

Shuckman Realty Inc. v Figliolia
2022 NY Slip Op 33673(U)
October 20, 2022
Supreme Court, New York County
Docket Number: Index No. 650053/2022
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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SHUCKMAN REALTY INC.,

Index No. 650053/2022

Plaintiff

- against -

DECISION AND ORDER

LINDA FIGLIOLIA and ARIEL PROPERTY
ADVISORS LLC,

Defendants

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LUCY BILLINGS, J.S.C.:

Defendant real estate broker Ariel Property Advisors LLC moves to dismiss plaintiff real estate broker's claim for tortious interference with a contract, plaintiff's only claim against this defendant, based on plaintiff's failure to state a claim. C.P.L.R. § 3211(a)(7). Defendant Figliolia, the owner of real property at 425 Hoyt Street, Kings County, moves to dismiss plaintiff's claim for breach of a contract, one of several claims against this defendant, on the same basis. Id. The court grants both motions as follows.

The amended complaint alleges the elements of tortious interference with a contract in that Ariel Property Advisors intentionally procured Figliolia's breach of an exclusive brokerage contract between plaintiff and Figliolia, by inducing Figliolia to sell her property through Ariel Property Advisors, despite its knowledge of the contract. Normandy Real Estate

Partners LLC v. 24 E. 12th St. Assoc. LLC, 168 A.D.3d 429, 430 (1st Dep't 2019). The allegations show that Ariel Property Advisors' inducement "exceeded a minimum level of ethical behavior in the marketplace." Id. (quoting White Plains Coat & Apron Co., Inc. v. Cintas Corp., 8 N.Y.3d 422, 427 (2007)).

Although the amended complaint also alleges that this inducement caused damages to plaintiff as Figliolia's broker, the court grants the motion to dismiss the complaint against Ariel Property Advisors because plaintiff's alleged damages are not ascertainable. The contract provides that the broker's commission "shall be paid in full upon closing of title and delivery of the deed for an outright sale." Aff. of David A. Wolf Ex. 1, at 10. Plaintiff's amended complaint merely alleges that Ariel Property Advisors "has or is about to be paid one full commission as a result of the sale by Figliolia of the Property to a Prospective Purchaser." Aff. of Alan A. Heller Ex. B ¶ 58. No interpretation of this allegation indicates that Ariel Property actually has received a commission, which undermines plaintiff's claims for both tortious interference with or breach of the contract. Whether the court construes plaintiff's allegation as "has . . . to be paid," or "is about to be paid," both constructions contemplate a future act, not one that already has occurred.

Since plaintiff's commission is contingent on the sale of

the property, plaintiff's damages are neither ascertainable nor recoverable until the sale has closed. DeLibero v. Duloc, 199 A.D.3d 600, 600 (1st Dep't 2021); B.P. Vance Real Estate, Inc. v. Tamir, 42 A.D.3d 343, 344 (1st Dep't 2007). Although nonpayment of plaintiff's commission is not the only basis for plaintiff's breach of contract claim, any commission from this transaction will constitute all plaintiff's recoverable damages. Thus, until the sale closes, plaintiff's claims for tortious interference with and breach of the contract remain premature, and plaintiff's alleged damages are only speculative. Moreover, Ariel Property Advisors' attorney confirmed at oral argument that the property has not yet been sold, and the most recent deed for 425 Hoyt Street, Kings County, presented in connection with these motions shows Figliolia still owns the property, none of which plaintiff disputes.

Finally, the disclosure plaintiff seeks under C.P.L.R. § 3211(d), even had plaintiff supported its need for the disclosure with the required affidavit, pertains to when Figliolia or her representative first was in contact with a potential purchaser and whether Ariel Property Advisors knew about her exclusive contract with plaintiff, not whether the sale has closed. Therefore the court grants defendant Ariel Property Advisors LLC's motion to dismiss plaintiff's claim for tortious interference with a contract and defendant Figliolia's motion to

dismiss plaintiff's breach of contract claim, both without prejudice. C.P.L.R. § 3211(a)(7).

DATED: October 20, 2022

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C