Scalacustom Props., Ltd. v Birol
2013 NY Slip Op 32730(U)
October 9, 2013
Supreme Court, Suffolk County
Docket Number: 15774/2007
Judge: Ralph T. Gazzillo
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Index No: 15774/2007

SHORT FORM ORDER

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

Post Trial Decision

PRESENT:

Hon. RALPH T. GAZZILLO
A.J.S.C.

Scala Custom Properties, Ltd.,

Plaintiff(s),

- against -

Ohran Birol and Nuray Birol,

Defendant(s).

The non-jury trial of this matter was held before the undersigned on June 24, 2013. In addition to a number of items of documents pre-marked as exhibits and/or evidence, the plaintiff relied upon four (4) witnesses: Mark Thomas Scala, Ronald Scala, Ohran Birol and Nuray Birol. The defense called no witnesses but instead relied instead upon cross-examination of each witness.

At the conclusion of the proceedings, in lieu of summations and after the defendants' application for a trial order of dismissal (decided below), both sides were invited to submit written factual and legal arguments as well as any requests for findings of fact pursuant to CPLR §4213 by July 12, 2013[1]. Those memoranda having since been received and reviewed, the Court's determination is as follows:

To begin with, there are a number of background facts which are not in serious dispute and were stipulated and agreed to by the parties at the trial's commencement. Specifically, there is no

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[1] Due to a difficulty with the transcript, the submission date was adjourned on consent tp September 5, 2013.

contest that this matter involves a premises located at 236 Dune Road, Quogue, New York, which consists of a condominium unit (# 236) purchased on October 2, 1995 by the herein co-defendants/ husband and wife as tenants by the entirety. On April 19, 2006, the defendant Ohran Birol signed "Exclusive Agency Agreement" appointing the plaintiff real estate agency as an agent to sell the premises for $1.75 million. The plaintiff contends that on August 7th, 2006, it informed Ohran Birol that a purchaser agreed to purchase the premises for $1.75 million in cash. The defendants, however, refused, claiming that the defendant Nuray Birol had never agreed to sell the premises. On November 27, 2006, the defendants transferred the property to Nuray Birol. By summons and complaint dated May 21, 2007, the plaintiffs allege two causes of action, one for breach of contract and one for *quantum meruit*. Both seek damages in the amount of $105,000.00. There is no counter-claim.

Supplementing those facts is the trial's evidence which included, of course, the testimony. As to that testimony, its essence and its major and/or most relevant contentions may summarized as follows:

Mark Thomas Scala's testimony indicated that he was the real estate agent who took the listing but he no longer works for the plaintiff real estate agency. That agreement was effective April 6, 2006[2] signed in front of him and expired on July 19, 2006. A second agreement was executed thereafter extending the agency to September 31, 2006 and containing the same listing or asking price of $1.75 million as well as the same six (6) per cent commission. Thereafter, the property was marketed by advertisements in *The New York Times*, provided to a multiple listing service as well as local papers. Also, a 24" by 24" sign was placed on the property, the premises was shown to 16 to 18 potential buyers, and several "open-houses" were conducted. There was an initial "all-cash" offer of $1.55 million by a Paul Dans; that offer was rejected as the defendants purportedly wanted more money. Dans then offered to pay the full asking price. That offer was transmitted to defendants who allegedly accepted it but shortly thereafter, Mrs. Birol "changed her mind and didn't want to sell" and gave no reason. The witness also indicated that in prior conversations she hadn't ever said she didn't want to sell the property.

On cross-examination, the witness further indicated that he had had conversations with Mrs. Birol prior to her husband signing the agreement. They had spoken about the price and other matters about a sale during approximately February or March of 2006 and she had indicated that she wanted to sell. (With regard to this point, he was somewhat adamant.) He added that he may have known them for as much as a year before the execution of the agreement. Although he knew they both owned the property, he had accepted Mr. Birol's signature as signing for both him and his wife as she was unavailable. He also added that between the signing of the first (April) agreement and the second (July), he had spoken with Mrs. Birol a number of times. (On his re-direct examination, he was also adamant about this).

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[2] Notwithstanding the year on the document, it appears obvious that it was signed in 2006.

The witness also admitted that he wasn't present when second offer was accepted. Also, while the property is one of two units which make up the condominium, the condominium association has but two (2) separate apartments and owners. Mr. Birol purportedly told him that the other unit's owner had "no problem" with the sale and they had congratulated the Birols.

Ronald Scala testified that he has been a licensed real estate broker for 25 years, including all times relevant to this matter. He had sent the first agency agreement to the defendants by facsimile, and he sent the extension the day after it expired. His description of his various efforts to sell the property paralleled the first witness, and he added that he had personally seen the sign directly next to the front door and that it was "impossible" not to see it.

As to the first offer, he testified that it was all cash but it was refused and unacceptable as "not enough money." Indeed, when he spoke on the phone to Mrs. Birol about that offer, she "made it empathic (sic) that it was not enough money." The witness indicated that her husband would, however, have accepted it. Thereafter, when the full asking price was offered Mr. Birol was "ecstatic"; subsequently, however, she called and said she "changed her mind" and didn't "want to sell."

Four weeks later, the witness purportedly sold Dans - "a guy running around with a lot of money in his pocket, all cash" - a waterfront property.

During Scala's cross-examination he stated that he had sold hundreds of houses where only one of the spouses signed. He also testified that he spoke with Mrs. Birol after the second offer. He strongly contended that she had previously and telephonically accepted that offer. Subsequently, and after her rejection, he questioned her change of heart as they had prior, contrary conversations about the sale. He also stated that her husband had asked him to try to convince her to sell.

Ohran Birol testified that he and his wife own the property and used it as an investment/rental property. Rentals, albeit sporadic over the years, varied from $20,000.00 to $36,000.000 a season. Although he wanted to sell, purportedly his wife didn't, and Scala "came into the game very late." In 2000 or so, Mr. Birol was told he could get "two million" for the unit. He had been offering it for sale and "praying" for an bid that his wife couldn't refuse. He also indicated she was aware he was trying to sell. He added that his fears of a real estate crash fueled his desire to sell and that either the day he signed the agreement or the next he told his wife.

He also stated that he had previously purchased the neighboring unit -234 - for $335,000.00 or so and sold it for $630,000.00 within two years. As to the unit of this litigation, he had accepted the first $1,550,000 offer "right away" but his wife rejected it. He admitted that Scala's firm did "their job" but contended that his wife never wanted to sell. After the first offer, his wife purportedly said she didn't want to sell. He claimed that he told Scala she was "crazy" and didn't want to sell it for the first offer, but perhaps if they got the full amount she would and he asked Scala to talk to her. His wife, however, indicated that she didn't want to sell and told her husband to "get that guy (Scala)

off [her] back."

He also alleged what was apparently purported to be an impediment to the sale: the right of first refusal by condominium owner of an adjoining unit (who would have had to pay the same price. As to the condominium board members, they are comprised of him, his wife, and one other; the Birols, however, enjoy more voting power than the other owner by a margin of 53% to 47%. As indicated by his testimony, the Birols have apparently been historically lax and somewhat less than faithful to the formalities and regulations of the condominium. For example, notice requirements of the by-laws (such as leasing notices and intent to sell) were not followed.

He also alleged that he resided in Quogue and his wife on Shelter Island and that the "for sale" sign on the street had been removed by the police. He further contended that he questioned Mark Scala as to whether Mrs. Birol should also sign the listing agreement but was told "it's not necessary." When this witness spoke to her about it that day or the day after, she "was not happy" and said she didn't want to sell. He also contended that his wife never had met with Mark Scala before they had listed their other Jones Road property. After the first offer was conveyed, he said she didn't want to sell.

Finally, on redirect, he contended that he was never told the offer was a cash deal.

The testimony of the final witness, Nuray Birol, was comparatively brief. She indicated that she first learned of the agency agreement on or about the day her husband signed.

She further stated that she had read condominium by-laws when they purchased the property and was familiar with them but never employed the notice requirements. She admitted they hold the majority of voting rights and that "we make the by-laws" and "everybody does their own thing."

She claimed she rejected the $1.75 million offer because she was unwilling to sell the property at "no price." She admitted, however, that thereafter she offered the property for sale with a number of other agents because they needed that for a marketing strategy to rent it for the summer. The listing were with a multiple listing service for $3.25 million and for $2.275 million and apparently actively they listed it for sale in 2009.

She also indicated that she listed the Jones Road property with the plaintiff until the plaintiff began the instant litigation.

LAW

First and foremost, having observed the witnesses, "the very whites of their eyes," on direct as well as cross-examination, the so-called "greatest engine for ascertaining the truth," *Wigmore on Evidence*, §1367, the Court is satisfied that the exercise has been fruitful and more than sufficient to determine the credible information as well as to simultaneously filter out that which is less than

reliable. Secondarily, it should go without saying that in evaluating each witness' contributions to the resolution of the controversies in this matter—as well as all such determinations—it is hornbook law that the quality of the witnesses, not the quantity, is determinative. *See, e.g., Fisch on New York Evidence,* 2d ed., §1090. As to the quality of any given witness, the flavor of the testimony, its quirks, a witness' bearing, mannerisms, tone and overall deportment cannot be fully captured by the coldrecord; the fact-finder, of course, enjoys a unique perspective for all of this, and the ability to absorb any such subtleties and nuances. Indeed, appellate courts' respect and recognition of that perspective as well as its advantages is historic and well-settled in the law. *See, e.g., Latora v. Ferreira,* 102 AD 3d 838 (2d Dept 2013); *Hom v. Hom,* 101 AD3d 816 (2d Dept 2012). Also worthy of examination is any witness' interest in the litigation. *See, e.g.,* 1 NY PJI2d 1:91 *et seq.*, at p.172. The length of time taken by either side's case or any witness' testimony is, however, clearly non-conclusive. Lastly, it should be underscored and acknowledged that during the course of gauging a witness' credibility as well as conducting the fact-finding analysis, the undersigned's continuous tasks also included, of course, segregating the competent evidence from that which was not, an undertaking for which the law presupposes a court's unassisted ability. *See, e.g., People v. Brown*, 24 NY2d 168 (1969); *Matter of Onuoha v. Onuoha*, 28 AD3d 563 (2d Dept 2006).

Those tasks and duties aside, there is also the purpose and goal of the trial, *viz.*, to try or test the case. It is hornbook law that the yardstick for measuring causes of actions such as the matter at bar is the same whether the trial is by bench or jury: The burden of proof rests with the plaintiff who must establish the truth and validity of each claim by a fair preponderance of the credible evidence. Stated otherwise, in order for a plaintiff to prevail on any individual claim, the evidence that supports that claim must appeal to the fact-finder as more nearly representing what took place than the evidence opposed to it; if the evidence does not, or if that evidence weighs so evenly that the fact-finder is unable to indicate that there is a preponderance on either side, then the question is decided in favor of the defendant. Only when the evidence favoring a plaintiff's claim outweighs the evidence opposed to it may that plaintiff prevail.

An action which founded upon a theory of contract requires proof requires proof of 1) at least two parties with legal capacity to contract, 2) mutual assent to the terms of the purported contract , and 3) consideration. See generally, Restatement (Second) of Contracts §§ 9,12,17: 1 Williston, *Contracts* (4th Ed) 200-09,§ 3:2; 22 NYJur2d, Contracts §§ 11, 13; *see, also,* UCC 1-201, subs 3, 11. Perhaps in more simple, general terms, there must be a sufficiently credible demonstration of a mutual understanding and agreement regarding the performance or forbearance of an act. *See generally, 410 Corp. v. Chmelecki Asset Mgt., Inc.* 51 AD3d 715 (2d Dept 2008). There are numerous conditions attached to that general rule, including the well-settled caveat that any "agreement" which provides for further negotiations regarding any material term or terms is unenforceable. *See, e.g., Teutul v. Teutul,* 79 AD3d 851 (2d Dept 2010). Stated otherwise, there must be a meeting of the minds on all of the essential terms of the contract. *Murray Adler Realty Co. Inc. v. Benefore,* 42 AD2d 715 (2d Dept 1973). *Quantum meruit* requires sufficient proof of 1) performance of the services in good faith, 2) the acceptance of the services by the person to whom they are rendered, 3) the reasonable value of the services, and 4) the expectation of compensation

therefor. *See, e.g., Atlas Refrigeration-Air Conditioning v. Lo Pinto, 33* AD3rd 636 (2006).

Moreover, the general rule regarding the entitlement of a real estate broker to a commission requires providing a purchaser who is ready, willing and able to buy the property on terms established by the seller. *See, e.g.,Crifasi Real Estate, Inc. v. Harv. Enters., Inc.,* 60 AD2d 802 (2d Dept 2009). Although that rule is simply stated, its application has spawned significant litigation and resulted in the rule's further interpretation, refinement, and qualification. For example, it has been determined that there must be an agreement to all the terms typical to such transactions; as such, any "agreement" which includes a proviso that its terms are to be thereafter arranged is in jeopardy. *Kaelin v. Warner,* 27 NY2d 352 (1971). Indeed, while the price may appear to be the prime focus of a bargain, for there to be the meeting of the minds required for an enforceable contract there must be an accord with respect to the other terms customary and essential to the transaction, including a real estate transfer. *M. A. Salazar, Inc. v. Levy,* 237 AD2d 583 (2d Dept 1997); *Helan Realty & Development Corp. v. Skyview Meadows Development Corp.,* 204 AD2d 601 (2d Dept 1994). Moreover, merely agreeing to pay "cash" may be seductively attractive, but standing alone it will be deemed insufficient. *Taibi v. Amer. Bank Note Co.,* 135 AD2d 810 (2d Dept 1987). The requirements of a valid agreement are, of course, determined by the circumstances. For example, when the seller had his business on the premises and intended to remain for some months, the date he had to vacate was required. *Blaufeux v. Paznik,* 162 AD2d 573 (2d Dept 1990). That is not to imply that the rule requires a fully executed contract, but there must be something more than an agreement on merely the price and closing date. *Penzotti v. Broda Mach. Co.,* 37 AD2d 340 (4th Dept 1971). Indeed, the failure to indicate a closing date - by itself - is not fatal as it will be presumed it will occur within a reasonable time. *Kirk Assoc. Ltd. v. McDonald Equities, Inc.,* 155 AD2d 281 (1st Dept 1989). However, where the broker's commission is specifically conditioned upon performance of the contract, that requirement must be satisfied. *Lane - The Real Estate Dept. Store v. Lawlet Corp.,* 28 NY2d 36 (1971).

Whether a buyer is "ready, willing and able" is, of course, a question of fact. Satisfactory proof of the buyer's financial ability does demand a demonstration that he or her have the funds on hand, or his or her exact financial status; it may be proven by other competent evidence. *See, e.g., Mengel v. Lawrence,* 276 AD2d 180 (1st Dept 1949); *see, also, Kirk Assoc. Ltd. v. McDonald Equities, Inc., supra.*

Finally, and with reference to another issue germane to this case, where there are multiple owners of the property, typically all must execute the brokerage agreement unless the person or persons executing it are cloaked with such authority. *See, generally, U-Buy Realty v. Aliota,* 151 Misc.2d 485 (Civil Ct., Kings Cty. 1991). In cases where that authorization is lacking, some have turned upon the broker's knowledge of the existence of the other owner or owners. *Id.* Others have pivoted on the non-signing owner's knowledge of or participation in the marketing of the property by the broker; in such cases, estoppel may bar an untimely claim of lack of binding authority. *Cf., Jill Real Estate v. Smyles,* 150 AD2d 640 (2d Dept 1989) (wife knew of and actively participated in the transaction); *Farr v. Newman,* 18 AD2d 54 (4th Dept 1963) (when told of offering price, wife said,

"Very well. That is good.").

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Focusing now upon those requirements on the matter at bar's and causes of action, and after reviewing the evidence under the light of the law and logic, the undersigned finds that the plaintiff's and his witness' recitation of the facts are the more credible. Indeed, their proffered testimonial evidence was more than sufficiently persuasive, appeared the more truthful and earnest, and its credibility was not convincingly undermined by cross-examination. Also, and as is often the case with "lay-witnesses" who are alien to the courtroom, any perceived flaws were slight and/or not of such consistency or consequence as be inexcusable or pollute the entire presentation.

Conversely, the undersigned rejects the defendants' testimony and their contentions as to the facts. Indeed, while the defendants' words have been memorialized within the cold record, some of the quality of that testimony has not. However, having observed—first-hand—their testimony, the undersigned must note that its flavor was undermined and contaminated by its presentation. Indeed, some of those impediments to credibility by nature *de hors* the record but would be perceived by an objective, neutral and casual onlooker who was able to observe, hear, and sense faint subtleties. Additionally, and while the majority of the defense was presented by Mr. Birol, his testimony was further stained by his wife's conduct[3]. Stated otherwise, some of the difficulty with both defendants' testimony is not what was said, but how.

Also, and again contrary to that offered by the defendants, the plaintiff's version of the facts is not only harmonious, it is logical. Moreover, and as was also noted, of the two versions, the plaintiff's proffered testimony was the more persuasive. In simplest terms, in the competition for credibility between the two versions, the plaintiff's outweighed that of the defendants.

Indeed, it has been demonstrated that Mr. Birol was vested with the real if not at least the apparent authority to enter into the agreement despite the absence of his wife's signature to the brokerage agreement. There can be no dispute that Mrs. Birol was aware of the agreement. Moreover, it has been satisfactorily demonstrated that she was a party to numerous conversations about selling the property and/or the agreement with *all* the witnesses. Some of those conversations may have been prior to any written agreement, but clearly some followed. Equally clearly, she rejected the first offer; but that rejection was of the amount of the bid and not of the listing. The latter omission and her neglect were subsequently compounded. Specifically, when an offer more to her liking was finally made, she initially accepted, and it was not until afterwards that she choose to withdraw her implicit consent. Manifestly, however, having had had knowledge of and participated in the transaction, her disclaimer was as untimely as it was inconsistent with her prior acts and

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[3]During his cross-examination an unprecedented event occurred: Her inappropriateness was so conspicuous, disquieting and out of order as to require the undersigned to interject, *twice*. Trial record pages 64, 108-09.

omissions. *Jill Real Estate v. Smyles; Farr v. Newman, supra.*

Therefore, as to which account of the facts is the more accurate faithful to the truth, the Court finds for the plaintiff.

That, however, does not end the inquiry. Initially, there is the defense's post-trial oral motion to dismiss. It is grounded upon allegations that there was no proof that Dans, the prospective buyer, had the "financial ability" to satisfy the purchase price. That application is dismissed. In so opining, the undersigned begins with the fact that such a contention is inconsistent with the stipulation entered into the record at the trial's beginning which included an acknowledgment that the sale was an all-cash deal. As further noted in the transcript, that stipulation was a product of a pre-trial conference held in chambers with both attorneys. Noticeably absent from the record, however, is any objection to or qualification of that statement by counsel.

Also, and independent of the stipulation, the record contains sufficient evidence to demonstrate Dans' finances, contentions which were neither rebutted nor even controverted during the trial. As to that evidence, and for example, the record discloses that Dans purchased another nearby waterfront property within weeks of his second offer to the Birols. Additionally, he was described as "a guy running around with a lot of money in his pocket, all cash." As indicated above, financial ability may be proven indirectly by competent proof sufficient to support the contention. *See, e.g., Mengel v. Lawrence, supra; see, also, Kirk Assoc. Ltd. v. McDonald Equities, Inc., supra.* In the matter at bar, the proffered testimony was
sufficient support.

Undeniably, however, the agency agreement in pertinent part indicates that the "[o]wner(s) understand and agree to pay the commission . . . if [the] property is sold or transferred or is the subject of a contract of sale within six months of [the] agreement, involving a person" who was shown the property by the agent. Clearly, there was no such contract and that is an impediment to the plaintiff's cause. *Lane - The Real Estate Dept. Store v. Lawlet Corp.*

Secondarily, and perhaps more profound, under the facts of this case the formal offer is an insufficient basis to support its enforcement. While it may contain the price and closing date (standing alone, insufficient - *Penzotti v. Broda Mach. Co. supra.*), it also anticipates a formal contract would "be discussed. and agreed to mutually, by the parties (sic) attorneys." Beyond peradventure, a full, complete and all-encompassing real estate contract is not required, but anyone with experience with such matters knows that there a myriad matters - some mundane but some major - which must be negotiated and agreed to before a contract is mutually acceptable. Indeed, most of those albeit "boilerplate" terms are contained in the now somewhat historic and familiar "Bloomberg form" real estate contract (and its ever-present "rider"). Those requirements - and more - have since been reproduced and supplemented by the typical (and somewhat intimidating) contract

generated by an attorney's word-processor[4]. Obviously, the offer need not contain verbiage which totally mirrors a full contract (*id.*), but there must some evidence that there is more than a mere agreement in principle or to agree. *Kaelin v. Warner*, *supra*. For example, there should be some mention of the issues customary and essential to such a transfer. *M. A. Salazar, Inc. v. Levy, supra; Helan Realty & Development Corp. v. Skyview Meadows Development Corp. supra.* In the matter at bar, no formal contact ever executed; additionally, the bare-boned binder is insufficient. Law and logic, therefore, dictate that the "offer" at bar is at best an invitation for further negotiations, and any reliance upon it was misplaced. As a result, it is opinion of the undersigned that it is unenforceable under either of the plaintiff's two causes of action.

This determination is not disturbed by the plaintiff's post-trial arguments or legal authorities. For the reasons above-stated, the undersigned is disinclined to adopt its view.

In sum, having failed to satisfy the law, each of the plaintiff's two (2) causes of action are dismissed.

The foregoing constitutes the decision of the Court.

Dated: 10/9/13
Riverhead, NY

Ralph T. Gazzillo
A.J.S.C.

~~NON-~~FINAL DISPOSITION

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[4]The contents of which are only limited by the author's imagination.