

**Douglas Elliman LLC v East Coast Realtors, Inc.**

2016 NY Slip Op 30666(U)

April 13, 2016

Supreme Court, New York County

Docket Number: 160945/2013

Judge: Robert D. Kalish

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 29

-----X

Douglas Elliman, LLC

Plaintiff,

Index No. 160945/2013

-against-

East Coast Realtors, Inc. And Glenn Busch, P.C.  
as escrowee

Defendants

-----X

**KALISH, J.:**

Upon review of the submitted papers, the Defendants' motion for summary judgment dismissing the Plaintiff's underlying action is granted and the Plaintiff's motion for partial summary judgment is denied as follows:

Background and Procedural History

In the underlying action, the Plaintiff alleges in sum and substance that she is a real estate broker licensed in the State of New York and that she represented a purchaser in the purchase of a property commonly known as 22 Grove Street, Unit 6BC ("Premises"). The Plaintiff claims that the Defendant East Coast Realtors, Inc. ("East Coast Realtors") is a real estate brokerage firm that represented the seller of said property. The Plaintiff further claims that the Defendant "solicited the cooperation of outside brokers and/or brokerages in procuring a purchaser for the premises" and that the Plaintiff procured the ultimate purchaser of the Premises. The Plaintiff alleges that at the closing on the sale of the Premises, East Cast Realtors received \$43,750.00 (2.5% of the sale price) as a commission and that the Plaintiff only received \$17,500.00 (1% of the sale price) as its commission.

The Plaintiff alleges two causes of action for quantum meruit and unjust enrichment respectively, claiming in sum and substance that it is entitled to \$43,750.00 (2.5% of the sale price) for its role in finding a buyer for the Property.

### Analysis

#### Parties' contentions

In support of its motion for summary judgment, the Defendant argues that it was given exclusive rights to sell the Premises by the former owner, and that the Plaintiff was employed by the purchaser of the Premises. The Defendant argues that there was no express contract between the Plaintiff and the Defendant entitling the Plaintiff to any part of the Defendant's commission on the sale (though the Defendant did pay a portion of its commission to the Plaintiff). The Defendant argues that the Plaintiff acted solely as the buyer's agent in the underlying real estate transaction and that the relationship between a buyer and a buyer's agent is contractual. The Defendant argues that the issue of the Plaintiff's entitled commission in the underlying action is governed by the contract between the Plaintiff and the buyer, and as such the Plaintiff cannot maintain a claim against the Defendant for quantum meruit. In support of said argument, the Defendant attaches with it moving papers a copy of the portion of the New York State Disclosure Form for Buyer and Seller, which is signed by both the buyer of the property and Plaintiff's employee, Melissa Hernandez. Said document specifically indicates that Melissa Hernandez is a licensed real estate broker acting "in the interest" of the "Buyer" as the "Buyer's agent" (Defendant's Exhibit C).

The Defendant argues that the Plaintiff negotiated on behalf of the buyers, not in the interest of the sellers, and that the Plaintiff owed no fiduciary duty to the Defendant or the seller. As such, the Defendant argues that the Plaintiff had no reasonable expectation of compensation from the Defendant and that the Plaintiff must seek compensation from the buyer who hired the Plaintiff. The Defendant further argues that the Plaintiff was not the procuring cause of the sale.

The Defendant further argues that it listed the Property on the Multiple Listing Service of Long Island Inc., and specifically indicated on said listing that the buyer's agency compensation was 0%. The Defendant attaches a copy of said listing with the submitted papers (Defendant's Exhibit B).

In opposition to the Defendant's motion and in support of its own cross-motion for summary judgment, the Plaintiff also argues that there was no contract between the Plaintiff and the Defendant, and therefore the Plaintiff can make a claim for quantum meruit and unjust enrichment. The Plaintiff further argues that there was no contract between the Plaintiff and the buyer. Further, Plaintiff argues that it was not employed as the seller's agent.

The Plaintiff argues that it provided services to the Defendant at the Defendant's behest. Specifically, the Plaintiff argues that the Defendant solicited the cooperation and involvement of other brokers by putting the listing for the Premises "out into the world" on "Street Easy" a real estate listing website. The Plaintiff argues in sum and substance that said listing on "Street Easy" constituted a "behest" for the purposes of its quantum meruit and unjust enrichment claims, and that based upon the Plaintiff's efforts in "securing" a purchaser, the Plaintiff has established prima facie that it is entitled to 2.5% of the sale price as compensation based upon the equitable theories of quantum meruit and unjust enrichment. The Plaintiff further argues that the Defendant engaged in "untrustworthy behavior" by continuing to list the Premises while it was already in contract with the buyers secured by the Plaintiff in violation of 19 NYCRR 175.9.

The Plaintiff further argues that it is a member of the Real Estate Board of New York and that the Plaintiff's salesperson who brought the buyer to the Premises believed she would be receiving 50% of the commission "as per industry standard for co-brokers in New York City".

In reply and opposition to the cross-motion, the Defendant argues that the Plaintiff's services were not performed at the Defendant's "behest". Specifically, the Defendant argues that although the Plaintiff alleges that the Defendant received a benefit from the Plaintiff's activities, said activities were at the behest of the buyers, not the Defendant. The Defendant emphasizes that the Plaintiff acted as a

“buyer’s agent” and as such negotiated on behalf of the buyer, not the Defendant or the seller of the Premises.

The Defendant further argues that the Plaintiff’s argument that the Defendant solicited the Plaintiff’s services is entirely meritless. Specifically, the Defendant argues that “Street Easy” is a consumer website, not a multiple listing type of service, and further that there was nothing in the “listing” of the property on “Street Easy” that constituted a solicitation of services. The Defendant further argues that solicitation and marketing services by real estate brokers and salespeople are specifically prohibited by “Street Easy’s” terms of use. The Defendant further argues that any solicitation of services would have been through the Long Island Board of Realtors, that the Plaintiff admits that it is not a member of the Long Island Board of Realtors and that the Plaintiff has failed to assert and/or establish that the Defendant was a member of or offered the listing for the Premises through the voluntary association Real Estate Board of New York.

#### Oral Argument

On March 22, 2016, the Parties appeared before the Court for oral argument on the motion and cross-motion. The Parties reiterated the arguments presented in their moving papers. In particular, the Parties argued as to whether or not the fact that the Plaintiff found the property on “Street Easy” constituted a “solicitation” of the Plaintiff’s services on the part of the Defendant. The Defendant argued that the Property was “listed” through the Multiple Listing Service of Long Island to other members of the Multiple Listing Service of Long Island, and that the compensation offered to buyer’s agents through said listing was 0%.

The Plaintiff argued that it is not a member of the Multiple Listing Service of Long Island and that it did not find the property through the Defendant’s listing on Multiple Listing Service of Long Island. The Plaintiff argued that it found the Property on a “listing aggregate” (describing Street Easy) and argued that by “putting it out there” the Defendant was asking for “co-brokerage to come and help”. However, the Plaintiff could not confirm that the property was put on Street Easy by the Defendant.

### Summary Judgment Standard

It is well established that “[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court’s directing judgment in its favor as a matter of law” (Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc., 96 AD3d 551, 553 (NY App Div 1<sup>st</sup> Dept 2012) [internal quotation marks and citation omitted]). “Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment” (*id.*). “Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution” (Giuffrida v Citibank Corp., 100 NY2d 72, 81 [2003]). “On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party” (Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted)). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 (1978); Grossman v Amalgamated Hous. Corp., 298 AD2d 224, 226 (NY App Div 1<sup>st</sup> Dept 2002)).

The Defendant entitled to summary judgment dismissing the Plaintiff’s causes of action for quantum meruit and unjust enrichment since the Plaintiff had a contractual relationship with the buyer as the buyer’s agent

“Quantum meruit and unjust enrichment theories are equitable in nature, and are appropriate only if there is no valid and enforceable contract between the parties covering the dispute at issue.” (Stephan B. Gleich & Assoc. v Gritsipis, 87 AD3d 216, 223 (NY App Div 2nd Dept 2011) citing AHA Sales, Inc. v Creative Bath Prods., Inc., 58 AD3d 6 (NY App Div 2nd Dept 2008); Hochman v LaRea, 14 AD3d 653 (NY App Div 2d Dept 2005); Zuccarini v Ziff-Davis Media, Inc., 306 AD2d 404 (NY App Div 2d Dept 2003); Old Salem Dev. Group, Ltd v Town of Fishkill, 301 AD2d 639 (NY App Div 2d Dept 2003)).

“In order to state a claim for quantum meruit, the plaintiff must assert: the performance of services in good faith; the acceptance of those services by the entity to which they were rendered; an expectation of compensation therefor; and the reasonable value of the services” (Lehrer McGovern Bovis, Inc. v New York Yankees, 207 AD2d 256, 259 (NY App Div 1st Dept 1994)). “To state a cause of action for quantum meruit, plaintiff must allege “(1) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services” (Farina v Bastianich, 116 AD3d 546, 548 (NY App Div 1st Dept 2014) citing Moors v Hall, 143 AD2d 336 (NY App Div 2d Dept 1988)

“The theory of unjust enrichment lies as a quasi-contract claim” and contemplates ‘an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties.’ An unjust enrichment claim is rooted in ‘the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another’” (Georgia Malone & Co., Inc. v Rieder, 19 NY3d 511, 516 (NY 2012) [internal citations omitted]). “The elements of a cause of action to recover for unjust enrichment are ‘(1) the defendant was enriched, (2) at the plaintiff’s expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered.’ ‘The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered’” (GFRE, Inc. v U.S. Bank, N.A., 130 AD3d 569, 570 (NY App Div 2d Dept 2015) citing Mobarak v Mowad, 117 AD3d 998 (NY App Div 2nd Dept 2014); Paramount Film Distrib. Corp. v State, 30 NY2d 415 (NY 1972); Sperry v. Crompton Corp., 8 NY3d 204 (NY2007)).

Upon review of the submitted papers and having heard oral argument, this Court finds that the Defendant has established prima facie that the Plaintiff had a contractual relationship with the buyer and acted as the buyer’s agent in the underlying real estate sale. Central to the Plaintiff’s recovery of any brokerage commission from the Defendants is the Plaintiff’s argument that there was an implied contract between the Plaintiff and the Defendant as to the Plaintiff’s commission on the sale of the property.

In the instant action, although the Plaintiff claims that it did not have a brokerage contract with the buyer, it does not disavow that it was retained by the buyer and was acting as the Buyer's agent. Further, although the Defendant argues that the New York State Disclosure Form for Buyer and Seller is not a contract in and of itself, the Plaintiff does not deny that it signed said Form with the buyer, which specially indicates that the Plaintiff was acting as the buyer's agent. In point of fact the Plaintiff specifically indicates in its pleadings that it represented the buyer in the underlying real estate sale.

Real Property Law 443(4)(a) gives the format for the New York State Disclosure Form for Buyer and Seller. Real Property Law 443(1) defines the terms as used in the New York State Disclosure Form for Buyer and Seller and defines the term "buyer's agent" as an agent who contracts to locate residential real property for a buyer or who finds a buyer for a property and presents an offer to purchase to the seller or seller's agent and negotiates on behalf of the buyer". It is undisputed that the Plaintiff and the buyer both signed New York State Disclosure Form for Buyer and Seller identifying the Plaintiff as the the buyer's agent. As such, pursuant to Real Property Law 443(1), the Plaintiff had a contractual relationship with the buyer of the subject Property regardless of the fact that the New York State Disclosure Form for Buyer and Seller itself did not constitute said contract.

Based upon these provisions of Real Property Law 443(1) and the fact that the Plaintiff identifies itself as the buyer's agent, the Court finds that the Defendant has established prima facie that the Plaintiff did have a contractual relationship with the buyer as the buyer's agent. Further, aside from the Plaintiff's self-serving claim that it did not have a contractual relationship with the buyer, the Plaintiff has submitted no proof to create an issue of fact on this point.

"A contract cannot be implied in fact where there is an express contract covering the subject matter involved" (Julien J. Studley, Inc. v New York News, Inc., 70 NY2d 628, 629 (NY 1987)). As the Plaintiff was the buyer's agent and had a contractual relationship with the buyer, there can be no implied contract between the Plaintiff and the Defendant as to the Plaintiff's commission relating to the sale of the property. Any claim the Plaintiff may have for a commission under a theory of contract or implied

contract would be against the buyers who retained the Plaintiff as their agent (See Kaplon-Belo Assoc., Inc v D'Angelo, 79 AD3d 930 (NY App Div 2d Dept 2010); see also Steven Fine Assocs. v Serota, 273 AD2d 375 (NY App. Div. 2d Dep't 2000)).

The Plaintiff did not obtain a buyer for the property at the Defendant's "behest"

Even assuming arguendo that the Plaintiff did not have a contractual relationship with the buyer, the Plaintiff's causes of action for quantum meruit and unjust enrichment would also fail as the Plaintiff did not perform any actions at the "behest" of the Defendant as to the underlying real estate transaction.

A Plaintiff is not entitled to recovery under the quasi-contract theories of quantum meruit or unjust enrichment, unless it can establish that it performed a service at the "behest" of the Defendant. "[I]t is not enough that the 'defendant received a benefit from the activities of the plaintiff[s] ... if services were performed at the behest of someone other than the defendant, the plaintiff[s] must look to that person for recovery'" (Schuckman Realty v Marine Midland Bank, N.A., 244 AD2d 400, 401 (NY App Div 2d Dept 1997) citing Kagan v. K-Tel Entm't, 172 AD2d 375 (NY App Div 1st Dept 1991)). The Plaintiff's work must have been done for the Defendant, which is to say at the "behest" of the Defendant (Kagan v K-Tel Entm't, 172 AD2d 375, 376 (NY App Div 1st Dept 1991)).

The fact that the property appeared on the "Street Easy" website does not constitute a solicitation of services on the part of the Defendant. Specifically, the fact that the Plaintiff found the property on a website does not imply that the Defendant placed the Property on the website or that the Defendant was soliciting the Plaintiff to obtain a buyer for the Property. In point of fact, the Plaintiff has not even submitted any proof to show that the Defendant was the one that actually placed the property on the Street Easy website. Further, even assuming that the Defendant had placed the "ad" on Street Easy, there is nothing from the "ad" itself (Attached as Plaintiff's Exhibit 5) to suggest that it was intended to solicit the services of outside brokers. The "ad" merely describes the Property and the offered price. Without more, the fact that the Plaintiff viewed the "ad" and contacted the Defendant indicating that a buyer was interested in the Property does not imply that the Plaintiff obtained a buyer at the "behest" of

the Defendant.

As such, the Plaintiff does not have a claim against the Defendant under quantum meruit or unjust enrichment.

Conclusion

Accordingly and for the reasons so stated it is hereby

ORDERED that the Defendant's motion for summary judgment dismissing the Plaintiff's action is hereby granted and the underlying action is dismissed in its entirety. It is further

ORDERED that the escrowee, Glenn Busch, P.C. shall release the remainder of the Defendant's real-estate commission that is held in escrow in accordance with this decision. It is further

ORDERED that the release of the escrow money shall be stayed for 30 days from service of this order with notice of entry upon counsel for all Parties. It is further

ORDERED that the Plaintiff's cross-motion for summary judgment is denied in its entirety.

The foregoing constitutes the ORDER and JUDGEMENT of the Court.

Dated: April 13, 2016

ENTER:

Robert D. Kalish JSC  
**HON. ROBERT D. KALISH**  
J.S.C.