

Trigoli v Domain Props. LLC

2010 NY Slip Op 32500(U)

September 3, 2010

Supreme Court, Queens County

Docket Number: 6268/2008

Judge: James J. Golia

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAMES J. GOLIA
Justice

IA Part 33

RONEN TRIGOLI, x

Plaintiff,

- against -

DOMAIN PROPERTIES LLC, HAIM YAGEN AND
RACHEL MIZRAHI,

Defendant.

Index
Number 6268 2008

Motion
Date May 27, 2010

Motion
Cal. Number 25

Motion Seq. No. 1

DOMAIN PROPERTIES LLC AND RACHEL MIZRAHI, x

Third-Party Plaintiff,

-against-

GREEN HOMES NYC

Third-Party Defendant.

x

The following papers numbered 1 to 13 read on this motion by plaintiff Ronen Trigoli for an order granting summary judgment on the sixth cause of action of the amended complaint against defendant Rachel Mizrahi, to recover on a promissory note in the sum of \$42,330.00, with interest from August 29, 2007, together with costs and attorney's fees. Defendants Rachel Mizrahi and Domain Properties LLC cross-move for an order granting summary judgment dismissing the complaint.

Papers
Numbered

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Memorandum of Law.....	

Upon the foregoing papers the motion and cross motion are determined as follows:

The Pleadings:

Plaintiff Ronen Trigoli alleges in his first amended complaint that he was a licensed real estate sales agent through July 2007, and that commencing in July 2007 he became a licensed real estate broker. Defendant Domain Properties LLC (Domain) is a licensed real estate brokerage firm. Defendants Haim Yagen and Rachel Mizrahi are both licensed real estate brokers. Plaintiff alleges that he was a one-third member of Domain.

Mr. Trigoli was terminated from his employment at Domain on August 24, 2007. He thereafter formed Green Homes NYC, third-party defendant herein, a real estate brokerage company.

This action was commenced on March 10, 2008. Ronen Trigoli alleges in the complaint that in February 2003, he, Mizrahi and Yagen agreed to form a real estate brokerage business known as Domain Properties LLC (Domain). Mr. Trigoli alleges that at all times he, along with Mizrahi and Yagen each owned an undivided one-third membership in Domain, and that until August 24, 2007, they divided the business' profits in equal shares. He further alleges that "[a]t all times relevant herein he was a member of Domain and procured real estate brokerage transactions on behalf of the defendants." Mr. Trigoli was married to Ms. Mizrahi's sister. He alleges that in April 2006, his marital problems caused a strain on his business relationship with the defendants, and that on August 24, 2007, Yagen and Mizrahi locked him out of the brokerage offices, and ousted him from the business. He alleges that the parties entered into a buy out agreement, whereby the defendants agreed to pay him for his share of Domain, which was memorialized in a writing dated August 29, 2007. He further alleges that this same writing constitutes a promissory note, executed by Rachel Mizrahi, individually and on behalf of Yagen and Domain.

Plaintiff's first cause of action to recover brokerage commissions, alleges that on August 29, 2007, Yagen and Mizrahi individually agreed to buy out his one-third interest in the brokerage business; that pursuant to this agreement Yagen and Mizrahi, individually and on behalf of Domain agreed to pay Trigoli a commission of 15% of the brokerage commissions on all signed real estate transactions and/or lease transactions obtained within six months through February 2008; that the defendants received brokerage commissions between August 29, 2007 and February 29, 2008, and have refused to remit payment to him;

that he has requested an accounting and payment of his commissions; that defendants have refused to permit him to examine their books; and that defendants have not paid the commissions.

The second cause of action to recover brokerage commissions, alleges, in the alternative, that defendants have been unjustly enriched.

The third cause of action for breach of contract alleges that Ms. Mizrahi executed a written agreement dated August 29, 2007 which memorializes the buy out agreement; that she executed this agreement individually and as agent for Yagen and on behalf of Domain, and that she breached this agreement individually and as agent for Yagen and on behalf of Domain, as no such payments have been made. Plaintiff seeks to recover sums due to him, pursuant to this agreement.

The fourth cause of action for conversion against Mizrahi and Yagen alleges that on August 24, 2007, Mizrahi and Yagen improperly locked Trigoli out of Domain, and improperly converted Domain's profits to themselves.

The fifth cause of action for breach of fiduciary duties, alleges that Trigoli has a one-third membership in Domain, and that since August 24, 2007, Mizrahi and/or Yagen improperly transferred income, cash and assets belonging to Domain to themselves or to third parties, in order to dilute the value of Trigoli's interest in Domain.

Plaintiff seeks to recover on the first five causes of action a sum "not less than \$1,000,000.00, the exact amount to be determined at trial," together with costs, disbursements and attorney's fees.

The sixth cause of action seeks to recover on an alleged promissory note dated August 29, 2007, and executed by Rachel Mizrahi.

Defendants served an answer and interposed 12 affirmative defenses and counterclaims against Trigoli for breach of contract, fraud, negligent misrepresentation, conversion, and in the alternative, breach of fiduciary duty. Defendants Yagen and Mizrahi, in their counterclaims, allege that they are the sole and exclusive members of Domain, with each maintaining a 50% ownership interest. Defendants allege that in June 2003, Trigoli introduced Yagen, a business acquaintance, to Mizrahi and that shortly thereafter, Yagen and Mizrahi agreed to form a real estate brokerage business. Domain was formed in June 2003, and Mizrahi and Yagen leased property at 1123 Broadway in Manhattan. It is alleged that the formation documents only identify Yagen and Mizrahi as Domain's members and have never been revised or amended. It is further alleged that Yagen and Mizrahi each initially

contributed capital of \$114,000.00 to Domain, and that Mizrahi contributed an additional \$114,000.00 in anticipation that Trigoli would eventually “buy in” as a member of Domain.

Defendants allege that Domain obtained loans totaling \$200,000.00 from JP Morgan Chase and North Fork Bank which were personally guaranteed by Yagen and Mizrahi, and that from July 2003 through February 2004, Domain, Mizrahi and Yagen invested substantial and additional funds to purchase furniture, advertise the company, hire employees, develop technology and develop the business. It is alleged that in July 2003, Mizrahi became the broker of record of Domain and in August 2003, Yagen also became the broker of record of Domain.

Defendants allege that Trigoli’s eventual membership in Domain was conditioned upon his acquiring a real estate broker’s license, paying an amount equal to the initial capital investment of \$114,000.00 paid by Yagen and Mizrahi, and contributing a substantial amount of new business, new clients and new opportunities for Domain. Defendants further allege that either Mizrahi or Domain loaned Trigoli a total of \$105,680.00 with the expectation that these loans would be offset by his capital investment in Domain, or that they would be repaid. Defendants allege that during the period of February 2004 through June 2007, Trigoli did not contribute any funds or repay the loans; that he was employed by Domain as a real estate sales agent; and that he did not make substantial contributions to the business.

Defendants allege that despite repeated admonishments, Trigoli directed profitable inquiries to a single sales agent at Domain, who he had developed a personal relationship with, to the detriment of the other agents, and had secretly deleted e-mails from Domain’s computer or server. Defendants also allege that they believe that Trigoli obtained his real estate license in an improper manner. Defendants allege that after Trigoli was terminated, they discovered that he had solicited Domain’s employees to join him in a new brokerage firm while still employed by Domain, and that at least one employee copied Domain’s proprietary and confidential data, enabling Trigoli to develop a virtually identical website for his new company. Defendants further assert that while Trigoli was still in Domain’s employ, he repeatedly solicited Domain’s actual and prospective customers, and diverted customers to his new company.

Defendants allege that after Trigoli was terminated, Mizrahi in order to avoid personal disputes pertaining to their family relations, offered Trigoli the sum of \$48,333.00, plus an amount equal to 15% of various transactions over subsequent months. It is alleged that Trigoli rejected Mizrahi’s offer, refused to engage in negotiations with her, and commenced this action.

Plaintiff’s motion for summary judgment:

Plaintiff now moves for summary judgment on his sixth cause of action to recover on a promissory note against Rachel Mizrahi. Defendant Haim Yagen has not responded to the motion, and plaintiff does not at present seek any relief against this defendant. It is noted that after the within motion was served, a notice of substitution of counsel dated February 2, 2010 was filed with the court on February 8, 2010, whereby defendants' counsel withdrew and all of the defendants stated that they were proceeding pro se. Ms. Mizrahi and Domain have retained new counsel who are representing them in this motion, although a notice of substitution has not been filed with the court.

Plaintiff, in support of his motion, relies upon the following hand written document, admittedly drafted by Rachel Mizrahi, which reads as follows:

“8/29/07

[Hebrew Letters]

\$48,333 Rachel owes Ronen
 \$1500 monthly for 6 months
 St 9/1 -Feb/08 6 months
 15% of Bal left after paying
 Domain payable
 2 Banks NFB & chase
 NYT advertising

(1) E44-estimate 200k ?? Will know by Fri
 (2) E39th St 105k 10/1/07
 (3) 430 Southern Blv. Bronx ?
 Car Fin till October -06 2 pymts.
 \$1500 Due to Haim

Rachel Mizrahi [signature]

Any signed deals (contracts) Within the
 next 6 months till Feb 08- Will be
 included in the “pending deal”
 15% is Due to Ronen.

Rachel Mizrahi [signature] 8/29/07

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(1) EX Pass Register for new tag
 (2) Car Fin-Till Oct payment 2006”

The above memorandum is not in the form of a promissory note, as it does not by its terms contain a promise to pay (*see* Uniform Commercial Code § 3-104 [1] [a]-[d]; [2] [d]). Rather, the memorandum constitutes a voluntary and unenforceable executory promise (*see Dougherty v Salt*, 227 NY 200, 202 [1919]; *Beitner v Becker*, 34 AD3d 406 [2006]). Plaintiff's motion for summary judgment on the sixth cause of action, therefore, is denied, and that branch of defendants' cross motion which seeks summary judgment dismissing the complaint, is granted as to this cause of action.

Defendants' cross motion to dismiss the remainder of the complaint:

Real Property Law § 440-a provides that no person, copartnership, limited liability company or corporation may engage in the business of, or hold himself out or act as a real estate broker or real estate salesman in New York, even temporarily, without first having obtained a license. Courts have consistently sustained the licensing requirements of this statutory provision in order "to protect the public from inept, inexperienced or dishonest persons" (*Dodge v Richmond*, 5 AD2d 593 [1958]).

The license issued to a limited liability company entitles one member thereof, or one manager thereof, to act as a real estate broker. Each other member or manager who desires to act as a real estate broker on behalf of the limited liability company must apply for and obtain an additional license expiring on the same date as the limited liability company's license. No license as a real estate salesman shall be issued to any officer of a corporation, nor to any manager or member of a limited liability company, nor to a member of a copartnership licensed as a real estate broker (Real Property Law § 441-b).

Where a person licensed individually later becomes an officer of a corporation or a manager or member of a limited liability company, or member of a copartnership, an application must be made on behalf of that corporation, limited liability company or partnership for a broker's license for that person as its representative for the remainder of the then current license term. The licensee must return the license and pocket card previously issued to him or her, in his or her individual capacity to the Department of State, which will endorse, without charge, the change of status on the face of the license and pocket card and return them to the licensee (Real Property Law § 441-b).

Defendants assert that Rachel Mizrahi and Haim Yagen were the only members listed in Domain's formation documents and that said documents were never altered or amended. The parties have not submitted a copy of Domain's formation documents which were filed with the Department of State.

It is undisputed that Domain, a limited liability company, obtained a real estate broker license in June 2003, and that its members, Rachel Mizrahi, obtained a real estate broker's license in July 2003, and Haim Yagen, obtained a real estate broker's license in July 2003.

Although Mr. Trigoli alleges that he is a one-third member of Domain, he admittedly was a licensed real estate salesperson through July 2007, and did not obtain his real estate broker's license until July 2007. Therefore, he was statutorily prohibited from being a member of Domain. In addition, there is no evidence that upon obtaining his real estate broker's license in July 2007, that Mr. Trigoli became a member of Domain, and that Domain applied for an additional license for him to represent it.

Mr. Trigoli claims that he repaid Ms. Mizrahi the sum of \$114,000.00, which she contributed to Domain on his behalf, by reducing the amount of his commissions totaling \$92,004.00, and by making a payment of \$50,000.00 directly to Domain. He states in his affidavit that prior to his termination, he owed Mizrahi \$22,480.00, which if he had not been ousted would have been completely paid within 60 days based upon the volume of business at that time.

In support of these claims, Mr. Trigoli has submitted a series of handwritten notes that contain figures and notations, cryptic references to Rachel, Ronen and Haim, as well as others, and include payments for stamps, taxis, petty cash amounts, and other office expenses. All dates set forth in these notes were prior to July 2007. Mr. Trigoli has also submitted a bank statement for April-May 2006 and a copy of a face of a check, dated May 23, 2006, payable to Domain Properties in the sum of \$50,000.00. This check is drawn on the account of Ronen Trigoli and Esther Trigoli, is signed by Esther Trigoli, and contains a notation on the memo line which reads "Loan from [illegable]."

These handwritten notes are insufficient to establish that commissions earned by Trigoli as a licensed real estate sales person were applied to sums Mizrahi had advanced on his behalf. As regards the check, although it is evidence of a payment to Domain, it is insufficient on its face to establish that this payment was made on behalf of Ronen, rather than Esther Trigoli, or the purpose of the loan.

Furthermore, plaintiff's assertion that the August 29, 2007 memorandum, is a buy out agreement, is rejected. This memorandum makes no reference to Mr. Trigoli as a member of Domain, or to any interest which he claims to have in Domain, and was not executed by Ms. Mizrahi on behalf of Domain or Mr. Yagen.

Since Mr. Trigoli was not a licensed real estate broker until July 2007, he is not entitled to recover any brokerage commissions from Domain or the co-defendants, which were earned by Domain from June 2003 to July 2007. It is noted that Mr. Trigoli does not

seek to recover brokerage commissions he may have earned for specific real estate transactions after he became a licensed real estate broker. Furthermore, as Mr. Trigoli cannot establish that he was a member of Domain between July 2007 and August 2007, he is not entitled to recover any profits earned by Domain during that period.

In view of the foregoing, plaintiff's motion for summary judgment on the sixth cause of action is denied, and defendants' cross motion for summary judgment dismissing the complaint in its entirety is granted. Since a motion for summary judgment searches the record, the complaint is also dismissed in its entirety as to defendant Haim Yagen. Defendants' counterclaims and third-party action are hereby severed and continued.

Dated: September 3, 2010

J.S.C.