Guttman Realty LLC v Zilber Realty LLC
2018 NY Slip Op 31079(U)
May 29, 2018
Supreme Court, New York County
Docket Number: 651080/2016
Judge: Arthur F. Engoron

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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GUTTMAN REALTY LLC d/b/a GUTTMAN REALTY ADVISORS,

Plaintiff,

- against -

ZILBER REALTY LLC,

Defendant.

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Index Number: 651080/2016

Sequence Number: 001, 002

Decision and Order:

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 8, were used (1) on defendant's motion for summary judgment and to dismiss, and (2) on plaintiff's motion for partial summary judgment:

	Papers Numbered:
Defendant's Motion for Summary Judgment and to Dismiss (Motion Seq. 001)	
Notice of Motion – Affirmation – Affidavit – Exhibits	1
Affirmation in Opposition – Exhibits	2
Reply Affirmation	3
Plaintiff's Motion for Partial Summary Judgment (Motion Seq. 002)	
Notice of Motion – Affirmation – Exhibits	4
Notice of Amended Motion	5
Notice of Second Amended Motion	6
Affirmation in Opposition	7
Reply Affirmation	8

Upon the foregoing papers, defendant's motion for summary judgment is hereby granted, and plaintiff's motion for partial summary judgment is hereby denied.

Background

Plaintiff, Guttman Realty LLC d/b/a Guttman Realty Advisors, is a licensed real estate broker. Defendant, Zilber Realty LLC, is the fee owner of an improved parcel of commercial real estate located at 1049 Lowell Street, Bronx, NY, Block 2757, Lot 12 ("the Building"). Defendant is owned by brothers Kenneth and David Silver. Also located at the same address is a business owned by the Silver brothers, named Pelican Products Co. Inc. ("Pelican"), which is a separate company that manufactures and sells novelty items, such as keychains, pens, etc. that are customized to include their clients' names and numbers.

The parties entered into a two-page agreement titled "Exclusive Right to Sell or Lease Property," effective as of March 23, 2015 ("the Brokerage Agreement"), which granted plaintiff an exclusive right to list the Building for sale. Pursuant to the Brokerage Agreement, the contract terms were set as follows, inter alia: (1) the "exclusive right to sell" obligated defendant to pay the Brokerage Agreement commission to plaintiff, even if defendant or another broker ultimately found the buyer during the contract term; (2) plaintiff was authorized to offer the Building for sale at a price of $2,750,000; (3) the contract term was set for the period starting March 23, 2015 and ending July 23, 2015 ("Contract Term"); and (4) plaintiff's commission was to be 5% of the purchase price ("the Commission"). The parties contemporaneously entered into an "Exclusive Right To Sell Business" agreement ("the Business Sale Agreement"), wherein defendant agreed to pay plaintiff a commission only if the listed business was sold during the Contract Term. Defendant alleges that plaintiff prepared both agreements, and that the following language was tellingly only

incorporated into the Business Sale Agreement and not the Brokerage Agreement: "Owner will pay the same commission [to broker], if within 180 days after this agreement terminates, the Owner sells the Listed Business to anyone who saw the listed business through brokers."

During the Contract Term, plaintiff procured several prospective purchasers of the Building, one of which was non-party Gotham Seafood Corporation ("Gotham"). In May 2015, plaintiff's employee, Mark Weaver, showed the Building to John McGuire, Gotham's principal. Plaintiff alleges that due to its efforts, defendant signed a Letter of Intent dated May 18, 2015 ("the LOI") for the conveyance of the Building to Gotham, at a purchase price of $2,750,000. Pursuant to a June 12, 2015 email, plaintiff reported to defendant that McGuire was not ready or interested in proceeding until he sold other unrelated property that he owned. There is no dispute that no contract of sale was signed.

On October 26, 2015, three months after the Contract Term expired, defendant entered into a contract of sale ("Contract of Sale") to sell the Building for $2,825,000 to non-party Sean-Saki Holdings Ltd. ("SSH"). By deed dated January 5, 2015 ("the Deed"), the Building was conveyed to SSH. On January 19, 2016, the Deed was recorded in the Bronx County Office of the City Registrar of the City of New York ("the City Registrar") under CRFN 201600017853. Pursuant to a sublease agreement dated January 5, 2016 ("Sublease"), SSH subsequently subleased the Building to Gotham and recorded it with the City Registrar's office on January 29, 2016 under CRFN 20160032633. Plaintiff submits the following evidence in support of its allegation that SSH and Gotham are owned and controlled by the same principals: (1) the records of the New York State Department of State, Division of Corporations, which show that SSH and Gotham share the same principal executive office located at 542 West 29th Street in Manhattan; and (2) the Sublease, which (a) is signed on behalf of SSH and Gotham by the same person – non-party witness John McGuire – who is identified as the President of both companies, and (b) identifies McGuire as the 100% owner of SSH and the 60% owner of Gotham.

On March 2, 2016, plaintiff commenced this action to recover from defendant commissions in the sum of $141,250 (i.e., 5% of the ultimate $2,825,000 sale price) allegedly due under the Brokerage Agreement. The complaint states causes of action for (1) breach of contract, and (2) breach of the implied covenant of good faith and fair dealing. On March 17, 2017, plaintiff filed an amended complaint, adding a third cause of action, requesting common-law relief for being the procuring cause of the sale. On March 20, 2017, defendant submitted an answer, stating the following affirmative defenses: (1) plaintiff is barred from bringing this action by the terms of the Brokerage Agreement; (2) pursuant to CPLR 8303-a and New York Rules of Court Subpart § 130-1, plaintiff's claims are frivolous, thereby entitling defendant to attorney's fees not exceeding $10,000; and (3) the action is barred by the Statute of Frauds, as neither the Brokerage Agreement nor any note or memorandum thereof was ever made in writing and subscribed by the parties. Plaintiff filed a Note of Issue on June 27, 2017.

On December 7, 2016, McGuire, SSH's principal and the Building's ultimate purchaser, appeared for a deposition, wherein he testified that, inter alia: (1) in or about 2013, he began looking to purchase commercial realty in the Bronx when he started getting offers on real property he owned that he was then using to operate Gotham; (2) he first met with plaintiff when plaintiff was identified as the Building's listing agent; (3) he offered plaintiff $2,700,000 for the Building, but was told that his offer was too low; (4) he never submitted an offer sheet, never signed the LOI, and never spoke to plaintiff again; (5) in the fall of 2005, whilst he was in the Bronx looking at other properties, he serendipitously drove by the Building, stopped and spoke to Kenneth Silver, defendant's principal, and discovered that it had not yet been sold; (6) he then had a meeting with Kenneth and David Silver, wherein he agreed to pay $2,850,000 for the Building; and (7) he had no secret negotiations with defendant during the time he dealt with plaintiff's employees.

On February 16, 2017, Jack Guttman, plaintiff's owner, appeared for a deposition, wherein he, inter alia: (1) conceded that Pelican and the Building were not sold during the Contract Term; and (2) testified that he had no dealings with McGuire after June 12, 2015, the date that McGuire rejected defendant's initial asking price of $2,7500,000. On March 22, 2017, Scott Wallace, a licensed salesman plaintiff employed for four years, appeared for a deposition, wherein he alleged that, inter alia: (1) he had no further contact with McGuire after May 30, 2015, after McGuire

refused to sign any type of letter of intent; (2) on June 12, 2015, Wallace sent an email to Kenneth Silver stating that McGuire could not afford to have two buildings "going at the same time"; and (3) there were other interested buyers and offers made, but none of them were accepted. On April 28, 2017, Matt Weaver, a licensed salesman plaintiff employed for six months and last worked for plaintiff in 2015, appeared for a deposition, wherein he testified that, inter alia: (1) McGire told him that he needed to sell his property before buying another one; and (2) he did not have further contact with McGuire after he left plaintiff's employ in June 2015.

On May 16, 2017, Kenneth Silver, defendant's President, appeared for a deposition, wherein he testified that, inter alia, it was due to the rising costs of production in 2015 that the Silver brothers decided to put Pelican and the Building up for sale.

The Instant Motions

Defendant now moves for summary judgment and to dismiss the complaint. Defendant argues, inter alia: (1) that it did not breach the Brokerage Agreement because there was no contract of sale signed during the four-month Contract Term, establishing that plaintiff's Commission was never triggered pursuant to the Brokerage Agreement's terms; (2) that it did not collude with SSH or McGuire to delay, fail, or refuse to facilitate a closing; (3) that the Contract of Sale's essential terms were negotiated after the Contract Term expired, including Phase I Environmental Studies, geophysical studies, ground penetrating radar studies, and the ultimate sale price ("the Essential Terms"); (4) that it has established its *prima facie* entitlement to summary judgment on its second cause of action for the breach of the implied covenant of good faith and fair dealing, as the record demonstrates that the Contract of Sale may not be attributed to efforts plaintiff made during the Contract Term; and (5) that plaintiff's common-law action alleging its entitlement to the Commission because it was a "procuring cause" of the Contract of Sale is foreclosed where the parties expressly agreed in writing that the Commission would be earned only if a contract of sale is signed during the Contract Term. Defendant submits, inter alia: (1) the affidavits of Kenneth and David Silver; the Brokerage Agreement; the Business Sale Agreement; the various deposition transcripts; the LOI; the Contract of Sale; and various email correspondences between the parties and/or McGuire. In opposition, plaintiff argues that there questions of fact exist as to defendant's bad faith conduct, which are sufficient to preclude the dismissal of its contract-based causes of action.

Plaintiff now moves (1) for partial summary judgment, as to its third cause of action, its common law action alleging its entitlement to the Commission because it was a "procuring cause" of the Contract of Sale *only*; and (2) to dismiss defendant's affirmative defenses, arguing, inter alia, that, pursuant to NYGOL § 5-701(a)(10), the Statute of Frauds defense is inapplicable to real estate brokers.

Discussion

A court may grant summary judgment where there is no genuine issue of material fact, and the moving party has made a prima facie showing of entitlement to a judgment as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dept 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment"). The moving party's burden is to tender sufficient evidence to demonstrate the absence of any material issue of fact. See Ayotte v Gervasio, 81 NY2d 1062 (1993). Once this initial burden has been met, the burden then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980). To prove breach of contract, a plaintiff must show: (1) the existence of a contract; (2) plaintiff's performance thereunder; (3) defendant's breach thereof; and (4) resulting damages. See Harris v Seward Park Housing Corp., 79 AD3d 425, 426 (1st Dept 2010).

Defendant has established its entitlement to summary judgment in its favor and to dismissal of plaintiff's complaint. The Brokerage Agreement ¶ 4(a) states that if "during the [Contract Term] a contract is signed to sell the premises to any person and a closing of the sale of the premises occurs at any time with such person, then the commission will be payable to [plaintiff] at that closing." Paragraph 4(b) of the Brokerage Agreement further states, in relevant part, that "[u]nless and until a closing shall occur, [defendant] will *not* be obliged to pay [plaintiff] any commission" (emphasis added). The record reflects, and plaintiff does not contest, that no contract of sale was signed before the Contract Term

expired, as required by the explicit terms of the Brokerage Agreement to trigger defendant's obligation to pay to plaintiff the Commission. Plaintiff did not obtain a deal on the terms set by the Brokerage Agreement, and the record does not support plaintiff's allegation that defendant somehow breached the Brokerage Agreement, or breached the implied covenant of good faith and fair dealing, simply because defendant ultimately sold the Building to SSH. While plaintiff alleges that but for its marketing efforts defendant would not have found SSH, the record does not demonstrate any direct and proximate link between plaintiff's efforts and the deal that was ultimately consummated months after plaintiff ceased its efforts in the matter. See Cushman & Wakefield, Inc. v 214 E. 49th St. Corp., 218 AD2d 464, 466 (1st Dept 1996) ("For well more than a century we have been guided by the principal that a broker's duty is to bring the minds of a buyer and seller to agreement on the sale (i.e., its terms and price), and until that is accomplished, no right to commissions accrues. It is not enough simply to open negotiations between parties; unless the broker can produce a purchaser who is ready, willing and able to buy, under the terms as specified by the seller, he has done nothing to induce a purchase, and will not be entitled to a commission even if that prospect ultimately purchases the property"); see generally Greene v Hellman, 51 NY2d 197, 206 (1980) ("It has long been recognized that a broker ... does not automatically and without more make out a case for commissions simply because he initially called the property to the attention of the ultimate purchaser. If that were enough, given the enterprise which our competitive society prizes in its brokers and its salesmen, a veritable morass of claims to property rights in their prospects would result"). Additionally, the terms of the ultimate Contract of Sale are significantly different from the terms of the LOI: (1) SSH purchased the Building for $2,825,000, as opposed to the LOI's demand for $2,750,000; and (2) the Contract of Sale contains the Essential Terms, which the LOI does not.

As a final matter, although this argument is no longer relevant to deciding the instant motions, plaintiff is correct in pointing out that the statute of frauds provision "*shall not apply* to a contract to pay commission to ... a duly licensed real estate broker or real estate salesman." See McKinney's General Obligation Law § 5-701(a)(10) (emphasis added); see also Sholom & Zuckerbrot Realty Corp. v Citibank, N.A., 205 AD2d 336, 338 (1st Dept 1994) ("A commission agreement with a real estate broker may be oral and does not fall within the Statute of Frauds"). As plaintiff is a duly licensed real estate broker, the statute of frauds defense fails.

The Court has considered plaintiff's other arguments and finds them to be unavailing and/or non-dispositive.

Accordingly, defendant's motion for summary judgment is hereby granted, and plaintiff's motion for partial summary judgment is hereby denied.

Conclusion

Defendant's motion for summary judgment is granted; plaintiff's motion for partial summary judgment is denied. The Clerk is hereby directed to enter summary judgment in favor of defendant, Zilber Realty LLC, and against plaintiff, Guttman Realty LLC d/b/a Guttman Realty Advisors, and to dismiss plaintiff's complaint with prejudice.

Dated: May 29, 2018

Arthur F. Engoron, J.S.C.