

CB Richard Ellis, Inc. v Burgio

2005 NY Slip Op 30447(U)

July 28, 2005

Supreme Court, New York County

Docket Number: 603930/2004

Judge: Karla Moskowitz

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

-----x
CB RICHARD ELLIS, INC. and CB RICHARD ELLIS
REAL ESTATE SERVICES, INC.,

Plaintiffs,

INDEX NO. 603930/2004

- against -

MOTION DATE _____

MOTION SEQ. NO. 002

MICHAEL BURGIO,

MOTION CAL. NO. _____

Defendant.
-----x

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 is decided in accordance with the accompanying Decision and Order.

Dated: July 28, 2005



KARLA MOSKOWITZ 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: PART 3

-----X
CB RICHARD ELLIS, INC. and CB RICHARD
ELLIS REAL ESTATE SERVICES, INC.,

Index No. 603930/2004

Plaintiffs,

- against -

DECISION and ORDER

MICHAEL BURGIO,

Defendant.

-----X
MOSKOWITZ, J.:

Plaintiffs CB Richard Ellis, Inc. and CB Richard Ellis Real Estate Services, Inc. (together, CBRE) move for an order: (1) entering judgment in the amount of \$812,093.81, together with interest in the amount of \$72,621.39 (through March 15, 2005) on a promissory note, with collection costs, reasonable attorney's fees, and disbursements; (2) scheduling a prompt hearing to determine CBRE's costs, including reasonable attorney's fees and disbursements; (3) dismissing the amended answer with affirmative defenses; and (4) declaring that, to the extent that defendant Michael Burgio may have a disputed interest in current and prospective CBRE brokerage commissions, he should pursue the remedies specified in the parties' operative employment agreement.

Burgio cross-moves: (1) pursuant to CPLR 3025 (b), for leave to amend his amended answer; (2) pursuant to CPLR 3212, for summary judgment: (a) dismissing the complaint to the extent that it seeks to recover monies allegedly due under a promissory note for lack of consideration for the execution of that note; (b) on his sixth counterclaim, for an accounting of all commissions due him; (c) on his third and fourth counterclaims, judicially declaring and

directing that CBRE comply with paragraphs 6 and 11 of the employment agreement regarding resolution of commission-related disputes; (d) on his third and fourth counterclaims, seeking a judicial declaration that CBRE is required to offset any monies due under the employment agreement with commissions due Burgio; and (e) on his second counterclaim for indemnification, including attorney's fees pursuant to the underlying employment agreement; or (3) alternately, pursuant to CPLR 3212 (f), denying or continuing CBRE's motion for summary judgment to permit the parties to conduct necessary discovery that was stayed by the making of CBRE's motion.

Background

CBRE, a Delaware corporation, is licensed as a New York State real estate broker. CBRE's predecessor-in-interest, Insignia/ESG, Inc. (Insignia), hired Burgio as a commercial real estate broker, pursuant to a written employment agreement, dated August 6, 2002 (Employment Agreement). Burgio began his employment on August 8, 2002.

The Employment Agreement does not provide for the payment of a salary to Burgio. Instead, it provides for CBRE to pay Burgio a percentage of commissions from transactions as to which he rendered services (Employment Agreement, ¶ 4 [d]). Pursuant to Rider "B" to the Employment Agreement (Rider B), Burgio would receive a draw against commissions (an "advance") of up to \$3 million during his first three years of employment, paid in semi-monthly installments, with a \$1 million cap on the draw in any given year (Rider B, ¶ 1).

The Employment Agreement provides further that if CBRE or Burgio terminates Burgio's employment during the first year of employment, Burgio would have no personal liability for the repayment of any outstanding draw amounts advanced during the first year. Burgio would repay

all such outstanding draw amounts solely from commissions that are due and that become due from CBRE to Burgio.

If CBRE or Burgio terminates Burgio's employment during the second year of employment, Burgio would not be personally liable for repayment of any outstanding draw amounts advanced to him during the second year of employment. Burgio would repay all these outstanding draw amounts solely from commissions that are due, and that become due from CBRE to Burgio. Burgio would remain personally liable, however, for repayment of any outstanding draw amounts advanced to him during the first year of employment.

If CBRE or Burgio terminates Burgio's employment during the third year of employment, Burgio would not be personally liable for repayment of any outstanding draw amounts advanced to him during the third year of employment. Burgio would repay all these outstanding draw amounts solely from commissions that are due and that become due from CBRE to Burgio. Burgio would remain personally liable, however, for repayment of any outstanding draw amounts advanced to him during the first and second years of employment.

On August 23, 2002, Burgio executed a promissory note (Note) in favor of CBRE's predecessor, Insignia. The first paragraph of the Note recites that, in consideration of CBRE's agreement to loan Burgio up to \$3 million, Burgio agrees to repay the total loan amount to the extent disbursed to Burgio, with interest as set forth in the Note.

The second paragraph recites that CBRE is disbursing the "Loan" to defendant in equal semi-monthly installments in accordance with the Employment Agreement. In his first two years of employment, CBRE would advance up to \$1 million without interest in each year. In the third year, CBRE would advance an amount up to the greater of (i) \$800,000, and (ii) 75% of the

annual average of the commissions payable to Burgio during the first two years.

On August 4, 2004, during his second year of employment, Burgio voluntarily terminated his employment with CBRE. Shortly thereafter, Cushman & Wakefield, a competitor of CBRE, employed Burgio. CBRE contends that, upon termination of his employment, Burgio owed it \$812,093.81, together with accrued interest in the sum of \$72,621.39 through March 15, 2005, in connection with the loan that it extended to him during his first year of employment pursuant to the Note. CBRE demanded payment, but Burgio refused. This action ensued.

CBRE also contends that Burgio is involved in a commission dispute with six other CBRE brokers, and that, pursuant to paragraph 4 (G) of the Employment Agreement, CBRE referred the dispute to internal, binding arbitration, known as the "Designated Executive Procedure," but Burgio has declined to participate and threatened to sue CBRE for any damages that the arbitration, now suspended, may cause.

The complaint contains three causes of action. The first cause of action is for breach of contract, based upon the \$812,093.81 allegedly due under the Note. The second cause of action is for breach of the implied covenant of good faith and fair dealing. The third cause of action is for indemnification, pursuant to the Employment Agreement, that provides that Burgio would indemnify it for damages that his breach of the Employment Agreement causes.

According to Burgio, at the time he terminated his employment, CBRE owed him approximately \$1 million in commissions, but CBRE has refused to pay that amount or to set-off the amount owed against the Note. He also contends that CBRE improperly elected to have the commissions determined through the Designated Executive Procedure; a procedure that is only for current employees and not for situations where the dispute arises after termination of

employment. He also contends that CBRE has instructed several third parties with whom Burgio has an established business relationship, and on whose transactions Burgio was involved prior to leaving CBRE's employ, to distance themselves from Burgio and to rely solely on CBRE's employees regarding certain transactions.

The answer contains eight counterclaims. The first counterclaim alleges that CBRE breached the Employment Agreement by: (1) failing to pay commissions, (2) seeking to improperly subject any dispute over the payment of commissions to the Designated Executive Procedure, (3) seeking to reduce or eliminate Burgio's commissions, and (4) failing to permit Burgio to offset any sums owed to CBRE with commissions owed to Burgio.

The second counterclaim seeks indemnification, pursuant to 9 (c) of the Employment Agreement, for damages that CBRE's alleged breach of the Employment Agreement caused. The third counterclaim seeks a declaratory judgment. The fourth counterclaim is for injunctive relief to enjoin CBRE from implementing its Designated Executive Procedure. The fifth, sixth, seventh, and eight counterclaims are for unjust enrichment, an accounting, conversion, and breach of the implied covenant of good faith and fair dealing, respectively.

Discussion

CBRE's motion for summary judgment on the Note is granted. CBRE has established a prima facie case for the relief it seeks by adducing proof of the Note and evidence that Burgio failed to make the required payments (*Tongkook Am. v Bates*, 295 AD2d 202 [1st Dept 2002]; *Boland v Indah Kiat Fin. (IV) Mauritius Ltd.*, 291 AD2d 342 [1st Dept 2002]).

The third paragraph of the Note provides that Burgio is personally liable for the repayment, on CBRE's demand, of all outstanding loan amounts that CBRE advanced that

Burgio has not repaid to CBRE from commissions. Paragraph 3 (b) (i) of the Note provides that if Burgio's employment is terminated during his second year of employment, which is what occurred, then Burgio is obligated to repay the amount loaned during the first year. Upon his voluntary termination of employment, Burgio owed CBRE \$812,093.81 for amounts advanced during the first year.

Burgio's argument, that he is entitled to offset current alleged unpaid commissions against the Note, is incorrect. The amount of any unpaid commissions is not inextricably intertwined with the amount due under the Note (*Banco Do Estado De Sao Paulo, S.A. v Mendes Jr. Intl. Co.*, 249 AD2d 137 [1st Dept 1998]). Because Burgio's employment terminated in the second year, under the terms of the Note, as well as the terms of the Employment Agreement, the amounts that CBRE advanced during the first year are separate from the commissions that Burgio earned during the second year.

Hence, because Burgio's obligations under the Note are not conditioned upon CBRE's commission-related obligations under the Employment Agreement, and, significantly, the Employment Agreement contains its own a procedure for resolving commission-related issues, the agreements are separately enforceable (*Inner City Telecom. Network v Sheridan Broadcasting Network*, 260 AD2d 257 [1st Dept 1999]).

Further, paragraph 5 of the Note provides:

"Broker hereby waives demand, presentment, and notice of dishonor. In the event of a suit to collect such sums, Broker agrees to jurisdiction and venue in the state and federal courts situated in New York, New York, and waives both trial by jury and the right to assert any offset or counterclaim in and to such collection suit."

Thus, although the counterclaims for commissions may serve as a basis for a separate action, they cannot bar summary judgment on CBRE's causes of action to recover on the Note (*Malsin v*

Stockman, 265 AD2d 533 [2d Dept 1999]).

Burgio's contention – that the note is unenforceable, because of lack of consideration – is unconvincing. Burgio argues that CBRE did not provide any new consideration for the Note, because he executed the Note 17 days after the parties signed the Employment Agreement. The note needed no new consideration, however, because, pursuant to Rider B, Burgio agreed to deliver to CBRE, from time to time, promissory notes reflecting the terms of the Employment Agreement (Rider B, ¶III [b]). Rider B is expressly incorporated by reference into the Employment Agreement (*Chiacchia v National Westminster Bank USA*, 124 AD2d 626 [2d Dept 1986]; *PaineWebber Inc. v Bybyk*, 81 F3d 1193 [2d Cir 1996]). More importantly, CBRE continued making bi-monthly (draw) payments to Burgio after the execution of the Note. Thus, Burgio's reliance upon *American Express Bank. Ltd. v Spire Puerto Rico*, 226 AD2d 158 [1st Dept 1996]) is unpersuasive, because there the plaintiff bank did not make additional loans, and the terms of the notes were inconsistent with the earlier agreement.

Burgio also contends that CBRE deducted State, City and Federal taxes, as well as medical and other benefits, from the draws, and he received approximately 50% of the amount that CBRE claims under the Note, and thus, the draws constitute wages, not loans. However, the parties' agreement contemplated that the first year draws would constitute loans if, as occurred here, Burgio terminated his employment in the second year. That the IRS may not treat the draws as loans until the repayment obligation becomes certain is not a basis to rewrite the parties' agreement under the guise of contract interpretation (*see 85th St. Restaurant Corp. v Sanders*, 194 AD2d 324 [1st Dept 1993]). Moreover, evidence in the record indicates that Burgio can recoup the tax payments from the taxing authorities.

Hence, Burgio's cross motion for leave to amend the answer, to add a defense of lack of consideration, is denied. Although leave to amend a pleading is freely granted, leave is properly denied where the proposed claims or defenses are palpably insufficient (*Tishman Constr. Corp. of New York v City of New York*, 280 AD2d 374 [1st Dept 2001]).

Burgio also argues that summary judgment is not available, because extrinsic evidence is required to determine the amount of Burgio's indebtedness under the Note. This argument is without merit. CBRE provided adequate extrinsic evidence, including the sworn, *and uncontroverted*, statement of Gerald Prager, Senior Managing Director and the Head of Accounting Department in CBRE's New York City office. Burgio's vague assertions as to the amount of indebtedness are insufficient to constitute a denial of the amount owed (*see Ticor Title Guar. Co. v Bajraktari*, 261 AD2d156 [1st Dept 1999]). Similarly, the alternate request, pursuant to CPLR 3212 (f), to deny or continue the motion for summary judgment to permit the parties to conduct necessary discovery is denied, because no further discovery as to the Note is necessary.

Both parties seek a declaration concerning the appropriate procedure for resolving Burgio's claim for CBRE brokerage commissions.

Contrary to CBRE's assertion, the applicable provisions of the Employment Agreement are 6 (C) and 11, and not 4 (G). According to CBRE, Paragraph 4 (G) applies to disputes between Burgio and other employees, whereas paragraphs 6 (C) and 11 apply to commission disputes between Burgio and CBRE (Affidavit of Gerald Prager, sworn to March 18, 2005, ¶¶ 16, 22; Affidavit of Prager, sworn to April 27, 2005, ¶ 9). Pursuant to paragraph 6 (C), Burgio must submit post-termination commission disputes in the first instance to the Designated Executive for determination. If the Designated Executive does not resolve the dispute with finality and to the

mutual satisfaction of Burgio and CBRE, then the parties may resort to litigation or arbitration (*see also* paragraph 11 [“commission disputes between Employee and the Company that first arise after Employee’s departure from the Company shall not be determined with finality by the Designated Executive . . .”]).

Although Burgio, as a former employee, may not be pleased with first appearing before the Designated Executive (as counsel expressed during oral argument), when the parties set down their agreement in a clear, complete document, the court should enforce their writing according to its terms (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157 [1990]). Indeed, the Employment Agreement is a negotiated instrument, as revealed by a rider to the Employment Agreement (Rider “A”) added at Burgio’s behest.

CBRE contends that the Designated Executive’s determination is final, pursuant to paragraph 4 (G), because Burgio’s dispute is with other CBRE brokers and not with CBRE itself. The record indicates otherwise. CBRE offers no persuasive evidence to support its assertion that the dispute is with other brokers and not with CBRE. In none of his three affidavits does Prager provide any information about the alleged broker disputes or identify any of these brokers. Neither does Suzy A. Reingold, a CBRE Senior Managing Director, who submitted an affidavit stating that she tried to facilitate the resolution of commission disputes that Burgio claims he had with other brokers. To be sure, in his April 27, 2005 affidavit, Prager provides detailed information about post-termination commission credits. But he provides no information about the commission disputes that Burgio allegedly has with other CBRE brokers.

In contrast to the conclusory evidence that CBRE submitted, Burgio has submitted detailed evidence setting forth his claim of a commission dispute with CBRE (*see* Burgio

Affidavit, sworn to April 19, 2005, ¶ 19; Letter dated October 7, 2004, at Exhibit F to Burgio Affidavit).

In view of the foregoing, all of defendants' other counterclaims, including an accounting, offsets and indemnification, are not now ripe for consideration, because the counterclaims are subject to the Designated Executive Procedure. If that procedure does not resolve the dispute to Burgio's satisfaction, he may apply to the court to restore his counterclaims.

Settle order and judgment.

Dated: July 28, 2005

ENTER:



J.S.C.