initiated the contact with Solomon. Plaintiff submits that, regardless of who initiated the conversation, Defendant necessarily discussed terms with Solomon, including the duration of the listing and amount of Defendant's commission. Thus, Plaintiff argues, Defendant's conduct, particularly in negotiating the terms of the listing agreement, constitutes solicitation within the terms of the Stipulation. Plaintiff's counsel notes that Holzman and Solomon's affidavits contain no details regarding whether any such negotiation took place.

Plaintiff's counsel also submits that it is unusual in the real estate industry for a customer to demand that a particular agent handle his listing. Rather, sellers are typically more concerned with the terms of the proposed listing agreement than which agent will handle the listing.

Plaintiff's counsel opposes Defendant's cross motion for sanctions, submitting that in light of the fact that Defendant admits listing the Property only one day after execution of the Stipulation, Plaintiff reasonably concluded that Defendant violated the court-ordered Stipulation. Plaintiff's counsel also submits that Plaintiff was not obligated to contact Solomon, and in fact was prohibited from doing so pursuant to Article 16 of the Code of Ethics which prohibits a broker from contacting a client of another broker for purposes of soliciting a listing. Thus, any effort by Plaintiff to contact Solomon could have been construed as improper interference with an existing listing.

In her Reply Affidavit, Holzman affirms that she appreciated the importance of the Stipulation, and made every effort to comply with it. She submits that she never "solicited" Solomon, who repeatedly asked Holzman to handle the listing on the Property. She affirms that she refused to handle that listing until Solomon's listing with Plaintiff had already expired.

Holzman, moreover, submits that it is significant that Plaintiff has not provided an affidavit of Moldawsky, the agent who took over the listing after Holzman began working with Prudential, or of Philip Laffey, a principal of Plaintiff who also handled Solomon's listing. Rather, Plaintiff provides an affidavit of its counsel, who has no personal knowledge regarding the circumstances of the listing.

Holzman submits, further, that the parties anticipated a situation such as the one involving Solomon, and drafted the applicable provision so that Holzman would not be prohibited from signing listings when the owner of property sought out Holzman. In support, Holzman refers to ¶ 3 of the Stipulation which provides, in pertinent part:

That from the date hereof through October 15, 2009, Defendant shall not solicit or hire any real estate agents or employees of Plaintiff that were active employees or independent contractors of Plaintiff as of January 20, 2009.

Holzman argues that the restrictions in ¶ 3 are more restrictive than those in ¶ 4, and demonstrate the parties' intent that Holzman not be prohibited from accepting listings when the owner sought

her out. She also disputes the claim of Plaintiff's counsel that it is not standard practice for a customer to demand that a particular agent handle a listing. Holzman affirms that, during her twenty five (25) years in the real estate industry, many customers have demanded that a certain agent handle their listings. Holzman also argues that, based on the definition of "solicit" in Black's Law Dictionary, it is evident that Holzman did not solicit Solomon's listing.

Holzman also contends that the Court should impose sanctions, *inter alia*, because Plaintiff's counsel, who has no personal knowledge regarding the listings, had no basis to support his affirmation that Holzman and Solomon each initiated contact with the other regarding the terms of the listing. She also disputes the claim of Plaintiff's counsel that Plaintiff was prohibited, by the applicable Code of Ethics, from contacting Solomon before moving for contempt.

C. The Parties' Positions

Plaintiff submits that Defendant violated the Stipulation by listing the Property in violation of the Stipulation and that the Court should adjudge her to be in contempt for that violation.

Defendant disputes that she is in contempt, submitting that her conduct in listing the Property did not constitute solicitation pursuant to the Stipulation. Defendant also seeks sanctions for Plaintiff's filing of the allegedly frivolous Order to Show Cause, submitting, *inter alia*, that minimal investigation would have revealed that any violation of the Stipulation by Defendant was not wilful.

RULING OF THE COURT

A. Contempt Principles

To sustain a finding of civil contempt based upon a violation of a court order, a movant must demonstrate the existence of an unequivocal mandate (*see Kavar v. Kavar*, 231 A.D.2d 681 (2d Dept. 1996)) and must establish a violation thereof by clear and convincing proof (*see Bickwid v. Deutsch*, 229 A.D.2d 533 (2d Dept. 1996)). Moreover, contempt requires a showing of willfulness. *Fox v. Fox*, 120 A.D.2d 488 (2d Dept. 1986). There must be a finding that the conduct complained of was calculated to or actually did defeat, impair or prejudice the rights or remedies of a party to a civil proceeding. *Barkan v. Barkan*, 271 A.D.2d 466 (2d Dept. 2000).

B. Construing the Stipulation

The Court must construe a contract in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. *MHR Capital Partners v. Presstek*, 12 N.Y.3d 640, 645 (2009). A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. *Id.* When a contract term is ambiguous, however, parol evidence may be considered to elucidate the disputed portions of the agreement. *Blue Jeans v. Basciano*, 286 A.D.2d 274 (1st Dept. 2001).

C. Request for Sanctions

Conduct is frivolous if it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law. 22 NYCRR § 130-1.1(c)(1); *Carniol v. Carniol*, 288 A.D.2d 421 (2d Dept. 2001); *Baghaloo-White v. Allstate Ins. Co.*, 270 A.D.2d 296 (2d Dept. 2000); or if it was undertaken primarily to harass another litigant. 22 NYCRR § 130-1.1(c)(2); *Carniol v. Carniol*, *supra*.

D. Conclusion

The Court cannot conclude, based on the four corners of the Stipulation, whether the parties intended to permit Defendant to accept a listing, that would otherwise be in violation of the Stipulation, when the owner sought out Defendant. Thus, parol evidence is necessary to elucidate the parties' intent on this issue. Until that determination is made, the Court cannot conclude whether Defendant's conduct in accepting the listing was wilful. Accordingly, the Court directs that a hearing will be conducted on these issues.

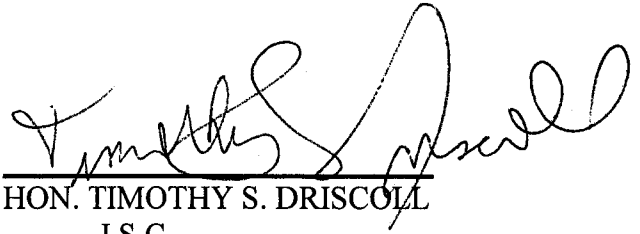
Given that Defendant listed the Property one (1) day after execution of the Stipulation, and the Court's conclusion that it is unclear whether the parties intended to permit Plaintiff to accept listings when the property owner sought her out, the Court cannot conclude that Plaintiff's motion was frivolous. Accordingly, the Court denies the Cross Motion for sanctions.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a conference on February 24, 2010 at 9:30 a.m., at which time the Court will schedule a hearing as directed herein.

DATED: Mineola, NY
January 26, 2010


HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
FEB 02 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE