SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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NRT NEW YORK, LLC., d/b/a CORCORAN GROUP, and CHARLES RUTENBERG, LLC,

Plaintiff,

Index No. 152678/2013

- against -

Decision and Order

CHRISTOPHER MORIN and MEI MORIN,

Mot. Seq.: 01

Defendants.

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

This is an action for breach of contract based on a purported brokerage agreement (the "Agreement") between plaintiff, Charles Rutenberg, LLC ("Rutenberg"), and defendants, Christopher Morin and Mei Morin (collectively, the "Morins" or "Defendants"), concerning the lease and eventual sale of the residential real property located at 201 E. 80th Street, New York, New York (the "Premises"). Plaintiffs, Rutenberg and NRT New York, LLC, d/b/a Corcoran Group ("Corcoran") (collectively, "Plaintiffs"), claim that the Agreement authorizes Plaintiffs, as principal and co-broker, respectively, to locate a tenant for the Premises, and entitles Plaintiffs to a commission fee for the sale of the Premises if the Premises are sold to a tenant procured under the Agreement. Plaintiffs claim that Defendants sold the Premises to a lessee procured under the Agreement, and now seek to recover the six percent commission fee to which they allegedly are entitled under the Agreement.

Defendants move for an Order, pursuant to CPLR 3211(a)(1), (a)(3), and (a)(7), dismissing Plaintiffs' second amended complaint on the basis of documentary evidence, lack of capacity, and failure to state a claim upon which relief may be granted.

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;
>
> (3) the party asserting the cause of action has not legal capacity to sue;
>
> (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). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]).

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]).

"The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." (*Flomenbaum v New York Univ.*, 2009 NY Slip Op 8975, *9 [1st Dept. 2009]).

Defendants argue that the Agreement itself constitutes documentary evidence

warranting the dismissal of Plaintiffs' second amended complaint, because the Agreement terminated prior to the sale of the Premises in question. Defendants argue that the Agreement states, "This agreement shall become effective on the date you sign it, and continue in full force and effect through November 23, 2009," and further argue that this provision governs the Agreement in its entirety. Defendants argue that the Premises were sold on June 9, 2011, nineteen months after the Agreement, by its terms, expired. As a result, Defendants contend, Plaintiffs' complaint fails to plead a breach of the Agreement.

Defendants also argue that Agreement contains an extension clause (the "Extension Clause"), and that the Premises were sold approximately fifteen months after the Extension Clause terminated. The Extension Clause provides,

> Within three (3) business days of the expiration date, we shall deliver to you, in writing, a list of no more than six (6) prospective renters or purchasers, as the case may be, who inspected the property during the term of the exclusive agreement. If within 180 days after the expiration date, a lease or contract of sale is signed with a purchaser on said list, Charles Rutenberg LLC shall be entitled to the commission provided for in this Agreement.

Defendants argue that including this Extension Clause in the Agreement demonstrates that Defendants and Rutenberg could have contracted for an additional extension or survival clause relating to the commission fee for the sale of the Premises, and deliberately failed to do so. Defendants argue that the Agreement contains no such clause, and that, as a result, any right Plaintiffs may have had to a commission fee for the sale of the Premises was terminated on November 23, 2009, along with the Agreement.

Plaintiffs' second amended complaint alleges, "On or about June 23, 2009 defendants Christopher Morin and Mei Morin engaged real estate brokerage firm Rutenberg to locate a suitable lessee for their residential property located at 201 East 80ths Street, Unit 3AB in New York, NY (the 'Premises') for which services they agreed to pay a commission. That agreement ("the Agreement") is annexed hereto as Exhibit A." Plaintiffs' amended complaint further alleges, "The Agreement further provides for an additional commission to be paid to Rutenberg if the lessee should purchase the Premises."

Plaintiffs' second amended complaint further alleges,

> The Morins authorized Rutenberg to solicit the cooperation of other real estate brokers to work with them on a cooperating basis to lease/sell the Premises. Accordingly, Rutenberg posted the listing for the lease of the Premises on the RLS and thereby made an offer of cooperation to participants in the RLS [a database of listings accessible to members of the Real Estate Board of New York ("REBNY")] thus obligating itself to share the commission with a cooperating broker who procures a lessee for the Premises.

Plaintiffs' second amended complaint asserts, "Corcoran . . . procured prospective lessees, Dr. And Mrs. Ali Askari (the "Askaris) who were ready, willing, and able to lease the Premises." Plaintiffs' amended complaint alleges that the Morins leased the Premises to the Askaris for a term of two years, and that "on or about June 9, 2011 the Askaris did in fact purchase the Premises from the Morins for the purchase price of $2,612,500, entitling Rutenberg to a commission in the amount of $156,750, $78,375 of which would have been immediately payable to the Corcoran plaintiff."

Plaintiffs argue that the Agreement is an exclusive listing agreement, and that the November 23, 2009, expiration date only pertains to the period of exclusivity negotiated under the Agreement. Plaintiffs argue that the expiration date limits the period of exclusivity, and that the term of this exclusive right does not limit Plaintiffs' right to *receive* an additional commission fee for the sale of the Premises, so long as Plaintiffs *produce* the relevant lessee within the exclusive period.

Plaintiffs further argue that the fifth paragraph of the Agreement provides for a commission to be paid in the event that the Premises are sold to a renter produced under the Agreement. Plaintiffs argue this paragraph stands on its own as a free-standing clause of the Agreement, and does not contain a time limitation.

Additionally, Plaintiffs argue that the Extension Clause is known in the brokerage business as a "protection clause," because it protects a broker's business by providing that certain transactions between an owner and a person introduced to the owner, as required under an exclusivity agreement, fall under the terms of that

agreement for a period of time after the exclusive right ends. Plaintiffs argue that the Extension Clause protects Plaintiffs' right to a commission for a period of four months after the Agreement's period of exclusivity expires, and does not limit Plaintiffs' right to an additional commission fee for the sale of the Premises. Plaintiffs further argue that Defendants' interpretation of the Agreement is not reasonable, because it unreasonable to expect that a renter would purchase the Premises prior to the expiration of its lease.

Here, Plaintiffs' complaint annexes the Agreement, thereby making the Agreement "a part of its pleadings for all purposes. Interpretation of the contract is a legal matter for the court, and its provisions establish the rights of the parties and prevail over conclusory allegations of the complaint. Thus, [the Court] must determine defendant[s'] obligation from the contract and if it does not appear from the pleading as a whole that defendant[s] ha[ve] wrongfully withheld [their] promised performance, the complaint must be dismissed." (*805 Third Ave. Co. v. M.W. Realty Associates*, 58 N.Y.2d 447, 451 [1983]) (internal citations omitted).

Under the terms of the Agreement, Defendants "employed [Rutenberg's] firm as a real estate broker with exclusive right to rent the above captioned property."

However, the Agreement states,

> We are authorized to solicit the cooperation of other licensed real estate brokers and to work with them on a cooperating basis for the rental of the above captioned apartment. If the apartment is rented pursuant to this agreement, our commission is to be paid by the owner and shall be one (1) month's rent (the actual monthly rent). The owner paid commission (OP) is to be paid by owner in certified funds at lease signing.

The Agreement further provides,

> If the renter purchases the property and any other property in connection therewith, including, without limitation, household furnishings and other personal property, and any garage and storage space, our firm will be recognized as the procuring cause of the sale and our commission to be

> paid by you shall be six percent (6%) of the total sale price. Payment of the commission shall be dispensed from the proceeds paid to the owner at the closing . . . If you willfully fail to close on the property, after a contract of sale is fully executed, then we shall be entitled to our full commission.

The Agreement also provides,

> During the term of this exclusive right, you agree to refer to us all inquiries, proposals and offers received by you regarding the apartment, including, but not limited to, those from principals and other brokers, and you agree to conduct all negotiations with respect to the rental, sale, or other disposition of the property, exclusively through our firm.

Read as a whole, the Agreement clearly provides for an additional commission fee to be paid if the renter purchases the Premises under the Agreement. The Agreement is not ambiguous, because Defendants' interpretation –that the Agreement contemplates that a person will lease the Premises, thus becoming the "renter," and thereafter purchase the Premises, all within a period of just a few months–is not reasonable. By contrast, Plaintiffs' interpretation–that the Agreement's expiration date limits the period of exclusivity, rather than the time within which Plaintiffs may receive a commission fee for the sale of the Premises to a renter procured during the term of the exclusive right–accords with the overall purpose of this exclusive brokerage Agreement. (*Sterling Resources Intl., LLC v. Leerink Swann*, LLC, 92 A.D.3d 538[1st Dep't 2012]).

Accordingly, accepting Plaintiffs' allegations as true, the four corners of Plaintiffs' complaint and the Agreement annexed thereto, adequately plead a cause of action for breach of contract.

With respect to Defendants' argument that Corcoran lacks standing to maintain this action for breach of contract, "The test for determining a litigant's standing is well settled. A plaintiff has standing to maintain an action upon alleging an injury in fact that falls within his or her zone of interest. 'The existence of an injury in fact–an actual legal stake in the matter being adjudicated–ensures that the party seeking

review has some concrete interest in prosecuting the action which casts the dispute 'in a form traditionally capable of judicial resolution.'" (*Silver v. Pataki*, 96 N.Y.2d 532, 539 [2001]) (citation omitted).

Additionally, "In order to have standing to challenge or enforce a contract, the plaintiff must be a party thereto or a third-party beneficiary thereof." (*Board of Educ. of the Northport-East Northport Union Free Sch. Dist. v. Long Is. Power Auth.*, 39 Misc. 3d 1232(A), 1232A [2013]).

Furthermore, "A non-party may sue for breach of contract only if it is an intended, and not a mere incidental, beneficiary, and even then, even if not mentioned as a party to the contract, the parties' intent to benefit the third party must be apparent from the face of the contract. Absent clear contractual language evincing such intent, New York courts have demonstrated a reluctance to interpret circumstances to construe such an intent." (*LaSalle Nat'l Bank v. Ernst & Young LLP*, 285 A.D.2d 101, 108-09 [1st Dep't 2001]).

Defendants argue that Corcoran lacks standing to assert a breach of contract claim based on the Agreement because Corcoran is not a party thereto or a third party beneficiary thereof. Defendants argue that the Agreement does not mention Corcoran and was not intended for Corcoran's benefit. Defendants also argue that, although the Agreement permits Rutenberg to work with other licensed real estate brokers "for the rental" of the Premises, the Agreement does not provide that Rutenberg may associate with other real estate brokers "for the sale" of the Premises, and does not provide that another real estate broker may share in a commission fee for the sale of the Premises.

Plaintiffs, in turn, argue that Corcoran procured the tenants who leased the Premises from Defendants based on a listing for the Premises posted on the Residential Listing Service ("RLS"). Plaintiffs argue that, pursuant to the rules governing the RLS, Corcoran is entitled to share in a commission thus generated, making Corcoran a co-broker with Rutenberg, the brokerage firm that posted the listing in question. Plaintiffs argue that Corcoran has a financial interest in the commission, and that the right to recover such commission gives Corcoran the right to be a party in this litigation.

Here, it is undisputed that Corcoran was not a party to the Agreement, and that Corcoran is not identified by name therein. However, the Agreement provides,

> We are authorized to solicit the cooperation of other licensed real estate brokers and to work with them on a cooperating basis for the rental of the above captioned apartment. If the apartment is rented pursuant to this agreement, our commission is to be paid by the owner and shall be one (1) month's rent (the actual monthly rent). The owner paid commission (OP) is to be paid by owner in certified funds at lease signing.

The Agreement separately provides,

> If the renter purchases the property and any other property in connection therewith, including, without limitation, household furnishings and other personal property, and any garage and storage space, *our firm* will be recognized as the procuring cause of the sale and *our* commission to be paid by you shall be six percent (6%) of the total sale price. Payment of the commission shall be dispensed from the proceeds paid to the owner at the closing . . . If you willfully fail to close on the property, after a contract of sale is fully executed, then we shall be entitled to our full commission. (emphasis added).

Here, the Agreement authorizes a commission fee for the sale of the Premises to a renter procured under the Agreement. The Agreement declares, "*our* firm" will be recognized as the procuring cause of the sale, and obligates Defendants to pay "*our* commission" for this sale. Unlike the previous provision for renting the Premises, however, this provision contains no contractual language evincing an intent to benefit Corcoran, or any other cooperating broker. Thus, the parties' intent to benefit Corcoran is by no means apparent from the face of the Agreement.

Furthermore, while Corcoran may stand to benefit from the performance of the Agreement, such benefit is merely incidental to Defendants' express promise to pay a six percent commission fee to Rutenberg for the sale of the Premises, and no duty to Corcoran is created under the Agreement. (*see* Restatement 2d of Contracts § 302). Accordingly, Corcoran lacks standing to pursue this action for breach of the Agreement, and any claim that Corcoran may have respecting the subject commission fee lies against Rutenberg, rather than Defendants.

Wherefore it is hereby,

ORDERED that Defendants' motion to dismiss is granted only to the extent that Corcoran's claims as against Defendants are severed and dismissed and the Clerk shall enter judgment accordingly; and it is further

ORDERED that Rutenberg's claims shall proceed; and it is further

ORDERED that Defendants are directed to answer Plaintiff's second amended complaint within 20 days of service of this order with notice of entry.

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

Dated: May 14, 2014

Eileen A. Rakower, J.S.C.