

**TDG-Tregny, LLC v Second Dev. Servs., Inc.**

2016 NY Slip Op 30809(U)

April 13, 2016

Supreme Court, New York County

Docket Number: 651510/2015

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
TDG-TREGNY, LLC d/b/a MNS,

Plaintiff,

Index No. 651510/2015

-against-

**DECISION/ORDER**

SECOND DEVELOPMENT SERVICES, INC., SDS  
COLCON LLC, LOUIS GRECO and  
SDS COLCON OWNER, LLC,

Defendants.

-----X  
**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff TDG-Tregny, LLC d/b/a MNS (“plaintiff” or “MNS”) commenced the instant action to recover a commission allegedly owed to MNS by defendants pursuant to a brokerage agreement. Plaintiff now moves for an Order pursuant to CPLR § 3212 granting it summary judgment on all of its causes of action, dismissing defendants’ counterclaims and awarding it recovery of its attorneys’ fees. Plaintiff’s motion is resolved as set forth below.

The relevant facts are as follows. Plaintiff is a real estate brokerage firm. On or about November 18, 2014, plaintiff entered into a written contract “by and between [plaintiff] and Second Development Services or successors, heirs or related entities, with offices located at 132 Remsen Street, Brooklyn, NY 11201 (‘SDS’)” (the “brokerage agreement”). The brokerage agreement states that plaintiff was the broker of record who procured the sale of property located at 63-65-67 Columbia Street, Brooklyn, New York (the “property”), and requires SDS to pay

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plaintiff a commission of three percent of the sales price of \$7,000,000.00. The brokerage agreement was signed by Louis Greco directly above the handwritten insertion of "SDS Colcon LLC" as the buyer of the property (the "brokerage agreement"). It is undisputed that defendants Second Development Services, Inc., SDS Colcon LLC and SDS Colcon Owner LLC have only paid the sum of \$50,000.00 to plaintiff, while the commission as set forth in the brokerage agreement is \$210,000.00. Thus, plaintiff commenced the instant action asserting causes of action for breach of contract, quantum meruit, unjust enrichment and breach of the implied covenant of good faith and fair dealing against defendants.

The court first considers the portion of plaintiff's motion for summary judgment on its cause of action for breach of contract. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

The law is well established that "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing." *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990). Moreover, "[w]hether or not a writing is unambiguous is a question of law to be resolved by the courts." *Id.* In the specific context of brokerage agreements,

summary judgment is appropriate where an agreement “acknowledges plaintiff’s performance of services” and expressly promises that defendants will pay plaintiff. *Georgia Malone & Co., Inc. v. Extell Dev. Co.*, 118 A.D.3d 591 (1<sup>st</sup> Dept 2014) (citing *Helmsley-Spear, Inc. v. New York Blood Ctr.*, 257 A.D.2d 64, 67)). Thus, where an agreement expressly acknowledges the plaintiff’s performance of services, the court may not consider evidence extrinsic to the agreement regarding whether a broker was actually the procuring cause. *See Helmsley-Spear, Inc. v. New York Blood Ctr.*, 257 A.D.2d 64, 67.

In the present case, plaintiff has made a *prima facie* showing of its entitlement to summary judgment on its cause of action for breach of contract against SDS Colcon LLC based on the brokerage agreement, signed by Louis Greco on behalf of SDS Colcon LLC, which states that “[plaintiff] is the broker of record who procured the sale of the property,” thereby acknowledging plaintiff’s performance of services, and that “the commission due to [plaintiff] from SDS herein shall be the sum of 3% of the sales price of \$7,000,000.00,” thereby requiring SDS Colcon LLC to pay plaintiff. Although the brokerage agreement states that it is “by and between [plaintiff] and Second Development Services or successors, heirs or related entities,” without explicitly including SDS Colcon LLC, defendants do not dispute that SDS Colcon LLC is a party to the brokerage agreement.

In opposition to plaintiff’s *prima facie* showing, defendants have failed to raise a triable issue of fact. Defendants’ argument that plaintiff did not actually procure the sale of the property is without merit. As the brokerage agreement expressly acknowledges plaintiff’s performance of services in procuring the sale of the property, the court cannot consider the extrinsic evidence submitted by defendants regarding whether plaintiff actually procured the sale of the property.

Defendants' argument that plaintiff's motion for summary judgment should be denied because defendants' payment of the sum of \$50,000.00 to plaintiff was in settlement of plaintiff's claims is without merit as defendants have failed to produce a written settlement agreement. Settlement agreements must be set forth in writing pursuant to CPLR § 2104 to be enforced. *See Bonnette v. Long Island College Hosp.*, 3 N.Y.3d 281, 285 (2004). Thus, plaintiff's motion for summary judgment on its cause of action for breach of contract is granted as against SDS Colcon LLC.

However, plaintiff has not made a *prima facie* showing of its entitlement to summary judgment on its cause of action for breach of contract as against Second Development Services, Inc. and SDS Colcon Owner, LLC as they were not signatories to the brokerage agreement. A cause of action for breach of contract generally cannot be asserted against a nonsignatory. *Balk v. 125 West 92nd Street Corp.*, 24 A.D.3d 193 (1<sup>st</sup> Dept 2005); *Brainstorms Internet Marketing, Inc. v. USA Networks, Inc.*, 6 A.D.3d 318 (1<sup>st</sup> Dept 2004) (contract claims were properly dismissed as to nonsignatory defendants as there was no evidence that the signatory was the alter ego of the non-signatory defendants).

Plaintiff's argument that Louis Greco's signature on behalf of SDS Colcon LLC also bound Second Development Services, Inc. and SDS Colcon Owner, LLC is without merit. A contract may be binding on a nonsignatory when it is signed by an agent with actual or apparent authority. *See Greene v. Hellman*, 51 N.Y.2d 197, 204 (1980); 12 WILLISTON ON CONTRACTS 35:11 (4<sup>th</sup> ed. 2013). *See also Kopelowitz & Co., Inc. v. Mann*, 83 A.D.3d 793, 797 (2<sup>nd</sup> Dept 2011).

In the present case, plaintiff has failed to produce any evidence, or to even allege, that Louis Greco signed the brokerage agreement as an agent of either Second Development Services,

Inc. or SDS Colcon Owner, LLC.

Plaintiff's argument that the deed and other documents transferring the real property at issue show that Louis Greco had the authority to bind SDS Colcon Owner, LLC as its agent, because Louis Greco signed the "Customer Registration Form for Water and Sewer Billing" and "Real Property Transfer Report" on behalf of SDS Colcon Owner LLC as an "authorized" signor, is without merit. These documents were signed after Louis Greco signed the brokerage agreement, and therefore do not speak to his authority to bind SDS Colcon Owner LLC at the time the brokerage agreement was executed. Thus, plaintiff's motion for summary judgment on its cause of action for breach of contract is denied as against Second Development Services, Inc. and SDS Colcon Owner, LLC.

Plaintiff has not made a *prima facie* showing of its entitlement to summary judgment on its cause of action for breach of contract as against Louis Greco. "It is well established that officers or agents of a company are not personally liable on a contract if they do not purport to bind themselves individually." *Georgia Malone & Co., Inc. v. Ralph Rieder*, 86 A.D.3d 406, 408 (1<sup>st</sup> Dept 2011) (upholding the dismissal of contract claims against an individual where he was listed as the "contact" and the corporate entity was listed as the "company" on the signature block of the contract).

In the present case, plaintiff has not established as a matter of law that Louis Greco signed the brokerage agreement in an individual, rather than in a representative, capacity as the signature block contains Louis Greco's signature directly above an identification of "SDS Colcon LLC" as the buyer of the property. Nothing in the agreement demonstrates any intent to hold Louis Greco individually liable. Thus, plaintiff's motion for summary judgment on its cause of action for breach of contract is denied as against Louis Greco.

