Slabakis v Poyiadjis
2020 NY Slip Op 31549(U)
March 30, 2020
Supreme Court, New York County
Docket Number: 655855/2018
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

- X

ANGELO SLABAKIS,

Plaintiff,

DECISION AND ORDER
Index No. 655855/2018

-against-

Motion Sequence No.: 002

ROYS POYIADJIS and CINCINNATI TERRACE PLAZA LLC,

Defendants.

- X

O. PETER SHERWOOD, J.:

In this motion sequence 002, defendants move to dismiss the amended complaint pursuant to CPLR 3211(a)(1), (3), (5) and (7). Defendants also moved for sanctions against plaintiff pursuant to NYCRR 130-1.1(a). For the following reasons, the motion to dismiss shall be granted and the request for sanctions denied.

I. FACTS

As this is a motion to dismiss, the facts are taken from the amended complaint and are assumed to be true.

Defendant Cincinnati Terrace Plaza LLC (CTP), is a New York limited liability company (amended complaint ¶ 3) ("compl."). The real estate sale at issue took place in Ohio.

As of May 2013, plaintiff Angelo Slabakis (Slabakis) owned 50% of 923 Cincinnati Terrace Plaza LLC (923 Cincinnati), the entity fee owner of 15 West 6th Street in Cincinnati, Ohio (the Premises) (*id.* ¶ 4). In 2013, 923 Cincinnati took out two mortgages in the aggregate sum of $3.6 million, secured by the Premises and personally guaranteed by Slabakis (*id.* ¶ 5). In 2014, Slabakis obtained a single replacement mortgage in the amount of $3.75 million from Madison Equities LLC (Madison), owned by defendant Roys Poyiadjis (Poyiadjis) (*id.* ¶ 7). 923 Cincinnati defaulted, Madison instituted a foreclosure proceeding, and obtained a judgment of foreclosure against 923 Cincinnati in July 2017 for $1,323,889.32 plus interest and costs (the Ohio Judgment) (*id.* ¶¶ 9-10; Dougherty affirmation, Exhibit C [NYSCEF Doc No. 37]). Madison then assigned its rights in the judgment to defendant CTP, which became owner of the Premises (comp. ¶ 11).

As majority or sole shareholder of CTP, Poyiadjis unsuccessfully tried to sell the Premises for 18 months (*id.* ¶ 13). As formalized in a series of emails (*id.*, ¶ 25; NYSCEF Doc No. 47), Poyiadjis and Slabakis entered into an agreement pursuant to which Poyiadjis agreed to sell Slabakis the Premises for $10 million (compl. ¶ 16). The parties agreed that upon a sale, (1) Slabakis would receive any proceeds above the $10 million sale price, (2) Poyiadjis would forgive a $465,000 personal loan to Slabakis that was secured by a lien on a property owned by him (the Sutton Place Property), and (3) Poyiadjis would also forgive a personal judgment against Slabakis related to his personal guarantee of the mortgages (*id.* ¶ 17). Rights in the Judgment were assigned to Platinum Real Estate Holdings, Inc. (Platinum), another company owned by Poyiadjis (*id.* ¶ 11).

Slabakis then took out a $600,000 mortgage on the Sutton Place Property, repaid the $465,000 loan and used the remainder as working capital for a syndicated partnership to acquire the Premises for $11 million (*id.* ¶¶ 19-22). The sale closed on August 1, 2018 (*id.* ¶ 26). At that time, defendants fulfilled only one of the three conditions through execution of a Mutual General Release forgiving the personal judgment (*id.*, ¶ 26). Defendants otherwise failed to honor their obligations and distribute to Slabakis $1,465,000 owed him (complaint ¶ 17).

Plaintiff Slabakis brings a single cause of action for breach of contract.

II. ARGUMENTS

Defendants argue that the claim for breach of contract should be dismissed because plaintiff has not alleged that he is a duly licensed real estate broker in Ohio. Because the contract at issue was one for the types of services provided by a real estate broker, the claim is grounded in an illegal contract which unless plaintiff was a licensed real estate broker at the time the services were rendered is unenforceable. The actions undertaken by Slabakis constitute "advice and assistance rendered" in procuring the purchase of real property. Ohio law requires any provider of such assistance to have an Ohio real estate broker license. An unlicensed broker may not collect broker fees (mem at 6, citing ORC 4735.02; *DiLuciano v Ohio Real Estate Comm'n*, 510 NE2d 837 [8th Dist App 1986]). The statute imposes a criminal penalty for violation (ORC 4735.99[A]; ORC 2929.24[A][1]; ORC 2929[2][a][i]). The New York courts will not enforce a contract to commit an unlawful act (*Scotto v Mei*, 219 AD2d 181, 183 [1st Dept 1996]).

Defendants also argue that the claim for breach of contract should be dismissed on the basis of a mutual general release signed by Slabakis and Platinum (CPLR 3211[a][5]). The release covers any agent, "affiliate, direct and indirect" or subsidiary of Platinum. CTP is a subsidiary and

Poyiadjis is an "affiliate" and "agent" of Platinum. By the terms of the release, Slabakis released all past, present and future claims (mem at 10, citing Dougherty affm).

Plaintiff responds that the Ohio statute does not apply here because he acted, not as a broker, but instead as a syndicator who has a 20% equity stake in the transaction. He claims the parties' agreement "which was memorialized in emails between the parties" refers at ¶ 14 of the amended complaint to "the sale of the premises **to Slabakis**" (Biaggi affm ¶¶ 37-38, NYSCEF Doc. No. 52) (emphasis in Opp.). Defendants maintain there was no agreement and the emails plaintiff references show that, although the parties were contemplating a possible arrangement there was no acceptance (Opp. p. 15).

III, DISCUSSION

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id*. at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

The amended complaint must be dismissed for multiple reasons as is discussed below.

Plaintiff signed a general release in favor of Platinum releasing it and its affiliates from any contractual obligation to plaintiff (*see* Dougherty affirmation, exhibit I [NYSCEF Doc No. 43]). The release states, in relevant part:

> "Angelo Slabakis…hereby releases and forever discharges PLATINUM REAL ESTATE HOLDINGS, INC., a Delaware corporation… and each of Platinum's past and present affiliates, direct and indirect subsidiaries, direct and indirect parent entities, officers, stockholders, directors, attorneys, insurers, agents and/or employees and/or their respective administrators, heirs, estates, assigns, executors and/or successors (collectively, "Platinum Releasees")"

(*id.*). Defendants argue that defendant Poyiadjis, who owns Platinum, is an "affiliate" and "agent" of Platinum. Poyiadjis is also majority or sole shareholder of defendant CTP, which according to defendants is an "affiliate, direct and indirect" subsidiary of Platinum. These assertions are consistent with the allegations in the amended complaint (*see* compl. ¶¶ 7, 11 and 14). Accordingly, the complaint is due to be dismissed under CPLR 3211(a)(5) (release).

The claim for breach of contract shall be dismissed pursuant to CPLR 3211(a)(3) for lack of legal capacity to sue. The contract plaintiff seeks to enforce is illegal. He was not a licensed real estate broker in Ohio when the transaction took place. The Ohio statute provides that "[n]o right of action shall accrue to any person, partnership, association, or corporation for the collection of compensation for the performance of the acts mentioned in section 4735.01 of the Revised Code, without alleging and proving that such person, partnership, association, or corporation was licensed as a real estate broker or foreign real estate dealer" (Ohio Rev. Code Ann. § 4735.21)[1].

The emails that plaintiff alleges memorialize the agreement shows that plaintiff was acting as a broker (*see* Dougherty Affim., Ex. M, Doc. No. 47). Further, although plaintiff alleges an agreement for sale of the property to him, he offers no factual evidence of any such sale or of being an equity holder.The emails show plaintiff as negotiating the sale of real estate and directing or assisting in procuring prospects for a commission or fee and as such represents brokerage services (*see* ORC 4735.01[A][1], [2] and [7]; *DiLuciano v Ohio Real Estate Comm'n*, 510 NE2d 837 [8th Dist App 1986] [finding that appellant was not entitled to recovery of money promised as compensation for his assistance in the purchase of a certain property where appellant claimed that he merely "introduced buyer and seller" but testimony revealed that he spent significant time on the transaction and expected compensation based on the commission "that is generally what realtors make when they sell property"]; *Binder v Trinity OG Land Dev. & Expl., LLC*, No. 4:11-CV-02621, 2012 WL1970239, at *3 [(N.D. Ohio May 31, 2012] [finding that plaintiff's actions fell "squarely within the broad definition of a real estate broker under Ohio Rev. Code § 4735.01"

[1] New York law also includes within the definition of real estate broker "any person…who, for another and for a fee, commission or other valuable consideration…offers or attempts to negotiate a sale…of an estate or interest in real estate" (N.Y. Real Prop. Law § 440).

where plaintiff alleged to have acted as a "finder", identifying landowners with whom the defendant could negotiate to obtain mineral rights, for compensation per acre]).

The claim for breach of contract must be dismissed pursuant to CPLR 3211(a)(3).

The Administrative Rules of the Unified Court System provide that "[t]he court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part" (22 N. Y.C.R.R. 130-1.1(a)). Frivolous conduct is defined as follows:

> "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false."

(*id*. at 130-1.1[c]). Defendant's request for sanctions is predicated upon plaintiff's general release signed in connection with the Ohio Judgment. The request shall be denied as the claim is not "completely without merit". Accordingly, it is hereby

ORDERED that the motion to dismiss (Motion Sequence Number 002) of defendants ROYS POYIADJIS and CINCINNATI TERRACE PLAZA LLC, is GRANTED in its entirety and the amended complaint is hereby DISMISSED; and it is further

ORDERED that defendants request for sanctions is DENIED; and it is further

ORDERED that judgment be entered against plaintiff ANGELO SLABAKIS and in favor of defendants ROYS POYIADJIS and CINCINNATI TERRACE PLAZA LLC.

This constitutes the decision and order of the court.

DATED: March 30, 2020

E N T E R

Hon. O. Peter Sherwood
O. PETER SHERWOOD J.S.C.