

<b>Thomas J. McCarthy Real Estate Inc. v Herlin</b>
2025 NY Slip Op 35392(U)
February 10, 2025
Supreme Court, Suffolk County
Docket Number: Index No. 602772/2024
Judge: Joseph C. Pastorella
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SUPREME COURT OF THE STATE OF NEW YORK
IAS/TRIAL PART 34 - SUFFOLK COUNTY

PRESENT: HON. JOSEPH C. PASTORESSA

THOMAS J. MCCARTHY REAL ES-
TATE INC. and THOMAS J. MCCAR-
THY,

Plaintiffs,

- against -

RODNEY HERLIN a/k/a RODNEY
HERRLIN,

Defendant.

DECISION AND ORDER

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Mot. Seq. 001: MD

Mot. Seq. 002: MotD; CASEDISP

Marshall M. Stern, P.C., Huntington Sta-
tion, NY, for plaintiffs

Tarbet & Lester, PLLC, East Hampton,
NY, for defendant

This action stems from an agreement (the listing agreement) between plaintiff
Thomas J. McCarthy Real Estate Inc. (TJM), of which plaintiff Thomas J. McCarthy was
the principal, and defendant, Rodney Herlin, to sell Herlin's house. Specifically, on Sep-
tember 30, 2022, Herlin gave TJM the exclusive right to sell his house for a five percent
commission. The listing agreement provided, as pertinent here, that "[a] commission
shall be earned and payable under any of the following conditions: (a) If the LISTING
BROKER or cooperating broker produces a buyer ready, willing and able to purchase the
PROPERTY on such terms and conditions acceptable to the OWNER." The listing agree-
ment also stated "SELLER REQUIRES PRE-APPROVAL AND OR PROOF OF FUNDS
TO BE COLLECTED PROIOR [sic] TO SHOWINGS."

Plaintiffs showed the house to nonparties Ronald Adjmi and Samantha Adjmi.
Plaintiffs did not ascertain whether the Adjmis were pre-approved or had proof of funds.
Instead, plaintiffs conceded that they only viewed a bank statement for "Ronald Adjmi
Trust u/l/w/t Amin E. Adjmi."

On August 8, 2023, Herlin and the Adjmis entered into a contract of sale, which
provided a closing date "on or about 30 [d]ays from the date hereof." The contract did
not include a mortgage commitment contingency section. The complaint alleges that
Herlin sent a letter to the Adjmis with a closing date of November 9, 2023, advising that

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time was of the essence, and stating that they would be in default if they did not close by that date. The complaint further alleges that on October 27, the Adjmis requested a 90-day extension of the closing date, which Herlin rejected. Plaintiffs then claim that on November 3, the Adjmis offered Herlin an additional \$10,000.00 for a 90-day extension, which was also rejected. The complaint interposed claims for breach of the listing agreement, legal fees, and a violation of Real Property Law § 294-b. Plaintiffs claim that they procured the Adjmis, buyers who were ready, willing, and able to purchase the house, and that Herlin breached the listing agreement by failing to cede to the Adjmis' requests for extending the closing date.

In a related action in this Court (index no. 629564/2023) (the related action), Herlin commenced an action against the Adjmis, seeking a judgment declaring that he was entitled to keep the down payment and for legal fees. The Adjmis counterclaimed for specific performance and breach of contract. This Court, in a decision dated July 2, 2024, granted Herlin's motion for summary judgment in his favor on the complaint. This Court held that Herlin properly sent a time is of the essence letter and provided the Adjmis with a reasonable time to close, granted Herlin's motion for summary judgment, declared that Herlin was entitled to receive and retain the down payment, and scheduled a hearing on the issue of legal fees.

In this action, plaintiffs seek summary judgment in their favor on the complaint in the amount of \$82,500.00, plus legal fees and disbursements. Herlin opposes the motion and seeks summary judgment in his favor dismissing the complaint and for a hearing to determine the amount of expenses, including legal fees, to which he is entitled.<sup>1</sup>

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; *Zuckerman v City of New York*, 49 NY2d 557), 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). 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). If the movant does not meet its burden, then the motion must be denied

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<sup>1</sup> Although denominated a cross motion, Herlin's application is really a regular motion because the application contained a return date different from the original return date and any adjourned return dates of plaintiffs' motion (CPLR 2215).

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without consideration of any opposing papers (*Vega v Restani Constr. Corp.*, 18 NY3d 499). On summary judgment, the Court must view the evidence in the light most favorable to the non-moving party (*id.*).

Although the listing agreement provides several scenarios under which plaintiffs would be entitled to a commission, plaintiffs argue only that they produced a buyer who was ready, willing, and able to purchase Herlin's house. Plainly, a purchaser is not ready, willing, and able to purchase real property unless it has the financial resources to do so (*e.g. Rusciano Realty Servs. v Griffler*, 62 NY2d 696). Plaintiffs have not submitted any evidence that the Adjmis had the financial resources to purchase Herlin's house (*see GLND 1945, LLC v Ballard*, 172 AD3d 1330; *Grunbaum v Nicole Brittany, Ltd.*, 153 AD3d 1384). They submit only a bank statement from a trust, a separate legal entity (*Matter of Ihmsen*, 253 App Div 472; *Pinckney v City Bank Farmers Trust Co.*, 249 App Div 375; *TDD Irrevocable Trust v J & A Saporta Realty Corp.*, 46 Misc 3d 1028) that, apparently, was never interested in purchasing the house. Thus, plaintiffs have not satisfied their prima facie burden, and their motion is denied.

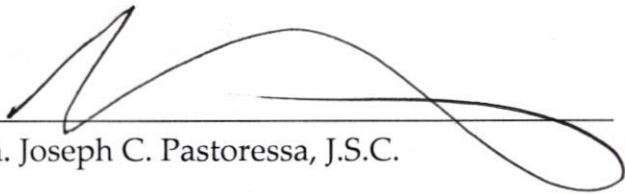
Turning to Herlin's motion, he satisfied his prima facie burden on summary judgment. Insofar as plaintiffs allege that Herlin breached the listing agreement by declining to agree to the Adjmis' requests to extend the closing date, this Court's July 2024 decision in the related action explained why Herlin acted well within his rights in doing so. Insofar as plaintiffs allege that they procured the Adjmis as purchasers, and that they were ready, willing, and able to purchase the house, Herlin showed that plaintiffs are wrong. To the contrary, Herlin showed, through his counsel's affirmation, that the Adjmis were not ready, willing, and able to purchase his house because they lacked the funds to do so (*see Ward Capital Mgt. LLC v New Pelham Parkway N. LLC*, 165 AD3d 477; *see also Hossain v Selechnik*, 107 AD3d 549; *Centro Props. Co. v Rosenberg*, 72 AD3d 1002). Although an affirmation from counsel is typically insufficient, here, Herlin's counsel also represented him in the unconsummated transaction between the parties and "was directly and personally involved in the negotiations of the [c]ontract of sale and with the sale itself." Plaintiffs failed to raise a material issue of fact in opposition. Thus, so much of Herlin's motion as seeks summary judgment dismissing the complaint is granted.

However, Herlin did not counterclaim for expenses or attorney fees. Thus, so much of his motion as seeks that relief is not properly before the Court.

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This shall constitute the decision and order of the Court.

Dated: February 10, 2025

  
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Hon. Joseph C. Pastoressa, J.S.C.

Papers considered: NYSCEF documents 14 through 41