Kassin Sabbagh Realty LLC v 125th St. Holding Co. LLC
2022 NY Slip Op 31725(U)
May 26, 2022
Supreme Court, New York County
Docket Number: Index No. 654030/2019
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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KASSIN SABBAGH REALTY LLC,

Plaintiff,

- v -

125TH STREET HOLDING COMPANY LLC, 125TH STREET BAPAZ LLC, DAVID ISRAELI, and ASHER BABAZADEH,

Defendants.

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INDEX NO. 654030/2019

MOTION DATE 09/16/2020, 09/25/2020

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 36, 39, 41, 43, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 60, 62, 63, and 64

were read on this motion by 3 defendants for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 34, 35, 37, 40, 42, 44, 57, 59, AND 61

were read on this motion by 1 defendant for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.

Upon the foregoing documents, and after argument, it is ordered that the motion by defendants 125th Street Bapaz LLC, David Israeli, and Asher Babazadeh for summary judgment dismissing the complaint as against them (motion seq. no. 001) is denied, per the following memorandum; and the motion by defendant 125th Street Holding Company LLC for summary judgment dismissing the complaint as against it (motion seq. no. 002), is similarly denied, per the following memorandum.

BACKGROUND

Plaintiff – a real estate brokerage firm – sues the defendants for a broker's commission in connection with the sale of Manhattan real property known as 51 East 125th Street, by defendant

125th Street Holding Company LLC, as seller ("125 Seller"), to defendant 125th Street Bapaz LLC ("125 Buyer").[1] Individual defendant David Israeli is alleged to be a principal of 125 Buyer, and individual defendant Babazadeh is alleged to be an agent of 125 Buyer (*see*, Complaint ¶¶ 23-24). The gist of the action is summarized in paragraphs 1 and 2 of the complaint thus:

> Defendants concocted a scheme to deny Plaintiff – a real estate brokerage firm – a commission earned from being the procuring cause of the purchase and sale of the real property known as 51 East 125th Street in Manhattan (the "Property"). Plaintiff introduced real estate investor David Israeli to Seller, the then-owner and seller of the Property, and facilitated negotiations between them for the purchase of the Property. Defendant Israeli and Seller reached a temporary impasse on price, and Plaintiff believed that no deal materialized between them for the sale of the Property. Soon after, however, Plaintiff discovered that the Property was purchased by defendant Bapaz, an entity created and controlled by Israeli . . . . At Israeli's instruction, defendant Babazadeh, a former employee and/or partner of defendant Israeli, signed the deed on behalf of Bapaz.
>
> Upon information and belief, Israeli is a beneficial owner of Bapaz and, consequently, the Property. As the procuring cause of the Property's sale, Plaintiff is entitled to a brokerage commission. Through this action, Plaintiff seeks a money judgment against Defendants for this unpaid brokerage commission and other damages.

The complaint asserts causes of action for breach by 125 Seller and Mr. Israeli of implied brokerage contract; unjust enrichment as against all defendants; *quantum meruit* as against all defendants; and tortious interference as against Messrs. Israeli and Babazadeh, and 125 Buyer. The complaint seeks a money judgment in an unspecified amount.

Defendants move for summary judgment dismissing the complaint. The motion is opposed.

DISCUSSION

A summary judgment movant's threshold burden requires a *prima facie* showing of entitlement to judgment as a matter of law, proffering sufficient evidence to eliminate any

[1] More precisely, and as discussed hereinbelow, 125 Seller entered into a sales contract with non-party 125 BSD Partners LLC, which then assigned the contract to 125 Buyer.

material issues of fact (*Tillmon v New York Housing Auth.*, 203 AD2d 19 [1st Dept 1994]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Once the movant has made a *prima facie* showing of entitlement to judgment as a matter of law, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact (*see, Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]). The party opposing the motion must demonstrate the presence of actual issues of fact, and lay bare his proofs; conclusory and unsubstantiated allegations are insufficient to defeat summary judgment (*Bonghi v Firstcent Shopping Center, Inc.*, 116 AD2d 502 [1st Dept 1986]).

Under implied contract theory, a broker is entitled to a commission if it is "a 'procuring cause' of the ultimate transaction (*see Greene v Hellman*, 51 NY2d 197, 206-207 [1980])" (*Capin & Assocs., Inc. v Herskovitz*, 194 AD3d 565, 565 [1st Dept 2021]). In stating that principle, "we do not mean, that the broker must of necessity be present and an active participator in the agreement of buyer and seller when that agreement is actually concluded. He may just as effectually produce and create the agreement, though absent when it is completed and taking no part in the arrangement of its final details." (*Sibbald v Bethlehem Iron Co.*, 83 NY 378, 382 [1881].)

Movants have submitted the affirmation of defendant David Israeli, the principal of 125 Buyer (NYSCEF Doc. No. 19), which recounts that he met with an agent of the plaintiff – one, Bunny Escava – relating to possible acquisition of the property, at a meeting on March 28, 2019, attended also by Escava and a principal of 125 Seller – Robert Nass (*id.*, ¶¶ 10-11; *see also*, NYSCEF Doc. No. 34 [Affidavit of Robert Nass] ¶ 1). According to Mr. Israeli: "the Seller told us that the purchase price was firm at $13,000,000.00, that he was not going to go below a purchase price of $13,000,000.00, and that he had a 'contract in hand'." (NYSCEF Doc. No. 19

¶ 11.) Notably, and as discussed more thoroughly below, a fourth person was also present at that meeting, brought by Mr. Nass. That person was Joseph Safdie, the broker for the purchaser of the property under the aforementioned contract (non-party 125 BSD Partners LLC) (*see*, NYSCEF Doc. No. 52 at 21-22). Mr. Israeli adds: "Thus, my 'offer' to purchase the Premises at a purchase price of $12,000,000.00 was summarily rejected by the Seller at our meeting on March 28, 2019. When the Seller advised me that he would not take anything less than $13,000,000.00 for the Premises, that was the end of our meeting. Since that meeting, I did not pursue the Premises further with either the Seller or the Plaintiff." (NYSCEF Doc. No. 19 ¶ 12.)

Mr. Israeli goes on to describe events following the aforesaid meeting. He recites that in May of 2019, he received an unsolicited call from a different broker – one, Joseph Martin – who informed him that the buyer with which 125 Seller contracted – 125 BSD Partners LLC – wished to assign the contract (*see, id.*, ¶ 21). Mr. Israeli concludes:

> After further consideration and analysis, I determined that the Premises were a good fit for my portfolio and decided to pursue negotiations through Mr. Joseph, my broker, to obtain an assignment of the Contract. Mr. Joseph was successful in negotiating an agreement with 125 BSD Partners LLC to assign the Contract. Thus, by Agreement, Assumption and Assignment dated May 21, 2019 . . . my entity, Defendant 125th Street Bapaz LLC, agreed to take an assignment of the Contract from 125 BSD Partners LLC and to purchase the Premises pursuant to that assignment. Defendant Asher Babazadeh is an employee of mine and was an authorized signatory for this entity.

(*Id.*, ¶ 22.) The contract referred to by Mr. Israeli, which was assigned from 125 BSD Partners LLC to 125 Buyer (NYSCEF Doc. No. 27, Schedule C), lists a purchase price at just under the $13,000,000 demanded by 125 Seller at his March 28, 2019, meeting with Mr. Israeli and Mr. Escava (plaintiff's agent); to wit, $12,950,000, despite the fact that during that meeting, per Mr. Israeli, $13,000,000 was a figure he would not consider paying for the property (*see*, NYSCEF Doc. No. ¶ 11). But somehow, Mr. Israeli proffers the assertion that a figure just below said sum became acceptable to him once the contract was offered to him via assignment from 125 BSD

Partners LLC (*see, id.*, ¶ 22) on the assertion that "[a]fter further consideration and analysis, I determined that the Premises were a good fit for my portfolio and decided to pursue negotiations through Mr. Joseph, my broker, to obtain an assignment of the Contract" (*id.*). This apparently forms a part of plaintiff's allegation that "Defendants concocted a scheme to deny Plaintiff – a real estate brokerage firm – a commission earned from being the procuring cause of the purchase and sale of the real property known as 51 East 125th Street in Manhattan (the 'Property')" (Complaint ¶ 1). But then, of course, a trier of fact might need to know, or want to know, whether the assignment deal yielded Mr. Israeli any brokerage fee savings in light of his attestation that it was procured through a different broker – in that instance, Joseph Martin – and, if so, in what amount?

In addition to the possible question raised by Mr. Israeli's declination of a direct $13,000,000 deal through plaintiff, followed by his acceptance of a substantially similar deal, via assignment, through a different broker (Joseph Martin), there also is some question about what exactly *did* occur at the March 28, 2019, meeting between plaintiff, Mr. Israeli, and 125 Seller. Mr. Israeli says that his proposed deal with 125 Seller came to an end at that very meeting on account of the price ($13,000,000), and that his ultimate purchase of the property via assignment from 125 BSD Partners LLC (for just under $13,000,000) was the product of an entirely independent chain of events, resulting from a change of heart. As he puts it: "After further consideration and analysis, I determined that the Premises were a good fit for my portfolio . . . ." (Affirmation of David Israeli [NYSCEF Doc. No. 11] ¶ 22.) However, the record also contains deposition testimony of another attendee of the March 28, 2019, meeting – Joseph Safdie – whose recollection of events differs somewhat from Mr. Israeli's stated recollection.

Plaintiff submits the deposition transcript of Joseph Safdie (NYSCEF Doc. No. 52), a licensed real estate broker responsible for finding 125 BSD Partners LLC in connection with 125 Seller's contract to sell the property (*see, id.,* at 13-17). According to Mr. Safdie, he learned of the meeting from Robert Nass (125 Seller's principal), as follows:

> Mr. Nass called me up and we were in contract at the time, and I was, I believe at his office at that day collecting documents for my client. And he was saying that another broker has been calling him up to sell the deal to his client that – **who had an exchange or something along those lines**. And Mr. Nass asked me to come along for the meeting and say even though your guys are in contract, the deal could be assigned . . . .

(NYSCEF Doc. 52 at 21-22 [emphasis added].) Thus, according to Mr. Safdie, it was understood going into the meeting that if 125 Buyer was destined to ultimately acquire the property, it would have to be by way of an assignment of the sales contract from 125 BSD Partners LLC to 125 Buyer. Indeed, the minimally cryptic reference to "exchange" in Mr. Safdie's description of events (*see, id.*) might be considered by a trier of fact to evince that even from the beginning of negotiations when plaintiff was involved, the idea here was for 125 Buyer to take an assignment of the already-executed contract between 125 Seller and 125 BSD Partners LLC – in other words, an "exchange" of the party-purchaser under the contract.

Mr. Safdie expounded further and explained that, barring some unanticipated breach of the contract of sale by 125 BSD Partners LLC, the only possible reason to have any meeting at all with Mr. Israeli, as a potential purchaser, would be to discuss an assignment to Mr. Israeli of the existing contract between 125 Seller and 125 BSD Partners LLC (*see, id.*, at 22-23).

At a bare minimum, the point raised by Mr. Safdie's deposition testimony, i.e., the practical futility of any deal with Mr. Israeli that would not involve an assignment from 125 BSD Partners LLC, taken together with Mr. Israeli's stated change of heart "[a]fter further consideration and analysis" (NYSCEF Doc. No. 11 ¶ 22), constitute issues of fact with regard to

the key question in this case: was plaintiff the "procuring cause" for the ultimate deal involving 125 Buyer's purchase of the property – or not? The fact that such a foundational question can still remain unanswered in this 2019-filed case, after all the discovery that has gone before in this case, mandates a denial of summary judgment and placement of this case on the trial calendar so as to allow the trier of fact to finally determine the facts underlying this dispositive question.

Counsel for the defendants places heavy reliance on a case decided by another justice of this court, affirmed by the Appellate Division, First Department; to wit, *RMB Properties LLC v American Realty Capital III, LLC* (55 Misc 3d 1202 [A], 2016 WL 8607330 [Sup Ct NY County 2016], *affd* 148 AD3d 585 [1st Dept 2017]). That decision granted summary judgment of dismissal in a brokerage fee case which also involved a defendant that took an assignment in connection with a real property transaction. But this court disagrees with said counsel's characterization of that decision as "directly on point" (Moving Memorandum [NYSCEF Doc. No. 18] at 7). The case is worthy of discussion, and of why it is distinguishable in significant measure.

In *RMB Properties*, the plaintiff broker ("RMB") introduced a real estate investment firm (defendant "ARC") to the opportunity to purchase certain real property. After touring the property, and expressing interest in it, it was learned that the seller was in the midst of negotiations with a competing bidder, Thor Equities LLC ("Thor"), at an offer of $84,000,000. RMB submitted a letter of intent on ARC's behalf at a higher offer of $85,000,000. The seller rejected it. In other words, at that point, RMB's effort to do a deal for ARC was concluded.

After the conclusion of RMB's aforesaid effort, ARC, on its own, submitted a letter of intent directly to the seller, offering a higher sum of $86,200,000. RMB, learning of that letter, desired to get involved; but ARC told RMB: "please do not discuss our offer with the seller.

You do not speak for us and you are doing more harm than good." (2016 WL 8607330 at *3.)

ARC learned that, at this point in time, the seller had entered into a time-limited exclusive letter of intent with Thor; but the seller then informed ARC that the Thor deal "was falling through" and asked ARC if it "was still interested" (*id.*). ARC "responded in the affirmative" and submitted an even higher letter of intent at $86,500,000.[2] But then, Thor re-emerged and ultimately signed an agreement with the seller "which granted Thor the exclusive option to purchase the Property for about $83.75 million and other consideration" (*id.*, at *4). Thereafter, ARC took an assignment of that agreement from Thor and purchased the property.

RMB sued ARC for a brokerage commission, alleging that it had an enforceable contract "based on their conduct" and that it "was the procuring cause of the transaction" (*see, id.*, at *4-*5). The court granted ARC summary judgment of dismissal, finding that, in those particular circumstances, "RMB was not the procuring cause of the transaction that was consummated . . . ." (*Id.*, at *5.)

This court views the circumstances in *RMB Properties* as substantially different from the circumstances in the present case. The key lies in that court's careful focus on "the transaction that was consummated." The deal that was consummated in that case was not the deal that was attempted by the broker (RMB). It was never anticipated or contemplated by RMB, or by ARC, for that matter, during the tenure of their interaction. During that tenure, the offer by ARC through RMB was for a direct contract price of $85,000,000 as party-purchaser under a potential contract of sale to be entered into as between ARC and the seller. No contract of sale with Thor or anyone else existed at that time; thus, no assignment of anything was involved at that point;

[2] A typographical error in the *RMB Properties* decision has it as "86,5000,000" (2016 WL 8607330 at *3). Given the logical progression of the negotiations recited in that case, this court understands the correct figure to be $86,500,000.

nor could it possibly have been the subject of any mental consideration or verbal discussion. Once that offer was rejected by the seller, the future efforts by ARC, on its own, to negotiate additional deals which were never handled by RMB, were exclusively its own, and in which RMB had no nexus. That includes the final deal, which involved the taking of an assignment from Thor – totally unanticipated by RMB or ARC during the tenure of their interaction with each other.

That is vastly different from the present case. In the present case, from very early on in the relationship between plaintiff and Mr. Israeli, i.e., the March 28, 2019, meeting, all pieces of the ultimate transactional construct were known to each other, present and accounted for: Mr. Escava for the plaintiff; Mr. Israeli for 125 Buyer; Mr. Nass for 125 Seller; and Mr. Safdie, broker for the contract purchaser/assignor, 125 BSD Partners LLC. Everyone involved or potentially involved might very well have understood at that precise moment in time that what was realistically at play here was a possible or probable assignment of the contract from the purchaser/assignor (125 SDB Partners LLC) to Mr. Israeli's company (125 Buyer). Unlike the circumstances in *RMB Properties*, there was already a fully executed contract in place at just under $13,000,000, so any possible entry by Mr. Israeli into this transaction might reasonably have had to be, in the mind of a trier of fact, through an assignment from 125 SDB Partners LLC to Mr. Israeli's entity (125 Buyer).

In that regard, the court finds it quite relevant that the ultimate deal done by Mr. Israeli – at just under $13,000,000 – was the precise deal on the table during the March 28, 2019, meeting at which Mr. Escava was present, i.e., a contract of sale at just under $13,000,000. This aspect, too, differs from the facts in *RMB Properties*, where the deal fluctuated at differing price points throughout the course of ARC's self-conducted negotiations. To put it this way: in this case, a

trier of fact might find it significant that there is an exact equilibrium between the transaction under ***realistic*** discussion at Escava's meeting and "the transaction that was consummated" (*RMB Properties,* 2016 WL 8607330 at *5); to wit, an assignment of the $13,000,000 contract from Mr. Safdie's client (125 SDB Partners LLC) to Mr. Israeli's company (125 Buyer) (*see also, Quantum Realty Servs., Inc. v ISE America, Inc.*, 214 AD2d 420, 421 [1st Dept 1995] ["Sufficient evidence was presented to establish the continuing connection between plaintiff's initial efforts and the eventual sale of the premises, and the limited interruption in the sequence of events did not diminish plaintiff's participation in the procurement of the eventual conclusion of the deal."]).

Mr. Israeli attempts to downplay the fact that he ultimately *did* do the deal discussed at the March 28, 2019, meeting by Mr. Nass. He posits that "[a]fter further consideration and analysis, I determined that the Premises were a good fit for my portfolio . . . ." (NYSCEF Doc. No. 19 at 22.) But on this motion to dismiss, such a remark seems to conjure up the direct relevance of the holding of the Court of Appeals in *Sibbald, supra,* that a cause of action for a brokerage commission is sufficiently pleaded "[i]f the efforts of the broker are rendered a failure by the fault of the [principal]; if capriciously he changes his mind after the [other potential contracting party], ready and willing, and consenting to the prescribed terms, is produced . . . ." (83 NY at 383-84.)

Consequently, this court finds that enough has been shown so far to demonstrate that, at a minimum, issues of fact exist bearing on the issue of whether plaintiff is the "procuring cause," as defined by case law, of the assignment deal that 125 Buyer ultimately did, resulting in its acquisition of the subject property. Thus, the motion by defendants 125th Street Bapaz LLC,

David Israeli, and Asher Babazadeh for summary judgment dismissing the complaint as against them (motion seq. no. 001) is denied.

The motion by defendant 125th Street Holding Company LLC for summary judgment dismissing the complaint as against it (motion seq. no. 002) "joins in, adopts and incorporates by reference the Co-Defendants' submissions made in support of their Motion for Summary Judgment . . . ." (Affidavit of Robert Nass [NYSCEF Doc. No. 34 ¶ 4.) Consequently, that motion is similarly denied for the reasons stated hereinabove.

Accordingly, it is

ORDERED that the motion by defendants 125th Street Bapaz LLC, David Israeli, and Asher Babazadeh for summary judgment dismissing the complaint as against them (motion seq. no. 001) is denied; and it is further

ORDERED that the motion by defendant 125th Street Holding Company LLC for summary judgment dismissing the complaint as against it (motion seq. no. 002) is denied.

This will constitute the decision and order of the court.

ENTER:

Louis L. Nock

5/26/2022
DATE

LOUIS L. NOCK, J.S.C.

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