

Fenwick-Keats Realty LLC v 212 East 29 St LLC

2012 NY Slip Op 31864(U)

July 3, 2012

Sup Ct, New York County

Docket Number: 111290/11

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice

Part 36

**FENWICK-KEATS REALTY LLC f/k/a FENWICK
KEATS GOODSTEIN and ALIGNED REAL ESTATE
a/k/a ALIGNED REAL ESTATE LLC,**

Plaintiffs,

-against-

212 EAST 29 ST LLC a/k/a 212 EAST 29TH ST. LLC,

Defendant.

FILED

INDEX NO. 111290/11

MOTION SEQ. NO. 001

JUL 17 2012

NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1-7 were considered on this motion for summary judgment:

PAPERS

NUMBERED

Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____

1, 2, 3

Answering Affidavits — Exhibits _____

4

Replying Affidavits _____

5, 6, 7

Cross-Motion: [] Yes [X] No

Upon the foregoing papers, it is ordered that this motion is decided as set forth below.

Plaintiffs Fenwick-Keats Realty LLC (Fenwick-Keats) and Aligned Real Estate (Aligned) brings this action, for breach of a broker's fee agreement, seeking a monetary judgment against defendant 212 East 29 St LLC, in the amount of \$298,000.

BACKGROUND

Plaintiffs Fenwick-Keats and Aligned (together Plaintiffs), are real estate brokers licensed in New York. Defendant was the owner of real property located at 212 East 29th Street, New York, NY (Premises) which it sold in July 2011, pursuant to a contract of sale (Contract), to Kaspar Properties, LLC (Purchaser). Purchaser is a company affiliated with Matthew Nalbandian (Nalbandian). On April 29, 2011, Nalbandian signed the Contract on behalf of Purchaser, as Purchaser's manager, and Steven Croman (Croman), the managing member of defendant, signed on behalf of defendant/seller, selling the

Premises for \$7,450,000. At the closing, defendant refused to pay the brokers' commission allegedly owed to Plaintiffs.

Thereafter, Plaintiffs jointly commenced this action alleging that defendant breached an agreement for payment of a brokers' commission. Plaintiffs now move for summary judgment pursuant to CPLR § 3212, alleging that no material issues of fact exist.

DISCUSSION

The standards of summary judgment are well settled. Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case". *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion. *Id.* at 853. Additionally, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility". *Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 (1st Dep't 1992), citing *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 (1st Dep't 1989). The court's role is "issue-finding, rather than issue-determination". *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) (internal quotations omitted).

In order for Plaintiffs to succeed on their breach of contract cause of action, Plaintiffs must establish a *prima facie* showing of the following elements: (1) a valid and enforceable contract; (2) its performance of the contract; (3) breach by the other party; and (4) damages. *Terwilliger v Terwilliger*,

206 F3d 240, 245–46 (2d Cir 2000); *see also Furia v Furia*, 116 AD2d 694, 695 (2nd Dep't 1986). The Court notes that Plaintiffs provided no memorandum of law in support of its motion and the only cases cited in their moving papers relate to granting summary judgment when no material issues of fact exist. Further, although Plaintiffs plead causes of action, other than breach of contract, in their complaint, this motion was not directed to other causes of action.

It is well established that a seller becomes liable to a broker that it has employed when the broker procures a ready, willing and able buyer on terms acceptable to the seller, even prior to a written contract of sale of the property. *See Eastern Consolidated Properties v Lucas*, 285 AD2d 421, 421 (1st Dep't 2001); *Prime City Real Estate Co., Inc. v Hardy*, 256 AD2d 80, 81 (1st Dep't 1998)(where sellers were held obligated to pay a real estate broker's commission when the sellers and purchaser had agreed on the essential terms of the transaction, notwithstanding the refusal of the vendors to negotiate the remaining details of the sale because of receipt of a higher offer). Here, while Plaintiffs claim an oral agreement was made with Croman on behalf of defendant, Croman denies this. Further, Croman denies Plaintiffs were the procuring cause; thus, issues of fact exist.

Plaintiffs allege that defendant agreed to pay a brokers' commission of \$298,000 if Nalbandian, or an entity controlled by Nalbandian, purchased the Premises for \$7,450,000. Thereafter, defendant's attorney prepared a draft brokerage agreement which was signed by Plaintiffs, but not by defendant. According to Plaintiffs, pursuant to the terms of the brokerage agreement, they began negotiating with Nalbandian, on behalf of defendant, for the sale of the Premises, and secured such sale. In support of their motion, Plaintiffs proffer, *inter alia*, a copy of the draft brokerage agreement signed only by Plaintiffs, and the Contract signed by defendant and Purchaser. Plaintiffs rely on paragraph 12 of the Contract in further support that a valid agreement was entered into with defendant for payment of a brokers' commission. The Contract, paragraph 12, states in pertinent part that:

Purchaser and Seller each represent and warrant that it has not dealt with any broker, consultant, finder or like agent who might be entitled to a commission or compensation on account of introducing the parties hereto, the negotiation or execution of this Agreement or the closing of the transactions contemplated hereby other than Fenwick Keats Goodstein (through Mike Sieger) and Aligned Real Estate (through Jon Isaacs) (collectively, the 'Broker'). Seller shall pay the commission due to the Broker pursuant to a separate agreement between Seller and the Broker.

In opposition, defendant contends that he never entered into an agreement with Plaintiffs for payment of a brokers' commission. Defendant further contends that the language in paragraph 12 of the Contract merely states that if a brokers' commission was due to Plaintiffs, defendant would pay it pursuant to a separate agreement. Specifically, defendant alleges that if such an agreement was entered into, it would have been memorialized in writing. While defendant does not dispute that its attorney prepared a draft brokerage agreement, it states that Plaintiffs' execution of such draft agreement means nothing as defendant did not execute or agree to it. Thus, defendant argues that no valid and enforceable contract was entered into by itself and Plaintiffs.

Drawing all reasonable inferences in favor of defendant the non-moving party, Plaintiffs have failed to establish that they are entitled to judgment, as a matter of law. Significantly, the "contract" relied upon by Plaintiffs was not signed by defendant. Further, the evidence submitted by Plaintiffs is insufficient to eliminate issues of material facts as required to grant summary judgment. *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). The documents proffered by Plaintiffs fail to establish that, as a matter of law, a valid and enforceable contract existed between Plaintiffs and defendant for the payment of a brokers' commission. Thus, a genuine issue of fact exists as to whether Plaintiffs and defendant entered into a contract, and Plaintiffs' motion must be denied.

As such, it is

ORDERED that Plaintiffs' motion for summary judgment is denied; and it is further
ORDERED that within 30 days of entry, defendant shall serve a copy of this

decision/order upon all parties with notice of entry.

This constitutes the decision/order of the Court.

FILED

JUL 17 2012

Dated: 7/3/12



DORIS KING-COHAN, J.S.C. NEW YORK
[X] NON-FINAL DISPOSITION COUNTY CLERK'S OFFICE

Check one: FINAL DISPOSITION
Check if Appropriate: DO NOT POST

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