

Collé v Saunders
2024 NY Slip Op 35661(U)
August 6, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 618625/2021
Judge: Kathy G. Bergmann
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

SHORT FORM ORDER

INDEX No. 618625/2021CAL. No. 202301559COSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY**PRESENT:**Hon. KATHY G. BERGMANN
Justice of the Supreme CourtMOTION DATE 2/28/24 (003)MOTION DATE 5/15/24 (004)ADJ. DATE 7/9/24

Mot. Seq. # 003 MotD

Mot. Seq. # 004 MotD

-----X
JEFFREY COLLÉ,

Plaintiff,

- against -

ANDREW SAUNDERS and SAUNDERS
VENTURES, INC. d/b/a SAUNDERS &
ASSOCIATES,Defendants.
-----XCAMPOLO, MIDDLETON & MCCORMICK,
LLP
Attorney for Plaintiff
4175 Veterans Memorial Highway, Suite 400
Ronkonkoma, New York 11779HOGAN LOVELLS US LLP
Attorney for Defendants
390 Madison Avenue
New York, New York 10017

Upon the following papers read on the motions for summary judgment and to strike: (1) Notice of Motion and supporting papers by defendants, filed February 7, 2024; (2) Answering Affidavits and supporting papers by plaintiff, filed March 27, 2024; (3) Notice of Motion and supporting papers by defendants, filed April 24, 2024; (4) Replying Affidavits and supporting papers by defendants, filed April 24, 2024; (5) Answering Affidavits and supporting papers by plaintiff, filed May 8, 2024; and (6) Replying Affidavits and supporting papers by defendants, filed May 14, 2024, it is

ORDERED that defendants' motion for summary judgment dismissing the complaint, and for legal fees and costs, is granted to the extent of dismissing the complaint, and is otherwise denied; and it is further

ORDERED that defendants' motion to strike the affirmations of plaintiff, Thomas Lawrence, and David Saskas from plaintiff's opposition to defendants' motion for summary judgment, and for legal fees and costs, is granted to the extent of striking the affirmations of plaintiff, Thomas Lawrence, and David Saskas from plaintiff's opposition to defendants' motion for summary judgment, and is otherwise denied.

This action stems from an alleged oral contract between plaintiff, Jeffrey Colle, and defendants,

Colle v Saunders
Index No. 618625/2021
Page 2

Andrew Saunders and Saunders Ventures, Inc., related to the premises known as 226 Further Lane in East Hampton, New York (the premises). Plaintiff, a builder and developer, alleges that he entered into an oral contract with defendant Saunders Ventures, Inc., a broker on the transaction, and its principal, defendant Andrew Saunders, to provide a then-potential purchaser of the premises, who subsequently purchased them, with an analysis of certain issues relating to the premises. Plaintiff alleges that in return for these services, defendants agreed to pay him a minimum of \$1.1 million once the premises were sold. The complaint pleads that plaintiff resolved various issues, including “environmental issues dealing with property setback and buildability issues due to nature conservancy areas and beach erosion concerns,” the removal of an oil tank, “swimming pool location issues tied to environmentally protected lands and walkways that were required to get to the beach,” and helping to achieve the maximum square footage permissible for building on the premises. After defendants did not pay him, plaintiff commenced this action for breach of contract, unjust enrichment, breach of the implied covenant of good faith and fair dealing, promissory estoppel, and quantum meruit.

Defendants now seek summary judgment dismissing the complaint against them, and for legal fees and costs. In support of their motion, they submit, among other things, the complaint, audio recordings, and excerpts from the depositions of plaintiff and Andrew Saunders. In opposition to the motion, plaintiff submits, among other things, a transcript of his deposition. Defendants also move to strike the affirmations of plaintiff, Thomas Lawrence, and David Saskas from plaintiff’s opposition to their motion for summary judgment. In support of this motion, defendants submit, among other things, a November 28, 2023 order. In opposition to the motion to strike, plaintiff submits his counsel’s memorandum of law.

The Court will first address defendants’ motion to strike. As a result of certain discovery disputes, this Court (St. George, A.J.), in a November 28, 2023 order, “ordered that the plaintiff is hereby precluded from offering any further evidence in support of his claims upon any dispositive motions and/or at a trial of this matter” (capitalizations omitted). Accordingly, the affirmations of plaintiff, Thomas Lawrence, and David Saskas, all of which post-date the November 2023 order, cannot be considered in opposition to defendants’ motion for summary judgment. The Court declines defendants’ invitation to impose sanctions. Thus, defendants’ motion to strike is granted to the extent of striking the affirmations of plaintiff, Thomas Lawrence, and David Saskas from plaintiff’s opposition to defendants’ motion for summary judgment, and is otherwise denied. The Court notes that, in any event, consideration of the affirmations would not alter this Court’s determination of defendants’ motion for summary judgment.

On a motion for summary judgment, the movant has the burden to show, through evidence in admissible form (*Bush v St. Clare’s Hosp.*, 82 NY2d 738, 602 NYS2d 324 [1993]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]), that it is entitled to judgment as a matter of law and that there are no disputed issues of material fact (CPLR 3212; *Matter of New York City Asbestos Litig.*, 33 NY3d 20, 99 NYS3d 734 [2019]). If the movant meets its burden, then the non-movant must show that there is a material issue of fact to be resolved at trial (*Matter of Eighth Jud. Dist. Asbestos Litig.*, 33 NY3d 488, 105 NYS3d 353 [2019]). If the movant does not meet its burden, then the motion must be denied without consideration of any opposing papers (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]). On summary judgment, the Court must view the evidence in the light most favorable to the non-moving party (*id.*).

Colle v Saunders
Index No. 618625/2021
Page 3

Defendants argue that plaintiff's claims are barred by Real Property Law §§ 442 and 442-d. It is undisputed that plaintiff was not a licensed real estate broker or licensed real estate salesperson. Section 442 states that

[n]o real estate broker shall pay any part of a fee, commission or other compensation received by the broker to any person for any service, help or aid rendered in any place in which this article is applicable, by such person to the broker in buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate including the resale of a condominium or cooperative apartment unless such a person be a duly licensed real estate salesperson regularly associated with such broker or a duly licensed real estate broker or a person regularly engaged in the real estate brokerage business in a state outside of New York.

Section 442-d states that

[n]o person, copartnership, limited liability company or corporation 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, exchanging, leasing, renting or negotiating a loan upon any real estate without alleging and proving that such person was a duly licensed real estate broker or real estate salesperson on the date when the alleged cause of action arose.

The purpose of section 442-d is to prevent persons who are not licensed real estate brokers from receiving a commission from the sale of real property (*NFS Servs. v West 73rd St. Assoc.*, 102 AD2d 388, 477 NYS2d 135 [1st Dept 1984], *aff'd* 64 NY2d 919, 488 NYS2d 648 [1985]). Nonetheless, "the statute does not encompass every situation in which an interest in real estate may be part of the transaction" (*Kreuter v Tsucalas*, 287 AD2d 50, 55, 734 NYS2d 185, 189 [2d Dept 2001] [quotation marks and citations omitted]). Rather, "[i]f an item of real estate, or an interest in real estate, is a mere incident or incidental feature of the transaction, the statute should not apply. This is true even though such item may be a significant though not dominant feature of the transaction" (*Saunders v Foschi*, 209 AD3d 512, 512-513, 176 NYS3d 243, 245 [1st Dept 2022], *lv dismissed* 39 NY3d 1068, 183 NYS3d 818 [2023]). Accordingly, section 442-d prevents someone who is not a licensed broker "from recovering fees or commissions for the performance of services facilitating the sale of real property" (*Thinkforward Fin. Group, LLC v On the Level Enters., Inc.*, 205 AD3d 440, 440, 168 NYS3d 441, 442 [1st Dept 2022]; *see Glynos v Dorizas*, 106 AD3d 480, 964 NYS2d 523 [1st Dept 2013]).

The alleged oral contract violated sections 442 and 442-d. Even under plaintiff's version of the alleged agreement—which the Court must accept as true in this procedural posture—he is admittedly seeking compensation from a broker for services that facilitated the sale of the premises. Plaintiff testified that based on the work he performed, he helped the purchaser formulate his offer to purchase the premises, that he performed his services "so [the purchaser] knew what he could build on the property before he bought it" because "it wasn't set in stone that he could get what he wanted," and that his fee is "for [his] consulting services to find out what the buildability was on this property, so the deal could happen." Moreover, plaintiff alleged in his complaint, which he verified, that he and defendants agreed that payment would not be due to him until after the premises were sold. Accordingly, plaintiff is

Colle v Saunders
Index No. 618625/2021
Page 4

barred from enforcing the alleged oral agreement (*see Enfeld v Hemmerdinger Estate Corp.*, 28 NY2d 606, 319 NYS2d 854 [1971] [an agreement to have an accountant help dispose of real property by “explain(ing) to interested parties the tax advantages which might be gained from a purchase” of the property, with payment to the accountant “if the deal went through,” was unenforceable under section 442-d], *affg* 34 AD2d 980, 312 NYS2d 735 [2d Dept 1970]; *Kucher v Sohayegh*, 182 AD3d 523, 120 NYS3d 779 [1st Dept 2020] [the plaintiff, who was not a licensed broker, could not recover under a “Management Fee Agreement,” as “the subject property was the dominant feature of the transaction at issue”]; *Ling’s Props., LLC v Bode*, 94 AD3d 951, 942 NYS2d 194 [2d Dept 2012] [a contract “for certain services designed to enable the plaintiff to acquire certain real property” was unenforceable under section 442-d because “the acquisition of real property was the dominant feature of the contract at issue,” and the requested fee was “for services facilitating the purchase and sale of the property”]; *Levinson v Genesse Assoc.*, 172 AD2d 400, 568 NYS2d 780 [1st Dept 1991] [a “consulting agreement” was unenforceable because “the nature of the underlying transaction with respect to which plaintiff rendered services was the purchase by defendants of a commercial building”]). For the same reasons, plaintiff’s quasi-contractual claims are meritless (*Amirkhanian v Berniker*, 147 AD3d 475, 47 NYS3d 22 [1st Dept 2017]; *Hartford v Landrich Inv. Co.*, 31 AD2d 616, 295 NYS2d 751 [1st Dept 1968]).

In opposition, plaintiff failed to raise a material issue of fact. Although plaintiff relies heavily on *Gerstein v 532 Broad Hollow Rd. Co.* (75 AD2d 292, 429 NYS2d 195 [1st Dept 1980]), that case involved unusual facts that are not present here. His allegation that “none of the . . . services rendered by [plaintiff] related to broker services,” even if true, is narrower than what is prohibited by section 442-d, to wit, “the performance of services facilitating the sale of real property” (*Thinkforward Fin. Group, LLC v On the Level Enters., Inc.*, 205 AD3d at 440, 168 NYS3d at 442; *see also Enfeld v Hemmerdinger Estate Corp.*, 28 NY2d 606, 319 NYS2d 854 [involving the provision of tax advice by an accountant to a potential purchaser of an interest in real property], *affg* 34 AD2d 980, 312 NYS2d 735). Simply put, plaintiff did not show “that the services rendered were for any purpose other than facilitating that purchase and sale” (*Futersak v Perl*, 84 AD3d 1309, 1311, 923 NYS2d 728, 730 [2d Dept 2011], *lv dismissed in part & denied in part* 18 NY3d 943, 944 NYS2d 466 [2012], *rearg denied* 19 NY3d 938, 950 NYS2d 92 [2012]). Indeed, as noted above, he conceded that the whole point of his alleged consultation was “to find out what the buildability was on this property, so the deal could happen.”

However, defendants have not provided any argument in support of their request for costs and legal fees. Accordingly, defendants’ motion for summary judgment is granted to the extent of dismissing the complaint, and is otherwise denied.

Dated: August 6, 2024


HON. KATHY G. BERGMANN

☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION