Red Oak Capital Advisors v 524 W. 19th St. Corp.
2018 NY Slip Op 32140(U)
August 29, 2018
Supreme Court, New York County
Docket Number: 651970/2016
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15
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RED OAK CAPITAL ADVISORS

Plaintiff,

Index No.: 651970/2016

-against-

524 West 19th Street Corp.

DECISION, ORDER and Judgment

Defendant.
---x

MELISSA A. CRANE, J. :

In this case plaintiff, Red Oak Capital Advisors LLC, seeks to recover an "Advisory Fee" in the amount of $80,000 pursuant to an agreement between the parties. The court held a trial on February 27, 2018. The following are the court's findings of fact and conclusions of law.

The plaintiff testified through its principal, Samual Guss. Defendant testified through Klemens Gasser. The court finds plaintiff's witness to be entirely credible. Defendant's witness's testimony did not strike the court one way or the other. Nonetheless, it is the documents that are more important, because they relate the story of this case better than either witness.

The parties do not dispute a contractual relationship. Specifically, on November 24, 2015, plaintiff and defendant entered into a written "Exclusive Authorization" (the "Agreement") whereby plaintiff agreed to perform certain services in connection with arranging a mortgage loan for the Commercial Gallery Unit and Residential Unit 1 (collectively the "Property") at the condominium located at 524 West 19th Street, New York, NY (Joint Statement of Undisputed Facts ¶ 2 and Plaintiff Ex. 1). The "Client" under the Agreement refers to defendant (Pl. Ex 1).

The Agreement was to remain in force until defendant terminated it, but in no event "earlier than sixty (60) days . . ." (PL Ex 1 ¶ 1). The Agreement also states that plaintiff's Advisory Fee would be 1.60% of the loan amount and would:

> "be deemed earned upon the Client's acceptance in writing of a loan commitment letter *or other similar document* setting forth the loan terms. Though earned at such time, Advisory Fee shall be payable by Client to Red Oak at the closing of the loan transaction."

(Ex 1 ¶ 2, emphasis added)

Paragraph 4 of the Agreement states:

> As Client acknowledges that both units are currently listed for sale as noted above and that Red Oak will be expending time and expertise in in attempting to obtain mortgage financing on the Property, in the event that Client sells or intends to sell the Property and either terminates this agreement or does not accept a loan commitment letter with terms that would otherwise be reasonably satisfactory to Client, then Client agrees to pay Red Oak a break-up fee equal to $20,000. Such payment shall be made at the time of the sale of the first of the two units.

Fourteen days after he signed the Agreement, on December 8, 2015, defendant accepted and executed a "Revised Term Sheet" with Emerald Creek Capital (Emerald) for "the lesser of $5,000,000.00 or up to 60% of the Market Value of the real estate collateral" to be secured by mortgages on the Property. (Pl Ex 4). The Revised Term Sheet stated it did not "impose any obligation on the lender to make the loan" and was "for discussion purposes only and is subject to Lender's satisfactory completion of its due diligence, internal credit approvals and satisfactory legal review (all of which shall be at Lender's sole and absolute discretion)" (*id*).

On December 14, 2015, 30 days after signing the Agreement, defendant wrote to plaintiff that he did not want to close with Emerald, but instead would borrow the money from its existing lender, Titan Capital. (See Pl Ex 5). On December 15, 2018, plaintiff sent defendant a bill for the full Advisory Fee (Pl. Ex 6).

There is no real dispute that defendant owes plaintiff at least the $20,000 break up fee. Defendant terminated the Agreement before 60 days and intended to sell the property (see Pl Ex. 6). The entire defense appears to rest on the speculation that Emerald would have been unable to close on the loan. However, there is no evidence of Emerald's supposed inability to close in the record, and nothing credible came out at trial to that effect. To the contrary, on December 14, 2015 at 6:07 AM, in an e-mail, Mr. Gasser acknowledged that plaintiff's work had been "effective" (Pl Ex 5, pg 2). In various emails, defendant conceded that it owed the fee to plaintiff (see, e.g., Pl Exhs 5, 7). Defendant even promised to pay plaintiff out of the proceeds of any sale of either unit or out of extra money from the loan with Titan whichever came first (see Pl Ex. 7 email from Gasser to Guss and Dan Schlufman dated Feb. 23, 2016 at 10:25 AM). By the same token, defendant's counterclaim, by which it seeks the return of its deposit based on the claim that plaintiff did not find a lender in a timely manner is without merit. Again, there is simply no evidence that Emerald would have been unable to loan the funds. Moreover, there is evidence that plaintiff made significant efforts towards finding defendant a potential lender. It created marketing materials and spent what must have been considerable time negotiating with Emerald. Accordingly, the court dismisses defendant's counterclaim.

What the documents do demonstrate is defendant's string of broken promises to pay a "fee." For instance, the loan with Titan closed in February 2016. However, defendant did not pay plaintiff at that time because of various liens:

> "Sam, I got the loan increase and extension from Titan. All of my cash got eaten up by liens and the units from the city and state that I didn't know about and that needed be paid off. So I have no money. In addition, I have a big IRS problem on me personally. I beg you to wait for one of the units to sell to get paid. . .."

On November 2, 2016, approximately a year after signing the Agreement, defendant sold the residential unit to a third party for $4,000,000. However, defendant did not pay plaintiff then either, despite prior representations to do so out of the proceeds of the sale. Defendant continues to own the commercial unit. It is on the market.

Although defendant repeatedly promised to pay plaintiff a "fee", it is not clear whether defendant meant the break up fee or the Advisory Fee. Thus, the main issue for trial was whether the Revised Term Sheet qualifies as an "other similar document setting forth the loan terms." Plaintiff argues that its 1.6% fee (in this case $80,000) was earned upon defendant signing the Term Sheet with Emerald.

The Revised Term Sheet states that it is "not a loan commitment" and did not "impose any obligation on the lender to make the loan." It states it is for "discussion purposes only." Indeed, the Revised Term Sheet goes out of its way to explain that it is does not commit the lender to anything, except, perhaps, to perform due diligence. Thus, it is not "similar" to a loan commitment. That defendant signed it, therefore, could not have triggered plaintiff's right to an Advisory Fee. In addition, the parties specifically provided for the contingency that defendant would seek to terminate the Agreement before signing a loan commitment or similar document. That provision involves the break up fee that the Agreement specifically recognizes was to compensate plaintiff for its "time and expertise." Nor can the court construe a promise to pay a fee to mean the Advisory Fee as that would contradict the clear terms of the Agreement. The circumstances also satisfy the second requirement to trigger the break up fee, because it is undisputed that defendant intended to sell the property at the time.

Accordingly, it is ordered that, after trial, the court awards judgment to plaintiff in the amount of $20,000 plus statutory interest as calculated by the Clerk of the court from April 13, 2016 along with costs and disbursements as taxed by the clerk of the court; and it is further

Ordered that plaintiff is awarded its reasonable attorneys' fees in accordance with paragraph 6 of the Agreement; and it is further

Ordered that motion no. 3, for an attachment, is denied as it has been rendered moot by this judgment

Ordered that the parties are to appear at an inquest for attorney's fees on September 21, 2018 at noon; and it is further

Ordered that the parties are to pick up their exhibits from the court within ten days or the court will dispose of them.

Dated: August 29, 2018
New York, NY

AJSC

HON. MELISSA A. CRANE
J.S.C.