

**Mihran Shlougian Real Estate LLC v Senex
Greenwich Realty Assoc, LLC**

2010 NY Slip Op 30075(U)

January 11, 2010

Supreme Court, New York County

Docket Number: 105675/09

Judge: Barbara R. Kapnick

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15-10

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

PRESENT: Kapnick
Justice

PART 30m

Mr. Hran Sabougan Real Estate

INDEX NO. 105675/09

- v -

MOTION DATE _____

MOTION SEQ. NO. 002

Senet Greenwech et al

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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

JAN 15 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/11/10

BARBARA R. KAPNICK 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 : IA PART 39

-----X
MIHRAN SHLOUGIAN REAL ESTATE LLC
and MIHRAN SHLOUGIAN,

Plaintiffs,

- against -

SENEX GREENWICH REALTY ASSOCIATES, LLC,

Defendant.

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

DECISION/ORDER
Index No. 105675/09
Motion Seq. No. 002

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

This case involves real estate brokerage commissions for two separate leases entered into by defendant Senex Greenwich Realty Associates, LLC ("Senex") as landlord for retail space at 120 Greenwich Street in Manhattan.

Plaintiffs claim that on or about November 30, 2007, Mihran Shlougian Real Estate LLC ("Shlougian LLC") and Senex executed a written brokerage agreement regarding a Restaurant Lease (the "SJM space"), which provided that Senex would pay to Shlougian LLC a total brokerage commission in the sum of \$191,540.85. Specifically, the Agreement provided in paragraph 3 that the commission would be paid as follows:

- (i) \$30,000.00 upon mutual execution and delivery of the Lease and Tenant paying the first month's rent on lease execution and delivering a security deposit to the Landlord, if due on lease execution;
- (ii) \$80,770.42 upon Tenant or its permitted subtenant or assignee's opening for business in the Premises; and

- (iii) \$80,770.42 twelve (12) months following the date the first payment of Commission was due on the condition that the Tenant is current in its monthly rent obligation pursuant to the Rent Article of the Lease, between Owner and Tenant, or if not current, when such default is cured.

Plaintiffs assert that the first installment of the commission in the sum of \$30,000 was paid, but that defendant Senex has failed to pay the second and third installments totalling \$161,540.84, plus interest from December 1, 2008, although duly demanded (first cause of action).

Plaintiffs further claim that on or about August 2, 2007, plaintiff Mihran Shlougian ("Mihran") and defendant Senex executed a written brokerage agreement regarding a lease of retail space at the property (the "Panini Lease"), which provided that Senex would pay to Mihran a total brokerage commission in the sum of \$102,128.53. Specifically, the Agreement provides in paragraph 3 that the commission would be paid as follows:

- (i) Fifty percent (\$51,064.26) upon mutual execution and delivery of the Lease and Tenant paying the first month's rent on lease execution and delivering a security deposit to the landlord, if due on lease execution; and
- (ii) Fifty percent (\$51,064.26) twelve months following the date the first payment of Commission was due on the condition that the Tenant is current in its monthly rent obligation pursuant to the Rent Article of the lease, between Owner and Tenant, or if not current, when such default is cured.

Plaintiffs assert that the first installment of the commission in the sum of \$51,064.26 was paid, but that Senex has failed to pay Mihran the second installment of \$51,064.26 with interest from September 12, 2008, although duly demanded (second cause of action).

By Decision/Order dated July 27, 2009, this Court granted on default plaintiffs' motion for a default judgment against defendant Senex for its failure to timely serve an Answer and/or appear in this action.

The decision permitted the Clerk to enter judgment in favor of Shlougian LLC and against defendant Senex on the first cause of action in the sum of \$161,540.84 with interest, and in favor of plaintiff Mihran against defendant Senex on the second cause of action in the sum of \$51,064.26 with interest.

Judgment was entered accordingly on August 12, 2009.

Defendants then moved by Order to Show Cause which was signed on August 28, 2009 for an order vacating the default judgment, pursuant to CPLR § 317. A Temporary Restraining Order Bond dated September 9, 2009 in the amount of \$200,000 was obtained by defendant as directed by this Court, as a result of which this

Court lifted the restraint on defendant's bank account on September 23, 2009.

Defendant argues that the Judgment should be vacated because Senex (a) was not personally served with the Summons and Complaint; (b) did not have notice of this action in time to defend against it; and (c) has a meritorious defense to the action.

Lawrence Devine, a member of Senex, asserts in his Affidavit in support of the Order to Show Cause that Senex was formed to convert the building at 120 Greenwich Street to condominium ownership. During the development and sale phases of the project, Senex maintained an office on the grounds of the building. However, when the Commercial Units were leased, Senex claims that it vacated its office at the building and that any mail addressed to Senex was left with the doorman and delivered sometime later to Mr. Devine.

Senex claims that through oversight, it failed to change the address registered with the Secretary of State to which the Secretary of State is required to forward process served upon Senex. As a result, Senex claims it never received the copy of the Summons and Complaint served on the Secretary of State or the Notice of Motion for a default judgment. Defendant further claims

it was unaware of the pendency of this action until after Judgment was entered and its bank account at HSBC Bank was restrained.

A corporation's failure to file a change of address with the Secretary of State does not constitute a per se barrier to vacatur of a default judgment pursuant to CPLR 317, which permits a defendant who has been "served with a summons other than by personal delivery" and "who does not appear" to defend the action "upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense" (see *Eugene di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141-142 [1986]).

Arabesque Recs. LLC v Capacity LLC, 45 AD3d 404 (1st Dep't 2007).

There is no proof in this case that defendant received personal delivery of the summons in time to defend this action.

Where, as here, "the court finds that defendant failed to 'personally receive notice of the summons in time to defend and has a meritorious defense,' relief from a default may be granted (citations omitted)." *Shanker v 119 E. 30th, Ltd.*, 63 AD3d 553 (1st Dep't 2009).

Therefore, this motion turns on whether or not defendant has set forth a meritorious defense.

Defendant essentially asserts that the tenants in the two leased spaces were not current on their monthly rent obligations

pursuant to the Rent Articles of their respective leases with Senex, and have still not fully cured their defaults, and thus the final commission installments are still not due.

Plaintiffs claim that any rent arrearages which were due from the tenants to Senex were not for their monthly rental obligations, but were instead for additional rent - such as water charges, taxes, late fees, etc. - which are not effected by the Rent Articles of the respective leases with Senex and its tenants. In any event, plaintiffs claim that any defaults have now been fully cured.

However, the Rent Articles of the leases - Paragraph 60 of the Riders to the two relevant leases - deal with both the monthly rental obligations and payment of Additional Rent. It is not clear from the spread sheets produced by the plaintiffs whether all the rent obligations of the tenants as of December 1, 2008 and September 12, 2008, respectively, have been paid in full.

Accordingly, defendant has asserted a meritorious defense to plaintiffs' claim for payment of the last installments in each of the brokerage agreements.

However, the defendant raises no defense to its failure to pay Shlougian LLC the second installment of \$80,770.42 on the SJM Space

due to plaintiff upon the Tenant's (or its permitted subtenant's or assignee's) opening for business.

Therefore, defendant's motion is granted to the extent of vacating the Judgment entered on August 12, 2009 and directing defendant to submit an answer to plaintiffs' Complaint within 30 days of service of a copy of this Order with notice of entry.

The Clerk may, however, enter a Judgment in favor of plaintiff Mihran Shlougian Real Estate LLC and against defendant Senex Greenwich Realty Associates, LLC in the sum of \$80,770.42 (the second installment on the Restaurant Lease) together with interest to be calculated by the Clerk from December 1, 2008.

A preliminary conference shall be held in IA Part 39, 60 Centre Street, Room 208 on March 3, 2010 at 9:30 a.m.

This constitutes the decision and order of this Court.

Dated: January 11, 2010


BARBARA R. KAPNICK
J.S.C.

FILED
JAN 15 2010
NEW YORK
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J.S.C.