

**Town & Country Real Estate of the E. End LLC v
Sotheby's Intl. Realty, Inc.**

2014 NY Slip Op 31195(U)

May 5, 2014

Supreme Court, Suffolk County

Docket Number: 10-12417

Judge: W. Gerard Asher

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 12-3-13 (#006)
MOTION DATE 1-28-14 (#007)
ADJ. DATE 2-25-14
Mot. Seq. # 006 - MD
007 - XMD

-----X
TOWN & COUNTRY REAL ESTATE OF THE
EAST END LLC,

Plaintiff,

- against -

SOTHEBY'S INTERNATIONAL REALTY,
INC., and DANA TROTTER, BARBARA
BORNSTEIN,

Defendants.
-----X

MICHAEL G. WALSH, ESQ.
Attorney for Plaintiff
800 Montauk Highway, Unit 4
Water Mill, New York 11976

DIANNE K. LeVERRIER, ESQ.
Attorney for Defendants
23 Royal Street
East Hampton, New York 11937

Upon the following papers numbered 1 to 39 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 22; Notice of Cross Motion and supporting papers 23 - 30; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers 31 - 39; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment in its favor, and for sanctions against counsel for the defendants, is denied; and it is further

ORDERED that the cross motion by the defendants for an order pursuant to CPLR 3212 granting summary judgment in their favor, is denied.

This is an action sounding in breach of contract and breach of good faith. In its complaint, the plaintiff alleges that the defendants breached a real estate co-brokerage agreement made between them, and intentionally acted to deprive it of its brokerage commission. The plaintiff claims entitlement to its commission of \$56,650 from the sale of certain real property in the amount of \$1.895 million. The plaintiff further alleges that the defendants contacted its customer directly and "failed to advise plaintiff that they had resumed negotiations with her in an effort to deprive plaintiff of its 3 percent commission."

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5-6-14

The parties do not dispute many of the underlying facts herein. It is undisputed that, in July 2009, the defendant Sotheby's International Realty, Inc. (SIR) offered to share the commission earned on the sale of certain property with a cooperating broker by listing the property on a multiple listing service known as OREX. SIR was attempting to find a purchaser for its clients' properties located at 2 Uncle Leo's Lane and 6 Uncle Leo's Lane in Water Mill, New York (collectively, Equine Venture) pursuant to a signed listing agreement affording SIR an exclusive right to sell. For reasons that will become clear herein, it is necessary to describe the subject properties. The listing agreement concerned the sale of both 2 and 6 Uncle Leo's Lane, and refers to them together as the "Equine Venture" property. Separately, the property of SIR's clients consisted of a horse farm located at 2 Uncle Leo's Lane (Horse Farm) and a residence on 6 Uncle Leo's Lane (House). Subsequent to the OREX listing, and at the request of the defendant Dana Trotter (Trotter), a licensed associate broker at SIR, a representative of the plaintiff registered its customer, Jane Gladstone Wheeler (Wheeler), with SIR as a party interested in the purchase of Equine Venture. On October 3, 2009, the plaintiff's licensed sales associate showed the Equine Venture property to Wheeler in a meeting with the owner and the defendant Barbara Bornstein (Bornstein), a licensed associate broker at SIR. The next day, Robert Tomich (Tomich), a licensed associate broker with the plaintiff and the person dealing directly with Wheeler, conveyed an offer to purchase Equine Venture to Bornstein, which was rejected by the owners. In "late October or early November," Wheeler and Trotter began a series of direct communications. On or about March 4, 2010, SIR placed a second listing on OREX seeking co-brokers for the sale of House. Thereafter, Wheeler and Trotter continued to communicate, which eventually led to the purchase by Wheeler of House without Horse Farm, and the payment by the owner of House of a commission equaling six percent of the sale to SIR.

The plaintiff now seeks an order granting it summary judgment on the complaint and for sanctions against the defendants' counsel. In support of its motion, the plaintiff submits, among other things, the pleadings, the depositions of three of its representatives, affidavits submitted in support of, and opposition to, prior motions made by the parties, the contract of sale regarding Wheeler's purchase of House, and various documents regarding its request for sanctions. The 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 eliminate any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

Judi A. Desiderio (Desiderio) was deposed on November 28, 2012, and she testified that she is the president and CEO of the plaintiff. She stated that Tomich and Lisa Allen (Allen) began working for the plaintiff as "agents" at approximately the same time, that she never met or spoke with Wheeler, and that the law requires real estate agents to obtain a signed New York State Disclosure Form (Disclosure Form) from their customers, or a waiver, "on the first substantial meeting." She indicated that OREX is

“just simply a portal for co-brokers,” that co-brokerage forms are printed from OREX, and that “[y]ou wouldn’t normally print out co-broke forms unless you need to retrieve them for whatever reason.” Desiderio further testified that the co-brokerage agreement form attached to the complaint is not the July 2009 Equine Venture version because the system only permits one form per listing, and that a second form was generated when SIR sought co-brokers for the separate sale of House. She acknowledged that the plaintiff does not have a signed copy of the July 2009 co-brokerage agreement form, and she indicated that “I don’t know of any local real estate firm that sends ours back signed.” She stated that it is the plaintiff’s custom and practice to respect the online forms, that the agreement is a verbal one, and that no local brokers ask for a signed agreement. Desiderio further testified that, after Wheeler called Tomich and informed him that she had bought House, she had a conference call with Trotter and Bornstein wherein she asked Trotter if she understood what she was doing, and that Trotter said “it’s a completely different property ... [and] Wheeler called me.” She indicated that, even though the July 2009 offering was on the entire Equine Venture property, the purchase of House, the only residence on the property, entitles the plaintiff to share in the real estate commission.

At her deposition, Allen testified that she was licensed as a sales associate in 2002, that she worked with Tomich, and that Wheeler was Tomich’s client. She first became aware of “2 and 6 Uncle Leo’s Lane” on October 2, 2009, when Tomich asked her to show the properties to Wheeler the next day because he was unavailable. She stated that she met Wheeler at the “Equine Venture portion” of the property on October 3, 2009, that Bornstein and one of the owners, Barbara Calabro (Owner), were present for the showing of the property, and that the Owner showed them the Horse Farm first. She indicated that the four of them then moved on to view House, and that Bornstein and the Owner remained in the kitchen while she and Wheeler toured the house. She and Wheeler then exited the house to view the grounds while Bornstein and the Owner remained inside. Allen further testified that, while they were outside, Wheeler told her that she was “mostly, or if not only, interested in purchasing the house at this point ... separate from the equine portion,” and that upon reentering the house she made that inquiry to Bornstein, who asked the Owner in front of everyone. She stated that the Owner “said no, not at this time.” She also stated that, as she and Wheeler were leaving the property, she suggested that Wheeler might ask if she could rent House with an option to buy, and that she recalled Wheeler telling her that she “would really still like to make an offer on the house.” However, Allen could not recall whether that conversation was as they were leaving the property. She indicated that the latter conversation was the last communication that she had with Wheeler, and that she called Tomich from her car and told him “how everything went and my suggestion as far as renting the property with an option to buy.”

At his deposition, Tomich testified that he is a licensed real estate associate broker, that he uses OREX to look up listing information, and that he does not have a signed copy of the co-brokerage form that was on OREX prior to the form for the House listing. He explained the relationship of OREX to the RealNet system, and stated that anyone that has access to the RealNet system has access to all information regarding a listing. He indicated that, when a broker lists an exclusive right to sell, it is “immediately co-brokered out to the rest of the community electronically.” Tomich further testified that he met Wheeler in August 2009, that she requested and he sent her listings of properties, and that he located 2 and 6 Uncle Leo’s Lane through RealNet after Wheeler asked to see horse farms. He stated that he orally registered Wheeler as his client with Trotter, “in person,” at SIR’s Bridgehampton office,

and that “[y]ou do that so ... the agent knows that you’re the one who brought the customer to a property.” He acknowledged that he did not register Wheeler as his customer with Trotter for just 6 Uncle Leo’s Lane (House). Tomich further testified that he and Wheeler communicated with each other regarding other properties between October 4, 2009 and February 28, 2010, that the first time he learned that House was listed separately was on April 1, 2010 when Wheeler called him to let him know that she had entered into a contract to purchase House separately, and that Wheeler told him in that phone call that “the defendants would be taking care of plaintiff’s commission.”

In June 2011, Trotter and Bornstein submitted affidavits in support of SIR’s prior motion to dismiss the plaintiff’s complaint. In September 2011, Tomich and Allen submitted affidavits in opposition to SIR’s motion to dismiss and in support of the plaintiff’s contemporaneous motion for summary judgment. In her affidavit, Trotter swears that, on June 26, 2009, SIR entered into a written listing agreement with the officers of Equine Ventures, Ltd. giving it an exclusive right to sell Equine Venture for a period of one year. She attaches a copy of the agreement as an exhibit to her affidavit. She states that SIR “invited the participation of other brokers in the sale ... offering 3% commission to a broker ... who ‘produces, negotiates and consummates the sale with the buyer ...,’” and that, on September 25, 2009, Tomich “contacted me to advise me that he had a customer interested in seeing the Equine Ventures, Ltd. Property.” She indicates that, because she would be on vacation, she asked Bornstein to make the arrangements for the showing, that she believes that, on October 4, 2009, Tomich conveyed an offer to purchase Equine Venture and an interest in renting the house during the winter to Bornstein, and that both offers were rejected by the owners. Trotter further swears that, in late October or early November 2009, Wheeler called her expressing an interest in seeing other horse farms, and that she had a telephone conversation with Wheeler in mid-January 2010 regarding some listings and mentioned that the owner of House may list House separately. On or about February 23, 2010, SIR and the owner of House entered into a “new exclusive listing agreement” at a price of \$1,895,000. She states that no one from the plaintiff’s offices contacted her regarding Wheeler’s interest in purchasing House after it was listed with SIR, that she believes Bornstein met Wheeler at House on February 28, 2010 and presented a disclosure form to Wheeler, which Wheeler refused to sign, and that SIR invited the participation of other brokers in the sale of House on March 4, 2010. She indicates that Bornstein e-mailed Wheeler on March 9, 2010 to let her know that an offer had been made on House by another broker, and that one hour later Wheeler e-mailed her and Bornstein an offer on House. Trotter further swears that the offer was not conveyed by anyone from the plaintiff’s offices, and that Wheeler and the owner of House entered into a contract of sale on March 19, 2010. She states that no one from the plaintiff’s offices was involved in the negotiations regarding the sale of House, that Wheeler negotiated the terms, and that House was sold to Wheeler and the commissions paid to SIR “pursuant to the SIR exclusive listing agreement and contract of sale entered into between [the owner] and Wheeler.”

In her affidavit, Bornstein swears that she is a licensed associate broker with SIR, that Trotter contacted her to show Equine Venture to Tomich and his client, and that she and Owner met Allen and Wheeler at Equine Venture on October 3, 2009. She states that neither Allen nor Wheeler inquired about purchasing House separately, that she e-mailed Tomich the owners’ rejection of the offers to purchase Equine Venture or rent House, and that Equine Venture never sold. She indicates that she met Wheeler at House on February 28, 2010 and presented a Disclosure Form to Wheeler, which Wheeler refused to sign. Bornstein further swears that, on March 9, 2010, she e-mailed Wheeler to advise her

that an offer had been made on House by another broker, and that within one hour Wheeler e-mailed Trotter with an offer on House. She indicates that the next day Wheeler's offer of \$1.75 Million for House was accepted by the owner, that a contract of sale was signed on or about March 19, 2010, and all of the essential terms of the sale were negotiated by Wheeler through her and Trotter. She states that no one from the plaintiff's offices procured Wheeler as a purchaser for House, and that the property was sold to Wheeler on April 15, 2010 and the commissions paid to SIR "pursuant to the SIR exclusive listing agreement and contract of sale entered into between [the owner] and Wheeler."

In their affidavits of September 2011, both Tomich and Allen swear to essentially the same facts as those which they recounted in their deposition testimony. One notable addition is that Tomich attaches as an exhibit to his affidavit copies of e-mails between himself and Wheeler, and between himself and Bornstein or Trotter, during the period September 8, 2009 to October 4, 2009. A review of said e-mails reveals that they essentially confirm most of the undisputed facts set forth by the parties to this action.

The contract of sale for House, dated March 19, 2009, reflects a purchase price of \$1,750,000, and provides in pertinent part in its printed text:

27. Broker. Seller and Purchaser each represents and warrants to the other that it has not dealt with any broker in connection with this sale other than SOTHERBY'S INTERNATIONAL REALTY - Listing Agents: Dana Trotter and Barbara Bornstein * ("Broker") and Seller shall pay Broker any commission earned ...

In handwriting the * symbol above is added, along with the handwritten notation above the subject paragraph "*and Town and Country R.E./Bob Tomich."

Here, the plaintiff has failed to establish its prima facie entitlement to summary judgment. "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," *Marciano v Ran Oil Co. E., LLC*, 63 AD3d 1118, 882 NYS2d 452 [2d Dept 2009], see also *Greene v Hellman*, 51 NY2d 197, 433 NYS2d 75 [1980]; *Poznanski v Wang*, 84 AD3d 1048, 923 NYS2d 602 [2d Dept 2011]; *Stanzoni Realty Corp. v Landmark Props. of Suffolk*, 19 AD3d 582, 875 NYS2d 162 [2d Dept 2005]). There are issues of fact whether the plaintiff had an express or implied agreement with SIR to co-broker the sale of Equine Venture which would include the latter sale of House separately. These issues of fact include, but are not limited to, whether local brokers do not require co-brokerage agreements to be signed and honor their mere input into OREX, whether Trotter and Bornstein were aware of Wheeler's interest in purchasing House separately prior to its listing and their contact with Wheeler, whether Wheeler considered the plaintiff her broker throughout her interaction with SIR, and whether Trotter and Bornstein were aware that Wheeler considered the plaintiff her broker at all times. As set forth above, without an express or implied agreement between the parties, the plaintiff cannot recover herein.

In addition, there are issues of fact whether the plaintiff was relieved from the requirement that it be the procuring cause of the latter sale of House. Real estate brokers use the phrase “to co-broke the commission” to describe situations in which they agree to split a commission (*William T. Bell & Assoc. v Pyramid Brokerage Co.*, 281 AD2d 943, 721 NYS2d 893 [4th Dept 2001]). It has been held that brokers who agree to divide real estate commissions can be considered to stand in the relationship of joint adventurers, or principal and agent, and must deal with each other in good faith (*see Sahoff Corp. v May Co. Real Estate, Inc.*, 258 AD 157, 15 NYS2d 795 [1st Dept 1939]; *cf. Douglas Elliman LLC v Corcoran Group Mktg.*, 93 AD3d 539, 940 NYS2d 595 [1st Dept 2012] [no duty of good faith between brokers because co-brokerage agreement had expired]). The plaintiff’s submission reveals that it had no contact with Wheeler regarding the House property after Wheeler’s offer on October 4, 2009 for Equine Venture was rejected, that it did not contact SIR after House was listed separately, and that it was not involved in negotiating the terms of the sale of the House property. However, there are issues of fact as to when the parties’ co-brokerage agreement, if any, expired, whether the defendants acted in good faith relative to the plaintiff when they communicated with Wheeler after October 4, 2009 without advising the plaintiff, and whether the defendants are bound by paragraph 27 of the contract of sale naming the plaintiff as a co-broker on the sale of House.¹ Generally, where a contract of sale admits a broker’s performance of services and includes an express promise by the seller to pay the commission, the broker is entitled to summary judgment on its claim for commissions (*Halstead Brooklyn, LLC v 96-98 Baltic, LLC*, 49 AD3d 602, 854 NYS2d 437 [2d Dept 2008]). Here, there are additional issues of fact as to who added the plaintiff’s name in the subject paragraph of the contract of sale, why it was added, and who participated in the decision to make that addition.

Accordingly, that branch of the plaintiff’s motion which seeks summary judgment on its complaint is denied.

In addition, that branch of the plaintiff’s motion for an order imposing sanctions against the attorney for the defendants pursuant to 22 NYCRR § 130-1.1 is denied. In his affirmation in support of the motion, counsel for the plaintiff contends, in essence, that opposing counsel failed to produce a copy of the contract of sale for House for three years despite her knowledge of its existence and despite demands for its production. New York State’s Rules of Professional Conduct, effective April 1, 2009, provide in pertinent part:

Rule 3.1: Non-meritorious claims and contentions.

(a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous ...

(b) A lawyer's conduct is “frivolous” for purposes of this Rule if:

¹ Counsel for SIR contends that the subject contract of sale has not been authenticated by the plaintiff. However, she does not contend that the copy submitted is inaccurate. In addition, the record reveals that SIR produced a copy of the contract of sale at the plaintiff’s request only after much debate which has resulted in the plaintiff’s request herein for sanctions.

* * *

(2) the conduct has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of Rule 3.2, or serves merely to harass or maliciously injure another; or ...

Rule 3.2: Delay of litigation.

In representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense.

Rule 3.4: Fairness to opposing party and counsel.

A lawyer shall not:

(a)

(1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce ...

A review of the plaintiff's submission reveals that counsel for the plaintiff first requested a copy of the subject contract in a demand dated March 22, 2013, that opposing counsel originally objected to the request, and that the document was produced in response to a motion to compel its production made by the plaintiff. The plaintiff's submission also reveals that opposing counsel had no legal obligation to reveal or produce the contract pursuant to earlier discovery demands made by the plaintiff. The Court finds that the defendants' actions based, in part, upon legal theories, clearly did not rise to the level of "frivolous conduct" as contemplated by court rules (*see* Uniform Rules for Trial Cts [22 NYCRR] § 130-1.1 [a]; CPLR 8303-a; *Agostini v Sobol*, 304 AD2d 395, 757 NYS2d 555 [1st Dept 2003]; *Juron & Minzner v State Farm Ins. Co.*, 303 AD2d 463, 756 NYS2d 428 [2d Dept 2003]; *Matter of Christopher*, 280 AD2d 546, 720 NYS2d 391 [2d Dept 2001]).

The defendants cross-move for an order pursuant to CPLR 3212 granting summary judgment in their favor. In support of their cross motion, the defendants submit, among other things, a time line created by Tomich, a copy of the preliminary conference order in this matter, and a copy of the plaintiff's demand for a copy of the subject contract of sale. In searching the record, it is determined that the defendants have failed to establish their entitlement to summary judgment. As noted above, there are issues of fact including, but not limited to, whether there was an express or implied co-brokerage agreement between the parties, whether the defendants acted in good faith if such an agreement was in place, and if Wheeler's alleged interest in purchasing House separately was conveyed to the defendants by Tomich or Allen prior to their direct communications with Wheeler. In addition, both Tomich and Bornstein swear in their affidavits that SIR was paid its commission pursuant to the contract of sale entered into between the owner and Wheeler. However, the defendants do not submit any evidence to establish that the language added to the contract of sale is not effective as a matter of law.

Town & Country Real Estate v Sotherby's

Index No. 10-12417

Page No. 8

In her affirmation in support of the defendants' cross motion, counsel asserts, among other things, that the defendants are entitled to summary judgment because the plaintiff did not participate in the negotiations which led to the sale of House. However, a broker who is not involved in the negotiations leading up to the completion of the deal, may be entitled to a commission where the broker establishes that it created an amicable atmosphere in which negotiations proceeded, or that it generated a chain of circumstances that proximately led to the sale of the property in question (*see Hentze-Dor Real Estate, Inc., v D'Allesio*, 40 AD3d 813, 836 NYS2d 265 [2007]; *Buck v Cimino*, 243 AD2d 681, 663 NYS2d 635 [1997]). However, absent bad faith on the part of the principal, a broker is not entitled to commissions for unsuccessful efforts (*see Sibbald v The Bethlehem Iron Co.*, 83 NY 378 [1881]). Here, there are issues of fact whether the plaintiff created an amicable atmosphere for negotiations and/or was prevented from doing so due to the defendants actions, whether the plaintiff generated a chain of circumstances leading to a sale of the property, and whether the plaintiff was deprived of an opportunity to earn a commission (*see eg. Douglas, Payton & Co. v We're Assoc.*, 197 AD2d 559, 602 NYS2d 658 [2d Dept 1993]).

Accordingly, the defendants' motion for summary judgment in their favor is denied.

Dated: May 5, 2014

W. Gerard Asher
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION