

**Crystal Beach Dev. Corp. v
Tanenbaum-Harber Co., Inc.**

2007 NY Slip Op 31456(U)

May 30, 2007

Supreme Court, New York County

Docket Number: 0602447/2006

Judge: Shirley W. Kornreich

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

PRESENT: SHIRLEY WERNER KORNREICH
J.S.C.

PART 54

Index Number : 602447/2006

CRYSTAL BEACH DEVELOPMENT

vs

TANENBAUM-HARBER CO.INC.

Sequence Number : 001

PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 2/22/07

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were filed with this motion to/for _____

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2
3, 4, 5
6, 7

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

UNFILED JUDGMENT
Judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

Dated: _____

2/20/07

SHIRLEY WERNER KORNREICH
J.S.C.

[Signature]
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
CRYSTAL BEACH DEVELOPMENT CORP.,

Plaintiff

Index No.: 602447/06

-against-

**DECISION,
ORDER
and JUDGMENT**

TANENBAUM-HARBER CO., INC.

Defendant

KORNREICH, SHIRLEY WERNER, J.:

This action arises from defendants' alleged breach of an insurance service fee agreement. Plaintiff Crystal Beach Development Corp., has asserted six causes of action against defendant Tanenbaum-Harber Co., Inc. and now moves for partial summary judgment on the fifth cause of action for breach of contract.

I. *Statement of Facts*

Plaintiff, by its President Keith Hamlin, avers the following. Plaintiff is the owner and developer of Poet's Landing, an eighty-eight unit Condominium complex being built at property located at 16-18 Hayestown Road, Danbury, Connecticut ("Condominium Project"). Aff. of Keith Hamlin, para. 3. In December of 2004, the parties met to discuss the feasibility of procuring an Owners Controlled Insurance Program ("OCIP") for the Condominium Project. *See id.*, para. 5-6. Defendant advised plaintiff that it was the exclusive underwriter for an OCIP offered by AIG Risk Management, Inc. ("AIG") for projects with a minimum cost of \$35 million dollars. *Id.*, para. 6. Plaintiff advised defendant that the Condominium Project's cost of

approximately \$30 million dollars would be below the minimum, but defendant assured plaintiff that the lesser amount would not impact plaintiff's ability to enter the OCIP. *Id.*, para. 7.

On December 10, 2004, defendant provided plaintiff with an analysis that presented the OCIP as the cost effective way to manage plaintiff's insurance costs. Hamlin Aff., para. 8. The analysis projected that contractor credits would exceed costs, resulting in a profit to plaintiff. *Id.* Plaintiff bound an OCIP with AIG with effective dates of coverage from April 11, 2005 through April 11, 2006, to be renewed at the end of the term. Hamlin Aff., para. 9.

On May 26, 2005, the parties entered into a Service Fee Agreement ("Agreement"). *Id.*, para. 10; Ex. B. Pursuant to the terms of the Agreement, plaintiff paid defendant a service fee of \$200,000 ("Service Fee") in exchange for defendant's services as "insurance brokers and risk managers" for plaintiff's Condominium Project. *Id.*, para. 10-11; Ex. B. The Agreement included an early termination provision that stated:

Notwithstanding the above, Client may terminate the agreement by notifying Broker, in writing, with 30 days advance notice. ... If this Agreement is terminated for any reason by either party in accordance with its terms the Service Fee will be pro-rated, over the "Term of Project", however the earned fee will be no less than \$100,000.

Hamlin Aff., Ex. B.

"Term of Project" was defined in the Agreement as "[c]ommencing with the effective date of the OCIP and shall continue until completion of the project(s), audits, final premium calculation and delivery of closing report, by BROKER." Hamlin Aff., Ex. B. Since the OCIP was effective April 11, 2005, the Term of Project began on that date. *Id.*, para. 20. Plaintiff indicated, in a time line supported by the current project schedule, that the projected construction

completion date for the Condominium Project was November 2007 and the projected closing report date was May 2008. *See id.*, para. 22-24; Ex. E.

Several months after beginning the Condominium Project, plaintiff concluded that because actual contractor deducts did not fall in line with the defendants' projections, the OCIP would result in a considerable loss. Hamlin Aff., para. 15-17. On January 31, 2006, plaintiff wrote a letter to defendant terminating its services and requesting the return of the unused portion of the Service Fee in the amount of \$100,000. Hamlin Aff., Ex. C. Defendant failed to return the requested amount, resulting in plaintiff's commencement of the instant action. Hamlin Aff., para. 19.

Defendant, by its Executive Vice President Alan N. Rovin, avers that plaintiff did bind an OCIP with AIG and entered into a Service Fee Agreement with defendant, paying defendant the sum of \$200,000. *See Affidavit of Alan N. Rovin*. Defendant states that questions remain regarding the construction costs and payroll estimate provided by the plaintiff on which the OCIP and Agreement were based and requests time for discovery. *Id.*, para. 7-9.

II. *Conclusions of Law*

To prevail on a motion for summary judgment, the movant must establish a prima facie showing of entitlement to judgment as a matter of law by producing sufficient evidence to demonstrate the absence of any material issue of fact. *Giuffrida v. Citybank Corp.*, 100 N.Y.2d 72, 81 (2003). Once the movant has made a prima facie showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial. *Zuckerman v. New York*, 49 N.Y.2d 557, 560 (1980).

Where a contract is straightforward and unambiguous, its interpretation presents a question of law for the court to be made without resort to extrinsic evidence. *Ruttenberg v. Davidge Data Sys. Corp.*, 215 A.D.2d 191, 192 (1st Dept. 1995). It is the responsibility of the court, on a motion for summary judgment, to determine the parties' intent, if possible, from within the four corners of the document. *Diversified Group, Inc. v. Sahn*, 259 A.D.2d 47, 50 (1st Dept. 1999).

It is undisputed that the parties entered into a Service Fee Agreement for a \$200,000 Service Fee. Nor is there dispute that the text of the Agreement plainly provides for the Service Fee to be pro-rated upon early termination, providing for a minimum fee of \$100,000, and allows for early termination upon 30 days notice. The Agreement was then terminated by plaintiff through a letter written on January 31, 2006, but defendant has refused to remit the demanded pro-rated fee. Plaintiff presents a construction timetable establishing that termination occurred before the halfway point of the Condominium Project as calculated according to the Agreement. Thus, plaintiff has established its entitlement to summary judgment by demonstrating that, as a matter of law, defendant breached the termination provision of the Agreement in failing to return the sum of \$100,000 to plaintiff. *See Zuckerman*, 49 N.Y.2d 557.

In opposing the motion, defendant presents no evidence challenging plaintiff's interpretation of the Agreement, Project timetable, or any other facts stated in plaintiff's affidavit. While defendant's affidavit refers to possible questions regarding the construction costs and payroll estimate provided by the plaintiff, defendant fails to establish their connection to any material questions of fact, since the Agreement permits termination "for any reason." Defendant claims that discovery is needed but does not explain how discovery would raise a

triable issue. Opposition to summary judgment cannot be based on "mere conclusions, expressions of hope or unsubstantiated allegations or assertions." *Zuckerman*, 49 N.Y.2d at 562.

Accordingly, it is

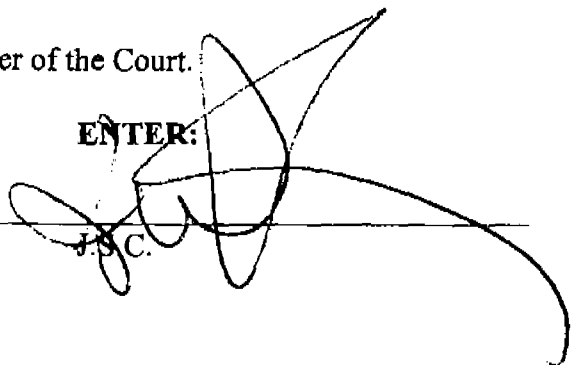
ORDERED that plaintiff's motion for summary judgment is granted on its fifth cause of action; and it is further

ORDERED that the Clerk is directed to enter judgment on plaintiff's fifth cause of action as against the defendant in the amount of \$100,000.00 plus interest thereon at the statutory rate from January 31, 2006 as computed by the clerk, with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs.

The foregoing constitutes the decision and order of the Court.

ENTER:

Date: May 30, 2007
New York, New York


J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).