

**Strough Real Estate Assoc., Inc. v Bowen**

2012 NY Slip Op 30920(U)

April 5, 2012

Supreme Court, Suffolk County

Docket Number: 11663/2010

Judge: William B. Rebolini

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK**

**I.A.S. PART 7 - SUFFOLK COUNTY**

**PRESENT:**

**WILLIAM B. REBOLINI**  
**Justice**

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Strough Real Estate Associates, Inc.,

Plaintiff,

-against-

Vincent Bowen,

Defendant.

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Index No.: 11663/2010

Motion Sequence No.: 002; MG

Motion Date: 11/9/11

Submitted: 1/18/12

Motion Sequence No.: 003; XMD

Motion Date: 12/14/11

Submitted: 1/18/12

Clerk of the Court

Attorney for Plaintiff:

Michael G. Walsh, Esq.  
860 Montauk Highway, Unit 4  
Water Mill, NY 11976

Attorney for Defendant:

Bennett & Read, LLP  
212 Windmill Lane  
Southampton, NY 11968

Upon the following papers numbered 1 to 69 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 20; Notice of Cross Motion and supporting papers, 21 - 57; Answering Affidavits and supporting papers, 58 - 69.

This is an action to recover a brokerage commission. Defendant entered into an "exclusive right to sell" brokerage agreement dated August 13, 2009 with plaintiff to procure a purchaser for defendant's property known as 73 Pine Neck Avenue, Sag Harbor, Town of Southampton, Suffolk County, New York. The agreement provided that the commission on any sale would be five percent of the gross sale price and that the agreed asking price for the property was \$1,399,000.00. Plaintiff found prospective purchasers, non-parties Daniel O'Connell and Susan O'Connell (the O'Connells).



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The O'Connells, as purchasers, and defendant, as seller, executed a contract of sale dated September 24, 2009 as well as riders to the contract of sale.

Paragraph 46 of the first (seller's) rider provides "This transaction included the existing dock and Seller has provided copies to Purchaser of the DEC and Trustee permits for said dock." Paragraph 12 of the second (buyer's) rider indicates,

Supplementing paragraph 46 of Seller's rider, seller represents and warrants that bulkhead are currently legal and have been in existence in its present location since before September 1, 1973. Seller represents that the dock at the premises was constructed in compliance with the requirements of the permit issued by the NYS Department of Conservation (NYSDEC). As a condition to closing, Seller shall provide proof that the Notice of Commencement and Notice of Completion of the project were properly and timely filed as required by the permit or provide evidence that the NYSDEC has signed off on the construction. Seller further represents and warrants that the Board of Trustees of the Town of Southampton were "signed off" on by the local departments having jurisdiction over such work to the extent that sign off was required. Seller shall also provide purchasers with plans for the dock.

Paragraph 31 of the first (seller's) rider provides that "In the event that the Seller shall elect or be entitled to terminate this agreement pursuant to any of its terms and conditions hereunder, it is understood and agreed that Purchaser, within ten (10) days after receipt of Seller's notice of election to terminate, shall have the option to notify Seller that Purchaser waives the condition under which Seller has elected to terminate same. If Purchaser so notifies, then Purchaser and Seller shall continue with the contract as if the provisions under which Seller elected to terminate did not exist and the closing of title shall take place in accordance with all remaining terms and conditions of the contract."

Defendant was unable to satisfy the condition to closing in paragraph 12 of the second (buyer's) rider of proof that the Notice of Completion of the dock was properly and timely filed as required by the permit or that the NYSDEC has signed off on the construction. He unilaterally cancelled the contract of sale on that basis.

Plaintiff commenced this action on March 31, 2010 to recover a brokerage commission of \$69,950.00 from defendant. Plaintiff claims that it was duly licensed to transact business as a real estate broker at its branch office located at 84 Main Street, in Sag Harbor, New York; that it was employed by defendant pursuant to the written agreement dated August 13, 2009 to procure a purchaser for his property; and that defendant agreed to pay plaintiff \$69,950.00 for its services in procuring such a purchaser. In addition, plaintiff claims that it found purchasers, the O'Connells, who were ready, able and willing to purchase the property at the price and terms agreed to by defendant; and that plaintiff duly performed all of the conditions of the contract and employment on its part. Plaintiff also claims that defendant, absent any fault on the part of plaintiff or the O'Connells, refused to sell the property to the O'Connells even though defendant had accepted them as purchasers based on the stated terms and conditions of the contract of sale and the O'Connells were ready, able and willing to purchase the property upon defendant's terms for the listing price of \$1,399,000.00., payable all in cash. Plaintiff

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further claims that its commission of \$69,950.00 is now due and owing, despite due demand.

Defendant's answer asserts affirmative defenses of lack of personal jurisdiction, failure to state a cause of action for breach of contract, and that the brokerage agreement provides that the commission is due upon sale, which did not take place, not when plaintiff procures a buyer who is ready, willing and able to close. By reply, plaintiff asserted that personal jurisdiction was obtained over defendant and attached a copy of the affidavit of service pursuant to CPLR §308 (2), asserted that the complaint states a cause of action for breach of contract and asserted that a contract of sale was fully executed and a down payment was tendered by the prospective purchasers on or about September 17, 2009 thereby satisfying the terms of the brokerage agreement.

Plaintiff now moves for summary judgment in its favor on its complaint. In support of the motion, plaintiff submits the affidavits of Julie Masson, a sales associate for plaintiff, and Scott Strough, plaintiff's president, license details concerning plaintiff and its employees from the New York Department of State Occupational Licensing Management System, the pleadings, the brokerage agreement, the contract of sale and attached riders and one certified portion and one uncertified portion of defendant's deposition testimony from October 15, 2010. In addition, plaintiff submits a copy of the NYSDEC permit issued to defendant expiring June 20, 2004 for the installation of ramps and stairs and other structures with respect to a dock on the subject property, a related permit issued by the Board of Trustees of the Freeholders and Commonality of the Town of Southampton, various e-mails and letters between the parties and the summons and complaint of a related action in the Supreme Court, Suffolk County, entitled, Daniel O'Connell and Susan O'Connell, plaintiffs, against Vincent Bowen and Birtwhistle & Gibson, P.C., defendants, under Suffolk County index number 06526/2010 commenced on February 19, 2010 for specific performance of the contract of sale.

Defendant cross-moves for summary judgment dismissing the complaint on the grounds that the terms of the brokerage agreement provides for the payment of a commission upon a sale, not upon procurement of purchasers ready, willing and able to purchase the property; that in any event, the O'Connells were not ready, willing and able purchasers inasmuch as they failed to agree to waive the dock contingency clause; and that Scott Strough and Julie Masson used a course of conduct that was detrimental and disloyal to defendant by showing the O'Connells other properties even after they signed the contract of sale and by exchanging e-mails and correspondence with the O'Connells without disclosing their contents to defendant. In support of his cross motion, defendant submits, among other things, his affidavit, the pleadings, the brokerage agreement, the contract of sale and attached riders, the certified deposition transcripts of Julie Masson and Scott Strough, and e-mail correspondence. Defendant's submissions also include a letter dated February 12, 2010 from defendant's attorney to the attorney for the O'Connells stating that his client had not been able to obtain evidence from the NYSDEC that the existing dock construction was satisfactory as required by paragraph 12 of the rider, that his client had decided to cancel the contract of sale for that reason, and that the contract down payment would be returned.

By his affidavit dated November 29, 2011, defendant contends that Scott Strough and Julie Masson did not inform him or disclose to him until after the brokerage agreement signing that the commission would be due upon sale and that they did not tell him that the O'Connells were willing to

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waive the dock contingency clause and close at the selling price in the contract of sale. In addition, defendant contends that he actively attempted to obtain a certificate of completion and was shocked to learn after signing the contract of sale that the dock did not conform to NYSDEC standards and that despite negotiating a proposed settlement and performing suggested repairs, the NYSDEC became unresponsive after mid-2009. He also argues that instead of advising the O'Connells to waive the dock clause and close at full contract price, Scott Strough and Julie Masson were secretly working against defendant by trying to convince him to accept an escrow or abatement of the purchase price and showing the O'Connells other properties during the pendency of the contract of sale thereby breaching their duty of loyalty to defendant.

The elements of a cause of action to recover damages for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of the contract, and (4) resulting damages (see, JP Morgan Chase v. J.H. Elec. of N.Y., Inc., 69 AD3d 802, 803 [2<sup>nd</sup> Dept., 2010]; Furia v. Furia, 116 AD2d 694, 695 [2<sup>nd</sup> Dept., 1986]; see also, Palmetto Partners, L.P. v. AJW Qualified Partners, LLC, 83 AD3d 804, 806 [2<sup>nd</sup> Dept., 2011]). It is a well-settled rule in this State that in the absence of an agreement to the contrary, a real estate broker will be deemed to have earned a commission when the broker produces a buyer who is ready, willing and able to purchase at the terms set by the seller (see, Lanep Real Estate Dept. Store v. Lawlet Corp., 28 NY2d 36 [1971]). A broker is entitled to recover a commission if he or she establishes (1) that he or she is duly licensed (Real Property Law §442-d), (2) that he or she had a contract, express or implied, with the party to be charged with paying the commission, and (3) that he or she was the procuring cause of the sale (see, Friedland Realty Inc. v. Piazza, 273 AD2d 351 [2<sup>nd</sup> Dept., 2000]; see also, Julien J. Studley, Inc. v. New York News, Inc., 70 NY2d 628 [1987]; Poznanski v. Wang, 84 AD3d 1048 [2<sup>nd</sup> Dept., 2011]; Kaplon-Belo Assocs., Inc. v. D'Angelo, 79 AD3d 930 [2<sup>nd</sup> Dept., 2010]). Real estate broker commissions are not earned until and unless the person produced by the broker reaches an agreement with the owner not only as to price but also as to the terms upon which the sale is to be made (see, Kaelin v. Warner, 27 NY2d 352, 355 [1971]; see, Crifasi Real Estate, Inc. v. Harv Enters., Inc., 60 AD3d 802 [2<sup>nd</sup> Dept., 2009]).

"At the juncture that the broker produces an acceptable buyer he has fully performed his part of the agreement with the vendor and his right to commission becomes enforceable. The broker's ultimate right to compensation has never been held to be dependent upon the performance of the realty contract or the receipt by the seller of the selling price unless the brokerage agreement with the vendor specifically so conditioned payment" (Hecht v. Meller, 23 NY2d 301, 305 [1968]; see, Mecox Realty Corp. v. Rose, 202 AD2d 404 [2<sup>nd</sup> Dept., 1994]). The seller can protect against the risk of having to pay the brokerage commission by either conditioning the brokerage contract, so that commissions would only be paid out of the proceeds of the sale, or contracting with the buyer that he would either have to purchase the property irrespective of its condition on the closing date or pay the broker's earned commission if he elected to rescind the contract (see, Hecht v. Meller, 23 NY2d 301 [1968]).

The subject brokerage agreement expressly provides that "SREA [Strough Real Estate Associates] will diligently investigate and develop offers for the sale of the Property at every appropriate opportunity ... The commission on any sale will be 5% of the gross sale price. If a buyer is procured by SREA, 100% of the commission will be payable to the selling exclusive broker.

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However, if a broker who has a co-broke [sic] arrangement with SREA procures a buyer, the commission will be split on a 50/50 basis with the selling broker entitled to 50% and SREA the remaining 50%. In any event, the commission paid by you shall not exceed 5% of the selling price.”

Here, plaintiff sufficiently pleaded a cause of action for the recovery of a real estate broker’s commission (see, Saland Real Estate v. Conklin, 139 AD2d 639 [2<sup>nd</sup> Dept., 1988]). Under the express terms of the brokerage agreement, plaintiff had an exclusive right to sell, entitling it to receive a commission for any sale, that is sales “transaction,” that occurred during the life of the agreement, whether or not the broker had been the procuring cause of the sale (see, Rennert Diana & Co., Inc. v. Ziskind, 191 AD2d 545 [2<sup>nd</sup> Dept., 1993]; Charles E. Hyde Realty v. Yerganian, 150 AD2d 417 [2<sup>nd</sup> Dept., 1989]). The sales transaction took place when the defendant and the O’Connells entered into a written contract of sale (see, *id.*). Thus, upon the signing of the contract of sale, a commission became due (see, *id.*). In addition, the broker’s right to a commission is not dependent upon performance of the real estate contract unless there is an agreement to the contrary (see, Mecox Realty Corp. v. Rose, 202 AD2d 404 [2<sup>nd</sup> Dept., 1994]; Cornelia and Broad Streets, Inc. v. Chase, 186 AD2d 341 [3<sup>rd</sup> Dept., 1992]). Notably, the brokerage agreement did not condition the commission upon closing or the passing of title (compare, Norma Reynold Realty, Inc. v. Edelman, 29 AD3d 969 [2<sup>nd</sup> Dept., 2006]; Dawn’s Gold Realty v. Dagnese, 304 AD2d 519 [2<sup>nd</sup> Dept., 2003]; Kaplon-Belo Assocs., Inc. v. D’Angelo, 79 AD3d 930 [2<sup>nd</sup> Dept., 2010]). Thus, the fact that a closing did not occur is irrelevant to the issue of plaintiff’s entitlement to its commission (see, Paul J. Boyer Realty v. Perry, 208 AD2d 1024 [3<sup>rd</sup> Dept., 1994]).

Moreover, the contract of sale included the signatures of defendant seller and the O’Connells, the purchase price, the address of the property, and a closing date (see, General Obligations Law §5-703[2]; Century 21 Volpe Realty, Inc. v. Jhong Kim, 231 AD2d 667 [2<sup>nd</sup> Dept., 1996], *lv* to appeal dismissed 89 NY2d 911 [1996]). There was clearly a meeting of the minds with respect to the essential terms customarily encountered in real property sales transactions and defendant clearly acquiesced to the O’Connells’ changes to the contract of sale (see, Vibar Const., Inc. v. Konetchy, 78 AD3d 819 [2<sup>nd</sup> Dept., 2010]; Stolen v. Bruaz Realty Corp., 173 AD2d 927 [3<sup>rd</sup> Dept., 1991]; see also, Cassetta Frank, Inc. v. P.G.C. Assocs., 264 AD2d 375 [2<sup>nd</sup> Dept., 1999]). Whether or not defendant was entitled under the contract of sale documents to terminate the contract of sale and the failure of the parties to go to closing are immaterial to this action.

As for plaintiff’s duty of loyalty, during the process of facilitating a real estate transaction, a broker owes a duty of undivided loyalty to its principal (see, Dubbs v. Stribling & Assocs., 96 NY2d 337 [2001] ). If this duty is breached, the broker forfeits his or her right to a commission, regardless of whether damages were incurred (see, Wendt v. Fischer, 243 NY 439 [1926]; see, Douglas Elliman LLC v. Tretter, 84 AD3d 446 [1<sup>st</sup> Dept., 2011]). In Sonnenschein v. Douglas Elliman-Gibbons & Ives, 96 NY2d 369, 375-376 [2001], the Court of Appeals held that:

Other jurisdictions have held that, in the absence of an agreement with a principal to the contrary, a broker owes no duty to refrain from “offering the properties of all [its] principals to a prospective customer” (Coldwell Banker Commercial Group v. Camelback Off. Park, 156 Ariz. 226, 230, 751 P.2d 542, 546; McEvoy v. Ginsberg, 345

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Mass. 733, 737, 189 N.E.2d 546, 547; see generally, *Foley v. Mathias*, 211 Iowa 160, 233 N.W. 106; *Lemon v. Macklem*, 157 Mich. 475, 122 N.W. 77). We find this approach to be consistent with the nature and fundamental requirements of the real estate marketplace in New York. Unless a broker and principal specifically agree otherwise, a broker cannot be expected to decline a prospective purchaser's request to see another property listed for sale with that broker. Any other rule would unreasonably restrain a broker from simultaneously representing two or more principals with similar properties for fear of violating a fiduciary obligation in the event a buyer chose the property of one principal over that of another. Similarly, such a limitation would frustrate the interests of sellers, who benefit from the opportunity to market their properties to as many potential purchasers as possible, as well as the interests of potential buyers, who often request exposure to a number of properties in order to select the one most suitable to their needs and budget. For these reasons, we decline to impose upon all broker/principal relationships the restrictive view of broker duty that plaintiffs espouse. Of course, a principal remains free to enter into an explicit agreement with a broker to achieve such an exclusive arrangement.

Inasmuch as there was no exclusive arrangement between plaintiff and defendant that plaintiff and its employees would not show other properties listed for sale with plaintiff to any prospective purchasers of defendant's subject property, defendant has failed to establish that plaintiff and its employees breached its duty of loyalty to defendant by showing other properties to the O'Connells and corresponding with them without defendant's knowledge (*see, id.*). Defendant's remaining contentions are without merit. Therefore, defendant has failed to raise a triable issue of fact concerning plaintiff's entitlement to its commission.

Accordingly, it is

**ORDERED** that this motion by plaintiff for summary judgment in its favor is granted; and it is further

**ORDERED** that this cross motion by defendant for summary judgment dismissing the complaint is denied; and it is further

**ORDERED** that the plaintiff shall settle judgment (*see*, 22 NYCRR §202.48).

Dated:

4/5/2012

  
HON. WILLIAM B. REBOLINI, J.S.C.

  X   FINAL DISPOSITION            NON-FINAL DISPOSITION