

**Atlantic Prop. Servs. LLC v Gillespie**

2008 NY Slip Op 31157(U)

March 31, 2008

Supreme Court, Suffolk County

Docket Number: 0011840/2004

Judge: John J.J. Jones

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 10 - SUFFOLK COUNTY

**PRESENT:**

Hon. JOHN J.J. JONES, JR.  
Justice of the Supreme Court

MOTION DATE 9-26-07  
ADJ. DATE 12-19-07  
Mot. Seq. # 005 - MotD  
Mot. Seq. # 006 - XMotD

-----X		
ATLANTIC PROPERTY SERVICES LLC,	:	ROBERT & ROBERT, PLLC
	:	Attorneys for Plaintiff
Plaintiff,	:	150 Broad Hollow Road, Suite 314
	:	Melville, New York 11747-4981
- against -	:	
	:	
PETER GILLESPIE ASSOCIATES, LLC a/k/a	:	DeIORIO LAW FIRM, LLP
PETER GILLESPIE ASSOCIATES	:	Attorneys for Defendant
(NEW YORK), LLC,	:	800 Westchester Avenue, Suite S-608
	:	Rye Brook, New York 10573
Defendant.	:	
-----X		

Upon the following papers numbered 1 to 14 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers 4 - 6; Answering Affidavits and supporting papers 7 - 8; Replying Affidavits and supporting papers 9 - 10; Other 11 - 12; 13 - 14; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that those portions of this motion (#005) by the plaintiff for summary judgment on its complaint are considered under CPLR 3212 and are granted to the extent that partial summary judgment on the issue of the defendant's liability for payment of a broker's commission is conditionally granted; and it is further

**ORDERED** that the remaining portions of the plaintiff's motion wherein it demands summary judgment dismissing all counterclaims interposed in the defendant's answer and the imposition of sanctions against the defendant and/or its counsel are considered under CPLR 3212 and 22 NYCRR Part 130-1 *et. seq.*, and are denied; and it is further

**ORDERED** that the cross motion (#006) by the defendant for summary judgment dismissing the plaintiff's complaint is considered under CPLR 3212 and is granted only to the extent that the defendant is awarded partial summary judgment dismissing the plaintiff's third cause of action for counsel fees.

The plaintiff commenced this action to recover a real estate brokerage commission purportedly due it from the defendant by reason of the plaintiff's procurement of a tenant for the defendant's commercial property situated in Riverhead, New York. The plaintiff claims that the defendant is the owner of the subject commercial premises and that in the latter half of 2001, the plaintiff's agents, procured a willing tenant and negotiated the general terms of a lease between the defendant, as landlord, and the prospective tenant, who is not a party to this action.

A written lease was subsequently prepared which provided the lessee with occupancy for an initial term of ten years. The tenant was granted the option to renew the lease for three consecutive ten year terms and for a fourth term of eight years. The lease was executed by the tenant and the defendant as landlord on May 17, 2002. No rent was due from the tenant for the first year of the lease as it had to secure various permits from governmental agencies to prepare the property for the use intended by the tenant. Paragraph 16 of the lease contained mutual representations by the landlord and tenant regarding no dealings nor engagement of the services of any real estate broker other than the plaintiff. The defendant and the tenant mutually agreed to indemnify each other against, *inter alia*, claims for damages arising out of any breach of the representations regarding the plaintiff's sole and exclusive retention, including claims for recovery of counsel fees incurred in the defense or prosecution of any such claims. Paragraph 16 of the lease also contained an express promise on the part of the defendant to pay, upon execution of the lease, a commission to the plaintiff "in accordance with terms of a separate agreement".

The plaintiff commenced this action in May of 2004 after the defendant refused to pay the plaintiff any monies towards the broker's fee which the plaintiff claims is due and owing under the terms of the written lease or as a matter of implied contract. The plaintiff's complaint seeks recovery of said broker's fees and an award of counsel fees under paragraph 16 of the lease. In response to service of said complaint, the defendant appeared by answer and therein asserted four counterclaims for recovery of damages by reason of the plaintiff's negligence or its breach of the terms of one or more separate property management contracts existent between the parties concerning several properties owned by the defendant in Suffolk County other than the one that is the subject of the plaintiff's complaint.

Now before the court is the plaintiff's motion (#005) for summary judgment dismissing the defendant's counterclaims and for summary judgment on its complaint. Plaintiff claims that although it is not a signatory to the May 17, 2002 lease between the defendant and the commercial tenant named therein, the plaintiff is entitled to the commission mentioned in paragraph 16 of said lease as the defendant expressly agreed therein to pay said commission to the plaintiff upon execution of the lease. The plaintiff further claims to be entitled to an award of counsel fees since paragraph 16 mentions

collectible counsel fees with respect to any breach of the representations as to brokers set forth in paragraph 16 by the parties to said lease. Plaintiff also demands summary judgment dismissing the defendant's counterclaims and an order imposing sanctions against the defendant and its counsel by reason of the purportedly frivolous nature of the answer served and filed herein by the defendant.

The defendant opposes the plaintiff's motion and cross moves for summary judgment dismissing the plaintiff's complaint. The cross motion (#006) is principally predicated upon claims that the plaintiff did not serve as the procuring cause of the May 17, 2002 execution of the lease by the defendant and its tenant and that the plaintiff's reliance upon paragraph 16 of the lease is misplaced. The plaintiff opposes the defendant's motion upon allegations that the defendant is clearly liable to the plaintiff for the brokerage commission referred to in the lease and that none of the defendant's counterclaims are meritorious.

Case authorities have established that where a lease or contract for the sale of real property acknowledges services performed by a broker and contains an express promise by the one of the parties to said lease or contract to pay a broker's commission, the broker is entitled, at the very least, to an award of partial summary judgment on the issue of the liability of the party who agreed to pay said commission in the subject lease or contract of sale (*see, Halstead Brooklyn, LLC, v 96-98 Baltic, LLC*, \_\_\_ AD3d \_\_\_, 2008 WL 669885 [NYAD 2<sup>nd</sup> Dept., 3/11/2008]; *Joseph P. Day Realty Corp., v Chera*, 308 AD2d 148, 762 NYS2d 373 [2003]; *Helmsley-Spear, Inc v New York Blood Ctr., Inc.*, 257 NYS2d 64, 687 NYS2d 353 [1999]; *Holiday Management Associates v Albanese*, 173 AD2d 775, 570 NYS2d 643 [1991]). The existence of a promise to pay the broker in a lease or other contract constitutes a "special agreement" which relieves the broker of the need to demonstrate that it was the procuring cause of the execution of the lease or sales contract (*see, Greene v Hellman*, 51 NY 2d 197, 433 NYS2d 75 [1980]; *see also, Hampton Realty of Bridgehampton, Inc., v Conklin*, 220 Ad2d 385, 631 NYS2d 887 [1995]). The fact that the amount of the broker's commission referred to in the lease or sales contract is defined only to the extent of being the subject of a separate agreement and that such agreement is oral rather than written does not render the obligor's promise to pay the commission unenforceable (*see, Eileen Green Realty Corp., v Polidori*, 224 AD2d 384, 637 NYS2d 766 [1996]; *Henri-Lynn Realty v Huang*, 159 AD2d 486, 552 NYS2d 357 [1990]; *Rappaport v Sabbeth*, 134 AD2d 419, 520 NYS2d 948 [1987]).

Here, the plaintiff's submissions sufficiently established the plaintiff's status as a licensed real estate broker and the existence of the lease containing a promise on the part of the defendant to pay a broker's commission to the plaintiff. The court thus finds that the plaintiff established, prima facie, its entitlement to an award of partial summary judgment on its first and second causes of action for recovery of a broker's commission (*see, Halstead Brooklyn, LLC, v 96-98 Baltic, LLC, supra; Eileen Green Realty Corp., v Polidori, supra; Henri-Lynn Realty v Huang, supra; Cf., Halstead Properties LLC, v Gluck*, 9 Misc3d 1123(a), 2005 WL 2847308; [Sup. Ct. New York County; 2005]). However, the material terms of the parties' "separate agreement" concerning the amount of the commission due the plaintiff for its services and other of its material terms such as the due dates of payment have not

been established as a matter of law as the existence of said agreement and the material terms thereof are in dispute. Accordingly, the court awards the plaintiff partial summary judgment on the issue of the defendant's liability for payment of a broker's commission. Said award is, however, expressly conditioned upon the plaintiff's establishment at the damages portion of the trial to be held herein the existence and material terms of the "separate agreement" referred to in paragraph 16 of the May 17, 2002 lease, including, *inter alia*, the amount, rate, and due date of the broker's commission contemplated by said lease provision.

The plaintiff failed to establish its entitlement to an award of summary judgment, partial or complete, on its pleaded claim for recovery of attorneys' fees. It is well settled that recovery of attorneys' fees by a successful litigant is proper only where a statute, law or rule provides therefor or where the party to be charged with liability has agreed to pay counsel fees under the terms of an enforceable contract (*see, Rad Ventures Corp., v Artukmac*, 31 AD3d 412, 818 NYS2d 527 [2006]). Here, the plaintiff's claim for recovery of counsel fees is dependent upon a contorted reading of paragraph 16 of the lease executed by the defendant and its tenant. A reading of paragraph 16 of the lease by the court does not support the plaintiff's claim of an entitlement to an award of counsel fees from the defendant and the plaintiff has failed to demonstrate that any statute, law or rule affords the plaintiff a right to such recovery.

The plaintiff's demands for an award of summary judgment dismissing the defendant's counterclaims is denied. While it is clear that a simple breach of contract generally does not give rise to actionable tort claims (*see, Clark-Fitzpatrick, Inc., v Long Island Railroad Company*, 70 NY2d 382, 521 NYS2d 653 [1987]), a party may be liable in tort where it has breached a duty of reasonable care separate and distinct from its contractual obligations (*see, New York University v Continental Insurance Company*, 87 NY2d 308, 639 NYS2d 283 [1995]). Here, the plaintiff failed to demonstrate by sufficient proof in admissible form that the defendants' claims to recover damages by reason of the plaintiff's purported negligence in providing property management services on the various properties of the defendant and the defendant's claims for breach of any management contract are without merit as a matter of law.

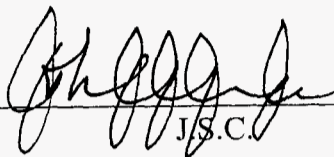
The plaintiff's further demand for an order imposing sanctions pursuant to 22 NYCRR Part 130-1 *et. seq.*, is denied. These demands are predicated upon the plaintiff's claim that the conduct of the defendant and/or its counsel in serving the defendant's answer which contains various affirmative defenses and counterclaims is actionable as frivolous conduct. The court, however, finds that the plaintiff's claims for an award of sanctions is without merit as the conduct complained of by the plaintiff is not frivolous within the meaning of 22 NYCRR Part 130-1.1.

The defendant's cross motion (#006) for summary judgment dismissing the plaintiff's complaint is denied except to the extent that the plaintiff's third cause of action, wherein it demands an award of counsel fees, is dismissed. The court's conditional award of partial summary judgment on the issue of the defendant's liability for payment of the broker's fee identified in paragraph 16 of the lease rendered

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the defendant's cross motion academic with respect to the first two causes of action set forth in the plaintiff's complaint. In contrast, the record adduced on the instant motion was sufficient to establish that, as a matter of law, the plaintiff's pleaded claim for recovery of attorneys' fees from the defendant is without merit (*see, Rad Ventures Corp., v Artukmac, supra.*). The defendant is thus awarded partial summary judgment dismissing the third cause of action set forth in the plaintiff's complaint. All other relief demanded by the defendant is denied.

Dated: 31 March '08

  
\_\_\_\_\_  
J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION