

Susan D. Fine Enter., LLC v Steele
2010 NY Slip Op 32398(U)
August 27, 2010
Supreme Court, New York County
Docket Number: 101160/08
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JOAN A. MADDEN

PRESENT: _____ J.S.C.

PART 11

Index Number : 101160/2008
SUSAN D. FINE ENTERPRISES
 vs.
STEELE, NORMAN
 SEQUENCE NUMBER : 004
 SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *is determined in accordance with the annexed decision and order.*

FILED
SEP 03 2010
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

Dated: August 27, 2010


HON. JOAN A. MADDEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
SUSAN D. FINE ENTERPRISES, LLC,

Plaintiff,

INDEX NO. 101160/08

-against-

NORMAN STEELE, NEW YORK PROPERTIES, L.L.C.,
ADAM STEELE, PRUDENTIAL DOUGLAS ELLIMAN,
INC., DREW GLICK, MARGARET POLIMENI and
VINCENT POLIMENI,

Defendants.
-----X

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

JOAN A. MADDEN, J.:

In this action for breach of contract and tortious interference with contract, plaintiff Susan D. Fine Enterprises, LLC (hereinafter "Susan Fine," as the sole member of Susan D. Fine Enterprises, LLC) seeks to recover a \$108,000 real estate broker's commission, in connection with the sale of condominium apartment 52C at 301 West 57th Street in Manhattan. Defendants, collectively,¹ move for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint. Plaintiff opposes the motion and cross-moves for summary judgment.

In support of their motion, defendants contend that plaintiff is not entitled to a commission, as she did not find the property for the purchaser, Vincent Polimeni, and did not negotiate the terms of the sale, and therefore, was not the procuring cause of the sale. Defendants

¹The complaint was previously dismissed as against defendant Vincent Polimeni, the purchaser of the apartment at issue. Susan D. Fine Enterprises, LLC v. Steele, 61 AD3d 518 (1st Dept 2009).

also contend that plaintiff was not the “acknowledged broker” for the seller or the purchaser.² In opposing the motion and cross-moving for summary judgment, plaintiff argues that the evidence conclusively establishes she was the procuring cause of the transaction, and that Prudential Douglas Elliman and Drew Glick tortiously interfered with her co-broke agreement with Adam Steele and Norman Steele.

It is well settled that a broker seeking a commission must establish that: 1) she is duly licensed; 2) she had a contract, express or implied, with the party to be charged with paying the commission; and 3) she was the procuring cause of the sale. See Greene v. Hellman, 51 NY2d 197, 206 (1980); Joseph P. Day Realty Corp. v. Chera, 308 AD2d 148, 151 (1st Dept 2003); Dagar Group, Ltd. v. Hannaford Bros. Co., 295 AD2d 554 (2nd Dept 2002); Buck v. Cimino, 243 AD2d 681, 684 (2nd Dept 1997), lv app den 91 NY2d 807 (1998). To qualify for a commission, however, a broker need not have been involved in the ensuing negotiations or the completion of the sale. See Hentze-Dor Real Estate Inc. v. D’Alessio, 40 AD3d 813, 816 (2nd Dept 2007); Country Harbor Realty, Inc. v. Sullivan, 23 AD3d 606 (2nd Dept 2005); Dagar Group, Ltd. v. Hannaford Bros. Co., *supra* at 555; Buck v. Cimino, *supra* at 684; Sholom & Zuckerbrot Realty Corp. v. Citibank, N.A., 205 AD2d 336, 338-339 (1st Dept 1994); Brown, Harris, Stevens, Inc. v. Rosenberg 156 AD2d 249 (1st Dept 1989). Rather, where as here, the broker was not involved in the negotiations leading up to completion of the deal, the broker is still entitled to a commission if she can demonstrate that she “created an amicable atmosphere in which negotiations proceeded

²Defendants’ motion focuses exclusively on the issue of whether plaintiff is entitled to a commission, which is an essential element of the breach of contract claim against Norman and Adam Steele, and the tortious interference claim against Prudential Douglas Elliman and Drew Glick. Plaintiff’s cross-motion seeks summary judgment on both the breach of contract and the tortious interference claims.

or that [she] generated a chain of circumstances that proximately led to the sale.” Hentze-Dor Real Estate Inc. v. D’Alessio, supra at 816 (quoting Dagar Group, Ltd. v. Hannaford Bros. Co., supra at 555); accord Cappuccilli v. Krupp Equity Ltd Partnership, 269 AD2d 822 (4th Dept 2000); Buck v. Cimino, supra at 684; Eugene J. Busher Co. v. Galbreath-Ruffin Realty Co., 22 AD2d 879 (1st Dept 1964), aff’d 15 NY2d 992 (1965).

Is not disputed that plaintiff Susan Fine is a duly licensed broker.³ Moreover, it is clear from the undisputed evidentiary proof, specifically Susan Fine’s affidavit and deposition testimony, which is corroborated by the deposition testimony of defendants Adam Steele and Norman Steele, that Adam Steele was the exclusive broker for the apartment owned by his father Norman Steele, and that Adam Steele had a co-broke agreement with Susan Fine, initially to rent the apartment in early 2007, and starting on or about March 1, 2007, to sell the apartment at an asking price of \$3,550,000. When the expression “co-broke” is used by real estate brokers, it means “to split” the commission. See William T. Bell & Associates, LLP v. Pyramid Brokerage Co., Inc., 281 AD2d 943 (4th Dept 2001).

As to whether plaintiff was the procuring cause of the sale, courts are in agreement that the issue of procuring cause is a generally a question of fact to be determined at trial. See Williams Real Estate Co., Inc. v. Solow Development Corp., 38 NY2d 978, 979-980 (1976); Gregory v. Universal Certificate Group LLC, 32 AD3d 777 (1st Dept 2006); Capuccilli v. Krupp Equity Ltd Partnership, supra at 822; Kronish v. Koffman, 199 AD2d 136, 138 (1st Dept 1993).

³Notably, defendants Norman Steele, Adam Steele, Drew Glick and Prudential Douglas Elliman, and former defendant Vincent Polimeni, are all licensed real estate brokers.

Here, the evidence⁴ before the court raises an issue of fact as to whether plaintiff was the procuring cause of the sale, specifically whether plaintiff “created an amicable atmosphere in which negotiations proceeded” or “generated a chain of circumstances that proximately led to the sale.” Hentze-Dor Real Estate Inc. v. D’Alessio, *supra* at 816; *accord* Dagar Group, Ltd. v. Hannaford Bros. Co., *supra* at 555; Cappuccilli v. Krupp Equity Ltd Partnership, *supra*; Buck v. Cimino, *supra* at 684; Eugene J. Busher Co. v. Galbreath-Ruffin Realty, *supra*.

It is not disputed that the purchaser, Vincent Polimeni, who already owned apartment 49C in the building, told his broker, Drew Glick, that he was interested in purchasing another apartment in the building on a higher floor, which had two balconies. On March 17, 2007, Glick checked the Douglas Elliman listing system and found that apartment 52C was for sale, and called the exclusive broker, Adam Steele, and asked if he could show the apartment. Steele said he was away for the weekend, but would make arrangements with the doorman to give Glick the key. Glick testified that he called Polimeni and told him about the apartment, and they arranged for Polimeni to call Glick the next day, Sunday, March 18, sometime during the afternoon, so Glick could meet Polimeni at the building to show him the apartment. Polemini testified that on March 18, he returned to the building earlier than originally expected because he was not feeling well, and rather than calling and waiting for Glick, he approached the concierge directly and asked for the key to apartment 52C. At the same time, Susan Fine was the lobby of the building, waiting for a customer. The concierge told Polimeni that Susan Fine had the key and could show him the apartment. It is not disputed that Fine showed Polemini the apartment, which was

⁴The court notes that the parties submit only selected portions of the witnesses’ deposition testimony.

empty, and that the owner, Norman Steele also happened to be there.

Fine testified that she showed Polimeni around the apartment, which took less than an hour, and when they left and were waiting in the hallway for the elevator, Polimeni told her he was interested in the apartment. Fine testified that when she told Polimeni the \$3,550,000 price was firm and not negotiable, he said he was interested in buying the apartment and agreed to the purchase price. Fine testified that Polimeni then said he had his own broker who he "wanted to introduce into the deal"; Fine said "I can't co-broke this, your didn't tell me you had a broker"; and Polimeni responded, "I am interested in buying it, you brokers work it out."

Polimeni testified that Fine did not identify herself as a broker. He also testified that when he was in the apartment, he attempted to give Norman Steele his business card and Fine said "don't do that." Polimeni explained he believed Fine did not want him to have any contact with the owner, and that he "didn't like the way the whole thing was handled, turned me off." He said Fine was obnoxious, and "from that point on," he and Fine "did not speak." Polimeni testified that he looked around the apartment, which was identical to the one already owned, except for the balconies. He could not recall if Fine said anything to him, and testified that he said "absolutely nothing" to her after the "card incident." Polimeni also testified that he was in the apartment for 10 or 15 minutes, and later that day he spoke to Glick and asked him to "check out the terms, talk to the owner and see what we can do about the price." He said he knew from his March 17 conversation with Glick that the price was \$3,550,000.

On March 18, both Fine and Glick spoke to Adam Steele and told him that they had an interested purchaser. Adam Steele testified that he knew from his father, Norman Steele, that Fine had shown the apartment to Polimeni. Adam Steele also testified that he initially did not

realize Fine and Glick were talking about the same purchaser and that there was a “conflict,” explaining that Fine was using last names and Glick was using first names.

According to Fine, for the next several weeks, she “telephoned Adam Steele regularly to be kept apprised so that I could continue to do my job,” and he told her that “the lawyers had not yet spoken, that a contract of sale had not been executed, and that he would keep me apprised.” In April, Adam Steele left a voice-mail message for Fine, which she recorded. Fine testified that Steele “declared that he was speaking on behalf” of his father and in his father’s interest, and he “assured” her that he “would not move forward with the sale of the apartment until any dispute between the brokers was resolved.”

Fine states that on May 9, 2008, she spoke to Adam Steele and “reminded him of our contract,” and he told her that “the ‘situation’ had become ‘complicated,’ that he could not speak to me, that he would no longer take my calls.” Fine then received a letter dated May 9, 2007, from Polomeni, advising that “you are not the broker on this deal,” “[y]ou were not the procuring cause of this deal,” and “[a]ll of my negotiations were through Drew Glick at Douglas Elliman and Adam Steele, the listing broker.”

Adam Steele testified that he consulted his attorney about the “conflict” between Fine and Glick, was advised not to communicate with either party. Adam Steele also testified that the deal eventually went forward even though the conflict had not been resolved, because he felt “protected” by the “indemnity” agreement. It is not disputed that Polimeni and Norman Steele signed a contract of sale dated May 31, 2007, which provided for a purchase price of \$3,600,000, and designated Adam Steele and Drew Glick, as the “only real estate brokers with whom they have dealt in connection with this Contract and the transaction,” with the following footnoted

language: "Except that the Parties are aware that a person, who neither Seller nor Purchaser recognizes as a broker in this transaction, may make a claim for a portion of the Purchaser's broker [Prudential Douglas Elliman and Drew Glick] commission against which Seller has been indemnified by Prudential Douglas Elliman."

Based on the foregoing, the record is sufficient to raise an issue of fact as to whether plaintiff was the procuring cause of the sale, by creating a amicable atmosphere in which negotiations proceeded, or generating a chain of circumstances that proximately led to the sale. It is undisputed that plaintiff had a co-broke agreement with Adam Steele and showed the apartment to Polimeni. Moreover, Fine testified that Polimeni immediately told her that he wanted to purchase the apartment and accepted the asking price, and she immediately communicated that information to Adam Steele. Polimeni's conflicting testimony that he said "absolutely nothing" to Fine after the business card "incident," raises questions of credibility that can only be resolved at trial. See S.J. Capelin Assocs, Inc. v. Globe Mfg Corp., 34 NY2d 338, 341 (1974); Shapiro v. Boulevard Housing Corp., 70 AD3d 474, 475 (2010).

This is not a case in which the broker simply brought the property to the purchaser's attention. See Greene v. Hellman, *supra* at 205; Lanstar International Realty v. New York News, Inc., 206 AD2d 411, 412 (1st Dept 1994). To the extent defendants argue that plaintiff is not entitled to a commission because she was not involved in any of the negotiations which brought the transaction to finality, not only was plaintiff's involvement in the negotiations not required, an inference could be drawn from the record that defendants intentionally excluded her from participating in the negotiations, presumably to avoid the conflict with Glick and to avoid paying her a commission, especially in view of the indemnity provision in the contract. See *e.g.* Buck v.

Cimino, supra at 685 (holding that plaintiff broker may be credited with setting in motion the chain of circumstances that proximately led to the sale; “[i]mpacting upon this determination is our conclusion that the plaintiff’s lack of involvement in the ensuing negotiations is attributable to Van Ess [purchaser], who apparently called upon her knowledge as a broker in affirmatively misleading the plaintiff into believing that she lacked any interest in the Cimino property while clearly the contrary was true.”); Hagedorn v. Elwyn, 229 AD2d 654 (3rd Dept 1996) (holding that the “record plainly reveals that Goldman’s [broker] exclusion from the negotiations was motivated by Callahan [purchaser] and Elwyn’s [seller] desire to avoid paying the commission”). Thus, since a triable issue of fact exists as to whether plaintiff was a procuring cause of the sale, defendants are not entitled to summary judgment dismissing the complaint, and plaintiff is not entitled summary judgment on the breach of contract claim.

Plaintiff is also cross-moving for summary judgment on the tortious interference claim against Prudential Douglas Elliman and Drew Glick (the “Douglas Elliman defendants”). The elements of a claim for tortious interference with the performance of a contract are the existence of a valid contract, defendants’ knowledge of the contract, defendants’ intentionally procuring a breach of the contract, the actual breach of the contract, and plaintiff’s resulting damages. See Lama Holding Co. v. Smith Barney, Inc., 88 NY2d 413 (1996); Joan Hansen & Co., Inc. v. Everlast World’s Boxing Headquarters Corp., 296 AD2d 103 (1st Dept 2002); Mautner Glick Corp. v. Edward Lee Cave, Inc., 157 AD2d 594 (1st Dept 1990).

Even assuming without deciding that the Douglas Elliman defendants had knowledge of plaintiff’s co-broke agreement with Adam Steele, plaintiff’s tortious interference claim cannot be resolved until it is clear that the Steele defendants actually breached the co-broke agreement by

not paying plaintiff the commission to which she was entitled. See id. As discussed above, the issue of whether plaintiff is entitled to a commission cannot be resolved as a matter of law, since a triable question of fact exists as to whether she was a procuring cause of the sale. Thus, that portion of plaintiff's cross-motion for summary judgment on the tortious interference claim is denied.

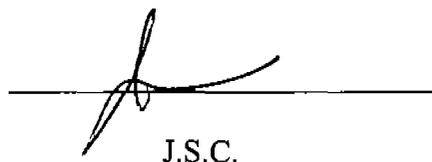
Accordingly, it is

ORDERED that defendants' motion for summary judgment and plaintiff's cross-motion for summary judgment are denied in their entirety; and it is further

ORDERED that the parties are directed to appear for the status conference previously scheduled for October 7, 2010 at 9:30 a.m., in Part 11, Room 351, 60 Centre Street.

DATED: August 27, 2010

ENTER:


J.S.C.

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