

SCANNED ON 10/31/2006
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. RICHARD B. LOWE, III
PRESENT: _____
Justice

PART 56

Barbara Concoran

INDEX NO. 604347/05

- v -

MOTION DATE 6/21/06

MOTION SEQ. NO. 001

Donald J. Trump

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
OCT 31 2006
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 10/24/06


HON. RICHARD B. LOWE, III
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

-----X
BARBARA CORCORAN, CARRIE CHIANG,
and SUSAN CARA-MADDEN,

Plaintiffs,

Index No. 604347/05

-against-

DONALD J. TRUMP,

Defendant.
-----X

RICHARD B. LOWE, III, J:

In this action, plaintiffs seek commissions allegedly owed under a Commission Agreement, dated July 27, 1994 (Agreement), between non-party The Corcoran Group, Inc. (Corcoran Group) and defendant Donald J. Trump (Trump). The Agreement was signed on behalf of the Corcoran Group by the three individual plaintiffs: the Corcoran Group's founder, plaintiff Barbara Corcoran (Corcoran); its senior vice president, plaintiff Carrie Chiang; and its broker, Susan Cara-Madden. By assignment dated September 24, 2001, the Corcoran Group assigned its rights under the Agreement to Corcoran.

The Agreement supercedes a prior agreement that provided for commissions to be paid to the Corcoran Group by Trump for introducing Trump to investors in connection with the acquisition of ownership interests in the Penn Yards, located on the West Side of Manhattan, which the Agreement defines as the "Transaction." Trump agreed to pay "a commission in an aggregate amount not to exceed Four Million (\$4,000,000) Dollars, consisting of the Base Commission and the Percentage Commission ... , as compensation in full for the services rendered in connection with the Transaction, the Investor Entities and the Project." Agreement,

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Weinreb Aff., Ex. 1, ¶ 2. In the Agreement, Trump “acknowledges that the Commission ... has been duly and unconditionally earned by” the Corcoran Group. *Id.*, ¶ 1.

The Agreement states terms for Trump’s payment of commissions. The parties concede that Trump paid the full Base Commission of \$2 million. The Percentage Commission is payable as “an aggregate amount not to exceed [\$2 million], payable in installments equal to [2 ½%] of all distributions received by Trump from or in connection with the Transaction, the Investor Entities or the Project or Trump’s interest in any of the foregoing” *Id.*, ¶ 3 (b). The parties do not dispute that Trump paid a portion of the Percentage Commission, an amount totaling \$741,564.55.

The Agreement identifies three events of default, one of which arises “[i]f, at any time while this Agreement shall be in effect, Trump shall (i) sell, transfer, assign or otherwise dispose of all or any portion of Trump’s interest in the Transaction, the Project or the Investor Entities to any third party other than an affiliate of Trump” *Id.*, ¶ 4 (c) (i). The Agreement states that, upon the occurrence of a default under this provision, “the entire Percentage Commission, or any portion thereof remaining outstanding, shall immediately become due and payable in full to [the Corcoran Group] together with any unpaid interest thereon.” *Id.*, ¶ 6.

The parties do not dispute that, on June 30, 1994, *before* the parties entered into the Agreement, Trump transferred legal title to his interest in the Penn Yards to Hudson Waterfront Associates, L.P. and related entities (Hudson Waterfront), in exchange for a 30% limited partnership interest in Hudson Waterfront. Plaintiffs’ Statement of Undisputed Material Facts, ¶ 8; Trump’s Counter-Statement of Facts, ¶ 8. Nor do the parties dispute that Trump’s limited partnership interest in Hudson Waterfront entitles him to no control or management authority.

Plaintiffs' Statement of Undisputed Material Facts, ¶ 9; Trump's Counter-Statement of Facts, ¶ 9.

In 2005, a portion of the Penn Yards were sold to non-party CRP/Extell Riverside, L.P. (CRP/Extell) for approximately \$1.76 billion, as part of a like-kind exchange sought by the limited partnership's general partners, pursuant to 26 USC § 1031 (a) (1031 Exchange). 26 USC § 1031 (a) enables investors to shelter sale proceeds from capital gains tax by rolling them over into similar investments, identified within 45 days, within a six-month period.

Plaintiffs now move for summary judgment on the complaint, for the balance of the Percentage Commission allegedly owed under the Agreement, an amount allegedly totaling \$1,258,435.45, plus interest.

DISCUSSION

Plaintiffs argue that Hudson Waterfront's sale of the Penn Yards constitutes an event of default under paragraph 4 (c) (i) of the Agreement, triggering Trump's payment obligation with respect to Percentage Commissions. In opposition, Trump argues that Hudson Waterfront transferred his interest, not Trump personally, and that, therefore, no event of default was triggered under paragraph 4 (c) (i).

To state a cause of action for breach of contract, plaintiffs must establish the existence of a contract, performance by plaintiffs, breach by defendant, and damages sustained by plaintiffs as a result of the breach. *Furia v Furia*, 116 AD2d 694 (2d Dept 1986).

"Interpretation of unambiguous contracts is a question of law and a proper function of the court on a motion for summary judgment." *Middlebury Office Park Ltd. Partnership v General Datacomm Industries, Inc.*, 248 AD2d 313, 314-15 (1st Dept 1998). However, courts are not

permitted to “fashion a new contract under the guise of contract construction; rather, they are required to discern the intent of the parties, to the extent that [the parties] evidenced what they intended by what they wrote.” *Slatt v Slatt*, 64 NY2d 966, 967 (1985) (internal citations and quotation marks omitted).

Here, the parties concede the existence of the Agreement, and, in the Agreement itself, Trump acknowledges the Corcoran Group’s performance. *See* Trump Aff., ¶ 22 (Trump does “not take issue with” the Agreement’s enforceability); *see also* Agreement, ¶ 1 (“Trump acknowledges that the Commission due Corcoran ... has been duly and unconditionally earned”). The parties also do not dispute that Hudson Waterfront consummated the 1031 Exchange, thereby transferring legal title to the Penn Yards properties. At the heart of the parties’ dispute is whether Trump breached the Agreement by committing an event of default under paragraph 4 (c) (i).

Paragraph 4 (c) of the Agreement states that an event of default occurs if “Trump shall (i) sell, transfer, assign or otherwise dispose of all or any portion of Trump’s interest in the Transaction, the Project or the Investor Entities to any third party other than an affiliate of Trump”

Here, as plaintiffs argue, Trump’s interest in the Penn Yards was transferred as a result of the 1031 Exchange. According to plaintiffs’ interpretation of the Agreement, an event of default occurred by virtue of the fact that the Penn Yards were sold, regardless of whether Trump himself sold the property.

However, as Trump points out, the Agreement defines “Trump” as “Donald J. Trump,” and “Investor Entities” is separately defined as “a partnership [formed by Trump and certain

investors introduced to Trump by Corcoran] and ... additional entities" *Id.* The parties do not dispute that Hudson Waterfront is an Investor Entity. Thus, Trump and Hudson Waterfront are defined separately in the Agreement. Paragraph 4 (c) (i) applies when "Trump shall" dispose of his interest in the Penn Yards, not when "Trump or the Investor Entities shall" dispose of Trump's interest. Because these terms are defined separately, the plain language of the agreement indicates that, if the parties intended paragraph 4 (c) (i) to be triggered by a sale by either Trump or Hudson Waterfront, then the parties would have included "Investor Entities" along with "Trump" in that provision of the Agreement.

In short, plaintiff's interpretation of the plain language of the Agreement suggests that the terms "Trump" and "Investor Entities" are synonymous, which is contrary to the meaning given to those terms in the Agreement. The court cannot replace the words "Trump shall" with the words "Trump or the Investor Entities shall," or re-write the Agreement under the guise of contract construction. *Slatt*, 64 NY2d 966, *supra*. A sale by the Investor Entities is not included as an event that qualifies as a default. Therefore, Trump refutes plaintiffs' interpretation of the Agreement based upon the plain language of the Agreement. Accordingly, plaintiffs fail to make a prima facie showing that they are entitled to summary judgment.

While Trump does not cross-move for summary judgment dismissing the action, in a footnote, Trump suggests that the court search the record and grant reverse summary judgment, pursuant to CPLR 3212 (b). Trump Opp. Mem. of Law, at 13 n 10. CPLR 3212 (b) provides that, "[i]f it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

As discussed above, the proceeds from the sale of the Penn Yards to CRP/Extell were

reinvested in the 1031 Exchange. Trump submits the affidavit of Allen Weisselberg (Weisselberg), the chief financial officer and executive vice president of the Trump Organization, which includes Trump and his various entities. Weisselberg is responsible for providing written notice to the Corcoran Group of any distributions received by Trump from the Investor Entities. Weisselberg states that “Trump has not received any distributions from the Investor Entities since April 2005,” at which time \$741,564.55 of the Percentage Commission had been paid. 4/12/06 Weisselberg Aff., ¶¶ 7, 8. In addition, Trump submits his own affidavit, stating that he never sold his 30% limited partnership interest in the Investor Entities, and that he remains a 30% limited partner in those entities. 4/13/06 Trump Aff., ¶¶ 9, 16.

This evidence shows that Trump’s Percentage Commission payment obligation, under paragraph 3 (b) of the Agreement, has not been triggered since April 2005, and that Trump is up to date with his Percentage Commission payment obligations. Moreover, plaintiffs do not claim that Trump received a distribution but failed to pay the Percentage Commission, under the other default provisions, paragraphs 4 (a) and (b). Nor do plaintiffs claim that Trump defaulted under the sole remaining default provision, paragraph 4 (c) (ii), which applies if “Trump shall ... pledge, collaterally assign, hypothecate or otherwise encumber or grant a security interest in all or any portion of Trump’s interest in the Transaction, the Project, the Investor Entities or any right to any Distributions from any of the foregoing” Agreement, at ¶ 4 (c) (ii).

Significantly, at the time that the parties entered into the Agreement, Trump did not own legal title to the Penn Yards. The parties entered into the Agreement *after* Trump transferred legal title to Hudson Waterfront. As discussed above, this fact is not disputed by the parties. Plaintiffs concede that Trump, as a limited partner of Hudson Waterfront, “had no control over

management decisions.” Plaintiffs’ Statement of Undisputed Material Facts, ¶ 10. Thus, implicit in plaintiffs’ argument is that the general partners of Hudson Waterfront sold Trump’s interest in the Penn Yards, not Trump, because Trump, as a limited partner, had no authority to do so.

These facts establish that plaintiffs knew, at the time that they entered into the Agreement, that the only interest Trump could dispose of was his interest in Hudson Waterfront. By defining Trump and Investor Entities separately, and drafting paragraph 4 (c) (i) to apply only to actions taken by Trump, plaintiffs also knew that there was a distinction between a transfer of the Penn Yards by Hudson Waterfront and a transfer by Trump.

The only purpose that the court can attribute to the plain language of this default provision is that Corcoran sought to ensure that it would be paid in the event that Trump disposed of his interest. Based upon the evidence submitted by Trump, in the affidavits of Weisselberg and Trump, Trump has not received any distributions from Hudson Waterfront since April 2005, he never sold his 30% limited partnership interest in Hudson Waterfront, and he remains a 30% limited partner in that entity. As Trump states in his opposition papers, he remains entitled to distributions. When he receives a distribution, Corcoran will be entitled to a Percentage Commission of that distribution, as required under paragraph 3 (b) of the Agreement.

For the foregoing reasons, based upon the plain language of the Agreement, Trump did not dispose of his interest in the Transaction, the Project or the Investor Entities. Therefore, Trump has made a prima facie showing that no default has occurred.

Plaintiffs argue that, under agency and partnership law, the act of Hudson Waterfront in selling the Penn Yards was the act of Trump. In support of their argument, plaintiffs cite *Gramercy Equities Corp. v Dumont* (72 NY2d 560 [1988]). *Gramercy Equities Corp.* involved

the allocation of damages between co-venturers. Specifically, the case dealt with whether, where one joint venturer, managing the business of the joint venture, alone commits an intentional fraud against third parties resulting in the recovery of damages by them, he is thereafter entitled to be indemnified by the other joint venturer. The Court applied partnership law, and stated that partners are “agents for each other.” *Id.* at 565. However, the Court determined that “[i]n matters of indemnification between two joint venturers, the unauthorized fraud found to have been practiced against third persons by only one venturer obviously is not the ‘proper conduct’ of the partnership business,” and, therefore, “the unauthorized fraud of one venturer cannot be said to be pursuant to the ‘agreement’ of both.” *Id.* at 566, citing Partnership Law § 40. Thus, *Gramercy Equities Corp.* merely dealt with issues of liability between joint venturers, and, in that context, treated them as ordinary partners in a partnership. The Court did not analyze limited partnerships, or the interpretation of contractual language concerning limited partners. Therefore, *Gramercy Equities Corp.* is distinguishable on its facts.

Plaintiffs also cite *Kaplan v Kaplan* (27 Misc 2d 596 [Sup Ct, Nassau County 1961]) in support of their argument. In *Kaplan*, the defendant sought to vacate plaintiff’s notice of examination, which demanded production of books of corporations and partnerships that were not parties to the action. However, the plaintiff claimed that the defendant was a member of the partnerships in question. The court found it improper for the plaintiff to request production of corporate documents, but permitted plaintiff’s request for the production of the partnership’s records, based on the legal principle that “a partnership is not a separate legal entity; the partners are ‘co-owners’ (Partnership Law, § 10).” *Id.* at 597. Thus, *Kaplan* did not deal with whether a general partner’s conduct may be imputed to a limited partner. Therefore, *Kaplan* is inapposite.

Plaintiffs next cite section 20 (1) of New York's Partnership Law, which states that:

[e]very partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership

Plaintiffs argue that, under this provision, the acts of the general partners, as agents of Hudson Waterfront, are the acts of the limited partners, including Trump. However, plaintiffs' reliance upon the Partnership Law merely shows that Trump is bound by the acts of the general partners of Hudson Waterfront, an assertion that is not disputed by Trump. In other words, a sale of the Penn Yards properties by the general partners of Hudson Waterfront constitutes a sale of Trump's interest of the Penn Yards by virtue of his ownership interest in Hudson Waterfront. However, plaintiffs fail to show that Trump himself took any action to dispose of his indirect interest in the Project, or any direct action to dispose of his interest in the Investor Entities.

Plaintiffs fail to cite any legal authority in support of their assertion that, in a limited partnership, a general partner's actions are imputed to the limited partners personally, in their individual capacities. Nor do plaintiffs acknowledge the various limited partnership statutes that distinguish general partners from limited partners by precluding limited partners from participating in the management of the limited partnership, and limiting limited partners' exposure to liability based upon lack of participation in management of the partnership. *See e.g.* Partnership Law §§ 96, 98, 99. Therefore, plaintiffs' reliance upon section 20 of the Partnership Law is unpersuasive.

In their reply papers, plaintiffs cite *People v Zinke* (76 NY2d 8, 9 [1990]), which dealt with "whether the general partner in a limited partnership can be found guilty of larceny for

misappropriating partnership funds.” The defendant was convicted, and, thereafter, moved to dismiss the indictment “on the ground that, as a general partner, he was a ‘joint or common’ owner of the partnership’s property and, thus, under the Penal Law could not be prosecuted for larceny even if he had misappropriated partnership property.” *Id.* at 10. The Court of Appeals upheld the law that, in “New York, partners cannot be charged with larceny for misappropriating firm assets ... , [because] a partner ‘could not steal partnership property.’” *Id.* at 13.

Plaintiffs cite to a portion of the government’s opposition argument, which sought to apply corporate law, treating the general partner of a limited partnership like a corporate manager. In the context of analyzing the differences between corporate law and partnership law, the Court made the unremarkable statement that limited partnerships are included in the Partnership Law. The Court refused to depart from its longstanding rule, stating that “[t]he important point is that limited partnerships are *partnerships* in the eyes of the law of this State, and as such they come within the rule that partners cannot be guilty of larceny when they steal from them.” *Id.* at 15. Nothing contained in *Zinke* establishes that, in a limited partnership, a general partner’s actions are imputed to the limited partners personally, in their individual capacities. Therefore, plaintiffs’ reliance upon *Zinke* is unpersuasive.

While the court acknowledges that, under New York law, a partnership cannot act independently of its members, here it is the general partners’ actions that gave rise to the sale of the Penn Yards, and plaintiffs fail to show that, under these circumstances, the acts of Hudson Waterfront should be deemed the acts of Trump personally, with respect to the Agreement. For the foregoing reasons, plaintiffs fail to refute Trump’s showing that the percentage commission is not due at this time, and will not become due until such time as Trump receives a distribution,

transfers his 30% interest in the Investor Entities, or otherwise defaults under the Agreement.

Accordingly, it is hereby

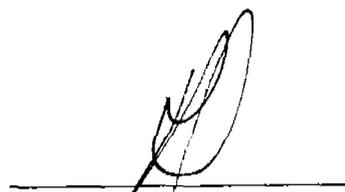
ORDERED that plaintiffs' motion for summary judgment is denied; and it is further

ORDERED that, pursuant to CPLR 3212 (b), reverse summary judgment is granted in favor of defendant, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: October 24, 2006

ENTER:



HON. RICHARD B. LOWE, III
J.S.C.

FILED
OCT 31 2006
NEW YORK
COUNTY CLERK'S OFFICE