

<b>Matter of Estate of Bullard</b>
2021 NY Slip Op 32224(U)
September 24, 2021
Surrogate's Court, Bronx County
Docket Number: File No. 2013-1100/E & F
Judge: Nelida Malave-Gonzalez
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## SURROGATE'S COURT, BRONX COUNTY

September 24 , 2021

## ESTATE OF HORACE BULLARD

File No.: 2013-1100/ E &amp; F

In this SCPA 1809 proceeding seeking to determine the validity of a claim, the executor, decedent's daughter, and sole residuary beneficiary, moves for summary judgment seeking to disallow a claim asserted by the respondent, a friend and business liaison of the decedent ("the claimant") pursuant to an alleged letter agreement dated September 1, 2011 (the "letter agreement"). The respondent filed opposition to the motion and a cross motion for summary judgment enforcing the letter agreement. The movant opposes the cross motion.

The decedent died testate on April 9, 2013. His will, dated January 6, 2013 was admitted to probate by decree dated June 6, 2013. According to the original probate petition, at the time of the decedent's death the estate consisted of wholly owned "S" corporations holding realty, as well as a counter claim in supreme court. The subject realty for the purposes of this proceeding are located in Coney Island, Brooklyn, New York at 1301 Surf Avenue (the "Shore Theater property), 1508-1520 Surf Avenue (the

“Thunderbolt property”), and West 21 Street (the “Washington Bath Site”), collectively known as the “Coney Island properties”. During his lifetime, the decedent requested the claimant, as a friend and business liaison, assist him in developing the Coney Island properties, among other projects, however those efforts were unsuccessful.

The claimant initially filed a compulsory accounting proceeding, which was later converted into the instant proceeding. The claim asserted is based on a 2011 letter agreement which was separately signed by the claimant and by the decedent, with each signature separately notarized. The decedent signed the letter agreement both in his individual capacity and in his capacity as the Chairman of the “S” corporations. The 2011 letter agreement recites that the claimant was involved with the decedent’s companies from 1992 with the intent of finding joint venture partners and financing the development of the “Coney Island Project”, in exchange for which the claimant was to receive a finder’s fee. The agreement continues that, two years after the claimant commenced working with the decedent, the claimants’s role expanded and he became a “development consultant and representative of my company’s Coney Island Project since 1994”.

In an expressly non-inclusive fashion, the 2011 letter agreement recites “including but not limited to” the “extensive efforts” rendered by the claimant while working on the Coney Island project and other matters for the decedent. According to the 2011 letter agreement, numerous “joint venture partnerships & my 25 acre amusement & retail

project didn't come to fruition as it was blocked by Mayor Giuliani." The 2011 letter agreement then states:

"In appreciation of your many years of the aforementioned efforts you have made, (as the aforementioned Finder's Fee will not materialize) therefore in the event of a sale/joint venture/long term lease I assigned you a 5% interest of the actual proceeds to me from the sale or joint venture development and/or long term lease of both the Thunderbolt and Shore Theater properties."

The Washington Bath Site is not at issue for summary judgment, as it was sold during the decedent's lifetime and the claimant received the sum of \$50,000.00 on May 11, 2005 in consideration of services relating to that realty. After the death of the decedent, the movant engaged in the sale of the Shore Theater property in December 2015 for a gross sale of \$14,000,000.00 and the claimant received no payment related to that property. At the present time, a portion of the Thunderbolt property is subject to an eminent domain litigation with the City of New York. It does not appear that efforts are being made to sell or develop the remaining portion of the Thunderbolt property.

In support of summary judgment, the movant asserts that the claim cannot be paid because the claimant is not a licensed real estate broker, that any oral contracts between the claimant and the decedent are barred by the Statute of Frauds, that the 2011 letter agreement is not

enforceable, and that the claim for quantum meruit can not be substantiated because the claimant has not documented or provided proof of a reasonable value of his services in excess of what has already been paid to him.

The movant claims that all actions taken by the claimant on behalf of the decedent and the company, were in contemplation of the ultimate goal of sale, lease or transfer of interest in the real property. Therefore claimant was de facto acting as a real estate broker under the relevant Real Property Law. As such, the five-percent fee in the 2011 letter agreement is a brokers commission, which the claimant is ineligible to collect as he is not a licensed real estate broker in New York State. In further support, movant annexes the a transcript of the claimant's deposition in which he states that he was owed eight to ten percent pursuant to oral agreements with the decedent, and not the five percent reflected in the 2011 letter agreement. Petitioner contends that such an assertion is based on oral agreements with the decedent and is barred by the Statute of Frauds.

Movant also avers that the 2011 letter agreement is not an enforceable agreement or contract as a matter of law as the material terms are too uncertain and indefinite. She asserts that enforceability of the 2011 letter agreement would require a date by which payment is to be made, include an expiration date, and provide a penalty for breach. Additionally the 2011 letter agreement does not explicitly state that it survives the death of the decedent; at the death of the decedent there would be no "proceeds actually received" to him, and therefore even if the letter were deemed a

contract, it expired upon his death. Moreover, even if the agreement were to be found to be enforceable, it has not been breached. The properties were inherited by the petitioner and not transferred by sale, long term lease, or development as is enumerated in the 2011 letter agreement, therefore movant contends that no breach has occurred

Lastly, movant claims that no monies are owed to the claimant as \$130,000.00 was paid to him over time for his work for the decedent's company. As the claimant has not made a showing of the value of his alleged services in excess of this sum and there is no way to ascertain a value of his services, and a claim for quantum meruit can not be substantiated.

In opposition to movant's summary judgment motion and in support of his cross motion, claimant contends that the 2011 letter agreement is an enforceable contract, and as to the five percent on actual proceeds from the two subject properties there is no question of fact. Though there is testimony from the claimant as to additional or greater percentages agreed to orally between the decedent and the claimant, claimant only seeks to enforce the terms contained in the 2011 letter agreement as a written contract.

Claimant contends that any reference to a finders fee or payment for any brokers services is not germane as the promise of same was rescinded by the 2011 letter agreement. The agreement specifies that five percent compensation is awarded in lieu of a finders fee and for

uncompensated services rendered over the course of several years. The 2011 letter agreement specifically states ...” in appreciation of your many years of the aforementioned efforts you made (as the aforementioned finders fee will not materialize).” Commencing in 1994 and even continuing after the 2011 letter agreement was signed, the claimant engaged in additional consulting services for the decedent such as marketing and sharing the profits in a screenplay written by the claimant with hope that it would develop into a feature film. These additional services are not limited to marketing the screen play but also presentations, spreadsheets, written correspondence, financial analysis models, reviewing title searches, researching and analyzing zoning codes, assisting in the litigation with the former Mayor’s office, acting as a company representative on phone calls and at meetings, as well as traveling to attend industry trade shows and participating as a member of the company’s development and media/advertising teams, none of which fall within the definitive terms necessitating a brokers license.

The claimant notes that the \$130,000.00 previously received and referenced by the movant was not compensation, but reimbursement and assistance in claimant’s office overhead costs during the period in which he was working without personal compensation. The payments made by decedent were also received prior to the 2011 letter agreement, the last of which was received by the claimant in November of 2010. The decedent therefore considered those reimbursements when entering into the 2011 letter agreement. The decedent, in the letter agreement, acknowledges that

the real estate venture for which the two had worked was ultimately blocked by litigation incited by then Mayor Giuliani.

In further support, claimant annexes electronic correspondence and the transcript testimony of a long time employee of the decedent, Diana LaToree, who is also the former co-executor in this estate, to further demonstrate the intent of the decedent in entering into the 2011 letter agreement. While there is no definite expiration date of the 2011 letter agreement, claimant contends that such an alleged ambiguity does not make a contract unenforceable where the intent of the parties, such as here, can be clearly ascertained.

Claimant therefore requests summary judgment solely determining the validity of his claim pursuant to the 2011 letter agreement, and requests a hearing to determine the sum certain owed to him. He seeks five percent of the 2015 sale of the Shore Theater Property, with statutory interest, and five percent of a fair market valuation of the remaining property at the time of decedent's death, also with statutory interest. Claimant opposes movants suggestion that the 2011 letter agreement was intended to expire at the death of the decedent. The testimony throughout the papers is conclusive that the decedent drafted the agreement after he was diagnosed with Lou Gehrig's Disease and was advised by his doctors to get his affairs in order. This makes clear that the decedent intended the 2011 letter agreement to survive his likely impending death.

In opposition to the cross motion, movant contends that

claimant's reliance on extrinsic and parol evidence, and the discretion of this court, to resolve ambiguities in the 2011 letter agreement is inappropriate, and reliance on such evidence, even in the light most favorable to the claimant, establishes a triable issue of fact. Further, that the reliance on such evidence is mis-characterized and over broad. Lastly, that the testimony of the movant used in claimant's cross-motion is taken out of context and contrary to its true meaning.

Summary judgment cannot be granted unless it clearly appears that no material issues of fact exist (see *Phillips v Joseph Kantor & Co.*, 31 NY2d 307 [1972]; *Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439 [1968]). The movant must make a prima facie showing of entitlement to judgment as matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Friends of Animals, Inc. v Associated Fur Mfrs. Inc.*, 46 NY2d 1065 [1979]). When the movant has made out a prima facie case, the burden of going forward shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (see *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion (See *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Although evidence that falls under the Dead Man's Statute is inadmissible at trial, such evidence is admissible in opposition to summary judgment (see *Phillips v*

Kantor & Co., 31 NY2d at 310 [1972]). Summary judgment is a drastic remedy which requires that the party opposing the motion be accorded every favorable inference and issues of credibility may not be determined on the motion but must await the trial (see *F. Garafalo Elec. Co. v New York Univ.*, 30 AD2d 186 [1st Dept 2002]).

Real property Law 440(1) defines a real estate broker as anyone who lists for sale, sells, exchanges, buys or rents, or offers or attempts to negotiate a sale or interest in real estate. Under New York law, real estate “finders” are merely required to find, interest, introduce and bring parties together for a deal which they themselves negotiate and consummate pursuant to a written agreement (See General Obligations Law 5-701[a][10]), while a “broker” is ordinarily required to bring the parties to a completed agreement by negotiating on behalf of the principal (see *Futersak v Perl*, 897 NY2d 886 [2010]) [The services performed by plaintiff pursuant to a written contract in locating a willing seller of commercial real estate for defendants in return for a percentage of the post-expense profits realized from defendant’s subsequent sale of the property were those of a real estate “finder” and not those of a real estate broker].

To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound (22 NY Jur 2d, Contracts section 9) (see *Kowalchuk v Stroup*, 61 AD3d 118 [2009]). Imperfect expression does not necessarily indicate that the parties to an agreement did not intend

to form a binding contract. To the extent that an agreement's terms may be ambiguous, indefinite, or uncertain, extrinsic or parol evidence is admissible to determine their meaning (see *Korff v Corbett*, 18 AD3d 248 [2005]) (where the court found a letter between an attorney and client, signed by both parties including individual and corporate capacities, was somewhat imprecise in language but was clearly from its face an intended contract. Further, that an agreement for an award of a percentage of 'gross receipts' was not too indefinite to be enforced as a contract). Mere assertion by one that contract language means something to him, where it is otherwise clear, unequivocal and understandable when read in connection with the whole contract, is not in and of itself enough to raise a triable issue of fact (see *Kasowitz Benson Torres and Friedman, LLP v Reade, et al*, 98 AD3d 403 [2012]).

It is clear from the facts, including the services of the claimant as outlined in the 2011 letter agreement by the decedent himself, that the claimant was not acting as a real estate broker as defined by the Real Property Law. Even in the light most favorable to the movant, the claimant was acting as a real estate finder, which is specifically and separately defined under the law, and is not subject to the requirement of a brokers license in order to receive a fee (see Real Property Law 440[1]).

The movant's claims that the 2011 letter agreement is unenforceable as no sale, long term lease or joint venture development of the properties may ever occur (see *Mellen & Jayne, Inc. v AIM Promotions*,

Inc., 33 AD3d 676 [2d Dept 2006]), lacks merit. The sale, long term lease or joint venture development events relating to those two properties were wholly within the control of the decedent during his lifetime and, now, is wholly within the control of the executor as, upon the decedent's death, the estate became the sole owner of the shares of the wholly owned "S" corporations holding and controlling those properties. Under such circumstances, the law and equity imply the duties of good faith and fair dealing and, in this case, that may translate into a duty to enter into a contract for the sale, long term lease or joint venture development of the two properties within a reasonable time where favorable opportunities have arisen or do arise (see *Simon v Etgen*, 213 NY 589, 594-596 [1915]). "The courts always avoid, if possible, any construction of a contract that is unreasonable or inequitable, and especially one that will place one of the parties at the mercy of the other" (*id.*, quoting *Schoellkopf v Coatsworth*, 166 NY 77, 84 [1901]; see also *Lowy & Donnath Inc. v City of New York*, 98 AD2d 42, 45 [1<sup>st</sup> Dept 1983], *affd* 62 NY2d 746 [1984]).

Moreover, the assignment of five percent of the "actual proceeds" obtained from the future "sale or joint venture development and/or long term lease of both the Thunderbolt and Shore Theater properties," is a present assignment of future funds to be obtained in a specified manner (sale, long term lease or joint venture development) from two specified properties (Thunderbolt and Shore Theater) (see *Leon v Martinez*, 84 NY2d at 87-89; *City of New York v Bedford Bar & Grill, Inc.*, 2 NY2d 429 [1957], *reh*

denied 3 NY2d 790 [1957] [finding that an assignment to a bank creditor of any refund that might become due to the debtor should a liquor store license not be granted or after the grant of the license upon its surrender or cancellation, was an equitable lien in the refund due, but the bank creditor's lien was subordinate to the city's docketed tax lien against the licensee]; see also *Law Research Serv. Inc. v Martin Lutz Appellate Printers Inc.*, 498 F2d 836, 858 [2d Cir 1974], citing *Stathos v Murphy*, 26 AD2d 500 [1<sup>st</sup> Dept 1966], *affd* 19 NY2d 883 [1967] [both cases discussing the difference between the assignment of future rights and the assignment of present rights and issues arising with regard to priorities of creditors]). The notarized signatures on the letter agreement are clear on their face that the decedent made an offer, and the respondent accepted it.


The 2011 letter agreement recites the consideration provided for the five percent interest assigned to the claimant in the actual proceeds of sale, joint venture development or long term lease of the two properties; namely, his many years of work on the development and sale of numerous properties and other services, and the originally promised payment of a finder's fee "will not materialize." Movant has failed to raise sufficient ambiguity to render the document unenforceable as a matter of law. The document itself in context with the extrinsic testimony of the decedent's employees as well as his health circumstances have established a *prima facie* case as to the enforceability of the 2011 letter agreement. However, there still exists a question of fact as to whether the decedent intended

himself to be bound by the document as interpreted by the claimant. Ultimately, the prima facie cases presented by both the claimant and the movant are sufficient to warrant denial of both the instant motion and cross motion for summary judgement.

Accordingly, the respective motions are denied and this matter is set for a hearing to assess whether the claim is valid, and if so, the value of such claim, upon the compliance with sections 207.29 and 207.30 of the Uniform Rules of the Surrogate's Court.

This constitutes the decision and order of the Court. The chief clerk is hereby directed to mail a copy of this decision counsel for the parties.

Proceed accordingly.

  
HON. NELIDA MALAVE-GONZALEZ  
SURROGATE