

Mitra Hakimi Realty Group, LLC v Salvit

2010 NY Slip Op 32883(U)

October 5, 2010

Supreme Court, Nassau County

Docket Number: 013874-10

Judge: Vito M. DeStefano

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 21
NASSAU COUNTY

MITRA HAKIMI REALTY GROUP, LLC,

Decision and Order

Plaintiff,

MOTION SUBMITTED:

August 23, 2010

-against-

MOTION SEQUENCE:01

INDEX NO. 013874-10

ROBERT SALVIT and TSIPORA SALVIT,

Defendants.

The following papers and the attachments and exhibits thereto have been read on this motion for summary judgment in lieu of complaint:

Notice of Motion	1
Affirmation in Opposition	2
Reply Affirmation	3

Background

On August 20, 2009, the Plaintiff (a real estate broker) and Defendants (property owners) executed a Listing Agreement for Real Property/Exclusive Right to Sell (the "Agreement"). By that Agreement, the Defendants agreed to pay the Plaintiff a total commission of four percent "if the property is sold or rented during the term of this Agreement whether or not the sale or rental is a result of the Broker's efforts and even if the property is sold as a result of the efforts of the owner or any other broker or agent not acting under this agreement." (Ex. "A" to Plaintiff's Motion). The Agreement also set forth the following:

**ALL ORAL OR PRIOR AGREEMENTS BETWEEN THE PARTIES ARE
HEREBY MERGED INTO THIS AGREEMENT AND THE PARTIES AGREE**

THAT THEIR RELATIONSHIP SHALL BE GOVERNED BY THIS AGREEMENT AND NOT BY ANY OTHER PRIOR ORAL OR WRITTEN REPRESENTATIONS OR AGREEMENTS. The parties agree that no change, amendment, modification or termination of this agreement shall be binding on any party unless the same shall be in writing and signed by the parties hereto subsequent to the date of this agreement.

(Ex. "A" to Plaintiff's Motion) (emphasis in original).

On February 8, 2010, while the Agreement was still in existence, the Defendants sold and conveyed the property to a third party, David Mahgerefteh (Exs. "D" and "E"). It is undisputed that a commission was not paid to the Plaintiff at the time of closing. It is also undisputed that the Plaintiff was not the procuring cause of the transaction.

Summary Judgment in Lieu of a Complaint

The Plaintiffs thereafter moved for summary judgment in lieu of a complaint pursuant to CPLR 3213 based on the following assertions: Plaintiff entered into an Agreement with Defendants for the sale of their property; the property was sold during the term of this Agreement; Plaintiff is entitled to a four percent commission of the total selling price pursuant to the Agreement; and Defendants have failed to pay the amount owed under the Agreement (Plaintiff's Motion at ¶¶ 5-8).

The Defendants oppose Plaintiff's motion on the grounds that the Agreement does not qualify as an "instrument for the payment of money only" under CPLR 3213 and summary judgment is not warranted in any event given issues of fact that need to be resolved, including Defendants' claim that the parties agreed that if Mahgerefteh (who had expressed an interest in the property prior to the execution of the Agreement) purchased the property, that a commission would not be owed to the Plaintiff (Defendants' Opposition at ¶¶ 2, 3).

For the reasons that follow, the Plaintiff's motion is denied.

Analysis

The Plaintiff moves for summary judgment pursuant to CPLR 3213 which states, in relevant part:

When an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint.

While the question of what constitutes "an instrument for the payment of money only" is often debated, the standard which is nevertheless most often used to ascertain whether a particular

instrument qualifies under CPLR 3213 is whether a *prima facie* case would be made out by proof of the instrument itself and a failure to make the payment as called for by its terms (*Interman Industrial Products, Ltd. v R.S.M. Electron Power, Inc.*, 37 NY2d 151 [1975]; *Seaman-Andwall Corp. v Wright machine Corp.*, 31 AD2d 136, 137 [1st Dept 1968]). The instrument itself must require the defendant “to make certain payments and nothing else.” (*Seaman-Andwall Corp. v Wright machine Corp.*, 31 AD2d at 137, *supra*). In the Court of Appeals more recent visit on the applicability of CPLR 3213, the Court noted that “cases within CPLR 3213 ‘have dealt primarily with some variety of commercial paper in which the party to be charged has formally and explicitly acknowledged an indebtedness.’ Where the instrument requires something in addition to defendant’s explicit promise to pay a sum of money, CPLR 3213 is unavailable” (*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]).

The instrument at bar, a Listing Agreement for the promise to pay four percent commission upon the sale of the property does not fall within the contemplated meaning of the statute as an “instrument for the sum of money only” because the Agreement itself requires something in addition to Defendants’ explicit promise to pay the commission, to wit, the sale of Defendants’ property (*see Weissman v Sinorm Deli, Inc.*, 88 NY2d at 444, *supra* [1996]; *Interman Industrial Products, Ltd. v R.S.M. Electron Power, Inc.*, 37 NY2d at 155, *supra* [CPLR 3213 had been repeatedly denied in those actions which were not based upon instruments for the payment of money only but, rather, required something in addition to the defendant’s explicit promise to pay a sum of money]; *Dubovsky & Sons, Inc. v Schwartz*, 75 AD2d 802 [2d Dept 1980] [relief pursuant to CPLR 3213 denied where additional proof dehors the instrument is necessary for plaintiff to prevail, namely, that goods were actually sold and delivered to debtor for which it remains liable]).

McNeilly v Rogers (58 AD2d 724 [3d Dept 1977]) is factually similar to the case at bar. *McNeilly* involved an action to recover a real estate commission allegedly earned by a realtor pursuant to a listing agreement whereby the seller of the property purportedly agreed to pay a commission to the realtor upon the realtor’s procuring a purchaser for the property. In reversing the Supreme Court’s granting of the realtor’s motion for summary judgment in lieu of a complaint, the Appellate Division stated:

For plaintiff to prevail on his motion, his action must be “based upon an instrument for the payment of money only” (CPLR 3213), and, as such, he must be able to prove a *prima facie* case merely by proof of the instrument and defendant’s failure to make payments in accordance with its terms. In this instance, however, as, for example, he must establish that he has procured a purchaser for the subject property at the contract price and terms or other acceptable price and terms.

(*McNeilly v Rogers*, 58 AD2d at 725, *supra* [citations omitted]).

Like the realtor in *McNeilly*, the Plaintiff at bar has failed to establish that the Agreement is one for the payment of money alone, as certain elements outside the Agreement are necessary, i.e, the Plaintiff's performance of her obligation under the Agreement and the amount of commission owed, if any (*Ippolito v Family Medicine of Tarrytown & Ossining, LLP.*, 46 AD3d 752 [2d Dept 2007] [plaintiff's motion for summary judgment in lieu of complaint should have been denied because instrument did not qualify; other than simple proof of nonpayment, outside proof was needed to determine the amount due to the plaintiff under the subject note]).

Plaintiff's reliance on *Bagley v Butler* (59 Misc2d 1029 [County Court Rensselaer County 1969] is unpersuasive and, to the extent it may be interpreted as calling for a different result, this court declines to follow it.¹

Based on the foregoing, it is hereby ordered that the Plaintiff's motion for summary judgment in lieu of a complaint pursuant to CPLR 3213 is denied.

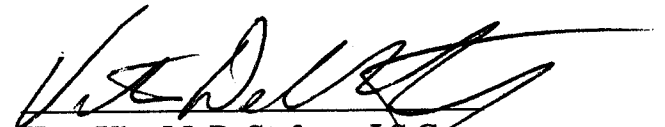
This constitutes the decision and order of the court.

Dated: October 5, 2010

ENTERED

OCT 08 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE


Hon. Vito M. DeStefano, J.S.C.

¹ While the instrument in *Bagley v Butler* was a contract between a realtor and an owner of real and personal property, the court treated the agreement as one calling for the "payment of a sum of money only" given the particular positions of the parties on their submissions. According to the court:

At the outset, there comes to mind of the court whether the instrument in question was of the kind intended to be embraced by the statute. The defendants here, by responding as they did and seeking the same kind of relief, indicated that the adopted procedure was a speedy and effective way of disposing of a claim. The aim of those who drew the statute was to avoid the superfluous gesture of a formal complaint and the delay incident to a formal answer when the actual situation dictated the wisdom of obtaining judgment, one way or the other, forthwith. Here, both parties apparently feel the statutory remedy should apply and the practical construction placed on the section by the parties is going to be followed by the court.