

**Colliers Intl. Li Inc. v 1400 Old Country Rd., LLC**

2011 NY Slip Op 32137(U)

July 21, 2011

Sup Ct, Nassau County

Docket Number: 000833/2010

Judge: Ira B. Warshawsky

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**SHORT FORM ORDER**

**SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. IRA B. WARSHAWSKY,  
Justice.**

**TRIAL/IAS PART 7**

\_\_\_\_\_  
COLLIERS INTERNATIONAL LI INC., f/k/a  
SUTTON & EDWARDS,  
Plaintiff,

-against-

INDEX NO.: 000833/2010  
MOTION DATE: 5/13/2011  
SEQUENCE NO.: 01, 02

1400 OLD COUNTRY ROAD, LLC, PARKWAY  
PLAZA REALTY, LLC, and BARNES & NOBLE,  
INC.,  
Defendants.

\_\_\_\_\_  
1400 OLD COUNTRY ROAD, LLC and PARKWAY  
PLAZA REALTY, LLC,

Counterclaim Plaintiffs,

- against -

ALAN ROSENBERG and HERB AGIN,

Additional Counterclaim  
Defendants.

\_\_\_\_\_  
The following papers were read on this matter:

*Motion Sequence No 1*

Defendants' Motion to Dismiss Complaint .....	1
Rule 19-A Statement of Material Facts .....	2
Memorandum of Law in Support of Motion .....	3
Affidavits of Greg Zucker, Esq. and Alan Rosenberg in Opposition .....	4
Plaintiff's Counter-Statement of Facts .....	5
Reply Memorandum of Law in Opposition to Motion .....	6

Motion Sequence No. 2

Plaintiff's Motion for Summary Judgment .....	7
Plaintiff's Rule 19-A Statement of Facts .....	8
Exhibit Binders "1" and "2" .....	9
Affidavit of Brian McCarthy in Opposition to Plaintiff's Motion	10
Memorandum of Law in Opp. to Motion for Summary Judgment	11
Reply Affidavit of Greg S. Zucker in Further Support of Motion	12
Reply Memorandum of Law in Further Support of Motion .....	13
Deposition of Brian McCarthy on Disk's 1 — 5 .....	14

## PRELIMINARY STATEMENT

Defendants move for dismissal of the complaint pursuant to Civil Practice Law and Rules § 3211, claiming that plaintiff is not entitled to a commission with respect to the extension of a Barnes and Noble lease because the transaction, initiated by them, was not in the best interests of defendant Landlord, and resulted in a substantial loss of income to them. In addition, defendants claim that plaintiff, without authorization to do so, participated in the negotiations on behalf of both the Landlord and the Tenant. They contend that dual representation was authorized under the terms of the Exclusive Agency Agreement, but only as to prospective tenants, and was inapplicable, without the consent of the Landlord, with respect to existing tenants.

Plaintiff moves for Summary Judgment, asserting that they are the exclusive broker for Landlord, and they brought about the lease extension for Barnes and Noble, extending it to 2017, when it was otherwise due to expire in 2012.

## BACKGROUND

Defendants acquired premises 1400 Old Country Road, Westbury, New York in 2008. At that time, Barnes and Noble was a tenant under a lease dated as of July 1, 2000. The lease was to expire on February 29, 2012. Landlord and Sutton and Edwards reached an agreement as to exclusive brokerage for the premises, and, under cover of letter dated April 16, 2009, Alan Rosenberg, on behalf of Sutton and Edwards, forwarded a signed Agency Agreement to Brian J. McCarthy, of Samson Management, the manager of the

property on behalf of the Landlord. The Agreement was between 1400 Old Country Road, LLC and Parkway Plaza Realty, LLC, as tenants-in-common, c/o Samson Management, LLC. The Agreement, Exh. "H" to motion, made Sutton & Edwards the sole and exclusive agent and granted the Broker exclusive rights to negotiate for and to find tenant(s) for the Property. Article VIII (A) of the Agreement, deals with existing leases. It states as follows:

Existing Leases. If a lease which was entered into prior to this Agreement contains a right to renew the term or to lease additional space from the Owner and said options are exercised pursuant to the terms set forth in the lease, no commission shall be due Broker. If the option is exercised, but on terms different from that set forth in the lease AND Owner requests Broker to negotiate the option, then Broker shall be entitled to a commission equal to 3% of the rent paid during the renewal period or for the rent paid for the additional space.

Article II of the Agreement deals with the issue of dual representation in which the Broker will be acting on behalf of both the Landlord and the Tenant. The provision for this situation reads as follows:

If Broker finds a prospective tenant(s) for the Property or portions thereof, Owner hereby authorizes Broker to represent and act as Broker for such tenant(s) and the Owner consents specifically to such dual agency. \* \* \* .

Not long after the reaching of an Exclusive Agency Agreement, Sutton and Edwards approached Barnes and Noble, in the person of Mitchell Klipper. At that time Barnes and Noble had approximately three years remaining on their 2000 lease at the premises. Sutton and Edwards discussed the potential costs of relocating to alternate locations, and proposed a reduction in the rent for the balance of the term in exchange for a five-year extension of the lease. Allegedly, the reduction in rental income for the

balance of the term was in excess of \$500,000. In addition, defendants contend that they had no intention of renegotiating the remainder of the lease term, but were effectively backed into doing so by Sutton and Edwards.

Barnes and Noble, for its part, claims that it was never advised that Sutton and Edwards was also negotiating on behalf of the Landlord. According to defendants, Rosenberg and Agin, whose offices were down the hall from one another, created a charade that Rosenberg was negotiating with the owners' representative, when, in fact, the owners representative was themselves.

Defendants assert that plaintiffs breached a fiduciary duty by failing to reveal to the principals of Landlord and Barnes and Noble that they were involved in dual representation. They claim that, in addition to a breach of a fiduciary duty, it is a breach of the obligations of Sutton and Edwards under the terms of the Agency Agreement, in that they never sought, nor obtained, the consent of their principal, the Landlord, to take on dual representation with an existing client. The renegotiation of a lease extension three-years prior to the expiration of the term, at a time when rentals were significantly lower than they were prior to the 2008 drop in the real estate market, served only to benefit the broker at the expense of the Landlord.

#### DISCUSSION

“During the process of facilitating a real estate transaction, the broker owes a duty of undivided loyalty to its principal. (*Douglas Elliman, LLC v. Tretter*, 84 A.D.3d 446, 448 [1<sup>st</sup> Dept.2011], citing *Dubbs v. Stribling & Assoc.*, 96 N.Y.2d 337, 340 [2001]). “If this duty is breached, the broker forfeits his or her right to a commission, regardless of whether damages were incurred”. *Id.* citing *Wendt v. Fischer*, 243 N.Y.439 (1926).

The facts in this case make it clear that plaintiff sought out Barnes and Noble, undertook to represent their interests in negotiating a reduction in current rental and a five-year extension without revealing to them that they were also representing the interest of the Landlord as the exclusive renting agent. Sutton and Edwards had a clear obligation

to extend its undivided loyalty to its principal, the defendants. While there were explicit provisions for authorizations and consent for the dual representation by plaintiff of potential new tenants as well as the Landlord. Barnes and Noble were not in this category of new tenants.

It appears that Barnes and Noble were in a bit of a quandary in 2009, with less than three years remaining on the term of their lease. There was a renewal option provision for a five-year term in the existing lease, and a process by which the rental figure was to be determined. Barnes and Noble were considering the relocation of a Data Management division, possibly to 1400 Old Country Road, but would not do so, according to the testimony of Mitchell Klipper, unless they had negotiated an extension of the lease so as to justify the expenditure for reconfiguring the building to accommodate the new personnel. On the other hand, Brian McCarthy, on behalf of Samson Management, testified that the property owners were not in favor of renegotiating the terms of the current lease for the purpose of obtaining a lease extension.

There is no doubt but that Sutton and Edwards brought about the lease extension agreement with Barnes & Noble. As the exclusive broker, they claim an entitlement to a commission even if they did not bring about the extension of the lease. Were it not for the prohibition of dual representation with respect to existing tenants, and the broker's duty of loyalty, plaintiff would state a valid claim for entitlement to a commission.

The voluminous documents submitted in conjunction with the motion make it abundantly clear that Sutton and Edwards were seeking to capitalize on an opportunity by shooting fish in a barrel. Defendants 1400 Old Country Road, LLC, and Parkway Plaza Realty, LLC did not need Sutton and Edwards to find Barnes and Noble. For this reason, the exclusive brokerage agreement permitted unapproved dual representation only with anticipated, as opposed to actual, tenants.

There is a circumstance under which the broker could be entitled to a fee for the extension of the lease of an existing tenant. The first condition to that entitlement is that

the extension must be on terms which differ from those of an option contained in the lease. In this case, the terms were different, because the option did not set a specific base rental, but provided a methodology for arriving at an agreed amount. The second condition, however, has not been met. Landlord did not request that Sutton and Edwards negotiate the extension and, in fact, initially rejected the proposal brought to them on behalf of the tenant. Ultimately, the extension agreement was executed at the rental per square foot proposed by Barnes and Noble through its representative, Sutton and Edwards.

Movant took upon itself to negotiate on behalf of the Landlord with an existing tenant without being asked to do so. This was a clear effort to receive a commission at the expense of , rather than to benefit, their principal. The plaintiff's motion for summary judgment is denied.

Defendants motion to dismiss the complaint is granted. Even if there were no exclusive brokerage agreement excluding negotiations with existing tenants without the approval of the landlord, the plaintiffs in this action have provided dual representation to both the landlord and the tenant, without advising either of them that they were also acting on behalf of the other. Plaintiff attempts to distinguish cases such as *Queens Structure Corp. v. J. Lawn Associates, Inc.*, 304 A.D.2d 736 (2d Dept.2003) on the ground that they, as opposed to the broker in that case, claim only one commission. The concept of undivided loyalty is not based on the number of commissions earned, but the requirement that the parties are entitled to know if the person they are relying upon as their representative in negotiations has a similar fiduciary duty to the other party.

As a broker for one party, the duty of the fiduciary is to make the terms as favorable to his employer and the rent paid by the tenant as high as possible. In holding themselves out to Barnes and Noble as a negotiator on their behalf, the obligation is exactly the opposite. (*Wendt v. Fisher*, 243 N.Y. 439 443 [1926, Cardozo, J.]). Again, plaintiff seeks to distinguish this case from the present circumstances because the broker was actually the principle of the real party in interest, the property sold to a dummy purchaser, and resold promptly after the closing for a profit. These are aggravating

factors, but they do not vitiate the requirement that a broker has a duty to his employer, and may not represent both interests without approval of his principal and the other party.

This constitutes the Decision and Order of the Court.

Dated: July 21, 2011

  
J.S.C.

**ENTERED**  
AUG 03 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE