

NRT N.Y., LLC v Middlegate Funding LLC
2020 NY Slip Op 34297(U)
December 21, 2020
Supreme Court, New York County
Docket Number: 652904/2019
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS 015

NRT NEW YORK, LLC, d/b/a
THE CORCORAN GROUP,

Plaintiff,

- against -

MIDDLEGATE FUNDING LLC,
DOUGLAS ELLIMAN LLC, and
COMMISSION EXPRESS
NATIONAL, INC.,

Defendants.

Index No. 652904/2019

Motion Date 08/10/2019

Motion Sequence No. 001

**DECISION + ORDER ON
MOTION**

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

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 1 - 6, 8, 9, 11 - 23, 27, 28, 30 - 36, 38 - 46, 48, 50 - 53, were read on these motions for JUDGMENT, SUMMARY.

Defendants, Middlegate Funding LLC (“Middlegate”), Douglas Elliman LLC (“Douglas Elliman”), and Commission Express National, Inc.

(“Commission Express”), file competing summary judgment motions for a declaration of priority among alleged security interests of co-defendants on debts owed by non-party debtor Magda Schenone.

Douglas Elliman moves, pursuant to CPLR 3212, for summary judgment (1) declaring that its Judgment against Magda Schenone has priority over the alleged security interest of Middlegate; (2) dismissing

Middlegate's cross claim; and (3) declaring that any payments made by plaintiff, NRT New York LLC d/b/a The Corcoran Group ("The Corcoran Group"), in satisfaction of the security interests alleged in this action be first applied in payment and satisfaction of the Douglas Elliman Judgment.

Middlegate cross-moves for summary judgment (1) declaring that its security interest is superior to the alleged security interests of Douglas Elliman and Commission Express; (2) denying Douglas Elliman's summary judgment motion; and (3) directing plaintiff to turn over to Middlegate commissions otherwise payable by plaintiff to Magda Schenone.

Commission Express cross-moves for summary judgment (1) declaring that its interest in the commission otherwise payable by plaintiff to Magda Schenone holds priority on order of payment over the alleged interests of Middlegate and Douglas Elliman; (2) denying Douglas Elliman's motion for summary judgment; and (3) dismissing Middlegate's crossclaims.

BACKGROUND

Plaintiff brings this action seeking, among other things, a declaration as to which defendant is entitled to the commission of \$75,975.00 (the "Commission") earned by Magda Schenone upon the closing of the 2019 sale of the premises located at 322 West 57th Street, Unit 40H2, New York,

New York. The following facts are gleaned from the submissions of the parties.

Plaintiff is a Delaware real estate brokerage firm authorized to conduct business in New York (Interpleader Complaint (NYSCEF Doc. No. 2). Middlegate and Douglas Elliman are New York limited liability companies (*id.*). Commission Express is a District of Columbia corporation with offices in Queens, New York (*id.*).

Magda Schenone is as an independent contractor licensed salesperson associated with plaintiff (*id.*). Pursuant to an agreement with plaintiff, she is entitled to certain commission splits on her sales, upon their closings and plaintiff's receipt of the commission arising from such sales (*id.*). Magda Schenone is also a former broker-agent with Douglas Elliman (Affirm, NYSCEF Doc. No. 12).

Each defendant asserts entitlement to all or a portion of the Commission based on a debt owed by Magda Schenone, and submits documents purporting to support its claim.

In particular, Middlegate asserts that a Master Commission Sales and Security Agreement, dated June 15, 2015 (Master Commission Sales and Security Agreement, NYSCEF Doc. No. 40), among other things, authorizes Magda Schenone to offer to sell commissions to it, and gives it a

continuing first security interest in the collateral. Middlegate also maintains that a UCC-1 Financing Statement, filed on June 26, 2015, bearing Filing No. 201506268248140, grants it a secured interest in all of Magda Schenone's "now owned and hereafter acquired Accounts (including all current and future Commissions), instruments, investment Property, and General Intangibles" (UCC Financing Statement, NYSCEF Doc. No. 17).

On January 29, 2016, Middlegate and Magda Schenone executed a Commission Sale Agreement, bearing Deal No. D003093, in the amount of \$90,000.00, plus interest, costs, and fees. On March 23, 2016, Middlegate and Magda Schenone executed a Commission Sale Agreement, bearing Deal No. 3396, in the amount of \$50,000.00, plus interest, costs, and fees. Magda Schenone made some payments toward the amounts outstanding under the Commission Sale Agreements. However, on February 5, 2018, Magda Schenone executed an Affidavit of Judgment by Confession in favor of Middlegate in the sum of \$115,000.00, plus interest (Affidavit, NYSCEF Doc. No. 42). Magda Schenone defaulted under the Affidavit of Judgment by Confession, and Middlegate obtained a Judgment, entered on September 11, 2018, against her in the amount of \$111,955.78 (Judgment, NYSCEF Doc. No. 19).

Plaintiff was served with a Restraining Notice dated April 9, 2019 (NYSCEF Doc. No.5) regarding the Middlegate Judgment. The Restraining Notice prohibits plaintiff from, among other things:

“Dispos[ing] of any debt to the judgment debtors to any person other than the sheriff, except under direction of the sheriff or pursuant to order of the court, until the expiration of one year after this notice is served upon you, or until the judgment is satisfied or vacated, whichever event occurs first”

(id.).

Douglas Elliman bases its claim for the Commission on a Judgment, entered on March 6, 2018, against Magda Schenone in the original amount of \$70,000.00 (Judgment, NYSCEF Doc. No. 18); an Income Execution, dated March 15, 2018 directing Magda Schenone’s employer to withhold installments amounting to 10% of her earnings to satisfy the Judgment (Income Execution, NYSCEF Doc. No. 3); and a Levy, dated April 11, 2018, in the sum of \$74,158.20 (Levy, NYSCEF Doc. No. 21) from The City Marshall notifying plaintiff of the Income Execution. While serving as a Douglas Elliman broker-agent, Magda Schenone had borrowed money against future commissions, signed promissory notes, and defaulted in repayment resulting in a \$70,000.00 Judgment (Affirm, NYSCEF Doc. No. 12).

Commission Express asserts that a UCC-1 Financing Statement, filed on August 10, 2017, bearing Filing No. 201708100395972, grants it a secured interest in all of Magda Schenone's accounts receivable "now owned and hereafter acquired, without limitation" (UCC Financing Statement, NYSCEF Doc. No. 34). Commission Express further asserts that an April 4, 2019 Notice of Assignment gave it a contractual interest in \$65,000.00 of the Commission. The Notice of Assignment states, in part:

"Payments due or to become due to Agent pursuant to the [commission account receivable] shall be made to [plaintiff] by the Settlement Agent for and on behalf of [Commission Express] and shall be held in trust for and on behalf of [Commission Express] and shall be held in trust and paid directly to [Commission Express] ..."

(Notice of Assignment, NYSCEF Doc. No. 33). The assignment was based on an advance of the Commission to Magda Schenone from Commission Express (see Email, NYSCEF Doc. No. 4).

As stated, the Interpleader Complaint seeks, among other things, a declaration as to which defendant is entitled to the Commission (NYSCEF Doc. No. 2). Middlegate's Answer includes general denials of the allegations in the Interpleader Complaint, and a crossclaim for a Judgment declaring that its interest in the Commission is superior to the interests of

co-defendants (Answer, NYSCEF Doc. No. 8). Douglas Elliman answered, generally denying the allegations in the Interpleader Complaint (Answer, NYSCEF Doc. No. 6), and in Middlegate's crossclaim (Answer, NYSCEF Doc. No. 9). The Answer of Commission Express includes general denials of the allegations in the Interpleader Complaint (Answer, NYSCEF Doc. No. 25).

Each defendant now seeks summary judgment, among other things, declaring that its interest in the Commission is superior to the interests of co-defendants.

DISCUSSION

It is well settled that the proponent of a summary judgment motion must make a prima face showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see JMD Holding Corp. v Congress Fin. Corp.*, 43 NY3d 373, 384 [2005]). However, once the showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to

establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York, supra*). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

As stated, the Interpleader Complaint essentially seeks a declaration as to which defendant is entitled to the Commission. “[T]he order of priority among judgments is to be determined strictly in accordance with the chronological service of execution levies and the filing of orders for turnover or receiverships, as the case may be” (*City of New York v Panzirer, 23 AD2d 158, 160* [1st Dept. 1965]; see also CPLR 5234[c]).

In seeking summary judgment, each defendant argues that its alleged security interest in the Commission is superior to the interest of co-defendants. Middlegate contends that its rights are superior since its June 26, 2015 UCC-1 Financing Statement filing predates co-defendants’ claimed security interest in the Commission. Douglas Elliman argues that co-defendants’ UCC-1 Financing Statements are insufficient to create a security interest in the Commission, and that its March 6, 2018 Judgment against Magda Schenone, March 15, 2018 Income Execution, and April 11, 2018 Levy give it priority over co-defendants’ claimed interest in the Commission. Commission Express asserts that its contractual interest the

Commission has priority on order of payment over the alleged interests of co-defendants.

UCC article 9 sets forth a comprehensive scheme to regulate security interests in personal property (see *Travelers Cas. & Sur. Co. of America v Target Mech. Sys., Inc.*, 6 Misc 3d 1003[A] *3 [Sup Ct, Kings County 2004]).

“It establishes a system that enables creditors to protect their interests in collateral often held by debtors or other third parties. The article includes a notice-filing concept by which, as a matter of public record, personal property is declared encumbered. Secured creditors may avail themselves of the protections afforded in article 9 by filing a UCC-1 financing statement in prescribed repositories. The filings serve to warn others, such as potential purchasers, transferees, or other creditors, of encumbrances”

(*id.*). UCC article 9 also applies to ... “a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract” (UCC 9-109[a][1]).

UCC 9-502(a) outlines the requirements for a proper filing of a Financing Statement, providing, in part, that “a financing statement is sufficient only if it: (1) provides the name of the debtor, (2) provides the name of the secured party or a representative of the secured party, and (3) indicates the collateral covered by the financing statement” “In order

for a security instrument to be valid and enforceable against the debtor and third parties, the debtor must sign a document describing the collateral, and the security interest must attach and be perfected” (*Lashua v LaDuke*, 272 AD2d 750, 751 [3d Dept 2000]; see also UCC 9-203). Under the UCC, a party can have a security interest in real estate commissions (see *Burton v Lucido*, 42 Misc 3d 1229[A], [Sup Ct, NY County 2014, revd on other grounds 135 AD3d 885 [1st Dept 2016])

It is undisputed that Middlegate’s UCC-1 Financing Statement filed on June 26, 2015 predates co-defendants’ claimed interest in the Commission. Where a secured creditor’s UCC-1 filing predates perfection by judgment creditors of their judgment liens, the rights of the secured creditor comes first (see *Travelers Cas. & Sur. Co. of America v Target Mech. Sys., Inc.*, *supra*, *4; see also *Matter of Resner v Greeley*, 212 AD2d 619 [2d Dept 1995])). Thus, Middlegate establishes entitlement to judgment as a matter of law.

Douglas Elliman and Commission Express fail to raise any triable issues of fact. The assertion that the Middlegate UCC-1 Financing Statement does not create a security interest because it does not secure identifiable proceeds lacks merit. UCC 9-315(a)(2) states that “a security interest attaches to any identifiable proceeds or collateral.” Proceeds are

identifiable “so long as there is a reasonable connection between the proceeds and the collateral secured by the security interest” (*Square Mile Structured Debt [One] LLC v Swig*, 2010 WL 4167253, *4 [Sup Ct, NY County 2010]). “A description of collateral as ‘all of the debtor’s assets’ or ‘all of the debtor’s personal property’ or using words of similar import does not reasonably identify the collateral” (UCC 9-108[c]). Rather, “a description of personal ... property is sufficient, whether or not it is specific, if it reasonably identifies what is described” (UCC 9-108[a]). Collateral is reasonably identified as long as the identity collateral is objectively determinable: that is; “if a third party could determine what items of the debtor’s collateral are subject to the creditor’s security interest” (*Rice v Miller*, 21 Misc 3d 573, 577 [Sup Ct, Erie County 2008]).

As stated, the June 26, 2015 UCC-1 Financing Statement granted Middlegate a secured interest in all of Magda Schenone’s “now owned and hereafter acquired Accounts (including all current and future Commissions)” UCC 9-102(a)(2) defines the term “account” to mean “a right to payment of a monetary obligation, whether or not earned by performance, ... for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, [or] for services rendered or to be rendered”

Here, the Court is satisfied that a third party could reasonably determine from the June 26, 2015 UCC-1 Financing Statement that Magda Schenone's current and future commissions are subject to Middlegate's security interest.

Further, a review of the submissions reveals nothing to support the position that the Commission belongs to plaintiff. In fact, in the Interpleader Complaint, plaintiff acknowledges that the Commission does not belong to it, and seeks direction as to its rightful disposition.

The assertion that the April 4, 2019 Notice of Assignment granted Commission Express an unencumbered contractual interest in the commission is also insufficient to defeat summary judgment. The Notice of Assignment cannot give Commission Express a priority interest since it was executed approximately four years after Middlegate filed its UCC-1 Financing Statement (*see City of New York v Panzirer, supra*). Furthermore, Middlegate's June 26, 2015 UCC-1 filing served to warn others of encumbrances (*see Travelers Cas. & Sur. Co. of America v Target Mech. Sys., Inc., supra*). As such, the assertion that plaintiff represented that there were no competing interests, is unavailing.

Commission Express' reliance on UCC 9-330(d), pertaining to priority of a "purchaser of an instrument", is misplaced since Commission Express

claims a security interest in the Commission based on a Notice of Assignment, not as a purchaser.

Accordingly, it is

ORDERED that the motion by defendant Douglas Elliman LLC is denied in its entirety; and it is further

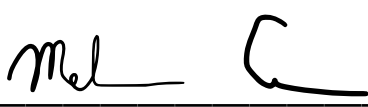
ORDERED that the cross motion by defendant Commission Express National, Inc. is denied in its entirety; and it is further

ORDERED that the cross motion for summary by Middlegate Funding LLC is granted; and it is further

ORDERED and ADJUDGED that the security interest of Middlegate Funding LLC in the Commission of Magda Schenone is superior to interests of Douglas Elliman LLC and Commission Express National, Inc., and plaintiff, NRT New York LLC is directed to turn over the Commission to Middlegate Funding LLC; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: December 21, 2020



J.S.C.

- 1. CHECK ONE:-----
- 2. CHECK AS APPROPRIATE:----- MOTION IS:
- 3. CHECK IF APPROPRIATE:-----

- CASE DISPOSED
- GRANTED DENIED GRANTED IN OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT
- REFERENCE

