[* 1]
SCANNED ON 9/17/2007

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

PRESENT: HON. ROLANDO T. ACOSTA Justice

PART 61

ERMA II, LTD

-v-

Roncalli, Anthony

INDEX NO. 600202/05

MOTION DATE

MOTION SEQ. NO. 4

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 ...	1 (A-E)
Answering Affidavits — Exhibits	2
Replying Affidavits	3 (A)

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

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).

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

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

Dated: 9/7/07

SO ORDERED

J.S.C.
ROLANDO T. ACOSTA

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 61

ERMA II,

Plaintiff,

– against –

Anthony M. Roncalli, Legolas Holdings LLC, Rohan Holdings LLC, Gondor Holdings LLC, Helms Deep Holdings LLC, Fire Island Pines Pavilion, Inc., Pines Boatel, Inc., Pine Blue Whale, Inc., Pines Harbor Café, Inc., and Pines Commercial Properties, LLC,

Defendants.

DECISION/ORDER

Index No. 600202/05

Seq. No. 4

Present:

Rolando T. Acosta
Supreme Court Justice

The following documents were considered in reviewing plaintiff's motion to reargue this Court's March 19, 2007 Decision and Order:

Papers	**Numbered**
Notice of Motion & Affirmation	**1 (Exhibits A-E)**
Affirmation in Opposition	**2**
Reply Affirmation	**3 (Exhibit A)**

On November 28, 2006, this Court granted plaintiff's motion for summary judgment on her breach of contract claim based on defendants agreement to pay brokerage fees to plaintiff for her securing a loan on defendants' behalf. On March19, 2007, this Court vacated its November 28, 2006 Decision and Judgment upon reargument because there were issues of fact as to whether the parties had agreed to a brokerage fee of two or three percent, and whether plaintiff had already been paid in full when a different broker split a 2% fee with her. Plaintiff now moves to reargue the Court's March 19, 2007 Decision and Order.

Background

Defendants engaged plaintiff, a real estate broker, to secure financing for the purchase of property on Fire Island. Ellen Wooland, ERMA II's president, prepared the following document, which defendant Anthony M. Roncalli signed on February 11, 2004:

> Dear Mr. Roncalli:
>
> It would be my pleasure to assist you in obtaining the financing you require for the commercial property as referenced above. The loan amount shall be approximately $2.5M based on a LTV (loan to value) not to exceed 75% of the appraised value of the commercial property.
>
> The financing will be structured as a 25-year self-liquidating loan. The interest rate is adjustable and will be based on a spread of approximately 2.75% over the prime rate of interest as published in the Wall Street Journal. Current pricing would set your interest rate at 6.75%. Your monthly payment will be $17,275.00, which includes principle and interest. This loan will be offered with total of three (3%) points payable to ERMA II LTD., which includes all brokerage fees.
>
> In order to proceed, we require a $2,500.00 application fee. This fee is used for underwriting, packaging, and general expenses. This fee is non-refundable. Please make check payable to ERMA II LTD. Upon receipt of said fee you will be contacted by our Processing Dept., which will request information as needed.
>
> If you have any questions or require additional information please do not hesitate to call.
>
> Very truly yours
> ERMA II lTD
>
> *Ellen Wolland*
> Ellen Wolland
> President
>
> The undersigned acknowledges and understands the terms outlined in this letter

Exhibit 1, Kuersteiner Affidavit [in original opposition](emphasis added). Thirteen days later, on February 24, 2004, Wolland sent defendants a "letter of intent to obtain a commitment." Exhibit 2, Kuersteiner Affidavit. The letter stated that plaintiff had located

an investor[1] that had preliminarily approved providing the financing on the terms to which they had previously agreed. Paragraph G stated "Points: Three points (3%) of the loan amount shall be paid to ERMA II LTD, including all brokerage points." It also stated on page three that "[b]orrowers signature on page 4 of this proposal is an express agreement to the terms disclosed, and an authorization to proceed toward commitment." Roncalli did not sign this letter, but instead inserted suggested changes to the letter, including changing the commission from three to two percent. The letter was returned to Wolland with a fax cover sheet, which stated "[a]ttached is a copy of your commitment letter marked with our comments. As you will see, we are more than willing to sign a letter pursuant to which we will pay the brokerage fees upon closing of a financing."

On March 17, 2004, Wolland sent defendants a revised letter of intent that incorporated some of the changes defendants had requested, including changing the commission from three percent to two percent. See Exhibit 3, Kuersteiner Affidavit. Approximately two weeks later, defendants executed a loan agreement with BLX Capital. Exhibit 4, Kuersteiner Affidavit. A few days later, Wolland sent Roncalli a letter dated April 2, 2004 (Exhibit 5, Kuersteiner Affidavit), which stated, inter alia, "[i]t has come to my attention that you have signed your commitment letter with [BLX] and you are anticipating a closing in the near future." It went on to state:

> Please be reminded that you have signed my agreement dated February 11, 2004 which includes the terms of the loan and a brokerage fee of 3% of the loan amount. As you recall, I agreed to reduce the fee to 2%. You were provided with a revised letter dated March 17, 2004 which you have not returned to my office.

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1. Although not stated in the letter, Business Loans Express, LLC ("BLX") was the lending company that agreed to provide the financing. According to George Reithoffer, a broker who worked with BLX, on referral by plaintiff, he began to work with defendants in March 2004 to have BLX provide financing. Reithoffer Affidavit at ¶ 3. Neither Reithoffer nor plaintiff state how or whether they agreed to share a brokerage fee. The agreement between BLX and defendants provided for defendants to pay an "origination fee" of $46,000 at the time of closing to BLX. See Eric Von Kuersteiner [one of two principal owners of defendant Pine Commercial Properties, LLC] Affidavit, Exhibit 4. According to plaintiff, an origination fee, which represent costs associated with creating and processing the loan, was separate and distinct from the brokerage fee that it was entitled to for securing the loan. Wolland Affidavit at ¶ 10. This contention, however, is disputed by defendants, who assert that the $46,000, which represents 2%, was intended to cover all brokerage fees. Von Kuersteiner Affidavit at ¶ 13.

> This loan was secured for you and your partner through ERMA II Ltd; we have proceeded with you in good faith and have done everything in our power to secure you a timely commitment.
>
> Please be advised that if the agreement is not signed by April 5, 2004, you leave me no other alternative but to enforce the terms of the original agreement and to contact [BLX] to ensure that the agreement is honored.

On May 4, 2004, Wolland sent an invoice to defendants seeking a two percent fee. Exhibit 6, Kuersteiner Affidavit. Fifteen days later, on May 19, 2004 the closing for the property was held and defendants paid BLX a brokerage fee of two percent ($46,000), and on May 27, 2004, BLX issued a check to plaintiff in the amount of $24,000 (1% of the loan amount). Exhibit 1, Reithoffer Affidavit [in original opposition]. On July 23, 2004, plaintiff's counsel wrote defendants a letter seeking plaintiff's three percent commission, noting that plaintiff had agreed to reduce the commission to two percent, but that was "predicated upon the understanding that it would receive its fees on a timely basis, at or about the time of closing." Exhibit 7, Kuersteiner Affidavit.

Plaintiff moved for summary judgment against defendants based on its breach of contract claim. According to plaintiff, the February 11, 2004 letter was an enforceable contract whereby defendants committed themselves to paying plaintiff three percent of the loan amount ($69,000).

Defendants opposed summary judgment on the grounds that there was never a mutual assent with respect to the amount of the commission. Defendants point to the language of the February 11th letter, which states that "[t]his loan will be offered with total of three (3%) points payable to ERMA II LTD., which includes all brokerage fees." According to defendants, the "will be offered" language is not a "clear and unambiguous" promise to pay three percent. Indeed, the parties eventually settled on two percent, as evidenced by, inter alia, the revised commitment letter, as well as plaintiff's counsel's July 23rd letter demanding payment.

Defendants also argued that even if there was a mutual assent on the amount of commission, by the express language of the agreement, the three percent includes "all brokerage fees." Accordingly, inasmuch as it paid a two percent commission to BLX upon closing, there were issues of fact as to whether plaintiff's commission should be reduced accordingly.

Analysis

It is well settled that the proponent of a motion for summary judgment must establish that "there is no defense to the cause of action or that the cause of action or defense has no merit," (C.P.L.R. §3212[b]), sufficiently to warrant the court as a matter of law to direct judgment in his or her favor. Bush v. St. Claire's Hospital, 82 N.Y.2d 738, 739 (1993); Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 (1985). This standard requires that the proponent of the motion "tender[] sufficient evidence to eliminate any material issues of fact from the case," id., "by evidentiary proof in admissible form." Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions." C.P.L.R. §3212(b).

Where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so. Vermette v. Kenworth Truck Company, 68 N.Y.2d 714, 717 (1986); Zuckerman v. City of New York, supra, 49 N.Y.2d at 560, 562. Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist. Id. at 562.

Here, viewing the facts in the light most favorable to defendants, Fundamental Portfolio Advisors v. Tocqueville Asset Management, 7 N.Y.3d 96, 106 (2006), plaintiff has established its entitlement to summary judgment in the amount of $23,000 representing the 1% it is still owed by defendants. On February 24 [consistent with plaintiff's February 11th letter] plaintiff offered to secure a loan for a 3% brokerage fee. Roncalli counter-offered with 2% when he returned the February 24th letter with changes. By its March 17, 2004 letter, plaintiff accepted the counter-offer of 2%. In fact, on April 2, 2004, plaintiff sent Roncalli a letter that stated "[a]s you recall, I agreed to reduce the fee to 2%." Indeed, it is noteworthy that plaintiff submitted an invoice to defendants requesting a two percent fee on May 4, 2004. Equally significant is that the May 4th invoice requesting the two percent fee predates the May 19th closing date. Moreover, by letter dated July 23rd, plaintiff's counsel reminds defendants that plaintiff had agreed to reduce the commission to two percent. Von Kuersteiner Affidavit, Exhibit 7. In short, plaintiff offered 3%, but agreed to defendants' counter-offer of 2%. It is also undisputed that plaintiff has thus far received $23,000 or 1%. Defendants, therefore, owe plaintiff $23,000 for a total of $46,000, the 2% that they agreed to pay plaintiff in brokerage fees.

Contrary to plaintiff's contention, it is not entitled to a 3% fee. Plaintiff bases its claim for 3% on its April 2, 2004 letter to defendants, where it states "[p]lease be advised that if the agreement is not signed by April 5, 2004, you leave me no other alternative but to enforce the terms of the original agreement [referring to plaintiff's February 11, 2004 letter] and to contact [BLX] to ensure that the agreement is honored." The problem with argument is that defendants successfully negotiated the fee to 2% and there is no indication in the record that plaintiff accepted the counter-offer only if defendants signed an agreement by April 5.

Plaintiff having established its entitlement to summary judgment, the burden shifts to defendants to raise triable issues of fact, which they have failed to do. The record is clear. Defendants agreed to pay plaintiff a brokerage fee of 2% of the loan amount for securing the loan. Plaintiff lived up to its part of the bargain and now defendants have to live up to their part of the bargain. Whether defendants made a separate agreement with BLX or Reithoffer does not change the fact that they agreed to pay plaintiff 2%. Nor can defendants prevent summary judgment by the fact that discovery is still pending with respect to whatever arrangements plaintiff made with BLX or Reithoffer inasmuch as plaintiff's agreement with defendants was that defendants would pay her 2%.

Accordingly, based on the foregoing, it is hereby

ORDERED that this Courts's March 19, 2007 Decision and Order is vacated; and it is further

ADJUDGED that plaintiff is awarded summary judgment in the amount of $23,000, with interest as of May 19, 2004.

This constitutes the Decision and Judgment of the Court.

Dated: September 7, 2007 ENTER

SO ORDERED

Rolando T. Acosta, J.S.C.

ROLANDO T. ACOSTA
J.S.C.

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