SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: Hon. Eileen Bransten, Justice PART 3

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MASSEY KNAKAL REALTY OF BROOKLYN, LLC,
d/b/a MASSEY KNAKAL REALTY SERVICES,

Plaintiff,

- *against* -

NEVINS REALTY CORP., RAY MCKABA, and
CULLEN & DYKMAN, LLP, as Escrow Agent

Defendants.

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Index No.: 651746/2011
Motion Date: 1/30/13
Motion Seq. No.: 002

The following papers, numbered 1 to 3, were read on this motion to dismiss an affirmative defense.

Notice of Motion/Order to Show Cause - Affidavits - Exhibits No(s). 1

Answering Affidavits - Exhibits No(s). 2

Replying Affidavits No(s). 3

Cross-Motion: ☐ Yes X No

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: ~~July~~ Aug 2, 2013

J.S.C.
Hon. Eileen Bransten

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

1. CHECK ONE: .....☐ CASE DISPOSED X NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: Motion Is: X GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: .....☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

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BRANSTEN, J.

In this action by a real estate brokerage company to recover a commission allegedly earned pursuant to an exclusive real estate brokerage listing agreement, Plaintiff Massey Knakal Realty of Brooklyn, LLC, d/b/a Massey Knakal Realty Services moves pursuant to CPLR 3211(b) to dismiss the Second Affirmative Defense of Defendants Ray McKaba and Nevins Realty Corp. (jointly, "Defendants") on the ground that it is without merit.[1] Defendants oppose.

I. BACKGROUND

On or about December 17, 2010, Plaintiff and Defendants purportedly entered into a written real estate brokerage listing agreement (the "Agreement"). (Affidavit of Stephen Palmese ("Palmese Aff.") ¶ 4, Ex. C). Under the Agreement, Plaintiff would

[1] Claims against Cullen & Dykman, LLP were dismissed pursuant to a notice of dismissal dated June 29, 2011. (Affirmation of Steven Landy ("Landy Affirm.") Ex. J).

market and promote the sale of the following parcels of real property located in Brooklyn: 350 Livingston Street, 325 Schermerhorn Street, 345 Schermerhorn Street and 62-64 Flatbush Avenue (Block: 167, Lots: 13, 50, 42, 27, 28 & 36) (the "Properties"). (Palmese Aff. ¶ 4, Ex. C). McKaba endorsed the Agreement on behalf of Nevins Realty Corp., and Ken Krasnow endorsed the Agreement on behalf of Plaintiff as "Managing Director." (Palmese Aff. Ex. C; Affidavit of Paul Massey, Jr. ("Massey Aff.") ¶ 5).

Pursuant to the Agreement, Plaintiff had the exclusive right to sell the Properties during the term of the Agreement. (Palmese Aff. ¶ 4, Ex. C). Defendants agreed to refer all offers and inquiries to Plaintiff but reserved the right to cancel the Agreement upon written notice. (Palmese Aff. ¶ 4, Ex. C). The Agreement also provided that Defendants would pay Plaintiff a commission of three percent (3%) upon the sale of the Properties, whether they were sold by Plaintiff, by another broker, or directly by Defendants. (Palmese Aff. ¶ 4, Ex. C).

In mid-January 2011, Plaintiff received an undated letter from McKaba instructing Plaintiff to cease and desist marketing the Properties. (Palmese Aff. ¶¶ 6-8, Ex. D). Plaintiff alleges that, after receiving the letter, Paul Massey, Jr., Plaintiff's CEO, spoke with McKaba on the telephone and that McKaba assured him that the Agreement had not been terminated. (Massey Aff. ¶¶ 11-12). Plaintiff argues that it continued to market the Properties, sending Defendants periodic updates of viewings and offers. (Palmese Aff. ¶

10, Ex. E). Defendants deny these allegations. (Affirmation of Steven Landy ("Landy Affirm.") Ex. I at ¶¶ 20-25).

In mid-February 2011, an investigative report for a trade journal revealed that Krasnow was not licensed as a real estate broker in New York State. (Affidavit of Michael Wlody ("Wlody Aff.") ¶ 6). Although Krasnow had previously held a New York State broker's license, he had neglected to renew it. (Wlody Aff. ¶ 5, Ex. F). As such, Krasnow was unlicensed at the time he signed the Agreement.

Following publication of the investigative report, Plaintiff removed Krasnow from his position. (Wlody Aff. ¶ 6). The Secretary of State also took action to sanction Plaintiff for "allowing an unlicensed broker to supervise two branch offices," in violation of RPL §§ 440-a and 441-c.[2] (Wlody Aff. ¶¶ 10-12, Ex. G).

In April 2011, Plaintiff learned that Defendants, acting on their own, were in contract to sell the Properties for $30 million. (Palmese Aff. ¶ 11). Plaintiff filed its verified complaint on June 27, 2011, asserting causes of action for (i) breach of contract, (ii) declaratory relief, (iii) quantum meruit, (iv) fraud and (v) contractual attorneys' fees. (Landy Affirm. Ex. H). Defendants filed their verified answer on August 4, 2011.

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[2] The Secretary of State complaint states that "[o]n or about October 6, 2008, [Krasnow] was hired by Massey Knakal Realty as the Managing Director for the Brooklyn and Queens offices" and that "between the time period of October 6, 2008 and February 14, 2011, [Krasnow] was supervising the daily business activities of real estate salespeople in both the Brooklyn and Queens offices without being licensed as a real estate broker." (Wlody Aff. ¶¶ 7-10, Ex. G).

(Landy Affirm. Ex. I). Plaintiff now moves to strike Defendants' Second Affirmative Defense. Defendants oppose.

II. DISCUSSION

Pursuant to CPLR 3211(b), "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." In bringing a motion to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the defense is without merit as a matter of law. *534 E. 11th St. Hous. Dev. Fund Corp. v. Hendrick*, 90 A.D.3d 541 (1st Dep't 2011). On such a motion, "the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed." *Id.* at 542. "A defense should not be stricken where there are questions of fact requiring trial." *Id.*

CPLR 3018(b) defines affirmative defenses as "matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading," including "facts showing illegality either by statute or common law."

Defendants' Second Affirmative Defense states in full:

> 77. The individual who executed the purported agreement attached as Exhibit A to Plaintiff's Complaint on behalf of Plaintiff lacked authority to do so.
>
> 78. Under Section 440-a of the New York Real Property Law, no person shall engage in or follow the business or occupation of, or hold himself out

or act temporarily or otherwise as a real estate broker or real estate salesman in the State of New York without first procuring a license therefore as provided in the Real Property Law.

79. Furthermore, under section 442 of the New York Real Property Law, it is unlawful for a real estate broker to split a fee or commission with a person who is not a licensed real estate broker except in certain defined circumstances that are not applicable here.

80. Under section 442-[e] of the New York Real Property Law, any person who violates any provision of Article 12-A of the Real Property Law, including the provisions referred to above, shall be guilty of a misdemeanor.

81. Ken Krasnow, whose title was Managing Director of Massey Knakal Realty Services, and who executed the purported agreement attached as Exhibit A to Plaintiff's Complaint on behalf of Plaintiff, was not a duly licensed real estate broker.

82. In February 2011, Plaintiff replaced Ken Krasnow as managing director of Plaintiff's Brooklyn office because he was not duly licensed as required by the New York State Department of State and under the Real Property Law.

83. Accordingly, Krasnow had no authority to hold himself out as a real estate broker or to execute a purported exclusive listing agreement on behalf of Plaintiff.

84. Accordingly, the purported listing agreement attached as Exhibit A to Plaintiff's Complaint is illegal and unenforceable.

(Landy Affirm. Ex. I at ¶¶ 77-84).

A. Krasnow's Authority

Defendants assert that the Agreement is an "unenforceable and illegal document because the individual who signed and negotiated it on behalf of [Plaintiff] lacked

authority to hold himself out as a real estate broker and to bind [Plaintiff] to the purported agreement." (Memorandum of Law of Defendants Nevins Realty Corp. and Ray McKaba in Opposition to Plaintiff's Motion to Dismiss the Defendants' Second Affirmative Defense ("Defs.' Memo") at 10); *see also id.* at 9 ("As a matter of agency law, Krasnow could not have had actual or apparent authority to execute the purported listing agreement on behalf of [Plaintiff] because [Plaintiff] was legally prohibited from employing Krasnow as the supervisor of its Brooklyn office.").

The case upon which Defendants rely, *Lindenbaum v. Albany Post Property Associates, Inc.*, 297 A.D.2d 661 (2d Dep't 2002), is inapposite. In *Lindenbaum*, the president of the corporate defendant executed a note and mortgage on behalf of the corporation as guarantee of his personal debt. *Id.* at 661-62. The court held that the principal corporation, rather than the third-party lender, could disaffirm the contracts because the president, acting as an agent, possessed neither actual nor apparent authority to bind the corporation to such agreements. *See id.* at 663. By this reasoning, Plaintiff, rather than Defendants, would be entitled to disaffirm the Agreement had Krasnow exceeded his scope of authority.

Regardless, Defendants' agency argument is unavailing because, by signing the Agreement, Krasnow was operating within the scope of his authority. It is well established that "[t]he scope of an agent's actual authority is determined by the intention of the principal or, at least, by the manifestation of that intention to the agent." *Wen Kroy*

Realty Co. v. Pub. Nat. Bank & Trust Co. of New York, 260 N.Y. 84, 89 (1932). Absent actual authority, an agent's apparent authority may serve to bind a principal to a third-party. *See Greene v. Hellman*, 51 N.Y.2d 197, 204 (1980). The existence of apparent authority "is dependent on verbal or other acts by a principal which reasonably give an appearance of authority to conduct the transaction." *Id.*

Here, Plaintiff does not allege that Krasnow exceeded his authority by entering into listing agreements on its behalf. Further, even if Plaintiff were to concede that Krasnow lacked actual authority, he possessed sufficient apparent authority to execute the Agreement. By appointing him "Managing Director" of its Brooklyn and Queens offices, Plaintiff cloaked Krasnow with the appearance of authority to conduct such transactions on its behalf. Therefore, as a matter of agency law, Krasnow had sufficient authority to enter into the Agreement on behalf of Plaintiff.

B. Illegality

Defendants argue that "the document is illegal and unenforceable because Kenneth Krasnow, who executed the document as 'Managing Director' of [Plaintiff], was not in fact a duly licensed real estate broker . . . ." (Defs.' Memo at 1). Defendants contend that, by signing the Agreement in an unlicensed capacity, Krasnow held himself out as a broker in violation of RPL § 440-a. (Defs.' Memo at 8-10). Defendants also argue that Plaintiff violated RPL § 442, which prohibits splitting fees or commissions with

unlicensed brokers. (Defs.' Memo at 8). Defendants point to the enforcement action taken by the New York Secretary of State as proof of the illegal nature of Krasnow's activity. (Defs.' Memo at 8-9).

Illegal contracts are generally unenforceable. *Lloyd Capital Corp. v. Pat Henchar, Inc.*, 80 N.Y.2d 124, 127 (1992). However, when the illegality consists of a *malum prohibitum* statutory violation, the contract may nevertheless be enforced if "the statute does not provide expressly that its violation will deprive the parties of their right to sue on the contract, and the denial of relief is wholly out of proportion to the requirements of public policy."[3] *Id.*

"Fee disputes involving persons who have failed to comply with licensing or registration requirements have spawned their own body of case law," and several tenets have emerged. *Benjamin v. Koeppel*, 85 N.Y.2d 549, 553 (1995). Fee forfeitures are generally disfavored, and "such forfeitures may be particularly inappropriate where there are other regulatory sanctions for noncompliance." *Id.* However, "where the statute looks beyond the question of revenue and has for its purpose the protection of public health or morals or the prevention of fraud," noncompliance with the statute's terms may

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[3] RPL § 442-d deprives unlicensed parties of the right to sue to recover a commission. *See, e.g., Galbreath-Ruffin Corp. v. 40th & 3rd Corp.*, 19 N.Y.2d 354, 362 (1967) ("It is, of course, the law that commissions cannot be recovered by a real estate broker who is unlicensed while his services were rendered."). Defendants, however, aver that their "Second Affirmative Defense does not assert that [Plaintiff] is barred from maintaining this action" under § 442-d. (Defs.' Memo at 10). The defense of illegality exists independently of the plaintiff's burden to allege and prove due licensure. *See Bendell v. De Dominicis*, 251 N.Y. 305, 311 (1929). Accordingly, the Court need not at this time address whether Plaintiff's action is barred by RPL § 442-d.

affect the legality of the business itself. *Galbreath-Ruffin Corp. v. 40th & 3rd Corp.*, 19 N.Y.2d 354, 363-64 (1967).

In *Galbreath-Ruffin*, an officer for the plaintiff, a licensed brokerage corporation, was also an officer in a second partnering brokerage corporation. *Id.* at 360-61. However, the officer was licensed to represent only the second corporation, in violation of RPL § 441-b. *Id.* at 361. The defendant sought to avoid paying the plaintiff a commission, arguing that "although no brokerage services were rendered except by licensed brokers, [the officer] was the only licensed broker who could act for plaintiff and that whatever [the officer] accomplished toward the earning of plaintiff's commissions was done in an unlicensed capacity." *Id.* The court rejected this argument, holding that the purpose behind the statute requiring a real estate broker's license "is the protection of the public, . . . not to permit others to take advantage of the violation of the statute to escape their obligations." *Id.* at 362-63 (internal quotation marks and citation omitted). The court reasoned that the officer was already licensed in New York State as a broker and that the second license would have been issued *pro forma*. *Id.* at 363.

Here, to hold the Agreement invalid due to Krasnow's failure to renew his license would be disproportionate to the requirements of public policy. While the licensing requirements aim to protect the public against fraud, Krasnow's mere execution of the Agreement does not undermine this concern. Krasnow had previously been licensed in New York State and was issued an additional license under the sponsorship of Plaintiff

four months after the Agreement was signed. (Wlody Aff. Ex. F). Plaintiff affirms that, other than signing the Agreement, Krasnow did not provide any brokerage services in connection with the sale of the Properties. (Palmese Aff. ¶ 2). Plaintiff also affirms that at all relevant times Plaintiff was duly licensed, as were all individuals who performed brokerage services on its behalf in connection with the Agreement. (Palmese Aff. ¶ 2). Finally, the Secretary of State has taken action to sanction Plaintiff.[4] *See Lloyd Capital*, 80 N.Y.2d at 127 (noting that forfeitures are disfavored "where there are regulatory sanctions and statutory penalties in place to redress violations of the law").

That the Secretary of State required Krasnow to be licensed does not dictate that the Court find the Agreement unenforceable. *See Galbreath-Ruffin*, 19 N.Y.2d at 366 ("Even if . . . it is the practice of the Department of State to require an extra license . . . that would not aid in resolving the question of judicial policy in determining whether to withhold the remedy for recovery of commissions."). Therefore, the Court concludes that the illegality defense fails as a matter of law.

C. Discovery

Defendants argue that Plaintiff's motion should be denied because there has been no discovery in this case and "it is not possible to test any of [Plaintiff's] factual

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[4] "The administrative proceeding was resolved through a consent order which allowed [Plaintiff] to retain its brokerage license." (Wlody Aff. ¶ 12).

contentions on this motion as to who did what and when." (Defs.' Memo at 10-11). CPLR 3211(d) provides in pertinent part:

> "Should it appear from affidavits submitted in opposition to a motion made under [3211(b)] that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion . . . or may order a continuance to permit further affidavits to be obtained or disclosure to be had . . . ."

Here, however, the parties do not dispute the factual basis for Defendants' Second Affirmative Defense—that Krasnow was unlicensed at the time he signed the Agreement. Defendants concede that, for the purposes of this motion, "[i]t is not relevant whether other individuals within [Plaintiff] who allegedly performed brokerage services were licensed because Krasnow signed the purported listing agreement at issue . . . ." (Defs.' Memo at 10). Defendants have not, as required by statute, submitted any affidavits in opposition to the motion. Further, it does not appear from Defendants' counsel's affirmation that essential facts may exist warranting such discovery. Therefore, Plaintiff's motion to dismiss Defendants' Second Affirmative Defense is granted.

(*Order of the Court follows on the next page*)

ORDER

Accordingly, it is

ORDERED that the motion of Plaintiff Massey Knakal Realty of Brooklyn, LLC to dismiss the affirmative defense is granted, and the Second Affirmative Defense of Defendants Nevins Realty Corp. and Ray McKaba is dismissed.

This constitutes the Decision and Order of the Court.

Dated: New York, NY
~~July~~ August 2nd, 2013

ENTER:

Hon. Eileen Bransten, J.S.C.