CBRE, Inc. v LDC Props., LLC
2021 NY Slip Op 30008(U)
January 4, 2021
Supreme Court, New York County
Docket Number: 653702/2019
Judge: Laurence L. Love
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LAURENCE L. LOVE** **PART** **IAS MOTION 63M**

Justice

---X

CBRE, INC.,

Plaintiff,

- v -

LDC PROPERTIES, LLC, MICHAEL LOSCO

Defendants.

---X

INDEX NO. 653702/2019

MOTION DATE 10/22/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

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

Upon the foregoing documents, plaintiff's motion for partial summary judgment in this breach of contract action against LDC Properties, LLC, for damages in the sum of $150,000 and defendants' cross motion to 1) compel plaintiff to arbitrate the parties' dispute according to the mandatory arbitration provision of paragraph thirteen of their exclusive sales listing and commission agreement, dated January 13, 2016; and 2) for an order dismissing the action against Michael Losco individually, per New York LLC Law 609(a) and 610 are decided as follows:

CBRE, Inc., is a real estate broker and LDC Properties, LLC was the owner of a property located at 611 West Hartsdale Avenue, White Plains, New York 10607. Plaintiff's complaint alleges that Michael Losco was the managing member of LDC Properties and was authorized to bind LDC to agreements with brokers. Allegedly, CBRE entered into a contract with LDC on January 13, 2016 to sell the property and an amendment of the listing agreement further provided that if LDC sold the property to Eden Technologies, CBRE would be owed a fee of $150,000. On or about March 30, 2017, LDC entered into a purchase and sale agreement with Eden

Technologies. CBRE sent an invoice to LDC for $150,000 which has not been paid resulting in the instant action.

A summons and complaint were filed on June 25, 2019 and issue was joined by an answer filed on July 22, 2019.

CPLR § 3212 (b) states that, "the [summary] motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented" (see *Glick & Dolleck Inc v Tri-Pac Export Corp*, 22 NY2d 439, 441 [1968]). "The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact" (see *Alvarez v. Prospect Hospital*, 68 NY2d 320 (1986). "Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable" (see *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]). On summary judgment, "facts must be viewed in the light most favorable to the non-moving party" (see *Vega v Restani Constr Corp*, 18 NY3d 499, 503 [2012]).

In support of its motion, plaintiff submits the affidavit of Louis Zuckerman, senior vice president of investment properties in the capital markets division of CBRE, Inc. Mr. Zuckerman affirms the amendment of the listing agreement, the selling of the property to 611 West Hartsdale Ave. LLC, which was a single purpose entity created by Eden Technologies, and the broker commission of $150,000. Plaintiff submits the amended exclusive sales listing and commission agreement signed by LDC Properties, LLC, member, Michael Losco, dated August 30, 2016 (see NYSCEF Doc. No. 19).

Defendants submit the affidavit of Michael Losco, the manager as well as a member of LDC Properties, LLC. Michael Losco highlights paragraph thirteen of the exclusive sales listing and commission agreement dated February 2, 2016, signed by Michael Losco and Robert Caruso of CBRE, Inc. Paragraph thirteen states, "[i]n the event of any dispute between owner and Broker relating to this Agreement, … Owner and Broker agree that such dispute shall be resolved by means of binding arbitration" (see NYSCEF Doc. No. 17).

Michael Losco's affidavit states in paragraph fifteen, "CBRE was not the 'procuring cause' of the sale of the Property (it was not involved) and that material issue of fact remains in this case" (see NYSCEF Doc. No. 29), but makes no mention of the amendment to the exclusive sales listing and commission agreement, dated August 30, 2016. In support of its argument, defendant cites *Saunders Ventures, Inc. v. Catcove Group, Inc.*, 151 A.D.3d 991 (2nd Dept 2017) which holds that "to prevail on a cause of action to recover a commission, the broker must establish 1) that it is duly licensed, 2) that it had a contract, express or implied, with the party to be charged with paying the commission, and 3) that it was the procuring cause of the sale." In opposition, plaintiff cites *Rachmani Corp. v. 9 E. 96th St. Apt. Corp.*, 211 A.D.2d 262, 268 (1995), which holds that "an exclusive right to sell agreement entitles the broker to receive commission on a sale to any purchaser, whether or not the broker played a part in the negotiations."

Plaintiff submits the contract, dated January 13, 2016, paragraph two, "[o]wner agrees to pay broker a sales commission equal to a percentage of the gross sales price or minimum fee as outlined below … This commission shall be earned for services rendered if, during the Term, the Property is sold to a purchaser procured by the Broker, Owner, or anyone else" (see NYSCEF Doc. No. 17, Ex. 4).

"Defendants' arguments that plaintiff is not entitled to a fee because it was not the 'procuring cause' or 'direct and proximate link' for the sale is unavailing, because the parties entered into an agreement that did not make the fee contingent on plaintiff's negotiation of the transaction" (see *Northeast Gen. Corp. v. Wellington Adv.*, 82 N.Y.2d 158, 162 – 163 [1993]).

In opposition, defendants cite only the binding arbitration clause in the exclusive sales listing and commission agreement, and do not deny the performance of nor the amount owed pursuant to the commission agreement. Defendant's answer fails to raise the defense of arbitration and "A right to arbitration may be modified, waived or abandoned, and once waived, the right to arbitrate cannot be regained" (see *Stark v. Molod Splitz De Santis & Stark, P.C.*, 9 N.Y.3d 59, 66 [2007]). Further, dismissal of this action at this point to pursue arbitration would be highly prejudicial.

Plaintiff presents the exclusive sales listing and commission agreement, the revised agreement, the signed purchase agreement, a deed record, and the CBRE invoice and as the documents show there was an exclusive sales listing and commission agreement for the property at 611 West Hartsdale Avenue, White Plains, New York 10607, and that the property was sold for $5,700,000, for a commission amount of $150,000. As such, plaintiff has established a *prima facie* entitlement to summary judgment and defendants have failed to raise an issue of fact precluding summary judgment.

As to the portion of defendant's motion seeking dismissal of this action as against Michael Losco, defendants cite New York Limited Liability Law Sections 609(a) and 610. NYLLC Law states in 609(a),

> Neither a member of a limited liability company, a manager of a limited liability company managed by a manager or managers nor an agent of a limited liability company is liable for any debts, obligations or liabilities of the limited liability company or each

> other, whether arising in tort, contract or otherwise, solely by reason of being such member, manager or agent or acting in such capacities or participating in the conduct of the business of the limited liability company.

NYLLC Law states in 610,

> A member of a limited liability company is not a proper party to proceedings by or against a limited liability company, except where the object is to enforce a member's right against or liability to the limited liability company.

Defendant Michael Losco states he cannot be held personally liable for any damages in this action by virtue of his limited involvement in exclusively acting as a manager of LDC. Defendants believe that Michael Losco received $50,000 at the closing of the subject property which defendants state should have been given to CBRE to apply to the earned commission. Plaintiff has not deposed Michael Losco and questions remain on plaintiff's causes of action for unjust enrichment, conversion, and other causes of action. As such, the motion for summary judgment is premature because plaintiff is entitled to discovery of matters exclusively within [defendant's] control concerning issues relating to its possible agency relationship" (see *Stern v. Starwood Hotels and Resorts Worldwide, Inc.*, 149 A.D.3d 496 [1st Dept. 2017]).

ORDERED that the branch of plaintiff's motion that seeks summary judgment in plaintiff's favor on the first cause of action for breach of contract of the complaint and a declaratory judgment with respect to the subject matter of that cause of action is granted; and it is further

ADJUDGED and DECLARED that plaintiff is entitled to the sum of $150,000; and it is further

ORDERED that plaintiff reserves its right to submit an application for attorneys' fee is granted; and it is further

ORDERED that the branch of defendant's cross-motion that seeks to compel CBRE, Inc. to arbitration is denied; and it is further

ORDERED that the branch of defendant's cross-motion that seeks dismissal as to Michael Losco is denied.

1/4/2021
DATE

LAURENCE L. LOVE, J.S.C.

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