

**Coldwell Banker Real Estate Servs., Inc. v 529
Atl. LLC**

2008 NY Slip Op 31896(U)

June 23, 2008

Supreme Court, Nassau County

Docket Number: 2364-08/

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 10

COLDWELL BANKER REAL ESTATE SERVICES,
INC. d/b/a COLDWELL BANKER COMMERCIAL
NRT WORLD CLASS REALTY, INC. d/b/a MILLENNIUM
COMMERCIAL & INVESTMENT and YVE AND
ASSOCIATES REAL ESTATE, INC. d/b/a CENTURY
21 YVE,

Plaintiffs,

INDEX NO.: 002364/2008
MOTION DATE: 04/22/2008
MOTION SEQUENCE: 001 and 002

-against-

529 ATLANTIC LLC and NEIL WAINLAND,
DON WAINLAND and MARK WAINLAND,

Defendants.

The following papers read on this motion:

Amended Notice of Motion, Affirmation, Affidavit & Exhibits Annexed	1
Plaintiffs' Memorandum of Law in Support	2
Notice of Cross Motion, Affirmations, Affidavit & Exhibits Annexed	3
Affirmation in Reply and in Opposition to Cross Motion of Errol F. Margolin & Exhibits Annexed	4
Reply Affirmation of Cary Scott Goldinger	5

Plaintiffs Coldwell Banker Real Estate Services, Inc. and Yve and Associates Real Estate, Inc., move pursuant to CPLR 3212 for an order granting Summary Judgment in their action against defendants 529 Atlantic LLC, Neil Wainland, Don Wainland, and Mark Wainland, and defendants cross-move for Summary Judgment.

This action was initiated in New York County on July 7, 2006. By Order of Hon. Justice Dorice Ling-Cohan on November 30, 2007, the action was transferred to Nassau County Supreme Court. Shortly thereafter and without engaging in discovery, this motion was filed. However, defendant has identified no argument which would require discovery, and the issue is deemed sufficiently ripe.

Plaintiffs assert entitlement to the broker's commission on the sale of a property by defendants to purchasers initially introduced by plaintiffs. Plaintiffs seek judgment for the commission fee and interest, plus attorney's fees and expenses.

Facts

On January 27, 2005, defendants entered into an agreement granting plaintiffs an exclusive right to sell or lease their property located at 529-559 Atlantic Avenue, Oceanside, NY, in return for a commission of 7% on the sale price. The contract specified the broker exclusive time period as continuing until July 27, 2005; it was lengthened in a later agreement until January 27, 2006. Additionally, an "extension" provision of the agreement provided that the Owner would pay the broker commission if the property was sold or leased within 180 days from the expiry of the exclusivity period to a person who was shown the property during the term of the agreement. See Brokerage Agreement, at exhibit C to the moving paper ¶ 7(C).

In October of 2005, plaintiffs received an offer for purchase from one Ezra Simon. Although the offer was below the listed price of the property, defendants entered into sale negotiations with Simon, signing a purchase agreement on October 18, 2005. Simon was unable to obtain a mortgage, however, and cancelled the contract pursuant to a mortgage contingency clause. This was not the end of Simon, though. Defendants and Simon later entered into an agreement on February 13, 2006, after the exclusivity period had expired, for purchase of the property with a money mortgage provided by the seller. Defendants closed on the agreement with Simon on May 2, 2006, and no brokerage commission was turned over to plaintiffs. Plaintiffs commenced this action seeking \$126,000, constituting a 7% commission on the terms of the agreement, plus interest, attorney's fees, and expenses.

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his

favor (CPLR 3212, subd [b]), and he must do so by tender of evidentiary proof in admissible form.” Zuckerman v. New York City Transit Authority, 49 N.Y.2d 557, 562 (1980).

Plaintiffs predicate their summary judgment claim on two contentions: 1) the purchase agreement and sale between Defendants and Simon took place during the exclusivity period, and 2) the Plaintiffs were the procuring cause of the valid sale contract.

Defendants contend that the sale took place after the exclusivity period, and, with the cancellation of the first purchase agreement with Simon rendering the contract null and void, the February 13, 2006 agreement with him represented an entirely new transaction outside the scope of the exclusivity agreement. Additionally, defendants contend plaintiffs failed in their requirement to produce a buyer ‘ready, willing, and able’ to purchase the listed property, and as such, are not entitled to any commission. See ¶ 18, Defendants’ Affirmation.

An “extension” clause is commonly included in a real estate listing contract to protect a broker from loss of compensation when a property is sold by the owner after the termination of the listing contract to a person who was introduced to the property by the broker. Picotte Real Estate, Inc. v. Gaughan, 107 A.D.2d 996, 997 (3d Dep’t 1985). In the instant case, an extension is included in the exclusivity agreement between plaintiffs and defendants and states: “If within 180 days after the expiration of this agreement the property is sold, exchange[d] or leased to or with any person or party to whom the property was shown during the term of the listing, Owner agrees to pay the Broker the commission set forth herein as if the Broker has made the sale, exchange or lease.” Brokerage Agreement, at exhibit C to the moving paper ¶ 7(C). By defendants’ own admission, the brokerage agreement expired on January 27, 2006, and the consequent deal with Simon took place on February 13, 2006. Although defendants contend this agreement is after the listing agreement, and its extension, had expired, it is clearly well within the 180 day extension provision.

Defendants’ additional contention that the February 13 agreement represents an entirely new transaction and is thus outside of the exclusivity contract is also rejected under the plain reading of the extension and the undisputed facts. Simon was shown the property by the broker, and as such, *any* transaction with him is governed by the extension provision. As a general principle, a real estate broker is entitled to a commission as the procuring cause of a sale where the broker generated a chain of circumstances which proximately led to the ultimate [sale] of the

[* 4]
premises. Corcoran Group, Inc. v. Morris, 107 AD2d 622, 623 (1st Dep't 1985); Busher Co. Inc. v. Galbreath Ruffin Realty Co. Inc., 22 AD2d 879 (1st Dep't 1964), Aff'd 15 NY2d 992. Even if the court accepts the defendant's contention that the purchase was an entirely new transaction, which the evidence appears to disconfirm, the introduction of Simon by plaintiffs to the property is sufficient according to the language of the extension and established case law to earn the commission.

Defendants' also contend that the plaintiffs did not produce a buyer "ready, willing and able" to purchase the property. However, "it is well settled that absent an agreement to the contrary, a real estate broker earns his commission when he produces a party who is ready, willing and able to purchase or lease on the terms set by the seller." Kaplon-Belo Assocs. v. Farrelly, 221 AD2d 321 (2d Dep't 1995). Where the vendor 'accepts' the purchaser by entering into a contract of sale with him, the broker is ordinarily relieved of the necessity of showing that the purchaser was ready, willing and able to perform. The seller will be presumed to have satisfied himself with respect to the purchaser's financial ability before entering into the contract. Agency, Broad & Cornelia Street, Inc. v. Lavigne, 97 AD2d 934 (3d Dep't 1983). In the instant case, the fact that defendants had to change the term of the sale, or that Simon defaulted at a later date, is irrelevant to the issue of whether he is a buyer "ready, willing and able" at the time of the transaction creating the broker's fee. Defendants' consummation of the sale of the property to Simon evidences that the plaintiffs procured a buyer "ready, willing and able." Plaintiffs have thus satisfied their burden of demonstrating that as a matter of law the court should direct judgment in their favor.

This action was brought against 529 Atlantic LLC and Neil Wainland, Don Wainland, and Mark Wainland individually, who are also members of the LLC. Plaintiffs contend the individual defendants should be held liable for the debts of 529 Atlantic LLC. As evidence, plaintiffs introduced the exclusivity agreements between the seller and broker, in which Neil Wainland signs as 'Owner.' Defendants cross-move to have the action against the individual defendants dismissed.

This evidence does not establish that Neil Wainland signed in his individual capacity, and not as a member of the LLC on behalf of the corporation. "Piercing the corporate veil requires a showing that: (1) the owner exercised complete domination over the corporation with

respect to the transaction attacked, and (2) that such domination was used to commit a fraud or wrong against the plaintiff, resulting in the plaintiff's injury." Matter of Morris v. New York State Dept. of Taxation & Fin., 82 NY2d 135, 141 (1993). Plaintiffs have not met this standard. Furthermore, there has been no evidence introduced that makes mention of Don Wainland and Mark Wainland, who are also named as defendants in the action. The court accepts defendants' contention that the claim against the individual defendants should be dismissed. This contention is supported by evidence that plaintiffs were aware the owner of the property was 529 Atlantic LLC. See Brokerage Agreement, at exhibit C to the moving paper (listing the 'name of owner' at the beginning of the agreement as 529 Atlantic LLC) and Deposition of Susan Langdon, page 69-71 (describing plaintiffs efforts to check the public records and determining 529 Atlantic LLC was the owner of the property).

Adequate remedy is available to plaintiffs under the debtor-creditor law to enforce judgment as necessary and allow for recovery from the LLC.

On the basis of the foregoing, plaintiffs motion for summary judgment is granted in part, and it is ORDERED and ADJUDGED that it have judgment against defendant 529 Atlantic LLC in the amount of \$126,000, plus interest from May 2, 2007, and taxable costs and disbursements, and the Clerk of the County of Nassau is directed to enter judgment accordingly. It is further ORDERED that the complaint is dismissed against the individual defendants Neil Wainland, Don Wainland, and Mark Wainland.

Plaintiffs application for counsel fees shall be determined by an inquest to be held before Court Attorney/Referee Thomas Dana (Room 206, Second Floor) on August 14, 2008, at 10:00 A.M. It is further

ORDERED that counsel for plaintiff shall serve defendant and file with the Clerk of the Court a Notice of Inquest and Note of Issue and pay all appropriate fees for the filing thereof on or before July 24, 2008.

Dated: June 23, 2008

L. B. Wainland

ENTERED

JUN 30 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**