

Norman Bobrow & Co., Inc. v Theory, LLC
2007 NY Slip Op 32258(U)
July 16, 2007
Supreme Court, New York County
Docket Number: 0600436/2004
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT

PART _____

Index Number : 600436/2004

NORMAN BOBROW & CO.

vs

INDEX NO. _____

THEORY

MOTION DATE _____

Sequence Number : 004

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

JUL 24 2007

NEW YORK
COUNTY CLERK'S OFFICE

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

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

Dated: 7/16/07

Luy
LOUIS B. YORK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2**

NORMAN BOBROW & CO., INC.,

Index No. 600436/2004

Plaintiff,

- against -

**THEORY, LLC, THEORY HOLDING INC.,
TIME WARNER ENTERTAINMENT
COMPANY, L.P., and HOME BOX OFFICE,**

Defendants.

Louis B. York, J.:

Motion sequences 3 and 4 are consolidated for disposition and resolved as follows:

In this litigation, plaintiff, a commercial real estate brokerage business, seeks a commission from Theory LLC and Theory Holding Incorporated (collectively, "Theory"), which allegedly had an exclusive broker agreement with plaintiff. Discovery is complete and the Note of Issue has been filed. Before the Court are plaintiff's motion and Theory's separately filed motion for summary judgment. For the reasons below, the court denies plaintiff's motion and grants Theory's motion, thus dismissing the case.

The parties present complicated and detailed recitations of the facts, and have presented numerous arguments in support of the present motions. To the extent relevant to this decision, the facts and arguments appear to be as follows. On May 15, 2000, plaintiff entered into an exclusive broker agreement with Elie Tahari and Associates ("Tahari"), which provided that plaintiff would have the exclusive right to represent Tahari and his "affiliates and subsidiaries with respect to [their] real estate arrangements in New York." In return, plaintiff agreed to analyze Tahari's current leases and make recommendations with respect to them; analyze

Tahari's "physical requirements and prepare a "comprehensive survey of alternative available space"; inspect spaces from this survey that were of interest to Tahari and provide detailed information as to the buildings of interest; negotiate leases and tenant work letters; and, assist Tahari in hiring architectural firms and with the relocation process, to the extent requested. While this contract was in effect, Tahari was a 50% owner of Theory. Andrew Rosen owned the other 50% of Theory.

In addition, on October 12, 2001, Andrew Rosen, Elie Tahari, and Jared Tollin, signed documents relating to the formation of the limited liability corporation Jared Tollin & Company, LLC ("JT"). The stated purpose of this LLC was to provide "real estate consulting services to companies and construction management services" including specified duties and those "the Members shall determine" In his deposition, Rosen asserted that at the time of the formation of JT, the parties intended that it would perform these services for Theory. The same day, Rosen and Tollin allegedly signed a letter agreement¹ which included an exclusive brokerage agreement with JT. The agreement was to last for one year, with the option to extend.

On January 15, 2002, plaintiff sent a second agreement, virtually identical in terms to the first, to Mr. Tahari. This agreement, which Mr. Tahari signed on behalf of Theory, was to expire on December 31, 2004. It states, in full, in pertinent part:

This agreement shall become effective immediately and continue until December 31, 2004. Upon and after the termination of this agreement, you shall recognize us as broker for any buildings or spaces to which you were introduced by us for a period of twenty-four (24) months after the termination of this agreement.

¹Plaintiff suggests the document was concocted in an effort to defeat his claim to a commission.

It does not contain any terms as to how the agreement could be terminated, and it does not state whether the arrangement would remain in force if all or part of Theory were sold. Additionally, the parties dispute whether Rosen – who, as stated, allegedly signed the October agreement giving JT the position of Theory’s exclusive broker – was aware of this new agreement.

In September 2003, Tahari sold his half of Theory to L & F Holdings, Incorporated (“Link”). Rosen retained an ownership interest in Theory. The contract of sale does not refer to the brokerage agreement with Theory; and, it appears that Link either (1) was unaware of or (2) did not believe itself to be bound by or (3) did not choose to acknowledge the alleged legitimacy of the brokerage agreement.

After the sale, in December of 2003, Bobrow and Tahari asked that Link continue to use plaintiff as Theory’s exclusive broker. Link apparently declined to agree to continue the arrangement. On January 8, 2004 – Mr. Bobrow, on behalf of plaintiff, met with Ricky C. Sasaki, president of Link, and the two again discussed the brokerage agreement. It also appears that plaintiff consistently maintained that, despite the transfer of ownership, the brokerage agreement remained binding on Theory until its natural expiration on December 31, 2004.

Around this time, Theory was engaged in transactions to lease a space in the Grace Building, 1114 Avenue of the Americas. On February 4, 2004, plaintiff wrote to Sasaki, claiming that plaintiff was entitled to a full commission if Theory leased space in the Grace Building. Plaintiff relied not only on its purported status as the exclusive broker for the company but on the fact that in March 2002 plaintiff showed the space in question to Theory. Link responded, by letter dated February 10, 2004, as follows:

Contrary to your assertions, there are no brokerage agreements in effect between Link or any of its subsidiaries or affiliates (including Theory . . .) and Norman Bobrow & Co. Inc. . . . which

require Link to use Bobrow for its “real estate arrangements” in New York City.

Should you continue to hold yourself out as the exclusive broker representing Link, its subsidiaries or affiliates in its real estate transactions or otherwise tortiously interfere with Link’s contractual relations, we reserve our right to pursue all available legal remedies against you.

In response to the February 10 letter, plaintiff filed this lawsuit. The lawsuit alleged that plaintiff was the exclusive broker for Theory and the party who initially showed Theory the space in the Grace Building. Accordingly, plaintiff alleged it was entitled to a broker’s commission of at least \$475,000 if Theory rented the space in question. Plaintiff also named Time Warner Entertainment Company, L.P. and Home Box Office (“HBO”)(collectively, “Time Warner”), the purported owners of the Grace Building, as defendants. Plaintiff claimed that Time Warner knew of plaintiff’s status as exclusive broker for Theory and disregarded that status in its negotiations.

Ultimately, Theory did not rent space in the Grace Building. Theory suggests that this was at least partly due to plaintiff’s activities. In their motion papers, the Theory defendants attach a lease dated April 26, 2004, between Theory and 40 Gansevoort Development LLC, for the entire building located at 40 Gansevoort Street in Manhattan (“Gansevoort”).

Theory also sent an April 27, 2004 letter to plaintiff, from its Chief Financial Officer, Yorim Arieven. The letter reiterated that, according to defendants, the brokerage relationship between Theory and plaintiff did not survive the sale of Theory and further stated that, even if there had been a valid brokerage agreement, Theory and Link had effectively canceled it in the February letter.

In May of 2004, plaintiff amended its complaint. In its first cause of action, plaintiff seeks an order declaring that, if Time Warner were to lease space at the Grace Building to Theory at any time before December 31, 2006, plaintiff would be entitled to a full commission under the exclusive brokerage agreement. This cause of action apparently has been withdrawn, as Time Warner and defendants did not enter into a lease and plaintiff has discontinued against Time Warner and HBO. The second cause of action alleges breach of the brokerage agreement by Theory; and, it seeks its full commission – allegedly, approximately \$1.7 million – based on the Gansevoort lease. The third cause of action essentially seeks the same equitable relief sought in the first cause of action, but as to the Gansevoort space. Currently the remaining parties all have moved for summary judgment.

In his motion, plaintiff asserts that the exclusive brokerage arrangement survived the sale of Tahari's half of Theory to Link. According to plaintiff, as Rosen maintained his interest in Theory following the transfer by Tahari, all of Theory's owners are indisputably chargeable with notice of the brokerage contract. He alleges that Rosen had no power to sign the October 2001 agreement. Moreover, plaintiff shows evidence that, at some point, he looked for rental spaces for Theory. He states that he continued to do so following the sale by Tahari and that therefore Theory is obliged to pay his commission.

In their motion, defendants allege the following: (1) even if the brokerage agreement survived the sale, plaintiff breached it by representing Tahari, who was Theory's direct competitor after the sale, and by presenting available properties, including the Gansevoort space, to Tahari instead of presenting them to Theory; (2) Theory effectively terminated the brokerage agreement in its communications with plaintiff; (3) even under the brokerage agreement, plaintiff was obliged to perform certain real estate services, which he failed to do in connection

with the leasing of the Gansevoort space, thus negating any alleged obligations on Theory's part; and (4) Theory found the space on its own, without any broker, and therefore plaintiff is not entitled to a commission.

There are numerous issues of fact here, which would preclude the issuance of summary judgment on behalf of plaintiff – and, in many circumstances, would preclude summary judgment on behalf of Theory. Among others, it is unclear whether Rosen's exclusive brokerage agreement with JT overrides the subsequent agreement with plaintiff, whether the reverse is true, or whether neither survives in the face of the conflicting and incompatible documents. According to Rosen, he and Tahari formed JT with the express purpose of having a real estate brokerage firm scouting spaces for Theory; and, there is some credence to his position based on the fact that the letter agreement was signed on the same date as the other document. Rosen also intimates in his deposition that he thought of plaintiff as Tahari rather than Theory's broker – that is, for Tahari and his apparently large array of businesses in New York City. Plaintiff, on the other hand, denies the legitimacy of the exclusivity agreement with JT; and, in some respect, this is supported by Tahari's position that plaintiff remained his broker.

In addition, it is unclear whether the parties intended the brokerage agreement with plaintiff to transfer with the sale of Tahari's share of the partnership. Due diligence allegedly failed to reveal the existence of the agreement, and the parties did not mention it in their contract of sale. However, it is unclear what effect this has on the validity of the earlier arrangement and the parties to this lawsuit dispute this issue vigorously but without resolution.

The parties also present conflicting versions of the facts when it comes to plaintiff's efforts in locating the Gansevoort space. Defendants state that plaintiff was secretly searching for property for Tahari, by then their competitor, when he located the space; plaintiff asserts that

he was looking for office space for Theory, when Rosen secreted it away from him, bypassing plaintiff's services.

For all of these reasons, summary judgment would be improper. However, there is one critical factor which plaintiff does not effectively dispute, and this resolves the case against him. Following the sale by Tahari of his interest in Theory, when plaintiff attempted to enforce his 2002 agreement with Tahari, Theory wrote to plaintiff and stated unequivocally that (1) it did not recognize the agreement; and, (2) to the extent that it may have been valid at one point, Theory now was terminating the agreement by the letter. The document on which plaintiff relies refers to a definite date of the agreement's termination. However, elsewhere it states that "in the event of termination" plaintiff maintained his right to a commission under certain circumstances. This latter statement demonstrates the parties' intention to enable the contract to be terminated. Moreover, plaintiff's suggestion that he continued to work as broker for Theory is not relevant here. Most of the dates he allegedly scouted property predate the sale of Tahari's share of Theory and all appear to predate the April letter from Link.

Therefore, it is

ORDERED that motion sequences number 3 is granted and the action is dismissed; and it is further

ORDERED that motion sequence number 4 is denied.

ORDERED:

Dated: July 16, 2007

FILED
JUL 24 2007
NEW YORK
COUNTY CLERK'S OFFICE

Levy

LOUIS B. YORK
S.B. York, J.S.C.