

Benn & Assoc., LLC v Vintage Capital Partners, LLC
2022 NY Slip Op 34312(U)
December 12, 2022
Supreme Court, Kings County
Docket Number: Index No. 525903/2022
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS ; CIVIL TERM: COMMERCIAL 8

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BENN & ASSOCIATES, LLC.,

Plaintiff,

Decision and order

- against -

Index No. 525903/2022

VINTAGE CAPITAL PARTNERS, LLC AKA
VINTAGE CAPITAL PARTNERS/WCJ PARTNERS AKA
WCJ PARTNERS/VINTAGE CAPITAL GROUP AND
CARY WOLEN, individually and in his capacity as
member of defendant, LLC,

Defendants,

December 12, 2022

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking an injunction and for summary judgement in lieu of complaint. The defendants have cross-moved seeking to dismiss the lawsuit. 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.

On February 2, 2022 the plaintiff and defendant entered into a commercial brokerage agreement wherein the plaintiff sought funding to pay off a mortgage on property located at 827 East 57th Street in Kings County. Pursuant to paragraph 6(b) of the agreement the plaintiff borrower agreed to pay the defendant "a Commercial Broker success fee equal to 4% of any loan secured by the Property as defined in this 'Project' for which Broker was the procuring cause of the financing. The Commercial Broker fee is fully earned when the financing has been approved in writing by a lender with the terms and conditions acknowledged in

writing to be acceptable to the Borrower" (id., [NYSCEF Doc. No. 37]). The defendant procured the necessary financing and a closing was scheduled for March 1, 2022. The closing concluded and the members of the plaintiff executed a document entitled 'Consent of Members' which states that Kevon Daniel the manager of Benn & Associates may take any necessary action for the purchase and mortgaging of the property located at 827 East 57th Street as well as a personal guaranty (see, NYSCEF Doc. No. 41]). Due to the lateness of the day the funds were not disbursed. The next day, on March 2, 2022 the plaintiff, through counsel, indicated the plaintiff wished to cancel the transaction. The following day, March 3, 2022 counsel indicated the plaintiff wished to proceed with the transaction and the following day, March 4, 2022 once again sought to cancel the transaction. The lender acquiesced to the request to cancel and rescind the transaction. The defendant nevertheless sought its fee and filed a UCC-1/Mechanic's Lien on the property pursuant to Paragraph 11 of the Commercial Broker Agreement. The plaintiff instituted this lawsuit and has moved seeking an injunction to restrain the defendant from maintaining the UCC-1 on the property. On October 14, 2022 a UCC-3 termination was filed and the property was then transferred to Kevon Daniel. As noted, motions have now been filed.

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]).

As noted, the agreement executed by the parties required the payment of the commission "when the financing has been approved in writing by a lender with the terms and conditions acknowledged in writing to be acceptable to the Borrower" (id). There is really no dispute the defendant satisfied the conditions

of the provision and is entitled to its fee. The mere fact the closing was never finalized does not mean the broker is not entitled to its fee. It does not matter the reason the closing was never finalized. Even if the plaintiff has valid reasons that would not affect the defendant's entitlement to a fee. The plaintiff argues that Paragraph 11 of the commercial broker agreement raises questions whether the defendant is entitled to a brokerage fee. That paragraph states that "Borrower agrees that if, for any reason, it elects not to close...a cancellation fee of 2% will be due and owing the Lender" (id). While it is curious that an agreement between the borrower and broker would contain obligations due the lender, clearly, that paragraph states a 2% would be owing to the lender, not the broker. Further, that paragraph which only deals with a fee owed to the lender seems to permit the lender to file such UCC-1 statement, not the broker. Therefore, the court cannot award any relief concerning the UCC-1 filed or the UCC-3 also filed since there are questions whether the filing of the UCC-1 was permitted by the broker. In any event, clearly, that paragraph does not in any way raise any questions of fact whether the broker is entitled to its fee. Indeed, there are no questions of fact the broker is entitled to such fee.


Therefore, based on the foregoing the defendant's cross-motion seeking to dismiss the lawsuit is granted. The

plaintiff's motions are now denied as moot.

So ordered.

ENTER

DATED: December 12, 2022
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC