

Delaurentis v Malley

2012 NY Slip Op 32953(U)

December 12, 2012

Sup Ct, New York County

Docket Number: 114259-2011

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER
Justice

PART 15

BRIAN M. DELAURENTIS,

Plaintiff,

INDEX NO. 114259-2011

MOTION DATE _____

- v -

MOTION SEQ. NO. 002

ERIC MALLEY and SOTHEY'S
INTERNATIONAL REALTY, INC.,

MOTION CAL. NO. **FILED**

Defendants.

DEC 14 2012

The following papers, numbered 1 to _____ were read on this motion for a
NEW YORK COUNTY CLERK'S OFFICE

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2, 3</u>
Answer — Affidavits — Exhibits _____	<u>4, 5</u>
Replying Affidavits _____	<u>6</u>

Brian M. Delaurentis (“Plaintiff”), a licensed real estate broker, brings this action to recover a brokerage commission from the sale of an apartment located at 161 West 15th Street, Apt 6FG, New York, New York. Plaintiff asserts that Defendants Eric Malley (“Malley”) and his employer, Sotheby’s International Realty, Inc. (“Sotheby’s”) (collectively, “Defendants”), who were representing a seller of the residential unit, refused to transact with Plaintiff and his client because Malley wanted to avoid sharing the sales commission with Plaintiff and/or because of Plaintiff and his client’s sexual orientation.

Plaintiff alleges that on November 20, 2010, he communicated to Malley by email and phone message that his client had offered to purchase the unit for \$3,150,000 with no contingencies. Plaintiff’s complaint states that Malley did not reply to his offer until November 23, 2010 when Malley confirmed that he was willing to co-broker the potential deal with Plaintiff, and equally divide the commission. On November 29, 2010, Malley communicated a counter-offer of

\$3,350,000. Plaintiff alleges that on November 30, 2010, he responded to Malley that his client wanted another showing of the apartment on December 3, 2010. On December 2, 2010, Plaintiff was advised by email that Malley accepted another offer. Plaintiff's complaint alleges that the apartment was sold for "precisely the same original amount of the November 20, 2010 unconditional offer made by Plaintiff's client for \$3,150,000."

Plaintiff's original complaint alleged causes of action for: (1) tortious interference with contract; (2) breach of oral contract; (3) housing discrimination based on sexual orientation; and (4) vicarious liability. On May 1, 2012, Defendants moved to dismiss in lieu of answering the complaint. By stipulation dated June 6, 2012, the parties agreed that Defendants would withdraw the motion to dismiss, without prejudice, to allow Plaintiff to file an amended complaint. In his amended complaint, Plaintiff alleges: (1) breach of written contract; (2) tortious interference with a prospective business advantage; (3) housing discrimination based on sexual orientation; and (4) vicarious liability.

Defendants Eric Malley and Sotheby's International Realty, Inc. now move to dismiss the amended complaint pursuant to CPLR §3211(a)(1) and (7).

For a motion to dismiss brought pursuant to CPLR §3211, "the court must presume the facts pleaded to be true and must accord them every favorable inference... it is also axiomatic that factual allegations that consist of bare legal conclusions are not entitled to such consideration. (*Hispanic Aids Forum v. Estate of Joseph Brown*, 16 AD3d 294, 792 NYS2d 43 [1st Dept 2005]). On a motion to dismiss pursuant to CPLR §3211(a)(1) "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted) Such a motion "may be appropriately granted only when the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." (*Goshen v. Mut. Life Ins. Co. Of NY*, 98 NY2d 314, 774 NE2d 1190 [2002]). Documentary evidence includes, "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable." (*Fontanetta v. Doe*, 73 AD3d 78, 898 NYS2d 569 [2nd Dept 2010]).

In order to prevail on a breach of contract claim, a plaintiff must establish each of the following four elements: (1) existence of a valid contract; (2) plaintiff's performance of the contract; (3) defendant's material breach of the contract; and (4) damages. (*Noise In The Attic Productions, Inc. v. London Records*, 10 AD3d 303, 782 NYS2d 1 [2004]).

Plaintiff's first cause of action in the amended complaint alleges that Defendant breached the written co-brokerage contract. Plaintiff alleges that (1) Plaintiff and Defendants were subject to a written Real Estate Board of New York ("REBNY") RLS Universal Co-Brokerage Agreement regarding negotiation of the proposed sale of the Apartment; (2) Plaintiff performed under the contract's terms in communicating offers and following up on the offer's status to Malley, the Exclusive Agent for the Seller; (3) Malley did not perform his contractual obligations and thereby breached the Co-Brokerage Agreement by failing to disclose the competing offer and unfairly treating Plaintiff through refusals to communicate in a prompt manner; and (4) Plaintiff has been damaged in the amount of \$94,500 plus interest from the date of the breach. Thus, Plaintiff has sufficiently laid out a breach of contract claim pursuant to CPLR §3211.

Plaintiff's amended complaint also asserts a cause of action for tortious interference with a prospective business advantage. To state a cause of action for tortious interference with a prospective business advantage, a plaintiff must set forth allegations that demonstrate, (1) Plaintiff had a business advantage with a third party; (2) Defendant interfered with those business relations; (3) Defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; (4) there was resulting injury to the business relationship. (*Thome v. The Alexander & Louisa Calder Foundation*, 70 A.D.3d 88 [1st Dept 2009]).

Plaintiff has laid out the requirements necessary to plead this cause of action. Plaintiff alleges, (1) he had a business relationship, a real estate brokerage contract, with a client with the expectation of compensation through co-brokerage; (2) Defendants interfered with his business relationship because upon receiving his offer to purchase the property on November 20, 2012, Malley "sought to delay Plaintiff and secure another purchaser, and refused to negotiate or consummate the offer through delay and non-responsiveness."; (3) Malley acted with "discriminatory animus; and/or dishonest, unfair and/or improper means in the course of dealing; and/or breaching his fiduciary duty to his client to obtain the

highest possible price so as to avoid sharing the commission”; and (4) but for Defendant Malley’s wrongful conduct, Plaintiff would have earned a \$94,500 commission.

Defendant has sufficiently pled tortuous interference with a prospective business relationship. The third requirement, that Defendant act with the “sole purpose of harming the plaintiff or by using unlawful means” is met in that a theory that defendant acted with the sole purpose of unlawful means, i.e. discriminatory animus, has been pled. Therefore, the motion to dismiss the second cause of action for tortuous interference with a prospective business relationship is denied.

The third cause of action for housing discrimination is brought pursuant to Executive Law §296(5)(c)(1). To state a prima facie case of housing discrimination, a plaintiff must demonstrate that (1) he is a member of the protected class by the statute; (2) he sought services in connection therewith that he was entitled to; (3) such services were denied; (4) the broker’s denial of such services occurred under circumstances giving rise to the inference of discrimination (*Sayeh v. 66 Madison Avenue Apt. Corp.*, 73 AD3d 459 [1st Dept 2010]). “If plaintiff can show that she was adversely affected by reason of discrimination perpetrated against the prospective purchaser, she has a cognizable claim for discrimination.” (*Axelrod v. 400 Owners Corp.*, 189 Misc.2d 461, 733 NYS2d 587 [NYS Sup. Ct. 2001]).

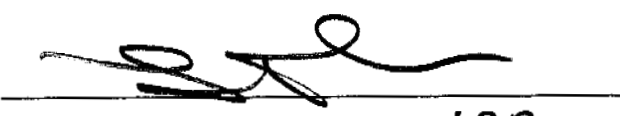
Plaintiff has standing to bring this action since he is alleging that he was adversely affected by defendants’ discrimination against his client, the prospective purchaser. Plaintiff’s housing discrimination claim alleges that (1) that he is a member of a protected class as a gay man with gay clients; (2) his client sought to and was qualified to purchase the apartment; (3) Malley refused to negotiate the sale of the apartment; and (4) the circumstances of the negotiations give rise to an inference of discrimination because Malley chose not to create a bidding war for the highest price that would have benefitted the seller, his principal to whom a duty of loyalty to get the highest price was breached by discriminatory animus. Taking the allegations as true, plaintiff has sufficiently pled a prima facie case of housing discrimination.

Wherefore, it is hereby,

ORDERED that Defendants motion to dismiss is denied in its entirety.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: December 12, 2012



HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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