

Poore v Brown Harris Stevens Residential Sales, LLC

2024 NY Slip Op 30647(U)

March 1, 2024

Supreme Court, New York County

Docket Number: Index No. 652218/2023

Judge: Lyle E. Frank

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

PRESENT: HON. LYLE E. FRANK **PART** **11M**

Justice

-----X

CHRIS POORE

Plaintiff,

- v -

BROWN HARRIS STEVENS RESIDENTIAL SALES, LLC,

Defendant.

-----X

INDEX NO. 652218/2023

MOTION DATE 09/26/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 44, 45

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Plaintiff Chris Poore (“plaintiff”) commenced this action against defendant Brown Harris Stevens Residential Sales, LLC., (“defendant”) for breach of contract in connection with his work as a real estate broker for the firm. Plaintiff now moves for summary judgement as to liability.¹ Defendant opposes.

Background

Defendant BHS is a limited liability company operating under New York law, licensed as a real estate brokerage firm with offices in New York City. Plaintiff Chris Poore is a licensed real estate broker and salesperson, associated with BHS from August 2020 until his resignation in August 2022.

On or about August 2020, the parties began discussions for plaintiff to end his association as a real estate broker with Sotheby’s International Realty to join BHS. Defendant’s offer to

¹ The Court would like to thank Takahiro Murata for his assistance in this matter.

plaintiff was memorialized in an offer letter, signed by both parties on August 19, 2020. In addition, the parties signed an Independent Agent Agreement (“IAA”), dated August 20, 2020, that explicitly incorporated by reference the terms of the signed offer letter.

In relevant part, the offer letter provided that the plaintiff would receive a commission split at 75% which would “remain as long as production remains at a similar level to your earnings of the last few years,” and an assistant at \$50,000 per year. With respect to advertising the offer letter provides, “We do not have budgets and will give you everything you need for your exclusives...” and “Marketing will give you a full level of support that will include but not be limited to...” Moreover, with regard to referrals, the offer letter states, “As mentioned, we will guarantee you referrals each year that come from various sources: broker specialist program, personal referrals, referrals through our network Leading Real Estate Companies of the World/Luxury Portfolio, our Development Marketing Division, and our relocation firms.”

The plaintiff resigned from the defendant’s brokerage on or about August 16, 2022. Upon plaintiff’s resignation, disputes arose regarding payment of commissions and monies defendant alleged plaintiff was obligated to repay the firm. Specifically, defendant notified plaintiff through counsel that he owed the brokerage \$440,529.97 in “Enhancements” due to his resignation before his third anniversary with the company, citing the brokerage’s policy manual. Plaintiff disputed that he agreed to said provision. Moreover, plaintiff alleges he spearheaded the sale of the property and was therefore entitled to a 75 percent commission split pursuant to the parties’ agreement. Defendant paid plaintiff a 40 percent commission split, citing again its broker policies which provide for a reduced commission split where a property is closed after a broker leaves the brokerage.

Subsequently, plaintiff commenced the instant action against defendant, claiming unpaid

sales commissions, statutory penalties, and attorneys' fees under New York Labor Law, and breach of contract for not honoring terms of the Offer Letter and IAA.

Standard

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]. As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 [1986]; *Winegrad v New York University Medical Center*, 64 NY 2d 851 [1985]. Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

Discussion

First, Plaintiff alleges pursuant to the parties' agreement, defendant was required to pay a 75 percent commission split on all sales. Plaintiff alleges that as defendant only paid plaintiff 40 percent commission for the property located at 32 Jane Street, New York, NY, defendant is in breach of the parties' agreement and plaintiff is entitled to summary judgment as a matter of law. In opposition, defendant contends that pursuant to the terms of the firm's policies, plaintiff was only entitled to receive 40% of the gross commissions on pending transactions at the time of termination. In response, plaintiff asserts that the policy manual was not explicitly referenced in

the offer letter or the IAA nor did plaintiff receive said policy manual at the time he signed the agreement, and thus plaintiff is not subject to its terms.

Thus, the crux of the dispute hinges on whether the Policy Manual is integrated into parties' agreement. In part the IAA states,

4. Agent's commissions shall be based upon a percentage of payments received by Broker for Agent's real estate transactions, as shown on Broker's Manual and other policies listed on Broker's internal intranet on MyBHS.com. Commission percentages may be adjusted by Agent's annual performance and other factors, and commissions will be computed after deduction for marketing expenses, other costs, referral fees, and other factors, as set forth in more particularity in Broker's Manual and other written policies and procedures as modified from time to time. Agent represents Agent has reviewed the Manual and other policies...

17. Broker shall provide Agent access, electronically or otherwise, to Broker's Manual and written policies and procedures, as modified from time to time, concerning the conduct of business, including without limitation commission computation, expenses, marketing, confidentiality, computer use, non-discrimination and other matters, ("Broker's policies"). Agent agrees to comply with Broker's Policies. Agent confirms that agent has been given the opportunity to review Broker's policies in detail and will keep abreast of all updates provided by Broker, which shall be binding on agent.

The Court finds that plaintiff has failed to establish its *prima facie* entitlement to summary judgment on its first cause of action. In the light most favorable to defendant, there is a question as to whether the policy manual is incorporated into the agreement and whether plaintiff had access to this agreement or should have requested access to all relevant manuals at the time of signing the agreement. Plaintiff contends that as the IAA only uses the term "brokers manual" and as the manual relied on by the parties is labeled policy manual, the manual is not incorporated by reference. However, as outlined above, in addition to the term "Brokers Manual," the IAA also references "other policies listed on Broker's internal intranet on MyBHS.com," as well as "other written policies and procedures as modified from time to time." Moreover, the IAA specifically states that the "agent represents agent has reviewed the Manual and other policies" and that "Agent

confirms the agent has been given the opportunity to review Broker's policies in detail and will keep abreast of all updates provided by Broker, which shall be binding on Agent."

Therefore, in the light most favorable to the defendant, there is a question of fact as to whether plaintiff should have known or did know about the relevant provision and whether he is bound by said policies as a matter of law. As such, with respect to plaintiff's first cause of action, plaintiff's motion for summary judgment is denied.

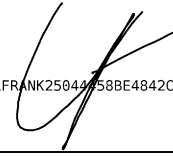
However, with respect to plaintiff's second cause of action, the Court finds plaintiff has established its entitlement to summary judgment as a matter of law. The offer letter, explicitly incorporated by reference into the Independent Agent Agreement provides, "As mentioned, we will guarantee you referrals each year that come from various sources..." It is undisputed that plaintiff only received three referrals over a period of two years. This follows that it would be impossible for plaintiff to have received multiple referrals each year, and thus defendant breached the explicit terms of the parties' agreement.

Defendants argues that it discharged its contractual obligations on best efforts basis. However, the Court finds this argument unavailing and without evidentiary support. Plaintiff has met its burden by tendering sufficient evidence to eliminate any material issues of fact from the case as to Defendant's liability on this issue. Defendants did not present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact. Therefore, as to plaintiff's second cause of action, plaintiff's motion for summary judgment is granted.

Accordingly, it is hereby

ADJUDGED that plaintiff's motion for summary judgment is denied as to its first cause of action and granted as to its second cause of action.

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3/1/2024

DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE