

**Conelly v New York City Charter High Sch. for  
Architecture, Eng'g and the Constr. Indus.**

2019 NY Slip Op 31581(U)

May 7, 2019

Supreme Court, Kings County

Docket Number: 507326/15

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Commercial Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 7<sup>th</sup> day of May, 2019.

PRESENT:

HON. LAWRENCE KNIPEL,  
Justice.

-----X

A.R. CONELLY, INC., d/b/a  
FILLMORE REAL ESTATE, LTD.,  
Plaintiff,

- against -

NEW YORK CITY CHARTER HIGH SCHOOL FOR  
ARCHITECTURE, ENGINEERING AND  
THE CONSTRUCTION INDUSTRY,  
Defendant.

-----X

AMENDED DECISION AND  
ORDER ON REARGUMENT

Index No. 507326/15

Mot. Seq. No. 9

The following e-filed papers read herein:

NYSCEF No.:

Notice of Motion, Supporting Affirmations (Affidavits),  
Memorandum of Law, and Exhibits Annexed \_\_\_\_\_  
Affirmation in Opposition and Exhibits Annexed \_\_\_\_\_  
Reply Memorandum of Law \_\_\_\_\_

235-244, 245  
247-260  
262

In this action to recover a real estate brokerage commission, plaintiff A.R. Conelly, Inc., d/b/a Fillmore Real Estate, Ltd. (plaintiff), asserted two causes of action against defendant New York City Charter High School for Architecture, Engineering and the Construction Industry (defendant). Plaintiff's first cause of action was contractual in nature seeking recovery of a commission pursuant to the Commercial Real Estate Commission Agreement, dated as of Oct. 18, 2012 (the brokerage contract). Plaintiff's second cause of action was equitable in nature seeking recovery of a commission under the quasi-contract/unjust enrichment theory. Defendant interposed an answer in which it asserted no counterclaims against plaintiff. Following completion of discovery and the filing of a note of issue, plaintiff and defendant each moved for summary judgment (Seq. Nos. 6 and 5, respectively). By order, dated Apr. 13, 2018 (the initial order), the Court resolved the parties' summary judgment motions, as follows:<sup>1</sup>

"Plaintiff's motion for summary judgment is denied – defendant's motion for summary judgment is granted.

The [brokerage] contract's ¶ 7 governs to limit plaintiff's commission to its explicit terms. Plaintiff may not rely on parol evidence."

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<sup>1</sup> Abbreviations, as used in the initial order, have been spelled out, and typographical errors have been corrected.

Thereafter, plaintiff moved for leave to reargue its prior motion for summary judgment and that of defendant (Seq. No. 7). Concurrently, defendant moved for an award of attorney's fees and costs under the brokerage contract; or, alternatively, for leave pursuant to CPLR 3025 (c) to amend its answer to conform to the evidence and to demand attorney's fees and costs under the brokerage contract (Seq. No. 8).

By order, dated Nov. 21, 2018 (the subsequent order), the Court resolved the parties' then-pending motions. With respect to plaintiff's motion for leave to reargue (Seq. No. 7), the Court ruled that:

"Leave to reargue is granted and, upon reargument, the Court *grants* defendant's prior motion for summary judgment *to the extent of* dismissing *plaintiff's first cause of action* for recovery of a brokerage commission *under the contract*, and *denies* the remainder of defendant's prior motion for summary judgment which was for dismissal of *plaintiff's second cause of action* for recovery of the commission *under the quasi-contract/unjust enrichment theory*.

(Subsequent Order at 1-2).

To reflect that ruling, the subsequent order amended and restated the initial order to read in its entirety, as follows:

"Plaintiff's motion for summary judgment is denied – defendant's motion for summary judgment is granted as to plaintiff's first cause of action for recovery of any and all brokerage commission under the [brokerage contract] . . . , but is denied as to plaintiff's second cause of action for recovery [of] a brokerage commission under the quasi-contract/unjust enrichment theory. The action is continued solely on plaintiff's quasi-contract/unjust enrichment theory."

(Subsequent Order at 2).

With respect to defendant's motion for an award of attorney's fees and costs under the brokerage contract and for alternative relief (Seq. No. 8), the Court ruled, in relevant part, that:

“[T]he [brokerage] contract, as the Court is construing it on reargument, has nothing to do with the *assignment* of the master lease for which plaintiff seeks recovery of the brokerage commission in this action. Hence, defendant's reliance on the [brokerage] contract's ¶ 7 for an award of legal fees and costs as a 'prevailing party' is misplaced; defendant did not prevail under the [brokerage] contract.”

(Subsequent Order at 2).

Defendant now moves in Seq. No. 9 for leave to reargue (1) plaintiff's prior motion for leave to reargue, and (2) defendant's motion for an award of attorney's fees and costs under the brokerage contract and for alternative relief. Defendant's contention in the first branch of its motion – that the Court overlooked the fact that plaintiff, in moving for reargument, did not challenge the prior dismissal of the second cause of action under the quasi-contract/unjust enrichment theory, pursuant to the initial order– is well taken. Upon a fresh review of plaintiff's opening papers in support of its prior motion for leave to reargue, the Court notes that plaintiff therein focused exclusively on the contractual theory of recovery. Considering the limited nature of the relief that was sought in plaintiff's prior motion, it was unnecessary for the subsequent order to address a matter outside the scope of the requested review (*see e.g. Baez v Parkway Mobile Homes, Inc.*, 125 AD3d 905, 908-909 [2d Dept 2015]). Accordingly, leave to reargue is granted to the extent that, upon reargument, the subsequent order is amended to delete the portion thereof which amended and restated the initial order. In place thereof, the initial order denying plaintiff's motion for summary judgment in its entirety and granting defendant's motion for summary judgment in its entirety is hereby reinstated.

On the other hand, the Court rejects defendant's remaining contention that the subsequent order incorrectly denied its motion for an award of attorney's fees and costs pursuant to the brokerage contract and for alternative relief. "Under the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" (*Hooper Assoc., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989]). New York public policy disfavors any award of attorney's fees to the prevailing party in a litigation (*see Pickett v 992 Gates Ave. Corp.*, 114 AD3d 740 [2d Dept 2014]). "Consequently, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*LG Funding, LLC v Johnson & Son Locksmith, Inc.*, 170 AD3d 1153, 1154 [2d Dept 2019] [internal quotation marks omitted]). Here, a promise to pay attorney's fees to defendant cannot be clearly implied from the language of the brokerage contract because the latter does not apply to the transaction at issue. Inasmuch as plaintiff could not recover a commission under the brokerage contract, it follows that defendant could not recover attorney's fees/costs under the brokerage contract either. Defendant's reliance on *Board of Mgrs. of 55 Walker St. Condominium v Walker St.* (6 AD3d 279, 280 [1st Dept 2004]), and *25 E. 83 Corp. v 83rd St. Assoc.* (213 AD2d 269 [1st Dept 1995]), is misplaced. Both decisions involved an ongoing relationship between the board and a condominium unit owner (or a cooperative apartment owner), as such relationship was governed by the by-laws of the condominium association (or the cooperative corporation). Moreover, because defendant never pleaded a counterclaim for attorney's fees and costs under the brokerage agreement in its answer, it would be inappropriate and prejudicial to plaintiff, which

had no opportunity for discovery, to consider summary judgment on the unpleaded counterclaim (*see Mendoza v Manila Bar & Restaurant Corp.*, 140 AD3d 934, 935 [2d Dept 2016]). Accordingly, leave to reargue defendant's motion for an award of attorney's fees and costs pursuant to the brokerage contract and for alternative relief is granted, and, upon reargument, the Court adheres to the subsequent order insofar as it denied such motion.

Plaintiff's counsel shall serve a copy of this amended decision and order with notice of entry on defendant's counsel and shall file an affidavit of said service with the Kings County Clerk.

This constitutes the amended decision and order of the Court.

ENTER FORTHWITH,



**HON. LAWRENCE KNIPEL**  
**Administrative Judge**

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