

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE
J.S.C.

PART 10

Index Number : 108456/2009
101 WARREN ST. ASSOCIATES LLC
VS.
PRESTIGE HOMES REALTY LLC
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001
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

FILED
FEB 16 2010
NEW YORK
COUNTY CLERK'S OFFICE

motion(s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

Dated: 2/8/10

HON. JUDITH J. GISCHE J.S.C.
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----X
101 Warren Street Associates LLC.

Plaintiff,

-against-

Prestige Homes Realty LLC.

Defendant.
-----X

DECISION/ ORDER

Index No.: 108456/09

Seq. No.: 001

PRESENT:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pltf's n/m (CPLR 3212) w/DD, JS affids, exhs	1
Def's opp w/YT affirm, EI affid	2
Pltf's reply w/DD affid	3

-----X

Upon the foregoing papers, the decision and order of the court is as follows:

This is a breach of contract action in which plaintiff, 101 Warren Street Associates LLC (the "Seller"), seeks to recover monies due on a letter agreement (the "Brokerage Agreement") entered into between plaintiff and defendant. Plaintiff moves, pursuant to CPLR § 3212, for summary judgment in its favor against defendant, Prestige Homes Realty LLC (the "Broker"). Since issue has been joined, and the note of issue has not yet been filed, summary judgment relief is available. [CPLR § 3212, Brill v. City of New York, 2 NY3d 648 (2004)].

The following facts are established by the documentary evidence and affidavits submitted in support of this motion.

Plaintiff asserts two causes of action: (1) breach of contract on the Brokerage Agreement; and (2) attorney's fees.

It is undisputed that defendant, as Broker, entered into a Brokerage Agreement with plaintiff, as Seller, as set forth in a letter dated April 27, 2006, for the premises located at 99 Warren Street and 101 Warren Street (the "Property"). The property is a residential condominium which at the time of the making of the Brokerage Agreement was still in the offering plan stage and had not yet been built.

In 2006, Broker introduced a prospective buyer, Rohit D'Souza (the "Buyer" or "Purchaser"), to the Seller. On May 9, 2006, Buyer and Seller entered into an option agreement for the purchase of Condominium Unit 3220 (the "Unit"), for the sum of \$6,815,000.00. Neither side has provided a copy of the option agreement to the Court, but its contents are not disputed. Thereafter, in accordance with the Brokerage Agreement, Seller paid Broker an advance of \$54,520.00 (the "Advance"), representing twenty percent (20%) of the estimated brokerage commission (4%) for procuring Buyer. The Brokerage Agreement states that:

2(b)(i). "Seller shall pay you an amount equal to twenty percent (20%) of the Brokerage Commission no later than ten (10) business days after the Additional Deposit has been paid, subject to collection"

2(c). "The Brokerage Commission due upon the sale of each Unit shall be four percent (4%) of the 'Net Purchase Price' for the Unit (as such term is defined in subparagraph (f) below)."

The Property was constructed over the course of the next two years and a closing date was set for April 1, 2009. Near the date of the scheduled closing, Buyer notified Seller that he could no longer afford to purchase the Unit and Buyer elected not

to go through with the closing. The Seller sent Buyer a notice of default and thereafter, Buyer and Seller entered into a Contract Termination and Release Agreement ("Release Agreement"). Although the Release Agreement is not provided to the Court by Seller, it is undisputed that Buyer was released from the option agreement, which was rescinded, and the closing never took place.

In support of its motion for summary judgment, Seller argues that Broker is obligated to return the Advance in the sum of \$54,520.00 based on the express and unequivocal terms of the Brokerage Agreement, specifically paragraph 2(e), as set forth below. Paragraph 2(e) of the Brokerage Agreement specifically states that:

2(e) "Notwithstanding the foregoing, if title to any Unit shall [fail] to be conveyed by Seller to the Purchaser thereof for **any reason, including without limitation**, the willful default of Seller, Seller's abandonment of the Offering Plan or a right of rescission granted by Seller, no Brokerage Commission shall be deemed to be earned by you with respect thereto. **In such event, all amounts previously paid pursuant to this letter agreement on account of such Brokerage Commission shall be reimbursed immediately by you to Seller.** If you shall fail to so reimburse such amounts to Seller, Seller may, in addition to such other remedies as it may have in law or equity, offset such amounts against future Brokerage Commissions payable to you for sales of Units at the Property or brokerage commissions earned by you elsewhere." (Emphasis added).

Although Broker does not deny that the closing did not take place or that the Brokerage Agreement is unambiguous, Broker nonetheless argues that Seller received a sum of \$1,000,000.00 from Buyer pursuant to the Release Agreement and that paragraph 2(e) does not apply because Seller received a substantial sum of money in consideration for the Unit, thus entitling Broker to retain the Advance.

Discussion

On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts to prove its *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. Only if this burden is met, must the party opposing the motion then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her failure so to do. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). In connection with a cause of action for breach of contract, only where the intent of the parties can be determined from the face of the agreement, will interpretation be a matter of law and the case ripe for summary judgment. American Express Bank v. Uniroyal, 164 AD2d 275 *app den.* 77 NY2d 807 (1991). The court must give weight to what is in the contract, not in the parties' minds. WWW Associates Inc. v. Giancontieri, 77 NY2d 157, 162 (1990).

The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. Furia v. Furia, 166 A.D.2d 694 (2nd Dept. 1990).

Seller has established its *prima facie* case that there is a Brokerage Agreement between Seller and Broker and it paid the Broker a 20% advance of its brokerage commission. Seller has also proved that pursuant to the conditions of the Agreement, Broker is required to reimburse the Seller for "all amounts previously paid pursuant to this letter agreement . . ." Broker's opposition does not raise any triable issues of fact or set forth any legal arguments that defeat Seller's motion for summary judgment or

warrant its denial for the reasons that follow:

Although Seller may have been paid a sum of money by Buyer to obtain his release from the option agreement, that payment does not allow Broker to keep the Advance paid by Seller. Paragraph 2(e) specifically states that if the Unit fails to be conveyed to Buyer "for any reason . . . without limitation," then the Broker shall reimburse the Seller for "all amounts previously paid." There is no condition in the Agreement that would allow the Broker to retain the Advance if the closing does not take place or the Buyer and Seller decide to rescind the option agreement.

Here, it is undisputed that the closing, scheduled for April 1, 2009, did not take place because the Buyer was unable to purchase the Unit. Paragraph 2(e), requires reimbursement if there is a failure to convey for any reason, requiring Broker to reimburse Seller with all amounts previously paid to it pursuant to the Brokerage Agreement.

It is well established that a broker only earns its commission when it procures a buyer ready willing and able to purchase on terms agreed to by the seller. Eastern Consolidated Properties v. Lucas, 285 AD2d 421 (1st Dept. 2001); Prime City Real Estate Co., Inc. v. Hardy, 256 AD2d 80 (1st Dept. 1998). Consequently, the Broker did not earn its commission since it did not produce a Buyer that was ready, willing, and able to purchase the Unit. Accordingly, the Buyer was not entitled to the commission because it did not earn it and therefore is not entitled to keep the percentage of the commission paid in advance.

Legal Fees

In general, each party to a litigation is required to pay its own legal fees, unless there is a statute or an agreement providing that the other party shall pay same. AG Ship Maintenance Corp. v. Lezak, 69 NY2d 1 (1986). The Brokerage Agreement does not provide that Broker is liable for Seller's reasonable attorneys' fees, costs and expenses incurred, in instituting, prosecuting or defending any action or proceeding. Consequently, Broker is not responsible for Seller's fees, and each side must bear their own.

Conclusion

In accordance herewith, it is hereby:

ORDERED that Plaintiff's motion for summary judgment is granted and Plaintiff is entitled to summary judgment against Defendants; and it is further

ORDERED that the Clerk shall enter a money judgment in favor of Plaintiff, 101 Warren Street Associates LLC, and against the Defendant, Prestige Homes Realty LLC, in the following amount: \$54,520.00 plus interest from June 12, 2009 and the costs and disbursements of this action.

Any requested relief not expressly addressed herein has nonetheless been considered by the Court and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
February 8, 2010

So Ordered:


HON. JUDITH J. GISCHE, J.S.C.