Eretz Realty, Ltd. v Falcone Realty Corp.
2021 NY Slip Op 31660(U)
May 17, 2021
Supreme Court, Kings County
Docket Number: Index No. 507570/2019
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

X

ERETZ REALTY, LTD.,

Plaintiff,

-against-

FALCONE REALTY CORP.,

Defendant.

X

DECISION/ORDER

Index No. 507570/2019
Motion Seq. No. 1
Date Submitted: 3/11/2021

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of plaintiff's motion for summary judgment

Papers	**NYSCEF Doc.**
Notice of Motion, Affirmation and Exhibits Annexed……	6-16
Affirmation in Opposition and Exhibits Annexed.....	19-25
Reply Affirmation.....	26

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is an action for a real estate broker's commission which plaintiff claims was earned and not paid. There is one cause of action under the common law and one based upon the negotiated (and lower) commission that was embodied in a "deal sheet." The property at issue is a commercial property in Brooklyn, located at 1649-1661 61st Street. After issue was joined, plaintiff moved for summary judgment, seeking an order awarding plaintiff a judgment for $150,200.00, which is the lower of the two calculations in the complaint.

Plaintiff supports its motion with an affirmation of counsel, an affidavit from Mendy Rub, the plaintiff's salesperson who worked on the transaction, and various emails. Mr. Rub claims he worked on this sale for several years, and lowered his commission several times,

and the seller lowered the sale price several times and increased the allowable amount of the mortgage contingency clause, and yet, after the seller's attorney finally received the go ahead from his client to send out the contract of sale, the seller refused to sign it after the buyer signed it and returned it to the seller's attorney. The plaintiff provides various iterations of the "deal sheet" with the final one stating that the seller would pay a commission of 2 percent, or $150,250.00 (Dos. 9, 11, and 12). This back and forth went on for more than two years, as described by Mr. Rub, until November 29, 2018, when the signed contract was sent by the buyer's attorney to the seller's attorney with a cover letter that the down payment would be wired once he received confirmation that the seller had signed the contract. The seller never signed the contract, and it appears defendant sold the property on May 30, 2019 to a different buyer, for approximately a million dollars more than the price in the unsigned contract described above.

Mr. Rub's affidavit (Doc. 8) describes an "oral agreement" and negotiations and renegotiations and different deal sheets exchanged prior to the issuance of the contract of sale. With regard to what he calls the first sale, he states that the defendant seller "wanted to sell a different property first," so after plaintiff was given the listing for this property (1649-1661 61st Street), and found a buyer for this property, after considerable negotiations for the sale, defendant sold the buyer a different property,1632-1648 61st Street, which must be more or less across the street. Both sides agree that plaintiff was paid a commission on that transaction.

With regard to the second sale, Mr. Rub states [aff Par. 12] "Approximately two years later, the seller asked me to try to reactivate the prior proposed sale. I contacted the purchaser, who was still interested in purchasing the Property, but at the reduced price of $7,512,500 (reduced from $7,700,000)." He concludes at Par. 18 that "the sellers reneged

on the deal and approximately six months later sold the Property to another purchaser and refused to pay me my commission." At Par. 20, he states "Since I located a prospective purchaser that was satisfactory to the sellers, I earned my commission and I am entitled to recover my 2% commission of $150,250.00."

Defendant opposes the motion with an affirmation of counsel, Jay Hochfelsen, who was the attorney who represented defendant in both of the subject sales transactions, a memo of law, two deal sheets, and three brokerage agreements. Chronologically, the first brokerage agreement, Doc. 21, is for the $7,700,000 purchase price and 2.5% commission, and although it is not dated, we know that this was in 2016, by matching it to the deal sheet. Then, Doc. 22 is the brokerage agreement for the second property, which Perlstein purchased in 2017. Document 24 is the unsigned brokerage agreement for the transaction at issue, which while undated, matches the terms in the deal sheet (Doc 23) and the contract of sale sent to Perlstein. Therefore, the only signed broker's agreement for the property at issue was executed in 2016, before Perlstein instead purchased defendant's other property. That 2016 brokerage agreement was no longer in effect in 2018 when the deal for the first property was reactivated. Not only does it have the wrong deal terms, but a brokerage agreement is deemed to have a reasonable duration, usually a year, so it had expired (see *Hampton Realty v Conklin*, 220 AD2d 385 [2d Dept 1995]). Mr. Hochfelsen seems to have been aware of this, as he annexes the "new" agreement as Doc. 24, but neither side signed it and as such it is not enforceable.

Mr. Hochfelsen, the defendant's attorney, adds more and different facts, with the following, in Par. 10 of his affirmation: "During the course of the negotiations of the First 2016 Transaction, [the buyer] decided he preferred to purchase a different nearby property" (the "Second Property"), also owned by defendant Falcone, located at 1632-1648 61st Street,

Brooklyn, New York (the "Second 2016 Transaction"). [Plaintiff] Eretz acted as the real estate broker for the Second 2016 Transaction." This contradicts plaintiff's affidavit, which states [Par. 11] that it was the seller who wanted to sell the other property "first." This difference has no legal significance to this matter, however. He goes on to say this deal closed in 2017, and Eretz was paid its commission.

Mr. Hochfelsen then states at Par. 16 of his affirmation that it was the broker who contacted the buyer in 2018 to initiate the negotiations for the other (initial) property at 1649-1661 61st Street: "In 2018, Rub again contacted Perlstein about purchasing the First Property and with Perlstein's renewed interest, the parties recommenced negotiations concerning the purchase of the First Property." To be clear, defendant's attorney claims that plaintiff initiated contact with the buyer on his own, while plaintiff claims defendant Falcone asked him to do so. This too is of no legal significance. Defendant's counsel argues that Eretz earned a commission on the sale of the other and second property to the same buyer, in 2017, but as the sale did not close for the first property, despite renewed negotiations and a contract being issued in 2018, no commission is due, in his opinion.

In essence, counsel states that all of the deal sheets for the property at issue, located at 1649-1661 61st Street, Brooklyn, NY, state that the commission will be paid to the broker at closing, and therefore, even though the deal sheets are not signed by anyone, they take the transaction out of the common law and require the sale to close for a commission to be earned. Mr. Hochfelsen states that his Exhibit 4 (Doc. 23 and also Doc. 12 submitted by plaintiff) was the deal sheet negotiated in Fall 2018 when the buyer again "expressed interest" in purchasing the subject property and signed a contract of sale. He states that subsequent to the issuance of this deal sheet, which states "2% ($150,250.00) of the purchase price to be paid by seller at closing," the brokerage agreement (Doc. 24) was

negotiated. This agreement is not signed by anyone, however. Counsel for defendant concludes that "There is no basis nor reason to pay Eretz a real estate broker's commission because the First Property was not sold to [this buyer] or another buyer introduced nor procured by Eretz. To be sure, Eretz had nothing to do with the purchase of the First Property at all."

Conclusions of Law

It is well established that under the common law, a seller becomes liable to a broker that it has employed when the broker procures a ready, willing, and able buyer on terms acceptable to the seller, even prior to the execution of a written contract of sale (*see Eastern Consolidated Properties v Lucas*, 285 AD2d 421 [1st Dept 2001]; *Prime City Real Estate Co., Inc. v Hardy,* 256 AD2d 80, 81 [1st Dept 1998] [where sellers were held obligated to pay a real estate broker's commission when the sellers and purchaser had agreed on the essential terms of the transaction, notwithstanding the refusal of the vendors to negotiate the remaining details of the sale because of receipt of a higher offer]). The broker's ultimate right to compensation has never been held to be dependent upon the performance of the realty contract or the receipt by the seller of the selling price (*see Hecht v Meller*, 23 NY2d 301, 305 [1968]).

There is no requirement that a real estate brokerage agreement be in writing (*see Tanenbaum v Boehm*, 202 NY 293 [1911]; *Lane-The Real Estate Dept. Store, Inc. v Lawlet Corp*., 28 NY2d 36 [1971]; *Feinberg Bros. Agency Inc. v Berted Realty Co*., Inc., 70 NY2d 828, 830 [1987]; *Salahuddin v Benjamin*, 42 AD2d 522 [1st Dept 1973]). A broker may prove employment by a seller by producing an express agreement or demonstrating the existence of an implied contract of employment (*see Sibbald v The Bethlehem Iron Co*., 83 NY 378 [1881]; *Joseph P. Day Rlty. Corp. v Chera*, 308 AD2d 148 [1st Dept 2003]). As

stated by the Court of Appeals in *Sibbald*, *supra* at 380:

> "[a]contract of employment may be established either by proof of an express and original agreement that the services should be rendered, or by facts showing, in the absence of such express agreement, a conscious appropriation of the labors of the broker. Indeed, . . . the contract may be established in some cases 'by the mere acceptance of the labors of the broker."

Accordingly, applying these principles, and based upon the evidence in the record, the court finds that the parties had an agreement for the payment of plaintiff's services upon the finding of a ready, willing, and able buyer on the sellers' terms, which plaintiff produced, and that the seller was solely responsible for the failure of the sale to be completed. Mr. Hochfelsen did not obtain a broker's agreement before he sent out the contract of sale with his client's consent. Without a written commission agreement, the common law applies. Thus, a commission was earned by plaintiff and is owed by defendant.

The existence of an implied agreement between the parties is determined relative to their objective intent, as evidenced by their words and deeds (*see Traver v Betts*, 83 AD2d 653 [3d Dept 1981]). An implied contract of employment may be based on the seller's acceptance of the broker's services, which occurs when the seller and buyer have agreed upon the terms of the sale (*see Gronich & Co., Inc. v 649 Broadway Equities Co*., 169 AD2d 600 [1st Dept 1991]). Those who accept the results of a broker's services are not entitled to assume that the broker works gratuitously (*id*.). Additionally, although the assent of a person to be charged under an implied contract is necessary, a person may conduct himself in such a manner that his assent may fairly be inferred (*see Miller v Schloss*, 218 NY 400 [1916]).

A broker only earns its commission when it procures a buyer ready, willing, and able to purchase on terms agreed to by the seller (*see Eastern Consolidated Properties v Lucas*, 285 AD2d 421 [1st Dept 2001]); *Prime City Real Estate Co., Inc. v Hardy,* 256 AD2d 80, 81 [1st Dept 1998]). Here, there was no issue of the buyer's financial ability raised, and he had

completed the purchase of the other property in 2017 for approximately $8 million without incident.

In order to be entitled to a commission, it is not necessary that a contract of sale be finalized, merely that there has been a meeting of the minds between the parties on all of the essential terms (*see Trylon Rlty Corp. v Di Martini*, 34 NY2d 899 [1974]; *Linda M. Kirk Assocs., Ltd. v McDonald Equities, Inc.*, 155 AD2d 281 [1st Dept 1989], *lv denied* 75 NY2d 706 [1990]). Thus, the fact that all of the legal and other details respecting the contract, customarily worked out between attorney, had not yet been resolved could not defeat the broker's right to his commission (*see Sanders A. Kahn Assoc., Inc. v Maidman,* 69 Misc 2d at 92, citing *Mengel v Lawrence*, 276 AD 180 [1st Dept 1949]).

The failure to pass title to a buyer will not defeat a broker's entitlement to a commission where the seller frustrates or prevents the consummation of the transaction (*see Lane-Real Estate Dept. Store v Lawlet Corp*., 28 NY2d at 42; *Eastern Consolidated Properties, Inc. v Lucas*, 285 AD2d 421 [1st Dept 2001]; *Linda M. Kirk Assocs., Ltd., v McDonald Equities, Inc.,* 155 AD2d at 282). As the Court of Appeals stated in *Sibbald v Bethlehem Iron Co*., 83 NY at 384, "[i]f the efforts of the broker are rendered a failure by the fault of the employer; if capriciously he changes his mind after the purchaser, ready and willing, and consenting to the prescribed terms, is produced . . . then the broker does not lose his commissions. [B]ad faith is not necessarily an essential ingredient to [a] finding of wrongful prevention" (*see also Tyrlon Rlty. Corp. v DiMartini*, 34 NY2d at 900). The law is clear that when a broker procures an acceptable buyer, the broker has fully performed its part of the agreement and its right to a commission becomes enforceable (*see Lane-Real Estate Dept. Store v Lawlet Corp*., 28 NY2d at 42; *see also Gilder v Davis*, 137 NY 504 [1893]).

Here, it is clear from the proof exhibited that there was an agreement for the sale of

the property as to all of the essential terms set forth by defendant and that the contract of sale was not signed by the defendant after it was signed by the buyer, and the property was not sold to the buyer solely because defendant chose not to proceed. It is well settled that a seller may not avoid payment of a broker's commission when the seller has frustrated the completion of the sale, which was clearly the case herein (*see Eastern Consolidated Properties, Inc. v Lucas,* 285 AD2d at 422; *Linda M. Kirk Assocs., Ltd. v McDonald Equities, Inc.*, 155 AD2d at 282; *Sibbald v Bethlehem Iron Co*., 83 NY at 383-384).

In accordance with the above, it is

ORDERED that judgment is awarded in favor of plaintiff and against defendant, in the amount of $150,200.00, with interest from April 5, 2019, the date the action was commenced, together with the costs and disbursements of this action; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon defendants with notice of entry; and it is further

ORDERED that, upon proof of service of a copy of this decision/order on defendant, with notice of entry, the Clerk of this Court shall enter judgment as indicated above.

This constitutes the decision and order of the court.

Dated: May 17, 2021

ENTER:

Hon. Debra Silber, J.S.C.