

Saunders Ventures, Inc. v Morrow

2014 NY Slip Op 30455(U)

February 20, 2014

Supreme Court, Suffolk County

Docket Number: 33638-2011

Judge: Emily Pines

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SHORT FORM ORDER

INDEX NUMBER: 33638-2011

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: **HON. EMILY PINES**
 J. S. C.

Original Motion Date: 11-04-2013
 Motion Submit Date: 11-19-2013
 Motion Sequence No.: 004 MG

[] FINAL
 [x] NON FINAL

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SAUNDERS VENTURES, INC, d/b/a SAUNDERS AND ASSOCIATES,

Plaintiff,

-against-

SUSAN DAVIDSON MORROW AND LAURA DAVIDSON TWEEDY AS SUCCESSOR TRUSTEES OF THE SHIRLEY V. DAVIDSON FAMILY TRUST, AND DOUGLAS ELLIMAN, LLC., d/b/a PRUDENTIAL DOUGLAS ELLIMAN REAL ESTATE, and B & H ASSOCIATES of NY, LLC d/b/a PRUDENTIAL DOUGLAS ELLIMAN REAL ESTATE,

Defendants.

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In this action for real estate brokerage commissions, Defendants Susan Davidson Morrow and Laura Davidson Morrow, as successor Trustees of the Shirley Davidson Family Trust ("Trustee Defendants"), move, by Notice of Motion, for Summary Judgment, pursuant to CPLR § 3212, dismissing the Plaintiff's claim for commissions against them in connection with the sale of property located in Bridgehampton, New York in August 2011.

The Trustee Defendants set forth that the cause of action asserted against them is based upon the Plaintiff's claim that it was a third party beneficiary of the contract of sale

entered into between the Defendant Trustees as owners of the subject property and the purchaser of the same. The Defendant Trustees assert that the only brokerage agreement executed by them was dated February 7, 2011 and is entitled "EXCLUSIVE RIGHT TO SELL AGREEMENT". This agreement, annexed to their motion papers was between the Trustees and Prudential Elliman Real Estate. It provided that "[i]f you, the owner(s) of the property, find a buyer for your house, or another broker finds a buyer, you must pay PDE [Prudential Elliman Real Estate] the commission as set forth. . . ." It also sets forth with regard to any co-brokerage agreements that "[y]ou authorize PDE at our sole discretion, to invite the cooperation of and to retain real estate brokers, some or all of whom may be acting on behalf of the prospective purchasers, in connection with offering the Property for sale. PDE agrees to compensate any such other brokers retained by PDE from the commission received by PDE hereunder".

Both of the Trustee Defendants submit affidavits in support of their motion for Summary Judgment, stating that neither ever entered into any agreements with the Plaintiff herein nor indeed ever met or communicated with any representatives of the Plaintiff. In addition, they set forth that at the closing of the sale they paid a full commission to Prudential Douglas Elliman Real Estate in accordance with their only agreement as set forth above. There is no dispute that the se Trustee Defendants actually paid the full commission.

The Co-Defendant B&H Associates of NY LLC d/b/a Prudential Douglas Elliman Real Estate, submits a Reply affirmation, essentially in support of the Trustees' motion for Summary Judgment on a somewhat different basis. According to counsel for that Defendant, it listed the subject property on what is known as the OREX Exchange in which it offers to co-broker a listing with other active participants subject to specific terms. It states that these terms state that no commission is due unless and until title passes to a buyer procured by the Selling Broker and the commission is collected by the exclusive broker. That Defendant goes on to state that there is no evidence that other than placing its name on this list that the Plaintiff was ever the procuring cause of the sale.

Plaintiff opposes the motion setting forth that by posting the listing of the subject property on the OREX website, B&H effectively co-brokered the deal with all other active participants in the Exchange. It adds that both the Plaintiff and Defendant B&H were signatories to this Universal Co-Brokerage Agreement. In addition, Plaintiff submits that it interprets the co-brokerage agreement between B&H and the Trustees to require the Trustees as sellers to remit the entire commission to B&H with the understanding that B&H would remit a share thereof to any other broker which participated in the arrangement for the actual sale of the property. Plaintiff also avers that the Trustee Defendants' motion is premature because critical facts concerning the role of the Plaintiff are in the sole possession of the Trustees. In further opposition to the motion, Plaintiff submits the affidavits from its president setting forth his view that OREX protocol does not permit a co-broker to contact the seller; from Plaintiff's vice president setting forth that the sale would not have occurred without her involvement; and from the managing partner of the purchaser of the property, supporting the claims of Plaintiff's vice president.

One who seeks to maintain an action for breach of contract as a third party beneficiary must establish that: 1) there is an existing and valid binding contract between the signatories; 2) the contract was intended for the third party's benefit; and 3) the benefit to third party is clear and direct as opposed to incidental. **Mandarin Trading Ltd. v Wildenstein**, 16 NY 3d 173, 919 NYS 2d 465, 944 NE 2d 144 (2011); **Mendel v Henry Philips Plaza West**, 6 NY 3d 783, 811 NYS 2d 294, 844 NE 2d 748 (2006). It must be established that the language of the subject contract clearly evidences an intent to permit enforcement by the third party ; therefore, courts are reluctant to construe an intent to benefit a third party in the absence of clear contractual language evincing such intent. **LaSalle National Bank v Ernst & Young LLP**, 285 AD 2d 101, 729 NYS 2d 671 (1st Dep't 2001).

In the context of claims by an alleged procuring broker, there appears to be no basis for a claim against a seller that contracts solely with the listing broker and makes no commitment to the broker who assisted in procuring the sale. Thus, in **Fischer v RSWP Realty LLC d/b/a**

Prudential Rand Realty et al, 19 AD 3d 540, 798 NYS 2d 72 (2d Dep't 2005), the Second Department held that dismissal of a procuring broker's claim against the vendor was warranted where no express nor implied contract existed between such broker and the vendors, whose sole brokerage contract was the listing agreement with the listing broker. The same conclusion was reached in a procuring broker's claim against seller in **REMAX HOMES AND ESTATES, INC. v Ivan LEIST**, 308 AD 2d 439, 764 NYS 2d 107 (2d Dep't 2003).

The case law on what constitutes an incidental beneficiary of a contract with other parties is instructive. In **ARTWEAR, INC. v Frederick HUGHS et al**, involving a suit by a sublicensee against the estate of Andy Warhol for refusal to approve any of its products for sale based upon its agreement with the licensee of the estate, the First Department affirmed dismissal of the case against the estate. In that case the estate's agreement with the licensee specifically authorized the licensee to utilize sublicensees to carry out its contractual duties. The court, in dismissing the sublicensees claims against the estate, asserting that although the provisions permitting such use of sublicensees could generate revenues both for the licensee and the estate itself, any benefit to those selected was considered an incidental by-product of such agreement. **Id.** at 82, 693.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. **Alvarez v Prospect Hospital**, 68 NY 2d 320 (1986). The moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issues of fact. **Weingrad v New York University Medical Center**, 64 NY 2d 851 (1985). Once the moving party has made a prima facie showing of entitlement to summary judgment, the burden of production shifts to the opposing party, who must then move forward and produce sufficient evidence of a triable issue of fact or demonstrate an acceptable excuse for failing to do so. **Zuckerman v City of New York**, 49 NY 2d 557 (1980); **Tillem v Cablevision Systems Corp.**, 38 AD 3d 878 (2d Dep't 2007).

In the case at bar, the moving Trustee Defendants have clearly sustained their burden, as

a matter of law, that the brokerage agreement they signed obligated them solely to the listing broker upon the sale of the subject property. There is nothing in that agreement nor in the OREX agreement, in which they were not a party that obligated them to a broker, such as Plaintiff, even if it were found that such broker was the procuring cause of the ultimate sale. As in the case law described above, the fact that the listing broker was permitted to utilize the services of another broker, provided at most an incidental and not a direct specific benefit to such entity and, therefore, simply provides no basis for a claim against the sellers under a third party beneficiary theory. Upon the shifting of the burden, as set forth above, Plaintiff fails to raise any triable issue of fact. The affidavits Plaintiff submits, stating that it was the procuring cause of the sale and that it did not contact the seller based upon OREX protocol simply does not deal with the issue of whether it was an clear intended third party beneficiary of the sellers' contract with the listing broker, such that the sellers would be liable for the Plaintiff's fee. Indeed the agreement specifically states the opposite, i. e., that the Trustees' sole obligation was to the listing broker. The statements that more discovery is necessary in order to determine whether any agreements existed between the seller and the listing broker, without any allegation or indeed assertion that such existed, is simply insufficient to raise an issue of fact, as such would clearly have been within the knowledge of those that submitted affidavits on Plaintiff's behalf.

The Court notes that although it did receive the papers referenced from the listing broker in reply papers, it did not consider them in determining this motion; moreover, it makes no determination herein with regard to any potential liability on that party's part to the Plaintiff in this matter.

Accordingly, the motion on behalf of the Trustee Defendants for Summary Judgment, dismissing the claim against them is hereby granted. This constitutes the Decision and Order of the Court.

Dated: February 20, 2014
Riverhead, New York



EMILY PINES
J. S. C.

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 NON FINAL