Atlas N.Y. LLC Co. v Eisenberg

2016 NY Slip Op 31778(U)

September 23, 2016

Supreme Court, New York County

Docket Number: 650553/2016

Judge: Saliann Scarpulla

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

----------X

ATLAS NEW YORK LIMITED LIABILITY COMPANY, D/B/A ATLAS REAL ESTATE NEW YORK,

Plaintiff,

-against-

MICHAEL EISENBERG, EISENBERG EXCLUSIVES, FURNISHED HABITAT, INC.

Defendants.

----------X

DECISION/ORDER
Index No. 650553/2016

HON. SALIANN SCARPULLA, J.:

In this action, defendants Michael Eisenberg, Eisenberg Exclusives (with Michael Eisenberg, collectively "Eisenberg"), and Furnished Habitat, Inc. ("Furnished Habitat" and collectively with Eisenberg, "Defendants"), move to dismiss the complaint of plaintiff Atlas New York Limited Liability Company, d/b/a Atlas Real Estate New York ("Plaintiff") pursuant to CPLR §§ 3211(a)(3) and (a)(7) and Real Property Law ("RPL") §§ 440-a and 442-d.

Unless noted otherwise, the following facts are taken from the complaint. On May 17, 2015, Plaintiff and Eisenberg entered into an exclusive brokerage and marketing agreement regarding ten rental properties in New York City (the "Exclusive Brokerage Agreement"). In this agreement, "Eisenberg appointed Atlas 'as the exclusive residential leasing agent ("Leasing Agent") for leasing of the [Exclusive] Properties.'" During the term of the Exclusive Brokerage Agreement, Eisenberg contracted (1) "that . . . it would 'refer to [Atlas] all inquiries, proposals and offers received by [Eisenberg] regarding the [Exclusive Properties], including but not limited to, those from principals and other brokers;'" (2) "'to conduct all negotiations with respect to the rental of the [Exclusive] Properties, exclusively through [Atlas] except during all two week periods prior to vacancy;'" and

(3) "'to abstain entirely from advertising the [Exclusive Properties] for [the term] including during any/all two week periods prior to vacancy periods.'" Eisenberg also deemed Plaintiff "'the procuring broker in connection with any lease of any of the [Exclusive] Properties during the term' and was 'entitled to a brokerage commission.'" However, Eisenberg was permitted to lease the properties in the Exclusive Brokerage Agreement if they were not leased two weeks before they became vacant.

Plaintiff alleges that, on or about June 22, 2015, it and Defendants entered into a Co-Exclusive Brokerage Agreement regarding more than 130 rental properties in New York City (the "Co-Exclusive Brokerage Agreement"). In this agreement, Plaintiff was deemed "'the co-exclusive resident[ ]leasing agent ("Leasing Agent") for leasing of the [Co-Exclusive] Properties." Plaintiff alleges that "[Defendants] expressly agreed that [Plaintiff] was 'the procuring broker in connection with any lease of any of the [Co-Exclusive] Properties during the term.'" However, Defendants had a right to lease properties in the Co-Exclusive Brokerage Agreement if they were vacant and to serve as a co-broker on leases of properties in the Co-Exclusive Brokerage Agreement if the properties were not leased two weeks before they became vacant.

Plaintiff alleges that Defendants did not perform their obligations under the relevant agreements, and that "Eisenberg and Furnished Habitat actively marketed and continued leasing the Exclusive Properties . . . in violation of the Exclusive Brokerage Agreement, and did so without ever paying Atlas its rightful commission as the procuring broker." Plaintiff further alleges that Defendants "fraudulently misrepresent[ed] and fail[ed] to disclose their intention to market and lease the Exclusive Properties and Co-Exclusive Properties to a revolving door of illegal, short-term occupants—i.e.,, lease occupancies lasting for less than thirty days in violation of New York law." Additionally, Plaintiff alleges that "[Defendants] consistently refused to provide [Plaintiff] with accurate information on existing tenancies, lease terms, and dates of vacancy for any of the Co-

Exclusive Properties, and similarly failed to account for and pay [Plaintiff] its rightful commissions as the procuring broker of the Co-Exclusive Properties." Plaintiff further alleges that "[Defendants] purposely blocked [Plaintiff]'s efforts to market, show, and lease the Exclusive Properties and Co-Exclusive Properties, including by failing to provide keys[and] deliberately providing the wrong keys." The complaint alleges causes of action for breach of the Exclusive Brokerage Agreement and Co-Exclusive Brokerage Agreement; fraudulent inducement; and an accounting.

Defendants now move to dismiss the complaint pursuant to CPLR §§ 3211(a)(3) and (a)(7), as well as RPL §§ 440-a and 442-d. In support of their motion, defendants first argue that Plaintiff cannot maintain this lawsuit because it does not have a real estate broker's license. They also argue that Atlas New York Limited Liability Company was not a signatory to the relevant agreements and is not in privity with Defendants; that the agreements are too indefinite to be enforced; that commissions cannot be recovered from Defendants; and that the accounting and fraudulent inducement causes of action fail to state claims.

In opposition to the motion, Plaintiff first argues that its breach of contract claim is properly pleaded because it has a valid license, Defendants' illegality argument is not applicable and is moot, it is in privity with Defendants, the compensation terms in the relevant agreements are sufficiently definite, and that it may recover commissions against the Defendants. It also argues that its fraudulent inducement and accounting causes of actions are viable.

In reply, Defendants additionally argue that the RPL "preclude[s] the issuance of a license to a trade or assumed name, acting for a limited liability company." They also argue that the RPL allows for an assumed name for individuals and co-partnerships, but not for limited liability companies or corporations. Defendants thus argue that the legislature evidenced its intent to prohibit limited liability companies from receiving a license under an assumed name.

Discussion

I. Lack of Capacity to Sue

"Capacity to sue is a threshold question involving the authority of a litigant to present a grievance for judicial review." *Town of Riverhead v. New York State Bd. of Real Prop. Servs.*, 5 N.Y.3d 36, 41 (2005). "Business corporations, for example, are creatures of statute and, as such, require statutory authority to sue and be sued." *Community Bd. 7 of Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148, 155 (1994).

Section 130(1) of the General Business Law ("GBL") provides, in part, that

> [n]o person shall thereafter (i) carry on or conduct or transact business in this state under any name or designation other than his or its real name . . . unless . . . (b) [s]uch person, if a corporation, limited partnership or limited liability company, shall file, together with the fees as set forth in subdivision five of this section, in the office of the secretary of state a certificate setting forth the name or designation under which business is carried on or conducted or transacted, its corporate, limited partnership or limited liability company name, the location including number and street, if any, of its principal place of business in the state, the name of each county in which it does business or intends to do business, and the location including number and street, if any, of each place where it carries on or conducts or transacts business in this state.

In opposing this motion, Plaintiff submitted the Affidavit of Lauren Weiner ("Weiner Affidavit"), President of Atlas New York Limited Liability Company, and attached a certificate of assumed name issued by the New York Department of State ("DOS"), dated February 5, 2013. In this certificate, Atlas Real Estate New York appears as the assumed name of Atlas New York Limited Liability Company. Plaintiff has, therefore, established that Atlas New York Limited Liability Company was authorized to conduct business pursuant to the GBL under its assumed name, Atlas Real Estate New York.

Section 442-d of the RPL provides that

> [n]o person, copartnership, limited liability company or corporation shall bring or maintain an action in any court of this state for the recovery of compensation for services rendered . . . in the buying, . . . leasing, [or] renting . . . any real estate without alleging and proving that

such person was a duly licensed real estate broker or real estate salesman on the date when the alleged cause of action arose.

At oral argument, I requested that Plaintiff provide me with the real estate broker license and on May 4, 2016, Plaintiff submitted such license issued by the DOS. The license, with an effective date of February 8, 2015, states that "Atlas Real Estate New York . . . has been duly licensed to transact business as a real estate broker and to be represented by Weiner Lauren Y." (Capitalization removed). Plaintiff previously provided a certificate of assumed name issued by DOS. I accept the license as valid.

To the extent that Defendants argue that Plaintiff has failed to allege that it was licensed as a real estate broker in the complaint, Plaintiff has made such an allegation in the Weiner Affidavit. *Cf. Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994) (internal citations omitted) ("In assessing a motion under CPLR 3211 (a) (7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint . . .."). Additionally, as Plaintiff has shown it was a licensed real estate broker, Defendants' argument concerning illegality is moot.

Defendants next argue that Plaintiff lacks privity with any of the Defendants, and therefore, may not maintain this action. Defendants assert that the relevant agreements were entered into by Atlas Real Estate New York and argue that Plaintiff was not a party to the agreements, without Atlas Real Estate New York being a registered assumed name of Atlas New York Limited Liability Company under GBL §130.

As stated above, Plaintiff submitted the Weiner Affidavit and attached a certificate of assumed name issued by DOS, dated February 5, 2013. In this certificate, Atlas Real Estate New York appears as the registered assumed name of Atlas New York Limited Liability Company. Therefore, under GBL § 130(1)(b), Atlas New York Limited Liability Company was authorized to conduct business as Atlas Real Estate New York, and "may sue in its corporate name under the

contract made for its benefit in its assumed name." *Mail & Express Co. v. Parker Axles, Inc.*, 204 A.D. 327, 329, (1st Dep't 1923). Accordingly, I deny the motion to dismiss on these grounds.

II. Failure to State a Cause of Action

In analyzing a CPLR 3211 motion, the court should "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon*, 84 N.Y.2d at 87-88. "In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and 'the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.'" *Id.* at 88 (citations omitted).

A. Breach of Contract

"The elements of [a breach of contract] claim include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010).

Definiteness of Compensation Terms in the Agreements

"[A] party seeking to recover under a breach of contract theory must prove that a binding agreement was made as to all essential terms." *Silber v. New York Life Ins. Co.*, 92 A.D.3d 436, 439 (1st Dep't 2012). Additionally, "[a]n agreement must have sufficiently definite terms and the parties must express their assent to those terms." *Id.* But "[b]efore rejecting an agreement as indefinite, a court must be satisfied that the agreement cannot be rendered reasonably certain by reference to an extrinsic standard that makes its meaning clear." *Cobble Hill Nursing Home, Inc. v Henry & Warren Corp.*, 74 N.Y.2d 475, 483 (1989).

Moreover, "[a]s price is an essential ingredient of every contract for the rendering of services, an agreement must be definite as to compensation." *Cooper Square Realty, Inc. v. A.R.S.*

Mgmt., Ltd., 181 A.D.2d 551, 551 (1st Dep't 1992). Most importantly, "a price term is not necessarily indefinite because the agreement fails to specify a dollar figure, or leaves fixing the amount for the future, or contains no computational formula." *Cobble Hill Nursing Home,* 74 N.Y.2d at 483 (1989). Instead,

> [w]here at the time of agreement the parties have manifested their intent to be bound, a price term may be sufficiently definite if the amount can be determined objectively without the need for new expressions by the parties; a method for reducing uncertainty to certainty might, for example, be found within the agreement or ascertained by reference to an extrinsic event, commercial practice or trade usage.

Id.

Here, both agreements between the parties address compensation. Both agreements first provide that "[i]f the apartments are rented pursuant to this agreement, our commission to be paid solely by the renter shall be fifteen (15%) percent of the first year's rent or any amount we chose to collect from the tenant up to that amount." Subsequent to that provision, the Exclusive Brokerage Agreement provides that

> [s]o long as this agreement is in effect and (i) subject to the extended term during which commissions are due to us as set forth above regarding renting to listed tenants ninety (90) days after this agreement's termination and (2) your right to lease Properties during the two (2) week period prior to vacancy you agree that the Leasing Agent is the procuring broker in connection with any lease of any of the Properties during the term of this agreement entitled to a brokerage commission equal to fifteen (15) percent of the first year's rent or six percent of the gross rent for any rental period up to or less than eleven (11) months, as the case may be.[1]

---

[1] After this final clause, the Co-Exclusive Agreement states "or the amount able to collect from the client."

In the complaint, Plaintiff alleges that the compensation agreed upon for the Co-Brokerage Agreement was the later of the two compensation terms. In its moving memorandum, Defendants argue that the term Plaintiff points to "only applies in the contingency of post-termination rentals, which did not occur." The question of which of these terms applies is not squarely raised by this motion and will not be addressed here.

Although not raised by the parties, I also note the differences in the versions of the Exclusive Brokerage Agreement submitted by each party. Defendants submitted an unexecuted version of this agreement, which did not list any specific properties. Plaintiff submitted a version of the

Here, there are definite compensation terms that may apply to Plaintiff's alleged factual scenario: (1) fifteen percent of the initial year's rent; (2) six percent of the gross rent for rental terms up to eleven months; or (3) an amount collected from the tenant. That the amount of compensation to be received by Plaintiff could be one of these alternatives does not render the agreements unenforceable. Therefore, the terms are sufficiently definite to survive the motion to dismiss.

Defendants' Alleged Breach of the Contract

In their moving memorandum of law, Defendants assert that "[b]oth alleged brokerage agreements provide that the commissions are 'to be paid solely by the renter' and that Eisenberg Exclusives and Furnished Habitats, as sublandlord, have 'no obligation to [ ] pay us commission for any apartments.'" They, therefore, argue that the lawsuit is unsustainable.

Here, the relevant agreements indicate that Defendants were only obliged to pay Plaintiff a commission in the case of post-termination rentals. In paragraphs discussing post-termination rentals, after the terms of the agreements, Plaintiff agreed to tender a list of six possible tenants who looked at a property during the terms of the agreements. "If within ninety (90) days after the expiration date, a lease is signed with a prospective tenant on said list, [Plaintiff] shall be entitled to be paid a commission from you as provided for in this Agreement." Plaintiff does not plead that it provided these lists to Defendants, and Michael Eisenberg, in his affidavit, states that "[f]ollowing [his] termination of the alleged agreements, I received no such lists under either the exclusive or

---

agreement executed by Lauren Weiner and Michael Eisenberg. In that version, which is illegible in some places, the second compensation term is crossed out and written next to it is "[t]he amount arranged [and] collected [f]rom the client." In a footnote in their reply memorandum, Defendants note that "[they] do not concede that the contracts annexed to the Higgins Affirmation are 100% replicas of the signed agreements."

non-exclusive agreement." Otherwise, during the terms of the agreements, the tenant, not Defendants, was responsible for paying Plaintiff its brokerage commission. ("If the apartments are rented pursuant to this agreement, our commission to be paid solely by the renter shall be fifteen (15%) percent of the first year's rent or any amount we chose to collect from the tenant up to that amount. . . . You, the Sublandlord, have no obligation to [ ] pay us commission for any apartments.")

Plaintiff has, however, alleged facts that support its breach of contract cause of action for breaches that took place during the terms of the agreements. Plaintiff alleges that, under the Exclusive Brokerage Agreement, "Eisenberg . . . agreed that, during the term, [1] it would 'refer to [Atlas] all inquiries, proposals and offers received by [Eisenberg] regarding the [Exclusive Properties], including but not limited to, those from principals and other brokers;" (2) that it would "'conduct all negotiations with respect to the rental of the [Exclusive] Properties, exclusively through [Atlas] except during all two week periods prior to vacancy;" and (3) that it would "'abstain entirely from advertising the [Exclusive Properties] for [the term] including during any/all two week periods prior to vacancy periods.'" Plaintiff alleges that, in violation of these terms, "Eisenberg and Furnished Habitat actively marketed and continued leasing the Exclusive Properties, including through websites such as Streeteasy.com and Homeaway.com."

Also, Plaintiff alleges that, under the Co-Exclusive Brokerage Agreement, Eisenberg and Furnished Habitat agreed that Plaintiff was "'the co-exclusive resident[] leasing agent ("Leasing Agent") for leasing of the [Co-Exclusive] properties.'" Plaintiff alleges that "Eisenberg and Furnished Habitat consistently refused to provide [Plaintiff] with accurate information on existing tenancies, lease terms, and dates of vacancy for any of the Co-Exclusive Properties" and additionally "purposely blocked Atlas's efforts to market, show, and lease the Exclusive Properties and Co-Exclusive Properties, including by failing to provide keys[and] deliberately providing the

wrong keys." As Plaintiff has adequately pled Defendants' breach of the above-discussed terms of the agreements, I deny the motion to dismiss the breach of contract claim.

B. Fraudulent Inducement

"To state a claim for fraudulent inducement, there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury." *GoSmile, Inc. v Levine,* 81 A.D.3d 77, 81 (1st Dep't 2010). "In the context of a contract case, the pleadings must allege misrepresentations of present fact, not merely misrepresentations of future intent to perform under the contract, in order to present a viable claim that is not duplicative of a breach of contract claim." *Wyle Inc. v. ITT Corp.*, 130 A.D.3d 438, 439 (1st Dep't 2015). "[A] misrepresentation of present fact, unlike a misrepresentation of future intent to perform under the contract, is collateral to the contract, even though it may have induced the plaintiff to sign it, and therefore involves a separate breach of duty." *GoSmile*, 81 A.D.3d at 81.

In their moving memorandum, besides repeating the licensure argument, Defendants also argue that the fraudulent inducement claim is not cognizable because "the complaint fails to allege a misrepresentation of present facts. The alleged promise to comply with law in performing a contract is not a misrepresentation of present fact but involves a promise of future intent to perform, which, . . . is not actionable." Defendants further argue in that memorandum that "since existing law, including statutory provisions, is part of every contract, an alleged promise to comply with law is not collateral or extraneous to the contract, but directly related to and subsumed by it, and, therefore, duplicative of existing contractual duties and obligations." They additionally argue that a fraud claim based on omissions is not cognizable because "no fiduciary or confidential relationship has been alleged in the complaint, and none existed in this conventional business arrangement" and that Plaintiff has failed to adequately allege the fraud claim.

Here, Defendants' alleged misrepresentations relate to a "future intent to perform under the contract." *Wyle*, 130 A.D.3d at 439. Moreover, Plaintiff's claim for fraudulent inducement claim based on ommissions fails because Plaintiff has not alleged that defendants omitted information "in order to defraud or mislead the plaintiff." *Connaughton v. Chipotle Mexican Grill, Inc.*, 135 A.D.3d 535, 537 (1st Dep't 2016). Failing to sufficiently allege the cause of action, the fraudulent inducement cause of action is dismissed.

C. Accounting

"Under established principles 'Supreme Court possesses the jurisdiction to order an accounting when four factors exist. They are (1) a fiduciary relationship, (2) entrustment of money or property, (3) no other remedy, and (4) a demand and refusal of an accounting.'" *Matter of Mary XX.*, 33 A.D.3d 1066, 1068 (3d Dep't 2006) (citation omitted).

The complaint is bereft of allegations that there was an "'entrustment of money or property'" or that there was "'a demand and refusal of an accounting.'" *Id.* Accordingly, the accounting cause of action is also dismissed.

In accordance with the foregoing, it is hereby

ORDERED that Defendants' motion to dismiss the complaint is granted with respect to the second, and third causes of action, and denied with respect to the first cause of action; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 208, 60 Centre Street, on October 26, 2016, at 2:15 PM.

This constitutes the decision and order of the Court.

DATE: 9/23/16

SALIANN SCARPULLA, JSC