

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

SITUS PROPERTIES, INC.,	:	June Term 2003
Plaintiff,	:	
	:	No. 002119
v.	:	
PETER ROBERTS ENTERPRISES,	:	COMMERCE PROGRAM
Defendant.	:	
	:	Control Number 062688

ORDER

AND NOW, this 26th day of January, 2005, upon consideration of Defendant Peter Roberts Enterprises' Motion for Summary Judgment and/or Petition to Strike Plaintiff's Expert Testimony, Plaintiff's response in opposition, memorandum and all matters of record, it hereby is **ORDERED** and **DECREED** that

1. Defendant's Motion for Summary Judgment is **Granted** as to Count III (unjust enrichment) and **Denied** as to Count I and II (breach of contract). Count III is dismissed.
2. Plaintiff's Motion for Summary Judgment is **Granted** and Judgment is entered in favor of Plaintiff and against Defendant in the amount of \$126, 940 and the money being held in an escrow account at Allegiance Bank of North America Account No. 48082 shall be released to Situs Properties Inc. Plaintiff's request for attorney fees and costs is **Denied** without prejudice.
3. Defendant's Petition to Strike Plaintiff's Expert Report is Moot.

BY THE COURT,

C. DARNELL JONES, II, J.

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MEMORANDUM OPINION

JONES, II, J.

Presently before the court is Defendant Peter Roberts Inc, a/k/a Peter Roberts Enterprises' ("PRE") Motion for Summary Judgment and/or Petition to Strike Plaintiff's Expert Testimony and Plaintiff Situs Properties, Inc.'s ("Situs") cross motion for summary judgment. For the reasons discussed below, PRE's motion for summary judgment is denied as to the breach of contract claim and granted as to the unjust enrichment claim, PRE's Motion to Strike Plaintiff's Expert Testimony is Moot and Situs' cross motion for summary judgment is granted.

BACKGROUND

Situs is a licensed real estate brokerage and management services company. Michael Cohen is the President of Situs. PRE is a company that owns commercial real estate in Philadelphia. Gloria Bressi is the president and sole owner of PRE.

On June 30, 1998, Situs and PRE entered into an Exclusive Agency Agreement for a term of one year. Under the terms of the agreement, Situs was appointed the sole and exclusive agent to lease and/or sell the Buttonwood property along with three other properties.

On June 29, 1999, the term of the Exclusive Agency Agreement expired. Although the Exclusive Agency Agreement expired pursuant to the terms of the Agreement, PRE was still required to pay Situs a commission under certain circumstances, in particular, when a prospective tenant procured by Situs during the twelve month agency period leased the premises within six months of the termination of the Exclusive Agency Agreement (tail period).

On August 17, 1999, the Mathematics Civic and Sciences Charter School of Philadelphia (the "Charter School") signed a six month lease for the Buttonwood property. The lease agreement acknowledged Situs as the sole broker in the transaction and incorporated by reference the Exclusive Agency Agreement dated June 30, 1998. Although it is unclear from the record as to whom the Charter School contacted with its interest to lease, the record is clear that PRE paid Situs the leasing commission set forth in the Exclusive Agency Agreement signed in June 1998.

On October 12, 1999 and March 9, 2000, the Charter School exercised its option to extend the term of the lease. The extended lease agreement incorporated the terms of the August 1999 lease. PRE continued to pay Situs a commission in accordance with the June 1998 Exclusive Agency Agreement.

On June 11, 2001, the Charter School signed a three year lease for the property beginning on September 1, 2001 and ending on August 31, 2004. The three year lease agreement contained a provision for a conditional "Obligation to Purchase". This provision provided that at any time after the eighteenth month anniversary of the commencement of the term, the Charter School or a designee of the Charter School, shall have the option to purchase the building and the real estate where the building is located.

Similar to the prior lease agreements executed between PRE and the Charter School, Situs was acknowledged as the sole broker in the transaction and that it was to be paid a commission in accordance with the Exclusive Agency Agreement dated June 1998. In accordance with the lease and the Exclusive Agency Agreement, Situs continued to receive a commission from PRE.

On May 15, 2003, Parents United For Better Schools (“Parents United”), a non profit corporation and parents advocacy group purchased the Buttonwood property for the Charter School. Several days before closing, Situs submitted an invoice for a 6% broker’s commission on the sale of the Buttonwood property. PRE refused to pay the commission and Situs filed a broker’s lien on the property in Philadelphia County pursuant to the Commercial Real Estate Broker’s Lien Act, 68 P.S. § 1052 *et. seq* for 6% of the sales price of \$2,100,000 and for \$940 for the May 2003 pro-rated lease commission, totaling \$126,940. This sum was escrowed by counsel at closing.

On June 4, 2003, Situs filed the instant complaint against PRE alleging causes of actions for Breach of Contract and Unjust Enrichment. The parties now seek an order granting summary judgment.

DISCUSSION

I. Legal Standard

A proper grant of summary judgment depends upon an evidentiary record that either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a prima facie cause of action or defense. Destefano & Associates, Inc. v. Cohen, 2002 WL 1472340,* 2 (Pa. Com. Pl. 2002) (Herron). Under Pa. R.C. P. 1035.2(2), if a defendant is the moving party, he may make the showing necessary to

support the entry of summary judgment by pointing to evidence which indicates that the plaintiff is unable to satisfy an element of his cause of action. Id. The nonmoving party must adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof such that a jury could return a verdict favorable to the non-moving party. Id. When the plaintiff is the moving party, “summary judgment is proper when if the evidence, viewed favorably to the plaintiff, would justify recovery under the theory he has pled.” Id. (quoting Horne v. Haladay, 728 A.2d 954, 955 (Pa. Super. 1999); citing Pa. R. Civ. P. 1035.2). Summary judgment may only be granted in cases where it is “clear and free from doubt that the moving party is entitled to judgment as a matter of law.

II. Situs Did Not Violate the Real Estate Licensing and Registration Act.

A principal purpose of RELRA is “to protect buyers and sellers of real estate, the most expensive item many persons ever buy or sell, from abuse by persons engaged in the real estate business.” Kalins v. Commonwealth, State Real Estate Com., 92 Pa. Commw. 569, 577, 500 A.2d 200, 203 (1985). RELRA establishes rules and regulations governing the profession of real estate brokers and provides for fines and penalties for violations of the Act. Knoblauch Inc. v. Singer, 53 Pa. D. & C. 4th 174 (Pa. Com. Pl. 2001).

PRE maintains that Situs’ violated the Real Estate Licensing and Registration Act (“RELRA”) 63 P.S. § 455.101 *et. seq.* and therefore may not sue for any alleged commission due. Specifically, PRE claims that Situs violated the RELRA when 1) it failed to obtain written consent from PRE with regard to the sales commission on the Buttonwood property and 2) by acting as though no termination date existed in the Exclusive Agency Agreement entered into on June 28, 1998 (“Agreement”). Whether

Situs violated the RELRA depends upon the interpretation of the Exclusive Agency Agreement, since a broker's right to a commission is a matter of contract, express or implied. Coldwell Banker Phylliss Rubin v. Romano, 422 Pa. Super. 319, 619 A.2d 376 (1993).

Under the terms of the exclusive Agency Agreement, from June 28, 1998 to June 29, 1999, Situs had the exclusive right to sell the Buttonwood property. The language of the contract states that Situs would be entitled to a commission if the property was sold or leased during the term of the contract, regardless of who actually effected the sale or exchange. (Dfts. Exhibit "A" ¶ 1 Deft.s Memo. In Support of the Motion for Summary Judgment). The term of the Agreement was for a period of twelve months with an option to extend by the parties. (Id ¶ 2). The agreement provides that Situs would be entitled to a commission for all periods of tenant's occupancy. (Id.) (emphasis added).

The language of the contract further states that Situs would be entitled to a commission if the property were sold or leased within six months after the termination of the Exclusive Agency Agreement regardless of who leased or sells the property. A commission may only be paid if the tenant or purchaser, individually or in combination with another or other, was offered the premises during the term of the Agreement or to any person, firm or corporation in whom such a party has an interest, relationship or connection. (Id. ¶ 5). In order to effectuate this provision, a registration list of Situs' prospective tenants in its monthly activity reports was to be provided to PRE. Under the terms of the agreement, Situs would be entitled to a commission for all periods of tenant's occupancy. (Id. ¶ 2).

PRE argues, in light of the above provisions, that since the Buttonwood property was sold three years after the expiration of the contract and the six month tail period, Situs is not entitled to a commission. This however is not the case. Although the Exclusive Agency Agreement expired it continues to control the commission relationship between Situs and PRE. In paragraph 3 subpart 3 of the Exclusive Agency Agreement, the agreement provides:

If the tenant under any such lease, or any person, firm, corporation, or other entity in whom such tenant has an interest, relationship or connection (a) shall lease additional space in the Premises or any expansion thereof or other property of the OWNER. OWNER agrees to pay AGENT a commission as in the first sentence of this clause and/or (b) shall purchase the PREMISES, any part thereof, any interest therein, and/or such additional space, and/or the property of which said space is a part, and/or a controlling interest in the ownership of the premises or any such property, or other property of the OWNER, OWNER agrees to pay AGENT a commission equal to SIX (6%) PERCENT of the gross sale price at the time of settlement.
(Id. ¶ 3)(emphasis added).

Based on the foregoing provision, if Situs procured a tenant during the term of the Exclusive Agency Agreement or within the six month period after the expiration of the Exclusive Agency Agreement and if said tenant or any person, firm, corporation, or other entity in whom such tenant has an interest, relationship or connection purchases the property, then Situs is entitled to a commission by PRE regardless of when the sale occurs.

Here, PRE entered into an exclusive agency agreement with Situs for a period of one year which terminated on June 29, 1999. The Charter School entered into a lease agreement with PRE on August 17, 1999, two months within the six month tail period

described in paragraph 5 of the Exclusive Agency Agreement. PRE paid Situs a lease commission as set forth in the Agreement. The Charter School extended its lease with PRE on two occasions. PRE paid Situs a commission since under paragraph 2 of the lease, Situs was entitled to collect a commission for all periods of tenants occupancy. On June 11, 2001, the Charter School entered into an agreement of lease with PRE for thirty six months. The June 11, 2001 lease contained an obligation to purchase after eighteen months to either the Charter School or a designee of the Charter School, subject to PRE's approval. PRE paid a commission to Situs. In May 2003, Parents United, a designee of the Charter School purchased the Buttonwood property for 2.1 Million dollars. Parents United is a nonprofit parent advocacy group which founded the Charter School.

(Plaintiff's Exhibit "C" Veronica Joyner p. 44). Parents United purchased the property to support the Charter School since the school itself can not own property. (Id. p. 9).

Under the terms of the Exclusive Agency Agreement and the facts set forth above, Situs did not violate the RELRA and therefore is entitled to recover a commission for the sale of the Buttonwood Property.

In addition to the Exclusive Agency Agreement, PRE's actions also support this court's conclusion that Situs is entitled to a commission for the sale of the Buttonwood property. As discussed supra, PRE entered into various lease agreements with the Charter School. The lease agreements contain the following provision:

Situs Properties, Inc. is acknowledged as the sole broker in this transaction and shall be paid a brokerage commission by Landlord in accordance with a separate agreement dated June 30, 1999. (sic). (Exhibit "C" ¶ 23, Defts. Motion for Summary Judgment; Exhibit "E" ¶ 25, Defts. Motion for Summary Judgment).

In accordance with these provisions, PRE paid Situs a commission.¹ PRE's payment of a commission to Situs under the lease agreements and the identification of Situs as the sole broker in the transactions demonstrates that the parties understood the terms of the Exclusive Agency Agreement and PRE's act of paying the commission ratifies the parties' intent that Situs be paid a commission with respect to the sale of the Buttonwood property.

The Exclusive Agency Agreement is not ambiguous in its terms and therefore the court cannot relieve PRE from a bad bargain or a bargain improvidently made. *See Turner v. Baker*, 225 Pa. 359, 362, 74 A 172 (1909). Accordingly, PRE's motion for summary judgment is denied and plaintiff's motion for summary judgment is granted.²

III. Situs' Unjust Enrichment Claim is Dismissed.

In Count III of the complaint, Situs alleges a claim for unjust enrichment. PRE argues that since its relationship with Situs is based on a written agreement a claim for unjust enrichment does not exist. The court agrees. "Where such an express contract exists on the very issue of commission, no quantum meruit/unjust enrichment recovery is permitted." *Coldwell Banker Phyliss Rubin v. Romano*, 422 Pa. Super. 319, 619 A.2d 376 (Pa. Super. 1993). Accordingly, PRE's Motion for Summary Judgment is Granted and Count III is dismissed.

¹ In an attempt to avoid its obligation to pay Situs a commission on the sale of the Buttonwood Property, PRE argues that a distinction exists between "owner" and "landlord" which relieves PRE's obligation. The court however finds that the terms "owner" and "landlord" refer to PRE and therefore the distinction PRE attempts to create is without a difference.

² In support of its position, PRE relies upon *Higgins v. Philadelphia Housing Development*, 2003 WL 23120194 (Pa. Com. Pl. Dec. 22, 2003) (Jones, J.). *Higgins* is distinguishable from the case at bar. Unlike the broker here, the broker in *Higgins* failed to present any evidence that it was entitled to receive a commission for negotiating the sale, identifying the prospective buyer as the tenant during the extension period ect. Here, PRE does not dispute the fact that MCSCS was a prospective tenant identified by Situs during the term of the Exclusive Agency Agreement. Based on the factual differences in this case, PRE's reliance on *Higgins* is misplaced.

IV. Attorney Fees and Costs Under the Commercial Real Estate Broker Lien Act.

Situs appears to have instituted this action under the Commercial Real Estate Broker Lien Act, 68 P.S. § 1058 as evidenced by the broker lien as well as the Civil Cover Sheet.

Under the terms of the Act, a broker may bring suit to enforce the lien in the Court of Common Pleas in the county where the lien has been filed by filing a complaint. 68 P.S. § 1058 (a). The Act provides

The cost of proceedings, including reasonable attorney fees and prejudgment interest due to the prevailing party, shall be borne by the nonprevailing party or parties...

Id. at (e).

In accordance with the Act, Situs requests that this court order PRE to reimburse it for its attorneys' fees and costs incurred in the case in the amount of \$39, 197.80. Situs however has not provided the court or PRE with any evidence to support the sum of \$39, 197.80 and how the sum was calculated. Based on the absence of said evidence the court is unable to determine if the amount requested by Situs is reasonable. Accordingly, the court will deny Situs' motion for attorney fees and costs without prejudice so that it may file the appropriate motion and supporting evidence.

CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment is **Granted** as to Count III (unjust enrichment) and **Denied** as to Count I and II (breach of contract). Count III is dismissed. Plaintiff's Motion for Summary Judgment is **Granted** and Judgment is entered in favor of Plaintiff and against Defendant in the amount of \$126, 940 and the money being held in an escrow account at Allegiance Bank of North America Account No. 48082 shall be released to Situs Properties Inc. Plaintiff's request

for attorney fees and costs is **Denied** without prejudice. Defendant's Petition to Strike Plaintiff's Expert Report is Moot.³

An Order contemporaneous with this Opinion will be filed.

BY THE COURT,

C. DARNELL JONES, II, J.

³ In light of this court's ruling on the motions for summary judgment and its reliance on the Exclusive Agency Agreement, the various leases and the deposition testimony of Veronica Joyner to decide said motions, the court found it unnecessary to consider PRE's petition to strike plaintiff's expert report. Thus, PRE's Petition to Strike Plaintiff's Expert Report is Moot.