

**Stribling & Assoc. Ltd. v Masten-Rosen**

2014 NY Slip Op 32084(U)

August 5, 2014

Sup Ct, NY County

Docket Number: 650126/2014

Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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STRIBLING & ASSOCIATES LTD.,

Plaintiff,

-against-

DAVID M. MASTEN-ROSEN,

Defendant.

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Index No. 650126/2014

DECISION AND ORDER

Motion Seq. 001

ELLEN M. COIN, J.:

Plaintiff Stribling & Associates Ltd. (Stribling), a real estate broker seeking to recover its commission, moves for summary judgment (1) on its complaint and (2) dismissing defendant's counterclaims. In addition, it seeks sanctions pursuant to Section 130-1.1 et seq. of the Rules of the Chief Administrator.

Defendant David M. Masten-Rosen cross-moves for summary judgment (1) upon his counterclaims and (2) dismissing the complaint with sanctions.<sup>1</sup>

The verified complaint alleges that on May 25, 2012, the parties entered into a commission agreement giving Stribling the exclusive right to sell defendant's apartment. The agreement provided that Stribling could bring in cooperating brokers, and

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<sup>1</sup>In lieu of affidavits in support of the motion and cross-motion, the parties rely upon their verified pleadings in accordance with CPLR §105(u). (*Sanchez v National Railroad Passenger Corp.*, 21 NY3d 890, 891 [2013]).

that Rosen would pay Stribling a commission of 5% of the total sale price upon closing. In order for the commission to be payable, the agreement required that Stribling procure "a buyer that is ready, willing and able to purchase the Apartment on terms acceptable to [defendant];" that a contract of sale be executed by the buyer; that a closing of sale take place; and that the buyer pay the full purchase price specified in the contract of sale. (Agreement, ¶5; Ex A to Compl.).

On November 30, 2012, the parties formally extended the commission agreement until May 29, 2013. The complaint alleges that on May 28, 2013, Stribling's broker asked defendant for permission to show the apartment to Josephine Sollano, but that defendant asked that the showing be deferred until he had the apartment cleaned. Again on June 4, 2013, Stribling's broker sought to show the apartment to Sollano, but Rosen again declined because he had not yet had the apartment cleaned. Stribling alleges that defendant subsequently permitted the apartment to be shown to Sollano and also agreed orally to execute another extension of the commission agreement.

Plaintiff alleges that on July 2, 2013, Stribling presented an offer from Sollano to purchase the apartment for \$1,375,000, and that on July 9, 2013, after negotiations conducted through Stribling, defendant accepted Sollano's enhanced offer of \$1,450,000 plus payment of the flip tax. Stribling prepared a

term sheet reflecting the terms of the deal, which identified Elizabeth Fishman of Stribling as broker for the seller and Emily Lundell of The Corcoran Group as broker for the buyer.

On August 12, 2013, defendant and Sollano entered into a written contract of sale, providing for sale of the apartment for the price indicated in the term sheet. The contract identified Elizabeth Fishman of Stribling as the real estate broker for the seller, and Emily Lundell of The Corcoran Group as the real estate broker for the buyer. (¶1.5; Ex. H to Compl.). In the section entitled "Broker," the contract provides, "Each Party represents that such Party has not dealt with any person acting as a broker, whether licensed or unlicensed, in connection with this transaction other than the Broker(s) named in ¶1.5" In addition, it states, "Seller shall pay the Broker's commission pursuant to a separate agreement. The Broker(s) shall not be deemed to be a third-party beneficiary of this Contract." (¶1.6; Ex. H to Compl.).

The complaint alleges, and defendant admits, that the sale of the apartment closed on December 27, 2013. (Compl. ¶16; Verified Answer ¶16).

Defendant's verified answer asserts fourteen affirmative defenses. In addition, it asserts counterclaims for breach of fiduciary duty, faithless servant, tortious interference with contract, and frivolous suit.

In his verified answer defendant alleges that Stribling and Sollano's broker agreed to split the commission so that each would receive 2.5% of the purchase price. Further, he alleges, Stribling would have realized a larger net commission if the apartment were sold to an unrepresented buyer. He claims that on June 26, 2013, Stribling presented an offer to him from such an unrepresented buyer, Robert Moore, who offered a lower purchase price than did Sollano. He alleges that Stribling withheld and/or misrepresented information regarding the respective offers and/or qualifications of Moore and Sollano, attempting to persuade him to accept Moore's offer over that of Sollano, all with the intent to earn a larger commission. He concedes that he accepted Sollano's offer.

The answer further alleges that as a result of Stribling's confidential relationship with defendant, Stribling knew that for tax purposes defendant wanted to consummate the sale before December 31, 2013. Defendant alleges that in order to delay, disrupt or frustrate the closing of defendant's sale to Sollano, Stribling breached its fiduciary duty of confidentiality by suggesting to Sollano's broker that defendant did not intend to pay a commission in connection upon the sale of the apartment. Sollano, in turn, demanded that a sum equivalent to the 5% commission be held in escrow rather than paid to defendant, to cover any claim against her for the brokers' commission.

Defendant alleges that Stribling's actions thereby induced a breach of the contract of sale. Defendant asserts damages in the amount of the 5% of the sale proceeds held in escrow.

### **Discussion**

"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 issues of fact from the case" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1<sup>st</sup> Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1<sup>st</sup> Dept 2006]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1<sup>st</sup> Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1<sup>st</sup> Dept 2002]).

The complaint alleges only one cause of action, for breach of contract. However, the contract provides that it may not be "changed, rescinded or modified except in writing, signed by both [parties]." (Ex. A to Compl., ¶13). The brokerage agreement was extended by letter agreement to May 29, 2013 (Ex. B to Compl.).

Stribling contends that defendant orally agreed to execute another extension of the commission agreement; defendant contends that after May 29, the agreement expired.

Although the complaint relies on a legal theory of breach of contract, the factual allegations plead a claim for a broker's commission. Summary judgment may be awarded on an unpleaded cause of action if the proof supports such cause and if the opposing party has not been misled to its prejudice. (*Weinstock v Handler*, 254 AD2d 165, 166 [1<sup>st</sup> Dept 1998]).

"[I]n the absence of an agreement to the contrary, a real estate broker will be deemed to have earned his commission when he [or she] produces a buyer who is ready, willing and able to purchase at the terms set by the seller." (*SPRE Realty, Ltd. v Dienst*, 2014 NY Slip Op 03642, 2014 WL 2050833, \*2 [1<sup>st</sup> Dept 2014][citation and internal quotation marks omitted]). The broker must be the procuring cause of the transaction. (*Id.*). Thus, there must be a direct and proximate link, as distinguished from one that is indirect and remote, between the bare introduction and the consummation. (*Id.*, 2014 WL 2050833, \*3).

Even assuming, as defendant urges, that the original, written contract expired, the evidence in the record demonstrates that Stribling produced Sollano, who was not only ready, willing and able to purchase the apartment, but who actually bought it from defendant pursuant to the written contract of sale.

Defendant's acknowledgment in the contract of sale that Stribling was its broker is an admission of Stribling's right to its commission. (*Fenwick-Keats Realty LLC v 212 East 29 St. LLC*, 108 AD3d 435 [1<sup>st</sup> Dept 2013]; *Sioni & Partners, LLC v Vaak Props., LLC*, 93 AD3d 414, 416 [1<sup>st</sup> Dept 2012]; *Ambrose Mar-Elia Co. v Dinstein*, 151 AD2d 416, 418 [1<sup>st</sup> Dept 1989]). Thus, Stribling has made a prima facie showing of its entitlement to its commission as a matter of law. The only issue remaining for the Court to determine is whether defendant's counterclaims meet that standard.

Defendant's First Counterclaim for breach of fiduciary duty is premised in part on his contention that plaintiff should not have urged him to accept Moore's offer to buy the apartment at a lower price. The second component of this claim is defendant's allegation that Stribling breached its fiduciary duty of confidentiality by suggesting to Sollano's broker that defendant did not intend to pay a commission upon the sale of the apartment.

The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct. (*Singh v PGA Tour, Inc.*, 42 Misc 3d 1225(A), \*6 [Sup Ct, New York County 2014]). Moreover, the particularized pleading requirement of

CPLR 3016(b) applies to this cause of action. (*Id.*).

Even assuming that defendant properly pled the first two elements in regard to Moore's offer, he fails to show that he suffered any damage as a result of Stribling's alleged misconduct. He accepted Sollano's higher offer in lieu of Moore's lower offer. Thus, this aspect of his First Counterclaim fails to allege a claim for breach of fiduciary duty. (*See, e.g., Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 808 [2d Dept 2011]).

The second factual basis of defendant's fiduciary duty counterclaim--that Stribling told Sollano's broker that defendant intended not to pay any broker's commission--fails to allege the requisite element of misconduct. In essence, defendant contends, without explanation, justification or legal citation, that he was entitled to deprive plaintiff of its commission, and that plaintiff, because of its fiduciary status, was powerless to prevent him from doing so. Assuming that Stribling did reveal this information, the allegation that it did so fails to demonstrate misconduct. Accordingly, the Court grants Stribling's motion to dismiss the First Counterclaim.

Defendant's Second Counterclaim alleges faithless servant. Like the First Counterclaim, it is predicated on defendant's allegations that Stribling suggested to Sollano's broker that defendant did not intend to pay a commission in connection with

the sale of the apartment, causing Sollano to demand escrow of the amount of the broker's fee. Defendant alleges as his damage the amount of the broker's fee.

The faithless servant doctrine provides that an agent is obligated to be loyal to his employer and is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties. (*Western Elec. Co. v Brenner*, 41 NY2d 291, 295 [1977]). A faithless servant must forfeit his right to compensation. (*Lamdin v Broadway Surface Adv. Corp.*, 272 NY 133, 138 [1936]).

Defendant's allegations on this counterclaim are that plaintiff "acted inconsistently with the agency and trust reposed in it by Defendant and failed to exercise the requisite good faith and loyalty in the performance of its duties." (Verified Ans. ¶68 at 9). Defendant asserts as damages the \$72,500 escrowed against the brokers' claims.

If, as defendant asserts in his answer, Stribling shared with Sollano's broker the fact that defendant intended to pay no commission, he fails to explain how this would make Stribling a "faithless servant." He offers no citation in support of his argument. Instead, he urges that in the absence of discovery, summary judgment should not be granted. He fails to present any evidentiary basis for his suggestion that discovery may lead to

relevant evidence. (*Progressive Northeastern Ins. Co. v Penn-Star Ins. Co.*, 89 AD3d 547, 548 [1<sup>st</sup> Dept 2011]). Accordingly, the Second Counterclaim is dismissed.

Defendant's Third Counterclaim alleges that Stribling induced a breach of the contract of sale by causing Sollano to demand that 5% of the purchase price be held in escrow to cover brokers' commissions. However, defendant accepted the benefits of the contract by proceeding with the closing of the sale of the apartment. (Compl., Ex I). There is no question that defendant sold the apartment, or that he received all of the proceeds except for those which were escrowed. Thus, he has ratified the transaction. (*Er-Loom Realty, LLC v Prelosh Realty, LLC*, 77 AD3d 546, 547 [1<sup>st</sup> Dept 2010]). Having done so, he has vitiated the basis for the Third Counterclaim.

Defendant's Fourth Counterclaim is dismissed. New York does not recognize an independent cause of action for the imposition of sanctions under CPLR §8303-a. (*Cerciello v Admiral Ins. Brokerage Corp.*, 90 AD3d 967, 968 [2d Dept 2011]). Indeed, the statute cannot be invoked for any purpose in a breach of contract case such as this. (CPLR §8303-a[a]; *Browning Ave. Realty Corp. v Rubin*, 207 AD2d 263, 267 [1<sup>st</sup> Dept 1994]).

In light of the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment upon its complaint is granted, and the Clerk is directed to enter

judgment in favor of plaintiff and against defendant in the amount of \$72,500, together with interest at the statutory rate from December 27, 2013, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, and it is further


ORDERED that the counterclaims of defendant are dismissed; and it is further

ORDERED that the balance of the motion is denied; and it is further

ORDERED that the cross-motion is denied.

ENTER.

Dated: *Aug 5*, 2014

  
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Ellen M. Coin, A.J.S.C.