SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR F. ENGORON** **PART** **IAS MOTION 37EFM**

Justice

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DOUGLAS ELLIMAN LLC

Plaintiff,

- v -

E.T.A. REALTY, INC.,

Defendant.

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INDEX NO. 656372/2018

MOTION DATE 02/26/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is hereby ordered that plaintiff's motion is denied and defendant's cross-motion is granted.

Background

Plaintiff, Douglas Elliman LLC ("plaintiff"), commenced this breach of contract action pursuant to an exclusive real estate brokerage agreement against defendant, E.T.A. Realty, Inc. ("defendant"), to collect an unpaid broker's fee for the sale of real property at 47-01 Vernon Boulevard, Long Island City, Queens ("the property"). Plaintiff is a licensed real estate brokerage authorized to do business in New York State and whose principal office is located at 575 Madison Avenue, New York, NY. Defendant is a domestic corporation that owned the property.

For approximately two years prior to December 2017, the property had been on the market "for sale by owner" (Exhibit 2, Doc. 81). Defendant hung large "for sale" signs on the building at the property, to advertise to area brokers and property investors. Among the various people with whom defendant spoke were representatives of Circle F Capital, but at that time a sale did not take place (Doc. 79). On November 29, 2017, defendant entered into an exclusive brokerage agreement ("the agreement"), covering December 1, 2017 to Febraury 1, 2018, with plaintiff for sale of the property through its broker-agent Alexander Pereira ("Pereira") (Exhibit D, Doc. 61). The parties subsequently extended the agreement to February 28, 2018 (Exhibit E, Doc. 62). The agreement entitled plaintiff to a two percent (2%) commission of the selling price "upon closing of the sale of the property" (Exhibit D, Doc. 61). The agreement also provided that plaintiff had a right, within ten days of termination of the agreement, to provide a list of six prospective buyers to defendant "with whom negotiations are pending" (a somewhat vague test), and if defendant "enters into a transaction" "within three months of termination" of the agreement with one of those buyers, plaintiff would be entitled to a commission on the sale (Exhibit D, Doc. 61). On or about December 12, 2017, during the term of the agreement, Pereira

presented defendant a joint written offer to purchase the property for six-million dollars ($6,000,000) on behalf of prospective buyers Circle F Capital and iCross Fund (the latter of whom was to provide the financing) (Exhibit F, Doc. 63). That offer did not result in a transaction.

On March 5, 2018, plaintiff sent defendant a letter confirming termination of the agreement. The letter stated that "if within ninety (90) days after the expiration date, a contract is signed to sell the property to a purchaser on [a list at the end of the letter], we shall be entitled to the commission provided for in paragraph 5 of this Agreement" (Exhibit O, Doc. 72). Circle F Capital and iCross Fund were included on the list. Defendant neither negotiated nor signed this termination letter. Pereira continued to communicate with defendant about potential sales until March 8, 2018, eight days following termination of the agreement (Exhibit G, Doc. 64).

Meanwhile, on or about March 4, 2018, defendant E.T.A. Realty and Circle F Capital executed a letter of "interest" for the purchase of the property for six million four hundred thousand dollars ($6,400,000), stating, in pertinent part:

> This letter expresses the interest of Circle F Capital, LLC or assigns (the Purchaser) in acquiring the properties listed. . . Seller and Purchaser shall negotiate a Purchase and Sale Agreement (PSA). . . Upon execution of the PSA, the Purchaser shall deposit into escrow Three Hundred Thousand Dollars ($300,000). . . This LOI is being sent in good faith by the Purchaser and does not legally bind the purchaser to any of the terms written.

(Exhibit H, Doc. 65).

On or about March 20, 2018, defendant's attorney sent draft contracts of sale to the buyer's attorney (Exhibit I, Doc. 66). In June 2018, defendant and the "Purchaser" (Exhibit , Doc. 65) signed a contract of sale for six-million fifty thousand dollars ($6,050,000) (Exhibit J, Doc. 67). Circle F Capital was not named grantee/buyer in the contract or deed; 47-01 Vernon, LLC was. However, on November 9, 2018, in an email correspondence, purchaser's attorney stated that 47-01 Vernon, LLC made this purchase under the "Circle F Umbrella" (Exhibit L, Doc. 69). On November 26, 2018, the deed was recorded (Exhibit K Doc. 68). Defendant has apparently refused to pay the broker commission, relying on language in the termination letter and stating that no "contract of sale" had been entered into with the buyer within ninety (90) days of termination of the agreement (Exhibit O, Doc. 72).

Plaintiff now moves, pursuant to CPLR 3212, for summary judgment in the amount of one hundred twenty-one thousand dollars ($121,000), which is two percent (2%) of the purchase price of six-million fifty-thousand dollars ($6,050,000), arguing, essentially, that plaintiff was both the procuring cause of the sale and is entitled to a commission pursuant to the agreement (Doc. 55, 56). Defendant now cross-moves, pursuant to CPLR 3212, for summary judgment, arguing that (1) the transaction occurred after the 90-day window period that the agreement provides, and (2) plaintiff was not "the procuring cause" of the subject transaction (Doc. 79).

Discussion

Summary judgment, pursuant to CPLR 3212, is properly granted when, viewed in a light most favorable to the non-movant, it is clear that there exist no triable issues of fact. Alvarez v Prospect Hosp., 68 NY2d 320, 325 (1986). In determining whether triable issues of fact are present, the moving party bears the burden of making a prima facie showing which demonstrates entitlement to summary judgment as a matter of law. Zuckerman v City of New York, 49 N.Y.2d 557, 562 (1980); Friends of Animals, Inc. v Associated Fur Mfrs., Inc., 46 N.Y.2d 1065, 1067 (1979).

It is well-settled that a real estate broker is not entitled to a commission if its contract terminates before the buyer and seller negotiate the subject transaction. Douglas Real Estate Mgt. Corp. v Montgomery Ward & Co., 4 NY2d 33, 37 (1958); Sibbald v Bethlehem Iron Co., 83 NY 378 (1881); Jagarnauth v Massey Knakal Realty Servs., Inc., 104 AD3d 564, 565 (1st Dept. 2013).

Here, the agreement between the parties stated as follows:

> If within three (3) months from the termination of this agreement, Principal enters into a transaction with any prospect with whom negotiations are pending at the time of such termination as set forth on a list of 6 prospects to be furnished to Principal by Agent within ten (10) business days after the termination of this agreement, Principal will pay to Agent the commission as outlined in this agreement as if this agreement was not canceled.

(Emphasis added) (Exhibit D Doc. 61).

Plaintiff argues that the March 4, 2018 letter of intent between buyer Circle F Capital and defendant constitutes a "transaction" (Doc. 74). This Court disagrees with that conclusion. The March 4, 2018 letter explicitly states that "[t]his LOI is being sent in good faith by the Purchaser and does not legally bind the purchaser to any of the terms written" (Exhibit H, Doc. 65). The plain meaning of the letter, under the objective theory of contracts, would not have led a reasonably prudent person in the same position as defendant to find a "meeting of the minds" between the parties sufficient to create a "transaction." Rather, within its four corners, the letter clearly indicates that it was simply an expression of interest and expressly stated that it was not binding on the potential purchaser (Exhibit H, Doc. 65). The signing of the contract of sale in June 2018 commenced the transaction.

In Granger v Schachenmayr, 49 AD3d 1079, 1081 (3d Dept 2008), the court held that a letter of intent is not a transaction when "there was no 'meeting of the minds on the essential terms of the transaction' that would trigger. . . entitlement to a commission." Furthermore, the Court of Appeals has held:

> We deem it settled that 'mere agreement as to price on a proposed sale of real property does not constitute a meeting of the minds of vendor and vendee so as to entitle the real estate broker to commissions. The parties must be brought to agreement with respect to all terms customarily encountered in such a transaction.'

Kaelin v Warner, 27 NY2d 352, 355 (1971) (internal citations omitted).

In Cochran v Norkunas 398 Md. 1, 5 (Maryland Court of Appeals 2007), the court considered "[whether] a negotiated letter of intent that contains all essential and material terms of a proposed contract to be entered, supported by consideration, and executed by all parties [is] an enforceable agreement under Maryland law." The court held "that because the parties did not intend to be bound, the letter of intent is unenforceable." Id. at 5. The Court of Appeals held:

> Manifestation of mutual assent includes two issues: (1) intent to be bound, and (2) definiteness of terms. Failure of parties to agree on an essential term of a contract may indicate that the mutual assent required to make a contract is lacking. If the parties do not intend to be bound until a final agreement is executed, there is no contract. . . In the case sub judice, we assume arguendo that the letter of intent contained all essential material terms, and we need not address whether the letter of intent contained all the material terms essential to complete a contract, because it is clear that the parties did not intend to be bound by the letter of intent alone.

Id. at 14-15.

Similarly, in the instant case, the letter of intent expressly noted that the letter "does not legally bind the purchaser to any of the terms written" (Exhibit H, Doc. 65). This unilateral disclaimer by the buyer defeats the bilateral "meeting of the minds" element that this Court needs to see, for a transaction to occur. Furthermore, the contract of sale, signed in June 2018, was the "transaction." As the "transaction" occurred outside the 90-day window stated in the agreement, defendant is not obligated to pay a commission.

Conclusion

Thus, for the reasons stated herein, plaintiff, Douglas Elliman LLC's motion for summary judgment is denied; defendant, E.T.A. Realty's cross-motion for summary judgment is granted; and the Clerk is hereby directed to enter judgment in favor of defendant, dismissing the instant action with prejudice.

8/12/2020
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE