Blooming Home Realty LLC v Infinity Holdings Northeast LLC
2023 NY Slip Op 35330(U)
February 9, 2023
Supreme Court, Orange County
Docket Number: Index No. EF004673-2022
Judge: Maria S. Vazquez-Doles
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At a term of the IAS Part of the Supreme Court of the State of New York,
held in and for the County of Orange, at, 285 Main Street
Goshen, New York 10924 on the 9th day of February 2023.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

BLOOMING HOME REALTY LLC d/b/a
BLOOMING REALTY

Plaintiff,

- against -

INFINITY HOLDINGS NORTHEAST LLC

Defendant.

DECISION & ORDER

Index No. EF004673-2022

Motion date: 11/25/2022
Motion Seq. # 1

VAZQUEZ-DOLES, J.S.C.

The following papers were read on the motion of Defendant Infinity Holdings Northeast for an order dismissing the plaintiff's complaint pursuant to CPLR §§ 3211(a)(10, (a)(5) and (a)(7):

Notice of Motion/ Affirmation/Memorandum of Law/Ex. A-I 1-12
Memorandum of Law...13
Reply Memorandum..14

The Defendant/Movant failed to establish that a Decision and Order in a prior lawsuit decided *on the merits* the same claim that is now alleged in the instant Complaint. Defendant/Movant also failed to establish that the instant Complaint does not plead a cause of action for breach of contract. For these reasons, the motion is DENIED.

I. THE PRIOR LAWSUIT

Plaintiff filed a prior lawsuit against the same defendant herein under Index No. EF003397-2021 ("Action One"). The Complaint in Action One alleged three causes of action:

breach of contract, unjust enrichment, and quantum meruit. The genesis of the claims was a real estate brokerage contract ("the Contract") that Plaintiff and Defendant signed for a specific piece of real property, namely SBL 223-1-1 Village of Blooming Grove, NY ("the Property"). The Contract provides for Plaintiff to receive five percent of the set sale price of $12.5 Million, i.e. $650,000.

The Defendant moved to dismiss the Complaint in Action One pursuant to CPLR 3211(a)(1) and (7). This Court's Decision and Order in Action One, dated March 9, 2022, held that the Complaint did not include an essential allegation to support the cause of action for breach of the Contract, namely it "failed to plead that [Plaintiff] was duly licensed at the time of the transaction" as a real estate broker in New York. In light of the written Contract between the parties, the Court also dismissed the second cause of action (unjust enrichment) and third cause of action (quantum meruit). On that basis, the Court dismissed the Complaint.

II. THE SECOND/INSTANT LAWSUIT

Plaintiff commenced the instant lawsuit by filing a Summons and Complaint on August 17, 2022. The Complaint pleads one count for breach of contract based on the same Contract alleged in Action One. Now, however, Plaintiff pleads that it is a licensed New York real estate broker. The instant Complaint alleges that the Contract provided that if Defendant sold the property to Abe Brach within 21 days after signing the Contract, Plaintiff would not receive a commission. The Complaint alleges that the Property was sold to non-party Abe Brach *greater than* 21 days after the Contract was signed.

Defendant filed the instant pre-Answer motion to dismiss on October 7, 2022. The motion seeks a dismissal on the basis of i) the Decision in Action One acts as res judicata and/or collateral estoppel and thereby bars the claim in the instant Complaint; and ii) the Complaint fails to state a cause of action because the Contract allegedly was terminated by Defendant less than 21 days after the parties signed it, thereby depriving Plaintiff of any commission.

III. MOTION TO DISMISS

A. CPLR 3211(a)(5)

With regard to the CPLR 3211(a)(5) basis to dismiss, Defendant must establish that the Court already decided in Action One the same claim pled in the instant Complaint *on the merits*. The burden is on the Defendant to establish this defense. *Israel v. Wood*, 1 NY2d 116 (1956). Unless a court converts a CPLR 3211 motion pursuant to Section (c) to a summary judgment motion, then a decision on a CPLR 3211 motion is not on the merits of the Complaint.

Here, the Court decided a CPLR 3211 motion to dismiss in Action One which, by definition, is a judgment on the pleadings alone. That Decision never reached the merits of the case. The Decision does not state that Action One was dismissed with prejudice and therefore the dismissal is without prejudice to Plaintiff re-filing its claims. The Decision in Action One held that the Complaint could not withstand Defendant's motion to dismiss because it did not plead that Plaintiff was a licensed real estate broker and that the second and third causes of action would not lie where a written contract was pled. Those issues cannot be relitigated by the parties at the trial level.

Defendant asserts that the ruling in Action One was on the merits and that Plaintiff is forever barred from suing on the Contract. The Court finds no basis in the facts of the Decision or any law to support Defendant's motion to dismiss on this basis. Plaintiff's Complaint in the instant action differs from the Complaint in Action One because it now pleads that Plaintiff is a licensed real estate broker and includes only one cause of action for breach of contract. For these reasons, the CPLR 3211(a)(5) branch of the instant motion is DENIED.

B. CPLR 3211(a)(1)

On a motion pursuant to CPLR 3211(a)(1), the Court is required to take the facts pled in the Complaint as true unless the movant provides documentary evidence so compelling as to "utterly refute Plaintiff's allegations". *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 (2002). Moreover, emails and affidavits are not the type of documentary evidence on a CPLR 3211 (a)(1) motion that the Legislature anticipated. *Pirozzi v. Garvin*, 185 A.D.3d 848 (2d Dept. 2020).

The instant motion asserts that the Complaint does not state a cause of action because the Contract was cancelled by Defendant prior to the date that the Property was sold and, on that basis, Defendant owes Plaintiff no commission. Defendant supports it motion with various emails and an affidavit of the managing member of the Defendant corporation. The affidavit asserts that the Contract could be terminated earlier than the May 20, 2021, date. However. the Court cannot assess the truth of facts pled in the Complaint on the instant motion apart from a review of documentary evidence in the form of the Contract. The Contract does not include any termination provisions and therefore on its face has a duration as stated of December 20, 2020 to May 20, 2021. Moreover, the Contract at Par. 3 provides that Defendant retains all rights to a commission if the Defendant does terminate prior to the end of the Listing Period of May 20, 2021.

The only exception to commissions due during the duration of the Contract is set forth in Paragraph 9, which provides:

> "The exclusive right to sell agreement shall become effective 21 days after the date of this agreement with regard to buyer Abe Brach/Orange Industrial LLC. Prior to the effective date, no sales commission shall be due if seller signs a contract of sale with said purchaser."

This plain wording of the Contract does not delay the start of the Contract for 21 days, as

Defendant asserts. That wording states only that a commission due Plaintiff for a sale of the Property in the first 21 days has one exception, namely if Abe Brach enters into a contract of sale with Defendant in the first 21 days. Contrary to Defendant's assertion, the words do not say that the entire contract did not go into effect for 21 days after December 20, 2020.

Moreover, the Defendant is noticeably silent with regard to the date on which it *entered into a contract of sale* with Abe Brach. The Complaint pleads that Defendant entered into the sale with Abe Brach after the 21 days passed. Even if the Court were to consider the affidavit and other data submitted on the motion, nothing refutes the contention in the Complaint because the affidavit states only that Brach "agreed" to purchase the Property prior to the end of the 21 days. That assertion, even if considered by the Court, creates an issue of fact as to the actual contract of sale date with Brach, which cannot be resolved on this CPLR 3211 motion.

C. <u>CPLR 3211(a)(7)</u>

On a motion for failure to state a cause of action pursuant to CPLR 3211(a)(7), the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 (2002); *Leon v. Martinez*, 84 NY2d 83 (1994). "The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one". *Id.* A complaint is legally sufficient if the court determines that a plaintiff would be entitled to relief on any reasonable view of the facts stated. *Campaign for Fiscal Equity v. State of New York*, 86 NY2d 307 (1995).

If a plaintiff chooses to stand on his or her pleading alone, "confident that its allegations are sufficient to state all the necessary elements of a cognizable cause of action, he [or she] is at liberty to do so and, unless the motion to dismiss is converted by the court to a motion for summary judgment, he [or she] will not be penalized because he [or she] has not made an evidentiary showing in support of his [or her] complaint" *Rovello v Orofino Realty Co.,* 40 NY2d 633 (1976).

The Defendant submits no separate argument with regard to that part of its motion pursuant to CPLR 3211(a)(7). The Court reviews the Complaint and, taking the allegations as true, finds that it states a cause of action. Plaintiff pled that the parties entered into the Contract for the sale of the Property. It pleads that Plaintiff is a licensed real estate broker in New York. The Complaint asserts that Defendant sold the property to Abe Brach, however it did so after the first 21 days, paid no commission, and thereby breached the contract, causing damages.

The contract is entitled "EXCLUSIVE RIGHT TO SELL AGREEMENT". The Contract includes terms that provide for a commission to Plaintiff during the duration of the Contract "whether or not the sale or transfer is a result of the Listing Broker's efforts and even if the Property is sold or transferred as a result of the efforts of the OWNER".

The distinction between an exclusive agency and an exclusive right to sell is well-established in New York. *Morpheus Capital Advisors LLC v. UBS,* 23 NY3d 528 (2014). A contract of sale must evidence an "unequivocal expression of intent" to confer this exclusive right. Id. Here, the Complaint has more than adequately pled this exclusive right to sell was intended by Defendant based on the terms of the Contract. For these reasons, that branch of the motion based upon CPLR3211 (a)(7) is DENIED.

Upon the foregoing, it is hereby

ORDERED that the Defendant's motion to dismiss is **DENIED.**

The foregoing constitutes the Decision and Order of this Court.

Dated: February 9, 2023
Goshen, New York

ENTER:

HON. MARIA S. VAZQUEZ-DOLES, J.S.C.