

<b>Donawald Realty, Inc. v Chang</b>
2018 NY Slip Op 30029(U)
January 5, 2018
Supreme Court, Kings County
Docket Number: 513068/15
Judge: Wavny Toussaint
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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5<sup>th</sup> day of January, 2018.

PRESENT:

HON. WAVNY TOUSSAINT,  
Justice.

----- X  
DONAWALD REALTY, INC.,

Plaintiff,

- against -

Index No. 513068/15

TINA CHANG,

Defendant.

----- X

The following papers numbered 1 to 9 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_

1-2 3-5 6-8  
7-8  
9

Upon the foregoing papers in this action to recover a real estate broker's commission, plaintiff, Donawald Realty, Inc. (Donawald), moves (in motion sequence 5) for an order, pursuant to CPLR 3212 (a), extending its time within which to make a summary judgment motion.

Defendant, Tina Chang (Chang), moves (in motion seq. 6) for an order, pursuant to CPLR 3212, awarding her summary judgment: (1) dismissing the complaint, and (2) granting her counterclaims asserted against Donawald.

Donawald cross-moves (in motion seq. 7) for an order: (1) granting it summary judgment on its first through fourth causes of action in the complaint for express and implied contract, pursuant to CPLR 3212, and (2) dismissing Chang's answer, affirmative defenses and counterclaims, pursuant to CPLR 3211 (b), 3212 and 3016 (b).

### ***Background***

#### ***The Exclusive Sales Listing Agreement (ESLA)***

Chang was the owner and the proprietary tenant of unit 3F, a residential cooperative apartment located at 288 5<sup>th</sup> Avenue in Brooklyn (Unit 3F). In or about February 2015, Donawald and Chang entered into the ESLA, pursuant to which Lynn Donawald agreed to exclusively broker and market Unit 3F for Chang from April 1, 2015 through July 1, 2015. According to the ESLA, the asking price for Unit 3F was \$799,000.00 and Donawald would earn a 3% commission at closing if she procured a purchaser during the exclusive term at a price that Chang found agreeable.

Regarding the brokerage commission, the ESLA provides that:

“The commission of the undersigned Broker shall not be earned or payable unless and until the full purchase price is paid to the Seller and the shares of stock and the proprietary lease allocated to the apartment are delivered to the purchasers as provided in subscription agreement/contract of sale.

“If full purchase price is not paid, or if the shares and lease are not delivered and accepted, for any cause or reason whatsoever, including but not limited to the failure or inability to perform said subscription agreement/contract by either the Seller or the Purchasers, *other than the Seller's willful default*, the commission is not to be considered as earned and is not due and payable, and the Broker shall not have any claim whatsoever

against the Seller for commission, in connection with the transaction. "When purchase price is paid to the Seller and such shares and lease are delivered to the Purchaser, the undersigned Broker will hereby become entitled to the commission set forth above" (emphasis added).

**Donawald Obtains Prospective Purchasers**

On June 3, 2015, Chang agreed to lower the listing price for Unit 3F to \$750,000.00. The following week, on June 9, 2015, Donawald notified Chang by text message that prospective buyers made "a full price offer at \$750k with 20 percent down . . ." Chang sent a responsive text message in which she expressed: "[t]hat's great" and asked Donawald "[w]hat's the strategy?" In response, Donawald recommended, "I would accept this offer and take others as a back up. This one is a bird in hand." Chang then advised Donawald, "[w]e are very happy" and asked if the deal was co-brokered. When Donawald indicated that it was the only broker, Chang responded, "Okay. Let's do it!" Later that day, the prospective buyers emailed Donawald a form reflecting that they were pre-approved for a mortgage.

The following day, on June 10, 2015, Donawald forwarded a copy of the mortgage pre-approval form to Chang with the following email:

"On Sunday, buyers viewed 288 5th Avenue during open house hosted from 1 to 3PM. On Monday June 9th, 2015 buyers made a full price offer of \$750,000.00. The same price as advertised for the open house hosted on June 7th and June 8th 2015. Their offer was accepted at 8:43 AM on June 10th, 2015.

"Please see the attached Pre-Approval letter as verification of their financial capability to close this sale.

"Sales Price: \$750,000.00  
Down payment: 20%  
Closing date: Flexible"

Chang subsequently attempted to re-negotiate with the prospective buyers, and presented them with a counteroffer, but the prospective buyers were unwilling to increase their \$750,000.00 offer. The sale to the prospective purchasers was never consummated.

### ***Chang Retains A New Broker Who Sells Unit 3F***

After the expiration of the exclusive term of the ESLA, Chang retained another broker, Corcoran Group, to market Unit 3F. On August 19, 2015, Chang entered into a \$785,000.00 contract of sale for Unit 3F with other prospective buyers who were procured by Corcoran Group and Keller Williams Realty Empire. The closing for the sale of Unit 3F ultimately took place on November 23, 2015.

### ***Donawald Files Two Mechanics' Liens***

Meanwhile, on September 22, 2015, Donawald filed a notice of pendency and a "Notice of Mechanics' Lien" against Chang and Unit 3F, which claimed that Donawald was owed \$45,000.00 for real estate brokerage services (First Mechanics' Lien). Donawald subsequently filed another notice of pendency and a "Notice of Brokers" against Chang and Unit 3F, which also claimed that Donawald was owed \$45,000.00 for real estate brokerage services (Second Mechanics' Lien).

### ***The Instant Action/Proceeding***

On October 26, 2015 Chang commenced a summary proceeding against Donawald by order to show cause with a verified petition seeking to summarily discharge the First and Second Mechanics' Liens. Essentially, Chang argued that the Mechanics' Liens were invalid under the New York Lien Law, which specifically

excludes real estate brokerage services from its purview. On November 3, 2015, Donawald answered the petition, asserted affirmative defenses and three counterclaims seeking a brokerage commission for producing a ready, willing and able purchaser of Unit 3F.

On December 17, 2015, the court granted Chang's petition and discharged the First and Second Mechanics' Liens "as there is no basis for filing of such a lien, where a real estate company is making a breach of contract claim for unpaid commissions allegedly owed on a contract to sell property." An order vacating the notices of pendency was subsequently issued on February 8, 2016.

For the sake of judicial economy and the parties' interests, the court converted Donawald's answer and counterclaims for a brokerage commission into a complaint and directed Chang to serve an answer. On January 6, 2016, Chang served an answer denying the material allegations in Donawald's complaint, asserted affirmative defenses and asserted counterclaims relating to the Mechanics' Liens that were previously discharged.

Prior to discovery, the parties filed dispositive motions on the pleadings. By a June 1, 2016 order, the court denied the parties' motions as premature because there were issues of fact that warranted discovery. The court ordered Donawald to serve a complaint on her contractual claims within 20 days and ordered Chang to serve an answer 20 days thereafter. Donawald filed a May 9, 2016 verified complaint, and Chang interposed a May 27, 2016 answer with four counterclaims. Donawald replied to Chang's counterclaims on June 14, 2016. Thereafter, discovery

ensued. A Note of issue was subsequently filed indicating that all discovery had been completed.

### ***The Instant Motions***

Donawald now moves for an order, pursuant to CPLR 3212 (a), extending its time to make a summary judgment motion.

Chang moves for an order: (1) granting her summary judgment dismissing Donawald's complaint; (2) granting her summary judgment on her first counterclaim seeking attorneys' fees and costs resulting from the First and Second Mechanics' Liens; (3) granting her summary judgment on her second and fourth counterclaims seeking damages resulting from the First and Second Mechanics' Liens; and (4) granting her summary judgment on her third counterclaim for abuse of process regarding the First and Second Mechanics' Liens.

Chang submits an affidavit in which she admits that she entered into the ESLA with Donawald for the sale of Unit 3F. While Chang admits that she consented to lower the listing price to \$750,000.00, she now contends that "[i]t was my understanding based on my past experience with Donawald in the real estate process that if the listing price was offered by a potential buyer, *it would be a starting point of negotiation* for the sale of the property" (emphasis added). According to Chang, when Donawald advised her that prospective purchasers offered the \$750,000.00 listing price, and she advised Donawald "[I]et's do it!", she was actually "indicating that [she] would like to start the negotiations process regarding the purchase price."

Chang contends that Donawald was only entitled to a 3% commission if several conditions were met following the procurement of a prospective purchaser, including: (1) a closing; (2) payment of the full purchase price to her; and (3) delivery of the shares of stock and the proprietary lease allocated to Unit 3F to the purchaser pursuant to a contract of sale. Chang further contends that Donawald is not entitled to a brokerage commission under a “willful default” theory because she did not have an agreed upon contract of sale with the prospective purchasers, nor could there be since she did “not agree on any basic essential terms customarily associated with a real estate transaction . . .”

Regarding the Mechanics’ Liens, Chang contends that they were filed by Donawald “in a bad faith attempt to disrupt [her] sale of Unit 3F . . .” Chang seeks monetary damages, pursuant to New York Lien Law § 39-a, based on Donawald’s unlawful filing.

Donawald opposes Chang’s summary judgment motion and cross-moves for summary judgment on its first and second causes of action based on an express contract with Chang and on its third and fourth causes of action based on an implied contract with Chang. Donawald also cross-moves for summary judgment dismissing Chang’s answer, affirmative defenses and counterclaims.

Lynn Donawald submits an affidavit attesting that on June 3, 2015, Chang “authorized and directed the Plaintiff-broker, orally, and in writing – by text (SMS) message – to set the asking price of the Unit at \$750,000.00” and that “[o]n or about June 8, 2015, the Plaintiff-broker produced a ready, willing and able purchaser of the



Unit . . . who agreed to pay the full asking price of \$750,000.00 for the Unit [as] evidenced by a ‘pre-qualification letter’ issued by a reputable lending institution.” Donawald contends that “the wrongful refusal by the Defendant-seller to honor the said authorized asking price constitutes a wilful default of the Listing Agreement..”

### ***Discussion***

Summary judgment is a drastic remedy and should be granted only when it is clear that no triable issues of fact exist (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). The moving party bears the burden of prima facie showing its entitlement to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material issue of fact (*see CPLR 3212 [b]; Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). Failing to make that showing requires denying the motion, regardless of the adequacy of the opposing papers (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Ayotte v Gervasio*, 81 NY2d 1062 [1993]). Making a prima facie showing then shifts the burden to the opposing party to produce sufficient evidentiary proof to establish the existence of material factual issues (*see Alvarez*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Accordingly, issue-finding rather than issue-determination is the key in deciding a summary judgment motion (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, [1957], *rearg denied* 3 NY2d 941 [1957]). “The court’s function on a motion for summary judgment is to determine whether material factual issues exist, not resolve such issues” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept. 2010] [internal quotation marks omitted]).

It is well-settled that “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” (Lane-Real Estate Dep’t Store, Inc. v Lawlet Corp., 28 NY2d 36, 42 [1971]). “The broker’s right to receive a commission otherwise owed to him may, however, be varied by agreement . . . where the parties agreed that the commission would be owing ‘if and when title passes’” (Graff v Billet, 101 AD2d 355, 356 [2d Dept. 1984], *aff’d*, 64 NY2d 899 1985]). In Graff, the Appellate Division explained that “[w]hatever preparatory work the broker did to produce a ready, willing and able buyer was irrelevant once he agreed to forgo his commission until passage of title. He bore the risk of the deal until the condition precedent was fulfilled, and that condition precedent simply never materialized” (*id.* at 356).

Here, the ESLA specifically provides that:

“If full purchase price is not paid, or if the shares and lease are not delivered and accepted, *for any cause or reason whatsoever*, including but not limited to the failure or inability to perform said subscription agreement/contract by either the Seller or the Purchasers, other than the Seller’s willful default, *the commission is not to be considered as earned and is not due and payable*, and the Broker shall not have any claim whatsoever against the Seller for commission, in connection with the transaction” (emphasis added).

Similar to the agreement in Graff, the ESLA between Donawald and Chang contains a condition precedent that title to Unit 3F must pass before a brokerage commission is earned.

There is no factual dispute that the purchase price of \$750,000.00 was never paid and the shares and lease for Unit 3F were never delivered and accepted by the potential purchasers procured by Donawald. According to the plain language of the ESLA, the passage of title was a condition precedent that must have been fulfilled for Donawald to earn a 3% brokerage commission for the sale. Because title to Unit 3F never passed to the potential purchasers, Chang is entitled to summary judgment dismissing Donawald's complaint in its entirety.

### ***Chang's Counterclaims***

Chang's counterclaims seek monetary damages, pursuant to New York Lien Law § 39-a, based on Donawald's allegedly bad faith attempt to disrupt her sale of Unit 3F by filing the Mechanics' Liens.

Lien Law § 39-a renders a lienor who exaggerated a mechanics' lien liable for damages and an attorneys' fee for services rendered in securing discharge of the mechanics' lien (*Exec. Towers at Lido, LLC v Metro Const. Servs., Inc.*, 303 AD2d 545, 545 [2d Dept. 2003]). "Lien Law § 39-a is penal in nature, and thus is strictly construed in favor of the party against whom the penalty is sought" (*id.* at 545-546).

Here, the Mechanics' Liens were declared void because "there is no basis for filing of such a lien, where a real estate company is making a breach of contract claim for unpaid commissions allegedly owed on a contract to sell property." Chang is not entitled to damages under Lien Law § 39-a because there was no finding that the Mechanics' Liens were willfully exaggerated. In addition, there is no other basis to award Chang monetary damages in connection with Donawald's filing of the

Mechanics' Liens because Chang did not sustain any damages, having ultimately sold Unit 3F at a price greater than the \$750,000.00 price listed by Donawald. Accordingly, it is

**ORDERED** that Donawald's motion (in motion seq. 5) for an order extending its time within which to make a summary judgment motion is granted without opposition; and it is further

**ORDERED** that the branch of Chang's motion (in motion seq. 6) for summary judgment dismissing the complaint is granted; and it is further

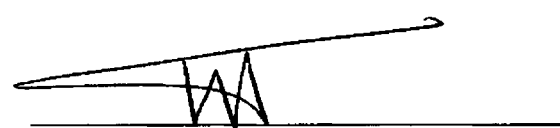
**ORDERED** that the branch of Chang's motion (in motion seq. 6) for summary judgment on her counterclaims for damages resulting from Donawald's unlawful filing of the Mechanics' Liens is denied; and it is further

**ORDERED** that the branch of Donawald's cross motion (in motion seq. 7) for summary judgment on its complaint is denied; and it is further

**ORDERED** that the branch of Donawald's cross motion (in motion seq. 7) for summary judgment dismissing Chang's counterclaims is granted.

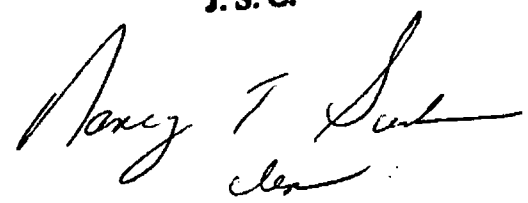
This constitutes the decision, order and judgment of the court.

E N T E R,



J. S. C.

**HON. WAVNY TOUSSAINT  
- J. S. C.**



2018 JAN 10 AM 11:16  
FILED  
KINGS COUNTY CLERK