

Greiner-Maltz Co. of Long Is., Inc. v Interpharm Holdings , Inc.

2009 NY Slip Op 30993(U)

April 27, 2009

Supreme Court, Nassau County

Docket Number: 010706/08

Judge: Michele M. Woodard

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

SCAN

-----X
GREINER-MALTZ COMPANY OF LONG ISLAND, INC.,

Plaintiff,

-against-

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 14
Index No.:010706/08
Motion Seq. Nos.: 03 & 04

INTERPHARM HOLDINGS, INC., INTERPHARM,
INC., INTERPHARM REALTY, LLC and SOVEREIGN
BANK, in its capacity as escrow agent,

DECISION AND ORDER

Defendants.

-----X
Papers Read on this Motion:

Plaintiff's Notice of Motion	03
Plaintiff's Affirmation of John McEntee	xx
Defendants' Notice of Motion	04
Defendants' Affidavit of Peter Giallorenzo	xx
Defendants' Memorandum	xx
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Plaintiff's Reply Memorandum	xx

This motion by Plaintiff Greiner-Maltz Company of Long Island ("Greiner-Maltz") for an order pursuant to CPLR § 3212 granting it summary judgment against the Defendants' Interpharm Holdings, Inc., Interpharm, Inc. and Interpharm Realty, LLC ("Interpharm") is **granted**.

This cross-motion by Defendants Interpharm Holdings, Inc., Interpharm, Inc. and Interpharm Realty, LLC ("Interpharm") for an order pursuant to CPLR § 3212 granting them summary judgment dismissing the complaint against them is **denied**.

In this action, the Plaintiff Greiner-Maltz, a New York State licensed real estate broker, seeks to recover a million dollar brokerage commission allegedly due pursuant to its written exclusive brokerage agreement with Interpharm. Interpharm has been in the business of developing, manufacturing and marketing generic prescription and over-the-counter pharmaceuticals since 1984. In an attempt to resolve mounting financial difficulties, Interpharm gave Greiner-Maltz a written exclusive right to sell one of its pieces of real property located at 50 Horseblock Road in Yaphank, N.Y., on April 1, 2008. The property involved is 37 acres with a 92,000 square foot building which Interpharm used primarily

Interpharm used primarily as a warehouse and for limited research and development. The brokerage agreement was negotiated by Greiner-Maltz and Interpharm. In fact, Interpharm's counsel reviewed it and his proposed revisions reducing Greiner-Maltz's commission if the property was sold to a specified party were accepted by Greiner-Maltz. The brokerage agreement took effect on March 1, 2008 one month prior to the signing of the agreement, and ran for one year but it could be terminated by either party on 30-days written notice. Under the brokerage agreement, Greiner-Maltz is entitled to a five percent commission on a sale of the property at the time of title closing if it is sold during the term of the agreement. Greiner-Maltz is also entitled to that commission if the property is sold within six months of the agreement's termination to a purchaser who inspected the property or negotiated its purchase during the term of the agreement, regardless of who procured the purchaser. The Agreement provides:

[Interpharm] acknowledges and agrees that Greiner-Maltz has been granted the *exclusive right to rent, sell, lease or exchange the Property . . .* and that Greiner-Maltz will be entitled to a commission if the Property is sold or exchanged by [Interpharm] during the term of the Agreement *regardless of whether the party to whom the Property is sold or exchanged is procured by Greiner-Maltz, [Interpharm], any employee of [Interpharm], or any other party . . .*"

As a result of on-going negotiations to sell not only its property but most of its assets, too, Interpharm sent Greiner-Maltz a written notice terminating their brokerage agreement on April 23, 2008. The following day, on April 24, 2008, Interpharm, Inc. and Interpharm Holdings entered into an Asset Purchase Agreement and a Loan and Security Agreement with Amneal Pharmaceuticals and Interpharm, Inc. and Interpharm Realty, LLC entered into a Contract of Sale for the real property in the amount of \$20,000,000 with Kashiv, LLC, as the purchaser designated by Amneal Pharmaceutical for tax purposes. The sale of all of Interpharm's assets was a prerequisite to the sale. Detailed separate agreements were entered with respect to other aspects of the sale, i.e., agreements with Interpharm's suppliers and customers, software agreements, trademark rights as well as leases to Amneal Pharmaceuticals for Interpharm's other two pieces of property. Amneal Pharmaceuticals, through its designee, had the right to assign the Contract of Sale for the real property without Interpharm's written consent and in fact did so two days prior to the closing to one of its affiliates, Hotel Circle Partners, LLC, to take advantage of the tax benefits of a like-kind exchange. Although the Contract of Sale provided that no broker was used, the

indemnify Amneal Pharmaceuticals for “any broker fees, commissions or similar payments to Greiner-Maltz . . . or any of its affiliates with respect to the sale of the [property].” The closing between Interpharm and Amneal Pharmaceuticals and Hotel Circle Partners took place on June 23, 2008. Despite due demand, Interpharm did not notify Greiner-Maltz of that closing and has refused to pay Greiner-Maltz’s commission. This action ensued.

Both Greiner-Maltz and Interpharm seek summary judgment.

“On a motion for summary judgment pursuant to CPLR § 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” *Sheppard-Mobley v King*, 10 AD3d 70, 74 (2d Dept 2004), aff’d. as mod., 4 NY3d 627 (2005), citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). “Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” *Sheppard-Mobley v King*, *supra*, at p. 74; *Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*. Once the movant’s burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. *Alvarez v Prospect Hosp.*, *supra*, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. *See, Demishick v Community Housing Management Corp.*, 34 AD3d 518, 521 (2d Dept 2006), citing *Secof v Greens Condominium*, 158 AD2d 591 (2d Dept 1990).

“[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms.” *W.W.W. Associates, Inc. v Giancontieri*, 77 NY2d 157, 162 (1990). “Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing.” *W.W.W. Associates, Inc. v Giancontieri*, *supra*, citing *Mercury Bay Boating Club v San Diego Yacht Club*, 76 NY2d 256, 269-270 (1990); *Judnick Realty Corp. v 32 W. 32nd St. Corp.*, 61 NY2d 819, 822 (1984); *Long Island R. Co. v Northville Indus. Corp.*, 41 NY2d 455 (1977); *Oxford Commercial Corp. v Landau*, 12 NY2d 362, 365 (1963). “Even where a contingency has been omitted, [a court] will not necessarily imply a term since courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing (quotations omitted).” *Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 (2001), quoting *Schmidt v Magnetic Head*

Corp., 97 AD2d 151, 157 (2d Dept 1983; *Morlee Sales Corp. v Manufacturers Trust Co.*, 9 NY2d 16, 19 (1961). These rules have “special import ‘in the context of real property transactions, where commercial certainty is a paramount concern, and where . . . the instrument was negotiated between sophisticated counseled business people negotiating at arm’s length.’ ” *Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co.*, 1 NY3d 470, 475 (2004), quoting *Matter of Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995]. “In such circumstances, courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include.” *Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co.*, *supra*, citing *Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 72 (1978).

Where the broker has been given the exclusive right to sell, he is entitled to a commission upon the sale of the property by the owner. *Far Realty Associates, Inc. v RKO Delaware Corp.*, 34 AD3d 261 (2d Dept 2006). In fact, when a broker has an exclusive right to sell, no efforts to sell are actually required to recover a commission, so long as the sale occurs while the agreement is in effect. *Audrey Balog Realty Corp., Inc. v East Coast Real Estate Developers, Inc.*, 202 AD2d 529 (2d Dept 1994). However, “[a] contract will not be construed to create an exclusive right to sell unless it expressly and unambiguously provides for a commission upon sale by the owner or excludes the owner from independently negotiating a sale.” *Far Realty Associates Inc. v RKO Delaware Corporation*, *supra*, at p. 262, citing *CV Holdings, LLC v Artisan Advisors, LLC*, 9 AD3d 654, 656 (3d Dept 2004); *Harvard Assoc. v Hayt, Hayt & Landau*, 264 AD2d 814 (2d Dept 1999).

An exclusive brokerage agreement was clearly entered into between Greiner-Maltz and Interpharm. Interpharm cancelled it in writing on April 23, 2008, resulting in its termination on May 23, 2008. Pursuant to the parties’ exclusive brokerage agreement, Greiner-Maltz was entitled to a commission even if Interpharm sold the property if the sale occurred on or before November 23, 2008 and was made to someone who had inspected or negotiated for the property’s sale during the agreement’s term.

Interpharm seeks to avoid its contractual obligations on two grounds: Because the property’s sale was accomplished in conjunction with its sale of its business, but for which the property’s sale would never have occurred; and, because the property was ultimately sold to Kashiv’s assignee Hotel Circle Partners which did not inspect or negotiate for the sale of the property while the brokerage

agreement was in effect.

To interpret the parties' brokerage agreement as limiting Greiner-Maltz's right to a commission to when only the property is sold and denying it its commission if the property's sale was in conjunction with or contingent upon any other transaction would result in a significant re-writing of the parties' agreement which this Court may not do. *See, Reiss v Financial Performance Corp., supra; Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co., supra.* In fact, Interpharm clearly could have exempted or modified Greiner-Maltz's right to a commission if the property was sold to Amneal Pharmaceuticals or its assignee or in conjunction with its business. It did not do so. Furthermore, Kashiv's assignment of its contractual rights which were procured while the exclusive brokerage agreement was in effect to third-party Hotel Circle Partners does not defeat Greiner-Maltz's right to a commission, either. *See, Century 21 Norme Foote, Inc. v Meyer*, 170 AD2d 873 (3d Dept 1991); *see also, Century 21-Clifford Realty, Inc. v Gibson*, 152 AD2d 446 (4d Dept 1989); *Hunt Real Estate Corp. v Smallidge*, 66 Misc2d 730 (Supreme Court Erie County 1971), app dism. 330 NYS2d 784 (4d Dept 1972).

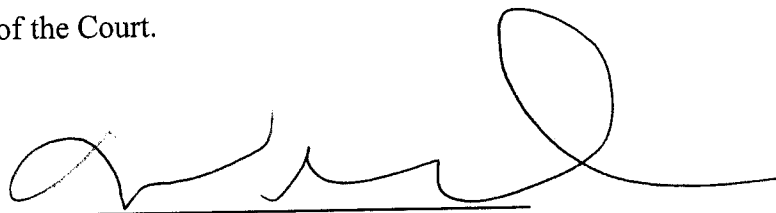
In sum, the following facts are eminently clear: Greiner-Maltz had an exclusive brokerage agreement giving it the right to sell the property. Interpharm negotiated and within six months of the agreement's termination sold the property to an assignee of the party who had negotiated for the property's purchase while the brokerage agreement was in effect. Greiner-Maltz is accordingly entitled to its commission under the brokerage agreement.

Greiner-Maltz's motion for summary judgment is **granted**. It is awarded judgment in the amount of \$1,000,000, plus pre-judgment interest at the statutory rate of nine percent from June 23, 2008, pursuant to CPLR § 5001, 5004.

This constitutes the Decision and Order of the Court.

DATED: April 27, 2009
Mineola, N.Y. 11501

ENTER:



HON. MICHELE M. WOODARD
J.S.C.

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ENTERED
APR 30 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE