

Eyzenberg & Co., LLC v Chelsmore Apts., LLC

2023 NY Slip Op 33966(U)

November 6, 2023

Supreme Court, New York County

Docket Number: Index No. 651725/2020

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

EYZENBERG & COMPANY, LLC
Plaintiff,

- v -

CHELSMORE APTS., LLC,
Defendant.

-----X

INDEX NO. 651725/2020
MOTION DATE 10/23/2023
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110

were read on this motion to/for JUDGMENT - SUMMARY.

Defendant’s motion for summary judgment dismissing the complaint or, in the alternative, to strike plaintiff’s jury demand is granted to the extent that the complaint is dismissed.

Background

Defendant owns real estate and plaintiff is in the business of assisting owners in getting mortgages. Defendant was trying to refinance some of its multifamily buildings in Manhattan. In July 2019, defendant received a letter of intent from JPMorgan Chase Bank (“JPMorgan”) which contained JPMorgan’s offer for a ten-year loan for \$64.5 million at a 3.8% interest rate. After this letter of intent was issued, the plaintiff and defendant entered into an agreement because defendant wanted more money and a lower interest rate than JPMorgan had offered in the letter of intent.

The agreement, which will be discussed in more detail below, basically provided that if plaintiff found defendant another lender and a deal was made, then plaintiff would get a fee. However, if defendant went with JPMorgan, then because defendant had already received a letter of intent from JPMorgan, plaintiff would only get a fee if plaintiff “improved” the deal that was then on the table as reflected in the letter of intent.

The deal with JPMorgan improved. It is undisputed that after the parties entered into their agreement, defendant entered into a second agreement with JPMorgan pursuant to a second letter of intent later in 2019 which was for more money and at a lower interest rate than what was offered in the first letter of intent. According to defendant, the final loan amount was \$65.5 million (a million dollars more) with an interest rate of 3.38% (lower than the original 3.8%). It is hotly disputed, however, whether plaintiff is entitled to a fee in connection with this second letter of intent.

The Parties’ Contentions

Defendant now moves for summary judgment on the ground that it handled all of the negotiations with JPMorgan for that better deal and so plaintiff is not entitled to a commission. It points out that plaintiff’s principal testified that none of plaintiff’s employees took part in the negotiations with JPMorgan and that two of JPMorgan’s loan officers swore that plaintiff did not do or say anything to influence the loan amount or interest rate.

Defendant argues that its principal, Joan Price Rahav, had already decided to refinance with JPMorgan but that plaintiff offered to help in July 2019, after the first letter of intent. Defendant insists that because it was already renegotiating with JPMorgan, the agreement between plaintiff and defendant specifically provided that plaintiff would only receive a

commission if plaintiff could procure a larger loan or a better interest rate (or both) from JPMorgan. Plaintiff would also receive a commission if defendant entered into a loan with another lender.

Defendant admits that one day after it entered into the agreement with plaintiff, JPMorgan lowered the interest rate by .1%. But according to defendant, once a loan officer at JPMorgan found out that plaintiff was trying to help defendant, he noted his dissatisfaction with plaintiff and the loan officer refused to communicate with plaintiff. Defendant argues that JPMorgan would only negotiate directly with defendant. And so defendant argues that the second letter of intent was brought about having nothing to do with plaintiff's efforts- the bank wouldn't even speak to plaintiff.

Defendant observes that a plain reading of the agreement should compel the Court to dismiss the case. It maintains the record shows that plaintiff did not do anything to assist defendant in getting a better loan from JPMorgan. Defendant argues that plaintiff's assertion that better loan terms were offered simply because JPMorgan knew plaintiff was working for defendant is not sufficient. It argues that the second cause of action—to reform the agreement between plaintiff and defendant—is moot because the first cause of action for breach of contract should be dismissed.

In opposition, plaintiff emphasizes that it was responsible for the improved terms offered by JPMorgan. It argues that JPMorgan decreased the interest rate immediately after discovering that defendant had hired plaintiff and highlights portions of the deposition testimony of defendant's principal which it claims shows plaintiff's assistance in improving the loan offer. Plaintiff contends that defendant is intentionally omitting the facts on this record, which show that the terms improved after it was hired.

Plaintiff details that it dedicated hundreds of hours on behalf of defendant and approached over 30 other banks and lending institutions, which resulted in four competitive offers. It contends that JPMorgan knew about these other offers and that this undoubtedly affected the interest rate ultimately offered by JPMorgan.

In reply, defendant contends that plaintiff is attempting to change the language of the agreement to provide that defendant would earn a fee regardless of its role in the ultimate loan procured by defendant from JPMorgan. It insists that plaintiff's basis for recovery is entirely speculative.

Discussion

To be entitled to the remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942

NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The Court's discussion begins with the relevant term of the parties' agreement, which provides that:

“Notwithstanding the foregoing, EyzenCo understands and acknowledges that Client has already received terms from Chase Bank (Chase LOI is attached as Exhibit A.) If Client should choose to close with Chase than [sic] the following fee schedule will apply:

(i) Should EyzenCo improve (only) on the fixed rate spread of 1.72% the Success Fee shall be equal to the lesser of .75% of the loan amount or 50% of the aggregate savings over the life of the loan.

(ii) Should EyzenCo improve (only) the proceeds of \$64,600,000 (\$65,600,000 if a lease is signed for the vacant store at 88 7th ave) by more than 5% the Success Fee shall be equal to .5% of the loan amount.

(iii) Should EyzenCo improve (both) the rate and proceeds from the Chase LOI than [sic] the Success fee shall be equal to .50% of the loan amount.

(iv) Should EyzenCo not be able to improve both the spread and proceeds than [sic] there shall be no Success fee payable to EyzenCo” (NYSCEF Doc. No. 41, ¶ 2).

There is no dispute that the ultimate loan obtained by defendant, which was after the parties entered into the agreement, had a better interest rate and larger total loan amount. The question on this motion is whether plaintiff raised an issue of fact that it *improved* the interest rate and loan amount ultimately offered by JPMorgan.

At plaintiff's deposition, its principal noted that “the Chase loan was improved upon by our involvement, and, in this case, it literally simply was because of our being hired. So, it had nothing to do, for example, with anything that we had necessarily done as of yet. . . . I did not get

a chance to directly negotiate with Chase, so it was not a task-oriented improvement, but, clearly, because of our involvement in the transaction and being a part of it, that the loan was improved upon” (NYSCEF Doc. No. 32 at 105-06). He added that “Chase still provided the best terms, but we improved upon, clearly, what [C]hase was offering, because otherwise [defendant] would never have hired us in the first place for the second and the third time, if we could not or did not prior to” (*id.* at 107).

One of the loan officers for JPMorgan testified that he received a single email and phone call from Mr. Eyzenberg but did not have any other communications with him (NYSCEF Doc. No. 36 at 174-75). This loan officer, Mr. Dooley, testified that he did not negotiate with plaintiff and that plaintiff did not say or do anything that led to JPMorgan improving its offer (*id.* at 175). The other loan officer, Mr. Ibarra, testified that he was not aware of anything that plaintiff did to influence the interest rate or the amount of the loan proceeds (NYSCEF Doc. No. 35 at 147-48).

Plaintiff is basically saying that JPMorgan is not telling the truth, and that of course the fact that JPMorgan knew that plaintiff was shopping the loan around to other banks and advising defendant led to JPMorgan offered a better deal than in the first letter of intent. That is, even though plaintiff did not actually negotiate directly with JPMorgan, plaintiff was the elephant outside the room during defendant’s negotiations with JPMorgan.

Plaintiff fails to present an issue of material fact. Even if defendant’s hiring of plaintiff spurred JPMorgan to make a better deal, the fact is that *plaintiff* did not do anything to improve the deal. Improve means “to advance or make progress in what is desirable” or “to make useful additions or amendment” (Merriam-Webster.com Dictionary, improve [<https://www.merriam-webster.com/dictionary/improve>]) [Note: online free version]). Simply put, the Court is unable

to identify what specific actions plaintiff took, or what was so special about plaintiff, that caused the loan terms to improve.

Clearly, when plaintiff entered the contract, plaintiff thought it was obligated to do something to earn a fee; it immediately contacted JPMorgan. If plaintiff intended to get a fee by sitting outside the room, then it should have negotiated a provision in the agreement to unconditionally get a fee if defendant got a better deal from JPMorgan.

Plaintiff was, in effect, a tree planted by defendant; plaintiff did not actively take any steps to improve the deal other than to exist. In fact, it was defendant that took action—to hire plaintiff. Under plaintiff’s theory, defendant could have hired any company like plaintiff to sit in the background and would have gotten the same result. The record shows that defendant’s principal negotiated exclusively with JPMorgan and plaintiff admits it had no role in that process. In fact, in an email from November 2019 (after defendant had signed a subsequent letter of intent with JPMorgan), plaintiff’s principal asks if there is anything plaintiff could do (NYSCEF Doc. No. 45 at 2). Defendant’s principal responds that it is “Smooth sailing here, almost finished” (*id.*).

Although plaintiff contends that it procured four other offers and expended hundreds of hours for defendant, it did not raise an issue of fact that these efforts had any influence on JPMorgan’s ultimate final offer. Although plaintiff characterizes these offers as competitive, the moving papers do not detail the precise details. And plaintiff admits it simply sent them to defendant, not to JPMorgan, and that JPMorgan had the best deal. That JPMorgan had a general awareness that defendant was seeking other offers does not yield the conclusion that plaintiff improved upon JPMorgan’s offer.

The critical point here is that under the precise terms of the agreement, plaintiff would receive a commission if defendant went with another lender procured by plaintiff, regardless of the interest rate and loan amount. Here, defendant did not choose that course of action and there is nothing to show exactly how plaintiff improved upon JPMorgan's offer especially where it is undisputed that plaintiff did not directly negotiate with JPMorgan.

Summary

The parties' agreement entitles plaintiff to a fee on the JPMorgan deal only if plaintiff "improved" on what was offered in the then-existing letter of intent. Improve, in this Court's view, requires some active participation by plaintiff. Plaintiff tried to actively participate but was either rebuffed by the bank (defendant's principal claims that Mr. Dooley [JPMorgan's loan officer] didn't want to work with plaintiff [NYSCEF Doc. No. 38, ¶ 20]) or plaintiff was called off by defendant (Mr. Dooley testified that defendant's principal told him that JPMorgan was not to work with plaintiff and could only negotiate directly with defendant [NYSCEF Doc. No. 36 at 57]). Either way, plaintiff here seeks a fee just for being outside the room while defendant and JPMorgan discussed the terms of the offer. But if plaintiff was entitled to a fee just by being outside the room, then the agreement would have provided an unconditional fee if defendant entered into a better deal with JPMorgan.

On this record, plaintiff's argument that it improved on these terms by simply being hired by defendant is not sufficient. Nothing in the contract prevented defendant from doing its own negotiating with JPMorgan. In other words, while plaintiff might understandably be upset for being cut out of the negotiations, the contract did not require defendant to let plaintiff negotiate on its behalf.

The Court understands plaintiff’s point – that defendant got a better deal with JPMorgan because the bank knew defendant retained plaintiff. But that is something *defendant* did to improve its deal – defendant let the bank know that it retained plaintiff and plaintiff was shopping the loan around to other lenders. Unfortunately, the agreement says that a fee would be earned only if plaintiff improved the deal with JPMorgan. That means plaintiff had to actually do something, not just be in the background.

The Court observes that plaintiff’s second cause of action to reform the contract (to remedy a scrivener’s error) is moot.

Accordingly, it is hereby

ORDERED that defendant’s motion for summary judgment is granted and the Clerk is directed to enter judgment in favor of defendant and against plaintiff along with costs and disbursements upon presentation of proper papers therefor. The case is dismissed.

11/6/2023
DATE


ARLENÉ P. BLUTH, J.S.C.

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| CHECK ONE: | <input checked="" type="checkbox"/> | CASE DISPOSED | <input type="checkbox"/> | NON-FINAL DISPOSITION | |
| | <input checked="" type="checkbox"/> | GRANTED | <input type="checkbox"/> DENIED | <input type="checkbox"/> | GRANTED IN PART <input type="checkbox"/> OTHER |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | | <input type="checkbox"/> | SUBMIT ORDER |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | | <input type="checkbox"/> | FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE |