Bay Sun Realty Inc. v Chang Jiang Li
2019 NY Slip Op 32710(U)
September 9, 2019
Supreme Court, Kings County
Docket Number: 508685/19
Judge: Leon Ruchelsman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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BAY SUN REALTY INC.,

Plaintiff, Decision and order

- against - Index No. 508685/19

CHANG JIANG LI, JIN HUA XU, NAN NAN LI, XIANGAN GONG, CHENG YUN HSU & TAI WEI HSU, mot # 1, 2 & 3

Defendants, September 9, 2019

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PRESENT: HON. LEON RUCHELSMAN

The defendants Mr. And Mrs. Hsu have moved pursuant to CPLR §3211 seeking to dismiss the complaint. The plaintiff has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The plaintiff is a real estate broker. They commenced this action against all the defendants seeking brokerage fees concerning the purchase of a property located at 1444 West 9th Street in Kings County. The defendants Cheng Yun Hsu and Tai Wei Hsu were the owners of the property and sold the property to defendants Chang Jiang Li and Jing Hua Xu and their daughter Nan Nan Li. Defendant Xian An Gong was the attorney for the purchasers. On April 17, 2014 the defendants purchasers and the plaintiff entered into a Offer to Purchase Agreement whereby it was agreed the plaintiff was to be paid a brokerage fee. Specifically, the agreement provided that "unless stated otherwise, the brokerage commission is to be paid by the Sellers"

(see, Offer to Purchase Agreement). The plaintiff commenced this action seeking recovery of his brokerage commission. The defendants Hsu have moved, essentially, seeking to dismiss the lawsuit on the grounds there was no brokerage agreement between the plaintiff and them. Rather, defendants argue the plaintiff maintained a brokerage agreement with the purchasers, however, there was no agreement between them and consequently the lawsuit must be dismissed.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, e.g. AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005], Leon v. Martinez, 84 NY2d 83, 614 NYS2d 972, [1994], Hayes v. Wilson, 25 AD3d 586, 807 NYS2d 567 [2d Dept., 2006], Marchionni v. Drexler, 22 AD3d 814, 803 NYS2d 196 [2d Dept., 2005]. Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

It is well settled that for a party to recover real estate brokerage commissions the broker must establish (1) that the broker is duly licensed, (2) that the broker had a contract, express or implied, with the party to be charged with paying the commission, and (3) that the broker was the procuring cause of the sale (see, Friedland Realty Inc., v. Piazza, 273 AD2d 351, 710 NYS2d 97 [2d Dept., 2000]). Admittedly, there is no written agreement between the parties (*cf*, NRT New York LLC v. Laffey, 103 AD3d 861, 962 NYS2d 266 [2d Dept., 2013]). Thus, the only question is whether an implied agreement existed. A brokerage agreement "may be implied where the principal received a benefit from the broker's services under circumstances which, in fairness, preclude the denial of an obligation to pay" (see, Poznanski v. Wang, 84 AD3d 1048, 923 NYS2d 602 [2d Dept., 2011]).

In this case there is no evidence an implied agreement existed between the plaintiff and the Hsus. First, as noted, the agreement was only signed by the other purchasing defendants. Moreover, the purchasing defendants signed confidentiality agreements with the plaintiff making an implied contract with the Hsus impossible.

Turning to the motion seeking to dismiss the cause of action for unjust enrichment, it is well settled that a claim of unjust enrichment is not available when it duplicates or replaces a conventional contract or tort claim (see, Corsello v. Verizon New

York Inc., 18 NY3d 777, 944 NYS2d 732 [2012]). As the court noted "unjust enrichment is not a catchall cause of action to be used when others fail" (id). Thus, unjust enrichment is usually reserved for cases where though the defendant committed no wrongdoing has received money to which he or she is not entitled (Corsello, supra) a truism inapplicable in this case. Since there is no contract between the Hsus and the plaintiff there can be no reasonable argument the defendants have been unjustly enriched. Therefore, the motion seeking to dismiss the second cause of action is granted.

Turning to the cause of action for quantum meruit, it is well settled that a plaintiff may file an action for quantum meruit as an alternative to a breach of contract claim (see, Thompson v. Horowitz, 141 AD3d 642, 37 NYS3d 266 [2d Dept., 2016]). "To be entitled to recover damages under the theory of quantum meruit, a plaintiff must establish: "(1) the performance of services in good faith, (2) the acceptance of services by the person or persons to whom they are rendered, (3) the expectation of compensation therefor, and (4) the reasonable value of the services rendered" (F and M General Contracting v. Oncel, 132 AD3d 946, 18 NYS3d 678 [2d Dept., 2015]). In this case, there was no expectation of compensation by the Hsus. Any work the plaintiff performed was reasonably expected to be compensated by the remaining defendants who signed the agreement. Therefore,

the motion of the Hsus seeking to dismiss the quantum meruit claim is granted.

It is well settled, the elements of a cause of action alleging tortious interference with contract are: (1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant's knowledge of that contract, (3) the defendant's intentional procurement of a third-party's breach of that contract without justification, and (4) damages (Anethsia Associates of Mount Kisco, LLP v. Northern Westchester Hospital Center, 59 AD3d 473, 873 NYS2d 679 [2d Dept., 2009]). Further, the plaintiff must specifically allege that 'but for' the defendant's conduct there would have been no breach of the contract (White Knight of Flatbush, LLC v. Deacons of Dutch Congregations of Flatbush, 159 AD3d 939, 72 NYS3d 551 [2d Dept., 2018]). Thus, to succeed upon these allegations the complaint must allege sufficient facts. Vague or conclusory assertions are insufficient (Washington Ave. Associates Inc., v. Euclid Equipment Inc., 229 AD2d 486, 645 NYS2d 511 [2d Dept., 1996]).

The Complaint does not explain in any detailed way the conduct of the Hsus that constituted interference with the contract between plaintiff and the purchasers. The Complaint merely states the Hsus "conspired to induce" the other defendants to circumvent the broker agreement (see, Verified Complaint ¶ 61). The next paragraph alleges the Hsus "frustrated Plaintiff's

expectation to receive the bargained for compensation for its service" (id at ¶ 62). However, there are no facts supporting those conclusory allegations. Therefore, the motion seeking to dismiss the fourth count as to the Hsus is granted.

Concerning the fraud and conspiracy to commit fraud causes of action, it is well settled that to succeed upon a claim of fraud it must be demonstrated there was a material misrepresentation of fact, made with knowledge of the falsity, the intent to induce reliance, reliance upon the misrepresentation and damages (Cruciata v. O'Donnell & Mclaughlin, Esqs,149 AD3d 1034, 53 NYS3d 328 [2d Dept., 2017]). These elements must each be supported by factual allegations containing details constituting the wrong alleged (see, JPMorgan Chase Bank, N.A. v. Hall, 122 AD3d 576, 996 NYS2d 309 [2d Dept., 2014]). Moreover, it is well settled that to successfully plead fraud, the fraud must be pled with specificity from which intent or reasonable reliance might be inferred (see, CPLR §3016(b), Goldstein v. CIBC World Markets Corp., 6 AD3d 295, 776 NYS2d 12 [1st Dept., 2004]). The Verified Complaint does not present any material misrepresentation made by the Hsus upon which the plaintiff relied. The Verified Complaint presents a factual predicate that details the negotiations between the parties but never describes anything that can be classified as a misrepresentation. Indeed, the Verified Complaint merely

states that **Sellers** informed **Broker** that they no longer wished to sell the Subject Premises for the agreed upon price and that they wanted more money for the Subject Premises (id at ¶ 26). However, that allegation does not explain any actual misrepresentation that induced the plaintiff's reliance. It is merely a conclusory statement that is not actionable. Therefore, the motion seeking to dismiss the fraud claims are granted as to the defendants Hsus.

Thus, the Hsus motion seeking to dismiss the entire complaint is granted.

The motion seeking to amend the caption to reflect the correct spelling of the defendant as Xiangan Gong is granted without opposition.

Concerning the remaining defendants, the motion seeking to dismiss the complaint due to the plaintiff's non-appearance is denied. To the extent any dismissal was granted, the case is restored and the parties are directed to proceed with discovery.

So ordered.

ENTER

DATED: September 9, 2019
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC