SHORT FORM ORDER

INDEX NO. 37906/2011

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION IAS PART 48 - SUFFOLK COUNTY

PRESENT:

HON. JERRY GARGUILO
SUPREME COURT JUSTICE

DECISION AFTER TRIAL

SAUNDERS VENTURES, INC., d/b/a SAUNDERS AND ASSOCIATES,

Plaintiff,

-against-

CATCOVE GROUP, INC., and RIVERSIDE CATWALK, LLC.,

Defendants.

PLAINTIFF'S ATTORNEY:
ANTHONY T. CONFORTI, ESQ.
250 NORTH SEA ROAD
SOUTHAMPTON, NY 11968

DEFENDANTS' ATTORNEY:
MARGOLIN BESUNDER, LLP
1050 OLD NICHOLS ROAD
ISLANDIA, NY 11749

This matter was tried by the Court on the following dates November 13, 14, 27, December 5, 7, and 14 of 2018. The Court took testimony from the following witnesses: (1) Janet Longo; (2) Lee Minetree; (3) Beatrice Gotthelf; (4) John Halsey; and (5) Charles Cuddy. The Court finds that the "interested witnesses," Lee Minetree and Beatrice Gotthelf testified honestly and each truly believed the facts to which each testified.

The Court recognizes, as the finder of fact, that the burden of proof is upon the Plaintiff. Burden of Proof is defined in the Pattern Jury Instructions:

> The burden of proof rests on the plaintiff. That means that it must be established by a fair preponderance of the credible evidence that the claim plaintiff makes is true. The credible evidence means the testimony or exhibits that you find to be worthy to be believed. A preponderance of the evidence means the greater part of such evidence. That does not mean the greater number of witnesses or the greater length of time taken by either

> side. The phrase refers to the quality of the evidence, that is, its convincing quality, the weight and the effect that it has on your minds. The law requires that in order for the plaintiff to prevail on a claim, the evidence that supports his claim must appeal to you as more nearly representing what took place than the evidence opposed to his claim. If it does not, or if it weighs so evenly that you are unable to say that there is a preponderance on either side, then you must decide the question in favor of the defendant. It is only if the evidence favoring the plaintiff's claim outweighs the evidence opposed to it that you can find in favor of plaintiff.

The Appellate Division (151 A.D.3d 991, 58 N.Y.S.3d 417, 2017 N.Y. Slip Op. 05109) succinctly set forth the facts in its decision, which this Court adopts as the law of the case:

> The plaintiff is a licensed real estate brokerage firm. The defendants are the former owners of parcels of vacant real property located in Southampton (hereinafter the subject property), which had been identified by the Peconic Estuary Program as high priority for preservation and protection.
>
> By letter agreement dated July 17, 2009, the plaintiff and the defendants entered into a nonexclusive brokerage agreement for a period of 120 days concerning the sale of the subject property at the listed price of $8 million. The brokerage agreement provided that the plaintiff would be entitled to a commission of 6% of the purchase price upon closing, from the proceeds of the sale.
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> The brokerage agreement also included an extension clause, or 'tail provision,' which is commonly included in a real estate listing contract to protect a broker from loss of compensation when a property is sold by the owner after the termination of the listing contract to a person who was introduced to the property by the broker (see *Ackerman v Dobbs*, 181 AD2d 704 [1992]; *Picotte Real Estate v Gaughan*, 107 AD2d 996, 997 [1985]). The extension clause provided that 'at the end of the term, [the

defendants] will either mutually extend the agreement or [the plaintiff] should provide a written list . . . of any actively interested purchasers and [the plaintiff] will be protected for a period of one year thereafter should a closing take place with [the plaintiff's] registered client.'

Prior to the expiration of the brokerage agreement, in August 2009, the plaintiff's broker, Lee Minetree, arranged and attended a meeting with representatives of the defendants, The Nature Conservancy of Long Island (hereinafter TNC) and the County of Suffolk, to discuss the acquisition of the subject property by the County via a 'bargain sale,' with TNC serving as an intermediary. According to the plaintiff, the subject property would first be conveyed by the defendants to TNC, the intermediary, for a purchase price less than the appraised fair market value, and the subject property then would be conveyed by TNC to the County, the ultimate purchaser. Once completed, the seller would receive the bargained-for sale price for its property and then take a charitable deduction in an amount equal to the difference between the appraised fair market value and the actual consideration received from the sale. After the initial meeting, the County made a formal offer to the defendants for the purchase of the subject property. As negotiations progressed, contracts for the two-part sale were drafted.

In January 2010, the plaintiff provided the defendants with two lists of prospective purchasers, which included the Peconic Land Trust (hereinafter PLT), TNC, and the County. As evidenced by a document signed only by the plaintiff's broker on August 2, 2010, the brokerage commission the plaintiff was willing to accept was purportedly reduced from 6% to 4%.

In or around September 2010, the defendants replaced TNC with PLT as the intermediary. On September 21, 2010, the defendants and PLT executed a contract of sale for the subject property. This contract, as amended on January 26, 2011, and further amended in June 2011, closed on August 31, 2011. One week later, PLT conveyed six parcels, consisting of 13.9026 acres, to

the County for the purchase price of $2,432,955.

The plaintiff commenced this action against the defendants in December 2011, alleging breach of contract and unjust enrichment. The plaintiff alleged that it was entitled to recover the sum of $97,318.20, representing a 4% commission on the sale of the subject property, since it was the procuring cause of the sale, and that the defendants would be unjustly enriched should they be permitted to keep the entire proceeds of the sale. The plaintiff subsequently moved for summary judgment on the complaint and the defendants cross-moved for summary judgment dismissing the complaint. The Supreme Court granted the defendants' cross motion, denied the plaintiff's motion, and dismissed the complaint. The plaintiff appeals.

As noted by the Appellate Division, "to prevail on a cause of action to recover a commission, the broker must establish (1) that it is duly licensed, (2) that it had a contract, express or implied, with the party to be charged with paying the commission, and (3) that it was the procuring cause of the sale" (*citations omitted*). "Where the broker is not involved in the negotiations leading up to the completion of the deal, the broker must establish that [it] created an amicable atmosphere in which negotiations proceeded or that [it] generated a chain of circumstances that proximately led to the sale." (*citations omitted*) "Although as a general rule a real estate broker will be deemed to have earned a commission when the broker produces a purchaser who is ready, willing, and able to purchase the property on terms acceptable to the seller, the broker's right to a commission may be varied by agreement" (*citations omitted*).

The Appellate Division set forth 3 areas left for inquiry. Is there an ambiguity in the brokerage agreement as to whether the commission was to be earned when the contract of sale was executed or only upon a successful closing within the one-year period set forth in the extension clause. This Court finds no ambiguity and in the event the Plaintiff was the "procuring cause" of the sale by any means, including the creation of an "amicable atmosphere" it would be entitled to its commission. The 2nd and 3rd issues returned by the Appellate Division deal with the issue of whether or not the Plaintiff was "the procuring cause" of the sale by creating an "amicable atmosphere" in which negotiations proceeded or generated a chain of circumstances that proximately led to the sale. Thirdly, the Appellate Division articulated a triable issue of fact as to whether the Defendants terminated negotiations with The Nature Conservancy in bad faith so as to deprive the Plaintiff of a

commission. This Court specifically finds that the Defendants did not terminate negotiations with The Nature Conservancy in bad faith. (*emphasis added*)

It is curious to this Court that the Appellate Division articulated a 3rd triable issue of fact limited to the inquiry to The Nature Conservancy as a prospective purchaser. If in fact that court only considered The Nature Conservancy as a prospective purchaser, then in that event, given this Court's finding of the absence of bad faith, in the substitution of the Peconic Trust for The Nature Conservancy by the Defendants, that, in and of itself would be dispositive and lead to a Defendants' verdict. The Court notes that neither party truly addressed the issue of whether or not there was a bad faith termination of negotiations and/or contractual obligations with The Nature Conservancy. The Court's attention was directed to the County of Suffolk as the purchaser and entitlement to a commission resulting from the sale of the Defendants' property to the Peconic Land Trust using the County of Suffolk as a pass-through.

The Court now turns its attention to the phrase "amicable atmosphere." Some courts have suggested that the factual equivalent of an amicable atmosphere occurs when a broker has brought the parties together in an amicable frame of mind, with an attitude toward each other and toward the transaction in hand, which permits their working out the terms of their agreement. *SPRE Realty, Ltd. v Dienst*, 119 A.D.3d 93, 98, 986 N.Y.S.2d 92, 95 (2014). The evidence presented to this Court cuts both ways. Defendants Exhibit NN is a March 20, 2008 letter from the County of Suffolk directly to Catcove Group, Inc., which reads as follows:

> Dear Catcove Group, Inc.:
>
> Suffolk County has identified the above referenced parcel as being of interest to our Land Preservation program. This preservation program is entirely voluntary.
>
> If you are interested in considering participating in the program, return the bottom portion of this letter to me at the address below.[1]

In response to the letter, the principal of the Catcove Group, Beatrice Gotthelf checked a box which noted "I am interested in discussing a possible sale to the County of Suffolk." This evidence is probative of the fact that the County of Suffolk was in the mix

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[1] This letter predates the commission agreement by more than one year.

prior to the arrival of the Plaintiff and/or its sales agent. Further, Defendants' Exhibit DD is an offer sheet submitted by the County of Suffolk directly to Catcove Group, Inc. that is checked accepted by Mr. Charles R. Cuddy, counsel to the Defendants.

The Plaintiff counters with a series of disclosure statements with respect to a proposed transfer of an interest in real property to Suffolk County pursuant to Suffolk County Code Section 342-6. The Court is aware that there were several of these disclosure statements in evidence all containing ¶J, which identifies the name of the real estate broker or brokers... who will earn a commission as a result of the consummation of a lease agreement between the County of Suffolk and the property owner/landlord. The Court is well aware that the anticipated transaction had nothing to do with leasing, and considers the error a scrivener's error or an administrative oversight in using the word "lease" as opposed to sale. In any event, these disclosure documents were executed by the Defendant and the Court accepts the same offered as an admission. (*emphasis added*)

Exhibit 21 is a contract dated March 21, 2011 between the Peconic Land Trust and the County of Suffolk. That March 21st contract has a disclosure statement, which once again lists Lee Minetree, an agent of the Plaintiff, as a real estate broker "who will earn a commission as a result of the consummation of a lease agreement between the County of Suffolk and a property owner/landlord represented by said broker or brokers..." However, at ¶14 of the same contract is the following conflicting language:

> The parties agree that no broker brought about this sale and the seller agrees to hold the County of Suffolk harmless and indemnify purchaser for any claims for broker's commissions arising out of this transaction.

The Court makes note of the fact that there was a meeting with the County of Suffolk attended by Ms. Gotthelf, principal of the Defendant, Randall Parsons, from the Nature Conservancy and Lee Minetree from the Plaintiff Saunders in connection with the proposed acquisition of Defendants property by the County of Suffolk.

Although the County witness, Ms. Longo, had no specific recollection of the meeting, the Court finds that the meeting did in fact occur. Somewhat significant is the fact that the meeting attended by Lee Minetree was more than a year after the County of Suffolk issued its letter at Exhibit NN. This confirms the Court's finding that the County of Suffolk was in the mix prior to the engagement and involvement of the Defendant.

The Court reminding itself of its own instruction concerning burden of proof, finds that the evidence weighs so evenly that it is unable to say that there was a preponderance on either side. In such an occasion, the finder of fact, the Court, must decide the question in favor of the Defendant.

Therefore, it is

ORDERED ADJUDGED AND DECREED that the Defendant shall be deemed the prevailing party and the Complaint herein dismissed.

The foregoing constitutes the decision and **ORDER** of this Court.

Dated: March 18, 2019

HON. JERRY GARGUILO, JSC