SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. ROBERT A. MCDONALD,
Justice.

----------x

ANGELIC REAL ESTATE, LLC.,

Plaintiff,

INDEX NO.: 612449/2020
Mot. Seq. No.: 001 and 002

-against-

AURORA PROPERTIES, LLC.

DECISION AND ORDER

----------x

The following papers have been considered upon these motions: NYSCEF DOC NO.

Notice of Motion/Affidavit/Exhibits/Statement of Material Facts	6 – 14
Memorandum of Law in Support	15
Notice of Cross-Motion/Affidavit/Statement of Material Facts	17 - 19
Memorandum in Opposition to Motion and Support of Cross-Motion....	20
Affidavits in Opposition to Cross-Motion and Further Support of Motion.	21 - 22
Statement of Material Facts	23
Reply Affidavit in Further Support of Cross-Motion	24

Upon the foregoing papers, Plaintiff Angelic Real Estate, LLC's motion, pursuant to CPLR §3212 for summary judgment on the causes of action in its complaint and Defendant Aurora Properties, LLC's cross-motion, pursuant to CPLR §3212, for summary judgment dismissing Plaintiff's complaint are consolidated for disposition and determined as set forth hereinafter.

FACTUAL BACKGROUND

In or about May 2020, the parties, through their principals, discussed the possibility of Defendant retaining Plaintiff to assist it in obtaining debt financing for its properties. After

several rounds of negotiations, on June 8, 2020, the parties executed a written agreement granting plaintiff the "exclusive" ability to secure the desired financing for defendant.

The agreement provided, in relevant part, that Plaintiff would assist Defendant in "identifying, soliciting proposals from, and negotiating with financing providers" for debt on certain properties owned by Defendant. Defendant's desired loan was non-recourse, for $19,000,000; with a 20-year term and 20-year amortization and an interest rate of 4.0% or lower. Plaintiff was engaged by Defendant for this purpose for a total of 120 days. The agreement also provided that if Plaintiff did not secure for Defendant, on or before June 20, 2020, one or more written quotes or terms sheets from lenders with Defendant's desired loan terms, the Agreement would remain in place but "shall become non-exclusive with regards to any lenders not already approached and engaged" by Plaintiff. In this instance, Plaintiff was to provide Defendant with a list of its "protected lenders" it had approached for the loans. If Defendant were to then obtain a loan from any of the protected lenders, the exclusivity clause of the agreement would be reinstated. The agreement also contained a carve out to the exclusivity period for lenders who Defendant had already engaged in negotiations with for a loan, provided a terms sheet was signed on or before June 30, 2020 (UBS, Mountain Commerce Bank, TNRDF).

Following execution of the agreement, Plaintiff solicited loan proposals with over one hundred lenders. Plaintiff maintained scrupulous records detailing (1) the potential lenders it contacted; (2) the potential lenders' representative contact information; (3) each time Plaintiff followed up with the potential lender; (4) any feedback it received from the potential lender; and (5) a detailed script for Defendant when communicating with lenders. Plaintiff presented Defendant with multiple financing options from various lenders through June 30, 2020 and beyond that deadline. Indeed, Defendant negotiated extensively with Citibank for a loan through July 2020, but ultimately chose not to do business with them.

On or about August 21, 2020, defendant obtained a loan commitment from Mountain Commerce Bank ("MCB") signing a term sheet and eventually closing on a $16,750,000 loan with MCB. Defendant, however, declined to pay any fees to Plaintiff, reasoning that Plaintiff was not entitled to a fee because MCB was one of the excluded lenders and that Plaintiff did not introduce or participate in the negotiations with MCB or otherwise facilitate the loan. Plaintiff subsequently commenced this action seeking to recoup the fee it believes it is entitled to under the agreement.

MOTIONS FOR SUMMARY JUDGMENT

Plaintiff moves for summary judgment on its claim for payment under the agreement. Plaintiff argues that under the plain terms of the agreement, it is entitled to a fee as long as Defendant obtained financing during the life of the parties' agreement. Plaintiff argues that the agreement was an exclusive one, subject to the carve outs for the three potential lenders, but that the carve out to the exclusivity provision expired on June 30, 2020. Plaintiff argues that because defendant signed the term sheet with MCB on August 21, 2020, after the expiration of the carve out, it is entitled to a fee.

Defendant counters, in its cross-motion for summary judgment dismissing the complaint, that Plaintiff did not meet the conditions precedent to earning a fee. Defendant asserts that in order to earn a fee, Plaintiff had to meet certain condition precedents under the agreement, such as securing a loan for defendant that met its terms. Defendant argues that Plaintiff would only have earned a commission if it was able to secure a lender that met Defendant's desired terms. Defendant states that Plaintiff never obtained a terms sheet from any lender with conforming terms during the exclusive period through June 20, 2020 and indeed, did not at any time thereafter. Defendant asserts that Plaintiff therefore never became entitled to a fee, particularly since Defendant eventually obtained its own loan from a lender it had already identified.

The parties agree that they are both bound by the terms of the agreement. Here, the agreement is clear, concise, and should be enforced according to its plain terms. Construing those terms and enforcing the agreement as drafted is a question of law for the Court (see, e.g., Birnkrant v Automobile Ins. Co. of Hartford, Ct., 206 AD3d 963, 964 [2d Dept 2022]). In so doing, a "court should arrive at a reasonable construction which will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized" (G3-Purves Street v Thomson Purves, LLC, 101 AD3d 37, 40-41 [2nd Dept 2012]). A court must be mindful, however, not to interpret a contract in such a way that is absurd, commercially unreasonable, or contrary to the reasonable expectation of the parties (In re Lipper Holdings, LLC, 1 AD3d 170 , 171 [1st Dept 2003]).

Plaintiff's argument that it is entitled to compensation under the agreement despite the fact that it did not actually obtain the financing for Defendant is largely based, as noted above, on the exclusivity provisions in the agreement. And while, to be sure, Courts have, in some instances, held that an exclusive right to sell establishes the right to commission even upon a sale by owner, (see, e.g., Solid Waste Inst. v Sanitary Disposal, 120 AD2d 915 (3rd Dept 1986][collecting cases]), here, the plain language of the agreement granted plaintiff a limited exclusive right, at best, to secure the loan for defendant.

To be sure, the agreement says that plaintiff is "exclusively" engaged to secure the loan on defendant's behalf, but that exclusive right is subject to numerous limitations within the agreement. In the first instance, the "Scope" section of the agreement provides that Plaintiff's right to act exclusively for Defendant lasts for 12 days, from the June 8, 2020 date of the agreement until June 20, 2020. At the conclusion of the period, the agreement becomes non-exclusive "with regard to any lenders not already approached and engaged by Plaintiff."

Plaintiff had the opportunity to preserve this exclusivity for any lender it had approached on Defendant's behalf by providing Defendant with a list of those "protected lenders." If Defendant were subsequently to secure a loan from any of those "protected lenders" then the exclusivity provision would be reinstated.

Another limitation on Plaintiff's exclusivity rights lies in the "carve out" provisions for the three lenders Defendant had already identified and was working with prior to Plaintiff's engagement, UBS, Mountain Commerce Bank, and TNRDF. As noted, this carve out exclusion ended on June 30, 2020.

Given these express limitations on Plaintiff's exclusive representation of Defendant, it cannot be concluded that Plaintiff had a right to compensation under the circumstances in which Defendant eventually secured the loan. The Court notes that Plaintiff argues that the "Scope" provision is a general provision of the agreement which should not be controlling over the specific provisions of the agreement. However, all the provisions of the agreement referred to by the parties are preceded by a sentence that states "[t]he following sets forth (Plaintiff's) mutually agreed upon compensation structure for such financing of the Properties." It is clear, based on this clause, that all provisions that follow are meant to limit the circumstances under which Plaintiff would be entitled to compensation.

Moreover, Defendant eventually secured its desired loan from MCB, one of the entities that Defendant specifically excluded Plaintiff from being able to receive a fee if a loan was secured from that entity. Notwithstanding the fact that the exclusion period ended on June 30, 2020, given the lack of exclusivity in the agreement, it would be commercially unreasonable for Plaintiff to receive a fee for a loan negotiated and secured solely by Defendant.

Accordingly, it is

ORDERED that Plaintiff's motion, pursuant to CPLR §3212, for summary judgment on the causes of action in its complaint is **DENIED;** and it is further

ORDERED that Defendant's cross-motion, pursuant to CPLR §3212, for summary judgment dismissing Plaintiff's complaint is **GRANTED;** and it is further

ORDERED that all requests for relief not addressed herein are DENIED.

This shall constitute the Decision and Order of the Court.

Dated: October 11, 2022

ENTER:

Robert A. McDonald, J.S.C.