

Alf Naman Real Estate Ltd. v 10 E. 63rd St., Inc.

2014 NY Slip Op 30060(U)

January 10, 2014

Supreme Court, New York County

Docket Number: 651967/2013

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT:

PART 15

Justice

Index Number : 651967/2013
ALF NAMAN REAL ESTATE LTD.
vs
10 EAST 63RD STREET, INC.
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. 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). 1-3

Answering Affidavits — Exhibits _____ No(s). 4, 5

Replying Affidavits _____ No(s). 6, 7

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 1/10/14

[Signature] J.S.C.

HON. EILEEN A. RAKOWER

- 1. CHECK ONE: ... [] CASE DISPOSED [X] 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: PART 15

-----X
ALF NAMAN REAL ESTATE LTD.,
and JOANNA CUTLER, d/b/a JOANNA
CUTLER REAL ESTATE,

Plaintiffs,

- v -

10 East 63RD STREET, INC.,

Defendant.
-----X

Index No.
651967/2013

**DECISION
and ORDER**

Mot. Seq. 1

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiffs, Alf Naman Real Estate, Ltd., and Joanna Cutler, d/b/a Joanna Cutler Real Estate (collectively, "Plaintiffs") bring this action to recover a brokerage commission based on the alleged sale of beneficial interest in real property located at 10 East 63rd Street, New York, New York ("the Building") and held by entity defendant, 10 East 63rd Street, Inc. ("Defendant"). Plaintiffs are real estate brokers who claim to have introduced non-parties Lance Valdez ("Mr. Valdez") and Jane Holzer ("Ms. Holzer") to the Building as prospective purchasers, that Mr. Valdez and/or Ms. Holzer agreed to purchase the Building from Defendant, that purchase terms were negotiated and agreed upon with Defendant, and that Mr. Valdez and/or Ms. Holzer were ready, willing, and able to consummate the purchase. Plaintiffs claim that they are jointly entitled to a brokerage commission, as a result.

Defendant moves for an order dismissing Plaintiffs' complaint pursuant to CPLR §3211(a)(1), (a)(5), (a)(7), and laches. Plaintiffs oppose.

CPLR §3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(1) a defense is founded upon documentary evidence;

(5) the cause of action may not be maintained because of . . . statute of limitations

(7) the pleading fails to state a cause of action.

On a motion to dismiss pursuant to CPLR §3211(a)(1), “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). A movant is entitled to dismissal under CPLR § 3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

Defendant submits documentary evidence demonstrating that the Building was never sold to non-party Mr. Valdez and/or Ms. Holzer, and that Defendant corporation continues to hold title to the Building. In addition, Defendant submits corporate tax returns showing that Defendant corporation has consistently had two stockholders, Guam Investment Services and Subacu Holdings, Ltd. (a wholly-owned subsidiary of Subaru Limited), and that each owned 50% of Defendant corporation’s stock during the relevant time period.

Defendant’s documentary evidence does not establish whether, as Plaintiff contends, Mr. Valdez obtained beneficial ownership of the Building by acquiring ownership or control of one or more of Defendant corporation’s corporate shareholders. Additionally, a broker may, in some instances, earn a commission even if no sale occurs. Accordingly, Defendant’s documentation fails to flatly

contradict Plaintiff's complaint and does not conclusively establish a defense to the asserted claims as a matter of law¹.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

Accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff's complaint adequately plead a cause of action for entitlement to a brokerage commission, for purposes of surviving a motion to dismiss at this early stage of litigation. Defendant's further objections to the timeliness of Plaintiffs' complaint are without merit.

Wherefore, it is hereby,

ORDERED that Defendant's motion to dismiss is denied in its entirety; and it is further

ORDERED that Defendant shall file and serve an answer within 20 days of receipt of a copy of this Order with Notice of Entry thereof.

This constitutes the decision and order of the court. All other relief requested is denied.

¹Defendant, in a reply affidavit in further support of its motion to dismiss, submits additional documentary evidence, to wit, copies of the shareholder registries of Guam Investment Services and Subacu Holdings, Ltd., for the period of 1996 to October, 2013. Whether or not such documentary evidence is properly submitted in a reply affidavit, (*Lumbermens Mut. Cas. Co. v. Morse Shoe Co.*, 218 A.D.2d 624, 625 [1st Dep't 1995]), Defendant's additional documentation also fails to flatly contradict Plaintiffs' claims, for purposes of CPLR 3211(a)(1), as many of these additional holders are corporate entities as well.

Dated: JANUARY 10, 2014



HON. EILEEN A. RAKOWER *LSC*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE