

Brooklyn Bound Realty Corp. v Charles
2022 NY Slip Op 34035(U)
November 22, 2022
Supreme Court, Kings County
Docket Number: Index No. 517027/2022
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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BROOKLYN BOUND REALTY CORP.,
Plaintiff, Decision and order

- against - Index No. 517027/2022

JANIS CHARLES as ADMINISTRATOR FOR
THE ESTATE OF PEARL BLAKE, and JANIS
CHARLES, INDIVIDUALLY,
Defendants, November 22, 2022

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved pursuant to CPLR §3211 seeking to dismiss the complaint. The plaintiff has cross-moved seeking summary judgement. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

According to the Verified Complaint, the plaintiff, a real estate broker was hired by the defendant to procure a purchaser for property located at 313 Jefferson Avenue in Kings County. The listing agreement was executed by the parties on August 28, 2020 and pursuant to its terms lasted until February 28, 2021. Paragraph 2(c) of the agreement states that the broker would be entitled to a 6% commission if "within 12 months after the termination of this listing, the property is sold by Owner or by any other person to a buyer who was first submitted to Owner, directly or indirectly, by Broker" (see, Exclusive Agency Listing Agreement [NYSCEF Doc. No. 27]). The plaintiff alleges

they procured a purchaser, Adrian Bartos, who agreed upon a price of \$1,500,000, a contract was entered into between the parties and the purchaser wired the down payment to the account of defendant's counsel. The Verified Complaint asserts the defendants never signed the contract and returned the down payment to the purchaser. Subsequently, in April 2022, the defendant and Bartos entered into a contract for a purchase price of \$1,805,000. Thus, the plaintiff asserts they are entitled to a 6% commission fee in the amount of \$108,300 and \$20,000 in costs and legal fees. Alternatively, the plaintiff seeks a commission of \$90,000 which is 6% of the original price of \$1,500,000.

The defendant has now moved to dismiss the action on the grounds the plaintiff failed to procure a buyer that was ready, willing and able to purchase the property because the buyer did not have sufficient funds to purchase the property and thus was not "able" to purchase such property. The plaintiff, on the other hand seeks summary judgement arguing there is no question of fact they are entitled to the fee.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the

complaint states in some recognizable form any cause of action known to our law" (see, AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

It is well settled that for a party to recover real estate brokerage commissions the broker must establish (1) that the broker is duly licensed, (2) that the broker had a contract, express or implied, with the party to be charged with paying the commission, and (3) that the broker was the procuring cause of the sale (see, Friedland Realty Inc., v. Piazza, 273 AD2d 351, 710 NYS2d 97 [2d Dept., 2000]).

First, there are questions of fact whether purchaser was able to finance the contract. The defendant argues the purchaser did not maintain sufficient funds in his bank account. However, he received a letter from TD Bank dated October 8, 2020 wherein he was offered a loan to help finance the purchase of the property (see, Bank Letter [NYSCEF Doc. No. 10]). In addition, Mr. Bartos maintained other assets sufficient to demonstrate sufficient funds to close on the property. Thus, the purchaser was "able" to close on the contract. Surely there are questions

in this regard which require further discovery.

Second, the brokerage agreement states that the "Broker shall receive a commission of 6% of the selling price accepted by the Owner" (id., at ¶2). Thus, by the plain terms of the agreement it is not enough to procure a buyer, rather, the selling price must be accepted by the owner. If no acceptance materializes then no commission is due. It is true that while the first contract, dated December 3, 2020 was never accepted by the seller, there are questions of fact whether a commission is due in any event and the amount of such commission due.


Paragraph 2(b) of the listing agreement states that the broker is entitled to a commission when the "Owner actually sells the property to a purchaser procured by Broker or by any other Broker during the term of this listing" (id). There can be no dispute the broker procured this purchaser during the term of the listing agreement. There are thus questions whether the broker is entitled to a commission where it procured the purchaser during the listing term's operative time frame, however, where the actual contract was executed after that time frame. Indeed, the inclusion of paragraph 2(b) as an additional basis for commissions in addition to paragraph 2(a) supports a broad reading of the clause. However, clearly, there must be some time frame in which the seller can be expected to believe the listing agreement was terminated even if the purchaser was someone

originally procured by the plaintiff. To the extent this reading of the brokerage agreement renders Paragraph 2(c) superfluous, first, the third paragraph states a commission is due if a closing takes place within twelve months of the contract's termination if the property is sold to anyone who was first "submitted" to the owner. The word "submitted" which is different than the word "procure" which is contained in paragraphs 2(a) and 2(b) may indicate a different factual scenario. In any event, the court need not speculate upon the correct interpretation of all three clauses and the interplay between them. It is enough to note there are questions as to the precise reach of that clause. Therefore, all motions seeking to dismiss the complaint or for a summary determination regarding the complaint are denied. The parties are now directed to proceed with discovery.

So ordered.

ENTER

DATED: November 22, 2022
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC