SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

CS EMPIRE REALTY LLC,

Plaintiff,

-against-

DELWAR HUSSAIN, DELCO PROPERTIES LLC and JOHN DOE,

Defendants.

Index No. 703661/2015

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS DELWAR HUSSAIN AND DELCO PROPERTIES LLC'S MOTION TO DISMISS VERIFIED COMPLAINT

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STATUTES

Defendants Delwar Hussain and Delco Properties LLC (collectively, "Defendants"), by their attorneys, Salamon, Gruber, Blaymore, & Strenger, P.C., submit this Memorandum of Law in support of their motion to dismiss the first cause of action in plaintiff CS Empire Realty LLC's Verified Complaint pursuant to CPLR 3211(a)(1) and (a)(7).

PRELIMINARY STATEMENT

Plaintiff CS Empire Realty LLC ("Plaintiff") asserts only one of its two causes of action against Defendants, claiming in its First Cause of Action that Defendants breached a June 5, 2013 real estate commission agreement (the "Commission Agreement") by failing to pay Plaintiff a commission on the canceled sale of property owned by Defendant Delco, located at 72-11 Roosevelt Avenue, Jackson Heights, New York 11372 (the "Premises") to 72-11 Roosevelt Realty LLC ("72-11 Roosevelt").

Delco and 72-11 Roosevelt entered into a contract of sale for the Premises dated June 20, 2013 (the "Sales Contract"). Affidavit of Delwar Hussain, sworn to on May 14, 2015 ("Hussain Affidavit") ¶ 4. The Commission Agreement, drafted solely by Plaintiff, explicitly conditions Plaintiff's entitlement to a commission "upon the closing of title to the Premises." *See* Compl. ¶ 24. Hussain Affidavit ¶ 8. Plaintiff admits, as it must, that closing never occurred. *See* Compl. ¶ 23; Hussain Affidavit ¶ 11. It is not disputed that the Premises is owned by Delco, a limited liability company and not Hussain personally, nor can it be disputed that Hussain only signed the Commission Agreement once on behalf of Delco.

Plaintiff does not and cannot allege that the sale was not consummated because of any deliberate action by Defendants to prevent the sale from moving forward. Instead, Plaintiff admits that the parties to the sale "reached an agreement amongst themselves" to cancel the Sales Contract. Compl. ¶ 15. Indeed, as of February 2015, approximately 20 months after execution

of the Sales Contract, the transaction had not closed, and the parties mutually and amicably decided to cancel the Sales Contract, which decision is memorialized in a Settlement Agreement dated March 10, 2015. *See* Hussain Affidavit ¶12 and Exhibit "B" thereto.

Despite these undisputed facts, Plaintiff commenced the instant litigation to collect a commission that was conditioned upon the occurrence of an event which Plaintiff acknowledges never occurred. Accordingly, the First Cause of Action finds no support in the documents, the facts or the law, and it must be dismissed.

ARGUMENT

LEGAL STANDARD

CPLR § 3211(a) permits a party to move for judgment dismissing one or more causes of action against him on a number of grounds, including, as is relevant here, CLPR §§ 3211(a)(1) and (7).

CPLR § 3211(a)(1) permits a party to move for such judgment where "a defense is founded upon documentary evidence." A motion to dismiss pursuant to this section should be granted where the documentary evidence submitted in support of the motion conclusively resolves all factual issues and establishes a defense as a matter of law. *See Goseh v Mutual Life Ins. Co.*, 98 NY2d 314, 326 (2002); *Leon v Martinez*, 84 NY2d at 88 (1994).

A motion to dismiss a pleading for failure to state of cause of action pursuant to CPLR § 3211(a)(7), based upon the plaintiff's failure to state a cause of action, should be granted only "if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law." *Palo v Cronin & Byczek, LLP*, 43 AD3d 1127, 1127 (2d Dep't 2007). However, "bare legal conclusions are not presumed to be true and are not accorded every favorable inference."

Kupersmith v Winged Foot Golf Club, Inc., 38 AD3d 847, 848 (2d Dep't 2007).

POINT I

THE FIRST CAUSE OF ACTION MUST BE DISMISSED BECAUSE PLAINTIFF ACKNOWLEDGES THAT THE SOLE EVENT THAT COULD HAVE TRIGGERED ITS ENTITLEMENT TO A COMMISSION NEVER OCCURRED

Plaintiff's cause of action for breach of the Commission Agreement relies upon the general rule is that to state a claim for the breach of a commission agreement, a broker must allege: (1) that it is duly licensed; (2) that it had a contract with the party charged with paying the commission; and (3) that it was the procuring cost of the sale. *Buck v. Cimino*, 243 A.D.2d 681, 684 (2d Dep't 1997). Thus, "a real estate broker will be deemed to have earned his commission when he produces a buyer who is ready, willing and able to purchase at the terms set by the seller." *Mecox Realty Corp. v. Rose,*, 202 A.D.2d 404, 404 (2d Dep't 1994), quoting *Lane-Real Estate Corp. v. Lawlet Corp.*, 28 N.Y.2d 36, 42 (1971). In its misplaced reliance upon the aforementioned general rule, Plaintiff alleges that it is entitled to a commission under the Commission Agreement because it 'produced "a ready, willing and able buyer (Purchaser) to purchase the Premises." Compl. ¶ 22.

However, the general rule is inapplicable where, as here, the commission agreement at issue explicitly states that the commission is not due and payable until "consumption (sic) of the transaction at closing of such title," or, as Plaintiff clarifies "payment of the commission was conditioned upon closing of title for the Premises" (Compl. ¶ 23); *see Mecox Realty*, 202 A.D.2d at 404 (general rule does not apply where broker's entitlement to commission is dependent upon "performance of the real estate contract"). In such cases, there must be "a formal act of closing" before any commission is due. *Donald Yoo (New York) Corp. v. Tauber*, 281 A.D.2d 171, 172 (1st Dep't 2001).

Here, plaintiff admits that "[t]he parties never closed said sale of the Premises...." *See*

Compl. ¶ 23. Thus, under the very terms of the purported Commission Agreement, Plaintiff has never been entitled to a commission because the sale never happened, and accordingly, the First Cause of Action must be dismissed pursuant to CPLR 3211(a)(1).

In attempt to get around these undisputed and inconvenient facts, Plaintiff alleges that because Defendants "caused the failure" of the sale," they cannot "disclaim liability for the commissions (sic)." Compl. ¶ 22. Such allegations cannot salvage the First Cause of Action because Plaintiff has failed to allege, nor can it allege, that Defendants "wrongfully or arbitrarily prevent[ed] the completion of the deal." *Heelan Realty and Dev. Corp. v. Skyview Meadows Dev. Corp.*, 204 A.D.2d 601, 603 (2d Dep't 1994) (broker may be entitled to commission where deal not completed due to seller's wrongful or arbitrary acts to prevent the sale). Instead, Plaintiff admits that the parties to the Sales Contract mutually agreed to cancel the sale; alleging: (1) "...Original Purchasers and Sellers reached an agreement amongst themselves regarding the soon-to-be repudiated contract for sale of the Premises" (Compl. ¶ 15); and (2) "[t]he parties never closed said sale of the Premises, however, because Sellers negotiated the cancellation of the contract for the sale of the Premises" (Compl. ¶ 23).

Having failed to allege that Defendants deliberately prevented the sale of the Premises to 72-11 Roosevelt, Plaintiff has failed to state a cause of action for breach of the Commission Agreement. *See, e.g. Heelan Realty*, 204 A.D.2d at 603 (broker not entitled to commission on canceled sale where cancellation caused by disagreement between buyer and seller as to essential terms of sale, and not by any willful act of seller to prevent consummation of negotiations); *see also R.L. Friedland Realty, Inc. v. Modern Cabinets Corp.*, 194 A.D.2d 657, 659 (2d Dep't 1993) (where commission agreement provided that commission becomes due upon passage of title, "except where there is 'willful default' on the part of the seller," no willful default where

defendants did not willfully breach enforceable sales contract); *Stutzmann Realty, Inc. v. Petralia*, 160 A.D.2d 994, 995 (2d Dep't 1990) (broker not entitled to commission where no default, "willful or otherwise, under the contract). Accordingly, the First Cause of Action must be dismissed pursuant to CPLR 3211(a)(7).

CONCLUSION

Based on the foregoing, it is respectfully submitted that the Verified Complaint be dismissed as against defendants Delwar Hussain and Delco Properties LLC, with prejudice, and for such other and further relief as the Court may deem just and proper.

Dated: Roslyn Heights, New York
May 14, 2015

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& STRENGER, P.C.

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