

Aug v 166 Enters. Corp.
2009 NY Slip Op 31766(U)
August 3, 2009
Supreme Court, New York County
Docket Number: 115083/08
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____

PART 10

Index Number : 115083/2008
AUG, JAMES S.
VS.
166 ENTERPRISES
SEQUENCE NUMBER : 001
DISMISS

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

submitted to oral argument - 2 failed to appear.

FILED
AUG 06 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

~~MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.~~

Dated: 8/3/09

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: IAS PART 10**

-----X
James S. Aug as the personal representative
of the E/O Charles Aug, deceased and Peter
Botsaris,

Plaintiff (s),

-against-

166 Enterprises Corp. and
Jacob Ben Moha,

Defendant (s).
-----X

DECISION/ ORDER

Index No.: 115083/08

Seq. No.: 001

PRESENT:

Hon. Judith J. Gische
J.S.C.

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

Papers	Numbered
Notice of Motion, PF affirm., gf affirm., exhibits.....	1
Notice of Cross-Motion. JBM affd., exhibits.....	2
PF Reply affirm., exhibits.....	3

FILED
AUG 06 2009
COUNTY CLERKS OFFICE
NEW YORK

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

Plaintiffs bring this action seeking real estate broker's commissions claimed due on a real estate lease option that was exercised by a tenant. They presently move to strike defendants' answer for failing to appear for depositions. Defendants have cross-moved for summary judgment dismissing the complaint. Issue has been joined and no Note of Issue has yet been filed. Thus, the summary judgment motion is properly before the court and may be considered at this time. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004). Since the disposition of the cross-motion for summary judgment could potentially effect the motion for discovery sanctions, it is considered first.

"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." Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). A party may not defeat a motion for summary judgment with bare allegations of unsubstantiated facts. Zuckerman v. City of New York, supra at 563-64.

Defendants argue that summary judgment dismissing Jacob Ben Moha from the case personally should be granted because the agreements sued upon demonstrate that they were not signed by Jacob Ben Moha in a personal capacity. Although Mr. Moha disputes that they were signed by him at all and claims the signatures are a forgery, on this motion he argues that even were the court to find the signatures bona fide, they do not bind him personally.

Defendants further argue that the "agreements" to pay any commissions are conflicting, thereby warranting dismissal of the action.

Defendant puts forth two documents purporting to address the issues of real estate commissions. One is a "memorandum" dated September 12, 1997 that purports to be signed by:

"Jacob Benmoha (signature)
Mr. Jacob Benmoha
President
Mayfair Market"

The second document is dated September 18, 1997 and is entitled "Commission Agreement." It purports to be signed by:

"OWNER/LANDLORD/LESSOR
166 Enterprise By. Officer .

By: Jacob Benmoha (signature)"

Even if these signatures are found to be genuine, it is beyond dispute that Jacob Ben Moha did not sign in any personal capacity. Plaintiff raises no argument in opposition that would legally obligate Jacob Ben Moha to personally pay any commission owed. The motion for summary judgment dismissing the action as to him personally is granted.

Defendants have not made out a prima facie case for summary judgment dismissing the complaint against the remaining defendant, 166 Enterprises Corp. The fact that there may be conflicting agreements, does not, as a matter of law, mean that neither is enforceable. At least one of the documents is signed by 166 Enterprises. Moreover plaintiff has produced copies of checks from 166 Enterprises Corp. that appear to be in payment of earlier commissions owed. The motion for summary judgment dismissing the complaint against 166 Enterprises Corp. is, therefore, denied.

Plaintiff claims that it is entitled to have the defendants' answer struck because they have failed to submit to depositions. CPLR 3126. Since the court already found that the action against Jacob Ben Moha should be dismissed, any request to strike the answer is denied as moot.

As to the remaining defendant, plaintiff has shown that he noticed defendants deposition before the preliminary conference was held. At the preliminary conference, the parties agreed and the court ordered depositions to take place on April 3, 2009. Thereafter defendant's attorney sought an adjournment of the April 3rd date for an additional 30 days, due to defendants' pressing business obligations Plaintiff would not agree.

Plaintiff claims that the delay in scheduling a deposition was willful and contumacious, warranting the severe sanction of striking defendant's answer. The court disagrees. While plaintiff is frustrated with the slow pace of discovery, there is nothing to suggest that defendant was seeking to avoid being deposed at all. Defendant had proposed at least two alternative deposition dates, that were ultimately rejected by plaintiff. Thus, striking of the answer is not warranted as of this time. Instead the court grants the motion only to the extent of directing the defendant appear for deposition at a mutually agreeable time on or before September 4, 2009. In the event 166 Enterprises, Inc., the remaining defendant, fails to appear for deposition, the motion for sanctions may be renewed.


Accordingly, the motion to strike the defendants' answer is granted only to the extent that defendant 166 Enterprises shall appear for deposition on or before September 4, 2009. The motion is otherwise denied.

The cross-motion is granted only to the extent of granting summary judgment dismissing the complaint against defendant Jacob Ben Moha. The cross-motion is otherwise denied. The claims against Jacob Ben Moha are hereby severed and dismissed and the clerk of the court is directed to enter a judgment dismissing the claims against Jacob Ben Moha.

Any relief requested that has not been addressed has nonetheless considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
August 3, 2009

So Ordered:

 Hon. Judith J. Gische, J.S.C.

FILED
 AUG 06 2009
 COUNTY CLERK'S OFFICE
 NEW YORK