

HGCD Retail Services, LLC v 44-45 Broadway Realty Co.

2005 NY Slip Op 30390(U)

June 30, 2005

Supreme Court, New York County

Docket Number: 600928/2002

Judge: Charles E. Ramos

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

PRESENT: **Charles Edward Ramos**

PART **53**

0600928/2002

HGCD RETAIL SERVICES
vs
44-45 BROADWAY REALTY

SEQ 2

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

JUL 08 2005

COUNTY CLERK'S OFFICE
NEW YORK

IS DISPOSED OF
IN ACCORDANCE WITH THE ACCOMPANYING
MEMORANDUM DECISION.

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

Dated: 6/30/05

[Signature]

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

J.S.C.

CHARLES E. RAMOS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION
-----X
HGCD RETAIL SERVICES, LLC,

Plaintiff,

Index No. 600928/2002

-against-

44-45 BROADWAY REALTY CO., a general
partnership, and BOWTIE MANAGEMENT CO.,
LLC,

Defendants.

-----X

Charles Edward Ramos, J.S.C.:

In motion sequence 002, plaintiff HGCD Retail Services, LLC, (HGCD) moves, pursuant to CPLR 3212, for an order granting summary judgment in its favor for the relief sought in the first cause of action in the second amended complaint, and dismissing defendants 44-45 Broadway Realty Co. (44-45 Broadway) and Bowtie Management Co., LLC's (Bowtie) affirmative defenses. 44-45 Broadway and Bowtie cross-move, pursuant to CPLR 3212, for summary judgment dismissing HGCD's first and second causes of action.

In motion sequence 003, 44-45 Broadway and Bowtie move for an order striking the demand for trial by jury of all issues contained in the plaintiff's note of issue.

Background

This action and the related action, *44-45 Broadway Realty Co. v Burak et al.*, Index No. 600928/03, arise out of a failed transaction involving the leasing of a certain premises, owned by defendant 44-45 Broadway, and known as 1514-1530 Broadway, New York, New York (the Premises), to non-party, Sephora USA, LLC

(Sephora).

On April 17, 2000, 44-45 Broadway, Bowtie, and HGCD, through its member Richard Hodos, entered into a written brokerage agreement (the Broker Agreement), in relation to HGCD's negotiation of the lease of the Premises. As per the Broker Agreement, Bowtie was designated by 44-45 Broadway to pay plaintiff's commission. Arthur Burak, an agent for Sephora's parent company, LVMH Moet Hennessey Louis Vuitton, allegedly was to share in the brokerage commission with HGCD, a claim which defendants deny.¹

The Broker Agreement provided that Bowtie would pay HGCD a commission in the sum of \$1,400,820.31 payable as follows:

"(a) \$350,205.10 within thirty (30) days after all of the Commission Payment Conditions (as defined in paragraph 2 below) have been satisfied; and (b) the balance of \$1,050,615.21 in eighteen (18) equal monthly installments of \$58,367.51 each commencing on the first (1st) day of the month in which tenant makes its first payment of Fixed Minimum Rent, other than Fixed Minimum Rent due on execution of the Lease (if any), and monthly thereafter on the first (1st) day of each of the next succeeding seventeen (17) months, provided that all of the Commission Payment Conditions (as defined in paragraph 2 below) have been satisfied and subject to paragraph 3 below."

Brokerage Agreement ¶ 1.

The Commission Payment Conditions are defined as follows:

"It is hereby agreed that your commission shall be deemed earned only if and when: (a) the Prospective Tenant and Owner execute a Lease and such Lease is delivered by Owner to Tenant; and (b) Owner delivers possession of the Premises to the Prospective Tenant (it being agreed that if Owner does not deliver possession of the Premises to the Prospective Tenant for any reason whatsoever no commission

¹This is the disputed issue in the related action, 44-45 Broadway Realty Co. v Burak et al., Index No. 600928/03.

shall be due or payable to you); and (c) the Prospective Tenant is not in default in the payment of Fixed Minimum Rent, Additional Rent or security under the Lease when any installment provided for in paragraph 1 above becomes due; and (d) Tenant has paid all security and Fixed Minimum Rent due upon execution of the Lease (if any) and checks for such security and Fixed Minimum Rent have cleared (the conditions set forth in Sections 2(a) through 2(d) hereof are collectively referred to herein as the "Commission Payment Conditions").

Brokerage Agreement ¶ 2.

Also on April 17, 2000, Burak signed a letter agreement for the benefit of 44-45 Broadway (Letter Agreement), which states:

"This is to confirm that neither Arthur Burak nor Burak Associates nor any affiliate or subsidiary of Arthur Burak or Burak Associates is entitled to any commission, finder's fee or other payment from 44-45 Broadway Realty Co. or Bowtie Management Company LLC or their principals, successors, assigns and agents in connection with the above-referenced proposed lease to Sephora USA, LLC.

This is to further confirm that neither Arthur Burak nor Burak Associates nor any affiliate or subsidiary of Arthur Burak or Burak Associates shall make any claim or in any manner seek any commission, finder's fee or other payment from 44-45 Broadway Realty Co. or Bowtie Management Company LLC or their principals, successors, assigns and agents in connection with the above-referenced proposed lease to Sephora USA, LLC."

April 17th Letter Agreement.

On August 9, 2000, 44-45 Broadway and Sephora entered into a lease for the Premises (the Lease). The Lease required that Sephora place \$1,250,000 in escrow, which was to be disbursed to 44-45 Broadway before the term of the Lease started. The Lease also required specific work to be done by 44-45 Broadway in order to reconfigure the Premises to Sephora's requirements (Landlord's Work). See Lease, Art. 40(J). The Landlord's Work was to be completed by October 1, 2001. If such work was not completed,

Sephora had the right to terminate the Lease. 44-45 Broadway proceeded with the Landlord's Work, but Sephora made objections. It is alleged that 44-45 Broadway was unable to complete some portions of the work because it became apparent that the requirements of the Landlord's Work were not reasonable or appropriate due to, *inter alia*, structural issues.

In a letter dated September, 18, 2001, 44-45 Broadway stated to Sephora that, in part,

"This letter constitutes formal notice that Landlord's Work, as set forth in Paragraph J of Article 40 of the Lease, has been substantially completed and Landlord hereby delivers possession of the Demised Premises to Sephora USA, LLC."

The letter was accompanied by a key to the padlock securing the Premises. Sephora returned the key to 44-45 Broadway with a list of items it claimed violated the Landlord's Work provisions of the Lease. Sephora then commenced an action against 44-45 Broadway in the Supreme Court, New York County.

On October 1, 2001, 44-45 Broadway commenced a non-payment proceeding in the Civil Court. In response, in its pending Supreme Court action, Sephora sought a stay and consolidation of the Civil Court proceeding on the grounds that the Civil Court did not have jurisdiction because Sephora lacked legal possession of the Premises. Justice Kapnick, of this court, heard the application, and determined that Civil Court was able to decide cases dealing with such issues. See Defendants' Documentary Exhibits, Exhibit N, Transcript of October 11, 2001. Judge Kapnick further stated that Sephora could make its motion on a jurisdictional basis in the Civil Court. *Id.*

On December 14, 2001, Sephora and 44-45 Broadway entered into a "Settlement Agreement and Release of Claims" (Settlement Agreement). In accordance with the Settlement Agreement, Sephora paid 44-45 Broadway \$7,500,000, and relinquished any claim to the escrow fund of \$1,250,000. The Lease was then terminated. The Settlement Agreement also provides a release, which states, in part:

"[44-45 Broadway], its predecessors, successors, assigns and all affiliated entities, and the directors, officers, shareholders, members, partners, employees, agents and attorneys of [44-45 Broadway], its predecessors, successors, assigns and all affiliated entities (collectively the "Broadway Related Parties"), on one hand, and Sephora, its predecessors, successors, assigns and all affiliated entities, and the directors, officers, shareholders, members, partners, employees, agents and attorneys of Sephora, its predecessors, successors, assigns and all affiliated entities (collectively the "Sephora Related Parties"), on the other hand, hereby release, remise, and forever discharge each other, and their respective parties of and from...all manner of actions, causes of action, loss, claims ... suits ... agreements ... damages ... judgments and executions ... presently known or unknown ... arising out of or in connection with, relating or pertaining to ... (a) the Lease; (b) the Guaranty; (c) the Building, except for: ... personal physical injury ... or claim for non-payment filed by a third party ...; (d) any transaction between Sephora and [44-45 Broadway]; (e) subject matter of the Supreme Court Action, Civil Court Proceeding, and/or the Appeal ..."

Settlement Agreement ¶ 3.

Shortly after the parties entered into the Settlement Agreement, HGCD commenced this action for payment of commissions allegedly owed pursuant to the Broker Agreement. On January 29, 2003, 44-45 Broadway commenced the related action, *44-45 Broadway Realty Co. v Burak et al.*, Index No. 600928/03.

Analysis

HGCD's Motion for Summary Judgment on its First Cause of Action

Plaintiff argues that the doctrine of judicial estoppel is applicable because in the prior proceedings defendants argued that they delivered possession of the Premises to Sephora. This court agrees. Judicial estoppel bars defendants from asserting that there was no delivery of possession. Defendants argue that the doctrine cannot be applied because they have never prevailed in any judicial proceeding based on positions incompatible with those taken in this action. However, "the doctrine of judicial estoppel to be aimed at preventing 'a party from asserting a factual position in a legal proceeding that is contrary to a position previously taken by him in a prior legal proceeding.'" *Simon v Safelite Glass Corp.*, 943 F Supp 261, 264 (EDNY 1996) (citation omitted). Thus, "this policy would not be served by limiting its application to cases where the legal position at issue was ruled upon in the context of a judgment." *D&L Holdings, LLC v RCG Goldman Company, LLC* 287 AD2d 65, 71 (1st Dept 2001).

Although there were no final determinations in the prior proceedings, defendants continuously took the position that they delivered possession when defendant 44-45 Broadway filed a civil proceeding. The defendants stated in the petition that Sephora was in possession of the Premises, made such arguments in open court, and most importantly, submitted sworn Affidavits to the Civil Court and Supreme Court stating that 44-45 Broadway delivered possession. See Moss Affidavit in Opposition, November

6, 2001, and Moss Affidavit in Opposition, October 10, 2001.

"Judicial estoppel protects the sanctity of the oath and the integrity of the judicial process ... by demanding absolute truth and consistency in all sworn positions." *Bates v Long Island Railroad Company*, 997 F2d 1028, 1037-38 (2nd Cir 1993).

"Preserving the sanctity of the oath prevents the perpetuation of untruths which damage public confidence in the integrity of the judicial system." *Id.* Thus, defendants are judicially estopped from asserting that 44-45 Broadway did not deliver possession.

Defendants argument that HGCD is barred from asserting that possession was delivered because such a position runs counter to that of Sephora's is without merit. Defendants have not presented sufficient evidence to raise an issue of fact as to whether plaintiff was bound by any argument made by Sephora.

Nevertheless, defendants also have not presented evidence sufficient enough to raise a triable issue of fact as to whether possession was delivered. In order to grant summary judgment, it must be clear that no material and triable issue of fact is presented. See *Brown v LaFontaine-Rish Med. Assocs.*, 295 AD2d 167 (1st Dept 2002); *DiMenna & Sons, Inc. v City of New York*, 301 NY 118 (1950). In a motion for summary judgment, after the movant makes a *prima facie* case, the burden shifts to the opposing party to produce evidentiary proof sufficient enough to establish the existence of material issues of fact that is require a trial. *Winegrad v New York Medical Univ. Med. Cen.*, 64 NY2d 851 (1985).

As previously stated, the Broker Agreement requires that:

"Owner delivers possession of the Premises to the Prospective Tenant (it being agreed that if Owner does not deliver possession of the Premises to the Prospective Tenant for any reason whatsoever no commission shall be due or payable to you)."

Brokerage Agreement, ¶ 2(b).

However,

"the objective in any question of the interpretation of a written contract, of course, is to determine what is the intention of the parties as derived from the language employed. At the same time the test on a motion for summary judgment is whether there are issues of fact properly to be resolved by a jury. In general the courts have declared on countless occasions that it is the responsibility of the court to interpret written instruments. This is obviously so where there is no ambiguity." *Hartford Accident & Indem. Co. v Wesolowski*, 33 NY2d 169, 171-72 (1973).

Ambiguity does not exist if the words of the contract have "a definite and precise meaning, unattended by danger of misconception in the purport of the [contract] itself, and concerning which there is no reasonable basis for a difference of opinion." *Breed v Insurance Co. of North America*, 46 NY2d 351, 355 (1978). Further, the written contract must be interpreted as a whole because the "meaning of a writing may be distorted where undue force is given to single words or phrases." *Williams Press, Inc., v State of New York*, 37 NY2d 434, 440 (1975).

It is clear that the phrase "Owner delivers possession of the Premises to the Prospective Tenant" has a definite and precise meaning, and, when read with the contract as a whole, the phrase is unambiguous. When reading the entire contract, delivery of possession required nothing more than 44-45 Broadway

delivering the Premises to Sephora. Plaintiff argues that 44-45 Broadway's action in handing over the key to the Premises to Sephora was evidence of delivery. The court agrees that this action, together with the letter acknowledging that possession was being delivered, constituted delivery of possession under the terms of the Broker Agreement. 44-45 Broadway has not presented enough evidence to raise a triable issue of fact as to whether that action constituted delivery of possession.

Further, defendants argument that the broad language of the Broker Agreement's conditions encompasses the Lease's requirement of the performance of the Landlord's Work before there could be delivery of possession is unavailing. Defendants present time sheets, prepared by Richard Hodos, which state that "Landlord shall deliver the premises with interior walls demolished and Landlord's base building work completed." However, these sheets do not raise an issue of fact as to the unambiguous language of the Broker Agreement. Defendants also argue that these time sheets raise an issue of fact, in that it was the parties' intention that delivery would not be completed until the Landlord's Work was finished. However, the time sheets were prepared before the Broker Agreement was entered into, and thus, are barred from being introduced as extrinsic evidence to vary or contradict the unambiguous terms of the writing.

As for the condition that defendants receive the payment of Fixed Minimum Rent before commission could be earned, this condition was satisfied when defendants entered into the

Settlement Agreement in December 2001. Upon entering into the Settlement Agreement, Sephora was no longer in default and the Lease had been terminated. The money paid by Sephora under the Settlement Agreement eliminated the rent payments that Sephora was otherwise obligated to make. Thus, Sephora was not in default and this condition was satisfied. The commission payments were due after the Settlement Agreement was entered into.

Plaintiff's Motion to Dismiss Defendants' Affirmative Defenses

Plaintiff also moves to dismiss defendants' affirmative defenses. Defendants' first affirmative defense alleges that conditions had to be satisfied for the commission to be earned, and these conditions did not occur. For the reasons stated above, this affirmative defense is dismissed.

Defendants' second affirmative defense asserts that this action is premature in seeking the brokerage commission in advance of when the installment payments would have been due under the Broker Agreement. The Broker Agreement provides for the initial commission thirty days after all Commission Payment Conditions are satisfied, and the balance payable in monthly installments. This defense is without merit. Defendants acknowledge that, at the time of the initial complaint, based on anticipatory breach, they were overdue in paying the initial payment and three monthly installments. Thus, this lawsuit would certainly not be premature as to those payments. Further, when the second amended complaint, dated June 20, 2003, was filed,

defendants would have owed plaintiff the remainder of the installments. Thus, the action is not premature, and the second affirmative defense is dismissed.

The defendants' third affirmative defense is for failure to state a cause of action is also dismissed for the reasons stated above.

The fourth and fifth affirmative defenses allege plaintiff's fraud and unclean hands arising out of the plaintiff's anticipation of sharing commissions with Arthur Burak, despite the Letter Agreement, which allegedly prohibited such sharing. Although the issue of commission sharing between HGCD and Burak is the subject of the related action, *44-45 Broadway Realty Co. v Burak et al.*, Index No. 600928/03, in this decision, the court will address only the allegations contained in defendants' affirmative defense pleading in the present action. The court will address, if appropriate, the allegations contained in 44-45 Broadway's complaint against Hodos, Burak, Burak Associates and HGCD in the pending motion and cross-motion in the related action.

Here, plaintiff argues that the fourth and fifth affirmative defenses are predicated upon allegations of fraud and deceit, but that the defendants fail to allege the elements of common law fraud. The fourth affirmative defense alleges that Burak entered into the Letter Agreement, and HGCD knew of the Letter Agreement's terms, but nevertheless, agreed to share equally in the costs and proceeds of this lawsuit. It further alleges that

as a result of Burak and HGCD's fraudulent and deceitful acts, the Broker Agreement is vitiated, and HGCD is not entitled to any recovery based on the Broker Agreement. The fifth affirmative defense alleges the HGCD knew of the substance of the Letter Agreement before it entered into the Broker Agreement, and the Burak/HGCD sharing agreement should have been disclosed to 44-45 Broadway. It further alleges that if 44-45 Broadway knew of the sharing agreement, it would not have entered into the HGCD Agreement.

To plead a claim of fraud, a party must allege a misrepresentation of a material fact, falsity, scienter, reliance, and injury. See *Vermeer Owners v Guterman*, 78 NY2d 1114. Defendants have not plead a cause of action for fraud in their fourth and fifth affirmative defenses.

Defendants argue that it was Hodos' material omission of fact that constitutes the misrepresentation required for pleading fraud. However, non-disclosure is equivalent to an affirmative misrepresentation only where a party to a transaction has a duty to disclose pertinent information. See *Wall Street Transcript Corp. v Ziff Communications, Co.*, 225 AD2d 322 (1st Dept 1996); *Guardian Life Ins. Co. v Handel*, 190 AD2d 57 (1st Dept 1993).

Here, in both affirmative defenses, defendants have failed to allege a duty owed by HGCD to defendants. Defendants' allegation in the fifth affirmative defense that, as a real estate broker, Hodos and HGCD had an obligation to exercise good faith and fair dealing, does not specifically allege a fiduciary

or special duty owed by plaintiff, as the defendants' broker. Defendants never allege that plaintiff was a broker acting on their behalf.

44-45 Broadway fails to prove or, at the minimum, even acknowledge that Hodos and HGCD were solely acting as 44-45 Broadway's broker. Defendants do not allege in the answer, briefs, or affidavits that HGCD or Hodos were acting as the broker on their behalf. Defendants do point out that plaintiff alleges in its complaint that "44-45 Broadway engaged [it] to procure a tenant," and argue that now plaintiff cannot claim it does not owe defendants a duty. Defendants, however, deny this allegation in their answer. Further, Mendelson's affidavit, submitted by 44-45 Broadway, states that Hodos was representing Sephora as a possible tenant for the Premises. See Mendelson Affidavit ¶ 2. Without specifically alleging the basis for a duty owed by HGCD, HGCD cannot be held liable in fraud for omissions.

Nevertheless, defendants also fail to sufficiently allege that the plaintiff's material omission of fact, that it had a commission share agreement with Burak, induced them to enter into the Broker Agreement, and that it resulted in some injury. See *Held v Kaufman*, 91 NY2d 425 (1998); *New York Univ. v Continental Ins. Co.*, 87 NY2d 308 (1995). Defendants' claim that it would not have entered into the Broker Agreement if it had known of the Hodos/Burak sharing agreement is conclusory. Thus, the fourth and fifth affirmative defenses are dismissed.

Defendants' sixth affirmative defense alleges that the releases exchanged by Sephora and 44-45 Broadway, as part of the Settlement Agreement, serve to release defendants from claims by plaintiff, as an agent or a "Sephora related party." However, defendants have failed to show that Sephora was authorized to bind the plaintiff to a release between defendants and Sephora. Defendants argue that Hodos and Burak assert in the related action that they are released from claims by 44-45 Broadway, and HGCD should not be permitted to take a counter position in the present action. However, Burak and Hodos argue that they are released from claims by 44-45 Broadway because 44-45 Broadway is a signatory to the Settlement Agreement. Here, HGCD argues that 44-45 Broadway cannot be released from claims by HGCD because HGCD is not a signatory to the Settlement Agreement. As previously stated, defendants have not presented evidence to raise an issue of fact as to whether Sephora had the right to bind plaintiff to the Settlement Agreement's release provision.

The seventh affirmative defense asserts that certain claims raised by plaintiff are barred by the doctrine of laches, waiver and/or estoppel. However, this Court need not become involved in the merits of the seventh affirmative defense, as it is related to a claim that HGCD is not alleging in its second amended complaint. See Defendants Memorandum of Law in Opposition, p. 26-27. Thus, the seventh affirmative defense is dismissed.

The eighth affirmative defense alleges that the second cause of action asserting a claim for a brokerage commission based on

the theory of quantum meruit is barred by the existence of a written brokerage agreement. This affirmative defense is dismissed as moot for the reasons below.

Defendants' Cross-Motion

44-45 Broadway and Bowtie cross-move, pursuant to CPLR 3212, for summary judgment dismissing HGCD's first and second causes of action. As stated above, defendants have not raised issues of fact as to the first cause of action, and thus, defendants' cross-motion for summary judgment on the first cause of action is denied.

Defendants also cross-move for summary judgment on the plaintiff's second cause of action, asserting a claim for a brokerage commission based on the theory of quantum meruit. The existence of a valid and enforceable written contract precludes a quantum meruit claim. *Aviv Constr., Inc. v Antiquarium, Ltd.*, 259 AD2d 445 (1st Dept 1999). Here, there is no dispute as to whether a written agreement exists, and there is no dispute that the written agreement covers the dispute in issue. See *Joseph Steinberg, Inc. v Walber 36th Street Assoc.*, 187 AD2d 225 (1st Dept 1993). Further, the Broker Agreement is not silent as to the dispute in issue, i.e., the plaintiff's entitlement to a commission. *Id.* Thus, the plaintiff's second cause of action is dismissed.

Motion Sequence 003

In motion sequence 003, 44-45 Broadway and Bowtie move for an order striking the demand for trial by jury of all issues

contained in the note of issue served by the plaintiff. The defendants argue that a plaintiff who joins legal and equitable claims arising from the same transaction waives its right to a jury trial on all its claims. See *A.J. Fritschy Corp. v Chase Manhattan Bank*, 36 AD2d 600 (1st Dept 1971). However, this issue is moot since this court granted summary judgment in favor of HGCD.

Accordingly, it is,

ORDERED that plaintiff HGCD's motion for summary judgment on its first cause of action is granted, and defendants 44-45 Broadway and Bowtie's affirmative defenses are dismissed; and it is further

ORDERED that defendants 44-45 Broadway and Bowtie's cross-motion for summary judgment is denied as to plaintiff's first cause of action, and is granted as to plaintiff's second cause of action based on quantum meruit; and it is further

ORDERED that defendants 44-45 Broadway and Bowtie's motion for an order striking plaintiff's jury demand is denied as moot.

The Clerk is hereby directed to enter judgment accordingly.

Dated: June 30, 2005

FILED

JUL 08 2005

COUNTY CLERK'S OFFICE
NEW YORK



J.S.C.

CHARLES E. RAMOS

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.