

**Lewis & Murphy Realty, Inc. v Colletti**

2017 NY Slip Op 31732(U)

July 25, 2017

Supreme Court, Queens County

Docket Number: 702422/2017

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
Justice

- - - - - x

LEWIS & MURPHY REALTY, INC., Index No.: 702422/2017

Plaintiff, Motion Date: 6/21/17

- against - Motion No.: 92

ANTHONY COLLETTI and NEW YORK CITY School Construction Authority, Motion Seq.: 1  
SCHOOL CONSTRUCTION AUTHORITY,

Defendants.

- - - - - x

The following electronically filed documents read on this motion by defendants ANTHONY COLLETTI and NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY for an Order pursuant to CPLR 3211(a)(1), (3), (5), and (7) dismissing the complaint:

	<u>Papers</u> <u>Numbered</u>
Notice of Motion-Affirmation-Exhibits-Memo. of Law...	EF 4 - 12
Memo. of Law in Opposition-Exhibits.....	EF 14 - 18
Memo. of Law in Reply-Affidavit.....	EF 19 - 20

Plaintiff commenced this action by filing a summons and verified complaint on February 21, 2017. The complaint alleges that plaintiff entered into a brokerage agreement with defendant Anthony Colletti (Colletti) dated June 13, 2013. Pursuant to the agreement, plaintiff located a buyer, defendant New York City School Construction Authority (SCA), to purchase property owned by Colletti at 111-10/12/14/16 Astoria Boulevard and 32-19 111<sup>th</sup> Street, in Corona, Queens County, New York. Based on such, plaintiff contends that it is entitled to a commission.

In support of the motion to dismiss, defendants submit an affirmation from John M. Giordano, Esq., affirming that he sent a letter dated August 25, 2016 to plaintiff detailing the circumstances surrounding the sale of the subject property. A copy of the letter is annexed to the motion papers. In late 2014 and early 2015, SCA made a number of offers for the purchase of

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QUEENS COUNTY

the property culminating with an offer of approximately \$7,800,000. The offers were rejected by Colletti. Nine months later, SCA issued a Notice of Taking for the proposed selection of the property for the construction of a new intermediate school. Colletti opposed the taking as excessive as it did not provide for the development of the property. SCA rejected Colletti's proposed mixed use development of the property, but indicated that in light of the Notice of Taking it was interested in pursuing negotiations for purchase of the property. Colletti then began negotiations with SCA for the sale of the property without aid of any broker. After obtaining appraisals, Colletti and SCA ultimately agreed that Colletti would sell the property to SCA for \$16,000,000.

On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314 [2002]; Leon v Martinez, 84 NY2d 83 [1994]; Greer v National Grid, 89 AD3d 1059 [2d Dept. 2011]; Prestige Caterers, Inc. v Siegel, 88 AD3d 679 [2d Dept. 2011]). A complaint must allege the material elements of the cause of action (see Lewis v Village of Deposit, 40 AD2d 730 [1972]; Kohler v Ford Motor Company, Inc., 93 AD2d 205 [3d Dept. 1983]). A court may consider evidentiary material submitted by a defendant in support of a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) (see CPLR 3211[c]; Sokol v Leader, 74 AD3d 1180 [2d Dept. 2010]). When evidentiary material is considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the criterion is whether the plaintiff has a cause of action, not whether he or she has stated one (see Basile v Wiggs, 98 AD3d 640 [2d Dept. 2012]).

"To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (Teitler v Pollack & Sons, 288 AD2d 302 [2d Dept. 2001]). "A motion to dismiss a complaint based on documentary evidence 'may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law'" (Stein v Garfield Regency Condominium, 65 AD3d 1126 [2009], quoting Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314 [2002]).

The first cause of action alleges that Colletti breached the agreement and, due to the breach, plaintiff is entitled to recover damages in the form of a commission equal to 2% of the purchase price for the property which is \$320,000. Defendants seek to dismiss the first cause of action on the ground that plaintiff has not pleaded, and cannot prove, that it produced a "ready, willing and able" buyer for the sale of the property. In opposition, plaintiff contends that it brought Colletti a ready, willing and able buyer for the property, the buyer closed, and therefore, plaintiff is entitled to a commission (citing Eastern Consol. Props., Inc. v 5 E. Realty Holding Co., LLC, 146 AD3d 622 [1st Dept. 2017]).

"To recover a commission, a broker must establish that he or she is duly licensed, that he or she has a contract, express or implied, with the party charged with paying the commission, and that he or she was the procuring cause of the sale or lease" (Bradenberg v Waters Place Assocs., L.P., 17 AD3d 615, 615 [2d Dept. 2005]). To establish a right to a commission, "a broker must demonstrate that he or she produced a ready, willing and able purchaser who came to a meeting of the minds with the seller as to all of the material terms of the sale" (Heelan Realty and Dev. Corp. v Ocskasy, 27 AD3d 620, 621 [2d Dept. 2006]).

Here, it is undisputed that plaintiff failed to plead that it was the "procuring cause of the sale". The complaint merely alleges that plaintiff is entitled to a commission because plaintiff introduced SCA to Colletti. The complaint also asserts that plaintiff was only required to produce a buyer. The complaint does not allege that plaintiff performed any other services or participated in the negotiations that led to the consummation of the contract and the sale of the property to SCA for the price of \$16,000,000. Moreover, the negotiations for the sale and purchase of the property occurred after the Notice of Taking was filed. At the time that SCA made an offer to purchase in 2014 and early 2015, the purchase price was not established and other material terms of the contract were not agreed upon by the parties. Therefore, plaintiff failed to state a cause of action for breach of the brokerage agreement.

Although plaintiff contends that it was not required to demonstrate that it was a procuring cause of the sale, the agreement provides that "[i]n the event Lewis & Murphy Realty bring a ready willing and able buyer that close on this property Anthony Colletti will pay Lewis & Murphy Realty a commission". Therefore, and contrary to plaintiff's contentions, the agreement here does not depart from the standard "procuring cause" to the lower standard of merely introduced (see Futterman Org. v


Bridgemarket Assoc., 278 AD2d 105, 105 [2d Dept. 2000] ["A finder's fee agreement in a real estate transaction is not enforceable unless the person who seeks remuneration had an express, special agreement to act solely as a finder"]; Spree Realty, Ltd. v Dienst, 119 AD3d 93, 95 [1st Dept. 2014] ["In the absence of an agreement to the contrary, 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"]. Even though plaintiff did introduce the parties, plaintiff failed to allege that it was the procuring cause of the sale, and thus, plaintiff is not entitled to a commission (see Douglas Elliman LLC v Corcoran Group Mktg., 93 AD3d 539 [1st Dept. 2012]; Ormond Park Realty v Round Hill Dev. Corp., 266 AD2d 523 [2d Dept. 1999]; Friedman Drew Corp. V MC Holdings Partners, 172 AD2d 384 [1st Dept. 1991]). Moreover, plaintiff did not plead the existence of a special agreement to act solely as a finder, and the agreement itself conclusively establishes that plaintiff was a broker and not a finder as there was no express, special agreement to act solely as a finder. Accordingly, the first cause of action shall be dismissed pursuant to CPLR 3211(a)(7) and (1).

The second cause of action alleges that SCA aided and abetted Colletti in breaching the agreement and, as a result thereof, plaintiff is entitled to recover damages from SCA equal to 2% of the purchase price for the property which is \$320,000. No cause of action exists for aiding and abetting a breach of contract (see Pomerance v McGrath, 124 AD3d 481 [1st Dept. 2015]). Accordingly, the second cause of action must be dismissed pursuant to CPLR 3211(a)(7). In any event, plaintiff's cause of action against SCA is defective because it is undisputed that plaintiff failed to serve a Notice of Claim pursuant to Section 1744(2) of the Public Authorities Law (see Jones Lang LaSalle of NY, LLC v New York City School Construction Authority, 31 Misc.3d 424 [Sup. Ct., New York Cnty, 2011] [noting that Section 1744(2) of the Public Authorities Law "requires plaintiff to plead and prove the filing of a notice of claim within three months of accrual of its claim"]).

Accordingly, and based on the above reasons, it is hereby

ORDERED, that defendants' motion to dismiss is granted in its entirety, the complaint is dismissed, and the Clerk of the Court shall enter judgment accordingly.

Dated: 7/25, 2017  
Long Island City, N.Y.

  
ROBERT J. McDONALD  
J.S.C.

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