

Balmer Parc, LLC v 720 Fifth, LLC

2007 NY Slip Op 31359(U)

May 18, 2007

Supreme Court, New York County

Docket Number: 0602231/2005

Judge: Helen E. Freedman

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

PI Index Number : 602231/2005

PART 30

BALMER PARC LLC

vs
720 FIFTH LLC.

Sequence Number : 002

SUMMARY JUDGMENT

DEX NO. _____

OTION DATE _____

OTION SEQ. NO. _____

OTION CAL. NO. _____

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

Notice of Motlon/ 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 memorandum of law

FILED
MAY 29 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 5/18/07

HEJ

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 39

-----X
BALMER PARC, LLC and DAKOTA REALTY GROUP,
LLC,

Plaintiffs,

-against-

720 FIFTH, LLC

Defendants.
-----X

HELEN E. FREEDMAN, J:

Index No.

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In this action, plaintiffs, two companies, both located at 445 Park Avenue, seek to recover sums for commissions on leases and payment for management services. Plaintiff Dakota Realty Group seeks \$192, 263 based on claims for breach of an express exclusive leasing agreement (second cause of action), quantum meruit (fifth cause of action) and unjust enrichment (sixth cause of action). Plaintiff Balmer Parc, LLC in the first, third, and fourth causes of action, seeks \$8,333 for management services provided pursuant to an oral agreement and based on quantum meruit or reasonable expectation for the month of April 2005. Defendant 720 Fifth, LLC ("720") is the net lessee of the premises since November 1, 2004. Pursuant to a notice dated April 7, 2005, plaintiffs terminated services to defendant as of April 30, 2005 allegedly because of lack of responsiveness to its requests. Plaintiff Dakota Realty Group LLC or its predecessor Dakota Realty Inc. had served as managing agent and exclusive leasing agent to the prior owner pursuant to written agreements since at least 1987. Defendant denies various claims and interposes counterclaims for various contractual breaches.

Defendant moves for summary judgment dismissing Plaintiff Dakota Realty Group's

Second, Fifth and Sixth Causes of Action seeking \$192,263, \$185,713.10 for a lease executed by defendant with Abercrombie & Fitch ("A&F") for the fourth floor of 720 Fifth Avenue and \$6,549.69 for obtaining a two year extension of a lease with a Richard J. Schwartz Corporation ("Schwartz Extension").

Plaintiff Dakota Realty Group ("Dakota") does not oppose the motion as to its second cause of action for breach of an express oral agreement, but opposes the motion as to its fifth and sixth causes of action based on quantum meruit and unjust enrichment.

Pursuant to written agreements, Dakota or its predecessor Dakota Realty Inc. (also "Dakota") served as both managing agent and exclusive leasing agent for predecessor 720 Fifth Avenue Associates and was entitled to commissions for all new and renewal leases during the terms of the agreements whether or not it was the procuring cause of the lease. Dakota had received commissions as well as a flat monthly fee for acting as the managing agent of the building. In 2003, plaintiff Balmer Parc LLC became the managing agent of the building, and in 2004, 720 Fifth, LLC became the net lessee of the building.

According to Mordecai Elazary, President of both Dakota Realty Group LLC and Balmer Parc, he met with Jeff Sutton, a member of defendant, and agreed that Balmer Parc and Dakota would continue to perform the functions it performed for the prior owner (who was still fee owner). Elazary believed that the parties agreed that leasing would be conducted through Dakota Realty although he acknowledges that there was no express or implied agreement to that effect. Although Dakota did not procure any new tenant, Elazary claims that it relocated an existing tenant, Felissimo Corporation of America ("Felissimo"), on the fourth floor to another space in the building so that defendant could lease the entire fourth floor to Abercrombie &

Fitch Stores ("A&F"). Defendant had procured the A&F lease. Elazary claims that he had extensive discussions with Sutton and Felissimo itself regarding the relocation of Felissimo. Plaintiff Dakota contends that it made numerous other efforts to lease space, none of which materialized, but that it successfully negotiated a renewal lease with Richard J. Schwartz, an existing tenant. In January 2005, after the A&F lease went into effect, Elazary sent Sutton an Exclusive Renting Agency Agreement based on the Real Estate Board of New York's standard contract, which Sutton did not sign. On or about March 28, 2005, after requesting the customary rates that an exclusive leasing or renting agent would receive plaintiff sent an invoice for \$185,713.10 in commissions for the A&F lease and \$6,549.69 for the R.J. Schwartz renewal lease. Neither were paid.

Defendant, through the affidavit of Jeff Sutton, denies that Dakota was the exclusive leasing agent for 720 Fifth. He alludes to the absence of any written agreement and states that there was no oral agreement giving Dakota exclusive leasing rights, as Dakota's president admits in his deposition. Sutton avers that plaintiff's case is premised on its assertion that it was the exclusive broker for the owner of the Building prior to when defendant became net lessee. Defendant contends that plaintiff Dakota provided no leasing services with respect to the A&F deal for which it seeks the bulk of its claim, and that it is not entitled to brokerage commission for obtaining an extension of an existing lease because that was part of its management duties. Sutton, in behalf of defendant also claims that there was no distinction made between Dakota's and Balmer Parc concerning performance of management agent's duties.

Sutton further asserts that he specifically declined to sign a proposed exclusive leasing agreement that Elazary sent him in January 2005, a month after Sutton consummated the deal

with A&F, and for which neither plaintiff provided services. He does acknowledge having entered into an oral agreement with plaintiffs for continuation of management services at the negotiated rate of \$8,333 per month. Those payments were made through March of 2005.

Defendant asserts that in view of the fact that there was admittedly no oral or written agreement for leasing services, and no services were actually provided other than obtaining an extension of an existing lease, there is no basis for the quantum meruit or unjust enrichment claims. Defendant also proffers documentary evidence to the effect that Dakota and Balmer Parc were used interchangeably in connection with management services. In fact, Blanche Christian-Crawford who turned over books and records as managing agent after plaintiffs terminated their agreement indicated that she was a Vice President of and worked for Dakota Realty as opposed to Balmer Parc, the supposed managing agent. Moreover, in various communications to tenants and to Consolidated Edison concerning management matters, the Operations Manager of the building used Dakota Realty letterhead.

Having acknowledged that its claim for breach of express or implied contract is unsupportable, plaintiff cites various cases for its quantum meruit and unjust enrichment claims. However, in each of the cases some specific service is alleged to have been performed. For example, in *Tucas Co. V. The Conium Company, LLC*, 2003 WL 1746731, plaintiff alleged that it performed brokerage services and that it was defendant that prevented the consummation of a deal. Here, plaintiff acknowledges that it did not procure the A&F lease and that although it tried to procure other leases, it was unsuccessful. Relocating an existing tenant does not constitute a leasing service. The only leasing service that plaintiff actually performed was the obtaining of an extension or renewal of the R.J. Schwartz lease. Without a specific agreement

stating otherwise, that would ordinarily be one of the duties of a managing agent. Since plaintiff(s) was paid its monthly management fee, it cannot seek an additional fee unless it can demonstrate that an agreement for such a fee existed..

Based on the foregoing, it is

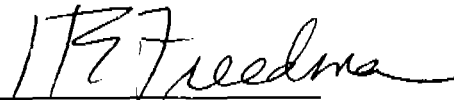
ORDERED that the second, fifth and sixth causes of action are dismissed; and it is further

ORDERED that the remainder of the action shall continue.

The parties are directed to appear for a pre-trial conference on May 29, 2007.

Dated: May 18, 2007

Enter:



Helen E. Freedman, J.S.C.

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