

**Voulgaris v Phillips**

2023 NY Slip Op 30945(U)

March 27, 2023

Supreme Court, New York County

Docket Number: Index No. 653490/2022

Judge: Lyle E. Frank

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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. LYLE E. FRANK PART 11M

*Justice*

-----X

NICK VOULGARIS,

Plaintiff,

- v -

MICHAEL PHILLIPS, JAMESTOWN, L.P., 801  
GREENWICH HOLDINGS, L.P., 803 GREENWICH  
HOLDINGS, L.P.

Defendant.

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INDEX NO. 653490/2022

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, defendants' motion to dismiss plaintiff's verified complaint is granted in its entirety.

The action arises out of an alleged oral agreement between defendant Michael Phillips and plaintiff Nick Voulgaris, allegedly reached on August 10, 2021. Plaintiff contends that based on the agreement, defendant Jamestown LP promised to pay plaintiff a finder's fee if the entity ended up purchasing properties located on Greenwich Street, New York. The fee would equal 10% of the final purchasing price.

Plaintiff alleges that after closing on the deal and purchasing the properties for \$16.1 million in December 2021, Jamestown refused to pay such fee and claimed no such deal between the two parties. Plaintiff commenced the instant action asserting breach of contract, promissory estoppel, quantum meruit, unjust enrichment, constructive trust and fraudulent misrepresentation.

Defendants move to dismiss the complaint in its entirety pursuant to CPLR § 3211(a)(5) and (a)(7) on the grounds that plaintiff's claims are barred by the Statute of Frauds under General

Obligations Law § 5-701(a)(10) and RPL § 442-d for failing to state a cause of action upon which relief may be granted. Plaintiff opposes the instant motion. For the reasons set forth below the motion to dismiss is granted.

### Discussion

When considering a motion to dismiss based upon CPLR § 3211(a)(7), the Court must accept the alleged facts as true, accord the plaintiff the benefit of every possible favorable inference, and determine whether the facts alleged fit into any cognizable legal theory. *See Leon v Martinez*, 84 NY2d 83 [1994].

Since plaintiff is seeking finder's fee from defendants and the transaction is solely about purchase of properties, the threshold issue in this is action is whether plaintiff was a duly licensed real estate broker or salesman on the date when the alleged cause of action arose. Given the nature of the transaction, Real Property Law (RPL) § 442-d controls.

The RPL states in pertinent part that “[n]o person, ... shall bring or maintain an action in any court of this state for the recovery of compensation for services rendered, in any place in which this article is applicable, in the buying, selling, ... [of] any real estate without *alleging and proving* that such person was a duly licensed real estate *broker* or real estate *salesman* on the date when the alleged cause of action arose” *id.* (emphasis added).

Here, the transaction at issue is the purchase of two properties located on Greenwich Street, New York and plaintiff is seeking the recovery of finder's fee for the service rendered to facilitate the transaction. The nature of the transaction and the substance of the claim put this suit under the purview of RPL § 442-d squarely.

The Appellate Division First Department has held that if the transaction involves “a sale of real estate, and since the plaintiff is not properly licensed he may not recover either brokerage

commission or finder's fees." *Sorice v Du Bois*, 267 NYS 2d 227, 228. The First Department does not differentiate brokerage commission from finder's fees when it comes to the recovery of "compensation" for services rendered in buying or selling real estate. The dispositive issue considered by the appellate court is whether the party seeking recovery of a finder's fee would be barred by RPL § 442-d if the party was not a licensed broker or salesman when the alleged cause of action happened.

Plaintiff cites to *Gerstein*, in his opposition to defendant's motion to dismiss, to support his contention that he does not need a license to recover the finder's fee. *Gerstein v 532 Broad Hollow Road Co.*, 75 AD2d 292 [1st Dept]. Plaintiff claimed that "plaintiff introduced and 'aroused' purchaser's interest in lease but play no role in 'negotiating the terms or conditions' of the lease, thus no brokerage license required." See NYSCEF Doc. No. 25 page 13, subsection B. The Court finds that *Gerstein*, is distinguishable to the instant matter. There the First Department held that a broker, needs a license to recover "compensation for brokerage services". *Gerstein* at 296. Here, plaintiff contends his is a finder not a broker, as such *Gerstein* does not apply.

Similarly, *Northeast General Corporation* cited by plaintiff is not on point. Plaintiff relied on the Court of Appeals' explanation of differences between a finder and a broker in a takeover transaction. See *Northeast Gen. Corp. v Wellington Advertising*, 82 NY2d 158, 162-163 [1993] (a finder is not a broker, although they perform some related functions. ... The finder is required to introduce and bring the parties together, without any obligation or power to negotiate the transaction, in order to earn the finder's fee. While a broker performs that same introduction task, the broker must ordinarily also bring the parties to an agreement). The Court highlighted the difference to make the point that finders do not owe the same fiduciary duty as brokers to their

clients. *Id.* at 163. The Court's decision in *Northeast General Corporation* is silent as to the requirement of license for finders to recover the finder's fee in a property transaction.

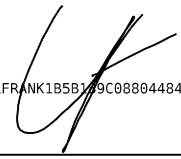
The Court notes that plaintiff has cited various Second Department case law to support his position, however as the First Department precedent is binding on this Court and specifically addresses the issues here, the Court declines to address the persuasive authority cited. In the end it is *Sorice* that controls. The controlling law in this Department is clear, that when the transaction involves sales of real estate, the person needs to be duly licensed to recover finder's fee for services rendered in the transaction. Plaintiff has never alleged in the complaint that he was a broker or salesman when he introduced the opportunity to defendants or when the alleged breach of contract happened. Nowhere in the documentary evidence indicates otherwise and there is no proof of plaintiff's identity as broker or salesman. Therefore, plaintiff should be barred from maintaining the action in this court.

Given that plaintiff failed to clear the hurdle of the threshold issue, the Court needs not consider the breach of contract and other contractual related claims. Even if the alleged oral agreement is enforceable and is not barred by the Statute of Frauds, plaintiff still cannot recover the finder's fee because he was not a licensed broker when the underlying transaction happened, and the service was rendered.

The Court finds that the complaint is insufficient as it fails to allege any factual allegations to support a cause of action for recovering the finder's fee. Accordingly, it is hereby

ORDERED that the verified complaint is dismissed in its entirety, and the Clerk of the Court shall enter judgment accordingly.

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3/27/2023

DATE

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LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED  DENIED

APPLICATION:

SETTLE ORDER

NON-FINAL DISPOSITION

GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER

FIDUCIARY APPOINTMENT  REFERENCE