

**Benyamini v Widewaters Uniontown Co., LLC**

2010 NY Slip Op 33129(U)

October 28, 2010

Supreme Court, Nassau County

Docket Number: 15423/08

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

\_\_\_\_\_  
HERTZL BENYAMINI a/k/a BERHOOZ  
BENYAMINI a/k/a BERHOOZ HERTZL  
BENYAMINI,

Plaintiff,

-against-

WIDEWATERS UNIONTOWN COMPANY, LLC,

Defendant.

\_\_\_\_\_  
WIDEWATERS UNIONTOWN COMPANY, LLC,

Defendant/Third-Party Plaintiff,

-against-

TARGET CORPORATION,

Third-Party Defendant.

TRIAL/IAS, PART 2  
NASSAU COUNTY

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MOTION DATE: Sept. 27, 2010  
Motion Sequence # 001

The following papers read on this motion:

- Notice of Motion..... X
- Affidavit in Opposition..... X
- Memorandum of Law..... XX
- Reply Memorandum of Law..... X

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Motion by third-party defendant, Target Corporation, an order, pursuant to CPLR 3211(a)(1) and (7), dismissing the third party complaint on the grounds of a defense founded upon documentary evidence and failure to state a cause of action is **granted** in part and **denied** in part.

This is an action for breach of a brokerage agreement. Insofar as a motion made pursuant to CPLR 3211 requires this Court to accept as true the allegations of the complaint (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]), the underlying facts, in the third party action, are as follows:

At some time prior to January 14, 2002, defendant/third party plaintiff, Widewaters Uniontown Company, LLC (“Widewaters”) engaged the plaintiff, Hertzl Benyamini a/k/a Berhooz Benyamini a/k/a Berhooz Hertzl Benyamini (“Benyamini”), to act as its real estate broker in connection with the possible sale of certain real property located in South Union Township, Fayette County, Pennsylvania.

On January 14, 2002, Widewaters drafted a Letter of Intent (“LOI”) to the third party defendant herein, Target Corporation (“Target”), for the proposed sale of this property to Target. The Letter of Intent is addressed to Greg Young, the Real Estate Manager of Target. It is signed by Scott Luedtke, of Widewaters’ Retail Development group, and states, in pertinent part, as follows:

The Widewaters Group is pleased to provided this revised proposal for our site on Matthews Drive, in the City of South Uniontown, PA to Target Stores, Inc. under the following terms and conditions:

1. Parties

Developer: Widewaters Uniontown Company, LLC

Tenant: Target Corporation, a Minnesota Corporation

2. Target Site:

Developer would sell the “Target Site” consisting of approximately \_\_\_ acres as depicted on the site plan dated September 13, 2001 for development of a building

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consisting of approximately 125,400 square feet (Target P. 2001 prototype), adequate parking and adequate direct access in fee to and from the following public road of Matthews Drive.

\*\*\*

5. Closing:

Target's obligation to close shall be subject to an initial due diligence period of 90 days and satisfaction of Target's contingencies before closing. Closing shall be held within 30 days of the date Target has advised Developer that all contingencies have been met or waived by Target. In no event shall Target be required to close until Developer has received all on and off-site entitlements including but not limited to final, unappealable zoning, site plan and subdivision approvals. \*\*\*

\*\*\*

15. Brokerage:

Developer will be responsible for paying any and all fees owed to Hertzl Behrooz Benyamini ("Broker") pursuant to the terms of a separate brokerage agreement.

\*\*\*

This letter is intended to be a non-binding letter that expresses the parties' current intention. Neither Developer nor Target shall be legally bound or obligated to perform with respect to the subject matter of this letter, under any legal theory, prior to the execution and mutual delivery of the final PA, OEA and/or SDA.

Subsequently, on August 2, 2005, Widewaters and Target entered into a PA pursuant to which Target purchased the same tract of land located in the County of Fayette, Commonwealth of Pennsylvania. Widewaters maintains that prior to the execution of the PA, Target required it to conduct negotiations for the PA through Metro Commercial Real Estate ("Metro"). In relevant part, the PA which identified Widewaters as the Seller and Target as the Buyer stated as follows:

1. Seller is the fee owner of a certain tract of land (the "Shopping Center Tract") consisting of approximately forty-three (43) acres located in the County of Fayette, Commonwealth of Pennsylvania, legally described in Exhibit A attached hereto, and which has been subdivided in accordance with the subdivision plan attached hereto as Exhibit B.\*\*\*

Exhibit A to the PA, in turn, stated as follows:

Exhibit A: Legal Description of Shopping Center Tract

All that tract and parcel of land set forth as lots 11A; 11B; 11C; 11D; 11E; 11F and 11G on the 2<sup>nd</sup> Revision of Lot 11 of the Widewaters Uniontown Company, LLC Plan of Lots ("Plan of Lots"), situate on Matthew Drive, South Union Township, Fayette County, PA, which Plan of Lots was recorded July 5, 2005 in the Recorder of Deeds Office of Fayette County, PA, in Plat Book Volume 76, Page 21.

Furthermore, Section 16 of the PA, entitled BROKERS, states, in full, as follows: Seller warrants to Buyer that Seller has not taken any action in connection with this transaction which would result in any real estate broker's fee, finder's fee, or other fee being due or payable to any party, other than a fee of \$247,600 payable to Metro Commercial Real Estate, Inc. (the "Broker"). Seller agrees to pay to Broker at Closing any and all fees due to Broker in connection with this transaction. Buyer warrants to Seller that Buyer has not taken any action in connection with this transaction which would result in any real estate broker's fee, finder's fee, or other fee being due or payable to any party. *Seller and Buyer respectively agree to indemnify, defend and hold harmless the other from and against any and all claims, fees, commissions, and suits of any real estate broker or agent with respect to services claimed to have been rendered for or on behalf of such party in connection with the execution of this Agreement or the transaction contemplated herein, provided that, in any event, Seller shall indemnify, defend and hold harmless Buyer from and against any and all claims, fees, commissions and suits of the Broker with respect to any and all services claimed to have been rendered in connection with the execution of this Agreement or the transaction contemplated herein. Notwithstanding anything contained in this Agreement to the contrary, the terms of this Section 16 shall survive the Closing or termination of this Agreement.* [Emphasis Added].

Also on August 2, 2005, as part and parcel of the PA, the parties also signed the Operation and Easement Agreement and the Site Development Agreement.

It is clear that through these provisions of the PA, specifically Section 16, that, notwithstanding the previously dated LOI, Widewaters represented that the only broker it had engaged in connection with the PA was Metro and that it had no involvement with Benyamini in this transaction.

Plaintiff Benyamini alleges that subsequent to his performance of all of the services

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required to bring about the execution of a Contract of Sale between Widewaters and Target, Widewaters entered into a contract of sale, i.e., the PA, with Target relating to the sale of the Subject Premises for \$1,250,000.00, that on August 2, 2005, Widewaters conveyed the subject premises to Target and, as a consequence thereof, plaintiff earned a commission of \$125,000.00 (*Third Party Complaint*, ¶6).

Widewaters, in turn, alleges in its third party complaint that Target should be liable for the amount of any broker's commission that plaintiff, Benyamini, recovers from Widewaters in the primary action. Specifically, in its first cause of action, Widewaters asserts that Target bears liability for Benyamini's broker's commission, if any, because it was "not ready, nor willing nor able to and did not enter into the real estate transaction reflected in the" LOI. Widewaters' second cause of action is for contractual indemnification under Section 16 of the PA in which both Widewaters and Target warranted that they had not taken any action "in connection with this transaction" that would result in an real estate broker's fee being due or payable to a broker other than the fee Widewaters admitted it owed to the broker specified in the PA, namely Metro.

Upon the instant motion, the third-party defendant, Target moves to dismiss Widewaters' third party complaint.

CPLR 3211(a)(1) permits the defendant to obtain a dismissal of one or more causes of action asserted against it on the ground that the defendant has a defense founded upon documentary evidence. When a motion to dismiss based upon documentary evidence is made pursuant to CPLR 3211(a)(1), the defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitely disposes of the plaintiff's claim (*Leon v. Martinez*, 84 NY2d 83 [1994]; *Sheridan v. Town of Orangetown*, 21 AD3d 365 [2<sup>nd</sup> Dept. 2005]).

CPLR 3211(a)(7) permits the defendant to seek a dismissal of a cause of action asserted against it when the plaintiff allegedly fails to state a cause of action in the pleading. In deciding a motion made pursuant to CPLR 3211(a)(7), the court must determine whether the pleader has a cognizable cause of action (*Leon v. Martinez*, *supra*; *Well v. Yeshiva Rambam*, 300 AD2d 580 [2<sup>nd</sup> Dept. 2002]). On a motion to dismiss for failure to state a cause of action, the complaint must be liberally construed in the light most favorable to the plaintiff, and all allegations must be accepted as true (*511 West 232nd Street Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144 [2002]; *Well v. Yeshiva Rambam*, *supra*). If, from the facts alleged in the complaint and the inferences which can be drawn from the opposition to

the motion, the court determines that the pleader has a cognizable cause of action, the motion to dismiss must be denied (*Sokoloff v. Harriman Estates Development Corp.*, 96 NY2d 409 [2001]; *Stucklen v. Kabro Assocs.*, 18 AD3d 461 [2<sup>nd</sup> Dept. 2005]).

By the terms of the LOI, the parties would become obligated to perform only upon the execution and mutual delivery of the final Purchase Agreement (“PA”), the Operation and Easement Agreement (“OEA”), and/or the Site Development Agreement (“SDA”). The “Letter of Intent” specified that the “letter is intended to be a non-binding letter that expresses the parties’ current intention [and that] [n]either Developer nor Target shall be legally bound or obligated to perform with respect to the subject matter of this letter, under any legal theory, prior to the execution and mutual delivery of the final [Purchase Agreement, Operation and Easement Agreement and/or Site Development Agreement].” Thus, the letter agreement itself contemplated the execution of additional formal agreements (*Venture Manufacturing Ltd. v. Matco Group, Inc.*, 6 AD3d 850 [3<sup>rd</sup> Dept. 2004]). Accordingly, the writing relied upon by the plaintiff, to wit, the LOI, is merely an agreement to agree, which is unenforceable (*Williamsburg Business Park, LLC v. Brooklyn Navy Yard Development Corp.*, 2 AD3d 439 [2<sup>nd</sup> Dept. 2003]; *Sabetfard v. Smith*, 306 AD2d 265 [2<sup>nd</sup> Dept. 2003]). Accordingly, third party defendant Target’s motion to dismiss the third party complaint for failure to state a cause of action is **granted** as to third party plaintiff Widewaters’ first cause of action based solely on the 2002 Letter Of Intent.

Third party defendant Target’s motion to dismiss Widewaters’ second cause of action for indemnification, based upon the PA that it signed with Target, is however **denied**. Initially, it is noted that despite not having established that it suffered any damages, the defendant/third party plaintiff, Widewaters, may maintain a claim for anticipatory indemnification which states that a party who has not yet sustained actual loss may still assert an anticipatory claim for indemnification. Anticipatory claims for contractual indemnification have been sustained, even where no damages have been suffered (*see, Pennsylvania v. General Ins. Co. v. Austin Powder Co.*, 68 NY2d 465, 470 [1986]; *McDermott v. New York*, 50 NY2d 211, 218 [1980]).

Nonetheless, a party seeking contractual indemnification must establish the existence of a written agreement between itself and the party from whom it is seeking indemnification (*Moss v. McDonald's Corp.*, 34 AD3d 656 [2<sup>nd</sup> Dept. 2006]). Contractual indemnity can be obtained if the agreement specifically so provides or if “...the intention to indemnify can be clearly implied from the language and purpose of the entire agreement, and the surrounding

facts and circumstances” (*Margolin v. New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]).

There is no dispute that the parties incorporated an indemnification clause in their PA. Pursuant to Section 16 of the PA, both Target and Widewaters agreed to “indemnify, defend and hold harmless the other from and against any and all claims, fees, commissions, and suits of any real estate broker or agent with respect to services claimed to have been rendered for or on behalf of such party in connection with the execution of this Agreement or the transaction contemplated herein, provided that, in any event, [Widewaters] shall indemnify, defend and hold harmless [Target] from and against any and all claims, fees, commissions and suits of [Metro] with respect to any and all services claimed to have been rendered in connection with the execution of this Agreement or the transaction contemplated herein.”

Target has not established that the indemnification provision in Section 16 of the PA does not require Target to indemnify Widewaters for any and all broker’s fees arising from the transaction. There is no dispute that Widewaters agreed to indemnify Target against any and all claims of Metro with respect to the transaction. The issue here is whether Target agreed to indemnify Widewaters for any and all claims brought by brokers other than Metro.

Contrary to Target’s argument, Section 16 does not provide for a specific, limited indemnification obligation, arising only if Target took some action which caused an additional fee to another broker to become owed. Rather, both parties agreed to a blanket indemnification requiring both of them to indemnify each other for any and all broker’s fees arising from the transaction. Thus, Widewaters’ failure to allege any such actions by Target is not material.

Inasmuch as the parties attempt to recast the facts of this case as two separate transactions, this Court finds that such a distinction is unfounded. There is no documentary (or other) evidence to support Target’s contention that the 2005 real estate transaction was different than the one contemplated by the LOI in 2002. It is undisputed that the parties in “both” transactions were identical and more importantly, both transactions concerned the sale and purchase of the same property - located on Matthews Drive in Fayette County, Pennsylvania. There is no evidence that the transactions dealt with different parcels of property. In the absence of any evidence that there were two separate transactions, Target’s argument that Section 16 expressly stated that it applied only to actions it took “in connection with this transaction” is equally meritless.

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In light of the foregoing, third party defendant Target's motion to dismiss Widewaters' second cause of action for contractual indemnification for a defense founded upon documentary evidence and failure to state a cause of action is **denied**.

This shall constitute the decision and order of this Court.

Dated **OCT 28 2010**

  
J.S.C.

**ENTERED**

**NOV 03 2010**

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**