Villager Capital Advisors, LLC v Union Settlement Assn., Inc.
2020 NY Slip Op 32333(U)
July 17, 2020
Supreme Court, New York County
Docket Number: 450962/2018
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

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VILLAGER CAPITAL ADVISORS, LLC,

Plaintiff,

- v -

UNION SETTLEMENT ASSOCIATION, INC., EAST 103RD STREET HOUSING DEVELOPMENT FUND CORPORATION, and EAST 104TH STREET HOUSING DEVELOPMENT FUND COMPANY, INC.,

Defendants.

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INDEX NO. 450962/2018

MOTION DATE 03/16/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68

were read on this motion to/for SUMMARY JUDGMENT.

Marvin and Marvin, PLLC., Rhinebeck, NY (John R. Marvin of counsel), for plaintiff.
Goldstein Hall, PLLC, New York, NY (Brian J. Markowitz and Daniel Goldenberg of counsel), for defendants.

Gerald Lebovits, J.:

This motion for summary judgment concerns whether defendant Union Settlement Association, Inc. (Union), must pay plaintiff, Villager Capital Advisors LLC, an additional $104,001.78 (plus interest) as part of a brokerage commission.

BACKGROUND

This action arises out of a brokerage agreement between plaintiff, a real-estate broker, and defendant Union. Union is the sole member of two housing development fund corporations, defendants East 103rd Street Housing Development Fund Corporation and East 104th Street Housing Development Fund Company (HDFCs). Union owned and operated the St. Lucy's Apartments through the two funds. Union wanted to sell its interest in the St. Lucy's Apartments. To do so, Union and the HDFCs entered into a brokerage agreement with plaintiff. Under the terms of the brokerage agreement, Union agreed to pay plaintiff "a Sale Commission equal to the sum of (i) 5% of the first $1,000,000 of gross sale price of the Project Interest, plus (ii) 3% of the portion of the gross sale price in excess of $1,000,000." (NYSCEF No. 2 at 2.) Plaintiff was to

receive the commission "immediately upon the closing of the sale transaction." (NYSCEF No. 2 at 2.)

Plaintiff began to gather financial information and to solicit bids. Union eventually selected a bid from L&M Development Partners and Settlement Housing Fund, Inc. (L&M). Union and L&M signed a purchase agreement that acknowledged plaintiff as the broker that procured the deal. L&M agreed to assume Union's debts and to pay $5,747,574 in cash for the St. Lucy's Apartments. (NYSCEF No. 58 §§ 2.1 & 3.3.) The assumed debt consisted of two Housing Development Corporation (HDC)-financed mortgage loans, totaling approximately $3,466,000. The assumed debt plus cash payment totaled $9,214,294.

The sale also required approval by both the Attorney General and Supreme Court. (*See* Not-For-Profit Corporation Law (NPCL) §§ 510, 511.) The Attorney General signed off on the petitions that Union, the HDFCs, and L&M submitted to the court for approval of the sale. In those petitions, the parties represented the purchase price as $9,214,294 for the St. Lucy's Apartments—the sum of the cash purchase price and the value of the mortgages assumed by L&M. Supreme Court, New York County (Masley, J.), approved the sale by two orders dated December 22, 2017. In those orders, Justice Masley listed the purchase price as $9,214,294. (NYSCEF No. 3 at 4.)

Plaintiff submitted an invoice for its commission to Gabriel Gerbi, Esq., Union's attorney. The invoice's commission calculation was based on a purchase price of $9,214,294. The amount due, less a pre-payment of $10,000, was $286,429. Gerbi replied by email that the assumed debt was not part of the consideration for plaintiff's commission. Plaintiff responded, arguing that the gross purchase price of $9,214,294 was confirmed in Justice Masley's orders. (NYSCEF No. 42.) Union and its attorneys made no further mention of the commission.

L&M and Union scheduled a closing for January 31, 2018. According to the allegations of the complaint, the parties did not inform plaintiff about the closing. Union told plaintiff that the deal could not close until certain code violations were remedied. Nonetheless, the closing occurred as scheduled on January 31, 2018. A week later, on February 6, 2018, Peter Brodie, plaintiff LLC's sole member, emailed David Nocenti, Union's executive director, to check on the status of the code violations. Nocenti replied on February 13, 2018, telling Brodie that the deal had closed and thanking him for his efforts.

Plaintiff received payment from Union for $182,427.22 on February 26, 2018—$104,001.78 less than the amount in plaintiff's commission invoice. Union included a cover letter explaining that the commission calculation was based only on the cash payment paid by L&M and did not include the value of assumed mortgages.

Plaintiff then brought this action for breach of contract and quantum meruit, seeking payment of the alleged shortfall. Plaintiff now moves under CPLR 3212 for summary judgment in its favor on the breach of contract claim. Union cross-moves under CPLR 3212 for summary judgment dismissing plaintiff's claims.

DISCUSSION

I. Plaintiff's Argument for Summary Judgment

A movant on summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. (*Pullman v Silverman*, 28NY3d 1060, 1062 [2016].) The burden then shifts to the motion's opponent "to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." (*Sumitomo Mitsui Banking Corp. v Credit Suisse*, 89 AD3d 561, 563 [1st Dept 2011].) If any doubt arises about the existence of a triable issue of fact, the motion for summary judgment must be denied. (*O'Brien v Port Auth. of N.Y. and N.J.*, 29 NY3d 27, 37 [2017].)

Plaintiff's summary-judgment motion here seeks (i) $104,001.78 in unpaid commission (representing plaintiff's commission on the value of the two assumed mortgages); (ii) interest at the judgment rate on $286,249 from January 31, 2018 to February 26, 2018 (when plaintiff received partial payment of the commission); and (iii) interest at the judgment rate on $104,001.78 from February 26, 2018 to the date of payment.

The issue on this motion is whether "gross sale price" in the brokerage agreement refers to L&M's cash payment or to L&M's cash payment and the two mortgages L&M assumed. Summary judgment may be granted on this issue only if the text of the brokerage agreement unambiguously expresses the parties' intent one way or the other. (*See Bank of New York Mellon Tr. Co. v Merrill Lynch Capital Servs. Inc.*, 99 AD3d 626, 628 [1st Dept 2012].) Thus, to prevail at summary judgment, a party must "show that [its] construction is the only one that flows naturally from the words used." (*Stone Travel Agency Inc. v Lambrou*, 176 AD2d 1170, 1171 [3d Dept 1991].) In considering this question, the court may not interpret the text of the contract in a way that "add[s] or excise[s] terms." (*Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 66 [1st Dept 2008].) And the contract may not be construed in a way that produces an absurd or commercially unreasonable result. (*Lipper Holdings, LLC v Trident Holdings, LLC*. 1 AD3d 170, 171 [1st Dept 2003].)

Plaintiff argues that "gross sale price" unambiguously refers to the entire consideration paid for the apartments, including the value of the mortgages that L&M assumed. (NYSCEF No. 44, at 11-12.) Plaintiff contends that a commission payment based on the entire consideration paid by the buyer is the industry standard and is thus commercially reasonable. (NYSCEF No. 65, at 8.) And Plaintiff asserts that any interpretation of "gross sale price" that does not include the assumed debt effectively excises the word "gross" from "gross sale price."

In response, Union contends that plaintiff's interpretation is "unheard of in the real estate industry." (NYSCEF No. 65, at 10-11.) Under plaintiff's interpretation, Union argues, if L&M assumed the mortgages and there was no cash payment, plaintiff would still receive a commission—which would assertedly be an absurd result (*See Lipper Holdings*, 1 AD3d at 171 [reasoning that construing a contract so that compensation payments were based on "phantom profits" is commercially unreasonable and therefore impermissible].) Plaintiff replies that this result is not absurd, and indeed would be consistent with industry practice, because the assumed debt is still consideration paid for the apartments. (NYSCEF No. 67, at 7.)

This court concludes that neither party has demonstrated that the party's preferred interpretation of "gross sale price" is the only one flowing from the text of the brokerage agreement. The agreement is instead ambiguous.

It is reasonable, as plaintiff asserts, for a broker who facilitates an agreement for a buyer to assume millions of dollars in mortgages to be paid a commission based on the value of those mortgages. This is particularly true here because the text of the brokerage agreement reflects the parties' understanding that the mortgages could be assigned to a buyer and that plaintiff's services were being enlisted to help bring about that assignment. The brokerage agreement provides that the properties to be sold are subject to mortgages financed by the HDC (NYSCEF No. 2, *Assumptions*); and it outlines the services plaintiff agreed to provide—including obtaining the HDC's consent to proceed with the sale (NYSCEF No. 2, *VCA Services*). Thus, it would be reasonable for the agreement to provide that plaintiff's commission would be calculated based the value of the mortgage debts it helped get assigned from Union to L&M, as well as the cash payment by L&M.

On the other hand, Union's interpretation—that "gross sale price" refers only to L&M's cash payment—is also reasonable. The mortgage debts at issue were held by a third-party lender and (as plaintiff concedes) were not Union's to sell. (*See* NYSCEF No. 53, *Brodie Transcript* at 61.) It is plausible that if the mortgages were not Union's to sell, but merely part of the overall structure of the agreement, then the parties did not intend the mortgages to be part of the "gross sale price." (*See id.*)

In the alternative, plaintiff and Union present interpretations of "gross sale price" based on extrinsic evidence. (NYSCEF No. 44, at 10-11; NYSCEF No. 65 at 11-19.) The petition and the two court orders approving the sale include the mortgages L&M assumed in the "purchase price." Plaintiff argues this fact demonstrates that "gross sale price" in the brokerage agreement should also include the mortgages L&M assumed. The purchase sale agreement between L&M and Union, however, excludes the mortgages from the "purchase price." Thus, Union argues that the purchase sale agreement supports its interpretation that "gross sale price" in the brokerage agreement excludes the mortgages. Union also contends that the previous drafts of the brokerage agreement support its interpretation. The drafts contain a $50,000 minimum commission payment provision. (*See* NYSCEF No. 52, *VCA Fee, Fee Amount*.) Union argues that if the parties to the brokerage agreement intended the mortgages' value to be part of the commission-payment calculation, the minimum payment term would not be necessary because a commission based solely on the mortgages would exceed $50,000.

When parties seek to use extrinsic evidence to resolve an ambiguous term of a contract, summary judgment remains inappropriate when determining the meaning of that term would require "a choice among inferences to be drawn from extrinsic evidence." (*Amusement Bus. Underwriters v American Intl. Group*, 66 NY2d 878, 880 [1985].) This court concludes that the conflicting extrinsic evidence relied upon by plaintiff and by Union presents a choice among two plausible (and opposite) inferences as to the parties' intent.[1] A triable issue of fact thus remains

[1] Union argues that under the contra proferentem doctrine, any ambiguity in the brokerage agreement should be construed in Union's favor because plaintiff drafted the brokerage

about whether Union and plaintiff intended "gross sale price" to include the value of the mortgages that L&M assumed. (*See LoFrisco v Winston & Strawn LLP*, 42 AD3d 304, 307-308 [1st Dept 2007].)

II. Union's Argument for Summary Judgment

Union cross-moves for summary judgment arguing that "gross sale price" is unambiguous and does not include the assumption of the mortgages. Union contends that its interpretation is consistent with that of an "ordinary businessman" and the only sensible interpretation. (NYSCEF No. 65, at 21.) For the reasons set forth above, however, "gross sale price" is ambiguous, and therefore summary judgment is inappropriate.

Union also asks this court to dismiss plaintiff's breach-of-contract cause of action for unpaid commission as against the HDFCs on the ground that plaintiff was not in privity with the HDFCs. In response, plaintiff contends that it can maintain its contract claim against the HDFCs because they were intended beneficiaries of the brokerage agreement. To demonstrate that a party was an intended third-party beneficiary of a contract, one must establish "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [the third party's] benefit and (3) that the benefit to him is sufficiently immediate . . . to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost." (*Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786 [2006].) Where performance is to be rendered directly to a third party under the terms of an agreement, the third party is deemed an intended beneficiary. (*Internationale Nederlanden (U.S.) Capital Corp. v Bankers Trust Co.*, 261 AD2d 117, 123 [1st Dept 1999].)

It is undisputed that the brokerage agreement is a valid contract between Union and plaintiff. The terms of the brokerage agreement provide that plaintiff was to facilitate the sale of Union's "100% ownership" of the HDFCs and all the interests held by each of those entities. (NYSCEF No. 2, *Assumptions*.) Plaintiff procured a buyer for Union and the HDFCs' assets in accord with the terms of the brokerage agreement. It follows that the HDFCs were beneficiaries of plaintiff's direct services, and plaintiff's contract cause of action against them may proceed.

Union also moves for summary judgement dismissing plaintiff's cause of action in quantum meruit. The existence of a valid, enforceable contract governing a particular subject matter, precludes recovery in quantum meruit for events arising out of the same subject matter. (*See Clark-Fitzpatrick, Inc. v Long Island Rail Road Co.*, 70 NY2d 382, 388 [1987].) Plaintiff

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agreement. (NYSCEF No. 65 at 19-20.) That rule of construction, however, is inapplicable when a contract results from negotiations between two commercially sophisticated entities. (*Citibank, N.A. v 666 Fifth Ave. Ltd. P'ship*, 2 AD3d 33, 331 [1st Dept 2003].) Here, Union was represented by counsel during the brokerage agreement negotiations and plaintiff was not. The parties also exchanged several drafts and incorporated some of Union's edits. (NYSCEF No. 49, *Affidavit of David Nocenti* ¶ 11.) Union does not demonstrate that it had "no voice in the selection of the [brokerage agreement's] language" to demand that the ambiguity be construed against plaintiff. (*67 Wall St. Co. v Franklin Natl. Bank*, 37 NY2d 245, 249 [1975].)

argues that its quantum meruit cause of action is an alternative theory of recovery, citing the possibility that this court may hold that the HDFCs were not intended beneficiaries to the brokerage agreement and dismiss the breach of contract claim as against them. But the validity and enforceability of the brokerage agreement is undisputed; that alone is sufficient to bar plaintiff from proceeding also on a quantum meruit theory. Whether the HFDCs were intended beneficiaries of the contract is beside the point. And in any event, although a plaintiff may *plead* alternative theories of recovery, by the time an action reaches the summary-judgment stage, the plaintiff must choose between those theories. (*See H.B.L.R., Inc. v. Command Broadcast Assoc., Inc.*, 156 A.D.2d 151, 152 [1st Dept 1989].) Thus, plaintiff's cause of action in quantum meruit is dismissed.

Accordingly, it is hereby

ORDERED that plaintiff's motion under CPLR 3212 for summary judgment in its favor is denied; and it is further

ORDERED that the branch of Union's cross-motion for summary judgment under CPLR 3212 seeking dismissal of plaintiff's breach-of-contract claims is denied; and it is further

ORDERED that the branch of Union's cross-motion for summary judgment under CPLR 3212 seeking dismissal of plaintiff's quantum-meruit claim is granted.

7/17/2020
DATE

HON. GERALD LEBOVITS
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE