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2021-03-08

### McLendon v. Kelley

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**McLendon v Kelley**

2021 NY Slip Op 30672(U)

March 8, 2021

Supreme Court, New York County

Docket Number: 156701/2020

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14**

*Justice*

-----X

JORDAN MCLENDON,

Plaintiff,

- v -

JENNIFER KELLEY, SOTHEBY'S INTERNATIONAL  
REALTY, INC., KATHRYN JOHNSON

Defendant.

-----X

INDEX NO. 156701/2020

MOTION DATE 03/04/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for DISMISS.

The motion by defendants Kathryn Johnson and Sotheby's International Realty Inc. ("Brokers Defendants") to dismiss the complaint is granted in part and denied in part.

**Background**

Plaintiff rented an apartment from defendant Kelley in November 2019 and took possession in December 2019. He claims that defendants never gave him a countersigned copy of the lease until he retained counsel. Only then did he discover that there were handwritten alterations to the lease including adding utilities and a maid/housekeeper in the margin.

Plaintiff also alleges that in December 2019 he was presented with a document entitled Disclosure Form for Landlord and Tenant which stated that the Broker Defendants were dual agents, meaning they were acting as licensed real estate brokers for both parties. Plaintiff asserts that the Broker Defendants only represented the landlord and that this document was used to circumvent New York law concerning broker's fees.

He admits that he suffered financially because of the ongoing pandemic and surrendered the apartment back to the landlord (Kelley) in May 2020. He claims that the apartment was relisted soon after he moved out but that the listing was eventually removed. Plaintiff complains that the landlord is not trying to properly mitigate her damages because she is listing the apartment at a rent higher than what plaintiff paid despite the current market conditions.

Plaintiff brings five causes of action relating to the lease and the rental process. He claims that defendants violated the Housing Stability and Tenant Protection Act (“HSTPA”) by charging him too much for the application fee, the processing fee and by charging him broker’s fees for the landlord’s broker. He also observes that he paid an advance rent payment of \$114,000, which also violated the HSTPA because a landlord may not require the advance deposit of more than one month’s rent.

The Broker Defendants move to dismiss the complaint against them. They claim that the first cause of action should be dismissed with respect to the broker fees because Real Property Law § 238 does not prohibit brokers from collecting fees. The Broker Defendants also argue that the limit on application and background check fees only apply to landlords, rather than brokers. Similarly, the Broker Defendants argue that the claims about the illegal advanced rent payment, mitigation of damages, breach of contract and legal fees do not lie with brokers and are instead causes of action against the landlord.

In opposition, plaintiff emphasizes that the Broker Defendants were working for the landlord (defendant Kelley) and that plaintiff could not have entered into the apartment without paying the fee to the Broker Defendants. Plaintiff details his view of the broker’s commission process: he insists that he was asked to pay \$17,000 for the landlord’s broker despite the fact that she was also the landlord’s agent. He contends that the HSTPA expressly sought to bar fees

charged by landlords except those expressly stated in the statute and that the landlord's agent (the broker) cannot charge fifteen percent of an entire year's rent under the HSTPA.

In reply, the Broker Defendants emphasize that Real Property Law § 238-a(1)(a) does not prohibit brokers retained by a landlord from collecting a commission from a tenant. They insist that HSTPA leaves out brokers, real estate agents, and any commissions from the provisions of this statute. The Broker Defendants insist that plaintiff did not address any of the other causes of action with respect to the Broker Defendants, and therefore, they should be dismissed.

### **Discussion**

The Broker Defendants move to dismiss pursuant to CPLR 3211(a)(1), (2), (3), (5), and (7). "In the context of a CPLR 3211 motion to dismiss, the pleadings are necessarily afforded a liberal construction. Indeed, we accord plaintiffs "the benefit of every possible favorable inference. [On a] "motion to dismiss on the ground that the action is barred by documentary evidence, such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law"(*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]).

As an initial matter, the Broker Defendants are correct that plaintiff did not specifically address the vast majority of their motion. In fact, plaintiff only appears to raise objections to his first cause of action related to the collection of the broker fees. Therefore, the complaint is dismissed against the Broker Defendants with respect to the second through fifth causes of action and with respect to the first cause of action to the extent plaintiff seeks recovery arising out of the application and processing fees. In any event those fees are charged by the landlord, not the broker.

### Broker's Commission

The central question on this motion is whether plaintiff can state a cause of action against the Broker Defendants based on the commission he claims he was forced to pay to them.

Plaintiff argues this violates the HSPTA and the Broker Defendants insist that the statute does not prohibit the charging of these fees.

The relevant provision of the HSTPA provides that:

“Except in instances where statutes or regulations provide for a payment, fee or charge, no landlord, lessor, sub-lessor or grantor may demand any payment, fee, or charge for the processing, review or acceptance of an application, *or demand any other payment, fee or charge before or at the beginning of the tenancy, except background checks and credit checks* as provided by paragraph (b) of this subdivision, provided that this subdivision shall not apply to entrance fees charged by continuing care retirement communities licensed pursuant to article forty-six or forty-six-A of the public health law, 1 assisted living providers licensed pursuant to article forty-six-B of the public health law, 2 adult care facilities licensed pursuant to article seven of the social services law, senior residential communities that have submitted an offering plan to the attorney general, or not-for-profit independent retirement communities that offer personal emergency response, housekeeping, transportation and meals to their residents.” Real Property Law § 238-a(1)(a) [emphasis added]).

Subsequent to the passage of this legislation the Department of State issued guidance that a broker for the landlord could not collect a broker fee from a prospective tenant pursuant to the above provision (NYSCEF Doc. No. 19, FAQ No. 5). The Department of State reasoned that the language barring a “demand [for] any payment, fee, or charge for the processing, review or acceptance of an application, or demand any other payment, fee or charge before or at the beginning of the tenancy, except background checks and credit checks” was prohibited because the broker was acting as the landlord’s agent (*id.*).

This guidance asserts that a real estate broker’s commission cannot be charged to a prospective tenant where the broker is working for the landlord because the broker is acting as the landlord’s agent. And the HSTPA expressly prohibits the charging of any fee before the

tenancy begins. The Broker Defendants question why the legislature did not expressly state that broker's commissions were included in the fees prohibited under the HSTPA. Plaintiff argues that the Department of State's reasoning makes sense: if the HSTPA barred brokers from charging fees, then it would bar a tenant's broker (i.e. a broker retained by a prospective tenant) from charging fees.

There is no doubt that there is a valid dispute over the reach of this HSTPA provision. However, the Court finds that the guidance from the Department of State permits plaintiff to state a cause of action against the Broker Defendants relating to the broker fee. Plaintiff alleges that the Broker Defendants were acting on behalf of the landlord during the transaction and were acting as the landlord's agent. Under the Department of State's interpretation, the Broker Defendants were not permitted to charge a third-party, plaintiff, for work performed as an agent for the landlord.

The Court observes the document signed by plaintiff indicating that the Broker Defendants acted as his broker (as well as the landlord's broker) does not compel dismissal because plaintiff alleges that he was told he had to sign the agreement or he wouldn't get the apartment. And the agreement expressly states at the top that it is not a contract (NYSCEF Doc. No. 17). That raises questions about the effect of the document. The Court emphasizes that it makes no finding about the significance of the document; discovery may reveal that plaintiff voluntarily signed the agreement or that the Broker Defendants did, in fact, act as his broker.

Under either scenario, plaintiff would not be able to seek repayment of the commission—the factual issue is whether this is a valid agreement and what effect it has on the parties. But on a motion to dismiss, the Court is unable to find that this constitutes documentary evidence that utterly refutes this cause of action. Plaintiff's claim, if true, does not evidence a meeting of the

minds. It demonstrates an effort to get plaintiff to pay an additional fee *after* he had already indicated his intent to rent the apartment and had negotiated about the apartment for weeks.

### Summary

Much of the Broker Defendants' arguments insist that the guidance provided by the Department of State should be disregarded and is not supported by the legislative history of the HSTPA. The Court understands those arguments but the question here is whether plaintiff can state a cause of action. Defendants have not moved for declaratory relief in this case and the Department of State (or any other relevant agency) is not a party to this case. The Broker Defendants and plaintiff point out that there is an ongoing Article 78 petition in Albany County regarding the nature of this guidance from the Department of State. That, of course, is where arguments about the intent of the HSTPA and whether the guidance violated SAPA will likely be raised and adjudicated.

To be clear, the Court makes no finding that the Department of State guidance is appropriate or was issued following the proper procedures. It merely finds that plaintiff can state a cause of action pursuant to that guidance sufficient to defeat a motion to dismiss. That the Broker Defendants do not like that guidance is understandable (and why there is a pending proceeding on the issue), but it is not a basis to grant a motion to dismiss.

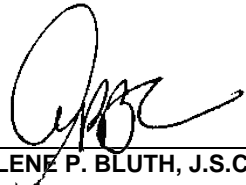
Accordingly, it is hereby

ORDERED that the motion by defendants Kathryn Johnson and Sotheby's International Realty, Inc to dismiss is granted to the extent that the second through fifth causes of action as well as the portion of the first cause of action relating to application and processing fees are severed and dismissed, and denied with respect to the remaining requested relief, and these defendants shall answer pursuant to the CPLR.



Remote Conference: May 12, 2021.

3/8/2021  
DATE

  
ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: