

Prime Realty, Inc. v Oppedisano

2015 NY Slip Op 32416(U)

December 14, 2015

Supreme Court, Queens County

Docket Number: 365/2013

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

PRIME REALTY, INC.,
Plaintiff,

Index
No. 365 2013

- against -

Motion
Dates Sept 8 & Oct 21, 2015

ANNAMARIA OPPEDISANO, et ano.,
Defendants.

Motion
Cal. Nos. 112 & 139

Motion
Seq. Nos. 3 & 4

The following papers numbered 1 to 23 read on this motion by plaintiff for an order granting it summary judgment in its favor and against defendant Anna Maria Oppedisano (defendant) and awarding attorney's fees; and by separate notice of motion by defendant for an order granting her summary judgment dismissing the complaint.

	<u>Papers Numbered</u>
Notices of Motion - Affirmation - Exhibits.....	1-5, 12-16 ¹
Answering Affirmations - Exhibits.....	6-8, 17-20
Reply Affirmations.....	9-11, 21-23

Upon the foregoing papers it is ordered that the motions are consolidated for purposes of a single disposition and are determined as follows:

Plaintiff, a real estate brokerage company, commenced this action to recover damages as a result of defendant's alleged breach of a certain exclusive listing agreement that was entered into between the parties. Defendant was the owner of the property known as 5 Point

1. In the future, papers submitted by defense counsel without exhibit tabs which protrude from the papers, as required by Part 14 Rules, will be disregarded.

Crescent, Malba, New York, 11357 (subject premises). On December 19, 2011, the parties entered into the agreement whereby, for a period of three months, set to expire on March 19, 2012, plaintiff was commissioned to sell the subject premises. According to the complaint, plaintiff listed the subject premises for \$3,950,000.00, conducted various open houses, and procured a ready, willing, and able buyer to purchase same for \$3,850,000.00 in or about January 2012. However, in contravention of the terms of the agreement, defendant independently located a buyer, advising plaintiff of same and further advising that she no longer required plaintiff's services. To that end, on or about January 23, 2012, defendant informed plaintiff's principal and owner, Mitch Slavuter, that a contract of sale was executed with "her brother's friend," for a purchase price of \$3,700,000.00. The closing took place on June 1, 2012, as evidenced by the attached deed and accompanying real property transfer documents, with no brokerage commission paid, despite plaintiff's demand therefor. As such, plaintiff seeks, *inter alia*, damages in the amount of \$148,000.00, representing 4% commission per paragraph 6 of the parties' agreement.

The exclusive listing agreement was annexed to the complaint. Paragraph 5 thereof states the following:

"The owner shall not offer nor show their property for sale or rent to any prospective buyers or tenants but shall refer all such prospective buyers or tenants to the BROKER, nor shall the owner negotiate the sale or rental of the property with a buyer unless the BROKER participates in such negotiations."

Paragraph 6 of the agreement, governing compensation to be awarded to plaintiff, states the following, at subparagraph B:

"Said [4%] total commission shall be earned and payable under any of the following conditions:

- (a) If the BROKER . . . produces a buyer ready, willing and able to purchase the property . . . :
- (b) If through the BROKER's . . . efforts a buyer and the owner(s) reach an agreement upon all the essential terms of a transaction.
- (c) If the property is sold or rented during the term of this Agreement whether or not the sale or rental is a result of the BROKER'S efforts and even if the property is sold as a result of the efforts of the Owner(s) or any other broker or agent not acting under this agreement.
- (d) If the BROKER . . . is the procuring cause of a transaction."

Paragraph 7 provides, in relevant part, that

“[t]he above compensation shall be paid to the BROKER in the event that the owner enters into a contract of sale to sell the property or actually sells the property within a period of 180 days after the termination of the agreement to any person (buyer) who has been shown the property during the term of this agreement.”

Plaintiff avers that it is entitled to summary judgment in its favor since, *inter alia*, defendant entered into a contract of sale on or about January 12, 2012, as evidenced by the executed contract of sale for the subject premises and a copy of a \$100,000.00 check made out to plaintiff’s counsel, representing down payment towards the purchase of same, which is during time the exclusive listing agreement was still in effect – which did not include any excluded conditions or names of excluded potential buyers – thereby breaching paragraph 5, 6(c), and 7 thereof.

Defendant, in support of her motion for summary judgment, contends – aside from her affirmative defense alleging duress – that she is entitled to summary judgment dismissing the complaint since there is no evidence that she breached the agreement: (1) she showed the subject premises to the then-prospective buyers prior to entering into the agreement with plaintiff; (2) she notified Mr. Slavuter of the existence of her prospective buyers upon execution of same, which resulted in the parties allowing defendant, within 30 days of execution, to cancel the agreement; and (3) she validly notified plaintiff of her intent to cancel upon execution of the January 12, 2012 contract of sale. Additionally, defendant states that the property was sold after the expiration of the term provided in the parties’ agreement, and negotiations to sell to her buyers were commenced prior to entering into the agreement with plaintiff and, as such, were exclusively a result of defendant’s own efforts.

Each party herein bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle them to judgment in its favor, without the need for a trial (CPLR § 3212; *Winegrad v NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Only if the burden is met will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action (*Zuckerman v City of New York*, *supra*). If the moving party fails to make out a prima facie case for summary judgment, however, then the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v Gervasio*, 81 NY2d 1062 [1993]).

Here, neither party met their burden of establishing their entitlement to summary judgment. Namely, there are issues of fact as to whether defendant showed the subject premises to the buyers, and apparently negotiated the terms, prior to entering into the

agreement – with plaintiff’s full knowledge – such that defendant would not be under an obligation under the agreement to pay plaintiff its commission (*cf. Grenier-Maltz Co. of Long Island, Inc. v Interpharm Holdings, Inc.*, 74 AD3d 1019 [2010]). Moreover, the terms of the contract cannot be said to be clear and unambiguous given the fact that plaintiff would only be entitled to a commission under paragraph 6 of the agreement – as relevant here per subparagraph (c) – if the property was sold during the term of the agreement. That provision was extended by the terms of paragraph 7, provided however, that the buyer was shown the property during the term of the agreement, which it was allegedly not here. Notwithstanding, it cannot be determined as a matter of law whether defendant, by her actions as recounted by plaintiff, engaged in conduct designed to avoid paying commission by simultaneously executing the agreement and securing her own buyers without plaintiff’s knowledge (*see e.g. Stephen Hirshon, Ltd. v Coffey*, 260 AD2d 465 [1999]), or whether, for instance, plaintiff was under an obligation to refer prospective buyers to plaintiff per paragraph 5 of the agreement, which would have thereby included the subject buyers.

Further, plaintiff has not, in support of its own motion, conclusively established that it is entitled to its commission by virtue of procuring its own buyer since plaintiff did not submit evidence thereon to sufficiently establish that said prospective buyer was indeed a ready, willing, and able one (*see e.g. Island Assoc. Real Estate, Inc. v Doukas*, 130 AD3d 684 [2015]; *O’Connor Realty Servs., Inc. v Higgins*, 149 AD2d 492 [1989]).²

It is noted that, to the extent defendant claims she validly cancelled the agreement in any event, she has not met her burden of establishing that paragraph 13 thereof, requiring any notices required to be given under the agreement to be made in writing, did not apply to that handwritten portion of the agreement allowing her to cancel within 30 days of execution.

Finally, as to the issue of duress as a defense, plaintiff submits her affidavit in which she states that, on or about December 19, 2011, Mr. Slavuter came to her place of business in an attempt to have her sign the agreement. He entered her office, closed the door and put a chair up to the door, cornered her and forced her to sign the agreement. She states that “Slavuter told me that I had to sign the agreement or else he would not let me leave my office to go pick up my children from school.” Plaintiff indicates that, at the time, she was going through a stressful and draining divorce and that, her mental state, coupled with Mr. Slavuter’s actions, “were too overwhelming and caused me to involuntarily execute the Agreement.” In reply, plaintiff points to the fact that defendant is a “strong, independent, sophisticated real-estate investor, business-woman and business owner,” who filed for

2. Plaintiff annexes a copy of an offer binder for its prospective buyer *in opposition* to defendant’s motion for summary judgment. It is noted that the purchase price indicated therein is \$3,950,000.00; however, plaintiff seeks – per its complaint – 4% of \$3,700,000.00.

divorce from her husband nearly five years earlier. Plaintiff argues that defendant's claims of duress are belied by, *inter alia*, the fact that several of the terms of the agreement were fully negotiated, including the handwritten 30-day cancellation clause.

“A contract is voidable on the ground of duress when it is established that the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his free will” (*Austin Instrument, Inc. v Loral Corp.*, 29 NY2d 124 [1971]). However, the party claiming a defense must act promptly or will be deemed to have elected to affirm, or ratify, it (*see Port Chester Elec. Const. Corp. v Hastings Terraces*, 284 AD 966 [1954]). Here, there are different accounts as to what occurred on the date the agreement was executed such that it cannot be determined whether defendant, indeed, signed same under duress. In any event, assuming defendant's account is true, there is an issue of fact as to whether defendant ratified the contract by both failing to act promptly in that regard and also by asserting that she performed in accordance with its terms (*i.e.*, by stating that she complied with the 30-day cancellation clause when she procured her own buyer).

Accordingly, the respective motions are denied.

Dated: December 14, 2015

J.S.C.