

Signature Partners, LLC v Atwater Press Realty Corp.

2013 NY Slip Op 32024(U)

August 21, 2013

Supreme Court, New York County

Docket Number: 157157/12

Judge: Charles E. Ramos

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**SUPREME COURT OF THE STATE OF NEW YORK -
NEW YORK COUNTY**

PRESENT: CHARLES E. RAMOS
Justice

PART 53

SIGNATURE

INDEX NO. 157157/12

MOTION DATE _____

- v -

ATWATER

MOTION SEQ. NO. 001

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 No(s) _____

Answering Affidavits - Exhibits No(s) _____

Replying Affidavits No(s) _____

**Upon the foregoing papers, it is ordered that this motion is
decided in accordance with the accompanying memorandum decision.**

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

DATED: 8/21/2013


CHARLES E. RAMOS J.S.C.

- 1. CHECK ONE : CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE : MOTION IS: 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: COMMERCIAL DIVISION

-----x
SIGNATURE PARTNERS, LLC,

Plaintiff,

Index No.
157157/12

-against-

ATWATER PRESS REALTY CORP.,

Defendant.

-----x

Hon. Charles E. Ramos, J.S.C.

In motion sequence 001, defendant Atwater Press Realty Corp. ("Atwater") moves pursuant to CPLR 3212 for summary judgment to dismiss the plaintiff Signature Partners, LLC's ("Signature") complaint.

Background

This action involves a dispute over a brokerage commission arising out of a brokerage agreement executed by the parties on August 19, 2009 (the "Exclusive Agreement"). Pursuant to the Exclusive Agreement, Signature was the exclusive sales broker for the fourth and fifth floors of a condominium building located at 207 West 25th Street, New York, New York (the "Atwater Property").

During the term of the Exclusive Agreement, three or four sale offers were received, but none of the offers resulted in a sale of the Atwater Property.

On May 2, 2011, Atwater informed Signature by letter that it was exercising its right to terminate the Exclusive Agreement effective June 2, 2011.

The Exclusive Agreement provided that the cancellation of the Exclusive Agreement shall not affect the rights of Signature with respect to prospective buyers submitted to or considered by Atwater prior to the cancellation of the agreement, nor the authority of Signature to continue to represent Atwater in such matters (the "Tail Provision") (Aff. In Supp., Ex. A).

On May 31, 2011, Signature sent a 471 page list of 43,000 prospective buyers that were purportedly covered under the Exclusive Agreement's Tail Provision (the "List") (*id.*, Ex. D).

Prior to the June 2, 2011 termination of the Exclusive Agreement, on May 16, 2011, Atwater entered into a second exclusive brokerage agreement with Michael Rudder ("Rudder") of the Rudder Property Group to market the Atwater Property (*id.*, Ex. M).

Rudder attracted interest from Brian Weld ("Weld"), the exclusive real estate broker for the International Alliance of Theatrical Stage Employees (the "IATSE"). Subsequently, on April 3, 2012, the parties entered into an agreement to sell the Atwater Property to an affiliate of the IATSE, IATSE General Corp. ("IATSE GC"). On June 28, 2012, the Atwater Property was sold to IATSE GC (Pl. 19-a, ¶ 34).

Thereafter, on October 11, 2012, Signature commenced this action alleging that Atwater breached the Exclusive Agreement by failing to pay Signature the full commission for the sale of the Atwater Property to IATSE GC.

The Exclusive Agreement provided that Signature is entitled to a full commission equal to 4% of the purchase price, but if another broker procures the purchaser, then Signature and the other broker are each entitled to one-half of the full commission.

Discussion

Remarkably, IATSE GC was not on the List. Nevertheless, Signature argues that it is entitled to a full commission for the sale of the Atwater Property because certain affiliates of the IATSE (the "IATSE Affiliates") appeared on the List (Aff. In Supp., Ex. D, pp. 10, 109, 181, 387, 434).¹ It alleges that its marketing efforts to the IATSE Affiliates contributed to the sale of the Atwater Property to IATSE GC.

In the alternative, Signature seeks discovery to determine if the procurement of the IATSE or IATSE GC as a prospective purchaser occurred before the termination of the Exclusive Agreement.

¹ The IATSE Affiliates are Local Union 794 Iatse (p. 10), Iatse National Welfare & Health Fund (p. 109), Theatrical Protective Union No. One Iatse (p. 181), Iatse National Benefit Funds (p. 387), Welfare fund of Local One Iatse (p. 434) (Mem. Opp., p. 5).

Atwater counters that the List failed to identify any prospective buyers that were "submitted or considered," as required by the terms of the Tail Provision.

It is undisputed that neither the IATSE or IATSE GC appear on the List. Furthermore, on April 8, 2013, during oral argument, Signature admitted that the List was merely a list of parties that its marketing company has mailed post cards to as part of its marketing efforts (Trans., Apr. 8, 2013, 11:4-18). Moreover, Signature fails to demonstrate that any of the IATSE Affiliates would qualify as a prospective buyer under the terms of the Tail Provision.

The Tail Provision is only operative in relation to "prospective buyers submitted or considered..." and does not apply to any party that may have been marketed to by Signature (Aff. In Supp., Ex. A).

Signature does not even allege that any of the Affiliates responded to its marketing efforts or even inquired about the Atwater Property. Thus, Signature fails to provide any basis for this Court to conclude that any of entities on the List were prospective buyers that were submitted or considered.

In addition, the affidavits submitted by Rudder and Weld affirm that they did not have any communications with Signature relating to the Atwater Property (Rudder Aff., ¶¶ 4, 6; Wood Aff., ¶ 4; Weld Aff., ¶¶ 3, 5).

Furthermore, James B. Wood ("Wood"), the point person in charge of finding a new location for the IATSE, affirms in his affidavit that he did not know of the Atwater Property until late October 2011 (Wood Aff., ¶ 4). Lastly, Wood also affirms that the IATSE has 380 local unions nationwide that operate autonomously and that the local unions had no involvement in the search and purchase of the Atwater Property (*id.* at ¶ 5).

The record is clear that neither Weld, Rudder, or Wood was aware of the Atwater Property until late October 2011, roughly five months after the Exclusive Agreement was terminated on June 2, 2011.

[S]ummary judgment is a drastic measure that deprives a party of [its] day in court, it may be granted only if no genuine triable issue of fact is presented. If there is any doubt as to the existence of a triable issue, the motion should be denied (*Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

The record definitively establishes that Signature is not entitled to the full commission because it was not the procuring broker. However, Signature has raised an issue of fact with respect to whether or it is entitled to one-half of the full commission in the event that the purchaser was procured before the Exclusive Agreement was terminated on June 2, 2011.

Therefore, this Court will permit the parties to conduct limited discovery on the narrow issue of Signature's entitlement to one-half of the full commission.

In the event that Signature is unable to establish its entitlement to one-half of the full commission through the discovery process, Atwater may move this Court for attorney's fees and sanctions, if so advised.

Accordingly it is,

ORDERED that the defendant Atwater Press Realty Corp.'s motion for summary judgment is denied, and it is further

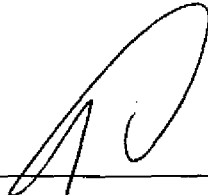
ORDERED that the parties are to conduct limited discovery on the issue of Signature Partners, LLC's entitlement to one-half of the full commission, and it is further

ORDERED that the parties are to contact the Clerk of Part 53 to schedule a status conference to be held within (60) sixty days of the date of this decision, and it is further

ORDERED that the parties may renew this motion upon the completion of limited discovery.

This constitutes the decision and order of this Court.

Dated: August 21, 2013



J.S.C.
CHARLES E. RAMOS