| **Besen & Assoc., Inc. v Cohen Media Group, LLC** |
| --- |
| 2017 NY Slip Op 31297(U) |
| June 14, 2017 |
| Supreme Court, New York County |
| Docket Number: 653526/2015 |
| Judge: Ellen M. Coin |
|  |
|  |

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

---

BESEN & ASSOCIATES, INC.,

Plaintiff,

-against-

COHEN MEDIA GROUP, LLC, et al.,

Defendants.

---

Index No. 653526/2015

Decision and Order

**ELLEN M. COIN, J.:**

Plaintiff Besen & Associates, Inc. (Besen), a real estate broker, brought this action against Cohen Media Group, LLC (Cohen Media), Cohen Brothers Realty Corporation (Cohen Realty) and Cohen Quad Cinema LLC (Cohen Quad), for failure to pay Besen a brokerage fee. Besen now moves for partial summary judgment on two of its causes of action. Defendants cross-move for summary judgment dismissing the complaint.

**The Facts**

Plaintiff's Managing Director, Rolfe Haas (Haas), alleges that the transaction began when David Fogel (Fogel), Senior Vice President of defendant Cohen Realty, called Haas, asking if Haas could locate a movie theater for sale in any of three specific neighborhoods in Manhattan for his boss, Charles Cohen (Cohen) to purchase. According to Haas, Cohen was the head of Cohen Realty and of Cohen Media, both of which were involved in the transaction. Haas alleges that he arranged and attended two

"walk-throughs" of the Quad Cinema, the first with Fogel and the second with Cohen. Haas claims that immediately after the second walk-through he discussed with Cohen Besen's commission in the event that a sale transaction were consummated, and that Cohen proposed that the commission be $200,000, payable by the buyer.

Haas claims that although he had initially entered the transaction as a buyer's broker, Besen functioned as a dual agent in the transaction because the seller did not have a broker. He alleges that immediately after the second walk-through he emailed Cohen a written brokerage agreement providing for Besen's commission for the transaction to be $200,000. He acknowledges that Cohen never signed the agreement at that time or on any of the four subsequent occasions that Haas re-sent the agreement to him.

Haas alleges that thereafter he provided to defendants due diligence materials on the Quad Cinema in accordance with Fogel's request; that he attended several meetings at Cohen's offices; negotiated the sales price with Fogel; and arranged for further discussions between the prospective buyers and the seller. However, on October 21, 2013, Fogel informed Haas that the price was too high, and negotiations ceased.

Haas claims that after running into Cohen at a gala, he contacted the seller and arranged a meeting between Cohen and the seller on February 27, 2014. Although Cohen cut Haas out of the

negotiation process thereafter, the seller kept Haas informed and eventually advised Haas that he had reached an agreement with Cohen to sell him the Quad Cinema for approximately $6 million. The seller also informed Haas that as part of the agreement, Cohen had agreed that the buyer would pay Besen's brokerage commission.

Plaintiff offers two contracts: (1) the Share Purchase Agreement for the sale of shares in Cinema Four Incorporated and Cinema Properties Inc., dated as of August 20, 2014, among Maurice S. Kanbar (Kanbar) as seller, Cohen Quad as purchaser and Cohen Media as guarantor; and (2) the Co-op Sale Agreement dated as of the same date between Kanbar and Cohen Quad (Haas Aff, exs. F, E).

The Share Purchase Agreement, in the section entitled "Brokers," provides: "Except for Cohen Brothers Realty Corporation and Rolfe Haas, Benson [sic] & Associates, no broker...is entitled to any brokerage, finder's or other fee or commission in connection with the transactions contemplated by this Agreement or any other Transaction Document based upon arrangements made by or on behalf of Purchaser" (Haas Aff., ex. F, § 4.4 at 12). The Co-op Sale Agreement defines the real estate " Broker(s)" as set forth in the Share Purchase Agreement (Haas Aff., ex. E, § 1.5). The section of the Co-op Sale Agreement entitled "Broker" states, "Purchaser shall pay the

Broker's commission pursuant to a separate agreement. The Broker(s) shall not be deemed to be a third-party beneficiary of this Contract." (Id., § 12.2).

**The Pleadings**

As relevant on this motion, plaintiff's First Cause of Action alleges breach of the brokerage agreement; its Second Cause of Action alleges breach of an implied brokerage agreement. Defendants' answer alleges seventeen affirmative defenses.

**Discussion**

Summary judgment is a "drastic remedy" (*Vega v Retani Constr. Corp.*, 18 NY3d 499, 503 [2012]). "[T]he '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'" (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the proponent of the motion meets this requirement, "the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If there is any doubt as to the existence of a material issue of fact, summary judgment

must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Cohen denies ever entering into a brokerage agreement with plaintiff, express or implied (Cohen Aff., ¶ 6 at 2, ¶¶ 15, 17, 19 at 4). Haas alleges that he made such an agreement with Cohen immediately after the second walk-through of the theater. As evidence of such agreement, he points to the provisions of the Share Purchase Agreement listing him as a broker and the Co-op Sale Agreement providing for the buyer to pay the broker's commission. Cohen, in response, contends that the reason for the cited provision in the Co-op Sale Agreement was to indemnify the seller regarding payment of a broker's commission "*if any such commission was earned*" (id. ¶ 28 at 6).

The Co-op Sale Agreement explicitly provided that the broker would not be a third-party beneficiary of Cohen Quad's agreement to pay the "Broker's commission" (Haas Aff., ex. E ¶ 12.2). Plaintiff cannot rely on the Co-op Sale Agreement as a basis for its recovery of a broker's commission, since the Agreement by its express terms specifically foreclosed its theory of recovery as a third-party beneficiary (*Adelaide Prods., Inc. v BKN Intl. AG*, 38 AD3d 221, 226 [1st Dept 2007]; *Nepco Forged Prods., Inc. v Consolidated Edison Co. of N.Y., Inc.*, 99 AD2d 508, 508 [2nd Dept 1984]["[w]here a provision exists in an agreement expressly

negating an intent to permit enforcement by third parties,...that provision is decisive"]).

Thus, as plaintiff relies on the provisions of the Co-op Sale Agreement and the Share Purchase Agreement for his breach of express contract claim, defendants are entitled to summary judgment dismissing the First Cause of Action.

Plaintiff's Second Cause of Action for breach of implied brokerage agreement relies on the well-settled rule that even in the absence of an express agreement, a real estate broker will be deemed to have earned its commission when it produces a buyer who is ready, willing and able to purchase at the terms set by the seller. The broker must be the procuring cause of the transaction, meaning that "there must be a direct and proximate link, as distinguished from one that is indirect and remote" between the introduction by the broker and the consummation of the transaction (*SPRE Realty, Ltd. v Dienst*, 119 AD3d 93, 97-98 [1st Dept 2014]). A broker need not negotiate the transaction's final terms or be present at the closing in order to recover a commission (*id.*, 119 AD3d at 99).

Here, plaintiff alleges that after Cohen terminated his initial negotiations with the seller, Haas brought the parties together again and arranged for a meeting that led to the ultimate sale. Thus, he has stated a prima facie case for recovery under the Second Cause of Action. As noted, Cohen

denies Haas' participation after the first set of negotiations failed, thereby raising a triable issue of fact as to whether there was the requisite "direct and proximate link" between plaintiff's introduction and the consummation of the sale.

Defendants raise another issue on their cross-motion, which, they contend, is fatal to plaintiff's claims: that Haas never disclosed to them that he was acting as a dual agent, representing both buyer and seller in the movie theater transaction.

A broker "has the affirmative duty not to act for a party whose interests are adverse to those of the principal." (*Goldstein v Dept. of State Div. of Licensing Servs.*, 144 AD2d 463, 464 [2nd Dept 1988]). In the context of a real estate transaction, a broker may not "act as agent for both seller and purchaser of property" unless the broker first obtains the consent of both principals "given after full knowledge of the facts" (*id.*; *Queens Structure Corp. v Jay Lawrence Assoc.*, 304 AD2d 736, 737 [2nd Dept 2003]). "An agent's disclosure of its dual agency may not be 'indefinite' or 'equivocal'; rather '[i]f dual interests are to be served, the disclosure to be effective must lay bare the truth, without ambiguity or reservation, in all its stark significance.' Similarly, proof of consent by a principal to dual agency 'must be exacting'" (*Sotheby's Intl. Realty, Inc. v Black*, 2007 WL 4438145, *2 [SD NY 2007] [citations

omitted]).

Here, Haas does not show that he expressly advised Cohen of plaintiff's dual agency. Instead, he points to email correspondence between himself and defendants in which defendants repeatedly refer, directly or obliquely, to the seller as Haas' client. Thus, plaintiff has raised an issue of fact regarding disclosure of his dual agency sufficient to defeat so much of defendants' cross-motion as seeks summary judgment dismissing the complaint on this basis.

It is therefore ORDERED that the motion of plaintiff Besen & Associates, Inc. for partial summary judgment on its first two causes of action is denied, and it is further

ORDERED that so much of the cross-motion of defendants Cohen Media Group, LLC, Cohen Brothers Realty Corporation and Cohen Quad Cinema, LLC as sought summary judgment dismissing the First Cause of Action is granted, the First Cause of Action is dismissed, and the motion is otherwise denied.

ENTER:

Dated: June 14, 2017

Ellen M. Coin, A.J.S.C.