

**Poznanski v Wang**

2013 NY Slip Op 33811(U)

April 23, 2013

Supreme Court, Nassau County

Docket Number: 018710/05

Judge: Stephen A. Bucaria

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**MEMORANDUM DECISION****Supreme Court, Nassau County, IAS Part 1**

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ABRAHAM POZNANSKI, NORTHERN BAY  
MANAGEMENT GROUP LLC, AFFINITY  
REALTY CONSULTANTS, LLC, ISLAND  
ASSET MANAGEMENT, LLC

**HON. STEPHEN A. BUCARIA, J.S.C.****INDEX NO. 018710/05**

Plaintiffs,

-against-

CHARLES B. WANG, PLAINVIEW PROPERTIES,  
LLC, ISLAND PROPERTIES, LLC, COMMANDER  
TERMINALS HOLDINGS, LLC, MARINERS WALK,  
LLC, LIGHTHOUSE DEVELOPMENT GROUP, LLC,  
CENTRAL ISLAND PROPERTIES LLC, LIGHTHOUSE  
HOTEL DEVELOPMENT I LLC, BUCKINGHAM  
VARIETY, LLC, SOUTH STREET ENTERPRISES, LLC,  
MAXWELL AVENUE PROPERTIES, LLC, ARKALION  
LTD., WALTER IMPERATORE and THEODORE P.  
SASSO,

Defendants.

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**DECISION AFTER TRIAL**

This is an action for breach of an agreement to pay a brokerage commission. The matter was tried before the undersigned on March 11, 12, 13, and 22, 2013.

Defendant Charles Wang ("Wang") is a real estate developer. Plaintiff Abraham Poznanski, through his company, Northern Bay Management Group, LLC, worked for Wang as a real estate consultant. Northern Bay was owned 99 % by Poznanski and 1% by his wife, Evelyn Poznanski (Tr. 47; 421). Northern Bay was formed around 1998 to provide real estate management services to real estate affiliates of Wang such as Island Properties, LLC ("Island Properties") (Tr. 201-02).

In 2000, Wang and another individual purchased a professional sports team known as The New York Islanders Hockey Club (Tr. 220). The home arena for the Islanders is the Nassau Veterans Memorial Coliseum ("Coliseum"), located in Uniondale, Town of Hempstead, Nassau County, New York (Tr. 220).

In or about late 2003, Wang began to plan for a proposed project, later known as the "Lighthouse" Project ("Project"), to redevelop the site of the Coliseum ("Coliseum") (Tr. 221). It soon became apparent that the acquisition of the Long Island Marriott Hotel, adjacent to the Coliseum site, would be important to the overall success of the Project. It was believed by the planners that the Hotel (a) would compete with any hotel on the Coliseum site, (b) had unused development rights, and (c) had an easement extending from the Hotel to the Coliseum (Tr. 237-39). Clearly, the unused development rights and the above ground and below ground easement were of prime consideration.

In late 2003/early 2004, Northern Bay became involved in the Project (Tr. 225). During 2004 and 2005, Northern Bay received a "Management fee" of \$24,000 per month from Lighthouse Development Group, LLC, although the purpose and scope of these services remains unclear (Tr. 227). In any event, Northern Bay was paid more than \$500,000 for these services (Tr. 227).

In January 2004, Wang assigned Poznanski, working through Northern Bay, to make indirect overtures to Al Butts, the owner of the hotel. In this regard, Poznanski's associate, Walter Imperatore, who had prior knowledge of Alan Ostroff, a hotel consultant, hired Ostroff, to approach Butts. In the ensuing months, Poznanski met twice with Butts at the hotel to discuss possibly selling it to Wang in connection with the Lighthouse project.

In February, 2004, Allen Ostroff began a series of meetings with Al Butts, the lead owner of the Hotel ("Butts") about acquiring the Hotel (Tr. 231). By the point Ostroff was retained in February, 2004, Wang had decided to purchase the Hotel (Tr. 246 ["I mean, I brought in Hotel dynamics [Allen Ostroff] to help me negotiate after I had already discussed with Al Butts the idea of buying the Hotel. So, in other words, *First* we agreed with the owner that we would be buying the Hotel. *Then* I wanted someone with expertise in the business to discuss with them, first of all to understand the business, and also to discuss the structure, or what we would pay for the new Hotel".] [Emphasis Added]).

Ostroff's invoices for his work on acquiring the Hotel (Def. Ex. 6) were paid for by Lighthouse (Tr. 222). Ostroff met with Butts through the Spring, Summer and Fall of 2004 to obtain and analyze financial information for the Hotel and to negotiate the terms of a purchase (Tr. 256-58, 281-93; Pl. Exs. 8, 9, 10, 11, 12, 13, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27 and 30). On December 30, 2004, the first draft of a term sheet for the purchase of the Hotel was transmitted (Tr. 296-99; Pl. Ex. 29; Def. Ex. 17).

The purpose of the term sheet "was to set forth the major terms, and agreement on those major terms, to allow the attorneys to draft a contract" (Tr. 335). The term sheets thereafter exchanged in January and February, 2004 all provided that no one would be paid a commission for the Marriott transaction (Tr. 302; Pl. Ex. 30, 31, 32, 35, 36, 38, 39, 40).

In January 2005, while negotiations for the Hotel were still proceeding, Poznanski created plaintiff Affinity Realty Consultants, LLC. Affinity was owned 65% by Poznanski, 25% by Walter Imperatore, and 10% by Poznanski's nephew. Affinity became a licensed Real Estate Broker on April 4, 2005. After Affinity was formed, Imperatore continued to work on the negotiation of the deal.

In mid February, 2005 Poznanski attended a meeting with Butts where the purchase price for the Hotel was agreed upon (Tr. 140-41). At this meeting, Butts stated he would have his attorneys draft a contract of sale for the Hotel (Tr. 327). By the point the contract of sale was being drafted, the parties had agreed on the terms of a term sheet for the sale (Tr. 332-34).

The first draft of the contract of sale was transmitted on March 17, 2005 (Tr. 356). This draft of the contract of sale did not provide for the payment of a brokerage commission (Tr. 356). None of the successive drafts of the contract of sale, through August 8, 2005, the date of the signing of the contract of sale, provided for the payment of a brokerage commission (Tr. 357-65).

Once the attorneys for the parties were engaged, which was prior to March 17, 2005, when the first draft of the contract of sale was circulated, the attorneys took over primary responsibility for the negotiations between the parties (Tr. 337). On April 4, 2005, after the attorneys had taken over primary responsibility for the negotiations, Affinity became a licensed broker (Tr. 410; Pl.Ex. 1).

Even after a draft agreement was prepared, Imperatore continued to be involved in the negotiations. Around July 28, 2005, Imperatore participated in discussions of numerous open issues, including assignment of the existing mortgage, the amount of the escrow, the due diligence period, and arrearages due on the ground lease. Imperatore was also involved in revision of the language of the real estate broker provision, which was intended, in part, to protect against claims for brokerage commissions by John Shtino and Steve Hartman. These individuals assisted in the transaction on behalf of the seller.

Affinity and Northern Bay had some common employees (Tr. 432). At no time however, did Affinity notify anyone that the Northern Bay employees who had been working on the Hotel acquisition prior to April 4, 2005 were purportedly now working for Affinity on the Marriot transaction (Tr. 418). Also, at no time did Affinity notify anyone it was expecting or believed it deserved a commission for the purchase of the Hotel (Tr. 373)].

On August 8, 2005, there was a meeting between the parties and their attorneys where the contract of sale (Pl. Ex. 50) was signed (Tr. 377). Poznanski did not attend the meeting (Tr. 377). That day, a clause was added to Section 17.1 of the contract about a commission claim being made by John Shtino ("Shtino") and Steve Hartman ("Hartman") (Tr. 377).

In October, 2005, a partner of Butts, Don Urgo, spoke to Shtino about the sale of the Hotel (Tr. 386; Def. Ex. 15), Shtino, in turn, spoke to Northern Bay employee Lori Horowitz ("Horowitz") about a sale of the Hotel to Wang for \$105,000,000, sending her documents about the Hotel (Tr. 386-87; Def. Exs. 15; 16). Horowitz was not authorized to enter into these discussions about the sale of the Hotel for Northern Bay (Tr. 386).

On November 26, 2004, Poznanski, concerned about a claim by Shtino and Hartman for a brokerage commission, sent an email to his employees at Northern Bay reminding them "that all of the correspondence for the Marriott Broker who is setting us up for a fee claim needs to be scanned so we have a complete set. Lori [Horowitz] and I will review it with Roy [Reichback] when I return to determine if there is anything else we need to do to protect us". (Def. Ex. 16).

In July, 2005, Poznanski attended two meetings about the terms of the contract of sale (Tr. 389). Among the issues discussed at these meetings was the commission claim by Shtino and Hartman (Tr. 389), including specifically how the parties were "going to deal with it and who is going to be responsible" (Tr. 389, 393). At this meeting, the parties discussed, with Poznanski present, "inserting Northern Bay into the contract of sale" to "defend the Shtino/Hartman claim" (Tr. 394-95). On the day of the signing of the contract of sale, it was Affinity who was inserted into the contract of sale (Tr. 406 ["I wasn't at the meeting when Affinity was added. We were talking about Northern Bay and somehow in the final agreement, I was not at that meeting, but somehow, it was supposed to be Northern Bay but it was Affinity. I'm not sure how that happened."]). This was a surprise to Poznanski, who conceded he did not expect Affinity to be named in the contract of sale. (Tr. 406).

On August 8, 2005, Wang's company, Lighthouse Hotel Development I, LLC entered into a purchase and sale agreement with Butts' company, BR-Coliseum, LLC. The purchase price was approximately \$105 million. Under section 17.1, the contract provides that the parties have not dealt with any broker, except "purchaser is represented by Affinity Realty Consultants, LLC and purchaser agrees to pay Affinity...pursuant to a separate agreement."

POZNANSKI, et al v WANG, et al

Index no. 018710/05

It is undisputed that there was no separate brokerage agreement between Lighthouse Hotel and Affinity for the payment of a brokerage commission. Nevertheless, such a contract may be implied where the principal received a benefit from the broker's services under circumstances which, in fairness, preclude denial of an obligation to pay (Poznanski v Wang, 84 AD3d 1048 [2d Dept 2011]).

Since the hotel was a key piece in the development project, Lighthouse received a benefit from Affinity's services in bringing about the contract to purchase. Although Poznanski was also being paid as a consultant, the circumstances preclude Lighthouse's denial of an obligation to pay a brokerage commission. The court concludes that there was an implied agreement for Lighthouse to pay a brokerage commission to Affinity. The court further concludes that Affinity was the procuring cause of the transaction. To be entitled to a commission, the broker must be the "procuring cause", that is, he must bring together the minds of the buyer and the seller (Greene v Hellman, 51 NY2d 197, 206 [1980]).

Because the implied agreement was silent as to the amount of the brokerage fee, the court must evaluate the reasonable value of plaintiff's services as in an action for quantum meruit. Thus, the primary issue for the court is the amount of plaintiff's damages. Plaintiff seeks 3 % of the sales price based upon the prior course of dealing of the parties. However, the transactions upon which plaintiff relies were on a much smaller order of magnitude. Moreover, the only tangible involvement of Affinity seen in the Exhibit 49, a memo wherein certain deal breaking issues were to be discussed at a subsequent meeting. Shortly thereafter, a sale was consummated.

It is clear from the testimony that the parties never agreed to a particular "Brokers Commission". The only documentary evidence submitted was inserted into the contract on the day of signature. This is memorialized in section 17.1. "The contract of sale at issue admits, by its very terms, the performance of services by Affinity...and includes an express promise to pay a commission"...Under circumstances which, in fairness, preclude the denial of an obligation to pay. Absent any evidence as to an agreed upon commission, the Court must look to quantum meruit to resolve this issue. No evidence, in any form, was submitted to this Court relative to industry standards or the parties intent. Compensation on a percentage basis is not appropriate because plaintiff was also doing consulting work for Lighthouse and being paid on a monthly basis. The value of the Marriott Hotel in turn must be seen in light of the totality of the Lighthouse project. Since the Lighthouse project did not go forward, the hotel is worth only a fraction of the amount Wang paid for it. The Court concludes, based on the evidence submitted, as well as the testimony, that the reasonable value of plaintiff's services is \$115,000. Accordingly, the Court awards judgment to plaintiff Poznanski in the amount of \$115,000. Plaintiff may settle a Judgment on notice to the defendant in the amount of \$115,000, with interest from August 8, 2005.

Dated APR 23 2013

  
J.S.C.