

<b>Pinnacle Realty of N.Y. LLC, v Saboy LLC</b>
2016 NY Slip Op 30919(U)
April 19, 2016
Supreme Court, Queens County
Docket Number: 709867/2014
Judge: Denis J. Butler
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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER IAS Part 12  
Justice

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PINNACLE REALTY OF NEW YORK LLC, Number 709867/2014

Plaintiff(s),

-against-

Motion  
Date February 23, 2016

SABOY LLC,

Motion Seq. No. 2

Defendant(s).

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COUNTY CLERK  
QUEENS COUNTY

The following papers were read on this motion by defendant for summary judgment dismissing plaintiff's complaint in its entirety pursuant to CPLR 3212; and cross motion by plaintiff for summary judgment in favor of plaintiff pursuant CPLR 3212.

	<u>Papers Numbered</u>
Notice of Motion, Affirmation, Exhibits.....	E9-22
Notice of Cross Motion, Affirmation, Affidavits	
Memorandum of Law and Exhibits.....	E49-68
Reply Affidavit, Memorandum of Law.....	E71-73
Reply Affirmation, Memorandum of Law.....	E74-75

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

This is a real estate broker action to recover commissions from defendant pursuant to an agreement, dated November 4, 2013, to secure a buyer who was ready, willing and able to purchase property owned by defendant, and located at 498 Nepperhan Avenue, a/k/a 135 Saw Mill River Road, Yonkers, New York. According to the six month exclusive brokerage agreement, plaintiff would receive 5% of the selling price as a commission. In addition, "[i]f within six months after the expiration of this agreement, a person or firm to whom the property has been submitted during the term . . . buys the property, a fee . . . shall be due to the [plaintiff]." Furthermore, "[a]t any time after February 1, 2014, [defendant] or

[plaintiff] broker may terminate this agreement by providing the other 30 days advance written notice." On or about February 5, 2014, defendant sent a notice to terminate the agreement. Thereafter, on March 10, 2014, defendant agreed to sell the subject property through nonparty broker Greiner-Maltz and a contract of sale was executed on April 4, 2014. Greiner-Maltz received a commission of \$250,000.

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. (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. (*Matter of Redemption Church of Christ v Williams*, 84 AD2d 648, 649 [3rd Dept 1981]; *Greenberg v Manlon Realty*, 43 AD2d 968, 969 [2nd Dept 1974]; *Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]). Once the movant has established his or her prima facie case, the party opposing a motion for summary judgment bears the burden of "produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact . . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v City of New York*, *supra* at 562; see also *Romano v St. Vincent's Medical Center of Richmond*, 178 AD2d 467, 470 [2d Dept 1991]; *Tessier v New York City Health & Hospitals Corp.*, 177 AD2d 626 [2d Dept 1991]). Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law. (*Friends of Animals, Inc., v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]).

"In an action to recover a real estate brokerage commission, the broker must establish: (1) that he or she is duly licensed, (2) that he or she had a contract, express or implied, with the party to be charged with paying the commission, and (3) that he or she was the procuring cause of the sale" (*Burton v. Lucido*, 42 Misc.3d 1229(A) [2014]; see *Friedland Realty v. Piazza*, 273 AD2d 351 [2000]).

In support of its motion, defendant argues that plaintiff was not the procuring cause of the sale or a dominant force of the broker in the negotiations, and that anything done was insufficient to warrant a commission citing, *inter alia*, *Sibbald v Bethlehem Iron Co.*, 83 NY 378, 390 (1881), *Greene v Hellman*, 51 NY2d 197, 205-206 (1980), *Good Life Realty, Inc. V Massey Knakal Realty of Manhattan, LLC*, 93 AD3d 490 (1st Dept 2012). In addition,

defendant argues that plaintiff did not "show the unit to the buyer, negotiate the sale price or attend the closing." Moreover, defendant argues that since the agreement was terminated, plaintiff is not entitled to a commission as the six month extension clause in the agreement only applies if the agreement expired by its own terms in six months and not if the agreement is terminated.

In support of its cross motion, plaintiff argues that, by the terms of the agreement, it had an exclusive right to market the subject property commencing on November 4, 2013 for a six month period and an additional six months following the exclusivity period for the sale to any buyer that plaintiff introduced to the subject property. Therefore, plaintiff argues that since the subject property was sold within the extension period to a buyer introduced to defendant by plaintiff, it is entitled to the commission. Plaintiff further claims that, contrary to defendant's argument, plaintiff actively marketed the subject property and that the buyer merely preferred and chose to instead deal directly with co-broker Greiner-Maltz. As a result of cutting plaintiff out of the transaction, defendant breached their agreement with plaintiff.

"It is well settled that, on a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and that circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where . . . the intention of the parties can be gathered from the instrument itself." (*Modell's N.Y. Inc. v Noodle Kidoodle, Inc.*, 242 AD2d 248, 250 [1st Dept 1997] quoting *Lake Const. & Dev. Corp. v City of New York*, 211 AD2d 514, 515 [1st Dept 1995]). "A written contract will be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose." (*Westmoreland Coal Co. v Entech. Inc.*, 100 NY2d 352, 358 [2003] [internal quotations omitted]).


Defendant seeks to create a distinction between the effect of termination and expiration of the contract. However, "[a]n expiration clause . . . is commonly included in a real estate listing contract to protect a broker to protect a broker from loss of compensation when a property is sold by the owner after the termination of the listing contract to a person who was introduced to the property by the broker." (*Picotte Real Estate, Inc. v Gaughan*, 107 AD2d 996, 997 [3d Dept 1985] citing *Construction of Provision in Real-estate Broker's Listing Contract That Broker Shall Receive Commission on Sale After Expiration of Listing Period to One with Whom Broker Has "Negotiated" During Listing Period*, Ann, 51 A.L.R.3d 1149, 1155, 1157). The extension clause applies irrespective of whether the agreement ends due to a lapse of the

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six month period or prematurely by notice of termination by a party. (See Black's Law Dictionary [10th ed 2014], expiration, termination.) In addition, an owner of a property cannot terminate a listing agreement "in bad faith and as a mere device to escape the payment of the commission" (*Sunset 3 Realty, Inc. v Russo*, 7 Misc3d 1015[A], 1 [NY Sup. Ct. 2005], citing *Werner v Katal Country Club*, 234 AD2d 659, 662; see, *O'Connell v Rao*, 70 AD2d 982, 983, lv. denied 48 N.Y.2d 609).

Notwithstanding the foregoing, there are questions of fact which preclude summary judgment to either party, including whether plaintiff was the procuring cause of the sale. As such, the motion and cross motion are hereby denied.

This constitutes the Decision and Order of the Court.

Dated: April 19, 2016

  
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Denis J. Butler, J.S.C.

**FILED**  
APR 20 2016  
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QUEENS COUNTY