

Bell Bros. of N.Y., Inc. v Lieberman

2010 NY Slip Op 30590(U)

March 15, 2010

Supreme Court, Nassau County

Docket Number: 013950-08

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
BELL BROTHERS OF NEW YORK, INC. d/b/a.
JOSEPH BELLAVIA & SONS,

TRIAL/IAS PART: 22
NASSAU COUNTY

Plaintiff,

Index No: 013950-08

-against-

Motion Seq. No: 2

Submission Date: 1/15/10

JOEL LIEBERMAN, LEE REALTY CORP. and
BLANCHE REALTY CORP.,

Defendants.

-----x

Papers Read on this Motion:

- Notice of Motion, Affirmation in Support and Exhibits.....x**
- Amended Notice of Motion.....x¹**

This matter is before the court on the motion by Plaintiff filed December 30, 2009 and submitted January 15, 2010. For the reasons set forth below, the Court denies Plaintiff's motion with leave to renew upon a more detailed factual showing.

BACKGROUND

A. Relief Sought

Plaintiff Bell Brothers of New York, Inc. d/b/a Joseph Bellavia & Sons ("Bell Brothers" or "Plaintiff") moves for an Order 1) pursuant to New York Uniform Rules for the New York State Trial Courts ("NYCRR") § 202.27, granting a default judgment in favor of Plaintiff as against Defendants Joel Lieberman ("Lieberman"), Lee Realty Corp. ("Lee Realty") and

¹ Plaintiff filed this Amended Notice of Motion to correct the return date listed in the original Notice of Motion, which read January 8, 2009 instead of January 8, 2010.

Blanche Realty Corp. (“Blanche Realty”) (collectively “Defendants”); and 2) , pursuant to N.Y. Debtor and Creditor Law § 276-a, awarding Plaintiff counsel fees.

Defendants have submitted no opposition or other response to Plaintiff’s motion..

B. The Parties’ History

The Complaint (Ex. A to Aff. in Support) alleges as follows:

Plaintiff is a New York corporation that is, and was at all relevant times, a licensed real estate broker whose clients include purchasers and sellers of automobile dealerships. Lieberman is, and was at all relevant times, an automobile dealer licensed in New York State whose business includes providing, buying and selling vehicles to the general public. Lieberman is, and was at all relevant times, the one hundred (100%) owner, president and secretary of Lee Realty, a New York corporation. Lieberman is also, and was at all relevant times, the one hundred (100%) owner, president and secretary of Blanche Realty. Finally, Lieberman was at all relevant times the one hundred (100%) owner, president and secretary of Dobler Chevrolet, Inc. d/b/a Dobler Chevrolet (“Dobler Chevrolet”), an automobile dealership whose business includes providing, buying and selling vehicles to the general public.

Blanche Realty and Lee Realty owned eight (8) parcels of real property in the Village of Hempstead, Nassau County, New York that were occupied by Dobler Chevrolet. Those parcels (collectively “Real Property”) were located at 1) 28 Sealy Avenue, 2) 36 Sealy Avenue, 3) 52 Sealy Avenue, 4) 24 Smith Street, 5) 35 Smith Street, 6) 63 Smith Street, 7) 257 North Franklin Street, and 8) 239 North Franklin Avenue.

Paragraph 13 of the Complaint alleges that, on or about May 31, 2006, Plaintiff and Lieberman, purportedly on behalf of Dobler Chevrolet, executed a letter agreement (“Agreement”)² pursuant to which:

- (a) Lieberman engaged Plaintiff to “represent the potential sale of the assets of Dobler Chevrolet and the Real Property occupied by the business;” (b) the Seller has authorized [Plaintiff] to offer for sale the above-mentioned entities [*i.e.*, the assets

² Neither the Complaint nor the motion contains a copy of the Agreement. The Court concludes that the Agreement exists in light of paragraph three (3) of Defendants’ Verified Answer (Ex. C to Aff. in Support), in which Defendants deny the allegation that Lieberman was the 100% owner, president and secretary of Lee Realty but admit “execution of a letter agreement on behalf of Dobler Chevrolet, Inc. and [refer] the Court to the letter for its terms.” Notably, in paragraph four (4) of their Answer, Defendants deny the allegations in paragraph 13 of the Complaint in which Plaintiff outlines the purported terms of the Agreement except that Defendants admit that “[Lee Realty] and [Blanche Realty] sold certain real estate to JS Hempstead Realty LLC.”

of Dobler Chevrolet and the real property occupied by Dobler Chevrolet] to John Staluppi or any entity owned or controlled by him,” (c) Plaintiff would be entitled to a five percent (5%) commission of the sale price for the assets of Dobler Chevrolet and the real property occupied by Dobler Chevrolet, and d) defendants agreed to “execute a formal commission agreement at [the] time of [the] formal contract execution [for the sale of the Real Property].

(quotation marks and brackets in original)

The Complaint further alleges that Lieberman never disclosed to Plaintiff that an entity other than Dobler Chevrolet owned the Real Property. Pursuant to the Agreement, Plaintiff advised John Staluppi (“Staluppi”) that the Real Property was for sale and supplied Staluppi with financial statements concerning Dobler Chevrolet’s business as well as surveys of the Real Property. Plaintiff also, pursuant to the Agreement, presented Defendants with Staluppi’s offer to purchase the Real Property and negotiated with Defendants and Staluppi concerning the sale of the Real Property.

After approximately two (2) months of negotiations, allegedly in an effort to prevent Plaintiff from benefitting from the proposed transaction, Lieberman advised Plaintiff that he would instead refinance the Real Property and continue to operate Dobler Chevrolet. On or about May 14, 2007, Lieberman arranged for Lee Realty and Blanche Realty to sell the Real Property to Staluppi for a purchase price of \$7,490,000 consisting of 1) \$5.5 million for the portions of Real Property owned by Blanche Realty and Lee Realty, and 2) \$1.9 million for the termination of Dobler Chevrolet’s leasehold interest in the Real Property.

The Complaint contains five (5) causes of action, asserted against all Defendants: 1) breach of contract, 2) *quantum meruit*, 3) fraud in the inducement, 4) fraudulent conveyance, and 5) piercing the corporate veil. Plaintiff seeks compensatory damages in the sum of \$395,000, punitive damages believed to be in excess of \$1 million and counsel fees pursuant to N.Y. Debtor and Creditor Law § 276-a.

In his Affirmation in Support, Plaintiff’s counsel provides the following procedural history of this matter. Following the service of Defendants’ Answer, the parties served discovery requests. Plaintiff responded to Defendants’ discovery requests but Defendants failed and refused to respond to Plaintiff’s discovery requests. By Order dated November 2, 2009 (Ex. E to Aff. in Support), the Court granted the application of Defendants’ counsel to be relieved and

directed the parties to appear for a Preliminary Conference before the Court on December 9, 2009 at 9:30 a.m. Plaintiff's counsel appeared as directed on December 9, 2009 but Defendants did not appear at which time the Court directed Plaintiff's counsel to send a letter to Defendants advising them that the Court had granted Plaintiff permission to file a motion for default judgment in light of their non-appearance at the Preliminary Conference. Plaintiff's counsel sent the letter as directed (Ex. F to Aff. in Support) and affirms that he has received no communication from Defendants reflecting their intention to defend this action. It is not clear from the Affirmation of Plaintiff's counsel whether the Defendants responded to Plaintiff's counsel in any fashion after receiving his letter. In their Answer, as discussed in part above, Defendants deny many of the allegations in the Complaint.

C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to judgment by establishing that Plaintiff fulfilled its obligations pursuant to the Agreement entitling Plaintiff to receive a 5% commission from the sale of the Real Property. Plaintiff also contends that it has demonstrated that, as a result of Defendants' wrongful actions in manipulating the assets of the corporate Defendants and Dobler Chevrolet to make them judgment proof at the time of their indebtedness to Plaintiff and, therefore, that Defendants are liable to Plaintiff for attorney's fees pursuant to New York Debtor and Creditor Law § 276-a.

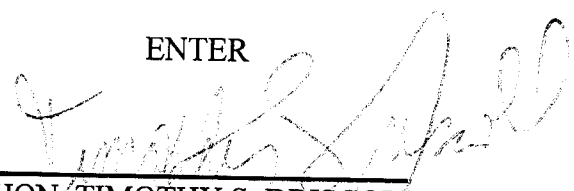
RULING OF THE COURT

Plaintiff seeks judgment based on its allegation that Defendants failed to comply with the terms of the Agreement. Plaintiff has not provided the Court with a copy of the Agreement on which its request for relief is based, or affidavits or other documentation establishing, *inter alia*, that 1) Plaintiff performed his obligations pursuant to the Agreement; 2) the Real Property was, in fact, sold; 3) Plaintiff did not receive monies owed to him under the Agreement; and 4) Lieberman did not comply with corporate formalities to such an extent that the Defendant corporations were mere alter egos of Lieberman and the Court should hold Lieberman liable for the obligations of the Defendant corporations.

In light of the foregoing, the Court denies Plaintiff's motion with leave to renew upon a more detailed factual showing.

All matters not decided herein are hereby denied.
This constitutes the decision and order of the Court.

DATED: Mineola, NY
March 15, 2010

ENTER

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

ENTERED
MAR 18 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE