

**Real Estate Strategies, Ltd v Arington Realty Group,
LLC**

2010 NY Slip Op 32296(U)

August 16, 2010

Supreme Court, Nassau County

Docket Number: 021018-07

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

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REAL ESTATE STRATEGIES, LTD.,

Plaintiff,

-against-

**ARLINGTON REALTY GROUP, LLC, HAROLD
LIPSKY, M.D., PARDEEP BANSAL, M.D., TRINITY
MALVERNE, INC. and PATRICK MCMANUS, M.D.,**

Defendants.

**TRIAL/IAS PART: 22
NASSAU COUNTY**

**Index No: 021018-07
Motion Seq. Nos. 1 & 2
Submission Date: 6/30/10**

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The following papers have been read on these motions:

- Notice of Motion, Affirmation in Support,
Affidavit in Support and Exhibits.....X**
- Affidavits in Opposition (3) and Exhibits.....X**
- Reply Affirmation in Support.....X**
- Notice of Motion, Affirmation in Support,
Affidavit in Support and Exhibits.....X**
- Affirmation in Opposition.....X**
- Reply Affirmation in Support and Exhibit.....X**

This matter is before the Court for decision on 1) the motion filed by Defendants Trinity Malverne, Inc. ("Trinity") and Patrick McManus, M.D. ("McManus") on May 24, 2010, and 2) the motion filed by Defendants Arlington Realty Group, LLC ("Arlington"), Harold Lipsky, M.D. ("Lipsky") and Pardeep Bansal, M.D. ("Bansal") on June 7, 2010, both of which were submitted on June 30, 2010. For the reasons set forth below, the Court grants the motions and dismisses the Amended Complaint.

BACKGROUND

A. Relief Sought

Defendants Trinity and McManus move for an Order, pursuant to CPLR § 3212, awarding summary judgment in favor of moving Defendants and against Plaintiff and dismissing the Amended Complaint (“Complaint”). Defendants Trinity and McManus also cross move against co-defendant Arlington Realty for indemnification.

Defendants Arlington, Lipsky and Bansal move for an Order, pursuant to CPLR § 3212, awarding summary judgment in favor of moving Defendants and against Plaintiff and dismissing the Complaint.

Plaintiff opposes Defendants’ motions.

B. The Parties’ History

The Complaint (Ex. G to Schaefer Aff. in Supp.) alleges as follows:

Plaintiff is a domestic corporation with offices located at 500 North Broadway, Suite 165, Jericho, New York. Arlington is a domestic limited liability company (“LLC”) with offices located at 1 Arlington Avenue, Malverne, New York (“Premises”). Lipsky and Bansal are members of Arlington. Trinity is a domestic corporation with offices at the Premises. McManus is a shareholder in Trinity.

Prior to July 26, 2006, Trinity was the owner of the Premises. On or about July 26, 2006, Trinity sold the Premises to Arlington for the sum of One Million Six Hundred Thousand (\$1,600,000.00) Dollars. The sale (“Sale”) of the Premises was allegedly brought about and procured by the efforts of Plaintiff, which had an implied agreement with Defendants to be paid a commission (“Commission”) for its efforts.

The first cause of action is based on Plaintiff’s allegation that Defendants breached the parties’ implied agreement and, as a result, owe Plaintiff the sum of Ninety Six Thousand (\$96,000) Dollars. In the second cause of action, Plaintiff alleges that Defendants Lipsky, Bansal and McManus conspired to defraud Plaintiff of the Commission by concealing the Sale and hiding their involvement with Arlington, and are liable to Plaintiff for the Commission.

In the third cause of action, Plaintiff alleges that on or about December 1, 2005, Defendants Lipsky, Bansal, McManus and Trinity entered into an agreement to lease (“Lease”) the Premises to Lipsky and Bansal’s professional corporation, All Island Gastroenterology &

Liver Associates, P.C. Plaintiff further alleges that, in furtherance of their agreement to defraud Plaintiff, the applicable Lease agreement contained a provision purporting to cancel the Lease in the event that the Premises was sold. Shortly thereafter, the Premises was sold to Arlington. Plaintiff alleges that, if Defendants are not required to pay the Commission to Plaintiff, Defendants owe Plaintiff a commission for the Leasing of the Premises.

The Answers to the original complaint, as well as the answer to the Amended Complaint, deny the existence of an agreement for the payment of a Commission and further deny all the essential allegations of the Complaint.

In his Affidavit in Support, Lipsky affirms as follows:

Arlington is an entity owned by his wife Sharon Lipsky, Luz Agrawal and Bansal. Arlington purchased the Premises from Trinity on July 26, 2006 for the sum of \$1.6 million.

In January of 2005, Lipsky was contacted by Brad Bold (“Bold”), a broker employed by Plaintiff, who asked Lipsky whether he was looking for office space. When Lipsky responded that he might be interested, Plaintiff began soliciting different building owners and Bold advised Lipsky about the Premises. Lipsky visited the Premises with Bold in early 2005, and discussed the potential purchase with his partner Bansal. Bold told Lipsky that the price he was offering was too low, and that McManus, the owner of the Premises, would not accept his offer.

It soon became apparent that there would be no agreement for Lipsky to purchase the Premises. Bold did not contact Lipsky again until September of 2005, at which time he revisited the potential purchase of the Premises by Lipsky/Arlington. Lipsky affirms that, although he discussed with Bold the possible purchase of the Premises, they never discussed the payment of a broker’s commission to Bold or Plaintiff, and Lipsky never spoke with any representative of Plaintiff about a broker’s fee. Lipsky submits that, as Bold and Plaintiff were not involved in Arlington’s ultimate agreement to purchase the Premises, no commission is owed to them.

In or about May of 2005, an individual named Dr. Agrawal (“Agrawal”), an acquaintance of Bansal, McManus and Lipsky, approached Lipsky to express his interest in purchasing the Premises from McManus, and asked whether Bansal and Lipsky would be interesting in becoming tenants. With Agrawal’s assistance, Bansal and Lipsky entered into the Lease with McManus and moved their medical practice into the Premises in December of 2005. Neither Bold nor Plaintiff was involved with that Lease transaction.

After Bansal and Lipsky moved their medical practice into the Premises, and had been tenants there for several months, Agrawal arranged a purchase of the Premises from McManus for the price of \$1.6 million. Neither Bold nor Plaintiff was involved in that transaction. Lipsky disputes Plaintiff's allegation that Defendants hid this sale from Plaintiff; rather, Defendants did not believe that Plaintiff or Bold was involved in the purchase of the Premises, and had not communicated with Bold for several months prior thereto. Thus, they had no obligation to advise Plaintiff or Bold of the Lease and subsequent Sale of the Premises.

C. The Parties' Positions

Defendants Trinity and McManus submit that they are entitled to summary judgment dismissing the Complaint on the grounds that 1) Plaintiff did not have an express contract with Trinity or McManus for the payment of a commission; and 2) there is no basis from which the Court may infer the existence of an implied contract for payment of a commission because there is no evidence that McManus accepted and benefitted from the broker's services. Defendant Trinity also contends that it is entitled to indemnification from Defendant Arlington because it was the unauthorized conduct of Arlington's representatives that necessitated Trinity's involvement in this action.

Defendants Arlington, Lipsky and Bansal submit that they are entitled to summary judgment dismissing the Complaint on the grounds that 1) the Complaint fails to allege that Plaintiff was duly licensed; 2) Plaintiff was neither the procuring cause of the Sale or Lease; 3) no implied contract existed between Plaintiff and Defendants Arlington, Lipsky and Bansal regarding the payment of a Commission; and 4) the fraud action is duplicative of the cause of action for breach of contract because Plaintiff has not alleged facts demonstrating that these Defendants breached any duty independent of the duty arising from the alleged implied contract. Defendant Arlington also contends that it is entitled to indemnification from Defendant Trinity pursuant to the contract between those parties.

Plaintiff opposes Defendants' motions, submitting that Plaintiff has presented facts from which the Court may infer that 1) there was an implied agreement to pay Plaintiff a Commission; 2) the actions of Plaintiff's representative brought about the Sale; and 3) the parties conspired to deprive Plaintiff of the Commission to which it was entitled. Thus, Plaintiff contends, summary judgment is not appropriate.

RULING OF THE COURT

A. Summary Judgment Standards

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

B. Plaintiff's Failure to Allege that it is Licensed Requires Dismissal of the Complaint

A license as a real estate broker or salesperson is required of a person who seeks compensation for services rendered in buying, selling, exchanging, leasing, renting or negotiating a loan upon real estate. Real Property Law ("RPL") § 442-d; *Bendell v. De Dominicis*, 251 N.Y. 305, 308 (1929); *Mavco Realty Corp. v. M. Slayton Real Estate, Inc.*, 38 A.D.3d 726, 727 (2d Dept. 2007). RPL § 440 defines "real estate broker" to include:

any person, firm, limited liability company or corporation, who, for another and for a fee, commission or other valuable consideration, lists for sale, sells, at auction or otherwise, exchanges, buys or rents, or offers or attempts to negotiate a sale, at auction or otherwise, exchange, purchase or rental of an estate or interest in real estate, or collects or offers or attempts to collect rent for the use of real estate, or negotiates or offers or attempts to negotiate, a loan secured or to be secured by a mortgage, other than a residential mortgage loan.

A broker is an agent who, for commission or brokerage fee, bargains or carries on negotiations on behalf of his principal as intermediary between the latter and third persons in transacting business relative to the sale or purchase of any form of property. *BAll Banking Corp. v. UPG, Inc.*, 985 F.2d 685, 700 (2d Cir. 1993). An action for a broker's commission cannot be maintained by a corporation if the corporation fails to allege that it is or was licensed, notwithstanding the fact that a real estate broker's license was held by its president. *Sharon Ava & Co., Inc. v. Olympic Tower Assoc.*, 259 A.D.2d 315, 316 (1st Dept. 1999). RPL § 442-d provides, in relevant part, as follows:

No person, copartnership, limited liability company or corporation shall bring or

maintain an action in any court of this state for the recovery of compensation for services rendered, in any place in which this article is applicable, in the buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate without alleging and proving that such person was a duly licensed real estate broker or real estate salesman on the date when the alleged cause of action arose.

The provisions of § 442-d are mandatory. Without allegation and proof that the real estate broker or salesman was licensed, the complaint to recover a commission must be dismissed. *M.K.D. Capital Corp. v. Miller*, 170 Misc.2d 1002, 1004 (Sup. Ct. N. Y. Cty. 1996). See also *Philip Mehler Realty, Inc. v. Kayser*, 176 A.D.2d 104 (1st Dept. 1991), *app. disp.*, 79 N.Y.2d 977 (1992), *reh. den.*, 79 N.Y.2d 1041 (1992), (trial court erred in denying defendant's application to dismiss plaintiff's cause of action to recover the balance due under a broker agreement where the plaintiff-corporation did not allege that it was licensed, or present any such proof to the special referee assigned to determine the licensing issue).

Due to the penal nature of the statute, it must be strictly construed and not be made applicable to every situation in which an interest in real estate may be part of the transaction. *Reiter v. Greenberg*, 21 N.Y.2d 388, 391-392 (1968); *Kreuter v. Tsucalas*, 287 A.D.2d 50, 54 (2d Dept. 2001); *Matter of Wertlieb*, 165 A.D.2d 644, 647 (1st Dept. 1991); *Eaton Assoc. v. Highland Broadcasting Corp.*, 81 A.D.2d 603, 604 (2d Dept. 1981). If an item of real estate is an incidental feature of the transaction at issue, RPL § 442-d does not apply. Where, however, as in this case, real estate is the principal element involved in the transaction, a broker must have a license and cannot evade that requirement by characterizing its services as that of a finder, intermediary or middleman. *Sorice v. DuBois*, 25 A.D.2d 521 (1st Dept. 1966).

Plaintiff's only allegation with respect to its status is that it "is a domestic corporation with offices for the transaction of business" in Jericho, New York (Complaint at ¶1). The Complaint contains no allegations that Plaintiff is or was licensed to broker the real estate transaction at issue. In addition, the Complaint does not allege that its president was a licensed real estate broker or salesperson; *cf. Sharon Ava & Co., Inc. v. Olympic Tower Associates, supra*. Moreover, the affidavits in opposition submitted by Plaintiff's managing director Bold and its former managing director Frank Roel fail to allege that they, as individuals, were licensed to broker the real estate transaction herein. *Cf. Rogovin v. Bach Realty Inc.*, 147 A.D.2d 364 (1st Dept. 1989). In *Rogovin*, the court declined to dismiss the action where 1) the dispute was

between brokers, not between a customer and broker; 2) the individual plaintiff was the sole shareholder, officer and employee of the corporate plaintiff which was formed for tax and pension plan purposes; 3) all brokerage services were performed by the individual plaintiff, who was a licensed broker; and 4) the purpose of the RPL provision would not be served by preventing the individual plaintiff from recovering commissions. Unlike *Rogovin*, the matter at bar contains no allegations that would militate against dismissal pursuant to RPL § 442-d.

In light of 1) the Court's obligation to apply strictly the provisions of RPL §442-d, 2) the fact that the services allegedly rendered by Plaintiff under the agreement clearly fall within the ambit of RPL § 442-d, and 3) the absence of allegations that Plaintiff possessed the requisite license, the Court grants Defendants' motions and dismisses the Complaint.

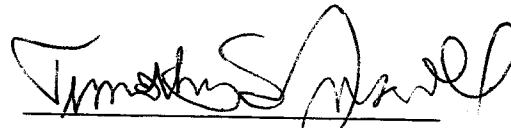
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY

August 16, 2010



HON. TIMOTHY S. DRISCOLL

J.S.C.

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ENTERED

AUG 20 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE