

Hampton Country Real Estate, Inc. v King
2011 NY Slip Op 30075(U)
January 4, 2011
Supreme Court, Suffolk County
Docket Number: 06-29212
Judge: Thomas F. Whelan
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SHORT FORM ORDER

INDEX No. 06-29212
CAL. No. 10-01027-CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 9-23-10 (#002)
MOTION DATE 9-30-10 (#003)
ADJ. DATE 10-25-10
Mot. Seq. # 002 - MotD
003 - MotD

-----X
HAMPTON COUNTRY REAL ESTATE, INC., :
 :
 :
 Plaintiff, :
 :
 - against - :
 :
 BARBARA KING, individually and as trustee of :
 the BARBARA KING FAMILY TRUST, :
 ANTHONY R. GUGLIOTTA, and :
 A. GUGLIOTTA DEVELOPMENT INC., :
 individually and d/b/a T.S. CONSTRUCTION, :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 66, read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14, 33 - 46; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 16 - 23, 26 - 30, 49 - 52; Replying Affidavits and supporting papers 53 - 60, 61 - 64; Other memoranda of law 15, 24 - 25, 31 - 32, 47 - 48, 65 - 66; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendants Anthony R. Gugliotta and A. Gugliotta Development Inc., individually and d/b/a T.S. Construction, for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint or granting summary judgment in their favor against the co-defendants on their cross claim for indemnification, is granted to the extent of granting summary judgment dismissing the complaint against Anthony R. Gugliotta and dismissing the second, fourth, fifth, and sixth causes of action against A. Gugliotta Development, Inc., and is otherwise denied; and it is further

FM 1-6-11

ORDERED that the motion by defendant Barbara King, individually and as trustee of the Barbara King Family Trust, for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint, dismissing the cross claim of the co-defendants, and in their favor over and against the co-defendants on their cross claim for indemnification, is granted to the extent of granting summary judgment dismissing the fourth, fifth, and sixth causes of action against her, and is otherwise denied.

In this action, the plaintiff seeks to recover a real estate broker's commission allegedly earned pursuant to an agreement between Robert M. Camerino (Camerino) on behalf of the plaintiff Hampton Country Real Estate, Inc., and the defendants Anthony R. Gugliotta (Gugliotta) and A. Gugliotta Development, Inc., Individually and d/b/a T.S. Construction (AGD). The plaintiff claims entitlement to a commission of \$140,000 from the sale of property located at 547 Butter Lane, Bridgehampton, New York (Butter Lane) in the amount of \$2.8 million. The plaintiff pleads six causes of action in the complaint: the first, alleging that Gugliotta and AGD breached the commission agreement, the second, that Gugliotta and AGD fraudulently procured the plaintiff's services, the third, that defendant Barbara King, individually and as trustee of the Barbara King Family Trust (King), wrongfully interfered with the brokerage contract, the fourth, that the defendants committed fraud, the fifth, that the defendants conspired to avoid paying the earned commission, and the sixth, that the defendants are responsible to pay the reasonable value of the plaintiff's services.

Gugliotta and AGD now seek an order granting summary judgment dismissing the complaint against them or granting summary judgment in their favor against King on their cross claim for indemnification. In support of the motion, Gugliotta and AGD submit, *inter alia*, the pleadings, the affidavit of Gugliotta, the depositions of the plaintiff, King and a non-party witness, and fliers used by them to advertise the sale of Butter Lane. Although there is no dispute that the plaintiff is a licensed real estate broker, Gugliotta and AGD claim that there was no agreement with the plaintiff and that the plaintiff was not the procuring cause of the sale.

"A real estate broker is entitled to recover a commission upon establishing that he or she (1) is duly licensed, (2) had a contract, express or implied, with the party to be charged with paying the commission, and (3) was the procuring cause of the sale" (*Marciano v Ran Oil Co. E.*, 63 AD3d 1118, 882 NYS2d 452 [2d Dept 2009]; *see also Greene v Hellman*, 51 NY2d 197, 433 NYS2d 75 [1980]; *Stanzoni Realty Corp. v Landmark Props. of Suffolk*, 19 AD3d 582, 796 NYS2d 549 [2d Dept 2005]).

In his affidavit, Gugliotta swears that he is the president of A. Gugliotta Development, Inc., which is in the business of building residential homes. In March 2004, his corporation mailed out fliers to real estate brokers in Bridgehampton, advising them of an open listing of the Butter Lane property. He states that in the spring of 2005, AGD's project manager at Butter Lane showed the house to Barbara King (King) and Lorraine Bracco (Bracco). Shortly thereafter, King called him and expressed interest in the house, and they arranged to meet at the house. He further swears that King stated that "there were no brokers involved," that no offer was made at that meeting, and that the two of them engaged in telephone negotiations for approximately one week. Within one month of their meeting, King made an offer to purchase the house for \$2.8 million dollars, which he accepted in late June 2005. He states that a contract was signed by the parties which included an indemnification clause regarding their mutual representations that neither had dealt with a broker in connection with the sale. The closing of title

occurred on July 22, 2005 and Gugliotta and AGD did not pay out a brokerage commission, "as no brokers were involved ..." He further swears that Camerino is a shareholder of the plaintiff, and that "No written agreement was ever entered into with Camerino, and no discussions were had between [Gugliotta] and Camerino regarding the subject premises."

At her deposition, King testified that, in early 2005, she was interested in purchasing either vacant land or a home in Bridgehampton to be near her good friend Bracco, who lives on Butter Lane. Bracco had introduced King to Camerino, who took them around to see properties in the area sometime in April 2005. During their excursion, she became very interested in property located on Mitchell Lane. On their way home, Camerino wanted to show them the Butter Lane house. She told Camerino that she had seen the house before and that she was not interested in seeing it again. However, she testified that she did walk through the house with Camerino that day, and that she does not recall any conversation with Camerino other than her telling him that she had seen the house already. King further testified that she and Bracco had been shown the Butter Lane house twice before by Gugliotta and AGD's project manager, that she had been through the house a couple of days before Camerino had them stop at the house, and that she had also seen it in the early stages of construction. She indicated that she made an offer on the Mitchell Lane property through Camerino, that the offer was accepted, that contracts were drawn up but not signed, and that the deal fell through based on the advice of her attorney. After the Mitchell Lane deal fell through, she contacted Gugliotta by phone at the number she had been given by the project manager at Butter Lane. King further testified that she did not know if she spoke to Camerino after the Mitchell Lane deal fell through, and that Camerino did not take part in the negotiations which led to her purchase of the Butter Lane house. In contrast to testimony given by Camerino, she stated that Camerino did not take her to see another Gugliotta and AGD property located in Deerfield on the day of the excursion, or any other day.

Bracco, a non-party witness, testified that she is a friend of King, and that she attempted to get King interested in purchasing a parcel of vacant land on Butter Lane in Bridgehampton. King made an offer on that parcel through an employee of the plaintiff but "it never went anywhere." She indicated that it may have been that employee who introduced King to Camerino, but that she did not know that as a fact. Bracco further testified that, before the April excursion with Camerino, she and King were shown Butter Lane by one of the workers on the site, who gave them the name and phone number of the builder. She stated that, on the day of the excursion, they told Camerino that they had previously seen the Butter Lane property, that King did not want to go into the house, and that King went into the house but stayed in the front and did not look around.

At his deposition, Camerino testified that his corporation received a mailing from Gugliotta and AGD in 2004 or 2005, which included an open listing for Butter Lane. He described an open listing as one "where a seller lists with real estate brokers, directly lists with broker A, broker B and C, and no broker has an exclusive." He stated that on or about April 9 or April 10, 2005, he telephoned Gugliotta to update the listing in anticipation of showing the house to King, and that Gugliotta asked him to show the Butter Lane property, to sell it, and also encouraged him to show King the Deerfield property. Camerino further testified that on or about April 12, 2005, he showed a number of properties to King, Bracco, and three other gentlemen accompanying them. He indicated that he showed the group the Deerfield property and introduced King to Gugliotta, whom he identified as the builder of the Butter

Lane house that they would be seeing later. He stated that they later traveled to Butter Lane, that King never said that she had been shown the house before, and the group spent a lot of time looking through the house. Camerino further testified that the group spent an hour or more looking at Butter Lane, that King told him that she wanted to build her own house, and that the group discussed aspects of the house that she might incorporate if she decided to build a new home. He indicated that, during the visit, the group grabbed fliers which included relevant information about the house. However, he did not recall if King took one of the fliers. He stated that he helped King put together the Mitchell Lane deal and that, when that deal fell apart, he spoke with her about other properties that were still available, including Butter Lane. She told him that she was not interested in Butter Lane, that she was going to rent a house from a friend for a month, and that she was “putting everything else on hold.” He stated that she did not return his telephone calls thereafter, and that he first learned that King had purchased Butter Lane when he saw it listed in the newspaper after the closing of title.

Gugliotta has established his entitlement to summary judgment dismissing the complaint against him. It is uncontroverted that he did business as a corporation. In order for him to be held personally liable in this matter, the plaintiff must pierce the corporate veil, which requires a showing that Gugliotta (1) exercised complete dominion and control over the corporation, and (2) used such dominion and control to commit a fraud or wrong against the plaintiff which resulted in injury (*see Matter of Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 603 NYS2d 807 [1993]; *Seuter v Lieberman*, 229 AD2d 386, 644 NYS2d 566 [2d Dept 1996]). The mere claim that the corporation was completely dominated by the individual, or conclusory assertions that the corporation acted as an “alter ego,” without more, will not suffice to support the equitable relief of piercing the corporate veil (*see Matter of Morris v New York State Dept. of Taxation and Fin.*, *supra*; *Abelman v Shoratlantic Dev. Co.*, 153 AD2d 821, 545 NYS2d 333 [2d Dept 1989]). Gugliotta has met his burden by submitting his affidavit that he did not have any conversations or dealings with Camerino personally or as president of the corporation. The plaintiff has failed to submit any evidence that Gugliotta acted in a personal capacity or made any statements, promises or agreements that can be construed as personal to him.

AGD has established its entitlement to summary judgment dismissing the second, fourth, fifth and sixth causes of action in the complaint. In essence, the second cause of action for fraudulent procurement and the fourth cause of action for fraud are identical. As a general rule, a claim for damages for fraud does not lie where the only fraud alleged relates to a breach of contract (*Selinger Enters. v Cassuto*, 50 AD3d 766, 860 NYS2d 533 [2d Dept 2008]; *Tiffany at Westbury Condominium v Marelli Dev. Corp.*, 40 AD3d 1073, 840 NYS2d 74 [2d Dept 2007]; *Ross v DeLorenzo*, 28 AD3d 631, 813 NYS2d 756 [2d Dept 2006]). Only where a defendant makes a material representation which was collateral or extraneous to the alleged contract between the parties, and the damages which a plaintiff seeks to recover are not the same damages recoverable for breach of contract, is a separate cause of action for fraud actionable (*see Lee v Matarrese*, 17 AD3d 539, 793 NYS2d 457 [2d Dept 2005]; *Americana Petroleum Corp. v Northville Indus. Corp.*, 200 AD2d 646, 606 NYS2d 906 [2d Dept 1994]). The Court finds that the plaintiff failed to demonstrate that AGD made such a collateral or extraneous material representation, and that the damages which the plaintiff seeks to recover are the same damages recoverable for breach of contract. The fifth cause of action for conspiracy must be dismissed as New York does not recognize civil conspiracy as an independent cause of action (*see Plymouth Drug Wholesalers v Kirschner*, 239 AD2d 479, 658 NYS2d 64 [2d Dept 1997]). Allegations

of conspiracy are permitted “only to connect the actions of separate defendants with an otherwise actionable tort” (*Alexander & Alexander of N.Y. v Fritzen*, 68 NY2d 968, 510 NYS2d 546 [1986]). Inasmuch as the plaintiff’s claim for civil conspiracy stands or falls with the underlying tort, the plaintiff’s fifth cause of action claim for conspiracy is rendered legally deficient with the grant of summary judgment on its claims for fraud (see *Ward v City of New York*, 15 AD3d 392, 789 NYS2d 539 [2005]; *Shepis v 3 Cottage Place Assoc.*, 265 AD2d 317, 696 NYS2d 687 [2d Dept 1999]). As for the sixth cause of action, sounding in quasi-contract, the Court finds that the conduct and resulting injury alleged is identical to those alleged in the first cause of the action alleging breach of the brokerage agreement. Consequently, it is dismissed as duplicative of the breach of contract cause of action (see *Deer Park Enters. v Ail Sys.*, 57 AD3d 711, 870 NYS2d 89 [2d Dept 2008]). “Briefly stated, a quasi-contractual obligation is one imposed by law where there has been no agreement or expression of assent, by word or act, on the part of either party involved. The law creates it, regardless of the intention of the parties, to assure a just and equitable result” (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 521 NYS2d 653 [1987]). The plaintiff makes no allegation that it entered into a special contract to act solely as a finder entitling it to recover in quantum meruit (*PKG Assoc. v Dubb*, 306 AD2d 333, 760 NYS2d 681 [2d Dept 2003]).

AGD has failed, however, to establish its entitlement to summary judgment as to the plaintiff’s first cause of action for breach of contract. There are issues of fact as to whether the plaintiff and AGD had either an express or implied contract, whether the plaintiff was the procuring cause of the sale of Butter Lane, or whether it was prevented from procuring the sale of Butter Lane (*Kooleraire Serv. & Installation Corp. v Board of Educ. of City of N.Y.*, 28 NY2d 101, 320 NYS2d 46 [1971]; *Williams Real Estate Co. v Viking Penguin*, 228 AD2d 233, 644 NYS2d 19 [1st Dept 1996]; *Baird v Bardis*, 32 AD2d 785, 302 NYS2d 318 [2d Dept 1969]). In addition, there is conflicting evidence whether the plaintiff’s involvement was the catalyst in a chain of circumstances which led to the sale of the property, and whether AGD accepted and benefitted from the plaintiff’s services (see *Zere Real Estate Servs. v Adamag Realty Corp.*, 60 AD3d 758, 875 NYS2d 162 [2d Dept 2009]; *Hammer v Griffin*, 19 AD3d 450, 796 NYS2d 241 [2d Dept 2005]; *Joseph P. Day Realty Corp. v Chera*, 308 AD2d 148, 762 NYS2d 373 [1st Dept 2003]; *Dagar Group v Hannaford Bros.*, 295 AD2d 554, 745 NYS2d 34 [2d Dept 2002]). The court’s function on summary judgment is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility (see *Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573, 774 NYS2d 792 [2d Dept 2004]; *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rennie v Barbarosa Transp.*, 151 AD2d 379, 543 NYS2d 429 [1st Dept 1989]). AGD’s failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

That branch of the motion by AGD which seeks an order granting summary judgment in its favor against King on its cross claim for indemnification is denied. Despite the mutual representations in the contract between the parties, there are multiple issues of fact requiring a trial regarding King’s dealings with Camerino, and whether King had seen Butter Lane prior to those dealings.

King moves for an order granting summary judgment dismissing the complaint, dismissing the cross claim of the co-defendants, and in her favor over and against the co-defendants on their cross claim

for indemnification. In support of the motion, King submits, *inter alia*, the pleadings, and the depositions of both the parties and Bracco.

King has established her entitlement to summary judgment on the plaintiff's fourth cause of action for fraud, the fifth cause of action for civil conspiracy, and the sixth cause of action sounding in quasi-contract. The elements of a cause of action for fraud, as pleaded in the plaintiff's fourth cause of action, are (1) a misrepresentation of fact, (2) which was false and known to be false by the defendant, (3) made for the purpose of deceiving the plaintiff, (4) upon which the plaintiff justifiably relied, (5) causing injury (e.g. *Clearview Concrete Prods. Corp. v S. Charles Gherardi, Inc.*, 88 AD2d 461, 453 NYS2d 750 [2d Dept 1982]; see also *Ozelkan v Tyree Bros. Envtl. Servs.*, 29 AD3d 877, 815 NYS2d 265 [2d Dept 2006]; *Eades v Tadao Ogura, M.D., P.C.*, 185 AD2d 266, 587 NYS2d 209 [2d Dept 1992]). The record reveals that King had no interest in the Butter Lane property until sometime after the Mitchell Lane deal fell apart. The plaintiff failed to establish that the alleged statement to Camerino by King that she was not interested in Butter Lane was false when made, known to be false by King, and made for the purpose of deceiving the plaintiff. A mere recitation of the elements of fraud and vague and conclusory assertions and mere suspicions are insufficient to raise a material issue of fact requiring a trial (see *National Union Fire Ins. Co. of Pittsburgh, Pa. v Christopher Assoc.*, 257 AD2d 1, 691 NYS2d 35 [1st Dept 1999]; *Bank Leumi Trust Co. of N.Y. v D'Evori Intl.*, 163 AD2d 26, 558 NYS2d 909 [1st Dept 1990]). As to the fifth cause of action for civil conspiracy—and as noted previously—it must be dismissed upon the grant of summary judgment on the claims for fraud. It cannot be maintained based on the plaintiff's claim for tortious interference because it is duplicative of that claim (*Deer Park Enters. v Ail Sys.*, *supra*). "Tortious interference is an emerging cause of action based on tort theories as they relate to contractual obligations. This theory can be divided into two basic components: (1) tortious interference with a prospective economic advantage; and (2) tortious interference with a contract, also known as civil conspiracy" (Rohan, Goldstein, and Bobis, Real Estate Brokerage Law and Practice § 4.11A). King has also established that there is no issue of fact regarding the plaintiff's sixth cause of action for quasi-contract. The plaintiff has failed to produce any evidence that it was acting as a broker for King, that King agreed in any manner to compensate the plaintiff for its services, or that King had any obligation to the plaintiff under the alleged agreement with Gugliotta and AGD or otherwise.

However, King has failed to establish her entitlement to summary judgment on the plaintiff's third cause of action for wrongful interference in contract. Wrongful (tortious) interference with contract requires the existence of a valid contract between the plaintiff and a third party, the defendant's knowledge of that contract, the defendant's intentional procurement of the third party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 646 NYS2d 76 [1996]; *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 595 NYS2d 931 [1993]; *M.J. & K. Co. v Matthew Bender & Co.*, 220 AD2d 488, 631 NYS2d 938 [2d Dept 1995]). A review of the record reveals that there are issues of credibility which preclude the grant of summary judgment regarding this claim (see *Doize v Holiday Inn Ronkonkoma*, *supra*; *Roth v Barreto*, *supra*; *Rennie v Barbarosa Transp.*, *supra*).

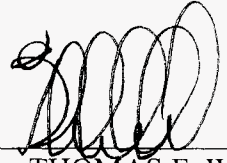
The remaining branches of King's motion, which are for summary judgment in her favor against Gugliotta and AGD on her cross claim for indemnification and dismissing Gugliotta and AGD's cross claim for indemnification, are denied. Despite the mutual representations in the parties' contract, there

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are multiple issues of fact requiring a trial regarding Gugliotta's dealings with Camerino, whether the plaintiff and AGD had either an express or implied contract, and, if so, whether King had seen Butter Lane prior to that contract, all of which bear on the question of which party may be required to indemnify the other pursuant to the contract.

The Court directs that the claims as to which summary judgment was granted are hereby severed and that the remaining claims shall continue (*see*, CPLR 3212 [e] [1]).

Dated: 1/4/11



THOMAS F. WHELAN, J.S.C.