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| <b>350 E. 120th St. LLC v Church of the Crucified Christ Baptist Church, Inc.</b>                                                                                                                                              |
| 2019 NY Slip Op 31830(U)                                                                                                                                                                                                       |
| June 21, 2019                                                                                                                                                                                                                  |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: 651593/2016                                                                                                                                                                                                     |
| Judge: Tanya R. Kennedy                                                                                                                                                                                                        |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 63

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350 EAST 120<sup>th</sup> STREET LLC, and  
RC REAL ESTATE OF NEW YORK LLC,

Plaintiffs,

-against-

Index No. 651593/2016  
Motion Sequence 005

CHURCH OF THE CRUCIFIED CHRIST  
BAPTIST CHURCH, INC., A RELIGIOUS  
CORPORATION, REVEREND CARRIE  
CALHOUN, DEBRA FLOURNOY, KENNETH  
CALHOUN, ILA TURNER, JARVIS DAVIS,  
SLY CALHOUN, LUCILLE WILLIAMS,  
WILMA JEAN FLOURNOY, and  
DEACON ANTHONY TURNER,

Defendants.  
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**HON. TANYA R. KENNEDY, J.S.C.:**

Plaintiff 350 East 120<sup>th</sup> Street LLC ("350 East") moves for summary judgment, pursuant to CPLR 3212, in its favor as to defendant Reverend Carrie Calhoun ("Calhoun"), and to sever the remaining defendants from this action, pursuant to CPLR 603. Defendants cross move for summary judgment, pursuant to CPLR 3212, to dismiss the action. Plaintiff RC Real Estate of New York LLC ("RC") also cross moves for summary judgment, pursuant to CPLR 3212, on its cause of action to recover brokerage commissions as against defendant Church of the Crucified Christ Baptist Church, Inc. ("the Church") and Calhoun. In the alternative, RC cross moves for summary judgment as against Calhoun, and to sever its cause of action for brokerage fees as against the Church. The court held oral argument on the motions, which are consolidated for disposition and decided in accordance with the following.

## BACKGROUND AND PROCEDURAL HISTORY

350 East commenced this action against the Church (a religious corporation), Calhoun (the Reverend of the Church), church trustees and members (second amended complaint, ¶2, 350 East Statement of Facts, ¶¶3-5).<sup>1</sup>

On or about January 7, 2013, RC and Calhoun entered into an agreement (“Agreement”) providing RC with an exclusive right to sell or lease the real property located at 350 East 120<sup>th</sup> Street, Block 1796, Lot 132, New York, NY (the Premises) (second amended complaint, ¶4; RC Statement of Facts, ¶5). Under the agreement, RC was entitled to receive commissions if either RC or defendants secured a purchaser (RC Statement of Facts, ¶7). Calhoun and the Church are both listed as co-owners on the deed for the Premises (350 East Statement of Facts, ¶6; RC Statement of Facts, ¶¶15-16).

Thereafter, on April 22, 2013, the Church entered into a contract (“Contract”) to sell the Premises to 350 East for \$550,000.00 (second amended complaint, ¶4; 350 East Statement of Facts, ¶¶7, 25). Calhoun signed the Contract and the rider to the Contract in her individual capacity and as the Reverend of the Church (350 East Statement of Facts, ¶¶8, 25). The Contract identified Calhoun and the Church as the sellers and indicated that the parties executing the document had the authority to engage in such action (*id.*, ¶8).

Upon executing the Contract, 350 East forwarded a \$55,000 down payment to defendants’ counsel and the closing date was scheduled for June 21, 2013 (second amended complaint, ¶6; 350 East Statement of Facts, ¶¶7, 9, 11). Although defendants subsequently obtained new counsel, former counsel continued to retain possession of the down payment in his escrow account (second amended complaint, ¶6; 350 East Statement of Facts, ¶¶9, 13). Although 350 East was ready,

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<sup>1</sup> All references are to Plaintiff 350 East’s Complaint, unless otherwise specified as RC’s Complaint.

willing and able to close under the Contract, the Church and Calhoun refused to sell the Premises (350 East Statement of Facts, ¶¶11-13).

On March 24, 2016, 350 East commenced this action to compel defendants to sell the Premises (second amended complaint, ¶16; 350 East Statement of Facts, ¶19). RC commenced a separate action against Calhoun and the Church to recover brokerage commissions in the sum of \$27,500.00 in Supreme Court, New York County, under index no. 156869/2016, which was consolidated with this action on October 25, 2017 (350 East Statement of Facts, ¶22).

350 East filed a Second Amended Complaint and Notice of Pendency on August 31, 2017 (350 East Statement of Facts, ¶20). On or about October 23, 2017, defendants e-filed an amended answer, asserting the defense that the proposed sale required a majority vote by the Church Board of Directors, which did not occur (Answer to Second Amended Complaint, ¶¶5-6). Defendants also asserted as an affirmative defense that paragraphs 44 and 45 of the Contract provided that the sale of the Premises was conditioned upon the consent and approval of the New York State Attorney General and the Supreme Court, New York County, and that the Contract was deemed cancelled and of no further effect because the Attorney General refused to provide consent and approval (*id.*, ¶¶7-9).

350 East now moves for summary judgment in its favor as to Calhoun, and to sever the remaining defendants from this action. Defendants cross move for summary judgment, pursuant to CPLR 3212, to dismiss the action against them. RC also cross moves for summary judgment on its cause of action for brokerage fees as against the Church and Calhoun. In the alternative, RC cross moves for summary judgment as against Calhoun, and to sever its cause of action for brokerage fees as against the Church.

## ARGUMENTS

350 East argues in support of its motion that it is entitled to summary judgment as against Calhoun because she is a co-owner of the Premises who signed the Contract and the rider in her individual capacity. Further, 350 East argues that severance is warranted to avoid any prejudice as against the remaining defendants.

In opposition to 350 East's motion and in support of the cross-motion for summary judgment, defendants argue, *inter alia*, that Calhoun lacked authority to enter into the Contract and that Calhoun is not a co-owner of the Premises. Specifically, Calhoun maintains that she was first required to obtain the approval of two-thirds of the Board of Trustees, which she failed to do (Calhoun Affidavit, ¶ 2). In addition, Calhoun maintains that her name was included on the deed only as an "identifier" because there are a number of Baptist churches in the Harlem area and that the "reference" to her name "help[ed] to distinguish between them" (Calhoun Affidavit, ¶2). Further, defendants maintain that the Contract is void pursuant to the statute of frauds because there is no writing which authorizes Calhoun to sign said document as agent.

RC argues in opposition to defendants' cross-motion and in support of its cross-motion to recover brokerage commissions that Calhoun is a co-owner of the Premises who signed the Agreement on behalf of the Church and as an owner of the Premises. RC additionally argues, *inter alia*, that defendants have failed to produce any documentation evidencing the fact that Calhoun required two-thirds board approval prior to selling the Premises.

## DISCUSSION

"The 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 . . ." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden

then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). "On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue, or if arguably there is a genuine issue of fact" (*S. J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341[1974]).

Under General Obligations Law §5-703(1), "an estate or interest in real property . . . cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing" (*see also Soho Ctr. for Arts & Educ. v Church of St. Anthony of Padua*, 146 AD2d 407, 411 [1st Dept 1989] ["any agreement, to lease defendant's property for more than five years, must be in strict conformity with the provisions of Religious Corporations Law §12"]; *Diocese of Buffalo v McCarthy*, 91 AD2d 213, 218 [4th Dept 1983] [Monsignor did not have implied or apparent authority to enter into a lease agreement on behalf of the diocese]; *Rende & Esposito Consultants v St. Augustine's R.C. Church*, 131 AD2d 740, 743 [2d Dept 1987] ["there is no proof of the existence of any actual authority or apparent authority on the part of Father Fiorello to bind St. Augustine's at the time he signed the contract"]).

Further, "[u]nwritten apparent authority is insufficient to satisfy the statute of frauds" (*Urgo v Patel*, 297 AD2d 376, 377 [2d Dept 2002]; *see 42nd Ave. Commons, LLC v Barracuda, LLC*, 140 AD3d 1012 [2d Dept 2016]; *Leist v Tugendhaft*, 64 AD3d 687, 688 [2d Dept 2009]).

Additionally, Section 509(b) of the Not-For-Profit Corporation Law provides, in relevant part:

"No corporation shall sell, mortgage, lease, exchange or otherwise dispose of its real property unless authorized by the vote of a majority of directors of the board

or a majority of a committee authorized by the board; provided that if such property constitutes all, or substantially all, of the assets of the corporation, then the vote of two-thirds of the entire board shall be required . . .”

Further, Religious Corporations Law ¶12 requires leave of the court or approval from the attorney general to sell or mortgage real property. “The object of the state in requiring a religious corporation to obtain leave of the court before conveying its real property, is to protect the society and its members from loss through unwise bargains, and to prevent perversion of the association’s property” (*Muck v Hitchcock*, 212 NY 283, 287 [1914]). “Unless and until both leave of the court and appropriate denominational authorization have been obtained as required by section 12 of the Religious Corporations Law, such a corporation may not sell any of its real property . . . it is established that it may enter into a contract to sell conditioned upon obtaining court approval” (*Church of God of Prospect Plaza v Fourth Church of Christ, Scientist, of Brooklyn*, 54 NY2d 742, 744 [1981]).

Here, there is no written agreement authorizing Calhoun, as agent, to execute the Contract and its rider. Further, the parties dispute whether Calhoun personally owned the Premises and was authorized to execute the Contract and rider in her individual capacity, which raises factual issues that warrant the denial of summary judgment. Therefore, the Court denies 350’s East motion for summary judgment as against Calhoun.

However, the Court grants defendants’ cross-motion for summary judgment to the extent of dismissing the action as against the Church, its trustees and members because the Contract and its rider fail to comply with General Obligations Law ¶5-703(1), as well as Not-for Profit Law §509(b) and Religious Corporation Law §12. Calhoun is not entitled to summary judgment dismissal at this juncture since there are issues of fact regarding her individual ownership and authority to sign the Contract and rider in her personal capacity.

To prevail on its motion for summary judgment, RC must “introduce evidence tending to show the existence of a commission agreement and that [it] has procured a ready, willing and able purchaser at the price and terms of the seller” (*Lane-Real Estate Dept. Store v Lawlet Corp.*, 28 NY 2d 36, 44 [1971]). However, the party must possess the requisite authority to enter into the brokerage agreement (*Sholom & Zuckerbrot Realty Corp. v CitiBank*, 205 AD2d 336, 338 [1st Dept 1994]).

RC is not entitled to summary judgment as against the Church because the Church did not have any authority to sell the Premises and the action is dismissed against this entity. Further, RC is not entitled to summary judgment as against Calhoun because there are factual issues with respect to whether Calhoun owned the Premises and was authorized to execute the Agreement in her individual capacity.

The branch of the motion by 350 East and the cross-motion by RC to sever, pursuant to CPLR 603, are denied as moot.

Accordingly, it is

ORDERED that the motion of plaintiff 350 East 120<sup>th</sup> Street LLC is denied, and the cross-motion of plaintiff RC Real Estate of New York LLC is denied; and it is further

ORDERED that defendants’ cross-motion is granted to the extent that the action by plaintiff 350 East 120<sup>th</sup> Street LLC is dismissed as against defendants The Church of the Crucified Christ Baptist Church, Inc., Debra Flournoy, Kenneth Calhoun, Ila Turner, Jarvis David, Sly Calhoun, Lucille Williams, Wilma Jean Flournoy and Deacon Anthony Turner, and the action by plaintiff RC Real Estate of New York LLC is dismissed as against defendant The Church of the Crucified Christ Baptist Church, Inc., and the action by plaintiffs 350 East 120<sup>th</sup> Street LLC and

RC Real Estate of New York LLC is severed as against the remaining defendant, Reverend Carrie Calhoun.

This constitutes the Decision and Order of the Court.

Dated: New York, New York  
June 21, 2019

ENTER:

  
J.S.C.

**HON. TANYA R. KENNEDY**