

Wallace v Nadi
2016 NY Slip Op 32446(U)
November 29, 2016
Supreme Court, Bronx County
Docket Number: 301234/2016E
Judge: Ruben Franco
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - IAS PART 26

ENRIQUE WALLACE,

Plaintiff,

Index No. 301234/2016E

-against-

**MEMORANDUM
DECISION/ORDER**

LYNN I. NADI, KARLA M. BEINFAIT and
THE SARAH G. RICCIARDI REVOCABLE
TRUST,

Defendants.

HON. RUBEN FRANCO

Plaintiff moves by Summons and Notice of Motion for summary judgment in lieu of a Complaint, seeking the sum of \$42,000.00, as commissions for the sale of real property pursuant to an alleged brokerage agreement.

In support of the motion, plaintiff submits his affidavit wherein he alleges that he and defendant Lynn I. Nadi ("Nadi"), entered into an Exclusive Right to Sell Agreement ("Agreement") dated September 2, 2014, which provided, in relevant parts, that plaintiff would serve as the exclusive agent for the sale of property located at 1232 Choctaw Place in Bronx County (the "Premises"), and that plaintiff would receive a commission of 5% of the sale price upon the sale of the Premises, if the Premises was sold, either during the period of the Agreement, or within 12 months after its expiration, to a person with whom plaintiff negotiated, or to whom the Premises is offered or shown during the period of the Agreement. Plaintiff produced a potential purchaser, Frank Tarul ("Tarul"), and conveyed an offer on behalf of Tarul to defendant Nadi, who acknowledged receipt of the offer on January 13, 2015. The initial offer was not accepted, however, negotiations continued regarding the purchase price for the Premises.

On February 6, 2015, defendant Nadi transmitted an e-mail to plaintiff ostensibly cancelling the Agreement, and stating that, "Should the house sell to anyone you have shown within the agreed time frame we will honor your commission."

Plaintiff had no further contact with defendant Nadi, but later learned that Tarul had purchased the Premises on August 5, 2015, for the sum of \$840,000.00. On October 17, 2015, plaintiff sent an e-mail to defendant Nadi stating that he learned that the Premises had been sold to Tarul and requested his commission. Plaintiff did not receive a response and commenced this action.

The moving party in a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, presenting sufficient evidence to demonstrate the absence of any material issues of fact (see, Alvarez v. Prospect Hospital et.al., 68 NY2d 320, [1986]; Winegard v. New York Univ. Med Center, 64 NY2d 851, [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]; Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, [1957]). Failure of the movant to sustain its burden requires denial of the motion, regardless of the sufficiency of the opposition Winegard v. New York Univ. Med. Center, *supra*, at 853. Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Gaddy v. Eyler, 79 NY2d 955 (1992); Alvarez v. Prospect Hospital, et al., *supra*; Zuckerman v. City of New York, *supra*.

Plaintiff has failed to provide evidence, in admissible form, to support his claim that he is entitled to a real estate broker's commission, and thus, has not carried his burden to show that judgment as a matter of law in his favor, is warranted.

Real Property Law § 440, requires that a real estate broker be licensed in order to receive a commission. Plaintiff implies in his affidavit, but does not explicitly state, that he is a licensed real estate broker. However, even if plaintiff were a licensed broker, his right to the commission would not survive inasmuch as the purported Agreement does not list the address of the property which is the subject of the commission, nor does it name as a party, the Sarah G. Ricciardi Irrevocable Trust (“the Trust”), the apparent owner of the Premises. In the case of an express trust, the real party in interest is the trustee, who is also the proper party to be served (see Siegel, NY Practice § 69 at 114 [5th ed 2011; CPLR § 1004). Here, at least one of the two trustees appears not to have been properly served. Indeed, defendant Karla M. Bienfait (“Bienfait”), a co-trustee, submits her affidavit in opposition to the motion and contests the court’s in personam jurisdiction, asserting that she was not served with the Summons, since she never resided nor worked at the address stated on the Summons. Plaintiff’s affidavit of service indicates that Bienfait was served with a copy of the Summons and Notice of Motion in lieu of Complaint by delivering a copy to a Patty, a Front Desk Manager, on May 2, 2016, at 1:20 P.M. This is insufficient to obtain jurisdiction over Bienfait under CPLR § 308, either individually or in her representative capacity as a trustee.

Notwithstanding her challenge to the court’s jurisdiction, Bienfait acknowledges that a contract to sell the Premises was signed on May 25, 2015, and that the sale took place on August 5, 2015. However, she denies ever meeting or communication with plaintiff or any real estate broker in connection with the sale of the Premises, claiming that she never signed a real estate broker’s agreement and that she was advised by the principal of Coldwell Banker that no fee was being sought in connection with the sale of the Premises.

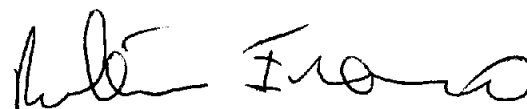
Defendant Nadi also submits her affidavit in opposition to the motion. She acknowledges that she is a co-trustee of the Trust, and does not contest the jurisdiction of the court over her or the Trust. She states that on August 26, 2014, she signed an Exclusive Right to Sell Agreement with Coldwell Banker, consenting for the latter to list the Premises for sale. However, the Agreement was not completely filled out; without her knowledge, plaintiff changed the date of the Agreement to September 2014. She further states that when she signed it on August 26, 2014, it did not reflect the address of the Premises, the amount of any commission, or the asking price.

There exist significant factual issues to be determined by the trier of fact. Accordingly, plaintiff's motion for summary judgment is denied.

Pursuant to CPLR § 3213, the documents submitted by the parties in connection with the motion, shall be deemed the Complaint and Answer,

This constitutes the Decision and Order of the Court.

Dated: November 29, 2016

A handwritten signature in black ink, appearing to read 'Ruben Franco', written over a horizontal line.

Ruben Franco, J.S.C.

HON. RUBÉN FRANCO