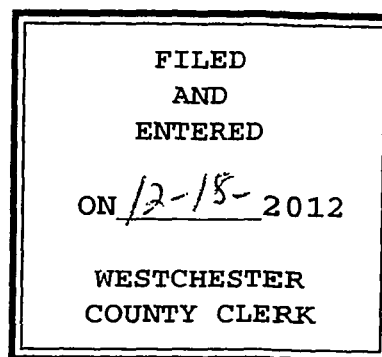


Strategic Bus. Edge, Inc. v La Traviata, Inc.
2012 NY Slip Op 33736(U)
December 12, 2012
Supreme Court, Westchester County
Docket Number: 14384/2009
Judge: William J. Giacomo
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This opinion is uncorrected and not selected for official publication.

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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.



**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

-----X
STRATEGIC BUSINESS EDGE, INC. d/b/a FIRST
CHOICE BUSINESS BROKERS OF NY,
Plaintiff,

Index No. 14384/2009

-against-

Decision & Order

LA TRAVIATA, INC. and RALPH TOMASSO,
Defendants

-----X
The following papers numbered 1 to 18 were read on the defendants' motion to vacate this Court's order of May 31, 2011 which awarded plaintiff a real estate broker's commission of \$137,500.

Papers Numbered

Order to Show Cause/Affirmation/Memorandum of Law/Exhibits A-E	<u>1-8</u>
Affirmation in Opposition/Exhibits A-H	<u>9-17</u>
Reply Memorandum of Law	<u>18</u>

Factual and Procedural Background

Plaintiff commenced this action seeking to recover a broker's commission allegedly due and owing under an Exclusive Right to Sell Listing Brokerage Agreement it had with defendants. In March 2008, defendant Ralph Tomasso listed his restaurant, defendant La Traviata, Inc., for sale with plaintiff, an entity predominately engaged in the listing and sale of businesses. The list price was set at \$1,100,000.00 for a 9-month term commencing

March 10, 2008 and terminating on December 10, 2008. The agreed upon broker's commission was 12.5% of the purchase price.

Pursuant to the terms of the brokerage agreement, within 10 days of the date of the agreement defendants were to provide plaintiff with certain financial disclosure. The agreement also provided that plaintiff could recover its commission if defendants failed to cooperate in facilitating a sale.

Plaintiff alleges that prior to January 20, 2009, it had procured an interested purchaser, however, defendants refused to provide copies of their existing lease and other financial disclosure documents. Therefore, plaintiff claims that due to defendants breach of the brokerage agreement, it is entitled to a commission of \$137,500 which is 12.5% of the listing price of \$1,100,000.00.

By order dated May 31, 2011, this Court granted plaintiff's motion for summary judgment on the ground that defendants' submission of a memorandum of law without an accompanying affirmation or affidavit of a person with knowledge of the facts of the case did not raise an issue of fact which would preclude summary judgment in plaintiff's favor.

By order dated November 10, 2011, this Court denied defendants' motion to "reconsider" its order of May 31, 2011.

Defendants now move to vacate this Court's May 31, 2011 order pursuant to CPLR 5015(a)(2) and/or (3). In support of their motion, defendants argue that in rendering the May 31, 2011 order of this Court it relied on fraudulent information because plaintiff failed to provide the Court with a copy of the full amended listing agreement. Defendants claim that on June 14, 2008, the parties signed a "Change Order to Listing Agreement" in which

it was agreed that the listing price would be reduced from \$1,100,000 to \$800,000. Defendants argue that plaintiff should have submitted this document to the Court on its motion for summary judgment. Defendant Ralph Tomasso, who is 77 in poor health and who lives in Florida, claims that he just located this document in his files in October of 2011.

In opposition, to this application plaintiff does not address its failure to provide the Court with all the relevant documents to this transaction including the "Change Order to Listing Agreement." Rather, it attacks defendant's failure to provide this document sooner. Further, plaintiff argues that while this motion is labeled as one to vacate pursuant to CPLR 5015(a)(2) it is really a motion to renew and reargue which should be denied.

Discussion

At the outset the Court notes that it agrees with plaintiff that this is really a motion to renew and as such the Court grants defendants leave to renew their opposition to plaintiff's original motion for summary judgment.

A "motion for leave to renew 'shall be based upon new facts not offered on the prior motion that would change the prior determination' (CPLR 2221[e][2]) and 'shall contain reasonable justification for the failure to present such facts on the prior motion' (CPLR 2221[e][3]." (*Caraballo v. Kim*, 63 A.D.3d 976, 882 N.Y.S.2d 211 [(2nd Dept 2009], citing *Ramirez v. Khan*, 60 A.D.3d 748, 874 N.Y.S.2d 257 [2nd Dept 2009]; *Dinten-Quiros v. Brown*, 49 A.D.3d 588, 852 N.Y.S.2d 793 [2nd Dept 2001]; and *Madison v. Tahir*, 45 A.D.3d 744, 846 N.Y.S.2d 313 [2nd Dept 2007]). "A motion to renew is not a second chance given to a party who failed to exercise due diligence when making their initial

factual presentation. (See *Renna v. Gullo*, 19 A.D.3d 472, 797 N.Y.S.2d 115 [2nd Dept 2005] quoting *Rubinstein v. Goldman*, 225 A.D.2d 328, 329, 638 N.Y.S.2d 469 [1st Dept 1996]; see also *Caraballo v. Kim*, *supra*; *O'Dell v. Caswell*, 12 A.D.3d 492, 784 N.Y.S.2d 603 [2nd Dept 2004]) .

Here, the Court notes that Mr. Tomasso lives in Florida, is elderly and in poor health. The Court accepts his explanation for the delay in provides the amendment to the listing agreement that his files have been with one attorney in New York and then a second attorney. As a result, it was only in fully reviewing the file in October of 2011 that he located, for the first time, the amendment to the original listing agreement.

Further, the Court notes when making its original motion plaintiff consistently argued that it was entitled to be paid its commission based upon the "listing price." Yet, plaintiff did not submit a copy of this amendment to the listing agreement in support of its original motion.¹ Interestingly and clearly self-servingly plaintiff now argues in opposition to this motion that the original listing agreement does not provide for payment based upon the "listing price;" rather the language of the listing agreement provides for payment on the "purchase price." Therefore, according to plaintiff's current arguments, this newly submitted amendment to the original listing price is not relevant.

In considering the renewal of plaintiff's summary judgment motion, the Court finds that defendants breached the "original" listing agreement as it was amended pursuant to

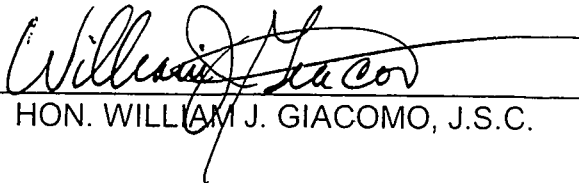
¹ The Court notes that should plaintiff ever appear before this Court again, in any capacity, any failure to provide full disclosure of all relevant information will result in immediate sanctions. In any event, such conduct seriously undermines the credibility of plaintiff.

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the amendment to the listing agreement submitted herewith. Therefore, the Court amends the commission awarded based upon this newly submitted evidence from \$137,500, the 12.5% commission on \$1.1 million, to \$100,000, the 12.5% commission on the actual listing price of \$800,000.

Based upon the foregoing, defendants' motion to renew is GRANTED and upon renewal the Court adheres to its original decision to GRANT summary judgment to plaintiff and award it a commission based upon the listing price. However, in light of the newly discovered evidence that the listing price was \$800,000 *not* \$1.1 million the award to plaintiff of \$137,500 is VACATED and the Court awards plaintiff a commission fee of \$100,000.

Dated: White Plains, New York
December 12, 2012


HON. WILLIAM J. GIACOMO, J.S.C.

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