

Lynn v 126 Columbia Tower 1 LLC

2025 NY Slip Op 30577(U)

February 14, 2025

Supreme Court, New York County

Docket Number: Index No. 655206/2023

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

JERRY LYNN, WINZONE REALTY, INC.,

Plaintiff,

- v -

126 COLUMBIA TOWER 1 LLC, BO JIN ZHU, COLUMBIA
INTERNATIONAL LLC

Defendant.

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INDEX NO. 655206/2023

MOTION DATE 03/27/2024

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31, 32, 33, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for DISMISS.

Upon the foregoing documents, defendant’s motion is granted.¹

Background

In December of 2015, Jerry Lynn (“Individual Plaintiff”) was approached by Bo Jin Zhu (“Defendant Zhu”), on behalf of 126 Columbia Tower 1 LLC (“Seller Defendant”) to act as a real estate salesperson to find buyers for a development site on West 126th Street. At this time, the Individual Plaintiff appears to have been an independent contractor for the real estate brokerage Winzone Realty, Inc. (the “Corporate Plaintiff”). The Defendant Seller agreed to pay Plaintiff a commission made up of a certain percentage of the selling price of the property, which was comparable to the industry standard. In 2016, a representative of would later be formed as Columbia International LLC (“Buyer Defendant”) was introduced to the Seller Defendant. Eventually a sales contract between the two was signed in August of 2017. During this time, the Individual Plaintiff alleges that he was the real estate salesperson for both the Buyer Defendant

¹ The Court would like to thank Emily Sheehy and Ziwei Wang for their assistance in this matter.

and the Seller Defendant for this transaction according to an alleged oral agreement with one of Buyer Defendant's managers, Xuan Cheng. The Buyer Defendant denies that there was ever an oral contract to have him as their agent and Ms. Cheng has submitted a sworn affidavit and transcript of WeChat messages denying the existence of such an agreement. The sales contract between the buyer and seller expressly states that only the Seller Defendant is responsible for paying the Individual Defendant's commission.

The Individual Plaintiff alleges that other than a partial payment in May of 2018, he has not been paid the full commission he is entitled to and that as a result, he brought this underlying suit seeking to collect the commission. In June of 2023, the Corporate Plaintiff assigned all of their rights (the "Assignment") to pursue a commission to the Individual Plaintiff. It is under this assignment that the Individual Plaintiff alleges he has standing to pursue a broker's commission in this suit. The Buyer Defendant brings the present motion to dismiss the complaint.

Standard of Review

It is well settled that when considering a motion to dismiss pursuant to CPLR § 3211, "the pleading is to be liberally construed, accepting all the facts alleged in the pleading to be true and according the plaintiff the benefit of every possible inference." *Avgush v. Town of Yorktown*, 303 A.D.2d 340 (2d Dept. 2003). Dismissal of the complaint is warranted "if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." *Connaughton v. Chipotle Mexican Grill, Inc*, 29 N.Y.3d 137, 142 (2017).

CPLR § 3211(a)(1) allows for a complaint to be dismissed if there is a "defense founded upon documentary evidence." Dismissal is only warranted under this provision if "the

documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994).

A party may move for a judgment from the court dismissing causes of action asserted against them based on the fact that the pleading fails to state a cause of action. CPLR § 3211(a)(7). For motions to dismiss under this provision, “[i]nitially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law.” *Guggenheimer v. Ginzburg*, 43 N.Y. 2d 268, 275 (1977).

Discussion

The Buyer Defendant makes several arguments as to why the complaint should be dismissed. For the reasons that follow, dismissal of the complaint is proper because the Individual Plaintiff lacks standing to pursue any claims related to a commission arising out of a real estate transaction and there are no claims asserted on behalf of the nominal Corporate Plaintiff.

The Individual Plaintiff Has No Standing to Pursue a Commission

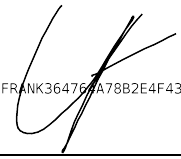
The Buyer Defendant argues that the Individual Plaintiff lacks standing to pursue the complaint under Real Property Law § 442a, which limits the ability to demand a commission to “a duly licensed real estate broker.” This requirement specifically excludes licensed salespersons from pursuing commissions like the one sought in this matter. *See, e.g., Barash v. Baharestani*, 138 A.D.3d 489, 490 (1st Dept. 2016). The Individual Plaintiff, who was a licensed salesperson at the time of the transaction but who allowed his license to lapse in 2022, argues that he has standing to pursue this action due to the Assignment from the broker. He cites to *Rocco*, in which the Fourth Department upheld an assignment in similar circumstances. *Rocco v. Sortino*, 105

A.D.2d 1063, 1063 (4th Dept. 1984). But some years later, the Fourth Department would reverse that holding. *Kavan v. Shaffer*, 199 A.D.2d 1089, 1089 (4th Dept. 1993). In *Kavan*, the court held that the General Obligations law did not permit a blanket assignment of a claim “where a statute forbids the same” and any purported assignment from a licensed broker to a non-broker would be void. *Id.*

Buyer Defendant also points to the fact that the Individual Plaintiff was not a licensed salesperson at the time of the purported assignment and argues that it would further be against New York public policy to permit brokers to assign their commission rights to persons who are neither a licensed broker nor a licensed salesperson. The underlying purpose behind RPL § 442 is to “protect the public from inept, inexperienced or dishonest persons who might aid in the perpetration of fraud.” *227 W. 61st Assoc., LLC v. Walsam 61 LLC*, 189 A.D.3d 601, 602 (1st Dept. 2020). Given the public policy behind RPL § 442-a and the appellate case law on this matter, this Court finds that the purported assignment in this matter is void as a matter of law, and therefore the Individual Plaintiff does not have standing to pursue this suit. Although the Corporate Plaintiff is a nominal plaintiff in this matter, each of the causes of action only assert rights on behalf of “Plaintiff Jerry Lynn” and none of the relief requested is sought on behalf of the Corporate Plaintiff. Therefore, dismissal of this action in its entirety is proper. Accordingly, it is hereby

ADJUDGED that defendant’s motion to dismiss the complaint in its entirety is granted.

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2/14/2025

DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT REFERENCE