

**PJD Corp. Realty, Inc. v Henry George Sch. of Social
Science**

2022 NY Slip Op 33221(U)

September 23, 2022

Supreme Court, New York County

Docket Number: Index No. 652616/2017

Judge: Sabrina Kraus

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

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PJD CORPORATE REALTY, INC.,

Plaintiff,

- v -

HENRY GEORGE SCHOOL OF SOCIAL SCIENCE,
DOUGLAS ELLIMAN REAL ESTATE, EDINBURGH SEVEN
SEAS LLC

Defendant.

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INDEX NO. 652616/2017

MOTION DATE 08/23/2022,
09/15/2022,
09/22/2022,
09/22/2022

MOTION SEQ. NO. 005 006 007
008

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 229

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

The following e-filed documents, listed by NYSCEF document number (Motion 007) 203, 204, 205, 206, 207, 208, 209, 210, 230, 231

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 221, 222, 223, 224, 225, 226, 227, 228, 232, 233

were read on this motion to/for SUBPOENA.

BACKGROUND

Plaintiff initially brought this action against defendant Henry George School of Social Science (HGS) asserting that it breached an exclusive real estate broker agreement by purchasing property located at 149 East 38th Street in Manhattan and seeking monetary damages for broker’s fee owed to it pursuant to the agreement. Plaintiff subsequently amended the complaint adding Douglas Elliman Real Estate (Elliman) and Edinburgh Seven Seas LLC (Edinburgh) as

defendants, asserting additional causes of action for fraud, interference with a contract, conspiracy to commit fraud, and seeking equitable relief including specific performance, reformation of the contract of sale, and unjust enrichment/disgorgement.

By order dated March 29, 2019 Judge Robert R. Reed dismissed the complaint as to Elliman and Edinburgh but declined to dismiss the claims against HGS. Plaintiff appealed the portion of the order dismissing the complaint against Elliman and Edinburgh. The Appellate Division, First Department, affirmed the order, holding in relevant part that:

Because the letter agreement at issue was a unilateral contract, it did not need to be supported by a mutual promise from plaintiff to be enforceable...

While the failure to identify plaintiff as buyer's broker can be actionable, it is only actionable where plaintiff has some contractual or other entitlement to be paid once it is identified as the broker... Because there was no such entitlement here, and [Edinburgh] did not agree to pay plaintiff any commission, there was no cause of action against [Edinburgh] or [Elliman] for the commission.

PJD Corp. Realty Inc. v Henry George School of Social Science, 184 AD3d 440, 441 (1st Dept 2020).

PENDING MOTIONS

On July 26, 2022, Elliman moved to quash the subpoena dated June 6, 2022, served on it by plaintiff, and for a protective order precluding plaintiff from seeking further discovery from it. (Mot. Seq. 5). On August 12, 2022, Plaintiff cross moved to compel Elliman to comply with the subpoena served on it.

On August 25, 2022, HGS moved for summary judgment dismissing all causes of action against it. (Mot. Seq. 6).

On August 30, 2022, HGS and Elliman moved to quash the subpoena to depose George Van Der Ploeg dated July 11, 2022 served on him by plaintiff, and for a protective order precluding plaintiff from seeking further discovery from it. (Mot. Seq. 7). On September 14,

2022, plaintiff cross moved to compel George Van Der Ploeg to comply with the subpoena served on him, although the cross motion was filed under a separate motion sequence. (Mot. Seq. 8).

The motions are consolidated herein for determination as set forth below.

ALLEGED FACTS

By signed letter dated July 7, 2015, Andrew Mazzone, as president of HGS, wrote the following to Phillip J. Dwyer, as president of plaintiff, which constitutes the purported exclusive broker agreement at issue:

This confirms your authorization to act as our exclusive broker with respect to our need for office space in New York City.

It is understood that you will analyze the costs associated with any proposed transaction and advise us. You agree to negotiate the business terms of any lease or purchase agreement we may enter into, and further agree to assist our attorneys in their review of any such agreement. However, we will look solely to our attorneys for legal guidance, and any negotiations shall be subject to our final approval. Unless otherwise agreed, you agree to look to the landlord/seller for your commission and we agree to recognize you as our exclusive broker in connection with any prospective locations submitted to us by your firm or others during this authorization period, whether or not we close the proposed transaction subsequent to the expiration of said period.

This authorization is valid through January 2016. It will automatically renew for six-month intervals, unless cancelled by either side with 60 days notice.

On January 8, 2017, HGS notified plaintiff that it would immediately terminate plaintiff's authorization to act as its exclusive broker. On or about April 28, 2017, HGS, with Elliman as its broker, closed a transaction to purchase real property located at 149 East 38th street in Manhattan, which was owned and sold by Edinburgh. Plaintiff was not listed as broker and received no commission. Plaintiff asserts upon information and belief that HGS's board approved of the purchase in February, prior to the expiration of the 60-day notice period to

terminate the exclusive broker agreement, and thus contends that it is entitled to receive a commission pursuant to the agreement.

DISCUSSION

HGS' Motion for Summary Judgment Is Granted

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. CPLR 3212(b); *Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 (2019). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; “conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient.” *Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 (2016), quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 (1988). In deciding the motion, the evidence must be viewed in the “light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference.” *O'Brien v Port Auth. of New York and New Jersey*, 29 NY3d 27, 37 (2017).

Plaintiff has withdrawn all remaining causes of action except for breach contract and reformation. For the reasons set forth below those claims are now dismissed.

To prevail on a breach of contract action, plaintiff must establish “the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages.” *Markov v Katt*, 176 AD3d 401, 401-402 (1st Dept 2019), quoting *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 (1st Dept. 2010).

“A claim for reformation of a written agreement must be grounded upon either mutual mistake or fraudulently induced unilateral mistake.” *Chimart Assocs. v Paul*, 66 NY2d 570, 573 (1986); *Goldberg v Manufacturers Life Ins. Co.*, 242 AD2d 175, 179 (1998), *lv dismissed in part*

and denied in part 92 N.Y.2d 1000 (1998); *Greater New York Mut. Ins. Co. v United States Underwriters Ins. Co.*, 36 AD3d 441, 443 (2007).

Before a court will grant reformation of a contract, the party demanding this equitable remedy “ ‘*must establish his right to such relief by clear, positive and convincing evidence*’ ” (*Schultz v. 400 Coop. Corp.*, 292 A.D.2d 16, 19, 736 N.Y.S.2d 9 [1st Dept.2002], quoting *Amend v. Hurley*, 293 N.Y. 587, 595, 59 N.E.2d 416 [1944]). The purpose of reformation is not to “alleviat[e] a hard or oppressive bargain, but rather to restate the intended terms of an agreement when the writing that memorializes that agreement is at variance with the intent of both parties” (*George Backer Mgt. Corp. v. Acme Quilting Co.*, 46 N.Y.2d 211, 219, 413 N.Y.S.2d 135, 385 N.E.2d 1062 [1978]). In order to “overcome the heavy presumption” that the contract embodies the parties' true intent, the party seeking reformation must “show in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties” (*id.*).

Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc., 112 AD3d 78 (1st Dept 2013). HGS contends that no valid contract exists arguing the Appellate Division holding that the subject agreement created no obligation to pay plaintiff once it was identified as broker and thus was not actionable, requires that the Court find that no valid contract exists.

Exclusive broker agreements have been found to be enforceable where the agreement does not specify the amount of the commission but does specify that the broker is required to be paid by the owner, even where, as here, the party’s only obligation is to represent to the seller that the agent is their exclusive broker. *See Lansco Corp. v N.Y. Brauser Realty Corp.*, 63 AD3d 513 (1st Dept 2009) (*exclusive broker agreement enforceable where it provided that owner would pay broker’s commission, although it did not contain material terms including manner in which broker’s fee was to be computed*); *Kaplon-Belo Assoc. Inc. v Cheng*, 258 AD2d 622 (2d Dept 1999) (*plaintiff entitled to “fair and reasonable” commission where it had exclusive broker agreement although agreement was silent as to amount of commission*); *Interactive Properties, Inc. v Doyle Dane Bernbach, Inc.*, 125 AD2d 265 (1st Dept 1986), *lv denied*, 70 NY2d 613 (1987) (*defendant’s breach of exclusive broker agreement prevented plaintiff from earning*

commission); Hunter Realty Organization, LLC v A.O. Textiles, 2013 WL 316370 (Sup Ct, New York County 2013) (agreement enforceable where broker “shall receive its compensation from the owner ...” and by breaching, defendant “deprived and prevented the plaintiff from receiving such compensation from the lessor”).

However, as the Appellate Division determined, plaintiff had no entitlement to be paid pursuant to the agreement once it was identified as broker, as the agreement only stated that plaintiff agreed to “look to the landlord/seller for [its] commission.” *PJD Corp.*, 184 AD3d at 441; *see e.g. Parkway Group, Ltd. V Modell’s Sporting Goods*, 254 AD2d 338 (2d Dept 1998) (even if agreement created an exclusive agency, plaintiff would not be entitled to a commission “at a rate to be negotiated” as it was an unenforceable agreement to agree); *Cooper Square Realty, Inc. v A.R.S. Mgt, Ltd.*, 181 AD2d 551 (1st Dept 1992) (exclusive agreement that provided plaintiff would be paid a commission “to be separately determined” was an unenforceable agreement to agree). Thus, the purported agreement is unenforceable, and plaintiff’s cause of action for breach of contract fails. Additionally, absent entitlement to be paid a commission pursuant to the agency agreement or otherwise, plaintiff fails to assert fraud sufficient to support reformation of the contract of sale.

Elliman’s motions to quash are granted, and plaintiff’s cross motions to compel are denied

As plaintiff’s remaining causes of action are dismissed, Elliman’s motions to quash the subpoenas are granted, and plaintiff’s cross motions to compel are denied as academic.

Wherefore, it is hereby:

ORDERED that defendant's motion for summary judgment (Mot. Seq. 6) is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion of Douglas Elliman Real Estate to quash a subpoena returnable in this court, served upon it on June 6, 2022 (Mot. Seq. 5), is granted; and it is further

ORDERED that plaintiff's cross motion to compel is denied as academic; and it is further

ORDERED that the motion of defendant Henry George School of Social Science and Douglas Elliman Real Estate to quash a subpoena returnable in this court, served upon it on July 11, 2022 (Mot. Seq. 7), is granted; and it is further

ORDERED that plaintiff's cross motion to compel (Mot. Seq. 8) is denied as academic; and it is further

ORDERED that, within 20 days from entry of this order, defendant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

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9/23/2022
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE