

679 Realty, LLC v Smith-Bernet, Inc.

2011 NY Slip Op 30943(U)

March 28, 2011

Supreme Court, New York County

Docket Number: 601280/09

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Saham Scarpulla
Justice

PART 19

679 Realty, LLC and Michael Radwin,
Plaintiff

Smith-Bernet, Inc.,
Defendant

INDEX NO. 601230/09
MOTION DATE 12/15/10
MOTION SEQ. NO. 04
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the accompanying decision/order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

MAR 31 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 3/28/11

Saham Scarpulla
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
679 REALTY, LLC AND MICHAEL RADWAN,

Plaintiffs,
-against-

Index No.: 601280/09
Submission Date: 12/15/10

SMITH-BERNET, INC.,

Defendant.

DECISION AND ORDER

-----X

For Plaintiffs:
Sylvain R. Jakobovics, Esq.
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Brooklyn, NY 11229

For Defendant:
Rosenberg & Estis, P.C.
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New York, NY 10017

FILED

MAR 31 2011

HON. SALIANN SCARPULLA, J.:

NEW YORK
COUNTY CLERK'S OFFICE

In this action to recover damages for unjust enrichment, defendant Smith-Bernet, Inc. ("Smith-Bernet") moves to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7).

Plaintiffs 679 Realty, LLC ("679 Realty") and Michael Radwan ("Radwan") commenced this action by summons and complaint dated March 16, 2009. Radwan was a managing member of 679 Realty. According to the complaint, Smith-Bernet was allegedly the real estate broker in a transaction for the sale of property between 679 Realty and 236 East 46th Street Corp. L.P. ("236 East"). The closing on the subject property occurred on March 19, 2004 and at the closing, Smith-Bernet received payment of \$200,000. However, 679 Realty and Radwan maintained that they did not sign any documents that

retained Smith-Bernet as broker and did not authorize payment of \$200,000. 679 Realty and Radwan claimed that Smith-Bernet was unjustly enriched in the amount of \$200,000.

In or about March 2010, 679 Realty and Radwan moved for a default judgment against Smith-Bernet. In an order dated March 18, 2010, this court denied the motion on the grounds that (1) 679 Realty and Radwan failed to show additional service of the summons and complaint upon Smith-Bernet; and (2) their affidavit of facts constituting the claim was woefully inadequate. Subsequently, in or about April 2010, Smith-Bernet moved to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7). That motion was granted on default. However, in an order dated October 13, 2010, this court granted 679 Realty and Radwan's motion to vacate the default and the underlying motion to dismiss was reinstated. It is that underlying motion to dismiss that is the subject of this decision and order.

In support of its motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7), Smith-Bernet submits the affidavit of Angela Bernet ("Bernet"), licensed real estate broker and president of Smith-Bernet. According to Bernet, in 2000, she was asked to find out if 679 Realty and Radwan were interested in selling their building located at 679 Third Avenue. She contacted Radwan and they spoke on twelve different occasions regarding the possible sale of the building. Bernet maintains that on or about May 18, 2000, the purchaser made an offer in writing of \$3,000,000 to purchase the building, which Bernet

conveyed to Radwan. In the written offer, she indicated that if the transaction were to be successful, Smith-Bernet would look to Radwan for a commission.¹

Negotiations continued into 2001 when Radwan counter offered with \$7,500,000. On March 12, 2001, Bernet proposed a counter offer, in writing, of \$5,250,000. After further negotiations, on or about January 27, 2004, Bernet offered Radwan, in writing, \$7,000,000 in cash to close in thirty days with Smith-Bernet's standard commission, payable in full at the closing. Bernet alleges that she and Radwan then verbally negotiated Smith-Bernet's commission, and agreed on a flat fee of \$200,000 as broker's commission.

On March 17, 2004, Bernet sent Radwan the commission bill in the amount of \$200,000. Radwan never objected to the bill and on March 19, 2004, 679 Realty and Radwan entered into a contract of sale with the purchaser for the building. Paragraph 8 of the contract indicated, "the parties hereto agree that [Smith-Bernet] is the sole broker who brought about this transaction and [plaintiffs] [agree] to pay any commission earned thereby in accordance with a separate agreement." On March 19, 2004, Smith-Bernet received the commission check in the amount of \$200,000 from 679 Realty and Radwan's attorney.

Based on the documentary evidence presented – the executed contract of sale, written offers, commission bill, and issued check – the court grants Smith-Bernet's motion to dismiss the complaint. *See generally Blonder & Co. v. Citibank, N.A.*, 28 A.D.3d 180

¹ Bernet explains that commission is typically 6% on the first million and 3% on the balance.

(1st Dept. 2006); *Bronxville Knolls v. Webster Town Ctr. Pshp.*, 221 A.D.2d 248 (1st Dept. 1995). In signing the contract of sale, Radwan agreed to the terms of the sale, including the payment of commission to Smith-Bernet as broker. Radwan and 679 Realty retained the commission bill from Smith-Bernet without objection and tendered payment in accordance with that bill.

Radwan's claim that he is unable to read or write English and thus did not understand the terms of the contract of sale that he signed and did not agree to pay a commission to Smith-Bernet is insufficient to preclude dismissal of the complaint. *See Holcomb v. TWR Express, Inc.*, 11 A.D.3d 513 (2nd Dept. 2004); *Shklovskiy v. Khan*, 273 A.D.2d 371 (2nd Dept. 2000); *Garcia v. Konkul*, 20 Misc. 3d 139A (N.Y. App. Term 2008).

In accordance with the foregoing, it is

ORDERED that defendant Smith-Bernet, Inc.'s motion to dismiss the complaint is granted and the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

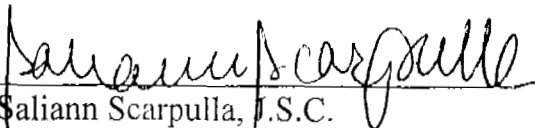
Dated: New York, New York
March 28, 2011

ENTER:

FILED

MAR 31 2011

**NEW YORK
COUNTY CLERK'S OFFICE**


Saliann Scarpulla, J.S.C.