

Bay Sun Realty Inc. v Chang Jiang Li

2019 NY Slip Op 33377(U)

November 7, 2019

Supreme Court, Kings County

Docket Number: 508685/19

Judge: Leon Ruchelsman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

KINGS COUNTY CLERK
FILED

2019 NOV -8 AM 10:37

-----x
BAY SUN REALTY INC.,

Plaintiff,

Decision and order

- against -

Index No. 508685/19

CHANG JIANG LI, JIN HUA XU, NAN NAN LI,
XIANGAN GONG, CHENG YUN HSU & TAI WEI HSU,
Defendants,

MS # 1

November 7, 2019

-----x
PRESENT: HON. LEON RUCHELSMAN

The defendants Chang Jiang Li, Jin Hua Xu, Nan Nan Li, Xiangan Gong have moved pursuant to CPLR §3211 seeking to dismiss the complaint. The plaintiff has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination. The court will address the substantive merits of the motion to dismiss.

As recorded in a prior order, the plaintiff is a real estate broker. They commenced this action against all the defendants seeking brokerage fees concerning the purchase of a property located at 1444 West 9th Street in Kings County. The defendants Cheng Yun Hsu and Tai Wei Hsu were the owners of the property and sold the property to defendants Chang Jiang Li and Jing Hua Xu and their daughter Nan Nan Li. Defendant Xian An Gong was the attorney for the purchasers. On April 17, 2014 the defendants purchasers and the plaintiff entered into a Offer to Purchase Agreement whereby it was agreed the plaintiff was to be paid a

brokerage fee. Specifically, the agreement provided that “unless stated otherwise, the brokerage commission is to be paid by the Sellers” (see, Offer to Purchase Agreement). The plaintiff commenced this action seeking recovery of his brokerage commission. The defendants Chang Jiang Li, Jin Hua Xu, Nan Nan Li, Xiangan Gong have moved, essentially, seeking to dismiss the lawsuit on the grounds there was no valid brokerage agreement between them and in any event the broker did not procure the sale.

Conclusions of Law

“[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law” (see, e.g. AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005], Leon v. Martinez, 84 NY2d 83, 614 NYS2d 972, [1994], Hayes v. Wilson, 25 AD3d 586, 807 NYS2d 567 [2d Dept., 2006], Marchionni v. Drexler, 22 AD3d 814, 803 NYS2d 196 [2d Dept., 2005]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

It is well settled that for a party to recover real estate brokerage commissions the broker must establish (1) that the broker is duly licensed, (2) that the broker had a contract, express or implied, with the party to be charged with paying the commission, and (3) that the broker was the procuring cause of the sale (see, Friedland Realty Inc., v. Piazza, 273 AD2d 351, 710 NYS2d 97 [2d Dept., 2000]). Although defendant Chang Jiang Li signed an Offer to Purchase agreement with the plaintiff that agreement specifically states that "the parties further agree this document does not constitute a contract or memorandum thereof" (see, Offer to Purchase). The plaintiff asserts the Offer to Purchase "is an enforceable contract between Plaintiff and Defendants C. Li and Xu" (see, Affirmation in Opposition, ¶ 34). The plaintiff is aware of the language in the Offer to Purchase Agreement but argues that "it is true that the OTP states that 'this document does not constitute a contract,' but it only means that the OTP is offer from Defendants C. Li and Xu to Sellers, instead of a contract between them" (id. at ¶ 35). It is difficult to discern the precise legal argument being presented, however, clearly, that language indicates the offer to Purchase Agreement was not a contract. Consequently, the motion seeking to dismiss the first cause of action for breach of contract is granted.

Turning to the cause of action for quantum meruit, as noted

in the prior order, it is well settled that a plaintiff may file an action for quantum meruit as an alternative to a breach of contract claim (see, Thompson v. Horowitz, 141 AD3d 642, 37 NYS3d 266 [2d Dept., 2016]). "To be entitled to recover damages under the theory of quantum meruit, a plaintiff must establish: "(1) the performance of services in good faith, (2) the acceptance of services by the person or persons to whom they are rendered, (3) the expectation of compensation therefor, and (4) the reasonable value of the services rendered" (F and M General Contracting v. Oncel, 132 AD3d 946, 18 NYS3d 678 [2d Dept., 2015]). In this case, there was surely an expectation of compensation by the plaintiff from the moving defendants. The defendants essentially argue that the plaintiff was not the procuring cause of the sale. However, there are questions of fact in this regard and the complaint, which must be presumed true for the purposes of this motion, establishes the ability for the plaintiff to pursue claims for quantum meruit. Therefore, the motion seeking to dismiss the quantum meruit claim is denied. Likewise, the motion seeking to dismiss the unjust enrichment claim is denied. In the absence of any contract and considering the plaintiff has presented prima facie evidence it did work for the defendants the motion seeking to dismiss the unjust enrichment claim is denied.

The motion seeking to dismiss the tortious interference claim is granted. Without the existence of a contract there can

be no such tortious interference.


Lastly, concerning the fraud and conspiracy to commit fraud causes of action, as noted, it is well settled that to succeed upon a claim of fraud it must be demonstrated there was a material misrepresentation of fact, made with knowledge of the falsity, the intent to induce reliance, reliance upon the misrepresentation and damages (Cruciata v. O'Donnell & Mclaughlin, Esqs, 149 AD3d 1034, 53 NYS3d 328 [2d Dept., 2017]). These elements must each be supported by factual allegations containing details constituting the wrong alleged (see, JPMorgan Chase Bank, N.A. v. Hall, 122 AD3d 576, 996 NYS2d 309 [2d Dept., 2014]). Moreover, it is well settled that to successfully plead fraud, the fraud must be pled with specificity from which intent or reasonable reliance might be inferred (see, CPLR §3016(b), Goldstein v. CIBC World Markets Corp., 6 AD3d 295, 776 NYS2d 12 [1st Dept., 2004]). The Verified Complaint does not present any material misrepresentation made by the defendants upon which the plaintiff relied. The Verified Complaint states that **Sellers** informed **Broker** that they no longer wished to sell the Subject Premises for the agreed upon price and that they wanted more money for the Subject Premises (id at ¶ 26). Further, the Verified Complaint states that "**Defendant's** colluded to fraudulently represent to Plaintiff that **Defendant Chiang Jiang Li** no longer wished to purchase the **Subject Premises**" (see,

Verified Complaint, ¶ 68). Even if true that does not describe any misrepresentation designed to induce the plaintiff to act in any way. Thus, the plaintiff has failed to properly allege fraud. Consequently, the motion seeking to dismiss the fraud claim is granted. Thus, all the causes of action are dismissed except for the claim for quantum meruit and unjust enrichment.

So ordered.

ENTER

DATED: November 7, 2019
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC

KINGS COUNTY CLERK
FILED
NOV 8 AM 10:37