

Capin & Assoc., Inc. v Herskovitz
2020 NY Slip Op 31671(U)
June 2, 2020
Supreme Court, New York County
Docket Number: 651747/2014
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA PART IAS MOTION 39EFM

Justice

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CAPIN & ASSOCIATES, INC.,
Plaintiff,

- v -

ISAAC HERSKOVITZ, 1895 BELMONT LLC,2078
CROTONA LLC,2079 MOHEGAN LLC,CROTANA
MOHEGAN LLC,2140 DALY LLC,2132 DALY LLC,990
BRONX PARK SOUTH LLC,984 BRONX PARK SOUTH
LLC,968 BRONX PARK SOUTH LLC,2146 VYSE
LLC,SEYMOUR ALBERT, HOWARD KLEINBAUM, VINSON
FRIEDMAN, FAIRMONT PLACE APARTMENT
ASSOCIATES, MOHEGAN/CROTONA II ASSOCIATES,
BRONX PARK SOUTH II ASSOCIATES, BRONX SOUTH III
ASSOCIATES

Defendant.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 134, 135, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 166, 167

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents, it is

In this action for breach of a brokerage agreement, defendants 1895 Belmont LLC, 2078 Crotona LLC, 2079 Mohegan LLC, 2140 Daly LLC, 2132 Daly LLC, 990 Bronx Park South LLC, 984 Bronx Park South LLC, and 2146 Vyse LLC (collectively, "Defendants") move, pursuant to CPLR 3212, for an order granting them summary judgment and dismissing plaintiff Capin & Associates, Inc.'s ("Plaintiff") amended complaint. Defendants also seek attorneys' fees and costs.

The amended complaint states that Plaintiff received the listing for a “Bronx Package” – comprised of approximately eleven buildings in Bronx, New York – from the owners and was authorized to list the package for sale on a “net” basis such that the purchaser would be responsible for Plaintiff’s brokerage commission upon the package’s sale.¹

On May 9, 2012, Frieda Benelyahou (“Benelyahou”), an Associate Broker employed by Plaintiff, sent an email to Isaac Herskovitz (“Herskovitz”), a real estate owner and developer, informing him of the Bronx Package and attaching rent rolls for each of the buildings. Shortly thereafter, the seller took the Bronx Package off the market.

On August 8, 2013, Luca Capin (“Capin”), Plaintiff’s principal, sent an email to Herskovitz which stated “[t]oday is the first day these buildings [sic] back in the market” and attached rent rolls, set-ups, income & expenses for the Bronx Package.

Herskovitz contacted Capin via email, on September 10, 2103, to discern the status of the Bronx Package. The following day, Capin emailed a response stating that

Sam Klein and his partner, Judah Klein has an accepted offer, however it turns about to be net of broker's commission, there is a dispute how much commission they are willing to pay, Deal is at \$ 39 MIL net to seller, they are only willing to pay me \$200 K, I am asking \$ 500 K (which is 1.25% if you are interested it is a perfect time to make your move right now, please feel free to let me know,thanks.

¹ The Bronx Package included the following properties: 1893-1895 Belmont Avenue, 2078 Crotona Parkway, 2074 Crotona Parkway, 2079 Mohegan Avenue, 2140 Daly Avenue, 2132 Daly Avenue, 990 Bronx Park South, 984 Bronx Park South, 968 Bronx Park South and 960 Bronx Park South.

On October 9, 2013, Herskovitz sent an email to Capin stating, “[a]ny movement on this? Now that the holidays are over I have the time to look into this if its still available.” On October 10 and 11, Herskovitz and Benelyahou exchanged several emails concerning the accuracy of the expenses for the Bronx Package. Benelyahou then took Herskovitz to inspect some of the properties. On October 21, 2013, Benelyahou sent an email to Herskovitz stating, “I was wondering if you wanted to pursue this deal any further.” Herskovitz again expressed concerns about the Bronx Package.

Meanwhile, Herskovitz was sent the same information about the Bronx Package from another broker, Michael Guttman (“Guttman”) of Rosewood Realty Group (“Rosewood”) on December 11, 2013.²

Subsequently, Herskovitz contacted Benelyahou on December 26, 2013 to see if the Bronx Package was still available and Benelyahou sent an email response stating,

I just spoke with the owner himself just now on his cell# . He said he signed a contract. With 60 days closing.

Plaintiff did not contact Herskovitz about the Bronx Package again although the Amended Complaint alleges that Plaintiff eventually learned that the Bronx Package sellers lied in December 2013 when they informed Plaintiff that the package was unavailable.

On January 1, 2014, Herskovitz emailed Guttman to see if the Bronx Package was “still around.” Guttman responded, “[a]s of last week it was still available. I think I can

² Also on December 11, 2013, Herskovitz replied, “Package still around[.]?” and Rosewood responded, “Yes. That’s why I sent it to you.” Herskovitz then stated, “Figured so. Saw it while back..... Not for me.”

get it near 40mm. need to move please if of interest.” Guttman sent an offering memorandum to Herskovitz. They continued to correspond during January and Guttman sent an email stating, “Sellers absolute bottom number is 39,600,000 with buyer to pay our broker fee on top.” Additional emails show that terms of the purchase were discussed and that Herskovitz wanted the brokerage fee to be net from seller.

A Brokerage Agreement, dated January 20, 2014, provided, among other things, that the purchase price for the Bronx Package was \$39,000,000 net of brokerage commission. An invoice for Rosewood’s brokerage commission fee for the Bronx Package, in the amount of \$390,000 (a 1% commission), was sent in March 2014.

Plaintiff’s amended complaint, alleging eight causes of action, was filed in June 2014 against the Defendants as well as individual and partnership seller defendants and Herskovitz individually.³ Defendants moved to dismiss and, in a motion decided on the record on March 26, 2015 (the “March 2015 Decision”), Justice Jeffrey Oing dismissed all causes of action against the individual and partnership seller defendants and Herskovitz. Justice Oing also dismissed all claims except breach of contract, breach of implied brokerage agreement, quantum meruit and unjust enrichment.

The parties then conducted discovery on the remaining causes of action and defendants now move for summary judgment dismissing the remainder of the complaint.

³ The causes of action in the amended complaint were: breach of contract, breach of implied brokerage agreement, quantum meruit, unjust enrichment, fraud and misrepresentation, conspiracy, tortious interference with economic advantage and prima facie tort.

Discussion

1. Breach of Contract - express

Plaintiff alleged in the Amended Complaint that Defendants breached an express oral real estate brokerage agreement. However, Plaintiff now concedes, including during oral argument of this motion, that there was no express oral brokerage agreement.⁴

Absent such an agreement, this cause of action fails. *See Retail Advisors Inc. v. SLG 625 Lessee LLC*, 138 A.D.3d 425, (1st Dept. 2016). Therefore, I grant Defendants' motion to dismiss Plaintiff's cause of action for breach of an express contract.

2. Breach of Contract - implied

Plaintiff alleges that Herskovitz accepted brokerage services from Plaintiff which "established" an implied brokerage agreement between them, and Defendants' failure to pay a commission to Plaintiff thereby constituted a breach.

Defendants argue that the implied brokerage agreement cause of action must be dismissed because the evidence submitted shows that Plaintiffs were not the "procuring cause" of the sale. "A broker does not earn a commission merely by calling the property to the attention of the buyer." *SPRE Realty, Ltd. v. Dienst*, 119 A.D.3d 93, 97-98 (1st Dept. 2014) (citations omitted). Instead, the broker "must be the 'procuring cause' of the transaction, meaning that 'there must be a direct and proximate link, as distinguished

⁴ Additionally, Capin testified as follows during his deposition:

Q. Is it true that Isaac Herskovitz agreed -- yeah. Agreed to pay you \$500,000 if he bought the building?

A. He did not agree to pay me \$500,000. No.

Capin deposition, p.245.

from one that is indirect and remote,' between the introduction by the broker and consummation of the transaction." *Id.* at 97-98 (citations omitted).

Here, the evidence submitted fails to raise an issue of fact showing that Plaintiff was the procuring cause of the sale of the Bronx Package. Plaintiff submits evidence showing only that Plaintiff sent the listing, engaged in a few email exchanges and showed the property.⁵ Benelyahou's deposition testimony confirms the extent of Plaintiff's actions and that these actions mainly took place in October 2013:

Q: And so aside from the walk-through of certain buildings in the Bronx package and your e-mail correspondence relating to Section 8, you didn't do anything else to market the Bronx package to Mr. Herskovitz or the buyers, correct?

A: Yes, correct.

* * * *

Q: Just to sort of sum up. All of this correspondence, everything you did relating to marketing the Bronx package to Mr. Herskovitz and the buyers occurred in October of 2013; is that right?

A: Yes.

See Benelyahou deposition transcript, p. 61-63. Moreover, both Benelyahou and Capin testified that they did not submit an offer from Herskovitz to the Bronx Package sellers.

See Benelyahou deposition transcript, p.64; Capin deposition transcript, p.240.

The final communication between Plaintiff and Defendants was the December email stating that the Bronx Package was no longer available.

⁵ Benelyahou testified at her deposition that she took Defendants to approximately six to nine of the eleven buildings in the Bronx Package.

In light of the foregoing, Defendants have established that Plaintiff was not the procuring cause of the 2014 sale of the Bronx Package. See *Mollyann, Inc. v. Demetriades*, 206 A.D.2d 415, 415 (2d Dept. 1994) (holding that plaintiff was not entitled to a brokerage fee because it was not the procuring cause of the sale where record showed that “plaintiff’s sole efforts consisted of some brief contacts with the sellers with respect to the property and showing the prospective buyers the property.”). Instead, the broker that effectuated the sale was Rosewood.

To support their summary judgment motion, defendants note that this action is very similar to *Capin & Associates, Inc. v. 599 West 188th Street, Inc.*, No. 650888/2013, 2018 WL 3474600 (N.Y. Sup. Ct. July 18, 2018) (the “Judge Hagler *Capin* decision”). In the action before Judge Hagler, Benelyahou received a non-exclusive property listing and she sent an offer from the buyer defendants to the seller defendants. There was no written brokerage agreement, but the offer noted that commission would be paid by purchaser without specifying an amount. *Id.* at *1. Ultimately, the seller defendants decided not to sell and the deal collapsed. *Id.* Approximately three years later, Benelyahou received a second listing for the same property and called the buyer defendants who stated that they were not interested in the property. *Id.* Benelyahou then found a new buyer for the property but the seller defendants declined to go forward with the sale, telling Benelyahou that it had another buyer. *Id.* The seller defendants eventually sold the property to the buyer defendants. *Id.* *Capin & Associates* sought payment of a fee for both the first and second listings of the property. *Id.* On defendants’ motion for summary judgment, Judge Hagler found that no fee was owed to *Capin &*

Associates for the first listing because no sale resulted. *Id.* at *6. Judge Hagler also dismissed Capin & Associates' claim for a fee for the second listing, deeming its actions insufficient to demonstrate that it was the procuring cause of the sale despite having introduced the buyer defendants and seller defendants and making phone calls. *Id.* at *7.

Plaintiff endeavors to distinguish the Judge Hagler *Capin* decision by arguing that in this case Plaintiff did more for the Defendants. The evidence, however, does not support Plaintiff's position. And, as in the Judge Hagler *Capin* decision, Plaintiff's actions in this action were insufficient to raise an issue of fact to show that it was the procuring cause.

Lastly, Plaintiff, in an attempt to avoid summary judgment and raise an issue of fact, contends that Herskovitz's affidavit contradicts his deposition testimony, and this inconsistency deprives it of probative value and raises questions of credibility. While it is true that Herskovitz did not recall many details about the Bronx Package discussions between him and Plaintiff, his testimony did corroborate Benelyahou's testimony regarding the extent of the parties' interactions.⁶ Moreover, as discussed above, both the documentary evidence and the deposition testimony of Capin and Benelyahou support summary judgment.

⁶ Q: ...So let me ask you, what do you remember that transpired between you and her?

A: Communicating about this package and showing me a rent role [sic], a setup and scheduling to take a look.

Q: And going down?

A: And going down.

For the foregoing reasons, I grant Defendants summary judgment dismissing the cause of action for breach of implied contract.

3. Quantum Meruit and Unjust Enrichment

As I have found that Plaintiff was not the procuring cause of the Bronx Package's sale to Defendants, it may not recover quasi contract damages. *See, e.g., Capin & Associates, Inc.*, 2018 WL 3474600 at *7. Thus, I dismiss Plaintiff's claims for quantum meruit and unjust enrichment.

4. Attorneys' Fees and Costs

Defendants contend that Plaintiff acted frivolously in bringing this action and seek attorneys' fees and costs, pursuant to Section 130-1.1 of the Rules of the Chief Administrator. 22 NYCRR 130-1.1. Plaintiff's arguments here, while not successful, were not frivolous and I therefore decline to impose sanctions against Plaintiff.

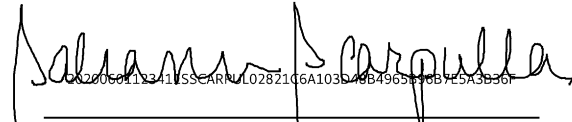
In accordance with the foregoing, it is

ORDERED that the motion by defendants 1895 Belmont LLC, 2078 Crotona LLC, 2079 Mohegan LLC, 2140 Daly LLC, 2132 Daly LLC, 990 Bronx Park South LLC, 984 Bronx Park South LLC and 2146 Vyse LLC for summary judgment against plaintiff Capin & Associates, Inc. is granted, except as to the request for attorneys' fees and costs, and the complaint is dismissed with prejudice; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

6/2/2020
DATE


SALIANN SCARPULLA, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE