

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

KLASSEN, INGALLS & ASSOCIATES, INC.
and EARLE INGALLS, d/b/a VR REAL
ESTATE BROKERS,

Plaintiff,

v.

DECISION AND ORDER

Index #2005/07062

F.J.M. ENTERPRISES, LLC d/b/a
TEMPLE'S DAIRY STORE, ONEIDA
LAKE LIQUORS, INC. and
FRANK J. MURACO,

Defendant.

Plaintiffs, Klassen, Ingalls & Associates, Inc. ("Klassen"), and Earle Ingalls d/b/a VR Real Estate Brokers ("VR") (collectively "plaintiffs"), have moved for an order pursuant to CPLR § 3212 for partial summary judgment for liability only on the grounds that defendants have breached contracts with plaintiffs and there are no questions of law or fact. Plaintiffs also request a hearing as to damages. Defendants, F.J.M. Enterprises, LLC, d/b/a Temple's Dairy Store ("F.J.M."), Oneida Lake Liquors, Inc. ("Oneida"), and Frank J. Muraco ("Muraco") have cross-moved for an order granting partial summary judgment dismissing plaintiffs' claim for a real estate commission, and dismissing plaintiffs' claim to the extent they seek to recover more than \$17,500. On December 20, 2005, Plaintiff submitted a

Reply Affirmation in response to defendants' cross-motion.

Plaintiffs commenced this action with a summons and verified complaint on or about June 27, 2005 and allege four causes of action: (1) breach of contract against F.J.M. and Muraco for failure to pay broker's commission, (2) breach of contract against F.J.M. and Muraco for failure to pay real estate transaction fee, (3) breach of contract against Oneida and Muraco for failure to pay broker's commission, and (4) reasonable attorneys' fees and costs pursuant to Broker's Agreements against F.J.M., Oneida, and Muraco. Defendants served their Verified Answer on or about August 4, 2005 and asserted an affirmative defense whereby defendants allege that plaintiffs breached the agreements because they failed to undertake any efforts to market the businesses and failed to deliver any prospective purchasers to defendants and thus are not entitled to the claimed commissions.

This dispute arises out of two Listing Agreements entered into between plaintiffs and defendants. Plaintiffs are in the business of brokering the purchase and sale of businesses, while defendant Muraco allegedly employed plaintiffs to assist him in selling certain businesses owned by him. See Bruu Affirmation, ¶ 5. The first agreement was entered into on July 6, 2004 between plaintiffs and defendant seller F.J.M., with Muraco personally guaranteeing payment and performance, wherein plaintiffs were

granted sole and exclusive right to sell defendant's business, Temple's Dairy Store, for a period of six months. Defendant F.J.M. agreed to pay plaintiffs a broker's commission equal to 9.5% of the total purchase price or \$10,000, whichever is more. This agreement was signed by plaintiff Earle Ingalls, a licensed real estate broker, and by Frank Muraco, as managing partner of F.J.M. See Exhibit A. Defendant Muraco admits to signing the Listing Agreement. See Muraco Affidavit, ¶ 4. The second agreement was entered into on July 6, 2004 between plaintiffs and defendant seller Oneida, with Muraco personally guaranteeing payment and performance, wherein plaintiffs were granted sole and exclusive right to sell defendant's business, Oneida Lake Liquors, Inc., for a period of six months. Defendant Oneida agreed to pay plaintiffs a broker's commission equal to 9.5% of the total purchase price or \$10,000, whichever is more. This agreement was signed by plaintiff Earle Ingalls, a licensed real estate broker, and by Frank Muraco, as president of Oneida Lake Liquors Inc. See Exhibit A. Defendant Muraco admits to signing the Listing Agreement. See Muraco Affidavit, ¶ 4. In addition, plaintiffs and defendant Muraco executed a Retainer Fee Addendum to the Listing Agreement on July 6, 2004, wherein Muraco paid plaintiffs a non-refundable retainer fee of \$2,500 which would be credited toward the broker's commission upon the sale of either of Muraco's businesses.

With respect to the first and third causes of action, plaintiffs allege that defendants sold the Temple's Dairy Store business for \$25,000 during the listing period, and that defendants sold the Oneida Liquor Store business during the listing period for \$20,000, which as plaintiffs allege, is far below the fair market value of \$350,000 for the Temple business and \$285,000 for the Oneida business as listed in the Listing Agreements. Plaintiffs further allege that they duly demanded payment from defendants for the commissions, yet defendants have not paid them anything and are therefore in breach of the Listing Agreements. Defendant Muraco alleges that, contrary to plaintiffs' express obligation in the listing agreement, plaintiffs undertook no efforts to market these properties, and that after several months of entering the Listing Agreements, he was forced to sell the Temple and Oneida businesses for \$25,000 and \$20,000 respectively, to his brother, David Muraco, because the businesses were losing money. Muraco Affidavit, ¶¶ 4, 17-20. While plaintiffs allege that both businesses were sold sometime during the listing period between July 6, 2004 through January 6, 2005, and while defendant Muraco admits that he sold both businesses to his brother, defendant does not set forth the exact dates of the sales, nor does he deny that he sold the businesses during the listing period. However, in a letter addressed to defendant Muraco dated January 6, 2005, which also is the last

day of the listing period, plaintiff demanded payment of the broker's commissions as a result of the sale of the two businesses during the listing period. See Bradia Affidavit, Exhibit 1. Defendant also admits that he hasn't paid the broker's commissions beyond the \$2,500 that he tendered at the outset, but asserts that he did not pay because plaintiffs undertook no efforts to market the two businesses. See Muraco Affidavit, ¶ 5.

As for the second cause of action, plaintiffs allege that defendants F.J.M. and Muraco breached the provision of the F.J.M. Listing Agreement wherein it provides for payment of commissions of 6% on real estate sold in connection with the sale of the Temple's Dairy Store business. However, defendants point out that, per the Listing Agreement, F.J.M. was only the seller of the Temple business and was not the owner of the real property upon which the Temple business was located. See Exhibit A, Listing Agreement. Defendant Muraco states he was the owner of the real property upon which the Temple business was situated, as indicated in the Listing Agreement, and admits that he sold the land and the business to his brother. Id.; Muraco Affidavit, ¶¶ 29, 31. Muraco also asserts that contrary to the contract provision, plaintiffs did not provide the buyer for the Temple business, nor do the plaintiffs allege that they provided the buyer of Temple's Dairy Store, and therefore, as defendant Muraco

asserts, plaintiffs are not entitled to the 6% real estate transaction fee. Id.; Muraco Affidavit, ¶¶ 30, 32.

Summary Judgment and Breach of Contract

It is well settled that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) (citations omitted); see also Potter v. Zimber, 309 A.D.2d 1276 (4th Dept. 2003) (citations omitted). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003), *citing Alvarez*, 68 N.Y.2d at 324. "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the responsive papers." Wingrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985) (citation omitted). See also Hull v. City of North Tonawanda, 6 A.D.3d 1142, 1142-43 (4th Dept. 2004). When deciding a summary judgment motion, the evidence must be viewed in the light most favorable to the nonmoving party. See Russo v. YMCA of Greater Buffalo, 12 A.D.3d 1089 (4th Dept. 2004). The court's duty is to determine whether an issue of fact exists, not to resolve it. See Barr v. County of Albany, 50 N.Y.2d 247 (1980); Daliendo v.

Johnson, 147 A.D.2d 312, 317 (2nd Dept. 1989) (citations omitted).

The elements of a breach of contract cause of action are: (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, and (4) resulting damages. See Furia v. Furia, 116 A.D.2d 694, 695 (2d Dept. 1986). Furthermore, the complaint must allege the provisions of the contract upon which the breach of contract claim is based. See Sud v. Sud, 211 A.D.2d 423, 424 (1st Dept. 1995).

First Cause of Action Against F.J.M. and Muraco
Third Cause of Action Against Oneida and Muraco

Plaintiffs have moved for partial summary judgment as to liability only, and allege that defendants have breached the Listing Agreements by failing to pay broker's commissions for the sale of defendants businesses within the six month exclusive listing period, despite due demand thereof. Plaintiffs also request a hearing to determine damages. Defendants assert in their affirmative defense that contrary to paragraph 3 of the contract, plaintiffs did not undertake any efforts to sell the businesses and therefore breached the agreement and thus are not entitled to any broker's commissions. Defendants also cross-move for an order dismissing plaintiff's claim to the extent they seek to recover more than \$17,500. It is not disputed that both businesses were sold during the listing period.

A brokerage agreement, which includes an "Exclusive Right to Sell" clause, entitles the broker to receive the commission for any sale that occurs within the time frame specified in the agreement, even if the broker did not have any hand in bringing about the sale. Hess v. Kruse, 131 A.D.2d 545, 546 (2d Dept. 1987), *citing* Hammond, Kennedy & Co. v. Servinational, Inc., 48 A.D.2d 394, 397 (1st Dept 1975). However, the listing agreement must clearly and expressly provide that a commission is due upon sale by the owner or exclude the owner from independently negotiating a sale. CV Holdings, LLC v. Artisan Advisors, LLC, 9 A.D.3d 654, 656 (3d Dept. 2004), *citing* Solid Waste Institute, Inc. v. Sanitary Disposal, Inc., 120 A.D.2d 915, 916 (3d Dept. 1986).

Paragraph 7b of both listing agreements provides:

Seller agrees to pay Broker a transaction fee in the amount equal to 9.5% of the total purchase price or \$10,000, whichever is more, immediately if . . . [s]eller sells, leases, trades or otherwise conveys all or any part of the Business **during the listing term regardless of whether or not the Broker was involved in or responsible for such disposition** or within two (2) years after the expiration of this Agreement to any person, firm or entity registered by the Broker or with whom the Seller had negotiations during the listing term. (emphasis added).

Paragraph 3 of both listing agreements provides:

Broker accepts employment and promises to use its best efforts to sell the Business described above but makes no guarantee that the Business will be sold.

Based on the foregoing principles, paragraph 7b in the parties' Listing Agreements, and plaintiffs allegations and supporting papers, including the Bradia Affidavit and annexed Exhibits, plaintiffs have met their initial burden by establishing a prima facie breach of contract and entitlement to partial summary judgement as to liability only for the first and third causes of action. Specifically, defendant admits that he entered into the contracts, while plaintiffs contend that they fully performed under the terms of the contract. Furthermore, plaintiffs state that defendants have breached paragraph 7b of the listing agreements by not paying the broker's commissions after the Temple and Oneida businesses were sold, and thus have been damaged in an amount still to be determined. David Bradia, a senior sales associate with defendant Klassen, sets forth the steps he took in using his best efforts to sell the businesses, including listing the properties with Klassen's inventory of buyers, notifying potential buyers, and advertising the businesses on three national websites. See Bradia Affidavit, ¶ 10. Bradia also states that he reviewed the listings with approximately 10 prospects, and heard from an additional 20 prospects as a result of the advertising on the national web sites. Id. Bradia further asserts that, on numerous occasions, he requested many documents from defendant Muraco so that he could assemble a "comprehensive package" which would aid prospective purchasers in assessing the

viability and valuation of each business, but maintains that he did not receive most of the documents requested from defendant. Id.

However, in defendants' affirmative defense, and as further set forth in its Affidavits in support of its cross-motion, defendant has raised a triable issue of material fact that requires a trial for resolution. Specifically, there is a question of fact as to whether plaintiffs undertook their "best efforts," indeed, any effort, to market the businesses. Plaintiffs assert that, even if it is true that they failed to undertake any efforts, "the inaction or action of plaintiffs is irrelevant in determining whether or not plaintiffs are entitled to a commission." Affirmation of Christen Culligan Bruu, Esq., ¶ 13. Defendants maintain, however, that this assertion is contrary to the express terms of the listing agreements wherein the plaintiff "promises to use its best efforts to sell the Business[es]." In addition, defendants point out that, if under Mr. Bruu's assertion that plaintiffs had no obligation to use its "best efforts" to market the businesses, then there would be no consideration for the listing agreements. In essence, defendants argue that "under Attorney Bruus's scenario, defendants tendered \$2,500, and signed a listing agreement obligating them to pay fees if the businesses were sold, but plaintiffs did not need to do anything to earn either the [\$2,500] deposit or any subsequent

fee." Affidavit of Jonathan B. Fellows, Esq., ¶ 8. The court agrees. The question of "best efforts" must be resolved.

Furthermore, defendant Muraco alleges that plaintiffs undertook no efforts to market his businesses. Muraco maintains that, contrary to plaintiffs' assertions, he was never informed (1) that his businesses were listed with Klaussen's inventory of buyers, (2) that plaintiffs notified potential buyers of the businesses for sale, (3) that anyone from plaintiffs' "inventory of buyers" was interested in purchasing the businesses, and (4) that there were any prospects from the alleged national website advertisements. Defendant Muraco also asserts that he never saw any of the advertisements on the three national web sites, that he was never advised of the "approximately 10 prospects" resulting from the web sites, and was never advised that plaintiff "heard from approximately twenty prospects for each business." Muraco further contends that he provided most of the documents requested by plaintiff for the "Comprehensive Package" for each business. Finally, defendant points out that plaintiff never identified any of the prospects, nor do plaintiffs provide any documents in support of their assertions. Based on the foregoing, defendants' affirmative defense, which is further supported in its cross-motion papers, raises a triable issue of fact which precludes summary judgment. Accordingly, plaintiffs' motion for partial summary judgment on the first and third causes of action is

denied.

Defendants' Cross-Motion for Partial Summary Judgment

On their cross-motion, defendants contend that pursuant to CPLR § 3212(g), this Court should find that the only issue for trial is whether plaintiffs used its best efforts to market the properties, and that *if* plaintiffs succeed on their claim, then damages should be fixed at \$17,500. Defendants assert that they are entitled to partial summary judgment dismissing plaintiffs' claim that they are entitled to a transaction fee other than as measured by the purchase price of the businesses.

Paragraph 7b of both Listing Agreements provides for a "transaction fee in the amount equal to 9.5% of the total purchase price or \$10,000, whichever is more." It is undisputed that the Temple business was sold during the listing period for \$20,000 and the Oneida business was sold during the listing period for \$25,000. Furthermore, defendant Muraco asserts that these payments were the only consideration he received for sale of the businesses, and further asserts that he questioned plaintiff on the \$350,000 and \$285,000 selling prices listed in the Listing Agreement since both businesses were losing money, wherein plaintiff responded that they could always lower the listing prices. In addition, defendants allege that the only value of both businesses was the equipment and a small amount of inventory. Defendants contend that if plaintiffs are entitled to recovery on

the transaction fee, it would be based on the \$20,000 and \$25,000 purchase prices, which would result in a maximum recovery of \$10,000 for each business. But, as defendants allege, since defendant has already paid a deposit of \$2,500, defendants assert that the maximum plaintiffs could recover is \$17,500 in this matter if plaintiffs are successful on their claim. Finally, defendants dispute that plaintiffs are even entitled to the \$17,500 since plaintiffs never undertook any efforts to sell the businesses.

In its Reply Affirmation, plaintiffs concede that defendants are entitled to discovery regarding plaintiffs' efforts to market the businesses, "just as plaintiffs are entitled to discovery to validate their position that Defendants impeded, hampered and frustrated Plaintiffs' attempts to market the businesses." Reply Affirmation of R. Axelrod, Esq., ¶ 3. Plaintiffs further assert in their Reply Affirmation that the sole issue before this Court is whether or not plaintiffs are entitled to partial summary judgment on liability for the broker's commission portion of its claim since plaintiffs state they are no longer pursuing their claim for real estate commissions. This court agrees. Both plaintiffs and defendants are entitled to discovery to determine each of their respective positions as to liability. But, defendants' cross-motion for partial summary judgment to provide a ceiling for plaintiffs' recovery at \$17,500 in the event plaintiff

is successful on its claim is granted. Plaintiffs have no theory of recovery above such amount other than that the businesses were sold to the brother at what plaintiffs presume was below market value. However, plaintiffs concede they did not provide a buyer within the term of the listing agreement and that the sale to the brother occurred shortly before the agreement expired. Nor do plaintiffs allege, even, that any one of the potential buyers identified by them (but not disclosed to defendants or the court) would have been in a position to purchase the businesses within two years after expiration of the term of the agreement. Moreover, plaintiffs offer no proof of any kind that the valuation was in excess of the broker's purchase price. Nor do plaintiffs identify any avenue of discovery that they need to pursue in order to make such a showing. Accordingly, defendants motion for partial summary judgment declaring a damages ceiling of \$17,500 is granted.

Second Cause of Action Against F.J.M. and Muraco

The Reply Affirmation of plaintiffs' Attorney in response to Defendants' cross motion states that plaintiffs are not pursuing their claim for real estate commissions in their second cause of action. Accordingly, the court concludes that plaintiffs are not entitled to the real estate commissions, and plaintiff's motion for partial summary judgment with respect to their second cause of action is denied and defendants' cross-motion for partial summary

judgment as that cause of action is granted.

Fourth Cause of Action Against All Defendants

Pursuant to paragraph 6 of both Listing Agreements, plaintiffs request attorneys' fees and costs against all defendants. "Should any action be commenced to enforce Broker's rights herein, and in the event Broker is successful, the Seller agrees to reimburse the Broker for reasonable attorney's fees and other related costs." Exhibit A. The Affirmation of Christen Culligan Bruu, Esq. merely requests a judgment for attorneys' fees and costs without specifying an amount, while the WHEREFORE clause of plaintiffs' verified complaint requests \$22,900 in attorneys' fees on it's fourth cause of action. In any event, since partial summary judgment as to liability was denied because there remains a triable issue of fact, plaintiffs request for costs and attorneys' fees as to the fourth cause of action against all defendants is denied without prejudice.

Summary

Plaintiffs' motion for partial summary judgment on liability only in its first cause of action for broker's commissions against F.J.M. and Muraco is denied.

Plaintiffs' motion for partial summary judgment on liability only on its second cause of action for a real estate transaction fee/commission against F.J.M. and Muraco is denied. Defendants' cross-motion for an order granting partial summary judgment

dismissing plaintiff's claim for a real estate commission is granted.

Plaintiffs' motion for partial summary judgment on liability only in its third cause of action for broker's commissions against Oneida and Muraco is denied.

Plaintiffs fourth cause of action against F.J.M., Oneida, and Muraco for attorneys' fees and costs is denied without prejudice.

Defendants' cross-motion for partial summary judgment declaring a damage ceiling is granted.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: December ____, 2005
Rochester, New York