

B. Adams Holding Corp. v Attia Enters.

2009 NY Slip Op 31400(U)

June 24, 2009

Supreme Court, New York County

Docket Number: 115501/08

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
JUDITH J. GISCHE, J.S.C.

PRESENT: _____

PART 10

Index Number : 115501/2008
B. ADAMS HOLDING CORP.
VS.
ATTIA ENTERPRISES
SEQUENCE NUMBER : 001
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

FILED

JUN 25 2009

COUNTY CLERK'S OFFICE
NEW YORK

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

Dated: 6/24/09

JUDITH J. GISCHE, J.S.C. 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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----x
B. ADAMS HOLDING CORP. and NFRN
CAPITAL, INC.,

Plaintiff,
-against-

ATTIA ENTERPRISES, HARBOR ISLAND
VIEW, LLC, HARBOR ISLAND
CONDOMINIUMS LLC and OFFER ATTIA,

Defendants.
-----x

Decision/Order

Index No.: 115501/08

Seq. No. : 001

Present:

Hon. Judith J. Gische

J.S.C.

FILED
JUN 25 2009
COUNTY CLERK'S OFFICE
NEW YORK

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

Pltf's motion [SJ] w/GA affid, HMB affid, DAK affirm, exhs 1

Numbered

Upon the foregoing papers, the decision and order of the court is as follows:

In this action, plaintiffs seek to recover commissions allegedly due to them.

Plaintiffs now move, pursuant to CPLR § 3212, for summary judgment in their favor and against defendants Attia Enterprises ("Enterprises"), Harbor Island View, LLC ("Harbor LLC"), Harbor Island Condominiums, LLC ("Harbor Condo") and Offer Attia ("Attia").

Despite proof or service of the instant motion on each of the defendants, none of them have submitted any opposition thereto. Therefore, the motion is considered on default.

At the outset, summary judgment relief is not available as to Harbor LLC or Harbor Condo. Although Attia has submitted an answer purportedly on behalf of these corporate entities, CPLR 321(a) provides that a corporation shall appear by attorney in prosecuting or defending a civil action. Therefore, issues has not been joined as to

Harbor LLC and Harbor Condo. The motion, insofar as it seeks relief against Harbor LLC and Harbor Condo, is denied. CPLR § 3212. Since these defendants have failed to answer or appear in this action, assuming plaintiffs can demonstrate proof of service of the summons and complaint, the next stage in this litigation would be for plaintiffs to move for a default judgment. Plaintiffs have ninety days from the date of this decision to so move. Failure to do so within the time provided will be deemed as an abandonment by plaintiff of its claims against these defendants, and the court shall dismiss same for failure to prosecute. CPLR § 3216.

Attia's answer on behalf of himself and Enterprises, a "doing business as" for Attia, is sufficient to join issue as to these two defendants. Since note of issue has not yet been filed then, summary judgment relief against same is available. Brill v. City of New York, 2 N.Y.3d 648 (2004).

On or about April 11, 2007, plaintiff NFRN Capital Inc. ("NFRN") entered into a Fee Agreement with the defendants Enterprises, Harbor LLC and Harbor Condo wherein these same defendants were obligated to pay a commission of 1.25% for any financing, whether debt or equity, provided by any of NFRN's sources for a project pertaining to Harbor Island Condominiums, 532 W. Boston Post Road, Mamoroneck, New York, 10543 (the "project"). Attia signed the Fee Agreement on behalf of the defendants Enterprises, Harbor LLC and Harbor Condo.

On or about October 11, 2007, plaintiffs B. Adams Holding Corp ("Adams") and NFRN entered into an Agreement wherein the plaintiffs agreed to "split evenly" the commission due on the "project." Plaintiffs claim that they obtained the financing for defendants Enterprises, Harbor LLC and Harbor Condo (the "loan"). However, there is

no dispute that a closing for the loan never took place. Plaintiff maintains that the "Defendants defaulted in closing the loan." Defendants, in their answer, maintain that "due to disagreement of the Defendants with the loan terms, the closing was cancelled and the loan was never obtained."

Plaintiffs argue that even though a closing never took place, they "earned their commission" and such commission is owed to them and remains due and owing. Their sole cause of action is for breach of the Fee Agreement. Defendants, in their answer, argue that under the terms of the Fee Agreement, plaintiffs were only entitled to a commission upon closing of any financing obtained by plaintiffs, and since no closing took place, plaintiffs are not entitled to any commission. Defendants, in their answer, also assert a defense that Attia "should be dismissed from [this action]" because he has no "personal contractual obligations" to the plaintiffs.

Discussion

On a motion for summary judgment, it is the movants' burden to set forth evidentiary facts to prove its *prima facie* case that would entitle them to judgment in their favor, without the need for a trial. Only if this burden is met, must the party opposing the motion then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her failure so to do. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Where, however, the proponent fails to make out its *prima facie* case for summary judgment, then the motion must be denied, regardless of the sufficiency the opposing papers. Alvarez v. Propect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993). When

issues of law are the only issues raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 AD2d 459 (2d Dept 2003).

The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. Furia v. Furia, 116 A.D.2d 694 (2d Dept 1986).

The Fee Agreement provides as follows:

It is agreed that ATTIA shall pay a commission of 1.25% (One and One Quarter Percent) for any financing, whether debt or equity, provided by any of NFRN's SOURCES for this PROJECT, including but not limited to George Adams of B Adams Holding and Guaranteed Home Mortgage, to be paid at closing.

It is understood that the actual dollar amount of the commission may change and will be calculated as 1.25% (One and One Quarter Percent) of the final dollar amount of the transaction.

"[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 N.Y.2d 157, 162 (1990). Defendants' argument rests on an interpretation of the Fee Agreement which is contrary to its plain meaning because it would effectively insert a condition into the contract that the commission due to plaintiffs would only be payable if title was actually closed. Rather, the term "to be paid at closing" can only be reasonably interpreted to fix the time when Enterprises should pay the commission that was otherwise earned, and that the actual closing of title was not a condition precedent to recovery of the commission. The Fee Agreement contains no inherent ambiguity or uncertainty, and the court will not interpret this contract in a way not intended by the parties at the time the Fee Agreement was entered into merely to

relieve a party from asserted disadvantage flowing from the terms of the contract. Collard v. Incorporated Village of Flower Hill, 52 N.Y.2d 594 (1981). Accordingly, plaintiffs are entitled to summary judgment on their sole cause of action against Enterprises.

As to Attia's personal liability, although he is not a signatory to the Fee Agreement, he is nonetheless personally liable insofar as there is no dispute that Enterprises is either a sole proprietorship or d/b/a by which Attia conducted business. Since neither of these corporate forms limit his liability on the Fee Agreement, Attia is, therefore, personally liable for the debts and obligations of Enterprises. Accordingly, plaintiffs are also entitled to summary judgment against Attia, individually.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiffs' motion for summary judgment is granted only to the extent that plaintiffs are entitled to summary judgment against defendants Attia Enterprises and Offer Attia; and it is further

ORDERED that the clerk shall enter a money judgment in favor of plaintiff B. Adams Holding Corp and against defendants Attia Enterprises and Offer Attia, joint and severally, in the total sum of \$99,712.16; and it is further

ORDERED that the clerk shall enter a money judgment in favor of plaintiff NFRN Capital, Inc. and against defendants Attia Enterprises and Offer Attia, joint and severally, in the total sum of \$99,712.16; and it is further


ORDERED that plaintiffs shall move within 90 days for entry of a default judgment

against defendants Harbor Island View, LLC and Harbor Island Condominiums LLC. Failure to do so shall be deemed an abandonment by plaintiff of its claims against these defendants, and the court shall dismiss same for failure to prosecute. CPLR § 3216.

Any requested relief not expressly addressed herein has nonetheless been considered by the court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
June 24, 2009

So Ordered:


HON. JUDITH J. GISCHE, J.S.C.

FILED
JUN 25 2009
COUNTY CLERK'S OFFICE
NEW YORK