

Devany v. Brockway Development, LLC

72 A.D.3d 1008, 900 N.Y.S.2d 329, 2010 N.Y. Slip Op. 03400

Appellate Division, Second Department · April 27, 2010

Text of the decision from New York State Law Reporting Bureau (official slip opinion):
https://www.nycourts.gov/reporter/3dseries/2010/2010_03400.htm

Bracketed red numbers such as [72 AD3d 1008] mark where each page of the official reporter begins, so you can cite a passage the same way a court does. Gray markers such as [*2] are the slip opinion's own page markers.

Court opinions are in the public domain. This copy is provided as a public service by Matthew L. Berman, matthewlberman.com. Attorney Advertising. Prior results do not guarantee a similar outcome. Reproduced without editorial changes; page markers added.

Devany v Brockway Dev., LLC 2010 NY Slip Op 03400 [72 AD3d 1008] April 27, 2010 Appellate Division, Second Department
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

As corrected through Wednesday, June 9, 2010

Kathleen D. Devany et al., Appellants, v Brockway Development, LLC, et al., Respondents.

[72 AD3d 1008] —[*1] Vasti & Vasti, P.C., Pleasant Valley, N.Y. (Thomas F. Vasti III of counsel), for appellants.

Handel & Carlini, LLP, Poughkeepsie, N.Y. (Anthony C. Carlini, Jr., of counsel), for respondents.

In an action, inter alia, to recover damages for breach of an employment contract, the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Dutchess County (Brands, J.), dated November 17, 2008, as granted the defendants' cross motion for summary judgment dismissing the complaint.

Ordered that the order is affirmed insofar as appealed from, with costs.

In the spring of 2000, the plaintiff Kathleen D. Devany (hereinafter the plaintiff), responding to a newspaper advertisement for a "[l]ong term position for right person," was hired by the defendants as sales manager for residential real estate developments under construction. A memorandum dated April 4, 2000, from the defendants to the plaintiff stated that her compensation included a \$750 per unit sales bonus, with an option given to the plaintiff to "elect to receive 50% of the prescribed sales bonus upon mortgage commitment if you so desire." In a written communication dated April 27, 2000, the plaintiff agreed to those terms, and noted that "[a]s we discussed" her compensation package included "both the single family and townhomes projects at Streamside Knolls." On May 23, 2000, the plaintiff signed an "employee acknowledgment form," stating that she was an employee at-will, and either she or her employer could terminate her employment at any time.

On June 18, 2004, the plaintiff's employment was terminated. In October 2005, she commenced the instant action to recover damages, inter alia, based upon the termination of her employment, and for alleged unpaid

commissions.

After discovery, the plaintiffs moved, among other things, for further discovery, and the defendants cross-moved for summary judgment dismissing the complaint. In the order appealed from, the Supreme Court granted the cross motion in its entirety, and denied the plaintiffs' motion as academic. [*2]

Where an employment agreement is silent as to duration, absent a limitation on the employer's right to discharge the [72 AD3d 1009]employee, there is a rebuttable presumption of an at-will employment relationship (see *Rooney v Tyson*, 91 NY2d 685, 690 [1998]). Such "temporally amorphous terms" as "permanent" or "long term" are not definite as to duration (*id.* at 691, 688 [internal quotation marks omitted]; *Peters v MCI Telecom. Corp.*, 685 F Supp 411, 414 [1988]). Further, if the alleged duration of the contract is by its terms in excess of one year, the statute of frauds applies (see General Obligations Law § 5-701 [a]), and the documents submitted by an employee in support of his or her claim must include the duration of the contract (see *Durso v Baisch*, 37 AD3d 646, 647 [2007]; cf. *Nausch v AON Corp.*, 2 AD3d 101, 103 [2003]).

Here, the plaintiff claims that she was hired for a definite term of 8 to 10 years. However, there is nothing in the documents submitted to establish a definite term of employment, nor is there any provision limiting the right of her employer to discharge her. Further, the plaintiff explicitly acknowledged that she was an at-will employee. As an at-will employee, she cannot recover damages based upon the termination of her employment (see *Smalley v Dreyfus Corp.*, 10 NY3d 55, 59 [2008]; *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304-305 [1983]; *McGimpsey v J. Robert Folchetti & Assoc., LLC*, 19 AD3d 658, 659 [2005]).

With respect to her claim for commissions, an at-will sales representative is entitled to post-discharge commissions only if the parties to the agreement expressly provided for such commissions (see *McGimpsey v J. Robert Folchetti & Assoc., LLC*, 19 AD3d at 659; *Swits v New York Sys. Exch.*, 281 AD2d 833, 835 [2001]; *Production Prods. Co. v Vision Corp.*, 270 AD2d 922, 923 [2000]; *UWC, Inc. v Eagle Indus.*, 213 AD2d 1009, 1011 [1995]). There is an exception to this doctrine for real estate brokers who claim to be the "procuring cause" of a real estate transaction (see *UWC, Inc. v Eagle Indus.*, 213 AD2d at 1011). However, the plaintiff was not a real estate broker, nor was she associated with a real estate broker. Therefore, she could not claim commissions based upon a claim that she was the "procuring cause" of a sale (see Real Property Law § 442-a).

"Once the commission is earned, it cannot be forfeited" (*Arbeeney v Kennedy Exec. Search, Inc.*, 71 AD3d 177, 182 [2010]; see *McGimpsey v J. Robert Folchetti Assoc., LLC*, 19 AD3d at 660). Thus, the plaintiff was entitled to be paid any commissions earned prior to the termination of her employment. The defendants established, as a matter of law, that the plaintiff was paid all commissions earned, and the plaintiffs failed to raise a triable issue of fact on this issue.

[72 AD3d 1010]The plaintiffs' remaining contentions are without merit. Covello, J.P., Florio, Eng and Chambers, JJ., concur.