

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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**PREMIER NORTH REALTY INC., AND
PRUDENTIAL DOUGLAS ELLIMAN REAL ESTATE,**

Plaintiff,

-against-

VICTOR CHIANG AND STELLA CHIANG,
Defendants,

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VICTOR CHIANG and STELLA CHIANG

Third-Party Plaintiffs,

-against-

**RICHARD FU CHUANG LIU and
HELEN CHI HUA HSIEH,**

Third-Party Defendant.

TRIAL PART: 16

NASSAU COUNTY

INDEX NO: 015773-07

MOTION SEQ. NO: 2

SUBMIT DATE: 11/15/10

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The following papers having been read on this motion:

Notice of Motion..... 1
Opposition.....2
Reply.....3
Third Party Affidavit.....4
Plaintiff Reply.....5

Motion (seq. no. 2) by the attorneys for the defendants Victor Chiang and Stella Chiang (collectively "Chiang" defendants or sellers) for an order pursuant to CPLR 3212 granting summary judgment in favor of the defendants dismissing the complaint is granted.

This is an action to recover a real estate broker's commission. The plaintiffs are licensed real estate brokers. The complaint alleges that on or about November 16, 2005, the Chiang's agreed to list their property known as 31 Claridge Circle, Manhasset, New York (the subject property) with the plaintiff Prudential Douglas Elliman Real Estate (Prudential) "in exchange for a four percent (4%) commission." The agreement allegedly expired after eight months. It is further alleged that

on or about February 5, 2006, the plaintiff, Prudential, introduced the defendants to Richard Liu and Helen Liu (hereinafter referred to as "Liu" or "buyers"). According to ¶ 6 of the complaint, the listing agreement states that:

The above compensation shall be paid to the broker in the event that the owner enters into a contract of sale to sell the property, or actually sells the property within the period of (180) days after the termination of the agreement to any person (buyer) who has been shown the property during the term of this agreement. This paragraph shall not apply if the owner(s) has in good faith relisted the property with another broker after the expiration of this agreement and prior to the commencement of negotiations with such buyer.

Plaintiffs allege the defendants conveyed the subject premises to Liu within 180 days of the time the plaintiff Prudential introduced the buyers to the sellers. Plaintiffs also allege there is a commission due and owing in the sum of \$86,800. The first cause of action alleges a breach of contract. The plaintiffs assert that Premier North Realty Inc. had a "partnering agreement" with Prudential Douglas Elliman Real Estate.

In support of the motion for summary judgment the attorney for defendants Chiang argues that the plaintiffs have failed to produce a copy of the written listing agreement referred to in ¶ 6 of the complaint. The Executive Director of plaintiff Prudential testified that she could not locate a copy of a signed agreement between Prudential and Chiang referred to in ¶ 6 of the complaint.

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it. *Sillman v Twentieth Century Fox Films Corp.*, 3 NY2d 395, 404. A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant. *Alvarez v Prospect Hospital*, 68 NY2d 320; *Winegrad v New York University Medical Center*, 64 NY2d 851; *Fox v Wyeth Laboratories, Inc.*, 129 AD2d 611; *Royal v Brooklyn Union Gas Co.*, 122 AD2d 133. The defendants have made an adequate *prima facie* show of entitlement to summary judgment.

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the

opposing party must be presented by evidentiary proof in admissible form. *Friends of Animals, Inc. v Associated Fur Mfgs., Inc.*, 46 NY2d 1065. Conclusory statements are insufficient. *Sofsky v Rosenberg*, 163 AD2d 240, *aff'd* 76 NY2d 927; *Zuckerman v City of New York*, 49 NY2d 557; see *Indig v Finkelstein*, 23 NY2d 728; *Werner v Nelkin*, 206 AD2d 422; *Fink, Weinberger, Fredman, Berman & Lowell, P.C. v Petrides*, 80 AD2d 781, *app. dismissed*, 53 NY2d 1028; *Jim-Mar Corp. v Aquatic Construction, Ltd.*, 195 AD2d 868, *lv. app. denied*, 82 NY2d 660.

In opposition to the motion for summary judgment the attorneys for the plaintiff Prudential submit a document called a "Listing Agreement for Residential Property Data Section." The document describes the subject property, a listing sale price of \$2,888,000 and property taxes of \$19,310. There are no narrative terms in the document. It is clear this is not the agreement referred to in ¶ 6 of the complaint. Ms. Chiang testified that she intended to use the services of Rachel Wiederkehr to try to sell her house. Although Mrs. Chiang candidly acknowledges signing the undated multiple listing document, there is not one iota of proof that she signed any other written document that could be categorized as a binding written commission agreement. RPL § 443 requires that licensees present a written agency disclosure form that details consumer choices about representation at the first substantive contact with a prospective seller or buyer. See *Spada, New York Real Estate for Salesperson*, Cengage, 4th Ed., 2009, pgs. 54-56; 71-75. The production of the disclosure form would be some proof of the plaintiffs contact with the defendants in regard to the issue of whether they were the procuring cause. There is no indication that the written "Disclosure Regarding Real Estate Agency Relationship Form" required by Real Property Law § 443 was ever provided to either the seller or buyer by any of the plaintiffs. Further, there is no proof that the brokers maintained any records of the underlying transaction in which the plaintiffs assert they were the procuring cause, for a period of three years, as required by 19 NYCRR § 175.23.

A real estate broker earns a commission when she brings together a buyer and a seller who have reached a meeting of the minds with respect to the essential terms of an agreement customarily encountered in such a transaction. *Kaelin v Warner*, 27 NY2d 352; *Heelan Realty and Development Corp. v Skyview Meadows Development Corp.* 204 AD2d 601. Although a contract of sale between the parties need not be fully executed or consummated for a broker to earn his commissions, unless expressly so conditioned in the brokerage agreement, a broker must produce a buyer ready, willing

and able to accept the terms offered by the seller. Further, although it is not disputed that in New York a real estate broker need not have a written agreement in order for it to recover a real estate brokerage commission, there must be proof of an oral agreement and that the broker was the procuring cause. See GOL § 5-701(a)(10); *Andover Realty Inc. v Western Electric Company*, 100 AD2d 157 *aff'd* 64 NY2d 10061.

Rachel D. Wiederkehr owns plaintiff Premier North Realty Inc. At most, Ms. Wiederkehr testified that she opened the subject premises for the buyers. Ms. Wiederkehr alleges the person "who displayed the house to the actual purchaser" was Yeuh Er Chin a/k/a Judy Lin, a licensed salesperson affiliated with co-plaintiff Prudential. There is no affidavit from Judy Lin, the salesperson allegedly responsible for the sale, attesting to the fact that she was the procuring sales person. There is no proof that the plaintiffs ever received an offer to purchase the subject property. Ms. Wiederkehr referred to "Daytime records" she maintained for the subject property. However, a copy of the "Daytime records" is not submitted in opposition to the within motion. Moreover, when asked about other papers signed by the Chiangs, Ms. Wiederkehr testified that they would not be in her possession, but rather the office of the co-plaintiff. Again, the documents were never produced. On Page 20 at lines 23-25 the representative of plaintiff, Prudential, allegedly the selling broker, was asked the following question: (Exhibit F Notice of Motion, deposition transcript of Karen Newhouse)

"What specific tasks did Prudential Douglas do with respect to selling this property?"

No answer is provided. Pages 21-25 of the transcript are not included in the submission before the court. Nor is there an affidavit from anyone with personal knowledge of the facts on behalf of the plaintiffs to state with any degree of specificity how the plaintiffs can be categorized as the procuring cause of the sale. There must be a direct and proximate link, as distinguished from one that is indirect and remote. The plaintiffs either individually or collectively failed to demonstrate that they brought the sellers and buyers together, much less a meeting of the minds. There is no showing that the brokers did anything to execute an interest in negotiating the terms. *Greene v Hellman*, 51 NY2d 197. Nor have the plaintiffs established that they created an amicable atmosphere in which negotiations proceeded or that generated a chain of circumstances that proximately led to the sale.

See, *Hentze-Dor Real Estate Inc. v D'Allesio*, 40 AD3d 813.

Summary judgment is a drastic remedy (*Andre v Pomeroy*, 35 NY2d 361, 364). Nevertheless, a "court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated" (*Assing v United Rubber Supply Co., Inc.*, 126 AD2d 590, see *Rotuba Extruders Ceppos*, 46 NY2d 223, and where there is nothing left to be resolved at trial, the case should be summarily decided (*Andre Pomeroy, supra* at p. 364). Conclusory assertions are not enough to defeat a motion for summary judgment (see *Spodek v Park Property Dev. Assoc.*, 263 AD2d 478). "[A]verments merely stating conclusions of fact or of law, are insufficient" to "defeat summary judgment" (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 quoting from *Mallad Constr. Corp. v Country Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290. Assuming *argundo*, there was an oral listing agreement, other than the conclusory allegations in the complaint, there is no credible or probative evidence to establish the plaintiffs were either individually or jointly the procuring cause of the subject real estate transaction. In opposition, the plaintiffs have failed to produce evidentiary proof in admissible form establishing the existence of a material question of fact. See *Crifasi Real Estate Inc. v Harvey Enterprises Inc.*, 60 AD3d 802.

The defendants' motion for summary judgment is granted. All proceedings under index no. 15773/07 are terminated.

This constitutes the decision and order of this Court.

DATED: December 20, 2010

ENTER


HON. ARTHUR M. DIAMOND

J. S.C.

ENTERED
DEC 23 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE