

Douglas Elliman, LLC v Five E. 44th LLC
2016 NY Slip Op 30507(U)
March 24, 2016
Supreme Court, New York County
Docket Number: 652271/11
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

-----X
DOUGLAS ELLIMAN, LLC,

Plaintiff,

-against-

FIVE EAST 44TH LLC,

Defendant.

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FIVE EAST 44TH LLC,

Third Party Plaintiff,

-against-

ILAN BRACHA and THE BRACHA GROUP,

Third Party Defendants.

-----X

HON. ANIL C. SINGH, J.:

In this action for alleged breach of contract in a real estate transaction, third party plaintiff Five East 44th LLC, (“Five East”) moves for an Order (1) granting a default judgment against third party defendants Ilan Bracha and The Bracha Group (collectively “Bracha” or “Bracha Defendants”) based upon their failure to answer or otherwise appear, pursuant to CPLR 3125. Plaintiff in the main action, Douglas

DECISION AND
ORDER

Index No.
652271/11
Mot. Seq. 008

Third Party Index No.:
595486/2015

Elliman, LLC (“Douglas Elliman”) opposes, and cross-moves for summary judgment, pursuant to CPLR 3212.

Background

On August 15, 2011, Douglas Elliman filed suit against Five East seeking alleged commissions due for real estate brokerage services concerning the sale of certain residential condominium units located at 5 East 44th Street, New York, New York (hereinafter “property”).

Specifically, for its complaint in the main action, Douglas Elliman sought to recover the total sum of \$87,871.00 for an alleged total unpaid commission due from Five East. On December 5, 2014, Douglas Elliman obtained a default judgment against Five East in the amount of \$87,871.00 for its failure to appear in the main action.

On June 11, 2015, this Court issued an order partially vacating the default judgment entered against Five East. This Court further directed that the Clerk of this Court enter judgment in favor of Douglas Elliman and against Five East for 50% of the unpaid brokerage commissions in the amount of \$43,935.50.

This Court directed Five East to commence this third party action against Bracha so that a determination can be made whether Bracha, as broker of the units at issue in the main action, is entitled to the remaining 50% commission in the

amount of \$43,935.50. Accordingly, on July 6, 2015 Five East commenced a third party action against Bracha. (Exhibit “B”). On July 31, 2015, both Bracha defendants were duly served at Bracha’s place of business with the appropriate follow up mailings.

To date, the Bracha defendants have failed to answer or otherwise appear. Based upon the foregoing, third party plaintiff Five East seeks a default judgment declaring that third party defendants Bracha and/or Bracha Group are hereby entitled to the remaining commissions at issue in the main action the amount of \$43,935.50.

Legal Standard for Default Judgment

On a motion for default judgment, the movant must submit “proof of service of ... the summons and notice” and “proof of the facts constituting the claim, the default and the amount due by affidavit made by the party.” (CPLR 3215).

Third Party Plaintiff Five East's motion for default judgment is denied for failure to provide proof of the claim itself. Five East's papers are defective as they rely on an attorney affirmation rather than an affidavit of merit from the plaintiff or someone with personal knowledge of the facts at issue (see Joosten v Gale, 129 AD2d 531, 535 [1st Dept 1987] (holding that “plaintiff was not entitled to a default judgment since, as noted, an attorney's verification not made on personal

knowledge cannot be used for purposes of obtaining a default judgment.”); see also Manhattan Telecom. Corp. v H & A Locksmith, Inc., 21 NY3d 200, 203 [2013]).

Legal Standard for Summary Judgment

“The proponent of a motion for summary judgment, pursuant to CPLR 3212 must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law.” (Dallas–Stephenson v. Waisman, 39 AD3d 303, 306 [1st Dept 2007] (internal citations omitted)). Upon proffer of evidence establishing a prima facie case by the movant, “the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.” (People v. Grasso, 50 AD3d 535, 545 [1st Dept 2008] (internal citations omitted)).

In their cross-motion for summary judgment, plaintiff asserts that it is undisputed that Bracha was an associate real estate broker associated with Douglas Elliman when the commissions were earned and therefore has no legal capacity to claim a commission from defendant, Five East. The party affidavit of Kenneth Harber, Esq. establishes that Bracha was licensed as an Associate Real Estate Broker associated with Douglas Elliman on or about October 26, 2010 and on or

about December 6, 2010, at the times the relevant commissions were earned and became due. (Exhibit “21”).

Real Property Law § 440(2) provides that “the practice of real estate sales and brokerage by such individual as an associate broker shall be governed exclusively by the provisions of this article as they pertain to real estate salesman.” (RPL § 440(2)). Furthermore, Real Property Law § 442-a provides that “[n]o real estate salesperson... shall receive or demand compensation of any kind from any person, other than a duly licensed real estate broker with whom he associated, for any service rendered or work done by such salesperson in the appraising, buying, selling, exchanging, leasing, renting or negotiating of a loan upon any real estate.” (RPL § 442-a).

Accordingly, because Bracha was an associate real estate broker associated with Douglas Elliman when the relevant commissions were earned, Bracha cannot independently seek a commissions from Five East. Bracha can only receive and/or demand compensation from the real estate broker with whom Bracha was associated, namely Douglas Elliman.

According to the fully executed contract by and between the parties, Douglas Elliman and Five East, (“Agreement”) and as alleged in the Verified Complaint, Douglas Elliman was granted the exclusive right to sell the units 18

and 6B at the subject property. (Exhibit “19”). The First Department has held that the “plaintiff was entitled to commission, without the need to prove it was the procuring cause of the sale, since a broker with an exclusive right to sell need not show that it was the procuring cause of the sale.” (Sioni & Partners, LLC v. Vaak Props., LLC, 93 AD3d 414, 417 [1st Dept. 2012]). Here, the written contract of sale were executed and title closed on units 18 and 6B, which were sold on or about October 26, 2010 and on or about December 6, 2010, respectively, pursuant to the terms of the Agreement.

Douglas Elliman has established its performance pursuant to the Agreement, but Five East failed to pay the commission owed to Douglas Elliman, therefore breaching the terms of the Agreement. Douglas Elliman has set forth a prima facie case for its cause of action of breach of contract. Furthermore, it is undisputed that as an associate real estate broker, Bracha, has no legally cognizable claim against Five East. Accordingly, it is hereby

ORDERED that third party plaintiff Five East 44th LLC,’s motion for default judgment is denied; and it is further

ORDERED that the plaintiff Douglas Elliman, LLC’s cross-motion for summary judgment herein in is granted; and it is further

ORDERED that the Clerk of the Court enter judgment in favor of plaintiff Douglas Elliman, LLC and against defendant Five East 44th LLC, in the sum of \$43,935.50 with statutory interest to run from November 6, 2010 together with costs and disbursements as taxed by the Clerk of the Court.

Date: March 24, 2016
New York, New York


Anil C. Singh