SPRE Realty, Ltd. v Dienst
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February 4, 2016
Supreme Court, New York County
Docket Number: 651671/2013
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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SPRE REALTY, LTD. d/b/a SUSAN PENZNER REAL ESTATE,

Plaintiff, Index No. 651671/2013

- against -

DANIEL DIENST and JILL DIENST,

Defendants.

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Hon. Charles E. Ramos, J.S.C.:

Defendants Daniel Dienst and Jill Dienst (collectively, the "Diensts") move for summary judgment, pursuant to CPLR § 3212, dismissing the complaint of plaintiff SPRE Realty, LTD. ("SPRE") in its entirety.

For the reasons set forth below, the Diensts' motion for summary judgment is granted in full.

Background

The facts set forth herein are taken from the parties' submissions, which are undisputed except where noted.

Susan Penzner is a duly licensed real estate broker and the principal of SPRE (Affidavit of Susan Penzner ["Penzner aff"], ¶¶ 2, 3). Daniel Dienst, CEO of a publicly traded company during the events relevant to the amended complaint, is a Wall Street businessman (Deposition of Daniel Dienst ["D.Dienst dep"], 7:13-24, 8:20-10:25; 11:2-10). Jill Dienst is Daniel Dienst's wife (Affidavit of Jill Dienst ["J.Dienst aff"], ¶ 2).

From early 2006 through 2008, Ms. Penzner showed the Diensts a number of luxury homes in Manhattan (Penzner aff, ¶6; J.Dienst aff, ¶ 3). The parties dispute whether the Diensts retained SPRE. SPRE has not produced a written contract, but claims that the Diensts retained Ms. Penzner as their real estate broker (Penzner aff, ¶6). The Diensts deny having hired Ms. Penzner and claim that Ms. Penzner did not discuss with them any obligation of their part for the payment of her commission (Affirmation of Wendy Michael ["Michael aff"], ¶ 22). The Diensts expected the seller to pay any broker's commission, if a transaction closed (J.Dienst aff, ¶ 21; D.Dienst aff, ¶ 3). SPRE claims that the Diensts understood that SPRE "would be paid a commission" (Complaint, ¶ 6), but does not specify by whom.

In October 2007, Ms. Penzner informed the Diensts of apartments that were currently under construction at 397 West 12th Street in Manhattan (the "Building") (J.Dienst aff, ¶ 6; Affidavit of Daniel Dienst ["D.Dienst aff"], ¶ 4). The Diensts were especially interested in a raw space duplex apartment to be constructed on the third and fourth floors ("Unit 3") (J.Dienst aff, ¶ 7; D.Dienst aff, ¶ 5). In June 2008, the Diensts entered into negotiations with Far West Village Partners, LLC (the "Partners") for the purchase of Unit 3, for an estimated $11.5 million (J.Dienst aff, ¶ 7; D.Dienst aff, ¶ 6).

As part of the negotiations for Unit 3, Ms. Penzner, on behalf of SPRE, executed a three page letter agreement (the "Brokerage Agreement") with the Partners (Michael aff, ¶ 20, Ex. L). The Brokerage Agreement, which expressly referenced Unit 3, provided, in relevant part, that the Partners would pay a commission to SPRE if the Partners and the Diensts execute a binding purchase agreement, and the agreed upon purchase price is delivered to and accepted by the Partners at closing (*id.*).

In September 2008, the Diensts withdrew from negotiations and declined to purchase Unit 3 because of the plummet in real estate prices due to the financial crisis, and because of the Partners' refusal to include a price protection clause in the contract of sale (D.Dienst aff, ¶ 19). The Diensts represent that they informed Ms. Penzner in September or October 2008 that they would no longer work with her in their search for residential property because she had been urging them to purchase Unit 3 at the height of the New York real estate bubble (D.Dienst aff, ¶¶ 20-21; J.Dienst aff, ¶ 13; D.Dienst dep, 21:24-22:10). Ms. Penzner did continued to work with Ms. Dienst to find commercial retail space for her antiques store (Penzner aff, ¶ 43). The Diensts halted their residential real estate search until the latter part of 2009, when the real estate market began to stabilize (D.Dienst aff, ¶¶ 22-23).

The Diensts represent that, in or about September 2009, Daniel Dienst coincidentally "bumped into" Cary Tamarkin, a developer and equity holder of the Building, outside his office (D.Dienst aff, ¶ 24). Mr. Tamarkin informed Daniel Dienst of the Building's inability to find tenants after the financial crisis (*id.*), and that he could obtain an apartment in the Building "for half price" (Deposition of Cary Tamarkin ["Tamarkin dep"], 23:14-23:15).

On October 27, 2009, Mr. Tamarkin arranged for the Diensts to view an apartment on the fifth and sixth floors of the Building ("Unit 4") (D.Dienst aff, ¶ 27; J.Dienst aff, ¶ 18). The Diensts subsequently made an offer to purchase Unit 4 for $6 million (D.Dienst aff, ¶ 28). After further negotiations with Mr. Tamarkin, the Diensts agreed to purchase Unit 4 for $6.25 million (*id.*). The purchase closed in February 2010 (D.Dienst aff, ¶ 30).

Ms. Penzner had no involvement in the 2009 negotiations between Daniel Dienst and Cary Tamarkin that ultimately led to the sale of Unit 4 to the Diensts (D.Dienst aff, ¶ 35). However, SPRE notes that Units 3 and 4 are both 6,600 square feet and have virtually identical floor plans (Penzner aff, ¶¶ 11, 18; Deposition of Stephen McRae ["McRae dep"], 36:15-21), and Ms. Penzner inquired about Unit 4 on behalf of the Diensts in a series of short e-mails in July 2008 (Penzner aff, ¶ 29, Ex. 18).

In April 2010, Ms. Penzner contacted Mr. Tamarkin regarding the sale of Unit 4 to the Diensts, claiming that it should have been a "co-broke" (Penzner aff, ¶ 46; Ex. 28). Rather than filing suit against the seller, Ms. Penzner commenced this action only against the Diensts 3 years later.

Procedural History

Previously, the Diensts moved to dismiss the complaint, which this Court denied (NYSCEF Doc. No. 22).

In *SPRE Realty Ltd. v Dienst,* the First Department affirmed this Court's denial of the Diensts' motion to dismiss (119 AD3d 93 [1st Dept 2014]), deciding that SPRE sufficiently alleged that (1) Ms. Penzner was the procuring cause of the Diensts' purchase, and (2) that the Diensts terminated Ms. Penzner's activities in bad faith and as a device to escape the payment of the commission. The First Department noted that the "direct and proximate link" standard articulated in *Green v Hellman* (51 NY2d 197 [1980]), governs determinations of circumstances under which a broker constitutes a procuring cause within the First Department (*SPRE Realty,* 119 AD3d at 99).

Discussion

The proponent of a motion for summary judgment pursuant to CPLR § 3212 must demonstrate that there are no genuine issues of material fact in dispute, and that it is entitled to judgment as a matter of law (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d

851, 853 [1985]). Mere conclusory assertions and unsupported contentions devoid of evidentiary facts are insufficient to raise a genuine triable issue of fact and defeat a motion for summary judgment (*Freedman v Chemical Construction Corp.*, 43 NY2d 260, 264 [1977]).

I. SPRE Fails To Raise A Triable Issue With Regard To Its Claim For Breach Of Implied Contract.

In order to receive a commission based on an implied contract theory, the broker must establish (1) that the defendant employed her (*Julien J. Studley, Inc. v New York News, Inc.*, 70 NY2d 628, 629 [1987]) and (2) that she procured a purchaser ready, willing and able to buy (or sell) the property on the terms (*Rusciano Realty Services, Ltd. v Griffler*, 62 NY2d 696, 697 [1984]).

A. SPRE Fails To Raise A Triable Issue With Regard To Whether the Diensts Employed Ms. Penzner, Or Whether Her Employment Entitles Her To A Commission.

A purchaser is not liable for the broker's commission on any contract theory unless the purchaser employs the broker (*Grossman v Herman*, 266 NY 249, 253 [1935]). A contract cannot be implied in fact where there is an express contract covering the subject matter involved (*Studley*, 70 NY2d at 629). A broker is entitled to recover a commission where the owner terminates her employment in bad faith, as a mere device to escape payment of the

commission (*SPRE Realty*, 119 AD3d at 100). However, a sale consummated after the employment relationship has been terminated in good faith does not entitle the broker to a commission (*Douglas Real Estate Management Corp v Montgomery Ward & Co.*, 4 NY2d 33, 37 [1958]).

Here, SPRE has failed to raise a triable issue with regard to whether the Diensts actually employed Ms. Penzner as their broker. The Diensts' uncontroverted testimony establishes that they expected the seller to pay Ms. Penzner a commission, which is supported by both industry practice and the Brokerage Agreement herein.

Furthermore, SPRE has not provided any evidence that the Diensts terminated Ms. Penzner in order to avoid paying her a commission, thereby acting in bad faith. Given the state of the market at the time the Diensts elected to discontinue their search for residential property and their failure to obtain certain conditions from the seller, it is wholly plausible that the Diensts lost interest in the Building in 2008, and SPRE has submitted no evidentiary facts to the contrary.

Therefore, SPRE fails to raise a triable issue with regard to whether the Diensts employed Ms. Penzner or whether she is thereby entitled to a commission.

B. SPRE Fails To Raise A Triable Issue With Regard To Whether Ms. Penzner Was The Procuring Cause Of The Unit 4 Sale.

Procuring cause requires that there be a "direct and proximate link" between the introduction of the parties and their agreement (*Greene v Hellman,* 51 NY2d 197, 206 [1980]). Merely introducing the parties is not enough to show a procuring cause (*see id.*), nor is calling the purchaser's attention to the property (*see Good Life Realty, Inc. v Massey Knakal Realty of Manhattan, LLC,* 93 AD3d 490 [1st Dept 2012]). A broker's mere creation of an "amicable atmosphere" or an "amicable frame of mind" that might have led to the ultimate transaction is also insufficient by itself to show procuring cause (*SPRE Realty,* 119 AD3d at 99).

The Diensts do not dispute that Ms. Penzner called the Diensts' attention to the Building and introduced them to Mr. Tamarkin, the developer with whom Mr. Dienst began negotiating for Unit 4. However, almost a year passed between the Diensts' termination of their residential property search and the start of the negotiations for Unit 4. Moreover, the Diensts ultimately purchased Unit 4, which, despite its similarity to Unit 3, was not the subject of the 2008 negotiations, apart from a few short inquiries via e-mail. SPRE provides no evidentiary facts creating a direct and proximate link between the Unit 3 negotiations and the Unit 4 sale, such as continued communications between the Diensts and Mr. Tamarkin or the Partners regarding Units 3 and 4.

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Therefore, SPRE has failed to raise a genuine issue of material fact with regard to whether Ms. Penzner was the procuring cause of the Unit 4 purchase.

II. SPRE Fails To Raise A Triable Issue With Regard To Its Claim For Quantum Meruit.

A claim of quantum meruit requires the plaintiff to allege (1) that services were performed for the defendant in good faith, (2) that the defendant accepted the services, (3) that an expectation of compensation arose, and (4) the reasonable value of the services rendered (*AHA Sales, Inc. v Creative bath Prods., Inc.*, 58 AD3d 6, 19 [2d Dept 2008]). No recovery can be had under a quantum meruit theory where it is clear that the broker had no expectation of compensation from defendants for the services she performed (*Brener & Lewis Management, Inc. v Engel*, 168 AD2d 254, 256 [1st Dept 1990]).

SPRE alleges that Ms. Penzner performed services for the Diensts in good faith and that the Diensts accepted her services.

However, SPRE has failed to show a triable issue of fact regarding an expectation of compensation from the Diensts for Ms. Penzner's services. The Brokerage Agreement plainly states that the Partners were to pay Ms. Penzner a commission for her efforts, should the deal close (Michael aff, ¶ 20, Ex. L; ¶ 21, Ex. K; Deposition of Susan Penzner, 136:12-21). Although Mr. Dienst testified that he did not expect Ms. Penzner to work

without compensation (D.Dienst aff, ¶ 14; D.Dienst dep, 16:20-25), SPRE has failed to provide any evidence of an agreement, express or implied, between Ms. Penzner and the Diensts establishing the expectation that the Diensts would pay Ms. Penzner for her efforts. To the contrary, the Diensts claim that Ms. Penzner never informed them that she expected a commission (D.Dienst aff, ¶ 3; J.Dienst aff, ¶ 4), and that they thought that the seller would pay her a commission (D.Dienst aff, ¶ 3). There are no evidentiary facts showing that the Diensts expected to pay Ms. Penzner a commission on the purchase of Unit 3, let alone on Unit 4.

Thus, there is no genuine issue of material fact regarding whether there was an expectation of compensation for Ms. Penzner's services, and the quantum meruit claim fails as a matter of law.

Accordingly, it is hereby

ORDERED that the motion of defendants Daniel Dienst and Jill Dienst dismissing the complaint is granted in full.

Settle order and judgment.

DATED: February 1, 2016

ENTER:

J.S.C.