

Sagacity Intl. Real Estate Advisors, Inc. v Wiggins
2020 NY Slip Op 32585(U)
August 5, 2020
Supreme Court, New York County
Docket Number: 652622/2019
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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SAGACITY INTERNATIONAL
REAL ESTATE ADVISORS, INC,
and GREGORY FRANCIS,
Plaintiffs,
-against-

Index No. 652622/2019

NICHOLAS WIGGINS and KASSIN SABBAGH REALTY LLC,
Defendants.

DECISION AND ORDER

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MELISSA CRANE, J.S.C.:

Defendant Nicholas Wiggins (“Wiggins”) moves to dismiss this action for failure to state a cause of action pursuant to CPLR 3211 (a) (7).

On June 19, 2019, plaintiffs Gregory Francis (“Francis”) and Sagacity International Realty Advisors, Inc. (“Sagacity”) executed a stipulation of discontinuance against defendant Kassin Sabbagh Realty, LLC (“KSR”), a licensed real estate broker. Both Wiggins and Francis associated themselves as licensed commercial real estate salespersons with KSR.

On March 5, 2018, Francis formed Sagacity, a corporation that both Wiggins and Francis were affiliated with. Sagacity is not a licensed real estate broker. It is undisputed that Wiggins did not contribute any capital to Sagacity, and does not have an ownership interest in Sagacity.

This action involves a dispute between Wiggins and Francis over their respective shares of the salespersons’ portion of a commercial real estate commission (the “Commission”) that KSR earned when it represented Crescent Heights, Inc. (“Crescent”), the seller of the Hanley Building, located at 165 East 66th Street in Manhattan. The parties to the Hanley deal executed the contract in September 2018. The closing occurred on April 5, 2019. Crescent then paid commission to KSR. According to Francis, attorneys for KSR acknowledged that the

salesperson's share of the commission is \$262,000. KSR is holding the commission pending determination of this action.

On February 15, 2019, Francis began working for KSR as a real estate salesperson, pursuant to the terms of a commission and employment agreement with KSR (the "Commission Agreement").¹ It is undisputed that, pursuant to the terms of KSR's employment and commission agreement, commissions are paid at closing.

On February 14, 2017, Francis became a licensed real estate salesperson. His license expired on February 13, 2019, and he renewed the license on April 22, 2019. On November 21, 2018, KSR dissociated itself from Francis's license. Thus, on April 5, 2019, the date of the closing of the Hanley deal and the date for the payment of the commission under the Commission Agreement, Francis did not have a real estate license, nor was he affiliated with KSR. However, Francis had a real estate license during his tenure at KSR when he allegedly performed a substantial volume of services for Crescent. Those services included marketing properties in Crescent's portfolio, other than the Hanley Building, to maintain KSR's relationship with Crescent. Wiggins states that Francis did not source the buyer for the Hanley Deal, negotiate the contract, or assist with the closing for this transaction.

Francis alleges that, after first meeting Wiggins in December 2017, and exploring mutual interests in the real estate industry, they agreed to an oral partnership where they would work together as a "shop within a shop," and share commissions equally under the KSR umbrella. Francis alleges that he and Wiggins left KSR in July 2018 to continue operating as a "shop within a shop" under the umbrella of Sagacity.

¹ The Commission Agreement is not included in the parties' submissions on this motion

Wiggins denies the existence of any partnership agreement. Instead, defendant argues that the failure to allege an agreement to share losses, in either the complaint or Francis's affidavit, defeats Francis's claim of an oral partnership agreement. Accordingly, the complaint fails to state a cause of action for an oral partnership. This court agrees.

“[A]n undertaking to share in profits without submitting to the burden of making good the losses renders such an agreement a nullity under partnership law” (*Chanler v Roberts*, 200 AD2d 489, 491 [1st Dept 1994]; *see also, Moses v Savedoff*, 96 Ad3d 466, 470 [1st Dept 2012]).

According to Francis, KSR offered Francis \$10,000 and Wiggins \$252,000, as their respective shares of the Commission. Further, Francis alleges that Wiggins proposed this split to KSR. Francis argues that he is entitled to half of the commission under the alleged partnership agreement.

The complaint contains seven causes of action. The first cause of action seeks a judgment declaring that Wiggins and Francis split the commission equally, and that a valid partnership agreement exists. Plaintiff pleads the second and fourth causes of action only against KSR, and, therefore the court dismisses them. The court dismisses the third cause of action for breach of the alleged partnership agreement. The fifth cause of action, alleging breach of the implied covenant of good faith and fair dealing, fails for lack of privity between Francis and Wiggins. The court also dismisses the sixth cause of action for breach of fiduciary duty because Wiggins and Francis had no fiduciary relationship absent a valid partnership agreement. Finally, the court dismisses the seventh cause of action for unjust enrichment because there is no property in the possession of Wiggins to disgorge. Further, the court precludes the fifth cause of action, breach of the implied covenant of good faith and fair dealing, in addition to the seventh cause of action for unjust enrichment as duplicative of the breach of an oral partnership agreement.

In addition, plaintiff must assert claims for compensation as a licensed real estate salesperson against KSR, not Wiggins. Real Property Law § 442-a, captioned “Compensation of salesmen; restrictions,” makes this clear. It provides:

“No real estate salesman in any place in which this article is applicable shall receive or demand compensation of any kind from any person, **other than a duly licensed real estate broker with whom he associated**, for any service rendered or work done by such salesman in the appraising, buying, selling, exchanging, leasing, renting or negotiating of a loan upon any real estate”

(Real Property Law § 442-a).

At this point, a declaration that Francis is entitled to one half of the commission from Wiggins, rather than KSR, violates RPL § 442-a (*Matusik v Ward*, 68 AD3d 1213, 1214 [3rd Dept 2009]; *Boxhoorn v CP Realty Associates*, 145 Misc2d 64, 66 [NY County, Civil Ct 1989]). Even if Francis had sufficiently alleged the existence of an oral partnership agreement, that agreement cannot circumvent RPL 442-a. As plaintiff only seeks a commission as opposed to a finder’s fee or a consultant fee, the alleged oral partnership would violate RPL 442-a and, therefore, under the circumstances, there can be no recovery (*see Kucher v Sohayegh*, 182 AD3d 523 [1st Dept 2020]).

Accordingly, it is

ORDERED that the court grants defendant Nicholas Wiggins’ motion to dismiss the complaint for failure to state a cause of action, pursuant to CPLR 3211 (a) (7); and it is further

ADJUGED, DECREED, AND DECLARED that Gregory Francis is not entitled to a partial commission from the Hanley Deal.

Dated: August 5, 2020
New York, NY

ENTER:



HON. MELISSA A. CRANE, J.S.C.