

Delibero v Duloc

2015 NY Slip Op 31680(U)

August 31, 2015

Superme Court, New York County

Docket Number: 156196/2013

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 59

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GRACE DELIBERO,
Plaintiff,

- against -

Index No.: 156196/2013

MICHAEL P. DULOC, ANDREA C. DULOC, AMZA,
LLC, CORE GROUP NYC, CORP., EMILY BEARE,
SAVANNA 141 DEVELOPERS, LLC and SAVANNA
141 PRINCIPALS, LLC,

Defendants.

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DEBRA A. JAMES, J.:

In this action for breach of contract, unjust enrichment,
tortious interference, and "broker commission due," the court
consolidates motion sequence numbers 003 and 004 for disposition.

In motion sequence number 003, defendants Core Group NYC,
Corp. (Core), Emily Beare (Beare), Savanna 141 Developers, LLC
and Savanna 141 Principals, LLC (Savanna), move to dismiss
plaintiff's amended complaint pursuant to CPLR 3211 (a) (1) (a
defense founded upon documentary evidence) and CPLR 3211 (a) (7)
(failure to state a cause of action).

In motion 004, defendants Michael P. Duloc, Andrea C. Duloc,
and AMZA, LLC (AMZA), (collectively, Duloc defendants), move for
summary judgment dismissal of the complaint, pursuant to CPLR
3212.

Plaintiff Grace Delibero is a New York state licensed real
estate broker. She initially served as the Duloc defendants'

exclusive listing agent for the sale of condominium unit 8C at 401 East 60th Street, New York, NY (8C-East 60th Street).

Defendants Michael and Andrea Duloc (the Dulocs) are the members and managers of AMZA, the entity which attempted to purchase and/or purchased and sold the properties involved in this action.

Defendants Savanna are sponsor-sellers, which entered into a contract to sell condominium unit 3B/Unit 6 located at 141 5th Avenue, New York, NY (3B-5th Avenue) to AMZA. This transaction did not close, and Savanna subsequently sold the unit to another, unrelated purchaser.

Defendant Core is a real estate brokerage firm, at which Beare is an agent. By contract, Savanna hired Core to serve as its exclusive listing agent for all units at 141 5th Avenue. After the listing agreement with plaintiff expired, the Duloc defendants entered into an exclusive listing agreement with Core/Beare for the sale of 8C-East 60th Street. Beare also served as their buying broker for unit 2A at 650 6th Avenue, New York, NY (2A-6th Avenue).

Plaintiff first became acquainted with the Dulocs in 2000, and earned a commission that year as their buying broker for purchase of the 8C-East 60th Street.

In 2008, the Dulocs contacted plaintiff with regard to

selling 8C-East 60th Street, and purchasing a larger condominium unit. Plaintiff showed the Dulocs 3B-5th Avenue, which was listed for \$2,650,000. On July 18, 2009, AMZA entered into a contract to purchase 3B-5th Avenue from Savanna at such asking price. Plaintiff is listed as a broker on that purchase contract. Additionally, plaintiff is listed as "Co-Broker" on the information form for such contract with a commission rate of 3%, and commission amount of \$79,500.

AMZA never closed on the 3B-5th Avenue, and instead, it entered into an April 28, 2010 agreement with Savanna which refunded \$198,750 of the down payment. Under such agreement, AMZA forfeited \$281,625 to Savanna, and plaintiff received no commission.

On December 1, 2008, the Duloc defendants and plaintiff entered into an exclusive listing agreement to sell 8C-East 60th Street, which was to expire on July 31, 2009. The agreement contained a clause which stated that if the condominium was sold to a party which was shown the apartment by plaintiff within six months of the expiration of the listing agreement, plaintiff would be entitled to the commission. Despite the termination of the agreement on the expiration date, plaintiff actively tried to find purchasers for the apartment until mid-January 2010, with

the approval of the Duloc defendants. The initial listing price was \$1,449,000, though it was lowered to \$1,169,000 by October of 2009. In a January 15, 2010 email to Michael Duloc, plaintiff indicates that she has communicated to the broker for Alberto Sampler (Sampler), and that AMZA had stated it would accept an offer of \$1,050,000. The email also indicates that Sampler had already made an offer of \$1,025,000, which the Dulocs defendants rejected. Sampler never made another offer.

In early January of 2010, Michael Duloc informed plaintiff that he would be obtaining a new broker to list 8C-East 60th Street, though he did not identify Beare by name. On January 21, 2010, plaintiff sent Michael Duloc an email requesting the identity of the new broker, so that she could give the names of the individuals who she had shown 8C-East 60th Street. On January 22, 2010, plaintiff sent an email to Michael Duloc which indicated she was continuing her efforts to obtain an offer of \$1,050,000 from Sampler through his agent. On January 26, 2010, plaintiff sent an email to Michael Duloc with the names of three prospective buyers she had shown the 60th Street to, including Sampler. On January 27, 2010, Michael Duloc signed an exclusive listing agreement with Core, with an initial listing price of

\$1,139,000. The agreement made reference to plaintiff's potential buyers.

On March 22, 2010, AMZA entered into a sale contract for 8C-East 60th Street, with a purchase price of \$992,500, and a separate personal property agreement for \$37,500, for a total of \$1,030,000. The buyers were not among the three names supplied by plaintiff. The sale closed on July 14, 2010.

At the time of entering the exclusive listing agreement with Core, the Dulocs asked Beare of Core to represent them as a buying agent. Beare showed the Dulocs 2A-6th Avenue, and on March 22, 2010, AMZA entered into a contract to purchase the property. The sale closed on July 15, 2010.

I. Duloc Defendants' Motion for Summary Judgment

In the amended complaint, plaintiff alleges that the Duloc defendants breached 8C-East 60th Street exclusive listing agreement by wrongfully refusing the Sampler offer. Plaintiff also alleges that the Duloc defendants caused her loss of the buyer's commission on 3B-5th Avenue by wrongfully backing out of its purchase after going into contract. In her opposition papers, plaintiff abandons the amended complaint's allegations against the Duloc defendants for unjust enrichment, or commission on 2A-6th Avenue.

When moving for summary judgment and dismissal, the burden is on the defendant to "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]).

The Duloc defendants argue that they are entitled to summary judgment and dismissal on the grounds that the 8C-East 60th Street listing contract with plaintiff expired with no sale, and because AMZA never accepted Sampler's offer, plaintiff is not entitled to a commission. The Duloc defendants also argue for summary judgment and dismissal of the claims relating to the buyer's commission on 3B-5th Avenue, because there is no buyer broker contract present and because, as a member of the Real Estate Board of New York (REBNY), plaintiff was bound by the "Universal Co-Brokerage Agreement" which stipulates that a commission is only due in the event of closing.

Plaintiff argues that there are issues of fact precluding summary judgment, as she has raised issues of fact that show that the Duloc defendants breached the implied covenant of good faith and fair dealing by refusing the Sampler offer on 8C-East 60th Street, and that she is entitled to a commission on the purchase of 3B-5th Avenue even though the sale did not close because she

is listed as AMZA's broker in the purchase contract and the Duloc defendants wrongfully reneged on consummating the sale.

Plaintiff denies being a member of REBNY at the time of the 3B-5th Avenue contract.

A. 8C-East 60th Street Seller's Commission and the Sampler Offer

The Duloc defendants argue that plaintiff's claims for a commission on 8C-East 60th Street must be dismissed because the Sampler offer never resulted in a sale, as required by the listing agreement. The court agrees. The listing agreement specifically states "If the apartment is sold pursuant to this agreement, the commission shall be paid by you [Duloc defendants] to me (Grace Delibero)". There was never even a contract of sale with Sampler, let alone a closing, and therefore the condition precedent was never met.

Even if the agreement was silent with regard to the requirement of a sale, plaintiff would not be entitled to a commission. "[A] real estate broker will be deemed to have earned his commission when he produces a buyer who is ready, willing and able to purchase at the terms set by the seller" (Lane--Real Estate Dept. Store v Lawlet Corp., 28 NY2d 36, 42 [1971]). "As long as the parties have agreed upon the essential

terms the commission is earned" (Williamson, Picket, Gross, Inc. v Hirschfeld, 92 AD2d 289, 293 [1st Dept 1983]). Sampler's offer did not meet the Duloc defendants' asking price for 8C-East 60th Street, and thus, Sampler was not ready, willing, or able to purchase at the terms set. In other words, the parties never agreed upon the price, the most essential term. Moreover, the refusal of the Duloc defendants to accept an offer for a lesser amount than the asking price is not a manifestation of bad faith, even though they ultimately accepted a lesser price (though slightly more than Sampler's offer) from a purchaser unrelated to Sampler.

B. 3B-5th Avenue Buyer's Commission

The amended complaint alleges the existence of an oral "buyer's broker" contract between the Duloc defendants and plaintiff in connection with their unconsummated deal to purchase 3B-5th Avenue. However, there are no allegations concerning the terms of this purported contract, nor does plaintiff elaborate on the details of this purported contract in her papers opposing the motion. In contrast, the purchase contract for 3B-5th Avenue does name plaintiff as a broker, and recites that Savanna is responsible for paying plaintiff's commission. By documentary evidence in the form of such purchase contract, the Duloc

defendants have established that they are not responsible for any commission that is due to plaintiff with regard to 3B-5th Avenue.

The court finds that defendant has established entitlement to judgment as a matter of law, and that plaintiff has not raised an issue of material fact was raised to preclude the granting of summary judgment. Accordingly, the court shall grant the Duloc defendants' motion for summary judgement in full, and shall dismiss the amended complaint as it pertains to the Duloc defendants.

II. Core and Savanna's Motion to Dismiss

When considering a motion made "pursuant to CPLR 3211 (a) (1) and (7), a court is obliged to accept the complaint's factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory ***. Dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267, 270-271 [1st Dept 2004] [internal citations and quotation marks omitted]).

A. The Breach of Contract/"Commission Due" Claims

Plaintiff alleges that Core is liable to her for the commission on 8C-East 60th Street, because Core induced the Duloc defendants to arbitrarily refuse the Sampler offer. These conclusory statements do not plead a cause of action for breach of contract, or "commission due."

Likewise, the allegations that plaintiff is entitled to a commission on 2A-6th Avenue because she introduced the Duloc defendants to Core also fails to state any cause of action. In order to earn a commission, a "broker must be the procuring cause of the transaction, meaning that there must be a direct and proximate link, as distinguished from one that is indirect and remote, between the introduction by the broker and the consummation of the transaction (SPRE Realty, Ltd. v Dienst, 119 AD3d 93, 98 [1st Dept 2014] [internal citations and quotation marks omitted]). Plaintiff was not listed as broker on the 2A-6th Avenue purchase contract, nor did she show 2A-6th Avenue to the Duloc defendants. The Duloc defendants became acquainted with Core during the process of their attempted purchase of 3B-5th Avenue; the fact that plaintiff was their realtor at the time does not make her a "procuring cause" of the purchase of a

different property after her relationship with the Duloc defendants ceased.

Plaintiff's allegations regarding the commission from the 3B-5th Avenue transaction survive dismissal with regard to Savanna. In her opposition papers, plaintiff submits a copy of the contract for the Duloc defendants purchase of 3B-5th Avenue from Savanna, which is dated July 14, 2008. The contract names plaintiff as a broker entitled to commission, who is to be paid by Savanna.

Savanna's argument that because plaintiff was a member of REBNY at the time the contract was signed, she would only be entitled to a commission if the closing took place, is not persuasive. In support of their argument, Savanna submits plaintiff's uncompleted annual dues statement from 2008, a blank REBNY co-brokerage agreement form¹ and an affidavit from another action dated November 23, 2009, where plaintiff testified that she was a member of REBNY. Plaintiff's affidavit fails to establish an irrefutable defense to her action against Savanna, as affidavits are not considered documentary evidence for the purposes of a motion pursuant to CPLR 3211 (a) (1) (Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d

¹ REBNY requires its members to use this form, which conditions the earning of a commission upon transfer of title.

431, 432-433 [1st Dept 2014]; Solomons v Douglas Elliman LLC, 94 AD3d 468, 469-470 [1st Dept 2012]; Tsimerman v Janoff, 40 AD3d 242, 242 [1st Dept 2007]). Nor can the court consider such affidavit in support of Savanna's subsection (a) (7) motion to dismiss the complaint for failure to state a claim for relief (Miglino v Bally Total Fitness of Greater N.Y., Inc., 20 NY3d 342, 351 [2013]). Nor is the dues notice probative on the issue of plaintiff's membership, since such notice does not indicate that plaintiff was a member of REBNY in 2008, or that she actually paid her dues. Moreover, while defendants' attorney affidavit may serve as a vehicle for the submission of admissible documents (see Zuckerman v City of New York, 49 NY2d 557, 563 [1980]), the certified REBNY records that show plaintiff was "dropped" from membership submitted for the first time in the reply affidavit of defense counsel are entitled to no consideration by the court. See Merchants Bank of N.Y. v Gold Lane Corp., 28 AD3d 266, 269 (1st Dept 2006).

With the exception of the allegations against Savanna for the Duloc defendant's aborted purchase of 3B-5th Avenue, plaintiff's causes of action for breach of contract and "commission due" shall be dismissed.

B. Unjust Enrichment

"The theory of unjust enrichment lies as a quasi-contract claim. It is an obligation the law creates in the absence of any agreement" (Goldman v Metro. Life Ins. Co., 5 NY3d 561, 572 [2005]). "A plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 182 [2011] [internal citations and quotation marks omitted]).

Plaintiff's unjust enrichment claim with regard to the sale of 8C-East 60th Street is not cognizable. The contract, which listed Core as the broker, included the provision that should any of the three parties that plaintiff showed the apartment enter into a contract of sale, plaintiff would be entitled to receive her commission. Plaintiff does not plead that any of the three parties to whom plaintiff introduced 8C-East 60th Street purchased such property, and thus, Core was not enriched at plaintiff's expense. Additionally, this contract, which provided protection to plaintiff, is in no way against equity or good conscience.

Nor is there a claim for unjust enrichment with respect to the failed 3B-5th Avenue purchase. Plaintiff does not allege that Core received any commission, and thus no enrichment is alleged. Nor is there any unjust enrichment claim against Savanna; the sale contract clearly states that Savanna is entitled to the down payment in the event that title does not transfer. If anything, Savanna was enriched less than it was entitled in providing a partial refund to the Duloc defendants.

Likewise, plaintiff has not stated any unjust enrichment claim with regard to 2A-6th Avenue. Besides the fortuitous introduction of the Duloc defendants to Core via the 3B- 5th Avenue transaction, plaintiff does not allege that she played any part in the 2A-6th Avenue transaction.

C. Tortious Interference With Contract

"Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (Lama Holding Co. v Smith Barney, 88 NY2d 413, 424 [1996]). There can be no claim for tortious interference regarding 2A-6th Avenue, as plaintiff was not a

party to any contract concerning that property, nor has she alleged that she is one.

Nor can plaintiff allege tortious interference on the 3B-5th Avenue transaction, as these claims are time barred. The statute of limitations for tortious interference is three years (CPLR 214[4]), and "since damage is an essential element of the tort, the claim is not enforceable until damages are sustained" (Kronos, Inc. v AVX Corp., 81 NY2d 90, 94 [1993]). Plaintiff was a party to the 3B-5th Avenue purchase contract, as a listed broker. The latest possible date that plaintiff could have been damaged was April 28, 2010, when the agreement cancelling the purchase was executed. Her claim for tortious interference with contract was commenced on July 8, 2013, more than three years after the cancellation of the agreement.

Plaintiff has stated a claim for tortious interference with regard to the exclusive listing agreement she entered into with the Duloc defendants, for the sale of 8C-East 60th Street. Plaintiff alleges the existence of that agreement (amended complaint, ¶ 15), Core and Beare's knowledge of that agreement (amended complaint, ¶ 24), procuring the Duloc defendant's breach of that agreement (amended complaint, ¶ 28), and damages (loss of commission) resulting from that breach (amended complaint, ¶ 33).

Accordingly, it is

ORDERED that the motion (004) by defendants Michael Duloc, Andrea Duloc and AMZA, LLC for summary judgment and dismissal of the complaint is granted in its entirety; and it is further

ORDERED that the motion (003) by defendants Emily Beare, Core Group, LLC Savanna 141 Developers and Savanna 141 Principals motion to dismiss the first cause of action for breach of contract, and the fourth cause of action for broker commission due is granted in part and denied and such causes of action are dismissed as against Emily Beare and Core Group; and it is further

ORDERED that the motion (003) by defendants Emily Beare, Core Group, LLC, Savanna 141 Developers and Savanna 141 Principals to dismiss the second cause of action for unjust enrichment is granted in its entirety and these claims are dismissed; and it is further

ORDERED that the motion (003) by defendants Emily Beare, Core Group, LLC, Savanna 141 Developers and Savanna 141 Principals motion to dismiss the third cause of action for tortious interference is granted in part and denied in part, and such claim against Savanna 141 Developers and Savana 141 Principals is dismissed; and it is further

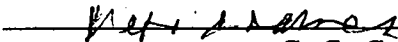
ORDERED that the time to serve a responsive pleading to the first amended complaint is extended pursuant to CPLR 3211(f); and it is further

ORDERED that the parties are directed to appear for a preliminary conference in Room 103, 71 Thomas Street, on October 27, 2015, 9:30 A.M.

This is the decision and order of the court.

Dated: August 31, 2015

E N T E R


DEBRA A. JAMES
J.S.C.