

East Coast Realtors, Inc. v Shahzad Bros., Inc.

2010 NY Slip Op 32504(U)

September 7, 2010

Supreme Court, Queens County

Docket Number: 23615/07

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**
Justice

IAS PART 6

EAST COAST REALTORS, INC.,

Plaintiff,

-against-

SHAHZAD BROTHERS, INC. and FAZAL
CHOUDRY,

Defendants.

Index No. 23615/07

Motion
Date June 15, 2010

Motion
Cal. No. 13 and 14

Motion
Sequence No. 3 and 2

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Upon the foregoing papers it is ordered that defendants' motion for an order granting summary judgment dismissing the complaint against the defendants and plaintiff's motion for summary judgment pursuant to CPLR 3212 are hereby consolidated solely for purposes of disposition of the instant motions and both motion are denied.

The plaintiff brought an action against defendants based on breach of contract. On March 9, 2007, defendant Fazal Choudry and plaintiff, East Coast Realtors Inc. signed a listing agreement whereby plaintiff was to market and sell defendant Choudry's real property located at 35-14 208th Street, Bayside, New York 11361. Thereafter, on June 18, 2007, the premises were sold by defendant Choudry to a Bernard Diaz and Lea Diaz on June 18, 2007. Plaintiff commenced actions against both defendants seeking a real estate commission for said sale (which actions were consolidated by order of this Court).

Summary judgment is a drastic remedy and will not be granted

if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

With respect to defendants' motion for an order granting summary judgment dismissing the complaint against the defendants, defendants established a prima facie case that there are no triable issues of fact. Defendant Shahzad Brothers argues that it is entitled to summary judgment because as it was never the owner of the subject premises, it could not therefore be liable for any commission. In support of their motion, defendants submit the affidavit of defendant Fazal Choudry, which affidavit avers that: he signed the exclusive listing agreement with Mr. Baker, an employee of plaintiff on or about March 9, 2010, that he never wrote any information in the paperwork, that he told him he was the owner of the subject premises, that he also told him about Mr. & Mrs. Diaz and that he wanted them to be exempt from the listing agreement and that if their loan came through, he would not pay any commission, that Mr. Baker agreed to the terms, that Mr. Baker filled in all of the blanks on all of the forms he asked him to sign, and he told him he wanted the property listed in Multiple Listing Service right away. Defendants also submit the examination before trial transcript testimony of associate real estate broker for plaintiff, John Baker, who testifies that the listing agreements and supporting documentation were filled

out by the Realtor and then signed by defendant Choudry. Defendants submit a report from the New York City ACRIS recording system, which report indicates that Shazhad Brothers was never the legal owner of the premises.

Defendants additionally argue that summary judgment mandates a dismissal of the Complaint against defendant Choudry as the listing agreement is unenforceable and the plaintiff was not the procuring cause of the sale. Defendants submit the listing agreement documents which form the basis of plaintiff's demand for commission. Defendants establish that plaintiff did not locate a buyer for the sale of the subject premises. Defendants also establish that the premises were sold to a Mr & Mrs. Diaz who were known to defendant Choudry and he alone was the person who located these buyers. Defendants submit that an offer and agreement reflecting the terms of the sale was executed between the buyers and defendant Choudry prior to execution of the listing agreement by defendant Choudry and Baker. Defendants also argue that the owner's name is listed incorrectly on all of the documents as Shazhad Brothers, which is a corporation that defendant Choudry has no ownership interest in, and lacks the authority to sign the agreement for, the agreement is unenforceable. Additionally, the real estate agent of plaintiff, testified at his examination before trial that the listing was dated 3/15/07 when it was actually signed on 3/8/07 or 3/9/07. Defendants argue that John Baker testified that the listing was not entered into the Multiple Listing Service until seven days after it was signed, and this is a direct violation of Multiple Listing Service rule 501.1.

In opposition, plaintiff submits an affidavit of John Baker, an associate broker of the plaintiff wherein he avers that: [o]n or about March 8, 2007, [he] explained to Mr. Choudry that if he had known of any potential buyers, that they could be listed as exemptions on the agreement. Mr. Choudry stated to [him] that he had no potential purchasers which is why he sought the assistance of a real estate broker. If Mr. Choudry had mentioned any potential purchasers known to him prior to signing the agreement, an exclusion naming the potential purchasers would have been written into the agreement. Additionally, Mr. Baker avers that plaintiff did locate a buyer for the property, and that an offer was made on April 24, 2007.

There are triable issues of fact as to whether, inter alia, there was a verbal agreement whereby Mr. and Mrs. Diaz were excluded from the listing agreement. As there are triable issues of fact, summary judgment is unwarranted and a trial is necessary.

With respect to plaintiff's motion for summary judgment pursuant to CPLR 3212, plaintiff established a prima facie case that there are no triable issues of fact. In support of the motion, plaintiff submits that according to the plaintiff's complaints, the defendant Fazal Choudry was a principal of defendant Shahzad Brothers, Inc. on March 8, 2007 and that both defendants represent to plaintiff East Coast Realtors that the defendants were the fee owners of the property located at 35-14 208th Street, Bayside, New York. According to the complaints, the agreement signed by the defendant Fazal Choudry, provided for a listing price of \$1,439,000.00 and provided for a commission to be paid to plaintiff totaling 3% of the negotiated sale or rental price and that despite this agreement, on or about June 18, 2007, Fazal Choudry sold the property for at least \$1,335,000.00. In support of the motion, plaintiff presents the examination before trial transcript testimony of John Baker, associate broker of plaintiff, who testified that: after the listing was signed by Fazal Choudry, he advertised the property in Harmon magazine, listed the property on Multiple Listing Service, conducted open houses, etc.; and that Mr. Choudry never mentioned that there were other potential purchasers at the time the listing was taken. Plaintiff also submit the examination before trial transcript testimony of defendant Fazal Choudry who testified that: he is a supervisor for Shazhad Brothers, Inc., that he owned the property and sold it in April or May of 2007 for \$1,335,000.00, that he signed the exclusive right to sell agreement on March 8, 2007 and that he understood the agreement was to be in effect from March 9, 2007 to September 9, 2007, and that he told Mr. Baker that he had two potential purchasers before the listing, but he did not put their names on the agreement.

In opposition, defendants submit, inter alia, the examination before trial transcript testimony of defendant Fazal Choudry, wherein he testifies that: he told Mr. Baker that there were two potential purchasers whom he did not wish to include in the agreement he executed with Mr. Baker.

There are triable issues of fact as to whether, inter alia, there was a verbal agreement whereby Mr. and Mrs. Diaz were excluded from the listing agreement. As there are triable issues of fact, summary judgment is unwarranted and a trial is necessary.

This constitutes the decision and order of the Court.

Dated: September 7, 2010

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Howard G. Lane, J.S.C.

