

Coldwell Banker Mid Plaza Real Estate Inc. v. Guindi

Supreme Court of New York, Kings County

May 11, 2009, Decided

29427/06

Reporter: 23 Misc. 3d 1132(A); 2009 N.Y. Misc. LEXIS 1271; 2009 NY Slip Op 51043(U); 889 N.Y.S.2d 881

[***1] Coldwell Banker Mid Plaza Real Estate Inc. and Greiner-Maltz Company of New York, Inc., Plaintiffs, against Joseph Guindi, et al., Defendants.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Core Terms

license, brochure, broker's commission, brokerage services, cause of action, renew, realty, real estate broker, unjust enrichment, unlicensed, unlicensed person, duly licensed, real estate, brokerage, quantum, meruit

Headnotes/Syllabus

Headnotes

[*1132A] Brokers--Real Estate Brokers--Commission. Real Property Law--§ 442-d (Actions for commissions; license prerequisite).

Counsel: [*1] For Plaintiff: Zalman Schochet, Esq., Altman Schochet LLP, New York, NY.

For Defendant: Gary S. Rosen, Esq., *Gary Rosen Law Firm*, P.C., Floral Park, NY, Solomon E. Antar, Esq., Brooklyn, NY.

Judges: Ann Pfau, J.

Opinion by: Ann Pfau

Opinion

Ann Pfau, J.

In this action, plaintiffs Coldwell Banker Mid Plaza Real Estate Inc. (Coldwell Banker) and Greiner-Maltz Company of New York, Inc. (Greiner-Maltz) (collectively, plaintiffs) seek to recover real estate brokerage commissions from defendants Joseph Guindi (Guindi), Liberty Variety Center, Inc. (Liberty), Flatlands Holdings, LLC (Flatlands), Sidney Elmann (Elmann), Elmann 1065 Realty, LLC (Elmann Realty), and Circle Imports, Inc. (Circle Imports) (collectively, defendants). Defendants have moved for summary judgment dismissing the complaint. For the reasons stated below, defendants' motion is granted in its entirety.

[***2] *Background*

In March 2005, defendant Elmann Realty sold a warehouse located at 1065 Shepard Avenue in Brooklyn, New York (the Brooklyn property) to defendant Flatlands, an entity created and controlled by defendant Guindi, for \$ 9,226,000. Although the contract recites that the seller and purchaser had no dealings with a real estate broker in connection with [*2] the transaction, plaintiffs seek a 6% brokerage commission.

Plaintiffs are licensed real estate brokers who were undisputedly involved in a prior sale of the Brooklyn property to Elmann Realty in April 2001. With respect to the March 2005 transaction, however, the parties sharply disagree on most of the facts and circumstances underlying plaintiffs' claim to a brokerage commission.

The brokerage services at issue were all allegedly rendered by nonparty Edmund Rahmey (Rahmey) and/or nonparty Steven Nadel (Nadel) in March 2005. Rahmey is an associate broker under Coldwell Banker's sponsorship pursuant to [Real Property Law § 440](#). Nadel is an independent contractor real estate broker who has an ongoing affiliation with Greiner-Maltz and a contractual agreement to share commissions.

Plaintiffs claim that Greiner-Maltz was a listing broker for the Brooklyn property, and that Guindi asked Rahmey to help him find suitable warehouse space. Plaintiffs claim that Rahmey introduced Guindi to the Brooklyn property, and that Guindi thereafter agreed to purchase the property from Elmann. Plaintiffs have submitted testimony from Rahmey and Nadel about various interactions with Elmann and Guindi that, **[**3]** according to plaintiffs, provide a basis for a brokerage commission to be paid on the Brooklyn property.

Defendants deny that Elmann or Elmann Realty had a listing agreement with Greiner-Maltz, that Rahmey introduced Guindi to the Brooklyn property, that plaintiffs otherwise facilitated the transaction or that defendants otherwise agreed to pay any commissions in connection with the transaction.

In September 2006, plaintiffs filed this action against defendants, seeking \$ 558,000 plus interest based on defendants' alleged breach of an oral brokerage commission agreement, or, alternatively, under a theory of unjust enrichment or quantum meruit.¹ Defendants answered the complaint, and discovery has taken place. In September 2008, defendants moved for summary judgment dismissing the complaint. In their reply papers, defendants argued for the first time that plaintiffs were not licensed real estate

brokers at the time of the transaction. The court permitted plaintiffs to submit a sur-reply to respond to these arguments, and also allowed defendants to submit an answer to that sur-reply.

Analysis

To grant summary judgment, "a court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the **[**3]** court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form" ([Menekou v Crean](#), 222 AD2d 418, 419-20, 634 N.Y.S.2d 532 [2d Dept 1995] [citations omitted]; see also [CPLR 3212](#); [Behar v Ordover](#), 92 AD2d 557, 459 N.Y.S.2d 304 [2d Dept 1983]). The burden in opposition is to submit "evidentiary proof, in admissible form, sufficient to establish the existence of a triable issue of fact" ([Stanzoni Realty Corp. v Landmark Props. of Suffolk, Ltd.](#), 19 AD3d 582, 583, 796 N.Y.S.2d 549 [2d Dept 2005]).

Although the parties' respective Rule 19-A statements reveal many disputed issues **[**5]** of fact that could be material to the proceeding, the court may not even reach these issues unless plaintiffs adequately demonstrates that they and those who acted on their behalf were licensed at the time of rendering the alleged brokerage services. For the reasons discussed below, the court concludes that this threshold requirement has not been met and that summary judgment must be granted to defendants.

First and Fifth Causes of Action - Recovery of Brokerage Commissions

In their first and fifth causes of action, plaintiffs seek to recover brokerage commissions from defendants. "It is well settled that in order to state a direct claim for a commission, a broker must prove (1) that he or she is duly licensed, (2) that he or she had a contract, express or implied,

¹ Two of the corporate defendants, Circle Imports and Libertv, are largely absent from the events underlying **[**4]** plaintiffs' claim to a commission. Plaintiffs claim that Elmann owns or controls defendant Circle Imports, the former tenant of the Brooklyn property, and that Guindi owns or controls defendant Libertv, the entity for which Guindi allegedly sought a warehouse. It appears from the parties' Rule 19-A statements that plaintiffs have submitted no evidence to support their conclusory allegations that the corporate veil should be pierced.

with the party to be charged with paying the commission, and (3) that he or she was the procuring cause' of the sale" (*Buck v Cimino*, 243 AD2d 681, 684, 663 N.Y.S.2d 635 [2d Dept 1997]; see also *Hentze-Dor Real Estate, Inc. v D'Allesio*, 40 AD3d 813, 815, 836 N.Y.S.2d 265 [2d Dept 2007]; *Stanzoni*, 19 AD3d at 583; *Friedland Realty v Piazza*, 273 AD2d 351, 351, 710 N.Y.S.2d 97 [2d Dept 2000]).

Real Property Law § 442-d requires that in order to bring or maintain an action to receive **[**6]** a real estate brokerage commission, the claimant must allege and prove that it was a duly licensed real estate broker on the date when the alleged cause of action arose (see *Mavco Realty Corp. v M. Slayton Real Estate, Inc.*, 38 AD3d 726, 727, 832 N.Y.S.2d 293 [2d Dept 2007]). Here, plaintiffs' cause of action arose in March 2005, when they allegedly procured a meeting of the minds between the seller and purchaser as to the property.

Plaintiffs have amply alleged and documented, without dispute, that plaintiffs were properly licensed at the relevant times by the Division of Licensing Services. Defendants argue, however, that there has been no showing that the individuals who performed the brokerage services on behalf of plaintiffs, *i.e.*, Nadel and Rahmey, were licensed when plaintiffs' claim accrued.² Defendants claim that this precludes plaintiffs' action to recover a brokerage commission.

Real Property Law § 440-a requires that the individual brokers associated with or working for a corporate broker must be licensed (see **[**7]** also *Real Property Law §§ 441, 441-b*).

A licensed broker may not recover a commission for brokerage services rendered by one who was not duly licensed as a real estate broker or salesperson (*Small v Marchese*, 98 Misc 2d 295, 296-97, 413 N.Y.S.2d 808 [App Term 1978] [employer/employee relationship]; *Brener &*

Lewis, Inc. v Fawcett Publs., Inc., 197 Misc. 207, 208, 90 N.Y.S.2d 853 [Sup Ct, NY County 1949], *aff'd*, 276 App Div 994, 95 N.Y.S.2d 598 [1st Dept 1950]; *Meyers v Suffin*, 203 NYS 103, 104 [App Term 1924]). Similarly, a licensed broker may not recover a commission after agreeing to split fees with an unlicensed co-broker (*City Ctr. Real [***4] Estate, Inc. v Berger*, 39 AD3d 267, 268, 833 N.Y.S.2d 75 [1st Dept 2007]; *Kennedy v Huntington Hartford*, 31 AD2d 616, 616, 295 N.Y.S.2d 751 [1st Dept 1968]).

The Licensing Division records before the court reflect that Nadel and Rahmey have, from time to time, allowed their licenses to lapse without promptly renewing them. It is undisputed that both Nadel and Rahmey had "lapsed" licenses during March 2005, when the brokerage services were allegedly rendered, although they later renewed their licenses and appear to be currently in good standing.

In order to recover a commission, the broker must have a valid brokerage license at the time **[**8]** the relevant services were rendered. Thus, if a broker was licensed before and after the services were rendered, but was unlicensed at the time of rendering the services, recovery is prohibited (*Bendell v De Dominicis*, 251 NY 305, 311, 167 N.E. 452 [1929] [Pound, J.]; *Roman v Lobe*, 243 NY 51, 52, 152 N.E. 461 [1926] [Cardozo, J.]).

Bendell and *Roman*, although decided more than 80 years ago, are directly controlling precedent. In *Roman*, the plaintiff "held a license for the year ending September 30, 1923" but "did not obtain a renewal license till October 26, 1923" (*243 NY at 52*). Judge Cardozo, writing for the Court, concluded that the plaintiff "was thus without a license on October 16, 1923, when the purchaser was procured and the cause of action arose" (*id.*). Even though the renewal was granted a mere 10 days after the services in question, plaintiff was barred from recovery of

² Plaintiffs have submitted uncontroverted affidavits to the effect that Rahmey and Nadel had express authorization to represent the companies' interests as is relevant to this action.

any brokerage commissions (*id. at 57* [upholding the constitutionality of the licensing requirement and noting that "[i]f he is without the needed license, he has only himself to blame, in that he did not ask for renewal till his license had expired"]).

Similarly, in *Bendell*, plaintiff "was a duly licensed broker when he was first employed [**9] [in 1926] and also when the contract of sale ... was entered into on November 15, 1927" (*251 NY at 307*). He was unlicensed, however, from September 30, 1926 to November 7, 1927 (*id.*), and he apparently performed the relevant services during that period (*id. at 309*). The Court held that he was not entitled to a commission because he was unlicensed during that time (*id. at 311* ["Illegality is a defense to the action.... Otherwise an unlicensed broker might negotiate sales with impunity up to the point of a complete agreement and then obtain his license for the purpose of recovering his commissions on the execution of a formal contract. The law is not so toothless."]). Even if a license is obtained the very next day after the services are rendered, the broker has "already acted illegally" and may not collect commissions (*Baird v Hine, 253 App Div 65, 66-67, 300 N.Y.S. 1171 [3d Dept 1937]*).

Subsequent cases have sometimes appeared to soften the licensing requirements in recognition that the legislative intent is to protect the public from inept, inexperienced or dishonest persons, "not to permit others to take advantage of the violation of the statute to escape their obligations" (*Galbreath-Ruffin Corp. v 40th & 3rd Corp., 19 NY2d 354, 362-363, 227 N.E.2d 30, 280 N.Y.S.2d 126 [1967]*, [**10] quoting *Bendell, 251 NY at 310*). Thus, the Court of Appeals has excused mere technical noncompliance with the licensing statute. In *Galbreath-Ruffin*, the plaintiff was a licensed brokerage corporation "at all times when brokerage services were rendered for defendant," and was affiliated with another properly licensed brokerage corporation (*19 NY2d at 361*). The two individuals who provided

brokerage services on plaintiff's behalf were also duly licensed brokers at all relevant times (*id.*). However, one of those two individuals, even though he was plaintiff's vice president, was licensed to provide brokerage services solely on behalf of plaintiff's affiliate. [**5] Technically, he should not have rendered brokerage services on behalf of plaintiff unless and until plaintiff paid \$ 50 under a section headed "license fee" for the additional license (*19 NY2d at 363*). The Court noted that this was purely a revenue measure, and that because "he already had been approved to act as a broker contemporaneously," the license "would have issued *pro forma*." (*19 NY2d at 363-64*).

In light of *Roman* and *Bendell*, however, failure to renew a license cannot be deemed [**11] mere technical noncompliance. The parties have not identified any relevant authority treating a failure to renew a license as a mere technicality, nor has this court been able to find such authority. The lapsed license situation here is readily distinguishable from *Galbreath-Ruffin*, because Nadel's and Rahmey's failure to renew their licenses left them without any contemporaneously valid New York brokerage license. The court concludes that, even assuming that renewal could have been achieved by "the ministerial act of filing," a broker who fails to undertake that ministerial act and was thus entirely unlicensed in New York at the relevant time cannot recover commissions under the statute (*NFS Servs. v West 73rd St. Assoc., 102 AD2d 388, 393, 477 N.Y.S.2d 135 [1st Dept 1984]* [broker licensed only in New Jersey, who could have become licensed in New York by the ministerial act of filing, may not recover brokerage commissions]).

The claims for brokerage commissions must therefore be dismissed as against all defendants, because they are based on brokerage services rendered by unlicensed persons. The result does not depend on whether or not the corporate defendants are, as conclusorily alleged in the

fifth [**12] cause of action, the alter egos of the individual defendants.³

Second, Third and Fourth Causes of Action - Unjust Enrichment and Quantum Meruit

In their remaining causes of action, plaintiffs seek to recover brokerage commissions under an unjust enrichment or quantum meruit theory. It is illegal, however, for unlicensed persons to render brokerage services (Bendell, 251 NY at 311; Baird, 253 AD at 67; see also Kopelwitz & Co. v Mann, 23 Misc 3d 1112[A], 2009 Slip. Op. 50712[U] [Sup Ct, Kings County 2009]; Koontz v Astronics Corp., 108 Misc 2d 1049, 439 N.Y.S.2d 274 [Sup Ct, Erie County 1981]). Unlicensed persons cannot evade the licensing [**13] requirements by invoking equitable remedies to recover in tort rather than in contract (Kennedy, 31 AD2d at 616 [prohibiting recovery "either in contract or in tort" for brokerage services rendered by unlicensed persons]; Kopelwitz & Co., supra [dismissing unjust enrichment and quantum meruit claims "because [plaintiff] is legally prohibited from collecting a commission"]; Small, 98 Misc 2d at 297

[holding that the motion court "should have determined as a matter of law that plaintiffs were barred from recovering a [***6] brokerage commission...., and from a recovery in quantum meruit"]; cf. Melius v Breslin, 46 AD3d 524, 527, 846 N.Y.S.2d 645 [2d Dept 2007] [concluding that one who seeks to enforce an "illegal and unenforceable" agreement has unclean hands, precluding any claim based on the equitable remedy of unjust enrichment]).

The claims for unjust enrichment and quantum meruit thus must be dismissed in their entirety, because they are based on brokerage services rendered by unlicensed persons.

Conclusion

Accordingly, it is hereby ordered that defendants' motion for summary judgment is granted in its entirety. In light of the disposition of this issue, the court need not reach the parties' remaining arguments.

This [**14] constitutes the decision and order of the court.

³ The court concludes that the claims against Circle Imports and Liberty for brokerage commissions also fail for the separate and independent reason that plaintiffs have not established the existence of any contract, express or implied, with these entities. It is undisputed that plaintiffs had no agreement with either entity, and that neither entity was an owner, purchaser, or seller of the Brooklyn property. Plaintiffs' contract claims against Circle Imports and Liberty must therefore be dismissed for this reason as well (see CPLR 3212 [b]; Hentze-Dor, 40 AD3d at 816).