

Winzone Realty Inc. v LII
2013 NY Slip Op 32970(U)
November 19, 2013
Sup Ct, Queens County
Docket Number: 18618/2012
Judge: Sidney F. Strauss
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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIDNEY F. STRAUSS
Justice

IA PART 11

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WINZONE REALTY INC.,

Index No.: 18618/2012

Plaintiff,

Motion Date: October 8, 2013

-against-

Seq. No.: 1

YUAN XIU LI a/k/a CHARLIE LI,

Defendant.

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The following papers numbered 1 to 7 were read on the motion of the defendant, seeking an order pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint and awarding defendant the legal fees and costs for this motion. Also read was the cross-motion of the plaintiff, seeking an order pursuant to CPLR 3212, granting it summary judgment in its favor, awarding plaintiff \$30,000.00 plus interest and awarding punitive damages in the amount of \$100,000.00.

PAPERS
NUMBERED

Notice of Motion - Affirmation - Exhibits.....	1 - 3
Notice of Cross-Motion - Affirmation - Exhibits.....	4 - 6
Opposition to Cross-Motion/Reply Affirmation.....	7

The underlying action seeks to recover a brokerage commission fee as it relates to a particular premises purchased by the defendant's wife. Defendant moves, seeking summary judgment dismissing plaintiff's complaint, arguing that the plaintiff's agent and principal, Guo Yu Sun ("Sun"), had brought a similar action, seeking the same recovery, in Civil Court, Queens County, Index No. CV-0020670-12/QU. The defendant in that prior action moved to dismiss, contending that since Sun was not a duly licensed real estate brokerage or licensed real estate agent in the State of New York, defendant had never agreed to pay Sun any commission, and lastly, that there was no contract between the parties. The civil court action was dismissed by the Hon. Jodi Orlow, dated August 13, 2012.

Plaintiff commenced the underlying action in Supreme Court, Queens County, seeking

virtually the same relief, alleging breach of contract, unjust enrichment and fraud. Plaintiff, in this action, seeks damages in the sum of thirty thousand dollars, with punitive damages in the amount of one hundred thousand dollars.

Defendant submits a copy of the pleadings for the instant action as well as a copy of the civil court action, including the order of dismissal. Also submitted is the affidavit of the defendant, a copy of the customer application relied upon by the plaintiff, and a copy of the Note of Issue filed for this action.

Plaintiff cross-moves, arguing that although Sun was not involved in the final negotiation for the premises, he had made “tremendous efforts to search for the subject premises, took the defendant to the premises to meet the previous owners and inspect the premises, and negotiated with the previous owners about the contract price.” It submits copies of its real estate brokerage license, and those of Sun, the salesperson and that of the agent. Plaintiff contends that although the defendant himself did not procure the premises, the fact that defendant’s wife was the purchaser is proof of the defendant’s attempt to avoid paying a commission. Plaintiff further asserts that despite the fact that the broker’s commission agreement was silent as to the specific amount of commission, it is entitled to a fair and reasonable fee. Even if the court were to find no enforceable contract, plaintiff asserts that it is still entitled to a fee pursuant to unjust enrichment, or the theory of implied employment. Plaintiff submits the affidavit of the plaintiff’s salesperson, Sun along with a copy of the original listing agreement and pictures of the subject premises, along with a copy of the recording and endorsement page indicating that the defendant’s wife owns the subject premises.

"[T]he 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 demonstrate the absence of any material issues of fact ***." (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986].) The defendant has successfully carried this burden. The burden on this motion shifted to the plaintiff to produce evidence showing that there is a genuine issue of fact which must be tried as to defendant’s motion and further, it must establish that there are no issues of triable fact as to its cross-motion. (See, *Alvarez v Prospect Hospital*, supra.) Plaintiff has failed to successfully carry this burden.

“ ‘A real estate broker is entitled to recover a commission upon establishing that he or she (1) is duly licensed, (2) had a contract, express or implied, with the party to be charged with paying the commission, and (3) was the procuring cause of the sale.’ ” (*Sutton & Edwards, Inc. v 68-60 Austin Street*, 70 AD3d 810 [2d Dept. 2010] citing *Marciano v Ran Oil Co. E., LLC*, 63 AD3d 1118 [2d Dept. 2009] quoting *811 Stanzone Realty Corp. v Landmark Props. of Suffolk, Ltd.*, 19 AD3d 582 [2d Dept. 2005].) It is axiomatic therefore, that “a broker will be deemed to have earned a commission [only when] when it produces a buyer who is ready, willing, and able to purchase upon the seller's terms.” (See, *Sutton & Edwards, Inc. v 68-60 Austin Street*, supra; *Rusciano Realty Servs. v Griffler*, 62 NY2d 696 [1984]; *Lane—Real Estate Dept. Store v Lawlet Corp.*, 28 NY2d 36 [1971].)

A licensed real estate broker such as the plaintiff is exempt from the requirement of the Statute of Frauds that brokerage commission contracts and such contracts implied in fact and in law be in writing to be enforceable. (See GOL § 5-701(a)(10); *Andover Realty, Inc. v Western Electric Co., Inc.*, 100 AD2d 157 [1st Dept. 1984], affd 64 NY2d 1006 [1985]; *Fidelity Business Brokers, Inc. v Gamaldi*, 190 AD2d 709 [2d Dept. 1993]; *R.B. Ventures, Ltd. v Shane*, 112 F3d 54 [2d Cir. 1997].) The absence of a signed, written agreement between the plaintiff and the defendants does not preclude the maintenance of causes of action for breach of contract and quantum meruit. (See, *Fidelity Business Brokers, Inc. v Gamaldi*, supra.)

The plaintiff attempts to rely upon the terms in its Customer Application, where it alleges the defendant signed as to the subject premises. However, defendant claims that the Application was signed by him, in blank, with no premises address listed under the category “Notice of Showing.” However, regardless of whether the address was on the application at the time the defendant signed it, the document cannot be considered a brokerage agreement. Therefore, although plaintiff is correct that in the absence of an enforceable contract, it may resort to a cause of action based on quantum meruit, there is no proof to support such a claim. (See, *Bradkin v Leverton*, 26 NY2d 192 [1970]; *Davis & Mamber, Ltd. v Adrienne Vittadini, Inc.*, 212 AD2d 424 [1st Dept. 1995]; *Rule v Brine, Inc.*, 85 F3d 1002 [2d Cir. 1996] [applying New York law].) The elements of a cause of action based on quantum meruit include “(1) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services.” (*Moors v Hall*, 143 AD2d 336 [2d Dept. 1988]; *Landcom, Inc. v Galen-Lyons Joint Landfill Commn.*, 259 AD2d 967 [4th Dept. 1999]; *Heller v Kurz*, 228 AD2d 263 [1st Dept. 1996].) Here, it is undisputed that the subject premises had been taken “off the market” at least nine months prior to its ultimate sale to the defendant’s wife. Moreover, it is also undisputed that the defendant never purchased the premises, and despite plaintiff’s accusations of fraud, no evidence has been submitted beyond Sun’s self-serving and conclusory affidavit containing same. In fact, it is undisputed that the plaintiff did not procure a ready, willing and able to purchase, buyer for the premises, nor did the plaintiff play any role in the ultimate purchase, nine months after the original listing had expired.

Although plaintiff contends that even if the court were to find that there was no express contract as agreed to by and between the defendants, the plaintiff has established a valid cause of action in quantum meruit. (See *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173 [2011].) *Mandarin Trading Ltd.*, specifically narrowed its determination stating that “[a]lthough privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated.” (*Mandarin Trading Ltd. v Wildenstein*, supra.) Here, this Court finds that the plaintiff has failed to establish, that the connection between the parties was sufficient to support a claim for unjust enrichment. (See, *Paramount Film Distributing Corp. v State*, 30 NY2d 415 [1972][courts have the latitude of evaluating a claim of unjust enrichment under the “broad considerations of equity and justice].) The Customer Application specifically states at the bottom that “In consideration of receiving the following confidential information Winzone Realty Inc. I agree that in the event I desire to purchase or rent any of the above

properties, that I will not make any offer without first notifying the broker. If I fail to do so, I will be personally liable for the commission to the broker.” Clearly, it was the intent of the parties to hold the only the defendant solely responsible in the event the premises were purchased by the defendant. Here, there was no listing, as even the plaintiff admits, and further, the defendant was not the purchaser for the premises. Accordingly, as to those branches of defendant’s motion seeking to dismiss plaintiff’s causes of action for breach of contract and unjust enrichment, same are granted.

As to that branch of defendant’s motion seeking dismissal of plaintiff’s cause of action for fraud, neither the pleadings nor the evidence submitted in support of plaintiff’s cross motion support a cause of action for fraud. In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury (*see Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d 413 [1996]; *New York Univ. v Continental Ins. Co.*, 87 NY2d 308 [1995]). Also, a cause of action alleging fraud must be pleaded with specificity (see CPLR 3016[b]; *Brualdi v IBERIA*, 79 AD3d 959 [2d Dept. 2010]; *Dumas v Fiorito*, 13 AD3d 332 [2004]; *107 Realty Corp. v National Petroleum U.S.A.*, 181 AD2d 817 [2d Dept. 1992]). Here, plaintiff failed to properly plead the elements of misrepresentation of a material fact or scienter in his complaint with specificity, as the complaint did not contain factual allegations showing that the defendant made representations concerning a material fact which was false and known by the defendant to be false at the time it was made and that the defendant made the representations with the purpose of inducing the plaintiff to rely upon them (*see Nationscredit Fin. Servs. Corp. v Turcios*, 55 AD3d 806 [2d De[t/ 2008]; *Maisano v Beckoff*, 2 AD3d 412 [2d Dept. 2003]).

Moreover, the fraud claim is duplicative of the breach of contract claim. A cause of action alleging fraud does not lie where the only fraud claim relates to a breach of contract" (*Tiffany at Westbury Condominium v Marelli Development Corp.*, 40 AD3d 1073, 1076 [2d Dept. 2007]; see also *Ross v DeLorenzo*, 28 AD3d 631, 636 [2d Dept. 2006]; *WIT Holding Corp. v Klein*, 282 AD2d 527, 528 [2d Dept. 2001]; *Morgan v Smith Corp.*, 265 AD2d 536, 536 [2d Dept. 1999]). Such misrepresentations are not collateral to the contract because they pertain to the exact allegations found in plaintiff’s breach of contract claim.

Finally, in an action for breach of contract, “punitive damages are not recoverable in an ordinary breach of contract case, as their purpose is not to remedy private wrongs but to vindicate public rights. Punitive damages are only recoverable where the breach of contract also involves a fraud evincing a high degree of moral turpitude, and demonstrating such wanton dishonesty as to imply a criminal indifference to civil obligations, and where the conduct was aimed at the public generally” (*Tartaro v Allstate Indem. Co.*, 56 AD3d 758, 758 [2d Dept. 2008]). “Punitive damages are available where the conduct associated with the breach of contract is first actionable as an independent tort for which compensatory damages are ordinarily available, and is sufficiently egregious to warrant the additional imposition of exemplary damages. A party must demonstrate not only egregious tortious conduct, but also that such conduct was part of a pattern

of similar conduct directed at the public generally” (*id.*).

Here, the defendant has met his burden entitling him to summary judgment on plaintiff’s causes of action alleging punitive damages (*Chance v Felder*, 33 AD3d 645, [2d Dept 2006]; *Zuckerman v City of New York*, 49 N.Y.2d 557 [1980]; *Tartaro v Allstate Indem. Co.*, 56 AD3d 758 [2d Dept., 2008]). Additionally, there is no evidence of a pattern of egregious conduct directed toward the public at large. (See, *Ural v Encompass Ins. Co. of America*, 2012 WL 2579996 [2d Dept. 2012].) As the Court of Appeals aptly stated, “a private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally.” (*Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 N.Y.2d 603 [1994].) In opposition, the plaintiff has failed to sufficiently raise triable issues of fact (*Tartaro v Allstate Indem. Co.*, 56 AD3d 758[2d Dept., 2008]). As such, defendant’s motion for summary judgment on the those branches of plaintiff’s causes of action seeking punitive damages is granted and as such, is dismissed.

Plaintiff has not submitted evidence in admissible form sufficient to demonstrate the absence of any material issues of fact and establish its right to judgment as a matter of law. (See, *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Ayotte v Gervasio*, 81 NY2d 1062 [1993].)

Accordingly, defendant’s motion is granted to the extent that the action is dismissed. However, as to defendant’s request for legal fees and costs, same is denied. The actions of the plaintiff do not warrant the imposition of such expenses. Further, the plaintiff’s motion is denied as moot, in light of this court’s determination in favor of the defendant.

Dated: November 19, 2013

SIDNEY F. STRAUSS, J.S.C.