

M. Robert Goldman & Co., Inc. v Willwin, LLC

2017 NY Slip Op 30614(U)

March 24, 2017

Supreme Court, New York County

Docket Number: 156516/2016

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

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M. ROBERT GOLDMAN & CO., INC.,

Plaintiff,

-against-

WILLWIN, LLC, PEM-AMERICA, INC

Defendants.
-----X

DECISION/ORDER
Index No. 156516/2016

HON. DAVID B. COHEN, J.:

The Complaint alleges that plaintiff and defendants entered into an agreement where plaintiff would provide financial services to defendant and secure appropriate financing for defendants to purchase a building. As compensation, defendant promised to pay \$90,000.00 in mortgage brokerage fees. Plaintiff further alleges that it secured a commitment from Genworth Financials for the financing, at the terms sought by defendant and that defendant even executed a loan application for the financing. However, after defendant withdrew the loan application, defendant failed to pay the brokerage fee. The Complaint alleges three causes of action, (1) breach of contract, (2) unjust enrichment, and (3) *quantum meruit*.

Defendant now moves to dismiss based upon CPLR 3211(a)(5) and (a)(7). Defendant argues that plaintiff is not licensed and that the Statute of Frauds, specifically NY GOL 5-701(a)(10), applies here; and because the agreement was not reduced to writing, the contractual and quasi-contractual causes of action must be dismissed. Further, the unjust enrichment and *quantum meruit* claims should be dismissed as duplicative and because the loan never closed. Finally, defendant points out that when the alleged agreement was entered into, defendant Willwin, LLC had not even been formed and defendant PEM-America was never contemplated as the borrower or proposed purchaser. Plaintiff contends that it is a licensed real estate broker and that NY GOL 5-701(a)(10) contains an exception for licensed real estate brokers.

NY GOL 5-701(a) provides “[E]very agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

- (10) Is a contract to pay compensation for services rendered in negotiating a loan ...
“Negotiating” includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction. This provision shall apply to a contract implied in fact, or in law to pay reasonable compensation but shall not apply to a contract to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman.”

General Obligations Law § 5-701

A plain reading of the statute states that an agreement to negotiate a loan is void unless in writing.

However, the statute also clearly states that it does not apply to a contract to pay compensation to a duly licensed real estate broker or real estate salesman. The exception is written without limitation as to the type of work performed by the licensed real estate broker/salesman. In any event, here the complaint alleges that plaintiff is fully licensed and seeks compensation for improperly withheld mortgage broker fees. It is clear that a “real estate broker is specifically exempt from the reach of the Statute of Frauds in respect to earning commissions” (*Andover Realty, Inc. v W. Elec. Co., Inc.*, 100 AD2d 157, 161 [1st Dept 1984], affd. 64 NY2d 1006 [1985]). Recovery based upon causes of action lying in breach of contract, unjust enrichment and *quantum meruit* is not precluded by the absence of a signed writing if plaintiff is a licensed real estate broker expressly exempt from the requirements of the Statute of Frauds (*Fid. Bus. Brokers, Inc. v Gamaldi*, 190 AD2d 709 [2d Dept 1993]).

Here, taking the facts as true as the Court must on a motion to dismiss under 3211¹, defendants’ motion to dismiss pursuant to CPLR 3211(a)(5) must be denied as this is claim by a real estate broker for fees in connection with plaintiff’s duties as a real estate broker. Additionally, *Real Estate Economic Resources, Inc. v Armendariz*, 162 AD2d 303 [1st Dept 1990], cited by plaintiffs is inapplicable to this matter. In that case, the broker never alleged it secured a commitment and only provided defendant therein with terms not comparable to those sought by defendant. Here, the complaint alleges that plaintiff secured a commitment from Genworth Financials and that the terms were at least agreeable to defendant at some point as evidenced by the submission of a loan application. Further, the fact that the loan was not consummated

¹ The Court also notes that not only does plaintiff allege that it is a licensed real estate broker and was at the time in question, plaintiff has attached documentation to its opposition that lends credible support to such claim.

does not preclude plaintiff from collecting compensation **contractually** due to plaintiff should defendant be held liable (emphasis added; *B.P. Vance Real Estate, Inc. v Tamir*, 42 AD3d 343 [1st Dept 2007])["it is well-settled common-law rule that a broker who 'produces a person ready and willing to enter into a contract upon his employer's terms ... has earned his commissions,' even if no contract is ever signed" quoting *Tanenbaum v. Boehm*, 202 NY 293 [1911]): Although, "parties to a brokerage agreement are free to add whatever conditions they may wish to their agreement, including a condition that the contract of sale actually be consummated before the broker is deemed to have earned his commission" (*id.*) at the pleading stage, dismissal without further facts as to the agreement would be inappropriate.

The motion to dismiss the causes of action for unjust enrichment and *quantum meruit* on the alternative grounds as duplicative and because the loan never closed is granted. To adequately plead a claim for unjust enrichment, the plaintiff must allege "that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]). Similarly, to state a cause of action, for *quantum meruit* "plaintiff must allege (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services" (*Fulbright & Jaworski, LLP v Carucci*, 63 AD3d 487 [1st Dept 2009]).

To successfully recover on a claim for quasi-contractual relief, plaintiff must have conferred a benefit on defendant (*see Martin H. Bauman Assoc., Inc. v H & M Intern. Transp., Inc.*, 171 AD2d 479, 484 [1st Dept 1991]; *see also Stephen Pevner, Inc. v Ensler*, 309 AD2d 722, 723 [1st Dept 2003]). Here, plaintiff acknowledges that the application for the loan was withdrawn. The Complaint further alleges that defendants were enriched by not paying the brokerage fee. Although, saving money is generally beneficial, the Complaint fails to state how defendants' savings were caused through plaintiff's actions of securing the loan commitment. Thus, although plaintiff allegedly secured the loan for defendants, by withdrawing the application and not obtaining the funds, defendants did not benefit from plaintiff's work as they did not utilize plaintiff's work. Plaintiff does not offer any other allegations that defendants' obtained benefits from

the fact that plaintiff worked hard at obtaining the loan. As plaintiff has not alleged any benefit that it conferred on defendants, the second and third causes of action must be dismissed.

Finally, defendants' arguments that when the alleged agreement was entered defendant Willwin, LLC had not even been formed and defendant PEM-America was never the borrower or proposed purchaser is denied without merit. As alleged, representations were made to plaintiff, that if true, could support liability as to either or both defendants.

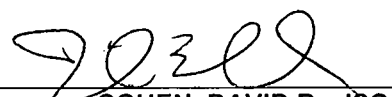
For the above reasons, it is therefore

ORDERED, that defendants' motion to dismiss the first cause of action is denied; and it is further

ORDERED, that defendants' motion to dismiss the second and third causes of action is granted.

This constitutes the decision and order of the Court.

DATE: 3/24/2017



COHEN, DAVID B., JSC