

Amirkhanian v Berniker
2016 NY Slip Op 31003(U)
May 31, 2016
Supreme Court, New York County
Docket Number: 161937/2015
Judge: Shlomo S. Hagler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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ALEX AMIRKHANIAN,

Plaintiff,

Index No.
161937/2015

DECISION/ORDER

-against-

IDO BERNIKER, and MERCER PARTNERS
INTERNATIONAL LLC d/b/a MERCER
PARTNERS, LP,

Defendants.

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HON. SHLOMO S. HAGLER, J.S.C.:

Defendants Ido Berniker ("Berniker") and Mercer Partners International LLC d/b/a Mercer Partners, LP ("Mercer") (collectively, the "defendants") move for an order dismissing the verified complaint of plaintiff, Alex Amirkhanian ("Amirkhanian"), pursuant to: (a) CPLR §3211(a)(1) as barred by documentary evidence; and (b) CPLR §3211(a)(7) for failure to state a cause of action.

Background

In or about April 2015, Amirkhanian represented himself to be a licensed California real estate broker and informed Berniker that a purported client of his, Gaye Dixon ("Dixon"), was looking for an apartment in New York City. On or about April 13, 2015,

Berniker and Amirkhanian executed a purported Commission Fee Splitting Agreement ("Fee Splitting Agreement") that stated that Berniker would split the potential commission profits derived from the introduction by Amirkhanian of Dixon in relation to the purchase of a residential single-family unit in the State of New York (Exhibit "B" to the Motion).

On July 1, 2015, Dixon entered into a purchase contract for a residential unit located at 109 Mercer Street, Unit 3, New York, New York ("109 Mercer"). In or about August 2015, shortly before the 109 Mercer transaction was set to close, Amirkhanian contacted Berniker and advised him that he had become aware that Dixon was preparing to purchase a second residential unit in New York City and was also expecting a referral fee on that transaction.

Berniker informed Amirkhanian that the April 2015 Fee Splitting Agreement only contemplated a referral fee for one transaction. Amirkhanian forwarded another letter agreement, which purported to "reaffirm" the April 2015 agreement and added additional terms providing for a second referral fee. On September 18, 2015, Amirkhanian reached out again to Berniker in an attempt to claim a referral fee. Berniker refused to pay Amirkhanian a second referral fee.

It is uncontroverted that Amirkhanian is neither a New York State licensed real estate broker or salesperson, nor does he allege in his complaint that he is a New York State licensed real estate broker or salesperson. In addition, Amirkhanian lacked a working California real estate broker's license at the time the April 2015 agreement was executed. Notwithstanding Amirkhanian's lack of a working license, he commenced this action against defendants to recover one-half (1/2) of the brokerage commission under a purported Fee Splitting Agreement.

Discussion

In deciding a motion brought pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the complaint should be liberally construed and the facts alleged in the complaint and any submissions in opposition to the dismissal motion accepted as true, according plaintiff the benefit of every possible favorable inference (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). "The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" (*Id.*) In opposition to such a motion, a plaintiff may submit affidavits "to remedy defects in the complaint" and "preserve inartfully pleaded, but potentially

meritorious claims" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635, 636 [1976]). However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by the documentary evidence are not entitled to any deference" (*Maas v Cornell Univ.*, 94 N.Y.2d 87, 91 [1999]). "[I]f sufficient factual allegation of even a single element are lacking, then the cause of action must be dismissed" (*Shea v Hambros PLLC*, 244 A.D.2d 39, 46 [1st Dep't 1998]).

On a motion to dismiss pursuant to CPLR § 3211(a)(1), the defendant has the burden of demonstrating that the documentary evidence conclusively resolves all factual issues, and that plaintiff's claims fail as a matter of law (*Robinson v. Robinson*, 303 AD2d 234, 235 [1st Dep't 2003]). While a complaint is to be liberally construed in favor of the plaintiff on a CPLR § 3211 motion to dismiss, where documentary evidence flatly contradicts the factual claims, the entitlement to the presumption of truth and the favorable inferences is rebutted (*Id.*; accord *Scott v Bell Atlantic Corp.*, 282 AD2d 180, 183 [1st Dep't 2001], *mod on other grounds*, 98 NY2d 314 [2002]).

In this case, plaintiff seeks to recover one-half (1/2) of the real estate brokerage commissions from defendants under an alleged agreement to split commissions earned by defendants from

the purchase of property by their client, Dixon. However, a valid real estate broker or real estate salesperson's license is a statutory prerequisite to any action to collect a brokerage commission or fee. Under Real Property Law §442-d¹, a plaintiff must be licensed in New York as a real estate broker/salesperson on the date the alleged services were performed in order to recover a brokerage commission or fee.

According to the real estate licensing records of the New York Department of State, plaintiff was not licensed as a real estate broker or salesperson in New York at the time that he alleges he performed the real estate brokerage services (Exhibit "C"). No real estate broker or salesperson license was found in the records in the name of Alex Amirkhanian.

The New York real estate licensing records, as documentary evidence, conclusively show, and it is undisputed, that plaintiff was not licensed as a real estate broker or salesperson in New York at the time he alleges he performed the real estate brokerage services when he referred Dixon to defendants.

While plaintiff concedes that he was, and is currently not,

¹ "No person...shall bring or maintain an action in any court of this state for the recovery of compensation for services rendered, in any place in which this article is applicable, in the buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate without alleging and proving that such person was a duly licensed real estate broker or real estate salesman on the date when the alleged causes of action arose." Real Property Law §442-d.

a duly licensed real estate broker or salesperson in New York State, plaintiff nonetheless alleges he is licensed as a real estate broker in the State of California. However, a foreign real estate broker license may be insufficient to support a claim in New York for brokerage commission, because pursuant to Real Property Law §442-d, plaintiff must have been licensed by the State of New York on the date of the alleged services to collect a commission or fee against the foreign broker's client, the owner of the subject property. See *NFS Services, Inc. v West 73rd Street Associates*, 102 A.D.2d 388 (1984), *aff'd* 64 N.Y.2d 919 (1985).

In *NFS Services, Inc. v West 73rd Street Associates*, plaintiffs were licensed as real estate brokers in New Jersey, but not in New York. The Appellate Division noted that the foreign broker neither applied for nor obtained a nonresident license pursuant to RPL §442-g (102 A.D.2d at 391). Therefore, the Court dismissed the complaint, and held that a real estate broker licensed in New Jersey, but not in New York, may not recover for breach of services rendered in New York directly against the foreign broker's client (*Id.*)

More significantly, according to the certified licensing records of the State of California Bureau of Real Estate,

plaintiff's California license was in a "non-working status," or "Licensed NBA"², which prevents plaintiff from performing brokerage services for which a real estate license is required in California (Exhibit "E" to the Motion) (under California law, "licensed NBA", means "the licensee may not perform acts for which a real estate license is required in California").

Plaintiff's referral of Dixon to the defendants certainly constitutes performance of a real estate brokerage service, which plaintiff could not perform since his California license was in a non-working status. Inasmuch as plaintiff was not licensed in New York and his California license was in a non-working status, he could not commence this action to recover a commission on the contract, or to otherwise recover brokerage commissions or fees.

Plaintiff's complaint contains seven (7) causes of action: (1) fraudulent inducement; (2) breach of contract; (3) unjust enrichment; (4) breach of implied covenant of good faith and fair dealing; (5) promissory estoppel; (6) specific performance; and (7) negligent misrepresentation (Exhibit "A" to the Motion). These causes of action are all variations of the same theme and seek the same relief, the recovery of a brokerage commission under the parties' alleged Fee Splitting Agreement.

²The acronym "NBA" means "no business address" or "no broker affiliation" (Exhibit "E" to the Motion).

Regardless of the legal theory of the cause of action, a plaintiff may not skirt the licensing requirement of Real Property Law §442-d by repackaging its claim for a brokerage commission under another name to allege various contractual and tort theories. Simply stated, the plaintiff's lack of any valid real estate broker or salesperson's license on the date the services were performed bars any recovery of a brokerage commission or fee under all theories or causes of action set forth in the complaint.

In view of the above, plaintiff's motions under sequence 001 for an order of attachment of the defendants' assets must be denied and the prior temporary restraining order ("TRO") is hereby vacated. Defendants' motion under sequence 002 to vacate the TRO is deemed moot. Plaintiff's motion under sequence 003 to vacate the automatic stay of disclosure pursuant to CPLR §3214(b) is deemed moot.

Conclusion

Accordingly, it is hereby

ORDERED, that plaintiff's motion under sequence 001 for an order of attachment of the defendants' assets is denied and the prior temporary restraining order is vacated; and it is further

ORDERED, that defendants' motion under sequence 002 to vacate the temporary restraining order is deemed moot; and it is further

ORDERED, that plaintiff's motion under sequence 003 to vacate the automatic stay of disclosure pursuant to CPLR §3214(b) is deemed moot; and it is further

ORDERED, that defendants' motion under sequence 004 to dismiss the complaint, pursuant to CPLR § 3211(a)(1) and CPRL §3211(a)(7), is granted.

The clerk shall enter a judgment dismissing this action,

Dated: May 31, 2016

ENTER:



J.S.C
SHLOMO HAGLER
J.S.C.