

GFI Realty Servs., LLC v Long
2022 NY Slip Op 33080(U)
September 12, 2022
Supreme Court, New York County
Docket Number: Index No. 656505/2020
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR F. ENGORON PART 37

Justice

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GFI REALTY SERVICES, LLC,	INDEX NO. <u>656505/2020</u>
Plaintiff,	MOTION DATE <u>06/10/2022</u>
- v -	MOTION SEQ. NO. <u>004</u>

MARY LONG,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 58, 59, 60, 61, 62, 63

were read on this motion for DEFAULT JUDGMENT.

Upon the foregoing documents and for the reasons stated hereinbelow, defendant's motion to dismiss is granted.

Background

On August 26, 2019, defendant, Mary Long ("Long"), as owner, entered into a three-month-long Exclusive Listing Agreement (the "Agreement") with plaintiff, GFI Realty Services, LLC ("GFI"), as broker, in which GFI was to help market and sell Long's real property located at 385 Monroe Street, Brooklyn, NY 11221 (the "Property"). NYSCEF Doc. No. 2.

The Agreement provided that:

As compensation for the services to be performed by GFI under this agreement, GFI shall be entitled to be paid a transaction fee (the "Transaction Fee") equal to 4% of the gross purchase price payable in connection with the Transaction. The Transaction Fee will be earned upon the acceptance of an offer to enter into the Transaction for not less than \$3,850,00 or any other price or terms that Owner may accept, whether or not through the efforts of GFI, and shall be payable by Owner upon consummation of such a transaction, provided such minimum offer was accepted...

NYSCEF Doc. No. 2.

Pursuant to the Agreement, GFI was additionally entitled to the Transaction Fee for a period of six months following the Agreement's termination on November 26, 2019, if the Property sold to a prospective party whom GFI had previously contacted while acting as Long's exclusive broker. NYSCEF Doc. No. 2. GFI agreed that a "complete list of such prospective parties shall be

provided to owner within thirty (30) days following the effective date of the termination” of the Agreement, in order to obtain that post-Agreement Transaction Fee. Id.

Long says that while represented by GFI she worked exclusively with an individual broker, third-party defendant Shlomo Antebi (“Antebi”). NYSCEF Doc. No. 39. Antebi executed the Agreement between Long and GFI and, according to Long, was her “only connection to [GFI] during the entire process” of selling the Property. NYSCEF Doc. No. 60.

As Long’s broker at GFI, Antebi marketed the Property to prospective buyers, including to non-party Eric Orlovsky of Center Street Capital (“Center Street Capital”). NYSCEF Doc. No. 40.

At some point toward the end of October 2019 Antebi left GFI to become a principal at third-party defendant Atlas Realty Group Partners, LLC (“ARG”). NYSCEF Doc. No. 39 ¶ 8-9.

On November 26, 2019, the Agreement effectively terminated without Long having accepted any offers to sell the Property.

On December 19, 2019, Antebi again pitched the Property in an email to Mr. Orlovsky of Center Street Capital. NYSCEF Doc. No. 43. At his deposition Antebi testified that he had an oral agreement to market the Property for Long. NYSCEF Doc. No. 39.

By December 26, 2019, thirty days had passed since the termination of the Agreement and, according to Long, GFI never provided her a list of prospective parties it had contacted while acting as the Property’s exclusive agent. NYSCEF Doc. No. 60. Nowhere in its papers does GFI allege that it ever provided Long with such a list.

On January 27, 2020, Antebi circulated a deal memorandum for a \$2,875,000 all-cash sale of the Property to “Eric Orlofsky (LLC to be formed)” with a commission to be paid to ARG. NYSCEF Doc. No. 44.

On April 28, 2020, less than six months after the termination of the Agreement, Long entered into a contract of sale for the Property with non-party 385 Monroe Street LLC (“385 LLC”). NYSCEF Doc. Nos. 47. The sale closed August 26, 2020. NYSCEF Doc. No. 49.

On November 23, 2020, GFI commenced the instant action, asserting a breach of contract, and seeking to recover a 4% Transaction Fee on the sale of the Property. NYSCEF Doc. No. 1. Plaintiff alleges that 385 LLC is an affiliate of Center Street Capital, as Mr. Orlovsky is a managing member of both companies, and Antebi had marketed the Property to him at GFI while the Agreement was in force. NYSCEF Doc. Nos. 49, 54.

On February 25, 2021, Long answered, denying the breach of contract claim and asserting five affirmative defenses (failure to state a cause of action; breach of contract; failure to name a necessary party; lack of standing; and unclean hands), three counterclaims (breach of contract; fraud; and unjust enrichment), and a cross-claim against ARG. NYSCEF Doc. No. 13.

On August 4, 2021, plaintiff served ARG and Antebi with subpoenas. NYSCEF Doc. No. 16. On September 15, 2021, GFI filed a proposed Order to Show Cause to enforce its subpoenas. NYSCEF Doc. No. 19.

In a Decision and Order issued on November 16, 2021, this Court directed Antebi and ARG to produce all responsive documents and to sit for depositions. NYSCEF Doc. No. 31.

On April 6, 2022, GFI filed a motion for summary judgment, pursuant to CPLR 3212, seeking a money judgment of \$108,000 plus interest. NYSCEF Doc. No. 34.

On the same day, GFI answered Long's counterclaims with general denials and twelve affirmative defenses. NYSCEF Doc. No. 38.

On May 20, 2022, Long, as third-party plaintiff, filed a third-party summons and complaint against Antebi and ARG. NYSCEF Doc. No. 57. The third-party complaint has apparently not been served, and the third-party defendants have not yet appeared in this action.

On May 22, 2022, Long filed the instant cross-motion to dismiss, without citing specific provisions of CPLR 3211, alleging that plaintiff breached the contract, failed to join necessary parties, and acted with unclean hands. NYSCEF Doc. Nos. 58.

In a Decision and Order dated August 23, 2022, this Court denied plaintiff's motion for Summary Judgment, without prejudice to renew, for failure to comply with 22 NYCRR 202.8g. NYSCEF Doc. No. 65.

Discussion

Dismissal for failure to state a cause of action pursuant to CPLR 3211(a)(7) is warranted when, "afford[ing] the pleadings a liberal construction, tak[ing] the allegations of the complaint as true and provid[ing] plaintiff the benefit of every possible inference," the complaint fails to assert to the court facts that would make out a cause of action. EBCI, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005).

Here, Long argues that GFI breached the Agreement first by not providing her with a list of prospective parties it had contacted while representing her, and, therefore, "cannot now benefit from a contract [that] they failed to act in accordance" with.

GFI does not deny that it failed to provide a list of prospective parties to Long but argues that its lapse is not fatal to its claim as Antebi undeniably marketed to Mr. Orlovsky while Long's agent at *both* GFI and at ARG and therefore *his* knowledge should have imputed onto Long. To that point GFI emphasizes that Long repeatedly and at length affirms that Antebi acted as her agent at both companies and notes that "[t]he general rule is that knowledge acquired by an agent acting within the scope of his agency is imputed to his principal and the latter is bound by such knowledge although the information is never actually communicated to it." Ctr. v Hampton Affiliates, Inc., 66 NY2d 782, 784 (1985) (citations omitted).

Plaintiff is correct that Long *should* have been imputed with the knowledge that Antebi had contacted Mr. Orlovsky while working as her agent at both GFI and ARG. Further, the record contains a plausible argument that Long has a cause of action against Antebi for tortious interference with a contract due to his failure to disclose his knowledge to her. Schmidt & Schmidt, Inc. v Town of Charlton, 103 AD3d 1011, 1013 (3d Dep’t 2013) (“To sustain a cause of action for tortious interference with contract, a plaintiff must show ‘(1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant’s knowledge of that contract, (3) the defendant’s intentional [and improper] inducement of the third party to breach that contract, and (4) damages’”) (citations omitted).

However, this Court need not reach questions of what Antebi did or did not tell Long as GFI breached the Agreement long before Long did. The clause in the plaintiff-drafted Agreement requiring GFI to proffer a list of prospective parties it had contacted to Long within 30 days of the termination of the Agreement is a mandatory “shall” clause not, a discretionary “may” clause. The purpose of that required list is two-fold: it gives an owner notice of who its now-former broker had contacted while representing it, and reminds it of its continuing obligation to pay a Transaction Fee were it to sell to one of those parties within six months.

The fact that Antebi was Long’s broker at GFI for two-thirds of the three-month Agreement and then again while at ARG does not excuse GFI from failing to disclose to Long to whom it marketed her Property.

Thus, Long did not breach the Agreement, as GFI breached it first by failing to provide a “complete list” (or any list) of prospective parties that it had pursued within the 30 day period after the expiration of the Agreement.

Conclusion

Therefore, defendant Mary Long’s motion to dismiss the complaint of plaintiff GFI Realty Services, LLC, is granted, and the Clerk is hereby directed to enter judgment accordingly.

9/12/2022

DATE



ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART OTHER
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN