

Slattery Advisors, Inc. v Sedona Partners, Inc.

2022 NY Slip Op 30931(U)

March 22, 2022

Supreme Court, New York County

Docket Number: Index No. 653766/2015

Judge: Melissa Crane

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESEN HON. MELISSA CRANE **PART** 60M
Justice
 -----X
INDEX NO. 653766/2015

SLATTERY ADVISORS, INC.,

Plaintiff,

Decision After Trial

- v -

SEDONA PARTNERS, INC., DAVID ITZKOWITZ

Defendant.

-----X

Melissa A. Crane, J.S.C.

The trial in this case culminates a long running litigation. The main issue for trial was to determine whether the “five-year tail” in the agreement between the parties meant the parties had to split commissions per client or per transaction. The court assumes familiarity with the prior decision denying defendant’s motion to dismiss, dated July 14, 2016 (2016 WL 3756017), and the decision denying defendant’s motion for summary judgment, dated October 15, 2019 (2019 WL5191213). This decision contains the court’s findings of fact and conclusions of law following the bench trial that took place in June 2021. The court commends the lawyers, both of whom did an excellent job presenting the issues to the court.

Credibility Findings

As to credibility, the court finds the evasive and defensive manner in which both plaintiff, through its principal, Mr. Slattery, on behalf of Slattery Advisors Inc., and defendant, Mr. Itzkowitz, on behalf of himself and Sedona Partners, Inc. (“Sedona”), answered questions on cross examination to reflect poorly on their credibility. This may have been the natural emotional consequence of the parties having had a close personal relationship before the events giving rise to this litigation occurred. However, between the two, it was only defendant Itzkowitz who, knowing there was a dispute, funneled all funds to himself. Mr. Itzkowitz did not hold even a portion of the disputed funds in escrow. He did not even keep disputed funds in his company, Sedona. Now Sedona lacks sufficient funds to be able to satisfy any judgment against it (see Tr. 808:20-809:16; DX-H¹).

Defendant Itzkowitz' claim that he was unaware of Mr. Slattery’s position that there was a breach of the five year tail when he retained the funds is simply not credible, especially in light

¹ The most recent bank statement for Sedona, ending 10/31/2015, shows a balance of \$35,580.90. There may be even less today.

of the many communications Mr. Slattery sent to Mr. Itzkowitz asking about how to ensure the integrity of the commission split directly after Itzkowitz terminated their agreement (see, e.g. PX 28, 30), as well as later on (see PX 61, email from Slattery to Itzkowitz, dated March 12, 2014). Indeed, in PX 61, Slattery makes clear his position that the five-year tail is client based, rather than transaction based. Still, Itzkowitz did not hold the disputed funds in escrow. This extreme self-dealing negatively impacts defendant's credibility to a severe degree. Given Sedona's inability to satisfy a judgment, it also provides a reason to pierce the corporate veil should Sedona owe plaintiff money (see *Pensmore Invs., LLC v. Gruppo, Levey & Co.*, 184 A.D.3d 468, [1st Dep't 2020], *leave to appeal denied*, 36 N.Y.3d 907 [2021]).

Plaintiff's attorney, Mr. Keith Krauss, also testified. Mr. Slattery hired Mr. Krauss to draft the agreement at issue. Unlike the parties, he testified forthrightly and without hesitation. However, Krauss' testimony was of limited utility because he admittedly never spoke to defendant about the five-year tail. He only spoke with plaintiff. Therefore, the court gives small weight to Mr. Krauss' testimony.

Findings of Fact

The parties had been working via an oral agreement whereby they provided brokerage services to Cushman & Wakefield, Inc. (Cushman) jointly, although each had their own independent contractor agreement with Cushman (see PX 11 and PX 12 the "IC agreements"). On July 27, 2010, the parties finally signed an agreement entitled "joint venture" that plaintiff's attorney, Mr. Krauss had drafted [the "JV Agreement" PX 1]. The agreement was entitled "Joint Venture Agreement" and bore an original, typed date of March 26, 2007. Apparently, it took some time for Mr. Slattery to badger Mr. Itzkowitz into signing it. The testimony at trial demonstrated that Mr. Itzkowitz did not think the parties needed a written agreement to reflect their oral arrangement. Nor did Mr. Itzkowitz really want this agreement. But sign it he did, and is now bound by its terms.

The objective of the JV Agreement was "to provide real estate brokerage services through and on behalf of Cushman & Wakefield Inc. (the C&W Services)" [See PX1 JV Agreement preamble 2nd and 4th paragraphs]. This stated objective is echoed in Article III governing commissions "relative to the performance of the C&W Services."

The JV Agreement reflects a true joint venture rather than a mere commission sharing agreement. Not only did the agreement bear the title "Joint Venture," but under the heading of "Duties," Article IV provided that Slattery and CAI agreed:

"to devote their full time and use their diligent and good faith best efforts to fully, faithfully, effectively and timely perform the C & W Services when and as required under the IC Agreements, and, to the extent consistent with the requirements of the IC Agreements, using standards and practices that are generally used and recognized in the industry."

Article IV further provided that "it is contemplated by the parties that they shall each contribute equitably, fairly and generally, over the course of time, equally to the performance of the C & W Services."

Article II of the Joint Venture Agreement, headed "Term," provided:

“Unless sooner terminated in accordance herewith, the term of this Agreement (the ‘Term’) shall begin on the Effective Date and shall continue for so long as both IC Agreements, as may be amended and/or extended from time to time, remain in full force and effect. This agreement shall be valid and binding on the parties for the Term except as to obligations which survive the expiration of this agreement, which obligations shall remain in full force and effect in accordance with the terms hereof.”

Article III, headed as “Compensation,” provided that “[c]ommissions earned by each party relative to performance of the C & W Services shall be divided between the parties upon receipt” in accordance with the “***business initiated and brought in by or through***” each party (emphasis added). The Joint Venture Agreement failed to define term “business initiated and brought in.”

The Agreement also provided for the following commission split:

- “a) Business initiated and brought in by or through SAI: SAI share = sixty (60%) per cent; CAI share = forty (40%) per cent.
- b) Business initiated and brought in by or through CAI: CIA share = sixty (60) per cent; SAI share = (40%) per cent.
- c) Business initiated and secured jointly by or through SAI and CAI-each party shall receive fifty (50%) per cent.
- d) Business initiated and provided by Cushman & Wakefield to SAI or CAI-each party shall receive fifty (50%) percent.”

Article III further provided a five-year tail. This clause is the focus of this litigation:

“For a period of five (5) years after the termination or expiration of this Agreement, each party and/or its heirs, successors or assigns as the case may be, shall be entitled to receive, as and when paid, the commission shares described in this paragraph with respect to ***any and all business falling within the scope of this paragraph as of the date of said termination or expiration***”

(emphasis added).

Additionally, Article III provided that:

“On January 1 and July 1 of each year during which this agreement is in effect and at the termination or expiration hereof, each party shall provide to the other a complete and accurate written report setting forth all then current business identifying client, nature of transaction, status and potential commission.”

The Agreement also provided that either party “may terminate the Agreement at any time, with or without cause or reason, upon no less than ninety (90) days prior written notice to the other” (Article IX [b]). Article XI, headed “Binding Effect,” provides that this “Agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, representatives and permitted assigns.”

On May 23, 2012, defendant terminated the agreement by serving the requisite 90 day notice (PX 31). Two years later, on May 22, 2014, Cushman terminated plaintiff.

Analysis

Interpreting the words “any and all business falling within the scope,” and the manner in which the parties were to split commissions, plaintiff is of the position that the commission sharing arrangement remains in effect and continues for five years under the five-year tail until August 23, 2017. This means, according to plaintiff, that it is entitled to commissions from all clients (extended to “client relationships” during the course of the trial) of the joint venture for a period of five years, regardless of who worked on the deals. Defendant’s interpretation is that plaintiff is only entitled to commissions from transactions existing as of the termination date, May 23, 2012.

Defendant is wrong. First, defendant’s interpretation reads the five-year tail right out of the agreement. Had the parties intended after termination to split only commissions from pending transactions, the JV Agreement could have stopped at the commission splitting formula that appears in Article III above the five-year tail. The JV Agreement ties the “commissions earned” (i.e. the right to a commission) to “business,” not to a closing (see PX 1 pg. 3) And, a party to the agreement has a right to a commission, whenever it comes in, from “business initiated” regardless of who initiated the deal that ultimately closed. Thus, as long as the commission was from a client of the joint venture, plaintiff could sit back and do nothing, but still receive a commission. Obviously, as a practical matter, commissions come in only after a closing. However, this does not mean that the five-year tail only allows commissions from transactions pending at the date of termination, but that had not yet closed. The JV Agreement simply does not say this.

Moreover, if the five-year tail operated more like a winding up provision, as defendant suggests, there would have been no need for a such a long period. Both parties testified that pending deals do not take five years to close. Indeed, Cushman itself customarily had a 30-day winding up period (see PX 12). It is also strange that, had defendant really meant the five-year tail to be a simple winding up provision, there is no contemporaneous evidence reflecting his position. All we have is an interpretation that does not add up and was likely contrived for this litigation. Meanwhile, Keith Krauss, an entirely credible witness, was able to testify as to plaintiff’s contemporaneous interpretation.

Finally, the way the parties interacted, prior to the deterioration of their relationship, comports with the interpretation that “business initiated” meant deals emanating from clients of the joint venture. Cushman hired plaintiff and defendant at the same time. Both plaintiff and defendant were involved in developing clients for Cushman jointly. Plaintiff testified credibly that he went after bigger clients, while defendant developed smaller ones.

From the time the parties commenced work at Cushman, they split commissions according to the formula in the JV Agreement, no matter who identified or worked on a particular transaction. What mattered was who brought in the client. If both plaintiff and defendant brought in a client, they split the commission 50/50. That Itzkowitz never applied the compensation provisions of Article III to produce a 60/40 split in his favor with respect to Abbott Labs, even though he testified that he did all the work on the underlying transaction, reflects that this was defendant’s understanding. Actions speak louder than words. Thus, the five-year tail

was meant to continue that commission splitting arrangement by which, if both parties brought in a particular client, commissions would be split 50/50 and even if one party did not bring in a particular client (as opposed to a transaction), that party would still receive 40%.

Effect of Cushman's Termination of Plaintiff on May 22, 2014

However, plaintiff also has misconstrued the agreement by failing to take all phrases into consideration. As a consequence, plaintiff is not entitled to the entire amount it seeks.

Plaintiff still needs to prove that the commissions were “relative to the performance of the C&W Services” (i.e. the provision of “real estate brokerage services through and on behalf of Cushman & Wakefield Inc.”). It also needs to account for the end phrase of the five year tail: “*as of the date of said termination or expiration.*”

The evidence backs up defendant's assertion that, at least with respect to Abbott, a transaction was not even contemplated and the parties would not begin working, until there was a “Request for Services” (RFS). Because Cushman terminated plaintiff on May 22, 2014, there was no way plaintiff could have provided any real estate brokerage services “on behalf of Cushman” after that date. Accordingly, plaintiff is not entitled to any part of a commission to the extent an RFS is dated after May 22, 2014. Nor would plaintiff be entitled to a commission from brokerage services rendered entirely after May 22, 2014 for any joint client.

Nevertheless, defendant's contention that plaintiff should not recover commissions on any transactions that closed after Cushman terminated plaintiff misses the mark. Plaintiff was still engaged in “real estate brokerage services through and on behalf of Cushman” prior to Cushman terminating its services. Being engaged in brokerage services was all plaintiff had to do to earn a commission, because the parties meant to split commissions from their joint clients while working for Cushman, regardless of who worked on the deal. That a deal closed after the termination, from brokerage activities occurring before termination, still entitles plaintiff to a commission under the JV Agreement.

- Abbie

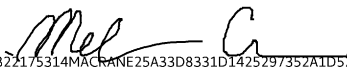
The five-year tail limits plaintiff to commissions from *any and all business falling within the scope of this paragraph as of the date of said termination or expiration.* It is undisputed that Abbie was spun off from Abbot, and Cushman only secured Abbie as a client, on December 19, 2012 (PX 18). This was four months after defendant terminated the JV Agreement. Cushman made defendant, not plaintiff, the sole account representative (see PX 18). Therefore, it is physically impossible for Abbie deals to constitute “business,” under the JV commission splitting provision, because Abbie never existed during the period the JV Agreement was active. Accordingly, plaintiff is not entitled to any commissions from Abbie deals. To the extent that plaintiff stretches the term “business” to include Abbie, an entity that did not yet exist, under some amorphous “client relationship” interpretation of the term “business,” the term is too vague to be enforceable (*see Eagle v Emigrant Savings Bank*, 148 AD3d 476 [1st Dep't 2017]; *Magnum Real Estate Services, Inc. v 133-134-135 Assoc., LLC*, 103 AD3d 453 [1st Dep't 2013]).

Overpayment to Plaintiff?

By way of counterclaim, defendant claims that plaintiff owes \$26,529.78. Given that defendant's view of the agreement has not prevailed, it may not matter. However, the court

could not follow defendant's argument at pages 61-63 of its post trial brief. It is possible that defendant did not mean to refer the court to CX-X. Therefore, defendant has not carried its burden on its counterclaims, but can have another opportunity to explain the math to the court within 30 days of the efiled date of this trial decision. This should not be taken as an opportunity to reargue any other aspect of this decision.

This constitutes the decision of the court. Plaintiff is directed to prepare a proposed judgment against both defendants, jointly and severally, reflecting revised amounts in accordance with the findings in this decision after trial within 30 days of the efiled date. That judgment should reflect that the clerk should calculate interest at 9% going back to the date of the last commission payment defendants received that should have been turned over to plaintiff. However, the court will not award attorney's fees as the JV Agreement does not contain a provision for awarding them.


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DATE: 3/22/2022

MELISSA CRANE, JSC

Check One:

Case Disposed

Non-Final Disposition

Check if Appropriate:

Other (Specify _____)