SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

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DANIEL, T. ENTERPRISES, INC., d/b/a
DANIEL T ENTERPRISES,

Plaintiff,

-against-

Index No. 151775/14
DECISION AND ORDER

CROMAN REAL ESTATE, INC., STEVEN CROMAN
d/b/a CROMAN REALTY, 635 E 6 LLC,

Defendants.

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Ellen M. Coin, J.:

Plaintiff, a commercial real estate brokerage firm, moves for summary judgment upon its complaint and striking defendants' affirmative defenses. For the reasons stated below, the motion is granted.

In July 2012 Tamir Daniel, plaintiff's President, approached the owner of a residential building in the East Village about selling the property (Property). The owner was interested in selling the Property for at least $4,500,000, with the buyer paying the broker's commission thereon. (Affidavit of Tamir Daniel, sworn to May 8, 2014 at ¶¶ 3,4). Daniel contacted defendant Steven Croman on July 16, 2012 and offered to give him information about the Property, which, she told him, was on East 6th Street near Avenue C. However, she advised him that before receiving the information, he would have to sign a confidentiality, representation and commission agreement

(Agreement), in which the building number would be left blank until after he executed the Agreement. Daniel was concerned that if she were to disclose the specific address of the Property to Croman, he might try to negotiate directly with the owner, pass along the information to another broker or work with another broker who would charge a smaller commission. (Daniel Aff ¶11 at 4). Croman requested that Daniel email the Agreement to him for execution.

The Agreement sent to Croman described the property as "consisting [of] 8,860 square feet and 10 residential units in East 6th street [sic] and Avenue C vicinity in New York, NY." (Ex. 2 to the Daniel Aff.) The Agreement provided that Croman, Croman Realty, and related entities, affiliates, designees, successors, nominees and assignees (collectively, "Purchaser" in the Agreement) would be represented by plaintiff in a transaction with the seller, and that upon consummation of a transaction with the seller, Purchaser would pay a fee to plaintiff of 3% of the gross purchase price. (Agreement, ¶2; Ex.2 to the Daniel Aff.). The Agreement was for a term of twelve months, but after expiration of the twelve month period, it would remain in effect unless canceled by either party on thirty days' prior written notice.

Croman executed the Agreement as President of Purchaser on July 17, 2012. On the same date Daniel signed the Agreement,

inserting the address, block and lot of the Property, and transmitted a fully-executed, complete copy to Croman, together with the financials for the Property. (Daniel Aff ¶ 13 at 4; Exs. 1,3). Although the asking price for the property was $4,500,000, Croman offered only $3,500,000. (Ex. 4 to the Daniel Aff.). After the owner rejected Croman's offer, the parties, through Daniel, continued negotiations into the end of August 2012, but were unable to agree upon a mutually agreeable sale price.

On July 24, 2013, defendant 635 E 6 LLC entered into a contract to purchase the Property, and the transaction closed on October 21, 2013 for a purchase price of $5,500,000. (Ex. 7 to the Daniel Aff.). Plaintiff, on learning of the sale, contacted Croman, demanding its commission. Defendants failed to remit any commission to plaintiff. This action followed.

The complaint pleads three causes of action: (1) for breach of the Agreement; (2) for loss of business resulting from defendants' breach; and (3) for attorneys' fees pursuant to the Agreement. Defendants' answer asserts nine affirmative defenses.

Discussion

"The proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law" (*O'Halloran v City of New York*, 78 AD3d 536, 537 [1st Dept 2010]). "Once this requirement is met, the burden then shifts to the opposing party

to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court's function on a motion for summary judgment is "'issue-finding, rather than issue-determination'" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, *rearg denied* 3 NY2d 941 [1957] [citation omitted]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Here defendants fail to submit evidentiary proof, relying instead on an attorney's affirmation. Defense counsel seeks to invoke CPLR 3212(f), requesting that defendants have discovery. Defendants' opposition fails to state any facts to support their affirmative defenses. Moreover, as discussed *infra*, it fails to establish defendants' purported need for discovery.

The Affirmative Defenses

The Second Affirmative Defense alleges that plaintiff has sustained no damages. The complaint alleges that plaintiff has been damaged in an amount equal to 3% of the sale price of the Property, i.e., the amount that plaintiff would have earned pursuant to the Agreement had defendants performed their duties thereunder. Plaintiff has produced unrefuted proof of the sale

to defendant 635 E 6 LLC. Thus, the Second Affirmative Defense fails to state a defense to this action, and is dismissed.

Defendants fail to allege any facts to support their Third Affirmative Defense of estoppel, their Fourth Affirmative Defense of laches, and their Sixth Affirmative Defense of unclean hands. Accordingly, those defenses are dismissed.

The Fifth Affirmative Defense alleges that plaintiff's claims are barred because it did not bring about the sale. This action is not brought as one for a broker's commission in the absence of agreement (*see e.g. Rusciano Realty Serv., Ltd. v Griffler*, 62 NY2d 696, 697 [1984]), but for breach of the Agreement. In order for plaintiff to recover under the Agreement, it did not have to bring about the sale. Instead, the Agreement provided that defendants "shall be represented solely by" plaintiff in a transaction with the seller, and that where defendants shall consummate a transaction with the seller, plaintiff would be entitled to its fee. Thus, the terms of the Agreement preclude this affirmative defense, which is dismissed.

Defendants' Seventh Affirmative Defense that plaintiff is not a licensed real estate broker is belied by plaintiff's documentary proof of its license (Ex. 14 to the Daniel Aff.). Defendants fail to offer any facts in opposition to this documentary evidence. Accordingly, this affirmative defense is dismissed.

Defendants fail to support their Eighth Affirmative Defense of fraudulent inducement with any factual allegation. It is dismissed.

The Ninth Affirmative Defense alleges that because plaintiff inserted handwritten language into the Agreement after Croman's execution of it, plaintiff cannot recover. Daniel alleges the reason why the Agreement was sent to defendants for execution with the street address of the Property in blank but with the cross-street location listed on it, and that she returned a fully-executed copy of the Agreement to defendants with the street address inserted. Defendants do not contradict her allegations. A party to a contract is deemed to have read it before signing it. (*McGarr v Guardian Life Ins. Co. Of America*, 19 AD3d 254 [1st Dept 2005]). Moreover, defendants do not deny that after executing the Agreement and receiving a complete copy of it with the insertion, they proceeded to use plaintiff's services in an effort to acquire the Building. Having ratified the Agreement by partly performing it and failing to repudiate it, defendants are estopped from complaining of plaintiff's post-execution insertion of the Property's particulars. (*Scharf v Idaho Farmers Mkt. Inc.*, 115 AD3d 500 [1st Dept 2014]; *Allen v Riese Org., Inc.*, 106 AD3d 514, 517 [1st Dept 2013]). Thus, this Affirmative Defense is dismissed.

Since the Court has dismissed all of defendants' other

affirmative defenses, the First Affirmative Defense for failure to state a cause of action is dismissed. (*Raine v Allied Artists Prod., Inc.*, 63 AD2d 914, 915 [1st Dept 1978]).

The Complaint

In response to plaintiff's motion for summary judgment on its complaint, defendants seek to invoke CPLR 3212(f) to obtain disclosure. In order to avail themselves of this provision, defendants must identify facts essential to justify opposition to the motion which are exclusively within plaintiff's knowledge and control. (*Merisel, Inc. v Weinstock*, 117 AD3d 459, 460 [1st Dept 2014]). Moreover, they must have a proper evidentiary basis supporting their request for further discovery. (*Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 103 [1st Dept 2006]).

Here defendants claim that they need discovery of facts leading up to the execution of the Agreement and clarifying why plaintiff intentionally inserted language into the Agreement after their execution of it. However, defendants do not dispute the recitation of facts contained in the complaint and in the Daniel Affidavit. Indeed, as noted, their Ninth Affirmative Defense confirms plaintiff's allegation that the handwritten language was inserted into the Agreement after defendants' execution of it.

Defendants further claim that they require discovery of the facts and circumstances supporting how plaintiff procured the

sale of the Property. Under the Agreement plaintiff had the exclusive right to represent defendants in any transaction to purchase the Property. Defendants would have this action for breach of contract determined under the criteria for recovery of a broker's commission in the absence of agreement. Here the written Agreement provided that defendants would be represented solely by plaintiff in a transaction with the seller and would pay a fee to plaintiff of 3% of the gross purchase price. Plaintiff does not allege that it procured the sale, but that defendants breached the Agreement by failing to pay plaintiff pursuant to the Agreement. (*Sioni & Partners, LLC v Vaak Props., LLC*, 93 AD3d 414, 417 [1st Dept 2012]). Thus, this aspect of discovery is not required.

To the extent that defendants argue that the Agreement is ambiguous, they fail to demonstrate any ambiguity.

Plaintiff has established that it entered into the Agreement with defendants; its performance under the Agreement by providing defendants with information about the Property and negotiating with the seller on defendants' behalf; defendants' purchase of the Property without paying plaintiff its commission; and plaintiff's resultant damage to the extent of its loss of commission. (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Accordingly, plaintiff has established its right to summary judgment on its First Cause of Action.

However, the same cannot be said for plaintiff's Second Cause of Action for loss of business. Nowhere in the Agreement was there any provision for consequential damages. General damages "are the natural and probable consequence of the breach" of a contract. They include money that the breaching party agreed to pay under the contract. By contrast, consequential, or special, damages do not 'directly flow from the breach.'" (*Biotronic A.G. v Conor Medsystems Ireland, Ltd.*, 22 NY3d 799, 805 [2014][citations omitted). "Where the damages reflect a loss of profits on collateral business arrangements, they are only recoverable when (1) it is demonstrated with certainty that the damages have been caused by the breach, (2) the extent of the loss is capable of proof with reasonable certainty, and (3) it is established that the damages were fairly within the contemplation of the parties." (*Id.* [citations and internal quotation marks omitted).

Nothing in the Agreement suggests that the parties contemplated that plaintiff be compensated for loss of other prospective, undetermined business as a result of any breach. The Court denies summary judgment to plaintiff on its Second Cause of Action, and searching the record, dismisses it.

However, the Agreement did provide for payment of attorney's fees to plaintiff to the extent caused by any breach by defendants of the Agreement. Thus, summary judgment is granted

to plaintiff on its Third Cause of Action for its legal fees.

Accordingly, it is ORDERED that the motion for summary judgment is granted on liability on plaintiff's First and Third Causes of Action only, and it is further

ORDERED that the Second Cause of Action is dismissed; and it is further

ORDERED that the affirmative defenses asserted in the answer herein are dismissed; and it is further

ORDERED that upon filing by plaintiff's counsel of a Note of Issue, an inquest shall be held assessing damages against defendants and awarding costs and disbursements and entering judgment in accordance therewith.

ENTER:

Dated: November 26, 2014

Ellen M. Coin, A.J.S.C.