

**Staubach Co. of N.Y., LLC v CB Richard Ellis, Inc.**

2007 NY Slip Op 32571(U)

August 18, 2007

Supreme Court, New York County

Docket Number: 0600031/2007

Judge: Walter Tolub

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1] FILED ON 8/20/2007  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **WALTER B. TOLUB**

PART \_\_\_\_\_

Index Number : 600031/2007

STAUBACH COMPANY OF NEW YORK

vs

CB RICHARD ELLIS

Sequence Number : 001

DISMISS ACTION

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 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

**IS DECIDED**

**IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION**

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

**FILED**

AUG 20 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 8/14/07

W  
**WALTER B. TOLUB<sup>S.C.</sup>**

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 24

-----x  
STAUBACH COMPANY of NY, LLC,

Plaintiff,

Index No. 600031/07  
Mtn. Seq. 001

- v -

CB RICHARD ELLIS, INC., et. al.

Defendant.  
-----x

**FILED**

AUG 20 2007

NEW YORK  
COUNTY CLERK'S OFFICE

This action was commenced by plaintiff Staubach Company of New York, LLC (Staubach), a commercial real estate broker, against CB Richard Ellis, Inc. (Ellis), a co-broker, and defendant Global Capital Finance Americas LLC (Global), formerly a tenant/sublessor of the premises located at 430 Park Avenue, 7<sup>th</sup> floor, New York City, New York (the premises). Staubach seeks to recover a broker's commission from Ellis and Global for procuring a subtenant for Global's lease, despite the fact that the landlord never approved of the sublease. Staubach concedes that it has recovered a brokerage commission from the landlord for presenting the same tenant to the landlord for a direct lease, after the landlord's consent to the sublease was denied.

The defendant co-broker Ellis moves to dismiss the complaint for failure to state a cause of action and based on documentary evidence, or for summary judgment. Plaintiff Staubach cross-moves for summary judgment against defendants, and for dismissal of defendant Global's counterclaims.

The record reveals that Global, a commercial tenant, sought

to escape from its lease via a sublease, assignment or a recapture by the landlord. It hired Ellis as broker. Ellis brought in Staubach as a co-broker, and it was Staubach who procured a subtenant. The landlord, however, chose to recapture the premises rather than consent to the sublease. Staubach received a full commission from the landlord for the direct lease that it entered into with the same subtenant that Staubach had procured for the aborted sublease. Staubach now seeks to recover a full commission from Global for procuring the subtenant, even though the sublease was rejected by the landlord in favor of a direct lease with the very same party. Staubach also seeks to recover this full commission from Ellis, pursuant to the terms of its co-brokerage agreement with Ellis.

The complaint alleges, in relevant part, that in February 2006, Staubach procured GC Anderson Partners, LLC (Anderson), a non-party to this action, as a subtenant for the premises. The sublease provided for a rental of \$541,200 per annum from the commencement of the lease through February 1, 2009, and a rent of \$565,800 per annum from March 1, 2009 through August 31, 2013. The defendant/tenant Global allegedly agreed to pay the broker's fees, pursuant to Article 9 of the sublease. The sublease was conditioned on the landlord's consent.

Staubach and Ellis entered into a co-brokerage agreement regarding the subletting of the premises on January 18, 2006.

[\* 4 ]

Ellis represented that it was the exclusive leasing agent for the premises, and that it was authorized to enter into a co-brokerage agreement with Staubach. Pursuant to the agreement, Ellis was to be paid an additional 50% commission by Global if an outside broker, other than Ellis, either procured a subtenant for the premises, or the recapture of the lease by the landlord. Ellis was then to pay the procuring outside broker's fee out of the one and a half commissions it was paid by Global. A schedule attached to the co-brokerage agreement contained commission rates applicable to an outside broker's fees.

After the sublease had been fully executed, the landlord withheld its consent to the sublease and recaptured the premises.

In the first cause of action, Staubach alleges that it is entitled to a commission from Global and Ellis based on Anderson's offer to sublease the premises, and that no part of the commission has been paid by either Ellis or Global. In the second cause of action, Staubach alleges a breach of Ellis's warranty of authority.

Global filed an answer containing three counterclaims. The first counterclaim alleges that Staubach breached its fiduciary duties to Global by negotiating a direct lease between the landlord and Anderson, and by failing to disclose that it was doing so. In the second counterclaim, Global alleges that Staubach breached the implied covenants of good faith and fair

dealing by presenting Anderson to the landlord as a direct tenant, thereby intentionally causing the landlord to reject the sublease between Global and Anderson. In the third counterclaim, Global claims that it had an economic relationship with Anderson that would have generated future economic benefit to it, and that Staubach willfully and intentionally acted to prevent the landlord from approving the sublease by wrongful means, all of which is alleged to have caused damage to Global.

Ellis moves for dismissal, or summary judgment dismissing the claims against it. Ellis argues that Global refused to pay it the full one and a half commissions upon learning that the landlord had negotiated a lease directly with Anderson, the proposed sublessee. Further, claims Ellis, Staubach received one full commission directly from the landlord, lending additional support to Global's refusal to pay the full commission to Ellis. Although Ellis concedes that it was paid a half commission by Global, it claims that it was never paid any additional commissions by Global for payment over to Staubach.

Staubach opposes Ellis's motion for dismissal or summary judgment, and has cross-moved for summary judgment on the complaint and dismissal of Global's counterclaims.

Staubach relies on the payment provision of the brokerage agreement between Ellis and Global, entered on October 20, 2005, as the source of its claim for a fee in connection with the

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sublease. Paragraph 8 (c) of the brokerage agreement states that in the event that an outside broker procures a subtenant, or the recapture of the lease, Global will pay Ellis an additional half commission and Ellis will compensate the outside broker out of that money, "but in no event for more than one full commission."

Staubach also relies on its co-brokerage agreement with Ellis, entered on January 18, 2006, as authority for the fee it now claims. The brokerage agreement mirrors the payment provision of the brokerage agreement. The first paragraph states that if Staubach procures a subtenant or the recapture of the lease, Ellis will be paid an additional half commission by Global, and will compensate Staubach out of the money paid it by Global, but in no event more than one full commission. The co-brokerage agreement further states that the payment will be made on the unconditional delivery of binding transactional documents, and receipt of the landlord's consent.

Staubach claims that Ellis only billed Global for its own share of the commissions due for the recapture of Global's premises, and not for Staubach's share, and that Ellis attempted "to relinquish Staubach's contractual rights." Affidavit of Robert Bundy, dated April 10, 2007, ¶ 4. Further, claims Staubach, the co-brokerage agreement with Ellis contained a merger clause which could not be altered except in a writing signed by both brokers.

Ellis allegedly initially billed Global for the full one and a half commissions, claims Staubach, but when Global refused to pay Ellis what it was contractually obligated to pay, Ellis rebilled Global for its 50% commission, and dropped the matter of collecting Staubach's commission, without Staubach's knowledge or consent.

Staubach concedes that it was paid a commission by the landlord when Anderson entered into a direct lease with it, but claims that the commission from the landlord was separate from the commission due from Global and Ellis for presenting Anderson to the landlord as a potential sublessee. "There is no provision which limits or negates Global's obligation to pay to an outside broker a commission for a recapture procured by the outside broker," claims Staubach. Plaintiff's Memorandum of Law in Opposition, at 8. Further, claims Staubach, Global benefitted hugely from Staubach's services since it was released from the obligation for seven years' worth of future rent.

On a motion to dismiss for failure to state a cause of action, every fact alleged must be assumed to be true, and the complaint is to be liberally construed. *M. Sobol, Inc. v Goldman*, 259 AD2d 526 (2<sup>nd</sup> Dept 1999). A complaint should not be dismissed so long as a cause of action exists. *Id.*

The first cause of action in the complaint fails to allege the existence of a contractual obligation on the part of Ellis to

[\* 8]

recover payment from Global for an outside broker. The co-brokerage agreement is silent with respect to Staubach's rights where Global refuses to pay Ellis the additional outside broker's commission. Staubach asks the court, in its moving papers, to find that since this remedy is not negatived in either the brokerage or the co-brokerage agreement, then it must certainly exist. However, Staubach has failed to point to any express language which even arguably appears to create this remedy. A broker's duty to share a commission with a co-broker, pursuant to a co-brokerage agreement, does not mature until the commission has actually been received by the primary broker. *William T. Bell & Assocs. v Pyramid Brokerage Co.*, 281 AD2d 943 (4<sup>th</sup> Dept 2001). The court will not read into the agreement an obligation on the part of Ellis to prosecute a claim against Global on behalf of Staubach in order to fill in gaps in the Staubach's agreement with Ellis.

Nor has Staubach adequately alleged, in other than conclusory fashion, that Ellis relinquished Staubach's right to payment from Global under the agreement, or that Ellis intentionally interfered with Global's payment of the full one and a half commission. The first cause of action, for breach of the agreement is, therefore, dismissed with respect to defendant Ellis. "Before liability can arise on a promise qualified by conditions expressed or implied in fact, those conditions must be

fulfilled." *William T. Bell & Assocs. v Pyramid Brokerage Co.*, 281 AD2d, at 943. (Citation omitted).

The second cause of action, for breach of warranty, fails to state a claim for relief. This claim, pleaded conditionally, seeks relief "if [Ellis] was not authorized by Global to enter into the Commission Agreement on the terms contained therein." However, there are no allegations in the complaint that Ellis was not authorized by Global to enter into the co-brokerage agreement. The second cause of action against defendant Ellis, pled as if it were a hypothetical set of facts, is dismissed in its entirety.

A movant's burden on a motion for summary judgment is to establish that there are no material issues of fact. *Zuckerman v City of New York*, 49 NY2d 557 (1980). Once a movant has met this burden, the party opposing the motion must come forward with proof of the existence of a triable issue. *Indig v Finkelstein*, 23 NY2d 728 (1968).

Staubach seeks summary judgment on the first cause of action against Global, claiming that payment of a half commission to Ellis by Global constitutes "an indicia under the [brokerage] agreement that there was an outside broker involved." Global obtained a signed sublease, which would have taken effect had the landlord not exercised its pre-existing contractual right to recapture, claims Staubach, and it is therefore entitled to a

full commission from Global, for the recapture.

Global opposes Staubach's cross motion for summary judgment, claiming that it has not had a chance to conduct discovery and that the facts essential to justify its opposition to summary judgment may exist but cannot be stated. CPLR 3212 (f). Global claims that Staubach's summary judgment cross motion is premature since discovery has not been completed. Staubach does not contradict this claim. Staubach's cross motion for summary judgment is thus denied, with leave to renew, and the parties are directed to appear for a scheduling conference.

Accordingly, it is

ORDERED that the defendant CB Richard Ellis, Inc.'s motion to dismiss the complaint is granted, and the complaint against this defendant is dismissed; and it is further

ORDERED that the cross motion of plaintiff Staubach Company of New York, LLC for summary judgment is denied; and it is further

ORDERED that the parties Staubach Company of New York, LLC and Global Capital Finance Americas LLC are directed to appear for a conference on November 9, 2007 at 11:00 am in room 335 at 60 Centre Street.

Dated: 8/17/07

ENTER:

*WBT*

WALTER B. TOLUB J.S.

**FILED**

AUG 20 2007

NEW YORK  
COUNTY CLERK'S OFFICE