

Buck Realty of Long Island, Inc. v Elliott
2012 NY Slip Op 31616(U)
June 5, 2012
Sup Ct, Nassau County
Docket Number: 3525/11
Judge: Anthony F. Marano
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. ANTHONY F. MARANO
Justice.

TRIAL/IAS PART
7
NASSAU
COUNTY

Buck Realty of Long Island, Inc.,
Plaintiff,

-against-

MOTION #003
INDEX # 3525/11

Shawn Elliott, Shawn Elliott Luxury
Homes, Inc., Shawn Elliott's Luxury
Homes and Estates LLC,
Defendant.

The following papers read on this motion:

- Notice of Motion X
- Answering Papers X
- Reply..... X

Motion by defendants Shawn Elliott, Shawn Elliott Luxury Homes, Inc., and Shawn Elliott's Luxury Homes and Estates, LLC for summary judgment pursuant to CPLR 3212 dismissing the complaint of Buck Realty of Long Island, Inc., is granted and judgment is awarded in favor of defendants as against plaintiff dismissing the complaint. This order concludes this proceeding.

Plaintiff Buck Realty of Long Island, Inc, (Buck) brings this action to recover commissions, alleging breach of contract, fraud and quantum meruit. The complaint alleges that "on or about November 1, 2009" Tod Buckvar entered into a commission agreement with defendant Shawn Elliott on behalf of Buck Realty (the alleged oral Agreement). The terms of the alleged oral Agreement required Elliott to find a person willing and able to purchase property located at 20 Wenwood Drive, Brookville, New York ("the subject property"). Buck alleges that Elliott sold the subject property on or about "July 1, 2010" and that Elliott has not paid the commission due.

On this motion for summary judgment defendants Shawn Elliott, Shawn Elliott Luxury Homes, Inc. and Shawn Elliott's Luxury Homes and Estates, LLC (collectively referred to as "Elliott") deny entering into any agreement with Buck and offer the affidavits of Seller, Wayne Steck, defendant Shawn Elliott and Tod Buckvar, plaintiff's principal, as well as documentary evidence.

Wayne Steck avers that he retained Elliott as a listing agent to sell the subject property. He avers that Buck Realty had "no role to play in referring" him to Luxury Estates and no role in his decision to retain Elliott as listing broker. Nor, he states, did he or his wife Lori consent to Buck entering any agreement with anyone regarding the sale.

Regarding his relationship with Tod Buckvar (Buckvar), Steck avers that Buckvar was a friend for twenty years. He had introduced his wife Lori Steck to Elliott when the Stecks bought the subject property, as they were planning to "flip" it. However their plans changed and they did not sell. Steck avers that over the next ten years or so he met Elliott at various fundraisers and other events, and they discussed real estate. At one point he and Elliott planned a real estate venture in East Quogue. The venture never happened.

Steck avers that in 2010 when he and his wife decided to sell, he contacted Elliott to retain Luxury Estates. Steck avers that he chose Elliott for two reasons. Luxury Estates' office manager sold their house in Oyster Bay sixteen years prior "for top dollar" and Luxury Estates agreed to "cut its standard five percent (5%) commission to four-and-a-half percent (4 ½ %)."

Steck also avers that as a real estate broker who owns his own brokerage, he could have listed the property himself but did not because he trusted Elliott. Luxury Estates sold the property for \$3,200,000. Luxury shared the 4 ½% commission with the Purchaser's agent, Century 21 Laffey Associates. Steck refused to give Buck a copy of closing statement, and told him in colorful language that he had done nothing to earn a fee. Steck avers that Buck told him he was entitled to a fee based upon his introduction of Shawn Elliott "nine years earlier".

Shawn Elliott's affidavit denies entering into any commission

agreement with Tod Buckvar, or plaintiff Buck Realty of Long Island, Inc. in November of 2009 or any other time. He states that Buck did not refer him to the Stecks, and points to the affidavit of Wayne Steck for confirmation.

In support Elliott also offers the listing agreement and Multiple Listing Service history for the subject property. The listing agreement provides for a 4½ % commission rate. Both documents show Shawn Elliott's Luxury Homes and Estates as the listing agent, and an asking price of \$3,995,000. Significantly, the agreement is dated September 11, 2009, and the Multiple Listing shows a listing date of September 25, 2009, both dates two months prior to the alleged oral agreement.

In opposition, Buckvar states that he had been to the home of Wayne and Lori Steck "innumerable" times as a social and business guest who came to "advise them financially", and that Wayne had relied upon him on many occasions "to give him advice". His statements regarding the formation of the agreement are as follows:

When Wayne and Lori Steck decided to sell the subject premises at 20 Wenwood Drive, Brookville, Long Island, I told them that I was calling Shawn Elliott because I believed he was the right broker to list the property with.

I thereupon called Shawn Elliott personally from Wayne and Lori's home, in their presence, and discussed with him the listing and sale of the subject property.

We agreed I would received half of his commission as being the referring real estate broker. He would be listing broker.

Buckvar does not contend that the Stecks authorized him to call

Elliott on their behalf, and his affidavit does not indicate the date upon which he made the alleged call in the presence of the Stecks at their residence. He thus fails to address the critical issues of authorization and the timing raised in the pleadings, i.e., how he could have referred the Stecks to Elliott at a time when Elliott already had a written listing agreement for the subject property.

In order to obtain summary judgment a movant must "establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law * * * The party opposing the motion . . . must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact"

(*Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966, 967 [1988]). Moreover, plaintiff cannot avoid summary judgment by offering "self-serving affidavits" "tailored" by omission to avoid the consequences of the facts previously alleged (cf., *Nemeroff v. Coby Group*, 54 AD3d 649, 651 [1st Dept 2008]).

Defendants have offered affidavits and documentary evidence. Steck denies retaining plaintiff. Shawn Elliott denies entering into any agreement with plaintiff and offers documentary evidence in support. The listing agreement and multiple listing documents support Elliott's factual assertion that he entered into a listing agreement with the Stecks two months before Buckvar's purported referral. Elliotts' submissions make out a prima facie case for

dismissal as a matter of law (*see, Nemeroff v. Coby Group*, 54 AD3d 649, 651 [1st Dept 2008], *supra*).

In opposition, plaintiff offers only Buckvar's affidavit alleging a referral, which omits reference to the critical date alleged in the pleadings. He argues, without legal support or authority, that the consent of the Stecks was not required.

As to the cause of action for breach of contract, there is "no evidence" other than a self serving affidavit that Buck performed services at the sellers' or the defendants' behest, indeed, no evidence that Buck had anything at all to do with the listing or sale of the subject property. Buck attempts to assert a right to collect a commission for referring the Stecks to a real estate agent with whom they had already entered into a written listing agreement. It is self evident that Buck could not bring about a listing which had already occurred. Buck alleged no other service warranting a commission. Thus Buck has failed to raise a triable issue with regard to breach of contract.

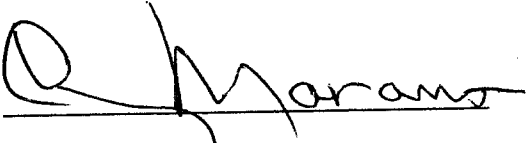
Nor is there evidence to support a claim of quantum meruit, as plaintiff "proffered no proof as to either the work he actually performed or a 'reasonable value' for those alleged services" (*see, Nemeroff v. Coby Group*, 54 AD3d 649 [1st Dept 2008]).

With respect to the final cause of action, a claim of fraud must be based upon something extrinsic to a claim of breach of contract and may not be premised upon the same allegations as a breach of contract (*Guerrero v Valianco*, 197 AD2d 667 [2d Dept

1993). Plaintiff has alleged only a breach of contract.

Based upon plaintiff's failure to raise a triable issue, Elliotts' motion for summary judgement is granted and the complaint is dismissed.

Dated: 6/5/2012



J.S.C.

ENTERED
JUN 13 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE