

Azad Prop. Group, LLC v Willspring Holdings LLC
2014 NY Slip Op 30747(U)
March 25, 2014
Supreme Court, New York County
Docket Number: 650626/2013
Judge: Marcy S. Friedman
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy S. Friedman, JSC

Azad Property Group, LLC

x

Plaintiff,

Index No.: 650626/2013

- against -

Willspring Holdings LLC and
 Willet Companies LLC,

DECISION/ORDER

Defendants.

x

In this action to recover a real estate brokerage commission, plaintiff broker Azad Property Group, LLC (Azad) seeks compensation for its work procuring a potential purchaser on behalf of defendant seller Willspring Holdings LLC (Willspring). The complaint alleges a first cause of action for breach of an implied in fact contract, a second for quantum meruit, and a third for tortious interference with contract. Defendants move to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7).

It is well settled that on a motion to dismiss pursuant to CPLR 3211(a)(7), “the pleading is to be afforded a liberal construction (see, CPLR 3026). [The court] accept[s] the facts as alleged in the complaint as true, accord[s] plaintiffs the benefit of every possible favorable inference, and determine[s] only whether the facts as alleged fit within any cognizable legal theory.” (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) However, “the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that

are unsupportable based upon the undisputed facts.” (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]; see also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1st Dept 2005], lv denied 6 NY3d 706 [2006].) When documentary evidence under CPLR 3211(a)(1) is considered, “a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (Leon v Martinez, 84 NY2d at 88.)

As alleged in the complaint, plaintiff, a licensed commercial brokerage firm, solicited Willspring about the sale of its building located at 131-137 Spring Street, New York. (Compl., ¶¶ 1, 6.) Defendant Willspring is a special purpose entity created to own the property at issue. (Id., ¶ 6.) It operated and acted through its alleged alter ego, defendant Willet. (Id., ¶¶ 3, 6.) Andrew Feldman, an employee of plaintiff, called Bruce Beswick, an officer of both Willspring and Willet, to ask whether the owner would be willing to sell the building. During this initial call, on or about November 20, 2012, Beswick stated that he would consider offers of at least \$100 million. Beswick and Feldman agreed on a broker’s commission of 1% of the sale price offered by a qualified purchaser procured by plaintiff. (Id., ¶ 11.)

On November 29, 2012, Feldman told Beswick that Vornado Realty Trust (Vornado), a large real estate investment trust, had expressed “serious interest” in purchasing the property. In response, Beswick provided Feldman with information about the property, including its rent roll. (Id., ¶¶ 12-13.) On November 30, 2012, Feldman sent Beswick a \$102.5 million offer letter from Vornado, which included deposit, contract timing, due diligence and closing date terms articulated by Beswick. (Id., ¶ 14.) The letter addressed brokerage fees as follows: “Broker: Seller shall pay all commissions in connection with this transaction.” Feldman’s email attaching

the letter referred to the commission rate discussed during the prior phone call, stating: "Please also note that this offer is being place[d] with you as sellers being responsible for my commission, an agreed upon 1%." (Aff. of Claire Wells [Ds' Attorney] in Support, Ex 1.)

As further alleged in the complaint, Beswick rejected the offer because Vornado did not address the property's securitized mortgage, which he wanted the buyer to either assume or defease. Feldman forwarded a revised offer letter from Vornado on December 3, 2012, indicating the potential buyer's willingness to pay the mortgage defeasance costs of approximately \$7 million. (Compl., ¶¶ 15-16, Wells Aff., Ex 2.) Beswick replied to Feldman in writing later that day: "In order for us to close this out I need to get \$105 million with buyer either taking loan over via assumption or defeasance. If Vornado comes up to the \$105 million I will close this out and have our attorney deliver a contract within 48 hours." (Compl., ¶ 17.) On December 4, 2012, Beswick repeated that "I can get the deal done at \$105m with contract out in less than 48 hours," again without reference to any other outstanding conditions to be negotiated. (Id.)

In response, Feldman forwarded Vornado's third offer letter, dated December 5, 2012, meeting Beswick's price terms and leaving the other offer terms unchanged. (Id., ¶ 19, Wells Aff., Ex 3.) The same day, Beswick and Feldman renegotiated plaintiff's commission rate, orally agreeing that it would be raised to 1.25%, because Feldman had secured a higher offer from Vornado. (Compl., ¶ 20.) On December 6, 2012, Beswick told Feldman that another buyer had offered \$115 million to purchase the building. Feldman told Beswick that "they had struck a deal," and that Vornado expected the sale to be completed. (Id., ¶ 21.) Beswick continued to send Feldman due diligence materials for Vornado, as a "back-up bidder" in case the other deal

fell through. On December 15, Beswick sent Feldman a text message, stating that “the property was no longer available.” (Id., ¶¶ 21-23.)

Implied In Fact Contract

Defendants contend that plaintiff’s first cause of action, alleging breach of an implied in fact contract, must be dismissed because Vornado’s letters proposed that Willspring pay Azad’s (Feldman’s) commission, and Willspring never accepted such offers. (Defs.’ Memo. in Reply at 1-2.) Plaintiff counters that an agreement for a broker’s commission is not required to be expressed in writing and may be implied in fact where the broker’s services are requested and accepted. (P.’s Memo. in Opp. at 4-6.)

It is well settled “that in the absence of an agreement to the contrary, a real estate broker will be deemed to have earned his commission when he produces a buyer who is ready, willing and able to purchase at the terms set by the seller.” (Lane-The Real Estate Dept. Store, Inc. v Lawlet Corp., 28 NY2d 36, 42 [1971], remititur denied 29 NY2d 552.) This rule applies even in the absence of an express contract for a brokerage commission. (See id.) Thus, an owner is “liable for a broker’s commission under a theory of a broker’s implied employment where, even in the absence of the owner’s express agreement to pay the broker’s commission, the owner accepted and benefitted from the broker’s services.” (Joseph P. Day Realty Corp. v Chera, 308 AD2d 148, 153 [1st Dept 2003].) The seller will remain liable to the broker he employed if he frustrates the consummation of the sale, as long as the buyer and seller have come to a meeting of the minds on the essential terms. (See Eastern Consol. Props., Inc. v Lucas, 285 AD2d 421, 422 [1st Dept 2001]; Prime City Real Estate Co., Inc. v Hardy, 256 AD2d 80, 80 [1st Dept 1998] [holding that after agreement was reached on essential terms including price, deposit, condition

of premises, and verification of rent, sellers' "subsequent receipt of an offer of a higher price did not entitle them to avoid paying plaintiff's commission by refusing to negotiate the remaining details of the sale"].)

Here, plaintiff sufficiently alleges that it produced a ready, willing, and able purchaser on defendant-seller's terms. The offer letters support plaintiff's claim that buyer and seller had agreed on the essential terms of the transaction, and that Vornado was a financially able buyer. Vornado's first letter incorporated several terms provided by Beswick, including purchase price, deposit, and timing for the contract, due diligence period, and closing. Its second offer letter accepted Willspring's mortgage defeasance condition. The third letter met Willspring's increased price term, which Beswick had held out as the final remaining condition for the sale. (Wells Aff., Ex 1-3.)

While an agreement on price alone does not constitute a meeting of the minds, where the prospective purchaser agrees to all essential terms set forth by the seller, the seller's obligation to pay a commission will not be excused because the seller chooses not to proceed in finalizing the contract. (Kirk Assocs., Ltd. v McDonald Equities, Inc., 155 AD2d 281, 282 [1st Dept 1989].) The complaint alleges that the parties reached agreement on all essential terms, including the amount of plaintiff's commission. The complaint further alleges that Willspring availed itself of plaintiff's services to procure a prospective purchaser, knowing that Feldman expected payment for acting on seller's behalf to extract concessions on price and mortgage defeasance terms. Based on these allegations, the court holds that the complaint pleads a cause of action for breach of an implied in fact contract.

In so holding, the court rejects defendant's contention that Willspring's failure to sign

Vornado's offer letters, which specify that the seller will pay broker's fees, negates entitlement to a commission. Put another way, plaintiff's claim to a commission is not defeated as a matter of law by the fact the seller's responsibility for the payment of commission was recited in an unsigned offer letter summarizing the agreed upon terms. While the lack of a signature might undermine a claim that an express contract for a broker's commission was made, plaintiff pleads an implied in fact contract. Moreover, as held above, where the essential terms of the sale have been agreed to, a seller cannot escape liability for a commission by failure to complete the sale. (Eastern Consol. Props., 256 AD2d at 80; see also Realty Invs. of USA, Inc. v Bhaidaswala, 254 AD2d 603, 604 [3rd Dept. 1998] ["broker's right to a commission is not dependent on the execution of a legally enforceable sales contract"].)

The court is unpersuaded by defendants' further contention that because Vornado was a client of plaintiff, Willspring could not have been plaintiff's employer for the purpose of this transaction. (Defs.' Memo. in Support at 4-5.) It is well settled that a broker can recover only from the party with whom it had an express or implied contract to provide brokerage services. (Joseph P. Day Realty, 308 AD2d at 155; RWSP Realty, LLC v Agusta, 42 AD3d 490, 491 [2d Dept 2007].) Plaintiff's allegations that Feldman persuaded Vornado to increase its offering price and to agree to Willspring's other conditions are consistent with a broker acting as the agent of the seller. (See Joseph P. Day Realty, 308 AD2d at 155; Parke-Hayden, Inc. v Loews Theatre Mgt. Corp., 1993 WL 287815, *5 [SD NY July 28, 1993], affd no opinion 22 F3d 1091 [2d Cir 1994], cert denied 513 US 875 [applying New York law] [holding that broker was not prevented from recovering from buyer, where broker was employed by both buyer and seller].)

Accordingly, defendant's motion to dismiss plaintiff's first cause of action for breach of

contract will be denied.

Quantum Meruit

Defendants contend that plaintiff's second cause of action for quantum meruit must be dismissed because plaintiff was not the procuring cause of the sale of the property to Vornado. (Defs.' Memo. in Reply at 3-4.) Plaintiff concedes that to recover from a seller on a quantum meruit or unjust enrichment theory, a broker must be the procuring cause of the transaction. (See P.'s Memo. In Opp. at 10.) Plaintiff claims that although it had no direct involvement with the ultimate purchaser, it was nevertheless the procuring cause of the transaction. (Id.)

As a threshold matter, a quantum meruit claim may be pleaded as an alternative basis for relief, where "there is a bona fide dispute as to the existence of a contract." (Foster v Kovner, 44 AD3d 23, 29 [1st Dept 2007] [internal citation omitted].) Here, however, the pleading of the quantum meruit claim is itself insufficient.

It is well settled that in order for a broker to be the procuring cause of the transaction, "there must be a direct and proximate link, as distinguished from one that is indirect and remote," between the broker's introduction of the buyer to the seller and the consummation of the sale. (Greene v Hellman, 51 NY2d 197, 206 [1981].) The complaint alleges that after Feldman delivered the third offer from Vornado, which met Willspring's terms, "Seller reneged, retrading the purchaser's deal for a higher offer from another buyer." (Compl. ¶ 1.) This speculative allegation is insufficient to plead the proximate link necessary to support the quantum meruit claim. (Compare Zere Real Estate Servs., Inc. v Parr Gen. Contr. Co., Inc., 102 AD3d 770, 773 [2d Dept 2013], lv denied 21 NY3d 855.) The quantum meruit claim will accordingly be dismissed.

Tortious Interference with Contract

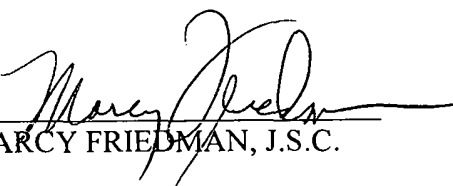
Plaintiff's third cause of action for tortious interference fails on the face of the pleadings. Plaintiff alleges that Willet is Willspring's alter ego, and that Willet acted through Willspring in negotiating the sale. It is well settled that "only a stranger to a contract, such as a third party, can be liable for tortious interference with a contract." (Koret, Inc. v Christian Dior, 161 AD2d 156, 157 [1st Dept 1990], lv denied 76 NY2d 714.) As the alter ego of a party to the contract with which it is alleged to have tortiously interfered, Willet "cannot be considered a 'stranger' to the contractual relationship . . . and there can be no claim for tortious interference with contract." (UBS Secs. LLC v Highland Capital Mgt., L.P., 86 AD3d 469, 477 [1st Dept 2011].) Plaintiff's third cause of action will therefore be dismissed.

It is accordingly ORDERED that the motion of defendants Willspring Holdings LLC and Willet Companies LLC to dismiss the complaint is granted to the extent of dismissing the second cause of action (quantum meruit) and the third cause of action (tortious interference); and it is further

ORDERED that the parties shall appear in Part 60 for a preliminary conference on May 6, 2014 at 2:30 p.m.

This constitutes the decision and order of the court.

Dated: New York, New York
March 25, 2014


MARCY FRIEDMAN, J.S.C.