

First Atl. Realty Inc. v Bozzo

2009 NY Slip Op 31293(U)

June 10, 2009

Supreme Court, New York County

Docket Number: 60213/05

Judge: Carol R. Edmead

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

HON. CAROL EDMEAD

PRESENT: _____

PART 35

Index Number : 602133/2005

FIRST ATLANTIC REALTY

vs.

BOZZO, ELBA

SEQUENCE NUMBER : 005

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 5/1/09

MOTION SEQ. NO. 006

MOTION CAL. NO. _____

his motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

FILED
JUN 15 2009
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that the motion

The instant motion and cross motions are decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the portion of Relais & Chateaux New York, Inc.'s and Relais & Chateaux International's motion for summary judgment is granted only to the extent of dismissing the claims of First Atlantic Realty Inc. and ATCO Residential Group, Inc.; and it is further

ORDERED that Relais & Chateaux New York, Inc.'s and Relais & Chateaux International's motion for summary judgment in all other respects is denied; and it is further

ORDERED that First Atlantic Realty Inc.'s and ATCO Residential Group Inc.'s cross motion for summary judgment is granted only to the extent of granting them summary judgment on the issue of liability as against Elba Bozzo and Jeanette Bozzo only; and it is further

Dated: _____

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

ORDERED that the issue of plaintiffs' damages is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that the portion of this motion dealing with the amount of damages is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiffs shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed information sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date; and it is further

ORDERED that counsel for the plaintiffs shall serve a copy of this order with notice of entry within twenty days of entry on counsel for all parties; and it is further

ORDERED that the action shall continue in all other respects.

Dated 6/10/09

ENTER:  J.S.C.

HON. CAROL EDMEAD

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----x
FIRST ATLANTIC REALTY INC. and
ATCO RESIDENTIAL GROUP INC.,

Plaintiffs,

Index No.: 60213/05

-against-

DECISION

ELBA BOZZO and JEANETTE BOZZO, AUDACES
FORTUNA, LLC, EUROPEAN COUNTRY KITCHENS
INC., and RELAIS & CHATEAUX NEW YORK,
INC.

Defendants.

-----x
ELBA BOZZO and JEANETTE BOZZO,

Third-Party Plaintiffs,

-against-

AUDACES FORTUNA, LLC, EUROPEAN COUNTRY
KITCHENS, RELAIS & CHATEAUX NEW YORK,
INC., and RELAIS & CHATEAUX
INTERNATIONAL,

Third-Party Defendants.

-----x
CAROL ROBINSON EDMEAD, J.:

FACTUAL BACKGROUND

Defendant Relais & Chateaux New York, Inc. (Relais) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and cross-claims asserted against it, and further moves, along with third-party co-defendant Relais & Chateaux International (collectively, Relais Defendants), pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint and cross-claims asserted against them. Plaintiffs First

Atlantic Realty Inc. (First Atlantic) and ATCO Residential Group, Inc. (ATCO), real estate brokers, cross move, pursuant to CPLR 3212, for summary judgment.

The initial complaint was filed against Bozzo on June 14, 2005, and was amended on October 9, 2005, to add Audaces Fortuna, LLC (Audaces) and European Country Kitchens, Inc. (ECK) as co-defendants. On July 12, 2007, Bozzo instituted the third-party action against Audaces, ECK and the Relais Defendants. On August 23, 2007, the Relais Defendants asserted counterclaims against Bozzo, alleging breach of contract, fraud, and negligent misrepresentation. On September 23, 2007, ECK asserted counterclaims against Bozzo. Finally, by leave of court on November 28, 2007, First Atlantic and ATCO amended the complaint to add Relais as a co-defendant.

This action arises out of a dispute as to the brokerage fees allegedly owing to First Atlantic and ATCO incident to the lease of a townhouse located at 148 East 63 Street, New York, New York, owned by defendants Elba and Jeanette Bozzo (Bozzo). On December 12, 2003, Bozzo and ATCO entered into a listing agreement with an exclusive right to rent the subject property. The Relais Defendants and ECK engaged the services of First Atlantic to locate a commercial rental property for them.

In the spring of 2004, First Atlantic alleges that it showed the subject property to David Peer (Peer), a principal of

defendants ECK and Audaces, a wholly owned subsidiary of ECK, who was seeking a commercial space for a joint venture among ECK, Audaces and the Relais Defendants.

According to the deposition of Jack Chanler (Chanler), president of First Atlantic, Peer was told that the custom was for the lessor of commercial space to pay the brokerage fee, and further stated that, unless he indicated otherwise prior to showing a particular location, the lessees would not be obligated to pay such commission. Chanler EBT at 48-49, Ex. B. Chanler further stated that he did not expect any broker commission fee from commercial tenants. *Id.* at 72-73.

On May 10, 2004, First Atlantic submitted an offer to ATCO on behalf of ECK, Audaces and the Relais Defendants to lease the subject premises at a monthly rental of \$18,000. This offer stated that it was contingent upon First Atlantic receiving a full commission, pursuant to an attached commission schedule for commercial rentals. Ex. F. Subsequently, through the brokers, the parties attempted to negotiate the lease. Allegedly, Bozzo wanted the tenants to pay the brokerage commission. By letter dated June 22, 2004, ATCO notified Bozzo that the tenant pays the broker's commission for residential leases, but the landlord pays the broker's commission for commercial leases. Ex. I.

On September 2, 2004, Bozzo notified ATCO that it was cancelling its agreement with ATCO. Opp. Ex. I. ATCO e-mailed

[* 6]

back to Bozzo, accepting the cancellation, but advising Bozzo that it was Bozzo's exclusive representative for the property, and if the property was leased to either ECK, Audaces or the Relais Defendants, ATCO was the procuring broker and would be entitled to a fee. Opp. Ex. K.

On or about December 29, 2004, Relais entered into a three month lease of the property with Bozzo, and on April 1, 2005, Relais and Bozzo entered into a commercial lease for a portion of the property, with a termination date of March 31, 2012. Ex. J. On April 15, 2005, Bozzo entered into a commercial lease for the remainder of the space at the townhouse with Audaces, terminating on April 30, 2012. The rent for the entire premises was \$20,000 per month.

The property in question did not have a certificate of occupancy for commercial use, and the tenants were evicted by the New York Department of Buildings. Ex. D.

The subject leases state that the premises were to be used for commercial purposes, but also state that the tenants were responsible for obtaining a certificate of occupancy if such is deemed necessary for the tenants to legally and lawfully use the premises as permitted by the lease. ¶ R-55 (D), Ex. J and K.

The complaint alleges that First Atlantic and ATCO are entitled to receive their brokerage commission fees from the Relais Defendants, Audaces and ECK based on a theory of unjust

enrichment. In the third-party complaint, Bozzo alleges that the leases provide for indemnification from the third-party defendants in the event that "any other broker or finder" asserts to have taken part in the procurement of the lease; however, the leases provided only contain a portion of the provision that allegedly allows for such indemnification, and does not contain the sections that indicate the name of the actual broker for the lease. Neither the Relais Defendants nor Bozzo, has provided a complete copy of the subject leases. Further, the provisions dealing with indemnification only indicate that the "misrepresenting party" is responsible for such indemnification, without identifying who such party might be.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment

must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

In opposition, First Atlantic and ATCO argue that the Relais Defendants' motion should be dismissed because it is only supported by an attorney's affirmation made without personal knowledge of the facts. However, the attorney's affirmation is used to introduce leases, court papers and deposition testimony, not as proof of the facts stated therein. As the court stated in *Olan v Farrell Lines, Inc.* (64 NY2d 1092, 1092 [1985]), "The fact that defendant's supporting proof was placed before the court by way of an attorney's affidavit annexing plaintiff's deposition testimony and other proof, rather than affidavits of fact on personal knowledge, does not defeat defendant's right to summary judgment." *Hoeffner v Orrick, Herrington & Sutcliff LLP*, 61 AD3d 614 (1st Dept 2009).

First Atlantic and ATCO then argue that the Relais Defendants' papers only contain conclusory arguments which are insufficient to sustain a motion for summary judgment. See *Shivers v Fishman*, 280 AD2d 355 (1st Dept 2001). However, First Atlantic and ATCO themselves only make this blanket statement, without pinpointing exactly which assertions of the Relais Defendants are unsupported conclusions. Furthermore, this argument is not only a generalization, but is rebutted by the documentary evidence submitted with the motion.

The contract between ATCO and Bozzo indicates that ATCO had the exclusive right to rent the property and that Bozzo was to be responsible for any brokerage commission for the commercial lease of the subject townhouse. The sworn testimony of Chanler, the First Atlantic representative, states that he told Peer, the owner of Audaces and ECK, that the landlord, not the tenant, of a commercial space is responsible for paying the brokerage fee. Furthermore, there is no contract between First Atlantic and the Relais Defendants to the contrary. Consequently, First Atlantic and ATCO have no contractual claim for a real estate broker's commission from the Relais Defendants.

First Atlantic's and ATCO's claim for the broker fee from the Relais Defendants is based on a theory of unjust enrichment.

The criteria for recovery under a claim of unjust enrichment are: "(1) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services [citation omitted]." *Joan Hansen & Co., Inc. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 108 (1st Dept 2002). In the instant matter, although First Atlantic and ATCO performed their services in good faith, and may be entitled to the reasonable value thereof, they never expected compensation from the Relais Defendants. *Brener & Lewis Management, Inc. v Engel*, 168 AD2d 254 (1st Dept 1990)

(there can be no recovery in quantum meruit when there is no expectation of compensation). All of the evidence submitted indicates that, as the lessor of commercial space, it was Bozzo who would be responsible for any brokerage commission. First Atlantic and ATCO have not provided any evidence that the Relais Defendants were ever considered to be responsible for the real estate brokerage commissions. Furthermore, since there is an express contract that covers the issue in dispute, a claim of quantum meruit is inappropriate. *Gary Powell, Inc. v Mendel/Borg Group, Inc.*, 237 AD2d 407 (2d Dept 1997). Therefore, the Relais Defendants are entitled to summary judgment as against the claims of First Atlantic and ATCO.

However, First Atlantic and ATCO are entitled to summary judgment, with respect to liability, as against Bozzo.

Under New York law, a real estate broker is entitled to a brokerage commission when it produces a purchaser or tenant ready, willing and able to buy or lease the property in question. *Corcoran Group, Inc. v Morris*, 107 AD2d 622 (1st Dept 1985), *affd* 64 NY2d 1034 (1985). The broker is entitled to his commission once he has performed his contract by providing a ready, willing and able tenant, which First Atlantic and ATCO undoubtedly did in the instant matter, as evidenced by the two leases eventually executed by the parties. *See generally Hecht v Meller*, 23 NY2d 301 (1968). This is true regardless of whether the leases could

not eventually be carried out due to misrepresentations by the property owner. *Schweid v Storandt*, 157 App Div 855 (4th Dept 1913), *affd* 217 NY 637 (1916).

"It is sufficient to entitle a real estate broker to compensation that a [lease] is effected through his agency as its procuring cause; and if his communications with the [tenant] are the means of bringing him and the owner together, and the [lease] results in consequence, the compensation is earned, even though the broker does not negotiate and is not present at the [execution] [internal citation omitted]."

Brown, Harris, Stevens, Inc. v Rosenberg, 156 AD2d 249, 250 (1st Dept 1989).

In the case at bar, there is no dispute that Bozzo, Audaces, ECK, and the Relais Defendants were all brought together by First Atlantic and ATCO. There is also no dispute that Audaces, ECK and the Relais Defendants were appropriate and qualified tenants for the property. Additionally, there is no evidence whatsoever that the parties would have entered into the leases without the services of First Atlantic and ATCO. All of the evidence provided points to the conclusion that First Atlantic and ATCO were the procuring cause of the subject leases.

Bozzo cannot avoid their obligations to the real estate brokers by cancelling their contract in bad faith.

On September 2, 2004, after several months of negotiations, Bozzo cancelled its agreement with ATCO, and the initial lease was signed just over three months later. No viable explanation is given for this conduct, and the most logical conclusion is

that Bozzo was attempting to avoid paying the real estate broker's commission.

"It is clear that the plaintiff, through its brokers, was the procuring cause of the [leases] between the defendant, as lessor, and the codefendant ... as lessee. The evidence adduced established an amicable atmosphere, set up by the plaintiff, in which negotiations proceeded and generated a chain of circumstances that proximately led to the lease deal. The defendant's last minute attempt to eliminate the plaintiff's commission was a mere device to escape payment of the commission [internal quotation marks and citations omitted]."

Friedland Realty Inc. v Piazza, 273 AD2d 351, 351 (2d Dept 2000).

Furthermore, ATCO had an exclusive right to rent, as evidenced by the contract between ATCO and Bozzo, and that right entitles it to a commission regardless of who actually consummates the lease. See *Far Realty Associates, Inc. v RKO Delaware Corp.*, 34 AD3d 261 (1st Dept 2006); see *Hammond, Kennedy & Co. v Servinational, Inc.*, 48 AD2d 394 (1st Dept 1975).

However, an unresolved question exists as to whether First Atlantic and ATCO are each entitled to a separate full commission, or they are to share one commission, and for this reason they are entitled to summary judgment on the issue of liability alone.

Lastly, the Relais Defendants' motion for summary judgment with respect to Bozzo is denied. Since the operative portions of the lease provided are incomplete, a material question of fact exists as to whether Bozzo is entitled to indemnification from

the Relais Defendants, as well as Audaces and ECK, precluding summary judgment.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the portion of Relais & Chateaux New York, Inc.'s and Relais & Chateaux International's motion for summary judgment is granted only to the extent of dismissing the claims of First Atlantic Realty Inc. and ATCO Residential Group, Inc.; and it is further

ORDERED that Relais & Chateaux New York, Inc.'s and Relais & Chateaux International's motion for summary judgment in all other respects is denied; and it is further

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ORDERED that the issue of plaintiffs' damages is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

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ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiffs shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed information sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date; and it is further

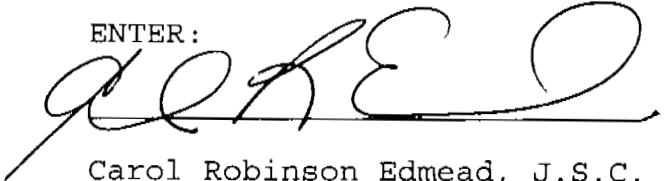
ORDERED that counsel for the plaintiffs shall serve a copy of this order with notice of entry within twenty days of entry on counsel for all parties; and it is further

ORDERED that the action shall continue in all other respects.

Dated: June 10, 2009

FILED
JUN 15 2009
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:



Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD