

**Corporate Natl. Realty, Inc. v Laboratory Corp. of
Am.**

2008 NY Slip Op 31766(U)

June 16, 2008

Supreme Court, Nassau County

Docket Number: 0832-07/

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

INDEX No. 020832/07

MOTION DATE: May 2, 2008
Motion Sequence # 001

CORPORATE NATIONAL REALTY, INC.,
GREINER MALTZ COMPANY OF LONG
ISLAND, INC. and SHOLOM, ZUCKERBROT,
WELLINS & EVANS, LONG ISLAND INC.,

Plaintiffs,

-against-

LABORATORY CORPORATION OF AMERICA,
d/b/a LABCORP. and REXCORP REALTY,

Defendants.

The following papers read on this motion:

- Notice of Motion..... X
- Affirmation in Opposition..... X
- Affirmation in Support..... X
- Memorandum of Law..... X
- Reply Memorandum of Law..... X

This motion, by defendants RexCorp Realty, for an order pursuant to CPLR 3211[a][1],[7] dismissing the complaint insofar as asserted against it, is determined as hereinafter set forth.

The plaintiffs Corporate National Realty, Inc. ["CNR"], Greiner, Maltz Company of Long Island, Inc. ["Greiner"], Sholom, Zuckerbrot, Wellins & Evans, Long Island, Inc., ["Sholom"], are three real estate brokers who have commenced the within action to

recover commissions allegedly due and owing in connection with a lease renewal involving commercial property located at 51 Charles Lindbergh Boulevard in Nassau County.

The relevant facts, as gleaned in part from the plaintiffs' amended complaint reveal that in 1981, non-party Frequency Electronics, Inc. ["Frequency"] entered into a long-term ground lease for the subject property with the County of Nassau.

Some nine years later in 1990, Frequency retained Sholom as its exclusive broker, and also hired Greiner and CNR as "additional procuring brokers" in order to locate a tenant for a proposed building which was to be constructed at the premises – *i.e.*, 51 Charles Lindbergh Boulevard (A. Cmplt., ¶¶ 14-15, 30).

The plaintiffs ultimately located a potential tenant for the property, non-party National Health Laboratories, Inc ["NHL"]. In August of 1991, Frequency as sub-landlord, and NHL as sub-tenant, executed a so-called "Restatement of Lease Agreement," which provided for an initial lease term of 15 years, together with two option periods of five years each. Pursuant to the Restated Lease Agreement, NHL agreed to pay all of the brokerage commissions due and owing the plaintiffs – an understanding further memorialized in two separate "lease commission agreements" previously executed by the plaintiffs and NHL in December of 1990 (A. Cmplt., ¶¶ 17-20; Def's Mot., Exhs., "C" & "D").

According to Paul Gruber – former principal of CNR – the plaintiffs were more than merely brokers; they allegedly "participated in the negotiation of the material elements of the deal * * *" (Gruber Aff., ¶¶ 3-4; Kanter Aff., ¶¶ 11-12, 43) and were "active[,] interested parties whose own material rights to the commission were inexorably intertwined with the material terms of the Lease itself" (Kanter Aff., ¶ 12). More particularly, the issue of commissions; "who was liable for them;" and how the plaintiffs would be protected if they were not paid – were supposedly issues integral "to the Lease itself" (Kanter Aff., ¶ 11).

Ultimately, a deal-saving arrangement was supposedly reached under which it was agreed among the parties, including the plaintiffs, that NHL would pay the brokers commissions – a departure from customary practice since normally, Frequency would be

responsible for the payment of commissions. This arrangement allegedly facilitated the transaction by "reduc[ing] the Landlord's cost for the transaction" and permitting "NHL to obtain a better rental rate" (Gruber Aff., ¶ 2).

The plaintiffs contend that the rental rate which was negotiated was materially dependent upon the tenant's agreement that it would pay commissions. The plaintiffs also claim that the "Lease Agreement "cannot be separated" from the Brokerage Commission Agreements because the material terms contained in the commission agreements were also negotiated by the Landlord even though its signature does not appear on those agreements" (Kanter Aff., ¶¶ 13, 80-81).

Although NHL agreed to pay the commissions pursuant to the restated lease, the two brokerage agreements also make reference to the "Landlord" in connection with the issue of commissions, providing that "[i]t is understood and agreed that the Procuring Brokers will not seek any real estate brokerage fees from the Landlord so long as the real estate brokerage fees set forth above is paid by the Tenant in accordance with this agreement" (Def's Mot., Exhs., "C" & "D"). The restated lease itself – the only document actually signed by Frequency – contains no such provision, although it does permit the Landlord to seek indemnity against the tenant for claims of the plaintiff brokers "or any other broker" (Lease Agreement, ¶ 32.01; Kanter Aff., ¶¶ 46, 48).

Significantly, both of the above-referenced lease commission agreements contain provisions which provide, in part, that NHL would pay additional commissions if the lease were to be extended.

The commission agreements state in this respect that, "[i]n the event Tenant [NHL] exercises an option(s) or creates a new arrangement to extend that lease Term Tenant [NHL] agrees to pay Procuring Brokers additional commissions at the rate of 3% of the annual rental of such option or extended term, payable upon the commencement of such term" (Lease Commission Agreements at 2; Def's Exhs., "C" & "D"). The lease itself contains no reference to the payment of brokerage commissions upon a renewal thereof (Bauer Aff., ¶ 14).

Thereafter, and pursuant to two written "Assignment & Assumption Agreements," dated January of 1998, Frequency assigned all of its right, title and interest in the subject property to Rexcorp Operating Partnership ["Rexcorp Partnership"] (A. Cmplt., ¶¶ 54-55;

Def's Exhs., "G" & "H"). The Agreements provide in part that the assignee "hereby assumes full responsibility for all obligations of landlord under the leases * * * accruing from and after the date hereof" (Def's Exh., "H", ¶ 2).

Shortly before the foregoing assignments were executed, codefendant Laboratory Corporation of America ["LabCorp"] became the successor in interest to NHL, as evidenced by a so-called "First Amendment of Restated Agreement of Sublease," dated December, 1997 (Def's Exh., "I"; A. Cmplt., ¶¶ 62-64).

In 2007, Rexcorp Partnership – organized as a "real estate investment trust" – completed a merger with SL Green Realty Corp., from which emerged a new entity known as "RexCorp. Realty, LLC" (Bauer Aff., ¶ 18).

As part of the foregoing transaction, a RexCorp affiliate, "51 Charles Lindbergh Boulevard, SPE, LLC" ["51, LLC"] was formed to assume the Ground Lease with Nassau County. According to the defendants, 51, LLC is now the new landlord – or more accurately, sub-landlord – under the lease. According to the plaintiffs, however, all of the RexCorp entities are alter egos of each other and/or "shell"-type entities.

In May of 2007, when the underlying lease term was nearing its expiration, Paul Gruber wrote to LabCorp's general manager and reminded him that LabCorp would be responsible for the payment of any commissions upon the renewal of the lease. LabCorp replied that it was not considering a renewal "at this time" (A. Cmplt., ¶ 89; Pltff's Exhs., "7", "8").

Subsequently, however, 51, LLC engaged the service of a third-party brokerage firm called Equis Corporation to assist them in negotiating the renewal. The Equis agreement was formally executed by 51, LLC, although it also identifies RexCorp Realty, LLC as "its general partner."

In April of 2007, 51, LLC and LabCorp executed a "Second Amendment of Restated Agreement of Sublease," pursuant to which the lease term was extended for a ten year period (A. Cmplt., ¶ 103; Bauer Aff., ¶¶ 21-22). Before the end of 2007, the lease was amended for a third and fourth time. By letters dated July and September of 2007, the plaintiffs wrote to LabCorp. advising that commissions were now due and owing based on the renewals. The plaintiffs' demands were rejected by LabCorp.. In November,

2007, the plaintiffs commenced the within action to recover commissions allegedly due and owing. According to the plaintiffs, LabCorp, NHL and RexCorp are all duty-bound to pay commissions arising out of the renewals. In response, codefendant Rexcorp Realty, LLC moved, pre-answer, pursuant to CPLR 3211[a][1],[7] to dismiss the complaint insofar as asserted against it, on the grounds that: (1) the operative commission agreements unambiguously required only the tenant – not the Landlord – to pay any commissions due and owing; and (2) it was not, in any event, a party to any of the controlling brokerage agreements and is not even a Landlord or an owner of the subject property. During the pendency of the motion, the plaintiffs served an amended complaint which included additional clarifying allegations relating to, *inter alia*, the 2007 RexCorp merger and the subsequent creation of 51, LLC. The parties have stipulated that the subject motion papers would "be applied to the Amended Complaint which was filed and served after the pending motion was served" (Pltff' s Exh., "2"). Specifically, and with respect to the RexCorp entities and 51, LLC, the amended complaint interposes separate causes of action sounding in unjust enrichment, quantum meruit, and reasonable legal fees.

On a motion to dismiss pursuant to CPLR 3211[a][7], the Court must accept as true, the facts "alleged in the complaint and submissions in opposition to the motion, and accord plaintiffs the benefit of every possible favorable inference," determining only "whether the facts as alleged fit within any cognizable legal theory" (Sokoloff v. Harriman Estates Development Corp., 96 NY2d 409, 414, 2001; see, AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co., 5 NY3d 582, 591, 2005; Polonetsky v. Better Homes Depot, 97 NY2d 46, 54, 2001; Leon v. Martinez, 84 NY2d 83, 87-88, 1994).

On the other hand, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration" (Morris v. Morris, 306 AD2d 449; see, Maas v. Cornell University, 94 NY2d 87, 91-92, 1999, quoting from, Gertler v Goodgold, 107 AD2d 481, 485, *affd*, 66 NY2d 946, 1999; see also, Salvatore v. Kumar, 45 AD3d 560, 563).

To succeed on a motion to dismiss pursuant to CPLR 3211[a][1], the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (Martin v. New York Hosp. Medical Center of Queens, 34 AD3d 650; see, AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co., *supra*, at 591; Leon v Martinez, *supra*, at 87-88).

Upon the papers submitted, the Court agrees that the plaintiffs' claims are defeated by the relevant documentary evidence submitted.

It is fundamental that, in order to state a claim for a commission, a broker must prove, *inter alia*, "that it had a contract, express or implied, with the party to be charged with paying the commission" (*Hentze-Dor Real Estate, Inc. v. D'Allesio*, 40 AD3d 813, 815; *Stanzoni Realty Corp. v. Landmark Properties of Suffolk, Ltd.*, 19 AD3d 582, 583; *Steven Fine Associates, Inc. v. Serota*, 273 AD2d 375, 376).

Here, however, it is undisputed that both of the original "lease commission" agreements and the lease itself, expressly provide that the *tenant* would be responsible for the payment of brokerage commissions "in connection with the transaction contemplated by this [Lease] Agreement * * *" (Lease, ¶ 32.03, at 74 *see also*, ¶ 32-04, at 74; Lease Commission Agreements, at 2). The RexCorp entities were not signatories to the commission agreements and the plaintiffs have not produced a separately executed document by which these defendants affirmatively agreed to pay commissions to the plaintiffs. Nor does the lease contain a provision stating that, in the event that tenant failed to pay commissions due and owing upon renewal, the Landlord would then be responsible for paying any outstanding commissions. Indeed, the lease itself makes no reference at all to the payment of commissions upon subsequent renewal – much less that the landlord would be obligated to make such payments.

Although the plaintiffs point to, *inter alia*, a boilerplate-type lease provision which states that the tenant would be required to indemnify the landlord against claims made by the plaintiffs or "any other brokers" there is nothing in this provision which obligates the defendants to pay for brokerage commissions. To the extent that the reference to indemnification denotes anything more than precautionary lawyering by the Landlord's counsel, the concept of indemnity generally implies a complete, "claim over" type recovery, suggesting that the duty to pay commissions was indeed to be exclusively borne by the tenant (*cf.*, *Mas v. Two Bridges Associates by Nat. Kinney Corp.*, 75 NY2d 680, 690-691, 1990).

More significantly, if, as the plaintiffs contend, the payment of commissions – and by whom they would be paid – was a such key factor in facilitating the transaction, one would expect the parties to have carefully outlined and addressed their respective commission obligations – especially in light of the plaintiffs' claim that they themselves, as interested brokers, were active players in the negotiation process "with regard to the

material terms of the Lease itself" (Gruber Aff., ¶¶ 3-4). To the contrary, the sophisticated, counseled parties involved in the transaction did not include a single directive requiring the Landlord's to pay commissions – in either the brokerage contracts or the comprehensive, 128-page lease agreement which was ultimately executed.

In light of the plaintiffs' current assertions that they participated in the substantive lease negotiations – and that the identity of the commission-obligor was key to the completed transaction – the absence of any specific provision, actually requiring the Landlord to pay broker's commissions, is telling.

It settled that sophisticated parties to real estate transactions "are free to make their contracts" and that Courts are "reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include" (*Rowe v. Great Atlantic & Pac. Tea Co., Inc.*, 46 NY2d 62, 72, 1978; see, *Maxton Blders. v. Lo Galbo*, 68 NY2d 373, 382, 1976). Moreover, "the provisions of the contract delineating the rights of the parties prevail over the allegations set forth in the complaint" (*Sterling Fifth Associates v. Carpentille Corp., Inc.*, 9 AD3d 261, 262; *Ark Bryant Park Corp. v. Bryant Park Restoration Corp.*, 285 AD2d 143, 150).

Nor are the commission agreements supportive of the plaintiffs' claims, since they both expressly identify the tenant as the party responsible for paying any brokerage commissions.

The plaintiffs' reliance, on an oblique reference to the landlord and the issue of commissions, is unavailing. Specifically, the plaintiffs rely upon the statement in the commission agreements – not the lease – which in cryptic fashion states: "[i]t is understood and agreed that Procuring Brokers will not seek any real estate brokerage fees from Landlord so long as the real estate brokerage fees set forth above * * * [are] paid by Tenant in accordance with this agreement" (Lease Commission Agreements, at 2 (Def's Exh. "C," "D")).

Firstly, even the brokerage agreements in which this statement actually appears, do not state or provide that the landlord would be required to pay commissions. Indeed, it is unclear precisely what meaning this statement was intended to have between the actual contracting parties (the tenant and the plaintiffs), but whatever its import may be – it is undisputed that neither the original landlord, nor the current defendants, were parties to either commission agreement. "It is well settled that one who is not party to an agreement

cannot be bound by it" (*Valisa Mfg., LLC v. The 54 Group, Ltd.*, 19 Misc.3d 1136(A), 2008 WL 2150111 at 5 [Supreme Court, Westchester County 2008]; see generally, *Tutora v. Siegel*, ___ Misc3d ___, 2006 WL 5127666 [Supreme Court, New York County, 2006], *affd.*, 40 AD3d 227; *Julien J. Studley, Inc. v. Levy Fashion Center Associates*, 268 AD2d 218 *cf.*, *Selinger Enterprises, Inc. v. Cassuto*, ___ AD3d ___, 2008 WL 1131666, 2nd Dept. 2008).

Further, since the contract documents do not require the landlord to pay commissions, the plaintiffs' claim, that the defendants assumed the duty to pay by virtue of the 1998 Frequency assignment, is also unavailing.

While Courts have held that assignees will sometimes assume the contractual obligations of their predecessors (see, *Bank of New York, Albany v. Hirschfeld*, 37 NY2d 501, 506, 1975; *cf.*, *Longley-Jones Associates, Inc. v. Ircon Realty Co.*, 67 NY2d 346, 347-348, 1986; *Breslin Realty Development Corp. v. Luk-Shop, LLC*, 304 AD2d 698), the plaintiffs' claims are still dependent on the foundational presumption that there was some sort of contractual duty to assume in the first place – a theory which this Court has already found to be untenable and inconsistent with the governing documentary evidence submitted.

The plaintiffs' reliance on Justice Franco's affirmed holding in *Breslin Realty Development Corp. v. Luk-Shop, supra*, is also misplaced since there, the Court held, among other things, that questions of fact had been presented with respect to whether a successor landlord was duty-bound to pay a broker's commission. In *Breslin*, however, the assignor-landlord had actually entered into a written commission agreement with the broker prior to the assignment at issue – a key fact not present here.

Lastly, it follows that the defendants have not been unjustly enriched for the purposes of sustaining that cause of action and the related *quantum meruit* or quasi-contract claim (*Selinger Enterprises, Inc. v. Cassuto, supra*; *Landcom, Inc. v. Galen-Lyons Joint Landfill Com'n*, 259 AD2d 967, 968).

"It is well settled that '[t]he essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered'" (*Sperry v. Crompton Corp.*, 8 NY3d 204, 215, 2007, quoting from, *Paramount Film Distrib. Corp. v. State of New York*, 30 NY2d 415, 421, 1972; see also, *Goldman v. Metropolitan Life Ins. Co.*, 5 NY3d 561, 572, 2005).

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Further, "[t]o recover in quantum meruit, a plaintiff must establish that the services were performed for the defendant or at its behest" and "must also establish, *inter alia*, that it had 'an expectation of compensation therefor'" (*Infusacare Medical Services, P.C. v. Syracuse Home Ass'n*, 49 AD3d 1176, quoting from *Moors v. Hall*, 143 AD2d 336, 337; see also, *Capital Heat, Inc. v. Buchheit*, 46 AD3d 1419, 1420). Notably, "[i]t is not enough that the defendant received a benefit from the activities of the plaintiff (*Heller v. Kurz*, 228 AD2d 263, 264; see, *Citrin v Columbia Broadcasting Sys.*, 29 AD2d 740).

Here, the plaintiffs cannot, upon the claims as pleaded, establish that the defendants were unjustly enriched or that they had an "expectation of compensation" "because the matter is controlled" by the underlying commission agreements (see, *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 NY2d 382, 388, 1987; *Infusacare Medical Services, P.C. v. Syracuse Home Ass'n*, *supra*), *i.e.*, the governing documents negotiated and signed in part, by the plaintiffs themselves, demonstrate that the tenant was to pay the plaintiffs' commission (e.g., *Whitman Realty Group, Inc. v. Galano*, *supra*, at 593; *Julien J. Studley, Inc. v. Levy Fashion Center Associates*, 268AD2d 218; *SageGroup Associates, Inc. v. Dominion Textile (USA), Inc.*, 244 AD2d 281, 283).

In short, the plaintiffs' attempt to cobble together disparate, inconclusive language in the lease and commission agreements to support their commission theory against a non-party to the controlling documents, is lacking in merit.

The Court has considered the plaintiffs' remaining contentions and concludes that they are insufficient to defeat the motion to dismiss.

Accordingly, the defendant RexCorp Realty's motion to dismiss is **granted**. The action against the remaining defendant is **severed** and **continued**.

A Preliminary Conference has been scheduled for July 24, 2008 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Dated JUN 16 2008

Stephen A. Bucaria
J.S.C.

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NASSAU COUNTY
COUNTY CLERK'S OFFICE