

Sarkinovic Realty Corp. v Bertoni

2010 NY Slip Op 33590(U)

December 13, 2010

Supreme Court, Queens County

Docket Number: 15444/2010

Judge: David Elliot

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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 14

SARKINOVIC REALTY CORP.

X

INDEX NO. 15444/10

- against -

MOTION SEQ. NO. 1

BY: ELLIOT, J.

CINTHIA BERTONI

X

DATED: DECEMBER 13, 2010

Defendant Cinthia Bertoni has moved for summary judgment dismissing the complaint against her on the grounds of lack of capacity to sue, res judicata, and the statute of frauds.

Ron Hiatt, a licensed real estate broker, operates plaintiff Sarkinovic Realty Corp. which employs Aida Markisic, a licensed salesperson. On May 1, 2008, defendant Cinthia Bertoni executed a brokerage agreement whereby she allegedly authorized Sarkinovic Realty to sell property known as 31-47 47th Street, Astoria, New York. Bertoni promised to pay the broker a 3% sales commission. Sarkinovic Realty procured buyers for the property who offered in writing to purchase the property for \$810,000. Bertoni allegedly accepted the offer. However, on or about August 5, 2008, defendant Bertoni allegedly informed Markisic that she would not sell the property because of “capital gains problems.”

The brokerage agreement signed by defendant Bertoni actually authorized Aida Realty to sell the property and does not mention by name Sarkinovic Realty. According to

Markisic, “Because my first name is ‘Aida,’ and because my last name is hard to pronounce, both I and my customers and clients refer to me as ‘Aida Realty.’ ” An awning outside the business address given for Sarkinovic Realty bears the name “Aida Realty.”

In October 2008, a plaintiff calling itself “Aida Realty Corp.” sued Bertoni for the \$24,300 commission allegedly due under the brokerage agreement in the New York State Supreme Court, County of Sullivan (*Aida Realty Corp. v Bertoni*, Index No. 4006/08). During the course of the action, Aida Markisic swore that she served as the chief salesperson for Aida Realty Corp., a New York Corporation. However, on this motion Markisic swears: “I never had anything to do with Aida Realty Corp.– and suing in its name was just a plain mistake.” Pursuant to a decision and order dated January 14, 2009 (one paper), the Honorable Mark M. Meddaugh granted Bertoni’s motion, upon which the plaintiff defaulted, for an order dismissing the action for lack of capacity to sue, since Aida Realty Corp. had been dissolved in 1980.

The attorney representing the plaintiff in the Sullivan County action wrote a letter to the court dated January 19, 2009, apparently before he learned of the court’s decision, stating:

“Our personal client in this matter is one Aida Markisic, a Bosnian National. She mistakenly advised us that the broker licensee corporation with which she was affiliated was Aida Realty Corp. The defendant’s counsel called to our attention that Aida Realty Corp. had been formed many years ago, prior to

Aida Markisic ever coming to the United States, and has since been dissolved. Aida Markisic never had any connection or affiliation with Aida Realty Corp. Actually, Aida Markisic was affiliated with Sarkinovic Realty Corp. as licensee. We would therefore consent to a dismissal of this case without prejudice to re-filing in the name of the proper corporation as party plaintiff.”

On or about June 17, 2010, Sarkinovic Realty began the instant action by the filing of a summons and complaint whose allegations are identical to those made in the Sullivan County action except for the name of the plaintiff.

The defendant had the burden of establishing that the instant action is barred on the grounds of res judicata and lack of capacity to sue. (*See, Seabrook v City of New York*, 306 AD2d 68.) She failed to carry that burden.

"Under the doctrine of res judicata, a disposition on the merits bars litigation between the same parties, or those in privity with them, of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding" (*Sterngass v Soffer*, 27 AD3d 549-550; *see, Barbieri v Bridge Funding, Inc.*, 5 AD3d 414.) In regard to identity of parties, Markisic has sworn that she “never had anything to do with Aida Realty Corp.” While the defendant produced evidence showing that Markisic does business under the name “Aida Realty,” this evidence does not also establish that Markisic had a relation to the Aida Realty Corp. that lacked capacity to sue because of dissolution. The defendant offered no evidence showing that plaintiff Sarkinovic Realty had any relation to the Aida Realty Corp. which the Sullivan

court regarded as the plaintiff. Under the circumstances, the defendant did not satisfy the requirement of an identity of parties.

The defendant also did not satisfy the requirement of a disposition on the merits. Capacity "is a threshold question involving the authority of a litigant to present a grievance for judicial review." (*Matter of Town of Riverhead v New York State Bd. of Real Prop. Servs.*, 5 NY3d 36, 41; *Caprer v Nussbaum*, 36 AD3d 176.) Though distinct concepts, legal capacity to sue is "related" to standing to sue (*Caprer v Nussbaum, supra*, 181), and issues pertaining to those threshold matters do not go to the merits of the case. (*See, Tico, Inc. v Borrok*, 57 AD3d 302 ["A dismissal premised on lack of standing is not a dismissal on the merits for res judicata purposes."]; *Cutler v Hayes*, 818 F2d 879, 888 ["Standing ranks amongst those questions of jurisdiction and justiciability not involving an adjudication on the merits whose disposition will not bar relitigation of the cause of action originally asserted, but may preclude, or collaterally estop relitigation of the precise issues of jurisdiction adjudicated."]; *McCarney v Ford Motor Co.*, 657 F2d 230, 234 ["We hold, therefore, that a dismissal based upon a lack of standing is not 'on the merits' of the underlying substantive claim . . .].")

The dismissal of the Sullivan County action has a preclusive effect only on the narrow issue of whether the Aida Realty Corp. unrelated to Sarkinovic Realty lacked the capacity to sue. "A dismissal based on plaintiff's lack of capacity to sue is dispositive only of that particular objection and does not preclude a new action which overcomes that objection." (*Tri Terminal Corp. v CITC Industries, Inc.*, 100 Misc 2d 477, 479.) As

Professor David Siegel explains: “A number of the objections listed as dismissal grounds in CPLR 3211(a) also come in for only limited res judicata application; they are deemed an adjudication of only the narrow ground predicating the dismissal even though the dismissal is embodied in a formal judgment. Illustrations here would be . . . the plaintiff's lack of capacity to sue at the time of the earlier action” “. . . The doctrinal element in this context is a kind of hybrid between claim preclusion and issue preclusion” (Siegel, NY Prac [4th Ed] §446.)

The defense based on the Statute of Frauds also lacks merit. Although the notice of motion raises the statute of frauds, the supporting affirmation of the defendant's attorney alleges little more than: “Defendant Bertoni never entered into any agreement with Sarkinovic Realty” The second affirmative defense raised in the defendant's answer alleges that the authorization to sell agreement does not satisfy the statute of frauds because a material term (the sales price) was “unilaterally changed.” The defendant's reliance on the statute of frauds is misplaced. Insofar as a promise to pay a commission is concerned, “[t]here is no requirement that a realtor's brokerage agreement be in writing” (*Eastern Consol. Properties, Inc. v Lucas*, 285 AD2d 421, 422; *see*, General Obligations Law 5-701 [a][10].) Insofar as General Obligations Law 5-703(1), which requires the authorization of an agent to sell real property to be in writing is concerned (*see, Bowling v. Pedzik*, 302 AD2d 343), the alleged absence of an enforceable contract between Bertoni and the prospective purchasers due to the lack of a sufficient writing to satisfy the statute of frauds

(General Obligations Law, § 5-703) is not determinative of the plaintiff broker's right to recover commissions. (*See, De Angelis v. Graham*, 96 AD2d 570.)

Accordingly, the motion is denied.

Short form order signed herewith.

J.S.C.