

Chung v Midwood Mgt. Corp.

2009 NY Slip Op 30644(U)

March 12, 2009

Supreme Court, New York County

Docket Number: 109666/08

Judge: Louis B. York

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

LOUIS B. YORK

PRESENT: _____ **J.S.C.**
Justice

PART 2

Chung
- v -
Midwood Management Corp.

INDEX NO. 109666/08
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

FILED
MAR 18 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/12/09

[Signature]
LOUIS B. YORK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
MICHAEL CHUNG, doing business as MCVEST
REALTY COMPANY,

Plaintiff,

-against-

Index No. 109666/08
DECISION AND ORDER

MIDWOOD MANAGEMENT CORPORATION, 160-06
NORTHERN BOULEVARD LLC, and 160-06 LLC,

Defendants.

-----X

LOUIS B. YORK, J.:

In this cause of action for breach of contract, Plaintiff Michael Chung, a real estate broker, alleges that he is entitled to a balance of \$140,000.00 stemming from a December 16, 2005 real estate broker agreement between Chung and Midwood Management Corporation, 160-66 Northern Boulevard, LLC, and 160-06, LL. Plaintiff now moves, pursuant to CPLR § 3212, for summary judgment for breach of contract and dismissal of the defendant's answer on the ground that all conditions precedent to the Defendant's obligation to pay the broker fee were fulfilled.

Defendants now cross-move to amend their answer in order to assert a counterclaim against Plaintiff for common law and contractual indemnification on the grounds that the Defendant suffered damage and monetary losses due to the defaults of the tenant procured by Plaintiff and that his failure to indemnify the Defendant for any damages stemming from such default.

For the reasons stated herein, the motion for summary judgment is denied and the cross-motion is granted.

Background

In his Affidavit dated November 4, 2008, Plaintiff asserts that the defendants breached the contract to pay a broker's fee for producing a lessee for the commercial space managed by Defendant at 160-06 Northern Boulevard, Queens, New York. The Plaintiff claims that all conditions precedent to the payment of the fee had been fulfilled, and that the Defendant's payment of the first installment of the fee constitutes a waiver and effectively estops the Defendant from disputing the claim. The conditions precedent to the payment of the brokerage fee under the agreement dictate that the tenant takes actual, physical possession of the premises. Additionally, the agreement states in the affidavit of John Martin, Esq. dated December 22, 2008, that, "if, at the time any payment is due from Landlord to Broker, the Tenant under the Lease is in default of any of its obligations thereunder, then no further commission shall be payable to you until such shall have been cured".

The Defendant claims that failure to pay the remaining balance of the broker fee was due to the multiple defaults of the tenant, which constituted a failure of the Plaintiff to fulfill the conditions precedent required for payment of the fee. These defaults include multiple rent defaults, illegally subletting the subject premises and failure to timely conduct the build-out of the subject premises in accordance with the terms of the lease. The Defendant seeks leave to amend his answer to assert a counterclaim, claiming that the Plaintiff promised to indemnify the Defendant from any losses resulting from defaults

of the tenant.

Decision

I. Motion for Summary Judgment is Denied

CPLR 3212(b) provides, in relevant part, that a motion for summary judgment “shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” In order for summary judgment to be granted, “it must clearly appear that no material and triable issue of fact is presented” Sillman v Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957).

The Plaintiff claims that there is no plausible basis for denying that plaintiff is entitled to payment of the second installment. Plaintiff contends that all of the conditions precedent necessary to trigger payment of the second installment have been met. However, there is a genuine issue of fact as to whether the conditions precedent have indeed been met. The tenant, Koguryo, never took actual physical possession of the premises. Additionally, the Tenant defaulted on the lease multiple times.

Plaintiff also contends that the Defendant’s payment of the initial installment of the broker fee constituted a waiver and estops Defendant from claiming that that the conditions precedent to payment had not been met. In support of this contention, the Plaintiff cites Rosenthal v. West, 274 A.D.2d 442 (1st Dept 1948)(partial payment by defendants for vault license estopped defendants from claiming that license had already issued at the time of sale). The Defendant claims that the payments actually made were not an admission that the full balance was actually owed, but were payments made in

good faith. In addition to the partial payments, a court must also consider the words and conduct of the parties. Madison Avenue Leasehold, LLC v. Madison Bently Associates, LLC, 30 A.D.3d 1 (1st Dept. 2006). A waiver is the voluntary abandonment or relinquishment of a known right. It is essentially a matter of intent which must be proved” Jeypaul Garage Corp. v. Presbyterian Hosp. in City of N.Y., 61 N.Y.2d 442 (1984).

When evaluating a motion for summary judgment, this court shall construe the facts presented in a light most favorable to the Defendant. Strychaliski v. Mekus, 54 A.D.2d 1068, 1069 (1976). Here, the aggregate actions and inactions of the tenant can conceivably be considered a failure of the conditions precedent under the lease terms. Furthermore, the intent of the Defendant in making partial payment of the fee was conceivably a gesture of good faith despite the many defects in the tenant’s performance of its obligations under the lease terms. “A waiver is a voluntary abandonment of a known right.” Jeypaul Garage Corp. v. Presbyterian Hosp., 61 N.Y.2d 442, 446 (1996). Therefore, a payment made for the purpose of good faith may not constitute an intent to relinquish or abandon the Defendant’s rights under the lease. These considerations constitute a triable issues of fact.

The motion for Summary Judgment is therefore denied.

II. Defendant’s Cross-Motion to Amend the Answer is Granted

Civil Practice Law and Rules 3025(b) and (c) provide in relevant part:

(b) Amendments and supplemental pleadings by leave. A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as maybe just including the granting

of costs and continuances.

(c) Amendment to conform to the evidence. The court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances.

The courts have consistently construed CPLR 3025 liberally. This liberal interpretation of the pleading rules were explained in Cooper v. Met Merchandising, Inc., 75 A.D.2d 519, 426 (1st Dept. 1980): “The proposed amendment of the complaint...merely sets forth additional theories of recovery based upon the same facts. Indeed the interposition of the cross claim and third-party complaint naturally flowing from these same alleged facts reinforces the conclusion that no undue surprise or prejudice will accrue from the plaintiff’s successful endeavor to so amend the complaint.”

The limiting of this principle that motions to amend pleadings should be liberally granted is the existence of surprise or prejudice to the other party. It is well settled that leave to amend pleadings shall be freely given absent prejudice or surprise resulting from a delay. See McCaskey, Davies and Associates, Inc. v. New York City Health & Hospitals Corp., 59 N.Y.2d 755 (1983).

Defendant merely seeks to assert its own theory of recovery based on existing facts in the record. No undue surprise or prejudice will occur where a very short period of time has passed between the interposition of the answer and the making of this motion. Additionally, the Plaintiff was aware that he had sent the e-mail message to the Defendant containing the alleged indemnification.

Therefore, the motion to amend the answer is granted.

Order


Based on the above, therefore, it is

ORDERED that the motion for summary judgment by plaintiff is denied; and it is further

ORDERED that the defendant's cross-motion to amend the answer is granted.

Dated: 3/10/09

ENTER



LOUIS B. YORK, J.S.C.

LOUIS B. YORK
J.S.C.

FILED

MAR 18 2009

COUNTY CLERK'S OFFICE
NEW YORK