

Tozzi v Mack

2018 NY Slip Op 30237(U)

February 14, 2018

Supreme Court, New York County

Docket Number: 152499/2017

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK : PART 32

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 JOHN TOZZI and CAMBRIDGE INVESTMENTS, LLC

Plaintiffs,

Index No. 152499/2017

Motion Seq: 001 & 002

-against-

CAROLA MACK and DJK RESIDENTIAL, LLC

DECISION & ORDER
ARLENE P. BLUTH, JSC

Defendants.

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 Motion Sequence numbers 001 and 002 are consolidated for disposition. The motions to dismiss by defendant Mack (mot seq 001) and by defendant DJK Residential, LLC (mot seq 002) are granted.

Background

This action arises out of the purchase of an apartment at 50 United Nations Plaza in Manhattan. Plaintiff Tozzi, as president of plaintiff Cambridge Investments, LLC (“Cambridge”) decided to buy a condo in 2015. The instant dispute centers around the role of defendant Mack in the purchases: Mack contends she served as the real estate agent for Tozzi and that both she and defendant DJK Residential, LLC (“DJK”) are entitled to keep the commissions they received while plaintiffs insist that Mack was not his broker or agent and should not have received any commission. Plaintiffs allege three causes of action against defendants for invalid commission, breach of fiduciary duty and unjust enrichment.

In February 2015, Mack contends that she began working as a broker¹ for plaintiffs—Mack worked for DJK as a real estate broker at the time. Mack communicated with Tozzi about transfer and mansion taxes as well as other obligations associated with buying a condo at 50 United Nations Plaza. Mack claims that she began negotiating on plaintiff's behalf for Unit 14B with the agent for the seller. Mack contends that eventually Tozzi responded, after some back and forth between them, that the offer was acceptable. An agreement was reached to purchase Unit 14B on March 2, 2015 (the "Option Agreement"). This agreement identified DJK and Mack as co-brokers and that the seller would pay them commissions.

In April 2015, Cambridge hired Mack to be a senior associate administrator at a salary of \$5,000 per month. Mack was responsible for payroll, arranging corporate travel and other duties.

Soon after the closing on Unit 14B, plaintiffs decided that they wanted to find a bigger apartment. Mack claims that she began negotiating on Tozzi's behalf about swapping Unit 14B for Unit 27A. In connection with the purchase of this apartment, the parties executed a Correction Rider to the Option Agreement ("Correction Rider"). This document incorporated all of the terms of the Option Agreement except that it required the purchaser to pay the difference between the two apartments (\$2.25 million) and other associated fees. Mack claims that she was unable to attend the closing for Unit 27A on July 9, 2015 (although she was present for the closing at Unit 14B) and she sent an associate broker from DJK to be there in her place.

¹Defendants use the term broker throughout their papers despite the fact that Mack emphasizes that "she does not contend that she is a licensed real estate broker. Instead, she is a licensed real estate agent and was Plaintiff's real estate agent working through DJK Residential" (NYSCEF Doc. No. 99, fn 1). For purposes of this decision and order, the distinction between a real estate agent and a broker does not have a dispositive effect and the terms are used interchangeably.

Both Mack and DJK move to dismiss plaintiff's complaint on the ground that the Option Agreement and the Correction Rider establishes that they were entitled to receive a commission in connection with the purchase of the two units. Defendants also rely on text messages and email communications in support of their claim that Tozzi knew that Mack was serving as his broker.

In opposition, plaintiffs emphasize that Mack was asked to look at apartments in her personal capacity as Tozzi's personal assistant. Plaintiffs emphasize that Mack appeared at the closing for Unit 14B only because Tozzi could not make it and that Tozzi represented himself at the closing for Unit 27A. Plaintiffs claim that Tozzi discovered for the first time at the closing for Unit 27A that Mack and DJK were listed as co-brokers on the deal and that they were to receive \$283,399.61. Plaintiffs insist that they did not contest the commissions received by Mack and DJK at the closing because of the complexity of the deal. Plaintiffs also stress that Mack quit her job at Cambridge the day after the closing on Unit 27A.

Plaintiffs maintain that the motions to dismiss should be denied because no brokerage agreement was ever signed identifying Mack and DJK as the buyer's agent. Plaintiffs also claim that they were provided with only the signature pages for the Option Agreement and that the Correction Rider, which plaintiffs acknowledge was signed by Tozzi, does not mention commissions.

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within

any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994] [citations omitted]).

A motion to dismiss based upon documentary evidence “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]).

Here, the submission of the Option Agreement and the Correction Rider provides documentary evidence that compels this Court to dismiss the complaint. The Option Agreement states that the co-broker is “DJK Residential– Carola Mack” (NYSCEF Doc. No. 15, ¶ 2.6). The Option Agreement also states: “**BROKER**: Purchaser represents to Sponsor that Purchaser has not dealt with any broker in connection with this transaction other than the Selling Agent, and the Co-Broker, if any, named in this Agreement, whose commissions shall be paid by the Sponsor” (*id.* ¶ 22). This Option Agreement contains Tozzi’s signature on behalf of Cambridge (*id.* at 17).

The Correction Rider, which provided for the ‘swap’ of apartments, noted that “Except as set forth in this Rider, all of the terms and conditions of the Option Agreement remain unchanged and in full force and effect” (NYSCEF Doc. No. 19).

Plaintiffs admit that Tozzi’s signature is genuine and never claim that he is unable to understand the agreement– instead, plaintiffs claim that Tozzi signed the Option Agreement without receiving the entire document. Tozzi contends that “It is my belief that Mack presented only the signature pages to me. She took advantage of this duty and listed herself as a co-broker with DJK, without my knowledge” (NYSCEF Doc. No. 65, ¶ 33 [Tozzi affidavit]).

While Tozzi may feel that Mack took advantage of the situation, that does not state causes of action for invalid commission, breach of fiduciary duty or unjust enrichment. The fact is that Tozzi is bound by the agreements he signed. “A party to a contract is not relieved from the contract’s provisions by asserting that he or she failed to read it” (*Martin v Citibank, N.A.*, 64 AD3d 477, 477, 883 NYS2d 483 [1st Dept 2009]). Tozzi’s conclusory claim that “it is my belief” that he received only the signature page is not enough to warrant denial of defendants’ motions (*cf. id.* [finding an issue of fact as to whether plaintiff received an entire lease agreement where defendant submitted an incomplete agreement in the litigation and the pages plaintiff claimed to have received had his initials while those he said he didn’t get were blank]). Tozzi does not claim, for instance, that he was led to believe that the agreement did not have preceding pages. Essentially, plaintiffs argue that they should not be bound by a signed agreement because, assuming Tozzi’s account to be true, Tozzi declined to request to see the entire agreement to buy an apartment worth over \$4 million.

Clearly, the Option Agreement had more pages than just the signature page— it was, after all, an agreement to buy an apartment. For some reason, Tozzi did not ask to review the rest of the Option Agreement— of course, had he done so, he would have seen that DJK and Mack were listed as co-brokers and entitled to commissions.

Tozzi had another chance to review the Option Agreement when he entered into the Correction Rider. The Correction Rider fully incorporated the terms of the Option Agreement, except those terms changed in the rider, including the provisions about the commissions to be paid to Mack and DJK. Although plaintiffs correctly state that the Correction Rider does not say

anything about commissions, a plain reading of it clearly references the Option Agreement— which does provide commissions for DJK and Mack.

The presence of the Option Agreement and the Correction Rider renders any analysis of the text messages and emails between Tozzi and Mack as moot. These signed agreements negate the necessity to ascribe meaning to those communications. The Court also need not explore the fact that Tozzi may have signed a New York State Broker Disclosure form on March 31, 2015, thus negating Tozzi's claim that he knew nothing about Mack's role (*see* NYSCEF Doc. No. 102 [email from Heather Gill, apparently an employee for plaintiff Cambridge, to defendant Mack on March 31, 2015 attaching a copy of a disclosure form in which Mack is listed as the buyer's agent and purportedly contains Tozzi's signature]).

Summary

Taking plaintiffs' allegations as true, as the Court must on a motion to dismiss, Tozzi clearly feels betrayed by Mack. Tozzi apparently had no idea that Mack was named as a broker in the Option Agreement and he thinks it is unfair for Mack to receive a commission associated with the purchase of the apartments. However, that frustration does not justify denial of defendants' motions because the Option Agreement (and the Correction Rider's incorporation of the Option Agreement's terms) provides for the payment of commissions to DJK and Mack by the seller. The fact that Tozzi thinks that these commissions were not earned or were part of a secret scheme is immaterial because they were plainly stated in an agreement signed by Tozzi. To ignore the terms of an agreement, under these circumstances, would nullify the purpose of

signing that agreement—to memorialize the parties' obligations. The Court declines to do that here.

The request for sanctions by Mack is denied because the complaint is not frivolous. Just because the Court is dismissing the complaint does not render it completely without merit.

Accordingly, it is hereby

ORDERED that the motion to dismiss by defendant Carola Mack (motion sequence 001) is granted, except that the branch of the motion seeking sanctions is denied; and it is further

ORDERED that the motion to dismiss by defendant DJK Residential LLC (motion sequence 002) is granted, except that the request for costs and disbursements is denied; and it is further

ORDERED that this action is dismissed and the clerk is directed to enter judgment accordingly.

This is the Decision and Order of the Court.

Dated: February 14, 2018
New York, New York



ARLENE P. BLUTH, JSC

**HON. ARLENE P. BLUTH
J.S.C.**