

**Sunshine Group, Ltd. v 1100 W. Ave. Props.,
LLC**

2009 NY Slip Op 32287(U)

September 30, 2009

Supreme Court, New York County

Docket Number: 600501/08

Judge: Barbara R. Kapnick

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

PRESENT: **BARBARA R. KAPNICK**

PART 39

Index Number : 600501/2008
SUNSHINE GROUP, LTD.
 vs.
1100 WEST AVENUE PROPERTIES,
 SEQUENCE NUMBER : 003
 DISMISS ACTION/INCONVENIENT FORUM

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

this motion to/for _____

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

FILED
 OCT 05 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

Dated: 9/30/09


BARBARA R. KAPNICK
 J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
 Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IA PART 39

-----X
THE SUNSHINE GROUP, LTD.,

Plaintiff,

-against-

1100 WEST AVENUE PROPERTIES, LLC,
MORGANS MIAMI INVESTMENT, LLC and
SANCTUARY WEST AVENUE, LLC,

Defendants.

-----X
BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 600501/08
Motion Seq. No. 003

On October 31, 2006, The Sunshine Group, Ltd. ("Sunshine") and defendants 1100 West Avenue Properties, LLC ("1100 West Avenue"), Morgans Miami Investment, LLC ("Morgans") and Sanctuary West Avenue, LLC ("Sanctuary"),¹ entered into an Exclusive Sales and Marketing Agreement ("Marketing Agreement") for the marketing and sale of residential hotel condominium units (the "units") in defendants' hotel condominium (the "Mondrian Miami Hotel") located at 1100 West Avenue in Miami, Florida.

Pursuant to the Marketing Agreement, defendants were obligated to pay Sunshine a marketing fee and commissions, and to advance or pay certain of Sunshine's costs and expenses. In addition,

¹ Defendants contend that only 1100 West Avenue contracted with Sunshine and is a proper party to this action, while Morgans and Sanctuary owe no obligations to plaintiff under the Marketing Agreement. Plaintiff, on the other hand, claims that Morgans and Sanctuary signed the Marketing Agreement as well and are thus also proper parties.

[*3]
paragraph 8(h) of the Marketing Agreement provides, in relevant part, as follows:

[a]t no time during the Term of this Agreement (and in the event Developer [i.e., 1100 West Avenue Properties, LLC] or Selling Agent [i.e., The Sunshine Group, Ltd.] terminates this Agreement as provided herein, or this Agreement expires by its terms, at no time during the period of two (2) years following such termination or expiration), may Developer (or any affiliate of Developer) knowingly or willfully (i) retain, whether as an employee, independent contractor, consultant, partner, co-venturer or in any other capacity, any of the executive, sales and executive support personnel employed by, or under a written independent contract with, Selling Agent at any time during the Term of this Agreement; (ii) hire, attempt to hire, contact or solicit with respect to hiring any sales person or employee of Selling Agent as of the date of this Agreement or any time during the Term of this covenant; or (iii) induce or otherwise counsel, advise, encourage or actively attempt to influence any other employee or agent of Selling Agent as of the date of this Agreement or any time during the Term of this covenant to terminate his or her employment or association with Selling Agent. In the event that Developer (or any affiliate of Developer) shall do so, Selling Agent shall have the right as Selling Agent's sole remedy (i) to seek injunctive relief to prevent the continued employment, retention or otherwise by Developer (or such affiliate) of said Selling Agent personnel or (ii) to receive liquidated damages in the sum of \$250,000 for each such individual, it being agreed that it would be difficult or impossible to ascertain the actual damages caused to Selling Agent by the breach of this covenant by Developer.

According to the Complaint, Sunshine sent various invoices to defendants for marketing, administrative and sales costs relating to units it marketed and sold out of its New York offices and elsewhere, in accordance with the terms of the Marketing Agreement.

Closing of the sale of such units has allegedly occurred in certain instances and is pending in others.

On January 31, 2008, Sunshine sent a Notice of Default to defendants for failure to make some of the invoiced payments. Thereafter, on February 12, 2008, Sunshine sent defendants a Notice terminating the Marketing Agreement.

On February 15, 2008, Sunshine, pursuant to Section 8(g) of the Marketing Agreement, sent defendants a list of all persons or entities with whom Sunshine, prior to termination, had active good faith negotiations or who had visited the Sunshine sales office regarding the purchase of a unit. Sunshine then filed this lawsuit against defendants on February 19, 2008.

In this action, Sunshine seeks to recover damages against defendants for: (i) breach of the Marketing Agreement based on defendants' alleged failure to make full payment to plaintiff for marketing, administrative and sales costs incurred by Sunshine in connection with its performance under the Marketing Agreement ("count one"); and (ii) breach of section 8(h) of the Marketing Agreement based on defendants' alleged communication with and solicitation of Sunshine's sales personnel, namely, Peter Belmonte,

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Jessica Conn and Sally Jacobs, about their prospective employment ("count two").

Plaintiff also seeks an Order declaring that: (i) defendants must act in good faith to close the sale of each unit which is subject to a purchase agreement procured by Sunshine prior to the termination of the Marketing Agreement and that defendants must pay Sunshine a commission on the closing of the sale of each unit, as set forth in Section 4 of the Marketing Agreement ("count three"); and (ii), (a) defendants must negotiate in good faith with any person or entity identified on the list by Sunshine; (b) pursuant to Section 8(g) of the Marketing Agreement, defendants must provide on a monthly basis a copy of each purchase agreement upon execution that defendant enters into with a person or entity identified on the list by Sunshine and a list of the dates and times of upcoming closings of the sales of the units; and (c) if within one hundred twenty days after termination of the Marketing Agreement defendants enter into a purchase agreement with a person or entity identified on the list by Sunshine, then defendants, upon closing of the sale of such unit, shall pay Sunshine a commission ("count four").

Finally, plaintiff seeks a monthly accounting of all purchase agreements entered into by defendants with any person or entity on or after January 1, 2008 with respect to a sale of a unit and a

* 6]
schedule of all closings which have and will have occurred subsequent to January 1, 2008 ("count five").

On March 4, 2008, shortly after Sunshine commenced this action, 1100 West Properties, LLC ("1100 West") filed an action against Sunshine, entitled *1100 West Properties, LLC v. The Sunshine Group, Ltd., Sally Jacobs, and Maefield Holdings, LLC d/b/a Maefield Development*, Case No. 08-12155 CA 40, in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida (the "Florida Action"), involving substantially the same parties² and similar issues and disputes as those in the instant action.³

Subsequently, Sunshine moved to stay or abate the Florida Action based on the existence of the instant action which was filed earlier. By Decision dictated on the record on June 3, 2008, the

² Pursuant to 1100 West's Notice of Voluntary Dismissal Without Prejudice, filed in or about September 2008, the Florida Action has been dismissed against defendants Sally Jacobs and Maefield Holdings, LLC d/b/a Maefield Development, neither of which is a party to the instant action.

³ In the Florida Action, 1100 West has set forth claims against Sunshine for breach of contract, fraudulent inducement, negligent misrepresentation and breach of fiduciary duty. 1100 West alleges, *inter alia*, that "[d]espite the Sunshine Group's earlier representations concerning its unique access to the New York condominium consumer and broker markets, the Sunshine Group made no attempt to sell or market Mondrian Miami units to New York customers and brokers. Not a single sale resulted from any Sunshine Group broker in New York." (Florida Compl. at ¶24.)

Hon. Gil Freeman stayed the causes of action in Florida between Sunshine and 1100 West. Judge Freeman noted on the record that "the New York Court will decide whether to dismiss, or send it back down here for form [sic] nonconvenience [sic] purposes, which wouldn't surprise me greatly."

Defendants now move,⁴ under motion sequence number 003, for an Order:

(1) pursuant to CPLR § 327, dismissing the Complaint on the grounds that New York is an inconvenient forum; or, in the alternative,

(2) granting a stay of the proceedings in this Court until the Florida litigation is resolved.⁵

⁴ Defendants have also separately moved, under motion sequence no. 001, for an Order, pursuant to CPLR § 3211, a) dismissing the claims asserted against defendants Morgans and Sanctuary on the grounds that they are not proper parties to this action; b) dismissing the action as to all defendants on the grounds that this Court lacks personal jurisdiction over them; c) dismissing all claims because a parallel lawsuit is pending in Florida involving the same parties, issues and disputes; or d) in the alternative, granting a stay of the proceedings in this Court until the Florida Action is resolved.

⁵ The motion also sought an Order: (i) consolidating motions sequence numbers 001 and 003; and (ii) granting joint oral argument. These branches of the motion were granted, and the motions were both scheduled for oral argument before this Court on November 20, 2008.

The Court of Appeals has held that among the factors to be considered by the Courts in determining a motion to dismiss based on *forum non conveniens* are

the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit (citations omitted). The court may also consider that both parties to the action are nonresidents (citation omitted) and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction (citation omitted). No one factor is controlling (citations omitted). The great advantage of the rule of *forum non conveniens* is its flexibility based upon the facts and circumstances of each case (citations omitted). The rule rests upon justice, fairness and convenience and we have held that when the court takes these various factors into account in making its decision, there has been no abuse of discretion reviewable by this court (citations omitted).

Islamic Republic of Iran v Pahlavi, 62 NY2d 474, 479 (1984), cert. denied, 469 US 1108 (1985).

Defendants argue that New York is an inconvenient forum because: (1) both 1100 West Avenue and Sanctuary are based in Florida; (2) neither 1100 West Avenue nor Sanctuary is registered to do business in New York, has a registered agent for service of process in New York, has an office, phone number or staff in New York, or maintain any physical presence in New York; (3) although defendant Morgans has an address in New York, it was established for the sole purpose of developing and marketing the Mondrian Miami Hotel project; (4) defendants' major witnesses - i.e., Keith Menin, Director of 1100 West Avenue, who helped negotiate the Marketing

Agreement; Abraham Galbut, a partner in Crescent Heights Partners, who is involved in the management of 1100 West Avenue's real estate development projects and personally reviewed and approved the Marketing Agreement at issue; Ben Rozansky, an employee of Crescent Heights Partners, who consulted with 1100 West Avenue concerning the marketing and sale of residential units at the Mondrian Miami Hotel and assisted in the processing of 1100 West Avenue's contractual arrangements; Al Agawal, the Chief Financial Officer of 1100 West Avenue; and Seth Frohlich, Vice President of 1100 West Avenue - are all residents of Florida; (5) all of defendants' financial books, documents and records, including all contracts relevant to this action, are located in Miami, Florida; (6) the entire arrangement set forth in the Marketing Agreement has its nexus in Florida because it concerned real property in Florida and Sunshine's sales office and personnel were based in Florida; (7) the Agreement contained a Florida choice of law provision, and the marketing and sales of the units were to conform specifically with Florida real estate laws and regulations; and (8) there is a viable alternative forum, i.e., the courts of Florida, where a parallel action is currently pending.

In opposition to the motion, plaintiff argues that its documents relating to the negotiation of the Marketing Agreement and the individuals with personal knowledge of these communications are

located in and/or work in New York.⁶ Defendants, however, contend that Pietro Belmonte, a Senior Vice President of International Sales by The Corcoran Group who was involved in the marketing and sale of the units, is a resident of Miami-Dade County, Florida, and works out of Sunshine's office in Miami.⁷

Sunshine also argues that New York has a public interest in retaining this action because Sunshine is a New York corporation and the Marketing Agreement was negotiated, signed and partially performed in New York. However, defendants contend that any negotiations relating to the execution of the Marketing Agreement are not relevant because this case involves the subsequent breach of the Agreement. Moreover, Sunshine represented and warranted therein that it was "duly licensed under the State of Florida as a real estate broker to sell condominium and cooperative units" and

⁶ Plaintiff has submitted an Affidavit dated November 11, 2008 from Linda Volpano, Esq., the Vice President of Business Affairs and General Counsel of Corcoran Sunshine Marketing Group, who represents that Sunshine's accounting department and other Sunshine employees communicated regularly with defendants, reviewed relevant documents and generated invoices from Sunshine's New York offices, and that defendants sent certain payment to Sunshine's New York office.

⁷ It should be noted that in an Affidavit dated November 1, 2008, Mr. Belmonte represents that he "travel[s] regularly into New York in connection with [his] work responsibilities. Thus, it would not be inconvenient for [him] to travel to New York in connection with this case."

it was authorized to do business in Florida, and made no such representations or warranties specifying any other jurisdiction.

In his Affidavit, Mr. Belmonte also states that he finds "it hard to believe" that defendants would claim that they would be inconvenienced if they were required to litigate this case in New York, since, defendants "constructed, maintained and utilized a model residence in New York to test-market the Units in New York and representatives of Defendants traveled regularly into New York at the time when the parties were operating under a written agreement." However, defendants argue that there were also marketing events held in other international cities since Sunshine was retained for both domestic and international marketing, and this dispute would be more appropriately venued in Florida where the property is located.

Based on the papers submitted, the oral argument held on the record on November 20, 2008 and the subsequent submissions, this Court finds that a balancing of the relevant factors set forth in *Islamic Republic of Iran v Pahlavi, supra*, favors dismissal of this action on the grounds that it involves real property located in Florida, several witnesses and documents reside or are located in Florida, and there is an available and more convenient forum in Florida, where a parallel action has already been commenced and no jurisdictional defenses have been raised.

Accordingly, defendants' motion to dismiss the Complaint on *forum non conveniens* grounds (motion seq. no. 003) is granted.

The Clerk may enter judgment dismissing this action without prejudice.

This constitutes the decision and order of this Court.

Dated: September 30, 2009



Barbara R. Kapnick

J.S.C.

**BARBARA R. KAPNICK
J.S.C.**

FILED
OCT 05 2009
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