Grubb & Ellis N.Y., Inc. v Country View Commons LLC

2009 NY Slip Op 31024(U)

April 29, 2009

Supreme Court, New York County

Docket Number: 602128/07

Judge: Emily Jane Goodman

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SCANNED ON 5/6/2009

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

PRESENT: EMILY JANE GOODMAN, Justice

PART 17

Index Number : 602128/2007

GRUBB & ELLIS NEW YORK

vs

COUNTRY VIEW COMMONS LLC

Sequence Number : 003

PARTIAL SUMMARY JUDGMENT

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

This motion to/for ______

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

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided per attached

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

FILED
MAY 06 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/29/09

EMILY JANE GOODMAN, J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

---X

GRUBB & ELLIS NEW YORK, INC.,

Plaintiff,

-against-

Index No.: 602128/07

COUNTRY VIEW COMMONS LLC.,

Defendants.

---X

FILED MAY 06 2009 COUNTY CLERK'S OFFICE NEW YORK

EMILY JANE GOODMAN, J.:

In this action, plaintiff, Grubb & Ellis New York, Inc. (G&E), seeks to recover commissions from the defendant, Country View Commons LLC, which is the owner of real property on Long Island (the Property). G&E moves for partial summary judgment, pursuant to CPLR 3212 (e), in its favor on the first and second causes of action of its complaint, and to sever the third cause of action.

It is undisputed that defendant hired plaintiff to find tenants for the Property at a time when it was undeveloped. Toward that end, the parties executed an agreement dated October 5, 2004 (the Agreement). The Agreement is in the form of a letter, and in it the parties agreed that plaintiff would have the exclusive right to find lessees and to negotiate the lease of "the Property for such price, rental and terms as you [defendant] may accept" for a specific period of time that was later extended (Pl. Mov. Aff., Exh. 3, at 1). The phrase "the Property" is not defined in the Agreement, but the letter has a reference line which states:

> "New Office Development – Approximately 30,000 SF
> 8 Acres -Browns Road, Smithtown, New York"

(Pl. Mov. Aff., Exh . 3, at 1).

The clause of the Agreement disputed by the parties provides that:

> "in the event the Property is leased during the term of the Agreement or the survival period referred in Paragraph 8 thereof [defendant] will pay to G&E a commission of seven (7%) percent gross rental for the first three (3) years plus three (3%) percent gross rental for each year thereafter including all renewals and extensions of the lease term.* In the event that a co-broker procures a lessee who leases the Property, [defendant] will pay G&E a single commission at the rate specified above which commission will be shared with the co-broker on such basis as G&E and co-broker shall agree. * Under no circumstances shall commissions be applied to lease terms per tenant that exceed ten (10) years in duration since commencement"[1]

(Pl. Mov. Aff., Exh . 3, ¶ 6 [Paragraph 6]). The Agreement also provides that upon and after its expiration defendant would:

> "recognize G&E and act exclusively through G&E as broker for a period of six (6) months with respect to any party with whom negotiations, conversations and dealings took place during the term of [this] . . . Agreement regarding the lease of the Property and [defendant] shall pay G&E commissions as provided in [this] Agreement, and [defendant] shall pay to G&E commissions as above specified in connection therewith provided a lease is mutually executed"

(Pl. Mov. Aff., Exh . 3, ¶ 8). The Agreement contains a relatively standard clause stating that the writing constitutes the entire agreement between the parties and prohibiting modifications without a writing signed by both parties (Pl. Mov. Aff., Exh . 3, ¶ 11).

Defendant entered into a commercial lease, dated October 28, 2005, with a tenant, that contains a provision that states that the leasing parties dealt with plaintiff as broker, and also

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[1]Plaintiff maintains that the language that follows the second asterisk in Paragraph 6, which was handwritten, is a cap on its commission at ten years no matter how long the lease term. As discussed below, the defendant agrees that commissions were limited to ten years and that fact is established.

provides that defendant would pay all commissions to plaintiff pursuant to a separate agreement (Mov. Aff., Exh. 5, ¶ 26). Defendant also entered into a commercial lease with another tenant, dated June 14, 2006, with a similar provision (Mov. Aff., Exh. 6, ¶ 26).[2] The Leases did not commence on the date of execution, but contain later commencement dates associated with development of the Property.

Plaintiff seeks a judgment awarding it $348,267.82, with interest from November 4, 2005, on the first cause of action in the complaint and $49,093.07 on the second cause of action, with interest from June 14, 2006, for commission payments. Defendant opposes the motion, contending that while plaintiff has earned the commission, the Agreement provides for payment of commissions over the first ten years of the Leases, and not merely upon their signing.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). If the movant establishes its prima facie burden, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact'" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Summary judgment should be denied where there is even an arguable or debatable issue of fact (*International Customs Assoc. v Bristol-Meyers Squibb Co.*, 233 AD2d 161, 162 [1st Dept 1996]; *Baker v Briarcliff School Dist.*, 205 AD2d 652, 653 [2d Dept 1994]).

"Although the common-law rule is that a broker who produces a person ready and willing

[2]Unless otherwise stated, the Court will refer to the two leases submitted by plaintiff with its moving papers as "the Leases."

to enter into a contract upon his employer's terms . . . has earned his commissions, the parties to a brokerage agreement are free to add whatever conditions they may wish to their agreement" (*Srour v Dwelling Quest Corp.*, 5 NY3d 874, 875 [2005], quoting *Feinberg Bros. Agency v Berted Realty Co.*, 70 NY2d 828, 830 [1987] [internal quotation marks and citation omitted]). Moreover, "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended . . . is generally inadmissible to add to or vary the writing" (*Vision Dev. Group of Broward County, LLC v Chelsey Funding, LLC*, 43 AD3d 373, 374 [1st Dept 2007], quoting *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). Whether or not a writing is ambiguous is a question of law for resolution by the court (*W.W.W. Assoc.*, 77 NY2d at 162). An agreement is ambiguous where the writing is reasonably susceptible to at least two interpretations or may have more than one meaning (*New York City Off-Track Betting Corp. v Safe Factory Outlet, Inc.*, 28 AD3d 175, 177 [1st Dept 2006]). "[C]ourts 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" (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001][internal quotation marks and citations omitted]).

The parties have narrowed the issues for determination by agreeing that plaintiff procured the two tenants that entered into the Leases with defendant, and is entitled to commission payments.[3] In fact, defendant represents that it stands "ready, willing and able to pay

[3]As the parties have agreed that plaintiff was the procuring broker for the Leases, defendants' submissions and moving demonstration establishing this fact need not be elaborated upon.

commissions to plaintiff in accordance with paragraph '6' of the parties' [ ] Agreement" (Def. Memo. of Law, at 3).

In support of its motion, plaintiff argues that pursuant to the Agreement, the tenant's signing of the Leases was the sole condition plaintiff had to meet in order to be entitled to commission payments at the rates in Paragraph Six. Plaintiff maintains that there is no dispute that this condition was met, and consequently it is entitled to summary judgment. Based on the merger clause in the Agreement, plaintiff also contends that parol evidence is inadmissible to vary the terms of the Agreement, and that if defendant intended to impose further conditions to plaintiff's entitlement to commission, those conditions should have been included in the Agreement.

In opposition to the motion, defendant submits the affidavit of its managing member, David A Scro. Scro avers that in 2004 defendant became the contract vendee of the Property. Scro further avers that at that time, he began speaking with plaintiff's former agent, and Scro's friend of about twenty years, Jack McGann, about the possibility of McGann helping to find prospective tenants for the Property. Scro states that McGann then began contacting prospective tenants and, after sending Scro proposals from the tenants that eventually entered into the Leases, asked Scro to enter into an brokers agreement. Scro maintains that the parties did not then enter into an agreement because defendant did not yet own the Property. Scro further maintains that he received the Agreement months later, and reviewed it to make certain that it provided for the payment of commissions to be linked to when he started receiving rental payments from any prospective tenant plaintiff procured.

Scro avers that McGann was fully aware of the undeveloped condition of the Property, and

that while a lease with a tenant might be signed, that it would be several years thereafter before the tenant's building, which was yet to be constructed, would be ready for possession, as the Leases were signed before plans and specification had been drawn up for each building. Scro further avers that McGann helped to negotiate the Leases, and was aware that they did not provide for the payment of rent at signing, because rent would not then be received by defendant. Scro states that McGann was also aware that Scro did not have the money separately set aside to pay a commission upon the signing of leases, and always agreed that Paragraph 6 provided that commissions would be paid over time.

According to Scro, the commencement date of one of the Leases was almost two years after it was signed, and the other over a year after the lease's execution. Scro avers that he did not receive an invoice from plaintiff when the Leases were signed, but that in late 2006, McGann told him that he was leaving G&E, which was giving him a hard time because the commissions had not been paid yet. Scro further avers that at around this time, McGann presented to him new brokers agreements, concerning the same transactions in the Agreement, that provided for payment up front, which Scro refused to sign. Finally, Scro states that the commission amounts in the complaint are not accurate.

As noted, what the parties dispute is not whether, but *when*, defendant is obligated to pay commissions to plaintiff. Plaintiff's position is that the only condition to its entitlement to payment of commissions was the leasing of the property. Defendant argues that the Agreement provides for the payment of commissions over a term of years, as a percentage of the yearly rental, and not up front, in a lump sum, upon the signing of leases with tenant, and specifically "that defendant was to pay plaintiff its commission at the rates specified *for* the first ten years of

the terms of the leases . . ." (Def. Memo. of Law, at 3 [emphasis supplied]). Defendant further argues that it is plaintiff, not defendant, who seeks to add terms to Agreement, and that the only reasonable interpretation of the Paragraph Six is that it provides that the commissions were going to be paid to plaintiff over a course of years, during the term of the lease, not to exceed ten years. Defendant maintains that in the event that the Court does not agree with defendant's interpretation of the Agreement, it should find the Agreement is ambiguous, and deny summary judgment as extrinsic evidence supports its position.

Specifically, defendant argues that, in Paragraph 6, the choice of the word "for" preceding the specified years, as opposed to the word "of" was intended to reflect both a rate and a duration for commissions, or at a minimum, is ambiguous. Thus, defendant argues that the word "for" was used "to evidence that the payments of the commission were to be made "for" a number of years" meaning that the commission "is to be paid <u>for</u> the first three years at a certain rate; and then <u>for</u> each year of the balance of the lease term at a different rate" (Def. Aff. in Opp, at 15).

Despite that Paragraph Six is not artfully drafted, it cannot be reasonably read as providing for commissions to be paid over time. Defendant's strained interpretation, that plaintiff would receive annual payments over the first ten years of the respective Leases, would require reading into the Agreement a provision that is not there. Such a reading necessitates that the one word-- "for" is construed to apply to two separate matters (both the rate and the duration). Notably, the Agreement does not have not language conditioning the payment of commissions on the receipt of rent. Instead, Paragraph Six conditions payment of commissions "in the event the Property is leased." Although commissions are also due for "all renewals and extensions" a reasonable construction of this provision is that commissions for any renewal/extension are due upon the

execution of such renewal lease/extension. The intent to tie commissions only to execution of a lease (or renewal thereof) is further indicated by the provision in Paragraph Eight that defendant "shall pay to G&E commissions as above specified in connection therewith provided a lease is mutually executed." If an agreement on its face is reasonably read in only one way, a court may not modify the contract to reflect its notion of fairness (*see e.g. Teichman v Community Hosp. of W. Suffolk*, 87 NY2d 514, 520 [1996]). Moreover, extrinsic or parol evidence is not admissible to create an ambiguity in a written agreement (*Del Vecchio v Cohen*, 288 AD2d 426, 427-428 [2d Dept 2001]). Thus, Scro's statements, no matter how credible, cannot be utilized to support defendant's position.

Nevertheless, the Court cannot grant plaintiff's motion for a reason not addressed by either party. The Agreement does not define the term "gross rental." While McGann provides an affidavit in which he states what the rent amounts were in the Leases over the years, the Court's review of the commercial lease entered into entered into by defendant with TSI Smithtown, Inc. (TSI Lease) reveals that it provides for two alternative possible annual rent rates for each of the third through the tenth years of the lease, with the tenant required to pay the lesser of the two rates. One of the possible rent rates for each of the third through tenth years is a set dollar amount or figure (Set Amount), and the other is linked to the previous year's consumer price index (CPI) increase (Formula Amount).[4] Thus, even interpreting the term "gross rental" as the "Minimum Rent" from the exhibits to the Leases, the Court cannot determine whether the rent figure in the TSI Lease is the Set Amount or the Formula Amount, and plaintiff failed to explain

[4]For example, the TSI Lease provides that for the third year "the Rent shall be equal to the lesser of (i) 795,600 per annum or (ii) $780,000, increased by one hundred (100) times the CPI Increase during the Second Lease Year (Pl. Mov. Aff., Exh. 5, Exh. B at 28). The provisions for rent for the fourth through tenth year are based on a similar formula.

the basis for McGann's assertion that the rent is the Set Amount.[5] Accordingly, because the Agreement provides that commissions are to be based on the "gross rental" which is not defined in the Agreement, summary judgment may not be granted at this juncture. In light of the foregoing, the Court need not address defendant's argument that summary judgment is premature because discovery has not been conducted. Furthermore, as summary judgment is denied, plaintiff's motion to sever the third cause of action is also denied.

Accordingly, it is

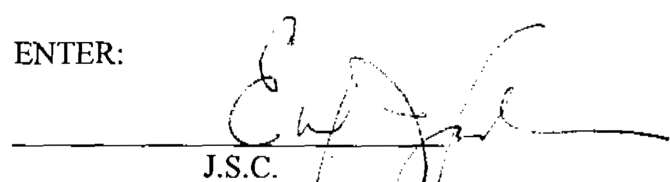
ORDERED that plaintiff's motion for partial summary judgment is denied, with leave to renew after the completion of discovery; and it is further

ORDERED that the parties contact the Court for a date for a settlement conference, with clients present.

This Constitutes the Decision and Order of the Court.

Dated: April 29, 2009

ENTER:



J.S.C.

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[5]The parties also may have intended that the Set Amount be the figure used to determine the commission, but plaintiff did not eliminate this fact issue with its moving papers as required on summary judgment.