

Compass Hamptons, LLC v Sotheby's Intl. Realty

2020 NY Slip Op 34258(U)

December 22, 2020

Supreme Court, New York County

Docket Number: 153152/2020

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

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INDEX NO. 153152/2020

COMPASS HAMPTONS, LLC

MOTION DATE 12/18/2020

Plaintiff,

MOTION SEQ. NO. 001

- v -

SOTHEBY'S INTERNATIONAL REALTY,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

were read on this motion to/for DISMISSAL.

The motion by defendant to dismiss is granted and the cross-motion by plaintiff for summary judgment is denied.

Background

This case is about a commission from the sale of a property in Southampton, New York. Plaintiff claims that it entered into a universal co-brokerage agreement with defendant in September 2015 that provided that defendant would pay plaintiff a commission if the property were sold or leased by plaintiff. Plaintiff alleges that during the approximately two-year term of the agreement, plaintiff introduced the eventual buyers to the premises.

In April 2017, the eventual buyers leased the premises for a "summer rental." Plaintiff admits that it received a commission check from defendant for the rental. It also claims it received a second commission check in March 2018 when the eventual buyers executed a second lease agreement.

However, in May 2019, the property was sold to the people who initially rented the premises. Plaintiff claims it should have received a commission for finding the buyer because it found them (although they rented for a few years prior to the sale).

Defendant moves to dismiss on the ground that the contract upon which plaintiff relies expired in 2017, well before the sale of the property. It claims that the buyer, the seller and defendant negotiated the terms of the contract in 2019 and plaintiff had no role in the sale. It insists that plaintiff's claim for breach of contract must be dismissed because no contract was attached to the complaint and, even if it was, there is no allegation that plaintiff breached any obligations.

Defendant argues that, at best, plaintiff found successful renters for the property who eventually decided to buy the property a few years later. It claims that plaintiff simply was not involved in the sale of the property. It concludes that plaintiff's quasi-contract claims must be dismissed as well.

In opposition and in support of its cross-motion for summary judgment (despite the fact that issue has not yet been joined), plaintiff emphasizes that it was the procuring cause of the sale. It found the eventual buyers and allegedly had conversations with them about buying the property.

In reply, defendant emphasizes that plaintiff was paid in connection with the 2018 lease (which was not part of the brokerage agreement) by the eventual buyers instead of the seller. Defendant points out that plaintiff was paid significantly less for the 2018 lease and has not explained this disparity nor has it produced any documentation supporting the alleged payment. Defendant also insists there is no basis for plaintiff to recover punitive damages.

In reply to its cross-motion, plaintiff emphasizes that it was the procuring cause of the sale—identifying the renters who eventually bought the property—and it should receive a commission for it.

Breach of Contract

The Court’s analysis begins with the co-brokerage agreement attached by plaintiff in its papers (NYSCEF Doc. No. 16). This agreement states that “No commission is due unless and until title passes to a buyer procured by the Selling Broker and the commission is collected by the Exclusive Broker, or in the case of an Exclusive Rental, leases are fully executed and the commission is actually collected by Exclusive Broker” (NYSCEF Doc. No. 16 at 2). According to plaintiff, its rights with respect to this agreement, terminated on December 31, 2017 (NYSCEF Doc. No. 1, ¶ 8).

Based on the documents and allegations cited by plaintiff, the Court is unable to find that there is a cognizable breach of contract cause of action. Plaintiff found renters for 2017 and received a commission for it. Nothing in the co-brokerage agreement mentions that a broker could receive a commission for a buyer who purchased the property nearly two years after the brokerage agreement expired. And the Court cannot read this clear and unambiguous contract to read otherwise. It cannot, for instance, infer a clause that would entitle plaintiff to receive a commission because the renters decided to purchase the property a few years later.

There is nothing on these papers to show that defendant breached any term of the contract upon which plaintiff relies.

Quasi-Contract Theories

The Court also dismisses plaintiff’s quasi contract theories of recovery: plaintiff asserts claims for quantum meruit, unjust enrichment, and equitable estoppel. “[I]n the absence of an

agreement to the contrary, a real estate broker will be deemed to have earned his commission when he produces a buyer who is ready willing and able to purchase at the terms set by the seller” (*Lane-Real Estate Dept. Store, Inc. v Lawlet Corp.*, 28 NY2d 36, 42, 319 NYS2d 836 [1971]). “[A] broker's commission is deemed earned when . . . a ready, willing and able buyer is produced who assents to the sellers' terms of sale” (*A.J. Clarke Real Estate Corp. v Meyers*, 27 AD3d 230, 230, 810 NYS2d 186 [1st Dept 2006] [citation omitted]).

There is no sufficient allegation that plaintiff produced someone ready to *buy* the property. Instead, it procured a renter who, according to plaintiff, talked about wanting to buy the property. But a desire to eventually purchase a property does not entitle plaintiff to a commission especially here where the renters renewed the lease in 2018 and then bought the property in 2019. Plaintiff's theory is that it should get a commission because the renters it found decided to buy the property years later. Under that argument, a broker would be entitled to a commission every time a renter decided to buy the property regardless of what happens in the intervening years. Of course, these are sophisticated parties and they were clearly capable of including language about receiving a commission in the event that a renter eventually decides to buy the property. But they did not. Instead, plaintiff appears to want to get a commission for something it had no role in—the purchase of the property.

While emails are attached by plaintiff, the latest email is from January 2018 and it concerns renting the property (NYSCEF Doc. No. 25). There is nothing submitted regarding the eventual buyers and plaintiff about taking concrete steps to buy the property in 2019, such as submitting an offer to inquiring about a price.

And, as defendant points out, the rental in 2018 occurred after discussions between the renters and the owner (NYSCEF Doc. No. 33 at 2 [affidavit of Mr. Reale, brokerage manager for

defendant]). In fact, Mr. Kulman (a real estate broker for plaintiff) claimed that plaintiff received a commission for \$21,150 for the 2017 rental but only \$5,000 for the 2018 lease renewal (NYSCEF Doc. No. 11 at 3, 5). Conveniently, plaintiff omits the documentation about the 2018 lease renewal but, clearly, the commission received for 2018 had nothing to do with the brokerage agreement which had already expired. The agreement required a 10% commission and it is preposterous to think that the lease renewal had a precipitous price drop.

Mr. Reale also explains that “When the Property was sold in 2019, Ms. Gersten [Seller] invoked a clause in the listing agreement that allowed her to pay a reduced commission if she procured a buyer directly, which is what Ms. Gersten did” (*id.*). Moreover, plaintiff produced nothing to show that the renters it found made any offers to purchase the property during the brokerage period or that plaintiff had any communications with the seller during about a sale of the property. Instead, the record before this Court shows that plaintiff found the renters, these renters re-upped in 2018 and then bought the property.

Summary

The Court recognizes that it must accept all facts asserted by plaintiff as true on a motion to dismiss. Here, those facts do not state a basis upon which plaintiff can get a commission in a sale in which it had no role and well after the expiration of its contract. There is no contract that defendant breached and the quasi contract theories are without merit. Plaintiff appears to want a commission because it feels it found the buyers years before the sale and defendant is taking advantage of its work.

But nothing submitted shows that plaintiff had any role in the sale; there are no emails between plaintiff and the buyers, sellers or even defendant about the sale of the property. Plaintiff is not entitled to a commission simply because it says it is. It had to do something with

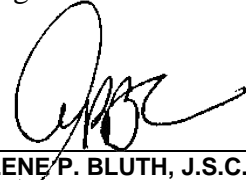
the sale. "It is not enough simply to open negotiations between parties; unless the broker can produce a purchaser who is ready, willing and able to buy, under the terms as specified by the seller, he has done nothing to induce a purchase, and will not be entitled to a commission even if that prospect ultimately purchases the property" (*Cushman & Wakefield, Inc. v 214 E. 49th St. Corp.*, 218 AD2d 464, 466, 218 AD2d 464 [1st Dept 1996]). Having informal discussions about the sale of the property in 2017 and possibly 2018 does not state a basis to recover a commission on the sale of a property in 2019.

Accordingly, it is hereby

ORDERED that the motion by defendant to dismiss is granted and Clerk is directed to enter judgment according along with costs and disbursements upon presentation of proper papers therefor; and it is further

ORDERED that the cross-motion by plaintiff for summary judgment is denied.

12/22/2020
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	REFERENCE
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	