

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 19

JAMES A. PHILLIPS REALTY, INC. X
etc.,

Plaintiff,

- against -

THADDEUS LUKASIEWICZ,
Defendant.

INDEX NO. 28437/2003

SUBMISSION DATE: FEBRUARY 15,
2008

DECISION AFTER TRIAL

DATED: May 19, 2008

BY: SATTERFIELD, J.

X

This is an action by James A. Phillips Realty, Inc. d/b/a Coldwell Banker Phillips brought to recover a real estate broker's commission in the amount of \$20,205.00.

On December 8, 2003, plaintiff began this action by the filing of a summons and complaint against defendant Thaddeus Lukasiewicz. On May 9, 2006, plaintiff filed a note of issue and a statement of readiness. On December 19, 2006, the parties signed a stipulation consenting to the referral of this matter to JHO Sidney Leviss to hear and report. On June 7, 2007, this action went to trial before JHO Leviss who subsequently passed away before rendering his report. On November 27, 2007, the parties entered into a stipulation consenting to the determination of the case by a new JHO based on the trial transcript, the trial exhibits, and the post-trial memoranda of law. This court will itself decide the

case based on the trial transcript, the trial exhibits, and post-trial memoranda of law.

Based on the credible evidence in this case, the court finds the following facts: Pursuant to a "Listing Agreement" dated August 8, 2003, defendant Thaddeus Lukasiewicz hired plaintiff Phillips, a licensed real estate brokerage owned by James A. Phillips III, to sell his house located at 63-34 83rd Street, Middle Village, New York for \$449,000.00. The listing agreement provided in relevant part: "The undersigned [Luckasiewicz] hereby agrees to pay you a commission of 4.5%, seven (7)%, eight (8)% of the purchase price in case the house is sold by you, by the undersigned or by any other person during the term of this agreement" Plaintiff found a buyer for the house, Michael Flannery, who signed the broker's purchase and sale agreement dated August 19, 2003, promising to pay the asking price for the house. Plaintiff referred defendant Luckasiewicz to Catherine O'Leary, Esq., and defendant called her to discuss retaining her in connection with the sale of the house. After agreeing on a \$950.00 fee, O'Leary prepared a contract of sale and sent it to Flannery's attorney. Flannery signed the contract, agreeing to pay the asking price of \$449,000.00, and on or about September 9, 2003, his attorney returned the contract together with a down payment to O'Leary. Flannery also withdrew two modifications to the contract that he had proposed. O'Leary informed defendant Luckasiewicz that

the buyer had withdrawn his proposed modifications, but defendant did not go to her office to execute the contract. In December 2003, defendant sent a letter to plaintiff attempting to terminate the listing agreement.

"[A]ll a broker need do to establish a prima facie case is introduce evidence tending to show the existence of a commission agreement and that he has procured a ready, willing and able purchaser at the price and terms of the seller" (Lane--Real Estate Dept. Store, Inc. v Lawlet Corp., 28 NY2d 36, 44.) "Unless the parties have agreed otherwise, a real estate broker will be deemed to have earned his commission when he produces a purchaser who is not only ready and willing to purchase at the terms set by the seller, but able to do so as well." (Rusciano Realty Services, Ltd. v Griffler, 62 NY2d 696, 697; see, Central City Brokerage Corp. v Elyachar, 40 AD3d 452.) "To establish the right to a commission, a broker must demonstrate that he or she produced a ready, willing, and able purchaser who came to a meeting of the minds with the seller as to all of the material terms of the sale" (Heelan Realty and Development Corp. v Ocskasy, 27 AD3d 620, 621; see, Devine Real Estate, Inc. v Brennan, 42 AD3d 646.)

In the case at bar, plaintiff successfully proved a prima face case (see, Lane--Real Estate Dept. Store, Inc. v Lawlet Corp., supra), and the burden in this action shifted to defendant Luckasiewicz to establish a valid defense. He failed to carry this

burden. First, the listing agreement signed by defendant is not void for vagueness (see, Joseph Martin, Jr., Delicatessen, Inc. v Schumacher, 52 NY2d 105; Brener & Lewis Management, Inc. v Engel, 168 AD2d 254), on the ground that it fixed the commission at three different rates. The commission rate of 4.5% was handwritten in the printed listed agreement, and the other rates of seven and eight percent printed therein were obviously intended to be crossed out. Second, plaintiff earned its commission despite the fact that title to the property never passed. While a real estate brokerage agreement may contain a condition precedent requiring the consummation of a transaction before a commission is earned (see, Srour v Dwelling Quest Corp., 5 NY3d 874; Levy v Lacey, 22 NY2d 271; Donald E. Welch Real Estate, Inc. v Heritage Broadcasting Co. of New York, 192 AD2d 891), the listing agreement signed by defendant Luckasiewicz did not contain such a condition precedent. The language in the listing agreement pertaining to the payment of a commission "in case the house is sold by you, by the undersigned or by any other person [etc.]" was not intended to make the payment of the commission contingent upon a sale of the property, but rather was intended to make the payment of a commission to the broker obligatory no matter who procured the buyer. As the listing agreement immediately explains after the quoted language, the clause was intended to give the plaintiff broker an "exclusive right to sell." (See, Devine Real Estate,

Inc. v Brennan, supra; CV Holdings, LLC v Artisan Advisors, LLC, 9 AD3d 654.) In any event, "[o]nce a broker has procured a buyer ready, willing and able to purchase on the seller's terms, the broker has earned its commission ... and the seller who frustrates the consummation of the transaction is liable nonetheless to the broker." (Eastern Consol. Properties, Inc. v Lucas, 285 AD2d 421, 422; see, Lane--Real Estate Dept. Store, Inc. v Lawlet Corp., supra.) A party who frustrates the fulfillment of a condition precedent cannot rely on that condition as a defense. (See, Lane--Real Estate Dept. Store, Inc. v Lawlet Corp., supra; Roberts v H. Gin Realty Corp., 185 AD2d 209.) In the case at bar, defendant Luckasiewicz frustrated the consummation of the contract by refusing to sign it after the buyer withdrew his proposed modifications.

Accordingly, plaintiff is entitled to enter judgment against defendant in the amount of \$20,205.00 plus interest at the legal rate from October, 2003.

Settle judgment.

J.S.C.