

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

CS EMPIRE REALTY LLC,

Plaintiffs,

-against-

DELWAR HUSSAIN, DELCO PROPERTIES LLC, and  
JOHN DOE,

Defendants.

Index No.: 703661/15

**MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS**

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**PRELIMINARY STATEMENT**

This memorandum of law is submitted by Plaintiff CS EMPIRE REALTY LLC, in opposition to Defendants' pre-answer motion to dismiss the complaint pursuant to CPLR 3211(a)(1) (documentary evidence) and CPLR 3211(a)(7)(failure to state a cause of action). The Defendants' motion must be denied because Defendants admit that Plaintiff produced a buyer who was ready, willing and able to purchase the property in question and admit that they willfully caused the failure of the sale by paying the buyer \$2 million to walk away. Since Defendants admit that they deliberately prevented the completion of the sale of the premises, they cannot now claim that the documentary evidence, i.e., the language in the Commission Agreement that states a commission is not due unless a sale is consummated, is a defense to Plaintiff's claims. Likewise, since the complaint adequately alleges that Defendants caused the failure of the consummation of the sale, the complaint has stated a cause of action.

**POINT I**  
**THE DOCUMENTARY EVIDENCE SHOWS THAT THE SALE OF THE PREMISES**  
**WAS NOT CONSUMMATED BECAUSE OF DELIBERATE ACTION BY THE**  
**DEFENDANTS**

**a.) The Defendants Own Documents and Affidavit Demonstrate that Defendants Willfully Caused the Sale to Fail**

Moving Defendants Delco Properties LLC and Delwar Hussain concede that as general rule “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 (2d Dept. 1994). In this case, the complaint alleges and Defendants do not dispute that Plaintiff did produce a buyer, that terms were agreed to, a contract was signed , a deposit was paid and the buyer was prepared to close. (See Complaint, Paragraph 13 and Contract of Sale, Exhibit “B” to Complaint). Defendants further admit that they paid the buyer \$2 million to induce the cancellation of the contract. (See Exhibit “B” to the Affidavit in Support of Delwar Hussain, sworn to on May 14, 2015).

Nevertheless, Defendants argue that the complaint should be dismissed because the “documentary evidence”, i.e. the Commission Agreement, provides that a commission is only payable if a sale is consummated and here a sale was not consummated. Defendants’ argument fails because the Court of Appeals in *Lane-Real Estate v. Lawlet Corp.*, 28 NY2d 36 (1971) made clear that “even where the broker and seller expressly provide that there shall be no right to a commission unless some condition is fulfilled, and the condition is not performed, the seller will nevertheless be liable if he is responsible for the failure to perform the condition”. Moreover, Defendants concede that a party may not avoid the obligation to pay a commission where it willfully caused the failure

of the sale. (See Defendants' Memorandum of Law, citing *Heelan Realty and Dev. Corp. v. Skyview Meadows Dev. Corp.*, 204 A.D.2d 601 (2d Dept. 1994)). Defendants here also admit that they paid the buyer \$2 million to induce the cancellation of the contract<sup>1</sup> and even attach a document memorializing that agreement. (See Exhibit "B" to the Affidavit in Support of Delwar Hussain, sworn to on May 14, 2015) Thus, Defendants' own documentary evidence demonstrates that they willfully caused the failure of the sale.

Under CPLR 3211(a)(1), dismissal is warranted only if the documentary evidence submitted utterly refutes the plaintiff's factual allegations, conclusively establishing a defense to the asserted claims as a matter of law. *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314, 326 (2002), citing *Leon v. Martinez*, 84 N.Y.2d 83, 88(1994). Since the documentary evidence proffered by Defendants does not utterly refute the Plaintiff's factual allegations and, to the contrary, actually evidences that Defendants willfully caused the failure of the sale of the property, the motion to dismiss based on the documentary evidence must be denied.

**b.) The Facts in the Cases Cited in Defendants' Memorandum of Law Are Distinguishable from the Facts in this Case**

The cases cited by Defendants in support of their motion are clearly distinguishable from the instant case and in fact support Plaintiff's position. In *Heelan Realty and Dev. Corp. v. Skyview Meadows Dev. Corp.*, 204 A.D.2d 601 (2d Dept. 1994), (as noted in Defendants' Memorandum of Law) the court found that the broker was not entitled to a commission on a cancelled sale because the cancellation was due to the buyer and seller failing to agree on

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<sup>1</sup>The Complaint alleges upon information and belief that this was done because the Defendants received a higher offer for the property. See Complaint, ¶17.

essential sale terms.<sup>2</sup> Therefore, it was not the willful act of the seller which caused the sale to fail. Rather, the sale failed because the parties could not agree on essential terms. Here, in contrast, the complaint alleges (and it is not disputed) that the buyer and seller (Defendants) agreed to terms on the transaction and entered into a written contract containing all the essential terms. The contract even provided that the Plaintiff was the sole broker on the deal and that the seller would pay the Plaintiff any commission earned.<sup>3</sup> The Complaint further alleges (and Defendants do not dispute) that the buyer explicitly advised Defendants that it was ready, willing and able to close on the contract. It was only after Defendants admittedly paid the buyer \$2 million that the buyer agreed to forgo closing on the deal. Thus, it was Defendants' willful act, i.e. offering and agreeing to pay the buyer \$2 million, and not a failure to agree on essential terms, that caused the failure of the sale.

In *R.L. Friedland Realty, Inc. v. Modern Cabinets Corp.*, 194 A.D.2d 657 (2d Dept. 1997) the sale failed to close because the seller could not or would not produce a certificate of occupancy prior to the closing. The broker in that case alleged that he was owed a commission, even though it was payable only upon the passing of title, because the seller's failure to produce a certificate of occupancy caused the buyer to not close on the deal. The broker argued that the seller's failure to produce the certificate was a willful default which caused the failure of the sale. The Second Department found that the broker's claim was properly dismissed because there were alterations to the contract which "demonstrate[d] either that no agreement had been reached at

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<sup>2</sup>In *Heelan*, the Second Department also noted that a "seller may not avoid payment of the broker's commission when the seller wrongfully or arbitrarily prevents the completion of the deal."

<sup>3</sup>See Contract of Sale, ¶27, Exhibit "B" to the Complaint.

all, or that the parties had agreed that the seller would not be responsible for the production of a certificate of occupancy.” Accordingly, since the seller was not obligated to produce a certificate of occupancy prior to the closing, it did not willfully or improperly cause the failure of the sale by not producing the certificate. In the instant case, there was a written contract under which the Defendants were obligated to close and only induced the buyer to agree to vitiate the contract by paying the buyer \$2 million.

In *Stutzmann Realty, Inc. v. Petralia*, 160 AD 2d 994 (2d Dept. 1990) the commission was payable upon the closing of title and the contract of sale expressly granted to the seller the right to cancel the contract in the event she was unable to convey good and marketable title. Before the closing, the seller was served with a lawsuit from a third party, seeking to enjoin the conveyance of the property and a lis pendens was also filed. The court held that since the seller had the right to cancel the contract because she could not convey good title and the lis pendens actually prevented her from conveying good title, there was no willful default under the contract and no commission was owed. In the instant case, Defendants had no right to cancel the contract by its terms and in fact paid off the buyer millions of dollars to get out of the contract. It is indisputable that this was a willful action by Defendants that caused the failure of the sale of the property.

**POINT III**  
**PLAINTIFF HAS STATED A CAUSE OF ACTION BY ALLEGING THAT**  
**DEFENDANTS DELIBERATELY PREVENTED THE SALE OF THE PREMISES**

The Defendants allege that the complaint fails to state a cause of action for breach of the Commission Agreement because it does not allege that the Defendants “deliberately prevented the sale of the Premises to 72-11 Roosevelt. . .” This is simply incorrect. In that regard, ¶16 of

the Complaint alleges: “Upon information and belief, pursuant to the above described agreement, Sellers [Defendants] agreed to pay Original Purchasers an unknown sum of money in order to agree to a cancellation of the contract of sale of the Premises.” ¶17 of the Complaint alleges: “Upon information and belief, the Sellers [Defendants] undertook such actions because Sellers had found new buyers, Defendant JOHN DOE, willing to pay a higher purchase price for the Premises.” ¶23 of the Complaint alleges: “The parties never closed said sale of the Premises, however, **because Sellers [Defendants] negotiated the cancellation of the contract for the sale of the Premises. Thus, Sellers prevented the closing from occurring.**” (Emphasis added).

It is well settled that, on a motion to dismiss pursuant to CPLR 3211, the court is to liberally construe the complaint, accept the alleged facts as true, give the plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory. *Leon v. Martinez*, 84 NY2d 83, 87-88. Here, the Complaint alleges that Defendants agreed to pay a sum of money so that the original buyers would allow them to cancel the contract, to enable them to sell the premises to third party for a higher price. Even without “liberally construing” the Complaint, Plaintiff has adequately alleged that Defendants deliberately prevented the sale of the Premises to 72-11 Roosevelt and thereby breached the Commission Agreement.<sup>4</sup>

### CONCLUSION

While Defendants allege that the documentary evidence demonstrates that there was no breach of the Commission Agreement, the documentary evidence actually confirms Plaintiff’s

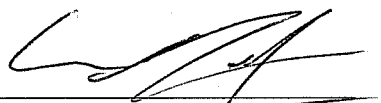
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<sup>4</sup> If the Court deems the Complaint deficient in its pleading regarding Defendants’ deliberate acts, then Plaintiff respectfully requests that any dismissal be with leave to file an amended complaint to further “flesh out” this allegation.

allegation that Defendants willfully caused to the failure of the sale of the premises. Accordingly, the Defendants' motion to dismiss the Complaint pursuant to CPLR 3211(a)(1) and 3211(a)(7) should be entirely denied.

Dated: Lake Success, New York  
June 9, 2015

Yours, etc.  
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