Kucher v Sohayegh
2019 NY Slip Op 32981(U)
October 7, 2019
Supreme Court, New York County
Docket Number: 156221/16
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

MARIO KUCHER

INDEX NO. 156221/16

MOT. DATE

- v -

MOT. SEQ. NO. 003

ELLIOT SOHAYEGH et al.

The following papers were read on this motion to/for sj and x-mot for sj

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s)._____

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s)._____

Replying Affidavits NYSCEF DOC No(s)._____

This action is for breach of contract and seeks a "management fee" in connection with the transfer of title of real property. Plaintiff, who is not a real estate broker, now moves: [1] for partial summary judgment on liability on his first cause of action; and [2] dismissing defendant's counterclaim and affirmative defenses. Defendants Elliot Sohayegh and Jacin Investors Corp., N.V. ("Jacin") cross-move for summary judgment: [1] dismissing plaintiff's complaint; and [2] "on their counterclaim in the form of an order requiring plaintiff to return the $200,000 finder's fee paid to him." Plaintiff opposes the cross-motion and further argues that the cross-motion and opposition papers to his motion-in-chief "are a legal nullity since they were untimely served in default without this Court's leave on the morning of MSQ No. 003's return date."

Issue has been joined and note of issue has not yet been filed. Therefore, summary judgment relief is available. The court's decision follows.

The relevant facts are largely in dispute. Plaintiff has provided a sworn affidavit wherein he states the following. Until 2014, plaintiff worked as a property manager for Jacin. Jacin is the fee simple owner of the multi-unit residential premises located at 1410 York Avenue, New York, NY 10021 (the "premises"). Prior to October 28, 2014, non-party Angel Climbler Teper owned the majority voting stock interest in Jacin.

Plaintiff claims that in order to purchase Teper's stock of Jacin, Sohayegh asked him to put him in touch with Teper because Teper "is a reclusive man living abroad, does not field public inquiries, and will not communicate with unknown individuals." On December 26, 2013, Sohayegh emailed plaintiff requesting that plaintiff execute an agreement entitled "Management Fee Agreement". Shortly thereafter, plaintiff and Sohayegh executed that agreement. A copy of Sohayegh's email and the executed agreement have been provided to the court.

Dated: 10/7/19

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

The email states:

> Hello Mario,
>
> The agreement is attached... It is the same format we used in the past with a similar situation... Thanks and I will call you soon...
>
> All the best,
> Elliot

The agreement is signed by Sohayegh as "Elliot Sohayegh, Esq." and plaintiff. The agreement provides in as follows:

> TO: Mr. Mario Kucher
> RE Sale of Jacin Investors Corporation, N.V.
> (1410 York Avenue, New York, NY 10021)
>
> A. Purchase Price..... $22,000,000.00
> B. Manager..... Mario Kucher
> C. Management Fee..... $1,000,000.00
> D. Party to Pay Management Fee..... Purchaser
>
> Dear Mr. Kucher,
>
> The following will serve to set forth our "Management Fee Agreement" concerning the above referenced property. It is agreed that Mario Kucher ("Manager") has introduced Jacin Investors Corporation, N.V. ("Seller") to the Sohayegh Family ("Purchaser") in connection with the sale of the single-asset foreign corporation that owns the real property located at 1410 York Avenue, New York, NY 10021 ("Premises") by Seller to Purchaser.
>
> The Management Fee in connection with the above referenced sale shall be $1,000,000.00 based upon a Purchase Price of $22,000,000.00. It is understood and agreed that the Management Fee shall be due and payable to Manager if and when title actually passes to Purchaser. If for any reason title does not pass to the Purchaser, then no Management Fee shall be due and/or payable to Manager. Manager shall not seek any other fee in connection with the Premises, or the contemplated sale, except as specifically set forth herein. This agreement shall bind all the respective parties hereto, their heirs and assigns and will not be changed unless agreed in writing and executed by all respective parties.

Plaintiff maintains that after the agreement was executed, he "facilitated [] Sohayegh's introduction to the investment opportunity to acquire the majority voting stock interest in [] Jacin [], by introducing [] Sohayegh to [] Teper." Plaintiff states that he performed under the agreement with due diligence by performing "regulatory compliance with New York State Division of Housing & Community Renewal [] and New York City Department of Housing Preservation & Development, as well as [] sourcing, locating, gathering, and compiling administrative documents and materials."

Plaintiff represents that on or about October 28, 2014, Sohayegh completed his acquisition of the majority voting stock interest in Jacin from Teper. After the closing, plaintiff received $200,000 in cash from Sohayegh with "further assurances that [] Sohayegh would deliver the remaining monies due and owing under the [a]greement shortly thereafter." Plaintiff's counsel points out, however, that defendants' verified bill of particulars alleges that "a real estate brokerage contract did not... exist between Plaintiff and Defendant, Elliot Sohayegh."

In their answer, defendants assert a counterclaim seeking disgorgement of the $200,000 on the grounds that RPL § 442-d precludes plaintiff from being compensated under the agreement for "real estate broker commissions, which Plaintiff in ineligible to receive since Plaintiff did not hold a real estate broker's license."

In opposition to the motion and in support of the cross-motion, defendants have submitted a sworn affidavit by Sohayegh. Sohayegh denies executing the agreement. As for the email, Sohayegh states that the agreement "bears a fraudulent signature that is not [his] and is dated many months prior to repeated emails from plaintiff pleading with [Sohayegh] to sign the finder's fee agreement." Sohayegh has provided to the court copies of emails from plaintiff to him. Sohayegh maintains "there would be no reason why [plaintiff] would subsequently ask [him] to memorialize our agreement." Sohayegh also takes issue with plaintiff's failure to state where and when the agreement was jointly executed.

Instead, Sohayegh maintains that he and plaintiff "orally agreed that if plaintiff could facilitate the sale for below market price that [Sohayegh] would pay plaintiff a $1,000,000.00 fee." Sohayegh claims that he only paid fair market value to purchase the premises, which was $23,500,000, $1.5 million more than what he originally intended to purchase the premises for. Sohayegh therefore maintains that the agreement was "never consummated". Sohayegh admits paying $200,000 in cash as a "broker's fee" to plaintiff because he "estimated that to be what plaintiff's introduction was worth at that time given the dramatically increased sale price."

Sohayegh further denies owning any percentage of stock interest in Jacin. Sohayegh claims that he is now only the property manager of the Premises and his family members own the Premises.

Plaintiff now moves for partial summary judgment on his first cause of action which is for breach of the agreement by Jacin and Sohayegh by failing to pay Kucher the $1,000,000 fee. Plaintiff also seeks an order dismissing defendants' counterclaim and affirmative defenses.

In turn, defendants argue that even if the agreement is valid, RPL § 442-d "does not permit someone who is not a real estate broker to collect a real estate broker fee in respect of the sale of real property." Defendants otherwise argue that triable issues of fact preclude summary judgment.

On reply, plaintiff maintains that the agreement is a valid finder's fee agreement, that defendants' forgery defense is not pleaded with particularity, was waived and otherwise fails.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; Ayotte v. Gervasio, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

At the outset, the court will consider defendants' cross-motion. While it was filed the day the motion-in-chief was originally returnable, plaintiff has had a sufficient opportunity to oppose the cross-motion and no prejudice will result from the court considering it.

Both the motion and cross-motion are denied for the reasons that follow. First, there is a triable issue of fact as to whether defendant executed the agreement. Both parties have a differing version of facts about their business relationship and the underlying transactions at issue. The court cannot resolve these competing accounts on a motion for summary judgment. Plaintiff's counsels' attempt to characterize Sohayegh as incredible as a matter of law is unavailing. Further, it is of no moment that defendants assert in their verified bill that a real estate brokerage contract did not exist between plaintiff and defendant. Indeed, Sohayegh denies ever signing the agreement.

However, even if there are no triable issues of fact as to whether defendant executed the agreement, there is a further issue of fact as to whether the agreement is enforceable. RPL § 442-d, which bars recovery for services as a broker by non-licensed persons, provides:

> No person, copartnership, limited liability company or corporation shall bring or maintain an action in any court of this state for the recovery of compensation for services rendered, in any place in which this article is applicable, in the buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate without alleging and proving that such person was a duly licensed real estate broker or real estate salesman on the date when the alleged cause of action arose.

Generally, whether a party's services fall under RPL Article 12-A, which includes RPL § 442-d, is an issue of fact (see *Zedeck v. Derfner Management Inc.*, 106 AD3d 465 [1st Dept 2013]). The amorphous description of plaintiff's purported management services under the agreement cannot be determined as a matter of law. Indeed, the facts and arguments advanced by plaintiff's counsel on replies underscores this material dispute. However, a reasonable factfinder could find that plaintiff did not perform brokerage services under the agreement (see i.e. *Glynos v. Dorizas*, 106 AD3d 480 [1st Dept 2013]; *Transaction Advisory Services, LLC v. Silver Bar Holding, LLC*, 38 AD3d 241 [1st Dept 2007]). Therefore, the agreement may not violate RPL § 442-d.

If the agreement is unenforceable, then defendants may prevail on their counterclaim.

Accordingly, it is hereby

ORDERED that both the motion and cross-motion are denied in their entirety; and it is further

ORDERED that the parties are directed to appear for a status conference on December 10, 2019 at 9:30am and plaintiff's time to file note of issue is extended to December 13, 2019.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 10/7/19
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.