

Casper v Cushman & Wakefield

2009 NY Slip Op 31955(U)

August 18, 2009

Supreme Court, New York County

Docket Number: 600419/2006

Judge: Louis B. York

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

PRESENT: _____

PART _____

Justice

Casper

INDEX NO.

600919 | 06

MOTION DATE _____

MOTION SEQ. NO.

001

MOTION CAL. NO. _____

- v -

Cushman & Wakefield

The following papers, numbered 1 to _____ were read on 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

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

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: _____

8/18/09

Luy

LOUIS B. YORK

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

REFERENCE

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 2

-----X
LEON CASPER

Plaintiff, Index # 600419/2006

-against-

CUSHMAN & WAKEFIELD

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 419).

-----X
YORK, J.:

In this action in which Leon Casper, an independent broker for defendant, Cushman & Wakefield, seeks commissions to which he is allegedly entitled, Cushman & Wakefield moves for an order granting it summary judgment dismissing the complaint and awarding it its reasonable legal fees, costs and expenses.

Background

Casper, who had been employed as a broker for Cushman & Wakefield since about 1959, became an independent contractor for it, pursuant to a written Independent Contractor Agreement (ICA), on April 1, 1994. The ICA provided, *inter alia*, that it was to continue until March 1, 1995 and that Cushman & Wakefield might agree to extend Casper's association for an additional year on the same terms as provided in the contract. However, either party could terminate the contract on 30 days written notice.

The ICA further provided (at ¶ 5 [a]), with respect to commissions for "leasing transactions in which Contractor has rendered services" that, subject to the contract's other terms, the contractor's full and only payment would be 50% of the gross commission, less certain expenses and any outside broker's commission. After its expiration or termination, the ICA (at ¶ 5 [b]) limited the contractor's ability to share in commissions. The ICA also gave Cushman & Wakefield the rights to assign its employees to work with or in place of the contractor, determine the commission charged and decide whether any transaction was "consummated in whole or in part by the Contractor's efforts." ICA at ¶ 6. In the event that Cushman & Wakefield assigned its employees to work with or in place of the contractor, the contractor's fees were subject to reduction "as in the reasonable opinion of [Cushman & Wakefield] is merited based upon the amount of work performed and the contribution made to the transaction by the Contractor and [Cushman & Wakefield] personnel ..., who have aided in the consummation of the transaction." *Ibid.*

If the contractor disputed Cushman & Wakefield's decision regarding the amount or allocation of his/her share of the commission, the contractor had the right to seek arbitration of that dispute before the American Arbitration Association (AAA),

such right had to be exercised within 30 days of receipt of the amount of the contractor's share of the commission. The arbitrator's determination was to be final and binding. If the contractor failed to notify Cushman & Wakefield within the 30-day period, that he desired a determination by the AAA, the contractor was deemed to have accepted Cushman & Wakefield's determination and waived the right to contest it.

The ICA further provided (at ¶ 14 [a]) that the parties had all existing legal and equitable remedies to enforce the "terms of or obligations arising out of this Agreement." It further provided that in any such proceeding, the prevailing party was in any action or proceeding to "interpret or enforce the terms of or entitled to recover from the non-prevailing party all reasonable legal fees, costs and expenses. The ICA (at ¶ 19) required any modifications or waivers of it to be in writing signed by the party to be charged.

The ICA expired by its terms in March 1995, and no further agreement or modification was ever executed. Casper continued to render services for Cushman & Wakefield and was still provided with commissions, when Cushman & Wakefield deemed it appropriate, and an office and a telephone. Casper contends that the ICA was in effect through his termination in August 2002.

In about 1999, a Cushman & Wakefield employee broker, Tara Stacom, and her team, began to represent a tenant client, Visiting Nurse Services (VNS), with respect to its leasing needs in Manhattan, Brooklyn and the Bronx. VNS's leases in the Bronx were expiring, and it wanted to consolidate its Bronx operations into one location. The plan was to lease some space in the short-term, while looking for one large space to be leased for the long-term. Stacom sought the services of Casper, who was familiar with the Bronx, to assist her team in meeting VNS's needs in that borough.

As to VNS's short-term needs, it is claimed that Casper found 1967 Turnbull Avenue (Turnbull Avenue), took VNS on a tour of it, VNS leased it, and that a commission was paid to Cushman & Wakefield, but that Casper was never paid anything. An October 4, 2001 e-mail from Stacom shows that she was considering giving Casper a 25% commission on that transaction and for the long-term lease on a property "not yet selected."

In addition, it is claimed that Casper completed a short-term deal for VNS at 2231 Westchester Avenue (Westchester Avenue), also referred to as 2233 and 2245 Westchester Avenue, was given a commission check, which he turned over to Cushman & Wakefield, requested payment, but never received any. Further,

Casper claims that VNS extended an option to renew that lease and that he received no commission for that either, allegedly as a result of Stacom's efforts to exclude him.

Regarding the long-term lease deal, Casper wrote to Laura Eber of VNS, by letter dated February 9, 2001, informing her of a 320,000 square foot property at 1200 Waters Place (also referred to as 1500 Waters Place), which had been recently acquired by a landlord, who was developing plans to increase its size and modernize it. Opposing exh. 1. He informed Eber that it was estimated that the property could be ready to occupy in 12-18 months, and that it was an option for them to consider. Casper further advised that he was waiting for descriptive materials, which he should receive in a week and would forward them to her once he received them. He indicated that they should discuss this, once he forwarded the materials to her the following week, and decide if they wanted to proceed. As is relevant, the February 9 letter was copied to Stacom and David Wolf, a junior member of Stacom's VNS team. It is unclear whether Casper received the materials the following week, but, in any event, he does not claim to have ever forwarded them to Eber. At his deposition (at 570, 571, 1133) Casper testified that he never showed the property to VNS, never met with Simone Development,

[* 7]

the property's leasing agent, in connection with placing VNS there, did not view the property in regard to VNS' placement there, and could not recall any follow-up after he sent the February 9 letter. Meanwhile, Casper continued to service VNS, by inter alia, showing it other properties, including on April 11, 2001 (Opposing exh. 3).

At some unspecified time, and no later than April 20, 2001, the relationship between Casper and Stacom started to sour, as reflected in a memo from Casper to Paul Moss, a Cushman & Wakefield employee, who handled broker conflicts. Opposing exh. 4. It is not entirely clear from that memo whether Stacom had already dismissed Casper from the VNS assignment at that time or was merely considering his removal, since some of the statements are possibly internally inconsistent, but it appears that Stacom was at minimum dissatisfied with commission arrangements Casper had made. Casper claims he was officially fired by Stacom from working on the VNS assignment on or about June 6 or 7, 2001. Casper aff. in opp. According to Stacom, who did not recall when Casper was removed from the VNS account, he was removed because VNS was dissatisfied with his performance. He was also allegedly removed because he gave away 1/3 of Cushman & Wakefield's commission to the landlord's agent on the Westchester

Avenue deal's first lease renewal, without obtaining Stacom's consent.

It appears that on June 19, 2001, after Casper was fired by Stacom, she sent Wolf to Cushman & Wakefield's appraisal department to see if they had any leads on a long-term lease prospect for VNS. It was not uncommon at Cushman & Wakefield that its appraisal department would contact its brokers for leads on appraisals, and that its brokers would contact the appraisal department for leads on properties. That department had appraised the Waters Place property for Simone Development and/or the landlord, and Philip Cadorette of that department advised Wolf of that property. That day, Wolf e-mailed Cadorette that it seemed as though it might be a good opportunity for their client and that he needed to promptly speak directly with its owner. The next day Cadorette replied that he had put in a call to Steve Woods, who was handling leasing at the property, and told him that Stacom would call him about the tenant's requirements.

On June 27 Woods gave, Stacom's team and Cadorette, a tour of the Waters Place property, which was formerly a residential psychiatric facility. The following day Cadorette e-mailed Woods and thanked him for giving the tour and for considering

Cushman & Wakefield as the brokers to market the leasing of the property.

Stacom was concerned that, as the representative of VNS, which was going to negotiate a lease for a portion of the Waters Place property, she had a conflict in trying to obtain the exclusive agency. She therefore claimed that she let other members of her team handle the negotiations for the exclusive agency. Meanwhile Stacom's team negotiated the VNS lease for the Waters Place property which was signed "around April 11, 2002." Stacom claims that Mr. Simone was impressed with her negotiating skills and was pleased with the results, and thus, after the VNS lease was executed, Simone retained Stacom and Cushman & Wakefield as the exclusive agent to procure tenants for the balance of the property's space. On about August 5, 2002, Cushman & Wakefield issued an internal announcement of the exclusive agency assignment.

Cadorette believed, that his introduction, entitled him to money in connection with all transactions on the exclusive agency. Stacom disagreed, but ultimately gave him, as a one-time thank you for his effort \$10,000, in full satisfaction of his claim. Arthur Mirante, Cushman & Wakefield's president, testified

at his ebt that it was acceptable to give a finder's fee to someone in the appraisal department.

Meanwhile, after being fired from Stacom's VNS team, Casper continued to be concerned about whether he would get appropriate credit for the VNS lease transactions, and had meetings and sent correspondence to various Cushman & Wakefield employees, including a July 8, 2002, letter to Mirante about Waters Place, Westchester Avenue and Turnbull Avenue. Casper also complained about several commissions unrelated to VNS. Specifically, he complained about the size of a commission that he had received in 2000 on a Deer Park, Long Island deal, and he was concerned that a Bush Terminal agency had an additional extension. Within a week of that letter, Cushman & Wakefield's General Counsel, Kenneth Singleton, gave Casper notice that Cushman & Wakefield had elected to terminate his relationship with it, effective August 16, 2002, and that the undated ICA would terminate at the same time. According to Mirante deposition testimony, Casper was terminated because of a lack of productivity and because his unhappiness with the company's management, and claiming that Casper had agreed with Mirante to pursue his Bush Terminal and VNS disputes via Cushman & Wakefield's internal arbitration procedure. A list of arbitrators was attached the letter which

gave Casper five days to choose an arbitrator. Mirante had testified that Casper had also been offered AAA arbitration procedures, if he did not feel comfortable with internal arbitration. At the time the termination letter was issued, all the various brokers' shares of the VNS lease deals had not been finalized, so that Casper did not know the amount of or allocation of his commissions on those leasing deals. Others, including Wolf and another team for which he had previously worked, were involved in attempting to get a bigger share of the VNS Waters Place lease deal than Stacom thought they deserved.

Casper did not select an arbitrator, but continued to send letters to Mirante and others at Cushman & Wakefield about his commissions. In addition, after he learned of the exclusive agency, Casper eventually sought to participate in commissions earned from it. In response to some of Casper's letters, he was advised by Mirante, Kenneth Krasnow, a Cushman & Wakefield manager, who was trying to resolve the VNS commission splitting issues among the brokers, and by Singleton, in essence that if in response to certain outstanding issues which Cushman & Wakefield was attempting to resolve among the brokers, issues remained unresolved, Casper's "rights to arbitrate and litigate remain[ed]." Opposing exhs. 35, 50, 62. The rights referred to

in these letters, appear only to relate to matters that Cushman & Wakefield was still in the process of negotiating among the brokers. It does not appear from any of these letters, or the letters to which they were responding, that the outstanding disputes that Cushman & Wakefield was attempting to resolve among the brokers included the Deer Park matter. In response to Singleton's letter, the last of these three letters, which only mentioned Casper's arbitration and litigation rights with respect to the VNS internal brokerage negotiation, evidently related solely to VNS's leases and not the exclusive agency, Casper replied that he would not go to arbitration, did not want to go to litigation, was prepared to litigate, but thought more could be accomplished in a meeting with reasonable Cushman & Wakefield people. Singleton did not reply.

Eventually, in December 2003 Cushman & Wakefield created an internal broker commission breakdown for the VNS Waters Place lease. Casper's share was determined to be 5%, less than that determined to be the shares of Wolf and his former team. Mirante testified at his ebt that commission shares were determined by agreement of the brokers, guided by "the laws of the jungle" and the contribution of each broker to the results.

Mirante, who believed that the situation was the same for employee brokers and independent contractor brokers, testified that while management tried to help settle commission disputes among brokers, it could not impose its will on them. Hence, the contractual arbitration provision, which was negotiated by its senior brokers 20-25 years before. Preventing management from dictating to the brokers. Every year there would typically be one to two informal arbitrations, and seldom would formal arbitration be needed.

According to Casper, in late December, a check for \$17,459.48 was issued and sent to him for the VNS Waters Place lease, without a breakdown of the brokers' commissions. He cashed the check without prejudice to any of his rights. Casper asserts that the check was unaccompanied by any information about Turnbull Avenue, Westchester Avenue or the Waters Place exclusive agency. Kenneth Goldstein, Cushman & Wakefield's Assistant General Counsel, asserts that Casper received a printed notice on approximately December 16, 2003, which broke down the commissions of all the brokers on the Waters Place VNS lease deal. That document, headed in large print **"VISITING NURSE SERVICE COMMISSION ALLOCATIONS"** had a handwritten note, "Leon, This is the only assignment in which you were credited with." Goldstein

aff., ¶ 17 and attached exh. F. Casper in his opposition papers does not address the allegation that he received this document.

About two years later, Casper retained counsel, who on November 21, 2005 wrote Cushman & Wakefield, claiming that Casper was owed commissions and requesting, in an effort "to avoid litigation," that documentation regarding, inter alia, the VNS lease transactions, the exclusive agency at Waters Place, Deer Park and Bush Terminal be provided by December 12. Goldstein responded that Cushman & Wakefield would send documentation where any commission was due, but that it would be forwarded during the first quarter of 2006, since this was the busiest part of Cushman & Wakefield's year.

The Instant Action

According to Casper, no documents were forthcoming, so this action was commenced. The verified complaint contains three breach of contract causes of action in which Casper seeks commissions respectively for the Waters Place, Turnbull Avenue and Westchester Avenue VNS leases as well as for the Waters Place exclusive agency, Bush Terminal and for the Deer Park property. Each such cause of action asserts that the parties had legally enforceable written or agreements. The complaint then goes on to assert three causes of action each sounding in unjust enrichment

and *quantum meruit*, with respect to commissions allegedly owing on the foregoing properties.

Cushman & Wakefield now seeks an order granting it summary judgment dismissing the complaint. It asserts that the Bush Terminal claims were abandoned by Casper once he was provided with documentation, which demonstrated that he had already been compensated in full with respect to that property. Thus, Cushman & Wakefield seeks dismissal of the second, fifth and eighth causes of action.

Cushman & Wakefield maintains that all the unjust enrichment and *quantum meruit* causes of action (causes of action fourth-ninth) must be dismissed since a valid contract, namely the ICA, governs the parties' relationship. Cushman & Wakefield notes that Casper took the position at his deposition, that until his termination, the ICA was in effect and that the complaint, verified by Casper, repeatedly relies on the ICA, which the complaint characterizes as a valid and legally enforceable agreement, to support Casper's claims. Cushman & Wakefield further asserts that, in light of the fact that the ICA requires the parties to submit all commission disputes to binding arbitration, and since Casper failed to and chose not to submit these disputes to arbitration, this action cannot be maintained.

Cushman & Wakefield also asserts that Casper's claim that an e-mail from Stacom establishes that he is entitled to a 25% commission for the VNS leases is unpersuasive and that the e-mail does not constitute a binding agreement. It further maintains that Casper is not entitled to any commissions in connection with the exclusive agency because he was retained by Stacom's team to find a space for VNS, and was not retained to lease Waters Place for its landlord, he was not the procuring cause of that exclusive agency, paragraph 5(b) of the ICA does not permit Casper to collect the commissions he seeks after he was terminated, that Casper cannot demonstrate lost profits, and that although the complaint does not seek a finder's fee, to the extent that such relief is sought, such claim must fail because he never entered into an agreement with Cushman & Wakefield to merely act as a finder and because his payment was restricted to his commissions under ICA paragraph 5 (a). Thus, Cushman & Wakefield asserts that the complaint must be dismissed. Finally, Cushman & Wakefield requests that if the breach of contract causes of action are dismissed, it is entitled, as the prevailing party, to legal fees, costs and expenses, under paragraph 14 (a) of the ICA.

While Casper fails to dispute that he is not entitled to any other commissions regarding Bush Terminal, he claims that he is entitled to his legal fees on the Bush Terminal claims because Cushman & Wakefield had never responded to his requests for documentation regarding the possibility that commissions were owed him on that deal until this action was commenced.

As to the balance of Casper claims, he asserts that there is an issue of fact as to whether the ICA is valid, since, after it was signed and returned to Cushman & Wakefield, it never signed the ICA and because it was never extended in writing. Casper further urges as to the validity of the ICA, that the termination letter nullified the ICA, including its arbitration clause.

Casper also asserts that the contractual provision requiring him to arbitrate his commission claims was waived by Cushman & Wakefield, via the various letters in which it was recited that his rights to arbitrate and litigate remained. He further maintains that his right to arbitration was never triggered as to the exclusive agency and Westchester Avenue, since he was never provided with written notice regarding his share of commissions, notwithstanding that he does not specifically refute Goldstein's assertion that Casper received the note that he was only credited with the Waters Place VNS

lease. Casper also claims that the Stacom October 4, 2001 e-mail acknowledges Stacom's agreement that he was entitled to 25% of the commissions on the VNS locations. In addition, Casper claims that Mirante's deposition testimony shows that the ICA was not the sole determinant in establishing commissions. Casper further claims that he helped Cushman & Wakefield obtain the exclusive agency by locating Waters Place in February 2001 and that, because the exclusive agency was entered into before he was terminated as an independent broker, he is entitled to commissions under that exclusive agency. He additionally urges that his locating the property and notifying VNS of it demonstrates that he was the procuring cause of the exclusive agency. Casper takes the position that an issue of fact exists as to whether he was fired from Stacom's team and then from the defendant company to avoid his sharing commissions, thereby raising an issue as to whether defendant breached its covenant of good faith and fair dealing. Casper believes that he can demonstrate damages on the exclusive agency or, alternatively, that he is entitled to a finder's fee for that agency.

Discussion

Since it is undisputed that Casper is not owed any commissions on the Bush Terminal property, the second, fifth and

eight causes of action are dismissed. Because he was not the prevailing party with respect to these causes of action, he is not entitled to legal fees.

The branch of the motion which seeks an order dismissing the fourth, sixth, seventh and ninth causes of action, which assert claims sounding in unjust enrichment and *quantum meruit* with respect to Deer Park, the VNS leases and the exclusive agency, is granted in light of the existence of a valid contract, and those causes of action are dismissed. Casper's position at his deposition and in his interrogatory responses was that the ICA was in effect until he was terminated in August 2002. There is no claim by him that the terms or conditions of his independent contractor arrangement with Cushman & Wakefield changed after March 1, 1995. And, when he was terminated, he was given the requisite notice under the ICA. The parties' conduct shows that a new contract containing the same provisions as the old contract arose. *North American Hyperbaric Center v City of New York*, 198 AD2d 148 (1st Dept 1993, lv denied 83 NY2d 758). Nor, does he claim that he never agreed to arbitrate his commission disputes after March 1, 1995. Indeed, at his deposition, when asked why he did not seek arbitration in connection with Deer Park when he received a 15% commission, which he viewed as inadequate, and

whether the failure to seek arbitration constituted a waiver of the right to contest the commission under the ICA, Casper did not state that he had not bound himself to arbitrate. Instead, Casper testified that he chose to express his dissatisfaction to the company's president and hoped that that would serve a constructive purpose. Moreover, Casper's verified complaint specifically seeks relief under the ICA. His "adoption of that agreement as the basis for [his] claims signaled [his] intention to put th[ese] dispute[s] to arbitration." *Arrowhead Golf Club, LLC v Bryan Cave, LLP*, 59 AD3d 347 (1st Dept 2009); *God's Battalion of Prayer Pentecostal Church, Inc. v Miele Associates, LLP*, 6 NY3d 371, 374 (2006).

Cushman & Wakefield's failure to sign the initial agreement is irrelevant. *McAlley v Boise-Griffin S.S. Co., Inc.*, 81 AD2d 771 (1st Dept 1981), app dismissed 54 NY2d 831. While Cushman & Wakefield asserted in the termination letter that the contract provisions themselves were terminated, it is abundantly clear that such was not the intention of the letter, which was too broadly worded. This is not a situation where there was a mutual nullification of the ICA and its provisions (See *Matter of Tarpon Cove [Taylor Woodrow Blitman Prop. Corp. of Fla.]*, 105 AD2d 656 [1st Dept 1984]), and in light of the ICA's no oral modification

clause, Cushman & Wakefield could not unilaterally nullify the ICA's provisions. Casper's having sued on the ICA is a "tacit concession" that he does not truly view the ICA as having been cancelled. *Id* at 657. Therefore, a valid contract and a valid arbitration clause was in place.

Casper's sole ground urged in support of his waiver argument, that the various letters stating that his rights to arbitrate and litigate constituted a waiver of Cushman & Wakefield's right to limit Casper to arbitration, is unavailing. "Waiver is an intentional relinquishment of a known right and should not be lightly presumed." *Gilbert Frank Corporation v Federal Insurance Co.*, 70 NY2d 966, 968 (1988). The loose language in the letters upon which Casper relies did not amount to a clear, knowing and voluntary waiver of Cushman & Wakefield's right to insist on arbitration as per the ICA to resolve Casper's commission disputes, and did not purport to create a right to litigation which did not exist. While the ICA did permit Casper to litigate, it did not permit him to litigate the commission disputes in issue, and having worked as a broker for Cushman & Wakefield for over 40 years, and having previously availed himself of arbitration, he was presumably aware of that.

In addition, ¶ 19 of the ICA required the waiver of any of its terms to be in writing signed by the party to be charged. No document has been executed by Cushman & Wakefield specifically waiving paragraph 6 of the ICA. Therefore no evidence of any alleged waiver can be offered by Casper. ICA at ¶ 19. Since all of Casper's claims are governed by the ICA's arbitration clause, Casper was advised in 2000 regarding his Deer Park commissions and in 2003 of his Water Place commissions and since he does not refute that he was advised in 2003 that the latter commission was the only assignment with which he was credited, his claims must be, and hereby are dismissed.

In any case, Casper's claims regarding his entitlement to commissions on any leases executed under the exclusive agency are without merit. Casper, an independent contractor, was not retained by Stacom's team to lease Waters Place on behalf of its leasing agent or landlord or to secure the exclusive agency. Rather, he was retained merely to find a property for VNS to lease. He was not involved in attempting to procure the exclusive agency, nor was he involved in the efforts to lease Waters Place for its leasing agent or landlord. Regarding post-

termination fees, the ICA's use of the word "transactions" (ICA at ¶ 5 [b] [i]) clearly contemplates transactions on which the independent contractor was engaged to render services before the agreement terminated. Casper had not been engaged in connection with the exclusive agency; he had been engaged to find a tenant, VNS, space. Moreover, a transaction, within the contemplation of that clause had not been consummated. The mere existence of an exclusive agency did not entitle anyone to commissions; commissions were earned under the exclusive agency when space was leased. Nor was Casper involved in a duly authorized written offer to lease space in connection with the exclusive agency. All leasing activity under the exclusive agency occurred after Casper was terminated.

While Casper may have brought Waters Place to the attention of VNS, the evidence shows a lack of followup with the client with respect to that property. Casper's claim about being prevented by Stacom from following up is undercut by the fact that he was still showing VNS properties months later. Further, any fee to which Casper may have been entitled with respect to bringing Waters Place to VNS's and Cushman & Wakefield's attention was limited to his commission under ICA ¶

5 (a) "as his full and only remuneration for his services." He is not entitled to separate finder's fee, and in any case his complaint does not seek a finder's fee. Accordingly, it is

ORDERED and ADJUDGED that the motion is granted, and the action is dismissed; and it is further

ORDERED and ADJUDGED that as the prevailing party, Cushman & Wakefield is entitled to its reasonable legal fees, costs and expenses; and it is further

ORDERED and ADJUDGED that the question of legal fees is referred to the Referees' Clerk, who is directed to assign this matter to the Special Referees' calendar for a special Referee to hear and decide and to enter a judgment thereon.

Dated: 8/18/09

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Ley

LOUIS B. YORK J.S.C.
J.S.C.