

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Index Number : 160731/2013
ROFFMAN, STUART
vs.
SOTHEBY'S INTERNATIONAL
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

Motion sequence 001 and 002 are decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion for summary judgment of defendant Sotheby's International Realty, Inc. is denied; and it is further

ORDERED that the motion for summary judgment of plaintiff Stuart Roffman is granted; and it is further

ADJUDGED and DECLARED that plaintiff Stuart Roffman owes no brokerage fee to defendant Sotheby's International Realty, Inc. on his sale of the building located at 171 East 62nd Street in Manhattan to Von Rabenturn Holdings, LLC; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2-11-15

HON. CAROL EDMEAD, J.S.C.

- 1. CHECK ONE: CASE DISPOSED (checked), NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

-----X
STUART ROFFMAN,

Plaintiff,

-against-

Index No. 160731/13

SOTHEBY'S INTERNATIONAL
REALTY, INC.,

Defendant.

-----X
CAROL R. EDMEAD, J.:

Motion sequence Nos. 001 and 002 are consolidated for disposition. In motion sequence No. 001, plaintiff Stuart Roffman moves, pursuant to CPLR 3212 (a), for summary judgment on the complaint. The complaint seeks a declaratory judgment that plaintiff does not owe defendant a broker's commission on his sale of the building (Building) located at 171 East 62nd Street in Manhattan. In motion sequence No. 002, defendant Sotheby's International Realty, Inc. (Sotheby's) moves for summary judgment on its counterclaims, alleging, respectively, breach of contract and a right to recover on the basis of quantum meruit. Sotheby's contends that it is owed a broker's fee on the sale of the Building.

The relevant facts are simple and undisputed. By listing agreement (Agreement), dated February 24, 2009, Roffman and Sotheby's entered into a contract, providing that, until the expiration thereof on August 31, 2009, Sotheby's would have an exclusive right to lease the Building. Thereafter, nonparties Stuart and Felicia Jacobs rented the Building and Sotheby's received a commission, in the amount of \$65,7000. On or about December 19, 2012, Roffman

sold the Building to Von Rabenturn Holdings, LLC (Holdings), for \$16,500,000. Holdings is wholly owned by Stuart and Felicia Jacobs.

Both parties rely upon paragraph seven of the Agreement. That paragraph provides:

Within three (3) business days after the expiration of the listing term, we [Sotheby's] shall deliver to you in writing a list of no more than six (6) names of persons who inspected the [P]remises during the listing term. If you enter into a lease for the Premises with a person procured during the term thereof or with a person introduced by us within 90 days thereafter, and the Premises is purchased by such lessee, you agree to pay [Sotheby's], at the time of closing, a commission of Five (5%) per cent of the contracted for purchase price.

Sotheby's argues that, because Holdings is wholly owned by Stuart and Felicia Jacobs, it should be held to be a purchasing lessee, thereby entitling Sotheby's to a 5% commission on the purchase price. Roffman disagrees.

Sotheby's could have qualified the word "lessee" by adding a more inclusive phrase. It did not do so. Nor does it argue that the word "lessee" has a broader meaning here than it usually has, by virtue of usage in the trade. "[C]ontract terms that are unambiguous must be enforced as written." *Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 4 (1st Dept 2012), citing *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 (1990). Moreover, inasmuch as the Agreement was drafted by Sotheby's, were the term "lessee" ambiguous, the ambiguity would be construed against Sotheby's. *Village of Ilion v County of Herkimer*, 23 NY3d 812, 820 (2014); *Albunio v City of New York*, 23 NY3d 65, 71 (2014).

This is not a case where a party has frustrated a broker's recovery of a commission, by failing to perform a condition precedent to such recovery (*see LanepReal Estate Dept. Store v Lawlet Corp.*, 28 NY2d 36, 43 [1971]), and Sotheby's expressly disclaims any imputation that plaintiff and the Jacobses colluded to deny Sotheby's a commission. *See* Sotheby's

memorandum in support of motion at 2. Rather, Sotheby's argues that Holdings and the Jacobses are identical, and it stands upon the Agreement. That argument is untenable. Citing *Barclay v Barclay* (155 NYS 221 [Sup Ct, NY County 1915], *affd* 171 App Div 951 [1st Dept 1915]), Sotheby's argues that a court of equity may disregard the separate entity of a corporation, in order to do justice. Assuming that *Barclay* is still good law, Sotheby's is seeking to recover for breach of a contract that it drafted. This is not a situation that calls for a disregard of corporate form. As plaintiff succinctly puts it, "[c]orporations are corporations; individuals, individuals." Taddeo, reply affirmation, ¶ 4. Inasmuch as the "lessee" introduced by Sotheby's did not purchase the Building, the Agreement does not entitle Sotheby's to a commission on that sale. Nor, inasmuch as the condition for Sotheby's to recover a commission is set forth in the Agreement, is Sotheby's entitled to a recovery in quantum meruit. *See Aviv Constr. v Antiquarium, Ltd.* 259 AD2d 445, 446 (1st Dept 1999), citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987).

To be sure, Holdings's corporate veil is flimsy. The Jacobses have submitted an affidavit, at Sotheby's request, in which they state that they continue to live in the Building, and that they are not tenants of Holdings. An "Agreement Between Owner and Architect," pertaining to possible work on the Building, and dated December 4, 2012, names Sy Jacobs and Felicia Anastasia (a/k/a Felicia Jacobs) as owners of the Building. *See* affidavit of Joseph Pell Lombardi, exhibit A. Indeed, Holdings was formed in November 2012, for the stated purpose of acquiring and operating the Building. *See* affidavit of Seymour Jacobs, exhibit A at 1. Were Sotheby's seeking to pierce Holdings's veil so as to recover from the Jacobses, it might well succeed. But that does not help Sotheby's, here.

Sotheby's argues that it needs discovery in order to ascertain when plaintiff learned that the Jacobses were the sole owners of Holdings. In his affidavit in opposition to Sotheby's's motion, Roffman states that the Jacobses did not represent their sole ownership of Holdings to him, and that, inasmuch as the contract for the sale of the Building recites an assignment of the lease for the Building, and of the security deposit, and does not mention the Jacobses, it has all the indicia of an arms' length transaction. But, even assuming that Roffman knew, when he sold the Building to Holdings, that Holdings was wholly owned by the Jacobses, that knowledge, absent collusion between Roffman and the Jacobses, would be irrelevant to the disposition of these motions. The Agreement states what it states, and again, absent collusion, Roffman was entitled to rely upon the Agreement.

Finally, Sotheby's's additional argument, that it served notices to admit on Roffman, to which Roffman failed to respond, and that, therefore, it is admitted that Roffman sold the Building to Holdings through Stuart and Felicia Jacobs, does not aid Sotheby's. Even assuming that the notices to admit were proper (*but see Taylor v Blair*, 116 AD2d 204, 206 [1st Dept 1986] [purpose of notice to admit is limited to matters as to which there can be no controversy]), and even assuming that Roffman knew that he was selling the Building through the two sole owners of Holdings, such knowledge on his part would be irrelevant to the disposition of these motions, for the reason given in the preceding paragraph.

Accordingly, it is hereby

ORDERED that the motion for summary judgment of defendant Sotheby's International Realty, Inc. is denied; and it is further

ORDERED that the motion for summary judgment of plaintiff Stuart Roffman is granted;

and it is further

ADJUDGED and DECLARED that plaintiff Stuart Roffman owes no brokerage fee to defendant Sotheby's International Realty, Inc. on his sale of the building located at 171 East 62nd Street in Manhattan to Von Rabenturn Holdings, LLC; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

Dated: February 11, 2015

ENTER:

A handwritten signature in black ink, appearing to read 'C. Edmead', written in a cursive style.

Carol Robinson Edmead, J.S.C.

HON. CAROL EDMOAD