

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 8
NASSAU COUNTY

ABRAHAM POZNANSKI, NORTHERN BAY
MANAGEMENT GROUP, LLC, AFFINITY
REALTY CONSULTANTS, LLC, ISLAND
ASSET MANAGEMENT, LLC,

INDEX No. 18710/05

MOTION DATE: Aug. 20, 2008
Motion Sequence # 004, 006

Plaintiffs,

-against-

CHARLES B. WANG, PLAINVIEW PROPERTIES,
LLC, ISLAND PROPERTIES, LLC, COMMANDER
TERMINALS HOLDINGS, LLC, MARINERS WALK,
LLC, LIGHTHOUSE DEVELOPMENT GROUP, LLC,
CENTRAL ISLAND PROPERTIES, LLC,
LIGHTHOUSE HOTEL DEVELOPMENT I LLC,
BUCKINGHAM VARIETY, LLC, SOUTH STREET
ENTERPRISES, LLC, OLD COUNTRY PROPERTIES,
LLC, MAXWELL AVENUE PROPERTIES, LLC,
ARKALION LTD., WALTER IMPERATORE and
THEODORE P. SASSO,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Cross-Motion..... X
Affidavit in Opposition..... X
Reply Affirmation..... X

Memorandum of Law..... X
 Reply Memorandum of Law..... X

This motion, by plaintiffs, Northern Bay Management Group, LLC ("Northern Bay") and Affinity Realty Consultants, LLC ("Affinity"), pursuant to CPLR 3212(e), granting them partial summary judgment on the fourth cause of action against the named defendants, specifically, Lighthouse Development Group, LLC, South Street Enterprises LLC and Island Properties LLC is **denied**; and a cross motion, by defendant, Lighthouse Hotel Development I, LLC ("Lighthouse Hotel"), pursuant to CPLR 3212, granting it summary judgment dismissal of the claim against it by plaintiffs Northern Bay and Affinity is **granted**.

Insofar as it is related to the motions at hand, plaintiffs, Abraham Poznanski, Northern Bay, Affinity and Island Asset Management, LLC, fourth cause of action seeks to recover a brokerage commission for three specific transactions: namely, the sale of premises located at 150 Pinehollow Road, Oyster Bay, New York by defendant Island Properties, LLC ("Island Properties Transaction"); the purchase of the premises located at 60 South Street, Oyster Bay, New York by defendant South Street Enterprises, LLC ("South Street Transaction"); and, the purchase of the Long Island Marriott Hotel in Uniondale, New York by Lighthouse Development Group, LLC in December 2005 ("Hotel Transaction"). In support of their motion for partial summary judgment, plaintiffs submit the affirmation of Abraham Poznanski who alleges that Affinity and/or Northern Bay were the named brokers of record in the respective contracts of sale. He states that based upon a brokerage commission of 3% for acquisitions and 6% for dispositions, the aggregate brokerage commissions earned by and currently due and payable to Affinity and/or Northern Bay exceeds \$3.7 million. Abraham Poznanski further states that the claim for a commission on the three transactions is based upon two written agreements: the management agreements with the named defendants referred to as the Wang Entities and the contracts of sale for each transaction. Plaintiffs submit that, as stated in each of the contracts of sale, Northern Bay and/or Affinity are the brokers of record. Specifically, plaintiffs note that paragraph 17.1 of the contract for the Hotel Transaction states that "Purchaser is represented by [Affinity] and Purchaser agrees to pay [Affinity] pursuant to a separate agreement." Similarly, paragraph 13 of the contract for the Island Properties Transaction states that "Tullio Bertolli of Design Development Realty and [Northern Bay] are recognized as the brokers who procured the sale of the Property...Seller shall pay at Closing any commission owed to the named brokers pursuant to separate agreement." Finally, paragraph 15 of Schedule D to the contract of sale for the South Street Transaction identifies Affinity and Northern Bay as the brokers of record. Pursuant to paragraph 14.01 of the contract itself for the South Street Transaction,

however, it is stated that "[t]he commission of such broker shall be paid pursuant to separate agreement by the party specified in Schedule D." Based upon the foregoing, plaintiffs submit that as there is no dispute that the commissions based upon these contracts have not been paid to the named plaintiffs, and as there is no dispute that said plaintiffs are identified as brokers in each of the respective contracts of sale prepared and signed by the Wang parties themselves, they are entitled to partial summary judgment as a matter of law.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal-News*, 211 AD2d 626, 2nd Dept., 1995).

The burden on the party moving for summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of opposing papers (*Id.*; *Alvarez v. Prospect Hosp.*, *supra*). However, once this initial burden has been met by movant, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form sufficient to create material issues of fact requiring a trial to resolve (*Id.*). Mere conclusions and unsubstantiated allegations or assertions are insufficient (*Zuckerman v. City of New York*, 49 NY2d 557, 562).

"To recover a commission, a broker must establish that he or she is duly licensed, that he or she has a contract, express or implied, with the party charged with paying the commission, and that he or she was the procuring cause of the sale or lease" (*Brandenberg v. Waters Place Assocs., L.P.*, 17 AD3d 615, 2nd Dept., 2005; *Ormond Park Realty, Inc. v. Round Hill Dev. Corp.*, 266 AD2d 523, 524, 2nd Dept., 1999). To establish that he or she was the procuring cause of the sale, the broker must demonstrate that he or she has produced a ready, willing and able purchaser who came to a meeting of the minds with the seller as to all of the material terms of the sale (*e.g.*, *Heelan Realty & Dev. Corp. v. Ocskasy*, 27 AD3d 620, 621, 2nd Dept., 2006).

In this case, plaintiffs have not met their burden of establishing a prima facie entitlement as a matter of law. For the sake of clarity, this Court will address the South Street

and Island properties transactions together. The Hotel Transaction will be addressed separately.

South Street and Island Properties Transactions

Notably, while plaintiffs attach copies of the purchase and sale agreements for each of the three transactions, they fail to append the supposed "Management Agreements with the Wang Entities" that purportedly supports their claim for a commission for the three transactions (*Poznanski Aff.*, ¶5). There is simply no evidence, on this record, that the named defendants, specifically, South Street and Island Properties ever signed a management agreement with either Northern Bay or Affinity. Plaintiffs also fail to establish that they were the procuring cause of the transactions. Plaintiffs' conclusory assertions that "these transactions w[ere] procured through the efforts of Northern Bay and/or Affinity" are not a substitute for proof (*J. Manes Co. v. Greenwood Mills, Inc.*, 53 NY2d 759, 761 [1981]). Plaintiffs' argument that the identification of Northern Bay and/or Affinity in the contracts of sale entitles them to a brokerage commission is entirely misplaced. Generally, summary judgment is granted to a real estate broker where a contract for the sale of real property acknowledges the services performed by a broker and contains an express promise by the seller to pay the broker's commission (*see e.g., Joseph P. Day Realty Corp. v. Chera*, 308 AD2d 148, 152, 1st Dept., 2003). The rationale for this general rule is that the brokerage provision is deemed an admission by the party against whom a commission is sought (11 NY Jur 2d, Brokers §117). In this case however, in the contracts of sale for the Island Properties and South Street transactions, Poznanski himself signed the contracts on behalf of Island Properties and South Street as an officer of these entities. The brokerage provisions in these contracts are hardly against Poznanski's self interest who admittedly has a 99% membership interest in Northern Bay and 65% ownership interest in Affinity. He clearly benefits from the insertion of the brokerage provisions in the contracts of sale. The brokerage provisions were not against Poznanski's interests and thus cannot constitute an admission by the plaintiffs (*Carr v. Burnwell Gas of Newark, Inc.*, 23 AD3d 998, 1000, 4th Dept., 2005). Accordingly, this Court finds that the general rule of granting summary judgment to a real estate broker does not apply to the Island Properties and South Street transactions.

In addition, the brokerage provisions in each contract clearly provide that the respective defendants shall pay at closing any commission owed to the named brokers pursuant to *a separate agreement*. Yet, plaintiffs have failed to offer any proof of such a separate agreement for the payment of a brokerage commission for this transaction (*Halstead Property, LLC v. Gluck*, 9 Misc. 3d 1123A [Sup. Ct. New York 2005], *app. withdrawn*, 25 AD3d 1069, 1st Dept., 2006). In the absence of any evidence of such a separate agreement, plaintiffs fail to meet their burden of establishing a prima facie entitlement as a matter of law (*Id.*).

Lighthouse Hotel Transaction

Turning to the Hotel transaction, in addition to failing to append the alleged "Management Agreement with the Wang Entities," plaintiffs also fail to establish the existence of a separate agreement pursuant to which Affinity was to be paid the commission as stated in the Hotel Transaction contract.

Furthermore, based upon the papers submitted for this Court's consideration, including the deposition testimony of Abraham Poznanski himself, it is patently clear that no one affiliated with Lighthouse Hotel agreed to pay either Northern Bay or Affinity a brokerage commission for the Hotel Transaction. In fact, at deposition, Poznanski, the CEO of both Affinity and Northern Bay, testified that there was no oral agreement with Affinity or Northern Bay for the Hotel Transaction (*Poznanski Tr.*, pp. 1011-12). He further testified that neither Northern Bay nor Affinity ever asserted that they were entitled to a commission on the Hotel transaction (*Id.* at 1281-83). Indeed, Poznanski testified that he deleted the provision providing for a commission to Northern Bay (*Id.* at 966-67, 1281-82). As stated above, plaintiffs argument that the provision in the contract of sale referring to plaintiffs as the brokers of record (notwithstanding the condition of a separate agreement) is determinative of its commission claim is herewith rejected (*Halstead Property LLC v. Gluck, supra*).

Moreover, plaintiffs fail to present any evidence to establish that either of them was the procuring cause of the Hotel Transaction. As stated above, Poznanski's conclusory assertion that the Hotel Transaction "was procured through the efforts of Northern Bay and/or Affinity" is not a substitute for proof. This Court finds that, under the circumstances presented, plaintiffs, having failed to meet the initial burden, their motion is **denied** without regard to the sufficiency of opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]; *Alvarez v. Prospect Hosp.*, 68 NY2d 320).

Lighthouse Hotel's Cross Motion

Finally, defendant, Lighthouse Hotel's cross motion for summary judgment dismissal of plaintiffs', Northern Bay and Affinity's claims for a brokerage commission on the Hotel Transaction is **granted**.

In support of its motion, defendant submits ample proof in admissible form including, the sworn affidavit of Walter Imperatore, the former Senior Vice President of Northern Bay and Affinity and the president of plaintiff, Island Asset Management, LLC ("IAM"); the sworn affidavit of Robert T. Bell, a certified public accountant and a financial advisor to defendant Charles B. Wang; and the sworn affidavit of Allen J. Ostroff, the president of Hotel Dynamics, LLC, a consulting firm founded in 1989. Defendant submits that this evidence clearly demonstrates that the procuring cause of the

Hotel transaction were not the plaintiffs, Northern Bay or Affinity; rather, the procuring cause of the sale were Allen Ostroff and Al Butts who brought about a meeting of the minds about the material terms of the Hotel Transaction.

The undisputed documentary evidence shows that it was Allen Ostroff of Hotel Dynamics, an experienced hotel consultant, who initiated contact with Al Butts, the lead principal of the owner of the Marriott Hotel at the Coliseum Site, and lead the negotiations. Moreover, according to Poznanski's own testimony, it is undisputed that Northern Bay and Poznanski had no experience in hotel acquisition or development (*Poznanski Tr.*, pp. 851-53). The fact that Northern Bay, which was receiving substantial fees for its work on the Lighthouse project participated in the discussions, and exchanged e-mails on aspects of the transaction does not entitle either Northern Bay or Affinity to a commission on the Hotel transaction.

In light of defendant, Lighthouse Hotel's showing of entitlement to judgment as a matter of law, the burden shifts to the plaintiffs as the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]).

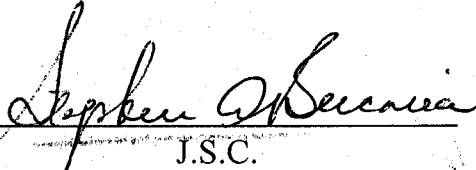
In opposition, the plaintiffs concede that there was no oral or written agreement between either (or both) of them and Lighthouse Hotel for the payment of a commission on the Hotel transaction. Instead, they rely upon the contract of sale for the Hotel transaction for their commission claim. Yet, it is the contract of sale that states that Lighthouse Hotel is to pay Affinity pursuant to a *separate* agreement. In the absence of any evidence of an agreement for the payment of a commission to either Northern Bay or Affinity for the Hotel transaction, neither plaintiff is entitled to a brokerage commission arising out of the purchase of the Marriott Hotel (*Halstead Property, LLC v. Gluck, supra*).

In addition, plaintiffs have also failed to establish that they were the procuring cause of the Hotel Transaction. The undisputed fact is that Affinity was not even formed until January 24, 2005, more than six months after Allen Ostroff began his discussion with Al Butts about the purchase of the Hotel. Plaintiffs have failed to present any evidence that it was *Affinity* that brought about a meeting of the minds about the material terms of the Hotel Transaction (*Aegis Property Servs. Corp. v. Hotel Empire Corp.*, 106 AD2d 66, 71, 1st Dept., 1985).

As such, defendant, Lighthouse Hotel's cross motion for summary judgment dismissal of plaintiffs' fourth cause of action for a brokerage commission on the Hotel Transaction is **granted**.

This shall constitute the decision and order of this Court.

Dated OCT 28 2008


J.S.C.

ENTERED
OCT 30 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE