

Delibero v Duloc

2019 NY Slip Op 32852(U)

September 26, 2019

Supreme Court, New York County

Docket Number: 156196/2013

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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GRACE DELIBERO,

Plaintiff,

- v -

MICHAEL DULOC, ANDREA DULOC, AMZA, LLC, CORE
GROUP NYC, CORP, EMILY BEARE, SAVANNA 141
DEVELOPERS LLC, SAVANNA 141 PRINCIPALS, LLC,

Defendants.

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INDEX NO. 156196/2013
MOTION DATE 07/20/2018
MOTION SEQ. NO. 005 006

DECISION + ORDER ON MOTION

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were read on this motion to/for JUDGMENT - SUMMARY

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of defendants Core Group NYC, Corp.,
Emily Beare, Savanna 141 Developers, LLC and Savanna 141
Principals, LLC for summary judgment dismissing the complaint
(motion seq. no. 005) is granted, and the complaint is dismissed
with costs and disbursements to these defendants as taxed by the
Clerk upon the submission of an appropriate bill of costs; and
it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the plaintiff's cross motion for leave to amend is denied; and it is further

ORDERED that the plaintiff's motion for partial summary judgment (motion seq. no. 006) on the claim against defendants Savanna 141 Developers, LLC and Savanna 141 Principals, LLC for a commission due is denied.

DECISION

Motion seq. nos. 005 and 006 are consolidated for disposition.

On motion seq. no. 005, defendants Core Group NYC, Corp. (Core), Emily Beare (Beare, together with Core, the Core Defendants), Savanna 141 Developers, LLC (Savanna Developers), and Savanna 141 Principals, LLC (Savanna Principals, together with Savanna Developers, the Savanna Defendants) move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint.

Plaintiff Grace DeLibero (DeLibero) cross-moves for leave to amend her complaint, pursuant to CPLR 3025.

On motion seq. no. 006, plaintiff DeLibero moves for an order, pursuant to CPLR 3212, granting her summary judgment on her claim for a commission due.

In this action, real estate broker DeLibero seeks commissions due for both a purchase and a sale transaction. Her only remaining claims, after previous dismissal motions, are for tortious interference with the brokerage agreement against the Core Defendants with regard to the sale of an apartment, and for a commission due on the failed purchase of a different apartment for the same client as against the Savanna Defendants.

Background

Plaintiff is a New York State licensed real estate broker, who was the exclusive listing agent for the sale of a condominium unit 8C at 401 East 60th Street, New York, NY (60th Street Apartment). Defendants Michael Duloc, Andrea Duloc, and AMZA, LLC (Duloc Defendants) were plaintiff's clients with respect to the sale of the 60th Street Apartment, who attempted to purchase other properties that are the subject of this action for commissions and tort.

The Savanna Defendants are the managers of a related entity, 141 Acquisition Associates, LLC, which was the sponsor-seller seeking to sell a condominium Unit 6 located at 141 Fifth Avenue, New York, NY (Fifth Avenue Property) to the Duloc Defendants. Core is a real estate brokerage firm, with Beare as one of its agents, which was engaged by the Savanna Defendants to serve as 141 Acquisition Associates, LLC's exclusive selling

agent for all units at 141 Fifth Avenue. The Duloc Defendants eventually entered into an exclusive listing agreement with the Core Defendants for the 60th Street Apartment after their agreement with plaintiff terminated, and Beare later served as the Duloc Defendants' buying broker for an apartment, unit 2A at 650 Sixth Avenue, New York, NY (the Sixth Avenue Apartment).

60th Street Apartment

In December 2008, plaintiff and the Duloc Defendants entered into a broker agreement (Duloc Selling Agreement), with plaintiff as the exclusive listing agent for the 60th Street Apartment. Pursuant to the Duloc Selling Agreement, plaintiff would be entitled to a commission of 4% if she sold the 60th Street Apartment without a co-broker, and 5% if she sold it with a co-broker, which commission would be payable and due at closing. The agreement was for a fixed term, expiring on July 31, 2009, and it provided that it could "not be changed, rescinded, or modified, except in writing, signed by both parties". Plaintiff confirmed at her deposition that this agreement is the only written agreement she had with the Dulocs, and that it was not modified in a writing signed by both parties.

The 60th Street Apartment initially was listed for sale at \$1,449,000. The Duloc Defendants obtained no offers at that price. Despite the expiration of the Duloc Selling Agreement on

July 31, 2009, the plaintiff continued to actively seek buyers for the apartment, and the Duloc Defendants continued to work with her. In October 2009, the Duloc Defendants reduced the asking price to \$1,169,000. No offers were obtained at that price either. In December 3, 2009, plaintiff obtained an offer from Alberto Sampler to purchase the apartment for \$1,025,000, which the Duloc Defendants rejected, and counter-offered \$1,050,000. Sampler did not accept the counter-offer.

In late 2009, the Dulocs became dissatisfied with DeLibero's performance as broker. They believed that her inability to obtain an offer at even the reduced asking price was attributable to her unresponsive and unprofessional conduct. Thus, the Dulocs chose not to renew the Duloc Selling Agreement, and Michael Duloc confirmed this in an email to plaintiff on January 7, 2010, stating that they had decided to give their listing to another broker. Despite this, on January 21, 2010, Michael Duloc gave plaintiff one last chance to act as their broker, saying that if one of her previous clients would agree to \$1,050,000 with a May 1, 2010 closing before he listed with a different broker "then best for you". Plaintiff was unable to, stating that she was trying to get the potential buyer's offer to that number, but the offer still stood at \$999,999.

In December 2009, Michael Duloc began interviewing other brokers to replace plaintiff as the broker for the 60th Street

Apartment, including Douglas Elliman, the Corcoran Group, and Core. On January 11, 2010, the Dulocs received a proposal from Core, and, on January 27, 2010, the Dulocs agreed to that proposal.

On January 26, 2010, plaintiff then provided the Dulocs with a list of prospective buyers to whom plaintiff had shown the 60th Street Apartment so that if the Dulocs' new broker sold to any of those potential buyers, plaintiff would receive a partial commission in accordance with the terms of the Duloc Selling Agreement. On January 27, 2010, Michael Duloc informed Beare that plaintiff was his prior broker as well as the identifies of the potential buyers to whom plaintiff had shown the property.

On March 10, 2010, the Dulocs, with Core as their broker, entered into an agreement to sell the 60th Street Apartment for an aggregate purchase price of \$1,030,000, which included the sale of the apartment as well as certain furnishings therein.

Fifth Avenue Apartment

In 2008, at the same time that the Dulocs were looking to sell their 60th Street Apartment, they were looking to buy a new apartment. While they had no agreement for plaintiff to broker the purchase of a new apartment, plaintiff showed them possible apartments, including one at a building being converted to condominiums and still under construction at 141 Fifth Avenue,

unit 3B (the Fifth Avenue Apartment). Core was the exclusive selling broker for the Fifth Avenue Apartment, hired by non-party 141 Acquisition Associates, LLC, pursuant to an Exclusive Sales and Marketing Agreement dated November 29, 2005. That agreement provided that Core was the exclusive selling agent for the individual apartments, but that it could work with "other licensed real estate brokers" to sell the units if the brokers were "members of REBNY who have executed a Universal Co-Brokerage Agreement," or entered into a separate "Co-Brokerage Agreement" with Core, and that any commission would be shared by Core with the co-broker "in accordance with the [REBNY] Universal Co-Brokerage Agreement or [other] Co-Brokerage Agreement" agreed upon by the parties.

On July 17, 2008, the Dulocs entered into an agreement with 141 Acquisition Associates, LLC to purchase the Fifth Avenue Apartment. The purchase price was \$2,650,000 with a closing date to be designated by 141 Acquisition Associates, LLC, as sponsor, upon 30 days written notice to the Dulocs. This agreement also provided that plaintiff was the co-broker with Core, and that 141 Acquisition Associates, LLC would be responsible for any commissions due to Core and plaintiff "pursuant to a separate agreement". According to Beare, "[a]ny broker that we co-broke with in the new development . . . is part of the REBNY co-broke agreement" and that this was

"standard procedure" for the sale of units at 141 Fifth Avenue when Core worked with a co-broker. In a May 4, 2010 email from Mark Ripka, of Core, to Michael Duloc, Ripka states that he did not have plaintiff sign a co-brokerage agreement in 2008, because at that time, she was a member of REBNY and covered under the REBNY Universal Co-Brokerage Agreement (UCB), and he confirmed that with REBNY.

The purchase of the Fifth Avenue Apartment and the Dulocs sale of their 60th Street Apartment were related -- they needed to sell 60th Street Apartment in order to purchase the Fifth Avenue Apartment. The inability to obtain an acceptable offer on the 60th Street Apartment sale, the delays in the Fifth Avenue Apartment construction, along with the softening of the real estate market, made it more difficult to sell the 60th Street Apartment for an amount sufficient to make the Fifth Avenue Apartment affordable. The contract of sale for the Fifth Avenue Apartment, however, did not contain a contingency clause to that effect. Thus, the Dulocs decided not to purchase the Fifth Avenue Apartment, negotiating to be relieved of their commitment to purchase. Core did not have any input in the Dulocs' decision not to purchase the apartment. On April 28, 2010, the Sponsor, 141 Acquisition Associates, LLC, agreed to release them in exchange for retaining 55% of their down payment (Termination Agreement). There was no closing on the Duloc's

purchase of that apartment, and title never passed to them. The Core Defendants did not receive any commission on the Dulocs' initial agreement to purchase and did not receive any portion of the security deposit that was returned to the Dulocs. Both Michael Duloc and Beare testified at their depositions that Beare did not help the Dulocs terminate the purchase agreement or ask the Dulocs to stop using plaintiff as their broker.

Sixth Avenue Apartment

On May 12, 2010, the Dulocs entered into an agreement to purchase an apartment at 650 Sixth Avenue, New York, NY (Sixth Avenue Apartment) for \$1,975,000. On July 15, 2010, that transaction closed, the day after the sale of the 60th Street Apartment closed. The Core Defendants represented the Dulocs in connection with this purchase, and plaintiff had no role in this transaction.

Proceedings in this Action

Plaintiff brought this action to recover commissions on all three properties, the 60th Street Apartment sale, the Fifth Avenue Apartment failed purchase, and the Sixth Avenue Apartment purchase.

Plaintiff's first amended complaint alleges four causes of action: breach of contract, unjust enrichment, tortious interference with contract, and broker commission due.

On a prior motion for summary judgment by the Duloc Defendants, this court dismissed plaintiff's claim for a commission on the 60th Street Apartment, because the offer by Alberto Sampler never resulted in a sale; the Sampler offer did not meet the Duloc's asking price, and, thus, he was not a ready, willing, and able buyer; and the Duloc's refusal to accept a lower price was not a manifestation of bad faith even if they later accepted a lesser price. Thus, this court held that the Duloc Selling Agreement had expired with no sale and had not been breached. This court also dismissed the claim for commission against the Dulocs on the Fifth Avenue Apartment on the ground that there was no evidence of an oral agreement, and the purchase agreement clearly provided that the Savanna Defendants agreed to pay the broker commissions, if any were due. Thus, the entire complaint as against the Dulocs was dismissed.

At the same time, this court determined the dismissal motion (for failure to state a claim and based on documentary evidence) by the Core and Savanna Defendants. The claims for breach of contract and commission due on the 60th Street Apartment, and for commission due on the Sixth Avenue Apartment, for unjust enrichment, and for tortious interference with the contract in connection with both the Fifth Avenue Apartment and

the Sixth Avenue Apartment, were all dismissed against these defendants.

This court denied dismissal as to two claims only: (1) tortious interference with the Duloc Selling Agreement (60th Street Apartment) as against the Core defendants; and (2) for a commission on the Fifth Avenue Apartment against the Savanna Defendants.

DISCUSSION

The Core Defendants are entitled to dismissal of the tortious interference claim as a matter of law. In order to establish a tortious interference with an existing contract claim, a plaintiff must show: (1) the existence and terms of a valid contract with a third party; (2) about which the defendant had knowledge; (3) the defendant's intentional procurement of the third party's breach of that contract, without justification; (4) breach, and (5) damages (see NBT Bancorp v Fleet/Norstar Fin. Group, 87 NY2d 614, 620-621 [1996]; New York Tile Wholesale Corp. v Thomas Fatato Realty Corp., 153 AD3d 1351, 1354 [2d Dept 2017]).

Here, the Core Defendants have presented prima facie proof that plaintiff cannot establish these elements, and plaintiff fails to raise a triable issue. Specifically, plaintiff cannot establish that the Duloc's breached the Duloc Selling Agreement. As already determined by this court on the Duloc Defendants'

earlier motion for summary judgment, there was no breach of contract. In particular, this court held that the Dulocs did not breach, because "[t]here was never even a contract of sale" for the 60th Street Apartment prior to the expiration and later termination of the Duloc Selling Agreement, "let alone a closing, and therefore [a] condition precedent was never met". This court also held that plaintiff failed to provide a buyer that was ready, willing, and able to buy, because the Sampler offer "did not meet the Duloc defendants' asking price," and the Dulocs did not act in bad faith in rejecting the lower offer procured by plaintiff. No appeal was taken from that order, and that determination is law of the case (Datalot, Inc. v Winum Enterprises, LLC, 146 AD3d 653, 653 [1st Dept 2017]; Glynwill Invs. v Shearson Lehman Hutton, 216 AD2d 78, 79 [1st Dept 1995]).

In addition, even if plaintiff's claim were construed as one for tortious interference with prospective contract rights, because the Duloc Selling Agreement was voidable or terminable at will, plaintiff would need to show culpable conduct by the Core Defendants (NBT Bancorp v Fleet/Norstar Fin. Group, 87 NY2d at 620-621). To assert such a claim, plaintiff would need to show that the Core Defendants intentionally induced a breach through improper means or with malicious intent (see Guard-Life Corp. v Parker Hardware Mfg. Corp., 50 NY2d 183, 196 [1980]; see also Carvel Corp. v Noonan, 3 NY3d 182, 191 [2004]). Improper

means is defined as "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure," but "persuasion alone" is insufficient (Guard-Life Corp. v Parker Hardware Mfg. Corp., 50 NY2d at 191). Plaintiff, here, simply points to the fact that the Core Defendants became the Dulocs' broker and eventually sold the 60th Street Apartment for them. The Core Defendants have presented undisputed proof that the Dulocs solicited and interviewed various brokers when they became unsatisfied with plaintiff's efforts, all of which happened after the Duloc Selling Agreement expired, sometime beginning in December 2009. Plaintiff's reliance on a September 16, 2009 email from Michael Duloc to Beare, as support for her contention that Beare clearly was aware of the Duloc's business relationship with plaintiff, fails to show the Core Defendants' knowledge of the Duloc Selling Agreement. While in the email Duloc was telling Beare that plaintiff was his broker, the subject line clearly denotes "141 Fifth Update," since plaintiff was the Dulocs buying broker for the Fifth Avenue Apartment. Moreover, this still fails to show intentional interference with improper means. Plaintiff herself concedes that Beare had a legitimate economic self-interest, which is insufficient for tortious interference with prospective contract without proof of malice or illegality (Unique Laundry Serv., Inc. v Hudson Park NY LLC, 129 AD3d 422,

424 [1st Dept 2015]; Collins v E-Magine, 291 AD2d 350, 351 [1st Dept 2002]). Plaintiff fails to present any other proof to raise a genuine issue of fact as to the Core Defendants' wrongful intent. Therefore, the tortious interference claim must be dismissed, as a matter of law.

The claim for commission due with regard to the Fifth Avenue Apartment as against the Savanna Defendants also shall be dismissed as a matter of law. First, contrary to plaintiff's contentions, the contract of sale for this apartment was between the Dulocs and 141 Acquisition Associates, LLC. The fact that defendant Savanna 141 Principals, LLC signed that agreement as "Manager", and signed the rider to it as "141 Acquisition Associates, LLC, By: Savanna 141 Principals, LLC," does not make Savanna Principals, LLC individually liable. Plaintiff conceded that the Savanna Defendants were not parties to the agreement in her opposition papers. In addition, contrary to plaintiff's contention, defendants did raise this issue in their prior dismissal motion and have not waived it. To the extent that plaintiff attempts to assert an alter ego theory, not only is such theory of liability not plead in the complaint, it is not supported by any facts, notwithstanding the completion of discovery. That 141 Acquisition Associates, LLC and the Savanna defendants share an address and Christopher Schlank is a principal of all three, is not sufficient in and of itself (see

Sass v TMT Restoration Consultants Ltd., 100 AD3d 443, 443 [1st Dept 2012] [overlapping ownership, common officer, and common office space fails to meet plaintiff's burden on summary judgment]).

While leave to amend to correct this error is sought by plaintiff, such amendment would be futile since there is an independent basis to dismiss this claim. Plaintiff is correct that the standard under the common law for a real estate broker to be deemed to have earned her commission is when the broker "produces a buyer who is ready, willing, and able to purchase at the terms set by the seller" (Lane-Real Estate Dept. Store v Lawlet Corp., 28 NY2d 36, 42 [1971]). That standard, however, only comes into play if there is no agreement to the contrary (id.; see also SPRE Realty, Ltd. v Dienst, 119 AD3d 93, 97-98 [1st Dept 2014]). Here, the contract of sale for the Fifth Avenue Apartment specifically provides that any commission for the sale of that apartment would be paid pursuant to a "separate agreement," and, thus, that separate agreement, rather than the common law, governs the payment of a commission. (CS Empire Realty, LLC v Hussain, 150 AD3d 1075, 1077 [2d Dept 2017] [parties to brokerage agreement may include condition that commission not earned unless contract of sale actually consummated]; B.P. Vance Real Estate, Inc. v Tamir, 42 AD3d 343, 344 [1st Dept 2007]).

The only "separate agreement" concerning commissions identified by either party, here, is the Exclusive Sales and Marketing Agreement, between the Core Defendants and 141 Acquisition Associates, LLC. That agreement provides that any such commission would be governed by the terms of the REBNY UCB or another "Co-Brokerage Agreement" between Core and the co-broker. No other "Co-Brokerage Agreement" has been identified by the parties. Therefore, plaintiff's right to a commission is governed by the REBNY UCB. The UCB in place at the time of this contract of sale, provided, in relevant part:

"[w]ith respect to a sale of an Exclusive Property, if a sale is consummated with a purchaser procured by another Residential Member of REBNY, unless the Exclusive Listing specifies otherwise, the Exclusive Broker and such Residential Member of REBNY shall each be paid as equal share of the commission as specified in the Exclusive Listing. Such Residential Member of REBNY shall not be paid a share of the commission unless: (i) a satisfactory contract of sale is fully executed by the purchaser and the owner of the Exclusive Property; (ii) title to the exclusive Property is passed to such purchaser or other authorized party pursuant to a fully executed contract of sale, and (iii) the Exclusive Broker has received the commission payable in accordance with the Exclusive Listing".

See B.P. Vance Real Estate, Inc. v Tamir, 42 AD3d at 344 [since plaintiff broker obtained listing as a signatory to UCB, its common law rights were limited by that agreement defining broker's right to commission]). The UCB further provides that, notwithstanding that provision, if the Residential REBNY Member procures a buyer and the buyer defaults on the contract of sale,

and the owner retains all or a portion of the buyer's down payment, and

"in accordance with the Exclusive Listing or pursuant to another agreement entered into between the Owner and the Exclusive Broker, the Owner pays the Exclusive Broker a percentage of the down payment retained by the Owner, then, in such event, the Residential Member shall be paid its share of the amount paid by the Owner to the Exclusive Broker"

(id., UCB, § 5 B [2] at 3).

Based on these provisions, if plaintiff is determined to be a member of REBNY, then her commission would only be earned upon execution of a contract of sale, passage of title, and the listing broker's receipt of its commission, or, if, as occurred here, upon the Dulocs' default and seller's retention of part of the Duloc's down payment, if the listing broker, Core, was paid a portion of that down payment. Defendants have demonstrated that plaintiff was a REBNY Residential Member, and plaintiff has failed to raise a genuine triable issue of fact.

Defendants have submitted an affidavit from William Auerbach, the Chief Financial Officer of REBNY, who stated that plaintiff was a member of REBNY for all of 2008 through to August 2009. He explained that REBNY membership is offered on an annual basis, when dues are not paid, follow up invoices are sent, and then a final notice. Auerbach states that "[a] person remains a member until after the final notice is sent and until the member is formally terminated on REBNY's books and records".

He affirmed that REBNY's membership records established that plaintiff was a member throughout 2008, and her membership was terminated in August 2009. He submitted a screenshot from REBNY's current computer membership records, showing that plaintiff's membership was not terminated until August 4, 2009. Mr. Auerbach further confirmed that REBNY sent plaintiff a 2008 annual dues invoice, and that plaintiff responded to that notice by writing her new change of address and sending it back to REBNY.

Mr. Auerbach further attested that, on February 10, 2009, REBNY sent plaintiff a revised UCB/Rules and Regulations and requested that she send back a participant acknowledgment, acknowledging that she received it for continued participation in the Residential Listing Service. He also submitted a letter dated April 28, 2009 from REBNY asking her, as a member of REBNY's Residential Brokerage Division, to sign the acknowledgment form reflecting her agreement to all the terms of the UCB. On May 5, 2009, plaintiff signed the REBNY acknowledgment form, as "a Residential Member of REBNY". At her deposition, plaintiff conceded that she filled out this form. Mr. Auerbach also submitted a copy of a letter from plaintiff to the REBNY, dated November 14, 2008, in which she advised REBNY why she was refusing to pay an arbitration award issued against her, and refers to herself repeatedly as a member of REBNY.

Finally, defendants submit plaintiff's November 23, 2009 answer to a petition filed against her in a proceeding, entitled Matter of Arbitration of Certain Controversies Between the Corcoran Group Real Estate v Grace DeLiberio (Index No. 116740/2008 [Sup Ct, NY County]) in which plaintiff states that REBNY told her that she had to agree to arbitration otherwise her membership would be terminated, and that she "had no choice but to agree to arbitration in order to continue memberships [sic] with REBNY, a membership critical to [my] livelihood". At her deposition, plaintiff confirmed that she signed this document. This prima facie proof clearly establishes plaintiff's REBNY membership.

Plaintiff has failed to raise a genuine fact issue. Rather, her vague, conclusory and self-serving affidavit does not satisfy her burden on this motion. In response to various contemporaneous writings in which she confirmed her membership, plaintiff now claims those writings were "mistaken," she was "scared of REBNY revoking [certain] privileges," and that "confused [her] into mistakenly thinking [that she] was still a member of REBNY", and that she had agreed to the Corcoran REBNY arbitration in 2009, not 2008. The arbitration award involving the Corcoran Group, however, explicitly states that it was pursuant to a March 28, 2008 written agreement in which plaintiff agreed to arbitrate pursuant to REBNY rules, and the award was dated October 24, 2008. Plaintiff also fails to

address the November 14, 2008 letter she wrote to REBNY about the Corcoran arbitration decision, in which she repeatedly refers to herself as a member.

In addition, plaintiff completely fails to address the acknowledgment of the REBNY UCB rules and regulations, which she signed and sent back to REBNY on May 5, 2009. Moreover, while plaintiff asserts that she did not pay her dues in 2008, she does not provide any documentary support. She admits that she sent back the dues invoice with her change of address indicated thereon but could not explain why she would send back a change of address when she was not a member. The REBNY rule (UCB, Section 4), which plaintiff contends supports her assertion that her membership terminated in March 2008 for failure to pay dues, only provides that a firm's failure to pay by March 1st terminates the firm's participation in the REBNY Listing Service but does not say anything about terminating REBNY membership. Her argument that, because the Savanna Defendants did not move to compel REBNY arbitration of this dispute, they waived their argument that the Fifth Avenue Apartment contract of sale is governed by REBNY rules, is rejected. The Savanna Defendants have submitted proof that they are not members of REBNY, and plaintiff fails to submit anything to the contrary. Rather, it was Core which was a member of REBNY, and with whom plaintiff was to share a commission, under those rules, if the transaction

closed, or if the buyer defaulted and Core was paid a commission from the retention of the down payment, none of which occurred. In sum, the evidence establishes that plaintiff was a member, and her conclusory claims that she was mistaken and confused, at most, create only a feigned issue, not sufficient to oppose dismissal of the claim for commission due (see Columbus Trust Co. v Campolo, 110 AD2d 616, 616 [2d Dept], affd 66 NY2d 701 [1985]; Vesta Capital Mgt. LLC v Chatterjee Group, 78 AD3d 411, 411 [1st Dept 2010] [where record contained actions and statements by parties prior to litigation showing their interpretation of a term to mean something, plaintiff's affidavit stating she understood it to mean something different is insufficient to raise triable issue]; see also Jaffa v Afrodiam, Ltd., 93 AD3d 758, 758 [2d Dept 2012] [affidavit presents feigned issue of fact designed to avoid consequences of earlier testimony]; Lupinsky v Windham Constr. Corp., 293 AD2d 317, 318 [1st Dept 2002] [a party cannot avoid summary judgment by submitting a self-serving affidavit in an attempt to retract a previous admission]).

The court has considered the parties' remaining arguments and finds them to be unavailing.

9/26/2019
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/> REFERENCE